

TAS / CAS

TRIBUNAL ARBITRAL DU SPORT
COURT OF ARBITRATION FOR SPORT
TRIBUNAL ARBITRAL DEL DEPORTE

CAS 2024/A/10868 World Anti-Doping Agency v. United States Anti-Doping Agency & Shea Foster

ARBITRAL AWARD

delivered by the

COURT OF ARBITRATION FOR SPORT

sitting in the following composition:

Sole Arbitrator: Dr Heiner Kahlert, Attorney-at-Law in Munich, Germany

in the arbitration between

World Anti-Doping Agency, Montreal, Canada

Represented by Mr Ross Wenzel, WADA General Counsel, and Mr Nicolas Zbinden and Mr Robert Kerslake, Attorneys-at-Law in Lausanne, Switzerland

Appellant

and

United States Anti-Doping Agency, Colorado Springs, United States of America

Represented by Mr James D. Bunting and Mr Carlos Sayao, Attorneys-at-Law in Toronto, Canada

First Respondent

Shea Foster, New York, United States of America

Second Respondent

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I. PARTIES

1. The World Anti-Doping Agency (the “**Appellant**” or “**WADA**”) is the international anti-doping agency. It has its registered seat in Lausanne, Switzerland, and has its headquarters in Montreal, Canada.
2. The United States Anti-Doping Agency (the “**First Respondent**” or “**USADA**”) is the national anti-doping organisation in the United States of America. It operates under the USADA Protocol for Olympic and Paralympic Movement (the “**Protocol**”).
3. Mr Shea Foster (the “**Second Respondent**” or the “**Athlete**”) is a 28-year-old para-athlete from the USA. He competed in the T38 1500m race until he declared his retirement from track and field on 12 May 2025.
4. The First Respondent and the Second Respondent are hereinafter jointly referred to as the “**Respondents**”. The Appellant and the Respondents are hereinafter jointly referred to as the “**Parties**”.

II. FACTUAL BACKGROUND

5. Below is a summary of the relevant facts based on the Parties’ submissions (this term including oral pleadings and evidence adduced). Additional facts may be set out, where relevant, in connection with the legal discussion that follows. While the Sole Arbitrator has considered all the facts transpiring from the Parties’ submissions in the present proceeding, he refers in his Award only to the facts he considers necessary to explain his reasoning.

A. The Athlete’s medical background

6. On 6 July 2020, the Athlete sustained a spinal cord injury (“**SCI**”) as a result of a car accident. Thereafter, he went through a process of recovery including a spinal fusion surgery, which took place on 3 June 2021.

B. The Athlete’s affiliation with United States Athletics Track and Field and his testing history prior to 20 July 2024

7. On 7 February 2023, the Athlete became registered with United States Athletics Track and Field (“**USATF**”) and, thereby, subject to the Protocol.
8. On 19 May 2023, the Athlete tested positive for Roxadustat, at an estimated concentration of 0.01 ng/mL (not adjusted for specific gravity). Roxadustat, also known as FG-4592, was developed for treating anaemia due to chronic kidney disease. It stimulates erythropoiesis, i.e., the production of new red blood cells, thereby increasing haemoglobin mass, which in turn enhances a person’s oxygen carrying capacity. Roxadustat is a non-specified substance prohibited at all times according to Section S2.1.2 of the WADA Prohibited List (in all of its editions relevant to this proceeding).

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9. On 11 June 2023, as part of the investigation into this adverse analytical finding (“**AAF**”) for Roxadustat, USADA unsuccessfully attempted to test the Athlete out-of-competition at his apartment in New York. The Athlete called the doping control officer shortly thereafter and claimed that he was in California. At a later point in time, the Athlete clarified that he had not actually been in California but rather had been intoxicated and sleeping at his apartment during the unsuccessful test attempt. He explained that he had initially pretended to be in California because he had been scared by the banging on his door and had not understood what was happening as he had never been tested out-of-competition before.
10. On 21 June 2023, the Athlete underwent a comprehensive anti-doping education tutorial that required him to complete an online assessment with 100% accuracy.
11. On 22 June 2023, USADA notified the Athlete of his commission of a potential anti-doping rule violation (“**ADRV**”).
12. On 27 June 2023, the Athlete tested positive for Roxadustat, this time at an estimated concentration of 0.0046 ng/mL (not adjusted for specific gravity).
13. On 17 July 2023, the Athlete provided an explanation for the presence of Roxadustat, stating, inter alia, as follows:

“The Athlete took a cycle of Roxadustat 50mg that was obtained from an online pharmacy from June 2021 through May 2022. The Athlete stopped the cycle of Roxadustat in approximately mid-May 2022 when he was leaving for Greece to film a Netflix series. At the time the Athlete ingested the Roxadustat, the Athlete was not subject to the WADA Code.”

14. On 19 July 2023, the Athlete provided further explanations in an interview with USADA (the “**Interview**”). In particular, he stated that he had used Roxadustat pills (in addition to injectable erythropoietin (“**EPO**”)) to expedite his recovery from his spinal fusion surgery. He added that he had learned about Roxadustat independently through online research, that he had found out that it was not “*approved*”, and that he had not at any point discussed his use of Roxadustat with his doctor as he did not want to implicate him. He further stated that he had acquired Roxadustat from an online pharmacy based in Japan, and that he took one 50mg tablet three to five times per week.
15. On 9 August 2023, the Athlete tested positive for Roxadustat, at an estimated concentration of 0.003 ng/mL (not adjusted for specific gravity).
16. On 6 October 2023, the Athlete tested positive for Roxadustat, at an estimated concentration of 0.006 ng/mL (not adjusted for specific gravity).
17. On 18 December 2023, the Athlete responded in writing to several questions put to him by USADA. In particular, he stated that he had first purchased Roxadustat on or about 29 August 2023, and had used it from early to mid-September 2021 until mid-May 2022. He acknowledged that he might have ingested Roxadustat in 2022 after returning in

early to mid-July from his filming in Greece if there had been pills remaining from his last order, although he believed none had been left.

18. On 12 January 2024, USADA wrote to WADA, World Athletics and the International Paralympic Committee (the “**IPC**”) in respect of the four positive tests from 19 May 2023 to October 2023. The letter stated, in its relevant part, that “*USADA is not proceeding with an ADRV for the presence of roxadustat in Mr. Foster’s Sample based on use that cannot be established to have occurred while Mr. Foster was subject to the Code.*”

C. The alleged ADRV

19. On 20 July 2024, the Athlete competed in the T38 1500m event in the 2024 US Paralympic Track and Field Trials, finishing first and thereby qualifying to the Paralympic Games in Paris. During that event, the Athlete underwent an in-competition doping test (the “**Test**”) during which he provided a urine sample with the sample number 288133V (the “**Sample**”).
20. On 23 July 2024, the “A” Sample was analysed by the WADA-accredited UCLA Olympic Analytic Laboratory (the “**Laboratory**”). The “A” Sample revealed an AAF for the presence of Roxadustat with an estimated concentration of 0.0466 ng/mL (not adjusted for specific gravity). The “A” Sample, just like certain previous samples of the Athlete, also showed the presence of amphetamine, which however was not pursued as a potential ADRV because the Athlete held a pertinent Therapeutic Use Exemption.
21. On 26 July 2024, the Athlete was notified on a potential ADRV for the presence and use of Roxadustat and that a provisional suspension was imposed on him with immediate effect.
22. On 29 July 2024, the Athlete (through his then counsel) provided an explanation for the above AAF of Roxadustat, stating, in its relevant part as follows:

“ **EXPLANATION** ”

The positive test on July 20, 2024 was another in the line of positives since May 19, 2023. The Athlete maintains that each of these Adverse Analytical Findings (“AAF”) were based on his use before he was subject to the Code. Since the initial AAF on May 19, 2023, the Athlete as not tested negative for Roxadustat [footnote omitted].

There is no evidence that the Roxadustat present in the Athlete’s system from his admitted use before he was subject to the Code has cleared his system. In fact, the trace amounts that have been present over multiple tests in the past year would indicate to the contrary. The Athlete maintains that this AAF is due to his prior admitted use of Roxadustat before he became subject to the Code.

This AAF follows the same pattern of all the other Anti-Doping Tests the Athlete has undergone over the past year. The Athlete's tests have consistently had low levels of Roxadustat present, without evidence that supports a new administration. This AAF is no different. The Athlete's AAF does not support a finding of new administration, but rather a continued prolonged excretion pattern based on either:

- 1) the Athlete's prior traumatic SCI;*
- 2) Hepatic Impairment in the Athlete's body secondary to the SCI; and/or*
- 3) Renal Impairment within the Athlete's body.*

CONCLUSION

Considering the Athlete's admitted use of Roxadustat and the multiple times that the Athlete has tested positive since May 19, 2023 without evidence of re-administration, there is no evidence that supports a finding of re-administration in this instance. The Athlete maintains that he has not taken Roxadustat since he joined USA Track & Field in February of 2023." (emphasis as in the original)

23. On 30 July 2024, an analysis of the "B" Sample by the Laboratory confirmed the presence of Roxadustat detected in the "A" Sample.
24. On the same day, USADA charged the Athlete with an ADRV for the presence and use and/or attempted use of Roxadustat pursuant to Articles 2.1 and 2.2 of the IPC Anti-Doping Code and Articles 2.1 and 2.2 of the World Anti-Doping Code (the "WADC"), the WADC Articles contained in Annex A of the Protocol having been incorporated by reference into the Protocol by virtue of Section 6(a) of the Protocol. The Athlete was further informed that owing to his inclusion in the US Paralympic Track and Field team for the Paris Paralympics, the case would be expedited for resolution according to Section 16(b) of the Protocol.

D. The Appealed Decision

25. On 2 August 2024, a virtual hearing took place before Hon. Hugh L. Fraser sitting as sole arbitrator of New Era ADR (the "**First Instance Arbitrator**"). USADA requested a four-year period of ineligibility, essentially arguing that the Athlete must have re-administered Roxadustat after becoming subject to the Protocol because his last admitted use of Roxadustat, more than 26 months earlier, could not explain the presence of Roxadustat in the Sample. The Athlete, in turn, mainly submitted that he had stopped using Roxadustat well before joining USATF and that SCI had been found to alter a body's pharmacokinetics, prolonging the excretion of most drugs due to a slowed renal clearance.

26. On 3 August 2024, the First Instance Arbitrator issued his decision (the “**Appealed Decision**”), stating, in its relevant part, as follows:

“A. USADA has not met its burden of proving to the comfortable satisfaction of the Panel that Shea Foster’s positive test on July 20, 2024, was caused by his ingestion of Roxadustat after October 6, 2023;

B. Shea Foster’s test results of July 20, 2024, do not constitute an ADRV;

C. The provisional suspension imposed on July 26, 2024, is lifted.”

27. On 7 August 2024, WADA and the IPC received the grounds of the Appealed Decision. In those grounds, the First Instance Arbitrator noted, in particular, that

“[...] in the absence of any data prescribing the outer limit of detection for Roxadustat and in the absence of any data from studies conducted on someone with a spinal injury who has been taking Roxadust [sic], this Panel cannot come to the conclusion that the Respondent’s test sample of July 20, 2024, falls outside of all acceptable excretion windows.”

E. Subsequent doping tests after the alleged ADRV

28. On 28 July 2024, the Athlete tested positive for Roxadustat, at an estimated concentration of 0.0080 ng/mL (not adjusted for specific gravity). [REDACTED]
29. On 4 August 2024, the Athlete tested positive for Roxadustat, at an estimated concentration of 0.0071 ng/mL (not adjusted for specific gravity). [REDACTED]
30. On 19 August 2024, the Athlete tested positive for Roxadustat, at an estimated concentration of 0.005 ng/mL (according to WADA) or 0.0117 ng/mL (according to Dr Fedoruk, in each case not adjusted for specific gravity). [REDACTED]
31. On 25 August 2024, the Athlete tested negative.
32. [REDACTED]
33. On 15 September 2024, the Athlete tested positive for Roxadustat, at an estimated concentration of 0.007 ng/mL (not adjusted for specific gravity).
34. On 30 January 2025, the Athlete tested negative.
35. On 5 May 2025, the Athlete tested positive for Roxadustat, at an estimated concentration of 0.002 ng/mL (not adjusted for specific gravity).

III. PROCEEDINGS BEFORE THE COURT OF ARBITRATION FOR SPORT

36. On 12 September 2024, the Court of Arbitration for Sport (“CAS”) received the Appellant’s Statement of Appeal within the meaning of Article R48 of the Code of Sports-related Arbitration (2023 edition) (the “CAS Code”). [REDACTED]
37. On 14 September 2024, the Appellant requested that the matter be decided by a sole arbitrator.
38. On 17 September 2024, the CAS Court Office notified the Statement of Appeal to the Respondents and invited the Respondents to indicate within 3 days whether they accept the Appellant’s request for suspension and whether they agreed to the appointment of a sole arbitrator.
39. On 23 September 2024, the Second Respondent (through counsel who had represented him in the previous instance) informed the CAS Court Office that he objected to Appellant’s request for suspension and that he requested a three-member panel.
40. On 26 September 2024, the First Respondent objected to the Appellant’s request for suspension, requested that the matter be heard by a three-member panel, and requested to be released from the arbitration. In relation to the latter, the First Respondent cited past practice between it and the Appellant in CAS appeals where both organizations were aligned on the substantive issues but adverse on costs, whereby the Appellant had agreed to release the First Respondent provided that the First Respondent and the athlete concerned confirmed that they would not raise such release in any argument with respect to admissibility or costs.
41. On 30 September 2024, the CAS Court Office requested the Appellant to confirm whether it agreed to release the First Respondent from the arbitration, and the Second Respondent to confirm whether it would waive, in such case, any argument concerning such release.
42. On 3 October 2024, the Second Respondent (again through counsel) confirmed the waiver, but the Appellant declined to release the First Respondent from the arbitration.
43. On 25 October 2024, the Second Respondent informed CAS that he was representing himself in the matter, and asked for information on the further procedure.
44. On 4 December 2024, the CAS Court Office informed the Parties that it had made several unsuccessful attempts of contacting the Second Respondent to clarify his representation. Moreover, it invited the Parties to try and find an agreement on the composition of the arbitral tribunal.

45. On 14 December 2024, the Second Respondent wrote to CAS again, asking for information on the further procedure, in particular any deadlines.
46. On 17 December 2024, the CAS Court Office informed that the only deadline running at the time was for the Parties to revert with respect to the composition of the Panel. The CAS Court Office further highlighted that it could not provide any legal advice to the Second Respondent.
47. On 17 January 2025, the Appellant and the First Respondent informed CAS that they had agreed on a person as sole arbitrator, indicating however that despite various attempts to obtain the Second Respondent's position on this proposal, the Second Respondent had not confirmed whether he agreed.
48. On 20 January 2025, the CAS Court Office advised the Parties that without the express consent of the Athlete, the Deputy Division President would disregard the bilateral agreement between WADA and USADA regarding the sole arbitrator to be appointed and that, as a consequence, the dispute would be referred to a sole arbitrator to be appointed in accordance with Article R54 of the Code.
49. On 27 January 2025, the CAS Court Office, on behalf of the Deputy President of the CAS Appeals Arbitration Division, informed the Parties that pursuant to Article R33, R52, R53 and R54 of the CAS Code, the arbitral tribunal had been constituted as follows:

Sole Arbitrator: Dr Heiner Kahlert, Attorney-at-Law in Munich, Germany.

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53. On 28 April 2025, within the deadline as previously extended, the Appellant submitted its Appeal Brief within the meaning of Article R51 of the CAS Code.
54. On 29 April 2025, the CAS Court Office forwarded the Appeal Brief to the Respondent and invited their Answers within the meaning of Article R55 of the CAS Code.
55. On 30 May 2025, within the deadline as previously extended, the First Respondent submitted its Answer.

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56. On 2 June 2025, the CAS Court Office acknowledged receipt of the First Respondent's Answer and informed that it had not received any communication from the Second Respondent, noting that the Sole Arbitrator may nevertheless proceed with the arbitration and deliver an award, in accordance with Article R55 of the CAS Code. Further, the CAS Court Office invited the Parties to indicate whether they preferred for a hearing to be held or for the Sole Arbitrator to issue an award based solely on the Parties' written submissions, and whether they sought for a case management conference (a "**CMC**") to be held.
57. On 9 June 2025, the First Respondent indicated that it did not consider a hearing necessary, and deferred to the Sole Arbitrator's view of whether a CMC would be of assistance to him.
58. By letter of 12 June 2025 (the "**12 June Letter**"), the Appellant stated that it did not request a hearing or a CMC. Moreover, expecting that no hearing would be held, the Appellant responded in writing to arguments that the First Respondent had made in its Answer in relation to *res judicata* as well as the costs of the arbitration.
59. On 1 July 2025, the CAS Court Office noted that the Second Respondent, although he had been duly notified of all communications from the CAS Court Office, had not responded to its letter of 2 June 2025 and that, for the sake of good order, a USB drive containing a copy of the entire case file was sent to all four addresses of the Second Respondent mentioned in the file, at the same time granting the Second Respondent a deadline of 15 days upon receipt of such USB drive to make any comments he deems necessary. The CAS Court Office highlighted that any failure by the Second Respondent to respond would not impede the procedure from advancing. Moreover, the First Respondent was invited to submit comments to the 12 June Letter.
60. On the same day, the First Respondent objected to the Sole Arbitrator considering the 12 June Letter 2025, to the extent it went beyond stating the Appellant's position on the holding of a hearing and a CMC. Among other things, the First Respondent noted that CAS jurisprudence referred to in said letter was not publicly available.
61. On 10 July 2025, the CAS Court Office informed the Parties that the copies of the case file had been successfully delivered to all four addresses of the Second Respondent. Moreover, the Parties were informed that the Sole Arbitrator had decided to admit the 12 June Letter to the file, for reasons to be explained in the arbitral award, and that the Appellant was invited to file copies of the CAS awards referenced, failing which the Sole Arbitrator would not consider those references.
62. On 11 July 2025, the Appellant submitted copies of the CAS awards.
63. On 15 July 2025, the Respondents were invited to comment on the 12 June Letter.
64. On 24 July 2025, the First Respondent filed comments on the 12 June Letter.
65. On 28 July 2025, the Appellant sent an unsolicited response to the First Respondent's comments on 24 July 2025.

66. On the same day, the CAS Court Office noted that the Second Respondent had failed to submit any comments to the 12 June Letter, but appeared to have set up his email account in such a way to automatically reject any communication from the CAS. Moreover, the Respondents were invited to comment on the Appellant's communication of the same day.
67. On 30 July 2025, the First Respondent submitted its observations on the Appellant's communication of 28 July 2025.
68. On 14 August 2025, the Parties were provided with the Order of Procedure and requested to return signed copies. The Order of Procedure contained, *inter alia*, the following language:

“By signature of the present Order, the Parties confirm their agreement that the Sole Arbitrator may decide this matter based on the Parties’ written submissions. The Parties confirm that their right to be heard has been respected. Pursuant to Article R57 of the Code, the Sole Arbitrator considers himself to be sufficiently well informed to decide this matter without the need to hold a hearing”
69. On 14 and 22 August 2025, respectively, the First Respondent and the Appellant submitted duly signed copies of the Order of Procedure.
70. On 19 September 2025, the Parties were again informed, out of an abundance of caution, that the Sole Arbitrator had decided not to hold a hearing.

IV. SUBMISSIONS OF THE PARTIES

71. The following summary of the Parties' positions is illustrative only and does not necessarily comprise every submission advanced by the Parties. The Sole Arbitrator confirms, however, that it has carefully considered all submissions made, regardless of whether there is any specific reference to them in this Award.

A. WADA's submissions and requests for relief

72. WADA's submissions, in essence, may be summarised as follows:
 - The Athlete committed an ADRV pursuant to Article 2.1 of the WADC (as incorporated by reference into the Protocol) because, according to Article 2.1.2 of the WADC, the presence of Roxadustat in the Athlete's "A" and "B" Sample is sufficient proof of an ADRV. The Appealed Decision misinterpreted those provisions by requiring USADA to prove not only the presence of Roxadustat in the Sample, but also that such presence was linked to re-administration after 6 October 2023 (i.e., the date of the last positive test for Roxadustat before the Test). As confirmed by CAS 2019/A/6180 and CAS 2018/A/5768, the earliest point in time a violation under Article 2.1 of the WADC can be said to have occurred is on the date of sample collection. Therefore, it would be illogical to require an ADO to determine when the prohibited substance may have been

ingested at an earlier point in time. Doing so confuses presence and use of a prohibited substance.

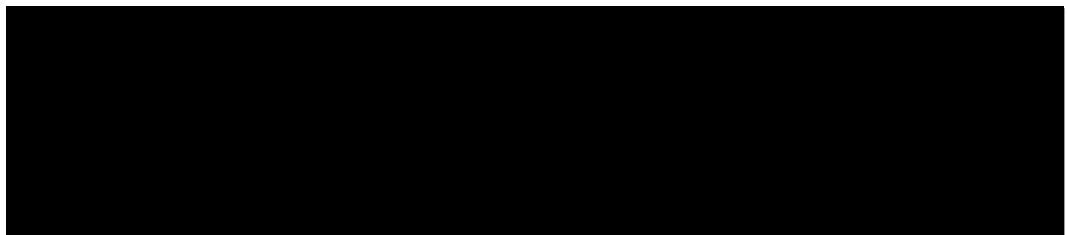
- Contrary to USADA’s view, there is no *res judicata* preventing a finding that there is an ADRV under Article 2.1 of the WADC regardless of whether the Athlete’s ingestion of Roxadustat preceded his becoming subject to the WADC. While the correct interpretation of the WADC by the aforementioned CAS jurisprudence was not followed by USADA when deciding not to move forward with ADRVs in respect of the Athlete’s AAFs in 2023, this does not make USADA’s incorrect application of the law *res judicata*. WADA is not seeking to relitigate USADA’s decision not to bring forward the AAFs in 2023. Instead, the present case relates to a different sample. In addition, a decision by WADA not to exercise its right to appeal is discretionary and based on several factors, including matters of policy. Such a decision not to appeal does not bind WADA with regards to the correct application of the law, as is confirmed by CAS jurisprudence (CAS 2019/A/6574, para. 56).
- Even if the approach adopted in the Appealed Decision were applicable (*quod non*), there is substantial evidence proving that intake of Roxadustat occurred subsequent to 7 February 2023 (i.e., the date on which the Athlete became subject to the Protocol), as will be discussed below in the context of the applicable sanction.
- As Roxadustat is a non-specified substance, Article 10.2.1 of the WADC provides that the period of ineligibility shall be four years, unless the Athlete can establish that the ADRV was not intentional. This requires actual, persuasive evidence, with identification of the source of the prohibited substance being a fundamental component. In CAS 2018/A/6768, para. 135, it was confirmed that the athlete “*must not only show how the [prohibited substance] entered his system [...], but also that the timing of such ingestion is consistent with the concentrations of the substance ultimately found in his sample [...]*.” To further reduce the period of ineligibility below two years, the Athlete would be required to establish that he bore No (Significant) Fault or Negligence for the ADRV, which however presupposes proof of source as a fundamental threshold matter.
- The Athlete has failed to prove the source of the ADRV. In particular, the Athlete’s claim that the presence of Roxadustat in the Sample is “*another in the line of positives since May 19, 2022*” is unrealistic and based on pure conjecture. Specifically, his defence at first instance was based on a speculative contention that his retention of Roxadustat is unique, in part due to the SCI, and on mere rhetoric derived from the fact that USADA had cleared him of wrongdoing in respect of the 2023 AAFs.
- The scientific evidence shows that it is far-fetched for Roxadustat to have been present in the Sample due to the Athlete’s last admitted use of Roxadustat in mid-May 2022.

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- The evidence of both Dr Fedoruk (USADA’s expert) and Mr Scott (the Athlete’s expert) at first instance concur on this point, as does the expert opinion provided in this arbitration by Prof. Saugy.
- Roxadustat does not occur naturally in the body. Accordingly, its presence can only be explained by external intake.
- Even when the Athlete’s ADRV is compared to the highly irregular results with patients suffering from chronic kidney disease, the results are incompatible with the explanation provided by the Athlete: In patients with renal impairment, a lower concentration of Roxadustat was present in the urine after 10 months than was detected in the Athlete’s sample after more than 26 months.
- In addition, it bears recalling that there is not in fact any evidence suggesting that the Athlete suffers from any kidney condition, or that SCIs may have any effect on metabolization of drugs similar to that of a renal impairment.
- Moreover, the significant uptick in the concentration of Roxadustat in the Sample when compared to the Athlete’s 2023 samples is extremely telling. While there was a consistent downward trend in the concentration of Roxadustat in each of the Athlete’s 2023 samples after adjustment for specific gravity, the concentration in the Sample was materially greater than that in the sample collected most previously on 6 October 2023, i.e., 9 months prior. This spike in concentration between October 2023 and July 2024 is extremely unlikely to have occurred without a new intake of Roxadustat taking place after 6 October 2023, as noted by Prof. Saugy. In fact, even the first sample of 19 May 2023 contained a concentration significantly lower than the Sample.
- Finally, as explained by Prof. Saugy, the rapid decrease in the concentration of Roxadustat in the subsequent samples taken from the Athlete in 2024 likewise confirms that, most likely, the Athlete re-administered Roxadustat between 6 October 2023 and 20 July 2024.
- Moreover, the Athlete’s conduct warrants significant caution in respect of his explanation:
 - The Athlete’s instinct to lie to USADA is troubling. First, when called by USADA to be notified of the AAF on 19 May 2023, he initially responded by noting that he did not know what “*Rox-dustat*” was. Subsequently, he admitted during the Interview that this was untrue, given that he had purchased the substance on multiple occasions prior to that phone call. Secondly, he confessed that he initially lied about the reason behind his unavailability for testing on 11 June 2023.

- The Athlete's explanation regarding his use of Roxadustat and EPO does not allay concerns. In the Interview, he explained that he learned about Roxadustat following his spinal surgery in June 2021 and started using it soon after, because it was known to increase the red blood cell count. He also admitted for the first time that he used EPO from June 2021 to May 2022 because it had the same effects as Roxadustat but it was newer and one did not have to take as much. However, he omitted to mention that he purchased two EPO products as early as 4 March 2021, i.e., three months prior to his spinal surgery. No explanation exists for this earlier use of EPO.
- Similarly, the Athlete explained in the Interview that he stopped using EPO and other ERAs around mid-May 2022 when he left for Greece to film a Netflix show, although he added that he may have continued using EPO for a short period after his return from Greece. However, the documents produced by the Athlete to USADA show that he purchased six injections of EPO on 11 January 2023, a mere 5 weeks before his registration with United States Athletics Track and Field. The Athlete omitted to mention this during the Interview, and later only stated that he had used three injections of this product "*on or about the week that the shipment was received*". This, however, is difficult to reconcile with the usage he described in the Interview (twice per month), which would suggest that he finished his course of EPO on 21 March 2023 at the earliest.
- Also, the Athlete's reasoning that he stopped using Roxadustat mid-May 2022 because he allegedly felt he did not need it for his back anymore does not mesh with his continued use of EPO upon his return from Greece.

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- In summary, the Athlete's explanation is wholly insufficient to prove source, and the Athlete's purported previous administration neither shifts the burden of proof nor does it grant effective immunity from sanction.
- USADA's position that it should not bear any costs is based on a flawed understanding of the concept of Operational Independence. As a Results Management Authority (as defined in the ISRM), USADA remains strictly liable for the decision of the hearing panel under its authority, notwithstanding that the hearing panel carries out its functions independently. In fact, no other party could be responsible for the incorrect decision of the hearing body chosen by USADA to carry out the function of first instance hearings. CAS jurisprudence

confirms that the definitions of operational and institutional independence do not limit the responsibility of the relevant anti-doping organization with regards to the costs related to the results management (CAS 2022/A/9286, para. 142; CAS 2023/A/9451, 9455 & 9456, para. 430), even if the first instance hearing panel is an independent arbitral tribunal (CAS 2020/A/6835, paras 202 et seqq.). USADA seeking a contribution towards its costs is inappropriate given that USADA was not obliged to engage in the merits of the appeal after deciding not to appeal against the Appealed Decision itself.

73. The Appellant made the following requests for relief in their Appeal Brief:

- “1. The appeal of WADA is admissible.*
- 2. The decision dated 3 August 2024 rendered by New Era ADR in the matter of USADA v. Shea Foster is set aside.*
- 3. Shea Foster is found to have committed an anti-doping rule violation under Articles 2.1 and/or 2.2 of Annex A to the USADA Protocol.*
- 4. Shea Foster is sanctioned with a period of ineligibility of four (4) years, starting on the date on which the CAS award enters into force. [footnote omitted] Any period of provisional suspension effectively served by Shea Foster before the entry into force of the CAS award in respect of the ADRV relating to the sample collected on 20 July 2024 shall be credited against the total period of ineligibility to be served.*
- 5. All competitive results obtained by Shea Foster from and including 20 July 2024 (i.e. the date of the anti-doping rule violation) are disqualified, with all resulting consequences (including forfeiture of medals, points and prizes).*
- 6. The arbitration costs shall be borne by USADA or, in the alternative, by the Respondents jointly and severally.*
- 7. WADA is granted a significant contribution to its legal and other costs.”*

B. USADA’s submissions and requests for relief

74. USADA’s submissions, in essence, may be summarised as follows:

- Pursuant to Article R58 of the CAS Code, the merits of this appeal are governed by the Protocol and, subsidiarily, by US law, given that both USADA and New Era are domiciled in the USA.
- The evidence establishes to the comfortable satisfaction standard that the 20 July 2024 AAF resulted from the Athlete’s use of Roxadustat after he became subject to the Protocol.
- As explained by Dr. Fedoruk, USADA’s Chief Science Officer, Roxadustat is a prohibited substance because athletes can experience greatly improved

endurance via increase in oxygen carrying capacity. This effect is particularly valuable to track athletes like the Athlete who compete in strenuous events requiring high levels of aerobic fitness.

- As further confirmed by Dr. Fedoruk, there is no evidence that Roxadustat, despite its unusually prolonged terminal excretion kinetics, can remain in one's system for 26 months after ceasing use. Instead, based on the scientific evidence before the Sole Arbitrator, the longest period Roxadustat can be detected in urine is approximately 18 months (540 days) after last use. Importantly, this information was not yet available to the First Instance Arbitrator because, when he rendered the Appealed Decision, such data did not yet exist as the study was still ongoing at the time. Therefore, the First Instance Arbitrator was only presented with measurements in three renally impaired patients on days 274, 191 and 314, respectively, of the wash-out period. It was precisely the lack of any data (at the time) on when the excretion drops off to an undetectable level that was highlighted by the First Instance Arbitrator in the Appealed Decision.
- In addition, the now available conclusion that Roxadustat can be detected in urine only up to 540 days is drawn from a study involving renally impaired patients. By contrast, the Athlete does not have chronic kidney disease. To the extent that there is any difference in urinary clearance times between healthy and renally impaired individuals, the urinary elimination of Roxadustat is faster in healthy individuals, as explained by Dr. Fedoruk. Accordingly, those 540 days are even a conservative estimate for the Athlete's clearance window.
- Moreover, the concentration of Roxadustat in the Athlete's samples increased between 2023 and 20 July 2024. Specifically, after normalization for specific gravity, the concentration in the Sample was 0.0621 ng/mL, which is a spike compared to the positive samples between 19 May and 6 October 2023, where the concentration, normalized for specific gravity, ranged between 0.015 and 0.02 ng/mL. Scientifically, this is a fatal blow to the Athlete's position because, as explained by Dr. Fedoruk (and Prof. Saugy), a general trend of decreasing urinary concentrations would be expected during a period of prolonged elimination of Roxadustat. This is also confirmed by the above-mentioned study with renally impaired patients, which showed that the urinary concentrations in the only two patients with multiple data points decreased significantly between 9 and 18 months after the last use. Accordingly, the spike on 20 July 2024 strongly suggests that a new administration of Roxadustat occurred after October 2023.
- Dr. Fedoruk also opined that there are no known mechanisms or studies showing that the human body accumulates Roxadustat (e.g., in body fat) or that Roxadustat binds to red blood cells in a way that would lengthen its detectability in urine.
- The Athlete's SCI does not affect Dr Fedoruk's expert conclusion that re-administration of Roxadustat after 6 October 2023 explains the 20 July 2024 AAF (or Prof. Saugy's expert opinion, which aligns with Dr. Fedoruk's).

Dr Fedoruk and Prof. Saugy agree that there is no evidence to suggest that the metabolism and subsequent pattern excretion of Roxadustat in urine is impaired in individuals with SCI. Indeed, even the Athlete's own expert at first instance, Mr. Scott, reached the same conclusion. In summary, there is no scientific basis to conclude that the Athlete's SCI could have caused Roxadustat to have both (i) remained in his urine for 26 months after his last use, and (ii) spiked in concentration on 20 July 2024 as compared to the prior positive test from 6 October 2023.

- USADA's view that the Athlete used Roxadustat after 6 October 2023 is supported by the following corroborative factors, some of which raise questions about the Athlete's credibility. In particular, the Athlete enjoyed a stark 18-second improvement in his T38 1500m time between May 2023 (4:16.33) and July 2024 (3:58.74) and was conspicuously absent from the 2024 Para National Championships in March 2024, when he could have been tested. Moreover, the Athlete's reported timeline of alleged Roxadustat use shifted over the course of USADA's results management of his AAFs. In his letter of 18 December 2023, he confirmed that he first purchased Roxadustat on 29 August 2021 and first used it in early to mid-September 2021. However, in his brief filed before the First Instance Arbitrator, he claimed that he began using Roxadustat in June 2021.
- Based on the above, the Sole Arbitrator can be comfortably satisfied that the Athlete committed the charged ADRVs and USADA agrees that the applicable period of ineligibility is four years. In particular, the Athlete is unable to discharge his burden to prove lack of intent, given that he was not actively participating in the CAS proceeding and offered merely denials and protestations of innocence at first instance, which is not enough under CAS jurisprudence to prove the source of the ADRV (e.g., CAS 2017/A/5369, para. 148; CAS 2020/A/6978, para. 134). However, the Athlete should receive credit for his provisional suspension of nine days, which was served from 26 July 2024 (date of imposition by USADA) until 3 August 2024 (date on which the First Instance Arbitrator lifted the provisional suspension).
- All results obtained by the Athlete on or after 20 July 2024 must be disqualified, per Articles 9 and 10.10 of the WADC. The Athlete has failed to meet his burden of proving, under Article 10.10 of the WADC, that fairness requires otherwise.
- In view of the above, there is no need for the Sole Arbitrator to address WADA's argument that a violation under Article 2.1 of the WADC occurs at the time of sample collection, even if the substance was ingested before the athlete became bound by the WADC. However, should the Sole Arbitrator wish to address that issue, USADA submits the following:
 - o The issue of whether use of a prohibited substance prior to being subject to the WADC can sustain an ADRV under Article 2.1 of the WADC is *res judicata* in this case. This principle is firmly established in US law, in international law and in most domestic legal systems. The

requirements of *res judicata* are met here because, in relation to the Athlete's 2023 AAFs, USADA resolved not to bring charges because there was insufficient evidence of use of Roxadustat after the Athlete become subject to the Protocol, and WADA decided not to appeal against such resolution. Per US law jurisprudence and doctrine, the principle of *res judicata* applies also to non-judicial decisions of administrative agencies when the agency is acting in a quasi-judicial capacity, which is what USADA did when deciding not to advance an ADRV against the Athlete.

- In any case, the comment to Article 7.7 of the WADC provides that conduct by an athlete before being subject to the authority of any Anti-Doping Organization does not constitute an ADRV. WADA's suggestion that this comment does not apply to a presence violation because it does not involve "*conduct*" is divorced from common sense and should be rejected. As the draft version of the 2027 WADC attempts to codify WADA's position, this suggests that the language in the current Code runs counter to it. If WADA's position is accepted, athletes could be subject to ADRVs and punished in an arbitrary manner based solely on the length of time a substance remains in their system. As confirmed by Dr. Fedoruk, there are at least five prohibited substances known to be excreted at low levels for extended periods of more than a year.
- USADA acknowledges and readily agrees with the concern raised by the CAS panel in CAS 2018/A/5768 that athletes might intentionally dope themselves just prior to becoming bound by the WADC and later claim innocence on that basis. This concern, however, can be managed through rules that punish acts that led to a positive test when such acts were done in connection with improving athletic performance at a sanctioned event. Alternatively, athletes could be required to make declaration of all substances used in the 12 months prior to being subject to the anti-doping rules, and if they used any prohibited substance, to require a sit-out period.
- The arbitration costs should be borne by the Athlete. By contrast, USADA should not be subject to any adverse costs award in this arbitration, for the following reasons:
 - USADA's requests for relief (beside costs) and its position on all relevant substantive issues fully align with those of WADA. Indeed, USADA argued before the First Instance Arbitrator against the outcome at which he ultimately arrived. This distinguishes the present case from CAS 2023/A/9451 & 9455 & 9456.
 - USADA was a Respondent solely due to WADA's unreasonable decision to bring this appeal also against USADA, and its unreasonable refusal to release USADA, even after the Athlete had agreed to such release and had waived making any arguments on admissibility or costs

based on USADA's release. USADA's participation in this arbitration at all times was intended to assist the Sole Arbitrator and enhance procedural efficiency.

- The requirement of Operational Independence belies WADA's argument that the Appealed Decision is attributed to USADA. Of course, Article 20 of the WADC provides that, if USADA delegates any aspect of its doping control obligations, USADA remains responsible to ensure the delegated aspects comply with the WADC and the International Standards. However, this does not mean USADA is responsible for the correctness and reasonableness of each and every factual or legal finding made by an impartial and operationally independent arbitrator. If WADA's position is accepted, some Results Management Authorities might exert influence over first instance hearing panels to protect against adverse cost exposure on subsequent CAS appeals, thereby undermining the fundamental principle of Operational Independence.
- The awards in CAS 2023/A/9451 & 9455 & 9456 and in CAS 2022/A/9286, as relied upon by WADA, can be distinguished from the present case. In particular, those appeals were brought by WADA against the decision of a body that was established by the relevant national anti-doping organization as a committee of that organization, as expressly taken into account by the Panel in CAS 2023/A/9451 & 9455 & 9456 in its cost decision. By contrast, New Era is an independent alternative dispute resolution platform intended to be applied across various sectors and industries. It was not established by USADA and already existed for approximately two years before USADA decided to use New Era's services.

75. On the merits, USADA made the following requests for relief:

"a. The Appealed Decision dated August 3, 2024, rendered by New Era in the matter of USADA v. Shea Foster (Case No. 24073002) is set aside.

b. The Athlete is found to have committed an ADRV under Article 2.1 and/or Article 2.2 of the Code (as incorporated into the Protocol).

c. The Athlete is sanctioned with a period of ineligibility of four years, starting on the date on which the CAS award enters into force. The period of provisional suspension effectively served by the Athlete before the entry into force of the CAS award in respect of the ADRV relating to the sample collected on July 20, 2024 shall be credited against the total period of ineligibility to be served (i.e., a credit of nine days).

d. All competitive results obtained by the Athlete from and including July 20, 2024 (i.e., the date of the ADRV) are disqualified, with all resulting consequences (including forfeiture of medals, points and prizes)."

76. On costs, USADA made the following requests for relief:

- „a. The arbitration costs shall be borne by the Athlete alone and not USADA;*
- b. USADA be granted a significant contribution to its legal and other costs; and*
- c. Any contribution granted to WADA for its legal and other costs be solely ordered against the Athlete and not against USADA.”*

C. The Athlete’s submissions and requests for relief

77. The Athlete did not make any substantive submissions in this arbitration, nor did he submit any request for relief.

V. JURISDICTION

78. The Sole Arbitrator observes that while USADA has expressly accepted CAS jurisdiction by signing the Order of Procedure, the Athlete has not made any substantive submissions in this arbitration. Therefore, the Sole Arbitrator must examine jurisdiction *ex officio* (see, *ex multis*, Swiss Federal Tribunal, ATF 120 II 155 (162); CAS 2012/A/2877, para. 36; CAS 2008/A/1699, para. 15).

79. Pursuant to Article R47 of the CAS Code:

“An appeal against the decision of a federation, association or sports-related body may be filed with CAS if the statutes or regulations of the said body so provide or if the parties have concluded a specific arbitration agreement and if the Appellant has exhausted the legal remedies available to it prior to the appeal, in accordance with the statutes or regulations of that body. [...]” (emphasis added)

80. Article 17 of the Protocol, which is the regulatory framework under which the Appealed Decision was issued, provides as follows:

“The following procedures apply to all hearings under this Protocol:

[...]

b. [...] the final award by the arbitrator(s) may be appealed to the CAS [...].”

81. Moreover, Article R-43 of Annex C to the Protocol (this Annex containing the procedural rules that governed the proceeding before the First Instance Arbitrator), provides that:

“The arbitration award may be appealed exclusively to CAS as provided in the USADA Protocol.”

82. On this basis, the Sole Arbitrator is satisfied that he has jurisdiction to hear the present appeal against the Appealed Decision.

VI. ADMISSIBILITY

83. Pursuant to Article 17(b) of the Protocol *juncto* Article 13.2.1 (f) of the WADC, WADA has a right to appeal against the Appealed Decision.

84. In respect of the applicable deadline to appeal, Article R49 of the CAS Code provides as follows:

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

85. Accordingly, Article R49 of the CAS Code accords priority to any deadline for appeal provided for in the regulations governing the body that issued the decision appealed against. Article 17(b) of the Protocol refers to Article 13.2.3.5 of the WADC for the deadline for an appeal filed by WADA. According to Article 13.2.3.5 of the WADC:

“The filing deadline for an appeal filed by WADA shall be the later of:

a) Twenty-one (21) days after the last day on which any other party having a right to appeal could have appealed,
or

b) Twenty-one (21) days after WADA’s receipt of a complete file relating to the decision.”

86. The IPC, which is a party having a right to appeal under Article 13.2.3.1(e) of the WADC (as incorporated by Articles 6(a) and 17(b) of the Protocol), received the reasoned Appealed Decision on 7 August 2024. This triggered the IPC’s appeal deadline of 21 days pursuant to Article 17(b) of the Protocol. Accordingly, the IPC’s appeal deadline did not expire before 28 August 2024. Consequently, per Article 13.2.3.5(a) of the WADC, WADA’s deadline to appeal could not have expired before 18 September 2024. WADA having filed its Statement of Appeal on 12 September 2024, the appeal was timely filed.

87. Noting that no Party raised any objections as to the admissibility of the appeal and since there are no indications in the file that the appeal could be inadmissible for any other reason, the Sole Arbitrator determines that the appeal is admissible.

VII. APPLICABLE LAW

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

“The Panel shall decide the dispute according to the applicable regulations and, subsidiarily, to the rules of law chosen by the parties or, in the absence of such a choice, according to the law of the country in which the federation, association or sports-related body which has issued the challenged decision is domiciled or

according to the rules of law that the Panel deems appropriate. In the latter case, the Panel shall give reasons for its decision.”

89. Accordingly, this appeal shall be decided pursuant to the Protocol and, subsidiarily, US law, being the law of the country in which both USADA and New Era ADR are domiciled. However, the Sole Arbitrator also notes that pursuant to Article 26.3 of the WADC, any issues of interpretation of the WADC shall be resolved autonomously, not by reference to any national law.

VIII. OTHER PROCEDURAL ISSUES

A. The Athlete’s failure to file any submissions

90. The Second Respondent’s failure to submit an Answer, to make any other substantive submissions in this arbitration, or to provide a signed copy of the Order of Procedure, did not prevent the Sole Arbitrator from proceeding with the arbitration and delivering this Award (see Article R55(2) of the CAS Code; CAS 2018/A/5945, para. 39). Every communication was sent to the Second Respondent by email to the same address from which he sent emails to the CAS Court Office during this arbitration. In addition, out of an abundance of caution, the entire case file was delivered to the Second Respondent on USB drives by courier to four addresses transpiring from the CAS file. Accordingly, the Sole Arbitrator is satisfied that the Second Respondent was duly notified of the arbitration but chose not to participate in it in a substantive manner.

B. Request for suspension of the arbitration

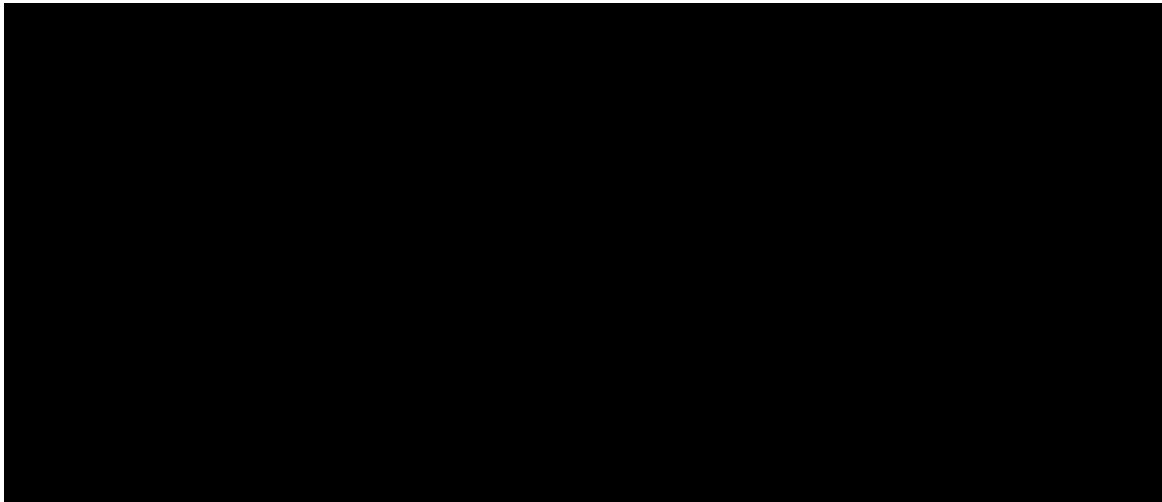
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C. Admissibility of the 12 June Letter

96. As mentioned above, when the Sole Arbitrator overruled USADA's objection and admitted the 12 June Letter into the record, he indicated to the Parties that he would explain the reasoning behind this decision in the arbitral award. Accordingly, the Sole Arbitrator will now provide such reasoning.
97. Per Article R56 of the CAS Code, after submission of the Appeal Brief and the Answer, the parties shall not be allowed to make any further submissions, unless agreed otherwise by the parties or decided otherwise by the Sole Arbitrator based on exceptional circumstances. In the present case, while there was no agreement between the Parties on additional submissions, the Sole Arbitrator found that exceptional circumstances existed to allow the 12 June Letter. Specifically, in the Answer, the Respondent raised for the first time in this case an argument of *res judicata*. Moreover, it set out its position on why it should not be subject to any adverse cost order. On both of those legal arguments, WADA would have been entitled to respond at the hearing. At the time of WADA's submission of the Appeal Brief, WADA could not yet know that no hearing would be held, especially that the Athlete would not file an Answer to challenge WADA's submissions on the merits, or request a hearing. Accordingly, to safeguard WADA's right to be heard, it was appropriate to invite its written position on the First Respondent's arguments. For completeness, the Sole Arbitrator notes that the First Respondent's right to be heard was likewise respected as it was given the opportunity to comment on the 12 June Letter.

IX. MERITS

98. The Sole Arbitrator finds that this case gives rise to two main questions on the merits: First, did the Athlete commit an ADRV? Secondly, if he did, what are the applicable consequences? The Sole Arbitrator will address each of these questions in turn.

A. Did the Athlete commit an ADRV?

99. At first instance, the Athlete was charged with an ADRV under both Article 2.1 and Article 2.2 of the WADC. Similarly, WADA's (and USADA's) requests for relief seek a finding that an ADRV was committed under Article 2.1 *“and/or”* Article 2.2 of the WADC. This being a case in which an AAF was reported for both the “A” Sample and the “B” Sample, the Sole Arbitrator finds it appropriate to assess primarily Article 2.1 of the WADC.
100. Pursuant to Article 3.2 of the WADC, the burden is on the Anti-Doping Organization, i.e., WADA in this appeal procedure, to prove the ADRV asserted by it

“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.”
101. As per Article 2.1.2 of the WADC, sufficient proof of an ADRV under Article 2.1 is established by presence of a prohibited substance in an athlete's “A” and “B” samples. As just mentioned, the Laboratory reported AAFs for both the “A” Sample and the “B” Sample. Moreover, there is no indication in the file that there could have been – or that the Athlete asserted at any stage of the proceedings – any departures from any International Standard that could have reasonably caused the positive tests (cf. Articles 3.2.2 and 3.2.3 of the WADC). Hence, the evidential requirement set out in Article 2.1.2 of the WADC is *prima facie* met.
102. However, USADA argues that that there is another requirement for establishing an ADRV under Article 2.1 of the WADC, namely that the use of Roxadustat that caused the AAF must have occurred after the Athlete became subject to the Protocol, i.e., after 7 February 2023. The Sole Arbitrator does not find this convincing. For WADA to be able to establish the *date* of use, it would necessarily need to establish *use*. This, however, is precisely what would be required to establish an ADRV under Article 2.2 of the WADC. This, in turn, would risk collapsing the distinction between Articles 2.1 and 2.2 of the WADC. The Sole Arbitrator finds it hard to accept that this is what the drafters of the WADC intended, especially because there is no indication in the wording of Article 2.1 of the WADC that this might be so.
103. In addition, the Sole Arbitrator notes the finding in CAS 2018/A/5768, at para. 106, that the interpretation of Article 2.1 of the WADC advanced by USADA in the present case *“would permit any athlete to abuse an assortment of performance-enhancing substances prior to joining the professional ranks and later to claim innocence just because substances were ingested (whether intentionally or unintentionally) prior to his or her being bound by the rules”*. USADA explicitly agrees with this concern, but argues that it could be addressed differently than by applying Article 2.1 of the WADC in those scenarios. While it may well be true that rules could be drafted in a way that would address the concerns identified in CAS 2018/A/5768, no such rules currently exist in the WADC. This militates against the proposition of adding to Article 2.1 of the WADC

an unwritten requirement that would create precisely the concerns mentioned in CAS 2018/A/5768.

104. Moreover, the Sole Arbitrator notes USADA's argument that applying Article 2.1 of the WADC to an athlete who used a prohibited substance only prior to becoming subject to the anti-doping rules could result in arbitrary sanctioning, depending on the excretion profile of the substance used. In the Sole Arbitrator's view, this argument overlooks that if an athlete establishes that the presence of a prohibited substance (or its metabolites or markers) results from use of the substance prior to the athlete becoming subject to Article 2.1 of the WADC, the athlete is unlikely to receive any period of ineligibility, on account of No Fault or Negligence. While competitive results may still be disqualified, this would not seem arbitrary, given the potential competitive advantage that the athlete may still have enjoyed for as long as the prohibited substance was in the athlete's system.
105. Although the comment to Article 7.7 provides that "[c]onduct by an Athlete [...] before the Athlete [...] was subject to the authority of any Anti-Doping Organization would not constitute an anti-doping rule violation [...]", the Sole Arbitrator is not satisfied, for the following reasons, that this adds an unwritten requirement to Article 2.1 of the WADC whereby the use that caused presence must have occurred after the Athlete became subject to the Protocol.
106. First, the Sole Arbitrator agrees with WADA that Article 2.1 of the WADC does not in fact involve any "*conduct*" in the sense of any human act or omission. Rather, it merely refers to a factual state, namely presence of a prohibited substance in a bodily sample. Accordingly, the Comment to Article 7.7 cannot be understood as a reference (also) to Article 2.1 of the WADC. Even if one considered presence of a prohibited substance to qualify as "*conduct*", such conduct did occur in the instant case only after the Athlete became subject to the Protocol.
107. Second, even if the comment to Article 7.7 of the WADC could be understood to refer also to Article 2.1 of the WADC, this comment would merely be an interpretative tool (see Article 26.2 of the WADC). It is doubtful whether this comment would be enough, in and of itself, to overcome the above-mentioned arguments militating strongly against the interpretation of Article 2.1 of the WADC advanced by USADA.
108. Third, the Sole Arbitrator notes that USADA's position is contrary to CAS jurisprudence (CAS 2018/A/5768, para. 106; CAS 2019/A/6180, para. 106(ii) and (v)). While there is no concept of binding precedent in CAS arbitration, he does find said jurisprudence persuasive. Not least against the background of this jurisprudence, the Sole Arbitrator is also not convinced by USADA's argument that simply because the draft version of the 2027 WADC apparently seeks to codify WADA's position on this point, this must mean that the current WADC is contrary to WADA's position. Instead, on the basis of said CAS jurisprudence, the intended codification appears to be a mere clarification (possibly in the light of the current comment to Article 7.7 of the WADC) rather than a change of the law.

109. Finally, the Sole Arbitrator does not consider that an application of Article 2.1 of the WADC in the present case is prevented by the *res judicata* principle. It is true that USADA decided not to press charges against the Athlete for a previous AAF for Roxadustat under Article 2.1 of the WADC, finding that it had not been established that the AAF had been caused by any use post-dating the Athlete's becoming subject to the Protocol. However, this decision does not constitute *res judicata* for the present arbitration, at the very least because WADA was not a party to that previous results management procedure before USADA. Identity of the parties is not only a pre-requisite under the triple identity test that is well-established in CAS jurisprudence, but also under US law (see, e.g., the very US Supreme Court decision invoked by USADA, *B&B Hardware, Inc. v Hargis Indus.*, 575 US 138, 147 (2015): "*the determination is conclusive in a subsequent action between the parties*", emphasis added). The mere fact that WADA chose not to exercise its right of appeal does not make the decision *res judicata* vis-à-vis WADA (see CAS 2019/A/6574, para. 56).
110. For all those reasons, the Sole Arbitrator concludes that due to the presence of Roxadustat in the Sample, the Athlete committed an ADRV under Article 2.1 of the WADC on 20 July 2024. Given that the applicable sanction is the same for both Article 2.1 and Article 2.2 of the WADC, and as WADA did not insist on a finding that both Articles were violated ("*and/or*"), the Sole Arbitrator refrains, for reasons of procedural economy, from addressing Article 2.2 of the WADC.

B. What are the applicable consequences?

111. According to Article 10.2.1 of the WADC, the period of ineligibility for a violation of Article 2.1 of the WADC involving a non-specified substance (such as Roxadustat) shall be four years unless the Athlete can establish that the ADRV was not intentional. As the burden of proof for non-intentionality lies on the Athlete, the applicable standard of proof is a balance of probability, per Article 3.1 of the WADC.
112. According to the prevailing line of CAS jurisprudence, this requires that "*the occurrence of a specified circumstance is more probable than its non-occurrence*" (CAS 2006/A/1067, para. 7; to same effect, e.g., CAS 2009/A/1926 & 1930, para. 31; TAS 2014/A/3475, para. 79; CAS 2020/A/6978 & 7068, para. 162). Put differently, the athlete must establish that the likelihood of the occurrence of the relevant circumstance is greater than 50% (see, *ex multis*, CAS 2009/A/1926 & 1930, para. 31). The Sole Arbitrator is aware that there is another line of CAS jurisprudence whereby it is sufficient for athletes to prove that the theory put forward by them is the most likely among several scenarios (see, e.g., CAS 2007/A/1370 & 1376, para. 58; CAS 2011/A/2384 & 2386, paras. 111-113). However, the Sole Arbitrator considers that it is not necessary for him to take any position on those two diverging views as he would arrive at the same conclusions under both theories in the present case.
113. The Athlete has not filed any substantive submissions in this arbitration. However, the Sole Arbitrator must nonetheless determine whether, based on the facts and evidence on record in this arbitration, it is established that the ADRV was non-intentional. In particular, the record includes multiple statements made by the Athlete (himself or through counsel) in the results management procedure conducted by USADA.

114. Throughout that procedure (including the proceeding before the First Instance Arbitrator), the Athlete argued that the presence of Roxadustat in the Sample was due to his intake of that substance prior to becoming subject to the Protocol, with a view to facilitating his recovery from his back injury and surgery. The Athlete further testified before USADA that, in his recollection, his last intake of Roxadustat was in mid-May 2022.
115. The Sole Arbitrator is inclined to accept that if this assertion were proven, the Athlete would bear No Fault or Negligence because, in that case, he arguably could not have known or suspected, around nine months before he even became subject to anti-doping rules, that his intake of Roxadustat would qualify as use of a Prohibited Substance, or otherwise violate any anti-doping rule (cf. the definition of No Fault or Negligence in Appendix 1 to the WADC). However, this may be left undecided because, on the balance of probability, the Sole Arbitrator is not satisfied that the ADRV was caused exclusively by intake of Roxadustat prior to the Athlete's becoming subject to the Protocol.
116. First, the scientific evidence casts severe doubt on whether an intake of Roxadustat in mid-May 2022 could have caused an AAF on 20 July 2024, i.e., 26 months later.
117. The Athlete's own expert witness at first instance, Mr Scott, testified that "*Roxadustat has a medium excretion half-life, and depending on amount administered, should be detectable in urine by a WADA laboratory using best practices for two to four weeks after last administration*". He further testified that "[u]nder normal circumstances, it is not reasonable that, even ignoring the Athlete's admitted administration in May 2022, that an administration prior to May 19, 2023, would still produce an adverse result five months later in October 2023". While Mr Scott added that "*it may be*" that severe injury or spinal injury has an effect on the metabolization, he acknowledged that he had "*no expertise in that area and found no literature in support of or in contradiction of that theory*".
118. At best, therefore, the Athlete's own expert hinted at the possibility of the Athlete's medical condition having altered the normal excretion pattern of Roxadustat, which normal pattern he confirmed could not explain the presence of Roxadustat in the Athlete's body in October 2023 after intake prior to 19 May 2023 (so could even less explain the presence of Roxadustat on 20 July 2024 after intake in mid-May 2022). However, Mr Scott was unable to support such possibility with any scientific data, to quantify the likelihood of such possibility, or to specify the magnitude of any such possible effect. Dr Fedoruk and Prof. Saugy have likewise confirmed that there were no scientific publications suggesting that SCI could impair the excretion of Roxadustat.
119. While Prof. Saugy noted that some publications do suggest that SCI may have a modest effect on the metabolism of drugs generally, it transpires from the scientific article cited by Prof. Saugy that this is due to decreased renal function in SCI patients. If one assumed, for the benefit of the Athlete, that the Athlete's SCI meant that his excretion profile for Roxadustat was more similar to that of renally impaired individuals than that of healthy individuals, it is highly relevant that due to the Athlete's multiple AAFs for Roxadustat, USADA conducted a study, in collaboration with the WADA-accredited

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laboratory in Cologne and the Laboratory, which looked specifically into the urinary excretion of Roxadustat in renally impaired (anemic) clinical patients. The following is a reproduction of a table taken from that study, as published in a scientific article submitted by WADA in this arbitration:

Parameter	Patient ID								
	1		2		3	4	5	6	7
Age/weight	36/71		64/84		45/95	89/45	85/64	54/84	70/84
Gender	Male		Male		Male	Female	Male	Female	Male
Cumulative dose, mg	4000		840		6480	300	6000	9600	11,900
Treatment duration, days	102		28		162	21	140	448	185
Wash-out period, days	291	540	274	524	314	506	184	184	511
Roxadustat, ng/mL	0.05	0.007	0.005	0.002	0.05	ND	0.02	0.003	0.009

120. In addition to the data included in the above table, Dr Fedoruk stated in his expert report submitted by USADA in this arbitration that, after the publication of the above-mentioned article, another sample was taken from Patient 1 on Day 663 after the last intake, and that no Roxadustat was detected in that sample.
121. Based on that study, Dr Fedoruk concluded in his expert report that “*even in renally-impaired patients receiving multiple doses, the clearance of Roxadustat may be detectable for up to approximately 18 months after the last dose, but not appreciably beyond*”. Indeed, in case of Patient 4, no Roxadustat could be detected on Day 506, i.e., approximately 17 months after the last intake. However, in case of Patient 1, the only sample in which no Roxadustat was found was the one taken on Day 663, i.e., approximately 22 months after the last intake, not 18 months as mentioned by Dr Fedoruk. That said, it is of course true that the last (detectable) traces of Roxadustat must have left the body of Patient 1 *before* Day 663, and the Sole Arbitrator notes that on Day 540, i.e., after approximately 18 months, the concentration was a mere 0.007 ng/mL. Accordingly, it may well be that “*not appreciably beyond*” 18 months, Roxadustat was excreted completely from that patient’s body as well. At any rate, even if one assumed, for the benefit for the Athlete, that Roxadustat is detectable for 662 days after the last intake, this would still be approximately four months less than the time between the Athlete’s last admitted intake and the ADRV.
122. Moreover, the concentration of Roxadustat in the Sample, i.e., 0.0466 ng/mL before adjustment for specific gravity, or 0.0621 ng/mL (per Dr Fedoruk) / 0.066 ng/mL (per Prof. Saugy) after adjustment, is significantly higher than the concentration found in the sample of Patient 1 on Day 540, i.e., approximately eight months earlier in the excretion process than the Athlete’s Sample. In fact, the estimated concentration of Roxadustat in the Sample is also significantly higher than the concentration of Roxadustat reported for *any* of the five other renally impaired patients participating in the study, whose samples were taken between 184 and 524 days after the last intake, i.e., in each case significantly earlier than the Athlete’s Sample. This includes two patients (Patients 6 and 7) whose cumulative dosage is similar to that suggested by the Athlete’s alleged use of Roxadustat until mid-May 2022 (3-5 tablets of 50mg per week from either June or mid-September

2021). In addition, Dr Fedoruk testified that “*cumulative exposure to Roxadustat does not appreciably alter the observed Roxadustat concentrations detected*”.

123. Under those circumstances, it does not appear very likely, to say the least, that the intake of Roxadustat alleged by the Athlete, i.e., prior to him becoming subject to the Protocol, could have caused a positive test some 26 months later.
124. Second, even if Roxadustat could be detectable 26 months after the last intake, the estimated concentration of Roxadustat in the Sample, as compared to previous samples provided by the Athlete, gives rise to additional doubts.
125. The Sole Arbitrator notes that the estimated concentrations of Roxadustat in the Athlete’s samples after adjustment for specific gravity differ between the expert reports of Prof. Saugy and Dr Fedoruk. This holds true for the samples collected on 19 May 2023, 27 June 2023, 20 July 2024, 28 July 2024, 19 August 2024, and 15 September 2024. Also, they rely on a different concentration before adjustment for specific gravity for the sample taken on 19 August 2024. However, regardless of whether one uses the numbers presented by Prof. Saugy or those presented by Dr Fedoruk, it is clear that the concentration of Roxadustat in the Sample (before and after adjustment for specific gravity) was significantly higher than the concentration in the previous sample collected on 6 October 2023, by a factor of almost eight (before adjustment) or more than three (after adjustment). It was also higher than the concentration estimated for the first sample testing positive for Roxadustat, i.e., the one collected on 19 May 2023. After this “*spike*” (in the words of both Dr Fedoruk and Prof. Saugy) in the Sample, the concentration rapidly decreased in the next sample collected on 28 July 2024, and remained at much lower levels than the Sample in all subsequent tests, two of which even came back negative.
126. In this regard, Dr Fedoruk testified as follows:

“[...] the surprising pattern of increasing estimated Roxadustat concentration in the 20-July- 2024 sample (0.0621 ng/mL specific gravity (SG) normalized) is unexpected more than 9 months after the previously reported AAF on 6-October-2023 (0.020 ng/mL SG-normalized). This spike is a ~3-fold increase in estimated concentration which supports re-administration. We would normally expect a general trend of decreasing urinary concentrations of a drug during such prolonged elimination. [...] Therefore, my conclusion is that re-administration of Roxadustat after 6-October-2023 [...] explains the AAF reported on the sample collected in-competition at the US Paralympic Track and Field Trials on 20-July-2024.

[...] My conclusion is further supported by the decreasing Roxadustat estimated concentrations over time in the 28-July-2024 sample and subsequent collected samples up until the most recent sample in 2025.”

127. Similarly, Prof. Saugy opined as follows:

“Then, there is a spike in concentration in the sample collected on 20 July 2024 (0.066 ng/mL), with a rapid decrease during the following weeks (between 0.0067 ng/mL and 0.0084 ng/mL).

This indicates that the normal excretion profile of Roxadustat was followed by the Athletes' 2024 samples presuming an intake at some point after the last 2023 sample (6 October 2023) and prior to 20 July 2024.

It is why it is extremely unlikely that 9 months after the last AAF, Oct 6, 2023 (0.02 ng/mL), a concentration of 0.066 ng/mL of Roxadustat can be found in the athlete's urine without a new intake taking place prior to 20 July 2024.”

128. Mr Scott, in turn, did not express any opinion on the differences in concentration of Roxadustat in the Athlete's various samples. Accordingly, the expert testimony of both Prof. Saugy and Dr Fedoruk on this point, which the Sole Arbitrator finds plausible, is not challenged by any other expert opinion on record. The Sole Arbitrator also notes that there is no indication in the record of any other plausible theory (other than re-administration) that could explain this very significant increase in Roxadustat concentration in the Sample as compared to the previous test on 6 October 2023. In such circumstances, the Sole Arbitrator considers that, from a scientific perspective, it is not predominantly likely, to say the least, for this unexpected increase to have been caused without any administration of Roxadustat after the test on 6 October 2023.
129. Third, there are no other circumstances apparent from the record that would militate in favour of the ADRV having been unintentional. To the contrary, if one considers relevant whether the Prohibited Substance in question has the potential to enhance sporting performance, this must be answered in the affirmative for Roxadustat. Its undisputed effect is to improve a person's oxygen-carrying capabilities, which is obviously of potential benefit to track athletes such as the Athlete. Similarly, it is undisputed that the Athlete's sporting performance did enhance quite significantly between May 2023 and July 2024. Accordingly, there is no room for any argument that the absence of an increase in performance would speak against the use of Roxadustat during this period (the Sole Arbitrator makes no finding on whether such argument would have been convincing if there had been no uptick in performance). Moreover, there are circumstances casting some doubt on the credibility of the Athlete and his commitment to clean sport: First, he effectively admitted having been untruthful in his statements to USADA twice – once regarding his whereabouts on 11 June 2023, and once regarding his allegedly not knowing what Roxadustat was. Second, he left unexplained his use of three EPO injections purchased only weeks before he became subject to the Protocol.
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- [REDACTED]
130. For the above reasons, on a balance of probability, the Sole Arbitrator is not satisfied that the presence of Roxadustat in the Sample resulted exclusively from the Athlete's use of Roxadustat prior to him becoming subject to the Protocol. There is also no indication in the record that the ADRV may have been unintentional for any other reason. In particular, there is nothing on file suggesting that the Athlete may have come into contact with Roxadustat unknowingly. Hence, the Sole Arbitrator concludes that the Athlete has failed to discharge his burden of proof in respect of lack of intent.
131. Therefore, pursuant to Article 10.2.1 of the WADC, the applicable standard period of ineligibility is four years. As WADA does not request the imposition of a higher sanction (having not maintained in its Appeal Brief its initial request of up to six years in the Statement of Appeal) and as there is no indication in the record that there is any ground for reducing the standard period of ineligibility, the Athlete shall serve a period of ineligibility of four years.
132. Pursuant to the second sentence of Article 10.13 of the WADC, the period of ineligibility shall commence on the date of this Award. However, in accordance with Article 10.13.2.1 of the WADC, the Athlete shall receive credit for any period of provisional suspension respected by him. The Sole Arbitrator notes that a provisional suspension was imposed on the Athlete by USADA on 26 July 2024 and lifted on 3 August 2024. There is no indication in the record (or suggestion by WADA) that the Athlete failed to respect such provisional suspension. Therefore, the Athlete shall receive credit for that provisional suspension.
- [REDACTED]
133. Finally, as per Articles 9 and 10.10 of the WADC, all competitive results that the Athlete obtained on or after 20 July 2024 until the date of this Award shall be disqualified with all resulting consequences, including forfeiture of any medals, points or prizes.

X. COSTS

134. Article R64.5 of the CAS Code provides as follows:

"In the arbitral award, the Panel shall determine which party shall bear the arbitration costs or in which proportion the parties shall share them. As a general rule and without any specific request from the parties, the Panel has discretion to grant the prevailing party a contribution towards its legal fees and other expenses incurred in connection with the proceedings and, in particular, the costs of witnesses and interpreters. When granting such contribution, the Panel shall take

into account the complexity and outcome of the proceedings, as well as the conduct and the financial resources of the parties. ”

135. While Article R64.5 of the CAS Code does not specify any criteria based on which the arbitration costs shall be allocated, the Sole Arbitrator finds it appropriate to take guidance from the same criteria that are mentioned in the third sentence of Article R64.5 with respect to the contribution to legal fees and other expenses, i.e. the outcome of the proceeding as well as the conduct and the financial resources of the parties. This also appears to be in line with CAS jurisprudence (see RIGOZZI/HASLER, in ARROYO, M.: *Arbitration in Switzerland – The Practitioner’s Guide*, 2nd ed, Article R64 CAS Code, para. 30).
136. The Sole Arbitrator notes that WADA prevailed by 100%. This being so, and considering also the Parties’ procedural behaviour and financial resources, the Sole Arbitrator finds that WADA shall bear no arbitration costs, and shall be entitled to a contribution to legal fees and other expenses related to this arbitration.
137. As between the Athlete and USADA, the Sole Arbitrator acknowledges that USADA’s requests for relief are materially identical (except for costs) to WADA’s, as were its requests before the First Instance Arbitrator. However, the Sole Arbitrator also notes that USADA chose not to appeal itself against the Appealed Decision, thereby foregoing the chance to act as a prevailing appellant in this matter. Moreover, USADA did disagree with WADA’s position on the applicability of Article 2.1 of the WADC (including on the issue of *res judicata*), with WADA’s position having been eventually upheld by the Sole Arbitrator.
138. In addition, while USADA correctly noted that the WADC requires Operational Independence of first instance hearing bodies, and while New Era ADR appears to qualify as an independent arbitral tribunal, the Sole Arbitrator finds that, in line with CAS jurisprudence, such independence does not detract from the fact that New Era ADR operated by delegation and within the responsibility of USADA as the Results Management Authority in this case (cf. CAS 2017/A/6369; CAS 2020/A/6835, para. 130; CAS 2022/A/9286, paras 141 et seq.; CAS 2023/A/9451, 9455 & 9456, para. 430). After all, it is USADA that chose New Era ADR as the hearing body acting as a first instance for cases such as the present one. Also, as acknowledged by USADA, Article 20 of the WADC provides that each Anti-Doping Organization shall, when delegating aspects of Doping Control to third parties, remain fully responsible for ensuring compliance with the WADC. It follows that if that hearing body takes a decision that is set aside on appeal because it does not accord with the WADC, USADA cannot disclaim responsibility on account of the hearing body’s independence.
139. Contrary to USADA’s argument, the Sole Arbitrator does not find it unreasonable that WADA named USADA as a Respondent in this case, and refused to release it even after the Athlete had waived any argument in that regard. As just mentioned, the decision even of an independent tribunal is attributed to the Results Management Authority. Moreover, as the subject matter of this appeal is a request to replace a decision issued in a proceeding to which USADA was a party, it stands to reason that USADA would need to be party of this appeal proceeding. As USADA did not appeal itself, the only

way for WADA to make USADA a party to this arbitration was to file its appeal (also) against USADA. In addition, it was explicitly confirmed in at least one CAS case that the Results Management Authority had standing to be sued (CAS 2020/A/6835, para. 130). Therefore, it was not unreasonable, to say the least, for WADA to name USADA as a Respondent. It is true that after the Athlete's waiver, and after USADA's agreement to be bound by the award in this arbitration, WADA might have accepted such release without risking a dismissal of its appeal for lack of the Athlete's standing to be sued alone, i.e., without USADA. However, WADA was within its rights to refuse to do so, which it did precisely because it wishes to seek costs against the party that it legitimately named as Respondent.

140. The Sole Arbitrator has carefully considered USADA's argument that, if Results Management Authorities were liable for costs every time a CAS appeal against a first instance decision is (partially) upheld, this might motivate certain Results Management Authorities to interfere with the work of the first instance body. In USADA's view, such approach to costs might, therefore, in fact undermine Operational Independence. The Sole Arbitrator accepts that there is a cost incentive for Results Management Authorities to ensure that their first instance bodies render correct decisions. This, however, is not a bad incentive *per se*. Rather, it may cause Results Management Authorities to carefully select the body acting as first instance and to take other measures aimed at ensuring sufficient quality of its decisions (e.g. sufficient financing, training programs for adjudicators etc.). That said, one cannot of course exclude that some Results Management Authorities may instead be tempted to avoid adverse financial consequences by violating the requirement of Operational Independence. However, apart from the fact that this could, if revealed, have very serious consequences for such Results Management Authorities, it should be obvious that there is no guarantee at all that such Results Management Authorities' "instructions" to the hearing body as to how it should decide a case would in fact result in correct decisions. Therefore, while there is some force to USADA's argument, the Sole Arbitrator does not agree that this financial incentive would inevitably undermine the principle of Operational Independence. Even less does the Sole Arbitrator agree that potentially illicit behaviour of some Results Management Authorities would allow him to conclude, in conflict with the express language in Article 20 of the WADC, that USADA is not responsible for decisions taken by New Era ADR.
141. All that said, while the Athlete is not responsible for the content of the Appealed Decision, it cannot be ignored that it was his ADRV that necessitated the results management procedure culminating in this CAS appeals arbitration. Also, the Athlete's decision to go silent (after initial submissions on procedural matters) and have his email account automatically reject emails from the CAS Court Office created additional delay and cost.
142. For those reasons, the Sole Arbitrator finds it appropriate for USADA to bear 75% and the Athlete to bear 25% of the arbitration costs in this case. Moreover, USADA shall contribute an amount of CHF 3,000 to WADA's legal fees and expenses related to this arbitration.

ON THESE GROUNDS

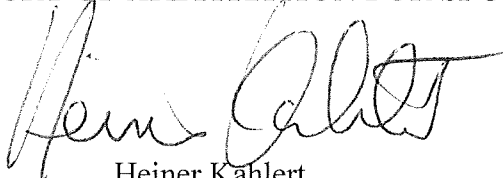
The Court of Arbitration for Sport rules that:

1. The appeal filed by the World Anti-Doping Agency (WADA) on 12 September 2024 against the decision rendered by New Era ADR on 3 August 2024 in the matter concerning Shea Foster is upheld.
2. The decision rendered by New Era ADR on 3 August 2024 in the matter concerning Shea Foster is set aside.
3. Shea Foster shall serve a period of ineligibility of four (4) years as from the date of this award, with credit given for the provisional suspension already served.
4. All competitive results achieved by Shea Foster from 20 July 2024 through the date of this award shall be disqualified with all resulting Consequences, including forfeiture of all medals, points and prizes.
5. The costs of the arbitration, to be determined and served to the parties by the CAS Court Office, shall be borne to 75% by the United States Anti-Doping Agency (USADA) and to 25% by Shea Foster.
6. The United States Anti-Doping Agency (USADA) is ordered to pay an amount of CHF 3,000 (three thousand Swiss francs) to the World Anti-Doping Agency (WADA) as contribution towards the legal fees and expenses incurred by it in connection with this arbitration proceeding. The United States Anti-Doping Agency (USADA) and Shea Foster shall bear their own costs.
7. All other motions or prayers for relief are dismissed.

Seat of arbitration: Lausanne, Switzerland

Date: 8 October 2026

THE COURT OF ARBITRATION FOR SPORT



Heiner Kahlert
Sole Arbitrator