

AMERICAN ARBITRATION ASSOCIATION
Commercial Arbitration Tribunal

In the Matter of the Arbitration between

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

Claimant

and

CONOR DWYER,

Respondent

Re: AAA Case No. 01-19-0000-6431

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 Santa Monica, California on August 13, 2019, before arbitrators James H. Carter, Cameron Myler 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. William Bock, III General Counsel, Jeffrey T. Cook, Results Management and Investigations Senior Director, and Nadia Soghomonian, Legal Affairs & Trial Counsel Manager, appeared and represented USADA.
2. Respondent, Conor Dwyer (**Mr. Dwyer**) is a 30-year-old swimmer, a two-time Olympian, having won gold and bronze at the 2016 Rio Olympic Games and gold at the 2012 London Olympic Games; and a four-time World Champion. Mr. Dwyer has won a total of 17 medals in major international competitions and is one of the top swimmers in the world. Mr. Dwyer was represented by Lauren Brock and Howard L. Jacobs of the Law Offices of Howard L.

Jacobs. Law Offices of Howard Jacob intern, Emily Fox, observed at the hearing. Claimant and Respondent shall be referred to collectively as “the parties” and individually as a “party”.

II. PROCEDURAL HISTORY

3. On November 15, 2018, Mr. Dwyer was selected for an out-of-competition test by the Fédération Internationale de Natation (FINA); on November 27, 2018, Mr. Dwyer was selected for an out-of-competition test by USADA; and on December 20, 2018, Mr. Dwyer was again selected for an out-of-competition test by USADA.
4. On December 21, 2018, USADA notified Mr. Dwyer that his November 27, 2018 sample tested positive for an anabolic agent of exogenous origin and imposed a provisional suspension. On December 27, 2018, Mr. Dwyer voluntarily accepted the laboratory’s findings and waived his right to test the B Sample or contest the lab findings.
5. On January 4, 2019, USADA sent Respondent a notice that his case was being forwarded to the Anti-Doping Review Board (“Review Board”). Respondent did not make a submission, and the Review Board concluded that there was sufficient evidence for USADA to proceed with a case against Respondent.
6. On January 25, 2019, USADA notified Mr. Dwyer that his December 20, 2018 sample tested positive for an anabolic agent of exogenous origin and that USADA was combining this adverse analytical finding with the case pending from the November 27, 2018 adverse analytical finding. On January 30, 2019, Mr. Dwyer voluntarily accepted the laboratory’s findings and waived his right to test the B Sample or contest the lab findings.
7. On February 4, 2019, USADA notified Respondent that the case involving his December sample was being sent to the Review Board, which concluded that there was sufficient evidence for USADA to proceed with a case against Respondent.
8. On February 15, 2019, USADA informed Mr. Dwyer that the Review Board found sufficient evidence of an anti-doping rule violation based on the two out-of-competition tests and recommended that the adjudication process proceed. USADA formally charged Mr. Dwyer with a single anti-doping rule violation, seeking a four-year period of ineligibility as a sanction.
9. On February 25, 2019, Mr. Dwyer contested the sanction issued by USADA and requested a hearing before a panel of three arbitrators. On February 26, 2019, USADA formally requested a hearing with the AAA, and by doing so informed FINA of its right to participate in the hearing as well.
10. On March 13, 2019, Mr. Dwyer received a letter from FINA informing him that his November 15, 2018 sample tested positive for an anabolic agent of exogenous origin and that FINA was referring the results management to USADA to consolidate with the existing proceedings. On March 20, 2019, USADA notified Mr. Dwyer that FINA had referred the November 15, 2018 adverse analytical finding to inform him that the matter was being combined with the pending case involving the two other USADA tests from November 27, 2018 and December 20, 2018.
11. On March 20, 2019, Mr. Dwyer waived review by the Review Board and, he additionally, voluntarily accepted the laboratory’s findings and waived his right to test the B Sample or contest the lab findings of the November 15, 2018 sample collected by FINA.

12. Once the composition of the Panel was confirmed, a preliminary hearing was held on May 8, 2019, which established August 13, 2019 as the hearing date.
13. On June 20, 2019, consistent with the Procedural Order issued in this case, the parties entered into a Stipulation of Facts with respect to the above.
14. Respondent's request for relief is that the sanction be a period of ineligibility not to exceed 16 months, with a start date on the date he was provisionally suspended, December 21, 2018.
15. USADA's request is a sanction of four years, with the sanction commencing on the date Mr. Dwyer's first sample was collected, November 15, 2018. If the sanction ultimately set by the panel is less than two years, USADA requests that the sanction start date be on the date Mr. Dwyer was provisionally suspended, December 21, 2018.
16. Though Respondent did not compete between the date the first positive sample was collected (November 15, 2018) and the date of provisional suspension (December 21, 2018), USADA submits that results during this time period, if any, should be disqualified.

III. JURISDICTION AND APPLICABLE LAW

A. Jurisdiction

17. 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 Respondent'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.
18. Further, this arbitration was initiated by the parties pursuant to the Claimant's letter to Respondent, dated February 15, 2019, which advised Respondent of his right to take this matter to arbitration, followed by Respondent's email through his counsel of February 25, 2019, which states that "Conor Dwyer contests the sanction being sought by USADA, and requests a hearing before a panel of 3 arbitrators...."
19. 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

20. The rules related to the outstanding issues in this case are the FINA Doping Control Rules, which implement the Code. As the FINA Doping Control 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.
21. 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.

* * *

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.

* * *

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.

...

10.2.2 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.

* * *

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

10.5.2 Application of No Significant Fault or Negligence beyond the Application of DC 10.5.1

If an Athlete or other Person establishes in an individual case where DC 10.5.1 is not applicable that he or she bears No Significant Fault or Negligence, then, subject to further reduction or elimination as provided in DC 10.6, the otherwise applicable period of Ineligibility may be reduced based on the Athlete or other Person’s degree of Fault, but the reduced period of Ineligibility may not be less than one-half of the period of Ineligibility otherwise applicable. If the otherwise applicable period of Ineligibility is a lifetime, the reduced period under this rule may be no less than eight years.

* * *

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.

10.11.3 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.

* * *

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

22. 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.
23. In addition to Mr. Dwyer, the Panel heard testimony from the following witnesses during the hearing:

For Respondent

- Ed Reardon, Mr. Dwyer's trainer, nutritional advisor and health coach
- Dr. Dana M. Russo, Doctor of Osteopathy, Board certified obstetrician and gynecologist, Mr. Dwyer's treating physician

For Claimant

- a. Bradley Anawalt, MD, FACP, Chief of Medicine at the University of Washington Medical Center and on the USADA Therapeutic Use Exemption Committee
- b. Matthew Fedoruk, Ph.D, USADA's Chief Science Officer
- c. Amber Donaldson, United States Olympic and Paralympic Committee (USOPC), Senior Director of the Sports Medicine Clinics
- d. Keenan Robinson, USA Swimming, Director National Team Sports Medicine & Science
- e. Dustin Nabhan, USOPC, Vice President, Sports Medicine, Research & Innovation

B. The Issues for the Panel

24. There is no dispute that Mr. Dwyer has committed an anti-doping rule violation. Accordingly, the only issue before this Panel is to determine the appropriate sanction applicable to the Respondent's anti-doping rule violation under the Code.
25. There is no dispute between the parties that the source of Respondent's anti-doping rule violation is prescription BioTe pellets which were surgically implanted by Dr. Russo in a short procedure on October 12, 2018.
26. Under Article 10.2, the Panel must first analyze the applicable "default sanction" before considering the reduction of that "default sanction", if any. Because testosterone is a non-Specified Substance on the Prohibited List, the default period of ineligibility is four years in accordance with Article 10.2.1, unless Respondent can establish that the anti-doping rule violation was not intentional, as defined in the Code.
27. In accordance with Article 10.2.3, the term "intentional" is meant to identify those Athletes who cheat. The definition requires that: (i) Respondent knew that his conduct would result in an anti-doping rule violation; or (ii) he knew that there was a significant risk that this conduct would result in an anti-doping rule violation and manifestly disregarded that risk.
28. If the Panel determines that the anti-doping rule violation was not "intentional", the Panel must then determine in accordance with Article 10.5.2 whether Respondent had "no significant fault or negligence" based on his breach of a duty or his lack of care, considering the definition of "fault". In that event, the Panel needs to determine whether there is any reduction to the "default sanction" and if so, how much of a reduction.

C. Respondent's Case

29. Mr. Dwyer testified that he did not know that the insertion of the BioTE pellets would result in an anti-doping rule violation. For many months, he had been suffering from health issues such as brain fog, low mental and physical energy, difficulty sleeping, depression and anxiety. Beginning in 2018, he was not concerned with his swimming performance, but rather his overall mental health and well-being.
30. Mr. Dwyer had confided these personal issues to his long-time friend, trainer, and nutritional coach, Ed Reardon. Mr. Reardon is the owner of two diet centers in Mr. Dwyer's previous hometown of Chicago and is not a licensed nutritionist. He helps people lose weight and sells diet products, trying to get people off medication. He does not work with athletes other than Mr. Dwyer, whom he has known for 10 years. According to Mr. Dwyer, Mr. Reardon taught him how to eat, train, sleep and was a life coach – on swimming, supplementation and life in general.
31. Mr. Dwyer met Mr. Reardon through his parents, and Mr. Dwyer had confidence in him and relied on him to make sure Mr. Dwyer did not take prohibited substances. Mr. Dwyer states that he did typically look at Global DRO, but Mr. Reardon testified that he also conducted research. Mr. Dwyer stated that he customarily would text Mr. Reardon and ask him to check with Global DRO regarding any treatment or supplement. He did not tell Mr. Reardon how to do the research, but specified that he needed to be sure whatever he took would be OK. Mr. Dwyer considered that Mr. Reardon was reliable because he did not fail a doping control during the entire 10 years that he had been working with Mr. Reardon, and he knew Mr. Reardon was doing the research necessary. Mr. Dwyer did not rely on USOPC or USA Swimming, as he felt

they gave preference to premier swimmers and were not interested in helping him beat the greatest swimmers. Instead, Mr. Dwyer relied on Mr. Reardon, the person whom he trusted the most in his life.

32. On the five or six occasions that Mr. Dwyer asked him to check on whether a supplement or substance was prohibited, Mr. Reardon's research technique was to conduct a Google search and then look at the web sites that would pop up in the search results. Mr. Dwyer had never taken any drugs without a prescription (he does have a therapeutic exemption for ADHD medication), nor had he taken any questionable supplements in his entire career. Mr. Reardon always advised Mr. Dwyer on what to eat and which supplements to take, and he checked everything Mr. Dwyer took for possible problems and possibly prohibited ingredients. Only once did Mr. Reardon determine that a recommended supplement (DHEA) was prohibited.
33. Mr. Reardon testified that he believed Mr. Dwyer over-trained for the year and a half prior to the Rio 2016 Olympic Games, and he came home from the Games feeling tired, with brain fog, fatigue, inability to sleep and generally "never got his mojo back". Mr. Dwyer's demeanor had changed, he was not the same upbeat, positive guy. Mr. Dwyer also testified about these symptoms. Mr. Reardon had experienced similar symptoms personally in April/May of 2018 and had then received treatment from Dr. Russo, a medical practitioner with an organization she founded called Inner Beauty Medical Rejuvenation & Hormone Optimization. She has received training from a company called BioTE Medical, which offers a non-FDA approved method of bioidentical hormone replacement therapy (BHRT) using pellet therapy. Mr. Reardon felt much better after being treated by Dr. Russo and then referred many of his customers to her; and they started feeling better also. He brought the BioTE treatment to Mr. Dwyer's attention and consulted Dr. Russo about Mr. Dwyer's situation. Dr. Russo has not treated any other elite athletes.
34. Together, Mr. Reardon and Dr. Russo discussed options for Mr. Dwyer in July/August 2018. Dr. Russo described BioTE to Mr. Dwyer in a phone call in August 2018, stating that BioTE involves inserting pellets, approximately the size of a grain of rice, under the skin tissue in a person's hip area, after which the blood then circulates around the pellets to make them dissolve the hormone into the body slowly over approximately five months. She explained to Mr. Dwyer that the pellets are bio-identical, derived from soy and yam, and that they would raise his testosterone hormone. Mr. Dwyer did not understand that the BioTE was in fact testosterone, but rather only that the pellets would raise his hormone health. They discussed his symptoms (according to Dr. Russo: extreme fatigue, anxiety and depression, brain fog and not sleeping well). During that call, and based on a blood panel result Mr. Dwyer had provided, as well as a "differential diagnosis" she runs in her head by questioning why the patient has these symptoms, Dr. Russo's diagnosis was that Mr. Dwyer had a testosterone deficiency that correlated to his symptoms. Her approach to treatment involved looking for ways to supplement that system. The goal of the treatment was to raise the testosterone level in his body to a high normal range, not a super physiologic state.
35. Mr. Dwyer's lab values for testosterone in Dr. Russo's estimation were low, in that she placed them in the 5th percentile, whereas someone Mr. Dwyer's age should be in the 50-90th percentile. She testified that her training (as a Doctor of Osteopathy, who is board certified by the American College of Obstetrics and Gynecology) did not specify that she should look at multiple blood samples taken in the morning, as Dr. Anawalt said was the best practice in diagnosing low testosterone. She typically only looks at one lab value to make a diagnosis. She saw no issue with the lab report she reviewed.

36. Mr. Reardon discussed Dr. Russo's view with Mr. Dwyer, who questioned why he should undertake the treatment, and asked whether this treatment was banned in sport. Mr. Reardon said he would look into it, whereupon he called Dr. Russo and discussed it with her. She explained to Mr. Reardon that BioTE is different from synthetic products and that it starts with sweet potato and yam. Mr. Reardon went online but could not find anything about the pellet form of testosterone, only about "synthetic testosterone" Mr. Reardon and Dr. Russo had not understood that the BioTE is also synthetic testosterone even though it is "bio-identical" and made from sweet potato and yam.
37. As a result of this call, Mr. Reardon and Dr. Russo decided that Dr. Russo would seek to determine whether BioTE was banned or not. She looked into it online but told Mr. Reardon she would feel more comfortable if she called someone. According to Mr. Reardon, he suggested she contact the USOPC because Mr. Dwyer had trained at the Olympic Training Center in Colorado Springs and he knew there was medical staff there.
38. Dr. Russo had not understood from Mr. Reardon that Mr. Dwyer was subject to drug testing, nor did they have any conversations about what he could take, but she volunteered to contact the USOPC to determine if she would have any problems with providing the prescribed treatment of bio-identical hormone replacement. She made this call because of her obligation as a medical provider, "to take care of [her patient] and treat [him] to the best of my ability", and "out of integrity and for my practice, I wanted to do my best". She had a general understanding that there are anti-doping rules, but this was not her focus. Her medical records (dated October 12, 2018, the date of the treatment) reflect that Mr. Dwyer told her he was not then competing and would not be for two more years. Mr. Dwyer does not recall making this statement.
39. Dr. Russo contacted the USOPC on August 29, 2018, making six phone calls that day to five different telephone numbers at the USOPC and one call to USA Swimming, as well as receiving two returned calls from the USOPC, as verified by her phone records. Two of these calls made by Dr. Russo were to the USOPC visitor's center; one was to the manager of the USOPC's national medical network at the time, who returned the call within a minute – which call lasted two minutes. The USOPC has not identified this person's name or who returned this call. Another of Dr. Russo's calls was to the USOPC head of security (who forwarded the voice mail to the USOPC's Senior Director of the Sports Medicine Clinics, Amber Donaldson), and one was to the main USOPC Sports clinic number. The other incoming call she received was from Ms. Donaldson's telephone number, and Dr. Russo's records show this call lasted eight minutes.
40. Dr. Russo testified that she participated in a telephone call with a male employee who was a doctor at USOPC, that she gave him her medical credentials and explained the focus of her practice, particularly her work with bio-identical hormone replacement. She allegedly informed this USOPC employee that she had a potential new athlete patient whom she wanted to ask questions about. When asked the name and which sport the athlete competed in, Dr. Russo advised the employee that, due to HIPAA rules, she could not disclose that information but advised that the sport was swimming. In addition, she said that he was not yet a patient, but rather her call was investigative.
41. Dr. Russo said that this male at the USOPC with whom she spoke on the phone told her that IV (intravenous) and IM (intramuscular) testosterone treatments are banned for Olympic athletes. She told him about the pellet therapy, *i.e.*, that it is derived from soy and yam, is bio-identical, and includes testosterone and stearic acid placed under the skin, to which he allegedly said this treatment was allowable. She told him the treatment was for symptom relief. When Dr. Russo

asked if she needed to get permission from anyone at the USOPC to treat the patient, or if the patient needed permission, he allegedly told her that as long as she is the physician treating the athlete, she would be able to treat him.

42. Ms. Donaldson testified that she had been forwarded Dr. Russo's voice mail message, which had been left with another USOPC employee, and that in the call Dr. Russo inquired about blood testing and hormone treatment for a patient. Ms. Donaldson had no specific memory of the conversation but testified that if Dr. Russo had raised the issue of testosterone treatment, in the normal course of Ms. Donaldson's conversations in response to inquiries on the subject, she would have said that athletes are responsible for anything they use or put in their bodies, that she would have told Dr. Russo that with respect to medications and testing, and she would have told Dr. Russo to check on the Global DRO web site, as any prohibited routes of administration would be on that site. She also would have suggested that, if appropriate, the athlete could get a therapeutic use exemption if the treatment was medically necessary. Ms. Donaldson then sent an email (submitted in evidence) after the call, to Keenan Robinson, the lead medical staff at USA Swimming, in case Dr. Russo called him with more questions. Due to HIPAA restrictions, Dr. Russo did not reveal in this call that her patient was an Olympian or his name.
43. Dr. Russo denies that the conversation included any of the statements that Ms. Donaldson said would have been made, or that she was referred to Keenan Robinson. She came away from her phone call with the USOPC person "completely certain" that she did not need permission, and that Mr. Dwyer did not need permission for Dr. Russo to be able to administer the pellet therapy. She felt very comfortable moving forward. Her specific and emphatic recollection is that the person she spoke to at the USOPC was a man and that he told her that as long as she was a medical practitioner treating a patient, and did not administer the treatment via IV or IM, she could provide testosterone to that patient under the rules. She also testified that she told the USOPC employee that the athlete would not be competing for three years.
44. Dr. Russo told Mr. Reardon and Mr. Dwyer in separate conversations that she was given verbal confirmation from a USOPC employee within the Sports Medicine Department that the BioTE treatment was allowable. Mr. Reardon remembered her reporting that her phone call was with a female at the USOPC. Dr. Russo said that Mr. Dwyer was comfortable this was something he was allowed to do, based on her conversation with USOPC. Mr. Reardon reassured Mr. Dwyer that he should be comfortable and believes that was why Mr. Dwyer was comfortable with the proposed treatment. Mr. Dwyer testified that, based on the report that the treatment was "green lit" by the USOPC, he was 100% OK that the treatment was part of the natural makeup of his body and would help him physically and mentally. He testified he told Dr. Russo he was an Olympic athlete and is subject to drug testing. Mr. Dwyer had numerous anti-doping education sessions over his career and has been tested numerous times (he estimates 50 times in an Olympic year). He also was fully aware that testosterone was not allowed, but he was under the impression that the pellet treatment was a natural way to help him. He had faith in Mr. Reardon and his care and attention to whether the treatment would hurt Mr. Dwyer's swimming career.
45. Mr. Dwyer testified that he looked on Global DRO for BioTE pellets but got no results. USADA's witness, Dr. Fedoruk, testified that nothing will come up if you search Global DRO for "bio-identical", "hormone", "biote" and that the only "BioTE" searches conducted in 2018 were by athletes who represented themselves as a cyclist, weightlifter, a triathlete and UFC athlete. When doing a search on Global DRO, an individual is required to identify which sport they participate in, but the website does not verify any of this information (*i.e.*, a swimmer could select weightlifting as their sport on the Global DRO site). Only one search was conducted

for “BioTE pellets”, in March 2018, and that was by an athlete who self-represented as a weightlifter. In any event, if a search yields no results, the user on Global DRO views a message that encourages him/her to contact USADA.

46. Dr. Anawalt testified that the medical records of Dr. Russo that he reviewed do not support the use of testosterone therapy for the reported symptoms, nor do they indicate a clear diagnosis at any point. The actions taken by Dr. Russo, in his opinion, were below the medically proper standard of care. He opined that it is essential to try to determine the cause of testosterone deficiency, which involves looking at more indicators than just the testosterone levels. He said that testosterone treatment should not be taken lightly because, once started, a patient is committing to long term therapy. He also testified that the patient would not know about the need for two morning tests to validate the deficiency and that it is up to the physician to verify whether the test is accurate.
47. Mr. Dwyer, Dr. Russo, and Mr. Reardon proceeded with the pellet treatment on October 12, 2018 with what they believed to be actual confirmation from the USOPC that this treatment would not result in an anti-doping rule violation. Mr. Dwyer signed various forms as part of the treatment, which he did not read. They referenced testosterone and that BioTE would increase hematocrit and muscle mass. Mr. Reardon was present for the procedure. He and Dr. Russo described what the procedure would be and Respondent asked a few questions. He understood that he was being given a small amount of BioTE and that this would raise his hormones to a normal level. He did not understand that there had been a diagnosis of a medical condition. The procedure took only a few minutes.
48. When Mr. Dwyer gave the samples at issue here, he did not declare the BioTE on the Doping Control Official Records (**DCORs**) because he believed it was permitted medication. He did declare Vitamin D and multi vitamins and, when questioned about this by USADA, stated that it was not on his mind because he was in New York, hanging out with his family and girlfriend.
49. Mr. Dwyer testified that he supports the anti-doping mission, has tried to “do it the right way” his entire career and was shocked, mad, sad and crushed when he got the notice from USADA about the anti-doping rule violation.

D. Applicable Default Sanction

50. The parties disagree about whether Respondent’s conduct was intentional in accordance with the Code. Both parties agree that Respondent bears the burden of proof by a balance of probabilities that Respondent’s conduct was not intentional in order to have the default sanction of four years reduced.
51. As referenced above, in accordance with Article 10.2.3, the term “intentional” is meant to identify those Athletes who cheat. The definition requires knowledge that: (i) Respondent knew that his conduct would result in an anti-doping rule violation; or (ii) he knew that there was a significant risk that this conduct would result in an anti-doping rule violation and manifestly disregarded that risk.
52. USADA argues that testosterone is one of the most widely known and powerful performance enhancing drugs in sport, and Respondent has been specifically educated on the fact that it is prohibited. USADA asserts that red flags should have been raised when a doctor whom Respondent met over the phone recommended a procedure involving testosterone. Respondent did not declare the treatment on his DCORs when he had on many occasions declared

substances that are not prohibited, the implication being that Respondent knew there was at least a risk he was violating the Code.

53. USADA cites to two cases regarding how an athlete can establish that he did not know of a risk of violation. The Panel did not find either case to be applicable based on the Respondent's situation. In *USADA v. Schumm* (AAA 01-17-0001-5091, 19 January 2018), Schumm was aware that her actions in using BioTE pellets were an anti-doping rule violation and had applied for a therapeutic use exemption. In this case, Mr. Dwyer was not aware of that fact. In *WADA v. CBF & Olivio Aparecido da Costa*, the athlete had consulted with the club doctor, who sent him to another doctor, but the athlete did not tell the second doctor that he was an athlete, nor did he tell the team doctor he was taking testosterone. In this case, it was clear to Dr. Russo that Mr. Dwyer was an athlete subject to doping restrictions, though she was under the impression he was not currently competing and would not be for several more years.
54. Respondent in turn submits that he acted in reliance on Mr. Reardon and Dr. Russo, who to him were trusted and reliable sources, who in turn relied on the trustworthy source of the USOPC Sports Medicine Department. These sources reported to him, in response to his questions about testosterone, that this treatment was permissible. Based on this factual history, Respondent submits that he (i) *did not* know that the BioTE pellets contained any banned substances; and (ii) *did not* know that the BioTE treatment might constitute or result in an anti-doping rule violation and because he *did not* know that this treatment might constitute or result in an anti-doping rule violation, he could not have manifestly disregarded that risk.
55. The Panel, having heard the sometimes contradictory testimony of the witnesses, and in particular Mr. Dwyer's credible testimony about what he understood at the time the treatment was recommended by Mr. Reardon and his understanding that the USOPC said it was permitted, finds that Respondent was not cheating, nor did he have any knowledge that the treatment might constitute, or risk resulting in, an anti-doping rule violation. He asked, was told otherwise by apparently qualified and reliable sources and specifically believed otherwise. The answers he received and the sources of those answers are the factors considered by the Panel in determining Mr. Dwyer's knowledge, not simply the fact that the question was asked. Whether Respondent's misguided belief was appropriate for an experienced Olympian with extensive anti-doping education, as argued by USADA, is not the standard to be applied with respect to this question. The Panel notes that Respondent did inquire, as was his duty. He was credible in his testimony that he believed what he was told. His experience with Mr. Reardon was such that no doubts were raised and no risk perceived. Dr. Russo came highly recommended, and she reported the treatment was approved by the USOPC.
56. Asking whether there is a banned substance is not the same as knowing there is a risk of a banned substance and manifestly disregarding that risk. This is the assessment the Panel is required to make to determine intentional misconduct. It cannot be that any time an athlete asks a doctor or other advisor whether a substance is banned (as is one of the elements of the highest standard of care), that the athlete will be held to have actual knowledge. The Code is specific in requiring knowledge of the banned substance or knowledge of the risk of a banned substance's presence. This is not to say that athletes can rely on third parties or otherwise proclaim ignorance in order to shirk their personal responsibility not to use banned substances. Rather, the Panel finds the Respondent and the witnesses credible in their testimony of lack of knowledge on this particular set of facts.
57. The Panel finds that this case, though involving a notorious substance, testosterone, is unusual due to Respondent's reliance on a long trusted adviser, his knowledge of the treatment that

adviser had previously received, which had helped the adviser in similar circumstances, his seeking the treatment for his personal well-being rather than for performance enhancement, the repeated emphasis by the medical professional the adviser had experience with and trusted, on the source of the testosterone being “natural” and created from soy and yams (even though she was mistaken in thinking this made a difference), which they all believed distinguished it from some “unnatural”/exogenous testosterone, and in particular Dr. Russo’s report of its being approved by the USOPC. The Panel finds that Respondent has met his burden by a balance of probabilities of proving that Respondent did not have the requisite knowledge for this anti-doping rule violation to be “intentional”. Thus, the default sanction under Article 10.2.3 is two years.

E. Reduction of Sanction

Source of positive sample

58. In order to obtain a reduction in the default sanction, Mr. Dwyer must prove (by a balance of probability) how the testosterone entered his system.
59. Mr. Dwyer admits that on October 12, 2018 he was treated with “BioTE” hormone replacement therapy by Dr. Dana Russo after several months of health concerns, including difficulty sleeping, fatigue, depression, anxiety, and lack of concentration. USADA accepts this is the source of the positive sample.

Level of Fault

60. Both parties agree that Article 10.5.2 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. The sanction range reduction in that case for a non-Specified Substance would be between a minimum of one year and a maximum of two years based on the athlete’s degree of fault. Under Article 10.5.2, if the athlete cannot carry his burden, then no further analysis is required, and the sanction is two years.
61. Respondent argues that he has established that he bore no significant fault or negligence. He had assurances from his long-time trusted adviser, Mr. Reardon that the pellet therapy was not prohibited by the Code. He had no reason to be suspicious of what Mr. Reardon told him. He went to experts (Mr. Reardon and Dr. Russo, who in turn consulted with the USOPC) to obtain the information, and he relied on them. As Dr. Anawalt stated, the patient cannot be expected to know what is supposed to be done; rather, the patient relies on the doctor’s expertise. Respondent had no reason to doubt what Mr. Reardon and Dr. Russo told him.
62. Respondent argues that the Panel has to assess the evidence to determine whether the conversation Dr. Russo reported to have had with the USOPC was some sort of subterfuge story based on all the circumstances. The Panel can evaluate the quality/competence of the doctor chosen by Respondent as an element of fault or negligence. Mr. Dwyer argues that is not the only factor for the Panel to assess, but rather that his choice to delegate to Mr. Reardon, a reliable and trusted part of Respondent’s team, was reasonable and that such choice should be taken into consideration when evaluating his degree of fault.

Delegation Doctrine

63. Respondent argues that in accordance with the delegation doctrine adopted in *Al Nahyan v. Fédération Equestre Internationale* (CAS 2014/A/3591), at ¶¶169 and 177, although an athlete “cannot avoid strict liability” by his reliance on others, “the sanction remains commensurate with the athlete’s personal fault or negligence in his selection and oversight of the physician, trainer, or advisor[.]” In *Sharapova v ITF* (CAS 2016/A/4643), at ¶¶ 85 and 95, the CAS Panel stated that in such a case, “the fault to be assessed is not that which is made by the delegate, but the fault made by the athlete in his/her choice... The measure of the sanction to be imposed depends on the degree of fault.” The Panel in *Sharapova* (at ¶ 85) went on to state as follows:

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

64. Therefore, according to Respondent, in assessing Mr. Dwyer’s degree of fault, the relevant inquiry is (i) whether his delegation to Mr. Reardon and/or Dr. Russo was reasonable; (ii) whether he properly instructed Mr. Reardon and/or Dr. Russo; and (iii) whether he exercised control or supervision over Mr. Reardon and/or Dr. Russo in carrying out the task of ensuring that he did not ingest any prohibited substances.
65. Respondent asserts that his choice of delegate in Mr. Reardon was reasonable. He compares the delegation in *Sharapova* to the delegation here and considers the delegates in the two situations to be equally reasonable choices.
66. Respondent knew that Mr. Reardon was checking on the status of BioTE, but he concedes he did not provide him with full instruction or control. Nevertheless, he did more than Sharapova, because Respondent repeatedly asked Mr. Reardon to make sure the BioTE was not banned. Since the *Sharapova* case is the only benchmark in determining direction, Respondent argues that he gave better direction and exercised more control than Sharapova did in her case. Based on the delegation doctrine, Respondent argues that he was not significantly negligent.
67. Respondent specifically asked if the BioTE treatment was prohibited and was told about the USOPC conversation and how Mr. Reardon and Dr. Russo concluded that it was allowable. While Respondent could have done more, the applicable standard is not perfection. He asserts that his fault in his delegation responsibilities was minimal (and certainly not significant).
68. USADA objects to the use of the delegation doctrine in this case and asserts that the Code and CAS case law do not condone a general delegation of an athlete’s personal doping control responsibilities outside the context of equine sport, where a rider is likely to rely on third parties

to a significant degree. USADA distinguishes the *Sharapova* case in that the parties had agreed to follow the delegation approach. The *Al Nahyan* panel noted that “the sanction remains commensurate with the athlete’s personal fault or negligence in his selection and oversight of the physician, trainer, or advisor, ... or, alternatively, for his own negligence in not having checked or controlled the ingestion of the Banned Substance.” (*Al Nahyan*, ¶ 177) Thus, USADA asserts that in *Al Nahyan* the resulting sanction would have been the same whether or not the panel applied the delegation doctrine.

69. USADA also distinguishes the substances at issue in the *Sharapova* case (meldonium, which had only recently been added to the WADA prohibited list and which the athlete had used for many years under the care of a sport physician) and testosterone in this case, where there could have been no legitimate confusion about the status of testosterone, since it has been prohibited as long as there has been a WADA prohibited list.
70. USADA relies on *FIS v. Johaug* (CAS 2017/A/5015), where the CAS panel declined to apply the delegation doctrine, stating “[i]t has been consistently held in CAS decisions that an athlete cannot delegate away his or her responsibilities to avoid doping. In fact, even in both cases that Ms. Johaug has cited as support (CAS 2014/A/3591 and CAS 2016/A/4643), this principle is clearly espoused.” (at ¶ 195)
71. USADA concludes that importing the delegation doctrine into a case such as this one would serve only to make it far too easy for an athlete to duck his or her duty to be responsible for what athletes put in their bodies by hiring or trusting inexperienced, naïve, or untrustworthy intermediaries.
72. If the Panel accepts the application of the delegation doctrine, USADA submits that Respondent’s delegation to Mr. Reardon and Dr. Russo was not reasonable, and his lack of oversight provides no relief. Specifically, Respondent provided no direction or oversight as to the steps to be taken to ensure compliance with the FINA Doping Control Rules. Nor did Mr. Reardon have any qualifications to manage questions regarding what medications were permissible for use by Olympic athletes. Respondent’s basis for relying on Mr. Reardon was that Respondent had not tested positive over 10 years while relying on Mr. Reardon. There was a clear lack of evidence that he was someone who could be relied on for anti-doping expertise. In *Johaug*, where the panel did not accept the athlete’s delegation argument, the doctor in question was the team doctor who had specialized in sports medicine for over 30 years, worked for large pharmaceutical companies such as Pfizer and Nycomed, served as Chief Medical Officer of the Norwegian Olympic Team at the 2014 Sochi Olympic Games, and was the Team Physician for the Norwegian National Women’s Cross Country Ski Team from 2014-2016. The panel in *Johaug* concluded that the doctor on whom the athlete relied “ha[d] an extraordinary level of anti-doping education and experience.
73. The athlete’s responsibility does not end once he has delegated responsibility to a qualified person; rather, the athlete must still instruct the delegate and exercise supervision and control. In this case, Respondent gave no instruction other than a general request that the delegate (Mr. Reardon) make sure that the pellet therapy was not prohibited under the applicable anti-doping rules. Furthermore, after Mr. Reardon seemingly delegated to Dr. Russo the responsibility of ensuring that the pellet therapy was not prohibited, Mr. Dwyer did not exercise any control over either of his delegates in carrying out that task. In USADA’s view, there was no appropriate instruction, monitoring or supervision – Respondent did not make any inquiries about whom Dr. Russo spoke to at the USOPC, but rather just relied on her statement that according to an unidentified individual at the USOPC, the pellet treatment was acceptable.

74. Further, USADA contends that, if Respondent had in fact checked Global DRO, and the system did not return a match, he would have been instructed to call USADA, which he did not do.
75. The Panel finds that the delegation doctrine is inapplicable to assist Respondent in meeting his burden of proof that he was not significantly negligent. The delegation doctrine does not relieve Respondent of his personal responsibility to exercise utmost care in ensuring that he did not ingest or use any prohibited substances. As stated in *Johaug*, he “cannot delegate away his . . . responsibilities to avoid doping.” (¶ 195) In addition, as the panel stated in *Sharapova* (at ¶ 85): “a player who delegates his/her anti-doping responsibilities is at fault if he/she chooses an unqualified person as her delegate, if he/she fails to instruct him properly or set out clear procedures he/she must follow in carrying out the task, and/or if he/she fails to exercise supervision and control over him/her in carrying out the task.” As Respondent did here, simply asking a question or making a general request about whether a proposed treatment is allowed under the anti-doping rules, is neither instructive nor supervisory in nature. Respondent’s delegate, Mr. Reardon (and Mr. Reardon’s delegate, Dr. Russo), had no particular qualifications such that delegating to them would relieve Respondent of his duty of utmost caution.

No Significant Fault or Negligence

76. Alternatively, Respondent submits that, should this Panel reject the applicability of the delegation doctrine, then the degree of fault should be measured by the care exercised by Mr. Dwyer in ensuring that he did not ingest or use any prohibited substances. 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 (*Cilic v. ITF, CAS 2013/A/2237*) to determine his level of fault.
77. USADA submits that Respondent cannot meet his burden to establish that he has no significant fault or negligence. According to the Code:

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.

78. Respondent should have been well aware of his responsibility and the need to investigate further when any type of treatment involving testosterone was suggested to him. Accordingly, USADA sees no basis for a finding of no significant fault or negligence and no need to conduct a *Cilic* analysis. Rather, USADA requests that the default sanction of two years be imposed in this case and that no further assessment of Mr. Dwyer’s fault is necessary since no reduction is appropriate.
79. 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.” (Code, Appendix 1: Definitions)

80. Respondent asserts that he had no basis not to believe or to doubt what Dr. Russo was telling him. He went to what he considered appropriate experts and relied on them to determine whether the proposed treatment was allowed under the applicable anti-doping rules. He was very specifically told that it was approved by the USOPC Sports Medicine Department.
81. 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.
82. 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. Since Respondent accepts he bore fault, the question for the Panel is to determine the degree of that fault. The Panel finds that Respondent certainly could have done much more than he did do considering all the circumstances, but the criteria do not require this to establish no significant fault or negligence. The “circumstances considered must be specific and relevant to explain the Athlete’s ... departure from the expected standard of behavior.” [*Code*, Fault definition.]
83. The Panel, having heard the testimony, is convinced that Respondent was confused about the “natural” testosterone treatment sourced from soy and yams he was offered, and his belief in the proposed treatment, combined with his absolute trust and reliance on Mr. Reardon, are circumstances the Panel considers to explain Respondent’s departure from the expected standard of behavior. He did correctly perceive some risk, asked for expert advice on that risk and obtained it – wrong though that advice was. In addition, Respondent placed trust in the report he was given that USOPC had approved the treatment, without delving deeper. He was relying on his “team” of experts and, with all the information he obtained, considering that he was not seeking to enhance his performance, the Panel finds he had a reduced reason to second guess what Mr. Reardon and Dr. Russo were telling him.
84. The Panel finds that the totality of the specific facts and circumstances are sufficient to find Respondent’s negligence not to have been significant in relationship to the anti-doping rule violation. The Panel must further determine the specific period of Ineligibility based on the provisions of Article 10.5.2 of the Code.

***Cilic* Analysis**

85. 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.

86. Applying the *Cilic* framework to this case, which involves a non-Specified Substance, a finding that Mr. Dwyer’s conduct involved a “Significant degree of or considerable fault” would result in a sanction of 20-24 months, a “Normal degree of fault” would result in a sanction of 16-20 months, and a “Light degree of fault” would result in a sanction of 12-16 months:

87. The *Cilic* panel described what the 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

88. Mr. Dwyer points out that, with reference to this highest standard of care, the *Cilic* panel noted 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.” In *Cilic*, at ¶ 74, the CAS panel noted that “in theory, almost all anti-doping rule violations related to the taking of a product containing a prohibited substance could be prevented.” As noted above, the standard is not perfection, but rather an analysis of the degree of fault.

89. 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.

90. Mr. Dwyer argues he took many of the steps that tribunals (including the *Cilic* panel) usually reference in assessing an athlete’s degree of fault. The objective elements (i.e., those relating

to the standard of care that could have been expected from a reasonable person in Respondent's situation) are:

- He relied upon two appropriate experts, his long-time health and fitness coach and a medical doctor with experience in BioTE treatments, who herself relied on what she says was advice of the USOPC;
- He received specific assurances from both Dr. Russo and Mr. Reardon that the BioTE treatment was permitted under the anti-doping regulations, which included Dr. Russo's explanation that (i) the BioTE pellets were "all natural"; and (ii) the USOPC Sports Medicine Department had informed Dr. Russo that the proposed BioTE pellet treatment was permitted under the anti-doping regulations;
- He reasonably relied on the research conducted by and information given to Mr. Reardon and Dr. Russo, and particularly on the assurances provided by the USOPC that were relayed to him, and proceeded with the treatment based on that determination; and
- He made a Global DRO search for BioTE, which yielded no results did not assist his determination.

91. Respondent concedes that he could have called USADA, but that this case is distinct from others where the athlete did not do anything.

92. Based on the foregoing objective factors, Respondent asserts the appropriate sanction is in the "light" degree of fault range, or 12-16 months.

93. Respondent provides the following as subjective elements (i.e., what could have been expected from Respondent) for the Panel to consider:

- His use of the BioTE pellets was in connection with health concerns which were causing him to have a high degree of stress, as opposed to his sport performance;
- His BioTE treatment consisted of a one-time insertion of BioTE pellets;
- He was not cavalier with his anti-doping responsibilities, but rather, he took reasonable steps to ensure that he did not use any prohibited substances;
- The way the BioTE treatment was explained to him, he did not perceive that there was a risk because he understood this testosterone to be something different, "all natural" and "bio identical," "from yam." He relied on that explanation combined with the conversation with the USOPC as reported to him (which he had no reason to believe did not happen or was not reported accurately), and as a result he did not perceive a risk of doping; and
- There was no intent to improve performance or to dope, but rather Respondent made a tragic mistake.

94. Respondent provides the below cases to support his contention that his degree of fault is reduced based on a consultation with a medical doctor (such as Dr. Russo) and/or nutritionist (such as Mr. Reardon):

- In *WADA v. Stauber & Swiss Olympic* (CAS 2006/A/1133) , the panel found that one of the elements in favor of Mr. Stauber (and thus leading to a reduction in his sanction) was that he consulted his doctor, a “trustworthy person” who “recognized having committed an error in not making any check concerning said medicine.” [par. 39(c)].
- In *ATP Tour Anti-Doping Tribunal Appeal of Graydon Oliver* at par. 57, Arbitrator Richard McLaren stated: “The nutritional consultant could have been asked for advice as reviewed in paragraph 40. Nevertheless, the Player in seeking and then relying on the advice about the relevant substance was not careless or negligent and did so in a fashion that is analogous to seeking the advice of a knowledgeable independent advisor.”
- In *FIS v. Johaug & NIF /Johaug v. NIF* at par. 207, the panel found that Ms. Johaug acted with No Significant Fault, as she had acted upon the advice of her doctor.
- Conversely, in *Squizzato v. FINA* (CAS 2005/A/830) at par. 10.10, the panel stated: “...[Squizzato] failed to abide by her duty of diligence. With a simple check, she could have realised that the cream was containing a doping agent, as clostebol is indicated on the product itself both on the packaging and on the notice of use. *At least she could have asked her doctor, coach or any other competent person to double-check the contents of the cream bought by her mother.*” [emphasis added].
- In *Knauss v. FIS* (CAS 2005/A/847) at par 7.5.5.2, the panel stated: “In particular, the Appellant did not obtain expert advice from an independent party....The reality of the matter is, however, that the Appellant did not even try to obtain such advice.”
- In *UCI v. Kolobnev & Russian Cycling Federation* (CAS 2011/A/2645) at par. 88, the panel stated: “On the other hand, the circumstances adverse to Kolobnev are the following: he did not consult with a doctor immediately prior to the purchase or the use of the Product.”
- In *USADA v. Johnson* (AAA No. 01-16-0005-1367) at par. 55, the panel found that Ms. Johnson’s failure to seek a doctor’s prescription worked against her in their finding of degree of fault.

95. Respondent argues that USADA seems to falsely suggest that any mistakes by Dr. Russo or Mr. Reardon automatically must be equated to significant fault on his part. In *USADA v. Klineman* (AAA No. 77 190 00462-13) at para. 10.17, the panel stated: “it is simply not the requirement that members of an athlete’s entourage must [be] completely free of mistakes for an athlete to qualify for a reduction in penalty ... perfection or invulnerability is not the applicable standard – the test for obtaining a reduction in penalty is whether the athlete acted without significant fault or negligence.” In other words, the Panel must assess the totality of the circumstances in determining the degree of fault (and consequently, the appropriate penalty).

96. With respect to the DCOR completed on November 15, 2018, November 27, 2018 and December 20, 2018, the first of which was filled out more than seven days after the BioTE pellets had been implanted, Respondent points out that FINA’s and USADA’s doping control forms both require the following information to be declared by the athlete:

1) Blood transfusions during the last six months; 2) Prescription/Non-Prescription medications within the last seven days; 3) Infusions and/or injections within the last seven days; 4) Dietary supplements and/or substances taken in the last seven days (including but not limited to vitamins, minerals, herbs, and amino acids); 5) Glucocorticosteroids in the last three months; 6) Inhalers in the last seven days; and 7) Current Therapeutic Use Exemption(s).

None of these conditions apply to the BioTE treatment, thus Respondent argues he had no basis to disclose it.

97. Respondent also points to the calendar of events that would allow him to qualify for the 2020 Tokyo Olympic Games, and specifically a qualifying competition in May 2020. He asks the Panel under the principles of proportionality to consider the effect on his chances to compete in the final Olympic Games of his career, if a sanction longer than 16 months were to be imposed.
98. Based on the foregoing, Respondent asserts the subjective factors move the appropriate sanction to the lower end of the light degree of fault, in the 12-16 months sanction range.
99. Using the *Cilic* analysis, USADA contends that, if Respondent has satisfied his burden of establishing no significant or negligence, a sanction at or near two years is still appropriate.
100. USADA points to the following objective factors, which reflect the “standard of care [which] could have been expected from a reasonable person in the athlete’s situation”:
- As to prescription medications, such as testosterone, the highest standard of care would be expected “because these products are particularly likely to distort competition”. [*Cilic*, ¶ 75(a)] The highest standard of care is referenced above and includes: “(i) read[ing] the label of the product used (or otherwise ascertain[ing] 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.” [*Cilic*, ¶ 74] Applying this standard to a seasoned, elite-level, highly-educated athlete required more than Respondent did in this case, even understanding he is not expected to do everything.
 - Respondent relied on the assurances of his coach and a hormone doctor who had never previously provided treatment to him and had no experience with elite athletes. Respondent was the most qualified person to conduct the research into whether BioTE was prohibited, to contact USA Swimming, USADA or the USOPC. Instead, he simply accepted their advice despite the fact that it ran counter to the anti-doping education he had received. Dr. Russo had no knowledge of anti-doping matters and started at the USOPC switchboard in doing her research. She was focused on the form of the testosterone, and the means of delivery, since she knew nothing about anti-doping. Respondent should have asked more questions. It was not reasonable to believe the conclusion she reported.
 - Respondent had plenty of time between August 2018 when the treatment was first discussed and October 2018 when the treatment took place to conduct appropriate inquiries.
 - Respondent signed, but did not read, the consent form at the time of the treatment, which referenced that the BioTE would increase hematocrit and muscle mass.

- Respondent's personal characteristics weigh in favor of imposing a period of ineligibility at or near 2 years. Relevant characteristics include: age and experience; language or environmental problems; anti-doping education received or accessible; and other personal impairments. [*Cilic*, ¶ 76] In this case, Respondent is an elite-level Olympic athlete with extensive exposure to anti-doping who has the resources within the USOPC, USA Swimming and USADA that were necessary to help him avoid a rule violation had he availed himself of those resources.
- Additionally, USADA points to Respondent not listing BioTE on his DCORs.

101. In spite of receiving assurances such as those given by Dr. Russo and Mr. Reardon, many panels have held that an athlete is still required to take personal steps to ensure that the substance or medication is not prohibited:

187. An athlete bears a personal duty of care in ensuring compliance with anti-doping obligations. The standard of care for top athletes is very high in light of their experience, expected knowledge of anti-doping rules, and public impact they have on their particular sport.

188. It follows that a top athlete must always personally take very rigorous measures to discharge these obligations. The CAS has specifically noted that the prescription of medicine by a doctor does not relieve the athlete from checking if the medicine contains forbidden substances or not (2006/A/1133).

189. Athletes always bear personal responsibility, and the failure of a doctor does not exempt the athlete from personal responsibility (see CAS 2012/A/2959; 2006/A/1133; CAS 2005/A/951).

190. Furthermore, athletes have a duty to cross-check assurances given by a doctor, even where such a doctor is a sports specialist (see CAS 2012/A/2959, CAS 2005/A/828). (*Johaug* at ¶¶ 187-190)

102. USADA points to the following subjective elements:

- There is no evidence that Respondent was seeking care for mental health issues or concerns, even though he argues that he was suffering from a high degree of stress.

103. USADA also argues that the principle of proportionality is reflected in the 2015 Code provisions and the specific sanctions, including the reduction of the period of ineligibility. Respondent's appeal to the Panel to consider the swimming calendar of events (i.e., the timing of qualifying competitions for the 2020 Tokyo Olympic Games) is an appeal to sympathy, which the cases since the 2015 Code has been passed have expressly precluded.

104. Respondent has not set forth personal characteristics or exceptional circumstances that qualify him for a reduction from the considerable degree of fault category and therefore the appropriate sanction is at or near 24 months. In sum, Respondent did nothing to ensure he was complying with the anti-doping rules prior to taking BioTE.

F. Merits

105. The Panel, in looking at the objective factors to assess the level of fault in relation to Respondent's duty of care, finds the following to be factors in his favor:

- Respondent did in fact consult with a doctor. That doctor was not well-informed, had a clear bias in favor of providing Respondent with her proposed treatment, and Respondent failed to be specific with her about what his anti-doping duties were. Nevertheless, since so many panels have held that the athlete must consult a doctor, and Respondent did consult a doctor, this is an objective factor in his favor.
- This doctor came highly recommended by the advisor Respondent trusted the most in his life and on whom he consistently relied over the last decade.
- The doctor reported that the treatment had been approved by the USOPC. Respondent had no reason to disbelieve this report. Though Dr. Russo is certain she spoke to a male at the USOPC who approved of the treatment, the USOPC identified no such person, and even though giving such alleged advice is highly unlikely, the Panel finds by a balance of probability that Dr. Russo convincingly reported her understanding (or misunderstanding) of her conversation with the USOPC Respondent.
- The information Respondent was receiving about the BioTE treatment was convincing and reassuring to him. He was deflected to focus on the “all natural” and “bio-identical” explanations, instead of on the ingredient of testosterone in the pellets.
- His reliance on Mr. Reardon and Dr. Russo, considering all of the above, was reasonable, especially when combined with the reported confirmation from the USOPC that the treatment was not prohibited. The combination of these influences is what makes the totality of the circumstances in this case distinct from another case where an athlete may rely on his or her advisors. In these circumstances, the report that the USOPC had approved the treatment gave Respondent all the assurances he felt he needed.

106. The Panel, in looking at the objective factors, finds the following factors to be factors against Respondent:

- Respondent, having heard that the treatment was testosterone based, did not conduct any due diligence whatsoever. He relied entirely on a non-sport doctor whom he knew of through a trusted source.
- Respondent selected an unqualified person as his delegate to conduct the research, which he is required by the highest degree of care to undertake, in some form, including as one possibility “consult appropriate experts in these matters and instruct them diligently before consuming the product” (*Cilic*, ¶ 74). Respondent should have deduced that Dr. Russo was not an appropriate expert. Furthermore, Respondent did not instruct her diligently. He relied too heavily on what she reported.
- Respondent’s passive reliance on Mr. Reardon was not consistent with the anti-doping education he personally and repeatedly received, nor was it in keeping with the highest standard of care required of him.
- Respondent, as an experienced, elite athlete, should have been more alert than he was when he heard that BioTE was testosterone based. This is a basic “red flag”

which should have caused him to take some proactive steps personally to research the treatment, doing more than looking up BioTE pellets on Global DRO with no follow up.

107. The Panel, in looking at the subjective factors, finds the following to be factors in Respondent's favor:

- Respondent's use of the BioTE pellets was in connection with health concerns which were causing him a high degree of stress, as opposed to impacting his sports performance. Respondent was perhaps somewhat impaired in his ability to assess the risk, as he did not connect the treatment to a diagnosed condition or to a physical ailment. He thought of it more as a treatment relating to his mental health, and unrelated to his physical performance in sport, in the way it was presented to him.
- He was clear and emphatic with Mr. Reardon that the treatment must be cleared as not prohibited by the anti-doping regulations.
- His BioTE treatment consisted of a one-time insertion of the pellets, which was presented as a minor procedure and one that Respondent did not associate with synthetic testosterone treatments. He perceived the procedure as something different. He did not understand that he had been diagnosed with any sort of medical condition.
- Respondent took the steps he had previously undertaken to ensure he did not use any prohibited substances. In his mind, it was appropriate to consult with Mr. Reardon who had always made sure that he did not test positive.
- The way the BioTE treatment was explained to him, combined with the report about Dr. Russo's conversation with the USOPC, caused him not to perceive that there was a risk. He is an elite athlete, with 10 years of anti-doping experience, and was very comfortable with the recommendation based on all the information he was given.

108. The Panel, in looking at the subjective factors, finds the following to be factors against Respondent:

- Respondent, other than consulting with Mr. Reardon and receiving the report from Dr. Russo that the treatment was deemed acceptable by the USOPC, did nothing himself to verify this. He accepted these advisors' reports without question. Though this may have felt to him to be adequate, such heavy reliance on a third party is an abrogation of his own responsibilities to use "utmost caution" to avoid using prohibited substances.
- As an elite athlete, with 10 years of anti-doping experience, having heard the treatment involved testosterone, he could have easily done more. The Panel understands that he did not perceive USA Swimming to be on his side, or willing to assist him, but he had every reason to contact USADA or to specifically instruct Mr. Reardon to do so. He simply failed in his duty of "utmost caution", which he was well aware of, though he had exercised it in this same manner to the date of these events.

109. As the *Cilic* panel pointed out with reference to the highest standard of care and the steps an athlete might take, “these steps can only be regarded as reasonable in certain circumstances.” In this case, Respondent took the primary step of consulting with a doctor, who reported getting the treatment approved. In his view, she had the necessary expertise, as Respondent understood it, she was reliable based on his advisor’s experience, and she was not consulted for performance enhancing reasons. By this step, he “ensured the product was reliably sourced” (number iv in the list of the highest standard of care) and he “consulted with appropriate experts” (number v in the list of the highest standard of care). Number v also requires that he “instruct them diligently before consuming the product,” and this he did not do. He did not take any of the other steps, and the question is whether it was reasonable for him, in his personal circumstances, to take only these steps.
110. The Panel has considered USADA’s argument that the assurances from Mr. Reardon and Dr. Russo are not sufficient, and that Respondent is required to take personal steps to ensure that the treatment is not prohibited. Respondent did not take “very rigorous measures” to discharge his obligations. Respondent does bear personal responsibility for this anti-doping violation and is not exempt from that responsibility because the failure was that of his advisor and/or his doctor. He was conscious of that responsibility and believed he had appropriately discharged that responsibility not just by consulting with his advisor, and the doctor, but also because of the report that the USOPC had approved the treatment. The Panel accepts that Respondent was told this and absolutely believed it and relied on it. He saw no basis to second guess it, because of his failure to ask more questions about how it was obtained. This is why Respondent’s fault is not in the “light” category. He could have done something more to avoid this tragic mistake.
111. With respect to the treatment not being disclosed on the DCORs, the Panel accepts Respondent’s argument that no such disclosure was required, in accordance with the terms of the DCOR, because of the date of the pellet treatment by Dr. Russo. The Panel assigns no significance to this non-disclosure.
112. The Panel does not use the principle of proportionality to consider the impact of the sporting calendar in making its determination, as the Panel accepts that the 2015 Code does reflect flexibility in the sanction, based on the actual circumstances, but specifically precludes the consideration of the “timing of the sporting calendar” as a factor, as set out in the definition of Fault.
113. The Panel finds that balancing all of the above objective factors, both in favor of and against Respondent’s case, the Respondent’s level of fault falls within the “normal” degree of fault. When considering the subjective elements, they are not exceptional such as to change Respondent’s level of fault, so his fault remains within the “normal” range, leading to a suspension in the 16-20 months range. As in all cases when a Panel is called upon to determine the level of fault of the athlete who has not met the highest standard of care in fulfilling his duty to avoid doping, the Panel must evaluate the totality of the specific facts and circumstances. Though this anti-doping rule violation involves testosterone, it also involves an athlete who simply did not grasp that the synthetic performance-enhancing version of testosterone was involved and he was convinced his use of it has been approved by the USOPC. The Panel imposes a period of ineligibility of 20 months.

G. Sanction Start Date

114. The Code states “[e]xcept 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.” (Code, Article 10.11) One of the exceptions to this rule is for athletes to receive credit for time served while provisionally suspended. (Code, Article 10.11.3) Accordingly, the parties both agree the appropriate start date for Respondent’s period of ineligibility is the date USADA imposed a Provisional Suspension—December 21, 2018.

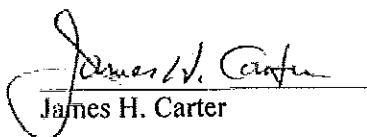
H. Disqualification of Results

115. Pursuant to Article 10.8, “all other competitive results of the *Athlete* obtained from the date a positive *Sample* was collected . . . through the commencement of any *Provisional Suspension* or *Ineligibility* period shall, unless fairness requires otherwise, be disqualified.” Although there may not be any results between the date of Respondent’s out-of-competition sample collection (November 15, 2018) and the date Respondent was provisionally suspended (December 21, 2018), given the mandatory language of Article 10.8, the Panel finds that results during this time period, if any, should be disqualified.

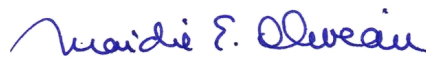
V. FINDINGS AND DECISION

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 default period of ineligibility for the anti-doping rule violation under Article 10.2.3 of the Code is two years, subject to further reduction;
- C. Respondent has sustained his burden of proof under Article 10.5.2 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 20 months;
- D. The start date of Respondent's period of Ineligibility is the date of his provisional suspension, December 21, 2018, and the period of ineligibility expires on August 20, 2020;
- E. Respondent's competitive results from the date of his sample collection, November 15, 2018 through his acceptance of Provisional Suspension, on December 21, 2018, if any, 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.


James H. Carter


Cameron Mylet


Maidie E. Oliveau
Chair

Dated: October 11, 2019