

New Era Alternative Dispute Resolution Arbitration Tribunal

In the Matter of the Arbitration between

UNITED STATES ANTI-DOPING AGENCY,

Claimant

and

KENSEY McMAHON,

Respondent

NE ADR Case Number 2023082101

FINAL AWARD OF ARBITRATOR

This arbitration is being conducted pursuant to the Procedures for the Arbitration of Olympic & Paralympic Sport Doping Disputes (effective as revised January 1, 2023) (“**Arbitration Procedures**”) as contained in the Protocol for Olympic and Paralympic Movement Testing (effective as revised January 1, 2023) (the “**USADA Protocol**”), and pursuant to the Ted Stevens Olympic and Amateur Sports Act, 36 USC 22501, *et seq.* (the “**Act**”). This arbitration is being administered by New Era Alternative Dispute Resolution (“**NE ADR**”). An evidentiary hearing was held via video conference on May 2, 2024, before the duly appointed arbitrator Garyl L. Johansen.

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

I. THE PARTIES

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

education, and research, while also developing programs, policies, and procedures in each of those areas.

2. Kensey McMahon (“**McMahon**” or “**Respondent**”) is a 24-year-old elite-level swimming athlete from Tuscaloosa, Alabama. Respondent specializes in long distance and open water disciplines. Respondent has had a successful career internationally and at the collegiate level swimming for the University of Alabama.
3. USADA was represented in this proceeding by Jeff T. Cook, Esq., USADA General Counsel, Spencer Crowell, Esq., USADA Olympic & Paralympic Counsel, and Muriel Ossip, USADA Legal Assistant.
4. Respondent was represented in this proceeding by Matthew D. Kaiser, Esq. and Paul Greene, Esq. of Global Sports Advocates, LLC.
5. USADA and Respondent shall be referred to collectively as the "Parties" and individually as a "Party."

II. ISSUE

6. Respondent was tested on July 1, 2023, at the 2023 USA Swimming National Championships. Her urine sample tested positive for vadaustat. Respondent does not contest her positive test. Accordingly, she admits that she violated Articles 2.1 (presence) and 2.2 (use/attempted use) of the World Anti-Doping Code (the “**WAD Code**”)^{1 2}
7. Respondent contends, however, that her anti-doping rule violation was not intentional, and thus, as provided for in Articles 10.2.1.1 and 10.2.2, her period of ineligibility is 2 years. USADA contends that Respondent cannot prove by a balance of probability that her anti-doping rule was not intentional, and therefore, as provided in Articles 10.2.1 and 10.2.1.1 her period of ineligibility is four years.
8. The issue then is what period of ineligibility results from Respondent’s anti-doping rule violation, two years or four years.

III. JURISDICTION

9. This matter is properly before NE ADR and this Arbitrator.

¹ Further reference to Article in this Award refers to the Articles of the WAD Code.

² Since the relevant Articles of the WAD Code and of the World Aquatics Doping Control Rules are essentially the same, only the WAD Code will be referenced in this Award. The Parties in their briefs and submissions referred to the WAD Code.

10. Respondent is an elite-level athlete, competing internationally under the authority of World Aquatics³ and competing in the U.S. as a member of USA Swimming (“USAS”).
11. Sections 4, 5 and 6 of the USADA Protocol, based on the WAD Code and the rules of sports organizations, including the International Olympic Committee (“IOC”) and United States Olympic & Paralympic Committee (“USOPC”), set forth rules that subject athletes, athlete support personnel and other persons to the USADA Protocol. A number of the criteria set out in Section 4 apply to Respondent.
12. Accordingly, USADA’s Protocol governs all proceedings involving Respondent’s alleged anti-doping rule violation.
13. Further, this arbitration was conducted by concurrence of the Parties. USADA by letter dated August 8, 2023, sent Respondent a charging letter regarding her possible anti-doping rule violations and further advised Respondent that if she chose “to contest the sanction proposed by USADA,” she had the right to “request a hearing before an independent arbitrator.” Respondent responded via email on August 20, 2023, stating that she “contests the anti-doping rule violation as charged and requests a hearing.” USADA then initiated this proceeding by notifying NE ADR by letter of August 21, 2023, of Respondent’s request to arbitrate.⁴
14. The USADA Protocol, at Section 17 provides, in pertinent part, that “all hearings will take place in the United States before the independent arbitral body using the Arbitration Procedures.” NE ADR has been designated as the independent arbitral body to hear anti-doping disputes in the U.S. NE ADR uses the Arbitration Procedures in hearing anti-doping disputes.
15. Also, Neither Party disputed NE ADR’s jurisdiction over this matter or that Respondent is properly subject to this proceeding. Both Parties participated in this proceeding without objection.⁵
16. Additionally, neither Party objected to the Arbitrator designated to hear this matter.

³ World Aquatics was formerly known as the Fédération Internationale de Natation (“FINA”).

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

⁵ R-7c of the Arbitration Procedures requires that, “A party must object to the jurisdiction of the arbitrator or to the arbitrability of a claim or counterclaim no later than the filing of the answering statement to the claim or counterclaim that gives rise to the objection.”

IV. BURDEN AND STANDARD OF PROOF

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

The Anti-Doping Organization shall have the burden of establishing that an anti-doping rule violation has occurred. The standard of proof shall be whether the Anti-Doping Organization has established an anti-doping rule violation to the comfortable satisfaction of the hearing panel, bearing in mind the seriousness of the allegation which is made. This standard of proof in all cases is greater than a mere balance of probability but less than proof beyond a reasonable doubt. Where the Code places the burden of proof upon the Athlete or other Person alleged to have committed an anti-doping rule violation to rebut a presumption or establish specified facts or circumstances, except as provided in Articles 3.2.2 and 3.2.3, the standard of proof shall be by a balance of probability.

V. PROCEDURAL HISTORY

18. This proceeding was initiated on August 21, 2023, pursuant to USADA's letter notifying NE ADR of Respondent's request for a hearing.
19. On September 14, 2023, the Arbitrator held a preliminary hearing with the Parties as provided for in the Arbitration Procedures.⁶ The Arbitrator issued Preliminary Hearing and Scheduling Order Number 1, on September 15, 2023, which, among other things, set dates for the submission of pre-hearing briefs, exhibits and designation of potential witnesses, and set the hearing date for January 11, 2024.
20. On October 31, 2023, Respondent requested that the schedule set out in Preliminary Hearing and Scheduling Order Number 1 be amended so that testing may be completed, and results obtained, on various supplements. Specifically, Respondent requested that the submission of the pre-hearing brief and the pre-hearing reply brief each be extended for thirty days and that the hearing be rescheduled for early February. USADA had no objection to this scheduling change.
21. After discussion between the Parties and the Arbitrator, a new schedule was agreed to for the submission of briefs and for the hearing. In accordance with the agreement, the Arbitrator issued Preliminary Hearing and Scheduling Order Number 2 on November 22, 2023, which set dates for the submission of pre-hearing briefs, exhibits and designation of potential witnesses, and set the hearing date for February 5, 2024.

⁶ R-15 of the Arbitration Procedures provides that, "At the request of any party or at the discretion of the arbitrator or the Arbitral Body, the arbitrator may schedule as soon as practicable a preliminary hearing," which "should be conducted by telephone at the arbitrator's discretion."

22. On December 18, 2023, USADA notified the Arbitrator that the Parties had conferred and would like to extend the hearing and briefing dates once more, as McMahon had identified further supplements to test. On December 19, 2023, McMahon affirmed the request to extend the hearing and briefing dates. The Parties requested a new hearing date during the week of April 29 or the week of May 6, 2024.
23. After discussion between the Parties and the Arbitrator, a new schedule was agreed to for the submission of briefs and for the hearing. In accordance with the agreement, the Arbitrator issued Preliminary Hearing and Scheduling Order Number 3 on January 4, 2024, which set dates for the submission of pre-hearing briefs, exhibits and designation of potential witnesses, and set the hearing date for May 2, 2024.
24. Prior to commencement of the hearing the Parties submitted pre-hearing briefs, offered exhibits, and listed potential witnesses as provided for in Preliminary Hearing and Scheduling Order Number 3.
25. On May 2, 2024, the Arbitrator held a full evidentiary hearing by video conference in which both USADA and Respondent participated.⁷
26. During the hearing, the Parties called witnesses to testify.
27. The Arbitrator heard from the following witnesses, all of whom were sworn:

For Respondent:

- Kensey McMahon, Respondent (Kensey McMahon also submitted a witness statement).
- Laurel McMahon, Mother of Respondent (Laurel McMahon also submitted a witness statement).
- Charlie Hawke, Friend of Respondent (Charlie Hawke also submitted a witness statement).
- Reed Fujan, Past Coach of Respondent (Reed Fujan also submitted a witness statement).
- Erica Beine, Sports Nutritionist (Erica Beine also submitted a witness statement).
- Dr. Pascal Kintz, Ph.D. (Toxicology), President X-Pertise Consulting (Dr. Kintz also submitted a hair testing analysis).
- Jennifer Wolfe Mize, Professional Polygraph Examiner of Commercial Polygraph, Inc. (Jennifer Wolfe Mize also submitted a polygraph report).

⁷ R-8a of the Arbitration Procedures provides that, “All hearings shall take place by telephone or video conference unless the parties and the arbitrator agree to an in-person hearing.”

For USADA:

- Matthew Fedoruk, Ph.D. (Pathology and Laboratory Medicine), Chief Science Officer of USADA (Dr. Fedoruk also submitted a Scientific Expert Opinion Report).

28. Each Party was afforded the opportunity to ask questions of the witnesses and examine them on their statements and did so as each Party considered necessary. The Arbitrator also asked questions of the witnesses as he determined appropriate.
29. The Parties submitted numerous exhibits, which were admitted into evidence at the start of the hearing without objection.
30. The Parties also provided opening and closing statements and gave arguments and presented their positions on various issues that arose during the hearing.
31. The rules of evidence were not strictly enforced, and rules of evidence generally accepted in administrative proceedings were applied.⁸
32. The hearing lasted one day.
33. The Parties declined to submit post-hearing briefs.
34. At the conclusion of the hearing the Arbitrator inquired of the Parties whether they had “further proofs to offer or witnesses to be heard.”⁹ The Parties indicated that they did not.
35. The Arbitrator declared the hearing closed as of May 2, 2024.¹⁰

VI. APPLICABLE LAW

36. In their submissions, the Parties rely on the provisions of the WAD Code, World Aquatics Doping Control Rules, USADA Protocol, the USOPC National Anti-Doping Policy, Arbitration Procedures, and on CAS and AAA jurisprudence. No law was cited by the Parties and no argument was made by the Parties that required the Arbitrator to deviate from the directives of the above listed rules, regulations, guidelines and jurisprudence, or to deviate from documents that were referred to or referenced in the above listed rules, regulations, guidelines or jurisprudence.

⁸ R-26a of the Arbitration Procedures provides that, “Conformity to legal rules of evidence shall not be necessary.”

⁹ R-30 of the Arbitration Procedures provides that, “The arbitrator shall specifically inquire of all parties whether they have any further proofs to offer or witnesses to be heard.”

¹⁰ R-30 of the Arbitration Procedures provides that, “The arbitrator shall declare the hearing closed at the conclusion of closing arguments unless a party demonstrates that the record is incomplete and that such additional proof or witness(es) are pertinent and material to the controversy.”

37. Although not every rule, regulation or guideline submitted by the Parties is listed below, the Arbitrator sets forth the primary rules, regulations, and guidelines considered applicable to this proceeding.
38. The relevant WAD Code provisions applicable to this proceeding¹¹ are as follows:

ARTICLE 2 ANTI-DOPING RULE VIOLATIONS

The purpose of Article 2 is to specify the circumstances and conduct which constitute anti-doping rule violations. Hearings in doping cases will proceed based on the assertion that one or more of these specific rules have been violated.

Athletes or other Persons shall be responsible for knowing what constitutes an anti-doping rule violation and the substances and methods which have been included on the Prohibited List.

The following constitute anti-doping rule violations:

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

2.1.1 It is the Athletes' personal duty to ensure that no Prohibited Substance enters their bodies. Athletes are responsible for any Prohibited Substance or its Metabolites or Markers found to be present in their Samples. Accordingly, it is not necessary that intent, Fault, Negligence or knowing Use on the Athlete's part be demonstrated in order to establish an anti-doping rule violation under Article 2.1.⁷

⁷[Comment to Article 2.1.1: An antidoping rule violation is committed under this Article without regard to an Athlete's Fault. This rule has been referred to in various CAS decisions as "Strict Liability". An Athlete's Fault is taken into consideration in determining the Consequences of this anti-doping rule violation under Article 10. This principle has consistently been upheld by CAS.]

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

¹¹ WAD Code effective January 1, 2021.

*confirms the presence of the Prohibited Substance or its Metabolites or Markers found in the Athlete's A Sample; or where the Athlete's A or B Sample is split into two parts and the analysis of the confirmation part of the split Sample confirms the presence of the Prohibited Substance or its Metabolites or Markers found in the first part of the split Sample or the Athlete waives analysis of the confirmation part of the split Sample.*⁸

⁸[Comment to Article 2.1.2: The Anti-Doping Organization with Results Management responsibility may, at its discretion, choose to have the B Sample analyzed even if the Athlete does not request the analysis of the B Sample.]

*2.2 Use or Attempted Use by an Athlete of a Prohibited Substance or a Prohibited Method*⁹

⁹[Comment to Article 2.2: It has always been the case that Use or Attempted Use of a Prohibited Substance or Prohibited Method may be established by any reliable means. As noted in the Comment to Article 3.2, unlike the proof required to establish an anti-doping rule violation under Article 2.1, Use or Attempted Use may also be established by other reliable means such as admissions by the Athlete, witness statements, documentary evidence, conclusions drawn from longitudinal profiling, including data collected as part of the Athlete Biological Passport, or other analytical information which does not otherwise satisfy all the requirements to establish "Presence" of a Prohibited Substance under Article 2.1. For example, Use may be established based upon reliable analytical data from the analysis of an A Sample (without confirmation from an analysis of a B Sample) or from the analysis of a B Sample alone where the Anti-Doping Organization provides a satisfactory explanation for the lack of confirmation in the other Sample.]

2.2.1 It is the Athletes' personal duty to ensure that no Prohibited Substance enters their bodies and that no Prohibited Method is Used. Accordingly, it is not necessary that intent, Fault, Negligence or knowing Use on the Athlete's part be demonstrated in order to establish an anti-doping rule violation for Use of a Prohibited Substance or a Prohibited Method.

3. PROOF OF DOPING

3.1 Burdens and Standards of Proof

The Anti-Doping Organization shall have the burden of establishing that an anti-doping rule violation has occurred. The standard of proof shall be whether the Anti-Doping Organization has established an anti-doping rule violation to

the comfortable satisfaction of the hearing panel, bearing in mind the seriousness of the allegation which is made. This standard of proof in all cases is greater than a mere balance of probability but less than proof beyond a reasonable doubt.¹⁸ Where the Code places the burden of proof upon the Athlete or other Person alleged to have committed an anti-doping rule violation to rebut a presumption or establish specified facts or circumstances, except as provided in Articles 3.22 and 3.23, the standard of proof shall be by a balance of probability.

¹⁸[Comment to Article 3.1: This standard of proof required to be met by the Anti-Doping Organization is comparable to the standard which is applied in most countries to cases involving professional misconduct.]

ARTICLE 9 AUTOMATIC DISQUALIFICATION OF INDIVIDUAL RESULTS

An anti-doping rule violation in Individual Sports in connection with an In-Competition test automatically leads to Disqualification of the result obtained in that Competition with all resulting Consequences, including forfeiture of any medals, points and prizes.⁵⁵

⁵⁵[Comment to Article 9: For Team Sports, any awards received by individual players will be Disqualified. However, Disqualification of the team will be as provided in Article 11. In sports which are not Team Sports but where awards are given to teams, Disqualification or other disciplinary action against the team when one or more team members have committed an anti-doping rule violation shall be as provided in the applicable rules of the International Federation.]

ARTICLE 10 SANCTIONS ON INDIVIDUALS⁵⁶

⁵⁶[Comment to Article 10: Harmonization of sanctions has been one of the most discussed and debated areas of anti-doping. Harmonization means that the same rules and criteria are applied to assess the unique facts of each case. Arguments against requiring harmonization of sanctions are based on differences between sports including, for example, the following: in some sports the Athletes are professionals making a sizable income from the sport and in others the Athletes are true amateurs; in those sports where an Athlete's career is short, a standard period of Ineligibility has a much more significant effect on the Athlete than in sports where careers are traditionally much longer. A primary argument in favor of harmonization is that it is simply not right that two Athletes from the same country who test positive for the same Prohibited Substance under similar circumstances should receive different sanctions only because they participate in different sports. In addition, too much flexibility in

sanctioning has often been viewed as an unacceptable opportunity for some sporting organizations to be more lenient with dopers. The lack of harmonization of sanctions has also frequently been the source of conflicts between International Federations and National Anti-Doping Organizations.]

10.1 Disqualification of Results in the Event during which an Anti-Doping Rule Violation Occurs

An anti-doping rule violation occurring during or in connection with an Event may, upon the decision of the ruling body of the Event, lead to Disqualification of all of the Athlete's individual results obtained in that Event with all Consequences, including forfeiture of all medals, points and prizes, except as provided in Article 10.1.1.⁵⁷

⁵⁷[Comment to Article 10.1: Whereas Article 9 Disqualifies the result in a single Competition in which the Athlete tested positive (e.g., the 100 meter backstroke), this Article may lead to Disqualification of all results in all races during the Event (e.g., the swimming World Championships).]

Factors to be included in considering whether to Disqualify other results in an Event might include, for example, the seriousness of the Athlete's anti-doping rule violation and whether the Athlete tested negative in the other Competitions.

10.1.1 If the Athlete establishes that he or she bears No Fault or Negligence for the violation, the Athlete's individual results in the other Competitions shall not be Disqualified, unless the Athlete's results in Competitions other than the Competition in which the anti-doping rule violation occurred were likely to have been affected by the Athlete's antidoping rule violation.

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

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

10.2.1 The period of Ineligibility shall be four years where:

10.2.1.1 The anti-doping rule violation does not involve a Specified Substance, unless the Athlete or other Person can establish that the antidoping rule violation was not intentional.⁵⁸

⁵⁸[Comment to Article 10.2.1.1: While it is theoretically possible for an Athlete or other Person to establish that the anti-doping rule violation was not

intentional without showing how the Prohibited Substance entered one's system, it is highly unlikely that in a doping case under Article 2.1 an Athlete will be successful in proving that the Athlete acted unintentionally without establishing the source of the Prohibited Substance.]

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

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

10.2.3 As used in Articles 10.2 and 10.3, the term "intentional" is meant to identify those Athletes or other Persons who engage in conduct which they knew constituted an anti-doping rule violation or knew that there was a significant risk that the conduct might constitute or result in an anti-doping rule violation and manifestly disregarded that risk. An antidoping rule violation resulting from an Adverse Analytical Finding for a substance which is only prohibited In-Competition shall be rebuttably presumed to be not "intentional" if the substance is a Specified Substance and the Athlete can establish that the Prohibited Substance was Used Out-of-Competition. An anti-doping rule violation resulting from an Adverse Analytical Finding for a substance which is only prohibited In Competition shall not be considered "intentional" if the substance is not a Specified Substance and the Athlete can establish that the Prohibited Substance was Used Out-of-Competition in a context unrelated to sport performance.

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

In addition to the automatic Disqualification of the results in the Competition which produced the positive Sample under Article 9, all other competitive results of the Athlete obtained from the date a positive Sample was collected (whether In-Competition or Out-of-Competition), or other anti-doping rule violation occurred, through the commencement of any Provisional Suspension or Ineligibility period, shall, unless fairness requires otherwise, be Disqualified with all of the resulting Consequences including forfeiture of any medals, points and prizes.⁷³

⁷³*[Comment to Article 10.10: Nothing in the Code precludes clean Athletes or other Persons who have been damaged by the actions of a Person who has*

committed an anti-doping rule violation from pursuing any right which they would otherwise have to seek damages from such Person.]

10.13 Commencement of Ineligibility Period

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

10.13.2 Credit for Provisional Suspension or Period of Ineligibility Served

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

10.13.2.2 If an Athlete or other Person voluntarily accepts a Provisional Suspension in writing from an Anti-Doping Organization with Results Management authority and thereafter respects the Provisional Suspension, the Athlete or other Person shall receive a credit for such period of voluntary Provisional Suspension against any period of Ineligibility which may ultimately be imposed. A copy of the Athlete or other Person's voluntary acceptance of a Provisional Suspension shall be provided promptly to each party entitled to receive notice of an asserted anti-doping rule violation under Article 14.1.⁷⁶

⁷⁶[Comment to Article 10.13.2.2: An Athlete's voluntary acceptance of a Provisional Suspension is not an admission by the Athlete and shall not be used in any way to draw an adverse inference against the Athlete.]

Appendix 1 Definitions

Competition: A single race, match, game or singular sport contest. For example, a basketball game or the finals of the Olympic 100-meter race in athletics. For stage races and other sport contests where prizes are awarded on a daily or other interim basis the distinction between a Competition and an Event will be as provided in the rules of the applicable International Federation.

Event: A series of individual Competitions conducted together under one ruling body (e.g., the Olympic Games, World Championships of an International Federation, or Pan American Games).

ARTICLE 26 INTERPRETATION OF THE CODE

26.2 The comments annotating various provisions of the Code shall be used to interpret the Code.

VII. FACTUAL SUMMARY

A. Introduction

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

B. Background/Factual Summary

40. Respondent is a 24-year-old elite-level swimming athlete, who specializes in long distance and open water disciplines. Respondent has had a successful career internationally,

including winning a bronze medal in the 1500m freestyle event at the 2022 FINA World Swimming Championships. Respondent also placed third in the 1500m freestyle event at the 2023 USA Swimming National Championships where the sample giving rise to Respondent's positive test was collected. Additionally, she placed third in both the 1500m and 400m freestyle events at the 2022 USA Swimming National Championships. Respondent qualified to represent the U.S. in the Santiago 2023 Pan American Games (because of her July 1 positive test she did not participate in the Games). Respondent competed for the University of Alabama from 2018 through 2023 (four as an undergraduate and one as a graduate student), during which she was named an All-American for the 2021-2022, 2020-2021 and 2019-2020 seasons.

41. Respondent is a current member of USA Swimming. She has been held membership in USA Swimming since 2008.
42. Respondent was added to USADA's Registered Testing Pool ("RTP") in 2019, where she remained until 2021. She was added back to the RTP in April 2022, and she remains in the RTP to this day.
43. USADA provided Respondent anti-doping education each year she was in the RTP. Through the repeated anti-doping education tutorials, USADA educated Respondent that she was responsible for everything that went into her body, the risks posed by supplements, the dangers and consequences of doping, and the prohibited status of various substances. Specifically, in 2023, USADA educated Respondent that all supplements pose inherent risks, and even third-party certified supplements are not guaranteed to be completely safe. Each tutorial included an online assessment that all athletes are required to complete with 100% accuracy. Each year, Respondent correctly identified strict liability as the concept that holds athletes responsible for everything that goes into their bodies, whether or not they intended to ingest the substance.
44. USADA selected Respondent for testing at the 2023 USA Swimming National Championships on July 1, 2023, and Respondent duly provided a urine sample.
45. USADA sent Respondent's July 1 sample to the UCLA Olympic Analytic Laboratory in Los Angeles, California, a WADA-accredited laboratory, for analysis. On July 7, 2023, the laboratory notified USADA that the sample returned an Adverse Analytical Finding ("AAF") for vadadustat (AKB-6548). Vadadustat is a Prohibited Substance in the class of Peptide Hormones, Growth Factors and Related Substances on the WADA Prohibited List. Vadadustat is a Non-Specified Substance within the meaning of the WADA Prohibited List and Article 4.2.2 of the WAD Code.
46. USADA notified Respondent that her sample tested positive for vadadustat on July 7, 2023, and imposed a provisional suspension against her on that date.

47. On July 7, 2023, Respondent requested testing of her B sample. On July 20, 2023, the UCLA Olympic Analytic Laboratory informed USADA that Respondent's B sample confirmed the presence of vadadustat. USADA notified Respondent of the Laboratory's finding on July 20, 2023.
48. On August 8, 2023, USADA charged Respondent with anti-doping rule violations ("ADRVs") for the presence of vadadustat (AKB-6548) in Respondent's urine sample and for the use and/or attempted use of vadadustat pursuant to Articles 2.1 and 2.2 of the WAD Code and Articles 2.1 and 2.2 of the World Aquatics Doping Control Rules.
49. On August 20, 2023, Respondent notified USADA that she "contests the anti-doping rule violation as charged and requests a hearing." USADA initiated this proceeding by notifying NE ADR by letter of August 21, 2023, of Respondent's request to arbitrate.
50. Respondent has been tested multiple times throughout her career. Except for the July 1, 2023, in-competition test, which is the subject of this arbitration, Respondent has never tested positive. During the period shortly before her July 1 test, Respondent submitted to and was tested on April 11, 2023 (out-of-competition), and on April 21, 2023 (in-competition), both tests which were negative. During the period immediately after her July 1 test, Respondent submitted to and was tested on July 5, 2023 (out-of-competition), which test was negative.
51. On August 30, 2023, Respondent submitted to an hour-long interview with Susan Law, USADA investigator, where Respondent responded to questions concerning her positive July 1, 2023, test.
52. After notification of her July 1, 2023, positive test, Respondent tested all medications and supplements that she had been taking prior to July 1 in an effort to determine the source of the vadadustat that caused her positive test. In all, Respondent tested 18 different products in four batches. Test results were returned on August 18, 2023, from Sports Medicine Research, located in South Jordan, Utah (one product), on September 1, 2023, from Sports Medicine Research located in South Jordan, Utah (three products), on October 27, 2023, from X-Pertise Consulting located in Mittelhausbergen, France (nine products) and on January 2, 2024, from X-Pertise Consulting located in Mittelhausbergen, France (five products). Vadadustat was not detected in any of the 18 medications and supplements tested.
53. On November 30, 2023, Respondent submitted to a polygraph test administered by Jennifer Wolfe Mize of Commercial Polygraph Inc. located in Birmingham, Alabama. Wolfe Mize found that "No Deception was Indicated" when Respondent answered "No" to the question "Did you ever ingest vadadustat?"

54. In October 2023 Respondent had her hair collected and tested by X-Pertise Consulting located in Mittelhausbergen, France. Vadadustat was not detected in Respondent's hair sample.

VIII. WITNESS TESTIMONY

A. Introduction

55. Witness testimony and statements were presented by the Parties. An analysis of this case does not depend on determining the absolute truth or falsity of any fact presented by a witness. The summary presented below is not a verbatim recitation of a witness's testimony but paraphrases the crux of pertinent testimony presented by the witness.

B. Testimony and Witness Statements

56. Respondent testified as follows. Respondent believes in clean sport. She disagrees with any form of doping. Respondent was raised to have strong morals. She doesn't believe in cutting corners. She is a religious person and holds those values. Respondent has attended numerous anti-doping education courses offered by USADA. She checked her supplements and medications on Global DRO to make sure that she did not take any medication or supplement that contained a banned substance. She works with Erica Beine of Beine Wellness Building, LLC to make sure that she was eating clean and taking clean supplements. She used NSF-certified supplements (Klean Athlete Brand). When Respondent was notified by USADA that her July 1 sample tested positive for vadadustat she was completely dumbfounded and felt like her life had been destroyed. She had never heard of vadadustat. She called her parents and coach to tell them of her positive test. She racked her brain to try and figure out how she could have tested positive. She has tested everything she could think of that she might have ingested prior to the July 1 sample collection to determine how she might have tested positive for vadadustat. She even thought back to her participation in the 10k race on May 20, 2023, in the 2023 World Aquatics Open Water Swimming World Cup, in Sardina, Italy, and considered if she might have ingested something at the feeding station during that competition. She also tried to determine if she could have accidentally ingested vadadustat during he stay in Italy but couldn't think of anything. Respondent's Performance at the 2023 USA Swimming National Championships was consistent with her results at prior competitions. Respondent wouldn't take a banned substance for a number of reasons. Respondent doesn't believe in cheating, doing so would let down her support group, would label her as a fraud and would be a complete betrayal to her faith, which is a significant part of who she is.
57. Laurel McMahon testified as follows. L. McMahon is the mother of the Respondent. L. McMahon and her husband are a hard-working family. They have high expectations of their children as to their character development. Religious faith, honesty, truthfulness, and work ethic are important parts of Respondent's upbringing. From a child until today, Respondent has been on a steady upward trajectory in terms of her swimming

performances. When Respondent told L. McMahon and her husband that she had tested positive, everyone was shocked and confused. They tried to console Respondent. No one knew what vada-dustat was. There still is not an answer as to how Respondent could have ingested vada-dustat. L. McMahon's heart breaks for Respondent because she has worked so hard and has overcome so many obstacles to have her career end this way. When Respondent's positive test becomes public, her reputation and character will be tainted, which just isn't fair. The whole situation is gut wrenching. Respondent's character and moral compass are beyond reproach. Respondent would never intentionally take vada-dustat or any other performance-enhancing substance. Respondent would never take shortcuts or the easy way out.

58. Charlie Hawke testified as follows. Hawke is from Australia. He is a junior at the University of Alabama on a swimming scholarship. Hawke first met Respondent in 2021. He and Respondent started dating in the fall of 2021. He has gotten to know Respondent very well. She is a loving, positive and outgoing person. She is dedicated to swimming. She is a hard worker and dedicated to improving her swimming through practice and training. Respondent understands the importance of being careful about what she puts in her body. She only takes NSF-approved substances. Hawke was with Respondent when she got the call that she had tested positive. Respondent was devastated, shed a lot of tears, and wanted to isolate herself. Respondent and Hawke did not know what vada-dustat was and did research on it. Hawke and Respondent tried to figure out how Respondent could possibly have tested positive. Respondent would never use a performance-enhancing substance. That is not the kind of person she is.
59. Reed Fujan testified as follows. Fujan coached at the University of Alabama from May 2019 until August 2023. He is currently Associate Head Swimming Coach at the University of Louisville. He knows Respondent very well from coaching her at the University of Alabama. Respondent is faith driven and cares about doing things the right way. She is honest and truthful. Respondent was ready both mentally and physically to compete at the 2023 USA National Championships. Respondent is not someone who would use a banned substance. That is not who she is. Respondent was very cautious about what she ingested. When Respondent called Fujan to inform him of her positive July 1 test, she was distraught, tearful, and distressed. Respondent's positive test has taken away her dreams and what she has been working so hard to accomplish.
60. Erica Beine testified as follows. Beine is the owner of Beine Wellness Building, LLC. She was a collegiate coach in Division 1 swimming and diving for thirteen years. In 2018 she retired from coaching and became certified as a Sports Nutrition Consultant, Holistic Nutritionist, Health Coach and Personal Trainer. Wellness Building takes a very conservative approach regarding use of supplements and only recommends sport-safe supplements. Beine first started working with Respondent in June 2018. Beine assisted Respondent with her nutrition through food and supplementation intake. One of the big concerns of Respondent was making sure that she took sport-safe supplements.

Respondent made sure that any supplements she took were NSF Sport-Certified. Although Respondent has progressed steadily in her swimming times, she has not made any big jumps that would be unusual. Beine asked Respondent to be an ambassador for Wellness Building because of Respondent's character. Beine would not jeopardize Wellness Building's brand by having her company associate with an individual who would intentionally ingest a banned substance. In Beine's mind, the thought of Respondent intentionally doping is beyond the realm of possibility. Beine does not believe that Respondent would ever intentionally take a banned substance.

61. Jennifer Wolfe Mize testified as follows. Wolfe Mize is a professional polygraph examiner with Commercial Polygraph, Inc. She is licensed as a polygraph examiner in the State of Alabama. Polygraph testing is based on a fear response because a person is fearful of being caught in a lie. Wolfe Mize conducted a polygraph examination of Respondent on November 30, 2023, at Commercial Polygraph's office. During the examination, Respondent responded to the questions that were given to her. Respondent's response to "Did you ever ingest Vadadustat?" was "No." Her response to "Did you ever ingest anything containing Vadadustat?" was "No." Wolfe Mize indicated that even though Respondent knew, at the time of the polygraph test, that vadadustat was in her system and that she had ingested it, the questions were framed in this way, because polygraph tests are not designed to test on intention. Thus, the questions were not framed, did Respondent "knowingly" ingest vadadustat, as that would indicate intention, which would be improper in a polygraph examination. Wolfe Mize stated that this was discussed with Respondent in the pretest phase of the examination, so that Respondent knew what was meant by the questions, and that "ingest" would mean "knowingly ingest" vadadustat. After examining Respondent's physiological responses as they related to the questions, Wolfe Mize determined that the polygraph examination indicated "No deception indicated," or that Respondent was being truthful.
62. Dr. Pascal Kintz testified as follows. Dr. Pascal has a Ph.D. in Toxicology. He is President of X-Pertise Consulting. X-Pertise performed tests on fourteen of Respondent's medications and supplements for vadadustat. It found no vadadustat in any of these medications and supplements. X-Pertise also performed a test on Respondent's hair sample for vadadustat. This test would determine if Respondent had been using vadadustat on a long-term basis. Respondent's hair sample was of a length that X-Pertise Consulting could test for one year, or for the period from October 2022 to September 2023. Respondent's hair was negative for vadadustat. Vadadustat testing in hair is relatively new. There are no clinical trials on whether vadadustat can be detected in human hair, however there are trials conducted on horsehair, which showed that vadadustat can be detected. In order for vadadustat to enhance performance, it would have to be used on a long-term basis and the amount would have to be for more than a microdose.
63. Dr. Matthew N. Fedoruk testified as follows. Dr. Fedoruk has a Ph. D. in Pathology and Laboratory Medicine. Dr. Fedoruk is Chief Science Office, Science & Research, at

USADA. He has been at USADA for 13 years. Respondent tested positive for Vadadustat. Vadadustat is a pharmaceutical drug approved in 37 countries. It was just approved in the U.S. in March of 2024. It is a hypoxia-inducible factor prolyl hydroxylase inhibitor. It mimics the body's exposure to low oxygen availability, thus stimulating the production of erythropoietin or EPO. This leads to increased red blood cell production resulting in an increase of oxygen delivery to tissues. It is indicated for the treatment of anemia due to chronic kidney disease in adults who have been receiving dialysis for at least three months. In athletes, increasing erythropoietin production via a Hypoxia-Inducible Factor, or HIF, activating agent, like vadadustat, can be advantageous for performance, training, and recovery. That is because an increase in red blood cells, and therefore an increase in hemoglobin mass, would allow an athlete to increase their oxygen carrying capacity leading to improved endurance during exercise. Clinical trial data demonstrates that after one dose of vadadustat there is an effect on the human body; and one can observe an increase in erythropoietin, which can then translate into an increase in red blood cell production. As one takes the drug at higher doses and for a longer period of time it can have a greater result on red blood cell production. It would take from 10 to 14 days to see this result. Vadadustat would not have been available in the U.S. prior to March 2024 as a therapeutic drug. Possibly it could have been available by other means. It is currently legally obtained in the U.S. through a prescription filled by a pharmacist. Vadadustat is not a naturally occurring drug. It is not legally allowed for use as an ingredient in any dietary supplement. To Dr. Fedoruk's knowledge, there has never been a dietary supplement, food product, cosmetic product or other pharmaceutical product containing vadadustat due to contamination or adulteration. There is also no evidence to suggest that vadadustat can be transferable by intimate contact or other environmental contamination, such as sharing water bottles or utensils, or through inhalation. A low concentration of vadadustat in the urine may be attributable to the tail end of excretion of the drug or to exposure to the drug at a lower concentration at a more recent period of time. A low concentration of vadadustat in a urine sample provides no information as to the source of the drug. No inference can be drawn from Respondent's negative tests on April 11, 202, April 21, 2023, or July 3, 2023. Vadadustat is not dissolvable in water. There are no studies as to how fast vadadustat excretes from the body. However, USADA has done some studies with roxadustat. After a person took a single therapeutic single dose of roxadustat, after 2 weeks to 20 days one would find roughly the same levels of roxadustat as were observed for vadadustat in Respondent's sample. If one took only a very small dose of roxadustat, 10 micrograms, roxadustat would be observed in someone's urine for only about 24 hours. An Athlete's Biological Passport monitors selected biological variables over time that indirectly reveal the effects of doping, rather than attempting to detect the doping substance or method itself. Those markers don't always change depending on the situation and the exposure of the drug or the method the athlete may be using. The absence of any change in Respondent's Biological Passport is not indicative that she didn't dope. There are limitations with hair testing in anti-doping cases. Hair is exposed to a number of environmental factors that can affect whether a substance can be detected. Also, there have been no human studies available as to excretion of vadadustat into hair or how it

would be identified in hair. There have been studies on horsehair, but no studies for human hair.

IX. DISCUSSION AND MERITS

A. Commission of Anti-Doping Rule Violation

64. There is no dispute between the Parties that Respondent's July 1, 2023, urine sample tested positive for vadaustat.
65. Based on the test results of both the A and B Samples, USADA charged Respondent with committing anti-doping rule violations of Articles 2.1 (presence) and 2.2 (use/attempted use). Respondent does not contest her violations of Articles 2.1 and 2.2.
66. Pursuant to Article 3.1 USADA has the burden of "*establishing that an anti-doping rule violation has occurred.*" The standard of proof is whether USADA "*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.*" Article 3.1 goes on to state that "*This standard of proof in all cases is greater than a mere balance of probability but less than proof beyond a reasonable doubt.*"
67. Based on Respondent's positive urine sample for vadaustat and the fact that Respondent does not contest her violation of Articles 2.1 and 2.2, USADA has met its burden.
68. Accordingly, the Arbitrator finds that Respondent has committed anti-doping rule violations as set forth in Articles 2.1 (presence) and 2.2 (use/attempted use).

B. Framework for Determining Respondent's Period of Ineligibility

69. Pursuant to Articles 10.2.1 and 10.2.1.1 the period of ineligibility imposed for a violation of Article 2.1 or Article 2.2 is four years. However, pursuant to Articles 10.2.1.1 and 10.2.2, where the anti-doping rule violation does not involve a "*specified substance,*" the period of ineligibility can be reduced to two years provided the person who has committed the anti-doping rule violation "*can establish that the antidoping rule violation was not intentional.*"¹²
70. Vadaustat is not a "*specified substance.*" It is a "*non-specified substance*" as identified on the WADA Prohibited List.

¹² If the anti-doping rule violation involves a "*specified substance or a specified method,*" then pursuant to Articles 10.2.1.2 and 10.2.2, the period of ineligibility is two years unless the Anti-Doping Organization "*can establish that the anti-doping rule was intentional.*"

71. Article 3.1 provides that “*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.*”
72. Accordingly, Respondent can reduce her period of ineligibility to two years if she can establish by a balance of probability that her anti-doping rule violation was not intentional.
73. Determining whether Respondent has met her burden of proof requires an examination of the meaning of “*intentional*” and an application of the specific facts supporting Respondent’s lack of intent.
74. Article 10.2.3 states:

As used in Articles 10.2 and 10.3, the term “intentional” is meant to identify those Athletes or other Persons who engage in conduct which they knew constituted an anti-doping rule violation or knew that there was a significant risk that the conduct might constitute or result in an anti-doping rule violation and manifestly disregarded that risk.
75. In simple terms, considering Respondent’s circumstances, can she disprove by a balance of probability (a) culpable intent or (b) or recklessness, allowing Respondent to have her period of ineligibility reduced from four years to two years. *SIA & WADA v. Jack & Swimming Australia*, CAS 2020/A/7579 & 7580 ¶ 153. Or, as stated slightly differently but with the same effect, can Respondent prove, by a balance of probability, based on the facts she can muster, that she did not engage in conduct that she knew constituted an anti-doping rule violation or that she did not engage in conduct knowing that there was a significant risk that her conduct might constitute or result in an anti-doping rule violation and she manifestly disregarded that risk. If not, then her period of ineligibility stands at four years. *WADA v. RUSADA & Valieva*, CAS 2023/A/9456 & 9456 ¶¶ 355 and 356.
76. Respondent and USADA’s briefs and the evidence submitted confront this issue, albeit with different outcomes.

C. Respondent’s Position Regarding Intent and Reduction of Period of Ineligibility

77. Respondent states that she tested all of the supplements and medications that she was taking prior to testing positive on July 1. Unfortunately, none of those supplements and medications tested positive for vadaustat. Respondent submits, however, that there are two possible explanations for her positive test. One, vadaustat entered Respondent’s system, possibly through ingestion, from some form of unknown environmental contamination.

78. Two, Respondent swam in the 10k race on May 20, 2023, at the 2023 World Aquatics Open Water Swimming World Cup, in Sardina, Italy. Respondent states that the feeding station at this race was a chaotic free-for-all, where support personnel put their athlete's nutrition in a cup and dangled the cup above the swimmers in the water for the swimmers to grab. Respondent speculates that she may have grabbed another swimmer's cup that contained vada-dustat.
79. Considering the above, Respondent admits that she has not with any concrete evidence, albeit not without trying, established the source of the vada-dustat found in her system. However, she contends that despite this, based on the framework established in *Jack*, which considered where an athlete could not establish source, she can prove by a balance of probability that she did not intentionally ingest vada-dustat or that she manifestly disregarded the risk of ingesting vada-dustat.
80. Respondent states that the arbitral panel in *Jack* utilized a two-prong test, which should be applied here. First, can the athlete disprove culpable intent? Second, can the athlete disprove recklessness? *Jack*, CAS 2020/A/7579 & 7580 at ¶ 153.
81. As to the first prong, Respondent states that the *Jack* Panel used the following methodology in determining whether there was an intent to take a prohibited substance: (i) examine the science, (ii) consider the totality of the evidence, (iii) review the science and evidence with common sense, and (iv) evaluate the athlete's credibility.
82. As to an examination of the science, Respondent points out the following.
83. There is little science available associated with the performance benefits of vada-dustat, either long term or short term.
84. Respondent's hair sample analysis, covering a span of 12 months, from October 2022 through October 2023, was negative, which confirms no long-term use.
85. There were no anomalies noted in Respondent's Athlete Biological Passport, which supports inadvertent, rather than intentional use.
86. The concentration of vada-dustat found in Respondent's sample was extremely low, meaning that it is possible, if not likely, that her positive test occurred because of some form of environmental contamination.
87. Concerning the totality of the evidence, Respondent asserts the following.
88. Respondent tested negative multiple times prior to her positive test.

89. Although vadadustat is intended to increase the oxygen in an individual's system and thus improve endurance, Respondent did not perform much better on July 1, 2023, than she had years earlier in the same event, which shows that her results on July 1, 2023, were not the result of doping. As evidence of this, Respondent's third-place finish in the 1500m freestyle (16:07.78) at the 2023 USA Swimming National Championships on July 1, 2023 (her positive test) was nearly identical to her time 4 years earlier in 2019 in the same event (16:09.80).
90. Respondent has received extensive anti-doping education (to which USADA expected strict adherence). Respondent has implemented this education, as it concerned the ingestion of substances, into her daily life by (i) only using NSF Certified for Sport supplements, (ii) working with a sports nutritionist since June 2022 to improve her health (eating cleaner foods to reduce inflammation, improve absorption of vitamins, etc.) and (iii) regularly checking with support personnel at the University of Alabama such as the team nutritionist and athletic trainer about what she was putting into her body.
91. Respondent passed a polygraph test where she answered "No" to both (1) "Did you ever ingest vadadustat?" and (2) "Did you ever ingest anything containing vadadustat?", which is further objective proof she never intentionally used vadadustat.
92. Regarding common sense, Respondent relies on the following.
93. Respondent would never have risked her swimming career by ingesting vadadustat.
94. At the time of Respondent's positive test, vadadustat was not readily available in the U.S. It was not approved by the FDA for use in the U.S. until March 2024 and was only available by prescription internationally. Thus, Respondent would have had to find a doctor who would have illegally prescribed it to her in order to have access to the medication.
95. Given Respondent's cautious attitude with what she consumed, particularly with regards to medication (she was only taking two medications at the time of her July 1, 2023, test), and her multi-year journey to eating healthier, common sense suggests that Respondent did not intentionally take vadadustat, but supports that vadadustat entered her body through environmental contamination.
96. Respondent is highly motivated, having endured long years of training regimes, and understands the need to make sacrifices to stay the course, which she clearly exhibited during her time in college and during the COVID shut down, which limited her swimming training and participation opportunities. Given what Respondent had already persevered through to get to her high level of performance, combined with the fact that she had been training well, felt optimistic going into the 2023 National Championships, and had already

qualified for the 2023 Santiago Pan American Games, common sense dictates that there would have been no reason for Respondent to impulsively take vadaadustat.

97. That Respondent took vadaadustat intentionally to improve her training capacity is pure speculation and cannot be given any weight.
98. Finally, concerning credibility, Respondent affirms the following.
99. Respondent met with and was questioned by USADA's investigator for an hour during which she responded to all questions posed to her and provided truthful and thoughtful responses.
100. Individuals who know Respondent have described her character with glowing remarks:
 - Reed Fujan, Respondent's coach, said that Respondent "is a deeply principled individual, guided by her faith, integrity, and a strong sense of moral responsibility."
 - Erica Beine, Respondent's nutritionist, chose Respondent to be an ambassador for her company because "she has always stood out as an individual that is grounded, hard-working, faithful, respectful, loyal, polite, and honest."
 - Charlie Hawke, Respondent's boyfriend, describes her as generous, friendly, and faithful.
 - Laurel McMahon, Respondent's mother, lauds Kensey's work ethic, overall drive, and attention to detail.
101. The pain and disbelief that Respondent has experienced because of the utter unfathomableness of the situation, and which people have seen firsthand, is genuine.
102. Respondent is a hard-working athlete whose faith has shaped her into the upstanding woman she is today. Respondent would never do anything to disgrace her family, God, or herself, such as intentionally taking an illegal banned substance.
103. As to the second prong of *Jack*, concerning whether Respondent can disprove being recklessly oblivious to the risk of environmental contamination, Respondent points to the following.
104. Respondent's positive test was an isolated incident. Respondent has never before tested positive for a banned substance.
105. Respondent has an unwavering commitment to clean sport and has personally taken steps to avoid any potential risk of accidentally coming into contact with any banned substance such as by: (i) only using NSF Certified for Sport supplements, (ii) reading the ingredients of supplements and medications and checking them on Global DRO, (iii) working with a

sports nutritionist to eat clean, (iv) checking with personnel at the University of Alabama before consuming any supplement, (v) minimizing the number of supplements and medications she takes, and (vi) never sharing water, drinks, food, supplements, or medications with other persons.

106. Respondent is overly cautious about what she consumes. Respondent has not lived recklessly in other parts of her life. She does not hang out with or date people who use prohibited substances, nor does she frequent establishments that would have prohibited substances.
107. In sum, applying the *Jack* framework, Respondent contends that she has successfully established by a balance of probability that her anti-doping rule violation was not intentional or that her conduct was not in reckless disregard of the risk involved in committing an anti-doping rule violation, and pursuant to Articles 10.2.1.1 and 10.2.2, her period of ineligibility must be 2 years.

D. USADA's Position Regarding Intent and Reduction of Period of Ineligibility

108. USADA challenges Respondent's reliance on *Jack*. USADA in its pre-hearing brief indicates that *Jack* is "the only case to USADA's knowledge that has ever found an athlete to have met their burden without first establishing the source or credible source of their positive test."
109. Further, USADA asserts that the *lex sportiva* of requiring athletes to establish the source of the prohibited substance that caused their positive test, in order to show unintentional use or non-reckless conduct, is well established.
110. USADA asserts that this threshold issue, establishing the source of the prohibited substance, is rooted in strict liability as set out in Article 2.1.1 and 2.2.2, which is that athletes are responsible for everything that goes into their bodies. USADA cites *WADA v. EGY-NADO & Elsalam*, CAS 2016/A/4563, for this principle, which states:

Thus, the necessity of proving "how the substance got there" as a precondition to qualify for any reduction in sanction flows naturally from the principle of the Athlete's responsibility for what goes into her body. If an athlete cannot prove to the comfortable satisfaction of the tribunal how a prohibited substance got into his/her body, she cannot exclude the possibility of intentional or significantly negligent use. A mere hypothesis is not sufficient in this regard. The WADC is quite clear that an athlete must completely exclude these possibilities in order to be entitled to a reduction in sanction.

Id. ¶ 56.

111. USADA cites a number of other cases where arbitral panels have held that unless an athlete can present concrete evidence of the source of their positive test, they cannot establish that their anti-doping rule violations were not intentional or reckless. *FINA v. GADA & Bolkvadze*, CAS 2017/A/5392 ¶ 69 (“In order to establish the origin of a Prohibited Substance by the required balance of probability, an athlete must provide actual evidence as opposed to mere speculation”); *WADA v. WSF & Iqbal*, CAS 2016/A/4919 ¶ 63 (“the Panel ... finds it very difficult to imagine how ... an athlete could establish that he acted unintentionally without knowing how the substance arrived in his body”); *IAAF v. RUSAF & Kopeykin*, CAS 2017/O/5218 ¶ 134 (“Establishing the origin of the prohibited substance requires substantiated, supported and corroborated evidence by the Athlete. It is not sufficient for the Athlete merely to make protestations of innocence, provide hypothesis or suggest that the prohibited substance must have entered his body inadvertently from some supplement, medicine, or other product which the Athlete was taking at the relevant time. Rather, the Athlete must provide concrete, persuasive and actual evidence, as opposed to mere speculation, to demonstrate that a particular supplement, medication or other product that he took contained the prohibited substance” (citations omitted)), *USADA v. Blazejack*, AAA 01-16-0005-1873 ¶ 7.7 (the Panel “needs more than theories ... [the athlete] needs to give the Panel some evidence which constitutes a probable source of the positive result”).

112. USADA is aware of the consequences of applying strict liability to cases involving intent or reckless behavior, where the source of the prohibited substance cannot be identified. As USADA states in its pre-hearing brief:

USADA understands that the strict liability standard can, at times, prove harsh, and USADA is sympathetic to those concerns. Nevertheless, strict liability is the foundation on which the anti-doping rules are constructed and until they are changed, the anti-doping community is charged with faithfully enforcing them.

113. USADA asserts that Respondent has been unable to identify the source of the vadadustat found in her system. USADA states that Respondent tested all of the supplements and medications that she was taking prior to her July 1 positive test, all of which tested negative for vadadustat.

114. USADA points out that the only thing that Respondent can suggest for why she tested positive for vadadustat, is that it entered her body through some form of unknown environmental contamination or that she may have taken another athlete’s sustenance cup by mistake at the 10k race on May 20, 2023, in the 2023 World Aquatics Open Water Swimming World Cup, in Sardina, Italy. USADA asserts that Respondent’s general claim of environmental contamination is pure speculation, without even a hint of how Respondent could have encountered such contamination. As to the possibility that Respondent could have accidentally taken someone else’s sustenance cup during the May 20 10k competition, USADA indicates that Respondent has provided no evidence

supporting such a theory. USADA points out that Respondent did not provide evidence about whether anyone saw Respondent taking another person's cup, whose cup she may have taken, or whether Respondent noticed anything unusual about what she was drinking from the cup. USADA submits that it is not even remotely feasible that Respondent took a drink that contained vadaadustat at the May 20 competition.

115. USADA also submits, that even though Respondent has raised environmental contamination and ingestion at the May 20 10k competition for why she tested positive for vadaadustat, she has effectively admitted that she cannot identify the source of her positive test.
116. Although USADA acknowledges that while it is theoretically possible for an athlete to establish that their anti-doping rule violation was not intentional or reckless without showing how the prohibited substance entered his system, USADA contends that it is nearly impossible for an athlete to provide such evidence so as to discharge their burden of proof. In any event, USADA contends that in this case Respondent has not presented such evidence. USADA argues that the factors upon which Respondent relies are not sufficient.
117. Concerning Respondent's denial of taking vadaadustat, USADA responds that Respondent's protestations of innocence cannot carry her burden. More must be required by way of proof given Respondent's duty to ensure that no prohibited substance entered her body. USADA cites *Villanueva v. FINA*, CAS 2016/A/4534 ¶ 41 in which the CAS panel stated, "the currency of [a] denial is devalued by the fact that it is the common coin of the guilty as well as the innocent." USADA also refers to *IWBF v. UKAD & Gibbs*, CAS 2010/A/2230 which states:

To permit an athlete to establish how a substance came to be present in his body by little more a denial that he took it, would undermine the objectives of the Code and Rules. Spiking and contamination – two prevailing explanations volunteered by athletes for such presence – do and can occur; but it is too easy to assert either; more must sensibly be required by way of proof given the nature of the athlete's basic personal duty to ensure that no prohibited substance entered his body.

Id. ¶ 11.12

118. Further, USADA asserts that testimonials of Respondent's good character are insufficient to prove that she did not act intentionally or with reckless disregard of the risk of committing an anti-doping rule violation. USADA cites *WADA v. Jobson*, CAS 2010/A/2307 ¶ 172 ("good character evidence submitted by the Player, which the Panel accepts, cannot mitigate his culpability so as to reduce his sanction"); *Gibbs*, CAS 2010/A/2230 at ¶ 12.10 ("General character reference can again not qualify; there is after

all a first time for everything ... the Sole Arbitrator cannot ascribe corroborative effect to material of that kind.”)

119. As to the concentration of vadaustat in Respondent’s sample, USADA makes two points. First, that Article 2.2.2 is clear that “[t]he success or failure of the Use or Attempted Use of a Prohibited Substance or Prohibited Method is not material. It is sufficient that the Prohibited Substance or Prohibited Method was Used or Attempted to be Used for an anti-doping rule violation to be committed.” Second, that the specific concentration detected in Respondent’s sample has no bearing on whether she acted intentionally or recklessly. USADA asserts, as Dr. Fedoruk testified, the low concentration of vadaustat in Respondent’s sample could very well be attributable to the test being collected at the tail end of the excretion period of one or more therapeutic or sub-therapeutic doses.
120. USADA also asserts that Respondent’s efforts to test her supplements and medications without providing concrete evidence of the source of the positive test are not sufficient to support a finding of unintentionality. USADA states that crediting such evidence would allow every athlete to easily establish non-intentional use.
121. Addressing Respondent’s polygraph test, USADA states that Respondent’s polygraph tests should be disregarded. USADA asserts that polygraph tests have an extremely spotty record in American, international, and sports jurisprudence. USADA points out that the U.S. Supreme Court in *United States v. Scheffer*, 523 U.S. 303, 309 (1998) ruled that “there is simply no consensus that polygraph evidence is reliable.” USADA also cites *WADA v. Swiss Olympic Association & Daubney*, CAS 2008/A/1515 ¶ 119 (“A polygraph test is inadmissible as per se evidence under Swiss law.”); *W. v. FEI*, CAS 99/A/246 ¶ 6 (“Under Swiss law, the use of a lie detector test does not appear to be admissible as a legitimate proof.”).
122. Turning to Respondent’s hair test results, USADA states that Dr. Fedoruk in his testimony and expert report explained that hair tests are entirely irrelevant in determining whether a person’s use was intentional because the mere presence of a prohibited substance, or lack thereof, has no bearing on whether the person ever intended to use or recklessly used the substance. In support of the irrelevancy of hair tests, USADA cites *Lawson v. IAAF*, CAS 2019/A/6313 ¶ 89 where the arbitral panel concluded that the athlete’s hair test was “of little relevance or weight in the determination of whether the Athlete may have unintentionally ingested” the prohibited substance. Also, USADA states that as Dr. Fedoruk explains, whether vadaustat can even be detected in human hair is unknown, as there have not been any studies published on the matter. USADA points out that Dr. Kintz, called by Respondent, based his opinion on the validity of finding vadaustat in human hair, on a paper that discussed analyzing horsehair. Thus, no weight should be given to any test that did not detect vadaustat.

123. Further, countering Respondent's assertion that she has been tested many times and other than her positive test for vadaustat she has never been found to have doped, USADA states that a history of clean testing is not sufficient to prove that Respondent did not intentionally take vadaustat prior to her July 1 test. USADA asserts that this has been a common finding in CAS jurisprudence considering anti-doping arbitrations. USADA points out that an athlete need not have been a multiple or long-time user of a prohibited substance, which is what Respondent is inferring by not having tested positive tests before July 1, to have used it intentionally or recklessly.
124. Concerning Respondent's assertion that common sense dictates that she has no reason to risk her career by taking vadaustat, USADA asserts the contrary is also true, stating that a high-level athlete with everything on the line could be especially motivated to succeed by any means necessary to reach their goals, including taking a prohibited substance. USADA indicates that one only needs to consider the litany of high-profile athletes who have received sanctions for intentional anti-doping rules over the years. USADA also refers to Dr. Fedoruk's testimony in which he indicated that vadaustat could be uniquely beneficial to long distance swimming athletes like Respondent.
125. Accordingly, USADA argues that Respondent has failed to discharge her burden, by a balance of probability, that her anti-doping rule violation was not intentional or that her conduct was not in reckless disregard of the risk involved in committing an anti-doping rule violation, and pursuant to Articles 10.2.1 and 10.2.1.1, her period of ineligibility must be 4 years.

E. Decision

126. Pursuant to Articles 10.2.1 and 10.2.1.1 the period of ineligibility imposed for a violation of Article 2.1 or Article 2.2 is four years. However, pursuant to Articles 10.2.1.1 and 10.2.2, the period of ineligibility can be reduced to two years provided Respondent "*can establish that the antidoping rule violation was not intentional.*"
127. Article 10.2.3 provides that as used in Article 10.2 the term "intentional" is meant to identify athletes "*who engage in conduct which they knew constituted an anti-doping rule violation or knew that there was a significant risk that the conduct might constitute or result in an anti-doping rule violation and manifestly disregarded that risk.*"
128. The question before the Arbitrator is did Respondent intentionally or with reckless disregard of the risk involved ingest vadaustat. If she cannot prove that she did not, then her period of ineligibility is four years. If she can prove that did not, then her period of ineligibility is two years.

129. The Comment to Article 10.2.1.1 states:

While it is theoretically possible for an Athlete or other Person to establish that the anti-doping rule violation was not intentional without showing how the Prohibited Substance entered one's system, it is highly unlikely that in a doping case under Article 2.1 an Athlete will be successful in proving that the Athlete acted unintentionally without establishing the source of the Prohibited Substance.

130. The first issue that must be addressed is, did Respondent establish how vadadustat entered her system.

131. After being notified of her July 1 positive test for vadadustat, Respondent tested all of her supplements and medications and none of them showed the presence of vadadustat. In her brief, Respondent admitted that she cannot “successfully establish” the origin of vadadustat.

132. However, Respondent's suggests that vadadustat may have entered her system, possibly through ingestion, from some form of unknown environmental contamination. This is mere speculation without any factual basis and Respondent spends negligible time advancing this theory.

133. Respondent also suggests that she may have ingested vadadustat on May 20, 2023, at the feeding station during the 10k race at the 2023 World Aquatics Open Water Swimming World Cup, in Sardina, Italy. However, she offers no concrete evidence of this, but merely states that the feeding station was chaotic, and she could have grabbed someone else's sustenance cup, which may have contained vadadustat. Respondent did not provide further information about the feeding station, the cup, or her consumption of food/drink at the feeding station. She provided no testimony from the person who was providing her the sustenance cup, or from any other person. She provided no evidence that would lead to the conclusion that Respondent took someone else's cup. Nor did Respondent provide any testimony that what she took at the feeding station tasted differently from her usual sustenance food/drink. Finally, it makes little sense that someone would take vadadustat during a race, as there is no evidence that consuming this drug during a race would provide an instantaneous benefit, as opposed to a drug that would give a swimmer an immediate energy boost. Respondent's proposition that she may have consumed vadadustat at the feeding station is merely conjecture.

134. Numerous arbitral panels considering this issue have found that theories of potential contamination, without concrete evidence, are wholly inadequate. *Iqbal*, CAS 2016/A/4919 at ¶ 78 (“the Athlete offers nothing else than purely theoretical causes for his AAF ... Such speculation is simply not sufficient to counter the presumption of intentional use.”); *Kopeykin*, CAS 2017/O/5218 at ¶ 134 (“It is not sufficient for the

Athlete merely to ... provide hypothesis or suggest that the prohibited substance must have entered his body inadvertently....”); *Blazejack*, AAA 01-16-0005-1873 at ¶ 7.7 (the Panel “needs more than theories about contaminated meat or substances”).

135. Accordingly, the Arbitrator finds that Respondent cannot establish how vada dustat entered her system.
136. That leads to the ultimate question, can Respondent establish, without showing how vada dustat entered her system, that her anti-doping rule violation was not intentional or that she disregarded the risk that her conduct could result in an anti-doping rule violation.
137. Based on the WAD Code and arbitration panels that have dealt with this issue, Respondent has a very difficult case. It goes without saying that it is challenging to prove a negative. Although there may be a corridor through which Respondent can pass to discharge her burden of unintentional use or lack of recklessness, it is a very narrow corridor and not easily navigated.
138. A number of arbitral panels have spoken about the difficulty for an athlete to prove that their anti-doping rule violation was not intentional or reckless, without first identifying how the substance entered their bodies. *Valieva*, CAS 2023/A/9456 & 9456 at ¶ 362 (“It is very difficult for the Panel to form a view as to the intention of the Athlete without evidence as to how she happened to ingest the [prohibited substance] in this case.”); *Iqbal*, CAS 2016/A/4919 at ¶ 66 (“So while this Panel assumes in favour of the Athlete that he does not have to necessarily establish how the prohibited [substance] entered his system when attempting to prove on a balance of probability the absence of intent, in all but the rarest cases the issue is academic.”); *Villanueva*, CAS 2016/A/4534 at ¶ 37 (“Where an athlete cannot prove source it leaves the narrowest of corridors through which such athlete must pass to discharge the burden which lies upon him.”).
139. Further, Article 2.1 provides:

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

140. The WAD Code is quite clear. Athletes are responsible for what enters their bodies. To allow for a reduction of the period of ineligibility, without concrete and substantial evidence that the anti-doping rule was unintentional or that Respondent’s conduct was not reckless, defeats the broader purpose of the WAD Code to ensure clean competition. As stated in *WADA v. Stanic & Swiss Olympic*, CAS 2006/A/1130 ¶ 14, to allow “speculation

as to the circumstances in which an athlete ingested a prohibited substance would undermine the strict liability rules underlying ... the World Anti-Doping Code, thereby defeating [its] purpose.”

141. For an athlete to meet their burden of proof, an athlete must present concrete and persuasive evidence, establishing on a balance of probabilities, that specific circumstances exist disproving the athlete’s intent to dope or that the athlete acted recklessly without regard to the risk involved.
142. Respondent asserts, however, that the circumstances of her case prove that she did not intend to ingest vada-dustat and that she did not act in a reckless manner that caused her to ingest vada-dustat.
143. Utilizing *Jack* as a guide, Respondent relies upon the following factors for her proof: i) Respondent’s attestations of innocence, ii) witness verifications of Respondent’s good character, iii) the extremely low concentration of vada-dustat found in her sample, iv) that there were no anomalies noted in her Athlete Biological Passport, v) that Respondent sought to find the cause of her positive test by having her supplements and medications tested, vi) that Respondent’s polygraph test evidenced that she did not knowingly take vada-dustat, vii) that Respondent’s hair sample did not test positive for vada-dustat, viii) that Respondent tested negative multiple times prior to her positive test, xi) that Respondent’s July 1 performance did not improve from past performances and x) that Respondent minimized risk by only taking NSF Certified for Sport supplements, by checking for banned substances in her supplements and medications on Global DRO, by using a sports nutritionist to improve her health and nutrition and by not eating food or drink offered by other persons.
144. The factors as presented by Respondent are considered below.
145. First and foremost, Respondent cites her own testimony that she did not intentionally take vada-dustat, nor can she fathom how it entered her system. Respondent recounts that she was dismayed and in shock when she was informed that she had tested positive for vada-dustat. Respondent affirms that she is aware of the doping rules and the difficulty she now finds herself in. Respondent states that she took care in taking supplements and ensuring that her medications did not contain prohibited substances. Respondent asserts that she would never do anything to jeopardize her reputation and career. The Arbitrator found Respondent to be well spoken and her demeanor to be sincere, genuine, and honest. Respondent was forthcoming in both her interview with USADA and at the hearing. Nothing about Respondent caused the Arbitrator to question her testimony. However, arbitral panels have been reluctant to put too much weight on protestations of innocence. *Jack*, CAS 2020/A/7579 & 7580 at ¶¶ 101 – 105. As the arbitral panel stated, “the guilty are just as likely as the innocent to express surprise, disbelief, and the profound sense of

injustice.” Here, the Arbitrator accepts Respondent’s protestations of innocence, with caution. *Id.* ¶ 101.

146. Respondent also presented witnesses who testified as to her good character and that she is not a person who would intentionally dope. They also testified to Respondent’s integrity, faith, honesty, and work ethic. Speaking on Respondent’s behalf were her mother Laurel McMahon, her friend Charlie Hawke, her coach Reed Fujan, and her sports nutritionist, Erica Beine. Respondent’s mother testified with much emotion. The Arbitrator found them to be candid and believable when testifying. However, here again, arbitral panels have been hesitant to accept character evidence without questioning its usefulness. As stated in *Blazejack*, AAA 01-16-0005-1873:

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

Id. ¶ 7.9. Also, as stated in *Jack*, CAS 2020/A/7579 & 7580 at ¶ 174, character references “must be taken with a grain of salt, and evaluated contextually with discernment.” And so, the Arbitrator accepts this evidence with the weight it deserves.

147. Respondent also argues that the extremely low levels of vadaustat that was found in her sample is evidence that she did not intentionally take or with reckless abandon consume vadaustat. However, the Arbitrator agrees with USADA that the specific concentration detected in Respondent’s sample has no real bearing on whether she acted intentionally or recklessly disregarded the risk of consuming vadaustat. Having a low concentration in one’s sample is not indicative one way or the other of intentional doping or recklessness. Further, as Dr. Fedoruk testified, the low concentration of vadaustat in Respondent’s sample could very well be attributable to the test being collected at the tail end of the excretion period of one or more doses of vadaustat. A low level of vadaustat found in Respondent’s sample at a point of time does not prove that Respondent did not have a high level in her system at an earlier time.
148. Respondent also indicates the fact that there were no anomalies noted in her Athlete Biological Passport, is evidence that she did not intentionally dope. However, this is not necessarily true. As Dr. Fedoruk testified, a normal Athlete Biological Passport is in no way indicative of intentional or unintentional use. An Athlete’s Biological Passport monitors selected biological variables over time that indirectly reveal the effects of doping. Any change in those markers depends on a variety of circumstances, including the type of drug and how that drug affects certain markers.

149. Respondent also asserts that she has a clean record when it comes to doping. It is true that Respondent has been tested at least 15 times, and except for her July 1 sample, she has always tested negative. Of particular interest, however, Respondent tested negative on April 11, 2023 (out-of-competition), on April 21, 2023 (in-competition), and then again on July 5, 2023 (out-of-competition). This series of tests, sandwiching so close her negative test of July 1, 2023, led the Arbitrator to consider whether they provided some credence to Respondent's contention that she did not intentionally take vada-dustat. However, as USADA asserts, and with which the Arbitrator must ultimately agree, negative tests, either relatively previous to or immediately after a positive test, do not disprove intent. An athlete can take a prohibited substance with a doping regimen so as to escape detection. Further, even though an athlete may have completed clean in the past, that does not preclude a decision to dope now. *Puerta v. UCI*, CAS 2021/A/7628 ¶ 176 ("even considering the Athlete's clean history, the Panel finds that the Appellant failed to establish on a balance of probability that the ADRV was not intentional for the purposes of 10.2 of the UCI ADR"); *Bolkvadze*, CAS 2017/A/5392 at ¶ 70 ("the fact that the athlete has never tested positive for a prohibited substance before" is not concrete evidence that the violation was not intentional). *Kopeykin*, CAS 2017/O/5218 at ¶ 171 (the athlete was not able to establish that his violation was not intentional even though his doping history was "impressively good").
150. Respondent asserts that she did her utmost to find the cause of her positive test by having her supplements and medications tested. Unfortunately, this did not prove fruitful. However, Respondent asserts that by making the effort and providing her supplements and medications to an independent testing laboratory, she did her best to prove her lack of intent. However, the mere fact that Respondent submitted her supplements and medications for testing does not assist Respondent. It is the Arbitrator's view, and as has been confirmed by several arbitral panels, having one's medications and supplements tested does not provide evidence of lack of intent. One does not flow from the other. *WADA v. Daiders & FIM*, CAS 2014/A/3615 ¶ 56 ("The person charged cannot discharge that burden merely by showing that he made reasonable efforts to establish the source, but that they were without success."); *Bolkvadze* ¶ 70 ("the mere fact that the Athlete requested an analysis of the food supplement he used at the time of the alleged offence does not prove on the balance of probability that the violation was not intentional").
151. Respondent also relies on her polygraph test as evidence that she did not intentionally take vada-dustat. However, the Arbitrator notes that the reliability of polygraph evidence is uncertain. A polygraph exam doesn't detect lies; it detects signs of emotion. The person conducting the test records physiological changes, such as heart rate, blood pressure, respiration levels, and skin conductivity, in reaction to a question. Those physiological factors are then interpreted to determine whether there is deception. Doubts and uncertainties plague even the best polygraph exams. Thus, arbitral panels have found, and the Arbitrator agrees, polygraph tests to be of limited value. *Campbell-Brown v. JAAA & IAAF*, CAS 2014/A/3487 ¶ 183 ("the Panel places no weight on the polygraph evidence");

Villanueva, CAS 2016/A/4534 at ¶ 46 (“In the Panel’s view, while CAS Panels may have previously found polygraph evidence to be admissible, such evidence is of limited value.”). Also, as stated in an article on the American Psychological Association website “although the idea of a lie detector may be comforting, the most practical advice is to remain skeptical about any conclusion wrung from a polygraph.” <https://www.apa.org/topics/cognitive-neuroscience/polygraph>. Furthermore, the Arbitrator has reservations about the approach used by Wolfe Mize in the examination given to Respondent. Respondent was asked But, Respondent knew that she had ingested vadaadustat at the time of the polygraph test, which was taken on November 1, 2023, as she had tested positive for it on July 1, 2023. The Arbitrator asked whether a better question would have been, did Respondent “knowingly ingest vadaadustat?” However, Wolfe Mize responded that polygraph tests are not designed to test intention, so it would have been improper to ask if Respondent “knowingly ingested vadaadustat?” She explained that this had been discussed with Respondent in the pretest phase of the examination, and so Respondent knew that “ingest” meant “knowingly ingest.” However, the Arbitrator fails to see the difference between “knowingly ingest,” and “ingest,” when “ingest” is defined to mean “knowingly ingest.” It may be that the Arbitrator does not understand the intricacies of polygraph examinations, but the question and the way it was posed leads the Arbitrator to question the methodology used in Respondent’s examination. For the above reasons, the Arbitrator gives little weight to the polygraph evidence submitted in support of Respondent’s case.

152. Respondent also points to the analysis conducted on her hair by Dr. Kintz of X-Pertise Consulting. This analysis, which was negative for vadaadustat, covered a span of 12 months, from October 2022 through October 2023. Respondent submits that this confirms no long-term use by Respondent. However, this test does not negate the finding by the UCLA Olympic Analytic Laboratory, after analyzing Respondent’s urine sample, that Respondent tested positive for vadaadustat. Nor, since the hair sample didn’t even show the presence of vadaadustat, it doesn’t provide any information on how vadaadustat entered Respondent’s body. Even if the hair sample tested positive for vadaadustat, which it didn’t, it wouldn’t indicate one way or the other if Respondent intentionally or with reckless disregard of the risks ingested vadaadustat. Additionally, the fact that Respondent was taking vadaadustat over a long period of time, or for a short period of time, seems of little relevance to whether she was taking it intentionally. Where this issue was raised in a similar case, *Bolkvadze*, CAS 2017/A/5392, the arbitral panel dismissed the athlete’s reliance on a negative hair sample and concluded:

Therefore, the sole Arbitrator finds that the fact that the hair analysis was negative does not demonstrate on the balance of probability i) how the prohibited substance entered the Athlete’s body, and ii) that the violation was not intentional. It follows that the Sole Arbitrator finds the hair analysis to be of no relevance in the present case.

Id. ¶ 70. Additionally, as admitted by Dr. Kintz, and affirmed by Dr. Fedoruk, there have been no clinical trials that have tested whether vadaustat is detectable in human hair. The best that can be offered is that there was a study indicating that it could be detected in horsehair. For the above reasons, the Arbitrator gives little, if any, value to Respondent's negative hair sample.

153. Respondent also submits that she did not perform much better on July 1, 2023, than she had years earlier in the same event. Respondent states that a sudden improvement in her times would have shown that she was intentionally doping. She asserts that no sudden improvement or a gradual improvement indicates that she was not intentionally doping. Although a sudden improvement in performance may raise a suspicion as to how this was accomplished, improvement in and of itself only raises the question of what attributed to the improvement. No improvement or a gradual improvement of performance may not raise such suspicion, but it does not directly indicate that doping was not involved. A variety of factors other than doping can bear on an athlete's performance. This type of evidence is by itself without sufficient weight to discharge the burden placed on the athlete. *Villanueva*, CAS 2016/A/4534 at ¶ 41 (The Appellant's explanation for the recent improvement in his performance, and his coach's sharing of that view is by itself without sufficient weight to discharge the burden upon him...."). The Arbitrator finds Respondent's performance times to be of little help in answering the question as to whether Respondent intentionally ingested vadaustat.
154. Respondent also argues that there was no reason for her to impulsively take vadaustat. Put simply, Respondent states that she had no incentive to dope. Respondent contends that she was a high-level athlete, performing well and without injury. However, an athlete with challenging goals, such as qualifying for and competing in the Olympics or Paralympics, could be especially motivated to succeed by any means necessary to reach those goals, including taking a prohibited substance. An athlete who professes a lack of incentive to dope, may in fact be motivated to dope, and in fact do so. This type of evidence does not satisfy the standard of proof required to show lack of intent. *Kopeykin*, CAS 2017/O/5218 at ¶ 167 ("the Athlete's ... lack of incentive to dope when the Athlete was not competing due to an injury and when, according to the Athlete, the substance could not provide any sporting advantage to the Athlete in the discipline which he practices" is far from being sufficient to establish lack of intent); *WADA v. Abdelrahman & EGY-NADO*, CAS 2017/A/5016 & 5036 ¶125. ("the lack of sporting incentive to dope, or mere speculation by an athlete as to what may have happened does not satisfy the required standard of proof (balance of probability)") The Arbitrator gives little weight to Respondent's declarations that she had no incentive to dope.
155. Finally, Respondent contends that she minimized the risk of testing positive for a prohibited substance by only taking NSF Certified for Sport supplements, by checking for banned substances in her supplements and medications on Global DRO, by using a sports nutritionist to improve her health and nutrition and by not eating food or drink offered by

other persons. This type of behavior and precaution on the part of Respondent is to be highly commended. It supports Respondent's contention that she did not act with reckless disregard of the risks of ingesting vadadustat. However, Respondent provided no evidence of these precautionary actions other than her own assertions that she did so. They are similar to an athlete's protestations of innocence. The Arbitrator gives them such weight as is appropriate.

156. Additionally, the Arbitrator considered the benefits of vadadustat on athletic performance and the circumstances surrounding its availability, as those factors related to Respondent. Vadadustat is classified by WADA on its Prohibited List as a Hypoxia-inducible factor or HIF activating agent. Vadadustat is taken orally in pill form and works by stimulating erythropoiesis, the production of new red blood cells, similar to more well-known doping agents like erythropoietin or EPO. Increased red blood cells results in increased hemoglobin mass, which enhances a person's oxygen carrying capacity. Vadadustat and other HIF activating agents are prohibited substances because athletes can experience greatly improved endurance via the increase in oxygen carrying capacity. Taking vadadustat would be beneficial to a long-distance swimmer, such as Respondent.
157. Further, although vadadustat has been approved for use in foreign countries, it was only approved for use in the U.S. by the United States Food and Drug Administration on March 27, 2024. Prior to its approval in the U.S., which was well after Respondent's positive test on July 1, 2023, it was not available in the U.S., except possibly on the black-market or through some other illegal means.¹³ As of the date of this Award, testified to by Dr. Fedoruk, vadadustat has not shown up as a contaminant or adulteration in any supplement or food product. This is unlike a number of other prohibited substances that commonly show up as contaminants. Vadadustat is not legally allowed to be included as an ingredient in any dietary supplement or food product. There is no evidence that vadadustat can be transferred by intimate contact or other environmental contamination, such as sharing water bottles or utensils, or through inhalation. These considerations do not support accidental or inadvertent use.
158. This is not an easy case. The Arbitrator would like to give Respondent the benefit of the doubt. However, the Arbitrator is cognizant that the WAD Code imposes strict liability on athletes, making them responsible for any prohibited substance that enters their bodies. This is as it should be. The purpose of the WAD Code, and the resulting testing of athletes, is to ensure a clean and fair competition. In this case, it also places a difficult burden on the Respondent, as she must prove a negative, that she did not intentionally ingest

¹³ Although not available in the U.S., vadadustat was available in Europe prior to March 2024. Respondent travelled to Italy in May 2023 to compete in the 2023 World Aquatics Open Water Swimming World Cup. Respondent could have unintentionally ingested vadadustat during this time, although Respondent testified that she could not determine how this would have happened, except at the 10k feeding station. However, the availability of vadadustat in Europe cuts both ways, as it would have been more readily available to obtain for purposes of doping.

vadadustat. That is not easily accomplished. That being said, based on all of the evidence presented in this case, adhering to the WAD Code, and respecting previous arbitral decisions that have dealt with this issue, the Arbitrator finds that Respondent did not discharge her burden of proving, by a balance of probability, non-intentional use of vadadustat or that she did not engage in conduct, knowing of a significant risk, that resulted in her anti-doping rule violation. Consequently, Respondent is subject to a period of ineligibility four years.

159. Finally, the Arbitrator wishes to state what the Arbitrator did not find. The Arbitrator did not find that Respondent intentionally doped. The Arbitrator did not find that Respondent, knowing of a significant risk that might constitute or result in an anti-doping rule violation, engaged in conduct that manifestly disregarded the risk. The Arbitrator did not find that Respondent was a cheat. What the Arbitrator did find was that Respondent was not able to carry her burden of proof. As aptly put by the arbitral panel in *Abdelrahman*, CAS 2017/A/5016 & 5036:

Accordingly, the majority of the Panel cannot find that the Athlete has discharged the burden which lies upon him to establish by a balance of probability non-intentional use of a prohibited substance. It reminds itself that it is not confined to a binary choice: intention or non intention. It is sufficient for it to find that the Athlete has not disproved intention. It can itself construct theories which both inculpate and which exculpate the Athlete from intentional use; but its only function as an arbitral body is to make findings based on the evidence and arguments adduced before it.”

Id. ¶ 131.

X. PERIOD OF INELIGIBILITY AND RESULTING CONSEQUENCES

A. Period of Ineligibility

160. Pursuant to the Arbitrator’s finding that Respondent did not discharge her burden of proving, by a balance of probability, non-intentional use of vadadustat or that she did not engage in conduct, knowing of a significant risk, that resulted in her anti-doping rule violation., and as set forth in Articles 10.2.1 and 10.2.1.1, Respondent’s period of ineligibility is four years.

B. Sanction Start Date and Credit for Provisional Suspension

161. WAD Code Article 10.13 states that:

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

162. Further, WADA Code Article 10.13.2.1 states:

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

163. USADA imposed a provisional suspension on Respondent commencing on July 7, 2023.

164. USADA did not allege or demonstrate that Respondent failed to respect her provisional suspension. Therefore, Respondent shall receive credit for the period of her provisional suspension running from July 7, 2023.

165. Both Parties agree, and the Arbitrator finds, that the start date for Respondent's period of ineligibility is July 7, 2023, the date USADA imposed the provisional suspension.

166. Imposition of a 4-year period of ineligibility and allowing a credit for the period of the provisional suspension, results in the expiration of Respondent's ineligibility on July 7, 2027.

C. Disqualification of Respondent's Results Obtained in the 1500m Freestyle.

167. Respondent was tested after she swam in the 1500m freestyle held on July 1, 2023. This test resulted in her positive test and anti-doping rule violation.

168. WAD Code Article 9 provides that:

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

169. Accordingly, the result obtained by Respondent in her 1500m freestyle competition held on July 1, 2023, is disqualified, together with the forfeiture of any medals, points and prizes obtained as a result of her swimming in that competition.

170. As a consequence, both Parties agree, and the Arbitrator finds, that McMahon's result in the 1500m competition at the 2023 US National Championships, together with all resulting consequences, including forfeiture of any medals, points, and prizes, are disqualified.

D. Disqualification of Results Subsequent to Sample Collection/Commission of Anti-Doping Rule Violation

171. WAD Code Article 10.10 provides that:

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

172. Respondent's positive sample was collected on July 1, 2023, and her provisional suspension was imposed on July 7, 2023.

173. Accordingly, the Arbitrator finds that Respondent's competitive results from the date of her positive test, July 1, 2023, through the date of her provisional suspension, on July 7, 2023, if any, are to be disqualified, and any medals, points or prizes earned during that period shall be forfeited.

XI. FINDINGS AND DECISION

The Arbitrator therefore rules as follows:

- A. Respondent has committed anti-doping rule violations under Articles 2.1 and 2.2 of the World Anti-Doping Code and Articles 2.1 and 2.2 of the World Aquatics Doping Control Rules for the Presence and Use of a prohibited substance.
- B. Respondent did not discharge her burden of proving, by a balance of probability, that her anti-doping rule violation was not intentional. As provided for in Articles 10.2.1 and 10.2.1.1 of the World Anti-Doping Code and Articles 10.2.1 and 10.2.1.1 of the World Aquatics Doping Control Rules, Respondent's period of ineligibility is four years.
- C. The start date of Respondent's period of ineligibility is the date of her provisional suspension, July 7, 2023, as provided for in Articles 10.13 and 10.13.2.1 of the World Anti-

Doping Code and Article 10.13 and 10.13.2.1 of the World Aquatics Doping Control Rules. Respondent's period of ineligibility expires on July 7, 2027.

- D. The result obtained by Respondent in her 1500m freestyle competition held on July 1, 2023, at the 2023 USA Swimming National Championships is disqualified, together with the forfeiture of any medals, points and prizes obtained as a result of her swimming in that competition as provided for in Article 9 of the World Anti-Doping Code and Article 9 of the World Aquatics Doping Control Rules.
- E. Respondent's competitive results from the date of her anti-doping rule violation on July 1, 2023, through the date of her provisional suspension on July 7, 2023 if any, are to be disqualified, and any medals, points, and prizes earned during that period shall be forfeited, as provided for in Article 10.10 of the World Anti-Doping Code and Article 10.10 of the World Aquatics Doping Control Rules.
- F. The Parties shall bear their own attorneys' fees and costs associated with this Arbitration.
- G. The administrative fees of NE ADR and the compensation and expenses of the Arbitrator shall be borne by the USOPC.
- H. This Award is in full settlement of all claims submitted in this Arbitration. All claims not expressly granted herein are hereby denied.

Dated: May 31, 2024



Gary L. Johansen, Arbitrator