

**SPORT DISPUTE RESOLUTION CENTRE OF CANADA (SDRCC)
CENTRE DE RÈGLEMENT DES DIFFÉRENDS SPORTIFS DU CANADA (CRDSC)**

**NO: SDRCC DT 22-0333
(DOPING TRIBUNAL)**

CANADIAN CENTRE FOR ETHICS IN SPORT (CCES)

AND

MARKUS THORMEYER (ATHLETE)

(RESPONDENT)

AND

SWIMMING NATATION CANADA (SNC)

(PARTY)

Before:

The Hon. L. Yves Fortier, KC (Arbitrator)

Appearances and Attendances:

For the Arbitrator: Me Sacha Cannon, Assistant to the Arbitrator

On behalf of CCES: Mylène Lee, Representative
Me Adam Klevinas, Counsel

On behalf of SNC: Marika Kay, Representative
Suzanne Paulins, Representative

On behalf of the Athlete: Markus Thormeyer, Athlete
James Bunting, Counsel
Theodore Milosevic, Counsel
Chad Poloni, Witness

DECISION WITH REASONS

INTRODUCTION

- 1) On January 19, 2022, Markus Thormeyer (the “Athlete”) provided a urine sample during an Out-of-Competition testing in Vancouver, BC.
- 2) On February 7, 2022, the Canadian Centre for Ethics in Sport (the “CCES”) was notified by WADA’s accredited laboratory (*Centre Armand-Frappier Santé Biotechnologique*) that the Athlete sample gave rise to an adverse analytical finding (“AAF”) due to the presence of SARM LGD-4033, a prohibited substance pursuant to the 2022 WADA Prohibited List (S1.2 – Anabolic Agents – Other Anabolic Agents), at an estimated concentration of 5,3 ng/ml. On March 3, 2022, this test was confirmed in the B-Sample of the Athlete’s urine specimen.
- 3) On February 11, 2022, the Athlete was notified by Swimming Natation Canada (“SNC”) of the AAF.
- 4) On February 15, 2022, the Athlete signed and sent a Voluntary Provision Suspension Form to the CCES pursuant to Canadian Anti-Doping Program (“CADP”) Rule 7.4.4.
- 5) On March 18, 2022, the CCES sent SNC a Notice of Charge asserting an ADRV against the Athlete pursuant to CADP Rules 2.1 (Presence in Sample) and 2.2 (Use or Attempted Use) and proposing a sanction of four years in accordance with CADP Rule 10.2.
- 6) On April 7, 2022, the Athlete sent a request for a hearing to the SDRCC. He admitted that an ADRV occurred but contested the four-year sanction proposed by the CCES.
- 7) On June 17, 2022, the Athlete filed the following written pleadings:
 - i. Written Submissions of Markus Thormeyer;
 - ii. Book of Authorities;
 - iii. Record of the Athlete.
- 8) On October 3, 2022, after substantial negotiations between the Parties, a joint submission and an evidentiary record were provided to the Tribunal on behalf of the Athlete and the CCES, in which they both recommend a 12-month period of ineligibility commencing on the date of the voluntary provisional suspension. The joint submission is **annexed** to this Decision.¹
- 9) On October 5, 2022, the hearing was held in Montreal, QC, in hybrid format, by videoconference and in person.
- 10) During the hearing, the Tribunal heard the Athlete’s and the CCES’s oral submissions. The Arbitrator also put questions to the Athlete, as did his counsel and counsel for the CCES.

¹ At paragraph 10 of the joint submission, the Parties agreed that “above” was a typo which should read “below”.

BACKGROUND

- 11) The Athlete is a 24-year-old Olympic-level Canadian swimmer competing mainly in the 100 and 200 metre freestyle and backstroke events, including relay races. He holds multiple Canadian national records and represented Canada at both the 2016 and 2020 Summer Olympics, competing individually and as a part of Canadian relay teams. The Athlete has also won multiple Canadian university swimming championships and holds multiple Canadian university records.
- 12) The Athlete is also a leader in the LGBTQI2S community and a successful academic. He publicly came out as a gay athlete in 2016. He has proactively shared his story and taken leadership roles in the LGBTQI2S community since then. The Athlete is currently completing is PhD studies in the field of zoology.

SARM LGD-4033

- 13) The Athlete submits that his AAF for SARM LGD-4033 was caused by the fact that he drank water from a bottle in the home that he was sharing at the time of a COVID-19 lockdown with his partner, Chad Poloni, on January 17 or 18, 2022.
- 14) The Athlete submits that he had no knowledge of his partner's use of SARMS at the time and did not know that he was using the same water bottle to take the prohibited substance. He also submits that he would have taken precautionary steps to prevent accidental contamination if he had known that his partner was taking SARMS in January 2022.
- 15) SARM LGD-4033 improves muscle strength and physical performance. It must be taken in liquid format, by mixing drops of the prohibited substance with water.

CADP PROVISIONS

- 16) The CCES does not agree that the Athlete bears No Fault or Negligence for the presence of the prohibited substance in his body but agrees "that Markus meets the requirement for No Significant Fault and that his degree of Fault is at the lighter end of the continuum."²
- 17) The CCES does not submit that the Athlete's ADRV was intentional. It accepts that SARMS entered the Athlete's body because he shared a water bottle with his partner. He did not know that Chad mixed his SARMS in this water bottle.
- 18) In order to establish No Significant Fault or Negligence, the Athlete and the CCES recall that the Athlete must establish, on a balance of probability: i) how the SARMS entered his system; and ii) that he bears no significant fault for the ADRV.

² Joint Submissions of Markus Thormeyer and CCES, at para 4.

19) The CADP defines No Significant Fault or Negligence as follows:

No Significant Fault or Negligence: The Athlete or other Person's establishing that any Fault or Negligence, when viewed in the totality of the circumstances and taking into account the criteria for No Fault or Negligence, was not significant in relationship to the anti-doping rule violation. Except in the case of a Protected Person or Recreational Athlete, for any violation of Rule 2.1, the Athlete must also establish how the Prohibited Substance entered the Athlete's system.

20) The CADP defines Fault as follows:

Fault: Fault is any breach of duty or any lack of care appropriate to a particular situation. Factors to be taken into consideration in assessing an Athlete's or other Person's degree of Fault include, for example, the Athlete's or other Person's experience, whether the Athlete or other Person is a Protected Person, special considerations such as impairment, the degree of risk that should have been perceived by the Athlete and the level of care and investigation exercised by the Athlete in relation to what should have been the perceived level of risk. In assessing the Athlete's or other Person's degree of Fault, the circumstances considered must be specific and relevant to explain the Athlete's or other Person's departure from the expected standard of behavior. Thus, for example, the fact that an Athlete would lose the opportunity to earn large sums of money during a period of Ineligibility, or the fact that the Athlete only has a short time left in a career, or the timing of the sporting calendar, would not be relevant factors to be considered in reducing the period of Ineligibility under Rule 10.6.1 or 10.6.2.

21) In summary, the maximum period of ineligibility for an unintentional ADRV is 24 months and the minimum period of ineligibility for a non-specified substance such as SARMS where there is No Significant Fault or Negligence is 12 months³ pursuant to CADP Rules 10.2.2 and 10.6.2 which read as follows:

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

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

10.2.2 If Rule 10.2.1 does not apply, subject to Rule 10.2.4.1, the period of Ineligibility shall be two (2) years.

³ Joint Submissions of Markus Thormeyer and CCES, at para 39.

[...]

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

10.6.2 Application of No Significant Fault or Negligence beyond the Application of Rule 10.6.1

If an Athlete or other Person establishes in an individual case where Rule 10.6.1 is not applicable, that he or she bears No Significant Fault or Negligence, then, subject to further reduction or elimination as provided in Rule 10.7, the otherwise applicable period of Ineligibility may be reduced based on the Athlete or other Person's degree of Fault, but the reduced period of Ineligibility may not be less than one-half of the period of Ineligibility otherwise applicable.[...]

ANALYSIS

- 22) The Tribunal has jurisdiction to hear and determine this doping case pursuant to CADP Rule 8. The jurisdiction of the Tribunal has not been challenged by the Parties.
- 23) In addition to the oral submissions of the CCES and the Athlete as well as the testimony of the Athlete at the hearing on 5 October 2022, the Tribunal has carefully reviewed their joint submission in relation to the proposed sanction. The joint submission includes the statement of facts of the Athlete as well as the law which “supports a 12-month period of ineligibility” which both Parties propose.
- 24) The Tribunal welcomes a joint submission of the Parties which includes a proposed sanction but reminds the Parties that it is for the Tribunal to make the final decision with respect to the appropriate sanction in the light of the circumstances of the case.
- 25) Having considered the joint written and oral submissions of CCES and the Athlete as well as the totality of the evidence, the Tribunal, informed by all the circumstances of the case, finds that the Athlete bears No Significant Fault or Negligence for the ADRV.
- 26) Firstly, the Tribunal finds on a balance of probability that the SARMS in the Athlete's urine sample came from the water which his partner had mixed with LGD-4033 in the water bottle which was beside their bed on January 17 and/or 18, 2022.⁴
- 27) Secondly, the Tribunal also finds that the Athlete bears No Significant Fault for the ADRV. The Athlete expected his partner to notify him if he was taking SARMS again.

⁴ Joint Submissions of Markus Thormeyer and CCES, at para 30.

Unknowingly, the Athlete drank from his partner's water bottle that was used to mix with SARMS.⁵

28) Accordingly, the Tribunal has reached the conclusion that a 12-month period of ineligibility commencing on 15 February 2022, the date of the Athlete's provisional suspension, would be fair, just, reasonable, and appropriate, pursuant to CADP Rules 10.2.2 and 10.6.2.

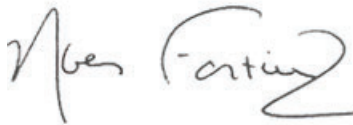
APPEAL

29) This Decision may be appealed exclusively in accordance with the procedures set out in CADP Rule 13.

DECISION

30) Markus Thormeyer is suspended for a period of 12 months from 15 February 2022.

Signed in Montreal on November 9, 2022

A handwritten signature in black ink, appearing to read "Yves Fortier". The signature is written in a cursive, flowing style.

The Honourable L. Yves Fortier, KC,
Sole Arbitrator

⁵ Joint Submissions of Markus Thormeyer and CCES, at para 37.

CANADIAN CENTRE FOR ETHICS IN SPORT (CCES)

AND

SWIMMING NATATION CANADA (SNC)

AND

MARKUS THORMEYER (Athlete)

JOINT SUBMISSIONS OF MARKUS THORMEYER AND CCES

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A. OVERVIEW

1. These submissions are presented jointly by Markus Thormeyer (“**Markus**”) and the CCES.

2. Markus Thormeyer is a highly accomplished Canadian Olympian and a leader outside the pool, where he is active in the LGBTQI2S community and pursuing a PhD degree. Markus has never previously had an adverse analytical finding (“**AAF**”) or anti-doping rule violation (“**ADRV**”) asserted against him.

3. Markus’ AAF for SARM LGD-4033 (“**SARMs**”) at an estimated concentration of 5,3 ng/ml resulted from Markus drinking tap water from a water bottle in the home that he was sharing at the time of a COVID lockdown with his trusted partner, Chad Poloni. Markus had no reason to believe that the water bottle could be contaminated with a prohibited substance.

4. Markus acknowledges that SARMs were in his body and, as a result, that an ADRV has occurred. Markus’ primary position in this proceeding has been that he bears No Fault or Negligence for the SARMs that was present in his body. The CCES does not accept that Markus bears No Fault or Negligence, but agrees that Markus meets the requirement for No Significant Fault and that his degree of Fault is at the lighter end of the continuum.

5. Based on the underlying facts as they are currently known and the applicable law, but subject to the CCES’ right to revise its position after hearing Markus’ responses to any questions from Arbitrator Fortier and any follow-up questions by the CCES resulting from the same, Markus and the CCES agree that a one-year period of ineligibility is a fair and reasonable outcome in the present matter. Subject to the aforementioned, Markus

and the CCES seek a proposed Award imposing a one-year period of ineligibility commencing on February 15, 2022 the date of Markus' provisional suspension (the "**Proposed Award**").

6. The position of Markus and the CCES is consistent with CAS jurisprudence holding that "the endeavours to defeat doping should not lead to unrealistic and impractical expectations the athletes have to come up with".¹ Holding Markus responsible to any significant degree of fault for the ADRV in this case would go too far and, contrary to CAS jurisprudence, impose unrealistic, impractical, and unfair obligations on him as an athlete.

7. The arguments and positions of the CCES and Markus in these Joint Submissions are made without prejudice to any position or submissions that either party may make should the Proposed Award be granted, including an appeal by the World Anti-Doping Agency ("**WADA**").

8. The evidentiary record supporting the Proposed Award is provided along with these Joint Submissions and includes:

- (a) The Witness Statement of Markus Thormeyer dated June 14, 2022;
- (b) The Witness Statement of Chad Poloni, Mr. Thormeyer's boyfriend, dated June 14, 2022;
- (c) The Witness Statement of Benjamin Keast, Mr. Thormeyer's former coach, dated June 17, 2022; and,

¹ *Fédération Internationale de Football Association (FIFA) & World Antidoping Agency (WADA)*, [CAS 2005/C/976](#) at para 73.

- (d) The Expert Opinion of Dr. Martial Saugy, an independent biochemistry and anti-doping scientific expert retained by the CCES, dated August 5, 2022.

9. A summary of the key facts in this case and a statement of the law as agreed to by the Markus and the CCES for the purposes of this hearing is provided below.

B. ATHLETE'S STATEMENT OF FACTS

10. For the purposes of this hearing to approve the Proposed Award, and without prejudice to any future position that the CCES may take, including after hearing Markus' responses to any questions from Arbitrator Fortier or any follow-up questions by the CCES resulting from the same, the CCES generally accepts the facts described above as true.

I. Markus' Background, Stance on Doping, & Leadership Role

11. Markus is a Vancouver-based 24-year-old Olympic-level Canadian swimmer competing mainly in the 100 and 200 metre freestyle and backstroke events, including in relay races.

12. Markus has had a successful swimming career at the intercollegiate, national, and international levels. He holds multiple Canadian national records, including in the 100 metre and 200 metre backstroke. He represented Canada at both the 2016 and 2020 Summer Olympics, competing individually and as a part of Canadian relay teams. Markus has also won multiple Canadian university swimming championships and holds multiple Canadian university records. In recognition of his success, Markus was named Canada's

Male Swimmer of the Year in 2018 and 2019 and, in 2019, won the Bus Phillips Memorial Trophy as the University of British Columbia's ("**UBC**") top male student athlete.²

13. Markus has never previously had an AAF or ADRV asserted against him despite being subject to testing for years. Over that time, Markus has rigorously monitored what he puts in his body and has only used a limited range of supplements. For example, in preparation for the 2020 Tokyo Summer Olympics, the only supplement that Markus took was batch-tested protein powder, which he stopped taking after the Olympics were over.³

14. Markus' character and integrity is clear from the comments of his former Coach, Ben Keast, who worked with Markus for many years, including through to the fall of 2021.

Coach Keast states:

I know, and have observed, that Markus is also a clean swimmer who takes his anti-doping obligations seriously. I do not believe Markus would ever intentionally use a banned substance to enhance performance. **There is no doubt in my mind that any exposure that Markus had with a prohibited substance was unintentional...** I could not, in good conscience, stay silent when someone of Markus character and integrity is on trial. Based on my personal knowledge of who Markus is as a person and the respect I have for him, I do not believe that Markus would ever intentionally use a banned substance to enhance his performance. There is, in fact, no doubt in my mind that any exposure that Markus had with a prohibited substance was unintentional.

Markus is a dedicated athlete and teammate. He is also an impactful and important role model and leader within Canadian sport and the Canadian swimming community more specifically. **In all of my experiences with Markus he has demonstrated that his a thoughtful and trustworthy teammate, role model and champion of the sport of swimming both in Canada and internationally.**⁴ [emphasis added]

² Thormeyer Statement at paras 8-12.

³ Thormeyer Statement at para 50.

⁴ Keast Statement at paras 5-6.

15. Outside of the pool, Markus is a leader in the LGBTQI2S community and successful academically. He publicly came out as a gay athlete in 2016 and has proactively shared his story and taken on leadership roles in the in the LGBTQI2S community since that time⁵. In September 2021, only two months after competing in the Summer Olympics, Markus started his PhD studies at UBC in the field of zoology.⁶

II. Markus' Relationship with Chad and their Discussion about Anti-Doping

16. Markus has determined that SARMs entered his body as a result of him sharing a water bottle in the evening with his partner Chad. In January 2022, Chad was, without Markus' knowledge, using SARMs and Markus was inadvertently exposed to SARMs when he drank from a water bottle that Chad used to mix his SARMs with water.

17. Markus and Chad started dating December 2020. A few months into their relationship in early 2021, Markus was subject to out-of-competition testing. Around this time Chad and Markus discussed the fact that Markus was subject to both in and out of competition testing. During the course of this discussion, Chad told Markus that in the past he had taken SARMs recreationally as part of his fitness regime. Markus knew SARMs were a prohibited substance and told Chad this and that he was not comfortable with Chad using SARMs. Chad explained that he was not taking them anymore and that he had no plans to take them. Given that Chad had no plans to take SARMs again, Markus did not feel the need to take any steps regarding his anti-doping obligations but understood that Chad would tell Markus if he decided to take SARMs again.⁷

⁵ Thormeyer Statement at paras 13-19.

⁶ Thormeyer Statement at paras 13-19.

⁷ Thormeyer Statement at paras 30-33; Poloni Statement at paras 8-11.

III. Markus Experiences Burnout and Withdraws from Swimming

18. Over the subsequent months, Markus prepared for and competed in the Summer Olympics held in the Summer of 2021. After the Olympics, Markus felt incredibly burnt out both physically and mentally. Because of this overwhelming stress and fatigue, Markus decided to withdraw from competitive swimming for an indefinite period of time. In or around September 2021, he told his coaches that he wouldn't be competing through at least the Summer of 2022.⁸

IV. Chad Tells Markus About SARMs

19. In November 2021, Chad told Markus that he had ordered SARMs again and intended to use it as part of his workout regime. At this time, Markus was experiencing a period of extreme stress, poor mental health, and physical fatigue associated with his decision to step away from competitive swimming and the start of his PhD studies. As a result of his fragile mental and emotional state, Markus was initially unsure how to address Chad's decision to take SARMs again, particularly because Chad was a significant source of support for Markus at the time.⁹

20. Roughly one week after Chad told Markus that he had ordered SARMs again, Chad told Markus that he had decided to stop taking the SARMs for personal reasons. Markus was relieved that Chad had made this decision, and fully trusted Chad to tell him if Chad made the decision to use SARMs again in the future.¹⁰

⁸ Thormeyer Statement at paras 20-25; Poloni Statement at para 13; Keast Statement at para 4.

⁹ Thormeyer Statement at para 34; Poloni Statement at paras 14-17.

¹⁰ Thormeyer Statement at para 35; Poloni Statement at paras 14-17.

21. Markus does not believe he stayed over at Chad's house in this time period in November 2021. Markus' evidence is that if Chad had not decided to stop using SARMS, he would have taken steps necessary to prevent accidental contact with SARMS due to Chad's use.¹¹ This would have included, for example, speaking to Chad about when and how he was using SARMS.

22. Chad and Markus went on a trip to Hawaii in December 2021 over New Year's. They were scheduled to return to Vancouver on January 5, 2022, but Chad had an inconclusive test for COVID-19, which forced him to remain in the USA. Markus travelled back to Vancouver and decided to stay at Chad's house in case Markus also had COVID-19. Markus lives with a roommate who he did not want to unknowingly give COVID-19 to. On January 8 or 9, Markus also tested positive for COVID-19 and decided to quarantine at Chad's house.¹²

23. Chad returned to Vancouver on January 17, 2022. Markus was still staying at Chad's house when Chad returned. Without telling Markus, Chad started taking SARMS immediately upon his return to Vancouver, while Markus was staying with him to recover from COVID-19. Chad took SARMS in liquid format, by mixing drops of the SARM with water in a water bottle that he would drink from at home and at the gym. He would typically mix the SARMS with water in a different room from where Markus was sitting. The SARMS are a clear liquid that would not discolour the water or make the water taste noticeably

¹¹ Thormeyer Statement at para 36.

¹² Thormeyer Statement at paras 37-39; Poloni Witness Statement at para 18.

different. Chad took the SARMS in that way on January 17 and 18, 2022, and Markus slept at Chad's house on both of these nights (January 17 and 18).¹³

24. On January 19, 2022, Markus was subject to out-of-competition testing in Vancouver. His urine sample was positive for LGD-4033 at an estimated concentration of 5,3 ng/ml. This test was later confirmed in the B-Sample of his urine specimen. On February 11, 2022, Markus was notified by Swimming Canada of the AAF.

25. The AAF resulted from Markus drinking from Chad's water bottle on January 17 or 18, 2022, likely when Markus used the water bottle in the evening when it was beside the bed he shared with Chad. Markus did not know that Chad was using SARMS and certainly did not know that Chad was using the same water bottle to take SARMS. Markus' evidence is that he would have taken precautionary steps to prevent accidental contamination if he knew Chad was taking SARMS in January 2022.¹⁴

26. In the expert opinion of Dr. Saugy, who was retained by the CCES, the concentration of 5.3 ng/ml of LGD 4033 metabolite found in Markus' urine may be compatible with the scenario presented by Markus and Chad and, at the very least, does not exclude the scenario presented by Markus.

V. Provisional Suspension, Admission of ADRV and Dispute over Sanction

27. On February 15, 2022, Markus signed and sent a Voluntary Provision Suspension Form to the Canadian Centre for Ethics in Sport ("**CCES**") pursuant to Canadian Anti-Doping Program ("**CADP**") Rule 7.4.4. On March 18, 2022, the CCES sent Swimming

¹³ Thormeyer Statement at paras 37-39, 42-45; Poloni Witness Statement at paras 18-21.

¹⁴ Thormeyer Statement at paras 42-47.

Canada a Notice of Charge asserting an ADRV against Markus and proposing a sanction of four years. On April 7, 2022, Markus sent his request for hearing form to the SDRCC, in which he admitted that an ADRV occurred but contested the four-year sanction recommended by the CCES.¹⁵

C. THE LAW SUPPORTS A ONE YEAR PERIOD OF INELIGIBILITY

28. Without prejudice to any future position that Markus or the CCES may take, Markus and the CCES jointly submit that Markus bears No Significant Fault or Negligence for the ADRV and that a one-year period of eligibility is appropriate.

29. In order to demonstrate No Significant Fault or Negligence, Markus must establish on a balance of probability: i) how the SARMS entered his system; and ii) that he bears no significant fault for the ADRV.¹⁶

30. On the first criteria, the following facts establish on a balance of probability that the SARMS in Markus' body resulted from drinking water mixed with LGD-4033 from Chad's water bottle on January 17 and/or 18, 2022:

- (a) Chad consumed SARMS on January 17 and 18, 2022 by mixing water with his liquid SARMS product in his water bottle;
- (b) Markus and Chad both explain that Chad's water bottle is left at the bedside in the evening;

¹⁵ World Anti-Doping Agency, [Prohibited Substance List 2022](#), p. 6.

¹⁶ *CCES v Janz Stein*, [SDRCC DT 19-0314](#) ("**Stein**") at para 71.

- (c) Markus recalls drinking from that water bottle during the evening on January 17 or 18 when he was staying at Chad's house;
- (d) Chad's evidence is that he has seen Markus drink from that water bottle in the past when Markus has stayed at his house during the evening; and
- (e) There was no way for Markus to discern the presence of SARMS in the water as it did not discolour the water or noticeably alter the taste of the water.

31. An American Arbitration Association ("**AAA**") Panel in *USADA v. Dayton Fix* ("**Fix**")¹⁷ approved a settlement agreement between the parties on a very similar set of facts, finding that the facts established that the prohibited substance entered the athlete's body when the athlete drank from his father's water bottle. In that case, the athlete tested positive for an anabolic agent called ostarine. The athlete's explanation for how the ostarine entered his system was that, without the athlete's knowledge, his father had begun taking ostarine, which his father consumed sublingually or by mixing with water and a health and wellness supplement. His father would sometimes mix the ostarine with the water and supplement and store it in water bottles in the refrigerator. The athlete went to visit his parents and recalled taking a drink of water from a water bottle in the refrigerator at some point during his visit. The Arbitration Panel found that this series of facts supported a finding that the athlete had demonstrated how the ostarine entered his system.¹⁸

¹⁷ *USADA v Dayton Fix*, [AAA No. 01-20-0003-7972](#) ("**Fix**").

¹⁸ *Fix*, at paras 25-26.

32. Similar to the situation in *Fix*, it is clear that Chad used SARMs, that Chad took it on January 17 and 18, that Chad mixed his SARMs with water in a water bottle that he kept around the house, that Markus was at Chad's house on January 17 and 18, and that Markus drank from Chad's water bottle on January 17 or 18. These facts demonstrate how the SARMs entered Markus' body.

33. Markus' explanation for how the SARMs entered his system and the surrounding facts are also supported by the CAS Panel's analysis in *Errani v ITF* ("**Errani**"),¹⁹ where a CAS Panel found that the athlete had established on a balance of probabilities how the prohibited substance entered her system. There, the athlete was staying with her parents prior to her positive test. The prohibited substance was present in the cancer medication taken by her mother, which her mother stored close to where food was prepared. The athlete's explanation was that one of her mother's pills must have fallen into and dissolved in the food that her mother was preparing, which the athlete then ate.²⁰ Accordingly, Markus' explanation and evidence is sufficient to determine on a balance of probabilities, how the SARM LGD-4033 entered his body.

34. On the second criteria, "**No Significant Fault or Negligence**" is defined as,

No Significant Fault or Negligence: The Athlete or other Person's establishing that any Fault or Negligence, when viewed in the totality of the circumstances and taking into account the criteria for No Fault or Negligence, was not significant in relationship to the anti-doping rule violation. Except in the case of a Protected Person or Recreational Athlete, for any violation of Rule 2.1, the Athlete must also establish how the Prohibited Substance entered the Athlete's system.²¹

¹⁹ *Sara Errani v. International Tennis Federation (ITF)*, [CAS 2017/A/5301](#) ("**Errani**").

²⁰ *Errani*, at para 181-186.

²¹ [CADP](#), Appendix 1.

35. "Fault" is defined in the CADP as:

Fault: Fault is any breach of duty or any lack of care appropriate to a particular situation. Factors to be taken into consideration in assessing an Athlete's or other Person's degree of Fault include, for example, the Athlete's or other Person's experience, whether the Athlete or other Person is a Protected Person, special considerations such as impairment, the degree of risk that should have been perceived by the Athlete and the level of care and investigation exercised by the Athlete in relation to what should have been the perceived level of risk. In assessing the Athlete's or other Person's degree of Fault, the circumstances considered must be specific and relevant to explain the Athlete's or other Person's departure from the expected standard of behavior. Thus, for example, the fact that an Athlete would lose the opportunity to earn large sums of money during a period of Ineligibility, or the fact that the Athlete only has a short time left in a career, or the timing of the sporting calendar, would not be relevant factors to be considered in reducing the period of Ineligibility under Rule 10.6.1 or 10.6.2.²²

36. When viewed in the totality of the circumstances, Markus bears no significant fault or negligence for the ADRV.

37. While Markus knew that Chad had taken SARMs in the past, Markus and Chad had discussed Chad's SARMs use and Markus expected Chad to tell him if Chad was taking SARMs. Chad did not do that and took SARMs without Markus knowing, using a water bottle that Chad stored around the house. Markus drank from that water bottle without any knowledge that it was used by Chad to mix and take SARMs. The only fault or negligence attributable to Markus in this situation is Markus dating and using the water bottle of a man who had used SARMs in the past. It would be unreasonable to expect Markus to stop dating Chad, or for Markus to attempt to separate every drinking and eating utensil that he and Chad could possibly share, when Chad had told Markus that he had stopped taking SARMs and that he would let him know if he was going to use SARMs again. In this respect, it is important to note that Chad had told Markus he was

²² [CADP](#), Appendix 1.

going to start using SARMS in November, but shortly after that told Markus he was not taking it. Contextually, the fact that Chad made good on his earlier promise to let Markus know if he was going to use SARMS resulted in Markus being comfortable that Chad would not inadvertently expose him to SARMS without fair warning, which would afford Markus an opportunity to take steps to protect against any possible contamination.

38. A finding of No Significant Fault or Negligence in this case is consistent with jurisprudence from sports arbitral tribunals around the world. For example:

- (a) In *CCES v Janz Stein* (“**Stein**”),²³ Arbitrator Soublière found that there was No Significant Fault or Negligence on the part of an athlete who consumed his girlfriend’s medication, which was a prohibited substance, thinking it was his own;
- (b) In *Fix*, the AAA Panel found that there was No Significant Fault or Negligence on the part of an athlete who consumed a drink at his parent’s house containing ostranine, because he did not know that his father was taking ostranine and that his father used those water bottles to store ostranine;²⁴
- (c) In *WADA v Timothy Marr* (“**Marr**”),²⁵ a CAS Panel found that there was No Significant Fault or Negligence on the part of an athlete who drank his

²³ [Stein](#), at para 74.

²⁴ [Fix](#), at paras 28-43.

²⁵ *World Anti-Doping Agency (WADA) v. World Triathlon Corporation (WTC) & Timothy Marr*, [CAS 2011/A/2398](#).

friend's soft drink that contained Adderall, after mistaking the soft drink for his own; and,

- (d) In *Errani*, the CAS Panel found that the athlete bore No Significant Fault or Negligence in a situation where, while staying with her parents, the athlete consumed food that had been contaminated by her mother's medication, which contained a prohibited substance and was stored in the kitchen.²⁶

39. In regard to Markus' degree of Fault and the appropriate duration of the resulting period of ineligibility, the maximum period of ineligibility for an unintentional ADRV is 24 months and the minimum period of ineligibility for a non-specified substance such as SARMs in a situation of no significant fault or negligence is 12 months.²⁷

40. The principles for assessing Markus' level of fault and the appropriate length of sanction are outlined by the CAS Panel in *ITF v Cilic* ("**Cilic**"),²⁸ as applied recently by AAA and SDRCC arbitrators in *Fix* and *Stein*.

41. In *Cilic*, the CAS Panel held that, in determining the level of fault or negligence for an ADRV, an adjudicator should consider both objective and subjective elements of the circumstances under which a prohibited substance unintentionally entered an athlete' system. The Panel described the difference between these objective and subjective elements as follows,

The objective element describes what standard of care could have been expected from a reasonable person in the athlete's situation. The subjective element

²⁶ *Errani*, at para 227.

²⁷ *CADP*, Rules 10.2.2, 10.6.2..

²⁸ *Marin Cilic v. International Tennis Federation*, [CAS 2013/A/3327](#) ("**Cilic**").

describes what could have been expected from that particular athlete, in light of his personal capacities.²⁹

42. *Cilic* holds that the objective aspect of this assessment should generally determine which of the three categories of fault, outlined above, the athlete's conduct fits into, with the subjective factors determining whether the athlete's conduct fits at the top or bottom end of each category. However, in extreme circumstances, the subjective factors may be strong enough to shift the level of fault between the three categories.³⁰

43. The Panel in *Cilic* was also clear that "in theory, almost all anti-doping rule violations relating to the taking of a product containing a prohibited substance could be prevented."³¹ In this sense, the benefit of hindsight should not obscure the assessment of what was objectively and subjectively reasonable at the time of the ADRV.

44. Markus believed he was drinking water and Markus submits that the *Cilic* objective factors militate in favour of a finding of a light degree of fault. This position is consistent with the decision in *Fix* where the Panel determined that, based on the objective factors, the athlete bore the lowest degree of fault because he reasonably believed he was drinking vitamin water.³²

45. More generally, Markus adhered to the standard of care expected from a reasonable person in his situation. While he knew that Chad took SARMs in the past, his understanding was that Chad would tell him if he was ever taking SARMs again. Chad

²⁹ *Cilic*, at para 71.

³⁰ *Cilic*, at paras 71-74.

³¹ *Cilic*, at para 74.

³² *Fix*, at para 36.

did this in November 2021, but did not do so in January 2022, leaving Markus with the reasonable belief that Chad was not taking SARMS in January 2022.

46. In the circumstances of this case, the only other steps Markus could have taken based on his knowledge and understanding in January 2022 would be to permanently and consistently avoid sharing any food, drink, and food- and drink-related household items with Chad because he knew that Chad had, in the past, taken a prohibited substance even though he understood that Chad was not taking SARMS at the time. This is an objectively unreasonable standard to hold Markus to and holding an athlete to such a standard would be unnecessarily restrictive and impose significant unnecessary repercussions on an athlete's lifestyle and interpersonal relationships with their friends and families.

47. An athlete cannot be expected to know every medication or substance taken by people who are their close or intimate relationships, and it is objectively fair for an athlete to rely on the statements of another person regarding what substances that other person is taking. As per the CAS Panel in *Santos*, "There are, and must be limits to which the anti-doping rules can extend in terms of imposing obligations on athletes... It is an unreasonable and impractical expectation to obligate an athlete to endeavor to survey the ailments of family members and the use by family members of various substances when visiting them in their home for a short stay."³³ For the reasons above, Markus bears a light degree of fault under the *Cilic* objective factors.

³³ *Santos*, at para 71.

48. The *Cilic* subjective factors also militate in favour of a light degree of fault. The subjective factors in *Cilic* are:

- (a) The athlete has taken the product over a long period of time without incident;
- (b) The athlete has previously checked the product's ingredient;
- (c) The athlete is suffering from a high degree of stress; and,
- (d) The athlete's level of awareness has been reduced by a careless but understandable mistake.³⁴

49. Regarding the first two of these factors, Markus believed he was drinking regular, unaltered water.

50. Markus was also under a significant amount of stress, as he had just recovered from COVID-19, was not able to live at home and had not lived at home for almost a month due to COVID-19 quarantine and had just started the second term of his PhD program.

51. These factors, along with the fact that Markus was not competing during the period leading up to or at the time of the AAF, all favour a finding that Markus' sanction should lie at the lowest end of the light fault category and that the sanction imposed on Markus should accordingly be a 12-month period of ineligibility. This ruling would be in line with the *Fix* case, where the athlete was sanctioned with a 12-month period of ineligibility.

D. JURISDICTION OF THE ARBITRATOR AND OTHER CONSIDERATIONS

³⁴ [Cilic](#), at para 76(d).

52. While a consent award may not be strictly contemplated under the applicable Rules, the Arbitrator clearly has jurisdiction to make a final and binding Award in this matter pursuant to Rule 8 of the CADP and Articles 6.11 and 6.12 of the SDRCC Code.³⁵

53. There is also precedent for an Arbitrator in anti-doping proceedings to make an Award based on joint submissions, as is the case here. For example, in *Drug Free Sport New Zealand v. Butson*,³⁶ a Panel of the Sports Tribunal of New Zealand made an order that the athlete be subject to a nine-month period of ineligibility in accordance with a joint proposal by the athlete and Drug Free Sport New Zealand, New Zealand's anti-doping agency. Before the CAS parties are also able to submit a joint resolution for review and approval before a sole CAS arbitrator.

54. There are also compelling reasons for the Athlete and the CCES to proceed in this manner. The parties have considered carefully the evidence and applicable law and concluded that the Proposed Award is fair and reasonable in the circumstances. There is little point in proceeding to a fully contested hearing in these circumstances and by proceeding on a joint basis the parties save significantly on the expenditure of time and resources. This includes not only the legal fees of the Athlete, but also the time of the CCES, the SDRCC and the learned Arbitrator. This is particularly so given that the SDRCC largely operates in a no cost regime meaning that in cases where an appeal is filed an Athlete incurs the full costs of the proceeding twice and is only able to seek cost recovery before the CAS on appeal.

³⁵ [CADP](#), Rule 8; [SDRCC Code](#), Articles 6.11 and 6.12.

³⁶ *Drug Free Sport New Zealand v. Butson*, [ST 18/16](#) (2017).

55. WADA's blanket (no reasons) refusal to endorse the resolution in no way fetters or undermines the Arbitrator's jurisdiction. To the contrary, following the issuance of an award by the Arbitrator, WADA will have a right of appeal should it be of the view that a one-year period of ineligibility is not appropriate.

56. Markus will be available at the hearing to answer any questions of the Arbitrator.

E. AWARD REQUESTED

57. For all of the reasons above, Markus and the CCES request an Award:

- (a) finding that Markus bears no significant fault or negligence for the ADRV and imposing a 12 month period of ineligibility commencing on the date of the voluntary provisional suspension.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 3rd day of October 2022.

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