BEFORE THE NATIONAL ANTI-DOPING PANEL

BETWEEN:

MARK DRY **Appellant**

- and –

UK ANTI-DOPING **Respondent**

- ANTI-DOPING ORGANISATION

APPELLANT'S RESPONSE TO RESPONDENT'S SUBMISSIONS DATED 30th JUNE

By way of Clarification

Introduction

1. The Appellant makes the following submissions by way of *"clarification"* following the Respondent's *Answer* dated 30th June 2021.
2. In doing so, the Appellant would respectfully request the Panel to consider the arbitrary and prejudicial content of the Respondent's *Answer* to the Appeal.
3. The *Answer* is misconceived for a number of reasons, not least of which is that the Respondent fully ignores the primary basis for the present Appeal, which is a request for a reduction of the period of ineligibility. The Respondent instead choosing to focus on an attempt to retry the facts (see paragraphs 2-12 and 26.5) and to by-pass the prohibition for a *de novo* hearing.
4. The Appellant respectfully submits that the Answer is misleading because it produces a narrative of repetitive facts and attempts who have as a clear aim to create a framework of a character assassination. In essence, most of the Respondent's submissions are excelling in the art of illusion. When the smoke clears, however, the true nature and content of such submissions become clear for what they are: misleading, untrue, arbitrary, and capricious.
5. The Appellant is, therefore, forced into further submissions so the true state of events can be clarified.
6. Save for where the Appellant expressly admits or denies any allegation(s) set out in any previous or present submissions, such allegation is neither admitted, nor denied and the Respondent is required to prove the same.

7. For ease of reference, and without any admission to any allegation made therein, unless otherwise so applied, the Appellant adopts, unless otherwise stated, the headings and abbreviations applied in the *Answer* by the Respondent.
8. References to paragraph numbers are, unless otherwise stated, references to paragraph numbers in the *Answer*.

Clarification

9. The issues in the present proceedings are simple. They focus on a test of whether:
   a) The period of ineligibility of 28 months imposed against the Appellant is proportionate to the offence committed.
   b) The Panel has a discretion to backdate the period of ineligibility to the date of the sample collection.

   On the issue of proportionality

10. The Respondent, respectfully, misunderstood the ruling in ***Puerta v ITF CAS 2006/A/1025*** (see paragraph 22.1 of the *Answer*). The Appellant submits that *Puerta* does not stand for the proposition that a proportionality analysis is only appropriate in the case of a gap or a lacuna; rather the gap/lacuna scenario is offered as an example of a scenario where a sanction under the *World Anti-Doping Code* may be disproportionate to a particular set of facts. Hence why the CAS Panel in *Puerta* recognised that the principle of proportionality may mandate that an arbitral tribunal may be required, under the particular facts of an individual case, to reduce the sanction for an anti-doping rule violation below what is otherwise provided for under the World Anti-Doping Code.[1] It is regrettable that the Respondent is trying to create new law here and/or attempt to persuade the Tribunal that it has no discretion to consider and apply the principle of proportionality.
11. As this Tribunal is well aware, the principle of proportionality also pervades Swiss law (as well as English law) and subsequently the general principles of law. In the premises, it is

[1] ***Puerta v ITF*** at paragraph 11.7.17: *"But the problem with any 'one size fits all' solution is that there are inevitably going to be instances in which the one size does no fit all. The Panel makes no apology for repeating its view that the WADC works admirably in all but the very rare case. It is, however, in the very rare case that the imposition of the WADC sanction must be just and proportionate.* ***If it is not, the sanction may be challenged****. The Panel has concluded, therefor, that in those very rare cases in which Articles 10.5.1 and 10.5.2 of the WADC do not provide a just and proportionate sanction,* ***i.e.****,* ***when there is a gap or lacuna in the WADC****, that gap or lacuna must be filled by the Panel."* Emphasis added.

respectfully submitted that any sanction must *"comply with the principle of proportionality, in the sense that there must a reasonable balance between the kind of the misconduct and the sanction."*[2] While the *WADC* includes mechanisms by which sanctions can be reduced or eliminated, CAS has made it clear that the introduction of these mechanisms does not remove the obligation of the disciplinary panels to measure the sanctions applied in any particular case against the principle of proportionality.[3]

12. In the same light, proportionality has been applied to reduce sanctions that would otherwise be mandatory under the *WADC* in several instances (each of these cases were submitted in previously raised arguments).[4]
13. Additionally, the current version of the *WADC* expressly instructs tribunals to ensure that any sanction imposed complies with the principle of proportionality. [5]
14. The Respondent is omitting the fact that the life span of an athlete's career is extremely short. The gap between 28 months and 24 months, is rather great and it can make a considerable difference in an athlete's life, either in training terms or personal terms.

On the issue of *res judicata*

15. The Appellant respectfully submits that the Respondent's *'cherry-picking'* approach of its arguments does not assist the Tribunal. The lack of force and substance, it is submitted with respect, in the Respondent's arguments, is leading the Respondent into a repetitive and erroneous field. For example, the content of paragraph 24.1 in the Answer could not be further from the truth. The Appellant is not trying to *"re-open and re-argue"* the Appellate Tribunal's ruling (on the contrary, this is exactly what the Respondent is doing throughout its

[2] See ***FIFA & WADA CAS Advisory Opinion, CAS 2005/C/976 & 986.***

[3] See ***Squizzato v FINA CAS 2005/A/830*** at paragraph 10.24: *"The Panel holds that the mere adoption of the WADA Code […] by a respective Federation does not force the conclusion that there is no other possibility for greater or less reduction a sanction than allowed by DC 10.5. The mere fact that regulations of a sport federation derive from the World Anti-Doping Code does not change the nature of these rules. They are still – like before – regulations of an association which cannot (directly or indirectly) replace fundamental and general legal principles like the doctrine of proportionality a priori for every thinkable case."*

[4] See ***FINA v Mellouli TAS 2007/A/1252; Walilko v Federation Internationale de l' Automobile CAS 2010/A/2268; Puerta v ITF CAS 2006/A/1025; Klein v ASADA CAS A4/2016; S v FINA 2005/A/830; Warren v USADA CAS 2008/A/1437.***

[5] See WADC Introduction at p. 17 *"These sport-specific rules and procedures, aimed at enforcing anti-doping rules in a global and harmonized way, are distinct in nature from criminal and civil proceedings. They are not intended to be subject to or limited by any national requirements and legal standards applicable to such proceedings, although they are intended to be applied in a manner which respects the principles of proportionality and human rights. When reviewing the facts and the law of a given case, all courts, arbitral hearing panels and other adjudicating bodies should be aware of and respect the distinct nature of the anti-doping rules in the Code and the fact that those rules represent the consensus of a broad spectrum of stakeholders around the world with an interest in fair sport."* Emphasis added.

Answer submissions with emphasis on paragraph 24.2). The present Appeal has a different objective and a different scope and as a result, the Appellant's submissions do not offend the principle of *res judicata*.[6] On the contrary, the Respondent's contentions offend the principle of *Ne Bis In Idem*, as such contentions have the potential of placing the Appellant in the premise where he has to be tried again for the same offence,[7] and have as an aim to negatively influence the Tribunal against the Appellant (see paras 26.5 and 26.7 of the Answer).

16. In the same light, the Respondent's *'cherry-picking'* approach is evident in paragraph 24.1 of the *Answer*. The Respondent erroneously claims that the Appellate Tribunal *'rejected'* his arguments, yet it makes no reference to the First Instance Tribunal and its decision on the 'definition' and 'examples' of Tampering. Similarly, the Respondent very carefully is avoiding the leading authority of *Murray*[8], although it is asking the Tribunal to consider *"tampering"*, *"exceptional circumstances"*, *"degree of fault"*, *"selected previous decisions"* and *"facts"*, without the assistance of such an important authority[9].

17. When the Appellant submits that the *Answer* is arbitrary, prejudicial and off the mark, it is because the Respondent repeatedly relies on a rhetoric about the lie told by the Appellant. What the Respondent repeatedly ignores throughout its *Answer* submissions (and on previous submissions) and its largely repetitive or duplicative reply submissions is that the **primary** basis of the first instance tribunal's finding was its reliance on *Murray* and its finding – consistent with *Murray* – that proving a lie is not enough, that there [and here the tribunal fully quoted from *Murray* at par. 40 of its Decision] *"must be some consideration of the extent of the behavior made to conceal the truth in order to be satisfied that there was an intent to subvert."* Perhaps the Respondent is asking the Tribunal to ignore leading authorities or even to reverse them, which would be a novel proposition.

On the degree of fault

18. The Respondent is asking the Tribunal to consider the *'degree of fault'* of the Appellant, yet the Respondent is suspiciously omitting to state that the Appellant is already serving/served a minimum 24-month period of ineligibility. Is there any degree of fault attached to the period of ineligibility served already and if this could be answered in the affirmative, what is the

[6] See ***CAS 2015/A/4353 Trabzonspor v TFF, UEFA and Fenerbahce*** at paras 92-99.
[7] See ***CAS 2018/A/5500 Lao Toyota FC v Asian Football Confederation***
[8] ***CAS 2017/A/4937 Drug Free Sport New Zealand v. Karl Murray***
[9] The Appellant is aware that the Panel did not have the opportunity to hear the facts, nor did it have the opportunity to try the evidence. It is also against the established procedure for the Respondent to trigger a de novo hearing, by making explicit and repetitive comments on the facts and evidence.

justification for an additional consideration of a further degree of fault? The Appellant submits this cannot be right.

19. The Appellant disagrees with the Respondent's litany of assertions on the degree of fault for a number of reasons:

a. The matter of *Cilic* favours an objective approach, but it fails to consider the personal characteristics and circumstances of the accused athlete. This may put the purposive approach of the *Code* at odds with the literal approach and it may place the Tribunal in a compromising situation, where the Tribunal has to consider whether the purposive nature of the *Code* does really apply to the present matter. The Appellant respectfully submits that *Cilic* is inapplicable in the present matter.

b. *Cilic* applies only as a guidance and does not create a standard set of tariffs of ineligibility periods in an indiscriminate manner. As the Respondent states, it is better to be accurate than consistent.

c. *Cilic* focuses on a determination of a degree of fault that, by and large, considers offences with inadvertent doping, such as the use of nutritional supplements and/or specified substances. Its guidance offered therein, cannot be said to be a safe determinative factor in considering different characteristics and circumstances that apply in the present matter.

d. *Cilic* concerns an athlete who only served a period of ineligibility of four months (on a completely different offence, and on different circumstances and evidence, which would potentially affect the accurate and objective determination of a degree of fault) on a specified substance/contaminated product matter. It, therefore, must be distinguished on the facts, as its application does not assist the Panel in a safe determination of the present matter.

20. In the alternative, if *Cilic* were to be applied in the present matter, then the degree of fault of the Appellant is at the lowest end of the spectrum, not warranting a period of ineligibility over 24 months. The Respondent has failed to consider the following steps that minimise the degree of fault of the Appellant (which are also extensively argued in Exhibit 7 in the Supporting Evidence to the present Appeal):

a. The Appellant has requested a *Case Resolution Agreement*, which does not necessitate the consideration of '*exceptional circumstances'* or of the *'degree of fault*'. This Request was rejected at face value with the excuse that the Appellant did not admit his faults quick enough. Yet the Respondent contradicts itself in its *Answer* when it argues that the Appellant responded, *'relatively quickly'* (see paras 26.5 and 26.7). Notwithstanding the

fact that this creates semantics, it is the Appellant's respectful submission that fairness requires a clear response by the Anti-Doping Organisation. There is no such thing as a *'relatively quickly'* response. It is either quick or it is not. The Appellant has made the case that he quickly acknowledged his errors and co-operated with the authorities (months before he was even charged), although the Respondent does not appear to be clear on this point (the *cherry-picking* approach). The Appellant would respectfully request that the Panel interpret this conflicting approach against the Respondent and draw all the appropriate negative inferences.

b. The Appellant promptly acknowledged his errors and admitted his mistakes, months before he was even charged. The Respondent appears unable to produce a clear response on this point and the Panel may conclude that the Respondent has conceded this point. The admission was quick and prompt, for the purposes of the Code's wording.
c. The Respondent appears to be willingly omitting the fact that the Appellant agreed to assist the authorities, admitted his regrettable lies quickly, even though promises were offered that there are no consequences for what he did.
d. The Respondent is omitting deliberately to explain to the Tribunal the reasons as to why its officers were threatening the Appellant with an 8-year ban, when he voluntarily agreed to sit in at an interview and co-operate with them (without the assistance of a legal representative).
e. The Respondent is omitting to state that part of its submissions at the first instance hearing included assertions and threats that what the Appellant did gave rise to criminal responsibility, for which the State could assume jurisdiction. The Respondent is put to strict proof to this effect.
f. The Respondent is omitting the premise that had the Appellant remained silent, there would have been no consequences for what he did. Instead of crediting the Appellant for such immediate change of heart, the Respondent intentionally and polemically ensured that the Appellant deserves the highest condemnation. To this date, it is not clear why the Respondent wants to make an example out of the Appellant. Perhaps the Respondent wishes to send the message to the athletic community that it is ok not to communicate with the authorities, or if you do communicate and make a mistake, you cannot take it back and you must suffer the consequences. That is quite a message to send.
g. The Respondent is omitting the fact that the Appellant corrected his whereabouts information immediately after he realised his error and before he knew that anti-doping officers were looking for him.

h. The Respondent is omitting/disregarding the fact that the actions of the Appellant did not jeopardise the administration of justice, did not disadvantage the Appellant's competitors and did not have any effect on the level playing field.

i. The Appellant did everything possible to correct his regrettable errors. He admitted his errors, he co-operated with the Respondent and displayed integrity and professionalism, even when he was threatened with sanctions that do not exist.

j. The Appellant is already serving a minimum of 24 months of ineligibility.

k. The Appellant has already suffered financially and personally because of the current period of ineligibility.

l. The Respondent should not expect the Appellant to produce any other unrealistic steps[10], when the primary basis for reducing the period of ineligibility (and entering into a *Case Resolution Agreement*) has been met: that is, there has been a prompt admission.

21. Furthermore, the Appellant would respectfully request that the Panel consider the premise that the present matter highlights the flaws that derive from the *WADC*. In respect of the degree of fault, submissions can be raised to the effect that the drafters of the Code considered the injustice a 4-year period of ineligibility could produce on specific circumstances of a tampering rule violation, that may give rise to difficult, sensitive, and exceptional characteristics. Regrettably, the Respondent has not paid attention to such characteristics, contrary to the spirit and the letter of the Code. The Respondent is requesting the Panel with its submissions to consider the degree of fault of the Appellant, but at the same time to disregard the period of ineligibility already served. In essence, the Respondent is asking the Panel, to accept that the Appellant has some degree of fault, for which he is going to serve a minimum of 24 months of a period of ineligibility, and then the Respondent is asking the Panel to consider a further degree of fault, or in the best possible scenario, to start counting afresh again. Put it simply, the Respondent wishes to create different levels of a degree of fault at different points in time. There is no better example than the present one to demonstrate the injustice and unfairness the language of Article 10.3.1 creates. Much rests on this submission.

22. Although the language of Article 10.3.1 appears simple, it cannot be said it offers clarity. It creates anomalies on the application of the Appellant's specific characteristics and the Panel is respectfully invited to determine this provision in light of the principle of *contra preferentem*. The Panel would be hard pressed to accept that, on the facts, this provision could be applied and offer justice. Its creation resembles the architecture of an ancient building,

[10] See FIFA and WADA (Advisory Opinion) CAS 2005/C/976 and 986 where the Panel states: "The Panel reminds the sanctioning bodies that the endeavours to defeat doping would not lead to unrealistic and impractical expectations as to what athletes have to come up with."

where several parts are missing. For this reason, the Panel is forced to purposefully interpret the provision's meaning and aim and in doing so, it must consider whether the fault must be *de minimis* or whether the Panel must only weigh up the degree of fault (and negligence) and decide accordingly.[11]

23. It follows, therefore, that the anomaly created by this provision destroys any attempt at consistency and even at accuracy. The Panel need not further guidance in concluding that the Respondent's suspiciously superfluous reliance on *Cilic* and its widespread and well-established inapplicability, demonstrates to a comfortable satisfaction level the premise that different sports enjoy different periods of ineligibility, even when factual and evidential backgrounds appear almost identical.[12] This, in essence, annihilates the very premise of the Code, which is the application of the principle of harmonisation.
24. Finally, and on this point, it is the Appellant's respectful submission that the Respondent misunderstood the Appellant's submissions on the matter of ***Rugby Football Union v (1) Joseph Stafford (2) Rupert Kay SR/311/2019***. The Respondent states that this authority is not relevant because the Respondent was not part of the *Case Resolution Agreement* achieved in this matter. Respectfully, this was not the nature of the submissions by the Appellant. The decision to sanction *Rupert Kay* with a 24-month period of ineligibility, was made before the *National Anti-Doping Panel* and was advertised on the Respondent's website as an imposed sanction[13]. Therefore, the Respondent was aware of this case and the subsequent sanctions imposed. It is submitted that fairness and consistency should be applied to sanctions imposed on athletes in the United Kingdom. It is the Appellant's respectful submission that the Respondent should have considered this decision in determining the most proportional sanction. In this light, the actions of *Rupert Kay* were to deliberately interfere with the doping control process and are significantly more prejudicial to the doping control process than the actions of the Appellant.

[11] On this point, Article 10.3.1 implies that the minimum the athlete must serve is 2 years of a period of ineligibility, and then any degree of fault (and negligence), must start operating from that point on. This cannot be said to be logical and just. In addition, this provision does not explain how the degree of fault needs to be interpreted in light of tampering offences, where the main ingredient for meeting the standard of proof is fraudulent behaviour. It also fails to address what *'exceptional circumstances'* are, and how to be addressed in light of *Murray*, where it was established that not every lie told amounts to fraudulent behaviour and, therefore, amounts to tampering. The exceptional circumstances analysed in the Appellant's various submissions, must lead the Panel to the conclusion that his degree of fault, (in excess of the ineligibility period already served), does not exist, or it is minimal and, therefore, his period of ineligibility must be reduced to 24 months.

[12] The degree of fault of the athlete and the subsequent examination of the principle of no significant fault or negligence, cannot be said to be considered in a 'one size fits all' approach. The Respondent is asking the Panel to do exactly that and the authorities the Respondent is citing cannot be said they assist the Panel.

[13] https://www.ukad.org.uk/sites/default/files/2020-09/nadp_consent_order_rupert_kay.pdf

On backdating the period of ineligibility

25. Article *13.10.1* is clear on the jurisdiction offered to the Panel to backdate a period of ineligibility, due to delays that are not attributable to the accused athlete. There is nothing in this provision which precludes the Panel from backdating the period of ineligibility. With the greatest of respect to the Respondent, its assertions at paragraph 28, including its sub-paragraphs, are misleading and confusing. The Appellant would respectfully request the Panel to dismiss the content of the totality of paragraph 28 and would explain, by way of clarification, the following:
    a. The Appellant very clearly explained in its Appeal, the delays caused by the Respondent in the final resolution of this dispute. Notwithstanding the fact that the Respondent rejected a *Case Resolution Agreement*, which would have put the present matter to an end, the Respondent also significantly used 'technicalities' to ensure that the Appellant would miss the *Tokyo 2020* Olympics.
    b. Such 'technicalities' were purposefully used so the Respondent can delay any decision making in the matter. The Appellant's prayers for relief were clear and self-explanatory. The Respondent, with respect, cannot use its own careless approach in dealing with this matter, so it can be free to divert responsibility elsewhere. It matters not when the Appellant filed his Application; rather when the Respondent decided upon it, considering, at the same time, the total length and duration of this regrettable matter.
    c. It would be outside the spirit of the *WADC* to preclude the Panel from considering the backdating of the period of ineligibility and from determining whether the Appellant has suffered a significant delay.
    d. The Appellant would respectfully refer the Panel to its submissions on this point included at paragraphs 56-65 of his Appeal document (in order to avoid repetitions).

26. Finally, the Appellant and his advisors would like to express their dissatisfaction at the inaccuracies contained at paragraph 14 of the Respondent's *Answer*. The Respondent has understood at all relevant times that the undersigned and his office have been the legal representatives of the Appellant. There has been no official communication with this office either by the Respondent or its legal representatives inviting the Appellant to submit an application for a reduction of sanction. It is mystifying why the Respondent and his advisors would ignore the Appellant's instructed Counsel and his office, who have been always appearing as the Appellant's legal representatives. In the best possible scenario this is

unprofessional and prejudicial. The Respondent is put to strict proof to explain that this is not the case.

Conclusion

27. The Appellant submits that, for all the reasons set forth in his Appeal and the present Clarification that need not be repeated in their entirety, a 28-month period of ineligibility is disproportionate to the facts of this matter, for which the Appellant has already accepted full responsibility for and duly apologised.
28. The Appellant has fully explained that despite the regrettable nature of his conduct (that being lying to the Respondent after a filing failure for which he would have not otherwise been required to respond to), he made efforts to amend that conduct by coming forward with the truth.
29. The Appellant would serve a minimum of 24 months of ineligibility for actions that bore no consequences. He has already been hit with a considerable sanction. Anything above that would be disproportionate. By applying such a disproportionate sanction to take effect, it would not only serve as a deterrent to athletes to correct any inaccuracies in their statements to anti-doping organisations but would likely encourage athletes not to cooperate with such organisations at all. Anti-doping regulation, globally, would be placed in a compromising situation.
30. Furthermore, the Appellant has been the subject to a period of ineligibility prior to the present proceedings. Any suggestion that a 28-month period of ineligibility is the only available sanction that results from the Appellant's conduct, ignores the fact that the Appellant has already served a sanction and born the public's scrutiny on this matter.[14]
31. Finally, the Appellant has already suffered the additional punishment of missing the summer Olympics. Considering that the Appellant has never been accused of, or nor found to have been, doping ever before, and because he has never had a filling failure prior to the incident at issue, a 28-month period of ineligibility would be disproportionate.
32. With the exception of the conduct giving rise to this Appeal, the Appellant has been (and will continue to be) an exemplary athlete for clean sport. A 28-month period of ineligibility for what should have otherwise been no violation of any kind (had he simply not responded to the Respondent's notice of a missed test), would be disproportionate, arbitrary, and simply unconscionable. Put it simply, it would be a gross miscarriage of anti-doping justice.

[14] https://www.bbc.com/sport/athletics/48264357

33. In conclusion, the whole purpose of accepting the *NADP*'s authority to hear an appeal and rule on the specific provisions of the *Code*, is to ensure that all parties have a say. Accordingly, as long as it can sensibly be said that there is a clear connection between the issues raised and the submissions produced before the Panel, it would be natural to conclude that the prayers for relief produced by the Appellant are fair, just and reasonable. The Appellant, regardless of the outcome of the present appeal, would serve a minimum of 24 months of a period of ineligibility. The Respondent can no longer continue to have reasonable grounds for complaint. Justice and convenience are sometimes at odds; in respect of the proportionality issues on which submissions could be raised in favour of the Appellant, they speak with a single voice.

For all the foregoing reasons,

The Appellant would respectfully reiterate the prayers for relief, already submitted in his Appeal, namely:

- That the Tribunal set aside the 28-month period of ineligibility and replace it with a period of ineligibility to 24 months.
- That the Tribunal backdate the period of ineligibility to the date of the sample collection of 15 October 2018.

On the 5th Day of July 2021

For the Appellant

Dr Gregory Ioannidis
Counsel to the Appellant Mr Mark Dry

Assisting: Mr Matthew Kirk, Miss Liberty Miller, Mr Graeme Poole