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IN THE UNITED STATES DISTRICT COURT FOR THE
CENTRAL DISTRICT OF CALIFORNIA
EASTERN DIVISION

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| In the arbitration matter of:<br>FLOYD LANDIS,<br>Petitioner,<br>and<br>UNITED STATES ANTI-DOPING AGENCY,<br>Respondent. | Case No.: No. CV-08-06330<br>MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF AMENDED MOTION TO VACATE ARBITRAL AWARD<br>Hearing Date and Time: November 24, 2008 @ 1:30pm<br>Honorable Judge Percy Anderson |

**MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF AMENDED MOTION TO VACATE ARBITRAL AWARD**

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This is a motion to vacate an arbitral award issued by the Court of Arbitration for Sport after a five-day hearing conducted in the United States between two U.S. residents, in a proceeding governed by U.S. law. Though guaranteed the right to a fundamentally fair hearing and an impartial decision based on the evidence, this was not the process Mr. Landis received. Instead, he faced a panel of arbitrators drawn from a pool heavily dominated by the sports bodies charged with enforcing the anti-doping rules, organizations with a vested interest in defending the work of the anti-doping labs against challenges of the sort Mr. Landis raised, a potential for bias made all the more acute in his case because the arbitrator he selected failed to disclose that he continues to represent such a client (the International Olympic Committee) before other CAS panels, including those presided over by USADA's lawyer, and by at least one of his co-arbitrators.

## I. INTRODUCTION

On July 23, 2006, Floyd Landis was pronounced the winner of the 2006 Tour de France. Two days later, the French testing lab, Laboratoire National de Dépistage et du Dopage, reported that the urine sample Mr. Landis gave after the seventeenth stage of the Tour had allegedly tested positive for the presence of exogenous testosterone. Since that time, Mr. Landis has been fighting to clear his name.

The first round of that fight occurred in Malibu, California in May, 2007, when a panel of the North American Court of Arbitration for Sport of the American Arbitration Association held a nine-day hearing to consider Mr. Landis's challenge to the doping charge, a challenge aimed squarely at the scientific reliability of the method used by the French lab, and at the lab practices followed during the actual analysis of his sample. In a decision issued on September 20, 2007, the AAA panel agreed that the French lab had failed to follow mandatory lab

standards when performing the first of the two tests it relied upon in reporting the doping violation [the "T/E ratio test"]. However, it also concluded that though the lab had failed to conduct the second test –the Carbon Isotope Ratio Test –in complete compliance with mandatory lab standards, its deviations did not cause the lab to report an incorrect result, so the AAA Panel upheld the doping suspension.

Mr. Landis appealed that ruling to the Court of Arbitration for Sport. Not only did the Court confirm the award of the AAA Panel, it imposed a $100,000 penalty against him. Because he was not provided a fundamentally fair hearing in which decisions were made by impartial arbitrators based on the evidence, Mr. Landis moves to vacate the arbitral award.

## II. ARGUMENT

### A. The Federal Arbitration Act, not the "New York Convention," provides the substantive rules of decision applicable to this dispute.

#### 1. Because the CAS appellate proceeding was a domestic arbitration, the Federal Arbitration Act's vacatur provisions apply in this case.

In 1925, Congress passed what is now known as the Federal Arbitration Act ("FAA"), a statute that sets out a comprehensive plan for arbitrating controversies where the parties contract for such a solution in a transaction involving interstate commerce.[1] In order to effectuate Congress's intent to provide not merely for any

[1] *Commonwealth Coatings Corp. v. Continental Casualty Co.*, 393 U.S. 145, 146-7, 89 S. Ct. 337, 338, 21 L.Ed.2d 301 (1968); 9 U.S.C.A.§2.

arbitration, but for an impartial one,[2] the FAA articulates four grounds for the vacatur of an arbitration award, justifying such relief when:

* an award was procured by corruption, fraud, or undue means;
* there was evident partiality or corruption in the arbitrator(s);
* the arbitrators were guilty of misconduct in refusing to postpone the hearing, refusing to hear evidence, or engaging in misbehavior prejudicing the rights of a party; or
* the arbitrators exceeded their powers, or so imperfectly executed them that a final and definite award was not made.[3]

The FAA also expressly recognizes that a court may decline to enforce an arbitration award if the arbitration agreement, as implemented, would be unenforceable based on the legal or equitable grounds that might render any sort of contract unenforceable, grounds including unconscionability.[4] While parties are free to define the arbitral process by contract, contractual provisions purporting to expand or contract the scope of judicial review articulated in the FAA will not be enforced.[5] Because Mr. Landis's arbitration arose pursuant to a transaction involving interstate commerce, the FAA applies to his motion to vacate.

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[2] *Commonwealth Coatings*, 393 U.S. at 147, 89 S.Ct. at 338. *See also Kyocera Corp. v. Prudential-Bache Trade Services, Inc.*, 341 F.3d 987, 998 (9th Cir. 2003)(FAA's vacatur provision designed to "preserve due process").

[3] 9 U.S.C.A. §10(a)(1)-(4); 9 U.S.C.A. §12.

[4] 9 U.S.C.A. §2; *Circuit City Stores, Inc. v. Adams*, 279 F.3d 889, 892-3 (9th Cir. 2002). *See also Hall Street Assoc., L.L.C. v. Mattel, Inc*,, ___U.S.___, 128 S. Ct. 1396, 1406, 170 L.Ed.2d 254(2008) (state law common law grounds continue to provide an avenue for attacking arbitral awards).

[5] *Hall Street*, 128 S. Ct. at 1404-6; *Kyocera Corp. v. Prudential-Bache Trade Services, Inc.*, 341 F.3d at 995, 1000.

nation.[16] There was no foreign property at issue in the proceeding, and none will be implicated by the award's enforcement.

Moreover, the CAS arbitration has no relationship with a foreign state, and envisages no performance abroad. Both the collection of the cost award and the re-issuance of his USA Cycling license will occur in the U.S. Mr. Landis's suspension is being enforced against him in the United States as both USA Cycling and USADA have taken the position that he cannot obtain a renewed USA Cycling license until he both pays the $100,000 penalty awarded by the Panel and serves out his suspension. Indeed, USADA's General Counsel, William Block, contacted Mr. Landis only weeks ago about the enforcement actions pending against him.[17] Thus, no credible argument can be made that the CAS arbitration was nondomestic under the test articulated in 9 U.S.C.A. §202.

In *Gatlin v. USADA*, however, USADA's co-defendant, the United States Olympic Committee, insisted that the Convention applied because the Court of Arbitration for Sport is itself Swiss tribunal.[18] But CAS is not a *party* to the arbitration, so its status is irrelevant to the Court's application of 9 U.S.C.A.§202. Similarly, the fact that the CAS Panel's decision was transmitted to CAS's main office in Lausanne, Switzerland for "delivery" (as opposed to its office in Denver, Colorado), cannot convert an otherwise domestic arbitration into an international

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[16] CAS Rule R58 [Exhibit 4, Motion to Vacate Arbitral Award] (in the event that neither the parties nor the Panel makes an express choice of another state's law, the law of the state in which the prosecuting national federation is domiciled governs the proceeding).

[17] See Letter from William Block III, General Counsel, USADA, to Floyd Landis, September 19, 2008 [Exhibit 6B, Motion to Vacate Arbitral Award](confirming that Mr. Landis has continued to participate in required anti-doping testing, but noting that he will not be issued a renewed cycling license until he pays USADA the $100,000 cost award).

[18] United States Olympic Committee's Motion to Dismiss Complaint, *Gatlin v. U.S. Anti-Doping Agency, Inc., et al.*, U.S. District Court, Northern District of Florida, Case No. 3:08cv241/LAC/EMT, attached herein as Exhibit B.

domestic law to the review of arbitration awards; they are not limited to the grounds set forth in Article V of the Convention.[21]

Even if this Court were to conclude that the United States was only a country of secondary jurisdiction, this Court still has jurisdiction over the instant proceeding, and the vacatur provisions of the FAA would apply to supplement the seven grounds the Convention supplies to parties seeking relief from an arbitral award.[22] The Second Circuit has held that the FAA and the Convention have "overlapping coverage" to the extent that the FAA is not inconsistent with the Convention: "We read Article V(1)(e) of the Convention to allow a court in the country under whose law the arbitration was conducted to apply domestic arbitral law, in this case the FAA, to a motion to set aside or vacate that arbitral award."[23] Federal courts in California have applied the FAA's statutory standards for a motion to vacate even in proceedings found to arise under the Convention.[24] Thus, the FAA governs resolution of this dispute even if this Court concludes that the CAS arbitration was nondomestic.

**3. Article V of the New York Convention authorizes this Court to vacate arbitral awards that were not the product of a fundamentally fair hearing.**

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[21] *Karaha Bodas Co.*, 364 F.3d at 287-8.k

[22] *Zeiler v. Deitsch*, 500 F.3d 157, 164-5 (2nd Cir. 2007)(when arbitration subject to Convention takes place in the U.S., court considering motion to vacate must also apply the FAA); *McDermott International, Inc. v. Lloyds Underwriters of London*, 120 F.3d 583, 588 (5th Cir. 1997); *Commercial Risk Reinsurance Co. Ltd. v. Security Ins. Co. of Hartford,* 526 F.Supp.2d 424, 427 (S.D.N.Y. 2007); *Gas Natural Aprovisionameintos, SDB, S.A. v. Atlantic LNG Company of Trinidad and Tobago*, 2008 WL 4344525 (S.D.N.Y., slip op. September 16, 2008) at *3 (FAA continues to apply, even in arbitrations governed by the Convention).

[23] *Alghanim*, 126 F.3d at 19-20, 21; *In re Arbitration between Halcot Navigation Ltd Partnership and Stolt-Nielsen Transp. Group*, 491 F.Supp.2d 413, 419-20 (S.D.N.Y. 2007); *Spector v. Torenberg*, 852 F.Supp. 201, 205-6 (S.D.N.Y. 1994).

[24] *Certain Underwriters at Lloyds*, 246 F.Supp.2d at 932-933.

At a minimum, even countries of secondary jurisdiction may decline to enforce an arbitral award under the provisions of Article V of the New York Convention itself.[25] Though §§1-2 of Article V articulate seven specific grounds for relief from an arbitral awards, Article V "essentially sanctions the application of the forum state's standards of due process.[26] Like the FAA, it guarantees a "fundamentally fair hearing" providing the party with an opportunity to present his case in front of impartial arbitrators.[27] Although Mr. Landis contends that the FAA, not the New York Convention, governs this proceeding, his motion to vacate specifically invokes the relevant grounds articulated in Article V out of an abundance of caution.

**B. Floyd Landis was entitled to a decision made by an impartial panel of arbitrators; decisions made by panels displaying "evident partiality" are subject to vacatur. 9 U.S.C.A. §10(a)(2); New York Convention, Art. V. §1(a), (d), §2(b).**

While an arbitration need only grant the parties a fundamentally fair hearing, the minimal requirements of fairness include the right to a decision made by impartial arbitrators.[28] Under the FAA, this Court may vacate an arbitration

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[25] See Exhibit A, New York Convention, Art. V, §1 and §2.

[26] *Zeiler*, 500 F.3d at 164-5 (Article V provides seven grounds for relief from an arbitral award subject to the New York Convention); *Karaha Bodas*, 365 F.3d at 298 (New York Convention sanctions application of forum state's standards of due process); *Iran Aircraft Indus. v. Avco Corp.*, 980 F.2d 141, 145 (2nd Cir. 1992)(same).

[27] *Karaha Bodas*, at 298-9; *Generica, Ltd. v. Pharm. Basics, Inc.*, 125 F.3d 1123, 1130 (7th Cir. 1997); New York Convention, Art. V. (1)(b), (d), and (2)(b).

[28] *Sunshine Mining Co. v. United Steelworkers of America*, 823 F.2d 1289, 1295 (9th Cir.1987); *Ficek v. Southern Pacific Co.*, 338 F.2d 655, 657 (9th Cir. 1964), cert den'd, 380 U.S. 988 (1965).

award if there was "evident partiality" in the arbitrators.[29] The Act thus represents a Congressional policy to provide not merely for any arbitration, but for an impartial one.[30] Because the work of arbitrators is conducted largely in private, and arbitrators are given free rein to decide both the law and the facts without significant appellate review of either, the policy of safeguarding the impartiality of arbitrators must be scrupulously observed, and arbitrators must err on the side of disclosure.[31] The policy articulated in §10(a)(2) requires that arbitrators not only be unbiased but that they appear to be so. The elementary requirements of impartiality that are taken for granted in every judicial proceeding are not set aside because these parties may have agreed to resolve their dispute through arbitration.[32]

"Evident partiality" may be demonstrated through proof of actual bias, which requires the articulation of specific facts which indicate improper motives.[33] Under the FAA, "evident partiality" also exists where an arbitrator fails to disclose any dealings that might create an impression of possible bias.[34] Where an arbitrator fails to make a required disclosure, the integrity of the process by which

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[29] 9 U.S.C.A. §10(a)(2); *Commonwealth Coatings*, 393 U.S. at 146-9; *New Regency Productions, Inc. v. Nippon Herald Films, Inc.*, 501 F.3d 1101, 1105-6 (9th Cir. 2007); *Woods v. Saturn Distribution Corp.*, 78 F.3d 424, 427 (9th Cir. 1996); *Schmitz v. Zilveti*, 20 F.3d 1043, 1046 (9th Cir. 1994); *Henry v. Halliburton Energy Services, Inc.*, 100 S.W.3d 505 (Tex. App. Dallas 2003), reh'g overruled, (Apr. 15, 2003) and review denied, (July 31, 2003).

[30] 9 U.S.C.A. §10(a)(2); *Commonwealth Coatings*, 393 U.S. at 147.

[31] *Commonwealth Coatings*, 393 U.S. at 149.

[32] *Commonwealth Coatings*, 393 U.S. at 146-9.

[33] *Premo v. Martin*, 119 F.3d 764, 771 (9th Cir. 1997).

[34] 9 U.S.C.A.§10(a)(2); *Commonwealth Coatings Corp.*, 393 U.S. at 147-9; *New Regency Productions, Inc. v. Nippon Herald Films, Inc.*, 501 F.3d at 1105-6; *Apusento Garden (Guam) Inc. v. Superior Court of Guam*, 94 F.3d 1346, 1352 (9th Cir. 1996); *Woods v. Saturn Distribution Corp.*, 78 F.3d at 427; *Schmitz v. Zilveti*, 20 F.3d at 1046-7.

arbitrators are chosen is at issue; parties can make an intelligent choice only when facts showing potential partiality are disclosed.[35] The test is an objective one; it is satisfied if the undisclosed facts would create an impression of possible bias in the eyes of the hypothetical reasonable person.[36] If an arbitrator's failure to disclose facts would create an objective impression of possible bias, the test for "evident partiality" is satisfied, even in the absence of actual bias, and even if the arbitrator himself lacked actual knowledge of the potential conflict.[37]

As fully articulated in Mr. Landis's motion, none of the arbitrators in this case made any disclosure of business dealings creating a powerful incentive for them to hold in favor of Mr. Landis's opponent USADA. Because the CAS refuses to forbid its arbitrators from continuing to represent clients before CAS panels, the CAS system institutionalizes and creates a revolving door, where the lawyers and arbitrators in one case may have their roles reversed in the next, and where repeat players (like USADA) have strong incentives to retain CAS arbitrators as their counsel. Although Mr. Landis was unaware of this fact and it was never subsequently disclosed to him, the arbitrator that *he selected* (Jan Paulsson) actively represents the International Olympic Committee before CAS Panels, and had a case pending before a CAS panel chaired by the USADA-selected arbitrator (David Rivkin) when both were selected to serve on the Landis panel. Further, Mr. Paulsson has repeatedly represented the IOC before panels upon which Mr. Richard Young, USADA's lawyer, served as arbitrator. This revolving door created a powerful incentive to reach decisions in favor of USADA's lawyer with the expectation that in a future proceeding where roles may be reversed, similar

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[35] *Schmitz v. Zilveti*, 20 F.3d at 1047; *Woods v. Saturn Distribution Corp.*, 78 F.3d at 427.

[36] *New Regency Productions, Inc.*, 501 F.3d at 1106; *Apusento Garden (Guam) Inc. v. Superior Court of Guam*, 94 F.3d at 1352.

[37] *New Regency Productions, Inc.*, 501 F.3d at 1106; *Schmitz v. Zilveti*, 20 F.3d at 1048.

deference might be paid. It is not necessary for Mr. Landis to prove that Mr. Paulsson acted in accordance with such an incentive; under the Federal Arbitration Act, these facts should have been disclosed to Mr. Landis, but were not.

And although actual bias need not be shown where nondisclosure occurs, Mr. Landis articulated in his motion several specific instances in which the Panel relied upon Mr. Young's statements as if they were evidence in the case, deference accorded no other lawyer in the case. This was particularly evident in the context of the Court's cost award, which was supported solely by statements made by Mr. Young in the complete absence of record evidence proving the amount or reasonableness of those costs, statements made in a post-hearing brief to which Mr. Landis had no right of reply. Although proof of actual bias is not necessary to satisfy the test for "evident partiality" in the nondisclosure context, the CAS Panel's cost award decision, in particular, suggests the existence of improper motive.

**C. The arbitration procedure selected by the CAS Panel deprived Floyd Landis of a fundamentally fair hearing because it prevented him from cross-examining witnesses, prevented him from countering USADA's "cost" evidence, and prevented him from otherwise presenting his case, 9 U.S.C.A.§10)(a)(3), (4); New York Convention, Art. V, §1(b), §2(b).**

In a decision made without apparent regard for the nature and complexity of the issues to be litigated in its *de novo* appeal hearing, the CAS Panel imposed severe time limits upon the evidentiary hearing it conducted, placing both parties on a "time clock" and allocating each of them only fourteen hours of hearing time in which to present their case. The hardship imposed by this ruling was greatly exacerbated by the Panel's corollary decision to require the submission of direct

testimony in writing, but to place no limits on the number of witnesses whose testimony could be submitted in this manner.[38] Since the submission of written direct testimony did not count against a party's time allocation, the Panel's procedural order created a powerful strategic incentive for USADA to *increase* the number of witnesses it would call, realizing that Mr. Landis would simply run out of time in which to cross-examine them all. Although it argued to the Panel that the issues on appeal should prevent far less complexity than those presented to the AAA Panel (a suggestion the Panel accepted, *see* Exhibit 23 to Motion to Vacate Arbitral Award), USADA nevertheless increased its witness count from nine to nineteen. There is simply no way that Mr. Landis could conduct meaningful cross-examination of nineteen witnesses in fourteen hours of hearing time, and the record clearly reflects this.[39]

The Panel's decision presents the classic example of a decision that appears facially neutral, but is nevertheless substantively or procedurally unconscionable.[40] The right to a fundamentally fair hearing includes the right to cross-examine witnesses giving evidence, particularly in cases where—as here—one's livelihood is at stake.[41] Even though an arbitration hearing is not governed by the Federal Rules of Evidence, and even though the right to cross-examination may not be required in every case, fundamental due process includes the right to cross-

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[38] CAS Panel Procedural Memorandum, December 13, 2007, ¶¶4.7-4.8, at 4-5 [Exhibit 23, Motion to Vacate Arbitral Award].

[39] *See*, e.g., CAS Hearing Transcript [Ex. 2, Motion to Vacate] at 793:24-794:23, 805:18-806:14, 807:1-22, 810:15-20, 1218:20-25, 1221:2-11, 1396:6-25, 1408:5-20.

[40] *Acorn v. Household Intern., Inc.*, 211 F.Supp.2d 1160, 1169-70 (N.D. Cal. 2002); *Ting v. AT&T*, 319 F.3d 1126, 1151 (9th Cir. 2003); *Mercuro v. Superior Court*, 96 Cal. App. 4th 167, 179 (2002).

[41] *Willner v. Committee on Character and Fitness*, 373 U.S. 96, 103, 83 S.Ct. 1175, 1180, 10 L.Ed.2d 224 (1963).

examination where one faces the prospect of being deprived of his vocation, and where the inability to conduct cross-examination deprives a party of the opportunity to challenge the substantive points made by the witness during direct examination.[42] Mr. Landis's inability to cross-examine witnesses inflicted express prejudicial harm upon him because the CAS panel relied upon the unchallenged testimony to support its conclusions.[43]

Not only was he prejudiced by his inability to cross-examine more than half of USADA's witnesses, he was penalized for that failure. Mr. Landis's inability to cross-examine all of the French lab witnesses was one of the key grounds offered in support of the Panel's decision to award $100,000 in costs: "The Appellant gave notice requiring a number of witnesses to be present in person for cross-examination in New York *but then elected not to call them* thus causing the Respondent to incur significant and ultimately unnecessary costs."[44] Mr. Landis did not *elect* not to call these witnesses; he had every incentive to cross-examine them, but simply ran out of time, a fact unequivocally confirmed by the record.[45] This procedure was fundamentally unfair and unconscionable, justifying vacatur.[46]

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[42] *Sunshine Mining Co. v. United Steelworkers of America*, 823 F.2d 1289, 1295 (9th Cir.1987)(while right to cross-examination not absolute, parties must be given an opportunity to present their case)

[43] CAS Decision at ¶178 [Exhibit 2, Motion to Vacate Arbitral Award] (CAS relies on testimony of "uncontroverted" chain of custody witnesses that Mr. Landis "did not elect to examine" to resolve evidence in USADA's favor).

[44] CAS Decision [Exhibit 1, motion to Vacate Arbitral Award] at 57, emphasis added.

[45] Transcript of CAS Hearing [Exhibit 2, Motion to Vacate Arbitral Award], Tr. 793:24-794:23, 805:18-806:14, 807:1-22, 810:15-20, 1218:20-25, 1221:2-11, 1396:6-25, 1408:5-20.

[46] 9 U.S.C.A. §2, 10(a)(3); New York Convention, Art. V §(1)(b), §2(b).

## D. This Court may vacate the CAS Panel's arbitral award because it was unconscionable, justifying vacatur under 9 U.S.C.A. §2, New York Convention, Art. V, §1(a), §2(b).

While federal policy favors arbitration agreements, federal courts rely on state law when addressing issues of contract validity and enforceability.[47] Thus, generally applicable contract defenses such as fraud, duress, or unconscionability, may be applied to invalidate arbitration agreements.[48]

In California, an unconscionability challenge has both a procedural and substantive prong.[49] Procedural unconscionability exists where an imbalance in bargaining power leads to either oppression or surprise and raises issues relating to freedom of assent, whereas substantive unconscionability involves the imposition of harsh or oppressive terms upon parties who have freely assented to them.[50]

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[47] 9 U.S.C.A. §2 (arbitration agreements may be invalidated on state law grounds applicable to contracts generally); *Hall Street Assoc., L.L.C. v. Mattel, Inc.*,, 128 S.Ct. at 1406(state law common law grounds continue to provide an avenue for attacking arbitral awards).

[48] 9 U.S.C.A. §2; *Hall Street Assoc., L.L.C. v. Mattel, Inc.*, 128 S.Ct. at 1406 (state law common law grounds continue to provide an avenue for attacking arbitral awards); *Davis v. O'Melveny & Myers*, 485 F.3d 1066, 1072-3 (9th Cir. 2007)(Contracts unenforceable in California if they are procedurally and substantively unconscionable); *Nagrampa v. MailCoups, Inc.*, 469 F.3d 1257, 1280-1 (9th Cir. 2006); *Ting v. AT&T*, 319 F.3d 1126, 1148 (9th Cir. 2003); *Circuit City Stores, Inc. v. Adams,* 279 F.3d at 892-3; *Ferguson v. Countrywide Credit Indust., Inc.*, 298 F.3d 778, 783 (9th Cir. 2002); *Ticknor v. Choice Hotels Int'l, Inc.*, 265 F.3d 931, 936-37 (9th Cir.2001); *Laster v. T-Mobile USA, Inc.*, 407 F.Supp.2d 1181, 1186-7 (S.D.Cal 2005); *Armendariz v. Foundation Health Psychcare Services*, 24 Cal.4th 83, 113-4, 99 Cal.Rptr.2d 745, 6 P.3d 669 (Cal.2000).

[49] *See* cases cited, note 48.

[50] *Little v. Auto Stiegler, Inc.*, 29 Cal.4th 1064, 1071, 130 Cal.Rptr.2d 892, 984, 63 P.3d 979 (2003); *Stirlen v. Supercuts, Inc.*, 51 Cal. App. 4th 1519, 1532, 60 Cal. Rptr. 2d 138, 145 (Cal. App. 1st Dist. 1997); *Davis v. O'Melveny & Myers*, 485 F.3d at 1072-3; *Ingle v. Circuit City Stores,* Inc., 328 F.3d 1165, 1171 (9th Cir. 2003); *Ferguson*, 298 F.3d at 783.

Both forms of oppression must exist, but need not be present in the same proportion; California employs a "sliding scale," so that the more substantively oppressive a contract term is, the less evidence of procedural unconscionability is required to render the agreement unenforceable, and vice versa.[51] If the unconscionability permeates the agreement, the entire arbitration agreement is unenforceable.[52]

Procedural unconscionability due to oppression arises when the imbalance of bargaining power between the parties leaves the weaker party with no real ability to negotiate and no meaningful choice.[53] Procedural unconscionability due to oppression is most often (though not always) found when the arbitration provision is contained in a contract of adhesion,[54] which it was in Mr. Landis's case. There is no dispute that American athletes wishing to compete in elite domestic and international cycling competitions are required to acquire a license from USA Cycling, which Mr. Landis did.[55] It is also undisputed that the license is a standardized form not subject to negotiation, presented on a "take it leave it" basis by the party that has the sole discretion to grant or deny the license. American athletes hoping to make their living in competitive cycling cannot do so without

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[51] *Nagrampa*, 469 F.2d at 1280-1; *Armendariz*, 24 Cal. 4th at 114.

[52] *Davis v. O'Melveny & Myers*, 484 F.3d at 1084.

[53] *Davis v. O'Melveny & Myers*, 485 F.3d at 1073; *Nagrampa*, 469 F.3d at 1280; *Stirlen v. Supercuts, Inc.*, 51 Cal. App. 4th at 1532, 60 Cal. Rptr. 2d at 145

[54] *Davis v. O'Melveny & Myers*, 485 F.3d at 1072-3; *Nagrampa,* 469 F.3d at 1281; Laster, 407 F.Supp.2d at 1187; *Armendariz*, 24 Cal.4th at 113-4.

[55] See Landis USA Cycling License [Exhibit 6A, Motion to Vacate Arbitral Award].

signing the USA Cycling license application. As such, it is the quintessential adhesion contract, and is procedurally unconscionable.[56]

The element of surprise was also present in Mr. Landis's case because the one-page document which is the only evidence of Mr. Landis's consent to arbitrate not only fails to mention arbitration, it also fails to specifically reference any particular set of rules intended to apply in such an arbitration. While the declaration does contain Mr. Landis's consent to submit disputes regarding drug testing to the Court of Arbitration for Sport, the document makes no mention of the numerous sets of rules that have been applied in his two arbitration proceedings, including the USADA Protocol, the rules of the UCI, the Supplemental Rules of the AAA applicable to sporting disputes, and the rules of the Court of Arbitration for Sport itself.[57] California courts have concluded that arbitration agreements are procedurally unconscionable where they incorporate rules of third-party organizations not provided to the party to be bound, or when they include terms buried in the "prolix printed form" drafted by the party with superior bargaining power.[58]

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[56] *Davis v. O'Melveny & Myers*, 485 F.3d at 1072-3 (contracts presented on a "take it or leave it" basis are adhesive); *Ferguson*, 298 F.3d at 783-4 (same); *Circuit City v. Adams*, 279 F.3d at 893 (same); *Armendariz*, 24 Cal.4th at 113 (same);*Laster*, 407 F.Supp.2d at 1187; *Little v. Auto Stiegler, Inc.*, 29 Cal.4th 1064, 1071, 130 Cal.Rptr.2d 892, 63 P.3d 979 (2003)

[57] See Landis Cycling License [Exhibit 6A, Motion to Vacate Arbitral Award].

[58] *Fitz v. NCR Corp.*, 118 Cal. 4th 702, 722-3, 13 Cal. Rptr. 3d 88, 101-102 (Cal. App. 4th Dist. 2004)(where employees were provided a brochure "explaining" arbitration policy but not the policy itself, and where important information was "buried in the fine print of a footnote," surprise element of procedural unconscionability was present); *Harper v. Ultimo*, 113 Cal. App.4th 1402, 7 Cal. Rptr.3d 418 (Cal. App. 4th Dist. 2003); *Stirlen v. Supercuts, Inc.*, 51 Cal. App. 4th 1519, 1532, 60 Cal. Rptr. 2d 138, 145 (Cal. App. 1st Dist. 1997)(surprise giving rise to a finding of procedural unconscionability existed where important information describing rights relinquished was buried in "prolix printed form drafted by the party seeking to enforce the disputed terms."); *Nagrampa*, 469 F.3d at 1280; *Ingle v. Circuit City Stores,* Inc., 328 F.3d at 1171; *Ferguson*, 298 F.3d at 783.

Substantive unconscionability exists where an arbitration agreement is overly harsh or generates one-sided results."[59] The imposition of a significant cost award upon Mr. Landis is overly harsh and is sufficient to render his arbitral proceeding substantively unconscionable. California courts have consistently held that pre-dispute, "take it, or leave it" arbitration agreements are unconscionable in the employment context where, as here, the employee is made to bear costs.[60] Following the California Supreme Court's lead in *Armendariz*, the Ninth Circuit has expressly held that the only valid fee provision is one in which the employee remains free from *any* costs he would not be required to bear to bring his action in court.[61] "By itself, the fact that an employee could be held liable for [the adversary's] litigation costs should she fail to vindicate employment-related claims renders this [fee-splitting] provision unconscionable."[62] Although Mr. Landis was not *employed* by USA Cycling or USADA, his position is much like an employee's: he cannot practice his chosen profession without consent of USA Cycling, and without signing the pre-dispute arbitration agreement. Because Mr. Landis is being asked to bear $100,000 in costs, the CAS award clearly satisfies the test for substantive unconscionability.

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[59] *Nagrampa*, 469 F.3d at 1280, emphasis added; *Geoffroy v. Washington Mutual Bank*, 484 F.Supp.2d 1115, 1118-9 (S.D.Cal. 2007)(same); *Pokorny v. Quixtar, Inc.*, 2008 WL 850358 (N.D. Cal, slip op. March 31, 2008)(same).

[60] *Circuit City Stores, Inc. v. Mantor*, 335 F.3d 1101, 1107-8 (9th Cir. 2003)(requiring employees to pay filing fee rendered agreement substantively unconscionable); *Ingle v. Circuit City Stores, Inc.*, 328 F.3d 1165, 1178 (9th Cir. 2003); *Ferguson*, 298 F.3d at 786; *Circuit City v. Adams*, 279 F.3d at 894; *Acorn v. Household Intern., Inc.*, 211 F.Supp.2d at 1169-70; *Armendariz,* 24 Cal.4th at 110-11, 99 Cal.Rptr.2d 745, 6 P.3d 669. *See also Nagrampa*, 469 F.3d at 1285 (fee-splitting provisions unconscionable where they impede plaintiff from vindicating statutory rights).

[61] *Ingle v. Circuit City Stores,* Inc., 328 F.3d 1165, 1178 (9th Cir. 2003); *Ferguson*, 298 F.3d at 786.

[62] *Ingle*, 328 F.3d at 1178.

California's reluctance to enforce arbitration agreements imposing fees upon the weaker party is not confined to the employment context. In *Ting v. AT&T,* for example, the Ninth Circuit applied the same fee-splitting rule traditionally applied in the employment context to a consumer action, holding that if consumers were required to pay arbitral fees in excess of what would be required in order to bring a case in court, the fee-splitting provision rendered the agreement substantively unconscionable.[63] Where the bargaining power between parties is unequal, as it is in the adhesion contract context, arbitration awards imposing costs upon the weaker party are unconscionable.

In addition to the imposition of a crippling $100,000 cost award upon Mr. Landis, the CAS arbitration was substantively unconscionable because of the significant advantages available to "repeat players" like USADA, which advantages are discussed at length in the motion to vacate. Indeed, Landis panelist, Mr. Paulsson, has written about the difficulties that athletes face in negotiating a sports arbitration:

> "Typically the exclusive jurisdiction of sporting authorities is set down in the by-laws of federations which grant licenses to compete in the course of a season or admission to participate in specific events. ...[T]he accused participating....often faces the proceedings much as a tourist would experience a hurricane in Fiji: a frightening and isolated event in his live, [sic] and for which he is utterly unprepared. The same may of course be said for most litigants in ordinary court proceedings. The difference is that whereas in the latter context the accused may be represented by experienced practitioners who appear as equals before the court, the procedures devised by most sports federations seem to be so connected to the organization that no outsider has the remotest chance of standing on an equal footing with his adversary—which is of course the

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[63] *Ting v. AT&T*, 319 F.3d at 1151. *See also Shankle v. B-G Maintenance, Inc.*, 163 F.3d 1230, 1235 (10th Cir. 1999)(fee-splitting provision requiring employee to pay as much as $5,000 to resolve claim was unconscionable).

> federation itself. To speak of a consensual process here seems an abuse of language."[64]

Because the sports federations and Olympic committees—bodies that share USADA's interest because they enforce anti-doping laws—nominate 60% of the members of the CAS arbitral pool and are the "repeat players" in the sports arbitration context (as is USADA), they enjoy a significant advantage. The inequities are compounded by the confidentiality that surrounds arbitration proceedings, secrecy that makes it difficult for outsiders to determine how various arbitrators have ruled in comparable cases, information much more available to frequent participants like USADA.[65]

And as stated more completely in the Amended Motion to Vacate, these advantages are further compounded because CAS refuses to prohibit the members of its arbitral pool from representing private clients before CAS panels. Thus, the repeat players have an incentive to hire CAS arbitrators as their lawyers—like USADA did when it hired Richard Young—and CAS arbitrators interested in obtaining lucrative legal business from such repeat players have an incentive to find in favor of those repeat players, institutionalizing an anti-athlete bias and creating a virtually closed system in which the athlete is at an extreme disadvantage.

California courts have noted the problems with "repeat player" bias and have found arbitration agreements unconscionable when they arise in that context.[66] As

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[64] Paulsson, J., "Arbitration of International Sports Disputes," in The Court of Arbitration for Sport, 1984-2004, Ian Blackshaw et al., (ed)(2006), at 40, 41-2.

[65] *Davis v. O'Melveny & Myers*, 485 F.3d at 1079; *Ting v. AT & T*, 319 F.3d at 1152; *Cole v. Burns Int'l Security Servs.*, 105 F.3d 1465, 1477 (D.C.Cir.1997).

[66] *Acorn v. Household Intern., Inc.*, 211 F.Supp.2d 1169-70; *Armendariz*, 24 Cal.4th at 115, 99 Cal.Rptr.2d 745, 6 P.3d 669 (size of employee award in arbitration is lower when employer is a repeat participant); *Mercuro v. Superior Court*, 96 Cal.App.4th at 179 (arbitration forum, though equally applicable to both parties, relevant to finding of unconscionability because "repeat player effect" rendered provision disadvantageous to weaker party). *See also Cole v. Burns Int'l Security Servs.*, 105 F.3d at 1476 ( court recognizes that because of the repeat participant effect, arbitration awards could systematically favor companies over individuals).

more fully described in his motion, the CAS appellate procedure was both procedurally and substantively unconscionable, so the CAS panel's award should be vacated.

**E. The Panel's decision should be vacated because it acted in manifest disregard of the law, justifying vacatur under 9 U.S.C.A. §10(a)(4), New York Convention, Art. V, §1(a), §2(b).**

An arbitrator acts in manifest disregard of the law, justifying vacatur, when he understands and can correctly state the rule of law to be applied, but proceeds to disregard that law.[67] As articulated in Mr. Landis's brief, the CAS Panel well understood the CAS Rules, World Anti-Doping Code provisions, and International Standard for Laboratories standards applicable to this proceeding because it articulated them in its decision. Nevertheless, it refused to apply those provisions, particularly with respect to the assignment of the burden of proof, as directed by Articles 3.1 and 3.2 of the World Anti-Doping Code. The Panel's repeated refusal to follow these rules resulted in many erroneous decisions, including but not limited to a $100,000 cost award unsupported by evidence and contrary to UCI rules.

**F. The Panel's "cost" award should be vacated because it violates the U.S. Constitutional protection against excessive punitive damages, justifying vacatur under 9 U.S.C.A. §10(a)(3),(4), New York Convention, Art. V, §2(b).**

Although the CAS Panel characterized its $100,000 penalty as an award of "costs," its failure to rely upon actual evidence of costs confirms that the award is in reality an award of punitive damages, imposed because the Panel was unhappy with

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[67] *San Martine Compania De Navegacion*, 293 F.2d 796, 801 (9th Cir. 1961); *Wilko v. Swan*, 346 U.S. 427, 436, 74 S.Ct. 182, 187, 98 L.Ed.2d 168 (1953).

the litigation choices made by Mr. Landis's counsel. [68] Because the award is punitive, and not cost-based, it is subject to constitutional limitations on the size of punitive damages awards.

Mr. Landis would first note that elementary notions of fairness demand that parties receive fair notice of conduct that might subject them to punishment, and of the severity of the penalty that the tribunal may impose.[69] Mr. Landis received no such notice. As the CAS Award makes clear, while he was entitled to raise a full range of issues in his *de novo* appeal, he was ultimately punished because he failed to prevail on any of them. No notice is provided that pursuing ultimately *unsuccessful* grounds for appeal will subject a party to a punitive award. Nor was Mr. Landis given any notice of the range of punishment to which he might be subjected. To his knowledge, no previous CAS Panel has ever awarded "costs" of this magnitude.

Courts look to three general indicators in determining whether a party was provided sufficient notice to support a punitive damages award: 1) the degree of reprehensibility of the conduct; 2) the disparity between the harm suffered by the opponent and the size of the punitive damages award; and 3) the difference between the penalty imposed in the instant case, as compared with other cases.[70] In Mr. Landis's case, not one of these indicators supports the imposition of a punitive damages award of $100,000 in an anti-doping suspension case. First, it is clear that the arbitrators imposed the penalty due to the conduct of Mr. Landis's lawyers, not because his *own* conduct as a cyclist required additional punishment or deterrence.[71]

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[68] *See* CAS Decision at Paragraph 289 [Exhibit 1, Amended Motion to Vacate Arbitral Award].

[69] *BMW of North America, Inc. v.Gore*, 517 U.S. 559, 574, 116 S.Ct. 1589, 1598 (1996).

[70] *Gore*, 517 U.S. at 575, 116 S.Ct. at 1598.

[71] CAS Decision at Paragraph 289 [Exhibit 1,Amended Motion to Vacate Arbitral Award] (justifying "cost" award on ground that Mr. Landis's failed to prevail on legal theories pursued, that he continued to press arguments in the *de novo* appeal that were rejected by the AAA panel below, because he called witnesses that were not cross-examined during the hearing.)

Second, this is a quasi-criminal proceeding, in which the prosecuting agency, USADA, is not seeking compensatory damages. Typically, punitive damages are only appropriate in the absence of a compensatory damages award where the party against whom the damages are awarded violated a federally-protected right, not the case here.[72] Certainly, the award of $100,000 in a case involving no compensatory damages, an award made in the absence of any evidence of Mr. Landis's ability to pay, or any evidence of the amount of money it might *take* to "deter" him, is so grossly excessive as to constitute a due process deprivation.[73] Finally, Mr. Landis is unaware of any other CAS proceeding in which "costs" were awarded in an amount that even approached the amount assessed against him. All of these factors demonstrate that the $100,000 penalty was grossly excessive, violating the due process rights guaranteed under the U.S. Constitution.

**G. Both diversity and federal question jurisdiction exist in this case.**

Mr. Landis alleges that this Court may exercise jurisdiction over the instant case based upon 28 U.S.C. 1331 and 1332. Federal question jurisdiction exists under 28 U.S.C. 1331 because the $100,000 penalty assessed against him is so grossly excessive that it violates his Fourteenth Amendment due process rights. Further, if this Court concludes that the New York Convention applies to this case, federal question jurisdiction exists because the Convention is a treaty of the United States.[74]

Diversity jurisdiction exists in this case as well. It cannot be disputed that there is complete diversity of citizenship between the parties. The $100,000 award satisfies the "amount in controversy" requirement because it constitutes a punitive damages award, not a "cost" award. Further, the value of the underlying arbitration greatly

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[72] *Passatino v. Johnson & Johnson Consumer Products, Inc.*, 212 F.3d 493, 514 (9th Cir. 2000)

[73] U.S. Constitution, amend. XIV; *Gore,* 517 U.S.at 1592, 116 S.Ct. at 562.

[74] 28 U.S.C.A. 1331; *Republic of Ecuador v. ChevronTexaco Corp.*, 376 F.Supp.2d 334, 347 (S.D.N.Y. 2005).

exceeded $75,000. As Mr. Landis pointed out in his declaration, he stood to lose or gain a one million Euro winning bonus depending upon the outcome of the arbitration.[75] When a case involves the sort of equitable relief at issue in the CAS proceeding, where the issue was whether or not Mr. Landis would be required to serve a two-year suspension, the amount in controversy is measured against the value to Mr. Landis of conducting his affairs free from the enforcement activities of USADA.[76] That amount greatly exceeds the $75,000 threshold, the $100,000 penalty and the one million Euro bonus, satisfying the "amount in controversy" prerequisite for the exercise of jurisdiction based upon diversity of citizenship.

## III. CONCLUSION

Mr. Landis's motion clearly articulates the facts and grounds upon which he rests his motion to vacate. This memorandum of points and authorities presents federal law interpreting the Federal Arbitration Act provisions upon which he relies. The authority presented clearly confirms that Mr. Landis was entitled to an arbitration hearing based on the evidence, and a decision made by impartial arbitrators. He did not receive such a hearing, so the CAS panel arbitral award should be vacated.

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[75] See Declaration of Floyd Landis [Exhibit 61, Motion to Vacate Arbitral Award].

[76] *Hunt v. Washington State Apple Advert. Comm'n.*, 432 U.S. 333, 347, 97 S.Ct. 2434 (1977); *America's MoneyLine, Inc. v. Coleman*, 360 F.3d 782, 786 (7th Cir. 2004).

Dated this 16th day of October, 2008.

Respectfully submitted,

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## PROOF OF SERVICE

STATE OF CALIFORNIA )

COUNTY OF LOS ANGELES )

I am a citizen of the United States and employed in the County of Los Angeles, State of California. I am over eighteen years of age and not a party to this within action; my business address is 273 W. 7th Street, San Pedro, California.

On the date set forth below, I served the foregoing document(s) described as: **MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF AMENDED MOTION TO VACATE ARBITRAL AWARD**

On all interested parties in this action by placing a true copy thereof enclosed in a sealed envelope(s) addressed and sent as follows:

**SEE ATTACHED SERVICE LIST**

[X] BY MAIL: I caused such envelope(s) to be deposited in the mail at San Pedro, California with postage thereon fully prepaid to the office of the addressee(s) as indicated above. I am "readily familiar" with this firm's practice of collection and processing correspondence for mailing. It is deposited with the U.S. Postal Service on that same day in the ordinary course of business. I am aware that on motion of party served, service is presumed invalid if postal cancellation date or postage meter date is more than one day after the date of deposit for mailing in affidavit.

[ ] BY FACSIMILE: I caused a courtesy copy to be transmitted by facsimile to the facsimile number of the offices of the addressee(s) as indicated above and below (see service list).

[X] BY FEDERAL EXPRESS: I caused such envelope to be transmitted by federal express for next day delivery (by 10:30 a.m.) to the offices of the addressee(s).

I declare under penalty of perjury, under the laws of the State of California that the above is true and correct.

Executed this 16th day of October, 2008 at San Pedro, California

**/s/ Cindy S. Ribeiro**

CINDY S. RIBEIRO

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T.I.A.S. No. 6997, 21 U.S.T. 2517, 1970 WL 104417 (U.S. Treaty)

UNITED STATES OF AMERICA
Multilateral

Recognition and Enforcement of Foreign Arbitral Awards[FN1]

FN1. For note by the Department of State, see p. 2561.

Convention done at New York June 10, 1958;
[FN2]

FN2. Texts as certified by the Secretary-General of the United Nations.

Accession, with declarations, advised by the Senate of the United States of America October 4, 1968;

Accession, with said declarations, approved by the President of the United States of America September 1, 1970;

Accession of the United States of America, with said declarations, deposited with the Secretary-General of the United Nations September 30, 1970;

Proclaimed by the President of the United States of America December 11, 1970;

Entered into force with respect to the United States of America December 29, 1970.

December 29, 1970.

BY THE PRESIDENT OF THE UNITED STATES OF AMERICA

A PROCLAMATION

**UNITED NATIONS CONFERENCE ON INTERNATIONAL COMMERCIAL ARBITRATION**

**CONVENTION ON TBE RECOGNITION AND ENFORCEMENT OF FOREIGN ARBITRAL AWARDS**

*Article I*

*Article II*

*Article III*

*Article IV*

*Article V*

*Article VI*

*Article VII*

*Article VIII*

*Article IX*

*Article X*

*Article XI*

*Article XII*

*Article XIII*

*Article XIV*

*Article XV*

*Article XVI*

Note by the Department of State

BY THE PRESIDENT OF THE UNITED STATES OF AMERICA

A PROCLAMATION

*1 CONSIDERING THAT:

The Convention on the Recognition and Enforcement of Foreign Arbitral Awards was adopted at New York on June 10, 1958, the text of which is as follows:

UNITED NATIONS CONFERENCE ON INTERNATIONAL COMMERCIAL ARBITRATION

CONVENTION ON THE RECOGNITION AND ENFORCEMENT OF FOREIGN ARBITRAL AWARDS

*Article I*

1. This Convention shall apply to the recognition and enforcement of arbitral awards made in the territory of a State other than the State where the recognition and enforcement of such awards are sought, and arising out of differences between persons, whether physical or legal. It shall also apply to arbitral awards not considered as domestic awards in the State where their recognition and enforcement are sought.

2. The term "arbitral awards" shall include not only awards made by arbitrators appointed for each case but also those made by permanent arbitral bodies to which the parties have submitted.

3. When signing, ratifying or acceding to this Convention, or notifying extension under article X hereof, any State may on the basis of reciprocity declare that it will apply the Convention to the recognition and enforcement of awards made only in the territory of another Contracting State. It may also declare that it will apply the Convention only to differences arising out of legal relationships, whether contractual or not, which are considered as commercial under the national law of the State making such declaration. [FN3]

FN3. For note by the Department of State, see p. 2561.

End of Footnote(s).*Article II*

1. Each Contracting State shall recognize an agreement in writing under which the parties undertake to submit to arbitration all or any differences which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not, concerning a subject matter capable of settlement by arbitration.

2. The term "agreement in writing" shall include an arbitral clause in a contract or an arbitration agreement, signed by the parties or contained in an exchange of letters or telegrams.

3. The court of a Contracting State, when seized of an action in a matter in respect of which the parties have made an agreement within the meaning of this article, shall, at the request of one of the parties, refer the parties to arbitration, unless it finds that the said agreement is null and void, inoperative or incapable of being performed.

*Article III*

Each Contracting State shall recognize arbitral awards as binding and enforce them in accordance with the rules of procedure of the territory where the award is relied upon, under the conditions laid down in the following articles. There shall not be imposed substantially more onerous conditions or higher fees or charges on the recognition or enforcement of arbitral awards to which this Convention applies than are imposed on the recognition or enforcement of domestic arbitral awards.

*Article IV*

*2 1. To obtain the recognition and enforcement mentioned in the preceding article, the party applying for recognition and enforcement shall, at the time of the application, supply:

(a) The duly authenticated original award or a duly certified copy thereof;

(*b*) The original agreement referred to in article II or a duly certified copy thereof.

2. If the said award or agreement is not made in an official language of the country in which the award is relied upon, the party applying for recognition and enforcement of the award shall produce a translation of these documents into such language. The translation shall be certified by an official or sworn translator or by a diplomatic or consular agent.

*Article V*

1. Recognition and enforcement of the award may be refused, at the request of the party against whom it is invoked, only if that party furnishes to the competent authority where the recognition and enforcement is sought, proof that:

(a) The parties to the agreement referred to in article II were, under the law applicable to them, under some incapacity, or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made; or

(*b*) The party against whom the award is invoked was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present his case; or

(*c*) The award deals with a difference not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration, provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, that part of the award which contains decisions on matters submitted to arbitration may be recognized and enforced; or

(*d*) The composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties, or, failing such agreement, was not in accordance with the law of the country where the arbitration took place; or

(e) The award has not yet become binding on the parties, or has been set aside or suspended by a competent authority of the country in which, or under the law of which, that award was made.

2. Recognition and enforcement of an arbitral award may also be refused if the competent authority in the country where recognition and enforcement is sought finds that:

(a) The subject matter of the difference is not capable of settlement by arbitration under the law of that country; or

(*b*) The recognition or enforcement of the award would be contrary to the public policy of that country.

*Article VI*

If an application for the setting aside or suspension of the award has been made to a competent authority referred to in article V (1) (e), the authority before which the award is sought to be relied upon may, if it considers it proper, adjourn the decision on the enforcement of the award and may also, on the application of the party claiming enforcement of the award, order the other party to give suitable security.

*Article VII*

*3 1. The provisions of the present Convention shall not affect the validity of multilateral or bilateral agreements concerning the recognition and enforcement of arbitral awards entered into by the Contracting States nor deprive any interested party of any right he may have to avail himself of an arbitral award in the manner and to the extent allowed by the law or the treaties of the country where such award is sought to be relied upon.

2. The Geneva Protocol on Arbitration Clauses of 1923 and the Geneva Convention on the Execution of Foreign Arbitral Awards of 1927[FN4] shall cease to have effect between Contracting States on their becoming bound and to the extent that they become bound, by this Convention.

FN4. 27 LNTS 157; 92 LNTS 301.

End of Footnote(s).*Article VIII*

1. This Convention shall be open until 31 December 1958 for signature on behalf of any Member of the United Nations and also on behalf of any other State which is or hereafter becomes a member of any specialized agency of the United Nations, or which is or hereafter becomes a party to the Statute of the International Court of Justice,[FN5] or any other State to which an invitation has been addressed by the General Assembly of the United Nations.

FN5. TS 993; 59 Stat. 1055.

End of Footnote(s).2. This Convention shall be ratified and the instrument of ratification shall be deposited with the Secretary-General of the United Nations.

*Article IX*

1. This Convention shall be open for accession to all States referred to in article VIII.

2. Accession shall be effected by the deposit of an instrument of accession with the Secretary-General of the United Nations.

*Article X*

1. Any State may, at the time of signature, ratification or accession, declare

that this Convention shall extend to all or any of the territories for the international relations of which it is responsible. Such a declaration shall take effect when the Convention enters into force for the State concerned.

2. At any time thereafter any such extension shall be made by notification addressed to the Secretary-General of the United Nations and shall take effect as from the ninetieth day after the day of receipt by the Secretary-General of the United Nations of this notification, or as from the date of entry into force of the Convention for the State concerned, whichever is the later.

3. With respect to those territories to which this Convention is not extended at the time of signature, ratification or accession, each State concerned shall consider the possibility of taking the necessary steps in order to extend the application of this Convention to such territories, subject, where necessary for constitutional reasons, to the consent of the Governments of such territories.

*Article XI*

In the case of a federal or non-unitary State, the following provisions shall apply:

*4 (a) With respect to those articles of this Convention that come within the legislative jurisdiction of the federal authority, the obligations of the federal Government shall to this extent be the same as those of Contracting States which are not federal States;

(*b*) With respect to those articles of this Convention that come within the legislative jurisdiction of constituent states or provinces which are not, under the constitutional system of the federation, bound to take legislative action, the federal Government shall bring such articles with a favourable recommendation to the notice of the appropriate authorities of constituent states or provinces at the earliest possible moment;

(c) A federal State Party to this Convention shall, at the request of any other Contracting State transmitted through the Secretary-General of the United Nations, supply a statement of the law and practice of the federation and its constituent units in regard to any particular provision of this Convention, showing the extent to which effect has been given to that provision by legislative or other action.

*Article XII*

1. This Convention shall come into force on the ninetieth day following the date of deposit of the third instrument of ratification or accession.

2. For each State ratifying or acceding to this Convention after the deposit of the third instrument of ratification or accession, this Convention shall enter into force on the ninetieth day after deposit by such State of its instrument of

ratification or accession.

*Article XIII*

1. Any Contracting State may denounce this Convention by a written notification to the Secretary-General of the United Nations. Denunciation shall take effect one year after the date of receipt of the notification by the Secretary-General.

2. Any State which has made a declaration or notification under article X may, at any time thereafter, by notification to the Secretary-General of the United Nations, declare that this Convention shall cease to extend to the territory concerned one year after the date of the receipt of the notification by the Secretary-General.

3. This Convention shall continue to be applicable to arbitral awards in respect of which recognition or enforcement proceedings have been instituted before the denunciation takes effect.

*Article XIV*

A Contracting State shall not be entitled to avail itself of the present Convention against other Contracting States except to the extent that it is itself bound to apply the Convention.

*Article XV*

The Secretary-General of the United Nations shall notify the States contemplated in article VIII of the following:

(a) Signatures and ratifications in accordance with article VIII;

(b) Accessions in accordance with article IX;

(c) Declarations and notifications under articles I, X and XI;

(d) The date upon which this Convention enters into force in accordance with article XII;

*5 (e) Denunciations and notifications in accordance with article XIII.

*Article XVI*

1. This Convention, of which the Chinese, English, French, Russian and Spanish texts shall be equally authentic, shall be deposited in the archives of the United Nations.

2. The Secretary-General of the United Nations shall transmit a certified copy of this Convention to the States contemplated in article VIII.

FOR AFGHANISTAN:

FOR ALBANIA:

FOR ARGENTINA:

Subject to the declaration contained in the Final Act.

C. RAMOS
26 August 1958

FOR AUSTRALIA:

FOR AUSTRIA:

FOR THE KINGDOM OF BELGIUM:
Joseph NISOT

A. HERMENT

FOR BOLIVIA:

FOR BRAZIL:

FOR BULGARIA:

Bulgaria will apply the Convention to recognition and enforcement of awards made in the territory of another contracting State. With regard to awards made in the territory of non-contracting States it will apply the Convention only to the extent to which these States grant reciprocal treatment.

A. GHEORGIEV
17 XII 1958

FOR THE UNION OF BURMA:

FOR THE BYELORUSSIAN SOVIET SOCIALIST REPUBLIC:
F. N. GRYAZNOV
29/XII-1958

FOR CAMBODIA:

FOR CANADA:

FOR CEYLON:
M. T. D. KANAKARATNE
December 30th, 1958

FOR CHILE:

FOR CHINA:

FOR COLOMBIA:

FOR COSTA RICA:
Alberto F. CAÑAS

FOR CUBA:

FOR CZECHOSLOVAKIA:

Czechoslovakia will apply the Convention to recognition and enforcement of awards made in the territory of another contracting State. With regard to awards made in the territory of non-contracting States it will apply the Convention only to the extent to which these states grant reciprocal treatment.

Jaroslav PS C OLKA
October 3, 1958

FOR DENMARK:

FOR THE DOMINICAN REPUBLIC:

FOR ECUADOR:
José A. CORREA
Dec 17/1958

FOR EL SALVADOR:
M. Rafael URQUÍA

F. R. LIMA

FOR ETHIOPIA:

FOR THE FEDERATION OF MALAYA:

FOR FINLAND:
G. A. GRIPENBERG
Dec. 29th, 1958

FOR FRANCE:
G. GEORGES-PICOT
25 November 1958

FOR THE FEDERAL REPUBLIC OF GERMANY:
A. BULOW

FOR GHANA:

FOR GREECE:

FOR GUATEMALA:

FOR HAITI:

FOR THE HOLY SEE:

FOR HONDURAS:

FOR HUNGARY:

FOR ICELAND:

FOR INDIA:
C. K. DAPHTARY

FOR INDONESIA:

FOR IRAN:

FOR IRAQ:

FOR IRELAND:

FOR ISRAEL:
H. COHN

FOR ITALY:

FOR JAPAN:

FOR THE HASHEMITE KINGDOM OF JORDAN:
Thabet KHALIDI

FOR THE REPUBLIC OF KOREA:

FOR LAOS:

FOR LEBANON:

FOR LIBERIA:

FOR LIBYA:

FOR LIECHTENSTEIN:

FOR THE GRAND DUCHY OF LUXEMBOURG:
Georges HEISBOURG
Le 11 novembre 1958

FOR MEXICO:

FOR MONACO:
Marcel PALMARO
Le 31/12/58

FOR MOROCCO:

FOR NEPAL:

FOR THE KINGDOM OF THE NETHERLANDS:
C. SCHURMANN

FOR NEW ZEALAND:

FOR NICARAGUA:

FOR THE KINGDOM OF NORWAY:

FOR PAKISTAN:
K. M. KAISER
30th of December 1958

FOR PANAMA:

FOR PARAGUAY:

FOR PERU:

FOR THE PHILIPPINE REPUBLIC:

Octavio L. MALOLES

The Philippine delegation signs ad *referendum* this Convention with the reservation that it does so on the basis of reciprocity and declares that the Philippines will apply the Convention to the recognition and enforcement of awards made only in the territory of another Contracting State pursuant to article I, paragraph 3, of the Convention.

FOR POLAND:

Jacek MACHOWSKI

With reservations as mentioned in article I, par. 3.

FOR PORTUGAL:

FOR ROMANIA:

FOR SAN MARINO:

FOR SAUDI ARABIA:

FOR SPAIN:

FOR THE SUDAN:

FOR SWEDEN:
Agda RÖSSEL
Dec. 23, 1958

FOR SWITZERLAND:
Felix SCHNYDER
29 décembre 1958

FOR THAILAND:

FOR TUNISIA:

FOR TURKEY:

FOR THE UKRAINIAN SOVIET SOCIALIST REPUBLIC:
P. P. UDOVICHENKO
29.XII.1958

FOR THE UNION OF SOUTH AFRICA:

FOR THE UNION OF SOVIET SOCIALIST REPUBLICS:
A. A. SOBOLEV
29-XII-58

FOR THE UNITED ARAB REPUBLIC:

FOR THE UNITED KINGDOM OF GREAT BRITAIN AND NORTHERN IRELAND:

FOR THE UNITED STATES OF AMERICA:

FOR URUGUAY:

FOR VENEZUELA:

FOR VIET-NAM:

FOR YEMEN:

FOR YUGOSLAVIA:

By its resolution of October 4, 1968, the Senate of the United States of America, two-thirds of the Senators present concurring, gave its advice and consent to ac-

cession to the Convention with the following declarations:

"The United States of America will apply the Convention, on the basis of reciprocity, to the recognition and enforcement of only those awards made in the territory of another Contracting State."

"The United States of America will apply the Convention only to differences arising out of legal relationships, whether contractual or not, which are considered as commercial under the national law of the United States."

The accession of the United States of America to the Convention was approved by the President of the United States of America with the aforesaid declarations on September 1, 1970, and the instrument of accession was deposited with the Secretary-General of the United Nations on September 30, 1970;

In accordance with paragraph 2 of Article XII, the Convention will enter into force for the United States of America on December 29, 1970, the ninetieth day after the deposit of its instrument of accession;

In accordance with paragraph 2 of Article X and pursuant to a notification by the Government of the United States of America received by the Secretary-General of the United Nations on November 3, 1970, the application of the aforesaid Convention will extend, with effect from February 1, 1971, to all the territories for the international relations of which the United States of America is responsible;

NOW, THEREFORE, I, Richard Nixon, President of the United States of America, proclaim and make public the Convention on the Recognition and Enforcement of Foreign Arbitral Awards to the end that, subject to the aforesaid declarations, it shall be observed and fulfilled, as to the United States of America on and after December 29, 1970, and as to all the territories for the international relations of which the United States of America is responsible on and after February 1, 1971, by the United States of America and by the citizens of the United States of America and all other persons subject to the jurisdiction thereof.

IN TESTIMONY WHEREOF, I have signed this proclamation and caused the Seal of the United States of America to be affixed.

DONE at the city of Washington this eleventh day of December in the year of our Lord one thousand nine hundred seventy and of the Independence of the United States of America the one hundred ninety-fifth.

[SEAL]

RICHARD NIXON
By the President:

WILLIAM P ROGERS
*Secretary of State*

Note by the Department of State

List of countries parties to the convention as of December 29, 1970, with texts of declarations and reservations made at the time of signature of the convention or deposit of the instrument of ratification or accession.

| Country | Date of deposit of ratification or accession (a) |
|---|---|
| Austria | May 2, 1961(a) |
| The Republic of Austria will apply the Convention, in accordance with the first sentence of article 1(3) thereof, only to the recognition and enforcement of arbitral awards made in the territory of another Contracting State. [Translation] | |
| Bulgaria | October 10, 1961 |
| Bulgaria will apply the Convention to recognition and enforcement of awards made in the territory of another contracting State. With regard to awards made in the territory of non-contracting States it will apply the Convention only to the extent to which these States grant reciprocal treatment. [Translation] | |
| Byelorussian Soviet Socialist Republic | November 15, 1960 |
| The Byelorussian Soviet Socialist Republic will apply the provisions of this Convention in respect to arbitral awards made in the territories of non-contracting States only to the extent to which they grant reciprocal treatment. [Translation] | |
| Cambodia | January 5, 1960(a) |
| Central African Republic | October 15, 1962(a) |
| Referring to the possibility offered by paragraph 3 of article I of the Convention, the Central African Republic declares that it will apply the Convention on the basis of reciprocity, to the recognition and enforcement of awards made only in the territory of another contracting State; it further declares that it will apply the Convention only to | |

differences arising out of legal relationships, whether contractual or not, which are considered as commercial under its national law. [Translation]

Ceylon — April 9, 1962

Czechoslovakia — July 10, 1959

"Czechoslovakia will apply the Convention to recognition and enforcement of awards made in the territory of another contracting State. With regard to awards made in the territory of non-contracting States it will apply the Convention only to the extent to which these States grant reciprocal treatment."

Ecuador — January 3, 1962

Ecuador, on the basis of reciprocity, will apply the Convention to the recognition and enforcement of arbitral awards made in the territory of another contracting State only if such awards have been made with respect to differences arising out of legal relationships which are regarded as commercial under Ecuadorean law. [Translation]

Finland — January 19, 1962

France[FN6] — June 26, 1959

Referring to the possibility offered by paragraph 3 of article I of the Convention, France declares that it will apply the Convention on the basis of reciprocity, to the recognition and enforcement of awards made only in the territory of another contracting State; it further declares that it will apply the Convention only to differences arising out of legal relationships, whether contractual or not, which are considered as commercial under its national law. [Translation]

Germany, Federal Republic of[FN7] — June 30, 1961

"With respect to paragraph 1 of article 1, and

| | |
|---|---|
| in accordance with paragraph 3 of article 1 of the Convention, the Federal Republic of Germany will apply the Convention only to the recognition and enforcement of awards made in the territory of another Contracting State." | |
| Ghana | April 9, 1968(a) |
| Greece | July 16, 1962(a) |
| Hungary | March 5, 1962(a) |
| ". . . the Hungarian People's Republic shall apply the Convention to the recognition and enforcement of such awards only as have been made in the territory of one of the other Contracting States and are dealing with differences arising in respect of a legal relationship considered by the Hungarian law as a commercial relationship." | |
| India | July 13, 1960 |
| "In accordance with Article I of the Convention, the Government of India declare that they will apply the Convention to the recognition and enforcement of awards made only in the territory of a State, party to this Convention. They further declare that they will apply the Convention only to differences arising out of legal relationships, whether contractual or not, which are considered as commercial under the Law of India." | |
| Israel | January 5, 1959 |
| Italy | January 31, 1969(a) |
| Japan | June 20, 1961(a) |
| ". . . it will apply the Convention to the recognition and enforcement of awards made only in the territory of another Contracting State." | |
| Malagasy Republic | July 16, 1962(a) |
| The Malagasy Republic declares that it will | |

apply the Convention on the basis of reciprocity, to the recognition and enforcement of awards made only in the territory of another Contracting State; it further declares that it will apply the Convention only to differences arising out of legal relationships, whether contractual or not, which are considered as commercial under its national law. [Translation]

Morocco — February 12, 1959(a)

The Government of His Majesty the King of Morocco will only apply the Convention to the recognition and enforcement of awards made only in the territory of another contracting State. [Translation]

Netherlands[FN8] — April 24, 1964

Referring to paragraph 3 of article I of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, the Government of the Kingdom declares that it will apply the Convention to the recognition and enforcement of awards made only in the territory of another Contracting State. [Translation]

Niger — October 14, 1964(a)

Nigeria — March 17, 1970(a)

"In accordance with paragraph 3 of article I of the Convention, the Federal Military Government of the Federal Republic of Nigeria declares that it will apply the Convention on the basis of reciprocity to the recognition and enforcement of awards made only in the territory of a State party to this Convention and to differences arising out of legal relationships, whether contractual or not, which are considered as commercial under the Laws of the Federal Republic of

Nigeria."

| | |
|---|---|
| Norway | March 14, 1961(a) |
| "1. We will apply the Convention only to the recognition and enforcement of awards made in the territory of one of the Contracting States." | |
| "2. We will not apply the Convention to differences where the subject matter of the proceedings is immovable property situated in Norway, or a right in or to such property." | |
| Philippines | July 6, 1967 |
| ". . . the Philippines, on the basis of reciprocity, will apply the Convention to the recognition and enforcement of awards made only in the territory of another Contracting State and only to differences arising out of legal relationships, whether contractual or not, which are considered as commercial under the national law of the State making such declaration." | |
| Poland | October 3, 1961 |
| "With reservations as mentioned in article 1, par. 3." | |
| Romania | September 13, 1961(a) |
| The Romanian People's Republic will apply the Convention only to differences arising out of legal relationships, whether contractual or not, which are considered as commercial under its legislation. The Romanian People's Republic will apply the Convention to the recognition and enforcement of awards made in the territory of another Contracting State. As regards awards made in the territory of certain non-contracting States, the Romanian People's Republic will apply the Convention only on | |

| | |
|---|---|
| the basis of reciprocity established by joint agreement between the parties. [Translation] | |
| Switzerland | June 1, 1965 |
| Referring to the possibility offered by paragraph 3 of article 1, Switzerland will apply the Convention to the recognition and enforcement of awards made only in the territory of another Contracting State. [Translation] | |
| Syria | March 9, 1959(a) |
| Tanzania | October 13, 1964(a) |
| "The Government of the United Republic of Tanganyika and Zanzibar will apply the Convention, in accordance with the first sentence of article 1(3) thereof, only to the recognition and enforcement of awards made in the territory of another Contracting State." | |
| Thailand | December 21, 1959(a) |
| Trinidad and Tobago | February 14, 1966(a) |
| "In accordance with Article 1 of the Convention, the Government of Trinidad and Tobago declares that it will apply the Convention to the recognition and enforcement of awards made only in the territory of another Contracting State. The Government of Trinidad and Tobago further declares that it will apply the Convention only to differences arising out of legal relationships, whether contracted or not, which are considered as commercial under the Law of Trinidad and Tobago." | |
| Tunisia | July 17, 1967(a) |
| . . . with the reservations provided for in article 1, paragraph 3, of the Convention, that is to say, the Tunisian State will apply the Convention to the recognition and enforcement of awards made only in the | |

territory of another Contracting State and only to differences arising out of legal relationships, whether contractual or not, which are considered as commercial under Tunisian law. [Translation]

Ukranian Soviet Socialist Republic — October 10, 1960

The Ukrainian Soviet Socialist Republic will apply the provisions of this Convention in respect to arbitral awards made in the territories of non-contracting States only to the extent to which they grant reciprocal treatment. [Translation]

Union of Soviet Socialist Republics — August 24, 1960

The Union of Soviet Socialist Republics will apply the provisions of this Convention in respect to arbitral awards made in the territories of non-contracting States only to the extent to which they grant reciprocal treatment. [Translation]

United Arab Republic — March 9, 1959(a)

United States of America[FN9] — September 30, 1970(a)

"The United States of America will apply the Convention, on the basis of reciprocity, to the recognition and enforcement of only those awards made in the territory of another Contracting State."

"The United States of America will apply the Convention only to differences arising out of legal relationships, whether contractual or not, which are considered as commercial under the national law of the United States."

FN6. Extended to all territories of the French Republic.

FN7. Applicable to Land Berlin.

FN8. Applicable to the Kingdom in Europe, Surinam and the Netherlands Antilles.

FN9. Extended to all the territories for the international relations of which the United States of America is responsible, with effect from Feb. 1, 1971.

T.I.A.S. No. 6997, 21 U.S.T. 2517, 1970 WL 104417 (U.S. Treaty)

END OF DOCUMENT

**UNITED STATES COURT**
**NORTHERN DISTRICT OF FLORIDA**
**PENSACOLA DIVISION**

JUSTIN GATLIN,

Plaintiff,

v.

Case No. 3:08cv241/LAC/EMT
Florida Bar No. 0393517

UNITED STATES ANTI-DOPING AGENCY, INC.; USA TRACK AND FIELD, INC.; UNITED STATES OLYMPIC COMMITTEE.; and INTERNATIONAL ASSOCIATION OF ATHLETICS FEDERATIONS,

Defendants.

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**UNITED STATES OLYMPIC COMMITTEE'S MOTION TO DISMISS COMPLAINT**

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Defendant, United States Olympic Committee (USOC), by and through undersigned counsel, moves pursuant to Federal Rule of Civil Procedure 12(b) to dismiss the Complaint filed in this action by Plaintiff, Justin Gatlin (Gatlin), for lack of jurisdiction. In support of its Motion, USOC submits the following memorandum of law.

**PRELIMINARY STATEMENT**

Gatlin brings this action alleging violations of the Americans with Disabilities Act (ADA) and the Rehabilitation Act of 1973 (RA) by the defendants, including USOC, seven years after testing positive for the use of Adderall at a track and field competition and after initiating, but not exhausting, required arbitral processes in which Gatlin raised ADA and RA claims. As this Court clearly recognized during the injunction proceedings, this Court lacks jurisdiction over

the subject matter of this Complaint. Accordingly, the Complaint should be dismissed as was Gatlin's Preliminary Injunction Motion. This Court does not have jurisdiction over the claims because the substance of Gatlin's claims were submitted to arbitration and Gatlin has not exhausted the arbitral remedies afforded to him.[1] Both the merits and the equities plainly favor dismissing Gatlin's claims.

**STATEMENT OF FACTS AS SET FORTH IN COMPLAINT**

Gatlin was diagnosed with Attention Deficit Disorder (ADD) at age 9 following difficulty concentrating on school work and later was prescribed medication to address the ADD, including Adderall. Compl. at ¶15, 21. Gatlin alleges that Adderall has no athletic performance-enhancing benefits (and to the contrary states that it makes him "lethargic"), but provides Gatlin the ability to avoid diminishment of his "scholastic performance." Compl. at ¶¶22, 23, 32, 37 and 41.

Gatlin accepted an athletic scholarship for track and field at the University of Tennessee, Knoxville (UT). Compl. at ¶28. At UT, Gatlin continued to excel in track and field, but he struggled academically even though he continued to use Adderall. Compl. at ¶¶31, 33-35. Gatlin was placed in a special education program at UT to assist in his school work, continued to be monitored by doctors, was provided with more access to tutors than otherwise would be allowed by NCAA regulations and was given "extended time on his examinations." Compl. at ¶¶29-30. In particular, Gatlin had trouble with his afternoon classes because Gatlin would typically skip his afternoon dose of Adderall because it made him feel lethargic at track practice. Compl. at ¶32. Gatlin's complaint does not allege that he uses Adderall to participate in track

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1 USOC does not waive any right or defense that arguably may become relevant and material if this Court were to find that it does have jurisdiction over this matter, including, but not limited to, statute of limitations, act of state doctrine, disability unrelated to access, no entitlement to money damages under the ADA, no entitlement to money damages under the RA as pled, and failure to join indispensable parties.

and field competition and only alleges a need for the medication to assist in academic performance. Compl. at ¶41.

Due to poor academic performance, Gatlin enrolled in summer school courses between his freshman and sophomore years of college to remain eligible to compete in track and field for UT.[2] Compl. at ¶40. On June 13, 2001, Gatlin was scheduled to take a summer school examination and was using Adderall. Compl. at ¶42. Following the examination, Gatlin stopped the use of Adderall in order to not feel the side effects at an upcoming track and field competition. Compl. at ¶44. Gatlin alleges that he had been instructed that it was standard practice for athletes on Adderall to stop taking the medication two days prior to competition. Compl. at ¶47.

Three days later, on June 16, 2001, Gatlin competed in his first USA Track & Field sanctioned competition. Compl. at ¶44, 46. Gatlin received a "pledge sheet" referencing drug testing and prohibited substances, although it did not specifically list Adderall. Compl. at ¶48. Gatlin signed the pledge sheet. Compl. at ¶49. There was also a form available called a "therapeutic use exemption" through which Gatlin could have disclosed any medically necessary medication, including Adderall, and sought an exemption from the standard testing prohibitions for this medication. Compl. at ¶50. After wining the 100 and 200 meter events and the 300 meter hurdles at the competition, Gatlin was tested for prohibited substances on June 16 and June 17, 2001. Compl. at ¶51. Both samples tested positive for amphetamines. Compl. at ¶52.

Gatlin presented his medical records to the United States Anti-Doping Agency (USADA) and requested that the positive result be waived. Compl. at ¶59-60. USADA denied the request and recommended that a two-year sanction be imposed. Compl. at ¶61. Gatlin was "advised"

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[2] Due to academic difficulties, Gatlin decided to turn professional after his sophomore year of college. Compl. at ¶80.

by "the USOC Ombudsman to" seek and retain independent counsel to assist with the positive findings and the arbitration process." Compl. at ¶58. Pursuant to USADA Protocol, Gatlin contested the sanction before an American Arbitration Association (AAA) Panel raising his ADA and RA arguments. Compl. at ¶63; *see* Docket Entry 36 (hereinafter "Order") p.3 ("[i]t is beyond dispute that Plaintiff properly challenged his suspension on grounds that Defendants' actions violated his rights under the American with Disabilities Act and the Rehabilitation Act of 1973, the very grounds he raises ..."). Gatlin does not allege that he pursued his arbitrational remedies to exhaustion.

Before the AAA Panel, while he raised the ADA and RA arguments, Gatlin "stipulated" and "agreed" that "Justin's positive result was technically a doping violation" under the International Association of Athletics Federations (IAAF) rules. Compl. at ¶64. The AAA Panel imposed a 2-year sanction for Gatlin's offense, but the IAAF granted him early reinstatement based on the medical use of Adderall.[3] Compl. at ¶71, 74. Notwithstanding the early reinstatement, in a 2002 newsletter, the IAAF stated that Gatlin had committed a doping offense and stated any repetition of his positive result would result in a lifetime ban. Compl. at ¶74 n.7. The complaint does not allege that Gatlin contested this IAAF statement or any of the parameters of the IAAF reinstatement in a proceeding before the Court of Arbitration for Sport (CAS) as was his right as the Court noted. *See* Order at 3 ("[a]s these matters have been decided, Plaintiff is precluded from raising them here unless he can show that the CAS decision falls within one of the identified exceptions.").

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[3] Gatlin participated in the 2004 Summer Olympics, winning numerous medals, and became the 2005 World and USA 100 meter and 200 meter champion. Compl. at ¶81-82.

In 2006, Gatlin competed in "the Kansas Relays" and was selected to be tested for use of prohibited substances. Compl. at ¶87. Gatlin tested positive for exogenous testosterone or its metabolites. Compl. at ¶88. Similar to the 2001 positive test, Gatlin "on advice of counsel entered into a stipulation wherein he admitted" that the 2006 test showed signs of a prohibited substance. Compl. at ¶92. Also similar to the 2001 positive test, Gatlin sought review raising the ADA and RA arguments before the AAA, which considered the 2006 violation to be Gatlin's second violation and imposed a four-year suspension.[4] Gatlin appealed the 2006 AAA decision to the Court of Arbitration for Sport (CAS), which considered Gatlin's ADA and RA arguments and affirmed the decision of the AAA panel with a slight date modification. Compl. at ¶109.

Gatlin filed a five-count complaint seeking monetary and injunctive relief for alleged violations of the ADA and RA. Injunctive relief was denied by this Court and the United States Court of Appeals for the Eleventh Circuit during the week of June 22, 2008 on the grounds that the Courts lacked jurisdiction to entertain Gatlin's complaint. *See* Order at 2, 4.

## ARGUMENT

### I. MOTION TO DISMISS STANDARD

"When considering a motion to dismiss, all facts set forth in the plaintiff's complaint are to be accepted as true and the court limits its consideration to the pleadings and exhibits attached thereto." *Thaeter v. Palm Beach County Sheriff's Office*, 449 F.3d 1342, 1352 (11th Cir. 2006) (citation omitted).

Under Federal Rule of Civil Procedure 12(b)(1), subject matter jurisdiction must be affirmatively shown in the record before considering the merits of any case. *E.g.*, *Sweet Pea Marine, Ltd. v. APJ Marine, Inc.*, 411 F.3d 1242, 1247 (11th Cir. 2005). Jurisdiction "must be

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[4] The AAA's four-year suspension ran from May 26, 2006 to May 26, 2010. Compl. at ¶94.

demonstrated not supposed." *Morrison v. Allstate Indem. Co.*, 228 F.3d 1255, 1273 (11th Cir. 2000). When a plaintiff's jurisdictional allegations are challenged, he bears the burden of supporting his "allegations by competent proof." *Id.*; *McNutt v. General Motors Acceptance Corp.*, 298 U.S. 178, 189, 56 S.Ct. 780, 80 L.Ed. 1135 (1936) (requiring proof by a preponderance of the evidence).

A party may bring either a facial or a factual challenge to a court's subject matter jurisdiction. *Lawrence v. Dunbar*, 919 F.2d 1525, 1528-29 (11th Cir. 1990). In a factual challenge, a court must determine if it has power to hear the case. *Id.* A court is not required to assume that the plaintiff's allegations are true and is free to weigh the evidence and evaluate the merits of the jurisdictional claims. *Id.* at 1529. The presumption of truthfulness afforded a plaintiff under Federal Rule of Civil Procedure 12(b)(6) does not attach and, where the elements of the underlying cause of action are not implicated, the court is free to weigh the evidence. *Scarfo v. Ginsberg*, 175 F.3d 957, 960 (11th Cir. 1999); *Goodman v. Sipos*, 259 F.3d 1327, 1331 n. 6 (11th Cir. 2001).

## II. THIS COURT LACKS SUBJECT MATTER JURISDICTION TO ADJUDICATE THE CLAIMS.

### A. This Court Does Not Have Jurisdiction Because the Substance of Each Count Has Been Submitted to Arbitration.

The United States courts, including this Court, have no jurisdiction to review the arbitral rulings that disqualified Gatlin from participating in Olympic events. As this Court specifically found in its June 24, 2008 ruling, "[i]t is beyond dispute that Plaintiff properly challenged his suspension on grounds that Defendants' actions violated his rights under the American with Disabilities Act and the Rehabilitation Act of 1973, the very grounds he raises" in his Preliminary Injunction motion, as well as his Complaint. Gatlin raised all of his claims,

including his ADA and RA arguments, in the AAA hearings on both the 2001 and the 2006 violation. He then again fully litigated all of his claims, including the ADA and RA claims, in a *de novo* appeal before the CAS. To address, yet again, Gatlin's claim that invalidating his 2001 violation through a retroactive therapeutic use exemption (TUE) would be a "reasonable accommodation" under the ADA and RA, this Court would have been required to determine, among other things, whether: (i) the 2001 violation can be used to enhance the sanction for the 2006 violation; (ii) Gatlin was at fault for the 2001 violation; and, most importantly (iii) *any* sanction for the 2001 positive test would violate the ADA and RA. Those are precisely the questions that were expressly addressed before the CAS and decided against Gatlin. Indeed, this Court specifically so noted when it indicated in its Order that "[a]s these matters have been decided [before the AAA and CAS], Plaintiff is precluded from raising them here... ."[5]

In its decision to deny the requested injunction, this Court was correct in relying on the Seventh Circuit's decision in *Slaney v. IAAF & USOC*, 244 F.3d 580 (7th Cir. 2001), to reject Gatlin's claims. *See* Order at 2-3. *Slaney* involved a similar attempt by an athlete to plead a challenge to a doping sanction as a violation of various state and federal laws (and made an allegation that the doping test involved systematically discriminated against women), which the court rejected because the disqualified athlete sought judicial review of "the identical issues" that had been adjudicated by the CAS. *Id.* at 590. As in *Slaney*, granting relief to Gatlin would

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[5] The Court did point out that there was certain mechanisms under the New York Convention by which an international arbitration could be challenged in a United States Federal Court, but it is important to note for this motion that such an action would be a complaint to set aside an arbitration, *not* as Gatlin seeks here, an attempt to re-litigate the substantive claims from the arbitration under a different federal statute. Such a complaint cannot be filed due to the Plaintiff's failure to exhaust remedies and the public policy favoring arbitration and the language used by this Court in its Order (and the Eleventh Circuit's denial of Plaintiffs' emergency motion).

necessarily undermine or, indeed, nullify the CAS's decision, and this Court correctly refused to do so.

The USOC is entitled (and, indeed, required) to enforce the CAS's decision under the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, also known as the New York Convention, which entered into force in 1959, and was subsequently codified in 9 U.S.C. §§ 201-208, as the CAS itself has recognized. The New York Convention governs because the CAS is a foreign tribunal, and the proceedings were governed by Swiss law, as the Eleventh Circuit recognized in *Industrial Risk Insurers v. M.A.N. Gutehoffenungshutte GmbH*, 141 F.3d 1434, 1440-41 (11th Cir. 1998) ("[w]e join the First, Second, Seventh, and Ninth Circuits in holding that arbitration agreements and awards 'not considered as domestic' in the United States are those agreements and awards which are subject to the Convention," not necessarily for being "made abroad, but because [they were] made within the legal framework of another country, *e.g.*, pronounced in accordance with foreign law *or involving parties domiciled or having their principal place of business outside the enforcing jurisdiction*"; "broad construction ... is more in line with the intended purpose of the treaty, which was entered into to encourage the recognition and enforcement of international arbitration awards") (original emphasis).

The Swiss Federal Supreme Court has recognized the CAS as "a real arbitral tribunal offering sufficient guarantees of independence and objectivity for its awards to be final and enforceable." Jan Paulsson, *The Swiss Federal Tribunal Recognises the Finality of Arbitral Awards Relating to Sports Disciplinary Sanctions Rendered by the IOC's Court of Arbitration for Sports*, 8 *International Arbitration Reports* 12, 15 (Oct. 1993) (citing *Grundel v. Int'l Equestrian Federation*, Judgment of Mar. 15, 1993). The Swiss Federal Supreme Court has

more recently reaffirmed that the CAS is an independent and fair international arbitral body. *See, e.g., A & B v. IOC & Int'l Ski Federation*, (May 27, 2003 decision of 1st Civil Division of the Swiss Federal Supreme Court) ("[t]he Federal Supreme Court has accepted that the CAS may be considered a true arbitral tribunal"); CAS Code at ¶¶3.3.3.3 – 3.3.4 ("having gradually built up the trust of the sporting world, this institution ... remains one of the principle mainstays of organized sport and is sufficiently independent vis-à-vis the IOC, as well as all other parties that call upon its services, for its decisions in cases involving the IOC to be considered true awards, equivalent to the judgments of State courts").

Although the statute codifying the New York Convention sets forth grounds for evading enforcement, 9 U.S.C. § 207, Gatlin failed to allege *any* basis for not enforcing the CAS's decision. Indeed, he has entirely ignored the New York Convention, as he sought, and obtained, the equivalent of *de novo* review of a claim that he voluntarily submitted to arbitration including whether he should be accommodated under the ADA and RA, in compliance with procedures by which he is bound. Compl. at ¶¶60, 1001, 104, 109. In its order vacating the injunction, this Court recognized that Mr. Gatlin had failed to plead or argue any of the exceptions to the New York Convention. *See* Order at 3. The Court noted that "the only conceivable exception would be the "public policy" exception, *see* Order at 3, 9 U.S.C. § 207, which exception is to be applied very narrowly. *See Trans Chem. Ltd. v. China Nat'l Mach. Import & Export Corp.*, 161 F.3d 314 (5th Cir. 1998); *Indocomex Fibres Pte, Ltd. v. Cotton Co. Int'l, Inc.*, 916 F.Supp. 721 (W.D. Tenn. 1996). As this Court acknowledged, the exception is "a very slender exception reserved for decisions which violate the 'most basic notions of morality and justice,'" such that even "arbitrary and capricious" decisions "do not qualify under this exception." *See* Order at 3-4 (citation omitted). No such argument could possibly be made here: enforcement of the CAS

decision would further the well-established goals of the Olympic Movement in creating a unitary and highly expert panel for review of eligibility determinations, as well as the USOC's statutorily granted exclusive authority to determine Olympic eligibility.

In addition, under the pertinent legislation and law, this matter must proceed pursuant to arbitration. Under the Amateur Sports Act, in accordance with its Congressionally mandated mission "to provide swift resolution of conflicts and disputes involving amateur athletes," 36 U.S.C. § 220503(8), the USOC provides for arbitration by the AAA for disputes involving doping charges, 36 U.S.C. § 220529(a). Further, discrimination claims, including ADA claims, are properly resolved in arbitration to which the parties have agreed.[6] *E.g, Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 110, 123-24 (2001); *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 35 (1991) (age-discrimination claim); *McWilliams v. Logicon, Inc.*, 143 F.3d 573, 576 (10th Cir. 1998) (ADA claim); *Miller v. Public Storage Mgmt., Inc.*, 121 F.3d 215, 218 (5th Cir. 1997) (ADA claim). In fact, the Congress amended the ADA in 1991 expressly to *encourage* alternative dispute resolution of ADA claims. 42 U.S.C. § 12212 ("the use of alternative means of dispute resolution, including ... arbitration, is encouraged to resolve disputes arising under this chapter").[7] Finally, "Congress demonstrated a liberal federal policy favoring arbitration agreements," *MS Dealer Service Corp. v. Franklin*, 177 F.3d 942, 947 (11th Cir. 1999) (quoting

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6 RA claims are also arbitrable. *See* 28 C.F.R. 36.103 (defining relationship of ADA Title III to the RHA.

7 Regulations promulgated under the ADA also provide for arbitration. 28 C.F.R. § 36.506. Courts may consider such regulations, "as Congress specifically directed the Attorney General to "issue regulations in an accessible format to carry out the provisions of [the ADA] ... that include standards applicable to facilities ... and vehicles covered under" the ADA. *Access Now, Inc. v. S.W. Airlines, Co.*, 227 F. Supp. 2d 1312, 1317 n.5 (S.D. Fla. 2002) (quoting 42 U.S.C. § 12186(b)).

*Gilmer*, 500 U.S. at 25, when it enacted the AAA, which mandates that courts "rigorously enforce arbitration agreements." *Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213, 221 (1985).

In the end, this Court's lack of jurisdiction is established by the overarching rule that parties are entitled to enforcement of binding arbitration agreements. *E.g., Gilmer*, 500 U.S. at 25; *Volt Info Sci., Inc. v. Bd. of Trs. of Leland Stanford Junior Univ.*, 489 U.S. 468, 476 (1989); *Moses H. Cone Mem. Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983); *Employers Ins. of Wausau v. Bright Metal Specialties*, 251 F.3d 1316, 1322 (11th Cir. 2001). The very essence of arbitration is that judicial review is all but eliminated, save for narrow grounds for vacatur, such as are set forth in the New York Convention or under the Federal Arbitration Act. *E.g., Hall St. Assocs. v. Mattel, Inc.*, --- U.S. ---, 125 S.Ct. 1396, 1402 (2008); *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52, 57 (1995); *Southland Corp. v. Keating*, 465 U.S. 1, 10 (1984). "Otherwise plenary review by a court of the merits would make meaningless the provisions that the arbitrator's decision is final, for in reality it would almost never be final." *Bianchi v. Roadway Exp.*, 441 F.3d 1278, 1284 (11th Cir. 2006) (citation omitted).

**B. Gatlin Has Failed to Exhaust the Required Arbitral Remedies Afforded to Him.**

Gatlin is not without a remedy if he is dissatisfied with the current status of his case. Under the agreement by which all parties to this action are bound, Gatlin, under controlling Swiss law, could seek review of the CAS decision, as may be available before the Swiss Federal Supreme Court, in accordance with the USADA Protocol and the CAS Code, as this Court recognized. *See* Order at 4 (Swiss Federal Supreme Court is Gatlin's "remaining avenue for relief").

The Swiss Act on Private International Law (PILA) provides for the review contemplated under the CAS Code. Under the PILA, a CAS award may be challenged on certain specified grounds to the Swiss Federal Supreme Court. Until Gatlin presents his case to the Swiss Federal Supreme Court, he has not exhausted his remedies. *Int'l Std. Elec. Carp. v. Bridas Sociedad Anonima Petrolera*, 745 F. Supp. 172, 177-78 (S.D.N.Y. 1990) (citation omitted).

In *Lee v. U.S. Taekwanda Union*, 331 F.Supp.2d 1252, 1258-59 (D.Hawai'i 2004), the court found that even if the USOC breached its bylaws when it removed a former coach of the United States Olympic Taekwondo Team, because the coach failed to exhaust his internal remedy of arbitration for the alleged breach, and thus, the district court lacked subject matter jurisdiction over the coach's claim alleging discrimination on the basis of race. *See alsa Devereaux v. Amateur Saftball Ass'n of America*, 768 F.Supp. 618, 624 (S.D.Ohio 1991) ("The Court hereby finds that the plaintiffs' failure to exhaust the administrative remedies provided for under the Amateur Sports Act of 1978, the arbitration procedures provided for under the Act, and the administrative remedies set forth in the official rules of the ASA, creates a situation whereby the Court's involvement is premature.").

**C. The ADA and RA Cannot be Invoked to Trump International Law.**

Disability claims are subject to overarching principles of international law.

> If, moreover, Title III's "readily achievable" exemption were not to take conflicts with international law into account, it would lead to the anomalous result that American cruise ships are obligated to comply with Title III even if doing so brings them into noncompliance with [international law], whereas foreign ships – which unlike American ships have the benefit of the internal affairs clear statement rule – would not be so obligated. Congress could not have intended this result.

*Spectar v. Narwegian Cruise Line, Ltd.*, 545 U.S. 119, 136 (2005).

Here, Mr. Gatlin's attempted use of the ADA and RA would trump the carefully created internationally applicable protections for Olympic eligibility determinations. Every federal judge faced with a disability claim could impose "reasonable accommodations" that violate the international conventions under which Olympic competitions are held, and by which the USOC is indisputably bound.

Since arbitral remedies are provided for and Gatlin did not exhaust those remedies before filing suit, Gatlin must exhaust such remedies and the failure to do so prior to filing suit in this Court requires dismissal of the action due to the lack of jurisdiction.

**CONCLUSION**

Ultimately, this Court's denial of preliminary injunctive relief for lack of jurisdiction is dispositive. The rectitude of that ruling has been recognized by the Eleventh Circuit in that court's denial of Gatlin's request for injunctive relief pending his attempted appeal from this Court's decision. This Court has no jurisdiction to grant *any* relief on Gatlin's claims.

WHEREFORE, USOC requests that this Court enter an order granting USOC's Motion to Dismiss in its entirety and with prejudice.

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that a true and correct copy of the foregoing has been served per Federal Rule of Civil Procedure 5(b)(2)(E) and Northern District of Florida Local Rule 5.1(A)(6) this 8th day of July 2008, to the following:

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