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

In the matter of the arbitration between FLOYD LANDIS, Petitioner, and UNITED STATES ANTI-DOPING AGENCY, Respondent.	Case No.: CV-08-06330 AMENDED MOTION TO VACATE ARBITRATION AWARD Hearing Date and Time: November 24, 2008 @1:30p.m. Honorable Judge Percy Anderson

Because the arbitrators considering Floyd Landis's anti-doping appeal failed to disclose business dealings and relationships creating a powerful incentive to rule in favor of his opponent, the U.S. Anti-Doping Agency, Mr. Landis was denied a fundamentally fair arbitral hearing in front of a panel of impartial arbitrators. What he received instead was a fundamentally *unfair* hearing in which the statements of USADA's counsel were given evidentiary weight while record evidence was ignored, and a hearing in which both the law and the evidence were disregarded. This Court should exercise the authority granted by the Federal Arbitration Act, 9 U.S.C.A., §2, §10 and 12, and vacate the award issued in the arbitral proceeding known as *Floyd Landis v/USADA*, CAS 2007/A/1394.[1]

I. PROCEDURAL ISSUES

A. Jurisdiction and Venue

Mr. Landis moves to vacate the arbitral award issued by the Court of Arbitration for Sport ("CAS"), the body to which Mr. Landis appealed an adverse arbitration decision issued by a U.S. panel pursuant to the protocol of the United States Anti-Doping Agency. *USADA v. Floyd Landis*, Case No. AAA 30 190 00847 06 ("the Appealed Case"). Thus, this motion to vacate arises under the Federal Arbitration Act, 9 U.S.C., §2, §10, §12.

There is complete diversity of citizenship between the parties, and the amount in controversy exceeds $75,000, so this Court has jurisdiction pursuant to 28 U.S.C. §1332(a).

Because Mr. Landis moves to vacate the arbitration award based not only upon the statutory grounds articulated in the Federal Arbitration Act but also upon the Fourteenth Amendment to the U.S. Constitution and federal common law rules, a federal question is presented, and jurisdiction is proper under 28 U.S.C. §1331.

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[1] The CAS Panel's decision is attached to this Motion as Exhibit 1. The transcript of the hearing is attached as Exhibit 2. *See also* Exhibit 62, Declaration of Kay Gunderson Reeves.

In the alternative, and out of an abundance of caution, Mr. Landis alleges that this motion arises under the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards ("New York Convention"), 9 U.S.C. §§201-208, presenting a federal question that vests this Court with jurisdiction under 28 U.S.C. §1331.

Venue is proper in the Central District of California under 9 U.S.C.A. §§9-11 and 28 U.S.C. §1391. The claims described herein arise out of a relationship between the parties that was initiated in this district and performed in substantial part in this district over a period of years. The contract binding Mr. Landis to arbitration with the Defendant was executed by him in this district, performance of a substantial portion of his obligations occurred in this district, and Defendant supervises U.S. athletes including Mr. Landis in this district on an ongoing and continuous basis. Enforcement of the $100,000 penalty awarded by the arbitrators in Defendant's favor will occur in this district. The Defendant, through its agents, does business in this district, and its activities are continuous and substantial. Alternatively, venue is proper in this district under 9 U.S.C. § 204.

B. Parties

Petitioner FLOYD LANDIS, an elite road cyclist pronounced the winner of the 2006 Tour De France, is an individual citizen of Riverside County, California.

The UNITED STATES ANTI-DOPING AGENCY, INC. ("USADA") is a not-for-profit corporation with its principal place of business in Colorado Springs, Colorado. In the United States, USADA is responsible for the management of anti-doping testing and adjudication of enforcement actions arising under the World Anti-Doping Code.

C. Procedural History

On July 23, 2006, Floyd Landis placed first in the Tour de France and was pronounced its winner, marking the eighth year in a row that an American rider had won road cycling's most prestigious stage race.

During the course of the race, Mr. Landis gave multiple urine samples as part of the race's anti-doping program, samples that were tested by the Laboratorie National de Depistage et du Dopage ("LNDD").[2] Two days after the Tour ended, the LNDD notified his international cycling federation, Union Cycliste Internationale ("UCI") that the ratio of testosterone to epitestosterone [the "T/E ratio"] in the "A" sample he provided after Stage 17 of the Tour exceeded the permissible limits set by the World Anti-Doping Agency ("WADA"), a result the LNDD allegedly confirmed by performing a Carbon Isotope Ratio ("CIR" test).[3] Upon Mr. Landis's request, LNDD performed T/E ratio and CIR tests on the "B" portion of his sample on August 3-5, 2006, reporting that these results confirmed the "A" on August 5. Based on the results of both the T/E ratio and the CIR tests, the LNDD reported an "Adverse Analytical Finding" under the WADA Code, a finding that was subject to enforcement in the United States by USADA.

Under the applicable UCI rules, adjudication of Mr. Landis's alleged doping violation was to occur in the United States. Ex. 3, AAA Panel Decision at ¶5-6. Though UCI rules charged his national federation, USA Cycling, with responsibility for conducting that proceeding, USA Cycling had contractually delegated its enforcement responsibilities to USADA, which commenced an anti-doping proceeding against Mr. Landis in September, 2006. In May, 2007, an original arbitration hearing was held before a panel of the North American Court of Arbitration for Sport of the American Arbitration Association ("the AAA Panel"), a proceeding governed by the UCI rules (which incorporate the WADA Code), the USADA protocol and California procedural law. Ex. 3, AAA Panel Decision at ¶¶8-12, ¶14, ¶20.

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[2] Each sample given is divided into an "A" portion and a "B" portion.

[3] Also commonly referred to as an "IRMS" test.

The AAA Panel issued its decision on September 20, 2007, concluding that the T/E ratio test results did not support the doping violation because the LNDD had failed to perform that test (and some aspects of the CIR test) in compliance with the International Standard for Laboratories ("ISL"). Ex. 3, AAA Decision at ¶172. However, a 2-1 majority of the Panel voted to sustain the doping violation, concluding that LNDD's failure to perform certain aspects of the CIR test in compliance with the ISL had not caused an incorrect result. The AAA Panel suspended Mr. Landis for a two-year period running from January 30, 2007 through January 29, 2009, imposing tremendous financial hardships on a man who had never made a living from any activity other than cycling. Ex. 3, AAA Panel Decision at ¶320(1), (6). In addition to losing his livelihood, Mr. Landis lost a 1 million Euro winning bonus and lucrative contracts exceeding that amount.

Mr. Landis appealed this decision to the appellate division of the Court of Arbitration for Sport ("CAS") on October 8, 2007. Pursuant to CAS rules, he made his arbitrator selection in November, 2007, choosing Mr. Jan Paulsson. USADA selected New Yorker lawyer, Mr. David Rivkin and, upon information and belief, the president of CAS's Appellate Division selected the panel president, Mr. David Williams, after consulting with Mssrs. Paulsson and Rivkin. Ex. 4., CAS Rule R54. The panel selection process was completed by mid-November, 2007.

The Panel conducted a *de novo* appeal hearing from March 19-24, 2008 in New York City, pursuant to USADA Protocol, ¶10(c) and CAS Rule R57. *See* Ex. 4, CAS Rule R57; and ex. 5, USADA Protocol, ¶10 (c). Both parties to the appeal were domiciled in the United States, the AAA decision appealed from was decided under the procedural rules of the State of California. On appeal, CAS applied its own rules of appellate procedures, as well as the UCI Rules of USADA Protocol; moreover, U.S. substantive law was also applicable since neither the parties nor the CAS panel made a different choice in the manner provided by CAS

rules. Ex. 1, CAS Decision, ¶¶23-24; Ex. 4, CAS Rule R58; Ex. 30, Order of Procedure, at 2, ¶7.

Though all of the CAS appeal proceedings had occurred in the United States, the decision was transmitted to CAS's home office in Lausanne, Switzerland for "delivery" instead of its Denver, Colorado office. The CAS Panel not only dismissed Mr. Landis's appeal, it imposed $100,000 in USADA's litigation costs against him, even though UCI rules do not provide for such an award, no evidence had been introduced to support such an award, and the issue of costs was not among the list of issues formally submitted to the Panel for decision. Divorced as it is from any actual evidence of what the "costs" of litigation were, the $100,000 award, though labeled as a "cost" award, is clearly a punitive award, one which neither CAS nor UCI rules allowed the arbitrators to award. See Exhibit 1, CAS Decision, ¶¶284-289. The Panel's award meant that Mr. Landis would continue to be deprived of his 1 million Euro winning bonus. That award will be enforced in the United States; indeed, both USA Cycling and USADA have already informed Mr. Landis that they will not issue him a USA Cycling license until he pays the penalty in full. Ex. 6-B, Letter to Floyd Landis from William Bock III, September 19, 2008. The $100,000 award has effectively extended his two-year suspension indefinitely, until such time as Mr. Landis—who has never made his living apart from cycling—is able to come up with the money.

Mr. Landis petitions this Court to invoke the authority granted to it under the Federal Arbitration Act, 9 U.S.C., §2, §10 and §12, and vacate the CAS panel's appellate award. In the alternative and out of an abundance of caution, Mr. Landis petitions this Court to invoke the authority granted to it under the New York Convention, 9 U.S.C. §§201-208, and vacate the CAS panel's appellate award.

D. **Grounds for Motion to Vacate the Panel's Award**

The CAS panel award should be vacated because Mr. Landis was denied a fundamentally fair hearing for the following reasons:

a) the CAS arbitrator selection process institutionalizes a "repeat player" bias into the CAS appeal system, creating an unconscionable system in which athletes are denied equal access to evidence and a chance at an impartial panel [9 U.S.C. §10(a)(2); New York Convention, Art. V., §1(a) and (d), Art. V, §2(b)];

b) the CAS arbitrators exhibited evident partiality by failing to disclose dealings creating a reasonable impression of possible bias and partiality, and by acting with actual bias [9 U.S.C. §10(a)(2); New York Convention, Art. V, §1(a) and (d), Art. V, §2(b)];

c) the arbitrators based their $100,000 "cost" award on unsworn statements made by USADA's lawyer after the close of the evidence, denying Mr. Landis a right to respond. Because it is not evidence-based, the "cost" award is properly characterized as a grossly excessive punitive damages award, impairing Mr. Landis's Fourteenth Amendment due process rights. In addition, the cost award was outside the scope of the arbitrators' power because the issue of costs had not been formally submitted for decision, and because such an award is not contemplated by the UCI rules governing the proceeding. The cost award was made in manifest disregard of the law, and was unconscionable; [9 U.S.C. §10(a)(3), §10(a)(4); New York Convention, Art. V, §(a), (b), (c), §2(a) and (b)];

d) the procedures and time limits adopted by the CAS panel during the appellate proceeding prohibited Mr. Landis from presenting his case [9 U.S.C. §10(a)(3); New York Convention, Art. V, §1(b)];

e) the arbitrators failed to base their substantive decisions upon the evidence presented, but instead relied upon non-evidentiary statements made by counsel for USADA (and fellow CAS arbitrator),

Mr. Richard Young [9 U.S.C. §10(a)(3), (4); New York Convention, Art. V, §1(b), §2(b)];

f) the arbitrators repeatedly refused to consider Mr. Landis's evidence, tantamount to a refusal to hear pertinent evidence at all [9 U.S.C.A. §10(a)(3); New York Convention, Art. V, §1(b)];

g) the arbitrators acted in manifest disregard of the law and their own rules [9 U.S.C.A. §10(a)(4); New York Convention, Art. V, §1(a), (b)];

h) The arbitration procedures as applied in Mr. Landis's case were unconscionable [9 U.S.C.A. §2, New York Convention, §1(a), §2(b)].

II. Argument

A. The CAS appeal process denied Mr. Landis a fundamentally fair hearing decided by impartial arbitrators.

1. The CAS arbitrator selection process is heavily biased in favor of the doping enforcement bodies, who nominate a majority of the arbitral pool, and who are in a far better position to know which arbitrators are likely to share their interests.

Only those cyclists holding a cycling license from their national federation are eligible to compete in elite international road cycling events like the Tour de France, and as a condition of being granted a license, each cyclist agrees to the jurisdiction of the Court of Arbitration for Sport for the resolution of doping disputes. Ex. 6, Floyd Landis's Cycling License; Ex. 7, UCI Anti-Doping Rules at

Parts I, VII, IX, X, XI; Ex. 3, AAA Panel Decision at ¶4, ¶¶10-11. The form and terms of the cycling license, including the consent to the Court of Arbitration for Sport's jurisdiction are not subject to negotiation; if the athlete wishes to compete, he must consent to the license terms. As required by UCI rules and the USADA Protocol, Mr. Landis submitted his initial arbitration to a panel of the North American Court of Arbitration for Sport; it is the appeal of that process that is the subject of this motion to vacate.

At first glance, the CAS appellate procedure presents the appearance of balance. Each party selects one arbitrator, with the panel president selected by the CAS's Appellate Division. Ex. 4, CAS Rules 48, 53-54. However, the CAS arbitral pool is heavily dominated by lawyers selected by the organizations charged with enforcing anti-doping regulations. Though CAS's parent organization, the International Council of Arbitration for Sport ("ICAS") formally selects the CAS arbitral pool, it chooses three-fifths of the pool members from lists submitted by the International Olympic Committee ("IOC"), the national Olympic committees in each member country, and international sports federations like UCI. Ex. 4, CAS Rule S14. These entities are among those charged with enforcing anti-doping regulations against athletes. While ICAS selects one-fifth of the CAS arbitration pool "after appropriate consultation with a view to safeguarding the interests of the athletes," organizations representing athletes are not provided an opportunity to submit lists of candidates for appointment to the CAS arbitrator pool. Arbitrators in the pool serve renewable four-year terms.

The IOC, the sports federations, and the national Olympic committees clearly have the ability to stack the CAS pool with arbitrators representing their interests, while athletes and athlete organizations have no formal ability to influence the composition of the arbitral pool. Conversely, any arbitrator nominated by one of these bodies has a reciprocal interest in advancing the agenda of the nominating bodies, thereby increasing the chances of renomination at the

end of the four-year term. As if this advantage were not significant enough, it is heightened by the fact that these nominating bodies—and the entities like USADA that share their interests—are in a position to *know* which arbitrators they proposed for inclusion in the CAS pool (and to share that information with other anti-doping enforcement bodies like USADA). In contrast to an individual athlete, each organization charged with prosecuting anti-doping offenses certainly knows the identities of any lawyers it nominates, and is in a position to gain access to the names of proposed arbitrators submitted by the other federations or sports organizations because they all have an interest in sharing this information amongst themselves, and with like-minded enforcement agencies such as USADA. By process of elimination, then, they can identify those nominated by ICAS as "independents" or as arbitrators reflecting athletes' interests. The athlete, by contrast, is in no position to know how any particular arbitrator gained admission to the pool, and in no position to make an informed choice should the need arise. No organization representing athletes nominates arbitrators, nor are the IOC, sports federations or national Olympic committees likely to share their knowledge about the CAS pool members with athletes charged with doping violations. The athlete alone is totally in the dark about the manner in which any particular arbitrator is selected for inclusion in to the CAS pool.

The sports federations and agencies not only dominate the pool selection process and have a significant knowledge advantage over the athlete, but they also gain an advantage because they appear before the CAS on a regular basis, in contrast to individual athletes. By virtue of their regular enforcement activities, "repeat players" like USADA are frequently in the position of selecting the individual arbitrators who serve on particular appeal panels, while individual athletes only rarely find themselves in this position. Any arbitrator interested in being selected to serve as arbitrator on a regular basis has an incentive to curry favor with those "repeat players" by taking positions favorable to them. This

repeat player bias is well-recognized. *Acorn v. Intern., Inc.*, 211 F.Supp.2d 1160, 1169-70 (N.D. Cal. 2002)(advantages to repeat participants in the arbitration market are well-known); Ex. 8, Letter from Laurence Schultz, President, Public Investors Arbitration Bar Association to Nancy Morris, Secretary, Securities and Exchange Commission, April 16, 2008 (describing repeat player bias).

"Repeat players" like USADA have a *unique* advantage in CAS proceedings because the WADA Code prohibits lab personnel from making any public comments undermining the work of another WADA lab. Ex. 19, AAA Panel Dissent at 5-7; Ex. 29, WADA Code, Annex B, Laboratory Code of Ethics, Part 4. While it is permissible –in fact, common–for the director of one WADA lab to provide expert witness testimony supporting or validating the work done by another WADA lab where (as here) that work is challenged in an anti-doping appeal, the converse is *not* true. Even if a WADA lab director believed that another lab had not correctly performed the testing relied upon to support a doping violation, the WADA Code of "Ethics" appears to prevent the lab director from speaking up on behalf of an athlete, *even on cross-examination*. Ex. 19, AAA Panel Dissent, at 6, ¶¶15-16; Ex. 60, AAA Tr. at 834:23-837:15 (testimony of Dr. Christiane Ayotte).

In a case like this one, where the athlete challenges the WADA lab's methods and practices, supporting testimony given by other WADA lab directors has been given great weight by sports arbitration panels. In the Landis case, for example, USADA designated three WADA lab directors to testify on its behalf at the AAA hearing: Dr. Christiane Ayotte (director, Montreal lab), Dr. Wilhelm Schänzer (director, Cologne lab) and Dr. Donald Catlin (former director, UCLA lab); Drs. Ayotte and Schänzer were designated as witnesses for the CAS hearing as well. Ex. 3, AAA Panel Decision at 20, ¶100; Ex. 25, USADA Witness Designation. The AAA Panel also designated Dr. Francisco Botré to serve as its "independent expert;" at the time, he was director of the WADA-accredited lab in

Rome. Ex. 3, AAA Panel Decision at 15, ¶63. On at least two occasions, the AAA Panel disregarded the evidence offered by Mr. Landis witnesses, finding it less than persuasive because they were not (as they could not be) WADA lab directors. Ex. 3, AAA Panel Decision, ¶¶238-40, ¶273, ¶278. The CAS Panel, too, rejected the evidence of Mr. Landis's experts, particularly Dr. Goldberger, because he did not direct a WADA-accredited laboratory. See Ex. 1, CAS Decision, ¶¶50, 76, 81, 131, 172, 178. Deference to the testimony of WADA lab directors is common in CAS proceedings. See, e.g., Ex. 12, CAS Case Law, *Landaluze v. Real Federacion Espanola de Ciclismo*, CAS 2006/A/1119 at ¶¶67-70; ¶¶72-79, ¶¶83-87. The fact that "repeat players" like USADA have access to the expertise of WADA lab directors while athletes do not is a significant advantage built into the anti-doping adjudication system, one that is virtually impossible for the athlete to overcome.

At the end of the day, any protection an athlete might gain from his right to select a single arbitrator is undermined not only by the heavily-slanted pool selection process, and the advantages created by WADA Code of Ethics, but also by CAS Rule R59, which allows the president of a CAS appellate panel to decide the case *alone*, in the absence of a majority. Ex. 4, CAS Rule R59. Appellate panel presidents, including the Landis panel president, are chosen by the President of the CAS Appellate Division, a position currently held by Mr. Thomas Bach, who also serves as Vice-President of the IOC. Ex. 4, CAS Rule R53. Thus, in the unlikely event that an athlete is lucky enough to select an arbitrator included in the CAS pool to "safeguard....the interests of athletes," that arbitrator can be overruled by a panel president selected by the Vice-President of the IOC. That is a particularly troubling prospect in Mr. Landis's case, because comments Mr. Bach made to the media the day the Landis "B" sample results were made public indicated that Mr. Bach had prejudged this case. Ex. 9-A, "Reacktionen auf den Fall Landis," comments of Thomas Bach, IOC Vice-President, President, Samstag,

August 4, 2006, http://www.n-tv.de/696797.html (Commenting that the fact that Landis could be suspended immediately furthered the goals of the International Olympic Committee, of which he is Vice-President); Ex. 9-B, Declaration of Seth Davidson.

Upon closer examination, the CAS system provides only illusory protections to athletes, whose participation in the system is guaranteed by the adhesion contracts they sign as a condition of eligibility. Ex. 6-A, Landis USA Cycling License. Athletes have no right to nominate arbitrators to the CAS pool, no ability to influence the decision to renew a pool member's appointment, no access to information about how any particular arbitrator came to be a member of the pool. Finally, because individual athletes appear only infrequently before CAS panels, they are in no position to take advantage of the "repeat player" bias that favors anti-doping agencies like USADA. The system created is entirely one-sided, and institutionalizes bias in favor of the "repeat players;" as such, the system fails to guarantee athletes like Mr. Landis a decision made by impartial arbitrators. The system is both procedurally and substantively unconscionable, justifying vacatur. Vacatur is also justified under FAA, 9 U.S.C.A., §2 and, §10(a)(2); New York Convention, Art. V, §1(a), (d), §2(b).

2. The CAS arbitrators' failure to disclose dealings with one another constituted "evident partiality," exacerbating the "repeat player" bias created by the CAS arbitrator-selection process.

The inequities created by the CAS's slanted arbitrator selection process are compounded immeasurably by the fact **that CAS allows the members of its arbitral pool to continue representing clients before other CAS panels**. Any CAS arbitrator who also represents sports bodies charged with enforcing the anti-

doping rules clearly has a bias in favor of his own client's position, and is therefore unlikely to take a position as arbitrator that is adverse to those interests. So if a client like the International Olympic Committee ("IOC") frequently finds itself relying upon the lab work done in WADA laboratories to prove up the anti-doping violations it pursues, it is unlikely that a CAS arbitrator, when representing the IOC as its lawyer, would take positions undermining the basic competence of those laboratories when serving as an arbitrator. Such arbitrators do not come to their panels with an open mind, but with a bias in favor of the view held by their paying clients. To make matters infinitely worse, because CAS allows its arbitrators to continue actively representing clients before CAS panels, the arbitrators and party representatives in any given case can expect to find their roles completely reversed in the next, with the former litigant sitting in judgment of a client represented by the former decision-makers. This is hardly a recipe for impartial decisionmaking.

And an impartial decision is what Mr. Landis had a right to receive. The federal policy favoring arbitration applies not to any arbitration, but to an impartial arbitration, a policy goal the Federal Arbitration Act implements by granting federal courts the authority to vacate arbitration awards in which arbitrators act with "evident partiality." 9 U.S.C.A. §10(a)(2); *Commonwealth Coatings Corp. v. Continental Casualty Co.*, 393 U.S. 145, 89 S.Ct. 337 (1968). That policy also finds expression in the New York Convention, which permits a court to vacate an arbitral award where the award would be contrary to established public policy, where the composition of the arbitral panel is inconsistent with the law of the country where the arbitration took place, or where the award is invalid under the rules of the host country. New York Convention, Art. V§§(1)(a), (1)(d) and (2)(b). The policy is also embraced by the rules of both UCI and CAS, which require impartial hearings and which mandate that arbitrators sign a declaration promising "to exercise their functions personally with total objectivity and independence," and to "immediately disclose any

circumstances likely to affect his independence with respect to any of the parties." Ex.4, CAS Rules S5, S18 and R33.

In this circuit, evident partiality within the meaning of FAA §10(a)(2) exists both where an arbitrator acts with actual bias, but also where the arbitrator fails to disclose financial, business or other facts that would have created a reasonable impression of partiality. *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). Far from guaranteeing an impartial panel, however, the CAS system exacerbates the existing "repeat player" bias present in many arbitral contexts by allowing the members of its arbitral pool to continue representing clients before CAS panels, creating even more incentives to favor the "repeat players" than would exist in the normal arbitral context.

As stated above, arbitrators participating in an arbitral arena featuring "repeat players" already have an incentive to favor the parties that make frequent appearances before the CAS because these parties determine far more frequently than any particular athlete which arbitrators from the pool are selected and which are not. However, because CAS arbitrators are allowed to represent clients before the CAS, "repeat players" like USADA present not just the source of further *arbitral* work, but also the source of potential future *legal* business. Adopting positions favorable to the interests of these "repeat players" is not only more likely to ensure that an arbitrator will obtain future arbitral appointments, but it increases his or her chances of being retained as future legal counsel. And of course, once a CAS arbitrator embraces positions consistent with those adopted by "repeat players" like USADA, that creates a powerful *reciprocal* incentive for those "repeat players" to do just what USADA did in Mr. Landis's case—hire a practicing CAS arbitrator to represent them. Not surprisingly, a cursory review of a recently-published listing of CAS cases, parties and arbitrators, confirms that

many of the most frequently-selected arbitrators are those that also represent private sports clients, or who have partners who do. Ex. 10, CAS Case List, 1985-2003 (See arbitrator/lawyers Beloff, Fortier [whose partner represents WADA], Martens, Young, Netzle, Morand and Paulsson). Powerful financial incentives clearly exist to align the financial interests of the "judges" with those of the "repeat player" litigants.

The fact that these "repeat players" can and do hire CAS arbitrators to represent them in CAS proceedings introduces a third powerful bias into the system. In the Landis appeal, USADA was represented by a lawyer, Mr. Richard Young, who is also a CAS arbitrator (see Ex. 10 and 11). That being the case, any sitting panelist that represents—or seeks to represent—sports clients before CAS panels had a clear incentive to favor USADA because in a future proceeding, the roles might be reversed, with Mr. Young deciding the fate of the arbitrator's own client. The fear of retribution in a future proceeding creates a powerful incentive to decide cases in favor of parties represented by fellow CAS arbitrators. And because "repeat players" provide far greater potential for lucrative long-term legal representation opportunities, these parties are far more likely to be able to entice a CAS arbitrator to work for them, creating a virtually closed system in which the athlete cannot compete.

Athletes are in a poor position to discover any of these facts. The process by which arbitrators are selected for inclusion in the CAS pool is not public, nor are CAS proceedings generally open to the public. The decisions of CAS panels are publicized only irregularly, posted on the CAS website for temporary periods and then removed (though this procedure has improved in recent months). While official CAS digests are eventually published in book form, those digests lag many years behind the decisions themselves, and contain only a part of the opinion issued by the panel. Worse, they do not disclose the names of the lawyers representing the parties in those proceedings. Therefore, athletes like Mr. Landis

are not able to access the facts that would reveal how the various arbitrators decide cases, which ones might espouse positions more favorable to athletes, or which ones wear two hats, sometimes representing a party, sometimes in judgment as a CAS arbitrator.

That situation changed significantly a few weeks ago, when CAS began publishing a relatively comprehensive list of decisions on its website. Ex. 10, CAS Case List. The partial listing contains an identification of the litigants (though the names of some athletes are not disclosed), the names of the lawyers sitting as arbitrators, and the names of the lawyer representing parties. At present, this list is partially complete, current only up through 2003.

Publication of this list allowed Mr. Landis to discover facts previously unknown to him, facts confirming that the worst case scenario for "repeat player" bias existed in his case. The information contained in that list, when combined with the few publicly-available facts and CAS decisions posted on the Internet, revealed that two of the three arbitrators on his panel had represented clients before the CAS, and that the firms of all three arbitrators actively sought out sports bodies as clients. It also confirmed that USADA's lawyer, Richard Young, was himself a CAS arbitrator who had frequently served on panels judging cases in which Mr. Paulsson (the arbitrator selected by Mr. Landis) had represented the IOC.

Starkly illustrating that the system for selecting the members of the CAS arbitral pool places athletes at a distinct knowledge disadvantage, the newly-released information indicates that it was Mr. Paulsson—the arbitrator that Mr. Landis selected—who had the most to disclose because he was most active in representing a client responsible for enforcing anti-doping rules (the IOC), a client likely to take positions completely adverse to those Mr. Landis was taking. Not counting the Landis case, Mr. Paulsson has anticipated in CAS proceedings

involving at least 33 athletes (or their doctors/managers),[4] and in at least twelve of those proceedings, he appeared on behalf of the IOC.[5] The CAS Case List indicates that Mr. Paulsson represented the IOC before a panel that included Mr. Young in the case of at least six athletes.[6] In addition, Mr. Paulsson appeared before panels including Mr. Rivkin on at least four occasions.[7] It also confirms that Mr. Paulsson presided as an arbitrator in two proceedings where the IOC appeared before him as a party.[8]

Nor is Mr. Paulsson the only lawyer in his firm who is a CAS arbitrator, or that represents sports law clients. His partner, Christian Duve, is a current member of the CAS arbitral pool (Ex. 13, excerpt, CAS arbitrator list), while another partner, Mr. Raj Parker, is a former CAS arbitrator who also regularly represents the Football Association.[9] Moreover, their firm—Freshfields, Bruckhaus, Derringer—was one of the lead firms representing the City of London in its

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[4] *See* Ex. 10, CAS Case List (identifying 29 cases in which Mr. Paulsson appeared as either arbitrator or party representative); Ex. 12, CAS Case Law (*Landaluze v. Real Federacion Espanola de Ciclismo*, CAS 2006/A/1119; 2007/A/1286; *Johannes Eder v. IOC*; 2007/A/1288, *Martin Tauber v. IOC*; 2007/A/1289, *Jurgen Pinter v. IOC* (decided January 4, 2008)).

[5] Ex. 12, CAS Case Law CAS 2007/A/1286; *Johannes Eder v. IOC*; 2007/A/1288, *Martin Tauber v. IOC*; 2007/A/1289, *Jurgen Pinter v. IOC* (decided January 4, 2008); Ex. 10: CAS 2002/A/389-393 (M. Mayer, W. Mayer, A. Walcher, P. Baumgartl, V. Muller); CAS 2002/O/373 (Scott); CAS 2002/A/370; CAS 2002/A/374; CAS 2002/A/376.

[6] Ex. 10, CAS 2002/A/389-393 (M. Mayer, W. Mayer, A. Walcher, P. Baumgartl, V. Muller); CAS 2002/O/373 (Scott)

[7] Ex. 12, CAS 2007/A/1286; *Johannes Eder v. IOC*; 2007/A/1288, *Martin Tauber v. IOC*; 2007/A/1289, *Jurgen Pinter v. IOC* (decided January 4, 2008); Ex. 10, 2002/A/376 (Baxter).

[8] Ex. 10, CAS 2000H OG-00-001; 2000H-0G-00-003.

[9] Ex. 12, CAS Case Law (CAS 2005/A/876, *Adrian Mutu v. Chelsea Football Club* (December 15, 2005)(Mr. Parker appointed as arbitrator); Ex. 14, http://soccernet.espn.go.com/england/news/2002/0529/20020529wfcspallfeat;html; https://www.onlinebld.com/uploads/Black%20Letter%20Law/Copy%20of%20BLL_2007_Final_Printversion/BLL_SECTION5_Judges.pdf.

successful bid for the 2012 Olympics, a decision made by the IOC. Ex. 15. Thus, members of the Freshfields firm, particularly Mr. Paulsson, have a significant economic incentive to espouse positions favorable to the IOC, and little interest in embracing positions taken by an athlete with adverse interests. While the brief biographical statement provided on the CAS website (and written in French) discloses that Mr. Paulsson has represented a number of Formula One drivers, it doe not disclose that he frequently represents the IOC before the CAS. Ex. 16, Jan. Paulsson Biographical sketch. When he selected Mr. Paulsson, Mr. Landis had no way of knowing about Mr. Paulsson's significant incentive to reject the sorts of legal arguments he intended to make on appeal. While proper disclosure would have allowed Mr. Landis to make an informed decision, Mr. Paulsson never disclosed any of these dealings.

The recently-published CAS listing also confirms that the Landis panel president, Mr. David Williams, has represented a client before the CAS. Ex. 10, CAS Case List, CAS 1991/A/56 (representing athlete). Although he has made no recent appearances on behalf of a litigant, Mr. Williams' London firm, Essex Court Chambers, advertises that it represents "sports governing bodies and individual sportsmen and women as well as acting in litigation or arbitration." Ex. 17. Because Essex Court Chambers seeks to represent sports governing bodies, it must anticipate appearing before the CAS on behalf of these entities.

There is no information confirming that Mr. Rivkin has represented a client before the CAS, but the newly-published list contains no information about the last five years, a period in which Mr. Rivkin began representing the international sailing club Club Nautico Espanol De Vela. Because sailing is an Olympic sport, the members of Club Nautico are subject to the World Anti-Doping Code and as such, Mr. Rivkin could reasonably expect to represent the club in CAS proceedings. *Golden Gate Yacht Club. v. Societe Nautique de Geneve*, 18 Misc. 3d 1111(A), 856 N.Y.S.2d 24 (Table)(N.Y.2007)(noting that David Rivkin of

Debevoise & Plimpton represents Club Nautico Espanol de Vela). Additionally, recently-published information reveals that when Mr. Paulsson and Mr. Rivkin were selected to serve on the Landis panel, Mr. Rivkin was serving as president of a CAS panel considering the IOC's enforcement action against three Austrian cross-country skiers, proceedings in which Mr. Paulsson represented the IOC. Ex. 12, CAS Case Law, 2007/A/1286, *Johannes Eder v. IOC*; 2007/A/1288, Martin *Tauber v/IOC*;2007/A/1289, *Jurgen Pinter v/ IOC* (decided January 4, 2008). Upon information and belief, the stakes were particularly high for Mr. Paulsson and the IOC in these cases because they were the first in which the IOC had disqualified athletes for anti-doping violations in the absence of a positive test, and the first cases in which the IOC sought a life-time ban. In these three high-profile cases, then, Mr. Rivkin (the USADA-selected arbitrator) was sitting in judgment of a client represented by Mr. Paulsson (the Landis-selected arbitrator) while the Landis appeal was pending. These facts were unknown to Mr. Landis when he selected Mr. Paulsson to serve on his CAS panel.

Although no available evidence indicates that Mr. Paulsson or Mr. Rivkin acted improperly or had inappropriate discussions about the two proceedings, a clear appearance of bias exists. CAS Rule R59 gave Mr. Rivkin the sole power to decide the fate of Mr. Paulsson's client in the absence of a majority, so persuading Mr. Rivkin was clearly crucial to Mr. Paulsson's success in these cases. The appointment of both Mr. Paulsson and Mr. Rivkin to the Landis appeal panel presented a timely opportunity for Mr. Paulsson to discuss the facts of his high-profile IOC cases with Mr. Rivkin. It also created an unfortunate incentive to trade votes, with Mr. Paulsson agreeing to exchange a vote on the Landis appeal for favorable treatment from Mr. Rivkin in the cases of the three Austrians.

Again, Mr. Landis does not allege that such conduct actually occurred. Rather, he alleges that Mr. Paulsson should have disclosed that he had three important cases pending before Mr. Rivkin at the time both were named to the

Landis panel so that Mr. Landis could have made an informed decision about whether he wanted to run the *risk* of improper conduct. The complete lack of disclosure deprived Mr. Landis of any opportunity to make an informed decision, and gave rise to a reasonable impression of possible bias, which is "evident partiality" under the FAA.

The CAS Case List also reveals the many occasions on which Mr. Young (USADA's lawyer), has served on CAS arbitration panels before which Mr. Paulsson appeared for the IOC. The list confirms that during 1994-2003, Mr. Young served as a CAS arbitrator eleven times,[10] and in six of these proceedings, Mr. Paulsson appeared before him representing the IOC.[11] This confirms that Mr. Young sat in judgment of Mr. Paulsson's client on more than half of the occasions in which he was appointed as a CAS arbitrator, while Mr. Paulsson appeared before Mr. Young more than half of the times that he appeared before CAS representing the IOC.[12] Mr. Landis had no way of knowing all of the above-recited facts when he selected Mr. Paulsson to serve as arbitrator on his CAS appeal panel in November, 2007.

Further compounding the institutional conflicts of interest created in the CAS system, the fact that Mssrs. Rivkin, Williams, and Paulsson also serve in other arbitral pools together creates additional opportunities for financial biases to arise, biases that could undermine impartiality. As they do in the CAS system, Mr. Rivkin, Mr. Paulsson and Mr. Williams participate in these arbitral proceedings, appearing as either lawyer or arbitrator, again sitting in judgment of one another's clients in arbitration proceedings. To give but one such example, in 2006-7, Mr. Rivkin represented Occidental Petroleum Corporation and Occidental

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[10] CAS 2002/A/370; CAS 2002/A/374; CAS 2002/A/373.; CAS 2000H OG-00-15; CAS 2000H OG-00-012; CAS 2000H OG-00-006; CAS 1998/A/184; CAS 1998 H OG-98-002.

[11] See Note 6.

[12] See Notes 5-6.

Exploration and Production Company in an arbitration proceeding where the stakes exceeded $1 billion, a proceeding in which Mr. Williams served as arbitrator. Ex. 18. Thus, these arbitrators constantly find themselves changing hats, arbitrator one day, litigant the next. The only party routinely excluded from this cycle is the athlete, who is not provided access to information revealing this web of professional relationships. These business dealings should have been disclosed but were not.

These problems are not unique to the Landis appeal. The recently-published CAS case listing confirms that many of the most frequently-appointed CAS arbitrators represent private sports clients (or have colleagues that do), including Dirk-Reiner Martens, Michael Beloff, Stephen Netzle, Yves Fortier [whose partner represents WADA], and Jean-Pierre Morand. In fact, the frequency with which Mssrs. Young, Martens, Fortier, Beloff, Netzle and Morand were appointed to CAS panels was so high that each time Mr. Paulsson represented the IOC before a CAS panel, he appeared before one of those lawyer/arbitrators. The CAS Case List illustrates a revolving door system, in which judges constantly changing places with the advocate. That being the case, each member of the Landis appeal panel—but especially Mr. Paulsson—could reasonably expect that in the event they or a member of their firm appeared before CAS on behalf of a client, USADA's lawyer, Mr. Young, might well be sitting on their panel. This created an additional and powerful incentive to take positions favorable to Mr. Young's client, USADA.

The clear conflict of interest created by allowing CAS arbitrators to represent clients remains largely invisible to athletes like Mr. Landis due to the CAS's failure to routinely publicize its decisions, or to make public the identities of the arbitrators and lawyers involved in each case. However, the conflicts created by allowing arbitrators to represent clients before the CAS or AAA are well-known to the CAS itself. In 2006, athlete Tim Montgomery discovered that

the law partner of an arbitrator appointed to his panel (Yves Fortier) represented the World Anti-Doping Agency itself; he asked CAS to annul the award issued by the panel that included Fortier, a request reported to have been dismissed by the CAS "out of hand." Ex. 20. Further, in 2007, the director and general counsel of the Canadian Centre for Ethics in Sport submitted comments to WADA requesting that Articles 8 and 13.2 of the World Anti-Doping Code be amended to prohibit CAS arbitrators from representing clients before the Court due to the conflict of interest created. Ex. 21-A, Letter from Joseph De Pencier to World Anti-Doping Agency, March 30, 2007 at 4; Ex. 21-B, Feedback on [WADA] Code 2007, Version 2.01, Art. 13-02, October 1, 2007, at 3 of 3 (comments of Joseph DePencier). This requested revision was never implemented.

While CAS is well aware of the problem created by this built-in conflict of interest, Mr. Landis was not. That is why arbitrators are under a duty to discover and disclose relationships like these, relationships that create a powerful incentive to disapprove of positions hostile to the interests of "repeat player" clients like the IOC and USADA. The "repeat players" that hire CAS arbitrators like Mr. Paulsson as lawyers depend upon the WADA labs' work as proof of anti-doping violations when they represent clients before the CAS; as such, they and their lawyers have a strong incentive to defend the scientific rigor of the tests used by these labs, and the competence of the lab's staff. An objective observer would be hard-pressed to conclude that an arbitrator who also represents a "repeat player" like the IOC—or one that sought out such clients—could be impartial when faced with an appeal like that brought by Mr. Landis, which attacked the competence of a WADA lab, attacked the scientific reliability of the lab tests, and challenged the Code interpretations that presumed that the work of WADA labs was performed properly and in a scientifically reliable manner.

No disclosure was made in Mr. Landis's case. Each CAS arbitrator failed to disclose ongoing dealings that created an actual and clearly identifiable incentive

to rule in favor of USADA and its counsel, Mr. Rich Young, dealings creating a reasonable impression of partiality or possible bias. Mr. Paulsson, Mr. Rivkin and Mr. Williams should have disclosed that they had represented parties before the CAS (and/or worked for firms that affirmatively solicited sports clients who would anticipate appearing before the CAS), parties with interests adverse to those of athletes seeking to prove their innocence. Mr. Paulsson and Mr. Rivkin should have disclosed that Mr. Rivkin was sitting in judgment of Mr. Paulsson and his client, the IOC, in three pending cases at the very time that both were selected to sit on the Landis panel. And Mr. Paulsson should have disclosed his ongoing representation of the IOC, as well as the fact that he had repeatedly appeared before Mr. Young and Mr. Rivkin, and could expect to do so in the future.

Each of these arbitrators had a duty to investigate and disclose these facts. *New Regency*, 501 F.3d at 1105; *Schmitz*, 20 F.3d at 1048. The failure to disclose at least the facts described above created a reasonable impression of potential bias, constituting "evident partiality" under the FAA. 9 U.S.C. §10(a)(2); New York Convention, Art. V, §§1(a) and (d), §2(b). It also prevented Mr. Landis from making an informed decision about whether to object to the composition of the panel. Because arbitrators are not isolated from each other, but instead hear and decide cases as a panel, after joint discussion, debate and deliberation, each panel member has an opportunity to persuade the others. *Wheeler v. St. Joseph Hospital*, 63 Cal. App. 3d 345, 133 Cal. Rptr. 775, 793 (Cal. App. 1976). Thus, a finding of evident partiality on the part of one arbitrator warrants vacatur of an entire arbitration award. *Schmitz*, 20 F.3d at 1049.

Where, as here, the party challenging an award demonstrates that an arbitrator failed to disclose business dealings that would have created a reasonable impression of potential bias had they been known, it is not necessary to demonstrate that any member of the panel acted with actual bias by producing specific facts indicated an improper motive. *Woods v. Saturn Distrib. Corp.*, 78 F.

3d 424, 427 (9th Cir. 1996); *Premo v. Martin*, 119 F.3d 764, 771 (9th Cir. 1997). However, the record facts in this case do provide a basis for concluding that the Panel deferred to fellow CAS arbitrator, Mr. Young, conduct that could be attributable to the presence of actual bias. Specifically, the Panel treated Mr. Young's statements as evidence on at least three occasions, deference afforded no other lawyer in the case.

First, as described below in greater detail [*see* pages 30-32], the Panel accepted Mr. Young's statements as evidence in support of its decision to impose $100,000 in "costs" against Mr. Landis. At the time the evidentiary hearing closed, there was no record evidence of the amount or reasonableness of any of USADA's litigation expenses, nor was the issue of costs formally submitted to the Panel for decision. Ex. 1, CAS Decision at ¶19 (listing the issues formally submitted for decision). However, USADA's post-hearing brief contained Mr. Young's unsworn statements describing the extent and reasonableness of some of USADA's costs, statements the Panel relied upon in assessing the $100,000 penalty against Mr. Landis.

Second, as again argued in detail below [*see* pages 47-49], the Panel accepted Mr. Young's unsupported statement to resolve a key issue relating to LNDD's accreditation. On appeal, Mr. Landis challenged LNDD's accreditation to perform the CIR method, arguing that the accreditation documents put in evidence by USADA confirmed that LNDD was only accredited to conduct the CIR test with a 20% measurement of uncertainty, not the 0.8‰ uncertainty measurement it actually used, and that had the 20% measurement of uncertainty been used, his results could not have been declared positive. Apparently concerned that Mr. Landis was correct about the LNDD's accreditation status, the Panel sidestepped the issue by relying on a statement by Mr. Young in a footnote to his post-submission brief, a statement making the unsupported (and incorrect) assertion that had the 20% measurement of uncertainty been applied, Mr. Landis's

sample results *would* still have been positive. Ex. 1, CAS Decision at ¶48; Ex. 22, Appellee's Post-Submission Brief, at 8, footnote 7.

Finally, as also argued in detail below [*see* pages 76-84], the panel accepted Mr. Young's "common sense" explanation to reconcile important inconsistencies between a document USADA relied heavily upon—a gas chromatography column maintenance log (Exhibit T142)—and the sworn testimony of USADA's own witness, the LNDD technician who was supposed to have actually made the entries on Exhibit T142.

Because arbitrators have a free rein to decide the law as well as the facts, and because their decisions are accorded a high degree of deference, the impartiality of those arbitrators must be scrupulously safeguarded. *Commonwealth Coatings Corp. v. Continental Casualty Co.,* 393 U.S. 145, 149, 89 S.Ct. 337, 339, 21 L.Ed.2d 301 (1968). In this case, no safeguards exist. The stacked arbitral pool and the institutional bias favoring repeat players like USADA prejudiced Mr. Landis from the outset. This prejudice was compounded by the CAS's willingness to allow its arbitrators to continue representing clients before CAS panels, and by the Landis panel's failure to make any disclosures about such dealings, leaving Mr. Landis with no opportunity to make an informed decision. As the above-described facts illustrate, the CAS system is an insider's club, favoring repeat players at the expense of athletes, a disadvantage that is only exacerbated when the arbitrators on a particular panel continue to represent clients before the CAS or seek to do so. Because the arbitrators on Mr. Landis's panel failed to disclose business dealings and interests creating a reasonable impression of bias, evident partiality existed, as did an unconscionable arbitral system. Therefore, vacatur is proper under FAA, 9 U.S.C.A. §2, and §10(a)(2) and the New York Convention, Art. V(1)(a), and (d) and §(2)(b).

B. The Panel's decision to impose a $100,000 penalty on Mr. Landis must be vacated because the decision was outside the scope of the

arbitrators' power, was unsupported by any evidence, and was not permitted by clearly applicable law.

Perhaps the strongest evidence that the Panel's decision-making was based upon actual bias was its decision ordering Mr. Landis, who has been unable to practice his profession since July, 2006, to pay $100,000 to USADA as reimbursement for its litigation costs. The decision was made even though neither party had formally submitted the issue of costs to the Panel for decision [*see* Ex. 1, CAS Decision, ¶19] and neither party had introduced evidence as to the amount or reasonableness of costs to the Panel. Instead, the Panel relied solely upon a statement made by fellow CAS arbitrator (and USADA lawyer), Richard Young. That statement, presented in a post-hearing brief to which Mr. Landis had no right of reply, described USADA's costs and was the only evidentiary basis for the Panel's cost award. Imposing such an onerous financial burden upon Mr. Landis—a financial burden that effectively extends his two-year sentence indefinitely—without hearing evidence or providing a right of reply denied Mr. Landis the basic due process right to a fundamentally fair hearing, and to a decision based on the evidence, in clear violation of well-established public policy. Further, the Panel erred in deciding an issue not formally submitted to it by the parties, and in manifestly disregarding clearly applicable UCI rules directly on point. As such, vacatur of the panel's cost decision is proper under FAA, U.S.C.A., §2 and, §10(a)(2), (3), and (4), and under the New York Convention, Art. V (1)(a),(b),(c), and §2(b), and because it is an unconscionable decision made in manifest disregard of the law.

1. The Panel's $100,000 cost award should be vacated because the issue of costs was not among the issues formally submitted to the Panel for decision.

Prior to the hearing, the CAS Panel directed both parties to submit a list of issues to be decided, which issues defined the scope of the arbitrators' mandate. Ex. 1, CAS Decision at ¶19-20. The formal list of issues defined the matters that were to be determined in the hearing, as well as the matters to be addressed in closing arguments and in the post-hearing briefing requested by the Panel. Ex. 2, Tr., 1494: 15-1498:0. The formal list of issues also defined the scope of the matters submitted to the arbitrators for a decision within the meaning of 9 U.S.C.A. §10(a)(4) and the New York Convention, Article V§(1)(c). Neither party formally submitted the issue of an appropriate award of costs to the CAS Panel for decision and determination. Ex. 1, CAS Decision at 3-5, ¶¶19-20.[13]

Mr. Landis was entitled to a fundamentally fair hearing, including the right to have notice of the issues being litigated, and about which he would be compelled to put on evidence. *Ficek v. Southern Pacific Co.*, 338 F.2d 655, 657 (9th Cir. 1964), cert den'd, 380 U.S. 988 (1965). The CAS Panel directed the parties to define the issues being submitted for determination, and directed them to limit their post-hearing briefing to the issues raised in that set of issues. Mr. Landis was entitled to rely upon the CAS Panel's direction, and confine his proffer of evidence and briefing to the issues actually submitted for decision, issues that did not include costs. Because the Panel decided an issue not formally submitted for decision and determination, vacatur is proper under 9 U.S.C.A. §10(a)(4) and New York Convention, Art. V, (1)(c).

2. In assessing $100,000 in USADA's litigation costs against Mr. Landis, the CAS Panel

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[13] Although USADA's post-hearing brief contains a footnote implying that the issue of costs was USADA's Issue #8" and Appellant's "Issue #11," that is incorrect. Ex. 22, Appellee's Post-Hearing Brief at 48, n. 45. The issues formally submitted for determination are set forth at pages 3-5 of the CAS Decision, in ¶¶19-20. USADA did not submit eight issues, it submitted only two (and neither addressed costs), while Mr. Landis's eleventh issue had nothing to do with costs. Ex. 1, CAS Decision, ¶¶19-20. Given that the panel would permit no further pleading, both parties stated in their closing brief that some cost award was appropriate, a statement that ought to have caused the panel to re-open for evidence if it agreed because it is undisputed that neither party submitted the issue of costs for determination, and neither produced evidence at the hearing to support such an award.

manifestly disregarded clearly applicable UCI rules, rules that do not permit the award of such costs, justifying vacatur.

Although the CAS Panel acknowledged that UCI Anti-Doping Rules provided the rules of decision in the Landis appeal, it did not apply them. Ex. 1, CAS Decision at 6, ¶22. *See also* Ex. 4, CAS Rule 58; Ex. 7, ¶290 (the CAS "*shall* decide the dispute according to these Anti-Doping Rules..."). UCI's hearing rules distinguish between a "sanction," and "costs," and expressly provide that each party shall bear the costs of their own witnesses and experts. Ex. 7, UCI Anti-Doping Rules; contrast ¶241 and ¶244 with ¶¶255-279. Rule 245 provides a limited exception, ostensibly permitting a panel to award the costs of sample testing, results management and the hearing proceeding, but only if those costs have been actually determined by the hearing panel. Ex. 7, at Rule 245. Not only are these exceptions inapplicable here, but none of them permits the Panel to award the opposing party's *litigation* costs when deciding anti-doping cases. Further, since *no* costs were "actually determined" by the Panel, no possible argument could be made that Rule 245 would have permitted the award of costs in Mr. Landis's case. Finally, a strong argument can be made that on *appeal*, the UCI rules only contemplate the award of costs *against* the national federation, a position that USADA occupies in this case by virtue of its contract with USA cycling. [14]

The UCI rules are consistent with CAS Rules 65.1 and 65.2, which provide that panel awards shall be rendered without costs other than a court office fee not in dispute here. Also consistent is CAS Rule 65.3, which provides that each party

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[14] *See* Exhibit 7, UCI Rules ¶¶280-291, especially Rule ¶282 (only mention of costs award in appellate rules states that on appeal by UCI, costs may be awarded against the ational federation, and only if the original hearing body incorrectly applied the rules). As stated above, "costs" and "sanctions" are not interchangeable terms in the UCI system. Contrast UCI Rules, ¶241, ¶¶244-246, ¶251, ¶253 [rules mentioning "costs"] with ¶¶255-279 [rules discussing "sanctions"].

shall advance the costs of its own experts and witnesses. Ex. 4, CAS Rule 65.3. While CAS Rule 65.3 provides discretion to the panel to award "costs" in certain circumstances, it can do so only after having made the determination mandated in Rule R64.4 and only after making certain factual findings not made here (about, for example, the parties' means). Moreover, that rule cannot be read to create an inconsistency with the UCI rules, particularly UCI Rule 245, because CAS is *required* to apply the UCI Rules. Ex. 7, UCI Rules, ¶290. At best, CAS Rule 65.3 should be read to describe the factors that a CAS panel is to consider before deciding to impose a cost award (considerations to be based on evidence), while UCI Rule 245 and UCI Rule 282 define which kind of costs may be awarded. The evidentiary record in the Landis appeal contained no evidence about the amount and reasonableness of costs, or about Mr. Landis's means, so the Panel's award was in no way the product of the Panel's cost "determination" within the meaning of Rule 245.

Despite the fact that the CAS Panel acknowledged that it was bound by the UCI Anti-Doping Rules and its own procedural rules, *see* Ex. 1, CAS Decision at ¶22-27, it declined to follow them, imposing $100,000 in litigation costs. This decision denied Mr. Landis his due process to a fundamentally fair hearing in which decisions are based on evidence, was unconscionable, and was made in manifest disregard of clearly applicable rules, justifying vacatur. FAA, 9 U.S.C.A, §2, §10(a)(3) and (4), New York Convention, Art. V, §1(a), (d), and §2(b).

3. Because the CAS Panel's $100,000 cost award was not based on evidence, Mr. Landis was denied a fundamentally fair hearing, so vacatur is proper.

Not only was the Panel's $100,000 cost award contrary to UCI rules and outside the scope of the issues formally submitted to it for decision, but it was not based upon any evidence, violating Mr. Landis's basic due process right to an arbitral decision based on evidence.

It is indisputable that at the close of the evidentiary portion of the hearing, USADA had presented no documents, no testimony, and no argument detailing the extent and reasonableness of its alleged litigation costs. When the Panel officially closed the record on March 24, 2008, it expressly prohibited the parties from submitting *any* further evidence, and prohibited them from filing any additional pleadings (with the exception of the post-appeal written submissions). Ex. 2, Tr. 1502:17-23, 1503:23-25. And as stated above, that post-hearing brief was to be linked directly to the list of issues to be decided—a list that did not include costs. Ex. 1, CAS Decision, ¶¶19-20; Ex. 2, Tr. 1215:19-1217:24, 1493:1-1499:10. *See also* note 13 above.

Not to be dissuaded, USADA decided to use the post-hearing brief to present Mr. Young's statements in support of a specific request that the panel both determine and actually award costs without further hearing or presentation of evidence. In that brief, Mr. Young alleged (without benefit of supporting bills, invoices or receipts) that USADA had incurred "out-of-pocket" expenses totaling at least $93,000-$60,000 in costs for "transportation, hotel, and meals in New York City for nine witnesses whom Appellant demanded be present in person for cross-examination and then elected not to call,"--as well as $33,000 in expert witness fees. Ex. 22, Appellee's Post-Hearing Brief at 48. Mr. Young requested that the Panel assess these costs against Mr. Landis as a penalty for his inability to cross-examine all of the French fact witnesses, and for his insistence upon pursuing a full range of issues on his *de novo* appeal. *Id.* at 48-9. Mr. Young's statements were not sworn, verified, or supported by any documentary evidence, nor were they subject to cross-examination, and because the Panel had prohibited the filing of any additional post-hearing brief (like a reply), Mr. Landis had no right of response.

Unable to anticipate Mr. Young's specific allegations and prohibited from filing a reply, Mr. Landis had no opportunity to challenge the absence of evidence

or the substance of Mr. Young's statements. He had no opportunity to present the record evidence demonstrating that his failure to call all of the French witnesses was attributable solely to the severe time constraints imposed at the hearing, not to any litigation misconduct [*see* argument at pages 34-37 below]. He had no opportunity to produce evidence about the hardship such a penalty would impose upon him since he had been prevented from making a living in cycling. And he had no opportunity to argue that UCI Rules did not permit the award of litigation costs against the athletes but only against the federation, or to argue that CAS precedent suggested that even if the facts were as Mr. Young alleged, the "equitable" decision was to let each party bear its *own* costs. Ex. 12, CAS Case Law, *Landaluze v. Real Federacion Espanola de Ciclismo*, CAS 2006/A/1119 at ¶120 (Paulsson, president)(where Panel concluded that sports federation had lodged many "futile" arguments, the "equitable" solution was to let each party pay its *own* costs). Despite these inequities, the Panel assessed $100,000 in costs against Mr. Landis based solely upon the statements made by fellow CAS arbitrator, Mr. Young.

When it based its $100,000 cost award upon the unsworn statements of fellow CAS arbitrator, Richard Young, while denying Mr. Landis any right of reply, the CAS Panel violated Mr. Landis' right to a fundamentally fair hearing, in which decisions are based upon evidence, not the statements of counsel, and in which both parties have notice and an equal right to be heard. *Sunshine Mining Co. v. United Steelworkers of America*, 823 F. 2d 1289, 1295 (9th Cir. 1987); *Townley v. Heckler*, 748 F.2d 109 (S.D.N.Y. 1984)(disability claimant's due process rights were violated when the administrative law judge relied upon a post-hearing report as the primary evidence upon which disability benefits were denied). It denied him the right to present any case in opposition to Mr. Young's cost allegations, which was unconscionable and a denial of due process justifying

vacatur under 9 U.S.C.A., §2, §10(a)(3) and New York Convention, Art. V, §(1)(a) and (b) and §2(b).

4. SUMMARY

The Panel's award must be vacated because the issue of costs was not among the issues formally submitted to the Panel for determination. As such, the Panel violated its own rules, exceeded the powers granted to it, generated an overly harsh, one-sided result which was unconscionable, and violated fundamental notions of due process, which emphasize the importance of notice and an opportunity to respond. Thus, a motion to vacate is proper under 9 U.S.C.A., §2, §10(a)(3) and (4) and the New York Convention, Art. V, §1(c) and §2(a).

The Panel's award must be vacated because imposing the litigation costs of the prevailing party upon the loser is contrary to UCI rules and is therefore a decision made in manifest disregard of the law, is unconscionable, and in contravention of the FAA, 9 U.S.C.A.§10(a)(3) and (4), and New York Convention, Art. V, §1(a),(d) and §2(b).

The Panel's award must be vacated because it was a decision made with evident bias in favor of fellow-CAS arbitrator and USADA lawyer, Richard Young, whose unsworn, unsupported and unchallenged statements provided the only basis for the cost determination. Further, the arbitrators' evident partiality rendered all of its decisions subject to vacatur, including its cost award. Vacatur is therefore appropriate under the FAA, §10(a)(1) and (2) and New York Convention, Art. V, §1(a) and §2(b).

Finally, the panel's cost award should be vacated because it was not supported by evidence. The right to have decisions based upon evidence is a fundamental due process right, and a necessary component of a fundamentally fair hearing. *Ficek v. Southern Pacific Co.*, 338 F.2d 655, 657 (9th Cir. 1964), cert den'd, 380 U.S. 988 (1965). As such, the decision is unconscionable, justifying vacatur under 9 U.S.C.A., §2 and California contract law. Vacatur is similarly

justified under FAA, 9 U.S.C.A., §10(a)(3) and (4) and New York Convention, Art. V, §1(a), (b), and §(2)(b).

C. The hearing procedures adopted by the CAS Panel prevented Mr. Landis from presenting his case, justifying vacatur.

Just as the system for selecting the CAS arbitral pool and appellate panel has an appearance of balance, so the hearing procedures adopted by the Landis panel had the appearance of fairness. In reality, those procedures placed Mr. Landis, who bore a heavy burden of proof, at a distinct disadvantage because they prevented him from presenting his evidence and cross-examining more than half of USADA's nineteen witnesses. To add insult to injury, Mr. Landis's inability to fully present his case formed the basis for imposing the $100,000 punitive cost award against him. Ex. 1, CAS Decision at ¶289. Because the arbitrators refused to hear all of Mr. Landis's evidence and prevented him from presenting his complete case—a right not denied to USADA—he was denied a fundamentally fair hearing, and the CAS award should be vacated. 9 U.S.C.A. §10(a)(3), (4); New York Convention, Art. V §1(b) and §(2)(b).

While arbitrators may not be bound by the rules of evidence, the FAA, the New York Convention, and fundamental notions of due process require that each party to an arbitration be provided an adequate opportunity to present its evidence and arguments. *Kiewit/Atkinson/Kenny v. International Brotherhood of Electrical Workers*, 76 F.Supp.2d 77, 80-1 (D. Mass. 1999)(*citing Hoteles Condado Beach, and La Concha Convention Center v. Union de Tronquistas Local* No. 901, 763 F.2d 34, 39 (1st Cir. 1985)). Mr. Landis did not have such an opportunity in this case, for several reasons.

First, as discussed above, the fact that the WADA Code of Ethics prevented any other WADA laboratory directors from testifying on Mr. Landis's behalf–even if they agreed with the substantive points he raised–denied him a level playing field before both the CAS and AAA Panels. Furthermore, Mr. Landis was denied

adequate time to present a highly technical scientific challenge to the LNDD's test results at both the AAA and CAS panel levels. At both the CAS appeal and the AAA hearing, the parties were placed on a "time clock," and both allocated an equal number of hours in which to present their evidence. Ex. 23, CAS Panel Procedural Memorandum, December 13, 2007, Part 4, at 3-4; Ex. 24, Letter from Carmen Martinez Lopez to the Parties, March 17, 2008 at 1 (parties allocated 14 hours). Because Mr. Landis bore a heavy burden of proof, this equal allocation placed him at a distinct disadvantage.

Because CAS appeals proceed *de novo*, the disputed issues were no less complex than those addressed at the AAA hearing. Further, presentation of both parties' evidence would require time-consuming translation. Recalling his inability to call all of the relevant fact witnesses to testify at the nine-day AAA hearing, Mr. Landis asked the CAS panel to give him five days to present his case in chief at the appeal hearing. This request was rejected. Instead, the Panel allotted only five days hearing total, with each party allocated 14 hours in which to present their case. Ex. 23, CAS Panel Procedural Memorandum, December 13, 2007, Part 4, at 3-4; Ex. 24, Letter from Carmen Martinez Lopez to the Parties, March 17, 2008 at 1 (parties allocated 14 hours).

This severe limitation was made more onerous by the Panel's decision to receive direct witness testimony by written submission. Ex. 23, CAS Panel Procedural Memorandum, December 13, 2007, ¶¶4.7-4.8, at 405. This seemingly innocuous decision had disastrous and extremely prejudicial consequences for Mr. Landis because the Panel imposed no limit on the *number* of witnesses that could submit direct testimony. 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 before cross-

examining all of them, thereby increasing the likelihood that a substantial portion of USADA's evidence might come in unchallenged.

This is precisely what happened. Mr. Landis, who bore a heavy burden of proof, presented only five direct witness declarations—one fewer than at the AAA hearing—while USADA, which had called only nine witnesses at the nine-day AAA hearing [*see* Ex. 3, AAA Decision at ¶100], submitted written testimony from *nineteen* witnesses. Ex. 25, USADA Witness Designation, January 31, 2008; Ex. 26, USADA's Motion in Limine to Exclude Evidence in Violation of CAS Rule 56 at 4-5 (March 14, 2008)(adding as a witness submission the March 14, 2008 letter from COFRAC administrator, Robin LeGuy). The inequity was all the more egregious because USADA—unlike Mr. Landis—had access to all of the LNDD fact witnesses, and could discover the facts known to them outside the hearing room, allowing USADA to use its precious hearing time more efficiently. Denied depositions, Mr. Landis was left to develop the crucial facts about what the LNDD staff actually did when they tested his Stage 17 sample through cross-examination alone. 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.

Despite having been allocated a few more hours hearing time as the hearing actually progressed, Mr. Landis was still compelled to waive his brief introductory direct examination [Ex. 2, Tr. 43:18-44:2], to abandon at least one issue in its entirety [Ex. 2, Tr. 22:12-17], and to relinquish his right to cross-examine ten of USADA's 19 witnesses [Ex.2, Tr. 793:34-794:23, 805:18-806:14, 807:1-22, 810:15-20, 1218:20-25, 1221:2-11, 1396:6-25, 1408:5-20]. He also had to circumscribe both his opening and closing arguments because he ran out of time [Tr. 112:7-9, 128:12-22, 1385:4-13, 1424:13-18, 1433:7-1434:12]. His inability to cross-examine witnesses inflicted prejudicial harm upon him because the CAS panel relied upon the unchallenged testimony to support its conclusions. Ex. 2,

CAS Decision at ¶178 (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).

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." Ex. 1, CAS Decision at 57, emphasis added. Mr. Landis did not *elect* 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. Ex. 2, 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.

The appellate procedures adopted by the CAS Panel denied Mr. Landis a meaningful opportunity to develop the factual record needed to establish the crucial facts about the LNDD's analysis of his Stage 17 samples, and denied him any opportunity to cross-examine more than half of the witnesses testifying against him, a denial of due process. *Willner v. Committee on Character and Fitness*, 373 U.S. 96, 103, 83 S.Ct. 1175, 1180, 10 L.Ed.2d 224 (1963). USADA suffered no comparable harm. Because Mr. Landis was denied a fundamentally fair hearing, and was prevented from presenting his case, the proceeding was unconscionable, so vacatur is appropriate under 9 U.S.CA.A. §2. Vacatur is also proper under FAA, 9 U.S.C.A. §10(a)(3) and (4) and the New York Convention, Art. V, §1(a) and §1(b) and §2(b).

D. The CAS Panel's repeated refusal to consider evidence supportive of Mr. Landis's substantive arguments was tantamount to a refusal to hear evidence at all, justifying

vacatur under 9 U.S.C.A. §10(a)(3) and (4) and New York Convention, Art. V, §1(a), (b).

The Panel's award was the product of a process slanted heavily in favor of the interests of "repeat player" anti-doping enforcement agencies like USADA, a process made even more onerous by procedural rulings made by Mr. Landis's particular panel. Although Mr. Landis contends that this resulted in a number of erroneous decisions in which the Panel either misapplied the law or improperly weighed the facts, he is mindful of the scope of review under the FAA. As such, Mr. Landis challenges five substantive decisions made by the Panel, decisions marred by the Panel's refusal to credit evidence to Mr. Landis's position, even when that evidence was contained in documents proffered by USADA in support of its own case, and even when uncontroverted by other evidence.

1. The Panel ignored USADA's own documentary evidence in concluding that LNDD was actually accredited to perform the tests it used to analyze Mr. Landis's Stage 17 sample, crediting instead late-produced "evidence" from an incompetent witness.

Because the AAA Panel concluded in 2007 that the T/E ratio test could not be used to support the reported anti-doping violation [*see* Ex. 3, AAA Panel Decision at ¶172], the CAS appeal focused on the sole remaining basis for that violation—the results of LNDD's CIR test. This test measures the ratio of Carbon^{12} atoms to Carbon^{13} atoms in the testosterone metabolites contained in a sample to determine if some of the testosterone in a person's body is of an exogenous nature. The centerpiece of Mr. Landis's appeal was that LNDD had neither used a reliable CIR method nor performed the method it *did* use correctly, violating the ISL. Ex.

27, Appeal Brief of Floyd Landis, *passim*; Ex. 28, Landis Closing Brief, *passim*.

A threshold issue in the analysis was whether the CIR method that LNDD used had ever been accredited by its national accreditation body, COFRAC. This determination was crucial because the answer to the accreditation question determined how the burden of proof was allocated between the parties, and whether USADA would be permitted to avail itself of certain presumptions in the WADA Anti-Doping Code.

Although the anti-doping agency bears an initial burden of proving the anti-doping violation "to the comfortable satisfaction" of the Panel, that burden is satisfied by simply introducing the results of the lab's positive test if the lab is accredited to perform the method it used. Ex. 29, WADA Code, Art. 3.1, 3.2. If the lab used an accredited method, USADA is entitled to the benefit of a presumption that the lab performed that method correctly on the occasion in question. Ex. 29, WADA Code, Art. 3.2; Ex. 1, CAS Decision, ¶¶28-33. However, if the lab did not use an accredited method, USADA had to prove that the method conformed to the "scientific community's practices and procedures," and that LNDD "satisfied itself as to the validity of the method before using it." Ex. 29, WADA Code, Art. 3.1., 3.2; Ex. 7, UCI Anti-Doping Rules, Art. 18; Ex. 12, CAS Case Law, *USADA & UCI v. Tyler Hamilton*, CAS 2005/A/884, ¶¶47-54.

Evidence of accreditation is clearly required and is part of USADA's burden; otherwise, it could avail itself of the Code's powerful presumptions based upon an unsupported allegation of accreditation in every case. Ex. 29, WADA Code, Art. 3.1. Under CAS Rule R56, USADA was obliged to produce the arguments and evidence in support of accreditation or reliability (or both) in its answering brief, filed January 31, 2008. And under the Panel's own scheduling orders, all witness testimony was to be filed by

March 7, 2008. Ex. 30, Letter from Matthieu Reeb to the parties, February 29, 2008.

USADA's appeal brief, filed January 31, 2008, contained a specific accreditation argument discussing the importance to be assigned COFRAC accreditation and the weight to be accorded the work of the COFRAC auditors. Ex. 31, Appellee's Brief at 14-15, 28-29. The brief also contained numerous assertions that the LNDD's CIR method was accredited. *Id.* At 6, 15, 27-29, 49, 57 (assertions that CIR/IRMS method was accredited). USADA presented several COFRAC accreditation documents to support its allegations, but designated no COFRAC witnesses to buttress that argument. Ex. 31, Appellee's Brief at 90 and Ex. 25, Appellee's Witness List (January 31, 2008).

Contrary to USADA's repeated assertions, however, the COFRAC accreditation documents established on their face that LNDD was *not* accredited to perform the CIR method in the manner it used to analyze Mr. Landis's Stage 17 sample. Although it is undisputed that LNDD used an 0.8 ‰ measurement of uncertainty to declare that the CIR values it measured confirmed the presence of exogenous testosterone in Mr. Landis's sample, the COFRAC accreditation documents do not confirm that LNDD was accredited to conduct the CIR method at this level of precision. Instead, each and every COFRAC document introduced by USADA indicated that at the time Mr. Landis's samples were analyzed in July and August, 2006, LNDD was only accredited to perform the CIR test with a ***20%*** measurement of uncertainty, not the 0.8 ‰ the lab used to declare Mr. Landis's sample a positive.[15] Ex. 32, Excerpt, USADA appeal exhibit T026

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[15] The CIR method, which is alternatively referred to as an "IRMS" test, is method "EC 31" on LNDD's COFRAC accreditation documents.

at LNDD 0086 (COFRAC's May 2006 accreditation document accrediting CIR method at 20% uncertainty level); LNDD 414 (LNDD's February 2006 audit, showing a 20% measurement of uncertainty accreditation and extending the September 2005 accreditation, also at 20%); LNDD 429 (showing a 20% measurement of uncertainty accreditation); LNDD 456 (undated validation study indicating LNDD uses a 0.8‰ measurement of uncertainty); Ex. 31, Appellee's Brief at 26-8 (LNDD uses a 0.8‰ measurement of uncertainty and did so when interpreting Mr. Landis's results); Ex. 28, Landis Closing Brief at 7-10. Not only do the three COFRAC accreditation documents produced by USADA expressly state that as of May 2006, LNDD was only accredited to perform the CIR method at a 20% uncertainty level, but it appears that this had been the standard for quite some time; LNDD 414 is simply an updated version of an earlier accreditation document issued in September 2005, which also contained the 20% measurement uncertainty figure, as indicated by the date change noted at the bottom of the page. Ex. 32, Excerpt, USADA appeal exhibit T026 at LNDD 0414.

It was not until December 15, 2006—months *after* Mr. Landis's sample was analyzed—that LNDD obtained COFRAC accreditation at the 0.8‰ uncertainty level. Significantly, the updated accreditation document includes an express effective date of December 15, 2006, not an earlier date, contradicting any suggestion that the updated accreditation was intended to be retroactive. Ex. 32, Excerpt, USADA appeal exhibit T026 at LNDD 0097-98 ("Date de prise d'effet: 15/12/2006"/Date of Effect: 12/15/06).

COFRAC may have been reluctant to accredit LNDD at the substantially-more precise 0.8‰ measurement of uncertainty in light of the CIR/IRMS method deficiencies COFRAC noted at the February 2006 audit, and the six-month delay that LNDD requested in order to remedy those

deficiencies. Ex. 32, Excerpt, USADA appeal exhibit T026 at LNDD 418 (LNDD request for renewal and extension of accreditation for various methods); LNDD 428 (LNDD requests an extension for certain doping control procedures), LNDD 429 (EC31 [CIR test] listed among the processes for which an extension was sought); LNDD 414 (COFRAC accreditation document confirming that an extension had been requested for EC31); LNDD 400 (recommending a six-month delay to address IRMS deficiencies). Whatever the reason, it is indisputable that any potential customer going to the LNDD in search of CIR testing services between February 2006 and December 15, 2006 would have come away with one and only one conclusion—that LNDD was accredited to perform CIR testing at only a 20% measurement of uncertainty level.

Not only did USADA's brief fail to present evidence to resolve the crucial deficiency in its own accreditation evidence—a deficiency which had been raised in the AAA hearing almost a year earlier [Ex.33, Excerpt, AAA Transcript at 878-9 (testimony of Dr. Christiane Ayotte); Ex. 28, Landis Closing Brief at 9]—but USADA tendered no document and designated to witness (including, particularly, the COFRAC auditor) to rebut the unambiguous statements contained in the COFRAC accreditation documents, not even to rebut Mr. Landis's expert, Dr. Goldberger, who discussed USADA's tender of accreditation documents in his March 7 declaration. Instead, under the guise of a motion in limine to exclude the portions of Dr. Goldberger's testimony discussing the accreditation issue, USADA sought to introduce an unverified letter from COFRAC administrator, Robin LeGuy, a letter it attached as an exhibit to its motion in limine. This occurred five days before the CAS appeal commenced on March 19, and well after the deadline for submission of exhibits and witness statements. Ex. 26, USADA's Motion in Limine to Exclude Evidence in

Violation of CAS Rule 56 at 4-5 (March 14, 2008) and attached March 14, 2008 letter from Robin LeGuy; Ex. 30 (setting March 7 deadline for witness designations); Ex. 4, CAS Rule R56. In this March 14 letter, Mr. LeGuy—who did *not* participate in the February 2006 audit at LNDD—stated that all of the COFRAC documents stating a 20% measurement of uncertainty were mistaken, and that the December 15, 2006 accreditation document should be considered retroactive to May 1, 2006, providing a neat resolution to USADA's accreditation problem. Exhibit 26, March 14 letter of Robin LeGuy.

By proferring Mr. LeGuy's "testimony" in the form of an unsworn letter *after* the deadline for briefing and both direct and rebuttal witness declarations, USADA was able to deny Mr. Landis the opportunity to marshal evidence to counter that letter, something the CAS Rules are intended to prevent. Ex. 4, CAS Rules R51, R55, R56; Ex. 30, Letter from Matthieu Reeb to Maurice Suh and Richard Young, February 29, 2008 (setting forth hearing scheduling order; hereinafter "CAS Scheduling Order"). Despite USADA's failure to present its proof by the deadlines imposed by the Panel's scheduling order, or by the deadlines imposed by Rule R56, the Panel admitted Mr. LeGuy's unsworn letter into evidence, ostensibly in exchange for its decision not to strike the portions of Dr. Goldberger's testimony during accreditation. Ex. 2, Tr. 23:3-15, 31:3-32:4, 40:5-13. The "exchange" was not a fair one however; Mr. Landis did not need to rely upon Dr. Goldberger's testimony to make his point because USADA's accreditation problem was presented on the face of its own documentary evidence, documents it needed to rely upon to prove that LNDD was accredited *at all*. Ex. 32, Excerpt, USADA appeal exhibit T026 at LNDD 0086. USADA, however, absolutely needed a COFRAC witness to "explain" that the three COFRAC accreditation documents executed by

the absent COFRAC auditor did not mean what they said—that LNDD was only accredited to perform the CIR method at a 20% measure of uncertainty. The Panel not only admitted the letter, *see* Ex. 2, Tr. 19:7-19, 22:24-23:11, it relied upon it. Ex. 1, CAS Decision, ¶45-7.

The Panel's decision to admit the March 14 LeGuy letter stands in stark contrast to its decision to exclude the portion of Dr. Goldberger's chain of custody testimony discussing LNDD's failure to provide complete documentation of the whereabouts of Mr. Landis's "B" sample on July 20, 2006. Though Mr. Landis had clearly launched a broad attack on LNDD's chain of custody in his appeal brief, [*see* Ex. 27, Brief of Floyd Landis at 69, 73 (LNDD's chain of custody documents "do not suffice to create a proper chain of custody," they "fail to record intra-laboratory transfers," and they fail to "record the location of the bottle during the time it was in the laboratory")], the CAS Panel excluded all of Dr. Goldberger's testimony about breaches occurring on July 20 because such examples were not specifically enumerated in Mr. Landis's appeal brief. Ex. 2, Tr. 45:18-47:13 (decision); Tr. 24:15-38:10 (argument); Ex. 34, Landis Response to USADA's Motion in Limine at 6-7; Ex. 26, USADA's Motion in Limine to Exclude Evidence in Violation of CAS Rule 56 at 2-3. As argued above, while it is not necessary for Mr. Landis to prove actual bias to establish that the Panel acted with evident partiality, the fact that the Panel excluded Dr. Goldberger's testimony, which was, at a minimum, timely under the scheduling order, but admitted Mr. LeGuy's, which was not, suggests actual bias in favor of fellow CAS arbitrator, Mr. Young.

The Panel relied upon Mr. LeGuy's March 14 letter –"evidence" it considered unchallenged because Mr. Landis "elected" not to cross-examine

Mr. LeGuy[16]--in making the crucial determination that LNDD was accredited to perform the CIR method at the 0.8‰ uncertainty level. CAS Decision, ¶¶45-7. But that letter should not have been considered for the same reasons that Dr. Goldberger's chain of custody evidence was excluded—it was produced well after all relevant deadlines. Ex. 4, CAS Rule R56, Ex. 30, CAS Scheduling Order. The Panel disregarded its own rules in admitting this letter, a decision suggestive of actual bias because it failed to accord the parties equal treatment under Rule R56.

Further, Mr. LeGuy's letter—like the unsupported statement of counsel—was not evidence because he was not a competent witness. Mr. LeGuy lacked personal knowledge of the facts because he was not one of the COFRAC auditors involved in the February 2006 LNDD audit upon which the later accreditation was based. Ex. 32, Excerpt, USADA appeal exhibit T026 at LNDD 383 (identifying COFRAC audit team members). Nor does his March 14, 2008 letter offer any other foundational allegations that might explain how he gained personal knowledge of the facts stated in the letter.

Indeed, Mr. LeGuy's lack of familiarity with the facts surrounding the audit is revealed by his statement that COFRAC received "*all* appropriate information for the validation of method EC31 [CIR]." Ex. 26, LeGuy March 14, 2008 letter, attached to USADA's Motion in Limine to Exclude Evidence in Violation of CAS Rule 56. This statement is highly improbable, given that the LNDD's own staff testified that the critical "peak matching" component of the CIR test had never been reduced to writing in a Standard Operating Procedure (SOP), meaning that a document describing the method could not have been given to the COFRAC auditor. Ex. 2, Tr. 658:17-660:25, esp. 660:5-25 (testimony of LNDD staff, Cynthia Mongongu).

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[16] Mr. LeGuy was one of the ten witnesses Mr. Landis was unable to cross-examine due to time constraints. Ex. 2, Tr. 1396:6-25.

Since he had not personally observed the accreditation activities and alleged no source from which he might have derived personal knowledge, Mr. LeGuy was not competent to testify about the precision with which LNDD was able to perform the CIR test during the COFRAC audit, or whether the actual COFRAC auditor, Bruno LeBizec, made a "mistake" by noting the 20% measurement uncertainty on at least three COFRAC accreditation documents. Mr. LeGuy simply did not know what happened at the COFRAC audit; his knowledge rested not on his own recollections and observations, but on his interpretation of COFRAC's documents. And no existing COFRAC audit document even hinted that COFRAC intended to accredit LNDD's CIR method at a 0.8‰ measurement of uncertainty prior to December 15, 2006. Ex. 32, USADA appeal exhibit T026 at LNDD 86, LNDD 97-98, LNDD 414 and LNDD 429. Indeed, if such a document existed, it surely would have been included in USADA's evidence rendering Mr. LeGuy's March 14 letter unnecessary.

The Panel's decision to admit and rely upon Mr. LeGuy's March 14, 2008 "testimony" was made in manifest disregard of CAS Rule R56 and its own scheduling order. More significantly, however, relying on that letter to contradict COFRAC's own documents was tantamount to deciding the issue in the complete absence of evidence because Mr. LeGuy was not a competent witness. *U.S. v. Beck*, 418 F.3d 1008, 1015 (9th Cir. 2008)(lay witness testimony is rationally-based where it is founded upon personal recollection and observation of concrete facts). While the rules of evidence do not strictly apply in an arbitration context, a fundamentally fair hearing requires that a decision be based upon *evidence*, not unsupported statements by out-of-court "witnesses" lacking personal knowledge of the facts. *Sunshine Mining Co. v. United Steelworkers of America*, 823 F.2d 1289, 1295 (9th Cir. 1987); *Ficek*, 338 F.2d at 657.

Relying upon COFRAC accreditation documents to find *for* USADA –as it did when deciding the CIR method was accredited *at all* –but disregarding those clear and unequivocal documents when they supported Mr. Landis is suggestive of actual bias. Moreover, failure to consider competent documentary evidence in favor of late-produced "evidence" contained in an unsworn, out-of-court statement made by a person lacking personal knowledge is tantamount to a refusal to consider the documentary evidence at all, making vacatur appropriate under 9 U.S.C.A. §10(a)(2), (3) and (4), and New York Convention, Art V§(1)(b) and §2(b).

The Panel compounded this error by relieving USADA of its burden of proof. Apparently concluding that if it was wrong about the accreditation question, WADA Code, Art. 3.2 would operate to shift the burden to USADA to prove that the LNDD's failure to apply the 20% uncertainty did not cause the positive result, the Panel went on to draw just such a conclusion on USADA's behalf: "even applying a 20% uncertainty, the delta-delta value would still be over 3.0%, and the Appellant's test would still be positive." Ex. 1, CAS Decision, ¶48. Although USADA should have borne a heavy burden to prove this fact to the "comfortable satisfaction" of the Panel, *see* Ex. 29, WADA Code at 2.1, 3.2, the Panel appears to have done USADA's work for it without benefit of evidence, stating its conclusion without a shadow of a reference to the record. In doing so, the Panel manifestly disregarded the applicable law by relieving USADA of its burden (a burden the panel clearly acknowledged and understood *see* CAS Decision, ¶¶29-33), and by making a decision not based upon any evidence tendered by any party. Not one of USADA's witnesses offered this testimony, nor did any document include such a statement.

It is not surprising that USADA's witnesses wouldn't testify to the conclusion the Panel reached –it is patently incorrect. The 20% is a *measurement*

uncertainty assigned to bound the uncertainties created by inevitable measurement error. As such, it is applied to LNDD's *measured* isotopic values –the "delta" value –not just the "delta-delta" value. [17] In fact, the statement that Mr. Landis's

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[17] For a discussion of "delta" and "delta-delta" values, see pages 51-3 below and CAS Decision, ¶¶59-60. Applying the 20% uncertainty to the "delta" value (the difference between LNDD's measured isotopic value and a standard value) as opposed to the "delta-delta" value (the difference between the "delta" for a particular testosterone metabolite and the "delta" for an endogenous reference compound) makes a significant difference, as can be seen by considering an example using the values LNDD derived for Mr. Landis's sample . See Ex. 31, Appellee's Brief, pages 27-8 for a table of both the delta values and the delta-delta values for Mr. Landis's Stage 17 sample. The first table on page 27 presents the measured delta values for the testosterone metabolites in Mr. Landis's sample, the second table on page 27 presents the measured delta values for the endogenous reference compound, and the first table on page 28 presents the delta-delta values (again, the difference between the delta for the individual testosterone metabolites in the sample and the delta for the endogenous reference compound). To take but one example, consider LNDD's delta value of -27.72 for Mr. Landis's "A" sample 5-alpha metabolite (the metabolite that LNDD relied upon to report the positive test). Applying a ±20% measurement uncertainty to that measurement yields a range of values between -22.18 and -33.26. The ±20% measurement uncertainty must also be applied to the -21.58 delta value for the endogenous reference compound, pdiol, yielding a range of values between -17.26 and -25.9 on the "A" sample. LNDD declares a positive only if the value of the testosterone metabolite is more than 3.8 delta units more negative than the value of the endogenous reference compound to which it is being compared (-3.8). But if one calculates a delta-delta by selecting a 5-alpha value at the least negative end of the possible range (-22.18) and a pdiol value at the most negative end of the range (-25.9), the 5-alpha value is clearly *less* negative than the pdiol, not more, yielding a delta-delta of +3.72, a result that could *not* be declared positive under LNDD's positivity criteria, which requires a delta-delta of -3.8. Similarly, a value of -24.00 falls within the range of possible values for both the 5-alpha and the pdiol, generating a delta-delta of zero. Again, not a positive. The same holds true for the "B" sample. Applying the ±20% measurement uncertainty to the measured value for 5-alpha (-27.43) yields a range of values between -21.63 and -32.92, while applying the same measurement uncertainty to the measured value for the endogenous reference compound, pdiol (-21.05), yields a range of values between -25.26 and -16.84. If one again calculates the delta-delta value by selecting a 5-alpha value at the least negative end of the possible range (-21.63) and a pdiol value at the most negative end of the range (-25.26), one gets a delta-delta value of +3.63, which is not a result that can be declared positive under LNDD's criteria, which requires a delta-delta value more negative than 3.8 (-3.8). Moreover, the value -24.00 is again within the range of possible values for both the 5-alpha and the pdiol, yielding a delta-delta of zero; again, not a positive result under LNDD's criteria. Because application of the ±20% measurement does not yield a delta-delta that is positive across the *entire* range of values in either the "A" or the "B" sample, Mr. Landis's result could not have been declared a positive if the ±20% measurement uncertainty had been applied.

sample would still have been positive even if a 20% uncertainty measurement had been applied is contained in only one place –a footnote to USADA's post-hearing brief written by its lawyer, Mr. Young. Ex. 22, USADA's Post-Hearing Brief at 8, footnote 7. Though this footnote cites as a reference ¶26 of Dr. Christianne Ayotte's witness declaration, her declaration contains no interpretation or application of the 20% measurement uncertainty. Ex. 35, Witness Declaration of Dr. Christianne Ayotte, March 7, 2008. Instead, the fuzzy math can be credited to the brief's author, Richard Young, USADA's lawyer and fellow-CAS arbitrator. Had Mr. Landis been permitted a right of reply, he could have pointed out that the statement was both unsupported and incorrect, but just as the Panel's limitations on the post-hearing briefs denied him a right to reply to Mr. Young's assertions about litigation costs, it also prohibited him from presenting any reply to footnote 7. Ex. 2, Tr. 1502:17-23, 1503:23-25. This is yet another example of the deference that the CAS panel afforded to Mr. Young, suggesting the existence of actual bias.

In reaching the conclusion that Mr. Landis's test would still have been positive no matter what measurement uncertainty was applied, the Panel also misapplied the burden of proof in at least two ways, manifestly disregarding the law it acknowledged and correctly articulated at the outset of its decision. Ex. 1, CAS Decision, ¶¶28-33. First, the Panel imposed upon Mr. Landis the burden of disproving accreditation, a burden he does not bear under the Code. Having made this mistake, the Panel then concluded that Mr. Landis was obligated to present his proof in his appeal brief, and that his "failure" to do so justified the decision to admit the late-produced letter of Mr. LeGuy. Ex. 1, CAS Decision at 11, n.23. But proving or disproving accreditation was not part of Mr. Landis's burden under the Code, it was USADA's. Ex. 29, WADA Code, Art. 3.1, 3.2; Ex. 12, CAS Case Law, *Hamilton* at ¶¶47-54.[18] Once USADA made clear that it would rely upon

[18] Moreover, the Panel simply misstates the record – Mr. LeGuy's March 14 letter was admitted "in exchange" for the Panel's decision to let Dr. Goldberger *testify* about the COFRAC

accreditation as part of its case establishing the existence of an anti-doping violation –as it did in its own appeal brief, filed months after Mr. Landis's – USADA had the burden of establishing the fact of accreditation, which it attempted to do on January 31, 2008 by submitting the COFRAC audit documents in its Exhibit T026. Ex. 36, USADA's Exhibit List. To deny Mr. Landis the right to point out that USADA's own evidence contradicted its claims about LNDD's accreditation status would prevent Mr. Landis from presenting a case, making vacatur appropriate under 9 U.S.C.A. §10(a)(3) and New York Convention Art. V(1)(b).

Second, the Panel relieved USADA of its burden of proving that Mr. Landis's sample would still have been positive if the ±20% measurement uncertainty had been applied by doing USADA's work for it, and extracting the unverified, unsupported and incorrect footnote 7 out of Mr. Young's closing brief. If USADA was to make this point, it had to do so with *evidence*, not bare allegations of counsel, submitted at a time when Mr. Landis had no right of reply. The Panel's action relieved USADA of this burden, in manifest disregard of the law.

The Panel's conclusion about accreditation was not based upon evidence, it was based upon two unsworn statements made by declarants (Mr. Young and Mr. LeGuy) who lacked competence to testify. Relying upon those statements was tantamount to deciding the issue in the complete absence of evidence, denying Mr. Landis a fundamentally fair hearing and justifying vacatur. 9 U.S.C.A. §10(a)(3) and (4) and New York Convention, Art. V, §1(a), (b) and §2(b).

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accreditation documents, not "in exchange" for allowing Mr. Landis to pursue the argument *at all*. Ex. 2, Tr. 23:3-15, 31:3-32:4, 40:5-13; USADA's Motion in Limine at 5. The documents providing the foundation for the argument itself were in the case either way because USADA needed them to establish that LNDD's CIR method was accredited at *all*.

2. The panel ignored uncontroverted evidence from USADA's own witnesses and documents, and disregarded clearly applicable law when it concluded that the LNDD's peak identification method complied with the ISL, justifying vacatur.

COFRAC may have been reluctant to accredit the LNDD's CIR method at the 0.8‰ degree of precision because the lab failed to document the method used for a key step in the analysis –identification of the testosterone metabolite peaks in chromatographic data generated by the CIR instruments. This failure to document the peak identification method, which was *conceded by the lab*, violated applicable WADA Technical documents and the ISL, which required that such methods be documented. Ex. 38, Landis Closing Brief at 10-15; Ex. 37, TD2003IDCR; Ex. 28, ISL, §5.4.4.3.1. The lab's concession should have resulted in a burden shift to USADA, which should then have had to prove that the violation did not cause the alleged doping violation, something USADA did not prove in the case below. Ex. 29, WADA Code, Art. 3.1, 3.2 (assigning burden of proof); Ex. 1, CAS Decision at ¶¶28-33 (acknowledging burden of proof rules). But because the Panel refused to acknowledge that Mr. Landis had established a departure from the ISL –a conclusion it could draw only by disregarding uncontroverted evidence of the lab's failure to document its peak identification method –it deprived Mr. Landis of a finding that should have resulted in victory. Mr. Landis therefore asks this Court to vacate the Panel decision.

The CIR (Carbon Isotope Ratio) test is intended to distinguish between naturally produced (endogenous) testosterone and synthetically produced (exogenous) testosterone contained in a urine sample. All testosterone metabolites are comprised of carbon, oxygen and hydrogen atoms, including the stable isotopes of carbon, Carbon^{12} and Carbon^{13}. Natural testosterone metabolites have both

Carbon^{12} and Carbon^{13} atoms, but the ratio between these atoms varies among individuals, influenced as it is by diet and other factors. Carbon^{12} and Carbon^{13} are also present in synthetic testosterone metabolites, but because these products tend to be made from soy, which is Carbon^{13}–depleted, a person using synthetic testosterone products will have comparatively fewer Carbon^{13} atoms in their testosterone. Simply put, the theory underlying the CIR test is that if the testosterone metabolites in an athlete's urine sample are more Carbon^{13} –depleted than normal, that indicates administration of synthetic testosterone. Ex. 1, CAS Decision, ¶¶59-60; Ex. 27, Landis Appeal Brief at 23-30.

The CIR test (also referred to as the "IRMS" test) uses a gas-chromatography combustion isotope ratio mass spectrometry (GC/C/IRMS) instrument to measure the Carbon^{12}/Carbon^{13} ratio of various compounds in a gas, and in turn compares this ratio to the Carbon^{12}/Carbon^{13} ratio of an international standard; the difference between the measured testosterone metabolite value and the international standard is the "delta value." Ex. 1, CAS Decision at ¶¶59-60. To account for individual variation caused by diet and other factors, it is also necessary to derive the delta value for what is known as an "endogenous reference compound" –a natural metabolite in the athlete's body not affected by the synthetic testosterone. The Carbon^{12}/Carbon^{13} ratio of that compound is also compared to the international standard, yielding a delta value for the endogenous reference compound. The difference between the delta for the testosterone metabolite and the delta for the endogenous reference compound is referred to as the "delta delta." Under the LNDD's interpretation of the WADA CIR positivity criteria, an athlete's sample should be declared positive for the presence of synthetic testosterone if the delta of just one of the four testosterone metabolites is three delta units more negative from the international standard than the delta for the endogenous reference compound. Because the LNDD's measurement of uncertainty must be

applied, samples at that lab are declared positive if the delta-delta is more negative than 3.8 delta units (-3.8). CAS Decision at ¶¶59-60.

The difficulty arises because the GC/C/IRMS instrument that measures and calculates the isotopic ratios of the chromatographic peaks generated as data cannot also identify the compound represented by these peaks. The GC/C/IRMS chromatograms allow the analyst to determine the isotopic values of a peak that elutes at a particular retention time, but they do not allow the analyst to determine what compound that peak represents. Compound identification is to be accomplished with the other instrument used in the CIR analysis–the gas chromatography/mass spectrometry (GC/MS), which identifies the testosterone metabolites represented by the various peaks, metabolites that elute at different times (retention times) and in different orders. Ex. 1, CAS Decision, ¶61. The GC/MS, which also generates data in the form of chromatograms, identifies the testosterone metabolites in a gas by both recording time it takes the compounds to elute from a column and comparing those to a standard, and also by comparing the molecular fingerprint of the compound. Both steps are necessary because different molecules can have the same retention times. So in the CIR method, two different sets of chromatograms are generated: one from the GC/MS instrument (which identifies the testosterone metabolites represented by the various peaks), and one from the GC/C/IRMS (which calculates the isotopic values of the peaks of interest). Ex. 1, CAS Decision at ¶61. See also Ex. 27, Landis Appeal Brief at 23-30 for a detailed description of the principles of the CIR/IRMS method.

In order to ensure that the isotopic ratio for a particular peak appearing on a GC/C/IRMS chromatogram is matched up with the correct testosterone metabolite peak on the GC/MS chromatogram, it is necessary to compare the peaks on the two sets of chromatograms and apply a method for ascertaining which GC/MS peak (which is compound-identified) is associated with which GC/C/IRMS peak (which has a particular isotopic ratio). This is called peak identification. The dispute in

this case centered around the method LNDD used to link the peaks generated in the GC/MS with the correct peak in the GC/C/IRMS in order to draw the conclusion that a particular testosterone metabolite had a particular Carbon^{12}/Carbon^{13} ratio. It is this step that allows the LNDD to derive the delta-delta, and to conclude that one or more testosterone metabolites is positive for the presence of exogenous testosterone under the lab's positivity criteria.

This peak identification step is also the part of the CIR method that LNDD failed to document in a Standard Operating Procedure, in violation of ISL, §5.4.4.3.1, which requires that LNDD "establish criteria for identification of a compound at least as strict as those stated in any relevant Technical Document." The relevant WADA Technical Document–TD2003IDCR–requires that the Laboratory establish criteria for identification of a compound, and that it "document appropriate analytical characteristics for a particular assay." Ex. 37, TD2003IDCR, emphasis added.

LNDD staff admitted that the peak identification method used at the lab is *not* documented–not in a Standard Operating Procedure (SOP), and not in a written validation study. Ex. 2, Tr. 660:5-661:20, 838:15-22; Ex. 28, Landis Closing Brief at 11. Although TD2003IDCR–a standard that the Panel expressly acknowledged, *see* Ex. 1, CAS Decision, ¶¶105-7 –requires documentation of the method used to analyze peaks and there was no dispute that the LNDD's peak identification method was *not* documented, the Panel simply declined to find a violation of the standard, content that the method "*as practiced*" by LNDD was sufficient. Ex. 1, CAS Decision at ¶105. The Panel could only have reached this conclusion by refusing to consider pertinent compliance evidence, and by manifestly disregarding both ISL§5.4.4.3.1 and TD2003IDCR. Therefore, vacatur is justified. 9 U.S.C.A. §10(a)(3) and (4) and New York Convention, Art. V, §1(a),(b) and §2(b).

Not only did the Panel disregard uncontroverted evidence of an ISL violation that should have changed the result in Mr. Landis's case, but it

determined that the LNDD "practiced" a method that the available evidence failed to prove had been validated. Although Mr. Landis was never able to reconcile the statements of the various witnesses describing the lab's peak identification method, and was therefore unable to determine exactly what LNDD *did* to identify peaks, [*see* Ex. 28, Landis Closing Brief at 11-15], the Panel satisfied itself that the LNDD staff had consistently described a two-step process for peak identification. Ex. 1, CAS Decision, ¶106. First, the Panel concluded that the lab identified the testosterone metabolite peaks on the GC/MS chromatograms by comparing the retention times[19] for the sample peaks with the retention times for known standards. Second, the Panel concluded that LNDD identified the testosterone metabolite peaks in the GC/C/IRMS (which can itself only measure isotopic values) by comparing the retention times for the sample peaks with the GC/C/IRMS retention times for peaks "known" to be the four testosterone metabolites in the *blank urine* quality control. Ex. 1, CAS Decision at ¶106.[20] The LNDD uses the blank urine sample as both a "negative" quality control and as an "anchor" for its peak identification method, the theory being that if one has definitively identified the testosterone metabolites in the blank urine pool and determined their retention times, one can use that information to identify the compounds in an unknown sample simply by comparing the retention times of the unknown peaks with the retention times in the blank urine. Ex. 1, CAS Decision at ¶103.

There are at least three problems with this purported method, the first of which is that it appears to render the GC/MS step completely unnecessary. Second, while the WADA Technical Document TD2003IDCR does permit a lab to

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[19] Again, this is the time it takes particular compound to be processed through the instrument and exit the column.

[20] The blank urine pool was used by LNDD as a "negative quality control" and retention time anchor; it was drawn from one individual known not to be taking any prohibited substances. Ex. 22, USADA's Post-Submission Brief at 20.

identify peaks in a sample by comparing them to peaks in a "reference collection," the LNDD's blank urine pool did not qualify as a reference collection as defined in the ISL. Reference collections must be comprised of a "collection of samples," not urine from one individual. Ex. 38, ISL §5.4.6.2; Ex. 28, Landis Closing Brief at 14-5. And as USADA confirmed, the blank urine pool used to identify peaks in Mr. Landis's sample was drawn from *one* individual. Ex. 22, USADA's Post-Hearing Brief at 20 (blank urine pool drawn from a single volunteer). A valid reference collection must also be drawn from persons who have been administered "an authentic and verifiable administration of a Prohibited Substance or Method," which did not happen to the single LNDD volunteer, who was known *not* to have taken any prohibited substance. *Id.*

Finally, in order for this blank urine comparison method to work under any circumstances, the peaks in the blank urine pool must be identified in the first place; they must be known. It is undisputed, however, that USADA produced no evidence demonstrating that LNDD *ever identified the peaks in its blank urine pool*. While USADA did rely upon a document that identified some characteristics of its blank urine pool (Ex. 32, Excerpt, USADA appeal exhibit T026 and LNDD 309-10), this document contained *other* types of information about the blank urine pool, including date of collection, pH, density, temperature and isotopic values of the compounds of interest. LNDD 309-310 does *not* demonstrate that LNDD *actually identified* the testosterone metabolite peaks in that blank urine pool, or what their retention times were. Ex. 28, Landis Closing Brief at 14, ¶(h). This is not disputed; USADA's expert, Dr. Brenna, readily admitted that this document does not indicate how LNDD identified the peaks in the blank urine in the first instance. Ex. 2, TR. 1083:6-1084:8; Ex. 28, Landis Closing Brief at 14. Not only does this document fail to establish how LNDD identified the peaks in the blank urine in the first instance, but LNDD technician, Cynthia Mongongu, testified that *no document* in the documentation package provided to Mr. Landis contained this

information; in fact, she did not know if a document containing such information existed at all. Ex. 2, Tr. 698:6-699:24; Ex. 28, Landis Closing Brief at 14.

In other words, USADA's own evidence –the only evidence available to the Panel to support the conclusion that the LNDD's unwritten peak identification method was valid –confirms that LNDD's unwritten method rendered the GC/MS step unnecessary, relied upon the use of a blank urine "reference collection" that did not satisfy TD2003IDCR's requirements for a reference collection, and was ultimately based upon a comparison between two sets of *unknown peaks*. Mr. Landis's peaks were not known, but neither were the peaks in the blank urine. Not one document establishes that LNDD *ever* definitively identified those blank urine peaks in the first instance. Thus, the linch-pin of the LNDD's unwritten peak identification method as found by the Panel was apparently based on *assumptions*, not a verified and validated method. Not only is the lab's method not *written*, as required by TD2003IDCR, but even "as practiced," it does not allow one to identify the peaks in a sample. Mr. Landis clearly presented this argument in his closing brief, but the Panel declined to address it. Ex. 28, Landis Closing Brief at 14-15; Ex. 1, CAS Decision at 105-8.

ISL §5.4.4.3.1 and WADA Technical Document TD2003IDCR require that peak identification criteria be established, and that the analytical characteristics be *documented* for each sample assay. The LNDD method was indisputably not documented. Although the Panel acknowledged that these standards applied, the Panel simply declined to enforce them. Ex. 1, CAS Decision at ¶105-7. In the face of uncontroverted evidence, the Panel refused to concede that Mr. Landis had established a violation of the ISL, a finding that should have shifted the burden of to USADA to prove that the violation did not cause the doping violation. Ex. 1, CAS Decision, ¶32 (athlete rebuts presumption that method was performed in compliance with the ISL by showing a departure). Further, it was a decision reached only after ignoring the uncontroverted evidence, evidence in the form of

admissions by LNDD staff, that the unwritten method LNDD used could not be considered reliable even in "practice" because it was based on an assumption about the peaks in the blank urine pool. Ignoring evidence is tantamount to a refusal to hear evidence at all, and a denial of Mr. Landis's ability to present his case. Vacatur is therefore proper under FAA, 9 U.S.C.A. §10(a)(3) and (4) and New York Convention, Art. V(1)(b).

3. The Panel ignored USADA's own documentary evidence in rejecting Mr. Landis's claim that the LNDD violated the ISL and its own SOP by failing to install the proper gas chromatography column on its CIR instruments.

No matter what method LNDD used to test Mr. Landis's Stage 17 sample, it was imperative that the two instruments it used to conduct this testing (the GC/MS and the GC/C/IRMS) were functioning properly. At the CAS hearing, however, Mr. Landis established, based upon LNDD's own documents, that the lab had used two *different* gas chromatography columns on its GC/MS and GC/C/IRMS instruments. The use of two different columns can change the order in which testosterone metabolites elute out of the column and are recorded as chromatographic peaks on the CIR data files. This is a violation of the lab's SOP M-AN-52, constituting an ISL violation. Ex. 39, Excerpt, USADA appeal exhibit T024, USADA 0124 (on July 24, 2006, GC/MS column was an Agilent 19091s-433); Ex. 40, Excerpt, USADA appeal exhibit T025, USADA 303 (on August 4, 2006, GC/MS column was an Agilent 19091s-433); Ex. 39, Excerpt, USADA appeal exhibit T024, USADA 0153 (SOP calls for use of an Agilent DB-17ms column); Ex. 40, Excerpt, USADA appeal exhibit T025, USADA 325 (same); Ex. 41, Excerpt, USADA appeal exhibit T084, LNDD 664 (same); Ex. 42, Written Declaration of Cynthia Mongongu at 4 (English Translation)(GC/C/IRMS column

used to analyze Mr. Landis's sample was the DB-17ms); Ex. 27, Landis Appeal Brief at 37-41; Ex. 28, Landis Closing Brief at 24-26; Ex. 43, Declaration of Dr. Goodman at ¶¶99-100; Ex. 3, AAA Panel Decision at ¶224 (violation of SOP can constitute violation of ISL).

Faced with another ISL violation confirmed by its own documents, USADA attempted to rebut those documents by proffering the written declaration of one Gerard LePetit, a maintenance contractor employed by LNDD to conduct routine maintenance on its CIR instruments. According to this declaration, Mr. LePetit performed a maintenance call on LNDD in April, 2006, removing the correct GC/MS column (the DB-17ms) and installing the Agilent 19091s-433(E) column on LNDD's GC/MS, making a written note of this installation in the maintenance report. Ex. 44, Declaration of Gerard LePetit at ¶¶7-12; Ex. 45, USADA appeal exhibit T141 at LNDD 1899, 1903. But while Mr. LePetit declared that it was "probable" that he simply forgot to make a similar notation when he removed the Agilent 19091s-44 at the conclusion of his maintenance call and replaced it with the correct column-the DB-17ms—he had no independent recollection of having done so. Ex. 44, Declaration of Gerard LePetit at ¶13; Ex. 2, Tr. 720:1-21. LNDD technician, Cynthia Mongongu, testified that she accompanied Mr. LePetit on his service call, but added that the LNDD had decided not to re-install the old DB-17ms after Mr. LePetit's service call, but to replace it with a *new* DB-17ms. However, she could not recall watching anyone replace the Agilent 19091s-44 with a new DB-17ms. Ex. 2, Tr. 729:7-730;4; Ex. 42, Declaration of C. Mongongu at 4 (English Translation). Claire Frelat, the LNDD technician who was identified in USADA Exhibit T 142 as the technician who installed the new DB-17ms column after Mr. LePetit's service call, made no mention in her two sworn declarations of having made this column change, and further testified that she could not recall having done so. Ex. 46, Declaration of Claire Frelat; Ex. 47, Rebuttal Declaration of Claire Frelat; Ex. 2, Tr. 818:9-820:6, 820:13-24.

Neither Mr. LePetit nor the LNDD technicians had a personal recollection of the facts that would allow them to contradict USADA's documents showing that two different columns were still in place when Mr. Landis's samples were analyzed in July and August, 2006. That being the case, USADA resorted to Exhibit T142 (LNDD 2004-5), a document *not* provided to Mr. Landis in the mandatory Laboratory Documentation Package. LNDD 2005 indicates that a technician with Code Number 26 (Claire Frelat) made a column change on April 27, 2006. Ex. 48, USADA appeal exhibit T142. As such, the document appeared to corroborate—in part—USADA's claim that the correct column had been re-installed before the lab tested Mr. Landis's samples in July and August, 2006. However, it also contradicted Mr. LePetit's claim that he "must have" re-installed the correct column before the conclusion of his service call on April 26 because Exhibit T142 indicates that it was Claire Frelat, Operator 26, who made the column change, and it indicates that the change was made on April 27, the day after Mr. LePetit's service work ended. Ex. 48, USADA appeal exhibit T142 at LNDD 2005; Ex. 2, Tr. 719:19-720:9.

As stated above, Claire Frelat never alleged that she had made the crucial column change in either of her two sworn declarations, though Mr. Landis clearly addressed the column issue in his November, 2007 appeal brief. Ex. 27, Landis Appeal Brief at 38-41. This is consistent with Ms. Frelat's utter lack of memory about the event. Ex. 1, Tr. 818:9-820:6, 820:13-24. Nor could Ms. Frelat explain why a document she testified had been filled out contemporaneously–as each event occurred–was out of date order, with the January 20, 2006 entry coming *after* the January 30, 2006 entry. Ex. 48, USADA appeal exhibit T142, LNDD 2005; Ex. 2, Tr. 813:8-816:5, 816:18-817:4, 817:23-819:23. What is certain is that if Ms. Frelat changed the column, Mr. LePetit did not, despite his assertions about what he "must have done." Ex. 2, Tr. 719:19-720:9.

Not only is T142 out of date order, it does not identify what type of column might have been installed on April 27, 2006. Ex. 48, USADA appeal exhibit T142. It does not indicate whether it was a DB-17ms or some other column, though the testimony was that the lab used a number of different columns on its various instruments. Ex. 2, TR. 728:20-729:6. In fact, the document never actually states that a column change occurred; the French words for "column change" ["changement de colonne"] appear nowhere on the page,[21] and since Ms. Frelat could not remember the column change, she could not clarify matters. Ex. 2, Tr. 818:15-820:6.

Mr. Young, however, *did* have an explanation–one which contradicted Ms. Frelat's sworn testimony. In his closing, Mr. Young relied upon LNDD 2005 as proof that the necessary column change had, in fact, occurred. He assured the Panel that they need draw no conclusion from the fact that the entries on LNDD 2005 were not in chronological order, as they should have been if they had truly been filled out contemporaneously; his "common sense understanding" lead him to believe that the document had either *not* been contemporaneously-completed, as Ms. Frelat testified, or that the dates had been filled in incorrectly at the time. Ex. 2, Tr. 1471;4-18, 1471:14-24. In other words, Mr. Young urged the Panel to rely upon the dates recorded Exhibit T142/LNDD 2005 to "prove" that the correct column was re-installed before LNDD tested Mr. Landis's sample, but not to draw the conclusion that the document was inauthentic (as Mr. Landis alleged) because it was not in fact the contemporaneously-created document it was represented to be. Untroubled both by Mr. Young's "heads, I win–tails, you lose" analysis, and by the fact that Ms. Frelat–who completed the form–declined to testify that she had simply made a mistake even when offered a chance to do so on cross-examination, the Panel embraced Mr. Young's "common sense" explanation, and relied on

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[21] Inexplicably, the document says that the event occurring on April 27, 2006 was a "chat colonne," which translates as "cat column."

LNDD 2005 to conclude that the correct column had been re-installed before Mr. Landis's sample was tested. Ex. 1, CAS Decision at ¶189.

Although the Panel relied on LNDD 2005 for the conclusion that a column change occurred in April, 2006, it disregarded the fact that LNDD 2005 also indicated that it was Ms. Frelat who made the column change on April 27, the day *after* Mr. LePetit concluded his work at LNDD, choosing to believe instead that Mr. LePetit had done it, as he said he "must have." Ex. 1, CAS Decision at ¶189. In drawing this conclusion, however, the Panel declined to acknowledge two inconsistencies: 1) LNDD 2005–which it relied upon for proof of the column change–attributed the column change to Ms. Frelat and not Mr. LePetit; and 2) Mr. LePetit could not have made the April 27 column change allegedly evidenced in LNDD 2005 because he finished his work at LNDD on *April 26*. Ex. 48, USADA appeal exhibit T142 at LNDD 2005; Ex. 44, Declaration of Mr. LePetit, ¶7 (Mr. LePetit's service call occurred on April 24-26); Ex. 2, Tr. 785:13-789:6 (column change would have occurred on April 27, after conditioning).

Finally, the Panel simply ignored the fact that even accepting LNDD 2005 at face value, it still contained no indication that the *correct* column –the DB-17ms – was installed on April 27, 2006. LNDD 2005 did not so state, nor did any other witness or document. Ex. 2, Tr. 720:2-19, 729:7-730:19; 785:13-787:17, 813:8-821:20.

The Panel simply disregarded these gaps in USADA's evidence. Although not one document or witness observed or recalled that the DB-17ms column had actually been re-installed on the LNDD's GC/MS instrument before Mr. Landis's sample was analyzed, the Panel simply concluded that LNDD 2005 got USADA close enough. Ex. 1, CAS Decision, ¶189. In doing so, it disregarded the sworn testimony of USADA's own witness, Claire Frelat, ignored the fact that neither LNDD 2005 nor any other document evidenced the re-installation of a DB-17ms column as required, and completely failed to credit LNDD's own documents,

which clearly indicated that in July and August, 2006, its GC/MS instrument was installed with an Agilent 19091s-433 column, not a DB-17ms column. Ex. 39, Excerpt, USADA appeal exhibit T024, USADA 0124 (on July 24, 2006, GC/MS column was an Agilent 19091s-433); Ex. 40, Excerpt, USADA appeal exhibit T025, USADA 303 (on August 4, 2006, GC/MS column was an Agilent 19091s-433); Ex. 39, Excerpt, USADA appeal exhibit T024, USADA 0153 (SOP calls for use of an Agilent DB-17ms column); Ex. 40, Excerpt, USADA appeal exhibit T025, USADA 329 (same); Ex. 41, Excerpt, USADA appeal exhibit T084, LNDD 664 (same); Ex. 42, Written Declaration of Cynthia Mongongu at 4 (English Translation)(GC/C/IRMS column used to analyze Mr. Landis's sample was the DB-17ms); Ex. 27, Appellant's Appeal Brief at 37-41; Ex. 28, Landis Closing Brief at 24-26; Ex. 43, Declaration of Dr. Goodman at ¶¶99-100. Unable to reconcile or fill this gap in the chain of events, the Panel simply pretended that it did not exist, denying Mr. Landis a fundamentally fair hearing based upon the evidence, justifying vacatur. 9 U.S.C.A. §10(a)(3) and (4); New York Convention, Art. V §1(a), (b), §2(b). Not only did the Panel ignore the significance of USADA's own documents, its reliance upon the word of Mr. Young to contradict the sworn testimony of USADA's own witness is suggestive of an actual bias favoring their fellow CAS arbitrator, justifying vacatur under 9 U.S.C.A. §10(a)(2) and New York Convention, Art, V, §1(a), (d), and §2(b).

4. The CAS Panel refused to consider Mr. Landis's evidence establishing that the LNDD's CIR instrument had not been maintained as required by the ISL and the lab's own Standard Operating Procedures.

Not only did Mr. Landis establish that LNDD failed to install the correct column on its CIR instruments, he established that the LNDD had failed to ensure

that the CIR instrument was functioning in a linear fashion, which is necessary for accurate measurement. The lab's Standard Operating Procedure ("SOP") required that it perform monthly linearity checks on its GC/C/IRMS instrument, but as the AAA Panel concluded, it failed to do so, neglecting to perform such a test in August, 2006. Ex. 3, AAA Panel Decision at ¶¶217-219. The lab's failure to conduct monthly linearity checks of its CIR instrument was a violation of the ISL and the LNDD's own Standard Operating Procedure (SOP). Ex. 3, AAA Panel Decision at ¶¶217-219; Ex. 27, Appellant's Brief at 49-50; Ex. 28, Landis Closing Brief at 19-20.

Linearity is of crucial importance in this case because only those CIR instruments operating in a linear fashion are able to provide accurate measurements. Ex. 3, AAA Panel Decision, ¶214, ¶216; Ex. 49, Declaration of Dr. Simon Davis, ¶52; Ex. 28, Landis Closing Brief at 9, ¶(E)(2). Therefore, labs must perform instrument tests on a routine basis in order to maintain WADA accreditation and ensure quality control. Ex. 3, AAA Panel Decision at ¶214. The AAA Panel had concluded that the LNDD failed to conduct a linearity test in August 2006, breaching its own SOP and the ISL. *Id.* at ¶¶217-9; Ex. 50, USADA appeal exhibit T112 at LNDD 547 (§4.2.6.2 of SOP 1-N-29). However, declining to shift the burden of proof to USADA to *prove* that this failure did not cause the Adverse Analytical Finding (as required by WADA Code, Art. 3.2), the AAA Panel simply concluded that because at least one of the linearity checks that LNDD *did* perform occurred within one month of the testing of Mr. Landis's sample (the June 26 and July 31 tests), the failure to perform checks on a monthly basis could not have caused the doping violation. Id. at ¶¶218-9.

Since the CAS appeal was a *de novo* hearing, USADA again faced the burden of proving that the failure to conduct the August 2006 linearity did not cause the doping violation, a burden that it had to assume given that LNDD had violated the ISL in failing to conduct the monthly checks. Ex. 29, WADA Code,

Art. 3.2. Apparently not confident that the CAS Panel would follow the AAA Panel's lead by relieving it of the burden of actually *proving* that the failure to conduct an August 2006 linearity test did not cause the doping violation, USADA "found" a document to "cure" the underlying violation, a document it asserted was the August 2006 linearity test. That document, Exhibit T155, was tendered to establish that LNDD had *not* violated the ISL because it had, in fact conducted monthly linearity tests. In the absence of a violation, USADA would no longer need to worry about proving that the failure to conduct monthly linearity tests had not caused the Adverse Analytical Finding.

Exhibit T155 was located at a fortuitous time for USADA, occurring only a few weeks before the CAS Panel hearing, but more than one month after the CAS Rule R56 deadline for indentifying exhibits had passed. Ex. 51, Letter from Richard Young to Matthieu Reeb, February 27, 2008 and attached Exhibit T155, LNDD 2018-2022; Ex. 4, CAS Rule R56. Worse, it was produced a *year* after LNDD asserted that "there were no other linearity tests done in between those already produced," and more than a year after the AAA Panel warned USADA that it would be precluded from introducing into evidence any documents requested in discovery but not produced, documents like this August, 2006, linearity check. Ex. 52, Respondent's Motion to Strike Untimely Exhibits and Related Testimony at 2, and Exhibit 4 to that Motion, at page 11 [March 30, 2007 letter from Richard Young to the AAA Panel](LNDDD had no more linearity document); Ex. 3, AAA Panel, Procedural Order No. 2, March 15, 2007, ¶5 (documents not produced in discovery could not be relied upon); Ex. 28, Landis Closing Brief, 19-20, 33.

Given the suspicious circumstances, Mr. Landis strenuously objected to admission of the test. Untroubled by the fact that T155 should have been produced a year earlier, or by the fact that USADA presented the document only weeks before the CAS Panel hearing, and more than one month after the Rule R56 deadline for identifying exhibits had passed, the Panel admitted the document. Ex.

51, Letter from Richard Young to Matthieu Reeb, February 27, 2008 and attached Exhibit T155, LNDD 2018-2022; Ex. 52, Respondent's Motion to Strike Untimely Exhibits and Related Testimony at 2; ex. 2, Tr. 798:2-799:7, 800:4-801:8. The Panel ultimately concluded that this August 2006 linearity document cured the violation identified by the AAA Panel. Ex. 1, CAS Decision, ¶91.

Not only should the document have been excluded if the Panel were proceeding in an even-handed manner with respect to its application of CAS Rule R56, but it should have been excluded because it was not authentic, as Mr. Landis alleged. Ex. 28, Landis Closing Brief at 33-34. He advanced at least three separate factual grounds for that allegation. Lacking evidence with which to counter these fact-based challenges to the document's authenticity, the Panel simply ignored them, stating flatly that Mr. Landis had "adduced" no evidence to counter the LNDD technician's testimony that she was "satisfied" that the document was, in fact, the original and unaltered August 2006 linearity check. Ex. 1, CAS Decision, ¶92.

The record is to the contrary. It confirms that Mr. Landis identified significant differences between the timely-produced linearity tests conducted on June 26, 2006, July 31, 2006 and September 25, 2006 (Ex. 32, Excerpt, USADA appeal exhibit T026 at LNDD 313-320, LNDD 327-29) and the late-produced document represented to be the August 2006 linearity check. Ex. 51, USADA appeal exhibit T155. First, the Data Processing Results for the timely-produced linearity tests reveal that the name of the "Folder" on each test document is the date on which the test was performed; that date is also entered on the line of the results sheet marked "Batch Name." Ex. 32, Excerpt, USADA appeal exhibit T026 at LNDD 313, 315, 317, 320, 322, 324, 327, 329, and 331; Ex. 27, Landis Closing Brief at 33-4. So, for example, the June linearity test has a "Folder" name of 260606 (June 26, 2006). *Id.* at LNDD 313. By contrast, the newly-located Data Processing Results sheet contained in Exhibit T155 does not contain a date in the

Folder or Batch Name lines, but instead states the word "STAB 3." Ex. 51, Exhibit T155, LNDD 2020-2022. In order for USADA's claim that the August 2006 linearity document was authentic to be plausible, one has to accept that LNDD adopted a different folder-and batch-naming procedure just for the month of August, returning to its practice of using the date as the folder and batch name in September 2006. This is not credible.

Second, Mr. Landis pointed out that the graphic presentation of the linearity run produced for the August 2006 "test" is not like the graphic presentations of the linearity runs occurring on June 26, July 31, or September 25, 2006. Ex. 52, Respondent's Motion to Strike Untimely Exhibits and Related Testimony at 12. The graphic presentation of the data on Exhibit T155/LNDD 2019, displays data on a graph, the x axis of which is measured in "AV" units, 3540-3595, and the y axis in Amps, 4.00E-3 to 4.60E-3. Ex. 51 USADA appeal exhibit T155 (LNDD 2020-2022). None of the earlier linearity runs have "AV" on the x axis and none use the same Amp scale for the y axis. Ex. 32, Excerpt, USADA appeal exhibit T026 at LNDD 319 and 326; LNDD 314, 316, 318, 321, 323, 325, 328, 330, and 332.

Third, Mr. Landis noted that when LNDD provided him with access to the LNDD's Electronic Data Files just prior to the AAA hearing, he was also provided with a complete file directory listing containing all files and directories for the CIR instrument over the relevant period of time. The folder with the name "STAB 3" *was not listed* among those file and folder names. Ex. 28, Landis Closing Brief at 33-34; Ex. 53, Landis Exhibit GDC 871-908. USADA never argued that Mr. Landis had incorrectly stated these facts.

USADA attempted to rely upon LNDD technician, Claire Frelat, to "authenticate" Exhibit T155, but her testimony was confused. For example, Ms. Frelat had submitted a witness declaration indicating that one of the "LNDD staff" had located this August 2006 linearity document, but on the stand at the CAS

appeal, she admitted that she was the member of the "LNDD staff" that had located the August linearity document. When asked why she didn't clearly state this in her declarations, she said that it was simply "shorter" to write that "LNDD staff" found the document than it was to write "I" found the document. Ex. 28, Landis Closing Brief at 34, ¶(v)(C); Ex. 2, Tr. 918:14-920:4. Ms. Frelat's memory about the details surrounding her location of that document was sketchy, Ex. 2, Tr. 881:20—884:24, though she was ultimately "satisfied" that it was authentic. Ex. 2, Tr. 920:5-9.

The Panel simply disregarded Mr. Landis's evidence that the document lacked the necessary indicia of authenticity. In so doing, it did not *weigh* that evidence, it proceeded as if no evidence had been presented, or "adduced," at all. Ex. 1, CAS Decision at ¶92. Pretending that no evidence was "adduced" to support the allegation of falsity is tantamount to a refusal to hear evidence at all, justifying vacatur under FAA, 9 U.S.C.A. §10(a)(3) and (3) and the New York Convention, Art. V §(1)(a),(b) and §2(b).

5. The Panel disregarded both the law and the facts in concluding that LNDD's chain of custody was complete

During the CAS appeal hearing, Mr. Landis established that the chain of custody documents produced to him by LNDD revealed nine separate gaps in the chain of custody for Mr. Landis's Stage 17 sample, a violation of the ISL, ¶3.2, ¶5.2.2.2 and of WADA technical document, TD2003LCOC. Ex. 28, Landis Closing Brief at 26-27; Ex. 27, Appellant's Brief Submitted by Floyd Landis at 68-73. Implicitly acknowledging that Mr. Landis had demonstrated a departure from the ISL –a fact that should have shifted the burden to USADA to prove (with evidence) that the departure did not cause the doping violation –the Panel declined to credit this evidence. Instead, at the urging of fellow CAS arbitrator, Richard

Young, the Panel ruled for the first time that literal compliance with the ISL was no longer required so long as compliance with the "concepts" of the rules would be sufficient. Ex. 1, CAS Decision, ¶178. Given this ruling, the Panel found it unnecessary to weigh Mr. Landis's evidence establishing that literal compliance with the chain of custody rules had not, in fact, occurred. In so doing, the Panel both declined to consider Mr. Landis's evidence and manifestly disregarded the applicable law, making vacatur appropriate under FAA §10(a)(3) and (4) and New York Convention, Art. V, §1(a), (b), and §2(b).

The CAS panel's decision is contrary to the well-established rules governing the conduct of WADA laboratories, rules that are set forth in the International Standard for Laboratories ("ISL") and WADA technical documents. Under the World Anti-Doping Code, lab compliance with the ISL is mandatory. Ex. 38, ISL (Preamble) at 2. As expressly recognized by the Panel in its decision [*see* Ex. 1, CAS Decision at ¶¶163-4], both the ISL and TD2003LCOC emphasize that the key requirement of the laboratory's chain of custody is that it consist of documentation "of the sequence of persons in possession of the sample and any portions of the sample taken for testing." Ex. 38, ISL, ¶3.2 ("Laboratory Internal Chain of Custody" defined as documentation); ISL ¶3.2 ("Laboratory Internal Chain of Custody" defined as documentation); ISL ¶5.2.2.2 (lab required to maintain a Laboratory Internal Chain of Custody to control and account for samples from receipt through final disposition); Ex. TD2003LCOC (a chain of custody is documentation). TD2003LCOC elaborates on ISL §5.2.2.2 by detailing the sorts of information that should be included on the chain of custody documentation, and clarifying that transfers of any sample should be noted on the chain of custody documentation when they occur, and not later. Ex. 54, TD2003LCOC. Only a contemporaneous written record generates chain of custody data of evidentiary quality, an express purpose of the ISL itself. See Ex. 38, ISL, ¶1.0, Ex.3, AAA Panel decision, ¶154.

USADA never introduced documentary evidence closing the particular chain of custody gaps Mr. Landis identified. Ex. 22, USADA Post-Hearing Submission Brief at 37-41. In fact, the only *document* cited by USADA in its post-hearing brief to challenge Mr. Landis's proof, and to establish that existing *documentation* made it possible to "follow LNDD's bottle chain of custody," was Exhibit T144. Far from being a lab-created chain of custody document created at the time sample transfers were made, Exhibit T144 was attorney work-product prepared in January 2008 for USADA's lawyers by consultant, Dr. Hatton, just prior to the time that USADA filed its response to Mr. Landis's CAS appeal. Ex. 22, USADA Post-submission brief at 39 (citing Exhibit 144); Ex. 55, USADA appeal exhibit T144 (marked as "Privileged and Confidential. Attorney Work-Product. LandisLabMap&COCHatton30Jan08.doc"]. In other words, USADA was unable to produce documentation showing a complete and continuous chain of custody for Mr. Landis's sample, as required by the ISL and WADA technical documents.

Implicitly acknowledging that Mr. Landis had successfully demonstrated a departure from the ISL rule that chain of custody be completely documented, the Panel simply concluded that literal compliance with the ISL was no longer required, despite the WADA Code's clear admonition that compliance with the ISL is mandatory. Ex. 38, ISL at 2, ISL ¶3.2, ¶5.2.2.2. In order to avoid the clear and express language of these WADA rules, the CAS panel accepted the unsupported statement of fellow CAS arbitrator, Richard Young, who contended that the clear requirement for documentation could be disregarded for two reasons –1) LNDD was only required to comply with the "concepts" of the chain of custody rules, and 2) a chain of custody could be created by *post hoc* testimony, despite the express requirement of "documentation." Ex. 1, CAS decision, ¶¶175, 178.

The Panel decision is irreconcilable with the express and unequivocal language of the rules themselves. The Panel was well aware of those rules because

they acknowledged and correctly quoted them at ¶¶163-164 of its decision. The rules were clear and explicit. As the dissenting arbitrator on the AAA Panel below observed, "the fight against doping is arduous and it may require strict rules. But the rule-makers and rule-appliers must begin by being strict with themselves." Ex. 19, AAA Dissent at 5, note 21, quoting *Quigley v. USA Shooting*, CAS 94/129 (Jan Paulsson, Panel President/Richard Young representing USA Shooting, *see* Ex.10). Although the panel was clearly aware of the rules and their clear meaning, it disregarded those rules. Thus, the panel's decision was one made in manifest disregard of the law.

The Panel also acted with manifest disregard for the law when it accepted Mr. Young's contention that a chain of custody may be established by testimony because this conclusion, too, is contrary to the ISL's express requirement for documentation. As the Panel clearly recognized, the ISL defines a chain of custody as "documentation." See Ex. 1, CAS Decision at ¶163 (quoting the ISL's definition of "Laboratory Internal Chain of Custody," ¶3.2). ISL ¶5.2.2.2 incorporates this defined term (requiring documentation) into its directive that labs maintain chain of custody procedures. And WADA technical document TD2003LCOC expressly reiterates the emphasis on documentation in its first sentence: "The Laboratory Internal Chain of Custody is documentation....". Ex. 1, CAS Decision at ¶164, quoting TD2003LCOC. The fact that TD2003LCOC allows a lab technician named on the chain of custody documents to explain entries made on those documents does not extinguish the requirement for documentation in the first instance; to accept this interpretation would completely undermine the rule's express documentation requirement, and would contradict the purpose of a chain of custody, which is to eliminate the need to rely upon fuzzy memories of long-past sampling events. Instead, a technician named on a document may explain his or her participation in the sampling activities noted on the document. The requirement for documentation is clear, explicit and well-established.

The reliability problems that arise when a lab looks to *post hoc* testimony to explain who did what with a lab sample analyzed months earlier are aptly illustrated by "one specific instance of improper chain of custody...of particular note" referenced in the Panel decision. Ex. 1, CAS Decision, ¶167. This gap of "particular note" centered around the very first set of tests performed on Mr. Landis's "A" sample on July 21, 2006. The documents recording the transfers made on the morning of July 21 –LNDD 1590 and 1591 –provide conflicting accounts of the location and person from which the first operator obtained Mr. Landis's sample that morning, the time at which the transfer was made, and the identity of all persons handling his sample that morning. Ex. 56, USADA appeal exhibit T103 at LNDD 1590-91. Specifically, LNDD 1590 states that Operator 44 (Laurent Martin) had possession of Mr. Landis's sample at 7:25 a.m. in Room 107, but it does not state where Mr. Martin got that sample. It also states that Operator 44 transferred the sample to Room 006 at 9:00 a.m., but does not identify the person receiving the sample. By contrast, LNDD 1591 indicates that the sample was retrieved from a refrigerator CHFR-1, but at a different time—7:30, not 7:25. It also states that it was Operator 42 (Jean Antoine Martin) not Operator 44 (Laurent Martin) who transferred the sample from Room 107 to Room 006 at 9:00 a.m. that morning. Because they are in conflict, these two documents cannot establish a clear and continuous record of the persons in possession of Mr. Landis's sample on the morning of July 21, the location of that sample, or the time at which transfers of the sample occurred, as required by ISL ¶5.2.2.2 and TD2003LCOC.

USADA had no other contemporaneously-recorded documentary evidence to close the gaps in the July 21 chain of custody, so it submitted written testimony from Operators 44 (Laurent Martin) and 19 (Myriam Garcia) instead. These were two of the LNDD technicians who handled Mr. Landis's "A" sample bottle that day. Even assuming, *arguendo*, that the ISL allows for the creation of a chain of

custody with testimony—which it does not—the declarations of Garcia and Martin did not resolve the inconsistency between LNDD 1590 and LNDD 1591.

In his written declaration, Mr. Martin confirmed that the information on LNDD 1590 was correct –he obtained Mr. Landis's A sample bottle at 7:25 a.m. on July 21, 2006 –but he added that he retrieved the sample from the CHFR-1 refrigerator, a transfer of the sample that should have been recorded on LNDD 1590, but was not. Ex. 57, Declaration of L. Martin. Finally Mr. Laurent declared that LNDD 1591 "shows that I transferred it to Garcia (operator code 19)." *Id.* at 4. This, of course, is incorrect; LNDD 1591 says nothing about Mr. Laurent Martin because his operator number (44) appears nowhere on that document. Nor did Mr. Martin have an independent recollection of giving the sample to Ms. Garcia. Ex. 2, Tr. 725:16-726:12.

Ms. Garcia's declaration also failed to resolve the discrepancy between LNDD 1590 and LNDD 1591. In her original declaration, Ms. Garcia never indicated who actually completed LNDD 1591, never explained why LNDD 1591 and LNDD 1590 are inconsistent as to the time at which the first possession of Mr. Landis's sample occurred on July 21 (7:25 a.m. or 7:30 a.m.), and never explained why Operator 42 had the sample on July 21, as indicated on LNDD 1591, or who he got it from. Ex. 58, Declaration of Myriam Garcia.

However, her story changed in a rebuttal statement filed ten days later. Ex. 59, Rebuttal Declaration of Myriam Garcia. In that rebuttal, Ms. Garcia declared for the first time that she was the person that completed LNDD 1591, and that she had made "two mistakes" when doing so –incorrectly noting the time that the sample was removed from storage as 7:30 instead of 7:25, and incorrectly identifying Operator 42 as the person transferring the bottle to Room 006, when she should have identified Operator 44. In short, Ms. Garcia's rebuttal declaration neatly resolved the inconsistencies between LNDD 1590 and LNDD 1591. The

trouble is that when Ms. Garcia was examined by USADA's own lawyer on direct examination, she denied having written the second declaration:

Q: Ms. Garcia, you've submitted two statements in this proceeding, correct?

A: **No, only one statement.**

Q: I think the record reflects that there are two statements, one dated March 5 and one dated March 12. Do you have both of those with you, Ms. Garcia?

A: Yes, I have one statement in front of me.

Q: What is the date on that statement?

A: It's the fifth of March.

Q: Ms. Garcia, we have a record before us that it a second declaration that you filed dated March 12th, and I'm not sure why you don't have it in front of you, but we have it here.

A: Okay, fine.

Q: So Ms. Garcia, just so we're clear here, do you recall now that there were two separate documents you filed, one on March 5 and another on March 12th?

A: **No, I don't remember.**

Ex. 2, Tr. 1241:4-1242:5, emphasis added. It was only after Mr. Paulsson read virtually all of the March 12 rebuttal to her in French[22] and asked her if it was "reminding her of anything," that Ms. Garcia indicated that she remembered signing a statement containing such recitations. Ex. 2, Tr. 1247:4-1249:2.

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[22] The transcript does not include any of the French questions and answers, only the English translation. Because Mr. Paulsson read Ms. Garcia's alleged March 12 rebuttal to her entirely in French, this reading is not reflected in the transcript. Ex. 2, Tr. 1247:23-1248:16.

Having "admitted" that she "recalled" writing a statement containing the factual allegations from the rebuttal declaration that Mr. Paulsson had just finished reading to her, Ms. Garcia went on to testify that she in fact *had no independent recollection of the facts stated in that declaration*; "two years was too long" ago for her to remember the facts of July 21, 2006. Ex. 2, Tr. 1249:20-1256:25, esp. 1251:7-8, 1241:18-20, and 1252:2-5. She further admitted that the sole basis for her conclusion that she had made a "mistake" in recording the time and operator code when completing LNDD 1591 two years earlier was the fact that LNDD 1590 said something different; she had no independent recollection of these facts. Ex. 2, Tr. 1254:21-1255:15, TR. 1256:8-25. Setting aside the troubling question of how the rebuttal declaration came to include those factual allegations she had no memory of, the one thing that *is* clear from Ms. Garcia's testimony is that the information she recorded on LNDD 1591 –that Operator 42 removed the bottle from storage at 7:30 –was based on her "personal direct observation at the time two years ago," and was therefore the best evidence she could offer about the events of July 21, 2006. Ex. 2, Tr. 1256:8-25. Ms. Garcia had no memory of the facts stated in the rebuttal declaration and no memory that she made a "mistake" two years earlier when completing LNDD 1591. She was simply not competent to testify that she had made a mistake on July 21, 2006.

The Panel was undeterred by Ms. Garcia's lack of memory. Ignoring her repeated insistence that she had no independent recollection of the events of July 21, the Panel instead insisted that it would rely upon her rebuttal declaration because she "appeared to be clear about the details of the actual testing" on July 21 Ex. 1, CAS Decision at ¶178. Of course, it was not "testing" that was at issue, it was the movement of Mr. Landis's sample. And Ms. Garcia's sworn testimony was that she had no independent

recollection of those facts but depended entirely on the documents. In reaching its conclusion that Mr. Landis's evidence was insufficient to establish a breach in the chain of custody, the Panel both disregarded existing evidence and created non-existent evidence, justifying vacatur under 9 U.S.C.A. §10(a)(3) and (4), and New York Convention, Art. V, §1(a), (b) and §2(b).

Paragraph 179 of the Panel Decision suggests that the Panel must have realized the shaky legal and factual ground upon which its opinion rested because there, the Panel holds that even if Mr. Landis had successfully demonstrated that there were "imperfections in the bottle chain of custody such as to constitute an ISL violation," he still would not have prevailed because he failed to prove that the LNDD staff tampered with that sample. Ex. 1, CAS Decision, ¶179. This, of course, is not his burden, and represents an assignment of the burden of proof not permitted under the Code, which never imposes upon the athlete the burden of proving that an ISL violation actually caused the Adverse Analytical Finding. To the contrary –if the athlete proves that a violation of the ISL occurred, the burden shifts to the anti-doping agency to prove that the ISL violation did not cause the Adverse Analytical Finding. Ex. 29, WADA Code, Art. 3.2.1, 3.2.2. This is boilerplate law in the anti-doping context; indeed, the Panel expressly (and correctly) recited these rules in Paragraphs 32 and 33 of its opinion. Ex. 1, CAS Decision, ¶¶32-33; *see also* ¶¶28-29 (correctly describing USADA's standard of proof).

These rules are clear and explicit, they have been in place for years, and have been applied by each of these arbitrators on numerous occasions in the past. Nevertheless, this Panel disregarded those rules in reaching the conclusion that even if Mr. Landis had successfully established that the LNDD violated the ISL, his claim could not succeed because he did not also

prove that the LNDD staff itself had tampered with the sample. This decision was made in manifest disregard of the law, justifying vacatur under FAA, §10(a)(3) and (4), and New York Convention, Art. V, §1(a),(b) and §2(b).

E. CONCLUSION

Mr. Landis was entitled to a fundamentally fair hearing, a hearing in which he was provided notice of the issues to be decided, and a decision based on the evidence, made by impartial arbitrators. He received none of this.

The CAS system cannot provide an impartial forum because CAS refuses to prohibit its arbitrators from continuing to represent clients before CAS panels, institutionalizing the worst form of the "repeat player" bias. In Mr. Landis's case, each of his arbitrators either actively represented clients before the CAS, was a member of a firm that solicited sports clients, or had appeared before the CAS on behalf of one or more litigants in the past. His opponent, USADA, had retained another CAS arbitrator to represent it in this case, a lawyer/arbitrator who had repeatedly been appointed to CAS panels before which one of the Landis arbitrators had appeared as an advocate, a circumstance that could occur again at any time. These facts were never disclosed to Mr. Landis. In such a situation, the incentive to embrace positions favorable to the CAS arbitrator's client, USADA, is simply too powerful to provide a clearly impartial arbitral forum free of potential bias.

In Mr. Landis's case, evidence of that bias is suggested by the $100,000 cost award imposed against him, an award not contemplated by UCI rules and one based not on evidence, but upon post-hearing statements represented by USADA's CAS arbitrator/lawyer in a brief to which Mr.

Landis was denied the right of reply. This $100,000 award was but one of the many decisions that were contradicted by the evidence, incompatible with the applicable law, or both, and but one of the instances in which the hearing procedure adopted by the Panel denied Mr. Landis an opportunity to present his case. Because arbitrators have free rein to decide both questions of law and fact, their impartiality must be scrupulously safeguarded. The CAS system simply does not provide such safeguards.

Mr. Landis was entitled to a hearing that provided basic due process, but he did not receive it. He respectfully requests that his motion to vacate the CAS Panel's arbitral award be vacated.

III. PRAYER FOR RELIEF

The CAS arbitration system institutionalizes and exacerbates the "repeat player bias, denying athletes like Mr. Landis even a chance at an impartial panel. That bias is particularly acute in Mr. Landis's case because the arbitrator he selected continues to represent a client before the CAS. This arbitrator has a strong incentive to embrace positions favorable to that client (the International Olympic Committee), but also to defer to USADA and its CAS arbitrator/lawyer, a lawyer who has frequently presided over cases in which the Landis-selected arbitrator appeared as advocate, a situation likely to occur in the future.

WHEREFORE, for the reasons stated above, Mr. Landis therefore respectfully requests that this Court exercise the authority granted under the Federal Arbitration Act, 9 U.S.C.A., §2, §10(a)(2)-(4), federal common law and/or the New York Convention, Art. V, and:

1) VACATE the arbitral award entered in the arbitral proceeding known as *Floyd Landis v/USADA*, CAS 2007/A/1394 dated June 30, 2008;

2) VACATE the $100,000 cost award issued by the Panel in *Floyd Landis v/USADA*, CAS 2007/A/1394;

3) VACATE the order of suspension confirmed by the Panel in *Floyd Landis v/USADA*, CAS 2007/A/1394;

4) GRANT such other relief as it considers just and proper under the circumstances.

Attorneys of Record for: Floyd Landis

Dated: October 16, 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:

AMENDED MOTION TO VACATE ARBITRATION 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
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