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15 IN THE UNITED STATES DISTRICT COURT FOR THE
16 CENTRAL DISTRICT OF CALIFORNIA
17 EASTERN DIVISION
18

19 In the matter of the arbitration between
20 FLOYD LANDIS,
21
22 Petitioner,
23
24 and
25 UNITED STATES ANTI-DOPING
26 AGENCY,
27
28 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

1 Because the arbitrators considering Floyd Landis's anti-doping appeal failed
2 to disclose business dealings and relationships creating a powerful incentive to rule
3 in favor of his opponent, the U.S. Anti-Doping Agency, Mr. Landis was denied a
4 fundamentally fair arbitral hearing in front of a panel of impartial arbitrators.
5 What he received instead was a fundamentally *unfair* hearing in which the
6 statements of USADA's counsel were given evidentiary weight while record
7 evidence was ignored, and a hearing in which both the law and the evidence were
8 disregarded. This Court should exercise the authority granted by the Federal
9 Arbitration Act, 9 U.S.C.A., §2, §10 and 12, and vacate the award issued in the
10 arbitral proceeding known as *Floyd Landis v/USADA*, CAS 2007/A/1394.¹

11 12 **I. PROCEDURAL ISSUES**

13 **A. Jurisdiction and Venue**

14 Mr. Landis moves to vacate the arbitral award issued by the Court of
15 Arbitration for Sport ("CAS"), the body to which Mr. Landis appealed an adverse
16 arbitration decision issued by a U.S. panel pursuant to the protocol of the United
17 States Anti-Doping Agency. *USADA v. Floyd Landis*, Case No. AAA 30 190
18 00847 06 ("the Appealed Case"). Thus, this motion to vacate arises under the
19 Federal Arbitration Act, 9 U.S.C., §2, §10, §12.

20 There is complete diversity of citizenship between the parties, and the
21 amount in controversy exceeds \$75,000, so this Court has jurisdiction pursuant to
22 28 U.S.C. §1332(a).

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

27
28 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.

1 In the alternative, and out of an abundance of caution, Mr. Landis alleges
2 that this motion arises under the United Nations Convention on the Recognition
3 and Enforcement of Foreign Arbitral Awards ("New York Convention"), 9 U.S.C.
4 §§201-208, presenting a federal question that vests this Court with jurisdiction
5 under 28 U.S.C. §1331.

6 Venue is proper in the Central District of California under 9 U.S.C.A. §§9-
7 11 and 28 U.S.C. §1391. The claims described herein arise out of a relationship
8 between the parties that was initiated in this district and performed in substantial
9 part in this district over a period of years. The contract binding Mr. Landis to
10 arbitration with the Defendant was executed by him in this district, performance of
11 a substantial portion of his obligations occurred in this district, and Defendant
12 supervises U.S. athletes including Mr. Landis in this district on an ongoing and
13 continuous basis. Enforcement of the \$100,000 penalty awarded by the arbitrators
14 in Defendant's favor will occur in this district. The Defendant, through its agents,
15 does business in this district, and its activities are continuous and substantial.
16 Alternatively, venue is proper in this district under 9 U.S.C. § 204.

17 **B. Parties**

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

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

25 **C. Procedural History**

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

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

14 Under the applicable UCI rules, adjudication of Mr. Landis's alleged doping
15 violation was to occur in the United States. Ex. 3, AAA Panel Decision at ¶5-6.
16 Though UCI rules charged his national federation, USA Cycling, with
17 responsibility for conducting that proceeding, USA Cycling had contractually
18 delegated its enforcement responsibilities to USADA, which commenced an anti-
19 doping proceeding against Mr. Landis in September, 2006. In May, 2007, an
20 original arbitration hearing was held before a panel of the North American Court of
21 Arbitration for Sport of the American Arbitration Association ("the AAA Panel"),
22 a proceeding governed by the UCI rules (which incorporate the WADA Code), the
23 USADA protocol and California procedural law. Ex. 3, AAA Panel Decision at
24 ¶¶8-12, ¶14, ¶20.

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

28 ³ Also commonly referred to as an "IRMS" test.

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

13 Mr. Landis appealed this decision to the appellate division of the Court of
14 Arbitration for Sport ("CAS") on October 8, 2007. Pursuant to CAS rules, he
15 made his arbitrator selection in November, 2007, choosing Mr. Jan Paulsson.
16 USADA selected New Yorker lawyer, Mr. David Rivkin and, upon information
17 and belief, the president of CAS's Appellate Division selected the panel president,
18 Mr. David Williams, after consulting with Mssrs. Paulsson and Rivkin. Ex. 4.,
19 CAS Rule R54. The panel selection process was completed by mid-November,
20 2007.

21 The Panel conducted a *de novo* appeal hearing from March 19-24, 2008 in
22 New York City, pursuant to USADA Protocol, ¶10(c) and CAS Rule R57. *See* Ex.
23 4, CAS Rule R57; and ex. 5, USADA Protocol, ¶10 (c). Both parties to the appeal
24 were domiciled in the United States, the AAA decision appealed from was decided
25 under the procedural rules of the State of California. On appeal, CAS applied its
26 own rules of appellate procedures, as well as the UCI Rules of USADA
27 Protocol; moreover, U.S. substantive law was also applicable since neither the
28 parties nor the CAS panel made a different choice in the manner provided by CAS

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

3 Though all of the CAS appeal proceedings had occurred in the United States,
4 the decision was transmitted to CAS's home office in Lausanne, Switzerland for
5 "delivery" instead of its Denver, Colorado office. The CAS Panel not only
6 dismissed Mr. Landis's appeal, it imposed \$100,000 in USADA's litigation costs
7 against him, even though UCI rules do not provide for such an award, no evidence
8 had been introduced to support such an award, and the issue of costs was not
9 among the list of issues formally submitted to the Panel for decision. Divorced as
10 it is from any actual evidence of what the "costs" of litigation were, the \$100,000
11 award, though labeled as a "cost" award, is clearly a punitive award, one which
12 neither CAS nor UCI rules allowed the arbitrators to award. See Exhibit 1, CAS
13 Decision, ¶¶284-289. The Panel's award meant that Mr. Landis would continue to
14 be deprived of his 1 million Euro winning bonus. That award will be enforced in
15 the United States; indeed, both USA Cycling and USADA have already informed
16 Mr. Landis that they will not issue him a USA Cycling license until he pays the
17 penalty in full. Ex. 6-B, Letter to Floyd Landis from William Bock III, September
18 19, 2008. The \$100,000 award has effectively extended his two-year suspension
19 indefinitely, until such time as Mr. Landis—who has never made his living apart
20 from cycling—is able to come up with the money.

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

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

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

- 1 a) the CAS arbitrator selection process institutionalizes a “repeat player”
2 bias into the CAS appeal system, creating an unconscionable system
3 in which athletes are denied equal access to evidence and a chance at
4 an impartial panel [9 U.S.C. §10(a)(2); New York Convention, Art.
5 V., §1(a) and (d), Art. V, §2(b)];
- 6 b) the CAS arbitrators exhibited evident partiality by failing to disclose
7 dealings creating a reasonable impression of possible bias and
8 partiality, and by acting with actual bias [9 U.S.C. §10(a)(2); New
9 York Convention, Art. V, §1(a) and (d), Art. V, §2(b)];
- 10 c) the arbitrators based their \$100,000 “cost” award on unsworn
11 statements made by USADA’s lawyer after the close of the evidence,
12 denying Mr. Landis a right to respond. Because it is not evidence-
13 based, the “cost” award is properly characterized as a grossly
14 excessive punitive damages award, impairing Mr. Landis’s Fourteenth
15 Amendment due process rights. In addition, the cost award was
16 outside the scope of the arbitrators’ power because the issue of costs
17 had not been formally submitted for decision, and because such an
18 award is not contemplated by the UCI rules governing the proceeding.
19 The cost award was made in manifest disregard of the law, and was
20 unconscionable; [9 U.S.C. §10(a)(3), §10(a)(4); New York
21 Convention, Art. V, §(a), (b), (c), §2(a) and (b)];
- 22 d) the procedures and time limits adopted by the CAS panel during the
23 appellate proceeding prohibited Mr. Landis from presenting his case
24 [9 U.S.C. §10(a)(3); New York Convention, Art. V, §1(b)];
- 25 e) the arbitrators failed to base their substantive decisions upon the
26 evidence presented, but instead relied upon non-evidentiary
27 statements made by counsel for USADA (and fellow CAS arbitrator),
28

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

3
4 f) the arbitrators repeatedly refused to consider Mr. Landis's evidence,
5 tantamount to a refusal to hear pertinent evidence at all [9 U.S.C.A.
6 §10(a)(3); New York Convention, Art. V, §1(b)];

7
8 g) the arbitrators acted in manifest disregard of the law and their own
9 rules [9 U.S.C.A. §10(a)(4); New York Convention, Art. V, §1(a),
10 (b)];

11
12 h) The arbitration procedures as applied in Mr. Landis's case were
13 unconscionable [9 U.S.C.A. §2, New York Convention, §1(a), §2(b)].
14

15 **II. Argument**

16
17 **A. The CAS appeal process denied Mr. Landis a fundamentally fair**
18 **hearing decided by impartial arbitrators.**

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

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

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

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

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

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

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

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

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

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

1 Rome. Ex. 3, AAA Panel Decision at 15, ¶63. On at least two occasions, the AAA
2 Panel disregarded the evidence offered by Mr. Landis witnesses, finding it less
3 than persuasive because they were not (as they could not be) WADA lab directors.
4 Ex. 3, AAA Panel Decision, ¶¶238-40, ¶273, ¶278. The CAS Panel, too, rejected
5 the evidence of Mr. Landis's experts, particularly Dr. Goldberger, because he did
6 not direct a WADA-accredited laboratory. See Ex. 1, CAS Decision, ¶¶50, 76, 81,
7 131, 172, 178. Deference to the testimony of WADA lab directors is common in
8 CAS proceedings. See, e.g., Ex. 12, CAS Case Law, *Landaluze v. Real*
9 *Federacion Espanola de Ciclismo*, CAS 2006/A/1119 at ¶¶67-70; ¶¶72-79, ¶¶83-
10 87. The fact that "repeat players" like USADA have access to the expertise of
11 WADA lab directors while athletes do not is a significant advantage built into the
12 anti-doping adjudication system, one that is virtually impossible for the athlete to
13 overcome.

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

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

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

19
20 **2. The CAS arbitrators' failure to disclose dealings with one**
21 **another constituted "evident partiality," exacerbating the**
22 **"repeat player" bias created by the CAS arbitrator-**
23 **selection process.**

24
25 The inequities created by the CAS's slanted arbitrator selection process are
26 compounded immeasurably by the fact **that CAS allows the members of its**
27 **arbitral pool to continue representing clients before other CAS panels.** Any
28 CAS arbitrator who also represents sports bodies charged with enforcing the anti-

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

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

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

3 In this circuit, evident partiality within the meaning of FAA §10(a)(2) exists
4 both where an arbitrator acts with actual bias, but also where the arbitrator fails to
5 disclose financial, business or other facts that would have created a reasonable
6 impression of partiality. *New Regency Productions, Inc. v. Nippon Herald Films,*
7 *Inc.*, 501 F.3d 1101, 1105-6 (9th Cir. 2007); *Woods v. Saturn Distribution Corp.*, 78
8 F.3d 424, 427 (9th Cir. 1996); *Schmitz v. Zilveti*, 20 F.3d 1043, 1046 (9th Cir. 1994).
9 Far from guaranteeing an impartial panel, however, the CAS system exacerbates
10 the existing “repeat player” bias present in many arbitral contexts by allowing the
11 members of its arbitral pool to continue representing clients before CAS panels,
12 creating even more incentives to favor the “repeat players” than would exist in the
13 normal arbitral context.

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

1 many of the most frequently-selected arbitrators are those that also represent
2 private sports clients, or who have partners who do. Ex. 10, CAS Case List, 1985-
3 2003 (See arbitrator/lawyers Beloff, Fortier [whose partner represents WADA],
4 Martens, Young, Netzle, Morand and Paulsson). Powerful financial incentives
5 clearly exist to align the financial interests of the “judges” with those of the “repeat
6 player” litigants.

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

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

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

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

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

20 Starkly illustrating that the system for selecting the members of the CAS
21 arbitral pool places athletes at a distinct knowledge disadvantage, the newly-
22 released information indicates that it was Mr. Paulsson—the arbitrator that Mr.
23 Landis selected—who had the most to disclose because he was most active in
24 representing a client responsible for enforcing anti-doping rules (the IOC), a client
25 likely to take positions completely adverse to those Mr. Landis was taking. Not
26 counting the Landis case, Mr. Paulsson has anticipated in CAS proceedings
27
28

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

8 Nor is Mr. Paulsson the only lawyer in his firm who is a CAS arbitrator, or
9 that represents sports law clients. His partner, Christian Duve, is a current member
10 of the CAS arbitral pool (Ex. 13, excerpt, CAS arbitrator list), while another
11 partner, Mr. Raj Parker, is a former CAS arbitrator who also regularly represents
12 the Football Association.⁹ Moreover, their firm—Freshfields, Bruckhaus,
13 Derringer—was one of the lead firms representing the City of London in its
14

15
16 ⁴ See Ex. 10, CAS Case List (identifying 29 cases in which Mr. Paulsson appeared as
17 either arbitrator or party representative); Ex. 12, CAS Case Law (*Landaluze v. Real Federacion*
18 *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)).

19 ⁵ Ex. 12, CAS Case Law CAS 2007/A/1286; *Johannes Eder v. IOC*; 2007/A/1288,
20 *Martin Tauber v. IOC*; 2007/A/1289, *Jurgen Pinter v. IOC* (decided January 4, 2008); Ex. 10:
21 CAS 2002/A/389-393 (M. Mayer, W. Mayer, A. Walcher, P. Baumgartl, V. Muller); CAS
22 2002/O/373 (Scott); CAS 2002/A/370; CAS 2002/A/374; CAS 2002/A/376.

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

25 ⁷ Ex. 12, CAS 2007/A/1286; *Johannes Eder v. IOC*; 2007/A/1288, *Martin Tauber v. IOC*;
26 2007/A/1289, *Jurgen Pinter v. IOC* (decided January 4, 2008); Ex. 10, 2002/A/376 (Baxter).

27 ⁸ Ex. 10, CAS 2000H OG-00-001; 2000H-OG-00-003.

28 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://socccernet.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.

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

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

21 There is no information confirming that Mr. Rivkin has represented a client
22 before the CAS, but the newly-published list contains no information about the last
23 five years, a period in which Mr. Rivkin began representing the international
24 sailing club Club Nautico Espanol De Vela. Because sailing is an Olympic sport,
25 the members of Club Nautico are subject to the World Anti-Doping Code and as
26 such, Mr. Rivkin could reasonably expect to represent the club in CAS
27 proceedings. *Golden Gate Yacht Club. v. Societe Nautique de Geneve*, 18 Misc. 3d
28 1111(A), 856 N.Y.S.2d 24 (Table)(N.Y.2007)(noting that David Rivkin of

1 Debevoise & Plimpton represents Club Nautico Espanol de Vela). Additionally,
2 recently-published information reveals that when Mr. Paulsson and Mr. Rivkin
3 were selected to serve on the Landis panel, Mr. Rivkin was serving as president of
4 a CAS panel considering the IOC's enforcement action against three Austrian
5 cross-country skiers, proceedings in which Mr. Paulsson represented the IOC.
6 Ex. 12, CAS Case Law, 2007/A/1286, *Johannes Eder v. IOC*; 2007/A/1288,
7 *Martin Tauber v/IOC*; 2007/A/1289, *Jurgen Pinter v/ IOC* (decided January 4,
8 2008). Upon information and belief, the stakes were particularly high for Mr.
9 Paulsson and the IOC in these cases because they were the first in which the IOC
10 had disqualified athletes for anti-doping violations in the absence of a positive test,
11 and the first cases in which the IOC sought a life-time ban. In these three high-
12 profile cases, then, Mr. Rivkin (the USADA-selected arbitrator) was sitting in
13 judgment of a client represented by Mr. Paulsson (the Landis-selected arbitrator)
14 while the Landis appeal was pending. These facts were unknown to Mr. Landis
15 when he selected Mr. Paulsson to serve on his CAS panel.

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

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

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

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

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

25 ¹⁰ CAS 2002/A/370; CAS 2002/A/374; CAS 2002/A/373.; CAS 2000H OG-00-15; CAS
26 2000H OG-00-012; CAS 2000H OG-00-006; CAS 1998/A/184; CAS 1998 H OG-98-002.

27 ¹¹ See Note 6.

28 ¹² See Notes 5-6.

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

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

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

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

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

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

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

12 Each of these arbitrators had a duty to investigate and disclose these facts.
13 *New Regency*, 501 F.3d at 1105; *Schmitz*, 20 F.3d at 1048. The failure to disclose
14 at least the facts described above created a reasonable impression of potential bias,
15 constituting “evident partiality” under the FAA. 9 U.S.C. §10(a)(2); New York
16 Convention, Art. V, §§1(a) and (d), §2(b). It also prevented Mr. Landis from
17 making an informed decision about whether to object to the composition of the
18 panel. Because arbitrators are not isolated from each other, but instead hear and
19 decide cases as a panel, after joint discussion, debate and deliberation, each panel
20 member has an opportunity to persuade the others. *Wheeler v. St. Joseph Hospital*,
21 63 Cal. App. 3d 345, 133 Cal. Rptr. 775, 793 (Cal. App. 1976). Thus, a finding of
22 evident partiality on the part of one arbitrator warrants vacatur of an entire
23 arbitration award. *Schmitz*, 20 F.3d at 1049.

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

1 3d 424, 427 (9th Cir. 1996); *Premo v. Martin*, 119 F.3d 764, 771 (9th Cir. 1997).
2 However, the record facts in this case do provide a basis for concluding that the
3 Panel deferred to fellow CAS arbitrator, Mr. Young, conduct that could be
4 attributable to the presence of actual bias. Specifically, the Panel treated Mr.
5 Young's statements as evidence on at least three occasions, deference afforded no
6 other lawyer in the case.

7 First, as described below in greater detail [*see* pages 30-32], the Panel
8 accepted Mr. Young's statements as evidence in support of its decision to impose
9 \$100,000 in "costs" against Mr. Landis. At the time the evidentiary hearing
10 closed, there was no record evidence of the amount or reasonableness of any of
11 USADA's litigation expenses, nor was the issue of costs formally submitted to the
12 Panel for decision. Ex. 1, CAS Decision at ¶19 (listing the issues formally
13 submitted for decision). However, USADA's post-hearing brief contained Mr.
14 Young's unsworn statements describing the extent and reasonableness of some of
15 USADA's costs, statements the Panel relied upon in assessing the \$100,000
16 penalty against Mr. Landis.

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

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

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

9 Because arbitrators have a free rein to decide the law as well as the facts,
10 and because their decisions are accorded a high degree of deference, the
11 impartiality of those arbitrators must be scrupulously safeguarded. *Commonwealth*
12 *Coatings Corp. v. Continental Casualty Co.*, 393 U.S. 145, 149, 89 S.Ct. 337, 339,
13 21 L.Ed.2d 301 (1968). In this case, no safeguards exist. The stacked arbitral pool
14 and the institutional bias favoring repeat players like USADA prejudiced Mr.
15 Landis from the outset. This prejudice was compounded by the CAS's willingness
16 to allow its arbitrators to continue representing clients before CAS panels, and by
17 the Landis panel's failure to make any disclosures about such dealings, leaving Mr.
18 Landis with no opportunity to make an informed decision. As the above-described
19 facts illustrate, the CAS system is an insider's club, favoring repeat players at the
20 expense of athletes, a disadvantage that is only exacerbated when the arbitrators on
21 a particular panel continue to represent clients before the CAS or seek to do so.
22 Because the arbitrators on Mr. Landis's panel failed to disclose business dealings
23 and interests creating a reasonable impression of bias, evident partiality existed, as
24 did an unconscionable arbitral system. Therefore, vacatur is proper under FAA, 9
25 U.S.C.A. §2, and §10(a)(2) and the New York Convention, Art. V(1)(a), and (d)
26 and §(2)(b).

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

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

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

24
25 **1. The Panel's \$100,000 cost award should be**
26 **vacated because the issue of costs was not**
27 **among the issues formally submitted to the**
28 **Panel for decision.**

1 Prior to the hearing, the CAS Panel directed both parties to submit a list of
2 issues to be decided, which issues defined the scope of the arbitrators' mandate.
3 Ex. 1, CAS Decision at ¶19-20. The formal list of issues defined the matters that
4 were to be determined in the hearing, as well as the matters to be addressed in
5 closing arguments and in the post-hearing briefing requested by the Panel. Ex. 2,
6 Tr., 1494: 15-1498:0. The formal list of issues also defined the scope of the
7 matters submitted to the arbitrators for a decision within the meaning of 9 U.S.C.A.
8 §10(a)(4) and the New York Convention, Article V§(1)(c). Neither party formally
9 submitted the issue of an appropriate award of costs to the CAS Panel for decision
10 and determination. Ex. 1, CAS Decision at 3-5, ¶¶19-20.¹³

11 Mr. Landis was entitled to a fundamentally fair hearing, including the right
12 to have notice of the issues being litigated, and about which he would be
13 compelled to put on evidence. *Ficek v. Southern Pacific Co.*, 338 F.2d 655, 657
14 (9th Cir. 1964), cert den'd, 380 U.S. 988 (1965). The CAS Panel directed the
15 parties to define the issues being submitted for determination, and directed them to
16 limit their post-hearing briefing to the issues raised in that set of issues. Mr.
17 Landis was entitled to rely upon the CAS Panel's direction, and confine his proffer
18 of evidence and briefing to the issues actually submitted for decision, issues that
19 did not include costs. Because the Panel decided an issue not formally submitted
20 for decision and determination, vacatur is proper under 9 U.S.C.A. §10(a)(4) and
21 New York Convention, Art. V, (1)(c).

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

24
25 ¹³ Although USADA's post-hearing brief contains a footnote implying that the issue of costs was
26 USADA's Issue #8" and Appellant's "Issue #11," that is incorrect. Ex. 22, Appellee's Post-Hearing Brief at 48, n.
27 45. The issues formally submitted for determination are set forth at pages 3-5 of the CAS Decision, in ¶¶19-20.
28 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.

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

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

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

25
26 ¹⁴ *See* Exhibit 7, UCI Rules ¶¶280-291, especially Rule ¶282 (only mention of costs
27 award in appellate rules states that on appeal by UCI, costs may be awarded against the ational
28 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”].

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

15 Despite the fact that the CAS Panel acknowledged that it was bound by the
16 UCI Anti-Doping Rules and its own procedural rules, *see* Ex. 1, CAS Decision at
17 ¶22-27, it declined to follow them, imposing \$100,000 in litigation costs. This
18 decision denied Mr. Landis his due process to a fundamentally fair hearing in
19 which decisions are based on evidence, was unconscionable, and was made in
20 manifest disregard of clearly applicable rules, justifying vacatur. FAA, 9 U.S.C.A.,
21 §2, §10(a)(3) and (4), New York Convention, Art. V, §1(a), (d), and §2(b).

22 **3. Because the CAS Panel’s \$100,000 cost award**
23 **was not based on evidence, Mr. Landis was**
24 **denied a fundamentally fair hearing, so vacatur**
25 **is proper.**

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

1 It is indisputable that at the close of the evidentiary portion of the hearing,
2 USADA had presented no documents, no testimony, and no argument detailing the
3 extent and reasonableness of its alleged litigation costs. When the Panel officially
4 closed the record on March 24, 2008, it expressly prohibited the parties from
5 submitting *any* further evidence, and prohibited them from filing any additional
6 pleadings (with the exception of the post-appeal written submissions). Ex. 2, Tr.
7 1502:17-23, 1503:23-25. And as stated above, that post-hearing brief was to be
8 linked directly to the list of issues to be decided—a list that did not include costs.
9 Ex. 1, CAS Decision, ¶¶19-20; Ex. 2, Tr. 1215:19-1217:24, 1493:1-1499:10. *See*
10 *also* note 13 above.

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

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

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

17 When it based its \$100,000 cost award upon the unsworn statements of
18 fellow CAS arbitrator, Richard Young, while denying Mr. Landis any right of
19 reply, the CAS Panel violated Mr. Landis' right to a fundamentally fair hearing, in
20 which decisions are based upon evidence, not the statements of counsel, and in
21 which both parties have notice and an equal right to be heard. *Sunshine Mining*
22 *Co. v. United Steelworkers of America*, 823 F. 2d 1289, 1295 (9th Cir. 1987);
23 *Townley v. Heckler*, 748 F.2d 109 (S.D.N.Y. 1984)(disability claimant's due
24 process rights were violated when the administrative law judge relied upon a post-
25 hearing report as the primary evidence upon which disability benefits were
26 denied). It denied him the right to present any case in opposition to Mr. Young's
27 cost allegations, which was unconscionable and a denial of due process justifying
28

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

3 **4. SUMMARY**

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

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

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

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

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

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

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

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

25 First, as discussed above, the fact that the WADA Code of Ethics prevented
26 any other WADA laboratory directors from testifying on Mr. Landis's behalf—even
27 if they agreed with the substantive points he raised—denied him a level playing
28 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-

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

3 This is precisely what happened. Mr. Landis, who bore a heavy burden of
4 proof, presented only five direct witness declarations—one fewer than at the AAA
5 hearing—while USADA, which had called only nine witnesses at the nine-day
6 AAA hearing [*see* Ex. 3, AAA Decision at ¶100], submitted written testimony
7 from *nineteen* witnesses. Ex. 25, USADA Witness Designation, January 31, 2008;
8 Ex. 26, USADA's Motion in Limine to Exclude Evidence in Violation of CAS
9 Rule 56 at 4-5 (March 14, 2008)(adding as a witness submission the March 14,
10 2008 letter from COFRAC administrator, Robin LeGuy). The inequity was all the
11 more egregious because USADA—unlike Mr. Landis—had access to all of the
12 LNDD fact witnesses, and could discover the facts known to them outside the
13 hearing room, allowing USADA to use its precious hearing time more efficiently.
14 Denied depositions, Mr. Landis was left to develop the crucial facts about what the
15 LNDD staff actually did when they tested his Stage 17 sample through cross-
16 examination alone. There is simply no way that Mr. Landis could conduct
17 meaningful cross-examination of nineteen witnesses in fourteen hours of hearing
18 time, and the record clearly reflects this.

19 Despite having been allocated a few more hours hearing time as the hearing
20 actually progressed, Mr. Landis was still compelled to waive his brief introductory
21 direct examination [Ex. 2, Tr. 43:18-44:2], to abandon at least one issue in its
22 entirety [Ex. 2, Tr. 22:12-17], and to relinquish his right to cross-examine ten of
23 USADA's 19 witnesses [Ex.2, Tr. 793:34-794:23, 805:18-806:14, 807:1-22,
24 810:15-20, 1218:20-25, 1221:2-11, 1396:6-25, 1408:5-20]. He also had to
25 circumscribe both his opening and closing arguments because he ran out of time
26 [Tr. 112:7-9, 128:12-22, 1385:4-13, 1424:13-18, 1433:7-1434:12]. His inability to
27 cross-examine witnesses inflicted prejudicial harm upon him because the CAS
28 panel relied upon the unchallenged testimony to support its conclusions. Ex. 2,

1 CAS Decision at ¶178 (CAS relies on testimony of “uncontroverted” chain of
2 custody witnesses that Mr. Landis “did not elect to examine” to resolve evidence in
3 USADA’s favor).

4 Not only was he prejudiced by his inability to cross-examine more than half
5 of USADA’s witnesses, he was penalized for that failure. Mr. Landis’s inability to
6 cross-examine all of the French lab witnesses was one of the key grounds offered
7 in support of the Panel’s decision to award \$100,000 in costs: “The Appellant
8 gave notice requiring a number of witnesses to be present in person for cross-
9 examination in New York *but then elected not to call them* thus causing the
10 Respondent to incur significant and ultimately unnecessary costs.” Ex. 1, CAS
11 Decision at 57, emphasis added. Mr. Landis did not *elect* to call these witnesses;
12 he had every incentive to cross-examine them, but simply ran out of time, a fact
13 unequivocally confirmed by the record. Ex. 2, Tr. 793:24-794:23, 805:18-806:14,
14 807:1-22, 810:15-20, 1218:20-25, 1221:2-11, 1396:6-25, 1408:5-20.

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

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

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

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

14 **1. The Panel ignored USADA's own documentary**
15 **evidence in concluding that LNDD was actually**
16 **accredited to perform the tests it used to analyze**
17 **Mr. Landis's Stage 17 sample, crediting instead late-**
18 **produced "evidence" from an incompetent witness.**
19

20 Because the AAA Panel concluded in 2007 that the T/E ratio test
21 could not be used to support the reported anti-doping violation [*see* Ex. 3,
22 AAA Panel Decision at ¶172], the CAS appeal focused on the sole
23 remaining basis for that violation—the results of LNDD's CIR test. This
24 test measures the ratio of Carbon¹² atoms to Carbon¹³ atoms in the
25 testosterone metabolites contained in a sample to determine if some of the
26 testosterone in a person's body is of an exogenous nature. The centerpiece
27 of Mr. Landis's appeal was that LNDD had neither used a reliable CIR
28 method nor performed the method it *did* use correctly, violating the ISL. Ex.

1 27, Appeal Brief of Floyd Landis, *passim*; Ex. 28, Landis Closing Brief,
2 *passim*.

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

9 Although the anti-doping agency bears an initial burden of proving the
10 anti-doping violation “to the comfortable satisfaction” of the Panel, that
11 burden is satisfied by simply introducing the results of the lab’s positive test
12 if the lab is accredited to perform the method it used. Ex. 29, WADA Code,
13 Art. 3.1, 3.2. If the lab used an accredited method, USADA is entitled to the
14 benefit of a presumption that the lab performed that method correctly on the
15 occasion in question. Ex. 29, WADA Code, Art. 3.2; Ex. 1, CAS Decision,
16 ¶¶28-33. However, if the lab did not use an accredited method, USADA had
17 to prove that the method conformed to the “scientific community’s practices
18 and procedures,” and that LNDD “satisfied itself as to the validity of the
19 method before using it.” Ex. 29, WADA Code, Art. 3.1., 3.2; Ex. 7, UCI
20 Anti-Doping Rules, Art. 18; Ex. 12, CAS Case Law, *USADA & UCI v. Tyler*
21 *Hamilton*, CAS 2005/A/884, ¶¶47-54.

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

1 March 7, 2008. Ex. 30, Letter from Matthieu Reeb to the parties, February
2 29, 2008.

3 USADA's appeal brief, filed January 31, 2008, contained a specific
4 accreditation argument discussing the importance to be assigned COFRAC
5 accreditation and the weight to be accorded the work of the COFRAC
6 auditors. Ex. 31, Appellee's Brief at 14-15, 28-29. The brief also contained
7 numerous assertions that the LNDD's CIR method was accredited. *Id.* At 6,
8 15, 27-29, 49, 57 (assertions that CIR/IRMS method was accredited).
9 USADA presented several COFRAC accreditation documents to support its
10 allegations, but designated no COFRAC witnesses to buttress that argument.
11 Ex. 31, Appellee's Brief at 90 and Ex. 25, Appellee's Witness List (January
12 31, 2008).

13 Contrary to USADA's repeated assertions, however, the COFRAC
14 accreditation documents established on their face that LNDD was *not*
15 accredited to perform the CIR method in the manner it used to analyze Mr.
16 Landis's Stage 17 sample. Although it is undisputed that LNDD used an
17 0.8 ‰ measurement of uncertainty to declare that the CIR values it
18 measured confirmed the presence of exogenous testosterone in Mr. Landis's
19 sample, the COFRAC accreditation documents do not confirm that LNDD
20 was accredited to conduct the CIR method at this level of precision. Instead,
21 each and every COFRAC document introduced by USADA indicated that at
22 the time Mr. Landis's samples were analyzed in July and August, 2006,
23 LNDD was only accredited to perform the CIR test with a **20%**
24 measurement of uncertainty, not the 0.8 ‰ the lab used to declare Mr.
25 Landis's sample a positive.¹⁵ Ex. 32, Excerpt, USADA appeal exhibit T026
26

27 ¹⁵ The CIR method, which is alternatively referred to as an "IRMS" test, is method "EC
28 31" on LNDD's COFRAC accreditation documents.

1 at LNDD 0086 (COFRAC's May 2006 accreditation document accrediting
2 CIR method at 20% uncertainty level); LNDD 414 (LNDD's February 2006
3 audit, showing a 20% measurement of uncertainty accreditation and
4 extending the September 2005 accreditation, also at 20%); LNDD 429
5 (showing a 20% measurement of uncertainty accreditation); LNDD 456
6 (undated validation study indicating LNDD uses a 0.8‰ measurement of
7 uncertainty); Ex. 31, Appellee's Brief at 26-8 (LNDD uses a 0.8‰
8 measurement of uncertainty and did so when interpreting Mr. Landis's
9 results); Ex. 28, Landis Closing Brief at 7-10. Not only do the three
10 COFRAC accreditation documents produced by USADA expressly state that
11 as of May 2006, LNDD was only accredited to perform the CIR method at a
12 20% uncertainty level, but it appears that this had been the standard for quite
13 some time; LNDD 414 is simply an updated version of an earlier
14 accreditation document issued in September 2005, which also contained the
15 20% measurement uncertainty figure, as indicated by the date change noted
16 at the bottom of the page. Ex. 32, Excerpt, USADA appeal exhibit T026 at
17 LNDD 0414.

18 It was not until December 15, 2006—months *after* Mr. Landis's
19 sample was analyzed—that LNDD obtained COFRAC accreditation at the
20 0.8‰ uncertainty level. Significantly, the updated accreditation document
21 includes an express effective date of December 15, 2006, not an earlier date,
22 contradicting any suggestion that the updated accreditation was intended to
23 be retroactive. Ex. 32, Excerpt, USADA appeal exhibit T026 at LNDD
24 0097-98 ("Date de prise d'effet: 15/12/2006"/Date of Effect: 12/15/06).

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

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

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

1 Violation of CAS Rule 56 at 4-5 (March 14, 2008) and attached March 14,
2 2008 letter from Robin LeGuy; Ex. 30 (setting March 7 deadline for witness
3 designations); Ex. 4, CAS Rule R56. In this March 14 letter, Mr. LeGuy—
4 who did *not* participate in the February 2006 audit at LNDD—stated that all
5 of the COFRAC documents stating a 20% measurement of uncertainty were
6 mistaken, and that the December 15, 2006 accreditation document should be
7 considered retroactive to May 1, 2006, providing a neat resolution to
8 USADA’s accreditation problem. Exhibit 26, March 14 letter of Robin
9 LeGuy.

10 By proffering Mr. LeGuy’s “testimony” in the form of an unsworn
11 letter *after* the deadline for briefing and both direct and rebuttal witness
12 declarations, USADA was able to deny Mr. Landis the opportunity to
13 marshal evidence to counter that letter, something the CAS Rules are
14 intended to prevent. Ex. 4, CAS Rules R51, R55, R56; Ex. 30, Letter from
15 Matthieu Reeb to Maurice Suh and Richard Young, February 29, 2008
16 (setting forth hearing scheduling order; hereinafter “CAS Scheduling
17 Order”). Despite USADA’s failure to present its proof by the deadlines
18 imposed by the Panel’s scheduling order, or by the deadlines imposed by
19 Rule R56, the Panel admitted Mr. LeGuy’s unsworn letter into evidence,
20 ostensibly in exchange for its decision not to strike the portions of Dr.
21 Goldberger’s testimony during accreditation. Ex. 2, Tr. 23:3-15, 31:3-32:4,
22 40:5-13. The “exchange” was not a fair one however; Mr. Landis did not
23 need to rely upon Dr. Goldberger’s testimony to make his point because
24 USADA’s accreditation problem was presented on the face of its own
25 documentary evidence, documents it needed to rely upon to prove that
26 LNDD was accredited *at all*. Ex. 32, Excerpt, USADA appeal exhibit T026
27 at LNDD 0086. USADA, however, absolutely needed a COFRAC witness
28 to “explain” that the three COFRAC accreditation documents executed by

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

5 The Panel’s decision to admit the March 14 LeGuy letter stands in
6 stark contrast to its decision to exclude the portion of Dr. Goldberger’s chain
7 of custody testimony discussing LNDD’s failure to provide complete
8 documentation of the whereabouts of Mr. Landis’s “B” sample on July 20,
9 2006. Though Mr. Landis had clearly launched a broad attack on LNDD’s
10 chain of custody in his appeal brief, [*see* Ex. 27, Brief of Floyd Landis at 69,
11 73 (LNDD’s chain of custody documents “do not suffice to create a proper
12 chain of custody,” they “fail to record intra-laboratory transfers,” and they
13 fail to “record the location of the bottle during the time it was in the
14 laboratory”)], the CAS Panel excluded all of Dr. Goldberger’s testimony
15 about breaches occurring on July 20 because such examples were not
16 specifically enumerated in Mr. Landis’s appeal brief. Ex. 2, Tr. 45:18-47:13
17 (decision); Tr. 24:15-38:10 (argument); Ex. 34, Landis Response to
18 USADA’s Motion in Limine at 6-7; Ex. 26, USADA’s Motion in Limine to
19 Exclude Evidence in Violation of CAS Rule 56 at 2-3. As argued above,
20 while it is not necessary for Mr. Landis to prove actual bias to establish that
21 the Panel acted with evident partiality, the fact that the Panel excluded Dr.
22 Goldberger’s testimony, which was, at a minimum, timely under the
23 scheduling order, but admitted Mr. LeGuy’s, which was not, suggests actual
24 bias in favor of fellow CAS arbitrator, Mr. Young.

25 The Panel relied upon Mr. LeGuy’s March 14 letter —“evidence” it
26 considered unchallenged because Mr. Landis “elected” not to cross-examine
27
28

1 Mr. LeGuy¹⁶--in making the crucial determination that LNDD was
2 accredited to perform the CIR method at the 0.8‰ uncertainty level. CAS
3 Decision, ¶¶45-7. But that letter should not have been considered for the
4 same reasons that Dr. Goldberger's chain of custody evidence was
5 excluded—it was produced well after all relevant deadlines. Ex. 4, CAS
6 Rule R56, Ex. 30, CAS Scheduling Order. The Panel disregarded its own
7 rules in admitting this letter, a decision suggestive of actual bias because it
8 failed to accord the parties equal treatment under Rule R56.

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

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

28 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.

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

16 The Panel’s decision to admit and rely upon Mr. LeGuy’s March 14,
17 2008 “testimony” was made in manifest disregard of CAS Rule R56 and its
18 own scheduling order. More significantly, however, relying on that letter to
19 contradict COFRAC’s own documents was tantamount to deciding the issue
20 in the complete absence of evidence because Mr. LeGuy was not a
21 competent witness. *U.S. v. Beck*, 418 F.3d 1008, 1015 (9th Cir. 2008)(lay
22 witness testimony is rationally-based where it is founded upon personal
23 recollection and observation of concrete facts). While the rules of evidence
24 do not strictly apply in an arbitration context, a fundamentally fair hearing
25 requires that a decision be based upon *evidence*, not unsupported statements
26 by out-of-court “witnesses” lacking personal knowledge of the facts.
27 *Sunshine Mining Co. v. United Steelworkers of America*, 823 F.2d 1289,
28 1295 (9th Cir. 1987); *Ficek*, 338 F.2d at 657.

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

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

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

1 uncertainty assigned to bound the uncertainties created by inevitable measurement
2 error. As such, it is applied to LNDD's *measured* isotopic values –the “delta”
3 value –not just the “delta-delta” value.¹⁷ In fact, the statement that Mr. Landis's
4

5 ¹⁷ For a discussion of “delta” and “delta-delta” values, see pages 51-3 below and CAS
6 Decision, ¶¶59-60. Applying the 20% uncertainty to the “delta” value (the difference between
7 LNDD's measured isotopic value and a standard value) as opposed to the “delta-delta” value (the
8 difference between the “delta” for a particular testosterone metabolite and the “delta” for an
9 endogenous reference compound) makes a significant difference, as can be seen by considering
10 an example using the values LNDD derived for Mr. Landis's sample. See Ex. 31, Appellee's
11 Brief, pages 27-8 for a table of both the delta values and the delta-delta values for Mr. Landis's
12 Stage 17 sample. The first table on page 27 presents the measured delta values for the
13 testosterone metabolites in Mr. Landis's sample, the second table on page 27 presents the
14 measured delta values for the endogenous reference compound, and the first table on page 28
15 presents the delta-delta values (again, the difference between the delta for the individual
16 testosterone metabolites in the sample and the delta for the endogenous reference compound).
17 To take but one example, consider LNDD's delta value of -27.72 for Mr. Landis's “A” sample 5-
18 alpha metabolite (the metabolite that LNDD relied upon to report the positive test). Applying a
19 $\pm 20\%$ measurement uncertainty to that measurement yields a range of values between -22.18 and
20 -33.26. The $\pm 20\%$ measurement uncertainty must also be applied to the -21.58 delta value for
21 the endogenous reference compound, pdiol, yielding a range of values between -17.26 and -25.9
22 on the “A” sample. LNDD declares a positive only if the value of the testosterone metabolite is
23 more than 3.8 delta units more negative than the value of the endogenous reference compound to
24 which it is being compared (-3.8). But if one calculates a delta-delta by selecting a 5-alpha
25 value at the least negative end of the possible range (-22.18) and a pdiol value at the most
26 negative end of the range (-25.9), the 5-alpha value is clearly *less* negative than the pdiol, not
27 more, yielding a delta-delta of +3.72, a result that could *not* be declared positive under LNDD's
28 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 $\pm 20\%$
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 $\pm 20\%$ 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 $\pm 20\%$ measurement uncertainty had been applied.

1 sample would still have been positive even if a 20% uncertainty measurement had
2 been applied is contained in only one place –a footnote to USADA’s post-hearing
3 brief written by its lawyer, Mr. Young. Ex. 22, USADA’s Post-Hearing Brief at 8,
4 footnote 7. Though this footnote cites as a reference ¶26 of Dr. Christianne
5 Ayotte’s witness declaration, her declaration contains no interpretation or
6 application of the 20% measurement uncertainty. Ex. 35, Witness Declaration of
7 Dr. Christianne Ayotte, March 7, 2008. Instead, the fuzzy math can be credited to
8 the brief’s author, Richard Young, USADA’s lawyer and fellow-CAS arbitrator.
9 Had Mr. Landis been permitted a right of reply, he could have pointed out that the
10 statement was both unsupported and incorrect, but just as the Panel’s limitations on
11 the post-hearing briefs denied him a right to reply to Mr. Young’s assertions about
12 litigation costs, it also prohibited him from presenting any reply to footnote 7. Ex.
13 2, Tr. 1502:17-23, 1503:23-25. This is yet another example of the deference that
14 the CAS panel afforded to Mr. Young, suggesting the existence of actual bias.

15 In reaching the conclusion that Mr. Landis’s test would still have been
16 positive no matter what measurement uncertainty was applied, the Panel also
17 misapplied the burden of proof in at least two ways, manifestly disregarding the
18 law it acknowledged and correctly articulated at the outset of its decision. Ex. 1,
19 CAS Decision, ¶¶28-33. First, the Panel imposed upon Mr. Landis the burden of
20 disproving accreditation, a burden he does not bear under the Code. Having made
21 this mistake, the Panel then concluded that Mr. Landis was obligated to present his
22 proof in his appeal brief, and that his “failure” to do so justified the decision to
23 admit the late-produced letter of Mr. LeGuy. Ex. 1, CAS Decision at 11, n.23. But
24 proving or disproving accreditation was not part of Mr. Landis’s burden under the
25 Code, it was USADA’s. Ex. 29, WADA Code, Art. 3.1, 3.2; Ex. 12, CAS Case
26 Law, *Hamilton* at ¶¶47-54.¹⁸ Once USADA made clear that it would rely upon

27
28 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. Goldherger *testify* about the COFRAC

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

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

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

24
25
26
27 accreditation documents, not “in exchange” for allowing Mr. Landis to pursue the argument *at*
28 *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*.

1 **2. The panel ignored uncontroverted evidence from**
2 **USADA's own witnesses and documents, and**
3 **disregarded clearly applicable law when it concluded**
4 **that the LNDD's peak identification method complied**
5 **with the ISL, justifying vacatur.**
6

7 COFRAC may have been reluctant to accredit the LNDD's CIR method at
8 the 0.8‰ degree of precision because the lab failed to document the method used
9 for a key step in the analysis –identification of the testosterone metabolite peaks in
10 chromatographic data generated by the CIR instruments. This failure to document
11 the peak identification method, which was *conceded by the lab*, violated applicable
12 WADA Technical documents and the ISL, which required that such methods be
13 documented. Ex. 38, Landis Closing Brief at 10-15; Ex. 37, TD2003IDCR; Ex.
14 28, ISL, §5.4.4.3.1. The lab's concession should have resulted in a burden shift to
15 USADA, which should then have had to prove that the violation did not cause the
16 alleged doping violation, something USADA did not prove in the case below. Ex.
17 29, WADA Code, Art. 3.1, 3.2 (assigning burden of proof); Ex. 1, CAS Decision at
18 ¶¶28-33 (acknowledging burden of proof rules). But because the Panel refused to
19 acknowledge that Mr. Landis had established a departure from the ISL –a
20 conclusion it could draw only by disregarding uncontroverted evidence of the lab's
21 failure to document its peak identification method –it deprived Mr. Landis of a
22 finding that should have resulted in victory. Mr. Landis therefore asks this Court
23 to vacate the Panel decision.

24 The CIR (Carbon Isotope Ratio) test is intended to distinguish between
25 naturally produced (endogenous) testosterone and synthetically produced
26 (exogenous) testosterone contained in a urine sample. All testosterone metabolites
27 are comprised of carbon, oxygen and hydrogen atoms, including the stable isotopes
28 of carbon, Carbon¹² and Carbon¹³. Natural testosterone metabolites have both

Carbon¹² and Carbon¹³ atoms, but the ratio between these atoms varies among individuals, influenced as it is by diet and other factors. Carbon¹² and Carbon¹³ are also present in synthetic testosterone metabolites, but because these products tend to be made from soy, which is Carbon¹³-depleted, a person using synthetic testosterone products will have comparatively fewer Carbon¹³ 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 Carbon¹³-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 Carbon¹²/Carbon¹³ ratio of various compounds in a gas, and in turn compares this ratio to the Carbon¹²/Carbon¹³ 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 Carbon¹²/Carbon¹³ 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

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

3 The difficulty arises because the GC/C/IRMS instrument that measures and
4 calculates the isotopic ratios of the chromatographic peaks generated as data
5 cannot also identify the compound represented by these peaks. The GC/C/IRMS
6 chromatograms allow the analyst to determine the isotopic values of a peak that
7 elutes at a particular retention time, but they do not allow the analyst to determine
8 what compound that peak represents. Compound identification is to be
9 accomplished with the other instrument used in the CIR analysis—the gas
10 chromatography/mass spectrometry (GC/MS), which identifies the testosterone
11 metabolites represented by the various peaks, metabolites that elute at different
12 times (retention times) and in different orders. Ex. I, CAS Decision, ¶61. The
13 GC/MS, which also generates data in the form of chromatograms, identifies the
14 testosterone metabolites in a gas by both recording time it takes the compounds to
15 elute from a column and comparing those to a standard, and also by comparing the
16 molecular fingerprint of the compound. Both steps are necessary because different
17 molecules can have the same retention times. So in the CIR method, two different
18 sets of chromatograms are generated: one from the GC/MS instrument (which
19 identifies the testosterone metabolites represented by the various peaks), and one
20 from the GC/C/IRMS (which calculates the isotopic values of the peaks of
21 interest). Ex. I, CAS Decision at ¶61. See also Ex. 27, Landis Appeal Brief at 23-
22 30 for a detailed description of the principles of the CIR/IRMS method.

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

1 this case centered around the method LNDD used to link the peaks generated in the
2 GC/MS with the correct peak in the GC/C/IRMS in order to draw the conclusion
3 that a particular testosterone metabolite had a particular Carbon¹²/Carbon¹³ ratio.
4 It is this step that allows the LNDD to derive the delta-delta, and to conclude that
5 one or more testosterone metabolites is positive for the presence of exogenous
6 testosterone under the lab's positivity criteria.

7 This peak identification step is also the part of the CIR method that LNDD
8 failed to document in a Standard Operating Procedure, in violation of ISL,
9 §5.4.4.3.1, which requires that LNDD "establish criteria for identification of a
10 compound at least as strict as those stated in any relevant Technical Document."
11 The relevant WADA Technical Document—TD2003IDCR—requires that the
12 Laboratory establish criteria for identification of a compound, and that it
13 "document appropriate analytical characteristics for a particular assay." Ex. 37,
14 TD2003IDCR, emphasis added.

15 LNDD staff admitted that the peak identification method used at the lab is
16 *not* documented—not in a Standard Operating Procedure (SOP), and not in a written
17 validation study. Ex. 2, Tr. 660:5-661:20, 838:15-22; Ex. 28, Landis Closing Brief
18 at 11. Although TD2003IDCR—a standard that the Panel expressly acknowledged,
19 *see* Ex. 1, CAS Decision, ¶¶I05-7 —requires documentation of the method used to
20 analyze peaks and there was no dispute that the LNDD's peak identification
21 method was *not* documented, the Panel simply declined to find a violation of the
22 standard, content that the method "*as practiced*" by LNDD was sufficient. Ex. I,
23 CAS Decision at ¶I05. The Panel could only have reached this conclusion by
24 refusing to consider pertinent compliance evidence, and by manifestly disregarding
25 both ISL§5.4.4.3.1 and TD2003IDCR. Therefore, vacatur is justified. 9 U.S.C.A.
26 §10(a)(3) and (4) and New York Convention, Art. V, §1(a),(b) and §2(b).

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

1 determined that the LNDD “practiced” a method that the available evidence failed
2 to prove had been validated. Although Mr. Landis was never able to reconcile the
3 statements of the various witnesses describing the lab’s peak identification method,
4 and was therefore unable to determine exactly what LNDD *did* to identify peaks,
5 [see Ex. 28, Landis Closing Brief at 11-15], the Panel satisfied itself that the
6 LNDD staff had consistently described a two-step process for peak identification.
7 Ex. 1, CAS Decision, ¶106. First, the Panel concluded that the lab identified the
8 testosterone metabolite peaks on the GC/MS chromatograms by comparing the
9 retention times¹⁹ for the sample peaks with the retention times for known
10 standards. Second, the Panel concluded that LNDD identified the testosterone
11 metabolite peaks in the GC/C/IRMS (which can itself only measure isotopic
12 values) by comparing the retention times for the sample peaks with the
13 GC/C/IRMS retention times for peaks “known” to be the four testosterone
14 metabolites in the *blank urine* quality control. Ex. 1, CAS Decision at ¶106.²⁰ The
15 LNDD uses the blank urine sample as both a “negative” quality control and as an
16 “anchor” for its peak identification method, the theory being that if one has
17 definitively identified the testosterone metabolites in the blank urine pool and
18 determined their retention times, one can use that information to identify the
19 compounds in an unknown sample simply by comparing the retention times of the
20 unknown peaks with the retention times in the blank urine. Ex. 1, CAS Decision at
21 ¶103.

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

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

28 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.

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

12 Finally, in order for this blank urine comparison method to work under any
13 circumstances, the peaks in the blank urine pool must be identified in the first
14 place; they must be known. It is undisputed, however, that USADA produced no
15 evidence demonstrating that LNDD *ever identified the peaks in its blank urine*
16 *pool*. While USADA did rely upon a document that identified some characteristics
17 of its blank urine pool (Ex. 32, Excerpt, USADA appeal exhibit T026 and LNDD
18 309-10), this document contained *other* types of information about the blank urine
19 pool, including date of collection, pH, density, temperature and isotopic values of
20 the compounds of interest. LNDD 309-310 does *not* demonstrate that LNDD
21 *actually identified* the testosterone metabolite peaks in that blank urine pool, or
22 what their retention times were. Ex. 28, Landis Closing Brief at 14, ¶(h). This is
23 not disputed; USADA’s expert, Dr. Brenna, readily admitted that this document
24 does not indicate how LNDD identified the peaks in the blank urine in the first
25 instance. Ex. 2, TR. 1083:6-1084:8; Ex. 28, Landis Closing Brief at 14. Not only
26 does this document fail to establish how LNDD identified the peaks in the blank
27 urine in the first instance, but LNDD technician, Cynthia Mongongu, testified that
28 *no document* in the documentation package provided to Mr. Landis contained this

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

3 In other words, USADA's own evidence –the only evidence available to the
4 Panel to support the conclusion that the LNDD's unwritten peak identification
5 method was valid –confirms that LNDD's unwritten method rendered the GC/MS
6 step unnecessary, relied upon the use of a blank urine "reference collection" that
7 did not satisfy TD2003IDCR's requirements for a reference collection, and was
8 ultimately based upon a comparison between two sets of *unknown peaks*. Mr.
9 Landis's peaks were not known, but neither were the peaks in the blank urine. Not
10 one document establishes that LNDD *ever* definitively identified those blank urine
11 peaks in the first instance. Thus, the linch-pin of the LNDD's unwritten peak
12 identification method as found by the Panel was apparently based on *assumptions*,
13 not a verified and validated method. Not only is the lab's method not *written*, as
14 required by TD2003IDCR, but even "as practiced," it does not allow one to
15 identify the peaks in a sample. Mr. Landis clearly presented this argument in his
16 closing brief, but the Panel declined to address it. Ex. 28, Landis Closing Brief at
17 14-15; Ex. 1, CAS Decision at 105-8.

18 ISL §5.4.4.3.1 and WADA Technical Document TD2003IDCR require that
19 peak identification criteria be established, and that the analytical characteristics be
20 *documented* for each sample assay. The LNDD method was indisputably not
21 documented. Although the Panel acknowledged that these standards applied, the
22 Panel simply declined to enforce them. Ex. 1, CAS Decision at ¶105-7. In the
23 face of uncontroverted evidence, the Panel refused to concede that Mr. Landis had
24 established a violation of the ISL, a finding that should have shifted the burden of
25 to USADA to prove that the violation did not cause the doping violation. Ex. 1,
26 CAS Decision, ¶32 (athlete rebuts presumption that method was performed in
27 compliance with the ISL by showing a departure). Further, it was a decision
28 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

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

5 Faced with another ISL violation confirmed by its own documents, USADA
6 attempted to rebut those documents by proffering the written declaration of one
7 Gerard LePetit, a maintenance contractor employed by LNDD to conduct routine
8 maintenance on its CIR instruments. According to this declaration, Mr. LePetit
9 performed a maintenance call on LNDD in April, 2006, removing the correct
10 GC/MS column (the DB-17ms) and installing the Agilent 19091s-433(E) column
11 on LNDD's GC/MS, making a written note of this installation in the maintenance
12 report. Ex. 44, Declaration of Gerard LePetit at ¶¶7-12; Ex. 45, USADA appeal
13 exhibit T141 at LNDD 1899, 1903. But while Mr. LePetit declared that it was
14 "probable" that he simply forgot to make a similar notation when he removed the
15 Agilent 19091s-44 at the conclusion of his maintenance call and replaced it with
16 the correct column-the DB-17ms—he had no independent recollection of having
17 done so. Ex. 44, Declaration of Gerard LePetit at ¶13; Ex. 2, Tr. 720:1-21. LNDD
18 technician, Cynthia Mongongu, testified that she accompanied Mr. LePetit on his
19 service call, but added that the LNDD had decided not to re-install the old DB-
20 17ms after Mr. LePetit's service call, but to replace it with a *new* DB-17ms.
21 However, she could not recall watching anyone replace the Agilent 19091s-44 with
22 a new DB-17ms. Ex. 2, Tr. 729:7-730;4; Ex. 42, Declaration of C. Mongongu at 4
23 (English Translation). Claire Frelat, the LNDD technician who was identified in
24 USADA Exhibit T 142 as the technician who installed the new DB-17ms column
25 after Mr. LePetit's service call, made no mention in her two sworn declarations of
26 having made this column change, and further testified that she could not recall
27 having done so. Ex. 46, Declaration of Claire Frelat; Ex. 47, Rebuttal Declaration
28 of Claire Frelat; Ex. 2, Tr. 818:9-820:6, 820:13-24.

1 Neither Mr. LePetit nor the LNDD technicians had a personal recollection of
2 the facts that would allow them to contradict USADA's documents showing that
3 two different columns were still in place when Mr. Landis's samples were
4 analyzed in July and August, 2006. That being the case, USADA resorted to
5 Exhibit T142 (LNDD 2004-5), a document *not* provided to Mr. Landis in the
6 mandatory Laboratory Documentation Package. LNDD 2005 indicates that a
7 technician with Code Number 26 (Claire Frelat) made a column change on April
8 27, 2006. Ex. 48, USADA appeal exhibit T142. As such, the document appeared
9 to corroborate—in part—USADA's claim that the correct column had been re-
10 installed before the lab tested Mr. Landis's samples in July and August, 2006.
11 However, it also contradicted Mr. LePetit's claim that he "must have" re-installed
12 the correct column before the conclusion of his service call on April 26 because
13 Exhibit T142 indicates that it was Claire Frelat, Operator 26, who made the column
14 change, and it indicates that the change was made on April 27, the day after Mr.
15 LePetit's service work ended. Ex. 48, USADA appeal exhibit T142 at LNDD
16 2005; Ex. 2, Tr. 719:19-720:9.

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

1 Not only is T142 out of date order, it does not identify what type of column
2 might have been installed on April 27, 2006. Ex. 48, USADA appeal exhibit T142.
3 It does not indicate whether it was a DB-17ms or some other column, though the
4 testimony was that the lab used a number of different columns on its various
5 instruments. Ex. 2, TR. 728:20-729:6. In fact, the document never actually states
6 that a column change occurred; the French words for “column change”
7 [“changement de colonne”] appear nowhere on the page,²¹ and since Ms. Frelat
8 could not remember the column change, she could not clarify matters. Ex. 2, Tr.
9 818:15-820:6.

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

27
28 ²¹ Inexplicably, the document says that the event occurring on April 27, 2006 was a “chat
colonne,” which translates as “cat column.”

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

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

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

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

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

21
22 **4. The CAS Panel refused to consider Mr. Landis's**
23 **evidence establishing that the LNDD's CIR instrument**
24 **had not been maintained as required by the ISL and the**
25 **lab's own Standard Operating Procedures.**
26

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

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

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

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

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

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

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

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

6 Not only should the document have been excluded if the Panel were
7 proceeding in an even-handed manner with respect to its application of CAS Rule
8 R56, but it should have been excluded because it was not authentic, as Mr. Landis
9 alleged. Ex. 28, Landis Closing Brief at 33-34. He advanced at least three
10 separate factual grounds for that allegation. Lacking evidence with which to
11 counter these fact-based challenges to the document's authenticity, the Panel
12 simply ignored them, stating flatly that Mr. Landis had "adduced" no evidence to
13 counter the LNDD technician's testimony that she was "satisfied" that the
14 document was, in fact, the original and unaltered August 2006 linearity check. Ex.
15 1, CAS Decision, ¶92.

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

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

7 Second, Mr. Landis pointed out that the graphic presentation of the linearity
8 run produced for the August 2006 “test” is not like the graphic presentations of the
9 linearity runs occurring on June 26, July 31, or September 25, 2006. Ex. 52,
10 Respondent’s Motion to Strike Untimely Exhibits and Related Testimony at 12.
11 The graphic presentation of the data on Exhibit T155/LNDD 2019, displays data
12 on a graph, the x axis of which is measured in “AV” units, 3540-3595, and the y
13 axis in Amps, 4.00E-3 to 4.60E-3. Ex. 51 USADA appeal exhibit T155 (LNDD
14 2020-2022). None of the earlier linearity runs have “AV” on the x axis and none
15 use the same Amp scale for the y axis. Ex. 32, Excerpt, USADA appeal exhibit
16 T026 at LNDD 319 and 326; LNDD 314, 316, 318, 321, 323, 325, 328, 330, and
17 332.

18 Third, Mr. Landis noted that when LNDD provided him with access to the
19 LNDD’s Electronic Data Files just prior to the AAA hearing, he was also provided
20 with a complete file directory listing containing all files and directories for the CIR
21 instrument over the relevant period of time. The folder with the name “STAB 3”
22 *was not listed* among those file and folder names. Ex. 28, Landis Closing Brief at
23 33-34; Ex. 53, Landis Exhibit GDC 871-908. USADA never argued that Mr.
24 Landis had incorrectly stated these facts.

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

1 appeal, she admitted that she was the member of the “LNDD staff” that had located
2 the August linearity document. When asked why she didn’t clearly state this in her
3 declarations, she said that it was simply “shorter” to write that “LNDD staff” found
4 the document than it was to write “I” found the document. Ex. 28, Landis Closing
5 Brief at 34, ¶(v)(C); Ex. 2, Tr. 918:14-920:4. Ms. Frelat’s memory about the
6 details surrounding her location of that document was sketchy, Ex. 2, Tr. 881:20—
7 884:24, though she was ultimately “satisfied” that it was authentic. Ex. 2, Tr.
8 920:5-9.

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

16
17 **5. The Panel disregarded both the law and the facts in**
18 **concluding that LNDD’s chain of custody was complete**
19

20 During the CAS appeal hearing, Mr. Landis established that the chain of
21 custody documents produced to him by LNDD revealed nine separate gaps in the
22 chain of custody for Mr. Landis’s Stage 17 sample, a violation of the ISL, ¶3.2,
23 ¶5.2.2.2 and of WADA technical document, TD2003LCOC. Ex. 28, Landis
24 Closing Brief at 26-27; Ex. 27, Appellant’s Brief Submitted by Floyd Landis at 68-
25 73. Implicitly acknowledging that Mr. Landis had demonstrated a departure from
26 the ISL –a fact that should have shifted the burden to USADA to prove (with
27 evidence) that the departure did not cause the doping violation –the Panel declined
28 to credit this evidence. Instead, at the urging of fellow CAS arbitrator, Richard

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

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

1 USADA never introduced documentary evidence closing the particular chain
2 of custody gaps Mr. Landis identified. Ex. 22, USADA Post-Hearing Submission
3 Brief at 37-41. In fact, the only *document* cited by USADA in its post-hearing
4 brief to challenge Mr. Landis's proof, and to establish that existing *documentation*
5 made it possible to "follow LNDD's bottle chain of custody," was Exhibit T144.
6 Far from being a lab-created chain of custody document created at the time sample
7 transfers were made, Exhibit T144 was attorney work-product prepared in January
8 2008 for USADA's lawyers by consultant, Dr. Hatton, just prior to the time that
9 USADA filed its response to Mr. Landis's CAS appeal. Ex. 22, USADA Post-
10 submission brief at 39 (citing Exhibit 144); Ex. 55, USADA appeal exhibit T144
11 (marked as "Privileged and Confidential. Attorney Work-Product.
12 LandisLabMap&COCHatton30Jan08.doc"). In other words, USADA was unable
13 to produce documentation showing a complete and continuous chain of custody for
14 Mr. Landis's sample, as required by the ISL and WADA technical documents.

15 Implicitly acknowledging that Mr. Landis had successfully demonstrated a
16 departure from the ISL rule that chain of custody be completely documented, the
17 Panel simply concluded that literal compliance with the ISL was no longer
18 required, despite the WADA Code's clear admonition that compliance with the
19 ISL is mandatory. Ex. 38, ISL at 2, ISL ¶3.2, ¶5.2.2.2. In order to avoid the clear
20 and express language of these WADA rules, the CAS panel accepted the
21 unsupported statement of fellow CAS arbitrator, Richard Young, who contended
22 that the clear requirement for documentation could be disregarded for two reasons
23 –1) LNDD was only required to comply with the "concepts" of the chain of
24 custody rules, and 2) a chain of custody could be created by *post hoc* testimony,
25 despite the express requirement of "documentation." Ex. I, CAS decision, ¶¶175,
26 178.

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

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

10 The Panel also acted with manifest disregard for the law when it accepted
11 Mr. Young’s contention that a chain of custody may be established by testimony
12 because this conclusion, too, is contrary to the ISL’s express requirement for
13 documentation. As the Panel clearly recognized, the ISL defines a chain of
14 custody as “documentation.” See Ex. 1, CAS Decision at ¶163 (quoting the ISL’s
15 definition of “Laboratory Internal Chain of Custody,” ¶3.2). ISL ¶5.2.2.2
16 incorporates this defined term (requiring documentation) into its directive that labs
17 maintain chain of custody procedures. And WADA technical document
18 TD2003LCOC expressly reiterates the emphasis on documentation in its first
19 sentence: “The Laboratory Internal Chain of Custody is documentation....”. Ex.
20 1, CAS Decision at ¶164, quoting TD2003LCOC. The fact that TD2003LCOC
21 allows a lab technician named on the chain of custody documents to explain entries
22 made on those documents does not extinguish the requirement for documentation
23 in the first instance; to accept this interpretation would completely undermine the
24 rule’s express documentation requirement, and would contradict the purpose of a
25 chain of custody, which is to eliminate the need to rely upon fuzzy memories of
26 long-past sampling events. Instead, a technician named on a document may
27 explain his or her participation in the sampling activities noted on the document.
28 The requirement for documentation is clear, explicit and well-established.

1 The reliability problems that arise when a lab looks to *post hoc* testimony to
2 explain who did what with a lab sample analyzed months earlier are aptly
3 illustrated by “one specific instance of improper chain of custody...of particular
4 note” referenced in the Panel decision. Ex. 1, CAS Decision, ¶167. This gap of
5 “particular note” centered around the very first set of tests performed on Mr.
6 Landis’s “A” sample on July 21, 2006. The documents recording the transfers
7 made on the morning of July 21 –LNDD 1590 and 1591 –provide conflicting
8 accounts of the location and person from which the first operator obtained Mr.
9 Landis’s sample that morning, the time at which the transfer was made, and the
10 identity of all persons handling his sample that morning. Ex. 56, USADA appeal
11 exhibit T103 at LNDD 1590-91. Specifically, LNDD 1590 states that Operator 44
12 (Laurent Martin) had possession of Mr. Landis’s sample at 7:25 a.m. in Room 107,
13 but it does not state where Mr. Martin got that sample. It also states that Operator
14 44 transferred the sample to Room 006 at 9:00 a.m., but does not identify the
15 person receiving the sample. By contrast, LNDD 1591 indicates that the sample
16 was retrieved from a refrigerator CHFR-1, but at a different time—7:30, not 7:25.
17 It also states that it was Operator 42 (Jean Antoine Martin) not Operator 44
18 (Laurent Martin) who transferred the sample from Room 107 to Room 006 at 9:00
19 a.m. that morning. Because they are in conflict, these two documents cannot
20 establish a clear and continuous record of the persons in possession of Mr.
21 Landis’s sample on the morning of July 21, the location of that sample, or the time
22 at which transfers of the sample occurred, as required by ISL ¶5.2.2.2 and
23 TD2003LCOC.

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

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

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

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

20 However, her story changed in a rebuttal statement filed ten days later. Ex.
21 59, Rebuttal Declaration of Myriam Garcia. In that rebuttal, Ms. Garcia declared
22 for the first time that she was the person that completed LNDD 1591, and that she
23 had made “two mistakes” when doing so—incorrectly noting the time that the
24 sample was removed from storage as 7:30 instead of 7:25, and incorrectly
25 identifying Operator 42 as the person transferring the bottle to Room 006, when
26 she should have identified Operator 44. In short, Ms. Garcia’s rebuttal declaration
27 neatly resolved the inconsistencies between LNDD 1590 and LNDD 1591. The
28

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

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

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

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

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

10 Q: What is the date on that statement?

11 A: It's the fifth of March.

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

15 A: Okay, fine.

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

19 A: **No, I don't remember.**
20

21 Ex. 2, Tr. 1241:4-1242:5, emphasis added. It was only after Mr. Paulsson
22 read virtually all of the March 12 rebuttal to her in French²² and asked her if
23 it was "reminding her of anything," that Ms. Garcia indicated that she
24 remembered signing a statement containing such recitations. Ex. 2, Tr.
25 1247:4-1249:2.

26
27
28 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.

1 Having “admitted” that she “recalled” writing a statement containing
2 the factual allegations from the rebuttal declaration that Mr. Paulsson had
3 just finished reading to her, Ms. Garcia went on to testify that she in fact *had*
4 *no independent recollection of the facts stated in that declaration*; “two
5 years was too long” ago for her to remember the facts of July 21, 2006. Ex.
6 2, Tr. 1249:20-1256:25, esp. 1251:7-8, 1241:18-20, and 1252:2-5. She
7 further admitted that the sole basis for her conclusion that she had made a
8 “mistake” in recording the time and operator code when completing LNDD
9 1591 two years earlier was the fact that LNDD 1590 said something
10 different; she had no independent recollection of these facts. Ex. 2, Tr.
11 1254:21-1255:15, TR. 1256:8-25. Setting aside the troubling question of
12 how the rebuttal declaration came to include those factual allegations she
13 had no memory of, the one thing that *is* clear from Ms. Garcia’s testimony is
14 that the information she recorded on LNDD 1591 –that Operator 42 removed
15 the bottle from storage at 7:30 –was based on her “personal direct
16 observation at the time two years ago,” and was therefore the best evidence
17 she could offer about the events of July 21, 2006. Ex. 2, Tr. 1256:8-25. Ms.
18 Garcia had no memory of the facts stated in the rebuttal declaration and no
19 memory that she made a “mistake” two years earlier when completing
20 LNDD 1591. She was simply not competent to testify that she had made a
21 mistake on July 21, 2006.

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

1 recollection of those facts but depended entirely on the documents. In
2 reaching its conclusion that Mr. Landis's evidence was insufficient to
3 establish a breach in the chain of custody, the Panel both disregarded
4 existing evidence and created non-existent evidence, justifying vacatur under
5 9 U.S.C.A. §10(a)(3) and (4), and New York Convention, Art. V, §1(a), (b)
6 and §2(b).

7 Paragraph 179 of the Panel Decision suggests that the Panel must
8 have realized the shaky legal and factual ground upon which its opinion
9 rested because there, the Panel holds that even if Mr. Landis had
10 successfully demonstrated that there were "imperfections in the bottle chain
11 of custody such as to constitute an ISL violation," he still would not have
12 prevailed because he failed to prove that the LNDD staff tampered with that
13 sample. Ex. I, CAS Decision, ¶179. This, of course, is not his burden, and
14 represents an assignment of the burden of proof not permitted under the
15 Code, which never imposes upon the athlete the burden of proving that an
16 ISL violation actually caused the Adverse Analytical Finding. To the
17 contrary –if the athlete proves that a violation of the ISL occurred, the
18 burden shifts to the anti-doping agency to prove that the ISL violation did
19 not cause the Adverse Analytical Finding. Ex. 29, WADA Code, Art. 3.2.1,
20 3.2.2. This is boilerplate law in the anti-doping context; indeed, the Panel
21 expressly (and correctly) recited these rules in Paragraphs 32 and 33 of its
22 opinion. Ex. I, CAS Decision, ¶¶32-33; *see also* ¶¶28-29 (correctly
23 describing USADA's standard of proof).

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

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

5 6 **E. CONCLUSION**

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

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

25 In Mr. Landis’s case, evidence of that bias is suggested by the
26 \$100,000 cost award imposed against him, an award not contemplated by
27 UCI rules and one based not on evidence, but upon post-hearing statements
28 represented by USADA’s CAS arbitrator/lawyer in a brief to which Mr.

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

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

11 12 **III. PRAYER FOR RELIEF**

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

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

- 26 1) VACATE the arbitral award entered in the arbitral proceeding
27 known as *Floyd Landis v/USADA*, CAS 2007/A/1394 dated
28 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

1 Respectfully submitted,

2
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STATE OF CALIFORNIA)
COUNTY OF LOS ANGELES)

On the date set forth below, I served the foregoing document(s) described as:

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

[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.

[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).

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

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