

IBSF 2017 Aleksandr Zubkov vs IBSF - Provisional Suspension #3

Annex:

Submission Aleksandr Zubkov to the International Bobsleigh & Skeleton Federation, 15 December 2017

Decision

International Bobsleigh and Skeleton

Doping Hearing Panel

IN THE MATTER OF A REQUESTED PROVISIONAL SUSPENSION OF

Mr. ALEXANDR ZUBKOV

To Bobsleigh Federation, of Russia
President Alexandr Zubkov
8 Luzhnetskaya Nab.
119991 Moscow, Russian Federation
By email: parkhomenko@rusbob.ru

I BACKGROUND

1. Mr. Alexandr ZUBKOV (hereinafter referred to as the "**Athlete**", (IF ID Number 130635, born on August 10, 1974), is a member of the Bobsleigh Federation of Russia.
2. On November 28, 2017 the International Bobsleigh and Skeleton Federation (hereinafter referred to as the "**IBSF**") notified the Athlete to provisionally suspend him in accordance with article 7.9 of the IBSF Anti-Doping Rules (hereinafter referred to as the "**IBSF ADR**"). The letter of the IBSF of November 28, 2017 is attached to this Decision as **Annex I**.
3. The notification of the provisional suspension from the IBSF followed a notification dated November 24, 2017 the IBSF has received from the International Olympic Committee ("**IOC**") informing that the IOC Disciplinary Commission (hereinafter also referred to as the "**Oswald Commission**") decided to sanction the Athlete because of anti-doping rule violations (hereinafter also referred to as "**ADRV**") committed by him according to the Oswald Commission in the context of the Sochi 2014 forensic and analytic doping investigations.
3. In the (not motivated) decision of the Oswald Commission of November 22, 2017 (attached as **Annex II** hereto, and referred to as the "**Non-Motivated Decision**") the Athlete:
 - I a) is found to have committed anti-doping rule violations pursuant to Article 2 of The International Olympic Committee Anti-Doping Rules applicable to the XXII Olympic Winter Games in Sochi, in 2014;
 - b) is disqualified from the events in which he participated upon the occasion of the XXII Olympic Winter Games in Sochi, in 2014, namely:
 - (i) the Two-Man's Bobsleigh Event, in which he ranked 1st and for which he was awarded a gold medal, a medallist pin and a diploma;
 - (ii) the Four-Man's Bobsleigh Event, in which he ranked 1st and for which he was awarded a gold medal, a medallist pin and a diploma;
 - c) has the medals, medallist pins and the diplomas obtained in the above-mentioned

Events withdrawn and is ordered to return the same to the International Olympic Committee.

- II. The International Bobsleigh and Skeleton Federation is requested to modify the results of the above-mentioned events accordingly and to consider any further action within its own competence.
- III. Aleksandr ZUBKOV is declared ineligible to be accredited in any capacity for all editions of the Games of the Olympiad and the Olympic Winter Games subsequent to the Sochi Olympic Winter Games.
- IV. The Russian Olympic Committee shall ensure full implementation of this decision.
- V. The Russian Olympic Committee shall notably secure the return to the International Olympic Committee, as soon as possible, of the medals, medallist pins and diplomas awarded in connection with the Two-Man's and the Four-Man's Bobsleigh Events to the Athlete.
- VI. This decision enters into force immediately. "

The Oswald Commission made clear in its Non-Motivated Decision that it intended to render a motivated decision within a reasonable time after the notification of the present decision, which it did on December 6, 2017, hereinafter referred to as the "**Oswald Decision**" and attached hereto as **Annex III**. The Non-Motivated Decision entered into force immediately (so per November 24, 2017).

4. In the same letter of November 28, 2017 the IBSF gave the Athlete and the Bobsleigh Federation of Russia the opportunity for a Provisional Hearing, as provided for in article 7.9.3 of the IBSF ADR.
5. The Athlete and the Bobsleigh Federation of Russia requested by email of November 27, 2017 an expedited hearing in accordance with article 7.9.3. of the IBSF ADR before the IBSF Doping Hearing Panel, consisting of the undersigned Panel members, which took place on December 1, 2017 at the Munion Congress Center at the Airport in Munich, Germany.
6. The Athlete was represented at the hearing by his legal representative Philippe Bärtsch (Schellenberg Wittmer Ltd) of Geneva, Switzerland and accompanied by the Secretary General of the Bobsleigh Federation of Russia, Sergey Parkhomenko, who acted as his translator.
7. The IBSF Doping Hearing Panel came to the conclusion that at the moment of the hearing there was not yet sufficient evidence relating to the Athlete that would justify the provisional

suspension being maintained for the time being. The Oswald Commission was invited to present the IBSF with a reasoned decision as soon as possible in order to reconsider the position of the Athlete. The reasoned decision of the IBSF Doping Hearing Panel of December 1, 2017 is attached hereto as **Annex IV**.

8. On December 6, 2017 the Oswald Decision (Annex III) was rendered and the IBSF Doping Hearing Panel consistent with its decision of December 1, 2017 invited the Athlete and its representative to continue on December 15, 2017 the hearing it started on December 1, 2017.
9. The IBSF Doping Hearing Panel received preceding the hearing of December 15, 2017 from Bird&Bird LLP, acting on behalf of the IBSF, an application for reconsideration of the decision to lift the provisional suspension for the Athlete. As the IBSF ADR does not provide for any such application the IBSF Doping Hearing Panel was not in any position to accept or deny such application.
10. On December 15, 2017 the IBSF Doping Hearing Panel, consisting again of the undersigned members, continued at the Munion Congress Center at the Airport in Munich, Germany the hearing of December 1, 2017. The purpose of the hearing was to decide on the question whether the Oswald Decision would give reason to re-impose the provisional suspension that was lifted by the Doping Hearing Panel by its December 1, 2017 decision.
11. The Athlete participating in the hearing by means of Skype was represented by his legal representative Philippe Bärtsch (Schellenberg Wittmer Ltd) of Geneva, Switzerland. Mr Bärtsch presented his arguments at the hearing. His written submission is attached to this Decision as **Annex V**.
12. The IBSF Doping Hearing Panel refers for the facts of the matter against the Athlete and the reasons for the IBSF to originally provisionally suspend the Athlete to **Annex III**, the Oswald Decision.

II. QUALIFICATIONS

13. The IBSF relied for the conduct of a follow up investigation into a possible anti-doping rule violation of the Athlete and its decision to provisionally suspend the Athlete exclusively on the Oswald Decision (in the meaning of article 7.7 of the IBSF ADR). The IBSF did not perform itself any further investigation into the facts and circumstances of the matter. The IBSF Doping Hearing Panel did not receive any additional investigation performed by the IBSF. The IBSF Doping Hearing Panel understands under the current exceptional circumstances such approach of the IBSF Anti-Doping Administrator.

14. The IBSF Doping Hearing Panel understands the position of the IBSF as such that the IBSF is satisfied by the Oswald Decision that an anti-doping rule violation by the Athlete has occurred. The Athlete has been properly notified in accordance with article 7.7 of the IBSF ADR and in accordance with article 7.9.2 provisionally suspended by the IBSF.
15. It follows from the above that the IBSF Doping Hearing Panel for its assessment of this case and the question whether it should re-impose the provisional suspension of the Athlete has to rely as well exclusively on the findings in the Oswald Decision.

III LEGAL FRAMEWORK

16. The IBSF ADR sets out in article 7.9.2 the regime with regard to an Optional Provisional Suspension:

"In case of an Adverse Analytical Finding for a Specified Substance, or in the case of any other anti-doping rule violations not covered by Article 7.9.1, IBSF Anti-Doping Administrator or its delegate may impose a Provisional Suspension on the Athlete or other Person against whom the anti-doping rule violation is asserted at any time after the review and notification described in Articles 7.2–7.7 and prior to the final hearing as described in Article 8."

17. Article 7.9.3 and especially article 7.9.3.2 of the IBSF ADR give rules on how a provisional suspension in accordance with the above provision can be challenged. Article 7.9.3.2 reads:

"The Provisional Suspension shall be imposed (or shall not be lifted) unless the Athlete or other Person establishes that: (a) the assertion of an anti-doping rule violation has no reasonable prospect of being upheld, e.g., because of a patent flaw in the case against the Athlete or other Person; or (b) the Athlete or other Person has a strong arguable case that he/she bears No Fault or Negligence for the anti-doping rule violation(s) asserted, so that any period of Ineligibility that might otherwise be imposed for such a violation is likely to be completely eliminated by application of Article 10.4; or (c) some other facts exist that make it clearly unfair, in all of the circumstances, to impose a Provisional Suspension prior to a final hearing in accordance with Article 8. This ground is to be construed narrowly, and applied only in truly exceptional circumstances. For example, the fact that the Provisional Suspension would prevent the Athlete or other Person participating in a particular Competition or Event shall not qualify as exceptional circumstances for these purposes."

18. On December 1, 2017 the Athlete making use of the above article challenged before the IBSF Doping Hearing Panel successfully the decision of the IBSF to provisionally suspend him. With

the Oswald Decision in place now the IBSF is satisfied (moreover) that an anti-doping rule violation by the Athlete has occurred.

19. The IBSF Doping Hearing Panel acknowledges that the IBSF has a broad authority to suspend provisionally the Athlete of whom it has a reasonable cause to believe it has committed an ADRV. The IBSF refers in this respect to the CAS decision in the matter of Alexander Legkov versus the International Ski Federation (FIS) (CAS 2017/A/4968). CAS upheld a decision of the FIS to provisionally suspend the athlete Legkov for circumstances similar to the subject at the time the Oswald Commission did not provide its decisions yet.

20. CAS construed the relation between the articles 7.9.2 and 7.9.3.2 of the FIS Anti-Doping Rules (that are identical in this respect to the IBSF ADR) as follows in paragraph 174 of its award:

"Another possible reconciliation is to acknowledge that Article 7.9.2 (either independently or, as noted above, together with article 7.7) confers a broad discretion, but Article 7.9.3.2 effectively acts as cap on such discretion by precluding a suspension where the grounds for successful challenge as set out in (a), (b) or (c) are clearly present at the outset and where a suspension is being contemplated, but has not yet been imposed (the "Preclusion"). The Panel prefers the latter analysis (...)."

21. CAS thus introduces a cap on the discretion of (here) the IBSF to provisionally suspend athletes and such cap is found in article 7.9.3.2 under (a), (b) and (c) of the IBSF ADR. The IBSF Doping hearing panel has tested the provisional suspension of the Athlete that is to be imposed according to the request of the IBSF against the provision of article 7.9.3.2 under (c):

"... (c) some other facts exist that make it clearly unfair, in all of the circumstances, to impose a Provisional Suspension prior to a final hearing in accordance with Article 8. This ground is to be construed narrowly, and applied only in truly exceptional circumstances. For example, the fact that the Provisional Suspension would prevent the Athlete or other Person participating in a particular Competition or Event shall not qualify as exceptional circumstances for these purposes."

22. The IBSF Doping Hearing Panel has taken due notice of the fact that article 7.9.3.2 sub (c) of the IBSF ADR has to be construed narrowly and applied only in truly exceptional circumstances. It is clear and incontrovertible that the current situation qualifies as such "truly exceptional circumstances" in the present case.

IV APPLICATION OF ARTICLE 7.9.3.2 SUB (C) BY THE IBSF DOPING HEARING PANEL

A. Preliminary Remarks

23. The IBSF Doping Hearing Panel has no reason to doubt the facts that are presented by the Oswald Decision in the matter of the Athlete. In its decision of January 6, 2017 (attached hereto as **Annex VI**) the IBSF already made the following qualification in that respect:

"The Doping Hearing Panel has taken strong notice of the systemic Russian doping control manipulation and cover up that is mentioned in the McLaren-reports. The second report even sharpens the picture and confirms the findings of the first report and identifies summer, winter, and Paralympic athletes involved in the doping cover-up and manipulation (p.4 of McLaren Report II)."

24. At the same time the Doping Hearing Panel made the following nuance to the use of the above-mentioned findings in individual cases:

"However, the McLaren Report II makes as well very clear that it has not assessed the sufficiency of evidence to prove an anti-doping rule violation of an athlete. The Doping hearing Panel refers to page 35-36 of the McLaren Report II:

"The IP ("Independent Person") is not a Results Management Authority under the World Anti-Doping Code and therefore does not have the authority to bring forward ADRV cases against individual athletes. Accordingly the IP has not assessed the sufficiency of the evidence to prove an ADRV by any individual athlete. Rather, for each individual Russian athlete, where relevant evidence of possible manipulation to conceal positive tests has been uncovered in the investigation, the IP has identified that evidence and will have provided it to WADA. The different types of evidence provided with respect to any individual athlete are like strands in a cable. It will be up to each Results Management Authority to determine whether the provided strands of evidence, standing alone or together build a sufficiently strong cable to support an ADRV in an individual case. Alternatively, the information may simply provide intelligence of that athlete as "benefiting from alleged manipulations to conceal positive doping tests" and may inform possible future targeted testing by the federation."

25. The IBSF Doping Hearing Panel refers to the declaration of the Independent Person (Professor Richard H. McLaren, O.C., hereinafter to be referred to as well as "**McLaren**") in this respect that was submitted on September 21, 2017 on the request of the Oswald Commission (Submission 4 in the IOC Package relating to the Athlete). The Independent Person repeats that the evidence in the matter of the Athlete *"was never obtained to establish an Anti Doping Rule*

Violation case against individual athletes. For the avoidance of any doubt and to be very clear, the focus of the IP Investigation, based upon its mandate, was to review evidence to establish whether "there had been a manipulation of the doping control process during the Sochi Games..." and to "identify the modus operandi and those involved in such manipulation" (p.1).

26. The Oswald Commission concur with the conclusion of McLaren of the existence during the Olympic Winter Games Sochi 2014 of a scheme in which the samples of protected Russian athletes (.....) were swapped (..) (Oswald Decision, paragraph 129-132).
27. From the general observations of McLaren, the Oswald Commission comes to the conclusion that in general the investigation by McLaren "*contain a wealth of relevant elements, which have contributed to help the Disciplinary Commission to understand the scheme put in place in Sochi and the implication of athletes therein*" (Oswald Decision, paragraph 142).
28. The Oswald Commission's mission was to conduct investigations into Russian athletes who participated in Sochi 2014 to determine whether they, and if so, which athletes, had actually participated in the conspiracy mentioned by McLaren and benefitted from it (Oswald Decision, paragraph 95).
29. The Oswald Commission stated that "*the relevance of the elements related to the individual athletes has to be considered from a different perspective*" (paragraph 133 of the Oswald Decision). The Oswald Commission observed that in his reports and specifically in the IP Report 2 McLaren carefully explained how the elements provided in his reports regarding individual athletes had to be understood and used.
30. The Oswald Commission qualifies as the authority responsible for assessing the relevant evidence in cases concerning the application of the IOC Anti-Doping Rules. It came to the conclusion that the relevant evidence in this respect unquestionable includes the elements provided in the reports and also in the EDP's, which McLaren prepared for that very purpose in respect of each of the athletes against which the Oswald Commission has opened proceedings (paragraph 138 and 140 of the Oswald Decision).
31. The Oswald Commission in this respect qualified the statements of Dr Grigory Rodchenkov as being of major significance (Oswald Decision, paragraph 243). All evidence that McLaren had available was tested against the statements of Dr Rodchenkov and since (the team of) McLaren was the only person that had access to Dr Rodchenkov in this respect, the Oswald Commission concluded that McLaren is the best placed person to make an assessment of the reliability of what Dr Rodchenkov had reported. McLaren came to the conclusion that Dr Rodchenkov was

a "truthful witness". This was one of the key findings of McLaren Oswald Decision, Paragraph 245 and 246).

32. The Oswald Commission reviewed all aspects of the case and all elements available and became convinced that Dr Rodchenkov was telling the truth for a large number of reasons, of which a number are mentioned in paragraph 249 of the Oswald Decision. Dr Rodchenkov was the main actor in the system and he is the best placed person to explain what it was, according to the Commission.

The qualification "major significance" by the Oswald Commission referring to Dr Rodchenkov's statements makes sense, since in a number of cases against the athletes involved there was no other evidence available (no Salt, no scratches or marks on bottles) other than the fact that the athlete was mentioned by Dr Rodchenko to be on the "Duchess-list".

B. Dr Rodchenkov

33. The Oswald Commission in the case of the Athlete reports its findings in Paragraph 365 up to and including Paragraph 388. Reference is made to Oswald Decision.
34. The subjects paragraphs show that the Oswald Decision leans heavily in the individual case of the Athlete on the statements of Dr. Rodchenkov. This is not surprising, where McLaren and consequently the Oswald Commission came to the conclusion that "*Dr. Rodchenkov was the main actor in the system and he is the best placed person to explain what it was*".
35. The IBSF Doping Hearing Panel is prepared to accept the conclusions drawn in the McLaren reports about the involvement of individual athletes and the trustworthiness of Dr Rodchenkov. The IBSF Doping Hearing Panel has at least no grounds to come to another decision in this respect.
36. However, the conclusion of both McLaren and the Oswald Commission that (a) Dr Rodchenkov is the main actor in the system and (b) the best placed person to explain what it was, is the core of the decision of the Oswald Commission to sanction individual athletes and is at the foundation of the decision of the IBSF to provisionally suspend the Athlete.
37. The athletes that are confronted with the statements of Dr Rodchenkov and that are implicated by his accusations need to be protected and safeguarded by legal rights in order to provide them a due process. This leading principle is here the core of what the IBSF Doping Hearing Panel will have to decide upon.

- 38 The IBSF Doping Hearing Panel will review in that respect two main arguments that are relevant to the question whether the athletes were protected sufficiently in their legal rights to receive due process, being Article 6 § 1 of the European Convention for the Protection of Human Rights regarding the right to a fair process and the provisions regarding Substantial Assistance in the WADA Code and in the (identical) IBSF ADR.

C. ECHR

39. The IBSF Doping Hearing Panel respects the fact that the internal proceedings of the IBSF do not require protection in the same manner as the accused in a criminal proceeding, for example. However, it is generally accepted by WADA following the receipt of a detailed opinion from the former President of the European Court of Human Rights Judge Jean-Paul Costa, that the applicability of the principles of proportionality and human rights are now expressly in the purpose, scope and organization of the Code.
[\(<https://www.wada-ama.org/en/resources/legal/legal-opinion-on-the-draft-2015-world-anti-doping-code>\)](https://www.wada-ama.org/en/resources/legal/legal-opinion-on-the-draft-2015-world-anti-doping-code).

40. According to Judge Jean Paul Costa:
"Whenever disciplinary anti-doping procedures concern rights and obligations of a civil nature, they fall under the scope of application of Article 6 § 1 of the Convention regarding the right to a fair trial."

According to the IBSF Doping Hearing Panel the principle of Article 6 of the Convention has to be reflected in the same manner in matters regarding Provisional Suspension as in Final Decisions, when assessing whether an previous decision (the Oswald Decision, on which a provisional or final suspension respectively will have to be based) complied with the right of the Athlete to a fair trial.

41. When considering the admission of evidence from absent witnesses, as is the case in the Oswald Decisions where Dr. Rodchenkov as key witness was not examined or cross examined, the European Court of Human Rights used to apply a three-step process in assessing whether Article 6 has been complied with:
1. Were there good reasons for the witnesses absence from the trial?
 2. Was the absent witness' evidence "sole or decisive"?
 3. Did sufficient counterbalancing factors exist?
- [\(<https://ukhumanrightsblog.com/2016/09/30/strasbourg-again-favouring-safety-of-conviction-over-cross-examination-of-witnesses/>\)](https://ukhumanrightsblog.com/2016/09/30/strasbourg-again-favouring-safety-of-conviction-over-cross-examination-of-witnesses/).

42. In more recent cases the European Court relied more strongly on the sole question whether there is other supporting evidence securing the conviction other than the evidence of the absent witness. The threshold for the sufficiency of additional evidence will be higher in the event that the absent witness evidence is more important, as is the matter in the subject case.

42. According to the IBSF Doping Hearing Panel there were no good reasons for Dr Rodchenkov to be absent from the hearing before the Oswald Commission. Dr Rodchenkov mentioned in an article in the New York Times ("**NYT**") of September 22, 2017 (**Annex VII** hereto) his availability and willingness to provide his testimony before WADA and Hearing Panels of Federations, but none of them ever sought to interview him. According to Dr Rodchenkov in the same NYT interview only one of the two IOC commissions established to investigate Russian doping asked for his evidence –and "*that was just two weeks ago*" (thus around 8 September 2017). This latter request will have led to the affidavit of Dr Rodchenkov of November 2, 2017,

43. The fact that Dr Rodchenkov was able to give an interview to the NYT in September 2017 and the fact that there were apparently no constraints for that, questions the attempts made by the Oswald Commission to have Dr Rodchenkov present (even by skype or other technical means) at a hearing before its commission to be interrogated by the Oswald Commission and cross examined by the Athlete's representatives. The statement in Paragraph 272 of the Oswald Commission is not sufficient justification to be absent if invited properly and timely. The question remains why Dr Rodchenkov was not already invited at the very start of the Oswald Commission, in order to avoid the time pressure that is now used as an argument why the affidavit of Dr Rodchenkov would suffice:

"Because of the constraints linked to the conditions imposed on any intervention of Dr Rodchenkov on the one hand, and the already mentioned time constraints requiring a resolution of the matters without further delay, the only practicable solution at that stage of the proceedings was the provision of written affidavits."

44. In the opinion of the IBSF Doping Hearing Panel and being the foundation of both McLaren and the Oswald Commission the evidence of Dr Rodchenkov -the absent witness- was "decisive" in placing sanctions on the Athlete.

45. In earlier CAS matters similar arguments have been used, although reference was made not to article 6 of the Convention but to Swiss procedural law:

CAS 2015/ A/3925 Traves Smikle v. Jamaica Anti-Doping Commission (JADCO)

"35. At the beginning of the hearing and after considering the respective arguments of Appellant and Respondent, the Panel determined that the admissibility of Dr. Schanzer's 27 May 2015 expert report is a matter of Swiss procedural law and exercised its discretion to exclude it as evidence because of his unavailability for cross examination during the hearing in accordance with its 18 May 2015 ruling."

In the above matter the expert report was declared inadmissible since the expert was not available for cross examination. The similarities with the subject case are clear.

D. WADACODE AND IBSF ADR: SUBSTANTIAL ASSISTANCE

46. It goes without saying that Dr Rodchenkov has committed an Anti-Doping Rule Violation as provided for in the WADA Code and the IBSF ADR, during the years that he ran the Moscow Laboratory as director.

47. By cooperating with McLaren in disclosing evidence about a widespread doping scheme in Russia, Dr Rodchenkov is to be regarded as an individual providing "Substantial Assistance in Discovering or Establishing Anti-Doping Rule Violations". The WADA Code (applicable in this matter through article 1.2 of the IOC -Doping Rules) in article 10.6.1 and the IBSF ADR in article 10.6.1 allows to:

"suspend a part of the period of Ineligibility imposed in an individual case in which it has results management authority where the Athlete or other Person has provided Substantial Assistance to an Anti-Doping Organization, criminal authority or professional disciplinary body which results in: (i) the Anti-Doping Organization discovering or bringing forward an anti-doping rule violation by another Person, or (ii) which results in a criminal or disciplinary body discovering or bringing forward a criminal offense or the breach of professional rules committed by another Person and the information provided by the Person providing Substantial Assistance is made available to IBSF."

48. The definition of Substantial Assistance according to the WADA Code and the IBSF ADR reads:

"Substantial Assistance: For purposes of Article 10.6.1, a Person providing Substantial Assistance must: (1) fully disclose in a signed written statement all information he or she possesses in relation to anti-doping rule violations, and (2) fully cooperate with the investigation and adjudication of any case related to that information, including, for example, presenting testimony at a hearing if requested to do so by an Anti-Doping Organization or hearing panel. Further, the information provided must be credible and must comprise an important part of any

case which is initiated or, if no case is initiated, must have provided a sufficient basis on which a case could have been brought."

49. In the definition of "Substantial Assistance" there are important procedural obligations inserted, that to the opinion of the Doping Hearing Panel are there to be able for the Anti-Doping Organization or Hearing Panel to consider the reliability of the individual providing such assistance and—even so important- to safeguard the legal position of third parties, among which other athletes, against allegations of such individual without the third parties (athletes) being able to adequately defend themselves against these allegations. Two of such procedural obligations are:

- A) presenting testimony at a hearing
- B) before a hearing panel or Anti-Doping Organization if so requested,

50. Both obligations have not been complied with in the subject case. The testimony of Dr Rodchenkov to McLaren cannot be regarded as a testimony before an Anti-Doping Organization or hearing panel,. The mandate of McLaren was of another nature and he made clear in several statements that the evidence he received was never obtained to establish an Anti-Doping Rule Violation case against the individual athletes.

Dr Rodchenkov was requested by the Oswald Commission to present his testimony at a hearing since the Oswald Commission stated that it had preferred to be able to hear Dr Rodchenkov in person. Instead of the hearing Dr Rodchenkov submitted an affidavit.

51. The IBSF Doping Hearing Panel regards the fact that no examination of Dr Rodchenkov took place before an Anti-Doping Organization or hearing panel, where he was prepared to provide his testimony at a hearing and the Oswald Commission itself preferred the same, (even as the representative of the Athlete did) as a violation of the WADA Code and the IBSF ADR on the obligation to follow procedural rules in respect of substantial assistance in discovering Anti-Doping Rule Violations.

V CONCLUSION

52. The IBSF Doping Hearing Panel comes to the conclusion that not hearing Dr Rodchenkov before a proper Disciplinary Commission or Hearing Panel instead of exclusively before McLaren is in breach of the WADA Code and the IBSF ADR and especially of article 10.6. of the WADA Code and article 10.6. of the IBSF ADR.

53. The IBSF Doping Hearing Panel comes to the conclusion that not hearing Dr Rodchenkov before a proper Disciplinary Commission or Hearing Panel instead of exclusively before McLaren is convincingly probable to be successfully contested before a Court as being not compatible with

the principles of international law, Swiss procedural law and in particular with article 6 § 1 of the European Convention for the Protection of Human Rights regarding the right to a fair process.

- 54 Following from the above conclusions it leads the IBSF Doping Hearing Panel to the finding that a provisional suspension of the Athlete under the current, exceptional circumstances would be clearly unfair within the meaning of article 7.9.3.2 sub (c) of the IBSF ADR.

The IBSF Doping Hearing Panel emphasises that article 7.9.3.2 sub (c) just refers to the fact that a Provisional Suspension prior to a final hearing in accordance with Article 8 would be clearly unfair. The Doping Hearing Panel envisages that at such IBSF final hearing or at another hearing before a Disciplinary Doping Panel such as for instance CAS, the procedural deficiency mentioned above may be removed by examining and cross-examining Dr. Rodchenkov (as said before, to which he has declared to be prepared).

55. The decision of the IBSF Doping Hearing Panel following the considerations in this document is not to re-impose the provisional suspension of the Athlete.
56. The IBSF Doping Hearing Panel would like to add the following consideration to its decision in this matter. The IBSF Doping Hearing Panel did not make any decision in this document about the validity of the McLaren report and the documents that have been made available to the IBSF. Nor has the IBSF Doping Hearing Panel expressed any opinion on the Oswald Decision, other than that the IBSF Doping Hearing Panel came to the conclusion that there was a legal necessity to have Dr Rodchenkov as witness available for examination and/or cross examination in order to create equality of treatment and therewith due process, which the Oswald Commission denied wrongfully.

DECISION

1. The IBSF Doping Hearing Panel having considered all information made available to it and for all the legal reasons and in the exceptional circumstances mentioned above dilligently comes to the conclusion not to re-impose the provisional suspension of Alexandr Zubkov that was imposed on him by the IBSF on 23November 2017 and lifted by the IBSF Doping Hearing Panel on December 1, 2017.
2. The IBSF Doping Hearing Panel noted that no application was made by the IBSF in respect of costs. Therefore, the IBSF and the Athlete shall bear their own costs.

Prof. Dr. Ian Blackshaw

Prof. Dr. Peter Hemmersbach

Advocaat Dolf Segaar

**International Bobsleigh & Skeleton Federation
Doping Hearing Panel
Provisional Suspension**

Aleksandr Zubkov

Submission to the International Bobsleigh & Skeleton Federation

15 December 2017

Mr Philippe Bärtsch
Dr Christopher Boog
Ms Anya George
Dr Anna Kozmenko
Dr Annabelle Möckesch
Dr Philip Wimalasena
Mr Luka Grosej
Schellenberg Wittmer Ltd
Attorneys at Law
15bis, rue des Alpes
P.O. Box 2088
1211 Geneva 1 / Switzerland
T +41 22 707 8000
F +41 22 707 8001
www.swlegal.ch

SCHELLENBERG 
WITTMER

Table of Contents

I.	Introduction	3
II.	The IOC investigations have not revealed any evidence that would justify a provisional suspension	5
A.	The results of the re-examination of sample bottles	5
1)	The IOC's experts findings contradict Dr Rodchenkov's allegations	5
2)	The IOC's experts methodology is flawed	6
a)	The developed classification does not contain a category for uncertain or inconclusive marks.....	6
b)	The empirical data is too limited	7
c)	The Lausanne Laboratory omitted to test any alternative hypotheses.....	8
d)	The Lausanne Laboratory did not modify its initial hypothesis after it had failed	8
e)	There is no explanation as to why 12 or more clicks could be disregarded in the Lausanne Laboratory's further experiments	9
f)	The methodology is entirely based on Dr Rodchenkov's unverified allegations	10
g)	The Lausanne Laboratory's experiments were not conducted under comparable conditions	11
h)	The marks are only examined through the distortion effect of the plastic cap, which increases the error rate	11
i)	The Lausanne Laboratory's team members were not qualified to conduct the forensic analysis of the sample bottles	12
3)	No evidence of tampering	12
B.	The salt content analysis.....	13
C.	The Duchess List	14
1)	The purpose of the Duchess List is dubious.....	14
2)	The origin of the Duchess List is dubious	15
3)	The Duchess List contains inconsistencies that further diminish its probative value.....	16
D.	The Medals-by-Day List	17
E.	Dr Rodchenkov's affidavit	17
F.	Dr Rodchenkov's alleged diary	20
G.	Professor McLaren's affidavit.....	20
III.	Conclusion.....	21

I. INTRODUCTION

1. Mr Aleksandr Zubkov files this submission in support of the oral arguments presented by his counsel on 15 December 2017 before the Hearing Doping Panel of the International Bobsleigh & Skeleton Federation ("**IBSF**").
2. In late December 2016, the Disciplinary Commission of the International Olympic Committee (the "**IOC Disciplinary Commission**" or the "**Oswald Commission**") opened a formal investigation against Mr Zubkov in relation to an alleged anti-doping rule violation ("**ADRV**") during the Sochi Olympic Games in 2014. This investigation was based on a general suspicion against Russian athletes in the wake of the McLaren Independent Person Report (the "**McLaren Report**")¹. No circumstances in Mr Zubkov's behavior have given rise to the investigation nor has any evidence of wrongdoing been discovered during the course of it.
3. In fact, as further developed below, the IOC Disciplinary Commission, which bears the burden of proving an ADRV, has not presented any evidence that Mr Zubkov committed any wrongdoing. Nevertheless, the IOC Disciplinary Commission decided to sanction Mr Zubkov. For the reasons explained below, this decision is fundamentally wrong and was rendered in breach not only of the applicable burden of proof but also of Mr Zubkov's due process rights.
4. On 29 November 2017, following the issuance of the operative part of the decision of the IOC Disciplinary Commission, the IBSF initially decided to provisionally suspend Aleksandr Zubkov.
5. On 1 December 2017, having heard the arguments presented by Mr Zubkov's counsel, the IBSF Doping Hearing Panel decided that the provisional suspensions imposed on Mr Zubkov had to be lifted ("**1 December 2017 Decision**"). The IBSF Doping Hearing Panel indeed held – rightly so – that "*there is still not yet sufficient evidence of the above mentioned individual athletes and officials that would justify the provisional suspension being maintained for the time being*".
6. Meanwhile, the IOC Disciplinary Commission issued the reasoned decision against Mr Zubkov, which is currently being challenged before the Court of Arbitration for Sports ("CAS") – where Mr Zubkov hopes and trusts justice will be done.
7. For the reasons set out below, the issuance of the IOC Disciplinary Commission's reasoned decision does not – and cannot – constitute a "*new development*" or a basis justifying a provisional suspension.
8. In this context, it is important to remember that the IOC Disciplinary Commission's findings are based almost entirely on the allegation of one sole person, Dr Grigory Rodchenkov, the former director of the Moscow WADA-accredited laboratory, who is not a truthful person and whose allegations were never tested by the IOC. Furthermore, Mr Zubkov was not given the opportunity to cross-examine Dr Rodchenkov, who

¹ The McLaren Report consists of two parts: the McLaren Independent Person Report – Part I dated 18 July 2016 ("**McLaren Part I**") and the McLaren Independent Person Report – Part II dated 9 December 2016 ("**McLaren Part II**").

allegedly refused to appear before the IOC Disciplinary Commission, whilst giving interviews and leaking information to the media.

9. The IOC Disciplinary Commission has openly admitted that Mr Zubkov (as well as many other Russian athletes) are being sanctioned not because of any evidence that they committed an ADRV, but rather because they are suspected of being "*part of a conspiracy, which infected and subverted the Olympic Games*".² Aside from the fact that this approach amounts to collective justice and is consequently fundamentally unlawful, the IOC Disciplinary Commission is operating outside of the boundaries of the applicable rules and regulations by imposing the most extreme of sanctions against them (including Mr Zubkov) based on untested assumptions, rather than on evidence.
10. Indeed, the IOC bears the burden of proving that Mr Zubkov committed an ADRV and it must discharge this burden "*to the comfortable satisfaction of the hearing panel bearing in mind the seriousness of the allegation*". In this case, the IOC has entirely failed to discharge that burden: First, there is no evidence that Mr Zubkov committed an ADRV, including that he consumed a Prohibited Substance (direct evidence). Second, there is no evidence that Mr Zubkov otherwise had knowledge, was involved in or even benefitted from anti-doping rule violations committed by third parties, for example through subsequent manipulations of his urine samples (indirect evidence). There was therefore no basis whatsoever for the IOC Disciplinary Commission for imposing sanctions on Mr Zubkov, let alone sanctions as severe as a life-long ban.
11. The IOC Disciplinary Commission rendered its decision with complete disregard not only to applicable standards of evidence, but also to Mr Zubkov's due process rights. Mr Zubkov was informed only in October 2017 of the allegations made against him – and then only in a vague manner. At the same time, he was provided with files comprising several hundreds of pages, including laboratory reports and scientific analyses of his urine samples, and invited to comment on those documents within a matter of two to three weeks. Much of this "evidence" was provided by the IOC only as of October 2017 even though it had been available months and sometimes over a year earlier. The evidence kept coming in from the IOC on a piecemeal basis, including a mere few hours before the hearing. Mr Zubkov was left with no time to prepare rebuttal evidence and, in addition, was not given the opportunity to cross-examine Dr Rodchenkov and Professor McLaren, on whose testimony the IOC's entire case is built. As a consequence of all these procedural violations, Mr Zubkov was deprived of the right to be heard, including the right to properly present his case before the IOC Disciplinary Commission.
12. The findings of the IOC Disciplinary Commission are therefore tainted from both a substantive and a procedural perspective.
13. They cannot serve as a basis to impose a provisional suspension on Mr Zubkov pending the appeal before the CAS.

² Decision of the IOC Disciplinary Commission in the proceedings against Mr Aleksandr Zubkov (SML-028), dated 6 December 2017, para. 543.

14. It should also be mentioned that the IOC Disciplinary Commission's finding that there was a "state-sponsored" doping scheme is contradicted by the findings of the Schmid Commission that there is no "*documented, independent and impartial evidence confirming the support or the knowledge of this system by the highest State authority*".³
15. Furthermore and as more fully described below, the additional forensic analysis obtained by the IOC Disciplinary Commission in fact confirms that Dr Rodchenkov's allegations are untrue:
 - If there had been a systematic bottle tampering, the IOC's expert (whose methodology is flawed) should have found T-marks on all the examined bottles. Significantly, he did not.
 - The IOC's expert findings also confirmed that fully closed bottles cannot be opened without leaving multiple T-marks, not even when they are not fully closed.
 - The IOC's expert has not been able to open any bottle that was fully closed without destroying the cap or leaving very significant marks, which is not surprising. Considering that a doping control officer was verifying that the process was respected and that the bottles were fully closed, the bottles could not have been tampered with, unless with the complicity of anti-doping officers. However, this has never been alleged let alone proven.

II. THE IOC INVESTIGATIONS HAVE NOT REVEALED ANY EVIDENCE THAT WOULD JUSTIFY A PROVISIONAL SUSPENSION

16. As will be demonstrated in the following paragraphs, the alleged "evidence" obtained by the IOC during its investigations has not revealed any wrongdoing, let alone the commitment of an ADRV, on the part of Mr Zubkov. Thus, the findings of the Oswald Commission are wrong and there are no elements that would justify issuing a provisional suspension.

A. The results of the re-examination of sample bottles

17. The results of the re-examination of Mr Zubkov's sample bottles collected during the Olympic Games in Sochi do not confirm that Mr Zubkov's sample bottles were tampered with.
 - 1) **The IOC's experts findings contradict Dr Rodchenkov's allegations**
18. Dr Rodchenkov alleges that there was a systematic bottle tampering and urine swapping in Sochi. If this would have indeed been the case, Professor Champod should have found evidence of tampering on all the bottles he examined. As a matter of fact, he did not.
19. In addition, by Professor Champod's own admission it is impossible to open properly closed bottles without leaving T-marks.

³ IOC Disciplinary Commission's Report to the IOC Executive Committee, p. 24; see also p. 26.

20. Finally, Professor Champod has not been able to open any bottles that were fully (and thus properly) closed.

2) The IOC's experts methodology is flawed

21. The developed methodology and the forensic analysis of the sample bottles present several serious flaws that call into question the reliability of the conclusions drawn in the corresponding reports.

a) The developed classification does not contain a category for uncertain or inconclusive marks

22. The Lausanne Laboratory classifies marks as F marks, U marks or T marks. According to the First Methodology Report, those categories have the following meaning:

"F marks [...] are typical of those observed consecutive to the manufacturing process either at Berlinger or its suppliers";

"U marks [...] are typical of those observed on inside of the cap either by the spring or the metallic ring when the bottle is regularly closed";

"T marks [...] are typical of those observed consecutive to a tampering activity."⁴

23. This classification is problematic for the following reasons:

24. The Lausanne Laboratory fails to duly reflect uncertainty in the classification of marks. It classifies all marks that it considers to be neither U marks nor F marks as T marks. It thereby assumes that all marks that are not compatible with F or U marks are marks typically observed consecutive to a tampering activity. Its classification does not contain a fourth category for inconclusive or uncertain marks. Its methodology thereby does not allow for any error rate or alternative explanation of the marks. Such method is not scientifically sound.

25. This is surprising as the report acknowledges that the distinction between the different categories of marks is not certain. In particular, the Lausanne Laboratory states that "*the marks left by the metal ring (due to the force induced to the tool) cannot be easily distinguished from marks left by the metal ring when the bottle is normally closed".⁵ This suggests that there is a degree of compatibility between T and U marks, meaning that certain marks could potentially fall into either category.⁶ Consequently, a further category for inconclusive marks would have been necessary.*

26. The Lausanne Laboratory further admits that although certain marks were not compatible with the T marks it had produced under controlled conditions, it nevertheless classified these marks as T marks:

⁴ See, e.g., Lausanne Laboratory, "Forensic report PFS 17.0056 / B2889607 Examination of marks inside the plastic cap of urine sample bottles", dated 12 October 2017 (066_N_Report_B2889607_2017-10-12_No T marks), pp. 2-3; see also First Methodology Report, pp. 10-11.

⁵ First Methodology Report, p. 31.

⁶ See also SNFC Report, p. 22.

"The observation of a T mark or a few T mark(s) in isolation (on one face or two adjacent faces) is an observation that we have not made during our tests, neither on normally closed bottles nor on bottles that we had tampered with. This observation raises the possibility of tampering but it cannot be assessed against the alleged tampering proposition. This is because these observations are also absent from the corpus of T marks that we produced under controlled conditions. The observations may suggest that another tampering method has been used, but it may also be because of some other unknown phenomenon."⁷

27. The Lausanne Laboratory also explicitly acknowledges that it cannot be certain of the origins of the marks:

"When a bottle of questioned status will be examined, the real nature of any observed marks – i.e. the exact mechanism whereby the marks were produced – will be unknown. That being said, we will still use the same taxonomy and assign labels (F, U or T) to the observations made on the cap. These labels will not mean that the nature of the marks is definitely established [...] the labels F, U or T assigned to observed marks will only indicate that their source (Factory, Usage or Tools) is presumed."⁸

28. The Lausanne Laboratory further states that the marks' "attributes (size, position, shape and direction) are compatible with what we have seen on marks of known status."⁹ What this means is that the Lausanne Laboratory only analyzed whether the marks and scratches observed on the Sochi samples were potentially compatible with – or rather not incompatible with – marks and scratches that the Lausanne Laboratory itself had created by forcefully opening a few sample bottles in their laboratory (i.e. "marks of known status").

b) The empirical data is too limited

29. The "marks of known status" the Lausanne Laboratory refers to¹⁰ are the marks that examiners created by re-opening "the limited number" of eleven bottles under controlled conditions during the development of its methodology.¹¹ It is highly questionable whether this limited number of samples is of a suitable size to produce reliable empirical data. The examiners themselves admit this, by stating that they "could no [sic] claim that it is impossible" to make observations of multiple T marks under the proposition of normal use of the bottle.¹²

⁷ E.g., Lausanne Laboratory, "Forensic report PFS 17.0056 / B2889781 Examination of marks inside the plastic cap of urine sample bottles", dated 26 September 2017 (I_Report_B2889781_2017-09-26), p. 5 (emphasis in original and added).

⁸ First Methodology Report, p. 34 (Emphasis added); see also Second Methodology Report, p. 9.

⁹ First Methodology Report, p. 34.

¹⁰ First Methodology Report, p. 34.

¹¹ First Methodology Report, p. 12; Second Methodology Report, p. 8.

¹² First Methodology Report, p. 40.

c) The Lausanne Laboratory omitted to test any alternative hypotheses

30. The report suffers from a further major flaw in that it examines only two propositions, namely:
- (a) that the sample bottles were "*initially closed according to regular instructions, then forcibly opened using metallic tools and resealed with the same cap*"¹³ or
 - (a) that the bottles were "*used and closed following regular instructions without any wrongdoing*."¹⁴
31. The Lausanne Laboratory explicitly admits that "*only the above-described tampering method has been investigated and not all conceivable usages of the bottles or actions that may facilitate its opening*."¹⁵
32. The Lausanne Laboratory thus omitted to test any alternative hypotheses. These could have, for example, included the following:
- individual manufacturing characteristics due to the bottles being produced on different machines; or
 - the introduction of foreign particles into the bottles during sample collection as a result of contamination or from particles within the urine itself; or
 - an act of sabotage.
33. By restricting their examination to the two stated propositions, the Lausanne Laboratory accepted without further ado the hypothesis that any marks on the bottles that were not U or F marks were produced by tampering and that the tampering occurred as (vaguely) described by Dr Rodchenkov. Such a methodology violates scientific standards. The experts should instead have tested all possible means by which the marks could have been produced to ascertain if their working hypothesis could be validated in isolation to all other possibilities. At the very least, they ought to have tested for likely alternative hypotheses such as those outlined above.

d) The Lausanne Laboratory did not modify its initial hypothesis after it had failed

34. As previously stated, for both propositions examined, the Lausanne Laboratory proceeded on the basis that the bottles were "*initially closed according to regular instructions*".¹⁶
35. The Lausanne Laboratory does not explain in its report what "regular" instructions are. However, the manufacturer's instructions, to which it refers in its report,¹⁷ and the applicable anti-doping rules are instructive in this respect.

¹³ First Methodology Report, p. 3.

¹⁴ First Methodology Report, p. 3.

¹⁵ First Methodology Report, p. 3.

¹⁶ First Methodology Report, p. 3 (Emphasis added).

36. The instructions issued by the manufacturer provide that the bottles should be closed "*by gently pressing the caps downwards while turning at the same time in a clockwise direction (hear a few clicks while turning). Keep on turning the cap until it moves no further.*"¹⁷ This means that the bottles were to be closed to the maximum of 15 clicks.¹⁹
37. During the urine collection procedure, the Athletes were supervised by a DCO, who was "*responsible for ensuring that each Sample is properly collected, identified and sealed*"²⁰ and who had to "*check, in full view of the Athlete, that the containers have been properly sealed.*"²¹ According to the manufacturer's instructions, this meant that:
- "The DCO shall instruct the athlete to do the following:*
- (a) *try to move the cap in an anti-clockwise direction in order to make sure that the cap is securely closed (or check with help of template)*
 - (b) *try to lift the cap up to make sure it cannot be removed*
 - (c) *turn the bottle upside down to see if there is any evidence of leakage*
- After the athlete's approval, the DCO shall follow the same steps in order to make sure that the BREG-KIT is completely and securely closed.*"²²
38. Therefore, the DCO had to take the necessary steps to ensure that the sample is properly sealed, including closing the bottle to the maximum possible click, *i.e.* 15 clicks. Consequently, following regular instructions would result in sample bottles being closed with 15 clicks.
39. After a few tests, the Lausanne Laboratory realized that too many marks were left when opening the bottles at 12 clicks or more and that they were unable to open bottles closed with 14 or 15 clicks without seriously damaging the cap or tools.²³ They therefore chose to vary the state of closure between 6 and 11 clicks.²⁴ Even though the original hypothesis ("*bottles initially closed according to regular instructions*") had failed, the Lausanne Laboratory did not expressly modify its hypothesis or raise a new hypothesis. This is contrary to the scientific method (and, frankly, a rather plain sign of bias). The scientific results are therefore not valid.
- e) There is no explanation as to why 12 or more clicks could be disregarded in the Lausanne Laboratory's further experiments**
40. In addition and most importantly, any further explanation as to why 12 or more clicks could be disregarded in the Lausanne Laboratory's further experiments is missing. This is

¹⁷ See First Methodology Report, pp. 9-10.

¹⁸ Berlinger's Handling instruction BREG-KIT urine in a cardboard box, 2012, p. 2 (Emphasis added).

¹⁹ See First Methodology Report, pp. 9-10.

²⁰ Annex D.3 of the Sochi ADR.

²¹ Annex D.21 of the Sochi ADR.

²² Berlinger's Handling instruction BREG-KIT urine in a cardboard box, 2012, p. 2.

²³ See First Methodology Report, p. 26; SNFC Report, p. 19.

²⁴ First Methodology Report, p. 26.

worrying as it is most likely that many sample bottles were closed with 12 clicks or more in Sochi.

41. The Lausanne Laboratory's assumption that the bottles were closed with less than 12 clicks is also incompatible with Dr Rodchenkov's statement in his affidavit to the Schmid Commission that the athlete passed the sealed A and B sample bottles "to the DCP for a final secure tightening and leak check".²⁵ A secure tightening would have required closing the bottles to the very end, and the DCP – as confirmed by Dr Rodchenkov – would have made sure that this was done properly.
42. The explanation provided in the Second Methodology Report that the position of oblique T marks allows the Lausanne Laboratory to determine the degree of closure²⁶ is also not convincing. It suffers from the same flaws as the First Methodology Report. First, the Mr Zubkov notes with surprise that the experts did not even mention these marks in their first report. Second, these marks are only compared with the marks found on five out of 21 bottles closed between six and ten clicks.²⁷ In addition, the experts could not explain why 40 per cent of the bottles containing multiple T marks did not contain any such alleged oblique marks. They simply stated that "*these oblique marks may be absent for multiple reasons such as a variation in the way work with the tools or the skill of the operator.*"²⁸ This could not indicate in clearer terms that there is an alternative explanation.

f) The methodology is entirely based on Dr Rodchenkov's unverified allegations

43. The methodology that the Lausanne Laboratory developed is entirely based on Dr Rodchenkov's unverified allegations.²⁹ For example, the Lausanne Laboratory created the tools that they used to open sample bottles only on the basis of Dr Rodchenkov's very limited testimony.³⁰ It has never been verified whether these tools even resemble the alleged tools described by Dr Rodchenkov. In fact, there has been no contact whatsoever between the Lausanne Laboratory and Dr Rodchenkov.³¹ This is also highly questionable, considering that Mr Horne used different tools³² to produce what he appears to record as similar results. This implies that a range of items or conditions could result in the production of similar marks on the plastic caps.

²⁵ Rodchenkov Affidavit to the Schmid Commission, para. 107.

²⁶ Second Methodology Report, p. 23.

²⁷ Second Methodology Report, p. 26.

²⁸ Second Methodology Report, p. 26 (Emphasis added).

²⁹ See also SNFC Report, p. 11.

³⁰ First Methodology Report, p. 3 ("*During follow-up interviews with the IP, Dr. Rodchenkov recalled that he personally witnessed the actual tooling that was used laid out on the workbench of the FSB agent charged with removing the caps. He described instruments, no bigger than a traditional Mont-Blanc pen, and similar to the instruments that a dentist would use in examining teeth, with a handle and thin metallic portion that was bent at various angles.*").

³¹ Professor Champod has explicitly confirmed this at the hearings before the Oswald Commission on 13 and 22 November and 4 December 2017.

³² Mr Horne used thin metal strips (Forensic Report (EDP0902), p. 9).

g) The Lausanne Laboratory's experiments were not conducted under comparable conditions

44. The Lausanne Laboratory's experiments were also not conducted under conditions comparable to those in Sochi.
45. First, the Lausanne Laboratory only opened empty sample bottles in an upside down position, apparently because this was easier.³³ By contrast, if sample bottles in Sochi had been opened (which they were not), this would have happened when they were filled with urine. It is unclear whether the same marks would be produced irrespective of whether the bottles are opened in upside-down or right-side up position, and whether opening a filled bottle upside-down is even possible.
46. Second, the Lausanne Laboratory did not consider that the long-term freezing of sample bottles may have an impact on the marks inside the bottle caps. Freezing causes expansion and retraction, which can result in a degree of distortion or movement in the material of the bottles. It cannot be excluded that this could result in marking. Again, the Lausanne Laboratory did not analyze such an alternative hypothesis.
47. In a similar vein, the Lausanne Laboratory did not consider that the observed oxidation of the metal ring on a number of bottles³⁴ could have impacted the marks found on the plastic caps. Oxidation offers the possibility of flaking of the surface of the metal, thereby producing a foreign body within the confines of the cap and bottle, which could result in scratches on the inner surface of the plastic cap. The oxidation could be present as a layer over the base metal, thereby reducing the space (tolerance) between the plastic cap and glass bottle, potentially marking the plastic cap.
48. Overall, the analysis was not conducted with due regard to "real" conditions that may have affected the original Sochi samples.

h) The marks are only examined through the distortion effect of the plastic cap, which increases the error rate

49. The Lausanne Laboratory was asked to use only "*non-destructive methods*" to examine the sample bottles and therefore chose imaging techniques that can be deployed through the sample bottle caps.³⁵
50. In this respect, the Lausanne Laboratory itself acknowledges "[a]nother difficulty that surrounds the observation of the marks comes from their reflections on the grooves, the inner and the outer surfaces of the cap or on the glass surface. The appearance of marks also changes according to the orientation of the light and the variation of the width of plastic between the observer and the mark left on the internal surface."³⁶ Thus, a further weakness of the applied methodology is that the marks are not examined directly, but

³³ First Methodology Report, p. 19.

³⁴ First Methodology Report, p. 32.

³⁵ Second Methodology Report, p. 2.

³⁶ First Methodology Report, p. 31.

rather through the distortion effect of the plastic cap. This undisputedly increases the error rate.

i) The Lausanne Laboratory's team members were not qualified to conduct the forensic analysis of the sample bottles

51. Furthermore, the Lausanne Laboratory's team members were not qualified to conduct the forensic analysis of the sample bottles.
52. Several members of Team 1³⁷ asked to record potential marks and scratches on the inner surface of the sample bottles and to classify any marks as either F, U or T marks were not qualified for this task. Except for the team leaders, the members of Team 1 were BSc or MSc students. They were not employed at the University of Lausanne but recruited for this specific project only.³⁸ So they were completely inexperienced in assessing marks and scratches. In addition, these students did not undergo the regular training for forensic tool mark examiners, but only a limited training program of 15 days.³⁹ As such, these students were not qualified to carry out the required tasks. The SNFC seems to have been worried about this as well, stating that "*documents available on staff training and competence [...] raised some questions of concern as members of Team 1 appeared rather unexperienced and only trained for the specific task.*"⁴⁰

3) No evidence of tampering

53. Regarding sample no. 2869291 and sample no. 2889141 corresponding to the two samples of Mr Zubkov, the Lausanne Laboratory reported to have found multiple T marks.⁴¹ At the same time, the experts made the following observation:

*"We have never observed empirically such marks on bottles that have been regularly closed. **But, given the limited bottles (22 in total) we examined during the development of this methodology, we do not claim that it is impossible to make such observations under the proposition on normal use of the bottle.**"*⁴²

54. In other words, the experts acknowledged that the scope of their investigation was too limited to allow drawing any adverse inferences with respect to an alleged manipulation of

³⁷ The Lausanne Laboratory built two teams to carry out the forensic analysis of the sample bottles: Team 1 and Team 2.

³⁸ SNFC Report, p. 29.

³⁹ SNFC Report, p. 29.

⁴⁰ SNFC Report, p. 29.

⁴¹ Lausanne Laboratory, "Forensic report PFS 17.0056 / B2869291 Examination of marks inside the plastic cap of urine sample bottles", dated 12 October 2017 (073_M_Report_B2869291_2017-10-12_Multiple T marks), pp. 5-6 and "Forensic report PFS 17.0056 / B2889141 Examination of marks inside the plastic cap of urine sample bottles", dated 12 October 2017 (074_M_Report_B2889141_2017-10-12_Multiple T marks), pp. 5-6.

⁴² Lausanne Laboratory, "Forensic report PFS 17.0056 / B2869291 Examination of marks inside the plastic cap of urine sample bottles", dated 12 October 2017 (073_M_Report_B2869291_2017-10-12_Multiple T marks), p. 5 and "Forensic report PFS 17.0056 / B2889141 Examination of marks inside the plastic cap of urine sample bottles", dated 12 October 2017 (074_M_Report_B2889141_2017-10-12_Multiple T marks), p. 5 (Emphasis added).

Mr Zubkov's sample bottles. In particular, the Lausanne Laboratory expressly pointed out that these marks may be the result of a normal use of the bottles.

55. As a result, there is no reliable evidence confirming any tampering with Mr Zubkov's sample. More importantly, there is no evidence that could establish to a comfortable satisfaction that Mr Zubkov committed an ADRV.
56. Furthermore and importantly, it is not Mr Zubkov who has to prove his innocence in this matter. It is not upon him to prove that the sample bottles were not tampered with but rather the IOC bears the burden of proving an ADRV pursuant to Article 3.1 of the Code and must do so to the comfortable satisfaction of the panel. Based on the evidence adduced by the IOC, it is incomprehensible why the panel was comfortably satisfied of any tampering with Mr Zubkov's samples.

B. The salt content analysis

57. By letter dated 17 October 2017, the IOC notified Mr Zubkov that it intended to conduct a specific analysis of the salt content of Mr Zubkov's B-sample 2889141. The B-sample was opened on 26 October 2017, before the undersigned had even received the information that the sample would be opened. The undersigned therefore did not have an opportunity to attend the opening and splitting of Mr Zubkov's sample, let alone procure the assistance of a forensic expert.
58. The IOC transmitted the results of its analysis on 31 October 2017 late in the afternoon, not even two days before the filing deadline of the submission before the IOC Disciplinary Commission. Mr Zubkov was therefore unable to comment on the results of the IOC's analysis in that submission, but had to reserve the right to do so.
59. In any event, the allegedly abnormal salt levels in the urine sample of Mr Zubkov is no indication that the samples were tampered with as these specific salt levels may have been caused by a multitude of other factors.
60. First, the size of the reference population chosen by Professor Burnier is limited and likely to not be sufficiently large statistically to provide a reliable range of mean and standard deviation values.
61. Second, single urine samples (*spot urines*) as taken from Mr Zubkov in the case at hand entail considerable inaccuracy and are not considered as a valid indicator of individual sodium intake. This is because the values for urinary analytes (including sodium) as assessed by Professor Burnier are dynamic and can vary widely depending on the physiological state of the person providing the sample.
62. Third, there are individual physiological factors that can influence the sodium concentration in a human's urine, including her/his blood pressure, possible states of dehydration (i.e. after a sport competition) or shock. Moreover, salt levels may be influenced by external factors such as food intake and, more generally, eating habits. For example, the sodium concentration in a sample may depend on whether that person had eaten prior to testing as well as on the type of food and the quantities, bodyweight, medical conditions and other factors. Furthermore, scientific studies have found that test

persons from countries with traditional high-salt diets show significant higher sodium concentrations in their urine. It is therefore not possible to report a value as 'normal' or 'abnormal' without knowing the physiological state, body-weight and medical conditions of the individual at the time of testing. This is expressly admitted in the Burnier Report which states that "*there are no real reference values for these urinary methods.*"⁴³

63. Fourth, in order to measure the values for outliers (i.e. values in excess of the >3SD above the Vancouver reference population mean threshold), samples had to be diluted. In this case, a measurement is taken on the diluted sample and the result multiplied by the dilution factor. If done inaccurately, this can introduce a substantial multiplication error.

C. The Duchess List

64. In its decision, the IOC Disciplinary Commission extensively relies on the so-called Duchess List (EDP0055).⁴⁴ According to Dr Rodchenkov's allegations, this list identified those Russian athletes whose samples were to be automatically swapped for their clean urine during the Olympic Games in Sochi because they were authorized to take the Duchess cocktail prior to and during the Olympic Games.⁴⁵
65. However, the Duchess List has no probative value with respect to Dr Rodchenkov's allegations, including that Mr Zubkov used prohibited substances or were involved in, or knew of, any alleged tampering or doping scheme.

1) The purpose of the Duchess List is dubious

66. On its face, the Duchess List – like the Medals-by-Day List – is nothing more than a competition schedule prepared in advance of the Sochi Olympic Games to identify potential medal winners. This was confirmed by the Russian Olympic Committee in its submission to the Oswald Commission.⁴⁶ Professor McLaren in fact also describes the Duchess List in this way: "*The Duchess list shows the sport and names of the athletes down the left hand side and the dates of the events across the top. Plotted throughout the chart is the anticipated competition schedule for the 37 athletes.*"⁴⁷ There is no indication in the list itself that it had any other purpose.
67. The only basis for the proposition that the list served to identify in advance those athletes who were part of the purported doping scheme and whose samples were to be automatically swapped is Dr Rodchenkov's unsupported allegation to that effect.⁴⁸

⁴³ Report by Professor Burnier dated 5 October 2017, p. 4.

⁴⁴ Decision of the IOC Disciplinary Commission in the proceedings against Mr Aleksandr Zubkov (SML-028), dated 6 December 2017, paras. 153-162, 168, 249, 252, 334, 357.

⁴⁵ See Affidavit by Professor Richard McLaren, dated 27 October 2017, p. 4.

⁴⁶ Russian Olympic Committee's Submission to the Disciplinary Commission dated 5 November 2017, para. 15.

⁴⁷ Affidavit by Professor Richard McLaren, dated 27 October 2017, p. 5.

⁴⁸ See McLaren Part II, p. 37.

68. Neither Professor McLaren nor the Oswald Commission has ever verified whether this allegation is correct. It was only from 29 October 2017 onwards that the IOC filed affidavits allegedly prepared by Dr Rodchenkov. Aside from the fact that the IOC once again prevented Mr Zubkov from having a chance to duly address this new "evidence", it is noteworthy that the affidavits do nothing in terms of corroborating the previous evidence. If anything, it is further proof that Dr Rodchenkov's testimony cannot be relied on.
69. In fact, the forensic evidence proves that Dr Rodchenkov's story is false. Based on the reports by the Lausanne Laboratory, the Duchess List could not have had the alleged purpose of identifying in advance the athletes whose samples were to be automatically swapped. Otherwise, the experts would have found marks indicating tampering on all of the Duchess List athletes' bottles. With respect to many of the athletes allegedly listed on the Duchess List, however, the experts did not find T marks on the sample bottles. Either there were no T marks at all, or only isolated T marks, which do not – according to the Lausanne Laboratory – constitute evidence of tampering.⁴⁹ In addition, Professor Champod confirmed at a hearing before the Oswald Commission that he and his team never managed to open bottles without leaving any T marks. It is therefore mere speculation that the sample bottles could be opened without leaving any T marks. Hence, Dr Rodchenkov's allegation regarding the purpose of the Duchess List is not corroborated but in fact contradicted by the findings of the Lausanne Laboratory.
70. In addition, if the underlying purpose of the alleged doping scheme was to increase the number of Russian medal winners at the Olympic Games in Sochi, as alleged by Dr Rodchenkov,⁵⁰ it is incomprehensible that many of the athletes who were included on the Duchess List were not considered potential medal winners. More precisely, there are more than ten athletes on the Duchess List that are not mentioned on the "Who to Watch in Sochi: Russia" List, which provides an overview of all potential Russian medal winners.⁵¹
71. It should also be noted that Dr Rodchenkov was surprised himself that Aleksei Petukhov, known to him as a strong opponent of doping, was suddenly included on the Duchess List.⁵² This remark is a further indication that the Duchess List might not have had the alleged purpose.

2) The origin of the Duchess List is dubious

72. In addition, the origin of the Duchess List is and has remained throughout very dubious. The only source of information available in this regard is Dr Rodchenkov. There is no

⁴⁹ In total, 71 samples of 23 athletes (out of the 37 athletes on the Duchess list) were re-examined. Only 17 samples of 11 athletes contained multiple T marks (see Statistics provided by Dr Robinson at the hearing before the Oswald Commission on 4 December 2017).

⁵⁰ See Rodchenkov's Affidavit to the Schmid Commission, dated 2 November 2017, paras. 57-58, 62.

⁵¹ E.g., Julia Ivanova, Aleksei Negodailo, Maria Orlova, Olga Potylitsyna, Yana Romanova, Alexander Rumyantsev, Evgenia Shapovalova, Olga Stulneva, Dmitry Trunenkov, and Evgeniy Belov.

⁵² See Rodchenkov's Affidavit, dated 27 October 2017, paras. 102-103.

corroborating evidence establishing who compiled the Duchess List and whether the information contained therein is in any way accurate and reliable.

73. Neither Professor McLaren nor the IOC has disclosed metadata that could perhaps clarify by whom and when the Duchess List was created. In his Affidavit, Professor McLaren claims that he is unable to disclose the metadata due to alleged restrictions by the US authorities, without however explaining what these are and why they would prevent this information from being introduced into a legal proceeding where the prosecution is seeking to rely on the very document as "key evidence".⁵³
74. It is regrettable – to say at least – that Professor McLaren is refusing to provide information on one of the very few pieces of alleged evidence that exists in this case, making it impossible once again for Mr Zubkov to adequately rebut such allegations.

3) The Duchess List contains inconsistencies that further diminish its probative value

75. There are also inconsistencies within the EDP that raise further doubts as to the accuracy of the Duchess List. The Oswald Commission seeks to do away with these inconsistencies, stating that "*these details did not affect the overall value and credibility of the evidence provided by Professor McLaren in the reports and in the EDPs*".⁵⁴ The fact is, however, that (i) the inconsistencies pointed out by Mr Zubkov for a long time go far beyond mere translation errors, and (ii) neither McLaren nor the IOC have corrected all of the alleged "mistakes", although they could easily have done so. What is worth pointing out is that whenever Mr Zubkov mentioned an inconsistency, it was conveniently amended.
76. For example, athlete code A1297 is linked to a speed skating athlete in the Duchess List, whereas the same code is linked to a judo wrestler on p. 60 of EDP1155. Similarly, athlete code A0866 is linked to a skeleton athlete in the Duchess List, whereas the same code is associated with a female hockey player in Part II of the McLaren Report.⁵⁵ Assuming these were indeed genuine redaction errors, the IOC would at least have had the duty to carefully verify and correct any alleged oversights, if necessary. However, no such action appears to have been taken.
77. Moreover, in the Sochi National Team List (EDP1154), which allegedly is an English translation of the Duchess List, four athlete codes (A1286, A1287, A1288, A1289) are "missing". There has been no explanation for this discrepancy and the affidavits by Professor McLaren and Dr Rodchenkov provide no clarification in this respect either.
78. Since the McLaren Report was rendered in December 2016, Professor McLaren has amended numerous alleged "redaction errors" over time, albeit usually secretly and

⁵³ See Affidavit by Professor Richard McLaren, dated 27 October 2017, p. 3.

⁵⁴ Decision of the IOC Disciplinary Commission in the proceedings against Mr Aleksandr Zubkov (SML-028), dated 6 December 2017, para. 144.

⁵⁵ See McLaren Part II, p. 108.

without ever informing anyone of the changes made. In Professor McLaren's affidavit provided on 27 October 2017, a number of further "redaction errors" were "corrected".⁵⁶

79. In sum, the Duchess List does not constitute evidence that Mr Zubkov committed any wrongdoing, let alone does it constitute evidence that Mr Zubkov committed an ADRV.

D. The Medals-by-Day List

80. Mr Zubkov's name does not appear on the so-called Medals-by-Day List.
81. In any event and more importantly, the Medals-by-Day List has no evidentiary value. As has been submitted by Mr Zubkov all along, the Medals-by-Day List did not have the purported purpose of identifying the athletes whose urine was to be swapped during the Olympic Games in Sochi. The Disciplinary Commission has finally acknowledged this fact, stating that "*this list may have been no more than a projection of possible medals that Russian athletes could win in the various competitions*".⁵⁷ As consequence, the Disciplinary Commission no longer relies on this list. It concluded that the Medals-by-Day List "*does not constitute relevant evidence for the purposes of assessing either the general situation, or the individual implications of athletes*".⁵⁸
82. The fact that the Medals-by-Day List did not have the purported purpose calls into question the alleged purpose of the Duchess List as the purpose of both lists is based on the testimony of Dr Rodchenkov only.

E. Dr Rodchenkov's affidavit

83. Dr Rodchenkov's affidavit does not contain any new information that would demonstrate that Mr Zubkov committed an ADRV. He simply repeats his allegations with respect to the Duchess cocktail, the clean urine collection, the opening of the sample bottles and the sample swapping already contained in the McLaren Reports.
84. In particular, the information in the affidavit pertaining to Mr Zubkov does not incriminate him. Dr Rodchenkov alleges that he was on the Duchess List (which has no probative value).⁵⁹ With respect to the Olympic Games in Sochi, Dr Rodchenkov makes a series of allegations regarding Mr Zubkov and supports them with a number of his Sochi Diary entries, produced as Attachments 8 to 13 of his "affidavit".⁶⁰ Yet, none of these Sochi Diary entries incriminate him, either because they are totally redacted or because their unredacted content does not demonstrate any wrongdoing on the part of Mr Zubkov.⁶¹

⁵⁶ Affidavit of Professor Richard McLaren, dated 27 October 2017, pp. 9-10.

⁵⁷ Decision of the IOC Disciplinary Commission in the proceedings against Mr Aleksandr Zubkov (SML-028), dated 6 December 2017, para. 167.

⁵⁸ Decision of the IOC Disciplinary Commission in the proceedings against Mr Aleksandr Zubkov (SML-028), dated 6 December 2017, para. 169.

⁵⁹ Affidavit of Dr Rodchenkov dated 2 November 2017, para. 185.

⁶⁰ Affidavit of Dr Rodchenkov dated 2 November 2017, para. 183-203.

⁶¹ Affidavit of Dr Rodchenkov dated 2 November 2017, Attachments 8-13.

85. In any event, Dr Rodchenkov is not a credible witness and therefore his testimony should not be given any weight.
86. Dr Rodchenkov is an individual with an admitted history of substance abuse. In 2005, Dr Rodchenkov admitted his "*extensive use of banned substances*".⁶² He was personally involved in the manipulation of blood and urine samples for his own financial gain, including accepting bribes.⁶³ He had a clear motive to blame his own improper conduct on others, including alleged directions by government officials. This is expressly mentioned in the report issued by WADA's Independent Commission ("**IC**"),⁶⁴ of which Professor McLaren was a member. The IC found that Dr Rodchenkov's statements were "*not credible*" and that he remained "*obstructive*".⁶⁵ Professor McLaren himself recognized in the McLaren Report Part I that "*there are allegations against [Dr Rodchenkov] made by various persons and institutional representatives ... that might impinge on his credibility in a broader context*".⁶⁶ Why Professor McLaren later changed his mind, and decided to rely almost exclusively on Dr Rodchenkov's testimony for his two reports, remains somewhat of a mystery. Unfortunately, Mr Zubkov never had the opportunity to question him to this effect, and the IOC does not seem to have bothered to do so, although it bears the burden of proof.
87. To this day, Dr Rodchenkov's statements have never been verified. There is in fact no corroborating evidence whatsoever, neither by witnesses nor in documentary form. In particular, the EDP documents were provided by Dr Rodchenkov himself. It is therefore no surprise that his testimony and the EDP documents are aligned as he could develop his story on the basis of these documents. Again, there have been no attempts by the IOC to even attempt to verify Dr Rodchenkov's testimony, although he on his own account would have been readily available for questioning,⁶⁷ let alone was Mr Zubkov ever given the opportunity to question Dr Rodchenkov.
88. Rather, there are striking inconsistencies in the testimony of Dr Rodchenkov, which the McLaren Report fails to address.
89. For example, Dr Rodchenkov changed his testimony between McLaren Report Part I in July 2016 and McLaren Report Part II in December 2016, without giving any explanations as to why. In the first report, Professor McLaren, for example, did not know how the FSB allegedly opened the B-sample bottle caps, concluding only that "*some method was used*".⁶⁸ In the second report, Dr Rodchenkov then suddenly – and without explanation – "*recalled*" personally witnessing the actual tools that were used to open the bottles.⁶⁹

⁶² WADA Independent Commission Report No. 1 dated 9 November 2015 ("**IC Report I**"), p. 201.

⁶³ IC Report I, p. 13.

⁶⁴ See IC Report I, pp. 201, 202, 207.

⁶⁵ IC Report I, pp. 204-205.

⁶⁶ McLaren Report I, p. 21.

⁶⁷ G. Rodchenkov, "Russia's Olympic Cheating, Unpunished", in The New York Times, 22 September 2017 (**Exhibit A-1**).

⁶⁸ McLaren Report I, p. 12.

⁶⁹ McLaren Report II, p. 82.

Interestingly, in his latest "affidavit", there is again no mention of him "*personally*" witnessing the tools allegedly used. He rather simply confirms that he never witnessed any tampering of samples.⁷⁰

90. There are further inconsistencies with respect to his testimony. In relation to McLaren Report Part I, Dr Rodchenkov testified that "*that there was an FSB agent in each Sochi doping control station responsible for sending the DCFs [Doping Control Forms] for protected Russian athletes to Irina Rodionova to be forwarded to Dr. Rodchenkov or his secretary to ensure that the correct samples were swapped.*"⁷¹ This is in contradiction with a later statement by Dr Rodchenkov, in which he explains that the laboratory learned of the sample numbers of protected athletes after these athletes had transmitted the pictures of their Doping Control Forms to Ms Rodionova.⁷² While this repeated "change of story" further calls into question the credibility of Dr Rodchenkov, Dr Rodchenkov's "evidence" in McLaren Report Part I confirms that even if there was a doping scheme as alleged by Dr Rodchenkov, this scheme could have been carried out without any involvement of individuals athletes.
91. Dr Rodchenkov also demonstrably lied to the IC, which as a consequence recommended serious sanctions against Dr Rodchenkov.⁷³ Only thereafter and fearing conviction, he "*came clean*" to the New York Times, which stated that "*Dr Rodchenkov's account could not be independently verified.*"⁷⁴
92. The IOC has attempted to cover up these serious shortcomings in Dr Rodchenkov's statements by asserting that a "CAS Tribunal" had found him to be a credible witness. This allegation is misleading. The CAS Tribunal in question merely found that it could rely on the fact that Professor McLaren had found Dr Rodchenkov to be credible for the purpose of his report without itself verifying his allegations or questioning him in the proceedings before it where a significantly lower standard of proof was said to apply than in the present case, namely that the sanction had "no reasonable prospect of being upheld", and not "comfortable satisfaction". It never found, and would never have found, Dr Rodchenkov's allegations credible without any verification whatsoever had it applied a "comfortable satisfaction" standard.
93. Against this background, Dr Rodchenkov's "testimony" cannot be given any evidentiary weight at all in the present proceedings, all the more so where it remains entirely untested by the IOC and Mr Zubkov has been completely deprived of his right to question Dr Rodchenkov. And it needs to be mentioned again: to claim that Dr Rodchenkov was not available for questioning is simply untrue – he himself has publicly stated the contrary.

⁷⁰ Affidavit of Dr Rodchenkov dated 27 October 2014, para. 58.

⁷¹ McLaren Report I, p. 59.

⁷² McLaren Report II, p. 99.

⁷³ IC Report I, pp. 47 and 202.

⁷⁴ R. Ruiz and M. Schwartz, "Russian Insider Says State-Run Doping Fueled Olympic Gold", in The New York Times, 12 May 2016 (**Exhibit A-2**).

F. Dr Rodchenkov's alleged diary

94. The excerpts of Dr Rodchenkov's alleged diary that were attached to his affidavit are of no probative value. Unlike the New York Times, Mr Zubkov has not been provided with the original diary and therefore the authenticity of this document could not be verified. It is completely unclear whether the diary was prepared by Dr Rodchenkov and, if so, whether it was prepared at the relevant time or only thereafter. In this regard, it is highly surprising that the diary is only mentioned in passing once in the McLaren Report and that Dr Rodchenkov only provided redacted excerpts together with his affidavit, which make it impossible to even verify the authenticity and contents of this diary.
95. Furthermore, the few unredacted diary entries which were provided to Mr Zubkov and upon which Dr Rodchenkov relied upon in his affidavit do not confirm any wrongdoing on the part of Mr Zubkov.

G. Professor McLaren's affidavit

96. Professor McLaren's affidavit dated 27 October 2017 does not constitute new evidence. In this affidavit, Professor McLaren does not provide any information that was not already included in the McLaren Report. He rather simply repeats the untested and unverified allegations of Dr Rodchenkov with respect to the Duchess List and the Medals-by-Day List. His further comments in the affidavit concern the conduct of the DNA analysis and alleged redaction errors in the EDP.
97. In any event, the McLaren Report, the IP Dossier prepared by Professor McLaren and Professor McLaren's affidavit do not constitute means of evidence. These documents are a compilation and reproduction of unverified witness testimony, the EDP documents and forensic analyses. The Disciplinary Commission itself acknowledges the diminished probative value of these documents, describing Professor McLaren as an "*indirect witness*".⁷⁵
98. Professor McLaren has also confirmed over and over again that his investigation was never intended to analyze any conduct of individual athletes, let alone to serve as evidence for any ADRV committed by any athlete. It is particularly noteworthy that Professor McLaren felt compelled to make an express point to this effect also in the IP Dossier he prepared for the IOC:

"The evidence the IP has was never obtained to establish an Anti-Doping Rule Violation case against individual athletes. For the avoidance of any doubt and to be very clear, the focus of the IP investigation, based upon its mandate, was to review evidence to establish whether 'there had been a manipulation of the doping control process during the Sochi Games ...' and to 'identify the modus operandi [sic] and those involved in such manipulation.'"⁷⁶

99. He repeated this in his affidavit as follows:

⁷⁵ Decision of the IOC Disciplinary Commission in the proceedings against Mr Aleksandr Zubkov (SML-028), dated 6 December 2017, para. 149.

⁷⁶ IP Dossier to IOC Re Aleksandr Zubkov (Bobsleigh) dated 31 March 2017, p. 1 (emphasis added).

*"For the avoidance of doubt and to be very clear, the focus of my investigation was to review evidence of an institutionalized doping cover up program which used the Moscow and Sochi laboratories to manipulate and cover up doping positive results. **The focus of the IP investigation was not to establish Anti-Doping Rule Violation cases against individual athletes.**"⁷⁷*

100. In addition, the McLaren Report itself states that it does not examine ADRVs by individual athletes.⁷⁸ The McLaren Report further confirms that it "*has not assessed the sufficiency of the evidence to prove an ADRV by any individual athlete.*"⁷⁹ Given its purpose and scope, the McLaren Report cannot serve as evidence for any ADRV committed by any individual athlete.
101. Hence, Professor McLaren did not analyze any ADRVs against individual athletes, did not intend to do so, and did not assess whether there was sufficient evidence to prove an ADRV by any individual athletes. For this reason alone, the McLaren report cannot serve as an evidentiary basis for any negative finding against Mr Zubkov.
102. Moreover, Professor McLaren decided to make Dr Rodchenkov's oral statements the central focus of the entirety of both of his reports. The vast majority of Professor McLaren's allegations rely exclusively on Dr Rodchenkov's oral testimony as proof. Professor McLaren repeatedly refers to Dr Rodchenkov's oral statements as "*Dr. Rodchenkov's evidence*" but does not provide any corroborating evidence.⁸⁰
103. Finally, the McLaren Report has never been verified or tested since it was published and still to date must be considered a mere manifestation of Professor McLaren's personal views. In particular, Mr Zubkov was denied his due process right to cross-examine Professor McLaren.
104. Against this background, seeking to base any action against Mr Zubkov on the McLaren Report would be entirely misplaced, especially where there is no other evidence whatsoever that would corroborate that Mr Zubkov ever committed any wrongdoing, let alone an ADRV.

III. CONCLUSION

105. Mr Zubkov has been tested on numerous occasions, and during his entire career. None of these tests have ever been positive, irrespective of whether he was tested in or outside of Russia. Mr Zubkov was also never accused of having committed a doping offense in the past. He is and has always been a "clean" athlete.
106. No evidence whatsoever of any wrongdoing, whether previously obtained or new, exists.
107. As has been demonstrated above, during its investigations, the IOC could not obtain any evidence that would prove that Mr Zubkov was involved in any wrongdoing. To the

⁷⁷ Affidavit of Professor Richard McLaren, dated 27 October 2017, p. 1 (emphasis added).

⁷⁸ McLaren Part II, pp. 18, 35.

⁷⁹ McLaren Part II, p. 35.

⁸⁰ McLaren Part I, pp. 50, 54 *et seq.*, 83.

contrary, the re-examination of the sample bottles did not confirm to the standard of proof required in this case that Mr Zubkov's sample bottles were tampered with. The alleged further evidence on which Professor McLaren relied in his reports does not indicate either that Mr Zubkov was involved in any manipulations. In any event, this evidence is unsuited due to serious inconsistencies and contradictions.

108. No provisional suspension must therefore be imposed.

Yours sincerely

Schellenberg Wittmer Ltd:

A handwritten signature in blue ink, appearing to be 'S. Bartsch', written over a horizontal line.

Philippe Bärtsch
Luka Grosej