



**Arbitration CAS 2017/A/4986 Evgenia Shapovalova v. International Ski Federation (FIS), award of 31 August 2017 (operative part of 29 May 2017)**

Panel: Prof. Jan Paulsson (France), President; Mr Boris Vittoz (Switzerland); The Hon. Michael Beloff QC (United Kingdom)

*Skiing (cross-country skiing)*

*Doping (tampering or attempted tampering with doping control)*

*Burden and standard of proof applicable to the imposition of a Provisional Suspension under the FIS ADR*

*Burden and standard of proof applicable to the lifting of a Provisional Suspension under the FIS ADR*

*Lack of infringement of the athlete's fundamental and personality rights*

*Assessment of the evidence upon which the provisional suspension is based*

*Determination of the length of the provisional suspension*

1. The provisional suspension occupies a space in which an anti-doping rule violation (ADRV) is asserted, but not yet proven. Provisional suspensions have therefore a necessarily preliminary character. The burden of proof and legal thresholds applicable must reflect the appealed suspension's provisional nature and track the rules specific to its imposition. A provisional decision is overturned if it has *"no reasonable prospect of being upheld"*. In other words, the imposition of a provisional suspension requires a "reasonable possibility" that the suspended athlete has engaged in an ADRV. A reasonable possibility is more than a *fanciful* one; it requires evidence giving rise to individualized suspicion. This standard, however, is necessarily weaker than the test of "comfortable satisfaction" set forth in Article 3.1 FIS Anti-Doping Rules (ADR), relating solely to the adjudication of an ADRV. Accordingly, a reasonable possibility may exist even if the federation is unable to show that the balance of probabilities clearly indicates an ADRV on the evidence available. Pursuant to Article 7.9.2 FIS ADR, *any* ADRV suspected of an athlete can serve as cause for a provisional suspension against him or her, should the federation so decide. The federation's burden under Article 7.9.2 is a limited one, but certainly not devoid of content. No plausible interpretation of Article 7.9.2 can require an athlete to disprove unsubstantiated assertions.
2. Once a suspension has been put in place and is challenged, Article 7.9.3.2 FIS ADR imposes three, independently sufficient criteria for lifting the suspension: a demonstrable lack of "fault" or "negligence" on the athlete's part, "no reasonable prospect" of the assertion of an ADRV succeeding on the merits, or the presence of "other facts" making it "clearly unfair" to leave the suspension in place. Article 7.9.3.2 thus plainly imposes a higher threshold to lift a suspension than the FIS ADR require to impose one in the first place. Since additional evidence can be adduced in the period between a suspension's imposition and ADRV proceedings, moreover, the rule does not require that "prospects" be assessed by reference to currently available evidence *in isolation*. Demonstrating the negative proposition, of *no* reasonable prospects,

therefore requires more than an assertion as to shortcomings with current evidence, such as a patent flaw in the case against the athlete.

3. It is uncontroversial that certain norms and principles relating *inter alia* to the athlete's rights of due process and personality inhere in Swiss law. These provide a minimum standard of process with which the FIS ADR must comply. However, those principles cannot be considered to be infringed where (i) there is neither "conviction" nor yet a formal "charge" of an ADRV, (ii) the *suspected* ADRV informing the athlete's suspension is clear, (iii) as a matter of procedural due process, the parties' equality of arms and the athlete's rights to a fair hearing and opportunity to present his/her case were satisfied at the first instance and on appeal. Moreover, the athlete's reference to a presumption of innocence cannot be considered to be availing. In this respect, Swiss "fundamental principles" including those relating to proof of guilt vary on a spectrum depending on the type of proceeding and cannot simply be transposed from criminal to private law. What is more, since there is no finding of guilt where a provisional suspension is at stake, the latter cannot implicate, still less violate, a presumption of innocence. Turning to the athlete's personality rights, they must be balanced against those of associational autonomy. An athlete who joins an association and thereby submits to that association's rules as a condition of participation may be deemed to have consented to those rules. Therefore, though a suspension infringes an athlete's personality rights it is permissible if it is proportionate, i.e., not "excessive". A determination of excessiveness depends on a balance of interests including *inter alia* the federation's appreciable interest in guaranteeing for all athletes a "*fundamental right to participate in doping-free sport*". Moreover, the fight against doping weighs even more heavily where the challenged measure is provisional and the infringement temporary.
4. The likelihood of an ADRV and the validity of provisional measures are clearly intertwined. The success of any ADRV charge will depend on further investigations, the outcome of which is at present unknown, indeed unknowable. This tension makes it all the more imperative that Article 7.9 FIS ADR be applied strictly to require evidence demonstrating at least a reasonable possibility of an ADRV. In this regard, the implication of an athlete in a clean urine bank whose existence is adduced by a report commissioned by the IOC i.e. the McLaren Report,, the existence of lists of names of athletes containing the athlete's code purportedly authorized to take a "boosting cocktail" and scheduled to start in medal races and who likewise enjoyed "protected" status under Russia's doping Scheme particularly when assessed collectively with evidence of tampering with the athlete's sample bottle, indicate a reasonable possibility of an ADRV. The evidence suffices for the limited purpose of Article 7.9.2 of the FIS ADR.
5. An athlete cannot endorse an indefinite and indeterminable suspension as proportionate. Noting the athlete's reasonable entitlement to legal certainty, it is deemed appropriate and just that the provisional suspension expire after 10 months, at

**which time it will be for the federation to consider whether or not to seek a further suspension justified by new developments and within the framework of the FIS ADR.**

## **I. THE PARTIES**

1. Ms. Evgenia Shapovalova (the “Athlete” or the “Appellant”) is an international-level Russian cross-country skier.
2. The International Ski Federation (“FIS”, the “Federation”, or the “Respondent”) is the world governing body for skiing. Its registered seat is in Switzerland. For its part, the Cross Country Ski Federation of Russia is a member of the Russian Ski Federation (“RSF”), the national governing body for skiing in Russia. RSF is the relevant Member Federation of FIS, but is currently suspended from membership and is not a party to these proceedings. Its registered seat is in Moscow.

## **II. BACKGROUND FACTS**

3. The information detailed in this section is a summary of relevant facts as provided by the Parties in their written pleadings and factual and legal exhibits attached thereto. This section serves solely for the purpose of factual synopsis. To the extent they are necessary or relevant, additional facts may be set out below, in particular in the Analysis of the Merits. The present award only refers to such evidence and arguments to the extent necessary to explain its reasoning; the Panel has, however, considered all facts, claims, and legal arguments put before it.
4. The Athlete challenges an Optional Provisional Suspension, imposed on her by the Federation on 22 December 2016 and based on a potential finding of an anti-doping rule violation (“ADRV”) at the 2014 Sochi Winter Olympic Games. That suspension was based on evidence made available to FIS by the International Olympic Committee (“IOC”) concerning alleged Russian State-sponsored doping practices described in a report by Professor Richard McLaren presented in two installments on 16 July and 9 December 2016 (the “McLaren Report”). The Athlete’s suspension prevents her from competing in FIS- or RSF-sanctioned cross-country skiing competitions pending the completion of an investigation by the IOC.
5. In light of the McLaren Report’s evident significance, the Panel considers it appropriate briefly to outline the history of its publication and the consequences of Professor McLaren’s research, including the suspension of the RSF and the imposition of provisional suspensions by FIS, including of the Athlete.
6. On 8 May 2016, the *60 Minutes* television program of the CBS (USA) aired allegations by the former director of the Moscow Doping Laboratory, Dr. Grigory Rodchenkov, relating to an elaborate doping scheme having allegedly been perpetrated from at least 2011 onward in Russia.

On 12 May 2016, the *New York Times* ran an article, “*Russian Insider Says State-Run Doping Fueled Olympic Gold*”, revealing additional details relating to the scheme described by Dr. Rodchenkov.

7. On 19 May 2016, the World Anti-Doping Agency (“WADA”) appointed Professor Richard McLaren as an “Independent Person” instructed to investigate Dr. Rodchenkov’s allegations. Professor McLaren’s mandate included (paraphrasing from the explicit mandate given to Professor McLaren and reproduced in the introduction to his Report):
  1. Determining whether the doping control process during the Sochi Games was manipulated, including but not limited to acts of tampering with the samples within the Sochi Laboratory.
  2. Identifying the *modus operandi* and those involved in such manipulation.
  3. Identifying any athlete that might have benefited from those alleged manipulations to conceal positive doping tests.
  4. Identifying if this *modus operandi* was also happening within the Moscow Laboratory outside the period of the Sochi Games.
  5. Reviewing and assessing other evidence or information held by Grigory Rodchenkov.
8. On 16 July 2016, the first part of the McLaren Report was published. It concluded *inter alia* that the WADA-accredited Moscow Doping Laboratory (“Moscow Laboratory”) operated, for the protection of doped Russian athletes, a State-sanctioned scheme of misreporting and concealment of test-positive urine sample results. In what Professor McLaren termed the “*Disappearing Positive Methodology*”, positive test results were reported to the Ministry of Sport, which generally directed the Moscow Laboratory to report these as negative in the WADA Anti-Doping Administration and Management System (“ADAMS”).
9. With respect to the 2014 Sochi Winter Olympic Games, Professor McLaren detailed the existence of an additional scheme whereby samples, belonging to doped Russian athletes but collected under the eye of international observers, were surreptitiously replaced with clean samples taken out-of-competition (McLaren Report, Part II, p. 97). The report alleged that the Ministry of Sport “*directed, controlled and oversaw*” the manipulation of protected athletes’ samples with the active participation and assistance of the Russian Center of Sports Preparation (“CSP”), Federal Security Service (“FSB”), and the Moscow and Sochi Laboratories.
10. In an announcement dated 19 July 2016, the IOC stated that a disciplinary commission chaired by Professor Denis Oswald (the “Oswald Disciplinary Commission”) would be established in order to conduct a full repeated analysis and inquiry into all Russian athletes having participated at the 2014 Sochi Games in addition to their coaches, officials, and support staff. The Oswald Disciplinary Commission’s investigative work is currently ongoing.
11. Professor McLaren’s original mandate required him to issue a report prior to the beginning of the 2016 Summer Olympic Games in Rio de Janeiro, Brazil. On the basis of the report’s publication, WADA extended Professor McLaren’s mandate in order to fulfill the third task

originally set out to him: *“Identify any athlete that might have benefited from those alleged manipulations to conceal positive doping tests”*.

12. That report, termed McLaren Part II for clarity in the present award, was published on 9 December 2016. This Report recalled that it was possible to re-open a Berlinger BERECKIT® sample bottle without destroying the closing mechanism after the container had been sealed during doping control (McLaren Report, Part I, p. 12; Part II, p. 26). In response to Dr. Rodchenkov’s provision of documentary evidence suggesting that certain athletes had benefited from this process, as well as the provision of a limited number of urine samples, the report commissioned a forensic report by King’s College London in order to ascertain if certain allegations of Dr. Rodchenkov, including that specific athletes had benefited from the process of sample-swapping (the “King’s College Forensic Report”), could be corroborated. That report analyzed a number of sample bottles in WADA’s possession and found that two types of marks were present on the internal surface of sample bottle lids that *“could not be reconciled with manufacturing”*. It described the two marks in the following terms:
  - *“The first type of mark (Type 1) was a horizontal long impact mark on the inside of the lid, usually below the level of the glass lip on the bottle. During research, these marks were reproduced and found to be present after screwing the lid on forcefully. They are suspected to have been caused by the metal ratchet ring vibrating and impacting against the inside of the lid. These marks were not reproduced when the lid was screwed on carefully. There were some similarities between these marks and marks reproduced when a flat strip of metal (inserted between the lid and the glass bottle) caused a ‘stab’ mark where it is forced over the lip and impacted with the lid. The marks on the sample bottles examined at Kings College could not be distinguished from the marks reproduced by screwing the lids on. Screwing the lids on again after they had been removed may result in multiple Type 1 marks not seen on lids that had only been screwed on once.*
  - *The second type of mark (Type 2) was a series of vertical and often diagonal scratch marks observed on the internal surface of the lid. There were similarities between marks reproduced when a flat strip of metal was inserted between the lid and the bottle to manipulate the metal ring to open the lids. These marks vary in size and shape. None of these marks could be reproduced during research by screwing on any lids. Some of these marks were however reproduced when the metal ring was manipulated with the metal strips and scratched the inside of the lid”<sup>1</sup>.*
13. In the course of assembling Part II of his report, Professor McLaren acquired numerous additional documentary exhibits, several of which have been placed on the record of this appeal by the Respondent and are described in the present award. In total, the McLaren Report relied on thousands of documents of which 1,166 are categorized and contained in the “Evidence Disclosure Package” (“EDP”) database, available online.
14. Taken together, the McLaren Reports declared *“beyond a reasonable doubt”* that Russian national institutions planned and carried out a *“carefully orchestrated conspiracy”* aimed at permitting doped Russian athletes to compete dirty while evading the detection of national and international

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<sup>1</sup> King’s College Forensic Report, EDP0902, p. 12 (page numbers for this document refer to the digital file, since this document is not numbered internally).

doping controls (McLaren Report, Part II, p. 95). Professor McLaren concluded that hundreds of athletes benefited, directly or indirectly, as “*party to the manipulations*” of doping controls described in the report’s first installment. Part II of the report additionally noted that Professor McLaren’s initial finding that 312 positive test reports had been misreported had increased, by December 2016, to 500 results.

15. Part II of the McLaren Report concluded, *inter alia*, the following:
  - Manipulation of doping controls involved officials in the Russian Ministry of Sport, the CSP and FSB, the Moscow Laboratory, and the Russian Anti-Doping Agency (“RUSADA”), in addition to the Russian Olympic Organizing Committee and individual coaches.
  - 695 Russian athletes and 19 foreign athletes “can be identified as part” of the scheme outlined in Part I to conceal potentially positive doping control tests.
  - Analysis of 44 B-sample bottles from athletes at the 2014 Winter Olympic Games (“Sochi Games”) showed evidence of scratches and marks indicative of tampering. (McLaren Report, Part II, pp. 18-20.)
16. Names of individual athletes in the McLaren Report were encrypted by its author prior to publication. By confidential letter dated 9 December 2016, Professor McLaren stated to the Federation that one sample indicative of potential tampering matched the Athlete. Professor McLaren further confirmed that the Appellant appeared underneath the code A0772 in his report.
17. Acting on this information, on 22 December 2016, the IOC wrote to the Federation with respect to the Athlete and informed FIS as follows:

*“Based on the information in our possession, the B-sample n° 2889781 notably appears to have been surreptitiously opened and the urine collected on 7 February 2014 replaced by a different urine (scratches and marks evidence indicates tampering).*

*At this stage, the alleged anti-doping rule violation is “tampering or attempted tampering with any part of the Doping Control” pursuant to Article 2 of The International Olympic Committee Anti-Doping Rules applicable to the XXII Olympic Games in Sochi, in 2014 (hereinafter: “IOC Anti-Doping Rules”). Further violations which might be brought to light in the course of further investigations are reserved”.*

### III. THE FIS PROCEEDINGS

18. On 22 December 2016, the Federation provisionally suspended the Athlete with immediate effect from competition. That suspension was imposed following allegations made available to FIS by the IOC concerning alleged Russian State-sponsored doping practices as identified by Professor McLaren. The Cross Country Ski Federation of Russia confirmed to FIS on 23 December 2016 that the Athlete had been notified of the suspension.

19. The Athlete challenged her provisional suspension before the FIS Doping Panel on 27 December 2016 and requested that FIS provide her with an “opportunity to participate” in the remaining events of the winter skiing season. FIS rejected the request and upheld provisionally the suspension on 30 December 2016. It also, however, invited her to a personal hearing in respect of the matter.
20. The Athlete submitted a further written statement to FIS reaffirming her previous submissions on 15 January 2017.
21. The FIS Doping Panel held a hearing on 24 January 2017 by videoconference. It issued the operative part of its decision, upholding the suspension, on 2 February 2017, with the reasoned decision ultimately issued on 6 February 2017. The decision states:

*“[T]he opening of the formal investigation by the IOC based on credible prima facie evidence contained in the McLaren Report and the supporting documents (including the description of the systematic doping and covering up), and the protection of the other competitors, as well as the integrity of the sport competitions in having a reliable outcome without the risk of being changed because of a later disqualification of the Athlete, justify the provisional suspension of the Athlete at this point in time. Further investigation will either confirm the suspicion and the provisional suspension will be replaced by a sanction, or demonstrate that the allegations have been groundless”.*
22. One member of the Panel dissented from the Doping Panel’s decision. The dissent is noted by the FIS Doping Panel majority in paragraph 29 of its decision and states:

*“The evidence mentioned in the McLaren Report is not sufficiently convincing and does not support the conclusion that the IOC investigation or a later appeal before the CAS will confirm that the Athlete has committed an ADRV.*

*The requirements for a provisional suspension are not met in this case since there is no reasonable prospect that the allegation of an ADRV will be upheld. The Athlete was tested many times at international competitions. She bears no fault or negligence if her sample was manipulated without her knowledge or consent. It would be unfair to the Athlete, based on the facts known to date, to suspend her from competing, especially because of the lack of evidence”.*
23. The decision was sent via e-mail to the Russian Ski Federation on the date of its dispatch, and was forwarded to the Athlete on 7 February 2017. It is this decision, upholding the Optional Provisional Suspension, that has given rise to the present appeal to the Court of Arbitration for Sport (“CAS”).

#### **IV. PROCEEDINGS BEFORE THE CAS**

24. On 16 February 2017, the Appellant submitted the appeal against the Federation to CAS pursuant to Article 13 of the FIS Anti-Doping Rules 2016 (the “FIS ADR”) and Article R47 of the Code of Sports-related Arbitration (“CAS Code”). Together with the Statement of Appeal,

which was designated as the Appeal Brief, Ms. Shapovalova included a request for emergency provisional relief. That request sought:

*“That the provisional suspension imposed by the FIS on 22 December 2016 and upheld by the FIS Doping Panel on 6 February 2017 be stayed with immediate effect pending a final decision on the appeal”.*

25. On 20 February 2017, the Respondent filed an answer in response to the Appellant’s request for emergency provisional relief.
26. On 21 February 2017, the Deputy President of the Appeals Arbitration Division of the CAS denied the Appellant’s request. A copy of the operative part of the Deputy President’s order was communicated to the Parties by the CAS Court Office on the same date. The reasoned order was communicated on 4 May 2017.
27. On 6 March 2017, the Appellant submitted a renewed request for urgent interim relief (“Application for Provisional Measures”) but addressed it for decision by the CAS Panel, once constituted. Similarly to the first request, the Application for Provisional Measures sought that the Athlete’s provisional suspension *“be stayed with immediate effect pending a final decision”* by the Panel.
28. By communication dated 8 March 2017, the CAS Court Office informed the Parties that the Panel had been constituted as follows: Prof. Jan Paulsson, President; Mr. Boris Vittoz; and Hon. Michael J. Beloff QC.
29. On 14 March 2017, the Respondent submitted comments in response to the Athlete’s Application for Provisional Measures (“Respondent’s Comments”), requesting that the Panel uphold the decision of the CAS Deputy President and keep in place the provisional suspension.
30. The Respondent filed its Answer on 20 March 2017. By letter dated 21 March 2017, the CAS Court Office confirmed receipt, noted the operation of Article R56 of the CAS Code in precluding further or supplemental written submissions, and invited the Parties to indicate whether they preferred a hearing to be held.
31. On 24 March 2017, the Parties each indicated that they preferred a hearing to be held in this matter.
32. Also on 24 March 2017, the Panel rejected the Appellant’s Application for Provisional Measures. The reasoned order on provisional measures was subsequently issued on 11 May 2017.
33. On 7 April 2017, the CAS Court Office acting on the Panel’s behalf requested that the Appellant provide certain information relating to her request that a hearing be held by “mid-May 2017”. The Appellant did so on 10 April 2017.



34. On 24 April 2017, the CAS Court Office informed the Parties that a hearing would be held in this case on 15 May 2017.
35. On 29 April 2017, the Respondent informed the CAS Court Office that Professor McLaren would “*not appear in person at the hearing of 15 May 2017*”. The Respondent enclosed an affidavit (the “McLaren Affidavit”) intended to substitute for Professor McLaren’s oral testimony.
36. On 2 May 2017, the CAS Court Office informed the Parties that the Panel took note of the McLaren Affidavit and intended to draw its own conclusions and inferences from it and to give appropriate consideration to the Appellant’s inability to put questions to Professor McLaren. The letter additionally invited the Parties to submit skeleton outlines of their arguments for use at the hearing by 10 May 2017, which were filed by the Parties on such date.
37. On 3 May 2017, the Appellant submitted a letter on in which she reiterated a “*fundamental procedural right to cross-examine Professor McLaren*” and reserved her right “*to further address*” the Respondent’s submission of the McLaren Affidavit at the hearing.
38. On 5 May 2017, the CAS Court Office informed the Parties of the appointment of Mr. Philipp Kotlaba, Attorney-at-Law in Washington, D.C., as *ad hoc* clerk to the Panel.
39. On 8 May 2017, the Panel requested the Respondent to make Professor McLaren available for examination (in person or by videoconference). On 10 May 2017, the Respondent informed the CAS Court Office of Professor McLaren’s unavailability for examination in person or by videoconference.
40. On 9 May 2017, the CAS Court Office circulated to the Parties an Order of Procedure, which was returned duly signed by each Party on 11 May 2017.
41. On 15 May 2017, a hearing was held at the Court of Arbitration for Sport in Lausanne, Switzerland. The following were in attendance:

Panel:

Prof. Jan Paulsson;  
Hon. Michael J. Beloff QC;  
Mr. Boris Vittoz;  
Mr. Philipp Kotlaba (*Ad hoc* clerk);

Appellant:

Ms. Evgenia Shapovalova;  
Mr. Philippe Bärtsch;  
Dr. Christopher Boog;  
Dr. Philip Wimalasena;

Dr. Anabelle Möckesch;  
Ms. Anna Kozmenko;  
Mr. Konrad Staeger;  
Mr. Alexey Petukhov;  
Mr. Maxim Vylegzhanin;  
Mr. Alexander Ponomarev (Interpreter);

Respondent:

Dr. Stephan Netzle;  
Dr. Karsten Hofmann; and  
Ms. Emile Merkt.

The Parties were given the opportunity to present their cases, to make their submissions and arguments, and to answer questions asked by the Panel. At the conclusion of the hearing the Parties confirmed that they had no complaint regarding the conduct of the proceedings. At the end of the hearing, the Appellant was also granted by the Panel the opportunity to file an official statement made by the IOC on 26 April 2017 before the Sports Committee of the German Bundestag, which the Appellant did on 16 May 2017.

42. On 29 May 2017, the Panel issued the operative part of its award. The present award reiterates the *dispositif* and sets forth the grounds for the Panel's decision.

## V. POSITIONS OF THE PARTIES

43. The following section is a summary of the Parties' positions. It serves the purpose of synopsis only and does not necessarily include every submission advanced by the Parties in their pleadings. The Panel has, however, considered all arguments advanced before it in deciding the present award.

### A. THE APPELLANT'S POSITION

44. The Appellant submits that the practices alleged in the McLaren Report do not suffice to demonstrate individual guilt adequate to justify her suspension by the FIS. Both the Federation's internal rules and fundamental principles of Swiss and European law mandate, as a condition of any provisional suspension, that the Respondent adduce evidence that the Appellant herself committed an anti-doping rule violation. The McLaren Report's intended scope, moreover, was limited to examining high-level practices and not specific athletes' guilt; the Appellant accordingly submits that the Respondent falls short of its burden and that the Optional Provisional Suspension must be lifted.

## 1. The Applicable Standard

45. The Appellant submits, first, that the applicable provisions regulating Optional Provisional Suspensions in the FIS ADR require the Federation to shoulder a legal burden which it has failed to meet.
46. As a preliminary matter, the Appellant stresses the Panel's power to review the suspension *de novo*, i.e., unfettered by any discretion exercised by FIS. She invokes, in this regard, Articles 13.1.1 and 13.1.2 of the FIS ADR, titled "*Scope of Review Not Limited*" and "*CAS Shall Not Defer to the Findings Being Appealed*" respectively. In the Appellant's view, the Panel need not defer either to the FIS Doping Panel or more generally to Professor McLaren's assertions. Indeed, the Panel "must" not do so – both under the applicable FIS framework and in recognition of her fundamental rights.
47. The Appellant argues that, under the FIS ADR, the Federation carries the following burden of proof for imposing a provisional suspension:
- First, the Federation must establish a *prima facie* case that the Appellant has committed an ADRV. A case may be grounded on an Adverse Analytical Finding ("AAF") or on "any other ADRV". The Federation, not the athlete, shoulders the burden establishing a *prima facie* case. In this connection, the Appellant draws the Panel's attention to Article 3.1 of the FIS ADR, which explains that the Federation "*shall have the burden of establishing that an anti-doping rule violation has occurred*". The Appellant considers Article 3.1 to govern Articles 7.9.2 and 7.9.3.2, the principal provisions relating to provisional suspensions.
  - If (and only if) the Respondent meets its burden above, the burden of proof shifts onto the Appellant. In the event she must then adduce counterevidence sufficient to satisfy one of the three requirements under Article 7.9.3.2 for lifting a provisional suspension, such as demonstrating that there is "*no reasonable prospect*" of an ADRV being upheld in her case.
48. To meet its initial burden, the Appellant submits, the Respondent must make out the following elements of a *prima facie* case: (i) the Appellant committed an ADRV; (ii) a concrete allegation of wrongdoing has been made; (iii) the allegation is adequately substantiated; (iv) there is "*at least a reasonable chance*" that the Appellant will be found guilty; and (v) the suspension levied is a proportionate one. The mere fact that an investigation has been commenced, in the Appellant's view, is not *prima facie* evidence.
49. The Appellant accordingly rejects the Federation's (purported) view that it may make "*any kind of allegation*" against an athlete, "*substantiated or not*", whereupon the burden of proof would shift to the Appellant to disprove the charge. This, she insists, cannot be. The FIS ADR do not call for athletes to "*prove a negative*". And the Appellant's fundamental due process rights – recognized, she suggests, by both Parties – prohibit it.
50. Whether on the basis of the FIS ADR or owing to principles such as the presumption of innocence and individualized guilt, the Appellant maintains that a provisional suspension may

be justified only by a showing that the Appellant herself committed an ADRV. Apart from the FIS ADR, however, the Appellant maintains that she enjoys fundamental rights deriving from Swiss constitutional and European human rights law that protect her from what she describes as a sanction without charge. Accordingly, even were the FIS ADR interpreted as permitting the suspension under appeal, these overriding principles of law would supersede the Federation's internal framework and require that the suspension be annulled.

## 2. The Evidentiary Deficit

51. Having set forth the legal standard she deems applicable, the Appellant submits that the evidence on record is insufficient to uphold the provisional suspension. The McLaren Report, in particular, cannot demonstrate any of the conditions which the Appellant considers it to be the Federation's obligation to satisfy. This section sets forth the Appellant's position as to why the provisional suspension must fail, beginning first with her characterization of the McLaren Report and continuing with an analysis of the individual documentary assertions on which the Federation purports to rely.

### *i. Limitations of the McLaren Report*

52. Influential though Professor McLaren's report has been, the Appellant suggests that it does not link her personally to the commission of any ADRV and indeed expressly disavows any intention to do so. The McLaren Report was not intended to justify a provisional suspension under the FIS ADR, nor can it.
53. The Appellant's submission that the McLaren Report is insufficient to demonstrate a *prima facie* case against her relies in the first instance on the assertion that Professor McLaren himself ruled out establishing guilt of anti-doping rule violations. By its own terms, the Appellant suggests, the McLaren Report indicts Russian doping controls generally, without documenting practices sufficient to establish an ADRV in respect of individual athletes. Part II of the McLaren Report, for instance, states:

*"The mandate of the IP [Independent Person] did not involve any authority to bring Anti-Doping Rule Violation ("ADRV") cases against individual athletes.... Accordingly, the IP has not assessed the sufficiency of the evidence to prove an ADRV by an individual athlete" (p. 18).*

Similarly, Professor McLaren states:

*"There was a program of doping and doping cover up in Russia, which may have been engaged in to enhance the image of Russia through sport. That doping manipulation and cover up of doping control processes was institutionalized through government officials in the MoFS [Ministry of Sport], RUSADA, CSP, the Moscow Laboratory and FSB, as well as sports officials and coaches. It is unknown whether athletes knowingly or unknowingly participated in the processes involved" (pp. 46 et seqq.).*

54. In the Appellant's view, the limited scope of the McLaren Report as underlined by its author has been recognized by the IOC, WADA, and the Respondent itself. A letter dated 23 February

2017 from the IOC Director General, for instance, informed the leadership of national Olympic committees and international federations as follows:

*“The establishment of acceptable evidence is a significant challenge, as some [international federations] have already experienced; where in some cases they have had to lift provisional suspensions or were not able – at least at this stage – to begin disciplinary procedures due to a lack of consistent evidence”.*

55. In a statement published on its website on 25 February 2017, moreover, WADA recalled the following with respect to a meeting held in Lausanne on 21 and 22 February of this year:

*“WADA’s objective for the Lausanne Meeting was to assist [Anti-Doping Organizations] in finding all available evidence on the EDP website; and, deciding whether, and to what extent, Anti-Doping Rule Violations (ADRVs) may be pursued, or not, under the anti-doping rules and regulations of the respective ADOs against athletes implicated by Part II of the Report....*

- *The Investigation was never intended to determine whether or not individual athletes identified had committed an ADRV.*
- *The Investigation confirmed that the process operated systemically across a spectrum of sporting disciplines and throughout national and international competitions held in Russia and abroad; and that, a significant number of athletes could have benefited from, or been involved in, the alleged manipulation to conceal positive doping tests.*
- *For many of the athletes identified by the McLaren Investigation, the only evidence available is what Professor McLaren could unveil.*
- *Unfortunately, many samples were disposed of by the Moscow laboratory, which means that they could not be re-analyzed. As well, requests to Russian authorities by Professor McLaren for additional evidence went unanswered.*
- *Together, this means that there simply may not be sufficient evidence required to sanction, with potential ADRVs, some of the individual athletes identified in the Report”<sup>2</sup>.*

Accordingly, officials at the highest levels of sport were aware of the McLaren Report’s limitations as a basis for ADRV prosecutions. Reference can also be made to an IOC statement to the German Bundestag expressing similar reservations.

56. The Respondent, moreover, is said to agree. In its Answer, FIS states that “[t]he very issue which led to the Optional Provisional Suspension and this appeal ... is about systematic, state-organised doping in Russia”. The Appellant submits that the Federation recognizes that the McLaren Report casts little light – indeed, none at all – on individual ADRV cases.
57. The Appellant concludes that the McLaren Report focused “solely on assessing whether there had been a systematic manipulation” of doping controls at Sochi, and if so, how such manipulation was implemented. That the McLaren Report’s publication has had broad effects on Russian and

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<sup>2</sup> WADA Press Statement dated 25 February 2017 (emphasis added); see also Official Statement by the IOC before the German Federal Parliament Sports Committee dated 26 April 2017 (Doc. No. 18(5)2012).

international sport writ large should not detract, in her view, from the express limitations on which the Report is premised – limitations noted by its author and conceded by all.

*ii. Individual Bases of Evidence*

58. In the Appellant's view, the McLaren's Report's limitations are apparent not only in the statements of its author and leading sponsors but also inhere in the documents on which the provisional suspension rests.
59. As a general matter, the Appellant argues, Professor McLaren's EDP should be treated with caution. From a technical perspective, the EDP appears to have been serially amended without explanation or attribution throughout the proceedings, resulting in a record rife with internal inconsistencies. Exacerbating this problem, the Appellant adds, the EDP is cumbersome, difficult to navigate, and occasionally offline – limiting her ability to mount an effective defense. The non-appearance of Professor McLaren at the hearing additionally removed the possibility of posing questions to the report's chief architect. In consequence the Appellant characterizes the record as unreliable. She requests the Panel to exclude evidence sourced from Professor McLaren as inadmissible on due process grounds, and asks that the affidavit submitted by the Respondent in lieu of Professor McLaren's appearance likewise be rejected.
60. Having sought to establish the unreliability of the evidence by reference to technical deficiencies of the EDP, the Appellant next turns to the individual components informing the Federation's imposition of her continued suspension, finding these insufficient.

*a) Evidence of Urine Tampering*

61. The McLaren Report's revelations rest on a central assertion: through subterfuge at the highest levels of Russian sport, contaminated urine samples were exchanged with clean ones in an elaborate scheme enabling certain Russian athletes to avail themselves of prohibited substances undetected. The Appellant denies that she was one of these athletes. In furtherance of that submission, the Appellant expresses doubt as to the scheme's practicalities and, separately, questions the link between the McLaren Report's allegations and her own conduct.
62. First, the Appellant questions the manner in which the McLaren Report establishes the parameters of sample-swapping at the Sochi Games. On the basis of information shared by the erstwhile director of the Moscow Laboratory, Professor McLaren recounts at length how contaminated samples were swapped with clean urine under the supervision of Dr. Rodchenkov. The Athlete, however, considers the contours of this practice to be insufficiently grounded. Whether clean urine was definitively kept and if so, by whom, remains in her view an open question. At the very least, such doubts undermine the Federation's ability to set out a *prima facie* case of the Athlete's personal involvement in tampering (if any)<sup>3</sup>.

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<sup>3</sup> At the hearing, the Appellant questioned how a clean urine bank could have been maintained and pointed to what she considered to be gaps in the documentary record in this regard. For example, counsel alleged that the limited number of

63. The Appellant's criticisms are not limited to Professor McLaren's conclusions regarding a clean urine bank or the Federation's assertion that the Appellant was one of its beneficiaries. In the notification letter precipitating the Appellant's provisional suspension, the IOC noted Professor McLaren's assertion that "*scratches and marks*" had been detected on the inner lid of one of the Appellant's BEREK-KIT® B sample bottles. In the Appellant's view, however, this evidence is insufficient to ground a *prima facie* case against her.
64. First, the Appellant asserts that scratches and marks are readily explicable by innocuous causes and therefore cannot be regarded as a necessary – or even probable – indication of tampering. In this regard, the Appellant cites the King's College Forensic Report, a project commissioned by Professor McLaren to verify Dr. Rodchenkov's description of the methods by which Russian security services allegedly reverse-engineered sample bottles targeted for swapping. That forensic report, the Appellant notes, states that both types of marks (termed Type 1 and Type 2) could have been caused by an "*original user without any tampering*". Whereas Type 1 marks were consistent with simply "*screwing the lid on forcefully*", Type 2 marks could be reproduced after any "*manual manipulation*" of the BEREK-KIT® metal ring prior to attachment (King's College Forensic Report, p. 12).
65. Accordingly, the Appellant's sample B vial does not constitute a "*smoking gun*" for the purpose of justifying a provisional suspension. Even in the event that the Federation were to demonstrate the existence of a "*catalogued bank of clean urine*" or prove, with sufficient confidence, a nexus between scratched sample bottles and manipulation, the Appellant submits that the evidence falls short of implicating her personally.
66. The Appellant has undergone "countless" doping tests, both inside and outside of Russia, during her career; not one has returned a positive result for doping. The Appellant was tested 27 times in Russia between 2011 and 2016, and 15 times outside Russia in the 2013-2014 season, without issue. Urine and blood tests taken during the Sochi Games themselves all tested negative for prohibited substances. No samples, the Appellant adds, exhibited scratches or marks (even assuming that such marks are indicative of tampering). The sheer number of tests to which she has submitted, the Appellant suggests, serves as an indication of her integrity in sport.
67. The collection and analysis of urine in Sochi, moreover, left little room for manipulation or concealment. The process was conducted "*strictly in accordance*" with anti-doping rules and was supervised by an IOC doping control officer:
- "The Appellant presented her passport to the doping control officer and completed the doping control form. The doping control officer accompanied the Appellant to the toilet, where the Appellant, under the eyes of the doping*

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EDP documents referring to the existence of a "*clean urine bank*" do not list the Appellant. The Panel does not understand the Appellant to be making the positive assertion that no urine tampering occurred in Russia. Rather, it perceives the Appellant's submission to suggest that significant doubts exist as to how the system worked, and that in consequence of such doubts the Federation has not made a *prima facie* case that Ms. Shapovalova's *specific* sample was tampered with, or that she participated in any such scheme (assuming tampering by some third party).

*control officer, provided her urine into a cup, which the Appellant had picked beforehand. The Appellant then poured the urine from the cup into two containers, which she had also chosen beforehand. One container was for the A-sample and the other for the B-sample. The Appellant then sealed the containers and placed them in a plastic bag, which she also sealed. The Appellant and the doping control officer checked that the procedure had been in line with the relevant rules and signed the doping control form, of which the Appellant received a copy. This completed the sample collection procedure”.*

68. With collection complete, the Appellant submits, the samples were no longer in her possession or control, but under the control of IOC officials. The samples were transported to the WADA-accredited Sochi Laboratory, a facility to which the Appellant had no access. The Appellant enjoyed no relationship to the doping control officers who collected the samples or the laboratory personnel who tested them. The Appellant, in short, maintains that “*no opportunity whatsoever*” existed to reopen or tamper with the containers personally. To the extent that tampering did occur, therefore, the evidence does not implicate the Appellant personally. It merely demonstrates that she would not have been immune to the interventions of Russian sports officials as alleged in the McLaren Report, Part I.
69. In this connection, the Appellant contests the Respondent’s assertion that it is inconceivable that third-party manipulation of her urine sample could have occurred absent her personal knowledge and involvement – in particular the Appellant’s (alleged) provision of clean urine, for the purpose of subsequent sample-swapping, outside the context of regular doping controls. The Appellant notes, for instance, that she provided urine samples twice a year during routine medical examinations in Moscow, a source from which clean urine theoretically could have been sourced – and misused – by a third party.
70. In any event, the Appellant does not consider the demonstration of innocence her burden to bear; rather, the Respondent alone must set out *prima facie* the elements of an ADRV. As the Respondent has not, in her view, proffered evidence sufficient to meet its burden under the FIS ADR, the Appellant deems herself under no obligation to propound theories on which sourcing of out-of-competition urine and tampering with those samples collected in-competition could have been achieved by third parties unknown.

b) *The Duchess List*

71. The Duchess List purportedly derives its name from a popular Russian alcoholic beverage on the initiative of Irina Rodionova, a Russian official who allegedly facilitated collection of clean urine samples from athletes. According to the McLaren Report, these (along with samples’ identification numbers) were subsequently made available to the FSB for swapping at the Sochi Laboratory. Also according to the McLaren Report, appearance on the list indicated that an athlete had been authorized to consume the “Duchess cocktail”, a suite of performance-boosting chemicals allegedly developed by Dr. Rodchenkov. Whereas the Federation insists that the Appellant’s appearance in this list is an indication that she was a direct beneficiary of the system of sample-swapping described by Professor McLaren, the Appellant herself disputes the list’s relevance and considers the document inapposite to a potential ADRV allegation.



72. The Appellant questions both the origin and relevance of the Duchess List. In the Appellant's view, the McLaren Report's vague assertions clarify little regarding the list's origin or purpose. What meaning, if any, can be drawn from an athlete's appearance in the document is highly questionable. The Russian original and English translation do not correspond, compounding the Appellant's view as to the document's unreliability as a technical matter and diminishing its probative value.

c) *The Medals-by-Day List*

73. The Appellant considers the Medals-by-Day List similarly unhelpful to the Federation's cause. The list, according to the McLaren Report, contained a daily competition schedule compiled and updated throughout the 2014 Sochi Games. Its purpose was to identify high-value athletes whose samples were not to test positive; all athletes appearing on the Duchess List were included in this document.

74. In the Appellant's view, the Medals-by-Day List raises more questions than it answers. Its origin is "dubious"; there is neither attribution of authorship nor explanation of purpose, apart from the testimony of Dr. Rodchenkov. The Appellant additionally suggests that (i) several, mutually inconsistent versions of the list exist in the EDP; (ii) the Respondent refers to versions different from those cited in the McLaren Report itself; and (iii) numerous athletes are listed under competitions in which they did not in fact participate. The Appellant, in short, considers the list to be affected by internal and external inconsistencies that diminish whatever value it might otherwise have in indicating *prima facie* an ADRV.

d) *Conclusions*

75. On the basis of the evidence proffered by the Federation, the Appellant submits that there is "no reasonable chance" that she will ultimately be found guilty of an ADRV. In the face of widespread acknowledgement of the McLaren Report's limitations, the Respondent relies on "assumptions", not substantiated assertions worthy of credit, to make its case under the FIS ADR framework. Based exclusively on a report "*prepared expressly not to analyze*" individual athletes' guilt, the provisional suspension falls well short of FIS's burden under Article 7.9.2 of the FIS ADR.

76. The Appellant notes that the McLaren Report's limitations have been recognized by at least one other international sporting federation under regulations "*nearly identical*" to those applicable to cross-country skiing. She cites the International Bobsleigh & Skeleton Federation, whose adjudication of four cases pursuant to rules that mirror, word-for-word, FIS ADR Article 7.9.3.2 resulted in a lifting of the suspensions there under review. The Panel should hold the Respondent to the "*same standard of the Rule of Law*" in this appeal.

77. Even if *arguendo* the FIS ADR permitted an Optional Provisional Suspension in this case – based on, for example, the Respondent's (allegedly incorrect) argument that Article 7.9.3.2 shifts the

burden onto an athlete to justify its cancellation – the Appellant adds that the suspension abridges her fundamental rights under Swiss law. She explains:

*“While the Respondent, being a private law association under Swiss law, enjoys some autonomy ... it must always respect the fundamental procedural rights of the Appellants, and its internal rules and procedures (such as the FIS ADR) must be compliant with fundamental principles of international and Swiss law”.*

78. The provisional suspension is according to the Appellant premised in reality on a theory of guilt by association, i.e., *“without any form of evidence of wrongdoing”* individually. It thereby violates (i) the presumption of innocence; (ii) the Appellant’s right to *“economic freedom”* and to practice her profession; (iii) her personality rights; and (iv) the principle of *“no judgment without a charge”*, since FIS neither has asserted an ADRV nor made concrete its allegations and evidence. The Respondent, she adds, cannot *“hide”* behind its internal regulatory framework to escape the application of such principles, which are applicable both under the European Convention on Human Rights and the Federal Constitution of the Swiss Confederation.
79. The Appellant concludes by drawing the Panel’s attention to the suspension’s severity of consequence. The suspension, effective since 22 December 2016, removed her from competition at the height of the 2016-2017 winter skiing season. Should the suspension remain in place, the next season may well also be out of reach. This fear, in the Appellant’s view, is in no way baseless since the suspension is for an *“unspecified amount of time”* and *“pending further notice”* as to the Oswald Disciplinary Commission’s investigative work. Nor is the concern merely temporal or defeasible; it is doubtful that the Oswald Commission is in a position to uncover additional evidence to demonstrate an ADRV on the merits. The Federation’s interests would be vindicated equally by lifting the suspension presently and reinstating it in the unlikely event that investigations yield evidence of a rule violation.
80. The Optional Provisional Suspension, in sum, is (i) unsubstantiated; (ii) unsupported by reliable evidence; (iii) issued in violation of the FIS ADR; (iv) irreconcilable with the Appellant’s fundamental personal and procedural rights; and (v) grossly disproportionate. The Appellant accordingly submits the following prayer for relief:
- (i) *Reverse the Decision of the FIS Doping Panel regarding Provisional Measures in the matter of Evgenia Shapovalova of 6 February 2017 and lift the provisional suspension against the Appellant; and*
- (ii) *Order the FIS to pay the Appellant’s costs and expenses.*

## **B. THE RESPONDENT’S POSITION**

81. The Federation maintains that its imposition of an Optional Provisional Suspension was necessary and legally justified. In its view, FIS ADR require the Appellant – and not the Federation – to demonstrate certain criteria in order to lift a suspension, once one has been instituted. The Appellant in its view has failed to make out these criteria, least of all that an eventual ADRV charge has *“no reasonable prospect”* of being upheld. The provisional suspension therefore survives scrutiny.

## 1. The Applicable Standard

82. The Federation notes at the outset that the underlying context of this case derives from “*systematic, state-organised doping in Russia*”. The unprecedented level of interference in Russian sport, it concedes, goes far beyond the personal involvement of specific athletes. Yet upholding the provisional suspension does not require the Panel to be satisfied that an ADRV definitively took place on the evidence before it; rather, the question presented is merely whether evidence existed before the FIS Doping Panel to give rise to a legally cognizable suspicion under the FIS ADR.
83. The Federation accordingly disagrees with the Appellant’s framing of the Panel’s task in this appeal. The finding that an ADRV has been proven, as distinguished from a finding that a provisional suspension should be imposed, is subject to separate judicial processes under standards wholly distinct from the one embodied in FIS ADR Articles 7.9.2 and 7.9.3.2.
84. The Federation submits that the following legal framework applies to the Panel’s assessment of the provisional suspension under review:
- Article 7.9.2, governing the initial imposition of an Optional Provisional Suspension, grants the Federation a “margin of discretion” in determining whether a suspension is appropriate. This is confirmed by permissive language such as “may” and “optional” (“*FIS may impose a Provisional Suspension on the Athlete or other Person against whom the anti-doping rule violation is asserted*”). The Federation concedes that its margin of discretion is not unlimited; a “reasonable possibility” (rather than a bare possibility) that the suspended athlete committed an ADRV, however, suffices.
  - Under Article 7.9.3.2, once FIS has imposed an Optional Provisional Suspension, the burden of proof shifts to the suspended athlete, who must demonstrate one of three criteria to lift the suspension. The Appellant may demonstrate that the “*allegation of a possible ADRV which led to the opening of a formal investigation*” has “*no reasonable prospect of being upheld*”. Alternatively, she may challenge the suspension on one of two remaining grounds – relating to no fault/negligence or other facts that make it “*clearly unfair*” to impose the suspension. Absent such showings, the suspension remains in place.
85. In this connection, the Federation distinguishes Article R57 of the CAS Code – which endows the Panel with *de novo* power of review – with what it deems the permissive language of Article 7.9.2 of the FIS ADR. In the Respondent’s view, the Panel “*remains bound*” by the FIS ADR, “*including the margin of discretion provided [to FIS] by these rules*”. It cannot, in other words, “*simply replace the discretion of the prior instance*” with its own discretion. The Respondent adds that Article 7.9.3.2, by shifting the burden onto the Appellant to set aside a suspension already imposed, buttresses the existence of a margin of discretion under the FIS ADR. In this connection, the Respondent denies the relevance of the Appellant’s reference to Article 3.1, which it considers material only to ADRVs, not provisional suspensions.

## 2. Sufficiency of the Evidence

86. The Federation submits that the McLaren Report, whether assessed holistically or by its individual exhibits, implicates the Appellant with sufficient confidence to justify her suspension. Professor McLaren's work unveiled an enterprise whose operation could not have gone unnoticed by the Appellant or have proceeded without her participation, particularly in the provision of clean urine subject to illicit sample swaps. Second, the Appellant's name appears in documents which the Federation suggests are strongly indicative of doping and subsequent cover-up. The Respondent therefore argues for the maintenance of the suspension.

### *i. The McLaren Report Is Reliable*

87. The McLaren Report's scope is necessarily broad in nature and transcends individual conduct. At the same time, Professor McLaren identified a system whose viability depended, in the Federation's view, on the Appellant's knowledge and participation.

88. The Federation notes that the McLaren Report draws upon thousands of documents in service of its main assertion: that athletes, with the assistance of Russian officials, systematically circumvented doping controls through false reporting of laboratory results and (during the Sochi Games) through the exchange of urine samples believed contaminated with clean ones procured out-of-competition. The Federation notes that Professor McLaren's findings, combined with incriminating evidence in respect of individual athletes, gave immediate rise to suspicions against the Appellant individually, triggered an immediate IOC investigation into her, and led directly to FIS's prompt institution of a provisional suspension pending institution of ADRV proceedings.

89. In this regard, the Respondent disagrees that correspondence by IOC or WADA sporting officials indicates a lack of faith in the McLaren Report or its capacity to justify a provisional suspension (and lead ultimately to ADRV findings). The IOC, for example, highlights that the McLaren Report precipitated further investigations of implicated athletes. Rather than suggesting that the report is "*unreliable*", the correspondence serves in the Federation's view as an endorsement of the McLaren Report's probative value. Similarly, the FIS Doping Panel reasonably concluded that there was a "*sufficient likelihood*" that the IOC investigation would confirm the suspicions raised by Professor McLaren, resulting in an ADRV conviction.

90. The Respondent considers it possible and prudent to draw inferences regarding the Appellant on the basis of the McLaren Report's general assertions, even without the assistance of individual documents naming her specifically. In its view, the steps outlined in the McLaren Report "*would not have been possible*" without the participation of the scheme's principal beneficiaries: individual athletes.

91. This is particularly true, in the Federation's view, with respect to a key component of the scheme detailed by Professor McLaren, namely the provision of clean urine samples transported to an FSB storage facility and subsequently exchanged with contaminated samples at the Sochi

Laboratory. As clean urine could not be provided without the Appellant's voluntary participation, FIS submits, it is simply not conceivable that she remained unaware of the scheme's prohibited purpose. At minimum, a "reasonable possibility" of an ADRV exists by way of inference from Professor McLaren's findings.

92. Finally, the Federation notes that other Russian athletes have been prevented from competition as a result of the findings of the McLaren Report even on a far more general basis than that contemplated by the provisional suspension under review. The Federation cites, in this regard, the International Paralympic Committee's institution of a blanket competition ban applicable to all Russian athletes for the 2016 Paralympic Games in Rio de Janeiro, Brazil. That decision, upheld on appeal (CAS 2016/A/4745), was taken at a time when only Part I of the McLaren Report had been published – i.e., prior to Professor McLaren's identification and implication of *any* individual athletes. That it survived scrutiny is a testament to the McLaren Report's strength in justifying broad legal measures to contain doping's effects.
93. The Respondent views its own stance as having a stronger basis than that of the International Paralympic Committee because it has taken a "more specific approach". Only those athletes explicitly identified in Part II of the McLaren Report, it explains, were provisionally suspended by FIS:
- "While the panel in CAS 2016/A/4745 concluded that the first McLaren Report was sufficiently reliable evidence to suspend an entire federation with the consequence of ineligibility of all Russian para athletes for participation in the Paralympic Games, the same must be true, a fortiori, for the second, more specific McLaren Report 2 as a sufficient factual basis for provisional suspension of those athletes specifically identified therein".*
94. It follows, in the Respondent's view, that the McLaren Report has been acknowledged, both by its sponsors and tribunals facing analogous claims, as a compelling basis for legal action.

***ii. The EDP Supports the Suspension***

95. The Federation's decision to suspend the Appellant relies additionally on documents enclosed with the McLaren Report, Part II. In the Respondent's view, the EDP supports a "reasonable possibility" that the Appellant committed an anti-doping rule violation and undermines her challenge under FIS ADR Article 7.9.3.2.
- a) Urine Samples*
96. The Respondent submits, first, that the McLaren Report convincingly demonstrates the existence of a urine sample-swapping scheme in which the Appellant was directly implicated.
97. As observed in the McLaren Report, the doping scheme in operation at the time of the Sochi Games relied on the manipulation of athletes' urine sample containers in order to exchange (supposedly contaminated) urine with clean samples collected outside of regular competition. Statements by Dr. Rodchenkov concerning the method by which FSB agents allegedly reverse-

engineered Berlinger BEREC-KIT® sample bottles in order to enable such swaps suggested that manipulation of the bottles resulted discernable marks on the containers' internal surface.

98. The Appellant's sample, collected on 7 February 2014, shows both types of marks:  
*"According to the Forensic Report, the examined Sample B bottle n°2889781 of the Appellant showed 3 x Type 1 marks and 2 x Type 2 marks".*
99. The *"scratches and mark evidence"* detected on one of Ms. Shapovalova's B-sample containers in 2014, according to the King's College Forensic Report and also the Respondent, *"could have been made by tools during covert opening"* consistent with Part I of the McLaren Report – whereby a Berlinger BEREC-KIT® sample bottle was allegedly opened without destroying the closing mechanism, swapped, and then re-sealed.
100. The Respondent concedes that Type 1 marks can derive from innocuous uses, appearing for instance where a container's lid is screwed on forcefully – as the Appellant alleges. FIS notes, however, that Type 2 marks cannot be readily explained outside the context of attempted tampering. Those marks – consisting of vertical and diagonal scratches – occurred in the forensic report only where manipulation with a metal strip was used to pry open a sealed bottle, in the same way as described by Dr. Rodchenkov and detailed in the McLaren Report. On this evidence, the Respondent submits that the Appellant's B-sample bottle shows evidence of tampering sufficient to ground a *"reasonable likelihood"* of an ADRV in which the Appellant was personally involved.
101. There is *"no allegation"* that the Appellant personally supervised the tampering process itself, FIS observes. Considering Professor McLaren's evidence, however, the Respondent considers it impossible that the Appellant could have provided clean urine without being aware of its illicit purpose:  
*"[I]t is difficult to accept that the content of the sample bottle was replaced or manipulated without the Appellant's prior co-operation or knowledge (e.g. by providing clean urine and/ or when the sample was manipulated to mask a prohibited substance....*  
*Regarding the Appellant's personal involvement, it is simply not conceivable that she provided clean urine before the Olympic Games outside of regular doping controls without knowing why she had to provide such urine, namely for the purpose of manipulating the doping controls".*
102. Additional arguments adduced by the Appellant to provide alternative explanations for her conduct, in the Respondent's view, are without merit. Evidence that the Appellant has submitted repeatedly to doping controls, for example, are no more convincing than her observations that an ADAMS analysis returns no positive test results. This evidence suggests not that no manipulation occurred, only that such manipulation evaded detection.
103. At the hearing, the Respondent similarly rejected the Appellant's suggestion that clean urine might have been sourced without her knowledge during semiannual physical examinations. The Federation observed that collection of clean urine in hospital cups was inconsistent with the

McLaren Report's description of illicit urine collection using nonstandard containers such as Coca Cola bottles; in any event, FIS deemed the argument insufficiently substantiated.

b) *Duchess List*

104. The Federation argues that the Appellant's appearance in the Duchess List provides an additional and compelling indication of her involvement in an ADRV. This document, according to Part II of the McLaren Report, was prepared "*before Sochi*" and included "*athletes known to be taking*" the Duchess cocktail, a performance-boosting concoction allegedly developed by Dr. Rodchenkov. Athletes consuming the cocktail were allegedly subject to out-of-competition urine collection in furtherance of the Russian Federation's sample-swapping scheme. The Federation therefore submits that the Appellant's inclusion leads directly to the conclusion that she benefited from and participated (albeit at an early stage of the process) in the concealment of test-positive urine samples.
105. Additionally, while the Respondent takes note of the Appellant's claims that the origin and purpose of the Duchess List are not clear from the face of the EDP, it maintains that the document shares a sufficient nexus with Professor McLaren's narrative of doping circumvention to be of value to the Panel. The list's relevance, FIS observes, cannot be severed from the testimony of Dr. Rodchenkov. Those statements attribute the list to CSP director Irina Rodionova and demonstrate its centrality to the Sochi scheme. Apart from Professor McLaren's own assertions, the Federation considers the Duchess List has obvious relevance given that there could be "*no need*" to draw such a list, as the Federation puts it, "*unless it was for a prohibited purpose*".
106. Accordingly, the Federation maintains that the Appellant's appearance in the Duchess List implies consumption of performance-enhancing drugs necessarily consequent on or consistent with the tampering alleged by Professor McLaren and detected in the Appellant's urine sample.

c) *Medals-by-Day List*

107. The Appellant's appearance on the so-called Medals-by-Day List, the Respondent submits, also associates her with the pool of doped athletes flagged by Russian sporting authorities for protection. That list, according to FIS, was prepared in advance of individual events at the Sochi Games. It lists the names of Russian athletes "*expected to compete in medal races*" and whose samples "*should therefore result in a negative finding*".
108. The Respondent contests the Appellant's criticisms of this exhibit's relevance. As with its "Duchess" equivalent, the Medals-by-Day list is neither dubious in origin nor divorced from Professor McLaren's conclusions. The list was prepared by Mr. Velikodniy's staff. It was updated regularly throughout the 2014 Sochi Games. Team composition, moreover, is routinely amended and can be modified in close proximity to an event such as a relay race. For these reasons, the Federation suggests that the existence of inconsistent versions of the list or its

failure to reflect perfectly final competition rosters does not undermine its probative value in linking the Appellant to an ADRV.

d) *Conclusions*

109. In light of the foregoing, the Respondent submits that it acted within its margin of discretion under FIS ADR Article 7.9.2 in imposing the provisional suspension. No individual piece of evidence alone suffices to ground an ADRV. Taken together, however, the documents demonstrate the Athlete's involvement:

*"the Russian Ministry of Sport (MoS), through the Center of Sports Preparation of National Teams of Russia and with the help of RUSADA and the laboratories of Moscow and Sochi installed a sophisticated system to protect certain Russian top athletes competing at the Olympic Games from being tested positive for prohibited substances. The Appellant was among these protected athletes".*

110. Both athlete-specific evidence and the "broader context" of systematic doping described in the McLaren Report establish a "strong suspicion" of doping and/or tampering with doping controls. Indeed, in the Federation's view, the Appellant's express identification in the McLaren Report as a beneficiary of the doping scheme "not only justified but required" the suspension.

111. Having argued that the record justified its imposition of the suspension pursuant to Article 7.9.2, the Federation concludes that the Appellant falls short of her burden under Article 7.9.3.2 to warrant the setting aside of her provisional suspension. That article provides that an Optional Provisional Suspension "shall be imposed (or shall not be lifted) unless" one of three conditions is met. In the Federation's view, the Appellant has failed to meet any one:

(i) The FIS Doping Panel had "valid reasons to conclude" that the assertion of an ADRV would have a "reasonable prospect of being upheld after further investigation". Indeed, in the Respondent's view, it is "not conceivable" that the Athlete provided clean urine outside of regular doping controls without an awareness of why she was being asked to do so.

(ii) With respect to arguments based on an absence of fault, the Appellant cannot "simply deny any personal involvement", particularly since the manipulations were dependent on the Athlete's irregular provision of clean urine. There is only a "very remote possibility" that such samples could have been procured without her knowledge.

(iii) Finally, since inability to participate in competitions is expressly excluded under Article 7.9.3.2(c), the Appellant's exclusion from the Russian championships or other sporting events falls short of circumstances making it "clearly unfair" for the suspension to remain in effect.

112. The Federation concludes by drawing the Panel's attention to the context in which the McLaren Report was published. The IOC's notification letter dated 22 December 2016 laid out compelling evidence that had been known to the Federation since at least 9 December 2016. The unprecedented scale of Professor McLaren's allegations in combination with athlete-specific data in the EDP, FIS insists, required an immediate and resolute response.



113. The Federation disagrees that its provisional suspension was imposed disproportionately or at the cost of the Appellant's due process rights, however. In its view, she was given a full and fair hearing at the FIS Doping Panel, before the Deputy President of the Appeals Arbitration Division of the CAS, and by this Panel upon submission of the Appellant's (second) Application for Provisional Measures. The same has been true throughout the proceedings on the merits.
114. FIS denies that the Appellant's treatment contravenes fundamental rights under Swiss or international law. In its view, the Appellant "*misses the point*". There has for instance been no "*conviction without charge*" because no ADRV has formally been alleged, much less adjudicated. The FIS Doping Panel explicitly recognized that a provisional suspension neither proves nor presumes the Appellant's ultimate guilt. On the other hand, the *potential* ADRV leading to the opening of an investigation against the Appellant and to her provisional suspension has from the outset been clear: "*Tampering or Attempted Tampering with any part of the Doping Control*", an offense defined under Article 2.5 of the World Anti-Doping Code ("WADA Code") and Article 2.5 of the FIS ADR. Accordingly, the Appellant has not been sanctioned without charge, presumed guilty, or deprived of any other fundamental rights.
115. The Appellant's suspected involvement in an ADRV is the subject of further investigation by the Oswald Disciplinary Commission, and the Respondent admits that the ultimate success or failure of ADRV proceedings depend on that body's findings. In contrast to the Appellant, however, FIS is optimistic that investigative work carries a healthy prospect of adducing new evidence. Further evidence might be adduced, for example, from (i) re-testing further samples collected from the Appellant before, at, and after the Sochi Games (if available); (ii) forensic analysis of all bottles used for sample collection; and (iii) examination of coaches and witnesses, including laboratory personnel such as Dr. Rodchenkov and persons of interest including Mr. Velikodniy and Natalia Zhelanova (Anti-Doping Advisor to the Russian Minister of Sport).
116. The balance of interests in maintaining the provisional suspension is in the Federation's view, therefore, firmly in its favor. The evidence indicates strongly the Appellant's involvement in an ADRV, even if the adjudication of an ADRV charge, once formally alleged, must await the result of further investigations. In the meantime, the Respondent notes, the Appellant has been allowed to train with the Russian national team, an accommodation intended to preserve her chances of qualification for the 2018 Olympic Winter Games. Though the Appellant understandably suffers harm from her inability to compete at present, FIS deems the provisional suspension proportionate and attentive to the Appellant's individual circumstances.
117. Finally, FIS adds that strong interests exist to keep the suspension in place. Maintaining the suspension mitigates the "*serious further risk*" of requiring retroactive disqualification of the Athlete (should she be found guilty of an ADRV). The potential need to revisit rankings, re-distribute medals, or otherwise modify competition results would "*diminish the value*" of the competition for participants, sponsors, and the viewing public. Indeed, in the Federation's view, continued participation of athletes suspected of ADRVs casts a shadow over all of Russian sport – including athletes not suspected of any misconduct. Seen in this light, FIS suggests, the

Appellant’s provisional suspension is not a “*sanction but a safeguard*”, one aimed at protecting integrity of sport generally and the interests of clean athletes particularly. The Federation deems its provisional suspension proportionate, taking into account its “*strong signal effect*” and legal endorsements of more severe measures – including blanket bans on all Russian athletes – in response to the McLaren Report.

118. The Respondent therefore considers the Optional Provisional Suspension justified on the basis of the evidence available. It submits the following prayer for relief:

(i) *The Appeal shall be dismissed.*

(ii) *The Appellant shall pay the Respondent’s costs and expenses related to her appeal, including the costs related to her Requests for Provisional Relief.*

## **VI. ANALYSIS**

### **A. JURISDICTION**

119. CAS jurisdiction in these proceedings results from Article 8.2.2 of the FIS ADR, which provides that decisions of the FIS Doping Panel “*may be appealed to the CAS as provided in Article 13*”. Article 13 states, in relevant part:

13.2 *A decision [...] to impose a Provisional Suspension as a result of a Provisional Hearing [...] may be appealed exclusively as provided in Articles 13.2 – 13.7.*

13.2.1 *In cases arising from participation in an International Event or in cases involving International-Level Athletes, the decision may be appealed exclusively to CAS.*

120. Neither Party disputes jurisdiction. The Panel is satisfied that Article 13 of the FIS ADR provides for appeal to CAS in cases, such as the present one, concerning the imposition of a provisional suspension on an athlete. Accordingly, the Panel deems that CAS has jurisdiction in this appeal, as confirmed by the Parties’ signature of the Order of Procedure.

### **B. ADMISSIBILITY**

121. As an “*appeal against the decision of a federation, association or sports-related body*”, the present proceedings are governed by Article 13.7 of the FIS ADR and Articles R47 *et seqq.* of the CAS Code.

122. The Appellant’s Statement of Appeal complies with all procedural and substantive requirements of the CAS Code, including, as appears from paragraphs 24 to 30 above, timely filing. The Respondent does not dispute the admissibility of the Appellant’s claims. Accordingly, the Panel deems the appeal admissible.

### C. APPLICABLE LAW

123. In their written submissions, the Parties disagreed as to whether the 2014 or the 2016 FIS ADR apply. At the hearing, however, the Parties ultimately (and in the Panel's view, correctly) agreed on the application of the 2016 FIS ADR. The Panel accordingly refers to those Rules – whose effective date of 1 January 2015 precedes the appealed suspension – in the present award.

124. FIS ADR Article 7.9 sets out the applicable regime with regard to Optional Provisional Suspensions. It provides, in relevant part:

*7.9.2 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, FIS 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.*

[...]

*7.9.3.2 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.*

125. FIS ADR Article 7.7 governs the “assertion” of an ADRV as cross-referenced in Article 7.9.2. It states:

*7.7 FIS shall conduct any follow-up investigation required into a possible anti-doping rule violation not covered by Articles 7.2-7.6. At such time as FIS is satisfied that an anti-doping rule violation has occurred, it shall promptly give the Athlete or other Person (and simultaneously the Athlete's or other Person's National Anti-Doping Organisation, the Athlete's or other Person's National Ski Association and WADA) notice of the anti-doping rule violation asserted and the basis of that assertion.*

### D. LEGAL ANALYSIS

126. The Panel first examines the legal framework applicable to its analysis of the Optional Provisional Suspension as set out in the FIS ADR.

127. This case belongs to the first generation of appeals concerning the application of the FIS ADR in response to the findings of the McLaren Report. The broader question of whether the McLaren Report justifies provisional measures against suspected athletes, however, is not without precedent. Before setting forth the legal standard in this appeal, therefore, the Panel first considers the precedential value, if any, of the cases cited by the Parties.

128. The Panel notes, first, the Appellant’s recourse to a decision by the International Bobsleigh & Skeleton Federation (“IBSF”), lifting the provisional suspensions of four athletes under a legal framework identical to that set out in Article 7.9 of the FIS ADR – including Article 7.9.3.2(c). That decision is described in an IBSF press release dated 8 January 2017 and concluded that it was “*clearly unfair*” to maintain the suspensions. The IBSF Doping Hearing Panel relied on the following:

- (i) Article 6 of the European Convention on Human Rights embodies a presumption of innocence which is further anchored by Article 3.1 of the IBSF Rules. The latter provision places a burden on the IBSF to prove athletes’ guilt before imposing a suspension.
- (ii) Part II of the McLaren Report provided “*sufficient reason*” to conduct further investigations but did *not* establish evidence sufficient to justify an immediate provisional suspension.

The IBSF panel accordingly lifted the provisional suspensions<sup>4</sup>. The decision in the Appellant’s view stands as one indication (by analogy) of how the FIS ADR deal with issues of burden of proof, including the evidentiary threshold necessary to impose and/or sustain a provisional suspension.

129. Although the IBSF decision itself has not been made available to the Panel, the decision is clearly distinguishable on the face of the press release submitted into the record. Critically, the IBSF Doping Hearing Panel appears to have relied upon Article 3.1 of that federation’s rules as imposing a burden of proof on the IBSF to “*prove[] guilt*” – a burden which the IBSF evidently failed to satisfy.

130. The Panel does not consider FIS ADR Article 3.1 to impose on the Federation a burden to demonstrate the Appellant’s guilt of an ADRV. The provision, like its IBSF equivalent, states as follows:

*Article 3 PROOF OF DOPING*

*3.1 Burdens and Standards of Proof*

*FIS and its National Ski Associations shall have the burden of establishing that an anti-doping rule violation has occurred....*

The standard for demonstrating an ADRV, as the provision makes clear, is “*comfortable satisfaction ... greater than a mere balance of probability*”. The question presented in this appeal, however, is not whether the Federation has demonstrated that the Appellant committed an ADRV. The FIS Doping Panel recognized that an ultimate determination of the Athlete’s guilt which would engage that very question remains contingent on further investigation. The Respondent, too, has repeatedly noted that no ADRV has yet been charged. The provisional suspension occupies a space in which an ADRV is asserted, but not yet proven.

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<sup>4</sup> The panel also invited the IBSF to “*share any outcome of its investigation*” and left open the possibility to “*potentially reconsider*” its decision.

131. Provisional suspensions have a necessarily preliminary character. The Appellant seems to agree, suggesting that a “*reasonable chance*” of an ADRV suffices at the provisional suspension stage. The burden of proof and legal thresholds applicable in this appeal must reflect the appealed suspension’s provisional nature and track the rules specific to its imposition. It follows that an Optional Provisional Suspension imposed pursuant to FIS ADR Article 7.9.2 is not subject to the strictures of Article 3.1, relating solely to adjudication of an ADRV. If the IBSF Doping Hearing Panel held otherwise, the Panel would decline to follow its example.
132. The Respondent, for its part, has cited a decision by the International Paralympic Committee (“IPC”) which purportedly imposed a blanket ban on Russian athletes on the basis of evidence in McLaren Report, Part I. The decision, in the Federation’s view, represents a considerably more severe outcome reached on the basis of evidence more limited than that available in this case. That the Paralympic ban passed legal muster, the Federation argues, supports a permissive interpretation of the FIS ADR.
133. The Paralympic precedent, however, was based on rules substantially different from the FIS ADR. In that case, the IPC suspended the Russian Paralympic Committee, not Russian athletes. Because Article 9.6 of the IPC Constitution precludes any suspended member federation from sending *any* athletes to IPC-sanctioned competitions, Russia was consequently unable to enter its nationals. Certain international federations<sup>5</sup> share this constitutional feature; FIS is not one of them. Because the FIS ADR are narrower in scope, their interpretation is not aided by reference to the IPC.
134. Accordingly, the Panel deems the precedents cited by both Parties inapplicable to the present appeal. It proceeds to interpret the FIS ADR in exercise of its plenary review power.
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135. FIS ADR Articles 7.7 and 7.9 each inform the imposition of a provisional suspension by FIS. The Panel’s first task therefore consists of determining to the extent possible the hierarchy among them. In particular, the Panel considers whether Article 7.7, which regulates the assertion of ADRVs writ large but is also incorporated specifically into Article 7.9.2, sets forth a substantive threshold before the latter provision can be set in motion.
136. One reading of the rules is to consider Article 7.7 the first step for the imposition of an Optional Provisional Suspension. That article can be read as starting a process which may or may not end with a finding of an ADRV; pending the final resolution of the charge, there may be a provisional suspension under Article 7.9. In other words, the reference in Article 7.7 to FIS being “*satisfied that an anti-doping violation has occurred*” can only sensibly require FIS to be satisfied to a level sufficient for it honestly and reasonably to make an assertion of an ADRV as that article contemplates.

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<sup>5</sup> The International Association of Athletics Federations, for instance, provide that “[*a*]ny athlete, athlete support personnel or other person [...] whose National Federation is currently suspended” is ineligible to compete. IAAF Rules, Art. 22(1)(a) (2016-2017 ed.).

137. Under this interpretation, there would be no need to consider the plethora of formulations used by the Parties to describe the threshold which must be met under the FIS ADR by use of the McLaren Report and other evidence. Once the Article 7.7 requirements are met, so that the assertion has been “*notified*”, it is Articles 7.9.2 and 7.9.3.2 which then regulate Optional Provisional Suspensions. That power has to be exercised proportionately within the bounds of reasonable discretion, but there is no further threshold beyond what is required to comply with Article 7.7: namely reasonable grounds for the ADRV’s assertion, and whose basis is sufficiently clear for the athlete (or other violator) to understand.
138. It is no less possible, in the Panel’s view, to consider Article 7.7 the *last* step in the provisional suspension context, imposing only procedural requirements for notification of an ADRV rather than setting forth a burden of proof. In this case the substantive threshold inheres exclusively in Article 7.9.2.
139. Though both options have merit, ambiguous drafting frustrates attempts at a definitive interpretation of the FIS Rules’ intended order of precedence. Especially unclear is the relationship between a suspension on the one hand (7.9) and the “*assertion*” of an ADRV on the other (7.7). Article 7.7, for example, requires that FIS be “satisfied” that an ADRV has occurred before “*asserting*” it. The wording might imply the existence of a threshold higher than suspicion, i.e., a violation that has been *established* with some satisfaction. In contrast, Article 7.9.2 refers to an ADRV being “*asserted*”, and incorporates Article 7.7, but proceeds to characterize that provision as nothing more than a “*review and notification*” requirement. Since notification alone cannot ground any burden of proof, Article 7.7 in this context serves only a procedural function, becoming relevant only after the substantive threshold (located elsewhere) is met. That reading is itself unsettled by Article 7.9.3.2, which states that a suspension must be lifted if the “*assertion*” of an ADRV has no prospect of being “*upheld*”. Here, an assertion is more than notice. Indeed it is a final decision (capable of being “upheld” or struck down).
140. A literal focus on the word “*assertion*” may therefore prove elusive. The drafters’ intent finds no expression in a uniform, *literal* construction of Articles 7.7 and 7.9. The more satisfactory approach, in the Panel’s view, examines the FIS ADR through the prism of how CAS exercises its jurisdictional *function* once one is established.
141. FIS is an institution comprised of discrete organs serving different functions. In either context, where FIS “*asserts*” an ADRV it exercises a prosecutorial function. A different organ evaluates that assertion in two possible ways: provisional or final. In either case, an appeal is possible. The question that then arises in each case is the standard of proof with respect to appeals of one or the other kind. In *this* appeal, a provisional decision is overturned if it has “*no reasonable prospect of being upheld*”. It is this explicit and undisputed standard which the Panel faces on appeal and which it must apply, independent of the precise confluence of Articles 7.7 and 7.9.2 that led FIS to impose a suspension in the first place.

142. Articles 7.9.2 and 7.9.3.2 regulate Optional Provisional Suspensions proper. The former states when and how a provisional suspension may be imposed. The latter sets out circumstances in which a suspension instituted pursuant to the preceding subparagraph may be challenged.
143. There is a clear difference between the permissive language of Article 7.9.2 and the mandatory nature of its successor, Article 7.9.3.2. The first of these permits (“*may*”) the Federation to impose an optional provisional suspension wherever an anti-doping rule violation is “*asserted*”. The second lays bare a shift of burdens; absent the Appellant’s satisfaction of certain conditions, the suspension “*shall not be lifted*”.
144. The Parties have adopted a multitude of formulations to describe the threshold under the FIS ADR which the McLaren Report and the material contained or referred to therein do or must meet: “*reasonable chance*”, “*difficult to believe*”, “*not conceivable*”. Behind the variations in phrasing lie two sharply divergent views. The Appellant considers the Respondent responsible for showing the existence of *an ADRV*. The Federation considers its burden limited to demonstrating that an ADRV was *possible* – whereupon the burden is assumed by the Appellant to demonstrate the opposite at a higher threshold (no “*reasonable prospect*”).
145. Articles 7.9.2 and 7.9.3.2, read in conjunction, establish a two-step framework that endows the Federation with broad authority provisionally to suspend athletes who it has reasonable cause to believe committed an ADRV. Pursuant to Article 7.9.2, *any* ADRV suspected of an athlete can serve as cause for a provisional suspension against him or her, should the Federation so decide. From that moment onward, a provisional suspension is subject to challenge only by reference to the enumerated criteria in Article 7.9.3.2, whose satisfaction it is the Appellant’s burden to establish.
146. The Federation’s burden under Article 7.9.2 is a limited one, but certainly not devoid of content. In the Panel’s view, no plausible interpretation of Article 7.9.2 can require an athlete to disprove unsubstantiated assertions.
147. This conclusion is also warranted by a structural comparison of Articles 7.9.2 and 7.9.3.2. The introductory clause of Article 7.9.3.2 has been designed, or so one must infer from the precision of its drafting, to relate not only to lifting a suspension but also to its initial imposition (“*shall be imposed (or shall not be lifted) unless*”). The Parties have not addressed why language relating to *imposition* appears in a provision otherwise concerning challenges against suspensions previously asserted; nor why, whereas Article 7.9.2 says that FIS “*may*” impose a provisional suspension (without specifying the standards for imposition), Article 7.9.3.2 says that a provisional suspension “*shall*” be imposed unless the Athlete can establish one or more of the factors set out in (a), (b), or (c) (the current language is imperfect and may justify revisiting by the rule-maker). One possible reconciliation of the apparent tension between the two articles is to construe Article 7.9.2 as identifying the existence of the power provisionally to suspend, and Article 7.9.3.2 as identifying the criteria for its exercise or non-exercise. 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 a 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 as more respectful of the text, structure, context, and perceptible purpose of the FIS ADR. It does not consider that the words which give rise to the problems of interpretation, i.e., “*shall be imposed (or [...])*” can simply be ignored or read out as superfluous given the precision of the parenthesis.

148. The Panel accordingly so holds, subject always but only to the Preclusion, that the imposition of a provisional suspension requires a “*reasonable possibility*” that the suspended athlete has engaged in an ADRV. The drafting of the FIS ADR leaves the relationship between Articles 7.7 and 7.9 open to question and the Panel accordingly declines to pronounce upon it, not least because the same question arises under the WADA Code 2015, the template for other, including FIS, anti-doping rules. The jurisdictional function of CAS upon referral of an appeal against a suspension imposed, however, is clear: the Panel assesses *inter alia* whether the assertion has “*no reasonable prospect*” of being upheld. A “*reasonable possibility*” anticipates the rejoinder that an assertion has “*no reasonable prospects*” and is the Federation’s burden to bear in the first instance.
149. A reasonable possibility is more than a *fanciful* one; it requires evidence giving rise to individualized suspicion. This standard, however, is necessarily weaker than the test of “*comfortable satisfaction*” set forth in Article 3.1. Accordingly, a reasonable possibility may exist even if the Federation is unable to show that the balance of probabilities clearly indicates an ADRV on the evidence available<sup>6</sup>.
150. Once a suspension has been put in place and is challenged, Article 7.9.3.2 imposes three, independently sufficient criteria for lifting the suspension: a demonstrable lack of “*fault*” or “*negligence*” on the athlete’s part, “*no reasonable prospect*” of the assertion of an ADRV succeeding on the merits, or the presence of “*other facts*” making it “*clearly unfair*” to leave the suspension in place. “*Reasonable possibility*” is at the other end of the spectrum from “*no reasonable prospects*”, although of course it demands less of the proponent.
151. Article 7.9.3.2 thus plainly imposes a higher threshold to lift a suspension than the FIS ADR require to impose one in the first place. Since additional evidence can be adduced in the period between a suspension’s imposition and ADRV proceedings, moreover, the rule does not require that “*prospects*” be assessed by reference to currently available evidence *in isolation*. The provision would permit, for example, a conclusion that “*reasonable prospects of success*” exist where documents are insufficient (individually or collectively) to ground an ADRV but nonetheless indicate misconduct for which further investigations hold out the prospect of more and better proof. Demonstrating the negative proposition, of *no reasonable prospects*, therefore requires more than an assertion as to shortcomings with current evidence, such as a patent flaw in the case against the Athlete.

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<sup>6</sup> Specific ADRV charges may follow the Oswald Disciplinary Commission’s investigations; any charges will fall under the jurisdiction of the IOC (with respect to the period of the Sochi Games) and are otherwise reserved for subsequent FIS proceedings.



## E. ANALYSIS OF THE MERITS

152. Having set forth the standard applicable under the FIS ADR to this appeal, the Panel turns to assessing the provisional suspension against the evidence proffered in its support. Accordingly, the Panel asks whether the Federation has demonstrated that, based on the evidence before it, a “reasonable possibility” existed that the Appellant committed an ADRV. It does so *de novo* in light of Articles 13.1.1 and 13.1.2 of the FIS ADR.

153. As explained below, the Panel concludes that the evidence establishes a “reasonable possibility” of an ADRV in the Appellant’s case. It further considers that the Appellant has not demonstrated with satisfaction the fulfillment of criteria necessary to lift the suspension, though the Panel has decided that it should be modified.

### 1. Preliminary Observations regarding the Record

154. The evidence in this appeal derives from one source: the McLaren Report and associated documents from the EDP. The McLaren Report itself, as stated, consists of two installments. Part I was published on 16 July 2016 and considered “*manipulation of the doping control process during the Sochi Games, including ... acts of tampering with the samples within the Sochi Laboratory*”. It concluded that doped Russian athletes were protected from at least 2011 through false reporting of positive test results by the Moscow Laboratory. During the Sochi Games, manipulation of urine samples at the Sochi Laboratory allegedly allowed Russian athletes to continue to dope undetected, even in the presence of international monitors.

155. Part II focused on the as-yet-unfulfilled third prong of Professor McLaren’s task: identification of “*any athlete that might have benefited from those alleged manipulations to conceal positive doping tests*”. Published on 9 December 2016, it made good on that promise. The document draws from thousands of exhibits and names hundreds of Russian athletes.

156. The Parties have addressed extensively the intended scope of Professor McLaren’s investigative work, the quality of his conclusions, and the degree of confidence with which these touch upon the Appellant individually. From these arguments emerges an overarching concern, asserted vigorously by the Appellant and denied by the Federation, implicating her rights to due process. She submits *inter alia* that she (i) has never been accused of an ADRV; (ii) is unaware what ADRV might potentially be charged; and (iii) is forced to defend herself against assumptions, not evidence.

157. The Panel accordingly turns to the Appellant’s invocation of fundamental rights with which she considers the suspension to be in tension. The Appellant’s submissions in this regard invoke rights both under Swiss constitutional and European human rights law.

158. Swiss law governs. This is true of FIS, a Swiss association whose statutes and regulations must be interpreted in accordance with Swiss law, and of CAS arbitrations writ large by virtue of their juridical seat. It is uncontroversial, moreover, that certain norms and principles relating *inter alia*

to the Appellant's rights of due process and personality inhere in Swiss law, either directly through codified law, or derived indirectly from principles of good faith and the prohibition on abuse of rights (Swiss Civil Code, Art. 2). These provide a minimum standard of process with which the FIS ADR must comply.

159. At the same time, as the Appellant recognizes, Swiss associations enjoy a degree of discretion in their internal affairs including with regard to disciplinary measures. The Panel accepts that there is a danger of abuse by international sport associations occupying in effect a monopoly over their respective disciplines. Even so, the Swiss Federal Tribunal affords sports associations substantial deference in the exercise of their disciplinary authority (including under Articles 63 *et seq.* of the Swiss Civil Code) and assesses sports arbitral awards with an appreciation of their utility (Judgment 4A\_178/2014 of 11 June 2014, para. 5.2; Judgment of 17 June 1971, BGE 97 II 108, 113-114; Judgment 4A\_428/2011 of 13 February 2012, para. 3.2.3). CAS jurisprudence likewise recognizes the wide discretion afforded to associations under Swiss law (Advisory opinion CAS 2005/C/976 & 986, para. 142 (“*Swiss law grants an association a wide discretion to determine the obligations of its members and other people subject to its rules, and to impose such sanctions it deems necessary to enforce the obligations*”); CAS 2011/O/2422, para. 55).
160. The question, therefore, is not whether the Appellant enjoys certain fundamental rights but rather to which degree they find expression vis-à-vis competing notions of associational autonomy. The authorities invoked by the Appellant recognize this tension, accepting for example that an athlete subject to sanctions proceedings internal to an association does not “*require protection in the same measure as, for example, the accused in a criminal proceeding*”. That sentiment applies all the more forcefully since the present appeal concerns not a disciplinary sanction *per se* but rather a provisional measure. Swiss law accepts that the predicates of a fair proceeding differ across types of procedures (civil, criminal, administrative, and disciplinary); it stands similarly to reason, in the Panel's view, that a provisional suspension – a non-punitive and interim measure – operates under a standard of scrutiny less exacting than that over ADRV proceedings.
161. In identifying the specific principles applicable to this arbitration under Swiss law, it is pertinent to consider as one element the criteria for challenging an international arbitral award. The Swiss Private International Law Statute (“PILS”) provides in Article 190(2) an exhaustive list of grounds under which an award may be annulled; by negative implication, these identify mandatory principles that arbitrators must consider. Of relevance here, subparagraph (d) of the article requires “*the principle of equal treatment of the parties*” and “*the right of the parties to be heard*”, while subparagraph (e) allows the nullification of awards “*incompatible with public policy*”. The first of these clarifies at least the Panel's responsibility to guarantee equality of arms and the Appellant's right to fair trial in the most general sense<sup>8</sup>, and is understood by the Swiss Federal

<sup>7</sup> SCHERRER/BRAGGER, Satzungs- und Gesetzeskonformität von Vereinsstrafverfahren am Beispiel des FIFA-Ethikverfahrens, SJZ 111/2015, 469, 474-475.

<sup>8</sup> HÜGI T., Sportrecht 167, paras. 32-36 (citing *inter alia* the principles of legality, fair trial, equal treatment in accordance with law, equality of arms, the right to be heard, the presumption of innocence, and *in dubio pro reo*; the latter two are limited in the context of doping-related proceedings internal to a sport federation); SCHERRER/LUDWIG, Sportrecht: Eine

Tribunal in essence to correspond to the requirements of due process under Article 29 of the Civil Code (Judgment of 10 September 2001, BGE 127 III 576, 578). Corollaries include in adversarial proceedings the Appellant's right to understand, confront, and refute the evidence against her (i.e., protection from having to disprove unsubstantiated assertions).

162. In alleging the provisional suspension's incompatibility with Swiss fundamental rights, the Appellant's submissions also evoke PILS Article 190(2)(e). Substantive public policy, or *ordre public matériel* in French, is understood by Swiss jurisprudence to embody fundamental principles which should comprise part of any legal order. This appeal, no less than the proceedings before the FIS Doping Panel, is bound to observe it. Even so, successful invocations of the public policy exception are rare. Even "*the manifestly wrong application of a rule of law or the obviously incorrect finding of a point of fact is still not sufficient to justify revocation for breach of public policy of an award made in international arbitration proceedings*" (CAS 2014/A/3803, para. 82). Only a *result* contradicting public policy may be grounds to annul. Considering that part of Swiss public policy is precisely to encourage expeditious resolution of international and especially sporting disputes, it is perhaps unsurprising that only two international arbitral awards (both of the CAS) have ever been set aside in these circumstances<sup>9</sup>.
163. It is against this backdrop and in light of precepts of Swiss law illuminated *inter alia* by the Swiss Civil Code and its Federal Constitution that the Panel assesses the Appellant's invocation of fundamental rights and their alleged violations, namely: (i) the principle of fair trial; (ii) the presumption of innocence; (iii) the principle of no judgment without charge; (iv) FIS members' right to equal and fair treatment in judicial proceedings; (v) the right to be heard; and (vi) the Appellant's personality rights.
164. The Panel accepts that principles guaranteeing a fair hearing, protecting against judgment without charge, and providing a right to be heard inhere in Swiss law. It does not consider that they have been infringed. As recognized by the FIS Doping Panel, there is neither "*conviction*" nor yet a formal "*charge*" of an ADRV. The *suspected* ADRV informing the Appellant's suspension is clear: tampering or attempted tampering with doping controls by virtue of her purported benefit from and participation in the sample-swapping scheme detailed by Professor McLaren. The Panel disagrees that a suspension premised on guilt while falling short of proving it on evidence currently available is in principle unjust.
165. There is no indication, moreover, that the Appellant has been deprived of due process in the first instance or on appeal. The right of equal treatment requires any arbitral tribunal to apply similar procedural rules and requirements to all parties, in particular with respect to the taking

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Begriffserläuterung 304 (2d ed. 2010) (adding the principles of *ne bis idem* and that no sanction may violate good morals (*gute Sitten*, or '*les bonnes mœurs*' in French)). Cf. European Convention on Human Rights, Arts. 6.1, 6.3.

<sup>9</sup> Neither case is relevant to this appeal. The first case, concerning a procedural public policy violation, found that a CAS tribunal improperly failed to observe the *res judicata* effect of a Zurich court judgment. Judgment 4A\_490/2009 of 13 April 2010, BGE 136 III 345. The other, concerning a substantive public policy violation, related to an indefinite (and potentially lifetime) occupational ban found to violate the athlete's freedom of profession (Swiss Federal Constitution, Art. 27(2)) and rights of personal freedom (Swiss Civil Code Art. 27(2)). Judgment 4A\_558/2011 dated 27 March 2012, BGE 138 III 322.

of evidence and the questioning of witnesses. The Panel has undertaken a number of procedural steps in order to ensure the equality of the Parties. Notably it has drawn the Parties' attention in advance to those facts which it deemed relevant and excluded from evidence the McLaren Affidavit (see para. 178 below), even where it was under no obligation to do so under Swiss law. Incidental aspects of the Panel's decision-making of which the Appellant disapproves, particularly its attachment of credibility to testimony by Dr. Rodchenkov despite his unavailability for security reasons, are not censured under Swiss or European human rights case law<sup>10</sup>. The Appellant's appearance before the FIS Doping Panel, in the Panel's view, likewise provided her with a full and fair opportunity to present her case and to be heard. The procedures both in the first instance and on appeal are in accord with the Appellant's right to "equal treatment" under Article 29(1) of the Swiss Federal Constitution.

166. Whereas the Panel considers the aforementioned principles to apply and to have been satisfied, others in its view do not carry the weight which the Appellant attributes to them. For example, the Panel considers the Appellant's reference to a presumption of innocence to be unavailing in the context of this appeal. The Panel has held that a provisional suspension must be substantiated by more than speculation alone; yet a "reasonable possibility" that the Appellant committed an ADRV in its view is all that is required. In any event, Swiss "fundamental principles" including those relating to proof of guilt vary on a spectrum depending on the type of proceeding and cannot simply be transposed from criminal to private law<sup>11</sup>. CAS sanctions result in a period of ineligibility to compete and forfeiture of prizes, not deprivation of liberty; what is more, this appeal concerns provisional measures, not a final sanction. Since there is no finding of guilt, the Panel does not consider a provisional suspension to implicate, still less violate, a presumption of innocence.
167. The Appellant's reference to her personality rights, in turn, must in the Panel's view be balanced against those of associational autonomy. Its determination flows from Articles 27(2) and 28 of the Swiss Civil Code, the first of which provides that no person may "surrender his or her freedom or restrict the use of it to a degree which violates the law or public morals". For its part, Article 28(2) forbids infringement of a personality right, but only absent consent or an "overriding private or public interest or by law". Two conclusions follow. First, an athlete who joins an association and thereby submits to that association's rules as a condition of participation may be deemed to have consented to those rules – including (presuming compliance with due process) the FIS Rules' provisions on provisional suspensions. Second, though a suspension infringes an athlete's personality rights it is permissible if it is proportionate, i.e., not "excessive" (Judgment of 6 December 1994, ATF 120 II 369, 371; Advisory opinion CAS 2005/C/976 & 986, para. 140). A determination of excessiveness depends on a balance of interests including *inter alia* "the length of bondage, the economic implications of such bondage and the interest of the relevant association for the

<sup>10</sup> CAS 2011/A/2384 & 2386, para. 27 (citing Judgment of 2 November 2006, ATF 133 I 33).

<sup>11</sup> Judgment 4A\_178/2014 of 11 June 2014, para. 5.2 ("*Anserdem lassen sich die beweisrechtlichen Grundsätze im Anwendungsbereich des Privatrechts – auch wenn Disziplinarmaßnahmen privater Sportverbände zu beurteilen sind – nicht unter dem Blickwinkel strafrechtlicher Begriffe wie der Unschuldsvermutung . . . bestimmen*"), that is, "Beyond this, evidentiary principles cannot be identified within the scope of private law – including when assessing disciplinary measures of private sporting associations – from the perspective of criminal law concepts such as the presumption of guilt"); Judgment of 15 March 1993, BGE 119 II 271 (*in dubio pro reo* and analogous guarantees of the European Convention on Human Rights are likewise inapposite).

*enforcement of the sanction at stake*” (CAS 2014/A/3803, paras. 90-94) – including FIS’s appreciable interest in guaranteeing for all athletes a “*fundamental right to participate in doping-free sport*”.

168. In the Panel’s view the provisional suspension, if justified by the underlying evidence, would not be intrinsically excessive. Sporting bans of considerable duration have been held to be proportionate, so long as they are not indefinite (CAS 2014/A/3803, deeming a one-year football ban not excessive; Judgment 4A\_304/2013 of 3 March 2014, para. 5.2.2). The sole instance in which the Swiss Federal Tribunal deemed one to violate public policy on grounds of excessiveness involved a potentially lifetime ban pending the athlete’s payment of more than EUR 11 million in a breach of contract claim (see note 9 above). Indeed, Swiss jurisprudence tolerates encroachments upon personality rights where a “*preponderant public interest*” so dictates, and recognizes the fight against doping as one such interest (Judgment 5C.248\_2006 of 23 August 2007, ATF 134 III 193, para. 4.6.3.3). That interest weighs even more heavily where the challenged measure is provisional and the infringement temporary. The suspension in short does not in the Panel’s view impermissibly infringe the Appellant’s personality rights.
169. Against this background, the Panel does not consider that any of the Appellant’s applicable rights are infringed so as to constitute a violation either of the *ordre public* or of Swiss substantive law.
170. Nevertheless, the Panel is sensitive to the Appellant’s concern. Her guilt or innocence, though beyond the scope of this appeal, inevitably informs the application of FIS ADR Article 7.9. The two issues – the likelihood of an ADRV and the validity of provisional measures – are clearly intertwined. The success of any ADRV charge will depend by the Federation’s own admission on further investigations, the outcome of which is at present unknown, indeed unknowable. This tension, in the Panel’s view, makes it all the more imperative that Article 7.9 be applied strictly to require evidence demonstrating at least a reasonable possibility of an ADRV.
171. The Panel accordingly turns to whether the McLaren Report offers such evidence. The McLaren Report, in the Appellant’s submission, is decidedly general in nature. Its scope indicts an entire system, rather than individual athletes. The Panel agrees that, on balance, individual athletes play but an auxiliary role in Professor McLaren’s work, though a large number of them are identified in Part II. Professor McLaren has also stated repeatedly that he did not assess “*the sufficiency of the evidence to prove an ADRV*”. It would however necessarily follow from the report’s findings as to the corruption of an entire system, devised to favor selected athletes, that some individual athletes must have benefited. It could not sensibly be concluded that whereas the system was corrupt in the manner identified nonetheless no athlete drew advantage.
172. Legal sufficiency, in any event, must be distinguished from factual plausibility. The McLaren Report, broad though its mandate is, captures a wealth of evidence that at least purports to implicate specific athletes. While it does not claim to ground an ADRV as a matter of law, the report does aim to provide *evidence* of an ADRV. In line with its mandate, Part II of the McLaren Report amassed a vast archive in service of identifying “*any athlete that might have benefited*” from the manipulations disclosed in Part I. Professor McLaren’s decision to forward, on the basis of

his findings, information concerning specific athletes to international sports federations can only be understood as an indication that he considered that evidence to establish a *plausible claim*, if not legal guarantee, of an ADRV. That federations subsequently imposed provisional suspensions in respect of such athletes indicates that they shared Professor McLaren's sentiment. The IOC's selection of the individuals identified, including the Appellant, for in-depth investigation follows the same logic.

173. There is in the McLaren Report indication, or at least purported indication, of ADRVs. The Panel accordingly reviews it pursuant to the "*reasonable possibility*" standard under the FIS ADR provisional suspension regime.
174. The Panel's analytical process, the Appellant urges, must be an individualized one. The Panel agrees. For this same reason, however, the Appellant's references to IOC and WADA correspondence – expressing doubts as to the consistency of data or the McLaren Report's capacity to demonstrate ADRVs for "*some of the individual athletes identified*" – are unavailing. Though some prosecutions may fail, the Panel's inquiry focuses on the strength of the Federation's case against the Appellant only. The ultimate failure of an ADRV allegation in this case would not and could not retrospectively invalidate the provisional suspension. Contrary to the IBSF Doping Hearing Panel – which appeared to assume that proof of guilt is required – a reasonable possibility is sufficient to justify a provisional suspension.
175. The Panel addresses finally the Appellant's concern that the McLaren Report be viewed critically and without undue deference to its conclusions. The Appellant considers this concern particularly acute in light of Professor McLaren's non-appearance at the hearing.
176. From its perspective, the Panel regrets Professor McLaren's absence and unavailability for questioning – contrary to the Federation's indication in its Answer that he would be called as a witness to "*allow the Panel to get a first-hand impression on the reliability of the information that led to his reports*". At the hearing, the Panel inquired of FIS as to the reasons for Professor McLaren's non-appearance. The response offered suggests that Professor McLaren chose not to make himself available, either as part of a principled objection to appearing in CAS proceedings or as an accommodation to IOC leadership pending the completion of the Oswald Disciplinary Commission's work. In any event, neither the Appellant nor the Panel has been able to pose questions to the person under whose supervision and control the evidence that fundamentally informs the suspension under appeal was gathered and analyzed.
177. In these circumstances, the Panel neither accepts nor rejects Professor McLaren's declaration that the conclusions of his report have been established "*beyond a reasonable doubt*" insofar as that statement might suggest that the Appellant's implication in that system is so established. Rather, it assesses independently the evidence on which the provisional suspension is based against the relevant standard under the applicable law.
178. The Panel notes additionally that the Respondent has submitted an affidavit by Professor McLaren concerning certain issues in dispute between the Parties. The document, intended to

substitute for Professor McLaren's hearing testimony, was tendered after the exchange of the Parties' main written pleadings. Pursuant to Article R56 of the CAS Code, parties may not "*specify further evidence on which they intend to rely after the submission of the appeal brief and of the answer*". The Panel retains the authority to order otherwise on the basis of "*exceptional circumstances*". In light of Professor McLaren's non-appearance, the Panel has not accepted the McLaren Affidavit into the record and so gives it no independent weight.

## 2. Application of Evidence to the Appellant

179. The Parties contest at length the McLaren Report's capacity to demonstrate involvement by the Appellant in an ADRV. The Appellant disputes the evidence along multiple dimensions. For the sake of conceptual clarity, the Panel classifies the Appellant's challenges to the evidentiary record as follows:
- Factual challenges: does the Appellant appear in the documents?
  - Relevance challenges: if she appears, is the documents' relevance to an ADRV evident or explained?
  - Credibility challenges: if the McLaren Report explains the relevance of the Appellant's appearance in a document, is this explanation compelling?
180. In assessing whether the provisional suspension meets legal thresholds required under the FIS ADR, the Panel considers each type of challenge underlying the Appellant's submissions. The Panel accordingly considers factual points in contention and draws links, if any, between the relevance of each document to potential misconduct. The Panel's assessment of the documents' individual and collective value informs its conclusion that the Federation has demonstrated a "*reasonable possibility*" of an ADRV in satisfaction of the FIS ADR Article 7.9.2.

### *i. Evidence of Tampering*

181. Professor McLaren describes a scheme in which athletes, protected by their Russian handlers, benefited from an exchange of presumably dirty urine samples in the Sochi Laboratory with clean ones. Clean urine was collected, transported, and stored by third parties on their behalf, kept under the control of the FSB, and later used to replace test-positive samples under cover of night. Upon substitution, re-opened bottles were once more sealed, with such samples eventually tested and reported as negative.
182. The Appellant's criticisms against FIS's allegation that she participated in this vast enterprise are legion. She challenges the existence of key elements of the sample-swapping scheme, including the existence of a "*catalogued bank of clean urine*"; she questions the Federation's reliance on forensic evidence of her urine sample; she deems Dr. Rodchenkov untrustworthy. The Panel addresses each objection in turn.
183. On its face, the EDP appears not to contain documents implicating the Athlete specifically in the creation of a "*catalogued bank of clean urine*". Moreover, of the EDP documents referencing

clean urine, the Appellant notes that her name and identification code go unmentioned. This assertion alone, however, does not defeat a reasonable possibility of the Appellant's implication in the manipulation of urine samples generally. In the Panel's view, the McLaren Report's description of a clean urine bank is but one element in a sophisticated system. Dr. Rodchenkov's testimony described a process comprising the following elements: (i) the provision of clean urine by protected athletes; (ii) collection of the samples by Irina Rodionova; (iii) transportation to and storage in an FSB-operated facility; and (iv) transfer to the Sochi Laboratory, where FSB personnel matched the clean samples' identification codes with a roster provided to them by the CSP. The Panel therefore assesses whether the evidence suggests the Appellant is implicated in any of these elements.

184. In light of the apparent destruction of large swathes of dirty urine samples and the unsurprising lack of cooperation by Russian officials in opening to Professor McLaren FSB-operated storage facilities, the process outlined above is necessarily presented in general terms. The Panel therefore considers that the provision of clean urine samples by specific athletes is evident, if at all, on an inferential basis and by indirect reference to other documents, such as the Duchess List, discussed below. This is consistent with the manner in which the Federation has framed its case and with the limitations that the Panel faces in this appeal more generally.
185. As a result *inter alia* of these limitations, questions as to the relevance, reliability, or credibility of many of Professor McLaren's assertions are answered by reference to the testimony of a third party, Dr. Rodchenkov, whose character and credibility the Appellant strenuously criticizes. Nevertheless, to the extent required by FIS ADR Article 7.9.2, the Panel is satisfied that the McLaren Report adduces sufficient evidence as to the existence of a clean urine bank and the Appellant's implication in it.
186. First, and considering the system as a whole, the Panel sees no reason not to credit the general testimony of Dr. Rodchenkov. Professor McLaren describes convincingly his ability independently to verify the method by which Russian agents allegedly re-opened and secretly re-sealed Berlinger BEREK-KIT® sample containers, which theretofore had been considered immune from manipulation. With the assistance of a forensic expert, Professor McLaren corroborated Dr. Rodchenkov's identification of 12 sample bottles removed from the Moscow Laboratory and allegedly belonging to doped athletes. As described in the first Report, 13 samples (twelve having allegedly been opened and re-sealed, the remaining sample an unopened dummy for control purposes) were submitted to microscopic examination. The forensic expert accurately identified those twelve which had been tampered with according to Dr. Rodchenkov; except for the dummy, each exhibited scratches and marks consistent with manipulation. DNA analysis lent Dr. Rodchenkov's statements further weight (McLaren Report, Part I, pp. 46-48).
187. The Appellant's B-sample bottle shows similar signs of tampering. As noted by the IOC and described in the King's College Forensic Report, the Appellant's sample container contains marks consistent with "*inserting a metal strip to disengage a metal ring which was intended to prevent re-opening*". That Type 1 marks might also be caused by innocuous handling does not undermine the forensic report's conclusion that both types observed were consistent with manipulation; as



noted above, such marks correlated with high statistical confidence to all bottles identified as suspect by Dr. Rodchenkov. Taken as a whole, the evidence is adequate, in the Panel's view, to establish a reasonable possibility of tampering.

*ii. Duchess and Medals-by-Day Lists*

188. Two additional documents are proffered in support of the Appellant's provisional suspension. The Duchess List contains names of athletes purportedly authorized to take the "*Duchess cocktail*". For its part, the Medals-by-Day List lists athletes, including but not limited to those named in the Duchess List, scheduled to start in medal races and who likewise enjoyed "*protected*" status under Russia's doping scheme. The list essentially serves an identical and supplementary role to the Duchess List, with similar implications and drawbacks. Both include the Appellant's athlete code.
189. The Panel turns first to the Duchess List. Here it disagrees with the Appellant's suggestion, made pointedly at the hearing, that Professor McLaren nowhere connects the Duchess List with the "*cocktail*" allegedly administered to doped Russian athletes. Part I of the McLaren Report recounts in clear terms Dr. Rodchenko's role in designing the cocktail as well as Irina Rodionova's influence in matters of nomenclature. File metadata suggest that the Duchess List was authored by Ms. Rodionova's deputy, Mr. Velikodniy (McLaren Report, Part I, pp. 50, 66).
190. The Appellant argues that vital connections between inclusion in the list and other elements – the Appellant's receipt of "*protected*" status from the Russian Ministry of Sport and her consumption of the Duchess cocktail, for example – fail because these rely on the testimony of Dr. Rodchenkov, who lacks credibility. Dr. Rodchenkov's character is not a question that can be resolved by the Panel on a technical level. Although not with respect to allegations as to the Duchess List specifically, Professor McLaren suggests that several of Dr. Rodchenkov's statements have been independently corroborated. Such corroborations led him to deem Dr. Rodchenkov a credible witness. The Panel, having considered especially Dr. Rodchenkov's identification of tampered samples and description (subsequently vindicated) of the manner in which such manipulation proceeded, is similarly persuaded.
191. Similar arguments have been advanced in respect of the so-called Medals-by-Day List, so termed because it is described in the McLaren Report as a running tally of Russian athletes slated to take part in Olympic medal races at Sochi. The Appellant argues that the list is irrelevant, without attribution, and available in a dizzying array of versions – inconsistent both with each other and with respect to athletes' final orders of appearance at Sochi.
192. Several versions of this list do not track Russian athletes' final starting positions at Sochi. As explained, however, by the Respondent, events such as relay races allow for last-minute substitutions. It is true that the lists fail to correspond precisely to actual participants in all respects, but in the Panel's view this does not weaken the conclusions that Professor McLaren drew from the document. A similar consideration applies in the Panel's view to the Appellant's remaining technical arguments, such as its observations regarding the files' metadata. The Panel

considers it well established that the EDP suffers from numerous technical oddities, something which perhaps is reflective of the unforgiving time constraints under which Professor McLaren operated and the adverse conditions in Russia in which he attempted to amass evidence. These flaws imbue the Federation's contemplations of an ADRV with a degree of doubt but they cannot be characterized as decisive for the present purposes of determining whether the suspension should be lifted.

193. Finally, as recalled above, the Panel considers that Article 7.9.2 of the FIS ADR, while requiring sufficient indication of individual guilt to conclude that there is a reasonable possibility of an ADRV, can and sometimes must be satisfied by reference to inferential reasoning. This is appropriate, in the Panel's view, considering that a provisional suspension is often necessary precisely in situations where misconduct is reasonably possible, even probable, but is not yet proven. In such cases, a suspension serves the interests articulated by FIS in its comments to the Appellant's Application for Provisional Measures: safeguarding the integrity of competitions and protecting the interests of third-party athletes.
194. The Panel considers the Duchess List and the Medals-by-Day List to be particularly suitable sources on which inferences should be drawn in the Federation's favor. By reference to possible manipulation of the Appellant's B-sample bottle as noted in the King's College Forensic Report, it is already established in the Panel's view that a reasonable possibility exists of tampering. The two lists lend a reason for this apparent manipulation. Indeed, despite the documents' numerous ambiguities and questions as to their precise origin, the Panel considers it difficult to imagine any reason why the lists under consideration would have been compiled, *but for* an illicit purpose connected with the cascade of subterfuge revealed by Professor McLaren.
195. Accordingly, the Panel concludes that the Duchess and Medals-by-Day Lists, particularly when assessed collectively with evidence of tampering with the sample bottle of the Appellant, indicate a reasonable possibility of an ADRV. The evidence suffices for the limited purpose of Article 7.9.2 of the FIS ADR.

### **3. Concluding Considerations**

196. For some athletes, the McLaren Report unveiled a relatively comprehensive suite of documentary evidence linking them to the Russian Federation's circumvention of doping controls. In these appeals, the Panel is asked to draw inferences based on a small combination of evidence – particularly symptoms of tampering observed on the Athlete's urine samples with her appearance in the Duchess List, which purports to explain why such tampering was necessary – and to determine whether such inferences meet the legal standards contemplated by the FIS ADR.
197. The Appellant's counsel have eloquently insisted that the factual record is tenuous when it comes to identifying specific evidence of wrong-doing by the Appellant as an individual actor.

198. The Panel cannot, however, decide this case in isolation from the dramatic context in which it has arisen. The McLaren Reports have found “*beyond a reasonable doubt*” that Russian national institutions carried out a comprehensive scheme designed to avoid all possibility of detecting (potential) doping offences committed by their favored athletes. A staggering number of 695 Russian athletes, according to Professor McLaren, “*can be identified as party to the manipulations to conceal potentially positive doping control tests*”<sup>12</sup>. His second Report indicated that his initial finding of 312 positive reports having been misreported as negative increased to 500 as a result of his work during the period between the conclusion of his first Report and that of the second.
199. Although the Appellant has strongly challenged the credibility of Dr. Rodchenkov, the Panel observes first of all that the testimony of persons guilty of wrongdoing themselves can be decisive in establishing the guilt of others, and that the extent of their own culpability may even add to their value, since it is likely to be the result of their extensive involvement, at high levels, in the unlawfulness being examined. Secondly, the Panel notes that Professor McLaren, after intensive inquiries, including an experimental verification that a previously unheard-of method of manipulation described by Dr. Rodchenkov was indeed feasible, came to the conclusion that he was a credible witness.
200. It may be that an examination of individual cases, such as the present ones, will lean to exoneration of the Appellant on the grounds that, irrespective of this troubling background, the evidence ultimately uncovered does not meet the standard of proof that is necessary for sanctions to be pronounced (i.e., that irrespective of the proof of *systemic* wrongdoing, *individual* guilt in particular cases is not established to that standard). But at this stage, the context just described leads the Panel to the conclusion that individual connecting factors and inferences which might emerge meet the test of “*reasonable possibility*” of success, and therefore justify the provisional suspension.
201. A provisional suspension is based necessarily on provisional evidence which may or may not ultimately establish an ADRV. Demonstration by an athlete that a claim has “*no reasonable prospect*” of eventual success can however prevail where no further evidence reasonably can be expected to arise, an argument which the Panel understands the Appellant to make in respect of the Oswald Disciplinary Commission. The Appellant’s belief that the Commission cannot unearth evidence more favorable to the Federation than that which is on record currently is however in the Panel’s view no less gratuitous an argument than the Respondent’s purported inability to conceive the Appellant as innocent. To the extent they are available, samples from 2008, 2010, and 2012 Olympic Games past will be tested; those already in WADA’s possession will be subjected to re-testing; coaches and laboratory personnel may be interviewed for the first time. Olympic re-testing from London alone has previously resulted in medal withdrawals and sanctions against 20 Russian athletes. Whether the investigative process incriminates or exonerates the Appellant is open to question but her present inability to satisfy the conditions in Article 7.9.3.2 is not.

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<sup>12</sup> The Panel notes that the word “potentially” qualifies the words “positive [...] tests”, not the word “manipulations”.

202. The Appellant has not shown cause to lift the suspension. At the same time the Panel is sensitive to the concern of the Appellant who stands under the shadow of a suspension undefined in length (which must be balanced, *inter alia*, against the legitimate interest of other athletes not to find themselves competing against athletes who may well be cheaters). Competitions cannot be repeated; the form and motivation of athletes wax and wane. Occupying in principle the space between suspicion and conviction, suspensions gradually lose their essential interim character with the passage of time. What conclusions the Oswald Disciplinary Commission may draw is necessarily open to question but the Panel believes it must and will one way or the other draw such conclusions. The Federation estimated a completion to Mr. Oswald's work by the upcoming winter skiing season (the IOC has also since publicly announced that the report is expected to be delivered in October 2017) and its counsel explicitly accepted the Panel's ability to introduce a temporal condition to the appealed suspension's maintenance. The Panel appreciates the unusual magnitude and complexity of cases awaiting Mr. Oswald's attention. It cannot however endorse an indefinite and indeterminable suspension as proportionate. Noting the Appellant's reasonable entitlement to legal certainty, the Panel accordingly deems it appropriate and just that the current provisional suspension expire after 31 October 2017, at which time it will be for FIS to consider whether or not to seek a further suspension justified by new developments and within the framework of the FIS ADR. This approach is entirely in accord with Article 7.9.3.2, particularly point (c), as in the Panel's view to impose a longer suspension in all the present circumstances would be clearly unfair.

## ON THESE GROUNDS

### The Court of Arbitration for Sport rules that:

1. The appeal filed on 16 February 2017 against the Decision of the FIS Doping Panel regarding Provisional Measures in the matter of Ms. Evgenia Shapovalova, dated 6 February 2017, is partially upheld.
2. The Decision of the FIS Doping Panel dated 6 February 2017 is amended as follows:  
The Optional Provisional Suspension is maintained until 31 October 2017, after which such suspension shall lapse and Ms. Evgenia Shapovalova shall, in the absence of any anti-doping rule violation sanction having been assessed against her, be restored to the *status quo ante* prevailing at the time of the suspension's imposition.
3. All other elements of the Decision of the FIS Doping Panel dated 6 February 2017 are confirmed.

4. The International Ski Federation may, on or after 1 November 2017, re-impose an Optional Provisional Suspension in accordance with the FIS Anti-Doping Rules if the facts and circumstances so merit. Such suspension shall be subject to appeal in accordance with Article 13.7.1 of the FIS Anti-Doping Rules.
5. (...).
6. (...).
7. All other motions or prayers for relief are dismissed.