

BEFORE THE AMERICAN ARBITRATION ASSOCIATION ("AAA")

North American Court of Arbitration for Sport Panel

UNITED STATES ANTI-DOPING AGENCY,	)	
	)	
Claimant	)	<u>ARBITRATION AWARD</u>
v.	)	AAA No. 30 190 00199 07
LATASHA JENKINS,	)	
Respondent	)	

WE, THE UNDERSIGNED ARBITRATORS, having been designated as follows: C. Mark Baker, Esq. by Claimant; Ms. Barbara Shycoff by Respondent and L. Yves Fortier, C.C., Q.C. by AAA, having been confirmed by the Parties, having been duly sworn, having duly heard the proofs and allegations of the parties and having deliberated FIND AND AWARD as follows:

**1. THE FACTS**

**A. The Parties**

1. Claimant, the United States Anti-Doping Agency ("USADA" or "Claimant"), is the independent anti-doping agency for Olympic Movement sports in the United States, and is responsible for managing the anti-doping testing and adjudication processes for member constituents pursuant to the USADA Protocol for Olympic Movement Testing ("USADA Protocol").
2. Respondent, Ms. LaTasha Jenkins ("Ms. Jenkins" or "Respondent"), is an elite-level athlete in the sport of track and field. Ms. Jenkins has participated in USA Track and Field's ("USATF") Out-of-Competition testing pool since 2000. Prior to this period, Ms. Jenkins participated in the International Association of Athletic Federations' ("IAAF") drug testing program. With the sole exception of the test in issue, Ms. Jenkins has not previously tested positive for a prohibited substance.
3. The IAAF is the world governing body for the sport of athletics, which includes track and field. It did not participate in this proceeding.

**B. Chronology of Events**

4. On 22 July 2006, while competing in the KBC Night Hechtel Meet in Heusden, Belgium, the IAAF required Ms. Jenkins to submit to a drug test. On the same day, Ms. Jenkins participated and placed first in the women's 100 meter event. Later that evening, Ms. Jenkins provided a urine sample at the doping control station at the venue, dividing the sample into two Berlinger collection bottles ("A" sample and "B" sample) each identified by control number 689699.
5. On the Doping Control Form, Ms. Jenkins declared that she had taken Voltaren, a prescription pain medication, Tylenol, and multi-vitamins over the course of the seven day period prior to administration of the test. The amount of urine collected and its pH at the time of collection (125 ml at pH 5.3) were also measured and recorded on the Form (see USADA Exh. 10).
6. The sample was then shipped on 25 July 2006 to the World Anti-Doping Agency ("WADA")-accredited laboratory in Ghent, Belgium ("Ghent Laboratory").
7. On 31 July 2006, the Ghent Laboratory conducted an initial laboratory screen from Ms. Jenkins's "A" sample using Gas Chromatography/Mass Spectrometry ("GC/MS") and detected the presence of the anabolic steroid metabolite NORANDROSTERONE.
8. On 2 August 2006, the Ghent Laboratory took three aliquots from the "A" sample bottle and performed three separate analyses of the urine, all of which revealed the presence of NORANDROSTERONE at an average concentration of 7.80 ng/ml.
9. The Ghent Laboratory subsequently reported the "A" sample as positive to the IAAF (see USADA Exh. 8A):

Sample number	Code Lab	Gender	pH	Volume	Density
A689699	G 164	F	5.37	65	1.026

\* This sample was correctly sealed

\* This sample was analysed using validated methods (ANAL-42, ANAL-97, ANAL-09, ANAL-15, ANAL-89, ANAL-108 AND ANAL-109)

The sample contains **NORANDROSTERONE**. The concentration of norandrosterone is 7.80 ng/ml. Taking into account the measurement uncertainty at the threshold level ( $K= 1.64$ , decision limit = 2.32 ng/ml), the concentration is above the threshold level.

**Opinion:** Norandrosterone is a metabolite of **NANDROLONE** or its precursors.

10. On 4 August 2006, at the request of the IAAF, Ms. Jenkins's sample was sent to the WADA-accredited laboratory in Köln, Germany ("Cologne Laboratory") for analysis by Isotope Ratio Mass Spectrometry ("IRMS").
11. On 8 August 2006, the Cologne Laboratory reported the "A" sample as positive for **NANDROLONE** (see USADA Exh. 9A):

**Results ( $\delta^{13}\text{C}$  [‰] – values)**

**Target substance**

Norandrosterone -28,4

**Internal reference compounds:**

Etiocholanolone -19,5

Androsterone -18,3

**Conclusions**

The  $\delta^{13}\text{C}$  [‰] – values of norandrosterone indicate an application of nandrolone or nandrolone prohormones.

12. Following notification that the "A" sample had tested positive for the presence of **NORANDROSTERONE** in excess of the allowable threshold, Ms. Jenkins requested that the "B" sample be tested. Ms. Jenkins did not attend or request the attendance of a representative during the B sample test.
13. On 21 September 2006, the Ghent Laboratory took three aliquots from the "B" sample bottle and performed three separate analyses of the urine. Ms. Jenkins's "B" sample tested positive for **NORANDROSTERONE** at a level of 12.30 ng/ml. The Ghent Laboratory again reported its finding to the IAAF (see USADA Exh. 8B):

Sample number	Code Lab	Gender	pH	Volume	Density
B689699	G 236	F	5.35	50	1.024

\* This sample was correctly sealed

\* This sample was analysed using validated methods (ANAL-42, ANAL-97, ANAL-89)

The sample contains **NORANDROSTERONE**. The concentration of norandrosterone is 12.30 ng/ml. Taking into account the measurement uncertainty at the threshold level (K= 1.64, decision limit = 2.32 ng/ml), the concentration is above the threshold level.

**Opinion:** Norandrosterone is a metabolite of **NANDROLONE** or its precursors.

14. On 22 September 2006, USATF wrote to USADA requesting that the agency handle the positive testing result under the USADA Protocol.
15. Following notification of the "B" sample results, Ms. Jenkins agreed to serve a provisional suspension beginning on 23 October 2006.
16. USADA subsequently requested that IRMS analysis also be performed on Ms. Jenkins's "B" sample. On 20 December 2006, the Cologne Laboratory reported that the "B" sample confirmed the finding of **NANDROLONE** in Ms. Jenkins's specimen (see USADA Exh. 9B):

Results ( $\delta^{13}\text{C}$  [‰] – values)

Target substance  
Norandrosterone            -29,4

Internal reference compounds:

Etiocholanolone            -19,7  
Androsterone                -18,9

Conclusions

The  $\delta^{13}\text{C}$  [‰] – values of norandrosterone indicate an application of nandrolone or nandrolone prohormones.

17. On 16 January 2007, USADA informed Ms. Jenkins in writing that the results of the "B" sample IRMS analysis conducted by the Cologne Laboratory also confirmed the presence of **NORANDROSTERONE** in her specimen.

C. Procedural Background

18. USADA forwarded Ms. Jenkins's case to a panel of the Anti-Doping Review Board on 16 January 2007. The Review Board determined there was sufficient evidence of a

doping violation and recommended that the adjudication process proceed as set forth in the USADA Protocol. USADA subsequently charged Ms. Jenkins with a doping violation for testing positive for NORANDROSTERONE and applied the following sanctions (see USADA Exh. 14):

USADA applies the sanctions found in the applicable rules and the United States Olympic Committee ("USOC") Anti-Doping Policies. Pursuant to the USADA Protocol, the IAAF Anti-Doping Rules, and the USOC Anti-Doping Policies, all of which have previously been provided to you, you are subject to the following sanction for a first doping violation:

- Two year period of ineligibility as described by the WADA Code, beginning on the day you accept this sanction, fail to request a hearing or fail to respond, or the date of the hearing decision in this matter, with credit given for the time served during the provisional suspension period beginning on October 23, 2006; and,
- Disqualification of the competitive results obtained on and subsequent to July 22, 2006, the day your sample was collected, including forfeiture of any medals, points and prizes; and,
- Two year period of ineligibility, beginning on the day you accept this sanction, fail to request a hearing or fail to respond, or the date of the hearing decision in this matter, with credit given for the time served during the provisional suspension period beginning on October 23, 2006, from participating or coaching in U.S. Olympic, Pan American Games or Paralympic Games Trials, being a member of any U.S. Olympic, Pan American Games or Paralympic Team and having access to the training facilities of the United States Olympic Committee ("USOC") Training Centers or other programs and activities of the USOC including, but not limited to benefits, grants, awards or employment as set forth in Section 6 of the USOC Anti-Doping Policies and further defined by Annex C therein.

19. Ms. Jenkins contested the imposed sanctions and filed a request for a hearing pursuant to subsections 10(a) and 10(b) of the USADA Protocol, which provide as follows (see USADA Exhs. 1 and 14):

**10. Results Management / Adjudication**

- a. Following receipt of the Review Board recommendation, USADA shall notify the athlete or other person in writing whether USADA considers the matter closed or alternatively what specific charges or alleged violations will be adjudicated and what sanction, consistent with

Annex A, IF rules or the USOC ADP, USADA is seeking to have imposed. The notice shall also include a copy of the Protocol and the American Arbitration Association Supplementary Procedures for Adjudication of Doping Disputes (the "Supplementary Procedures") attached as Annex E. Within ten (10) days following the date of such notice, the athlete or other person must notify USADA in writing if he or she desires a hearing to contest the sanction sought by USADA. The athlete or other person shall be entitled to a five (5) day extension if requested within such ten (10) day period. If the sanction is not contested in writing within such ten (10) or fifteen (15) day period, then the sanction shall be communicated by USADA to the athlete or other person, USOC, the applicable NGB and IF and WADA and thereafter imposed by the NGB. Such sanction shall not be reopened or be subject to appeal unless the athlete or other person can demonstrate by a preponderance of the evidence in a subsequent appeal to CAS that he or she did not receive either actual or constructive notice of the opportunity to contest the sanction. The athlete or other person may also elect to avoid the necessity for hearing by accepting the sanction proposed by USADA. If the sanction is contested by the athlete or other person, then a hearing shall be conducted pursuant to the procedure set forth below.

- b. The hearing will take place in the United States before the American Arbitration Association ("AAA") using the Supplementary Procedures. The parties will be USADA and the athlete or other person. USADA shall also invite the applicable IF and WADA to participate either as a party or as an observer. The athlete or other person shall have the sole right to request that the hearing be open to the public subject to such limitations as may be imposed by the arbitrator(s). For their information only, notice of the hearing date shall also be sent to the USOC, the Athlete Ombudsman and the applicable NGB. If the athlete or other person requests, the Athlete Ombudsman shall be invited as an observer.

20. Although duly invited, neither the IF (IAAF) nor WADA chose to participate in the proceedings either as a party or an observer.
21. The Panel received various submissions from the parties, including a pre-hearing brief from each side and production requests.

22. On 1 June 2007, the Respondent filed a demand for discovery, requesting the production of certain Standard Operating Procedures ("SOPs") from both the Ghent and Cologne Laboratories.
23. On 15 June 2007, the Respondent filed a Motion to Compel Production of Documents or, in the Alternative, Exclude Testimony and Evidence. The Motion pertained primarily to the disclosure of the requested SOPs.
24. USADA filed its Response to the Motion on 18 June 2007, and the Respondent filed a Reply on 22 June 2007.
25. The Panel issued an Order compelling the production of certain SOPs, along with English language translations, on 28 June 2007. Following the submission of further information by USADA on the relevance of certain requested SOPs, the Panel issued an Amended Order on 13 July 2007.
26. The Panel convened a teleconference with the parties on 16 July 2007, to advise of unforeseen scheduling complications which required that the hearing, originally scheduled to take place in Chapel Hill, North Carolina on 12-13 July 2007, be rescheduled. The Panel rescheduled the hearing, in consultation with the parties, for 29-30 October 2007, also in Chapel Hill, North Carolina.
27. In accordance with the agreement of the parties, no transcript was taken during the evidentiary hearing.
28. At the close of the evidentiary hearing, the Panel invited each party to provide their closing statements in writing, as well as further submissions on the nature of the analytical procedure involved in each testing method applied to Ms. Jenkins's specimen.
29. On 2 November 2007, Ms. Jenkins informed USADA and the Panel of her intention to withdraw two of the defences advanced in support of her case. These defences related to (1) the alleged violation of certain aspects of the International Standard for Testing and (2) the alleged presence of exceptional circumstances due to supplement contamination. As a result, neither of these defences, nor the evidence introduced in relation to them, is addressed in the present Award.

30. On 13 November 2007, the Panel received supplemental briefs from each party addressing the remainder of the issues in controversy. Following receipt of these submissions, the record was declared closed on 22 November 2007.

31. On 12 December 2007, the Chairman, on behalf of the Panel, conveyed to the Parties the Panel's findings and Award. The detailed reasons for these findings and Award are conveyed herein.

**D. Evidentiary Hearing**

32. USADA was represented by Mr. William Bock III, of the law firm Kroger Gardis and Regas LLP. USADA called the following witnesses:

- Dr. Larry D. Bowers, USADA's Senior Managing Director;
- Dr. Wilhelm Schänzer, Director of the Cologne Laboratory;
- Dr. Franz Delbeke, Director of the Ghent Laboratory;
- Ms. Elizabeth Miller, USADA Doping Control Officer ("DCO"); and
- Ms. Joanna Myers, USADA DCO.

33. The Respondent was represented by Mr. Michael Straubel, Director of the Sports Law Clinic at Valparaiso University in Indiana. Mr. Straubel was assisted by Valparaiso University law students: Kevin Huss, Rebecca Meyer, Brandon Sanchez, and Mike Zonder. Respondent called the following witnesses:

- Ms. LaTasha Jenkins;
- Dr. David Black, Chairman of the Aegis Sciences Corporation;
- Mr. Dean Hayes, Track Coach at Middle Tennessee State University; and
- Mr. Souhel Al Awar, owner of a granite and marble company in Raleigh, North Carolina.

34. In order to accommodate scheduling difficulties, the witnesses were called out of order. Ms. Jenkins testified first. She was followed by her two character witnesses (Mr. Hayes and Mr. Al Awar). Dr. Bowers, Dr. Delbeke, Dr. Schänzer, DCOs Miller and Myers, and Dr. Black then gave evidence.



35. Ms. Jenkins is an articulate 29-year old woman who testified primarily as to the impact of the July 2006 test on her career in track and field. Since notification of the positive test result in July 2006, Ms. Jenkins has trained intermittently. However, in the fall of 2007, Ms. Jenkins ceased even intermittent training due to her work schedule.
36. Dr. Bowers testified primarily as to the presence of exogenous-NORANDROSTERONE in Ms. Jenkins's sample, the meaning of the two international standards in issue, ISL 5.2.4.3.2.2 and ISL 5.2.5.1.1, and the laboratories' respective compliance with these standards. Dr. Bowers prefaced his comments on the particulars of this case with an explanation of the testing methods applied to Ms. Jenkins's sample.
37. With regard to the GC/MS process, Dr. Bowers explained that an aliquot of the athlete's "A" sample is injected into the GC/MS machine. The sample then enters a combustion furnace where it is vaporized and swept through a thin hollow wire (a chromatographic column) by a carrier gas. The mixture flows through the column and the compounds in the mixture are separated by virtue of their volatility and their relative interaction with a coating on the interior surface of the column and the carrier gas. The molecules, separated as a result of this process, emerge from the column at different times depending on their chemical composition. This is known as the "retention time". The molecular mass of the fragments is then measured by the mass spectrometer. The combination of retention time and molecular weight provides a measurement of the amount of a particular substance in the sample.
38. Dr. Bowers reviewed the Ghent Laboratory documentation of the "A" sample test, comparing the quality control and system blank results to the Respondent's sample, and concluded that the 2ng/ml threshold had been exceeded, stating that this constitutes an adverse analytical finding ("AAF") (see USADA Exh. 8A).
39. Dr. Bowers also provided an explanation of the IRMS testing method applied by the Cologne Laboratory. Dr. Bowers explained that the IRMS method effectively measures the relative abundance of the two stable isotopes of carbon: carbon 12 ( $^{12}\text{C}$ ) and carbon 13 ( $^{13}\text{C}$ ). The relative abundance of one isotope with respect to the other is the difference or delta ( $\delta$ ), expressed in parts per thousand. This isotopic difference determines whether a steroid, detected in an athlete's urine sample, is of a natural or synthetic origin. The

IRMS method measures the ratio of  $^{13}\text{C}$  to  $^{12}\text{C}$  molecules, such as NANDROLONE, its precursors and its metabolites. Synthetic compounds have less  $^{13}\text{C}$  than their endogenous homologues.

40. As with the GC/MS testing, in the case of the IRMS method, a sample solution is injected into the gas chromatograph where it is vaporized and swept through the chromatographic column by a carrier gas. The mixture then flows through the column and the compounds comprising the mixture are separated by virtue of their interaction with the column's interior coating and the carrier gas. The separated compounds then enter a furnace where the compound is completely combusted. The carbon atoms in the molecule are converted to carbon dioxide ( $\text{CO}_2$ ); that  $\text{CO}_2$  enters the IRMS instrument where the  $^{13}\text{C}/^{12}\text{C}$  or  $\delta^{13}\text{C}$  is calculated. The delta value is the difference between the  $^{13}\text{C}/^{12}\text{C}$  ratio of the sample and that of an international standard material which has a delta value of zero. A difference between the delta values of the exogenous NORANDROSTERONE metabolites of 3 per mil or more constitutes an adverse analytical finding.
41. Dr. Bowers concluded, upon reviewing the Cologne Laboratory documentation, that the IRMS results in this case reflect an exogenous administration of NORANDROSTERONE (see USA DA Exh. 9A).
42. Turning to the interpretation and application of the International Standard for Laboratories ("ISL"), Dr. Bowers, who participated in the drafting of ISL 5.2.4.3.2.2<sup>1</sup>, explained that the standard was written to ensure that different people would carry out the parts of the procedure involving quantitative aspects. Dr. Bowers further explained that the standard was written to address a wide variety of tests and that framing the standard to address each assay had been challenging.
43. Dr. Bowers stated that, while compliance with the ISL is always mandatory, laboratory directors retain some discretion in devising particular tests. This discretion is constrained

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<sup>1</sup> ISL 5.2.4.3.2.2 reads as follows: The "B" sample confirmation must be performed in the same Laboratory as the "A" sample confirmation. A different analyst must perform the "B" analytical procedure. The same individual(s) that perform the "A" analysis may perform instrumental set up and performance checks and verify results.

by the ISO and WADA-accreditation processes, which involve a review of laboratory procedures to ensure compliance with both ISO and WADA standards.

44. Dr. Bowers agreed that the use by the drafters of the mandatory language "must" in ISL 5.2.4.3.2.2 was intentional. Dr. Bowers also admitted that, if he was asked to draft the standard today, he would probably use different wording in order to clarify the standard, or, at a minimum, provide examples to guide its application.
45. Having reviewed the laboratory documents, Dr. Bowers observed that the same analyst at the Ghent Laboratory had handled the sample in both "A" and "B" sample procedures conducted at that laboratory. He opined candidly that this constituted a violation of the standard (see USADA Exh. 34, p. 0186). Dr. Bowers also testified that, similarly, the same analyst at the Cologne Laboratory had handled the sample in both the "A" and "B" analyses and that the standard appeared to have been violated by that laboratory also.
46. Dr. Bowers stated, however, that if an analyst from the Ghent Laboratory had added NANDROLONE to the sample, for example, at the derivitization step, it would not have caused the positive result under the IRMS test because the urine analyzed by the Cologne Laboratory came from a separate sample bottle than the urine analyzed by the Ghent Laboratory. Moreover, Dr. Bowers observed that the IRMS analysis in the Cologne Laboratory of the "A" sample preceded the Ghent Laboratory's analysis of the "B" sample. Thus, in Dr. Bowers' view, violation of ISL 5.2.4.3.2.2 did not cause the adverse analytical finding. Dr. Bowers further opined that he could not see how the departure could have caused the adverse finding.
47. Dr. Black's testimony supplemented his written opinion, which was submitted as an exhibit to Respondent's Pre-Hearing Brief. In his written opinion, Dr. Black stated as follows (see Respondent's Exh. F):

**A. GC/MS A and B Documents**

1. The A Sample data packet contains a verbal description of the processing of the A sample aliquots for screening analysis and explicitly states that "the sample was aliquoted by [Analyst 1] for the screening procedure" and "the sample was extracted according to the screening procedure SOP ANAL-15 by [Analyst 1]" (page 2). This indicates that [Analyst 1] physically handled portions of the sample for the purpose of

taking a portion of sample for performing the screening tests and also manipulating the sample for the purpose of isolating steroid metabolites. These procedures clearly indicate that [Analyst 1] handled the A sample for testing. The documentation sheet found on page 12 of the data packet documents by initials of [Analyst 1] his involvement in the testing for extraction, derivitization and GC/MS instrument analysis.

2. The A Sample data packet contains a verbal description of the processing of the A sample aliquots for confirmation analysis and explicitly states that "3 aliquots of the sample were analyzed according to the specifications indicated on the sample confirmation form (Fig 18) by [Analyst 1] according to SOP ANAL-89" (page 2). This clearly indicates that [Analyst 1] physically handled portions of the sample for the purpose of taking a portion of sample for performing the confirmation test. The documentation sheet found on page 35 of the data packet documents by the initials of [Analyst 1] his involvement in the extraction procedure for the A sample confirmation test.

3. The B Sample data packet from the Universiteit Gent clearly documents on page 12 that [Analyst 1] physically handled the portion of the B sample processed for confirmation analysis. The documentation on page 12 records [Analyst 1] carried out the derivitization procedure on the B sample just as he had done when performing the A sample screening test.

4. The Universiteit Gent data package for the A sample analysis and B sample analysis clearly documents the involvement of [Analyst 1] in testing both samples and physically handling portions of both the A and B samples.

#### **B. IRMS A and B Samples**

1. Page 1 of the Institut fur Biochemie data packet identified [Analyst 1], [Analyst 2] and [Analyst 3] as the analysts who handled and processed the sample identified as A 689699 for IRMS testing. This indicates that they physically handled the sample and/or portions of the sample for testing.

2. The data packet for both the A and B sample testing by IRMS indicate [Analyst 4] was involved in the "testing" and was responsible for "Scr. 4" (see page 2 of both A and B data packets). The data packet does not identify what testing is indicated by "Scr. 4", but the data packet does identify the IRMS procedure as the "Scr 14" test (see A data packet page 11). This would indicate that [Analyst 4] was not directly involved in the IRMS analysis of either the A or B sample.

3. The data packet for both the A and B sample testing by IRMS indicate [Analyst 1] was involved in the testing and was responsible for "Scr. 14" (see page 2 of both A and B data packets) which is further identified in the data packets as the IRMS test.

4. The data packet for both the A and B sample testing by IRMS indicate [Analyst 2] was involved in the "testing" and was responsible for "Scr.

7" (see page 2 of both A and B data packets). The data packet does not identify what testing is indicated by "Scr. 7", but the data packet does identify the IRMS procedure as the "Scr. 14" test (see A data packet page 11). The data packets suggest the Scr. 7 would not involve touching or handling the A or B samples for IRMS analysis.

5. The data packet for both the A and B sample testing by IRMS indicate [Analyst 3] was or could be involved in the testing and is responsible for "Scr. 14" (see page 2 of both A and B data packets) which is further identified in the data packets as the IRMS test.

6. Page 13 of the A sample data packet and page 14 of the B sample data packet for the IRMS analysis documents that [Analyst 5] was the analyst who operate [sic] IRMS instrument and performed the instrument analysis for the A and B sample testing.

7. Same as item 6.

#### **B. IRMS Sample A**

1. Scr. 7 is a test not defined and apparently not performed. If the testing was performed the data is not provided. The chain of custody for Scr. 14 for the A sample is found on page 11.

2. I have no explanation for the differences between page 2 of the A and B data packets.

3. Although [Analyst 2] is listed in the B sample data packet on page 12, which is a corollary to the indication of [Analyst 1] on page 11 of data packet A, [Analyst 1] is identified as involved in the testing as documented on page 10 of the B sample data packet. The documentation indicates that [Analyst 1] was involved in physically handling both the A and B sample for IRMS testing. Page 19 of the B sample data packet does not have a corollary page in the A sample data packet.

[...]

#### **B. IRMS Sample B**

1. By reference to pages 12 and 19 both [Analyst 1] and [Analyst 2] were involved in the physical handling and testing of the B sample for IRMS testing.

2. The tests indicated as 1, 2, 7 and 10 are not defined and if performed the data is not included in the B sample data packet.

3. The tasks performed are inherent in the procedures for the Scr. 14 test. The steps or procedures would not be listed separately.

4. Page 12 indicates by printed name and initials that [Analyst 2] performed the tasks indicated. The staff identified on page 2 does not identify [Analyst 2] as performing the Scr. 14 test.

5. [Analyst 6] physically accepted and stored the B sample. This documents that [Analyst 6] actually handled the sample while receiving and storing the sample after receipt at the laboratory.

[...]

My additional review of the documents from the Gent and Koln laboratories indicates that in both laboratories the same staff were involved in processing both the A and B samples for testing. This is in violation of the WADA International Standards for Laboratories and should impeach the validity of the results.

[...]

48. During the hearing, Dr. Black testified that one of the purposes of ISL 5.2.4.3.2.2 is to ensure that if there has been an error with respect to the "A" analysis, it will not be repeated on the "B" analysis. In Dr. Black's opinion, the standard therefore serves as protection against both benign error and malicious intent.
49. Dr. Black further testified that, for the purposes of ISL 5.2.4.3.2.2, the "analytical procedure" includes aliquoting, extraction and derivitization, observing that each step involves touching or manipulating the sample or extracts of the sample. This handling of the sample or extract of the sample for purposes of the analysis occurs up to the placement of the vials on an auto-sampler.
50. By way of example, Dr. Black stated that an error could occur during the derivitization procedure, as someone could confuse the test sample with a control sample or place the vials in the wrong slots on the automated machine. Dr. Black further stated that, in his view, none of the steps performed by the analyst at either the Ghent or the Cologne Laboratory, each of whom participated in both the "A" and the "B" sample analysis conducted at that laboratory, came within the exceptions set out in the last sentence of ISL 5.2.4.3.2.2.
51. The directors of both laboratories gave evidence by telephone in respect of the procedures followed by their respective laboratories in the analysis and testing of the samples in question.

52. Dr. Delbeke, director of the Ghent Laboratory, prefaced his evidence by stating that the laboratory is WADA-accredited, has been proficiency-tested by the World Association of Scientists ("WAS"), and is ISO 70025 certified.
53. Dr. Delbeke observed that the sample received by the Ghent Laboratory was normal and that there were no signs of bacterial degradation, such as an elevated pH level or conversion of testosterone into androstenedione (see USADA Exh. 8A). Dr. Delbeke also explained that the control samples against which the test sample was measured established that the results for the "A" and "B" samples, respectively, were within the normal range of measurement uncertainty (see USADA Exhs. 8A and B).
54. In respect of the testing procedure, Dr. Delbeke testified that the same analyst had in fact participated in both the "A" and the "B" analysis of Ms. Jenkins's sample. Specifically, the analyst in question performed the derivization step of the GC/MS analysis on the "A" sample and the extraction procedure on the "B" sample. However, because the analyst did not perform the *same procedure* on both the "A" and the "B" sample, Dr. Delbeke expressed the view that ISL 5.2.4.3.2.2 was not violated. Dr. Delbeke also stated that, in any event, he did not feel this standard was necessary to protect the integrity of the laboratory process.
55. In respect of certification of the testing results and ISL 5.2.5.1.1,<sup>2</sup> Dr. Delbeke directed the Panel to documentation in the laboratory package bearing the signatures of the two scientists who had reviewed and certified the results (see USADA Exhs. 8A and B).
56. Dr. Schänzer, Director of the Cologne Laboratory, confirmed that his laboratory was also WADA-accredited and had been proficiency-tested by the WAS. He also stated that no bacterial degradation was observed in the Respondent's sample.
57. Dr. Schänzer testified that the Respondent's sample was compared to control samples, including a quality control sample, a blank urine sample and a suspicious urine sample,

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<sup>2</sup> ISL 5.2.5.1.1 reads as follows: A minimum of two certifying scientists must independently review all Adverse Analytical Findings before a report is issued. The review process shall be documented.

and that her sample tested positive for an exogenous source of NANDROLONE (see USADA Exhs. 9A and B).

58. Dr. Schänzer told the Panel that, in his view, the testing process may be divided into two parts: technical preparation and analytical preparation. Technical preparation, he stated, may be performed by the same person. However, analytical preparation, involving aliquoting and extraction, must, in Dr. Schänzer's opinion, be performed by different analysts. According to Dr. Schänzer, the "A" sample analytical preparation was performed by one analyst while the "B" sample analytical preparation was performed by another. These analysts then changed roles to perform the so-called technical preparation in the reverse order on the "A" and the "B" sample analysis (see USADA Exhs. 9A and 9B).
59. As did Dr. Delbeke, Dr. Schänzer represented to the Panel that, by carrying out the analytical procedure in this way, ISL 5.2.4.3.2.2 had not been violated.
60. With respect to ISL 5.2.5.1.1, Dr. Schänzer confirmed that two scientists had indeed certified the testing results, directing the Panel to the signatures of the two reviewing scientists in the laboratory documents package (see USADA Exhs. 9A and 9B).
61. Finally, Mr. Al Awar and Mr. Hayes gave evidence with respect to the Respondent's good character.<sup>3</sup>

## II. APPLICABLE RULES

62. The IAAF Anti-Doping Rules ("IAAF Rules"), which codify key provisions of the WADA Anti-Doping Code ("WADA Code"), govern this proceeding.
63. The following definitions, set forth in the IAAF Rules, are relevant to the present proceeding:

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<sup>3</sup> The two USADA DCOs, Ms. Miller and Ms. Myers, gave evidence with respect to issues which are no longer in contention before the Panel.



## DEFINITIONS

### *Adverse Analytical Finding*

A report from a laboratory or other approved testing entity that identifies in a sample the presence of a prohibited substance or its metabolite or markers or evidence of the use of a prohibited method.

[...]

64. The relevant definition of doping is found in Rule 32:

### **Rule 32 Anti-Doping Rule Violations**

1. Doping is strictly forbidden under these Anti-Doping Rules.
2. Doping is defined as the occurrence of one or more of the following anti-doping rule violations:

(a) the presence of a prohibited substance or its metabolites or markers in an athlete's body tissues or fluids.

All references to a prohibited substance in these anti-Doping Rules and the Procedural Guidelines shall include a reference, where applicable, to its metabolites or markers.

(i) it is each athlete's personal duty to ensure that no prohibited substance enters his body tissues or fluids. Athletes are warned that they are responsible for any prohibited substance found to be present in their bodies. It is not necessary that intent, fault, negligence or knowing use on an athlete's part be demonstrated in order to establish an anti-doping rule violation under Rule 32.2(a).

(ii) except those prohibited substances for which a reporting threshold is specifically identified in the Prohibited List, the detected presence of any quantity of a prohibited substance in an athlete's sample shall constitute an anti-doping rule violation.

65. With respect to the standard of proof and the burden of establishing that an anti-doping rule violation has or has not occurred, Rule 33 is explicit. It provides:

### **Rule 33 Standards of Proof of Doping**

1. The IAAF, the Member or other prosecuting authority shall have the burden of establishing that an anti-doping rule violation has occurred under these Anti-Doping Rules.
2. The standard of proof shall be whether the IAAF, the Member or other prosecuting authority has established an anti-doping rule

violation to the comfortable satisfaction of the relevant hearing body, bearing in mind the seriousness of the allegation which is made. This standard of proof is greater than a mere balance of probability but less than proof beyond a reasonable doubt.

3. Where these Anti-Doping Rules place the burden of proof on an athlete, athlete support personnel or other person alleged to have committed an anti-doping violation to rebut a presumption or establish specified facts or circumstances, the standard of proof shall be by a balance of probability.
4. Facts related to anti-doping rule violations may be established by any reliable means. The following standards of proof shall be applicable in doping cases:
  - (a) WADA-accredited laboratories are presumed to have conducted sample analysis and custodial procedures in accordance with the International Standard for Laboratories. The athlete may rebut this presumption by establishing that a departure from the International Standard for Laboratories has occurred, in which case the IAAF, the Member or other prosecuting authority shall have the burden of establishing that such departure did not undermine the validity of the adverse analytical finding.

[...]

66. Samples are to be analysed in accordance with the following IAAF Rule:

**Rule 36 Analysis of Samples**

1. All samples collected under these Anti-Doping Rules shall be analysed in accordance with the following general principles:

[...]

**International Standard for Laboratories**

- (d) Laboratories shall analyse samples and report results in conformity with the International Standard for Laboratories.

[...]

67. Finally, the IAAF Rules contain the following general guide to their interpretation:

**Rule 45 Interpretation**

1. Anti-Doping rules are, by their nature, competition rules governing the conditions under which the sport of Athletics is to be held. They are not intended to be subjected to or limited by the requirements and legal standards applicable to criminal

proceedings or employment matters. The policies and standards set out in the Code as a basis for the fight against doping in sport, and as accepted by the IAAF in these Anti-Doping Rules, represent a broad consensus of those with an interest in fair sport and should be respected by all courts and adjudicating bodies.

2. The various headings and sub-headings used in these Anti-Doping Rules are for convenience only and shall not be deemed to be part of the substance of these Anti-Doping Rules or to affect in any way the language of the provisions to which they refer.
3. The Definitions in Chapter 3 shall be considered an integral part of these Anti-Doping Rules.

68. The 2006 WADA Prohibited List, adopted by the IAAF, provides as follows:

#### **S1. ANABOLIC AGENTS**

Anabolic agents are prohibited.

##### **1. Anabolic Androgenic Steroids (AAS)**

a. Exogenous\* AAS, including:

1-androstendiol; 1-androstendione; [...] nandrolone; 19-norandrostenedione; norboletone; norelostebol; norethandrolone; oxabolone; oxandrolone; oxymesterone; oxymetholone; prostanazol; quinbolone; stanozolol; stenbolone; 1-testosterone; tetrahydrogestrinone; trenbolone and other substances with a similar chemical structure or similar biological effect(s).

[...]

Where an anabolic androgenic steroid is capable of being produced endogenously, a *Sample* will be deemed to contain such *Prohibited Substance* where the concentration of such *Prohibited Substance* or its metabolites or markers and/or any other relevant ratio(s) in the *Athlete's Sample* so deviates from the range of values normally found in humans that it is unlikely to be consistent with normal endogenous production. A *Sample* shall not be deemed to contain a *Prohibited Substance* in any such case where an *Athlete* proves that the concentration of the *Prohibited Substance* or its metabolites or markers and/or the relevant ratio(s) in the *Athlete's Sample* is attributable to a physiological or pathological condition.

In all cases, and at any concentration, the *Athlete's* sample will be deemed to contain a *Prohibited Substance* and the laboratory will report an *Adverse Analytical Finding* if, based on any reliable analytical method (e.g. IRMS), the laboratory can show that the *Prohibited Substance* is of exogenous origin. In such case, no further investigation is necessary.

69. The WADA International Standard for Laboratories, Version 4.0 (August 2004) ("ISL"), which has also been adopted by the IAAF, provides as follows with regard to the scope and purpose of the laboratory standards:

#### **PREAMBLE**

The World Anti-Doping Code *International Standard for Laboratories* is a mandatory level 2 *International Standard* developed as part of the World Anti-Doping Program.

The basis for the *International Standard for Laboratories* is the relevant Sections in the Olympic Movement Anti-Doping Code. An expert group, together with a *WADA Laboratory Accreditation Committee*, has prepared the document and drafts have been circulated for initial review and comment from all IOC accredited doping Laboratories and the IOC Sub-Commission on Doping and Biochemistry of Sport.

Version 1.0 of the *International Standard for Laboratories* was circulated to Signatories, governments and accredited laboratories for review and comments in November 2002. Version 2.0 was based on the comments and proposals received from these stakeholders.

All *Signatories*, governments and *Laboratories* were consulted and have had the opportunity to review and provide comments to version 2.0. This draft version 3.0 was presented for approval to the WADA Executive Committee on June 7<sup>th</sup>, 2003.

The *International Standard for Laboratories* will come into effect on January 1<sup>st</sup> 2004.

[...]

#### **1.0 Introduction, Scope and References**

The main purpose of the *International Standard for Laboratories* is to ensure laboratory production of valid test results and evidentiary data and to achieve uniform and harmonized results and reporting from all accredited *Doping Control Laboratories*.

[...]

The International Standard for *Laboratories*, including all Annexes and Technical Documents, is mandatory for all signatories to the code.

The World Anti-Doping Program encompasses all of the elements needed in order to ensure optimal harmonization and best practice in international and national anti-doping programs. The main elements are: the *Code* (Level 1), *International Standards* (Level 2), and *Models of Best Practice* (Level 3).

In the introduction to the World Anti-Doping Code (*Code*), the purpose and implementation of the *International Standards* are summarized as follows:

*"International Standards* for different technical and operational areas within the anti-doping program will be developed in consultation with the *Signatories* and governments and approved by *WADA*. The purpose of the *International Standards* is harmonization among Anti-Doping Organizations responsible for specific technical and operational parts of the anti-doping programs. Adherence to the *International Standards* is mandatory for compliance with the *Code*. [...]"

Compliance with an International Standard (as opposed to another alternative standard, practice or procedure) shall be sufficient to conclude that the procedures covered by the *International Standard* were performed properly.

This document sets out the requirements for *Doping Control Laboratories* that wish to demonstrate that they are technically competent, operate an effective quality management system, and are able to produce forensically valid results. *Doping Control Testing* involves the detection, identification, and in some cases demonstration of the presence greater than a threshold concentration of drugs and other substance deemed to be prohibited by the list of Prohibited substances and *Prohibited Methods* (*The Prohibited List*) in human biological fluids or tissues.

70. As noted earlier by the Panel, specific provisions of the ISL in issue in the present proceeding are:

ISL 5.2.4.3.2.2

The "B" sample confirmation must be performed in the same Laboratory as the "A" sample confirmation. A different analyst must perform the "B" analytical procedure. The same individual(s) that perform the "A" analysis may perform instrumental set up and performance checks and verify results.

ISL 5.2.5.1.1

A minimum of two certifying scientists must independently review all Adverse Analytical Findings before a report is issued. The review process shall be documented.

### III. THE PARTIES' CONTENTIONS

#### A. Claimant's Position

71. USADA advances three main submissions. First, USADA claims that the mere presence of the prohibited substance 19-NORANDROSTERONE above the 2 ng/ml threshold in the Respondent's urine sample, regardless of her intent, constitutes a doping violation under the WADA Code and IAAF Rules. Second, USADA contends that the Respondent has failed to offer sufficient evidence to rebut the presumption of the validity of the results from the Ghent and Cologne Laboratories. Finally, USADA submits that, in any event, any violation of an international standard in this case did not cause the Respondent's AAF.
72. USADA argues that under the IAAF Rules, and consistent with other CAS and AAA panel Awards, the mere presence of 19-NORANDROSTERONE in excess of 2 ng/ml in Respondent's urine sample constitutes a doping offence<sup>4</sup> (see Claimant's Pre-Hearing Br. at 8; Claimant's Post-Hearing Br. at 3).
73. USADA avers that the testing results of both the Ghent and Cologne Laboratories, which detected the presence of exogenous 19-NORANDROSTERONE in the Respondent's sample above the established threshold through two independent testing methods, constitute proof that a doping violation occurred. USADA explains that the Ghent Laboratory detected 19-NORANDROSTERONE on three (3) successive aliquots of the Respondent's urine sample during the "A" sample analysis, and again on three (3) successive aliquots of the Respondent's urine sample during the "B" confirmation procedure. USADA points to the Ghent Laboratory's document package in which the laboratory reported an estimated concentration of 7.8 ng/ml of 19-NORANDROSTERONE in the "A" sample and of 12.3 ng/ml of 19-NORANDROSTERONE in the "B" sample (see Claimant's Post-Hearing Br. at 5-6).
74. USADA argues that the difference of 4.5 ng/ml between the "A" and the "B" samples, which was raised by Respondent as a possible indicator of bacterial degradation in the

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<sup>4</sup> See: *USADA v. Vencill*, AAA 30 190 00291 03; *USADA v. Vencill*, CAS 2003/A/484; *USADA v. Daru Cherry*, AAA 30 190 00463 03.

sample, was addressed and resolved by Dr. Delbeke during the hearing. Dr. Delbeke testified that there was no bacterial degradation of the sample and detailed the two separate methods by which the integrity of the sample had been tested prior to conducting the sample analysis.

75. USADA further points to the corroborating evidence of Dr. Bowers and Dr. Black, who both reviewed the laboratory documentation and testified that, apart from the issue of compliance with ISL 5.2.4.3.2.2, the laboratory analysis was conclusive.
76. USADA also offers the result of the IRMS analysis conducted by the Cologne Laboratory as conclusive evidence of the presence of a prohibited steroid in the Respondent's sample. USADA argues that this conclusion is supported by the following language in the WADA Prohibited List:

In all cases, and at any concentration, the *Athlete's* sample will be deemed to contain a *Prohibited Substance* and the laboratory will report an *Adverse Analytical Finding* if, based on any reliable analytical method (e.g. IRMS), the laboratory can show that the *Prohibited Substance* is of exogenous origin. In such case, no further investigation is necessary.

If a laboratory reports, using an additional reliable analytical method (e.g. IRMS) that the *Prohibited Substance* is of exogenous origin, no further investigation is necessary and the *Sample* will be deemed to contain such *Prohibited Substance*.

77. USADA argues that the reliability and conclusiveness of IRMS analysis in detecting doping with steroids has been upheld consistently by CAS panels and other tribunals<sup>5</sup> (see Claimant's Pre-Hearing Br. at 6-8; Claimant's Post-Hearing Br. at 7-8).
78. USADA quotes, in particular, the following passage from *Susin v. FINA* at page 35 of the award:

Based upon the above analysis, the Panel has concluded that : (a) the IRMS analysis provides conclusive scientific evidence of an exogenous administration of testosterone and ; (b) the Panel is entitled to rely upon

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<sup>5</sup> See *Susin v. FINA*, CAS 2000/A/274; *IAAF v. Dos Santos*, CAS 2002/A/383; *WADA v. Wisum*, CAS 2005/A/908; *IAAF v. Czech Athletic Federation and Z*, CAS 2002/A/362; *UCI v. S, DCU and DIF*, CAS 1998/A/192; *UCI v. Moller*, CAS 1999/A/239; *UCI v. Bakker and KNWU* CAS 2005/A/936; and *UCI v. Skelde*, CAS 1998/A/192.

the IRMS analysis as an independent and sufficient basis for finding that the Appellant committed a doping offence under FINA Rule DC 2.1(a).

79. Turning to the Cologne Laboratory results, USADA observes that both the "A" and "B" samples contained an approximate 10 delta unit difference in the <sup>13</sup>C level in the 19-NORANDROSTERONE when compared to other steroids, well in excess of the threshold delta value (*i.e.*, 3 per mil) to establish the presence of an exogenous steroid. USADA concludes that, as the testimony of Dr. Bowers established that an IRMS analysis is not affected by bacterial degradation, the Panel may take the Cologne Laboratory results as conclusive evidence of the presence of exogenous 19-NORANDROSTERONE in Ms. Jenkins's sample (see Claimant's Post-Hearing Br. at 9).
80. In support of its second main submission, USADA contends that there is insufficient evidence on the record to rebut the presumption of the validity of the results from the Ghent and Cologne laboratories. USADA's position in this regard turns primarily on its interpretation of ISL 5.2.4.3.2.2.
81. USADA contends that ISL 5.2.4.3.2.2 requires only that there be no overlap in the work performed by an analyst on the "A" and the "B" samples in either laboratory. USADA contests the testimony of Dr. Black in respect of the underlying purposes of ISL 5.2.4.3.2.2. The Panel recalls that Dr. Black had offered two reasons for the inclusion of that standard: (1) to prevent an analyst from duplicating on the "B" analysis an error made by that analyst on the "A" analysis or "benign error"; and (2) to prevent an analyst from intentionally manipulating the sample so that the "B" sample would confirm a faulty "A" analysis or "malicious intent". In USADA's view, this second reason is not supported by a contextual interpretation of ISL 5.2.4.3.2.2. USADA offers three arguments in this regard (see Claimant's Post-Hearing Br. at 12).
82. First, USADA claims that had the drafters of the standard been concerned to deal with the possible malicious intent of laboratory analysts, they would not have required in the first sentence of the standard that the "B" sample analysis take place in the same laboratory as the "A" sample analysis (see Claimant's Post-Hearing Br. at 12).
83. Second, USADA reasons that it would make no sense to allow "A" sample analysts anywhere near the "B" analysis, such as by permitting the same individual who



performed the "A" analysis to perform instrument set up, performance checks and to verify results, if the drafters had intended the second sentence of the standard to prevent fraud by the "A" sample analysts (see Claimant's Post-Hearing Br. at 13).

84. Finally, USADA argues that there is nothing in the second sentence of the standard as written which specifically excludes the approach taken by the laboratories in the present case, namely to divide up the analytical procedure and to ensure that no analyst performs the same analytical steps on both the "A" and the "B" analysis (see Claimant's Post-Hearing Br. at 13).
85. In USADA's view, this contextual interpretation of the standard is reasonable and supported by the approach taken by the two WADA-accredited laboratories in this case. Thus, on this interpretation, ISL 5.2.4.3.2.2 does not preclude an individual from handling different aspects of the "A" and "B" analytical procedure as long as there is no overlap in specific roles from the "A" analysis to the "B" analysis (see Claimant's Post-Hearing Br. at 11-14).
86. USADA further distinguishes the Award of the CAS panel in *UCI v. Landaluce & RFEC*<sup>6</sup>, ("*Landaluce*") from the facts in the present arbitration, pointing out that in *Landaluce* a single analyst had performed all aspects of the "B" analysis as well as certain portions of the "A" analysis, whereas no such overlap had occurred in the present proceeding (see Claimant's Reply Br. at 5; Claimant's Post-Hearing Br. at 14).
87. In respect of ISL 5.2.5.1.1, USADA relies upon the laboratory documentation packages and testimony provided by the laboratory directors in support of its position that the standard was met in this case (see Claimant's Post-Hearing Br. at 15).
88. In the alternative, USADA contends that should the Panel find the presumption in favour of the WADA-accredited laboratories to have been rebutted, there is sufficient evidence on the record to conclude that any such violation did not undermine the validity of the test results. USADA submits that any departure from either ISL did not cause Ms. Jenkins's adverse analytical finding because her sample was tested at two independent

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<sup>6</sup> TAS 2006/A/1119.

laboratories, using two separate testing methodologies, and both methods in both laboratories attested to the presence of exogenous NORANDROSTERONE (see Claimant's Post-Hearing Br. at 15-16).

89. USADA offers the independent corroboration of the Ghent Laboratory findings by the Cologne Laboratory, which evidence it reasons was not available in the *Landaluze* case, as "conclusive evidence" that any departure from ISL 5.2.4.3.2.2 or ISL 5.2.5.1.1 did not cause Ms. Jenkins's adverse analytical finding (see Claimant's Post-Hearing Br. at 16).
90. USADA concludes that, in accordance with the IAAF Rules, the appropriate sanction to be imposed on Ms. Jenkins is a two-year period of ineligibility to begin on the date of this Panel's award, with credit for the time of her provisional suspension to which she agreed (see Claimant's Pre-Hearing Br. at 12-13).

#### **B. Respondent's Position**

91. Ms. Jenkins, having withdrawn certain of her initial submissions (see para. 29, above), offers two main arguments in her defence. First, Ms. Jenkins claims that ISL 5.2.4.3.2.2 and ISL 5.2.5.1.1 were violated by both the Ghent Laboratory and the Cologne Laboratory in respect of her sample. Second, Ms. Jenkins argues that USADA has not met its burden of proving that any such violation did not undermine the validity of the IAAF.
92. Ms. Jenkins submits that the objective of ISL 5.2.4.3.2.2 is to prevent the intentional or accidental alteration or manipulation of the testing process, and ultimately the testing outcome. In Ms. Jenkins' view, the CAS panel in *Landaluze* fashioned a test that achieves this objective "by focusing on human contact with the sample: touching, handling, and manipulating the sample" (see Respondent's Pre-Hearing Br. at 16-17; Respondent's Post-Hearing Br. at 2-3).
93. Ms. Jenkins submits that this interpretation of ISL 5.2.4.3.2.2 was subsequently upheld by a FINA panel in *FINA v. Oliva*<sup>6</sup> ("*Oliva*") (see Respondent's Pre-Hearing Br. at 17).

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<sup>6</sup> FINA Doping Panel 1/07.

94. Ms. Jenkins contends that the purpose of ISL 5.2.4.3.2.2 is two-fold: (i) to ensure the reliability and integrity of the drug testing process, the laboratories, and the individual test results; and (ii) to ensure the appearance of reliability and integrity in each one of these facets of a doping investigation. Ms. Jenkins argues the standard emerges from what she terms the "double blind principle", whereby two separate and independent analyses are necessary to ensure the validity of the test results.
95. Ms. Jenkins claims that the standard must be prophylactically enforced for three (3) reasons (see Respondent's Pre-Hearing Br. at 19-20).
96. First, Ms. Jenkins submits there is a deterrence value to strictly enforcing the ISL. She argues that the integrity of the entire anti-doping system is called into question when the ISL are not strictly respected and enforced (see Respondent's Pre-Hearing Br. at 29).
97. Second, Ms. Jenkins submits that it is virtually impossible to determine the effect of an ISL violation because evidence of tampering, either intentional or unintentional, will surface only from the testimony of the very laboratory personnel accused of having violated a standard. In Ms. Jenkins's view, such evidence is in itself unreliable because of the nature of the impugned activity which requires the prosecuting authority to prove a negative (see Respondent's Pre-Hearing Br. at 21-22).
98. Finally, Ms. Jenkins submits that the presumptions in favour of WADA-accredited laboratories, along with limitations on the documentary evidence available to athletes and the imposition of strict liability once a prohibited substance is proved to have been found in an athlete's sample, require that the ISL be strictly enforced. The athlete reasons that she should not be held strictly liable if the test results are not strictly reliable (see Respondent's Pre-Hearing Br. at 22).
99. Ms. Jenkins further argues that the purpose of the WADA Code and the international standards is to ensure uniformity and that this Panel must not, therefore, redraft the ISL or read into the ISL a "notion of international comity" that in effect respects different laboratories' interpretations of the ISL (see Respondent's Post-Hearing Br. at 3).
100. Ms. Jenkins contends that the laboratory documentation and witness testimony in this case confirm that, both at the Ghent Laboratory and at the Cologne Laboratory, the same

analyst performed analytical procedures on both the "A" and "B" sample, thereby violating ISL 5.2.4.3.2.2.

101. In respect of ISL 5.2.5.1.1, Ms. Jenkins submits that this standard requires that two scientists conduct an independent review, that the review be certified, and that the certification be documented. Moreover, Ms. Jenkins argues the certification must affirmatively state that the adverse analytical finding meets a minimum standard of reliability. The absence of such proof, in Ms. Jenkins's view, cannot be cured through expert testimony because the documents on which the expert must rely are "fundamentally unreliable" (see Respondent's Post-Hearing Br. at 8-9).
102. Ms. Jenkins further claims that in order to meet its burden once a violation of the ISL is proved to have occurred, USADA is required, at a minimum, to produce the laboratory personnel involved in the testing process at each laboratory to testify that no tampering occurred or to corroborate testimony from the laboratory directors that no tampering occurred (see Respondent's Post-Hearing Br. at 2).
103. Ms. Jenkins reasons that the integrity of the doping control regime rests on the integrity of laboratory results and procedures. In support of her position, she cites the dissenting opinion of arbitrator Christopher Campbell in *USADA v. Floyd Landis*,<sup>7</sup> ("*Landis*") at paragraphs 60-61 (see Respondent's Post-Hearing Br. at 10):

[I]t is imperative that WADA Accredited Laboratories abide by the highest scientific standards

[...] As athletes have strict liability rules, the laboratories should be held strictly liable for their failure to abide by the rules and sound scientific practice.

104. Ms. Jenkins concludes that both the "A" and "B" sample results from the two laboratories in the present case must be "overturned and excluded" (see Respondent's Post-Hearing Br. at 7).

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<sup>7</sup> AAA 30 190 00847 06.

#### IV. DISCUSSION

##### A. Strict Liability and the Anti-Doping Regime

105. In accordance with the USADA Protocol contractually binding on the parties, the Panel must apply the IAAF Rules with respect both to the definition of doping and to the consequences of a doping offence (IAAF Rule 32(1)).
106. Pursuant to the IAAF Rules, doping is a strict liability offence. As a result, a doping offence occurs when a prohibited substance is found to be present in an athlete's urine sample irrespective of whether the athlete knowingly used the prohibited substance (IAAF Rule 32(2)). This principle has been consistently upheld in anti-doping cases.<sup>7</sup>
107. As a corollary of the strict liability nature of the anti-doping regime, the IAAF and WADA rules must be strictly construed. This is implicit in the rules themselves, which provide that (IAAF Rule 45(1)):

[t]he policies and standards set out in the [WADA] Code as a basis for the fight against doping in sport and as accepted by the IAAF in these Anti-Doping Rules, represent a broad consensus of those with an interest in fair sport and should be respected by all courts and adjudicating bodies.

[Emphasis added]

108. Strict construction of the anti-doping rules has been recognized by the CAS and other national tribunals.<sup>8</sup> In *Landaluce*, a CAS panel observed that its role is limited to applying the rules as articulated by the rule-making bodies governing competitive sport (*Landaluce* at para. 113):

The applicable rule [ISL 5.2.4.3.2.2] is clear and devoid of flexibility. The CAS arbitrators' mission is not to modify the rules nor is their mission to appropriate discretionary power when no text allows them to do so.

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<sup>7</sup> See *USADA v. Landis*, AAA 30 190 00847 06; *Oleksandr Polyudonostey v. International Ice Hockey Federation*, CAS 2005/A/1990; *ATP v. Valsov*, CAS 2005/A/873; *UCI v. Moller*, CAS 1999/A/239; *UCI v. Bakker and KNWU*, CAS 2005/A/936.

<sup>8</sup> See *UCI v. Landaluce & RFEC*, TAS 2006/A/1119; *FINA v. Oliva*, Fina Doping Panel, 1/07; *USADA v. Landis*, AAA 30 190 00847 06.

[Emphasis added]

109. In *Landis*, a majority of the AAA panel observed that in interpreting the anti-doping rules, and in particular the ISL, adjudicative bodies must respect the drafters' intentions as expressed on the face of the rule or standard (*Landis* at para. 240):

In applying the language of [ISL 5.4.4.2.1] what is required is that the "method should avoid interference". The language is not mandatory. Had the drafters' intended that matrix interference be avoided it would require wording such as "shall" or "must".

[Emphasis in original]

110. Indeed, the purpose and scope of the ISL preclude an adjudicative body or panel from imposing a higher or other standard on a USADA-accredited laboratory in order to establish the laboratory's compliance with the rules (ISL, Article 1.0):

Compliance with an International Standard (as opposed to another alternative standard, practice or procedure) shall be sufficient to conclude that the procedures covered by the International Standard were performed properly.

(Emphasis added)

111. Accordingly, this Panel cannot question the wisdom or the practicality of a mandatory rule or standard. Rather, it is the Panel's remit to apply the rules drafted and agreed by all stakeholders in the anti-doping system.

**B. Presence of a Prohibited Substance in Respondent's Sample**

112. Doping is defined as "the presence of a prohibited substance or its metabolites or markers in an athlete's body tissues or fluids" (IAAF Rule 32.2(a)).
113. The WADA Prohibited List describes 19-NORANDROSTERONE as a metabolite of a prohibited anabolic steroid. Under the IAAF Anti-Doping Rules and WADA Rules, the presence of 19-NORANDROSTERONE above 2 ng/ml in either a male or female athlete establishes ingestion of the prohibited substances NANDROLONE, 19-norandrostenediol, or 19-norandrostenedione.
114. USADA has presented documentary evidence from two independent WADA-accredited laboratories which detected, through two different testing methodologies, the presence of

exogenous NORANDROSTERONE above the 2 ng/ml threshold level in the Respondent's sample. USADA's expert reviewed the laboratory documentation and testified that the documentation establishes a doping violation.

115. Respondent's expert, Dr. Black, also observed that the laboratory documents establish a doping violation (see USADA Exh. 33):

The data provided does document the presence of 19 Norandrosterone, which is the primary urinary metabolite detected from the use of pharmaceutical Nandrolone or products containing precursor chemicals causing such a positive finding.

116. USADA has therefore met its initial burden of proving to the Panel's comfortable satisfaction that a doping violation has occurred.

**C. Violation of the International Standard for Laboratories**

117. WADA-accredited laboratories benefit from a presumption of having conducted sample analysis and custodial procedures in accordance with the ISL. This presumption may be rebutted by the athlete by establishing, on a balance of probability, that a departure from the ISL has occurred (IAAF Rule 33).
118. The consequence of rebutting this presumption is not, however, an automatic invalidation of the testing results. As explained below, if the athlete is able to demonstrate a departure from the ISL, the burden then shifts back to USADA to prove that such violation did not undermine the validity of the AAF.

**1. ISL 5.2.4.3.2.2**

119. The Respondent alleges that both the Ghent and Cologne Laboratories violated ISL 5.2.4.3.2.2 because an analyst who participated in the "A" sample analysis in each laboratory also participated in the "B" sample analysis in that same laboratory.
120. On its face, ISL 5.2.4.3.2.2 clearly forbids an analyst who performs the "A" sample analysis from performing the "B" sample analysis: "*A different analyst must perform the 'B' analytical procedure.*" [emphasis added]. Nevertheless, controversy arose during the course of the proceeding in respect of the meaning of the term "analytical procedure"

and, more broadly, the proper interpretation of the standard for the purpose of identifying conduct which would amount to a violation of this standard.

121. "Analytical procedure" is not defined in the IAAF Rules. Neither party was able to provide the Panel with a comprehensive definition of the term.
122. However, two observations may be made. First, the singular use of the term "analytical procedure" (i.e., as opposed to "procedures") suggests that, to the extent that an analytical procedure is composed of several steps, the drafters intended that an analyst involved in any step of the "A" sample analytical procedure must not perform any step of the analytical procedure on the "B" sample. This proposition is supported by the expert testimony of both Dr. Bowers and Dr. Black.
123. Second, the drafters have set out a closed list of steps that analysts involved in the "A" sample analysis may also perform on the "B" sample analysis: instrumental set up and performance checks, and the verification of results. There is no basis on the face of the standard to import other activities into this list of acceptable areas of overlap. This second proposition is also supported by the expert testimony of Dr. Bowers and Dr. Black.
124. During the evidentiary hearing, Claimant drew the Panel's attention to two exhibits prepared by USADA in order to facilitate an understanding of the sequence of steps involved in each testing method at each laboratory and the identity of the individuals who performed each of those steps (see USADA Exhs. 34 and 35). These exhibits are summarized below:

**GC/MS (Chent Laboratory)**

<u>Step #</u>	<u>ALIUQUOT</u>	<u>A SAMPLE</u> <u>Person</u>	<u>B SAMPLE</u> <u>Person</u>
1	Aliquot three 5.0 ml samples	Analyst 1	Analyst 4
<u>Step #</u>	<u>EXTRACTION</u>	<u>Person</u>	<u>Person</u>
1	Buffer with 1 ml phosphate	Analyst 1	Analyst 4
2	Add 50 µl of B-glucuronidase enzyme	Analyst 1	Analyst 4
3	Hydrolysis at 42 C	Analyst 1	Analyst 4
4	Add 0.5 g NaHCO <sub>3</sub> /K <sub>2</sub> CO <sub>3</sub>	Analyst 1	Analyst 4
5	Add 50 µl of internal standard	Analyst 1	Analyst 4



6	Extract with 5 mL n-pentane	Analyst 1	Analyst 4
7	Centrifuge for 20 minutes	Analyst 1	Analyst 4
8	Separated and dried over anhydrous Na <sub>2</sub> SO <sub>4</sub> and evaporated at 40 C	Analyst 1	Analyst 4
<b><u>Step #</u></b>	<b><u>DERIVITIZATION</u></b>	<b><u>Person</u></b>	<b><u>Person</u></b>
1	Add 100 µl of derivatization mixture	Analyst 2	Analyst 1
2	Heat at 80° C	Analyst 2	Analyst 1
3	Inject 0.5 µl for GC/MS	Analyst 2	Analyst 1
<b><u>Step #</u></b>	<b><u>ANALYSE</u></b>	<b><u>Person</u></b>	<b><u>Person</u></b>
1	Verify instrument, check results	Analyst 2 Analyst 3	Analyst 1 Analyst 3

IRMS (Cologne Laboratory)

<b><u>Step #</u></b>	<b><u>ALIQUOT</u></b>	<b><u>A SAMPLE -</u></b>	<b><u>B SAMPLE</u></b>
		<b><u>Person</u></b>	<b><u>Person</u></b>
1	Aliquot 10 ml of sample	Analyst 1	Analyst 2
<b><u>Step #</u></b>	<b><u>EXTRACTION</u></b>	<b><u>Person</u></b>	<b><u>Person</u></b>
1	C18-column irrigation	Analyst 1	Analyst 2
2	Aliquot urine on C18-column irrigate	Analyst 1	Analyst 2
3	Elute with MeOH	Analyst 1	Analyst 2
4	Evaporation to dryness	Analyst 1	Analyst 2
5	Add Phosphate buffer (1 ml 0.2M ph 7.0)	Analyst 1	Analyst 2
6	Add Enzyme (50 µl B-glucuronidase of e.coli)	Analyst 1	Analyst 2
7	Hydrolysis (1 h at 50°C)	Analyst 1	Analyst 2
8	Add 500 µl K <sub>2</sub> CO <sub>3</sub> /KHCO <sub>3</sub> (1:1) - 20% sol.	Analyst 1	Analyst 2
9	Add 5 ml tert.-butylmethyether	Analyst 1	Analyst 2
10	Agitate 5 min., centrifuge 5 min.	Analyst 1	Analyst 2
11	Transfer of organic phase in separate tapered glass, evaporation to dryness, REPEAT steps 9-11	Analyst 1	Analyst 2
12	Storage of extracts in locked room (R-702)	Analyst 1	Analyst 2
<b><u>Step #</u></b>	<b><u>NP-HPLC</u></b>	<b><u>Person</u></b>	<b><u>Person</u></b>
1	Transfer of samples via 2 x 100 µl MeOH in HPLC-autosampler vials	Analyst 2	Analyst 1
2	Drying in exsiccator over P <sub>2</sub> O <sub>5</sub>	Analyst 2	Analyst 1
3	Apply a little solvent 50 µl n-hexane/IPA 9/1; cut sample	Analyst 2	Analyst 1
4	Dry fractions in rotating evaporator	Analyst 2	Analyst 1

<u>Step #</u>	<u>RP-HPLC</u>	<u>Person</u>	<u>Person</u>
1	Transfer of samples via 2 x 100 µl MeOH in HPLC-autosampler vials	Analyst 2	Analyst 1
2	Drying in exsiccator over P <sub>2</sub> O <sub>5</sub>	Analyst 2	Analyst 1
3	Apply a little solvent 50 µl n-hexane/IPA 9/1; cut sample	Analyst 2	Analyst 1
4	Dry fractions in rotating evaporator	Analyst 2	Analyst 1

<u>Step #</u>	<u>ANALYSE</u>	<u>Person</u>	<u>Person</u>
1	Instrumental control for HPLC	Analyst 2	Analyst 1

125. During the hearing, the parties could not agree whether, in respect of the GC/MS method, the "analytical procedure" included both extraction and derivitization phases or only the extraction steps, and similarly with respect to IRMS analysis whether the "analytical procedure" comprised both extraction and HPLC phases or solely the extraction steps. Dr. Bowers and Dr. Black both testified that the extraction and derivitization phases of the GC/MS procedure are part of the "analytical procedure", as are the extraction and HPLC phases of the IRMS procedure.
126. In its post-hearing submissions, USADA conceded that the term "analytical procedure" includes both the extraction and derivitization phases of the GC/MS method, and both the extraction and HPLC phases of the IRMS analysis. USADA further stipulated that "[t]he evidence at the hearing was undisputed that analysts involved in the A sample analysis in both the Ghent and Cologne laboratories also participated in the B sample analysis" (see USADA Post Hearing Br. at 11).
127. The documentary evidence and expert testimony are indeed persuasive. The Panel finds that the term "analytical procedure" in ISL 5.2.4.3.2.2 includes both the extraction and derivitization phases of the GC/MS method, and both the extraction and HPLC phases of the IRMS analysis. Furthermore, it is undisputed that at each of the Ghent Laboratory and the Cologne Laboratory, the same analyst performed steps forming part of the "analytical procedure" on both the "A" and the "B" analysis at that laboratory.
128. USADA argues that "[t]he evidence is also undisputed that there was no overlap in the work performed by an analyst on the A and B samples". On this basis, USADA submits

that ISL 5.2.4.3.2.2 was not violated. In order to anchor its overlap argument, USADA adopts a contextual approach to the interpretation of the standard and emphasises the distinction between the facts in the present case and the facts in *Landaluce*.

129. In particular, USADA avers that, in *Landaluce*, a single analyst had performed all aspects of the "B" analysis as well as certain steps in the "A" analytical procedure. In the Panel's view, this interpretation of the standard flies in the face of the plain language of ISL 5.2.4.3.2.2 and belies the core reasoning of the CAS panel in *Landaluce*.
130. In arriving at its conclusion that ISL 5.2.4.3.2.2 had been violated, the *Landaluce* panel did not focus on the fact that there had been an overlap in the steps performed by an analyst on the "A" and the "B" samples. Rather, guided by the consensus of three experts, the panel focused on whether the same analyst had touched or manipulated both the "A" and "B" samples, with the exception of the steps specifically exempted in the standard (*i.e.*, instrumental set up, performance checks and verification of results). The panel's clear reasoning follows (*Landaluce* at paras. 96-103):

Mr. Landaluce used as a basis the report of Dr. de Boer to claim that the analyst who did the analysis of the B sample was also involved in the analysis of the A sample, in violation of point 5.2.4.3.2.2 of the ISL.

Dr. de Boer indicated that this standard prohibits the same analyst from touching/manipulating both the A and B samples ("touching the sample must be separate"). [...]

In this particular case, the report dated 11 June 2005 reveals that the analyst who did the analysis of the B sample did the following tasks in the A analysis: *package* [...] at 4 degrees C, redissolve in acetonitrile and transfer to a vial, evaporate, redissolve in hexane and inject in the GC-MS.

The Panel President asked Dr. Saugy whether point 5.2.4.3.2.2 of the ISL prohibited the same analyst from touching/manipulating both the A and B samples. Dr. Saugy acquiesced in the following terms: "I agree that it excludes any manipulation of the sample".

The Panel President then interrogated Prof. de Ceaurriz to know whether the same analyst had touched/manipulated the A and B samples. Prof. de Ceaurriz replied: "Yes. It is clearly indicated, if you want, it is indicated in our chain of [custody]. There is no ambiguity on this. [The analyst] touched the samples in the A and touched the totality of the samples in the B. There is no ambiguity on this."

The Panel President then asked whether that constituted a departure from the ISL, to which Prof. de Ceaurriz replied: "Indeed, It is even openly in the laboratory documents. [...] with respect to the standard, that is true, she has contact with the sample."

Prof. de Ceaurriz indicated that there had been 10% of "overlap between the two persons for workload reasons".

The group of experts present at the Hearing thus recognized that the analyst who participated in the two analyses did not limit herself to "performing instrumental set up and performance checks and verify results" and determined that there had been a departure from point 5.2.4.3.2.2 of the ISL.

[Emphasis added]

131. The *Lundaluze* panel then acknowledged the controversy surrounding the application of ISL 5.2.4.3.2.2 as presently drafted. The panel recognized specifically that strict enforcement of this standard could impose a severe burden on laboratories. But the panel concluded that, as an adjudicative body, it could only apply the rules as it found them.
132. The Panel quotes at length the following passage in *Lundaluze*, which it considers apposite in all relevant respects to its reasoning in the instant case (*Lundaluze* at paras. 109-112):

Although aware of the imperatives of costs and organization faced by laboratories, the Panel must watch over the respect of fundamental rules, considering the implications that its decision could have on the reputation, and therefore, the career of the athlete, if a disciplinary sanction were to be pronounced against him.

The Panel is well aware that the standard which requires that a different analyst analyze the B sample has been the subject of intense discussions between WADA and laboratory directors. The latter claim that this rule unreasonably complicates laboratory operations, and yet it has not been demonstrated that it brings additional protection to the athletes tested. Indeed it would be unrealistic to require that the same analyst conduct the totality of an analysis from beginning to end. In fact, the analyses for certain substances can last several days during which processes are mechanically carried out. The analysts carry out numerous tasks, shifting from one to the other, so that several analyses can be done simultaneously. If it is conceivable to require of a large laboratory with a staff of 50 to 100 to organize the work so as to exclude from the analysis of the B sample the analyst who analyzed the A – even though this constitutes a non-negligible complication factor which the laboratories would rather be spared – such a requirement would constitute a major complication factor for a laboratory of smaller size,

It is virtually impossible to prove a negative fact, in this case that the involvement of the same analyst in both analyses did not affect the result. Therefore certain laboratory directors consider this rule too rigid; in reality, sufficient protection of the athletes is already ensured in that the system of identification of samples by codes ensures that their identity is not known to the analysis.

This reasoning, although rational and plausible, fails before the CAS for a very simple reason: the arbitrators do not create the rules, the [sic] apply them. This is all the more true because the authors of the antidoping regulation kept the rule which requires another analyst for the analysis of the B sample, even though they had heard the comments of the laboratory directors. The rules can certainly be modified or refined, but such is not the role of the CAS.

[Emphasis added]

133. Shortly after the *Landaluce* Award was issued, a FINA doping panel dismissed a prosecution against an athlete because of failure by the laboratory concerned to observe the standard requiring that different analysts carry out the analytical procedure on the "A" and the "B" sample. In that case, the same analyst had opened both the "A" and "B" sample bottles, and had carried out extraction procedures for epitestosterone on both the "A" and the "B" samples<sup>9</sup>:

The case is dismissed as the persons who conducted the analysis of the "B" sample were also involved in the analysis of the "A" sample. This was a violation of the International Standards for Laboratories. Such a departure from the International Standard is serious enough to cause the acquittal of the athlete (see Court of Arbitration in Sports (CAS), 20.12.2006, 2006/A/1119 UCI/Landaluce, Nr. 95-115).

[Emphasis added]

134. The Panel finds that both *Landaluce* and *Oliva* are persuasive precedents for the principle that the touching, manipulation, or handling of a sample by an analyst who participates in both the analytical procedure for the "A" sample analysis and the analytical procedure for the "B" sample analysis is prohibited. It is therefore irrelevant that there was no overlap in the particular steps conducted by the analysts who participated in both the "A" and "B" sample analytical procedure at the Ghent and Cologne Laboratories if those steps involved touching, handling or manipulating the sample. Based on the documentary

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<sup>9</sup> See: *FINA v. Oliva*, FINA Doping Panel 1/07, para. 23.

evidence and testimony of both expert witnesses, the Panel concludes that the steps engaged in by Analyst 1 of the Ghent Laboratory and Analysts 1 and 2 of the Cologne Laboratory during the analytical procedure involved in both the "A" and the "B" sample analysis involved touching, handling or manipulating the sample. As such, ISL 5.2.4.3.2.2 has been violated.

135. The Panel is aware that certain laboratory directors, including the directors of the Ghent and Cologne Laboratories who testified in this proceeding, believe that strict compliance with the standard, as now authoritatively interpreted, is unnecessary to ensure the reliability and integrity of laboratory procedures or testing results. The Panel appreciates their views. However, unless and until ISL 5.2.4.3.2.2 is modified, WADA-accredited laboratories have no alternative but to adhere to and follow the standard as drafted.
136. In view of the grave implications for athletes, such as Ms. Jenkins, who are held strictly to account for any transgression of applicable anti-doping rules, testing laboratories must also be held strictly to account for any non-compliance with those same rules. Failure to comply with the mandatory standard contained in ISL 5.2.4.3.2.2 cannot be viewed as a mere technicality. The strict liability regime which underpins the anti-doping system requires strict compliance with the anti-doping rules by every one involved in the administration of the anti-doping regime in order to preserve the integrity of fair and competitive sport.
137. For the afore-mentioned reasons, the Panel finds unanimously that both the Ghent and Cologne laboratories violated ISL 5.2.4.3.2.2.

#### 2. ISL 5.2.5.1.1

138. With respect to the alleged violation of ISL 5.2.5.1.1, the Respondent's arguments and evidence are far less compelling. In her post-hearing submissions, the Respondent argues that ISL 5.2.5.1.1 requires the certifying scientists to state affirmatively that an independent review was conducted and that the adverse analytical findings meet a minimum standard of reliability. The Panel finds that this interpretation is not supported by the text of ISL 5.2.5.1.1.

139. The text of ISL 5.2.5.1.1 requires only that the independent review process be documented: "A minimum of two certifying scientists must independently review all Adverse Analytical Findings before a report is issued. The review process shall be documented." [Emphasis added].
140. The standard does not specify how the review process is to be documented. As mentioned previously, it is not the role of an arbitration panel to impose a particular requirement on a laboratory where an obligation may, on the face of the rule or standard creating the obligation, be satisfied in any number of ways.
141. The Respondent's attempt to impose such a particular requirement exceeds what the standard actually requires in this instance, namely, that at least two certifying scientists must independently review the adverse and analytical findings before a report is issued and that the review process must be documented.
142. The Respondent relies on the dissenting opinion of arbitrator Campbell in *Landis*. The Panel, however, prefers – and indeed agrees with – the opinion of the majority in that case.
143. The majority in the *Landis* case adopted a strict approach to the construction of applicable anti-doping rules without distinction between those rules which impose a specific practice on laboratories and those which leave greater discretion to individual laboratories to fashion their compliance.
144. For example, in rejecting the athlete's submission that the rules governing chain of custody had been violated, the majority in *Landis* explained that failure to observe what might objectively constitute good practice does not necessarily establish a violation of an international standard if that practice is not mandated by the rule in question (*Landis* at para. 275):

What the Respondent has established here is that there may be a better standard and a higher standard imposed upon laboratories or self-imposed by WADA Laboratories. The proof of some other procedure, alternative standard or a better practice engaged in by other laboratories is of no consequence in rebutting the presumption because it is not a requirement of WADA accredited laboratories. Whether or not it is good

practice to document these transfers is irrelevant to the laboratory's adherence to the ISL in this case.

[Emphasis added]

145. The majority concluded that, notwithstanding the desirability of harmonizing laboratory chain of custody procedures, the applicable rules do not in fact require that laboratories satisfy chain of custody documentation requirements in a particular way (*Landis* at paras. 276-278).
146. The Panel agrees with the reasoning of the majority in the *Landis* Award and adopts it without reservation to interpret ISL 5.2.5.1.1.
147. During the hearing, both Dr. Schänzer and Dr. Delbeke testified that two certifying scientists in each respective laboratory independently reviewed the adverse analytical findings before the laboratory reports were issued. Furthermore, each laboratory bundle contains a document identifying the two certifying scientists from each laboratory who certified their review of the AAFs.
148. Thus, the Panel finds that the requirements of ISL 5.2.5.1.1 have been met.
149. The totality of the evidence in the present case demonstrates that both the Ghent and the Cologne Laboratories have satisfied the minimum requirements demanded of them by ISL 5.2.5.1.1.
150. The Panel therefore finds that Respondent has not succeeded in rebutting the presumption that both laboratories complied with ISL 5.2.5.1.1.

**D. The Validity of the Adverse Finding**

151. As set out above, the athlete has rebutted the presumption that the sample analysis was conducted in accordance with ISL 5.2.4.3.2.2. USADA therefore has the burden of demonstrating to the Panel's comfortable satisfaction that the violation of the standard in question did not cause the athlete's adverse analytical finding. There are certain inherent difficulties in discharging this burden. First and foremost, it requires proof of a negative.
152. In *Landaluce*, the panel found that the prosecuting authority had failed to demonstrate that the departure from the ISL at issue was not at the origin of the adverse analytical



finding because the authority presented no evidence in support of its assertions that the testing results had not been undermined by the violation. The panel said: (*Landaluce* at paras. 105-107):

It was not demonstrated that this was not at the origin of the adverse finding, nor that it was. It was, however incumbent upon the UCI, according to article 18 of the UCI Anti-doping Rules, to demonstrate that the departure from the ISL was not at the origin of the adverse finding, but this was not done. The UCI merely indicated in its appeal brief that:

*"And even if there had been a departure – quod non – this couldn't have led to the adverse analytical finding, unless it is established that [the analyst] committed an error which caused the adverse analytical finding, quod non."*

Also during the hearing, the UCI simply noted:

*"As for the departures from the ISL which were brought up, I believe I can conclude that if they took place, they are not significant and are certainly not at the origin of the result."*

It was indeed for the UCI to demonstrate that the failure to meet point 5.2.4.3.2.2 of the ISL was not at the origin of the adverse finding. To the extent that the UCI did not succeed in doing so, the Panel's only possible conclusion is to exonerate Mr. Landaluce.

153. In *Landis*, the athlete similarly succeeded in rebutting the presumption in favour of the laboratory – in that case with regard to forensic corrections made by a laboratory under WADA TD2003LCOC.<sup>8</sup> However, the majority also found that USADA had successfully demonstrated that in the circumstances of that case the violation of the international standard did not cause the athlete's adverse analytical finding. On the basis of the evidence presented by USADA, the majority ruled that the errors ("improper corrections or notations" on certain laboratory documents) did not undermine the validity of the AAF. They wrote (*Landis* at paras. 286-289):

In a situation such as this, it would suffice to show that at all times the LNDD was handling and testing the Respondent's sample and that the documents presented are the documents with respect to his specimen.

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<sup>8</sup> WADA TD2003LCOC provides: "Any forensic corrections that need to be made to the document should be done in a single line through and the change should be initialled and dated by the individual making the change. No white out or erasure that obligate the original entry is acceptable".

In response to the submissions of the Respondent on this matter, the Claimant acknowledges there are some improper corrections or notations but there remains no difficulty in demonstrating that the corrections were appropriate and did not cause the Respondent's AAF.

Firstly, the Claimant notes that the correct sample number was identified each and every time the Respondent's sample was placed on an instrument for analysis. Although there was a transposition error at USADA 0008, there is no doubt that the sample being tested was that of the Respondent. Furthermore, in relation to sample numbers 995676 and 995475, the LNDD provided the report forms for the real Samples and confirmed that both samples were reported as negative.

The Panel therefore finds that the Claimant has established that the departures from the ISL and WADA Technical Document requirements did not cause the AAF. [...]

154. The *Landis* panel cautioned, however, that laxity in observing the International Standards could result in the dismissal of a doping case in appropriate circumstances (*Landis* at para. 290):

The Panel does, however note that the forensic corrections of the Lab reflect sloppy practice on its part. If such practices continue it may well be that in the future an error like this could result in the dismissal of an AAF finding by the Lab.

155. USADA's main contention in the present proceeding is that the Cologne Laboratory's findings corroborate the Ghent Laboratory's findings and are therefore "powerful and conclusive evidence" that any departure from ISL 5.2.4.3.2.2 did not cause the Respondent's AAF. The difficulty with this submission, on its face, is that the Panel has found that *both* laboratories violated ISL 5.2.4.3.2.2. Two wrongs do not make a right.

156. Because both the Ghent Laboratory and the Cologne Laboratory violated the standard, USADA cannot rely solely upon either laboratory's findings of an AAF to discharge its burden; nor can it rely on both laboratories' findings, as it attempts to do (see USADA Post-Hearing Br. at 16):

We know that any departure from ISL 5.2.4.3.2.2 or 5.2.5.1.1 in the Ghent laboratory did not cause its finding of exogenous norandrosterone because that finding was corroborated by the independent analysis of the Cologne laboratory. Likewise, we know that any departure from ISL 5.2.4.3.2.2 or 5.2.5.1.1 in the Cologne laboratory did not cause its finding because that finding was corroborated by the independent analysis of the Ghent laboratory.

157. The fact that both laboratories reached a similar result notwithstanding a similar violation of ISL 5.2.4.3.2.2 does not demonstrate that the violation of the ISL at either one of the laboratories did not cause the AAF in that laboratory.
158. The Panel therefore finds that USADA has not met its burden of proving to the Panel's comfortable satisfaction that the Ghent and Cologne Laboratories' violations of ISL 5.2.4.3.2.2 did not undermine the validity of the Respondent's adverse analytical finding.

**E. Conclusion**

159. In summary, the Panel is of the view that: (i) USADA has proved that the prohibited substance 19-NORANDROSTERONE was found above the threshold level in urine specimen 689699 provided by the Respondent on 22 July 2006; (ii) the Respondent has successfully demonstrated that ISL 5.2.4.3.2.2 was violated by both the Ghent and Cologne laboratories; (iii) the Respondent has not demonstrated that ISL 5.2.5.1.1 was violated; and (iv) USADA has failed to prove to the Panel's comfortable satisfaction that the failure by both laboratories to observe ISL 5.2.4.3.2.2 did not undermine the validity of the testing result.
160. In view of the Panel's finding that USADA has failed to demonstrate that the violation of ISL 5.2.4.3.2.2 by both laboratories did not undermine the validity of the test results, the results must be set aside.
161. In closing, the Panel wishes to add two comments. Firstly, doping in sport is a scourge which must be eradicated. It is a strict liability offence and, just as the athletes who are subject to the anti-doping regime are expected to follow its rules and standards to the letter, so they are entitled to expect that those rules and standards will be strictly construed and followed by the anti-doping authorities themselves, including the WADA-accredited laboratories that play such a vital role in the regime. Following the rules applicable to all stakeholders is the best method of ensuring the integrity of sport.
162. Finally, the Panel wishes to emphasize certain aspects of the findings which compel its award in this case. The Panel has found that two WADA-accredited laboratories detected prohibited levels of 19-NORANDROSTERONE in the Respondent's sample provided on 22 July 2006. The Panel has also determined that those test results must be set aside

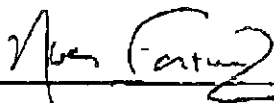
because of a violation of the ISL and because USADA was unable to prove that that violation did not undermine the validity of the test results in question. However, the Panel has not found that the violation of the ISL caused the Respondent's test results; nor has it determined whether the Respondent did or did not use a prohibited substance such as to account for the test results at issue.

#### FINDINGS AND AWARD

This Panel therefore finds and awards as follows:

1. The Ghent and Cologne Laboratories violated ISL 5.2.4.3.2.2 in the conduct of their analysis of Ms. Jenkins's sample;
2. The Ghent and Cologne Laboratories did not violate ISL 5.2.5 1.1 in the conduct of their analysis of Ms. Jenkins's sample;
3. Claimant, USADA, has not demonstrated to the Panel's comfortable satisfaction that the violation of ISL 5.2.4.3.2.2 did not cause the AAF arising from the analysis of the Respondent's, Ms. Jenkins's, sample by the Ghent and Cologne Laboratories;
4. The testing results of Respondent are set aside.
5. The administration fees and expenses of the American Arbitration Association and the compensation and expenses of the arbitrators shall be borne by USADA.
6. The parties shall bear their own costs and attorneys' fees.
7. This Award is in full settlement of all claims submitted in this arbitration.

Signed this 25 day of January 2008.



L. Yves Fortier, C.C., Q.C.  
Chair

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C. Mark Baker, Esq.



Ms. Barbara Shycoff