

AAA No. 77 190 00293 10 USADA v. LaShawn Merritt

ARBITRAL AWARD

Pronounced by the

**AMERICAN ARBITRATION ASSOCIATION
North American Court of Arbitration for Sport Panel**

Sitting in the following composition:

Chair: Christopher L. **Campbell**, Attorney-at-law, Fairfax, CA

Arbitrators: Jeffrey G. **Benz**, Attorney-at-Law, Los Angeles, CA
Allen P. **Rosenberg**, Attorney-at-Law, Alexandria, VA

In the arbitration between

United States Anti-Doping Agency, Colorado Springs, CO
Represented by William Bock, III, Esq. and Stephen Starks, Esq.

Claimant

and

LaShawn Merritt, Norfolk, VA
Represented by Howard L. Jacobs, Esq.

Respondent

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AWARD OF ARBITRATORS

WE, THE UNDERSIGNED ARBITRATORS (“Panel”), having been designated by the above-named parties, and having been duly sworn and having duly heard the proofs, arguments and allegations of the parties, and, after a hearing held on July 12, 2010 do hereby render the Panel’s full award pursuant to its undertaking to do so by October 15, 2010.

1. SUMMARY

1.1 This case involves Respondent’s first anti-doping violation. Respondent does not challenge the Positive Analytical Finding. He alleges that he ingested the Prohibited Substance by accident. Mr. Merritt had three positive tests on October 28, 2009, December 8, 2009 and January 16, 2010 for the same prohibited substance DHEA. Pregnenolone was also found in his samples. Those tests are treated as one violation under anti-doping rules. For reasons related to USADA’s legitimate and reasonable investigation, he was not informed of his positive tests until March 22, 2010.

1.2 At his hearing, Mr. Merritt proved two things beyond a reasonable doubt: (i) he tested positive as a result of ingesting a product, ExtenZe¹, he purchased at a 7 Eleven store and (ii) he did not purchase this product to enhance his sports performance. His evidence was so convincing that after its submission the United States Anti-Doping Agency (“USADA”) agreed that Mr. Merritt’s positive tests were caused by ExtenZe. This is significant for a number of reasons, one of which is that it is vital to the health of sport that Anti-Doping Organizations acknowledge when they believe accidental ingestion takes place. This is especially the case with an organization respected around the world like USADA. Given USADA’s acknowledgment, there is no dispute that this case represents the accidental ingestion of a Prohibited Substance.

¹ A product advertised to help sexual functioning in various ways.

1.3 The World Anti-Doping Code (“Code”) provides it is within this Panel’s jurisdiction to determine the “appropriate Consequences” of Mr. Merritt’s Positive Analytical Finding. All Signatories of the Code must respect this Panel’s determination (subject to the right of appeal). A mandatory provision of the Code, Article 10.2, dictates the maximum penalty Mr. Merritt can suffer for this Positive Analytical Finding is a two-year period of ineligibility (i.e., 24 months).

1.4 This 24 month period of ineligibility may be eliminated if the Panel finds that Mr. Merritt was not negligent when he ingested the ExtenZe product. However, the Panel finds that Mr. Merritt was clearly negligent. The Panel may also reduce the two-year period of ineligibility (24 months) as low as a one-year period of ineligibility (12 months) if the Panel finds that Mr. Merritt was not significantly negligent.

1.5 In finding that Mr. Merritt was not significantly negligent, the Panel took into consideration several factors. First, the Panel is confident that enhancing his sports performance was the last thing on Mr. Merritt’s mind when he purchased ExtenZe. Therefore, there was a complete “absence of intention to gain [an] advantage [over] competitors.”² Second, the Panel is unaware of any warnings provided to athletes concerning products that deal with sexual functioning, making this is a unique case. As argued by Mr. Merritt, a person would not anticipate that they could test positive for a steroid from purchasing a product at a 7 Eleven Store.³ The sale of steroid products is now outlawed in the United States. Purchasing a product at the 7 Eleven Store is different than purchasing a product at a Vitamin supplement store, for which athletes have been consistently warned. This brings us to the third issue which is related

² *Squizzato v/ FINA*, CAS 2005/A/830, ¶10.14.

³ 7 Eleven was legally selling the ExtenZe product and this decision is in no way meant to suggest that 7 Eleven was acting inappropriately. Further, 7 Eleven voluntarily provided evidence to this Panel and allowed its employee to testify. They should be commended for their cooperation as a good corporate citizen and an organization that manifestly shows concern for their customers.

to the first. When Mr. Merritt purchased the product, he was in the off season taking a break from competition. His first break in two years. His guard was down and his positive tests can in no way be said to have affected any competitions. Fourth, after hearing the evidence at the hearing, the Anti-Doping Organization, USADA, conceded that Mr. Merritt's positive test was an accidental ingestion case and there was no intent to enhance sports performance.

1.6 Nevertheless, the Panel finds that Mr. Merritt's negligence necessitates a serious consequence. Therefore, given the totality of the circumstances in this case, the Panel imposes a 21 month period of ineligibility.

1.7 Regarding the starting date of his period of ineligibility, the Code provides that this Panel has the discretion to start Mr. Merritt's period of ineligibility as early as the date of sample collection under two separate conditions: (1) delays in Doping Control not caused by Mr. Merritt and/or (2) if Mr. Merritt admits the anti-doping violation "after being confronted with the anti-doping rule violation by the Anti-Doping Organization." The Panel finds that Mr. Merritt satisfied both of these provisions.

1.8 In respect to the second provision, the Panel finds that Mr. Merritt's conduct was exemplary and demonstrated tremendous character in making what had to be a painful and humiliating confession. Mr. Merritt's period of ineligibility will start on October 28, 2009. That means that Mr. Merritt's suspension will end on July 27, 2011.

1.9 Mr. Merritt requests that the Panel rule on the issue of whether International Olympic Committee's ("IOC") Executive Board's unpublished Memorandum relating to IOC Rule 45 of the Olympic Charter ("The Unpublished Memo") conforms to the mandatory provisions of the Code. Under The Unpublished Memo, if this Panel imposes over a six-month period of ineligibility The Unpublished Memo precludes an athlete from competing in the next

Olympic Games. The Unpublished Memo imposes this penalty even if the athlete's period of ineligibility has expired by the time of those Olympic Games. In this case, if The Unpublished Memo is valid an imposition of a 21 month period of ineligibility would preclude Mr. Merritt from competing in the United States Olympic Trials in 2012 and in the Olympic Games in 2012. *De facto*, The Unpublished Memo imposes a three-year period of ineligibility on Mr. Merritt.

1.10 The Panel finds that any bylaw, rule, statute or provision of any Signatory under the Code, regardless of its characterization (i.e., eligibility, membership, field of play or otherwise), that would, from a "material point of view," prevent Mr. Merritt from competing in their event after his period of ineligibility has ended based on, or related to, a decision or finding of this Panel is a penalty rule interfering with the sphere of the mandatory provisions of the Code and is therefore not an "appropriate Consequence" of his anti-doping violation.

1.11 It has been stated, "Every system of law seeks to apply sanctions . . . which are just and proportionate . . . the [Code] is, in a sense, a species of international law, in that it must be allied in every country, and, therefore, must produce a just and proportionate sanction. . ." ⁴ Article 10.2 of the Code is in conformity with the principle of justice and proportionality. However, The Unpublished Memo exceeds the maximum sanction that could be imposed under Article 10.2 on an athlete who ingested a prohibited substance by accident.

1.12 The imposition of a three-year period of ineligibility on an athlete who ingested a prohibited substance by accident as would be required by The Unpublished Memo in this case is (1) not in conformity with the mandatory provisions of the Code and (2) antithetical to the notions of justice and proportionality. Further, any organization that fails to allow an athlete to immediately challenge such a rule deprives that organization of the moral authority to argue that they have a fair or just system.

⁴ *Puerta v/ITF*, CAS 2006/A/1025, ¶11.7.24.

1.13 This Panel finds that The Unpublished Memo is not in conformity with the mandatory provisions of the Code to the extent it increases the Consequences to athletes over those determined by a Code Article 8.1 (this Panel's decisions) hearing process. That would involve double jeopardy. The IOC cannot use this Panel's decision in any way to preclude Mr. Merritt from competing in the Olympic Games if his period of ineligibility, as established by this Panel, has expired. To allow otherwise would make this Panel an accomplice to manifest injustice and the violation of a mandatory provision of the Code.

1.14 Also, given the foregoing, the United States Olympic Committee ("USOC") and its member organizations are hereby precluded from using The Unpublished Memo as a reason to prohibit Mr. Merritt from participating in the Olympic Trials or having his name submitted to the IOC for entry into the Olympic Games. Simply stated, precluding Mr. Merritt from competing in these events after his period of ineligibility has ended would not be an "appropriate Consequence" of his anti-doing violation. All Signatories of the Code must allow Mr. Merritt to compete in their events after July 27, 2011 if the reason for his exclusion would be based on or related to this Panel's decision and/or findings, including the IOC.

2. PARTIES

2.1 Claimant, United States Anti-Doping Agency ("USADA"), is the independent anti-doping agency for Olympic sports in the United States and is responsible for conducting drug testing and any adjudication of positive test results pursuant to the United States Anti-Doping Agency Protocol for Olympic Movement Testing, effective as revised August 13, 2004 ("USADA Protocol").

2.2 At the Hearing, Claimant was represented by William Bock, III, Esq., General Counsel and Stephen Starks, Legal Affairs Director, of USADA, 1330 Quail Lake Loop, Suite 260, Colorado Springs, CO 80906.

2.3 The Respondent, LaShawn Merritt, is a member of USA Track & Field, Inc.⁵ He is the 2008 Olympic Gold Medalist and 2009 World Champion in the 400 meters.

2.4 At the Hearing, Respondent was represented by Howard L. Jacobs, Law Offices of Howard L. Jacobs, 2815 Townsgate Road, Suite 200, Westlake Village, California 91361.

2.5 The Panel appreciates and commends the excellent briefing and oral presentations of counsel for both parties in this matter.

3. **JURISDICTION**

3.1 This Panel has jurisdiction over this doping dispute pursuant to the Ted Stevens Olympic and Amateur Sports Act (“Act”), 36 U.S.C. §220501, *et seq.*, because this is a controversy involving Respondent’s opportunity to participate in national and international competition representing the United States. The Act states:

An amateur sports organization is eligible to be recognized, or to continue to be recognized, as a national governing body only if it . . . agrees to submit to binding arbitration in any controversy involving . . . the opportunity of any amateur athlete . . . to participate in amateur athletic competition, upon demand of . . . any aggrieved amateur athlete. . . , conducted in accordance with the Commercial Rules of the American Arbitration Association, as modified and provided for in the corporation’s constitution and bylaws. . .⁶

⁵ USA Track and Field, Inc. (“USATF”) is the National Governing Body (“NGB”) for track and field, long-distance running and race walking in the United States. It is a member organization of the USOC and International Amateur Athletic Federation (“IAAF”).

⁶ 36 U.S.C. §220521.

3.2 Under its authority to recognize an NGB⁷, the USOC established National Anti-Doping Policies, the relevant version of which was effective August 13, 2004 (“USOC Policies”), which, in part, provide:

. . . NGBs shall not have any anti-doping rule which is inconsistent with these policies or the USADA Protocol, and NGB compliance with these policies and the USADA Protocol shall be a condition of USOC funding and recognition.⁸

3.3 Regarding athletes, the USOC Policies provide:

. . . By virtue of their membership in an NGB or participation in a competition organized or sanctioned by an NGB, Participants agree to be bound by the USOC National Anti-Doping Policies and the USADA Protocol.⁹

3.4 In compliance with the Act, Article 10 (b) of the USADA Protocol provides that hearings regarding doping disputes “will take place in the United States before the American Arbitration Association (“AAA”) using the supplementary Procedures.”¹⁰

3.5 Both USADA and the USOC are Signatories to the Code and must comply with the mandatory provisions of the Code. As such, the USOC in partnership with the USADA established the arbitration system referenced above to be in compliance with Article 8.1 of the Code. Under Article 8.1, this Panel and the hearing conducted before it, represents the hearing process required by the Code.

⁷ 36 U.S.C. §220505(c)(4).

⁸ USOC Policies, ¶13.

⁹ *Id.* at ¶12.

¹⁰ The supplementary procedures refer to the American Arbitration Association Supplementary Procedures for the Arbitration of Olympic Sport Doping Disputes, as approved by the USOC’s Athletes’ Advisory Council and NGB Council. 36 U.S.C. §220522.

4. RULES APPLICABLE TO THIS DISPUTE

The rules related to the outstanding issues in this case are the mandatory provisions of the Code and the IAAF Anti-Doping Rules. As the sample collection took place in 2009 and 2010, the 2009 versions of the Code and IAAF Anti-Doping Rules controls this case. As IAAF Anti-Doping Rules and the Code are virtually identical, the applicable Code provisions (version 2009) will be referenced unless otherwise specified. They are as follows:

WADA CODE (Version 2009)

INTRODUCTION

Part one of the Code sets forth specific anti-doping rules and principles that are to be followed by organizations responsible for adopting, implementing or enforcing anti-doping rules within their authority, e.g., the International Olympic Committee, International Paralympic Committee, International Federations, Major Event Organizations, and National Anti-Doping Organizations. All such organizations are collectively referred to as Anti-Doping Organizations.

All provisions of the Code are mandatory in substance and must be followed as applicable by each Anti-Doping Organization and Athlete or other Person. The Code does not, however, replace or eliminate the need for comprehensive anti-doping rules adopted by each Anti-Doping Organization. While some provisions of the Code must be incorporated without substantive change by each Anti-Doping Organization in its own anti-doping rules, other provisions of the Code establish mandatory guiding principles that allow flexibility in the formulation of rules by each Anti-Doping Organization or establish requirements that must be followed by each Anti-Doping Organization but need not be repeated in its own anti-doping rules. . . .

[Comment: Those Articles of the Code which must be incorporated into each Anti-Doping Organization's rules without substantive change are set forth in Article 23.2.2 For example, it is critical for purposes of harmonization that all Signatories base their decision on the same list of anti-doping rule violations, the same burdens of proof and impose the same Consequences for the same anti-doping rule violations. These rules must be the same whether a hearing takes place before an International Federation, at the national level or before the Court of Arbitration for Sport. (emphasis added)

2.1 Presence of a Prohibited Substance or its Metabolites or Markers in an Athlete's Sample Specimen.

2.1.1 It is each Athlete's personal duty to ensure that no Prohibited Substance enters his or her body. Athletes are responsible for any Prohibited Substance or its Metabolites or Markers found to be present in their Sample. Accordingly, it is not necessary that intent, fault, negligence or knowing Use on the Athlete's part be demonstrated in order to establish an anti-doping violation under Article 2.1.

3.1 Burdens and Standards of Proof.

The Anti-Doping Organization shall have the burden of establishing that an anti-doping rule violation has occurred. The standard of proof shall be whether the Anti-Doping Organization has established an anti-doping rule violation to the comfortable satisfaction of the hearing panel bearing in mind the seriousness of the allegation which is made. This standard of proof in all cases is greater than a mere balance of probability but less than proof beyond a reasonable doubt. Where the Code places the burden of proof upon the Athlete or other Person alleged to have committed an anti-doping rule violation to rebut a presumption or establish specified facts or circumstances, the standard of proof shall be by a balance of probability, except as provided in Article 10.4 and 10.6 where the Athlete must satisfy a higher burden of proof.

3.2 Methods of Establishing Facts and Presumptions.

Facts related to anti-doping rule violations may be established by any reliable means, including admissions. . .

8.1 Fair Hearing

Each Anti-Doping Organization with responsibility for results management shall provide a hearing process for any Person who is asserted to have committed an anti-doping rule violation. Such hearing process shall address whether an anti-doping rule violation was committed and, if so, the appropriate Consequences. The hearing process shall respect the following principles:

- a timely hearing;
- a fair and impartial hearing panel;
- the right to be represented by counsel at the Person's own expense;
- the right to be informed in a fair and timely manner of the asserted anti-doping rule violation;
- the right to respond to the asserted anti-doping rule violation and resulting Consequences;
- the right of each party to present evidence, including the right to call and question witnesses [subject to the hearing panel's discretion to accept testimony by telephone or written submission];

- the Person's right to an interpreter at the hearing, with the hearing panel to determine the identify, and responsibility of the costs, of the interpreter; and
- a timely, written, reasoned decision, specifically including an explanation of the reason[s] for any period of Ineligibility (emphasis added)

10.2 Ineligibility for Presence, Use or Attempted Use, or Possession of Prohibited Substances and Prohibited Methods

The period of Ineligibility imposed for a violation of Article 2.1 [Presence of Prohibited Substance or its Metabolites or Markers], Article 2.2 [Use or Attempted Use of Prohibited Substances or Prohibited Method] or Article 2.6 [Possession of Prohibited Substances and Prohibited Methods] shall be as follows, unless the conditions for eliminating or reducing the period of Ineligibility, as provided in Article 10.4 and 10.5, or the conditions for increasing the period of Ineligibility, as provided in Article 10.6, are met:

- First Violation: Two (2) years' Ineligibility.

10.5 Elimination or Reduction of Period of Ineligibility Based on Exceptional Circumstances

10.5.1 No Fault or Negligence

If an Athlete establishes in an individual case that he or she bears No Fault or Negligence, the otherwise applicable period of Ineligibility shall be eliminated. When a Prohibited Substance or its Markers or Metabolites is detected in an Athlete's Sample in violation of Article 2.1 [Presence of Prohibited Substance], the Athlete must also establish how the Prohibited Substance entered his or her system in order to have the period of Ineligibility eliminated. In the event this Article is applied and the period of Ineligibility otherwise applicable is eliminated, the anti-doping rule violation shall not be considered a violation for the limited purpose of determining the period of Ineligibility for multiple violations under Article 10.7.

10.5.2 No Significant Fault or Negligence

If an Athlete or other Person establishes in an individual case that he or she bears No Significant Fault or Negligence, then the otherwise applicable period of Ineligibility may be reduced, but the reduced period of Ineligibility may not be less than one-half of the period of Ineligibility otherwise applicable. If the otherwise applicable period of Ineligibility is a lifetime, the reduced period under this Article may be no less than eight (8) years. When a Prohibited Substance or its Markers or Metabolites is detected in an Athlete's Sample in violation of Article 2.1 [Presence of a Prohibited Substance or its Metabolites or Markers], the

Athlete must also establish how the Prohibited Substance entered his or her system in order to have the period of Ineligibility reduced.

[Comment to Article 10.5.1 and 10.5.2: The Code provides for the possible reduction or elimination of the period of Ineligibility in the unique circumstances where the Athlete can establish that he or she had No Fault or Negligence, or No Significant Fault or Negligence, in connection with the violation. This approach is consistent with basic principles of human rights and provides a balance between those Anti-Doping Organizations that argue for a much narrower exception, or none at all, and those that would reduce a two-year suspension based on a range of other factors even when the Athlete was admittedly at fault. These Articles apply only to the imposition of sanctions; they are not applicable to the determination of whether an anti-doping rule violation has occurred. Article 10.5.2 may be applied to any anti-doping rule violation even though it will be especially difficult to meet the criteria for a reduction for those anti-doping rule violations where knowledge is an element of the violations.

10.9 Commencement of Ineligibility Period

Except as provided below, the period of Ineligibility shall start on the date of the hearing decision providing for Ineligibility or, if the hearing is waived, on the date Ineligibility is accepted or otherwise imposed. Any period of Provisional Suspension [whether imposed or voluntarily accepted] shall be credited against the total period of Ineligibility imposed.

10.9.1 Delays Not Attributable to the Athlete or other Person

Where there have been substantial delays in the hearing process or other aspects of Doping Control not attributable to the Athlete or other Person, the body imposing the sanction may start the period of Ineligibility at an earlier date commencing as early as the date of Sample collection or the date on which another anti-doping rule violation last occurred.

10.9.2 Timely Admission

Where the Athlete or other Person promptly [which, in all events, for an Athlete means before the Athlete competes again] admits the anti-doping rule violation after being confronted with the anti-doping rule violation by the Anti-Doping Organization, the period of Ineligibility may start as early as the date of Sample collection or the date on which another anti-doping rule violation last occurred. In each case, however, where this Article is applied, the Athlete or other Person shall serve at least one-half of the period of Ineligibility going forward from the date the Athlete or other Person accepted the imposition of a sanction, the date of a hearing decision imposing a sanction, or the date the sanction is otherwise imposed.

10.10.1 Prohibition Against Participation During Ineligibility

No Athlete or other Person who has been declared Ineligible may, during the period of Ineligibility, participate in any capacity in a Competition or activity [other than authorized anti-doping education or rehabilitation programs] authorized or organized by any Signatory, Signatory's member organization, or a club or other member organization of a Signatory's authorized or organized by any professional league or any international-or national-level Event organization.

An Athlete or other Person subject to a period of Ineligibility longer than four (4) years may, after completing four (4) years of the period of Ineligibility, participate in local sport events in a sport other than the sport in which the Athlete or other Person committed the anti-doping rule violation, but only so long as the local sport event is not at a level that could otherwise qualify such Athlete or other Person directly or indirectly to compete in [or accumulate points toward] a national championship or International Event. (emphasis added)

15.3 Result Management, Hearings and Sanctions

Except as provided in Article 15.3.1 below, results management and hearings shall be the responsibility of and shall be governed by the procedural rules of the Anti-Doping Organization that initiated and directed Sample collection [or, if no Sample collection is involved, the organization which is discovered the violation]. If that Anti-Doping Organization does not have the authority to conduct results management, then results management authority shall default to the applicable International Federation. Regardless of which organization conducts results management or hearings, the principles set forth in Articles 7 and 8 shall be respected and the rules identified in the Introduction to Part One to be incorporated without substantive change must be followed. (emphasis added)

15.4.1 Mutual Recognition

15.4.1 Subject to the right to appeal provided in Article 13, Testing, therapeutic use exemptions and hearing results or other final adjudications of any Signatory which are consistent with the Code and are within that Signatory's authority, shall be recognized and respected by all other Signatories.

20.1 Roles and Responsibilities of the International Olympic Committee

20.1.1 To adopt and implement anti-doping policies and rules for the Olympic Games which conform with the Code. . .

20.1.4 To take appropriate action to discourage noncompliance with the Code as provided in Article 23.5.

23.1 Acceptance of the Code

23.1.1 the following entities shall be Signatories accepting the Code: WADA, The International Olympic Committee, International Federations, The International Paralympic Committee, Major Event Organizations, and National Anti-Doping Organizations. These entities shall accept the Code by signing a declaration of acceptance upon approval by each of their respective governing bodies. . .

23.2.2 The following Articles[and corresponding Comments] as applicable to the scope of the anti-doping activity which the Anti-Doping Organization performs must be implemented by Signatories without substantive change [allowing for any non-substantive changes to the language in order to refer to the organization's name, sport, section numbers, etc.]: . . .

- Article 2 [Anti-Doping Rule Violations] . . .
- Article 10 [Sanctions on Individuals]. . .
- Article 13 [Appeals] with the exception of 13.2.2 and 13.5

No additional provision may be added to a Signatory's rules which changes the effect of the Articles enumerated in this Article. (emphasis added)

5. STIPULATION

On July 2, 2010, the parties entered into the following stipulation:

The United States Anti-Doping Agency ("USADA") and Mr. LaShawn Merritt stipulate and agree to, for purposes of all proceedings involving USADA urine Samples 1528297, 1528309 and 1524798, the following:

1. That the 2009 USADA Protocol for Olympic and Paralympic Movement Testing ("Protocol") governs the hearing for Mr. Merritt's doping offense involving USADA Samples 1528297, 1528309 and 1524798;
2. That the mandatory provisions of the 2009 World Anti-Doping Code ("WADA Code") including, but not limited to, the definitions of doping, burdens of proof, Classes of Prohibited Substances and Prohibited Methods, and sanctions, as contained in the Protocol at Annex A, and the International Association of Athletics Federations ("IAAF") Anti-Doping Rules, [are] applicable to this hearing for the alleged doping offense involving USADA Samples 1528297, 1528309 and 1524798;
3. That Mr. Merritt gave the urine Samples designated as USADA Samples 1528297, 1528309 and 1524798 during out-of-competition testing on October [] 28, 2009, December 8, 2009 and January 16, 2010, respectively;

4. That each aspect of the Sample collection and processing for USADA Samples 1528297, 1528309 and 1524798 was conducted appropriately and without error;
5. That the chain of custody for USADA Sample 1528297 from the time of collection and processing at the collection site to the receipt of the Sample by the World Anti-Doping Agency (“WADA”) accredited laboratory in Salt Lake City, Utah (the “Utah Laboratory”) was conducted appropriately and without error;
6. That the Utah Laboratory’s chain of custody for USADA Sample 1528297 was conducted appropriately and without error;
7. That the chain of custody for USADA Sample 1528309 and 1524798 from the time of collection and processing at the collection site to the receipt of the Samples by WADA accredited laboratory at the University of California at Los Angeles (“UCLA Laboratory”) was conducted appropriately and without error;
8. That the UCLA Laboratory’s chain of custody for USADA Samples 1528309 and 1524798 was conducted appropriately and without error;
9. That the Utah Laboratory, using a Gas Chromatography Isotope Ratio Mass Spectrometry (“GC/IRMS”) method, also known as Carbon Isotope Ratio (“CIR”) analysis, determined that the A bottle of USADA Sample 1528297 reflected values out of the ordinary, and therefore recommended follow up testing;
10. That the UCLA Laboratory, using a GC/IRMS method, also known as CIR analysis, determined that the A bottles of USADA Samples 1528309 and 1524798 reflected values consistent with the administration of a steroid;
11. That both the A and B bottles of USADA Samples 1528297, 1528309 and 1524798, were sent for further analysis to the WADA accredited laboratory in Cologne, Germany (the “Cologne Laboratory”);
12. That the chain of custody for USADA Samples 1528297, 1528309 and 1524798 from the time they were shipped by the Utah Laboratory and the UCLA Laboratory to receipt of the Samples by the Cologne Laboratory was conducted appropriately and without error;
13. That the Cologne Laboratory’s chain of custody for USADA Samples 1528297, 1528309 and 1524798 was conducted appropriately and without error;
14. That the Cologne Laboratory reported that through CIR analysis, both the A and B bottles of USADA Samples 1528297, 1528309 and 1524798, reflected

values of testosterone metabolites indicating an application of testosterone prohormones;

15. That the Cologne Laboratory determined through accepted scientific procedures and without error that USADA Samples 1528297, 1528309 and 1524798 reflected application of testosterone prohormones in the Class of Anabolic Agents on the 2009 and 2010 WADA Prohibited List (“Positive Tests”);

16. That the Cologne Laboratory also accurately determined through accepted scientific procedures and without error that USADA Samples 1528297, 1528309 and 1524798 indicated the possible application of Pregnenolone;

17. That Mr. Merritt agrees that the Positive Tests constitute a first doping offense;

18. USADA has agreed to not contest Mr. Merritt’s contention, based on the product label attached hereto under Tab A, that a product known as “Extenze” contains the substances DHEA and Pregnenolone;

19. Mr. Merritt has agreed not to contest USADA’s contention, based on product labels and internet advertising, attached hereto as Exhibit B, that the following products marketed as enhancing athletic performance also contain the substance DHEA and Pregnenolone: Primordial Performance Dermacrine DHEA and Pregnenolone skin cream –

<http://www.primordialperformance.com/store/dermacrine-dhea.html>; Primordial Performance Dermacrine Liqua Vade injectable hormone formula –

<http://www.primordialperformance.com/store/dermacrine-liqua-vade.html>;

Primordial Performance 1-T Liqua Vade injectable Anabolic pro-steroid formula

– <http://www.primordialperformance.com/store/1-t.html#prodfacts>; Biomax

Formulations DHEA and Pregnenolone drops –

[http://www.fubaohealthstore.com/Biomax-Formulations-Dhea-Pregnenolone-](http://www.fubaohealthstore.com/Biomax-Formulations-Dhea-Pregnenolone-Drops-1-Oz.html)

[Drops-1-Oz.html](http://www.fubaohealthstore.com/Biomax-Formulations-Dhea-Pregnenolone-Drops-1-Oz.html); USA Lifestyle Triple Hormone capsules –

[http://www.usalifestyle.net/theproducts.cfm?master=10591&owner=651&kw=Tri](http://www.usalifestyle.net/theproducts.cfm?master=10591&owner=651&kw=TripleHormone_fr&cid=163)

[pleHormone_fr&cid=163](http://www.usalifestyle.net/theproducts.cfm?master=10591&owner=651&kw=TripleHormone_fr&cid=163); Lifetime DHEA and Pregnenolone capsules –

[http://www.vitaminlife.com/product-](http://www.vitaminlife.com/product-exec/product_id/26879/nm/DHEA+And+Pregnenolone+25mg+DHEA+10m+++Pregnenolone+15mg)

[exec/product_id/26879/nm/DHEA+And+Pregnenolone+25mg+DHEA+10m+++P](http://www.vitaminlife.com/product-exec/product_id/26879/nm/DHEA+And+Pregnenolone+25mg+DHEA+10m+++Pregnenolone+15mg)

[regnenolone+15mg](http://www.vitaminlife.com/product-exec/product_id/26879/nm/DHEA+And+Pregnenolone+25mg+DHEA+10m+++Pregnenolone+15mg); Earth Turns DHEA Plus Pregnenolone capsules –

<http://www.earthturns.com/ProductDetails.asp?ProductCode=F809-60>);

20. By agreeing to the foregoing stipulation USADA does not stipulate that Mr. Merritt purchased the product known as Extenze or that use of such product caused Mr. Merritt’s positive drug test results;

21. By agreeing to the foregoing stipulation Mr. Merritt does not stipulate that Mr. Merritt used any of the products referred to in paragraph 19 above and specifically denies using any of the products listed in paragraph 19 above;

22. That the parties agree that Mr. Merritt's Provisional Suspension started on April 5, 2010;

23. That Mr. Merritt reserves the right to argue exceptional circumstances under the applicable rules.

24. That Mr. Merritt reserves the right to argue for a reduction in penalty based on the doctrine of proportionality;

25. That Mr. Merritt reserves the right to argue the application of Article 10.9.1 of the WADA Code related to the commencement of the ineligibility period;

26. By including the foregoing paragraphs regarding the arguments or defenses pertaining to sanction length or start date which Mr. Merritt has reserved and for purposes of this stipulation USADA does not concede that any such argument has merit. Likewise, USADA reserves the right to make any argument available under the rules pertaining to sanction length or start date and to argue for up to a four-year period of ineligibility based on aggravating circumstances, and for purposes of this stipulation Mr. Merritt does not concede the merit of USADA's arguments concerning sanction length.

6. PROCEDURAL ASPECTS OF CASE

6.1 The Panel and the parties held a preliminary hearing by telephone conference on June 24, 2010. At the preliminary hearing, the Panel made certain rulings and resolved certain issues. The parties agreed to an accelerated exchange program. The Panel issued its order establishing the briefing schedule and the Evidentiary Hearing date and location.

6.2 In particular, the Panel established that by July 2, 2010, Mr. Merritt was to identify each fact and expert witness it intended to call in its case in chief, exchange a brief summary of the testimony of its witnesses, and submit his pre-hearing brief and exhibits to USADA and the arbitrators. By July 9, 2010, USADA was to identify each fact and expert witness it intended to call in its case in chief, exchange a brief summary of the testimony of its witnesses, and submit its pre-hearing brief and exhibits to Mr. Merritt and the arbitrators. The Evidentiary Hearing was set on July 12, 2010 in Norfolk, Virginia.

6.3 Other than the counsel which has already been identified, the individuals present at the hearing were as follows: Owen Merritt, Mr. Merritt's father; Brenda Stukes, Mr. Merritt's mother; and Ms. Collin White, Mr. Merritt's godmother and aunt.

6.4 When Mr. Merritt testified about ExtenZe, and the situation surrounding his purchase of ExtenZe, his mother and aunt left the room. During the closing arguments, late in the evening, Mr. Merritt's coach, Dwayne Miller, was present.

6.5 Testifying on behalf of Mr. Merritt was Brian Bymum his high school football coach and Bruce Rader, a local TV personality. They testified to Mr. Merritt's character and contributions to the community. Leslie James, a 7 Eleven employee, testified regarding Mr. Merritt's purchase of the ExtenZe product as did Mr. Merritt himself. USADA did not produce a witness.

6.6 After the parties had submitted their evidence on the issue of Mr. Merritt's negligence, the Panel adjourned the hearing on July 12, 2010 before determining the issue raised by Mr. Merritt regarding The Unpublished Memo. On July 29, 2010, the Panel issued an Invitation to Participate in Anti-Doping Hearing to the IOC and WADA. The Panel informed the IOC and WADA that the issue to be determined was whether The Unpublished Memo conformed to the Code. The Invitation stated the following:

WE, THE UNDERSIGNED ARBITRATORS (collectively, "Panel"), having been duly designated and seated, and having been duly sworn and having duly heard the proofs, arguments and allegations of the parties, at a hearing held July 12, 2010, have temporarily adjourned that hearing on the same day in order to resolve an issue raised by Mr. Merritt regarding the consequences of his positive test.

As Mr. Merritt has not disputed the World Anti-Doping Agency ("WADA") Accredited Laboratory's Positive Analytical Finding, the only issues remaining in dispute are the consequences of his positive test. Article 8.1 of the World Anti-Doping Code ("WADA Code") specifically provides that this Panel is competent to determine this issue. In that regard, Mr. Merritt has requested that the Panel

consider the issue of whether recent Regulations Regarding Participation in the Olympic Games, Rule 45 of the International Olympic Committee's ("IOC") *Olympic Charter*, a document apparently not published on the IOC's website or otherwise accessible to the public, ("the Unpublished Memo") conforms to the WADA Code. The briefs of Mr. Merritt and USADA are enclosed.

Article 21.1.10 of the WADA Code provides that the IOC and WADA (collectively, the IOC and WADA are referred to as "Invited Parties") have the obligation to cooperate with relevant national organizations and agencies and other Anti-Doping Organizations. In addition, Article R-4 of the USADA Protocol for the Olympic and Paralympic Movement Testing provides that the applicable International Federation and World Anti-Doping Association shall also be invited to participate in the proceedings. The Panel finds these provisions broad enough to include the IOC as the clear intent was to allow the international body or other organization potentially imposing a sanction to participate in the proceedings. As the Panel is part of an Anti-Doping Organization's result management process, pursuant to Article 20.1.10, this Panel respectfully invites the participation of the Invited Parties in the dispute, limited to the issue of whether the Unpublished Memo conforms to the WADA Code with respect to Respondent's eligibility for the Olympic Games in 2012 or is otherwise validly adopted and enforceable (in other words, the Panel requests the Invited Parties' positions on the issues raised by Mr. Merritt concerning the Unpublished Memo). Mr. Merritt and USADA have either agreed or not objected to the Invited Parties' participation.

The Panel respectfully requests that within 30 days of the date of this Invitation the IOC and WADA each inform the Panel whether they will participate in Mr. Merritt's hearing as invited. As part of the Invited Parties' participation, we respectfully request that each Invited Party inform the Panel of whether it would like to participate by written submission or an in-person hearing. It is our understanding that Mr. Merritt would accept whatever fair procedure the Invited Parties or the Panel select. Notice can be given to the Chair of the Panel at one of the following addresses: (1) by mail at Chapman & Intrieri LLP, Attorneys at Law, 2236 Mariner Square Drive, Suite 300, Alameda, CA 94501, or (2) by e-mail at ccampbell@chapmanandintrieri.com.

Once the Panel hears from the Invited Parties, the Panel will establish a briefing and/or hearing schedule that is convenient for all parties. However, if the Panel does not hear from the Invited Parties within 30 days of the date of this Invitation, the Panel will rule on the issue.

6.7 Both the IOC and WADA responded. WADA stated that it did not have an obligation to participate in the proceeding as Article 20.1.10 did not apply to WADA, but only to

the IOC. Nevertheless, WADA acknowledged that it is always willing to help panels “if [they] can do so in the interest of the fight against doping.” It provided two advisory opinions: (1) CAS 2008/C/1619 Advisory Opinion IAAF (“IAAF Advisory Opinion”), and (2) TAS 2009/C/1824 IOC (“IOC Advisory Opinion”). WADA also stated the following:

WADA’s position on the IOC Executive Board’s decision to impose eligibility conditions to these athletes who wish to participate to the Olympic Games is the following:

- WADA was not consulted nor involved in any way in the adoption or Implementation of such decision by the IOC;
- There is a distinction to be made between the sanction process of the Code, and the right of an event organizer to impose eligibility conditions on those wishing to compete in the event. WADA considers that all anti-doping sanctions are governed by the World Anti-Doping Code and any signatory must comply with the Code;
- WADA is aware that CAS has published an opinion on this matter indicating that it is an eligibility matter; this opinion was produced in the Hardy case (CAS 2009/A/1853) to which WADA was a party and is attached to this correspondence for your information. At the same Hardy hearing, another opinion from CAS was produced in relation to the rule of the European Athletic Federation. While this is not directly linked with the Olympic Charter rule, it concerns the same issues, and it is also attached to this correspondence for your information;

Based on the above, we have nothing more to add by way of submission or information, and suggest that our physical presence at a hearing would not be required.

6.8 The IOC responded as follows:

In answer to your invitation to participate as an invited party in the hearing of the above mentioned case, this is to advise you the IOC considers that if any party intends to challenge any IOC decision, it may do so in front of the appropriate international jurisdiction, which is not the AAA.

7. FACTUAL FINDINGS

7.1 The facts in this case are not in dispute. Mr. Merritt is a native of Portsmouth, Virginia. He spent one year as a college athlete at East Carolina University, signing an

endorsement contract with Nike during his first season of indoor track. He is currently enrolled at Norfolk State University in Business Administration Norfolk, Virginia.

7.2 Mr. Merritt won the gold medal in the 400 meters race, and set two junior world records as part of the American 4×100 and 4×400 meter relay teams, at the 2004 World Junior Championships. He took part in the 2005 World Championships, his first major senior championship, where he was the relay substitute for the men's 4×400 m team that ultimately won the gold medal.

7.3 Mr. Merritt was selected for the 4×400 m relay team for the 2006 IAAF World Indoor Championships, which won the gold medal. Outdoors, he came in 3rd place at the 2006 IAAF World Athletics Final in the 400 meters, and was selected to represent the United States at the 2006 IAAF World Cup, at which he won the 400-meter competition.

7.4 Mr. Merritt won the silver medal the 2007 World Championships in the 400 meters, finishing in 43.96. He was also a part of the United States' 4×400 meter relay team which again won the gold medal. Mr. Merritt also won the gold medal at the 2007 IAAF World Athletics Final in the 400 meters.

7.5 In 2008, Mr. Merritt won the U.S. Olympic Trials in the 400 meters, and went on to win the Olympic gold medal in that same event. In 2009, he won the gold medal in the 400 meters at the World Championships.

7.6 Mr. Merritt has been tested extensively throughout his career. All of these tests, with the exception of those that are the subject of this arbitration, have been negative for any banned substances.

7.7 Mr. Merritt testified his competitions ended on September 20, 2009. Thereafter his plan was to take a break because he had not taken a vacation in two years. He went on a

cruise on October 1, 2009. From October through the middle of December he was not training at all. He started training in the middle of December. His training consisted of road work on the sand and lifting weights twice a week.

7.8 He first purchased the ExtenZe product in the middle of October. He brought it after an evening at a night club. He didn't have to get up in the morning. He saw the commercials about the product and its claims that it helped you last longer and stay firmer. He wanted those qualities in dating his lady friend. He used it that same night. He alleges the product works so between October and April he would purchase the product on occasion, at most twice a month.

7.9 He wasn't training so he was not thinking about track. His mind set when purchasing the product was thinking about having sex with a woman. It never entered his mind that the product contained a steroid derivative. He admitted he did not look at the label. He testified that even if he had looked at the label during this period he would not have known the stuff was on the banned list. There are maybe five 7 Eleven stores within a ten minute drive of his home. In most of the stores, ExtenZe was on the aisle shelf. He would always buy condoms when he purchased ExtenZe. In the store of his fact witness, Ms. James, the product was behind the counter.

7.10 The testimony of Ms. Leslie James confirmed Mr. Merritt's story. In the Panel's opinion, Ms. James' testimony was devastatingly convincing. It is the Panel's belief that her testimony even convinced USADA regarding the validity of Mr. Merritt's story. Ms. James has worked for the 7 Eleven company for around 11 months. She does not have a defined shift. She works in all three shifts. At the time of the hearing she was still employed by 7 Eleven.

7.11 Her testimony was that periodically, between December of 2009 and January of 2010, she recalled Mr. Merritt purchasing the ExtenZe product between four or five times. The 7 Eleven company requires that their employees know their regular customers' purchasing habits.

7.12 Ms. James remembered that Mr. Merritt's habit was first to typically purchase a lottery ticket and jungle juice. He would then leave the store and come back in to purchase condoms and ExtenZe. She thought that was humorous. His purchases were usually with cash because you can't purchase lottery ticket with a credit card. You have to use cash or a debit card. Ms. James' store had noticed that the ExtenZe product was frequently stolen so her store put the product behind the counter. As a result, when Mr. Merritt purchased the ExtenZe, she had to take the item from behind the counter herself. She was aware of Mr. Merritt also purchasing condoms. However, the condoms were not behind the counter.

7.13 She never socialized with Mr. Merritt. She does not believe they share mutual friends. Around the end of June 2010, Mr. Merritt approached her and asked her three questions: (1) do you remember me, (2) do you remember me buying anything, and (3) I have a situation, would you be willing to testify. She did not know his name before he approached her with these questions. She does not recall Mr. Merritt purchasing the ExtenZe product after April of 2010.

7.14 When he was first notified of the positive test in late March of 2010, Mr. Merritt's first reaction was that the positive test must have been caused by a skin cream that he had recently started using for acne. Mr. Merritt shared this information with USADA as soon as he found out about the positive tests. The reason that he believed this is because initially, the skin cream was the only product that he thought of that he had used in close proximity to all three tests. The skin cream, called Dermatologic Cosmetic Laboratories AHA Revitalizing Lotion 10,

was sent to Aegis Laboratories for steroid contamination testing (which included testing for DHEA) on April 8, 2010; and that testing was negative.

7.15 After sending the skin cream for testing, Mr. Merritt focused his attention on whether there was anything else that he might have taken that could possibly have caused the positive test. He ultimately remembered the ExtenZe product, and because he did not have any more of that product remaining, he went to the 7-Eleven store to buy another 4-pill packet. When he bought the packet, he realized for the first time that the listed ingredients of ExtenZe included both DHEA and pregnenolone. He testified that his heart sank. He thought how stupid he had been. Rather than hiding this fact, Mr. Merritt announced it to the world, recognizing the humiliation that would soon follow, and immediately informed USADA.

7.16 Regarding the testing of the sample, the October 28, 2009 sample (1528297) was initially tested at the WADA-accredited laboratory in Utah. That laboratory reported the results were out of the ordinary and recommended follow up testing. The reason the Utah laboratory did not declare the October 28, 2009, sample positive was because the laboratory uses pregnanediol as an endogenous reference compound (i.e., comparator) in its IRMS method. Therefore, in the exercise of appropriate caution, USADA sought a second opinion by sending the to the WADA-accredited lab in Cologne, Germany. By as early as January 12, 2010, that laboratory reported that the carbon isotope ratio (“CIR”) analysis reflected values consistent with the administration of a steroid. The “A” Sample #1528297 (October 28, 2009) was reported by the Cologne laboratory as follows: “The δ -13 [‰]-values of the testosterone metabolites (E, A, DHEA) indicate an application of testosterone prohormones.” In addition, the Cologne laboratory indicated that the Pregnanediol value “indicates the possible application of pregnenolone.” This was confirmed by the “B” sample testing.

7.17 Sample #1528309 (December 8, 2009), was sent to the WADA-accredited laboratory at UCLA, who reported that the CIR analysis was consistent with the administration of a steroid. The sample was then sent to the WADA-accredited laboratory in Cologne, Germany. That laboratory confirmed the UCLA Laboratory's finding as follows: "The δ -13 [‰]-values of the testosterone metabolites (E, A, 5 α , 5 β , DHEA) indicate an application of testosterone prohormones." In addition, the Cologne laboratory indicated that the Pregnanediol value "indicates the possible application of pregnenolone." This was confirmed by the "B" sample testing.

7.18 Sample #1524798 (January 16, 2010), was initial sent to the UCLA laboratory. USADA then instructed UCLA to send the sample to the Cologne laboratory which found as follows: "The δ -13 [‰]-values of the testosterone metabolite (E) indicate an application of testosterone prohormones." In addition, the Cologne laboratory indicated that the Pregnanediol value "indicates the possible application of pregnenolone." This was confirmed by the "B" sample testing.

7.19 Dr. Laurent Rivier attended the examination of the "B" samples in Cologne, Germany. During that "B" testing, in which the Cologne laboratory used a new GC/IRMS testing method that reportedly has a lower limit of detection and a greater degree of accuracy, Dr. Rivier and Dr. Geyer (of the Cologne laboratory) discussed many subjects, including the most likely cause of the positive tests. Both of them agreed that the positive tests were likely caused by the ingestion of DHEA; and further agreed that the pregnanediol values indicated that the athlete likely also ingested pregnenolone. In essence, the unique ingredients in the ExtenZe product are consistent with what was found in Mr. Merritt's samples.

8. ISSUES TO DECIDE

Given the parties agreement, there are only three issues this Panel must decide. First, what is Mr. Merritt's level of fault and period of ineligibility. Second, what is the appropriate start date for Mr. Merritt's period of ineligibility. Third, whether The Unpublished Memo is in conformity with the mandatory provisions of the WADA Code.

9. FAULT ANALYSIS

Mr. Merritt Was Negligent

9.1 Under Article 10.5.1 of the WADA Code, if an athlete establishes that he bears no fault or negligence for his positive test his period of ineligibility can be eliminated. In this case, in October of 2009, Mr. Merritt was returning from a night club and purchased the ExtenZe product. He did not look at the label in fine print on the back of the product. Had he looked at the label, he would have clearly seen that the product contained DHEA. As such, there is no dispute, Mr. Merritt and USADA agree that his conduct was negligent and therefore his period of ineligibility cannot be eliminated.

Mr. Merritt Was Not Significantly Negligent

9.2 Under Article 10.5.2 of the WADA Code, if an athlete establishes in an individual case that he bears no significant fault or Negligence then his period of ineligibility can be reduced up to one half of the period of ineligibility. USADA argues that Mr. Merritt was significantly negligent therefore his period of ineligibility cannot be reduced by this Panel. USADA cites several nutritional supplement cases where athletes were found to be significantly negligent even when the prohibited substances were not listed on the label. *Knauss v. FIS*, CAS 2005/A/847; *Vencill v. USADA*, (CAS 2003/A/484; *USADA v. Oliveira*, AAA No. 77 190 00429

09 (2009). In all of these cases the athlete clearly did not intend to cheat. However, in all of these cases the athletes were admittedly taking the nutritional supplements to enhance their sports performance. Further, these are nutritional supplement cases.

9.3 USADA also cites *Torri Edwards and IAAF*, CAS OG 04/003. In *Edwards* the athlete purchased a glucose product in a foreign country that contained a prohibited substance. The same product in the United States did not contain the prohibited substance. However, the prohibited substance was listed in French, which Ms. Edwards could not read. The Panel in that case refused to reduce the period of ineligibility. The Panel notes that while Ms. Edwards had no intention of cheating, she was taking a product with the intent of enhancing her sport performance.

9.4 USADA argues that if an athlete could be found to have committed no significant fault or negligence when they had failed to read the label then “it is difficult to conceive how an athlete could ever be found at significant fault for ingesting a prohibited substance.”

9.5 Mr. Merritt argues that his positive test was caused by the ExtenZe, a product not intended to enhance sport performance. He argues that the Panel’s decision on no significant fault or negligence should be guided by cases where the athlete’s conduct was utterly unrelated to sport or sport performance. He cites the decisions in *Brunemann v. USADA*, AAA No. 77 190 00447 08 (2009); *Cosby v USADA*, AAA No. 77 190 00543 09 (2010); and *WADA v. Thompson*, CAS 2008/A/1490. He argues that in all three cases the athletes used a substance for reasons that had nothing to do with sport or sport performance. In all three cases none of the athletes were attempting to enhance sport performance. Further, in two of the cases the athletes could have read the labels which identified the prohibited substance.

9.6 As a consequence of the parties' arguments, a threshold question becomes whether an athlete's failure to read the label is significant negligence per se. CAS and CAS/AAA case law suggests otherwise. In *Squizzato v. FINA*, CAS 2005/A/830, the athlete used a foot fungus cream that contained a prohibited steroid. The steroid was clearly listed on the label but the athlete did not read the label. The panel found that *Squizzato* was not significantly negligent and reduced her period of ineligibility from 24 months to 12 months. In making its finding of no significant fault or negligent the panel held:

As the [athlete] appears to have no intention whatsoever to gain an advantage towards her competitors, her negligence in forgetting to check the content of a medical cream can be considered as mild in comparison with an athlete that is using doping products in order to gain such advantage. (*Squizzato* at ¶10.14.)

9.7 Another case in which the athlete failed to read the label was *Cañas v/ATP*, CAS 2005/A/951. Cañas took medication that contained a prohibited substance that was clearly identified on the label. Cañas did not read the label, even though he knew that the medication had been through several hands before being delivered to him. (*Cañas* at ¶8.7) The panel in *Cañas* found that there was no intent to enhance sports performance. (*Id.* at ¶8.13) The *Cañas* panel stated "without negligence, there would not be a Doping Offense." (*Id.* at ¶ 8.14.) In finding no significant fault or negligence, the *Cañas* panel stated, "the requirements to be met by the qualifying element "no significant fault or negligence must not be set excessively high." (*Id.* at ¶9.1.)

9.8 Under *Cañas*, the Panel explained that it set the length of sanction between one and two years based on an evaluation of the degree of negligence under the heading of no significant fault or negligence. As such, the degree of negligence was doubly relevant. First it was relevant to determine whether a reduction could be made and second it was relevant to

determine the extent of the reduction. (*Id.* at ¶9.1.). The athlete's period of ineligibility was reduced from 24 months to 15 months.

9.9 In *Thompson v. USADA*, CAS 2008/A/1490, an athlete knowingly ingested cocaine before a competition and tested positive for the prohibited substance as a result. In finding no significant fault or negligence, the CAS Panel considered several factors including the athlete's age and experience and expressly found that the athlete did not take the substance "with any intention to influence his performance at the championship . . . [the] ingestion of cocaine could not possibly have acted as a stimulant to enhance his performance." (*Thompson* at ¶ 8.22.) The athletes' period of ineligibility was reduced from 24 months to 12 months.

9.10 Another case in which the athlete failed to read the label is *Brunemann v. USADA*, AAA No. 77 190 E 00447 08 JENF (2009). In *Brunemann*, a specified substance case¹¹, the athlete took her mother's medicine thinking it would help her constipation. The panel made the following findings in *Brunemann*:

Ms. Brunemann took the pill without her mother's knowledge. She did not ask her mother about the contents of her mother's prescription medication bottle. She did not take any steps to ensure that the pill was a laxative or, even if it was a laxative, that the pill did not contain a Prohibited Substance. Had Respondent carefully inspected the bottle, she would have seen that the pills contained diuretics, which are now a Specified Substance under both 2009 and FINA and WADA anti-doping rules. Respondent did not consult USADA's 2008 Guide to Prohibited Substances and Prohibited Methods of Doping and Drugs before taking the pill. She did not call the USADA Drug Reference Hotline. She did not check USADA's website. Had she taken any of these steps, she would have discovered that triamterene and hydrochlorothiazide are banned substance. Given these facts, the Panel finds that Respondent was negligent. (*Brunemann* at ¶9.8.)

9.11 In finding no significant fault or negligence on the facts of the *Brunemann* case, the panel found that the athlete did not intend to cheat or enhance her sports performance.

¹¹ In specified substance cases a Panel has the discretion to reduce the period of ineligibility as low as a mere warning.

(*Id.* at ¶1.2.) Like Mr. Merritt, Ms. Brunemann was in her off season, essentially on vacation.

(*Id.* at ¶9.4.) Brunemann’s period of ineligibility was reduced from 24 months to 6 months. (See *Cosby v. USADA*, AAA No. 77 190 00543 09 (2010) – athlete failed to read the label in specified substance case and the panel found no significant fault or negligence and reduced the period of ineligibility from 24 months to 4 months; See also *WADA v. Lund*, CAS OG 06/001—athlete failed to look at Prohibited Substance list, sanction reduced from 24 months to 12 months.)

9.12 Having established that as a threshold matter Mr. Merritt’s failure to read the label is not significant negligence per se, the Panel must determine whether exceptional circumstances exist which, when viewed in the totality of the circumstances of the specific case, demonstrate that the athlete’s fault or negligence was not significant. (*Thompson at* ¶8.9) Mr. Merritt bears the burden of proof on this issue by a balance of probability.

9.13 One significant factor in favor of finding no significant fault or negligence in this case is this Panel’s determination that there was: (1) no intention to dope, (2) no intention to gain a competitive advantage, and (3) no competitive advantage was gained. (See *Thompson at* ¶8.5 citing *Squizzato v. FINA*, CAS 2005/A/830). Indeed, the significance of allowing this Panel flexibility in reducing an athlete’s period of ineligibility when a Panel makes a finding that the athlete did not intend to enhance performance has been expressly stated in WADA’s communications to athletes. In WADA Question & Answer regarding the 2009 Code, P. 3, WADA’s statement supports the holding in *Squizzato* regarding the changes in the 2009 Code:

A greater flexibility is introduced as relates to sanctions in general. While this flexibility provides for enhanced sanctions, for example in cases involving aggravating circumstances (see above). Lessened sanctions are possible where the athlete can establish that the substance involved was not intended to enhance performance. (WADA Q & A: 2009 Code, p.3.) (emphasis added)

9.14 In this case, the athlete sustained his burden of proof well beyond the balance of probability that “the substance involved was not intended to enhance performance.” Indeed, Mr. Merritt’s evidence was so convincing that USADA agreed that this was an accidental ingestion case and Mr. Merritt did not have the intention of enhancing his sports performance.

9.15 Second, while athletes have been warned they must be careful in nutritional supplement cases, the Panel is unaware, and no evidence was submitted, concerning any warnings regarding products relating to sexual functioning. This is not surprising, the privacy of an individuals’ sexuality requires the greatest degree of protection. As such, the issue of sexuality rarely comes up in the context of doping in sport. In this respect, this is a truly exceptional case. Given the unique set of facts, the Panel is somewhat sympathetic to Mr. Merritt’s argument that he would not have thought he could test positive for steroids from purchasing a product at a 7 Eleven store. The sale of steroid products is now outlawed in the United States. Purchasing a product at the 7 Eleven Store is different than purchasing a product at a Vitamin supplement store, for which athletes have been consistently warned. This argument does not relieve Mr. Merritt of negligence, but it does mitigate against the severity of his negligence.

9.16 Third, as noted above, Mr. Merritt was in the off-season. He was not in competition or thinking of competition. His guard was down. While it is each athlete’s personal duty to ensure that no Prohibited Substances enter his body, the fact that an athlete is in the off season and their guard was down has been cited as a factor to consider in a finding of no significant fault or negligence. (*See Brunemann* at ¶¶9.3 and 9.4.)

9.17 Finally, another important factor to consider in the finding of no significant fault or negligence is that USADA has agreed that this is an accidental ingestion case. (*See Puerta v.*

ITF, CAS 2006/A/1025, ¶¶5.3 and 11.3.8.) The Panel is of the view that it was the intent of the drafters of the 2009 WADA Code that athletes “who are determined to cheat will be treated a little firmer and those who have inadvertently taken something will be treated fairer.”¹² In other words, an athlete who tests positive by accident should be treated differently from athletes who intend to cheat.

9.18 The Panel is aware that having this as a factor could cause anti-doping organizations to refuse to accept the fact that an athlete tested positive by accident even though the evidence of such an accident is overwhelming, as in this case. However, it is the Panel’s view that such a tactic would not be healthy for sport. When an athlete cheats he or she creates a black mark on sport. This is why WADA has aggressively and appropriately waged its battle against doping. However, when an athlete tests positive by accident, such a finding, especially when acknowledged by a well respected anti-doping agency such as USADA, removes that black mark and restores the public’s confidence in the sport. It is vital to the health of sport that anti-doping agencies acknowledge when they believe accidental ingestion has taken place as USADA has consistently done when they feel it is appropriate.

9.19 For the reason stated above, the Panel finds that Mr. Merritt has sustained his burden of proof in support of a finding of no significant fault or negligence. As required by *Cañas*, the Panel must now evaluate Mr. Merritt’s level of fault in determining the length of his period of ineligibility.

Mr. Merritt’s Level of Fault Requires the Imposition of a 21 Month Sanction

9.20 USADA is already on record requesting a sanction of 24 months. This is especially the case given that Mr. Merritt purchased the ExtenZe product several times. Mr. Merritt argues that his sanction should be reduced from between 12 months to 15 months.

¹² *Inside the Games*, quoting David Howman from WADA.

Further, Mr. Merritt argues the only reason he purchased the product several times was because USADA failed to notify him of his first positive test in October, which was the first time he took the product.

9.21 In *Crews v. AIBA* CAS 2009/A/1985, the CAS panel addressed the issue of how to deal with evidence when delays had been caused by the anti-doping agency. In that case, the athlete's allegations of how she ingested the Prohibited Substance had to be taken as true because the delay had prohibited her from "producing the evidentiary material on which she would wish to rely." (*Crews* at ¶¶5.11 and 5.12.) While USADA's conduct was in no way wrongful given its desire to fully investigate Mr. Merritt's unusual test results, the delays by USADA did prejudice Mr. Merritt in three significant ways. First, it made it harder for Mr. Merritt to trace the source of his contamination. Second, it meant that Mr. Merritt was not informed of the prohibited substances in ExtenZe after his first positive test on October 28, 2010. As a result, he took the product more than one time. Third, it potentially delayed the start date of his period of ineligibility.

9.22 USADA argues that after October 28, 2009 it asked Mr. Merritt on a number of occasions to identify the nutritional supplements and medicines he was taking and Mr. Merritt failed to identify the ExtenZe product. Therefore USADA argues that Mr. Merritt contributed to the delay because it was the presence of the Pregnenolone that initially raised questions about the validity of the test results.

9.23 The Panel is not persuaded on the facts of this case that Mr. Merritt contributed to the delay. First, USADA knew on October 28, 2009 that Mr. Merritt's sample showed the presence of DHEA and Pregnenolone. While USADA did ask Mr. Merritt on several occasions to identify any medicine or supplements he was taking, USADA did not notify Mr. Merritt until

March 22, 2010 that he tested positive for a Prohibited Substance or that DHEA and Pregnenolone was found in his samples. Absent the disclosure of an allegation of doping, given Mr. Merritt's privacy rights, the Panel is somewhat uneasy with finding that Mr. Merritt would have to disclose to USADA issues relating to his sexual habits.

9.24 After the March 22, 2010 notification, Mr. Merritt testified that he immediately stopped taking everything and started to fully investigate what caused his positive test. In this case, the Panel is therefore entitled to assume that had Mr. Merritt been informed in late October or early November of the presence of DHEA and Pregnenolone in his samples he would have only taken ExtenZe once. Therefore, we will analyze the case based on Mr. Merritt's first use of the ExtenZe product.

9.25 The Panel acknowledges that when arbitration tribunals have found no significant fault or negligence in nutritional supplement cases the most frequent period of ineligibility is 18 months. The Panel rejects Mr. Merritt's suggestion that he should receive a sanction between 12 and 15 months. In the Panel's view, Mr. Merritt's negligence is on the high end. Mr. Merritt is an experienced, world-class athlete. He did not read the label. Had he done so, he would have seen there was a Prohibited Substance in the product.

9.26 The Panel is of the view that Mr. Merritt must be given a more severe sanction than a typical vitamin supplement case. Given the serious nature of Mr. Merritt's oversight, the Panel finds that the "appropriate Consequences" in this case is the imposition of a 21 month period of ineligibility. This period of ineligibility is higher than athletes have been given even when they were found to be significantly negligence. (*FINA v. Mellouli*, TAS 2007/A/1252 – athlete knowingly took a prohibited substance and tested positive in-competition; 24 month period of ineligibility was reduced to 18 month on the ground of proportionality.) This slight

reduction also serves the purpose of differentiating Mr. Merritt's sanction from that of a drug cheat.

10 START DATE ANALYSIS

10.1 USADA argues that Mr. Merritt's period of ineligibility should start on April 5, 2010 the date he accepted his provisional suspension. Regarding the delay in notification of the positive test, USADA argues that there was "no unreasonable delay in the analysis in this case." USADA argues that the need for obtaining follow up samples and additional analysis is solely attributed to Mr. Merritt's use of a product containing pregnenolone which interfered with the Utah laboratory's IRMS analysis.

10.2 Mr. Merritt argues that there were substantial delays in the hearing process that was not attributable to the athlete. He was not notified of his positive test until five months after the first positive test. Therefore, Mr. Merritt's period of ineligibility should start on October 28, 2009.

10.3 Article 10.9.1 allows the Panel to start the period of ineligibility as early as the date of sample collection if there are "substantial delays in the hearing process or other aspect of Doping Control not attributable to the Athlete. . ." The Panel finds that as early as January 12, 2010 there was no dispute regarding Mr. Merritt's test result. USADA was aware that Mr. Merritt had tested positive for DHEA. USADA did not notify Mr. Merritt of this fact until March 22, 2010. The Panel finds that USADA's reasons for not informing Mr. Merritt was reasonable. However, Article 10.9.1 does not contain the term "unreasonable delay." It simply states "substantial delay." The Panel finds that a delay in notification for over two months (USADA's best case scenario) is "substantial" and prejudicial to Mr. Merritt. The sooner Mr. Merritt was notified, the sooner he could conduct an investigation into the causes of his positive

test (for which he has the burden of proof) and the sooner he would have stopped taking the substance.

10.4 Further, Mr. Merritt accidentally ingested the Prohibited Substance, the Panel is unwilling to find that Mr. Merritt contributed in the delay of his notification of the October 28, 2009 Positive Analytical Finding. The Panel may very well have taken a different view in an intentional doping case. Nevertheless, as that issue is not before the Panel, any statement regarding a case of intentional cheating would be irrelevant to this case.

10.5 In addition, Article 10.9.2 provides that where an athlete promptly admits the anti-doping rule violation after being confronted with the anti-doping rule violation by the Anti-Doping Organization, the period of Ineligibility may start as early as the date of Sample collection. . .” USADA had no real argument to refute that Mr. Merritt satisfied this provision. Mr. Merritt argued that he in fact did comply with this provision and admitted the anti-doping rule violation as soon as he determined what caused his Positive Analytical Finding.

10.6 The Panel finds that on April 22, 2010, as soon as Mr. Merritt determined that the use of the ExtenZe product caused his positive test he notified USADA. Further, Mr. Merritt also issued a press release publically admitting his error. In this respect, the Panel finds that Mr. Merritt’s conduct was exemplary and showed tremendous character in making what had to be a painful and humiliating confession in an area that should normally remain his private business. Mr. Merritt also executed a stipulation with USADA accepting the fact that he had committed an Anti-Doping rule violation. Finally, the evidence clearly established that Mr. Merritt had not competed since the March 22, 2010 notification of his positive test. Given these facts, the Panel finds that Mr. Merritt has sustained his burden of proof establishing that he satisfied the requirements of Article 10.9.2.

10.7 October 28, 2009 is the date of the sample collection for Mr. Merritt's first Positive Analytical Finding. Because Mr. Merritt has sustained his burden of proof under both Article 10.9.1 and 10.9.2, Mr. Merritt is entitled to a start date of October 28, 2009.

11. THE UNPUBLISHED MEMO ANALYSIS

11.1 The issue in dispute regarding the IOC concerns the new regulations to Rule 45 of the *Olympic Charter*, adopted by the IOC Executive Board on June 27, 2008, which provides as follows:

“INTERNATIONAL OLYMPIC COMMITTEE – Regulation Regarding Participation in the Olympic Games Rule 45 of the *Olympic Charter* (OC)

1. Any person who has been sanctioned with a suspension of more than six months by an anti-doping organization for any violation of any anti-doping regulations may not participate, in any capacity, in the next edition of the Games of the Olympiad and of the Olympic Winter Games following the date of expiry of such suspension.
2. These Regulations apply to violations of any anti-doping regulations that are committed as of 1 July 2008. They are notified to all International Federations, to all National Olympic Committees and to all Organising Committees for the Olympic Games.” (“The Unpublished Memo”)

11.2 Mr. Merritt argues that the IOC is a Signatory to the Code and cannot make substantive changes to the Code. Mr. Merritt argues that The Unpublished Memo makes a substantive change to Article 10, a mandatory provision of the Code, by imposing an additional period of ineligibility, a penalty, over and above what is provided by Article 10 of the Code. He requests that the Panel find The Unpublished Memo fails to conform to the mandatory provisions of the Code and is therefore invalid.

11.3 Mr. Merritt also argues that under Swiss law a penalty is valid only if it is consistent with the fundamental principle of proportionality. Under this principle, it is commonly acknowledged that a two-year period of ineligibility (24 months) for the first doping offense is the maximum that can be imposed under fundamental rights and democratic principles.

He cites *LG Munich Krabbe v. IAAF et al.*, Decision of 17 May 1995, reported in SpuRt 1995 p. 161, 167 (loose translation) to support this argument. This maximum penalty applies to someone who intends to cheat, not an accidental case. Therefore, with respect to an accidental case, a three-year period of ineligibility would obviously fail to comply with the principles of proportionality.

11.4 In addition, Mr. Merritt argues if The Unpublished Memo is valid, under the principle of proportionality, Mr. Merritt can be given no more than a six month period of ineligibility. In the alternative, Mr. Merritt argues that this Panel should retain jurisdiction of the case and allow Mr. Merritt to obtain a waiver from the IOC. If the IOC does not grant the waiver, then the Panel should impose the six month sanction.

11.5 Mr. Merritt further argues that the IOC is too powerful within the Olympic movement to obtain a fair hearing on the issue of whether The Unpublished Memo conforms to the mandatory provisions of the Code. Mr. Merritt likewise raises fears that he would be retaliated against for raising these issues.

11.6 Initially, USADA submitted its brief which took a position regarding The Unpublished Memo. However, at the hearing, USADA withdrew all arguments regarding The Unpublished Memo, other than to say that to properly rule on The Unpublished Memo the IOC should be a party.

11.7 As noted above, after inviting the IOC to participate under the provisions of WADA Code 20.1.10, the IOC declined to participate. In its refusal, the IOC asserted that this Panel does not have jurisdiction over this dispute.

The Panel has Jurisdiction to Determine Whether the Unpublished Memo Conforms to the Mandatory Provisions of the Code

11.8 Jurisdiction is always a threshold question. The Panel finds that it has jurisdiction over this issue for the reasons stated below. The American Arbitration Association Supplementary Procedures for the Arbitration of Olympic Sport Doping Disputes (“AAA Rules”), R-7, states the following:

- a. The arbitrator[s] shall have the power to rule on his or her own jurisdiction, including any objections with respect to the existence, scope or validity of the arbitration agreement. . . (AAA Rules, R-7.)

11.9 The Code, Article 8.1, mandates that each “Anti-Doping Organization with responsibility for results management shall provide a hearing process . . . Such hearing process shall address whether an anti-doping rule violation was committed and, if so, the **appropriate Consequences**. . .” (emphasis added) In Mr. Merritt’s case, our Panel encompasses that hearing process. WADA has stated, and this Panel so finds that, “all anti-doping sanctions are governed by the World Anti-Doping Code.”¹³ These “sanctions” are the “appropriate Consequences” for which the Code mandates this Panel decides. The Code provides no limits on the scope and breath of this Panel’s determination¹⁴ other than to be in compliance with the mandatory provisions of the Code and to be in harmonization with the rest of the world in determining the “appropriate Consequences.” Therefore, to the extent that the The Unpublished Memo imposes “Consequences” on Mr. Merritt for his Anti-Doping rule violation, the IOC inserts itself into this Panel’s jurisdiction. To put another way, the ability to determine what is the “appropriate

¹³ WADA’s written response to this Panel dated August 26, 2010.

¹⁴ The Code does place one limit on this Panel’s ability to determine the “appropriate Consequences,” and that concerns the determination of a Therapeutic Use Exemption (“TUE”), for which the WADA Code under Article 13.4 provides that CAS has the exclusive jurisdiction. This case does not involve a dispute regarding granting a TUE.

Consequences” under the Code necessarily means that this Panel has jurisdiction to determine what is not an “appropriate” consequence under the Code.

11.10 Article 15.4.1 of the Code is further evidence that this Panel has jurisdiction over the issue raised by Mr. Merritt. Article 15.4.1 provides that all Signatories are contractually obligated to recognize the “hearing results” (i.e., sanctions/consequences) of this Panel (absent appeal). The Signatories to the Code include the IOC, WADA, USADA, and the USOC.

11.11 Also, to the extent that a particular relevant Signatory has a dispute with the “hearing results,” the Code provides that Signatory with the right to appeal this Panel’s decision under Article 13. In fact, Article 13.2.3 of the Code specifically provides the IOC with the ability to appeal the decision of this Panel over issues “affecting eligibility for the Olympic Games.”

11.12 If this Panel is not given broad authority to determine the “appropriate Consequences” for an anti-doping rule violation, the Appeal section of Article 13.2.3 would be biased and one sided. Only the IOC could appeal a decision by the Panel regarding IOC eligibility, not the athlete. (See *WADA v. Hardy et al.*, CAS 2009/A/1870 (“CAS Hardy Case”)-- because AAA decision was decided under FINA rules the IOC Rule was not part of the AAA case and Hardy did not have the right to join the IOC to her appeal.) Justice and the law abhors such a lack of symmetry. As stated in *USADA v. Hardy*, AAA No. 77 190 00288 08 (2009) (“AAA Hardy Case”), “the Panel is . . . bound by the USADA Protocol to grant any remedy or relief the Panel deems just and equitable and within the scope of the agreement of the parties.” (AAA Hardy Case at ¶7.42.) The agreement of the parties in this case, including the IOC, is, among other things, the Code.

11.13 Finally, to limit this Panel’s ability to determine the “appropriate Consequences” would appear to be in conflict with the purpose behind establishing arbitrations in doping disputes and fundamental fairness. If Mr. Merritt was not allowed to challenge The Unpublished Memo in these proceedings, the only place he could challenge them would be before the civil court, if allowed. Indeed, he may be precluded from challenging the rule altogether as more fully explained below.

11.14 Therefore, a narrow reading of the scope of the term “appropriate Consequences” would violate one of the identified requirements of a fair hearing in Article 8.1 of the Code. Namely, if Mr. Merritt was not allowed to challenge all of the resulting consequences of his Positive Analytical Finding (this would include his ineligibility to compete in the next Olympic Games) the promise that the athlete has the “right to respond to the asserted anti-doping rule violation and resulting Consequences” would be a lie. When given two possible interpretations, one leading to injustice and a violation of a fundamental principle of the Code and the other leading to justice and consistency with the Code, the interpretation leading to justice and consistency with the Code should be followed.

The Panel Finds that The Unpublished Memo Does not Conform to Mandatory Provisions of the Code

11.15 Having determined that this Panel has jurisdiction because by creating The Unpublished Memo the IOC places itself into this Panel’s jurisdiction under the Code, the only limit on this Panel’s ability to decide whether The Unpublished Memo conforms to the mandatory provisions of the Code concerns the right for each party to be notified of the dispute and be provided with the opportunity to participate in the hearing. To resolve the notice and participation issues, the Panel adjourned the hearing on the issue of whether The Unpublished

Memo violated a mandatory provision of the Code and served its Invitation to Participate on the IOC. After receipt of the IOC's refusal to participate, the Panel observed that it also had to consider Article 3.2.4 of the Code which states:

The hearing panel in a hearing on an anti-doping rule violation may draw an inference adverse to the Athlete or other Person who is asserted to have committed an anti-doping rule violation based on the Athletes or other Person's refusal, after a request made in a reasonable time in advance of the hearing, to appear at the hearing [either in person or telephonically as directed by the hearing panel] and to answer questions from the hearing panel or the Anti-Doping Organization asserting the anti-doping rule violation. (Code, Article 3.2.4.)

11.16 Given the IOC's refusal to participate, it is appropriate for this Panel to draw an adverse inference regarding certain issues relating to The Unpublished Memo, its intent and affect.

11.17 This brings us to the issue of whether The Unpublished Memo conforms to the mandatory provisions of the Code, i.e., whether it imposes an "appropriate" consequence on Mr. Merritt. Three CAS/AAA Panels have faced this issue: *USADA v. Brunemann*, CAS/AAA No. 77 190 E 00447 08 JENF (2009); AAA Hardy Case; and this Panel. None of those Panels were of the view that The Unpublished Memo conformed with the mandatory provisions of the Code. All of the arbitrators on those Panels were CAS arbitrators. In *Brunemann*, the Panel simply side stepped the issue by only providing a six month sanction. (*Brunemann* at footnotes 27 and 28.) In the AAA Hardy Case, the Panel struggled with how to appropriately handle the situation. However, the panel did not struggle with its analysis of The Unpublished Memo. This Panel likewise has trouble with The Unpublished Memo and agrees with the reasoning of the AAA Hardy Case which stated:

Rule 45 appears to be contradictory to the requirements of various provisions of the Code. The Code provides that the IOC is bound to conform to its policies and rules for the Olympic Games (Code, Article 20.1 provides: **Roles and Responsibilities of the International Olympic Committee** . 20.1.1 To adopt and

implement anti-doping policies and rules for the Olympic Games which conform with the Code.”) [footnote 6 of the Hardy decision states, As if these provisions were not sufficiently express, the 2009 version of the Code is more explicit, with the following provision: 23.2.2 “No additional provision may be added to a Signatory’s [such as the IOC] rules which changes the effect of the Articles enumerated in this Article.” One of the “Articles enumerated in this Article” is the “Sanctions on Individuals” which is the subject of this analysis.] The IOC has signed the WADA Declaration of Acceptance of the Code, as required by Article 23.1.1 of the Code. Code, Article 23.2.1 mandates that all signatories “shall implement applicable Code provisions through policies, statutes, rules or regulations according to their authority and within their relevant spheres of responsibility” . . .

11.18 This *Hardy* type analysis was confirmed by a CAS case facing the same issue. In CAS 2008/C/1619 Advisory Opinion IAAF (“IAAF Advisory Opinion”), the IAAF sought an advisory opinion from CAS regarding whether their Rule 103.2.2 and 3 of the EEA Competition Regulations constituted a penalty rule or an entry rule. These rules were similar in structure and language to The Unpublished Memo. These rules provided that any athlete that was given a two-year period of ineligibility could not take part in the next edition of the European Athletics Championships following the conclusion of the athlete’s period of ineligibility. The provision stated the athlete would be informed of his/her ineligibility to take part in the next European Athletics Championships according to regulation 103.2.2. Under those facts, the Panel found the following:

The provision providing for a certain period of ineligibility because of an Anti-Doping Rule violation, therefore, in the context of the IAAF, being the signatory for the sport of Athletics of the World Anti-Doping Code . . . is – **from a material point of view** – a penalty rule and not an entry rule. . . . To sum up, rule 103.2.2 and 3 EAA Competition Regulations is to be considered a penalty rule interfering with the sphere of IAAF anti-doping regulations. It does not comply with the commitment of the EEA as an IAAF Area Association to comply with the IAAF Anti-Doping Rules [i.e. mandatory provisions of the WADA] Code](CAS 2008/C/1619 Advisory Opinion IAAF, ¶¶2.9, 2.15 and 2.18.) (emphasis added.)

11.19 That a refusal to enter an athlete in the Olympic Games under the IOC eligibility rules because of an expired doping sanction was a penalty and double jeopardy has already been

decided by a CAS tribunal in an actual case. In *Prusis et al. v. The IOC*, CAS OG 02/001, the IOC sought to prohibit the entry of *Prusis* into the Olympic Games after his anti-doping sanction had expired. The IOC made the following arguments: (1) its refusal is not a sanction but an entry rule and (2) under the Olympic Charter the IOC can refuse entry to any athlete for any reasons. (*Prusis* at ¶26.) The panel, in addressing the issue of whether the IOC could refuse entry to an athlete based on a doping violation after the expiration of his penalty held:

In the absence of a clear provision in the Olympic Charter and in the Rules of the relevant International Federation entitling the IOC to intervene in the disciplinary proceedings taken by that International Federation, it is the Panel's opinion that an athlete has a legitimate expectation that, once he had completed the punishment imposed on him, he will be permitted to enter and participate in all competitions absent some new reason for refusing his entry. If it were otherwise, there would be a real risk of double jeopardy, as this case has illustrated. As became clear from statements made by the IOC's representatives during the hearing, the effect of refusing Mr. Prusis entry was to impose a further sanction on him for the same offence. . . . (emphasis added) (*Prusis* at ¶35.)

11.20 In this case, there is no evidence that the IAAF has consented to The Unpublished Memo. Furthermore, pursuant to Article 20.3.2, the IAAF would be precluded from consenting as they are a signatory to the Code and must have rules that conform to the Code. The Unpublished Memo does not conform to the Code.

11.21 But note, there is also a CAS advisory opinion that analyzed The Unpublished Memo, ("IOC Advisory Opinion") and came to a different result. In the IOC Advisory Opinion, the IOC sought an advisory opinion from CAS regarding the following question:

Is the International Olympic Committee (IOC) entitled to demand that all parties and persons concerned comply with and apply the decision of 27 June of the IOC Executive Board . . .

11.22 This advisory opinion found that The Unpublished Memo was an eligibility rule not a penalty. Their finding is in direct conflict with the established legal precedent of *Prusis*

and the reasoning in the IAAF Advisory Opinion. As such, the IOC Advisor Opinion failed to respect the legal precedent established by CAS. It appears that the IOC Advisory Opinion attempted to make a distinction between the IAAF Advisory Opinion on the ground that the IOC is somehow a different type of Signatory to the WADA Code than an International Federation.

The panel stated the following:

The panel does not consider the Rule laid down in the decision of 27 June 2008 to be a sanction but rather details of the rules of eligibility for participation in the Olympic Games. The Panel believes that, given the exceptional nature and universal importance of this event, the rules of invitation and entry must be in perfect harmony with the objectives laid down in the Olympic Charter and the IOC mission. The IOC, which organizes the Olympic Games, an exceptional sporting event that is rare in that it takes place every 4 years and is of universal importance, and that must ensure the Olympic Charter is adhered to, can in no way be compared to any other international sports federation in charge of organising regular competitions. (TAS 2009/C/1824 IOC, ¶7.1.3.)

11.23 If it looks like a duck, walks like a duck and quacks like a duck, it's a duck. The Panel finds that the precedent of *Prusis* controls this case regarding the issue of double jeopardy and the notion that the Unpublished Memo is a penalty no matter what you call it (i.e., eligibility rule, membership rule, field of play decision or otherwise). The Unpublished Memo imposes an additional penalty on an athlete over and above what is provided for in the Code for a doping infraction. It "is . . . a penalty rule interfering with the sphere of [the mandatory provisions of the Code]." (See IAAF Advisory Opinion, ¶2.11.) Any argument to the contrary is mere skulduggery.

11.24 Indeed, in the IOC Advisory Opinion, the Panel finds there is sufficient evidence to apply an adverse inference against the IOC. The Panel finds the IOC has admitted that The Unpublished Memo is within the sphere of the mandatory provisions of the Code. The panel stated:

In support of their request for an advisory opinion, the IOC representatives referred to the principles that led the IOC to adopt its decision of 27 June 2008. In short, having recalled that combating drug use was an absolute priority not only of the IOC but of the Olympic Movement as a whole, it was stated that pursuant to Rule 2.8 of the Olympic Charter, **the IOC's role was specifically to "lead the fight against doping in sport** [changed to bold font by the panel]. . . . Thus, the IOC recalled the general background and its role, which is to ensure the implementation and protection of the fundamental right of sports competitors to take part in "*doping-free*" events. (IOC Advisory Opinion, ¶¶6.1 and 6.2.)

11.25 Further, of the two advisory opinions, for several reasons, the Panel finds that the IAAF Advisory Opinion states the correct legal position in this case and will adopt its reasoning as our finding in determining the "appropriate Consequences" for Mr. Merritt's Positive Analytical Finding.

11.26 First, the IAAF Advisory Opinion is more in line with the valid legal precedent of *Prusis*. Second, the IOC Advisory Opinion on its face states it is not legal precedent this Panel must follow. (TAS 2009/C/1824 IOC, ¶3.7.) It was merely an opinion of the three arbitrators on the panel.

11.27 Third, the IOC Advisory Opinion suffers from a substantial flaw, it fails to analyze The Unpublished Memo with the mandatory provisions of the Code, in this case Article 10.2. The IOC Advisory Opinion, Paragraph 1.2, makes no reference to the Code. (TAS 2009/C/1824 IOC, ¶1.2.) This defect is evidenced by the IOC Advisory Opinion's reference that the "applicable law . . . was primarily the Olympic Charter and, on a supplementary basis, Swiss law." (*Id.*)

11.28 Fourth, while we agree with the IOC Advisory Opinion that the IOC has incredibly broad authority regarding the Olympic Games, that authority also means they have the power to limit their authority. It is the Panel's view that as a Signatory to the Code the IOC has

agreed to limit its authority. The IOC has pledged “To adopt and implement anti-doping policies and rules for the Olympic Games which conform with the Code.” (Code, Article 20.1.1.)

11.29 Fifth, the Panel could not find any reference in the Code that would differentiate the IOC as a Signatory from International Federations regarding mandatory provisions of the Code. Indeed, WADA has stated that all Signatories’ rules must conform to the mandatory provisions of the Code.

11.30 This Panel finds it has the authority and jurisdiction to decide the “appropriate Consequences” in this case. Its decision of the “appropriate Consequences” must be respected and followed by all Signatories to the Code, including the IOC (absent an appeal). The Unpublished Memo imposes a “Consequence.” Pursuant to the Code, this Panel has the authority and jurisdiction to determine whether that “Consequence” is appropriate. Because The Unpublished Memo imposes an additional penalty on Mr. Merritt for his anti-doping rule violation after his period of ineligibility has expired, it is not an appropriate consequence under the Code.

11.31 Further this Panel must take into consideration the principle of proportionality. In quoting from *Ward v/FEI*, CAS 199/A/246, the *Squizzato* panel stated the following:

The Panel notes that it is widely accepted general principle of sports law that the severity of a penalty must be in proportion with the seriousness of the infringements. The CAS has evidenced the existence and the importance of the principle of proportionality on several occasions. (*Squizzato* at ¶10.20.)

11.32 Regarding this issue, the AAA Hardy Case eloquently stated the case:

Clearly, the overall effect of the one year period of Ineligibility on Respondent, taking into account the impact of Rule 45, is far in excess of what should be expected when applying principles of fundamental justice and fairness in the circumstances of this case. The effect of this penalty imposed upon Respondent is first a one year period of Ineligibility (including missing the 2008 Olympic Games for which she qualified) and second, because of Rule 45, no eligibility to compete in the next Olympic Games. This penalty is indeed, in the view of the

Panel, evidently grossly disproportionate, under the principles of proportionality. In addition, this penalty is inconsistent with the provisions of the FINA DC and the Code.

Because this is an accidental ingestion case, Mr. Merritt's infringement of the rules is not that severe. Therefore, like Ms. Hardy's case, imposing a three-year period of ineligibility as would happen if The Unpublished Memo was valid would violate the principle of proportionality and the Panel would have imposed a sanction of six months.

11.33 Finally, the Panel thinks it is important to address one issues raised in the CAS Hardy Case. In that case, both the USOC and USADA wrote the arbitration panel stating, in substance, the following:

it is in the best interest of sport generally that the issues raised by Ms. Hardy be addressed promptly and fully by an appropriate adjudicatory body after having heard from all relevant parties, including the IOC", since "a ruling on the matter . . . will allow all NOCs and athletes appropriate time to plan for the Games with full knowledge of the applicable rules and implications." (CAS 2009/A/1870 *WADA v. Hardy et al.*, ¶¶32 and 35.)

11.34 The reason behind the urgency expressed by the USOC and USADA is apparent. A ruling that this Panel does not have the ability to determine the "appropriate Consequences" for these athletes in very real terms could mean that the athletes are *de facto* precluded from challenging The Unpublished Memo. For example, in the CAS Hardy Case, the panel determined that the FINA Rules did not allow Hardy to join the IOC. That meant that Hardy had no way of challenging The Unpublished Memo. She would not be able to challenge The Unpublished Memo until her name was submitted for entry to the IOC. However, her name would never be submitted for entry to the IOC because the USOC rules would state she is not eligible to compete in the Olympic Games. That means she likely would not be eligible to compete in the Olympic Trials. She could challenge the USOC rule preventing her from competing in the Olympic Trials, but those rules would be upheld as they relate to the IOC rules.

That means, regardless of the merits, Mr. Merritt, and Ms. Hardy for that matter, could very well be denied their day in court.

11.35 In the alternative, should the USOC decide that The Unpublished Memo is not valid, athletes affected by The Unpublished Memo could compete in the Olympic Trials and knock out athletes who would otherwise qualify. Thereafter, if The Unpublished Memo was found to be valid, an athlete who was knocked out of the competition by Mr. Merritt or Ms Hardy, an athlete who had no connection with doping whatsoever, would have been prevented from competing. The uncertainty of The Unpublished Memo could also cause the USOC to face unnecessary and excessive litigation, with its resulting costs.

11.36 All of this demonstrates that the principles of Olympism (i.e., respect for universal fundamental ethical principles such as fairness and human dignity) requires a CAS resolution of this issue sooner rather than later. Mr. Merritt should know where he stands in all aspects of his competitive career after the conclusion of this case, which would include appeals. His competitors in the United States should know. USATF and the USOC should know. Delaying the final determination of whether The Unpublished Memo conforms to mandatory provisions of the Code cheats athletes and sport organizations around the world.

12. DECISION AND AWARD

On the basis of the foregoing facts and legal aspects, this Panel renders the following decision:

12.1 Respondent has committed a doping violation under Article 2.1 of the 2009 version of the WADA Code.

12.2. The following sanction shall be imposed on Respondent:

12.2.1 The “appropriate Consequences” imposed by the Panel is a Twenty-one month period of ineligibility commencing October 28, 2009 and ending on July 27, 2011.

12.2.2 During his period of ineligibility Mr. Merritt is prohibited from participating in and having access to the training facilities of the United States Olympic Committee Training Centers or other programs and activities of the USOC including, but not limited to, grants, awards, or employment pursuant to the USOC Anti-Doping Policies.

12.2.3 After his period of ineligibility has ended on July 27, 2011, Mr. Merritt is eligible to compete in the competitions of all Signatories to the Code including the USOC, IAAF and IOC, if the reason for his exclusion would be related to this anti-doping rule violation. Because Mr. Merritt’s period of ineligibility expires on July 27, 2011, The Unpublished Memo does not apply to Mr. Merritt and cannot be used to prevent Mr. Merritt from competing in the Olympic Trials, having his name submitted for entry into the Olympic Games or competing in the Olympic Games.

12.3 The parties shall bear their own attorney’s fees and costs associated with this arbitration.

12.4 The Administrative fees and expenses of the American Arbitration Association, and the compensation and expenses of the arbitrators and the Panel, shall be borne entirely by USADA and the United States Olympic Committee.

12.5 This Award is in full settlement of all claims and counterclaims submitted to this Arbitration. All claims not expressly granted herein are hereby denied.

12.6 This Award may be executed in any number of counterparts, each of which shall be deemed an original, and all of which shall constitute together one and the same instrument.

Dated: October 15, 2010.

/s/ Chris Campbell
Christopher L. Campbell, Chair

/s/ Jeff Benz
Jeffrey G. Benz

/s/ Allen Rosenberg
Allen P. Rosenberg