

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

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In the Matter of the Arbitration between

United States Anti-Doping Agency,

Claimant

and

Jonathan Page,

Respondent

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Re: AAA No. 77 190 16 09 JENF

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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 an evidentiary hearing held on January 22, 2009 and declared closed on January 26, 2009, do hereby render the Panel's reasoned award pursuant to its undertaking to do so by February 5, 2009.

**1. SUMMARY**

1.1 This case involves Respondent's first anti-doping violation. The Panel determined he was an honest and forthright athlete with an accomplished domestic and international cyclocross career, spanning 12 years of professional competition. According to his testimony, he has been subject to anti-doping controls since his first professional competition at age 21 "hundreds of times", in competition and out of competition, has never before tested positive or been found to have committed a doping offense, and has never missed a test.

1.2 Respondent suffered a concussion and other injuries in a race-ending crash while competing in the Union Cycliste' International ("UCI") cyclocross World Cup event in Koksijde,

Belgium on November 29, 2008 ("the Event"). In addition, in the time leading up to and just before the start of the race, Respondent had a number of exceptional personal and equipment-related setbacks that caused him to be less attentive to the race and its requirements than his lengthy record of accomplishment and participation in the anti-doping system demonstrated he normally would have been. Among other things, Respondent failed to report to the anti-doping station immediately following the Event even though he had been selected, and his rider number had been posted to indicate that he had been selected, for anti-doping controls for that race in accordance with the UCI Rules.

1.3 The Panel finds that under the relevant UCI Rules (defined below), even though Respondent failed to report for sample collection as required by the UCI Rules, Respondent was able to demonstrate "compelling justification" for his failure to so report through testimony that: He was sick with loose stools during the week before and even as late as the day of the Event; his children (who, with his wife, accompany him on the cyclocross race circuit) were similarly sick and were vomiting during the same time period; he had lost his long time European bicycle sponsor and had to find a replacement sponsor from the United States; he had to replace his old bicycles with bicycles manufactured and shipped to Belgium by the new sponsor on the eve of the race; his mechanic was not available to assemble and test his newly acquired bicycles; he suffered a flat tire at the starting line just prior to the Event and had to make a last minute bicycle switch to one of his new untested bicycles and then replace it back moments before the race start; and that he suffered two crashes during the Event, one of which knocked him briefly unconscious with a concussion, caused him additional injuries, and forced him to abandon the Event. In addition, USADA admitted and Respondent established that had he appeared for the anti-doping test at the Event, he would not have been tested. As a result, considering the totality of the circumstances,

and the plain language of the UCI rule on "compelling justification", the Panel determines that Respondent satisfied the burden of proof through the evidence by greater than a mere probability and should suffer no sanction.

## 2. PARTIES

2.1 Claimant, 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 (defined later), Claimant was represented by William Bock, III, Esq., General Counsel (who attended by telephone), and Stephen A. Starks, Esq., Legal Affairs Director, of USADA, 1330 Quail Lake Loop, Suite 260, Colorado Springs, CO 80906. Johnnie Wingard, Paralegal, also attended on behalf of USADA.

2.3 At the Hearing, Respondent, Jonathan Page, established he is an elite level cycling athlete and member of USA Cycling.<sup>1</sup> He appeared at the Hearing, having traveled from his training and competition base in Belgium expressly for purposes of attending the Hearing to personally submit his evidence to the Panel.

2.4 At the Hearing, Respondent was represented by Antonio Gallegos, Esq., of Holland & Hart LLP, 555 17<sup>th</sup> Street, Ste. 3200, Denver, CO 80202, and John Bliss, Esq., of the Offices of John Bliss, 730 Hawthorn Avenue, Boulder, CO 80304. Greg S. Nelson, Esq., of Prediletto, Halpin, Sharnikow & Nelson, 302 North 3<sup>rd</sup> Street, Yakima, WA 98901 joined them on the briefs but did not appear at the Hearing.

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<sup>1</sup> USA Cycling is the National Governing Body ("NGB") for the sport of cycling in the United States. USA Cycling is a member of the UCI and the United States Olympic Committee ("USOC").

2.5 The Panel appreciates and commends the excellent briefing and oral presentations of counsel for both parties in this matter, particularly given the expedited timeframe under which this matter arose and was scheduled, and the Panel appreciates the forthright manner in which the Respondent appeared and provided his testimony.

### 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. . . .<sup>2</sup>

3.2 Under its authority to recognize a NGB<sup>3</sup>, the USOC established its National Anti-Doping Policies,<sup>4</sup> the latest version of which is 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.<sup>5</sup>

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.<sup>6</sup>

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<sup>2</sup> 36 U.S.C. §220521.

<sup>3</sup> 36 U.S.C. §220505(c)(4).

<sup>4</sup> The USOC has adopted the World Anti-Doping Code.

<sup>5</sup> *USOC Policies*, ¶13.

<sup>6</sup> *Id.* at ¶12.

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."<sup>7</sup>

#### 4. RULES APPLICABLE TO THIS DISPUTE

The following provisions of the UCI Anti-Doping Rules and Procedures have been argued in this case (in its legal analysis, the Panel discusses the relevant provisions):

##### 4.1 UCI ANTI-DOPING RULES AND PROCEDURES (Version 13 August 2004) (collectively "UCI Rules")<sup>8</sup>

###### Definition of doping

14. Doping is defined as the occurrence of one or more of the anti-doping rule violations set forth in article 15.

###### Anti-doping rule violations

15. The following constitute anti-doping rule violations: . . .

3. Evading *Sample* collection or, after notification as authorized under the Anti-Doping Rules, refusing, or failing without compelling justification, to submit to *Sample* collection or, regarding the Riders referred to in article 122, to check in for *Sample* collection.

\* \* \*

###### Proof of doping

###### Burdens and standards of proof

16. The UCI and its National Federations shall have the burden of establishing that an anti-doping rule violation has occurred. The standard of proof shall be whether the UCI or National Federation has established an anti-doping rule violation to the comfortable satisfaction of the hearing body bearing in

<sup>7</sup> 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.

<sup>8</sup> The formatting in the below reproduction of the rules is from the original UCI Rules text. At times, the UCI Rules contain typographical errors and inconsistent formatting of references; these are reproduced below and indicated with an appropriate "*sic*" reference. The numbers below that precede the cited provisions of the UCI Rules refer to the respective articles in such Rules.

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 these Anti-Doping rules place the burden of proof upon the *Rider* 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.

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#### **Methods of establishing facts and presumptions**

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

\* \* \*

#### **Procedural Guidelines**

96. The Anti-Doping Commission shall issue *Procedural Guidelines* for all aspects of *Testing* conducted under these Anti-Doping Rules.

*Procedural Guidelines* shall be in conformity with these Anti-Doping Rules and in substantial conformity with the *International Standard for Testing*.

*Procedural Guidelines* shall be binding upon their approval by the President of the UCI.

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#### **Selection of *Riders* to be tested**

121. The *Riders* to be tested shall be as designated in the *Procedural Guidelines*.

The Anti-Doping Commission may also issue confidential instructions to the Anti-Doping Inspector [*sic*] for the selection of *Riders* to be tested in a particular *Event*.

122. For each *Competition* or *Race* for which a *Post-Competition Testing* session is organized, the *Anti-Doping Inspector* shall draw lots for a first and a second reserve *Rider* who will be subjected to testing in that order if a *Rider* drawn by lot is required to undergo tests as a result of his placing or if a *Rider* meets two criteria for selection simultaneously or if one such *Rider* is unable for practical reasons to undergo *Sample* taking, so that the number of tests called for by the Anti-Doping Commission is carried out.

The reserve *Rider* must check in for *Sample* collection within the prescribed time limit, even if they would not be required to submit a *Sample* collection.

\* \* \*

**Notification of Riders**

124. Any *Rider* including any *Rider* who has abandoned the *Race*, shall be aware that he may have been selected to undergo *Testing* after the *Race* and is responsible for enduring personally whether he is required to appear for *Sample* collection.

To this end, the *Rider*, immediately after finishing or abandoning the *Race* shall locate and proceed to the place where the list of *Riders* who are required to appear for *Sample* collection, is displayed and consult the list.

The last thirty starters in time trials shall consult the list after the last *Rider* finishes his ride. The other *Riders* to be tested shall be notified in the way as for *Individual Testing*.

The obligations under this article cease to exist as soon as the *Rider* has signed that he has been notified in person that he has been selected to undergo *Testing*.

(text modified on 1.02.07; 1.01.08)

125. The organizer and the *Anti-Doping Inspector* shall ensure that a list of the *Riders* who are required to appear for *Sample* collection shall be displayed at the finish line and at the entrance of the doping control station before the finish of the winner.

At world championships, the list shall not be displayed at the finish line but instead at another appropriate place that shall be determined and announce by the *Anti-Doping Inspector*.

**Comment:** *Riders* that can't find the list at the finish line, [sic] shall always proceed to the doping control station.

(text modified on 1.02.07)

\* \* \*

127. *Riders* shall be identified on the list by their name or their race number or their place in the ranking.
128. No *Rider* may take the absence of his name, race number or placing from the displayed list as excuse if he is identified in another manner or if it is established that he had learnt in another way that he was required to appear for *Sample* collection.

**Comment:** No additional form of notification (for example: audio announcement) has to be used. The absence of an additional form of notification may never be interpreted as an indication that no Testing will take place and is no excuse for failing to submit to *Sample* taking. When a *Rider* does not appear for *Sample* taking, there is no obligation for the *Anti-Doping Inspector*, the organizer or anyone else to try to contact or notify the *Rider*.

(text modified on 1.01.08)

129. A *Rider* may be notified in person by a chaperone for Testing at a Post-Competition Testing session in the same way as for *Individual Testing*.

The organizer is required to provide at least one chaperone for every rider selected to undergo *Testing*.

(text modified on 1.01.08)

130. The chaperone shall remain close to the *Rider* and observe him at all times, and accompany him to the doping control station.

At all times the rider [*sic*] shall remain within sight of the chaperone from the time of notification to the completion of the *Sample* collection procedure. The *Rider's Support Personnel* must not hinder the chaperone from continuously observing the *Rider*.

The absence of a chaperone cannot be pleaded as a defense.

(text modified on 1.01.08)

131. Time-limit for attendance

Except as provided under article 124 for the other riders than the last thirty starters in time trials, each *Rider* to be tested must present himself at the doping control station within 30 (thirty) [*sic*] of finishing the *Race* or, where appropriate, within 30 (thirty) minutes of the end of an official ceremony in which he has taken part. For a *Rider* required to attend a press conference under a provision of the regulations, the deadline shall be extended to 50 (fifty) minutes.

(text modified on 1.02.07)

132. A *Rider* who has abandoned the *Race* must attend within 30 (thirty) minutes of the finishing time of the last classified *Rider*.



**A *Rider* who has abandoned a time trial race shall proceed immediately to the finish line. If he is selected for testing he shall be notified in the way as for the *Individual Testing*.**

(text modified on 1.02.07)

\* \* \*

**Time limit for Sample taking**

149. When a *Rider* does not report to the doping control station within the time-limit, the *Anti-Doping Inspector* shall use his judgment whether to attempt to contact the *Rider*.
150. If a *Rider* foresees that he might be prevented from reporting within the time-limit, he shall try, by all available means, to inform the *Anti-Doping Inspector*.

\* \* \*

**Appendix 1 - Definitions**

**Procedural Guidelines:**

Documents established by the Anti-doping Commission and regulating technical and operational parts of *Testing* pursuant to article 96; reference to these Anti-Doping Rules shall include reference to the *Procedural Guidelines* where applicable.

\* \* \*

**Appendix 2 – Selection of Riders to be tested  
(Article 121 of the Anti-Doping Rules)**

(In the absence of specific instructions from the antidoping commission)

The provision applicable to this matter is found in Appendix 2, part B, as follows:

**B. Other Events**

**III. One day events (all disciplines) . . .**

**• World Cup**

1. The winner of the race
2. The leader on the general classification of the world cup after the race
3. Two riders selected at random by the Inspector.

## 5. STIPULATION

While the Parties entered into various evidentiary stipulations, the Parties did not enter into any stipulation concerning the outcome or conduct of the hearing in this matter.

## 6. PROCEDURAL ASPECTS OF CASE

6.1 The Panel and the parties held a preliminary hearing by telephone conference call on January 15, 2009. At the preliminary hearing, the Panel made certain rulings and resolved certain issues. The Panel issued its order on January 16, 2009 establishing the briefing schedule, the hearing date and location, and addressing certain matters related to the hearing.

6.2 The evidentiary hearing was conducted on January 22, 2009 in Denver, Colorado, at the offices of the American Arbitration Association ("the Hearing").

6.3 The following individuals testified at the Hearing at the request of Respondent: Jonathan Page (Respondent) (in person), Dr. Piet Daneels (Respondent's personal physician) (by telephone), Franky Van Housbroucke (Respondent's bicycle mechanic) (by telephone), and Brandon Dwight (a cycling athlete who had a failure to report for sample collection case dismissed by USADA) (in person). The following witness testified at the Hearing at the request of USADA: Patrick DeMunter (the Event's Anti-Doping Inspector) (by telephone).

6.4 All exhibits filed with the parties' pre-hearing briefs were admitted into evidence, along with additional exhibits presented at the Hearing. The parties made opening statements and closing arguments. The parties responded to the questions of the Panel. The Panel requested additional documents be disclosed at the conclusion of the January 22, 2009 hearing. The parties provided the requested additional documents to the Panel later that evening and the hearing was closed on January 26, 2009.

6.5 Also present at the hearing was John Ruger, the USOC's Athlete Ombudsman.

6.6 At the request and with the consent of both Parties, the Panel issued the following summary decision by email on January 22, 2009:

*This matter was presented to the Panel at a hearing today, January 22, 2009, and, as agreed by all parties, their counsel, and the Panel, the Panel is issuing its summary decision as follows:*

*While USADA presented a prima facie case, in a professional manner, of the failure of Jonathan Page ("Respondent") to submit to sample collection at the UCI World Cup event in cyclocross, held at Koksijde, Belgium, on November 29, 2008, and Respondent acknowledged such failure, the Panel, after careful consideration and review of Respondent's presentation of mitigating facts, has determined that compelling justification existed for Respondent not to have submitted to sample collection under the applicable UCI Anti-Doping Rules, and the Panel has therefore determined that Respondent has not committed an anti-doping rule violation.*

*A reasoned award will follow within the time required after the hearing is closed. The Panel thanks counsel for all parties for their excellent and complete briefing and presentation of the arguments in this case. The Panel asks that USADA and the AAA forward this summary decision to the UCI and any other appropriate party as soon as possible.*

*By  
Paul E. George, Chair  
On Behalf of the Panel*

6.7 This document constitutes the "reasoned award" referenced in the Panel's summary decision.

## **7. PARTIES' ARGUMENTS**

### **Respondent's Arguments**

7.1 Throughout his pre-hearing brief, oral argument, evidence, and testimony at the Hearing, Respondent argued that his failure to submit to doping controls after the Event was caused by the unique circumstances of his case and his physical condition and injuries, which included a concussion.

7.2 Respondent argued that Article 122 of the UCI Rules required the UCI anti-doping inspector for the race to draw lots for two reserve riders who will be tested if a rider does not check in for testing or is unavailable for practical reasons. Respondent argued that the anti-doping inspector did not designate any of the riders who were drawn by lot as a reserve and instead the anti-doping inspector determined that the first two randomly chosen riders who checked in would submit to sample collection. As a result, Respondent argued that he would not have had to provide a sample had he checked in for sample collection.

7.3 Respondent argued that USADA had provided correspondence to UCI in early 2007 confirming USADA's intention to enforce Article 122 of the UCI Rules so that anti-doping violations would only be charged against reserve riders who would have actually been tested at the event where they were designated as reserve riders, and that the current interpretation of Article 122 of the UCI Rules was inconsistent with USADA's prior interpretation (which had been shared with UCI).

7.4 Respondent argued that USADA could not meet its burden in proving an anti-doping violation under Article 122 because "compelling justification" existed for Respondent's failure to appear at the anti-doping station within the required time after the conclusion of the race. Respondent argued that he was sick with loose stools during the week before and even as late as the day of the Event, that his children were similarly sick and were vomiting during the same time period, that he had recently lost his long-term European bicycle sponsor and had to find a replacement sponsor from the United States, that he had to replace his old bicycles, and cause them to be shipped to Belgium from the United States, and assemble and test the bicycles manufactured by his new sponsor on the eve of the race, that he suffered a flat tire at the starting line just prior to the Event and had to make a last minute bicycle switch to one not fully tested by him or his

mechanic, which bicycle was later replaced immediately before the Event start, and that he suffered two crashes during the Event, one of which knocked him unconscious briefly with a resultant concussion and other injuries, and forced him to abandon the Event, following which he went to his trailer near the race course and sought the advice of his doctor.

7.5 Respondent also argued that textual changes to the applicable UCI Rules between the version in effect at the time of the Event (Article 15.3) and the version that took effect on January 1, 2009 (Article 21.3), under the doctrine of *lex mitior*, required the Panel to find that failing to check in for sample collection was no longer an anti-doping rule violation under the UCI Rules.<sup>9</sup>

7.6 Respondent also argued that should the Panel determine that Respondent had committed an anti-doping violation under the UCI Rules, the Panel should find that Respondent was without fault or negligence or at least without significant fault or negligence and reduce the applicable penalty accordingly.<sup>10</sup>

#### **USADA's Arguments**

7.7 USADA argued that Respondent failed to submit to sample collection as required by the UCI Rules, after being properly noticed of such requirement. USADA argued that even if a rider abandoned a race the UCI Rules required that athlete to appear for anti-doping sample collection if selected. USADA argued that no "compelling justification" existed for Respondent's failure to submit sample collection.

7.8 USADA argued that the provisions of the UCI Rules that govern exceptional circumstances for no fault or negligence on the part of an athlete would not apply to a case for

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<sup>9</sup> Because the Panel found that compelling justification existed for Respondent to not report for sample collection, the Panel did not need to address this argument.

<sup>10</sup> Because the Panel found that compelling justification existed for Respondent to not report for sample collection, the Panel did not need to address this argument.

failure to submit a sample because a finding of fault or negligence is essentially incorporated into the UCI Rules as a precondition for establishing a violation of Article 15.3 of the UCI Rules.<sup>11</sup>

7.9 USADA argued that Respondent's conduct did not constitute the lack of significant fault or negligence under the UCI Rules because this case was not truly exceptional, and Respondent could not demonstrate that he was physically unable to report to the finish line to check whether he was selected for anti-doping controls within 30 minutes of the finish of the Event, that he could not demonstrate he could have had a representative check on whether he had been selected for anti-doping controls, or that Respondent could not demonstrate that he was otherwise not responsible for his failure to report for sample collection within the required time.<sup>12</sup>

## 8. TESTIMONY OF THE PARTIES AND THEIR WITNESSES

8.1 The following witnesses testified on behalf of Respondent: Respondent testified about his background and accomplishments in the sport of cycling, and the disciplines of cyclocross and road racing, the circumstances in his life arising during the week prior to the Event, the circumstances occurring to him on the day of the Event, his extensive experience with anti-doping controls before and after the Event, his injuries at the Event, and his recovery from the Event. Franky Van Halsebroucke, Respondent's mechanic and a long-time supporter of Respondent, testified about his background as a professional cyclist and cycling team manager, his experience with anti-doping controls at elite cycling events, Respondent's bicycle situation at the Event, Respondent's physical appearance and the outward manifestations of Respondent's mental condition immediately following the Event, and steps taken by Respondent to depart from the Event. Dr. Piet Daneels, Respondent's personal physician, testified about his treatment of

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<sup>11</sup> Because the Panel found that compelling justification existed for Respondent to not report for sample collection, the Panel did not need to address this argument.

<sup>12</sup> Because the Panel found that compelling justification existed for Respondent to not report for sample collection, the Panel did not need to address this argument.

Respondent before the Event and after, his diagnosis of Respondent's concussion, his interactions with Respondent immediately following the Event, and his treatment of Respondent's various medical ailments before and after the Event. Brandon Dwight, a non-elite cycling athlete, testified about his experience with USADA and its interpretation of UCI Rule 122 in a domestic event.

8.2 The following witness testified on behalf of USADA: Patrick DeMunter, the UCI-appointed anti-doping officer for the Event, testified about the anti-doping controls at the Event, the anti-doping rules applicable to the Event, the posting of the identification of riders to be tested at the Event, the process for determining the riders to list as being required to report to the anti-doping station and the process for determining the riders to test from among those who report, the circumstances surrounding efforts to locate Respondent at the Event when he did not report to the anti-doping station, and the reports filed by Mr. DeMunter with UCI concerning anti-doping controls at the Event.

8.3 The Panel found the testimony of all of the witnesses informative and credible and thanked them for their participation in the hearing.

## 9. FINDINGS

9.1 Respondent is a forthright, experienced international cycling athlete, who has raced for over 12 years as a professional in both road racing and cyclocross, who has been subjected to anti-doping controls many times, both in competition and out of competition. Respondent has never before been found to have committed a doping offense, nor has he ever been the subject of any anti-doping-related irregularity. He has never before missed an anti-doping test or failed to report for sample collection.

9.2 Under the UCI Rules, the Respondent was under an obligation to report to the anti-doping station within thirty (30) minutes of the conclusion of the race, and that obligation was not

waived by the fact that the Respondent would not have been tested or by the fact that USADA had stated in a 2007 letter its intention not to enforce Article 122 of the UCI Rules (i.e., charge an athlete with an anti-doping violation for not reporting) in those cases where a reserve rider would not have been tested at an event. Respondent in fact acknowledged his responsibility to report for sample collection, but Respondent also detailed the significant reasons by which he should not be found to have committed a doping offense. In particular, Respondent was able to demonstrate to the Panel that the only explanation for his failure to submit to sample collection at the Event, despite his knowledge of the rules and his following of those rules both before and after the Event, was the culmination of the many factors detailed by the Panel below. The Panel was convinced that there could be no other explanation.

9.3 Respondent was suffering from significant flu-like symptoms the week before the Event, as were his children with whom he lived and traveled for his races;

9.4. Respondent lost his bicycle sponsor during the week before the Event, was forced to obtain a new sponsor, and was forced to change out his bicycles as a result;

9.5. Respondent, without the services of his experienced mechanic, had to build his new bicycles the night before the Event, experienced a flat tire while lining up for the start of the Event, in order to not lose his starting position in the Event, was forced to race to his recently-arrived bicycle mechanic to switch out his malfunctioning bicycle for his other new, untested bicycle, run back to the starting line, and then have his bicycle mechanic appear to provide him with the original, but repaired, bicycle just as he was to start the race;

9.6 During the first lap of the Event, Respondent crashed but recovered and continued the Event. During the second lap of the Event, Respondent crashed so hard that he was knocked out and suffered a concussion. He was forced to abandon the Event as a result. His crash was of



such severity that it caused several spectators and others to inquire of his medical condition from his bicycle mechanic after the crash. Medical evidence from his treating physician was provided at the Hearing, and never rebutted, to substantiate his concussion and lack of ability to focus or concentrate after the second crash.

9.7 Respondent normally had in place at least two other individuals, one of whom was his wife, in addition to himself to check the finish line postings on whether he was required to report for anti-doping controls at the conclusion of the race. Neither of these backup individuals checked on Respondent's status for the Event. There was testimony that his wife returned to their nearby trailer to check on Respondent's physical condition upon learning of his crash.

9.8 Had Respondent reported for anti-doping controls at the conclusion of the Event, he would not have been selected for sample collection because the anti-doping inspector had already filled his quota of riders to test within approximately 15 minutes of the conclusion of the Event.

9.9 When the Respondent did not report to the anti-doping station within a short time after conclusion of the race, there was conflicting testimony on whether the anti-doping inspector sent a chaperone or did not send a chaperone to locate Respondent.<sup>13</sup>

9.10 No evidence was presented that Respondent was actually aware of his selection for anti-doping controls and there was no evidence that Respondent deliberately missed the test. The Panel found the testimony of Respondent compelling about his opposition to doping and his own significant experience submitting to anti-doping controls over his long career (including the weeks immediately preceding and following the Event). Therefore, the Panel finds that Respondent was

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<sup>13</sup> In any event, whether a chaperone was sent to locate Respondent or not is of no moment. UCI Rules Articles 129 and 130 provide that while a chaperone may be sent to look for or escort riders, the failure of a chaperone to be used is not a defense to an anti-doping offense. The Panel does not need to address this issue here because the Panel found that Respondent did not commit an anti-doping offense.

unaware of being selected for anti-doping controls and that Respondent inadvertently failed to submit to sample collection.

## 10. LEGAL ANALYSIS

10.1 The Panel is bound to apply article 15.3 of the UCI Rules. Article 15.3 provides that the following is an anti-doping rule violation:

Evading *Sample* collection or, after notification as authorized under the Anti-Doping Rules, refusing, or failing without compelling justification, to submit to *Sample* collection or, regarding the Riders referred to in article 122, to check in for *Sample* collection.

10.2 There is no guidance provided in the UCI Rules on the meaning of the phrase "compelling justification", nor is there a definition of such phrase in the World Anti-Doping Code ("WADA Code"). In addition, no case was presented to the Panel defining the meaning of "compelling justification" as used in the UCI Rules or the WADA Code (though the parties provided various definitions aimed at providing plain language meaning). As a result, the Panel is required to determine the meaning of "compelling justification."

10.3 The Oxford English Dictionary (<http://dictionary.oed.com>) defines "compelling" as follows:

1. *trans.* To urge irresistibly, to constrain, oblige, force:
  - a. a person *to do* a thing (the usual const.).
  - b. a person *to (into)* a course of action, etc.
  - c. with *simple object*: To constrain, force.
  - d. *absol.*
2.
  - a. To take or get by force, to extort. *Obs.*
  - b. To constrain (an action); to bring about by force, constraint, or moral necessity; to exact by rightful claim; to command.
3.
  - a. To force to come, go, or proceed; to drive forcibly, to force. Also (esp. in transl.) in the literal sense of the Latin: To drive or force together; to gather into a company by force. Cf. *cloud-compeller*. (Now rare and poetic.)
  - b. To force by pressure, compress. *Obs. exc. fig.*

4. To overpower, constrain. *Obs. rare.*

Webster's Dictionary (<http://www.merriam-webster.com/dictionary/compelling>) defines "compelling" as "forceful", "demanding attention", or "convincing".

10.4 Thus, from the plain language of UCI Article 15.3, the Panel is required to determine if the justification offered by the Respondent demanded his attention, and if the circumstances testified to by the Respondent convincingly constrained his ability to act in accordance with UCI rules.

10.5 The Panel finds that the phrase "compelling justification" in Article 15.3 of the UCI Rules means that the evidence of failure to submit to sample collection must be greater than a mere balance of probability and of such a nature that the Respondent was forced, drawn or constrained by the factual circumstances to not submit to sample collection.

10.6 The Respondent demonstrated to the Panel's unanimous satisfaction that his failure to submit to sample collection was not due to ignorance, intent, or habitual misconduct, but to a confluence of personal circumstances – both emotional and physical, and most notably a concussion – amounting to compelling justification for his failure to submit to sample collection.

10.7 The Panel has found that the following basic facts support Respondent's claim that compelling justification existed such that he could not report for sample collection:

- a. Respondent was suffering from significant flu-like symptoms the week before the Event, as were his children with whom he lived and traveled for his races;
- b. Respondent lost his bicycle sponsor during the week before the Event, was forced to obtain a new sponsor, and was forced to change out his bicycles as a result;
- c. Respondent had to build his new bicycles the night before the Event, experienced a flat tire while lining up for the start of the Event, was forced to race to his recently-arrived bicycle mechanic to switch out his malfunctioning bicycle for a new one, run back to the

starting line, and then have his bicycle mechanic appear to provide him with the original, but repaired, bicycle just as he was to start the race;

d. During the first lap of the Event, Respondent crashed but recovered and continued the Event. During the second lap of the Event, Respondent crashed so hard that he was knocked unconscious and suffered a concussion. He was forced to abandon the Event as a result, and he never crossed the finish line. His crash caused several spectators and others to inquire of his medical condition of his bicycle mechanic after the crash. Medical evidence from his treating physician was provided at the Hearing, and never rebutted, to substantiate his concussion and lack of ability to focus or concentrate after the second crash.

e. Respondent had in place at least two other individuals in addition to himself to check the finish line postings on whether he was required to report for anti-doping controls at the conclusion of the race. Neither of these backup individuals was able to check on Respondent's status for the Event.

f. There was no evidence to suggest that Respondent knew he had been selected to provide a sample and there was no evidence to suggest that Respondent was attempting to evade sample collection.

10.8 Furthermore, had Respondent reported for anti-doping controls at the conclusion of the Event, he would not have been selected for sample collection because the anti-doping inspector admitted that he had already filled his quota of riders to test within approximately 15 minutes of the conclusion of the Event.

10.9 The Panel is of the view that when the facts set forth in paragraph 10.3 hereof are considered in the totality of the circumstances there was compelling justification for Respondent's failure to submit to sample collection in this case.

10.10 The Panel was confronted here with a case factually more compelling than that provided in *USADA v. Jeanson* (AAA Case No. 30 190 00609 04, June 28, 2004). In *Jeanson*, the female cycling athlete had flown into Belgium the evening before the competition from North America, on the morning of the competition she received a report that her hematocrit count was abnormally high, while awaiting analysis of the B sample of the blood collected was informed that a urine test was required but she was forced to provide her sample before a male chaperone, and then she received a results of her B sample which showed her hematocrit to be within the acceptable range. As a result of this, she was rendered "hysterical", and she failed to report for sample collection after the race as provided in the then-applicable UCI rules. Based on the totality of the circumstances, the *Jeanson* panel determined, under different UCI rules than the UCI Rules applied here, that she had committed a doping offense but that she was able to rebut the presumption of her refusal to submit to testing and that her unique circumstances did not justify a suspension but rather a warning under the then-applicable UCI rules.

10.11 In *UCI v. McGrory* (CAS Unnumbered; April 7, 2005), the CAS panel determined that an experienced international athlete who opted to not check on whether he had to report for sample collection after a UCI race, and did not so report, should have his sanction reduced from 3 months to 1 month where there were no mitigating facts reported other than that the weather was "miserable" and the finish line, where the anti-doping list was posted, was surrounded by spectators and vehicles. In the present case, the Panel is of the view that the circumstances surrounding Respondent's failure to present himself for sample collection are far more compelling than those presented by the athlete in *McGrory*.

10.12 In *Aberg v. Swedish Cycling Federation* (CAS Unnumbered; August 23, 2005), the CAS panel determined to reduce the penalty for an experienced international athlete's failure to

report for sample collection to 1 year from 2 years, where the athlete failed to appear at the doping control station, or even check the identifying list, even though it was clearly posted that as the winner of the race he would have had to provide a sample. The only mitigating factor found by the CAS panel was that the event organizers were disorganized. Here, the Panel finds that substantially greater circumstances, not the least of which was a diagnosed head injury, combined to cause Respondent to fail to appear to provide his sample, so *Aberg* is inapposite.

10.13 The Panel learned of the CAS decision in *WADA v. CONI, FIGC, Daniele Mannini, and Davide Possanzini*, CAS 2008/A/1557 (decided January 28, 2009) after the Panel had issued its summary decision in this matter. In the *Mannini/Possanzini* case, the athletes were originally sentenced to a 15 day suspension because they reported to a team meeting rather than anti-doping controls after being directed to report to anti-doping controls by the relevant doping control officer, but the CAS panel determined that the athletes should have been required to serve a 1 year period of ineligibility. The CAS panel rejected the athletes' claim that compelling justification existed for the athletes to not attend anti-doping controls immediately following their soccer match after they had been personally notified by the relevant authorities to report for doping controls and were under the guidance of a chaperone for such purpose when they were diverted to a mandatory team meeting.<sup>14</sup> The CAS panel found the following in mitigation: That their team "had suffered from a series of bad results and the additional defeat in a game at home resulted" in their club's President "being particularly agitated and the players feeling under pressure as they left the pitch; this pressure was increased by the players being summoned to an immediate meeting (before showering) and by the presence of the President in the dressing room; there was heated discussion in the dressing room that could be heard from the outside; although the players were not locked in into the changing room, they were obviously not in a position to easily get up and leave, since the

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<sup>14</sup> Interestingly, the CAS panel did not attempt to define "compelling justification" as used in the applicable rules.

doping-control officer found it impossible to enter from the outside, and were under considerable pressure to remain in the meeting.” *Id.* at ¶ 87. The present case is much different from the situation in *Mannini/Possanzini*. The CAS panel was presented with a case where the athletes involved were specifically notified of their need to attend sample collection and consciously chose to proceed in a different direction than required under the rules. Here, the Respondent was in no position to be able to make such a conscious choice -- after having suffered a concussion and other injuries -- following a race he had to abandon, all in a week in which he faced both an unrelated illness and challenging changes in his cycling career. Moreover, he never received actual notice of his selection to appear for anti-doping controls (nor would he have been selected to provide a sample had he been so notified).

10.14 As a result, having reviewed the totality of the circumstances presented by this case, and without intending to give direction for any future cases, the Panel finds that compelling justification existed for Respondent to have not reported to the anti-doping control station after the Event to provide his sample. The Panel notes that the totality of the circumstances here is unique to this case, and unlikely to be repeated. No athlete should read into this decision that they would be able to evade sample collection in the future without substantial risk of being found to have committed a doping offense, absent a showing of compelling justification that is, taken in the totality of the circumstances, comparable to the unique facts presented in this case.

#### 11. DECISION AND AWARD

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

11.1 Respondent has not committed an anti-doping violation under the UCI Rules. Respondent was able to demonstrate a compelling justification for his failure to submit to sample collection at the Event.

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

11.3 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.

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

11.5 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: February 4, 2009.

  
Paul E. George, Chair  
Jeffrey G. Benz  
Hon. Peter Lindberg