

ARBITRAL OPINION & AWARD

Delivered by the

American Arbitration Association

NORTH AMERICAN COURT OF ARBITRATION FOR SPORT

Sitting in the following composition:

President: Prof. Richard H. McLaren, Barrister, London, Ontario,
Canada
Arbitrators: Edward Colbert, Attorney-at-law, Washington, D.C., USA
Margery Gootnick, Attorney-at-law, Rochester, N.Y., USA

In the arbitration between

United States Anti-Doping Agency ("USADA"), Colorado Springs, Colorado, USA
Represented by Mathew S. Barnett and Travis T. Tygart, Attorneys-at-law, Colorado
Springs, Colorado, USA
-Claimant-

and

Scott Moninger ("Moninger"), Boulder, Colorado, USA
-Respondent-
represented by Robert W. Stone, Attorney-at-law, Boulder, Colorado, USA

I. PARTIES CONCERNED

- 1.1 The Claimant, USADA, is the independent anti-doping agency for Olympic Sports in the United States and is responsible for conducting drug testing and adjudication of positive test results pursuant to the United States Anti-Doping Agency Protocol for Olympic movement testing ("USADA Protocol").
- 1.2 Mr. Scott Moninger ("Respondent") is a racing cyclist in the elite class category, resident in the USA.
- 1.3 Union Cycliste Internationale ("UCI") is the International Federation for the sport of cycling.
- 1.4 USA Cycling ("USAC") is the National Governing Body for the sport of cycling in the United States.

ARBITRAL AWARD

II. FACTS

II.1 UNDISPUTED FACTS

- 2.1.1 On 10 August 2002 at the UCI sanctioned Saturn Cycling Classic, the Respondent provided a urine sample. The parties to this proceeding now agree that each aspect of the sampling process for the Respondent's sample was conducted appropriately and without error.
- 2.1.2 The sample arrived at the International Olympic Committee ("IOC") accredited Olympic Analytical Laboratory at the University of California, Los Angeles ("UCLA lab") on 11 August 2002. Again, the parties now agree that the urine was

that of the Respondent and that each aspect of the transportation and laboratory chain of custody was conducted appropriately and without error.

2.1.3 The analytical results at the UCLA lab resulted in an A sample analysis finding of the prohibited anabolic steroid, 19-norandrosterone in excess of 5 Ng/ml, the threshold established by the UCI. The amount was approximately 22 Ng/ml. The UCLA lab report containing its finding was sent to the USADA by fax of 23 August 2002.

2.1.4 The parties have stipulated that norandrosterone is a metabolite of the following prohibited substances: Nandralone, 19-Norandrostendione, and 19-Norandrostendiol, and certain other steroids all of which are listed on the UCI list of Prohibited Classes of Substances and Prohibited Methods.¹

2.1.5 The UCLA lab informed UCI and USADA of the Claimant's positive test. The Respondent was informed and he requested that the B sample be tested. The same lab then analyzed the B sample, and the analysis confirmed the positive results of the sample analysis.

2.1.6 The Respondent agreed on 6 October 2002 to a provisional suspension which has been in effect up to the date of this award

2.1.7 The parties stipulated document further provided:

10. "That an unsealed bottle of Doctor's Brand L-Tyrosine ("Tyrosine Bottle 1") identified as

¹ See Stipulation of Facts and Issues Between United States Anti-Doping Agency and Scott Moninger, 28 February 2003 at para 9. See also UCI Prohibited Classes of Substances and Prohibited methods, Art. 5 of the Anti-Doping Examination Regulations, I Prohibited Classes of Substances, C. Anabolic Agents at 3.

#020109 was forwarded by Mr. Moninger to Integrated Biomolecule Corporation ("IBC") in Tucson, Arizona and subsequently tested by IBC;

11. That IBC through laboratory analysis concluded that 19-norandrosterone was present in the Tyrosine Bottle 1;
12. That the unsealed Tyrosine Bottle 1 containing the remaining capsules following IBC's analysis along with two sealed bottles of Doctor's Brand L-Tyrosine, which had not been previously tested ("Tyrosine Bottle 2" and "Tyrosine Bottle 3") were forwarded to the UCLA Laboratory for testing and that each aspect of the chain of custody until arrival at the UCLA Laboratory was conducted appropriately and without error; [but see paragraph 5.6, *infra*]
13. That with respect to Tyrosine Bottle 2 and Tyrosine Bottle 3 that the UCLA Laboratory concluded that there was no presence of 19-norandrosterone or any other anabolic steroids searched for found after the UCLA Laboratory analysis;
14. That with respect to Tyrosine Bottle 1, the UCLA Laboratory concluded that there was no presence of 19-norandrosterone but did find that Tyrosine Bottle 1 contained "unidentified substances" and that "[s]ome of the substances have spectral characteristics of androgens." The UCLA Laboratory further noted "[w]e are attempting to identify the unknown substances with steroids characteristics" (the results are not yet reported but

USADA will promptly provide upon receipt) and the UCLA Laboratory noted on Annex A to its report "unknown steroids detected;"

15. That neither IBC nor the UCLA Laboratory reported any detection of tampering with the capsules in Tyrosine Bottle 1, Tyrosine Bottle 2, or Tyrosine Bottle 3;
16. That Mr. Moninger has not previously had a positive laboratory test reported, excluding USADA specimen number 465616, by UCL, the United States Olympic Committee ("USOC") or USADA. Mr. Moninger has been tested five times by USADA on May 24, 2001 (Event Test), August 10, 2002 (Event Test), November 20, 2002 (Out-of-Competition). Mr. Moninger was also tested on February 24, 2003 but the results have not yet been communicated. USADA will promptly provide the report upon receipt."².

2.1.8 Following the USADA Anti-Doping Review Board recommendation USADA determined that in accordance with Article 130, section 1, of the UCI Anti-Doping Examination Regulations ("UCI AER") for the use of an anabolic steroid, the Respondent was subject to the disqualification from the event at which the sample was taken; a suspension for two years; and a fine of SFR 2,000. It is from that decision that the Respondent makes application to this panel of arbitrators ("Panel") in accordance with the USADA Protocol to overturn or modify the suspension imposed upon the Respondent.

² The Panel was advised at the Hearing that the test result was negative.

II.2 PARTIES' SUBMISSIONS

II.2. FACTS PLEADED BY THE CLAIMANT

- 2.2.1 Dr. Catlin advised that he was unable to tell anything from the report of the IBC lab without the presence of the mass spectrometer results.
- 2.2.2 Dr. Catlin and Dr. Bowers testified that the parent drug 19 norandrosterone shows up in the urine as norandrosterone. The parent drug does not show up in the urine but the metabolite does.
- 2.2.3 Dr. Bowers testifies that it is very unusual to find as a contaminant in the analysis of a supplement capsule the metabolite norandrosterone, which shows up normally in the urine sample not in the capsule analysis. He also testifies that trace contaminants in supplements are found in various studies including the IOC study to be typically at .01/ng and .05/ng whereas in this case the IBC lab result is 28 milligrams, not micrograms, or 28,000% higher than any IOC study of trace contaminants.

II.3. FACTS PLEADED BY THE RESPONDENT

- 2.3.1 Counsel asserts that Mr. Moninger has an impeccable and long-standing reputation in the cycling community in his more than 21 years in cycling including his professional career since 1991. It is further asserted that he has a good name, reputation and is viewed as a person of honour and integrity within the cycling community.
- 2.3.2 The Respondent asserts that he had taken an amino acid supplement (L-Tyrosine) for many years. He regularly

obtained L-Tyrosine from Vitamin Cottage³ a Colorado based health food store.

2.3.3 On attempting to purchase unsuccessfully his regular brand he purchased another brand known as "Doctor's Brand L-Tyrosine". He read the label carefully which indicated the product contained only "pure" L-Tyrosine. He advises he took this version of the amino acid supplement for one month prior to the competition in which his urine sample was collected. He further believes he did not take the supplement after the Thursday prior to the race on Saturday.

2.3.4 As indicated in the stipulated facts the Respondent had the "Doctor's Brand" L-Tyrosine tested by the Integrated Biomolecule Corporation ("IBC"). The Respondent asserts that the analytical results confirm that he is the innocent victim of a mislabeled supplement that he took prior to the race.

II.4 POSITIVE LAB FINDING

2.4.1 The UCLA Lab found the presence of 19-norandrosterone at an amount in excess of 5 ng/ml in the Respondent's urine specimen

2.4.2 The 19-norandrosterone is a metabolite of the Prohibited Substances: nandrolone, 19-norandrostendione, and 19-norandrostendiol, and certain other steroids all of which are listed on the UCI list of Prohibited Classes of Substances and Prohibited Methods.

³ The Respondent's brief asserts that Vitamin Cottage is a family owned business, which has been in business since 1955 and represents itself as a "National Grocer". The Respondent further describes the store as being a health food store and not a gymnasium, health club or internet site.

2.4.3 UCI has a strict liability definition of doping and the presence of a Prohibited Substance in an athlete's urine constitutes a doping offense. By the commencement of the hearing the Claimant had established a *prima facie* case that a doping infraction had occurred under the UCI AER.

2.4.4 The Respondent asserts that the presumption of strict liability in the UCI AER Rules when read in conjunction with the general principles of fairness associated with having to rebut the presumption means that the strict liability concept ought to be read out of the rules.

III. PROCEEDINGS

3.1 The Respondent chose to contest through this arbitration the sanction of disqualification from the Saturn Cycling Classic Race; a two year suspension and a fine of CHF 2,000.

3.2 Pre-hearing telephone conference calls took place on 10 December 2002 and on 10 March 2003. An evidentiary hearing was held on 13 & 14 March 2003 in Denver, Colorado. Aside from the members of the Panel, present at the hearings for the Claimant were: as counsel; Matthew Barnett, Esq., Holme, Roberts, Owen, and Travis Tygart, Esq., Director of Legal Affairs, USADA; as witnesses; Dr. Don H. Catlin, Director of the UCLA Olympic Analytical Laboratory {by telephone}; Dr. Larry D. Bowers, USADA Senior Managing Director Technical and Information Resources. For the Respondent, present at the hearing were his Counsel, Robert Stone, Esq.; as witnesses; Scott Moninger, Kelly Moninger (wife of Scott Moninger), Dr. Dinesh Patel, Ph.D., Integrated Biomolecule Corp. {by telephone}, Daniel Taylor, Endurance Research Labs, Dean Golich, Ph.D., Elizabeth Wrenn-Estes, Licenced UCI Commissar, Sean Petty, USA Cycling, Steve Johnson, USA

Cycling {by telephone}, Len Pettyjohn, Team Director, Race Promoter, Roy Knickman, Olympic Medalist in Cycling, Ron Kiefel, Olympic Medalist in Cycling {by telephone}, Allen Lim, Expert Cycling Kinesiology and Jonathon Vaughters, Professional Cyclist.

- 3.3 The parties had the opportunity to and made opening remarks in accordance with the Panel's procedural orders. The parties had filed pre-hearing briefs in accordance with the Panel's procedural orders. After closing arguments the Panel closed the hearing on 26 March 2003 and informed the parties that an award would be issued within the ten day time frame after the closing of the record as provided for in the USADA Protocol.

IV PROCEDURAL ISSUES & APPLICABLE LAW

- 4.1 The parties agreed that the Panel was properly constituted under the USADA Protocol and has jurisdiction to make a final and binding decision to determine if the Respondent has violated the provisions of the UCI AER. This matter involves the UCI AER Rules as they were pronounced in force as of 1 July 2001.
- 4.2 The Panel is under an obligation to decide this dispute according to the applicable regulations of the UCI in accordance with the USADA Protocol.

- 4.3 The relevant Rules of the UCI AER to be applied in this case read as follows:

Chapter II PRINCIPLES

Scope

- Art. 2** These regulations shall apply to all license-holders and all cycle races.

These regulations and these alone shall apply to all aspects of antidoping controls in every international event and to out of the competition tests by the UCI. National Federations shall neither deviate therefrom nor add thereto.

These regulations and these alone shall also apply to all aspects of antidoping controls in national events and to out-of-competition tests by the national federations. National federations may not depart from them or add clauses except as expressly permitted under these regulations. In issues which, under these regulations, are to be the responsibility of the national federations in their own respective national events, the national regulations shall follow the provisions of these regulations as closely as possible.

- Art. 3** **Prohibition of doping**
1. Doping contravenes the fundamental principle of Olympism and sports and medical ethics.
 2. Doping is forbidden.
 3. Recommending, proposing, authorising, condoning or facilitating the use of any substance or method covered by the definition of doping or trafficking is also forbidden.

- Art. 4** **Definition of doping**
- Doping is:
1. the use of an expedient (substance or method) which is potentially harmful to athletes' health and/or capable of enhancing their performance, or
 2. the presence in the athlete's body of a prohibited substance or evidence of the use or attempted use thereof or evidence of the use or attempted use of a prohibited method.

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The rider's personal duty

Art. 7 Regardless of the obligation on other licence holders to respect the provisions of these regulations, it shall be the personal responsibility of every rider to ensure that they neither use any prohibited substance or prohibited method nor permit any such substance or method to be used.

Warning: riders must refrain from using any substance, foodstuff or drink of which they do not know the composition. It must be emphasised that the composition indicated on a product is not always complete. The product may contain prohibited substances not listed in the composition.

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Chapter VIII DISCIPLINARY MEASURES

A. PRINCIPLES

Art. 124 Within the limits set by the present regulations, the penalties imposed must be proportionate with the offence committed, taking account of both the specific details of the case in hand and the characteristics of cycle

sport and its various disciplines. Therefore the following elements, inter alia, will be considered:

- the circumstances surrounding the offence,
- the character, age and experience of the transgressor,
- the gravity of the consequences of the penalty of his social, sporting and economic position,
- the risk to a professional career,
- the rider's normal discipline and programme, particularly as regards the length of the season for that discipline and the number and importance of the events.

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B. OFFENCES

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Doping in general

Art. 130 In cases of doping other than those covered by Article 129, the rider shall be penalised as follows:

1. first offence, other than intentional doping:
 - suspension for at least two years.

2. second offence or intentional doping:
 - suspension for a minimum of four years up to and including suspension for life.

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C. GENERAL

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Disqualification

Art. 143 Any case of doping of a rider during competition shall automatically and independently of any penalty imposed, and even where it is not explicitly noted in the decision, lead to that rider's disqualification. A rider who is found to have committed an act covered under Article 131 or under Article 133 while participating in the competition in question shall also be disqualified automatically.

...

Art. 151 Where the period of suspension imposed is less than one year, the normal period of inactivity of the rider in question will automatically be added to it, in accordance with the following provisions:

- a) if the period of suspension imposed includes the first day of the normal period of inactivity, the period of suspension shall be extended by the duration of the normal period of inactivity;
- b) if the period of suspension imposed starts during the normal period of inactivity, the period of suspension shall be extended by a duration equal to that between the start of the suspension and the end of the normal period of inactivity.

Art. 152 The normal period of inactivity is determined as follows:

- a) for a rider whose primary activity is road racing, from 1 November to 31 January;
- b) for a rider whose primary activity is mountain biking, from 1 November to 31 January;
- c) for a rider whose primary activity is cyclo-cross, from 1 March to 30 September;

- d) for a rider whose primary activity is BMX, from 1 November to 28 February.

V DECISION

- 5.1 The Prohibited Substance 19 norandrosterone was found to be present in the body of the Respondent as a result of an undisputed analytical finding by the UCLA lab. Doping is defined in Art. 4 of the UCI AER as the "presence in the athlete's body of a prohibited substance ...". Therefore, an infraction has occurred under the Rules and a Doping violation must be found by this Panel to have occurred.
- 5.2 The definition of doping is a strict liability offence under the UCI AER rules as has been held to be so in the decision involving the UCI in *UCI v. Moller*.⁴ An argument was made on behalf of the Respondent that under United States law there could not be a presumption of strict liability. The Panel rejects that position and notes the well-established international interpretation of the UCI AER Rules, which it is required to apply in this case as reflected in the jurisprudence.⁵ It also notes that the Respondent has agreed to observe the Rules of the UCI AER by private contractual agreement. This sets his case before the Panel in a very different context than the US case law cited to the Panel.

⁴ CAS 99/A/239 and *UCI v. Outchakov* (CAS 2000/A/272). A number of cases involving other sports organizations have also endorsed the elimination of intent as a aspect of proving liability in doping cases. See *USADA v. Dickey* AAA 30 190 00341 02; *Javanovic v. USADA* CAS 02/A/360; and *Meca-Medina v. FINA* CAS 99/A/234.

⁵ CAS 99/A/239. See also *USADA v. Dickey* AAA 30 190 00241 02; *UCI v. Outchakov* (CAS 2000/A/272) and *Brook Blackwelder v. USADA* AAA/CASNA No. 190 00012.

- 5.3 Article 143 indicates that in any case of doping established by an analysis of a sample given at a competition will result in disqualification from the competition in which the sample was obtained. Therefore, the Respondent is disqualified from the Saturn Cycling Classic on 8 August 2002. The Respondent's results in that race are hereby void and nullified.
- 5.4 At issue in this proceeding is a determination by the Panel of the appropriate sanction under the UCI AER. Article 130 directs that, other than intentional doping, which was not contested as being the case, then a suspension for a doping infraction is a "suspension for at least two years". Article 125 indicates that such a suspension can be "reduced below the minimum laid down [two years in this case] ... as long as such reduction is expressly based on aspects covered by article 124". Article 125 goes on to indicate that in no case may the sanction be reduced below 6 months.
- 5.5 The athlete has two approaches to the determination of the appropriate sanction. First he has attempted to provide an explanation as to how a Prohibited Substance might have been in his urine thereby explaining how the analytical finding might have occurred. Second he has called testimony directly connected to Article 124 to plead a reduction of the sanction which at its least could not be less than six months.
- 5.6 Turning first to the evidence provided by the Respondent to explain the positive analytical result. The UCLA Lab analysis of the Tyrosine Bottle 1 and the IBC lab result are in conflict with the UCLA Lab unable to confirm the IBC analytical result. The contaminant reported by the IBC is not the parent drug but the metabolite of it usually found in the urine. The level of contamination reported by the IBC is massively in excess of heretofore known examples of trace

contaminants found in supplements. The evidence at the hearing unequivocally demonstrated that the chain of custody of the open bottle of 15 capsules was totally inadequate. Therefore, the Panel finds that the Respondent has not established its burden to the comfortable satisfaction of the Panel, which is the standard to be applied.⁶ Following this finding the Panel is left in the same circumstances as in the *Blackwelder*, case, *supra* in that it has no explanation for the analytical positive result.

- 5.7 Turning to the athlete's second approach to the reduction in the sanction the Panel must undertake an analysis of Article 124 despite the rejection of the explanation discussed heretofore.
- 5.8 Article 124 directs this Panel to ensure that "the penalties imposed ... be proportionate with the offense committed". In so doing the Panel is to take account of "both the specific details of the case in hand and the characteristics of cycle sport and its various disciplines".
- 5.9 The starting point in undertaking this analysis of proportionality must be Article 7. That article places the following personal responsibility on a cycling athlete: "to ensure that they neither use any prohibited substance or prohibited method nor permit any such substance or method to be used". This is an unequivocal statement of responsibility. It is then coupled with the following warning:

"riders must refrain from using any substance, foodstuff or drink of which they do not know the composition. It must be emphasized that the composition indicated on a product is not always complete. The product may

⁶ *Brooke Blackwelder v. USADA AAA/CASNA No. 30 190 00012. USADA v. Dickey AAA 30 190 00241 02.*

contain prohibited substances not listed in the composition”.

This warning is particularly germane in this case. There was a change in the supplement regimen. While the Panel is not satisfied that the changed supplement was the cause of the analytical result it is the responsibility of the athlete to be careful in respect of the entire regimen that is used.

5.10 Article 124 provides guidelines to assist in the proportionality analysis by setting out five elements to be considered. The most applicable of those elements in this case is the one about the “character, age and experience of the transgressor”.

5.11 Scott Moninger has raced for more than 21 years and been a professional cyclist since 1991. He is 36 years of age and nearing the twilight of his career as a professional cyclist. He feels at best that he may perhaps have two more years in which to race. During his career he has been tested in excess of one hundred times all of which were negative other than the one at hand. He has throughout his career used the same nutritional supplements for many years. A list of the supplements was provided. The only change in that list was the Doctor’s Brand L-Tyrosine labeled “pure amino acid” discussed previously.

5.12 An impressive list of fellow competitors some of whom were Olympic medallists; administrators in the USAC, coaches in the sport and a representative of the event sponsor at which the positive analytical result occurred testified as to the quality of the character of Mr. Moninger. The Panel is satisfied that the Respondent has an impeccable and long-standing reputation in the cycling community. The evidence clearly indicates that he is one of the most respected and trusted members of the American cycling community.

- 5.13 In a set of rules like those of the UCI AER where the Panel must consider the doctrine of proportionality as it is described in Article 124 consistency in the determination of the appropriate quantum of the sanction is crucial to the proper administration of the rules. Therefore, it is very important to examine the sanctions in the reported cases in cycling as applied by either the North American Court of Arbitration for Sport or its international counterpart. Consistency in the approach to sanctioning is very important for the sport.
- 5.14 In the two previous USADA cycling cases⁷ reported to the time of writing this decision the sanction in *Blackwelder*, supra, was eight months at a time when the rules provided for the selection of a suspension of between 6 months and one year; In *Dickey*⁸ supra, where the suspension was under the UCI AER rules as they apply in this case the sanction was twenty-two months from the date argued by the respondent as the appropriate date from which to calculate the suspension. This later case was a much more egregious case in terms of the conduct of the athlete than has occurred in this case involving deliberate use of a substance and more than one substance being found.
- 5.15 In the international cases⁹ that have been published to the time of writing, all of which were under the sanctioning rules as they were in the *Blackwelder* case, the suspension sanctions have been within the 6 months and a year range while never being the full year. There is one international

⁷ *Blackwelder v. USADA* (AAA/CAS No 30 190 000 12) and *USADA v. Dickey* (AAA 30 190 00341 02)

⁸ *USADA v. Dickey* (AAA No. 30 190 00341 02).

⁹ *UCI v. Moller* (CAS 99/A/239) Athlete suspended for 8 months and 2 weeks; *Meier v. Swiss Cycling* (CAS 2001/A/345) Athlete suspended for 8 months taking into account period of inactivity; *UCI v. Hamburger* (CAS 2001/A/343) Athlete suspended for 6 months.

case¹⁰ under the rules applicable in this case and the minimum sanction of 6 months was imposed.

- 5.16 An analysis of the foregoing USADA and international cases reveals that there has not been a case where the full sanction of either one year or now two years has been applied.
- 5.17 Having regard particularly to the case law on sanctioning in cycling internationally and domestically and weighing the elements of Article 124: in particular the “character, age and experience” and “risk to a professional career”; and having rejected the explanation provided by the athlete; the Panel concludes that an appropriate sanction in this instance is one year.
- 5.18 The Claimant imposed a provisional suspension with the concurrence of the Respondent on the 6 October 2002. The Panel will take account of the commencement of the provisional suspension from that date and the suspension will end on 5 October 2003. Such a termination date while imposing a significant suspension on the athlete does permit him to compete before the close of the season in the calendar year 2003. Therefore, in all of the circumstances of this case a one year suspension is determined by this Panel to be proportionate with the offence committed.
- 5.19 Article 128 in paragraph 4 indicates that for a license-holder resident outside of Europe there may be a reduction in the minimum fine to be imposed. The Respondent had deliberately chosen to cycle in the United States and not in Europe. This provision applies and the Panel reduces the fine in accordance with the Article to CHF 700.

¹⁰ UCI & FCI v. Pantani (CAS 2002/A/403 & CAS 2002/A/408)

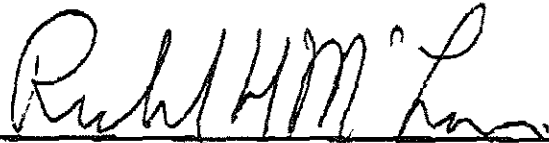
VI. FINDINGS

The Panel decides as follows:

- 6.1 A doping infraction occurred and the Respondent is disqualified from the Saturn Cycling Classic on 8 August 2002. The Respondent's results from that race are nullified.
- 6.2 A suspension of one year is ordered commencing the date following the date of this Award less the applicable time served under the provisional suspension which commenced on 6 October 2002. Therefore, the suspension will terminate on 5 October 2003.
- 6.3 A fine of CHF 700 is assessed in accordance with Article 128.
- 6.4 The administrative fees and expenses of the American Arbitration Association and the compensation and expenses of the arbitrators shall be borne by USADA.
- 6.5 The parties must each bear their own legal costs.

DATED THIS 2ND DAY OF APRIL, 2003

PRESIDENT OF THE PANEL



Prof. Richard H. McLaren
Barrister & Solicitor

ARBITRATORS



Edward T. Colbert, Esq.



Margery Gootnick, Esq.