BEFORE THE AMERICAN ARBITRATION ASSOCIATION
(hereafter "AAA")
The North American Court of Arbitration for Sport/AAA Panel

United States Anti-Doping Agency	)	
(hereafter "USADA")	)	
	)	
Claimant	)	
	)	
and	)	
	)	
	)	Interlocutory Award
Floyd Landis	)	Case No: 30 190 00847 06
(hereafter the "Athlete")	)	
	)	
Respondent	)	
	)	

APPEARANCES

Claimant:	Richard Young, Esq.; Mathew Barnett, Esq.
Respondent:	Maurice Suh, Esq.; Howard Jacobs, Esq.; and, James C. Ho, Esq.
Athlete:	Floyd Landis
UCI:	No appearance
USA Cycling, Inc.:	No appearance
WADA	No appearance

WE, THE UNDERSIGNED ARBITRATORS, having been designated by the above named parties and having been duly sworn and having duly heard the proofs and allegations of the parties MAKE THIS INTERLOCUTORY AWARD AS FOLLOWS:

Background

1. On 2 February 2007 the Panel issued Procedural Order No. 1 {Order No. 1 or Order}. In accordance with that Order, the parties filed various written briefs. The Respondent opened the process with its position on *Retesting of Urine Specimens that have Previously Tested Negative for Prohibited Substances* being filed on 5 February 2007. That document was followed by USADA setting out its position on 9th February 2007 regarding *Further Analysis of Mr. Landis's Other Tour de France Samples and Follow-up Samples obtained by USADA using the IRMS Method*. The Respondent filed its Rebuttal Brief on 13 February 2007.

2. Order No. 1 further directed USADA to produce *all documents responsive to the Respondent's request for documents dated October 23rd 2006 and January 22nd 2007 or explanations as to why some documents cannot be made available*. The Respondent's *Second Request for Production of Documents* dated 22 January 2007 was the subject of written explanations by USADA; the World Anti-Doping Agency {"WADA"}; and, the Laboratoire National de Dépistage du Dopage {"LNDD or the Lab"} on 7 February 2007. In reply to those submissions the Respondent filed its Response Brief on 13 February 2007.

3. The Response Brief of the Respondent raised a new issue regarding depositions. The brief contained requests for taking depositions of a number of laboratory technicians at the LNDD, the Lab director of the LNDD and two other WADA accredited laboratory directors Dr. Ayotte and Dr. Catlin amongst other persons who were sought to be deposed.

4. The Panel heard and considered the oral argument of the parties' counsel on the above matters and other issues at a hearing in the offices of the AAA at Los Angeles, California on 22 February 2007, continued the next day by a telephone conference call to complete the process.

5. The purpose of this Interlocutory Award is to resolve the aforementioned two matters that have arisen and require resolution before the arbitration can proceed further.

The Testing of Additional Samples

a. Availability of Samples

6. The LNDD tested eight urine samples provided by Mr. Landis during the Tour de France 2006. But for the one sample under consideration in this arbitration procedure, the Lab did not declare an analytical positive result in any of the other seven sample analyses.

7. For each sample that was tested, a Testosterone/Epitestosterone {"T/E

ratio"} analysis was conducted and used as a screen. The LNDD as a matter of standard practise only conducts further analysis of any sample using the *Carbon Isotope Ratio* {"CIR"}[1] analysis if the T/E ratio screen was 4:1 or higher. The seven samples now proposed to be tested in the "B" sample all had "A" sample analyses where the screen did not exceed the 4:1 ratio.

8. It is the standard practise of the LNDD that if the T/E ratio is 4:1 or less, then no CIR analysis is done unless there is some other non analytical chemistry reasons for doing so. This is a practical limitation on the laboratory brought about by the cost of the IRMS analysis and other considerations.

9. For the sample being considered under the USADA doping charge the T/E ratio was in excess of 4:1. Therefore, a CIR analysis was conducted. It resulted in the Lab declaring an adverse analytical finding.

10. In the charge letter of 19 September 2006 USADA states that:

> ***… USADA charges you with a doping violation for testing positive for exogenous testosterone or its precursors[2] as conclusively established by Carbon Isotope Ratio ("CIR") analysis and further corroborated by an elevated testosterone to epitestosterone ("T/E") ratio in this sample, which could only be compatible with exogenous administration …***

11. Of the seven samples not involved in the above charge by USADA only one sample has sufficient urine left for a CIR analysis of the "A" sample. In all seven cases, the "B" sample remains sealed and frozen and could be made available for additional testing.

12. There are also two out-of-competition samples that were given by Mr. Landis after the Tour de France in August of 2006. Those "A" samples were analyzed at the WADA accredited UCLA laboratory, and no analytical positives were declared by that laboratory. In the case of those samples a CIR analysis was done and produced a negative result. At the hearing in Los Angeles on 22 February the Panel advised USADA that those samples had resulted in negative analytical results and the remaining "B" samples were not to be considered within the Panel's current ruling.

b. <u>USADA desire to test additional samples</u>

13. USADA advised the Athlete's counsel by letter on 27 December 2006 that it intended to test the seven remaining "B" samples using the CIR analysis. They further advised that the Athlete might like to have his own observer

[1] CIR analysis is the test performed using an Isotope Ratio Mass Spectrometry ("IRMS") instrument. The terminology is frequently used interchangeably. It is also described on occasion as the test used for "synthetic testosterone".

[2] Some examples of precursors are: androstenediol, androstenedione, DHEA and testosterone esters. Such precursors metabolize in the body into testosterone. These precursors are found on the Prohibited List.

present to view the opening and analysis of these samples. Mr. Landis counsel objected immediately. It was agreed by the parties that the issue would be placed before this Panel for resolution.

c. Position of the Parties

14. USADA submits that there is nothing in the WADA rules or International Standards that restricts when a laboratory can use IRMS in connection with analyzing a sample. Additional tests would be reliable scientific evidence which may not establish a positive analytical result but can be used to prove or corroborate a doping offense. It is submitted that USADA does not need the permission of the Panel to engage in the further analysis. Furthermore, Article 17 of the UCI Rules permits a national anti-doping agency such as USADA to prove an anti-doping violation "by any reliable means". UCI Article 178 further supports this proposition by permitting rather than restricting the analysis requested.

15. The Respondent submits that there is a fundamental rule that "B" samples shall be tested only in the event that the corresponding "A" sample has previously tested positive for a Prohibited Substance ("the two-sample protocol"). There are both UCI rules – such as Rule 194 restricting the time for analysis of the "B" sample – and WADA International Standards for Laboratories rules – such as Rule 5.2.4.3.2.3 – that prevent a valid positive declaration of an adverse analytical finding unless the "B" sample is confirming the "A" sample. It is further submitted that Article 8(b) of USADA's protocol provides that there is no positive result until after the "B" sample confirms the "A" sample. Therefore, to declare a sample positive there must be both an "A" and "B" specimen available. There are no "A" samples available in six of the seven samples and thus they can never be declared positive. An analysis of the "B" specimen can only be performed if that further analysis can lead to a positive result for the sample, which it cannot, because the "A" samples were never tested using CIR analysis. The two-sample protocol is designed to protect the rights of athletes against false positives and flawed methodologies such as those used by the LNDD.

d. Ruling

16. The Panel agrees with the Respondent's submission that the additional testing of any of the remaining "B" samples cannot result in an adverse analytical finding. In order to have an adverse analytical finding the UCI Rules and USADA protocol require a positive result in the "A" sample which is confirmed by the testing of the "B" sample, thereby becoming an adverse analytical finding.

17. The Panel does not agree with the proposition of the Respondent nor find that the testing of the "B" samples violates the alleged fundamental rule that "B" samples shall be tested *only* in the event that the corresponding "A"

sample has previously tested positive for a Prohibited Substance. There is no such fundamental rule and none was pointed to by the counsels for the Respondent. Rather they sought from the Panel a ruling that we should put such an overarching construct on the applicable UCI and related rules. The Panel finds that samples may be tested for reasons other than adverse analytical results where a "B" sample must be used to confirm an "A" finding. Under the UCI Rule 167 the sample collected from the Athlete under the *Anti-Doping Rules shall become the property of the UCI upon collection* and is no longer within the control of the Athlete. Aside from Rule 167 the Athlete has agreed to this consequence by contract through his license to cycle and the athlete agreement. Therefore, the UCI and through them USADA may engage in additional testing of the "B" sample only for purposes other than confirming an adverse analytical result.

18. In making the foregoing ruling the Panel notes the Respondent's submission that the two-sample protocol contained within the applicable rules is designed to protect the rights of athletes against false positives and flawed methodologies. However, further "B" sample testing is not within the two-sample protocol because the result does not lead to an adverse analytical finding. The argument of the Respondent is one to put up a protective shield that would never permit anyone knowing what the "B" tests might reveal. That is not a search for the truth or to understand all the facts involved in the matter.

19. Further in making the foregoing ruling, if the methodologies of the Lab are indeed flawed, as alleged by the Respondent, then, the appointment of an expert by the Panel to review the operation of the Lab's IRMS and GC/MS equipment will provide the protection for the Athlete. The Panel's expert will identify if there are flaws in the testing equipment. Therefore, the interests of the Athlete are protected in permitting an analysis of the "B" samples through the role of the Panel's expert. That expert will have determined if the methodologies are flawed.

20. Even in the absence of the foregoing determination in paragraph 18, this Panel does not have under the applicable rules the juridical power to restrict the gathering of potential evidence by any party to the proceeding. USADA does not require the permission of the Panel to engage in further analysis of the "B" samples or any other aspects of their gathering of potential evidence. Equally the Panel does not have the legal authority to issue an injunction to stop USADA in its process of gathering potential evidence as requested by the Respondent.

21. The authority of the Panel is to rule on the admissibility of evidence proffered by the parties' counsels. It is not within the authority of the Panel to rule on the gathering of potential evidence by any party. Once potential evidence is obtained and, when it is proffered as evidence in the arbitration proceeding, then the Panel must rule on its admissibility as evidence.

22. Therefore, in some respects this issue amounts to a premature application as to the admissibility of evidence if it were to be obtained. In the normal course of events this Panel would be inclined to advise the parties that it would reserve on any rulings as to admissibility of evidence until the time it is proffered as such in the arbitration proceeding. However, we were persuaded by the submissions of Respondent's counsel that in this case the cost of testing and having experts present is so enormous that it is unrealistic to go through the process only to learn at a later date that the Panel will not accept the proffered potential evidence as being admissible evidence. For this reason we are persuaded to make the following preliminary ruling on admissibility.

23. The Panel makes this advance evidentiary ruling subject to further submissions from the parties at the time of the proffering of the evidence at the arbitration. The Panel in making this advance ruling reserves the right to affirm or re-determine the ruling at the time of the request to admit the evidence as part of the arbitration proceeding.

24. The "B" samples CIR analysis results are admissible as evidence:

- **(i) to test the credibility of the Athlete and other witnesses testimony;**
- **(ii) to satisfy the shifting burden of proof arising from the rebuttable presumptions that a departure from an International Standard with regard to analytical or custodial procedures of a laboratory has occurred as provided by Article 3 of the WADA Code;**
- **(iii) to corroborate[3] the analysis of the "B" sample that was performed by the Lab by providing additional scientific evidence, albeit insufficient to establish an adverse analytical finding;**
- **(iv) to establish the fact of doping by another reliable means; and**
- **(v) may be admissible for reasons unknown at this time.**

25. In view of the foregoing determinations, the Panel finds that should any additional testing be carried out by USADA through the authority of the UCI that the Athlete have the same rights of attendance and participation as were extended to him at the time of the confirmation analysis of the "B" sample at issue in this proceeding.

Request for Depositions

[3] Note that such corroboration may not overrule or out weigh the anti-doping rules of the UCI or the WADA International Standards that are applicable to the Lab procedures and are alleged by the Respondent to have been violated.

a. The Position of the Parties

26. The Respondent alleges that the LNDD uses outdated software in both its GC/MS and IRMS instruments and this justifies the deposition of certain laboratory technicians. Furthermore, the Lab documents disclosed to date reveal white outs and erasures that obliterate the original entries and are contrary to the WADA International Standards and the International Organization for Standardization rules governing laboratories. In these circumstances, it is submitted that the documents alone cannot answer the questions that arise and therefore, justify the deposition of all laboratory personnel that handled the sample used to lay the USADA charge.

27. The Respondent further alleges that Lab documents have been tampered with. After the receipt by the Athlete of the laboratory document package from USADA on 28 August 2006 Mr. Landis publicly alleged that some of the documents contained incorrect critical data. On 20 September 2006 the Athlete received a second set of laboratory documents from the Agence Francaise de Lutte contre le Dopage {"AFLD"} who were conducting a parallel proceeding in France pursuant to the French Public Health Code. The same documents from the USADA package had the previous errors "corrected" and yet both documents apparently bore the stamp that indicted that they were originals. It was submitted that these events justify the deposition of the Lab Director.

28. It is also alleged that analysts who conducted the "A" sample analysis were incorrectly involved in the "B" sample analysis. If such were the case it could be a failure by the Lab to comply with the WADA International Standard for Laboratories which requires that a different analyst must perform the "B" analytical procedure than the one who performed the A sample analysis. This is an additional basis for justifying the deposition of certain Lab analysts. There is also a request to depose two other WADA accredited laboratory directors: Dr. Ayotte and Dr. Catlin amongst some other personnel.

29. USADA responds submitting that this procedure is arbitration and not civil litigation. USADA will be calling some of these people as witnesses in their case and thus the Respondent will be able to cross-examine them. Furthermore, USADA is willing to permit cross-examination of the other persons named to be deposed if the Respondent so desires. That is the arbitration process and it ought not to be altered in any way.

b. Ruling

30. USADA has indicated that it will be calling as witnesses various lab technicians. They have also indicated that if they do not intend to call a person they will make them available at the arbitration if required for cross-examination by the Respondent. That is the normal procedure at arbitration

and particularly doping arbitrations such as this one.

31. Rule 23 dealing with the Exchange of Information of the AAA Supplementary Procedures for the Arbitration of Olympic Sport Doping Disputes as of August 2004 provides:

a. At the request of any party or at the discretion of the arbitrator, consistent with the expedited nature of arbitration, the arbitrator may direct (i) the production of documents and other information, and (ii) the identification of any witnesses to be called.

b. . . .

c. The arbitrator is authorized to resolve any disputes concerning the exchange of information.

32. The Panel has the authority to rule on the Exchange of Information based on Rule 23. That rule contemplates that arbitration is expedited in nature. Depositions are found in civil litigation but are far less common in arbitration. Consistent with the expedited nature of doping arbitrations we find that pre-hearing depositions of witnesses who are going to appear at the hearing are not part of the doping arbitration procedure contemplated by Rule 23. The hearing is the appropriate place where their testimony should be taken.

33. The request for all depositions made by the Respondent is hereby rejected.

DATED this 17th DAY of MARCH 2007.

For the Panel

IN _____ _____

Patrice Brunet, Esq.
Chairman

IN _____ _____

Prof. Richard H. McLaren, C.Arb Esq.

Dissenting, Chris Campbell, Esq.

UNITED STATES ANTI-DOPING AGENCY v. FLOYD LANDIS
American Arbitration Association No. 30 190 00847 06
Northern American Court of Arbitration for Sport Panel
RE: Interlocutory Award dated March 17th 2007

Christopher L. Campbell, concurring in part and dissenting in part.

1. DEPOSITION OF LABORATORY WITNESSES

I concur with the majority decision that depositions of the laboratory witnesses will not be allowed in this case. I disagree with majority's reasoning behind the decision.

This is one case where Mr. Floyd Landis' requests for depositions should be granted. There are numerous allegations of rule violations by the Laboratory. Some of those alleged violations appear on the face of the Laboratory documents. As such, Landis has made enough of an evidentiary showing to justify his need to obtain the information a deposition would provide before the hearing.

I agree with Claimant that this Panel does not have the authority to order the deposition of a non-party witness. I question whether the LNDD, as USADA's main witness and accuser in this case, would come under the protections typically afforded non-parties witnesses in arbitrations. Because USADA has not agreed to the depositions, there would also be great difficulty subpoenaing Laboratory personnel because they do not live in the United States. Therefore, the realities of the situation dictates we go forward with the hearing without taking the depositions.

However, should Landis request, the Laboratory witnesses should be put on first. This would give Landis' experts a little more time to analyze their testimony. Further, if as a result of their testimony, Landis requires additional time to prepare his case, I would grant an immediate continuance.

2. TESTING OF ADDITIONAL SAMPLES

I. ISSUE IN DISPUTE

The Issue is whether a WADA or IOC Accredited Laboratory can make an Adverse Analytical Finding from a B Sample when there is no corresponding positive A Sample.

Landis petitions this Panel to prohibit USADA from directing the Laboratoire National de Dépistage du Dopage ("LNDD") to conduct further tests on seven B Samples of his urine taken during the 2006 Tour de France. Six of those seven B Samples do not have any remaining A Samples. All seven samples tested negative for any prohibited substances. However, the LNDD did not use the more sensitive IRMS analysis on those negative screens. It is not clear to me whether the remaining A Sample contains enough urine to conduct a

valid test.

II. SUMMARY OF CONCLUSION

For the reasons stated below, I conclude that the International Standard for Laboratories, Version 3.0 ("International Standards") of the World Anti-Doping Agency Code ("WADA Code"), controls this dispute and precludes the LNDD from further testing of the remaining B Samples. This Panel should direct USADA to instruct the LNDD not to conduct the B Sample tests. Further, this Panel should rule that any evidence that results from any testing of the B Samples would be obtained in violation of the WADA Code and will not be admissible as evidence.

III. PARTIES ARGUMENTS

A. Landis argues that the testing of the B Samples without a positive confirmation of the A Sample violates the protection afforded all athletes under the WADA Code.

Landis objects to the testing of his additional B Samples by LNDD for a number of reasons. First, he argues that the purpose of the A and B Sample system under the WADA Code was specifically designed to protect the rights of athletes against errors in doping procedures. He argues the International Standards apply in this case and do not allow the LNDD Laboratory to conduct tests on just the B Samples for use as evidence, collaborative or otherwise, of doping. Landis also objects on the ground that it would complicate the proceeding and cost him more money to monitor the tests. He objects on the ground that his identity has been disclosed. This disclosure would render any further testing of his samples by the LNDD a conflict of interest, as there would be obvious bias. He argues that the confidentiality of the results of these additional tests would likewise not be protected.

B. USADA argues that testing the B Samples would not be used as proof of doping, but merely corroborative evidence of doping regarding the sample in dispute in this case.

USADA argues they have the authority to direct LNDD to test the B Samples "to determine [if] the presence of exogenous testosterone can be detected in those samples." (USADA v. Landis, Transcript of the Proceeding, No. 30 190 00847 06, dated February 22, 2007 ("Hearing Transcript"), Page 8, Line 6 -8). It is USADA's position that if the LNDD reports the B Samples show evidence of exogenous testosterone, that would be "reliable evidence of the detection of testosterone in one specimen or in the other specimen." (Hearing Transcript, Page 15, Line 15-16). In other words, the B samples, which could not be used to convict Landis of a doping violation independently, could be used to corroborate the sample in question in this case.

This corroborate evidence from the LNDD report would come in under the WADA Code's, "other reliable scientific evidence like analytical evidence that doesn't rise to the level of a positive test for the proof of that kind of a case." (Hearing Transcript, Page 16, Line 5-9). USADA argues that the International Standards are silent on this issue and

therefore LNDD is not prohibited from conducting such tests. USADA also argues that by his membership in Union Cycliste Internationale ("UCI"), Landis has given UCI and WADA the right to test samples at any time for any reason, because UCI owns Landis' urine sample.

IV. LEGAL ANALYSIS

A. LABORATORY OBLIGATIONS IN TESTING

1. The International Standards are a mandatory provision of the WADA Code and governs the activity of a WADA or IOC Accredited Laboratory.

The parties agree that the WADA Code has been adopted by the UCI and therefore governs this dispute. As a threshold matter, it cannot be disputed that the two sample method (A and B) is part of the WADA Code testing protocol for the express purpose of protecting the "rights of the athletes."[1]

The International Standards are a mandatory component of the WADA Code. (International Standards, Page 4, Introduction, Scope and References). Therefore, regardless of any rights that Landis may have forfeited, the International Standards establish the minimum operating standards for laboratory performance. (Id.). Neither the World Anti-Doping Agency ("WADA") nor UCI can direct the LNDD to violate a mandatory provision of the WADA Code. Further, both parties seem to agree that if the International Standards did address this issue that would be dispositive.

2. The finding of the presence of a prohibited substance or the use of a prohibited method is an Adverse Analytical Finding.

The International Standards define an "Adverse Analytical Finding" as follows:

> A report from a Laboratory or other approved Testing entity that identifies in a Specimen the presence of a Prohibited Substance or its Metabolites or Markers (including elevated quantities of endogenous substances) or evidence of the Use of a Prohibited Method.

(International Standards, Section 3.1, page 8).

It cannot, in good faith, be disputed that USADA is looking to have the LNDD report the presence of a Prohibited Substance or its Metabolites or Markers in Landis' B Samples. That is an "Adverse Analytical Finding," as defined by the International Standards.

3. The LNDD cannot report an Adverse Analytical Finding on Landis' B Samples

[1]WADA Clarifies B-Sample Procedure, November 22, 2006, WADA Director General David Howman, http://www.wada-ma.org/en/newsarticle.ch2?articleId=3115361

Should the LNDD report an Adverse Analytical Finding in the B Samples, USADA would introduce that report in this Adjudication Process as collaborative evidence of the alleged positive test in dispute in this case. The International Standards, Section 7.0, titled "Requirements for supporting an Adverse Analytical Finding in the Adjudication Process," mandates the following requirement for Laboratories:

> In support of ***any*** Adverse Analytical Finding the Laboratory is required to provide the Laboratory Documentation Package described in detail in the Technical Document on Laboratory Documentation Packages. (Emphasis added)

(International Standards,¶ 7.1, page 46).

The WADA Technical Document - TD2003LDOC ("Documentation Package"), mandates that ***"All Documentation Packages provided shall contain the following information: . . . "A" Sample Confirmation Procedure Data . . . . [and the] "B" Sample Confirmation Procedure Data***." (Emphasis added). The International Standards defines a "Confirmation Procedure" as follows:

> An analytical test procedure whose purpose is to identify the presence of a specific Prohibited Substance in a Sample. [Comment: A Confirmation Procedure may also indicate a quantity of Prohibited Substance greater than a threshold value or quantify the amount of a Prohibited Substance in the Sample.]

(International Standards, ¶3.2).

Regarding the "A" Sample Confirmation, the International Standards, ¶ 5.2.4.3.1 states:

> Presumptive identification from a Screening Procedure of Prohibited Substances, Metabolite(s) of a Prohibited Substance, or Marker(s) of the Use of a Prohibited Substance or Method ***must*** be confirmed using a second Aliquot(s) taken from the original "A" Sample. (Emphasis added)

(International Standards, ¶ 5.2.4.3.1).

It is clear that for at least six of the seven urine samples USADA is proposing to test, the LNDD could not be in compliance with International Standards, ¶ 5.2.4.3.1.

In addition, the Documentation Package also requires that the Laboratory provide the B Sample Confirmation Procedure Data. LNDD would be required to produce to Landis the B Sample results. Regarding those results, the International Standards mandate that those B Sample results "must confirm the A Sample identification for the Adverse Analytical Finding to be valid." International Standards, ¶5.2.4.3.2.3. Again, under USADA's proposed testing scheme, LNDD could not be in compliance with International Standards, ¶5.2.4.3.2.3.

The absurdity of allowing the testing of a B Sample with no corresponding A Sample confirmation is demonstrated by taking the analysis of the LNDD's obligation to its natural conclusion. The International Standards, ¶5.2.4.3.2.7, states, "If the 'B' Sample confirmation does not provide analytical findings that confirm the 'A' Sample result, the Sample shall be considered negative and the Testing Authority notified of the new analytical finding." To be in compliance with this mandatory provision, regardless of the outcome of the tests, the LNDD would have to notify USADA that the tests were negative.

4. Because the LNDD could not report an Adverse Analytical Finding they would be in violation of the WADA Code if they conducted further testing on the B Samples for use by USADA in these proceedings.

Going through this analysis demonstrates that the LNDD would be in violation of the WADA Code if it tested those remaining B Samples. WADA Code Article 6.4 titled, "Standards for Sample Analysis and Reporting" provides:

> Laboratories shall analyze Doping Control Samples and ***report results*** in conformity with the International Standard for laboratory analysis. (Emphasis added)
>
> (WADA Code, Article 6.4).

The LNDD would not be in compliance with the International Standards because they would not be able to test an Aliquot of the A Sample. They would not be able to conduct a Confirmation procedure on the A Sample. They would not be able to provide Landis with the A Confirmation Package or the B Confirmation Package. In short, the LNDD would not be able to comply with the majority of the procedures required to support and report an Adverse Analytical Finding.

The stated policy of having A and B Samples is for the protection of the rights of all athletes. This system is in place to "protect individuals" in the case where the analysis of the B Sample does not match the A Sample.

"The fight against doping is arduous, and it may require strict rules. But the rule-makers and the rule-appliers must begin by being strict with themselves." Arbitration CAS 94/129, *USA Shooting & Q./ International Shooting Union (UIT*), award of May 23, 1995. USADA is requesting that we look the other way concerning this proposed rule violation. While the rules were put in place to advance the fight against doping; they were also put in place to protect athletes.

Any organization or individual dedicated to protecting the interest of athletes should not approve of USADA's tactic in this particular situation. This Panel should direct USADA to instruct the LNDD not to conduct the B Sample tests. Further, this Panel should rule that any evidence that results therefrom is a serious breach of the protocol established by the WADA Code and as such would not be admissible as evidence.

B. CONFLICT OF INTEREST

In regards to the sample in question in this case, Landis alleges that LNDD: (1) used improper pressurization of its IRMS instructions, (2) notified the media of his alleged positive test in violation of the WADA Code, (3) did incomplete derivation, (4) failed to apply a measurement of uncertainty, (5) ignores its calculation for measurement of error, (6) exceeded the 5% Threshold in its calculation for the B Sample test for degradation, (7) used computer software to analyze his test that was not designed for the IRMS instrument the laboratory used, (8) produced documentation packages riddled with errors including wrong identification numbers, (9) tampered with laboratory documents, (10) had another athlete's cases thrown out because of laboratory error, (11) committed errors in the variance of the test outside of permitted boundaries, etc. While the Panel has not come to any conclusion regarding these allegations, given the documents produced to date, these allegations are not frivolous. If proved, they would represent serious deficiencies under the WADA Code.

Should this Panel find that Landis' allegations have merit, LNDD could face severe consequences. The International Standards state:

> The WADA Executive Committee revokes accreditation of any Laboratory accredited under these provisions if WADA determines that Revocation is necessary to ensure the full reliability and accuracy of drug tests ***and the accurate reporting of test results***. Revocation of accreditation may be based on, but not limited to, the following considerations: . . . Unsatisfactory performance in analyzing and reporting results of drug tests . . . . (Emphasis added)
>
> (International Standards, ¶6.4.8.3)

In short, should Landis prevail in this case the LNDD laboratory is facing serious consequences. In addition, the International Standards for Testing, Version 3.0, June 2003 ("Testing Standards") requires that the IOC Accredited Laboratory conducting the tests not know the identity of the athlete. The rule states:

> Documentation identifying the Athlete shall not be included with the Samples or documentation sent to the WADA accredited laboratory or as otherwise approved by WADA.
>
> (Testing Standards, ¶ 9.3.4)

We know that the LNDD is aware that the B Samples belong to Landis. We know that USADA will instruct the LNDD to conduct the tests on the additional B Samples of Landis. We know that USADA would in fact be requesting that LNDD validate their process. We know that this case is a highly politicized issue in France. Landis is facing a sanction from authorities in France and any laboratory shortcoming would be an embarrassment to France. We know that these tests will determine the winner of the Tour de France. We know that the normal safeguards of the A and B Samples will not be provided.

Given all of these facts, I agree with Mr. Suh, "we are looking at the worse case scenario with respect to motivation here or possible wrong motivation." Landis' request that the LNDD not conduct further testing is rational. Any reasonable person in his situation would make such a request.

Without question, even in the absence of all the rules that would be violated to conduct the tests, USADA's request to the LNDD to conduct additional testing represents a conflict of interest. As stated by Mr. Suh, this is no ordinary conflict of interest; this is a conflict of interest "on steroids."

C. THE LABORATORY IS AWARE THEY ARE TESTING LANDIS' SAMPLES

The identity of the athlete should not be known to the Laboratory when the A Sample is tested. (Testing Standards, ¶9.3.4.). This is to instill confidence of the athletes in the system. This ensures the athletes that they will not be targets for financial, competitive or political reasons. Laboratories should be independent when conducting tests without anticipating whether a test would, or should, be positive. This rule protects against there being any motivation for declaring any test positive or negative.

Anonymity is a material provision of the WADA Code. In addition, anonymous tests are an essential part of sound scientific practice. I would therefore preclude the testing of all Samples that the LNDD is aware belongs to Landis, including what may remain of the one A Sample of the B Samples USADA proposes to tested.

D. CONCLUSION

For the reasons stated above, it is inappropriate for USADA to direct further testing of the B Samples. To produce reports from those B Samples, the LNDD would have to violate the WADA Code. I would order USADA to cease and desist from pursuing further testing of those samples. I would also rule that any reports from those B Samples would not be admissible as evidence in this case. The admission of evidence obtained in clear violation of the WADA Code smacks of an uneven application of the rules. To allow such conduct strips this adjudication of the appearance of fairness.

Dated: March 17, 2007

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Christopher L. Campbell, Esq.