

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

UNITED STATES ANTI-DOPING AGENCY,	)	
	)	
Claimant,	)	<b>INTERIM ARBITRAL AWARD</b>
	)	
JESSICA HARDY ,	)	AAA No. 77 190 00288 08
	)	
Respondent.	)	
	):	

THE UNDERSIGNED ARBITRATORS, having been designated by the above-named parties, and having duly heard the proofs and allegations of the parties, do hereby find and issue this Interim Award, as follows:

**1. THE FACTS**

- 1.1 Claimant, the United States Anti-Doping Agency (“USADA”) is the independent anti-doping agency for Olympic Movement sports in the United States and is responsible for conducting drug testing and adjudication of potential doping offenses pursuant to the USADA Protocol for Olympic Movement Testing (the “USADA Protocol”). USADA was represented by William Bock and Stephen Starks, both of whom are in house counsel at USADA.
- 1.2 Respondent Jessica Hardy was at the time of the events in question a 21 year old swimmer who had been a member of the U.S. National swim team since 2005, currently holding a number of World or American records. She qualified for the 2008 United States Olympic team in four events. Ms. Hardy was represented by Howard Jacobs of the Law Offices of Howard Jacobs.
- 1.3 Respondent was tested three times during the 2008 U.S. Olympic Team Trials (the “Trials”). On July 1, 2008, Day 3 of the Trials, Respondent finished first in the Women's 100m Breaststroke, qualifying her for the 2008 Olympic Games in that event. Immediately after her finish that day, Respondent was tested in-competition for the first time during the Trials. That sample was sent to the UCLA Olympic Analytical Laboratory ("UCLA") for analysis and received by UCLA the next day, July 2, 2008. UCLA reported that sample as negative on July 17, 2008 and USADA processed that result on July 18, 2008.
- 1.4 The next sample collected from Respondent was Sample # 1517756, on July 4, 2008, Day 6 of the Trials, after her fourth place finish in the Women’s 100 m Freestyle. This Sample is the subject of the matter before this Panel. Two days after providing Sample #1517756, on July 6, 2008, Day 8 of the Trials, Respondent finished second in the

Women's 50m Freestyle, and was tested in-competition for the third time during the Trials. That sample was also sent to UCLA for analysis and received by UCLA the next day, July 7, 2008. UCLA reported that sample as negative on July 17, 2008, the same day it reported the first sample negative, and USADA processed that result on July 18, 2008 as well.

- 1.5 UCLA sent notice to USADA that Respondent's A bottle of Sample #1517756 was positive after business hours on Friday July 18, 2008 and therefore USADA did not receive notice of the positive result until Monday, July 21, 2008. The urine sample was reported as positive for clenbuterol. USADA notified Respondent of the positive early in the day of July 21, 2008 via phone.
- 1.6 The B bottle of Sample #1517756 was opened on July 21, 2008. USADA sent Respondent written notice of her A Sample positive via email and overnight mail on the afternoon of July 21, 2008. On July 22, 2008, USADA received the documentation package for the A confirmation of Sample #1517756 and forwarded the package to Respondent's counsel via email. That same evening USADA received word from UCLA that the B bottle analysis confirmed that Sample #1517756 was positive for clenbuterol.
- 1.7 Clenbuterol, a beta-2 agonist and anabolic agent, is prohibited both in and out of competition.
- 1.8 When she was notified of the positive test, Respondent was attending a USA Swimming Pre-Olympic camp at Stanford University in Palo Alto, California. At the time of her notification, she was scheduled to leave with the rest of her Olympic teammates for the Olympic Games on July 25, 2008. Instead, she remained at home and ultimately decided to withdraw from the US Olympic team to try to determine the cause of her positive test.
- 1.9 On July 23, 2008 UCLA reported to USADA that Respondent's two samples from July 1, 2008 and July 6, 2008 which were reported negative, actually revealed the presence of "suspect clenbuterol transitions".

## 2. JURISDICTION

- 2.1 This Panel has jurisdiction over this doping dispute pursuant to the Ted Stevens Olympic and Amateur Sports Act (the "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>1</sup>

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<sup>1</sup> 36 U.S.C. §220521.

2.2 Under its authority to recognize a national governing body (“NGB”)<sup>2</sup>, the United States Olympic Committee (“USOC”) established its National Anti-Doping Policies,<sup>3</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>4</sup>

2.3 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>5</sup>

2.4 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.” The Supplementary Procedures refer to the American Arbitration Association Supplementary Procedures for the Arbitration of Olympic Sport Doping Disputes (the “Supplementary Procedures”), as approved by the USOC’s Athletes’ Advisory Council and NGB Council, which govern this Panel’s conduct of the proceedings.

### **3. THE PROCEEDINGS**

3.1 Respondent requested an expedited hearing which was held on July 31, 2008. The Panel agreed to bifurcate the issues to be determined in this case and issued an Award effective August 1, 2008, finding that Respondent had violated Federation Internationale de Natation (“FINA”) Doping Control Rules (“DC”) 2.1 for the presence of the prohibited substance clenbuterol and FINA DC 2.2 for use of a prohibited substance. In that same Award, the Panel ordered that the second phase of the hearing be limited to the issue of whether exceptional circumstances exist pursuant to FINA DC 10.5 that might reduce or eliminate the presumptive period of ineligibility from the two years imposed by the Panel, effective August 1, 2008 and ending July 31, 2010.

3.2 The second phase of the hearing resumed on January 27 and 28, 2009. It was then adjourned due to unavailability of Respondent’s expert witness and resumed on March 31 and April 1, 2009.

3.3 At the request of the Panel, the parties submitted post-hearing briefs and the hearing was closed on April 27, 2009.

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<sup>2</sup> 36 U.S.C. §220505(c)(4).

<sup>3</sup> The USOC has adopted the World Anti-Doping Code.

<sup>4</sup> *USOC Policies*, ¶13.

<sup>5</sup> *Id.* at ¶12.

4. **APPLICABLE RULES**

4.1 The relevant definition of doping, as set forth in the FINA DC, is as follows:

**DC 1 DEFINITION OF DOPING**

Doping is defined as the occurrence of one or more of the anti-doping rule violations set forth in DC 2.1 through DC 2.8.

**DC 2 ANTI-DOPING RULE VIOLATIONS**

The following constitute anti-doping rule violations:

**DC 2.1** *The presence of a Prohibited Substance or its Metabolites or Markers in a Competitor's bodily Specimen.*

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

**DC 2.2** *Use or Attempted Use of a Prohibited Substance or a Prohibited Method.*

**DC 2.2.1** The success or failure of the Use of a Prohibited Substance or Prohibited Method is not material. It is sufficient that the Prohibited Substance or Prohibited Method was Used or Attempted to be Used for an anti-doping rule violation to be committed.

**List of Prohibited Substances**

The FINA DC, through DC 4.1, has adopted the World Anti-Doping Agency's ("WADA") Prohibited List as described in Article 4.1 of the World Anti-Doping Code (the "Code").

The Prohibited List states as follows:

**Prohibited Substances**

**S1. ANABOLIC AGENTS**

Anabolic Agents are prohibited.

2. Other Anabolic Agents, includingN but not limited to:

Clenbuterol, selective androgen receptor modulators (SARMs), tibolone, zeranol, zilpaterol.

**DC 3 PROOF OF DOPING**

**DC 3.1** ... Where these Rules place the burden of proof upon the Competitor ... 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.

## **DC 10 SANCTIONS ON INDIVIDUALS**

**DC 10.2** .... the period of Ineligibility imposed for a violation of DC 2.1..., DC 2.2 ... shall be:

First Violation: Two (2) years' Ineligibility.

**DC 10.5** *Elimination or Reduction of Period of Ineligibility Based on Exceptional Circumstances.*

**DC 10.5.2** This DC 10.5.2 applies only to anti-doping rule violations involving DC 2.1..., DC 2.2.... If a Competitor establishes in an individual case involving such violations that he or she bears No Significant Fault or Negligence, then the period of Ineligibility may be reduced, but the reduced period of Ineligibility may not be less than one-half of the minimum period of Ineligibility otherwise applicable.... When a Prohibited Substance or its Markers or Metabolites is detected in a Competitor's Specimen in violation of DC 2.1 (presence of a Prohibited Substance), the Competitor must also establish how the Prohibited Substance entered his or her system in order to have the period of Ineligibility reduced.

**DC 10.8** *Commencement of Ineligibility Period*

The period of Ineligibility shall start on the date of the hearing decision providing for Ineligibility or, if the hearing is waived, on the date Ineligibility is accepted or otherwise imposed... Where required by fairness, such as delays in the hearing process or other aspects of Doping Control not attributable to the Competitor, the period of Ineligibility may start at an earlier date commencing as early as the date of Sample collection.

## **APPENDIX 1 - Definitions**

No Significant Fault or Negligence. The Competitor's establishing that his or her fault or negligence, when viewed in the totality of the circumstances and taking into account the criteria for No Fault or Negligence, was not significant in relationship to the anti-doping rule violation.

No Fault or Negligence. The Competitor's establishing that he or she did not know or suspect, and could not reasonably have known or suspected even with the exercise of utmost caution, that he or she had Used or been administered the Prohibited Substance or Prohibited Method.

## **OLYMPIC CHARTER, RULE 45**

1. Any person who has been sanctioned with a suspension of more than six months by any anti-doping organization for any violation of any anti-doping regulations may not participate, in any capacity, in the

next edition of the Games of the Olympiad and of the Olympic Winter games following the date of expiry of such suspension.

2. These regulations apply to violations of any anti-doping regulations that are committed as of 1 July 2008. They are notified to all International Federations, to all National Olympic Committees and to all Organizing Committees for the Olympic Games.

## **5. ISSUES TO BE DETERMINED**

5.1 The following are the issues which the Panel is to determine:

- (a) Has Respondent met her burden under DC 10.5.2 of proving by a balance of probability how the Prohibited Substance entered her system in order to have the period of Ineligibility reduced? As part of this burden, is it necessary for Respondent to prove that there was a sufficient quantity of the Prohibited Substance in her system to cause the concentration of the Prohibited Substance in her Sample #1517756?
- (b) Has Respondent established under DC 10.5.2 that her negligence, when viewed in the totality of the circumstances, was not Significant in relation to the anti-doping rule violation? Respondent does not argue that she bore no Fault or Negligence, so the issue is one of the degree of her negligence.
- (c) If the Panel finds that Respondent has met her burden of proof under DC 10.5.2, then the Panel is to determine the reduction in the period of Ineligibility.
- (d) The effect, if any, of Olympic Charter Rule 45 on the period of Ineligibility.

## **6. THE EVIDENCE**

6.1 The Panel notes that the parties presented evidence over a period of six days, most of which was scientific evidence. Only the relevant evidence the parties presented at the hearings is discussed below.

6.2 Respondent began taking supplements manufactured by AdvoCare in late 2007, at the urging of her coach. Though she had been competing successfully without taking supplements, she felt she needed to do everything possible to maximize her performance and opportunity to make the U.S. Olympic team. She knew other elite athletes who took supplements. It was her impression that 85-90% of elite swimmers take nutritional supplements.

6.3 She did receive USADA's literature which contained explicit warnings against taking supplements. She was fully aware of the dangers of taking supplements, especially since she trained with Kicker Vencill who had committed an anti-doping rule violation when taking contaminated supplements and was ineligible to compete for two years as a result. Ms. Hardy fully accepts responsibility for her negligence in taking supplements.

6.4 She wanted to be very diligent in doing her research before taking AdvoCare supplements. She asked AdvoCare, through her agent, for assurances that its supplements

were safe, pure and uncontaminated. When she ultimately agreed to endorse the AdvoCare supplements, she spoke to Rob Webb of AdvoCare directly.

- 6.5 She also requested and obtained an indemnity provision in her endorsement agreement with AdvoCare. She relied on this indemnity as a guarantee that the products were reliable, i.e. contained only those ingredients listed. The indemnity was with respect to the “management, administration, or promotion of AdvoCare’s product.”
- 6.6 She told the AdvoCare distributor, Tyler Deberry, that she needed a promise that the contents of the supplements would be as stated on the product label, which she checked. She was told by Mr. Deberry that AdvoCare has its products tested, the company goes to extra lengths to make sure its products are the best on the market and that the products are certifiably clean.
- 6.7 She talked to the other elite athletes she knew who were taking AdvoCare supplements and none of them had positive doping control results. They also told her of benefits obtained through the taking of the supplements.
- 6.8 She looked on the web site and concluded that the company appeared reputable. She did not see any bodybuilders or other evidence of the company’s distribution of Prohibited Substances. She noticed the claim that the supplements are “formulated with quality ingredients” which was the same claim AdvoCare made verbally. The site also prominently features the claims that: the products are safe; AdvoCare maintains the highest standards of manufacturing and scientific integrity; and AdvoCare’s solutions are safe and natural.
- 6.9 She spoke to the USA Swimming team nutritionist who said she could not say the supplements were safe, but that of all the companies, she thought AdvoCare was the best. The nutritionist saw positives in taking the supplements and, according to Ms. Hardy, stated that “if it were her, she would take them.”
- 6.10 Respondent also spoke to a sports psychologist at the United States Olympic Committee who said there were enough benefits from taking the supplements, so it would be worth it to take them, if Respondent thought it was a safe company.
- 6.11 Her conclusion from her extensive inquiries was to feel assured that the AdvoCare supplements were safe products. She received her supplements directly from the company, under the terms of her endorsement agreement with AdvoCare entered into in January 2008.
- 6.12 Prior to the positive doping control test at issue, Respondent was tested 11-13 times during the period she took the AdvoCare products and her results were all negative.
- 6.13 Among the AdvoCare products Respondent took was Arginine Extreme. After being advised of the positive result for Sample #1517756, Respondent had supplements from the same lot as she was then taking tested by Anti-Doping Research Inc. (“ADR”). Dr. Don Catlin of ADR also had some of the Arginine Extreme product tested by Equine Drug Testing Laboratory (“EDTL”).
- 6.14 Claimant raised questions about numerous aspects of the supplement testing by ADR as well as by EDTL. These included the chain of custody of the aliquots of the product samples tested at ADR, the chain of custody of the product sample supplied to EDTL as

well as the reliability of the scientific process used to test the supplements and therefore the testing results.

- 6.15 Most relevant however, is that three of the four scientific experts who testified, including Claimant's expert, Dr. Hans Geyer, Deputy Head of the Institute of Biochemistry of the German Sport University Cologne, a laboratory accredited by WADA, were satisfied that both labs produced results which were scientifically valid to show the presence of clenbuterol in the Arginine Extreme product.
- 6.16 Dr. Catlin testified that the testing of Ms. Hardy's supplements did not follow any national or international standard nor was there a specific accepted reliable method to guide ADR in its testing of the supplements. Rather, ADR tested the supplements repeatedly using different methods to see if clenbuterol could be reliably found in the samples of the Advocare products.
- 6.17 The evidence was that some of the lab's results were negative as ADR had tried different methods to test for the presence of clenbuterol. Some of their testing methods did however show clenbuterol in one of the Advocare supplements, Arginine Extreme.
- 6.18 ADR sent 4 gms. of Arginine Extreme to EDTL in order for Dr. Maylin to test the product on his advanced machinery. Dr. Sabrina Benchaar of ADR testified that ADR's procedures were to keep the chain of custody documents for this type of delivery separately and these documents were not provided during the hearing. Upon receipt of the Arginine Extreme from ADR, Dr. Maylin kept it in a file cabinet in his office and testified that the sample was not contaminated in his lab.
- 6.19 EDTL had much greater experience testing for clenbuterol in various products. Dr. Maylin used a long standing method and had the advantage of a more advanced mass spectrometer, the Agilent 6460 Triple Quadrupole LC Mass Spectrometer.
- 6.20 The testing method used by both labs was not validated, nor was it robust according to the scientifically understood meaning of that term. There was no probability study nor was there a measurement of uncertainty applied to either lab's work. Dr. Maylin testified credibly however that it is not necessary that the method be validated for it to be reliable under these circumstances, i.e. where the testing is for the presence of a substance in a specific powder. Because the testing was qualitative, i.e. to determine the presence of clenbuterol, rather than quantitative, the testimony was that there is no necessity to have either a probability study or the measure of uncertainty.
- 6.21 There was extensive evidence regarding the miniscule quantities of clenbuterol in the supplement, and their likelihood of producing the larger estimated concentration of clenbuterol found in Respondent's Sample (which itself was deemed low at 4ng/mL).
- 6.22 There was also testimony by both Dr. Geyer and Dr. Maylin that supplement contamination will not produce a uniform result or uniform quantities in different samples of the contaminated product. The changes in quantities of clenbuterol found in this particular supplement are indicative of uneven contamination in the product itself, according to Dr. Maylin.
- 6.23 The scientists were questioned about the miniscule quantities of clenbuterol found in Respondent's supplements and the quantities of the supplements Respondent would have to take to cause the appearance of the concentration found in her urine. They consistently



answered that any calculation would be only a rough estimate; there could be no precision. There were calculations made by both Dr. Geyer and Dr. Larry Bowers, Senior Managing Director of USADA, which indicated that, based on the quantity of clenbuterol found in the supplement samples, massive quantities of the supplement would have to be consumed at one sitting to yield the concentration of clenbuterol found in Respondent's urine during doping control on July 4, 2008.

- 6.24 There was also evidence that clenbuterol will be present in a urine specimen for 72 hours after its consumption. Respondent took 2-3 packets of Arginine Extreme on two of the 3 days prior to her positive doping control test, for a total of 4 to 6 packs over 72 hours.

## 7. ANALYSIS

- 7.1 Claimant argues that Respondent has not met her burden of proof, first as to whether the supplements Respondent took were contaminated and second regarding whether even if contamination was proven, this miniscule quantity of clenbuterol/contaminant could have caused Respondent's positive doping control result.

### *Proof of the presence of the Prohibited Substance*

- 7.2 Claimant bases its argument that Respondent did not prove the supplements she took were contaminated on the following: 1. the tests of the supplements performed by ADR were not scientifically reliable nor did they consistently show the presence of clenbuterol in the supplements; 2. there was an incomplete chain of custody in some of the aliquoting of the supplements at the ADR lab; and 3. there is inadequate chain of custody documentation of the Arginine Extreme supplements delivered to Dr. Maylin.
- 7.3 With respect to the first point, three of the four expert scientists who testified agreed that the results of ADR and EDTL showed the presence of clenbuterol in the supplements. It was acknowledged that testing for the presence of contaminants in supplements does not follow the same strict procedures as the WADA accredited anti-doping labs follow when testing athletes' urine specimens. This did not trouble the scientists (other than Dr. Bowers), under the circumstances of this case, i.e. the testing of a supplement product for the presence of a specific substance.
- 7.4 As to the second and third points with respect to the chain of custody documentation defects, though the records are not as clear and thorough as they might be, there was no inference to be drawn from such defects that the samples tested by ADR and EDTL were not the supplements of AdvoCare supplied by Respondent.
- 7.5 The Panel finds that Respondent did meet her burden by a balance of probability in showing the presence of clenbuterol in the AdvoCare Arginine Extreme supplements she was taking prior to her doping control of July 4, 2008.

### *Proof of causation of the positive doping control result*

- 7.6 Claimant argues that, even assuming the finding of a presence of clenbuterol in the supplements taken by Respondent, the Panel has to find that the miniscule amount of clenbuterol in the supplements was insufficient to cause the positive doping control result.

- 7.7 FINA DC 10.5.2 reads: “When a Prohibited Substance or its Markers or Metabolites is detected in a Competitor’s Specimen in violation of DC 2.1 (presence of a Prohibited Substance), *the Competitor must also establish how the Prohibited Substance entered his or her system* in order to have the period of Ineligibility reduced.” (emphasis added)
- 7.8 Respondent argues that this FINA DC Rule requires her to prove only how the Prohibited Substance entered her system, which she has done. The Code does not require her to prove that it entered her system in certain quantities to yield the level of the Prohibited Substance which caused the positive result.
- 7.9 The concentration of clenbuterol in Respondent’s urine was low. The amount of clenbuterol shown to be present in the samples of the supplements tested was miniscule. There were however consistent assertions by the expert scientists that their calculations regarding how much of the supplement Respondent would have to consume were very rough estimates. There are too many variables to accurately gauge exactly how much clenbuterol might have been in the contaminated supplements Respondent took.
- 7.10 In addition, contaminated supplements will produce different results depending on which samples are tested as the contamination is unevenly distributed throughout the product. Of course, the actual packets of Arginine Extreme taken by Respondent prior to her providing her Sample could not be tested. The packets which were used for the tests by both ADR and EDTL were however from the same lot. They showed differing quantities of the contaminant, when tested by different methods.
- 7.11 Clenbuterol is strictly prohibited under the Code. There is not a specific concentration level that must be reached to have a positive result. UCLA reported Respondent’s Sample of July 4 positive for clenbuterol, without indicating the concentration. In addition, the urine samples taken from Respondent on July 1 and July 6, during which time she was also taking the same supplement, initially tested negative at UCLA. Upon retesting by UCLA, her samples “actually revealed the presence of ‘suspect clenbuterol transitions.’”
- 7.12 Respondent met her burden of proof that the supplements she took were contaminated with clenbuterol. Claimant asserts that the claimed contamination of the supplements was so miniscule that it could not possibly have caused the positive doping control result in the quantities found. There is however no requirement in FINA DC 10.5.2 that Respondent prove a correlation between the concentration of the Prohibited Substance in her urine and the quantity in her supplements. The plain language of DC 10.5.2 directs such a result in this case and under the particular circumstances of this case. As stated in USA Shooting and Mr George M. Quigley, Jr. v. Union Internationale de Tir (CAS 94/129 at 55), “...the rule-makers and the rule-appliers must begin by being strict with themselves. Regulations that may affect the careers of dedicated athletes must be predictable. ... They should not be the product of an obscure process of accretion. Athletes and officials should not be confronted with a thicket of mutually qualifying or even contradictory rules that can be understood only on the basis of the de facto practice over the course of many years of a small group of insiders.”
- 7.13 Claimant points to the Code 10.5.2 Comment which provides, in an example, that reduction in the Ineligibility Period “may well be appropriate in illustration (a) [a positive test resulting from a mislabeled or contaminated vitamin or nutritional supplement] if the Athlete clearly establishes that the *cause of the positive test* was contamination in a

common multiple vitamin purchased from a source with no connection to Prohibited Substances and the Athlete exercised care in not taking other nutritional supplements.” In the introduction to this Comment discussion, it is made plain that the above example serves solely to illustrate the operation of Article 10.5. The Comment is read by the Panel to mean that Respondent has to prove by a balance of probability exactly what she has done: how the Prohibited Substance entered her system and that the Prohibited Substance was also found in the nutritional supplement she was taking. The Panel finds this was the cause of the positive test.

- 7.14 The Panel finds that Respondent is entitled to rely on the actual language of FINA DC 10.5.2 without adding further unwritten requirements. She has no further burden of proof with respect to whether the quantity of clenbuterol shown to be in her contaminated supplements produced the concentration levels of clenbuterol in her Sample #1517756.

*Degree of Negligence*

- 7.15 Respondent concedes that she was negligent in taking supplements in spite of the known risks of doing so. The question for the Panel is the degree of her negligence. She asserts that the standard to determine whether she was Significantly Negligent is whether the steps she took were reasonable under the circumstances, not whether she could have done more. She compares her asserted diligence in trying to avoid taking contaminated supplements to those steps taken by other athletes whose level of negligence were determined by Court of Arbitration for Sport (“CAS”) panels in relation to the standard for Significant Negligence. The Panel looks to the cases cited by Respondent, *Knauss v. FIS* (CAS 21005/A/847), *WADA v. Despres* (CAS 2008/A/1489) and *Vencill v. USADA* (CAS 2003/A/484).
- 7.16 In *Vencill v. USADA*, the athlete’s fault or negligence was found to have been exceptionally significant because Mr. Vencill did not live up to his duty to be responsible for any Prohibited Substance found to be present in his Specimen. Specifically, he was taking a variety of nutritional supplements and multi-vitamins – many of which were apparently recommended to him by fellow swimmers, including teammates – that he never discussed with his parents, coach or doctor, never researched on his own and never had tested until his positive doping control result. He failed to make even the most rudimentary inquiry into the nature of the supplements he took. The panel found that Mr. Vencill had to be well aware of the warnings regarding possible supplement contamination and was willfully blind in taking those supplements.
- 7.17 In Mr. Despres’ case, he ingested a nutritional supplement which was the cause of his positive doping control result. He took the supplement despite repeated warnings from the Canadian Centre for Ethics and Sport (“CCES”) and WADA emphasizing the risk of contamination in nutritional supplements. The panel looked to the official commentary of Article 7.39 of the CADP, which is the same as FINA DC 10.5.2. This commentary makes two essential points:
- (a) A period of Ineligibility will be reduced based on No Significant Fault or Negligence only in cases where the circumstances are truly exceptional and not in the vast majority of cases.

(b) A reduced period of Ineligibility based on No Significant Fault or Negligence may be appropriate in cases where the Athlete clearly establishes that the cause of the positive test was contamination in a common multiple vitamin purchased from a source with no connection to Prohibited Substances and the Athlete exercises care in not taking other nutritional supplements.

- 7.18 The CAS panel found that Mr. Despres' circumstances were not truly exceptional as he did not make a direct inquiry with the distributor of the product to ascertain the safety of the supplement. He made no attempt to contact the distributor or manufacturer of his supplements to obtain more information about the product. The panel stated: "Had he done so, he would have demonstrated the higher level of care necessary to establishing 'no significant fault or negligence.'" (WADA v. Despres at 7.6). The Despres panel found that Mr. Despres did not show a good faith effort to leave no reasonable stone unturned before he ingested the nutritional supplements (*id.* at 7.8). The panel listed additional steps he could have taken: checking with his doctor, the team doctor or the team nutritionist about whether his supplement company was a trustworthy brand of the type of supplements he was taking. He could have done more thorough research. He did research over the internet for "one hour", but websites flagged by WADA and CCES during the hearing showed that the brand he took promotes bodybuilding and sells products for muscle enhancement. Mr. Despres did see links that showed his brand sold muscle enhancers, but said "what company that sells supplements doesn't also produce this stuff as well?". He also knew that though his brand was FDA tested, it did not test for WADA Prohibited Substances. He could have made further inquiries but did not because he believed "it wasn't going to make a difference."
- 7.19 The panel found that Mr. Despres' behavior showed that he took into account a certain margin of risk. His positive test was clearly not as a result of contamination in a common multiple vitamin purchased from a source with no connection to Prohibited Substances as referenced in the Code Comments to 10.5.2. There was no pattern of care on his part. The panel noted that "contamination alone cannot be a sufficient basis for finding 'no significant fault or negligence.'"
- 7.20 Mr. Knauss also took contaminated supplements, after taking "the clear and obvious precautions which any human being would take in consuming a food or, in this case a nutritional supplement, namely the reading of the package labeling or the accompanying product description and instructions for use. His direct inquiry with the distributor of the product falls within this category of a precaution." (Knauss v FIS at 7.3.6) The panel distinguished these precautions from failures which give rise to ordinary fault or negligence at most, such as having the nutritional supplement tested for its content or not taking any at all. Based on Mr. Knauss also consistently procuring his supplements from a reputable supplier, the panel found that Mr. Knauss' case deviated substantially from the typical doping case under the equivalent rule to FINA DC 10.5.2 and that he was not Significantly Negligent.
- 7.21 These cases give this Panel guidance in the evaluation of whether Respondent's negligence was Significant, which would negate any possibility of a reduction in the period of Ineligibility, or simply ordinary negligence, which would allow the consideration of a reduction.

- 7.22 When considering all of the steps taken by Respondent prior to taking the contaminated supplements, the Panel notes the following:
- (a) Respondent had personal conversations with AdvoCare about the supplements' purity prior to taking them.
  - (b) The AdvoCare web site assured that its products were "formulated with quality ingredients." The association to known steroid enhanced activities such as bodybuilding promoted 'natural' bodybuilding rather than 'steroidal' bodybuilding.
  - (c) Respondent was told by AdvoCare that its products were tested by an independent company for purity and its web site confirmed that, though only with respect to one of its products.
  - (d) Respondent obtained the supplements directly from AdvoCare with whom she had a contractual relationship, not from an unknown source.
  - (e) The supplements Respondent took were not labeled as 'steroidal' or otherwise labeled in a manner which might have raised suspicions.
  - (f) Respondent took the same supplements for at least eight months prior to her positive doping control result.
  - (g) Respondent obtained an indemnity from AdvoCare with respect to its products.
  - (h) Respondent consulted with various swimming personnel, including the team nutritionist and the USOC sports psychologist, and her coach, about the quality of the AdvoCare products.
- 7.23 The Panel must look to the totality of the circumstances in evaluating whether Respondent's case is indeed "truly exceptional." None of the CAS cases reviewed by the Panel includes the combination of circumstances listed above. In totality, they do add up to "truly exceptional" circumstances.
- 7.24 While the Panel declines to find that there was any intention by Respondent to cheat or that she was seeking to enhance her performance inappropriately or in violation of the rules, there is no doubt that Respondent acted with "fault or negligence" in committing an anti-doping violation under the FINA DC Rules. She took a nutritional supplement which was the cause of her positive doping control result. She took supplements in spite of being aware of the warnings of USADA and despite her hesitation about taking supplements due to the risk of contamination. She does not argue that she was not negligent. The issue is whether her conduct is below the level of Significant Negligence defined in the FINA DC rules. Looking to the Comments in the Code, the two criteria mentioned there as "illustrations which could result in a reduced sanction based on No Significant Fault or Negligence" are found in this case. Those criteria are: the source of her supplements had no connection to Prohibited Substances and the label of the contaminated supplement did not list the Prohibited Substance.
- 7.25 As stated in Knauss (at 7.3.5), "the requirements to be met by the qualifying element 'no Significant Fault or Negligence' must not be set excessively high." Because of the totality of the factors listed above, the Panel finds that Respondent's negligence did not

rise to the level of being Significant and thus her period of Ineligibility may be reduced from two years.

***Reduction of Ineligibility Period***

- 7.26 The Code does not provide any guidance with respect to the appropriate reduction of the period of Ineligibility other than to limit it to one-half of the otherwise applicable Ineligibility Period (which means the maximum reduction would result in a one year Ineligibility Period). (FINA DC 10.5.2)
- 7.27 The Panel considers the same factors as considered in the above analysis with respect to Respondent's level of negligence to evaluate how much to reduce her Ineligibility Period. As stated in Knauss, "In deciding how this wide range is to be applied in a particular case, one must closely examine and evaluate the athlete's level of fault or negligence." Respondent is a young adult who was no more than ordinarily negligent, and she took numerous steps to avoid taking contaminated supplements. She of course could have taken more steps, but she was not in any way Significantly Negligent.
- 7.28 The Panel finds that, under the provisions of the Code, and based on the totality of the circumstances in this case, Respondent's Ineligibility Period may be reduced to the maximum extent. An Ineligibility Period of one year is fair and reasonable, subject to the procedure outlined in the paragraphs that follow this one.

***The IOC's Recent Amendment to Olympic Charter Rule 45***

- 7.29 Having decided the case of Respondent under the provisions of the FINA DC which are applicable in this case, the Panel must also consider whether it is within its jurisdiction to address the impact on Respondent of additional regulations under Olympic Charter Rules 19 and 45 ("Rule 45"), which was adopted July 1, 2008 by the International Olympic Committee ("IOC"). This Rule provides that Respondent, were she ultimately to qualify for the United States Olympic Team in 2012, would be ineligible to compete at those Olympic Games given the Ineligibility Period of one year imposed as a sanction on Respondent as a result of her anti-doping rule violation.
- 7.30 Respondent points out also that Rule 45 will cause her to be denied the opportunity to attempt to qualify for the 2012 Olympic Games, as the USA Swimming Standard Waiver and Release Form swimmers are required to sign prior to competing at any USA Swimming Event, including the Olympic Trials, provides:

**"OATH OF ELIGIBILITY.** I declare that I am eligible and in good standing with regulations laid down by USA Swimming, the International federation for Amateur Swimming (FINA), and the *International Olympic Committee (IOC)*. I also declare that I am not under suspension or disciplinary action imposed for use of illegal drugs or other athlete regulation infractions." (Emphasis added)

Respondent therefore may be ineligible to compete in the 2012 US Olympic Trials in the sport of swimming, as she would be unable to declare that she is "in good standing with regulations laid down by... the IOC" based on Rule 45. Similarly, paragraph 5 of the USOC Policies appears to prohibit athletes who are otherwise ineligible to compete in the Games because of a doping offense from competing in the US Olympic trials and

qualifying events for the Olympic trials. Thus Rule 45 precludes her from competing in the next Olympic Games because she has been sanctioned with a “suspension of more than six months.” It is assumed by the Panel that the use of “suspension” in Rule 45 refers to the “period of Ineligibility” of one year, which is “more than six months.”

- 7.31 Rule 45 appears to be contradictory to the requirements of various provisions of the Code. The Code provides that the IOC is bound to conform to its policies and rules for the Olympic Games (Code, Article 20.1 provides: “**Roles and Responsibilities of the International Olympic Committee** . 20.1.1 To adopt and implement anti-doping policies and rules for the Olympic Games which conform with the Code.”<sup>6</sup>). The IOC has signed the WADA Declaration of Acceptance of the Code, as required by Article 23.1.1 of the Code. Code, Article 23.2.1 mandates that all signatories “shall implement applicable Code provisions through policies, statutes, rules or regulations according to their authority and within their relevant spheres of responsibility.” However, the IOC has not had an opportunity to argue its position in this proceeding.
- 7.32 As stated in section 2, this Panel’s jurisdiction derives from Respondent’s membership in a USOC-recognized NGB (USA Swimming) which has agreed to comply with the provisions of the USADA Protocol. The Supplementary Procedures, which are part of the USADA Protocol, at R-45(a) provide: “The arbitrator may grant any remedy or relief that the arbitrator *deems just and equitable and within the scope of the agreement of the parties....*” (emphasis added)
- 7.33 The Panel thus looks to:
- (a) The scope of the agreement of the parties; and
  - (b) Any just and equitable remedy or relief within the scope of that agreement.
- 7.34 The parties to this arbitration are USADA and Jessica Hardy, whose “agreement” to submit to the Panel’s jurisdiction is based on Respondent’s membership in USA Swimming, which in turn is bound both by its membership in FINA and recognition by the USOC to adopt the mandatory provisions of the Code (as also reflected in FINA DC) and the USADA Protocol.
- 7.35 Thus, the “scope of the agreement” of the parties is reflected in the USADA Protocol and by reference both in the USADA Protocol and the terms of Respondent’s membership in USA Swimming, in the FINA DC rules, which are identical to the mandatory provisions of the Code.
- 7.36 FINA DC 13.2.3 provides that the IOC has the right to appeal this Panel’s decision to CAS “where the decision may have an effect in relation to the Olympic Games, including decisions affecting eligibility for the Olympic Games.” Clearly, since this Panel’s decision will have the effect of making Respondent ineligible for the 2012 Olympic Games, the IOC has the right to appeal this Panel’s decision. It is unlikely however that the IOC would be so inclined, since the Panel would be making no decision in derogation of its Rule 45 or any of the IOC’s other rights.

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<sup>6</sup> As if these provisions were not sufficiently express, the 2009 version of the Code is more explicit, with the following provision: 23.2.2 “No additional provision may be added to a Signatory’s [such as the IOC] rules which changes the effect of the Articles enumerated in this Article.” One of the “Articles enumerated in this Article” is the “Sanctions on Individuals” which is the subject of this analysis.

- 7.37 The effect of this situation is to allow the IOC to appeal if the Panel makes a decision in derogation of its rule, but to give Respondent no recourse against the effect of Rule 45 on her since the IOC is not a party to these proceedings. Respondent missed the 2008 Olympic Games because of this anti-doping rule violation for which she is found not to have been Significantly Negligent. In addition, this new Rule 45 will cause her to be unable to attempt to qualify for the 2012 Olympic Games, i.e. it will affect her eligibility for the Olympic Games.
- 7.38 Respondent argues that under the doctrine of proportionality, this Panel's imposition of a period of Ineligibility in excess of six months will result in her missing two Olympic Games, which "penalty is shockingly disproportionate to her degree of fault." She quotes the FIFA & WADA Advisory Opinion (CAS 2005/C/976 & 986) at ¶143: "The right to impose a sanction is limited by the mandatory prohibition of excessive penalties, which is embodied in several provisions of Swiss law. To find out whether a sanction is excessive, a judge must review the type and scope of the proved rule violation, the individual circumstances of the case, and the *overall effect of the sanction on the offender*. However, only if the sanction is evidently and grossly disproportionate in comparison to the proved rule violation and if it is considered as a violation of fundamental justice and fairness, would the Panel regard such a sanction as abusive and, thus, contrary to mandatory Swiss law." (emphasis added)
- 7.39 This Panel's decision is guided by CAS precedent and the CAS precedent to which we look applies Swiss law. Neither party objected to the applicability of Swiss law in this case. Clearly, the overall effect of the one year period of Ineligibility on Respondent, taking into account the impact of Rule 45, is far in excess of what should be expected when applying the principles of fundamental justice and fairness in the circumstances of this case. The effect of this penalty imposed upon Respondent is first a one year period of Ineligibility (including missing the 2008 Olympic Games for which she qualified) and second, because of Rule 45, no eligibility to compete in the next Olympic Games. This penalty is indeed, in the view of the Panel, evidently grossly disproportionate, under the principles of proportionality. In addition, this penalty is inconsistent with the provisions of the FINA DC and the Code.
- 7.40 Nevertheless, the Panel is not applying any rules other than the FINA DC to this case and is bound by the provisions of those rules to impose a one year period of Ineligibility.
- 7.41 As Claimant argues, if each arbitral panel, when confronted with the impact of Rule 45, were to reduce the sanction to a six month period of Ineligibility, this would fundamentally re-order the sanctions for anti-doping rule violations. In essence, Respondent's approach could bring about a "one size fits all" sanctioning system even though there would be no basis to seek a reduction below a one year period of Ineligibility absent the existence of Rule 45. Such an approach would undermine the sanctioning system clearly required by the provisions of both the Code and the FINA DC. Further, such a one size fits all sanctioning solution would be fundamentally unfair to clean athletes and to other athletes who have received lengthier suspensions prior to the adoption of Rule 45. The Panel is also concerned that rather than having an anti-doping system that reflects harmonized sanctions (a stated goal of the Code), a Signatory to the



Code, the IOC, has unilaterally altered the sanctions imposed on athletes in contravention of the express language of the Code.<sup>7</sup>

- 7.42 However, the Panel is also bound by the USADA Protocol to grant *any remedy* or relief that the Panel *deems just and equitable and within the scope of the agreement of the parties*. The agreement of the parties includes the Code, which specifically limits the IOC's authority to adopt rules contradictory to the Code. The agreement of the parties also allows the IOC to appeal the Panel's decision.
- 7.43 Thus, the Panel deems it just and equitable to fashion a remedy that allows Respondent the opportunity to apply to the IOC for a waiver of the applicability of Rule 45 in her case with respect to: a. being in compliance with USA Swimming's Oath of Eligibility when attempting to qualify to compete in the 2012 Olympic Games; and b. her eligibility to compete in those Games, should she qualify according to USA Swimming's criteria.
- 7.44 This remedy allows the IOC to appeal the decision of the Panel to CAS thereby having the opportunity to be heard with respect to Rule 45 as it applies to Respondent and relates to the Code, or in the alternative, the IOC may consider Respondent's application for a waiver with respect to Rule 45 under the circumstances of her case.
- 7.45 The Panel retains jurisdiction over this case until such time as: a. the IOC has appealed this decision to CAS and the appeal has been initiated under the CAS rules; or b. Respondent has applied to the IOC for a waiver of Rule 45 on or before July 31, 2009 (the date of expiration of Respondent's one year period of Ineligibility); and the application for a waiver of Rule 45 has been denied by the IOC or the IOC has not responded.
- 7.46 In the event the IOC either does not respond to Respondent's application or denies the application, within three months of the date of its receipt by the IOC, the Panel shall review the circumstances as reported by Respondent and reserves the right to reduce the period of Ineligibility imposed upon Respondent to six months.

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<sup>7</sup> The IOC as a Signatory to the Code was a participant in the process for amending the Code. No provision similar to Rule 45 is included as part of the 2009 World Anti-Doping Code amendments.

8. FINDINGS AND DECISION

8.1 The Panel therefore rules as follows:

8.2 Pending the provisions of paragraphs 8.4-8.6 hereof, Jessica Hardy shall be ineligible to compete for a one year period commencing on August 1, 2008 and concluding on July 31, 2009, under the provisions of the FINA DC Rules. The Panel shall retain jurisdiction over this proceeding until the earlier of the IOC's timely appeal to the Court of Arbitration for Sport, the IOC's grant of a waiver of the application of Rule 45, or the Panel's determination regarding the procedures set forth in paragraphs 8.4 and 8.5 hereof.

8.3 This decision shall be served upon the IOC by the American Arbitration Association, via email and by overnight courier.

8.4 If the IOC has not appealed this decision to the Court of Arbitration for Sport within twenty one days from its receipt by the IOC, as allowed under FINA DC 13.2.3, then this Panel retains jurisdiction over the matter as follows:

- (a) If Respondent has applied to the IOC for a waiver of Rule 45 and it has been denied by the IOC or the IOC has not responded within three months from the date of her application.
- (b) Respondent shall report to this Panel her progress on the application for a waiver to the IOC. Respondent shall provide this Panel through the American Arbitration Association with a copy of all communications with respect to Respondent's anti-doping violation, including any proceedings before the Court of Arbitration for Sport.

8.5 If Respondent has not applied to the IOC for a waiver of Rule 45 on or before July 31, 2009 then this decision shall become final.

8.6 If the IOC appeals this decision to the Court of Arbitration for Sport within twenty one days from its receipt by the IOC, this Award shall become final upon initiation of the appeal by the Court of Arbitration for Sport.

8.7 The parties shall bear their own costs and attorneys' fees.

8.8 Except as set forth above, this Award is in full settlement of all claims submitted to this arbitration. All claims not expressly granted herein are hereby denied.

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 Award.

5/2/09  
Date

5/4/09  
Date

5/2/09  
Date

[Signature]  
Jeffrey G. Benz

[Signature]  
Hon. James M. Murphy

[Signature]  
Maidie Oliveau, Chair