BEFORE THE AMERICAN ARBITRATION ASSOCIATION

North American Court of Arbitration for Sport Panel

USADA, Claimant AAA No. 30 190 00291 03

and

Kicker Vencill, Respondent

ARBITRAL DECISION AND AWARD

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, and having, after a hearing held on June 21 and June 22, 2003, issued an Interim Award on June 22, 2003 in accordance with the parties' request to render a decision in the case by June 26, 2003, do hereby render its full award pursuant to our undertaking to do so by July 30, 2003.

1. The Parties.

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 any adjudication of positive test results pursuant to the United States Anti-Doping Agency Protocol for Olympic Movement Testing ("USADA Protocol").

1.2 The Respondent, Kicker Vencill, is a competitive swimmer in the elite class category, resident in the USA.

1.3 La Fédération Internationale de Natation ("FINA") is the international federation for the sport of swimming whose constitution recites, *inter alia*, the objective of both promoting swimming and "providing a drug free sport." (FINA Constitution C.S. 1 and 2).

2. The Applicable FINA Rules.

Under the USADA Protocol and the AAA Supplementary Procedures for Arbitration Initiated by USADA ("AAA Supplementary Procedures"), applicable to this proceeding, the FINA Rules, including the provisions relating to prohibited substances, doping, unannounced testing, and sanctions, apply. The Doping Control ("DC") Rules applicable to this case include the following:

DC 1.1 Doping is strictly forbidden as a violation of FINA Rules.

DC 1.3 All competitors shall submit to doping control carried out . . . in competition, out of competition, announced or unannounced . . .

DC 2.1 Doping offenses are:

a) the finding of a prohibited substance within a competitor's body tissue or fluids;

b) the use or taking advantage of a prohibited method.

DC 3.1 Except as set forth in DC 3.5 . . . the following classes of substances shall be prohibited at all times:

A. Anabolic agents.

DC 8.3.2. Analysis of all samples shall be done in laboratories accredited by the IOC. Such laboratories shall be presumed to have conducted tests and analyses in accordance with the highest scientific standards and the results . . . shall be presumed to be scientifically correct. Such laboratories shall be presumed to have conducted custodial procedures in accordance with prevailing and acceptable standards of care; these presumptions may be rebutted by evidence to the contrary.

DC 9.1 The sanctions for doping offenses involving prohibited substances shall be:

DC 9.1.1 For a doping offence involving anabolic agents . . .

First offense:

- a minimum of four (4) years' suspension; plus

– a retroactive sanction involving cancellation of all results achieved in competitions during the period prior to the date the suspension takes effect and extending back to six (6) months before the collection of the positive sample, shall be imposed.

DC 9.1.7 The right to a hearing related to an offence under DC 9.1 can involve only:

a) whether the correct body tissue or fluid has been analyzed;
b) whether the body tissue or fluid has deteriorated or been contaminated;
c) whether the laboratory analysis was correctly conducted;
d) whether the minimum suspension for a first offence should be exceeded; and
e) whether a minimum sanction can be lessened in accordance with DC 9.10.

The finding in a competitor's body tissue or fluids of a prohibited substance shall constitute an offence, regardless of whether the competitor can establish that he or she did not knowingly use the prohibited substance.

DC 9.10 Where the rules impose a minimum term suspension, the minimum may be lessened if the competitor can clearly establish how the prohibited substance got into the competitor's body or fluids and that the prohibited substance did not get there as a direct or indirect result of any negligence of the competitor. Every competitor has the personal responsibility to assure that no prohibited substance shall enter his or her body and that no prohibited method be used on such competitor's body, and no competitor may rely on any third party's advice in this respect.

3. Background and Facts.

3.1 Respondent on January 21, 2003, as part of an out-of-competition drug test, provided a urine sample at the request of a USADA Doping Control Officer. The UCLA accredited laboratory ("UCLA Lab"), which conducted the test, received the sample on January 22, 2003. The laboratory test performed from the "A" sample of Respondent's urine specimen revealed the presence of "19 – norandrosterone at a concentration greater than two nanograms per milliliter of urine and 19 – noretiocholanolone" in each of three "aliquots" from the "A" sample from which three separate analyses were performed. All three revealed a

nandrolone concentration in excess of the 2 ng/ml permissible threshold for males. This finding was reported to USADA. The Respondent was notified by letter of February 4, 2003. That letter advised Respondent that if he chose not to accept the "A" sample test results he had the right to request and observe the "B" sample analysis, which was to take place on February 18, 2003 at the UCLA lab starting at 9:00 a.m. For reasons later discussed, although Respondent and his representative were present on February 18 for approximately 90 minutes, they left before the B sample test analysis was performed, and Respondent claims that he was not given the opportunity to observe the analysis. By letter of February 26, 2003 USADA informed Respondent that the B sample analysis confirmed the positive A sample analysis, that the matter was being forwarded to a panel of the USADA Anti-Doping Review Board for its recommendation and that Respondent had the right (which he exercised) to make written submittals to the Board.

3.2 By letter of March 25, 2003 the USADA Review Board recommended *inter alia* the minimum four year suspension from the date the positive sample was collected and the retroactive cancellation of all competitive results after the date 6 months before the sample collection date. Respondent was further advised of his right to request a hearing before a panel of North American Court of Arbitration for Sport ("CAS") arbitrators who are also American Arbitration Association ("AAA") arbitrators in accordance with the USADA Protocol to contest the sanction proposed by USADA. Respondent by its April 3, 2003 informed USADA of its election to proceed to arbitration, which USADA formally initiated in its April 10, 2003 letter to AAA and FINA.

3.3 During the course of six preliminary hearings conducted by telephone conferences during a period from May 14, 2003 to June 12, 2003 issues relating to Respondent's extensive

document requests and the possible re-test, by agreement of the parties, of the Respondent's urine sample were considered and addressed by the panel.

3.4 Evidentiary hearings took place over the course of 19 hours on June 21 and June 22, 2003, and the panel issued its Interim Award on June 22, 2003.

4. The Evidentiary Hearing

4.1 The Claimant, USADA, was represented as counsel by William Bock, III, of the firm of Kroger Gardis & Regis and Travis T. Tygart, Director of Legal Affairs, USADA. Dr. Don H. Catlin, Director of the UCLA Olympic Analytical Laboratory, and Dr. Larry D. Bowers, USADA's Senior Managing Director, Technical and Information Resources, testified as witnesses for USADA.

4.2 The Respondent, Kicker Vencill, who testified on his behalf, was represented as counsel by Howard L. Jacobs of the firm of Forgie Jacobs & Leonard, Michael F. Eubanks of the firm of Shumate, Flaherty, Eubanks & Baechtold and Mark Paxton, Director of Regulatory Affairs, Murty Pharmaceuticals Incorporated. Dr. Hemant H. Alur, Senior Scientist at Glaxo Smith Klein, testified as an expert witness for Respondent.

4.3 Also present at the hearing, beside the panel, were Mr. and Mrs. Vencill, Respondent's parents; Dr. Srikumaran K. Melethil, a consultant to Respondent; Dr. David C. Salo, Respondent's coach and head coach of the Irvine Novaquatics Swimming Club, who testified by telephone as a fact witness on Respondent's behalf; Thomas McVay, Doping Control Officer, USADA, who testified by telephone as a witness for USADA; and Stacey Michael, Drug Control Co-ordinator, USA Swimming, who testified by telephone as a witness for USADA.

4.4 Dr. Christiane Ayotte, Director of the Doping Control Laboratory, INRS - Institut Armand-Frappier, an IOC accredited laboratory, acted as an informal technical consultant to the panel and heard by telephone the expert testimony given by Dr. Catlin and Dr. Alur.

4.5 The hearing was governed by the Commercial Rules of the AAA, amended as of January 1, 2003, as modified by the AAA Supplementary Procedures, referred to in the USADA Protocol as Annex D. The parties filed pre-hearing briefs and numerous exhibits, all of which were deemed admitted in evidence, in accordance with the panel's procedural orders. The parties made opening statements and closing arguments, and the record was closed on June 22, 2003 after the conclusion of the hearing.

5. Respondent's Arguments.

5.1 Respondent through his pleadings, pre-hearing brief, oral argument and testimony given at the evidentiary hearings contends that the doping charge should be dismissed for one or more of the following reasons:

5.1.1 USADA failed to provide absolute proof of the complete chain of custody from sample collection to the final report on the B sample analysis, and the chain of custody from the point of collection to arrival the following day at the UCLA Lab is "incomplete and/or inaccurate" and not "contemporaneously documented in writing." (Respondent Pre-Hearing Brief at p 10).

5.1.2 Respondent was not provided the opportunity to observe the B sample analysis in accordance with the IOC Olympic Movement Anti-Doping Code ("IOC Code").

5.1.3 The UCLA Lab failed to employ acceptable scientific practices or controls in reporting Respondent's positive test results within the meaning of FINA Rule DC 8.3.2, which

requires that tests and analysis of samples be conducted in accordance with the highest scientific standards not merely acceptable standards as Rule 32 of the USADA Protocol requires.

5.1.4 The UCLA Lab failed to validate its test method before use as required by either acceptable or highest scientific standards and as required by ISO 17025, Sections 5.4.4 and 5.4.5. Moreover, there was a failure to provide Respondent with data to ascertain whether the UCLA Lab maintains records as required by ISO 17025, Section 5.5.5 of its equipment and software as to . . . "dates, results, and copies of reports and certificates of all calibrations, adjustments, acceptance criteria, and the due date of next calibration."

5.1.5 The minimum nandrolone metabolite levels found in Respondent's test samples are consistent with the possibility of endogenous production accounting for the prohibited nandrolone level in his urine specimen. In that regard Respondent cites the study of Le Bizec *et al*[1] and the so-called "grey zone," discussed in the *Bernhard*[2] case, where the concentration level of 19-NA is, as in this case, between 2 and 5 ng/ml, for the proposition that the UCLA Lab should, therefore, be held to a higher burden of proof in this proceeding that cannot be met. Respondent would ignore the contrary holding in *Meca-Medina,*[3] which refuted the grey zone theory, as being erroneous and a "flawed precedent."

5.1.6 The supplements taken by Respondent might have been contaminated. Such a finding would be consistent with the IOC funded study at the Cologne, Germany IOC

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1 Le Bizec B, Monteau F, Gaudin, I, Andre, P. "Evidence for the Presence of Endogenous 19 - norandrosterone in Human Urine." 723 J. Chromatogr., B. Bimed Sci Appl. 157-172 (1999)

2 *Bernhard v. ITU*, CAS 98/222

3 *Meca-Medina v. FINA*, TAS 99/A/234

lab,[4] indicating that a number of supplements not represented to contain nandrolone in fact do in sufficient quantity to cause a positive finding in a urine sample.

5.2 For Claimant to be entitled to the presumptions under FINA Rule 8.3.2 that the UCLA Lab conducted tests and analyses of Respondent's samples in accordance with the highest scientific standards and that such analyses are scientifically correct, USADA was required to produce the documentation referred to in 5.1.1 *et seq.*

5.3 Extenuating circumstances, the principle of proportionality and fairness require mitigation of the sanctions within the meaning of certain CAS decisions[5] and FINA Rule 9.10.

6. Legal Analysis and Decision

6.1 The panel is obligated, in accordance with the USADA Protocol contractually binding upon the parties, to apply the FINA Rules in deciding whether and with what consequences a doping offense by Respondent has occurred.

6.2 The applicable FINA Rules set out in paragraph 2 above clearly define doping as a strict liability offense; that is, a doping offence has been committed where a prohibited substance, in this case the anabolic agent 19-norandrosterone, in excess of 2 ng/ml was present in the athlete's urine sample, whether or not the athlete *knowingly* used the prohibited substance. In other words proof of the presence of a prohibited substance in the athlete's urine sample is all that is required for an offence to be established.[6] It is, therefore, incumbent upon USADA, in

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4 Schänzer, "Positive Doping Cases With Norandrosterone After Application of Contaminated Nutritional Supplements," 2000 (Respondent's Exhibit 38)

5 See *e.g. C v. FINA* (CAS 98/222); *HAGA v. FINA* (CAS 2000/A/281); *N v. FEI* (CAS 92/73); *N.J.Y.&W v. FINA* (CAS 98/208) and *UCI v. M* (CAS 98/212)

6 FINA Rule DC 2.1. This is consistent with the Olympic Movement Anti-Doping Code, Chapter II, Article 2.

order to prevail, to meet its burden of proving to the comfortable satisfaction of the panel that the substance 19-norandrosterone[7] was properly identified in Respondent's urine sample at a level in excess of 2 ng/ml.[10]

6.3 The strict liability rule inherent in the FINA Rules has been confirmed in several CAS, AAA/CAS and International Federation decisions[8] notwithstanding the quasi-criminal nature of the sanctions applied to an offence. In the recent *Poll* case, Claudia Poll, an elite swimmer, like the Respondent, alleged that the level of nandrolone detected in her sample for an out-of-competition test could have been endogenously produced, that she had not intended to ingest a prohibited substance and that the laboratory failed to document proper sample custody or meet certain ISO 17025 standards in its testing procedures. These arguments were not accepted by the CAS panel, which upheld the FINA Doping Panel's decision that a doping offence had been committed and applied the FINA recommended four (4) year minimum suspension for a first offender.

6.4 Although Respondent does not dispute the sample collection process, as the athlete did in *Poll*,[9] or the chain of custody from the time of the sample's arrival at the UCLA Lab, Respondent has argued that USADA failed to provide the requisite written documentation

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7 Appendix A of the FINA Rules includes, within the list of prohibited classes of substances nandrolone, 19 - noradrostenedicol and 19 - morandrostenedrone as prohibited anabolic agents.

8 See *Poll v. FINA* (CAS 2002/A/399); *FINA v. Stylianou* (FINA Doping Panel Decision 4/02); *FINA v. Bliamou* (FINA Doping Panel Decision 3/02); *FINA v. Demetis* (FINA Doping Panel Decision 2/02); *FINA v. Ojagh* (FINA Doping Panel Decision 2/03); *Meca-Medina v. FINA* (CAS 99/A/234). As to non-FINA cases see *UCI v. Moller* (CAS 99/A/239); *UCI v. Outchakov* (CAS 2000/A/272); *Janovic v. USADA* (CAS 02/A/360); *USADA v. Dickey* (AAA 30 190 00341 02); AAA/CAS 2003 *USADA v. Moninger* (AAA 30 190 00930 02) and AAA/CAS 2002 *Brooke Blackwelder v. USADA* (AAA No. 30 190 00012)

9 See footnote 8 *supra*.

to provide absolute proof of the chain of custody from the sample collection location to its arrival at the UCLA Lab. In fact the evidence is to the contrary. USADA produced documentation that Tom McVay, USADA's Doping Control Officer, delivered Respondent's sample to the UCLA Lab with the sample intact. This was corroborated by his testimony at the hearing. Respondent was unable to show a gap in the chain of custody that would demonstrate even a minor irregularity in the chain of custody process.[10]

6.5 As to Respondent's argument that he was not given the opportunity to observe the B sample analysis, the facts show otherwise. Dr. Catlin testified that the analysis can take up to 36 hours to complete. Respondent and his coach arrived at the UCLA Lab before 9:00 am on the morning of February 18, 2003 the date on which testing of the B sample was to commence. They testified that they waited for about 90 minutes and then had to leave.[11] It was their choice to leave. They were afforded the opportunity to stay as long as they wished until the testing was completed. When Dr. Catlin learned the following day that Respondent had alleged he was denied his right to observe the testing, he ordered an investigation, and an incident report was ultimately issued. After hearing the testimony the panel is of the view that if there was any fault

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10 On January 21, 2003, Mr. Vencill provided a urine sample at the request of USADA Control Officer, Tom McVay. After providing the sample, Mr. Vencill split the sample into A and B sample collection bottles. The collection bottles and the records were all identified by USADA NO. 467313. USADA Exhibit 6. The bottles were placed into a Styrofoam shipping container and turned over to Mr. McVay. Mr. Vencill indicated on his Doping Control Form that no irregularities occurred in the sample collection process. USADA Exhibit 6. Mr. McVay testified he used the Berlinger kit which he placed in a container in his ice chest and then took it home and placed it in his refrigerator. He remained at home except for a short period during which time his wife was present. He then delivered the sample to the collection site at the UCLA Lab on January 22, 2003. The sample arrived intact and undamaged.

11 Respondent and Coach Salo admitted they were present for the opening of the B sample and that the seals were intact and had not been tampered with.

on the part of USADA or the UCLA Lab it was that Respondent was not advised of the duration of the analysis so that he might have planned accordingly. Nevertheless, USADA's Travis Tygart offered to have the B sample opening and analysis rescheduled to a time when Respondent would be available, but this offer was declined by Respondent.

6.6 Claimant clearly demonstrated to the panel's satisfaction that a prohibited substance was found in Respondent's test sample resulting in a doping offense within the meaning of FINA Rules DC 2.1 and 3.1. The extensive documentation it provided to Respondent demonstrates presumptively that the laboratory analysis was correctly conducted, that Respondent's urine specimen had not deteriorated or been contaminated and that the proper laboratory procedures had been followed. Moreover, in accordance with FINA Rule DC 8.3.2 the results of the UCLA Lab, an IOC accredited lab, are presumed to be scientifically correct, and the tests and analyses presumed to have been conducted in accordance with the highest scientific standards (see paragraph 2 above). Accordingly, USADA has met its burden of proving a doping offense was established from properly conducted testing and analyses of Respondent's urine sample by the accredited UCLA Lab.

6.7 It is incumbent, therefore, on Respondent to rebut the FINA Rule DC 8.3.2 presumptions, and the FINA Rules by their terms limit the right to a hearing to those matters enumerated in DC 9.1.7. (See paragraph 2 above). One such matter contested by Respondent is "whether the laboratory analysis was correctly conducted." (DC 9.1.7c). Respondent's arguments that the UCLA Lab did not use acceptable scientific practices in its findings of positive test results are virtually uncorroborated. Dr. Milethil, who attended but did not testify at the evidentiary hearings, declared in his June 11, 2003 affidavit that the method used to quantify Respondent's sample does not meet generally accepted standards of reproducibility. His

conclusion that the variability of about 250% of the "abundance data" for the B sample from that of the A sample proved to be incorrect. Indeed, the B sample reading of 4.2 ng/ml very closely approximated the A sample reading of 4.3 ng/ml. (See Claimant's Exhibits G&H). The low variability of the two samples only supports Dr. Catlin's testimony that the test methodology in fact produced excellent results. Moreover, the allegation that the UCLA Lab was required, and failed, to validate its test method prior to use on Respondent's sample and to produce requisite data concerning its equipment and software as required by the standards of ISO 17025 is without merit under the rules applicable to this proceeding. USADA produced more documentation with respect to the UCLA Lab than it technically was required to produce. The accreditation process and IOC's adoption of ISO 17025 provide basic protection to athletes that the testing of urine samples will be done in accord with acceptable standards. Dr. Catlin credibly testified that the UCLA Lab has never used testing methodology that has not been validated for clinical samples, including methodology to detect 19-norandrosterone. The IOC in certifying the UCLA Lab for 2003 re-accreditation concluded, according to Dr. Catlin, that the testing procedures to detect 19-Norandronterone were appropriate. Dr. Catlin's testimony was not refuted by Dr. Alur, Respondent's expert witness, who was discredited. Even were Respondent's allegations as to the failure of the UCLA Lab to meet ISO standards proven, which was not the case, the panel is not bound to apply those standards in this case. As the panel stated in *Poll v. FINA*:

> "The Panel has neither authority to apply nor interpret the rules set by these bodies, or to force any laboratories to comply with those rules. The panel is in no way a supervising authority for laboratories, being either IOC - ISO/IEC accredited or not. The panel relies upon the accreditation process and is without authority to intervene and

> impose its views on the laboratory procedures to be applied by accredited labs."[12]

and

> "If those bodies have authorities towards the *'supplier'* or the *'client'* concerned by the *'particular fields of technical activity'* in which the ISO/IES . . . is active, they have no authority towards the parties involved in this proceeding, *i.e.*, FINA and Mrs. Poll."[13]

6.8 Respondent contends that the levels of nandrolone metabolites in his test samples are within the so-called "grey zone" discussed in the *Bernhard* case,[14] namely between 2 and 5 ng/ml. The FINA Rules do not require USADA to prove the validity of the cut-off level. Dr. Catlin confirmed credibly that the 2 ng/ml threshold for reporting nandrolone positive results for males is scientifically valid. This cut-off level is fixed to avoid detection of any endogenous production of nandrolone. Moreover, Respondent has cited no evidence to indicate that he naturally produced high levels of nandrolone. In fact an "endogenous production" claim belies Respondent's assertion that all his tests prior to or after his positive test in January, 2003 were negative.

6.9 Respondent asserts that one or more of the supplements taken by him might have been contaminated. It is clear under the FINA Rules that the unwitting ingestion of a supplement which was contaminated with a prohibited substance is not a defense to a doping charge. Indeed, DC 2.4 provides that "[i]t is a competitor's duty to ensure that no prohibited substance enters or comes to be present in his/her body tissue or fluids. Competitors are responsible for any

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12 CAS 2002/A/399 *Poll v. FINA* at § 9.4.8.

13 Id. at § 8.7.

14 CAS 98/227 *Bernhard v. ITU*

substance detected in samples given by them". Rather, the question of intent is relevant, if at all, to the issue of the extent of the sanction. Thus DC 9.10 provides:

> Where the rules impose a minimum term suspension, the minimum may be lessened if the competitor can clearly establish how the prohibited substance got into the competitor's body or fluids and that the prohibited substance did not get there as a direct or indirect result of any negligence of the competitor. Every competitor has the personal responsibility to assure that no prohibited substance shall enter his or her body and that no prohibited method be used on such competitor's body, and no competitor may rely on any third party's advice in this respect.

6.10 The application of DC 9.10 to Respondent's position is discussed infra in paragraph 7.

6.11 Respondent also asserts that the supplements he took[15] did not enhance his performance. It is clear that it is not required that a performance enhancing effect be demonstrated to establish a doping offense.[16] Respondent's argument that on two other occasions prior, and one occasion subsequent, to the positive test results found in January and February, 2003, he tested negative for nandrolone is not a defense to the specific finding of a doping violation.[17]

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15 See fn. 18, *infra*

16 See *Baumann v. IOC, et al.* (CAS OG 00/006) at p. 14 and *Raducan v. IOC* (CAS OG 00/11).

17 See *Blackwelder v. USADA*, AAA/CAS No. 30190 00012 at p 4.

7. Sanctions

7.1 As indicated in our Interim Award rendered on June 22, 2003, and in this full award, this panel found that a doping violation by Respondent had occurred. We further concluded in our Interim Award that Respondent is suspended as a first offender for the minimum four-year suspension prescribed under FINA Rule DC 9.1.1.

7.2 We noted that DC 9.1.7 provides the opportunity for the athlete to submit evidence that the minimum sanctions set forth in DC 9.1.1 be reduced. The circumstances under which the minimum suspension period may be reduced are prescribed in DC 9.10 as follows:

> Where the rules impose a minimum suspension, the minimum may be lessened if the competitor can clearly establish how the prohibited substance got into the competitor's body or fluids and that the prohibited substance did not get there as a direct or indirect result of any negligence of the competitor. Every competitor has the personal responsibility to assure that no prohibited substance shall enter his or her body and that no prohibited method be used on such competitor's body, and no competitor may rely on any third party's advice in this respect.

7.3 At the evidentiary hearing, Respondent testified at considerable length aided by skilled counsel that one or more of the requisite elements of DC 9.10 had been met to prove a case for reducing the suspension period. By contrast, USADA produced evidence supported by able argumentation that Respondent had not met the burden of proving that a reduction in the suspension period is warranted. We believe that neither the evidence adduced at the hearings nor the precedents support Respondent's position.

7.4 Kicker Vencill is an intelligent, educated and articulate 24-year-old swimmer who has distinguished himself in competitive swimming beginning at a very young age. He testified that he qualified for the Pan Am Games to take place in August, 2003 and has aspirations to

make the United States Olympic Team. He set up his own website listing his accomplishments and participated as a member of a task force to promote swimming at elementary schools and in his community. He considered himself a role model in the swimming community and is a member of USA Swimming and the National Team.

7.5 Respondent testified that there was widespread use of supplements by his swimming colleagues, noting that "a majority of post-graduates do some form of supplements." He testified that he had taken at various times the six supplements previously reported to USADA.[18] He said he would keep bottles of supplements and discard them when he passed the urine tests. He said the supplement ZMA was recommended to him by a colleague, that he was introduced to other supplements and discovered some by his own research. He claimed never to have been told that supplements could be contaminated, that he never received at any of his e-mail addresses the numerous e-mails sent to him by U.S. Swimming and USADA, which contained information and warnings about supplement use, and that he had never visited USADA or IOC websites except to update his forms and information. On cross-examination, Respondent testified he did not, until this proceeding, know that FINA had a zero tolerance policy for doping violations.

7.6 USADA presented at the hearings numerous exhibits of material sent to Respondent, and Stacy Michael of U.S. Swimming testified that none of the many e-mails regarding possible supplements' contamination sent to Respondent were ever returned. On cross-examination Respondent said that other than some discussion with other swimmers and

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[18] The supplements Respondent identified as using regularly included Ultimate Nutrition Super Complete Capsules, Ultimate Nutrition Glutamine Powder, Ultimate Nutrition Maximum MSM, Arrowhead Mills, FSI Nutrition Creation Edge Effervescent and EAS ZMA.

one or two calls to a doping hotline, he did nothing to investigate the supplements he took and did not read the various press releases issued on contamination of supplements.

7.7 Respondent's testimony that he had never been told or received any communication that supplements might be contaminated is simply not credible. There was very extensive information either sent to him directly or available to him that should have alerted him to the risk of use of supplements that could result in a doping violation. Moreover, apart from the scholarly research on contaminated supplements,[19] the UK Sports Nandrolone Review issued in 2000, after noting that certain supplements contain compounds similar to nandrolene or its metabolic precursors, contained the following warnings:

> "It may not be obvious from the label that such substances are present and are banned substances. Users of inadequately and incorrectly labeled products are at risk of unknowingly ingesting a banned substance. We therefore recommend that the sports community should be reminded they must maintain a high level of awareness of the possible hazards of using some nutritional supplements and herbal preparations."[20]

We believe several warnings to this effect were both directly and indirectly communicated to the Respondent.

7.8 There is no evidence, nor do we have any reason to believe, that Respondent intentionally took supplements that were contaminated. We do believe, however, from the

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19 *See, e.g.*, Trace Contamination of Over-the-Counter Androstendione and Positive Test Results for a Nandrolone Metabolite (Journal of the American Medical Association)(No. 22-29, 2000) by D. Catlin, *et al.*; Analysis of Non-Hormonal Nutritional Supplements for Anabolic-Androgenic Steroids - An International Study (Institute of Biochemistry German Sport University Cologne, Prof. Dr. Wilhelm Schänzer).

20 UK Sports Nandrolone Review at p. 14. See also USADA's Guide to Prohibited Classes of Substances and Prohibited Methods of Doping, November, 2002 at pp. 24, 25.

evidence presented that in using supplements and declining to test them Respondent failed to establish how the prohibited substance entered his body[21] and his lack of negligence. Accordingly, he did not meet the standards required under DC 9.10 to justify a suspension lower than the minimum.

7.9 In a succession of CAS and FINA Doping Panel cases from 1999 to 2003, both a four-year minimum suspension and retroactive cancellation of results were imposed on swimmers as the sanction for doping offenses involving detection of 19-norandrosterone above the FINA established threshold. *See, e.g., Poll v. FINA*, CAS 2002/A/399; *Meca-Medina v. FINA* and *Majcen v. FINA*, TAS 99/A/234 and TAS 99/A/235; *FINA v. Ojagh*, FINA Doping Panel 2/03; *FINA v. Stylianou*, FINA Doping Panel 4/02; *FINA v. Bliamou*, FINA Doping Panel 3/02; and *FINA v. Demetis*, FINA Doping Panel 2/02. Extenuating circumstances asserted by athletes in these FINA-related and other cases have been rejected as justification for a lesser sanction. These circumstances included age and bad advice from a third party (*FINA v. Stylianou*, involving a 16-year-old who had relied on her coach and doctor to her peril); denial by athlete of taking any substance that might amount to doping (*Poll v. FINA*); alleged use of medicine for a medical disease (*FINA v. Ojagh*); a suspension would cause the athlete to miss the Olympic Games (*Jovanovic v. USADA*, CAS 2002/A/360); and assertion that it is FINA's intention to harmonize its rules, including sanctions, with the pending World Anti-doping program (*FINA v. Stylianou*).[22]

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21 Respondent concedes that none of the supplements he took were tested for containing a prohibited substance.

22 The supplements allegedly contaminated in *Stylianou* were sold under the "Ultimate Nutrition" label, the same brand as supplements used by Respondent. (cf fn 18).

7.10 Counsel for Respondent in summation argued that the new World Anti-Doping Code ("WADA") scheduled to go into effect January 1, 2004 would impose a two year sanction were it applicable to this case. He noted that the panel in *Gatlin v. USADA* (AAA/CAS No. 30 190 00546 01), decided May 1, 2002, imposed the minimum two year suspension required under IAAF rules for a first offender who tested positive for amphetamine, a prohibited substance, but retained jurisdiction over the case so that it might reconsider the suspension should IAAF not grant early reinstatement to the athlete with a more appropriate term. Respondent's counsel argued that this panel, therefore, should retain jurisdiction pending the consideration by *FINA* of the new WADA Code.[23] As counsel for USADA noted, however, the circumstances in *Gatlin* were totally different from those presented in this proceeding. The panel in *Gatlin* issued the conditional suspension based on an agreement between USADA and Justin Gatlin that took into account the unusual circumstances of his case including, inter alia, that the IAAF Council would only re-consider his case after the minimum two year sanction is imposed and that the medication he took (which contained the prohibited substance) was an appropriate treatment of his condition of attention deficit disorder. But for those circumstances and others particular to Gatlin's case, the panel would not, and likely would not have been authorized to, retain jurisdiction.

7.11 Finally, Respondent's counsel argued that FINA Rule DC 9.10 requires that the sanction be proportionate depending on the severity of the offense and that the lack of intent to ingest a contaminated substance is an exceptional circumstance that should dictate a reduction in

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[23] The WADA Code was not adopted by FINA as of the date a violation by Respondent occurred and is, therefore, inapplicable in this case. Following the issuance of this panel's Interim Award and prior to the date of this Final Award, FINA evidently adopted the WADA Code at its Extraordinary Congress on July 11, 2003. It is not for this panel, however, to reduce the minimum sanctions which were in effect at the time the doping violation occurred. That determination is for FINA to make.

the term of Respondent's suspension. We find no support in the FINA Rules for this proposition. Indeed, we conclude from the evidence adduced at the evidentiary hearing that Respondent failed to establish how nandrolone got into his body and that it got there as a result of lack of his negligence. These elements are required in order for the minimum suspension to be reduced under DC 9.10.

7.12 The raising by Respondent of "proportionality" does, however, require further discussion. The panel in *Poll v. FINA*, CAS 2002/A 399 noted, as does this panel, that the language of the FINA Rules does not permit a reduction in the suspension under the circumstances presented in this case. It noted, however, that CAS panels have considered reduction of sanctions, citing *Faschi v. FINA*, TAS 1996/56 and *McLain Ward v. FEI* 1999/A/246.[24] In the latter case the panel referred to "a widely accepted general principle of sports law that the severity of a penalty must be in proportion with the seriousness of the infringements. The CAS has evidenced the existence and the importance of proportionality on several occasions." The *Poll* case panel went on to note, however, that a four year and even a lifetime suspension were not deemed disproportionate, citing *Susin v. FINA*, CAS 2000/A/274 and *Reinhold v. FINA*, CAS 2001/A/330, before concluding that a four year suspension for Mr. Poll was proportionate. To the same effect see *Meca-Medina v. FINA*, TAS 99 /A/234.

7.13 The case law clearly indicates that for the most part the proportionality doctrine has to date been applied in a sports specific and conduct specific manner taking into account the applicable international federation rules and, in the case of United States athletes, the USADA Protocol. This is likely to remain so unless and until the international federations have chosen to

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[24] See also *Kabaeva v. FIG*, TAS 2002/A/386 decided 23 January 2003 and FCLP v. IWF, TAS 99/A/252, § 7.7.7.

harmonize their rules and regulations or adopt a common code such as the WADA Anti-Doping Code.[25]

7.14 We are not unmindful that the strictness of the FINA Rules places a heavy burden on athletes to be alert and vigilant in taking supplements in a setting where, if Respondent is correct as to the universe of swimming, a majority of his colleagues take them. We also recognize that supplements are heavily promoted. Nevertheless it is the athlete's responsibility to heed warnings about supplements.

7.15 To require that the international sports federations prove intent to commit a doping infraction would make a mockery of the enforcement efforts to create a drug-free athletic environment. The athletes compete pursuant to rules with which they have agreed to comply in advance. We understand that at present different athletes have to comply with different rules in each sport, and we applaud the efforts at harmonization to achieve greater sanction uniformity. We also believe that within the applicable rules that the athlete has a basic right to compete, to pursue his or her chosen athletic field of endeavor. With this right, however, comes an obligation to exercise personal responsibility. We neither decide, nor do we believe we have the authority to decide, whether the lack of uniformity of rules and sanctions violates basic human rights of athletes. We do not sit as a constitutional tribunal. To date, proportionality has been largely considered in the precedents within the context of a particular sport and its rules, not

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25 There must be a balance between the protection of the athlete's basic, human right to compete and the rights of the many constituents within the athletic community (athletes, coaches, officials, fans, sponsors and national and international sports federations) who benefit from a drug-free environment where results are based on ability of athletes playing on a proverbial "level playing field." This balance, at times precarious, will be ameliorated with the harmonization of rules and sanctions as the WADA Code contemplates, thereby advancing the principle in doping cases that the sanctions not be disproportionate to the offense.

generically across boundaries. Nevertheless we would acknowledge that there are basic principles of fairness that apply to the enforcement of the rules of each sport.

In this case Respondent had the opportunity to test the supplements he used. He chose not to do so. While this does not manifest in itself an intention to use a prohibited substance, the failure to test his supplements, particularly when coupled with the numerous warnings sent to him or as to which he was put on notice, amount to a lack of compliance on his part that obviate a reduction of the suspension under the applicable rules.

8. Decision and Award

Confirming its Interim Award, the panel decides as follows:

8.1 A doping violation occurred on the part of Respondent.

8.2 The minimum suspension of four (4) years to take place effective from January 21, 2003 is imposed.

8.3 There is no retroactive sanction imposed involving cancellation of all results achieved in competitions during the period prior to the date the suspension takes effect and extending back to six (6) months before the collection of the positive sample.[26]

8.4 The administrative fees and expenses of the American Arbitration Association and the compensation and expenses of the arbitrators shall be borne by USADA.

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[26] Although, as we have noted, Respondent failed to qualify for a reduced "suspension" under FINA Rule DC 9-10, the results of the two tests he took prior to the positive test result in this case were negative. Accordingly, and because no intent to dope was established, we believe it inappropriate, as we decided in our Interim Opinion, to apply a retroactive sanction.

8.5 The parties shall bear their own costs and attorneys' fees. The cost of the transcript shall be borne by Respondent.

8.6 This Award is in full settlement of all claims submitted in this arbitration.

Signed this 24th day of July, 2003

Walter G. Gans

Walter G. Gans, Chair

Christopher L. Campbell

Carolyn B. Witherspoon

8.5 The parties shall bear their own costs and attorneys' fees. The cost of the transcript shall be borne by Respondent.

8.6 This Award is in full settlement of all claims submitted in this arbitration.

Signed this 24th day of July, 2003

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