AMERICAN ARBITRATION ASSOCIATION

North American Court of Arbitration for Sport Panel

In the Matter of the Arbitration between

United States Anti-Doping Agency,

Claimant

and

Kirk O'Bee,

Respondent.

Re: AAA No. 77 190 00515 09 JENF

AWARD OF ARBITRATORS

WE, THE UNDERSIGNED ARBITRATORS ("Panel"), having been designated by the above-named parties, having been duly sworn, and having duly heard and fully considered the allegations, arguments, and proofs of the parties, FIND AND AWARD as follows:

1. Introduction

1.1 In this case, the United States Anti-Doping Agency ("USADA") seeks a lifetime period of ineligibility for cyclist Kirk O'Bee's second anti-doping violation based on his alleged use or attempted use, possession, trafficking or attempted trafficking, and administration or attempted administration of prohibited substances, including recombinant human erythropoietin

("rhEPO"), testosterone, and human growth hormone ("HGH"). USADA also seeks disqualification of Mr. O'Bee's cycling competition results from July 15, 2003 or when its non-analytical positive evidence establishes Mr. O'Bee committed a second doping violation, which USADA contends occurred prior to his May 20, 2009 positive test for rhEPO.

1.2 Mr. O'Bee asserts that the evidence in this case does not prove he committed his second anti-doping violation prior to May 12, 2010, which is the date he admitted using rhEPO for the first time. He asserts that the appropriate sanction for his second anti-doping violation is an eight-year period of ineligibility and that there should be no invalidation of his cycling competition results prior to May 12, 2010.

1.3 For the reasons described in this Award, the Panel finds that USADA has proven to the comfortable satisfaction of the Panel, while bearing in mind the seriousness of the allegations made, that the evidence establishes that Mr. O'Bee used or attempted to use rhEPO on or at least as early as October 3, 2005, thereby committing his second anti-doping violation in violation of Article 21.2 of the International Cycling Union Anti-Doping Rules ("UCI ADR") (Article 2.2 of World Anti-Doping Code ("WADA Code"), which is substantially similar in relevant part in both the 2003 and 2009 versions. The Panel imposes a lifetime suspension on Mr. O'Bee and disqualifies his cycling competition results from October 3, 2005 through July 29, 2009, the date Mr. O'Bee accepted a provisional suspension.

2. Parties

2.1 The Claimant, USADA, 5555 Tech Center Dr., Suite 200, Colorado Springs, CO 80919, USA, 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 and Paralympic Movement Testing, effective as revised January 1, 2009 ("USADA Protocol"). During the course of this proceeding, Claimant was represented by William Bock, III, Esq., USADA's General Counsel, and Stephen A. Starks, Esq., USADA's Legal Affairs Director. Mr. Bock served as sole trial counsel for USADA during the hearing in this matter held on April 16, 2010 in Indianapolis, Indiana and continued by telephone on May 7, 2010.[1]

2.2 The Respondent, Kirk O'Bee, is a United States citizen who resides in North Vancouver, British Columbia, Canada. He is an elite cyclist who is a member of USA Cycling[2] and the USADA Registered Testing Pool. During the hearing Mr. O'Bee was represented by Mark W. Sniderman, Caplin Sniderman P.C., Carmel, Indiana.

3. Jurisdiction

3.1 This Panel has jurisdiction over this doping dispute pursuant to the Ted Stevens Olympic and Amateur Sports Act ("Act"), 36 U.S.C. §220501, *et seq.*, because this is a controversy involving Respondent's opportunity to participate in national and international competition representing the United States. The Act states:

> An amateur sports organization is eligible to be recognized, or to continue to be recognized, as a national governing body only if it . . . agrees to submit to

[1] At the beginning of the April 16th hearing, Mr. O'Bee's counsel cited Rule 3.7 of the Indiana Rules of Professional Conduct, which prohibits an attorney from acting as an advocate at trial in which he "is likely to be a necessary witness" and moved to disqualify Mr. Starks from serving as counsel for USADA during the hearing because he was listed as one of USADA's witnesses. In response, Mr. Bock stipulated that Mr. Starks would not serve as USADA's trial counsel during the hearing.

[2] USA Cycling is the National Governing Body ("NGB") for the Olympic sport of cycling in the United States. USA Cycling is a member of the International Cycling Union ("UCI") and the United States Olympic Committee ("USOC").

> 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. . .[3]

3.2 Under its authority to recognize a NGB[4], the USOC established National Anti-Doping Policies, the relevant version of which was 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.[5]

3.3 Regarding athletes, the USOC Policies provide:

. . . By virtue of their membership in an NGB or participation in a competition organized or sanctioned by an NGB, Participants agree to be bound by the USOC National Anti-Doping Policies and the USADA Protocol. [6]

3.4 In compliance with the Act, Article 10 (b) of the USADA Protocol provides that hearings regarding doping disputes "will take place in the United States before the American Arbitration Association ("AAA") using the supplementary Procedures."[7]

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[3] 36 U.S.C. §220521.

[4] 36 U.S.C. §220505(c)(4).

[5] USOC Policies, ¶13.

[6] *Id.* at ¶12.

[7] The supplementary procedures refer to the American Arbitration Association Supplementary Procedures for the Arbitration of Olympic Sport Doping Disputes, as approved by the USOC's Athletes' Advisory Council and NGB Council. 36 U.S.C. §220522.

4. Background and Litigation History

4.1 On June 10, 2001 Mr. O'Bee provided an in-competition urine sample at the 2001 USPRO Championships in Philadelphia, Pennsylvania that tested positive for synthetic testosterone, an anabolic steroid. He served a one-year suspension from July 15, 2002-July 15, 2003, which was the maximum sanction for a first doping offense under the 2001 UCI anti-doping rules.

4.2 On May 20, 2009, USADA collected urine sample number 1839555 from Mr. O'Bee. The sample was sent to the WADA accredited laboratory in Montreal, Quebec, Canada for analysis, which determined it contained isoforms of rhEPO. During the April 16th hearing Mr. O'Bee , through his counsel, "stipulate[d] that the [laboratory] results were accurate."

4.3 On July 27, 2009 Mr. O'Bee voluntarily accepted a provisional suspension as a result of the Montreal laboratory's "report of an Adverse Analytical Finding for evidence of a Non-Specified Substance" in his May 20, 2009 urine sample.

4.4 On August 13, 2009 Mr. O'Bee, who was unrepresented by counsel at the time, voluntarily participated in a telephone conversation with Mr. Bock and Dr. Eichner regarding his usage of banned performance-enhancing substances and his knowledge of such usage by other professional cyclists.

4.5 On November 16, 2009, based on the Montreal laboratory's report of an adverse analytical finding of rhEPO in his urine sample, USADA's Anti-doping Review Board ("Review Board") found sufficient evidence that Mr. O'Bee committed a doping violation and recommended that the adjudication process proceed as set forth in the USADA Protocol and UCI ADR.

4.6 In a November 19, 2009 letter to Mr. O'Bee, USADA stated: "At this time, reserving all rights to amend this charge, USADA charges you with a second anti-doping rule violation for the presence in your sample of the prohibited substance recombinant EPO isoforms, pursuant to Chapter II, Article 21 of the UCI ADR (Articles 2.1 and 2.2 of the Code)." USADA informed Mr. O'Bee that it sought a "[l]ifetime period of ineligibility" and "[d]isqualification of [his] competitive results obtained on and subsequent to the earliest date upon which you committed an anti-doping violation based on evidence currently in USADA's possession or which USADA may receive (currently USADA has information in its possession indicating that you engaged in rule violations from on or before September 16, 2005) including forfeiture of any medals, points and prizes consistent with Chapter X of the UCI ADR."

4.7 In a December 1, 2009 letter informing the American Arbitration Association ("AAA") of Mr. O'Bee's request for a hearing, USADA stated it "is seeking the sanction as set forth in the attached copy of the charging letter that was sent to Mr. O'Bee on November 19, 2009."

4.8 On January 22, 2010 the Panel was appointed by AAA to adjudicate this matter.

4.9 During a February 19, 2010 preliminary hearing by telephone between Mr. O'Bee, USADA, and the Panel, Mr. O'Bee requested an opportunity to consult with John Ruger, the United States Olympic Committee's Athlete Ombudsman, in an effort to obtain an attorney to represent him in this proceeding, which the Panel granted. Soon thereafter Mr. Sniderman agreed to represent Mr. O'Bee pro bono, which the Panel commends him for doing.

4.10 In accordance with the agreement between the parties' counsel, the Panel's March 15, 2010 Scheduling Order set the hearing for April 16, 2010 in Indianapolis, Indiana. The

Scheduling Order required USADA to identify its witnesses, provide exhibits, and submit its pre-hearing brief by March 26, 2010; Mr. O'Bee was required to do so by April 9, 2010. Pursuant to agreement of counsel and with the Panel's approval, these dates were extended by three days for each party.

4.11 In a March 26, 2010 letter to Mr. Sniderman, USADA stated it "now supplements its prior charges and charges Mr. O'Bee with violations of the foregoing provisions of the Code," which USADA identified as Articles 2.2, 2.6, 2.7 and 2.8 of the WADA Code and parallel rules of the UCI.

4.12 In its March 29, 2010 Pre-Hearing Brief, USADA provided a detailed description of the non-analytical positive evidence supporting its contention that Mr. O'Bee committed his second doping violation prior to his May 20, 2009 positive test for rhEPO[8] and stated that it "seeks disqualification of all of Respondent's competitive results from July 15, 2003, then [sic] end date of Respondent's prior sanction, or from the moment the evidence establishes that he committed his second anti- doping violation, which USADA submits was many years prior to his second positive sample obtained on May 20, 2009."

4.13 In his April 12, 2010 Pre-Hearing Brief, Mr. O'Bee raised procedural challenges to the non-analytical positive evidence USADA would be relying upon to establish his commission of a second doping violation prior to May 20, 2009. He argued that USADA is precluded from prosecuting its non-analytical positive anti-doping claims because USADA failed to comply with both its own Protocol and the American Arbitration Association Supplementary

[8] USADA's request that the Panel draw an adverse inference pursuant to WADA Code 3.2.4 if Mr. O'Bee refused to testify at the April 16, 2010 hearing despite its March 26, 2010 request that he do so became moot when he voluntarily testified at the hearing.

Procedures for the Arbitration of Olympic Sports Doping Disputes ("AAA Supplementary Procedures"). He also asserted this evidence is unauthenticated and should be deemed inadmissible by the Panel.[9]

4.14 In an April 16, 2010 Reply Brief, USADA replied to the procedural challenges raised in Mr. O'Bee's April 12, 2010 Pre-Hearing Brief. USADA argued it had properly pleaded its non-analytical positive doping claims, had given Mr. O'Bee adequate notice of these claims, and that its prosecution of these claims does not violate either the USADA Protocol or the AAA Supplementary Procedures.

4.15 During the April 16, 2010 hearing, Glen Mitchell, Stephen Starks, Rebecca R. Hendricks, Blake Schwank, and Dr. Daniel Eichner testified on behalf of USADA. Kirk O'Bee, Professor Derek S. Witte, Gerald O'Bee, and Kathryn O'Bee testified on behalf of Mr. O'Bee. The hearing was continued by teleconference on May 7, 2010 to complete the parties' examination of Dr. Eichner.

4.16 On May 10, 2010, the Panel requested counsel for the parties to address the applicability of *French v Cycling Australia*, CAS 204/A/651, to the present proceeding in their respective post-hearing briefs. The Panel also requested counsel to answer the following question: "Do either of the parties contend that Kirk O'Bee's agreement to participate in an August 13, 2009 telephone interview with Dr. Daniel Eichner and William Bock, III was conditioned upon any agreement between Mr. O'Bee and USADA concerning the sanction for his May 20, 2009 positive test for rhEPO, and, if so, what were the terms of their agreement?"

[9] In addition, Mr. O'Bee asserted that the Montreal laboratory's positive test results for rhEPO in his sample are inaccurate and unreliable, which claim was subsequently abandoned at the April 16th hearing when his counsel stipulated the laboratory's results are accurate.

4.17 The hearing remained open until July 28, 2010 to enable the court reporter to prepare the transcript of the hearing and to accommodate three joint requests for extensions of time by the parties' counsel to submit their post-hearing briefs. At the Panel's request, the parties' counsel agreed that the Panel's written award would be due on October 1, 2010 because one of the arbitrators would be out of the country and unable to participate in deliberations or drafting of the award from August 16-September 20, 2010.

4.18 On August 11, 2010, pursuant to R-33 of the AAA Supplementary Procedures, the Panel reopened the hearing for the limited purpose of requesting Mr. O'Bee to provide answers to the best of his knowledge to the following three questions as soon as possible: "1. Identify Kirk O'Bee's primary residence(s) from January 2007 through March 2008 and the approximate dates during which he lived at each residence. 2. Identify Suzanne Johnson's primary residence(s) from January 2007 through March 2008 and the approximate dates during which she lived at each residence. 3. Identify the approximate date on which Kirk O'Bee and Suzanne Johnson resumed living together in February 2008 and the residence at which this occurred." The Panel also requested that the parties agree to extend the time its award is due until October 15, 2010. On August 14, 2010, Mr. O'Bee provided answers to these questions without any objections,[10] which he subsequently corrected and supplemented on September 20, 2010. On August 16, 2010, the Panel closed the reopened hearing.

4.19 The following discussion of the parties' submissions is summarized and does not purport to include the details of every contention put forward by the parties. However, the Panel

[10] On August 13, 2010, USADA objected to the Panel's reopening of the hearing and asserted the Panel "should resolve this case based on the extensive submissions already made" by the parties. USADA also objected to the Panel's requested extension of time to issue the award solely because it was made in connection with the reopening of the hearing. On August 16, 2010, given USADA's objections and to ensure that R-33 of the AAA Supplementary Procedures would not be violated, the Panel informed the parties it would issue its award by October 1, 2010 as previously agreed and withdrew its request for an extension of time.

has carefully considered all of the parties' respective submissions on every issue in this matter, even if there is no specific reference to those submissions in this award.

5. Procedural Issues

Mr. O'Bee's Motion to Strike USADA's April 16, 2010 Reply Brief and Exhibits 88-93

5.1 Approximately one hour before the April 16, 2010 hearing was to begin, USADA submitted a Reply Brief with attached exhibits A-E, which was not contemplated by the March 15, 2010 Scheduling Order, in response to the procedural challenges raised in Mr. O'Bee's April 12, 2010 Pre-Hearing Brief. USADA also submitted six new exhibits, which were marked as USADA Exhibits 88-93. Exhibit 88 is a March 17, 2007 packing slip. Exhibit 89 is a March 1, 2007 customs declaration. Exhibit 90 is an unnotarized affidavit from Suzanne Johnson, dated April 15, 2010. Exhibits 91-93 are email correspondence between Suzanne Johnson and Stephen Starks regarding her unwillingness to testify at the hearing and her affidavit.

5.2 During the hearing Mr. O'Bee's counsel moved to strike USADA's Reply Brief and Exhibits 88-93 as evidence on the ground they were not timely filed.

5.3 The Panel denied the motion to strike USADA's reply brief, which merely summarizes the arguments made by Mr. Bock during the hearing regarding the procedural issues raised by Mr. O'Bee, and attached exhibits A-E, which are duplicate copies of exhibits USADA previously submitted in accordance with the Scheduling Order. To provide Mr. O'Bee with a full opportunity to be heard, the Panel granted his counsel's request to respond to the arguments raised in USADA's reply brief in his post-hearing brief.

5.4 The Panel granted the motion to exclude USADA Exhibits 88-93 because they were not submitted in a timely manner, subject to USADA's right to use these documents as

rebuttal evidence. The Panel excluded Exhibit 90 on the additional ground that USADA had not attempted to subpoena Ms. Johnson or established she was unavailable to testify at the hearing.

Compliance with Rule 11(b) of the USADA Protocol

5.5 In relevant part, Rule 11 of the USADA Protocol states as follows:

> Except as provided in sections 12 and 13 of this Protocol, when USADA receives a laboratory report confirming an *Adverse Analytical Finding* or concludes after investigation that an *Atypical Finding* was the result of the administration of a *Prohibited Substance* or *Use of a Prohibited Method*, or when USADA has otherwise determined that an anti-doping rule violation may have occurred, such as admitted, refusal to test, evasion of *doping control, trafficking*, a whereabouts failure or other violation of **Annex A,** IF rules or the USOC NADP then USADA shall address the case through the following results management procedures:
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> a. ...the Review Board shall review all *Sample* test results reported by the laboratory as an *Adverse Analytical Finding* or as an *Atypical Finding* and as to which USADA determines that there exists no valid TUE, or other sufficient reason not to bring the case forward as a potential anti-doping rule violation....
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> b. ...the Review Board shall also review all potential anti-doping rule violations, including violations of **Annex A**, IF rules or the USOC NADP, not based on *Adverse Analytical Findings*, which are brought forward by USADA....
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> c. Upon USADA's receipt of a laboratory B *Sample* report confirming an *Adverse Analytical Finding* (or immediately when analysis of the B *Sample* has been expressly waived by the *Athlete* or other *Person*), or when USADA determines that a potential violation of other applicable anti-doping rules has occurred, the following steps shall be taken:
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> ...
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> ii. The Review Board shall be provided the laboratory documentation and any additional information which USADA deems appropriate....
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> ...
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> v. The Review Board shall be entitled to request additional information from either USADA or the *Athlete* or other *Person*.
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> vi. Notwithstanding the forgoing, the process before the Review Board shall not be considered a "hearing." The Review Board shall only consider written submittals. Submittals to the Review Board shall not be used in any further hearing or proceeding without the consent of the party making the submittal. No evidence concerning the proceeding before the Review Board, including but not limited to the composition of the Review Board, what evidence may or may have not been considered by it, its deliberative process or its recommendations shall be admissible in any further hearing or proceeding.
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> ...

> vii. The Review Board shall consider the written information submitted to it and shall, by majority vote, make a signed, written recommendation to USADA with a copy to the *Athlete* or other *Person* whether or not there is sufficient evidence of doping to proceed with the adjudication process.
>
> ...

5.6 Mr. O'Bee argues that USADA violated Rule 11(b) of the USADA Protocol by not submitting any non-analytical positive evidence to the Review Board before bringing anti-doping charges against him based on this evidence. He asserts that "each and every rule violation USADA claims [he] committed was required to be reviewed by the Review Board" and that "the Panel lacks jurisdiction to consider the non-analytical charges because the Review Board never concluded there was sufficient evidence to proceed on anything but the analytical positive." He claims that USADA's non-compliance with Rule 11(b) violates his due process rights by not giving him fair notice of the specific non-analytical positive charges against him and by failing "to respect the regulatory scheme—in and of itself—that was agreed to by the stakeholders in the Olympic movement who established this anti-doping paradigm."

5.7 In response, USADA asserts that pursuant to Rule 11(c)(vii) the only purpose of the Review Board process is to determine "whether or not there is sufficient evidence of doping to proceed with the adjudication process." USADA provided the Review Board with the "laboratory documentation" regarding the adverse analytical finding of rhEPO in Mr. O'Bee's May 20, 2009 urine sample as required by Rule 11(c)(ii). Because the Review Board determined this constituted sufficient evidence of doping by Mr. O'Bee to proceed to arbitration, USADA contends it was not required to submit any non-analytical positive evidence to the Review Board, although it had the discretion to do so pursuant to Rule 11(c)(ii), which permits the submission of "any additional information USADA deems appropriate." Relying on Rule 11(c)(vi) that states "[n]o evidence concerning the proceeding before the Review Board . . . shall be admissible

in any further hearing or proceeding," USADA also asserts that the Panel is precluded from reviewing the Review Board process in this arbitration proceeding. USADA also contends that its non-analytical positive claims were identified in its November 19, 2009 charging letter, which provided Mr. O'Bee with adequate notice that USADA intended to prosecute these claims.

5.8 During the April 16, 2010 hearing, the Panel denied Mr. O'Bee's motion to preclude USADA from introducing any non-analytical positive evidence based on its alleged non-compliance with Rule 11(b) of the USADA Protocol. After carefully considering the parties' respective arguments during the hearing and in their briefs, the Panel reaffirms this ruling for the following reasons.

5.9 Rule 11(c)(vii) precludes the Panel from reviewing any evidence concerning the proceedings before the Review Board, including whether any non-analytical positive evidence was submitted for its consideration. The sole purpose of the Review Board process is to determine "whether or not there is sufficient evidence of doping to proceed with the adjudication process" (Rule 11(c)(vii)), which the Review Board affirmatively found based on the Montreal laboratory's report of an adverse analytical finding of rhEPO in Mr. O'Bee's May 20, 2009 urine sample. Rule 11(c)(ii) states: "The Review Board shall be provided the laboratory documentation **and any additional information which USADA deems appropriate.**" (emphasis added.) Rule 11(b) requires the Review Board to "review all potential anti-doping rule violations . . . not based on *Adverse Analytical Findings*, **which are brought forward by USADA**." (emphasis added.)

5.10 Although Rule 11 requires USADA to submit the laboratory report of an adverse analytical finding to the Review Board, the Panel concludes that the highlighted language in this rule gives USADA the discretion to present other evidence of an athlete's doping violations to

the Review Board. Contrary to Mr. O'Bee's contention, Rule 11(b) does not require USADA to do so as a prerequisite to prosecuting its non-analytical positive anti-doping rule claims against him. Moreover, the November 19, 2009 charging letter, which states that USADA claims to have evidence of "rule violations from on or before September 16, 2005," provided Mr. O'Bee with adequate notice that USADA intended to rely upon non-analytical positive evidence in seeking lifetime ineligibility and disqualification of his results "on and subsequent to the earliest date upon which [he] committed an anti-doping violation."

Compliance with Rule R-5 of the AAA Supplementary Procedures

5.11 Rule R-5 of the AAA Supplementary Procedures states:

> After filing of a claim, if any party desires to make any new or different claim, it shall be made in writing and filed with the AAA. The party asserting such a claim shall provide a copy of the new or different claim to the other party or parties. After the arbitrator is appointed, however, no new or different claim may be submitted except with the arbitrator's consent.

5.12 Mr. O'Bee argues that "USADA never correctly filed any claim with the AAA based on non-analytical violations allegedly committed by [him]." He asserts that USADA's December 1, 2009 claim filed with AAA encompassed only USADA's November 19, 2009 charge that he committed "a second anti-doping rule violation for the presence in your sample of the prohibited substance recombinant EPO isoforms."[11] Although USADA "reserv[ed] all rights to amend this charge," Mr. O'Bee contends USADA did not supplement this sole charge of an adverse analytical finding until March 26, 2010 when it informed his counsel in a letter that "USADA now supplements its prior charges and charges Mr. O'Bee with violations of the

[11] In his Pre-Hearing Brief, Mr. O'Bee asserted that USADA failed to comply with R-4 of the AAA Supplementary Procedures by not sending him a copy of its December 1, 2009 letter to AAA initiating this arbitration proceeding. During the hearing Mr. O'Bee's counsel withdrew this argument after reviewing a copy of USADA's December 1, 2009 email to Mr. O'Bee transmitting a copy of this letter, which was attached as Exhibit A to USADA's April 16, 2010 Reply Brief.

foregoing provisions of the Code," which specifically references Articles 2.2 (use or attempted use of a prohibited substance), 2.6 (possession of a prohibited substance), 2.7 (trafficking or attempted trafficking in any prohibited substance) and 2.8 (administration or attempted administration of any prohibited substance). He asserts these March 26, 2010 charges are "new or different" claims under Rule R-5 that USADA cannot prosecute in this proceeding because they were not "made in writing and filed with the AAA" and submitted with the Panel's consent as required by this rule.

5.13 In response, USADA states it has not changed its claim and asserts its November 19, 2009 charging letter, which was referenced in and included with its December 1, 2009 letter to AAA, specifically references its non-analytical positive claims. USADA points out that the charging letter explicitly refers to "Chapter II, Article 21 of the UCI ADR (Articles 2.1 and 2.2 of the Code)" and gives appropriate notice of its intention to use non-analytical positive evidence to seek a "[l]ifetime period of ineligibility" and "[d]isqualification of [Mr. O'Bee's] competitive results obtained on and subsequent to the earliest date upon which you committed an anti-doping violation based on evidence currently in USADA's possession or which USADA may receive (currently USADA has information in its possession indicating that you engaged in rule violations from on or before September 16, 2005) including forfeiture of any medals, points and prizes consistent with Chapter X of the UCI ADR."

5.14 In its Pre-Hearing Brief, USADA also asserted its non-analytical positive evidence is relevant and admissible to corroborate the accuracy of the Montreal laboratory test results regarding the presence of rhEPO in Mr. O'Bee's system[12] and to establish aggravating

[12] This issue became moot when Mr. O'Bee's counsel stipulated to the accuracy of the laboratory results during the hearing.

circumstances justifying Mr. O'Bee's lifetime suspension from the sport of cycling.[13] In addition, USADA requested that the Panel retroactively consent to its filing of the specific non-analytical positive charges set forth in its March 26, 2010 letter because Mr. O'Bee had clear notice of its intention to prosecute these charges "for months in advance of the November 19, 2009 charging letter."[14]

5.15 During the April 16, 2010 hearing, the Panel permitted USADA to introduce its non-analytical positive evidence subject to Mr. O'Bee's evidentiary objections based on its preliminary determination that doing so would not violate Rule R-5. However, after carefully considering the parties' respective arguments and after full deliberation, the Panel rules that USADA's March 26, 2010 supplemental charges explicitly alleging violations of WADA Code Articles 2.6 (possession of a prohibited substance), 2.7 (trafficking or attempted trafficking in any prohibited substance) and 2.8 (administration or attempted administration of any prohibited substance) for the first time are "new or different" claims than those in its November 19, 2009 charging letter filed with AAA, which specifically reference only Mr. O'Bee's alleged violations of WADA Code Articles 2.1 (presence of a prohibited substance in an athlete's sample) and 2.2 (use or attempted use of a prohibited substance), namely recombinant EPO isoforms. Although the November 19, 2009 charging letter references "Article 21 of the UCI ADR," which prohibits the use, attempted use, possession, trafficking or attempted trafficking, and administration or

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[13] Based on the Panel's finding the Mr. O'Bee committed his second doping violation on or at least as early as October 3, 2005, Article 10.2 (Imposition of Ineligibility for Prohibited Substances and Prohibited Methods) of the 2003 WADA Code, not Articles 10.6 (Aggravating Circumstances Which May Increase the Period of Ineligibility) and 10.7 (Multiple Violations) of the 2009 WADA Code, is the applicable rule regarding the length of Mr. O'Bee's suspension.

[14] In his Post-Hearing Brief, Mr. O'Bee stated that his "objection centers not on a 'fair notice' defense, but rather USADA's non-compliance with the appropriate rules."

attempted administration of prohibited substances, it appears to limit the scope of the charges against Mr. O'Bee only to alleged violations of "Articles 2.1 and 2.2 of the Code." Moreover, the charging letter's only specific charge is the "presence in your sample of the prohibited substance recombinant EPO isoforms," which is an alleged violation of WADA Code 2.1, and expressly reserves "all rights to amend this charge."

5.16 At a minimum, the charging letter is ambiguous, and its terms should be construed against its drafter, USADA. The Panel concludes that USADA may prosecute only its alleged rule violations based on WADA Code Articles 2.1 and 2.2 as adopted in Article 21 of the UCI ADR, specifically the presence of rhEPO in Mr. O'Bee's May 20, 2009 sample and his use or attempted use of rhEPO from on or before September 16, 2005, which are the only charges clearly identified its November 19, 2009 charging letter. Because USADA did not comply with Rule R-5's requirements that "new or different" claims be "made in writing and filed with the AAA" and submitted with the Panel's consent, USADA is precluded from prosecuting in this proceeding its March 26, 2010 supplemental charges alleging Mr. O'Bee violated Articles 2.6, 2.7, and 2.8 of the WADA Code.

5.17 The Panel declines USADA's request to retroactively consent to the submission of its March 26, 2010 supplemental charges, which never were submitted to the Panel and written notice of which were provided to Mr. O'Bee's counsel only three weeks before the hearing. The Panel believes it is important to strictly enforce Rule R-5 to ensure that an athlete has timely, clear notice of the specific anti-doping charges against him in order to adequately defend himself against USADA's allegations, particularly when a lifetime suspension and retroactive invalidation of competition results are sought. Doing so potentially helps to foster

settlement (thereby avoiding formal adjudication) by clearly informing an athlete in writing of the precise claims USADA seeks to prosecute.

6. Applicable UCI ADR and WADA Code Rules

6.1 The presence of a *Prohibited Substance* or its *Metabolites* or *Markers* in a *Rider's* bodily Specimen

UCI ADR 21.1, which is identical to Article 2.1 of the 2009 WADA Code and is substantially similar in relevant part to the corresponding 2003 WADA Code provision, provides:

> 1.1 It is each *Rider*'s personal duty to ensure that no *Prohibited Substance* enters his body. *Riders* 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 *Rider's* part be demonstrated in order to establish an anti-doping violation under Article 21.1.
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> 1.2 Sufficient proof of an anti-doping violation under Article 2.1 is established by either of the following: presence of a *Prohibited Substance* or its *Metabolites* or *Markers* in the *Rider's A Sample* . . . and the analysis of the *Rider's B Sample* confirms the presence of the *Prohibited Substance* or its *Metabolites* or *Markers* found in the *Rider's A Sample.*

6.2 *Use or Attempted Use* by a *Rider* of a *Prohibited Substance* or a *Prohibited Method*

UCI ADR 21.2, which is identical to Article 2.2 of the 2009 WADA Code and is substantially similar in relevant part to the corresponding 2003 WADA Code provision, provides:

> 2.1 It is each Rider's personal duty to ensure that no *Prohibited Substance* enters his or her body and that he does not Use a *Prohibited Method.* Accordingly, it is not necessary that intent, fault, negligence or knowing *Use* on the *Rider's* part be demonstrated in order to establish an anti-doping violation for *Use* of a *Prohibited Substance* or a *Prohibited Method.*
>
> 2.2 The success or failure of the *Use* of a *Prohibited Substance* or a *Prohibited Method* is not material. It is sufficient that the *Prohibited Substance* or a *Prohibited Method* was *Used* or *Attempted* to be *Used* for an anti-doping rule violation to be committed.

"*Use*" is defined as the utilization, application, ingestion, injection or consumption by any means whatsoever of any *Prohibited Substance* or *Prohibited Method.*" Appendix 1, UCI ADR and Code. "*Attempt*" is defined as "Purposely engaging in conduct that constitutes a substantial step in a course of conduct planned to culminate in the commission of an anti-doping

rule violation." Appendix 1, UCI ADR and Code. The Comment to Article 2.2. of the Code provides that " It has always been the case that Use or Attempted Use of a Prohibited Substance or Prohibited Method may be established by any reliable means. As noted in the Comment to Article 3.2 (Methods of Establishing Facts and Presumptions), unlike the proof required to establish an anti-doping violation under Article 2.1, Use or Attempted Use may also be established by other reliable means such as admissions by the Athlete, witness statements, documentary evidence . . . "

6.3 Burdens and Standards of Proof

Article 3.1 of the 2003 and 2009 WADA Code provides that "The *Anti-Doping Organization* shall have the burden of establishing that an anti-doping rule violation has occurred. The standard of proof shall be whether the *Anti-Doping Organization* has established to the comfortable satisfaction of the hearing panel bearing in mind the seriousness of the allegation which is made. This standard of proof in all cases is greater than a mere balance of probability but less than proof beyond a reasonable doubt. . . . "

6.4 WADA Prohibited List

Pursuant to Chapter 29 of the UCI ADR, the UCI has adopted the WADA Prohibited List as described in Article 4.1 of Code. The WADA Prohibited Lists in effect from January 1, 2005 to the present list testosterone as a prohibited anabolic agent under S1 and erythropoietin (EPO) and growth hormone (hGH or GH) as prohibited hormones and related substances under S2.

6.5 Imposition of Ineligibility for Prohibited Substances and Prohibited Methods

Article 10.2 of the 2003 WADA Code provides:

Except for the specified substances identified in Article 10.3, the period of *Ineligibility* imposed for a violation of Articles 2.1 (presence of *Prohibited Substance* or its *Metabolites* or *Markers*), 2.2 (*Use* or *Attempted Use* of *Prohibited Substance* or *Prohibited Method*) and 2.6 (Possession of Prohibited Substance and Methods) shall be:

First violation: Two (2) years' *Ineligibility*.

Second violation: Lifetime *Ineligibility*.

However, the *Athlete* or other *Person* shall have the opportunity in each case, before a period of *Ineligibility* is imposed, to establish the basis for eliminating or reducting this sanction as provided in Article 10.5.

6.6 Elimination or Reduction of Period of *Ineligibility* Based on Exceptional Circumstances

In relevant part Article 10.5 of the 2003 WADA Code provides:

10.5.1 *No Fault or Negligence*

If the *Athlete* establishes in an individual case involving an anti-doping rule violation under Article 2.1(presence of *Prohibited Substance* or its *Metabolites* or

Markers) or *Use* of a *Prohibited Substance* or *Prohibited Method* under Article 2.2 that he or she bears *No Fault or Negligence* for the violation, the otherwise applicable period of *Ineligibility* shall be eliminated. . . .

10.5.2 *No Significant Fault or Negligence*

This Article 10.5.2 applies only to anti-doping rule violations involving Article 2.1 (presence of *Prohibited Substance* or its *Metabolites* or *Markers*), Use of a *Prohibited Substance* or *Prohibited Method* under Article 2.2 . . . If an *Athlete* 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 the minimum period of *Ineligibility* otherwise applicable. If the otherwise applicable period of Ineligibility is a lifetime, the reduced period under this section may be no less than 8 years. . . .

6.7 *Disqualification* of Results in *Competitions* Subsequent to *Sample* Collection

Article 10.7 of the 2003 WADA Code provides:

In addition to the automatic *Disqualification* of the results in the *Competition* . . . all other competitive results obtained from the date a positive *Sample* was collected (whether *In-Competition* or *Out-of-Competition*) or other anti-doping rule violation occurred, through the commencement of any *Provisional Suspension* or *Ineligibility* period, shall, unless fairness requires otherwise, be *Disqualified* with all of the resulting consequences including forfeiture of any medals, points and prizes.

6.8 Commencement of *Ineligibility* Period

In relevant part, Article 10.8 of the 2003 WADA Code) states: "The period of *Ineligibility* shall start on the date of the hearing decision providing for Ineligibility . . ."

7. Testimony of Mr. O'Bee and His Witnesses

7.1 Mr. O'Bee testified he has been a competitive cyclist for twenty years, initially as an amateur and as a professional since 2000.

7.2 Mr. O'Bee began a romantic relationship with Suzanne Johnson in October 2000. They lived together in North Vancouver from July 2002 until the end of December 2005. During this time they had a son together. They also jointly purchased, owned, and used a desktop computer; each of them had separate computer passwords. Beginning in 2004 Ms. Johnson

discovered his passwords without his permission and accessed his facebook and yahoo email accounts multiple times without his permission.

7.3 At the end of 2005 they separated due to personal differences and because they couldn't get along, and he moved out of their residence. Mr. O'Bee believes some of their relationship difficulties resulted from Suzanne not liking the fact he often was away from home pursuing his professional cycling career.

7.4 They lived in separate residences until February 2008, when they moved back in together in North Vancouver and attempted to reconcile after Ms. Johnson became pregnant with their daughter. During their period of separation Mr. O'Bee had no access to the desktop computer, which Ms. Johnson took to her residence. Neither of them was happy after moving back in together. In September 2008, while Mr. O'Bee was at a cycling race in Missouri, Ms. Johnson accessed his side of their computer and discovered personal information about him that led to a domestic dispute. He testified Ms. Johnson "became very upset and sent me some texts and said, our relationship is over, you need to move out, and made a comment in regards to 'I'm going to make sure you hit the bottom of the barrel.'" When he arrived home in mid-September, he learned that Ms. Johnson had obtained the issuance of a peace bond that prohibited him from returning to their residence. He moved out into his own separate residence soon thereafter and was embroiled in a dispute with Ms. Johnson regarding his visitation rights for their children for several months.

7.5 Because of stress caused by his poor relationship with Ms. Johnson, inability to see his children as often as he wanted, and financial pressures, Mr. O'Bee's spring 2009 cycling training was difficult. The focus of his training was for a June 2009 cycling race in Philadelphia,

in which his performance would largely determine whether Bissell Pro Cycling would renew his one-year contract to be the team's sprinter. Mr. O'Bee testified that cycling is "contractual from year to year, and your results matter every year." He claims that he took rhEPO for the first time on approximately May 12, 2009 and again on May 19, 2009 to enhance his fitness to perform in the upcoming Philadelphia race. Mr. O'Bee stated he injected himself with rhEPO while by himself at his home in North Vancouver. He stated that a friend, who was not a cyclist or athlete, whose identity he refused to disclose[15] gave him the rhEPO and told him to how to inject himself.

7.6 Mr. O'Bee denied ingesting or possessing any banned performance enhancing substances other than rhEPO on May 12 and 19, 2009 between the time of his June 10, 2001 positive test for synthetic testosterone and his May 20, 2009 positive test for rhEPO. He denied ever using or injecting himself with HGH or investigating the possibility of using it.

7.7 Although Mr. O'Bee acknowledged calling Glen Mitchell, General Manager of the Bissell Pro Cycling Team in late July 2009 to inform him the A sample for his May 20, 2009 urine sample was positive for rhEPO, he denies telling him he used rhEPO during his cycling career.

7.8 Mr. O'Bee testified he told Dr. Eichner (and Mr. Bock) that he had used rhEPO on May 12 and 19, 2009 during their August 13, 2009 phone conversation, but denies stating he

[15] In its Post-Hearing Brief, USADA asked the Panel to draw an adverse inference that Mr. O'Bee's refusal to testify regarding the source of his supply of rhEPO was to avoid disclosure that his use of rhEPO occurred over a longer period of time than he admitted. The Panel refuses to so because neither the 2003 nor the 2009 WADA Code imposes an affirmative obligation on an athlete to disclose the source of banned substance; however, both versions of the Code provide for leniency if the athlete cooperates with an anti-doping investigation. Article 10.5.3.

had used rhEPO continuously or periodically throughout his cycling career or that he had used testosterone periodically throughout his cycling career.

7.9 He admits using kirkobee@telus.net from January 2005 through the end of 2008 and kirkobee@yahoo.com from 2005 to the present as his personal email addresses. However, he denies writing (or does not recognize) any emails sent to or from either email account address from September 16-December 2005, which USADA proffers as evidence of his doping violations during this period of time. In particular, he denies having any email communications with Ellis Toussier regarding the purchase or usage of rhEPO or human growth hormone, or with fellow cyclists Kirk Ditterich or Nathan O'Neill regarding rhEPO or human growth hormone. He believes these emails are inaccurate or fabricated by Ms. Johnson, whom he claims sent emails to others (e.g., his cycling coach) using his email accounts without his permission.

7.10 He admitted using "bluevanrider" as his member name to purchase items on Ebay, but denies using this account to purchase a box of HemoCue Hb 201, an item used with a hemoglobin meter, and claims that Ms. Johnson had access to his Ebay account because she knew his password. He also denies ever using a hemoglobin meter as well as using "bluevanrider" in any email correspondence from kirkobee@telus.net claiming to be an elite cross country skiing coach in British Columbia seeking to purchase a hematocrit centrifuge.

7.11 Mr. O'Bee denies ever ordering clenbuterol or clomiphene, and he denies seeing the purchase orders for these products that are addressed to him and proffered as Exhibits 30 and 31 by USADA. He also denies that the two vials of performance-enhancing substances and photos of other vials of performance-enhancing substances (Exhibit 15) provided by Ms. Johnson to USADA belonged to him. He also denies that Canadian customs officials ever seized

any banned performance-enhancing substances from him at the Peace Arch crossing on the United States border.

7.12 Derek S. Witte, a close friend of Mr. O'Bee who has known him for approximately twenty years, testified that Mr. O'Bee "has a really strong conscious [sic]" and "he's always been forthright with everyone." He also testified he met Suzanne Johnson a few times and believes she was very resentful Mr. O'Bee's professional cycling career required so much travel and "it made her spiteful, in [his] opinion, about their relationship."

7.13 Gerald O'Bee, Mr. O'Bee's father, testified that Mr. O'Bee owns up to his mistakes and experienced a significant amount of stress as a result of his relationship with Ms. Johnson.

7.14 Kathryn O'Bee, Mr. O'Bee's mother, testified that Mr. O'Bee has a history of admitting his mistakes. She has known Ms. Johnson during the course of her relationship with Mr. O'Bee and is aware of the tension that has existed in their relationship over the years. She believes Ms. Johnson resents Mr. O'Bee because of the significant time he spent competing in and training for cycling, and also believes it is possible "Suzanne set up Kirk."

8. USADA's Non-Analytical Positive Evidence of Mr. O'Bee's Doping Violations and Evidentiary Issues

8.1 Article 3.2 of the 2003 and 2009 WADA Code provide that "Facts related to anti-doping rule violations may be established by any reliable means, including admissions." In relevant part, the Comment to Article 3.2 of the 2009 WADA Code provides: "For example, an Anti-Doping Organization may establish an anti-doping rule violation under Article 2.2 (Use or Attempted Use of a Prohibited Substance or Prohibited Method) based on the Athlete's

admissions, the credible testimony of Third Persons, reliable documentary evidence, reliable analytical data from either an A or B Sample as provided in the Comments to Article 2.2 . . ."

8.2 In relevant part, Rule R-28(a) of the AAA Supplementary Procedures states "The parties may offer such evidence as is relevant and material to the dispute and shall produce such evidence as the arbitrator may deem necessary to an understanding and determination of the dispute. Conformity to legal rules of evidence shall not be necessary." Rule R-28(c) provides that "The arbitrator shall determine the admissibility, relevance, and materiality of the evidence offered and may exclude evidence deemed by the arbitrator to be cumulative or irrelevant." Rule R-29 states "The arbitrator may receive and consider the evidence of witnesses by declaration or affidavit, but shall give it only such weight as the arbitrator deems it entitled to after consideration of any objection made to its admission."

8.3 USADA seeks to prove Mr. O'Bee committed his second doping violation prior to his May 20, 2009 positive test for rhEPO through the use of non-analytical positive evidence, including his own testimony, verbal admissions he made to others, and documentary evidence (e.g., email correspondence and purchase orders for banned performance-enhancing substances).

Glen Mitchell's Testimony Regarding Mr. O'Bee's Doping Admissions

8.4 During the hearing Glen Mitchell testified that during a July 2009 telephone conversation Mr. O'Bee admitted he had taken rhEPO on May 12 and 19, 2009 and that "he had used rhEPO in the past for specific races here and there." Mr. Mitchell acknowledged that Mr. O'Bee did not tell him "he had been using performance-enhancing substances for his entire career."

8.5 The following evidence proffered by USADA in support of its claims gave rise to objections by Mr. O'Bee's counsel during the April 16, 2010 hearing or May 7, 2010 continuation and/or raised evidentiary issues that the Panel asked the parties' counsel to address in their post-hearing briefs.

Dr. Eichner's Testimony Regarding Mr. O'Bee's Doping Admissions

8.6 During the April 16, 2010 hearing, Dr. Eichner, an employee of USADA, testified concerning Mr. O'Bee's statements made during an August 13, 2009 telephone conversation[16] with him and Mr. Bock.[17] Dr. Eichner testified that Mr. O'Bee stated he started using rhEPO and testosterone in 2001 to prepare for races. Specifically, he testified: "Mr. O'Bee said that he would use EPO for two to three weeks leading to major races. Two to three times a year he would take a dose of EPO two to three weeks up to those events." "Mr. O'Bee said it was impossible to be an athlete in that level cyclist [sic] without taking testosterone, because your testosterone would deplete in all the hard levels of training and racing." When asked "Did [Mr.

[16] Based on the parties' statements in their respective post-hearing briefs in response to the Panel's May 10, 2010 email inquiry to their counsel, the Panel concludes that neither party asserts any agreement or understanding that Mr. O'Bee's statements would not be used against him in any subsequent hearing or any limitations regarding any sanction USADA could seek against Mr. O'Bee for participating in this telephone call.

[17] USADA was represented by Mr. Bock, who did most of the questioning of Mr. O'Bee during this telephone call Although Mr. O'Bee was not represented by counsel and perhaps was not informed he could have attorney present, the Panel notes that this conversation did not violate *ABA Rule 4.3 Dealing with Unrepresented Person*, which has been adopted verbatim in Colorado and Indiana. *Rule 4.3* states: "In dealing on behalf of a client with a person who is not represented by counsel, a lawyer shall not state or imply that the lawyer is disinterested. When the lawyer knows or reasonably should know that the unrepresented person misunderstands the lawyer's role in the matter, the lawyer shall make reasonable efforts to correct the misunderstanding. The lawyer shall not give legal advice to an unrepresented person, other than the advice to secure counsel, if the lawyer knows or reasonably should know that the interests of such a person are or have a reasonable possibility of being in conflict with the interests of the client." USADA has no obligation under the WADA Code or AAA Supplementary Procedures to provide a "Miranda"-type warning to athletes who are subject to a doping investigation or voluntarily provide information relating to a doping investigation. The USOC Athlete Ombudsman is available to advise athletes and to assist athletes in obtaining counsel to protect their legal rights.

O'Bee] indicate that he had used testosterone again once he came back from his suspension after July 15th of 2003?," Dr. Eichner responded "That's correct."

8.7 During cross examination, Dr. Eichner stated he took notes of this telephone call, which were in front of him, but he had not referred to them during his testimony. Mr. O'Bee's counsel moved to strike Dr. Eichner's testimony because these notes had not been provided to him, thereby denying him an opportunity to cross-examine Dr. Eichner regarding his notes. The Panel denied this motion, but ordered USADA to provide a copy of Dr. Eichner's original handwritten notes and a typed copy to Mr. O'Bee's counsel, who was given an opportunity to review these notes and to recall Dr. Eichner as a witness.

8.8 On May 7, 2010, Dr. Eichner's testimony was continued by telephone conference call, and Mr. O'Bee's counsel continued his cross-examination. Mr. O'Bee's counsel objected to the scope of USADA's re-direct examination of Dr. Eichner as being outside the scope of his cross examination of this witness. In response, USADA's counsel argued that any questions relating to Dr. Eichner's notes are relevant and appropriate and related to the cross-examination, which was an effort to suggest these notes were inaccurate. The Panel rules that all incriminating statements that Mr. O'Bee made to Dr. Eichner are both relevant and admissible evidence, which may be used against him in this hearing. *ASADA v. Wyper*, CAS A4/2007 (athlete's admissions to Australian Sports Anti-Doping Authority investigator are admissible and reliable evidence that supports doping violation).

Suzanne Johnson's Affidavit

8.9 During the April 16, 2010 hearing, the Panel granted Mr. O'Bee's motion to exclude Ms. Johnson's affidavit (USADA Exhibit 90) because it was not submitted in a timely

manner and USADA had not attempted to subpoena Ms. Johnson or establish she was unavailable to testify at the hearing. The Panel also made a preliminary determination that USADA could use these documents as rebuttal evidence. However, after carefully examining the extremely incriminating statements in Ms. Johnson's affidavit and more fully considering the parties' respective arguments regarding its admissibility, the Panel rules that this affidavit is inadmissible for any purpose, including for rebuttal of Mr. O'Bee's testimony.

8.10 The Panel finds that Ms. Johnson's affidavit, despite being notarized after the April 16, 2010 hearing, is not sufficiently reliable or authentic to be admitted as evidence. Mr. O'Bee provided undisputed testimony concerning his past and current acrimonious relationship with Ms. Johnson (which is corroborated by his parents' testimony), that she resented the traveling and time away from home required by his cycling career, and that she made a September 2008 threat "to make sure [Mr. O'Bee] hit the bottom of the barrel." Soon thereafter Ms. Johnson contacted USADA and informed Mr. Starks she had evidence of Mr. O'Bee's usage of banned performance-enhancing substances. Kathryn O'Bee testified it was possible "Suzanne set up Kirk," and Ms. Johnson refused to testify in this proceeding. The Panel concludes that its consideration of the incriminating statements in Ms. Johnson's affidavit, without providing Mr. O'Bee any opportunity for cross-examination to challenge their veracity, would be fundamentally unfair and deny Mr. O'Bee his right to a fair hearing pursuant to Article 8.1 of the 2009 WADA Code.

Stephen Starks' Testimony

8.11 Mr. O'Bee objected to Stephen Starks' testimony concerning his communications with Ms. Johnson on the ground that it is hearsay. USADA responded that hearsay evidence is admissible in arbitration proceedings and that the Panel should consider it. The Panel rules that

Mr. Starks' testimony is sufficiently reliable to be admissible evidence that proves the forensically retrieved email correspondence and other computer-generated documents came from computer disks provided to USADA by Ms. Johnson in late October or early November 2008 as well as that she was the source of two vials of drugs and photos of vials of drugs (USADA Exhibit 15) allegedly belonging to Mr. O'Bee. The Panel rules that the rest of Mr. Starks' testimony, in particular Ms. Johnson's allegations regarding Mr. O'Bee's doping activities, is inadmissible, which is necessary to ensure that her inadmissible affidavit testimony is not indirectly provided as evidence through Mr. Starks' testimony.[18]

Two Vials of Drugs and Photos of Vials of Drugs Allegedly Belonging to Mr. O'Bee

8.12 During the April 16, 2010 hearing, Mr. O'Bee's counsel objected to the admissibility of two vials of banned performance-enhancing drugs[19] and photos of vials of banned performance-enhancing drugs allegedly belonging to Mr. O'Bee on the grounds of lack of foundation and authenticity as well as questions about them posed to him by USADA's counsel. In its Pre-Hearing Brief, USADA argued this was admissible non-analytical positive evidence.

8.13 The Panel rules that the two vials of drugs are inadmissible because they do not constitute properly authenticated and reliable evidence.[20] Mr. O'Bee testified the vials were not

[18] In making this ruling, the Panel is not questioning Mr. Starks' veracity or suggesting his testimony was not truthful.

[19] In his Post-Hearing Brief, Mr. O'Bee argues that *French v Cycling Australia*, CAS 204/A/651, which ruled that an athlete's admitted usage of a product is alone insufficient to establish use of a prohibited substance identified on a product's label, precludes the admission of these vials into evidence because no laboratory testing confirmed they contained banned substances. The Panel rejects this argument because *French v Cycling Australia* addresses the sufficiency of evidence to establish a doping violation, not the admissibility of evidence.

[20] USADA did not specifically request that these vials be admitted into evidence at the hearing, but it appears to rely on them as corroborating evidence of Mr. O'Bee's doping violation in its Post-Hearing Brief.

his and that he did not recognize them. Because Ms. Johnson's affidavit is inadmissible for any purpose, there is no evidence to establish the vials belonged to Mr. O'Bee.

8.14 The Panel rules that the photos of vials of banned performance-enhancing drugs (USADA's Exhibit 15) are inadmissible because they are not properly authenticated and reliable evidence. Mr. O'Bee testified he never saw the drugs in these photos. Because Ms. Johnson's affidavit is inadmissible for any purpose, there is no evidence to establish the vials of drugs in these photos belonged to Mr. O'Bee.

8.15 Alternatively, even if the Panel ruled that this evidence is admissible, it is entitled to very little weight, if any, for the same reasons.

Email Correspondence Between Mr. O'Bee and Others and Other Documents Forensically Retrieved From Mr. O'Bee's Computer Hard Drive

8.16 A substantial component of the non-analytical positive evidence USADA relies on to prove Mr. O'Bee's second doping violation prior to his May 20, 2009 positive test for rhEPO is forensically retrieved email correspondence between Mr. O'Bee and others (USADA Exhibit 103, pp. 1-94) and other documents (USADA Exhibits 30 and 31) copied from the hard drive of the desktop computer jointly owned and used by Mr. O'Bee and Ms. Johnson, which she provided to USADA in late October or early November 2008. Mr. O'Bee's counsel stipulated that the computer disks received by USADA from Ms. Johnson were not changed or altered in any fashion by USADA.[21]

[21] USADA provided copies of the computer disks to Mr. O'Bee's counsel and the Panel as required by the Scheduling Order, but not, in order to preserve their privacy, "a number of intimate images, apparently involving Mr. O'Bee and Ms. Johnson" stored on their computer. In response to Mr. O'Bee's counsel's objection that the entire contents of the disks had not been provided, USADA offered to make them available for inspection if requested. Because Mr. O'Bee's Post Hearing Brief does not assert that USADA failed to do so, the Panel deems this objection to be waived.

8.17 At conclusion of the April 16, 2010 hearing the Panel requested the parties' counsel to brief whether Ms. Johnson's unauthorized accessing and copying of Mr. O'Bee's password-protected email accounts and files and providing computer disks containing these documents to USADA is legal under Canadian and U.S. law. USADA extensively briefed this issue in its Post-Hearing Brief, but Mr. O'Bee did not do so.

8.18 Although USADA asserts the Panel should not request that the parties address an issue Mr. O'Bee's counsel has not raised, the Panel holds that Rule R-40 of the AAA Supplementary Procedures gives it the inherent authority to raise legal issues not raised by either party in an effort to satisfy its obligation to render a "just and equitable" award. The Panel rules that Mr. O'Bee has waived this possible defense by not briefing this issue as he was instructed to do. Thus, it is not necessary for the Panel to rule on the merits of the issue it raised *sua sponte*.

8.19 Mr. O'Bee asks the Panel to apply the Federal Rules of Evidence, which he asserts require the exclusion of electronically-stored information unless its proponent proves it is: 1) authentic; 2) an original or permissible duplicate; and 3) evidence with a probative value not outweighed by the danger of unfair prejudice it creates. See *Lorraine v Markel*, 241 F.R.D. 534, 538 (D. Md. 2007). Mr. O'Bee contends that USADA has not satisfied any of these requirements; therefore, this proffered evidence is inadmissible and should not be considered by the Panel.

8.20 In response, USADA argues that formal rules of evidence in judicial proceedings are inapplicable to arbitration proceedings. It asserts that the forensically retrieved email correspondence between Mr. O'Bee and others along with the other documents copied from the hard drive of the desktop computer jointly owned and used by Mr. O'Bee and Ms. Johnson is

sufficiently authentic and reliable evidence of Mr. O'Bee's doping violations. See, e.g., *Fitigues, Inc. v. Varat Enterprise*, 1992 U.S.Dist. LEXIS 14207 at *16-17 ("An arbitrator is not constrained by formal rules of evidence or procedures, but rather need only grant the parties a fundamentally fair hearing."); *Chasser v. Prudential-Bache Securities*, 703 F. Supp. 78, 80 (S.D. Fla. 1988) ("arbitration proceedings, however, are not constrained by the formal rules of evidence").

8.21 In accordance with Rule R-28 of the AAA Supplementary Procedures, which expressly states that "[c[onformity to legal rules of evidence shall not be necessary," the Panel rejects Mr. O'Bee's request to instead apply the Federal Rules of Evidence and *Lorraine v Markel* to this arbitration proceeding.[22] Pursuant to its express authority under Rule R-28(a) of the AAA Supplementary Procedures and for the following reasons, the Panel rules that USADA's proffered evidence has sufficient indicia of authenticity and reliability to be considered and weighed by the Panel in determining whether Mr. O'Bee used or attempted to use rhEPO prior to his May 20, 2009 positive test for rhEPO and resolving other issues in the proceeding.

8.22 All of the September 16-December 25, 2005 email correspondence in USADA's Exhibit 103 between Mr. O'Bee and five different parties (e.g., Team Life Research, a supplier of Growth Hormone Releasing Peptide Sermorelin Acetate; Ellis Toussier, a Mexican internet supplier of rhEPO and HGH; Nathan O'Neil, a fellow cyclist; Kirk Detterich, a fellow cyclist; and Marty Nothstein) were sent or received by kirkobee@telus.net, an email address Mr. O'Bee

[22] The Panel also rejects Mr. O'Bee's argument in his Post-Hearing Brief that *French v. Cycling Australia* precludes the admissibility of USADA's proffered computer files and email correspondence because there is "no scientific evidence that ties Kirk to any of it." *French v. Cycling Australia* is inapplicable because it does not consider the admissibility of, or authentication requirements for, emails and other documents obtained from computer files.

acknowledged using from January 2005 through end of 2008. This is the email address Mr. O'Bee provided to USADA in his whereabouts form for the time period from October to December 2005. Mr. O'Bee and Ms. Johnson lived together and shared access to a jointly owned computer during this period of time, so it can be fairly inferred that this email correspondence came from the hard drive of this computer.

8.23 There was no testimony from any witness who saw Mr. O'Bee type or send any of these emails, and there was no testimony from any of the recipients or senders of this email correspondence. However, Mr. O'Bee's assertion that Ms. Johnson may have either used his kirkobee@telus.net account without his authorization to send emails purporting to be from him, or fabricated or altered any emails he originally sent from this account is convincingly rebutted by the uncontradicted testimony of USADA's two expert witnesses, whom Mr. O'Bee's counsel stipulated are experts in their respective fields.

8.24 Blake Schwank, a Microsoft certified system engineer and owner of Colorado Computer Support, Inc., used a computer file recovery program to retrieve the Microsoft Outlook Express email correspondence in USADA Exhibit 103 (which had been deleted from the "deleted items" folder for kirkobee@telus.net) and other files from the computer disks Ms. Johnson provided to USADA. After examining the IP addresses and their corresponding location routings, he concluded that the email correspondence in USADA Exhibit 103 from Team Life Research, Ellis Toussier, Nathan O'Neil, Kirk Detterich, and Marty Nothstein is genuine and was actually sent to kirkobee@telus.net and that corresponding return email correspondence originated from kirkobee@telus.net. In his opinion, although he did not see Mr. O'Bee receive or send any of this email correspondence from kirkobee@telus.net, he believes that the existence of other routine email correspondence in which Mr. O'Bee is identified as the

sender or recipient that is close in time to the incriminating emails in USADA Exhibit 103 negates the possibility Ms. Johnson sent these emails.

8.25 Rebecca Hendricks, a certified computer forensics expert who reviewed the computer disks, testified that the dates and times of the email correspondence (i.e., September 16-December 25, 2005) in USADA Exhibit 103 correlates exactly and accurately indicates when it was sent and received because of its positioning in the email database for kirkobee@telus.net. Although she did not see Mr. O'Bee send any of this email correspondence from kirkobee@telus.net, in her opinion the contents and timing of the email correspondence indicates a familiarity between the named parties, which convinces her Ms. Johnson did not send the emails in USADA Exhibit 103.

8.26 In Ms. Hendricks' expert opinion, there is a "close to zero, as a grain of sand" possibility that the original emails sent from kirkobee@telus.net were altered because there is a consistent pattern of sequential emails in the database. She testified that "I cannot wrap my mind around how it could be done given the data structure, the number of times it's replicated to the numbers it would have to be fixed and residual data. I could not come to a conclusion that someone could get that done flawlessly in the period of time that did not look to be weeks or months." Moreover, she testified that attempting to alter original emails in the database would corrupt it, and she found no evidence of any corruption.

8.27 Ms. Hendricks' examination of the computer disks revealed they were copied from a computer hard drive on September 12, 2008, are "read-only edition, so they're the original disks," and "are DVR, which means you can only write on them, and you can't alter the

data on them." Her testimony negates the possibility that Ms. Johnson or anyone else altered the files on the computer disks after they were copied and subsequently provided to USADA.

8.28 The Panel finds it troubling that Ms. Johnson provided incriminating documents and other physical evidence of Mr. O'Bee's doping violations as well as an affidavit to USADA, but she refused to testify under oath and subject herself to cross-examination at this hearing despite USADA's request she do so. However, despite Mr. O'Bee's testimony that Ms. Johnson threatened "to make sure [he] hit the bottom of the barrel" and accessed his kirkobee@telus.net email account without his authorization, the Panel finds she did not send, fabricate, or alter the September 16-December 25, 2005 email correspondence in USADA Exhibit 103, which the Panel concludes is authentic and reliable evidence.[23]

8.29 The Panel's review of USADA Exhibits 30 and 31, which are two on-line purchase orders retrieved from the computer disks provided by Ms. Johnson to USADA raised some important questions not considered during the hearing. Mr. O'Bee testified that, from December 2005-February 2008, he and Ms. Johnson had separate residences and he had no access to the computer, which was in her sole possession during this time and from which the following documents were copied: 1) a March 17, 2007 purchase order confirmation to kirkobee@yahoo.com from cemproducts.com, an on-line seller of steroids and other banned performance-enhancing substances, for cutting edge clenbuterol, an anabolic agent, stating "Ship to Kirk O'Bee, 1171 Handsworth Rd, North Vancouver BC V7G1A2" and "Bill to Kirk O'Bee, 645 Ada Dr., Ada, MI 49301" (USADA Exhibit 30); and 2) a February 8, 2008 purchase order

[23] On cross-examination, USADA asked Mr. O'Bee to describe anything in the content of these emails that was inconsistent with events in his life and he did not do so. *USADA v. Collins*, AAA 30 190 00658 04 at ¶4.7 (panel concludes that, even though neither the sender nor recipient of incriminating emails testified during the hearing, the detailed nature of the "emails themselves provide further evidence of their authenticity and origin" by their consistency with actual events in the life of the athlete charged with a doping violation).

confirmation to kirkobee@yahoo.com from cemproducts.com for clomiphene, used to overcome suppression of endogenous testosterone production caused by use of synthetic anabolic agents, stating "Ship to Kirk O'Bee, 1171 Handsworth Rd, North Vancouver BC V7G 1S8" and "Bill to Kirk O'Bee, 645 Ada Dr., Ada, MI 49301" (USADA Exhibit 31).

8.30 Mr. O'Bee acknowledged using kirkobee@yahoo.com as one of his email addresses from 2005 to the present. But he denied ever ordering clenbuterol or clomiphene or seeing these purchase orders and testified that Ms. Johnson had accessed his email accounts without authorization when they had previously lived together. Mr. O'Bee's USADA Whereabouts Form (USADA Exhibit 14) is blank for January 2007-March 2008 and does not disclose his residence(s) during this time.

8.31 In order to have full information to evaluate Mr. O'Bee's contention that Ms. Johnson may have fabricated evidence against him, the Panel re-opened the hearing on August 11, 2010 for the limited purpose of requesting Mr. O'Bee to answer three questions, which he answered as follows:[24]

> **Question 1**: Identify Kirk O'Bee's primary residence(s) from January 2007 through March 2008 and the approximate dates during which he lived at each residence. **Answer**: Jan. 1, 2007 - Feb. 14, 2008: 1171 Handsworth Rd., North Vancouver, British Columbia. Feb. 15, 2008 - March 2008: 2135 Kirkstone Rd., North Vancouver, British Columbia
>
> **Question 2**: Identify Suzanne Johnson's primary residence(s) from January 2007 through March 2008 and the approximate dates during which she lived at each residence. **Answer**: Jan. 1, 2007 - Feb. 14, 2008, 3449 Emerald Dr., North Vancouver, British Columbia Feb. 15, 2008 - March 2008, 2135 Kirkstone Rd., North Vancouver, British Columbia.
>
> **Question 3**: Identify the approximate date on which Kirk O'Bee and Suzanne Johnson resumed living together in February 2008 and the residence at which this occurred. **Answer**: Feb. 15, 2008, 2135 Kirkstone Rd., North Vancouver, British Columbia.

[24] In a September 20, 2010 email, Mr. O'Bee's counsel corrected and supplemented the original responses provided on August 14, 2010.

8.32 Mr. O'Bee's identified 1171 Handsworth Rd as his residence, which is the same as the 1171 Handsworth Rd shipping address for the foregoing products. He identifies Ms. Johnson's residence as 3449 Emerald Dr. Thus, the Panel concludes that Ms. Johnson did not use Mr. O'Bee's kirkobee@yahoo.com email account to order these products and fabricate incriminating evidence against him and that USADA Exhibits 30 and 31 constitute authentic and reliable evidence.

9. Findings

9.1 The Panel finds that USADA has proven to the comfortable satisfaction of the Panel, while bearing in mind the seriousness of the allegations made, that Mr. O'Bee committed his second anti-doping violation prior to May 12, 2009, the date he contends he used rhEPO for the first time. The following evidence establishes Mr. O'Bee's usage or attempted usage of rhEPO on multiple occasions beginning on or at least as early as October 3, 2005:

9.1.1 Mr. O'Bee's May 20, 2009 urine sample tested positive for rhEPO.

9.1.2 In a July 2009 telephone conversation, Mr. O'Bee told Glen Mitchell, the general manager of his Bissell racing team, that his "A" sample tested positive and admitted taking rhEPO. Mr. O'Bee admitted using rhEPO "in the past for specific races here and there, and that it was kind of in his mind that it was needed to perform against the –against, you know, the bigger venue that we were racing against." Mr. O'Bee testified he was unaware Mr. Mitchell "had anything against him," and the Panel finds Mr. Mitchell's testimony to be credible.

9.1.3 During an August 13, 2009 telephone call with Dr. Daniel Eichner and Bill Bock to further USADA's knowledge regarding his doping protocols, Mr. O'Bee

admitted he started to use rhEPO in 2001 and continued to do so until "he was caught." Dr. Eichner testified that Mr. O'Bee said "he would use EPO for two to three weeks leading to major races. Two to three times a year he would take a dose of EPO two to three weeks up to those events."[25] Dr. Eichner testified Mr. O'Bee said he monitored his hematocrit levels "with his little hemoglobin kit." This admission is corroborated by a May 31, 2007 email from riomedical to kirkobee@telus.net to "bluevanrider," a name Mr. O'Bee admitted to using to purchase items on eBay, regarding 1 Box of HemoCue Hb201, which is used in connection with a hemoglobin meter and February 23, 2008 email correspondence from "bluevanrider" using kirkobee@telus.net regarding the proposed purchase of a microhematocrit centrifuge on eBay. According to Dr. Eichner, there is no legitimate personal use of either a hemoglobin meter, which may be possessed by someone using rhEPO to ensure his blood is not too concentrated, or a centrifuge, which is used by rhEPO users to measure their hematocrit levels.

9.1.4 During the hearing Mr. O'Bee admitted using rhEPO on May 12, 2009 by injecting himself while alone at his home in North Vancouver, British Columbia, which he claimed was the first time he ever used rhEPO. The Panel does not find Mr. O'Bee's testimony to be credible based on the following corroborating evidence that he was using or attempting to use rhEPO prior to this time. Moreover, it appears very unlikely that, after competing in a cycling race in Arkansas on May 7-10, 2009, he returned home before competing in another cycling race in Delaware that began on or

[25] The Panel rejects Mr. O'Bee's contention that Dr. Eichner's testimony is not credible and should be given little, if any, weight because of some errors in transcribing his hand written notes of this telephone conversation. The Panel finds that any errors are minor and do not adversely affect the credibility of Dr. Eichner's testimony.

around May 16, 2010, which would require multiple cross country flights of several hours.

9.1.5 In an October 3, 2005 email to Ellis Toussier, Mr. O'Bee wrote "I've worked out the kinks in getting products across the border so I'd like to inquire about an order of GH and EPO. How much does a box of 6 x 4,000 units EPO cost? Is it possible to get a box of 6 x 10,000 units?

9.1.6 On October 5, 2005, Ellis Toussier responded that a box of 6 x 4,000 units EPO cost "$650 + $35" and that it is not possible to get a box of 6 x 10,000 units because "4000 iu is the highest it comes in."

9.1.7 In email correspondence with Nathan O'Neill from November 8-December 26, 2005, Mr. O'Bee discussed the purchase and use of EPO and the degree to which it is detectable by anti-doping agencies. In a November 15, 2005 email, Mr. O'Bee informed Mr. O'Neill he could get "vit.e," a term used to refer to EPO, from Ellis (presumably Ellis Toussier). In a December 22, 2005 email, Mr. O'Bee told Mr. O'Neill that "My vit.e arrived today at my friends place."

9.1.8 In a December 25, 2005 email to Kirk Ditterich, Mr. O'Bee stated "I pretty much just confirmed from my own research that the amount of vit.e I bought was only 6,000 iu. Not 60,000 iu like I thought."

9.2 Despite Mr. O'Bee's denial that he has ever used HGH, Mr. O'Bee's email correspondence from September 16-October 10, 2005 with four different parties (e.g., Team Life Research, a supplier of Growth Hormone Releasing Peptide Sermorelin Acetate; Ellis Toussier, a Mexican internet supplier of rhEPO, HGH, and other banned performance-enhancing substances;

Kirk Detterich, a fellow cyclist; and Nathan O'Neill, a cycling teammate) proves he was using or possessed HGH beginning on or at least as early as September 16, 2005:

9.2.1 In a September 16, 2005 email to Team Life Research, Mr. O'Bee stated "I received the product Growth Hormone Releasing Peptide (GHRP) Sermorelin Acetate. After mixing a vial with 3ml of bacteriostatic water the solution did not mix cleanly. . . . I would like to exchange the vial for a new one." In a November 28, 2005 follow-up email, Mr. O'Bee gave his return address as "Sam Johnson, 1457 Dempsey Rd., North Vancouver, BC V7K 1S8," which is the same address he provided to USADA in his whereabouts form.

9.2.2 In October 3, 2005 email to Ellis Toussier, Mr. O'Bee inquired about purchasing Saizen, a brand of growth hormone, and its cost. He stated that Canadian Customs officials previously had seized a shipment of 10 vials of 6mg Serostim, another brand of growth hormone, because they did not accept his prescription as valid, which "was a lot of money and GH down the drain."

9.2.3 In October 4, 2005 email to Mr. O'Bee, Ellis Toussier responded that he "stopped sending HGH or any medicine to Canada, because another shipment was seized, but I thought yours had been delivered." Although he could not deliver Saizen to Mr. O'Bee in the U.S., Mr. Toussier stated "I can deliver 6 mgs Serostim in the U.S. Price is $1000, this is $260 less than my usual [price], because I want to make up for the lost HGH which I didn't know you lost."

9.2.4 In an October 4, 2005 email to Kirk Detterich, Mr. O'Bee stated "GH is ridiculously expensive now" based on Toussier's price quote.

9.2.5 In an October 3, 2005 email to Ellis Toussier, Mr. O'Bee stated: "I had a bad experience with Serostim last time I tried it. Everytime I injected it it gave me a light headed feeling along with anxiety attacks. After a couple weeks taking it it got worse so I stopped. For a while afterwards I had extreme anxiety and panick [sic] attacks. It didn't seem to react with my body correctly as I have tried other GH and have not had the same reaction. Because of this I'm very hesitant to try Serostim again."

9.2.6 In a November 8, 2005 email to Nathan O'Neill, Mr. O'Bee stated "he was heading down to the border this week to send back the stuff to LIFE Research" and "I think I'm going to try and use Geref stuff this winter to see how it works for me." Geref is growth hormone releasing hormone that is a prohibited substance under the WADA Code.

9.3 Despite Mr. O'Bee's denials, Mr. O'Bee used or possessed synthetic testosterone after termination of his one year suspension from July 15, 2002-July 15, 2003 imposed by the UCI based on his June 10, 2001 positive test for synthetic testosterone. Dr. Eichner testified that Mr. O'Bee admitted using testosterone after his suspension ended on July 15, 2003, which is corroborated by March 17, 2007 and February 8, 2008 on-line purchase order confirmations for clenbuterol (an anabolic agent) and clomiphene (a banned substance used to overcome suppression of endogenous testosterone production caused by use of synthetic anabolic agents), from cemproducts.com, an on-line seller of steroids and other banned substances, to Mr. O'Bee. (USADA Exhibits 30 and 31.)

9.4 In response to USADA's questioning, Mr. O'Bee was evasive and his testimony was not credible. When confronted with incriminating evidence, Mr. O'Bee generally denied

making the subject statements or could not recollect any documents evidencing his doping violations. In addition to denying that he wrote any of the foregoing incriminating emails, Mr. O'Bee denied any knowledge of other non-incriminating emails during this time period that were retrieved from the computer he and Ms. Johnson jointly owned (e.g., correspondence with fellow cyclists such as Kirk Ditterich on topics of mutual interest they likely would discuss such as racing team contract negotiations or with his father regarding his income tax returns). He claimed not to recognize the computer's file set-up or any of the named files except for one designated as "USADA."

9.5 After June 10, 2001 through May 19, 2009 anti-doping authorities tested Mr. O'Bee at least 22 times, which results were all negative for the presence of banned performance-enhancing substances. However, these negative tests do not necessarily prove Mr. O'Bee was not using rhEPO, HGH, or testosterone during this time period. An athlete could be using one or more of these substances (as well as others), and its presence in his bodily fluids may not be sufficiently high to be detected by laboratory analysis at the time of sample collection and testing, or it may be detectable in the sample given (e.g., HGH currently can be detected only in blood, not urine).

10. Legal Analysis

10.1 Although not squarely on point factually, several Court of Arbitration for Sport and American Arbitration Association/North American Court of Arbitration for Sport Panels have found that non-analytical positive evidence such as an athlete's uncontroverted admission of a doping violation or a corroborated admission establishes his use or attempted use of a prohibited substance. See, e.g., *Australian Sports Anti-Doping Agency v. Wyper,* CAS A4/2007;

USADA v. Montgomery, CAS 2004/O/645; *USADA v. Gaines,* CAS 2004/O/649; *USADA v. Leogrande*, AAA No. 77 190 00111 08; *USADA v. Collins,* AAA No. 30 190 00658 04.

10.2 In *Montgomery* and *Gaines*, the panel ruled that an athlete's single uncontroverted verbal admission to one other athlete has been found sufficient to prove use of a prohibited substance and commission of a doping offense. For example, in *Gaines*, the panel determined that the following uncontroverted admission, which it found to be "clear and compelling," is "sufficient in and of itself to find Respondent guilty of doping." (¶52) The incriminating testimony was: "Ms. White testified that Ms. Gaines called her 'not long after' her own (Ms. Gaines') appearance before the Grand Jury (the exact date of this conversation was not provided). The evidence is that during that conversation, Ms. Gaines said that 'they asked her whether or not she used it. And she said, Yeah but it made me gain weight so I stopped using it.'. . . As regards what 'it' meant, Ms. White was unequivocal: it meant 'the Clear.'" (¶49)

10.3 Similarly, Mr. O'Bee's written admissions in his December 22, 2005 email to Nathan O'Neill ("My vit.e arrived today at my friends place.") and his December 25, 2005 email to Kirk Ditterich ("I pretty much just confirmed from my own research that the amount of vit.e I bought was only 6,000 iu.") constitute "clear and compelling" evidence that of his use or attempted use of rhEPO. Although Mr. O'Bee disputes Dr. Eichner's testimony that he admitted using rhEPO since 2001 and Glen Mitchell's testimony that he used rhEPO "in the past for specific races here and there,"Mr. O'Bee's email correspondence with Ellis Toussier, Nathan O'Neill, Kirk Ditterich and others corroborates their testimony and rebuts Respondent's denials.

10.4 In *Collins*, the panel found that email correspondence in which an athlete admitted her usage of banned substances or techniques proved that she committed a doping

violation. The panel ruled that these email admissions along with the athlete's corroborating blood and urine test results "independently and collectively prove [her] use of prohibited substances and techniques beyond a reasonable doubt." (¶4.2)

10.5 In *Wyper*, the panel concluded that an athlete's on-line communications, investigation, research, ordering, and paying for hGH and rhEPO, including email correspondence regarding the benefits of and inquiries regarding how to obtain these banned substances, constitute "a series of acts which were purposely engaged in" and taken together establish attempted use of performance-enhancing banned substances. (¶38) Although Australian customs officials seized the hGH and rhEPO ordered by the athlete before it was delivered to him, the panel ruled that his actual possession of banned substances not required "before he could take a substantial step in a course of conduct planned to culminate in the commission of an Anti-Doping Rule violation." (¶36)

10.6 In *Leogrande*, the panel found a doping violation based on the athlete's admitted use of EPO to the director of his cycling team and another employee (both of which he later denied making), corroborating scientific evidence showing that his protein patterns are very atypical and show suppression of human production of EPO consistent with taking rhEPO, and other circumstantial evidence. The panel concluded that the athlete's denials were not credible in light of circumstantial evidence of his use of rhEPO, including photos of him holding vials of rhEPO and his signature on a UPS receipt for rhEPO. Because he had admitted using a

prohibited substance, confirming laboratory results were not required to establish the athlete's doping violation.[26]

10.7 Based on its comparison of the totality of the evidence in this case with the evidence in *Montgomery, Gaines, Collins, Wyper,* and *Leogrande*, the Panel determines that USADA has proven Mr. O'Bee's use or attempted use of rhEPO on or at least as early as October 3, 2005 to its comfortable satisfaction bearing in mind the seriousness of the allegation which is made. This is his second anti-doping violation; he committed his first doping violation on June 10, 2001 when his in-competition urine sample tested positive for synthetic testosterone. The Panel is not comfortably satisfied USADA has established Mr. O'Bee's use or attempted use of rhEPO prior to October 3, 2005 based solely on Dr. Eichner's testimony, which is disputed by Mr. O'Bee and is not independently corroborated.

10.8 In accordance with Article 10.2 of the 2003 WADA Code, the Panel imposes a lifetime suspension on Mr. O'Bee for his second doping violation. Because Mr. O'Bee used or attempted to use rhEPO, a prohibited substance that is administered by injection and used intentionally to gain a competitive advantage, the Panel concludes there is no basis for finding Mr. O'Bee has "no fault or negligence" or "no significant fault or negligence" for his second doping violation under Article 10.5 of the 2003 WADA Code, thereby justifying any reduction

[26] On the other hand, an athlete's admitted usage of product whose label states one of its ingredients is a prohibited substance alone is insufficient to prove "use" of a prohibited substance. Laboratory analysis of the product is required to prove the athlete used a prohibited substance. *French v Cycling Australia*, CAS 204/A/651.

of his suspension.[27] Moreover, at no time during the hearing did Mr. O'Bee express any remorse for his doping violations.

10.9 In accordance with Article 10.7 of the 2003 WADA Code, which is substantially the same as Article 10.8 of the 2009 WADA Code and provides that "competitive results obtained from the date . . . doping violation occurred . . . shall, unless fairness requires otherwise, be Disqualified," the Panel disqualifies Mr. O'Bee's cycling competition results from October 3, 2005 through July 29, 2009. See *Leogrande*, supra (disqualifying athlete's race results from the date of corroborated admission of rhEPO use). Respondent disputes Dr. Eichner's testimony that he admitted using rhEPO since 2001, but there is substantial corroborating evidence that Respondent used or attempted to use rhEPO on or at least as early as October 3, 2005. See *Montgomery*, supra at ¶62 and *Gaines*, supra at ¶65 (ordering retroactive invalidation of race results under the 2003 WADA Code based on non-analytical positive evidence establishing an athlete's doping violations).

[27] Alternatively, even if the Panel applied UCI 306 (Article 10.7 of the 2009 WADA Code) pursuant to the doctrine of *lex mitior*, a lifetime suspension is within the permissible range of the standard sanction (eight years to lifetime ineligibility) for an athlete's second anti-doping rule violation. For the same reasons, the Panel finds that a lifetime suspension is appropriate and proportional in this case. Based on its findings that Mr. O'Bee used or possessed human growth hormone and testosterone as well as rhEPO, the Panel concludes that USADA has established aggravating circumstances under UCI ADR 305 and Article 10.6 of the 2009 WADA Code, which justifies a lifetime period of ineligibility under UCI ADR 306 (Article 10.7 of the 2009 WADA Code). In relevant part, the Comment to Article 10.6 provides: "Examples of aggravating circumstances which may justify the imposition of a period of Ineligibility greater than the standard sanction are: . . . the Athlete or other Person Used or Possessed multiple Prohibited Substances or Prohibited Methods or Used or Possessed a Prohibited Substance or Prohibited Method on multiple occasions . . ." The evidence proves that Mr. O'Bee used or possessed multiple prohibited substances (e.g., rhEPO, growth hormone, and testosterone) and used or possessed one or more prohibited substances on multiple occasions (e.g., rhEPO), which constitute aggravating circumstances justifying a lifetime period of ineligibility.

11. DECISION AND AWARD

11.1 Based on the foregoing facts and legal analysis, the Panel renders the following decision and award:

11.2 Mr. O'Bee has committed doping violations under Articles 21.1 and 21.2 of the UCI ADR (Articles 2.1 and 2.2 of WADA Code, which are substantially similar in relevant part in both the 2003 and 2009 versions).

11.3 The following sanctions shall be imposed on Mr. O'Bee:

11.3.1 Pursuant to Articles 10.2 and 10.8 of the 2003 WADA Code, a lifetime period of ineligibility from the date of this award, including his ineligibility from participating in and having access to the training facilities of the United States Olympic Committee Training Centers or other programs and activities of the USOC including, but not limited to, any grants, awards, or employment.

11.3.2 Pursuant to Article 10.7 of the 2003 WADA Code, invalidation of all of Mr. O'Bee's cycling competition results from October 3, 2005 through July 29, 2009.

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

11.5 The administrative fees and expenses of the American Arbitration Association and the compensation and expenses of the Panel members shall be borne entirely by the United States Olympic Committee.

11.6 This Award is in full settlement of all claims and counterclaims submitted to this Arbitration. All other requests, motions, or prayers for relief submitted by the parties, even

though not expressly mentioned in the award, have been taken into account by the Panel and are hereby denied or rejected.

11.7 This Award may be executed in any number of counterparts, each of which shall be deemed an original, and all of which shall constitute together one and the same instrument.

Dated: October 1, 2010.

Matthew J. Mitten, Chair

Christopher L. Campbell

James M. Murphy