VIA ELECTRONIC MAIL TO PAT.MCQUAID@UCI.CH AND FLORENCE.BARBER@UCI.CH

July 26, 2012

Mr. Patrick McQuaid, President
UNION CYCLISTE INTERNATIONALE
Ch. de la Mêlée 12
1860 Aigle
Switzerland

Re: ***Your two letters dated July 13, 2012***

Dear Mr. McQuaid:

I write in response to your two letters dated July 13, 2012, one sent to United States Anti-Doping Agency (USADA) Chief Executive Officer Travis Tygart and one sent to me as USADA's General Counsel.

In your letter to Mr. Tygart you primarily address USADA's case against Lance Armstrong, adopt some of the arguments now being advanced by Mr. Armstrong's lawyers and public relations consultants, and ask for a pre-hearing disclosure to the Union Cycliste Internationale ("UCI") of USADA's complete case file.

In your letter to me you make many of the same arguments applying them to the three (3) respondents, Dr. Luis Garcia del Moral, Dr. Michele Ferrari and Mr. Jose "Pepe" Marti, as to whom USADA has announced rule violations. As your two letters set forth overlapping claims and arguments, they are most efficiently addressed in a single response.

USADA'S JURISDICTION TO CONDUCT RESULTS MANAGEMENT IN THESE CASES

The basic position in your letters appears to be that the UCI and not USADA has results management authority over each of the cases. This is a complete "about face" from the UCI's prior public statements regarding this case within the past month. Indeed, you were even publicly quoted as stating that USADA had jurisdiction and could impose sanctions against each of the Respondents.[1] With all due respect, and as explained in this letter, you were correct in the first media statements that you made in which you opined that USADA is the correct results management authority and can impose sanctions in these cases.

[1] USADA has right to ban Bruyneel worldwide, McQuaid says, *Cycling News*, July 2, 2012.

It is also surprising to us that you are taking the position that the UCI has results management authority for the first time in your letters dated July 13. You have known since June 12, 2012, that USADA had initiated anti-doping proceedings against Mr. Armstrong, his team manager and team trainer and three doctors associated with his cycling team. On June 12 Travis Tygart personally called you and informed you of USADA's intent to initiate proceedings and told you exactly who the proceedings were to be initiated against. You did not at that time or at any time subsequently and prior to your July 13 letter express to Mr. Tygart or anyone else at USADA any concerns over USADA's jurisdiction or authority to proceed.

Additionally, you received two formal notice letters on June 12, 2012 and June 28, 2012, in which USADA asserted its jurisdiction over the six respondents, including Armstrong, and in response to these letters you did not raise any objection to, or concern about, USADA's assertion of jurisdiction. In fact, at no time during the pendency of USADA's proceedings before issuing charges did you ever raise any issue with USADA's jurisdiction. These facts, as well as your prior public statements, undermine the statements in your July 13 letters regarding the UCI rules and reflect a waiver of any right by the UCI to conduct results management in this case.

Interestingly, the precise claim that you make for the first time in your July 13 letters to Mr. Tygart and to me is the same claim that Mr. Armstrong's lawyers have been making in his court case from the time his case was filed on July 9. Nevertheless, whether the claim comes from Mr. Armstrong or from the UCI it is equally without merit.

USADA has Authority to Initiate Results Management Proceedings Against Mr. Armstrong under the USADA Protocol and the USOC National Anti-Doping Policies

USADA has independent results management authority over Mr. Armstrong under the USADA Protocol and the USOC National Anti-Doping Policies[2] based on his violations of the substantive anti-doping rules of USADA and the USOC and its members, including USA Cycling. In addition to the UCI ADR, and as set forth in USADA's June 28, 2012, charging letter, domestic rules under which Mr. Armstrong was accountable also proscribed doping by him. USADA has authority under its rules and pursuant to the authority conferred upon USADA in the USOC's rules and in the rules of its members to prosecute Mr. Armstrong's anti-doping rule violations. This basis for USADA's jurisdiction over Mr. Armstrong was described in USADA's recent motion to dismiss Mr. Armstrong's case in federal court. A copy of USADA's motion to dismiss is provided for your review and incorporated herein as if fully set forth.

[2] Previously known as the USOC National Anti-Doping Program.

USADA has Authority to Initiate Results Management Against both Mr. Armstrong and the Foreign Respondents under the UCI ADR

As explained in USADA's June 12, 2012, notice letter on which the UCI was copied and to which the UCI did not timely object, pursuant to the UCI ADR arts. 11 and 13, USADA has results management authority, including authority to conduct hearings, for any anti-doping rule violations where no sample collection is involved and where USADA is the Anti-Doping Organization which discovered the anti-doping rule violation.

Also pursuant to the UCI ADR, the results management and hearing process in such cases is to be administered by and under the USADA Protocol. *See* UCI ADR, arts. 11 and 13. USADA's jurisdiction extends to both UCI and USA Cycling license-holders and also to:

a) Any *Person* who, without being a holder of a license, participates in a cycling *Event* in any capacity whatsoever, including, without limitation, as a rider, coach, trainer, manager, team director, team staff, agent, official, medical or para-medical personnel or parent and;

b) Any *Person* who, without being a holder of a license, participates, in the framework of a club, trade team, national federation or any other structure participating in *Races*, in the preparation or support of riders for sports competitions[.]

UCI ADR, art. 18. This provision extends USADA's jurisdiction to non license holders who participated in the framework of a team preparing riders for competition.[3]

You claim that UCI has exclusive results management jurisdiction over these cases because the "discovery" of these anti-doping rule violations occurred with Floyd Landis's email of April 30, 2012. That assertion is simply not correct. First, even focusing on Mr. Landis's email, USADA's receipt of that email was not the first evidence it received from Mr. Landis. Second, it is preposterous for UCI to claim that the Landis email resulted in it discovering "evidence of facts that apparently constitute an anti-doping rule violation" (UCI ADR, art. 10) when, as described in detail below, UCI's response to the Landis email was to vehemently deny the truth of his evidence. UCI even went so far as to sue Mr. Landis in Swiss court on account of that email. Having publicly asserted that Mr. Landis's evidence is false, UCI has abdicated any authority to conduct results management based on that evidence. Third, the facts alleged by Mr.

[3] USADA further notes that it has evidence that each of the Respondents was employed at various times by a UCI licensed continental team located in the United States. Therefore, each may have held a cycling license. Moreover, more than one of the Respondents is a license holder or has otherwise made himself subject to the jurisdiction of sports organizations other than the UCI.

Landis are not the first facts, nor are they even close to being the only facts, upon which USADA's cases against the Respondents are based. As USADA's notice and charging letters of June 12 and June 28, 2012 make clear, the information provided to USADA by Mr. Landis (which goes far beyond the contents of the April 30, 2010 email) is just a small fragment of the evidence of the numerous anti-doping rule violation that were committed by the Respondents.

Finally, even if Article 10 of the UCI ADR were to give UCI results management jurisdiction in these cases (which it does not), then Article 12 of the UCI ADR expressly recognizes that a national anti-doping organization like USADA has concurrent jurisdiction to bring the same case:

> Where apparent evidence for the same anti-doping violation is found by persons or bodies referred to both in article 10 [referring to UCI and its member federations] and article 11 [referring to other anti-doping organizations such as USADA] or when such evidence is found by persons or bodies referred to in article 10 whereas another Anti-Doping Organization having jurisdiction over the Person concerned under the Code opens result management or hearing process based upon such evidence, UCI may decide to leave the case to the Anti-Doping Organization concerned.

UCI ADR, art. 12.

Thus, UCI ADR, art. 12 supports the concept of concurrent jurisdiction involving both the UCI and a national anti-doping organization and closes the door upon the incorrect argument made in your letters that results management decisions for "anti-doping violations where no sample collection is involved" resides only with the UCI. Therefore, it is plainly not the case that the UCI rules provided that USADA needed to seek the approval of the UCI or to submit the case file to the UCI before proceeding to results management in the cases at issue. Rather, this UCI rule expressly acknowledges that there will be cases where another anti-doping organization "opens result management or hearing process based upon such evidence" and under the UCI ADR without the prior consent of the UCI.

Moreover, as provided below, in this particular case where the UCI is barred from conducting results management due to its conflicts of interest, UCI ADR, art. 12, provides a clear indication that under the UCI ADR (and in combination with the USA Cycling rules which confer all results management authority of the national federation upon USADA) the only available results management authority under the rules is USADA. USADA is the only anti-doping organization which can be said to have discovered anti-doping rule violations where no sample collection is involved and which is not barred from conducting results management in this case.

Even if UCI had Results Management Authority over the Armstrong Case, that Case Would in all Events End up Being Brought Forward by USADA

As explained above, UCI does not have results management authority over the Armstrong case because of USADA's independent results management authority under the USADA Protocol and the USOC Anti-Doping Policy, and because you are incorrect in asserting that the anti-doping rule violations by Mr. Armstrong were "discovered" by the UCI through the Landis email. However, even if you were correct that the facts in the Armstrong case should first go to UCI for review (a hearing is not required under Art. 230 of your rules), USADA would end up being the party to bring the case against Mr. Armstrong anyway. Under UCI ADR 234, if UCI concludes that an anti-doping rule violation has taken place, the case would be sent back to USADA to instigate disciplinary proceedings—which is right where we are now. On the other hand, if UCI were to conclude that no anti-doping rule violation took place, then under UCI ADR 233, USADA has the right to appeal that decision to CAS and USADA would then be the party initiating an anti-doping rule violation proceeding against Mr. Armstrong before CAS based on all the same evidence.

USADA's Authority to Impose Sanctions Against a Respondent Who Chose Not to Contest USADA's Proposed Sanction

Your July 13 letter to me states that even if Drs. del Moral, Ferrari, and Celaya, and team trainer Marti failed to timely respond to USADA's notice of the right to request a hearing that it was required that a hearing have been held. However, your statement is inconsistent with Article 8.3 of the World Anti-Doping Code which provides that the "right to a hearing may be waived either expressly or by the *Athlete*'s or other *Person*'s failure to challenge an *Anti-Doping Organization*'s assertion that an anti-doping rule violation has occurred with the specific time period provided in the *Anti-Doping Organization*'s rules."

As you know, USADA's procedural rules, set forth in the USADA Protocol, do permit USADA to impose a sanction against an individual who does not timely request a hearing to contest the sanctions which USADA seeks to impose exactly as permitted by the World Anti-Doping Code. There is no requirement that a hearing be held in the event that a Respondent chooses not to challenge USADA's assertion that an anti-doping rule violation occurred by failing to timely request an arbitration hearing.

UCI'S CONFLICT OF INTEREST DISQUALIFIES IT FROM CONDUCTING RESULTS MANAGEMENT IN THESE CASES

I will begin the discussion in this section by observing that USADA was established as an independent anti-doping organization not subject to the control of any sports organization precisely for situations such as this where a sports organization with manifest conflicts of interest

is attempting to impose its will on the results management process. USADA does not suffer from the numerous conflict of interests that the UCI has in this case.

I understand that Mr. Tygart has previously discussed with you the difficulties of UCI becoming involved in a case such as this where many could legitimately contend that UCI's involvement in the results management of the case would suffer from a structural concern sometimes referred to colloquially as "the fox guarding the henhouse." In numerous instances the inability of a sports organization to effectively police doping within its sport has been noted.

For instance, in the well known *Mitchell Report*, an independent investigation into what has been referred to as "the steroid era" in Major League Baseball, Senator George Mitchell recounted baseball's ineffectiveness in policing steroid use in its sport. Unfortunately, the evidence is even stronger that cycling under the management of the UCI has been enmeshed in its own EPO and blood doping era. By our count, of the twenty-one (21) podium finishers at the Tour de France during the period from 1999-2005 only a single rider other than Mr. Armstrong was not implicated in doping by a subsequent investigation. Yet, only a single one of these riders had a positive test with the UCI. The rest of the podium finishers were implicated by law enforcement investigations.[4] Unfortunately, cycling's doping era did not end in 2005 as the cases of more recent Tour de France podium finishers Floyd Landis, Andreas Klöden, Bernhard Kohl, and Alberto Contador and many other top cyclists serve to illustrate.

Like any sports federation under similar circumstances, the UCI has conflicting interests when one of the highest profile athletes in its sport is accused of anti-doping rule violations. Doping by high profile athletes in a sport undermines corporate sponsorship opportunities and jeopardizes public support for the sport. For this very reason, independent anti-doping agencies such as USADA were established. USADA's fundamental purpose is clean sport and, unlike the UCI, USADA can pursue evidence of doping unhindered by conflicting goals related to the perceived financial interests of the sport.

You are well aware of the efforts of USADA on behalf of clean sport from the *Floyd Landis* case, USADA's approximately seventy-five other successful prosecutions of cyclists for anti-doping rule violations since 2001, the regular attendance of UCI's staff at the annual USADA Symposium on Anti-Doping Science and through many other activities.

For better or worse, a finding that Respondents engaged in doping as alleged by USADA will likely further undermine public confidence in the UCI's anti-doping efforts. This is in part the case because Mr. Armstrong, his team manager, trainer and team doctors are being accused of

[4] Including the investigations of the Festina Affair (French law enforcement investigation), Operacion Puerta (Spanish law enforcement investigation), the Freiburg Clinic (German investigation), and other law enforcement investigations.

engaging in a pervasive and long running doping scheme. It is also because the UCI has repeatedly taken public positions which have placed the UCI irretrievably in the camp of those accused of doping in these cases and those prior positions taken by the UCI now commit the UCI to a negative position on the evidence in these cases.

For instance, at the time in 2010 when Mr. Landis publicly raised his allegations of Mr. Armstrong's doping, in an *Associated Press* article you stated that Mr. Landis' allegations in his April 30, 2010 email were "nothing new" and that, "he already made those accusations in the past."[5] It is, therefore, shocking to us that you are now making the inconsistent claim that Mr. Landis's allegations conferred results management authority upon the UCI under the UCI rules. It is frankly dumbfounding that the UCI now claims to have the authority to conduct results management on the basis of evidence which the UCI previously said that it had investigated, rejected and decided not to proceed upon. By prejudging Mr. Landis's evidence in the press, whatever results management authority the UCI may have had to consider his evidence has been abdicated.

Similarly, when Tyler Hamilton publicly explained his knowledge of Mr. Armstrong's doping in a *60 Minutes* interview nationally telecast in the United States and reported around the world in May, 2011, the UCI's Honorary President and current UCI Management Committee Member, Hein Verbruggen, stated:

> That's impossible, because **there is nothing. I repeat again: Lance Armstrong has never used doping. Never, never, never**. And I say this not because I am a friend of his, because that is not true. **I say it because I'm sure**."[6]

These comments during the pendency of USADA's investigation by the UCI's Honorary President, who also currently serves on the UCI Management Committee, are further evidence that even before USADA's investigation was complete the contention that Mr. Armstrong engaged in doping was pre-judged and rejected by the UCI despite the fact that neither you, nor Mr. Verbruggen, nor any other representative of the UCI, have met with Mr. Hamilton or with any other of USADA's numerous witnesses concerning these matters.

In response to Tyler Hamilton's public allegations, on May 23, 2011, the UCI issued an official statement expressing that the UCI "categorically rejects the allegations made by Mr. Tyler Hamilton, who claims that Lance Armstrong tested positive for EPO during the 2001 Tour of Switzerland and had the results covered up after one of his representatives approached the Lausanne laboratory responsible for analyzing the test results from this event." This is yet

[5] Floyd Landis comes clean, accuses Lance Armstrong, *USA Today*, May 21, 2010.
[6] Verbruggen says Armstrong "never, never, never" doped, *Cycling News,* May 24, 2011 (emphasis added).

another example of the UCI taking a public position on the evidence in this case, during the pendency of an ongoing investigation and before a decision to prosecute had ever been made and it provides further support for the conclusion that by its own actions the UCI has disqualified itself from any role in this case.

Moreover, as you know, in this particular case it has been alleged by several athletes that information exists suggesting that the UCI may not have aggressively pursued evidence of Mr. Armstrong's doping that may have been within the UCI's possession. According to these athletes, Mr. Armstrong told them that he made one or more payments to the UCI following when Mr. Armstrong allegedly had a positive or suspicious test result.

In response to Mr. Landis's claims regarding a cover-up of Mr. Armstrong's test results and alleged favoritism towards Armstrong, you, former UCI President Hein Verbruggen and the UCI have filed a defamation lawsuit against Mr. Landis in the Swiss courts. You took this action despite the fact that an investigation of Mr. Landis's claims was pending. Having filed a lawsuit against Mr. Landis it is inconceivable that the UCI could expect that it retains the authority to conduct results management and, if necessary, the authority to present the evidence in an anti-doping case where one of the witnesses in that case is, at the same time being sued by the UCI. For this reason as well the UCI has a clear conflict of interest in this matter which disqualifies it from playing a results management role.

You complain that USADA did not share its case file with you in advance of initiating the proceedings against Mr. Armstrong and the other respondents; USADA was under no obligation to do so. Moreover, as explained above, it is clear that the UCI has for some time had a clear conflict of interest in relation to USADA's investigation of Mr. Armstrong. The UCI has plainly prejudged a portion of the evidence in this case and engaged in legal proceedings directly adverse to a witness. For these reasons, it is readily apparent why it would have been inappropriate for USADA to provide the UCI its investigative file before proceeding with results management, why transfer of the file to the UCI is foreclosed at this time and why any results management role for the UCI is barred.

Finally, as explained below, there exists yet another strong additional reason why the UCI is not in a position to be involved in any way in the results management of this matter.

Armstrong's Payments To UCI

In the April 30, 2010, email from Floyd Landis to USA Cycling President Steve Johnson (that is referred to in both of your letters and discussed above) Mr. Landis alleged that while winning the Tour of Switzerland Mr. Armstrong "tested positive for EPO at which point he and Mr. Bruyneel flew to the UCI headquarters and made a financial arrangement with Mr. [Verbruggen] to keep the positive test hidden."

As part of its investigation concerning alleged doping by Mr. Armstrong USADA met with Lausanne laboratory director Martial Saugy who confirmed various communications and meetings he claims to have had with UCI personnel, Johann Bruyneel and Lance Armstrong concerning EPO test results for a sample that Mr. Armstrong provided at the 2001 Tour of Switzerland. Mr. Saugy told USADA that representatives of UCI were aware of both the indication of EPO use from Mr. Armstrong's 2001 Tour of Switzerland sample and of the meetings involving Dr. Saugy, Mr. Armstrong and Mr. Bruyneel.

In May 2011 Tyler Hamilton appeared on the *60 Minutes* news program and stated Lance Armstrong had told him that Armstrong had a positive test for EPO at the 2001 Tour of Switzerland and that Hamilton was told that "Lance's people and the people from the . . . governing body of the sport figured out— figured out a way for it to go away."

In addition, USADA has reviewed statements attributed to you concerning the foregoing and Mr. Armstrong's payments to the UCI and noted certain apparent inconsistencies. For instance, we understand that on May 23, 2010, you confirmed that Mr. Armstrong did make a payment to the UCI, stating:

> The UCI received $100,000 from Lance Armstrong in 2005. Four years after this incident [the Tour of Switzerland] is supposed to have taken place. So they are completely separate. That money was given to the UCI to buy a Sysmex machine because we needed to go more into blood controls and we needed a Sysmex machine which cost something like $88,000. It was given to the UCI to buy that machine and the UCI is still using that machine at international events on a daily basis.[7]

In your May 23, 2010, statement you apparently did not mention any meeting involving both Johan Bruyneel and Lance Armstrong and you relied upon an alleged four year gap between the 2001 Tour of Switzerland, (which took place from June 19 through June 28, 2001), and Mr. Armstrong's 2005 payment to UCI as demonstrating the absence of a connection between Armstrong's 2001 Tour of Switzerland test results and his subsequent payment to the UCI.

However, in a subsequent article, on May 25, 2010, you apparently conceded that a meeting with Mr. Bruyneel and Mr. Armstrong did take place at UCI headquarters less than a year after the 2001 Tour of Switzerland. We understand that you stated:

> We are looking into it to be fully transparent, by the end of it **we will have the full facts available. That will include the invoice of the Sysmex machine, when it was bought**. My understanding, without having examined the full detail,

[7] Confusion over payment Armstrong made to the UCI for a Sysmex Machine, *Cycling Weekly*, May 23, 2010.

> is that during 2002 Lance Armstrong and Johan Bruyneel visited the UCI headquarters in Aigle. It had just opened in April 2002, it was some time after that. They got a guided tour of the centre. They were impressed by what they saw and Armstrong offered $100,000 to help the development of cycling. The UCI decided to use the money on a Sysmex machine, my understanding is that the machine cost around $88,000. We did nothing more about this until 2005 when it was realized that the money had not been paid by Armstrong. A phone call was made and the money came in.[8]

The foregoing statement appears to be inconsistent with your earlier statement regarding the timing of the communications with Mr. Armstrong and concerning Mr. Bruyneel's involvement. Also, you initially stated that there was only a single payment to UCI from Mr. Armstrong totaling $100,000.[9]

However, you thereafter stated that Mr. Armstrong made two payments to the UCI. According to you, UCI received from Mr. Armstrong "in May 2002 . . . a personal cheque, signed by himself and his wife, for $25,000" and in 2005 a check for $100,000 "from his company CSE."[10]

Yet, in the arbitration between Mr. Armstrong and SCA Promotions, Mr. Armstrong was questioned regarding his payments to the UCI and provided responses inconsistent with your explanation. While Mr. Armstrong referenced various possible amounts of payments in his testimony, he ultimately testified that he may have made a payment or payments to the UCI totaling as much as $200,000 and that he may have made pledges of additional payments to the UCI. Therefore, Mr. Armstrong's prior testimony under oath appears to conflict with your statements regarding the amount of the payments made by Armstrong, also indicating that he may have made additional promises of payments to the UCI.

Mr. Armstrong's payments to the UCI create a further conflict of interest for the UCI. In addition, given that there exists evidence that the payments relate to evidence and claims in these very cases it is apparent that the UCI may be called upon to provide evidence in the eventual arbitration hearing. For this reason as well the UCI is foreclosed from participating in the results management of Mr. Armstrong's case.

[8] McQuaid confirms Armstrong donated $100,000 to UCI, *Cycling Weekly*, May 25, 2010 (emphasis added).
[9] McQuaid confirms Armstrong donated $100,000 to UCI, *Cycling Weekly*, May 25, 2010.
[10] McQuaid reveals Armstrong made two donations to the UCI, *Cycling News*, July 10, 2010.

CREATION OF AN INDEPENDENT TRUTH AND RECONCILIATION COMMISSION TO ADDRESS DOPING IN CYCLING

In your July 13, 2012 letter to Mr. Tygart, you proposed that the Armstrong case be referred to what you call "an independent panel who shall decide if the Respondents have a case to answer." You then claim a role for UCI in setting up the panel you propose, stating that "[w]e can discuss the modalities for setting up such a panel and assuring their independence."

However, as explained above, the UCI has waived any right to proceed as a results manager in this matter and is barred from seeking to prevent USADA from doing so. The UCI's public statements, prior conduct and myriad conflicts of interest foreclose any results management role for it. There exists abundant evidence confirming that the UCI has prejudged the evidence without even seeing it, foreclosing any right to be involved in deciding whether disciplinary proceedings should be opened or how they should be conducted. Consequently, it would be highly inappropriate at this juncture for USADA to turnover any case file to UCI as you demand, much less for USADA and UCI to participate in setting up an extra-judicial review panel not provided for in any applicable rules.

USADA's results management of these matters will not be diverted to a panel controlled in whole or in part by the UCI. The USADA Protocol, USOC National Anti-Doping Policies and the UCI's own rules all fully support USADA's results management role in this case.

At the appropriate time when these matters are in arbitration and as provided in the USADA Protocol for Olympic and Paralympic Testing (the "USADA Protocol") the UCI will be invited to join the proceedings as a party[11] or as an observer. By participating as an observer in such proceedings as may go to a hearing the UCI will be afforded an opportunity to review the evidence exchanged in the case in accordance with the time frame determined by neutral arbitrators.

What is needed is not a panel to hear these cases. That mechanism is already underway, as provided for in the USADA Protocol, the USOC Anti-Doping Rules, and the UCI ADR. What is needed is a Truth And Reconciliation Commission to clean up the sport of cycling once and for all. As previously noted, in recent history, doping in cycling has been epidemic. Many of the same individuals who were involved in that epidemic are still entrenched in the sport. That is why the cases against Messrs. Bruyneel and Marti and Drs. Celaya, del Moral and Ferrari, who were involved with doping cyclists in the past and are still working with cyclists, are particularly important. If UCI is truly interested in setting up a special panel to deal with doping, it should not be for one case, rather UCI should ask WADA to establish an independent body akin to a

[11] USADA does not intend to foreclose the possibility that it may take the position that given the conflicts of interest noted in this letter (and others which USADA may raise at the appropriate time) the appropriate role for the UCI in any case may be as an observer only.

Truth And Reconciliation Commission, where the skeletons of doping in cycling can all come out of the closet, the many cyclists who have doped can come clean, and cycling can go forward with a fresh start.

I trust that the foregoing adequately addresses the issues raised in your two letters dated July 13, 2012. Now that these matters have been addressed, as explained below, I have a request that I would like to make of the UCI.

USADA's REQUEST FOR DOCUMENTS FROM THE UCI

We understand from your prior statements, some of which are collected above in this letter, that the UCI maintains in its possession documents that are relevant to USADA's ongoing proceedings against various Respondents, including Mr. Armstrong. You have previously stated that in connection with the investigation of Mr. Armstrong and the United States Postal Service Cycling team you would cooperate with USADA and would welcome any inquiry asking to review the UCI's records. [12]

You have also stated:

> The UCI take seriously the accusation that the UCI took a bribe to hide the positive test of Lance Armstrong in 2001. . . We've contacted in recent days the labs involved for testing for EPO at that time. **I have statement here from those labs that support what I am about to say** . . . that there is no way that the UCI or its former president Hein Verbruggen could have accepted a bribe. It's just not possible.[13]

We understand that in August of 2010 you said, "the **UCI conducted a review** in which it contacted laboratories that had done testing at the time [i.e., during 2001] and found that each EPO test was followed up."[14] You were further quoted as stating, "**We have a very clear file that will show to any investigation that the UCI did everything correct** and did not and could not have hid a positive control."[15]

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[12] *E.g.*, McQuaid: UCI takes Landis allegations very seriously, *Cycling Weekly*, May 25, 2010 ("I asked the US federation to begin an inquiry. They requested USADA to make an inquiry and that is ongoing."); McQuaid reveals Armstrong made two donations to the UCI, *Cycling News*, July 10, 2010 ("We haven't been contacted by anyone in the USA, but if we are, we'll tell them everything we know. They can study our books."); McQuaid: There has never been corruption in the UCI, *Cycling News*, February 3, 2011 ("We'd welcome any investigation into the UCI.").
[13] UCI admits accepting Lance Armstrong donation was a mistake, *The Guardian*, May 25, 2010 (emphasis added).
[14] UCI Cycling chief: no contact from US investigators, *Yahoo! Canada Sports*, August 17, 2010.
[15] *Id* (emphasis added).

Accordingly, USADA will now take you up on your invitation to provide relevant documents in the UCI's possession to USADA. USADA requests that UCI provide USADA with the following:

1. The statements from laboratories referred to in the foregoing quotations.

2. The complete "file" referred to in your statement above regarding an investigation of laboratories.

3. The complete file from your investigation of statements made by Floyd Landis.

4. The complete file from your investigation of statements made by Tyler Hamilton.

5. Complete documentation from each EPO analysis conducted on Lance Armstrong's samples from each UCI event in 2001 (including the Tour of Switzerland), including, but not limited to, all doping control forms, reports of analyses, densitometry results, and electropherograms.

6. All communications between UCI and each laboratory regarding the foregoing results.

7. Any emails or other correspondence since 1999 with any current or former official in the sport of cycling or any representative, agent or lawyer of such an official regarding testing of any Lance Armstrong sample at the 2001 Tour of Switzerland.

8. All communications between you and/or Hein Verbruggen and/or Philippe Verbiest and/or Mario Zorzoli and Lance Armstrong, Johan Bruyneel or any representative of Mr. Armstrong or Mr. Bruyneel since 1999.

9. All documents created as a result of any investigation relating to Lance Armstrong's test results from the 2001 Tour of Switzerland.

10. Information on all blood collections and results associated with blood samples provided by Lance Armstrong in the years 2008, 2009, and 2010 including copies of doping control forms associated with his samples, his answers to questions related to the blood passport, athlete medical declarations, supplementary report forms, chain of custody forms and laboratory certificates of analysis.

11. If, as part of the UCI biological passport program, any historical reviews have been completed by your independent ABP expert panel on Mr. Armstrong's hematological profile and/or .abp files created for evaluation within the WADA ABP Software,

please provide this information. Please also include laboratory documentation packages from Mr. Armstrong's samples if you have requested them, or alternatively grant USADA permission to request this information directly from the laboratories at our own expense. Further, if it is more convenient for USADA to contact the Lausanne laboratory Athlete Passport Management Unit (APMU) or any other laboratory for any of this information, please grant us permission to receive all relevant information.

12. All of Mr. Armstrong's license applications in your possession (whether made to USA Cycling or to UCI).

With respect to each request above, to the extent that any information sought by this request is in the possession of the Lausanne Laboratory or any other laboratory USADA respectfully requests that you authorize any such laboratory to provide this information directly to USADA.

If you have any questions regarding this request please do not hesitate to contact me.

Very truly yours,

UNITED STATES ANTI-DOPING AGENCY

William Bock, III
General Counsel

WB/ljm

Enclosure (Motion to Dismiss in *Armstrong v. USADA*)

cc: David Howman, Director General, WADA (David.Howman@wada-ama.org)
Olivier Niggli, CFO, Legal Director, WADA (Olivier.Niggli@wada-ama.org)

IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

LANCE ARMSTRONG,

Plaintiff,

v.

UNITED STATES ANTI-DOPING AGENCY and TRAVIS TYGART, In His Official Capacity as Chief Executive Officer of the United States Anti-Doping Agency,

Defendants.

Civ. Action No. 1:12-cv-00606-SS

DEFENDANTS' MOTION TO DISMISS FOR LACK OF SUBJECT MATTER JURISDICTION OR, IN THE ALTERNATIVE, MOTION TO DISMISS OR STAY UNDER THE FEDERAL ARBITRATION ACT

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AAA	American Arbitration Association
ADRB	Anti-Doping Review Board
CAS	Court of Arbitration for Sport
IOC	International Olympic Committee
NGB	National Governing Body
RTP	Registered Testing Pool
UCI	International Cycling Union or Union Cycliste Internationale
USADA	United States Anti-Doping Agency
USOC	United States Olympic Committee
WADA	World Anti-Doping Agency

Pursuant to Rule 12(b)(1) of the Federal Rules of Civil Procedure and Section 3 of the Federal Arbitration Act, Defendants United States Anti-Doping Agency ("USADA") and Travis Tygart, in his official capacity as the Chief Executive Officer of USADA, respectfully submit this Motion to Dismiss for Lack of Subject Matter Jurisdiction or, in the Alternative, Motion to Dismiss or Stay Under the Federal Arbitration Act.

I. INTRODUCTION

Under the Ted Stevens Olympic and Amateur Sports Act ("Sports Act"), 36 U.S.C. § 220501, *et seq*, Congress has established arbitration as the exclusive forum for disputes relating to athlete eligibility in sports that are part of the Olympic movement, including cycling and triathlon. As an elite athlete member of USA Cycling and USA Triathlon, Lance Armstrong is subject to this mandatory dispute resolution framework. His claims, which attempt to bypass and enjoin the mandatory arbitration process, are preempted by the Sports Act. By bringing suit before completing the available arbitral process, he has also failed to exhaust the administrative remedies afforded him by the Act. The court lacks subject matter jurisdiction for both reasons.

With respect to USADA's alternative motion to dismiss or stay under Section 3 of the Federal Arbitration Act ("FAA"), undisputed facts show Armstrong agreed on multiple occasions to be bound by anti-doping rules applicable to competitors in cycling and triathlon in the United States. He further agreed that any necessary hearing regarding a violation of these rules would be an arbitration under the USADA Protocol for Olympic and Paralympic Movement Testing ("USADA Protocol" or "Protocol") and pursuant to the American Arbitration Association ("AAA") Supplementary Procedures for the Arbitration of Olympic Sport Doping Disputes ("AAA Supplementary Procedures").

With no apparent regard for his prior commitments to be bound by the sport rules, and indeed silent as to many of the applicable rules[1], Armstrong asks this Court to enjoin the USADA adjudication process and prevent the enforcement of the anti-doping rules to which he agreed. He would have this Court ignore both the applicability of the Sports Act and settled case law which confirm that (i) courts lack jurisdiction over controversies such as this, concerning athletic eligibility, and (ii) Armstrong's only recourse is binding arbitration.

The rules applicable to Armstrong are the same rules applicable to every other U.S. cyclist in the USADA registered testing pool (the "USADA RTP") and are identical in material respects to the rules applicable to the nearly 3,000 U.S. athletes from more than 40 Olympic movement sports[2] in the USADA RTP. He attacks the legal process establishing USADA's jurisdiction over the members of U.S. sport national governing bodies ("NGBs"), a process repeatedly upheld by courts and supported by the USOC, NGBs and athletes for more than a decade. USADA respectfully requests that the Court reject Armstrong's effort to create a new set of rules applicable only to him.[3]

II. THE COURT LACKS SUBJECT MATTER JURISDICTION OVER PLAINTIFF'S CLAIMS.

A. Standard of Review

A motion under Rule 12(b)(1) of the Federal Rules of Civil Procedure challenges the subject matter jurisdiction of the district court to hear a case. *Brinston vs. Koppers Indus.*, 538 F.

[1] Armstrong repeatedly refers to the UCI Anti-Doping Rules in his Amended Complaint as if those are the only rules which USADA is claiming he violated and the only rules by which USADA asserts jurisdiction. The USADA's June 28, 2012, charging letter includes violations under rules of the United States Olympic Committee ("USOC"), USA Cycling, USADA and the World Anti-Doping Code. As explained in this Motion, those rules—ignored in the Amended Complaint—also support USADA's jurisdiction over Armstrong.

[2] "Olympic movement sports" refers to those sports on the program of the Olympic Games.

[3] The Amended Complaint contains many inaccuracies and incomplete statements. Exhibit 1 is a chart highlighting those inaccuracies.

Supp. 2d 969, 976 (W.D. Tex. 2008). "The burden of proof for a Rule 12(b)(1) motion to dismiss is on the party asserting jurisdiction." *Id.* Therefore, Mr. Armstrong carries the burden to prove subject matter jurisdiction.

In evaluating a challenge to subject matter jurisdiction, "the Court is free to weigh the evidence and resolve factual disputes so it may be satisfied jurisdiction is proper." *JD Wind 1, LLC vs. Smitherman*, No. A-09-CA-917-SS, 2010 WL 3703119, at *4 (W.D. Tex. Sept. 14, 2010), *citing Montez vs. Dep't of Navy*, 392 F.3d 147, 149 (5th Cir. 2004). For this inquiry, "the Court may consider: (1) the complaint alone; (2) the complaint supplemented by undisputed facts; or (3) the complaint supplemented by undisputed facts plus the court's resolution of disputed facts." *Id.* "Dismissal is warranted if Plaintiff's allegations, together with any undisputed facts, do not establish the Court has subject matter jurisdiction." *Id.*

B. Factual Background Relating to Lack of Subject Matter Jurisdiction[4]

1. Doping control framework for Olympic movement sports in the United States

The USOC, USA Cycling and USADA, along with other entities, share responsibility for doping control in the sport of cycling in the United States.

The USOC is a federally chartered nonprofit corporation created by Congress, *see* 36 U.S.C. § 220502 (1998), and recognized by the International Olympic Committee ("IOC") as the national Olympic committee for the United States. The Sports Act confirms the USOC's exclusive jurisdiction, directly or through its constituent national governing bodies, to coordinate and oversee amateur athletic activity in the United States. *See* 36 U.S.C. § 220503, *et seq.* The Sports Act defines "amateur athlete" broadly as "an athlete who meets the eligibility standards

[4] Attached are affidavits confirming these facts. *See* Ex. 2 (Dershowitz Affidavit); Ex. 3 (Tygart Affidavit); Ex. 4 (Tomlonovic Affidavit); Ex. 5 (Farrell Affidavit). Each PDF contains "bookmarks" that point to the particular documents referenced in the PDFs.

established by the national governing body or paralympic sports organization for the sport in which the athlete competes." 36 U.S.C. § 220501(b)(1).

Thus, despite the common understanding of the term "professional athlete," Kobe Bryant and LeBron James, who are presently competing for USA Basketball and consequently in the USADA RTP, are also "amateur" athletes within the meaning of the Sports Act. Similarly, although he has earned more prize money and endorsement income than nearly any other competitor in sport, Lance Armstrong has been considered an "amateur athlete" within the meaning of the Sports Act nearly his entire career.

USA Cycling is a member of the USOC and is the national governing body for cycling in the United States.[5] USA Cycling is also the United States member of the International Cycling Union or Union Cycliste Internationale ("UCI"), the sport's international governing body.[6]

USADA was formed in 2000 as an independent, private, not-for-profit corporation on the recommendation of the USOC.[7] USADA assumed the anti-doping responsibilities previously shared by the USOC and its more than forty NGBs in the United States.[8] The procedures applicable to drug testing, results management and adjudication of doping matters are set forth in the USADA Protocol and AAA Supplementary Procedures.[9] When USADA was formed, the USOC adopted a bylaw requiring USA Cycling and other NGBs to "comply with the procedures pertaining to drug testing and adjudication of related doping offenses of the independent anti-

[5] Ex. 2 (Dershowitz Aff.) ¶ 4.

[6] Ex. 4 (Tomlonovic Aff.) at exhibit Y.

[7] Ex. 3 (Tygart Aff.) ¶¶ 4-5; Ex. 2 (Dershowitz Aff.) ¶ 7.

[8] Ex. 3 (Tygart Aff.) ¶ 4.

[9] Ex. 3 (Tygart Aff.) ¶ 8 & at exhibit C.

doping organization designated by the USOC [*i.e.*, USADA] to conduct drug testing."[10] The USOC also required that each NGB "shall not have any anti-doping rule which is inconsistent with . . .the USADA Protocol," and that every athlete member of an NGB, by virtue of his or her membership in the NGB or inclusion in the USADA RTP, "agrees to be bound by the . . . the USADA Protocol."[11]

In compliance with the USOC's requirements, USA Cycling adopted regulations incorporating the USADA Protocol for all USA Cycling members. These regulations further state, "All testing and results will be the responsibility of [USADA]" and "[a]ny investigation, prosecution, and hearings shall be the responsibility of [USADA]."[12] USA Cycling's bylaws specify that every member athlete "shall be required to obtain a USA Cycling license in order to participate and shall be subject to USA Cycling regulations."[13]

2. Application of the USADA Protocol to Armstrong

By virtue of his membership in USA Cycling, his obtaining an annual license through USA Cycling, and his inclusion in the USADA RTP, Armstrong agreed to be bound by the USADA Protocol.[14] Armstrong and his counsel acknowledged this very fact in a prior arbitration proceeding.[15]

[10] Ex. 2 (Dershowitz Aff.) ¶ 10.

[11] Ex. 2 (Dershowitz Aff.) ¶¶ 11-12 & ex. F, G.

[12] Ex. 4 (Tomlonovic Affidavit) ¶ 41 & ex. Q.

[13] Ex. 4 (Tomlonovic Affidavit) ¶ 42 & ex. Y.¶

[14] Ex. 4 (Tomlonovic Affidavit) ¶¶ 39-42; Ex. 2 (Dershowitz Aff.) ¶¶ 11-12 & ex. F.

[15] Ex. 3 (Tygart Aff.) ¶¶ 10-11.

In 2005, Armstrong was a claimant in a commercial arbitration against a company called SCA Promotions.[16] To bolster his claim in the arbitration that he had never doped, Armstrong and his counsel requested and received an affidavit from USADA's then General Counsel, Travis Tygart.[17] This affidavit, which Armstrong submitted to the arbitrators, states:

> All athletes in U.S. Olympic sports, including athlete members of U.S. national governing bodies such as USA Cycling, are subject to the programs of USADA. . . .To be recognized as a national federation by the UCI and the USOC, USA Cycling is legally required to follow the protocols of USADA. . .
>
> By being a licensed member of USA Cycling, like all licensed members, Mr. Lance Armstrong ("Mr. Armstrong") has an obligation to participate in the drug testing programs of USADA. Further, since Mr. Armstrong competes internationally and is an elite U.S. cyclist, he is in the USA Cycling/USADA OOC drug testing pool. . .
>
> If USADA charges an athlete [with a doping violation], the athlete can contest the charge through arbitration before a panel of American Arbitration Association ("AAA") and the Court of Arbitration for Sport ("CAS") arbitrators.
>
> USADA also has the ability to proceed against an athlete for committing a doping violation not involving a positive test. . . [18]

Thus, Armstrong clearly understood he was subject to the USADA Protocol, including its results management and adjudication rules.[19]

Armstrong also has been included in the USADA RTP for most of the last twelve years.[20] He submits "whereabouts filings" with USADA every quarter and regularly receives

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[16] Ex. 3 (Tygart Aff.) ¶ 10.

[17] Ex. 3 (Tygart Aff.) ¶ 10 & ex. E. Mr. Tygart's willingness to provide an affidavit helpful to Armstrong's efforts in the SCA arbitration negates the repeated assertions in his exhibits that USADA somehow has a long-standing "vendetta" against him.

[18] Ex. 3 (Tygart Aff.) at ¶ 10 & ex. E.

[19] *See* Ex. 3 (Tygart Aff.) at ¶ 12.

[20] Ex. 4 (Tomlonovic Affidavit) ¶¶ 10-34.

communications from USADA informing him the Protocol applies to him.[21] Likewise, the rules of the NGBs which he voluntarily joined subjected him to USADA's anti-doping rules and arbitration process.[22]

3. USADA's presentation of charges

By letter dated June 12, 2012, USADA notified Armstrong that, based on the evidence described in the letter, it was initiating the process set forth in the Protocol for the specified anti-doping rule violations.[23] The letter stated the matter would be forwarded to the Anti-Doping Review Board ("ADRB") for its consideration as provided in the USADA Protocol.[24] Armstrong was invited to make written submittals to the ADRB on or before June 22, 2012, which Armstrong did.[25] The ADRB reviewed the written submittals and made its recommendation to USADA.[26]

Upon receipt of the ADRB's recommendation, USADA sent Armstrong a letter dated June 28, 2012.[27] The letter informed Armstrong that USADA was charging him with specified anti-doping rule violations, USADA would seek specified sanctions against him, and described his procedural rights under the Protocol.[28] As provided by the Protocol, the letter stated Armstrong would have ten days, or until July 9, 2012, to respond to USADA's charges by either

[21] Ex. 4 (Tomlonovic Affidavit) ¶¶ 18-19, 25, 30, 35.

[22] Ex. 4 (Tomlonovic Affidavit) ¶¶ 39-44. Armstrong's Amended Complaint focuses solely on the UCI Anti Doping Rules and ignores the USA Cycling, USOC and USADA rules to which he is also subject.

[23] Ex. 3 (Tygart Aff.) ¶ 31 & ex. I.

[24] *Id.*

[25] Ex. 3 (Tygart Aff.) ¶ 31.

[26] *Id.*

[27] Ex. 3 (Tygart Aff.) ¶ 32 & ex. J.

[28] *Id.*

accepting the sanctions or requesting an arbitration hearing before the AAA pursuant to the Protocol.[29] Before the conclusion of the initial ten day period, Armstrong requested and was granted an additional five days, until July 14, 2012, within which to choose to proceed to arbitration.[30] On July 9, 2012, Armstrong filed this lawsuit, and the parties subsequently agreed to extend the July 14, 2012 deadline by up to thirty days.[31] The present deadline for Armstrong to choose arbitration expires on August 13, 2012.

4. The long-standing role of arbitration in Olympic sport eligibility disputes

It has long been a principle of international Olympic sport that athlete eligibility disputes are resolved exclusively by arbitration.[32] In the United States, this is embodied in the Sports Act which provides for AAA arbitration of disputes relating to athlete eligibility.[33] When athletes become members of an NGB, such as USA Cycling or USA Triathlon, they agree to submit their eligibility disputes, including disputes concerning anti-doping rule violations, to arbitration.[34] The Olympic Charter also requires arbitration for all athlete eligibility disputes.[35]

The final arbitral body for disputes in Olympic movement sports, including cycling, is the Court of Arbitration for Sport ("CAS") which is seated in Lausanne, Switzerland. CAS handles all appeals of eligibility questions involving the Olympic Games, as well as a vast variety of

[29] *Id.*

[30] Ex. 3 (Tygart Aff.) ¶ 32.

[31] *Id.*

[32] Ex. 2 (Dershowitz Aff.) ¶ 17.

[33] Ex. 2 (Dershowitz Aff.) ¶ 16.

[34] Ex. 2 (Dershowitz Aff.) ¶¶ 11, 12, & 16.

[35] Ex. 2 (Dershowitz Aff.) ¶ 17.

other sports and commercial disputes. An appeal of a CAS award is to the Swiss Federal Tribunal, the appellate court which functions as Switzerland's Supreme Court.[36]

C. The Court Lacks Subject Matter Jurisdiction Because the Sports Act Preempts Plaintiff's Claims.

Congress "made clear choices" to keep disputes involving the eligibility of amateur athletes "out of the federal courts" and within the alternative structure established by the Sports Act and USOC. *Barnes v. Int'l Amateur Athletic Fed'n*, 862 F. Supp. 1537, 1544 (S.D. W.Va. 1993); *Cantrell v. United States Soccer Fed'n*, 924 P.2d 789, 792 (Okla. Ct. App. 1996) ("Congress, as a general matter, intended to leave questions of eligibility of those involved in amateur athletics to be resolved in accordance with the Act.").[37] As Judge Posner explained in his oft-cited quote, "[a]ny doubt on this score can be dispelled by the reflection that there can be few less suitable bodies than the federal courts for determining the eligibility, or the procedures for determining eligibility, of athletes to participate in the Olympic Games." *Michels v. USOC*, 741 F.2d 155, 159 (7th Cir. 1984) (Posner, J., concurring). Congress specifically rejected proposed legislative provisions that would have created authority for the judicial system to become embroiled in issues related to amateur athletes, and Congress explicitly gave the USOC and NGBs exclusive jurisdiction over eligibility for competitions. *Id.* at 158-59.[38]

Through the Sports Act, Congress vested the USOC and its NGBs with the authority to coordinate and regulate amateur athletics and sports organizations in the United States. *Barnes*,

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[36] Ex. 3 (Tygart Aff.) ¶ 30.

[37] The Sports Act was originally enacted as the Amateur Sports Act in 1950 at 36 U.S.C. 371, *et seq.* It was amended and renumbered in October 1998. The cases cited in this brief refer to provisions that are common to both versions of the Act.

[38] In enacting the Sports Act, Congress decided against including a provision that would have provided special jurisdiction in district courts for certain injunctive proceedings and a provision that would have provided district courts with jurisdiction to enforce decisions of arbitrators. *See Barnes*, 862 F. Supp. at 1544.

862 F. Supp. at 1543-44. Pursuant to 36 U.S.C. § 220523(a), with respect to American cycling athletes, USA Cycling (as the NGB for cycling) "exercise[s] jurisdiction over international amateur athletic activities . . . and establishes procedures for determining eligibility standards for participation in competition." Thus, under the Sports Act, the USOC and USA Cycling exercise exclusive jurisdiction, without court intervention, with regard to all matters related to Plaintiff's eligibility to compete in cycling. *Slaney v. Int'l Amateur Ath. Fed'n*, 244 F.3d 580, 596 (7th Cir. 2001) ("the USOC has exclusive jurisdiction, under the Amateur Sports Act, to determine all matters pertaining to eligibility of athletes"), *cert. denied*, 534 U.S. 828 (2001).

In *Slaney*, world renowned track and field athlete Mary Decker Slaney brought a lawsuit against the USOC, claiming she had been damaged by the "unlawful manner in which the USOC conducts its doping program." *Id.* at 596. Examining each of Slaney's claims, the court held that "Slaney cannot escape the fact that her state-law claims, whether framed as breach of contract, negligence, breach of fiduciary duty, fraud, constructive fraud, or negligent misrepresentation, are actually challenges to the method by which the USOC determines eligibility of athletes." *Id*. at 596. Relying on the broad rule that "the USOC has exclusive jurisdiction, under the Amateur Sports Act, to determine all matters pertaining to eligibility of athletes," the Seventh Circuit affirmed the dismissal of Slaney's claims. *Id.* at 596; *see also Barnes*, 862 F. Supp. at 1543-1544 (dismissing athlete's claim against his NGB for damages arising from his two-year suspension for doping because claim "was expressly subject to resolution in accordance with the mandates of … the Act," in accordance with "congressional intent to establish a centralized, monolithic structure for coordinating amateur athletics").[39]

[39] State appellate courts likewise have held that the Act preempts an athlete's eligibility claims. *Walton-Floyd v. USOC*, 965 S.W.2d 35, 40 (Tex. App.—Houston [1st Dist.] 1998, no pet.) ("To hold a common law duty exists outside the scope of the Act, thereby enabling an individual athlete to bring suit, threatens to override legislative intent and opens the door to inconsistent interpretations of the Act."); *Cantrell v. United States Soccer*

Congress did not intend for disputes regarding amateur athletic eligibility to be resolved in the courts, but instead provided that such claims were to be addressed in arbitration.[40] As a result, this Court lacks subject matter jurisdiction over the Amended Complaint.

D. Alternatively, the Court Lacks Subject Matter Jurisdiction Because Plaintiff Has Failed to Exhaust Administrative Remedies.

Because Plaintiff has failed to exhaust the available administrative remedies under the Sports Act and USADA Protocol to address the alleged anti-doping rule violations, the Amended Complaint must be dismissed for lack of subject matter jurisdiction. *See, e.g.*, *Punzalan v. FDIC*, 633 F. Supp. 2d 406, 415 (W.D. Tex. 2009) ("[T]he Court likewise lacks subject-matter jurisdiction over those claims due to Plaintiffs' failure to administratively exhaust them").

Courts interpreting the Sports Act have held consistently a plaintiff must exhaust administrative remedies before pursuing any court action against a NGB. *See Barnes*, 862 F. Supp. at 1544-46 (athlete's complaint against NGB dismissed for lack of subject matter jurisdiction for failure to exhaust administrative remedies under the Act); *Devereaux v. Amateur Softball Ass'n of Am.*, 768 F. Supp. 618, 623 (S.D. Ohio 1991) ("where administrative remedies are provided by federal law, a litigant must first exhaust those remedies before the dispute may be properly brought before the federal courts."); *see also Reynolds v. Athletics Cong. of the USA, Inc.*, No. C-2-91-0003, 1991 WL 179760, at *7 (S.D. Ohio Mar. 19, 1991) (suit challenging

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Fed., 924 P.2d 789, 792 (Okla. App. 1996) ("We find Congress, as a general matter, intended to leave questions of eligibility of those involved in amateur athletics to be resolved in accordance with the Act.").

[40] While *Slaney* and *Barnes* were decided prior to USADA's formation, their reasoning applies with equal force to preclude a court challenge to the USADA arbitration process which is authorized in the USOC's Bylaws and fulfills the Sports Act's requirement for binding arbitration to resolve eligibility disputes in the doping context. Whether the USOC or its NGBs handle doping cases, as in *Slaney*, or they delegate anti-doping functions to USADA, courts cannot provide a judicial forum for athletes to avoid the mandatory dispute resolution process established by the Sports Act. *See Graham v. U.S. Anti-Doping Agency*, No. 5:10–CV–194–F, 2011 WL 1261321, at *4-5 (E.D.N.C. 2011) (granting motion to dismiss pursuant Rule 12(b)(1) because the Sports Act precluded Plaintiff's constitutional and common law claims against USADA).

doping adjudication could not go forward because athlete had failed to exhaust administrative remedies), *vacated based on lack of subject matter jurisdiction for failure to exhaust*, 935 F.2d 270 (6th Cir. 1991); *Dolan v. U.S. Equestrian Team, Inc.*, 608 A.2d 434, 436-37 (N.J. Super. Ct., App. Div. 1992) (where USOC and NGB had adopted arbitration provisions consistent with the Sports Act, "there is nothing unfair about requiring plaintiff to exhaust her administrative remedies").

Consistent with the absence of a private cause of action, the Sports Act imposes on the USOC and its NGBs a requirement that they establish administrative procedures for, among other matters, the resolution of eligibility disputes between members and their NGBs. *See* 36 U.S.C. §§ 220503(8), 220505(c)(5), 220509(a), 220522(a)(4), 220522(a)(13). In the case of eligibility disputes over doping offenses, the USOC has enacted Bylaw 8.7(j), which requires that all NGBs "comply with the anti-doping policies of the [USOC] and with the policies and procedures of the independent anti-doping organization designated by the [USOC] to conduct drug testing and adjudicate anti-doping rule violations." In turn, USA Cycling and USA Triathlon have complied with the USOC Bylaw and National Anti-Doping Policies by adopting regulations incorporating the USADA Protocol for all members and requiring all American cycling and triathlon athletes to respect and comply with the USADA Protocol. See discussion above, section II.B(1).

Instead of availing himself of the required administrative remedy of an arbitration under the USADA Protocol (including the right to a *de novo* hearing before CAS), Armstrong filed this suit to avoid the arbitral forum. Armstrong's failure to exhaust his available administrative remedies leaves this Court without jurisdiction. *Barnes*, 862 F. Supp. at 1546 (failure to exhaust administrative remedies "renders the court without subject matter jurisdiction over [the]

claims"); *Reynolds*, 1991 WL 179760, at *5 (plaintiff is "relegated to the . . .dispute resolution mechanisms, including arbitration, provided for under the Act and the USOC Constitution") (quoting *Plucknett v. The Athletics Congress*, No. 6820545 (N.D. Cal. 1982)).

E. Armstrong's Myriad Complaints About the Arbitral Process Must be Arbitrated. In the Alternative, They Fail On Their Merits.

In his Amended Complaint, Armstrong contends he should not be required to arbitrate under the USADA Protocol because arbitration does not afford him the same procedural rights available in criminal or civil judicial proceedings. This "mistrust of the arbitral process" has been "undermined by [the Supreme Court's] recent arbitration decisions." *Garrett v. Circuit City Stores, Inc*., 449 F. 3d 672, 680 (5th Cir. 2006), *citing Gilmer v. Interstate/Johnson Lane Corp*., 500 U.S. 20, 34 n.5 (1991).

In *Gilmer*, the court rejected the same "host of challenges" raised in this case:

> Gilmer also raises a host of challenges to the adequacy of arbitration procedures. Initially, we note that in our recent arbitration cases we have already rejected most of these arguments as insufficient to preclude arbitration of statutory claims. Such generalized attacks on arbitration "rest on suspicion of arbitration as a method of weakening the protections afforded in the substantive law to would-be complainants," and as such, they are "far out of step with our current strong endorsement of the federal statutes favoring this method of resolving disputes."

500 U.S. at 30, *quoting Rodriguez de Quijas v. Shearson/American Express, Inc*., 490 U.S. 477, 481 (1989). With respect to the plaintiff's complaints about purported inadequacies of the arbitral forum in *Gilmer*, the Supreme Court felt it necessary to "address these arguments only briefly." *Gilmer*, 500 U.S. at 30. USADA will do the same here.

a. Alleged bias of arbitrator pool as a whole

As did the plaintiff in *Gilmer*, Armstrong "speculates that the arbitration panels will be biased." *Id*. "However, 'we decline to indulge the presumption that the parties and arbitral body conducting a proceeding will be unable or unwilling to retain competent, conscientious and

impartial arbitrators.'" *Id.*, *quoting Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth*, 473 U.S. 614, 634 (1985); s*ee also Michaels v. Mariforum Shipping, S.A.*, 624 F.2d 411, 414 n.4 (2d Cir. 1980) ("a district court cannot entertain an attack upon the qualifications or partiality of arbitrators until after the conclusion of the arbitration and the rendition of an award.").

b. Limitations on discovery

Armstrong asserts due process is lacking because discovery in arbitration may be more limited than in federal courts. "Although those procedures [in arbitration] might not be as extensive as in the federal courts, by agreeing to arbitrate, a party 'trades the procedures and opportunity for review of the courtroom for the simplicity, informality, and expedition of arbitration.'" *Gilmer*, 500 U.S. at 31, *quoting Mitsubishi*, *supra*, at 628.

c. Limited judicial review and no review by a U.S. court

Armstrong complains the USADA Protocol does not allow full judicial review, and the available review is by a Swiss court. But limited judicial review, and review by courts outside the United States, are critical components of international arbitration. "Courts repeatedly admonish that 'severely limited' judicial review is an essential, and inherent, feature of contractually agreed binding arbitration, necessary to avoid undermining the 'twin goals of arbitration . . . settling disputes efficiently and avoiding long and expensive litigation.'" *Lummus Global Amazonas, S.A. v. Aguaytia Energy Del Peru, S.R. Ltda.*, 256 F. Supp. 2d 594, 605 (S.D. Tex. 2002) *modified on denial of reconsideration on other grounds*, *quoting Matter of the Arbitration Between Trans Chemical Limited and China Nat'l Machinery Import and Export Corp.*, 978 F. Supp. 266, 303 (S.D. Tex. 1997), *aff'd*, 161 F. 3d 314 (5th Cir. 1998). "Concerns of international comity [and] respect for the capacities of foreign and transnational tribunals . . . require that we enforce the parties' [arbitration] agreement, *even assuming that a contrary result*

would be forthcoming in a domestic context." *Lim v. Offshore Specialty Fabricators, Inc*., 404 F. 3d 898, 906 (5th Cir. 2005), *quoting Mitsubishi, supra*, at 629 (emphasis in original).[41]

III. ALTERNATIVELY, USADA IS ENTITLED TO A DISMISSAL OR STAY OF PROCEEDINGS IN THIS COURT PURSUANT TO SECTION 3 OF THE FEDERAL ARBITRATION ACT.

Under Section 3 of the FAA, a trial court must grant a stay pending arbitration if the issues in a complaint are within the reach of an arbitration agreement. *Midwest Mechanical Contractors, Inc. v. Commonwealth Const.* Co., 801 F.2d 748, 751 (5th Cir. 1986). Accordingly, if (or to the extent) the Court declines to grant USADA's motion pursuant to Rule 12(b)(1), USADA moves the Court for an order staying or dismissing this lawsuit pending arbitration.

In resolving arbitrability disputes under the FAA, the Court may summarily determine whether a valid agreement to arbitrate exists. *See Hancock v. Am. Tel. & Tel. Co., Inc.*, 804 F. Supp. 2d 1196, 1207 n.24 (W.D. Okla. 2011) (applying "a summary-judgment-like standard" to resolve the question whether an arbitration agreement existed). Here, it is undisputed Plaintiff was a licensed member of USA Cycling and USA Triathlon, and included in USADA's registered testing pool during the times he was alleged to have doped; as a result, he was bound by USA Cycling's regulations which incorporated the USADA Protocol and AAA Supplementary Procedures. *See, e.g., Coenen v. R.W. Pressprich & Co., Inc.*, 453 F.2d 1209, 1211-12 (2d Cir. 1972) (by signing application for membership in which party agreed to abide by constitution and rules of stock exchange, party bound to arbitrate pursuant to exchange rules); *Stolow v. Greg Manning Auctions, Inc.*, 258 F. Supp. 2d 236, 249 (S.D.N.Y.) (bylaws of association "express the terms of a contract which define. . .the duties assumed by those who

[41] Armstrong claims that the arbitration agreement is "unconscionable." Amended Compl. ¶ 55(a)(iii). Armstrong does not articulate any facts in support of that conclusory allegation. Furthermore, a state law claim of unconscionability could not circumvent the federally mandated dispute resolution scheme under the Sports Act.

have become members"), *aff'd*, 80 Fed. Appx. 722 (2d Cir. 2003); *Netumar Lines v. General Cocoa Co.*, No. 96 Civ. 0136, 1997 WL 401668, at *2 (S.D.N.Y. July 16, 1997) (members of voluntary association bound by terms of association rules, including arbitration requirement). *see also Jacobs v. USA Track and Field*, 374 F. 3d 85, 87 (2d Cir. 2004) (noting that, "[a]s a member of USATF, petitioner has expressly agreed to abide by its rules and regulations").

Under the FAA, a district court has jurisdiction to engage only in a limited review to ensure that the dispute is arbitrable—"*i.e.*, that a valid agreement to arbitrate exists between the parties and that the specific dispute falls within the substantive scope of that agreement." *PaineWebber, Inc. v. Hartmann*, 921 F.2d 507, 511 (3d Cir. 1990), *overruled on other grounds by Howsam v. Dean Witter Reynolds*, 537 U.S. 79, 85 (2002), *citing AT&T Technologies, Inc. v. Comm'ns Workers of Am.*, 475 U.S. 643, 649 (1986). Even this limited review, however, is removed from the Court's jurisdiction where the parties' agreement clearly and unmistakably provides that the question of arbitrability is to be arbitrated. *AT&T Techs.*, *supra*, 475 U.S. at 649.

Here, the applicable AAA rule, incorporated into the USADA Protocol, provides, "The arbitrator shall have the power to rule on his or her own jurisdiction, including any objections with respect to the existence, scope or validity of the arbitration agreement."[42] Numerous courts reviewing this precise provision uniformly hold it constitutes a clear and unmistakable agreement that all questions of arbitrability shall be decided in arbitration rather than court. *See, e.g.*, *Halliburton Energy Servs*., Inc. *v. BJ Servs. Co*., No. 2:08-cv-475-TJW, 2010 WL 2991031, at *3 (E.D. Tex. July 28, 2010) ("By applying the AAA rules to the arbitration, the Court agrees with numerous other courts and finds that the [arbitration agreement] applies the rules to all

[42] Ex. 3 (Tygart Aff.) ¶ 8 & ex. C at Annex D (AAA Supplementary Procedures, R-7).

aspects of the arbitration, including the threshold issue of jurisdiction. Thus, the arbitrator, instead of this Court, is vested with the jurisdictional issue of arbitrability."); *Bollinger Shipyards Lockport LLC v. Northrop Grumman Ship Sys.*, No. 08-4578, 2009 WL 86704, *5 (E.D. La., Jan. 12, 2009) ("All of the federal courts to have considered the issue have held that when a contract contains or incorporates this type of language, it clearly and unmistakably vests the arbitrator, and not the district court, with authority to decide which issues are subject to arbitration.") *cf. DK Joint Venture 1 v. Weyand*, 649 F.3d 310, 317 n.7 (5th Cir. 2011) (noting that "sister circuits have held that an arbitration agreement that refers to the AAA's rules clearly and unmistakably demonstrates that the parties intended to give arbitrator the power to determine whether an issue or dispute is arbitrable" but failing to reach the issue because defendants were not themselves parties to the arbitration agreement) (citing cases).

Since all of Armstrong's challenges to arbitrability (*e.g.*, conflicting or overlapping authority for results management under the UCI rules and the USADA Protocol, statutes of limitation, unconscionability and due process challenges) are matters for the arbitrators to decide in the first instance, dismissal is appropriate. *See Alford v. Dean Witter Reynolds, Inc.*, 975 F.2d 1161, 1164 (5th Cir. 1992) ("The weight of authority clearly supports dismissal of the case when *all* of the issues raised in the district court must be submitted to arbitration.") (emphasis in original).

IV. CONCLUSION AND PRAYER

WHEREFORE PREMISES CONSIDERED, Defendants pray that the Court (i) grant their Motion to Dismiss for Lack of Subject Matter Jurisdiction; (ii) in the alternative, grant their Motion to Dismiss or Stay Under the Federal Arbitration Act; and (iii) grant Defendants such other and further relief to which they may be justly entitled.

Date: July 19, 2012

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on July 19, 2012, I electronically filed **DEFENDANTS' MOTION TO DISMISS FOR LACK OF SUBJECT MATTER JURISDICTION OR, IN THE ALTERNATIVE, MOTION TO DISMISS OR STAY UNDER THE FEDERAL ARBITRATION ACT** with the Clerk of Court using the CM/ECF system which will send notification of such filing to the following e-mail addresses:

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