

**BEFORE THE AMERICAN ARBITRATION ASSOCIATION  
Panel for Olympic Sport Doping Disputes**

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AAA CASE NO. 77 190 168 11 JENF

In the Matter of the Arbitration between

UNITED STATES ANTI-DOPING AGENCY, Claimant

and

EDDY HELLEBUYCK, Respondent

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**AWARD OF ARBITRATORS**

WE, THE UNDERSIGNED ARBITRATORS ("Panel"), having been designated by the above-named parties, and having been duly sworn and having duly heard the voluminous and extensive proofs, arguments, witness testimony, and allegations of the parties, and, after a hearing held on December 6 through December 7, 2011 in Tucson, Arizona do hereby render the Panel's full award pursuant to its undertaking to do so by January 30, 2012.

**1. SUMMARY**

1.1 Based on admissions by Respondent, Eddy Hellebuyck ("Hellebuyck" or "Respondent"), that he took EPO on multiple occasions prior to January 31, 2004, the starting date for his doping sanction previously imposed by prior AAA and CAS panels, Claimant, United States Anti-Doping Agency ("USADA" or "Claimant") seeks to extend back in time the period of Hellebuyck's ineligibility to disqualify his prior results and cause forfeiture of any medals and prize money Hellebuyck may have obtained during that extended period.

1.2 In what the Panel believes is a case of first impression, the Panel determines that Hellebuyck's perjury in a proceeding before the anti-doping tribunal established by the USOC,

WADA and IAAF precludes Hellebuyck from arguing for any protection under IAAF or WADA rules regarding limiting the time USADA has to pursue charges against him. Athletes' in AAA and CAS tribunals cannot be forced to testify against themselves, they can choose not to testify. However, if they choose to testify before an AAA or CAS tribunal, they have a legal duty to testify truthfully. Hellebuyck breached that duty when he testified that he never used EPO in his 2004 hearing before the AAA and 2005 hearing before CAS. But for his perjury, Hellebuyck's records would have been expunged from 2001 through 2004. Hellebuyck cannot now come before this tribunal and in essence use his perjury as a means to avoid the consequences that should have been imposed in 2004. As a result, Respondent's sanction for his first anti-doping offense shall be modified to invalidate his competitive results from October 1, 2001 through January 30, 2004.

## **2. PARTIES**

2.1 USADA is the independent anti-doping agency for Olympic sports in the United States and is responsible for conducting drug testing and any adjudication of positive test results pursuant to the United States Anti-Doping Agency Protocol for Olympic and Paralympic Movement Testing, effective as revised January 1, 2009 ("USADA Protocol").

2.2 At the Hearing, Claimant was represented by William Bock, III, Esq., its General Counsel, of the law firm of Kroger, Gardis & Regas, LLP, 111 Monument Circle, Suite 900 Indianapolis, Indiana 46204-5125.

2.3 The Respondent, Hellebuyck, was a member of USA Track & Field, Inc. (“USATF”)<sup>1</sup> for the time period in question in this case.

2.4 At the Hearing, Respondent was represented by his counsel Richard J. Shane, Esq., of the law firm of Riley, Shane & Keller, P.A., 3880 Osuna Road, NE, Albuquerque, NM 87109.

2.5 The Panel appreciates and commends the excellent briefing and oral presentations of counsel for both parties in this matter.

### **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.*; the United States Olympic Committee (“USOC”) National Anti-Doping Policies, as revised effective as of January 1, 2009 (“USOC Policies”) Paragraphs 7, 11, and 12; and the Protocol for Olympic and Paralympic Movement Testing, Effective as revised January 1, 2009 (“USADA Protocol”) Paragraph 15 (a).<sup>2</sup> The parties’ agreement to arbitrate is set forth in the above-referenced documents.

### **4. RULES APPLICABLE TO THIS DISPUTE**

The rules related to the outstanding issues in this case are the World Anti-Doping Code (“WADA Code”) and the IAAF Anti-Doping Rules. With respect to the IAAF rules, it was necessary to consider rules going back eleven-years given the judicial principle of *lex mitior*, a

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<sup>1</sup> USATF is the National Governing Body (“NGB”) for track and field, long-distance running and race walking in the United States. It is a member organization of the USOC and International Amateur Athletic Federation (“IAAF”).

<sup>2</sup> See *USADA v. Merritt*, AAA No. 77 190 00293 10 (2010) ¶¶3.1-3.5.

doctrine that provides for the application of the lesser of two punishments that may apply. The relevant rules are as follows:

#### **IAAF OFFICIAL HANDBOOK (Versions 2000-2001 and 2002-2003)**

##### **Rule 55**

1. Doping is strictly forbidden and is an offence under IAAF Rules.
2. The offence of doping takes place when either:
  - (i) a prohibited substance is found to be present within an athlete's body tissue or fluids; or
  - (ii) an athlete uses or takes advantage of a prohibited technique; or
  - (iii) an athlete admits having used or taken advantage of a prohibited substance or a prohibited technique . . . .
8. An admission may be made either orally in a verifiable manner or in writing. For the purpose of these Rules, a statement is not to be regarded as an admission where it was made more than six years after the facts to which it relates. . . .

#### **WADA CODE 2009**

##### **Article 3.1 Burdens and Standards of Proof**

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 an anti-doping rule violation 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.

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##### **Article 3.2 Methods of Establishing Facts and Presumptions**

Facts related to anti-doping rule violations may be established by any reliable means, including admissions. . .

##### **Article 10.7.4 Additional Rules for Certain Potential Multiple Violations**

. . . . If, after the resolution of a first anti-doping rule violation, an Anti-Doping Organization discovers facts involving an anti-doping rule violation by the Athlete or other Person which occurred prior to notification regarding the first violation, then the Anti-Doping Organization shall impose an additional sanction based on the sanction that could have been imposed if the two violations would have been adjudicated at the same time. Results in all Competitions dating back to the earlier anti-doping rule violation will be Disqualified as provided in Article 10.8. To avoid the possibility of a finding of aggravating circumstances [Article 10.6] on account of the

earlier-in-time but later-discovered violation, the Athlete or other Person must voluntarily admit the earlier anti-doping rule violation on a timely basis after notice of the violation for which he or she is first charged. The same rule shall also apply when the Anti-Doping Organization discovers facts involving another prior violation after the resolution of a second anti-doping rule violation.

#### **Article 17 Statute of Limitations**

No action may be commenced against an Athlete or other Person for an anti-doping rule violation contained in the Code unless such action is commenced within eight (8) years from the date the violation is asserted to have occurred.

#### **Article 25.2 No-Retroactivity Unless Principles of “Lex Mitior” Apply**

With respect to any anti-doping rule violation case which is pending as of the Effective Date and any anti-doping rule violation case brought after the Effective Date based on an anti-doping rule violation which occurred prior to the Effective Date, the case shall be governed by the substantive anti-doping rules in effect at the time the alleged anti-doping rule violation occurred unless the panel hearing the case determines the principle of “*lex mitior*” appropriately applies under the circumstances of the case.

#### **USADA Protocol (January 1, 2009)**

##### **Paragraph 11. Results Management Anti-Doping Review Board Track**

###### **11(b)**

Except as provided in section 12, 13 and 14 of this Protocol, 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. Review of potential violations other than Adverse Analytical Findings shall be undertaken by three Review Board members appointed in each case by USADA’s CEO.

###### **11(c)(vi)**

Notwithstanding the foregoing, 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 not have been considered by it, its deliberative process or its recommendations shall be admissible in any further hearing or proceeding.

#### **American Arbitration Association Supplementary Procedures for the Arbitration of Olympic Sports Doping Disputes (January 1, 2009) (“Supplementary Procedures”)**

## Rule -5 Changes of Claim

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. FACTUAL FINDINGS

5.1 Respondent was an elite-level distance runner in the sport of track and field. He has won over 20 marathons in his career. He was a 1996 Olympian and a member of 5 World Championship teams combined for both his native Belgium and his adopted home of the United States. He has also been a Masters level runner for a number of years.

5.2 On January 31, 2004, Hellebuyck provided a urine sample as part of USADA's out of competition drug testing program. The WADA accredited laboratory at the University of California Los Angeles found Hellebuyck's sample positive for recombinant human erythropoietin (hereafter "EPO").

5.3 EPO is a protein hormone that causes the body to produce more red blood cells than usual and thus increase the oxygen carrying capacity of the blood.<sup>3</sup> EPO is made primarily by the kidneys in response to low levels of oxygen in body tissues or to anemia.<sup>4</sup> EPO stimulates the production of red blood cells and the synthesis of cellular hemoglobin.<sup>5</sup> It is widely known that exogenous EPO is a prohibited substance under WADA and IAAF rules and has been on the WADA Prohibited Substances List for all times relevant to this arbitration.

5.4 Hellebuyck challenged this positive test before an American Arbitration Association ("AAA") hearing under the USADA Protocol. The hearing was conducted by a

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<sup>3</sup> USADA, *Spirit of Sport*, July – September 2006, Vol. 6, Issue 3, pg. 5.  
(<http://www.usada.org/files/active/athletes/newsletter/Spirit%20of%20Sport%20to%20web.pdf>)

<sup>4</sup> *Id.*

<sup>5</sup> *Id.*

three-member panel of arbitrators on November 30, 2004. On December 9, 2004 the AAA panel issued its award imposing a two-year period of ineligibility commencing from January 31, 2004. Notably, two members of that AAA panel are members of this Panel.

5.5 Hellebuyck testified at the hearing before the prior AAA panel. During his cross-examination he was asked about his use of performance enhancing drugs:

Q. (Howard Jacobs, Hellebuyck's counsel) And the Fedex told you that your sample had tested positive for EPO

A. (Hellebuyck) The letter said that.

Q. The letter did?

A. Yeah.

Q. What was your reaction to that?

A. I thought it was a joke. I said someone is trying to scare me or make a joke on me.

Q. Did you talk to anyone about it?

A. Called my wife right away. And that's all. That's it. I talked to Shawn.

Q. Did you ever call USADA about it?

A. I would not know where to call. I never heard about USADA before.

Q. Had you used EPO before at any time prior to giving the sample on January 31 [2004]?

A. Never.

Q. Have you used it at any time since?

A. No

Q. Have you ever used any banned substance at all?

A. No.

Q. Do you know how much EPO costs?

A. I assume it's expensive.

Q. But you don't know?

A. I don't know.<sup>6</sup>

[Questioning by Travis Tygart, USADA's counsel in the 2004 AAA proceeding]

Q. You made a press release, talked to the media about your positive test?

A. Yeah.

Q. You and your wife both actually did interviews?

A. Yeah. We did with Toby Tanser.

...

Q. And those were published in various media outlets; is that right?

A. Yes. I don't know how many copies he made.

Q. And do you remember in that interview saying that this test was a false test?

A. Yeah.

Q. And that's your position in this case; is that right?

A. Yes, that's right.

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<sup>6</sup> Transcript and Concordance, *United States Anti-Doping vs. Hellebuyck*, AAA 30 190 00686 04 (November 30, 2004), pp. 187-188.

...

Q. And you said – and I think you may have just misstated it. You had heard of USADA prior to receiving the positive letter, is that right?

A. Yeah, I've heard of USADA.

Q. Because I think you said you had never heard of USADA, but that's not true?

A. That's not true.

...

Q. It's your – your position this was a false test –

A. Yes.

Q. – is not going to change regardless of what the panel's decision is in this case, is it?

A. My decision is I'm – I didn't do anything wrong.

Q. And even if this panel determines differently, your position is not going to change, is it?

A. No.

Q. And that's what you'll tell the public; Is that right?

A. Yes.

Q. And that's what you'll tell your sponsors?

A. Yeah.

Q. That's what you'll tell the employer at your high school?

A. Yes.<sup>7</sup>

5.6 The IAAF appealed the AAA arbitration panel's December 9, 2004 award to the Court of Arbitration for Sport ("CAS") on the issue of the start date of the sanction. On May 5, 2005, the CAS Panel declared Hellebuyck ineligible from November 30, 2004 through November 29, 2006. The Court also ruled that any competitive results he obtained between January 31, 2004 and November 30, 2004 were annulled under Rule 59(4) of the IAAF Rules version 2002-2003.<sup>8</sup>

5.7 In February 2010, Hellebuyck agreed to participate in an interview with Runner's World magazine. His first interview took place in February and was conducted by Runner's World journalist John Brant. Brant interviewed Hellebuyck on several occasions thereafter. In

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<sup>7</sup> *Id.* at 190-193.

<sup>8</sup> *IAAF v. Hellebuyck*, CAS 2005/A/831.



those interviews, Hellebuyck admitted to using EPO as early as August of 2001.<sup>9</sup> The article first appeared in the December 2010 edition of Runner's World.

5.8 Hellebuyck taped portions of his interview with John Brant. In addition, Hellebuyck and his then wife Shawn Hellebuyck taped their conversations with a Runner's World fact checker.

5.9 On October 2010, Hellebuyck contacted Travis Tygart, USADA's CEO, by telephone and confessed to using EPO in 2001. On March 3, 2011, USADA transmitted a letter to Hellebuyck notifying him that, given his admissions, USADA was empaneling an Independent Anti-Doping Review Board to review the original 2004 charge against him and recommend further action.

5.10 It is undisputed, through Hellebuyck's admissions and the testimony of Shawn Hellebuyck at the hearing, that Hellebuyck used EPO on at least six occasions: October 2001, March 2002, May 2002, June 2003, December 2003, and Winter 2004.<sup>10</sup> Shawn Hellebuyck testified that the August 2001 date stated by the Runner's World article was not accurate. Consequently, it is undisputed that Hellebuyck committed perjury in his testimony before the AAA panel in 2004 as well as before the CAS panel in 2006.

5.11 Regarding the rationale for IAAF Rule 55.2 (iii) (six year limitation period on prosecuting based on admissions), Mark Edward Gay, the drafter of the rule, stated in his affidavit, in part, the following:

4. IAAF Rules 55 and 56 set out the offence of doping and the ancillary doping offences. These are grouped together at IAAF Rule 60 to make seven different

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<sup>9</sup> John Brant, Runner's World, *The Confessions of Eddy Hellebuyck* (December 2010) pg. 96, 114 (<http://www.runnersworld.com/article/0,7120,s6-239-567--13729-0,00.html>)

<sup>10</sup> Hearing Transcript *In the Matter of United States Anti-Doping Agency and Eddy Hellebuyck*, Arbitration Confidential Hearing, AAA No. 77 190 00168 11 (December 6-7, 2011), pg. 163, lines 1-4. Hellebuyck should consider himself fortunate that USADA did not assert that each of these additional admitted instances constituted another doping offense such that the multiple doping offense rules of the anti-doping rules, with their enhanced penalties, might apply here.

doping offences. IAAF Rule 60 deals with sanctions and it imposes the relevant sanction for each doping offence created. The admitted use or taking advantage of a prohibited substance or prohibited techniques is established as doping offence by IAAF Rule 55.2(3). IAAF Rule 55.8 helps to define what is to be regarded as an admission. It states "An admission may be made either orally in a verifiable manner or in writing. For the purpose of these Rules, a statement is not [to] be regarded as an admission where it was made more than 6 years after the facts to which it relates."

5. Under IAAF Rule 60.2(a) the sanction for an admission is equal to the sanction that would have been imposed had the IAAF (or any other relevant body) detected the substance that the athlete admitted using in a sample. Therefore, if the athlete admitted using an androgenic anabolic steroid for which the sanction at the time was a two year period of ineligibility, the sanction that would be imposed by the IAAF for an admission of the use of androgenic anabolic steroids would be two years.

6. The admissions rule was introduced into IAAF Rules at the IAAF Congress in Barcelona in August 1989. I drafted the rule and was present at the conference. The previous summer at the Olympic Games in Seoul, the Canadian sprinter, Ben Johnson, had tested positive for Stanozolol in a drug test taken after the final of 100 metres. Stanozolol is an androgenic anabolic steroid. This caused a shockwave throughout track and field athletics and indeed throughout world sport generally. The IAAF had previously had rule against doping, but it was legally weak (being based not on strict liability for detection but on an athlete "taking a prohibited substance"). Additionally, the previous rule, IAAF Rule 144, was regarded as a "technical rule", the consequence of which was that an athlete had "rendered themselves ineligible for competition". The new emphasis in the Rules was on the fact that doping was not merely a "technical offence" but was morally wrong and should be treated in this fashion and more seriously. (The sanction for a first doping offence was raised by the Congress in Barcelona from 18 months to 2 years.)

7. Prior to the new Rules passed at the IAAF Congress in Barcelona in 1989, admissions had not been regarded as doping offences. They were added in 1989 for a number of reasons. First, it seemed ludicrous that an athlete could be sanctioned for two years for testing positive but not for admitting the same conduct that would attract a two year ban. Therefore, it was thought that common sense favoured penalizing this conduct.

8. Secondly, the profile of track and field athletics was higher at the time and the Ben Johnson scandal had had a monumental impact upon track and field's reputation. There was a feeling at the time that the sport's reputation could be very badly damaged by newly retired athletes admitting (whether truthfully or not) taking performance enhancing substances in order to spice up biographies, autobiographies or memoirs. Such spiced up biographies, autobiographies or memoirs would command higher advances from publishers and could improve their sales. If an athlete risked having all of his or her titles taken away and performances annulled (the practical effect of a conviction under this Rule) this would act as a strong disincentive to publishing such revelations. The six year

period set out in Rule 55.8 was not intended as a general limitation period, a topic to which I will return. Rather, it was felt that the revelations of conduct committed six years before would be of little interest to book publishers or media, having occurred a long time ago in sporting terms. Admissions as to recent misconduct, however, would seriously damage the sport's reputation. Equally, at the time, the pace of improvement in track and field athletics was such that after six years all but the most exceptional records of performance by an athlete would have been surpassed.

9. There is also another problem with admissions, which is evidential. The longer after an event occurred in relation to which the admission is made, the greater the difficulty in proving the truth of the admission, particularly if all one is relying on is the admission itself. In the case of the detection of prohibited substances or trafficking, other supporting evidence may well exist. In the case of admissions, frequently all that one would have is the athlete's word for it, unsupported by contemporaneous, corroborating evidence. It was felt to be over-burdensome to prosecutors to compel them to investigate admissions of conduct committed a long time ago when the only evidence of the commission of an offence was the admission itself.

10. I should emphasise that the six year referral period set out in IAAF Rule 55.8 was confined merely to the offence of admitting taking advantage of or having used a prohibited substance or prohibited technique. This is clear as a matter of language in the Rules, as there is no other such period referred to in relation to any of the other doping offences. It is also clear that the IAAF at the time did not consider there to be a "de facto" six year limitation period. . that an athlete had "rendered themselves ineligible for competition".

## **6. PROCEDURAL ASPECTS OF CASE**

6.1 On April 13, 2011, USADA transmitted a letter to Hellebuyck advising him that the, "Review Board determined there was sufficient evidence of an anti-doping rule violation and recommended that the adjudication process proceed as set forth pursuant to the USADA Protocol for Olympic and Paralympic Movement Testing and the International Association of Athletics Federation Anti-Doping Rules, both of which have adopted the World Anti-Doping Code." (hereafter the "Charging Letter")"

6.2 On April 27, 2011, USADA sent Hellebuyck what USADA has identified as the "charging letter." On June 22, 2011 USADA sent correspondence to the AAA initiating this

hearing process with the “charging letter” attached. The April 27, 2011 “charging letter” stated the following:

You were notified on April 13, 2011, that the Panel of the United States Anti-Doping Agency (“USADA”) Anti-Doping Review Board (“Review Board”) met concerning whether there is sufficient evidence to proceed with modifying your sanction based on your multiple admissions of synthetic erythropoietin (“EPO”) use since the summer of 2001 . . . . **at this time you are subject to the following modification of your previous sanction for an anti-doping rule violation:** Disqualification of the competitive results obtained on and subsequent to August 1, 2001, the first date on which there is any evidence of your participation in a rule violation, and through the end date of your ineligibility on January 30, 2006, including forfeiture of any medals, points and prizes consistent with Rule 40 of the IAAF Anti-Doping Rules. (emphasis added)

6.3 On August 4, 2011, the AAA notified the parties of the appointment of the arbitrators on this Panel. The Panel set the preliminary hearing for August 24, 2011.

6.4 Shortly after the August 24, 2011 preliminary hearing, the Panel submitted a draft of its initial scheduling order for comment before issuing the order. The Panel timely received the parties’ comments and on August 29, 2011 presented a redlined version of a revised draft order that addressed many of the concerns of the parties. Thereafter, the initial scheduling order was transmitted to the parties on August 30, 2011 (“Initial Order”)

6.5 The Initial Order, in part, stated the following:

September 7, 2011: In light of the acknowledged difficulty that could exist for locating applicable rules, including but not limited to international federation rules, from several years ago, USADA shall provide a list of all rules, regulations, and guidelines under which it is alleging substantive violations by Mr. Hellebuyck and/or giving rise to USADA’s claim(s), as well as any rules, regulations, and guidelines that could for the relevant time period provide any relevant defense to USADA’s claims, along with complete copies of the actual sets of rules from which the rules, regulations, and guidelines identified by USADA are being asserted for the relevant time periods;

6.6 On September 7, 2011, USADA submitted its list of claims and related rules. In its submission, USADA asserted two claims:



(1) That Respondent engaged in the use of the prohibited substance erythropoietin (“EPO”) from the summer of 2001 and has admitted the use of EPO beginning during this time frame and should have all competitive results disqualified from the first date on which it can be established that Respondent used EPO (whether by admission or other evidence).<sup>11</sup>

(2) That Respondent engaged in anti-doping rule violations or attempted violations during the anti-doping proceeding conducted by USADA in 2004 in connection with Respondent’s urine sample collected on January 31, 2004 (the “2004 Proceeding”), by lying in one or more pleadings submitted in the 2004 Proceedings and through falsely testifying under oath at the hearing in the 2004 Proceeding, thereby tampering or attempting to tamper with the disciplinary process and covering up or attempting to cover up or engage in other complicity in connection with Respondent’s prior rule violations and/or attempted violations, and Respondent should, therefore, have all competitive results disqualified from the first date on which it can be established that Respondent used EPO (whether by admission or other evidence).<sup>12</sup>

6.7 On September 23, 2011, Hellebuyck filed a “Motion to Compel Discovery.”

Hellebuyck requested: “legible copies of all documents upon which USADA relies upon and/or intends to introduce in support of its charges against Mr. Hellebuyck and requested sanction.” In addition, Hellebuyck requested that he be allowed to take the deposition of Travis Tygart.

6.8 On October 10, 2011, Hellebuyck filed his motion to dismiss the Primary and Secondary charges alleged in USADA’s September 7, 2011 submission. Hellebuyck argued that pursuant to the legal principle of *lex mitior*, Hellebuyck’s admissions are controlled by the 2000-2003 IAAF Rules. IAAF Rule 55.2 (iii) (2000-2003 versions) is a substantive rule and not a procedural or evidentiary rule. Under that rule admissions could not be used to impose a doping sanction if they were made more than six years after the alleged violations. Therefore the Primary Charge had to be dismissed.

6.9 With respect to the Secondary Charge, Hellebuyck made two arguments. First, Hellebuyck argued that USADA had failed to present the Secondary Charge to the Board of

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<sup>11</sup> For the purpose of this award we will identify this claim as the “Use” claim or “Primary Charge.”

<sup>12</sup> For the purpose of this award we will refer to this claim as the “Tampering” or “Secondary Charge.”

Review. As this failure was a violation of the USADA Protocol, USADA was precluded from alleging the Secondary Charge in this arbitration.

6.10 Second, Hellebuyck argued that the American Arbitration Association Supplementary Procedures for the Arbitration of Olympic Sports Doping Disputes (2009) R-5 required that USADA obtain the Panel's prior approval before adding a new charge after the Panel had been appointed. In this case, USADA had added this secondary charge for the first time in its September 7, 2011 submission without first obtaining the approval of the Panel. Because USADA had failed to request the Panel's prior approval this Secondary Charge should be dismissed.

6.11 On October 12, 2011, USADA submitted its response to Hellebuyck's motion to dismiss. USADA made five arguments in opposition to Hellebuyck's motion. First, Article 10.7.4 (ii) embodies the relating back doctrine which allows USADA to impose the full sanction against Hellebuyck because the sanction relates back to the 2004 hearing date in which those sanctions were initially imposed. The 2004 date is fully within any IAAF statute of limitations period.

6.12 Second, the statute of limitations in the WADA Code has been tolled by Hellebuyck's fraudulent concealment. Third, Hellebuyck's lies to the prior panel constitutes tampering with the doping control process.

6.13 Fourth, Respondent's competitive results for 2003 fall within the eight year period dating from USADA's January 11, 2011, written communication to Respondent in this matter. Fifth, Respondent's reliance on an alleged six (6) year statute of limitations is misguided as the IAAF's six year rule pertaining to certain admissions was repealed years ago and has no applicability in this proceeding.

6.14 On October 12, 2011, Hellebuyck amended his motion to compel because the parties had reached agreement on many of the issues presented in his initial motion to compel. The amended motion requested that Hellebuyck be allowed to tape record a telephone interview with Travis Tygart prior to the hearing.

6.15 On October 13, 2011, USADA filed its Motion for Subpoena to Compel Testimony. The subpoenas ordered the testimony of Shawn and Eddy Hellebuyck at the hearing.

6.16 On October 19, 2011, USADA filed a motion to compel for Hellebuyck to produce all tape recordings and other evidence related to Hellebuyck's interactions with Runner's World magazine. In addition, USADA also requested that Hellebuyck be compelled to produce affidavits of athletes who believed that Runner's World behaved unethically and dishonest in its writing of the article about Hellebuyck.

6.17 On October 21, 2011, Hellebuyck submitted its response to USADA's motion to compel. He objected to USADA's motion as it related to compelling him to testify. Hellebuyck did not object to the subpoena for Shawn Hellebuyck, his former spouse.

6.18 In addition, on October 21, 2011, USADA submitted its response to Hellebuyck's First Amended Motion to Compel. USADA opposed Hellebuyck's request to tape record his pre-hearing interview with Travis Tygart.

6.19 On October 24, 2011 a lengthy hearing was held on the parties' motion to compel. Most of the discovery issues and requests were resolved by agreement of the parties. After a hearing on the remaining issues, on October 25, 2011 the Panel made its ruling.

6.20 With respect to Hellebuyck's motion to compel the Panel ordered the following:

- a. Within 7 days after the issuance of this Order, counsel for USADA shall provide a transcript of the handwritten notes at issue, certified by Mr. Tygart under oath to be true and correct under penalties of perjury.

b. Within 7 days after receipt of the transcript of the notes in question, Mr. Hellebuyck's counsel shall have the right to propound no more than 30 interrogatories on Mr. Tygart pertaining to the substance of the transcript of the notes in question which shall require his response within 7 days. All other aspects of the interrogatories and responses thereto shall be treated in accordance with the Federal Rules of Civil Procedure unless the Panel determines otherwise.

c. All other relief requested in Mr. Hellebuyck's motion to compel the deposition of Mr. Tygart, whether addressed expressly herein or not, is hereby denied.

6.21 With respect to USADA's motion to compel the Panel ordered as follows:

The motion to compel the attendance, participation and testimony of Mr. Hellebuyck at the hearing in this matter is denied. While the panel encourages the participation of all parties in the hearing process, particularly the party against whom the allegations are made that form the basis of the hearing, the Panel is without power to compel the participation of a charged party at the hearing. Not only do the applicable arbitration rules not provide for requiring the attendance of a party at the hearing, but the applicable arbitration rules, incorporating provisions of the World Anti-Doping Code including Article 3.2.4, as well as prior Court of Arbitration for Sport cases involving athletes Montgomery and Gaines, provide that the athlete has a right to decide whether to testify or not and that the Panel may draw an adverse inference from the non participation of the charged party in the hearing. Mr. Hellebuyck's counsel indicated in his brief that he was well aware of the prospect of the Panel being requested to draw an adverse inference if Mr. Hellebuyck did not appear at the hearing in this case (the Panel reserves its judgment on such matters until the hearing). Accordingly, the Panel denies the motion to compel Mr. Hellebuyck's attendance at the hearing.

6.22 On October 27, 2011, a hearing was held on Hellebuyck's motion to dismiss.

This hearing took nearly three hours and involved complex issues of first impression. The briefing on this motion was voluminous. As far as the Panel is aware, there have been no AAA or CAS panels that have addressed fraudulent concealment or equitable tolling as a result of a prior perjury allegation with respect to the statute of limitations under the WADA Code or the admissions limitation period under IAAF Rules. Further, neither party seemed prepared to fully discuss the analysis and elements under a fraudulent concealment or equitable tolling argument.

6.23 After hearing the parties arguments, on October 28, 2011 the Panel ruled as follows:



1. With respect to the motion to dismiss concerning USADA's charges that Mr. Hellebuyck used EPO from August 1, 2001 to January 31, 2004, the Panel defers decision at this time [on] the motion. The Panel also wishes to specifically note for the parties that while the parties may and should include in their hearing briefs whatever issues the parties think are necessary to a fair and just determination of their respective cases by the Panel, given the apparent significance as a possible case of first impression the Panel seeks both sides to ensure in their respective hearing briefs that they provide additional briefing on the fraudulent concealment claim so as to educate the Panel at the very least on the significant legal and factual bases for such a charge and any defenses thereto, the legal effects of such a charge and any defenses thereto, and any impacts on the statute of limitations and its interplay with the doctrines of discovery and tolling relating to charges previously unknown that might be identified after what otherwise appears to be a limitations period. The Panel will take up this issue later in these proceedings after receiving the parties' briefing.

2. With respect to the alleged charge of tampering specifically raised after USADA sent its charging letter without leave of the Panel, the Panel decides to grant the motion, and that charge is hereby dismissed and cannot be raised in this proceeding. . . .

6.24 On November 23, 2011, USADA filed two motions: Emergency Motion to Compel the Production of Eddy Hellebuyck's training logs and motion for issuance of subpoena to Shawn Hellebuyck.

6.25 On November 29, 2011, Hellebuyck filed his response to USADA's two motions. Essentially, Hellebuyck stated he would comply with USADA's requests and he was looking for the training logs which appeared to be missing.

6.26 Regarding USADA's two pending motions, on December 1, 2011, The Panel ruled as follows:

1. With respect to USADA's Emergency Motion to Compel, the Panel is reminded of the age old idiom, adapted from the Oxford Dictionary of Proverbs, that "you cannot get blood from a stone". Mr. Hellebuyck has submitted argument[s], and [an] affidavit, that he and Shawn Hellebuyck are searching for the training logs requested by USADA after reading the transcript of the interview recording that was provided by Mr. Hellebuyck, but so far no such logs have been located. The Panel wishes to let the parties know that it is of the view that if such logs exist and can be located they must be produced at or before the hearing. Of course, if no such logs can be located, then there is nothing to compel to be

produced. Having said that, the Panel is of the view that Mr. Hellebuyck and Shawn Hellebuyck are ordered that they should use commercially reasonable efforts to locate and produce such training logs as requested by USADA. Mr. Hellebuyck, should he testify, and Shawn Hellebuyck should be prepared to be examined under oath by USADA and the Panel on their efforts to locate such logs and to produce them in advance of the hearing, and the Panel will consider any relevant objections and consequences related thereto.

2. With respect to USADA's Renewed Motion for Issuance of Subpoena to Shawn Hellebuyck, the Panel is of the view that in light of the brief submitted by Mr. Hellebuyck's counsel such motion is rendered moot. Mr. Hellebuyck's counsel has indicated that Shawn Hellebuyck will be produced at the hearing as requested to provide testimony as a witness under examination by USADA. The Panel wishes to express the view that in light of the brief of Mr. Hellebuyck's counsel, should Shawn Hellebuyck not appear at the hearing as called by USADA, the Panel would issue a subpoena compelling [her] appearance at the hearing.

6.27 The Panel issued a First Amended Scheduling order. The order merely moved the hearing date from starting on December 5 to starting on December 6 and continuing from day to day through December 8, if necessary, as had previously been agreed by the parties.

6.28 The hearing was commenced in Tucson, Arizona on December 6, 2011. Appearing on behalf of USADA was William Bock, III Esq. and appearing on behalf of Hellebuyck was Richard J. Shane, Esq. Testifying on behalf of USADA were Travis Tygart, CEO USADA and Matt Fedoruk, M.D., USADA's Science Director. Both had short examinations and cross examinations.

6.29 Testifying on behalf of Hellebuyck was Shawn Hellebuyck. USADA took two days to cross-examine Shawn Hellebuyck, taking nearly 8 hours of hearing time on one witness. Further, in disregard of the Panel's prior ruling regarding the compulsory testimony of Hellebuyck, USADA again took substantial time arguing that the Panel

should order Hellebuyck to testify, which the Panel declined to do in light of the provisions of World Anti-Doping Code section 3.2.4.

6.30 The parties engaged in multiple hours of opening and closing statements at the hearing.

## 7. MOTION TO DISMISS ANALYSIS AND DECISION

7.1 There is no dispute that Hellebuyck has admitted using EPO starting as early as October of 2001. Therefore, a threshold issue to decide is whether any sanctions can be imposed against Hellebuyck under IAAF or WADA rules. If no sanctions can be imposed under IAAF or WADA rules, the Panel can then evaluate USADA's equitable arguments, as we have done below.

***IAAF Rule 55.2 (iii) is a substantive rule and under the legal principle of lex mitior Hellebuyck's conduct from 2000-2003 is governed by that rule***

7.2 If IAAF Rule 55.2 (iii) (versions 2000-2003) is a substantive rule USADA is precluded from commencing an action against Hellebuyck over six years after the conduct in question occurred under the legal principle of *lex mitior*. If IAAF Rule 55.2 (iii) is a procedural or evidentiary rule, IAAF Rule 55.2 (iii) which expired on 2004 is no longer applicable in doping cases. In addition, the current WADA Code, Article 17, precludes USADA from commencing an action against Hellebuyck over eight years after the conduct in question occurred.

7.3 In evaluating whether IAAF Rule 55.2 (iii) was a substantive or procedural rule the Panel carefully examined the affidavit of Mark Edward Gay<sup>13</sup> that was submitted by USADA. In his affidavit, Mr. Gay stated the following:

The admitted use or taking advantage of a prohibited substance or prohibited technique **is established as a doping offense by IAAF Rule 55.2(3)**. IAAF Rule

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<sup>13</sup> Mark Edward Gay is a Solicitor Advocate and Partner in the law firm of DLA UK LLP. Since 1988 he has represented the IAAF as one of its external counsel. He was the author of IAAF Rule 55.2 (iii).



55.8 helps to define what is to be regarded as an admission. It states: "An admission may be made either orally in a verifiable manner or in writing. For the purpose of these Rules, a statement is not [to] be regarded as an admission where it was made more than 6 years after the facts to which it relates." Under IAAF Rule 60.2(a) the sanction for an admission is equal to the sanction that would have been imposed had the IAAF (or any other relevant body) detected the substance that the athlete admitted using in a sample. (emphasis added)

7.4 Given the plain language of Rule 55.2 (iii) and the affidavit of Gay, the Panel finds that Rule 55.2 (iii) was a substantive rule, not evidentiary or procedural rule. Therefore, under the legal principle of *lex mitior*, Hellebuyck's conduct from 2000-2003 is covered by IAAF Rule 55.2 (iii).

***The April 13, 2011 Letter Informing Hellebuyck that sanctions will be imposed and that he can request the AAA hearing process is the date USADA "commenced action" against Hellebuyck***

7.5 Next, to determine how far back the Panel can go to impose additional sanctions against Hellebuyck the Panel must determine when USADA commenced its action against him as provided in WADA Code Article 17. USADA argues for a date prior to the USADA's submission of the allegations to the Review Board, in this case January 11, 2011.

7.6 Hellebuyck argues that the action is deemed commenced when USADA notified him on April 13, 2011 of the results of the Review Board and the action USADA was going to take against him as a result. This letter, in part, stated the following:

At this time, reserving all rights to amend this charge, USADA is modifying the charges of your previous anti-doping rule violation to include disqualification of your competitive results from the first date on which there is any evidence of your participation in a rule violation pursuant to Article 10.7.4 of the Code. . .

7.7 The Panel rejects the start time as January 11, 2011, because at the time of the January 11, 2011 communications no action had been commenced beyond the writing of the letter. The Panel finds the April 13, 2011 date is the only reasonable "action is commenced" date under Article 17 of the WADA Code. This letter states: "if you are willing to accept this

sanction, please inform us in writing . . . . If you choose to contest the sanction . . . you have the right to request a hearing. . . .” The letter signifies that “at this time” an action has been commenced.

7.8 When viewing the six year limitations for admissions under IAAF Rule 55.2 (iii) it is clear that the charging letter is well past six years ending in December of 2003. The last date to bring the charges using the admissions would have been April 13, 2005.

7.9 Therefore, as the only evidence in this case is Hellebuyck’s admission (judicial or otherwise), IAAF Rule 55.2 (iii) precludes the Panel from using Hellebuyck’s admissions under IAAF Rule 55.2 (iii) or WADA Code Article 10.7.4. In this regard, but for the equitable considerations in this case, Hellebuyck’s motion to dismiss would be granted.

***The Panel lacks the jurisdiction to consider Hellebuyck’s argument that USADA failed to present the tampering charges to the Review Board***

7.10 With respect to the tampering charges, Hellebuyck makes two arguments. First that USADA did not present this charge to the Review Board. Therefore USADA is precluded from submitting this charge to this Panel. However, the USADA Protocol is clear, this Panel can make no ruling or decision based on what the Review Board did or did not do, nor may this Panel use material submitted to the Review Board. The panel in O’Bee stated the following:

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. . . <sup>14</sup>

7.11 USADA may or may not have followed its Protocol with respect to the Review Board. However, what is clear is that this Panel has no jurisdiction over or ability to consider issues concerning the Review Board.

***USADA was required to request the Panel’s permission before bringing the tampering charges***

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<sup>14</sup> *USADA v. O’Bee*, AAA No. 77 190 00515 09 JENF, ¶5.9 (Arbitrators Mitten (Chair), Campbell and Murphy).

7.12 Hellebuyck's second argument is that USADA initiated this charge after the Panel had been selected without seeking the permission of the Panel in violation of R-5 of the Supplementary Procedures. USADA argues that the Panel's Initial Order requested the claims the parties were asserting and thus opened the door for USADA to insert this new charge.

7.13 The USADA letter dated April 27, 2011 states the sanction is being imposed "based on your multiple admissions of synthetic erythropoietin." USADA has identified this letter as the "charging letter." This letter does not identify a rule violation under WADA Code Article 2.5, Tampering or Attempted Tampering with any part of Doping Control. This charge does not appear until USADA's September 7, 2011 submission to the Panel.

7.14 The WADA Code now imposes severe sanctions against athletes for doping violations. This includes sanctions as harsh as four years of ineligibility for a first offense. Given these severe sanctions, the Supplemental Procedures were drafted to insure that athletes understood the charges against them and could exercise their due process rights in defense of such a claim. The athletes in the United States should not have a hearing process that would allow them to be ambushed by new charges.

7.15 Under the Act, the creation of the Supplemental Procedures was required to and did include the input of the various stakeholders, including representatives of athletes and the National Governing Bodies, to ensure an appropriate process for resolving these disputes. The prior request/notice procedure was a necessary part of this process and this Panel would be remiss to ignore the result of that carefully considered process.

7.16 There will be times when USADA, because of mistake or newly discovered evidence, will seek or feel compelled to bring additional charges against an athlete after an AAA Panel has been selected. The Supplementary Procedures allow USADA to add new charges in

such circumstances provided it seeks prior approval from the Panel. Such a request would come in the form of a motion that would be fully briefed by both sides unless the addition is stipulated to. In most circumstances, the Panel would likely approve such a request provided the athlete is given the opportunity to request a continuance of the hearing and allowed additional time to adequately investigate the new charges and conduct a fair defense.

7.17 However, USADA should not fail to request the Panel's permission and then assume the Panel will ignore the rules regarding the process of bringing new charges. All parties before an AAA Tribunal must be treated equally. All parties should follow the rules. No party should be left with the impression that one party controls the hearing process. USADA's failure to follow the Supplementary Procedures cannot be tolerated by this Panel. Such action by the Panel could negate the appearance of impartiality.

7.18 The Panel had issued that portion of its Initial Order for the purpose of ensuring that the Respondent had adequate access to the rules of the IAAF that were being asserted by USADA to support the claims that it had previously asserted in its charging letter. The Panel's intention in issuing this request was made clear in the request itself, "In light of the acknowledged difficulty that could exist for locating applicable rules, including but not limited to international federation rules, from several years ago, USADA shall provide a list of all rules, regulations, and guidelines under which it is alleging substantive violations by Mr. Hellebuyck and/or giving rise to USADA's claim(s), as well as any rules, regulations, and guidelines that could for the relevant time period provide any relevant defense to USADA's claims, along with complete copies of the actual sets of rules from which the rules, regulations, and guidelines identified by USADA are being asserted for the relevant time periods." In sum, the Panel was not requesting an expansion of USADA's claims against Hellebuyck nor was it inviting an

amended set of charges. Rather, the Panel was trying to get USADA, the party in a better position to have access to long out of date rules and regulatory documents, to provide those things to the Respondent so that an adequate defense could be prepared. The Panel notes that the Supplemental Procedures do not provide for any form of detailed written notice by USADA of the charges it makes and perhaps the next time those procedures are reviewed for revision this issue should be examined. Having said this, the tampering claim was not in any way included in the USADA charging letter so there was no way the Respondent could have had notice of such claim until after USADA responded to the Panel's Initial Order.

7.19 As the *O'Bee* panel ruled when faced with a similar situation:

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 RuleR-5 to ensure that an athlete has timely, clear notice of the specific anti-doing charges against him in order to adequately defend himself against USADA's allegations . . . 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.<sup>15</sup>

As is often noted by CAS panels, "The fight against doping is arduous, and it may require strict rules. But the rule-makers and the rule appliers must begin by being strict with themselves." *See, e.g., CAS 2009/A/1752 Devyatofskiy & Tsikhan v/ IOC(citing USA Shooting v. Quigley, CAS 94/129 (1995))*. Accordingly, this Panel adopts the *O'Bee* panel's reasoning and adds an additional consideration that enforcing this requirement fosters an orderly and fair adjudicatory process and the proper incentive for rule appliers to follow the requirements of their rules.

7.20 As a result, the Panel dismisses, with prejudice, USADA's tampering charge. Further, this Panel respectfully requests that in the future USADA take the simple step of seeking the Panel's approval before adding a new charge. The Panel also recommends that in the future

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<sup>15</sup> *USADA v. O'Bee*, AAA No. 77 190 00515 09 JENF, ¶5.17 (Arbitrators Mitten (Chair), Campbell and Murphy).



the USADA charging letter clearly and specifically identify the wrongful conduct asserted and the particular rule(s) that the conduct allegedly violates.

## 8. UNCLEAN HANDS, EQUITABLE TOLLING AND PERJURY ANALYSIS

8.1 “He that hath committed Iniquity, shall not have equity.” R. Francis, *Maxims of Equity* 5 (1727).

8.2 Both the common law and the civil law are clear in their revulsion toward indulging a party that has engaged in an act that is contrary to law or public policy in the full benefits of relief that might otherwise be available.

8.3 In the common law, this principle has developed under the well known equitable doctrine of unclean hands. It is often stated that one who comes into equity must come with clean hands (or alternatively, equity will not permit a party to profit by his own wrongdoing, *ex turpi causa*). In other words, if you ask for help about the actions of someone else but have acted wrongly, then you may not receive the relief you seek.

8.4 However, the requirement of clean hands does not mean that a "bad person" cannot obtain the aid of equity." Equity does not demand that its suitors shall have led blameless lives." *Loughran v. Loughran*, 292 U.S. 215, 229 (1934) (Brandeis, J.). The defense of unclean hands only applies if there is a nexus between the applicant's wrongful act and the rights he wishes to enforce. This maxim bars relief for anyone guilty of improper conduct in the matter at hand. It operates to prevent any affirmative recovery for the person with "unclean hands," no matter how unfairly the person's adversary has treated him or her. It is not necessary that it actually have hurt the other party. See generally *Black's Law Dictionary* 1367 (5<sup>th</sup> ed. 1979); Bryan Garner, *A Dictionary of Modern Legal Usage* 116 (1987).

8.5 The purpose of this doctrine is to protect the integrity of the court and the legal system. It does not disapprove only of illegal acts but will deny relief for bad conduct that, as a matter of public policy, ought to be discouraged. A court will inquire on whether the bad conduct was intentional. This rule is not meant to punish mere carelessness or a mistake. It is possible that the wrongful conduct is not an act but a failure to act. For example, someone who hires an agent to represent him or her and then sits silently while the agent misleads another party in negotiations is as much responsible for the false statements as if he himself or she herself had made them.

8.5 It is well-established in the common law that courts are empowered to grant relief consistent with the equitable principle that "[n]o one shall be permitted to profit by his own fraud, or to take advantage of his own wrong, or to found any claim upon his own iniquity, or to acquire property by his own crime". *Riggs v Palmer*, 115 NY 506, 511, 22 NE 188 (1889); *see also Matter of Covert*, 97 NY2d 68, 74, 761 NE2d 571, 735 NYS2d 879 (2001); *In re Lonergan's Estate*, 63 NYS2d 307 (1946); *see also Barker v Kallash*, 63 NY2d 19, 25, 468 NE2d 39, 479 NYS2d 201 (1984); *Carr v Hoy*, 2 NY2d 185, 187, 139 NE2d 531, 158 NYS2d 572 (1957). Pursuant to this doctrine, which has been applied in both civil and criminal cases, the wrongdoer is deemed to have forfeited the benefit that would flow from his or her wrongdoing. *See Giles v California*, 128 S Ct 2678, 2683 (2008) (discussing common-law doctrine of "forfeiture by wrongdoing," under which a criminal defendant forfeits the right to confront witnesses by engaging in conduct designed to prevent a witness from testifying); *Diaz v United States*, 223 US 442, 458, 32 S Ct 250 (1912), *quoting Falk v United States*, 15 App DC 446, 460 (1899) ("The question is one of broad public policy. . . . Neither in criminal nor in civil cases will the law allow a person to take advantage of his own wrong' "); *Matter of Coty, Inc. v Anchor*

*Constr. Inc.*, 2003 NY Slip Op 50013[U], \*27 (Sup Ct, NY County 2003), *aff'd* 7 AD3d 438, 776 NYS2d 795 (2004) (stating "for example, if one party destroys evidence, wrongfully resists disclosure, intentionally absents itself, or prevents a witness from testifying, it cannot profit from its own misconduct").

8.6 It is "an old, old principle" that a court, "even in the absence of express statutory warrant," must not "allow itself to be made the instrument of wrong, no less on account of its detestation of everything conducive to wrong than on account of that regard which it should entertain for its own character and dignity". (*Matter of Hogan v Supreme Ct. of State of N.Y.*, 295 NY 92, 96, 65 NE2d 181 (1946), *quoting Baldwin v City of New York*, 42 Barb 549, 550 (1864), *aff'd* 45 Barb 359, 30 How Pr 289 (1865).

8.7 The civil law equivalent of the unclean hands doctrine of the common law is embodied in a number of civil code sections throughout Europe. Indeed, the equitable principle of unclean hands is so extensively accepted that it has been said to be a general principle of international law. Justice Margaret White, *Equity – A General Principle of Law Recognized by Civilized Nations?*, 4 *QUT Law and Justice Journal* 103, 110 (2004) (stating "it seems to be taken for granted that various equitable rules, such as estoppel and the principle that 's/he who comes to equity must come with clean hands' are part of international law and require no further explanation than their relevance to the case at hand. This is consistent with an approach to equity that seeks to draw upon aspects of equitable doctrine common to 'civilised nations' without resorting to technicalities specific to particular legal systems").

8.8 The Panel finds here that Hellebuyck came to this Panel with unclean hands. He committed perjury in his 2004 hearings before the AAA when he testified that he had not used EPO. He did not have to testify at those hearings. Now, having admitted he committed multiple

doping offenses during the relevant time period that he lied about in the 2004 hearing, he cannot assert that some procedural or substantive rule designed for the purpose of ensuring the adequate presentation of timely and reliable evidence should work to his benefit to avoid a determination that he committed the doping offense.

8.9 The doctrine of equitable tolling of a statute of limitations is similarly well-grounded in the common law and the civil law. Equitable tolling is a principle of law providing that a statute of limitations shall not bar a claim in cases where the party against whom the statute of limitations period is being asserted, despite the employment of due diligence, could not or did not discover the injury or wrong until after the expiration of the limitations period. The statute of limitations in the common law sets the maximum time after an event that legal proceedings based on that event may be initiated. In civil law systems, similar provisions are typically part of the civil code or criminal code and are often known as periods of prescription.

8.10 Once the time allowed for a case by a statute of limitations runs out, if a party raises it as a defense and that defense is accepted, any further litigation is foreclosed. However, most jurisdictions provide that limitations are tolled, or delayed, under certain circumstances. Tolling will prevent the time for filing suit from running while the condition exists. In those instances, in most jurisdictions, the running of limitations is tolled until the circumstance no longer exists.

8.11 There may be a number of factors that will affect the tolling of a statute of limitations. In many cases, the discovery of the harm (as in a medical malpractice claim where the fact or the impact of the doctor's mistake is not immediately apparent) starts the statute running. In some jurisdictions the action is said to have not accrued until the harm is discovered;

in others, the action accrues when the malpractice occurs, but an action to redress the harm is tolled until the injured party discovers the harm.

8.12 It may also be inequitable to allow a defendant to use the defense of the running of the limitations period, such as the case of an individual in the position of authority over someone else who intimidates the victim into never reporting the wrongdoing, or where one is led to believe that the other party has agreed to suspend the limitations period during good faith settlement negotiations or due to a fraudulent misrepresentation.

8.13 Procedural questions regarding the “interruption, suspension, expiry or extension” of the statute of limitations are to be decided through application of “principles of private law of the country where the interested sports authority is domiciled.”<sup>16</sup> The equitable principle of fraudulent concealment has been recognized by the United States Supreme Court and any of the states that could have jurisdiction over this dispute in the United States (Indiana, Colorado, Arizona, California and New Mexico)<sup>17</sup> In finding that fraudulent concealment tolled the statute of limitations in a Bankruptcy case, the US Supreme Court stated the following:

They [Statute of Limitations] were enacted to prevent frauds; to prevent parties from asserting rights after the lapse of time had destroyed or impaired the evidence which would show that such rights never existed, or had been satisfied, transferred, or extinguished, if they ever did exist. To hold that by concealing a fraud, or by committing a fraud in a manner that it concealed itself until such time as the party committing the fraud could plead the statute of limitations to protect it, is to make the law which was designed to prevent fraud the means by which it is made successful and secure. And we see no reason why this principle should not be applicable to suits tried on the common-law side of the Court’s calendar as to those on the equity side.<sup>18</sup>

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<sup>16</sup> *Comitato Olimpico Nazionale Italiano (CONI)*, CAS 2005/C/841, ¶78.

<sup>17</sup> *Fager v. Hundt*, 610 N.E. 2d 246, 251 (Ind. 1993); *First Interstate Bank of Fort Collins, N.A. v. Piper Aircraft Corp.*, 744 P. 2d 1197, 1200 (Colo. 1987);

<sup>18</sup> *Bailey v. Glover*, 88 U.S. 342, 349 (1875)

8.14 False testimony has been found to be concealment.<sup>19</sup> When individuals are not compelled to testify, but do so, they have a legal duty to testify truthfully.<sup>20</sup> In the jurisdiction of USATF, the courts have stated the doctrine of fraudulent concealment should be available to stop a defendant from asserting the statute of limitations when he has, either by deception or by a violation of duty, concealed from the plaintiff material facts thereby preventing plaintiff from discovering a potential cause of action.<sup>21</sup>

8.15 The elements required for equitable tolling of a statute of limitations under fraudulent concealment are as follows: (1) concealment of the wrongful conduct by defendant, (2) plaintiff's lack of knowledge of the wrongful conduct, (3) plaintiff brought suit within the length of the limitations period after discovery of the wrongful conduct, (4) plaintiff's lack of knowledge of the wrongful conduct was not attributable to a lack of diligence, and (5) reliance on the fraudulent concealment.<sup>22</sup> All elements have been met in this case.

8.16 Here, the Panel determines, as an alternate basis for its decision, that permitting Hellebuyck to assert a statute of limitations period, whether substantive or procedural in nature would also allow Hellebuyck to benefit from his own misconduct. In essence, if the Panel were to permit Hellebuyck's position, the Panel would be asserting a rule that would have the effect of encouraging wrongdoers to testify falsely, and intentionally so, to AAA and CAS arbitration tribunals and then sit silent until after the expiration of the limitations period, coming clean with impunity. The Panel is of the view that the anti-doping rules were not designed or intended to create such a possibility and that allowing this would run counter to the fight for doping free

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<sup>19</sup> *N.L.R.B. v. O'Neill*, 965 F.2d 1522, 1527-28(9<sup>th</sup> Cir. 1992); *State of N.Y. v. Hendrickson Bros., Inc.*, 840 F.2d 1065,1083 (2<sup>nd</sup> Cir. 1988)

<sup>20</sup> *First Interstate Bank of Fort Collins, N. A. Piper Aircraft Corp.*, 744 P. 2d 1197, 1200; *Stephens v. Irvin*, 730 N.E.2d 1271, 1280 (Ind. Ct. App. 2000); *Fager v. Hundt*, 610 N.E. 2d at 251 (Ind. 1993)

<sup>21</sup> *Fager v. Hundt*, 610 N.E. 2d at 251.

<sup>22</sup> *State of N.Y. v. Hendrickson Bros., Inc.*, 840 F.2d 1083 (2<sup>nd</sup> Cir. 1988).

sport that the anti-doping rules are built to protect. In support of this position, Travis Tygart testified as follows:

But what I know is, when he lied, he covered up, he took responsibility. He cheated clean athletes. And the fundamental principle that clean athletes rely on is that his results should be disqualified. Where that fits in legally within this case, I don't know because I'm not handling this case and I'm not an expert on that. But what I do know is those results deserve to be disqualified because that's what clean athletes expect. That's what they deserve for competing on a clean playing field despite the fact that he cheated them and then lied about his cheating.<sup>23</sup>

8.17 Accordingly, the Panel is of the view that, as an alternative basis to its finding of unclean hands by Hellebuyck, any limitations period in this case was tolled until actual discovery of the wrongdoing, in other words until Hellebuyck notified USADA in October of 2010, and USADA brought its claims herein well within any limitations period after that publication.

8.18 In anti-doping cases, it is well accepted that fundamental legal principles apply, including principles of general application that are not expressly embodied in statutory or rule-based law. For example, Court of Arbitration for Sport (“CAS”) cases have so often supplemented the principles of the World Anti-Doping Code with analysis of the application of the doctrine of proportionality that it is now analyzed by the CAS panels without reference to its source. There are also general principles of fundamental fairness that have entered the jurisprudence in this field, such as interpreting rules *contra proferentum* and otherwise considering how to fill a *lacuna* in the law. Further underscoring this point, Hellebuyck himself, in his prior proceeding before CAS, and again in this proceeding, attempted unsuccessfully to assert the extra-rule doctrine of *lex mitior* to lessen his penalty (the CAS panel undertook the *lex mitior* analysis but determined it did not apply as was being asserted by Hellebuyck).

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<sup>23</sup> *In Re Matter of USADA and Hellebuyck*, AAA No. 77 190 00168 11 JENF, Arbitration Confidential Hearing Transcript (12/6-12/7, 2011) pp. 236:17-237:2.

8.19 The equitable doctrines pursuant to which we base our decision on these principles do not displace legislative authorities, the World Anti-Doping Code or the IAAF rules, but instead complement them. Rather, for the following reasons, it is clear to us that the relevant law-giving bodies did not contemplate the circumstances presented by this case when drafting the various rules.

8.20 Clearly, allowing a party who has perjured himself before the AAA and CAS anti-doping tribunals to assert a statute of limitations period in his own defense as a way to avoid punishment would be unjust and would make a mockery of these arbitration tribunals and their legal process.

8.21 Accordingly, the Panel finds that Rule 55(2)(iii) of the IAAF Rules was violated by Hellebuyck and the prior sanction for his first anti-doping offense should be modified to invalidate his competitive results from October 1, 2001 through January 30, 2004. The October 21, 2001 start date derives from both parties agreeing that this was the earliest date of additional admitted use by Hellebuyck.

## **9. DECISION AND AWARD**

On the basis of the foregoing facts and legal aspects, this Panel renders the following decision:

9.1 Respondent has committed a doping violation under Article 2.1 of the 2009 version of the WADA Code.

9.2. The following sanction shall be imposed on Respondent: Respondent's sanction for his first anti-doping offense shall be extended and modified to invalidate his competitive results from October 1, 2001 through January 30, 2004.



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

9.4 The Administrative fees and expenses of the American Arbitration Association, and the compensation and expenses of the arbitrators and the Panel, shall be borne entirely by USADA and the United States Olympic Committee.

9.5 This Award is in full settlement of all claims and counterclaims submitted to this Arbitration. All claims not expressly granted herein are hereby denied.

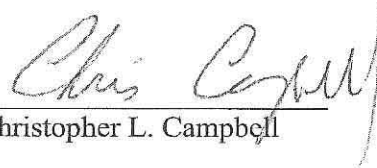
9.6 This Award may be executed in any number of counterparts, each of which shall be deemed an original, and all of which shall constitute together one and the same instrument.

Dated: January 30, 2012



Jeffrey G. Benz, Chair

Hon. Jim Murphy



Christopher L. Campbell