

Memo

To: WADA FOUNDATION BOARD MEMBERS

From: DAVID HOWMAN

Date: 9 JULY 2008

Re: LANDIS DECISION

In view of the significance of the Landis case, the way in which the case was conducted by his lawyers and experts, and the considerable amount of misinformation given to the public by that team in the many months leading up to both hearings, I thought it would be useful to draw your attention to certain of the comments made by the unanimous CAS Panel in its decision.

Before setting out a number of these specific comments, I should also advise you that every one of the scientific challenges that Mr. Landis made against the Paris laboratory, the methods used in relation to the analysis and indeed any other component of the anti-doping program were determined by the Panel to be unfounded. Essentially this means the Panel found no evidence to support any of the arguments that were raised by Landis through his legal and scientific teams. In reaching its decision in matters of science, the Panel made the following comment in respect of the experts:

“On the accreditation issue, and indeed on all other matters covered in her evidence, the tribunal accepts the expert opinion of Dr. Christiane Ayotte head of the WADA accredited laboratory in Montreal, in preference to Dr. Goldberg and the other experts for the Appellant. Dr. Ayotte has vast experience in this field and impressed the panel as an objective and fair minded expert. As to the challenge to her independence the Panel accepts as truthful and credible her response which was as follows:

“With regards to my “independence” as a director of WADA-accredited laboratory: while I agree that I have never testified directly in support of an athlete challenging test results, trying to imply that I would remain silent and voluntarily support wrong results is simply absurd and contradicts my actions. I will get involved during the result management process and this is what I have been doing for the IAAF for example, for several years. I have always provided objective opinions on laboratory findings and there are instances where I have not recommended further actions going “against” a laboratory. I am not afraid of challenging publicly WADA’s positions when I disagree and was never threatened by WADA to lose testing or accreditation. Had I not strongly believed that the Athlete’s sample in this case should be reported as an

adverse analytical finding, I would never have agreed to testify. Further, in providing testimony in this case or any other case, I only express my honest opinions on topics about which I am asked to testify regardless of whether they are favourable or unfavourable to another laboratory”.

Equally as important, the Panel commented in its analysis of the whole case as follows:

“256. In his closing brief the Appellant asserted that:

“Mr Landis' search for the truth in this case has been obstructed - often with devastating results - by the presence of bias, inconsistent and false statements and fraudulent documents ... The decision to include these arguments was not made lightly and only after deliberation and careful analysis of the record. Much of this evidence went completely unanswered at the CAS hearing. The search for truth should end with the vindication of Mr Landis, not the affirmation of a litany of bad lab practices and poor oversight.”

257. The Panel has found no evidence at all to sustain any of these serious allegations. Moreover, the Panel is surprised that such serious allegations should be pursued in the closing brief when it must have been clear at the end of the hearing that there was no evidential basis from expert testimony or otherwise to support them.

258. At the end of the hearing the Panel requested specificity from the Appellant in his closing brief as follows:

“MR PAULSSON: But I think this is the time in the post hearing briefs not so much for prose, but for references because it would be of assistance to the arbitrators in considering the rhetoric of persuasion which we've heard today. That was the time for that and now it would be good to have comprehensive references.

For example, if Mr Suh is on the subject, if he continues to pursue the themes of bias in the lab and cover-up in the light of the evidence of these hearings, it would be handy not to have a lot of adjectives about it, but just notations of what are - what is the evidence of those propositions, in objective form. This is the basis on which those points are still being pursued. And again, the reason I even put a question mark is that today in closing submissions what I heard was rather the language of indicia of falsity rather than a clear statement to the effect that there had been bias and cover-up which of course are strong accusations.”

Notwithstanding this request, the closing brief for the Appellant was largely devoid of any specific evidence to support the bias, fraud/forgery cover-up allegations."

259. There is a clear distinction between administrative deficiencies, bad laboratory practice, procedural error, or other honest inadequacy on the one hand and dishonesty or bad faith on the other. Some of the Appellant's expert witnesses appeared insufficiently aware of this distinction".

The Panel also commented:

"261. The Panel also finds much force in the Respondent's contention that the "Appellant's experts crossed the line, acting for the most part as advocates for Appellant's cause and not as scientists objectively assisting the Panel in the search for the truth.

262. The Appellant also refrained for the most part from putting the fraud/cover-up allegations to the witnesses concerned. This is a fundamental aspect of fairness toward witnesses and one of the duties of counsel. ...

263. The lies, fraud/forgery cover-up theme was part of the Appellant's avowed plan, announced before the AAA proceedings commenced, that "our defence was essentially to take down the French lab in an embarrassing way." One could perhaps understand such a strategy when the Appellant's livelihood and reputation was at stake. However, when it emerged at the end of this hearing that the evidence would not support the strategy it should not have been pursued further.

264. In summary, the Appellant failed to provide any credible evidence of a deliberate attempt to deceive or defraud the Panel or cover-up alleged data tampering. The alleged inconsistencies in LNDD documents and testimony revealed, if anything, in some instances less than ideal laboratory practices, but not lies, fraud, forgery or cover-ups."

The Panel then turned to the issue of costs and commented:

"289. Taking into account the discretionary factors listed in this Rule the Panel awards costs of USD100,000 to the Respondent because:

- *There was no evidence that the Respondent engaged in "litigation misconduct" as argued by the Appellant. On the contrary, as stated in Section VIII C of this Award, if there was any litigation misconduct it may be ascribed to the Appellant;*
- *Although the Appellant had the right to pursue a comprehensive de novo appeal in such an important matter, all of its multiple defenses have been*

rejected as unfounded. All that the Appellant has established after a wide-ranging attack on LNDD is that there were some minor procedural imperfections. This was not surprising in view of the unprecedented scope and intensity of the technical challenges made against LNDD by the Appellant and his witnesses;

- *The Appellant chose not to eliminate any of his challenges after their rejection by the AAA Tribunal and it compelled the Respondent to contest the same very wide range of issues on this appeal as had already been addressed below, as well as some additional contentions. The Appellant should have presented a much more focused challenge before this Panel especially since a number of his challenges were barely arguable;*
- *The Appellant gave notice requiring a number of witnesses to be present in person for cross-examination in New York but then elected not to call them thus causing the Respondent to incur significant and ultimately unnecessary cost.*
- *In addition, the Appellant chose to pursue in its post-hearing brief serious allegations of misconduct against LNDD which had not only been rejected by the AAA Tribunal but in respect of which no sufficient evidence had been adduced before this Panel;*
- *In the foregoing circumstances the Respondent is entitled to some compensation for part of its attorneys fees and therefore costs in the sum of USD 100,000 are awarded to the Respondent."*

In view of these clear unequivocal statements by a unanimous Panel, you may find it surprising that Mr. Suh has nevertheless stated publicly:

"The evidence strongly supports Floyd's innocence. We maintain that the French laboratory's work violated proper procedures and that these violations were not simply technical in nature. They resulted in the inaccurate findings at the heart of this case."

Perhaps that sums up the whole case. Some lawyers run cases based on arguments which sound good and appeal to the media and the public, but which have no basis whatsoever in fact. Fiction becomes their "reality" until it is exposed by independent arbitrators as wrong and misleading.