UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF FLORIDA
PENSACOLA DIVISION

JUSTIN GATLIN,

Plaintiff,

v. Case No. 3:08cv241/LAC/EMT

UNITED STATES ANTI-DOPING AGENCY, INC.; USA TRACK AND FIELD, INC.; UNITED STATES OLYMPIC COMMITTEE; and INTERNATIONAL ASSOCIATION OF ATHLETICS FEDERATIONS,

Defendants.

DEFENDANT UNITED STATES OLYMPIC COMMITTEE'S MOTION FOR FINAL SUMMARY JUDGMENT

Defendant United States Olympic Committee (U.S. Olympic Committee), pursuant to Rule 56 of the Federal Rules of Civil Procedure, hereby moves this Court for the entry of a final summary judgment in its favor against Plaintiff, Justin Gatlin (Mr. Gatlin), on grounds that there is no genuine issue as to any material fact and U.S. Olympic Committee is entitled to a judgment as a matter of law.[1] In support thereof, U.S. Olympic Committee submits the following Memorandum of Law and its contemporaneously filed Northern District of Florida Local Rule 56.1 Statement of Undisputed Material Facts (SoF), which is incorporated herein by reference.

[1] U.S. Olympic Committee submits this dispositive Motion due to the absence of jurisdiction, without waiving its rights, assuming for the purposes of argument that the motion were not granted, as to other factual and legal defenses in its Answer and Affirmative Defenses.

I. INTRODUCTION.

Mr. Gatlin alleges, under the guise of an academic disability, he can destroy not only the integrity of the International Olympic games, the international legal prohibition against doping, and the rule of law precluding local laws of nations from interfering with international arbitration (required by international conventions and law) but, also, the arbitration requirements contained in the very disability laws under which Mr. Gatlin seeks to proceed. Mr. Gatlin, as the transcript of his initial oral argument before this Court and his First Amended Complaint state, asserts that he could proceed here notwithstanding arbitration requirements because he is bringing a "disability discrimination" claim; but, the very cases he cited in favor of his motion for a TRO included court decisions rejecting jurisdiction over ADA and RA claims where arbitration, as here, was mandated.

On June 24, 2008, this Court vacated its previously entered temporary restraining order, ruling that it lacks jurisdiction to consider Plaintiff's claims and accordingly denied his request for a preliminary injunction to require the U.S. Olympic Committee and other defendants to allow Mr. Gatlin, who had been disqualified from Olympic participation based on two violations of established anti-doping regulations, to participate in the United States Olympic Trials.[2] Just as it had no jurisdiction to consider Mr. Gatlin's claims for injunctive relief, this Court has no jurisdiction to consider Mr. Gatlin's remaining claims for damages. Mr. Gatlin sought and was given leave to amend his complaint, but, through that amendment and despite the attempt to bolster the damage claims, he still is trying to have this Court ignore and violate the very laws which he seeks to proceed under and which preclude jurisdiction here.

Mr. Gatlin was disqualified from the trials because of his second violation of the anti-doping prohibitions adopted by the International Olympic Committee (IOC), which the U.S. Olympic Committee is obligated to enforce through the arbitration process mandated by the United States Congress and Olympic movement rules. He sued the U.S. Olympic Committee,

[2] The trials went forward after the United States Court of Appeals for the Eleventh Circuit denied Mr. Gatlin's stay motion and, indeed, the 2008 Olympics have now been completed.

the United States Anti-Doping Agency (USADA), USA Track and Field, Inc. (USATF) and the International Association of Athletics Federations (IAAF), seeking injunctive relief that would require the defendants to allow him to participate in the trials, as well as damages. Mr. Gatlin, like all athletes who participate in Olympic events, is contractually and legally bound to seek review of anti-doping suspensions through an arbitration process mandated by the United States Congress in the Amateur Sports Act, the IOC, and every other organization with jurisdiction over Olympic sports.

But Mr. Gatlin – after losing his challenge both in the initial round of arbitration and on his appeal to the Court of Arbitration for Sport (CAS), which has exclusive jurisdiction to review Olympic arbitration decisions – has declined to seek review of the CAS decision in the only judicial tribunal with jurisdiction to hear an appeal from that arbitral body, the Swiss Federal Supreme Court. Instead, in contravention of the Olympic Charter, established Olympic anti-doping protocols, and fundamental limitations on judicial review of arbitral decisions, Mr. Gatlin sought injunctive relief and damages before this Court, which ultimately denied injunctive relief based on its ruling that the Court has no jurisdiction to review the arbitration rulings that disqualified Mr. Gatlin from participating in Olympic events.

Like the rulings of arbitral panels in the United States and, indeed, around the globe, the CAS's decisions are final, except for review in the Swiss Federal Supreme Court which, under governing Swiss law, is the only body that may provide any review of the CAS's arbitral decisions. The United States courts simply have no authority to supplant this carefully designed arbitration structure.

The very Congressional act that constitutes the U.S. Olympic Committee as the National Olympic Committee for the United States, overseeing the United States' participation in the Olympics, prohibits such judicial intrusion, as does the convention that governs extraterritorial enforcement of international arbitration awards. And, as Judge Posner rightly has observed, "[t]here can be few less suitable bodies than the federal courts for determining the eligibility, or the procedures for determining the eligibility, of athletes to participate in the Olympic Games."

Michels v. U.S. Olympic Comm., 741 F.2d 155, 159 (7th Cir. 1984) (Posner, J. concurring). The U.S. Olympic Committee is complying with orders of the AAA and the arbitral body that has been tasked by the Olympic movement and the IOC with hearing appeals from AAA decision – to which bodies Mr. Gatlin voluntarily submitted the very claims that he now asserts should be heard anew in federal court.

This Court's jurisdictional ruling is entirely correct and compels the Court to grant summary judgment in favor of U.S. Olympic Committee for Mr. Gatlin's claims. This Court has no power to address Mr. Gatlin's improperly brought claims.

II. FACTUAL BACKGROUND.

A. Mr. Gatlin's Claims.

On June 9, 2008, Mr. Gatlin filed his original complaint, seeking injunctive relief and damages under the Americans with Disabilities Act (ADA) and Rehabilitation Act (RA). SoF:¶47. This Court granted a temporary restraining order (TRO) against the defendants on June 20, 2008. SoF:¶49.

On June 24, 2008, the Court vacated the TRO and denied Mr. Gatlin's request for a preliminary injunction for lack of jurisdiction to address his claims. SoF:¶53. The Court ruled that, "[u]nder the Ted Stevens Olympic and Amateur Sports Act (Amateur Sports Act), Congress provided the [U.S. Olympic Committee] with exclusive jurisdiction over all matters concerning this country's participation in the Olympic Games." SoF:¶54. Thus, the claims that Mr. Gatlin unsuccessfully submitted to the CAS "are barred from relitigation in this forum." SoF:¶55. His "remaining avenue for relief lies with the Swiss Supreme Court, which may in its discretion elect to review the case." SoF:¶56.[3]

After the U.S. Olympic Committee moved to dismiss the complaint, Mr. Gatlin sought and was granted leave to file an amended complaint. SoF:¶61. His First Amended Complaint

[3] Mr. Gatlin appealed the June 24, 2008 order to the Eleventh Circuit. SoF:¶58. The Eleventh Circuit denied his motion for stay. SoF:¶58. The Olympic trials went forward on June 27, 2008, with Mr. Gatlin barred from participation. SoF:¶59. Mr. Gatlin thereafter dismissed his appeal as moot. SoF:¶58.

asserts four claims under the ADA and one claim under the RA. SoF:¶61. *See* 42 U.S.C. § 12182(b); 29 U.S.C. § 794. Essentially, Mr. Gatlin alleges that disabled individuals – including Mr. Gatlin - are not able fully to enjoy defendants' services, facilities, privileges, advantages or accommodations and that defendants have failed to make reasonable modifications in their policies, practices and procedures to accommodate disabled persons. *Id*. He seeks both equitable relief and damages. *Id.*[4]

Specifically, Mr. Gatlin alleges that he suffers from Attention Deficit Disorder (ADD), for which he takes Adderall®, a prescription medication. SoF:¶1. He alleges that he has been denied a reasonable accommodation for his disability. *Id.* These are allegations that were specifically and fully litigated in the arbitrations referenced above. SoF:¶46.

B. The Defendants.

The U.S. Olympic Committee is the National Olympic Committee (NOC) for the United States, as recognized by the IOC. SoF:¶64. The IOC, which is not a party in this case, "is an international, non-governmental, non-profit organization organized under the laws of Switzerland." SoF:¶63.[5] The IOC recognizes NOCs, such as the U.S. Olympic Committee, as well as International Sports Federations (IFs), which administer specific sports. SoF:¶4. Defendant IAAF is globally recognized as, including by the IOC and the U.S. Olympic Committee, the IF for track and field. SoF:¶64.

The Amateur Sports Act, as first enacted in 1978, was intended by the Congress to recognize "an already long-existing relationship" between the U.S. Olympic Committee and IOC, as the entity overseeing the Olympic movement in the United States, which relationship

[4] Like the original complaint, the amended complaint seeks both equitable relief and damages. SoF:¶46, 61. But the essence of Mr. Gatlin's amended complaint is unchanged: he alleges, contrary to this Court's ruling on the preliminary injunction, that he unlawfully was denied eligibility for the 2008 Olympic trials. SoF:¶61.

[5] "Perhaps the IOC's most important function is the role it plays in setting international sports law," because nations generally adhere voluntarily to "the rules, decisions and practices of the IOC and the Olympic Charter, often incorporating them into their respective national sports laws policies." Note, *The Olympic Binding Arbitration Clause and the Court of Arbitration for Sport: An Analysis of Due Process Concerns,* 18 Fordham Intell. Prop. Media & Ent. L. J. 997, 1002 (2008) (footnote omitted) (hereinafter, *Binding Arbitration*).

extends back to 1896, and to "statutorily legitimize[] that relationship with a federal charter and federal incorporation." *DeFrantz v. U.S. Olympic Comm.,* 492 F. Supp. 1181, 1187 (D.D.C. 1980). Through the Act, Congress has granted the U.S. Olympic Committee "exclusive jurisdiction … over … [a]ll matters pertaining to United States participation in the Olympic Games." 36 U.S.C. § 220503(1).

The U.S. Olympic Committee and recognized IFs, such as the IAAF, in turn recognize National Governing Bodies (NGBs), "to administer and govern a particular sport within the United States." SoF:¶65. Defendant USATF is the NGB recognized by U.S. Olympic Committee and IAAF for track and field sports in the United States. SoF:¶65.

The U.S. Olympic Committee and other NOCs "work in conjunction with the IOC to promote the worldwide Olympic movement and each are responsible for organizing their country's participation in the Olympic Games." SoF:¶66. As a recognized NOC, the U.S. Olympic Committee must abide by IOC rules. SoF:¶66; *see also* Olympic Charter, art. 24(A).

The IOC "requires all NOCs to abide by a strict set of anti-doping standards" established by the World Anti-Doping Agency (WADA). SoF:¶67. Defendant USADA "is the national anti-doping organization for the Olympic movement in the United States." SoF:¶67. USADA operates an Olympic drug-testing program in the United States under an agreement with the U.S. Olympic Committee. *Id.*

C. Mr. Gatlin's Suspensions From Sanctioned Track and Field Events.

1. The 2001 Suspension.

Mr. Gatlin alleges that he used Adderall® for alleged academic purposes only while he was a student at the University of Tennessee (UT) and that he was monitored by track team physicians. SoF:¶3. Adderall® contains amphetamine. SoF:¶10.

He participated in the USATF's Junior Nationals event on June 16, 2001 (Junior Nationals), and signed an application in which he agreed "to abide by the applicable USATF Bylaws, Operating Regulations, and Competition Rules," which rules include that disciplinary

proceedings "related to domestic positive drug tests of USATF athletes shall be conducted by USADA" and submitted to arbitration. SoF:¶¶4-5. He admits having received and signed a notice concerning the use of prohibited substances, which included a statement that "an individual taking prescription medicine should contact USADA." SoF:¶6. That notice also expressly stated that prescription medication "may contain prohibited substances," that a prescription "*does not* allow you to take a prohibited medication or substance," and that the list of common medicines that contain prohibited substances included with the notice "is *NOT* all-inclusive." SoF:¶7 (original emphasis). The IAAF's list of prohibited substances included medications containing amphetamine. SoF:¶10.

At the time of the 2001 Junior Nationals, USADA had in place a therapeutic use exemption process (TUE Process), through which athletes, such as Mr. Gatlin, could seek exemptions for the use of a medically necessary substance, including those such as amphetamine which Mr. Gatlin took, on the Prohibited List. SoF:¶9. Mr. Gatlin did not seek such an exemption, nor did he request any accommodation under the ADA, before participating in the Junior Nationals. SoF:¶11. He tested positive for amphetamines during USADA's routine testing at the Junior Nationals. SoF:¶12 (the 2001 Violation).

Under USADA's Protocol for Olympic Movement Testing (USADA Protocol), the test results were reviewed by the Anti-Doping Review Board. SoF:¶15. Mr. Gatlin agreed to "faithfully accept and abide by terms of what ever penalty" USADA and U.S. Olympic Committee recommended for his violation. SoF:¶16. After the Anti-Doping Review Board found sufficient evidence for a hearing, Mr. Gatlin elected, under the USADA Protocol, to contest the violation. SoF:¶¶17-18. USADA accordingly notified the American Arbitration Association (AAA), before which such proceedings are heard. SoF:¶18.[6]

[6] Under the IAAF's rules, by which the AAA is bound in conducting doping arbitrations, a "doping violation" occurs when a prohibited substance is found in an athlete's "body tissues or fluids," in the absence of a prior medical exemption." SoF:¶¶20-21.

USADA and Mr. Gatlin ultimately stipulated in the AAA proceedings that: (i) Mr. Gatlin had ADD for 10 years; (ii) amphetamine, a prohibited substance, had been detected in his urine sample; (iii) the amphetamine derived from Mr. Gatlin's use of Adderall®; and (iv) the positive test constitutes a doping violation. SoF:¶19. Under the rules in effect in 2001, the AAA panel was required to impose a two-year sanction, regardless of mitigation. SoF:¶22. That sanction was imposed on May 1, 2002, and Mr. Gatlin elected not to seek review before the Court of Arbitration for Sport, the only body with authority to review the AAA ruling. SoF:¶25, 29.

Instead, Mr. Gatlin petitioned the IAAF for early reinstatement, citing his use of Adderall®, and the IAAF granted the petition. SoF:¶¶26-27. But Mr. Gatlin was placed on notice that any subsequent doping violation in violation of IAAF Rules would result in a lifetime ban. SoF:¶28.

2. The 2006 Violation.

When participating in the "Kansas Relays" event in 2006, Mr. Gatlin tested positive for exogenous testosterone, was charged with another violation of anti-doping rules, and admitted the violation by stipulation with USADA. SoF:¶¶30-34. The 2001 Violation agreement notwithstanding, USADA – in recognition of the circumstances that led to Mr. Gatlin's reinstatement after that violation – agreed to pursue only an eight-year suspension, rather than a lifetime ban, and allowed Mr. Gatlin to seek a reduction to less than eight years. SoF:¶34-35.

At the AAA hearing on the 2006 Violation, Mr. Gatlin asserted that the ADA and RA prohibited an enhancement of the penalty based on his use of Adderall®, arguing his entitlement to a "reasonable accommodation" by USADA and the IAAF, *i.e.*, "to limit the effective time and scope of the first violation in considering the second violation." SoF:¶38. The AAA panel declined to conduct "a 'retrial'" of the 2001 Violation, and imposed a four-year suspension. SoF:¶39. Mr. Gatlin appealed the decision to the CAS, which considered briefs and documentary evidence, and conducted a two-day hearing in May 2008. SoF:¶¶41-43. Mr.

Gatlin, citing the ADA and the RA, argued to the CAS that the 2001 Violation should not have been used to enhance his penalty. SoF:¶44.

The CAS affirmed the AAA decision on June 6, 2008. SoF:¶45. On September 10, 2008, the CAS issued its full written opinion, which is denominated a "reasoned decision." SoF:¶45.[7]

The CAS ruled that the 2006 Violation was properly treated as Mr. Gatlin's second doping violation, based on his stipulation to the 2001 Violation and his acknowledgement that he had violated the anti-doping rules:

> [I]t is clear that Mr. Gatlin was well aware that his first violation constituted a doping offense. Firstly, the Agreed Stipulation entered into on 22 April 2002 between Mr. Gatlin and USADA, states in relevant part at paragraph 7: "*The parties agree that Mr. Gatlin's positive test result is technically a doping violation under the IAAF Rules.*" Secondly, the IAAF press release dated 3 July 2002 states in relevant part: "*However, Council stressed that Gatlin HAD committed a doping offence and issued a warning that any repetition of his positive result would result in a life ban.*" [Emphasis in original] Thirdly, in 2003, Mr. Gatlin stated that "*I accepted the suspension. I just broke the rules which were the rules.*"

SoF:¶46. Addressing Mr. Gatlin's ADA claim, the CAS ruled that "there was no discrimination on the basis of a disability," reasoning:

> [I]n order to constitute a violation, Mr. Gatlin must have been prevented from competing by virtue of his disability. He was not prohibited from competition by virtue of his disability, nor is his disability in any way related to his ability to compete. The panel notes from Mr. Gatlin's own submissions that "*[h]is ADD affected his ability to focus in the classroom and frustrated his attempts to study and complete other assignments out of the classroom."* While Mr. Gatlin's disability admittedly put him at a disadvantage in the classroom, it in no way put him at a disadvantage on the track. Indeed, until recently, he was the reigning 100m Olympic champion.
>
> Mr. Gatlin has failed to demonstrate what conduct on the part of either IAAF or the USATF would be prohibited by the ADA. At no time prior to the 2001 positive test did Mr. Gatlin notify USATF of his learning disability nor did he at

[7] The Court's prior orders were entered based on the CAS's initial memorandum decision.

> any time make a request of either USATF or the IAAF for accommodation of his disability. It is therefore difficult to understand how Mr. Gatlin was in any way discriminated against by IAAF or the USATF on the basis of his disability.

SoF:¶46 (original emphasis). The CAS accordingly held that "there was no duty for the IAAF, or for the USATF, to accommodate Mr. Gatlin's disability" because "[t]he IAAF and USATF cannot be required to modify their doping rules to accommodate a learning disability that has no effect whatsoever on an athlete's ability to compete." *Id.*[8]

The CAS accordingly concluded that the 2001 Violation "was properly adjudicated." SoF:¶46. In crafting an equitable sanction, however, the CAS took into consideration "the circumstances surrounding *both* violations." *Id.* Because Mr. Gatlin's "conduct and personal culpability in 2001 can hardly be said to be equal to that of an athlete who has intentionally used performance-enhancing substances," the CAS reduced the sanction from eight to four years. *Id.*

III. ARGUMENT.

A. The Olympic Arbitration Structure.

The Olympic arbitration structure is founded in several sources. Under the Amateur Sports Act, in accordance with its Congressionally mandated mission "to provide swift resolution of conflicts and disputes involving amateur athletes," 36 U.S.C. § 220503(8), the U.S. Olympic Committee has designated arbitration by the AAA for disputes involving doping charges, 36 U.S.C. § 220529(a). The AAA panel's decision "is binding on the parties if the award is not inconsistent with the [U.S. Olympic Committee's] constitution and bylaws." 36 U.S.C. § 220529(d).[9] The USADA Protocol also adopts the AAA's Commercial Arbitration Rules, as modified to accommodate doping disputes. SoF:¶68. The USADA Protocol imposes a

[8] Assuming that such a duty could exist, however, the CAS held that "this duty was met" because "Mr. Gatlin was never prevented from taking his medication out of competition," but rather had "failed to discontinue the use of his medication in time for it to clear his system so as not to test positive." *Id.* Although the U.S. Olympic Committee was not a party to the AAA proceedings or before the CAS, the AAA and CAS decisions are nonetheless binding on Mr. Gatlin.

[9] The Amateur Sports Act was intended by the Congress "to protect the U.S. Olympic Committee against lawsuits for situations in which an athlete's right to participate in the Olympic Games is at stake." *Binding Arbitration, supra* at 1008 (footnote omitted). Indeed, the Olympic arbitration structure itself was created "to keep disputes out of the U.S. courts." Nancy K. Raber, *Dispute Resolution in Olympic Sport: The Court of Arbitration for Sport*, 8 SETON HALL J. SPORT L. 75, 77 (1998) (hereinafter *Dispute Resolution*).

full panoply of arbitral protections, including expansive rights to introduce evidence and the opportunity to be represented by counsel. SoF:¶68. The IAAF's Anti-Doping Rules also entitle an athlete to a hearing. SoF:¶69.

The AAA panel's eligibility decision is reviewable by the CAS. SoF:¶:70. CAS is governed by the International Court of Arbitration for Sport (ICAS), whose main task is to safeguard the independence of CAS and the rights of the parties to a CAS proceeding. SoF:¶71. ICAS is responsible for the appointment of the CAS arbitrators, who are also nominated by various entities to safeguard the interests of International Sports Federations, National Olympic Committees, the International Olympic Committee, and the athletes. *Id.* There are currently over 200 CAS arbitrators from around the world. The list of CAS arbitrators includes many of the leading commercial arbitrators in the world. *Id.*

The CAS has a broad scope of review, with "full power to review the facts and the law," including the authority to either "issue a new decision which replaces the decision challenged or annul the decision and refer the case back" to the original panel. SoF:¶72. Parties are allowed both briefing and the opportunity to present witnesses. *Id*.

The Swiss Federal Supreme Court has recognized the CAS as "a real arbitral tribunal offering sufficient guarantees of independence and objectivity for its awards to be final and enforceable." Jan Paulsson, *The Swiss Federal Tribunal Recognises the Finality of Arbitral Awards Relating to Sports Disciplinary Sanctions Rendered by the IOC's Court of Arbitration for Sports,* 8 *International Arbitration Reports* 12, 15 (Oct. 1993) (citing *Grundel v. Int'l Equestrian Federation,* Judgment of Mar. 15, 1993). The Swiss Federal Supreme Court has more recently reaffirmed that the CAS is an independent and fair international arbitral body. *A & B v. IOC & Int'l Ski Federation,* (May 27 2003 decision of 1st Civil Division of the Swiss Federal Supreme Court) ("[t]he Federal Supreme Court has accepted that the CAS may be considered a true arbitral tribunal. *See* CAS Code at ¶¶3.3.3.3 – 3.3.4 ("having gradually built up the trust of the sporting world, this institution … remains one of the principle mainstays of organized sport" and is sufficiently independent vis-à-vis the IOC, as well as all other parties that

call upon its services, for its decisions in cases involving the IOC to be considered true awards, equivalent to the judgments of State courts"). *See also* DE:16-2:¶32.

B. This Court Has No Jurisdiction to Hear Mr. Gatlin's Challenge to the Arbitral Decisions Upholding His Suspension.

1. The arbitral bodies gave full consideration to Mr. Gatlin's claims.

Mr. Gatlin's challenge to the 2006 Violation and resulting suspension was based on the ADA and the RA, *i.e.*, the same statutory provisions on which he bases his claims before this Court. The AAA panel gave Mr. Gatlin's claims painstaking consideration, issuing a 53-page decision, over a strong dissent. SoF:¶40. The panel rejected Mr. Gatlin's claim with respect to the 2006 Violation, based on a positive test for exogenous testosterone, that he should be found without fault because the positive finding could have resulted from use of a steroid cream by a disaffected trainer, because Mr. Gatlin failed to produce any factual support for that defense and, in particular, such evidence as he presented was neither credible nor substantiated. SoF:¶40.

The panel took into consideration that "Mr. Gatlin has tested positive for testosterone, a very serious violation." SoF:¶40. Further, the panel specifically considered and rejected Mr. Gatlin's argument that the 2006 Violation should be treated as his first offense, in support of which argument Mr. Gatlin relied on claims under the ADA and the RA that underpin his current action before this Court. SoF:¶39. After supplemental briefing, the panel concluded that the 2001 violation "cannot be construed … as constituting a 'no fault' level of responsibility," such that the 2006 violation was properly treated as a second violation. SoF:¶40. The panel also noted that Mr. Gatlin had not appealed the 2001 violation to the CAS. *Id.* The panel imposed a four-year suspension, retroactive to May 2006. *Id.*

On appeal to the CAS, Mr. Gatlin expressly acknowledged the CAS's jurisdiction over the appeal. SoF:¶41. The parties submitted both briefs and detailed witness statements. SoF:¶42. Mr. Gatlin submitted seven detailed witness statements, including two medical statements covering the issues that were central to his disability claims, which claims he briefed

extensively. *Id*. The CAS carefully considered all of Mr. Gatlin's arguments in making its final decision, as set forth above.

2. The CAS's decision is subject to review only in the Swiss Federal Supreme Court.

The CAS's Secretary General set forth the effect of the CAS's affirmance of the AAA panel's decision:

> Pursuant to article R59 of the Code of Sports-related Arbitration, the CAS award is final and binding upon the parties.
>
> In accordance with article 190 of the Swiss Act on Private International Law, the award shall be final when communicated. It can be challenged before the Swiss Federal Tribunal on five specific grounds only. To the best of our knowledge, the CAS award … has not been challenged by Mr. Gatlin, or any other party. As a consequence, the CAS award … is enforceable like any other award rendered by an independent and impartial arbitral tribunal, pursuant to the New York Convention on the recognition of foreign arbitral awards ….

SoF:¶45.

The IAAF rules provide that CAS decisions "shall be final and binding upon all parties, and on all Members, and no right of appeal will lie … ." SoF:¶73. The CAS Code similarly provides that a CAS decision is "final and binding upon the parties." *Id*. Under the USADA Protocol, "[t]he decisions of CAS shall be final and binding on all parties and shall not be subject to any further review or appeal except as permitted by the Swiss Federal Judicial Organization Act or the Swiss Statute on Private International Law." *Id*.[10]

This makes eminent good sense. The CAS "serves as the court of highest appeal for Olympic athletes when they are subject to disciplinary action." Daniel H. Yi, *Turning Medals into Metal: Evaluating the Court of Arbitration of Sport as an International Tribunal*, 6 ASPER REV. INT'L BUS. & TRADE L. 289, 294 (2006) (hereinafter *Medals into Metal*). Its arbitrators have "legal training and … possess recognized competence with regard to sport." CAS Code, arts. S13, S20; *Medals into Metal*, *supra* at 299. The CAS's institutional knowledge and

[10] All IFs recognized by the IOC have acknowledged that CAS decisions are binding. Urvais Naidoo & Neil Sarin, *Dispute Resolution at Games Time,* 12 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 489, 495-96 (2002).

international jurisdiction is a far superior forum for adjudication of eligibility disputes: there are 203 countries in the Olympic movement – more nations than are members of the United Nations – and, "[w]ere the institutions of the Olympics subject to the laws and jurisdictions of every one of its 203 member nations, the entire enterprise could be paralyzed by conflict laws and constant litigation." *Id.* at 301. As a matter of practicality, an institution such as the U.S. Olympic Committee "simply cannot defend its myriad of decisions in the courts of every single member nation." *Id.* at 301-02 (footnote omitted). And it has been rightly said that "[t]here can be few less suitable bodies than the federal courts for determining the eligibility, or the procedures for determining the eligibility, of athletes to participate in the Olympic Games." *Michels v. U.S. Olympic Comm.,* 741 F.2d 155, 159 (7th Cir. 1984) (Posner, J. concurring).

3. This Court has no jurisdiction to consider Mr. Gatlin's claims.

Because Mr. Gatlin did not seek review of the CAS's initial decision before the Swiss Federal Supreme Court prior to the Olympic trials, the IOC ruled that he would not have been allowed to participate in the Beijing Summer Olympics. SoF:¶60. The Director of the IOC's Legal Affairs Department categorically declared Mr. Gatlin's ineligibility:

> Pursuant to the sanction that was imposed upon Mr. Gatlin as a consequence of an anti-doping rule violation, Mr. Gatlin is not eligible to compete in the 2008 Beijing Olympic Games. … Mr. Gatlin's case was appealed to the Court of Arbitration for Sport (CAS) and the CAS confirmed the sanction against him. This was in accordance with the rules applicable to Mr. Gatlin. Should he wish to appeal this CAS decision, he must do so before the Swiss Federal Court.

Id.

This Court accordingly denied injunctive relief to Mr. Gatlin, for lack of jurisdiction. SoF:¶54. That ruling compels the conclusion that he cannot now go forward on his claims for further relief.

In denying injunctive relief, this Court first ruled that the U.S. Olympic Committee's exclusive jurisdiction over Olympic eligibility preempted judicial review:

> Under the Ted Stevens Olympic and Amateur Sports Act (Amateur Sports Act), Congress provided the [U.S. Olympic Committee] with exclusive jurisdiction

> over all matters concerning this country's participation in the Olympic Games. *See* 36 U.S.C. § 220503(3). As courts have indeed held, issues regarding whether an athlete is eligible to participate in the Olympic Games or any of its qualifying events are reserved solely for the U.S. Olympic Committee, and the courts have no jurisdiction to entertain a private right of action that might impinge upon an eligibility determination. *See Slaney v. The Intern. Amateur Athletic Federation,* 244 F.3d 580, 594-95 (7th Cir. 2001); *Lee v. Taekwondo Union,* 331 F.Supp.2d 1252, 1256-57 (D. Haw. 2004). Because Plaintiff's motion seeks preliminary relief which is directly aimed at lifting his current suspension in order to allow him to participate in the upcoming Olympic trials, the Court is preempted from taking jurisdiction over the matter.

Id.

The Court further held that the CAS's decision is entitled to deference under the United States Convention on the Recognition and Enforcement of Foreign Arbitral Awards, under which "claims that have been properly submitted to arbitration and ruled upon by entities such as CAS are barred from relitigation in this forum." SoF:¶55. Because Mr. Gatlin "properly challenged his suspension on grounds that Defendants' actions violated his rights under the Americans with Disabilities Act of 1973, the very grounds he raises in his motion," the Court held that he "is precluded from raising them here." *Id.* Rather, Mr. Gatlin's "remaining avenue for relief lies with the Swiss Supreme Court, which may in its discretion elect to review the case." SoF:¶56[11]

The Court's was correct in relying on the Seventh Circuit's decision in *Slaney v. IAAF & U.S. Olympic Committee*, 244 F.3d 580 (7th Cir. 2001), to reject Mr. Gatlin's claims. DE:36. *Slaney* involved a similar attempt by an athlete artfully to plead a challenge to a doping sanction as a violation of various state and federal laws (and made an allegation that the doping test involved systematically discriminated against women), and which the court rejected because the disqualified athlete sought judicial review of "the identical issues" that had been adjudicated by the CAS. *Id.* at 590. As in *Slaney*, granting relief to Mr. Gatlin would necessarily undermine and, indeed, would nullify the CAS's decision, and the Court correctly refused to do so.

[11] As of the filing of this motion, Mr. Gatlin has not sought relief in the Swiss Supreme Court.

The U.S. Olympic Committee is entitled (and, indeed, required) to enforce the CAS's decision under the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, also known as the New York Convention, which entered into force in 1959, and was subsequently codified in 9 U.S.C. §§ 201-208, as the CAS itself has recognized. *See* DE:20.[12] The New York Convention governs because the CAS is a foreign tribunal, and the proceedings were governed by Swiss law, as the Eleventh Court recognized in *Industrial Risk Insurers v. M.A.N. Gutehoffenungshutte GmbH,* 141 F.3d 1434, 1440-41 (11th Cir. 1998) ("[w]e join the First, Second, Seventh, and Ninth Circuits in holding that arbitration agreements and awards 'not considered as domestic' in the United States are those agreements and awards which are subject to the Convention," not necessarily for being "made abroad, but because [they were] made within the legal framework of another country, *e.g.*, pronounced in accordance with foreign law *or involving parties domiciled or having their principal place of business outside the enforcing jurisdiction*"; "broad construction … is more in line with the intended purpose of the treaty, which was entered into to encourage the recognition and enforcement of international arbitration awards") (original emphasis).

The Swiss Act on Private International Law (PILA) provides for the review contemplated under the CAS Code. SoF:¶74. Under the PILA, a CAS award may be challenged on certain specified grounds; and the Swiss tribunal would entertain an appeal by Mr. Gatlin, if he had filed one. *Id*. Because the seat of the CAS arbitration was Switzerland (as agreed by the parties), and

[12] In 36 U.S.C. § 220505(a), the Congress set forth the U.S. Olympic Committee's powers, which – like any corporation's – include the power to "sue and be sued," with the limitation that state-court actions may largely be removed to federal court. 36 U.S.C. § 220505(a)(9). But, in specifically setting forth the U.S. Olympic Committee's "[p]owers related to amateur athletics and the Olympic Games," however, the Congress directed the U.S. Olympic Committee to "facilitate, through orderly and effective *administrative procedures,* the resolution of conflicts or disputes that involve any of its members an any amateur athlete ... that arise in connection with … eligibility for and participation in, the Olympic Games." 36 U.S.C. § 220505(c)(5) (emphasis added). The two sections must be interpreted as drafted by the Congress. *E.g., Bledsoe v. Palm Beach County Soil & Water Conservation Dist.,* 133 F.3d 816, 824 (11th Cir. 1998) ("it is generally presumed that Congress acts intentionally and purposely where it includes particular language in one section of a statute omits in another") (citation and internal quotations omitted).

because the procedural law of the CAS arbitration was Swiss law, Mr. Gatlin's claims should have been presented to the Swiss Federal Supreme Court:

> It is clear, we believe, that any suggestion that a Court has jurisdiction to set aside a foreign award based upon the use of its domestic, substantive law in the foreign arbitration defies the logic both of the [New York] Convention debates and of the final text, and ignores the nature of the international arbitration system …. The whole point of arbitration is that the merits of the dispute will not be reviewed in the courts, wherever they be located. Indeed, this principle is so deeply embedded in American, and specifically, federal jurisprudence, that no further elaboration is necessary. That this was the animating principle of the Convention, that the Courts should review arbitrations for procedural irregularity but resist inquiry into the substantive merits of awards, is clear from the notes on the subject by the Secretary General of the United Nations. Accordingly, we hold that the contested language of Article V(1)(e) of the Convention, "… the competent authority of the country under the law of which, [the] award was made" refers exclusively to procedural and not substantive law, and more precisely, to the regimen or scheme of arbitral law under which the arbitration was conducted.

Int'l Std. Elec. Corp. v. Bridas Sociedad Anonima Petrolera, 745 F. Supp. 172, 177-78 (S.D.N.Y. 1990) (citation omitted). Mr. Gatlin, however, chose not to go before the Swiss Tribunal, but rather, in a blatant attempt to forum shop, has brought claims here which, if granted, would have the effect of overturning the CAS decision.

Although the statute codifying the Convention sets forth grounds for evading enforcement, 9 U.S.C. § 207, Mr. Gatlin failed even to allege, much less establish, *any* basis for not enforcing the CAS's decision.[13] Indeed, he entirely has ignored the New York Convention and, has the Court noted, "the only conceivable exception" would be the "public policy" exception, *see* DE:36:3, 9 U.S.C. § 207, which exception is to be applied narrowly, and should only be invoked where enforcement would violate the forum's basic notions of morality and justice. *Trans Chem. Ltd. v. China Nat'l Mach. Import & Export Corp.*, 161 F.3d 314 (5th Cir. 1998); *Indocomex Fibres Pte, Ltd. v. Cotton Co. Int'l, Inc.*, 916 F.Supp. 721 (W.D. Tenn. 1996).

[13] At most, the Court would have jurisdiction to refuse to *enforce* an award, but it cannot have jurisdiction to *vacate* an award, as that power lies solely with the Swiss Federal Tribunal.

As the Court acknowledged, the exception is "a very slender exception reserved for decisions which violate the 'most basic notions of morality and justice,'" such that even "arbitrary and capricious" decisions "do not qualify under this exception." DE:36:3-4 (citation omitted). No such argument could possibly be made here: enforcement of the CAS decision would further the well-established goals of the Olympic Movement in creating a unitary and highly expert panel for review of eligibility determinations, as well as the U.S. Olympic Committee's statutorily granted exclusive authority to determine Olympic eligibility.[14]

Moreover, it is well recognized that discrimination claims, including ADA claims, are properly resolved in arbitration to which the parties have agreed. *E.g., Circuit City Stores, Inc. v. Adams,* 532 U.S. 105, 110, 123-24 (2001); *Gilmer v. Interstate/Johnson Lane Corp*., 500 U.S. 20, 35 (1991) (age-discrimination claim); *McWilliams v. Logicon, Inc.,* 143 F.3d 573, 576 (10th Cir. 1998) (ADA claim); *Miller v. Public Storage Mgmt., Inc.,* 121 F.3d 215, 218 (5th Cir. 1997) (ADA claim); *Patterson v. Tenet Healthcare, Inc.,* 113 F.3d 832, 837 (8th Cir. 1997) (Title VII and state human rights statutory claims); *Siebert v. Amateur Athletic Union of U.S., Inc.* 422 F.Supp.2d 1033, 1046 (D. Minn. 2006); *Santos v. GE Capital,* 397 F.Supp.2d 350, 356 (D. Conn. 2005) (ADA claim). For that matter, the Congress amended the ADA in 1991 expressly to *encourage* alternative dispute resolution of ADA claims. 42 U.S.C. § 12212 ("the use of alternative means of dispute resolution, including ... arbitration, is encouraged to resolve disputes arising under this chapter").[15]

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[14] The precedent upon which Mr. Gatlin has previously relied for the proposition that arbitration itself is somehow contrary to public policy, *Bercovitch v. Baldwin School, Inc.,* 133 F.3d 141 (1st Cir. 1998), actually holds to the contrary, in accordance with the case law that establishes the correctness of the U.S. Olympic Committee's position. *Id.* at 148-51 (holding that ADA claims are lawfully subject to arbitration; "[p]laintiffs have waived a judicial forum, by their own bargain, and must now submit their ADA and Rehabilitation Act claims to arbitration") (footnote omitted).

[15] Regulations promulgated under the ADA also provide for arbitration. 28 C.F.R. § 36.506. Courts may consider such regulations, "as Congress specifically directed the Attorney General to issue regulations in an accessible format to carry out the provisions of [the ADA] ... that include standards applicable to facilities … and vehicles covered under" the ADA. *Access Now, Inc. v. S.W. Airlines, Co.,* 227 F. Supp. 2d 1312, 1317 n.5 (S.D. Fla. 2002) (quoting 42 U.S.C. § 12186(b)).

Thus, this Court's lack of jurisdiction to grant *any* relief to Mr. Gatlin is established by the overarching rule that parties are entitled to enforcement of binding arbitration agreements. *E.g., Gilmer*, 500 U.S. at 25; *Volt Info Sci., Inc. v. Bd. of Trs. of Leland Stanford Junior Univ.*, 489 U.S. 468, 476 (1989); *Moses H. Cone Mem. Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983); *Employers Ins. of Wausau v. Bright Metal Specialties,* 251 F.3d 1316, 1322 (11th Cir. 2001). The very essence of arbitration is that judicial review is all but eliminated, save for narrow grounds for vacatur, such as are set forth in New York Convention or under the Federal Arbitration Act. *E.g., Hall St. Assocs. v. Mattel, Inc.,* --- U.S. ---, 125 S.Ct. 1396, 1402 (2008); *Mastrobuono v. Shearson Lehman Hutton, Inc.,* 514 U.S. 52, 57 (1995); *Southland Corp. v. Keating,* 465 U.S. 1, 10 (1984). "Otherwise plenary review by a court of the merits would make meaningless the provisions that the arbitrator's decision is final, for in reality it would almost never be final." *Bianchi v. Roadway Exp.,* 441 F.3d 1278, 1284 (11th Cir. 2006) (citation omitted).

The courts are to "rigorously enforce" arbitration agreements. *Brandon, Jones, Sandall, Zeide, Kohn, Chalal & Musso, P.A. v. MedPartners, Inc.,* 312 F.3d 1349, 1357-58 (11th Cir. 2002) (citation omitted). Although Mr. Gatlin attempts to "plead around" the Court's prior ruling in his amended complaint, *e.g.*, alleging that only a federal district court can address ADA and RA claims, SoF:¶62, and pleading a claim for damages, SoF:¶61, Mr. Gatlin cannot disguise his claim's essence -- which is that he was purportedly unlawfully denied an opportunity to participate in the Olympic trials. Only by adjudicating that question in Mr. Gatlin's favor could the Court afford him any relief whatsoever. But the Court must enforce the agreement by which all parties to this action are bound, which would require Mr. Gatlin, under controlling Swiss law, to seek such review of the CAS decision as may be available before the Swiss Federal Supreme Court, in accordance with the USADA Protocol and the CAS Code, as this Court has already ruled. SoF:¶56 (Swiss Federal Supreme Court is Mr. Gatlin's "remaining avenue for relief").[16]

[16] Doing so would be required even if New York Convention did not apply and the CAS's decision were treated as an ordinary commercial arbitration award, governed by the Federal Arbitration Act (FAA). The FAA, 9 USC § 1, *et* (continued . . .)

CONCLUSION

Based upon the foregoing, the U.S. Olympic Committee requests the Court to grant final summary judgment, on the basis that the Court is without jurisdiction to hear Mr. Gatlin's claims.

Dated this 29th day of September, 2008.

Respectfully submitted,

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seq., "imposes a heavy presumption in favor of confirming arbitration awards," with the movant limited to four narrow statutory grounds and the burden placed squarely on the losing party in arbitration to establish grounds for vacatur. *Riccard v. Prudential Ins. Co.,* 307 F.3d 1277, 1288-89 (11th Cir. 2002). Mr. Gatlin has neither pled nor even suggested that the CAS's decision is subject to review under the FAA's constrained review scheme.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been served per Federal Rule of Civil Procedure 5(b)(2)(E) and Northern District of Florida Local Rule 5.1(A)(6) this 29th day of September 2008, to the following:

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