

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

Lance Armstrong,

Plaintiff,

v.

United States Anti-Doping Agency, *et al.*,

Defendants.

Civ. Action No. 1:12-CV-00606

**PLAINTIFF LANCE ARMSTRONG'S MOTION FOR
TEMPORARY RESTRAINING ORDER AND PRELIMINARY INJUNCTION
TO PRESERVE THE STATUS QUO**

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Date: July 9, 2012

Pursuant to Federal Rule of Civil Procedure 65, Plaintiff Lance Armstrong (“Plaintiff” or “Mr. Armstrong”), by and through his attorneys, respectfully moves this Court to issue a temporary restraining order against Defendants United States Anti-Doping Agency and its CEO Travis Tygart (collectively, “USADA”), to prevent USADA from causing irreparable injury to Mr. Armstrong. In support of his Motion, Mr. Armstrong states the following:

1. On June 28, 2012, Defendants USADA and Mr. Tygart charged that Mr. Armstrong and five others engaged in a conspiracy to use and traffic prohibited doping substances during an extensive time period, with most of the alleged conduct occurring more than a decade ago. USADA’s charging letter is conclusory and contains no factual or evidentiary support. The Department of Justice, working with USADA and three other federal agencies, investigated similar allegations for two years and decided in February 2012 not to bring any charges. At issue in this case is USADA’s attempt to force Mr. Armstrong to arbitrate these claims, despite the absence of any enforceable agreement to do so. That arbitration would be conducted in a forum that Mr. Armstrong’s Complaint alleges USADA has rigged in its favor, for which USADA does not have jurisdiction, and on charges it has no authority to bring.

2. Immediate relief is necessary because USADA seeks to force Mr. Armstrong to choose **by 5:00 pm eastern on July 14, 2012** either to participate in USADA’s pre-ordained proceeding or to agree to skip the pretense altogether and accept USADA’s sanctions. Those sanctions would include a lifetime ban on his ability to compete and the stripping of his cycling achievements, including his seven *Tour de France* titles. If Mr. Armstrong does not respond, then, on 5:01 pm eastern of the same day, USADA will automatically and unilaterally impose these sanctions.

3. Mr. Armstrong respectfully requests that this Court temporarily enjoin USADA and stay the July 14, 2012 deadline for Mr. Armstrong to either accept sanctions or contest the charges in a proceeding that is rigged to lead to sanctions. This stay harms no one and will permit Mr. Armstrong to seek meaningful relief in this Court. Mr. Armstrong will suffer irreparable harm absent a stay, as he will be forced to accept USADA's *ultra vires* sanctions, including the permanent loss of his livelihood and the stripping of all his numerous cycling titles, or be forced to partake in a process that violates his Constitutional and common law due process rights. Either way, absent a stay, Mr. Armstrong will also suffer irreparable reputational damage. On the other hand, no one, least of all USADA, will be harmed by a stay, as Mr. Armstrong agrees not to compete in events for which USADA's proposed sanctions would render him ineligible during the pendency of his application.

4. Mr. Armstrong readily meets each of the four elements for the granting of a Temporary Restraining Order. *See Janvey v. Alguire*, 647 F.3d 585, 595 (5th Cir. 2011); *Valley v. Rapides Parish School Bd.*, 118 F.3d 1047, 1051 (5th Cir. 1997) (granting preliminary injunction on procedural due process claim); *Kelly v. Thompson*, No. MO-10-CV-31-RAJ, 2010 WL 1425428, at *1 (W.D. Tex. Mar. 31, 2010) (applying standard for preliminary injunctive relief and granting temporary restraining order).

5. **Substantial Likelihood of Success on the Merits.** Mr. Armstrong's Complaint raises four causes of action and advances numerous independent reasons he should prevail. Count I alleges that USADA is violating Mr. Armstrong's Fifth Amendment Due Process rights. Count II alleges that USADA is violating Mr. Armstrong's common law due process rights. Count III alleges that USADA is tortiously interfering with his contractual relations with the international cycling organization, Union Cycliste International ("UCI"). And Count IV seeks

declaratory relief to prevent USADA from proceeding with its plan to enter sanctions against Mr. Armstrong, among other declarations.

6. Mr. Armstrong has a substantial likelihood of success on each of these independent causes of action.

a. **Count I. Mr. Armstrong's Fifth Amendment Due Process Claim.** USADA is a state actor subject to Constitutional constraints. USADA passes at least two of the state-action criteria identified by the United States Supreme Court: the “public function” and the “coercive power” tests. *See Brentwood Acad. v. Tennessee Secondary Sch. Athletic Ass’n*, 531 U.S. 288, 295 (2001); *Molinas v. Williams*, 691 F. 931, 940 (10th Cir. 1982) (holding that government funding is one factor in determining an entity’s status as a “state actor”).

b. USADA is a state actor under the public function test because USADA is recognized by Congress as a national organization to carry out an anti-doping testing program for Olympic and Paralympic sports, is acting as a regulator under an express grant of power from Congress, enforces the United States’ obligations under an international treaty, and is predominantly funded by the United States. *See* Pub. L. No. 107-67 § 644, 115 Stat. 514, 555 (Nov. 12, 2001); 154 Cong. Rec. S6980 (July 21, 2008); <http://www.usada.org/ar-audit-report> (USADA reporting that in 2010 it received a \$10 million unrestricted grant from the federal government with total revenue of approximately \$15 million).

c. USADA is a state actor under the coercive power test because its investigation of Mr. Armstrong, and the resulting charges, stem from a two-year investigation it conducted alongside—and with the rights afforded only to—federal government investigators and agencies, including the Department of Justice, the Federal Bureau of Investigation, the Food & Drug Administration, and, among others, the United States Postal Service Office of Inspector General.

d. Mr. Armstrong has property interests at issue here protected by the Fifth Amendment. These include, *inter alia*, his cycling achievements, including his seven *Tour de France* titles, and his livelihood.

e. USADA, acting in concert with the government and under the government's cloak of financial and investigative resources, seeks to deprive Mr. Armstrong of these vital liberty and property rights without the basic procedural protections to which any defendant is entitled in a court proceeding—or even in a traditional arbitration conducted according to the rules of the American Arbitration Association or any other reputable arbitral forum. USADA's processes violate due process here because, among many other deficiencies, Mr. Armstrong would have:

- No right to a charging document that fairly informs him of the charges against which he must defend.
- No right to a hearing. The result of any USADA hearing is appealable to the Court of Arbitration for Sport (“CAS”), which supposedly conducts a *de novo* review. But once the matter proceeds to CAS, that arbitration panel need not hold a hearing at all.
- No right to cross-examine witnesses and confront his accusers.
- No right to exculpatory evidence, even though USADA obviously has such evidence.
- No right to disclosure of cooperation agreements or inducements provided by USADA to its cooperating witnesses.
- No right to obtain investigative witness statements. Absent such statements, Mr. Armstrong's counsel will lack the ability, fundamental to any lawyer, to cross-examine his accusers with their prior statements.
- No right to obtain full disclosure of laboratory analysis. *See* USADA Protocol § 9(c) & Annexes B, C. And no right to an impartial assessment of whether laboratory testing procedures are accurate.
- No right to an impartial arbitration panel.
- No possibility of a dissenting opinion by an arbitrator who disagrees with the majority.

- No right to review by a United States court of his claims. CAS is the exclusive appellate tribunal for any USADA arbitration, and the only appeal from a CAS decision is to the courts of Switzerland.

7. **Count II. Mr. Armstrong's Common Law Due Process Claim.** USADA's arbitration procedures violate settled principles of common law due process because USADA violated its own rules and imposed arbitrary and unfair procedures when attempting to deprive Mr. Armstrong of valuable property interests. USADA purports to charge Mr. Armstrong and exercise jurisdiction over him pursuant to the UCI Rules in effect during the period between 1998 and 2012. Under those rules, however, USADA has no jurisdiction to assert the charges it has brought. USADA not only lacks jurisdiction to charge Mr. Armstrong, it also has violated its own rules by flouting the applicable statute of limitations, providing improper inducements to witnesses, and subverting the Review Board process.

8. **Count III. Tortious Interference.** USADA has injured Mr. Armstrong by tortiously interfering with his UCI license. During each of the years in question, as USADA is aware, Mr. Armstrong signed a UCI International License Application that afforded Mr. Armstrong certain rights and imposed certain duties on UCI. USADA has proceeded with its charges in contravention of the UCI rules, thereby interfering with UCI's performance of its obligations, including, *inter alia*, UCI's control over results management, its exclusive jurisdiction over the drug tests upon which USADA relies, its authority to delegate disciplinary responsibility to USA Cycling, its duty to review proposed disciplinary proceedings against its license-holders, charge only violations based on reliable evidence, and its commitment to abide by the eight-year statute of limitations.

9. **Count IV. Declaratory Relief.** Mr. Armstrong seeks declaratory relief that: a) he has no enforceable agreement with USADA that authorizes arbitration with respect to the

charges against him; b) USADA lacks jurisdiction to bring the charges asserted against him; and, *inter alia*, c) any alleged contract with USADA is unenforceable for the reasons alleged by him.

10. **Irreparable Injury.** If the Court does not provide the requested relief, Mr. Armstrong will suffer irreparable injury. The Hobson’s Choice forced upon Mr. Armstrong—namely, agree to a lifetime ban and the loss of everything that he has achieved or elect to endure a preordained arbitration process that USADA has unfairly stacked against him—is a gross denial of due process and outside USADA’s jurisdiction. Absent an immediate injunction, Mr. Armstrong will suffer irreparable harm by being forced to choose, by July 14, 2012, between immediate punishment or, through submitting to and perhaps conferring jurisdiction upon a fundamentally unfair arbitration, punishment later.

a. To obtain a preliminary injunction, the plaintiff must demonstrate “that if the district court denied the grant of a preliminary injunction, irreparable harm would result.” *Janvey*, 647 F.3d at 600. “In general, a harm is irreparable where there is no adequate remedy at law.” *Id.* Mr. Armstrong’s livelihood and legacy is at stake in this litigation. Currently, USADA is railroading Mr. Armstrong to either, in a contrived and needlessly compressed timeframe, participate in a hearing concerning charges spanning perhaps more than 16 years over which USADA has no jurisdiction, and in a forum lacking critical due process guarantees that is certain to result in an adverse decision, or forego any type of hearing at all. Either choice is certain to result in Mr. Armstrong incurring a lifetime suspension from international and elite domestic competition and the stripping of his seven *Tour de France* titles.

b. Mr. Armstrong faces a deprivation of his constitutional rights. Mr. Armstrong faces much the same circumstances that were deemed sufficient to constitute irreparable harm in *Valley v. Rapides Parish Sch. Bd.*, 118 F.3d 1047 (5th Cir. 1997). There, the plaintiff faced “the

threat of injury to [her] reputation,” a threat to “her ability to procure comparable employment,” and being subject to an “egregious and constitutionally infirm hearing”; the court concluded this was “sufficient to satisfy irreparable injury.” *Id.* at 1056. As the Southern District of Texas has explained, if Mr. Armstrong has “been deprived of procedural due process, [that] is in itself irreparable injury.” *Associated Builders & Contractors of Texas Gulf Coast, Inc. v. U.S. Dept. of Energy*, 451 F. Supp. 281, 286 (S.D. Tex. 1978). Further, the Supreme Court has made clear that a party need not endure a blatantly unfair procedure before securing injunctive relief. *See Gibson v. Berryhill*, 411 U.S. 564 (1973).

11. **Balance of Harms.** There is no harm to a standstill during a meaningful judicial review. USADA can identify no harm, much less any harm that conceivably outweighs the damage to Mr. Armstrong. Mr. Armstrong retired from professional cycling more than a year ago and agrees not to compete in any other sanctioned sporting events during the pendency of his application. Moreover, he does not ask the Court to interfere with any rule-imposed ban, but rather, to preserve the status quo until the Court has the opportunity to resolve the issues raised in his Complaint. Conversely, if a stay is not granted, Mr. Armstrong will be unable to obtain meaningful relief from this Court.

12. **The Public Interest.** With just one month left before the Olympic Games, the agency charged with monitoring Olympic athletes has chosen to devote its energies (and the money of the American taxpayer) to the fruitless pursuit of stale charges against an athlete who is not involved in the upcoming games, retired from cycling, and has never tested positive for the use of performance-enhancing drugs.

a. Granting the requested relief will not harm any public interest. To the contrary, it is in the public interest that USADA be required to follow the rules governing its jurisdiction and

conduct, and that athletes receive a fair resolution of anti-doping matters. This is necessary so that accused athletes are able to vindicate their rights—and reputations—in a fair proceeding. It also is necessary to ensure that the public can trust the anti-doping system.

b. The public has an interest in ensuring that the system for adjudicating allegations of athletic doping is fair and meets procedural due process requirements. More generally, it is in the public interest that government actors abide by procedural due process protections for those accused of wrong-doing and threatened, as a result, with the loss of their livelihood.

13. We anticipate that USADA will contend that this Court does not have jurisdiction to stop USADA because Mr. Armstrong is bound by the arbitration proceeding of the USADA protocol. Such a contention fails for any and all of the following independent reasons.

a. USADA does not have jurisdiction here at all. USADA cannot rely on a Protocol that it does not have jurisdiction to invoke to compel Mr. Armstrong into arbitration.

b. The crux of Mr. Armstrong's claim is that the USADA arbitration process is rigged in violation of procedural and common law due process standards. The rigged process cannot be the same process that decides whether it is, in fact, rigged.

c. Mr. Armstrong signed only a UCI licensing agreement, which does not even mention arbitration. A provision that never mentions arbitration cannot meet the high standard required to demonstrate that the parties "clearly intended" to arbitrate questions of arbitrability.

d. USADA has no standing to compel Mr. Armstrong to arbitrate his claims. Mr. Armstrong has never had any agreement with USADA; he entered only into an agreement with UCI and USADA's contractual arbitration rights are purely derivative of those contained in the UCI agreement. It is USADA's burden to establish the existence of a valid agreement to

arbitrate the claims made. Even assuming, *arguendo*, that that agreement permits UCI to compel arbitration, only UCI has standing to make that motion.

e. Even assuming, *arguendo*, that this Court finds that Mr. Armstrong “clearly” intended to delegate issues of arbitrability to arbitration and that USADA, as a non-signatory, can enforce it, the delegation clause itself is unconscionable and a contract of adhesion.

f. There has been a failure of an essential condition precedent to the institution of the proposed procedures by USADA. Specifically, disposition by UCI as provided in its ADR procedures is an essential precondition to any proceeding or charge by USADA.

g. Because USADA can, with the consent of the World Anti-Doping Agency and without Mr. Armstrong’s consent, unilaterally modify its arbitration requirement, its obligation to Mr. Armstrong is purely “illusory” and therefore the arbitration clause is not enforceable.

14. Mr. Armstrong also anticipates that USADA may assert that the Olympic and Amateur Sports Act, 36 U.S.C. § 220509, *et seq.* (the “Act”) preempts the Court’s authority to review USADA’s conduct. Any such argument would be incorrect. The Act bestows certain limited rights, as well as certain obligations, upon the United States Olympic Committee (“USOC”) and its member National Governing Bodies (“NGB”). Among other things, the Act requires arbitration of certain disputes between NGBs and between athletes and an NGB. It does not mention USADA (or the notion of a national anti-doping organization), much less require that a dispute between an athlete and USADA be arbitrated. It does not require arbitration of disputes in which an international federation, not any domestic organization, has jurisdiction. Moreover, even where the Act does provide for mandatory arbitration of a given dispute, it limits the availability of judicial oversight of an arbitration only in narrowly defined circumstances not present here.

15. **In further support of this Motion**, Mr. Armstrong relies upon the accompanying Memorandum of Points and Authorities, and Affidavit of Tim Herman with Exhibits (incorporated here in full by reference), the Complaint and whatever argument and evidence may be presented at a hearing on this Motion.

16. **Requested Relief.** With respect to this motion, Mr. Armstrong respectfully asks the Court to grant relief as follows: a) injunctive relief staying the asserted requirement that Mr. Armstrong elect, by July 14, 2012, or any other date, arbitration of the June 12, 2012 and June 28, 2012 charges, or accept the sanctions specified in those documents; b) injunctive relief enjoining Defendants from imposing any sanction, or imposing any costs or fines on Mr. Armstrong, or taking any action with respect to disqualification of competitive results held by Mr. Armstrong, based on the allegations in the June 12, 2012 and June 28, 2012 letters; and, *inter alia*, c) injunctive relief enjoining Defendants from all other actions in furtherance of pursuing doping charges, imposing sanctions, or taking any action with respect to disqualification of competitive results held by Mr. Armstrong.

CERTIFICATE OF CONFERENCE

On July 9, 2012, counsel for Plaintiff telephoned USADA General Counsel William Bock, III and informed him that Plaintiff appeared in this Court at this time to seek this temporary restraining order. Counsel for Plaintiff also delivered to USADA by electronic mail copies of the Complaint, this Motion and related papers.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on the 9th day of July, 2012, I electronically filed the foregoing with the Clerk of Court using the CM/ECF system and that I have served a true and correct copy of the foregoing document on counsel listed below via email:

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