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 ATHLETIC FEDERATIONS,

Defendants.

PLAINTIFFS RESPONSE TO DEFENDANT USOC'S MOTION FOR SUMMARY JUDGMENT

Comes Now Plaintiff Justin Gatlin who, pursuant to Federal Rule of Civil Procedure 56 and Local Rule 56.1, submits this Response to Defendant Untied States Olympic Committee's (USOC) Motion for Summary Judgment. In response, Plaintiff says as follows:

PLAINITFF'S RULE 56.1 STATEMENT OF FACTS

Plaintiff Justin Gatlin, by and through the undersigned and pursuant to Northern District of Florida Local Rule 56.1, hereby submits its statement of undisputed material facts in response to Defendant USOC's Motion for Summary Judgment.

1. Plaintiff ("Justin") had never been instructed or advised that his use of Adderall® could pose drug testing issues for a USATF event. In fact, Justin had been instructed that it was standard practice for those athletes on this medication to stop 2 days prior to competition. This routine was the way Justin had managed his dosage in NCAA events. (Plaintiff Exhibit ("PE") 1 ¶ 45)

2. The only document provided to Justin that referenced drug testing was a pledge sheet that referred to several prohibited substances. Adderall® was not included on the list of prohibited substances nor was there any reference to any medication used to treat ADD. (PE 1 ¶ 46)

3. This pledge was reviewed by Justin's coach at Tennessee, Vince Anderson, and Justin signed it. There were no special forms or presentations presented by any of the Defendants that discussed other prohibited substances or "use exemptions". (PE 1 ¶ 47)

4. As required by the USADA Protocol for Olympic Movement Testing (the "USADA Protocol"), the USADA Anti-Doping Review Board met to consider whether there was sufficient evidence of a Doping Offense to proceed to a hearing, and, if so, to recommend a sanction. This review board had the option of waiving this violation in light of the medically necessary nature of the positive drug test and Justin's specific disability. (PE 1 ¶ 57)

5. Justin presented this Board with all of his medical records and his request that this positive result be waived. The Board met and considered this accommodation but rejected it. (PE 1 ¶ 58).

6. On August 24, 2001, Justin was notified that the USADA Anti-Doping Review Board had recommended that the case proceed to discipline and that a two year sanction be imposed for the offense. (PE 1 ¶ 59)

7. Prior to the AAA hearing, Justin attempted to appeal directly to the IAAF for early reinstatement. The IAAF refused to entertain such an issue until there had been a formal sanction imposed by the AAA panel. (PE 1 ¶ 60).

8. Justin chose to contest the sanction recommended by the USADA Anti-Doping Review Board and, therefore, pursuant to USADA Protocol, the case moved to a hearing before an American Arbitration Association Panel. (PE 1 ¶ 61)

9. USADA and Justin stipulated to findings of fact at the AAA hearing. First, it was admitted that Justin suffered from ADD since the age of 9. Second, it was admitted that a prohibited substance, amphetamine, had been detected in his samples. Third, it was admitted that the cause of ingestion was the prescription medicine Adderall® and, fourth, the parties agreed that Justin's positive result was technically a doping violation under the, then current, IAAF Rules[1]. (PE 1 ¶ 62)

10. At that time, IAAF Rule 60(2) (a) (i) required that the arbitration panel impose a 2 year sanction for the first offense regardless of any mitigating circumstances. There was no provision, at that time, for a finding of "fault" or "no fault" and such findings would not have any effect on the sanction. (PE 1 ¶ 63)

11. In essence in 2001, once the drug test was positive, there was "strict liability" and issues related to mitigation were only considered in relationship to the severity of the sentence. However, in 2001 even fault was not expressly considered under the IAAF and/or USADA protocol. The application of this CAS Award when used to justify excluding the Plaintiff from competitions now and in the future is a direct violation of the ADA and the RA. (PE 1 ¶ 64)

12. In 2001 the NCAA's drug policy permitted athletes who tested positive at to submit medical evidence that supports their legitimate use of the drug. The NCAA would review this evidence and extend exemptions to athletes using medically necessary substances. (See NCAA Drug Policy attached as PE 2).

13. As a result of this award, Justin has suffered significant monetary damages and his career as a runner has been effectively terminated. (PE 1 ¶ 65)

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[1] IAAF rules are adopted and used by USADA.

14. Plaintiff is in no way seeking to appeal, modify or challenge the arbitration that was officiated by the AAA and/or CAS. (PE 1 ¶ 127)

15. Plaintiff, for the first time, seeks to have this Court consider whether the enforcement of an arbitration award violates United States statutory law, namely the American's with Disabilities Act and the Rehabilitation Act of 1974. (PE 1 ¶ 128)

16. Plaintiff in his arbitration set out arguments related to his eligibility for participation but has never, before the instant complaint, alleged that the application of the award amounts to a violation as set out below in detail. (PE 1 ¶ 129)

17. The Defendant's arbitration process has no system through which monetary damages may be alleged, considered and/or granted. (USADA Arbitration Procedures attached as PE 3, PE 10 and PE 1 ¶ 132)

18. Plaintiff, in fact, as never prior to this complaint made any allegation and/or argument for a monetary damage award. (PE 1 ¶ 133)

19. This monetary prayer for relief is a difference not contemplated by or not falling within the terms of any prior submission to arbitration. (PE 1 ¶ 134)

20. The monetary prayer for relief in this action is a matter that is beyond the scope of the submission to arbitration. (PE 3, PE 10 and PE 1 ¶ 135)

21. This Court's consideration of the propriety of a monetary award on these facts would not affect the eligibility determination made in any previous arbitration. (PE 1 ¶ 136)

22. The Americans with Disabilities Act and Rehabilitation Act of 1973 are statutes enforceable only by a United States Court. (PE 1 ¶ 137)

23. On June 24, 2008, This Court entered an order on Plaintiffs Motion for Temporary Restraining Order and/or Preliminary Injunction which set out the reasons that Your Honor felt that this Court lacked subject matter jurisdiction over Plaintiffs eligibility determination. This Order

was specifically limited to ". . . 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 of the matter." (Honorable Lacey Collier's June 24, 2008 Order Page 2 attached as PE 4).

24. The June 24, 2008 Order did not discuss this Court's Jurisdiction over the allegations of other civil rights statutory violations and the monetary prayer for relief now at issue. (PE 4).

25. The rules governing the arbitration of Mr. Gatlin's 2001 Doping Offense were the American Arbitration Association's Modified Rules (AAA-USADA Rules USADA Protocol for Olympic Movement Testing (b) (ii)). These modified rules were specifically written for the United States Anti-Doping Agency hearings and contain numerous alterations to the general commercial rules. For instance, the AAA commercial rules provide the following related to the scope of the award:

R-44

(a) The arbitrator may grant any remedy or relief that the arbitrator deems just and equitable and within the scope of the agreement of the parties, including but not limited to, specific performance of a contract.

(b) In addition to a final award, the arbitrator may make other decisions including interim, interlocutory, or partial rulings, orders, and awards. In any interim, interlocutory, or partial award, the arbitrator may assess and apportion the fees, expenses and **compensation** related to such award as the arbitrator determines is appropriate.

(c) In the final award, the arbitrator shall assess the fees, expenses, and compensation provided in Section R-51, R-52, and R-53. The arbitrator may apportion such fees, expenses, and **compensation** among the parties in such amounts as the arbitrator determines is appropriate.

Commercial AAA Rules
(Emphasis Added)

However in the AAA-USADA rules for arbitration the "Scope of the Award provision has been stripped. The modified AAA-USADA rule on the scope of the award reads as follows:

R-45

> All fees and expenses payable to the AAA, the arbitrator or for witnesses proof produced at the direct request of the arbitrators shall be paid solely by USADA.

Absent from the AAA-USADA version of Rule 45 is any mention of an award consisting of "compensation." No arbitration panel, including the CAS and the Swiss Federal Tribunal, has jurisdiction to affirmatively award monetary damages to the Plaintiff. (PE 3 and 10).

26. On November 8, 1978, Public Law 95-606 (The Amateur Sports Act) was enacted by Congress. It specifically named the USOC as the coordinating body for athletic activity in the United States directly relating to international Olympic family athletic competition, including the sports on the programs of the Olympic and Pan American Games. The USOC was also given the responsibility of promoting and supporting physical fitness and public participation in athletic activities by encouraging developmental programs in its member organizations.

The Act also included provisions for recognizing National Governing Bodies (NGBs) for the sports on the Olympic (winter and summer) and Pan American Games programs and gave the USOC the general authority, on a continuing basis, to review matters related to the recognition of NGBs in the Act. This public law not only protects the emblems of the IOC and the USOC, but also gives the USOC exclusive rights to the words "Olympic," "Olympiad" and "Citius, Altius, Fortius," as well as to Olympic-related symbols in the United States. There is, however, a grandfather clause that enables anyone using the symbols or terminology before September 21, 1950, to continue using them. (PE 5)

27. The Corporation shall enforce and comply with all rules and regulations of the IOC (International Olympic Committee), IPC (International Paraolympic Committee and the PASO (Pan American Sports Organization). Pursuant to the authority granted by the IOC, IPC and the PASO,

the corporation shall have exclusive jurisdiction to enter competitors who will represent the Untied States in the Olympic Games, the Paraolympic Games and the Pan American Games, and the enforce in connection therewith the definition of an eligible athlete adopted by the IOC, IPC and the PASO. (PE 6).

28. USOC's very own constitution provides that one of it main purposes are to:

> encourage and provide assistance for athletic programs For amateur athletes with disabilities including, where feasible, the expansion of opportunities for meaningful participation by such amateur athletes and programs of athletics for able bodies amateur athletes.

(PE 11)

29.The Chief Executive Officer for USA Track and Field, Inc (USATF), Craig Masback, has admitted the doping process is subject to US law and that between anti-doping rules, US law and the new sports related common law, confusion and conflict is rampant. Further, Mr. Masback admits that the USOC and the IAAF are many times in conflict with one another and that the USATF is usually in the middle of these legal conflicts. (PE 10).

30.The only membership application produced by the Defendants in this case is unsigned. (PE 8).

31. In 2001 the NCAA Drug Testing Policy permitted an athlete to prove the medical necessity of his medication therefore refuting a positive drug screen after the test. They have not used a "strict liability". (PE 2).

INTRODUCTION

Defendant USOC's Motion for Summary Judgment is due to be denied. This Motion has been filed prior to any discovery from this Defendant. The Motion is a Rule 12(b)1 Motion for lack

of subject matter jurisdiction. It is due to be denied since the Plaintiff has shown sufficient evidence of jurisdiction in one or more of the following ways:

A) the ASA does not implicitly preempt this civil rights claim

B) the New York Convention is not applicable to the case at bar

C) A prima facie violation of the Americans with Disabilities Act and the Rehabilitation Act of 1973 has been alleged.

ARGUMENT

This Court has subject matter jurisdiction since the statutory claims at issue could never have been the subject of any USADA arbitration.

First, the arbitribility of any claim is determined by the existence and extent of the agreement to arbitrate. Here, the controlling arbitration provision is not a typical commercial arbitration clause but rather a very limited clause related only to positive doping sanction rebuttal. (SoF ¶ 17) The actual arbitration clause in this case is made up of several references in 3 different documents. The wording starts with the membership application, then to USATF procedures which refer athletes to the USADA Protocol. (SoF ¶ 30) Mr. Gatlin would be considered a member of the USATF and his signed membership application, references his agreement to abide by the various policies of the USATF including those related to disciplinary proceedings. USATF procedures mandate that discipline "related to domestic positive drug test of USATF athletes shall be conducted by USADA." (See Defendant Exhibit 29-3:4-6). So, once an athlete has signed membership application, he or she has indirectly submitted to USADA the conduct disciplinary proceedings related to domestic positive drug sanctions.

The first step in determining the scope of an arbitration provision is to look to the provision itself. The only guidance we have is the phrase referencing USATF members' obligation to abide by the disciplinary procedures related to "domestic positive drug test". The scope of this arbitration clause is confined to the ability of the athlete to rebut or mitigate the sanction imposed from a positive drug test. Under the USADA rules in place in 2001, once the test was positive the athlete had the right to agree to the findings or to dispute the findings and then submit to arbitration. The arbitration would be brought by USADA, as the prosecution, and the athlete is the respondent. There was no procedure that would allow an affirmative cause of action to be brought under this modified AAA procedure. (SoF ¶ 4-8).

It is clear that even though there is a federal policy in favor of finding arbitration, this policy cannot, however, serve to stretch the contract beyond the scope originally intended by the parties. *Seaboard Coast Line R. Co. v. Trailer Train Co.,* 690 F. 2d 1343 (11th Cir. 1982); *Kemiron Atlantic, Inc. v. Aguakem Intern., Inc.,* 290 F. 3rd 1287 (11th Cir. 2002). Further, the intent of the contracting parties regarding arbitration is paramount and can trump the Federal Arbitration Act's policy in favor or arbitration. *Kemiron,* 290 F.3rd 1287 (11th Cir. 2002).

Courts are bound to interpret the wording of an arbitration agreement using ordinary state-law rules of contract construction. *Perez v. Glose Airport Sec. Services, Inc.,* 253 F. 3rd 1280 (11th Cir. 2001). It is a cardinal rule that the construction of all written instruments is a question of law and belongs to the courts, provided "the **language** used is clear, plain, certain, undisputed, **unambiguous**, unequivocal, and not subject to conflicting inferences." *Friedman v. Virginia Metal Products Co.,* 56 So.2d 515, 516 (Fla.1952).

"When a contract is clear and unambiguous, "the actual language used in the contract is the best evidence of the intent of the parties, and the plain meaning of that language controls.' " *Maher v. Schumacher,* 605 So.2d 481, 482 (Fla. 3d DCA 1992).

The language at issue concerns the requirement that "positive drug tests" must be submitted to USADA for disciplinary proceedings. This language is clear and unambiguous. The only matter contemplated by these words to be submitted to arbitration is a positive drug test sanction. There is no language that comes close to including an ADA or RA claim as the proper subject for this type of modified "rebuttal" arbitration. What the arbitration clause does not say is even more important. There is no wording that requires "all claims" or even "all claims relating to the positive drug test". The operative agreement only requires that challenges to a specific sanction can only be mitigated by using this modified system of doping arbitration. This is only a mitigation hearing not a true arbitration.

The USOC seems to argue that the Plaintiff's use of his disability as a defense to its prosecution is the same as its affirmative use in the complaint at bar. The USOC is wrong for several reasons. The matter before this Court is a complaint for damages stemming from an independent and distinct statutory violation. The only issue previously considered by the various arbitration panels was whether the Americans with Disabilities Act prohibited the imposition of an enhanced sanction for the positive drug test in 2001 not whether such conduct amounts to a compensable violation.

AAA Commercial Procedures modified by USADA to omit references to compensation show intent to not consider actions like those contained in this action

Mr. Gatlin's arbitration panels conducted in 2002 and 2007 were both governed by the AAA-USADA Arbitration Rules. These rules do not permit the arbitrators to award anything other than a "reasoned award". There is no mention of "compensation" in any of the modified rules. This omission by USADA evidences its specific intent to leave out any reference to the ability to grant "any remedy or relief" and also leaving out the use of the word "compensation". The only items permitted under the USADA version of the AAA rules is the ability to provide a "reasoned

award" and the ability to award fees and expenses. (SoF 25). True Commercial arbitrators have full authority to grant all types of relief. (SoF ¶ 30).

The movant attempts to argue that Mr. Gatlin had a "full" hearing and he is now estopped from asking this Court to exercise jurisdiction over this matter. The use of the word "full" implies an equal and unrestricted opportunity to present a case for violation and compensation. This argument fails since Mr. Gatlin's rights under the ADA and the RA were not considered for the purpose of enforcement. These statutes provide relief for violations and they were not drafted to be used as shields in sports prosecutions. Hence, they have not been asserted until this lawsuit was filed.

For Movant's arbitration argument to work they would need many facts that are not available. First, the USADA arbitration agreement and procedures would have needed to provide jurisdiction for its panel to consider statutory violations and further allow them to award appropriate relief. The arbitration agreement and USADA's modified arbitration procedures do not provide jurisdiction to consider the claims contained in the instant action. Second, Mr. Gatlin would have needed to file a complaint for damages against USADA and USATF for their violation of the ADA and the RA and then taken steps to prove these violations and requested relief at his hearings. Further, these matters would have needed to be fully considered under American law and then a reasoned award denying monetary relief would have been in the record. Clearly this is not what has happened in this matter. (SoF ¶ 17-20).

Mr. Gatlin's collateral reference to the ADA in the context of this very limited sanction hearing was only used to mitigate punishment. The use of the ADA as a way of illustrating how unfair this punishment would be is much different from the affirmative allegations before this Court. Mr. Gatlin's reference to the ADA prior to the filing of this lawsuit was never to establish a violation and obtain compensation. Rather, his prior lawyers' use of the ADA references was only

illustrative of the unfairness of the punishment. The fact that the Defendants actions coincidentally fit squarely within a prima facie case under the ADA and the RA should not be used against Mr. Gatlin now that he had chosen to exercise them.

The New York Convention does not apply to bar this action since the USADA arbitration panels could not consider the claims set out in this suit.

Movant's New York Convention argument is not an appropriate argument unless there is an arbitration agreement that is broad enough to have encompassed the claims before this Court. Plaintiff argues that the arbitration clause in this case, limited to mitigating drug test sanctions, coupled with USADA's very narrow procedural rules would not permit a plaintiff to assert claims like those asserted in the case at bar. Since it was impossible for the plaintiff to assert the claims in any of the prior arbitrations, the New York Convention has no application.

The law in the area of arbitration agreements has consistently limited the application of an arbitration agreement to the terms of the agreement. *Becker v. Davis*, 491 F. 3d 1292, 1300-01 (11th Cir. 2007). To evaluate the language of the arbitration agreement in this case requires reference to a several different documents. First, the USATF membership application requires signatures to "abide by the applicable USATF Bylaws, Operating Regulations, and Competition Rules." (SoF ¶ 30). Then when you reference the USATF Operating Regulation 10 Section D, it provides that USATF disciplinary proceedings should be conducted by USADA. (SoF ¶ 25). Then one must look to the Protocol for Olympic Movement Testing to understand the USADA process. Specifically, Section 10 (a) titled "Results Management/Adjudication" sets out the details of the USADA adjudication process. The following is the relevant language concerning the purpose of a hearing:

> Within ten (10) days following the date of such notice, the athlete or other person must notify USADA in writing if he or she desires a hearing **to contest the sanction** sought by USADA. . . . The athlete or other person may also elect to avoid the

necessity for hearing by accepting the sanction proposed by USADA. If the sanction is contested by the athlete or other person, then a hearing shall be conducted pursuant to the procedure set forth below.

USADA Protocol for Olympic Movement Testing
(Emphasis Added) (PE 7)

The express wording of this arbitration agreement (albeit its piecemeal presentation) relates only to disputing a sanction sought by USADA. The remainder of Section 10 sets out the modified procedural rules of the AAA designed specifically for contesting a sanction.

A complete list of USADA sanctions are all set out in Annex A, Article 10 of USADA's Protocol for Olympic Movement Testing. In pertinent part this section reads:

10.1 Disqualification
10.2 Ineligibility

Annex A, Article 10 USADA Protocol
For Olympic Movement Testing (PE 7)

USADA is not permitted to provide any other relief other than Disqualification and Ineligibility. USADA only has these sanctions available because it has very limited jurisdiction. Its own policies clearly limit the application of its arbitration agreement and, in turn, make an argument under the New York Convention moot.

In support of its position, Movant relies on legal precedent that involves pure commercial arbitration clauses and pure AAA arbitration procedure. USOC cites cases such as *Industrial Risk Insurers v. M.A.N. Gutehoffenungshutte GmbH,* 141 F. 3d 1434, 1440-41 (11th Cir. 1998); *Int'l Std. Elec. Corp v. Bridas Sociedad Anonima Petolera,* 745 F. Supp 172, 177-78 (S.D.N.Y. 1990); *Circuit CityStores, Inc., v. Adams,* 532 U.S. 105, 110, 123-24 (2001), to name a few. All of these cases have a couple of things in common. First, they are pure commercial arbitrations. Second, they were not conducted

under the modified USADA arbitration rules and, third, all of these matters were compelled to arbitration as a result of broad commercial arbitration clauses.

Missing from Movant's argument is a discussion distinguishing their position here from the rulings in cases like; *Lee v. United States Taekwondo Union,* 331 F. Supp. 2d 1252 (D.C. Hi 2004)(Former Coach of United States Taekwondo Team sued USOC, among others, court held race discrimination claims not preempted under ASA); *Slaney v. Int'l Amateur Athletic Fed'n,* 244 F. 3d 580 (7th Cir. 2001)(RICO and conspiracy allegations brought by athlete against USOC in blod doping case not preempted but failed under 12(b)6 standard to state claim); *Akiyama,* 181 F. Supp. 2d at 1183(holding that title II of Civil Rights Act of 1964 applied to prevent discrimination on basis of religion at judo competition); *Sternberg v. U.S.A. Nat'l Karate-Do Fed'n, Inc.*, 123 F. Supp 2d 659 (E.D.N.Y. 2000)(female athlete stated valid Title IX claim against karate national governing body based on organization's decision to withdraw women's karate team form international competition).

Movant purposely avoids a discussion of sports related ADA cases, including the *Shepherd* matter in which they recently consented to jurisdiction. USOC wishes that this Court would glance over the nature of this action and make the leap of logic considering this arbitration as one comparable to a pure commercial arbitration. Mr. Gatlin was not a party to a commercial arbitration as were all of the claimants cited by Movant in support of its New York Convention argument. Hence, the analysis under the New York Convention is misplaced.

The Amateur Sports Act has no application to the First Amended Complaint

The ASA was interpreted by this Court in its June 24, 2008 Order to grant exclusive jurisdiction to the USOC in determining the eligibility of athletes in Olympic and International competition. Plaintiff's First Amended Complaint seeks no determinations related to Olympic competition or participation in international competitions. (SoF ¶ 17-20) Therefore, any arguments

related to the ASA are misplaced and not relevant to the jurisdiction of this court to consider the allegations contained in the First Amended Complaint.

Movant attempts to argue, without citing this Court to any legal authority, that Mr. Gatlin's claims are somehow preempted by the ASA. This contention is without merit.

As this Court is aware, Congress's intent to preempt another law may be explicitly stated in the language of the statute or implicitly contained in the structure and purpose of the statute. *Jones v. Rath Packing Co.,* 430 U.S. 529, 525, 97 S.Ct. 1305, 1309, 51 L.Ed. 2d 604 (1977). Given the distinction between express and implied preemption, The Supreme Court has identified three types of preemption (1) express, (2) field preemption and (3) conflict preemption. *English v. General Elec. Co.,* 496 U.S. 72, 79, 110 S.Ct. 2270, 2275, 110 L.Ed.2d 65 (1990).

In addition, principles of statutory construction and interpretation, as well as the underlying statutory policies and congressional intentions, also are important considerations when there is a potential conflict among federal statutes because fundamentally each federal statute has equal effect under the law. The Supreme Court provides that "[i]t is a cardinal principle of construction that .... [w]hen there are two acts upon the same subject, the rule is to give effect to both." *United States v. Borden Co.*, 308 U.S. 188, 198, 60 S.Ct. 182, 84 L.Ed. 181 (1939).

Here the two statutes at issue are the ASA and ADA. The ASA does not contain an express preemption. Any preemption would have to be implied from the following phrase:

> (3) exercise *exclusive jurisdiction, either directly or through its constituent members or committees over all matters pertaining to the participation of the United States in the Olympic Games and in the Pan-American Games, including the representation of the United States in such games*

> *and over the organization of the Olympic Games and the Pan-American Games when held in the United States.*
>
> 36 U.S.C.A. § 374 (1990)

As this Court has previously determined, this statute expressly provides that the USOC has exclusive jurisdiction over "all matters" related to participation in the Olympic Games and the Pan-American Games. This statute specifically does not mention competition in domestic events since doing so would necessary involve itself in NCAA competitions as well as a limitless number of other amateur sporting activities. The express, clear and unambiguous language of the ASA limits its applicable to Olympic and Pan-American participation. Therefore, based upon the principles of basic statutory interpretation, the ASA's application is limited to eligibility for Olympic or Pan-American Games.

The ADA and the RA can be read together with the ASA as it pertains to domestic, non Olympic and Pan-American competitions. Since the two statues can be read together the very important civil rights issue against disability discrimination for domestic events should be enforced.

Even if the arbitration is deemed to have fully considered the claims in this case the AAA panel decision is not binding on the USOC since it is inconsistent with the USOC's constitution and by laws

In Movant's brief the USOC notes that 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." citing 36 U.S.C. § 220529(d) The USOC's Olympic constitution contains the following in regards to discrimination:

> encourage and provide assistance for athletic programs for amateur athletes with disabilities including, where feasible, the expansion of opportunities for meaningful participation by such amateur athletes and programs of athletics for able bodies amateur athletes

USOC's very own constitution prohibits discrimination and promotes competition of athletes suffering from disabilities. Assuming that this Court was to find that Mr. Gatlin's only venue for his ADA claim was this sports arbitration panel, then the result of this arbitration is offensive to the fundamental principles of the USOC and should be void.

USOC actions and recent settlement of the *Shepherd* matter is further support that its jurisdiction arguments are without merit

This past year the USOC settled a case known as *Shepherd v. USOC.* Mark Shepherd was a wheelchair basketball para-olympian who filed an action against the USOC alleging ADA violations. Mr. Shepard's claims related to discriminatory manner in which the USOC provided disabled athletes services, benefits and financial assistance versus the manner such items were provided to able-bodies athletes. *Shepherd v. United States Olympic Committee*, 464 F. Supp 1072 (N.D. Col. 2006) at 1075. Shortly after Mr. Shepherd filed his complaint the USOC moved for summary judgment arguing that it had not duty to provide equal services under the ADA. *Shephard,* 464 F. Supp 1072 at 1082.

The USOC in *Shepherd* made an argument that the ASA preempts ADA claims since they equate to challenges as to how the USOC allocates its money and therefore not subject to jurisdiction by the District Court. *Shepard,* 464 F. Supp 1072 at 1087. In support of the USOC's argument in *Shepherd* its lawyers cited several of the same cases cited in the instant matter. *Id* at 1087. Plaintiff Shepherd argued that there was no preemption of these claims since this was not an eligibility determination but rather a separate and distinct cause of action citing *Slaney v. Int'l Amateur Athletic Fed'n,* 244 F. 3rd 580 (7th Cir. 2001); *Akiyama v. United States Judo, Inc.,* 181 F. Supp 2d 1179, 1183 (W.D. Wa. 2002); and *Sternberg v. U.S.A. Nat'l Karate-Do Fed'n, Inc.,* 123 F. Supp 2d 659 (E.D.N.Y 2000).

The Colorado District Court agreed with Mr. Shepherd and also noted that there is further support in favor of jurisdiction in *Lee v. United States Taekwondo Union,* 331 F. Supp. 2d 1252 (D. Haw. 2004) (Lee sued the USOC for race discrimination and the USOC argued that the ASA preempted his claims) specifically citing the following language from that opinion:

> to the extent Lee was invoking protections afforded him under federal civil rights laws independently of and in addition to rights governed by the ASA, however, his claims were not preempted.
>
> *Lee,* 331 F. Supp. 2d 1252 at 1260-61

Here, Mr. Gatlin is asserting his protections afforded to him under civil rights laws independent and in addition to rights governed by the ASA. Mr. Gatlin does not seek a determination of his eligibility from this court. Mr. Gatlin seeks to assert his rights under a federal civil rights statute and requests relief for these violations.

CONCLUSION

This Court has subject matter jurisdiction since these ADA and RA were not the subject of any prior arbitration (nor could they have been). Further, since Mr. Gatlin's civil rights claims have never been considered any analysis under the New York Convention is misplaced. Hence, USOC's Motion for Summary Judgment should be denied.

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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) and Northern District of Florida Local Rule 5.1 (A)(6) this 20th day of October, 2008 to the following:

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