AMERICAN ARBITRATION ASSOCIATION
COMMERCIAL ARBITRATION TRIBUNAL

AAA Case No. 01-15-0004-2085

TYLER McCANDLESS, Claimant

and

USA TRACK & FIELD, Respondent

and

CRAIG LEON, Affected Athlete

CORRECTED FINAL REASONED AWARD AND DECISION

Pursuant to the Commercial Arbitration Rules of the American Arbitration Association ("AAA"), a full, one-day evidentiary hearing was held in this matter by telephone and voluminous arguments and evidentiary submissions were made before the sole arbitrator Jeffrey G. Benz (the "Panel" or the "Arbitrator" or "I"). The final reasoned decision and award of the Arbitrator, after having considered the evidence and submissions of the parties, the arguments of counsel, and the relevant law, is as follows (this is the corrected version of the award as requested or consented to by the parties):

I. INTRODUCTION

1.1 This unfortunate dispute involves a decision by USA Track & Field ("USATF"), the national governing body for the sport of athletics in the United States, recognized as such by the United States Olympic Committee ("USOC") and the International Association of Athletics Federations ("IAAF"), to nominate one athlete over another to compete on behalf of the United States in the men's marathon at the 2015 Pan American Games in Toronto, Canada.

1.2 In this case, as is often the case, both athletes were innocent of any wrongdoing in their behavior, but, as is not often the case, USATF directly caused the problem that gave rise to this dispute by mistakenly entering one athlete over another more qualified athlete to be a member of the team. As a result, one athlete who had built up expectancy by reasonably relying on USATF's mistaken decision is being replaced with another more qualified athlete who for his case did everything he was supposed to do.

II. THE FACTS AND PROCEDURAL HISTORY

2.1 Below is a summary of the relevant facts and allegations based on the parties' written and oral submissions, pleadings and evidence adduced during the pendency of this arbitration proceeding. Additional facts and allegations found in the parties' submissions, pleadings and evidence may be set out, where relevant, in connection with the legal discussion that follows. While the Arbitrator has considered all the facts, allegations, legal arguments and evidence submitted by the parties in the present proceedings, this Final Reasoned Decision and Award only refers to the submissions and evidence necessary to explain the Arbitrator's reasoning. This section is intended only to give a brief overview of the basic facts underlying this case and is without prejudice to the facts stated in the Analysis section below.

2.2 As required by the U.S. Olympic Committee, USA Track & Field ("USATF") posted the selection criteria for the 2015 Pan American Games on its website. The "USA Track & Field ATHLETE SELECTION PROCEDURES 2015 Pan American Games," ("Selection Criteria") provided, *inter alia*, as follows:

> *"1.3. Provide a comprehensive, step-by-step description of the method that explains how athletes will go through the selection process to become Team nominees (include maximum Team size) ...*
>
> * * *
>
> *Marathon*
> *Marathon athletes will be selected based on the best times achieved (per gender) on an IAAF approved course from July 1, 2014 to March 29, 2015. IAAF approved courses can be found at www.iaaf.org. Marathon athletes must have met the qualifying standard for the Pan American Games."*
>
> * * *
>
> ***"3. REMOVAL OF ATHLETES***
>
> *3.1. Prior to acceptance of nominations by the USOC, USATF has jurisdiction over potential nominees.*
>
> *An athlete who is to be nominated to the Team by USATF may be removed as a nominee for any of the following reasons, as determined by USATF:*
>
> *3.1.1. Voluntary withdrawal. Athlete must submit a written letter to USATF's CEO/Executive Director.*

3.1.2. Injury or illness as certified by a physician (or medical staff) approved by USATF. If an athlete refuses verification of his/her illness or injury by a physician (or medical staff) approved by USATF, his/her injury will be assumed to be disabling and he/she may be removed. □

3.1.3. Violation of USATF's Statement of Conditions (Attachment B). □

An athlete who is removed from the Team pursuant to this provision has the right to a hearing per USATF's Bylaws, Article 14 and Regulation 21 and the USOC's Bylaws, Section 9.

3.2. Once an athlete nomination is accepted by the USOC, the USOC has jurisdiction over the Team, at which time, in addition to any applicable NGB/HPMO Code of Conduct, the USOC's Code of Conduct and Grievance Procedures apply. The USOC's Code of Conduct and Grievance Procedures can be found at: http://www.teamusa.org/For-Athletes/Athlete-Ombudsman/Games-Info □

3.3. An athlete may be removed as a nominee to the Team or from the Team for an adjudicated violation of IOC, PASO, IPC, WADA, IF, USADA and/or USOC anti-doping protocol, policies and procedures, as applicable." □

4. REPLACEMENT OF ATHLETES

4.1. Describe the selection and approval process for determining replacement athlete(s) should a vacancy occur:

4.1.1. prior to submission of Entries by Name to the Local Organizing Committee, including any applicable group or committee: □An athlete who withdraws from the team due to illness, injury or for any other reason, or fails to abide by the USATF Statement of Conditions, prior to submission of entries to the LOC, will be replaced by the next eligible athlete who has completed USATF's Team Processing for that event and who has achieved the Pan American Games qualifying standard, in rank order finish from the applicable selection event, or USATF's U.S. Performance Rank Order List as of June 28, 2015. The replacement athlete will be required to sign a Statement of Conditions for participation. (See Attachment B).

□

4.1.2. after submission of Entries by Name to the Local Organizing Committee, including any applicable group or committee: □

An athlete who withdraws from the team due to illness, injury or for any other reason, or fails to abide by the USOC Code of Conduct after submission of entries to the LOC will be replaced by the next eligible athlete who has completed USATF's Team Processing for that event and who has achieved the Pan American Games qualifying standard, in rank order finish from the applicable selection event, or USATF's U.S. Performance Rank Order List as of June 28, 2015, provided they are on the USOC long list and have completed all USOC paperwork. The replacement athlete will be required to sign a Statement of Conditions for participation. (See Attachment B)."

2.3 Tyler McCandless ran his qualifying time of 2:15:26 at the Twin Cities Marathon on October 5, 2014. On May 25, 2015, he was asked by USATF if he was interested in running in the marathon at the 2015 Pan American Games, to which he responded that he would like to take the spot.

2.4 On May 28, 2015, Tyler McCandless received an email from USATF, stating in pertinent part as follows:

"Congratulations on your selection to represent for Team USA at the Pan American Games!

The window for adding athletes to the USOC list has closed. So you will need to submit all your information ASAP. The attached word document is the information required by the USOC."

2.5 Tyler McCandless submitted the requested documentation on May 28, 2015 – the same day that he received it. He submitted his participation forms from the Pan American Sports Organization and USATF on May 29, 2015. Also on May 29, 2015, USATF advised Tyler McCandless that the men's team manager for USATF would be Tracy Sundlun. Subsequent to that notification, Tyler McCandless received multiple emails from Tracy Sundlun congratulating him on his selection to the 2015 Pan American Games team, and listing him on the USATF roster for the Pan American Games.

2.6 On June 5, 2015, Tyler McCandless submitted his signed USOC participation Agreement for the 2015 Pan American Games.

2.7 On July 6, 2015, the USOC announced the roster for the 2015 Pan American Games, which roster included Tyler McCandless.

2.8 The Opening Ceremonies for the Pan American Games were scheduled for July 10, with the men's marathon being contested on July 25.

2.9 On July 6, 2015, Mr. Craig Leon notified USATF that he believed that he should have been selected for the men's marathon at the 2015-Pan American Games instead of Tyler McCandless (or words to that effect). In fact, Mr. Leon had run a

qualifying marathon time that was 43 seconds faster than the qualifying time run by Mr. McCandless (albeit in different marathons), and Mr. Leon had previously advised USATF of his interest in the position. USATF admitted that it had failed to consider this information prior to naming Mr. McCandless to the team.

2.10 Mr. McCandless relied on his selection by USATF and evidence was put forward that Mr. McCandless had (i) trained for 6 weeks for the Pan American Games marathon; (ii) put his dissertation defense for his Ph.D. on hold to compete in the Pan American Games marathon; and (iii) deferred a job offer so that he could prepare for and compete in the Pan American Games marathon. Furthermore, in training for the Pan American Games marathon since late May 2015, Mr. McCandless had foregone other racing opportunities, and made the 2015 Pan American Games marathon a significant part of his build-up to the 2016 US Olympic Trials (which will take place on February 13, 2016 in Los Angeles). In essence, believing that it had made a mistake, USATF asked Tyler McCandless to bear all of the consequences of USATF's "mistake."

2.11 Mr. Leon filed a Section 9 Complaint with the USOC on July 8, 2015, which would be expected of an athlete who believed that he had been wrongly left off of the 2015 Pan-American Games team. However, Mr. Leon did not file a demand for arbitration in connection with his Section 9 Complaint, apparently hopeful that the USOC would be able to mediate and resolve the dispute (under the Ted Stevens Amateur and Olympic Sports Act). The USOC, however, was unsuccessful in resolving the dispute.

2.12 On July 9, 2015, at 2:00 p.m. ET, with Mr. Leon still having not filed a demand for arbitration in connection with his Section 9 Complaint, USATF sent a letter to counsel for Mr. McCandless and to counsel for Mr. Leon (attached as Exhibit 9), which stated *inter alia* as follows:

> *"Pursuant to Sections 1.2 and 1.3 of the USA Track & Field Athlete Selection Procedures for the 2015 Pan American Games, Approved January 6, 2015 and Revised February 2, 2015, USATF is notifying you that it intends to nominate Craig Leon, instead of Tyler McCandless, to the 2015 Pan American Track and Field Team for the Marathon competition. USATF has instructed the USOC to accept Mr. Leon as its nominee. ... USATF will submit Mr. Leon's nomination to the USOC on Monday, July 13, 2015, at 10:00 am EDT for the USOC's acceptance and submission to Toronto 2015."*

2.13 On July 10, 2015, with Mr. Leon still having not filed a demand for arbitration in connection with his Section 9 Complaint, USATF unilaterally removed Mr. McCandless and replaced him with Mr. Leon as a member of the 2015 Pan-American Games team in the men's marathon. Seemingly recognizing that there was no basis to remove Mr. McCandless or replace him with Mr. Leon under its own Selection Procedures, USATF took the position that it had neither removed Mr. McCandless nor replaced him with Mr. Leon: USATF simply pretended that it never nominated Mr. McCandless in the first place. USATF claimed that it was nominating Mr. Leon "instead

of" or "in place of" Mr. McCandless.

2.14 Mr. McCandless was both selected to the 2015 Pan-American Games team and nominated to that team. He completed all of the necessary paperwork, and has been listed on the USOC's roster for the 2015 Pan-American Games team. The USATF Selection Procedures for the 2015 Pan-American Games identify the conditions under which USATF can remove or replace an athlete who has already been nominated to the 2015 Pan-American Games team, and none of those conditions apply in this case.

2.15 On July 20, 2015, Mr. McCandless filed his arbitration demand and this proceeding ensued. After holding a preliminary hearing and issuing a briefing schedule, the Panel determined to hold the evidentiary hearing in this matter by telephone on July 14, 2015.

2.16 The Panel issued its operative interim award on July 15, 2015 providing as follows:

> *"This Arbitrator renders the following interim operative decision and award in the above-referenced case:*
>
> *1.1. The arbitration claims of Tyler McCandless are dismissed because of an admitted mistake in notification by USA Track & Field.*
>
> *2.2 USA Track and Field, as the sole cause of the extraordinary issues that gave rise to this dispute, shall pay a contribution toward the attorney's fees of Tyler McCandless, in an amount to be determined in the final reasoned award.*
>
> *2.3. USA Track and Field, as the sole cause of the extraordinary issues that gave rise to this dispute, shall bear all of the administrative fees and expenses of the American Arbitration Association and the compensation and expenses of the arbitrator in this proceeding. The final accounting for such fees and expenses shall be set forth in the final reasoned award.*
> *2.4. The fully reasoned award shall be delivered by the Arbitrator hereafter, within the required time.*
>
> *2.5. This Award is in full and final settlement of all claims and counterclaims submitted to this arbitration. All claims not expressly granted herein are hereby denied.*
>
> *IT IS SO ORDERED AND AWARDED, and signed in Los Angeles, California."*

2.17 On August 2, 2015, the Panel issued an order for additional submissions on fees and costs providing in pertinent part as follows:

"The Arbitrator in the above-referenced case issues the following order for additional limited submissions as set forth below:

1.1 In accordance with paragraphs 2.2 and 2.3 of the Interim Operative Decision and Award in this case, Claimant is entitled to recover from USA Track & Field a contribution toward Claimant's reasonable attorney's fees and costs, as well as the Claimant's share of the AAA's and the Arbitrator's fees and costs, for this arbitration.

1.2 The Arbitrator orders further briefing from the parties on the issue of Claimant's recovery of these elements and quantification or computation thereof as follows:

a. By <u>August 14, 2015, midnight PT</u>: Claimant shall file its brief and any supporting evidence or documents addressing the issues specifically set forth above; and
b. By <u>August 28, 2015, midnight PT</u>: Respondent, and the Affected Athlete, if appropriate, shall file submissions in response to the brief and supporting evidence or documents of the Claimant.

1.3 No further briefing or submissions on this subject or in this case will be accepted or considered by the Arbitrator unless otherwise specifically requested or permitted by the Arbitrator.

1.3 Upon receipt of all party submissions on these issues, the Arbitrator will determine whether a brief telephonic oral argument is necessary and request the parties' availability therefor and/or will determine to close the evidence and proceed to render a final reasoned award at that time. The parties may request an oral hearing on this subject when they make their submissions, but granting that request will be subject to the Arbitrator's discretion.

IT IS SO ORDERED."

2.18 The parties agreed to various extensions of time for the Panel to submit its final reasoned award until and through September 25, 2015 and this Award issued on time.

III. STANDARD OF REVIEW AND BURDEN OF PROOF

3.1 The standard of review applicable to a Section 9 case involving team selection was succinctly stated in <u>Craig v. USA Taekwondo</u> (AAA CASE NO. 77 190E 00144 11 JENF):

"4.1 It is well accepted that the standard of review for cases arising under Section 9 of the USOC Bylaws is de novo. Section 9 proceedings are

not appeals of NGB decisions and there is no requirement for an arbitrator in these proceedings to give deference to any prior decision and in fact it would be incorrect to do so.

4.2 The burden of proof is not as clearly defined in the USOC Bylaws or the Act, although a line of cases has developed making the determination of the burden of proof in Section 9 cases turn on whether the case involves a disciplinary proceeding or a selection/eligibility issue. The parties' counsel agreed that because this case involves an athlete selection issue, the burden of proof rests with the athlete to demonstrate that the NGB failed to appropriately apply its rules to the facts at issue. As a result, the athlete claimant was required to present her case first and she was able to provide rebuttal evidence and argument."

See also, Hyatt v. USA Judo (AAA CASE NO. 01-14-0000-7635).

3.2 The Arbitrator adopts in this case the above statement of relevant and applicable procedural law as set forth in the Craig and Hyatt cases.

IV. ANALYSIS

A. The Right Athlete to Compete and the Right to Compete

4.1 There can be no suggestion that Mr. McCandless was in error in any way in accepting his roster spot on the 2015 Pan American Games team or that Mr. Leon was in error in advising USATF of his desire to be considered for the team and finishing with his qualifying time during the relevant window. Basically, there can be no suggestion that Mr. McCandless is in any way to blame, or that Mr. Leon is in any way to blame, for this situation whatsoever. Responsibility for this predicament lies exclusively and solely with USATF. Had USATF not overlooked Mr. Leon's prior qualifying time and his express statement of interest in being selected, there would be no dispute here.

4.2 Given the facts here, we have a case of mistaken selection or wrongful selection based on a mistake in fact.

4.3 Because the parties have agreed that Mr. McCandless was not the correct selection and that Mr. Leon had qualified for selection, we do not have to analyze the Selection Criteria in any detail here. Mr. Leon should have been selected over Mr. McCandless but was not. The parties differ on what the effect was of Mr. McCandless' initial selection instead of Mr. Leon's and whether we are now faced with a removal that invokes the removal provisions of the Selection Procedures.

4.4 Had Mr. McCandless been properly named to the team under the Selection Procedures, then I would agree that the removal provisions of the Selection Procedures should apply. However, here there was a clear mistake in fact as the naming of Mr.

McCandless to the team. In other words, he was not actually named to the team in any operative sense of that word, at least not *vis a vis* Mr. Leon.

4.5 In contract law, a mistake is an erroneous belief, at the time of contracting, that certain facts are true. It can be argued as a defense and if successfully raised can lead to the agreement in question being found void or voidable or an equitable remedy may be provided. Here, there was clearly a mistake in fact at work. Both parties mistakenly believed that Mr. McCandless had qualified under the Selection Procedures. The mistake was the result of an abject mistake in analysis by USATF of which athlete had qualified for the Pan American Games under the Selection Procedures. USATF has admitted its fault in this regard and Mr. McCandless has conceded that Mr. Leon had qualified over him based on the Selection Procedures.

4.6 As a result of this mistake, the fundamental basis for the parties to enter into the contract evidenced by the Selection Procedures provisions governing removal from selection were voidable and did not apply. A key condition to their application was missing, namely a proper selection of Mr. McCandless under the Selection Procedures to be on the team.

4.7 This doctrine does not provide a broad excuse for a national governing body to avoid selections it later does not like; this is an exceptional case where the initial selections were made not based on some misinterpretation of the application of the Selection Procedures but were made based on the lack of a key fact on which the selection was to have been based, namely that Mr. McCandless was the individual who had properly qualified for the team when he was not. No one disagrees with this point.

4.8 As a result of the mistake in fact, I find that the removal provisions of the Selection Procedures do not apply. Simply put, Mr. McCandless did not actually qualify for the team so the removal provisions could not apply.

4.9 Having said that, USATF had argued that the Arbitrator should imply a term in the Selection Procedures to allow for removal here on grounds not stated in the express selection procedures because the wrong selection was made. The Arbitrator declines to do that because simply implying terms, no matter how practical they might be, where there is a very detailed selection procedure that has been vetted by the national governing body and the USOC and relied upon by athletes in their own competitive preparations, would derogate from the significant due process aspects of selection procedures and open the door potentially to selection procedures having no significant meaning or being subject to being rewritten by arbitrators or national governing bodies on an ad hoc or ex post facto basis. No reader of this decision should take from it that this Arbitrator condones implying terms into selection procedures; the holding here is limited to the very narrow and frankly unique facts at hand, where there is an agreed upon mistake in fact that forms the basis for the selection in the first place.

B. Arbitration and Attorney's Fees and Costs

4.10 Mr. McCandless seeks to have the Arbitrator shift responsibility for his portion of the arbitration fees and costs (those fees of the arbitrator and of the AAA) to USATF. To determine this issue, I must first analyze the basis for such a request, then, if such a basis is adequately established, determine whether the facts and equity support allocation, and then if the facts and equity support allocation, determine a reasonable amount to shift.

4.11 Internationally, the general rule on allocating arbitration costs is the oft-quoted maxim that "the costs follow the event." *E.g.*, Arbitration Act 1996 (Section 61(2)) (United Kingdom). See generally *Redfern and Hunter on International Arbitration* §9.93 (5th ed. 2009); Robert Smit and Tyler Robinson, "Cost Awards in International Commercial Arbitration: Proposed Guidelines for Promoting Time and Cost Efficiency", 20 *Am. Rev. Int'l Arb.* 267 (2009); Chartered Institute of Arbitrators, *Practice Guideline 9: Guideline for Arbitrators on Making Orders Relating to the Costs of the Arbitration*. In other words, in international cases, the prevailing party can expect to receive an award in its favor that includes its own legal fees and other arbitration-related costs including the costs of the arbitrators and the arbitration institution.

4.12 Both the New York Convention and the FAA are silent on this topic.

4.13 Under the general rule in the United States in litigation and arbitration, dating from a US Supreme Court case in 1796 (see J. Gotanda, "*Awarding Costs and Attorneys' Fees in International Commercial Arbitration*," 21 Mich. L. Rev. 10, n.39 (1999)), a prevailing party is generally entitled to shifting of its reasonable attorney's fees or costs to the non-prevailing party only upon the basis of contract or a statute providing for such shifting. See, e.g., California Civil Code § 1717; College of Commercial Arbitrators, *Guide to Best Practices in Commercial Arbitration* 181 (2nd ed. 2010). In some limited circumstances, a court can also award a party's attorney's fees or costs where there exists some form of egregious misconduct during the course of the litigation or proceeding that might have prolonged the proceedings or unnecessarily or unreasonably increased the attorney's fees or costs of their opponent.

4.14 There is case law that suggests that an arbitrator possesses the inherent authority to award attorney's fees due to the conduct of a party both before (given the arbitrator findings that USATF was "the sole cause of the extraordinary issues that gave rise to this dispute") and during the arbitration proceeding. See, e.g., Todd Shipyards Corp. v. Cunard Line, Ltd., 943 F.2d 1056 (9th Cir. 1991) [arbitration conducted under AAA Commercial Rules]; ReliaStar Life Ins. Co. of N.Y. v. EMC National Life Co., 564 F.3d 81 (2nd Cir. 2009).

4.15 Section R-43(a) of the AAA Commercial Arbitration Rules ("AAA Commercial Rules") provides that, "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..." Counsel in this and other cases have argued that this provision provides a basis for an assessment of attorney's fees in certain circumstances.

4.16 Prior cases have found attorney's fees and costs were awardable against a national governing body in a selection case arising under Section 9 of the USOC Bylaws. See, e.g., Pohl v. USA Badminton (AAA No. 30 190 00604 03) (2003), at par. 17 (stating, "In light of the fact that these proceedings were the direct result of USAB's failures throughout the course of these trials, it shall bear all of the costs of these proceedings, including Pohl's filing and attorney's fees, as well as all costs and fees of the American Arbitration Association and the compensation of the arbitrator.").

4.17 The Arbitrator declines to find, as urged by claimant, that USATF acted in bad faith in any way during the arbitration proceedings, but the Arbitrator stands by the decision that this is one of the truly rare cases in which a losing party can and should be awarded a contribution toward his or her attorney's fees and costs given the mistake that directly caused and required an arbitration to determine the outcome of this dispute. This was not a mistake in the sense of reasonably applying selection procedures where there might be a difference of opinion; the USATF mistake was grossly negligent in naming Mr. McCandless instead of Mr. Leon and neither Mr. McCandless nor Mr. Leon did anything other than what they were supposed to do in the circumstances. Accordingly, I am awarding a contribution toward the attorney's fees and costs of Mr. McCandless from USATF in the amount of $7500. I am making this award as a partial contribution toward the $12,126.50 being sought by Mr. McCandless on the basis that Mr. McCandless was not the prevailing party, though he was the victim of USATF's mistake.

4.18 Section R-47 of the AAA Commercial Arbitration Rules ("AAA Commercial Rules"), titled "Scope of Award", provides as follows:

> *"(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 Sections R-53, R-54, and R-55. The arbitrator may apportion such fees, expenses, and compensation among the parties in such amounts as the arbitrator determines is appropriate."*

4.19 Section R-54 of the AAA Commercial Rules, titled "Expenses", provides as follows:

> *"The expenses of witnesses for either side shall be paid by the party producing such witnesses. All other expenses of the arbitration, including*

required travel and other expenses of the arbitrator, AAA representatives, and any witness and the cost of any proof produced at the direct request of the arbitrator, shall be borne equally by the parties, unless they agree otherwise or unless the arbitrator in the award assesses such expenses or any part thereof against any specified party or parties."

4.20 These provisions of the AAA Commercial Rules are consistent with the text of the Revised Uniform Arbitration Act ("RUAA"), which provides in Section 21(c) that "an arbitrator may order such remedies as the arbitrator considers just and appropriate under the circumstances of the arbitration proceeding", and its comment 2 stating "parties may provide for the remedy of attorney's fees and other expenses in their agreement even if not otherwise authorized by law." (statutory reference here to the AAA Commercial Rules with their Section R-54 broad discretion for arbitrators to make awards of arbitration fees almost certainly suffices here as constituting a proper basis for awarding arbitration costs if the RUAA applied). The RUAA has been adopted in many US states, though notably California and New York have retained their own arbitration statutes, which, while different, recognize similar principles. E.g., Calif. C. Civ. Pro. § 1284.2 ("unless the arbitration agreement otherwise provides or the parties to the arbitration otherwise agree, each party to the arbitration shall pay his pro rata share of the expenses and fees for the neutral arbitrator, together with other expenses of the arbitration incurred or approved by the neutral arbitrator, not including counsel fees or witness fees or other expenses incurred by a party for his own benefit") (here the reference to the AAA Commercial Rules with its broadly discretionary Section R-50 suffices as the parties' agreement on this point).

4.21 Essentially, under AAA Commercial Rules Section R-50, in the absence of an agreement between arbitrating parties to the contrary, the arbitrator has discretion to assess and award arbitrator and arbitral institution fees and expenses in the final award. This discretion does not appear to be bounded by any constraints, at least not on the face of the rule, and it appears that this Rule 50 applies irrespective of whether the parties have an express fees and costs shifting provision in their agreement or not; simply by agreeing to arbitrate under the AAA Commercial Rules, which include this provision, indicates the parties' assent to and binds the parties to permit cost shifting should the arbitrator determine to do so. This arrangement is not unique to the AAA; other reputable arbitral institutions have similar rules on this subject. *Compare* R-54, *with* CPR Rules 17.2, 17.3 and JAMS Rule 24(f) and 31. *See generally* College of Commercial Arbitrators, *Guide to Best Practices in Commercial Arbitration* 181-82 (2nd ed. 2010)

4.22 Presumably, as is the case with the general freedom of parties to construct their arbitration by agreement as they see fit, this rule based cost shifting right could be modified by the parties in their agreement to arbitrate or in their arbitration clause (or, as here, in the relevant rules requiring submission to the AAA under the AAA Commercial Arbitration Rules subject to the limited modification procedure set forth in Section 220522(a)(4) of the Ted Stevens Olympic and Amateur Sports Act). No such rules modification is in existence for these cases as yet, so the Arbitrator is bound by the plain

text of Section R-54.

4.23 Now that the Arbitrator has established that arbitration costs can be shifted within a broad range of arbitrator discretion, I must determine whether I should shift such arbitration costs here.

4.24 Considering all of the above legal standards, the Arbitrator is of the view that the entire AAA filing fees and the entire fees of the Arbitrator should be shifted to USATF. The conduct that gave rise to the demand for arbitration in this case was directly the result of the conduct of USATF. The claimant athlete bore no responsibility for the decisions that were made by or the actions that were taken by USATF. Accordingly, justice requires that USATF should bear the burden of the costs of its actions.

4.25 Once I accept that costs should be shifted, it is well accepted that the Arbitrator is empowered to determine the quantum of costs that can be shifted. Generally, it appears from the jurisprudence that such shifted costs should be "reasonable". I could determine to shift all, some, or none of the costs in my sole discretion absent a prohibition otherwise in the parties' arbitration agreement or rules (no such prohibition exists here). Given that 100% of the fees requested are either the standard filing fees of the AAA and the fees dramatically reduced from my usual hourly rates, and that the bulk of the arbitration costs to be shifted consist of my own fees, I would be hard pressed to find that the costs here are unreasonable absent the presence of some other circumstance. Accordingly, I determine that the requested arbitration fees of the arbitrator and the filing fees of the AAA are reasonably calculated and reasonable under the circumstances and should be entirely shifted to USATF.

V. AWARD

5.1. The arbitration claims of Tyler McCandless are dismissed because of an admitted mistake in notification by USA Track & Field.

5.2 USA Track & Field, as the sole cause of the extraordinary issues that gave rise to this dispute, immediately shall pay a contribution toward the attorney's fees of Tyler McCandless, in the amount of $7,500.00.

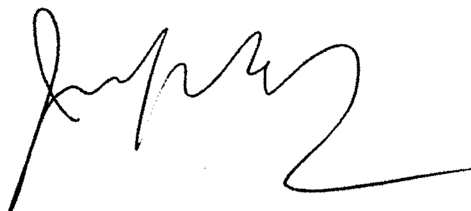
5.3 USA Track & Field, as the sole cause of the extraordinary issues that gave rise to this dispute, shall bear all of the administrative fees and expenses of the American Arbitration Association and the compensation and expenses of the arbitrator in this proceeding. Accordingly, the administrative fees of the American Arbitration Association totaling Eight Hundred Fifty Dollars and No Cents ($850.00) and the compensation of the arbitrator totaling One Thousand Five Hundred Dollars and No Cents ($1,500.00) shall be borne by USA Track & Field. Therefore, USA Track & Field shall reimburse Tyler McCandless the sum of One Thousand Six Hundred Dollars and No Cents ($1,600.00), representing that portion of said fees in excess of the apportioned costs previously incurred by Tyler McCandless.

5.4 The amounts awarded herein shall have added to them post-judgment interest accruing at the legal rate under applicable law.

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

5.6 The AAA is directed to notify the parties of this Corrected Final Reasoned Award and Decision forthwith.

IT IS SO ORDERED AND AWARDED, and signed in Los Angeles, California.



February 29, 2016

Jeffrey G. Benz
Arbitrator