BEFORE THE AMERICAN ARBITRATION ASSOCIATION
Commercial Tribunal

Melissa Merson Claimant **v.** USA Triathlon Respondent	**AAA No. 01-14-0001-6464** **Order on Claimant's Motion to Dismiss**

To: Michael Straubel (*michael.straubel@valpo.edu*)
Valparaiso University Law Clinic
510 Freeman Street
Heritage Hall
Valparaiso, IN 46383-7897

Steve Smith (*steve.smith@hro.com*)
Holme Roberts & Owen
90 South Cascade Avenue
Suite 1300
Colorado Springs, CO 80903

cc: Gary Johansen (*gary.johansen@usoc.org*)
United States Olympic Committee
1 Olympic Plaza
Colorado Springs, CO 80909-5780

Jennifer Nilmeier (*JenNilmeier@adr.org*)
Manager of ADR Services
American Arbitration Association
Western Case Management Center
6795 North Palm Ave, 2nd Floor
Fresno, CA 93704

On February 10, 2015, Claimant Mellissa Merson ("Claimant") filed a Motion to Dismiss for Failure to State a Claim, and Respondent USA Triathlon (sometimes "USAT" or "Respondent") opposed that motion on February 23, 2015. For the reasons set forth below, the Motion to Dismiss is treated as a motion for summary judgment in part. The motion is denied in part and granted in part.

Background of the Dispute:

1. Claimant was a member since 2008 of the Executive Board of the International Triathlon Union ("ITU") having been elected that year. As a direct result of holding that position, Claimant was also an *ex officio* member of the USA Triathlon Board of Directors, the Respondent in this matter.

2. During 2012 the Respondent's Board of Directors was called on to vote on an individual whom the USAT would nominate to stand for election to ITU Executive Board for the coming term of office and Claimant sought nomination to be re-elected. The USAT Board voted to nominate a person other than Claimant and Claimant eventually brought an Article 9 Proceeding before the United States Olympic Committee ("USOC") seeking to overturn that vote and compel the USAT to nominate her to stand for election to the ITU Executive Board. (AAA Case No. 77 190 272 12 JENF) (the "First Arbitration") The hearing on that complaint was held on September 20 and 21, 2012, and a decision rendered by the Arbitrator on September 22, 2012, with a reasoned decision published on October 12, 2012.[1] The First Arbitral Award[2] ruled for USAT and held that:

> "[Ms. Merson]'s claims and requested relief are denied (in other words, the USA Triathlon Board's decision to nominate only [another individual] for a position on the ITU Executive Board remains in effect.)"

(¶1.5 at 6 First Arbitral Award; see also *id* at ¶7.0 at 16).

3. On or about October 11, 2012, an USAT form purporting to nominate Ms. Merson to stand for election on the ITU Executive Board is alleged to have been prepared by or on behalf of Ms. Merson and allegedly executed by the Secretary General of USAT (the "SG"). (See January 16, 2015 Charging Letter, Exhibits E & F) While it is not fully clear in the papers before the Arbitrator precisely what then transpired, Ms. Merson was not elected to the ITU Executive Board and, consequently, lost her position as an *ex officio* member of the USAT Board of Directors.

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[1] Statements in the briefs before this Arbitrator that the decision in the First Arbitration was issued on October 12, 2012 are misleading at best.

[2] See January 16 Charging Letter, Exhibit D.

4. Not deterred in her zeal to participate in governance of her sport, Claimant was elected to the Mid-Atlantic Region Council of the USAT in the fall of 2013 and assumed office in January 2014. (See *Motion to Dismiss*, at 12)

The Current Proceeding:

5. Approximately twenty months after the alleged actions of Ms. Merson in submitting the nomination form to the ITU, and over six months since her election to the Mid-Atlantic Region Council Respondent USAT notified Claimant that she was under investigation for her actions with respect to the nomination in 2012. That notification informed her that she was to be subject to a disciplinary proceeding before the Board of Hearings and Appeals of the USAT Board of Directors ("BHA") to determine whether she should be sanctioned and excluded from USAT activities for a period of time as a result. (See June 6, 2014 Charging Letter) This is apparently the first point at which Claimant was notified that a formal disciplinary proceeding would be held[3]. That Charging Letter specified that:

a. Claimant violated the USAT Volunteer Code of Ethics by "...submitting, or participating in the submission of, an authorized and improper International Triathlon Union nomination for the ITU Executive Board."

b. That the alleged actions "may violate Section IV.G.1 of the Code" and setting out that Code Section in pertinent part.

c. The complaint about a possible violation of the Code had been referred to a panel of the BHA for an investigation as to whether a possible violation had occurred.

d. The result of the investigation was that a Disciplinary Hearing into Claimant's actions was to be held.

e. That if a violation was determined to have occurred, the Claimant was possibly subject to being "...fined, sanctioned, censured, suspended, expelled, or other[wise] rendered [in]eligible to compete or participate in USA Triathlon sanctioned events."

f. That it was the recommendation of the USAT Board of Directors that, if a violation of the Code were to be found, that the Claimant's "...membership be suspended for a period of no less than 3 years and that all privileges and positions held as a result of your USAT membership be similarly suspended."

g. That the BHA would be in contact with her "in the near future."

(See *Motion to Dismiss*, Exhibit Y)

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[3] It was not, however, the first point at which such charges were considered by USAT. It appears undisputed that Respondent commenced an internal complaint procedure sometime in 2013 but did not inform Claimant of that process until sending the June 6, 2014 Charging Letter. (See Opposition at 10)

6. Claimant quickly retained counsel and on June 27, 2014, before receiving any new communication from the BHA, her counsel had in turn filed a complaint against Respondent before the USOC under Article 9 of the USOC By-Laws[4]. That complaint asked that the dispute between Claimant and Respondent be resolved by the USOC, if possible. (See Opposition Exhibit J)

7. The Parties evidently participated in efforts at resolution through the USOC Ombudsman pursuant to Article 9[5]. Sometime during that apparently lengthy process, Respondent decided not to wait any longer and informed the Claimant by letter of September 2, 2014, that the BHA would proceed with the disciplinary proceeding and hold a hearing on the charges against her on October 15, 2014[6]. That letter also informed her of her rights to answer, appear and to retain counsel. On September 26, 2014, Claimant's counsel requested that Respondent provide the discovery requested by Claimant on June 17, 2014, prior to the filing of an Article 9 Complaint on June 27, 2014. Again on September 29, 2014, Claimant repeated that request and also provided a copy of specific discovery requests pursuant to USOC By-Law Article 9. In both September letters, Claimant informed Respondent that if Respondent did not inform her by October 6, 2014, that the requested discovery would be produced in advance of the noticed hearing, she would file a formal arbitration demand pursuant to Article 9. Apparently Respondent neither provided the discovery nor informed Claimant that it would do so, and on October 6, 2014, Claimant filed the arbitration demand which resulted in this proceeding.

8. Pursuant to a schedule agreed upon by the Parties and Ordered by the Arbitrator, Respondent on January 16, 2015, served on Claimant a new and expanded "Charging Letter" stating in a bit more detail the claims against Claimant, and with supporting Exhibits. That January 16 Charging Letter was based on the same allegations made in the June 26 Charging Letter, namely submission to the ITU of the October 11, 2012 nomination form signed by the Claimant and the SG. The January 16 Charging Letter did assert additional charges that the alleged actions of Claimant were not only in violation of Section IV.G.1 of the Code (specified in the June 6, 2014, Charging letter) but also that she may have violated:

a. Section I of the Code

b. Article III, sections (a) and (b) of the USAT Bylaws

c. Article XVIII, section 1 of the USAT Bylaws

d. Section 5231(a) of the California Nonprofit Public Benefit Corporations Law

The Motion to Dismiss:

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[4] Claimant counsel had also on June 17, 2014, served on the Respondent a discovery demand, requesting documents and information Claimant wanted in order to defend herself against the impending charge. (See Motion to Dismiss, Exhibit X)

[5] See, e.g., Opposition, Exhibit K.

[6] See Motion to Dismiss, Exhibit Z.

9. On February 10, 2015, Claimant filed a *Motion to Dismiss for Failure to State a Claim upon Which Relief Can Be Granted*, with accompanying Exhibits (the "Motion to Dismiss"). The Motion to Dismiss asserted numerous grounds, each of which will be addressed *infra*. On February 23, 2015, Respondent filed its *Opposition to Claimant Melissa Merson's Motion to Dismiss for Failure to State a Claim Upon Which Relief Can be Granted,* with accompanying Memorandum and Exhibits. (the "Opposition"). While no showing was made by Claimant of a likelihood of success on the merits prior to filing the Motion, it will nevertheless be addressed to determine if the issues may be narrowed in this matter. (AAA Rules of Commercial Arbitration, R33).

Legal Standard

10. It is well-settled that the party moving for dismissal under the Federal Rules of Civil Procedure (Rule 12(b)(6)) has the burden of proving that no claim has been stated. (2 James William Moore et al., Moore's Federal Practice § 12:34 (3d ed. 2009)). To survive a motion to dismiss, "a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" (*Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (*citing Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Iqbal*, 556 U.S. at 678 (citation omitted). This plausibility standard is not a "probability requirement," but instead asks for "more than a sheer possibility that a defendant has acted unlawfully." *Id.* On a Rule 12(b)(6) dismissal motion, the issue is not whether a plaintiff will ultimately prevail, but whether it is entitled to offer evidence to support its claims. *Scheuer v. Rhodes*, 416 U.S. 232, 236 (1974), *abrogated on other grounds*, *Harlow v. Fitzgerald*, 457 U.S. 800 (1982).

11. It is only required of a complaint[7] that it contain "a short and plain statement of the claim showing that the pleader is entitled to relief," and this standard "contains a powerful presumption against rejecting pleadings for failure to state a claim." *Gilligan v. Jamco Dev. Corp.*, 108 F.3d 246, 248-49 (9th Cir. 1997) (internal quotation omitted); *see also Hall v. City of Santa Barbara*, 833 F.2d 1270, 1274 (9th Cir. 1986) ("It is axiomatic that 'the motion to dismiss for failure to state a claim is viewed with disfavor and is rarely granted.'"). Furthermore, when considering a motion for failure to state a claim under United States federal law, "all allegations of material fact are accepted as true and should be construed "in the light most favorable to the plaintiff." *Smith v. County of Los Angeles*, 535 F. Supp. 2d 1033, 1034 (C.D. Cal. 2008) (internal quotation omitted).

12. This strong presumption against dismissal of a complaint for failure to state a claim is not unique to the federal courts, but reflects a general position in US jurisprudence that on a motion to dismiss the court or arbitrator must afford the pleadings a liberal construction (*EBC I, Inc. v. Goldman Sachs & Co.*, 5 N.Y.3d 11, 19 (2002)). In doing so the court or arbitrator must accept as true the facts alleged in the complaint and submissions in opposition to a motion to dismiss,

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[7] Fed. R. Civ. P. 8(a)(2)

and accord plaintiffs the benefit of every possible favorable inference and determine only whether the facts as alleged fit within any cognizable legal theory. (*Sokoloff v. Harriman Estates Dev. Corp.*, 96 N.Y.2d 409, 414 (2001)). That is, the court or arbitrator's role in evaluating a motion to dismiss "is limited to determining whether the complaint states a cause of action, not whether there is evidentiary support for the complaint." (*Bernstein v. Kelso & Co.*, 231 A.D.2d 314, 317 (1st Dep't 1997) ("We liberally construe the complaint in favor of the Plaintiff and accept as true all factual allegations.")). Simply put, "whether a plaintiff can ultimately establish its allegations is not part of the calculus in determining a motion to dismiss." (*EBC I*, 5 N.Y.3d at 19).

The Grounds Stated for Dismissal

13. In short, none of the three grounds for dismissal as enumerated in the Motion to Dismiss actually challenge the adequacy of the pleadings, apparently conceding that they do make out a cognizable claim. Rather, the grounds arise from either affirmative defenses, or procedural deficiencies. Motions to dismiss for failure to state a claim generally cannot reach the merits of these affirmative defenses unless they are clearly alleged in the pleadings, themselves. Goodman v. Praxair, Inc., 494 F.3d 458, 464 (4th Cir. 2007).

14. When a motion to dismiss presents matters outside of the pleadings, "the motion must be treated as one for summary judgment." Fed. R. Civ. P. 12(d); see also, e.g., *Obaseki v. Fannie Mae*, 840 F. Supp. 2d 341, 344 (D.D.C. 2012) (converting a motion to dismiss a complaint as untimely into a summary judgment motion because the parties relied on evidence outside the pleadings). The judge or arbitrator has complete discretion to determine whether or not to accept the submission of any material beyond the pleadings that is offered in conjunction with a motion to dismiss and rely on it, thereby converting the motion, or to reject it or simply not consider it. 5C Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* § 1366 (3d ed. 2008). Upon conversion, the standard of summary judgment applies, and the non-movant must demonstrate that there is no genuine issue as to any material fact. *Reese v. Anderson*, 926 F.2d 494, 498 (5th Cir. 1991) When, like here, a party's motion to dismiss is based on an affirmative defense not apparent on the face of the challenged pleading, courts and arbitrators often rely on extrinsic evidence presented by the parties and convert the motion to one for summary judgment. *See, e.g., Rycoline Products, Inc. v. C & W Unlimited*, 109 F.3d 883, 886-87 (3d Cir. 1997); *Obaseki*, 840 F. Supp. 2d at 344; Haskins v. Hawk, No. CIV.A. ELH-11-2000, 2013 WL 1314194, at *6 (D. Md. Mar. 29, 2013). Because, here, the parties opted to rely on external exhibits in their respective briefs, the arbitrator will accept these documents into the record and convert the motion to dismiss into a motion for summary judgment.

A. Procedural Timeliness of the Charges Specified in the January 16 Charging Letter

15. Claimant moves to dismiss Respondent's January 16, 2015 Charging Letter on the grounds that it adds new claims, in an untimely manner, to the allegations in the original Charging Letter of June 6, 2014. Amendments to pleadings should be liberally allowed. *See, e.g.*, Fed. R. Civ. P. 15 (allowing amendment of a pleading once as a matter of course and subsequently upon the other party's written consent or the court's leave, which should be given

"freely . . . when justice so requires"); *Foman v. Davis*, 371 U.S. 178, 182, 83 S. Ct. 227, 230, 9 L. Ed. 2d 222 (1962) (holding that leave to amend complaint should be freely given in absence of any apparent or declared reasons such as undue delay, bad faith or dilatory motive on part of movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to opposing party by virtue of allowance of amendment, and futility of amendment).

16. The January 16, 2015 Charging Letter states as its factual basis only the same complaint as the June 6, 2014 letter—namely the submission of an allegedly fraudulent nomination form. The parties need elucidate no new facts to support their claims and defenses. The only difference between the charging letters is that the subsequent letter alleged that these actions violated not only Section IV.G.1 of the Code, but also Section I, as well as two Articles of the USAT Bylaws and a section of the California Nonprofit Public Benefit Corporations Law. These changes are not substantive. *See Wilson v. Intercollegiate (Big Ten) Conference Athletic Ass'n*, 668 F.2d 962, 966 (7th Cir. 1982) (stating that "merely added constitutional and statutory references purporting to further show that the treatment of which [the injured party] complained was unlawful" did not change the original claims drastically). As such, simply adding another basis for asserting that the actions alleged were detrimental to Respondent does not appear to prejudice Claimant. Accordingly, the amendment to the Charging Letter as it relates to the submission of the allegedly fraudulent nomination form will be allowed[8].

17. However, to the extent that the January 16, 2015 Charging Letter may be used to assert facts other than the nomination issue as the basis of complaint, it would present new factual claims. Although amendments are liberally allowed, "where the amendment seeks to add a new claim, derived from a different set of facts of which the original complaint did not provide adequate notice," prejudice will result. *Smith v. Cadbury Beverages, Inc.*, 942 F. Supp. 150, 160 (W.D.N.Y. 1996) *aff'd*, 116 F.3d 466 (2d Cir. 1997) (internal citations omitted) (preventing the amendment of a complaint to allege new facts and claims occurring two years after the incidents underlying the original complaint). Accordingly, pursuant to Rule 6, AAA Rules of Commercial Arbitration, any claims in the January 16, 2015 Charging Letter directed to issues other than the allegedly fraudulent nomination form (see discussion *infra*) will not be permitted, and the claims in the current proceeding are not amended to include them.

Claims based on facts prior to October 12, 2012

18. A good deal of the briefing and accompanying exhibits from both parties relate not to the question before this Arbitrator, but to the question presented to the arbitrator in the First Arbitration, namely: that the actions of the Respondent's Board were not fully disclosed to the arbitrator and, therefore, the decision in that matter should not have been in favor of Respondent. Regardless of the merits of this argument, and this Arbitrator has no view on that issue, Claimant

[8] Claimant also references this Arbitrator's Case Management Order of January 19, 2015, as a basis for striking those portions of the January 16, 2015 Charging Letter setting out additional legal bases for disciplinary action. In addition to the reasons set out hereinabove permitting amendment, to the extent necessary, it should be pointed out here that the Claimant stipulated to the procedure used in this matter, including the issuance of a new Charging Letter by Respondent, which Respondent did while confining itself to the original factual allegation.

cannot raise it here. Res judicata and collateral estoppel principals apply to a binding arbitration award in much the same manner as they do a court judgment. *See U.S. W. Fin. Servs., Inc. v. Buhler, Inc.*, 150 F.3d 929, 932 (8th Cir. 1998) ("A final arbitration award, unless it is set aside for a legally sufficient reason, has the same preclusive effect as a judgment"). As such, once a binding arbitration award has been rendered, issues that were either raised or could and should have been raised in the earlier adjudication cannot be reevaluated in a subsequent arbitration. *See Grynberg v. BP, P.L.C.*, 527 F. App'x 278, 281-82 (5th Cir. 2013). There is nothing in the record to indicate that Claimant raised this issue either in the First Arbitration prior to October 12, 2012, nor moved for reconsideration or otherwise challenged that decision until setting it out in Claimant's memorandum in support of her motion to dismiss As such, res judicata will prevent Claimant's attempt to relitigate it here. *Trustmark Ins. Co. v. John Hancock Life Ins. Co. (U.S.A.)*, 631 F.3d 869, 874 (7th Cir. 2011) ("Arbitrators are entitled to decide for themselves those procedural questions that arise on the way to a final disposition, including the preclusive effect (if any) of an earlier award").

Claims Based on Facts occurring after October 12, 2012, Other than Submission of the Nomination Form

19. In addition to the facts and allegations relating to the issue resolved by the First Arbitral Decision, Respondent has opposed the Motion to Dismiss with argument and exhibits relating to events other than the submission of the accused nomination form. Namely, Respondent has presented evidence with respect to harassing actions, including allegedly frivolous lawsuits by another Board Member, Mr. Sexton, and threatening behavior by an attorney allegedly associated with Claimant and Mr. Steven Sexton, Mr. John Lines (though precisely when these all of these occurred is not specified, it is clear at least some predated the First Arbitration).

20. However disruptive and annoying those events may have been to Respondent, and whether or not the Claimant was a participant in those events (which appears to be a question of fact), and whether or not they occurred after October 12, 2012, it remains that none of these were addressed in either the June 6, 2014 or the January 16, 2015 Charging Letters. Consequently, since it does not appear that Respondent has sought to amend the Charging Letter to add these events to this proceeding, they are irrelevant to the resolution of this matter. No motion is required to strike them. *See* Fed. R. Civ. P. 12(f) ("The court may strike from a pleading an insufficient defense or any redundant, immaterial, impertinent, or scandalous matter. The court may act . . . on its own . . . "); *see also* Allen v. Figuera, 416 F. App'x 771 (10th Cir. 2011) (stating that a magistrate judge could *sua sponte* strike affidavits based on the submitter's attempt to use them to circumvent the process for establishing facts set forth by Federal Rules of Civil Procedure).

B. Whether the Claims are Time Barred

21. Claimant asserts that the Respondent failed to provide for a hearing within the time set out in Chapter XV of the Respondent's By-Laws. (Motion to Dismiss at 2, 11). Chapter XV is not a statutory bar provision, but a procedural requirement, subject to modification by the actions of the parties or the unilateral discretion of the USAT Board of Hearings and Appeals.

> Notice. The proposed subject of the hearing (the "respondent") shall be given written notice personally delivered or sent to his last known address by certified mail, return receipt requested. The notice shall apprise the respondent of the specific charge made against him, the specific Rules, regulations, or policies alleged to have been violated, the potential penalties which may be imposed, and the date, time, and place where a hearing will be held. The hearing date shall be set for a time not less than thirty (30) days nor more than sixty (60) days after the date of the notice. The Hearing Panel may continue or postpone the hearing in its sole discretion for good cause shown.

(ByLaws, Chapter XV, section (4)(a).)

22. Claimant herself specifies that the date of the notice was June 6, 2014, and then argues (though without specificity) that the date range during which a hearing before the BHA had to be held was, therefore, July 6 – August 5, 2014. Claimant does not address the issue of a postponement, for which By-Law XV clearly provides.

23. While it was not the Hearing Panel which affirmatively postponed the hearing, there is no question that it was postponed. In fact, it was postponed because on June 27, 2014, the Claimant filed a complaint with the United States Olympic Committee under Article 9 of the USOC ByLaws, well before the first date on which the BHA could have scheduled a hearing. Nevertheless, Claimant now argues that the Article 9 proceeding did not have the effect of postponing the hearing date and, therefore, by August 5, 2014, the Respondent had lost the ability to conduct the disciplinary hearing at all. Claimant cites no authority for this proposition, and the Arbitrator is unaware of any support for such a position.

> Article XIII of the USAT ByLaws provides specifically that:
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> USA Triathlon agrees to submit, upon demand of the United States Olympic Committee, to binding Arbitration conducted in accordance with the commercial rules of the American Arbitration Association in any controversy … involving the opportunity of any amateur athlete, coach, trainer, manager, administrator or official to participate in amateur athletic competition.[9]

24. Claimant concedes that the dispute represented in the June 6, 2014 Charging Letter "…was removed…" by her own actions from the USA Triathlon Board of Hearings and Appeals. Therefore, it was by definition no longer pending before the Respondent. Whether the Article 9 complaint is considered to toll the time periods of the disciplinary process which

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[9] The right of an athlete, administrator or official to seek the protection of the USOC arbitration procedures is addressed in the USOC By-Laws Article 9, which includes administration by the USOC legal department and the participation of the USOC Ombudsman. (Art. 9.5) If a resolution is not reached through the Ombudsman, or if either party is dissatisfied with the results, then either may seek arbitration before the AAA. (Art. 9.6, 9.7).

has been removed to the USOC[10], or whether they are considered to be supplanted by the procedural dates set out in USOC ByLaw Article 9[11], it is beyond question that the actions of both Parties hereto have been timely in this regard. Claimant did not want to participate in a hearing before the BHA and so submitted to the jurisdiction of the USOC, and on July 3, 2014, the USOC informed the Parties that their dispute was then subject to the USOC Article 9 procedures, and that if either party was dissatisfied, the resolution was to be through arbitration before the AAA (Opposition, Exhibit K). Claimant makes no claim that the USOC acted in an untimely manner or otherwise violated any of her due process rights.

25. There does not appear to have been any claim raised during the USOC administration of the dispute that the USOC did not have jurisdiction by reason of any time bar, nor that the demand for arbitration was in any way time barred.

C. Whether the Claims Should be Dismissed under the Principle of Laches

26. Claimant next raises a defense that the Respondent's disciplinary claims should be barred under the principal of laches. Laches is an equitable doctrine which provides that an action may be barred if three elements are established: (i) inexcusable delay in asserting the claim; (ii) an implied waiver by the party bringing the action through knowing acquiescence in an existing condition; and (iii) prejudice to the adverse party. (27 Am.Jur. 2d Equity §124.) In addition to these well established elements, some jurisdictions will also examine whether the adverse party lacked knowledge that the complaining party would assert a claim and that the adverse party acted in reliance on the fact of the delay. (Id.) Whether the time period of the delay is "inexcusable" or "unreasonable" is dependent on the facts of each case. The period may be informed by any applicable statute of limitations (according to California's Code of Civil Procedure § 338, an action for fraud must be filed within three years from the date of discovery by the aggrieved party), but is not defined by such a time period.[12] In this case, the Respondent's

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[10] *See, e.g., Scharer v. San Luis Rey Equine Hosp., Inc.*, 204 Cal. App. 4th 421, 430 (2012) (noting that "courts have adhered to a general policy which favors relieving plaintiff from the bar of a limitations statute when, *possessing several legal remedies* he [or she], reasonably and in good faith, pursues one designed to lessen the extent of his injuries or damage") (emphasis and brackets in original).

[11] See USOC ByLaw Article 9.10.

[12] In *Petrella v. Metro-Goldwyn-Mayer, Inc.*, 134 S. Ct. 1962 (2014), the Supreme Court held that the doctrine of laches could not be invoked as a bar to a copyright holder's pursuit of a claim for damages that was brought within the copyright statute's three-year statute of limitations. The Court noted that, "in extraordinary circumstances, laches may, at the very outset of the litigation, curtail the relief equitably awarded." *Id.* at 1966. For example, the doctrine of laches would prevent the owner of copyrighted architectural designs from mandating the destruction of over 100 complete and occupied homes, even if a suit requesting such relief were brought within the three-year statute of limitations. *Id.* at 1978 (discussing *Chirco v. Crosswinds Communities, Inc.*, 474 F.3d 227 (C.A.6 2007)). Because, in that case, "the plaintiffs knew of the defendants' construction plans before the defendants broke ground, yet failed to take readily available measures to stop the project; and the requested relief would 'work an *unjust* hardship' upon the defendants and innocent third parties," destruction of the homes was barred by the laches doctrine, although the copyright holder could still seek other remedies including financial and injunctive relief. *Id.* (emphasis in original). Indeed, the Court emphasized, "we have never applied laches to bar in their entirety claims for discrete wrongs occurring within a federally prescribed limitations period. Inviting (continued...)

ByLaws do not set out any limitation on the time period on which a disciplinary proceeding may be brought, and Claimant has not identified any, and so the general principles of equity will apply.

27. Looking to state law for guidance, Respondent argues that the law of Colorado (in which Respondent has been incorporated since November of 2012) should guide the inquiry. Colorado has a statute of limitations of three (3) years for civil actions sounding in fraud. (C.R.S. §13-80-101(1)(c)[13], and Respondent urges this on the panel. However, in so far as the Arbitrator can determine on the record before him, the actions which form the basis of the complaint occurred in October of 2012, during a time when Respondent was a California corporation. As California also has a three-year statute of limitations for actions sounding in fraud (CA Civ. Pro. § 338), the choice of law between Colorado and California is irrelevant, and Respondent's claims are timely under the statutes of limitation of both states.

28. Claimant makes the allegations that she has been prejudiced by delay, and even specifies that the basis of the alleged prejudice arises from an inability "...to gather evidence, seek witnesses, and hire an attorney to combat the charge..." against her (See Motion to Dismiss, at 13). However, Claimant provides no support for these conclusory allegations of prejudice. She has not identified any specific evidence she is prevented from acquiring by reason of any delay[14], she has not identified any witness from whom she has been unable to obtain evidence due to any delay,[15] and has been represented by counsel from the very beginning of the dispute process.[16]

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individual judges to set a time limit other than the one Congress prescribed, we note, would tug against the uniformity Congress sought to achieve when it enacted [the statute of limitations]." *Id.* at 1975.

[13] It is noted that actions sounding in breach of trust or of fiduciary duty also are subject to a three year statutory bar. C.R.S. §13-80-101(1)(f).

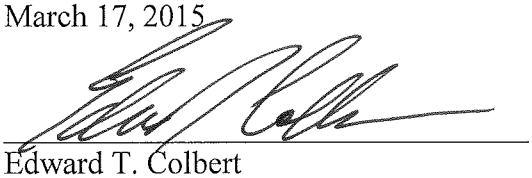
[14] She has availed herself of discovery procedures against Respondent, and has submitted in connection with her motion numerous emails, minutes and other documents – including documents as to which Respondent has complained were internal, confidential, or privileged documents.

[15] Claimant has sought and secured an order compelling production of a specifically identified member of the Respondent's Board.

[16] Christopher Campbell, a highly experienced attorney in the sports governance field, and specifically with regard to disciplinary proceedings, made an appearance on behalf of Claimant on June 17, 2014, eleven days after the Notice was sent to Claimant. Claimant subsequently transitioned to new counsel, also with expertise in the area of sports, and continues to be represented herein by competent counsel.

29. In light of the foregoing, the Motion to Dismiss is Denied, but to the extent that Respondent may attempt during course of this proceeding to rely on a factual basis for a disciplinary action other than the creation and submission to the ITU of an allegedly fraudulent nomination form, it is Granted.

March 17, 2015



Edward T. Colbert
Kenyon & Kenyon
1500 K Street, N.W.
Washington, D.C. 20005