APPENDIX C

[Filed Jul. 13, 1993]

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

Case No. C-2-92-452

HARRY L. REYNOLDS, JR.,
Plaintiff,

v.

INTERNATIONAL AMATEUR ATHLETIC FEDERATION,
Defendant.

OPINION AND ORDER

This matter comes before the Court to consider the motion of the Defendant, International Amateur Athletic Federation ("IAAF"), to vacate the default judgment previously entered by this Court on December 3, 1992. Fed. R. Civ. P. 60(b). The motion filed subsequent to garnishment proceedings initiated in this case by Plaintiff Reyolds, contends that this Court lacked both personal jurisdiction over the IAAF and subject matter jurisdiction over the controversy.

STANDARD OF REVIEW

The mechanism by which an entry of default judgment may be set aside is found in Federal Rule of Civil Procedure 55(c):

> For good cause shown the court may set aside an entry of default and, if a judgment by default has been entered, may likewise set it aside in accordance with Rule 60(b).

Thus, a default *entry* can be set aside under this rule for "good cause shown," while a default that has become final as a *judgment* can be set aside only under the stricter Rule 60(b) standards for setting aside final, appealable orders. Rule 60(b) provides:

> On motion and upon such terms as are just, the court may relieve a party or a party's legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of the judgment.

While relief from judgment under Rule 60(b) is normally an extraordinary remedy to be granted only in exceptional circumstances, where the motion is brought under Rule 60(b)(4) and alleges that "the underlying judgment is void because the court lacked personal or subject matter jurisdiction," once the court decides that the allegations are correct "the trial judge has no discretion and must grant appropriate Rule 60(b) relief." *Textile Banking Co. v. Rentschler*, 657 F.2d 844, 850 (7th Cir. 1981). While there is some dispute in the federal courts as to which party carries the burden of proof with respect to jurisdiction after a default judgment has been entered, this Court believes the Seventh Circuit's approach is the better one:

If the defendant, after receiving notice,

> chooses to let the case go to a default judgment, the defendant must then shoulder the burden of proof when the defendant decides to contest jurisdiction in a postjudgment rule 60(b)(4) motion.

ally Export Corp. v. Balicar, Ltd., 804 F.2d 398, 401 7th Cir. 1986). *See also Rohm & Haas Co. v. Aries*, 03 F.R.D. 541, 544 (S.D.N.Y. 1984) (noting that the pposing view fails to consider that a defendant has an pportunity prior to the entry of default to oppose juris- iction by a Rule 12 motion).[1]

DISCUSSION

Subject Matter Jurisdiction

A. Diversity Jurisdiction

The Court must first consider whether subject matter urisdiction exists. Plaintiff asserts that diversity jurisdic- ion exists pursuant to 28 U.S.C. § 1332(a), which pro- vides:

> (a) The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $50,000, . . . and is between —
>
> (1) citizens of different States;
>
> (2) citizens of a State and citizens or subjects of a foreign state;[2]

[1] This Court firmly believes that there ought to be some incentive for a defendant to contest jurisdiction with a Rule 12(b) motion rather than to await judgment and contest jurisdiction with a Rule 60(b) motion. After all, the resources conserved may often times be enormous. By shifting the burden of proof, a defendant receives just such an incentive.

[2] Jurisdiction asserted pursuant to section 1332(a)(2) is commonly referred to as alienage jurisdiction.

> (3) citizens of different States and in which citizens or subjects of a foreign state are additional parties;
>
> (4) a foreign state, . . . as plaintiff and citizens of a State or of different States.

Plaintiff claims to be a citizen of Ohio, and this claim is not seriously contested.[3] Accordingly, the Court must determine whether the IAAF is diverse from Plaintiff within the meaning of § 1332(a).

The IAAF is an unincorporated association. For purposes of § 1332(a), an unincorporated association is deemed to be a citizen of all states in which members are domiciled. Thus, the citizenship of each IAAF member[4] must be considered in determining whether diversity exists. *See* Charles A. Wright, et al., *Federal Practice and Procedure* § 3630, at 688-89. Plaintiff maintains that diversity jurisdiction exists because no IAAF member is a citizen of Ohio. Thus, the IAAF's citizenship is completely diverse from Plaintiff's citizenship. Defendant, however, maintains that diversity jurisdiction does not exist. Specifically, Defendant asserts that some of its two hundred members are not "citizens or subjects of foreign states" within the meaning of § 1332(a) because certain IAAF members either are agencies or instrumentalities of

[3] The complaint states that Plaintiff resides in Westerville, Ohio. Because diversity jurisdiction looks only to an individual's citizenship, Defendant asserts that the complaint should have stated that Plaintiff is a citizen of or is domiciled in Ohio. Notwithstanding, the record before the Court establishes Plaintiff's Ohio citizenship. *See Fawvor v. Texaco, Inc.*, 387 F. Supp. 626, 628 (E.D. Tex. 1975), *remanded on other grounds*, 546 F.2d 636 (5th Cir. 1977).

[4] The membership of the IAAF consists of approximately 205 national amateur athletics associations. Each member represents a separate country. The Athletic Congress ("TAC") is an IAAF member which represents the United States. For the purposes of diversity jurisdiction, TAC is a citizen of Indiana and Virginia.

foreign states, or are citizens or subjects of states not recognized by the United States. Defendant also asserts that diversity jurisdiction cannot exist because one of its members has no citizenship. The Court shall consider each assertion in turn.

1. Agents or Instrumentalities of Foreign Sovereigns

It is well established that an action involving an agency or instrumentality of a foreign sovereign may be prosecuted only if the procedural requirements of the Foreign Sovereign Immunities Act ("FSIA") are met. 28 U.S.C. §§ 1330, 1602-11. Moreover, the FSIA provides the sole basis for obtaining subject matter jurisdiction over such agency or instrumentality. *Argentine Republic v. Amerada Hess Shipping Corp.*, 488 U.S. 428 (1989).

As Defendant has acknowledged, however, Plaintiff is not suing each IAAF member individually. Rather, Plaintiff is suing the IAAF as an entity. Therefore, because suit was not brought against a foreign agent or instrumentality, Plaintiff need not comply with the procedural requirements of the FSIA. Further, there is nothing in the language of the FSIA which prevents a court from concluding that an agent or instrumentality of a foreign state is a subject or citizen of a foreign state for the purposes of determining the citizenship of an unincorporated association. Consequently, the fact that some members may be agents or instrumentalities of a foreign state does not preclude the Court from asserting diversity jurisdiction over the IAAF.

2. Citizens or Subjects of States Not Recognized by the United States

Not every alien can sue under diversity jurisdiction. The party must be a citizen or subject of a "foreign state." Unrecognized regimes are usually not considered "foreign states" under 28 U.S.C. § 1332(a), and, as a result, their

entitled to sue under the same statute. Therefore, as a general rule [5], a foreign national can sue in federal court only if he is a citizen of a foreign state which is recognized by the United States government at the time of the commencement of the suit. *Land Oberoesterreich v. Gude*, 109 F.2d 635, 637 (2d Cir. 1940). This rule is not limited to cases involving diversity jurisdiction, however. It precludes an unrecognized nation from bringing suit regardless of the basis for asserting subject matter jurisdiction. *See, e.g., Republic of Vietnam v. Pfizer, Inc.*, 556 F.2d 892 (8th Cir. 1977) (federal question jurisdiction).

Notwithstanding, recognition by the Executive Branch is not required where the unrecognized nation or national is brought into the suit as a *defendant*. In *Klinghoffer v. S.N.C. Achille Lauro*, 937 F.2d 44, 48 (2d Cir. 1991), the Second Circuit stated:

> While unrecognized regimes are generally precluded from appearing as plaintiffs in an official capacity without the Executive Branch's consent, [citations omitted], there is no bar to suit where an unrecognized regime is brought into court as a defendant.

The *Klinghoffer* court found that the Palestine Liberation Organization ("PLO")—although never recognized by the Executive Branch—did not "lack[] the capacity to be sued in United States courts." *Id.* Hence, although certain IAAF members may represent states not recognized by the Executive Branch, this fact, in and of itself, does not prevent this Court from asserting diversity jurisdiction over Plaintiff's suit.

[5] The rationale for this rule is as follows: The constitutional authority to recognize nations lies solely with the Executive Branch. *Banco National de Cuba v. Sabbatino*, 376 U.S. 398, 410 (1964). Thus the judiciary should not undermine the foreign policy of the Executive Branch by entertaining suits from unrecognized nations or their nationals. *See Latvian State Cargo & Passenger S.S. Line v. McGrath*, 188 F.2d 1000, 1003 (D.C. Cir.), *cert. denied*, 342 U.S.

In addition, the IAAF argues that several of its members represent states which cannot be "foreign states" under § 1332(a) because they are colonies or dependencies of other, recognized states. Many courts, however, have found colonies or dependencies of recognized states to be "foreign states" for the purposes of diversity jurisdiction. *See Wilson v. Humphreys (Cayman) Ltd.*, 916 F.2d 1239 (7th Cir. 1990), *cert. denied*, 111 S.Ct. 1415 (1991); *Netherlands Shipmortgage Corp. v. Madias*, 717 F.2d 731 (2d Cir. 1983); *Creative Distributors, Ltd. v. Sari Niketan, Inc.*, No. 89 C 3614, 1989 WL 105210 (N.D. Ill. 1989); *Timco Eng'g, Inc. v. Rex & Co.*, 603 F. Supp. 925 (E.D. Pa. 1985); *cf. Tetra Finance (HK), Ltd. v. Shaheen*, 584 F. Supp. 847 (S.D.N.Y. 1984).

In *Wilson v. Humphreys (Cayman) Ltd.*, the Seventh Circuit stated that "the exercise of American judicial authority over the citizens of a British Dependent Territory implicates this country's relationship with the United Kingdom—precisely the raison d'etre for applying alienage jurisdiction." 916 F.2d at 1243. In this Court's opinion, the Seventh Circuit's reasoning applies not only to IAAF members representing the British Dependent Territories, but also to members representing any colony or dependency of a country recognized by the United States. Thus, the fact that several IAAF members represent colonies or dependencies of other, recognized states does not prevent this Court from exercising diversity jurisdiction.

3. Stateless Citizen

Finally, the IAAF asserts that the Northern Mariana Amateur Sports Association, which represents the Commonwealth of the Northern Mariana Islands ("CNMI"), has no citizenship for the purposes of diversity jurisdiction. CNMI citizens are United States citizens but, according to the IAAF, they are "stateless" because they are not citizens of a state or territory. Thus CNMI citizens may not sue under diversity jurisdiction. *Cf. Cresswell*

v. Sullivan & Cromwell, 922 F.2d 60 (2d Cir. 1990) (U.S. citizens domiciled abroad are "stateless" for the purposes of diversity jurisdiction. Therefore, partnership that included "stateless" citizens cannot be sued under diversity jurisdiction).

If the IAAF's argument were accepted, CNMI citizens would be the only class of United States citizens—other than citizens domiciled abroad—who are denied the right to sue under § 1332(a). The Court is reluctant to conclude that Congress would create a pocket of citizenry who are refused equal access to United States courts. Indeed, 48 U.S.C. § 1694(a) casts doubt upon the assertion that Congress intended to bar CNMI citizens from suing under § 1332(a). Section 1694a(a) provides in part:

> The District Court for the Northern Mariana Islands shall have the jurisdiction of a District Court of the United States, including, but not limited to, diversity jurisdiction provided for in section 1332 of Title 28. . . .

It seems highly unlikely that Congress would confer upon the District Court for the Northern Mariana Islands the power to exercise diversity jurisdiction, yet not permit any CNMI citizens to sue under such jurisdiction. Further, in *Yokeno v. Mafnas*, 973 F.2d 803 (9th Cir. 1992), a Japanese citizen brought suit against a CNMI citizen. The Ninth Circuit expressly stated that diversity jurisdiction would exist between a CNMI citizen and a Japanese citizen, but remanded the case back to district court for a determination on whether diversity had been obtained collusively. Thus, the courts, as well as Congress, have evinced an intent to permit CNMI citizens to sue under § 1332(a).

B. Review of the London Arbitration

Beyond the issue of diversity jurisdiction, the IAAF maintains that the Court lacks subject matter jurisdiction because Plaintiff's suit, in essence, seeks to set aside an

international arbitral decision (*i.e.*, the IAAF's decision regarding Plaintiff's use of steroids). Under the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 21 U.S.T. 2517, T.I.A.S. No. 6997, 300 U.N. 38 ("the Convention"), such decisions may be set aside only by a "competent authority of the country in which . . . [the] award was made." *Id.* Article V, ¶ 1(e). The United States became a party to the Convention in 1970, and soon thereafter Congress enacted legislation implementing the provisions of the Convention into domestic law. 9 U.S.C. §§ 201-08. The United Kingdom is also a signatory to the Convention. Thus, according to the IAAF, this Court lacks jurisdiction to entertain Plaintiff's claims; Plaintiff can only bring suit in England because that is where the award was made.

Notably,

> the Convention applies only to awards resulting from arbitrations to which the parties have submitted voluntarily. If the arbitration were conducted by a permanent body to which the parties were obligated to bring their disputes regardless of their will, the proceedings are judicial rather than arbitral in character and the resulting award would not come within the purview of the Convention.

Leonard V. Quigley, *Accession by the United States to the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards*, 70 Yale L.J. 1049, 1061 n.54 (1961) (quoting the Official Report of the United States Delegation to the Convention). Thus, as evidence of each party's willingness to arbitrate, an agreement to arbitrate must be in writing to be enforceable under the Convention. Convention, Article II, ¶ 1. An "agreement in writing" is defined as "an arbitral clause in a contract or an arbitration agreement, signed by the parties or contained in an exchange of letters or [illegible]." *Id.* Article II ¶ 2.

In the instant case, there is no "agreement in writing" between Plaintiff and the IAAF. Ostensibly, then, the IAAF's decision regarding Mr. Reynolds does not come within the purview of the Convention and, as a result, the Convention does not defeat this Court's jurisdiction. Regardless of the writing requirement, Defendant claims that the Convention nonetheless precludes this Court from exercising jurisdiction over Plaintiff's lawsuit.

First, because Plaintiff asserted—and the Court found—that the IAAF violated his right to contractual due process by not providing a fair hearing in accordance with its rules, Default Op. at 19, the IAAF claims that Plaintiff cannot now disavow the existence of an agreement to arbitrate. The determinative issue, however, is whether the Convention is applicable to the decision rendered by the IAAF, thereby requiring this Court to abstain from hearing Plaintiff's suit. For the Convention to apply, there must be an "agreement in writing" to arbitrate. In the instant case, it is undisputed that there was no "agreement in writing" as defined by the Convention. Thus, this argument is without merit.

Second, Defendant maintains that Plaintiff cannot avoid an arbitral award by raising the Convention's writing requirement defense because he actually participated in an arbitration proceeding. In support, Defendant cites to *Minister of Defense v. Gould, Inc.*, 887 F.2d 1357 (9th Cir. 1989), wherein the Ninth Circuit held that acceptance of the Algerian Accords by the President of the United States constituted an "agreement in writing" between an American corporation and the government of Iran for purposes of the Convention. The Algerian Accords provided for the release of American hostages held in Iran and also established the Iran-U.S. Claims Tribunal ("Tribunal"), which gave American and Iranian nationals a forum to present their claims against either country or its citizens. *Id.* at 1359. The Ninth Circuit then went on to state that even if there were no "agreement in writing," the American corporation "ratified" the actions of

the United States by filing a claim and arbitrating it before the Tribunal. *Id.* at 1364.

Gould, however, is distinguishable because it involved overriding foreign policy considerations not found in the instant case. *See Dames & Moore v. Regan*, 453 U.S. 654, 686-88 (1981) (As a necessary incident to settling major foreign policy disputes, the President has authority to suspend actions in U.S. Courts which were brought by American nationals against Iran. Consequently, nationals may assert their claims against Iran only before the Tribunal.) These considerations require that courts uphold the ability of the President to force American nationals to submit their claims to arbitration. *See, e.g., id.* at 673-74 (discussing ability of President to override individual claimants when foreign policy at issue). Thus, in *Gould*, the policy favoring voluntary arbitration—as evidenced by an "agreement in writing"—was overridden by a presidential exercise of constitutional authority. Such is not the case here. *Gould* therefore lends little support to Defendant's argument that Plaintiff's alleged* participation in the IAAF arbitration precludes him from raising the writing requirement defense.

Last, Defendant asserts that because a written arbitration agreement exists between TAC and other IAAF members, the IAAF's decision may only be attacked in the courts of England. Defendant relies upon *International Standard Elec. Corp. v. Bridas Sociedad Anonima Petrolera*, 745 F. Supp. 172, 175-78 (S.D.N.Y. 1990) to support its claim that anyone challenging the IAAF's decision must bring suit in England. In *International Standard*, however, a written agreement to arbitrate existed between the parties. *Id.* at 174. Thus, that case is

* Plaintiff contends that he was not a party to the arbitration. Instead, according to Plaintiff, the proceeding was between TAC and the IAAF. Mem. in Opp'n, at 49. The Court expresses no opinion as to whether the arbitration was between the IAAF and TAC or the IAAF and Plaintiff.

limited to the issue of setting aside an award under Article V of the Convention. As mentioned above, the issue before this Court is whether the Convention applies at all, thereby precluding review of Plaintiff's suit. Convention, Article II. Because there is no written agreement between the Plaintiff and the IAAF, the IAAF's decision with regard to Plaintiff does not come within the purview of the Convention. Consequently, the Convention does not bar Plaintiff's suit in this Court.

Having concluded that subject matter jurisdiction exists, the Court shall consider Defendant's remaining grounds for quashing the default judgment.

II. Personal Jurisdiction

For personal jurisdiction to exist over a nonresident defendant in a diversity case, the central concern is the relationship among the defendant, the forum, and the litigation. When presented with a jurisdictional dispute concerning the sufficiency of the defendant's contacts with the forum state, a district court must apply the law of the state in which it sits, subject to constitutional limitations. *Welsh v. Gibbs*, 631 F.2d 436, 439 (6th Cir. 1980). Thus, two basic prerequisites must be satisfied: the defendant must be amenable to suit under the forum state's long-arm statute and the exercise of jurisdiction over the defendant must not violate the Due Process Clause of the United States Constitution. *In-Flight Devices Corp. v. Van Dusen Air, Inc.*, 466 F.2d 220, 224 (6th Cir. 1972).

This two-tier analysis is required whenever personal jurisdiction is premised solely on conduct of the defendant as delineated in the Ohio's long-arm statute because "the cause of action *must* have arisen from that conduct." *Berning v. BBC, Inc.*, 575 F. Supp. 1354, 1357 (S.D. Ohio 1983) (interpreting § 2307.382(B), *amended by* § 2307.382(C)). If the Ohio long-arm statute does not provide a basis for the exercise of personal jurisdiction

over the nonresident defendant, jurisdiction is unavailable even if the exercise of such would not violate due process.

In the instant case, Plaintiff has alleged four causes of action: breach of contract; breach of contractual due process; defamation; and interference with business relations. The Court must first determine whether the Ohio long-arm statute provides a basis for asserting personal jurisdiction over Defendant with regard to each cause of action. If the statute does provide a basis, the Court shall proceed to the second tier of analysis and determine whether the assertion of personal jurisdiction violates due process.

A. Amenability to Suit Under Ohio's Long-arm Statute

The Ohio Revised Code provides in part:

> (A) A court may exercise personal jurisdiction over a person who acts directly or by an agent, as to a cause of action arising from the person's:
>
> (1) Transacting any business in this state;
>
> * * * *
>
> (3) Causing tortious injury by an act or omission in this state;
>
> * * * *
>
> (6) Causing tortious injury in this state to any person by an act outside this state committed with the purpose of injuring persons, when he might reasonably have expected that some person would be injured thereby in this state;
>
> * * * *
>
> (C) When jurisdiction over a person is based solely upon this section, only a cause of action arising from acts enumerated in this section may be asserted against him.

O.R.C. § 2307.382.

Plaintiff has averred that the "transacting any business" provision of the Ohio long-arm statute applies to his contract and contractual due process claims. The Ohio Supreme Court has indicated that this provision is "very broadly worded and permit[s] jurisdiction over defendants who are *transacting any* business in Ohio." *Kentucky Oaks Mall Co. v. Mitchell's Formal Wear, Inc.*, 53 Ohio St. 3d 73, 75, 559 N.E.2d 477, 480 (1990), *cert. denied*, 111 S.Ct. 1619 (1991) (emphasis in original). Further, the word "any" has been defined to include "each," "every," and even the "slightest." *Lanier v. American Bd. of Endodontics*, 843 F.2d 901, 906 (6th Cir. 1988).

As the Court previously held, a contract existed between Plaintiff and the IAAF, and the IAAF breached its contractual obligations. Default Op. at 11. In addition to the contract, Plaintiff has demonstrated that the IAAF, through its officers and counsel, directly correspond with Plaintiff and Plaintiff's counsel in Ohio, telephoned Plaintiff's counsel in Ohio, and physically appeared in Ohio. Specifically, before initiating any litigation, Plaintiff's counsel requested documents from the IAAF and Manfred Donike, a member of the IAAF Medical and Doping Commissions. Pl.'s Exh. 21. Mark Gray, counsel for the IAAF, responded to Plaintiff's request in a letter dated December 6, 1990. Pl.'s Exh. 11. In this same letter, Mr. Gay requested that all correspondence to the IAAF be sent to TAC. TAC would then contact the IAAF if it needed assistance.

Moreover, Manfred Donike voluntarily appeared in Ohio to testify against Plaintiff at a TAC Doping Control Board hearing.[7] In addition, Ollan Cassell, Vice-

[7] Defendant claims that Donike appeared at the hearing at TAC's request, and not as a representative of the IAAF. The Court entertains no doubt that Donike appeared as a representative of the IAAF. Indeed, in a sworn declaration used as evidence in an earlier TAC hearing, Donike stated that "[a]s a result of my position with the IAAF, I had occasion personally to review Butch

President of the IAAF and Executive Director of TAC, travelled to Ohio and repeatedly communicated with Plaintiff concerning his suspension and the IAAF Council decision to extend the suspension. Pl.'s Exh. 9, 13. Finally, with respect to an IAAF hearing held in May 1992, Mark Gay telephoned and corresponded with Plaintiff's counsel. Pl.'s Exh. 23. At the suggestion of Mr. Gay, a telephone conference call was held between TAC, Plaintiff's counsel, and Mr. Lauri Tarasti, the chairman of the IAAF Arbitration Panel. The IAAF arranged for Mr. Tarasti's presence at the conference call.

Defendant does not contest the existence of these contacts with Ohio. Rather, Defendant claims the contacts do not constitute the transaction of business within the meaning of O.R.C. § 2307.382(A)(1). As mentioned above, however, Plaintiff need only show that Defendant conducted the slightest act of business in Ohio to satisfy § 2307.382(A)(1). Upon consideration, the Court finds that Plaintiff has met his burden.

This conclusion is buttressed by the Court's determination that TAC acts as the agent of the IAAF in this country. In Ohio, the relationship of principal and agent exists when one party exercises the right of control over the actions of another, and those actions are directed toward the attainment of an objective which the former seeks. *Hanson v. Kynast*, 24 Ohio St. 3d 171, paragraph one of syllabus, 494 N.E.2d 1091 (1986). As the events occurring before and after the commencement of Reynolds' suit clearly indicate, TAC acts on behalf of the IAAF and in accordance with its rules. Therefore, jurisdiction over the IAAF may also be based upon TAC's contacts with Ohio and, as a result, the Court concludes that the IAAF has transacted business in Ohio through its own acts, and by the acts of its agent, TAC.

Reynolds' drug test results. . . ." Pl.'s Ex. 22. Thus, Donike's appearance at the Ohio hearing arose out of his association with the IAAF.

Defendant insists that even if it did transact business in Ohio, Plaintiff's contract and contractual due process claims did not arise out of any business transacted there. O.R.C. § 2307.382(C). Instead, according to Defendant, Plaintiff's causes of action arose from "a urine sample taken in Monaco, analyzed in France, and confirmed by an international arbitration hearing held in London." Def.'s Mem. in Support at 9. The Court does not believe that Plaintiff's connections with Defendant should be fragmented in this fashion. As previously mentioned, a contractual relationship existed between the IAAF and Plaintiff. Under this relationship, the IAAF established the rules and regulations governing the procedural process by which Plaintiff would be tested for prohibited substances. Further, the contract provided for a hearing process if the use of prohibited substance was attributed to Plaintiff. The IAAF's contacts in Ohio related entirely to the process of considering whether or not Plaintiff had taken prohibited substances. Thus, Plaintiff's breach of contract and contractual due process claims clearly arose from Defendant's transaction of business in Ohio. *See Lanier v. American Bd. of Endodontics*, 843 F.2d at 908.

Plaintiff has also averred that two of the three "tortious conduct" provisions of the Ohio long-arm statute, subsections (A)(3) and (A)(6), apply to his claims for defamation and tortious interference with business relations. Section 2307.382(A)(3) provides that a court may exercise jurisdiction over a person when that person caused tortious injury by an act or omission in this state. Section 2307.382(A)(6) provides for jurisdiction when a tortious injury is caused in this state by a party when he might have reasonably expected that some person would be injured thereby in this state.

Defendant defamed Plaintiff and tortiously interfered with his business relations by issuing an international press release wherein the use of a controlled substance,

nandrolone, was falsely attributed to Plaintiff. Not surprisingly, periodicals disseminated this defamatory material—including periodicals circulated in Ohio. Indeed, the primary purpose of a press release is to distribute information to the press publication. As a result, Plaintiff suffered economic loss. Specifically, NIKE, Inc. terminated its endorsement contract with Plaintiff.[8] Pl.'s Exh. 24. Three Ohio corporations—Kroger, Firestone & Rubber Corporation, and Ross Laboratories—also terminated endorsement contracts with Plaintiff. Finally, Plaintiff missed out on future endorsement contracts and appearance fees. Consequently, Plaintiff suffered a substantial amount of lost income, *see* Pl.'s Exh. 26, and, more importantly, his reputation was harmed by Defendant's actions.

Plaintiff has clearly suffered tortious injury in Ohio as a result of Defendant's tortious acts. The IAAF claims, however, that it did not know Plaintiff was an Ohio citizen and, therefore, could not reasonably foresee that its tortious acts would harm Plaintiff in Ohio. Even if this were so, it is of little legal import. The IAAF intentionally and purposefully directed their tortious acts toward Plaintiff, and such acts had a devastating effect upon Plaintiff. Hence, it would be reasonable for the IAAF to anticipate being hailed into court where the Plaintiff resides (*i.e.*, Ohio). *See Calder v. Jones*, 465 U.S. 783 (1984).

B. Due Process

Aside from determining whether the IAAF is amenable to suit in Ohio pursuant to the Ohio long-arm statute, this Court must also determine whether the exercise of jurisdiction over the IAAF comports with the dictates of Due Process:

[8] Such termination also resulted from direct communications between NIKE and the IAAF. Pl.'s Exh. 25.

> Due Process requires only that in order to subject a defendant to a judgment in personam, if he be not present within the territory of the forum, he have certain minimum contacts with it such that the maintenance of the suit does not offend "traditional notions of fair play and substantial justice."

International Shoe Co. v. Washington, 326 U.S. 310, 316 (1945). In determining whether this standard has been satisfied, this Court is guided by a three-part test adopted by the Sixth Circuit: (1) whether the defendant purposely availed itself of the privilege of acting in the forum state or causing a consequence in the forum state: (2) whether the cause of action arose from the defendant's activities in the forum state; and (3) whether the defendant's actions or the consequences of its actions had a substantial enough connection with the forum to make the exercise of jurisdiction over the defendant reasonable. *See, e.g., Southern Machine Co. v. Mohasco Indus., Inc.*, 401 F.2d 374, 381 (6th Cir. 1968); *In-Flight Devices*, 466 F.2d at 226. This test is not to be mechanically applied, and it does not "eliminate the need to consider the jurisdictional facts of each case individually, to make judgments as to the substantiality of contacts with the forum state and the fairness and justice of subjecting a specific defendant to the *in personam* jurisdiction of the forum state." *Id.* at 225-26. Rather, "[i]t is imperative that it be understood that the flexibility, and therein the virtue, of the *International Shoe* test is retained in the third condition and no mechanical consideration of the first two elements of the test can eliminate the need for an appraisal of the overall circumstances of each case if jurisdiction is to be found." *Id.* at 226.

The first criterion—a showing that the defendant has purposefully availed itself of the privilege of transacting business in Ohio and thereby invoked the benefits and protections of its laws—is "the *sine qua non* for *in personam* jurisdiction." *Southern Machine Co.*, 401 F.2d at

381-382. Purposeful availment, however, is not contingent upon the Defendant's physical contacts with Ohio. All that is required is that the Defendant's actions be "'purposefully directed' toward residents of another State." *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 476 (1985).

There is no question that Defendant's activities were purposefully directed toward Plaintiff, a resident of Ohio. First, Defendant entered into a contract with Plaintiff, thereby creating continuing obligations between itself and Plaintiff. *Id.* at 475-76. In addition, Defendant, and its agent, TAC, corresponded with Plaintiff and Plaintiff's counsel in Ohio, and travelled to Ohio. Defendant argues that because much of the Ohio contacts were initiated by Plaintiff, it did not purposefully avail itself of the privilege of acting in Ohio. Defendant's argument misses the point: "[T]he question of which party solicited the . . . interface is irrelevant, so long as defendant then directed its activities to the forum resident." *Lanier v. American Bd. of Endodontics*, 843 F.2d at 910 (citing *Southern Machine Co.*, 401 F.2d at 382)).

Second, Defendant's defamatory statements were directly aimed at Plaintiff. Defendant issued a press release, the sole purpose of which was to disseminate defamatory information about the Plaintiff. Such information would obviously have a devastating impact on Plaintiff, and this impact would be most strongly felt in Ohio—the state where Plaintiff was domiciled. *Calder v. Jones*, 465 U.S. at 789-90. *See also Hugel v. McNell*, 886 F.2d 1 (1st Cir. 1989) (Personal jurisdiction is proper when effects of defamatory statements made outside state are most strongly felt in forum state—state of Plaintiff's domicile); *Laxalt v. McClatchy*, 622 F. Supp. 737 (D.C. Nev. 1985) (same). The fact that Defendant did not personally circulate the information in Ohio is irrelevant. *Calder v. Jones*, 465 U.S. at 789.

The second criterion is also satisfied: Plaintiff's causes of action arise in Ohio. The IAAF's breach of Plaintiff's contract and its consequences were made possible only by the IAAF's transaction of business with Plaintiff in Ohio. *See Lanier v. American Bd. of Endodontics*, 843 F.2d at 907. Moreover, the defamatory statements were published in Ohio, and the economic impact of the IAAF's tortious interference with Plaintiff's business relationships has occurred in Ohio.

Once the first two criteria are satisfied, "[a] defendant cannot defeat jurisdiction unless it presents 'a compelling case that the presence of some other considerations would render jurisdiction unreasonable.'" *Id.* at 910 (quoting *Burger King*, 471 U.S. at 477). Defendant advances several arguments in an attempt to show that jurisdiction over it would be unreasonable. Basically, Defendant argues that jurisdiction by this Court, or by any court located in the United States, would be unreasonable because the IAAF and its members have—for perfectly valid reasons—agreed otherwise, and that U.S. courts should abide by this agreement. The Court is not persuaded.

Defendant breached its contract with Plaintiff, deprived him of right to contractual due process, defamed him, and interfered with his ability to earn a living, all of which cost Plaintiff millions of dollars in economic harm along with immeasurable dollars in emotional harm. Further, Defendant threatened Plaintiff (and other U.S. athletes) with additional harm if Plaintiff did not terminate his suit against the IAAF. Throughout all of this, the IAAF has insisted that Plaintiff was not entitled to any form of recourse against it, and that it could never be held accountable for its misconduct—no matter how egregious.

Belatedly, Defendant now claims that Plaintiff could have contested its doping decision in an English court.

In light of pronouncements[9] by the IAAF's President, Primo Nebiolo, the Court views this claim with some skepticism.[10] Nevertheless, even if the IAAF were to accept the jurisdiction of English courts to review its doping decisions, the Court finds it unreasonable to require Plaintiff—who has already expended a considerable amount of time and money pursuing a remedy in this Court—to commence a new suit in an English court. Plaintiff, as an individual, has limited economic resources. In contrast, the IAAF has much greater resources, including world-wide business and legal contacts. In the United States alone, the IAAF organizes meets, negotiations contracts with major television networks, including NBC, Cablevision and Turner Broadcasting, and with corporate sponsors, including Mobil and Coca Cola. Simply put, the IAAF has aptly demonstrated its ability to conduct business in the U.S., and its familiarity with U.S. laws. Therefore, the burden of litigating in the United States does not outweigh the prejudice that would occur to Plaintiff by requiring him to bring a new suit in England.

Additionally, as the Court has previously stated, it is simply an unacceptable position that the courts of this country cannot protect the individual rights of the United States citizens where the rights are threatened by an association which has significant contacts with this country, which acts through an agent organization in this country,

[9] Primo Nebiolo, along with other IAAF officials, has repeatedly taken the position that the IAAF's doping decisions are unimpeachable, and that the IAAF will never accept a contrary decision by any court in the world. *See* Pl.'s Ex. 30, 31; Preliminary Injunction Op. at 14.

[10] Moreover, in a proceeding before an English court, the IAAF declared that, should banned athletes seek to challenge IAAF eligibility determinations, they would have to bring an action in each country where they sought to compete. *Gasser v. Stinson*, No. CH-88-6-2191 (1988), Def's Mem in Support of Mot. to Quash, Exh. 2 at 36.

and which exercises significant control over athletes and athletic events in this country. Thus, Defendant has failed to persuade the Court that the exercise of personal jurisdiction would be unreasonable.

III. Service of Process

In issue here is whether Defendant was properly served with process. Notably, there is no dispute that Defendant was actually served: Plaintiff's attorney first sent the summons and complaint to Mr. Ollan Cassell, the IAAF's Vice-President, by certified mail[11] and then personally served Mr. Cassell in New Orleans. This manner of service undeniably complied with Rule 4(c)(2)(C)(ii) of the Federal Rules of Civil Procedure. According to Defendant, however, service under the Federal Rules is not available in cases like the instant action where the federal court predicates its jurisdiction on the forum state's long-arm statute. Rather, Defendant maintains that a federal court must look to the service provisions of the forum state's long-arm statute as dictated in Federal Rule 4(e). Hence, Defendant claims that the service of process was improper because it did not comport with the Ohio Rules of Civil Procedure.

Rule 4.3(B)(1) of the Ohio Rules of Civil Procedure provides that out-of-state service generally should be made by certified mail. The Rule then goes on to state: "[t]he clerk shall place a copy of the process and complaint . . . to be served in an envelope. He shall address the envelope. . . . He shall affix adequate postage and place the sealed envelope in the United States mail as certified mail return receipt requested. . . ." Ohio R. Civ. P. 4(B)(1). According to Defendant, because Plaintiff's counsel—and not the clerk—was responsible for sending the summons and complaint via certified mail, this manner of service was ineffective.

[11] An agent of Defendant acknowledged receipt of the summons served by certified mail.

"Certified mail service under Civ. R. 4.3(B)(1) is valid where the envelope containing the documents to be served is delivered to a person other than the defendant, at the defendant's address." *Mitchell v. Mitchell*, 64 Ohio St. 2d 49, 51, 413 N.E.2d 1182, 1183 (1980); *see also Castellano v. Kosydar*, 42 Ohio St. 2d 107, 111, 326 N.E.2d 686, 689 (1985). It is undisputed that Defendant was served, had notice of the suit, and chose not to appear. The fact that Plaintiff's attorney, and not a court employee, sent process by certified mail is of no importance. Indeed, the local Rules for the Southern District of Ohio unequivocally state that when service is to be made by certified mail under the Ohio Rules, plaintiff's attorney—and not the clerk—is "to address the envelope to the person to be served [and] place a copy of the summons . . . to be served in the envelope." S.D. Ohio L. R. 4.1. If this Court were to accept Defendant's literal reading of Rule 4.3, a plaintiff serving process pursuant to this Court's local rules would never effectively serve process pursuant to the Ohio Rules. Hence, the Court rejects Defendant's reading of Rule 4.3(B)(1). *Cf. KDI Precision Products, Inc. v. Radical Stampings, Inc.*, 620 F. Supp. 786, 792 (S.D. Ohio 1985) (Plaintiff served process by ordinary mail in accordance with Rule 4(c)(2)(C)(ii) of the Federal Rules of Civil Procedure. Court held that such service also satisfied Rule 4.3(B)(1) under the Ohio Rules of Civil Procedure, notwithstanding the fact that Rule 4.3(B)(1) provides for service by certified mail.)

Moreover, even if one accepts the argument that service of process was insufficient (and this Court does not), Defendant has waived the right to assert the defense that service of process was insufficient in this matter. *See Walsh v. SmithKline Beckman, et al.*, No. 89-5833, 1990 WL 76460 (E.D. Pa. June 6, 1990); *Adidas Sportschuhfabriken Adi Dassler Stiftung & Co., K.G., et al. v. Steven Cheung, et al.*, No. 87 Civ. 8989, 1990 WL 48063 (S.D.N.Y. April 10, 1990). Defendant indisput-

ably received notice, but made the calculated choice not to appear in the action. For almost 10 months after receiving notice of Plaintiff's suit, Defendant never contested service of process.

> It was only upon the [attempted garnishment] of [Defendant's] assets that [Defendant] alleged that service was improper and attempted to collaterally attack the default judgment. It is too late for such an argument. This litigation has been underway for [over a year]. [Plaintiff has] expended significant time and money in the pursuit of a recovery from [Defendant], and the Court has devoted substantial time and effort to the adjudication of this case. [Defendant] had actual notice of this litigation and they are estopped from arguing form over substance.

Adidas Sportschuhfabriken, 1990 WL 48063, at *5. Accordingly, the Court concludes Defendant has, under equitable principles, waived the right to claim that service of process was insufficient in this matter. *Walsh*, 1990 WL 76460, at *2.

Conclusion

Upon consideration and being duly advised, the Court finds Defendant's motion to quash the default judgment to be without merit and it is, therefore, DENIED.

In addition to the motion to quash, Defendant moves for an Order modifying or clarifying the Order previously entered by this Court on February 19, 1993. The Court hereby finds the Defendant's motion to be meritorious and it is, therefore, GRANTED. Thus, for clarification purposes, the Court never intended the February 19, 1993 Order to prohibit the IAAF from raising its jurisdictional defense in response to the garnishment action filed by Plaintiff in the United States District Court for the Eastern District of Virginia.

IT IS SO ORDERED.

/s/ Joseph Kinneary

YBXXI/N4C/US/90/996 (earlier decision)

cious prosecution under the Fourth and Fourteenth Amendments to the Constitution and 42 U.S.C. § 1983. Mrs. Torrie was arrested for violating Michigan's compulsory attendance law, M.C.L.A. 380.1561; M.S.A. 15.41561, because she failed to send Desmond to school. The statute provides in part:

> [E]very parent, guardian, or other person in this state having control and charge of a child from the age of 6 to the child's sixteenth birthday, shall send that child to the public schools during the entire school year. The child's attendance shall be continuous and consecutive for the school year fixed by the school district in which the child is enrolled.

A parent who fails to comply "is guilty of a misdemeanor, punishable by a fine of not less than $5.00 nor more than $50.00, or imprisonment for not less than 2 nor more than 90 days, or both." M.C.L.A. 380.1599; M.S.A. 15.41599.

Plaintiffs claim that defendants Mieras and Bruhn did not advise the prosecutor's office that Desmond had been identified as a special education student, or that his poor attendance might be related to his disability. According to plaintiffs, defendants' failure to divulge this information resulted in a warrant which was based upon false, inaccurate, or incomplete information.

I find no factual support for the plaintiffs' position. The record indicates that Mrs. Torrie's arrest was based upon probable cause and a valid arrest warrant. The facts are undisputed that Mrs. Torrie failed to send Desmond to school. I have been unable to find any legal support for the plaintiffs' contention that Michigan's compulsory attendance laws do not apply to handicapped students or that defendants had an obligation to inform the prosecutor that Desmond was receiving special education services. Plaintiffs' claims of false arrest, false imprisonment and malicious prosecution must fail.

Intentional Infliction of Emotional Distress, Selective Prosecution, First Amendment

Plaintiffs' claims for intentional infliction of emotional distress, selective prosecution, and violation of the First Amendment also fail. I find nothing in the record to indicate that the defendants' actions amounted to extreme or outrageous conduct. The record also fails to establish that others with similarly dismal attendance records were not prosecuted. As for their First Amendment claim, plaintiffs have failed to show how any First Amendment theory applies. Furthermore, plaintiffs did not assert a First Amendment claim in the complaint or the amended complaint.

State Tort Law

Because this Court is dismissing all of plaintiffs' federal causes of action, I have decided, in accordance with 28 U.S.C. § 1367(c)(3), that this Court will not exercise its supplemental jurisdiction over the remaining state law claims. I point out to the parties the tolling of the period of limitations as provided in 28 U.S.C. § 1367(d).

CONCLUSION

The defendants' motion is granted based upon the analysis set forth above. All of the plaintiffs' federal claims are dismissed. Because of ambiguities in the plaintiffs' complaint, it is not clear if any state law claims remain. If there are any remaining state law claims, they are DISMISSED WITHOUT PREJUDICE.

Harry L. REYNOLDS, Jr., Plaintiff,

v.

INTERNATIONAL AMATEUR ATHLETIC FEDERATION, et al., Defendants.

No. C-2-92-452.

United States District Court, S.D. Ohio, E.D.

June 19, 1992.

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5. **Federal Courts**

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