CAS 2017/A/5015 International Ski Federation (FIS) v. Therese Johaug & The Norwegian Olympic and Paralympic Committee and Confederation of Sports

CAS 2017/A/5110 Therese Johaug v. The Norwegian Olympic and Paralympic Committee and Confederation of Sports

ARBITRAL AWARD

delivered by the

COURT OF ARBITRATION FOR SPORT

Sitting in the following composition:

President:	Mr Romano F. Subiotto Q.C., Solicitor-Advocate in London, United Kingdom and Brussels, Belgium
Arbitrators:	Mr Markus Manninen, Attorney-at-law in Helsinki, Finland
	Mr Jeffrey G. Benz, Attorney-at-law in Los Angeles, USA
Ad hoc Clerk:	Ms Sujin Chan-Allen, Attorney-at-law in London, United Kingdom and Brussels, Belgium

in the arbitration between

International Ski Federation, Oberhofen, Switzerland

Represented by Dr Stephan Netzle, Attorney-at-law with Times Attorneys in Zurich, Switzerland

Appellant

and

Therese Johaug, Oslo, Norway

Represented by Mr Christian B. Hjort and Mr Mikkel Toft Gimse, Attorneys-at-law with Advokatfirmaet Hjort DA in Oslo, Norway, Mr Mike Morgan, Attorney-at-law with Morgan Sports Law in London, UK, and Mr Howard Jacobs, Attorney-at-law in California, USA

First Respondent/Cross-Appellant

and

Norwegian Olympic and Paralympic Committee and Confederation of Sports, Oslo, Norway

Represented by Ms Henriette Hillestad Thune, Head of Legal Department, Attorney-at-law at the Norwegian Olympic and Paralympic Committee and Confederation of Sports.

Second Respondent

I. THE PARTIES

1. The Appellant, the International Ski Federation (the "FIS"), is the international governing body for skiing and snowboarding. It is responsible for the Olympic disciplines of alpine skiing, cross-country skiing, ski jumping, Nordic combined, freestyle skiing, and snowboarding, and has been recognized as such by the International Olympic Committee. The FIS has the duty to ensure the global welfare of these sports and their impact on the community. It is based in Oberhofen, Switzerland.

2. The First Respondent and Cross-Appellant, Ms Therese Johaug ("Ms Johaug"), is an international-level professional cross-country skier from Norway. She is a member of the Norwegian National Women's Ski Team, and has won to date, seven World Championship gold medals and three Olympic medals in skiing.

3. The Second Respondent, the Norwegian Olympic and Paralympic Committee and Confederation of Sports/Norges Idrettsforbund (the "NIF") is the umbrella organization of all national sports federations in Norway. Its Adjudication Committee rendered the decision that is the subject of this appeal (the "Decision").

II. FACTUAL BACKGROUND

4. This section summarizes the main relevant facts and allegations based on the Parties' written submissions, oral pleadings and evidence adduced during these proceedings. Although the Panel has considered the entirety of the Parties' submissions, it refers here only to matters it considers necessary to explain its reasoning.

5. Ms Johaug is an extremely successful and experienced cross-country skier. She has been a top-level international athlete for approximately 10 years. Since 2007, Ms Johaug has had 100 individual podium placings and 42 individual victories. Among her achievements: she won the World Championships in several disciplines in 2011, 2013 and 2015; she was an Olympic champion in relay in 2010; and she won the World Cup overall and the Tour de Ski in the 2013/2014 and 2015/2016 seasons. She has undergone many training activities on doping controls.

Events in Italy

6. At the end of August 2016, Ms Johaug sustained sunstroke while at a training camp in Seiser Alm, Italy. She developed a fever and diarrhea, and sunburn on her lip. She felt unwell and called the team doctor, Dr Fredrik Bendiksen on 28 August 2016. After some time, her sunburned lip became painful and she developed large blisters, which eventually burst.

7. On 1 September 2016, Dr Bendiksen arrived in Livigno. The next day, Ms Johaug asked him if he had anything to treat her lip. Dr Bendiksen did not have the product he was looking for, Terra-Cortril, and decided to visit a pharmacy.

8. On 3 September 2016, Dr Bendiksen purchased two non-prescription pharmaceutical products at a local pharmacy, Keratoplastica and Trofodermin. He noted that

Trofodermin contained the antibiotic neomycin. He also noticed that Clostebol was an ingredient, but did not identify it as a Prohibited Substance.

9. He gave Ms Johaug the Keratoplastica to use, on the same day. The next day, Dr Bendiksen noticed that Ms Johaug's lip had not improved. He brought her the Trofodermin ointment and explained how to use it. At that point, Ms Johaug asked Dr Bendiksen if the cream was safe to use. Dr Bendiksen assured her that the cream was "clean".

10. Ms Johaug took the box containing the Trofodermin cream to her hotel room. She removed the tube of cream and the accompanying insert. She noticed the insert was in Italian but threw it away as she did not understand it. She did not inspect the box and threw it away without noticing that the box carried a red "doping warning" on the side. Ms Johaug used the cream from 4 to 15 September 2016.

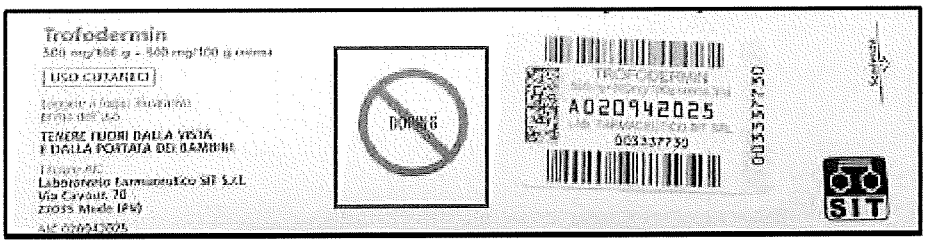


Figure 1: Image of Trofodermin box with doping warning (submitted by Ms Johaug)

Trofodermin

11. Trofodermin is a cream, administered locally on affected skin. It is an over-the-counter substance (*i.e.* available without a prescription). It is not registered in Norway. Its active ingredients are: (a) Neomycin sulfate (0.5%), and (b) Clostebol acetate (0.5%), as the packaging clearly indicates. The cream Ms Johaug used was sold in a 30 g tube.

12. Clostebol is listed on the World Anti-Doping Agency's ("WADA") Prohibited List group S1 (Anabolic Agents) for substances and methods prohibited at all times, in and out of competition.

Anti-Doping Test and Results

13. On 16 September 2016, Ms Johaug underwent an unannounced doping control test conducted by the Norwegian Anti-Doping Committee. She provided blood and urine samples. As requested by the Doping Control Officers, she completed a Doping Control Form, declaring "Trofodermin" as a medication that she had taken in the last seven days.

14. Ms Johaug's A sample was tested by the Norwegian Doping Control Laboratory. The test report submitted on 30 September 2016 noted the presence of a Clostebol metabolite at an estimated concentration of 13 ng/mL. At the request of Anti-Doping Norway, the B sample was analyzed on 6 October 2016. This analysis confirmed the A sample results.

Provisional Suspension

15. On 18 October 2016, the Prosecution Committee for Anti-Doping Norway imposed a two-month provisional suspension on Ms Johaug commencing that same date, until 18 December 2016.

16. On 12 December 2016, the Prosecution Committee suspended Ms Johaug for another two months, until 19 February 2017, pending a final judgment.

The Hearing

17. On 25 and 26 January 2017, The Adjudication Committee of Anti-Doping Norway (the "Adjudication Committee") conducted a public hearing in Oslo. It heard testimony from numerous witnesses including Ms Johaug herself and Dr Bendiksen. Anti-Doping Norway requested a sanction of fourteen months to be imposed on Ms Johaug.

The Decision on Appeal

18. On 10 February 2017, the Adjudication Committee issued its Decision. It noted that the facts of the case were undisputed by the parties involved. The Decision focused on the degree of fault to be attributed to Ms Johaug, and the proportionate sanction.

19. The Adjudication Committee noted the strict requirements of due care required of Ms Johaug:

> "*Therese Johaug has for many years been one of the group of athletes on whom the very strictest due care requirements must and will be applied when it comes to the use of medicines/ pharmaceutical substances, both in and out of competition.*"

20. In assessing Ms Johaug's degree of compliance, the Adjudication Committee considered the fact that she had asked Dr Bendiksen, an international expert with significant knowledge of sports medicine including the rules on doping, whether it was safe to use the cream. Dr Bendiksen's response undoubtedly "*contained an assurance that the cream was not on the Prohibited List and that it was appropriate for her to use the cream*".

21. The Adjudication Committee observed that a greater degree of care was not inherent in Ms Johaug's particular situation:

> "*there were in general no circumstances/danger signals relating to the injury itself that should have led her to exercise a greater degree of care. [...] She had no reason to suspect that she was risking treatment with a medication that might be violating the anti-doping regulations. [...] Clostebol and similar substances would not be the natural/appropriate choice of medication for treating sores of this kind.*"

22. Moreover, the Adjudication Committee considered it pertinent that Ms Johaug knew that Dr Bendiksen had purchased the Trofodermin cream at the same time as the other cream, Keratoplastica, and thus, knew that he had had plenty of time to investigate the product. Additionally, although the box carried a red doping warning label on one side, such labeling was "*uniquely Italian*" and previously unknown to Norwegian athletes and their support team.

23. The Adjudication Committee also opined that "*extra diligence might have been expected on Johaug's part if [...] she had been waiting for the doctor outside the pharmacy and had been handed the cream by the doctor there and then*".

24. Nevertheless, the Adjudication Committee decided that Ms Johaug's circumstances necessitated a greater degree of care on her part for several other reasons: (i) she knew that she was allowing herself to be treated with other medicines than her "usual" medication, (ii) as the first cream failed to improve her lip sores, she should have known the second cream would have other properties/active substances, and (iii) she knew the team's medical bag did not contain appropriate medicine and that Dr Bendiksen was going to look for something at a pharmacy in a foreign country, therefore there was a risk he was not well-acquainted with the purchase. As such, Ms Johaug's questions to Dr Bendiksen did not constitute a sufficient level of investigation. The Adjudication Committee noted:

> "*At the very least, she should have satisfied herself to an even greater degree that the doctor had checked the product against the Prohibited List. It was not enough for her simply to trust that he had (probably) done so.*"

25. Overall, the Adjudication Committee considered that the question of fault or negligence must always be decided on the basis of the specific circumstances of each particular case.

26. With respect to Ms Johaug's particular situation, the Adjudication Committee found that she did not exercise the degree of care expected of her to show "*No Fault or Negligence*".

27. However, as Ms Johaug asked Dr Bendiksen whether the medicine was safe and received his assurances, and given that the possibility he might make an error in this regards was "*hardly imaginable*", the Adjudication Committee found that the period of ineligibility should be below the 14 months requested by Anti-Doping Norway. It also disagreed with Ms Johaug that a period of ineligibility for longer than "*far less than one year*" would be disproportionate, following settled case law in the CAS.

28. The Adjudication Committee suspended Ms Johaug for thirteen months, commencing 18 October 2016.

III. PROCEEDINGS BEFORE THE CAS

29. On 6 March 2017, the FIS filed a statement of appeal (serving as its appeal brief) against the Decision with the CAS against Ms. Johaug and the NIF. The statement of appeal/appeal brief contained, *inter alia*, a proposal for the matter to be decided by a Sole Arbitrator and a request for an expedited procedure.

30. On 10 March 2017, Ms Johaug rejected the FIS's request for an expedited procedure. In addition, she requested a panel of three arbitrators.

31. On 10 March 2017, the NIF indicated its deferment of all procedural matters to the other Parties.

32. On 12 March 2017, the FIS agreed to Ms Johaug's proposal to refer this procedure to a panel of three arbitrators

33. On 13 March 2017, the FIS nominated Mr Markus Manninen as a member of the Panel. On the same day, Ms Johaug nominated Mr Jeffrey Benz as a member of the Panel. The NIF later consented to such nomination of Mr. Benz.

34. On 17 March 2017, Ms Johaug requested the CAS to order an English translation of the FIS' "Case File" and suspend the time limit for responding to the appeal, pending compliance of this request.

35. On 17 March 2017, the CAS Court Office invited the FIS to provide the translated documents, and suspended Ms Johaug's deadline to file her answer pending response from the FIS in accordance with Articles R29 and R32 of the Code.

36. On 21 March 2017, the FIS filed English translations of documents it referred to in its statement of appeal/appeal brief. The next day, 22 March 2017, the FIS provided the CAS Court Office with its complete case file.

37. On 23 March 2017, the CAS Court Office lifted the suspension of Ms Johaug's deadline to file her answer.

38. On 27 March 2017, the NIF filed its answer in accordance with Article R51 of the Code.

39. On 6 April 2017, Ms Johaug requested an extension of the deadline to file her answer (and any cross-appeal) to 21 April 2017. Such request was granted in accordance with Article R32 of the Code.

40. On 20 April 2017, Ms Johaug requested another deadline extension to 28 April 2017, which was again granted in accordance with Article R32 of the Code.

41. On 24 April 2017, the CAS Court Office informed the Parties that the Panel appointed to decide the matter was constituted as follows:

President:	Mr Romano F. Subiotto Q.C., Solicitor-Advocate in London, United Kingdom and Attorney-at-law in Brussels, Belgium
Arbitrators:	Mr Markus Manninen, Attorney-at-law in Helsinki, Finland
	Mr Jeffrey G. Benz, Attorney-at-law in Los Angeles, USA.
Ad hoc clerk:	Ms Sujin Chan-Allen, Attorney-at-law in London, United Kingdom, and Brussels, Belgium

42. On 27 April 2017, Ms Johaug filed a statement of appeal with the CAS Court Office and on the next day, 28 April 2017, Ms Johaug filed her answer (to case CAS 2017A/5015), consolidated together with her appeal brief and supporting materials (in case CAS 2017/A/5015).

43. On 10 May 2017, the CAS Court Office, in accordance with Article R52 of the Code and based upon the agreement of the parties, consolidated these two procedures.

44. On May 12, 2017, the NIF informed the CAS Court Office that it would not file a response with respect to Ms Johaug's cross-appeal.

45. On May 29, 2017, the FIS provided the CAS Court Office with "Comments" to Ms Johaug's cross-appeal as an "interested party".

46. On 2 June 2017, the parties signed and returned the orders of procedure to the CAS Court Office.

47. On June 6, 2017, a hearing was held at the CAS Headquarters located in Lausanne, Switzerland. The Panel was assisted by Mr. Brent J. Nowicki, Managing Counsel to the CAS, and joined by the following persons attended the hearing for the parties:

i.	For the Appellant (FIS):	Dr Stephan Netzle and Mr Emile Merkt
ii.	For the First Respondent (Ms Johaug):	Ms Johaug, assisted by: Mr Christian Hjort, Mr Mike Morgan, and Mr Howard Jacobs, counsel; and Ms Gytte Borch, interpreter.
iii.	For the Second Respondent (NIF):	Ms Henriette Hillestad Thune and Ms Siri Grønborg Christensen, counsel.
iv.	Observer:	Ms Anne-Lise Rolland, Norwegian Ski Federation

48. At the opening of the hearing, the parties confirmed that they had no objections to the constitution of the Panel. Counsel for the Appellant and First Respondent made opening statements. Counsel for the FIS introduced as an exhibit a Trofodermin box displaying the doping warning.

49. Counsel for the Second Respondent noted that the NIF should not be a party to the proceedings and that it should not be held accountable for any costs. The NIF did not advance any further position during the hearing.

50. The Panel heard testimony from Ms Johaug and Dr Bendiksen. These witnesses were then cross-examined by the FIS. Ms Johaug also played a video clip of her press conference that had taken place after she found out about her positive doping test results.

51. At the conclusion of the hearing, the parties stated that their rights to a fair hearing had been heard, and reiterated that they had no objection to the constitution of the Panel.

IV. JURISDICTION

52. The applicable procedure in this case is set out under Article R47 et seq. of the CAS code, which allows for an appeal to be filed with CAS if the regulations of a sports association, (the NIF Statutes) in this case, so provide. Article R47 states in part:

> "*An appeal against the decision of a federation, association or sports-related body may be filed with CAS if the statutes or regulations of the said body so provide or if the parties have concluded a specific arbitration agreement and if*

the Appellant has exhausted the legal remedies available to it prior to the appeal, in accordance with the statutes or regulations of that body".

53. Article R57 sets out the Panel's power to determine the case *de novo*. It states in part:

> "*The Panel has full power to review the facts and the law. It may issue a new decision which replaces the decision challenged or annul the decision and refer the case back to the previous instance*".

54. The FIS relies on the Appeal Procedure set out in Section 12-25 of the NIF Statutes, and Ms Johaug relies on Article 13.2.4 of the WADA Code and the FIS Anti-Doping Rules, which grants the right of cross-appeal. No party objected to CAS jurisdiction and consented thereto without objection when signing the order of procedure.

55. Accordingly, the CAS has jurisdiction to rule on the present matter.

Standing of the NIF

56. The NIF argues that it is not appropriately a party to the FIS' appeal. It is the Second Respondent because the decision under appeal was made by its Adjudication Committee.

57. The NIF considers that it is contrary to the objectives of the creation of the NIF's independent judicial bodies, and the principle of separation of powers to make it a party in an ADRV case. The NIF was not a party in the proceedings before NIF's Adjudication Committee.

58. The NIF does not take a position with respect to the FIS' request for an extension of Ms Johaug's period of ineligibility. However, it opposes the request to contribute to the FIS' costs and expenses related to the appeal.

59. The FIS and Ms Johaug have not provided any submissions in response to the NIF's position on its standing.

60. The Panel notes that the issue of the NIF's standing as a party to a CAS appeal based on a decision by its Adjudication Committee has previously been considered in CAS 2013/A/3115 and CAS 2013/A/3116. It stated (at paragraph 108):

> "*As determined in previous decisions of the CAS, such as CAS 2010/A/2083 which was relied upon by the NOPC, the appeal can be made "against the National Federation that made the contested decision and/or the body that acted on its behalf". In this case the NOPC is the Federation and the Appeal Committee is the body that acted on its behalf, pursuant to the Regulations of the NOPC*".

61. The Panel concurs with the findings in CAS 2013/A/3116. An appeal can be made against the National Federation that made the contested decision and/or the body that acted on its behalf. Accordingly, the NIF is legitimately a party in these proceedings.

V. APPLICABLE LAW

62. Ms Johaug submits that the applicable law should be Swiss law for the following reasons:

1. The NIF Statutes are based on the WADA Code – and the WADA Code has primacy;
2. The WADA Code was conceived by WADA, a Swiss private law foundation.
3. The WADA Code emphasizes that all Signatories should adhere to the same rules at the national and international level, as well as before the CAS.
4. The domicile of the FIS is Switzerland.
5. As the domicile or place of incorporation of most International Federations is Switzerland, Swiss law is often the most applicable to doping disputes before the CAS.

63. Further, Article R58 provides:

> "*The Panel shall decide the dispute according to the applicable regulations and, subsidiarily, to the rules of law chosen by the parties or, in the absence of such a choice, according to the law of the country in which the federation, association or sports-related body which has issued the challenged decision is domiciled or according to the rules of law that the Panel deems appropriate. In the latter case, the Panel shall give reasons for its decision*".

64. No party disputes Ms Johaug's assertions.

65. Accordingly, the Panel decides that Swiss law applies to this dispute.

VI. ADMISSIBILITY OF THE APPEAL AND CROSS-APPEAL

66. The appeal by the FIS was filed within the deadline set out in Section 12-25 (10) of the NIF Statutes and fulfilled the relevant administrative requirements. This appeal is admissible.

67. Ms Johaug submits that her cross-appeal is admissible based on an amalgamation of the following provisions:

Jurisdiction

- Section 12-1(5) of the NIF Statutes;
- Section 12-23 (c) of the NIF Statutes;
- Section 12-25(2) of the NIF Statutes; and
- Section 12-24 of the NIF Statutes.

Time Limit

- Article 13.2.4 of the WADA Code; and
- Article 13.2.4 of the FIS ADR (application via Section 12-1(5) and Section 12-23 (c) of the NIF Statutes).

68. The FIS objects to the admissibility of Ms Johaug's cross-appeal.

A. <u>Ms Johaug's Submissions on Admissibility of the Cross-Appeal</u>

69. Ms Johaug's cross-appeal is authorized by virtue of the following provisions:

70. **Section 12-1(5) of the NIF Statutes**:

> "*These doping provisions regulate every aspect concerning anti-doping work and are in conformity with the World Anti-Doping Code (Code) and the International Standards issued by the World Anti-Doping Agency (WADA). For all aspects not directly regulated by these doping provisions, the World Anti-Doping Code and the International Standards shall apply automatically and be considered as part of these doping provisions. In case of conflict between the World Anti-Doping Code/the International Standards and these doping provisions, the World Anti-Doping Code/the International Standards shall have precedence*".

71. This confirms primacy of the WADA Code in case of any conflict with the NIF Statutes. The provisions of the WADA Code are therefore deemed to apply and shall be considered as part of the NIF Statutes.

72. This was confirmed in case CAS 2013/A/3116, which stated:

> "*Pursuant to Regulation 12-1 (3), the NOPC Regulations in relation to anti-doping are stated to be in conformity with the World Anti-Doping Code issued by WADA, and that for all aspects not directly regulated by the NOPC Regulations, the WADC shall apply automatically and be considered part of the NOPC Regulations. It also states that in cases of conflict between the NOPC Regulations and the WADC, the WADC takes precedence*".

73. **Section 12-23 of the NIF Statutes** allows appeal of decisions made by the NIF's adjudication committee and other decisions covered by Article 13.2 of the WADA Code:

> "*§ 12-23 Decisions subject to appeal*
>
> *The following decisions may be appealed:*
>
> *a) decisions made by the NIF's adjudication committee*
> *b) decisions made by Anti-Doping Norway under §§ 12-8 (10), 12-13, 12-16 and 12-21*
> ***<u>c) other decisions mentioned in WADC art. 13.2</u>***". [emphasis added]

74. **Section 12-25(2) of the NIF Statutes** provides the right for an international-athlete (such as Ms Johaug) to appeal:

"*§ 12-25. Appeal procedure*

(2) Appeals on decisions made by the NIF's adjudication committee are determined as follows:

a) decisions concerning ***international level athletes*** *as defined by the international federations or decisions related to an international event, may be appealed directly to CAS without being treated by the NIF's appeals committee,*
b) WADA may appeal all decisions directly to CAS without treatment in NIF's appeal committee,
c) other appeals are handled by the NIF's appeals committee". [emphasis added]

75. **Article 13.2.4 of the FIS ADR and the WADA Code**, which are identical, apply since the FIS itself appealed the Decision:

"*13.2.4. Cross Appeals and other Subsequent Appeals Allowed*

Cross appeals and other subsequent appeals by any respondent named in cases brought to CAS under the Code are specifically permitted. Any party with a right to appeal under this Article 13 must file a cross appeal or subsequent appeal at the latest with the party's answer".

76. The Comment to Article 13.2.4 of the WADA Code explains that this provision is necessary because the CAS no longer permits the right to a cross-appeal since 2011. This reads as follows:

"*This provision is necessary because since 2011, CAS rules no longer permit an Athlete the right to cross appeal when an Anti-Doping Organization appeals a decision after the Athlete's time for appeal has expired. This provision permits a full hearing for all parties*".

77. Article 13.2.4 is mandatory. This is required by Article 23.2.2 of the WADA Code, which states:

"The following Articles [...] must be implemented by Signatories without substantive change [...]:

[...] Article 13 (Appeals) with the exception of 13.2.2, 13.6, and 13.7."

78. CAS 2015/A/4215 indicates that WADA Code Article 13.2.4 allows for the extension of the time period in which a party may file a cross appeal:

"*161. So what is the true meaning of Article 75.4 FIFA ADR (and Article 13.2.4 2015 WADAC)? In the Panel's view, these articles do nothing more than extend the time period in which a party to a doping appeal may file a cross appeal (or any subsequent appeal). In such cases, the time limit for a party to submit its cross or subsequent appeal is extended until the moment it submits the answer. This time limit can thus be longer than the normal filing period of 21 days. This possibility is perfectly in line with Article R49 of the Code which gives preference to the time limits set forth in a federation's regulations. The standard 21-day deadline remains the default situation otherwise.*

> *162. In addition, any cross appeal must specifically comply with the usual procedural requirements set forth under Article R47 et seq of the Code, meaning the respondent must accompany the same with a copy of the challenged decision, the CAS Court Office fee and all other procedural and documentary elements required to set it in motion*".

79. Therefore, Ms Johaug argues her cross-appeal is admissible – the time limit for filing is (at the latest) with her answer in CAS 2017/A/5015. Her answer was due on April 28, 2017. Ms Johaug filed the cross appeal on April 27, 2017, and therefore met the deadline.

B. THE FIS' SUBMISSIONS ON ADMISSIBILITY OF THE CROSS-APPEAL

1. The Cross-Appeal is Late and Inadmissible

80. The relevant NIF Statutes setting out the appeal procedure are Sections 12-23 and 12-24. These do not provide the right for an athlete to "cross-appeal".

81. NIF Statutes Section 12-1 (5) does not introduce the possibility of a cross-appeal. The WADA Code contains some provisions that must be adopted and implemented by Anti-Doping Organizations ("ADOs"), and others that the ADOs are not obliged to adopt. ADOs are not obliged to adopt Article 13.2.4 of the WADA Code. Otherwise, WADA would not have approved the NIF Statutes as the binding ADRs for Norwegian athletes.

82. Therefore, Ms Johaug's cross-appeal must be regarded as a regular appeal which has been filed late.

83. The time extensions granted by the CAS Court Office do not apply to the cross-appeal. Neither the CAS nor the FIS accepted Ms Johaug's cross-appeal when extensions for the time-limits to file the answer to the FIS's appeal were allowed. The FIS was asked about its consent to the extension for the time limit for the answer only.

2. A Cross-Appeal does not Empower the CAS to Mitigate the Sanction

84. Even if the right to a cross-appeal exists, there can be no reduction or elimination of the sanction below the 13 months imposed by the Adjudication Committee. The Comment to Article 13.2.4 of the WADA Code states:

> "*This provision is necessary because since 2011, CAS rules no longer permit an Athlete the right to cross appeal when an Anti-Doping Organization appeals a decision after the Athlete's time for appeal has expired. This provision permits a full hearing for all parties*".

85. This means the athlete does not have a second chance to file a full appeal against the initial verdict after an ADO has filed a subsequent appeal. Article 13.2.4 of the WADA Code only makes sure that the athlete's due process rights remain fully respected if an ADO files a subsequent appeal after the athlete accepted the initial verdict and decided not to appeal the respective decision.

86. As a consequence, the athlete has the right to be heard in subsequent appeals before the CAS to make sure the initial decision is not overturned to his or her disadvantage. Article 13.2.4 of the WADA Code does not revive the athlete's full appeal rights after

the time limit for his or her appeal has expired. The athlete may indeed request, by way of cross-appeal, that the sanction imposed by the initial decision must not be aggravated but cannot request a lower sanction. The athlete could have done so by filing an ordinary appeal within 21 days of the decision.

87. Ms Johaug accepted the initial verdict of the Adjudication Committee and did not file an appeal within 21 days of the Adjudication Committee's decision. She cannot change her mind now and challenge the initial decision.

88. Ms Johaug's due process rights are already fully respected in the original appeal procedure instituted by the FIS. There is no legal interest worth protecting in a separate cross-appeal.

3. *De Novo* Competence vs Scope of the Cross-Appeal

89. Article R57 of the CAS Code provides the Panel with full power to review the facts and law. However, the Panel is bound by the Parties' requests for relief and the applicable rules determining scope, and the procedural rules of the CAS Code.

90. If Ms Johaug had filed a timely and regular appeal against the Decision, the Panel would have had to review the Decision *de novo*. However, Ms Johaug accepted the 13-month sanction (through public statements, and by not filing an appeal) and she is barred from retrospectively requesting mitigation of the sanction.

91. The cross-appeal is not independent, but necessarily conditional upon the appeal of another Party. The athlete can only try to prevent disadvantage accruing to her as a result of the FIS' appeal. That is the scope of Article 13.2.4 of the WADA Code and also of the Panel's jurisdiction.

92. Ms Johaug's requests for relief should be rejected and her cross-appeal should be dismissed.

VII. SUBMISSIONS OF THE PARTIES

A. SUBMISSIONS OF THE APPELLANT (THE FIS)

1. The Cause of Ms Johaug's Adverse Analytical Finding was a Lip Cream

93. The FIS accepts the facts underpinning the Decision. It agrees that the source of Ms Johaug's adverse analytical finding was a lip cream, Trofodermin, which contains Clostebol acetate, and that she had received it from Dr Bendiksen.

2. The Imposed Period of Ineligibility is Inappropriate

94. The crux of the FIS's appeal focuses on Ms Johaug's failure to look at the packaging of the lip cream. It submits that the sanction issued by the Adjudication Committee can be considered to be "*comparably mild*". It argues that the Adjudication Committee probably did not sufficiently consider the disregard of Ms Johaug and Dr Bendiksen as to the clear doping warning on the box.

95. The FIS agrees with the Adjudication Committee's finding that Ms Johaug's fault was not significant as she relied on her team doctor who gave her the Trofodermin to cure the acute sunburn on her lips.

96. Further, the FIS argues that it is an athlete's primary duty of care to read the packaging of products and to double-check with a medical person if the information refers to a prohibited substance, especially if a product is used for the first time. In this case, Ms Johaug did not have to decipher the pharmaceutical names of substances or even a foreign language.

97. Boxes containing Trofodermin sold in Italy are marked with clear doping warning pictograms. This image clearly informs anyone looking at it that the product contains "doping" substances. Everybody would understand (without any pharmaceutical or medical background, or double-checking) that the product contained "doping" substances.

3. Requests for Relief

98. On the basis of these submissions, the FIS requests relief as follows:

> (1) *The period of ineligibility imposed on Ms Therese Johaug by the decision rendered by the Adjudication Committee of the Norwegian Olympic and Paralympic Committee and Confederation of Sports dated February 10, 2017 shall reasonably be extended.*
>
> *(2) The Appellants shall contribute to the Respondent's costs and expenses related to this appeal.* [1]

99. At the conclusion of the hearing, the FIS requested that Ms Johaug's period of ineligibility be extended to a period between 16-20 months.

B. Submissions of the Respondent and Cross-Appellant (Ms Johaug)

1. Background

100. Ms Johaug agrees that she obtained Trofodermin from Dr Bendiksen and that this was the source of the Clostebol found in her system. Trofodermin is not intended to enhance performance. This is not disputed by the Parties.

101. When traveling, Ms Johaug and the Norwegian women's cross country ski team are supported by a team doctor or team physiotherapist who travels with a locked suitcase containing medication for use by the athletes. If other medications are required, the team doctor is responsible for procuring them. As a matter of team policy, members of the team are not permitted to buy medications when traveling abroad.

102. Ms Johaug is required by her team contract to check the use of any dietary supplements with the team doctor, and to comply with advice and guidance given by the team's

[1] The Panel notes that the FIS's request for relief as to the costs improperly requests costs against itself to the extent it prevails. On 8 March 2017, the FIS submitted a letter amending such references to the Appellant and the Respondents in the FIS's request for relief on costs.

doctor or medical support team. Whenever Ms Johaug is abroad, she will confer with the team doctor even if she only needs ordinary pain killers or anti-inflammatories. Ms Johaug has always been diligent and fastidious about her anti-doping obligations.

Ms Johaug's Use of Trofodermin

103. At the end of August, Ms Johaug was training in Seiser Alm, Italy. The training was physically grueling. She suffered a severe sunburn on her lower lip, which caused open wounds that bled and excreted puss. They were extremely painful. Ms Johaug was extremely distressed as she was in severe pain and felt the wounds were not healing.

104. On 3 September 2016, Dr Bendiksen gave Ms Johaug Trofodermin. She asked him if it was "*entirely safe to use*" and he assured her that "*this cream is not on the doping list*". After that, she did not think of the matter again and had no doubts applying the cream. Given Dr Bendiksen's experience and role as team doctor, she expected him to have sufficiently researched Trofodermin against the WADA Prohibited List and all other necessary research to ensure its safety.

105. As Ms Johaug is obliged, pursuant to her team contract, to follow the team doctor's guidance, she relied and acted on Dr Bendiksen's advice. Ms Johaug cites clause 5.2.1 of her contract, which stipulates:

> "*5.2.1 The Athlete is obliged to:*
>
> *[...]*
>
> *h. abstain from using preparations or other things that are or may be contrary to NIF and WADA doping rules. Use of natural preparations and dietary supplements shall be approved by NSF's doctor before potential use. If situations arise in which the Athlete has a need for medicinal preparations, the coach shall be informed and NSF's doctor consulted. The Athlete is obliged to comply with advice and guidance given by NSF's doctor/medical support team.*"

106. Ms Johaug honestly believed that she had discharged her duty with regards to her anti-doping obligations. She did not see herself as more competent than Dr Bendiksen in this regard. She has never knowingly or deliberately violated any anti-doping rules. Ms Johaug was not aware, at the time, of the stress that Dr Bendiksen was under.

Dr Bendiksen's Role in the Events

107. Dr Bendiksen is the team doctor. He has been a practicing doctor since 1982 and has specialized in sports medicine for over 30 years. He has also worked for large pharmaceutical companies such as Pfizer and Nycomed. In addition, he has extensive experience acting as Team Physician for numerous Olympic teams in a range of sports. Recently, he served as Chief Medical Officer of the Norwegian Olympic Team (2014 Sochi Olympic Games), and Team Physician for the Norwegian National Women's Cross Country Ski Team (2014-2016).

108. Dr Bendiksen has an extraordinary level of anti-doping education and experience. He has completed Anti-Doping Norway's anti-doping course and a two-year program with the IOC, culminating in the IOC diploma in sports medicine. This included a module

on "*Drugs in sport: practice and prevention*". Dr Bendiksen has delivered seminars on anti-doping on behalf of Anti-Doping Norway, and assisted hundreds of athletes with their doping control tests, both in and out of competition. He had a reputation on the team as a "fusspot" because he was considered to be very strict in ensuring compliance with all NIF, FIS and WADA rules and regulations. Ms Johaug was familiar with Dr Bendiksen's qualifications and experiences.

109. Following the 2014 Winter Games, Dr Bendiksen was employed as the team doctor. During this period, Ms Johaug consulted Dr Bendiksen with respect to any treatments she required, followed his instructions closely, and verified with him the safety of products she considered using.

110. During the time of Dr Bendiksen's purchase of the Trofodermin, he was under a lot of stress due to several personal and professional issues relating to: the case of Martin Johnsrud Sundby and the attendant media pressure, his wife's impending eye surgery, and his attendance to a badly injured Norwegian athlete during training. As a result, Dr Bendiksen was very stressed.

111. Dr Bendiksen was looking for a cream containing Neomycin, an antibiotic, to treat Ms Johaug's sores. Once he had noted the Trofodermin contained Neomycin, he did not conduct any further inspection of the packaging and did not make the connection between Clostebol and the Prohibited List. He did not notice the doping warning on the box. He then put the box in a carrier bag, where it remained until he handed the box to Ms Johaug. In normal circumstances, he would always conduct an internet search to verify the safety of any product. He cannot explain why he overlooked the presence of Clostebol and surmises that he failed to detect it due to the stresses affecting him.

112. Dr Bendiksen's role in this matter cannot be overstated. He took full responsibility for the adverse analytical finding and has resigned from his position as team doctor.

2. No Intent

113. Ms Johaug did not act with "intent", as defined below:

> "*10.2.3 As used in Articles 10.2 and 10.3, the term "intentional" is meant to identify those Athletes who cheat. The term, therefore, requires that the Athlete or other Person engaged in conduct which he or she knew constituted an anti-doping rule violation or knew that there was a significant risk that the conduct might constitute or result in an anti-doping rule violation and manifestly disregarded that risk*".

114. Ms Johaug used Trofodermin to treat her lips and there was no attempt on her part to "*cheat*". Therefore, the baseline sanction should be two years under Article 10.2.2 of the WADA Code, and not four years under Article 10.2.1. Article 10.2 stipulates that the period of ineligibility shall be four years where the violation was intentional.

115. However, the Panel need not consider the issue of intentionality and must assess this appeal based on degree of fault, in particular by considering whether Ms Johaug meets the criteria for "*No Fault or Negligence*".

3. Determining Fault

116. In assessing Ms Johaug's degree of fault, the Panel is required to consider subjective factors. The definition of fault is set out at Appendix 1 of the WADA Code as follows:

> "***Fault:*** *Fault is any breach of duty or lack of care appropriate to a particular situation. Factors to be taken into consideration in assessing an Athlete or other Person's degree of Fault include, for example, the Athlete's or other Person's experience, whether the Athlete or other Person is a Minor, special considerations such as impairment, the degree of risk that should have been perceived by the Athlete and the level of care and investigation exercised by the Athlete in relation to what should have been the perceived level of risk. In assessing the Athlete's or other Person's degree of Fault, the circumstances considered must be specific and relevant to explain the Athlete's or other Person's departure from the expected standard of behavior. [...]*".

117. Therefore, in determining fault, the Panel should consider: (a) the degree of risk that should have been perceived by the athlete; and (b) the level of care and investigation exercised by the athlete in relation to the perceived level of risk.

118. The Panel must consider both objective elements (the steps taken to prevent the consumption of a prohibited substance, generally outlined in CAS 2013/A/3327 and subjective factors (such as Ms Johaug's personal circumstances and any impairments).

Delegation of anti-doping obligations

119. Ms Johaug is permitted to delegate elements of her anti-doping obligations. If a mistake later arises, the fault to be assessed is not Ms Johaug's but the fault made by her choice of delegate.

120. To support this argument, Ms Johaug relied on sections of several cases arguing as follows:

> *"(a) The CAS observed in CAS 2014/A/3591 Al Nahyan v. Fédération Equestre Internationale, although an athlete "cannot avoid strict liability" by her reliance on others, "the sanction remains commensurate with the athlete's personal fault or negligence in his selection and oversight of the physician, trainer, or advisor[.]"*
>
> *(b) In CAS 2016/A/4643 Maria Sharapova v ITF, the Panel determined that the fault to be assessed is not that which is made by the delegate, but the fault made by the athlete in his/her choice... The measure of the sanction to be imposed depends on the degree of fault".*

121. Therefore, the relevant consideration is the "*reasonableness or otherwise of her choice of delegate*".

4. No Fault or Negligence

122. The Panel should find that Ms Johaug acted with "No Fault" ("NF").

123. Article 10.4 of the WADA Code provides that if there is a finding of "*No Fault or Negligence*" then no period of ineligibility is imposed. To qualify for this, Ms Johaug must first establish how the Prohibited Substance entered her system.

124. Ms Johaug has explained how Clostebol entered her system and this explanation was accepted by the FIS. Therefore this criterion is fulfilled.

125. The Panel is also required to take Ms Johaug's personal circumstances and any impairments into account to calibrate its assessment of fault. These are: (a) Ms Johaug was contractually bound to follow the advice of Dr Bendiksen and that she had total confidence in his ability as an expert in anti-doping; (b) Ms Johaug is ordinarily very cautious with regards to her anti-doping obligations; and (c) at the time of the incident, Ms Johaug was in a very poor state of mind due to her health issues that she even considered quitting the training camp.

126. In assessing the "*degree of risk that should have been perceived*", the Panel should consider the following factors: (a) the medication came from Dr Bendiksen who purchased it himself and explicitly vouched for its safety; (b) Ms Johaug was seeking treatment for her lips, therefore the degree of risk perceived must be considerably less than might be the case if the treatment required an injection or oral ingestion; (c) she had suffered lip sores on many previous occasions and had no reason to suspect that treatment of the same issue would present any risk; (d) it is extremely unusual for Clostebol or similar substances to be used for the treatment of these types of sores, therefore there was nothing particular in the injury or treatment that should have led her to exercise a greater degree of care; and, (e) it was reasonable for Ms Johaug to believe that any necessary checks had been conducted in the time Dr Bendiksen had the Trofodermin in his possession (almost 24 hours).

127. Therefore, the degree of risk perceived must be close to nil.

128. In assessing the "*level of care and investigation exercised by the athlete in relation to what should have been the perceived level of risk*", the Panel should consider the relevant circumstances as follows: (a) Ms Johaug asked the person best placed to make decisions in relation to anti-doping issues; (b) she was contractually obligated to run any checks past Dr Bendiksen; (c) she expressly asked him whether the product was safe, even though most athletes would not have asked the question given his vast experience; and (d) Dr Bendiksen affirmed that Trofodermin was safe to use.

129. Dr Bendiksen did not provide the quality of advice that might normally have been expected but that cannot be held against Ms Johaug as she had no reason to think that he was going to be less diligent than usual.

130. As such, the level of care exercised by Ms Johaug was exactly what might have been expected of her – if not greater – in respect of the low level of risk that would have been perceived in these particular circumstances.

131. CAS 2005/C/976 & 986, *FIFA & WADA* states:

> "*73 [...] The Panel underlines that this standard is rigorous, and must be rigorous, especially in the interest of all other competitors in a fair competition. However, the Panel reminds the sanctioning bodies that the endeavours to*

> *defeat doping should not lead to unrealistic and impractical expectations the athletes have to come up with. Thus, the Panel cannot exclude that under particular circumstances, certain examples listed in the comment to art. 10.5.2 of the WADC as cases of "no significant fault or negligence" may reasonably be judged as cases of "no fault or negligence".*"

132. Based on the foregoing submissions:

1. Article 10.4 of the WADA Code (Elimination of the Period of Ineligibility where there is No Fault or Negligence) applies;

2. There was no fault or negligence on her part; and

3. No period of ineligibility should be imposed.

No Significant Fault or Negligence

133. In the alternative, if the Panel finds that "No Fault" does not apply, then Ms Johaug should be found to have had "No Significant Fault" ("NSF") and her sanction should be limited to a maximum of a one year ban.

134. In accordance with Article 10.5.2 of the WADA Code, Ms Johaug's fault should be "*viewed in the totality of the circumstances*". Her particular circumstances, as previously set out, warrant the maximum reduction possible under Article 10.5.2, *i.e.* one-half of the applicable period. Therefore, any sanction must be limited to a maximum of one year.

Proportionality

135. Ms Johaug submits that the Panel must consider whether the sanction imposed is proportionate, and that any period of ineligibility would be disproportionate.

136. Although the WADA Code prescribes mechanisms by which sanctions can be eliminated or reduced, the Panel should measure the sanctions applied against the principle of proportionality. In CAS 2005/A/830 the CAS stated:

> "*10.24 [...] the Panel holds that the mere adoption of the WADA Code [...] by a respective Federation does not force the conclusion that there is no other possibility for greater or less reduction a sanction than allowed by DC 10.5. The mere fact that regulations of a sport federation derive from the World Anti-Doping Code does not change the nature of these rules. They are still – like before – regulations of an association which cannot (directly or indirectly) replace fundamental and general legal principles like the doctrine of proportionality a priori for every thinkable case.*"

137. Further, the WADA Code now expressly instructs tribunals to ensure that any sanction imposed complies with the principle of proportionality.

138. Therefore, the existence of fault-based mechanisms in the WADA Code does not remove the Panel's obligation to ensure that sanctions are commensurate to the specific circumstances before it.

Envisaged Goals

139. There must be a reasonable balance between the kind of misconduct and the sanction. In order to ensure that balance, the Panel first needs to determine the "*justifiable aim*" or "*envisaged goal*". This was noted in CAS 2005/C/976 & 986:

> "*138 The sanction must also comply with the principle of proportionality, in the sense that there must be a reasonable balance between the kind of the misconduct and the sanction. In administrative law, the principle of proportionality requires that (i) the individual sanction must be capable of achieving the envisaged goal, (ii) the individual sanction is necessary to reach the envisaged goal and (iii) the constraints which the affected person will suffer as a consequence of the sanction are justified by the overall interest in achieving the envisaged goal.*
>
> *139 A long series of CAS decisions have developed the principle of proportionality in sport cases. This principle provides that the severity of a sanction must be proportionate to the offense committed. To be proportionate, the sanction must not exceed that which is reasonably required in the search of the justifiable aim.*"

140. The "*justifiable aims*" of sanctions are "*retributive and educational*":

1. In CAS 2010/A/2268, paragraph 133, the CAS considered "*the specific circumstances of the case and of the twofold aim – retributive and educational – of the sanction*" and decided that the strict application of Article 10.2 in that case would be "*excessive and disproportionate*".

2. In CAS 2007/A/1252, paragraph 97, the CAS considered that the otherwise applicable sanction there was "*neither proportionate with the misconduct of the athlete nor would it be capable of achieving the envisaged goal – that is both to prevent abuse and educate – of the said rules*" and therefore applied the principle of proportionality to allow it to step outside the bounds of the WADA Code.

141. Ms Johaug's case is highly unusual as she did precisely as she was required – she consulted and followed the advice of a very experienced sports doctor who was also the team's resource for anti-doping matters. She is in her current position precisely, and paradoxically, because she did as she was required.

142. The Panel must ask itself whether punishing Ms Johaug in these circumstances is capable of meeting the "*envisaged goal*". With respect to retribution, there would be something very wrong with a system that punishes athletes for doing what they are always cautioned to do. On the goal of education, it is questionable what the lesson learned would be.

143. Therefore, imposing any period of ineligibility would defeat the purpose of the rules.

144. If the Panel disagrees, it must then examine whether there is a "*reasonable balance between the kind of misconduct and the sanction*".

Balance between the Misconduct and the Sanction

145. In summary of the facts, Ms Johaug sought medical treatment from a very experienced sports doctor. If she had ignored Dr Bendiksen's advice, she would not be in the position in which she now finds herself. That is the "*misconduct*" that is being punished and against which the Panel must determine the proportionality of any sanction to be imposed on her.

146. The Panel must ensure that there is a reasonable balance between the nature of the "*misconduct*" and any proposed sanction.

147. Ms Johaug has been punished enough. Aside from the stress and stigma that will now attach to Ms Johaug's name for the rest of her life, the provisional suspension has, on its own, already caused significant damage to her career.

1. She was publicly branded a "cheat", a title that – regardless of the outcome of this case – will follow her for the rest of her life;

2. She has missed the entirety of the 2016/2017 season;

3. She is being denied the right to train with her teammates – many of whom are among her closest friends – which is causing Ms Johaug a great deal of distress as that is effectively her social life; and

4. She lost her main sponsor – Fischer – leading to a significant loss of income.

148. In considering the issue of proportionality, Ms Johaug also requests the Panel to consider the nature of the product.

1. Specified Substances are treated as such because, according to the 2009 version of the WADA Code "*there is a greater likelihood that Specified Substances, as opposed to other Prohibited Substances, could be susceptible to a credible, non-doping explanation.*"

2. There is thus an artificial division between Specified Substances and non-Specified Substances, such as Clostebol, because one class of substances is deemed more likely to be "*susceptible to a credible, non-doping explanation*", although the reality is that specific circumstances of any given case will determine whether there is "*credible, non-doping explanation*".

149. Ms Johaug used a lip cream – a product completely unrelated to sports performance. Thus, the Panel is faced with a "credible non-doping explanation" on the one hand, but the WADA Code mandates a minimum period of ineligibility of 12 month on the other, based solely on an artificial separation between Specified Substances and non-Specified Substances.

5. Request for Relief

150. Ms Johaug requests the Panel to:

1. set aside the Decision dated February 10, 2017;

2. dismiss the appeal filed by the FIS;

3. *eliminate the period of ineligibility imposed on her, on the basis that she acted without "fault or negligence" pursuant to Article 10.4 of the WADA Code;*

4. *alternatively, apply the principle of proportionality to eliminate or, otherwise, significantly reduce the otherwise applicable sanction; and*

5. *alternatively, limit the otherwise applicable sanction to a maximum of 12 months pursuant to Article 10.5.2 of the WADA Code.*

If any period of ineligibility were to be imposed on her, Ms Johaug requests the Panel to backdate any such period of ineligibility to the date of sample collection (September 16, 2016) in accordance with Article 10.11 of the WADA Code/Section 12–17(3) of the NIF Statutes based on prompt admission.

Finally, Ms Johaug requests the Panel to order the FIS and NIF to:

6. *reimburse Ms Johaug for her legal costs and other expenses pertaining to this appeal proceeding before CAS; and*

7. *bear the costs of the arbitration.*

C. THE FIS'S RESPONSE TO MS JOHAUG'S SUBMISSIONS

1. Dr Bendiksen

151. The FIS does not challenge Dr Bendiksen's professional qualifications. It notes however that he was not with the team when needed. Although Ms Johaug was allegedly very sick and suffering from severe pains on 2 September 2016, he let another two days pass before treating her.

2. Ms Johaug's Contractual Obligations

152. Ms Johaug implies that her contractual obligations under the "Agreement for Athletes selected for the Norwegian Ski Federation's National Team" ("Athletes Agreement") oblige her to "*blindly follow the doping-related information from her team doctor*". This is misleading in several respects:

1. The primary personal duty under Article 5.2.1 h. of Ms Johaug's contract is to "*abstain from using preparations or other things that are or may be contrary to NIF and/or WADA doping rules.*" Ms Johaug failed to highlight this first and foremost sentence.

2. Approval by the Ski Federation's doctors before potential use is required for the "*[u]se of natural preparations and dietary supplements.*" Typically, such supplements do not often bear clear information indicating a prohibited substance and it is therefore not clear whether they "*are or may be contrary to NIF and/or WADA doping rules*".

3. The next sentence obliges an athlete to notify her coach and the team doctor of her need for a "medicinal preparation" (*i.e.* medication). Finally, the Athletes Agreement makes clear that the athlete shall follow the medical advice given by the NSF's doctor/medical support team. These are not obligations specific to doping.

In particular, there is absolutely nothing in these two sentences which would dispense an athlete who signed the Athletes Agreement from complying with his or her personal duties related to doping.

153. Therefore, nothing in Ms Johaug's contract required her to deviate from strictly observing her personal duty to make sure no prohibited substance entered her body. On the contrary, Article 5.2.1 h. of her contract explicitly reminds her of her doping-related duties.

3. Delegation of Doping Related Duties to Dr Bendiksen

154. There was no delegation of doping-related duties to Dr Bendiksen. Ms Johaug seems to have confused consultation with a medical doctor with delegation to a third person. Ms Johaug was simply asking for advice from her doctor as to whether the product was "clean", and did not conduct any supervision or control in these circumstances. Therefore, merely consulting with a doctor is not delegation.

155. The duty of care to avoid doping is personal and remained with Ms Johaug at all times.

156. The athlete's personal duty of care may include asking a medically trained person about doping risks of a certain product, but that is only one of several precautions that must be observed. An athlete may not blindly rely on a doctor's answer, especially when the doping risk is so obvious, as in the present case.

157. In both cases cited by Ms Johaug (CAS 2014/A/3591 and CAS 2016/A/4643), the Panel excluded a finding of No Fault or Negligence right away.

158. In CAS 2014/A/3591, which was about a doped horse, the Panel found that in equestrian sport, a PR "*is likely to rely on systems and the work of third parties to a significant degree (and, of course, to a greater ex-tent than a human athlete)*".

159. In CAS 2016/A/4643, the Panel considered that "*nothing prevented the Player, a high–level athlete focused on demanding sporting activities all over the world, from delegation activities aimed at ensuring regulatory compliance and more specifically that no anti-doping rule violation is committed to Mr Eisenbud*".

160. In both cases, the panels found, however, that even if the decision of the athlete to be assisted in meeting his or her anti-doping obligations, the athletes still remained obliged to monitor or supervise the activities of their delegates.

161. The issue in Ms Johaug's case is not about delegating any doping-related duties to a third person, but whether Ms Johaug has complied with her personal duty to make sure that no prohibited substance entered her body by asking Dr Bendiksen whether Trofodermin was safe, despite the obvious and unmissable warning on the package that it was not.

162. Dr Bendiksen's mistakes are difficult to understand but do not discharge Ms Johaug from her personal duty to check whether the product contained a prohibited substance. This required no medical knowledge at all.

163. The case involving teammate Martin Johnsrud Sundby should have alerted Dr Bendiksen to be even more attentive and to double-check all circumstances before providing medical advice to one of the team's top athletes.

4. No Intention to Improve Sporting Performance

164. The FIS accepts that Ms Johaug did not attempt to improve her sporting performance by applying Trofodermin. However, she did not comply with the standard of "utmost caution" to prevent a prohibited substance from entering her body.

165. Consulting Dr Bendiksen does not absolve Ms Johaug from any fault, for the following reasons:

1. Ms Johaug disregarded the clear doping warning sign on the package of Trofodermin.

2. The active ingredients of Trofodermin, namely "Clostebol acetate" and "Neomiciono solfato", are printed clearly on the package and the tube itself. It does not require Italian language skills to identify the active ingredients and to double-check them.

3. Ms Johaug did not review the patient information package. The two active ingredients are mentioned on the front page of the patient information. Throwing the information away just because it is in a foreign language is definitely not compliant with the athlete's duty of care.

4. Ms Johaug did not conduct an internet check on Trofodermin. There are several websites in English which list the ingredients of Trofodermin, in particular, Clostebol.

5. Ms Johaug did not consult the WADA Prohibited List. If she had just typed "Clostebol" in the search function, she would have been alerted that this was a prohibited substance.

166. Ms Johaug should have been even more vigilant as:

1. She must have been aware that the WADA Prohibited List contains substances, not products.

2. She suffered from sunburn and blisters on her lips several times before.

3. She was given Trofodermin, which was not her usual treatment for sunburned lips, and it was her first time using it. The product was bought in a foreign country and it was completely unknown to her.

5. The Proportionality of a 13-month sanction

167. A period of ineligibility can be reduced based on No Significant Fault only in cases where the circumstances that justify deviation from the duty of "utmost care" are truly exceptional. Consulting the team doctor may be taken into consideration under Section 12-9 of the NIF Statutes when the sanction is to be reduced based on No Significant Fault or Negligence. The Adjudication Committee did this.

168. The circumstances, especially the fact that the prohibited substance and the doping risk could easily have been identified by Ms Johaug herself, call for a sanction clearly above the minimum of 12 months, and also higher than 13 months.

169. When applying the system to determine the length of a period of ineligibility (according to the degree of fault that was introduced in CAS 2013/A/3327) and considering the fact that Clostebol is a non-specified substance *(i.e.* anabolic steroid prohibited at all times) which was applied for a period of at least 10 days, the length of the period of ineligibility must be between the minimum duration of 12 months and a maximum of 24 months. Accordingly, a significant degree of or considerable fault may lead to a sanction of 20 – 24 months, a normal degree of fault may lead to 16 – 20 months, and a light degree of fault may lead to 12 – 16 months.

170. In determining the level of objective fault, the Panel must consider that the duty of care that an athlete must apply requires him or her to check the package for the ingredients, especially when using it for the first time, and even more when it has been bought in a foreign country.

171. Ms Johaug failed to check the ingredients that were indicated on the packaging and the tube, and disregarded the obvious doping warning sign on the outer package. This constitutes a significant or considerable degree of fault. The fact that she asked Dr Bendiksen whether the product was "clean" may, at most, lead to a finding of a normal degree of fault, but not below.

172. Ms Johaug did not exercise the utmost caution under the circumstances. As recognized in CAS 2014/A/3798, it is not sufficient to ask a doctor whether the product is clean – the athlete cannot rely on support staff.

173. The fact that the WADA List could not be displayed on Ms Johaug's phone and that she had not alerted anyone to this shows that she had not previously used this list. On cross-examination, Ms Johaug testified that she had only taken Anti-Doping Norway's e-learning test after her recent press conference on her ADRV. It is alarming that she failed to fulfill the minimum requirements of checking the e-learning program on anti-doping until after the incident.

174. A suspension of between 16 – 20 months is appropriate in these circumstances.

VIII. MERITS

175. The Panel must decide three questions:

1. What is the appropriate level of fault attributable to Ms Johaug?

2. What is the sanction proportionate to Ms Johaug's circumstances?

3. Is Ms Johaug's cross-appeal admissible?

1. Appropriate Level of Fault

i. *The Criteria for No Fault*

176. "No Fault or Negligence" is defined in Appendix 1 of the WADA Code as follows:

> "*The Athlete or other Person's establishing that he or she did not know or suspect, and could not reasonably have known or suspected even with the exercise of utmost caution, that he or she had Used or been administered the Prohibited Substance or Prohibited Method or otherwise violated an anti-doping rule. Except in the case of a Minor, for any violation of Article 2.1, the Athlete must also establish how the Prohibited Substance entered his or her system.*"

177. There is no dispute between the Parties as to how Clostebol entered Ms Johaug's system. The Panel accepts that this was a result of the use of Trofodermin purchased by Dr Bendiksen at a pharmacy in Livigno, Italy, on 3 September 2016.

178. In assessing an athlete's degree of fault, "*the circumstances considered must be specific and relevant to explain the Athlete's or other Person's departure from the expected standard of behavior*" (Definition of Fault set out in Appendix 1 of the WADA Code). This principle was also emphasized in CAS 2010/A/2229.

179. To determine the category or level of fault in Ms Johaug's circumstances, it is instructive to turn to the approach set out in CAS 2013/A/3327 which provides relevant considerations as to the "objective" and "subjective" levels of fault. The Panel stated:

> "*71. In order to determine into which category of fault a particular case might fall, it is helpful to consider both the objective and the subjective level of fault. The objective element describes what standard of care could have been expected from a reasonable person in the athlete's situation. The subjective element describes what could have been expected from that particular athlete, in light of his personal capacities.*
>
> *[...]*
>
> *74. [...]*
>
> *aa) The objective element of the level of fault*
>
> *At the outset, it is important to recognise that, in theory, almost all anti-doping rule violations relating to the taking of a product containing a prohibited substance could be prevented. The athlete could always (i) read the label of the product used (or otherwise ascertain the ingredients), (ii) cross-check all the ingredients on the label with the list of prohibited substances, (iii) make an internet search of the product, (iv) ensure the product is reliably sourced and (v) consult appropriate experts in these matters and instruct them diligently before consuming the product*".

180. Although an athlete may not always be expected to follow all the steps outlined in CAS 2013/A/3327 above, in every circumstance, the Panel finds it striking that Ms Johaug did not perform the most important of them. She was given the packaging of the

Trofodermin but did not conduct even a cursory check of the label. Had she done so, she would most likely have noticed the doping-related warning on the box. Instead, she threw away the box and the accompanying leaflet.

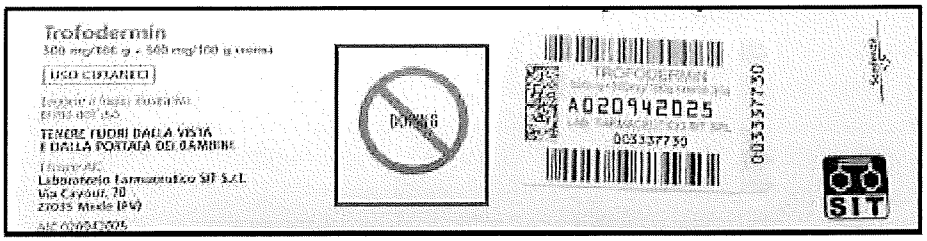


Figure 2: Image of Trofodermin box with doping warning (submitted by Ms Johaug)

181. The Panel also observes that the front of the Trofodermin tube clearly indicates "Clostebol acetate" as an ingredient. There was no need even to consult a long list of ingredients to know the important active ingredients in the product.

182. As the tube was in her possession for approximately 12 days (4 – 16 September 2016) before the sample was taken, she had more than ample opportunity to verify whether the active ingredients were on the WADA Prohibited List. This could have been conducted very quickly and easily on the internet and did not require any knowledge of Italian. Had Ms Johaug just done a simple internet search for e.g. "Clostebol" and the "WADA Prohibited List" she would have found out very quickly that Clostebol is a prohibited substance.

183. The importance of conducting a thorough internet search of a product before using it has also been stressed in CAS 2010/A/2229. In this case, the Panel noted that a very experienced international athlete required to be knowledgeable of doping issues and risks, had no excuse not to be very careful in avoiding the use of doping products. The Panel highlighted the importance of conducting internet research and found that if the athlete had pushed the internet research further, he would have found relevant information on the active ingredient in question.

184. In CAS 2005/A/830, the athlete applied Trofodermin without conducting a check of its contents. The Panel found at paragraph 34, that an athlete fails to abide by his/her duty of diligence if, with a "simple check" she could have realized the medical product he/she was using contained a prohibited substance that was indicated on both the packaging of the product and its notice of use.

185. CAS jurisprudence is very clear that a finding of No Fault applies only in truly exceptional cases. In order to have acted with No Fault, Ms Johaug must have exercised the "utmost caution" in avoiding doping. As noted in CAS 2011/A/2518, the Athlete's fault is "*measured against the fundamental duty which he or she owes under the Programme and the WADC to do everything in his or her power to avoid ingesting any Prohibited Substance*". It also emphasized the personal duty of care, citing the basic principle that it is "*each Competitor's personal duty to ensure that no Prohibited Substance enters his or her body*".

186. Even where the circumstances are "extraordinary" and there is minimal negligence, athletes are not exempt from the duty to maintain "utmost caution". (CAS 2006/A/1025)

ii. *Duty and Standard of Care*

187. An athlete bears a personal duty of care in ensuring compliance with anti-doping obligations. The standard of care for top athletes is very high in light of their experience, expected knowledge of anti-doping rules, and public impact they have on their particular sport.

188. It follows that a top athlete must always personally take very rigorous measures to discharge these obligations. The CAS has specifically noted that the prescription of medicine by a doctor does not relieve the Athlete from checking if the medicine contains forbidden substances or not (2006/A/1133).

189. Athletes always bear personal responsibility and the failure of a doctor does not exempt the athlete from personal responsibility (*see* CAS 2012/A/2959; 2006/A/1133; CAS 2005/A/951).

190. Furthermore, athletes have a duty to cross-check assurances given by a doctor even where such a doctor is a sports specialist (see CAS 2012/A/2959, CAS 2005/A/828).

191. Numerous cases before the CAS have consistently emphasized that an athlete's personal responsibility requires him or her to cross-check assurances given by a doctor. This was summarized in CAS 2012/A/2959 as follows:

> *"8.19 [...] Dr. Tachuk's role does not relieve Mr. Nilforushan of responsibility. In CAS 2008/A/1488, the CAS panel commented at paragraph 12 that "in consideration of the fact that athletes are under a constant duty to personally manage and make certain that any medication being administered is permitted under the anti-doping rules, the prescription of a particular medicinal product by the athlete's doctor does not excuse the athlete from investigating to their fullest extent that the medication does not contain prohibited substances". In CAS 2005/A/872, a CAS panel ruled that for a reduction based on no significant fault or negligence there must be more than simply reliance on a doctor. Further, Koubek [...] makes clear that an athlete must cross check assurances given by a doctor, even where such a doctor is a sports specialist*".

192. The Panel remarks that the consistent findings in this line of cases is relevant to Ms Johaug's circumstances. An athlete cannot abdicate his or her personal duty to avoid the consumption of a prohibited substance by simply relying on a doctor. Although Ms Johaug selected an eminently qualified doctor to assist her in her anti-doping obligations, the ultimate responsibility lies with her. She cannot discharge this responsibility by merely asking about the product's safety and assuming that her doctor (no matter how highly qualified Dr Bendiksen may be) has done the requisite checks. The fact that Dr Bendiksen had the Trofodermin in his possession for some time, and could have been expected to have done the requisite checks, before giving it to her does not reduce Ms Johaug's duty of care. It is not appropriate for an athlete, without any substantiation, to draw a conclusion that her doctor has carried out his responsibilities properly, and subsequently adjust her own level of diligence according to what she thought the doctor could have done.

iii. *Delegation of anti-doping responsibility*

193. Ms Johaug has vigorously submitted that she conducted herself with a great level of care and even went beyond what could ordinarily be expected of someone in her circumstances. To that end, she explained her reliance on Dr Bendiksen's significant expertise, as well as her additional query of whether the Trofodermin was safe to use.

194. Ms Johaug also argued that she was permitted to delegate her anti-doping responsibilities to a third party, and that the fault to be assessed is not that made by the delegate but the fault made by her in her choice of delegate. As support for this, she cited CAS 2014/A/3591and CAS 2016/A/4643.

195. A majority of the Panel disagrees with this. It has been consistently held in CAS decisions that an athlete cannot delegate away his or her responsibilities to avoid doping. In fact, even in both cases that Ms Johaug has cited as support (CAS 2014/A/3591 and CAS 2016/A/4643), this principle is clearly espoused.

196. In CAS 2016/A/4643, the Panel stated:

> "*97. a. [...] It cannot be consistent with the relevant precedents and the WADC that an athlete can simply delegate her obligations to a third party and then not otherwise provide appropriate instructions, monitoring or supervision without bearing responsibility; such a finding would render meaningless the obligation of an athlete to avoid doping.*"

197. In CAS 2016/A/4643, the Panel also underscored the fact that the Parties themselves had agreed to follow the approach that athletes are permitted to delegate elements of their anti-doping obligations (paragraph 85). This is not the case here. The FIS does not agree that delegation is applicable to Ms Johaug's case.

198. Ms Johaug cited CAS 2014/A/3591 (paragraph 177) as stating "*the sanction remains commensurate with the athlete's personal fault or negligence in his selection and oversight of the physician, trainer, or advisor*". However, this paragraph continues, "*or, alternatively, for his own negligence in not having checked or controlled the ingestion of the Banned Substance.*" The Panel even noted that the rider's responsibility did not end with the selection of the best team, and that the team had to be supervised and controlled.

199. The CAS 2014/A/3591 case is also factually distinct from Ms Johaug's situation. It pertained to the delegation of responsibility in the context of equine sport where a rider was likely to rely on third parties to a significant degree, a situation that is different from human athletic endeavor.

200. Ms Johaug further asserts that she conducted herself in accordance with her contractual obligations, which was to seek and follow the advice of the team doctor. Ms Johaug's contract requires her to "*comply with advice and guidance given by NSF's doctor/medical support team*". Ms Johaug's contract certainly does not require her to abandon her personal duty of care.

Conclusion on the Applicability of No Fault

201. By failing to simply check the label, it is clear that Ms Johaug did not exercise the utmost caution. Relying on the assurances of the team doctor without any further steps indicates that she did not exercise caution to the greatest possible extent – there were numerous other things, such as checking the label and conducting an internet search, that Ms Johaug could easily have done.

202. The very fact that the doping pictogram on the packaging was unique and unfamiliar to Norwegian athletes emphasizes the necessity to always check the labels – especially when consuming new medication in a different country. The uniqueness of the pictogram is hardly justification for Ms Johaug's failure to observe its existence.

203. Based on the foregoing, the Panel finds that Ms Johaug's conduct does not warrant a finding of No Fault.

2. Appropriate Sanction

204. The FIS submits that the appropriate level of fault is No Significant Fault ("NSF"). Ms Johaug has pled this as an alternative.

205. NSF is defined by the WADA Code as:

> "*The Athlete or other Person's establishing that his or her Fault or negligence, when viewed in the totality of the circumstances and taking into account the criteria for No Fault or Negligence, was not significant in relationship to the anti-doping rule violation. Except in the case of a Minor, for any violation of Article 2.1, the Athlete must also establish how the Prohibited Substance entered his or her system*".

206. The FIS concurs with Ms Johaug's submission that the Clostebol found in Ms Johaug's system was a result of inadvertence, and that there was no intention to cheat. In light of the very small quantity of Clostebol found, the fact that it was found out-of-competition, and the credible explanation supported by documentary evidence that Ms Johaug unknowingly ingested Trofodermin provided by Dr Bendiksen to heal her lip sores, the Panel finds that she did not act with intention to cheat or gain any competitive advantage.

207. The Panel has assessed the totality of the circumstances. In particular, the Panel weighed Ms Johaug's negligence in failing to examine the box and entirely missing the warning sign, against the fact that she did consult with a qualified and trusted doctor. As such, the Panel finds that Ms Johaug acted with NSF as she had acted upon the advice of Dr Bendiksen, a highly-respected expert in anti-doping, and that the Trofodermin had been provided by him.

208. In order to determine the appropriate range of sanction applicable, the Panel finds the approach in CAS 2013/A/3327 (considered under a prior WADA Code regime) instructive. As such, the Panel has transposed the CAS 2013/A/3327 assessment of fault to Ms Johaug's case, where a finding of an ADRV with NSF under the 2015 WADA Code in this situation would typically warrant a suspension range of between 12 – 24 months. In doing so, the Panel considers that within the NSF category, a greater

degree of fault may lead to a sanction of 20 – 24 months, a normal degree of fault may lead to a sanction of 16 – 20 months, and a light degree of fault may lead to 12 – 16 months. Given Ms Johaug's overall circumstances, the majority of the Panel finds that a normal degree of fault is applicable.

209. Having determined the relevant level of NSF, the Panel turns now to any subjective elements that "*can be used to move a particular athlete up or down within that category*" (CAS 2013/A/3327).

210. Considering Ms Johaug's extremely high level of experience and success as an international athlete, her failure to conduct a basic check is very surprising. Throughout her ten-year career as a professional cross-country skier she has been subject to approximately 140 doping control tests. As such, she should have been very familiar with the rigorous standards expected of an athlete such as herself. Therefore, in light of her personal capacities, Ms Johaug would certainly have been expected to at very least check the label and conduct a basic internet search.

211. Ms Johaug has submitted that her state of mind was extremely poor due to the injury on her lip and the stress she suffered. Nevertheless, this is far from sufficient to justify her obliviousness. Checking the label is the most basic step that an athlete can perform to satisfy his or her own personal duty of care. This expectation has been consistently espoused in numerous cases dealing with athletes that failed to read the product label (*e.g.* CAS 2005/A/830 and CAS 2005/A/951). There was no evidence that indicated Ms Johaug's mental faculties were so impaired as to preclude her from carrying out this basic responsibility. A top-level athlete such as Ms Johaug should be accustomed to the rigors of intense athletic training. The severity of her injuries was not to the extent of requiring any sort of emergency treatment. Indeed, Dr Bendiksen treated Ms Johaug's lip and advised her on her overall condition, including sunstroke, over the course of several days without any serious or immediate medical intervention.

212. Although it is unfortunate that Ms Johaug sustained lip injuries as well as training stress, the Panel does not consider those circumstances sufficiently exceptional to warrant a derogation from her duty of care by placing full responsibility on her doctor. The Panel remarks that if athletes were allowed to escape their personal duty by passing it on completely to an expert in anti-doping (such as a specifically qualified doctor), this could create a more advantageous position for wealthier athletes who have more resources to engage experts, leading to potentially unequal treatment in assessing compliance. Nevertheless, appropriate reliance on a well-known and respected expert can provide some basis to envisage a reduction, as in this case.

213. Finally, the Panel has also taken into consideration Ms Johaug's belief that the Trofodermin was safe in light of her understanding that Dr Bendiksen purchased the medication himself, after being influenced by Dr Bendiksen's explicit reassurance of its safety. The Panel is not heavily persuaded by such argument. Consequently, Ms Johaug's overall circumstances place her level of fault in the middle of the 16 – 20 month range.

i. Proportionality

214. Having decided on the level of fault, the Panel now turns to the question of proportionality.

215. The presence of Clostebol in Ms Johaug's doping sample constitutes a rule violation, according to NIF Statutes Section 12-3(1) a) and WADA Code Article 2.1.

216. Clostebol is not a specified substance, and the Panel has determined that Ms Johaug did not act with intention or gross negligence as defined in Article 10.2 of the WADA Code. In these circumstances, NIF Statutes Section 12-8(4) stipulate that the period of ineligibility shall be two years.

217. The FIS submits that Ms Johaug's sanction was too mild and is "skeptical" of whether the Adjudication Committee properly considered the explicit doping warning on the Trofodermin package when it determined the sanction.

218. On the other hand, Ms Johaug contends that any period of ineligibility imposed on her would be disproportionate and argues that this sanction should be reduced.

219. Ms Johaug questions whether punishing her in these circumstances meets the "justifiable aim" of retribution and education. She argues that she "*did as all athletes are always told to do and as she was contractually obligated*", and that was her so-called "*misconduct*".

220. The Panel does not find this argument convincing. As set out previously in this award, athletes are required to perform their anti-doping obligations with utmost care, which in practice includes reading labels and packaging as a basic minimum. Further, delegation to a third-party, even to a highly qualified sports doctor, is not an acceptable justification. As noted in CAS 2014/A/3798:

> "*[...] it is a key principle of the fight against doping that an athlete cannot blindly rely on his support staff, including doctors. An athlete has a personal duty to ensure that no prohibited substance enters his or her body. He is responsible for the conduct of people around him from whom he receives food, drinks, supplements or medications, including his doctor, and cannot therefore simply say that he trusts them and follows their instructions*".

221. The Panel in CAS 2014/A/3798 also found that nothing prevented the athlete from carrying out his own research and checking personally on (the particular circumstances) the supplement he ingested. Likewise, Ms Johaug was equally free to conduct her own research into Trofodermin.

222. Ms Johaug also submitted that she has already been punished as this case has caused stress and stigma that will be attached to her name for the rest of her life, the provisional suspension she served has already caused significant damage to her career; she has missed the entirety of the 2016/2017 season; she is being denied the right to train with her teammates, and she has lost her main sponsor, causing a significant loss of income.

223. Ms Johaug also argued that an extension of her current suspension period (which is due to end on November 17, 2017) would negatively impact her chances in being selected for the Norwegian Olympic team due to the timing of the race season which starts in November. She explained the importance of the 2018 Olympics for her as she has never won a personal Olympic gold medal.

224. Nevertheless, none of these reasons are relevant considerations with respect to Ms Johaug's sanction. The sanction must be commensurate with Ms Johaug's degree of fault and the factors Ms Johaug has pled do not warrant a reduction beyond the prescribed minimum. In defining fault, the WADA Code at Appendix 1 states:

> "*[...] the fact that an Athlete would lose the opportunity to earn large sums of money during a period of Ineligibility, or the fact that the Athlete only has a short time left in his or her career, or the timing of the sporting calendar, would not be relevant factors to be considered in reducing the period of Ineligibility under Article 10.5.1 or 10.5.2*".

225. This principle has been espoused in 2010/A/2107.

226. With respect to Ms Johaug's arguments on the nature of the product, the Panel has analyzed product considerations in assessing the duty of care. Regardless of the fact that Trofodermin is a skin cream (and not just a lip cream) and not directly related to sports performance, the usual expectations of care and diligence apply as it is clearly a medicinal product. This is not a case of exceptional inadvertence where truly unexpected ingestion of a prohibited substance would warrant an additional reduction of sanction based on proportionality.

227. Further, as recently reiterated by the Panel in CAS 2016/A/4643, the WADA Code has been found repeatedly to be proportional in its approach to sanctions, and the question of fault has already been built into its assessment of length of sanction.

228. Consequently, pursuant to Section 12-8(4) of the NIF Statutes and Article 10.2.2 of the WADA Code, which mandate a period of ineligibility of two years, and Section 12-10(3) of the NIF Statutes and Article 10.5.2 of the WADA Code, which permit a reduction of up to one-half of this period, the applicable suspension range for the finding of NSF in Ms Johaug's case is between 12 – 24 months.

ii. Decision on Sanction

229. It is unfortunate that Ms Johaug's failure to conduct a basic check of the label has resulted in an ADRV that is inconsistent with her otherwise clean anti-doping record. Nevertheless, in order to ensure equality in applying anti-doping rules, the Panel must apply a proportionate sanction consistent with the level of fault.

230. Although Ms Johaug committed the ADRV with NSF, she still bears a certain degree of fault. As such, the sanction cannot be reduced to the minimum measure of ineligibility under Section 12-10(3) of the NIF Statutes or Article 10.5.2 of the WADA Code.

231. Considering the totality of the circumstances, the majority of the Panel determines that a period of ineligibility of eighteen (18) months is appropriate.

232. Ms Johaug has requested for any period of ineligibility to be backdated to the date of sample collection in accordance with Section 12-17(3) of the NIF Statutes or Article 10.11.2 of the WADA Code on timely admission. She argues that by admitting the use of Trofodermin in the DCF and the results of the test through a press conference, she had made a prompt admission.

233. However, the Panel observes that Ms Johaug's Interview Record states the contrary: "*The athlete does not admit a rule violation pursuant to section 12-3(1)(a)-(j) of the NIF Act*". When questioned, Ms Johaug's counsel submitted that Ms Johaug did not dispute that there was a violation, but disputed instead the allegation that she acted "with fault". This explanation is not compelling and the Panel finds that there was no timely admission by Ms Johaug.

234. Accordingly, the starting date of Ms Johaug's period of ineligibility remains 18 October 2016.

(c) Admissibility of Cross-Appeal

235. The Panel has already examined Ms Johaug's response to the FIS's appeal, which comprised the same set of facts and arguments (consolidated together with her cross-appeal) and rendered its decision accordingly.

236. Therefore, in consideration of the foregoing and of the fact that FIS's appeal is partially upheld, a decision on the admissibility of the cross-appeal is dismissed as moot. Nevertheless, the Panel notes for consideration on future examination of the right to file a cross-appeal under Article 13.2.4 of the WADA Code, which is in derogation to the 21-day time limit set in the CAS rules, that it may be pertinent to consider the implications of this provision's exact wording, and in particular the reference to the term "are" in the following sentence: "*Cross appeals [...] **are** specifically permitted*" [emphasis added], instead of "shall be", as is the case with other mandatory provisions that are intended to impose an obligation on the parties to which they are addressed. It is further noted that this issue may be considered in light of other WADA Code provisions which permit (but not oblige) certain actions, by using "may be" as the operative text, such as in Articles 4.4.4.3 and 4.4.7 which state that certain decisions "may be appealed by the Athlete". These considerations raise the question of whether the WADA Code intended to allow for the possibility of cross-appeals where the rules of the federation concerned actually provided for it (or did not), or where all parties involved in the dispute before CAS had the opportunity to specifically agree to the filing of a cross-appeal, even outside the regular time limit for appeal, or whether it intended to suggest that such a possibility be available under other conditions.

237. However, considering the outcome of this appeal, and noting that any such decision on this question would be moot, the Panel will not answer these questions.

IX. COSTS

238. Article R64.4 of the Code provides the following:

> *"At the end of the proceedings, the CAS Court Office shall determine the final amount of the cost of the arbitration, which shall include: the CAS Court Office fee, the administrative costs of the CAS calculated in accordance with the CAS scale, the costs and fees of the arbitrators, the fees of the ad hoc clerk, if any, calculated in accordance with the CAS fee scale, a contribution towards the expenses of the CAS, and the costs of witnesses, experts and interpreters. The final account of the arbitration costs may either be included in the award or communicated separately to the parties."*

239. Article R64.5 of the Code reads as follows:

> *"In the arbitral award, the Panel shall determine which party shall bear the arbitration costs or in which proportion the parties shall share them. As a general rule, the Panel has discretion to grant the prevailing party a contribution towards its legal fees and other expenses incurred in connection with the proceedings and, in particular, the costs of witnesses and interpreters. When granting such contribution, the Panel shall take into account the complexity and outcome of the proceedings, as well as the conduct and the financial resources of the parties."*

240. Having taken into account the outcome of the arbitration, and considering the Athlete was left to defend against an incorrect decision rendered by her Olympic committee (who chose not to actively defend this decision on appeal), but noting that the Athlete herself was unsuccessful in her cross-appeal which required significant written submissions by the FIS, the Panel determines that the costs of this appeal shall be split 50% by the NIF and 50% by Ms Johaug.

241. Furthermore, pursuant to Article R64.5 of the CAS Code, and in consideration of the outcome of the proceedings, the majority of the Panel determines that Ms Johaug and the NIF shall jointly and severally contribute the amount of 3,000 CHF (three thousand Swiss francs) to the FIS as a contribution to their legal and other costs. Ms Johaug and the NIF shall bear their own legal and other costs.

ON THESE GROUNDS

The Court of Arbitration for Sport rules that:

1. The appeal filed by the International Ski Federation against Ms Therese Johaug and The Norwegian Olympic and Paralympic Committee and Confederation of Sport on March 6, 2017 is partially upheld.

2. The cross-appeal filed by Ms Therese Johaug against The Norwegian Olympic and Paralympic Committee and Confederation of Sport on 27 April 2017 is dismissed.

3. The decision rendered by the Adjudication Committee of the Norwegian Olympic and Paralympic Committee and Confederation of Sports on 10 February 2017 is amended as follows:

   Ms Therese Johaug is suspended for a period of eighteen (18) months commencing 18 October 2016.

4. The costs of the arbitration, to be determined and served to the parties by the CAS Court Office, shall be borne 50% by The Norwegian Olympic and Paralympic Committee and Confederation of Sport and 50% by Ms Therese Johaug.

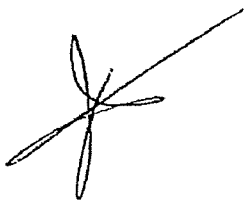
5. Ms Therese Johaug and The Norwegian Olympic and Paralympic Committee and Confederation of Sport are jointly and severally ordered to pay the International Ski Federation a total amount of CHF 3,000 (three thousand five hundred Swiss francs) as contribution towards the expenses incurred in connection with these arbitration proceedings.

6. All other motions or prayers for relief are dismissed.

Seat of arbitration: Lausanne, Switzerland

Date: 21 August 2017

THE COURT OF ARBITRATION FOR SPORT



Romano F. Subiotto Q.C.
President of the Panel