Tribunal Arbitral du Sport
Court of Arbitration for Sport

CAS 2013/A/3115 World Anti-Doping Agency (WADA) v. Rebecca Mekonnen & The Norwegian Olympic and Paralympic Committee (NOPC)

CAS 2013/A/3116 World Anti-Doping Agency (WADA) v. Lasse Sundell & The Norwegian Olympic and Paralympic Committee (NOPC)

ARBITRAL AWARD

delivered by

COURT OF ARBITRATION FOR SPORT

sitting in the following composition:

Sole Arbitrator: Mr. Lars Halgreen, attorney-at-law in Copenhagen, Denmark
Ad hoc clerk: Mr. Roderick Maguire, barrister-at-law in Dublin, Ireland

in the consolidated arbitration

World Anti-Doping Agency, Lausanne, Switzerland
Represented by Mr. Olivier Niggli and Mr. Yvan Henzer, attorneys-at-law in Lausanne, Switzerland

Appellant

vs.

Ms. Rebecca Mekonnen, Loddefjord, Norway
Represented by Mr. Erik Flågan, attorney-at-law in Oslo, Norway

First Respondent

The Norwegian Olympic and Paralympic Committee, Oslo, Norway
Represented by Ms. Henriette Hillestad Thune, Head of Legal Department, Oslo, Norway

Second Respondent

World Anti-Doping Agency, Lausanne, Switzerland
Represented by Mr. Olivier Niggli and Mr. Yvan Henzer, attorneys-at-law in Lausanne, Switzerland

Appellant

vs.

Mr. Lasse Sundell, Oslo, Norway
Represented by Mr. Erik Flågan, attorney-at-law in Oslo, Norway

First Respondent

The Norwegian Olympic and Paralympic Committee, Oslo, Norway
Represented by Ms. Henriette Hillestad Thune, Head of Legal Department, Oslo, Norway

Second Respondent

I. THE PARTIES

1. The World Anti-Doping Agency (hereinafter referred to as "WADA" or "the Appellant") is a Swiss private law foundation with its seat in Lausanne, Switzerland and its headquarters at Stock Exchange Tower, 800 Place Victoria, Montreal, Quebec, H4Z 1B7, Canada. WADA is the global regulator of the World Anti-Doping Code ("WADA Code" or "WADC").

2. Ms. Rebecca Mekonnen is an amateur athlete who competes in the sport of powerlifting. She is a member of the Norwegian club, Bergen Styrkeloftklubb.

3. Mr. Lasse Sundell is an amateur athlete who competes in the sport of floorball. He is a member of the Norwegian club Akerselva IL.

4. The Norwegian Olympic and Paralympic Committee (hereinafter the "NOPC") is the National Olympic Committee for Norway.

II. FACTUAL BACKGROUND

5. Below is a summary of the relevant facts and allegations based on the parties' written submissions, pleadings, and evidence adduced at the hearing. Additional facts and allegations found in the parties' written submissions, pleadings, and evidence may be set out, where relevant, in connection with the legal discussion that follows. While the Sole Arbitrator has considered all the facts, allegations, legal arguments and evidence submitted by the parties in the present proceedings, the Sole Arbitrator only refers to the submissions and evidence he considers necessary to explain his reasoning.

A. Ms. Rebecca Mekonnen

6. On 4 February 2012, Ms. Mekonnen was tested in competition by Anti-doping Norway wherein she tested positive for two prohibited substances, namely cannabis metabolites and methylhexaneamine ("MHA").

7. By decision dated 23 April 2012, the NOPC imposed a ten-month period of ineligibility on Ms. Mekonnen for her first anti-doping rule violation.

8. On 25 May 2012, WADA filed an appeal against this decision to the NOPC Appeals Committee. Following a hearing, where Ms. Mekonnen was not represented by counsel, the NOPC Appeal Committee ultimately rejected WADA's appeal by a majority and confirmed the decision at first instance. In a decision dated 22 February

2013, the NOPC Appeals Committee found as follows (as translated into English by WADA – a translation which has not been contested by the Respondents):

> *"There are no disagreements about the facts of the case. Ms. Mekonnen's ingestion of hashish/cannabis and methylhexaneamine are in breach of letters a and b of Section 12-2 (1) of [Norwegian Olympic and Paralympic Committee and Confederation of Sports] NIF's Act. The penalty for breaches of these provisions is basically exclusion for two years, cf. Section 12-8 (4). The exclusion period can only be relaxed if the athlete or others are able to "produce evidence showing... that the ingestion or possession of the banned substances was not motivated by a desire to enhance the athlete's performance", cf. Section 12-8 (5).*
>
> *Ms. Mekonnen has accepted taking both a dietary supplement and hashish, but she claims to have examined the dietary supplement before taking it. She also gives the impression of having acted in good faith.*
>
> *As correctly maintained by the Adjudication Committee, all athletes take medication and dietary supplements at their own risk and they are also responsible for ensuring that any substances are not illegal or do not contain any illegal ingredients.*
>
> *The Adjudication Committee's decision accords with the recommendations of Antidoping Norway, and the Appeals Committee sees no reason not to comply with the assessment and the penalties arrived at in the first instance.*
>
> *The minority (the committee member, Ms. Mjelde) believes that a strict response is required and that the athlete cannot be regarded as having acted in good faith. In addition to drug abuse, this [case] concerns the ingestion of a dietary supplement that is well known in powerlifting circles. She is unable to see that there are any extenuating circumstances. The exclusion period should therefore be set at two years.*
>
> *The exclusion is accordingly determined by majority."*

Submissions of WADA in the CAS Appeal of Ms. Mekonnen

9. In its Appeal Brief, WADA requested the following relief:

> *"1. The Appeal of WADA is admissible.*
>
> *2. The decision rendered by the Appeals Committee of the Norwegian Olympic and Paralympic Committee in the matter of Ms. Rebecca Mekonnen is set aside.*
>
> *3. Ms. Rebecca Mekonnen is sanctioned with a two-year period of ineligibility on the date on which the CAS decision enters into force. Any period of ineligibility (whether imposed ... or voluntarily accepted by Ms. Rebecca Mekonnen) before the entry into force of the CAS decision shall be credited against the total period of ineligibility to be served.*
>
> *4. All competitive results obtained by Ms. Rebecca Mekonnen from 4 February 2012 through the commencement of the applicable period of ineligibility shall be disqualified with all of the resulting consequences including forfeiture of any medals, points and [prizes];*
>
> *5. WADA is granted an award for costs."*

10. WADA's submission in support of its request may be summarized as follows:

11. WADA submits that the NOPC Appeals Committee correctly determined that Ms. Mekonnen committed an anti-doping rule violation pursuant to Chapter 12-2 (1) of the NOPC Regulations, as both marijuana and MHA are Specified Substances prohibited in competition. However, WADA strongly disputes the sanction issued by the NOPC Appeals Committee. Chapter 12-8 (4) of the NOPC Regulations provides that an athlete shall incur a two-year period of ineligibility for a first anti-doping violation, which may be eliminated in the case of no fault or negligence pursuant to Chapter 12-9 (1) of the NOPC Regulations or reduced in the case of no significant fault or negligence pursuant to Chapter 12-9 (2) of the NOPC Regulations. Moreover, Chapter 12-8 (5) of the NOPC Regulations provides that the period of ineligibility may be reduced or eliminated when the prohibited substance is a Specified Substance. However, in order to have the period of ineligibility reduced or eliminated under that provision, the athlete must establish how the prohibited substance entered his or her system and that the athlete had no intent to enhance his sporting performance or mask the use of a performance-enhancing substance.

i. Elimination or Reduction under Article 12-8 (5) of the NOPC Regulations.

12. WADA accepts that Ms. Mekonnen has established on the balance of probability that the source of MHA was her ingestion of the food supplement Jack3d, and that Ms. Mekonnen smoked cannabis several days before the competition. WADA implies that Ms. Mekonnen cannot therefore benefit from the elimination of a sanction due to no fault or negligence under Chapter 12-9 (1) of the NOPC Regulations, as she has been responsible for the ingestion of both substances.

13. However, WADA submits that in order to benefit from a reduction of the period of ineligibility for specified substances, in accordance with Chapter 12-8 (5) of the NOPC Regulations, Ms. Mekonnen must establish to the comfortable satisfaction of the Sole Arbitrator that she had no intent to enhance her sporting performance or mask the use of a performance-enhancing substance. It is submitted that as Ms. Mekonnen stated that she took the supplement before the competition in order to have more energy, she wanted to enhance her performance. Therefore, even though she may not have known that the supplement contained a specified substance, Ms. Mekonnen does not meet the second condition provided for under Chapter 12-8 (5).

14. Indeed, it is submitted that the supplement is marketed as the *"best energy supplement"* and that the use of such a supplement in the context of the sport of powerlifting helped Ms. Mekonnen to gain an advantage over her competitors, and therefore the only sensible interpretation of her actions is that she took the supplement to artificially enhance her performance and to achieve better results. To avoid this conclusion, WADA submits that Ms. Mekonnen would have to provide compelling third-party evidence to show an alternative, non-performance-related intention in taking the supplement. It is submitted that the evidential burden is high given the need for independent evidence and the standard of comfortable satisfaction that must be attained by the Panel. It is submitted, therefore, that the standard of no fault or negligence has not been attained, and that the elimination or reduction in the period of ineligibility under Chapter 12-8 (5) has not been achieved either, and the ordinary two-year ban should apply.

ii. Reduction of the Sanction for No Significant Fault or Negligence

15. WADA further submits that a reduction in any sanction by up to half the period of ineligibility, which would be available if Ms. Mekonnen could show that there was no significant fault or negligence on her behalf, cannot be permitted in this case. In

order to achieve such a reduction, it is submitted that Ms. Mekonnen must show that, when viewed in the totality of the circumstances and taking into account the criteria for no fault or negligence, her fault or negligence was not significant in relation to the anti-doping rule violation. It is highlighted by WADA that, as stated in the comment to Article 10.5.2 of the World Anti-Doping Code ("WADC"), such a reduction only applies where the circumstances are truly exceptional.

16. WADA, citing *FIFA v. WADA*, CAS 2005/C/976 & 986, argues that significant fault or negligence exits if an athlete ingests a substance without enquiring or ascertaining whether it contains a specified substance. Relying on a series of additional CAS jurisprudence, WADA submits that Ms Mekonnen should have obtained assurances from a medical professional that the supplement did not contain a prohibited substance and undertaken research on the websites of WADA and the manufacturer, at the very least.

17. In conclusion, WADA submits that there are five points that particularly weigh against Ms. Mekonnen in relation to showing that she had no significant fault or negligence:

    1. Athletes are warned about the risks of taking supplements;
    2. The ingredient of "1,3 dimethylamylamine" is listed on the supplement and this is known to be methylhexaneamine;
    3. No assurance from a specially-qualified person such as a doctor was sought in relation to taking the supplement;
    4. No research on the supplement was done by Ms. Mekonnen;
    5. The supplier of the supplement was not contacted before taking it.

18. WADA submits that Ms. Mekonnen significantly departed from her duty of care, and agrees with the minority of the appeal committee in submitting that a strict response is required as the risks of supplements in powerlifting are well-known. In relation to the ingestion of cannabis, it is submitted that athletes should know the prohibited list and that by smoking cannabis without consulting WADA's List of Prohibited Substances ("Prohibited List"), Ms. Mekonnen did not satisfy her duty of care.

Submissions of Ms. Mekonnen in the CAS Appeal

19. In her Appeal Brief, Ms. Mekonnen requested the following relief:

> *"Principally:*
>
> *1. The Appeal is denied.*
>
> *Alternatively:*
>
> *2. Ms. Mekonnen is without guilt and her consumption of the substance did not have any performance-enhancing objective – the punishment and he shall receive a warning in its place (sic).*
>
> *Second Alternative:*
>
> *3. Ms. Mekonnen shall be dealt with by the Court with the utmost leniency.*
>
> *Regardless:*
>
> *Principally:*
>
> *4. Ms. Mekonnen is granted an award for costs.*
>
> *Alternatively:*
>
> *5. WADA is not granted an award for costs.*

20. Ms. Mekonnen's submission in support of her request may be summarized as follows:

21. Ms. Mekonnen is a 30-year old amateur sportsperson who received her weightlifting license approximately two and a half years ago. She has taken part in six club competitions and three regional competitions. In her submissions, Ms. Mekonnen states that she has received some anti-doping information and education, but notes that her club "has a strong anti-doping profile."

22. Sadly, Ms. Mekonnen has a problematic background which includes drugs and mental illness. At 17, she was hospitalised for her mental condition, and between the ages of 20 to 28 she needed substantial medication to cope with her mental problems. She has also been a victim of domestic violence. Finding motivation in sports in 2010, Ms. Mekonnen quit the use of illicit drugs and her need for medication was reduced. It is submitted that the training and social aspects of sports had a very beneficial impact on her, making her more capable of handling life.

23. According to Ms. Mekonnen's submission, she had no intention of gaining any unlawful competitive advantage in using either substance. With respect to the cannabis, Ms. Mckonnen submits that she smoked marijuana with friends in the days prior to her test. She was unaware that cannabis was a prohibited substance under the Prohibited List, and that she did not believe that the substance would still be in her body some days later when going to compete. It is submitted that it did not impact on her performance. It is also noted that WADA has decided to recalibrate the threshold for cannabis and that under the new proposals, Ms. Mekonnen would not fall foul of the regulations, given the concentration of cannabis that was recorded in her system.

24. With respect to the MHA, Ms. Mekonnen submits that she obtained Jack3d from a friend who suggested that the product was "legal" and "had the effect of bringing energy." The Jack3d was purchased as Gymgrossisten, a large supplier of dietary supplements in the Nordic Region. Upon receipt of the Jack3d, Ms. Mekonnen "checked the substance on the internet and based on her experience it seemed legal and natural." Her motivation for taking the Jack3d was based on the products content of creatinc and caffeine, both legal substances in connection with competitions. Moreover, Ms. Mekonnen states that she ascertained that the list of ingredients on the Jack3d label includes a reference to 1,3 dimenthylamylamine, but that she did not know that this substance was also commonly referred to as MHA. She did not submit any further evidence concerning her research into the Jack3d product.

25. Finally, Ms. Mekonnen questions why WADA does not list 1,3 dimethylamylamine as a Specified Substance itself.

26. It is submitted that a standard of strict liability in relation to suspension, rather than disqualification in relation to an event, is not compatible with either the WADC or Norway's obligations under the European Convention on Human Rights. It is further submitted that case law relating to professional athletes is not relevant to amateur athletes such as Ms. Mekonnen.

i. Fault or Negligence Under NOPC Regulations 12-8(5) and 12-9(2)

27. As an initial matter, Ms. Mekonnen submits that the commentary to Article 10.5.1 and 10.5.2 of the WADA Code specifically explains that lack of experience is a relevant factor to be assessed in relation to a person's fault. In this regard, Ms.

Mekonnen criticizes WADA's submission for failing to take into consideration the athlete's amateur status, level, and background. According to the WADC the main goal of its directives is to ensure that top-level athletes are tested and sanctioned. Notably, recreational athletes may be included or excluded by national organisations in relation to the WADC.

28. Ms. Mekonnen submits that any suspension should be rendered pursuant to NOPC Section 12-8(5) wherein a two-year ban can be substituted with as a minimum a warning and as the maximum a two-year ban. In this regard, Ms. Mekonnen notes that the origination of the substances is undisputed (Jack3d and cannabis) and that the evidence displays that she had no intention to enhance her performance when ingesting these products.

29. It is also submitted that in the current review of the WADC, it is proposed that future athletes will no longer have to show that they had no intention of enhancing performance, and that this should be taken into consideration. It is also submitted that given her background and lack of experience, there is a clear inference that Ms. Mekonnen did not intend to improve her sporting performance, and that cannabis and Jack3d at the level consumed have no performance enhancing effect. It is submitted that in the alternative there is insignificant fault of negligence, and that the ban should be reduced to one year.

ii. No Significant Fault Under NOPC Regulation 12-9(2)

30. In the alternative, Ms. Mekonnen submits that any breach of the regulations was caused by insignificant fault and therefore, and suspension can be reduced by not more than one half the term of the ban originally imposed, i.e. one year. In this regard, she again states that origination of the substance is undisputed, and that any breach of the regulations was insignificant wrongdoing on her part.

iii. Conflict with the European Convention for Human Rights.

31. Ms. Mekonnen also submits that if WADA's arguments are accepted, she will be denied the opportunity to prove their innocence, and that the norm for recreational athletes will be higher than that in relation to professional athletes. Relying on jurisprudence in relation to the European Convention of Human Rights, Ms. Mekonnen submits that the opportunity to prove innocence must be genuine. It is submitted that this opportunity has not been afforded to Ms. Mekonnen, and the Sole

Arbitrator acknowledges the national jurisprudence cited by Ms. Mekonnen relating to suspensions concerning nutritional supplements.

32. Finally, Ms. Mekonnen states that she has not competed in her sport for 14 months, of which 10 were a result of the decision of the NOPC Appeals Committee. It is submitted that this should be taken into account in relation to any suspension.

iv. Witness Statements supporting Ms. Mekonnen

33. Ms. Mekonnen submits three witness statements on her behalf. The first is from the Chair of the Bergen Powerlifting Club, Tor Engevik, which provides, in part, that Ms. Mekonnen has not been involved in competitions or training sessions since she was banned because of a positive urine sample in February 2012. It also stated that a six-month ban should be enough, as it is unclear what WADA hopes to achieve by a two-year ban.

34. The second witness statement was filed by Toril Aga, a Clinical Social Worker with the Psychiatric Youth Team of the Bergen Clinics. It states that Ms. Mekonnen has been under treatment since September 2010 having been referred by her regular doctor. It states that she has a long-term and complicated problem involving some psychoses and the use of narcotics. It goes on to state that Ms. Mekonnen has suffered from anorexia and bulimia since her teen years as well as angst/depression, and that her health has on several occasions been so poor that she has been admitted to a mental care institution. It concludes by stating that:

"Whilst receiving treatment she has benefitted greatly from training activities designed to improve both mental and physical health. This has also had a major positive effect in connection with her mastering her problems with narcotics use."

35. An extract of the medical journal of Ms. Mekonnen from the Bergen Emergency Medical Service is provided and shows that Ms. Mekonnen has been in an ongoing violent domestic relationship.

36. The third witness statement has been provided by Mr. Ove Martinussen, and states that he purchased Jack3d without receiving any product information. He simply considered that this was something that would give him more energy, and as Ms. Mekonnen was "over-trained," he gave her some to take.

Submissions of the NOPC in the CAS Appeal

37. The only submissions made by the NOPC at any stage relate to its standing to be a party to the proceedings. In their submission, the NOPC request the following relief:

> *"The NOPC hereby respectfully requests the CAS Panel to rule on the question of jurisdiction in a preliminary decision as follows:*
>
> *1. The Norwegian Olympic and Paralympic Committee and Confederation of Sports is dismissed as a party to the case CAS 2013/A/3116 World Anti-Doping Agency (WADA) vs. Lasse Sundell and the Norwegian Olympic and Paralympic Committee and Confederation of Sports (NOPC).*
>
> *2. The Norwegian Olympic and Paralympic Committee and Confederation of Sports is dismissed as a party to the case CAS 2013/A/3116 World Anti-Doping Agency (WADA) vs. Rebecca Mekonnen and the Norwegian Olympic and Paralympic Committee and Confederation of Sports (NOPC).*
>
> 3. *The NOPC is granted an award for costs."*

38. The NOPC's submission in support of its request may be summarized as follows:

39. WADA "has not been able to refer to any agreement or regulation that binds *NOPC to participate in the appeals,"* and therefore the NOPC must be dismissed as a party to the appeals. It is also submitted that the General Assembly of the NOPC elects members of NOPC's Adjudication Committee and Appeal Committee, they are *"not subject to the instructional authority of the governing bodies"* as specified in Chapter 4-6 of the NOPC Regulations. It is implied that therefore the NOPC was not responsible for the decision being appealed as the decision was taken by an independent committee. It is further submitted that the responsibility for doping control and prosecution has been transferred from the NOPC to Anti-Doping Norway pursuant to Chapter 12 of the NOPC Regulations. Again, it is implied that the NOPC had no role in relation to the prosecutions under the doping rules of the NOPC and therefore there is no nexus allowing WADA to join the NOPC to the appeal.

40. The NOPC submits that its Regulations do not provide for it to be a party to the appeal, and that it cannot be properly joined as a party pursuant to the CAS Rules. It is submitted at paragraph 10 of the submission of 23 May that "CAS Rule 27, 41.4

and 47 all state that the Rules only apply when there is an agreement to arbitrate, either as set out in a contract or regulations. In the present cases NOPC has not entered into any arbitration agreement."

41. The NOPC goes on to submit that it was not a party to the original case, nor the appeal to the NOPC Appeals Committee, and that it has no capacity to appeal decisions under its own Regulations. It concludes on this basis that "*there is no legal basis for including NOPC as Respondent to the appeals.*" It is submitted that Article 13 of the WADC giving CAS jurisdiction over judicial decisions and other decisions does not operate in this instance to confer jurisdiction on the CAS in respect of the NOPC, as the athletes in these cases are the subject of the rule violation rather than the NOPC.

42. The submission of WADA that CAS jurisprudence supports the inclusion of the NOPC as a party because it did not render a compliant decision is disputed on the basis that the Sole Arbitrator alone can make such a determination and therefore this cannot form the basis for the inclusion of the NOPC as a party.

43. The NOPC states that it will recognise any decision of the CAS in relation to the case.

44. The NOPC cites CAS 2010/A/2083 to distinguish a case where the Swiss Olympic Committee was included as a Respondent because the rules of the International Cycling Union provided that the national federation be joined, in contrast to this case. CAS 2009/A/1870 is also cited, where the United States Anti-Doping Agency was a party to the proceedings as it accepted the jurisdiction and it had been a party to the decision at national level, but it was not permitted to join the International Olympic Committee ("IOC") as a party as it was found that there was no consent from the IOC and it was not bound by the same arbitration agreement as the parties. Reliance is also placed on CAS 2004/A/628 to distinguish the case at hand from a case where the parties enter into an arbitration agreement before the CAS hears an appeal, and that agreement provides the basis for the joinder of a national governing body.

45. The NOPC submits that the inclusion of it in this appeal would contradict the universal principle of the requirement for legal interest as WADA has not put forward any request for relief as against the NOPC, save as to costs.

B. Mr. Lasse Sundell

46. On 18 February 2012, Mr. Sundell was tested in competition by Anti-doping Norway. He tested positive for MHA, and his adverse finding was not challenged.

47. By a decision dated 29 May 2012, the NOPC imposed a six-month period of ineligibility on Mr. Sundell for his first anti-doping rule violation.

48. On 2 July 2012, the Appellant filed an appeal against this decision, and the NOPC Appeals Committee deemed it necessary to determine the case of Mr. Sundell together with the case of Ms. Mekonnen, as *"they both raise questions about the reactions determined in respect of taking the same kind of dietary supplements."*

49. On 22 February 2013, the NOPC Appeals Committee rejected WADA's appeal and confirmed the decision at first instance.

50. In relation to Mr. Sundell, the Appeals Committee unanimously dismissed the appeal, finding as follows:

"It is obvious that Mr. Sundell has ingested substances that are illegal in accordance with the List of Prohibited Substances. According to letter a of Section 12-2 (1) of NIF's Act, the presence of such substances in athletes' doping tests are subject to penalties, regardless of the culpability of the athlete concerned. Athletes are solely responsible for ensuring that no banned substances enter their bodies, cf. Section 12-4 (1). Liability is thus basically objective, something which accords with WADC's Articles 2.1 and 10.2 (in the WADA Code). The extent to which this also accords with the presumption of innocence in accordance with EMC Article 6.2 must be specifically assessed in accordance with Supreme Court and EMD practice.

However, in this case Mr. Sundell took substances which are illegal in accordance with the List of Prohibited Substances in connection with bodybuilding without closer examination to see if the contents of the dietary supplements were illegal as specified on the List of Prohibited Substances. This occurred despite the fact that many dietary supplements that are taken in connection with body-building contain such illegal substances. Mr. Sundell has thus clearly displayed negligence and this means that he is guilty of breaching letter b of Section 12-2 (1) of NIF's Act, as well as letter a, cf. Section 12-4 (2) Thus in this case there is no question of imposing penalties in accordance with objection liability.

In this context the question of guilt and the degree of guilt first become relevant when imposing penalties. Where the degree of guilt is low, the penalties for breaches of letter a of Section 12-2 (1) can be reduced to an exclusion period which is shorter than two years or to just a warning, cf. Section 12-8 (5). This is dependent i.a. on the fact that Mr. Sundell "is able to produce evidence to show" that the ingestion of the illegal substances "was not motivated by a desire to enhance his performance."

The Adjudication Committee's decision accords with Antidoping Norway's recommendations, and after undertaking a concrete assessment the Appeals Committee finds no grounds for increasing the exclusion period. In particular this is because the athlete has accepted the circumstances and has cooperated with the antidoping authorities in order to clarify the facts of the matter."

Submissions of WADA in the CAS Appeal of Mr. Lasse Sundell

51. In its Appeal Brief, WADA requested the following relief:

1. The Appeal of WADA is admissible.

2. The decision rendered by the Appeals Committee of the Norwegian Olympic and Paralympic Committee in the matter of Ms. Lasse Sundell is set aside.

3. Ms. Lasse Sundell is sanctioned with a two-year period of ineligibility on the date on which the CAS decision enters into force. Any period of ineligibility (whether imposed ... or voluntarily accepted by Mr. Lasse Sundell) before the entry into force of the CAS decision shall be credited against the total period of ineligibility to be served.

4. WADA is granted an award for costs."

52. WADA's submission in support of its request may be summarized as follows:

53. In order to benefit from a reduction of the period of ineligibility for specified substances, in accordance with Chapter 12-8 (5) of the NOPC Regulations, WADA submits that Mr. Sundell must establish to the comfortable satisfaction of the Sole Arbitrator that he had no intent to enhance her sporting performance or mask the use of a performance-enhancing substance. It is submitted that the standard "comfortable satisfaction" has been found to come close to the standard of "beyond reasonable doubt" by previous CAS Panels.

54. WADA submits that the NOPC Appeals Committee correctly determined that Mr. Sundell committed an anti-doping rule violation pursuant to Chapter 12-2 (1) of the NOPC Regulations, as MHA is a Specified Substances prohibited in competition. However, WADA strongly disputes the sanction issued by the NOPC Appeals Committee. Chapter 12-8 (4) of the NOPC Regulations provides that an athlete shall incur a two-year period of ineligibility for a first anti-doping violation, which may be eliminated in the case of no fault or negligence pursuant to Chapter 12-9 (1) of the NOPC Regulations or reduced in the case of no significant fault or negligence pursuant to Chapter 12-9 (2) of the NOPC Regulations, as submitted in relation to Ms. Mekonnen. Moreover, Chapter 12-8 (5) of the NOPC Regulations provides that the period of ineligibility may be reduced or eliminated when the prohibited substance is a Specified Substance. However, in order to have the period of ineligibility reduced or eliminated, the athlete must establish how the prohibited substance entered his or her system and that the athlete had no intent to enhance his sporting performance or mask the use of a performance-enhancing substance.

i. Elimination or Reduction under Article 12-8 of the NOPC Rules.

55. WADA accepts that Mr. Sundell has established on the balance of probability that the source of MHA was his ingestion of the food supplements Jack3d and Hemo-Rage.

56. However, WADA submits that in order to benefit from a reduction of the period of ineligibility for specified substances, in accordance with Chapter 12-8 (5) of the NOPC Regulations, Mr. Sundell must establish to the comfortable satisfaction of the Sole Arbitrator that he had no intent to enhance his sporting performance or mask the use of a performance-enhancing substance. It is submitted that Mr. Sundell took the supplements in connection with weight training, thereby enhancing his performance. It is submitted that taking supplements to enhance strength or to train more is clearly associated with a performance-enhancing intent and not with any medical or other intent.

57. Moreover, Mr. Sundell took the supplement on the day the anti-doping test was performed and the high concentration of the specified substance shows that he ingested the product containing it only a few hours before competition. The timing of the ingestion suggests that he ingested the supplement in connection with the

competition and not in the context of training, contrary to what was stated by Mr. Sundell and found by the NOPC Appeals Committee.

58. WADA also argues that the supplement Jack3d is marketed as the *"best energy supplement,"* and that other food supplements, like Hemo-Rage, are typically ingested to boost an athlete's performance. It is further submitted that the Jack3d ingredients label discloses that it contains 1,3 dimethylamylamine, which should have led Mr. Sundell to refrain from taking it. It is submitted that Mr. Sundell could not have been unaware of the properties of the products he ingested and that he cannot submit that he wrongly believed they were something of a different nature.

59. In conclusion in relation to the above, WADA submits that Mr. Sundell must have failed to establish the absence of an intent to enhance sporting performance. Given that the supplements taken clearly have the potential to enhance performance, the logical conclusion is that Mr. Sundell did indeed use them to enhance his performance. To avoid this conclusion, the Appellant submits that Mr. Sundell would have to provide compelling third-party evidence to show an alternative, non-performance-related intention in taking the supplement. It is submitted that the evidential burden is high given the need for independent evidence and the standard of comfortable satisfaction that must be attained by the Panel. It is submitted that therefore, the standard of no fault or negligence is not attained, and the ordinary two-year ban should apply.

ii. Reduction of the Sanction for No Significant Fault or Negligence

60. WADA further submits that a reduction in any sanction by up to half the period of ineligibility, which would be available if Mr. Sundell could show that there was no significant fault or negligence on his behalf, cannot be permitted in this case. The same argument is employed in relation to Mr. Sundell as in relation to Ms. Mekonnen. In order to achieve such a reduction, it is submitted that Mr. Sundell must show that, when viewed in the totality of the circumstances and taking into account the criteria for no fault or negligence, his fault or negligence was not significant in relation to the anti-doping rule violation. It is highlighted by WADA that, as stated in the comment to Article 10.5.2 of the WADC, such a reduction only applies where the circumstances are truly exceptional.

61. WADA cites Article 12-4 (1) of the NOPC Rules, reflecting Art. 2.1 of the WADA Code, which states:

> *"It is each athlete's personal duty to ensure that no prohibited Substance enters his or her body. Athletes are responsible for any Prohibited Substance or its metabolites or Markers found to be present in their Samples. Accordingly, it is not necessary that intent, fault, negligence or knowing Use on the athlete's part be demonstrated in order to establish an anti-doping violation under Article 2.1 [presence of a Prohibited Substance or its Metabolites or Markers in an Athlete's Sample]"*

62. Citing FIFA v. WADA, CAS 2005/C/976 & 986, WADA argues that significant fault or negligence only exits if an athlete ingests a substance without enquiring or ascertaining whether it contains a specified substance. Relying on a series of additional CAS jurisprudence, as it has done in relation to Ms. Mekonnen, WADA submits that Mr. Sundell should have obtained assurances from a medical professional that the supplements he was using did not contain a prohibited substance and undertaken research on the websites of WADA and the manufacturer website, at the very least.

63. In conclusion, WADA submits that there are seven points that particularly weigh against Mr. Sundell in relation to showing that she had no significant fault or negligence:

- Mr. Sundell's performance has been enhanced by the use of the two supplements;
- Athletes are warned about the risks of taking supplements;
- The official websites of the products indicate that they contain substances that are prohibited by some sports organisations;
- The ingredient of "1,3 dimethylamylamine" is listed on the supplement Jack3d and this is known to be methylhexaneamine;
- No assurance from a specially-qualified person such as a doctor was sought in relation to taking the supplement;
- No research on the supplements was done by Mr. Sundell;
- The supplier of the supplement was not contacted before taking it.

64. WADA submits that though Mr. Sundell claims that the shop assistant who sold him the supplements did not mention that they contained a banned substance, this does not constitute a mitigating circumstance because (a) Mr. Sundell did not tell the assistant that he was an athlete bound by a duty of care; and (b) shop assistant assurances are not reliable.

65. WADA further submits that the sanction should not have been reduced as Mr. Sundell cooperated with the anti-doping authorities and accepted the facts, as admissions are only mitigating circumstances if made before the notification of the adverse analytical findings, or if they result in the discovery of other anti-doping rule violations committed by other persons.

66. WADA concludes by submitting that there was significant fault on the part of Mr. Sundell and there can be no reduction of the two-year ban for a first anti-doping rule violation.

Submissions of Mr. Sundell in the CAS Appeal

67. In his Appeal Brief, Ms. Sundell requested the following relief:

> *"Principally:*
>
> *1. Lasse Sundell is without guilt and is acquitted.*
>
> *Alternatively:*
>
> *2. Lasse Sundell is without guilt and her consumption of the substance did not have any performance enhancing objective – the punishment and he shall receive a warning in its place (sic).*
>
> *Second Alternative:*
>
> *3. Lasse Sundell shall be dealt with by the Court with the utmost leniency.*
>
> Regardless:
>
> *Principally:*
>
> *4. Sundell is granted an award for costs.*
>
> *Alternatively:*
>
> *5. WADA is not granted an award for costs."*

68. Mr. Sundell's submission in support of his request may be summarized as follows:

69. Mr. Sundell is a 27 year-old Swedish amateur floorball player who moved to Norway in 2008. He works as a traffic supervisor, in shifts, which means that he cannot participate in all organised training or matches. He has played floorball since he was 14, and he played in the fifth division in Sweden before moving to Norway. He sustained a serious ligament injury in 2007 that caused him to be unable to play floorball for over a year. It resulted in an invalidity percentage of 7% and does not allow him to participate in intensive sporting activities.

70. Mr. Sundell considers himself to be a respectable social player of floorball, and plays as a hobby. He has never had any contact with top-level sports, and therefore never received any anti-doping training. Mr. Sundell cannot participate in more than approximately three quarters of the training sessions for his team because of his work. He also trains in the gym for general improvement in his physical health and to prevent additional injury relating to his previous ligament injury. His attendance at the gym was therefore not primarily for the benefit of his floorball.

71. Mr. Sundell had used a series of supplements with creatine between 2008 and 2012, but in January 2012, he bought the two supplements Jack3d and Hemo-Rage in the retail shop Gymgrossisten. He purchased these on the advice of the shop assistant, who did not mention anything about uncertainty in relation to banned substances. It is submitted that these supplements were used in relation to the strength and cardio-vascular training of Mr. Sundell and not in relation to his floorball playing.

72. It is submitted that Mr. Sundell was training at his fitness centre on the day that the tests were taken, and the records of the training centre are submitted to support this. Mr. Sundell stated on the form provided in relation to the doping test that he had taken dietary supplements in the form of Creatine and protein that day, as well as a sleeping pill the previous day.

73. Mr. Sundell does not dispute that he ingested MHA, a product that is permitted for out-of-competition use. It is submitted that Mr. Sundell did not know that the substance identified on the product's label, 1,3 dimethylamylamine, was a prohibited substance, or that it was the same substance as MHA.

ii. Fault or Negligence Under NOPC Regulations 12-9(1), 12-8 (5) and 12-9(2)

74. As an initial matter, Mr. Sundell submits that the commentary to Article 10.5.1 and 10.5.2 of the WADC specifically explains that lack of experience is a relevant factor to be assessed in relation to a person's fault. In this regard, Mr. Sundell criticizes WADA's submission for failing to take into consideration the athlete's amateur status, level, and background. According to the WADC, the main goal of its directives is to ensure that top-level athletes are tested and sanctioned. Notably, recreational athletes may be included or excluded by national organisations in relation to the WADA code.

75. Mr. Sundell submits that pursuant to § 12-9 (1) of the NOPC Regulations, a ban can be reversed if it can be shown that the breach of the regulations was caused unwittingly, once the athlete can show how the substance came into his body. Mr. Sundell submits that it is not contested as to how the supplements came to be in his body, and that through witnesses and documentary evidence, he will show that the breach was unwitting. It is thereby principally submitted that the ban should be lifted.

76. In the alternative, Mr. Sundell submits that any suspension should be rendered pursuant to NOPC Regulations § 12-8(5) wherein a two-year can be substituted with at a minimum a warning and at maximum a two-year ban. In this regard, Mr. Sundell notes that the origin of the substance is undisputed (Jack3d and Hemo-Rage) and that the evidence displays that he had no intention to enhance his performance when ingesting these products, and that it has no performance-enhancing effect.

77. Like Ms. Mekonnen, Mr. Sundell submits that there is a current review of the WADC, under which athletes will no longer have to show that they had no intention of enhancing performance, and that this should be taken into consideration now. It is also submitted that given his background and lack of experience, there is a clear inference that Mr. Sundell did not intend to improve his sporting performance, and that MHA has no performance enhancing effect for a floorball player.

78. It is submitted that in the alternative to a finding under § 12-9 (1), there should be a finding under § 12-8 (5), and the ban should be lifted and replaced with a warning.

iii. No Significant Fault Under NOPC Regulation 12-9(2)

79. In the alternative, Mr. Sundell submits that any breach of the regulations was caused by insignificant fault and therefore the suspension can be reduced by not more than

one half the term of the ban originally imposed, i.e. one year. In this regard, he again states that origination of the substance is undisputed, and that any breach of the regulations was insignificant wrongdoing on his part.

iv. Conflict with the European Convention for Human Rights.

80. Mr. Sundell also submits that if WADA's arguments are accepted, he will be denied the opportunity to prove their innocence, and that the norm for recreational athletes will be higher than that in relation to professional athletes. Relying on jurisprudence in relation to the European Convention of Human Rights, Mr. Sundell submits that the opportunity to prove innocence must be genuine. It is submitted that this opportunity has not been afforded to Mr. Sundell.

81. Finally, Mr. Sundell states that he has not competed in his sport for more than 11 months, of which 6 up to 24 September 2012 were a result of the decision of the NOPC Appeals Committee, and a further 6 since 4 April 2013. It is submitted that this should be taken into account in relation to any suspension.

v. Witness Statements supporting Mr. Sundell

82. On behalf of Mr. Sundell two witness statements were received. Mr. Thomas Jonsson, General Secretary of the Norwegian Bandy Association states that floorball in Norway has about 8,000 licensed players and is a young sport. Norway is ranked fifth in the world and is significantly behind the four leading countries, and most floorball players in Norway play in their leisure time and have ordinary jobs.

83. Mr. Axel Wallin states in a witness statement that he was with Mr. Sundell when he purchased Jack3d and Hemo-Rage. They had been recommended by the shop assistant in Gymgrossisten in relation to strength and cardiovascular training but nothing had been said about uncertainty in relation to banned substances. Based on the guidance and professionalism of the staff, Mr. Wallin says he was shocked to hear that Mr. Sundell tested positive after using the recommended supplements. It is stated that the purpose of buying the products was to use in relation to training at the fitness centre and not in relation to playing floorball. Mr. Wallin played for the same floorball team in 2011-2012 and there were no medical support personnel for the team.

Submissions of the NOPC in the CAS Appeal of Mr. Sundell

84. As with the NOPC's submission in the case of Ms. Mekonnen, the only submissions made by the NOPC relate to its standing to be a party to the proceedings, as outlined above. In this regard, the Sole Arbitrator refers to paragraphs 2.33 to 2.41, *infra*.

III. PROCEEDINGS BEFORE THE COURT OF ARBITRATION FOR SPORT

85. On 15 March 2013, WADA filed two separate Statements of Appeal, one against Ms. Rebecca Mekonnen and the NOPC, proceeding number CAS 2013/A/3115, and one against Mr. Lasse Sundell and the NOPC, proceeding number CAS 2013/A/3116.

86. On 25 March 2013, WADA filed its respective Appeal Briefs.

87. On 3 May 2013, with the consent of the parties, the Deputy President of the CAS Appeals Division consolidated the two appeals.

88. The athletes jointly nominated Mr. Lars Halgreen, Attorney-at-Law in Copenhagen, Denmark as the Sole Arbitrator, the NOPC and WADA agreed to the nomination and it was confirmed by the Deputy Division President on 3 May 2013.

89. On 23 May 2013, the NOPC filed a joint Answer with respect to both appeals.

90. On 24 May 2013 and 31 May 2013, Mr. Sundell and Ms. Mekonnen filed their respective Answers.

91. The parties jointly agreed to submit this proceeding on submission, without oral hearing. Such agreement was confirmed by letter from the CAS Court Office, on behalf of the Sole Arbitrator, on 5 July 2013, and by the parties' execution of the Order of Procedure, wherein all parties agreed that their right to be heard had been respected during this appeal.

IV. ADMISSIBILITY

92. Article R49 of the CAS Code provides as follows:

In the absence of a time limit set in the statutes or regulations of the federation, association or sports-related body concerned, or of a previous agreement, the time limit of an appeal shall be twenty-one days from the receipt of the decision appealed against. The Division President shall not initiate a procedure if the statement of appeal is, on its face, late and shall so notify the person who filed the document. When a procedure is initiated, a party may request the Division President or the

President of the Panel, if a Panel has been already constituted, to terminate it if the statement of appeal is late. The Division President or the President of the Panel renders his decision after considering any submission made by the other parties.

93. WADA states that it was notified of the decision under appeal on 22 February 2013. This is not disputed. WADA lodged the Appeal on 15 March 2013, within 21 days of 22 February. The Sole Arbitrator therefore determines that the Appellant complied with the time limits prescribed under Article R49 of the Code. Consequently this Appeal is admissible.

V. JURISDICTION OF THE CAS

94. Article R47 of the Procedural Rules ("the Rules") of the Code of Sports-related Arbitration ("the Code") provides as follows:

"An appeal against the decision of a federation, association or sports-related body may be filed with the 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 him prior to the appeal, in accordance with the statutes or regulations of that body."

95. Chapter 12-15 (8) of the NOPC Regulations provides as follows:

(8) "Decisions made by the Norwegian Olympic and Paralympic Committee and Confederation of Sports' appeal committee related to an athlete, who at the time the violation was committed, was listed at a special list prepared by an International Sports Federation, may be submitted before CAS. Other decisions made by the Norwegian Norwegian Olympic and Paralympic Committee and Confederation of Sports' appeal committee are subject to appeal before CAS by WADA or an International Sports Federation pursuant to the rules adopted by CAS."

96. Article R27 of the Code provides as follows:

"These Procedural Rules apply whenever the parties have agreed to refer a sports-related dispute to the CAS. Such reference may arise out of an arbitration clause inserted in a contract or regulations or by reason of a later arbitration agreement (ordinary arbitration proceedings) or involve an appeal against a decision rendered by a federation, association or sports-related body where the statutes or regulations

of such bodies, or a specific agreement provides for an appeal to the CAS (appeal arbitration proceedings).

Such disputes may involve matters of principle relating to sport or matters of pecuniary or other interests relating to the practice or the development of sport and may include, more generally, any activity or matter related or connected to sport."

97. WADA submits that pursuant to Chapter 12-15 (8) of the NOPC Regulations it has the right to appeal to the CAS against the decisions of the NOPC Appeals Committee pursuant to the rules of CAS. This is not disputed.

98. WADA submits that it has submitted the appeal in a timely manner and that it is an appropriate party to bring an appeal, and that it has brought the appeal as against the appropriate parties. Ms. Mekonnen and Mr. Sundell do not contest the jurisdiction of the CAS. The NOPC, however, challenges CAS jurisdiction *ratio personae* over itself, but recognises the jurisdiction of CAS *ratio materiae* with respect to the decision of the Appeals Committee.

99. The Sole Arbitrator confirms that it has exclusive jurisdiction to hear this appeal and considers the parties to the appeal at Section 8 below.

VI. APPLICABLE LAW

100. Article R58 of the Code provides as follows:

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.

101. It is common case between the parties that the applicable regulations are the Regulations adopted by the NOPC which apply, *inter alia*, to all participants in competitions or sports events organised by organisational units within the Norwegian Olympic and Paralympic Committee and Confederation of Sports. 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. Therefore, the Sole Arbitrator will rely on the provisions of the WADA Code where necessary.

A. Relevant NOPC Regulations

102. Chapter 12 of the NOPC Regulations sets out the anti-doping provisions. It states at § 12-1, § 12-2, § 12-8, §12-9 and § 12-11 as follows:

"§ 12-1 Scope

(3) These doping provisions regulate every aspect concerning anti-doping work and are assumed to be in conformity with the World Anti-Doping Code issued by the World Anti-Doping Agency (WADA). In case of interpretation differences, the doping provisions shall be interpreted in compliance with the World Anti-Doping Code."

§ 12-2 Definition of doping and rule violations

(1) The following constitute rule violations:

a) The presence of a prohibited substance, its metabolites or indicators in an athlete's doping test.....

2) The doping list comprises prohibited substances or methods, the doping list will specify substances (hereinafter referred to as Particular substances) that in the event of a positive test or possession thereof may lead to a reduced exclusion cfr. § 12-8 (5). The doping list enters into force upon WADA's decision. The doping list applies and is enforced until a new list enters into force."

103. The relevant provisions of chapter 12-8 state as follows:

"(4) Violation of § 12-2 (1) letters a – c, e and f, shall be sanctioned with a two years exclusion for the first violation and a life time exclusion for the second violation....

(5) If an athlete or person is able to demonstrate how a Particular substance was induced into the athlete's body or came into their possession, and that consumption or possession of a particular substance was not motivated by a wish to increase their performance ability or to camouflage the use of a prohibited substance, he/she shall as a minimum be given a warning and as a

maximum a two years' exclusion. The degree of guilt and the character of the violation shall be determinant for a potential reduction of the exclusion period."

The relevant section of § 12-9 state as follows:

"(1) If the athlete or person proves that violation is caused without guilt, exclusion imposed shall be discharged. The violation does not count as a first time violation in cases where this may be of relevance.

(2) If the athlete or person proves that violation is caused with no significant guilt, then the period of exclusion may be reduced to no less than one-half of the minimum period of exclusion otherwise applicable. If the otherwise applicable period of exclusion is a lifetime, the reduced exclusion period under this section may be no less than eight years.

(3) In case of a positive doping test the athlete must also prove how the prohibited substance was induced to the athlete's body in order for the exclusion to be discharged or reduced."

The relevant section of § 12-11 states as follows:

"(3) It is considered as multiple violations if it may be demonstrated that the later violation was committed by an athlete or a person after he/she was warned about the previous violation, or it may be demonstrated that there was made a reasonable attempt to warn him/her about the previous violation. If it may be determined that both violations were committed prior to the warning was given or attempted given, it will be considered as one violation, and the most severe exclusion period shall be imposed."

B. <u>Relevant Provisions of the WADA Code</u>

104. The most relevant provisions of the WADA Code are found in Articles 10.2, 10.4, 10.5 and 10.7:

*"10.2 **Ineligibility for Presence, Use or Attempted Use, or Possession of Prohibited Substances and Prohibited Methods***

The period of Ineligibility imposed for a violation of Article 2.1 (Presence of Prohibited Substance or its Metabolites or Markers), Article 2.2 (Use or Attempted Use of Prohibited Substance or Prohibited Methods) or Article 2.6

(Possession of Prohibited Substances and Prohibited Methods) shall be as follows, unless the conditions for eliminating or reducing the period of Ineligibility, as provided in Articles 10.4 and 10.5, or the conditions for increasing the period of Ineligibility, as provided in Article 10.6, are met:

First violation: Two (2) years Ineligibility.

10.4 Elimination or Reduction of the Period of Ineligibility for Specified Substances under Specific Circumstances

Where an Athlete or other Person can establish how a Specified Substance entered his or her body or came into his or her Possession and that such Specified Substance was not intended to enhance the Athlete's sport performance or mask the Use of a performance-enhancing substance, the period of Ineligibility found in Article 10.2 shall be replaced with the following:

First violation: At a minimum, a reprimand and no period of Ineligibility from future Events, and at a maximum, two (2) years of Ineligibility.

To justify any elimination or reduction, the Athlete or other Person must produce corroborating evidence in addition to his or her word which establishes to the comfortable satisfaction of the hearing panel the absence of an intent to enhance sport performance or mask the Use of a performance-enhancing substance. The Athlete's or other Person's degree of fault shall be the criterion considered in assessing any reduction of the period of Ineligibility.

10.5 Elimination or Reduction of Period of Ineligibility Based on Exceptional Circumstances

10.5.1 No Fault or Negligence

If an Athlete establishes in an individual case that he or she bears No Fault or Negligence, the otherwise applicable period of Ineligibility shall be eliminated. When a Prohibited Substance or its Markers or Metabolites is detected in an Athlete's Sample in violation of Article 2.1 (Presence of Prohibited Substance), the Athlete must also establish how the Prohibited Substance entered his or her system in order to have the period of Ineligibility eliminated. In the event this

Article is applied and the period of Ineligibility otherwise applicable is eliminated, the anti-doping rule violation shall not be considered a violation for the limited purpose of determining the period of Ineligibility for multiple violations under Article 10.7.

10.5.2 No Significant Fault or Negligence

If an Athlete or other Person establishes in an individual case that he or she bears No Significant Fault or Negligence, then the otherwise applicable period of Ineligibility may be reduced, but the reduced period of Ineligibility may not be less than one-half of the period of Ineligibility otherwise applicable. If the otherwise applicable period of Ineligibility is a lifetime, the reduced period under the Article may be no less than eight (8) years. When a Prohibited Substance or its Markers or Metabolites is detected in an Athlete's Sample in violation of Article 2.1 (Presence of a Prohibited Substance or its Metabolites or Markers), the Athlete must also establish how the Prohibited Substance entered his or her system in order to have the period of Ineligibility reduced.

10.7 Multiple Violations

10.7.4 Additional Rules for Certain Potential Multiple Violations

For purposes of imposing sanctions under Article 10.7, an anti-doping rule violation will only be considered a second violation if the Anti-Doping Organization can establish that the Athlete or other Person committed the second anti-doping rule violation after the Athlete or other Person received notice pursuant to Article 7 (Results Management) or after the Anti-Doping Organization made reasonable efforts to give notice, of the first anti-doping rule violations; if the Anti-Doping Organization cannot establish this, the violations shall be considered together as one single first violation, and the sanction imposed shall be based on the violation that carries the more severe sanction; however, the occurrence of multiple violations may be considered as a factor in determining aggravating circumstances (Article 10.6)"

VII. THE SOLE ARBITRATORS'S FINDINGS ON THE MERITS

A. Is the NOPC an Appropriate Party?

105. The Sole Arbitrator has considered the arguments raised by the NOPC in relation to its status as a party to the case before the CAS.

106. The Sole Arbitrator is satisfied that the CAS has the requisite jurisdiction over the named parties in this matter. It is clear from the provisions of the NOPC's own Regulations that the procedure of an appeal is subject to the rules laid down by the CAS. It is clear from Rule R27 that the arbitration "can involve an appeal against a decision rendered by a federation, association or sports related body where the statutes or regulations of such bodies, or a specific agreement provide for an appeal to CAS (appeal arbitration proceedings)." The NOPC Regulations lay down the appeal procedure for the NOPC Appeal Committee and provide for the appeal to CAS.

107. Article R47 provides in fact that "an appeal against a 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" and does not require that there is an agreement to arbitrate as submitted by the NOPC.

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.

109. The Sole Arbitrator notes that the Adjudication and Appeals Committee of the NOPC "shall not be subject to the instructional authority of the governing bodies" of the NOPC pursuant to Regulation 4-6 (4) of the NOPC Regulations. As was the case in CAS 2007/A/1376 *FIFA v. CBF, STJD and Dodo*, cited by WADA, in relation to the position of internal committees in Brazilian football, this is a commendable position. This separation of powers ensures that at a national level, the executive branch of the NOPC is not permitted to encroach on the domain of the judicial branch, being the Adjudication Committee and the Appeals Committee.

110. However, as in CAS 2007/A/1376, this situation, which is mirrored in other sports organisations throughout the world, does not mean that the NOPC Appeals Committee is a body which could legally stand alone if the NOPC did not exist.

111. The Sole Arbitrator agrees with the Panel in 2007/A/1376 at paragraph 87 of that decision, and finds that the "stand-alone test" is the decisive test to reveal whether a given sports justice body pertains in some way to the structure of a given sports organisation or not. If the NOPC did not exist, the NOPC Appeals Committee would

not exist and would not perform any function. Accordingly, the Sole Arbitrator is of the view that (at least) for international purposes the decisions of the NOPC Appeals Committee, although independently reached, must be considered to be the decisions *of the* NOPC.

112. The Sole Arbitrator therefore determines that the CAS has jurisdiction in relation to the Appeal as against the NOPC.

B. <u>Applicability of Article 10.4 of the WADA Code</u>

113. The Sole Arbitrator has considered the submission of the parties in relation to the applicability of Article 10.4 and 10.5 of the WADA Code (as reflected in Chapter 12-8 (5) and 12-9 (1), (2) and (3) of the NOPC Regulations respectively) to the athletes in this case.

114. The Sole Arbitrator notes that there are two conflicting lines of authority within CAS jurisprudence in relation to the applicability of Art. 10.4 of the WADC. The first line of authority is that following the cases of CAS 2010/A/2107 *Flavia Oliviera v. United States Anti-Doping Agency* and CAS 2011/A/2645 *UCI v. Alexander Kolobnev and Russian Cycling Federation* wherein it has been considered by the Panels that merely showing that an athlete intended to take a supplement or product to enhance their performance, did not mean that the athlete must have therefore intended to take each of the individual constituents of that supplement or product.

115. This line of authority is contradicted by the case of CAS A2/2011 *Foggo v. National Rugby League,* which found that specific knowledge that a specified substance was being taken is not a prerequisite for intent. If the athlete believes that the ingestion of the product will enhance his or her performance, he or she will be deemed to have intended to enhance their performance with the constituent prohibited substance, even if they did not know that the product contains that substance. This was followed in CAS 2012/A/2804 *Dimitar Kutrovsky v. International Tennis Federation,* where the Panel found at para. 9.15 that "an athlete's knowledge or lack of knowledge that he has ingested a specified substance is relevant to the issue of intent but cannot, pace *Oliviera,* of itself decide it." The Panel went on to state that "It is counter-intuitive that in a code which imposes on an athlete a duty to take responsibility for what he ingests, ignorance alone works to his advantage."

116. The Sole Arbitrator notes that in CAS 2012/A/2822, *Erkand Querimaj v. International Weightlifting Federation,* the Panel held that there was a difference

between recklessness as to whether a specified substance is ingested, which is equated to the athlete running into a minefield "ignoring all stop signs along his way," (which is characterised as indirect intent) and being merely "oblivious" as to whether the specified substance was contained in a product ingested. It was found by the Panel in that case that recklessness would not come within Article 10.4 but being oblivious would.

117. The *Querimaj* Panel found that in relation to different products ingested, there would be a "graduated system" of duty of care depending on the likelihood of the product being used in a training or sport related context. Though the Panel felt that outlining the terms of such a scale of duty of care was beyond it, it found in that case that the athlete had no indirect intent to enhance sport performance in using a supplement called Body Surge. The athlete knew that certain substances were prohibited though he was unaware what was prohibited. He read the label that listed the ingredient "1,3 dimethylamylamine," a synonym for the specified substance MHA. Yet the Panel accepted that the athlete was told that the supplement did not contain any specified substance by a personal trainer and former weightlifter who supplied the athlete with supplements and advice on his career. The Panel accepted that the athlete trusted this person. The athlete listed the supplement on the doping control form, which was taken as evidence that the athlete did not believe it to contain a specified substance. The Panel concluded that it was comfortably satisfied that the athlete did not intend to enhance sporting performance.

118. The Sole Arbitrator finds that the flexibility of sanction that can be imposed under Article 10.4 allows for all concerns that may exist to be reflected in the sanction ultimately applied. In considering the wording of Article 10.4 and the concept of intention, the Sole Arbitrator notes that there is no consideration of recklessness in the current WADC. The difficulty posed in proving a lack of intention to enhance sport performance, as required by Article 10.4, reflects the tension between the language used in the provision of Article 2.2 of the WADC which states that "it is not necessary that intent, fault, negligence or knowing *Use* on the ***Athlete's*** part be demonstrated in order to establish an anti-doping violation" and the fact that such an anti-doping violation can be reduced through Articles 10.4 and 10.5 where it is shown that there is "no intent" to enhance sport performance, "no fault or negligence" and "no significant fault or negligence."

119. For the purposes of Article 10.4, the Sole Arbitrator finds that intent requires a positive determination grounded in knowledge. If an athlete shows that he or she did not know that they were taking a specified substance, and that is corroborated as required, it naturally follows that he or she could not have intended to improve their sporting performance through the use of such specified substance.

120. The level of recklessness or culpability involved in the lack of knowledge will inform the level of reduction, if any, merited under Article 10.4. That provision clearly envisages a situation where the period of ineligibility is replaced by an exclusion for exactly the same length of two years, even though there is no intention to enhance sport performance or mask the use of a performance-enhancing drug. However, the Article does provide a nuanced approach to the sanction being imposed.

C. Determining the Period of Ineligibility for Ms. Rebecca Mekonnen

121. In relation to the relief sought by the Appellants in the Appeal Brief in CAS 2013/A/3115 in relation to Ms. Mekonnen, the Sole Arbitrator has examined all of the salient factors and is of the following conclusion:

Specified Substances

122. There is no dispute between the parties that the substances found in Ms. Mekonnen's sample are specified substances under Article 4.2.2 of the WADA Code. There is no dispute as to the applicability of the NOPC Regulations. MHA and cannabis are respectively classified under class S.6 and S.8 respectively of the WADA list of prohibited substances and methods, and defined therefore as "particular substances" under chapter 12-2(2) of the NOPC Regulations.

123. This is Ms. Mekonnen's first violation of the NOPC Regulations, and as such, absent other considerations, the sanction to be imposed would be that set out in Chapter 12-8 (4) being two years' exclusion from competition and organised training and the loss of the right to be an elected or appointed officer.

Elimination or Reduction under Article 12-8 of the NOPC Rules.

124. In order to avail herself of the provisions of § 12-8 (5), and to reduce her exclusion to a maximum of two years and a minimum of a reprimand, Ms. Mekonnen has to show first, how the substances were introduced into her body, and secondly, that the

consumption of those substances was "not motivated by a wish to increase performance ability or to camouflage the use of a prohibited substance."

125. The Sole Arbitrator agrees with the submission of the Appellant that the standard of proof in relation to whether Ms. Mekonnen can benefit from a reduction or elimination of the exclusion otherwise applicable is proof to his "comfortable satisfaction" pursuant to Article 10.4 of the WADA Code as set out above and that this is a significantly more onerous standard than that of the "balance of probabilities" though not to the level of "beyond reasonable doubt."

The specific requirements to be fulfilled according to Article 10.4 of the WADA

126. Ms. Mekonnen has given an explanation of how she ingested both specified substances, and this explanation was accepted by the Appellant. She has stated that she took Jack3d which she got from her friend, Owe Martinussen, and that this explained the MHA in her system. She has stated that she smoked marijuana which explained the cannabis present in her sample.

127. The Appellant has submitted that Ms. Mekonnen must be found to have taken the specified substance contained within the supplement "motivated by a wish to increase performance ability" as set out in Chapter 12-8 (5) of the NOPC (and the corresponding provision of the WADC) because she took the Jack3d to boost her energy level before a competition. No corresponding argument is made in relation to the consumption of cannabis by Ms. Mekonnen.

128. The Sole Arbitrator notes that Article 10.4 of the WADC requires corroboration, but this clearly qualifies the first paragraph of that Article and thus the corroborating evidence must go to indicate that the use of "the Specified Substance was not intended to enhance" their sport performance, not necessarily that they did not intend to enhance sport performance through the use of a supplement. As such, pursuant to the reasoning above at para. 7.14 *et seq.*, if the athlete can show that she did not know that she was ingesting a specified substance, it follows that she cannot have intended to enhance her sport performance with that substance. Ms. Mekonnen has provided a corroborating witness statement from Mr. Owe Martiniussen, which must be read as establishing that Ms. Mekonnen had no intent to use MHA to enhance her sports performance. It is also undisputed that Ms. Mekonnen took the cannabis recreationally in a social setting, and she has submitted a statement from the Bergen

Clinics stating that she has a history of using narcotics to deal with her psychoses. In relation to both substances, the Sole Arbitrator finds that Ms. Mekonnen therefore has established to the comfortable satisfaction of the Sole Arbitrator how she took these substances and given corroborating evidence to show that she did not intend to enhance her sporting performance by using the specified substances.

129. The Sole Arbitrator is therefore comfortably satisfied that Ms. Mekonnen did not intend to enhance her sport performance through use of a specified substance, i.e. neither MHA nor cannabis.

Whether Ms. Mekonnen can benefit from Chapter 12-9 (1) and Art. 10.5.1

130. Regulation 12-9 (1) of the NOPC Regulations, in line with Article 10.5.1 of the WADA Code states that:

"If the athlete or person proves that violation is caused without guilt, exclusion imposed shall be discharged. The violation does not count as first time violation in cases where this may be of relevance."

131. The Sole Arbitrator finds that the violation is not without guilt, given the provisions of the WADC and the NOPC Regulations – in particular Regulation 12-4 (1) stating that:

"the athlete must procure that no prohibited substance is induced into the athlete's body." This reflects Article 2.2.1 of the WADA Code stating that:

"It is each Athlete's personal duty to ensure that no Prohibited Substance enters his or her body. Accordingly it is not necessary that intent, fault or knowing Use on the Athlete's part be demonstrated in order to establish an anti-doping rule violation for Use of a Prohibited Substance or Prohibited Method."

These provisions make it clear that each athlete is responsible for what is introduced into their body. Therefore, Regulation 12-9 (1) cannot be interpreted to mean in a circumstance like this, where Ms. Mekonnen has taken a supplement that she made very little enquiry in relation to, that she is entirely free from guilt and should have her sanction removed.

132. The Sole Arbitrator therefore proceeds to consider the sanction under 12-8(5) alone, and does not consider the alternative submission under 12-9(2) which is less beneficial to Ms. Mekonnen.

Single violation

133. In relation to the adverse finding in relation to cannabis, it is clear that this case falls under § 12-11 of the NOPC Regulations and Article 10.7 of the WADA Code. It is accepted by the Appellant that Ms. Mekonnen took the cannabis recreationally and it is not suggested that there was any intent to enhance sporting performance. Cannabis is prohibited in competition under S8 of the WADA list of prohibited substances, and MHA is prohibited under S6 of the same list. Therefore, the Sole Arbitrator will proceed to treat the case as a single violation, given that the athlete had never had a previous violation and had not been given any warning.

The appropriate reduction in the level of sanction for Ms. Mekonnen

134. Of central importance in relation to Ms. Mekonnen is that she is a sportsperson who does not compete at an elite level. At the time she tested positive for the two specified substances, cannabis and MHA, she had taken part in six competitions in powerlifting, having received her licence less than 12 months earlier.

135. It was stated by Ms. Mekonnen that she had not, as an amateur athlete, been warned of the risks inherent in using dietary supplements and that she had limited anti-doping information and education. This was not controverted.

136. The Appellant submitted at paragraph 48 of the Appeal Brief that the packaging of the product that Ms. Mekonnen ingested "expressly mentions that one of its compounds is "1,3 dimethylamylamine", which is known to be methylhexaneamine." It was submitted by Ms. Mekonnen that she did not know that these substances were synonymous, and that she had researched on the internet, contrary to the submission of the Appellant.

137. The Sole Arbitrator notes the fact that 1,3 dimethylamylamine is still not included in the list of specified substances as a synonym for MHA, though dimethylpentylamine is so included in the 2013 list. CAS jurisprudence has previously upbraided WADA for not taking the small step of including 1,3 dimthylamylamine, or other "known" variations of MHA, on its website or the Prohibited List. In *Kutrovsky*, the Panel decided in relation to the same supplement, Jack3d, and again an athlete who had researched on the internet but found no issue with the ingredients listed, that the fault for the ignorance of a professional athlete should at least in part be attributed to WADA "for not ensuring that the Prohibited List contains the appropriate level of detail for common supplement additives (WADA is or at least should be aware of the

many examples in CAS jurisprudence and in the market)." The present case could possibly have been avoided if WADA's Prohibited List had been completed as suggested in the *Kutrovsky* award. Instead, the CAS has again had to handle another case where athletes, in this case both of whom are resoundingly amateur, did not know that they were ingesting a prohibited substance.

138. However, a further consideration in relation to Ms. Mekonnen is that she took a substance designed to enhance sporting performance. It is stated that she took Jack3d for its caffeine and creatine content, receiving it from a friend. It is not contested that Ms. Mekonnen searched on the internet and believed that the substance was legal and natural. However, given that Ms. Mekonnen knew she was taking a supplement that could potentially contain substances that she could not consume when in competition at least, the lengths that she went to in order to satisfy herself were not reasonable. The list of ingredients contained a synonym for the specified substance. Ms. Mekonnen did not consult with any professional of any kind. While Ms. Mekonnen can reasonably have trusted a friend to a certain degree, the lack of qualification of Mr. Martiniussen means that his certification that the substance was legal should have been of little comfort to Ms. Mekonnen.

139. The starting point in considering the level of sanction is the principle in Article 2.2.1 (reflected in §12-4 of the NOPC Regulations) that each athlete is responsible for what he or she ingests. Ms. Mekonnen showed considerable fault in trusting her friend and only making a search on the internet which cannot have been very detailed given its results. The Sole Arbitrator however is prepared to take into account the fact that Ms. Mekonnen was not competing at an elite level and had been competing for less than one year.

140. Having regard to all the facts as set out, the Sole Arbitrator considers it appropriate to impose a period of ineligibility of 15 months.

D. <u>Determining the Period of Ineligibility for Mr. Lasse Sundell</u>

141. It is not disputed that Mr. Sundell took the specified substance MHA by ingesting two sports supplements, namely Jack3d and Hemo-Rage. Mr. Sundell submits that he took the supplements to enhance his weight strength and cardio-vascular training, after advice from a shop assistant. Nothing was mentioned by the shop assistant in relation to any banned substances.

142. The Appellant submits that Mr. Sundell clearly cannot benefit from Article 10.4 of the WADA Code and the corresponding provision of the NOPC Regulations as there was an intent to enhance sport performance, though it is not contested that Mr. Sundell did not know that the supplements contained a banned substance.

Elimination or Reduction under Article 12-8 of the NOPC Rules.

143. In order to benefit from Article 10.4 and §12-8(5) of the NOPC Regulations, Mr. Sundell has to show how the substance entered his body, and that he did not intend to enhance sport performance by taking the specified substance.

144. The Sole Arbitrator accepts the explanation as to how the specified substance was ingested, being through the use of the supplements Jack3d and Hemo-Rage.

145. Even if the Sole Arbitrator accepted that the supplements were taken to enhance sport performance and not to improve training (which is portrayed as a theoretical rather than effective distinction by the Appellant) it is not disputed that Mr. Sundell did not know that the supplement contained a specified substance. Likewise, the corroborating statement of Mr. Axel Wallin must be read as establishing to the comfortable satisfaction of this Sole Arbitrator that Mr. Sundell had no intent to use MHA to enhance his sports performance

146. Following the logic of the decision in *Oliviera* as set out above, the Sole Arbitrator thus does not accord with the submission that because Mr. Sundell may have taken a product to improve sport performance generally speaking, that he necessarily cannot show his lack of intention to take one of the constituent ingredients of that product.

147. The Sole Arbitrator concludes that Mr. Sundell did not know that the supplements contained the specified substance and that therefore he did not intend to take the specified substance, and he has satisfied the requirements of §12-8(5) of the NOPC Regulations and Article 10.4 of the WADA Code.

Whether Mr. Sundell can benefit from Regulation 12-9 (1) and Art. 10.5.1

148. Regulation 12-9 (1) of the NOPC Regulations states that:

"If the athlete or person proves that violation is caused without guilt, exclusion imposed shall be discharged. The violation does not count as first time violation in cases where this may be of relevance."

149. The Sole Arbitrator finds that the violation is not without guilt given the provisions of the WADC and the NOPC Regulations – in particular Regulation 12-4 (1) stating that:

"the athlete must procure that no prohibited substance is induced into the athlete's body" reflecting Article 2.2.1 of the WADA Code stating that:

"It is each Athlete's personal duty to ensure that no Prohibited Substance enters his or her body. Accordingly it is not necessary that intent, fault or knowing Use on the Athlete's part be demonstrated in order to establish an anti-doping rule violation for Use of a Prohibited Substance or Prohibited Method."

These provisions make it clear that each athlete is responsible for what is introduced into their body. Therefore, Regulation 12-9 (1) cannot be interpreted to mean in a circumstance like this, where Mr. Sundell has taken a supplement that he made very little enquiry in relation to, he is entirely free from guilt and should have his sanction removed.

150. The Sole Arbitrator therefore proceeds to consider the sanction under 12-8(5) alone, and does not consider the alternative submission under 12-9(2) which is less beneficial to Mr. Sundell.

The appropriate reduction in the level of sanction for Mr. Sundell

151. As an initial matter, the Sole Arbitrator notes that it is undisputed that Mr. Sundell never received the benefit of anti-doping information and education. This was not contradicted by the Appellant, and the Sole Arbitrator does not believe that this athlete received such (or any) necessary education and information. He was not ignorant; he was simply uneducated. In this regard, such an amateur athlete should not be held to the same level of anti-doping knowledge as an experienced professional. To do so would unduly punish Mr. Sundell from not knowing what no one took the time to teach him.

152. However, though he does not compete at an elite level, Mr. Sundell has played floorball for a considerable period of time. He was nonetheless in competition and should have taken more care in relation to the products he ingested. The primary responsibility for not ensuring that no prohibited substance enters an athlete's body under of the NOPC Regulations and Article 2.2.1 of the WADC lies with Mr. Sundell individually. Mr. Sundell did not do any research himself, and there is

nothing to suggest that he was given a positive assurance by the sales assistant that the products he was buying could be taken in competition.

153. Based upon these the circumstances, the Sole Arbitrator finds that the length of Mr. Sundell's exclusion should be 15 months.

E. <u>Starting Point for Period of Ineligibility for Ms. Mekonnen</u>

154. § 12-17 of the NOPC Regulations states that the exclusion of an athlete shall become effective on the day exclusion was imposed for the first time. However, it goes on to state at para. (3) as follows:

"If there has been a significant delay in the procedure . . . the tribunal may determine an earlier effectuation of the exclusion. Imposed exclusion may first be effectuated at the time of testing in relation to a positive test, or at the time of another violation."

155. This provisions mirrors Article 10.9 of the WADA Code which states as follows:

10.9 Commencement of Ineligibility Period

Except as provided below, the period of Ineligibility shall start on the date of the *hearing decision providing for Ineligibility or, if the hearing is waived, on the date Ineligibility is accepted or otherwise imposed. Any period of Provisional Suspension (whether imposed or voluntarily accepted) shall be credited against the total of Ineligibility imposed.*

10.9.1 Delays not attributable to the Athlete or other Person

Where there have been substantial delays in the hearing process or other aspects of Doping Control not attributable to the Athlete or other Person, the body imposing the sanction may start the period of Ineligibility at an earlier date commencing as early as the date of Sample Collection or on the date on which another anti-doping rule violation last occurred.

156. The Sole Arbitrator notes that Ms. Mekonnen has voluntarily suspended herself from competition and training since 2 March 2012. Evidence was submitted in this regard and was not controverted. Consequently, the period of exclusion will run from the date that Ms. Mekonnen voluntarily suspended herself.

F. Starting Point for Period of Ineligibility for Mr. Sundell

157. It is uncontroverted that Mr. Sundell was suspended for six months from 23 March 2012. He then accepted a voluntary suspension from 4 April 2013. He notified the CAS by letter dated 18 September 2013 that he was withdrawing his voluntary suspension from that date. As of 18 September 2013, he had therefore served 11 months and 2 weeks' suspension. Based upon the foregoing, the period of exclusion of 15 months will include his voluntary suspension. The remaining 3 months and two weeks' suspension shall run from the date of this decision.

G. Reliefs sought by the NOPC in each case

158. In relation to the reliefs sought by the NOPC in each case, such relief is denied on the grounds that the NOPC is a proper party to the proceedings.

159. All further and other claims are dismissed.

VIII. CONCLUSION

160. In summary, the Sole Arbitrator determines that:

161. The ten-month period of ineligibility imposed by the NOPC on Ms. Rebecca Mekonnen and confirmed by the NOPC Appeals Committee is set aside and is replaced with a period of ineligibility of fifteen (15) months;

162. The period of ineligibility of Ms. Mekonnen commenced on 2 March 2012 and continued up to and including 1 June 2013;

163. The six-month period of ineligibility imposed by the NOPC on Mr. Lasse Sundell and confirmed by the NOPC Appeals Committee is set aside and is replaced with a period of ineligibility of fifteen (15) months;

164. The period of ineligibility of Mr. Sundell runs from 23 March 2012 for six months, from 4 April 2013 for 5 months and two weeks for a total to date of 11 months and two weeks, and continues to run from the date of this decision up to and including the conclusion of his sentence.

IX. COSTS

165. Art. R64.4 of the CAS Code provides:

"At the end of the proceedings, the 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 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".

166. Art. R64.5 of the CAS Code provides:

"The arbitral award shall determine which party shall bear the arbitration costs or in which proportion the parties shall share them. As a general rule, the award shall 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 outcome of the proceedings, as well as the conduct and the financial resources of the parties".

167. As a general rule, the award shall grant the prevailing party a contribution towards its legal fees and other expenses incurred in connection with the proceedings. In the present case, WADA was partially successful in its appeal. As a general rule, the CAS grants the prevailing party a contribution towards its legal fees and other expenses incurred in connection with the proceedings. The CAS may however depart from that principle under certain circumstances, in particular when such a burden put on the losing party would put its financial situation at stake. That appears to be the case here – the two athletes are young recreational amateurs with minimal financial means, and the costs associated with this appeal are likely such that they could have a significant financial impact. In consideration of all matters, the Sole Arbitrator rules that WADA and the NOPC shall each pay 1/3 of the costs of the arbitration, to be calculated and notified to the parties by the CAS Court Office, and each athlete shall pay 1/6 of such costs. The Sole Arbitrator further orders that each party shall pay their own legal fees.

ON THESE GROUNDS

The Court of Arbitration for Sport rules that:

1. The Appeal filed by the World Anti-Doping Agency on 15 March 2013 against the decision of the Appeals Committee of the Norwegian Olympic and Paralympic Committee and Confederation of Sports in the case of Ms Rebecca Mekonnen dated 22 February 2013 is partially upheld;

2. The decision of the Appeals Committee of the Norwegian Olympic and Paralympic Committee and Confederation of Sports imposing a ten month period of ineligibility on Ms. Rebecca Mekonnen is set aside and a period of ineligibility of fifteen (15) months commencing on 2 March 2012 is substituted therefor;

3. The Appeal filed by the World Anti-Doping Agency on 15 March 2013 against the decision of the Appeals Committee of the Norwegian Olympic and Paralympic Committee and Confederation of Sports in the case of Mr. Lasse Sundell dated 22 February 2013 is partially upheld;

4. The decision of the Appeals Committee of the Norwegian Olympic and Paralympic Committee and Confederation of Sports imposing a six month period of ineligibility on Mr. Lasse Sundell is set aside and substituted therefor with a period of ineligibility of fifteen (15) months from 23 March 2012 for six months, from 4 April 2013 for 5 months and two weeks for a total to the date of this decision of 11 months and two weeks, and continuing to run from the date of this decision up to and including the conclusion of his sentence;

5. WADA and the NOPC shall bear 1/3 of the costs of the arbitration to be calculated and notified to the parties by the CAS Court Office, and both Ms Mekonnen and Mr Sundell shall each pay 1/6 of the arbitration costs;

6. Each party shall bear its own legal and other costs incurred in connection with these arbitration proceedings; and

7. All further and other claims for relief are dismissed.

Lausanne, 9 December 2013

THE COURT OF ARBITRATION FOR SPORT

Lars Halgreen
Sole Arbitrator