AMERICAN ARBITRATION ASSOCIATION
Commercial Arbitration Tribunal

In the Matter of the Arbitration between UNITED STATES ANTI-DOPING AGENCY, Claimant, and INIKA MCPHERSON, Respondent.	AAA Case No. 01-22-0005-2545

FINAL AWARD

Pursuant to the American Arbitration Association's ("AAA") Commercial Arbitration Rules ("AAA Commercial Arbitration Rules") as modified by the Procedures for the Arbitration of Olympic & Paralympic Sport Doping Disputes (effective as revised January 1, 2021) ("Arbitration Procedures") as contained in the Protocol for Olympic and Paralympic Movement testing (effective as revised January 1, 2021) (the "USADA Protocol"), and pursuant to the Ted Stevens Olympic and Amateur Sports Act, 36 U.S.C. 22501, *et seq.*, an evidentiary hearing was held via videoconference on March 17, 2023, before the duly appointed Arbitrator Jeffrey A. Mishkin. Mr. Mishkin was assisted by Danielle Menitove, Esq., associate to the Arbitrator.

I, THE UNDERSIGNED ARBITRATOR, having been designated, and having been duly sworn, and having duly heard the allegations, arguments, submissions, proofs, and evidence submitted by the Parties do hereby FIND and AWARD as follows:

I. THE PARTIES

1. United States Anti-Doping Agency ("USADA" or "Claimant") is the independent anti-doping organization, as recognized by the United States Congress, for all Olympic, Paralympic, Pan American and Parapan American sport in the United States. USADA is authorized to execute a comprehensive national anti-doping program encompassing testing, results management, education, and research, while also developing programs, policies, and procedures in each of those areas.

2. Inika McPherson ("McPherson" or "Respondent") is a 36-year-old elite track-and-field athlete specializing in high jump. Respondent is a three-time U.S national champion and was a member of the 2016 U.S. Olympic team.

3. USADA was represented in this proceeding by Jeff T. Cook, Esq., USADA General Counsel, and Spencer Crowell, Esq., Olympic & Paralympic Counsel.

4. Respondent was represented in this proceeding by Howard L. Jacobs, Esq., Aaron Mojarras, Esq., and Kayla Williams. Respondent's agent, Kimberly Holland, also attended the hearing.

5. Claimant and Respondent will be referred to collectively as the "Parties."

II. THE STIPULATED FACTS

6. Pursuant to the Stipulation of Uncontested Facts and Issues between USADA and McPherson dated October 28, 2022 (R-8),[1] the Parties have stipulated that USADA collected Respondent's urine sample designated as USADA urine specimen number 177073V, out-of-competition, on June 3, 2022. The Parties agree that each aspect of the sample collection and its processing was conducted appropriately and without error. (R-8 ¶¶ 3-4.)

7. The Parties have further stipulated that a WADA-accredited laboratory, through accepted scientific procedures, in accordance with the International Standards for Laboratories, and without error, determined that both the A and B samples contained furosemide. (*Id.* ¶¶ 5-7.)

8. The Parties stipulate that furosemide is a Prohibited Substance in the class of Diuretics and Other Masking Agents on the WADA Prohibited List, adopted by both the USADA Protocol and World Athletics Anti-Doping Rules. (*Id.* ¶ 8.)

9. The Parties acknowledge that a provisional suspension was imposed on Respondent on July 22, 2022, and that time served under the provisional suspension should be credited toward any period of ineligibility that Respondent might receive. (*Id.* ¶¶ 9-10.)

III. ISSUE

10. The main issue to be resolved in this proceeding is the appropriate sanction for Respondent's anti-doping rule violation. Specifically, I must determine whether Respondent has met her burden of proving No Significant Fault or Negligence and, if so, whether her degree of fault warrants a reduced period of Ineligibility.

11. USADA also has requested the disqualification of any results obtained by Respondent on and after June 3, 2022, through the commencement of her provisional suspension on July 22, 2022.

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[1] "R", followed by a number, means "Respondent Exhibit", followed by the number thereof. "C" followed by a letter, means "Claimant Exhibit", followed by the letter thereof.

IV. JURISDICTION

12. The Parties have stipulated that this proceeding, involving Respondent's urine specimen number 177073V, is governed by the USADA Protocol. (*Id.* ¶ 1.)

13. Under R-7 of the Arbitration Procedures, which are part of the USADA Protocol, "[t]he arbitrator shall have the power to rule on his or her own jurisdiction, including any objections with respect to the existence, scope or validity of the arbitration agreement." Moreover, "[a] party must object to the jurisdiction of the arbitrator or to the arbitrability of a claim or counterclaim no later than the filing of the answering statement to the claim or counterclaim that gives rise to the objection."

14. No party has objected to my jurisdiction or to the arbitrability of the claim.

15. Accordingly, I conclude the issues presented in this case are properly before me.

V. BURDEN AND STANDARD OF PROOF

16. As set forth in Article 3.1 of the WADA Code:

> The *Anti-Doping Organization* shall have the burden of establishing that an anti-doping rule violation has occurred. The standard of proof shall be whether the *Anti-Doping Organization* has established an anti-doping rule violation to the comfortable satisfaction of the hearing panel, bearing in mind the seriousness of the allegation which is made. This standard of proof in all cases is greater than a mere balance of probability but less than proof beyond a reasonable doubt. Where the *Code* places the burden of proof upon the *Athlete* or other *Person* alleged to have committed an anti-doping rule violation to rebut a presumption or establish specified facts or circumstances, except as provided in Articles 3.2.2 and 3.2.3, the standard of proof shall be by a balance of probability.

VI. PROCEDURAL HISTORY

17. This proceeding was initiated on December 14, 2022, pursuant to USADA's letter notifying the AAA of Respondent's request for a hearing.

18. On December 16, 2022, the AAA notified the parties that the undersigned had been appointed as arbitrator for this matter. No party has objected to my appointment as arbitrator in this matter.

19. On January 13, 2023, pursuant to R-15 of the Arbitration Procedures, a preliminary hearing was held with the Parties.

20. Following the preliminary hearing, a Report of Preliminary Hearing and Scheduling Order was issued on January 16, 2023, which, among other things, set dates for the submission of pre-hearing briefs, exhibits and designation of potential witnesses, and set the hearing date for March 17, 2023.

21. On February 14, 2023, Respondent submitted her pre-hearing brief and supporting evidence.[2]

22. On March 7, 2023, USADA submitted its pre-hearing brief and supporting evidence.[3]

23. On March 17, 2023, an evidentiary hearing was held via videoconference in which both USADA and Respondent were present and participated with the assistance of counsel.

24. During the hearing, the Parties called witnesses to testify. The Parties were afforded the opportunity to ask questions of the witnesses and did so as they considered necessary.

25. The following witnesses provided sworn testimony at the hearing:

For Claimant

Dr. Matthew Fedoruk, Ph.D., USADA Chief Science Officer
Grayson Potter, USADA Elite Education Lead

For Respondent

Inika McPherson, Respondent

26. Respondent also submitted a witness statement from Marnesiya Holmes, a close friend of Respondent. At the hearing, Respondent represented that efforts had been made to secure Ms. Holmes' attendance at the hearing, but that Ms. Holmes had failed to respond.

27. The Parties provided opening and closing statements, gave arguments, and presented their positions on various issues that arose during the hearing.

28. Pursuant to R-26 of the Arbitration Procedures, the rules of evidence were not strictly enforced.

29. The hearing lasted one (1) day.

30. At the conclusion of the hearing, in accordance with R-30 of the Arbitration Procedures, the Parties confirmed they did not have "any further proofs to offer or witnesses to be heard."

31. The hearing was declared closed on March 20, 2023.

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[2] Respondent submitted two additional exhibits on February 16, 2023.

[3] USADA submitted an amended exhibit on March 11, 2023.

VII. APPLICABLE LAW

32. Respondent and USADA stipulate that the USADA Protocol governs this proceeding involving Respondent's urine specimen number 177073V, collected out-of-competition on June 3, 2022. (R-8 ¶¶ 1, 3.)

33. The Parties have further stipulated that "the mandatory provisions of the World Anti-Doping Code (the 'Code') including, but not limited to, the definitions of doping, burdens of proof, Classes of Prohibited Substances and Prohibited Methods, sanctions, the USADA Protocol, World Athletics Anti-Doping Rules, and the United States Olympic and Paralympic Committee ('USOPC') National Anti-Doping Policy are applicable" to this matter. (*Id.* ¶ 2.)

34. Pursuant to the WADA Prohibited List, furosemide is a Specified Substance that is prohibited at all times, in- and out-of-competition. (C-O at 12.)

35. The relevant WADA Code provisions applicable to this proceeding are as follows:

> ***Article 2. Anti-Doping Rule Violations***
>
> The purpose of Article 2 is to specify the circumstances and conduct which constitute anti-doping rule violations. Hearings in doping cases will proceed based on the assertion that one or more of these specific rules have been violated.
>
> *Athletes* or other *Persons* shall be responsible for knowing what constitutes an anti-doping rule violation and the substances and methods which have been included on the *Prohibited List*.
>
> The following constitute anti-doping rule violations:
>
> **2.1 Presence of a *Prohibited Substance* or its *Metabolites* or *Markers* in an *Athlete*'s Sample**
>
> 2.1.1 It is the Athletes' personal duty to ensure that no *Prohibited Substance* enters their bodies. *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 rule violation under Article 2.1
>
> . . .
>
> **2.2 *Use* or Attempted *Use* by an *Athlete* of a *Prohibited Substance* or a *Prohibited Method***
>
> 2.2.1 It is the *Athletes*' personal duty to ensure that no *Prohibited Substance* enters their bodies and that no *Prohibited Method* is *Used*. 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 rule violation for *Use* of a *Prohibited Substance* or a *Prohibited Method*.

2.2.2 The success or failure of the *Use* or Attempted *Use* of a *Prohibited Substance* or *Prohibited Method* is not material. It is sufficient that the *Prohibited Substance* or *Prohibited Method* was *Used* or *Attempted* to be *Used* for an anti-doping rule violation to be committed.

Article 10: Sanctions on Individuals

10.2 *Ineligibility* for Presence, *Use* or Attempted *Use* or *Possession* of a *Prohibited Substance* or *Prohibited Method*

The period of *Ineligibility* for a violation of Article 2.1, 2.2 or 2.6 shall be as follows, subject to potential elimination, reduction or suspension pursuant to Article 10.5, 10.6 or 10.7:

10.2.1 The period of *Ineligibility*, subject to Article 10.2.4, shall be four (4) years where:

10.2.1.1 The anti-doping rule violation does not involve a *Specified Substance* or a *Specified Method*, unless the *Athlete* or other *Person* can establish that the anti-doping rule violation was not intentional.

10.2.1.2 The anti-doping rule violation involves a *Specified Substance* or a *Specified Method* and the *Anti-Doping Organization* can establish that the anti-doping rule violation was intentional.

10.2.2 If Article 10.2.1 does not apply, subject to Article 10.2.4.1, the period of *Ineligibility* shall be two years.

10.2.3 As used in Article 10.2, the term "intentional" is meant to identify those *Athletes* or other *Persons* who engage in conduct which they knew constituted an anti-doping rule violation or knew that there was a significant risk that the conduct might constitute or result in an anti-doping rule violation and manifestly disregarded that risk. An anti-doping rule violation resulting from an *Adverse Analytical Finding* for a substance which is only prohibited *In-Competition* shall be rebuttably presumed to be not "intentional" if the substance is a *Specified Substance* and the *Athlete* can establish that the *Prohibited Substance* was *Used Out-of-Competition*. An anti-doping rule violation resulting from an *Adverse Analytical Finding* for a substance which is only prohibited *In-Competition* shall not be considered "intentional" if the substance is not a *Specified Substance* and the *Athlete* can establish that the *Prohibited Substance* was *Used Out-of-Competition* in a context unrelated to sport performance.

10.6 Reduction of the Period of *Ineligibility* based on *No Significant Fault* or *Negligence*

10.6.1 Reduction of Sanctions in Particular Circumstances for Violations of Article 2.1, 2.2 or 2.6.

All reductions under Article 10.6.1 are mutually exclusive and not cumulative.

10.6.1.1 *Specified Substances* or *Specified Methods*
Where the anti-doping rule violation involves a *Specified Substance* (other than a *Substance of Abuse*) or *Specified Method*, and the *Athlete* or other *Person* can establish *No Significant Fault* or *Negligence*, then the period of *Ineligibility* shall be, at a minimum, a reprimand and no period of *Ineligibility*, and at a maximum, two years of *Ineligibility*, depending on the *Athlete*'s or other *Person*'s degree of *Fault*.

10.10 *Disqualification* of Results in *Competitions* Subsequent to *Sample* Collection or Commission of an Anti-Doping Rule Violation

In addition to the automatic *Disqualification* of the results in the *Competition* which produced the positive *Sample* under Article 9, all other competitive results of the *Athlete* obtained from the date a positive *Sample* was collected (whether *In-Competition* or *Out-of-Competition*), or other anti-doping rule violation occurred, through the commencement of any *Provisional Suspension* or *Ineligibility* period, shall, unless fairness requires otherwise, be *Disqualified* with all of the resulting *Consequences* including forfeiture of any medals, points and prizes.

Appendix 1: Definitions

***Fault*:** *Fault* is any breach of duty or any lack of care appropriate to a particular situation. Factors to be taken into consideration in assessing an *Athlete*'s or other *Person*'s degree of *Fault* include, for example, the *Athlete*'s or other *Person*'s experience, whether the *Athlete* or other *Person* is a *Protected Person*, special considerations such as impairment, the degree of risk that should have been perceived by the *Athlete* and the level of care and investigation exercised by the *Athlete* in relation to what should have been the perceived level of risk. In assessing the *Athlete*'s or other *Person*'s degree of *Fault*, the circumstances considered must be specific and relevant to explain the *Athlete*'s or other *Person*'s departure from the expected standard of behavior. Thus, for example, the fact that an *Athlete* would lose the opportunity to earn large sums of money during a period of *Ineligibility*, or the fact that the *Athlete* only has a short time left in a career, or the timing of the sporting calendar, would not be relevant factors to be considered in reducing the period of *Ineligibility* under Article 10.6.1 or 10.6.2.

No Fault or Negligence: The *Athlete* or other *Person*'s establishing that he or she did not know or suspect, and could not reasonably have known or suspected even with the exercise of utmost caution, that he or she had *Used* or been administered the *Prohibited*

Substance or *Prohibited Method* or otherwise violated an anti-doping rule. Except in the case of a *Protected Person* or *Recreational Athlete*, for any violation of Article 2.1, the *Athlete* must also establish how the *Prohibited Substance* entered the *Athlete*'s system.

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

VIII. FACTUAL BACKGROUND

36. Below is a summary of the relevant facts and allegations based on the Parties' written and oral submissions, pleadings and evidence adduced during the pendency of this arbitration proceeding. Additional facts and allegations found in the Parties' submissions, pleadings and evidence may be set out, where relevant, in connection with the legal discussion that follows. While I have considered all the facts, allegations, legal arguments, and evidence submitted by the Parties in the present proceeding, this Award only refers to the submissions and evidence necessary to explain my reasoning. The facts presented or relied upon below may differ from one side or the other's presented version, and that is the result of my necessarily having to weigh the presented evidence in providing the basis for and in coming to a decision as to the Award.

37. Respondent is a 36-year-old high jump athlete. She began competing at the elite level in 2010. She is a three-time U.S. national champion and was a member of the 2016 U.S. Olympic team. Respondent has been in the USADA Registered Testing Pool since 2011 and testified that she has been drug tested "quite often" throughout her career.

38. Before her positive test in 2022, Respondent tested positive for a Prohibited Substance on one prior occasion. In 2014, Respondent tested positive for cocaine after unintentionally ingesting it while smoking cigars at a party. Respondent accepted a 21-month sanction for her prior anti-doping rule violation.

39. USADA provides athletes information on anti-doping matters through newsletters and other educational materials. USADA also provides athletes with annual Athlete's Advantage Tutorials that deal with anti-doping matters and that advise athletes that they are responsible for everything that enters their bodies. Respondent has received such tutorials since 2011. Respondent confirmed that she recalled taking the 2022 tutorial and acknowledged that it advised athletes "to search your medications on GlobalDRO.com to see if a substance or method is prohibited. If you're unsure about the results from your Global DRO search, you can call your Drug Reference Team at USADA."

40. While much of Respondent's anti-doping education came in the form of online tutorials, Respondent also attended an in-person education session with Grayson Potter, the Elite Education Lead at USADA, in 2021. This in-person education involved a one-on-one

session between Ms. Potter and Respondent that Ms. Potter estimated lasted approximately 3-5 minutes. Ms. Potter testified that during the session, she would have reminded Respondent to check her medications and answered any questions Respondent may have had. Ms. Potter did not recall if Respondent asked any questions during her session and stated that anti-inflammatory medications would not have been discussed during the session unless Respondent had specifically asked about them. Respondent did not recall attending the session but does not dispute that she attended.

41. Respondent testified that she has a "good understanding" of her anti-doping responsibilities.

42. In August of 2021, Respondent suffered an injury to her left heel. The injury caused Respondent significant pain and largely prevented her from training for the remainder of the year.

43. Between Fall 2021 and April 2022, Respondent testified that she tried to treat her injury with rest, icing and stretching. She also testified that she took over-the-counter anti-inflammatories during this period.

44. Respondent stated that she has taken various anti-inflammatory medications throughout her career as an elite high jumper—including ibuprofen/Advil, Tylenol, Panadol and Meloxicam—and understood that anti-inflammatories were not prohibited.

45. In April 2022, Respondent was still experiencing pain in her left heel and thus travelled to Atlanta, Georgia to see Dr. Rudolph Amadeus Mason, a USA Track and Field team physician. Dr. Mason gave Respondent a platelet-rich plasma injection in her left heel. Although Respondent's medical records indicate that Dr. Mason diagnosed Respondent with plantar fasciitis, Respondent testified that this diagnosis was not communicated to her. Instead, Dr. Mason simply instructed her to rest her foot and use a walking boot.

46. Approximately one-and-a-half weeks after receiving the platelet-rich plasma injection, Respondent contacted Dr. Mason to inform him she was still experiencing pain in her heel. Dr. Mason prescribed Respondent 800mg ibuprofen tablets and 50 mg tramadol tablets. The ibuprofen was prescribed to be taken one tablet every eight hours, and the tramadol was prescribed to be taken 1 tablet every four hours not to exceed 400mg/day. No refills were prescribed for either medication.

47. Respondent testified that she took both the ibuprofen and the tramadol as prescribed, and that the medications lasted approximately 2-3 weeks. Respondent stated that she attempted to contact Dr. Mason for new prescriptions when her medications ran out but that he was unavailable, so she proceeded to take over-the-counter ibuprofen to manage her pain. She also continued to use the walking boot "on and off."

48. On June 2, 2022, Respondent called her friend Marnesiya Holmes and made plans to visit her at Ms. Holmes' grandmother's house. Respondent stated that during the call, she

discussed with Ms. Holmes her high jumping season and mentioned the pain she was experiencing from her heel injury.

49. Later that day, Respondent visited Ms. Holmes at her grandmother's house. Respondent stated she was in pain during her visit and asked Ms. Holmes for an anti-inflammatory. Ms. Holmes told Respondent that her grandmother had anti-inflammatories that she took for her knee and offered to give Respondent one to help with Respondent's pain. Respondent testified that Ms. Holmes went into her grandmother's bedroom to retrieve the anti-inflammatory medication while Respondent stayed on the couch in the living room. Ms. Holmes returned to the living room holding a single pill that she gave to Respondent and that Respondent consumed. Respondent testified that she did not see, nor did she ask to see, the bottle that the pill came from.

50. Respondent further testified that Ms. Holmes did not tell her the name of the anti-inflammatory medication she provided to Respondent nor did Respondent ask. Respondent stated that she did not inspect the pill to see if it had any markings or was labelled as Advil or Tylenol. Instead, Respondent asserts that she had trusted Ms. Holmes to give her what Ms. Holmes had stated she was giving Respondent—an anti-inflammatory.

51. Respondent explained that she was not expecting the pill that Ms. Holmes provided her to be the same anti-inflammatory that had been prescribed by Dr. Mason, and thus was not expecting it to look like the anti-inflammatory she had been prescribed. Respondent stated, however, that the pill that Ms. Holmes brought her was small and looked like anti-inflammatories she had taken previously.

52. Respondent testified that she was not aware that Ms. Holmes' grandmother was taking furosemide. Indeed, Respondent stated that she had never even heard of furosemide at the time.

53. The next day, on June 3, 2022, a doping control officer came to Respondent's residence for an out-of-competition test. On the doping control form, Respondent declared seven supplements and medications that she had taken in the prior seven days but failed to declare the pill that Ms. Holmes had provided her. Respondent testified that she "really just forgot" to include the pill Ms. Holmes had given her on the doping control form.

54. On July 22, 2022, USADA notified Respondent that her sample had tested positive for furosemide and imposed a provisional suspension. She was later notified that the B bottle of her sample had confirmed the presence of furosemide.

55. Respondent "does not dispute the presence of furosemide in her sample and accepts that she has committed an anti-doping rule violation under the USADA Protocol." (Respondent Pre-Hearing Br. ¶ 1.2.)

56. After being notified of her positive test, Respondent contacted Ms. Holmes and informed her she had tested positive for a prohibited substance. Respondent asked Ms. Holmes to confirm what she had given Respondent on June 2, 2022.

57. In her witness statement, which Ms. Holmes declared was "true to the best of [her] knowledge, information, and belief," Ms. Holmes stated that she "checked [her] grandmother's medications and learned that, in addition to her anti-inflammatory pills (naproxen) and other prescriptions, she had a prescription for furosemide pills." (Witness Statement of Marnesiya Holmes ¶ 8.) Ms. Holmes further stated that "her grandma, unfortunately, had mixed up all of her prescriptions so that she had a variety of pills in each pill bottle that were then mixed up across various compartments in her pillbox." (*Id.* ¶ 9.) Ms. Holmes asserted that her "grandma suffers from dementia, which has been deteriorating over time, and did not realize that she had done this. When [Ms. Holmes] discussed the situation with [her] grandma, she initially could not remember which pill bottle she told [Ms. Holmes] to grab the pill from. [Her] grandmother believes that she likely told [Ms. Holmes] that her furosemide pills were her anti-inflammatory pills by mistake. Beyond that, [Ms. Holmes] also eventually learned that the pill bottle that [her grandmother] told [Ms. Holmes] contained her anti-inflammatory pills also contained several furosemide pills by accident." (*Id.* ¶ 10.) Ms. Holmes states that when she gave Respondent the pill, "neither of us had any idea that it was a furosemide pill. [Respondent] was also not aware that my grandma suffered from dementia, or that she had a prescription for furosemide at the time." (*Id.* ¶ 11.)

58. On July 31, 2022, still experiencing pain in her left heel, Respondent went to the emergency room. At that visit, Ms. McPherson learned she had plantar fasciitis. Since learning of her plantar fasciitis diagnosis, Respondent has modified her physical therapy treatment, which Respondent described as "helpful" in treating her injury. Respondent opined that her injury is "90% resolved."

59. On September 16, 2022, Respondent provided USADA with a "Supplementary Letter of Explanation," stating that "[o]n approximately June 2, 2022, a close friend's grandmother gave Ms. McPherson a pill she claimed was an anti-inflammatory medication that would help reduce the swelling" and that "[i]n investigating the possible cause of her positive test, Ms. McPherson learned for the first time that the medication provided by her friend's grandmother was furosemide." Ms. McPherson therefore "submits that the medication provided by her friend's grandmother was more likely than not the source of her positive test." (R-7.)

60. On October 14, 2022, Respondent participated in an interview with USADA. During the interview, and as Respondent confirmed at the hearing, Respondent acknowledged that taking the pill from Ms. Holmes was "irresponsible." (C-M at 7.)[4]

[4] USADA subsequently conducted an interview of Ms. Holmes as well. (C-N.)

IX. ANALYSIS AND FINDINGS

A. Anti-Doping Rule Violation

61. As stated above, it is undisputed that Respondent's sample tested positive for furosemide, a Specified Substance prohibited both in- and out-of-competition. Respondent admits that she committed an anti-doping rule violation. (Respondent Pre-Hearing Br. ¶ 1.2.) Accordingly, USADA has met its burden of proof that an anti-doping rule violation has occurred.

B. No "Intentional" Violation

62. USADA proffers that "although it could be argued Respondent's recklessness amounted to intentional use as defined in the Code, USADA does not press that argument here." (Claimant Pre-Hearing Br. at 8.)

63. Dr. Fedoruk explained that diuretics were first banned in sport (both in- and out-of-competition) "because they can be used by athletes for three primary reasons. First, their potent ability to remove water from the body can cause a rapid weight loss that can be required to meet a weight requirement in sporting events. . . . Second, they can be used to mask the administration of other doping agents by reducing their concentration in urine primarily because of an increase in urine volume. Lastly, diuretic induced dehydration has the potential to impact blood measurements made for the Athlete Biological Passport." (C-P at 2.) There is no evidence that Respondent used furosemide for any of these reasons.

64. I find that Respondent has been forthcoming throughout these proceedings, including at the hearing, and credit her testimony that she took furosemide under the mistaken belief that she was taking an anti-inflammatory medication.

65. The Parties agree that the starting sanction for Respondent's anti-doping rule violation is a two-year period of ineligibility. (Respondent Pre-Hearing Br. ¶ 5.4; Claimant Pre-Hearing Br. at 8-9.)

66. Accordingly, I find that Respondent's anti-doping rule violation was not intentional, and the starting sanction for Respondent's anti-doping rule violation is a two-year period of ineligibility.

C. Reduction of Period of Ineligibility for No Significant Fault or Negligence

67. The core issue to be decided is whether, under Article 10.6.1 of the WADA Code, Reduction of the Period of *Ineligibility* based on *No Significant Fault* or *Negligence*, Respondent's penalty should be reduced.

68. Respondent bears the burden of establishing, by a balance of probabilities, how the Prohibited Substance entered her system and that any Fault or Negligence, when viewed

in the totality of the circumstances and taking into account the criteria for No Fault or Negligence, was not significant in relationship to the anti-doping rule violation.

69. If Respondent cannot carry her burden, then no further analysis is necessary, and the sanction for her anti-doping rule violation is two years.

70. If Respondent meets her burden, then Respondent's degree of fault is assessed under the framework outlined in CAS 2013/A/3327, *Cilic v. ITF*, and CAS 2016/A/4371, *Lea v. USADA*. *Cilic* and *Lea* utilize a two-step analysis in determining the degree of fault, considering both objective and subjective standards. An objective standard of fault "describes what standard of care could have been expected from a reasonable person in the athlete's situation." *Cilic* ¶ 71. The subjective standard of fault "describes what could have been expected from that particular athlete, in light of his personal capabilities." *Id.*

71. The "objective element should be foremost in determining into which of the three relevant categories a particular case falls." *Id.* ¶ 72. "The subjective element can then be used to move a particular athlete up or down within that category." *Id.* ¶ 73. "[I]n exceptional cases, it may be that the subjective elements are so significant that they move a particular athlete not only to the extremity of a particular category, but also into a different category altogether," but such cases are "the exception to the rule." *Id.* ¶ 74.

72. In assessing an athlete's degree of fault, *Cilic* and *Lea* identified three categories of fault:

    a. "considerable degree of fault": 16 - 24 months, with a "standard" considerable degree of fault leading to a suspension of 20 months.
    b. "moderate degree of fault": 8 - 16 months, with a "standard" moderate degree of fault leading to a suspension of 12 months.
    c. "light degree of fault": 0 - 8 months, with a "standard" light degree of fault leading to a suspension of 4 months.

    Lea ¶ 90; *see also Cilic* ¶ 70.

1. Respondent's Contentions

73. As an initial matter, Respondent submits that she has established, by a balance of probabilities, how furosemide entered her system. Respondent states that it is more likely than not that her positive test was caused by mistakenly taking one of Ms. Holmes' grandmother's furosemide pills on June 2, 2022, thinking it was an anti-inflammatory pill.

74. Respondent next contends that she has established, by a balance of probabilities, that when viewed in the totality of the circumstances she was not significantly at fault or negligent. Respondent argues she is entitled to a reduction of her sanction for No Significant Fault or Negligence because she asked for, and Ms. Holmes purported to give her, a harmless anti-inflammatory medication—medication she had taken on many

occasions throughout her career and that she knew was not prohibited. Respondent notes that Ms. Holmes was a close friend and Respondent had no reason to believe Ms. Holmes was giving her anything other than the anti-inflammatory Ms. Holmes claimed to be giving her. Respondent also emphasizes that she took the pill out-of-competition while she was on a break from training and competing.

75. In support of her argument that she has proven No Significant Fault or Negligence, Respondent cites to CAS 2005/A/847, *Knauss v. FIS*. The CAS Panel in that case stated that "the requirements to be met by the qualifying element '*no significant fault or negligence*' must not be set excessively high" because "the higher the threshold is set for applying the rule, the less opportunity remains for differentiating meaningfully and fairly within the (rather wide) range of the sanction." *Knauss* ¶ 16.

76. Respondent argues that the facts of her case are very similar to those in *USADA v. Rivera*, AAA Case No. 01-16-0000-6096 (Aug. 31, 2016), where the Panel found the athlete had met the criteria for No Significant Fault or Negligence and imposed a 12-month period of ineligibility. In *Rivera*, the athlete, who was suffering from head and neck pain due to an injury as well as pain from her menstrual cycle, asked her grandmother for a pain reliever. Rivera's grandmother gave her a pill that looked like Panadol but did not tell her what it was. After testing positive for a prohibited substance, Rivera called her grandmother who informed her she had given Rivera a Percocet. The Panel, applying *Cilic*, determined that the athlete's objective degree of fault was "considerable" because she did not ask her grandmother what the pill was. The Panel, however, concluded that the following subjective elements moved her into the "moderate" range of fault, and justified a 12-month period of ineligibility:

> [T]he substances involved are Specified Substances, they are prohibited only in-competition, and there was no performance enhancing effect. In addition, Rivera was in severe pain and looking for relief, was in the process of moving out of her grandmother's house and back on her own (as a single mother), and was struggling financially. As an experienced athlete, she has had plenty of anti-doping education, though not in the two years prior to this incident, she was not an active international level athlete and thus less focused on her anti-doping responsibilities, though that does not diminish her previous experience and education in anti-doping. She was out-of-competition at the time she took the pill, trusted her grandmother, and took a substance she thought might be Panadol to relieve her pain.

Rivera ¶ 111.

77. Respondent asserts that additional cases also support her argument that where an athlete ingests a prohibited substance under the mistaken belief that the substance is a different, permissible substance, a finding of No Significant Fault or Negligence is appropriate. For example, in *FINA v. Willenbring*, FINA Doping Panel 02/18 (Jan. 12, 2018), a high school swimmer tested positive for HCTZ, a diuretic banned both in- and out-of-competition, after a family friend had stayed at his house and commingled Aleve and HCTZ in an Aleve bottle. The Panel concluded that the athlete was not at significant fault for the anti-doping rule violation because the athlete had "ingested HCTZ

inadvertently due to an unfortunate mistake," and imposed a 4-month sanction. Similarly, in *USADA v. Klineman*, AAA Case No. 77 190 000462 13 JENF (Dec. 12, 2013), where a volleyball athlete tested positive for DHEA after her mother had mistakenly included one of her DHEA pills with the athlete's vitamins, the parties agreed the case involved No Significant Fault or Negligence and the Panel imposed a 13-month sanction, one month longer than the maximum permissible reduction in that case.

78. Respondent argues that her case is distinguishable from CAS 2017/A/5320, *USADA v. Bailey*, where a CAS Panel concluded that the athlete had not met his burden of proving No Significant Fault or Negligence for an anti-doping rule violation after he consumed a pre-workout supplement provided to him by a teammate. Respondent asserts that athletes receive significant training and warnings regarding the risks of using pre-workout supplements and thus Bailey should have been aware of such risks, whereas Respondent consumed what she believed to be a harmless anti-inflammatory. Respondent further argues that *Bailey* is distinguishable because the athlete in that case held the supplement container that identified the prohibited substance as an ingredient, whereas Respondent took a single pill provided directly from her friend and that her friend described as an anti-inflammatory.

79. Respondent contends that having met the threshold requirement of establishing No Significant Fault or Negligence, her degree of fault under *Cilic* is light or, at most, moderate. Respondent asserts that the following objective factors weigh in her favor: (a) she had been using a prescription anti-inflammatory, for which she checked the ingredients against the Prohibited List before consumption; (b) she took what she thought was an anti-inflammatory pill and had no reason to believe it was anything different from what she had been taking; (c) she was familiar with anti-inflammatory medications and had been using them to treat pain and swelling for a lower body injury, which was the same reason Ms. Holmes' grandmother was using anti-inflammatory medication; (d) she knew that anti-inflammatory medications, such as the ibuprofen she had been taking for her injury and the naproxen prescribed to Ms. Holmes' grandmother, are safe for consumption; and (e) no sporting advantage was sought or obtained. (Respondent Pre-Hearing Br. ¶¶ 6.4.4.1-6.4.4.5.)

80. Respondent argues that her case is distinguishable from cases where athletes have been found to bear "considerable" fault for their anti-doping rule violations. For example, in CAS 2018/A/5739, *Cadogan v. National Anti-Doping Commission of Barbados (NADCB),* an athlete was found to be in the "considerable" fault category when he took furosemide mistakenly believing he was taking headache relief medicine. Respondent argues that "unlike the athlete in *Cadogan*, who removed the pill from the blister pack and easily could have checked the ingredients to ensure he was indeed taking an anti-inflammatory pill, Ms. McPherson did not see the pill bottle or pillbox that Ms. Holmes retrieved the pill from and did not have the same opportunity to check the ingredients." (Respondent's Pre-Hearing Br. ¶ 6.5.7.)

81. Respondent further argues that if her objective fault is in the moderate category, her case is an "exceptional case" in which the subjective elements are so significant that they should move her to the "light" category of fault. (*Id.* ¶ 6.4.5.)

82. Respondent asserts that the following subjective factors weigh in her favor: (a) she was in significant pain, for which she was experiencing a high degree of stress, at the time she inadvertently consumed the furosemide pill and only took the pill to get some relief from her injury; (b) she had run out of her anti-inflammatory prescription and could not get a refill to alleviate the pain and swelling in her heel, which was continuing to get worse; (c) she had been taking prescription strength anti-inflammatory medication for approximately two months at the time she took what she believed to be one of Ms. Holmes' grandmother's anti-inflammatory pills; (d) she believed the anti-inflammatory pill she took was approximately the same as the ibuprofen pills she had been taking, which she knew were safe for consumption; (e) she did not know that Ms. Holmes' grandmother had dementia or kept all of her several prescriptions in one room, and therefore could not have been alerted to the possibility of Ms. Holmes' grandmother confusing her medications; and (f) her level of awareness was reduced by a careless and understandable mistake. (*Id.* ¶¶ 6.4.6.1-6.4.6.6.)

83. Respondent therefore contends that a sanction of 0-8 months is appropriate.

84. Alternatively, Respondent argues that her sanction should be reduced under the principle of proportionality. Specifically, Respondent contends that should she receive a sanction longer than 12 months, "in addition to losing sponsorships and her livelihood, she will likely have to retire from sport completely. Such a sanction, when considering the circumstances of this case, would be clearly disproportionate." (*Id.* ¶ 7.6.)

2. Claimant's Contentions

85. USADA asserts that Respondent has failed to meet her burden of demonstrating No Significant Fault or Negligence and is entitled to no reduction of her 2-year sanction.

86. USADA argues that "Respondent falls well short of meeting [her] burden here because her ADRVs are a direct result of her significant negligence in not even attempting to vet the medication before taking it." (Claimant Pre-Hearing Br. at 10.) USADA emphasizes that Respondent failed to make any inquiry regarding what the pill was that was provided to her by Ms. Holmes, such as asking what kind of anti-inflammatory she was being provided or inspecting the pill before consuming it.

87. USADA further argues that given Respondent's experience as an elite athlete with more than a decade of anti-doping education, her ingestion of the pill provided to her by Ms. Holmes without any inquiry cannot qualify for a reduction for No Significant Fault or Negligence. USADA contends that Respondent's failure to ask any questions regarding the pill Ms. Holmes provided her was particularly negligent given her prior anti-doping rule violation.

88. USADA also notes that Respondent "failed to disclose furosemide, or an anti-inflammatory medication, on her doping control form during the June 3 sample collection." (*Id.* at 12.)

89. USADA cites CAS 2017/A/5350, *USADA v. Bailey*, to argue that "[a]n athlete's failure to take basic steps to educate herself about a substance prior to consumption does not warrant a finding of no significant fault." (*Id.* at 10.) USADA states that this case is "strikingly similar" to *Bailey* in that "Respondent failed to conduct even the most basic research or inquiry into the medication that her friend had given her" and "[a]lso, like Bailey, USADA provided Respondent extensive anti-doping education." (*Id.* at 11.) USADA argues that "[e]xactly as in *Bailey*, Respondent failed to ask a single question about the substance before taking it. Just as the *Bailey* panel noted in its decision, it is hard to see how Respondent could have done less here." (*Id.* at 12.)

90. USADA contends that the decision in *USADA v. Downing*, AAA Case No. 01-21-0016-9375 (May 2, 2022), also supports a finding that Respondent has failed to demonstrate No Significant Fault or Negligence. In *Downing*, an elite shooting athlete tested positive for testosterone after using a hormonal cream prescribed by a nurse practitioner. The nurse practitioner also had prescribed DHEA, but the athlete did not fill the DHEA prescription because she knew DHEA was prohibited. The arbitrator noted that "[s]ince Respondent knew that DHEA was prohibited, it raises the question as to why Respondent did not question whether the cream was also prohibited. One might surmise that this should have alerted Respondent to the dangers of using the cream without further investigation." *Downing* ¶ 134. The arbitrator concluded that Respondent had not met her burden of showing she was not significantly at fault or negligent because "[g]iven [the athlete's] experience and knowledge, she should have questioned what was in the cream and should have known that resources were available to her to find out if the cream contained a prohibited substance. Even though she had plenty of time to check on the ingredients in the cream and she had extensive anti-doping education, Respondent failed to take the most basic steps in ascertaining what was in the cream." *Id.* ¶ 141.

91. In the event Respondent is found to have met her burden of demonstrating No Significant Fault or Negligence, USADA contends that Respondent's degree of fault under *Cilic* is considerable, and a 2-year sanction should still apply. USADA argues that "[b]ecause furosemide is both a prescription medication and prohibited at all times, the highest standard of care applies to Respondent, and under *Cilic* she was expected to exercise the utmost caution in her review of the medication before use." (Claimant Pre-Hearing Br. at 14.) USADA argues that "Respondent failed to even attempt any of the standard of care responsibilities set forth in *Cilic*," thus placing her in the "considerable" degree of fault category. (*Id.* at 15.)

92. USADA further argues that under the subjective standard, "Respondent's unique combination of extensive anti-doping education as a 36-year-old Olympian and personal experience with a previous ADRV for carelessly ingesting another prohibited substance places her squarely at the top of the 'considerable' degree of fault range." (*Id.* at 20.)

93. Finally, USADA argues that Respondent's sanction should not be reduced based on proportionality because principles of proportionality have already been incorporated into the WADA Code.

3. Arbitrator's Findings

a. No Significant Fault or Negligence

94. In order to obtain the benefit of Article 10.6.1.1, Respondent must first establish how the Prohibited Substance entered her system. I find that Respondent has established, by a balance of probabilities, that she took a furosemide pill on June 2, 2022, while at Ms. Holmes' grandmother's home. Respondent's testimony has been consistent from the very first explanation she gave to USADA on September 16, 2022, up to and including at the hearing on March 17, 2023, about the circumstances surrounding her taking what turned out to be a furosemide pill. Respondent also provided corroborating evidence, including photos of Ms. Holmes' grandmother's prescription for furosemide. Notably, USADA does not dispute that Respondent has established how the Prohibited Substance entered her system. Accordingly, I find that Respondent has established how the Prohibited Substance entered her body.

95. Having established how the Prohibited Substance entered her body, Respondent next bears the burden of establishing, by a balance of probabilities, No Significant Fault or Negligence in relationship to the anti-doping rule violation.

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

97. In *Bailey*, the CAS Panel explained that "[i]n determining fault, the Panel should consider (a) the degree of risk that should have been perceived by the athlete; and (b) the level of care and investigation exercised by the athlete in relation to the perceived level of risk." *Bailey* ¶ 84.

98. This matter presents a very close case as to whether Respondent has met her burden of establishing No Significant Fault or Negligence. On the one hand, I find that Respondent has been honest and forthcoming throughout these proceedings. Respondent provided credible testimony that she requested an anti-inflammatory medication from her close friend Ms. Holmes, and Ms. Holmes purported to provide Respondent with an anti-inflammatory pill. Respondent was aware that anti-inflammatory medication was not prohibited, had taken anti-inflammatory medication throughout her career without any

issue, and knew many other elite athletes who took anti-inflammatories. Moreover, Respondent testified that the pill Ms. Holmes provided her, while different in appearance from the prescription anti-inflammatory medication she had taken most recently, looked similar to anti-inflammatory medication she had taken previously.

99. On the other hand, the level of investigation Respondent undertook before mistakenly ingesting the furosemide pill was minimal. While Respondent asked Ms. Holmes for an anti-inflammatory and Ms. Holmes described what she was providing to Respondent as an anti-inflammatory, Respondent failed to undertake any further investigation. Respondent failed to make any inquiry of her friend regarding the type of anti-inflammatory medication she was receiving, did not request to see the bottle that the pill came from, and did not review any markings on the pill to confirm that it was, in fact, what Ms. Holmes claimed it to be. Moreover, Respondent is an elite-level athlete who has received many years of anti-doping training. Respondent should have been aware of the risks and potential consequences of taking a pill from a friend, yet failed to take steps to confirm that the pill was in fact the permissible anti-inflammatory medication she expected it to be.

100. After considering the Parties arguments and evidence presented, including witness testimony and exhibits, I find that Respondent has shown, by a balance of probabilities, No Significant Fault or Negligence. While the facts presented make this a very close case, I find that, given the totality of the circumstances, the degree of risk that Respondent should have perceived here was relatively low. Specifically, I note that Respondent asked her close friend for an anti-inflammatory which she had taken on many occasions throughout her career without issue. Furthermore, Respondent ingested a pill that her friend confirmed to be an anti-inflammatory and that looked like anti-inflammatory medication she had taken previously. Given the low level of risk Respondent reasonably perceived in taking what she believed to be a harmless anti-inflammatory, I find that Respondent's failure to undertake additional inquiry does not, given the totality of the circumstances, prevent her from meeting her burden of establishing No Significant Fault or Negligence.

101. I find the facts of this case to be most analogous to *Rivera*, where the Panel concluded the athlete had met her burden of establishing No Significant Fault or Negligence. Respondent, like Rivera, requested, and believed she was receiving, a harmless anti-inflammatory medication from a trusted source. And although Respondent, like Rivera, failed to conduct any further investigation into the medication she was provided, "[i]n Respondent's situation, where she was *in practice* operating under the mistaken impression that she was taking a harmless or Tylenol equivalent substance, the objective situation is that there was no basis for her to conduct a search." *Rivera* ¶ 108.

102. I find the facts here readily distinguishable from those presented in *Bailey* and *Downing*. Whereas Respondent asked for and reasonably believed she was receiving a harmless anti-inflammatory, Bailey knowingly ingested a pre-workout supplement, which athletes are repeatedly warned about given the high risk that the supplement may contain a prohibited substance. The degree of risk that should have been perceived by Bailey in

consuming an unknown supplement, therefore, was very high. Similarly, the degree of risk Downing should have perceived in taking a hormonal cream that was prescribed at the same time as a substance she knew to be prohibited was very high. By contrast, as discussed above, I find that the degree of risk Respondent should have perceived in requesting and ingesting what she reasonably believed to be an anti-inflammatory medication to be much lower. Thus, under these circumstances, Respondent has demonstrated No Significant Fault or Negligence.

b. Degree of Fault

103. Having found that Respondent has satisfied her burden of establishing No Significant Fault or Negligence, Respondent's degree of fault must be determined under the framework set forth in *Cilic* and *Lea*. Under that framework, I must analyze both Respondent's objective and subjective level of fault.

104. USADA has argued that with respect to the objective standard, "[b]ecause furosemide is both a prescription medication and prohibited at all times, the highest standard of care applies to Respondent, and under *Cilic* she was expected to exercise the utmost caution in her review of the medication before use." (Claimant Pre-Hearing Br. at 14.) In this case, however, the fact that furosemide is a prescription medication and prohibited at all times is not relevant because Respondent did not know she was taking a prescription medicine that was prohibited at all times. Rather, Respondent believed she was taking an anti-inflammatory medication permitted at all times. I agree with the Panel's reasoning in *Rivera* that in such circumstances "whether it is a prescription medicine or an illegal drug or a harmless acetaminophen does not affect her degree of fault per se." *Rivera* ¶ 107.

105. While the objective standard of care described in *Cilic* includes taking such actions as reading the label, cross-checking ingredients against the prohibited list and conducting an internet search, "an athlete cannot be reasonably expected to follow all of the above steps in every and all circumstances." *Cilic* ¶ 75. As discussed above, because Respondent was operating under the mistaken impression that she was taking a permissible anti-inflammatory medication, there was no basis for her to conduct a search of the ingredients. *Rivera* ¶ 108.

106. Nonetheless, I find that Respondent bears "considerable" fault for failing to determine what she was taking when Ms. Holmes provided her with a pill. As the Panel explained in *Rivera*:

> Though she had no basis to conduct a search, the standard of care imposed on all elite athletes is to determine what they are taking when they are taking a pill. This is the minimum required in the objective standard of care. It cannot be that an athlete simply takes something under a mistaken impression, based on inattention, or otherwise, and then pleads ignorance later about what the substance was in order to reduce her level of fault. In this failure not to determine what she was taking, Respondent bears considerable fault.

Id. ¶ 109.

107. The decision in *Cadogan* further supports a finding of "considerable" fault here. Respondent, like the athlete in *Cadogan*, "did nothing to confirm that [she] was taking the substance [she] intended to take." *Cadogan* ¶ 73. Respondent's argument that she acted with "significantly less fault" than the "considerable" fault found in *Cadogan* because the athlete in that case "could have checked the ingredients" but Respondent "did not see the pill bottle or pillbox . . . and did not have the same opportunity to check the ingredients" is not persuasive. (Respondent Pre-Hearing Br. ¶ 6.5.7.) Respondent's failure to request to see the pill bottle or pillbox that Ms. Holmes retrieved the pill from does not reduce her level of fault. Respondent was responsible to know what she was putting into her body, and she bears "considerable" fault for failing to make inquiries to confirm she had in fact been provided with an anti-inflammatory medication.

108. I find the facts of the *Willenbring* case to be clearly distinguishable, and thus reject Respondent's argument that *Willenbring* supports a finding of "light" fault here. In *Willenbring*, the athlete took a pill directly from a clearly marked Aleve bottle, whereas Respondent took a pill without seeing or asking to see the bottle from which it came. Furthermore, Willenbring was a 17-year-old high school student who had received only minimal anti-doping education, and thus the athlete involved had significantly less experience than Respondent.

109. I likewise find the *Klineman* case on which Respondent relies to be distinguishable. There, an athlete's mother organized her vitamins in a daily organizer after the athlete had showed her mother the supplements she was taking. While the mother and the athlete shared the organizer, the athlete had taken steps to ensure that only pills they were both taking were put in the organizer to avoid the athlete accidentally taking a pill that belonged to her mother. The Panel there noted that the athlete "gave explicit instructions to her mother specifically identifying what she was taking and which pills should be added to the organizer." *Klineman* ¶ 10.15. Notably, the parties there agreed that the athlete bore No Significant Fault or Negligence for her anti-doping rule violation. In the present case, beyond asking for an anti-inflammatory, Respondent gave no instructions to Ms. Holmes nor did she specifically identify or seek to confirm the type of anti-inflammatory she was receiving. The level of diligence exercised by Respondent, therefore, is significantly less than the diligence exercised by the athlete in *Klineman*.

110. Having concluded that the objective element places Respondent in the "considerable" fault category, I next turn to the subjective element. Under *Cilic*, the subjective element is "used to move a particular athlete up or down within that category." *Cilic* ¶ 73. It is only in "in exceptional cases" that "the subjective elements are so significant that they move a particular athlete not only to the extremity of a particular category, but also into a different category altogether." *Id.* ¶ 74.

111. In analyzing the subjective element, "[w]hilst each case will turn on its own facts, the following examples of matters which can be taken into account in determining the level of subjective fault can be found in CAS jurisprudence":

    a. An athlete's youth and/or inexperience.

b. Language or environmental problems encountered by the athlete.
c. The extent of anti-doping education received by the athlete (or the extent of anti-doping education which was reasonably accessible by the athlete).
d. Any other "personal impairments" such as those suffered by:
    i. An athlete who has taken a certain product over a long period of time without incident. That person may not apply the objective standard of care which would be required or that he would apply if taking the product for the first time.
    ii. An athlete who has previously checked the product's ingredients.
    iii. An athlete is suffering from a high degree of stress.
    iv. An athlete whose level of awareness has been reduced by a careless but understandable mistake.

Id. ¶ 76.

112. Here, Respondent is an experienced, elite-level athlete who has received extensive drug education yet failed to disclose her ingestion of what she believed to be an anti-inflammatory medication on June 2, 2022 on her USADA Doping Control Form one day later. Respondent also has the personal experience of a prior anti-doping rule violation. In addition, no mitigating "language or environmental problems" are applicable here nor do I find that Respondent was suffering from such a "high degree of stress" that her personal capability to comply with the expected standard of care was reduced.

113. Nonetheless, having given due consideration to the above factors, I find that several subjective mitigating factors justify moving Respondent to the low end of the "considerable" degree of fault category.

114. First, Respondent has taken anti-inflammatory medications—both prescription and over-the-counter—on many occasions throughout her career without incident. Indeed, Respondent had recently been prescribed anti-inflammatory medication by a USATF team physician. Such circumstances contributed significantly to Respondent's false sense of security in requesting and ingesting what she believed to be an anti-inflammatory medication, and resulted in Respondent failing to apply the objective standard of care she would likely have applied if taking a new product for the first time.

115. Second, Respondent did not know that Ms. Holmes' grandmother had a prescription for furosemide. Nor did Respondent know that Ms. Holmes' grandmother was suffering from dementia or have any reason to believe she would have confused her anti-inflammatory pills with a different medication.

116. Third, Respondent's level of awareness was reduced by a "careless but understandable mistake." Respondent requested an anti-inflammatory, which she had taken on many occasions and which she knew was not prohibited, from her close friend Ms. Holmes, and Ms. Holmes confirmed she was providing Respondent an anti-inflammatory. Respondent had no reason to believe the pill was anything other than what she had requested and what Ms. Holmes stated it was. Respondent credibly testified that the pill she was provided looked like anti-inflammatories she had previously taken. Given that

Respondent believed she was taking a harmless anti-inflammatory medication, Respondent's level of awareness was reduced, and I find her failure to conduct further inquiry into the pill she was provided in these circumstances to be a "careless but understandable mistake."

117. Finally, I note that Respondent took a single pill out-of-competition, and the pill she consumed was a Specified Substance with no performance-enhancing effect.

118. I do not, however, find this to be an "exceptional case" in which the subjective elements are "so significant" to move Respondent out of the "considerable" fault category altogether. While the Panel in *Rivera* found the subjective elements in that case justified moving the athlete from the "considerable" fault category to the "moderate" fault category, Rivera had not been in the Registered Testing Pool for the two years prior to her positive test, she was not an active international level athlete and was "thus less focused on her anti-doping responsibilities," and, while experienced, had received significantly less anti-doping training than Respondent.

119. In assessing Respondent's degree of fault based on the objective and subjective factors and considering the totality of the specific and relevant circumstances, I find that Respondent is at the low end of the "considerable" degree of fault category, warranting a period of ineligibility of 16 months.

c. Proportionality

120. Having decided on the level of fault, I next turn to the issue of proportionality.

121. Respondent argues that should she "receive a sanction longer than 12 months, in addition to losing sponsorships and her livelihood, she will likely have to retire from sport completely. Such a sanction when considering the circumstances of this case, would be clearly disproportionate." (Respondent Pre-Hearing Br. ¶ 7.6.)

122. In defining Fault, the WADA Code makes clear that "the fact that an *Athlete* would lose the opportunity to earn large sums of money during a period of *Ineligibility*, or the fact that the *Athlete* only has a short time left in a career, or the timing of the sporting calendar, would not be relevant factors to be considered in reducing the period of *Ineligibility* under Article 10.6.1 or 10.6.2."

123. Moreover, as explained in the *Cadogan* decision, "[t]he CAS jurisprudence since the entry into effect of the 2015 WADC is not favourable to the introduction of proportionality as a means of reducing yet further the period of ineligibility provided for by the WADC." *Cadogan* ¶ 79. As the arbitrator there explained, "the well-established view [is] that the WADC 'has been found repeatedly to be proportional in its approach to sanctions, and the question of fault has already been *built into* its assessment of length of sanction,' as was vouched for by an opinion of a previous President of the European Court of Human Rights." *Id.* ¶ 81.

124. Notwithstanding the foregoing, I note that the 16-month sanction imposed in this matter is consistent and proportionate with other sanction outcomes involving inadvertent consumption of Specified Substances by experienced athletes. *See Rivera* (12-month period of ineligibility); *Cadogan* (20-month period of ineligibility).

125. Accordingly, I deny Respondent's request that her period of ineligibility be further reduced based on the principle of proportionality.

D. Start Date of Sanction

126. Article 10.13.2.1 states: "If a *Provisional Suspension* is respected by the *Athlete* or other *Person*, then the *Athlete* or other *Person* shall receive a credit for such period of *Provisional Suspension* against any period of *Ineligibility* which may ultimately be imposed."

127. Respondent accepted a provisional suspension on July 22, 2022.

128. Accordingly, both Parties agree that the start date for Respondent's period of ineligibility is July 22, 2022.

129. Imposition of a 16-month period of ineligibility results in the expiration of Respondent's ineligibility on November 22, 2023.

E. Disqualification of Results

130. Respondent's competitive results, if any, are to be disqualified from the date of her positive test, June 3, 2022, through the commencement of her provisional suspension on July 22, 2022.

X. FINDINGS AND DECISION

The Arbitrator therefore rules as follows:

A. Respondent, Inika McPherson, committed the anti-doping rule violations alleged in the charge letter dated December 1, 2022 pursuant to Article 2.1 and 2.2 of the WADA Code.

B. Respondent did not intentionally violate the anti-doping rules under Article 10.2 of the WADA Code; therefore the default or starting period of ineligibility for the anti-doping rule violations is two (2) years.

C. Respondent has sustained her burden under Article 10.6.1 of the WADA Code that, on a balance of probabilities, she bears No Significant Fault or Negligence for the anti-doping rule violations, and that the period of ineligibility is reduced from two years to 16 months.

D. The start date of Respondent's period of ineligibility is the date of her provisional suspension, July 22, 2022, and the period of ineligibility expires on November 22, 2023.

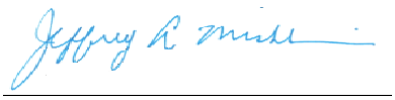
E. Respondent's competitive results, if any, from the date of her positive test on June 3, 2022, through the commencement of her provisional suspension on July 22, 2022, are to be disqualified, and any medals, points and prizes earned during that period shall be forfeited.

F. The parties shall each bear their own respective attorneys' fees and costs associated with this Arbitration.

G. The administrative fees and expenses of the AAA and the compensation and expenses of the Arbitrator shall be borne by USADA and the USOPC as set forth in the Arbitration Procedures.

H. This Award shall be in full and final resolution of all claims and counterclaims submitted in this Arbitration. All claims not expressly granted herein are hereby denied.

Dated: April 12, 2023
New York, NY



Jeffrey A. Mishkin