TAS / CAS
TRIBUNAL ARBITRAL DU SPORT
COURT OF ARBITRATION FOR SPORT
TRIBUNAL ARBITRAL DEL DEPORTE

CAS 2023/A/9482 Joanna Evans v. World Aquatics
CAS 2023/A/9564 WADA v. World Aquatics & Joanna Evans
CAS 2023/A/9592 World Aquatics v. Joanna Evans

ARBITRAL AWARD

delivered by the

COURT OF ARBITRATION FOR SPORT

sitting in the following composition:

President:	Mr Stephen L. Drymer, Attorney-at-Law in Montreal, Canada
Arbitrators:	Ms Laura Abrahamson, Attorney-at-Law in Los Angeles, USA
	Mr Ulrich Haas, Professor in Zurich and Attorney-at-Law in Hamburg, Germany
Clerk:	Ms Stéphanie De Dycker, CAS Clerk, Lausanne, Switzerland

in the arbitration between

Ms Joanna Evans, Freeport, Bahamas

Represented by Howard L. Jacobs, Attorney-at-Law in Westlake Village, California, United States of America

Appellant in the matter CAS 2023/A/9482
Second Respondent in the matter CAS 2023/A/9564
Respondent in the matter CAS 2023/A/9592

and

World Aquatics, Lausanne, Switzerland

Respondent in the matter CAS 2023/A/9482
First Respondent in the matter CAS 2023/A/9564
Appellant in the matter CAS 2023/A/9592

and

World Anti-Doping Agency, Montreal, Quebec, Canada
Represented by Mr. Nicolas Zbinden and Mr. Adam Taylor, Attorneys-at-Law in Lausanne, Switzerland

Appellant in the matter CAS 2023/A/9564

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I. PARTIES

1. Ms Joanna Evans is a professional swimmer from Freeport, Bahamas (the "Athlete").

2. World Aquatics (formerly *Fédération Internationale de Natation*) ("WA") is the governing body for all aquatic sports. It is an association under the Swiss Civil Code ("SCC"), with its headquarters in Lausanne, Switzerland. As a signatory of the World Anti-Doping Code, WA has adopted its own anti-doping rules, as explained below.

3. The World Anti-Doping Agency ("WADA") is an international independent agency established to lead a worldwide anti-doping movement across all sports and countries. It is headquartered in Montreal, Quebec, Canada.

4. The Athlete, WA and WADA are jointly referred to as the "Parties".

II. FACTUAL BACKGROUND

5. The present appeal proceedings were initiated against the decision rendered by the FINA Doping Panel on 15 February 2023 (the "Decision"), according to which the Athlete was found guilty of an Anti-Doping Rule Violation ("ADRV"), namely, use of the Prohibited Substance "Clostebol", under Article 2.1 of the FINA Doping Control Rules (edition 2021) ("DCR"). She was consequently sanctioned with a twenty-four (24) months ineligibility period, starting from the date on which she was provisionally suspended (i.e. 14 February 2022) and ending on 13 February 2024.

6. Below is a summary of certain key facts and allegations drawn from the Parties' written submissions as well as the oral pleadings and evidence adduced at the hearing. Additional facts and allegations may be set out, where relevant, in later sections of this award (the "Award"), in particular in connection with the Panel's discussion of the merits of the case. The Panel has considered all of the facts, allegations, legal arguments and evidence submitted by the Parties in the present proceedings. It nonetheless refers in this Award only to those submissions and evidence that it considers necessary to explain its reasoning and conclusions.

A. The facts of the case

7. On 3 December 2021, the Athlete was selected for an unannounced Out-of-Competition doping control, and urine sample numbers A and B- 3156962 were collected from her (the "Test"). The samples were sent for analysis to the WADA-accredited laboratory in Cologne, Germany (the "Laboratory").

8. On 6 January 2022, the Laboratory reported an Adverse Analytical Finding ("AAF") for clostebol metabolite 4-chloro-androst-4-en-3α-ol-17-one ("Clostebol") in sample no. A-3156962.

9. Clostebol is banned at all times as per the WADA Prohibited List and is classified under Class S1.1 as an Anabolic Androgenic Steroid and as a *Non-Specified Substance*. Upon inquiry, the Laboratory informed the International Testing Agency ("ITA") that the roughly estimated concentration of Clostebol metabolite in the sample was approximately 1.5 ng/ml.

10. Upon receipt of the AAF, the ITA conducted an Initial Review of the result under Article 7 of the DCR and Article 5.1.1 of the International Standards for Results Management and found that, according to the ITA and the World Aquatics records: (a) no applicable Therapeutic Use Exemption ("TUE") has been or was in the process of being granted to the Athlete, (b) there was no apparent departure from the International Standard for Testing and Investigations or the International Standard for Laboratories that could undermine the validity of the AAF, and (c) the AAF was not caused by the ingestion of the Prohibited Substance through a permitted route insofar as Anabolic Steroids are banned irrespective of the route of ingestion.

11. On 14 February 2022, the ITA notified the Athlete of the AAF ("AAF Notification") and provisionally suspended her with immediate effect. The Athlete was informed of (i) the potential Consequences of the AAF, (ii) her procedural rights, including the right to request the B-sample counter-analysis or a provisional hearing or a final expedited hearing and (iii) her right to admit to the ADRV and/or provide substantial assistance. The Athlete was also invited to provide explanations as to the circumstances that led to the presence of the prohibited substance in her sample.

12. On 21 February 2022, the Athlete challenged the AAF, requested a copy of the laboratory documentation package, and that her "B" sample be tested albeit indicating that she would not attend the opening of the B-sample.

13. On 25 February 2022, the Athlete informed the ITA that the Athlete accepted the AAF and withdrew her request to have the B-sample tested as well as her request for a copy of the laboratory documentation. The Athlete provided a response to the AAF Notification, which can be summarized as follows:

    - On 11 September 2021, the Athlete was visiting Italy over a six-week period for several swim meets. On that date, she was in Naples, Italy. While in her hotel room, she suffered a laceration to the 4th digit of her right hand on a rusted balcony gate. As a precaution to prevent infection she went to a pharmacy (*Farmacia del Sole*) within walking distance, where she asked for antibiotic cream. Given the language barrier (the Athlete could not speak Italian, and the pharmacist did not speak English), she pointed to her swollen, cut finger. She expected to be provided with a Neosporin-like cream, similar to what would be available over the counter in the United States. Instead, she was provided with a tube of Trofodermin cream (the "Cream") containing an antibiotic (neomycin)

and also – unknown to her at the time – the banned substance Clostebol. The Athlete, concerned about her finger, did not consider that an antibiotic cream could contain a banned substance. She used the Cream once per day for approximately three days.

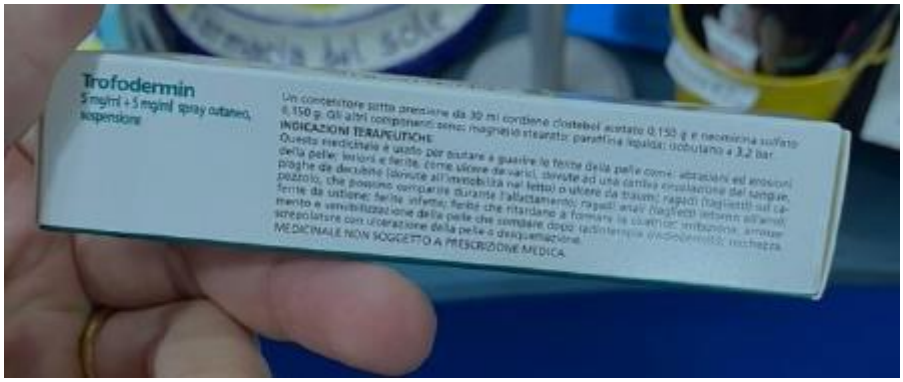
- After the Athlete returned home to Austin, Texas, she experienced a slip and fall on approximately 30 October 2021, on concrete pavement near her home. She suffered a significant abrasion/cut to her left leg, just below her knee. Having recently arrived home from her travels, the Cream was easily accessible in her toiletry bag, so she applied the Cream to her leg to prevent infection. For approximately the first five days, she applied the Cream daily to the affected area. Following that, she believes that she applied the Cream approximately once or twice a week until the area was healed (or approximately sometime during the last week of November 2021). The Athlete's leg is still scarred from her fall.

- Although some tubes of Trofodermin contain an anti-doping warning on the product itself, it does not appear that the Athlete's tube of Trofodermin contains any such warning. She discarded the packaging that the Cream came in shortly after purchasing it in Italy.

- The Athlete's limited use of the Trofodermin product was in no way related to sport performance, and was solely intended and used for the treatment of her two separate injuries. The amount she used could not in any event have affected her performance.

- Regrettably, the Athlete did not check GlobalDro when she purchased the Cream because, as mentioned, she had no expectation that a topical antibiotic could contain a banned substance such as Clostebol, a substance she had never heard of before receiving notification of her positive test.

14. Trofodermin is a medication that takes the form of a cream or a spray, administered locally on affected skin. As the packaging clearly indicates ["*medicinale non soggetto a prescrizione medica*"], it is available over-the-counter (*i.e.* available without a prescription) in pharmacies only. Its active ingredients are: (a) Neomycin sulfate and (b) Clostebol acetate. The packaging of Trofodermin, which is provided by the Athlete, shows the following indications:



15. The Athlete also supplied a photo of the actual tube of Trofodermin that she testified she purchased in September 2021 in Italy and used both in Naples and Austin, which clearly shows "*Clostebol acetato*" in multiple places:

16. On 22 March 2022, after an initial assessment of the Athlete's explanations, the ITA reached out to the National Anti-Doping Agency of Italy ("NADO Italy") to inquire (i) whether, as per the logs and records of *Farmacia del Sole – Napoli*, they had sold a tube of Trofodermin cream on or around 11 September 2021, and (ii) what are the requirements (if any) in Italy to detail an anti-doping warning on tubes of Trofodermin cream.

17. On 7 and 8 April 2022, NADO Italy informed ITA that under a Ministerial Decree approved by the Ministry of Health in 2003, it is mandatory for the product Trofodermin cream to contain the pictogram "DOPING". Further, a specific warning is also included in the drug illustration leaflet contained in the package of the cream.

18. NADO Italy also provided the ITA with the response that they had received from *Farmacia del Sole Centro Celiachia* in Naples according to which, as per the logs of

the purchase and sales register of the pharmacy, the pharmacy did not sell any Trofodermin Cream in September 2021; it did sell the Trofodermin Spray on 12 September 2021 at 15 o'clock, which corresponds to the closest date to the one it was asked for by the ITA (*i.e.* 11 September 2021).

19. On 1 June 2022, the ITA informed the Athlete that it asserted an ADRV against the Athlete and proposed an Agreement on Consequences pertaining to an ADRV in accordance with Article 8.3.1 of the DCR, namely offering a 3-year sanction to the Athlete if accepted by 20 June 2022.

20. On 20 June 2022, the Athlete refused the proposed Agreement on Consequences and requested a hearing before the FINA Doping Panel pursuant to Article 8 of the DCR.

B. Proceedings before the FINA Doping Panel

21. On 20 July 2022, WA referred the matter to the FINA Doping Panel ("DP"), requesting a period of ineligibility of four (4) years.

22. On 23 August 2022, the Athlete filed her defense to the DP.

23. On 22 September 2022, WA filed its reply to the Athlete's defense.

24. On 7 and 13 December 2022, the Athlete was heard by the DP in a hearing held by videoconference.

25. On 16 December 2022, the DP rendered the following decision (the "Decision"):

"1.- Ms. Evans is found to have committed an anti-doping rule violation under FINA DC Rule of DC 2.1, presence of a prohibited substance (Clostebol) in an athlete's sample (class S1.1 Anabolic androgenic steroid).

2. Ms. Evans is sanctioned with a 24-month ineligibility period. She is credited with having served a provisional suspension since 14 February 2022. Therefore, the 24-month period of ineligibility will end on 13 February 2024. Ms. Evans admitted unwitting use of a product containing Clostebol commencing on 11 September 2021 and continuing through November 2021, therefore, all results obtained by Ms. Evans from 11 September 2021 and through and including the date of this decision are disqualified. Any medals, points and prizes achieved during that period shall be forfeited. […]"

26. On 15 February 2023, the DP rendered the Decision in its motivated form, which was notified to the Athlete on the same day.

27. The DP's reasoning underlying its Decision can be set out in material part as follows:

"The FINA Doping Panel considers that Ms Evans has sufficiently established the source of her AAF and her explanation is accepted. The Athlete's burden is not to furnish definitive proof of source, but to establish such proof on a balance of probabilities. The source of her positive test was the Trofodermin purchased in Italy. This cream contains the prohibited substance and the Athlete conceded having used it to treat her cuts on two occasions. Even if she could not recollect the exact location of the Pharmacy in which she purchased the cream, its continued presence in her belongings give credence to the fact that this was the origin of the prohibited substance entering into her system. Additionally, the fact that she was injured a second time in the USA and once again used the cream to treat her cut is deemed a credible explanation by the FINA Doping Panel. The photographs and the video provided by the Athlete was sufficient evidence that she had injured her knee at her home in the USA at around the time she alleged.

Finally on this last point, the fact that the FINA witness statement from DR. Jordi Segura acknowledged that that the urinary concentration of Clostebol reported by the laboratory (around 1.5 ng/mL) for the sample collected on 3 December 2021 could not arise from the application of a Trofodermin cream containing Clostebol, once per day on 11-12-13 September 2021, based on the existing scientific data on the pharmacokinetics and elimination of Clostebol from the human body, increased the FINA Doping Panel's finding that based on a balance of probability that it was the subsequent use of Trofodermin to treat Ms. Evan's knee injury which was the cause of the positive test result, as she showed that her injury and subsequent use of Trofodermin took place between 30 October and 4-5 November 2021.

18.3 Period of Ineligibility

18.3.1 According to Article 10.2.1 of the FINA DC Rules, the standard period of Ineligibility imposed for the violation of Articles 2.1 or 2.2 for a non-Specified Prohibited Substance is four years, unless the Athlete or other Person can establish that the ADRV was not intentional.[…]

Pursuant to CAS Case law, (Ianone (CAS 2020/A/6978 and Shayna Jack CAS 2020/A/7579), it is clear that the athlete cannot rely on simple protestations of innocence or mere speculation as to what must have happened but must instead adduce concrete and persuasive evidence establishing, on a balance of probabilities, a lack of intent (see for example, CAS 2017/A/5369; CAS 2016/A/4919; CAS 2016/A/4676; CAS 2017/A/5335). In this matter, as stated above, the FINA Doping Panel finds that the Athlete has clearly provided evidence which point to the use of a substance to treat an injury and did not consider the consequences this behaviour would have regarding the risk of violating an anti-doping rule. It appears to the contrary clear to the Doping

Panel that Ms. Evans purchased and used the Trofodermin cream to treat a laceration in Italy (and later a second laceration in Texas and did not appreciate or understand that there was a risk that the Trofodermin might contain a prohibited substance, having not appreciated the risk.

18.3.2 Whilst the FINA Doping Panel can accept the fact that the use of Trofodermin was not intentional, the Panel finds that the Athlete's attitude towards anti-doping rules in general to be naive at the least, blatantly reckless at the most. Ms. Evans functioned on the assumption that needing little or no medication or any such treatment, she was at little or no risk of crossing the line of anti-doping. She additionally stated that she almost never used any supplements. She acknowledged at the hearing that she paid little attention to the label on the box of the cream. Had she done this, she probably would have seen the clear sign that Trofodermin contained a prohibited substance.

She also admitted that at no time did she consider checking on any of the informative websites provided to athletes to see whether there was any risk at taking this substance to treat her injury, as she did not consider that skincare products presented a risk. This routine check was not carried out in Italy upon purchase of the Trofodermin, but it did not cross her mind to do so either on her return to the USA when she suffered a subsequent injury. The Athlete in fact could not recall ever having been told or having spontaneously gone to consult any list on a website for prohibited substances.

The FINA Doping Panel would disagree with the Athlete in drawing comparisons between her case and the Johaug case (CAS 2017/A/5015). In the Johaug matter, the Athlete tested positive for Clostebol pursuant to having used Trofodermin, which her physician had purchased for her at a pharmacy. Her doctor noticed that Clostebol was an ingredient, but did not identify it as a Prohibited Substance. In that case, the athlete relied on the opinion of a professional physician. Contrary to Ms. Evans, Ms. Johaug took concrete steps to prevent the ADRV before applying the cream. Ms. Johaug did not satisfy herself with the fact that the cream was provided by her national team doctor who was an expert in anti-doping and who was aware that she is subject to anti-doping rules. She also asked the team doctor whether it contained a prohibited substance and he replied that it didn't. This was instrumental to the CAS Panel's determination that she bore no significant fault. Ms. Evans did not do any of this. Her lack of care and curiosity cannot be explained by the simple fact that she had purchased this cream at a pharmacy.

The FINA Doping Panel therefore cannot agree with the Athlete and consider that she behaved in a manner without significant fault or negligence. To the contrary. This finding is consistent with the frame work outlined in Cilic vs ITF (CAS 2013/A/2237). To arrive at this conclusion, in addition to the above, the FINA Doping Panel considered the following, notably the subjective aspects of her behaviour :

(i) The extent of anti-doping education received or which was reasonably available to the athlete. Ms Evans had received extensive anti-doping education and had even delivered anti-doping education to young athletes prior to her ADRV. In particular, she had been requested to take the anti-doping course for international-level athletes by FINA one month before she returned the AAF.

(ii) The age and level of experience of the athlete: she had been an international-level athlete competing at the highest level of the sport (e.g. World Championships, World Swimming Championships, ISL) for more than 8 years at the time of her ADRV.

(iii) Language or environmental problems encountered by the athlete: whilst it is acknowledged that the purchase of Trofodermin took place in a foreign country for the Athlete, and that she did not speak Italian, it is clear that this did not prevent her from checking the label or asking questions, neither behaviour which would have been hindered by a language barrier. She simply assumed the product was safe to use and nothing prevented her from using a translating app, consulting a team doctor who speaks her first language, or even upon returning to the USA questioning someone about Trofodermin.

(iv) If the athlete had been taking this product over a long period of time without incidents. In this case, she applied the cream for approximately 2-3 months at the most, and at no time was she negatively tested.

(v) If the athlete had previously checked the ingredients of the product. As mentioned above, this would appear to not have been standard procedure for the Athlete.

(vi) If the athlete was suffering a high degree of stress. In this instance, even though the cut she suffered and the knee injury in the USA were not to be taken lightly, they were not life-threatening, nor did they induce any particular stress.

(vii) If the athlete's level of awareness has been reduced by a careless but understandable mistake. Ms. Evans stated at the hearing that she did not consider that a skincare product was a risk. In Cilic, the CAS pointed out that "a medicine designed for a therapeutic purpose (…) calls for a higher standard of care (…) because medicines are known to have prohibited substances in them."

Hence the FINA Doping Panel finds that the athlete's behaviour was significantly negligent, and therefore whilst DC 10.2.1 does not apply, 10.2.2 commands that the sanction be set at 2 years."

III. PROCEEDINGS BEFORE THE COURT OF ARBITRATION FOR SPORT

A. Proceedings *CAS 2023/A/9482 Joanna Evans v. World Aquatics*

28. On 8 March 2023, the Athlete filed her appeal against the Decision before the Court of Arbitration for Sport (the "CAS") and submitted her Statement of Appeal pursuant to Article R48 of the Code of Sports-related Arbitration (2023 edition) (the "CAS Code"). In her Statement of Appeal, the Athlete nominated Ms Laura Abrahamson, Attorney-at-Law in Los Angeles, USA, as arbitrator.

29. On 13 March 2023, the CAS Court Office informed the Parties that the present arbitration proceedings had been assigned to the Appeals Arbitration Division of the CAS and invited the Athlete to file her Appeal Brief within the prescribed time limit and WA to nominate an arbitrator.

30. On 24 March 2023, WA nominated Prof. Ulrich Haas, Attorney-at-Law in Hamburg, Germany and Professor in Zurich, Switzerland, as arbitrator.

31. On 30 March 2023, within the agreed time limit, the Athlete filed her Appeal Brief with the CAS Court Office.

B. Proceedings *CAS 2023/A/9564 WADA v. World Aquatics & Joanna Evans*

32. On 11 April 2023, WADA filed its appeal against the Decision before the CAS and submitted its Statement of Appeal pursuant to Article R48 of the CAS Code. In its Statement of Appeal, WADA nominated the same arbitrator as WA in the procedure *CAS 2023/A/9482 Joanna Evans v. World Aquatics*, namely Prof. Ulrich Haas.

33. On 13 April 2023, the CAS Court Office invited WA and the Athlete to indicate whether they agree to consolidate the present proceedings with the case *CAS 2023/A/9482 Joanna Evans v. World Aquatics*.

34. On 13 and 15 April 2023, WA and the Athlete, respectively, agreed to consolidate the present proceedings with the case *CAS 2023/A/9482 Joanna Evans v. World Aquatics*.

35. On 17 April 2023, the CAS Court Office confirmed the consolidation of the present proceedings with the case *CAS 2023/A/9482 Joanna Evans v. World Aquatics*.

C. Proceedings *CAS 2023/A/9592 World Aquatics v. Joanna Evans*

36. On 20 April 2023, WA filed its appeal against the Decision before the CAS and submitted its Statement of Appeal pursuant to Article R48 of the CAS Code. In its Statement of Appeal, WA requested the consolidation of the present matter with the cases *CAS 2023/A/9482 Joanna Evans v. World Aquatics and CAS 2023/A/9564 WADA v. World Aquatics & Joanna Evans*. In its Statement of Appeal, WA also nominated the same arbitrator as in the cases *CAS 2023/A/9482 Joanna Evans v. World Aquatics and CAS 2023/A/9564 WADA v. World Aquatics & Joanna Evans*, namely Prof. Ulrich Haas.

37. On 24 April 2023, the CAS Court Office invited the Athlete to indicate whether she agreed to consolidate the present proceedings with the cases *CAS 2023/A/9482* and *CAS 2023/A/9564* and invited WA to file its Appeal Brief within the prescribed time limit.

38. On 3 May 2023, the CAS Court Office informed the Parties that none of the Parties objected to the consolidation of such procedure with the cases *CAS 2023/A/9482* and *CAS 2023/A/9564*, and that, as a result, all three procedures were consolidated from then on.

D. Consolidated Proceedings *CAS 2023/A/9482 Joanna Evans v. World Aquatics & CAS 2023/A/9564 WADA v. World Aquatics and Joanna Evans & CAS 2023/A/9592 World Aquatics v. Joanna Evans*

39. On 11 May 2023, within the agreed time limit, WA filed its Appeal Brief/Answer in the consolidated matters *CAS 2023/A/9592* and *CAS 2023/A/9482*.

40. On 12 May 2023, within the agreed time limit, WADA filed its Appeal Brief with the CAS Court Office in the matter *CAS 2023/A/9564*.

41. On 22 May 2023, the CAS Court Office informed the Parties that the Panel appointed to decide the present procedure was constituted as follows:

President:	Mr Stephen L. Drymer, Attorney-at-Law in Montreal, Canada
Arbitrators:	Ms Laura Abrahamson, Attorney-at-Law in Los Angeles, USA
	Prof. Dr Ulrich Haas, Professor in Zurich, Switzerland and Attorney-at-Law in Hamburg, Germany.

42. On 2 June 2023, WA filed its Answer to WADA's Appeal Brief in the matter *CAS 2023/A/9564*.

43. On 26 June 2023, within the agreed time limit, the Athlete filed her Answer in the consolidated matters *CAS 2023/A/9564* and *CAS 2023/A/9592*.

44. On 27 June 2023, the CAS Court Office invited the Parties to indicate whether they preferred a hearing to be held in these matters or for the Panel to issue an award based solely on the Parties' written submissions and whether they request a case management conference with the Panel to discuss procedural issues.

45. On 3 July 2023, the Athlete informed the CAS Court Office that it preferred a hearing to be held in the present matters and that it did not request a case management conference with the Panel although it would not be opposed to one being scheduled.

46. On 4 July 2023, WA informed the CAS Court Office that it preferred the award to be rendered based solely on the Parties' written submissions and that it did not request a case management conference with the Panel.

47. On 4 July 2023, WADA informed the CAS Court Office that it preferred a hearing to be held in the present matters and that it did not request a case management conference with the Panel.

48. On 10 July 2023, the CAS Court Office informed the Parties that the Panel had decided to hold a hearing in these matters, to be held by videoconference and consulted the Parties on possible hearing dates.

49. On 12 July 2023, the Athlete informed the CAS Court Office that she preferred the hearing to be held in-person.

50. On 13 July 2023, the CAS Court Office took note of the Athlete's preference for an in-person hearing; the CAS Court Office separately informed the Parties that Ms Stéphanie De Dycker, CAS Clerk, would assist the Panel in the present matter.

51. On 20 July 2023, the CAS Court Office invited the Athlete to provide brief written reasons for her request that the hearing be held in person rather than virtually as the Panel originally indicated.

52. On 24 July 2023, the Athlete provided brief written reasons for her preference for an in-person hearing. The Athlete in particular indicated that she did not insist on an in-person hearing if that would cause unnecessary delay in the scheduling of the hearing and, for the same reasons, would prefer the hearing to be set without the need for a prior case management conference.

53. On 25 July 2023, the CAS Court Office invited WA and WADA to comment on the Athlete's written reasons regarding her preference for an in-person hearing.

54. On 28 July 2023, WA indicated to the CAS Court Office that it still considered that a hearing via videoconference would be preferable in this case, and that it agreed with

the Athlete that the hearing be set without the need for a prior case management conference.

55. On the same day, WADA informed the CAS Court Office that it still considered that the hearing could be held by videoconference or in the alternative in a hybrid fashion and that it agreed with the Athlete that the hearing be set without the need for a prior case management conference.

56. On 2 August 2023, in light of the Athlete's primary interest that the hearing be scheduled as soon as possible, the CAS Court Office, on behalf of the Panel, proposed to the Parties various possible virtual hearing dates.

57. On 10 August 2023, the Athlete informed the CAS Court Office that the Parties jointly accepted to hold a hearing virtually on one of the proposed hearing dates.

58. On 11 August 2023, the CAS Court Office confirmed to the Parties that they were called to appear at the hearing in the present proceedings, which would be held by videoconference on 6 October 2023 and invited the Parties to communicate the list of the persons attending the hearing as well as their contact details. Finally, the CAS Court Office invited the Parties, on behalf of the Panel, to confer with each other and to jointly propose a detailed hearing schedule to the CAS Court Office.

59. On 22 August 2023, the CAS Court Office issued an order of procedure (the "Order of Procedure") in the present matter, and requested the Parties to return a completed and signed copy, which the Parties did on 29 and 30 August 2023.

60. On 1 September 2023, WA communicated a tentative hearing schedule that was agreed upon by the Parties, for the Panel to review.

61. On 6 September 2023, WA, the Athlete and WADA separately communicated to the CAS Court Office the list of persons attending the hearing as well as their contact details.

62. On the same day, the CAS Court Office informed the Parties that the Panel had accepted their proposed hearing schedule.

63. On 6 October, a hearing was held in the present matter by videoconference. In addition to the members of the Panel, Ms Delphine Deschenaux-Rochat, CAS Counsel, and Ms Stéphanie De Dycker, CAS Clerk, the following persons attended the hearing:

For the Athlete:	Ms Joanna Evans, the Athlete
	Mr Howard L. Jacobs, counsel
	Ms Katy Freeman, counsel
	Ms Bailey Andison, witness

For WA:	Mr Justin Lessard, Aquatics Integrity Unit Dr Chris Schubert, witness
For WADA:	Mr Nicolas Zbinden, counsel Mr Adam Taylor, counsel Mr Ross Wenzel, WADA Mr Cyril Troussard, WADA Mr Alexandre Csuzdi-Vallee, WADA Mr Xavier Dupuis, WADA Dr Chris Schubert, witness

64. At the outset of the hearing, the Parties declared that they had no objections as to the constitution of the Panel.

65. At the hearing, the Panel heard evidence from the Athlete, Ms Bailey Andison and Dr Chris Schubert. Before taking their evidence, the President of the Panel informed the witnesses and the Athlete of their duty to tell the truth subject to sanctions of perjury under Swiss law. The Parties and the Panel had the opportunity to examine and cross-examine them. Each of them confirmed their written statement.

66. The Parties thereafter were given a full opportunity to present their case, submit their arguments and answer the questions from the Panel.

67. At the end of the hearing, the Parties confirmed that they were satisfied with the procedure throughout the hearing, and that their right to be heard had been fully respected.

IV. THE PARTIES' SUBMISSIONS AND REQUESTS FOR RELIEF

68. The aim of this section of the Award is to provide a summary of the Parties' main arguments rather than a comprehensive list thereof. Additional elements of the Parties' claims may be discussed in subsequent sections of Award. As stated above, the Panel reiterates that in deciding upon the Parties' claims it has carefully considered all of the submissions made and all of the evidence adduced by the Parties, whether or not expressly referred to in this section of the Award or in the discussion that follows.

A. The Athlete

69. In her Appeal Brief filed in the matter *CAS 2023/A/9482*, the Athlete requested the following relief:

> *"9.1.1 Declare that [the Athlete]'s appeal should be upheld;*
> *9.1.2 Declare that the 2-year sanction issued by the WA Disciplinary Tribunal be set aside;*
> *9.1.3 Declare that the sanction issued by the WA Disciplinary Tribunal should be reduced to a period between 16 and 18 months, based on Ms. Evans' level of fault or negligence; and*
> *9.1.4 Declare that [the Athlete]'s sanction should start on the 3 December 2021 date of her positive test.*
> *9.1.5 Award [the Athlete]a contribution towards her legal costs in this appeal."*

70. In her Answer filed in the matters *CAS 2023/A/9564 & CAS 2023/A/9592*, the Athlete requested the following relief:

> *"4.1.1 Declare that […] WADA's appeal should be denied;*
> *4.1.2 Declare that [...] WA's appeal should be denied.*
> *4.1.3 That […] WADA and WA shall bear all costs of the proceedings including a contribution toward […] Joanna Evans' legal costs."*

71. The Athlete's submissions, in essence, may be summarized as follows:

- The Athlete's burden is not to furnish definitive proof of the source of the AAF but to establish such proof on a balance of probabilities, which she did based on the following elements:
    - Mr Paul Scott confirms in his expert report that the Athlete's use of the Cream between 30 October and 3 November and 1-2 weekly applications thereafter until discontinuing use at the end of November 2021, as indicated by the Athlete, is consistent with the AAF for Clostebol at an approximate concentration of 1,5 ng/mL.
    - The Athlete testified, and her witness statement confirmed, that she cut her finger on 11 September 2021 in Italy, that she purchased the Cream in a nearby-located pharmacy and used it for a few days to treat her cut. The Athlete further testified that when back in the US, she used the same Cream again in November 2021 (*i.e.* shortly before the Test) to treat a knee injury. The photographs and the videos on the record establish that she had injured her knee at around the time she alleges.
- The ADRV is not indirectly intentional either: The Athlete did not know she was taking a significant doping risk because she did not know that the Cream contained

a prohibited substance and never associated steroids or banned substances with an over-the-counter ("OTC") antibiotic cream. She does not recall seeing the doping warning sign on the box, which she discarded after a few days, and viewed the Cream to be like "Neosporin" which she knew is safe for athletes to use. Hence, nothing in the circumstances of the case constituted an 'obvious red flag' such that she would have known she was taking a significant risk of committing an ADRV and manifestly ignored it.

- The Athlete committed *No Significant Fault or Negligence* on the basis of Article 10.6.2 of the DCR and she should be sanctioned with an ineligibility period between 16 and 18 months:
    - Based on the framework outlined in the *Cilic* case, the Athlete's objective fault is normal: she obtained the Trofodermin cream from a reputable source and used it in order to cure an injury; her positive test was the result of inadvertence, as she failed to examine the box of the Cream and missed the warning sign; she had no access to a team doctor to verify the Cream before using it.
    - Based on the framework outlined in the *Cilic* case, the Athlete's subjective fault must be assessed taken into account the following factors: the Athlete is nowhere near as experienced as was Ms Johaug in the case *CAS 2017/A/5015*; the Athlete was in a foreign country and did not speak the native language; the Athlete's level of awareness was reduced by a careless but understandable mistake in that she did not believe than an antibiotic cream that would heal a cut carried anti-doping risks in the way that taking a pill, drink or shot would.
- From 25 February 2022 until 1 June 2022, the Athlete was with no news as to her situation and thereby the procedure suffered a substantial delay which is not attributable to the Athlete. Based on Article 10.13.1 DCR, the Athlete's period of ineligibility shall start on 3 December 2021, *i.e.* the date of the sample collection.

B. World Aquatics

72. In its Appeal Brief in the matter *CAS 2023/A/9592*, which it considered as its Answer in the matter *CAS 2023/A/9482*, WA requested the following relief:

"1. The appeal of World Aquatics is admissible.
2. The decision dated 15 February 2023 rendered by the World Aquatics Doping Panel in the matter of Joanna Evans is modified to the following limited extent: the violation of article DC 2.2 is added to para. 1 of the dispositive part of the Appealed Decision and the "24-month ineligibility period" from para. 2 of the dipositive part of the Appealed Decision is replaced with a "period of ineligibility of four years".

3. Any arbitration costs shall be borne by the Athlete.

4. World Aquatics is granted a significant contribution to its legal and other costs."

73. In addition, in the matter *CAS 2023/A/9564*, WA informed the CAS Court Office that "*it fully agrees with the position laid out by WADA in its Appeal Brief. This being said, World Aquatics should not bear any arbitration cost. […] Moreover, if any contribution of cost is granted to WADA; it should be paid by Ms. Joanna Evans entirely as she would be the only non-prevailing party in that case. […] For the rest, World Aquatics would kindly direct the Panel to its Appeal Brief of 11 May 2023 in which it believes its position has been laid out clearly*".

74. WA's submissions, in essence, may be summarized as follows:

- The Athlete failed to establish how and when the prohibited substance entered her system and therefore failed to rebut the applicable presumption of intent: the Athlete's burden is to demonstrate that her explanation on how and when the prohibited substance entered her system is "more likely than not" to be true – it is not enough to identify a possible explanation. The Athlete must also show that the ingestion of the alleged source product in the amount(s) and at the time(s) specified would have produced the concentration of the substance that was subsequently found in her sample. In the present matter:
    - Dr Jordi Segura confirmed that the application of the Cream on her lacerated finger in September 2021 could not be the source of the AAF.
    - The Athlete failed to establish that the application of the Cream on her knee was more likely than not to have occurred: it is not established that the Athlete applied the Cream on that injury; there is no evidence of when the tube of Trofodermin was bought and based on her changing explanations as to the pharmacy where she bought the Cream, there is no evidence to conclude that the Trofodermin was in her belongings since her trip to Italy; in addition, no one saw the Athlete applying the Cream on her knee injury; also, the videos and photographs of 18, 19 and 26 November 2021 show no significant injury. Finally, the scientific expertise of Dr Jordi Segura does not even address the alleged knee applications.
    - The Athlete's credibility is negatively impacted by her contradictory statements: she indicated that she bought the Cream at the *Farmacia Del Sole* in Napoli, Italy, although this was proven not to be the case; the Athlete also asserted that there was no team doctor available to her when she cut her finger, although it is proven that a doctor was present to address the medical issues of the athletes; finally, the Athlete first

declared that she did not mention the Cream on the doping control form as she did not consider a topical cream could be an intake method for a banned substance, whereas in her brief, she indicated that it was because to her recollection, she had not used the Cream for more than seven days.

- There are no exceptional circumstances to establish lack of intention without proving the source.

- Even accepting the Athlete's explanation at face value, the Athlete's violation was committed with indirect intent: The Athlete is an experienced athlete who received extensive anti-doping education and who admits in her witness statement being aware of the risks associated with the medications; she did not ask the pharmacy about doping risks nor did she check the box of the Cream or the list of ingredients; to the contrary, two months after having purchased the Cream, the Athlete applied it again on her knee injury without consulting a medical practitioner or even checking herself the ingredients. As a result, the Athlete knew there was a significant risk that the conduct might constitute or result in an ADRV and manifestly disregarded that risk.

- If the Panel considers that the Athlete's violation was committed unintentionally - *quod non* - , the Athlete's request for a reduction of her ban below the two-years-period of ineligibility (as provided under Article 10.2.2 of the DCR) based on No Significant Fault or Negligence (as provided under Article 10.6.2 DCR) is unfounded:

    - The objective elements of the Athlete's level of fault indicate a significant level of fault or negligence: she failed to read the label of the Cream, to cross-check the ingredients with the list of prohibited substances, make an internet research on the Cream, ensure the product is reliably sourced and consult appropriate experts in these matters.

    - The subjective elements of the Athlete's fault further exacerbate the Athlete's level of fault: the Athlete is educated and experienced and was 24 years old at the time of the relevant facts ; the doping insignia on the box of the Cream renders any argument based on the language barrier irrelevant; moreover, it was the first time she tested while taking this medication, and while she applied the Cream on multiple occasions she never checked the ingredients of the product; she was not experiencing a high degree of stress.

    - The fact that the ADRV may have been a result of inadvertence and the purpose for which the Cream was used are irrelevant for the purpose of assessing the Athlete's level of fault, as they apply with respect to the assessment of the Athlete's intention, not her level of fault. In any event, the AAF clearly had an impact on the Athlete's performances as at the time of

the Test, she was competing in International Swimming League ("ISL") events and in a key phase of her preparation.

- The three-months period between the Athlete's explanation letter and the ITA's offer of acceptance of consequences is within the bounds of normality and cannot justify any backdating of the start date of the period of ineligibility under Article 10.13.1 of the DCR.

C. WADA

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

"1. The appeal of WADA is admissible.
2. The decision dated 15 February 2023 rendered by the FINA Doping Panel in the matter of Joanna Evans is modified to the following limited extent: the "24-month ineligibility period" from para. 2 of the dipositive part of the Appealed Decision is replaced with a "period of ineligibility of four years".

3. Any arbitration costs shall be borne by World Aquatics or, in the alternative, by the Respondents jointly and severally.

4. WADA is granted a significant contribution to its legal and other costs."

76. WADA's submissions, in essence, may be summarized as follows:

- The Athlete's burden is to prove on balance of probabilities that her violation was neither directly intentional or indirectly intentional, which requires in all but the most exceptional cases, proof of source. The Athlete failed to demonstrate the source of the AAF:
    - The Athlete provided no evidence of her purchase of the Cream in Italy on 11 September 2021. Ms Andison confirms that she did not actually see the cream that the Athlete purchased and the *Farmacia del Sole* in Napoli reported not to have sold any Trofodermin cream that day.
    - The Athlete provides no evidence that she kept the Cream and brought it back to the USA and that she used the Cream on the alleged injury.
    - WADA does not dispute the fact that the concentration found in the Athlete's sample is compatible with the use of the Cream in the course of November 2021.
- Even accepting the Athlete's explanation at face value, the Athlete's conduct clearly amounts to indirect intent:
    - The Athlete is a very experienced athlete with significant anti-doping education; she is aware of the risks associated with medications.

- The Athlete failed to exercise any diligence whatsoever: she did not cross-check the ingredients of the Cream nor check the box of the Cream or search the Cream on the internet; she did not consult any of the medical doctors that were dedicated to her team and therefore available; if anything, the language barrier should have made her even more cautious; she decided to use the Cream again once back in the USA, still with no check, to treat a knee injury.
- CAS case law has not hesitated to find the violation was committed with (indirect) intent in similar circumstances.

V. THE HEARING

77. At the hearing, the Panel heard the testimony of the Athlete, her former teammate Ms Bailey Andison, and WA's witness Dr Chris Schubert.

➢ The Athlete

78. The Athlete is a citizen of the Bahamas and professional swimmer specializing in freestyle. She is the Bahamas national record holder in the 200m, 400m and 800m freestyle and 200m and 400 individual medley events. She represented her country at the Rio and Tokyo Olympic Games as well as at the 2014 and 2018 Commonwealth games. The Athlete qualifies herself as "*an ardent supporter of anti-doping, and [she is] usually extremely careful about what [she] put[s] into [her] body – especially supplements or medications*." During September 2021, she was in Italy for a series of swim meets for the ISL.

79. On 6 September 2021, she underwent a doping test, for which the doctor of the ISL was present and signed the doping control form. On or around 11 September 2021, while the Athlete was standing on the balcony of her hotel room at Palazzo Caracciolo Napoli, she wrapped her hand around the wrought-iron barrier, and it sliced her finger open where it had rusted. She provides a picture of the cut, which is dated 11 September 2021.

80. When she cut her finger, which happened in the late morning, there were several other persons present in the room; she asked around for Neosporin as it is what she would qualify a "classic" in aquatics but none of the persons present could provide it to her at that time. And so, later that day, the Athlete decided to try to purchase some healing ointment at a local pharmacy in order to avoid a possible infection.

81. The Athlete did not attempt to consult a team doctor. The Athlete said in her written testimony that there was no team doctor for her to consult at the time. At the hearing, the Athlete explained that although there were in fact doctors available at the ISL, in

order to consult with them she would have needed to contact the general manager first, who would then have needed to contact the team doctor, who would have needed to come to the hotel to meet with her. The Panel would note that although the evidence has now established that there was a change in team doctors at some point on 11 September (see the summary of Dr Schubert's evidence, below), and so it is possible that there was no such doctor available to the Athlete at the exact time she cut her finger (approximately late morning) or when she left the hotel to purchase her own healing ointment (before dinner), it remains the case that there were doctors generally available during the ISL and that, at the very least, she could have consulted a doctor on any of the following days.

82. In any event, the Athlete decided to look for a nearby pharmacy before going for dinner with Ms Andison. The two athletes walked out of the hotel towards a main street. They separated as they arrived at an ATM, where Ms Andison stopped to withdraw cash while the Athlete continued – alone – to a nearby pharmacy. The Athlete did not see the name of the pharmacy. Based on her recollection of the direction in which she walked after leaving the hotel, the Athlete indicated that it was the *Farmacia del Sole*, but later specified that there were several pharmacies in the area and that it could have been another pharmacy.

83. At the hearing, the Athlete added that on her way to the pharmacy, she google-translated "antibiotic". She entered the pharmacy and went to the counter. As she did not speak Italian, she simply showed her finger to the pharmacist. The Athlete believes that the pharmacist came from behind the counter – the same counter at which she eventually paid for her purchase – and took the Cream from a shelf in the store.

84. The Athlete did not remember whether the pharmacist offered her several medications or only the Cream; she may have offered her some Band-Aids (or equivalent) as well. The Athlete did not mention to the pharmacist that she was an athlete; and she explained that neither would she have mentioned the fact had she been in a pharmacy in the USA.

85. The Athlete stated that she did not recall seeing the sign on the box with the word "doping" shown in a red circle with a line through it (see the photo at para. 14 above). Nor did she recall whether she examined the box. She explained that, had she seen the doping sign, it would have raised a red flag. She testified that her exchange with the pharmacist was very limited. She recalled trying to pay for the Cream with her credit card, but that her card could not be processed. She eventually paid cash. She did not keep the receipt.

86. When she returned to the hotel, she applied the Cream to her finger. The Athlete explained that she does not recall examining the box at that time either, and that she does not recall seeing the warning sign. She testified that she used the Cream a couple

of times over the course of a few days. At no time did she check the ingredients of the Cream nor did she consult with a doctor. At the hearing, the Athlete explained that she could not even confirm whether she read the list of ingredients on the box or on the tube of Cream itself, even though the picture of the tube of Cream supplied by the Athlete in her appellate brief clearly shows "*Clostebol acetato + Neomicina solfato*" in white letters to the right of the Trofodermin name, (and also shows "*100 g di crema contengono clostebol acetato*" below the Trofodermin name in smaller black letters). She further explained, somewhat vaguely that she probably linked one of the ingredients, *i.e.* Neomicina, with the product she usually uses in similar cases when in the USA (*i.e.* Neosporin). She testified that she could not have recognised Clostebol, as she had never heard about it prior to the proceedings.

87. At some point during her stay in Italy, she discarded the box of the Cream that was in the toiletry bag because her hair conditioner leaked and the box became saturated.

88. On her way back to the USA, the Athlete stopped for two weeks in the Bahamas where she stayed with her family and friends. On 30 October 2021, after she had returned to her home in Austin, Texas, she experienced a bad fall on a concrete sidewalk while she was walking her dog, scraping her knee. She used the Cream which she had brought back from Italy. She claims to have applied the Cream to her knee approximately once or twice a week, a total of about five times, until her knee healed at around the end of November 2021.

89. The Athlete explained that she did not even know what Clostebol was until she received notification about her positive test. At the doping control, she never considered listing the Cream on the Doping Control Form because she did not consider a topical cream could be an intake method for a banned substance.

- <u>Ms Bailey Andison</u>

90. Ms Andison is a professional swimmer from Canada who specializes in the 200m individual medley. Although she has only known the Athlete since 2021, she considers Ms Evans to be a person, an athlete, and a teammate of the utmost integrity.

91. In September 2021, Ms Andison was in Naples with the Athlete where both athletes were competing together on a team during the 2021 ISL season. Upon the team's arrival in Naples, there were some briefings on security issues but nothing relating to use of medications or creams. Ms Andison does not recall any doctors being introduced to the team either in person or in writing (*e.g.*, by text).

92. Ms Andison was with the Athlete when she cut her finger in the hotel in Naples. Later that day, before dinner, Ms Andison left the hotel with the Athlete when the latter went to a nearby pharmacy to purchase an antibiotic cream. The two athletes walked for

approximately seven minutes, between 100 and 500 meters. They split up in front of an ATM where Ms Andison stopped to withdraw Euros. The Athlete continued to the pharmacy.

93. Ms Andison was not with the Athlete at the pharmacy and did not actually see the cream that the Athlete purchased, but she is confident that she saw it in the Athlete's hand when they met for dinner; and she says that she would have recalled the Athlete telling her that she did not find anything to heal that cut, if that had been the case. She also knows that the Athlete's finger eventually healed (the Athlete kept a Band-Aid over it when she was not in the pool).

94. At the hearing, Ms Andison stated that it is possible that there was a medical doctor available for the athletes of several teams, and she agreed with the Athlete that in order to see a doctor it would have been necessary to first contact the general manager. In Ms Addison's view, the cut the Athlete suffered did not seem to require medical advice.

- Dr Chris Schubert:

95. Dr Chris Schubert is a medical doctor, who was employed by DC Trident and the ISL to be available to all athletes present at the Naples ISL event in August-September 2021. During that time, Dr Schubert treated many athletes from DC Trident, attended all of their meets and some of their practices. In addition to being generally available, he was present at the team hotel at specific times in case athletes needed to see him. He also rode on the DC Trident team bus and recalls being introduced to the DC Trident team by the Team Manager.

96. At the outset of his time in Naples, he was typically contacted by team managers or others (coaches, physiotherapists) on behalf of athletes who needed consultations or treatment. By the end of his stay, he was being contacted directly by athletes who wished to see him.

97. Dr Schubert attended the doping control tests for several athletes, including the Athlete's doping control on 6 September 2021.

98. He left Naples on 11 September 2021, leaving the medical bag (which contained Neosporin) with Mr Jason Lezak to give to his replacement, Dr James Johnson.

VI. JURISDICTION

99. Article R47 of the CAS Code provides as follows:

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

exhausted the legal remedies available to it prior to the appeal, in accordance with the statutes or regulations of that body. […]*"*

100. Article 13.2.1 of the World Aquatics Doping Control Rules (edition 2023) ("WA DCR") provides as follows:

"*In cases arising from participation in an International Competition or in cases involving International-Level Athletes, the decision may be appealed exclusively to the CAS appeals division*."

101. Article 13.2.3.1 of the WA DCR provides that "*[i]n cases under Art. 13.2.1, the following parties shall have the right to appeal to the CAS appeals division: (a) the Athlete […] (c) World Aquatics […] (f) WADA*."

102. By signing the Order of Procedure, the Parties have confirmed that the CAS has jurisdiction to decide the appeals at issue in the present proceedings. There is in any event no doubt that the Athlete qualifies as an "*international-level athlete*" within the meaning of the WA DCR, and that, as a result, the Athlete, WA and WADA have a right to appeal the 15 February 2023 Decision before the CAS.

103. The Panel therefore finds that the CAS has jurisdiction to decide the appeals.

VII. ADMISSIBILITY

104. 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 in a previous agreement, the time limit for 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 her/his decision after considering any submission made by the other parties. […]"

105. As per Article 13.2.1 of the WA DCR, "*In […] cases involving International-Level Athletes, the decision may be appealed exclusively to the CAS appeals division*". Article 13.2.3.1 of the WA DCR provides that "*[i]n cases under Art. 13.2.1, the following parties shall have the right to appeal to the CAS appeals division: […] (f) WADA*."

106. Article 13.2.4 of the WA DCR provides as follows:

"*Cross appeals and other subsequent appeals by any respondent named in cases brought to the CAS appeals division under the Code are specifically permitted. Any*

party with a right to appeal under this Art. 13 must file a cross appeal or subsequent appeal at the latest with the party's answer."

107. Article 13.6.1 of the WA DCR provides as follows:

"*The deadline to file an appeal to the CAS appeals division shall be twenty-one (21) days from the date of receipt of the decision by the appealing party. The above notwithstanding, the following shall apply in connection with appeals filed by a party entitled to appeal but which was not a party to the proceedings that led to a decision being appealed:*

a) Within a deadline of fifteen (15) days from receipt of the decision, the party/ies entitled to appeal can request a copy of the complete case file from the Anti-Doping Organization that had Results Management authority, including the reasons for the decision and, if the proceedings took place in another language, a translation in one of World Aquatics' official languages (English or French) of the decision and of the motivation, as well as of any document which is necessary to understand the content of the decision.

b) If such a request is made within the fifteen (15) day period, then the party making such request shall have twenty-one (21) days from the receipt of the full file, including translations, to file an appeal to the CAS appeals division.

The above notwithstanding, the filing deadline for an appeal by World Aquatics shall be the later of:

a) Twenty-one (21) days after the last day on which any other party having a right to appeal (except WADA) could have appealed before the CAS appeals division; or

b) Twenty-one (21) days after World Aquatics' receipt of the complete file relating to the decision.

The above notwithstanding, the filing deadline for an appeal filed by WADA shall be the later of:

a) Twenty-one (21) days after the last day on which any other party having a right to appeal could have appealed, or

b) Twenty-one (21) days after WADA's receipt of the complete file relating to the decision."

108. The statement of appeal in the matter *CAS 2023/A/9482* was filed by the Athlete on 8 March 2023, *i.e.* within the time limit of 21 days of receipt of the Decision.

109. The statement of appeal in the matter *CAS 2023/A/9592* was filed by WA with the CAS Court Office, together with its Answer in the matter *CAS 2023/A/9482*, on 20 April 2023. The Panel therefore finds that WA's appeal was timely filed in accordance with Article 13.2.4 of WA DCR with respect to cross-appeals.

110. The statement of appeal in the matter *CAS 2023/A/9564*, was filed by WADA with the CAS Court Office on 11 April 2023, *i.e.* within the time limit of 21 days from the last day on which any other party having a right to appeal could have appealed, be it the Athlete in the matter *CAS 2023/A/9482* or WA in the matter *CAS 2023/A/9592*.

111. The Panel therefore finds that the present appeals proceedings are admissible.

VIII. APPLICABLE LAW

112. Article R58 of the CAS 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."*

113. The Decision was rendered following a procedure that was initiated under the DCR. It follows, and the Parties agree, that the DCR apply to the merits of the present appeals proceedings. Based on the principle *tempus regit actum*, the procedural aspects of the present matters are, however, governed by the WA DCR which came into force on 1 January 2023.

IX. MERITS

114. The Panel recalls at the outset that the existence of an ADRV in the present matter is not in dispute. Clostebol was found to be present in the Athlete's sample. Clostebol is an anabolic androgenic steroid prohibited under S1.1 of the WADA Prohibited List 2021 and a Non-Specified Substance. The Athlete waived the analysis of her B sample and admitted the use of Clostebol through the application of the Cream.

115. The Panel notes that WA requested that the Athlete be found to have violated article 2.2 of the DCR in addition to Article 2.1. WA did not, however, provide any justification in support of its request in this regard, and the Panel sees no reason to expand or reframe the case on the basis of this unsupported request. The present matter is clearly a "presence"-based case founded on an adverse analytical finding that was

accepted by the Athlete. WA's request on this specific point is therefore dismissed without need for any further explanation.

116. The sole issue in these appeal proceedings, as in the proceeding below, is thus the consequences of the Athlete's ADRV, and more particularly, the question of "intention" (or "intentionality" as it is sometimes called).

117. The starting point of the analysis is article 10.2.1.1 of the DCR, which provides:

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

DC 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. […]"

118. Since Clostebol is a Non-Specified Substance under the WADA Prohibited List, the Athlete is presumed to have acted intentionally. However, the Athlete may attempt to rebut this presumption. The burden of establishing that the ADRV was not intentional lies with the Athlete.

119. As regards the standard of proof applicable in such a case, Article 3.1 of the DCR provides:

"[…] Where these Anti-Doping Rules place 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 DC 3.2.2 and DC 3.2.3, the standard of proof shall be by a balance of probability."

120. Hence, the burden is on the Athlete to demonstrate, on a balance of probabilities, that she acted without intent within the meaning of Article 10.2.3 of the DCR.

A. Did the Athlete act without intent?

121. Article 10.2.3 of the DCR provides:

"[…] 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. […]"

122. In order to demonstrate that she acted without intent within the meaning of Article 10.2.3 of the DCR, the Athlete must demonstrate that the ADRV was neither directly nor indirectly intended. As stated by an eminent panel in a separate case:

"[A]s a result of the burden of proof placed on him by Article 10.2.1.1, it is thus for the Athlete to prove by a balance of probability pursuant to Article 3.1 of the [DCR] that he did not engage in a ***conduct which he 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***." (CAS 2017/A/5016 & 5036, para 121; emphasis added).

(i) The Parties' Positions

123. The Parties disagree on whether the Athlete has successfully rebutted the presumption that her ADRV was committed intentionally.

124. The Athlete contends that she has demonstrated that her positive test was more likely than not caused by her use of the Cream purchased in Naples, Italy. In this regard, Dr Paul Scott has confirmed that the Athlete's claimed use of the Cream between 30 October and 3 November and 1-2 weekly applications thereafter until the end of November 2021 is consistent with her 3 December 2021 positive test for Clostebol at an approximate concentration of 1,5 ng/ml. In addition, the Athlete says that her testimony regarding why, where and when she purchased the Cream (and applied it while in Italy) is backed up by Ms Andison's testimony. Moreover, the Athlete strenuously argues that she did not have actual knowledge or understanding that there was a significant risk that her use of the Cream might result in an ADRV, for the simple reason that she did not associate a cream purchased over-the-counter with prohibited substances and never considered it possible that such a product could contain a prohibited substance or that its use could give rise to an ADRV. In other words, being wholly unaware of any risk, and nothing in the circumstances of the case constituting an obvious red flag pointing to any such risk, it is not possible to say that she manifestly ignored the risk.

125. For their part, WADA and WA submit that the Athlete presented insufficient evidence to demonstrate the circumstances surrounding her alleged purchase of the Cream. Specifically: the pharmacy in Naples where she initially claimed to have purchased the Cream on 11 September 2021 turned out not to have sold any Trofodermin cream during the entire month of September 2021; no witness has been presented to say they saw her buying the Cream in Italy; no evidence of an actual purchase (such as a receipt) has been presented. Further, the Athlete provides no evidence of her use of the Cream on her alleged knee injury upon her return to the USA. Even accepting the Athlete's explanation at face value, her conduct clearly amounts to a case of indirect intent: even though she is an experienced athlete with significant anti-doping education she decided to purchase and use the Cream without the slightest diligence whatsoever – she did not check the ingredients against the Prohibited List, nor (she says) did she even look at the

box containing the Cream which, as it turns out, bears a clear doping warning sign; nor did she consult a medical doctor at any time prior to using the Cream on multiple occasions both in Italy, where a team doctor was available, or in the US, where her own physician was available to her.

(ii) The Panel's Findings

126. As the Panel had occasion to note during the hearing, fact evidence may be adduced in various forms. Both documents (exhibits) and testimony (written or oral) may constitute evidence. In this case, for example, in addition to the exhibits submitted by the parties, the testimony of the Athlete, Ms Andison and Dr Schubert is adduced as evidence. As with any evidence admitted in the record, the Panel's appreciation of such testimonial evidence, the weight to be ascribed to it and the extent to which it is probative of the facts in support of which it is adduced is another matter, and is discussed further below as necessary.

127. Turning to the substantive questions at issue in this case, the Panel first observes that, in all but exceptional circumstances, the demonstration of lack of direct or indirect intent requires an athlete to prove the source of her ADRV (see for example, CAS 2017/A/5248, CAS 2017/A/5295, CAS 2017/A/5335; CAS 2017/A/5392; and CAS 2018/A/5570). Indeed, the commentary to Article 10.2.1.1 of the DCR itself specifies:

"While it is theoretically possible for an Athlete or other Person to establish that the anti-doping rule violation was not intentional without showing how the Prohibited Substance entered one's system, it is highly unlikely that in a doping case under DC 2.1 an Athlete will be successful in proving that the Athlete acted unintentionally without establishing the source of the Prohibited Substance."

128. Similarly, another CAS panel found:

"[I]*t could be de facto difficult for an athlete to establish lack of intent to commit an anti-doping rule violation demonstrated by presence of a prohibited substance in his sample if he cannot even establish the source of such substance: proof of source would be an important, even critical, first step in any exculpation of intent, because intent, or its lack, are more easily demonstrated and/or verified with respect to an identified "route of ingestion"*" (CAS 2017/A/5016 & 5036, para 123).

129. It bears recalling that the Athlete's burden to demonstrate that she acted unintentionally, in particular by proving the source of the ADRV, is on a balance of probabilities standard. This standard, as applied by CAS panels, typically entails the following:

- The athlete must prove that his/her hypothesis is more probable than other possible explanations; and/or at least 51% likely to have occurred (CAS 2007/A/1370, para 58; CAS 2011/A/2384 & 2386, para 6).

- The occurrence of the scenario posited by an athlete must be more probable than its non-occurrence, not merely the most likely among competing scenarios (CAS 2017/A/5301 & CAS 2017/A/5302).

- The question is not which is the most likely scenario as between two or more competing scenarios. Rather, the athlete must prove that the particular chain of events adduced by him/her is more likely than not to have happened. The athlete may address other scenarios in order to support his/her position. However, the burden rests on the athlete to prove that the scenario presented by him/her is more probable than not. It is not for the other party to prove the occurrence of a different scenario, nor is that other party even obliged to put forward any other competing scenario (CAS 2019/A/6541 para 80, CAS 2012/A/2759, paras 11.31 and 11.32, CAS 2014/A/3615, para. 52).

- Mere denials, attestations of innocence and efforts to locate the source are not enough to meet the required standard. The athlete must adduce actual evidence, as opposed to mere speculation (CAS 2010/A/2230, para 11.34; CAS 2014/A/3820, para 80; CAS 2014/A/3615, para 56).

- Establishing that a particular scenario is possible is insufficient to satisfy the athlete's burden to establish the origin of the Prohibited Substance. By way of illustration, in CAS OG 16/25 the Panel stated that it "*found the sabotage(s) theory possible, but not probable and certainly not grounded in any real evidence*" (para 7.27).

- In addition to establishing the source of an adverse analytical finding, the athlete must demonstrate that that source could in fact have caused the adverse finding, by means of corroborating evidence, such as scientific or other proof (CAS 2010/A/2277, para 36).

130. As regards the last of the foregoing points, it is noted that neither WADA nor WA challenged Dr Scott's expert report. Nor did they present any scientific evidence of their own which might suggest that Dr Scott's report is inaccurate. As a result, the Panel accepts Dr Paul Scott's conclusion that the Athlete's use of the Cream between 30 October and 3 November and 1-2 weekly applications thereafter until the end of November 2021 is consistent with her 3 December 2021 positive test for Clostebol at an approximate concentration of 1,5 ng/ml.

131. However, the remainder of the Athlete's evidence as to the source of her ADRV – including her written and oral testimony, which constitutes the bulk of her evidence – raises several points of concern. The Panel addresses the key elements of that evidence below.

132. The Panel observes that neither the Athlete nor any other witness was able to confirm to the Panel the exact date on which the Athlete cut her finger. The Athlete stated only that it must have been "on or about 11 September 2021" based on a picture of her lacerated finger that she had saved on her cell phone, and that the incident occurred in the late morning or early afternoon. She also testified that there were several other people present in the hotel room at the time, including Ms Andison, and that she asked them for Neosporin – which she called a "classic" among swimmers – but no one could provide it to her.

133. This latter point is curious. If Neosporin is truly as ubiquitous among swimmers as the Athlete suggests – which goes to her claim that what she thought was a Neosporin-like antibiotic ointment (*i.e.,* the Cream) could not have raised any "red flag" in her mind regarding the risk of such medication – one is left to wonder why none of the persons present in the hotel room either had any Neosporin on them or offered to return to their rooms to get a tube for the Athlete to use. None of this is decisive, but these aspects of the case are, as said, curious.

134. Similarly, the Athlete claimed that she could not identify the name or the precise location of the pharmacy where she says that she purchased the Cream in Naples. As discussed above, she claims that she was initially able to deduce that the pharmacy in question must have been the *Farmacia del Sole*. In response to WADA's and WA's evidence that that particular pharmacy did not sell any Trofodermin cream during the period when the Athlete was in Italy, the Athlete acknowledged that it could have been – indeed, it *must* have been, if the sequence of events that she recounts is true – another pharmacy in very close proximity. Yet despite the obvious centrality of the issue to her case, and despite WA's clear willingness to assist in identifying the pharmacy that allegedly sold the Cream, the Athlete apparently did not consider it necessary or opportune, at any point either during the DCR proceedings or in the present appeals, to investigate the matter further, for example so as to identify other pharmacies in the area.

135. In light of this evidence from WADA and WA, it is unfortunate that the Athlete could not provide the Panel with any further corroborating evidence of an actual purchase of the Cream. The Athlete explained that she was alone in the pharmacy where she says she purchased the Cream in Naples (but for the pharmacist), that her credit card did not work (and so she could not submit a statement of her credit card account), and that she paid cash and discarded the receipt. Nor could Ms Andison say that she actually saw the Cream after the Athlete claims to have purchased it (as noted above, she says only that she is certain that she would have recalled if the Athlete had told her that she could not have found what she was looking for).

136. As for her knee injury, even if the Panel were to accept – based on the Athlete's testimony, the photographs submitted by her and the expert evidence of Dr Scott – that the Athlete injured her knee on or around 30 October 2021, that she used the Cream which she says she purchased in Italy to treat that particular injury, and that that was

the source of her ADRV, the Panel also finds it unfortunate that nobody associated with the Athlete or anybody else from whom she might have procured a witness statement could confirm to the Panel that she applied the Cream to her knee injury.

137. Ultimately, however, this case need not and does not turn on whether the Athlete sufficiently demonstrated the source of her ADRV. That is because, *even if* the Panel were to consider that it is more likely than not that her ADRV was caused by her use of the Cream purchased in Italy on or around 11 September 2021 and applied to her knee injury in November 2021, the Panel would still not be persuaded of her lack of intent.

138. The most striking feature of the Athlete's case – and *the decisive point as regards her ability to refute the presumption of intent* – is the Athlete's testimony to the effect that she never noticed either the red doping warning sign on the box containing the Cream or the multiple references to Clostebol on the tube of the Cream itself.

139. The Athlete's argument as to lack of intent is that she was unaware of any risk, nothing in the circumstances of the case constituting an obvious red flag pointing to any such risk, and thus it is not possible to say that she manifestly ignored the risk. However, at the hearing, the Athlete acknowledged that a sign as evident as the doping warning on the box would have raised a red flag to her had she actually seen it. She also conceded that she "must have looked at" the box. This specific evidence was apparently not before the DP. In any case, *of course* the Athlete must have looked at the box, and on more than one occasion. By her own account she handled and manipulated the box several times, including: when she purchased the Cream; on the several occasions when she used the Cream, before discarding the box; and when she removed the box from her toiletry bag to discard it. She also must have looked at the tube of Cream, which next to the name Trofodermin states "*Clostebol acetato + Neomicina solfato*".

140. Is it credible that the Athlete did not notice the red doping sign at any time before discarding the box? The Panel thinks not. Is it credible that the Athlete did not notice "Clostebol" on the tube of Cream itself on any of the multiple occasions she applied it in Italy in September of 2021 and in the United States in November of 2021? The Panel thinks not. Is it credible that she was not thereby alerted to the fact that, at the very least, there was a significant risk that using the Cream could give rise to an ADRV, a risk that she manifestly disregarded? Again, the Panel thinks not.

141. It must be stressed that this is not one of those rare cases where an athlete may be able to prove the absence of intent without demonstrating the source of the ADRV. As explained by another CAS panel:

"[…] *the Panel can envisage the possibility that it could be persuaded by an athlete's assertion of lack of intent, where it is sufficiently supported by all the circumstances and context of his or her case, even if, in the opinion of the majority of the Panel, such*

a situation may inevitably be extremely rare: where an athlete cannot prove source, it leaves the narrowest of corridors through which such athlete must pass to discharge the burden which lies upon him. […] The foregoing, in fact, does not mean that the Athlete can simply plead his lack of intent without giving any convincing explanations, to prove, by a balance of probability, that he did not engage in a conduct which he knew constituted an anti-doping rule violation or knew that there was a significant risk that said conduct might constitute or result in an anti-doping rule violation and manifestly disregarded that risk. The Panel repeats that the Athlete, even though he is not bound to prove the source of the prohibited substance, has to show, on the basis of the objective circumstances of the anti-doping rule violation and his behaviour, that specific circumstances exist disproving his intent to dope." (CAS 2017/A/5016&5036, paras. 123-124).

142. On the contrary, this is a case in which the Panel considers that *even accepting the entirety of the Athlete's evidence regarding* ***the source*** *of the Prohibited Substance present in her sample,* the Athlete still has not rebutted, on a balance of probability, the presumption of intent.

143. As noted above, intent may be either direct or indirect. The Athlete's burden includes demonstrating that she did not directly or indirectly intend to commit the ADRV. The concept of indirect intent has been described as follows, in terms that this Panel adopts as its own:

"[…] the term 'intent' should be interpreted in a broad sense. Intent is established – of course – if the athlete knowingly ingests a prohibited substance. However, it suffices to qualify the athlete's behaviour as intentional, if the latter acts with indirect intent only, i.e. if the athlete's behaviour is primarily focused on one result, but in case a collateral result materializes, the latter would equally be accepted by the athlete. If – figuratively speaking – an athlete runs into a 'minefield' ignoring all stop signs along his way, he may well have the primary intention of getting through the 'minefield' unharmed. However, an athlete acting in such (reckless) manner somehow accepts that a certain result (i.e. adverse analytical finding) may materialize and therefore acts with (indirect) intent" (CAS 2012/A/2822, para. 8.14).

144. In another case, a CAS panel stated:

"[…] the Athlete took the risk of ingesting a Specified Substance when taking the Supplement and therefore of enhancing his athletic performance. In other words, whether with full intent or per 'dolus eventualis', the Panel finds that the Appellant's approach indicates an intent on the part of the Appellant to enhance his athletic performance within the meaning of Art. 10.4 IWF ADP" (CAS 2011/A/2677, para. 64).

145. In the present case, as mentioned, the Panel does not find it credible that the Athlete did not at any time see the red doping warning sign on the box containing the Cream that she claims is the source of her ADRV and/or Clostebol listed on the tube of Cream. On the contrary, the Panel considers it more likely than not that she did see the sign and/or Clostebol, but that she used the Cream nonetheless. In doing so she either *knowingly applied a prohibited substance to treat her injury* or, at the very least, disregarded the red doping sign on the box and/or Clostebol on the tube of Cream, and when this fact is considered with her failure to take any steps whatsoever to ensure the Cream did not contain a Prohibited Substance thereby she *recklessly accepted that an adverse analytical finding may materialize from her use of the Cream.*

146. For what it may be worth, the Panel considers the second scenario to be more likely, *i.e.,* that the Athlete acted with *indirect intent (dolus eventualis)* as opposed to *direct intent.* But for purposes of determining the consequences of her ADRV, it matters not. What matters is that the Panel finds that the Athlete's evidence on point is not credible, and that she has accordingly failed to rebut the presumption of intent.

147. If any additional support were required for its finding in this regard, the Panel recalls that it is well-established and well-known in the world of sport that particular care is required from an athlete when applying medications, because the danger of a prohibited substance entering the athlete's system is particularly high in such context, *i.e.* significant (CAS 2020/A/7536, para. 88; CAS 2020/A/7299 para. 133 et seq.; CAS 2013/A/3327, para. 75; CAS 2016/A/4609, para. 68). An athlete's seniority and experience are also relevant. The present case involves an educated and very experienced athlete, who positively confirmed in her written and oral testimony that she is usually "*extremely careful about what [she] put[s] into [her] body – especially supplements and medications*". In other words, by her own evidence the Athlete recognised that self-medication (let alone the use of nutritional supplements) is associated with a risk of doping.

148. The Panel is of the view that the Athlete was particularly reckless in the circumstances. She decided, on her own initiative, to buy an antibiotic cream in a pharmacy in a foreign country, from a pharmacist with whom she says she could not communicate effectively; and she applied the product which was labelled (on both the box and the tube) as containing "*Clostebol acetato*" in addition to "*Neomicina solfato*" on repeated occasions over a fairly long period, to treat two separate injuries, without doing any research or at any time seeking advice from a doctor, coach, pharmacist or anybody else – whether in Italy, the Bahamas or the United States – as to the potential of the Cream to cause an ADRV.

149. Before the DP, the Athlete argued – and the DP accepted – that there was no "*team doctor readily on hand*" when she cut her finger. However, both the Athlete and Ms Andison acknowledged that the Athlete could have consulted with a doctor if she

had wanted to do so, perhaps not before but certainly after purchasing the Cream, and the Athlete certainly had time to consult her own doctor before her November 2021 application of the Cream, which under her own case resulted in the AAF.

150. The Athlete also claims that she did not bother to look at the leaflet inside the box containing the Cream, because she assumed that it was written in Italian only. Perhaps it was. Accepting that the leaflet that she exhibited to the Panel, which was in Italian only, was identical to the leaflet that came with her Cream, that leaflet contains a specific warning with respect to "doping". Had she looked at the leaflet, the Panel is of the view that the Athlete would likely have seen, and would certainly have understood, the word "doping". This may (indeed should) have led her to Google-translate the rest of the sentence containing the warning – much as she Google-translated the word "antibiotics" on her way to purchase the Cream, so as to be able to explain to the pharmacist the kind of product she required.

151. The Athlete further failed to check the word "Clostebol" or any of the other ingredients prominently listed on the box or on the tube of Cream. The Athlete testified that she could not recall whether or not she even bothered to look at the list of ingredients. Again, had she done so, a simple internet check would have identified Clostebol or even Trofodermin as problematic.

152. As explained, the Athlete failed to ask the pharmacist about any doping risks associated with the use of the Cream. One might understand an assumption that a pharmacist in Naples might not speak English. Less understandable, or defensible, is a failure even *to try* to ask the pharmacist – and it is noteworthy that the Athlete believed the person serving her to be a pharmacist, and not merely a salesperson – about the possibility that the medicinal cream that she purchased might contain a prohibited substance.

153. The Athlete also argued that she did not associate a topical antibiotic cream with any prohibited substance. The Panel does not agree with the Athlete. As other CAS panels already confirmed, "*Medicines come along in different forms such as pills, creams, drops or syringes. This is well-known and one does not need specific anti-doping education to know that prohibited substances may enter into the athlete's system via ingestion, skin or bloodstream*" (CAS 2020/A/7536, para. 91).

154. In any event, and to be very clear, although the Athlete claims to have believed that the Cream was similar to Neosporin, she knew that it was *not* Neosporin.

B. Consequences

155. In light of the above considerations, Article 10.2.1.1 of the DCR Rules requires that the Athlete be sanctioned with a period of ineligibility of four years. Those same considerations also explain why there is no ground for considering a reduction of the

period of ineligibility on the basis of No Significant Fault or Negligence under Article 10.6.2 of the DCR.

156. The Athlete was provisionally suspended on 14 February 2022 and has respected her provisional suspension. Pursuant to Article 10.13.2 of the DCR, the Athlete is entitled to full credit for her provisional suspension already served. As a result, the four-year period of ineligibility shall be considered to have started on 14 February 2022.

157. Further, Article 10.10 of the DCR provides:

"In addition to the automatic Disqualification of the results in the Event which produced the positive Sample under DC 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."

158. Since the Athlete admitted use of the Cream containing the prohibited substance commencing on 11 September 2021 and continuing through November 2021, all results obtained by the Athlete from 11 September 2021 through the commencement of her provisional suspension on 14 February 2022 are disqualified with all resulting consequences including forfeiture of any medals, points and prizes.

159. Finally, the Athlete submits that the three-months' delay between the submission of her explanation of her adverse analytical finding on 25 February 2022 and the rejection of that explanation by ITA Legal on 1 June 2022, constitutes a substantial delay not attributable to her, within the meaning of Article 10.13.1 of the DCR; as a result, the Athlete requests that her period of ineligibility starts on the date of the Test, *i.e.* on 3 December 2021.

160. Article 10.13.1 of the DCR reads:

"*Where there have been substantial delays in the hearing process or other aspects of Doping Control, and the Athlete or other Person can establish that such delays are 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 the date on which another anti-doping rule violation last occurred. All competitive results achieved during the period of Ineligibility, including retroactive Ineligibility, shall be Disqualified."*

161. In the present matter, the Panel is of the view that the three-month delay between the submission of the Athlete's explanation for her AAF and the ITA's offer of acceptance of consequences cannot *per se* be said to be substantial. As WA has explained, if nothing else, it took time for it to verify the Athlete's contention regarding the purchase

of the Cream that she claimed was the source of her ADRV. In addition, as the word "may" clearly indicates, the backdating of the start date of the ineligibility period is a matter of discretion. A panel may, but is not required to backdate a suspension where it finds that there have been "*substantial delays […] not attributable to the Athlete*". Here, in the absence of such a finding, the Panel has no discretion.

X. COSTS

162. Article R65 of the CAS Code reads as follows:

"1. This Article R65 applies to appeals against decisions which are exclusively of a disciplinary nature and which are rendered by an international federation or sports-body. […]

2. Subject to Articles R65.2, para. 2 and R65.4, the proceedings shall be free. The fees and costs of the arbitrators, calculated in accordance with the CAS fee scale, together with the costs of CAS are borne by CAS.

Upon submission of the statement of appeal, the Appellant shall pay a non-refundable Court Office fee of Swiss francs 1,000. — without which CAS shall not proceed and the appeal shall be deemed withdrawn. […]

3. Each party shall pay for the costs of its own witnesses, experts and interpreters. ***In the arbitral award and without any specific request from the parties, the Panel has discretion to grant the prevailing party a contribution towards its legal fees and other expenses incurred in connection with the proceedings and, in particular, the costs of witnesses and interpreters. When granting such contribution, the Panel shall take into account the complexity and the outcome of the proceedings, as well as the conduct and financial resources of the parties****. […]"* (Emphasis added)

163. The appeals filed separately by the Athlete, WA and WADA are directed against a decision which is exclusively of a disciplinary nature rendered by an international sport body. Therefore, these proceedings are free, except for the CAS Court Office fee in the amount of CHF 1'000.- (one thousand Swiss francs) paid by each of the above-mentioned appellants, which are retained by the CAS.

164. In the light of the outcome of the present proceedings as well as the fact that WA is represented internally, the Panel finds that the Athlete and WA shall bear their own costs and other expenses incurred in connection with the proceedings in CAS 2023/A/9482 and CAS 2023/A/9592.

165. Considering the outcome of the present proceedings, the fact that WADA was represented by an external counsel as well as the respective financial resources of the Parties, in the exercise of the discretion accorded it by Article R65.3, the Panel decides that the Athlete shall pay an amount of CHF 2'000.- (two thousand Swiss francs) to

WADA as contribution towards the expenses incurred by it in connection with the arbitration proceedings in the matter CAS 2023/A/9564.

ON THESE GROUNDS

The Court of Arbitration for Sport rules that:

1. The appeal in the matter CAS 2023/A/9482 filed by Joanna Evans on 8 March 2023 against the Decision rendered by the FINA Doping Panel on 15 February 2023 is dismissed.

2. The appeal in the matter CAS 2023/A/9564 filed by WADA on 11 April 2023 against the Decision rendered by the FINA Doping Panel on 15 February 2023 is upheld.

3. The appeal in the matter CAS 2023/A/9592 filed by World Aquatics on 20 April 2023 against the Decision rendered by the FINA Doping Panel on 15 February 2023 is partially upheld.

4. The Decision rendered by the FINA Doping Panel on 15 February 2023 (01/2022) in the matter Joanna Evans is modified as follows:

   "*2. Ms Evans is sanctioned with a period of ineligibility of four years starting from 14 February 2022. All results obtained by Ms. Evans from 11 September 2021 and through and including the start of the provisional suspension on 14 February 2022 are disqualified. Any medals, points and prizes achieved during that period shall be forfeited*."

5. The Award is pronounced without costs, except for the Court Office fee of CHF 1'000.- (one thousand Swiss Francs) paid by each of the Parties in their respective appeal, which is retained by the CAS.

6. Joanna Evans is ordered to pay the amount of CHF 2'000.- (two thousand Swiss francs) to WADA as a contribution towards the expenses incurred in connection with the arbitration proceedings in the matter CAS 2023/A/9564. Joanna Evans and World Aquatics shall bear their own costs.

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

Seat of arbitration: Lausanne, Switzerland
Date: 18 March 2024
Operative part notified on: 21 December 2023

THE COURT OF ARBITRATION FOR SPORT

Stephen L Drymer
President of the Panel

Laura Abrahamson
Arbitrator

Ulrich Haas
Arbitrator

Stéphanie De Dycker
Clerk