

**FINA Doping Panel 01/2022**

comprised of

Robert Fox (SUI)	Chairman
William BOCK III (USA)	Member
Peter Kerr (AUS)	member

In the proceedings against

**Ms. Joanna Evans** (“The Athlete”), c/o. Law Offices of Howard L. Jacobs

31111 Agoura Rd., Suite 225, Westlake Village, California 91361

**Affiliated to the Bahamas Aquatic Federation (BAF)**

and

**Fédération Internationale de Natation (“FINA”)**, Chemin de Bellevue  
24 A/B, Lausanne, Switzerland

## **A. THE PARTIES**

1. **FINA** is the world governing body for the sport of Aquatics (meaning swimming, open water swimming, diving, high diving, water polo, artistic swimming and Masters programme). FINA has its headquarters in the city of Lausanne, Switzerland. According to FINA Rule C 5, one of the main objectives of FINA is to provide fair and drug free sport. In furtherance of this goal FINA has adopted and implemented, in accordance with FINA's responsibilities under the World Anti-Doping Code, the FINA Doping Control Rules (Hereinafter the "FINA DC Rules" or "DC").

2. **Ms. Joanna Evans** (the "Athlete" or "Ms. Evans"), born on 3 July 2002 is a professional swimmer from Freeport, Bahamas, specializing in the freestyle. Ms. Evans is a five-time Bahamian national record holder in the 200m, 400m, and 800m freestyle events as well as the 200m and 400m individual medley events. Ms. Evans has been swimming since the age of 8, and has represented her country at the 2016 and 2020 Summer Olympics, as well as the 2014 and 2018 Commonwealth Games. She resides and trains in Austin Texas USA.

## **B. FACTUAL BACKGROUND AND PROCEDURAL HISTORY**

*The following is a summary of the main relevant facts, as submitted during the proceedings. Additional facts may be set out where relevant in the legal discussion that follows. While the Panel has considered all the facts, allegations and evidence submitted in the present proceedings, it refers only to the facts, allegations, and evidence it considers necessary to explain the reasoning in this decision.*

3. FINA has delegated the implementation of areas of the FINA anti-doping programme to the International Testing Agency (the "ITA"). Such

delegation includes the Results Management of Anti-Doping Rule Violations (“ADRVs”) under the jurisdiction of FINA.

On 3 December 2021 the Athlete was selected for an unannounced Out-Of-Competition doping control and sample numbers A and B-3156962. The sample was sent for analysis to the World Anti-Doping Agency (“WADA”)-accredited laboratory in Cologne, Germany (the “Laboratory”).

On 6 January 2022, the Laboratory reported an Adverse Analytical Finding for clostebol metabolite 4-chloro-androst-4-en-3 $\alpha$ -ol-17-one. Such substance is banned at all times as per the 2021 and 2022 WADA Prohibited List and is classified under Class S1.1 as Anabolic Androgenic Steroids. According to the Laboratory, the roughly estimated concentration of clostebol metabolite in the sample was approximately 1.5 ng/ml.

4. Upon receipt of the AAF, the ITA conducted the Initial Review of the result under Article 7 of the FINA ADR and Article 5.1.1 of the International Standards for Results Management (“ISRM”) and found that, according to the ITA and the FINA records, (a) no applicable Therapeutic Use Exemption (“TUE”) had 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 (“ISTI”) or the International Standard for Laboratories (“ISL”) 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.

5. 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.

6. On 26 February 2022, Ms. Evans, represented by Mr. Howard Jacobs, attorney, responded and stated that:

- a) She accepted the AAF and did not request for the opening and analysis of the B-sample.
- b) She alleged that the source of clostebol in her sample was the use of the cream “*Trofodermin*” which she purchased from “*Farmacia del Sole*” in Naples, Italy. She explained that she had purchased the cream on 11 September 2021 to treat a laceration to the 4th digit of her right hand. The Athlete provided a google map screen-shot showing the directions to the pharmacy she visited as well as a photograph of her injured finger. The cream had been paid for with cash and hence she did not have any credit card records of the purchase.
- c) The Athlete stated that she didn’t speak Italian and that when she had visited the pharmacy, she had expected to be provided with a “*Neosporin-like cream*”, similar to what would be available over the counter in the United States.
- d) Ms Evans further stated that she had used the cream topically as follows:
- Once per day for three days – 11 September 2021 until 13 September 2021, to treat her injured finger; and
  - Once per day for five days – 30 October 2021 until 3 November 2021 and once or twice a week from 3 November 2021 until the last week of November 2021 to treat an abrasion on her left knee which she had incurred on her return to the USA.
- e) Ms Evans stated that she was unaware that the cream Trofodermin contained the prohibited substance Clostebol and although some tubes of Trofodermin contain an anti-doping warning on the product itself, the tube purchased by the Athlete at the pharmacy in Naples, Italy, did not appear to contain such warning and she had discarded the packaging that the cream came in shortly after purchasing it.
- f) Finally, she stated that her use of the cream was in no way related to sports performance and was only to treat her injury. She expressed regret over not having checked *Global Dro* when she had purchased the product but had no expectation that a topical antibiotic could contain a banned substance.

7. Based on the explanations provided by the Athlete, the ITA conducted its own follow-up investigation.

On 22 March 2022, the ITA reached out to the National Anti-Doping Agency (“NADO”) Italy to inquire (a) whether, as per the logs and records of *Farmacia del Sole – Napoli*, they had sold a tube of Trofodermin cream in or around 11 September 2021; it asked what the requirements (if any) in Italy to detail an anti-doping warning on tubes of Trofodermin cream.

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 picogram “DOPING”. Further a specific warning is also included in the drug illustration leaflet contained in the package of the cream.

NADO Italy also provided to the ITA 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.

8. On 1 June 2022, the ITA asserted an anti-doping rule violation against the Athlete and proposed an Agreement on Consequences pertaining to an Anti-Doping Rule Violation in accordance with Article 8.3.1 of the FINA Doping Control Rules. ITA informed the Athlete that it believed 4 years to be an appropriate sanction (but offering a 3-year sanction if accepted by 20 June 2022).

On 20 June 2022, the Athlete refused the proposed Agreement on Consequences and requested a hearing before the FINA Doping Panel pursuant to Art. 8 of the FINA Doping Control Rules. She additionally requested the complete responses from NADO Italy and *Farmacia del Sole Centro Celiachia* that had been referenced in ITA’s letter of 1 June 2022; and *Farmacia del Sole Centro Celiachia*’s purchase logs and sales register receipts for the month of September 2021.

9. On 20 July 2022, the case was referred to FINA Doping Panel by FINA. In its referral, FINA requested the FINA Doping Panel:

-- *Declare that Ms. Evans has committed an anti-doping rule violation of DC 2.1 and DC 2.2;*

- *Impose on Ms. Evans a period of ineligibility of 4 years, commencing on the date of the Doping Panel's decision;*
- *Crediting the time served by Ms. Evans under her provisional suspension since 14 February 2022;*
- *Order the disqualification of all results obtained by Ms. Evans since 3 December 2021 with all resulting consequences including forfeiture of any medals, points and prizes.*

**10.** On 25 July 2022, FINA Doping Panel Chairman wrote to Ms Evans' attorney and set a deadline to 22 August 2022 in response to FINA's referral to the Doping Panel. The Athlete filed her response in the deadline, with 33 exhibits and witness statements of Mr. Hillinger, Mr. Cargill, Mr. Darville, Mr. Bowleg, Ms. Evans, Ms. Andison, Ms. Capitano and Ms. Gallagher. Furthermore, the Athlete filed on 24 August 2022 a witness statement from the Athlete's team captain, Ms Carole Capitani.

On 26 August 2022, FINA requested to be given a 15-day deadline to reply to Ms. Evans' defence and expressed that while it noted that the statement of Ms. Capitani was filed after the deadline of the Athlete had passed, it did not object to its addition to the file.

FINA Doping Panel Chairman, by letter dated 6 September 2022 set FINA a deadline to 22 September 2022 to file its additional response to the Athlete's defence.

On 14 September 2022, the FINA Doping Panel Chairman informed the parties of the composition of the FINA Doping Panel entrusted with deciding on this matter and set a deadline to 22 September 2022 for both parties to file any objection to its composition.

On 22 September FINA filed its additional brief along with 3 exhibits, including an expert opinion signed by Dr. Jordi Segura. Both parties accepted the composition of the FINA Doping Panel to handle this case.

By letter dated 11 October 2022, the FINA Doping Panel proposed a hearing date by videoconference for 22 October 2022, setting both parties a deadline to 17 October 2022 to accept this date.

Finally, parties agreed on a date for a hearing to be held by videoconference on 7 December 2022.

Regarding witness testimonies, on 20 October 2022, FINA expressed the opinion that it was not necessary for those who had provided a witness statement or expert statement to attend, only to repeat what was in their respective statements. The Athlete on the other hand objected to the holding of an abbreviated hearing as proposed by FINA due to the seriousness of the matter and the sanction which she risked.

By letter dated 14 November 2022, the FINA Doping Panel set a deadline to 18 November 2022 for both parties to discuss and state which witnesses it wished to have heard at the hearing.

On 18 November 2022, FINA informed the FINA Doping Panel that after consultation with Ms Evan's legal team, it was agreed not to hear Mr. Hillinger, Mr. Cargill, Mr. Darville, Mr. Bowleg and Mr. Segura, but that both parties requested the Panel's decision on the need to hear Ms. Evans, Ms. Andison, Ms. Capitano and Ms. Gallagher.

On 29 November 2022, the FINA Doping Panel informed the parties that:

1. The FINA Doping Panel would hear the testimony of Ms. Evans, as a party in the matter and pursuant to its standard practise.
2. After reviewing the witness statements of the potential witnesses, Ms Capitano, Ms Gallagher and Ms Andison and relevant filings by FINA, the FINA Doping Panel found that FINA did not contest the factual statements made in those witness statements and therefore the Doping Panel was willing to accept these statements as uncontested and not to hear testimony from these three witnesses.

**11.** A hearing was held on 7 December 2022. This hearing had to be recessed and the parties were convened to an addition final hearing at which closing arguments were heard on 13 December 2022.

**12.** The operative part of this decision was communicated to the Parties on 17 December 2022.

#### **D. JURISDICTION & APPLICABLE RULES**

**13.** As per Articles C 19.1.3 and C22.8 of the FINA Constitution of 5 June 2021, and Article 8 of the FINA DC Rules, the FINA Doping Panel is the responsible body to adjudicate cases relating to violations of the FINA DC Rules.

The provision of the FINA DC Rules, entitled “Scope”, stipulates that:

*“These Anti-Doping Rules shall apply to and be binding upon FINA and each FINA Member Federation and its members, and each Continental Body or regional organization consisting of FINA Member Federations [...]”*

In the present case, the Bahamas Aquatic Federation is a Member of FINA and Ms. Evans is an Athlete, affiliated with the Bahamas Aquatic Federation, subject to the FINA DC Rules. As such, the Athlete is bound by the FINA DC Rules.

Considering the above, the FINA Doping Panel has jurisdiction to render a decision in this case.

The FINA DC Rules in its version in force in 2021 applies to this case.

## **E. LEGAL DISCUSSION**

### **E1. Applicable provisions of the FINA Doping Code (“DC”)**

#### ***DC 2 Anti-Doping Rule Violations***

*The following constitute anti-doping rule violations:*

#### ***DC 2.1 Presence of a Prohibited Substance or its Metabolites or Markers in an Athlete’s Sample***

***DC 2.1.1*** *It is each Athlete’s personal duty to ensure that no Prohibited Substance enters their bodies. Athletes are responsible for any Prohibited Substance or any of its Metabolites or Markers found to be present in their Samples. Accordingly, it is not necessary that intent, Fault, Negligence or knowing Use on the Athlete’s part be demonstrated in order to establish an Anti-Doping Rule Violation under DC 2.1.*



**DC 2.2 Use or Attempted Use by an Athlete of a Prohibited Substance or a Prohibited Method**

**DC 2.2.1** *It is the Athletes' personal duty to ensure that no Prohibited Substance enters their bodies and that no Prohibited Method is Used. Accordingly, it is not necessary that intent, Fault, Negligence or knowing Use on the Athlete's part be demonstrated in order to establish an anti-doping rule violation for Use of a Prohibited Substance or a Prohibited Method.*

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

**DC 3.1 Burdens and Standards of Proof**

*FINA shall have the burden of establishing that an anti-doping rule violation has occurred. The standard of proof shall be whether FINA has established an anti-doping rule violation to the comfortable satisfaction of the hearing panel bearing in mind the seriousness of the allegation which is made. This standard of proof in all cases is greater than a mere balance of probability but less than proof beyond a reasonable doubt. Where 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.*

**DC3.2 Methods of Establishing Facts and Presumptions**

*Facts related to anti-doping rule violations may be established by any reliable means, including admissions. The following rules of proof shall be applicable in doping cases:*

**DC 3.2.1** *Analytical methods or Decision Limits approved by WADA after consultation within the relevant scientific community or which have been the subject of peer review are presumed to be scientifically valid. Any Athlete or other Person seeking to challenge whether the conditions for such presumption have been met or to rebut this presumption of scientific validity shall, as a condition precedent to any such challenge, first notify WADA of the challenge and the basis of the challenge. The initial hearing body, appellate body or CAS on its own initiative may also inform WADA of any such challenge. Within ten (10) days of WADA's receipt of such*

*notice and the case file related to such challenge, WADA shall also have the right to intervene as a party, appear amicus curiae, or otherwise provide evidence in such proceeding. In cases before CAS, at WADA's request, the CAS panel shall appoint an appropriate scientific expert to assist the panel in its evaluation of the challenge*

**DC 3.2.2** *WADA-accredited Laboratories, and other Laboratories approved by WADA, are presumed to have conducted Sample analysis and custodial procedures in accordance with the International Standard for Laboratories. The Athlete or other Person may rebut this presumption by establishing that a departure from the International Standard for Laboratories occurred which could reasonably have caused the Adverse Analytical Finding.*

*If the Athlete or other Person rebuts the preceding presumption by showing that a departure from the International Standard for Laboratories occurred which could reasonably have caused the Adverse Analytical Finding, then FINA shall have the burden to establish that such departure did not cause the Adverse Analytical Finding.*

## **DC 10 Sanctions on Individuals**

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

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

**DC 10.2.1** *The period of Ineligibility, subject to DC 10.2.4, shall be four 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.*

**DC 10.2.2** *If DC 10.2.1 does not apply, subject to DC 10.2.4.1, the period of Ineligibility shall be two (2) years.*

**DC 10.2.3** *As used in DC 10.2, the term "intentional" is meant to*

*identify those Athletes or other Persons who engage in conduct which they knew constituted an anti-doping rule violation or knew that there was a significant risk that the conduct might constitute or result in an anti-doping rule violation and manifestly disregarded that risk. An anti-doping rule violation resulting from an Adverse Analytical Finding for a substance which is only prohibited In-Competition shall be rebuttably presumed to be*

*not "intentional" if the substance is a Specified Substance and the Athlete can establish that the Prohibited Substance was Used Out-of-Competition. An anti-doping rule violation resulting from an Adverse Analytical Finding for a substance which is only prohibited In-Competition shall not be considered "intentional" if the Substance is not a Specified Substance and the Player can establish that the Prohibited Substance was Used Out-of-Competition in a context unrelated to sport performance.*

### **DC 10.6 Reduction of the Period of Ineligibility based on No Significant**

#### **Fault or Negligence:**

### **DC 10.6.2 Application of No Significant Fault or Negligence beyond the**

#### **Application of DC 10.6.1**

*If an Athlete or other Person establishes in an individual case where DC 10.6.1 is not applicable that he or she bears No Significant Fault or Negligence, then, subject to further reduction or elimination as provided in DC 10.7, the otherwise applicable period of Ineligibility may be reduced based on the Athlete or other Person's degree of Fault, but the reduced period of Ineligibility may not be less than one-half of the period of Ineligibility otherwise applicable. If the otherwise applicable period of Ineligibility is a lifetime, the reduced period under this rule may be no less than eight (8) years.*

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

*In addition to the automatic Disqualification of the results in the Event which produced the 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 or any medals, points and prizes.*

### **DC 10.13 Commencement of Ineligibility Period**

*Where an Athlete is already serving a period of Ineligibility for an anti-doping rule violation, any new period of Ineligibility shall commence on the first day after the current period of Ineligibility has been served. Otherwise,*

*except as provided below, the period of Ineligibility shall start on the date of the final hearing decision providing for Ineligibility or, if the hearing is waived or there is no hearing, on the date Ineligibility is accepted or otherwise imposed.*

***DC 10.13.1 Delays not attributable to the Athlete or other Person***

*Where there have been substantial delays in the hearing process or other aspects of Doping Control, 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 the 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.*

***DC 10.13.2 Credit for Provisional Suspension or Period of Ineligibility Served***

*DC 10.13.2.1 If a Provisional Suspension is respected by the Athlete or the other Person, then the Athlete or other Person shall receive a credit for such period of Provisional Suspension against any period of Ineligibility which may ultimately be imposed. If the Athlete or other Person does not respect a Provisional Suspension, then the Athlete or other Person shall receive no credit for any period of Provisional Suspension served. If a period of Ineligibility is served pursuant to a decision that is subsequently appealed, then the Athlete or other Person shall receive credit for such period of Ineligibility served against any period of Ineligibility which may ultimately be imposed on appeal.*

**E2. The Athlete's position**

**14.** The Athlete held that on or about 11 September 2021, she was in her hotel room at the Palazzo Caracciolo Napoli when she cut her finger on the wrought-iron barrier of her balcony. The laceration was significant for somebody who had to spend most of her days in a chlorinated pool. Having no commonly used antibiotic in the USA, such as Neosporin, nor a team doctor readily on hand, and concerned with avoiding infection, she went to a close by pharmacy. Ms. Evans did not speak Italian, and the pharmacist on duty did not speak English, so she simply showed the

pharmacist her finger. The pharmacist returned with a “Trofodermin” cream. The Athlete alleges she tried to pay for the cream with her bank card, but that it would not process, so she had to use cash. Ms. Evans recalled looking at the Trofodermin, but it was in Italian, and she did not have reason to believe that it contained any banned substances. She claims she thought she was simply using a topical cream akin to Neosporin, because she never associated something banned with an antibiotic ointment. Ms. Evans did not recall seeing any doping warning on the box, but she did discard the box when she opened the tube of Trofodermin. She used the cream as needed under her bandage and continued applying it for a few days until her injury healed.

**15.** On or about 30 October 2021, the Athlete was back at her residence when she slipped and fell on wet concrete, causing a significant injury to her knee. For approximately 5 days after, recalling that she still had the Trofodermin in her toiletry bag and that she had used it successfully, she used the cream rather than going to the store to purchase new antibiotic cream.

**16.** The Athlete argued that:

- Her positive test was more likely than not caused by her use of a Trofodermin cream purchased in Italy. The Trofodermin contained clostebol, a substance that Ms. Evans had never even heard of until she received notification of her positive test. The described use of the Trofodermin cream containing clostebol purchased by Ms. Evans is consistent with the Adverse Analytical Finding.
  
- on a balance of probability, the positive test was more likely than not caused by her use of Trofodermin purchased at *Farmacia del Sole* or a pharmacy in close proximity;
  
- The default or starting sanction should be 2 years, as her use of the substance found was unintentional, as she never intended to cheat, nor could she have engaged in conduct that she knew to be an anti-doping rule violation because she was using a cream for dermal injuries sustained in two separate incidents outside of competition;

- Ms. Evans did not know that the cream that she was given by the pharmacist contained clostebol, but believed the cream to be akin to that of “Neosporin”, an antibiotic healing cream used to treat cuts in North America;
- She never associated topical use of a cream provided over the counter as something that could contain a prohibited substance;
- The Athlete further never associated steroids or banned substances with an antibiotic cream;
- While the box contained a “doping” insignia with a red line through it, the Athlete did not reference the box (but rather the tube itself) ;
- When Ms. Evans used the Trofodermin, she did not know that there was a significant risk that conduct might constitute or result in an anti-doping rule violation; therefore, she could not have “manifestly disregarded that risk.”
- Hence in light of the above, the Athlete was not significantly negligent or significantly at fault.
- That using the Cilic vs ITF scale (**CAS 2013/A/2237**) and in reference to a case bearing factual similarities involving Clostebol, notably among others, (**NIF & FIS vs Johaug, CAS 2017/A/5015**), the FINA Doping Panel should consider the additional points on assessing the subjective factors:
  - a) Despite her athletic experience, Ms. Evans is still actively learning about anti-doping, and she would elaborate on her naivete that led to her ADRV.
  - b) She was in a foreign country where she did not speak the native language.
  - c) She was generally on her own with respect to treating her injury sustained in her hotel room and did not have the ability of family or doctors to assist her.
  - d) Her level of awareness was reduced by a careless but understandable mistake, in that she did not believe that an antibiotic

cream that would heal a cut carried anti-doping risks in the way that taking a pill, drink or shot would. For that matter, she never considered an antibiotic cream to contain a steroid.

e) The Athlete, who first experienced an injury while in a foreign country, and then again in the U.S. (away from her family), was just trying to treat her cuts and abrasions and doing so in a way that she thought was safe and effective. Hence, in no way were her actions related to sport performance.

Hence a sanction range within 12 and 18 months.

### **E3 FINA's Position**

17. FINA's position was based on the following assertions.

- The Athlete had not been able to establish source and how the substance entered into her system, nor that it was unintentional;
- Based on the information received from NADO Italy, *Farmacia del Sole* in Naples, Italy did not sell the Trofodermin cream to the Athlete in September 2021. The pharmacy did not sell any tube of Trofodermin cream in September 2021. Accordingly, the FINA Doping Panel cannot accept that the source of the prohibited substance in the Athlete's sample was the use of the Trofodermin cream allegedly purchased by the Athlete on 11 September 2021.
- The Athlete provided no dated proof of purchase of the tube, hence the Trofodermin tube of Ms. Evans could have been purchased after she was notified of the AAF.
- The pictures of the injuries provided by the Athlete were unreliable because it is not known when they were taken and whether it is Ms. Evans in the picture. In this regard, FINA added that the publicly available videos of the Athlete from November 2021 would appear to suggest that any alleged abrasion to her left knee had been fully healed by then.
- The Athlete displayed reckless behaviour and had not fulfilled the most basic duty that is expected from an International-level athlete. A cursory search of the product on the internet would have made it abundantly clear to the Athlete that Trofodermin cream contains the prohibited steroid clostebol. Moreover, the fact that this cream contained clostebol should be well-known in the athletic community

as evidenced by the fact that multiple high ranked athletes have tested positive for clostebol in recent years for use of Trofodermin;

- The Athlete was at a competition with her International Swimming League Team (DC Trident) when she allegedly purchased the cream. It would thus have been easy for her to seek guidance from someone of the team or someone from the medical staff of the competition, rather than going to buy Trofodermin on her own to self-medicate.
- Ms Evans did not detail any precaution that she took to ensure that no prohibited substances entered her system – she did not consult a doctor or a physician before taking the product and failed to declare the use of the product on her Doping Control Form.

## **18. E4 FINA Doping Panel Findings**

### **18.1 Establishment of the presence of a prohibited substance**

Pursuant to DC 3.1, as a starting point, FINA shall have the burden of establishing that an ADRV has occurred. The standard of proof shall be whether FINA has established an ADRV to the comfortable satisfaction of the FINA Doping Panel, bearing in mind the seriousness of the allegation which is made. In substance, under DC 3.2.1 and 3.2.2, WADA-accredited laboratories benefit from a presumption in favour of the validity of both their analytical methods and their analyses as such. FINA, in turn, also benefits from these presumptions when it asserts an ADRV based on a WADA-accredited laboratory's confirmation of the "Presence" of a Prohibited Substance in an athlete's sample.

In the present case, the analytical report of the Sample A3156962 provided by the Athlete indicated the presence of the prohibited substance Clostebol and the Athlete expressly waived her right to the analysis of the Sample B on 26 February 2022.

The Athlete's A Sample was analysed by a WADA-accredited laboratory. Thus, and as noted, the Laboratory benefits from the presumption in DC 3.2.2 that it has conducted sample analysis and custodial procedures in accordance with the ISL. The Athlete did not try to rebut such presumption.

It is therefore not under dispute that it is established that there is a presence of a prohibited substance or its metabolites or markers in the



Athlete's Sample, hence an anti-doping rule violation. FINA Doping Panel accepts that in this matter the Athlete violated both DC 2.1 and DC 2.2.

## **18.2 The source of the AAF**

The Athlete has explained the origin of the prohibited substance in her system and argued that it came from the use of Trofodermin which was purchased in Italy. FINA has disputed this and argued that the Athlete had not met her burden of proof to establish the source of the AAF.

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. 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.

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.

(iv) 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.

(v) 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.

(vi) 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.

(vii) 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.

(viii) 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.

#### **18.4 Commencement of the Period of Ineligibility and Credit for Provisional Suspension**

Pursuant to DC 10.13.1, 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. DC 10.11.4 provides for credit for provisional suspensions.

In this case, the FINA Doping Panel does not consider that there was any substantial delay. In addition, it is to be noted that a hearing could have been held before the FINA Doping Panel in October and it was due to the parties non-availability that a hearing could not be held. The Athlete has been provisionally suspended since 14 February 2022, the time she served under provisional suspension must be credited against the period of ineligibility imposed.

### **18.5 Disqualification**

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.

### **18.6 Costs**

According to DC 12.4, Member Federations shall be obliged to reimburse FINA for all costs (including but not limited to Laboratory fees, interpretation and hearing expenses and travel) related to an anti-doping rule violation, Missed Test or Filing Failure committed by an Athlete or a Person affiliated with that Member Federation.

As no such costs appear to have been borne by FINA in this case, nor claimed, the present decision is rendered without costs.

## **18.7 Right of Appeal**

As per Article 13.6.1 of the FINA DC Rules, this decision can be appealed by Ms. Evans within twenty-one (21) days from the date of receipt of the decision by email, exclusively to the Court of Arbitration for Sport. The address of the Court of Arbitration for Sport is:

Court of Arbitration for Sport

Palais de Beaulieu, Avenue des Bergières 10, 1004 Lausanne

Switzerland

## **19. 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.

3. The decision is rendered without cost.

4. Any appeal against this decision may be referred to the Court of Arbitration for Sport (CAS), Lausanne, Switzerland not later than twenty-one (21) days after notification by email of the full reasoned decision.

Done in Lausanne on 15 February 2023

On behalf of the FINA Doping panel

Chairman

A handwritten signature in black ink, appearing to be 'R. Fox', written in a cursive style.

Robert Fox