

IN THE MATTER OF PROCEEDINGS BROUGHT BY THE INTERNATIONAL TENNIS INTEGRITY AGENCY UNDER THE 2022 TENNIS ANTI-DOPING PROGRAMME

Before:

Clifford Hendel (Chair)
Lucy Martinez
Professor Dorian Haskard

BETWEEN:

International Tennis Integrity Agency (“ITIA”)

Anti-Doping Organisation

- and -

Stefano Battaglino (the “Player”)

Respondent

FINAL DECISION OF THE INDEPENDENT TRIBUNAL

A. INTRODUCTION

1. This is the final decision of the Independent Tribunal appointed pursuant to the 2022 Tennis Anti-Doping Programme (“TADP”) to determine a charge brought on 7 March 2023 by the International Tennis Integrity Agency (“ITIA”) – an independent body established by the international governing bodies of tennis to promote, encourage and safeguard the integrity of professional tennis worldwide – against the Player, a 25-year-old Italian tennis player, with career-high rankings of 536 (singles) and 670 (doubles).
2. The Player has been charged with Anti-Doping Rule Violations (“ADRVs”) under Articles 2.1 and 2.2 of the TADP as a result of the presence of metabolites of Clostebol in a urine sample

collected during his participation in the WTT M15 Casablanca 2022 tournament in Morocco held in September 2022 (the “Event”).

3. Clostebol is an S1 anabolic androgenic steroid and a Prohibited Substance. As such, its presence (or that of its metabolites) in the Player’s Sample, or its use by the Player, are so-called “strict liability” ADRVs under TADP Articles 2.1 and 2.2 respectively (set out in Section B below).
4. The Player does not, and indeed cannot, dispute that Clostebol metabolites were in his urine and thus does not, and indeed cannot, dispute (despite repeated assertions to the contrary) that he committed the ADRVs. However, he argues (or is understood to argue, having focussed his arguments on No Fault or No Significant Fault and addressing only passingly the question of no intention) that the period of Ineligibility to be imposed on him as a consequence of the ADRVs should: (a) be reduced (from four years to two) on the basis that there was no intent to commit the ADRVs; and/or (b) be reduced further or eliminated entirely, on the basis that the violation involved either No Fault or Negligence or No Significant Fault or Negligence under TADP Articles 10.5 and 10.6, respectively.
5. The Player has been provisionally suspended since 1 February 2023.
6. The Independent Tribunal is grateful to both Parties and their counsel for their helpful written and oral submissions, and for their collaboration in the management of this proceeding.

B. LEGAL FRAMEWORK

7. The ITIA has charged the Player with a violation of TADP Article 2.1, which states that the following is an Anti-Doping Rule Violation: *“The presence of a Prohibited Substance or any of its Metabolites or Markers in a Player’s Sample, unless the Player establishes that such presence is consistent with a TUE [Therapeutic Use Exemption] granted in accordance with Article 4.4”,* it being *“each Player’s personal duty to ensure that no Prohibited Substance enters their body”*.
8. The ITIA has also charged the Player with a TADP Article 2.2 ‘Use’ violation, involving *“Use or Attempted Use by a Player of a Prohibited Substance or a Prohibited Method, unless the Player establishes that such Use or Attempted Use is consistent with a TUE granted in*

accordance with Article 4.4”, it being “each Player’s personal duty to ensure that no Prohibited Substance enters their body”.

9. ADRVs under both TADP Articles 2.1 and 2.2 require that the Independent Tribunal be comfortably satisfied that the ITIA has established each of the elements of the ADRVs charged. Both are strict liability offenses, with no requirement that the ITIA prove the source of the Prohibited Substance. In particular, both articles provide that *“it is not necessary to demonstrate intent, Fault, Negligence or knowing Use on the Player’s part in order to establish an [ADRV...]; nor is the Player’s lack of intent, Fault, Negligence or knowledge a defence to a charge that an [...ADRV] has been committed.”*

10. TADP Articles 10.2.1 and 10.2.2 provide that:

“10.2 The period of Ineligibility imposed for an Anti-Doping Violation under Article 2.1, 2.2 or 2.6 that is the Player’s [...] first doping offence will be as follows, subject to potential elimination, reduction, or suspension pursuant to Articles 10.5, 10.6 or 10.7.

10.2.1 ...[T]he period of Ineligibility will be four years:

10.2.1.1 where the Anti-Doping Rule Violation does not involve a Specified Substance or a Specified Method, unless the Player [...] establishes that the Anti-Doping Rule Violation was not intentional...

10.2.2 If Article 10.2.1 does not apply, then [...] the period of Ineligibility will be two years.”

Thus, the benchmark sanction is four years of Ineligibility, unless the Player rebuts the presumption of intentionality, in which case the sanction is reduced to two years.

11. TADP Article 10.2.3 provides that:

“As used in Article 10.2, the term ‘intentional’ is meant to identify those Players [...] who engage in conduct that 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”.

12. TADP Article 10.5 provides for the elimination of the period of Ineligibility on the grounds of No Fault or Negligence. TADP Article 10.6 provides for the reduction of the period of Ineligibility on the grounds of No Significant Fault or Negligence.

13. The terms “*No Fault or Negligence*” and “*No Significant Fault or Negligence*” are defined in the TADP Appendix as follows:

“No Fault or Negligence. The Player or other Person establishing that they did not know or suspect, and could not reasonably have known or suspected even with the exercise of utmost caution, that they had Used or been administered the Prohibited Substance or Prohibited Method or otherwise violated an anti-doping rule. Except in the case of a Protected Person or Recreational Athlete, for any violation of Article 2.1 the Player must also establish how the Prohibited Substance entered their system.” (emphasis added)

“No Significant Fault or Negligence. The Player or other Person establishing that their Fault or Negligence, when viewed in the totality of the circumstances and taking into account the criteria for No Fault or Negligence, was not significant in relationship to the Anti-Doping Rule Violation. Except in the case of a Protected Person or Recreational Athlete, for any violation of Article 2.1 the Player must also establish how the Prohibited Substance entered their system.” (emphasis added)

14. When a sanction is imposed, the period of Ineligibility starts on the date that the decision is issued, provided that any period of Provisional Suspension served by the player must be credited against the total period of Ineligibility to be served (TADP Article 10.13.2.1).

15. Further, TADP Article 9.1 provides that an ADRV committed by a Player in connection with or arising out of an In-Competition test automatically leads to disqualification of the results obtained by the Player in the Competition in question.

16. If the Player establishes that an ADRV based on TADP Articles 2.1 or 2.2 was not intentional then the period of Ineligibility is two years, subject to potential reduction or suspension (provided the Player establishes how the Prohibited Substance entered their system) pursuant to TADP Article 10.5 or 10.6. Otherwise, the period of Ineligibility is four years.

C. SUMMARY OF FACTS AND PROCEDURAL BACKGROUND

17. On 14 September 2022, the Player participated in the first round of the Event in Morocco.

18. Due to [REDACTED], the Player called for a medical “time-out” during the second set of the match. He was attended to by a tournament physiotherapist, who (the Player testifies) massaged [REDACTED] with a cream or lotion.

19. Immediately after the match concluded, the Player was informed that he had been randomly selected for a doping control test and accordingly an In-Competition urine Sample was collected. On 17 October 2022, the WADA-accredited laboratory reported an Adverse Analytical Finding for Clostebol metabolites in the Player's A Sample. On 5 January 2023, after the Player requested testing of his B Sample, the B Sample confirmed the finding. The Player did not have a TUE.

20. On 1 February 2023, the ITIA sent the Player a formal notice that he may have committed an ADRV under Articles 2.1 and/or 2.2 of the TADP on the basis that Clostebol metabolites were found in his Sample collected during the Event. The Player was given the opportunity to respond and was advised of the consequences of the ADRV. The Player was also advised that he was provisionally suspended with effect from 1 February 2023.

21. The Player provided a response to the Pre-Charge Notice via the TADP Portal (received on 14 February 2023), in which he denied the possible ADRVs. The Player commented as follows:

"I am now responding to your communication of 1 February 2023 regarding the notification of a potential doping violation.

I learned that I have been suspended as an athlete until the conclusion of this procedure.

I cannot admit a doping code violation if I have not committed it and I am shocked by the communication I read.

I have never used doping substances in my entire life as an athlete to improve my performance.

I participated in the ITF tournament in Morocco and then I found out I was positive for this substance (Clostebol) which I have never felt in my life.

In my previous communications I have provided my own explanations, but at this point I prefer to hire a qualified medical expert to read the results of the analysis on sample B and produce his report on the matter.

I cannot admit what I did not do, even if it costs me the impossibility of training and participating in competitions."

22. On 7 March 2023, the ITIA sent the Player a Notice of Charge which advised that he was being charged with the commission of an ADRV under TADP Articles 2.1 and/or 2.2 on the basis that Clostebol metabolites were found to be present in his urine Sample collected during the Event. The Player was advised of his options and the consequences of an ADRV.

23. On 26 March 2023, the Player wrote to the ITIA reasserting his denial of the ADRVs and requesting that his case be referred to the Independent Panel.

24. Subsequently, and in these proceedings, while not taking issue with the presence of Clostebol in his urine, the Player has maintained that the origin of the Clostebol in his system on the date of the sample collection was the cream or lotion applied [REDACTED] by the attending tournament physiotherapist during the medical time-out in that day's match.

25. At the Player's request, the ITIA through the ITF arranged for the Player to be provided with the contact details of the physiotherapist; however, repeated efforts by the Player's counsel to contact him were unavailing. In this regard, the Player asserts that had he been able to have access to the physiotherapist subsequent to the administration of the massage, he likely would have been able to confirm his narrative and establish that the massage was the source of the Prohibited Substance in his body.

26. The Independent Tribunal is composed of Clifford J. Hendel, Chair (appointed on 18 April 2023), Lucy Martinez (appointed on 4 August 2023) and Prof. Dorian Haskard (appointed on 1 September 2023, the date of constitution of the Independent Tribunal).

D. PARTIES' BRIEFS

27. The Player's position, as confirmed at the hearing, is set out in the "Merits" section of his Brief, which provides the following, in paragraphs 37 through 44:

"37. This dispute clearly concerns a case of accidental intake of a banned substance.

On 14 September 2022, the athlete, during the match against tennis player Barreto Sanchez, called a medical time-out to get a massage [REDACTED] from the tournament physiotherapist

38. The physiotherapist massaged the athlete using a cream. He was not wearing gloves and the athlete does not remember whether the physiotherapist had cream on his hands after massaging another athlete previously.

Approximately 1.5 h after the massage the athlete underwent a doping control and tested positive for metabolites of the substance Clostebol.

The results of the counter-analysis on sample 'B' revealed the presence of Clostebol metabolites only at trace levels.

39. *The presence of Clostebol metabolites in the athlete's urine is not discussed.*

40. ***As argued by Prof. Dr. Pieraccini, the fact that there were only trace levels of Clostebol metabolites in Mr. Battaglino's urine and that the athlete had undergone an anti-doping control 21 days earlier with negative results demonstrates, however, that there was no intake of Clostebol to influence the athlete's sporting performance and therefore no doping action.***

41. *It is very likely, therefore, that the cream used by the tournament physiotherapist contained the substance Clostebol. There have been multiple cases of accidental positivity linked to the presence of a regularly marketed drug called [REDACTED] available in cream and spray form.*

42. *It is certainly probable, moreover, that the physiotherapist applied the cream beforehand to an athlete and then massaged Mr. Battaglino without gloves, thus causing epidermal contamination.*

43. *The athlete is convinced that the physiotherapist's intervention is the trigger for the Clostebol positivity, also because:*

- *he had been tested 21 days earlier during the tournament in Egypt and in that occasion he tested negative for the use of doping substances;*
- *during his career he has never incurred an adverse finding;*
- *he always fought the use of prohibited substances and / or methods prohibited in sport;*
- *he pays maniacal attention when taking any type of medicine and/or supplement precisely because he is worried about any potential anti-doping violations.*

44. *The athlete therefore argues that the presence of Clostebol into his body occurred accidentally, without his knowledge and without any doping purpose.*

He absolutely believes that he has no fault or negligence, or at least very minimal fault.
[reproduced as written]

28. The Player's Request for Relief is as follows:

"55. ***Firstly:*** *recognise No Fault or Negligence [and] discharge the Athlete from all charges*

On subordinated basis: *in the unlikely event that this Independent Tribunal does not recognise the absence of fault or negligence, recognise No significant fault or negligence*

on the part of the Athlete in accordance with Article 10.6.2 TADP with the subsequent determination of the sanction. In any event, it is requested that the disqualification starts from the date of the control, 14 September 2022.

On an extremely subordinated basis: *if the Independent Tribunal- but it is hard to understand why- considers that there is no significant fault or negligence, it is requested to recognise the minimum degree of fault on the part of the athlete and, evaluating all the circumstances of the case in question, to apply the minimum sanction.*

In any event, it is requested that the disqualification starts from the date of the inspection, 14 September 2022

In any case, the ITF Independent Tribunal is requested to formally demand to the director of the M15 tournament in Casablanca, Morocco, Mr. Chamoumi to provide the list of the tournament's physiotherapists present on 14 September 2022 during the match between Mr. Stefano Battaglino and Mr. Barreto Sanchez.” [reproduced as written]

29. The ITIA's position is set out in its Brief, which provides in relevant parts as follows:

- “44. *The ITIA respectfully submits that the Player's explanation is nothing more than mere speculation. The Player has failed to produce any evidence to support his version of events and his scientific evidence is soundly rebutted by Prof. Ayotte.*
45. *In his brief, the Player requested the 'ITF Independent Tribunal to formally demand the director of the M15 Tournament in Casablanca, Morocco, Mr. Chamoumi to provide the list of the tournament's physiotherapists present on 14 September 2022 during the match between Mr. Stafano [sic] Battaglino and Mr. Barreto Sanchez and the list of the tournament-approved medicines'.*
46. *The ITIA contacted the ITF to procure the information for the Player and on 15 July 2023, provided Sport Resolutions with the name of the Tournament Director, the ITF Supervisor and the name, email address and phone number for the tournament physiotherapist. The ITIA understands that the Player's counsel will contact the tournament physiotherapist to clarify the use of medical products used at the Event. The ITIA reserves its right to respond to any further evidence or submissions from the Player on this point.*

47. *The ITIA's primary submission on the facts is that it is highly unlikely that the tournament physiotherapist would use a product containing a banned substance at the Event, which was an international tournament and part of the ITF World Tennis Tour.*
48. *Even accepting arguendo that the physiotherapist did use a product containing a banned substance, there is no reason why a physiotherapist would use a product containing Clostebol – an antiseptic and healing cream – to massage [REDACTED]. Furthermore, it is doubtful that a professional physiotherapist would treat a second patient before washing his hands after the first patient. Finally, there is no evidence that products containing Clostebol are available to purchase in Morocco.*
49. *In any event, the Player's hypothesis is refuted by Prof. Ayotte's scientific analysis of the Player's sample. Prof. Ayotte's expert opinion is that 'It is not possible to draw any conclusion based on these findings other than resulting from the previous administration of clostebol by the athlete. The nature of the clostebol-product, the timing and frequency of use cannot be deduced from a single spot urine sample. The athlete was tested (negative) once before, 21 days earlier, which indicates that clostebol was administered after that date. Based on all the above, there is no reason to exclude a deliberate use of a clostebol-product including pills, sprays or creams during that period preceding the positive test collected on 14 September 2022'.*
50. *Prof. Ayotte states that the presence of metabolite M1 from single or repeated oral doses is detected for only approximately 5 days post-dosing, and concludes that there is 'zero evidence' linking the massage received by the Player to the administration of Clostebol.*
51. *It is therefore 'impossible' to exclude doping scenarios and to find the physiotherapist at fault:*

'It is not possible, based on the results of a single urine sample to exclude any scenario. As shown earlier, the presence of metabolite M1 from oral doses (single or repeated) of clostebol acetate is detected for only approximately 5 days post-doping. On the other hand, in the contamination scenario reported by Gessner et al, only one out of 5 volunteers excreted M1 after one hour. It is therefore in my opinion, impossible to affirm that the results of urine sample 1104947 are due to one scenario, i.e., the contamination via a massage taken 1,5 h prior to the test and not to any other possible sources.

Finally, as mentioned by Prof. Pieraccini, there is zero evidence linking the massage received during the match to the administration of clostebol acetate. [REDACTED] or [REDACTED] are antibiotic creams that are applied to speed up healing on abrasions and erosions, injuries, and wounds. The athlete needed a [REDACTED]. [REDACTED] described that the physiotherapist applied a "lotion"; as far as I know, [REDACTED] or [REDACTED] are not in lotions, but in creams contained in tubes (or Sprays) as shown in the screen capture of the Google search reproduced in Annex 1. Furthermore, there appears to be no reason for a physiotherapist to apply an antibiotic cream for a massage intended to [REDACTED]. [REDACTED]. It is asserted that the physiotherapist could have used or applied [REDACTED] cream (prohibited to athletes) for example just before giving the massage to the player without washing hands. Such a negligent behaviour is incompatible with a professional therapist. Furthermore, no evidence was presented that clostebol-creams are available in Morocco and that the medical services available during the tournament included preparations containing prohibited steroids.

In conclusion, the athlete was tested twice, the first time three weeks prior to the test that returned an AAF for the presence of clostebol metabolites. Based upon the literature, it is impossible to exclude doping scenarios and to affirm that the negligence of a physiotherapist is the likely explanation.'

52. As matters stand, the ITIA respectively submits that the Player falls far short of providing the Tribunal with persuasive evidence that his explanation for the AAF is more likely than not to be true. The Player has not produced any evidence to support his explanation, let alone 'specific, objective and persuasive evidence' as required by CAS jurisprudence."

30. The ITIA, beyond characterizing the Player's position as "mere speculation", has offered a number of observations tending to undercut the Player's case, i.e., suggesting that it would seem highly unlikely that a professional physiotherapist in Morocco would (i) use, as a cream or lotion [REDACTED] in a tournament, a product (as confirmed by the ITIA) unavailable for purchase in the country, prohibited by the anti-doping rules, and designed as a healing agent ([REDACTED]), (ii) treat a player without washing his hands after a prior treatment of another player, and (iii) not discuss with the player the composition of the product being applied, especially if there was any doubt regarding its compliance with the anti-doping rules. The ITIA further pointed out that if the physiotherapist

did indeed apply a Clostebol product to the Player without washing his hands or wearing gloves, it could be expected that he would have acted similarly in other occasions and other testing positives would have occurred at or around the Event -- but they apparently did not.

31. The ITIA finally (i) insists that the Player's obligation to keep his body free of prohibited substances applies no less during a match than at any other time, and questions both (ii) the Player's suggestion that highly ranked players, having better access to aid and assistance, are better suited to follow the related strictures than lower-ranked players like himself and (iii) his practice of exercising "*maniacal attention*" over medications he personally obtains and administers to himself, but not to those provided to him by others.

32. The ITIA's Request for Relief is as follows:

"77. Based on the foregoing, the International Tennis Integrity Agency respectfully requests the Independent Tribunal to rule as follows:

- a. Find that the Player has committed ADRVs under TADP Articles 2.1 and 2.2, in that Clostebol metabolites were present in his urine sample collected In-Competition on 14 September 2022;*
- b. Find that the Player has not met his burden to demonstrate that his violations were not intentional within the meaning of TADP Article 10.2.3, and therefore impose a period of Ineligibility of four years;*
- c. Alternatively, if it finds the Player has met his burden of proving that his violations were not intentional within the meaning of TADP Article 10.2.3, to impose a period of Ineligibility of two years, without any further reduction pursuant to TADP Article 10.5 or 10.6;*
- d. Disqualify the results obtained by the Player (with all resulting consequences, including forfeiture of all medals, titles, ranking, points and prize money) at the Event, pursuant to TADP Articles 9.1 and 10.1 respectively, and at subsequent events pursuant to TADP Article 10.10."*

E. THE HEARING

33. The hearing was held remotely on 2 October 2023. It was attended by the following people:
for the Respondent: the Player, Stefano Battaglini, his counsel, Antonio Maria Borello, and

his expert, Prof. Giuseppe Pierracini; for the ITIA: Louise Reilly, external counsel, and Katy Stirling, Ben Rutherford, Nicole Sapstead, Simona Viel, Josh Coakes, Jamie Pethick, Jodie Cox, and Julia Lewis; for the ITF: Stuart Miller, as an observer; as Secretariat to the Independent Tribunal, Astrid Mannheim and Xènia Campàs Gené; Manuela Castello, translator for the Player; Manel Atserias, independent observer; and the Independent Tribunal, comprised of Clifford J. Hendel, Lucy Martinez, and Prof. Dorian Haskard.

34. The Player testified at the hearing in pertinent part as follows:

- He devoted *“maniacal attention”* to the contents of any medication or supplement product that he bought and administered to himself.
- He never used doping substances and never before tested positive.
- He had tested negative in an In-Competition anti-doping control in Cairo, Egypt 21 days prior to testing positive at the Event.
- The physiotherapist who administered [REDACTED] during the medical time-out, that the Player requested due to [REDACTED], did not explain the contents of the cream or lotion used, and this was customary in the circumstances (*“you explain symptoms and they decide what needs to be done”*; *“I was concentrating on the match”*).
- The physiotherapist did not wear gloves during the massage.
- The Player *“struggles to think”* that it should be his responsibility to know or to inquire what the tournament-retained physiotherapist is applying during a medical time-out in the protected environment of a tournament (*“I trusted him; one would never expect he would use prohibited medication”*), noting that while Top 10 or Top 100 players tend to have assistants and advisers (and potentially their own doctors and/or physiotherapists) that permit them to assist with such matters, lower-ranked players such as the Player do not have access to such assistance.
- He was unaware at all relevant times that in Italy (among a small group of countries, not including Morocco) a cream known as [REDACTED] for healing or *“cicatrizing”* wounds which contained Clostebol was available on the over-the-counter market.

35. The Player's expert testified, in pertinent part, as follows on the basis of the Player's B sample and the relevant literature:

- The concentration of Clostebol metabolites in the Player's urine was very low.
- The hypothetical use of an anabolic steroid to enhance performance in two weeks' time would be incapable of obtaining a pharmacological response, especially for Clostebol which is a very weak anabolic steroid and not the "*best choice*" for intentional doping.
- On the basis of the single urine test reviewed, there are no means to directly correlate the massage with the positive sample, but such correlation is "*possible*" and the massage "*cannot be excluded*" as a potential source of the substance in the Player's body.
- It is extremely difficult to differentiate whether the use was inadvertent or whether the use was a case of doping (e.g. using small doses to aid recovery), with the sample having been taken towards the end of the excretion trail.

36. The ITIA's expert was not called to testify. The contents of her report are summarized in the excerpts from the ITIA's Brief above.

F. DISCUSSION

37. As preliminary matters:

38. Firstly, while the Player has not formally and officially recognized the existence of the ADRVs under TADP Articles 2.1 and 2.2 (he indeed denied them in his communications to the ITIA), the nature of his defence and the contents of his brief and evidence proffered at the hearing make clear that he does indeed recognize – as he must in light of their strict liability nature – the ADRVs deriving from the presence of a Prohibited Substance (Clostebol) in his body, limiting his defence to the question of the consequence of (i.e. sanction for) such violations.

39. Secondly, while the large part of his defence is, or appears to be, dedicated to the question of No Fault or Negligence (TADP Article 10.5) or No Significant Fault or Negligence (TADP Article 10.6), with little, if any, separate and express focus on rebutting the presumption of intentionality (TADP Article 10.2.1.1), the Tribunal has understood the defence to be

directed to this latter question (lack of intent being, at the least, implied in the defence which is more expressly focussed on TADP Articles 10.5 and 10.6 and the questions of the presence or absence of Fault or Negligence).

40. This is due to the fact that, in order to avail himself of the benefits of TADP Articles 10.5 or 10.6, the Player must establish how the Prohibited Substance entered his system. Here, the Tribunal finds that this prerequisite has not been met, and the Player (and his medical expert) so concede. See, for example, the first part of the concluding phrase in Dr. Pieraccini's expert report: ***"While it is not possible to demonstrate a direct link to the massage received prior to the September 14 anti-doping control, it should be emphasized that there is a compatibility between the estimated concentrations of Clostebol metabolites in Mr. Battaglino's urine with the timing and route of this possible intake."*** (emphasis added)
41. Thirdly, the Tribunal is aware that the Player has sought access to the Event physiotherapist for some months, and that when the latter's contact information was made available, the physiotherapist did not respond to the Player's efforts to contact him. Patently, this unfortunate inability to contact the physiotherapist who the Player asserts administered a massage using a cream or lotion containing a Prohibited Substance (or administered such previously to another Player and failed to wash his hands before treating the Player) substantially increases the difficulty for the Player in proving source of the Prohibited Substance.
42. But this circumstance does not relieve the Player of his obligation and burden of proof under the TADP. As indicated, the Tribunal finds that the Player has not established how the Clostebol came to be in his system, so his attempts to benefit from Articles 10.5 (potentially eliminating sanctions) and 10.6 (reducing sanctions) are unsuccessful. Instead, his defence is understood to relate to TADP Article 10.2.1 and his efforts to rebut such section's presumption of intentionality (thereby reducing the sanction from four to two years).
43. As set out above, TADP Article 10.2.1 provides for a reduction of the period of Ineligibility for an ADRV under TADP Articles 2.1 or 2.2 in the event that the Player rebuts the presumption of intentionality and TADP Article 10.2.3 contains a definition of intentionality for these purposes.

44. The current state-of-play on the understanding and application of these provisions is well-described in the 2023 decision in the case of UK Anti-Doping Limited v Khan (SR/238/2022):

“11. In a paper by Rigozzi, Haas, Wisnosky, Viret on the 2015 World Anti-Doping Code the authors stated:

‘The 2015 Code does not explicitly require an Athlete to show the origin of the substance to establish that the violation was not intentional. While the origin of the substance can be expected to represent an important, or even critical, element of the factual basis of the consideration of an Athlete’s level of fault, in the context of Article 10.2.3, panels are offered flexibility to examine all the objective and subjective circumstances of the case and decide if a finding that the violation was not intentional is warranted.’

12. There is a very clear distinction between Article 10.2.1, which governs this case, and Articles 10.5 and 10.6 which permit the elimination or reduction of the period of Ineligibility on grounds of No Fault or No Significant Fault or Negligence. Those provisions are subject to an express requirement that ‘the Athlete must also establish how the Prohibited Substance entered the Athlete’s system’, whereas Article 10.2.2 contains no such requirement. The Rigozzi article refers to WADA & UCI v Contador CAS 2011/A/2384 where a minuscule quantity of clenbuterol could not have been deliberately ingested or intended to enhance performance, and was thus inconsistent with the intentional use under the equivalent of Article 10.2.2. But in order for the Athlete to establish No (or No Significant) Fault or Negligence for presence of the substance the athlete had to prove its source.

13. In this case the obligation imposed on the Athlete is to prove (a) that he did not know that the relevant conduct would constitute an ADRV, and (b) that he did not know that there was a significant risk that the conduct might constitute or result in an ADRV, and manifestly disregarded that risk. The special meaning of intentional in this context requires direct intent or, if recklessness is in question, indirect intent. The test is subjective, based on the Athlete’s knowledge, and under Article 8.4.2 the required standard of proof is on the balance of probabilities. The 2021 World Anti-Doping Code (“2021 Code”) had removed from Article 10.2.3 the words ‘Athletes who cheat’, thus removing any need to consider whether the athlete had any intent to enhance performance.

14. *The revision to the 2021 Code introduced a comment to Article 10.2.1.1 in these terms: '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 Article 2.1 an Athlete will be successful in proving that the Athlete acted unintentionally without establishing the source of the Prohibited Substance'.*

[...]

15. *The jurisprudence is clear that proof of the source of the Prohibited Substance is not an essential threshold question which necessarily has to be proved in every case before the Athlete can satisfy Article 10.2.3. In **Villanueva v FINA** (CAS 2016/A/4534) at [37] the panel observed:*

"Furthermore, the Panel can envisage the theoretical possibility that it might be persuaded by an athlete's simple assertion of his innocence of intent when considering not only his demeanour, but also his character and history.... That said, such a situation would inevitably be extremely rare. Even on the persuasive analysis of Rigozzi, Haas et al., proof of source would be 'an important, even critical' first step in any exculpation of intent. 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." (footnotes omitted)

45. Here, the Tribunal finds that the Player has not established the source of the Clostebol, nor corroborated his claim with any specific, probative evidence (or indeed, any evidence). His own expert has concluded that contamination via the massage was no more than one possibility, among others. Indeed, both medical experts agree that neither doping nor inadvertent contamination can be ruled out.

46. In response to questions from the Tribunal at the hearing and in two rounds of focussed Post-Hearing submissions, the Parties have discussed the jurisprudence relating to the requirements to rebut a finding of intentionality for the purposes of TADP Article 10.2.1.1, to determine whether this case could fairly be considered as one of the "extremely rare" cases which could, via "the narrowest of corridors", rebut the presumption of intentionality without proof of source.

47. On the basis of this consolidated, but highly fact-specific, jurisprudence, the Tribunal concludes that the Player has not, on the balance of probabilities, rebutted the presumption of intentionality with the specific, concrete, objective, and persuasive evidence required by the jurisprudence.
48. In Lawson v IAAF (CAS 2019/A/6313), which was sharply criticized in a case note authored by the outgoing chair of the WADA Compliance Review Committee (LawinSport, 24 April 2020) as having flung the “floodgates” wide open, the athlete supported his claim that his positive test result for a prohibited substance was caused by the ingestion of contaminated meat with very substantial and concrete corroborating evidence (including a polygraph test, hair analysis to confirm dosage, records of the restaurant where he had eaten and of the meat-packing company which supplied the restaurant) and this, in the context of scientific evidence supplied by the IAAF, was evaluated by the tribunal as insufficient to consider the athlete’s explanation as less than probable.
49. The factual evidence in the present case is much more meagre than that in Lawson; indeed, it consists essentially of the Player’s testimony, bereft of corroboration of any sort. As to the scientific evidence in this case, it only establishes the possibility of inadvertent contamination via the massage but equally recognizes the possibility of other, non-inadvertent origins. Accordingly, the finding of No Fault or Negligence in Lawson and the consequent exoneration of the athlete from any sanction has no material bearing on the present case, as the cases are entirely distinguishable on their factual and scientific underpinnings.
50. In WADA v. Swimming Australia, Sport Integrity Australia & Shayna Jack (CAS 2020/A/7579) and Sport Integrity Australia v. Shayna Jack & Swimming Australia (CAS 2021/A/7580), the panel affirmed a decision recognizing a successful rebuttal of intention for the purposes of TADP Article 10.2 and imposing a sanction of two years Ineligibility as a result. Jack involved a pharmacologically irrelevant dose of the steroid in question, a substance in respect of which the specifics of the excretion meant that direct intention could be excluded and that was irrelevant for the discipline, in a situation in which the athlete was found to be extremely credible.

51. The evidence in the present case is far less compelling than in Jack; in particular, the specificities of excretion mean that direct intention cannot be excluded, and the scientific testimony was that small doses of Clostebol could have the effect of accelerating recovery. For completeness, the Tribunal notes that it found the Player generally credible in his testimony at the hearing; nonetheless, this credibility does not approach the level of thoroughly corroborated, extreme credibility that infuses the decision in Jack.
52. Finally, in UK Anti-Doping Limited v Khan (SR/238/2022), the panel determined that the boxer had satisfied his burden of rebutting the presumption of intentionality in a *“rare case in which the Athlete was fortunate to have been required to take a doping test 7 days before the fight providing a clear marker that any subsequent sample would only have been ingested 7 days or less before the bout, thus excluding any possible argument that the residual sample could have been derived from the ingestion of a pharmacologically effective dose administered before 12 February 2022.”*
53. The present dispute is not such a *“rare case”* with such a recent prior negative test result sufficient, in light of the relevant excretion period, to exclude a doping scenario; indeed the Player’s expert agreed that this possibility could not be excluded. Hence the Khan case is of no assistance to the Player either.
54. In summary, the scientific and factual evidence present in this case are not sufficient to consider that the presumption of intentionality has been rebutted in the absence of proof of source. Although the Tribunal recognises that the Player’s inability to contact the tournament physiotherapist hampered his possible evidence-gathering, the Tribunal finds that, based on the text of the TADP and the jurisprudence summarised above, on the balance of probabilities, the Player has failed to rebut the presumption of intentionality.
55. The jurisprudence cited by the Player in his second Post-Hearing Submission does not affect the foregoing. In each of the four CAS cases cited (all involving Clostebol), the parties were in agreement as to how the substance had entered the athlete’s system; accordingly, TADP Articles 10.5 (No Fault or Negligence) and 10.6 (No Significant Fault or Negligence) entered into play, leading to a reduction of the sanction in three cases and the elimination in one. Here, however, the only agreement between the Parties involves the concurrent possibilities of inadvertent contamination-by-massage and by intentional doping: there is no

room for the application of TADP Articles 10.5 or 10.6, as the source of the Prohibited Substance was not proven or agreed.

56. Under the circumstances, and on the balance of probabilities, the Tribunal determines that the Player, Stefano Battaglino, has failed to establish that the ADRVs were not intentional, and accordingly the period of Ineligibility shall be four years. In this regard, the Tribunal finds that the (to some extent, understandable) practices of the Player mentioned in paragraph 31 above reflect a lack of proper diligence on his part, and therefore buttress the conclusion that he has failed to rebut the presumption of intentionality.

57. In so finding, and for completeness, the Tribunal does not (and need not) conclude that intentional doping has occurred. Instead, (i) on application of the strict set of rules which the Tribunal must apply, including the presumptions contained in such rules, (ii) on the basis of a challenging burden of proof not easily overcome, and (iii) in the light of a large body of diverse jurisprudence which the Tribunal must take into account, we find only that the presumption of intentionality has not been rebutted on the balance of probabilities.

58. Finally, the Tribunal notes, and is not unsympathetic to, the conundrum created for the non-doping athlete by the combination of these strict rules and the ever-increasing capacity for scientific detection of increasingly irrelevant trace elements of contaminating Prohibited Substances.

G. CONCLUSION

59. For the reasons set out above, we find that:


- a. Mr Battaglino is an International-Level Player as defined in the TADP; Mr Battaglino has committed ADRVs under TADP Articles 2.1 and 2.2 in that Clostebol metabolites were present in his urine Sample collected In-Competition on 14 September 2022;
- b. Mr. Battaglino has not met his burden to demonstrate that his violations were not intentional within the meaning of TADP Article 10.2.3 and we therefore impose a period of Ineligibility of four years, starting on the date hereof and with credit for the provisional suspension in effect from 1 February 2023.

- c. Mr Battaglino's results obtained at the Event (namely, the WTT M15 Casablanca 2022 tournament) are disqualified (with all resulting consequences, including forfeiture of any/all medals, titles, ranking points and Prize Money), pursuant to TADP Articles 9.1 and 10.1, and his results from subsequent events are disqualified pursuant to TADP Article 10.10.
- d. The Independent Tribunal makes no order for costs, so under TADP Article 8.5.4 the Parties will each bear their own costs.
- e. All further requests or prayers for relief are dismissed.

H. RIGHT OF APPEAL

60. In accordance with Article 13.8 of the TADP, the Parties may appeal this decision by submitting an appeal with the Court of Arbitration for Sport (**CAS**), located at Palais de Beaulieu Av. des Bergières 10, CH-1004 Lausanne, Switzerland (procedures@tas-cas.org).

61. TADP Article 13.8.1.1 sets the deadline for the Player to file an appeal to CAS, which is 21 days from the date of receipt of this decision.



Clifford J. Hendel, Chair



Lucy Martinez



Prof. Dorian Haskard

London, UK
30 October 2023

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