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FINA Doping Panel 03/10

FINA Doping Panel

comprised of

F.D. van Heijningen	(NED)	Chairman
William Bock, III	(USA)	Member
Farid Ben Belkacem	(ALG)	Member

In the proceedings against

the swimmer **Ryan Napoleon**
affiliated to the Swimming Australia, Ltd.

represented by: Mr. John E. Marshall
Mrs. Suzanne Wallace
Sydney, Australia

I THE PARTIES

1.1 The FEDERATION INTERNATIONALE de NATATION (FINA) is the International Federation governing disciplines related to swimming. FINA has established and is carrying out, *inter alia*, a doping control program, both for in-competition as well as out-of-competition testing.

1.2. SWIMMING AUSTRALIA LTD. (SAL) is a member of FINA. SAL is required to recognize and comply with FINA's anti-doping rules which are set out in the FINA Doping Code ("FINA DC"). The FINA DC is directly applicable to and must be followed by *Competitors, Competitor Support Personnel*, coaches, physicians, team leaders, and club and representatives under the jurisdiction of SAL.

1.3 Mr. Ryan Napoleon is a 20 year old male Australian swimmer. Mr. Napoleon lives in the State of Queensland, Australia. He trains at the St. Peters Western Swim Club. He was selected to compete for the Australian national swimming team at the 2009 World Championships in Rome. At the time of the hearing he was competing as a member of the Australian national team in the 2010 Pan Pacific Swimming Championships and he has been selected to compete in the 2010 Commonwealth Games. He has been in the FINA Registered Testing Pool since 2009.

II PROCEEDINGS

2.1 By letter dated 30 March 2010, the FINA Executive Director advised Mr. Napoleon that the A sample of an out of competition doping control test conducted on 16 November 2009 had tested positive for the prohibited substance Formoterol. Mr. Napoleon was advised that he could arrange for a B sample analysis.

2.2 By letter dated 8 April 2010, Mr. Napoleon requested that the B sample analysis be conducted.

2.3 By letter dated 12 April 2010, Mr. Napoleon was advised by the FINA Executive Director that the B sample analysis would be conducted on April 20, 2010.

2.4 By letter dated 21 April 2010, Mr. Napoleon was advised by the FINA Executive Director that the B sample analysis had confirmed the A sample finding that the prohibited substance Formoterol was present in his urine sample. Mr. Napoleon was further advised that his case would be forwarded to the FINA Doping Panel for further consideration and the FINA Executive Director invited Mr.

Napoleon to provide evidence of a therapeutic use exemption (TUE) for the substance in question.

2.5 The FINA Executive turned down the request of Mr. Napoleon's counsel dated 25 May 2010 for the case to be referred to the FINA Executive pursuant to FINA DC 7.1.10 to determine that there was not a sufficient scientific or factual basis to proceed further with the case. By letter dated 28 June 2010 the FINA Executive Director advised that the FINA Executive had decided that responsibility for resolution of this matter should continue to rest with the FINA Doping Panel.

2.6 The FINA Doping Panel was formed pursuant to FINA Rule C 21.6.

2.7 In advance of the hearing the chairman of the FINA Doping Panel requested that Mr. Napoleon submit the various inhalers in question to the Panel for examination at the hearing.

2.8 The FINA Doping Panel hearing was held on 20 August 2010 commencing at 7:30 A.M. in FINA Headquarters, Lausanne (SUI).

2.9 Mr. Napoleon was represented at the hearing in this matter by the attorneys provided by SAL, Mr. John Marshall and Ms. Suzanne Wallace, who took part in the hearing by Skype and telephone link. Mr. Napoleon testified via telephone.

III JURISDICTION AND APPLICABLE RULES

3.1 The jurisdiction of the FINA Doping Panel arises out of the following provisions of the FINA Rules: C 21.5., C 21.6 and FINA DC 8.1.

3.2 The applicable Rules in this case are the FINA Doping Control Rules in effect since January 1, 2009 (amended on the occasion of the FINA General Congress on 24 July 2009).

IV LEGAL DISCUSSION

THE FACTS

4.1 Mr. Napoleon did not dispute the accuracy of the laboratory testing which found the prohibited substance Formoterol in his urine sample.

4.2 Formoterol is a prohibited substance under Class S3. Beta-2 Agonists under both the 2009 and 2010 Prohibited List International Standard adopted by the World Anti-Doping Agency (WADA) and is therefore prohibited at all times, in and out of competition, pursuant to FINA DC 4.1.

4.3 All Beta-2 Agonists, except Salbutamol and Salmeterol, require a TUE for use in or out of competition. Salbutamol and Salmeterol can be used under the care of a physician and within certain limits if the athlete completes a declaration of use and identifies the use on his or her doping control form.

4.4 Athletes subject to the WADA Prohibited List may not use Formoterol without a valid TUE.

4.5 Mr. Napoleon did not have, and has never had, a TUE for Formoterol.

4.6 Mr. Napoleon was diagnosed with asthma during childhood and in 2008 submitted to FINA an abbreviated therapeutic use exemption (ATUE) indicating his medical use of the substances Budesonide and Salbutamol.¹

4.7 Budesonide is a glucocorticosteroid which is a substance prohibited only in competition. Budesonide may be used in competition through inhalation if the athlete completes a declaration of use and notes his or her use on their doping control form. It is therefore not necessary to obtain a TUE to use Budesonide if the declaration of use process is followed.

4.8 Mr. Napoleon declared Pulmicort 400 on his November 16, 2009, doping control form.

4.9 The active ingredient in Pulmicort 400 is Budesonide. Pulmicort 400 is dispensed in an inhaler and contains 400 milligrams of Budesonide.

4.10 Formoterol is not an ingredient in Pulmicort 400.

¹ The ATUE process no longer exists.

4.11 Mr. Napoleon testified that after receipt of FINA's 30 March 2010 notice that he had tested positive for Formoterol that he and his family commenced an investigation to determine what had caused the positive test result.

4.12 Mr. Napoleon testified that both he and his father had asthma for which both have been prescribed Pulmicort 400 to be used through an inhaler.

4.13 Mr. Napoleon stated that both he and his father stored their inhalers in a drawer in the pantry of the family home and that both used the inhalers within the drawer without regard for whether the inhaler was prescribed for the father or the son.

4.14 Upon review of the inhalers in the drawer in the pantry, Mr. Napoleon and his father discovered that there was one inhaler that unlike the other inhalers had a red ring at the bottom of the inhaler. All the other inhalers had a brown ring at the bottom of the inhaler.

4.15 The inhaler with the red ring had been issued to Ryan Napoleon's father in error in fulfillment of his father's prescription for Pulmicort 400. While the prescription label affixed to the inhaler by the pharmacy read, "Pulmicort 400," upon closer examination the inhaler bore a drug manufacturer's label for "Symbicort 400."

4.16 Symbicort is an asthma medication containing both Budesonide and Formoterol.

4.17 The inhaler containing Symbicort 400 was provided to Mr. Napoleon's father on or about 6 November 2009.

4.18 Mr. Napoleon testified that he believed that his father's inhaler containing Symbicort 400 was the source of the Formoterol found in his urine sample.

4.19 Based on his standard daily practice of reaching into the pantry drawer to obtain an inhaler and using the inhaler without regard to whether the inhaler had been prescribed to him or his father and the location of his father's inhaler containing Formoterol in the pantry drawer, Mr. Napoleon believed he had used his father's inhaler and consequently ingested Formoterol.

4.20 Mr. Napoleon could not confirm how many times he had used the Pulmicort 400 between the time the inhaler was obtained by his father and the time he discovered the inhaler contained Formoterol on or about April 22, 2009.

4.21 Mr. Napoleon acknowledged that he may have used the prohibited substance Formoterol on numerous occasions because he did not make it a practice to look at the label of the inhalers when he took one out of the pantry drawer to use. Mr. Napoleon used an inhaler twice daily.

4.22 Mr. Napoleon confirmed that his failure to review the labels of the inhalers in the pantry drawer was so complete that despite

the fact that the Symbicort inhaler had apparently been in the family medication drawer for some five months and it contained a red ring that was clearly and obviously different from his prescribed inhaler, also containing a label stating that it was "Symbicort" and not "Pulmicort," that he never noticed the differences in inhalers prior to his positive drug test.

4.23 The Panel found Mr. Napoleon's testimony to be credible and persuasive.

4.24 The Panel examined the inhaler in question and compared it to one of Mr. Napoleon's more recently prescribed inhalers containing Pulmicort 400. The Symbicort 400 inhaler had a pharmacy label referencing Pulmicort 400 prescribed to Mr. Napoleon's father. There was no evidence of tampering with the label.

4.25 Mr. Napoleon's testimony regarding the mix up of inhalers was further confirmed by the pharmacist who originally filled the father's prescription on or about 6 November 2009 and who testified, against self interest and at substantial potential risk to her career, that she had accidentally provided Symbicort instead of Pulmicort.

MR. NAPOLEON'S POSITION

4.26 Mr. Napoleon's counsel contended that Mr. Napoleon's use of Formoterol was wholly attributable to the error of the pharmacist

in providing Mr. Napoleon's father the incorrect inhaler and was therefore without fault or negligence by Mr. Napoleon and that pursuant to FINA DC 10.5.1 Mr. Napoleon's period of ineligibility should be eliminated and his violation not considered a first violation for the purpose of application of FINA DC 10.7 (pertaining to multiple violations) in the event Mr. Napoleon should commit a second anti-doping rule violation within eight years.

4.27 Alternatively, Mr. Napoleon's counsel contended that pursuant to the Specified Substance provision set forth in FINA DC 10.4 that Mr. Napoleon should be sanctioned with no period of ineligibility.

THE LAW

Analysis pursuant to FINA DC 10.5.1 (No Fault or Negligence)

4.28 The FINA Doping Control Rules are founded on the fundamental premise contained in FINA DC 2.1.1 that:

"It is each Competitor's personal duty to ensure that no Prohibited Substance enters his or her body. Competitors are responsible for any Prohibited Substance or its Metabolites or Markers found to be present in their Samples. "

4.29 The FINA Doping Control Rules define "No Fault or Negligence" as:

"The Competitor's establishing that he or she did not know or suspect, and could not reasonably have known or suspected even with the exercise of utmost caution, that he or she had Used or been administered the Prohibited Substance or Prohibited Method."

4.30 The cause of Mr. Napoleon's positive drug test for Formoterol was the culmination of a number of factors, none of which

were separately sufficient to have alone resulted in the positive test, and which included: the inaccurate fulfillment of his father's prescription by the pharmacy, Mr. Napoleon's practice of storing his own prescribed inhaler with his father's inhaler and regularly using his father's prescribed inhaler, Mr. Napoleon's regular practice of using either his or his father's medication without reading the label on the inhaler, Mr. Napoleon's failure to read the label on the inhaler on the occasion(s) which caused his positive test result and which would have revealed to him that the medication was "Symbicort" and not the "Pulmicort" which he had been prescribed, and Mr. Napoleon's failure to notice other differences on the product packaging, such as the red ring on the inhaler, which could have alerted him to the fact that he was not using the medication he had been prescribed.

4.31 Due to the foregoing circumstances, Mr. Napoleon cannot be considered to have acted with "No Fault or Negligence" in relationship to his anti-doping rule violation because Mr. Napoleon could have avoided use of a product containing Formoterol through the exercise of "utmost caution" by undertaking any one of several reasonable precautions that can be expected of elite athletes subject to sport anti-doping rules, including: storing his prescription medications in a location not shared with other members of his household, not using anyone else's prescription medication and carefully checking the label of a medication he pulled out of a drawer before use to ensure that the medication he was using was, in fact, the medication that he had been prescribed (particularly where the drawer was used by others and not only himself to store medications).

4.32 Elite athletes such as Mr. Napoleon are expected to exercise the utmost caution to avoid ingesting a prohibited substance.

This means that, at a minimum, they must read the labels of the medical products that they use. See, e.g., *Edwards v. IAAF and USATF*, (CAS/OG/2004/003) (CAS panel found that American sprinter Torri Edwards was *not* qualified to receive *any* reduction based on her degree of fault in a situation in which she was in a foreign country and her trainer gave her a product labeled in French which happened to contain a prohibited stimulant); *Squizzato and FINA*, (CAS 2005/A/830) ¶¶ 10.9 – 10.10 (panel accepted that swimmer was not properly instructed about the prohibited substance list and was unaware that a mere cream could contain a doping agent. Nevertheless, the Panel concluded that “she failed to abide by her duty of diligence. With a simple check, she could have realized that the cream was containing a doping agent. . . . At least she could have asked her doctor, coach or any other competent person to double check the contents of the cream.”).

4.33 The Comments to FINA DC Articles 10.5.1 and 10.5.2 explain that an athlete receiving a prohibited substance from his physician cannot escape a period of ineligibility and is at fault even if the athlete did not know he was ingesting a prohibited substance because “athletes are responsible for their choice of medical personnel[.]” Likewise, an athlete may not escape responsibility even for sabotage by a family member “or other Person with the Athlete’s circle of associates” because “Athletes are responsible for what they ingest and for the conduct of those Persons to whom they entrust access to their food and drink.” Comment, FINA DC Articles 10.5.1 and 10.5.2. This has been an important principle in prior FINA cases. See, e.g., *FINA v. Stylianou*, (FINA Doping Panel 4/02), pp. 10-12 (16 year old swimmer relied upon physician who gave her vitamins and assured her they were safe, yet the vitamins turned out to be contaminated with a steroid).

4.34 CAS panels, as well, regularly reinforce the importance of the principle that athletes are responsible for the negligence of those to whom they entrust their medical or dietary care. For instance in *Demetis v. FINA*, CAS 2002/A/432, the Panel said:

"If an athlete . . . is permitted to exculpate and reinstate himself . . . by merely pleading that he has been made the unwitting victim of his or her physician's (or coaches) mistake, malfeasance or malicious intent, the war against doping in sports will suffer a severe defeat. It is the trust and reliance of clean athletes in clean sports, not the trust and reliance of athletes in their physicians and coaches which merits the highest priority . . . If such a defense were permitted in the rules of sport competition, it is clear that the majority of doped athletes will seek refuge in the spurious argument that he or she had no control over the condition of his or her body. "

Demetis, ¶ 9.3.11.

4.35 Simply, Mr. Napoleon should have organized the storage and use of his medicines more carefully. The mistake of the pharmacy, in relation to his father's medicine, does not set aside this responsibility.

4.36 In addition, Mr. Napoleon's fault is higher than if he had simply used the incorrect inhaler on a single occasion. Because he was so lax in overseeing the medication he was using, Mr. Napoleon conceded that he did not know how many times he had used the inhaler containing Formoterol and that he could have used the banned substance on many occasions between November 6, 2009, when the inhaler was obtained from the pharmacy and April, 2010 when he learned of his positive drug test and deduced that his father's inhaler was the cause.

4.37 For the foregoing reasons the Panel concludes that Mr. Napoleon's degree of care in using inhalers (both his and the inhaler of his father that contained Formoterol) was less than should be expected from an elite athlete who should exercise more vigilance to ensure his compliance with sport anti-doping rules.

4.38 Other than pointing out that Mr. Napoleon has not satisfied the high standard necessary to meet the criteria for "No Fault or Negligence" the Panel does not wish to condemn Mr. Napoleon further. His positive drug test resulted from the unfortunate coincidence of a number of factors and the facts in his case are clearly sympathetic and do not suggest any intent to cheat. These factors are discussed below in the analysis of his request for a reduced sanction pursuant to FINA DC 10.4, the Specified Substances provision.

Analysis pursuant to FINA DC 10.4 (Specified Substance)

4.39 Formoterol is a "Specified Substance" pursuant to FINA DC 4.2.1. Consequently, pursuant to FINA DC 10.4 if certain factors are met the otherwise applicable period of ineligibility can be reduced to at a minimum a reprimand and a maximum of two years ineligibility.

4.40 The factors which must be established in order for an athlete to qualify for treatment under FINA DC 10.4 are:

- a. The swimmer must establish how the Specified Substance entered his or her body or came into his or her Possession; and
- b. The swimmer must produce corroborating evidence in addition to his or her word which establishes to the comfortable satisfaction of the hearing panel the absence of an intent to enhance sport performance or mask the use of a performance enhancing substance.

4.41 If the foregoing factors are proved by the swimmer then the swimmer's degree of fault is the criterion considered in assessing any reduction of the period of ineligibility.

4.42 Mr. Napoleon established by a balance of probabilities how the Formoterol entered his body by establishing the high probability that he used his father's inhaler containing Formoterol on one or more occasions after November 6, 2009, and by adequately discounting any other possible sources of the drug.

4.43 Mr. Napoleon also produced corroborating evidence which established to the Panel's comfortable satisfaction that Mr. Napoleon did not intend to enhance sport performance or mask the use of a performance enhancing substance. Such corroborating evidence included:

- a. The relatively extraordinary admission against interest of the pharmacist and the live telephonic testimony on the record and under oath of this individual (as well as the submission of a notarized written declaration under oath from the pharmacist) whose error in filling Mr. Napoleon's father's prescription was a significant factor in the chain of events leading to the positive drug test and which indicates that there was no wrongful intent behind the ingestion of Formoterol;
- b. The appearance of the prescription label on the inhaler in question which did not reflect any evidence of tampering;
- c. The consistent testimony of Mr. Napoleon's father which was received by affidavit, (although the Panel placed only minimal reliance on this testimony given the close family relationship involved);
- d. The declaration of Pulmicort 400 on Mr. Napoleon's doping control form, his prior ATUE for budesonide and salbutamol, another Beta-2 agonist, and his current prescription for Pulmicort 400 (as evidenced by his current inhaler which was examined by the Panel), all of which were fully consistent, with the explanation of a mix up involving asthma medications;

- e. The fact that Formoterol is a well known Beta-2 agonist used in the treatment of asthma;
- f. The relatively low level of Formoterol found in Mr. Napoleon's sample; and
- g. The statement of the Chairman of the FINA Doping Control Review Board who opined that, Formoterol is "commonly used in the management of asthma" and that "there is good evidence that the use of such drugs [including Salbutamol and Formoterol] to treat asthma confers no performance-enhancing benefits" and that "these drugs have been controlled because there is some evidence that at very high dose levels they can possess some anabolic properties."

4.44 Accordingly, Mr. Napoleon established his entitlement to a sanction within the range specified by FINA DC 10.4.

SANCTION

4.45 In considering whether Mr. Napoleon should receive any period of ineligibility, and, if so, what period of ineligibility was appropriate the Panel considered Mr. Napoleon's degree of fault as instructed by FINA DC 10.4.

4.46 As explained above, Mr. Napoleon's degree of fault was, when considering the degree of care required from elite athletes who represent their country in international competition, while not overwhelming, certainly manifest (i.e., clearly apparent and visible).

4.47 It is also below the standard of care for an elite athlete to store his or her medications in a common area where they can be easily confused with medications of other individuals and this is particularly the case where the athlete was admittedly not reviewing the label of the products used by him.

4.48 Factors weighing in Mr. Napoleon's favor include the fact that his positive arose in connection with use of a necessary medication. While Mr. Napoleon's practice of allowing intermingling of his medication with his father's medication did not satisfy the standard of "utmost caution" it was understandable in the context of his family relationships and living situation. Furthermore, there was no indication of any intent to cheat and Mr. Napoleon clearly did not think there was a substantial risk that he would get a higher than normal dose of medication or a different medication because he believed his father had an identical prescription. Mr. Napoleon also responded promptly to his positive test, quickly ascertaining the cause of the positive test and immediately taking steps to avoid any future recurrence by storing his medications in a separate drawer and resolving to no longer use his father's inhaler.

4.49 Under these circumstances, the Panel believes a three (3) month period of ineligibility is appropriate under the FINA Doping Control Rules.

4.50 Pursuant to FINA DC 10.9 Mr. Napoleon's period of ineligibility shall run from August 20, 2010, the date of the hearing in this matter and the date on which the Panel issued its interim decision setting forth its basic determination and disposition without a full reasoned award.

4.51 Pursuant to FINA DC 10.8 all competitive results obtained from the date of a positive sample through the commencement of any provisional suspension or ineligibility period shall, unless fairness requires otherwise be disqualified.

4.52 As noted above, Mr. Napoleon did not serve a provisional suspension.

4.53 However, given the unique facts in this case which includes the successful establishment of entitlement to a reduced period of ineligibility under FINA DC 10.4, proof that Mr. Napoleon did not intend to enhance sport performance or mask the use of a prohibited substance, Mr. Napoleon's fairly low degree of fault, Mr. Napoleon's prompt discontinuance of use of the substance in question and the Panel's determination that only three (3) months ineligibility should be served, the Panel concludes that fairness requires that not all of Mr. Napoleon's results since his positive urine sample should be disqualified.

4.54 Mr. Napoleon testified that he immediately ceased using his father's inhalers once he learned of the likelihood that one contained Formoterol following notification of his positive drug test and that this occurred on or about 6 April 2010. Accordingly, the Panel has disqualified Mr. Napoleon's results only for the period from his positive doping control on 16 November 2009, through 6 April 2010.

V. CONCLUSION

5.1 Mr. Ryan Napoleon receives a three (3) month period of ineligibility commencing on 20 August 2010, and ending at the conclusion of 19 November 2010, for his first anti-doping rule violation.

5.2 All results obtained by Mr. Napoleon on or after 16 November 2009 and through and including 6 April 2010 are disqualified. Any medals, points and prizes achieved during that period shall be forfeited.

5.3 All costs of this case shall be borne by SAL in accordance with FINA DC 12.2.

5.4 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 receipt of this judgement (FINA Rule C 12.9.3).

F.D. van Heijningen William Bock, III Farid Ben Belkacem

Signed on behalf of all three Panel Members

A handwritten signature in black ink, appearing to be 'F.D. van Heijningen', written in a cursive style.

F.D. van Heijningen