



FÉDÉRATION  
INTERNATIONALE  
DE NATATION

**FINA Doping Panel 09/14**  
**27 February 2015**

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**FINA Doping Panel**

comprised of

Robert Fox (SUI)	Chairman
Raymond Hack (RSA)	Member
Farid Ben Belkacem (ALG)	Member

In the proceedings against

the swimmer **JOAO LUIZ GOMES JUNIOR** (“the Athlete or the swimmer”) affiliated to the Brazilian Swimming Federation (“CBDA”)

represented by:

Me Marcelo Franklin Filho,  
Rio de Janeiro, Brazil

**I THE PARTIES**

1.1 The FEDERATION INTERNATIONALE de NATATION (FINA) is the International Federation governing the sport of Aquatics. 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. The Brazilian Swimming Federation is a member of FINA. The Brazilian Swimming Federal is required to recognize and comply with FINA’s anti-doping rules, which are set out in the FINA Doping Control Rules (“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 the Brazilian Swimming Federation.

1.3 The Athlete was a member of the Brazilian Swimming Team which competed in the FINA World Swimming Championships in Doha (QATAR) from 3 until 7 December 2014 (“Competition”).

1.4 The Athlete is 29 years old, born on 21 January 1986 and is part of the Brazilian Swimming Team. He started swimming when he was only 7 years old in a small club in Brazil. His best results started to appear in 2009.

- gold medal at the 2009 Paris Open, in the 50-meters breaststroke,
- at the 2010 South American Games, he won the silver medal in the 50-meters breaststroke, and bronze in the 100-meters breaststroke,
- at the 2011 Summer Universiade, the swimmer won silver medal in the 50-meters breaststroke, and bronze in the 100-meters breaststroke.

1.5 On 4 December 2014, the Athlete participated:

- in the heats Men’s 4 x 50m Medley Relay,
- in the heats Mixed 4 x 50m Medley Relay, events.

1.6 He was tested by FINA on 4 December 2014.

1.7 At the test, in the Urine Collection Form, he did not declare that he had taken CAFFEINE and declared many other substances.

## **II. NATURE OF THE CASE**

2.1 Mr. Gomes's sample was received at the World Anti-Doping Agency (WADA) accredited laboratory in London, United Kingdom, on 6 December 2014.

2.2 On 12 December 2014, the Laboratory reported to FINA that Mr. Gomes's sample was positive for the prohibited substance HYDROCHLOROTHIAZIDE, Class S5 Diuretics and Masking Agents of the WADA Prohibited List.

2.3 On 24 December 2014, the FINA Doping Control Review Board recommended that the positive drug test be considered an Adverse Analytical Finding.

2.4 As discussed below, because Mr. GOMES waived the B sample analysis and did not contest the laboratory finding, the primary issues for the hearing concerned the appropriate period of ineligibility and the proper start date for his sanction.

## **III. PROCEEDINGS**

3.1 By letter dated 6 January 2015, Mr. Cornel Marculescu, FINA Executive Director informed Mr. Gomes that he had been tested positive for the substance Hydrochlorothiazide (Class S.5 Diuretics and Masking Agents). In this correspondence, he outlined the FINA Doping Control Rules (hereafter: FINA DC) and provided the athlete with the opportunity to use his right to the analysis of the B sample.

3.2 On the same date, the FINA Executive Director, informed Mr. Coaracy Nunes Filho, President of Brazilian Swimming Federation

(CBDA) that Mr. Gomes had been tested positive to the substance Hydrochlorothiazide (Class S.5 Diuretics and Masking Agents) in Doha, Qatar.

3.3 By letter dated 12 January 2015, Mr Marcelo Franklin Filho provided his power of attorney and announced to FINA that his services had been retained to represent Mr. Gomes for this case.

3.4 By letter dated 16 January 2015 to the FINA Executive Director, the athlete, through his Counsel, Mr. Marcelo Franklin Filho, waived his right to request the analysis of the B sample of his urine and

- requested some documentation;
- specified that his client required copies of the entire A sample laboratory documentation package, with full information as required by the International Standard for Laboratories;
- confirmed that Mr. Gomes had started a voluntary provisional suspension and requested the consideration of this period in case any ineligibility is imposed;
- requested a hearing with all the rights provided by FINA DC 8;
- and finally that a final decision is rendered by no later than March 2015 because of the qualification period for the Rio de Janeiro Olympics.

3.5 By letter dated 20 January 2015, FINA sent to the swimmer's attorney the Acceptance of Provisional Suspension form to be signed by the athlete and informed him that all the relevant documents in this case would be forwarded to the FINA Doping Panel.

3.6 By letter dated 23 January 2015, Mr. Robert Fox, Chairman of FINA Doping Panel, informed Mr Marcelo Franklin Filho of the composition of the FINA Doping Panel and the date of hearing.



3.7 By letter dated 26 January 2015, Mr Marcelo Franklin Filho confirmed to FINA and the Chairman of Doping Panel that his client accepted the Doping Panel composition and agreed to the date of the hearing. He requested a short five days extension of the deadline to present his defense brief and he sent the Acceptance of Provisional Suspension Form signed by his client. Hence FINA considered the date of 19 January 2015 as a beginning date of the provisional suspension.

3.8 By letter dated 28 January 2015, the Chairman of FINA Doping Panel extended the deadline for filing the submissions to 6 February 2015.

3.9 By letter dated 13 February 2015, Mr Marcelo Franklin Filho was advised by Mr Robert Fox, Chairman of FINA Doping Panel, that the hearing is set on Friday, 27 February 2015 at 9:30 in the new FINA Headquarters.

3.10 The hearing was held on 27 February 2015, at the FINA offices in Lausanne (SUI) before the undersigned members of the FINA Doping Panel.

3.11 Mr. Gomes was present at the hearing and was represented by his counsel. Also present was Doctor Gustavo D. Magliocca, specialist in sport medicine and Doctor of The Brazilian Swimming Team and an interpreter, Ms. Monica Lange.

3.12 Mr. Gomes testified at the hearing and was questioned at some length by all members of the Panel.

3.13 FINA was represented at the hearing by Ms. Katarzyna Jozwik.

#### **IV. JURISDICTION AND APPLICABLE RULES**

4.1 The jurisdiction of the FINA Doping Panel arises out of the following provisions of the FINA Rules: C 22.8, C 22.9 and FINA DC 8.1.

4.2 The applicable Rules in this case are the FINA Doping Control Rules in effect since 1 January 2009 (amended on the occasion of the FINA General Congress on 24 July 2009 and revised in January 2012 and November 2014 in Doha).

4.3 The Doping Panel decided applying the Rules amended in July 2009.

#### **V. MOTIONS AND CONTENTIONS**

##### **A. Mr. GOMES'S CONTENTIONS**

5.1 The swimmer accepted that he had violated FINA DC 2.1 through the presence of a banned substance in his urine sample.

5.2 However, he contended that he did not bear any fault for his positive test and pursuant to FINA DC 10.5.1, he bears no fault or negligence and that the otherwise applicable period of ineligibility should be eliminated.

5.3 The athlete asserted that he had adequately proved the cause of his positive test by providing the following explanations and evidence:

(a) He explained that he began using Caffeine pills in 2010 that were prescribed by his doctor René de Almeida Leite.

The doctor explained the prescription for the following reasons set forth in a written statement dated 10 January 2015:

*«(.....) When I take care of athletes, besides physical performance, I also think the quality of life he must have, especially in relation to anxiety and mental and physical stress.*

*Thus, when we look at the local market, we find products with the caffeine substance at concentrations much higher than I like to use. We found concentrations about 250 to 700 mg.*

*In this case, because the lack of manufactured products in concentrations that I approve below 120 mg, according to the minimum recommendation of mg per kg of athlete weight, I asked for a manipulation that no pass this measurement.*

*The only way to get the dosage I like to use with my athlete would be through energy drinks. But they contain other substances in high doses, in addition to caffeine, which makes it impractical for everyday use.*

*The goal of manipulation was to let the product safe at doses beyond the more accessible values for continuous use.*

*As positive effects on the body, caffeine increases alertness and deducts fatigue, which could increase the ability to perform certain tasks, in this case, the quality of training.*

*Caffeine intake allows better performance in prolonged exercise and high intensity and short duration exercise, according to studies.*

*Based on the recommendation of 3 -13 mg caffeine per kg of weight, I used a minimum of 3 mg and can be used 2 x a day, thus reaching the sum of two capsules the dosage that I expected (240 mg/ day)»*

- (b) In addition, he alleged using the supplement food that was recommended by Dr. Juliana B. Alves, who is responsible for the drug manipulation at the Pharmacy Ateliê das Formulas, since 2009.

She declared in her written statement dated 16 January 2015 the following:

*“1. My name is Juliana B. Alves, PhD, pharmacist graduated in 2003 by Universidade Bandeirantes de Sao Paulo (University Bandeirante of Sao Paulo) and I am responsible for the drug manipulation of the Pharmacy Ateliê das Formulas since 2009.*

*2. My bother-in-law (sic) is an athlete. So the Pharmacy Ateliê das Formulas has extreme care in the production of food supplements for athletes, being deemed reliable by the sports community.*

*3. Since 2010, for four years, we manufacture nutritional supplements for the swimmer Joao Luiz Gomes Junior and for many other athletes. It was never found any problem.*

*4. Swimmer Joao Luiz Gomes Junior is our client exactly due to our commitment and standard of excellence in manipulation of nutritional supplements. We guarantee the following items:*

*a. certificate of purity of the substances used in formulas.*

*b. manipulation of supplements for athletes in especial and separated rooms on days when the Pharmacy is closed.*

*c. detailed record of the entire production process.*

*5 The pharmacy admits to have manipulated the CAFFEINE in a normal Pharmacy operation day and therefore without the previously agreed care.*

*6. The nutritional supplement was made on a working day of week (Friday) and in the same day when a formula with the substance Hydrochlorothiazide was being made (as attached register). This change in procedures unfortunately caused the cross-contamination.*

*7. I have prepared this statement in connection with the procedure established by the International Swimming Federation for investigation of adverse analytical finding. I put myself at your disposal to confirm by phone and answer questions related to this statement in a hearing before the FINA or the CAS.*

*8. I declare that the facts described in this statement are true and accurate, at my best memory.”*

(c) Finally, Dr Gustavo declared in his written testimony dated 28 January 2015:

*“(.....) for the appropriate test purposes in proceedings before the FINA, that I analysed technically the reports of swimmer João Gomes Jr.’s exam and I conclude that the hydrochlorothiazide found in his urine sample has not the purpose of mask other substances.*

*The hydrochlorothiazide acts directly on the kidneys, acting on the electrolyte reabsorption mechanism in fibulo distal convoluted. By increasing the sodium and potassium secretion, increases the excretion of water, allowing the dilution of urine. It is assumed that urine considered diluted have a density lower than 1,005. The urine of the athlete was 1009 density.*

*Moreover, the substance has volume of distribution of 3.6 l/kg and a terminal half-life of from 10 to 27 hours. Any diuretic action is promoted from two hours of substance consumption in minimum dose (considering the weight of 80 kg athlete) 9-11 mg. The action lasts from 6 to 12 hours and is about 97% excreted in urine. So, according to the data, if the athlete had ingested a dose found in your (sic) urine, it should have been done close to 10 hours before the event, without any dilutive effect as actually presented in the sample. I explicitly advocate the hypothesis of cross-contamination in supplements ingested between 30 and 40 minutes before the race, whose action time would not have occurred, but it was already possible to detect the minimum amount in the urine.”*

5.4 Mr. Gomes presented another detailed explanation regarding why, in his view, his actions were not negligent.

5.5 Mr. Gomes contended that the evidence was strong that he did not intend to enhance his athletic performance.

5.6 Mr. Gomes testified that he is an elite swimmer who had been through numerous doping controls and he is aware that he is responsible for what he puts in his body.

## VI. LEGAL DISCUSSION

### A. THE FACTS

The FINA DP has found that the following facts were established in this case:

6.1 The Hydrochlorothiazide is a prohibited substance in Class S5 of the WADA Prohibited List and is therefore prohibited at all times, in and out of competition, pursuant to FINA DC 4.1.

6.2 Athletes subject to the WADA Prohibited List may not use Hydrochlorothiazide without a valid TUE.

6.3 The FINA DP accepts that Mr. Gomes did not intend to use Hydrochlorothiazide in order to enhance his sport performance.

6.4 Mr. Gomes had used Caffeine products for years without incident.

6.5 This fact put to rest any serious suspicion that he either used the product for a longer time period or that he intended to dope with the product.

6.6 Mr. Gomes was questioned at some length by the members of the FINA DP on each of the forgoing factual matters. He impressed the FINA DP as sincere and honest and appropriately remorseful for his mistake. He did not seek to blame others for his rule violation and he accepted responsibility for his actions and his duties under the rules. His explanations were logical and fit well with, and were corroborated by, the test results and other documentary evidence in the

case. Consequently, the FINA DP found Mr. Gomes's testimony to be credible and persuasive.

6.7 Upon learning of his positive drug test Mr. Gomes promptly discontinued his use of caffeine and of all supplements in the future.

## B. THE LAW

6.9. 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*.

6.10 The way the caffeine was acquired cannot change its fundamental character. It follows that Rule DC 10.4 is applicable and that Rule DC 10.5.1 is not available to the athletes. As a result, the athletes cannot establish that they bear "No Fault or Negligence" for the purpose of Rule DC 10.5.1 and that no sanction is appropriate (CAS 2011/A/2495 FINA v. César Augusto Cielo Filho & Confederação Brasileira de Desportos Aquáticos (CBDA) and CAS 2011/A/2496 FINA v. Nicholas Araujo Dias dos Santos & CBDA and CAS 2011/A/2497 FINA v. Henrique Ribeiro Marques Barbosa & CBDA and CAS 2011/A/2498 FINA v. Vinicius Rocha Barbosa Waked & CBDA).

6.11 Consequently, Mr. Gomes must be sanctioned for his inadvertent use of Hydrochlorothiazide.



6.12 Hydrochlorothiazide is a specified substance, as provided for in FINA DC 4.2.1. Pursuant to FINA DC 10.4, where a competitor can establish how a specified substance entered his body or came into his or her possession and that such specified substance was not intended to enhance the competitor's sport performance or mask the use of a performance-enhancing substance, the period of ineligibility found in FINA DC 10.2 shall be replaced for a first violation at a minimum, a reprimand and no period of ineligibility, and at a maximum of two years of ineligibility.

6.13 The Panel felt that the circumstances of this matter did not allow it to envisage a mere reprimand.

6.14 In addition to his credible testimony, Mr. Gomes produced corroborating evidence, which established by a balance of probabilities that he did not intend to enhance sport performance. Rule DC 10.4 prerequisites' are satisfied where none of the alleged facts as to how the prohibited substance entered the athletes' bodies have been contested and where it was agreed that the athlete did not wish to enhance their sportive performance. Rule DC 10.4 expressly provides that the athlete's degree of fault is the sole criterion for determining the appropriate sanction. In this respect, the fact that the athletes have taken the necessary precautions before taking caffeine pills (prescription from their doctor, controlled pharmacy, certificate of purity of the caffeine) and that more precautions could not have been expected from them, should be taken into consideration (CAS 2011/A/2495 FINA v. César Augusto Cielo Filho & Confederação Brasileira de Desportos Aquáticos (CBDA) and CAS 2011/A/2496 FINA v. Nicholas Araujo Dias dos Santos & CBDA and CAS 2011/A/2497 FINA v. Henrique Ribeiro Marques Barbosa & CBDA and CAS 2011/A/2498 FINA v. Vinicius Rocha Barbosa Waked & CBDA). In this

case however, considering the risk of contamination when medication is prepared by a pharmacy, which was highlighted in high profile cases from Brazil, such as the ones cited in this matter, the Panel felt that the athlete cannot totally discharge his responsibility based on merely on what the Pharmacy did, but is obliged to investigate further their preparation of the pills before ingesting them. To the least, he should seek to ensure that the proper process is followed at each manufacturing of the pills. Had these precautions been taken, surely the change of process by the pharmacy could have been discovered.

6.15 Once it is determined that an athlete did not intend to enhance his sporting performance and that the requirements for a reduction of the standard sanction under Article 10.2 are fulfilled, the Panel has to assess the Athlete's degree of fault according to Article 10.4 (*James Armstrong v. World Curling Federation (WCF)*, CAS 2012/A/2756).

6.16 A recent case providing a significant degree of analysis in evaluating the various factors relevant to an arbitral panel's consideration of fault is *Cilic v. ITF*, CAS 2013/A/3335.

6.17 The *Cilic* Panel recognized three degrees (or ranges) of fault:

- a. **Significant degree of or considerable fault**, which the Panel said would support a sanction range of 16-24 months.
- b. **Normal degree of fault**, which the Panel said would support a sanction range of 8-16 months.
- c. **Light degree of fault**, which the Panel said would support a sanction range of 0-8 months (*Cilic case*).

In terms of the subjective element of the level of fault as discussed in the *Cilic* case, Mr. Gomes's situation presents a number of subjective considerations which serve to point to a light degree of fault.

## **VII. SANCTION**

7.1 After evaluating the circumstances in this case and applying FINA DC 10.4, the FINA DP believes a six (6) month period of ineligibility is appropriate. The circumstances in Mr. Gomes's case are such that he should not be penalized for the entire 24 months that would be required to be served by someone that was intentionally cheating, which he clearly was not.

7.4 Upon balancing all of the relevant factors and after considering many other cases across a wide spectrum of sports the FINA DP has concluded that a six (6) month period of ineligibility is both just and fair under the circumstances of this case.

7.5 Pursuant to FINA DC 10.9.2 due to his timely admission, waiver of the B sample analysis and acceptance of responsibility Mr. Gomes's period of ineligibility shall run from 4 December 2014, the date of sample collection, and ending at the conclusion of 3 June 2015 for his first anti-doping rule violation.

7.6 According 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.

7.7 Therefore, all competitive results achieved by Mr. GOMES on or after 4 December 2014, shall be annulled together with the

consequences thereof (forfeiture, of medals/prizes, reimbursement of prize money).

7.8 Mr. GOMES participated in team events and in heats of the men's 4 x 50m medley relay and in the mixed 4 x 50m medley relay. The Brazilian team won the gold medal in both events and broke a world record in the final of the men's 4 X 50m medley relay. The Doping Panel considered sanctioning the team events in which the swimmer partook in application of FINA DC 11.1:

*"Where any Anti-Doping Rule has been violated by a member of a relay team or a duet or team in synchronised swimming or synchronised diving, the duet or team shall be Disqualified from the Event".*

The Doping Panel considered the fact that the swimmer did not participate in the finals of the various relay events is sufficient grounds to not disqualify the Brazilian Relay teams.

The Doping Panel also took into consideration FINA DC 10.8, pursuant to which the Doping Panel has the discretion to not automatically disqualify the results in the Event which produced the positive sample, for reasons of fairness. After, serious deliberation, the Panel decided that the present decision could not impact the team result of Brazil in either 4X 50m event.

More importantly however, this matter was brought against Mr. Gomes solely, and not the entire Brazilian team. Hence, any sanction against the Brazilian relay teams would open the present decision to the detrimental flaw of having been an *ultra petita* decision, going beyond the scope of the matter under examination. The Brazilian team was not a party to this process and therefore any decision rendered against the teams and its athletes on the mere violation of the Doping Rules of one

of its members would have violated the cardinal principles of law, such as a party's right to be heard and right to present a defence.

## VIII. SUMMARY OF THE DECISION

8.1 Mr. Joao Luiz Gomes Junior receives a six (6) months period of ineligibility commencing on 4 December 2014, and ending at the conclusion of 3 June 2015, for his first anti-doping rule violation.

8.2 All results obtained by Mr. Gomes on or after 4 December 2014 and through and including the date of this decision are disqualified. Any medals, points and prizes achieved during that period shall be forfeited.

8.3 All costs of this case shall be borne by the Brazilian Swimming Federation in accordance with FINA DC 12.2.

8.4 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 12.11.4 and DC 13.6).

Robert Fox  
Chairman

Farid Ben Belkacem  
Member

Raymond Hack  
Member

Signed on behalf of all three Panel Members



Robert Fox