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## FINA Doping Panel 04/19

comprised of

Peter Kerr (AUS)

in the proceedings against

the swimmer **Mr Gabriel da Silva Santos** (the Athlete), affiliated to the Brazilian Swimming Federation (CBDA)

represented by: Mr Stephano Malvestio, Attorney at Law, of Bichara and Motta

### 1. 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 CBDA is a member of FINA. CBDA is required to recognise 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 and must be followed by Athletes, Athlete Support Personnel, coaches, physicians, team leaders, and club representatives under the jurisdiction of the CBDA.

1.3 The Athlete is a member of the CBDA and thus is subject to the jurisdiction of the FINA DC. The Athlete is a freestyle 100m specialist, 23 years of age at the time of the sample collection.

## 2. NATURE OF THE CASE

- 2.1 On 20 May 2019 the Athlete provided a urine sample during an out-of-competition test conducted in Sao Paulo, Brazil. FINA was the testing authority for this sample collection.
- 2.2 The Athlete's sample was sent to the Canadian WADA-accredited laboratory located in Montreal, Quebec. The A sample analysis was performed. The laboratory confirmed an adverse analytical finding (**AAF**) for the substance **Clostebol** (Class S1.1.A Exogenous Metabolites). The level of Clostebol detected was reported by the laboratory as being roughly 0.2 ng/mL.
- 2.3 By letter dated 25 June 2019, FINA notified the Athlete and CBDA regarding the AAF reported by the laboratory. FINA asserted to the Athlete that this constitutes a potential violation to the FINA DC. Subsequently, FINA provided the Athlete with all appropriate documentation.
- 2.4 By letter of 27 June 2019 Bichara and Motta, Attorneys at Law, advised FINA that they acted on behalf of the Athlete. A copy of Power of Attorney dated 26 June 2019 confirming this was enclosed. The Attorneys also advised that the Athlete will not request the analysis of the B sample.

The Attorneys further advised 'We would like to point out the proximity of the upcoming events, ie the Gwangju 2019 World Championships which take place from 12 until 28 July and which the Athlete has been appointed to participate' and requested '*that this matter be dealt with as a priority and on an urgent basis, in order for the Athlete to be able to participate in the 2019 World Aquatic Championships on 21 July 2019*'.

Further the Attorneys also advised '*... the Athlete informs us that as of 26 June 2019, he has voluntarily decided not to take part in any aquatic activities until a final decision has been rendered on the present matter*'.

### **3. PROCEEDINGS**

3.1 By letter dated 8 July 2019, Mr. Robert Fox, Chairman of the FINA Doping Panel, confirmed the composition of the Panel would be Mr. Peter Kerr (AUS) as a single person to conduct and chair the hearing pursuant to FINA DC 22.9 '*Whenever necessary the Chair of the Doping Panel shall appoint one or three persons from the Doping Panel to adjudicate all matters before it. No member of the Doping Panel shall be appointed to hear a specific case when he or she is a citizen of the country of the individual or organisation suspected of violating FINA Rules; the Chair of the Doping Panel may also determine situations in which a Panel member should not be appointed due to other potential conflicts*'. Further advised that the hearing would be held in Gwangju, Korea on 19 July 2019.

3.2 On 12 July 2019, the Athlete filed his defence brief and supporting exhibits.

### **4. JURISDICTION AND APPLICABLE RULES**

4.1 The jurisdiction of the FINA Doping Panel arises out of the provisions of the FINA Rules C22.8, C22.9 and FINA DC8.1.

4.2 The applicable Rules in this case are the FINA Doping Control Rules in effect since 1<sup>st</sup> January 2015.

## **5. MOTIONS AND CONTENTIONS**

- 5.1 The Athlete's legal counsel filed a comprehensive Defence Brief on 12 July 2019. A summary of the Athlete's position and relief sought by the Athlete is set out below.
- 5.2 The Athlete properly and quickly admitted to the ADRV. The two issues to be addressed at the hearing were: (i) how did the Clostebol get into the Athlete's urine sample; and (ii) what are the consequences?
- 5.3 In the Defence Brief, the Athlete's history as a 'clean' athlete was stressed as was the surprise the Athlete experienced when he was informed by FINA regarding the AAF involving Clostebol. The Athlete was regularly assisted by his personal doctor Dr Rodrigo Brochetto as well as with the director of the medical staff of the CBDA, Dr Gustavo Magliocca both of whom are aware that the Athlete cannot consume any prohibited substances. He was even more surprised at the AAF as on 12 April 2019 he had been tested and there was no AAF, just thirty eight days prior to his test on 20 May 2019 which test resulted in the AAF.
- 5.4 The Athlete is a very experienced swimmer who has competed in Olympic Games, World Championships and Pan Pacific Championships and is well aware of the high probability of being tested at any moment. The Athlete attests that he has always acted with extreme diligence, never consuming any medication, vitamin or supplement that had not been prescribed or authorised by his doctor.
- 5.5 After being informed of the AAF by FINA and after conducting an exhaustive investigation regarding the possible ways the Clostebol may have entered his system, the Athlete's conclusion was that the only explanation would be cross-contamination through personal contact with

the Athlete's brother (Gustavo) who had been using a cream Novaderm, prescribed by a urologist, Dr Cristiano Bortolin. The Athlete's legal attorney tendered 'Exhibit 6' a copy of a statement by Dr Bortolin dated 26 June 2019 that he treated the Athlete's brother on 10 April 2019 and on 24 April 2019 prescribing on the last date '*clostebol acetate + neomicina for topical use*'. The Athlete's legal attorney also tendered 'Exhibit 7' a photograph of the used tube of Novaderm with the words clearly marked on the tube '*acetato de clostebol 5mg/g*'.

- 5.6 Gustavo was being treated for skin irritation to the face and genital area over an extended period requiring constant use of Novaderm. He commenced using Novaderm on 24 April 2019 and continued using Novaderm up to and including 20 May 2019 the relevant testing day of the Athlete. Gustavo has attested to this in an affidavit dated 11 July 2019 and tendered as 'Exhibit 8'. Annexed to Exhibit 8 are photographs of the skin irritations referred to which appear to be obvious and significant and includes infected area and lower legs. Gustavo attests that the Athlete spent 18 and 19 May 2019 at their parents' house, where Gustavo also resides, in order to celebrate their grandfather's birthday. This was one day before sample collection. Tendered as 'Exhibit 4' is an extract of the Athlete's grandfather's passport confirming his birthday as 19 May. This is consistent with the Athlete's testimony in relation to his reason for his presence in his parents' house.
- 5.7 The Athlete attests that during this visit he shared objects such as soap, clothes, pillows and face towels with his brother without knowledge of the use of the cream by him.
- 5.8 The Defence Brief stressed that 'it was important to highlight that Gustavo is not an athlete and has no knowledge of the List of Prohibited Substances nor of the Anti-Doping rules. Thus, not only did he have no

idea that such a cream contained a prohibited substance, but also he never thought that it was relevant to share with the Athlete the fact that he was treating his injuries with a cream containing Clostebol. In this sense, the Athlete had no idea about Gustavo's skin irritations and wounds'.

5.9 The Defence Brief states 'it will be demonstrated that the present case does not deal with the intentional use of a prohibited substance in order to enhance performance not to obtain any type of unfair advantage. In fact, the present case refers to the unintentional contamination by a prohibited substance, while the Athlete was visiting his mother in order to participate in a family reunion'.

5.10 In support of his contentions biochemist Professor LC Cameron was engaged by the Athlete to provide an analysis of the AAF. Professor Cameron describes himself, amongst other things, as a Professor of Genetics and Molecular Biology, Principal Investigator of the Center of Innovation in Mass Spectrometry – Laboratory of Protein Biochemistry, Head of Department of Genetics and Molecular Biology at the Federal University of the State of Rio de Janeiro. His report was tendered as 'Exhibit 9'. In summary his findings were:

- the amount of Clostebol found in the Athlete's sample was extremely low at 0.17 ng/mL (WADA accredited laboratory reported '... roughly estimated amount of 0.2 ng/mL');
- Professor Cameron included a chart in his report in which he compares the amounts of Clostebol found in people who have intentionally and unintentionally used the substance in different circumstances to the amount of Clostebol found in the Athlete's sample;
- in Experiments I and II noted in the chart people intentionally had contact with Clostebol in two different situations. In Experiment I, a person who had sexual intercourse for approximately 20 minutes with a

partner who had used 5g of Clostebol was later detected with 0.9-3.50 ng/mL of Clostebol. In Experiment II a person who applied 200mg of Clostebol directly to his penis after twenty minutes of having applied the substance was detected to have 22.00 ng/mL of Clostebol;

- In the third example cited cross-country skier athlete Johaug used an ointment on his sore lips which contained Clostebol which led to a sample reading of 13.00 ng/mL.

5.11 In the Defence Brief it is submitted that the Athlete 'was contaminated by sharing clothes, pillows and face towel with his brother and was detected with only 0.17ng/mL of Clostebol. This concentration is extremely lower than the cases demonstrated where all people had direct contact with the substance'. The Athlete also submits 'Professor Cameron states that in order to enhance performance a person would have to make use of Clostebol for a long period which is not the case since the Athlete had previously tested (negative) on 12 April 2019: Clostebol has mild anabolic properties needing to be used during a long period to create a competitive advantage. The acute use of Clostebol would have a negligible effect on performance. On Apr. 12<sup>th</sup>, 2019 the athlete was selected for an out-of-competition blood and urine screening showing adequate (nil) results'.

5.12 In conclusion the Defence Brief states that in view of Professor Cameron's findings 'from a scientific point of view, it is not possible to state that the Athlete used any prohibited substances in order to enhance his performance and gain unjust advantage since not only was the concentration of Clostebol extremely low, but also his Anti-Doping Control exam performed only 38 days before did not return positive'.

5.13 The Athlete asks the Panel to determine, pursuant to FINA DC 10.4 that he is at '*no fault or negligence*' and thus to impose no sanction. In any

event, the Athlete submits that if any period of ineligibility is to be imposed on the Athlete, it should be the minimum possible taking into account the facts established based on the Athlete's low degree of fault.

## **6. LEGAL DISCUSSION**

### **(A) THE FACTS**

- 6.1 The Athlete testified as to his passion for swimming starting when he was nine years old through enrolling on one of the most well-known clubs in Sao Paulo, Esporte Clube Pinheiros. He has made many sacrifices in order to excel at swimming and it has been a central part of his life. He is now one of Brazil's top swimmers having achieved high success in several important competitions including 2016 Rio Olympic Games, the FINA World Championships 2017 in Budapest where he won a silver medal and set a new South American record and the 2018 Pan Pacific Swimming Championships in Tokyo where he won a gold medal.
  
- 6.2 The Athlete explained in detail the care he takes to ensure he is a 'clean' athlete and that he is aware of the high probability of being tested at any moment especially close to important events such as the FINA World Championships Gwangju 2019. He also testified that he has always acted with extreme diligence, never consuming any medication or, vitamin or supplement that had not been prescribed or authorised by a doctor. He also testified that before he consumes any medication he consults his personal doctor Dr Rodrigo Brochetto as well as with the director of the medical staff of the CBDA, Dr Gustavo Magliocca both of whom are aware that the Athlete cannot consume any prohibited substance.



6.3 The Athlete has provided a detailed account in his MOTIONS AND CONTENTIONS of the circumstances in which he has come into contact with Clostebol with explanations and confirmations of the various contentions that he has made.

## **(B) THE LAW**

### **6.4 FINA DC 2.1.1**

It is each Athlete's personal duty to ensure that no Prohibited Substance enters his or her body. Athletes are responsible for any Prohibited Substance or its Metabolites or Markers found to be present in their Samples. Accordingly, it is not necessary that intent, Fault, negligence or knowing Use on the Athlete's part be demonstrated in order to establish an anti-doping rule violation under DC 2.1.

*[Comment to DC 2.1.1: An anti-doping rule violation is committed under this Article without regard to an Athlete's Fault. This rule has been referred to in various CAS decisions as "Strict Liability". An Athlete's Fault is taken into consideration in determining the Consequences of this anti-doping rule violation under DC 10. This principle has consistently been upheld by CAS.]*

### **6.5 FINA DC 7.9.1 Mandatory Provisional Suspension**

The FINA Executive or Member Federation with results management responsibility shall impose a Provisional Suspension promptly after the review and notification described in DC 7.1 and 7.3 have been completed for an Adverse Analytical Finding involving a Prohibited Method or a Prohibited Substance other than a Specified Substance.

A mandatory Provisional Suspension may be eliminated if the Athlete demonstrates to the hearing panel that the violation is likely to have involved a Contaminated Product. A hearing body's decision not to eliminate a mandatory Provisional Suspension on account of the

Athlete's assertion regarding a Contaminated Product shall not be appealable.

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

The period of Ineligibility imposed for a first violation of DC 2.1, 2.2 or 2.6 shall be as follows, subject to potential reduction or suspension of sanction pursuant to DC 10.4, 10.5 or 10.6:

DC 10.2.1 The period of ineligibility shall be four years where:

DC 10.2.1.1 The anti-doping rule violation does not involve a Specified Substance, unless the Athlete or other Person can establish that the anti-doping rule violation was not intentional.

DC 10.2.1.2 The anti-doping rule violation involves a Specified Substance and FINA or the Member Federation can establish that the anti-doping rule violation was intentional.

DC 10.2.2 If DC 10.2.1 does not apply, the period of Ineligibility shall be two years.

DC 10.2.3 As used in DC 10.2 and 10.3, the term "intentional" is meant to identify those Athletes who cheat. The term therefore requires that the Athlete or other Person engaged in conduct which he or she knew constituted an anti-doping rule violation or knew that there was a significant risk that the conduct might constitute or result in an anti-doping rule violation and manifestly disregarded that risk. An anti-doping rule violation resulting from an Adverse Analytical Finding for a substance which is only prohibited In- Competition shall be rebuttably presumed to be not

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

**6.7 FINA DC 10.4 *Elimination of the Period of Ineligibility where there is No Fault or Negligence***

If an Athlete or other Person establishes in an individual case that he or she bears No Fault or Negligence, then the otherwise applicable period of Ineligibility shall be eliminated.

*[Comment to DC 10.4: DC 10.4 and DC 10.5.2 apply only to the imposition of sanctions; they are not applicable to the determination of whether an anti-doping rule violation has occurred. They will only apply in exceptional circumstances, for example where an Athlete could prove that, despite all due care, he or she was sabotaged by a competitor. Conversely, No Fault or Negligence would not apply in the following circumstances: (a) a positive test resulting from a mislabelled or contaminated vitamin or nutritional supplement (Athletes are responsible for what they ingest (DC 2.1.1) and have been warned against the possibility of supplement contamination); (b) the Administration of a Prohibited Substance by the Athlete's personal physician or trainer without disclosure to the Athlete (Athletes are responsible for their choice of medical personnel and for advising medical personnel that they cannot be given any Prohibited Substance); and (c) sabotage of the Athlete's food or drink by a spouse, coach or other Person within the Athlete's circle of associates (Athletes are responsible for what they ingest and for*

*the conduct of those Persons to whom they entrust access to their food and drink). However, depending on the unique facts of a particular case, any of the referenced illustrations could result in a reduced sanction under DC 10.5 based on No Significant Fault or Negligence].*

#### **6.8 FINA DC 10.5.1.2 Contaminated Products**

In cases where the Athlete or other Person can establish No Significant Fault or Negligence and that the detected Prohibited Substance came from a Contaminated Product, then the period of Ineligibility shall be, at a minimum, a reprimand and no period of Ineligibility, and at a maximum, two years Ineligibility, depending on the Athlete's or other Person's degree of Fault.

*[Comment to DC 10.5.1.2: In assessing that Athlete's degree of Fault, it would, for example, be favourable for the Athlete if the Athlete had declared the product which was subsequently determined to be Contaminated on his or her Doping Control form.]*

#### **6.9 FINADC 10.5.2 Application of No Significant Fault or Negligence beyond the Application of DC 10.5.1**

If an Athlete or other Person establishes in an individual case where DC 10.5.1 is not applicable that he or she bears No Significant Fault or Negligence, then, subject to further reduction or elimination as provided in DC 10.6, the otherwise applicable period of Ineligibility may be reduced based on the Athlete or other Person's degree of Fault, but the reduced period of Ineligibility may not be less than one-half of the period of Ineligibility otherwise applicable. If the otherwise applicable period of Ineligibility is a lifetime, the reduced period under this rule may be no less than eight years.

*[Comment to DC 10.5.2: DC 10.5.2 may be applied to any anti-doping rule violation except those rules where intent is an element of the anti-doping rule violation (e.g., DC 2.5, 2.7, 2.8 or 2.9) or an element of a*

*particular sanction (e.g., DC 10.2.1) or a range of Ineligibility is already provided in a rule based on the Athlete or other Person's degree of Fault]*

**6.10 FINA DC 10.8 *Disqualification of Results in Events subsequent to Sample Collection or Commission of an Anti-Doping Rule Violation***

In addition to the automatic Disqualification of the results in the Event which produced the positive Sample under DC 9, all other competitive results of the Athlete obtained from the date a positive Sample was collected (whether In- Competition or Out-of-Competition), or other anti-doping rule violation occurred, through the commencement of any Provisional Suspension or Ineligibility period, shall, unless fairness requires otherwise, be Disqualified with all of the resulting Consequences including forfeiture of any medals, points and prizes.

*[Comment to DC 10.8: Nothing in these Anti-Doping Rules precludes clean Athletes or other Persons who have been damaged by the actions of a Person who has committed an anti-doping rule violation from pursuing any right which they would otherwise have to seek damages from such Person.]*

**6.11 FINA DC 10.11.2 *Timely Admission.***

Where the Athlete or other Person promptly (which, in all events, means for an Athlete before the Athlete competes again) admits the anti-doping rule violation after being confronted with the anti-doping rule violation by FINA or a Member Federation, the period of Ineligibility may start as early as the date of Sample collection or the date on which another anti-doping rule violation last occurred. In each case, however, where this rule is applied, the Athlete or other Person shall serve at least one-half of the period of Ineligibility going forward from the date the Athlete or other Person accepted the imposition of a sanction, the date of a hearing decision imposing a sanction, or date the sanction is otherwise imposed.

This rule shall not apply where the period of Ineligibility has already been reduced under DC 10.6.3.

#### **6.12 FINA DC Appendix 1: Fault**

*Fault:* Fault is any breach of duty or any lack of care appropriate to a particular situation. Factors to be taken into consideration in assessing an Athlete or other Person's degree of Fault include, for example, the Athlete's or other Person's experience, whether the Athlete or other Person is a Minor, special considerations such as disability, the degree of risk that should have been perceived by the Athlete and the level of care and investigation exercised by the Athlete in relation to what should have been the perceived level of risk. In assessing the Athlete's or other Person's degree of Fault, the circumstances considered must be specific and relevant to explain the Athlete's or other Person's departure from the expected standard of behaviour. Thus, for example, the fact that an Athlete would lose the opportunity to earn large sums of money during a period of Ineligibility, or the fact that the Athlete only has a short time left in his or her career, or the timing of the sporting calendar, would not be relevant factors to be considered in reducing the period of Ineligibility under Article 10.5.1 or 10.5.2.

*[Comment: The criteria for assessing an Athlete's degree of Fault is the same under all Articles where Fault is to be considered. However, under DC 10.5.2, no reduction of sanction is appropriate unless, when the degree of Fault is assessed, the conclusion is that No Significant Fault or Negligence on the part of the Athlete or other Person was involved.]*

#### **6.13 FINA DC Appendix 1: No Fault or Negligence**

No Fault or Negligence: The Athlete or other Person'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 or otherwise violated an anti-doping rule. Except in the case of a Minor, for any violation of DC 2.1, the Athlete must also establish how the Prohibited Substance entered his or her system.

#### **6.14 FINA DC Appendix 1: No Significant Fault or Negligence**

No Significant Fault or Negligence: The Athlete or other Person's establishing that his or her 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 Minor, for any violation of DC 2.1, the Athlete must also establish how the Prohibited Substance entered his or her system.

*[Comment: For Cannabinoids, an Athlete may establish No Significant Fault or Negligence by clearly demonstrating that the context of the Use was unrelated to sport performance.]*

#### **(A) SANCTION**

6.15 In this case, which does not involve a Specified Substance where the ADRV involving the presence of Clostebol (Class S1.1.A Exogenous Metabolites) in admitted, the primary issue to determine at the hearing in the proper sanction. The mandatory sanction for the presence of Clostebol pursuant to FINA DC 10.2 in a four year period of ineligibility unless the Athlete can establish that the ADRV was not intentional, so as to reduce the sanction from four years down to two years. The Athlete must demonstrate pursuant to FINA DC 10.2.3, firstly how the Clostebol entered his system and secondly that he did not know that he had engaged in conduct that constituted an ADRV or that he did not know there was a risk that his conduct might result in an ADRV and that he had manifestly disregarded that known risk.

6.16 As previously stated, the Athlete's explanation for the AAF was that he was contaminated by his brother through his use of the prescription medicine Novaderm, which contained Clostebol. The Panel accept that this is what has happened. For the reasons summarised below, the Panel is satisfied that in all material respects the Athlete's explanation for the cause of the AAF is accurate:

- the Athlete's testimony was clear and compelling. He was very credible and struck the Panel as being an honest and upstanding young man.
- The Athlete's brother, Gustavo (Skype), Professor Cameron (Skype), Dr Rodrigo (in person) and coach Alberto Silva (in person) also gave clear and compelling testimony. It is in the Panel's belief, that the testimonies given were honest and not invented.
- Importantly, the material and documents filed as exhibits in the Defence Brief all corroborated the testimony of the Athlete, his brother, Professor Cameron, Dr Rodrigo and the Athlete's coach. These documents included, inter alia, photographs, video, prescriptions, independent expert analysis confirming the potential for transdermal transfer of Clostebol, etc.
- Clostebol has a short half-life so that efforts to use Clostebol as a doping agent would require frequent applications. This is risky for an athlete who wishes to abuse Clostebol as a doping substance and the need for frequent applications would not likely lead to a detected level of about 0.2 ng/mL as reported in this case.
- Importantly, the level of Clostebol detected was extremely low at about 0.2 ng/mL. The Panel is comforted that this extremely low level detected by the Canadian laboratory is fully consistent with the Athlete's explanation of cross-contamination from his brother being the cause of the AAF. However, the Panel wishes to note that a very low level of Clostebol detected cannot, alone, serve as proof that the Athlete was



not intentionally doping. There remains the possibility that despite the trace amount found in the Athlete's urine sample the Athlete could have taken Clostebol intentionally some days earlier and the sample collection was merely fortuitously timed to result in the detection of the last remaining metabolites of the drug in the Athlete's system although this remains as a possibility, the Panel does not believe it is likely, for all the reasons set out in this paragraph.

- Finally, the Panel agrees with the statement by the Athlete's attorney that '*there is a high incidence of Clostebol in commercial products in Brazil as well as Italy*'. The Panel believes this is what happened to the Athlete.

- 6.17 The Panel is satisfied on the balance of probabilities that the cause of the AAF is cross-contamination, as explained by the Athlete. Through the sharing of clothes, towels, pillows, soaps, etc. with the Athlete's brother and immediately prior to the sample collection on 20 May 2019, the Athlete was unknowingly brought into contact with and contaminated by Clostebol.
- 6.18 As a result of this conclusion, the Panel is satisfied that the requirements of FINA DC 10.2.1.1 are met. The Athlete did not act intentionally. The maximum period of ineligibility rests at two years.
- 6.19 The Athlete claims in his Defence Brief that if it is established that the AAF was caused by the sharing of clothes, pillows, towels with his brother (thus demonstrating how the substance entered his body) the final result must be a determination by the Panel that the Athlete is at 'no fault or negligence' for the ADRV. Essentially, the Athlete claims, on the balance of probability that he has not acted with any intention, fault or negligence whatsoever. In essence, the Athlete's position is that if the Panel accepts his explanation regarding the cause of the AAF –

that he did not know anything at all about the Novaderm cream his brother was using – that is enough to satisfy the test to prove he is at 'no fault or negligence' for the AAF.

With regret, the Panel does not agree.

- 6.20 The definition of 'no fault' or 'negligence' contained in FINA DC is a high standard for an athlete to satisfy. It is only applicable to eliminate a sanction in exceptional circumstances. The legal test, to satisfy 'no fault or negligence' is designed to prevent an athlete from avoiding a sanction altogether by simply ignoring a risk or danger that could have been reasonably discovered. Of course, the basis for an athlete's ignorance or lack of knowledge can either be inadvertent (as in this case) or it can be the result of intentional and wilful blindness.
- 6.21 To evaluate a claimed lack of intention pursuant to FINA DC 10.2.1.1, the Panel's inquiry must focus solely on whether the athlete knew (his actual subjective knowledge) that his conduct constituted an anti-doping rule violation and manifestly disregarded that risk. This analysis depends on what the Athlete actually knew. In contrast, the definition of 'no fault or negligence' in FINA DC forces the Panel to evaluate both (i) what the Athlete knew or suspected and (ii) what he could reasonably have known or suspected, even with the exercise of utmost caution. Importantly, and unlike the test to establish intent, to be at 'no fault or negligence' the Athlete must (despite what he actually knew) be able to demonstrate, in addition, that he could not reasonably discover that he had been administered a Prohibited Substance or otherwise violated an anti-doping rule, even if he did take the greatest care or exercise utmost caution.

6.22 Finally, it is not appropriate to focus exclusively on how much caution or care was actually taken by the Athlete. This is a relevant and necessary factor to consider in the evaluation of no fault and negligence – but it is not sufficient. The proper analysis must address what the Athlete actually did know and what reasonably could have been known even if the Athlete did exercise utmost caution.

6.23 The Athlete's position on this initial point is set out in paragraph 4.20 in the Defence Brief

*'The Athlete submits that he has satisfied this burden where there is no way for the Athlete to have reasonably known or expected that he would be exposing himself to the risk of investing a prohibited substance when spending a weekend with his family in order to celebrate his grandfather's birthday.'*

6.24 The Panel believes that any athlete who was exercising the utmost caution to avoid a doping violation would, at a minimum, investigate the status of all food, drinks, supplement products, prescriptions, medications and creams and ointments at his or his parents' home. Such an investigation could be reasonably expected of this Athlete, especially so with these factors present.

- the Athlete is an elite and experienced world class swimmer who is required to take the highest levels of precautions.
- the Athlete's attorney conceded that Clostebol is commonly found in ointments and creams in Brazil and there have been many doping cases in Brazil involving an accidental and involuntary contamination. The Athlete's knowledge, awareness of the risk of contamination would serve to motivate a fulsome search of all such creams and ointments in his parents' home. The Athlete has been competing at a high level since he was young and not competing in a vacuum of unawareness of

the avoidance of such accidental contamination. Similarly, the Athlete has testified as to the great care he has taken through his swimming career from a young age to be compliant with anti-doping laws. This atmosphere of great care would impact his immediate family including his parents and siblings to ensure that at all times, the family home and household were, in effect, 'sterile'. The Panel does not accept that the Athlete's parents and sibling would not be aware of the Athlete's obligations in this regard and the dangers of the prospect of contamination by Clostebol. The well-known danger of the presence of Clostebol in creams and ointments and the attendant positive tests for same in Brazil is well publicised. Taken with the clear indications of infection of the Athlete's brother, the Panel does not accept that the Athlete would not make even a most basic inquiry as to the condition and how it was being treated thus alerting him to further investigate.

- 6.25 Whatever level of caution the Athlete, in fact, exercised, if he had exercised the 'utmost caution' and had asked detailed questions and conducted an investigation regarding the medicines present in his parents' house (which the Panel is satisfied any athlete exercising the greatest care or 'utmost caution' would do - particularly if he had made even a basic observation of his brother's infections) the medicine with Clostebol as a listed ingredient would have been discovered. This is particularly the case as the Athlete has provided evidence as to the close physical living quarters apparent in his parents' house and his 'intimate' contact with towels, pillows, soaps etc that he shared with his brother. Novaderm used by the brother is clearly marked with the word 'Clostebol' and even a cursory inquiry of his parents and brother as to the medicines and creams which were in the house would have revealed the presence of the cream containing Clostebol, clearly marked.

- 6.26 The Panel finds that FINA DC 10.4 is not applicable. The Athlete has not established that he is at 'no fault or negligence' for the ADRV.
- 6.27 Pursuant to FINA DC 10.5.2, the Athlete can obtain a sanction reduction below two years of ineligibility if he can establish how the Clostebol entered his system and that he bears 'no significant fault or negligence' for the ADRV. The actual sanction reduction, if any, below two years must be based on an evaluation of the Athlete's degree of fault'. In no case may the sanction be reduced below a period of ineligibility of one year.
- 6.28 The Athlete has demonstrated how the Clostebol entered his system. The Panel believes the Athlete's explanation regarding the cause of the AAF and has no difficulty concluding that the Athlete bears 'no significant fault or negligence' for the ADRV. The question remains – what is the Athlete's degree of fault' for the ADRV?
- 6.29 The Panel is satisfied that the Athlete's 'degree of fault' whether evaluated on a subjective or an objective basis is low. Despite the generally high level of caution the Athlete habitually exercised to be sure that he was, at all times, competing as a 'clean athlete', he simply did not ever think to inquire of his brother as to whether the brother was treating the obvious severe infection with a cream or ointment and to then identify the nature of the cream or ointment and as to whether it contained a prohibited substance. The Panel is satisfied that the minimum sanction possible, being a period of ineligibility of one year, is appropriate in this case.
- 6.30 The question then arises as to when such period of ineligibility arises. The Defence Brief states at 4.30

*'Nevertheless, it is important to highlight that in good faith, the Athlete has voluntarily withheld from attending any training sessions or competitions ever since he was communicated by FINA about the Adverse Analytical Finding'.*

However, contrary to this statement, the Athlete, when questioned, confirmed that he had continued training with the Brazilian team and did not take any form of provisional suspension. The Athlete is an accredited member of the Brazilian team and entertained a hope that he might have not been suspended and thus compete in his event in the 2019 FINA World Aquatic Championships on 21 July 2019.

## **7. THE CONCLUSION**

- 7.1 **Mr Gabriel da Silva Santos is found to have committed an anti-doping rule violation** under FINA DC Rule 2.1, presence of prohibited substance Clostebol in the Athlete's sample.
- 7.2 Mr Gabriel da Silva Santos **receives a twelve (12) month period of ineligibility** commencing on 20 July 2019 and ending at the concluding of 19 July 2020 for his first anti-doping rule violation. This is the minimum period of ineligibility possible pursuant to FINA DC 10.5.2.
- 7.3 All results obtained by Mr Gabriel da Silva Santos on or after 20 May 2019 and through and including the date of this decision are disqualified. Any medals, points and prizes achieved during that period shall be forfeited.
- 7.4 All costs of this case shall be borne by the Brazilian Swimming Federation in accordance with FINA DC Rule 12.3.

7.5 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 the complete and measured judgment (FINA DC 12.11.4 and DC 13).

A handwritten signature in black ink, appearing to read 'Peter Kerr', with a stylized flourish at the end.

**Peter Kerr**

Chairman