

**FINA Doping Panel 02/19**

2017-2021

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**FINA Doping Panel**

comprised of

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In the proceedings against

the swimmer **Mr. Henrique Martins** (the “Athlete”)

affiliated to the Brazilian Swimming Federation  
 (“BSF”)

represented by: Mr. Marcelo Franklin, legal counsel.

**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 The Brazilian Swimming Federation (BSF) is a member of FINA. BSF 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 JSF.

1.3 The Athlete, is a member of the BSF.

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

2.1 The Athlete was subjected to an out-of-competition test on 27 March 2018. This test yielded an adverse analytical finding for SARM S-22 (listed on the Prohibited List as ostarine) in his urine sample at an estimated concentration of 140 picograms (i.e., .14 ng/mL).

2.2 Ostarine is a prohibited substance under Class S1.2 (Other Anabolic Agents) of the 2018 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 2.2 and DC 4.2.1.

## **III. BACKGROUND OF THE ATHLETE**

3.1 The Athlete, born 14 November 1991, is 28 years old and an experienced professional swimmer who has competed at or near the highest levels of his sport for more than a decade.

3.2 Over the time period since his first doping control in December 2014 the Athlete has been drug tested at least 20 times. His only positive test was the out of competition doping control on 27 March 2018.

3.3 The Athlete has been in the FINA Registered Testing Pool for the first time in 2015.

#### **IV. PROCEEDINGS**

- 4.1 By letter dated 3 May 2018, the FINA Executive Director advised the Athlete that the A sample of an out of competition doping control test conducted on 27 March 2018 had tested positive for the presence of the prohibited substance SARM S-22 or its metabolites. The Athlete was advised that he could arrange for a B sample analysis.
- 4.2 On 11 May 2018 the Athlete waived the B sample analysis.
- 4.3 By letter dated 3 September 2018 the Athlete was advised that his case would be forwarded to the FINA Doping Panel for further consideration. Additionally, in this letter the FINA Executive Director noted that a mandatory provisional suspension was being imposed by FINA as of 11 May 2018.
- 4.4 The FINA Doping Panel was formed pursuant to provision C 22.9 of the FINA Constitution.
- 4.5 The FINA Doping Panel hearing was held on 2 November 2018 in FINA Headquarters, Lausanne (SUI).
- 4.6 The Athlete was represented at the hearing in this matter by Mr. Marcelo Franklin of Belo Horizonte, Brazil.
- 4.7 In advance of the hearing the Athlete submitted a detailed affidavit. He also was present at the hearing and testified and responded to questions from the FINA Doping Panel.
- 4.8 As explained below, the Athlete's attorney made detailed submissions on his behalf, including a pre-hearing brief, and numerous affidavits.

## V. JURISDICTION AND APPLICABLE RULES

- 5.1 The jurisdiction of the FINA Doping Panel arises out of the following provisions of the FINA Rules: C 22.8, C 22.9 and DC 8.1.
- 5.2 The applicable Rules in this case are the FINA DC in effect since 1<sup>st</sup> January 2015 (accepted in November 2014 in Doha).
- 5.3 Rules that bear on the decision of the FINA Doping Panel in this case include:

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

#### **DC 2.1.1**

It is each *Athlete's* personal duty to ensure that no *Prohibited Substance* enters 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.

#### **DC 2.1.2**

Sufficient proof of an anti-doping rule violation under DC 2.1 is established by any of the following: presence of a *Prohibited Substance* or its *Metabolites* or *Markers* in the *Athlete's* A Sample where the *Athlete* waives analysis of the B Sample and the B Sample is not analyzed; or, where the *Athlete's* B Sample is analyzed and the analysis of the *Athlete's* B Sample confirms the presence of the *Prohibited Substance* or its *Metabolites* or *Markers* found in the *Athlete's* A Sample; or, where the *Athlete's* B Sample is split into two bottles and the analysis of the second bottle confirms the presence of the *Prohibited Substance* or its *Metabolites* or *Markers* found in the first bottle.

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

**DC 3.1 Burdens and Standards of Proof**

FINA and its *Member Federations* shall have the burden of establishing that an anti-doping rule violation has occurred. The standard of proof shall be whether FINA or the *Member Federation* has occurred. The standard of proof shall be whether FINA or the Member Federation has established an anti-doping rule violation to the comfortable satisfaction of the hearing panel bearing in mind the seriousness of the allegation which is made. This standard of proof in all cases is greater than a mere balance of probability but less than proof beyond a reasonable doubt. Where these Anti-Doping Rules place the burden of proof upon the *Athlete* or other *Person* alleged to have committed an anti-doping rule violation to rebut a presumption or establish specified facts or circumstances, the standard of proof shall be by a balance of probability.

**DC 10 SANCTIONS ON INDIVIDUALS**

**DC 10.1 *Disqualification* of Results in the *Competition* during which an Anti-Doping Rule Violation Occurs**

An anti-doping rule violation occurring during or in connection with a *Competition* may, upon the decision of the ruling body of the *Competition*, lead to *Disqualification* of all of the *Athlete's* individual results obtained in that *Competition* with all Consequences, including forfeiture of all medals, points and prizes, except as provided in DC 10.1.1.

Factors to be included in considering whether to *Disqualify* other results in a *Competition* might include, for example, the severity of the *Athlete's* anti-doping rule violation and whether the *Athlete* tested negative in the other *Events*.

**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.

**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.

**DC 10.5 Reduction of the Period of *Ineligibility* based on *No Significant Fault or Negligence***

**DC 10.5.1** Reduction of Sanctions for *Specified Substances* or *Contaminated Products* for Violations of DC 2.1, 2.2 or 2.6.

**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*.

**DC 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.

#### **DC 10.11 Commencement of *Ineligibility* Period**

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

##### **DC 10.11.1 Delays not attributable to the *Athlete* or other *Person*.**

Where there have been substantial delays in the hearing process or other aspects of *Doping Control* not attributable to the *Athlete* or other *Person*, the body imposing the sanction may start the period of *Ineligibility* at an earlier date commencing as early as the date of *Sample* collection or the date on which another anti-doping rule violation last occurred. All competitive results achieved during the period of *Ineligibility*, including retroactive *Ineligibility*, shall be *Disqualified*.

##### **DC 10.11.2 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.



**DC 10.11.3** If a *Provisional Suspension* is imposed and respected by the *Athlete* or the other *Person*, then the *Athlete* or the other *Person* shall receive a credit for such period of *Provisional Suspension* against any period of *Ineligibility* which may ultimately be imposed. If a period of *Ineligibility* is served pursuant to a decision that is subsequently appealed, then the *Athlete* or other *Person* shall receive a credit for such period of *Ineligibility* served against any period of *Ineligibility* which may ultimately be imposed on appeal.

**DC 10.11.4** If an *Athlete* or the other *Person* voluntarily accepts a *Provisional Suspension* in writing from FINA or a *Member Federation* and thereafter refrains from competing, the *Athlete* or the other *Person* shall receive a credit for such period of voluntary *Provisional Suspension* against any period of *Ineligibility* which may ultimately be imposed. A copy of the *Athlete* or the other *Person's* voluntary acceptance of a *Provisional Suspension* shall be provided promptly to each party entitled to receive notice of an asserted anti-doping rule violation under DC 14.1.

**DC 10.11.5** No credit against a period of *Ineligibility* shall be given for any time period before the effective date of the *Provisional Suspension* or voluntary *Provisional Suspension* regardless of whether the *Athlete* elected not to compete or was suspended by his or her team.

## **VI. LEGAL DISCUSSION**

### **6.1 Motions and contentions of the Athlete.**

The Athlete contended:

6.1.1 That he had never previously had a positive doping control in more than 20 prior anti-doping tests.

6.1.2 That he did not intend to use a prohibited substance.

6.1.3 That he acted reasonably and diligently to avoid a positive test.

6.1.4 That his positive test was the result of an amino acid supplement from the company Fiale Laboratório de Estéreis e Injetáveis (the “Fiale Laboratory”) which had been prescribed to the Athlete by his doctor Dr. Lucas Mendes Penchel, of the Clinica Penchel in Belo Horizonte, Brazil on 26 March 2018, one day prior to the Athlete’s positive test, and which was later found to be contaminated with Ostarine through laboratory testing.

6.1.5 That the Athlete’s degree of fault was low in using the allegedly contaminated supplements because he relied on his doctor who was supposedly an experienced sports doctor.

6.1.6 That the Athlete’s degree of fault was low because he personally contacted the Fiale Laboratory which produced the amino acid product he used and conducted reasonable internet searches regarding the likely efficacy of the supplements he was using.

6.1.7 That because he acted reasonably promptly to pull himself out of training, test his supplement and not challenge the adverse analytical finding, any period of ineligibility should commence as of the date of sample collection.

## 6.2 Factual findings of the FINA Doping Panel:

The FINA Doping Panel has found the following facts in this case:

### **The Athlete’s use of supplements and relationship with Dr. Lucas Mendes Penchel**

6.2.1 The Athlete testified that he had been using supplements and other products prescribed by Dr. Penchel for approximately three

years. However, until March of 2018 the supplements prescribed by Dr. Penchel were in powder form.

6.2.2 The Athlete testified that Dr. Penchel is a well-known sports doctor in Belo Horizonte and that he went to Dr. Penchel specifically in order to get expert advice in order to be careful and comply with the anti-doping rules.

6.2.3 Dr. Penchel holds himself out as an expert on the anti-doping rules and there was testimony that he claims to have received a certification in anti-doping. Dr. Penchel himself testified that he was knowledgeable about sport anti-doping rules.

6.2.4 The Athlete contends that he was vigilant in guarding against the possibility of a positive drug test from the supplements prescribed to him by Dr. Penchel in part because Dr. Penchel held himself out as a sports doctor with experience under the anti-doping rules and told the Athlete that Dr. Penchel was certified in anti-doping procedures.

#### **Dr. Penchel's Administration of an Intravenous Infusion to the Athlete**

6.2.5 The Athlete's counsel entered into evidence a prescription for the Athlete dated 25 March 2018 and signed by Dr. Penchel. The prescription is for an intravenous infusion of 13 listed amino acids in 250 mL of saline.

6.2.6 Dr. Penchel testified that he switched to an intravenous infusion rather than a powder form supplement because in March 2018 the Athlete was ill and losing weight and strength.

6.2.7 Both Dr. Penchel and the Athlete testified that the infusion in March was the only time the athlete was given an infusion.

- 6.2.8 When asked if he was aware of any limit on the amount of an infusion he could receive the Athlete testified that he was not aware of a limit, but that Dr. Penchel had told him that an infusion of 250 mL was permissible.
- 6.2.9 The Athlete testified that in the 24 hour period after receiving the prescription from Dr. Penchel that he did research on Fiale Laboratory by calling the Laboratory to see if they produced prohibited products and by searching the internet to try to ensure that there was no reason to believe Fiale Laboratory sold prohibited substances or had previously been involved in any doping cases. He testified that his research had uncovered no red flags concerning Fiale Laboratory.
- 6.2.10 Dr. Penchel testified via cell phone from Paris, France where Dr. Penchel was attending a sports medicine conference. Dr. Penchel affirmed the authenticity of the prescription he wrote to the Athlete.
- 6.2.11 Given that Paris is only a several hour train ride from Lausanne, the Athlete's counsel was asked why Dr. Penchel did not testify in person before the FINA Doping Panel.
- 6.2.12 The Athlete's legal counsel stated that he had pleaded with Dr. Penchel to appear before the Panel, however, Dr. Penchel was unwilling to do so.
- 6.2.13 The Athlete confirmed that he had been sorely disappointed by Dr. Penchel's refusal to testify in person despite the fact that he was obviously in a position to do so.
- 6.2.14 Given that the Athlete's reputation and livelihood were at stake in this proceeding, that Dr. Penchel was intimately involved in the

events in question, and that Dr. Penchel had previously planned travel that permitted him to be within a reasonable traveling distance at the time of the hearing, the FINA Doping Panel understands that disappointment expressed by the Athlete and his counsel in Dr. Penchel not making himself available to testify in person.

6.2.15 Nevertheless, Dr. Penchel did testify via video/audio and the FINA Doping Panel found that this method of testimony was adequate under the circumstances for the FINA Doping Panel to be fully advised regarding the relevant actions of Dr. Penchel.

6.2.16 The Athlete explained, and Dr. Penchel confirmed, that the amino acid supplement was administered by Dr. Penchel's nurse via intravenous infusion at Dr. Penchel's office on 26 March 2018.

6.2.17 The prescription signed by Dr. Penchel that was provided by the Athlete indicates that the amino acid product from the Fiale Laboratory was to be administered in 250 mL of 0.9% saline solution.

6.2.18 Dr. Penchel was shown the prescription and confirmed he had signed the prescription.

6.2.19 Dr. Penchel testified that the ampoule of amino acids from the Fiale Laboratory was 10 mLs and, as indicated on the prescription, to be administered in 0.9% saline solution.

6.2.20 When questioned about the infusion Dr. Penchel testified, however, that despite the fact that the prescription he wrote and signed references at least a 250 mL infusion that the infusion given by his nurse did not actually exceed 50 mL.

6.2.21 Dr. Penchel also testified that prior to administering the infusion he had had a conversation with the Athlete and told him that under WADA rules infusions could not exceed 50 mL. Of course, this explanation was inconsistent with the testimony of the Athlete, who did not recall discussion about a 50 mL limit.

6.2.22 Dr. Penchel testified that around March of 2018 he had checked the WADA rules and confirmed that the maximum permissible infusion amount was 50 mL and that he was therefore sure that his office had not administered an infusion that was over the WADA limit.

6.2.23 Dr. Penchel testified that he instructed his nurse to use markings on the side of the infusion bag to pour in excess of 200 mL out of a 250 mL infusion bag and to give the Athlete less than 50 mL.

6.2.24 When asked where the remainder of the saline solution in the infusion bag was disposed of, Dr. Penchel said that he was not sure and would have to check with his nurse.

6.2.25 Dr. Penchel's explanation that he did not follow his prescription, which states that a 10 mL ampoule of amino acids was to be administered in 250 mL of 0.9% saline solution, was not convincing, for a number of reasons:

6.2.25.1 First, Dr. Penchel's testimony about what he told the Athlete about the permissible infusion amount was inconsistent with the recollection of the Athlete who recalled a discussion about 250 mL.

6.2.25.2 Second, Dr. Penchel's claim to have consulted WADA rules in March, 2018 and learned that the infusion limit was 50 mL is questionable given that the infusion limit was actually

100 mL per 12 hour period in 2018. Thus, there is some question as to whether Dr. Penchel has himself ever actually personally consulted the WADA rules to confirm the allowable infusion amount outside a hospital.

6.2.25.3 Third, If Dr. Penchel had recently checked the infusion limit in March, 2018 and been aware of the 100 mL limit at that time it would not make sense for him to personally sign a prescription indicating that an athlete subject to the anti-doping rules was to receive an infusion of at least 250 mL.

6.2.26 The Panel concludes that the evidence is strong that Dr. Penchel was, at a minimum, unaware of the WADA infusion rule at the time he administered an IV infusion to the Athlete and that on 26 March 2018 his office administered an infusion to the Athlete of at least 250 mL in violation of Article 2.8 of the FINA DC and Category M2.2 of the WADA Prohibited List which in 2018 proscribed infusions in excess of 100 mL per 12 hour period except for those legitimately received in the course of hospital treatments, surgical procedures or clinical diagnostic investigations.

6.2.27 This evidence undercuts the credibility of Dr. Penchel as an expert in anti-doping matters as he represented to the Athlete, and it also explains his unwillingness to show up to the hearing to testify.

6.2.28 At the same time, that the Athlete was given an over-limit infusion by Dr. Penchel enhances the credibility of the Athlete and his counsel who forthrightly did not hesitate to provide the prescription from Dr. Penchel which reflects on its face on over-the-limit infusions.

6.2.29 Thus, the Panel was confronted with a situation where the evidence at the hearing demonstrated that the Athlete had unwittingly

committed a rule violation with which he had not been charged through use of a prohibited method, i.e., an infusion over the limit of 100 mL in a twelve hour period.

6.2.30 Dr. Penchel is apparently not a member of the BSF or any other national swimming federation. Therefore, the FINA Doping Panel lacks authority over him in relation to the strong likelihood that he violated sport anti-doping rules by providing an over-limit infusion.

6.2.31 At the doping control on 27 March 2018 the Athlete forthrightly and separately declared on his doping control form each of the 13 amino acids identified on his prescription from Dr. Penchel.

6.2.32 The detailed nature of the Athlete's disclosures on his doping control form is commendable and has done him good service in this situation as the FINA Doping Panel finds this detailed disclosure to be strong corroboration for the Athlete's use of the amino acid infusion from the Fiale Laboratory as he testified to at the hearing.

6.2.33 Thus, the Panel has no doubt that the Athlete, in fact, received the infusion of amino acids identified in Dr. Penchel's prescription.

**Supplement testing by Laboratório de Análises Clínicas de Faculdade de Medicina do ABC (Dr. Fernando Luiz Affonso Fonseca, Chairman of Clinical Analysis)**

6.2.34 2 sealed glass ampoules bearing the marking "FIALE® Lote 1707281 were received by the Laboratório de Análises Clínicas de Faculdade de Medicina do ABC (the "Laboratory").

6.2.35 These ampoules were obtained from Dr. Penchel and forwarded to the Laboratory.



- 6.2.36 As the glass ampoules can only be accessed by breaking the glass seal on the ampoules, the FINA Doping Panel concluded that the possibility that the samples were somehow manipulated is highly unlikely.
- 6.2.37 Dr. Fernando Luiz Affonso Fonseca, Chairman of Clinical Analysis at the Laboratory testified that the glass ampoules were sealed and did not appear to have been tampered with either at the time of receipt or at the time of sample analysis.
- 6.2.38 Upon receipt of the samples they were stored in the Laboratory's refrigerator until the analysis was performed.
- 6.2.39 The Laboratory used the Enzyme-Linked Immunosorbent Assay (ELISA) method to conduct the sample analysis. Dr. Fonseca testified that the Laboratory had been accredited to perform analysis using this method since 1999 and had been internationally certified in the use of this method since 2008. Dr. Fonseca further testified that he had had published a number of peer reviewed papers using the ELISA method for analysis at Laboratory.
- 6.2.40 The FINA Doping Panel is satisfied that the Laboratory accurately and using appropriate scientific methodology detected Ostarine in the ampoules.
- 6.2.41 Given that the infusion was given the day before the positive test the FINA Doping Panel is satisfied that the Athlete has established by a balance of probabilities that an ampoule of amino acids from FIALE Laboratory was the likely source of his positive drug test.

## **The Athlete's Positive Test and Provisional Suspension**

- 6.2.42 On 3 May 2018 the Athlete was notified of his positive test from the 27 March 2018 doping control.
- 6.2.43 On 11 May 2018 the Athlete waived the B sample analysis thereby accepting his positive test.
- 6.2.44 The Athlete did not dispute the accuracy of the WADA accredited laboratory testing which found ostarine in his urine sample.
- 6.2.45 Ostarine is in a class of drugs known as Selective Androgen Receptor Modulators or SARMs. SARMs are a relatively new class of drugs intended to have the same effects as anabolic agents but be more selective in their action.
- 6.2.46 As explained below, SARMs are reported to be growing in popularity and present significant risks for athletes.
- 6.2.47 The number of positive tests from SARMs has increased in recent years.
- 6.2.48 WADA's 2017 Testing Figures Report indicates that in 2017 there were 47 positive tests for ostarine, 9 positive tests for LGD-4033 at WADA accredited laboratories and a total of 65 positive tests for SARMs.<sup>1</sup> In contrast, in 2012 there were only 5 positive tests worldwide for SARMs.<sup>2</sup>

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<sup>1</sup> [https://www.wada-ama.org/sites/default/files/resources/files/2017\\_anti-doping\\_testing\\_figures\\_en\\_0.pdf](https://www.wada-ama.org/sites/default/files/resources/files/2017_anti-doping_testing_figures_en_0.pdf)

<sup>2</sup> <https://www.wada-ama.org/sites/default/files/resources/files/WADA-2012-Anti-Doping-Testing-Figures-Report-EN.pdf>

6.2.49 All prohibited substances require a TUE for use in or out of competition. However, at present SARMs (including ostarine and LGD-4033) are not approved for human use or consumption outside of clinical trials. Therefore, there is no legitimate use of SARMs in sport.

6.2.50 A recent article in the *New York Times* reported the following about the dangers and risks of ostarine:

Many athletes and gym-goers are turning to a popular but potentially dangerous new pill to help them build muscle and gain strength: a steroid alternative known as SARMs. The pills are widely marketed online as “legal steroids” that provide the muscle-building benefits of anabolic steroids without the troubling side effects. . . .their spread has alarmed health authorities, who say they are not necessarily safe.

Drug companies developed SARMs, which stands for selective androgen receptor modulators, as an alternative to anabolic steroids for people who suffer from age and disease-related muscle loss. But they are the subject of ongoing clinical trials and have not been approved for use by the Food and Drug Administration.

In October, the agency issued a public advisory cautioning that SARMs were unapproved drugs linked to “serious safety concerns,” including the potential for an increased risk of liver toxicity, heart attacks and strokes.

A month later, a study published in JAMA [the Journal of the American Medical Association] revealed that products marketed as SARMs were frequently misbranded and tainted with unlisted ingredients. Out of 44 products that were purchased online and analyzed, only about half contained an actual SARM, while 10 percent contained none at all. Roughly 40 percent had other hormones and unapproved drugs. Several contained a drug that was abandoned by GlaxoSmithKline a decade ago after it was found to cause cancer in animals.

The long-term consequences of using SARMs are largely unknown, and people who purchase products marketed as them cannot be entirely sure what they are putting in their bodies, said Dr. Shalender Bhasin, the director of research

programs in men's health, aging and metabolism at Brigham and Women's Hospital and an author of the JAMA report.<sup>3</sup>

It is clear that the use of a SARM is a substantial health risk to an athlete, which is one of the reasons WADA puts substances on its Prohibited List.

6.2.51 As the *New York Times* article quoted above indicates, SARMS, including ostarine, are widely available for sale over the internet as athletic performance enhancing supplements and marketed to athletes despite the fact that selling these products to the general public for human consumption is currently unlawful.

6.2.52 Because of their use by supplement companies SARMS have also been found at contaminant levels in supplements.

6.2.53 Therefore, a positive test for a SARM at a low level does not, in and of itself, clearly point to whether the SARM was ingested as the consequence of intentional use of an illicit product or as the result of contamination of a supplement.

### **6.3 Legal conclusions of the FINA Doping Panel**

The FINA Doping Panel has reached the following legal conclusions in this case:

6.3.1 The Athlete has committed his first anti-doping rule violation as a result of the positive test for a prohibited substance in his sample.

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<sup>3</sup> <https://www.nytimes.com/2018/04/12/well/move/sarms-muscle-body-building-weight-lifting-pill-supplements-safety.html>

- 6.3.2 The Athlete has carried his burden to prove that his anti-doping rule violation was not intentional as required by FINA DC 10.2.1.1.
- 6.3.3 The Athlete has established how the Prohibited Substance entered his system.
- 6.3.4 While proof of source is not explicitly referenced in FINA DC 10.2.1.1, it is relevant to the consideration of whether the athlete has proven lack of intent pursuant to FINA DC 10.2.3.
- 6.3.5 The Contaminated Products Rule, FINA DC 10.5.1.2, also explicitly requires the Athlete to establish No Significant Fault or Negligence which does explicitly require a showing by the Athlete of “how the Prohibited Substance entered his . . . system.”<sup>4</sup>
- 6.3.6 As explained above, the Athlete has carried his burden of establishing the source of his positive test and has satisfied the requirements of the Contaminated Products Rule.
- 6.3.7 The Athlete could also potentially have his sanction reduced via FINA DC 10.5.2 for no significant fault or negligence.
- 6.3.8 Nevertheless, the question of the Athlete’s degree of fault is more complicated in this case than in the typical contaminated products case.
- 6.3.9 While the Athlete’s degree of fault in using the amino acid product from FIALE Laboratory under the care of his physician was low, the Athlete’s investigation into the infusion limit was not sufficient

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<sup>4</sup> Definition of No Significant Fault or Negligence.

and his reliance on Dr. Penchel regarding the infusion rules turned out to be misplaced.

6.3.10 The Panel hastens to add that the Panel was very impressed by the Athlete and his conduct at the hearing and in relation to this matter. The Panel has no concern whatsoever that the Athlete was seeking to obtain an unfair advantage. In his testimony the Athlete appeared humble, contrite, and accepting of responsibility for his mistake of relying upon Dr. Penchel and not investigating the infusion rule further. He answered every question directly and left a firm and unshakeable impression with the Panel that he was honest and fully committed to clean sport.

6.3.11 Taking all of this into account, the Panel finds the athlete's degree of fault to have been moderate because as an elite athlete he should have been aware of the infusion rule and, while his reliance on a physician who held himself out to be an expert in the rules is understandable, reliance on his physician does not absolve him of his personal responsibility to know and follow the rules.

6.3.12 Therefore, the FINA Doping Panel assigns a sanction of twelve months which is at the midpoint of the sanction range for a contaminated product.

## **VII. CONCLUSION**

7.1 Mr. Henrique Martins is found to have committed an anti-doping rule violation under FINA DC Rule 2.1 as a result of the presence of a prohibited substance in his sample.

- 7.2 Mr. Henrique Martins receives **a one year (i.e., 12 months) period of ineligibility** commencing on **11 May 2018**, the date he received a provisional suspension, and ending at the conclusion of **10 May 2019**, for his first anti-doping rule violation.
- 7.3 All results obtained by Mr. Henrique Martins on or after 27 March 2018 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 BSF in accordance with FINA DC 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 this judgement (FINA Rule C 12.11.4 and DC 13.7.1).

Robert Fox  
Chairman

Peter Kerr  
Member

William Bock  
Member

Signed on behalf of all three Panel Members



Robert Fox