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FINA Doping Panel 03/20

FINA Doping Panel

comprised of

Robert Fox (SUI) Chairman

William Bock III (USA) Member

David Lech (CAN) Member

In the proceedings against

the athlete **Guillermo BERTOLA**
affiliated to Confederación Argentina de Deportes Acuáticos (CADDA)
Unrepresented by legal counsel

and

the Fédération Internationale de Natation (FINA)
Represented by Mr. Loic Loutan, attorney

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 CADDA is a member of FINA. CADDA 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 and must be followed by Athletes, Athlete Support Personnel, coaches, physicians, team leaders, and club representatives under the jurisdiction of CADDA.

1.3 The Athlete is a member of CADDA and thus is subject to the jurisdiction of the FINA DC. The Athlete competes in the sport of open water swimming.

2. NATURE OF THE CASE AND PROCEDURAL HISTORY

- 2.1 On December 2, 2019, FINA sent the Athlete a letter informing him that FINA was investigating a potential anti-doping rule violation (“ADRV”) committed by the Athlete pursuant to the Athlete Biological Passport (“ABP”) Program. The evidence that triggered this investigation was a series of blood test results from samples collected from the Athlete in the course of FINA’s Out-of-Competition blood testing program in 2013, 2018 and 2019.
- 2.2 An Expert Panel was selected by the Athlete Passport Management Unit (APMU) appointed by the International Testing Agency (ITA). ITA manages the Athlete Biological Passport Module on behalf of FINA. The Expert Panel included three experts with knowledge in the fields of clinical haematology, laboratory medicine/haematology and sports medicine and exercise physiology specialized in haematology.
- 2.3 The Expert Panel unanimously expressed its opinion in an Expert Report that it was highly unlikely that the Athlete’s longitudinal profile was the result of a normal physiological or pathological condition, and that what was identified as an abnormal profile from a blood sample given on January 31, 2018 may be the Use of a Prohibited Substance or a Prohibited Method. The Expert Report and the ABP Documentation package was provided to the Athlete together with the Expert Panel’s opinion. The Athlete was invited to explain the abnormal profile.
- 2.4 The Athlete replied to FINA on December 10, 2019 and provided his explanation for what was described by the Expert Panel as an abnormal profile. In summary, the Athlete denied that he was doping and claimed that the ABP Documentation could be satisfactorily explained due to his intermittent bouts of hard training at altitude together with his use of a snorkel and mask with hypoxic effect. The Athlete further explained that he used a hyperbaric chamber, was taking iron injections and was feeling ill in the weeks prior to the Santa Fee ultra-distance swimming competition which was when the problematic blood sample was collected. The Athlete’s explanation was forwarded to the Expert Panel for further review.

- 2.5 On January 6, 2020, the Expert Panel replied to FINA and rejected the Athlete's explanations point by point. The Expert Panel concluded: "*It is therefore our unanimous opinion that based on the information provided by the athlete at this stage, the likelihood of the abnormality described above being due to blood manipulation, namely the artificial increase of red cell mass in January 2018 is very high and the likelihood of the abnormality being caused by any other mean, such as a pathology or analytical shortcomings, is very low. We therefore maintain our unanimous opinion set out in the previous joint report.*"
- 2.6 In consequence, FINA formally charged the Athlete on January 20, 2020 with an ADRV under FINA DC 2.2 "Use or Attempted Use by an Athlete of a Prohibited Substance or a Prohibited Method". The proposed sanction was a four-year period of ineligibility. The Athlete was provisionally suspended on that date.
- 2.7 By letter dated February 10, 2020, the Athlete wrote to FINA and acknowledged that his previous explanation was not accurate. In fact, the Athlete confirmed in the letter to FINA that for various reasons he had undergone "*an inappropriate method that is transfusion, manipulating the blood of another person, in this case my mother who has the same blood group (factor 0 NEGATIVE RH).*" The Athlete admitted to FINA the fact of the ADRV that had been charged against him.
- 2.8 Accordingly, FINA formally referred the matter to the Doping Panel to determine what sanction should apply to the Athlete. FINA provided written submissions and supporting documentation to the Doping Panel on February 18, 2020. FINA set out in detail the reasons why FINA believed the sanction for the admitted ADRV should remain at four-years. In summary, FINA claimed that the Athlete acted with full knowledge that the transfusion was not allowed and because of his intentional conduct was not entitled to any sanction reduction below the presumptive sanction of four-years of sport ineligibility contained in the FINA DC.
- 2.9 On March 2, 2020, Mr. Robert Fox, Chair of the FINA Doping Panel, wrote to the Athlete to inquire if the Athlete wished to attend at a hearing to determine

the applicable sanction. All material filed by FINA with the Doping Panel was sent on to the Athlete.

2.10 On March 23, 2020, the Athlete provided additional explanations in a letter to the Doping Panel. On April 3, 2020, the Athlete's mother also wrote to the Doping Panel. By letter dated April 26, 2020, the Athlete formally requested a hearing before the Doping Panel to determine the sanction, if any, that should apply to him as a result of the admitted ADRV. The Athlete also informed the Doping Panel of the witness that he would call at the hearing.

2.11 On May 14, 2020, Mr. Robert Fox, confirmed with the Athlete that a hearing would be conducted by the Doping Panel by means of a teleconference on May 27, 2020. Mr. Robert Fox informed the Athlete regarding the composition of the Doping Panel. The Athlete accepted the three members of the FINA Doping Panel.

3. JURISDICTION AND APPLICABLE RULES

3.1 The jurisdiction of the FINA Doping Panel arises out of the provisions of the FINA Rules C 22.8, C22.9 and FINA DC 8.1.

3.2 The applicable Rules in this case are the FINA DC in effect since January 1, 2015.

4. MOTIONS AND CONTENTIONS

4.1 In advance of the hearing the Athlete filed with the Doping Panel a number of documents containing explanations for his conduct and requests for a sanction falling well below the four-year period of ineligibility proposed by FINA. At the hearing the Athlete wished to testify regarding his personal circumstances, tell what had happened, and explain why he was entitled to a significantly reduced sanction.

4.2 FINA maintained that the admitted ADRV must result in a sanction of four-years of sport ineligibility, as mandated in the FINA DC.

- 4.3 The singular issue the Doping Panel was required to address at the hearing was whether the Athlete's conduct was intentional and, if not, what were the proper consequences of the admitted ADRV considering the Athlete's degree of fault?
- 4.4 Prior to the formal commencement of the hearing, when questioned by Mr. Robert Fox, the Athlete confirmed (i) that he was satisfied with the Doping Panel's jurisdiction, (ii) there were no concerns regarding bias on the part of the Doping Panel members, (iii) the proposed manner of conducting the hearing by teleconference was acceptable, and (iv) no outstanding procedural issues remained to be resolved. The Athlete wished to proceed.

5. LEGAL DISCUSSION

A. THE FACTS

- 5.1 During the hearing the Doping Panel heard evidence from the Athlete and from his mother, Ms. Claudia Suarez. FINA relied entirely on the written submissions provided to the Doping Panel, in advance. Set out below is a summary of the evidence and contentions relied on by the parties. Testimony was heard by way of a Zoom call with capable translation services (Spanish to English) being provided by Ms. Gabriela Gancedo. While the summary does not contain every contention and allegation made by FINA and the Athlete, the Doing Panel has reviewed and carefully considered all of the written submissions and evidence offered by the parties, including those not specifically mentioned in the following summary.
- 5.2 The Athlete testified regarding his start in swimming and his significant athletic success. The Athlete was born on December 26, 1989. He started swimming at the age of 7. It was a summer activity, selected for him by his mother, and the Athlete quickly developed a passion for the sport. By age 17, after he finished high school, the Athlete was competing in ultra-distance competitions and training hard every day. Swimming was the singular focus in his life and the Athlete had the full support and encouragement of his family in this pursuit. In fact, the entire family was involved and committed to assisting the Athlete progress in the sport. There is no doubt the Athlete was highly motivated and fully committed to achieving success in the sport he loved.

- 5.3 The Athlete received modest financial support from the State for his swimming related expenses, but the vast majority of the money needed to train, travel and compete at the highest level in the sport had to be raised by the Athlete and by his family. This required a significant commitment of time and effort – all sacrifices made by the Athlete and other family members to support his swimming career. The Athlete organized local races to raise funds and, in general, struggled to support himself as an elite athlete. It was stressed by the Athlete how involved the entire family was in his pursuit of success in open water swimming and how much he depended on their support and commitment.
- 5.4 As a national team member the Athlete obtained a few sponsors for gear, clothing and equipment but he had no regular access to team coaches, trainers or doctors. Living in the city of Cordoba, in central Argentina, precluded any regular or ongoing interaction with national swimming team support services.
- 5.5 Despite the challenges he faced, the Athlete enjoyed significant success. He was a two-time Pan-Am Games medalist. In 2017, he was the Open Water World Champion and Grand Prix winner. In 2018, he was second in the Grand Prix series. The Athlete also attended FINA World Championships on 3 occasions as a national team swimmer. The Athlete enjoyed success in many open water ultra-distance events. The Athlete was an elite and experienced ultra-distance swimmer with a true passion for this most grueling sport.
- 5.6 Despite his vast experience and his membership on the Argentinian national team, the Athlete claimed he had never received any formal anti-doping education. He was never involved in a formal class or required to take an anti-doping course. The Athlete testified that no anti-doping resources were ever provided to him. He knew that he should not take “some substances” as he had discussed various doping scandals with teammates. He had heard tales from other swimmers and, of course, knew of doping issues that arose in other sports. The Athlete knew that he should check the ingredients of supplements he might take but he was not generally concerned regarding the risk of inadvertent doping as he took few supplements. In fact, the Athlete testified that he did not like taking medicine, even when sick.

- 5.7 If he did fall sick or was taking a medicine or a supplement he would typically consult with a local doctor for advice as he had no access to a national team doctor or a sport specialist at his home location in Cordoba. The Athlete's main source of anti-doping information came from Google searches. The Athlete testified that he was aware that the anti-doping rules he was subject to as an elite swimmer did ban both prohibited substances and prohibited methods.
- 5.8 The Athlete testified that he initially tried to explain away the ABP Program findings from the problematic sample collected from him on January 31, 2018. He testified that he invented other explanations for the abnormal profile. The Expert Panel rejected these explanations. The Athlete conceded to the Doping Panel that he underwent a blood transfusion from his mother on January 23, 2018.
- 5.9 The Athlete testified that in late January, 2018, he was training extremely hard in preparation for a major ultra-distance national competition and was not taking his thyroid medication, as directed. The Athlete was tired, dehydrated and suffering from unspecified gastro-intestinal problems. The Athlete was exhausted and was quite frightened at his frail and weakened condition. The Athlete felt so poorly on January 23, 2018, that he was temporarily staying at his mother's home as he required her care and support.
- 5.10 It was in these circumstances that the Athlete agreed to receive a blood transfusion from his mother. The Athlete claimed the transfusion was the result of his mother calling for a local doctor to examine him at her home because she was so concerned about his weakness and poor health. The Athlete's evidence was that after the doctor assessed him, his mother accepted the doctor's advice to perform a blood transfusion. This was possible as they had the same blood type. This fact was known previously. The Athlete claims that as he was tired and ill and weak and very concerned regarding his health he simply went along with the proposed treatment.
- 5.11 Critically, the Athlete acknowledged to the Doping Panel that when he received the blood transfusion from his mother on January 23, 2020, he knew that it was not allowed and that blood transfusions were prohibited.

- 5.12 In testimony tendered by both the Athlete and Claudia Suarez, it was clarified that since 2013 the Athlete experienced thyroid problems and had been prescribed medication to combat this illness. When the Athlete takes the medication, as directed, he feels perfectly fine. However, the Athlete does not like taking medicine and regularly adjusts the doses he takes to try to live without the needed medication. The Athlete often stops taking the thyroid medicine entirely. When this happens he is often ill.
- 5.13 Ms. Suarez testified regarding her concern for her son's health and that she was very worried to see him in such a weak and compromised state. She explained why she called for a doctor to visit (whom she did not know and cannot name) and explained how this young doctor and a driver arrived at her home in an ambulance to examine the Athlete.
- 5.14 Ms. Suarez testified regarding her knowledge of her son's thyroid condition and the steps that were needed to manage that condition. She testified regarding her knowledge of the medicine that the Athlete must take and that she knew he typically did not take properly. She testified, as best as she was able to recall for the Doping Panel, details of the process, procedures and timing associated with calling for the doctor, the doctor's arrival and examination of the Athlete, the doctors diagnostic steps, the proposed therapy and the eventual blood transfusion that was performed. She testified regarding how the Athlete was examined, what treatment was provided, that the attending doctor knew that the Athlete was not taking his thyroid medication properly and that eventually 350 ml of her own blood (in two bags) was transfused into the Athlete.
- 5.15 Ms. Suarez insisted in her testimony that the doctor attending at her home to treat the Athlete assured her that the Athlete needed the blood transfusion for his good health and would feel much better after receiving her blood. She insisted that she had no knowledge that this procedure was not allowed for elite athletes, like her son. Likewise, she testified that the local doctor gave her absolutely no indication that a blood transfusion could be a problematic issue for an elite athlete, like her son. She believed she was addressing her son's valid health concerns perfectly appropriately.

5.16 Ms. Suarez testified emotionally that she feels extremely guilty regarding the choices she made. Specifically, she is tormented that the doctor she called, the therapy the doctor proposed, and which she agreed to, have devastated her son and his swimming career. A career that the entire family worked so long and so hard to establish. Ms. Suarez begged the Doping Panel to permit her son to move past the mistake that was made.

5.17 The Athlete also testified emotionally regarding the negative effect a long sanction would have on him personally and on his good reputation and swimming career. The Athlete believes the grave mistake he made concerning the blood transfusion should be punished - but by a modest sanction permitting him to continue to participate in sport. The Athlete wishes to continue his work motivating youth in his region to participate in sport and to get involved in distance swimming.

5.18 The Athlete wants a second chance and is willing to be a role model to swimmers whereby his situation can be a warning to others to not be so cavalier regarding their anti-doping responsibilities. Importantly, the Athlete claims that he did not intend to cheat or to otherwise seek to take advantage of his competitors by having a blood transfusion. Rather, he testified he was merely trying to regain his baseline health and conditioning after suffering from a devastating physical breakdown.

5.19 In his submissions, Mr. Loutan, representing FINA, made the following brief factual points in response to the Athlete's evidence at the hearing:

- The Athlete is clearly elite and experienced.
- The Athlete admitted the ADRV and conceded that he knew the transfusion was a prohibited method before it was given.
- The Athlete accepted the transfusion.
- The Athlete elected to participate in the Santa Fee ultra-endurance race shortly after receiving the transfusion, and won.

5.20 FINA believes that the athlete was already given a second chance, and wasted it. He was asked by FINA to tell the truth about his situation and to explain

truthfully the circumstances of the problematic blood profile. Instead, the Athlete attempted to deceive FINA by initially hiding the fact of the transfusion.

B. THE LAW

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.

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.]

C. SANCTION

5.21 In this case, where an ADRV is admitted by the Athlete, the sole issue the Doping Panel must determine is the proper sanction. The sanction for Use of a Prohibited Method (blood transfusion) pursuant to FINA DC 10.2 is a four-year period of ineligibility, unless the Athlete can establish that his Use of a Prohibited Method was not intentional. To prove a lack of intent, the Athlete must demonstrate pursuant to FINA DC 10.2.3, that (i) he did not know that he had engaged in conduct that constituted an ADRV, and (ii) that he did not know that there was a risk that his conduct might result in an ADRV and he manifestly disregarded that known risk. If the Athlete is able to prove a lack of intent on a balance of probability, the default sanction is two-years of ineligibility (FINA DC 10.2.2), subject to the possibility of further sanction reductions. However, if the Athlete is unable to prove a lack of intent, the sanction must remain at four years.

5.22 Based on the evidence seen and heard, the Doping Panel is certain that there was a blood transfusion given to the Athlete on or about January 23, 2018. This is admitted. What is less certain is whether the circumstances surrounding the transfusion are precisely as described by the Athlete and by his mother. The Doping Panel remains somewhat sceptical.

5.23 The Doping Panel is uncertain whether the evidence given by Ms. Suarez is complete and accurate. Perhaps any lack of clarity in the explanations provided by Ms. Suarez was the inevitable result of her testimony being translated, exacerbated by her nervousness participating in a FINA hearing. When the Doping Panel questioned her regarding a singular event in her life – a blood transfusion using her blood given to her son while he was ill – many of the answers were surprisingly general. Ms. Suarez was unable to describe in much detail the process of giving the blood, the time it took or the equipment used.

Her evidence regarding the volume of blood given and the timing for each stage in the process was vague, at best.

5.24 Further, the Doping Panel is left wondering whether Ms. Suarez, a loving mother who was undoubtedly very worried for her son's health (after observing him lying weak and sick at her home) would indeed call for an unknown and unnamed local general practitioner to attend to her son. After what must have been a rather cursory health assessment, why would Ms. Suarez accept for her son as the very first line of therapy a saline solution drip and subsequently agree to provide 350 ml of her own blood to be transfused, when:

- She knew that the Athlete had been training very hard in preparation for an important national competition and was exhausted. She knew he was experiencing uncomfortable gastro-intestinal issues. These are well understood physical stressors that do not require a blood transfusion to address.
- She knew that the Athlete was not taking his required thyroid medication properly (which was unfortunately typical). She knew that if he were to resume taking the prescribed medicine, as directed, he would certainly feel better.
- She knew that she would not approve any treatment for her son consisting of pills or medicine that the attending doctor might order because she knew that her son did not like taking medication of this kind. She knew that her son had to be careful regarding what substances (including medicine) entered his body. It begs the question – what was the doctor actually called for?
- She did not take her son to a local hospital or contact the endocrinologist who had initially diagnosed and was treating the underlying thyroid condition. She knew that the thyroid condition had from time to time caused the Athlete physical distress.
- She never suggested that her son follow a slow and measured recovery regime from his weakened condition (i.e. rest and fluids over a period of days and weeks). She did not suggest that in his compromised state it

would be far better and more prudent for her son to simply drop out of the Santa Fee ultra-distance race, now just weeks away.

- 5.25 The choices and decisions made by Ms. Suarez on January 23, 2018, given her intimate and detailed knowledge of her son's underlying health conditions and her support and active involvement in his athletic career, are surprising to the Doping Panel. The general lack of detail in the testimony received from Ms. Suarez regarding the transfusion process is also troubling. That said, any uncertainty in the evidence from Ms. Suarez need not be resolved or reconciled to allow the Doping Panel to determine the proper sanction for the Athlete. In other words, regardless of the reasons or rationale or true motivation for the blood transfusion, whether it came about exactly as presented by the Athlete and his mother or through some other strategy or scheme, is not particularly relevant to the calculation of the proper sanction.
- 5.26 A blood transfusion was performed on the Athlete on or about January 23, 2018. All parties agree on this. The Athlete has frankly admitted to the Doping Panel that he knew at the time he received the transfusion that receiving a blood transfusion was a prohibited method. This knowledge was also demonstrated in the Athlete's letter to FINA dated February 10, 2020, wherein he stated that he had undertaken "*an inappropriate method that is transfusion....*" (emphasis added).
- 5.27 The Athlete's honest acknowledgement that he knew a blood transfusion was a prohibited method when he accepted a transfusion from his mother precludes the Athlete from satisfying his onus in FINA DC 10.2.3. With such knowledge, the Athlete cannot demonstrate that he did not act with intent when he accepted the blood transfusion. Accordingly, no sanction outcome below four-years of sport ineligibility is possible in these circumstances. The Doping Panel has no residual discretion to reduce the sanction below four-years on other grounds.

6. CONCLUSION

- 6.1 Mr. Guillermo BERTOLA is found to have committed an ADRV under FINA DC 2.2, "Use of a Prohibited Substance or Prohibited Method."
- 6.2 Mr. Guillermo BERTOLA is sanctioned with a **4 (four) year ineligibility period** in accordance with FINA DC 10.2.1.1. The sanction starts on 20 January 2020, the day his provisional suspension commenced and ends on 19 January 2024.
- 6.3 All results obtained by Mr. Guillermo BERTOLA from 23 January 2018, shall be annulled together with the consequences thereof which shall include the forfeiture of any medals, points, prizes or the reimbursement of prize-money.
- 6.4 All costs of this case shall be borne by the Confederación Argentina de Deportes Acuáticos (CADDA) in accordance with FINA DC 12.3.
- 6.5 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 reasoned judgement (FINA Rule C 12.11.4 and DC 13).

Lausanne, 17 June 2020



FINA Doping Panel Chairman
Robert Fox