BEFORE THE AMERICAN ARBITRATION ASSOCIATION

United States Anti-Doping Agency, Claimant, v. Hirut Beyene, Respondent.	)	**ARBITRAL AWARD** AAA No. 77 190 00389 13

THE UNDERSIGNED ARBITRATOR, having been designated by the above-named parties, and having duly heard the allegations, proofs and arguments of the parties, does hereby find and issue this Final Award, as follows:

I. BACKGROUND FACTS

1. Claimant, the United States Anti-Doping Agency (USADA), is the independent anti-doping agency for Olympic Movement sports in the United States and is responsible for conducting drug-testing and adjudicating potential doping offenses pursuant to the USADA Protocol for Olympic and Paralympic Movement Testing ("USADA Protocol").

2. Respondent, Hirut Beyene, is a twenty-one year old long distance runner from Ethiopia. Ms. Beyene speaks limited English. Ms. Beyene first moved to the United States in the summer of 2012 to train in New York City. Her sole income while living in the United States came from prize money won from running races. Because of the doping violation giving rise to these proceedings and (as more fully described below) the parties' agreement to a provisional suspension, Ms. Beyene could no longer afford to remain in the United States and has since returned to Ethiopia.

3. On May 5, 2013, Ms. Beyene competed in the Dick's Sporting Goods Pittsburgh Marathon (the "Pittsburgh Marathon") and placed second among women. After the race, Ms. Beyene provided a urine sample that tested positive for methylhexaneamine, a stimulant listed as a prohibited substance in the 2013 Prohibited List of the World Anti-Doping Agency ("WADA") Code. Under the WADA Code, methylhexaneamine is designated as a "specified substance." The presence in an athlete's body of substances categorized as "specified" may be "susceptible to a credible, non-doping explanation." Comment to WADA Code Article 10.4.

4. Although initially uncertain as to how methylhexaneamine entered her body, Ms. Beyene now believes that her positive test was the result of her consumption of a dietary supplement known as InVite Health Power Plant Nitric Oxide Circulation Formula ("Power Plant"). Ms. Beyene asserts that the day before the Pittsburgh Marathon, her roommate and fellow Ethiopian runner, Demesse Tefera ("Tefera"), provided her with Advil and what he told her was the dietary supplement Cytomax to help alleviate her menstrual pain. Ms. Beyene disclosed that she had taken Advil and Cytomax on her Declaration of Use form. As will be explained in more detail below, several months after learning of her positive test and still at a loss to understand what might have caused it, Ms. Beyene questioned Tefera more closely and was then informed that the Cytomax powder she had been given had actually been mixed together with small amounts of two other supplements, Optimum Nutrition Essential Amino Energy ("Amino Energy") and Power Plant.

5. By letter dated May 23, 2013, USADA informed Ms. Beyene of the adverse analytical finding and her right to testing of the "B" sample.

6. Upon learning of the adverse analytical finding, Ms. Beyene's husband, Ashebir Getahun, who resides in Ethiopia with the couple's two children and is more fluent in English than Ms. Beyene, responded to USADA expressing Ms. Beyene's surprise at the positive test result and explaining that she had taken only Advil and Cytomax before the race. USADA responded that it would investigate whether Ms. Beyene's use of Cytomax may have caused her adverse analytical finding and requested information regarding the flavor and lot number of the consumed substance which the athlete promptly provided.

7. On June 10, 2013, USADA informed Ms. Beyene that, based on its review, it appeared extremely unlikely that the positive test result was caused by her use of Advil or Cytomax. USADA inquired as to whether Ms. Beyene had taken any other products in the weeks leading up to the Pittsburgh Marathon. Mr. Getahun responded that Ms. Beyene had not taken any other substances, and instead suggested the possibility that a competitor may have sabotaged Ms. Beyene by tampering with her water bottles before the race. Mr. Getahun stated, however, that "we are not saying (concluding) that this is a situation that has resulted in (led to) the positive test. We have just raised the situation as we did not get or cannot recall any other reasons as far as our knowledge is concerned."

8. By letter dated June 28, 2013, USADA informed Ms. Beyene that her "B" sample had confirmed the adverse analytical finding for the presence of methylhexaneamine and that her case had been forwarded to a Panel of the Anti-Doping Review Board for its consideration and recommendation as to whether there existed sufficient evidence of an anti-doping rule violation.

9. By letter dated July 12, 2013, Ms. Beyene was advised that a USADA Anti-Doping Review Board had determined that there was sufficient evidence of a doping violation and recommended that the adjudication process proceed as set forth in the USADA Protocol and the International Association of Athletics

Federations Anti-Doping Rules ("IAAF ADR"). USADA charged Ms. Beyene with an anti-doping rule violation for the use of methylhexaneamine and proposed a two-year sanction. Ms. Beyene was informed that she had the right to contest the proposed sanction and request a hearing. On July 17, 2013, Mr. Getahun informed USADA that Ms. Beyene would contest the sanction and requested a hearing before the American Arbitration Association.

10. On October 7, 2013, Ms. Beyene agreed to a provisional suspension barring her from competing in any competitions under the jurisdiction of IAAF, USA Track & Field or USOC, or any clubs, member associations or affiliations of those entities, until her case was deemed not to be a doping offense, she accepted a sanction, she failed to contest this matter, or a hearing had been held and a decision reached. It was agreed that the time served under the provisional suspension would be deducted from any period of ineligibility Ms. Beyene might receive.

11. It was after she had agreed to the provisional suspension that Ms. Beyene questioned Tefera about the contents of the Cytomax container he had provided her in May 2013 and learned that what he had given her was actually a blend of Cytomax, Amino Energy and Power Plant. This new information was promptly called to the attention of USADA.

12. On October 24, 2013, I was informed by USADA that it had reached an agreement with Ms. Beyene to test the aforementioned supplements for the presence of methylhexaneamine. Pursuant to a "Stipulation of Uncontested Facts and Issues Between the United States Anti-Doping Agency and Hirut Beyene," the parties agreed that the sample collection, chain of custody and laboratory procedures that had led to the adverse analytical finding were conducted appropriately and without error. Under the agreement, USADA undertook to test the Cytomax, Amino Energy, Power Plant and the blended powder for the presence of methylhexaneamine. The parties agreed to alternative sanctions depending on the results of the testing. Specifically, if none of the products tested positive for the presence of methylhexaneamine, Ms. Beyene agreed to a two-year period of ineligibility; if Cytomax, Amino Energy or Power Plant tested positive for the presence of methylhexaneamine, Ms. Beyene agreed to a four-month period of ineligibility; and if Cytomax, Amino Energy and Power Plant all tested negative for the presence of methylhexaneamine but the blended powder tested positive, no period of ineligibility would be agreed upon and the arbitration proceedings would resume.

13. The Cytomax, Amino Energy and blended powder all tested negative for the presence of methylhexaneamine.

14. USADA, however, was unable to purchase the Power Plant supplement for testing as the product was out of stock through online retailers and at retail stores operated by the supplement's manufacturer, InVite Health. On December 5, 2013, a USADA representative contacted InVite Health by telephone to inquire about

the availability of the product. A customer services agent informed the USADA representative that Power Plant had been recalled due to "clumping" issues and that there was no timeline for when the product would return to the market. When the USADA representative identified himself and explained that he was trying to locate the product in order to have it tested to determine whether it might have caused an athlete to test positive for a prohibited substance, an InVite Health pharmacist joined the telephone call and stated that the Power Plant product could not have caused the athlete's positive test because "they only use quality ingredients and best manufacturing processes." In describing this conversation, the USADA representative stated that "[t]he pharmacist was extremely agitated while speaking with me." The pharmacist agreed, however, to send USADA a bottle of the product.

15. But instead of sending the product as promised, on December 6, 2013, an InVite Health attorney telephoned the USADA representative and asserted that InVite Health had retained only one bottle of Power Plant after the product recall and that it would therefore not be able to send that bottle to USADA for testing at a USADA testing facility. The attorney stated that the company would instead send the bottle to a testing lab of its own choosing and agreed to share the results of the testing with USADA. The attorney declined to say when the results might be available. To date, InVite Health has not provided USADA with any test results.

16. A hearing in this matter was held in New York on January 3, 2013. Ms. Beyene submitted the sworn statements of herself and Tefera as direct testimony. No objection was made to the receipt into evidence of the sworn statements, and both Ms. Beyene and Tefera were available by telephone conference for cross-examination with Mr. Getahun acting as translator. All exhibits offered by the parties were admitted into evidence. Post-hearing briefs were submitted by the parties on January 13, 2014, and the hearing was declared closed the same day.

II. JURISDICTION AND APPLICABLE RULES

17. There is no dispute that the undersigned Arbitrator has jurisdiction over this matter. The parties have agreed that the USADA Protocol governs these proceedings and that the WADA Anti-Doping Code, IAAF ADR (which incorporate the WADA Code) and USOC Anti-Doping Rules provide the applicable rules relating to, among other things, definitions of doping, burdens of proof, Classes of Prohibited Substances and Prohibited Methods, and Sanctions.

18. The following provisions of the IAAF ADR are relevant to these proceedings:

> Rule 32: Anti-Doping Rule Violations
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> 1. Doping is defined as the occurrence of one or more of the anti-doping rules violations set forth in Rule 32.2 of these Anti-Doping Rules.

2. Athletes or other Persons shall be responsible for knowing what constitutes an anti-doping rule violation and the substances and methods which have been included on the Prohibited List. The following constitute anti-doping rule violations:

   (a) Presence of a Prohibited Substance or its Metabolites or Markers in an Athlete's Sample.

      (i) It is each Athlete's personal duty to ensure that no Prohibited Substance enters his 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 Rule 32.2(a).

      (ii) Sufficient proof of an anti-doping rule violation under Rule 32.2(a) is established by either 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.

Rule 33: Proof of Doping

Burdens and Standards of Proof

1. The IAAF, the Member or other prosecuting authority shall have the burden of establishing that an anti-doping rule violation has occurred. The standard of proof shall be whether the IAAF, the Member or other prosecuting authority has established an anti-doping rule violation to the comfortable satisfaction of the relevant 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.

2. 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, except as provided in Rules 40.4 (Specified Substances)

and 40.6 (aggravating circumstances) where the Athlete must satisfy a higher burden of proof.

Rule 40: Sanctions on Individuals

Ineligibility for Presence, Use or Attempted Use, or Possession of a Prohibited Substances and Prohibited Methods

2. The period of Ineligibility imposed for a violation of Rule 32.2(a) (Presence of a Prohibited Substance or its Metabolites or Markers), 32.2(b) (Use or Attempted Use of a Prohibited Substance or Prohibited Method) or 32.2(f) (Possession of a Prohibited Substance or Prohibited Method), unless the conditions for eliminating or reducing the period of Ineligibility as provided in Rules 40.4 and 40.5, or the conditions for increasing the period of Ineligibility as provided in Rule 40.6 are met, shall be as follows:

   First Violation: Two (2) years' Ineligibility.

Elimination or Reduction of Period of Ineligibility for Specified Substances under Specific Circumstances[1]

4. Where an Athlete or other Person can establish how a Specified Substance entered his body or came into his possession and that such Specified Substance was not intended to enhance the Athlete's sport performance or mask the Use of a performance-enhancing substance, the period of Ineligibility in Rule 40.2 shall be replaced with the following:

   First Violation: At a minimum, a reprimand and no period of Ineligibility from future Competitions and, at a maximum, two (2) years' Ineligibility.

   To justify any elimination or reduction, the Athlete or other Person must produce corroborating evidence in addition to his word which establishes to the comfortable satisfaction of the hearing panel the absence of an intent to enhance sport performance or to mask the Use of a performance-enhancing substance. The Athlete or other Person's degree of fault shall be the criterion considered in assessing any reduction of period of Ineligibility.

   This Article applies only in those circumstances where the hearing panel is comfortably satisfied by the objective circumstances of the

[1] The parties' written submissions identify WADA Code 10.4 as the provision governing this dispute. IAAF ADR 40.4 and WADA Code 10.4 are identical in all material respects.

case that the Athlete in taking a Prohibited Substance did not intend to enhance his sport performance.

Commencement of Ineligibility Period

10. Except as provided below, the period of Ineligibility shall start on the date of the hearing decision providing for Ineligibility or, if the hearing is waived, on the date the Ineligibility is accepted or otherwise imposed. Any period of Provisional Suspension (whether imposed or voluntarily accepted) shall be credited against the total period of Ineligibility to be served.

    (c) If an Athlete voluntarily accepts a Provisional Suspension in writing (pursuant to Rule 38.2) and thereafter refrains from competing, the Athlete shall receive credit for such period of voluntary Provisional Suspension against any period of Ineligibility which may ultimately be imposed. In accordance with Rule 38.3, a voluntary suspension is effective upon the date of its receipt by the IAAF.

III. CONTENTIONS OF THE PARTIES

Respondent's Contentions

19. Ms. Beyene contends that, in the circumstances of this case, she is entitled under WADA Code 10.4 (and its equivalent, IAAF ADR 40.4) to the elimination or reduction of what would otherwise be a mandatory two-year period of ineligibility.

20. To demonstrate entitlement under WADA Code 10.4 to the elimination or reduction of a period of eligibility, the athlete must (a) establish, by a balance of probability, how the specified substance entered her body; and (b) produce corroborating evidence in addition to her word that establishes, to the comfortable satisfaction of the hearing panel, the absence of intent to enhance sport performance. Assuming these elements are satisfied, the athlete's degree of fault is the basis on which to assess any reduction in the period of ineligibility. Ms. Beyene contends that she has satisfied the elements of WADA Code 10.4 and that her degree of fault is minimal.

21. Ms. Beyene asserts that methylhexaneamine entered her body as a result of her consumption of the dietary supplement Power Plant. This conclusion, according to Ms. Beyene, is more probable than not because she claims that there is nothing else she consumed in the days leading up to the Pittsburgh Marathon that could have caused the positive test. Ms. Beyene notes that in addition to taking what Tefera told her was Advil and Cytomax, she ate only basic foods in the days before the race and consumed no other products, supplements or medications.

22. Ms. Beyene asserts that she did not immediately question Tefera after learning of her positive drug test because she was embarrassed by the positive test and feared

how she would be perceived by Tefera and others if they were to learn of the alleged doping violation. She also states that she had no reason to suspect that Cytomax could have caused her positive test as Tefera himself had never tested positive for a prohibited substance.

23. Ms. Beyene proffers Tefera's corroborating testimony that while he gave Ms. Beyene what he told her to be Advil and Cytomax in response to her complaints of menstrual pain, he actually had mixed the Cytomax with small amounts of Amino Energy and Power Plant because he did not want to waste the remains of those other supplements. Tefera testified that he purchased the Power Plant at a pharmacy on the advice of a pharmacist after requesting a product to help him lose weight. Ms. Beyene contends that Power Plant was not marketed for weight loss, while methylhexaneamine is known for its ability to aid weight loss. In addition, while Tefera could not recall the precise location of the pharmacy at which he purchased the Power Plant, he testified that it was near a subway stop in the Bronx in the vicinity of 230th Street. An InVite Health store is in fact located on 233rd Street within sight of the subway station.

24. Ms. Beyene also emphasizes that InVite Health's conduct in removing the product from the market, its unwillingness to allow USADA to test the Power Plant product and its failure, despite an assurance that it would do so, to provide USADA with the results of its own testing demonstrate that, on a balance of probability, Power Plant was the source of the methylhexaneamine for which she tested positive.

25. Ms. Beyene maintains that because she believed she was taking only Cytomax, which did not contain any prohibited substances, and consumed Power Plant unknowingly, she cannot be said to have acted with the intent to cheat or enhance sport performance in an illegal manner. Ms. Beyene proffers Tefera's corroborating testimony that he gave her Advil and Cytomax in response to her complaints of menstrual pain and did not tell her he had mixed the Cytomax with Amino Energy and Power Plant.

26. With respect to degree of fault, Ms. Beyene notes that at the time of her positive test, she was twenty-one years old and living in a foreign country, she had no formal anti-doping education, she spoke limited English and she relied on her roommates to help her communicate. Ms. Beyene therefore contends that she acted with no fault or negligence in ingesting the prohibited substance and that the otherwise mandatory two-year period of ineligibility should be replaced by, at most, a period of ineligibility limited to the duration of her provisional suspension.

Claimant's Contentions

27. Claimant contends that Respondent has failed to carry her burden of establishing, by a balance of probability, how methylhexaneamine entered her body and hence she is not entitled to an elimination or reduction of the period of ineligibility for

use of a specified substance under WADA Code 10.4 (and its equivalent, IAAF ADR 40.4).

28. Claimant argues that the mere fact that Power Plant is no longer available on the market does not prove that the product contained a prohibited substance. The parties have stipulated to the fact that supplements are added and removed from the market on a regular basis. Claimant contends that Respondent has offered no convincing evidence, scientific or otherwise, to support her contention that Power Plant was the source of the prohibited substance. Claimant emphasizes that Respondent bears the burden of establishing how the methylhexaneamine got into her body and that she has failed to carry that burden.

29. With respect to the requirement under WADA Code 10.4 (and its equivalent, IAAF ADR 40.4) that the athlete demonstrate absence of an intent to enhance sport performance, USADA, at least for purposes of these proceedings, does not contend that Ms. Beyene acted with any intent to enhance sport performance and concedes that her degree of fault is low.

IV. DISCUSSION

30. I accept the parties' stipulation of uncontested facts and issues, as further supported by the documentary evidence submitted by USADA, that Ms. Beyene gave the urine sample in question, that each aspect of its analysis was conducted appropriately and without error, that there were no chain of custody issues with respect to the sample, and that the laboratory determined that the sample contained methylhexaneamine, a specified substance on the 2013 WADA Prohibited List.

31. It is undisputed that the positive test result constitutes Ms. Beyene's first anti-doping offense. Under IAAF ADR 40.2, the period of ineligibility for a first anti-doping offense, absent aggravating circumstances, is two years. The principal issue for decision is whether Ms. Beyene has established entitlement to the elimination or reduction of the two-year period of ineligibility under WADA Code 10.4 (and its equivalent, IAAF ADR 40.4).

32. Under the particular circumstances of this case, I conclude that Ms. Beyene has established: (a) that it is more probable than not that the methylhexaneamine entered her body through her consumption of Power Plant; and (b) to my comfortable satisfaction, based on corroborating evidence in addition to Ms. Beyene's testimony, that she lacked any intent to enhance sport performance.

33. With regard to the standard of proof, "[w]hile the absence of intent to enhance sport performance must be established to the comfortable satisfaction of the hearing panel, the Athlete may establish how the Specified Substance entered the body by a balance of probability." Comment to WADA Code Article 10.4; *see also* IAAF ADR Rule 33.2 ("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.").

34. Under established jurisprudence in cases before the Court of Arbitration for Sport ("CAS"), the balance of probability standard means that "a panel should simply find the explanation of an athlete about the presence of a Specified Substance more probable than not." *Rybka v. UEFA*, CAS 2012/A/2759, para 17. In other words, an athlete "bears the burden of persuading the judging body that the occurrence of the circumstances on which [she] relies is more probable than their non-occurrence or more probable than other possible explanations of the doping offence." *FIFA v. Dodô*, CAS 2007/A/1370 & 1376, para. 58.

35. Where there exist several alternative explanations for the ingestion of the specified substance, the athlete has met the required standard of proof so long as the decision maker is satisfied that the explanation proffered by the athlete is more likely than not to have occurred. *ITF v. Gasquet*, CAS 2009/A/1926 &1930, para. 31. The CAS Panel in *Gasquet* explained:

> [I]t remains irrelevant that there may also be other possibilities of ingestion, as long as they are considered by the Panel to be less likely to have occurred. In other words, for the Panel to be satisfied that a means of ingestion is demonstrated on a balance of probability simply means, in percentage terms, that it is satisfied that there is a 51% chance of it having occurred. The Player thus only needs to show that one specific way of ingestion is marginally more likely than not to have occurred.

Id.

36. In *UCI v. Contador*, CAS 2011/A/2384 & 2386, para. 56, the CAS Panel explained that "[w]here various possible routes of ingestion exist, the circumstances of the particular case will provide indications for the greater or lesser degree of likelihood of each of them." In evaluating the various possible routes of ingestion, the decision maker must conduct a "comparative assessment" under which "[t]he hypothesis advanced on the evidence by the party bearing the burden (here the Athlete) must be compared to the rival hypothesis (to the extent that any others exist)." *Id.*, para. 75; *see also id.*, para. 111 ("The likelihood of alleged alternative scenarios having occurred is, however, to be taken into account when determining whether the Athlete has established, on a balance of probabilities, that the source he is alleging of entry into his system of the Prohibited Substance is the more likely."); *id.*, para. 112 ("This implies that if, after carefully assessing all the alternative scenarios invoked by the parties as to the source of entry of the Prohibited Substance into the Athlete's system, several of the alleged sources are deemed possible, they have to be weighed against one

another to determine whether, on balance, the more likely source is the one invoked by the Athlete."). The Panel in *Contador* recognized that the "comparative exercise may bring the decision-maker to a conclusion which had it been measured *ex ante*, might have been thought improbable." *Id.*, para. 75.

37. To be clear, the Claimant does "not have the burden of establishing that other alternative scenarios caused the adverse analytical finding, since the risk that the [athlete's] scenario cannot be ascertained remains with [her]." *Id.*, para. 111.

38. Moreover, an athlete's mere "speculative guess or explanations uncorroborated in any manner" is insufficient to meet her burden under the balance of probability standard. *La Barbera v. International Wheelchair & Amputee Sports Federation (IWAS)*, CAS 201/A/2277, para. 4.27. "One hypothetical source of a positive test does not prove to the level of satisfaction required that such explanations are factually or scientifically probable. Mere speculation is not proof that it did actually occur." *Id.*

39. With respect to the question of how methylhexaneamine entered Ms. Beyene's body, there have been called to my attention only four possible explanations. First, Ms. Beyene may have consumed methylhexaneamine as a result of sabotage by a competitor who deliberately added that substance to her water bottles before the race. Second, Ms. Beyene may have intentionally consumed methylhexaneamine from a source she has failed to disclose, and thus has knowingly provided false testimony in these proceedings. Third, Ms. Beyene may have forgotten that she consumed substances or products beyond those that she has disclosed and it is those substances or products that caused her positive test. Finally, as Ms. Beyene contends, her unknowing consumption of Power Plant may have caused her positive test.

40. First, I find it very unlikely that methylhexaneamine entered Ms. Beyene's body as a result of sabotage by a competitor. Although I recognize this explanation is not entirely impossible, there is simply no evidence to support this theory of ingestion. The initial suggestion by Ms. Beyene's husband that her positive test may have been caused by competitor sabotage was nothing more than unsupported speculation, and Mr. Getahun recognized as much in his June 11, 2013 email to USADA, noting that "we are not saying (concluding) that this is a situation that has resulted in (led to) the positive test. We have just raised the situation as we did not get or cannot recall any other reasons as far as our knowledge is concerned." In the absence of any evidence to support a theory of competitor sabotage, I find this alternative very unlikely.

41. Second, I find the possibility extremely small that Ms. Beyene intentionally consumed methylhexaneamine and has knowingly provided false testimony in these proceedings. From the date she first was notified of her positive test, Ms. Beyene consistently has maintained that she had experienced menstrual pain before the race, informed Tefera of such pain and that he provided her with Advil and what he told her was Cytomax. On the day of the Pittsburgh Marathon, Ms.

Beyene disclosed that she had taken Advil and Cytomax on her Declaration of Use form. In addition, Ms. Beyene has presented evidence regarding her limited financial means while living in New York and that any funds she received were used to pay for rent and to purchase basic food items and other necessities of life. It is not difficult to believe that, in these circumstances, Ms. Beyene would refrain from using her very modest resources to purchase products or supplements that contained methylhexaneamine. Moreover, nothing has occurred in these proceedings to suggest that Ms. Beyene is not honest or credible. USADA does not contend that Ms. Beyene has been in any way untruthful and, based upon my own evaluation of this record and Ms. Beyene's conduct and responses at the hearing (albeit on a telephone conference and through a translator), I fully credit her testimony. I therefore find it extremely unlikely that Ms. Beyene intentionally consumed methylhexaneamine and has provided false testimony in these proceedings.

42. Third, I find that there is only a remote possibility that Ms. Beyene has failed accurately to recall all the substances or products she consumed before the Pittsburgh Marathon. Given the evidence Ms. Beyene has proffered regarding her very limited diet, it appears unlikely that Ms. Beyene simply has forgotten that she consumed additional substances or products in the days leading up to the race. Additionally, Ms. Beyene was closely questioned at the hearing as to whether there were any other foods, products or medications that she had taken before the Pittsburgh Marathon that she had not already disclosed. Under oath, Ms. Beyene insisted that she had ingested nothing else in the days leading up to the race. I find Ms. Beyene's testimony credible and therefore conclude that this third possible theory is very unlikely to have caused her positive test.

43. Finally, as Ms. Beyene contends, the presence of methylhexaneamine in her body may have been caused by her unknowing consumption of Power Plant. While the issue is hardly free from doubt, I find this theory more probable than not and more probable than all other possible explanations for the positive test.

44. Shortly after learning from Tefera that the supplement he had provided her before the Pittsburgh Marathon was not simply Cytomax, but rather a blended powder including Amino Energy and Power Plant, Ms. Beyene entered into a stipulation with USADA to provide for the testing of all the supplements. Ms. Beyene clearly did so in the belief that one of these substances was the cause of her positive test. Testing of the Cytomax, Amino Energy and blended powder all came back negative for the presence of methylhexaneamine. Having concluded that Ms. Beyene has provided credible testimony that she did not consume any foods or products other than those disclosed, the remaining possible cause for Ms. Beyene's positive test is the Power Plant.

45. Tefera testified that he purchased the Power Plant on the advice of a pharmacist after requesting a product to help him lose weight. Power Plant was not marketed

as a weight loss product, while methylhexaneamine, however, is known for its weight loss properties.[2] Although Tefera could not recall the precise location of the pharmacy at which he purchased the Power Plant, he testified that it was near a subway stop in the Bronx in the vicinity of 230th Street. Upon a search for InVite Health stores in that area, USADA in fact located an InVite Health store on 233rd Street within sight of the subway station.

46. I find credible Tefera's testimony that he provided Ms. Beyene with a blended powder containing Power Plant and that he had purchased the product upon the advice of a pharmacist to assist with weight loss. Given the limited financial resources apparently available to Tefera as well as Ms. Beyene, Tefera's testimony that he added the small remaining quantities of Amino Energy and Power Plant to the Cytomax container so as not to waste any of the supplements is believable. Moreover, the fact that Tefera recalled that he purchased the Power Plant at a store in the vicinity of 230th Street near a subway stop and that an InVite Health store is in fact located on 233rd Street within sight of the subway station lends further credence to his testimony.

47. InVite Health's conduct in removing Power Plant from the market, refusing to allow USADA to test the Power Plant product, and failing to keep its promise that it would test the Power Plant product itself and report the results to USADA provides, at least by inference, some additional evidence that Power Plant may have been the source of the methylhexaneamine for which Ms. Beyene tested positive.

48. Having considered all the evidence and evaluated the other possibilities as to how methylhexaneamine entered Ms. Beyene's body, I find it more likely than not that her positive test was caused by her consumption of Power Plant. Although the cause of her positive test cannot be known to a certainty, Ms. Beyene need only show that the presence of methylhexaneamine in her body was "marginally more likely than not" to have been caused by her ingestion of Power Plant. She has satisfied that burden. Far from a mere "speculative guess or explanations uncorroborated in any manner," Ms. Beyene has presented corroborating evidence and testimony in addition to her own credible testimony. I therefore conclude that Respondent has presented sufficient evidence to establish that it is more probable than not that the presence of methylhexaneamine in her body was caused by her consumption of Power Plant.

49. Having found that Ms. Beyene has satisfied her threshold burden of establishing by a balance of probability how the specified substance entered her body, Ms.

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[2] *See, e.g.*, DMAA Research, *available at* http://dmaaresearch.com/research (summarizing clinical research studies on products containing methylhexaneamine and noting potential weight loss properties).

Beyene must next establish, to my comfortable satisfaction, that she did not act with intent to enhance sport performance.

50. Based on all of the evidence, I doubt very much that, in consuming what she believed at the time to be Cytomax, Ms. Beyene intended to cheat or to gain an illegal advantage in her competitive performance. I accept Respondent's credible testimony that she did not take Cytomax to enhance sport performance. Tefera's testimony corroborates Ms. Beyene's account that she took the Cytomax with Advil at Tefera's recommendation to alleviate her menstrual pain. USADA accepts, for purposes of these proceedings, that Ms. Beyene had no intent to enhance sport performance. Accordingly, I find that Ms. Beyene has established, to my comfortable satisfaction, that she acted with no intent to enhance sport performance. I therefore conclude that Respondent has demonstrated entitlement under WADA Code 10.4 (and its equivalent, IAAF ADR 40.4) to a reduction in the otherwise applicable two-year period of ineligibility.

51. Lastly, I conclude that Ms. Beyene's degree of fault is minimal under the circumstances. At the time of her positive test, Ms. Beyene was a twenty-one year old athlete living in a foreign country. Ms. Beyene speaks very limited English and relied on her roommates with whom she trained to communicate. Ms. Beyene has received no formal anti-doping education. Given the unique and compelling circumstances presented in this matter, I find that a four-month period of ineligibility is appropriate. The period of ineligibility shall commence from the date of Ms. Beyene's acceptance of her provisional sanction.

V. DECISION AND AWARD

The Arbitrator therefore rules as follows:

1. Ms. Beyene's period of ineligibility shall be reduced to four months, under WADA Code 10.4 (and its equivalent, IAAF ADR 40.4), beginning as of October 7, 2013 and ending on February 7, 2014.

2. In accordance with Paragraph 15.d of the USADA Protocol, the administrative fees of the American Arbitration Association and the fees and costs of the Arbitrator shall be borne by the United States Olympic Committee.

3. The parties shall bear their own costs and attorney's fees.

4. This Award is in full settlement of all claims submitted to this Arbitrator. All claims not expressly granted herein are hereby denied.

Jeffrey A. Mishkin, Arbitrator

Dated: February 3, 2014.

BEFORE THE AMERICAN ARBITRATION ASSOCIATION

United States Anti-Doping Agency, Claimant, v. Hirut Beyene, Respondent.	)))))))))	AAA No. 77 190 00389 13

THE UNDERSIGNED ARBITRATOR, having issued a Final Award in this matter on February 3, 2014, hereby issues the following clarification pursuant to Rule 43 of the AAA Supplementary Procedures for the Arbitration of Olympic Sport Doping Disputes:

1. On February 7, 2014, Claimant, the United States Anti-Doping Agency ("USADA"), requested clarification of the Final Award to make express that the sanction imposed included the loss of results obtained on and subsequent to May 5, 2013, the date of the positive doping test.

2. On February 13, 2014, Respondent Hirut Beyene filed an opposition to USADA's request on the grounds that the request is untimely. Ms. Beyene also asserts that under Article 10.8 of the World Anti-Doping Agency ("WADA") Code, fairness requires that her results following the positive test through the date of her provisional suspension not be disqualified.

3. It is undisputed that Ms. Beyene has committed an anti-doping rule violation based on the presence of methlhexaneamine in her sample collected on May 5, 2013 at the Dick's Sporting Goods Pittsburgh Marathon (the "Pittsburgh Marathon").

4. Under International Association of Athletics Federations Anti-Doping Rule ("IAAF ADR") 39, "[a]n anti-doping rule violation in connection with an In-Competition test automatically leads to disqualification from the Event in question, with all resulting consequences for the Athlete, including the forfeiture of all titles, awards, medals, points and prize and appearance money."

5. Pursuant to the terms of IAAF ADR 39, Ms. Beyene's results achieved at the Pittsburgh Marathon are automatically disqualified. The disqualification of such results is not affected by USADA's failure to have raised this specific issue at the hearing or in its pre- or post-hearing written submissions.

6. The disqualification of competitive results following the date of Ms. Beyene's positive test at the Pittsburgh Marathon through the commencement of her provisional suspension is governed by IAAF ADR 40.8. Under that provision:

> In addition to the automatic disqualification of the results in the Competition which produced the positive sample under Rules 39 and 40, all other competitive results obtained from the date the positive Sample was collected (whether In-Competition or Out-of-Competition) or other anti-doping rule violation occurred through to the commencement of any Provisional Suspension or Ineligibility period shall be Disqualified with all of the resulting Consequences for the Athlete including the forfeiture of any titles, awards, medals, points and prize and appearance money.

7. As an initial matter, Ms. Beyene asserts that WADA Code Article 10.8 requires the disqualification of results "unless fairness requires otherwise." The "unless fairness requires otherwise" clause in WADA Code Article 10.8, however, is conspicuously absent from IAAF ADR 40.8. It therefore is not entirely clear that the disqualification of the results at issue is not mandated, without exception, under IAAF ADR 40.8.

8. Even assuming that the "unless fairness requires otherwise" clause applies, Ms. Beyene has failed to establish that fairness requires that any results from the date of her positive test through the commencement of her provisional suspension not be disqualified. Ms. Beyene presented no evidence at the hearing regarding the races she competed in following her positive test or demonstrating any unfairness regarding the disqualification of results from such races. Moreover, even on this post-hearing application, Ms. Beyene has not presented sufficient evidence of unfairness to overcome the general rule of disqualification USADA asks to have applied. Absent that showing, Ms. Beyene's results following her positive test through the commencement of her provisional suspension must be disqualified.

* * *

For the foregoing reasons, the Final Award is modified to make express that the sanction imposed includes the disqualification of results obtained on and subsequent to May 5, 2013 through the commencement of Ms. Beyene's provisional suspension.

Jeffrey A. Mishkin, Arbitrator

Dated: February 18, 2014.