AMERICAN ARBITRATION ASSOCIATION
Commercial Arbitration Tribunal

In the Matter of the Arbitration between

UNITED STATES ANTI-DOPING AGENCY,

Claimant

and

ATALELECH KETEMA ASFAW,

Respondent

Re: AAA Case No. 01-14-0001-4332

REASONED DECISION AND AWARD

Pursuant to the American Arbitration Association's ("AAA") Commercial Arbitration Rules ("AAA Commercial Arbitration Rules") as modified by the American Arbitration Association Supplementary Procedures for the Arbitration of Olympic Sport Doping Disputes as contained in the Protocol for Olympic and Paralympic Movement Testing, effective January 1, 2009, pursuant to the Ted Stevens Olympic and Amateur Sports Act, 36 USC 22501, *et seq*. ("USADA Protocol"), an evidentiary hearing was held in Albuquerque, New Mexico, on January 29, 2015, before the duly appointed arbitration panel consisting of Jeffrey G. Benz (Chair), Maidie Oliveau, and Barbara Shycoff (collectively, "the Panel" or "the Arbitrators"). The Panel, having been duly sworn, and having duly heard the proofs, arguments, witness testimony, and allegations of the parties, do hereby render our full award pursuant to our undertaking to do so within the time required under the relevant rules, as follows:

I. INTRODUCTION

1.1 The Respondent in this case, Atalelech Ketema Asfaw ("Respondent" or "Ms. Asfaw"), is a marathoner who has competed internationally first for Ethiopia and later for the United States. She provided a urine specimen for an in competition test that was administered at the Marathon Movistar Lima 42K in Lima, Peru on May 18, 2014. Her urine test returned an adverse analytical finding for the presence of Ephedrine above the permissible threshold.

1.2 Claimant, the United States Anti-Doping Agency ("Claimant" or "USADA") sought a two-year penalty under the applicable rules.

1.3 The Panel determines, for the reasons specified below, that Ms. Asfaw shall serve a two-year suspension for her adverse analytical finding, commencing on the date of sample collection.

II. THE PARTIES

2.1 Claimant, USADA, as the independent anti-doping agency for Olympic Sports in the United States, is responsible for conducting drug testing and for adjudication of any positive test results and other anti-doping violations pursuant to the USADA Protocol. William Bock, Esq., of the law firm Kroger, Gardis and Regas, who is also General Counsel of USADA, alongside Onye Ikwuakor, Esq., who is Legal Director of USADA, appeared and represented Claimant USADA.

2.2 Respondent, Ms. Asfaw trains and lives in or around Albuquerque, New Mexico. Michael Straubel, Esq., of Valparaiso University Law School, and law students James Hoch, Rudy Longman, and Travis Rhodes, appeared and represented Respondent (collectively, Claimant and Respondent shall be referred to as "the parties" and individually "party").

2.3 The Panel appreciates and commends the excellent briefing and oral presentations of counsel for both parties in this matter, and on the Respondent's side by the law students participating.

III. JURISDICTION/APPLICABLE RULES

3.1 The Panel has jurisdiction over this doping dispute pursuant to the Ted Stevens Olympic and Amateur Sports Act ("Act") §220522 because this is a controversy involving Respondent's opportunity to participate in national and international competition. The Act states, in relevant part, that:

> "*An amateur sports organization is eligible to be recognized, or to continue to be recognized, as a national governing body only if it . . . agrees to submit to binding arbitration in any controversy involving . . . the opportunity of any amateur athlete, coach, trainer, manager, administrator or official to participate in amateur athletic competition, upon demand of the corporation or any aggrieved amateur athlete, coach, trainer, manager, administrator or official, conducted in accordance with the Commercial Rules of the American Arbitration Association, as modified and provided for in the corporation's constitution and bylaws. . . . .*"[1]

3.2 Under its authority to recognize an NGB[2], the United States Olympic Committee ("USOC") established its National Anti-Doping Policies, the current version of which is effective as of January 1, 2009 ("USOC Policies"), which, in relevant part, provide:

> *". . . NGBs shall not have any anti-doping rule which is inconsistent with these Policies or the USADA Protocol, and NGB compliance with these Policies and the USADA Protocol shall be a condition of USOC funding and recognition."*[3]

3.3 Regarding Respondent, the USOC Policies provide:

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1 *Ted Stevens Olympic and Amateur Sports Act* (*"Act*"), 36 U.S.C. § 220501, § 220522(a).

2 *Act*, §220505(c)(4).

3 *National Anti-Doping Policies*, ¶12.

". . . each NGB shall be responsible for informing Athletes and Athlete Support Personnel in its sport of these USOC National Anti-Doping Policies and the USADA Protocol which is incorporated into the agreement between the USOC and USADA. By virtue of their membership in an NGB, license from a NGB, participation in an Event or Competition organized or sanctioned by an NGB, selection for a national team, receipt of benefits from an NGB or the USOC or by virtue of their inclusion in the USADA RTP, Participants agree to be bound by the USOC National Anti-Doping Policies and the USADA Protocol. . . ."[4]

3.4 In compliance with the Act, the USADA Protocol, Article 15, provides that hearings regarding doping disputes "will take place in the United States before the American Arbitration Association ("AAA") using the [USADA Protocol]."

3.5 No party disputed the Panel's jurisdiction here and in fact all consented to it and participated in these proceedings without objection.

3.6 The rules related to the outstanding issues in this case are the IAAF rules on anti-doping, which implement the World Anti-Doping Agency Code (the "WADA Code"). As the IAAF rules relating to doping are virtually identical to the WADA Code, the applicable WADA Code provisions (version 2009) will be referenced. The relevant WADA Code provisions are as follows:

"2.1 Presence of a Prohibited Substance or its Metabolites or Markers in an Athlete's Sample Specimen

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 Sample. 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 violation under Article 2.1

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3.1 Burdens and Standards of Proof

The Anti-Doping Organization shall have the burden of establishing that an anti-doping rule violation has occurred. The standard of proof shall be whether the Anti-Doping Organization 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 the Code places 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

[4] *Id.* at ¶11.

balance of probability, except as provided in Article 10.4 and 10.6 where the Athlete must satisfy a higher burden of proof.

3.2 Methods of Establishing Facts and Presumptions

Facts related to anti-doping rule violations may be established by any reliable means, including admissions. The following rules of proof shall be applicable in doping cases. . . .

* * *

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

The period of Ineligibility imposed for a violation of Article 2.1 [Presence of Prohibited Substance or its Metabolites or Markers], Article 2.2 [Use or Attempted Use of Prohibited Substances or Prohibited Method] or Article 2.6 [Possession of Prohibited Substances and Prohibited Methods] shall be as follows, unless the conditions for eliminating or reducing the period of Ineligibility, as provided in Article 10.4 and 10.5, or the conditions for increasing the period of Ineligibility, as provided in Article 10.6, are met:

- *First Violation: Two years' Ineligibility.*

* * *

10.4 Elimination or Reduction of the Period of Ineligibility for Specified Substances under Specific Circumstances

Where an Athlete or other Person can establish how a Specified Substance entered his or her body or came into his or her 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 found in Article 10.2 shall be replaced with the following:

- *First violation: At a minimum, a reprimand and no period of Ineligibility from future Events, and at a maximum, two [2] years of Ineligibility.*

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

* * *

10.9 Commencement of Ineligibility Period

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 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 imposed. . . .

10.9.2 Timely Admission

Where the Athlete or other person promptly [which, in all events, for an Athlete means before the Athlete competes again] admits the anti-doping rule violation after being confronted with the anti-doping rule violation by the Anti-Doping Organization, 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 Article 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 the date the sanction is otherwise imposed."

IV. FACTUAL BACKGROUND/PROCEDURAL HISTORY

4.1 On May 18, 2014, Respondent participated in the Lima Marathon in Lima, Peru (the "Lima Marathon"). Immediately following her third place finish in the race, Respondent provided urine Sample #432 (the "Sample) in accordance with the event's anti-doping program. *See* Respondent's Doping Control Form. Respondent's Sample was then sent to the World Anti-Doping Agency ("WADA") accredited laboratory in Bogota, Columbia (the "Laboratory" or "Bogota Laboratory"), for analysis. *See* Lab Result Documents.

4.2 On June 9, 2014, the Bogota Laboratory reported to the Lima Marathon event organizing committee that the A-Sample had tested positive for the presence of Ephedrine at a concentration greater than the decision limit of 11.0 µg/mL. *See* June 9, 2014, Bogota Laboratory Report to Lima Marathon.

4.3 On June 12, 2014, Respondent's International Federation, the IAAF, was informed of Respondent's adverse finding via the clearinghouse on WADA's Anti-Doping Administration & Management System ("ADAMS"). *See* Lab Result Documents.

4.4 On June 13, 2014, Dr. Jorge Tello Sanchez, the Medical Director for the Lima Marathon, notified the Respondent, through her agent Derek Froude, of the adverse finding for Ephedrine in her Sample. *See* June 16, 2014, Froude Correspondence to IAAF.

4.5 On June 16, 2014, Mr. Froude forwarded the adverse finding notification to the Results Manager of the IAAF's Medical and Anti-Doping Department, Thomas Capdevielle. In the accompanying email, Mr. Froude expressed his surprise at personally receiving the notification, though not with the Laboratory's findings. Mr. Froude explained that the finding for Ephedrine could likely be explained by Respondent's use of the allergy medication Benadryl and then asked what the Respondent's options were at that time. Mr. Froude closed the email by providing Mr. Capdevielle with Respondent's personal contact information in order to facilitate direct communication between the IAAF and Respondent. *Id*.

4.6 On June 23, 2014, IAAF Anti-Doping Administrator Dr. Gabriel Dollé sent Respondent a letter advising her of her (i) opportunity to provide an explanation for the adverse analytical finding; (ii) right to request the analysis of the B-Sample; and (iii) right to request the A-Sample laboratory documentation package. *See* June 23, 2014, IAAF Correspondence to Respondent.

4.7 On June 25, 2014, Respondent sent a letter to the IAAF in response to their June 23 correspondence. In her letter, Respondent expressly waived her right to request the analysis of her B-Sample and stated that she did not "dispute the finding of Ephedrine in the sample collected at the 2014 Maraton Movistar Lima 42K on 18th May, 2014, in Lima, Peru." Respondent further explained that the adverse finding had resulted from her use of Benadryl and asked that the IAAF exercise its discretion by imposing a sanction of a "warning" in her case. *See* June 25, 2014, Respondent Correspondence to IAAF. As a result of Respondent's voluntary decision, confirmed in writing, to waive the B-Sample analysis and to accept the finding of Ephedrine in her Sample, no B-Sample analysis was performed.

4.8 On June 26, 2014, the IAAF referred the matter to USADA for results management. *See* June 26, 2014, IAAF Correspondence to USADA. Thereafter, on July 2, 2014, USADA notified Respondent that her case had been referred to USADA for results management. USADA also advised Respondent that the matter was being forwarded to a Panel of the Anti-Doping Review Board ("Review Board") for its consideration and recommendation as to whether there was sufficient evidence of an anti-doping rule violation to proceed to a hearing and invited Respondent to make a submission to the Review Board by July 14, 2014, for its consideration. *See* July 2, 2014, USADA Correspondence to Respondent.

4.9 On July 14, 2014, Respondent sent USADA a letter (dated July 12, 2014) with an explanation for her positive test as well as photos of various supplements, vitamins and medications she claimed to have used in the preceding months. *See* Exhibits Binder, Tab 12, Bates USADA 000007-000020. It was in her July 12 letter that Respondent for the first time identified a product other than Benadryl as the source of the Ephedrine in her Sample. Respondent's explanation from her letter to USADA regarding her ingestion of Ephedrine is as follows:

> *"After initially be [sic] notified of the positive finding for Ephedrine, I personally jumped to the conclusion that the Benadryl Allergy Medicine I had been taking must have been the cause. But doing some research online, it seems that this is not the case.*

I submit as attachment photographs of all of the medicines that I had taken in the weeks prior to the competition in Lima, and I believe that I have now identified the likely source of the Ephedrine – a box of Chinese Herbal Medicine that I was given by some Asians I met at a restaurant in late January 2014 when I was competing in the Osaka Ladies Marathon in Japan and when my allergies and cough were especially bothering me to the extent that I could not finish the competition. It is green and white with Chinese characters in the attached photographs.

The label of the box is all in Chinese which I cannot read, but I had a Chinese associate translate the label for me and he informs that the fifth and sixth characters translate to "Ephedra Sinica", an herb that does contain Ephedrine.

I did not even specifically intend to take this medicine in the days prior to the Lima Marathon, but I have (until now) been in the habit of putting some of [sic] all the pills that I take (analgesics, antihistamines) into a single pill bottle for convenience when traveling. There are some of the Chinese pills in this bottle, so I am convinced that I must have inadvertently taken some while in Lima."

See Exhibits Binder, Tab 12, Bates USADA 000012.

4.10 Respondent closed her letter by confirming that she would not compete until after the resolution of her case (the signed Acceptance of Provisional Suspension form accompanied the letter) and requested that she receive a "Warning" for her anti-doping rule violation. *See* Exhibits Binder, Tab 12, Bates USADA 000013.

4.11 Over the next month, USADA and Respondent exchanged several emails regarding the permissiveness of a treatment plan her physician was recommending to manage lateral hip pain Respondent was experiencing due to bursitis. *See* Exhibits Binder, Tab 12, Bates USADA 000027-000037. The next written communication between USADA and Respondent regarding this case occurred on August 18, 2014, when USADA sent Respondent a list of questions regarding the "Chinese Herbal Medicine" she had identified as causing her positive test. *See* Exhibits Binder, Tab 12, Bates USADA 000038-000045.

4.12 Respondent provided her responses to USADA's questions on August 25, 2014. *See* Exhibits Binder, Tab 12, Bates USADA 000064-000070. Thereafter, on August 29, 2014, USADA advised Respondent that the Review Board had determined there was sufficient evidence of a doping offense and formally charged her with an anti-doping rule violation for the presence of Ephedrine in her urine Sample and for the use and/or attempted use of Ephedrine. *See* August 29, 2014, USADA Correspondence to Respondent 11. Respondent was advised that she could accept a two-year period of ineligibility for the alleged anti-doping rule violation or contest the proposed sanction by requesting a hearing before the AAA. *Id*.

4.13 On September 8, 2014, counsel for Respondent advised USADA that Respondent was unwilling to accept USADA's proposed sanction and formally requested a hearing before the AAA. *See* September 8, 2014, Correspondence from Respondent's Counsel to USADA

4.14 This arbitration proceeding was commenced on September 9, 2014. The Panel conducted its initial preliminary hearing in this matter on October 30, 2014 and issued a lengthy Procedural Order. The evidentiary hearing in this matter was conducted in an all day hearing on January 29, 2015, in Albuquerque, New Mexico.

4.15 USADA's submissions were:

a. Respondent is responsible for every substance that enters her body and in order to be entitled to a reduction of the standard two-year period of ineligibility under the applicable rules, bears the burden to prove how the substance got into her body. The burden of proof for her to establish those facts is by a "balance of probability" which has been established through CAS jurisprudence to mean 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 offense". *E.g.*, *FIFA & WADA v. Dodo*, CAS 2007/A/1370 & 1376, ¶ 127. Put another way, for a hearing body "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." *ITF v. Gasquet*, CAS 2009/A/1926 & 1930, ¶ 5.9. Respondent's claims regarding the source of prohibited substance in her system are clouded by inconsistencies in her statements and she is unable to meet her burden of proof in support of her explanation.

b. Even if the Panel accepts that Respondent has established by a balance of probability how the Ephedrine entered her body, she must still produce corroborating evidence, *in addition to her word*, which establishes to the comfortable satisfaction of the Panel that she did not intend to enhance her athletic performance by using the prohibited substance. Code Article 10.4. Respondent failed to identify any compelling evidence, in addition to her word, to corroborate her explanation regarding her lack of intent to enhance her performance.

c. Even if the Panel accepts Respondent's explanation regarding the source of the Ephedrine in her Sample and even if the Panel concludes that Respondent has carried her burden of establishing that she did not intend to enhance her performance through the use of Ephedrine, Respondent's admitted conduct with respect to her acquisition and ingestion of the Ephedrine clearly establishes that her degree of fault for testing positive for a prohibited substance is significant. Respondent's degree of fault is arguably just as significant, if not more so, than the fault exhibited by other athletes who have previously been denied any sanction relief for their doping offenses. Pursuant to Article 10.4 of the WADA Code if an athlete who has tested positive for a Specified Substance carries both her burden of establishing the source of her positive test and an absence of intent to enhance performance or mask the use of a prohibited substance then the athlete's "degree of fault shall be the criterion considered in assessing any reduction of the period of *Ineligibility*."

d. Using the multi-part analysis set forth by the CAS Panel i*n Cilic v. ITF, CAS 2013/A/3327, 3335*, Respondent's objective level of fault must be considered extremely high. She did not undertake any of the five steps *Cilic* required and thus her

fault is within the *Cilic* category of significant or considerable fault. Assessing the subjective fault factors from *Cilic* it is clear that no subjective factor present in Respondent's case can materially diminish the high degree of objective fault that must be attributed to her for consciously ingesting a pill received from strangers more than three and a half months before her competition and without having made any effort to ascertain the contents of the pill. Because of her significant fault, her period of *Ineligibility* cannot be reduced at all and the sanction for her anti-doping rule violation is two years.

4.16 Ms. Asfaw's submissions were:

a. Respondent met her burden of proving the source of the Ephedrine and how it entered her body by a preponderance of the evidence. The Claimant is only suggesting inconsistencies in Ms. Asfaw's explanation without producing any concrete evidence, only speculation. The inconsistencies, such as the claim that the box was the source of the medication and then it was a bottle from which the pills were poured out of, are easily explained by English language difficulties, that include issues with syntax, understanding the full meaning of English words, word tense and word choice. The discrepancy in Ms. Asfaw's explanation of the color of the medication being white and the Claimant's contention that the Ephedrine is light brown is speculation. The source of evidence used to describe the pill color is no better than Ms. Asfaw's firsthand account of the color. Because Ms. Asfaw has been forthcoming, cooperative and her explanation throughout this process has been consistent and truthful, Ms. Asfaw withstands the unsubstantiated speculative attacks and meets the burden of a balance of probability.

b. Ms. Asfaw was able to produce evidence, through testimony of her manager Derek Froude, documenting her poor health condition at the time of the races in Osaka and in Peru. Mr. Froude testified that he was with her in Peru before the race and saw that she was visibly ill and likely suffering from an allergy attack, thus corroborating Ms. Asfaw's story. He knew she was going to take some medication to attempt to alleviate her symptoms but was unsure of what she took. If there were any minor inconsistencies within her story, they can be attributed to her limited understanding of the English language.

c. With respect to the Respondent's degree of fault, she posits that in exceptional cases, the subjective element can be so significant that it could move the athlete, for example, from the normal fault category down into the light fault category. Each case can turn on its own facts but the subjective level of fault can be judged by inquiring into: an athlete's youth and/or inexperience, language or environmental problems encountered by the athlete, the extent of anti-doping education received by the athlete, and any other "personal impairments". Although she has been a competitive runner in the United States for several years, Ms. Asfaw has received no formal introduction to the applicable WADA Code and her experience with drug testing is minimal. Ms. Asfaw's difficulty understanding the English language clouds her ability to comprehend the WADA Code as well as her ability to determine the information that was exchanged when she received the Ephedrine tablets at the restaurant in Japan. She also suffered from a personal impairment in that she was under a high degree of stress when she received the Ephedrine in Japan and then again in Peru when she was suffering an

allergy attack and desperate for relief. These amount to exceptional circumstances entitling her to a reduction in the period of ineligibility.

d. Ms. Asfaw also believed the Ephedrine pills were an over the counter medication which she mistakenly believed is always safe to take and would not result in a positive test. Though this is a mistaken belief, the Panel must take into account her subjective belief about the safety of this medication.

e. In determining the length of her suspension, fault is the most critical factor for Ms. Asfaw. Given the exceptional circumstances surrounding her positive test, including the subjective factors such as her limited language abilities and lack of anti-doping education, she exhibited light fault and requests a period of ineligibility of eight (8) months in accordance with the *Cilic* guidelines for light negligence.

4.17 On February 4, 2015, the Panel issued its order concerning post-hearing submissions which provided in relevant part:

> "*ADDITIONAL SUBMISSIONS. The Panel will accept one additional submission from each party, at the party's option (in other words, this submission is not mandatory), provided that any such additional submission is received by the Panel, in conformity with the requirements of this order, no later than midnight, Pacific Time, February 9, 2015. The intention of the Panel is that these additional submissions are simultaneous; in other words, each party is to set forth its respective positions, as more fully set forth below, based on the evidence and arguments adduced at the evidentiary hearing, without reference to the additional submission of the other party. "*

4.18 On February 11, 2015, after both parties made the additional permitted submissions, the hearing in this matter was closed.

V. ANALYSIS

5.1 While the Panel has considered all the facts, allegations, legal arguments and evidence submitted by the parties in the present proceedings, it refers in this Award only to the submissions and evidence it considers necessary to explain its reasoning.

Inconsistent Statements

5.2 There were a number of inconsistencies between the prior statements of the Respondent and her testimony at the hearing as well as with the testimony submitted on her behalf.

Onset of allergy symptoms

5.3 In her Pre-Hearing Brief, Respondent described in detail the circumstances that led to her receipt and subsequent use of the Ephedrine pills that allegedly led to her positive test at the Lima Marathon on May 18, 2014. However, when compared to Respondent's Pre-Hearing

Brief and prior written statements as well as the witness testimonies provided at the hearing, the narrative changes.

5.4 In her Pre-Hearing Brief, Respondent stated that her allergy symptoms began prior to her competing in the Osaka Women's Marathon, but after her arrival in Japan. *See* Respondent's Pre-Hearing Brief, p. 8.[5] This claim is supported by a statement from Respondent's husband, Fitsum Tesfa, who wrote in an email to Respondent's counsel that, "I remember that she was fine before leaving for Japan. I think the stress due to long travel and change of environment was the reasons for her bad allergies there and she could not even complete the competition." E-mail Questions & Answers, Fitsum Tesfa – Husband.[6]

5.5 The Respondent's pre-hearing explanation regarding the timing of the onset of her allergy symptoms is that they occurred after she arrived in Japan. Yet, at the hearing, both Respondent and Mr. Tesfa testified that the Respondent was already ill prior to traveling to Japan. In fact, Respondent testified that her symptoms were so severe prior to travelling to Japan that her husband encouraged her to cancel her race plans and remain at home.

Timing of receipt of pills

5.7 Prior to the hearing, Respondent claimed that she obtained and used the Ephedrine pills prior to competing in the Osaka Women's Marathon. *See* Respondent's Pre-Hearing Brief, p. 8,[7] 9.[8] At the hearing, however, Respondent testified, both on direct and cross examination, that she did not obtain the Ephedrine pills until after she had participated in the race.

Container of pills upon receipt

5.8 In Respondent's July 12, 2014, letter to USADA, she identified the source of the Ephedrine as "a box of Chinese Herbal Medicine that [she] was given by some Asians [she] met at a restaurant in late January 2014" and then describes the box as "green and white with Chinese characters in the attached photographs." Exhibits Binder, Tab 12, Bates USADA 000012.

5.9 Yet in August of 2014, when asked whether she still had the package that the Ephedrine pills were originally contained in, Respondent replied that she had never had the medicine package and that the pills were given to her in a small bottle. *See* Exhibits Binder, Tab 12, Bates USADA 000069, Questions #5 and 6.

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[5] "Traveling to new areas often causes agitation of her allergies, which she began experiencing while she was in Japan before competing in the Osaka Women's Marathon."

[6] Exhibits Binder, Tab 3.

[7] "Prior to competing in the race she went to eat a Chines restaurant located near the New Otani Osaka Hotel, where she was staying. Prior to eating at the restaurant her allergies were bothering her. At the restaurant, her allergies began to get worse. Noticing her plight, one of the workers of the restaurant offered her a Chines [*sic*] medicine to help her condition."

[8] "Even with the assistance of the medication Ms. Asfaw was unable to finish the race due to her symptoms."

5.10 At the hearing, Respondent testified that the Ephedrine pills were not actually provided to her in a container of any kind. Rather, she testified, the Ephedrine pills were given to her loose, in a napkin from the restaurant where she was dining. When asked about the inconsistencies of her statements regarding the packaging of the Ephedrine pills, both in her correspondence with USADA and testimony at the hearing, Respondent claimed that she had not intended to mislead USADA and that the discrepancies could be attributed to a lack of proficiency, on her part, with the English language.

5.11 Respondent's explanation is contradicted, however, by her agent, Derrick Froude, who testified that he had essentially drafted the Respondent's July 12 letter to USADA, and that he had written that the source of the Ephedrine was "a box of Chinese Herbal Medicine that [Respondent] was given" because he believed at that time, based on his discussions with Respondent, that Respondent had been given the Ephedrine pills in a medication box.

Image source

5.12 At the hearing, Respondent testified that the individuals who gave her the Ephedrine pills conducted an Internet search of the medication, at her request, in an attempt to provide her with additional information concerning the medication. Respondent testified that the Internet search was conducted on the phone of one of the individuals who gave her the medication and that the image was obtained by Respondent taking a picture of the screen of that individual's phone while the medication was pictured. Respondent testified that she took the picture of the phone's image from the website "just in case" something happened to her as a result of using the medication and because she understood that she needed to know what she was ingesting in order to avoid taking a prohibited substance.

5.13 The manner in which the image was saved to Respondent's phone is of particular importance in this case because, as was demonstrated during USADA's cross-examination of Respondent, photos taken with an iPhone are embedded with certain identifying information called metadata. Among the information contained in the metadata for a photo taken with an iPhone is the date and time when the photo was taken. In the present case, with the exception of the Ephedrine package images, all of the photos Respondent sent to USADA on July 14 and July 16, 2014, of her medications and supplements contained metadata which revealed when the photos were taken. *See* Exhibit 50.[9]

5.14 There was a lack of metadata for the Ephedrine image, which cuts against Respondent's claim that the image is a photo that she took with her iPhone. Respondent's testimony on this particular point is further undermined by the lack of the presence of the phone that was reportedly displaying the image that Respondent claims she photographed, as well as the testimony of her agent who stated that it was his understanding that the Ephedrine medication image was sent to her via email or text by the individuals who provided her with the Ephedrine pills and not that she had taken the photo herself.

Color of pills

5.15 From the start of these proceedings up until the time of her cross-examination at the hearing, Respondent maintained that the Ephedrine pills she was allegedly given in Japan were white and very similar in appearance to aspirin and other pain relieving medications she takes on occasion. *See* Respondent's Pre-Hearing Brief, p. 10;[10] Exhibits Binder, Tab 12, Bates USADA 000069-70, Questions #10[11] and 12.[12] On cross-examination Respondent remained steadfast in her description of the appearance of the Ephedrine pills until USADA provided her with a printout of a translated product information page for the medication she claims to have taken, which indicated that the pills were actually "light brown" in color.

5.16 Upon learning that the Ephedrine medication was described as "light brown" on the product information page, Respondent immediately amended her earlier testimony and declared for the first time that the Ephedrine pills she was given were actually "light brown" or "tan" in color. Respondent's sudden shift concerning the color of the Ephedrine pills did not only position her hearing testimony in direct conflict with her prior written statements and the arguments contained in her Pre-Hearing Brief, it was also directly at odds with the testimony of her husband, who testified that Respondent showed him the Ephedrine pills when she returned from Japan and that they were "white" in appearance.

Quantity of pills

5.17 Respondent has maintained throughout these proceedings that she was provided between 20 and 30 Ephedrine pills and that she used the pills sparingly while in Japan and Peru. In her Pre-Hearing Brief, Respondent stated that she took 2-4 pills each day for three days while in Japan and then on three occasions while in Peru. Respondent's Pre-Hearing Brief, p. 9-10. At the hearing, however, Respondent testified that she only used the pills in Japan after dropping out of the Osaka Women's Marathon, one day prior to returning to the United States, and that she **may** have taken some of the pills while in Peru on the evening prior to and the morning of the Lima Marathon. Even accepting Respondent's low estimate for the number of pills she was given and high estimate for the number of pills she ingested, there should have still been some of the Ephedrine pills remaining in Respondent's travel container when she returned from Peru.

5.18 In her July 12, 2014, letter to USADA, Respondent explained that she combines all of her pills in a single pill bottle for convenience while traveling and that she was convinced that she had inadvertently ingested some of the pills while in Peru because, "There **are** some of the Chinese pill in this bottle…." Exhibits Binder, Tab 12, Bates USADA 000012 (emphasis added). However, when asked by USADA in August 2014 whether she still had any of the Ephedrine pills she claimed that none of the pills remained. Exhibits Binder, Tab 12, Bates USADA 000069, Questions #7 and 8.

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[10] "However, the Chinese medication is white and looks very similar to a common aspirin and other vitamins that were also contained in the bottle."

[11] "They are white and just look like other pills."

[12] "Small, white round pills, about ¼ inch in diameter and it look like CVS brand extra strength pain relief acetaminophen."

5.19 When questioned at the hearing about the apparent discrepancy between her July 12 letter and August 25 response to USADA regarding the existence of any remaining Ephedrine pills, Respondent testified that none of the Ephedrine pills were remaining at the time that the July 12 letter was drafted and sent to USADA. Respondent once again claimed that she had not intended to mislead USADA and attributed the discrepancy to her lack of proficiency with the English language. Mr. Froude, however, explained that in drafting the letter for Respondent, he had referred to the Ephedrine pills in the present tense because it was his belief, based on his conversations with Respondent at the time the letter was written, that she was still in possession of some of the Ephedrine pills. Mr. Froude also testified that he was surprised to learn, on the day of the hearing, that Respondent did not have any Ephedrine pills remaining in her possession.

Different photos of pills

5.20 As mentioned above, Respondent's Pre-Hearing brief states that Respondent sent copies of the Ephedrine medication image to both USADA and her counsel prior to the phone needing to be replaced. Respondent's Pre-Hearing Brief, p. 9. A close examination of the images reveals, however, that the images sent to USADA are very closely cropped in comparison to the image sent to Respondent's counsel.

5.22 Respondent first sent an image of the Ephedrine medication to USADA on July 14, 2014. *See* Exhibits Binder, Tab 12, Bates USADA 000015-17. Thereafter, in response to a request from USADA for a higher quality image, Respondent sent USADA the second image of the Ephedrine medication on July 16, 2014. *See* Exhibits Binder, Tab 12, Bates USADA 000024-25. The two images appear to be identical.

5.22 Respondent presumably sent the third image of the Ephedrine medication to her counsel after USADA formally charged her with an anti-doping rule violation on August 29, 2014. Unlike the images that were sent to USADA, the image sent to Respondent's counsel does not appear to have been cropped in any significant manner, if at all. *See* Exhibits Binder, Tab 7. The lack of cropping in the image sent to Respondent's counsel makes it readily apparent that the image is of a promotional photo for the Ephedrine medication. The same cannot be said for the images that Respondent sent to USADA.

5.23 When questioned about the clear differences between the images she had sent to USADA and her counsel, Respondent claimed that she only cropped the image that was sent to USADA on July 16, 2014, in response to USADA's request for a higher quality image.

Correspondence

5.24 At the hearing, Respondent was pointedly asked by USADA whether she had received any assistance in drafting the correspondence that she sent to the IAAF on June 25, 2014, the letter that she sent to USADA dated July 12, 2014, and the responses she provided to a list of questions from USADA on August 25, 2014. In response to this line of questioning, Respondent testified that her agent, Mr. Froude, assisted her with the June 25 and August 25

communications, but maintained that she drafted the July 12 communication without any outside assistance.

5.25 On cross-examination by USADA, Mr. Froude readily admitted to drafting the June 25 letter to the IAAF; however, contrary to Respondent's testimony, Mr. Froude also claimed drafting the July 12 letter to USADA and flatly denied any involvement in the drafting of the August 25 communication.

5.26 Given the similarities in style and syntax between the June 25 and July 12 communications, the Panel is of the opinion that Mr. Froude's testimony regarding the authorship of the July 12 letter to USADA is more credible than the Respondent's testimony. The Panel is also inclined to believe Mr. Froude's testimony concerning the August 25 communication based on the fact that the responses to USADA questions regarding the container the pills were provided to her in, and whether she still had any pills in her possession, are in direct conflict with the information contained in the July 12 letter drafted by Mr. Froude.

How the Prohibited Substance Entered Her System

5.27 Individually, each of the inconsistencies referenced above would not be terribly significant. En masse, several of the inconsistencies referenced above are sufficiently troublesome as to cast serious doubt on Respondent's explanations and potentially derail her attempts to meet her burdens. The Panel did take these inconsistencies into account, however, it was evident that Ms. Asfaw has significant difficulty with the English language which largely explains these seemingly inconsistent statements. USADA has not produced any contrary evidence. The Panel accepts that the source of the Ephedrine was a Chinese cold medicine given to Ms. Asfaw while she was in Japan, by unidentified individuals attempting to help her. Ms. Asfaw was desperate for relief and accepted medication in an effort to relieve her symptoms. The medication helped her feel better and she subsequently kept the remaining pills in a travel pill bottle that was eventually brought home and set aside. The pill bottle was later used in May of 2014 to transport Ms. Asfaw's medication to Lima, Peru. Feeling ill, the pills were inadvertently ingested, when she thought she was taking aspirin, prior to the Lima Marathon when Ms. Asfaw was again seeking relief for her allergy symptoms. The Panel is willing to accept that Ms. Asfaw met her burden of proof by a balance of probability to establish how the Ephedrine entered her system—she took pills given to her by others, which pills contained Ephedrine. This burden is lower than a preponderance of the evidence and is met because in spite of the inconsistencies in the evidence, Ms. Asfaw's explanation is more likely than not and as such is accepted by the Panel.

Absence of Intent to Enhance Performance

5.28 If an athlete seeks an elimination or reduction of the suspension for a Specified Substance, the athlete must establish that the Specified Substance was not intended to enhance the athlete's sport performance. The athlete must produce corroborating evidence, in addition to his or her word, which establishes to the comfortable satisfaction of the hearing panel the absence of an intent to enhance sport performance. Ms. Asfaw was able to produce corroborating evidence, through the testimony of her manager Derek Froude, documenting her

poor health condition at the time of the races in Osaka and in Peru. Mr. Froude testified that he was with her in Peru before the race and saw that she was visibly ill and likely suffering from an allergy attack, thus corroborating Ms. Asfaw's story. He knew she was going to take some medication to attempt to alleviate her symptoms but was unsure of what she took. She was consistent in her testimony and the other evidence she presented that her intention in taking the substance was not to enhance sport performance but to alleviate the symptoms of her allergies and other illnesses.

5.29 The Panel finds that Ms. Asfaw demonstrated that she had no intent to enhance her sport performance by using Ephedrine. There were no inconsistencies with respect to this aspect of the evidence. All the witnesses were clear that Ms. Asfaw's intention in taking the substance was not to enhance sport performance but to alleviate the symptoms of her illness. She met her burden to the comfortable satisfaction of the Panel.

Analysis of Fault

5.30 Pursuant to Article 10.4 of the Code, if an athlete who has tested positive for a Specified Substance carries both her burden of establishing the source of her positive test and an absence of intent to enhance performance or mask the use of a prohibited substance then the athlete's "degree of fault shall be the criterion considered in assessing any reduction of the period of *Ineligibility*."

5.31 In analyzing the degree of fault under Article 10.4, the Panel is guided by the multi-part analysis set forth by the Court of Arbitration for Sport Panel in *Cilic v. ITF*, CAS 2013/A/3327, 3335.

5.32 The *Cilic* Panel recognized the following degrees of fault:

1. "Significant degree of or considerable fault," for which the sanction range would be 16-24 months ineligibility and a "standard" sanction would be 20 months; [13]

2. "Normal degree of fault," for which the sanction range would be 8-16 months ineligibility and a "standard" sanction would be 12 months;[14]

3. "Light degree of fault," for which the sanction range would be 0-8 months ineligibility and a "standard" sanction would be 4 months.[15]

5.33 According to the decision in *Cilic*, both the objective and subjective level of fault may be considered in assessing into which of the three relevant categories of fault a particular case falls.[16] However, "the objective element should be foremost"[17] in making this assessment. Generally, the subjective element should only "be used to move a particular athlete up or down

[13] *Cilic v. ITF*, CAS 2013/A/3327, 3335, p. 15, ¶¶ 69-70.
[14] *Id.*
[15] *Id.*
[16] *Cilic*, p. 15, ¶ 71.
[17] *Cilic*, p. 15, ¶ 72.

within that category,"[18] i.e., within the three categories set forth above. "[I]n exceptional cases, it may be that the subjective elements are so significant that they move a particular athlete not only to the extremity of a particular category, but also into a different category altogether. That would be the exception to the rule, however."[19] The Panel is not convinced that any subjective element pertaining to Respondent's circumstances is so exceptional that it would justify deviation from the *Cilic* objective fault categories.

5.34 The prohibited substance at issue in this case, the stimulant Ephedrine, is prohibited in-competition only. The *Cilic* Panel instructs that in dealing with substances prohibited in-competition it is further relevant and important to assess whether the substance was taken in-competition or out-of-competition.[20] In the event a substance was taken in-competition then "the full standard of care described [in *Cilic*] should . . . apply."[21]

5.35 In this case Respondent admitted that she took an Ephedrine pill on the morning of her competition, therefore, there is no dispute that the substance was taken in-competition, meaning that the full standard of care described in *Cilic* should apply. Accordingly, pursuant to *Cilic* the standard to which the Respondent was accountable was to:

(i) read the label of the product used (or otherwise ascertain the ingredients),
(ii) cross-check all the ingredients on the label with the list of prohibited substances,
(iii) make an internet search of the product,
(iv) ensure the product is reliably sourced and
(v) consult appropriate experts in these matters and instruct them diligently before consuming the product.[22]

5.36 It is unfortunately the case that Respondent did not undertake to satisfy any of the foregoing factors before using the Ephedrine pills on May 18, 2014, the day of her competition at the Lima Marathon. According to her testimony she obtained a label of the product on January 26, 2014, the day of the Osaka Marathon, but the label was in Chinese and she could not read it or ascertain the ingredients in the product. According to her own testimony and that of her husband, Respondent brought a picture of the label home to the United States (on her phone) a couple of days later and showed it and the pills she had obtained to her husband.

5.37 Thus, both Respondent and her husband were aware in January 2014 that she possessed an unknown medication for which she was unaware of the ingredients. Respondent therefore had more than three and a half months in order to obtain a translation of the label in her possession and had some three and a half months in which to ascertain the ingredients in the product but entirely failed within that lengthy period to inform herself of the product ingredients.

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[18] *Cilic*, p. 16, ¶ 73.
[19] *Cilic*, p. 16, ¶ 73.
, p. 16, ¶ 74.
[21] *Cilic*, p. 16, ¶ 75(b)(i).
[22] *Cilic*, p. 16, ¶ 74.

5.38 Had Respondent undertaken the fundamental step of seeking to have the product label translated she could have then cross-checked the ingredients on the label with the list of prohibited substances and made an internet search of the product. However, she never took this elemental step. It cannot be contested that had she taken the simple step of having the product label translated so she could read it she would have successfully learned that the product was prohibited in-competition. Indeed, when, through her agent, she undertook the fundamental step of having the label (or product box) translated she was readily able to find out that the product contained a prohibited substance and even that the product contained a warning against use by athletes.

5.39 The step of ascertaining whether the product was reliably sourced also weighs very heavily against Respondent. There is no dispute that she received the pills in question from complete strangers. She knew little to nothing about the strangers who gave her the pills, she acquired no contact information to permit her to maintain contact with her source and received the pills in a napkin, not even in a container of any sort. Also of concern is the fact that her recollection of the color of the pills differed from the product description on the one marketing photo she did access. In short, there is nothing about what Respondent did that discharged her responsibility to ascertain that the product was reliably sourced.

5.40 Finally, a basic step which Respondent did not even attempt to undertake was to consult with an appropriate expert. She did not have to look far. Indeed, had she merely described the circumstances under which she got the pills to her agent, Mr. Froude, who was also in Japan when Respondent allegedly obtained the pills, he testified that he would have told her that "never in a million years" should she use the pills. All it would have taken would have been one call to her agent or to some other knowledgeable individual within her sport and she would have been instructed that it was foolhardy in the extreme to take loose pills provided to her by total strangers in a foreign country.

5.41 For the reasons discussed above, Respondent's objective level of fault must be considered to be extremely high. According to *Cilic*, "[t]he objective element describes what standard of care could have been expected from a reasonable person in the athlete's situation."[23] A reasonable person in Respondent's circumstances would have undertaken each of the five steps above of (1) seeking to read the label by having it translated, (2) cross checking the ingredients against the prohibited list, (3) researching the product on the internet, (4) only taking a product that was reliably sourced, and (5) consulting an appropriate expert regarding the product. Respondent undertook none of these steps therefore there can be no serious contention other than that her degree of fault is extremely high and can fall nowhere else than within the *Cilic* category of significant or considerable fault. Basically, Respondent took no steps to protect herself with respect to ingesting a prohibited substance by taking the Ephedrine.

5.42 The *Cilic* panel also noted that even where an in-competition substance is taken out-of-competition significant fault can be found in the circumstances where (a) the product is advertised as "performance enhancing," or (b) the product is a medicine. In these circumstances, according to *Cilic*, "a particular danger arises, that calls for a higher standard of care."[24] "The

[23] *Cilic*, p. 15, ¶ 71.
[24] *Cilic*, p. 17, ¶ 75.

principle underlying the two exceptions is that they are instances of an athlete who could easily make the link between the intake of the substance and the risks being run."[25]

5.43 Notably, at least one of the *Cilic* exceptions is present in this case, making it objectively even more apparent to a reasonable person in Respondent's circumstances that the risks being run were very high indeed. There is no dispute that Respondent understood that the substance which Respondent took and to which she attributes her positive test was "a medicine designed for a therapeutic purpose."[26] Respondent testified that she identified the substance to the doping control officer as an "anti-histamine"[27] and that she was specifically taking the pills for a therapeutic purpose to relieve what she characterized as debilitating symptoms of asthma.

5.44 The *Cilic* panel pointed out that "medicines are known to have prohibited substances in them." Therefore, when athletes take what they understand to be a medication a more significant duty of care attaches, and their degree of fault is objectively higher in the event they fail to meet the expected level of care in taking a medication. Respondent understood when she ingested the pills in question before the Lima Marathon that she was taking a medication for a therapeutic purpose. For this reason as well, in accordance with the opinion in *Cilic*, she must be found to fall within the category of significant or considerable fault

5.45 According to *Cilic*, once the level of objective fault is ascertained and the athlete is slotted in one of the three basic sanction ranges then the athlete's subjective fault is assessed to determine where within the range the athlete's sanction should be placed. Subjective factors identified by the *Cilic* Panel include: (1) youth and inexperience, (2) language or environmental problems, (3) the extent of anti-doping education received by the athlete, and (4) personal impairments such as taking a product over a long period of time without incident, previously checking a product's ingredients, an athlete suffering from a high degree of stress or where the athlete's level of awareness has been diminished "by a careless but understandable mistake."[28]

5.46 Under *Cilic* it is clear that the proper approach is not merely to count up subjective factors as if checking off facts on a checklist. Rather, the subjective factors, just like the objective factors, are to be evaluated in the context of the case to ascertain whether the subjective factors actually contributed to the athlete's rule violation in the particular case. Apart from such an analysis any reliance on subjective factors is arbitrary and unprincipled and will result in unprincipled decision-making.

5.47 For instance, an athlete is not entitled to a sanction reduction merely because they are young, or because they are have chosen to live and train in a foreign country where they do not know the language as well, or simply because they have not received anti-doping education. To find otherwise would be inequitable and unfair to the athlete's competitors because it would mean that the rules apply differently to different athletes not because of any concept of

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[25] *Id.*

[26] *Id.*

[27] *See* Exhibit 29 (Doping Control Form), referring to "antihistaminico" which Respondent said referred to the pills she took.

[28] *Cilic*, pp. 17-18, ¶ 76.

proportionality or fault but merely based on differences of background or choice (such as where to live) which are not relevant in the context of the case.

5.48 Thus, care must be taken in assessing the applicability of the subjective factors just as care should be taken in applying the objective factors. No subjective factor should be applied in a rote fashion and without any demonstration that the subjective factor actually contributed to the athlete's rule violation in that particular case.

5.49 Assessing the subjective fault factors from *Cilic* it is clear that no subjective factor present in Respondent's case can materially diminish the enormously high degree of objective fault that must be attributed to her for consciously ingesting a pill received from strangers more than three and a half months before her competition and without having made any effort to ascertain the contents of the pill. Respondent is a professional athlete, and while she may not be in the upper echelon of marathon competitors in the world, she nevertheless specifically entered the Lima Marathon because she believed she could win it and take home the five thousand dollar first place check. She testified that she previously competed in World Cross Country Championships for Ethiopia and presently intends to compete for the U.S. Olympic team. She has been drug tested on more than one occasion and was aware of the drug testing rules and of the need to use caution in ingesting products. Indeed, she testified that she specifically obtained a photograph of the packaging of the pills in question because of her understanding that she needed to know what she was ingesting due to the need to avoid taking any prohibited substance.

5.50 As explained below, the presence of the pills in Respondent's possession for this long period of time before her positive test and before she used the pills at the Lima Marathon entirely negates each of the *Cilic* subjective factors as to Respondent. In other words, Respondent's act of obtaining the pills some three and half months before her positive drug test eliminates any legitimate basis for arguing that subjective factors can diminish her degree of fault.

5.51 Accepting Respondent's version of the story in full, Respondent took strange pills obtained from strangers in a foreign country (Japan). The strangers who gave her the pills did not speak her language and were only able to communicate with her in gestures. Respondent knew she needed to ascertain what was in the pills. So, she obtained from the strangers a screen shot of the product packaging, which was in Chinese. It did not concern her that the product packaging she was shown (a box) was different than the container (a bottle) out of which the stranger extracted the pills. Respondent took the pills to her hotel room in a napkin and there she mixed them up with her other medicines in a pill bottle. Returning home with the strange pills in her pill bottle, Respondent removed the pills from the bottle to show them to her husband. Despite the fact that Respondent had returned home and was no longer using the strange pills because she had access to her own medicines, after showing the pills to her husband she poured the strange pills back into her travel pill bottle. She then did nothing with the pills, nor did she seek to translate the product packaging image saved on her phone, for three and a half months. She then traveled to South America with the pills and used the strange pills on the day of an important race, which she had entered and traveled to because she had been told she had a chance to win the race.

5.52 The Panel finds that the following factors do not favor the requested reduction in this case:

- Ms. Asfaw took a medication, the only information about which was written in Chinese, a language she does not know, understand, or read.

- Ms. Asfaw did not undertake any research about the product or its contents before ingesting it, let alone compare the product name or its ingredients against the WADA Prohibited Substances List; indeed she undertook no other effort whatsoever to review the contents of the medication and her obligations to avoid violating the anti-doping rules.

- Ms. Asfaw did not research the product on the Internet and did not verify its contents and the ability to use it in the period around the competition date with any other person or doctor.

- Ms. Asfaw was aware of other doping cases in her sport, but did not draw any necessary conclusions from them for her own behavior.

In sum, the Respondent disregarded even the most basic anti-doping obligations of an athlete, and she undertook no affirmative measures to protect herself. Normally in these cases a tribunal is able to list factors favoring the requested reduction and it is noteworthy here that the Panel finds no such ameliorating factors to be present.

5.53 The subjective factors that 1) Ms. Asfaw is an international athlete, having competed internationally for two different countries, and 2) she lacked any basic anti-doping education from any relevant organization, were considered by the Panel, but such factors do not outweigh Ms. Asfaw's lack of overall diligence in her anti-doping obligations under the circumstances. While she may have lacked anti-doping training, she is neither young nor inexperienced. When considering the list of factors set forth above, the Panel finds it significant that Ms. Asfaw is an active international competitor and yet she undertook no fundamental protections or otherwise had any apparent consciousness of the anti-doping rules required of all competitors in sport. The Panel views this athlete's actions in this regard as grossly negligent or even reckless, though not intentional, but nonetheless there is no basis for a reduction in fault under Article 10.4 of the WADA Code.

5.54 The Panel inquired at the hearing and Respondent's counsel stated that she was relying completely on Article 10.4 of the WADA Code and not asserting any arguments under or otherwise invoking WADA Code Articles 10.5.1 or 10.5.2, so the Panel did not consider those provisions, a waiver having been made on the record.

5.55 The Panel accepts that this is the first violation by Ms. Asfaw. The Panel further accepts that Ms. Asfaw consumed the Ephedrine in order to address her medical condition, and that she did so with no intention to enhance her performance or to violate any rules. The Panel wishes to make clear that Ms. Asfaw is not a cheater and exhibited no intention to violate any

rule; she was merely completely ignorant of the rules in place governing doping and her need to protect herself from an inadvertent positive test, and she had no wish to breach any such rules. The Panel is appreciative of Ms. Asfaw's immediate disclosure of the medication which she had consumed and her frank and open testimony. Perhaps the system failed her insofar as it did not highlight sufficiently for her the relevant rules governing anti-doping measures in sport; there certainly was no evidence she ever received any training on such rules and her conduct was so reckless that no individual who was aware of the anti-doping rules would ever reasonably do what she did, thereby demonstrating her lack of education. It is not clear where the fault with the system lies, whether with USADA, WADA, or the IAAF (clearly she bears one hundred percent of the personal fault of failing to take precautions to avoid ingesting a Prohibited Substance in-competition). Nevertheless, under these circumstances, she is still at fault and there is no basis for a reduction of the two-year period of ineligibility. The Panel is bound to follow the requirements of the WADA Code in these matters, regardless of any sympathy the Panel members have for the situation in which Ms. Asfaw finds herself.

5.56 Accordingly, Respondent shall serve a sanction of two (2) years duration.

Start Date

5.57 WADA Code Article 10.9.2 provides that, "Where an athlete promptly admits the anti-doping rule violation after being confronted with the anti-doping rule violation by the Anti-Doping Organization, the period of Ineligibility may start as early as the date of Sample collection. . ."

5.58 In this case, Respondent took the notion of "promptly" to an entirely new high level She was notified on June 23, 2014 by the IAAF of her adverse finding. Ms. Asfaw immediately investigated the cause of her positive test and notified IAAF on June 25, 2014 that she was expressly waiving her right to request analysis of the B sample and was accepting that Ephedrine was the finding. Under any standard, she robustly satisfied the requirement to admit the anti-doping violation "promptly". In her first response to correspondence from USADA, Ms. Asfaw agreed to not compete until this matter was resolved and she immediately executed an Acceptance of Provisional Suspension after being asked to do so, which took her out of competition until her eligibility status was adjudicated, thus further demonstrating her good faith to resolve her case.

5.59 These facts demonstrate that Respondent could not have more promptly admitted her anti-doping rule violation to USADA.

5.60 Given that Respondent (1) is an innocent athlete who tested positive by accident and (2) promptly admitted the anti-doping rule violation and voluntarily accepted her suspension, the Panel finds that Respondent satisfied the requirements of WADA Code 10.9.2 and, therefore, the Panel rules that her two year sanction will start from May 18, 2014, the date the Sample that tested positive was taken.

VI. DECISION AND AWARD

6.1 On the basis of the foregoing facts, legal analysis, and conclusions of fact, this Panel renders the following decision:

a. Respondent has committed her first doping violation under Article 2.1 of the 2009 version of the WADA Code;

b Respondent has not sustained her burden of proof under WADA Code Article 10.4 to qualify for a reduction in the length of her sanction. Therefore, the Panel imposes a period of ineligibility starting from the date of the Sample collection of her adverse analytical finding, May 18, 2014 and continuing through May 17, 2016, a period of two years;

c The parties shall bear their own attorneys' fees and costs associated with this arbitration;

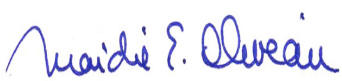
d The administrative fees and expenses of the American Arbitration Association, and the compensation and expenses of the arbitrators and the Panel, shall be borne entirely by USADA and the United States Olympic Committee;

e This Award shall be in full and final resolution of all claims and counterclaims submitted to this Arbitration. All claims not expressly granted herein are hereby denied; and

f This Award may be executed in any number of counterparts, each of which shall be deemed an original, and all of which shall constitute together one and the same instrument.

DATED: March 9, 2015

Jeffrey Benz
Chair



Maidie E. Oliveau
Arbitrator

Barbara Shycoff
Arbitrator