

## **FINAL ROUND**

### ***SERVING UP SUPPLEMENTS***

#### **GENERAL FACTS**

Every four-years, the Olympic Games are a worldwide event where teams from all qualifying countries come to compete against each other. Athletes train for years to compete during these games and dedicate their entire lives to being fit in order to compete in this competition. The number one threat to the games according to the World Anti-Doping Agency's (WADA) is doping. Its mission is to lead a collaborative worldwide campaign for doping-free sport.

WADA was established in 1999 as an international independent agency composed and funded equally by the sports movement and governments of the world. Its key activities include scientific research, education, development of anti-doping capacities, and monitoring of the World Anti-Doping Code – the document harmonizing anti-doping policies in all sports and all countries. WADA is a Swiss private law foundation. Its seat is in Lausanne, Switzerland, and its headquarters are in Montreal, Canada.

Part of WADA'S role, along with the Olympic Oversight Committee, is compliance and investigation into supplements created on the open market for use by athletes and the like. For example, protein supplement companies and athletes frequently team up in endorsement deals to promote supplements that athletes use in competing in various sports. WADA and the Olympic Oversight Committee review and make sure all supplements are not performance enhancing drugs. Athletes testing positive for substance use have resulted in athletes being banned from future Olympic Games.

#### **The Parties**

##### **BPI Sports**

BPI Sports LLC ("BPI") is the fastest growing and premier sports nutrition company on the planet. It was founded in 2010 and has its headquarters in Hollywood, Florida. BPI utilizes four distribution hubs nationwide and has sister brands IMAGE Sports, EXT Sports, PRO-NUTRA, Brain Pharma and the 4x Mr. Olympia Jay Cutler Elite Series. BPI has a partnership with GNC and was awarded the "Rising Star of The Year" from GNC for its IMAGE Sports and PRO-NUTRA lines in 2013 as demonstrating "outstanding sales growth" despite being relatively new to the shelves in GNC stores.

Despite the company's relatively young age, BPI has grown to the point where their product lines are now found in eighty-three different countries. BPI has over 200,000 Facebook

“Likes” and over 12,000 Twitter “Followers.” BPI’s market share and social media presence increased significantly after signing four-time Mr. Olympia Jay Cutler (not the current Chicago Bears quarterback) in 2012 to an endorsement contract that gave Cutler substantial equity stake in the Jay Cutler Signature Series product line.

### **Fabiana Claudino**

Fabiana Claudino is a female Brazilian volleyball player. She captained Brazil to the gold medal at the 2012 Olympics. Claudino started playing volleyball at a very young age and has been a country favorite and success story. She has won many championships with her professional team as well. Her debut with team Brazil was in 2002, at the age of 18. In 2003, she competed in the Pan American Games in Santo Domingo and played in the World Cup. She won first place in the Grand Prix and helped Brazil take home fourth place in the 2004 Athens Olympics, where she was the fifth youngest athlete in the Games in the women’s volleyball competition.

After the Athens Olympics, Claudino gained ground and became a regular for the Brazilian National Team. She competed for Brazil in Beijing in 2008 and Athens in 2012, taking home gold medals each time. She has won “Best Middle Blocker” for the 2013 South American Championship. At just twenty-nine years old, she won “Best Blocker” and was named captain of Brazil’s gold medal team during the 2012 London Games. The 2016 Olympic Games will be hosted by Brazil and based in Rio de Janeiro. Brazil has automatically qualified for the 2016 Rio Games because of Brazil success the past two Olympics, specifically, women’s volleyball, and as the host nation. Claudino will presumably captain the squad in their quest for a third straight gold medal finish.

### **Contractual Relationship between the Parties**

Seeking to expand their endorsement portfolio beyond bodybuilding, BPI Sports reached out to Claudino after the 2012 London Games hoping to secure a long-term endorsement contract. For BPI, signing Claudino would be a chance to stake a claim in the ever-growing markets of volleyball, women’s fitness, and international sports. As it stands, volleyball is the second-most popular sport in Brazil based on viewership and attendance at matches.

As an international team sports female athlete, Claudino had not found herself at the front of the line for high-profile endorsement contracts. She was thus excited to hear from BPI and after a short negotiation, signed a five-year contract with BPI where she would represent BPI in various advertising schemes in exchange for significant in-kind supplement shipments and a small amount of yearly monetary compensation.

The contract signed by the parties contains four clauses pertinent to this negotiation:

- Warranty: BPI warrants that no product provided by BPI shall contain any substance banned by WADA.
- Liquidated Damages: Because damages to intangible interests are hard to calculate with confidence and as inducement to BPI to agree to this endorsement contract, the parties have agreed that damages for any significant breach of this contract shall not exceed \$500,000 for all forms of damage except that if BPI engages in willful, reckless, or grossly negligent acts that injure Claudino, BPI shall be liable for all actual damages incurred without the limitation stated above.
- Choice of Law: In the event a dispute arises about the interpretation of this contract, general principles of U.S. contract and tort law shall apply and no state law decision of any state shall be binding.
- Attorney's Fees. In the event of litigation or arbitration concerning breach of this contract, the prevailing party shall be entitled to be reimbursed for reasonable attorney's fees, expenses and costs by the non-prevailing party.

### **The Dispute:**

#### Positive Test for DMAA

Methylhexanamine, also known as dimethylamylamine (DMAA), is a known vasoconstrictor and central nervous system stimulant that is banned by multiple organizations (the U.S.A. Armed Services, the National Football League, and Major League Baseball) and several countries, including Canada and New Zealand.

While the supplement industry is not nearly as regulated in the United States as it is in other countries, specifically Brazil, in 2012 the U.S. Federal Drug Administration (FDA) issued warning letters to companies notifying them products with DMAA need to be taken off the market or reformulated to remove this substance. Most companies warned are no longer distributing products with DMAA. While the FDA is working to get these products off the market, consumers were advised publically not buy or use any dietary supplement product containing DMAA.

In August 2014, Claudino tested positive for DMAA during a routine qualifying test administered by WADA. This triggered an automatic two-year ban through the 2016 Rio Olympic Games. The punishment was standard for international competition for first-time offenders. Due to this ban, she is now ineligible for the 2016 Olympics in Rio. Claudino was devastated and surprised. Recently, she has appealed her positive test to the Court of Arbitration for Sport (CAS) and is scheduled for a hearing in March 2015. The matter is now in the public

eye. Claudino contends that she never knowingly took anything containing DMAA and her positive test must have been triggered by one of BPI's products.

### **The Lawsuit**

In September 2014, Claudino filed a lawsuit citing fraud and negligent misrepresentation as her causes of action in federal court (U.S. District Court–Fort Lauderdale) against BPI for willful, reckless, and grossly negligent acts in providing her with a supplement that contained DMAA. In her complaint, Claudino alleges that BPI deliberately or negligently failed to inform her that the supplement IMR VORTEX contained DMAA. She alleges her damages are \$11,500,000.00 itemized as follows:

- Loss of participation in the 2016 Rio Olympic Games: \$2,500,000.00;
- Lost endorsement deals \$1,750,000.00;
- The legal fees and costs of appealing the case to WADA and possibly the CAS: \$2,000,000.00;
- The additional cost of hiring a drug testing expert to assist on the appeal, \$2,000,000.00;
- The loss and damage to her reputation \$1,000,000.00;
- The emotional damages from not being able to compete in the 2016 Rio Olympics as a hometown athlete, \$2,000,000.00;
- Finally, the remainder of the contract price with BPI, \$250,000.00.

In BPI's motion for summary judgment, BPI argued that there was no evidence suggesting any willful "spiking" of any supplements received by Claudino. In an accompanying affidavit, BPI's director of quality control stated as follows;

1. BPI was among the companies that removed DMAA from their product lines following the FDA's warning in 2012.
2. Before 2012, DMAA was found in BPI's pre-workout supplement IMR VORTEX. However, IMR VORTEX had since been reformulated and all BPI products no-longer contain DMAA.
3. While IMR VORTEX was among the products Claudino received from BPI as part of her in-kind compensation per the endorsement contract, the product Claudino received was the reformulated product, and not the one with DMAA as an ingredient.

BPI moved the court to rule that under the liquidated damages clause in the endorsement contract, damages be limited to \$500,000.00. It is undisputed that BPI has served Claudino with an offer of judgment pursuant to Rule 68 of the Federal Rules of Civil Procedure in the amount of \$500,000.00 and Claudino rejected the offer. BPI has requested that the suit be dismissed with Claudino receiving nothing for her claims.

The trial judge denied the motion for summary judgment because the court found that there were genuine disputes of material fact concerning whether there was any DMAA in any product furnished to Claudino by BPI and whether BPI committed any willful, reckless or grossly negligent acts in furnishing supplements to Claudino. She has ordered the parties meet and confer in an effort to resolve the matter prior to their return to court in October 2014.

Multiple depositions have occurred and the parties have convened today to discuss the possibility of a settlement. It is clear from the depositions that DMAA was in the product that BPI sold at some point in time and that DMAA was in Claudino's system as part of a drug test. BPI has conceded that it never informed Claudino that IMR VORTEX had at one time contained DMAA because it believed that the DMAA had been removed and did not want to alarm Claudino.

BPI will be represented by its general counsel and outside trial attorney. Claudino will be represented by her trusted personal attorney that handled the underlying endorsement contract along with her trial attorney.