IN THE MATTER OF AN ARBITRATION
BETWEEN

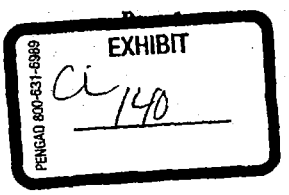
LANCE ARMSTRONG AND TAILWIND SPORTS, INC.	§	
Claimants,	§	
v.	§	BEFORE THE NATIONAL ARBITRATION MEDIATION, INC.
SCA PROMOTIONS, INC.	§	
Respondent.	§	

RESPONDENT SCA PROMOTIONS, INC.'S RESPONSE TO CLAIMANTS' MOTION ON SCOPE OF ISSUES

COMES NOW SCA Promotions, Inc. ("SCA"), Respondent in this arbitration, and files this, its Response to Claimants Tailwind Sport, Inc.'s ("TSI") and Lance Armstrong's ("Armstrong") (collectively "Claimants") Motion on Scope of Issues, and would show as follows:

I.
INTRODUCTION AND SUMMARY OF RESPONSE

It is difficult to know exactly how to respond to Claimants' "Motion on Scope of Issues." It is certainly not a motion to dismiss since it incorporates evidence, raises fact issues, and goes well beyond the parties' pleadings. Nor is it a summary judgment motion in that Claimants do not suggest that all material facts are undisputed but merely that they are correct in their factual positions (*e.g.*, "Claimants are confident that SCA will be unable to point to any representation, much less one that was false or fraudulent.") (Claimants' Motion at 7). Finally, whatever the purpose of Claimants' motion, they (correctly) acknowledge that their Motion is not ripe and that they need additional discovery prior to its resolution (*e.g.*, "Supplementation and further support



of the motion set forth herein will be necessary," and "the complete absence of any discovery has inhibited Claimants' ability to adequately articulate the basis for their positions[.]"). *Id.* at 12.

SCA disagrees with Claimants' legal positions but agrees on its requested relief – discovery is necessary for both parties to put on their respective cases. Based on the claims and defenses it has asserted, SCA believes discovery is necessary regarding three main areas:

(1) Depositions of the *parties* regarding all material matters raised in the pleadings. This would include deposing Mr. Armstrong and Mr. Stapleton regarding the disputed issues in this case.

(2) Depositions of certain *individuals* with knowledge of (a) information regarding Mr. Armstrong's use of illegal PEDs; (b) the inefficiency of testing procedures, and (c) Mr. Armstrong's illegal race fixing.

(3) *Document discovery* regarding disputed issues. SCA already has served its discovery and is awaiting responses and documents from Claimants.

Without this discovery, SCA cannot effectively present its case. Most of the witnesses from whom SCA seeks testimony are well aware of the intimidating power of Mr. Armstrong or have faced it in the past first hand. They know that disclosure of harmful information about Mr. Armstrong may put them at risk and they are unwilling to testify without a subpoena.[1] More importantly, virtually all of the witnesses cannot be compelled to testify at the hearing and thus deposing them is the only meaningful way to present their testimony.

Accordingly, SCA requests that this Panel allow each party reasonable discovery of the issues raised by their respective pleadings, including depositions.

[1] For example, Mr. Armstrong recently filed a Motion for Sanctions against one litigant who had the temerity to allege in his pleadings that he saw steroids in Mr. Armstrong's apartment. Other witnesses are aware of Mr. Armstrong's aggressive attacks on anyone who speaks negatively about him and have told SCA that they will only provide testimony pursuant to a subpoena.

II.
FACTUAL OVERVIEW

Claimants continue to mischaracterize the contract at issue in this case (the "Contingent Contract"). SCA did not agree to pay Lance Armstrong a specified sum if he won the 2004 Tour de France. Mr. Armstrong is not a party to the Contingent Contract and its terms expressly disclaim any such contractual relationship (*See* Contingent Contract at paragraph 1: "This contract is issued for the sole benefit of the Sponsor[.]") SCA only agreed "to reimburse Sponsor for the full amount of any Performance Awards scheduled hereunder[.]" *Id.*

However, the Contingent Contract made it very clear that its obligation to reimburse the Sponsor (TSI) was premised upon the fact that "the conditions of the events scheduled herein and the Sponsor's [contract with Lance Armstrong] [had to] comply with the terms and conditions of this contract." *Id.* at Exhibit A. This clearly means that Mr. Armstrong had to do more than just win the 2001, 2002, 2006, and 2004 Tour de France races – he had to win in a manner consistent with the requirements of the Contingent Contract. The Contingent Contract makes it clear that "compliance with terms of this contract" is a "condition precedent to SCA's reimbursement" of TSI. *Id.* at 1.

SCA intends to forcefully present defenses that Claimants have not complied with the terms of the Contingent Contract as fully described in SCA's Answer and Counterclaims. Presentation of those claims and defenses will require that SCA be able to develop evidence through discovery as described below.

III.
RESPONSE AND ARGUMENT

Claimants' Motion does no more than identify some of the disputed issues between the parties. Claimants even concede that resolution of those issues require additional evidence. SCA agrees. In fact, there are numerous issues – both factual and legal – that must be considered

by this Panel in order to resolve the parties' dispute. Resolving these disputes will often involve determining the credibility of witnesses as well as examining and considering expert testimony.

While recognizing these disputed issues, Claimants mistakenly brush them aside and continue to assert that this case is largely a question of whether Mr. Armstrong won the 2004 *Tour de France*. Since he did, the only remaining issue, according to Claimants, is to figure out how much extra he could be owed by SCA.[2] Given the terms of the Contingent Contract, however, Mr. Armstrong's Tour de France wins alone do not trigger liability on SCA's part. The real question for the Panel is *how* he won. Was Mr. Armstrong in compliance with all applicable Tour de France and UCI rules or did he prevail with the aid of illegal PEDs? Claimants characterize this as "relitigating the 2004 Tour de France" but that is clearly incorrect. The Contingent Contract provides for when and how SCA is liable and its contractual conditions must be satisfied. Those conditions cannot be waived, modified or brushed aside by Tour de France officials.

Moreover, it is not just Mr. Armstrong's conduct in 2004 that matters, but whether he used PEDs previously in his career. Mr. Armstrong's prior use of PEDs radically alters the contracting relationship between SCA and TSI and will operate to release SCA of any obligations. First, if illegal use of PEDs occurred during prior Tour de France races, then TSI would owe back amounts SCA had previously paid to it. Second, the testimony at the hearing will demonstrate that had SCA known of Mr. Armstrong's prior use of PEDs, it would not have entered into any contract with TSI.

[2] SCA contends that any claim for money beyond what was specified in the Contingent Contract is expressly barred by its terms. *See, e.g.*, Contract at ¶ 1 ("SCA's liability is limited to the actual cost to Sponsor of the performance award(s) scheduled under this contract." Significantly, TSI has not plead or offered any evidence that it has paid Mr. Armstrong *any* performance bonus (or was even contractually required to do so).

A. **Disputed Matters Regardless of Whether The Contract At Issue Is For Insurance.**

Much of Claimants' case is premised upon the argument that the Contingent Contract is a contract for insurance and that SCA is in the business of insurance. *See* Motion at 3-7. Claimants advance this argument not based on the facts, but in the hope of creating some artificial duty on behalf of SCA that will make it easier for TSI to avoid its own contractual obligations. SCA strongly disputes Claimants' insurance contention (*see infra*) but, regardless of its outcome, there are still numerous significant evidentiary issues that the Panel must consider before rendering a ruling. These issues are irrespective of the issue of insurance and are detailed below.

1. **Did Lance Armstrong Fail To Comply With All Applicable Rules In Winning The Tour De France?**

This is the main issue that permeates this case. Simply put, if Mr. Armstrong cheated[3] in order to win the Tour de France in 2001, 2002, 2003, and 2004, then SCA has no obligation to pay TSI any money under the Contingent Contract – regardless of whether it is a contract for insurance or an ordinary business contract. This is because the Contingent Contract only requires SCA to reimburse TSI if Mr. Armstrong wins in accordance with all applicable rules *and* if the Promotion does not differ from how it was represented. Surely Claimants do not suggest – nor can they – that SCA has to reimburse TSI even if Mr. Armstrong won the Tour de France while using illegal PEDs but was lucky or clever enough to not get caught.

To the contrary, the Contingent Contract specifically excuses SCA from any obligation under such circumstances. Notably, this is not an issue of fraudulent inducement or otherwise dependent upon compliance with certain aspects of insurance law. It is an issue of contractual

[3] "Cheated" means that Mr. Armstrong used any illegal substance or technique.

compliance and thus the insurance provisions relied upon by Claimants are irrelevant to its determination.

Discovery Necessary.

Obviously, Mr. Armstrong and TSI strongly dispute any assertion that Mr. Armstrong used PEDs during the Tour de France in the years contemplated under the Contingent Contract (or, for that matter, at any time during his career). To buttress its contention, SCA has informally obtained substantial and credible evidence to suggest otherwise. Much of its evidence is detailed in its Answer and Counterclaim but its investigation has been hindered by Claimants' refusal to provide information and the unwillingness of certain witnesses to voluntarily testify.

Accordingly, SCA still needs to depose certain individuals who have refused to cooperate with SCA's investigation without the issuance of a subpoena or whose attendance at the hearing cannot be compelled. These individuals will testify either that they (1) saw indicia strongly suggesting or proving Mr. Armstrong's use of PEDs or (2) heard statements from Mr. Armstrong indicating his acknowledgement that he used PEDs. The expected testimony of some of these individuals is detailed in SCA's Answer and Counterclaims.[4]

Sadly, this evidence continues to grow and the need for discovery becomes greater and greater. Recent evidence includes an e-mail communication between Lance Armstrong and William Anderson (who worked for Mr. Armstrong) that (immediately prior to the 2004 Tour de France) spoke of "tests" with Dr. Ferrari. The e-mail is reproduced here:

[4] SCA has not given the names of its possible witnesses. This has been done to protect them from possible intimidation. SCA will be willing to reveal at the hearing the type and quality of evidence that it expects to obtain from depositions. SCA has prepared a list of people with knowledge of relevant facts and will provide that to Claimants.

—— Original Message ——
From: Lance Armstrong
To: 'allison anderson'
Sent: Monday, June 28, 2004 1:59 AM
Subject: RE: We've moved!

residents of drippin'????

holy shit!!! awesome!!

I have been totally incommunicado for weeks to let all this BS pass (it has) and so I'm sorry to have been a stranger...

tests are good (even schumi is psyched) and we're all ready to go for 6!

tell your boys I said "wassup".

la

Testimony will reveal that "Schumi" is code for Dr. Ferrari, the notorious doping doctor. SCA expects to confirm that the "tests" immediately before the 2004 Tour de France with "Schumi" refer to illegal PEDs being orchestrated or administered by Dr. Ferrari.

Claimants' response to this evidence is that Mr. Armstrong was thoroughly tested in 2004 (and previously) and has never tested positive. *See* Claimants' Motion at 9-11. To refute this, SCA has developed evidence demonstrating that (a) the testing protocols are completely inadequate to catch most modern PEDs; (b) tour officials and professional cyclists know that testing is inadequate and that negative results mean nothing about the use of PEDs, and (c) the testing procedures are lax and allow cyclists to "beat" most tests. Simply put, passing a test is meaningless.

Although much of this will be presented by expert testimony, SCA needs to depose certain witnesses to disprove Claimants' reliance on testing, including demonstrating that:

(1) Testing is conducted in an inadequate manner and cannot detect most PEDs.

(2) Mr. Armstrong missed at least one test, which is equivalent to failing a test.

(3) Mr. Armstrong tested positive on at least one test but that it was covered up.

The necessary depositions will allow SCA to refute Claimants' contention that testing proves Mr. Armstrong did not use PEDs.

2. **Did The "Actual Conditions Of The Promotion Differ In Any Way From Those Represented By Sponsor to SCA?"**

A second inquiry, which is broader than just asking whether Mr. Armstrong used PEDs during the Tour de France, also must be made. The Contingent Contract specifies that the "actual conditions of the Promotion cannot differ in any way" from those represented by Sponsor to SCA or the contract is null and void. Accordingly, several inquiries must be made, including:

(1) What were the "Conditions of the Promotion" as represented by Sponsor?

(2) Did the actual conditions of the Tour or promotion differ in any way?

SCA has detailed numerous such representations in its Complaint, including:

- *Mr. Armstrong was "clean" and had never "doped."* Prior to and during the term of the Contingent Contract, Claimants continually assured the public (and, in the process, SCA) that Mr. Armstrong did not use PEDs or otherwise "doped." Claimants even assured the public and SCA that Mr. Armstrong had *never* used such substances during the course of his entire career.

- *The TDF and UCI Accurately Police Itself To Ensure That The Cyclists in the TDF Did Not "Dope."* To bolster their assurances about being "clean," Claimants repeatedly told the public and SCA that Mr. Armstrong has been tested numerous times (they often referred to him as the "most tested" cyclist) and that those tests confirm that he has does not use PEDs. In the process, Mr. Armstrong and TSI have represented and implied that the testing was effective (*i.e.*, that it would determine if Mr. Armstrong used PED) and that it was always conducted in a professional and neutral manner.

- *Claimants represented that they had no ties to or association with doping.* Claimants also publicly maintained that Mr. Armstrong had no association with those who facilitate doping.

SCA intends to prove that these represented conditions were far different from what occurred at the actual Tour de France. Claimants' response to this contention strains credulity. Claimants' quickly concede that Mr. Armstrong *and* TSI have stated publicly that Mr. Armstrong does not and has not used PEDs. In fact, to this day, they continue making these

statements. However, despite those public statements, they contend that SCA has no right to rely upon them because Mr. Armstrong did not *personally* make those assurances to an SCA employee. *See* Claimants' Motion at 7.

Claimants' position is without merit. *First*, from a contractual standpoint, SCA need not *prove* reliance. The Contingent Contract specifies that SCA is excused fro liability if the Promotion differs in any way from the representations made by Sponsor. SCA need not prove it relied on such representations but only that they were made. Claimants do not dispute they made such statements.

Second, in any event, it is clear that under Texas law TSI can be liable to SCA for statements it made to the public. As the Texas Supreme Court held, "a person who makes a misrepresentation is liable to the person or class of persons the matter intends or 'has reason to expect will act in reliance upon the misrepresentation.'" *Ernst & Young v. Pacific Mutual Life Ins. Co.*, 51 S.W.3d 573, 578 (Tex. 2001) (*quoting* RESTATEMENT (SECOND) OF TORTS § 531 (1977)). SCA intends to put on evidence that TSI (and Mr. Armstrong) made such statements about Mr. Armstrong's non-use of PEDs with the intent of furthering their respective business interests and knew or had reason to expect that businesses such as SCA would rely on those assurances. Indeed, TSI and Mr. Armstrong know that any entity doing business with them is relying on Claimants' integrity that Mr. Armstrong is not cheating.[5]

Third, TSI can incur liability not only for its own statements, but those statements made by Mr. Armstrong that TSI endorsed or accepted. TSI (through Bill Stapleton) acts as Lance Armstrong's agent and, in the past, either has spoken directly for Mr. Armstrong or has served to clarify Mr. Armstrong's statements. In that capacity, TSI has both directly stated and endorsed

[5] At the very least, this will be a disputed fact issue for the Panel.

statements about Mr. Armstrong's non-use of PEDs and that he is clean because he has passed numerous drug tests. SCA expects discovery to thoroughly confirm this point.

Fourth, Claimants not only made affirmative statements about the conditions of the Promotion, they also omitted key information. For example, and as alleged in SCA's affirmative claims, TSI made no statement disclosing an investigation of Lance Armstrong or his close association with Dr. Ferrari. TSI certainly did not disclose that Mr. Armstrong was conducting "tests" with Dr. Ferrari a few weeks before the 2004 Tour de France.

Fifth, Claimants' contention that SCA should have been aware of the "rumors and stories circulated about Mr. Armstrong since before he won his first Tour de France in 1999," and thus cannot claim there are undiscovered facts that would have altered its decision to enter the Contingent Contract is without merit. Claimants' Motion at 9. Simply put, the existence of some story about PED use by Mr. Armstrong cannot operate to bar any claim at this stage of the proceedings. SCA will testify that, at the time it entered into the Contingent Contract and later made payments, it was unaware of the specific facts upon which it now bases its claims. Claimants may challenge that testimony but it is nothing more than a disputed fact issue.

Moreover, Claimants vehemently denied at the time *all* such stories and rumors. Even the very articles attached to Claimants' motion contain powerful denials by Claimants. Claimants cannot now contend that SCA should have been aware of illegal PED use by Mr. Armstrong when Claimants denied every such allegation. SCA is entitled to prove that it relied on Claimants' denials.

Finally, Claimants' contention that these "rumors and stories" somehow alerted SCA to alleged misrepresentations by Claimants contradicts Claimants' other positions. On the one hand, Claimants dismiss any suggestion that there is credible evidence of PED use by Mr.

Armstrong that would entitle SCA to discovery. Yet, Claimants then argue that there was enough evidence of PED usage by Mr. Armstrong that SCA should not have made prior payments on the Contingent Contract and thus has somehow waived its claims.

Necessary Discovery.

In order to prove these matters, SCA needs to depose many of the same people as described above.

3. **Were There Other Differing Conditions Or Was SCA Fraudulently Induced Into The Contingent Contract?**

There are several other differing conditions that Claimants do not address in their motion. They include as follows:

(1) Whether Mr. Armstrong previously fixed a race. SCA has credible information to suggest Mr. Armstrong fixed a race in the 1990s. Knowledge of this fact alone would have caused SCA to not enter the Contingent Contract.

(2) Whether other conditions of the Promotion were different (*i.e.*, were the testing protocols insufficient).

These matters will require some depositions of individuals with knowledge of the allegedly fixed race.

B. **Matters In Dispute Related To The Insurance Issue.**

Much of Claimants' motion is based on the mistaken impression that the Contingent Contract is for insurance. In doing so, Claimants mischaracterize not only the legal standard that is to be applied, but also the nature of the Contingent Contract itself. SCA believes that this is an issue to be resolved by the Panel upon hearing the evidence. Of course, as demonstrated above, the resolution of whether the Contingent Contract involves insurance does not resolve many of the key issues in this case and does not preclude SCA from prevailing but, in any event, Claimants are incorrect in their argument.

1. **The Contingent Contract Is Not Insurance.**

Claimants are in error when they contend that SCA is in the business of insurance and that the Contingent Contract is for insurance. At the very least, the matter is a disputed fact issue and requires the Panel to hear evidence before resolving the issue. In fact, even Claimants concede that additional discovery is necessary to resolve this issue. *See* Claimants' Motion at 12. That aside, it is clear that Claimants' characterization of the Contingent Contract is flawed.

First, Claimants mischaracterize the requirements of determining whether a contract is for insurance. Claimants suggest that the only requirement of insurance is the assumption of risk on behalf of the insured. *See* Claimants' Motion at 4-5. This is wrong and, if accepted, would turn virtually any contract into one for insurance since most contracts involve the allocation and assumption of risk.

In fact, insurance requires two essential elements, at least one of which is not present here. Insurance requires not only *risk shifting*, but also *risk distribution*. Risk shifting is the assumption of risk by the insurer. Risk distribution (also called risk spreading or risk pooling) means that the insurer spreads or pools many risks and distributes losses among all insureds.

These two requirements have long been held to be essential elements of insurance. Almost forty years ago, the United States Supreme Court noted that the concept of risk distribution or underwriting is "the one earmark of insurance as it has commonly been conceived of in popular understanding and usage." *Securities and Exchange Comm'n v. Variable Annuity Life Ins. Co.*, 359 U.S. 65, 72-73 (1959). The Supreme Court later noted that the *Variable Annuity Life Ins. Co.* holding recognized the significance of underwriting or spreading of risk as an indispensable characteristic of insurance. In *Group Life & Health Ins. Co. v. Royal Drug Co.*, 440 U.S. 205, 212 (1979), the Supreme Court. In *Royal Drug*, the Supreme Court further held that the primary elements of an insurance contract are the spreading and underwriting of a

policyholder's risk. *See id.* at 211. As the Court explained: "It is characteristic of insurance that a number of risks are accepted, some of which involve losses, and that such losses are spread over all the risks so as to enable the insurer to accept each risk at a slight fraction of the possible liability upon it."[6] *See id.* (quoting 1 G. Couch, CYCLOPEDIA OF INSURANCE LAW § 1:3 (2d ed. 1959)).

Federal courts also recognize that distribution of risk is an essential element of an insurance contract. The Fifth Circuit Court of Appeals held that "[r]isk shifting or risk distribution is one of the requisites of a true insurance contract." *Steere Tank Lines, Inc. v. United States*, 577 F.2d 279, 280 (5th Cir. 1978), *cert. Denied*, 440 U.S. 946 99 S. Ct. 1424, 59 L. Ed. 2d 634. The Fifth Circuit concluded that the absence of risk shifting and risk distribution indicated that the arrangement in question was not an insurance arrangement. *See id.* Other courts have adopted this requirement. The D.C. Circuit Court of Appeals explained it this way:

> "insurance involves essentially a contractual security against anticipated loss. The risk of loss on the part of the insured is occasioned by some future or contingent event, and is shifted to or assumed by the insurer. There is also a distribution of the risk of loss by the payment of a premium or other assessment into a general fund. This permits the insurer to accept each risk at a small fraction of the possible liability upon it."

Metropolitan Police Retiring Ass'n, Inc. v. Tobriner, 306 F.2d 775, 777 (D.C. Cir. 1962).

Texas law is similar. While the Texas Insurance Code does not define the term "insurance," courts have considered what constitutes "insurance" under the Code. *See Great Am. Ins. Co. v. North Austin Mun. Util. Dist. No. 1*, 908 S.W.2d 415, 422 (Tex. 1995). In *Great Am. Ins. Co.* the court considered whether article 21.21 of the insurance code applied to a commercial surety and thus whether a surety owes a common law duty of good faith and fair dealing to its

[6] Although the main issue in *Royal Drug* was the interpretation of the term "business of insurance" contained in section 2(b) of the McCarran-Ferguson Act, the Court did not limit its discussion to only section 2(b), but rather enunciated principles of insurance law generally applicable to any case.

bond oblige. *Id* at 416. In making this determination, the court examined the differences between insurance and suretyship: "*Insurance involves the pooling and spreading of risk* of the insureds, with nor right of indemnity possessed by the insurer. Suretyship, on the other hand, allows a surety full rights of indemnity against its principal." *Id.* at 424 (emphasis added). The court concluded that suretyship, "as historically understood in the insurance and suretyship fields," does not constitute the business of insurance under article 21.21. *Id.*

Commentators and legal treatises consistently state that risk distribution is an essential element of an insurance contract and that risk shifting alone is not sufficient to constitute an insurance contract. The definite treaties on issuance notes that the primary requirement of an insurance contract is the assumption of a risk of loss and the undertaking to indemnify the insured against such loss. *See* Lee R. Russ & Thomas F. Segalla, COUCH ON INSURANCE § 1:9 (3d ed. 1995). Simply put, the absence or presence of assumption of risk is not the sole test to be applied in determining whether a party is engaged in the business of insurance. *See id.* "It is characteristic of insurance that a number of risks are accepted, some of which will involve losses, and that such losses are spread over all the risks in a way that enables the insurer to accept each risk at a slight fraction of the possible liability upon it." *Id.*

Meanwhile, Holmes and Rhodes explain the issue this way:

> Risk sharing is the linchpin of insurance and its accompanying body of law . . . . Risk sharing connotes not only a transfer of risk (risk-shifting) to others but a distribution (sharing) of the risk among the others. *All contracts allocate and shift risks. An insurance contract differs from the ordinary contract because of risk-distribution.* In the insurance contract, the risk of an actual loss is distributed (socialized) among a large group of persons exposed to a comparable risk of loss.

Holmes & Rhodes, *supra*, § 1.3, at 10-11 (emphasis added). The consensus of these commentators is that risk shifting is not, in and of itself, determinative of whether a contract is an

insurance contract. Rather, insurance contracts both shift the risk and distribute the risk, thus taking advantage of the law of large numbers

Second, evidence will be put on at the hearing (both fact based and expert based) to show that SCA does not engage in the business of insurance in accordance with the above definitions. SCA does not "insure" Mr. Armstrong (it does not even contract with him) nor does it insure TSI and spread that risk over a pool of similarly situated insureds facing similar risks.

Third, another essential element of insurance is missing from this arrangement – the element of a true adverse risk. Normally, insurance is designed to protect the insured from a real risk that is adverse to the insured. The risk usually is an unavoidable occurrence that the insured faces. When no such risk exists, it cannot be manufactured by the insured to create the artificial need for insurance (known as the "manufactured risk" condition). Nor can an insured seek to create a positive risk so as to profit from the insurance.

In this case, there was no true real risk. TSI did not face a real risk but merely created an incentive for Lance Armstrong if he achieved a specified goal. The "risk" (the winning of the Tour de France) was not and adverse event but a highly beneficial thing for both Armstrong and TSI. Thus, the risk of loss (winning the Tour de France) is "manufactured" and the contractual arrangement between the parties is not one for insurance. In fact, Claimants' insistence that Mr. Armstrong is a direct party to the contract and needs to be paid directly only reinforces this point – there was no true risk.

The Texas State Board of Insurance has examined contracts like the one at issue here and generally determined that they are not for insurance because they do not address true risks. *See* Exhibit A. This case is similar as there was only a manufactured risk.

Fourth, Claimants' efforts to show that other companies "insured" TSI and Mr. Armstrong is utterly irrelevant to determining whether SCA is in the business of insurance. The other entities' business dealings and how they handle risk distribution does not alter or affect SCA. Accordingly, such "evidence" is irrelevant.

Fifth, if Claimants are correct and SCA is held to have insured Mr. Armstrong directly, then SCA has asserted other defenses such as that its contract is an illegal wagering agreement with Mr. Armstrong.[7] Moreover, because a fundamental part of the Tour de France promotion (*i.e.*, that SCA was not gambling with Mr. Armstrong personally) is different than what was represented by TSI, SCA would not be liable under the terms of the Contingent Contract.

In sum, Claimants' asserted defense of insurance requires an evidentiary hearing and testimony. The discovery necessary for this is largely the depositions of the parties and any experts.

2. **Even If The Contingent Contract Is Insurance, Its Terms For Payment Have Not Been Satisfied.**

Even if the Panel were to determine that SCA is in the business of insurance and that the Contingent Contract is an insurance contract, the Panel still must determine whether the terms of the alleged insurance require payment. This is because the same conditions precedent to SCA paying "insurance" to TSI apply whether the Contingent Contract is for insurance or is an ordinary contract. In other words, Mr. Armstrong still cannot have cheated to win the 2004 Tour de France and get paid, whether the payment is viewed as a reimbursement to his "sponsor" or as an insurance payment. As a result, SCA still must develop the same evidence to show that the key element of the "insurance contract" was not satisfied.

[7] This is because SCA will have, in effect, gambled directly with Mr. Armstrong directly on his performance rather than agreeing to reimburse the Sponsor for its own contractual obligation.

3. **Article 21.17 and the Dispute Over The Exercise Of Good Faith.**

Claimants attempt to limit SCA's ability to argue that TSI did not fully disclose all material facts prior to entering into the Contingent Contract by arguing that Article 21.17 bars such a claim because SCA failed to give 90 day notice that it was not paying the claim. This contention is not only incorrect, but does not limit SCA's case in any way.

First, if the Contingent Contract is not one for insurance, then Claimants' reliance on Article 21.17 is moot. *Second*, even if the Contingent Contract is for insurance, Article 21.17 is inapplicable because SCA has not made a final determination that there was fraud in the application process. As a result, SCA is not required to provide any such notice.

Third, SCA will put on evidence at the hearing that it did provide notification to TSI that it was questioning its claim and requested information to complete its investigation. Testimony at the hearing will further show that TSI refused to cooperate for providing information, thereby hindering SCA's ability to determine if there was fraud in the application.

Fourth, in any event, even if Article 21.17 is applicable and even if Claimants can prove that SCA failed to comply with its terms, it still would not bar SCA from proving that TSI failed to comply with the terms of the "insurance" Contingent Contract. This is because Article 21.17 only bars claims premised upon fraud in the actual application; it does not prevent SCA from claiming it is not obligated under the terms of the "insurance" to pay any claim.

Finally, the parties will dispute claimants' contention that SCA acted in bad faith. To counter Claimant's contention, SCA intends on proving that there existed reasonable grounds for questioning the claim. This will require SCA to present evidence that made it reasonable for it to not pay TSI's demand and further to request additional information regarding the matter. Much of this evidence is similar to the evidence described above and will require deposing the same individuals.

EXHIBIT A

STATE BOARD OF INSURANCE

1110 SAN JACINTO AUSTIN, TEXAS 78701-1998

EDWIN J. SMITH, JR., Chairman
DAVID H. THORNBERRY, Member
JAMES L. NELSON, Member

DOYCE R. LEE, Commissioner
ERNEST A. EMERSON, Fire Marshal
NICHOLAS MURPHY, Chief Clerk

May 9, 1988

R. Michael Thompson
Executive Vice President
Equity American Insurance Company
600 Las Colinas Blvd, Suite 202
Irving, Texas 75039

Re: Filing of Special Manuscript Contractual Liability Policy

Dear Mr. Thompson:

After a thorough review of the captioned filing by our staff attorney and the general liability staff we are of the opinion that this policy is essentially an indemnifying contract for a game of chance and therefore is a wagering contract. Such devices do not lawfully constitute insurance, and would be void as they are against public policy.

Insurance is designed to indemnify insureds against loss through specified perils. A peril by definition is not the anticipated outcome, but rather an unfortunate and uncontrollable event which may cause a loss. Awarding prizes is not a peril, it is a foreseeing results of holding a legitimate contest.

Based upon this we find your filing unacceptable for use in the State of Texas.

A letter voluntarily withdrawing your filing will alleviate the necessity of a Board Order disapproving same.

Very truly yours,

James W. Fisher
Director, General Liability
Casualty Division

JWF/dr