



Tribunal Arbitral du Sport  
Court of Arbitration for Sport

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Lausanne, 21 July 2008/MR/PL/ln/

Re : CAS 2007/O/1375 Serhiy Honchar v/Neuer Strassen Sport GmbH (NSSG)

Dear Sirs,

Please find attached the partial arbitral award rendered by the Panel in charge of the present arbitration procedure.

Regarding the next steps of the above-referenced arbitration, I kindly refer you to my letter dated 24 June 2008. For the sake of clarity, I draw the Respondent's attention to the fact that the time limit to file its statement of case in respect of the damages claim and costs, and its exhibits, starts to run upon receipt of the present correspondence, by fax.

I remain at your disposal for any further information you may have.

Yours sincerely,

Pauline LIEVRE  
Counsel to CAS

Encl.



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**CAS 2007/O/1375 S. Honchar v/Neuer Strassen Sport GmbH**

**PARTIAL ARBITRAL AWARD**

delivered by the

**COURT OF ARBITRATION FOR SPORT**

sitting in the following composition;

President: Mr Peter Leaver QC, Barrister-at-Law, London, England

Arbitrators: Mr Luigi Fumagalli, Attorney-at-law, Milan, Italy

Mr Ulrich Haas, Professor, Zurich, Switzerland

Ad Hoc Clerk: Ms Anna Boase, Barrister-at-Law, London, England

in the arbitration between:

**SERHIY HONCHAR** represented by Mr Andrea Arreghini, Attorney-at-law, of Studio Legale ABPP and by Mr Nicolo Velati, Attorney-at-law, Milan, Italy.

Claimant

v/

**NEUER STRASSEN SPORT GMBH**, represented by Dr Friedrich Klinkert and Mr Dirk Hochapfel, Attorneys-at-law, of Heymann & Partner Rechtsanwälte, Frankfurt am Main, Germany and by Mr Jorge Ibarrola, Attorney-at-law, of Lausanne, Switzerland.

Respondent

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## A. INTRODUCTION

### (1) The Parties

1. The Claimant, Mr Serhiy Honchar ("Mr Honchar" or "the Claimant"), is a 38 year old Ukrainian professional cyclist. He has raced professionally since 1996 and his achievements include winning the Grand Prix des Nations in 1999, a time-trial World Championship in 2000, the Ukrainian Championship in 2003 and stages of the Giro d'Italia and the Tour de France.
2. The Respondent, Neuer Strassen Sport GMBH ("NSSG" or "the Respondent"), is a sports management company which was, from mid 2006 to November 2007, the exclusive operator of a professional cycling team based in Bonn, Germany (the "T-Mobile Team") which was sponsored by T-Mobile AG ("T-Mobile") and which was registered with the Union Cycliste Internationale ("UCI").

### (2) Summary

3. On 1 November 2006 the parties entered into an agreement entitled "T-Mobile Team Independent Contractor (Self-Employed) Agreement" (the "Agreement") by which the Claimant agreed to participate in cycling races for the year 2007 as a member of the T-Mobile Team, in exchange for specified compensation. The Claimant agreed to abide by a code of conduct and the Respondent had the right to terminate in certain circumstances.
4. In April 2007 the Claimant was suspended from the T-Mobile Team. On 18 June 2007 the Respondent gave written notice of termination of the Agreement, stating that the Claimant had breached the Agreement and the code of conduct, and referring to the Claimant's "*active violation of our anti-doping rules*". The Claimant denies breaching

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the Agreement and denies any doping violations. The Claimant seeks reinstatement and compensation. The Respondent counterclaims in respect of various alleged losses.

**(3) Jurisdiction**

5. The Court of Arbitration for Sport ("CAS") has jurisdiction in this matter by contractual agreement between the parties. Clause 14 of the Agreement provided as follows:

*"14. Arbitration. Any disputes arising out of or in connection with this Agreement shall be submitted to and finally settled by binding arbitration under the applicable regulations (ordinary arbitration proceedings) of the Court of Arbitration for Sport in Lausanne (CAS) without recourse to the ordinary courts of law. The arbitral tribunal consists of three arbitrators. The place of arbitration is Lausanne, Switzerland. The language of the arbitration proceedings is English."*

6. There is a dispute between the parties which arises out of or in connection with the Agreement. The Claimant has submitted the dispute to CAS and the Respondent has not contested the jurisdiction of CAS to determine the dispute. The parties' confirmed the jurisdiction of CAS by signing the Order of Procedure.

**(4) Procedural matters**

7. On 5 September 2007, the Claimant submitted to CAS a Request for Arbitration, attaching the Claimant's Exhibits 1 to 8. On 19 October 2007, the Respondent submitted to CAS an Answer to the Request for Arbitration, which included a counterclaim.
8. On 24 October 2007, the parties were notified of the appointment and composition of the CAS Tribunal as set out above, the Claimant having nominated Mr Fumagalli and the Respondent having nominated Professor Haas.
9. The parties have since produced the following documents setting out their respective cases:

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- 9.1. The Claimant's Statement of Claim and Reply to Counterclaim dated 29 November 2007 (the "Statement of Claim"), attaching the Claimant's Exhibits 9 to 15;
  - 9.2. The Respondent's Answer to the Claim in response dated 28 January 2008 (the "Answer to the Claim"), attaching the Respondent's Exhibits 1 to 14;
  - 9.3. The Claimant's Reply to response to the Statement of Claim and Reply to Counterclaim dated 7 April 2008 (the "Reply");
  - 9.4. The Respondent's Answer to the Reply in response dated 9 May 2008 (the "Answer to the Reply"), exhibiting the Respondent's Exhibits 15 to 23.
10. A hearing in this matter took place before the Tribunal at the offices of CAS in Lausanne on 17 June 2008.
  11. At the start of the hearing, the Tribunal proposed and the parties agreed that the hearing should be concerned only with whether NSSG was lawfully entitled to terminate the Agreement, and that the consequential claims of the successful party would be subject of further written submissions, evidence and (if necessary) a further hearing. Accordingly, this is a Partial Award. At the end of the hearing, the Tribunal ordered a timetable for the submission of documents in relation to the second stage.
  12. Mr Honchar was asked some factual questions by NSSG's legal team about races in which he had participated in 2006. Also, Dr Nicole Prommer was called by NSSG to give factual evidence about the collection of Mr Honchar's samples. There was no other factual evidence. Although Mr Alessandro Carrera (Mr Honchar's coach) and Mr Bruce Carmedelle (NSSG's Managing Director) were present at the hearing, they were not called to give evidence at this stage.

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13. Because there were so many expert witnesses (identified below), the expert evidence was heard by the method of what is called "Witness Conferencing". That method requires the Tribunal to have studied carefully all of the expert reports before the commencement of the hearing and involves the experts in different areas of expertise expressing their views on various topics identified by the Tribunal in a discussion format. The method was used with the consent of all parties. If the expert evidence had not been taken in that way, it is unlikely that the Tribunal would have been able to conclude the hearing in one day. The expert witnesses were as follows:

13.1. For Mr Honchar: Dr Giovanni Inghilleri.

13.2. For NSSG: Professor Dr Walter Schmidt; Dr Pierre Eduard Sottas; Professor Dr Saugy; Dr Christopher J Gore (who did not attend, but whose expert report was read and considered by the Tribunal).

14. Finally, the Tribunal heard legal submissions on behalf of the parties, to which reference is made below.

## **B. BACKGROUND**

15. In its Answer to the Claim, NSSG sought to put the Agreement in context by referring to some background factual information which is summarised below, so far as it is not understood to be disputed by Mr Honchar.

16. In 2006 a number of high profile professional cyclists were found to have committed doping violations and the reputation of the sport of cycling was damaged. The scandals affected the T-Mobile Team, as its leading racer, Jan Ullrich, was suspended from the Tour de France.

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17. Following these events, T-Mobile sought new management of its cycling team and entered into an agreement with NSSG. NSSG sought to establish a professional cycling team with a clean image. NSSG says it imposed strict anti-doping obligations and measures in order to give effect to this aim.

## C. THE AGREEMENT

### (1) The Parties' Obligations

18. By the Agreement, dated 1 November 2006, Mr Honchar agreed to ride for the T-Mobile Team for the year 2007. Mr Honchar was referred to in the Agreement as the "Rider". The Agreement, a copy of which is the Claimant's Exhibit 1, expressly incorporated by reference Schedules 1, 2 and 3 thereto.

19. The main substance of the parties' bargain was contained in the first four clauses of the Agreement, which provided as follows:

1. *"Engagement. NSSG retains Rider as a self-employed, independent contractor professional cyclist who shall race exclusively as a member of the T-Mobile Team and represent the Sponsors on the terms and conditions set forth in this agreement. Rider accepts this engagement. Rider has a valid license from all applicable cycling associations and will maintain all licenses in good standing throughout the term of this Agreement.*
2. *Services and Responsibilities. During the term of this Agreement, Rider shall perform the following services exclusively for NSSG (the "Services"):*
  - 2.1 *Race competitively as a member of the T-Mobile Team at events selected by NSSG. Rider's individual annual race calendar will be developed in cooperation with NSSG. Rider is not assured the right to participate in any race, and Rider cannot race in events not on the T-Mobile Team schedule without the prior permission of NSSG;*
  - 2.2 *Represent and promote the products and services of the Sponsors in a positive way; and*



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- 2.3 *Attend public relations events, promotions, media interviews and other activities in support of the T-Mobile Team and the Sponsors as required by NSSG after reasonable notice to Rider.*
3. Term. *The term of the Agreement is for one year, beginning on January 1, 2007 and ending on December 31, 2007.*
4. Compensation. *In exchange for Rider's performance of the Services and the release of his likeness rights described in Section 6 below, NSSG will pay Rider as detailed on Schedule 1 of this Agreement."*
20. The compensation payable to Mr Honchar, as identified in Schedule 1, consisted of "Base Compensation" of €210,000 per annum and "Marketing Rights Compensation" of €90,000 per annum, as well as certain performance incentives and the reimbursement of reasonable expenses.
21. Clauses 7 and 9 of the Agreement provided as follows:
7. Code of Conduct. *NSSG and its Sponsors' success are dependent upon their good standing and positive reputation among the International cycling regulatory authorities and the general public. Therefore, Rider shall perform the Services with the highest degree of care, honesty and integrity and shall do nothing in any way to diminish or harm the good standing and positive reputation of NSSG, the T-Mobile Team or the Sponsors.*
- 7.1 *NSSG and the Sponsors place the utmost importance on doping-free activities by the T-Mobile Team and its members. Therefore, NSSG Sports has a "zero tolerance" policy for any violation of, or appearance of violating, any and all anti-doping regulations and restrictions applicable to Rider and/or the T-Mobile Team.*
- 7.2 *An essential term of this Agreement is that Rider shall abide by the Code of Conduct for the T-Mobile Team, as detailed in Schedule 3. Rider agrees to abide by this Code of Conduct.*
- ....
9. Fitness and injury. *Rider warrants that he is injury free, doping free and medically and athletically able to meet the necessary competitive standards of elite professional cycling. Rider shall immediately inform NSSG of any change in Rider's medical condition. Rider shall promptly comply with any request from NSSG for a*

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*professional medical evaluation or test of any kind whatsoever, at the expense of NSSG. All test results and related information will be kept strictly confidential by the medical staff, independent advisors and team management who have access to this information."*

22. The Code of Conduct at Schedule 3 included the following:

*"You may be placed on probation, suspended for a definite or indefinite period or time (with or without compensation and terms of probation), fined, or your contract terminated for good cause if you violate the provisions of this Code of Conduct or the UCI ProTour Code of Conduct, or, through direct action or inaction, you aid, abet, facilitate or fail to disclose another Team member's violation of either Code of Conduct. If a doping violation occurs, the fine can reach up to 100% of the Base Compensation and bonus you have been obtained according to your rider contract. Such fine will depend on the gravity, the duration and the over all circumstances of the violation as determined by NSSG in its dutiful discretion.*

*Any of the following actions by or affecting you will be a violation of this Code of Conduct:*

- 1.1 Being charged with a crime or the existence of any pending criminal charges for: (i) any felony; (ii) any offence involving use, possession, distribution or intent to distribute illegal drugs or controlled substances; or (iii) any act involving sexual misconduct.*
- 1.2 A violation of any of the anti-doping provisions set forth by a national cycling governing body, Union Cycliste Internationale (UCI), the World Anti-Doping Agency (WADA), or any relevant anti-doping agency or governing body.*
- 1.3 Any conduct by you having the appearance of involvement in any form of unauthorized performance enhancement, manipulation or doping.*
- 1.4 Any participation in the distribution or administration of any illegal or controlled substance listed on the UCI, WADA, United States Olympic Committee (USOC), or United States Anti-Doping Agency (USADA) lists of banned substances, as amended from time to time.*
- 1.5 Failure to report in a timely manner for any examination, testing or other evaluation requested and paid for by the Team, or if any test results produce unclear, abnormal or unusual results as interpreted in the sole discretion of the Team medical staff of advisors.*
- 1.6 The administration of any substance by injection, whether legal or illegal, unless it is done by a licensed, medical professional approved in advance by the Team Doctor and is for the purpose of health maintenance or due to illness."*

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**(2) Termination Provisions**

23. Clause 13 set out certain circumstances in which NSSG could terminate the Agreement for cause.

*"13. Termination. During the term of this Agreement, NSSG may terminate this Agreement for cause for any of the following:*

*13.1 Any violation of any of the terms of this Agreement, including the advertising and marketing obligations;*

*13.2 A violation of the Code of Conduct or any relevant law or cycling regulation;*

*13.3 The inability of Rider to race competitively for 180 days or more in a calendar year, regardless of the cause;*

*13.4 Any conduct by Rider that discredits or harms the reputation, business or otherwise, of NSSG, the T-Mobile Team or the Sponsors; or*

*13.5 The loss or material reduction in the T-Mobile sponsorship amount, for any reason."*

**(3) Governing Law**

24. The Agreement made no express provision as to its governing law. The parties did agree by clause 14 (set out above) to submit their disputes to CAS and to be bound by CAS rules.

25. The CAS Code provides at R45 as follows:

*"R45 Law Applicable to the Merits*

*The Panel shall decide the dispute according to the rules of law chosen by the parties or, in the absence of such a choice, according to Swiss law. The parties may authorize the Panel to decide ex aequo et bono."*

26. In its Answer to the Claim (at pages 19-21), the Respondent referred to this rule and to the Swiss Private International Law, and asserted that Swiss law is applicable to the merits of the case.

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27. In his Reply, the Claimant did not comment upon the Respondent's assertion. In oral submissions on behalf of the Claimant, Mr Arreghini accepted that Swiss law should apply. Further, he indicated that he did not dispute the expert report of Dr Antonio Rigozzi submitted by the Respondent (Respondent's Exhibit 22) which said that the Agreement and Code of Conduct were lawful and in accordance with Swiss law.
28. In these circumstances, the Tribunal will decide this dispute according to Swiss law.

**D. EVENTS GIVING RISE TO THE DISPUTE**

29. The events which give rise to the dispute took place in the period April to June 2007. The following narrative is understood to be uncontroversial. The legal and factual issues are identified below.
30. In early 2007, Mr Honchar participated in several races as a member of the T-Mobile Team, namely the "Grand Prix of Chiasso" on 3 March, the "Grand Prix of Lugano" on 4 March and the "Settimana Ciclistica Internazionale" from 27 to 31 March 2007.
31. Mr Honchar was entered to ride in the "Tour de Romandie" from 1 to 6 May 2007 as a member of the T-Mobile Team. Shortly before the event, in late April 2007, Mr Honchar was subject to blood tests by UCI and by medical staff on behalf of the T-Mobile Team. Upon receipt of the results of these tests, NSSG withdrew Mr Honchar from the "Tour de Romandie", suspended him from racing for thirty days and submitted him to further testing. NSSG did not enter him for the Giro d'Italia from 12 May to 3 June 2007 or the Criterium du Dauphine Libéré from 10 to 17 June 2007. Mr Honchar's suspension was reported in the media.

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32. In June 2007 there was an exchange of emails (some in English, some in Italian) on the subject of Mr Honchar's position between Mr Honchar and his representatives on the one hand and representatives of NSSG on the other (Claimant's Exhibit 4).

33. On 18 June 2007, NSSG wrote to Mr Honchar in the following terms (a copy of the letter is Claimant's Exhibit 6):

*"We are writing to inform you that your Independent Contractor (Self-Employed) Agreement dated 18 October 2006 with NEUER STRASSEN SPORT GMBH is terminated effective immediately.*

*Your agreement with NSSG is being terminated for cause as the result of your violation of sections 7, 7.1, 7.2 and 9 of the agreement and the anti-doping provisions of the T-Mobile Team Code of Conduct. Your active violation of our anti-doping rules is a material breach of the agreement and gives NSSG the right to immediately terminate the agreement without any further payment to you.*

*You must immediately return all Team property to NSSG, including: bicycles, components, SRM training system, wheels and other support equipment in your possession.*

*We reserve our right to assess a fine against you for doping violations and to demand repayment from you of all amounts you have been paid by NSSG under the agreement to date. Further we will take any and all legal action necessary to protect the interests of the team and its members. Note that you remain specifically bound by full and complete confidentiality in all matters relating to the T-Mobile Team.*

*We regret that your actions have left us with this conclusion of our contractual relationship."*

34. On 27 June 2007, Mr Honchar wrote to NSSG in the following terms (a copy of the letter is Claimant's Exhibit 8):

*"I contest and refuse your termination of the Independent Contractor (self-employed) Agreement as communicated in your letter of June 18, 2007.*

*Particularly I contest the reasons of your termination as therein indicated.*

*In this connection I wish to point out that I never violated the Sections of the above-mentioned Agreement indicated in your letter, as well I never violated any other Section*

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*of said Agreement and any anti-doping provision of the T-Mobile Team Code of Conduct.*

*With regard to this matter, please note that I never violated the anti-doping rules, as clearly provided by the always negative results of the various tests effected by UCI as well as by the fact that I am not disqualified.*

*As consequence of the above I request the continuance of the execution of said Agreement, as well as the reintegration into the team, as well as the regular payment of my compensation.*

*On the basis of the above I also reject any eventual fine you should assess, and I will consider myself free to submit all the matter to an arbitration under the regulation of the Court of Arbitration of Sport in Lausanne according to Section 14 of the Agreement."*

#### **E. THE PARTIES' CASES**

##### **(1) The issues**

35. The parties are in dispute as to whether or not NSSG was entitled to terminate the Agreement. The following issues arise:

35.1. The legal issues: what were Mr Honchar's contractual obligations and what were NSSG's contractual rights as regards termination;

35.2. The factual issues: whether Mr Honchar was in breach of those obligations and whether NSSG in fact had a right to terminate;

35.3. The consequences: what should be the practical and financial consequences, if any, of the Tribunal's conclusions on the legal and factual issues?

36. Although the consequences are not subject of this Partial Award and are to be determined at a later stage, the Tribunal nevertheless sets out below what each party has claimed, in the event that they should succeed on the legal and factual issues.

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**(2) Mr Honchar's case**

37. As regards the legal issues, Mr Honchar's case is as follows:

37.1. In general terms, professional cycle racers must respect the rules made by the sports federations of which they are members, by UCI and by the international agencies appointed by them. As regards doping in particular, the professional cycle racer must submit to the tests and methods of tests fixed by UCI and by the individual federations or agencies recognised by them, and his results must fall within the range of values fixed by those bodies otherwise he will be disqualified (Statement of Claim, page 4).

37.2. Mr Honchar was obliged to follow UCI rules, to submit to UCI tests, to give test results within the range fixed by the UCI and not to be disqualified by UCI (Statement of Claim, page 5).

37.3. NSSG was not entitled to rely upon alternative testing methods which were different from those used by UCI, nor to allege that Mr Honchar had breached the Code of Conduct based on the results of such tests. The controlled subject must know in advance the rules he must respect; for NSSG to rely on rules unknown to Mr Honchar would be contrary to the principle of legal certainty (Statement of Claim, page 6).

37.4. If NSSG wished to impose more stringent doping regulation on Mr Honchar, it should have inserted such rules in the Agreement. In particular, NSSG should have identified in the Agreement the testing methods it proposed to use and the ranges of results with which Mr Honchar had to comply. The Agreement contained no such provision; therefore, Mr Honchar's obligations were limited to compliance with UCI rules and NSSG's right to terminate was limited to breach of such rules (Statement of Claim, page 6 and Reply pages 2 to 5).

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37.5. The most up to date anti-doping criteria and levels applied by NSSG were not adopted by UCI, were not referred to in the Agreement and *"the first time Mr Honchar was told of them was during this arbitration before CAS"* (Reply page 7). In oral submissions, Mr Arreghini on behalf of Mr Honchar explained the above points, and said that NSSG had behaved like *"tyrants"*.

38. As regards the factual issues, Mr Honchar's case is as follows:

38.1. The burden is on NSSG to prove the factual matters which it alleges as grounds for termination of the Agreement (Statement of Claim, pages 2-3 and Reply page 5).

38.2. The tests carried out and analysed by UCI prior to the Tour de Romandie produced a *"regular result"*. In relation to the other tests to which Mr Honchar was subjected, he *"never resulted positive"* (Request for Arbitration, page 5 and Reply pages 4 and 6). The results of the tests carried out by UCI were within the ranges fixed by UCI and Mr Honchar was not disqualified. Mr Honchar respected the UCI rules, as he was obliged to do (Statement of Claim, pages 5-7).

38.3. Mr Honchar never violated any provision of the Agreement, nor any rule of the UCI professional cycling regulations. The doping charges are *"completely groundless"*, and were a pretext for early termination of the Agreement (Request for Arbitration, page 6-7). Since UCI did not find that Mr Honchar violated any of its rules, the termination by NSSG was *"absolutely ungrounded and unlawful"* (Statement of Claim, page 7).

38.4. In light of the above, Mr Honchar's written case was that there was no point in discussing the merits of NSSG's expert medical evidence. However, Mr Honchar did rely on the expert report and testimony of Dr Giovanni Inghilleri. This was said to show that the evidence relied upon by NSSG did not *"provide any kind of*



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*certainty as to the problems at issue*", and are insufficient to meet NSSG's burden of proof. Dr Inghilleri's evidence is examined further below.

38.5. In oral submissions, Mr Arreghini submitted that Mr Honchar was denied the opportunity to defend himself because there was no biological material left on which to perform a counter analysis. This effectively prevented him from disproving NSSG's case.

38.6. In oral submissions, Mr Arreghini said that the relevant standard of proof on the factual issues was that the Tribunal should be "*comfortably satisfied*".

39. As to consequences, if the Tribunal finds in his favour Mr Honchar invites the Tribunal to grant the following relief (Request for Arbitration, page 8 and Reply, page 10):

39.1. To declare that NSSG's purported termination of the Agreement was groundless and unlawful;

39.2. To order NSSG to accept Mr Honchar back onto the T-Mobile Team;

39.3. To order NSSG to pay Mr Honchar all compensation due under the Agreement, with interest for late payment;

39.4. To order NSSG to pay damages for "the damage to the athletic efficiency, the damage of the public image, the bonuses not received as consequence of the failed presence to the competitions" in the minimum sum of €2,000,000;

39.5. To order NSSG to pay Mr Honchar's legal costs incurred in this dispute and in this arbitration.

39.6. To reject NSSG's counterclaims.

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39.7. To *"confirm and enforce the guarantee and/or security given by NSSG T-Mobile to UCI- International Cycling Union, relative to the credits of Mr Honchar."*

(3) **NSSG's case**

40. As regards the legal issues, NSSG's case is as follows:

40.1. The Agreement is to be considered in the light of the background, as summarised above. NSSG's strict anti-doping stance was reflected in the Code of Conduct, which applied a more stringent standard than the UCI rules. By signing the Agreement, Mr Honchar was on notice of this approach (Answer to the Claim, pages 2-6).

40.2. NSSG's overall anti-doping programme included: (i) UCI official tests; (ii) blood examinations by the team doctors; (iii) blood volume tests, test data evaluation and *"off model"* analysis provided by the University of Bayreuth; and (iv) unannounced testing by NADA. Mr Honchar was subject to these tests starting in October 2006 and was, therefore, aware of them before entering the Agreement (Answer to the Claim, pages 5-6).

40.3. As regards Mr Honchar's obligations, NSSG relies upon clause 7 which provided that NSSG had a *"zero tolerance"* policy for any violation or appearance of violation of any and all anti-doping regulations and restrictions, and provided that it was an essential term that Mr Honchar agree to abide by the code of conduct. NSSG also relies upon Mr Honchar's warranty in clause 9 that he was *"doping free"* (Answer to the Claim, pages 7-8). As Dr Klinkert on behalf of NSSG said in oral submissions, Mr Honchar knew the rule and the rule was *"no doping"*.

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40.4. NSSG emphasises that violations of the code of conduct include any conduct *"having the appearance of involvement in any form of unauthorised performance enhancement, manipulation or doping"*, and also *"if any test results produce unclear, abnormal or unusual results as interpreted in the sole discretion of the Team medical staff or advisors"* (Answer to the Claim, pages 8-9).

40.5. As regards NSSG's rights to terminate, NSSG relies upon Clauses 13.1 and 13.2 which provide the right to terminate in the event of any violation of the Agreement or the code of conduct (Answer to the Claim, page 8).

40.6. Specifically, NSSG wanted to test its riders for blood manipulation (by injecting erythropoietin ("EPO") or by blood transfusions) by determining the total haemoglobin mass in the blood (or blood volume). This was different from and more advanced than the relevant UCI tests, which measured only the haematocrit value. NSSG says it was entitled to use this method of testing on Mr Honchar to ensure that he met his obligations under the Agreement.

40.7. Mr Honchar's case amounts to suggesting that performance enhancing manipulations of the blood were permitted, so long as not officially detected and so long as test results did not exceed any officially pre-defined limits. Even on its own terms, the argument is wrong because the UCI Anti Doping Regulations provides by article 17 that violations may be established by any reliable means. More fundamentally, Mr Honchar's argument ignores the clear terms of the Agreement by which he was bound which are not limited to UCI rule violations (Answer to the Reply, pages 5-7).

41. As regards the factual issues, NSSG's case is as follows:

41.1. NSSG relies upon the results of tests to which Mr Honchar was subject on: 15 and 17 October 2006, 13 and 19 January 2007, 28 and 30 April 2007, 4, 7, 8, 15, 19,

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25 and 30 May 2007 and 4 June 2007. Such tests included UCI and other tests (Answer to the Claim, pages 10-17).

41.2. NSSG relies upon an overall analysis of these results. NSSG concludes that "*the result of the Claimant's tests proves doping with EPO or/and blood transfusion(s) shortly before 28 April 2007. There is no other conceivable explanation for the athlete's values as measured by UCI and the team's medical staff.*" (Answer to the Claim, pages 17-18) The expert evidence submitted by NSSG in support of this conclusion is considered below.

41.3. The evidence is said to prove that Mr Honchar was in fact involved in blood manipulation. Alternatively, at the very least it shows an appearance of involvement in performance enhancement or manipulation. In the further alternative, the evidence shows "*unclear, abnormal or unusual results*", as interpreted by the team medical staff in their sole discretion. In any event, Mr Honchar was in breach of the code of conduct and NSSG was entitled to terminate the Agreement (Answer to the Claim, pages 22-23).

41.4. In oral submissions, NSSG's legal team said that the Tribunal should be comfortably satisfied as to the factual issues. Even if the Tribunal were to apply a higher standard of proof, namely, '*beyond reasonable doubt*', NSSG had proved its case.

42. As to consequences, if the Tribunal finds in its favour NSSG counterclaims and invites the Tribunal to grant the following relief (Answer to the Request for Arbitration, pages 5-6, and Answer to the Claim, page 27):

42.1. To dismiss Mr Honchar's claims;

42.2. To declare that NSSG was entitled to terminate the Agreement;

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42.3. To order Mr Honchar to pay NSSG:

€127,500 (the compensation paid to Mr Honchar in 2007);

€127,500 (a fine for breach of the code of conduct);

€13,090 (the value of bicycles supplied to Mr Honchar);

€3,196.58 (the medical costs of the testing of Mr Honchar);

€5,000,000 (loss of reputation and financial damage).

42.4. To order Mr Honchar to reimburse NSSG in respect of any damage found to have been caused by him to the Audi vehicle supplied to him during the Agreement (which has now been returned to NSSG).

42.5. To order Mr Honchar to pay the costs of the arbitration and NSSG's legal costs.

#### **F. THE FACTUAL EVIDENCE**

43. Dr Prommer is an assistant of Professor Schmidt (one of NSSG's expert witnesses), and she was responsible for collecting Mr Honchar's data on behalf of NSSG. Dr Prommer was asked by NSSG to attend the hearing at quite short notice in order to respond to certain challenges made in Dr Inghilleri's expert report (which was provided, by agreement, at a relatively late stage). NSSG agreed that her testimony should be limited to factual evidence about the collection of data (and not its interpretation). Although prior to the hearing it had objected in writing to Dr Prommer giving evidence, Mr Honchar's team agreed at the hearing that the Tribunal could hear from Dr Prommer.
44. Dr Prommer explained to the Tribunal the machines and methods used to collect the relevant data and described how, in the case of Mr Honchar, she had gone about such collection. She showed her original copies of the test results and explained the meaning of the various pieces of information and values reflected in the results.

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45. The Tribunal invited Dr Inghilleri to explain what, if any, issues he wished to raise about Dr Prommer's evidence. Dr Inghilleri said that what she had described was a normal process, and that he did not criticise her work. However, he did have two concerns. First, that the reliability of the testing methods was open to human error. Secondly, the documents recording the test results of Mr Honchar were marked with his name in manuscript only; it would have been preferable for his name to have been recorded by the machine which took the readings and for him to have signed the document at the time. It was explained to the Tribunal by Dr Prommer and Professor Schmidt that the machines used were not able to print names. Thus, the names had to be inserted in manuscript on the results print-out.

## **G. THE EXPERT EVIDENCE**

### **(1) Procedural matters**

46. The Tribunal had read the expert reports of Dr Inghilleri (provided on 9 June 2008), Professor Schmidt (Respondent's Exhibit 18), Dr Gore (Respondent's Exhibit 19) and Professor Saugy (Respondent's Exhibit 20).
47. Dr Sottas, a bio-statistician, had not prepared an expert report, but NSSG had given notice that it wished to rely on his evidence in its Answer to the Claim at page 18. NSSG wished him to be available to answer questions in light of Dr Inghilleri's report. In these circumstances, Mr Honchar's team did not object to him giving oral evidence.
48. As indicated above, the Tribunal heard the testimony of the expert witnesses (except Dr Gore, who did not attend) as to the interpretation of the data by the method of Witness Conferencing. The following summary does not attempt to set out all of the helpful written evidence reviewed by the Tribunal, but to identify the matters shown to have been at issue between the parties.

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(2) **The Respondent's experts**

49. Professor Schmidt confirmed in oral evidence his written conclusion, namely that there was a very high probability (99.9999%) that Mr Honchar had engaged in doping or blood manipulation between 28 April and 8 May 2007, in light of a comparison of his results in this period against the periods before and after. He reached this conclusion based on individual and collective analysis of the following parameters:

49.1. Total haemoglobin mass, being the total amount of haemoglobin (an oxygen carrying molecule) circulating in the blood volume;

49.2. Haemoglobin concentration, being the amount of haemoglobin per litre of blood, and haematocrit, being the ratio of red blood cells to plasma;

49.3. Reticulocyte count, being the relationship between reticulocytes (young red blood cells) and all red blood cells in the blood which shows the level of proliferation activity in the marrow.

49.4. Concentration of erythropoietin (or "EPO").

50. The data from these tests can be evaluated in a number of ways. Professor Schmidt reached his conclusions based upon the sequence of each set of results over time, and the apparent absence of other factors which would account for increases and decreases (such as training at altitude). He also reached the same conclusions by use of the "*athlete's passport*" method (or "OFF" method) which compares (i) the athlete's own historical data; (ii) data typical of the population; (iii) the specific results to be analysed. This method produces a "Z-score", which indicates deviation from the range of normality. A high Z-score suggests the likelihood that doping or blood manipulation has taken place.

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51. In writing and orally, Dr Saugy confirmed his agreement with Professor Schmidt's analysis and conclusions.
52. Dr Gore's expert report also reached the same conclusion, stating on page 15: "*Overall Mr Honchar's constellation of transiently high total haemoglobin mass, followed by high OFF-hr score and rebounding serum EPO is extremely unusual and consistent with blood transfusion and subsequent removal.*" Dr Gore's analysis took statistical account of the risk of measurement error.
53. Dr Sottas confirmed, from his perspective as a bio-statistician, that the number of measurements used to produce the baseline for these evaluations was adequate. He said that the Z-score already takes into account a range of values and that those used were sufficient; it was very unlikely that any athlete could naturally produce a Z-score such as that of Mr Honchar.

**(3) The Claimant's expert**

54. Dr Inghilleri's report did not exclude the possibility of doping by Mr Honchar but had concluded that it was not possible to say with the necessary certainty that he had used prohibited methods to increase his haemoglobin mass. He amplified some of his reasoning in oral evidence. He said that the reliability of the Z-score depended on the use of at least six measurements to calculate the mean value. This was the practice of WADA and UCI, yet NSSG had used just two measurements which made their conclusions unreliable. To rely too heavily upon values generated from the population as a whole undermined the beauty of the "*athlete's passport*" method, which was athlete specific. As indicated above, NSSG's experts disagreed.



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55. Dr Inghilleri also said that an athlete's values can change with the seasons, such that winter results should not be expected to be the same as those produced during the racing season. He was unable to identify any authoritative writing or publication to support this theory, and NSSG's experts disagreed with him.
56. Further Dr Inghilleri compared the 2007 results with those of Mr Honchar in 2006 which he said reflected a similar pattern. This, he said, may show that such results were typical for Mr Honchar. NSSG's experts suggested, on the contrary, that Mr Honchar could have used similar practices during the 2006 racing season.
57. Mr Ibarola questioned the experts on behalf of NSSG and invited them to comment on the one page data summary table at Appendix 1 to the report of Dr Gore. In this table, the first column listed the dates on which samples had been taken and subsequent columns identified the results of the various tests on each of those dates. This review had regard to the sequence of values over time. Dr Inghilleri agreed that looking at the pattern of values on seven dates was a fair basis on which to reach a conclusion.
58. However, Dr Inghilleri maintained that the pattern of values shown in Appendix 1 were within the normal range and could not be said to prove any blood manipulation. In contrast, NSSG's experts said that changes in blood volume of nearly one litre in a short period was most unusual; that the change in levels recorded during Mr Honchar's participation in a stage race were the opposite of what one would expect; and that all of the suspicious values coincided.
59. Dr Inghilleri accepted that he had not performed any analysis of his own on Mr Honchar's results. The Tribunal noted that one or two results could be inaccurate but that taken as a whole, it was difficult to avoid the conclusions reached by Dr Schmidt. Dr Inghilleri did not appear to address this point directly, and maintained that no reliable conclusion could be reached.

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## **H. DECISION**

### **(1) The factual issues**

60. The Tribunal applies the standard of proof of the World Anti-Doping Code, requiring it to be "*comfortably satisfied*".

61. The Tribunal rejects the argument that Mr Honchar had no opportunity to disprove NSSG's factual case because, so it was said, there were no biological materials left to test. The Tribunal heard that Mr Honchar had never made a request for such materials and there was no evidence that he had sought any alternative testing to disprove NSSG's case.

62. The Tribunal accepts without hesitation the evidence of the Respondent's experts. The Tribunal is comfortably satisfied that Mr Honchar in fact engaged in doping or blood manipulation during the period 28 April to 8 May 2007.

63. Insofar as it is relevant, the Tribunal further concludes that Mr Honchar conducted himself in a way which had the appearance of involvement in unauthorised performance enhancement, manipulation or doping.

### **(2) The legal issues**

64. The Tribunal accepts the Respondent's case and rejects that of the Claimant.

65. Mr Honchar was contractually bound by clause 7 of the Agreement to abide by NSSG's "*zero-tolerance*" policy on doping and to comply with the specific terms of the Code of Conduct. The Code stated that violations would include any conduct having the appearance of doping, and giving test results which produced unclear, abnormal or unusual results as interpreted by the team medical staff. Clause 13.2 of the Agreement entitled NSSG to terminate in the event of any violation of the Code of Conduct.

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66. It is true that the Code of Conduct also stated that it would be a violation to breach UCI anti-doping rules. However, the contractual duties accepted by Mr Honchar in entering into the Agreement went much wider than this. The Tribunal rejects the argument that Mr Honchar was ignorant of these. On the face of the Agreement itself, signed by Mr Honchar, it was apparent that NSSG required him to be and remain at all material times "*doping-free*", and that this clearly went beyond the obligations imposed by the UCI or other bodies. The Tribunal also rejects the suggestion that NSSG had to specify its testing methods and standards in the contract in order to rely upon them. NSSG was entitled to use any reasonable and reliable means to ensure that Mr Honchar met his obligation not to engage in doping, and was not limited to those methods or standards routinely employed by UCI or any other body.

67. The Tribunal also accepts Dr Rigozzi's uncontested opinion that the contract between Mr Honchar and NSSG was enforceable in Swiss Law.

**(3) Conclusion**

68. The Tribunal concludes that Mr Honchar was contractually bound not to engage in doping or blood manipulation or to appear to do so, that he was in breach of those obligations and that NSSG was entitled to terminate the Agreement.

69. In light of these conclusions, the Tribunal rejects the claims made by Mr Honchar which are summarised above at Paragraph 39. At the next stage of these proceedings (described at Paragraph 11 above), the Tribunal will consider whether all or any of NSSG's claims (as summarised at Paragraph 42 above) should succeed.

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**I. COSTS**

70. Rule 64.5 of the Code of Sports-related Arbitration provides as follows:

*"The arbitral award shall determine which party shall bear the arbitration costs or in which proportion the parties shall share them. As a general rule, the award shall grant the prevailing party a contribution towards its legal fees and other expenses incurred in connection with the proceedings and, in particular, the costs of witnesses and interpreters. When granting such contribution, the Panel shall take into account the outcome of the proceedings, as well as the conduct and financial resources of the parties."*

71. Under cover of letters dated 30 June and 1 July 2008 from the Claimant and Respondent respectively, the Tribunal received statements of costs, as requested. These statements related only to costs up to and including the hearing on 17 June 2008 and reflected the following, in summary:

71.1. Both statements of costs recorded that each party had paid a first advance of costs to CAS in the sum of CHF 22,000.

71.2. The Claimant's statement of costs came to a total of CHF 103,425.20. Within this total, the fees and disbursements of the law firms of Messrs Cecconi and Arreghini which represented Mr Honchar came to a total of CHF 80,400. The balance (of CHF 23,425.20) consisted of expert fees and other disbursements.

71.3. The Respondent's statement of costs came to a total of CHF 143,640.78. Within this total, the fees and disbursements of NSSG's legal counsel came to a total of CHF 80,000. The balance (of CHF 63,640.78) consisted of expert fees and other disbursements.

72. The prevailing party is NSSG. In accordance with Rule 64.5, the Tribunal considers that Mr Honchar should have to make a contribution towards NSSG's legal fees and other expenses incurred in connection with this stage of the proceedings. In deciding the

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amount of such contribution, the Tribunal takes account of the outcome and the fact that this was a commercial dispute, rather than a disciplinary matter.

73. In considering the amount of the legal fees and other expenses claimed by NSSG, the Tribunal notes the following:

73.1. Mr Honchar's own legal fees were very similar to those incurred by NSSG. This assists the Tribunal in concluding that NSSG's fees were reasonable.

73.2. The Tribunal notes that NSSG's expert fees and other disbursements are approximately CHF 40,000 higher than those of Mr Honchar. This is consistent with the fact that Mr Honchar relied upon only one expert. NSSG presented detailed and compelling evidence from a number of experts, which has assisted the Tribunal in reaching its decision.

74. In the exercise of its discretion, the Tribunal concludes that Mr Honchar should make a contribution of 80% of the legal fees and expenses incurred by NSSG in the sum of CHF 114,912.62 (being 80% of CHF 143,640.78).

75. Further, the Tribunal concludes that the parties shall share the total arbitration costs to date in the following proportions: NSSG to pay 20% and Mr Honchar to pay 80%. The total arbitration costs to date will be notified to the parties shortly after this Partial Award is issued.

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**ON THESE GROUNDS**

The Court of Arbitration for Sport rules that:

1. The Claimant acted in breach of his obligations under the T-Mobile Team Independent Contractor (Self-Employed) Agreement dated 1 November 2006 between the parties.
2. The Respondent was entitled to terminate such agreement on 18 June 2007.
3. The Claimant's claims are rejected.
4. The Claimant should pay the costs of the Respondent in the sum of CHF 114,912.62 within 28 days of receipt of this Partial Award, or such other date as may be agreed between the parties.
5. The parties shall share the total arbitration costs up to the date of the present award, to be notified by the CAS in a separate letter, in the following proportions: NSSG to pay 20% and Mr Honchar to pay 80%.

Lausanne, 21 July 2008

**THE COURT OF ARBITRATION FOR SPORT**



Peter Leaver QC

President of the Panel