EXHIBIT "C"
Tab 1

AMERICAN ARBITRATION ASSOCIATION

Piotr Nowak, Claimant/Counterclaim Respondent	:	CASE NO. 14 166 01589 12
v.	:	
	:	Arbitrator: Margaret R. Brogan
Pennsylvania Professional Soccer LLC and Keystone Sports and Entertainment LLC, Respondent/Counterclaim Claimant	:	
v.	:	
Pino Sports LLC Counterclaim Respondent	:	

THE PHILADELPHIA UNION'S POST-HEARING BRIEF

Respondent/Counterclaim Claimant, Pennsylvania Professional Soccer LLC (hereinafter, the "Philadelphia Union") and Respondent, Keystone Sports and Entertainment LLC (hereinafter, "Keystone")[1] (the Philadelphia Union and Keystone will hereinafter collectively be referred to as "Respondent"), by and through their attorneys, Buchanan Ingersoll & Rooney PC, hereby submit the following Post-Hearing Brief.

BUCHANAN INGERSOLL & ROONEY PC

By: */s/Thomas G. Collins*

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Dated: December 5, 2014

[1] Of note, Claimant has included Keystone Sports and Entertainment LLC as a Respondent. Claimant, however, was employed at all times by Pennsylvania Professional Soccer LLC and not Keystone Sports and Entertainment LLC.

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I. INTRODUCTION

At its core, this matter is a relatively simple dispute between a Major League Soccer Club, the Philadelphia Union, and its Team Manager, Piotr Nowak (hereinafter, "Nowak" or "Claimant") (collectively, the "Parties"). The Parties executed a Manager Employment Agreement (hereinafter, the "Employment Agreement") on June 1, 2009, which made Mr. Nowak the "sole manager of the Team [Philadelphia Union]" through December 31, 2012. On December 20, 2010, the Parties executed a Letter Agreement Addendum, which, *inter alia*, extended the term of the Agreement to December 31, 2015 (hereinafter, the "2010 Extension"). On December 20, 2011, the Parties entered a formal Addendum to the original Agreement, which, *inter alia*, expressly nullified the 2010 Extension and provided specific detail regarding compensation and other matters tied to the extending of the term of the Employment Agreement through December 31, 2015 (hereinafter, the "2011 Extension").

Shortly after the execution of the 2011 Extension, Claimant began engaging in a pattern of conduct that, as explained more fully below, not only violated the express terms of the Employment Agreement, but ultimately left the Philadelphia Union with absolutely no choice but to exercise its discretionary right to terminate the Employment Agreement, effective June 13, 2012. Pertinent in this regard, the Employment Agreement expressly provided the Philadelphia Union with the right to unilaterally terminate the Employment Agreement – without any further monetary obligation to Claimant – if it determined, in its good faith discretion, that Claimant engaged in certain conduct delineated within the Employment Agreement. In other words, prior to executing the Employment Agreement, the Parties, through their respective counsel, negotiated and agreed to provide the Philadelphia Union with the discretion to unilaterally terminate the Employment Agreement should it determine, in its good faith discretion, that

Claimant engaged in certain conduct specifically enumerated within the Employment Agreement. This contractually allocated discretion was appropriate considering the context of the Employment Agreement, which placed Claimant in a position of being one of the Philadelphia Union's most visible representatives while, at the same time, providing him with a significant salary, the potential for bonuses, and other valuable compensation.

The evidence elicited during the 5-day Hearing in this matter indisputably establishes that the Philadelphia Union was well within its discretionary right to terminate the Employment Agreement effective June 13, 2012. Indeed, the record evidence establishes that, shortly after the commencement of the 2012 season, Claimant began engaging in a reprehensible pattern of conduct that not only provided a good faith basis for the Philadelphia Union to exercise its discretionary right to terminate the Employment Agreement, but which also rose to such a significant level that the Philadelphia Union had no choice but to exercise such discretion. As explained more fully below, this conduct included, but was not limited to: (1) Claimant's interfering with the players' rights to contact the Major League Soccer Players Union ("MLSPU"); (2) Claimant's inappropriate on-field conduct in violation of League rules, including without limitation his conduct during the April 21, 2012 Chivas USA game wherein he left the Technical Area, charged onto the field of play, and initiated physical contact with an opposing player (resulting in fines and a suspension to Claimant as well as fines on the Philadelphia Union); (3) Claimant's jeopardizing of the health and safety of the players when he admittedly failed to follow the directives of the Athletic Trainers and forced the players – including injured players – to participate in an unprecedented 10-12 mile trail run on a concrete surface – further denying the players the ability to hydrate during the arduous trail run; (4) Claimant's jeopardizing of the health and safety of the Philadelphia Union players by creating an

atmosphere where players felt they had to hide concussion symptoms from the Philadelphia Union's medical staff; (5) Claimant's inappropriate hazing of players, which involved Claimant physically slapping rookie players, [redacted]; and (6) Claimant's repeated material breaches of the Employment Agreement, including without limitation, his seeking of other employment and making disparaging remarks about the Philadelphia Union and its management during the time he was employed with the Philadelphia Union.

Claimant's actions in this regard – which were either admitted by Claimant or established through the credible and consistent testimony elicited during the 5-day Hearing – unquestionably fell within the ambit of the conduct delineated within the termination provision of the Employment Agreement. Moreover, due to the severity of such actions, the Philadelphia Union not only had a good faith basis to exercise its discretionary right to terminate the Employment Agreement, but it was left with absolutely no choice but to exercise such discretion. Although this should be obvious from the circumstances, the actions of both Major League Soccer ("MLS" or the "League") and the Major League Soccer Players Union ("MLSPU") further confirm this point. In fact, based upon the actions of both the League and the MLSPU, the Philadelphia Union was left with no choice but to exercise its discretionary right to terminate the Employment Agreement. As explained more fully below, the MLSPU independently – not from the management of the Philadelphia Union – learned of the actions taken by Claimant relative to the players and immediately contacted the League, ultimately informing the League, for the first time in its existence, that it would consider striking – withholding its players from the Philadelphia Union – if Claimant was not removed as the Manager of the Philadelphia Union.

Additionally, based upon the information it obtained from the MLSPU – not from the management of the Philadelphia Union – the League initiated an independent investigation into Claimant, ultimately determining that Claimant engaged in reprehensible conduct relative to the players and that such conduct warranted the termination of Claimant as the Manager of the Philadelphia Union. Significantly, after conducting its investigation and understanding the position of the MLSPU, the League issued a directive to the Philadelphia Union – explicitly informing the Philadelphia Union that Claimant was prohibited from having any further contact with the players. It is important to note here that the players are employed by the League and not the Philadelphia Union.

As noted below, the position of the League in this regard is important in two material respects. First, the Employment Agreement specifically provides that it can be terminated – without any further monetary obligation to Claimant – if the Philadelphia Union is directed by the League to terminate or suspend the Employment Agreement. Secondly, the League's position relative to Claimant's actions – as well as the position of the MLSPU – illustrates that the Philadelphia Union had a good faith basis to exercise its discretion and terminate the Employment Agreement. Indeed, the League and the MLSPU – the two primary entities controlling the business of professional soccer in the United States — not only believed that Claimant's actions were significant enough to warrant the termination of the Employment Agreement, but, again, they both actually took positions that left the Philadelphia Union with no choice but to exercise its discretionary right to terminate the Employment Agreement.

Claimant has attempted to muddy the waters by arguing that the Philadelphia Union terminated the Employment Agreement as a result of its financial position and/or as a result of a perceived personal vendetta the Philadelphia Union's CEO and Operating Partner, Nick

Sakiewicz, had against Claimant. Such arguments, however, are simply red herrings that are not supported by the record evidence. As noted above, three separate entities – the Philadelphia Union, the League and the MLSPU – all determined ***independently*** that Claimant engaged in reprehensible conduct relative to the players and that his actions warranted the Philadelphia Union exercising its discretionary right to remove Claimant as the coach of the Philadelphia Union.

II. FACTS[2]

A. Claimant's Interfering with and Retaliating Against Players for Engaging in Union Activities.

On or about March 15, 2012, around the end of the 2012 preseason training camp, representatives from the MLSPU, including its Executive Director, Robert Foose, visited with the Philadelphia Union's players. (SMF ¶ 38.) Following this March 15, 2012 meeting, Mr. Foose contacted the Philadelphia Union's Technical Director, Diego Gutierrez, [redacted]. (SMF ¶ 39.) Mr. Foose and Mr. Gutierrez exchanged emails from the initial March 15, 2012 meeting through March 20, 2012, ultimately – at least from the perspective of the MLSPU – resolving the issue. Mr. Foose testified on the point as follows:

> …[Mr. Foose] called Diego, talked it through. He said he would get back to me. We then had an e-mail exchange [redacted]

[2] Along with the instant Brief, the Philadelphia Union is simultaneously filing a Proposed Statement of Undisputed Material Facts. The Philadelphia Union hereby incorporates the same by reference.

> So I get that information back. I responded by e-email to Diego and [Claimant] was copied on the e-email that Diego had sent to me. I responded and said: Okay, [redacted]
>
> **So that was the gist of the e-mail exchange that happened, and at that point I considered the matter closed.**

(SMF ¶ 40) (emphasis added.)

This issue, however, was not resolved from Claimant's perspective. In fact, Claimant became aware of the [redacted] complaint was brought to the attention of the MLSPU, as Mr. Gutierrez not only informed him of the complaint, but Claimant was copied on the emails exchanged between Mr. Gutierrez and Mr. Foose. (SMF ¶ 41.) After being made aware of the [redacted] issue, Claimant met with the Philadelphia Union's two [redacted] in his office. (SMF ¶¶ 42-43.) During this meeting, Claimant initially asked Mr. [redacted] and Mr. [redacted] whether they or another member of the team raised an issue with the MLSPU [redacted]. (SMF ¶ 44.) Claimant then informed Mr. [redacted] and Mr. [redacted] that issues, [redacted], should be brought to the Claimant and not the MLSPU – directing them not to contact the MLSPU. (SMF ¶ 45.)

After meeting with Mr. [redacted] and Mr. [redacted] in his office, Claimant held a team meeting and communicated the same message to the team – that issues, [redacted], should be brought to his attention and not the MLSPU. (SMF ¶ 46.) As testified to by Mr. [redacted] during this team meeting, Claimant said:

> …that we should not involve the Players Union for something that we can handle internally.

(SMF ¶ 47.)

Claimant actually acknowledges that he told the players not to involve the MLSPU, specifically testifying that, during this team meeting, he told the players the following:

> ...So if any kind of issues will occur, I told them basically that please, if you have any kind of concerns, any issues...just to tell them if you have any kind of issues, please see us *first* so we will not have problems or questions from the Players Union about any kind of concerns you have or you might have in the future.

(SMF ¶ 48) (emphasis added.)

Following the team meeting, Claimant still did not believe the issue was resolved; he was determined to identify the player that brought the [redacted] issue to the attention of the MLSPU – the player that betrayed him – that went behind his back to the MLSPU. Indeed, shortly after holding the team meeting, Claimant called Mr. [redacted] and, again, asked him who went to the MLSPU with the [redacted] issue, specifically asking Mr. [redacted] whether he was the one that brought the issue to the MLSPU. (SMF ¶ 49.) Although Claimant denies making this call, another Philadelphia Union player, [redacted], was present at the time Mr. [redacted] received the phone call from Claimant and confirmed, through his testimony, that Claimant did in fact make this call to Mr. [redacted] (SMF ¶ 50.)

Claimant also separately called Mr. [redacted] in an attempt to ascertain the identity of the player that brought the [redacted] issue to the MLSPU, specifically asking Mr. [redacted] to reveal the identity of the player who brought the [redacted] issue to the attention of the MLSPU. (SMF ¶ 51.) During this conversation with Mr. [redacted] Claimant also reiterated his belief that there was no need to use the MLSPU for issues that arise; they can be handled internally. (SMF ¶ 52.)

Apparently unsatisfied with refusal of Mr. [redacted] and Mr. [redacted] to reveal the identity of the player that brought the [redacted] issue to the MLSPU, Claimant decided to contact Mr. Foose. (SMF ¶ 52.) During his conversation with Mr. Foose, who, again, is the head of the MLSPU, Claimant not only informed Mr. Foose that he did not think it was appropriate for players to be

talking to the MLSPU, but he also specifically asked Mr. Foose to identify the player that brought the [redacted] issue to his attention – to the attention of the MLSPU. (SMF ¶ 53.)

This was an "extremely unusual conversation" for Mr. Foose, as he never before had a conversation where a coach asked him to disclose the identity of a player that raised an issue with the MLSPU. (SMF ¶ 54.) Notwithstanding the unusualness of his conversation with Claimant, Mr. Foose did not immediately contact the League, as he was made aware of the communications between Claimant and Mr. [redacted] and he was afraid Claimant would retaliate against Mr. [redacted]. (SMF ¶ 55.) Mr. Foose's apprehension in this regard turned out to be completely warranted, as Claimant, admittedly, believed that Mr. [redacted] brought the [redacted] issue to the attention of the MLSPU. (SMF ¶ 56.) Mr. [redacted] was traded a mere two-weeks after Claimant made the telephone call to Mr. [redacted] specifically asking him whether he was the one who raised the issue with the MLSPU. (SMF ¶ 56.) Interestingly, while Claimant maintains that the trade of Mr. [redacted] was not retaliatory in nature, the record evidence establishes that, during an emotional statement made by Claimant after the May 26, 2012 game against Toronto[3] – a game or two after Mr. [redacted] was traded – Claimant threatened the team, specifically stating that:

> …he couldn't be fired…he wasn't afraid to do anything in regards to the team…
>
> …he wasn't afraid to shake the tree…he had traded away [the] [redacted] and [the] leading goal scorer…[he] wasn't afraid to make moves and to roll with it.

(SMF ¶ 94.)

Accordingly, while Claimant maintains that his trading of Mr. [redacted] was not retaliatory, the record evidence establishes that Claimant used his trading of Mr. [redacted] referred to in

[3] It was the May 26, 2012 game against Toronto – the game where Toronto beat the Philadelphia Union, picking up its first win of the season. (SMF ¶¶ 90-94.)

his emotional statement, to threaten the players. In other words, do not cross him, or you will be traded.

After Mr. [redacted] was traded, the MLSPU brought the following three issues to the attention of the League during a prescheduled meeting it had with the League on May 22, [redacted]: (1) the [redacted] issue; (2) two separate interference issues – Claimant informing players not to contact the Players Union and Claimant pressuring [redacted] to disclose the identity of individuals exercising their Union rights; and (3) their belief that Mr. [redacted] was traded in retaliation for Claimant's belief that Mr. [redacted] raised the [redacted] issue with the MLSPU. (SMF ¶ 57.) Todd Durbin, the Executive Vice President of Competition, Player and Labor Relations for the League, summed up the May 22, 2012 meeting as follows:

> ...the Players Union had an issue that not only was Mr. Nowak directing them not to bring issues to the Players Union but also seemed to be trying to find out who, in fact, had brought these issues to the Players Union and they were very concerned about retaliation taking place...one of their core assertions was that there was a trade of a player by the name of [redacted] and that they believed that not only was there the potential threat of retaliation, but that retaliation was taking place.

(SMF ¶ 58.)

On or about May 24, 2012, after he met with the MLSPU, Mr. Durbin called Mr. Sakiewicz and informed him that there were several complaints regarding Claimant interfering with players' rights to communicate with the MLSPU, and, as a result, the League was performing an investigation. (SMF ¶ 59.)

To that end, not only did Claimant potentially violate the [redacted] established by the League's Collective Bargaining Agreement, but he also interfered with the players' rights to contact the MLSPU and retaliated against a player that he errantly believed betrayed him by exercising his MLSPU rights. Moreover, Claimant's actions in this regard were independently –

not by the management of the Philadelphia Union – brought to the attention of the MLSPU and the League, resulting in an investigation being performed by the League.

B. *Claimant's Violation of League Rules During the April 21, 2012 Game Against Chivas USA, including his Initiation of Contact with an Opposing Player.*

On April 21, 2012, Claimant coached the Philadelphia Union in a game against Chivas USA. (SMF ¶ 61.) During this game, Claimant, in violation of League Rules, left the coaches Technical Area, ran onto the field, participated in a "melee" with the players, and initiated physical contact with a player on the opposing team. (SMF ¶ 72.) More specifically, as shown within the video produced by the Philadelphia Union relative to the April 21, 2012 Chivas USA game,[4] a Philadelphia Union player, [redacted] engaged in a two-footed, studs-up challenge (tackle) on an opposing player, resulting in Mr. [redacted] receiving a red card and ejection from the game. (SMF ¶¶ 63, 65.) Mr. [redacted] challenge caused tempers to "flare" and an ensuing "melee." (SMF ¶ 66.) As part of the "melee," Claimant left the coach's "Technical Area" – in violation of League rules – charged on to the field and pushed – initiated physical contact with – the goalkeeper for Chivas USA.[5] (SMF ¶ 67.)

Contrary to clear video evidence illustrating that Claimant pushed the goalkeeper for Chivas USA, Claimant initially testified that he did not "push anybody." (SMF ¶ 68.) He later attempted to justify his actions during the April 21, 2012 Chivas USA game by claiming that he was protecting Mr. [redacted] (SMF ¶ 69.) In other words, Claimant, an experienced coach of a professional soccer team, believes he can justify his actions – justify why he thought it was necessary to violate League rules by leaving the Technical Area, charging onto the field, engaging in a "melee" with the players, and initiating physical contact with a player – by

[4] Of note, Claimant testified that the video produced by the Philadelphia Union – Respondent Exhibit 6 – fairly and accurately reflected what happened on April 21, 2012. (SMF ¶ 64.)
[5] Although it happens quickly, if you pause the video at the 1:53 minute mark, it is clear that Claimant pushes the opposing team's goalkeeper.

claiming that he was protecting Mr. [redacted]. Foremost, there simply is no justification for a coach to leave the Technical Area and charge onto the field of play, let alone for the coach to further initiate physical contact with a player on the opposing team. Moreover, even if such actions could be justified, the rationale offered by Claimant – that he was protecting Mr. [redacted] – is not supported by the record evidence. Indeed, a careful review of the video illustrates that, at the time Claimant reached Mr. [redacted], the referee was already there taking control of the situation.[6] (SMF ¶ 69.) Additionally, at the time Claimant reached Mr. [redacted], two to three Philadelphia Union players were already there or arriving at the same time as Claimant – one of which was right there to protect Mr. [redacted] from the goalkeeper – from the opposing player Claimant pushed. (SMF ¶ 70.) In fact, in response to being pushed by Claimant, the goalkeeper, trying to get to Claimant, pushed that Philadelphia Union player who was in-between him and Claimant.[7] (SMF ¶ 70.)

Not only did Claimant's actions during the April 21, 2012 Chivas USA game result in Claimant receiving a red card ejection from the game, but the League also took it upon itself to conduct an investigation into Claimant's conduct. (SMF ¶¶ 62, 73.) After completing its investigation, the League concluded that the Claimant, in violation of League rules, left the coaches Technical Area and "initiated contact with an opposing player." (SMF ¶ 73.) Based upon the results of its investigation, the League fined Claimant $5,000 and suspended him for two (2) games. (SMF ¶ 76.) The League also fined the Philadelphia Union $5,000. (SMF ¶ 75.)

Significantly, while this was the first time that Claimant initiated physical contact with *a player*, this was not the first time Claimant initiated physical contact with someone during his tenure with the Philadelphia Union; he also pushed another Philadelphia Union employee, Rick

[6] See the video at the 0:15 mark and 1:50 mark.
[7] Again, see the video at the 0:15 mark and 1:50 mark.

Jacobs, after a reserve game in 2011. (SMF ¶ 78.) Similarly, this was not the first time Claimant received a red card ejection from a game for leaving the Coach's Technical Area. (SMF ¶ 77.) Indeed, he also received a red card and was ejected for leaving the Technical Area during a U.S. Open Cup game against DC United on April 6, 2011. (SMF ¶ 77.)

C. Claimant's Jeopardizing of the Health and Safety of the Players by Failing to Follow the Medical Directives of the Athletic Trainers – Forcing Injured Players to Participate in a 10-12 Mile Trail Run and Denying Players Hydration During the Arduous Trail Run.

1. Facts Leading to the May 31, 2012 Trail Run.

As a result of his red card and ejection for violating League rules by leaving the Technical Area and initiating contact with an opposing player during the April 21, 2012 Chivas USA game, the League suspended Claimant for two games – the April 28, 2012 game against San Jose and the May 5, 2012 game against Seattle. (SMF ¶¶ 83-84, 86.) The Philadelphia Union lost both of these games. (SMF ¶¶ 85, 87.) Unfortunately, its winless streak continued when Claimant returned from his suspension, as the Philadelphia Union lost its next League game against the New York Red Bulls, and then it tied its following League game against FC Dallas. (SMF ¶¶ 88-89.)

The Philadelphia Union's next League game was on May 26, 2012 against Toronto, and although Toronto had not yet won a game at that point in the season, it ended up beating the Philadelphia Union. (SMF ¶¶ 90-91.) After the game, Claimant was upset and admittedly made an "emotional statement" to the players. (SMF ¶ 92.) More specifically, according to several players, Claimant made the following "emotional statement" after the Toronto game:

> We were supposed to have five days off, but not I'm going to think about how long that's actually going to be. We're going to get home, we're going to work hard, we're going to shake tree, and we're going to figure out who sticks and who doesn't…My job is not going anywhere, I can't be fired.

> Cancel your trips. We're going to go back and we're going to work hard.

(SMF ¶ 93.)

Within his "emotional statement," Claimant also informed the players that:

> ...he couldn't be fired...he wasn't afraid to do anything in regards to the team...
>
> ...he wasn't afraid to shake the tree...he had traded away [redacted] and [the] leading goal scorer...[he] wasn't afraid to make moves and to roll with it.

(SMF ¶ 94.)

Claimant acknowledges that he originally – prior to the Toronto game – planned to give the players at least four days-off starting on May 30, 2012. (SMF ¶ 95.) However, as threatened in his "emotional statement" after the Toronto game,[8] Claimant cancelled the players' scheduled days-off – requiring players to cancel their vacation plans – and made the players, for the first time in team history, show up at a trail located at the Youth Soccer Center ("YSC") on May 31, 2012. (SMF ¶ 99.)

2. Claimant's Denial of Water to the Players During the Trail Run

The trail, which is located approximately 100 yards from the YSC facility, is a blacktop/ cement/pavement trail that is approximately two body widths wide, uneven in parts with rolling hills, and approximately 1.3 miles in length. (SMF ¶¶ 100-101.) On that particular day, May 31,

[8] Notably, three days after the Toronto game – on May 29, 2012 – the Philadelphia Union had a U.S. Open Cup (non-League) game against the Rochester Rhinos. (SMF ¶ 96.) Claimant, however, was unable to coach this game, as he was suspended from the game as a result of his receipt of a red card ejection for leaving the coach's Technical Area during the Philadelphia Union's last U.S. Open Cup game on April 6, 2011. (SMF ¶ 97.) Accordingly, as a result of his inappropriate on-field actions – including leaving the coach's Technical Area on two separate occasions as well as his initiating contact with an opposing player – Claimant was suspended and unable to coach the Philadelphia Union for three (3) games in a seven (7) game stretch from May 5, 2012, through May 29, 2012. (SMF ¶ 98.)

2012, it was hot and sunny, about 80 degrees and humid.[9] (SMF ¶ 102.) Shortly after the players arrived at the trail, Claimant directed them to begin running the trail; he did not inform them how far he was making them run, he simply told them to keep running until he told them to stop. (SMF ¶ 103.) After the players completed three lengths of the trail – approximately 4 miles ("First Interval") – he directed them to take a short break. (SMF ¶ 105.)

During the short break, Claimant admittedly told the players that they were prohibited from hydrating – from drinking any water – during the trail run.[10] (SMF ¶ 108.) Generally speaking, it is the responsibility of the Athletic Trainers to ensure the players are appropriately hydrated during practices. (SMF ¶ 106.) In this regard, at the time of the May 31, 2012 trail run, the Athletic Trainers brought 24 reusable "Gatorade" water bottles, which are 22-ounce "squirt" bottles, out to the trail – there was essentially at least one 22-ounce "squirt" bottle available for each player. (SMF ¶ 107.) Although these water bottles were available to the players, after the players completed the First Interval, Claimant refused to allow players to use them. (SMF ¶ 108.) In fact, Claimant admits that he took the reusable squirt bottles provided by the Athletic Trainers from the players and threw them in the bushes.[11] (SMF ¶ 109.)

Believing that the denial of water to the players jeopardized their health and safety, especially considering the weather and the arduous nature of the trail run, the Philadelphia

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[9] Towards the end of the hearing, Claimant introduced – as Claimant Exhibit 13 – a Quality Controlled Local Climatological Data Report ("Weather Report"), which, according to Claimant, provides a fair assessment of the weather on May 31, 2012. It appears as though Claimant is offering this evidence to counteract the testimony of several witnesses relative to the weather during the May 31, 2012 trail run. Significantly, however, this Weather Report only details the weather *observed* at the Philadelphia International Airport, ***which is approximately 30 miles away from the YSC facility***. Accordingly, it does not provide an accurate representation of the weather ***at the YSC facility during the May 31, 2012 trail run – it certainly is not more credible than the witnesses who consistently testified as to what they actually experienced the weather to be during the May 31, 2012 trail run***.

[10] Importantly, Claimant admits that he did not monitor or ensure that the players were hydrated before the start of the run. (SMF ¶ 104.)

[11] Mr. [redacted] testified that he specifically witnessed Claimant take the reusable squirt water bottles and hide them in the woods – telling players "you guys don't need water." (SMF ¶ 110.)

Union's Head Athletic Trainer, Paul Rushing, confronted Claimant about his decision to deny water to the players. Mr. Rushing described the ensuing argument with Claimant as follows:

> ...we had the bottles out, the water bottles out and the Gatorade squeeze bottles, and put those out; and the players started getting a drink, which is standard, and then **[Claimant] got mad and took it [water] away**. And then they all went on their next bout [interval trail run] and then I got in an argument about the water with him...He just said, 'no water'...in a harsh manner. And again, this whole thing was kind of snowballing and I was like, I couldn't believe it was happening. And...**my job is to protect the players and to, you know, not put them in harm's way and do what I think is right and that's what I was hired for as the head trainer, and I felt like I wasn't allowed to do that.** And, again, I was just really frustrated and really upset about that...
>
> ...So when [the players] left again, we got into more of an argument...and **[Claimant] physically took the bottles with the carriers and threw them in the bushes**...
>
> **...[Claimant]...was basically saying...this is what I say and this is what I want you to do and if you're not with me, you're against me** kind of thing...

(SMF ¶ 111) (emphasis added.)

Philadelphia Union player, [redacted], happened to finish his First Interval of the trail run at the time Claimant and Mr. Rushing were arguing, testifying that he witnessed the following exchange take place between Mr. Rushing and Claimant:

> ...After both of them went back and forth about whether water should be distributed or not, **Mr. Rushing...pretty much had a Pontius Pilate moment** where he was like, 'You know what? You're in charge, but I refuse to have my hands in this because this isn't right. So if this is what you want to do, I'm washing my hands of this. I want no part of this. But this isn't right...**[Claimant] – I remember him saying this distinctively – was like...'I don't care. I'm going to make men out of these guys.'**

(SMF ¶ 114) (emphasis added.)

Accordingly, despite Mr. Rushing's repeated efforts to convince Claimant that the denial of water to the players during the trail run jeopardized their health and safety, Claimant refused to concede his position – stating he "didn't care," he was "going to make men out of [the

players]."[12] Claimant's position in this regard is quite interesting considering that Claimant knew that MLS games were actually being stopped to allow players to take breaks and stay hydrated. (SMF ¶ 130.) Nonetheless, against the clear directives of Mr. Rushing, Claimant refused to allow the players to hydrate during the trail run. He simply told them to keep running until he told them to stop. (SMF ¶ 115.) In total, the players ran three or four Intervals, totaling approximately 10-12 miles – all on a concrete surface, in hot and humid weather, and without the ability to hydrate. (SMF ¶ 116.)

It is important to reiterate that Claimant not only refused to allow the players to access water during the trail run, but he also physically took water bottles from the hands of the players and Mr. Rushing. Indeed, one player, [redacted], testified that when he finished the First Interval of the run, he witnessed Claimant physically take water bottles from Mr. Rushing and throw them. (SMF ¶ 114.) Another player, [redacted] testified that, after he completed the First Interval of the run, the following occurred:

> Again, I sort of happened upon it already occurring and [Claimant] was like pretty explicitly letting everybody know that they weren't going to have any water
>
> **And I remember having like a Kirkland Costco bottle, much like that sort of plastic bottle, in my hand. And he [Claimant] took the water bottle out of my hand and said that when you're thirsty, you lose focus** – which I sort of thought at the time, well, if I'm thirsty and I get some water, then I'll be focused, I'll be ready to run some more – **and then tossed it to the side**.
>
> And then there were some hushed conversations going on between Paulie [Paul Rushing], John [Hackworth], and [Claimant] and I remember kind of questioning Paulie as to, you know, frankly: What the hell's going on? I

[12] Claimant also admits that made the following statements to Mr. Rushing during the May 31, 2012 trail run:

> No fucking water put the water back, water will make you lose focus and if you're thirsty you are weak.

(SMF ¶ 118.)

> mean, it's hot as hell, we're out here running. There's no reason why guys shouldn't have water. I certainly never had seen anything like that.

(SMF ¶ 112.)

Additionally, after initially arguing with Claimant regarding the players' access to water during the trail run, Mr. Rushing – as he was extremely concerned about players becoming dehydrated – tried to sneak water to the players, but Claimant, once again, physically took the water bottles from Mr. Rushing, walked through the players and threw the water bottles into the woods/bushes. (SMF ¶ 116.)

Accordingly, not only did Claimant deny players access to water against the wishes of Mr. Rushing, but he also became physical with the players and Mr. Rushing – physically taking water bottles – including at least one individual, disposable water bottle – from the hands of players and Mr. Rushing and threw them into the woods/bushes.

Once again needing to find some justification for his actions, Claimant testified that he denied water to the players because one of the players, [redacted] was sick and he did not want the other players to get his illness. (SMF ¶ 119.) This last ditch and contrived effort to justify his actions – his actions in jeopardizing the health and safety of the players – was clearly not well thought out and, quite frankly, is absurd given the circumstances. First, after blaming his withholding of the water on Mr. [redacted] sickness, Claimant testified that Mr. [redacted] was sent back to the locker room immediately after the warm-up. (SMF ¶ 120.) In other words, Mr. [redacted] was not present during the trail run – during the time Claimant denied the players access to water – and, thus, he obviously would have been unable to contaminate the water supply. Second, Claimant, during the May 31, 2012 trail run, never mentioned Mr. [redacted] or his sickness as the reason for his denial of water to the players; rather, as confirmed by the players and Mr. Rushing, Claimant simply and repeatedly stated:

> **...water makes you weak. If you're thirsty, you're weak...If you're thirsty, you lose focus...**

(SMF ¶ 121) (emphasis added.)

In fact, Claimant admits that he made the following statements to Mr. Rushing during the May 31, 2012 trail run:

> **No fucking water put the water back, water will make you lose focus and if you're thirsty you are weak.**

(SMF ¶ 118) (emphasis added.)

Third, the record evidence establishes that, generally speaking, when a player is sick, the Athletic Trainers take one of the 22-ounce reusable "squirt" bottles and put different color tape on it to ensure that only the sick player uses that particular water bottle – and that the sick player does not drink out of the other water bottles. (SMF ¶ 122.) In other words, Claimant's alleged worry about Mr. [redacted]' sickness would have easily been resolved by following the standard protocol of giving Mr. [redacted] a water bottle with a piece of tape on it.

Fourth, the offered justification does not explain why Claimant physically took an individual, ***disposable*** bottle from the hands of Mr. [redacted].

Fifth, and, perhaps most importantly, any alleged concern over Mr. [redacted]' sickness could have been easily resolved by directing Mr. Rushing and the players to ensure that only ***individual, disposable bottles*** were used. In fact, Claimant testified that if the players were given individual, disposable bottles of water or Gatorade, it would have probably alleviated his concerns relative to Mr. [redacted]' stomach flu. (SMF ¶ 123.) As established within the record evidence, individual disposable bottles of water and Gatorade were in fact available at YSC at the time of the run. (SMF ¶ 124.) Indeed, Mr. Rushing brought three ice chests (one with wheels on it) filled with three cases of individual (not shared) 16.9-ounce disposable water

bottles and three cases of individual (not shared) 20-ounce disposable Gatorade bottles to the YSC that day. (SMF ¶ 126.) If requested – or if Mr. Rushing knew that a player's sickness was the reason Claimant was denying hydration to the players – Mr. Rushing would have easily taken the three (3) minute, 100 yard walk from the trail to obtain the individual, disposable water and Gatorade bottles. (SMF ¶ 127.) This was not done because – contrary to Claimant's later contrived explanation – he simply never raised the issue. (SMF ¶¶ 120-125.)

Sixth, the May 31, 2012 training session was not the only time Claimant placed water limitations on the players. Indeed, during the practice held on June 7, 2012, Claimant also placed a water volume limitation on the players, informing each player that they were limited to one bottle of water for the entire practice. (SMF ¶¶ 160-164.) Mr. [redacted] described the water limitation imposed by Claimant during the June 7, 2012 practice as follows:

> …in reaction to the game we just played against D.C. United, which was an Open Cup quarterfinal game in D.C., so the incident with the water and the running happened the week before in preparation for that game, we go to D.C. and win the game…And [the next] practice everybody is obviously excited, pretty tired, but we're practicing because we have a League game, and it comes to the point of the water break – because there's usually a standard water break during each practice – and…**I remember [Claimant] making a comment of that we were going to get water, but that each person was only allowed to have one water bottle and if they finished that water, then that was the water for the day that they could have; and that…because we won our game in D.C., then…it was a possibility that we would go the rest of the season without, you know, having as much water**…

(SMF ¶ 163.)

Based upon the foregoing, Claimant's attempt to offer [redacted]' illness as an "after-the-fact" justification for denying water to the players during the May 31, 2012 trail run is a thinly veiled last ditch effort on his part to mask his completely inappropriate actions – actions that he now knows jeopardized the health and safety of the players. In fact, this purported

justification is only important in one respect – it illustrates that Claimant understands the seriousness of his decision to prohibit players from hydrating during a 10-12 mile trail run. In other words, if Claimant truly believed he did not jeopardize the health and safety of the players by denying them water during the May 31, 2012 trail run, he would not have attempted to justify his actions, especially with a justification so clearly unsupported by the record evidence.

3. *Claimant's Forcing of Injured Players to Participate in Training Against Directives of Athletic Trainer*

Before the start of practice on May 31, 2012, Mr. Rushing informed Claimant inside the YSC facility that four players were on the injury list – [redacted] with a right big toe injury, [redacted] with a right ankle injury, [redacted] with gastroenteritis, and [redacted] with an ankle injury – and it was his opinion that they should not participate in the trail run; they should remain in the facility on a bike. (SMF ¶ 131.) With regards to Mr. [redacted] Mr. Rushing was concerned his participating in the run – even simply walking – because:

> …[Mr. [redacted] suffered a toe injury…and obviously the big toe is the weightbearing part of your foot, you don't want to put weight on that foot if it's a fresh injury like that.

(SMF ¶ 132.)

Mr. Rushing wanted Mr. [redacted] on a bike, which is nonweightbearing and allows a player to get fitness without putting any pressure on the joint or the injured part of the body. (SMF ¶ 133.) Similarly, Mr. Rushing also did not want Mr. [redacted] or Mr. [redacted] participating in the trail run because he was afraid they would aggravate their ankle injuries – neither of them had ankles that were ready for a 10 mile run on concrete in Mr. Rushing's opinion. (SMF ¶ 134.)

Prior to start of the May 31, 2012 trail run, Mr. Rushing conveyed his concerns regarding Mr. [redacted], Mr. [redacted] and Mr. [redacted] to Claimant. (SMF ¶ 135.) Claimant's response to Mr. Rushing was that everyone "was going to go outside" and, to Mr. Rushing's shock, Claimant

made the injured players participate in the trail run once outside. (SMF ¶ 136.) Even more shocking to Mr. Rushing was that Claimant also informed him that neither Mr. Rushing nor the team doctors were going to make decisions regarding the ability of a player to train or play in a game; these decisions were now going to be made by Claimant.[13] (SMF ¶ 137.)

Interestingly enough, Claimant admitted during his testimony that, contrary to the clear direction of Mr. Rushing, he "ordered" the injured players to participate – at least walk – the trail on May 31, 2012. (SMF ¶ 138.) More specifically, Claimant testified that he "ordered" [redacted] and [redacted] to participate in the trail run even though Mr. Rushing explicitly informed Claimant that they had injuries and should not participate. (SMF ¶ 139.) In fact, as it relates to his forcing of injured players to participate in the May 31, 2012 trail run, Claimant testified as follows:

> Q. Did you instruct him to run on May 31st?
>
> A. ...I told that the injury group that Paul Rushing was referring to would be the Group No. 3 and they will walk the trail.
>
> Q. Okay. So, you did instruct him to walk the trail; correct?
>
> A. Yes.
>
> Q. And Paul Rushing had told you that he wanted him back inside the facility on the bike; correct?
>
> A. That's what he indicated before we leave the facility. He was making strong case that those players have to be in the facility on the bikes.

(SMF ¶ 141.)

As a result of their forced participation in the interval trail run on May 31st, at least three players – Mr. [redacted] Mr. [redacted] and Mr. [redacted] – suffered set-backs with their injuries, likely requiring these players to miss additional playing time. (SMF ¶ 144.) At least two of the

[13] Claimant made this statement to Mr. Rushing even though he readily admits that he is not a licensed athletic trainer. (SMF ¶ 143.)

injured players forced to participate in the May 31st run, [redacted] and [redacted] were unable to play in the next game for the Philadelphia Union. In fact, both players were unable to play for at least sixteen (16) days after the run. (SMF ¶ 145.)

Additionally, at least one player – [redacted] – was injured during the interval trail run. Mr. [redacted] testified directly on the point:

> I had pain in my foot the second day of the run, starting the run. A bit of pain that night. Tried to get through the first segment of the second – day run and [the Assistant Athletic Trainer] pulled me and said that's enough.
>
> ***
>
> ...Shortly after they sent me to Chip Hummer, the team doctor, the team physician, to get an MRI...It revealed I had a stress reaction. Dr. Hummer basically said had I gone any longer, it would have turned into a stress fracture. And subsequently I was on crutches for a few days, I couldn't put any weight on it...

(SMF ¶ 146.)

In short, Mr. [redacted] was injured on May 31, 2012 during the trail run – apparently due to the length and intensity of the running/training. (SMF ¶ 147.) As a result of the injury he suffered during the trail run, Mr. [redacted] was unable to play for at least a week – missing at least one game. (SMF ¶ 148.) Additionally, a "handful" of other players, including [redacted] (complaining that his "feet were on fire"), came to Mr. Rushing after the May 31, 2012 run seeking treatment – with several of the players being referred to a doctor the next day or within the next couple of days. (SMF ¶ 149.)

Importantly, not only did Claimant, against the clear directives of the Athletic Trainers, force injured players to participate in the May 31, 2012 trail run, but he also told Mr. Rushing that all medical decisions regarding the ability of a player to train or play in a game were now going to be made by Claimant. Additionally, as a result of Claimant's actions in this regard, the

injured players not only suffered setbacks relative to their injuries, but other players actually sustained injuries as a result of the length/intensity of the trail run.[14]

D. The Involvement of the League and the MLSPU Occurred Independently: It Was NOT Initiated by the Management of the Philadelphia Union.

On June 1, 2012 – the day after the May 31, 2012 trail run and, presumably, after Mr. Foose spoke with Philadelphia Union players[15] – Mr. Foose contacted Mr. Durbin[16] to inform him of the actions taken by Claimant during the May 31, 2012 practice; specifically informing Mr. Durbin of the excessive length/intensity of the trail run, the fact that Claimant withheld water from the players during the run, the fact that Claimant required injured players to participate in the run, and the confrontation Claimant had with medical staff.[17] (SMF ¶¶ 165-166.) At or around the same time, Mr. Durbin was also made aware of Claimant's actions during the May 31, 2012 practice from Evan Dabby,[18] who, at the time, was in charge of team trainers and medical operations for the League. (SMF ¶ 167.) More specifically, Mr. Dabby informed Mr. Durbin that the Philadelphia Union team trainer (Mr. Rushing) had a "very serious incident take place" during a training session – both as it related to having injured players participate in training and the withholding of hydration to players. (SMF ¶ 168.)

At the time he received the information from Mr. Foose and Mr. Dabby – on or about June 1, 2012 – the League, through Mr. Durbin, was already investigating the MLSPU

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[14] Several players testified relative to the length and intensity of the May 31, 2012 trail run, stating that it was absolutely excessive. In fact, according to Mr. [redacted], "[i]t was roughly twice as long as [he'd] ever run in [his] [redacted] years of professional soccer...including [his] time with the [United States] National Team." (SMF ¶¶ 153-155.) Similarly, Mr. [redacted], who has been a player within the League for [redacted] years and who also has experience playing for the United States Men's National Soccer Team, testified that he had never previously been asked to run the distance he was asked to run by Claimant during the trail run on May 31, 2012. (SMF ¶ 156.)

[15] The League, and not the Philadelphia Union, technically employs the players. (SMF ¶ 220.)

[16] At all times pertinent to the instant litigation, Mr. Durbin was responsible for investigating, on behalf of the League, any allegations of wrongdoing made against coaches. (SMF ¶ 166.)

[17] Although Mr. Foose obtained the information relating to the May 31, 2012 trail run from the players of the Philadelphia Union, he did not disclose the identity of the players to the League. (SMF ¶ 171.)

[18] As noted in more detail, Mr. Dabby was made aware of Claimant's actions on May 31, 2012 as a result of a report prepared by Mr. Rushing. (SMF ¶ 167.)

interference allegations against Claimant (made at the end of May, 2012). (SMF ¶¶ 169, 173.) Upon receipt of these additional allegations, "major alarm bells" went off for Mr. Durbin, and, as a result, he informed Mr. Foose that the League would immediately conduct an additional investigation into Claimant's actions during the May 31, 2012 trail run. (SMF ¶¶ 170, 172.) Mr. Durbin was responsible for overseeing the League's investigation into Claimant, although he was assisted by Brett Lashbrook, the Special Assistant to the Commissioner.[19] (SMF ¶¶ 177-178.)

Understanding the seriousness of the allegations made against Claimant and to ensure that the health and safety of the players were not put at further risk, Mr. Durbin called and emailed Mr. Sakiewicz informing him of the allegations made against Claimant – the most immediate of which was that Claimant was not following the advice/input of the trainer. (SMF ¶ 179.) In particular, on June 6, 2012, Mr. Durbin sent an email to Mr. Sakiewicz, providing him with a letter dated May 31, 2012, from Mr. Rushing to the Philadelphia Union's Team Physician, Dr. Chip Hummer. (SMF ¶ 181.) This May 31, 2012 letter of Mr. Rushing informed Mr. Durbin, the League, and Mr. Sakiewicz of the following issues relative to the May 31, 2012 practice:

- That Mr. Rushing felt the players' health was put at risk when they were not allowed to have water by Claimant during an 8-10 mile interval run in 80-82 degree heat;
- That Mr. Rushing felt at least three players suffered set-backs with their injuries;
- That when Mr. Rushing attempted to raise these issues with Claimant, he was advised by Claimant that neither he or any other member of the medical staff would make the determination as to which players are healthy enough to play in each game or to participate in training sessions – he was further told that these decisions were going to now be made by Claimant.

(SMF ¶ 182.)

[19] Significantly, the League does not have formal due process rules or appeal procedures with respect to coaches. (SMF ¶ 190.)

In response to Mr. Durbin's June 6, 2012 email, Mr. Sakiewicz sent an email to Mr. Durbin assuring him that he had instructed the medical staff to continue to administer the highest level of medical care to the players and, if anything should change or prevent them from doing that, Mr. Sakiewicz was to be notified immediately. (SMF ¶ 183.)

After ensuring that Mr. Sakiewicz understood the seriousness of the allegations against Claimant and that Mr. Sakiewicz was taking measures to ensure that the health and safety of the players were being protected, Mr. Durbin informed Mr. Sakiewicz that the League was performing an investigation into these allegations – an investigation that was in addition to the ongoing investigation the League was already performing as a result of the players union interference allegations made against Claimant at the end of May, 2012. (SMF ¶ 180.)

Shortly thereafter, Mr. Durbin determined that the League would conduct a series of interviews, and, after the completion of the interviews, Mr. Durbin would discuss the League's findings with Mr. Sakiewicz – before it put together a report formally detailing the League's findings. (SMF ¶ 184.) As the players of the Philadelphia Union were "extremely afraid" of the potential "consequences" or "retaliation" if it became known that they participated in the League's investigation, the MLSPU asked the League to put Confidentiality Agreements in place.[20] (SMF ¶ 174.) The MLSPU and the League where able to agree on the language of the Confidentiality Agreements and the League began its investigation into the allegations made against Claimant. (SMF ¶ 176.)

[20] Significantly, there was only one other instance in which the MLSPU asked the League to put in place a Confidentiality Agreement relative to a League investigation into misconduct – that other instance involved Claimant during Claimant's tenure as the head coach of another MLS team, DC United. (SMF ¶ 175.)

On Sunday, June 10, 2012, the League – through Mr. Durbin's investigation – conducted the contemplated series of interviews, initially interviewing Mr. Rushing[21] and then interviewing the players. (SMF ¶ 185.) Later in the day on June 10, 2012, after completing the interviews, Mr. Durbin contacted Mr. Sakiewicz and informed him that a formal report would be provided shortly, but that the testimony received from the players was "very disturbing." (SMF ¶ 191.) During their conversation on June 10, 2012, Mr. Durbin's view was that Claimant's employment needed to be terminated – specifically informing Mr. Sakiewicz that he believed Claimant "need[ed] to be fired." (SMF ¶ 192.)

A few days later, the League, through Mr. Durbin, issued the MLS Report – dated June 12, 2012 – which detailed the final results[22] of the investigation performed by the League relative to the allegations made against Claimant. (SMF ¶ 187.) When questioned as to why Mr. Durbin completed the investigation without interviewing Claimant, Mr. Durbin responded:

> The conclusion I came to, having heard the testimony of Mr. Rushing and, more importantly, the testimony that I did hear from the players, coupled with the testimony that was reported back to me by Mr. Lashbrook, **I didn't see a path forward at that point in time.**

(SMF ¶ 189) (emphasis added.)

Based upon the findings within the MLS Report, Mr. Foose believed Claimant's actions during the May 31, 2012 trail run created a "very, very dangerous situation" for the players, specifically noting:

> …it was a hot day, it was an extremely humid day – both of them were – and **the length of the runs was completely out of whack with anything that I had ever heard of any coaching staff doing within the League.**
>
> So, you know, every player was endangered with regard to the water **because it is simply not safe to be out in those conditions and running**

[21] In fact, as part of Mr. Durbin's investigation, Mr. Rushing was interviewed approximately three times. (SMF ¶ 186.)
[22] As of June 12, 2012, the League's investigation into the allegations against Claimant was complete. (SMF ¶ 188.)

> **that length** – even for athletes as fit as ours it is not safe to be out and doing that – without access to water.

(SMF ¶ 194) (emphasis added.)

Accordingly, the MLSPU took the following position relative to Claimant:

> **We certainly took a position and I think our position really from June 1st on was very clear, which was that [Claimant] needed to be removed as coach of the team and that it was not appropriate nor was it safe for our members to have him as coach of the team**. So from the moment we learned about the runs and the things that happened with those as well as the concussion issues, **our position was he can't continue as coach**.

(SMF ¶ 195) (emphasis added.)

Significantly, Mr. Foose, who had led the MLSPU since its inception on April 1, 2003, testified that the MLSPU had never previously (or subsequently) taken the position that a coach needed to be removed from a team. (SMF ¶ 196.) In this instance, however, the MLSPU felt so strong in its position relative to Claimant that it informed Mr. Durbin that it was contemplating a strike or withholding players from team activities if Claimant continued to coach the Philadelphia Union:

> So this was a conversation that took place between Jon Newman [counsel for MLSPU] and myself on the 10th and when we talked about what was going to be happening next, **the Union, Players Union, given their concern, the health and safety concern, for the players, the environment that the players were in, felt that if [Claimant] was going to continue to be the coach, that there were discussions about whether or not the players would, in fact, report for training**.

(SMF ¶ 197) (emphasis added.)

Simply put, the MLSPU believed that Claimant's actions warranted his termination – warranting him being "fired as the coach [of the Philadelphia Union]." (SMF ¶ 198.) Importantly, Mr. Durbin – and the League – shared the same view as Mr. Foose, with Mr. Durbin

specifically testifying that Claimant's actions could not be corrected and, as a result, he believed Claimant "need[ed] to be fired." (SMF ¶¶ 199-200.)

It is extremely important to reiterate and note here that Mr. Foose and Mr. Durbin were not made aware of the Claimant's actions by Mr. Sakiewicz or any other member of the Philadelphia Union's management. To the contrary, after receiving a telephone call from Mr. Foose, *Mr. Durbin contacted Mr. Sakiewicz* to advise him of the allegations made against the Claimant and the fact that the League would be performing an independent investigation into such allegations. (SMF ¶¶ 165-166, 179.) Moreover, neither Mr. Sakiewicz nor any other member of the Philadelphia Union's management was involved in the investigation performed by the League – the investigation, including the conclusions detailed within the resulting MLS Report, was independently performed by the League with the cooperation of the MLSPU. Accordingly, *both Mr. Durbin and Mr. Foose came to their conclusions – that Claimant could not continue to coach the Philadelphia Union – on their own, completely independent of Mr. Sakiewicz or anyone else from the management of the Philadelphia Union.* (SMF ¶ 200.)

E. Mr. Sakiewicz's Knowledge of and Independent Investigation into the Claimant's Actions.

As noted in the prior subsection, the investigation performed by the League was not initiated by Mr. Sakiewicz or anyone else within the management of the Philadelphia Union; it was initiated by the MLSPU when Mr. Foose – presumably after speaking with the players[23] – contacted Mr. Durbin to advise him of the issues surrounding the May 31, 2012 trail run.[24] (SMF ¶¶ 165-166.) However, Mr. Sakiewicz became aware of Claimant's inappropriate actions and he did perform an investigation on behalf of the Philadelphia Union relative to such actions.

[23] To reiterate, the League, and not the Philadelphia Union, technically employs the players. (SMF ¶ 220.)
[24] Additionally, it was the MLSPU – Mr. Foose – that informed the League about the interference and retaliation issues. (SMF ¶¶ 57-58.)

To illustrate, on May 31, 2012, shortly after the conclusion of the trail runs, Mr. Sakiewicz was made aware that the Claimant required the players, including injured players, to run approximately 10 miles on the trails at YSC without hydration. (SMF ¶ 201.) Later that same day in this regard – May 31, 2012 – Mr. Sakiewicz spoke with the team physician, Dr. Chip Hummer, for approximately 45-60 minutes, attempting to understand which players on the team were injured, the level of their respective injuries, the potential impact the lack of hydration can have on players, and the exact details of the length of the trails runs. (SMF ¶ 202.) Mr. Sakiewicz also asked Dr. Hummer to document his knowledge and opinion relative to the trail runs that took place on May 31, 2012. (SMF ¶ 203.)

After speaking with Dr. Hummer – still on May 31, 2012 – Mr. Sakiewicz contacted Mr. Rushing and asked Mr. Rushing to describe the events that took place that morning during the trail runs. (SMF ¶ 204.) Mr. Rushing's conversation with Mr. Sakiewicz occurred after Mr. Rushing had both sent his May 31, 2012 letter to Dr. Hummer (SMF ¶ 205) and reached out to John Gallucci, one of the medical coordinators for the League.[25] (SMF ¶ 205). During their conversation, which was approximately an hour long, Mr. Rushing was "shaken," his "voice was cracking," and he was "very, very upset," as he was worried about losing his athletic training license because of the events that took place during the May 31, 2012 trail runs. (SMF ¶ 206.) Mr. Sakiewicz, obviously alarmed by Claimant's actions, told Mr. Rushing that he no longer reported to Claimant and that he was to ensure that all players were appropriately hydrated, that he delivered the utmost care to the players, and that he should immediately contact Mr. Sakiewicz if anyone hindered his ability to comply with these directives. (SMF ¶ 207.)

[25] 150) Of note, after the conclusion of the run, Mr. Rushing was "upset and confused," and worried about the status of his license as an athletic trainer and, as such, he decided – on his own accord – to contact John Gallucci, one of the medical coordinators for the League, and asked him for advice.

After speaking with Dr. Hummer and Mr. Rushing, Mr. Sakiewicz contacted Mr. Debusschere, the Philadelphia Union's Executive Vice President and CFO, and informed him of the situation related to the trail run and directed Mr. Debusschere to monitor the team's training activities, to have a conversation with Josh Gros – a team administrator – to investigate further what went on during the trail run and to obtain a timeline of the events, and to attend the next practice or have someone attend the team's next practice to ensure that the proper medical treatment was being provided to the players. (SMF ¶ 208.)

Again, Mr. Sakiewicz did not contact Mr. Durbin or anyone else within the League's Commissioner's office to discuss Claimant's actions relative to the May 31, 2012 trail run. (SMF ¶ 209.) To the contrary, on or about June 6, 2012, Mr. Sakiewicz received a voicemail and an email from the League – by way of Mr. Durbin – informing Mr. Sakiewicz that a series of allegations were made against Claimant – the most immediate is that Claimant was not following the advice/input of the trainer – and the League was performing an investigation into the allegations.[26] (SMF ¶ 209.) Accordingly, while Mr. Sakiewicz already had knowledge of the Claimant's actions during the May 31, 2012 trail run from Dr. Hummer and Mr. Rushing, he was also later made aware of Claimant's actions and the fact that the League was performing an investigation into Claimant's actions by Mr. Durbin on June 6, 2012. (SMF ¶ 213.)

On or about June 7, 2012, Dr. Hummer sent Mr. Sakiewicz an email, which attached another copy of Mr. Rushing's May 31, 2012 letter to Dr. Hummer, as well as a letter from Dr. Hummer to Mr. Sakiewicz dated June 7, 2012. (SMF ¶ 216.) Dr. Hummer's June 7, 2012 letter notified Mr. Sakiewicz of the following:

[26] The investigation referred to in the June 6, 2012 email was in addition to the investigation the League was already performing as a result of the players union interference allegations previously made against Claimant (at the end of May, 2012), and of which Mr. Sakiewicz was previously made aware. (SMF ¶ 210.)

- Players running a significant distance in 82 degree heat on concrete without the availability of hydration may put the players at risk of electrolyte imbalance or subject them to risk of heat stroke;

- Players with existing lower extremity injuries could have those injuries exacerbated with increased healing time if they participated in a long distance run on a concrete surface on two consecutive training days;

- [redacted] relates his severe right lateral mid foot pain to the trail runs. His working diagnosis is mid foot capsular sprain and his return to play is indeterminate.

(SMF ¶ 214.)

To that end, although the investigation performed by the League was not initiated by Mr. Sakiewicz or anyone else within the management of the Philadelphia Union, Mr. Sakiewicz was keenly aware of Claimant's inappropriate actions during the May 31, 2012 trail run and he did in fact perform his own investigation on behalf of the Philadelphia Union relative to such actions.

III. ARGUMENT

A. Standard of Review

At times in this litigation, the Parties have indirectly and, in some cases, directly argued that the primary issue in the instant litigation is whether the Philadelphia Union had "just cause" to terminate the Employment Agreement.[27] Such a classification of the primary issue in this matter is misleading. The Employment Agreement does not – in any respect – reference a "just-cause" standard. Rather, as noted in significant detail below, the Parties, after negotiating the terms of the Employment Agreement through their respective counsel, agreed to provide the Philadelphia Union with the authority to terminate the Employment Agreement should it determine, in its good faith discretion, that Claimant engaged in certain conduct delineated within the Agreement.

[27] In fact, Claimant specifically utilized the phrase "just cause" within his Arbitration Demand.

Accordingly, the primary issue in this matter is not whether the Philadelphia Union had "just cause" to terminate Claimant in the traditional sense; rather it is whether, in accordance with the express terms of the Employment Agreement, the Philadelphia Union had "a good faith basis to exercise its discretion to terminate the Employment Agreement." In other words, the resolution of the instant litigation does not involve the "just-cause" standard routinely applied in traditional labor arbitrations. Instead, it involves a simple assessment of the basic principles of Pennsylvania contract law.

B. Pertinent Contractual Language within the Employment Agreement.

The Employment Agreement contains the following provisions relevant to the instant litigation:

1. Termination Provisions – Providing the Philadelphia Union with Sole Discretion to Terminate the Employment Agreement.

On or about June 1, 2009, Claimant and the Philadelphia Union entered into a Manager Employment Agreement (the "Employment Agreement"). (SMF ¶ 7.) Prior to Claimant's execution of the Employment Agreement, Claimant's retained counsel, William Daluga, Esq., negotiated the terms of the Employment Agreement on behalf of Claimant and, in fact, "was one of the authors of the [Employment Agreement]." (SMF ¶ 8.) In executing the Employment Agreement, the Parties agreed that the Employment Agreement would commence on June 1, 2009, and extend to December 31, 2012[28] – unless "sooner terminated as provided [within the Employment Agreement]." (SMF ¶ 11.) In this regard, the Employment Agreement contained the following unambiguous termination provision:

> ...Club may terminate this Agreement, and Manager's employment hereunder, upon written notice by Club to Manager in the event of the occurrence of any of the following:

[28] As detailed within the Philadelphia Union's Proposed Statement of Material Facts, the Parties ultimately agreed to extend the terms of the Employment Agreement to December 31, 2015. (SMF ¶¶ 27-29.)

> ***
>
> (2) ...**any material breach of this Agreement** or the Pino Agreement...by Manager;
>
> (3) **Manager's gross negligence or willful misconduct** in performing his duties hereunder;
>
> ***
>
> (5) Manager's **commission of any action or involvement in any occurrence that (x) brings Manager into public disrepute or (y) reflects in a materially adverse manner on the integrity, reputation or goodwill of Club or the Team;**
>
> (6) Manager **engages in any activity set forth in Paragraph I(C);**
>
> (7) **Manager's failure to comply in all material respects with Team Rules...or League Rules;** or
>
> (8) **Club is directed by the Commissioner of the League to terminate *or suspend* this Agreement as a result of the acts or omissions of Manager.**

(SMF ¶ 14) (emphasis added.)

As it relates to Subsection (III)(A)(5), Paragraph I(C)(v) of the Employment Agreement provides, in pertinent part:

> Manager expressly acknowledges and agrees that he shall be subject to discipline by the League...or Club...including without limitation, fines, suspension (with or without pay) or termination of this Agreement if:
>
> ***
>
> (v) he makes a statement or engages in conduct...that is materially prejudicial to the interests of the League or the Team or materially detrimental to the public image and/or reputation of the League, the Club and/or the game of soccer.
>
> ...Club...shall determine, **in good faith and its sole discretion**, whether Manager has engaged in any of the above-listed behaviors.

(SMF ¶ 13) (emphasis added.)

In addition to providing the Club with the "sole discretion" to determine whether Claimant engaged in the conduct encompassed in Paragraph I(C)(v), the Employment Agreement, through Paragraph III(C), provided the Philadelphia Union with the sole discretion to enforce the termination provision – to enforce Paragraph III(A). More specifically, Paragraph III(C) of the Employment Agreement provides, in pertinent part:

> Whether Club has terminated this Agreement pursuant to Paragraph III(A) or (B) shall be determined in good faith by Club **at its reasonable discretion**; provided that:
>
> (i) prior to terminating Manager pursuant to Paragraph III(A), club shall specify in reasonable detail the reason Manager is being so terminated and give Manager an opportunity to respond thereto;
>
> ***
>
> (iii) prior to terminating Manager pursuant to clause (2), (3), or (7) of Paragraph III(A), Club shall allow Manager fifteen (15) days to cure the occurrence, except that club shall have no obligation to provide Manager such opportunity to cure **if Club determines, in its good faith judgment**, that the occurrence is of a nature that is not curable or that Manager's continued employment during a cure period could be [sic] reasonably be expected to result in material harm to Club.

(SMF ¶ 15) (emphasis added.)

Under Pennsylvania law, contracts are interpreted in accordance with the plain meaning rule, which assumes that the intent of the parties to an instrument is "embodied in the writing itself." *Duquesne Light Co. v. Westinghouse Elec. Corp.*, 66 F.3d 604, 613 (3d Cir.1995) (*quoting Hullett v. Towers, Perrin, Forster & Crosby, Inc.*, 38 F.3d 107, 111 (3d Cir.1994)). Pennsylvania courts do not rewrite contracts to change the plain meaning of the terms used. *Steuart v. McChesney*, 498 Pa. 45, 444 2d 659, 662 (1982) (*citing Hagarty v. William Akers, Jr. Co.*, 342 Pa. 236, 20 A.2d 317 (1941)). Moreover, Pennsylvania courts do not "distort the meaning of the language or resort to a strained contrivance in order to find ambiguity." *Madison*

Const. Co. v. Harleysville Mut. Ins. Co., 537 Pa. 595, 735 A.2d 100 at 106 (1999). If the writing on its face is clear and unambiguous, the parties' mutual intent is found only in the express language of the agreement. *Atkinson v. Lafayette College*, 460 F.3d 447, 452 (3d Cir. 2006).

Here, the foregoing provisions of the Employment Agreement are unambiguous and only capable of one reasonable interpretation. Pursuant to the express terms of these provisions, the Parties agreed to give the Philadelphia Union the sole discretion to terminate the Employment Agreement if the Philadelphia Union: (1) determines – ***in its reasonable discretion*** – that Claimant engaged in any of the conduct delineated in Paragraph III(A) of the Employment Agreement; and/or (2) if it determines, ***in its good faith discretion,*** that Claimant made a statement or engaged in "conduct…that is materially prejudicial to the interests of the League or the Team or materially detrimental to the public image and/or reputation of the League, the [Philadelphia Union] and/or the game of soccer." (SMF ¶¶ 13-16.) To put it another way, the Parties, through their respective counsel, negotiated and agreed to provide the Philadelphia Union with the ability to terminate the Employment Agreement if it had a good faith basis to conclude that Claimant engaged in the conduct delineated in Paragraph I(C)(v) or Paragraph III(A) of the Employment Agreement. This contractually allocated discretion is not surprising considering the context of the Employment Agreement, which placed Claimant in a position of being one of the Philadelphia Union's most visible representatives while, at the same time, providing him with a significant salary, the potential for bonuses, and other valuable compensation.

2. *The Philadelphia Union's Obligations Should it Exercise Its Discretion to Terminate the Employment Agreement.*

In exercising its discretionary right to terminate the Employment Agreement, the Philadelphia Union – pursuant to the unambiguous terms of the Employment Agreement – is

only obligated to act in in good faith and to provide Claimant with: (1) notice of the reasons surrounding the termination; (2) the opportunity to respond; and (3) in certain limited circumstances, the ability to cure his conduct. (SMF ¶¶ 13-16.) The Employment Agreement does not contain or reference any other prerequisites or obligations that must be met before the Philadelphia Union exercises this discretionary right. In particular, the Employment Agreement does not require the Philadelphia Union to conduct a particular investigation into actions taken by Claimant, nor does it require the Philadelphia Union to provide Claimant with a certain amount of time before it exercises its discretionary right to terminate the Employment Agreement. It simply requires the Philadelphia Union to exercise its discretion in good faith and to provide Claimant with notice, the opportunity to respond and, in certain limited circumstances, the ability to cure his actions. (SMF ¶¶ 13-16.)

3. Claimant's Limited Opportunity to Cure his Conduct.

While the Employment Agreement provides Claimant with the limited ability to cure his conduct – only applying to instances in which the Philadelphia Union determined that Claimant engaged in the conduct delineated within Paragraph III(A)(2), (3), or (7) of the Employment Agreement – it further provides that the Philadelphia Union was under absolutely no obligation to provide Claimant with an opportunity to cure if it determined – ***in its good faith judgment*** – that the conduct engaged in by Claimant is of a nature that is not curable, or that the continued employment of Claimant during a cure period could reasonably be expected to result in material harm to the Philadelphia Union. (SMF ¶ 17.)

Accordingly, Claimant's *potential* ability to cure is limited by the Employment Agreement in two significant respects. First, it does not apply to instances in which the Philadelphia Union determined – ***again, in its sole discretion*** – that Claimant engaged in any of

the conduct outlined in Paragraph III(A)(4), (5), (6), or (8) of the Employment Agreement. Additionally, in the limited circumstances in which the cure provision is potentially applicable – when the Philadelphia Union relies upon Paragraph III(A)(2), (3) or (7) to terminate the Employment Agreement – Claimant would still not be provided with the ability to cure if the Philadelphia Union determined, ***again, in its good faith judgment***, that the conduct engaged in by Claimant was of a nature that was not curable, or that Claimant's continued employment during the cure period could reasonably be expected to result in material harm to the Philadelphia Union.

4. Summation of Pertinent Contractual Language.

To that end, the Parties, after negotiating the terms of the Employment Agreement through counsel of their choice, expressly agreed to provide the Philadelphia Union with the ability to terminate the Employment Agreement if it determined – ***in its sole discretion*** – that it has a good faith basis to conclude that Claimant engaged in certain delineated categories of employee misconduct. Moreover, while, in certain limited instances, the Employment Agreement provided Claimant with the ability to cure his misconduct, the Philadelphia Union was expressly given the discretion to determine whether the ability to cure was inappropriate under the circumstances.

C. The Philadelphia Union's Exercise of its Discretionary Right to Terminate the Employment Agreement.

1. The Termination of the Employment Agreement.

a. Notice and Opportunity to Respond.

On June 13, 2012, at approximately 7:31 a.m., Nick Sakiewicz sent Claimant an email informing Claimant that he received a memo from the League concerning an investigation the League had been conducting, and specifically outlining several of the findings made by the

League. (SMF ¶ 320.) Specifically, the June 13, 2012 email from Mr. Sakiewicz to Claimant notified Claimant of the following findings made by the League:

- Claimant jeopardized the health and safety of the players by restricting access to water during training;
- Claimant jeopardized the health and safety of injured players by requiring them to participate in training activities against the advice of the team medical staff;
- Claimant jeopardized the health and safety of the players by creating an atmosphere where concussion symptoms should be kept from the medical staff and not treated;
- Claimant engaged in inappropriate physical contact with rookie players as part of an annual "hazing";
- Claimant interfered with the players right to contact the MLSPU with concerns; and
- Claimant created an overall "culture of fear" where players did not believe they had the ability to raise and address concerns regarding their work environment without retribution.

(SMF ¶ 321.)

Within the June 13, 2012 email, Mr. Sakiewicz also asked Claimant to meet him in his office at 9:00 a.m., to discuss the League's findings in greater detail. (SMF ¶ 322.) Mr. Sakiewicz was actually "anxious" to meet with Claimant to discuss the findings of the League and to give Claimant an opportunity to respond.[29] (SMF ¶ 323.) Claimant did in fact meet with Mr. Sakiewicz on June 13, 2012, at approximately 9:00 a.m. (SMF ¶ 324.) Present at the June

[29] In fact, Mr. Sakiewicz's plan for the meeting with Claimant was explained as follows:

> My intention was to share the document with him that we drafted for his termination that outlined six points [Document 36] and went through each point diligently with him. And if he would have brought…concerns/ issues…objections/proof, anything in that meeting, Mr. Haines, I'm a reasonable guy, I hired [Claimant]…to a long-term agreement, I wanted to have a long run with [Claimant] and building our team, I would have listened. I would have given him 48 hours to explain each and every issue. But unfortunately the meeting lasted 25 or 30 minutes.

(SMF ¶ 330.)

13, 2012 meeting, which lasted approximately 25-30 minutes, was Claimant, Mr. Sakiewicz, and Mr. Debusschere. (SMF ¶¶ 325-326.)

During the meeting, Mr. Sakiewicz went through the six League findings – as summarized in Mr. Sakiewicz's June 13, 2012 email – giving Claimant as much time as he wanted to discuss each finding.[30] (SMF ¶ 327.) During this discussion, Claimant was specifically asked whether the findings were true and his response was simply "this isn't true" and "this is bullshit"; he did not offer any type of a substantive response to suggest that the League's findings were actually untrue.[31] (SMF ¶ 328.)

Claimant acknowledged during his testimony that, on the date of his termination, he was provided with a copy of the termination letter and made aware of the issues contained within the termination letter. (SMF ¶ 335.) The termination letter advised Claimant that the Philadelphia Union was exercising its discretionary right to terminate the Employment Agreement, pursuant to Paragraph III(A), as a result of:

- Claimant's various breaches of League Rules (including the League's CBA), including physical confrontations with players during a game resulting in a fine and multi-game suspension, interfering with the rights of players to contact the MLSPU, subjecting players to inappropriate hazing activities and engaging in behavior that put the health and safety of the players at risk;

- Claimant's material breaches of the Employment Agreement, including engaging in discussions regarding and otherwise actively seeking, employment by other professional soccer teams in Europe and making disparaging remarks to third parties regarding the Philadelphia Union and its management;

[30] Significantly, Mr. Sakiewicz had previously discussed several of the issues, including the players' interference issue with Claimant on multiple occasions prior to the June 13, 2012 meeting. (SMF ¶ 329.)

[31] On June 13, 2012, at 9:33 a.m. – immediately after his June 13, 2012 meeting with Claimant concluded – Mr. Sakiewicz sent an email to the Commissioner of Major League Soccer, Don Garber, informing him that Claimant had been terminated. (SMF ¶ 332.) In response, Mr. Garber sent Mr. Sakiewicz an email asking "[h]ow did [Claimant] handle it?" (SMF ¶ 333.) Mr. Sakiewicz responded to Mr. Garber's inquiry, informing him that Claimant acted – in typical fashion – very poorly and blaming everyone else. (SMF ¶ 334.) This email exchange confirms that Claimant was given the opportunity to respond to the reasons given relative to the termination of the Employment Agreement.

- Claimant's demonstrating gross negligence, including putting the health and safety of players at risk by requiring injured players to participate in strenuous training activities, not allowing players to have water during such activities, ignoring the advice of the athletic trainers regarding which players are healthy enough to practice or play in games and creating an atmosphere where medical issues should be hid from medical staff;

- Claimant's committing actions that have reflected in a materially adverse manner on the integrity, reputation and goodwill of the Philadelphia Union (in the eyes of the League, U.S. Soccer, current and potential players, sponsors and fans);

- Claimant's multiple incidents of insubordination with respect to the Chief Executive Officer; and

- Claimant's various material breaches of Team Rules, including creating a hostile work environment and culture of fear for players and other front office employees by orally berating and physically intimidating fellow employees.

(SMF ¶ 335.)

b. The Issuance of the Termination Letter.

After walking Claimant through the reasons surrounding the Philadelphia Union's decision to exercise its discretionary right to terminate the Employment Agreement, Claimant was provided with two options: (1) he would be presented with an executed termination letter; or (2) he could sign a mutually agreeable separation agreement and release. (SMF ¶ 336.) Claimant was then asked whether he had any questions and Claimant simply asked that the termination letter and separation agreement be sent to his attorney, William Daluga, Esq.[32] (SMF ¶ 337.) At Claimant's request, later that same day – on June 13, 2012 – Mr. Debusschere sent both the termination letter and the proposed Separation Agreement to Mr. Daluga. (SMF ¶ 338.) Approximately three to four weeks later, Claimant, through Mr. Daluga, notified the Philadelphia Union that he would be filing suit in Federal Court. (SMF ¶ 339.) As a result, the Philadelphia Union formally issued the termination letter to Claimant. (SMF ¶ 340.)

[32] At Claimant's request, later that same day – on June 13, 2012 – Mr. Debusschere sent both the termination letter and the proposed Separation Agreement to Attorney Daluga. (Respondent Exhibit 63; Hearing Trans., 111:11-112:13.)

2. *Claimant's Material Breaches of the Employment Agreement.*

As noted in Subsection III.B., *supra*, pursuant to Paragraph III(A)(2) and Paragraph III(C) of the Employment Agreement, the Philadelphia Union had the right to terminate the Employment Agreement if it determined – in its good faith discretion – that Claimant materially breached the Employment Agreement. (SMF ¶¶ 14-16.) In other words, ***if the Philadelphia Union had a good faith basis to determine that Claimant materially breached the Employment Agreement, it – in its sole discretion – could terminate the Employment Agreement.*** It is important to immediately reiterate that the Philadelphia Union does not necessarily need to establish a material breach. Indeed, pursuant to the terms of the Employment Agreement, the Philadelphia Union is only required to establish that it had a good faith basis to determine that a material breach in fact occurred. *See Duquesne Light Co. v. Westinghouse Elec. Corp.*, 66 F.3d 604, 613 (3d Cir.1995) (contracts are interpreted in accordance with the plain meaning rule, which assumes that the intent of the parties to an instrument is "embodied in the writing itself."); *Murphy v. Duquesne Univ.*, 565 Pa. 571, 777 A.2d 418, 429 (Pa.2001); (it is settled law that "when a writing is clear and unequivocal, its meaning must be determined by its content alone."); *Steuart v. McChesney*, 498 Pa. 45, 444 A.2d 659, 661 (Pa.1982) (the intent of the parties to a written agreement is to be regarded as being embodied in the writing itself).

As noted within the Termination Letter, Claimant materially breached the Employment Agreement in several material respects.[33] Foremost, contrary to Paragraph I(B) of the Employment Agreement, Claimant violated numerous League Rules (including the League's CBA with the MLSPU). Secondly, contrary to Paragraph VII of the Employment Agreement, Claimant, during the time he was employed by the Philadelphia Union, engaged in discussions

[33] To reiterate, although it clearly can, the Philadelphia Union does not need to establish a "material" breach; pursuant to the terms of the Employment Agreement, it is only required to establish that it had a good faith basis to determine that a material breach occurred.

with and otherwise sought employment with other professional soccer teams. Finally, Claimant, contrary to Paragraph IX(D) of the Employment Agreement, made disparaging remarks about the Philadelphia Union and its management.

Each of the aforementioned breaches standing alone amount to a material breach of the Employment Agreement giving the Philadelphia Union the good faith basis to exercise its discretionary right to terminate the Employment Agreement. However, the fact that Claimant breached the Employment Agreement in several respects gave the Philadelphia Union even broader latitude to exercise its discretionary right to terminate the Employment Agreement. *See Kang v. Trustees of Univ. of Pennsylvania*, 2010 WL 5596577 (Pa. Com. Pl. Aug. 23, 2010) *aff'd in part, rev'd in part sub nom. Kang v. Trustees of the U of Pa.*, 64 A.3d 30 (Pa. Super. Ct. 2012) (acknowledging that where an employee continued to engage in misconduct that was a violation of employer's policy—and thus, a breach of the employment contract—a material breach of the employment contract occurs, notwithstanding the fact that the first incident of misconduct may not have been material by itself).

a. Claimant's Violations of League Rules – Materially Breaching Paragraph I(B) of the Employment Agreement.

As noted within the Termination Letter, Claimant committed various breaches of League and Team Rules, which amounted to material breaches of the Employment Agreement and provided the Philadelphia Union with a good faith basis to exercise its discretionary right to terminate the Employment Agreement.

i. Claimant's Violation of the Collective Bargaining Agreement by Interfering and Retaliating Against the Players for Exercising Their Rights to Contact the MLSPU.

As part of the Employment Agreement, Claimant agreed to comply with all constitutions, bylaws, rules, regulations, policies, guidelines, directives, instructions, rulings, orders and

agreements of the League. (SMF ¶ 287.) These categories obviously include Claimant's agreement to comply in all material respects with the League's Collective Bargaining Agreement or "CBA" with the players. (SMF ¶ 38.) As outlined in specific detail in Section II.A., *supra*, the record evidence illustrates that Claimant, contrary to the terms of the CBA, interfered with and retaliated against the players for exercising their rights to contact the MLSPU. Indeed, the record evidence establishes:

- At the end of the 2012 preseason training camp, representatives from the MLSPU, including Mr. Foose, visited with the Philadelphia Union's players and, following that meeting, Mr. Foose advised Claimant, through Mr. Gutierrez, that a [redacted] issue had been brought to the attention of the MLSPU. (SMF ¶¶ 38-39, 41.)

- Although Mr. Foose believed the issue was resolved, Claimant took it upon himself to meet with Mr. [redacted] and Mr. [redacted], the [redacted] to: (1) ask them to identify the player that raised the [redacted] issue with the MLSPU; and (2) tell them that issues, including the [redacted] issues, should be brought to the Claimant and not the Players Union – directing them not to contact the MLSPU. (SMF ¶¶ 40, 42-45.)

- After meeting with Mr. [redacted] and Mr. [redacted] in his office, Claimant held a team meeting and communicated the same message to the team – that issues, including the [redacted] issue, should be brought to his attention and not the Players Union. (SMF ¶ 46.) Claimant admits that, during this team meeting, he told the players the following:

  > ...So if any kind of issues will occur, **I told them basically that please, if you have any kind of concerns, any issues**...just to tell them if you have any kind of issues, **please see us first so we will not have problems or questions from the Players Union about any kind of concerns you have or you might have in the future**.
  >
  > (SMF ¶ 48) (emphasis added.)

- Following the team meeting, Claimant still did not believe the issue was resolved; he was determined to identify the player that brought the [redacted] issue to the attention of the MLSPU. Accordingly, Claimant called Mr. [redacted][34] and Mr. [redacted] separately, again, asking each of them to reveal the identity of the player that went to the MLSPU with the [redacted] issue. (SMF ¶¶ 49, 51.)

[34] Although Claimant denies making this call, another Philadelphia Union player, [redacted] was present at the time Mr. [redacted] received the phone call from Claimant and confirmed, through his testimony, that Claimant did in fact make this call to Mr. [redacted] (SMF ¶ 50.)

- Apparently unsatisfied with refusal of Mr. [redacted] and Mr. [redacted] to reveal the identity of the player that brought the [redacted] issue to the MLSPU, Claimant decided to contact Mr. Foose. (SMF ¶ 52.) During his conversation with Mr. Foose, Claimant not only informed Mr. Foose that he did not think it was appropriate for players to be talking to the MLSPU, but he also specifically asked Mr. Foose to identify the player that brought the [redacted] issue to his attention – to the attention of the MLSPU. (SMF ¶ 53.)

- Although this was an "extremely unusual conversation" for Mr. Foose, he did not immediately contact the League, as he was made aware of the communications between Claimant and Mr. [redacted] and he was afraid Claimant would retaliate against Mr. [redacted] (SMF ¶ 55.)

- Mr. Foose's apprehension in this regard turned out to be warranted, as Claimant, admittedly believing that Mr. [redacted] brought the [redacted] issue to the attention of the MLSPU, traded Mr. [redacted] a mere two-weeks after Claimant made the telephone call to Mr. [redacted] specifically asking him whether he was the one who raised the issue with the MLSPU. (SMF ¶ 56.)

- After Mr. [redacted] was traded, the MLSPU brought the following three issues to the attention of the League during a prescheduled meeting it had with the League on May 22, 2012: (1) the [redacted] issue; (2) two separate interference issues – Claimant informing players not to contact the Players Union and Claimant pressuring [redacted] to disclose the identity of individuals exercising their Union rights; and (3) their belief that Mr. [redacted] was traded in retaliation for Claimant's belief that Mr. [redacted] raised the [redacted] issue with the MLSPU. (SMF ¶ 57.)

To that end, the record evidence establishes that Claimant interfered with the rights of the players – namely Mr. [redacted] and Mr. [redacted] – to raise issues with the MLSPU. Indeed, Claimant not only directed the players not to contact the MLSPU with issues, but he also attempted to coerce the players (and Mr. Foose) to reveal the identity of the player that already brought an issue – the [redacted] issue – to the MLSPU. Moreover, within a few weeks, Claimant traded away the player he admittedly believed was responsible for the [redacted] issue being brought to the MLSPU.[35] (SMF ¶ 57.)

[35] It is worth reiterating that a game or two after Mr. [redacted] was traded – Claimant threatened the team, specifically stating that:

> …he couldn't be fired…he wasn't afraid to do anything in regards to the team…

This interference and retaliation violated the express terms of the CBA, which specifically allow for players to raise issues to the MLSPU, whom, in turn, has the ability to raise such issues with the League and, if necessary, to file a grievance on behalf of the player (Article 21 of the CBA; Respondent Exhibit 66.) Claimant's repeated attempts to restrain, coerce, and threaten the players in an attempt to prevent them from exercising their right to contact the MLSPU directly conflicts with and violates the express terms of the CBA. This, in turn, violates League Rules and constitutes a material breach of the Employment Agreement. Similarly, Claimant's retaliating against Mr. [redacted] directly conflicts with and violates the express terms of the CBA, which, in turn, violates League Rules and constitutes a material breach of the Employment Agreement.

Such breaches are material[36] considering Claimant's actions in this regard not only violated the CBA and, thus, League Rules, but such actions also violated The National Labor Relations Act ("NLRA"). Indeed, it is well settled that coercively interrogating or retaliating against employees to discourage union activities violates Section 8 of the NLRA. *See Central Transport v. NLRB*, 997 F.2d 1180 (7th Cir.1993). If Claimant's actions were enough to constitute violations of the law, then they were certainly enough to constitute a material breach of the Employment Agreement and to provide the Philadelphia Union with a good faith basis to exercise its discretionary authority to terminate the Employment Agreement. As noted in detail

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> ...he wasn't afraid to shake the tree...he had traded away [redacted] and [the] leading goal scorer...[he] wasn't afraid to make moves and to roll with it.

(SMF ¶ 94.)

Accordingly, while Claimant maintains that his trading of Mr. [redacted] was not retaliatory in nature, the record evidence establishes that Claimant used his trading of Mr. [redacted] referred to in his emotional statement, to threaten the players.

[36] To reiterate, although it clearly can, the Philadelphia Union does not need to establish a "material" breach; pursuant to the terms of the Employment Agreement, it is only required to establish that it had a good faith basis to determine that a material breach occurred.

above, if the Philadelphia Union has a good faith basis to determine that the Claimant materially breached the Employment Agreement, it has the discretion to terminate the Employment Agreement. As detailed within the Termination Letter, the Philadelphia Union made the decision to exercise its discretionary right in this regard, and, as a result, it appropriately terminated the Employment Agreement and Claimant's Arbitration Demand should be dismissed as a matter of law on this independent basis alone.

ii. Claimant's Violation of League Rules During the April 21, 2012 Chivas USA game.

As explained in specific detail in Subsection II(B), *supra*, during the April 21, 2012 game against Chivas USA, Claimant left the coach's Technical Area, charged onto the field of play, participated in a "melee," and initiated physical contact with a player on the opposing team. (SMF ¶¶ 67-72.) As a result of Claimant's actions in this regard, he received a red card and was ejected from the game, requiring the Philadelphia Union to complete the game without their head coach. (SMF ¶¶ 62.) Subsequent to the game, the League conducted an investigation and determined that Claimant's actions during the April 21, 2012 Chivas USA game violated League rules,[37] and, as a result, the League suspended Claimant for two additional games and personally fined him $5,000. (SMF ¶¶ 73, 76.) Additionally, the League fined the Philadelphia Union $5,000 directly. (SMF ¶¶ 74-75.)

Claimant's actions during the April 21, 2012 Chivas USA game indisputably violated League Rules and, considering that Claimant was contractually obligated to comply with all League Rules, his failure to do so during the April 21, 2012 Chivas USA game breached the Employment Agreement. Moreover, this breach was material for several reasons. First, it not

[37] As detailed within the 2012 Game Operations Manual, coaches are not permitted to leave the Technical Area and enter the field of play during a game. (SMF ¶ 73.) Additionally, it is considered a Major Game Misconduct for a coach to engage in "fighting" or "provoke a fight" during a game. (SMF ¶ 73.)

only resulted in fines levied on both Claimant and the Philadelphia Union, but, more importantly, it resulted in Claimant being suspended – unable to coach – two of the Philadelphia Union's regular season League games. In other words, Claimant was unable to perform the duties he was hired to perform – coach the Philadelphia Union – for two League games. Also relevant to this point is that the Philadelphia Union lost both of these games. (SMF ¶¶ 85, 87.)

Second, Claimant actually physically contacted a player on the opposing team. (SMF ¶¶ 67-68, 72-73.) This act in and of itself is reprehensible – there is no justification for Claimant losing his temper to the point of physically pushing a player. Indeed, there have been very few instances where a coach of a professional or collegiate team in the United States initiated contact with any player, let alone a player on the opposing team. One such well-known instance occurred in the 1978 Gator Bowl between Clemson and Ohio State. In that game, Ohio State coach, Woody Hayes, lost his temper and punched a player for Clemson. Coach Hayes, who had won three consensus national championships, was fired the next morning. It was the final game Coach Hayes ever coached.[38] Although we do not have the benefit of knowing the contractual language contained in Coach Hayes employment contract, we do know that getting physical with a player is simply unacceptable and warranted the immediate termination of a decorated coach.

Thirdly, Claimant's actions during the Chivas USA game were significantly embarrassing to the Philadelphia Union. Indeed, the resulting embarrassment from Claimant's actions during this game was summed up precisely by the television broadcaster as follows:

> And Peter Nowak lost his mind there. Yeah, he should be sent off. That's inexcusable. Inexcusable for a head coach to act in this manner.
>
> ...and that is what Baldomero Toledo is telling him. It's like: What's your justification? Just walk off. He's telling him: Peter, just go.

[38] http://www.foxsports.com/college-football/story/ohio-state-s-woody-hayes-shouldn-t-be-defined-by-the-infamous-clemson-punch-010214

> ...Look at Peter Nowak. See, that's why he gets sent off. What are you doing on the field?

(SMF ¶ 315.)

Fourth, this is not the first time Claimant was suspended from a game for engaging in similar actions; Claimant also received a red card and was ejected for leaving the Technical Area during a U.S. Open Cup game against DC United on April 6, 2011. (SMF ¶ 77.) Similarly, this was not the first time he received a red card ejection from a game for leaving the Coach's Technical Area; he also pushed another Philadelphia Union employee, Rick Jacobs, after a reserve game in 2011. (SMF ¶ 78.) In other words, despite being given several chances, Claimant was simply unwilling to conduct himself in compliance with League Rules.[39]

Finally, according to Paragraph VIII of the Employment Agreement, Claimant contractually agreed that any and all breaches of the Employment Agreement would result in irreparable harm. (SMF ¶ 25.) Specifically, Paragraph VIII of the Employment Agreement provides:

> [Claimant] represents and agrees that he has extraordinary and unique knowledge, skill and ability as manager of a professional soccer team and its operations, that the services [Claimant] is to provide to [the Philadelphia Union] hereunder cannot be replaced or the loss thereof adequately compensated for in money damages and that any breach by [Claimant] of this [Employment] Agreement will cause irreparable injury to [the Philadelphia Union].

(SMF ¶ 25.)

Accordingly, Claimant knew and understood that he contractually agreed that any breach of the Employment Agreement would cause irreparable harm to the Philadelphia Union. Moreover, this provision reiterates that the Philadelphia Union, in agreeing to hire Claimant, bargained-for Claimant to actually be available to coach the team. As Claimant's actions

[39] Significantly, the Employment Agreement contains a Non-Waiver Clause at Paragraph XII.

resulting in Claimant being dismissed from the remainder of the Chivas USA game (missing part of that game) as well as the next two League games,[40] the Philadelphia Union certainly was not getting the benefit of its bargain.

To that end, Claimant's actions during the April 21, 2012 Chivas USA game clearly violated League Rules, which, in turn, materially breached the Employment Agreement. As noted in detail above, if the Philadelphia Union has a good faith basis to determine that the Claimant materially breached the Employment Agreement, it has the discretion to terminate the Employment Agreement. Considering Claimant's ridiculous actions during the April 21, 2012 Chivas game, it is extremely difficult, if not impossible, to argue that the Philadelphia Union did not, at the very least, have a "good faith" basis to conclude that Claimant materially breached the Employment Agreement by violating League Rules. As it clearly had a good faith basis to come to this conclusion, the Philadelphia Union had the discretionary right to terminate the Employment Agreement. As detailed within the Termination Letter, the Philadelphia Union made the decision to exercise its discretionary right in this regard, and, as a result, it appropriately terminated the Employment Agreement and Claimant's Arbitration Demand should be dismissed as a matter of law on this independent basis alone.

iii. Claimant's Violations of the League's Concussion Protocols.

The League's Medical Policies and Procedures Manual contains Concussion Protocols – protocols that are, generally speaking, updated annually. (SMF ¶ 228.) Contrary to these Protocols, which Claimant is contractually charged with knowing, Claimant would make light of

[40] To reiterate, Claimant was also suspended from a U.S. Open Cup game on May 29, 2012. Accordingly, as a result of his inappropriate on-field actions – including leaving the coach's Technical Area on two separate occasions as well as his initiating contact with an opposing player – Claimant was actually suspended and unable to coach the Philadelphia Union for three (3) games in a seven (7) game stretch from May 5, 2012 through May 29, 2012. (SMF ¶ 98.)

the fact that players had concussions and, in fact, it was not uncommon for Claimant to call a player a "pussy" for having a concussion. (SMF ¶¶ 228-229.) Claimant would also tell players that they should not miss any time due to a concussion – you are weak if you are unable play through a concussion. (SMF ¶ 230.)

On June 1, 2012, Mr. Foose was made aware of a pattern of abuse directed by Claimant against players who had suffered concussions, testifying on this point as follows:

> Well, there are several things: a repeated suggestion that there's no such thing [as concussions], they don't exist, they're not real; a repeated suggestion that they don't have them in Germany, that players just take a pill and go on, the implication being that it's a toughness question; the denigration of players who had suffered them for not being able to get immediately back out on the field; statements about players who are recovering from concussions and happen to be eating at a training table and saying in front of the group or some group of players why do you need to eat, you're not even practicing, you don't have any need for food.
>
> **Those types of statements then generally creating an atmosphere where players were afraid to speak up and be honest about their symptoms for fear of the reaction and the consequences that would come down on them from those disclosures.**

(SMF ¶¶ 231-232) (emphasis added.)

The concussion issue was a significant issue for the MLSPU and Mr. Foose:

> ...The **concussion issue is a huge issue** for us and a big issue for me personally. I had at that point just spent the prior year before that working with the League to develop a concussion protocol and those efforts have continued today.
>
> **It's a big issue in our sport.** I spent yesterday actually at the White House listening to the President talk about how important this issue is and how much we need to change this sort of macho culture that can be out there with regard to this issue, that concussions have to be taken seriously...Players' lives are at risk. **So my reaction was very, very strong on both of these cases that there had been a real sort of recklessness towards players' safety shown in Philadelphia.**

(SMF ¶ 233) (emphasis added.)

Mr. Foose sits on the League's concussion committee and was part of that committee in May/June of 2012, when the issue relating to Claimant's treatment of concussions was brought to the attention of Mr. Foose and the MLSPU. (SMF ¶ 234.) Mr. Foose raised the issue relating to Claimant's treatment of concussions to the concussion committee:

> ...I [Mr. Foose] sent a lengthy e-mail detailing the information that I had learned, what had happened, and saying very forcefully that from my perspective **we could not be successful as a concussion committee until we had removed people who had these kinds of attitudes from positions of management in the League, from coaching staffs and medical staffs**, and that from my perspective this was completely unacceptable to be happening in our League.

(SMF ¶ 235.)

Additionally, Claimant's inappropriate handling of concussions – his creating of an atmosphere where concussion symptoms should be kept from the medical staff and not treated – was addressed by the League during its investigation and included within the League's final report. (SMF ¶ 236.)

To that end, Claimant breached Paragraph I(B) of the Employment Agreement when he failed to comply with League Rules – specifically, the Concussion Protocols within the League's Medical Policies and Procedures Manual – by creating an atmosphere where players felt they needed to hide concussion symptoms. As noted in detail above, if the Philadelphia Union has a good faith basis to determine that Claimant materially breached the Employment Agreement, then it has the discretion to terminate the Employment Agreement. Considering the position taken by the MLSPU – as described within Mr. Foose's testimony above – the Philadelphia Union unmistakably had a good faith basis to determine that Claimant failed to abide by the League's Concussion Protocols and, as a result, Claimant breached the Employment Agreement. With this known, the Philadelphia Union was clearly within its discretionary right to terminate

the Employment Agreement. As detailed within the Termination Letter, the Philadelphia Union made the decision to exercise its discretionary right in this regard, and, as a result, it appropriately terminated the Employment Agreement and Claimant's Arbitration Demand should be dismissed as a matter of law on this independent basis alone.

iv. Other Miscellaneous League Rule Violations of Claimant.

As the head soccer coach of the Philadelphia Union, Claimant is charged with knowing League Rules, including without limitation ensuring that the Philadelphia Union fields a team consistent with such rules. (SMF ¶ 287.) On July 21, 2011, Claimant started an Academy Player in an exhibition game against Everton FC, an English Premier League team. (SMF ¶ 288.) It was a violation of the MLSPU rules to play an Academy Player in this exhibition game. (SMF ¶ 289.) The following day, on July 22, 2011, Mr. Durbin sent an email to all League Coaches and Technical Directors providing them with a Memo outlining that Trialist and Academy Players are not allowed to participate in gated exhibition games (hereinafter, the "Memorandum"). (SMF ¶ 290.) Claimant acknowledges that he received the email from Mr. Durbin sending the Memorandum. (SMF ¶ 291.) After receiving the email with the Memorandum, Diego Gutierrez, who was hired by Claimant as the Sporting Director, contacted Mr. Foose and asked whether the Philadelphia Union could use Academy Players for their game against Real Madrid. (SMF ¶ 292.) Mr. Foose informed Mr. Gutierrez that he could not – it was prohibited. (SMF ¶ 292.)

Despite his receipt of the Memorandum and the conversation Mr. Gutierrez had with Mr. Foose, Claimant ignored a League rule and played an Academy Player during the Real Madrid game. (SMF ¶ 293.) Claimant's decision in this regard "caused a lot of angst around the League." (SMF ¶ 294.) Nevertheless, on August 25, 2011 – approximately one month after he

allowed an Academy Player to play against Real Madrid – Claimant also permitted a Trialist player to play in a gated exhibition game against the Harrisburg Islanders. (SMF ¶ 295.)

Claimant's playing of the Trialist player in the gated exhibition game against the Harrisburg Islanders was his second violation of the Memorandum sent by Mr. Durbin – second violation in the month since the issuance of the Memorandum. (SMF ¶ 296.) More disturbingly, Claimant spoke with Mr. Durbin and informed him that he understood it was a violation for the unsigned (Trialist) player to participate in the gated exhibition game, but that he decided to play the player anyway. (SMF ¶ 297.) He also informed Mr. Durbin that he disagreed with the rule and would do it again. (SMF ¶ 297.)

As a result of Claimant's action in blatantly ignoring this League Rule, the Commissioner of Major League Soccer, Don Garber, fined the Philadelphia Union $25,000. (SMF ¶ 298.) The Philadelphia Union was able to get the $25,000 fine reduced to $15,000 through negotiation with the League,[41] but the other $10,000 was held in abeyance in case there were any future violations.[42] (SMF ¶ 299.)

Furthermore, within the Philadelphia Union organization, the Team Manager is responsible for the signing of all Homegrown Players. (SMF ¶ 302.) In this regard, on or about May 1, 2012, the League concluded that the Philadelphia Union violated the League's Home Grown Player rule and sanctioned it as follows: (1) loss of $75,000 in allocation money; (2) a $35,000 fine payable immediately; and (3) should the player be transferred – which is a determination that will now solely be made by the League – the League will retain 2/3's of the transfer revenue with the Philadelphia Union only receiving 1/3. (SMF ¶ 303.)

[41] From a timing perspective, it is worth noting that the $15,000 fine was billed to the Philadelphia Union on February 22, 2012. (SMF ¶ 300.)
[42] The $10,000 that was held in abeyance was ultimately assessed against the Philadelphia Union. (SMF ¶ 301.)

Taking into consideration the $5,000 Team fine – but not the $5,000 individual fine imposed on Claimant – as a result of Claimant leaving the Technical Area and initiating contact with a player during the April 21, 2012 game against Chivas USA, the Philadelphia Union was required to pay $55,000 in fines from February 22, 2012, through April 26, 2012 solely as a result of Claimant's actions. (SMF ¶¶ 304-305.) In other words, in a little more than a two month span in 2012, the Philadelphia Union was required to pay in fines approximately 15% of Claimant's $373,050 salary – all as a result of Claimant's violation of League Rules. This additional 15% expenditure, which does not even take into consideration the loss of the allocation money and potential transfer revenue – is absolutely significant. Accordingly, Claimant's breaching of his obligation to comply with the aforementioned League Rules was material and certainly provides the good faith basis for the Philadelphia Union to exercise its discretionary right to terminate the Employment Agreement. As detailed within the Termination Letter, the Philadelphia Union made the decision to exercise its discretionary right in this regard, and, as a result, it appropriately terminated the Employment Agreement and Claimant's Arbitration Demand should be dismissed as a matter of law on this independent basis alone.

b. Claimant's Seeking of Other Employment During the Time he was Employed by the Philadelphia Union – Materially Breaching the Paragraph VII of the Employment Agreement.

Before the Parties entered into the Employment Agreement, the Philadelphia Union was required to negotiate a "buy-out" for Claimant relative to his then current contract with the United States Soccer Federation ("U.S. Soccer"). (SMF ¶ 19.) More specifically, the Philadelphia Union, through Mr. Sakiewicz, negotiated and paid a $75,000 buyout to U.S. Soccer in order to release Claimant from his contract. (SMF ¶¶ 20, 251-252.) Given that it invested significant resources – including the $75,000 payment to U.S. Soccer – to bring

Claimant to the team, the Philadelphia Union had concerns about Claimant returning to U.S. Soccer while he was still under contract with the Philadelphia Union. (SMF ¶ 253.) Accordingly, the Parties included the following language within Paragraph VII of the Employment Agreement:

> Furthermore, during the Term, [Claimant] shall not (1) engage in discussions with any other professional soccer team regarding employment by such team…

(SMF ¶ 254.)

Claimant testified that he understood that, during the term of the Employment Agreement, he was prohibited from engaging in "any discussions with any clubs[,] and if any clubs or federations or national teams would like to engage with [Claimant] in discussion of the contract, that they need to seek the permission from the Philadelphia Union…" (SMF ¶ 23.) Nevertheless, Claimant, contrary to the terms of Paragraph VII, engaged in discussions with and otherwise sought employment with other professional soccer teams – including U.S. Soccer – on several occasions during the time he was employed with the Philadelphia Union.

i. Claimant's Attempt to Return to U.S. Soccer While Employed by the Philadelphia Union.

While he was still employed by the Philadelphia Union, Claimant reached out to his former-player representative and current sports broadcaster, Shep Messing, in an effort to seek other employment. Pertinent in this regard, Claimant and Mr. Messing were very close and, in fact, Mr. Messing acted as Claimant's advisor during the time Claimant was employed as the head coach of DC United – another MLS team.[43] (SMF ¶ 265.) Their relationship was to the point that Claimant would refer players to Mr. Messing to represent and Mr. Messing actually

[43] Mr. Messing's advisor relationship was to a degree where Claimant believed it necessary to give Mr. Messing a championship ring after DC United won the MLS championship. (SMF ¶ 265.)

recommended Claimant to Mr. Sakiewicz for the head coaching position with the Philadelphia Union. (SMF ¶¶ 266-267.)

According to the testimony of Mr. Messing – an unbiased and independent witness – in April/May of 2010, before the start of the 2010 Men's World Cup in South Africa, Claimant contacted Mr. Messing and told him that, if the United States Men's National Soccer Team[44] did not do well in the World Cup, he wanted to take over for Bob Bradley as Head Coach of the Men's National Soccer Team. (SMF ¶ 268.) Then, the week after the Men's National Soccer Team lost in South Africa, Claimant called Mr. Messing and asked Mr. Messing to speak to Sunil Gulati – President of U.S. Soccer – and see if Claimant could become the next Head Coach of the Men's National Soccer Team – he wanted to take over for Bob Bradley in this regard, who was still under contract with U.S. Soccer at the time. (SMF ¶ 269.) Although he was reluctant to, Mr. Messing did in fact reach out to Mr. Gulati on Claimant's behalf – specifically notifying Mr. Gulati that Claimant was interested in Bob Bradley's position. (SMF ¶ 270.)

Claimant's actions in seeking to return to the U.S. Soccer – the exact entity in which the Philadelphia Union paid $75,000 in order to bring him to Philadelphia – without question violated Paragraph VII of the Employment Agreement. In fact, the primary purpose of including Paragraph VII in the Employment Agreement was to protect the Philadelphia Union from Claimant taking this exact action – from Claimant attempting to return to U.S. Soccer after the Philadelphia Union paid it $75,000 to bring Claimant to Philadelphia.

ii. Claimant's Seeking of Employment in Europe, Dubai and the Emirates While Employed by the Philadelphia Union.

Although Claimant's actions in seeking a return to U.S. Soccer is enough in and of itself to establish a material breach of Paragraph VII of the Employment Agreement, it is worth further

[44] Notably, the United States Men's National Soccer Team is part of the United States Soccer Federation.

noting that, in 2012, while Claimant was still employed by the Philadelphia Union, Claimant again contacted Mr. Messing in an effort to seek other employment. This time, Claimant asked Mr. Messing whether he could find Claimant a coaching position in Europe, specifically asking Mr. Messing to investigate a coaching position with the Polish National Team, a coaching opportunity in Scotland, and coaching possibilities in England. (SMF ¶¶ 274-275.) At the same time – in 2012, while he was still employed by the Philadelphia Union – Claimant also asked Mr. Messing for the contact information of sports agent, Michael Morris, as Claimant thought Mr. Morris could help him find another coaching position in Europe. (SMF ¶ 276.)

Mr. Messing provided Claimant with the requested contact information of Mr. Morris and, according to the testimony of Mr. Morris – another unbiased and independent witness – Claimant, while he was still employed by the Philadelphia Union, in fact contacted Mr. Morris on 3 or 4 occasions asking Mr. Morris to help find him a coaching position in the Emirates or in Europe. (SMF ¶¶ 277-278.) Additionally, according to Mr. Morris, Claimant, while he was still employed by the Philadelphia Union, also sent Mr. Morris his CV – his resume. (SMF ¶ 279.) As requested by Claimant – again, during the time he was employed with the Philadelphia Union – Mr. Morris also testified that he actually reached out on Claimant's behalf to clubs in the U.K., America, Dubai and Europe – informing these clubs that Claimant was looking for a coaching position. (SMF ¶ 280.) As several of the clubs Mr. Morris reached out to on behalf of Claimant asked for a copy of Claimant's CV/resume, Mr. Morris sent Claimant's CV/resume to the clubs. (SMF ¶ 281.)

To that end, the testimony of these two independent, unbiased witnesses, Mr. Messing and Mr. Morris, indisputably establishes that, during the time he was employed by the Philadelphia Union, Claimant "engage[d] in discussions" regarding employment with other

professional soccer teams. In this regard, it is worth pointing out that the testimony of Mr. Morris – establishing that Claimant contacted him – actually corroborates the testimony of Mr. Messing, at least to the extent he testified that Claimant contacted him to obtain Mr. Morris' contact information. In other words, the testimony of these two witnesses – establishing Claimant violated Paragraph VII of the Employment Agreement – is consistent and absolutely credible.

Importantly, on or about May 24, 2012, mere weeks before the Philadelphia Union exercised its discretionary right to terminate the Employment Agreement, Mr. Messing called Mr. Sakiewicz, unsolicited,[45] and informed him that Claimant: (1) previously sought employment with U.S. Soccer; (2) was actively seeking employment in Europe; and (3) asked for the contact information of Mr. Morris, a well-known sports agent. (SMF ¶ 282.) In other words, notwithstanding the timing of Claimant's actions in seeking other employment, Mr. Messing did not advise Mr. Sakiewicz of Claimant's actions in this regard until May 24, 2012.

iii. Claimant's Attempt to Seek Other Employment Through Veljko Paunovic.

In addition to the testimony provided by Mr. Messing and Mr. Morris, the record evidence also established that Claimant, during the time he was employed by the Philadelphia Union, updated and submitted his resume in an effort to seek other employment. More specifically, on April 30, 2012, Claimant sent an email to Veljko Paunovic, which stated:

> Let's work the project together and I feel that it would be great to have you as my assistant coach wherever I & we can go. Let me know what do you think about this opportunity.

(SMF ¶ 256) (emphasis added.)

[45] Mr. Messing was a former teammate and acquaintance of Mr. Sakiewicz. (SMF ¶ 282.)

During his hearing testimony, Claimant was asked what he meant by "wherever I & we can go" and, in response, Claimant simply testified that he didn't know – he had "no recollection whatsoever." (SMF ¶ 257.) Considering Claimant's subsequent actions, it is clear that Claimant was referring to him looking for another coaching position – where, assuming Mr. Paunovic helped him secure the other coaching position, Mr. Paunovic could be his assistant coach. To illustrate, on the following day, May 1, 2012, at 9:50 a.m., Claimant sent another email to Mr. Paunovic, this time attaching his resume. (SMF ¶ 258.) The resume sent by Claimant to Mr. Paunovic had been updated to include the Claimant's experience with the Philadelphia Union,[46] (SMF ¶ 259.) Additionally, on the last page of Claimant's resume, Claimant wrote:

> My resume is enclosed for your review. Thank you in advance for your generous consideration. I may be reached at my telephone number or E-mail indicated above should You [sic] wish to contact me. I would be happy to make myself available for a professional Interview [sic] at your convenience.

(SMF ¶ 260.)

Interestingly, on his resume, Claimant does not include his Philadelphia Union email address – he only includes his personal email address. (SMF ¶ 262.) Additionally, within one (1) minute of sending his resume to Mr. Paunovic – at 9:51 a.m., Claimant sent another email to Mr. Paunovic directing Mr. Paunovic to send future emails to his "personal email address." (SMF ¶ 263.) During his hearing testimony, Claimant was asked why he directed Mr. Paunovic to communicate with him at his personal email address and, in response, Claimant simply stated that he "ha[d] no clue." (SMF ¶ 264.) Although Claimant claims not to know, it is pretty obvious under the circumstances that Claimant was attempting to conceal the fact that he was seeking other employment in violation of Paragraph VII of the Employment Agreement.

[46] Although the resume sent on May 1, 2012, to Mr. Paunovic was updated with his Philadelphia Union experience, at his deposition, Claimant unequivocally testified that, during the time he was employed by the Philadelphia Union, he never put together a resume or a CV. (SMF ¶ 261.)

To that end, Claimant, contrary to the terms in Paragraph VII, sought other employment during the time he was employed by the Philadelphia Union. Each of his actions in this regard without question breached the Employment Agreement. Moreover, these breaches were material for several reasons. Foremost, given the significant resources the Philadelphia Union invested to bring Claimant to Philadelphia – including a $75,000 buy-out – it wanted to ensure that Claimant remained as coach for the entire term of the Employment Agreement. Accordingly, it ensured that the Employment Agreement included language that specifically prohibited Claimant from even engaging in discussions regarding other employment. This fact alone establishes the materiality of Claimant's breach in this regard.

Additionally, Claimant's actions were significantly embarrassing to the Philadelphia Union. As explained in more detail in Subsection III.C.2.c., *infra*, not only was Claimant looking for other employment, but, in his attempts to find new employment, he was making disparaging remarks concerning the Philadelphia Union as well as its management.

Again, the Parties expressly agreed, pursuant to Paragraph VIII within the Employment Agreement, that any and all breaches of the Employment Agreement would result in irreparable harm. (SMF ¶ 25.) Specifically, Paragraph VIII of the Employment Agreement provides:

> [Claimant] represents and agrees that he has extraordinary and unique knowledge, skill and ability as manager of a professional soccer team and its operations, that the services [Claimant] is to provide to [the Philadelphia Union] hereunder cannot be replaced or the loss thereof adequately compensated for in money damages and **that any breach by [Claimant] of this [Employment] Agreement will cause irreparable injury to [the Philadelphia Union]**.

(SMF ¶ 25) (emphasis added.)

Accordingly, Claimant knew and understood that he contractually agreed that any breach of the Employment Agreement would cause irreparable harm to the Philadelphia Union. He also

understood that the benefit of the bargain for the Philadelphia Union was Claimant remaining the coach during the entire term of the Employment Agreement. Claimant's attempt to find other employment – on several occasions – potentially deprived the Philadelphia Union of its bargained-for benefit and, thus, such actions indisputably amount to a material breach of the Employment Agreement. At the very least, Claimants actions in this regard provide the Philadelphia Union with a good faith basis to exercise its discretionary right to terminate the Employment Agreement. As detailed within the Termination Letter, the Philadelphia Union made the decision to exercise its discretionary right[47] in this regard, and, as a result, it appropriately terminated the Employment Agreement and Claimant's Arbitration Demand should be dismissed as a matter of law on this independent basis alone.

c. *Claimant's Making Disparaging Remarks Concerning the Philadelphia Union – Materially Breaching Paragraph IX(D) of the Employment Agreement.*

In executing the Employment Agreement, Claimant and the Philadelphia Union agreed to the following:

> (D) ...during the Term and for twelve months thereafter, **Manager and the executives of the Club shall refrain from making any disparaging remarks regarding Club or the Team, its players, management, ownership or employees or the Stadium**, on the one hand, and Manger or Pino, on the other hand.

(SMF ¶ 24.)

The record evidence establishes that Claimant breached this provision of the Employment Agreement. More specifically, Mr. Messing testified that, during the time Claimant was employed by the Philadelphia Union, he met with Claimant for about an hour and Claimant made the following statements to him:

[47] It is important to reiterate that the Philadelphia Union did not learn of Claimant's actions in seeking additional employment until May 24, 2012 – mere weeks before the Philadelphia Union exercising its discretionary right to terminate the Employment Agreement. (SMF ¶ 282.)

> ...We spoke for an hour and the gist of – not the gist; that conversation was [Claimant] telling me: **I have to get the hell out of Philadelphia. These guys are stupid. They don't know what they're doing and they're broke. They have no money**...that also was a very shocking conversation to me because he was bad mouthing and slamming a team in the League...**But he was off the wall at that point saying that they're stupid, they don't have a clue, and they're broke**...

(SMF ¶ 271) (emphasis added.)

Mr. Messing further testified that Claimant told him that "Nick [Mr. Sakiewicz] doesn't have a fucking clue"; "[t]hey don't know what they're doing. They have no money." (SMF ¶ 272.) On or about May 24, 2012, within mere weeks of the Philadelphia Union exercising its discretionary right to terminate the Employment Agreement, Mr. Messing called Mr. Sakiewicz, unsolicited, and informed him of Claimant's disparaging remarks in this regard. (SMF ¶ 282.)

To that end, Mr. Messing – again, an unbiased, independent witness – testified that Claimant, contrary to Paragraph IX of the Employment Agreement, made disparaging comments about the Philadelphia Union and Mr. Sakiewicz. Such comments are without question damaging to the reputation of both the Philadelphia Union and Mr. Sakiewicz – they go directly to the heart of Mr. Sakiewicz' ability and the financial viability of the Philadelphia Union. Of note here, Mr. Messing was a well known and regarded soccer broadcaster. Claimant was essentially making these comments to a journalist without any concern as to whether they would be more publicly communicated by Mr. Messing. Claimant's making of such comments during the time he was employed by the Philadelphia Union clearly amounted to a material breach of Paragraph IX of the Employment Agreement. At the very least, Claimant's actions in this regard provide the Philadelphia Union with a good faith basis to exercise its discretionary right to terminate the Employment Agreement. As detailed within the Termination Letter, the

Philadelphia Union made the decision to exercise its discretionary right[48] in this regard, and, as a result, it appropriately terminated the Employment Agreement and Claimant's Arbitration Demand should be dismissed as a matter of law on this independent basis alone.

3. Claimant's Gross Negligence or Willful misconduct in performing His Duties Under the Employment Agreement.

As noted within the Termination Letter, the Philadelphia Union also exercised its discretionary right to terminate the Employment Agreement as a result of Claimant engaging in "gross negligence or willful misconduct in performing his duties…" In particular, the Termination Letter advised Claimant[49] that the Philadelphia Union was exercising its discretionary right to terminate the Employment Agreement, *inter alia*, due to Claimant's: (1) interfering with and/or retaliating against players for exercising their MLSPU rights; (2) jeopardizing the health and safety of players by forcing them to participate in unprecedented training activities without hydration; (3) jeopardizing the health and safety of players by disregarding the advice of the head athletic trainer and forcing injured players to participate in the unprecedented training activities; (4) jeopardizing the health and safety of the players by creating an atmosphere where the players felt they were required to hide concussions from the medical staff; and (5) subjecting the players to inappropriate hazing activities. (SMF ¶ 335.)

Claimant's actions in this regard were, to put it mildly, reprehensible and not the expected actions of an individual responsible for being the face of a professional soccer franchise. Moreover, these actions without question provided a good faith basis for the Philadelphia Union to terminate the Employment Agreement due to Claimant's engaging in

[48] It is important to reiterate that the Philadelphia Union did not learn of Claimant's actions in seeking additional employment until May 24, 2012 – mere weeks before the Philadelphia Union exercising its discretionary right to terminate the Employment Agreement. (SMF ¶ 282.)

[49] Claimant was also advised on the specific issues amounting to gross negligence via email on June 13, 2012. (SMF ¶ 321.)

"gross negligence or willful misconduct." Indeed, due to the seriousness of Claimant's actions, the question should not be "whether these actions constitute gross negligence providing a good faith basis for the Philadelphia Union to terminate the Employment Agreement," it should be "how can these actions not constitute a good faith basis for the Philadelphia Union to terminate the Employment Agreement for gross negligence?"

However, even if it was assumed, contrary to the indisputable record evidence, that, under the factual circumstances, it was questionable whether the Philadelphia Union had a good faith basis to exercise its discretion to terminate the Employment Agreement, the positions taken by the League and the MLSPU relative to Claimant's actions indisputably confirm that the Philadelphia Union had a good faith basis to exercise its discretion and terminate the Employment Agreement. Indeed, as explained in more detail below, the League and the MLSPU – the two primary entities controlling the business of professional soccer in the United States – not only believed that Claimant's actions were significant enough to warrant the termination of the Employment Agreement, but they both actually took positions that left the Philadelphia Union with no choice but to exercise its discretionary right to terminate the Employment Agreement.

a. Claimant's Interfering with and Retaliating Against Players for Exercising their Rights to Contact the MLSPU.

As noted in more detail in Subsection II.A. and III.C.2.a., *supra*,[50] the record evidence establishes that Claimant interfered with the rights of the players – namely Mr. [redacted] and Mr. [redacted] – to raise issues with the MLSPU. Indeed, Claimant not only directed the players not to contact the MLSPU with issues, but he also attempted to coerce the players (and Mr. Foose) to reveal the identity of the player that already brought an issue – [redacted] issue – to the

[50] In the interests of judicial economy, the Philadelphia Union will not reiterate the facts outlined within these subsections; rather it will incorporate the same herein by reference.

MLSPU. Significantly, within his own testimony, Claimant's admits that he told the players not to contact the MLSPU, specifically testifying:

> ...So if any kind of issues will occur, **I told them basically that please, if you have any kind of concerns, any issues**...just to tell them if you have any kind of issues, **please see us first so we will not have problems or questions from the Players Union about any kind of concerns you have or you might have in the future**.

(SMF ¶ 48) (emphasis added.)

Of note, this message was communicated to the entire team in addition to Mr. [redacted] and Mr. [redacted] following Claimant's collective meeting with those gentlemen as the [redacted] (SMF ¶¶ 46-48.) In addition to Claimant's admission in this regard, the record evidence – created through the testimony of several independent and unbiased witnesses – establishes that Claimant repeatedly interrogated players (Mr. [redacted] and Mr. [redacted]) as well as Mr. Foose in an attempt to ascertain the identity of the individual that brought the [redacted] issues to the attention of the MLSPU. It is well settled that coercively interrogating employees to discourage union activities violates Section 8(a)(1) of the NLRA. *Sambo's Restaurants*, 247 NLRB 777 (1980) ("by asking the employees to reveal the identities of the employees responsible for the Union [activities] and by asking whether [an employee] was responsible for the Union, Respondent violated Section 8(a)(1) of the Act.").

In addition to Claimant's repeated attempts to interrogate, coerce, and threaten the players (as well as Mr. Foose), the record evidence also establishes that Claimant retaliated against the player he admittedly believed was responsible for raising the [redacted] issue with the MLSPU. (SMF ¶ 57.) In fact, Claimant, in an emotional statement he made to the team, used the fact that he traded this player – [redacted] – to threaten the team. (SMF ¶ 94.) It is also well settled that retaliating against an employee for engaging in union activities violates Section 8 of the NLRA. *3815 9th Avenue Meat and Produce Corp. d/b/a Compare Supermarket and*

United Food and Commercial Workers Union, Local 342, 2012 WL 2992089 (N.L.R.B. Div. of Judges Jul 20, 2012) (Employer violated Sections 8(a)(1) and (3) of the NLRA by discharging employee in retaliation for his union activities and his protected concerted activities).

Accordingly, Claimant's repeated attempts to interrogate, coerce, and threaten the players in an attempt to prevent them from exercising their right to contact the MLSPU violated the law. Similarly, Claimant's trading of a player in retaliation for that player exercising his right to contact the MLSPU violated the law. Considering that Claimant's actions in this regard clearly violated the law – specifically the NLRA – such actions, without a doubt, amounted to gross negligence and/or willful misconduct providing a good faith basis for the Philadelphia Union to exercise its discretionary right to terminate the Employment Agreement. Indeed, how could the Claimant's actions in violating the law not amount to gross negligence or willful misconduct? Simply put, it cannot. Moreover, as noted in detail above, if the Philadelphia Union determines in good faith the Claimant engaged in gross negligence, it has the discretion to terminate the Employment Agreement. As detailed within the Termination Letter, the Philadelphia Union made the decision to exercise its discretionary right in this regard, and, as a result, it appropriately terminated the Employment Agreement and Claimant's Arbitration Demand should be dismissed as a matter of law on this independent basis alone.

b. Claimant's Jeopardizing the Health and Safety of the Players by Forcing them to Participate in Unprecedented Training activities Without Hydration.

As noted in more detail in Subsection II.B., *supra*, the record evidence establishes that Claimant jeopardized the health and safety of the players by forcing them to participate in an unprecedented trail run without hydration. Indeed, the testimony of Claimant, the players and the athletic trainers established the following:

- The Philadelphia Union played a League game on May 26, 2012 against Toronto, and although Toronto had not yet won a game at that point in the season, it ended up beating the Philadelphia Union. (SMF ¶¶ 90-91.) After the game, Claimant made an "emotional statement" to the players that included:

> We were supposed to have five days off, but not I'm going to think about how long that's actually going to be. We're going to get home, we're going to work hard, we're going to shake tree, and we're going to figure out who sticks and who doesn't...My job is not going anywhere, I can't be fired.
>
> Cancel your trips. We're going to go back and we're going to work hard.
>
> ...he couldn't be fired...he wasn't afraid to do anything in regards to the team....
>
> ...he wasn't afraid to shake the tree...he had traded away [redacted] and [the] leading goal scorer...[he] wasn't afraid to make moves and to roll with it.
>
> (SMF ¶¶ 93-94.)

- As threatened in his "emotional statement" after the Toronto game, Claimant cancelled the players' scheduled days off – requiring players to cancel their vacation plans – and made the players, for the first time in team history, show up at a trail located at the Youth Soccer Center ("YSC") on May 31, 2012. (SMF ¶ 99.)

- The trail, which is located approximately 100 yards from the YSC facility, is a blacktop/cement/pavement trail that is approximately two body widths wide, uneven in parts with rolling hills, and approximately 1.3 miles in length. (SMF ¶¶ 100-101.) On that particular day, May 31, 2012, it was hot and sunny, about 80 degrees and humid. (SMF ¶ 102.)

- Shortly after the players arrived at the trail, Claimant directed them to begin running the trail; he did not inform them how far he was making them run, he simply told them to keep running until he told them to stop. (SMF ¶ 103.)

- Although water was available to the players, Claimant admits that he told the players that they were not able to have water and he, in fact, did not let the players have water during the run. (SMF ¶ 108.)

- Claimant further admits that he took the reusable "squirt" bottles provided by the Athletic Trainers from the players and threw them in the bushes. (SMF ¶ 109.)

- Believing that the denial of water to the players jeopardized their health and safety, especially considering the weather and the arduous nature of the trail run, the Philadelphia Union's Head Athletic Trainer Paul Rushing, confronted Claimant about his decision to deny water to the players. (SMF ¶ 111.)

- Despite Mr. Rushing's repeated efforts to convince Claimant that the denial of water to the players during the trail run jeopardized their health and safety, Claimant refused to concede his position – stating he "didn't care," he was "going to make men out of [the players]." (SMF ¶ 114.)

- Claimant also admits that made the following statements to Mr. Rushing during the May 31, 2012 trail run:

> No fucking water put the water back, water will make you lose focus and if you're thirsty you are weak.
>
> (SMF ¶ 118.)

- Claimant knew that MLS games were actually being stopped to allow players to take breaks and stay hydrated. (SMF ¶ 130.)

- Nonetheless, and against the clear directives of Mr. Rushing, Claimant refused to allow the players to hydrate during the trail run; he simply told them to keep running until he told them to stop. (SMF ¶ 115.)

- Claimant also physically took water bottles out of the hands of Mr. Rushing and the players, namely [redacted], who had an individual disposable bottle ripped out of his hands by Claimant. (SMF ¶¶ 112, 114.)

- After initially arguing with Claimant regarding the players' access to water during the trail run, Mr. Rushing – as he was extremely concerned about players becoming dehydrated – tried to sneak water to the players, but Claimant, once again, physically took the water bottles from Mr. Rushing, walked through the players and threw the water bottles into the woods/bushes. (SMF ¶ 116.)

- In total, the players ran three or four Intervals, totaling approximately 10-12 miles – all on a concrete surface, in hot and humid weather, and without the ability to hydrate. (SMF ¶ 116.)

There is no question that the foregoing actions of Claimant amounted to gross negligence and/or willful misconduct providing the basis for the Philadelphia Union to exercise its discretionary right to terminate the Employment Agreement. At a starting point, Claimant's requiring of the players to run 10-12 miles on a concrete surface was, to put it mildly,

unprecedented and absurd. Indeed, Mr. [redacted] and Mr. [redacted], two players with extensive experience playing in the League as well as with the U.S. Men's National Soccer Team,[51] testified that they had never been asked to run 10-12 miles before. In fact, Mr. [redacted] testified that the 10-12 miles was "roughly twice as long as [he'd] ever run [before]."[52] (SMF ¶ 154.)

To compound the ridiculous length of the run, Claimant, against the advice of the Head Athletic Trainer, made the decision to deprive the players of hydration. Although the denial of water to players running that distance under any circumstances is simply nonsensical and absurd, it was especially troubling on this particular occasion as the record evidence establishes that the weather during the run was 80 degrees and humid. A simple Google search can uncover hundreds of instances where young athletes – ranging from high school athletes to professional athletes in the National Football League – die as a result of heat exhaustion and dehydration. While the Philadelphia Union players – in this instance – were lucky enough to survive this 10-12 mile run on concrete surface in hot and humid weather without hydration, it does not mean that Claimant's actions did not put the health and safety of these players at risk.[53] To the contrary, his actions, which, again, overruled and incited a confrontation with the athletic trainers, absolutely jeopardized the health and safety of these players.

To make matters worse, as explained in Subsection II.B., *supra*, there was absolutely no compelling justification to warrant Claimant taking this risk. In fact, it is hard – if not

[51] Specifically, Mr. [redacted] testified that he has approximately [redacted] years of experience playing in the MLS, specifically playing for approximately [redacted] different MLS teams and having approximately [redacted] different coaches; he also played for the U.S. National Team [redacted] (SMF ¶ 153.) Similarly, Mr. [redacted] testified that he had approximately [redacted] years of experience including his time playing for the U.S. Men's National Soccer team. (SMF ¶ 156.)

[52] Mr. Foose also testified that the length of the trail run "was completely out of whack with anything that [he] had ever heard of any coaching staff doing within the League." (SMF ¶ 194)

[53] Although the players were lucky enough to avoid heat exhaustion, the record evidence does establish that a handful of players were injured as a result of the arduous nature of the trail run. In particular, Mr. [redacted] suffered a stress reaction that kept him on crutches for a few days. (SMF ¶ 146.) Additionally, [redacted] complained that his "feet were on fire." (SMF ¶ 149.)

impossible – to imagine a scenario where it would be appropriate to withhold hydration from professional athletes, especially if those athletes are being asked to run 10-12 miles.[54] Claimant does attempt to justify his actions "after-the-fact" by saying he withheld water from the players because one of the players, [redacted] was sick and he did not want the sickness to spread. Not only does this statement fly in the face of the record evidence – which clearly illustrates that Claimant never mentioned Mr. [redacted] sickness on the date of the run,[55] but, even if accepted as true, it does not even come close to amounting to a compelling enough reason to deny players hydration during a 10-12 mile run. This is particularly true where there were coolers filled with in excess of 60 individual / disposable bottles of Gatorade and water less than 100 yards away from the trail. If Claimant was in fact worried about [redacted] spreading his virus, these individual / disposable bottles could have been distributed to the players. If this was in fact Claimant's concern, why did he forcibly take [redacted] individual / disposable water bottle? There is simply no explanation for Claimant's conduct in this regard. His "explanation" reflects his subsequent realization that his conduct was completely out-of-bounds and represents nothing more than a veiled attempt to cover-up his grossly inappropriate and boorish behavior on May 31st. (Also see in this regard Subsection III.C.S., *supra.*).

To that end, Claimant, presumably as punishment for the team losing to Toronto,[56] forced the players to run approximately 10-12 miles on a concrete surface, in hot and humid weather, and without the ability to hydrate. Moreover, during the trail run, Claimant became very confrontational and, in fact, physically took water bottles, including at least one individual

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[54] There is a reason why Mr. [redacted] and Mr. [redacted] through their entire careers, never had another instance in which a water limitation was placed upon them during a training session. (SMF ¶¶ 157-158.)

[55] It is important to note that Claimant offers absolutely no corroborating evidence with regards to this claim. In particular, it is rather telling that Claimant could not produce one witness to confirm that he was actually concerned about spreading the sickness of [redacted].

[56] Mr. [redacted] actually testified that he believed the Claimant's actions during the May 31, 2012 training session were meant to "punish" the players. (SMF ¶ 159.)

disposable water bottle, from Mr. Rushing and the players. Claimant actions in this regard were inappropriate, unprofessional and, most importantly, jeopardized the health and safety of the players. At the same time, there is no question that such actions amounted to gross negligence and/or willful misconduct providing a good faith basis for the Philadelphia Union to exercise its discretionary right to terminate the Employment Agreement. As detailed within the Termination Letter, the Philadelphia Union made the decision to exercise its discretionary right in this regard, and, as a result, it appropriately terminated the Employment Agreement and Claimant's Arbitration Demand should be dismissed as a matter of law on this independent basis.

e. Claimant's Jeopardizing the Health and Safety of the Players by Disregarding the Advice of the Head Athletic Trainer and Forcing Injured Players to Participate in Training Activities.

As detailed in Subsection II.B., *supra*,[57] in addition to refusing to allow players to hydrate during the 10-12 mile trail run, Claimant, also in contravention of the strenuous objection of the athletic trainers, forced injured players to participate in the 10-12 mile run. Indeed, the record evidence establishes that, on the date of the trail run, Mr. Rushing informed Claimant inside the YSC facility that there were four players on the injury list and that he wanted these players to remain in the YSC facility for treatment; due to the extent of their injuries. Mr. Rushing did not think it was appropriate in this regard for these players to participate in an intensive training session. (SMF ¶¶ 131, 141.) As admitted by Claimant, contrary to Mr. Rushing's opinion, he "ordered" these four injured players to participate in the trail run. (SMF ¶ 138.) In other words, Claimant, over the advice of the athletic trainers, required the four injured players to participate in a trail run that was, according to a player with over ● years of professional soccer experience, twice as long as any run he was ever asked to do. (SMF ¶¶ 153-155.) In addition to overruling

[57] In the interests of judicial economy, the Philadelphia Union will not reiterate the facts outlined within this subsection; rather it will incorporate the same herein by reference.

Mr. Rushing with regards to these four players, Claimant informed Mr. Rushing that neither he nor the team doctors were going to make decisions regarding the ability of a player to train or play in a game; these decisions were now going to be made by Claimant.[58] (SMF ¶ 137.)

While the Philadelphia Union players were lucky enough to be able to avoid any serious injuries as a result of Claimant's refusal to provide access to water, the same cannot be said of Claimant's decision to force the injured players to participate in the trail run. Indeed, as a result of their forced participation, at least three players suffered set-backs with their injuries, likely requiring these players to miss additional playing time. (SMF ¶ 144.) Moreover, at least two of the injured players forced to participate were unable to play in the next game for the Philadelphia Union. In fact, both of these players were unable to play for at least sixteen (16) days after the run. (SMF ¶ 145.) Additionally, a "handful" of players came to Mr. Rushing after the May 31, 2012 run seeking treatment – with several of the players being referred to a doctor the next day or within the next couple of days. (SMF ¶¶ 146-149.) One player, Mr. [redacted] actually sustained a stress reaction as a result of the arduous nature of the trail run. (SMF ¶ 146.) In other words, the injured players were, over the advice of the athletic trainers, required to participate in a trail run that was so intense that healthy players actually sustained injuries. Under such circumstances, there is absolutely no justifiable reason for Claimant to have ignored the advice of the athletic trainers and forced players with significant injuries to participate in the trail run.

As a result of such participation, several of these injured players suffered setbacks relative to their injuries. In other words, Claimant actions not only jeopardized the health and safety of the players, but they actually affected the health and safety of the players, as several

[58] Such a statement was quite interesting considering Claimant acknowledges that he is not a licensed athletic trainer. (SMF ¶ 143.)

players exacerbated their injuries due to their forced participation. This directly affected the Philadelphia Union, as the setbacks suffered by these players resulted in the players missing additional playing time.

There is absolutely no question that Claimant's actions in this regard amounted to gross negligence and/or willful misconduct providing a good faith basis for the Philadelphia Union to exercise its discretionary right to terminate the Employment Agreement. As detailed within the Termination Letter, the Philadelphia Union made the decision to exercise its discretionary right in this regard, and, as a result, it appropriately terminated the Employment Agreement and Claimant's Arbitration Demand should be dismissed as a matter of law.

Although unnecessary given the circumstances, the outrage exhibited by the League and the MLSPU upon learning of Claimant's actions in forcing injured players to participate in the trail run confirms that the Philadelphia Union, at the very least, had a good faith basis to exercise its discretionary authority to terminate the Employment Agreement. In fact, based upon the resulting actions of the League and the MLSPU, the Philadelphia Union was essentially left with no choice but to exercise its discretion in this regard and Claimant's claim should be dismissed on this independent basis alone.

d. Claimant's Jeopardizing the Health and Safety of the Players by Creating an Atmosphere Where Players Felt the Need to Hide Concussions from the Medical Staff.

As noted in more detail in Subsection III.C.2.a.iii., *supra*, the League's Medical Policies and Procedures Manual contains Concussion Protocols – protocols that are, generally speaking, updated annually. (SMF ¶ 228.) Contrary to these Protocols, Claimant would make light of the fact that players had concussions and, in fact, it was not uncommon for Claimant to call a player a "pussy" for having a concussion. (SMF ¶¶ 228-229.) Claimant would also tell players that

they should not miss any time due to a concussion – you are weak if you are unable play through a concussion. (SMF ¶ 230.) Mr. Foose testified as to Claimant's pattern of abuse directed against players who had suffered concussions as follows:

> Well, there are several things: **a repeated suggestion that there's no such thing [as concussions], they don't exist, they're not real; a repeated suggestion that they don't have them in Germany, that players just take a pill and go on, the implication being that it's a toughness question; the denigration of players who had suffered them for not being able to get immediately back out on the field; statements about players who are recovering from concussions and happen to be eating at a training table and saying in front of the group or some group of players why do you need to eat, you're not even practicing, you don't have any need for food.**

(SMF ¶¶ 231-232) (emphasis added.)

Based upon these statements, Claimant had created an atmosphere where players were afraid to speak up and be honest about their symptoms for fear of the reaction and the consequences that would come down on them from those disclosures. Considering the importance of this issue to the MLSPU and League, Claimant's actions in this regard were significantly alarming. (SMF ¶ 233.) As is readily known, the existence of concussions in professional sports is significantly. By way of example, the NFL is currently facing a number of lawsuits over its handling of concussions. Accordingly, Claimant's actions regarding concussions not only jeopardized the health and safety of the players, but it also subjected the League and the Philadelphia Union to potential liability – both from a public relations standpoint and from a monetary standpoint.

Based upon the foregoing, there is absolutely no question that Claimant's actions in this regard amounted to gross negligence and/or willful misconduct providing a good faith basis for the Philadelphia Union to exercise its discretionary right to terminate the Employment Agreement. This good faith basis is compounded by the position taken by the MLSPU – as

described within Mr. Foose's testimony above – as well as the position taken by the League – as described within the MLS Report. As detailed within the Termination Letter, the Philadelphia Union made the decision to exercise its discretionary right in this regard, and, as a result, it appropriately terminated the Employment Agreement and Claimant's Arbitration Demand should be dismissed as a matter of law on this independent basis alone.

e. Claimant's Subjecting of Players to Inappropriate Hazing Activities.

Claimant brought the idea of spanking rookie players following training camps to the Philadelphia Union, as he had also spanked players when he was the head coach of DC United. (SMF ¶ 237.) Claimant admits that he participated in a practice following the training camps of 2010, 2011 and 2012 where players were spanked. (SMF ¶ 238.) Claimant also admits that this practice included Claimant dipping his hand in ice water and then spanking the rookie players, sometimes choosing to hit the players with a sandal. (SMF ¶¶ 239-240.) Claimant further admits that [redacted] participated in the [redacted] training camp. (SMF ¶ 241.) At that time, Claimant physically spanked Mr. [redacted], who, again, was [redacted]. (SMF ¶ 242.)

Importantly, Mr. Sakiewicz became aware of the "spanking" when he was shown a video of the ritual in [redacted]. (SMF ¶ 243.) Considering the volatile nature of hazing activities in sports, Mr. Sakiewicz was extremely concerned by the content of the video. Indeed, a simple Google search can uncover hundreds of hazing incidents where athletes – ranging from high school to professional sports – sustained significant injuries, including death, as a result of being subject to certain hazing activities. Understanding this, as well as the fact that Claimant was actually physically hitting the rookie players – to the point that an ice bucket was needed to numb Claimant's hands – Mr. Sakiewicz, as soon as he and Claimant were alone, approached Claimant

and told him that he did not want the "spanking" to happen again; he wanted Claimant to "cease doing it" immediately.[59] (SMF ¶ 244.) However, in March/April of [redacted] Mr. Sakiewicz found out that, contrary to his direct order to Claimant, the rookie hazing ritual – including the spanking of a minor – had again taken place at the conclusion of training camp in February of [redacted]. (SMF ¶ 245.) In other words, Claimant ignored Mr. Sakiewicz's direct order for him to cease "spanking" / hazing activities.

Claimant's complete disregard of a direct order given to him by Mr. Sakiewicz – who, according to the Employment Agreement, is Claimant's direct report – amounted to insubordination. (SMF ¶ 10.) Such insubordination, especially considering it involved such a sensitive issue, absolutely amounted to gross negligence or willful misconduct providing the Philadelphia Union with a good faith basis to terminate the Employment Agreement. Indeed, Claimant's refusal to follow this direct order not only jeopardized the health and safety of the players, but it also subjected the Philadelphia Union to liability – both from a public relations standpoint (if it became known to the public) and from a monetary standpoint (if a player sustained a serious injury).

Notably, Claimant's blatant disregard of Mr. Sakiewicz's order to cease "spanking" the rookie players was not the first time Claimant engaged in insubordinate behavior. Indeed, in or around August of 2011, Vice President of Operations, Rick Jacobs, came up with the idea of inviting all the high school coaches to PPL Park for a symposium where the Philadelphia Union could share its plan for rolling out its youth soccer program. (SMF ¶ 306.) Mr. Sakiewicz thought it was a good enough idea to warrant a collaborative, brainstorming session and asked

[59] Mr. Debusschere corroborates the testimony of Mr. Sakiewicz, testifying that he knew Mr. Sakiewicz had directed the Claimant to cease the "spanking." (SMF ¶ 245.)

Mr. Jacobs to send sent out an email. (SMF ¶ 307.) Mr. Jacobs agreed and sent such an email to a variety of people, mistakenly failing to copy Claimant on the email. (SMF ¶ 308.)

Although Mr. Jacobs apologized for not including Claimant on the email, Claimant became very upset – inciting a significant amount of back-and-forth emails. (SMF ¶ 309.) Mr. Sakiewicz repeatedly asked Claimant to meet with him to discuss the issue of Mr. Jacobs leaving him off of the email, but Claimant refused to meet with him. (SMF ¶ 310.) In addition to his refusal to comply with Mr. Sakiewicz's reasonable request to meet with him, Claimant also had his attorney send Mr. Sakiewicz correspondence advising him that Claimant is not required to report him; rather, he reports to the owner of the Philadelphia Union, Jay Sugarman. In other words, Claimant was telling Mr. Sakiewicz – the CEO of the Philadelphia Union – that he does not have to listen to him. (SMF ¶ 311.) Mr. Sakiewicz responded to Claimant, citing to the pertinent provisions of the Employment Agreement clearly illustrating that Claimant reported to Mr. Sakiewicz. (SMF ¶ 312.)

This prior insubordinate behavior simply demonstrates that Claimant had a history of insubordinate behavior; he was a loose cannon with absolutely no respect for authority. In other words, Claimant's insubordinate history illustrated that he had no intention of ever rectifying his behavior; Claimant was going to continue to do what he wanted to do. This repeated insubordinate behavior, on top of the overall seriousness of the hazing issue, clearly amounted to gross negligence and/or willful misconduct providing the Philadelphia Union with a good faith basis to exercise its discretionary authority to terminate the Employment Agreement. As detailed within the Termination Letter, the Philadelphia Union made the decision to exercise its discretionary right in this regard, and, as a result, it appropriately terminated the Employment

Agreement and Claimant's Arbitration Demand should be dismissed as a matter of law on this independent basis alone.

4. Claimant's Conduct Reflected in a Materially Adverse Manner on the Integrity, Reputation or Goodwill of the Philadelphia Union and/or was Materially Prejudicial to the Interests of the League or the Philadelphia Union or Materially Detrimental to the Public Image and/or Reputation of the League, the Philadelphia Union or the Game of Soccer

As discussed in more detail within Subsection III.B., *supra*, Paragraph III(A) of the Employment Agreement allows the Philadelphia Union to terminate the Employment Agreement if it, in its reasonable discretion, determines in good faith that the following occurred:

> ***
> (5) Manager's commission of any action or involvement in any occurrence that (x) brings Manager into public disrepute or (y) **reflects in a materially adverse manner on the integrity, reputation or goodwill of Club or the Team**;
>
> (6) Manager engages in any activity set forth in Paragraph I(C);

(SMF ¶¶ 14-15) (emphasis added.)

Paragraph I(C)(v) of the Employment Agreement allows the Philadelphia Union to terminate the Employment Agreement if it, in its sole discretion, determines in good faith that Claimant:

> ***
> (v) **makes a statement or engages in conduct…that is materially prejudicial to the interests of the League or the Team or materially detrimental to the public image and/or reputation of the League, the Club and/or the game of soccer**.

(SMF ¶ 13) (emphasis added.)

Accordingly, pursuant to the express terms of the Employment Agreement, the Philadelphia Union could terminate the Employment Agreement if: (1) it determined – ***in its reasonable discretion*** – that Claimant committed an action or was involved "in any occurrence

that (x) brings Manager into public disrepute or (y) reflects in a materially adverse manner on the integrity, reputation or goodwill of Club or the Team"; and/or (2) it determined, ***in its sole discretion***, that Claimant made a statement or engaged in "conduct...that is materially prejudicial to the interests of the League or the Team or materially detrimental to the public image and/or reputation of the League, ***the Club*** and/or the game of soccer." (SMF ¶¶ 13-15.) Significantly, while the Employment Agreement does provide Claimant with a limited ability to cure his conduct in certain instances, such a right to cure does **not** apply to Paragraph III(A)(5) or (6) and/or Paragraph I(C)(v).

As outlined in specific detail throughout this Brief, shortly after the commencement of the 2012 season, Claimant began engaging in pattern of reprehensible conduct that without question fell within the ambit of Paragraph III(A)(5)-(6) and/or Paragraph I(C)(v). Indeed, as noted throughout this Brief:

- Claimant, contrary to the terms of the CBA as well as the law (NLRA), interfered with the rights of the players by threatening, coercing and restraining players from exercising their right to contact the MLSPU;
- Claimant, contrary to the terms of the CBA as well as the law (NLRA), retaliated against a player he believed contacted the MLSPU with the [redacted] issue – trading the player and, thereafter, pointing out the trade to the other players as a form of intimidation;
- Claimant, in violation of League Rules, left the coaches Technical Area, ran onto the field, participated in a "melee" with the players, and physically pushed a player on the opposing team, resulting in the broadcaster making the following statement: (SMF ¶ 72.)

> And Peter Nowak lost his mind there. Yeah, he should be sent off. That's inexcusable. Inexcusable for a head coach to act in this manner.
>
> ...and that is what Baldomero Toledo is telling him. It's like: What's your justification? Just walk off. He's telling him: Peter, just go.

> ...Look at Peter Nowak. See, that's why he gets sent off. What are you doing on the field?

(SMF ¶ 13.)

- Claimant's jeopardizing of the health and safety of the players by forcing them, against the strenuous objections of the athletic trainers, to participate in an unprecedented 10-12 trail run on a concrete surface, in hot and humid weather without hydration – including Claimant actually physically ripping water bottles out of the hands of the players and the Head Athletic Trainers.

- Claimant's, against the strenuous objections of Mr. Rushing, forcing injured players to participate in an unprecedented trail run on a concrete surface, in hot and humid weather without hydration, resulting in several of these injured players suffering setbacks relative to their injuries. In other words, Claimant's actions not only jeopardized the health and safety of the players, but they actually affected the health and safety of the players.

- Claimant's making of disparaging remarks about the Philadelphia Union to Mr. Messing; specifically telling him:

> ...We spoke for an hour and the gist of – not the gist; that conversation was [Claimant] telling me: I have to get the hell out of Philadelphia. These guys are stupid. They don't know what they're doing and they're broke. They have no money...that also was a very shocking conversation to me because he was bad mouthing and slamming a team in the League...But he was off the wall at that point saying that they're stupid, they don't have a clue, and they're broke...
>
> Nick [Mr. Sakiewicz] doesn't have a fucking clue; [t]hey don't know what they're doing. They have no money.

(SMF ¶¶ 271-272.)

Each of the foregoing actions of Claimant without question brought Claimant into public disrepute, reflected in a materially adverse manner on the integrity, reputation and goodwill of the Philadelphia Union, was materially prejudicial to the interests of the League and the Philadelphia Union, and/or was materially detrimental to the public image or reputation of the League, the Philadelphia Union and/or the game of soccer. Most importantly, each of these actions by Claimant: (1) reflected in a materially adverse manner on the integrity, reputation and

goodwill of the Philadelphia Union; (2) was materially prejudicial to the interests of the Philadelphia Union; and (3) was materially detrimental to the public image or reputation of the Philadelphia Union.

As a starting point, Claimant's actions during the April 21, 2012 Chivas USA game were "out of control" and significantly embarrassing to the Philadelphia Union. Mr. Sakiewicz testified relative to this point as follows:

> It was more than infuriating…it was alarming, it was embarrassing. I know all the owners in the League, including Mr. Anschutz, whose name is on the trophy, who I worked for for six years, who are watching this, and the first thing that pops in my head is: **What kind of team is Nick Sakiewicz running? It's, excuse my French, a shit show.**
>
> And this was more than just heat of the moment, coach running onto the field, players engaging in a fight. This was the beginnings of a brand that Jay and I did not want to have as a club and it was hurtful, it was disappointing, it was alarming, and it was tough to watch.

(SMF ¶ 79.)

Mr. Sakiewicz further testified that Claimant actions during the April 21, 2012 Chivas USA game did not comport with Philadelphia Union policies and procedures in at least two respects, specifically testifying:

> …There is our purpose statement, which I alluded to earlier, which lays out a lot of detail about things like the brand, our core beliefs, our greatest imaginable challenge, which is to become one of America's most admired soccer brands; and then there's an employee manual. And then, of course, there's [Claimant's] contract, which addresses a lot of those responsibilities, roles, duties, and things that we expect out of [Claimant].

(SMF ¶ 316.)

During his testimony, Claimant actually acknowledged that he received negative feedback as a result of his actions during the April 21, 2012 game against Chivas USA – which is easily confirmed by reiterating the reaction of the broadcaster during the game. (SMF ¶¶ 72, 317.)

Additionally, the disparaging remarks made by Claimant to Mr. Messing – that Mr. Sakiewicz and the Philadelphia Union were broke and did not know what they were doing – absolutely constitute a "statement…that is materially prejudicial to the interests of…the [Philadelphia Union] or materially detrimental to the public image and/or reputation of the [Philadelphia Union]." In this regard, it is important to reiterate that Mr. Messing is not only a broadcaster for the League, but he is also well-known in the U.S. soccer community and he could have easily utilized this information to further defame the public image or reputation of the Philadelphia Union.[60]

The remaining issues – the interference/retaliation with the players MLSPU rights and the jeopardizing of the health and safety of the players by withholding water and forcing injured players to participate in a strenuous 10-12 mile trail run – all became significantly embarrassing when the League took it upon itself to investigate Claimant and then issued the MLS Report. Indeed, the issuance of the MLS Report had a significant negative impact on the position/posture of the Philadelphia Union with the League, the MLSPU, and the players. Mr. Sakiewicz specifically testified on this point as follows:[61]

Q. Was the June 12th, 2012, report embarrassing to you?

A. That would put it lightly…**It was beyond embarrassing**.

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[60] *See also, Ott v. Buehler Lumber Co.*, 373 Pa. Super. 515, 519-20, 541 A.2d 1143, 1145-46 (1988), quoting generally *O'Neil v. Schneller*, 63 Pa.Super 196 (1916) with respect to employment contracts as follows:

> It was not necessary for the defendants [employers] to show that appellee's [employee's] conduct caused them to suffer any loss. A master is not compelled to keep an employee, hired for a given term, in his service until the master's business has suffered pecuniary loss, where the employee is disobedient and quarrelsome with co-employees… When the master is justified in believing that the employee's conduct is such that an injury or loss to the business or disorganization of affairs is likely to follow from such conduct if it is permitted to continue, the master would be warranted to discharging the employee.

[61] Mr. Sakiewicz further testified that he believed Claimant's actions affected the organization, the fans, the sponsors, broadcast partners, affiliates, and investors. (SMF ¶ 319.)

> Q. Did you feel like it had a detrimental impact on the team's position or posture with the League and the Players Union?
>
> A. No question. **It had a negative impact on the team's position in the League; with other owners who are our partners; for me personally and my reputation with the commissioner; senior executives at the League; other members; the President of Soccer United Marketing, Kathy Carter, who I had launched the League with; to multiple, multiple people. It was a very, very difficult thing to read**.

(SMF ¶ 318.)

In addition to Mr. Sakiewicz's subjective beliefs regarding the effect the MLS Report had on the Philadelphia Union, the record evidence conclusively establishes that Claimant's actions absolutely affected the integrity, reputation, goodwill and public image of the Philadelphia Union – at least in the eyes of the League and the MLSPU. Indeed, as noted in more detail in Subsection II.D., *supra*, based upon the findings within the MLS Report, the MLSPU believed Claimant's actions during the May 31, 2012 trail run created a "very, very dangerous situation" for the players, specifically noting:

> ...it was a hot day, it was an extremely humid day – both of them were – and **the length of the runs was completely out of whack with anything that I had ever heard of any coaching staff doing within the League**.
>
> So, you know, **every player was endangered with regard to the water because it is simply not safe to be out in those conditions and running that length – even for athletes as fit as ours it is not safe to be out and doing that – without access to water**.

(SMF ¶ 194) (emphasis added.)

Accordingly, the MLSPU took the following position relative to Claimant:

> **We certainly took a position and I think our position really from June 1st on was very clear, which was that [Claimant] needed to be removed as coach of the team and that it was not appropriate nor was it safe for our members to have him as coach of the team**. So from the moment we learned about the runs and the things that happened with those as well as the concussion issues, **our position was he can't continue as coach**.

(SMF ¶ 195) (emphasis added.)

Significantly, Mr. Foose, who had led the MLSPU since its inception on April 1, 2003, testified that the MLSPU had never previously (or subsequently) taken the position that a coach needed to be removed from a team. (SMF ¶ 196.) In this instance, however, the MLSPU felt so strong in its position relative to Claimant that it informed Mr. Durbin that it was contemplating a strike or withholding players from team activities if Claimant continued to coach the Philadelphia Union:

> So this was a conversation that took place between Jon Newman [counsel for MLSPU] and myself on the 10th and when we talked about what was going to be happening next, **the Union, Players Union, given their concern, the health and safety concern, for the players, the environment that the players were in, felt that if [Claimant] was going to continue to be the coach, that there were discussions about whether or not the players would, in fact, report for training.**

(SMF ¶ 197) (emphasis added.)

Simply put, the MLSPU believed that Claimant's actions were so reprehensible that they not only warranted his being "fired as the coach [of the Philadelphia Union]," but, should the Philadelphia Union not take that action, it would potentially withhold the players from training. (SMF ¶¶ 197-198.) Importantly, Mr. Durbin – and the League – shared the same view as Mr. Foose, with Mr. Durbin specifically testifying that Claimant's actions could not be corrected and, as a result, he believed Claimant "need[ed] to be fired."[62] (SMF ¶¶ 199-200.)

The positions of the League and the MLSPU illustrate that Claimant's actions affected the integrity, reputation, goodwill and public image of the Philadelphia Union – at least in the eyes of the League and the MLSPU. Indeed, their positions without a doubt illustrate that the

[62] It is extremely important to reiterate that both Mr. Durbin and Mr. Foose came to their conclusions – that Claimant could not continue to coach the Philadelphia Union – on their own, completely independent of Mr. Sakiewicz or anyone else from the management of the Philadelphia Union. (SMF ¶ 200.)

Philadelphia Union, at the very least, had a good faith basis to exercise its discretionary authority to terminate the Employment Agreement pursuant to Paragraph III(A)(5)-(6) and Paragraph I(C). As detailed within the Termination Letter, the Philadelphia Union made the decision to exercise its discretionary right in this regard, and, as a result, it appropriately terminated the Employment Agreement and Claimant's Arbitration Demand should be dismissed as a matter of law. Again, while the Employment Agreement does provide Claimant with a limited ability to cure his conduct in certain instances, such a right to cure does **not** apply to Paragraph III(A)(5)-(6) and/or Paragraph I(C)(v).

5. *Claimant's Failure to Comply in all Material Respects with Team Rules or League Rules.*

As discussed in more detail within Subsection III.B., *supra*, Paragraph III(A)(7) of the Employment Agreement allows the Philadelphia Union to terminate the Employment Agreement if it, in its reasonable discretion, determines in good faith that Claimant failed "to comply in all material respects with Team Rules…or League Rules." In this regard, the Philadelphia Union already detailed Claimant's violations of League and Team Rules within Subsection III.C.2.a. of this Brief. In the interests of judicial economy, the Philadelphia Union will not reiterate those arguments herein; rather, it will incorporate such arguments herein by reference.

Based upon the arguments presented in Subsection III.C.2.a., it is absolutely clear that the Philadelphia Union had a good faith basis to exercise its discretionary authority to terminate the Employment Agreement pursuant to Paragraph III(A)(7) for Claimant's violation of League Rules. As detailed within the Termination Letter, the Philadelphia Union made the decision to exercise its discretionary right in this regard, and, as a result, it appropriately terminated the Employment Agreement and Claimant's Arbitration Demand should be dismissed as a matter of law on this independent basis alone.

6. The Philadelphia Union was Directed by the League to Terminate or Suspend the Employee Agreement.

As discussed in more detail within Subsection III.B., *supra*, Paragraph III(A)(8) of the Employment Agreement allows the Philadelphia Union to terminate the Employment Agreement if it is directed by the Commissioner of the League to terminate ***or suspend*** the Employment Agreement. In this regard, the record evidence establishes that, as a result of Claimant's inappropriate conduct towards the players, the League ultimately directed the Philadelphia Union to terminate – at the very least, suspend – the Employment Agreement and, as such, the Philadelphia Union was within its right to terminate the Employment Agreement without any further monetary obligations to Claimant.

To illustrate, the following background is relevant. On Sunday night, June 10, 2012, while Mr. Sakiewicz was in Florida, Mr. Durbin called Mr. Sakiewicz to advise him of the results of the multiple League investigations into Claimant's actions. (SMF ¶ 218.) During their conversation, Mr. Durbin told Mr. Sakiewicz that the League was going to provide him with a formal report, but that, in the meantime, Claimant could not be near Philadelphia Union players.[63] (SMF ¶ 219.) Mr. Durbin further informed Mr. Sakiewicz that he wanted Claimant to be terminated the following day, on Monday, June 11, 2012, specifically sending Mr. Sakiewicz the following email on June 11, 2012:

> This cannot last until the weekend. You gave me your assurance this would happen wed. [sic]. It was my recommendation for it to happen this morning.

(SMF ¶ 221.)

Mr. Sakiewicz, however, wanted and, in fact, requested additional time before making a final determination to terminate Claimant. (SMF ¶ 222.) As the Philadelphia Union had two

[63] Of note here, the League, and not the Philadelphia Union, technically employs the players. (SMF ¶ 220.)

games coming up, he wanted to receive and review the actual League report to confirm the results of the League's investigation, and he wanted time to talk to the Philadelphia Union owners and investors. (SMF ¶ 222.) Mr. Durbin – within several back and forth emails with Mr. Sakiewicz on June 11, 2012 – informed Mr. Sakiewicz that Claimant had to be terminated no later than the morning of Wednesday, June 13, 2012 – **specifically telling Mr. Sakiewicz that Claimant "cannot train the team on [Wednesday, June 13, 2012]..."**[64] (SMF ¶ 223.)

The day before the deadline imposed by Mr. Durbin, on June 12, 2012, Mr. Sakiewicz received an email from Mr. Durbin attaching an MLS Report detailing the results of the League's investigation into the multiple complaints it received relative to Claimant. (SMF ¶ 225.) The following day, the Philadelphia Union – based upon the directive of Mr. Durbin as well as Paragraph III(A)(8) of the Employment Agreement – exercised its discretionary right to terminate the Employment Agreement.

Importantly, Paragraph III(A)(8) of the Employment Agreement allows the Philadelphia Union to terminate the Employment Agreement if it is directed by the Commissioner of the League to terminate ***or suspend*** the Employment Agreement. Accordingly, even if Claimant were to argue that the League did not direct the Philadelphia Union to "terminate" the Employment Agreement, the Philadelphia Union also had the discretionary right to terminate the Employment Agreement if the League directed the Philadelphia Union to "suspend" the Agreement. Considering – as evidenced in the aforementioned emails – the League directly informed the Philadelphia Union that Claimant was not allowed to train the team (or be near the players), it is quite clear that the League, at the very least, directed the Philadelphia Union to

[64] Mr. Sakiewicz, who has been an executive in Major League Soccer for 19-20 years, had never seen an instance in which the League prohibited a coach from participation in practice – while coaches have been red carded and unable to coach in games, he had never experienced a coach being unable to practice or be around players between contests. (SMF ¶ 224.)

"suspend" Claimant. Either way, the Philadelphia Union appropriately exercised its discretion to terminate the Employment Agreement.

Of note, during the pendency of the instant Arbitration, Claimant filed a separate lawsuit in the United States District Court for the Eastern District of Pennsylvania against the League and the MLSPU. (SMF ¶ 344.) Within this lawsuit, Claimant alleges that his firing was ordered by the League. (SMF ¶ 345.) Specifically, Claimant alleges the following in his Complaint against MLS and the MLSPU: ***

> 25. During the discovery phase of Plaintiff's case against the Philadelphia Union, Plaintiff learned that his termination was precipitated by an investigation demanded by the Major League Soccer Players Association and conducted by the Major League Soccer which resulted in a Report.
>
> ***
>
> 27. During the deposition testimony of Philadelphia Union President and owner, Jay Sugarman related to the arbitration between the Philadelphia Union and Mr. Nowak (the "Arbitration"), Mr. Sugarman testified that the decision to fire Piotr Nowak was based on a directive from MLS that Mr. Nowak be terminated as a coach.
>
> 28. During the Arbitration hearing conducted in late May of 2014, the Executive Director of the Players Union testified that an investigation of Piotr Nowak was demanded by the Player's Union in May of 2012 over a disputed training exercise.
>
> ***
>
> 30. **The termination of Piotr Nowak, as coach of the Philadelphia Union *was precipitated and directly caused* by Major League Soccer and Major League Soccer Players Association.**
>
> ***

In making these averments in a federal complaint, Claimant was obligated, subject to sanctions, to comply with Rule 11 by only making factual contentions that have evidentiary support. Fed.R.Civ.P. 11. If Claimant's allegations are taken as true – which, as described above, comport with the record evidence – then the Philadelphia Union properly exercised its

discretionary right to terminate the Employment Agreement pursuant to Paragraph III(A)(8). Indeed, at the very least, the simple fact that Claimant is making these allegations in a federal lawsuit illustrates that the Philadelphia Union must have had a good faith basis to believe it was directed to terminate ***or suspend*** the Employment Agreement by the League.

Significantly, while the Employment Agreement does provide Claimant with the ability to cure his conduct in certain instances, such a right to cure does **not** apply to Paragraph III(A)(8). Accordingly, the Philadelphia Union properly exercised its discretionary right to terminate the Employment Agreement and, as a result, it appropriately terminated the Employment Agreement and Claimant's Arbitration Demand should be dismissed as a matter of law on this stand alone basis.

D. The Philadelphia Union Properly Exercised its Discretionary Right to Determine that Claimant Was Unable to Cure His Actions.

1. Claimant Has No Ability to Cure His Conduct When the Philadelphia Union Determines, in Its Sole Discretion, that Claimant Engaged in the Conduct Outlined in Paragraph III(A)(5), (6) or (8) of The Employment Agreement.

As noted in more detail within Subsection III.C.3., *supra*, while the Employment Agreement provides Claimant with the limited ability to cure his conduct, it is limited in two significant respects. First, it does not apply to instances in which the Philadelphia Union determined, in its sole discretion, that Claimant engaged in any of the conduct outlined in Paragraph III(A)(5), (6), or (8) of the Employment Agreement. In other words, Claimant has absolutely no ability to cure his conduct should the Philadelphia Union determine, in its good faith discretion that Claimant: (1) committed an action or was involved "in any occurrence that (x) brings Manager into public disrepute or (y) reflects in a materially adverse manner on the integrity, reputation or goodwill of Club or the Team"; (2) made a statement or engaged in "conduct...that is materially prejudicial to the interests of the League or the Team or materially

detrimental to the public image and/or reputation of the League, the Club and/or the game of soccer"; and/or (3) if the Club is directed by the Commissioner of the League to Terminate ***or suspend*** the Employment Agreement.

Accordingly, relative to the arguments presented by the Philadelphia Union in Subsections III.C.4. and III.C.6., *supra*, Claimant had absolutely no ability to cure. Indeed, once the Philadelphia Union had a good faith basis to determine that the Claimant engaged in the conduct outlined in Paragraph III(A)(5), (6), or (8) of the Employment Agreement, it could exercise its discretionary right to terminate the Employment Agreement – it was under no contractual obligation even to consider providing Claimant with the ability to cure such conduct.

2. *The Philadelphia Union is Under No Obligation to Provide Claimant with an Opportunity to Cure if it Determines, in Its Good Faith Judgment, that Such Conduct is Not Curable or that the Continued Employment of Claimant during a Cure Period could Reasonably be Expected to Result in Material Harm to the Philadelphia Union.*

There are limited circumstances where the Employment Agreement does *potentially* provide Claimant with the ability to cure his conduct. These circumstances are limited to instances in which the Philadelphia Union determines, in its good faith discretion, that Claimant engaged in the conduct delineated within Paragraphs III(A)(2), (3), or (7) of the Employment Agreement. However, as outlined in more detail within Subsection III.C.3., *supra*, the Philadelphia Union was under absolutely no obligation to provide Claimant with an opportunity to cure, if it determines – ***in its good faith judgment*** – that the conduct engaged in by Claimant is of a nature that is not curable, or that the continued employment of Claimant during a cure period could reasonably be expected to result in material harm to the Philadelphia Union. (SMF ¶ 17.)

As outlined in the Termination Letter, at the time it exercised its discretionary right to terminate the Employment Agreement, the Philadelphia Union also determined, in its good faith

judgment, that the Claimant's actions were "not capable of being cured" and that Claimant's continued employment "would continue to cause material harm…" (Respondent Exhibit 36.) Under the circumstances, the fact that this "judgment" of the Philadelphia Union was made in "good faith" is absolutely indisputable. Indeed, the conduct engaged in by Claimant – namely his: (1) interfering with and/or retaliating against players for exercising their MLSPU rights; (2) jeopardizing the health and safety of players by forcing them to participate in unprecedented training activities without hydration; (3) jeopardizing the health and safety of players by disregarding the advice of the head athletic trainer and forcing injured players to participate in the unprecedented training activities; (4) jeopardizing the health and safety of the players by creating an atmosphere where the players felt they were required to hide concussions from the medical staff; and (5) subjecting the players to inappropriate hazing activities – is simply not curable and rose to the level that the continued employment of Claimant could cause material harm to the Philadelphia Union.

As a starting point, in order to have an opportunity to cure, the matter at hand must in fact be curable. How can the Claimant cure his interference and retaliation relative to the players engaging in union activities? He could certainly "promise" not to do it again, but the trade of Mr. [redacted] is final and cannot be reversed. Additionally, the player intimidation has occurred and the quelling effect it had on the players during Claimant's remaining tenure with the Philadelphia Union can not be reversed. As to the level of fear among the players and the MLSPU, not even Bob Foose was willing to raise the interference issue with the League until after Mr. [redacted] was traded by Claimant for fear of retaliation. Moreover, how can Claimant cure his actions during the April 21, 2012 Chivas USA game? Again, he can "promise" not to do it again, but that does not remedy the fact that Claimant pushed an opposing player and was suspended and unable to

coach two League games. The embarrassment to the Philadelphia Union may diminish over time, but can't be ameliorated by Claimant. Further, how can Claimant cure the $55,000 in fines the Philadelphia Union was required to pay in 2012 as a result of his actions? A "promise" not to do it again will not reimburse the Philadelphia Union for the lost $55,000. How can he cure the fact that he breached the Employment Agreement by seeking additional employment and making disparaging remarks about the team and its management? Again, a simple "promise" not to do it again or "sorry I told folks you were broke and stupid" cannot rectify his actions in this regard; he still made these comments to a broadcaster who could have easily utilized this information to further defame the public image or reputation of the Philadelphia Union. Additionally, how can Claimant cure the fact that he placed his hand in an ice bucket and "slapped" [redacted] during a hazing ritual he was already directed to cease? He cannot – there is no way to take back the fact that he slapped rookie players, including [redacted] against the direct order of Mr. Sakiewicz. As a final and perhaps most important example, how can Claimant cure his actions relative to the May 31, 2012 trail run? Again, he can certainly "promise" not to do it again, but such a "promise" is hollow and cannot remedy the fact that he put the health and safety of the players at significant risk. How can Claimant remedy the exacerbated injuries suffered by the players – requiring the players to miss additional playing time and/or how can he remedy the new injuries suffered by players, resulting in those players missing playing time?

The answer to each of the foregoing questions is, simply, "he cannot cure these actions." Indeed, considering the seriousness of such actions, a simple "promise" not to do it again and/or "apology" is simply not enough to "cure" the harm these actions have already created. Claimant's actions are tantamount to an individual punching or striking another and then apologizing and promising not to do it again – that individual cannot take back the punch, nor

can he "cure" the fact that he has assaulted another. The conduct has already been completed. The crime has occurred. Claimant is simply not entitled contractually to a mulligan for his grossly inappropriate actions. Accordingly, while Claimant may regret his actions – although it does not appear as though he does – the conduct and its resulting harm have already occurred. There is simply no feasible way for Claimant to rectify the fact that he traded a player and intimidated a team, the fact that players health and safety was put in jeopardy during the May 31, 2012 trail run, the fact that players were injured or exacerbated existing injuries during the May 31, 2012, the fact that he was suspended for two games, and the fact that he "slapped" [redacted]

Simply put, the actions engaged in by Claimant could not be reasonably cured and, thus, the Philadelphia Union exercised its good faith judgment not to provide Claimant with an opportunity to cure. Regardless of Claimant's zealous arguments to the contrary, that is all that is required of the Philadelphia Union contractually.

Even if we assume, *arguendo*, that Claimant's conduct was curable – a fact that flies in the face of the record evidence and common sense – the providing of Claimant with the ability to cure his conduct would have caused "material harm" to the Philadelphia Union. Indeed, as outlined in detail above, the MLSPU believed that Claimant's actions warranted his termination – warranting him being "fired as the coach [of the Philadelphia Union]." (SMF ¶ 198.) Similarly, Mr. Durbin – and the League – shared the same view as Mr. Foose, with Mr. Durbin specifically testifying that Claimant's actions could not be corrected and, as a result, he believed Claimant "need[ed] to be fired." (SMF ¶¶ 199-200.) How could Claimant cure his actions in this regard when the League was communicating to the Team that Claimant could have no contact with players after June 13, 2012? Of particular note, Mr. Foose and the MLSPU believed Claimant's actions created such a "very, very dangerous situation" for the players, that

the MLSPU was contemplating a strike or withholding players from team activities if Claimant continued to coach the Philadelphia Union. (SMF ¶ 197.) In other words, if the Philadelphia Union provided Claimant with the ability to cure his conduct, it would have been materially harmed, as the MLSPU could have withheld the players from the team. Considering such an action would have left the Philadelphia Union without a team, it is quite obvious that the continued employment of Claimant would have resulted in material harm to the Philadelphia Union.

Based upon the foregoing, it is indisputable that the Philadelphia Union's decision not to provide Claimant with an opportunity to cure was made in "good faith." It is quite clear from the record evidence that Claimant's conduct was not curable and, even if it was, Claimant's continued employment during a period of cure would have resulted in material harm to the team and would have been materially detrimental to the Team's position and standing with the League and MLSPU.

E. Claimant Cannot Enforce the Employment Agreement Against the Philadelphia Union as: (1) He Was the First to Breach the Employment Agreement; and (2) He Engaged in Actions that Failed to Comport with the Standards of Good Faith and Fair Dealing.

Under Pennsylvania contract law, "a material breach by one party to a contract entitles the non-breaching party to suspend performance." *LBL Skysystems (USA), Inc. v. APG-America, Inc.*, 2005 WL 2140240, at *27 (E.D.Pa. Aug. 31, 2005) (citing *Widmer Eng'g, Inc. v. Dufalla*, 837 A.2d 459, 467 (Pa.Super.Ct.2003) (the general rule is that if a breach is deemed "material," then the non-breaching party is discharged from all liability under the contract, and may suspend its own performance.)). Additionally, under Pennsylvania contract law, if it is determined that the party seeking to enforce a contract has engaged in actions that failed to comport with standards of good faith and fair dealing, then it follows that the other party is relieved of its

obligation to perform under any contract that may have existed. *Falls v. State Farm Ins. Mut. Auto. Ins. Co.*, 774 F. Supp. 2d 705, 711-12 (M.D. Pa. 2011).

More specifically, in *Falls v. State Farm Ins. Mut. Auto. Ins. Co.*, 774 F. Supp. 2d 705, 711-12 (M.D. Pa. 2011), the court found a material breach of an employment contract where the employee used his coworker's username and password to log into the employer's computer system in order to complete required coursework for the coworker. In granting summary judgment for the employer on the plaintiff-employee's breach of contract claim, the court reasoned as follows:

> [W]e find it clear beyond peradventure that [plaintiff] materially breached his employment contract with [employer]. Logging on to another employee's account and completing coursework that [employer] expected [a coworker] to complete is at a minimum, unethical behavior. **This was a breach of trust that occurred at an early time in the parties' dealings, and thus could not be weighed against accumulated good will. It was reasonable for [employer] to assume that they could not trust [plaintiff] in the future.**
>
> Most importantly, **[plaintiff] failed to comport with standards of good faith and fair dealing.** Every contract in Pennsylvania imposes on each party a duty of good faith and fair dealing in its performance and its enforcement. Donahue v. Federal Express Corp., 753 A.2d 238, 242 (Pa.Super.Ct.2000) (internal citations omitted). "Good faith has been defined as 'honesty in fact in the conduct or transaction concerned.'" *Id.* "An agency relationship is a fiduciary one ... [t]hus in all matters affecting the subject of the agency, **the agent must act with the utmost good faith in furthering and advancing the principal's interests.**" eToll, Inc. v. Elias/Savion Adver., 811 A.2d 10, 21 (Pa.Super.Ct.2002). [Plaintiff] did not act in good faith. To repeat, his actions in completing [his coworker's] coursework were dishonest. **[Employer] was thus relieved of its obligation to perform under any contract that may have existed.**

Falls, 774 F. Supp. 2d at 712 (M.D. Pa. 2011) (emphasis added.)

Pennsylvania contract law controls the instant dispute. As outlined in detail within Subsection III.C.2., *supra*,[65] Claimant materially breached the Employment Agreement in numerous respects. Furthermore, Claimant's actions in this regard failed to comport with the

[65] In the interests of judicial economy, the Philadelphia Union will not reiterate those arguments herein; rather, it will incorporate the same by reference.

standards of good faith and fair dealing. As a result, pursuant to Pennsylvania contract law, the Philadelphia Union is discharged from all liability relative to the Employment Agreement – it is relieved from the monetary obligations that serve as the basis for Claimant's Arbitration Demand. Accordingly, Claimant's Arbitration Demand has no basis and should be dismissed as a matter of law.

F. Any and All Credibility Determinations Must be Resolved in Favor of the Philadelphia Union and Against Claimant.

It is well settled that, within an arbitration proceeding, findings of fact and inferences to be drawn therefrom are the exclusive province of the arbitrator. *Martik Brothers, Inc. v. Kiebler Slippery Rock, LLC*, No. 08–1756, 2009 WL 1065893 (W.D.Pa. Apr. 20, 2009) (*citing Exxon Shipping Co. v. Exxon Seamen's Union*, 73 F.3d 1287, 1297 (3d Cir. 1996). Based upon the record evidence established during the 5-day Hearing in the instant litigation, it is indisputable that all factual determinations as well as the resulting inferences therefrom must be resolved in favor of the Philadelphia Union. Indeed, with all due respect to Claimant, the only consistency in his testimony was that it consistently conflicted with the testimony given by the other witnesses and hard evidence – with many of the other witnesses being completely independent, having absolutely no interest in the outcome of the instant litigation.

For instance, and by way of specific example,[66] Claimant testified that, during the May 31, 2012 trail run, he did not "personally take water bottles away from the players" or "physically take anything out of anybody's hands." (SMF ¶ 346.) However, a former player of the Philadelphia Union, [redacted] testified that, during the May 31, 2012 trail run, he attempted to drink out of an individual disposable water bottle, but Claimant physically took the bottle out of his hands and threw it to the side. (SMF ¶ 347.) Similarly, Claimant initially

[66] Although not exhaustive, the following illustrates several of instances where Claimant's testimony directly conflicted with the testimony of other witnesses.

testified that he did not "throw any [of the water] bottles up into the woods" during the May 31, 2012 trail run. (SMF ¶ 348.) However, a current player, [redacted] testified that he specifically witnessed Claimant take the water bottles and hide them in the woods – telling players "you guys don't need water." (SMF ¶ 349.) Upon hearing Mr. [redacted] testimony, Claimant – when he was recalled as a rebuttal witness – revised his testimony and admitted that he did take the water as described by Mr. [redacted] (SMF ¶ 350.)

As it further relates to the water limitations Claimant placed on the players, Claimant also testified that, subsequent to the May 31, 2012 run, he did not limit the players to one water bottle per practice or place any other water limitations on the players. (SMF ¶ 351.) However, two players, Mr. [redacted] and [redacted], as well as the Assistant Athletic Trainer, Steve Hudyma, all testified that Claimant did in fact place volume water limitations on the players during a practice subsequent to the May 31, 2012 trail run. (SMF ¶ 352.)

Additionally, Claimant testified that, during the May 31, 2012 trail run, he did not advise the Head Athletic Trainer of the Philadelphia Union, Paul Rushing, that the medical staff would no longer make the determination as to which players are healthy enough to play in each game or participate in the training sessions – such determinations would now be made by the Claimant. (SMF ¶ 353.) Mr. Rushing, however, specifically testified that, during the May 31, 2012 trail run, Claimant explicitly informed him that neither Mr. Rushing nor the team doctors were going to make decisions regarding the ability of a player to train or place in a game; these decisions were now going to be made by Claimant. (SMF ¶ 354.) Similarly, Claimant also testified that Philadelphia Union player [redacted] was able to play in the June 5, 2012 game – only five days following the May 31, 2012 trail run. (SMF ¶ 355.) Mr. [redacted] however, testified

that he was unable to play until at least sixteen (16) days after the May 31, 2012 trail run. (SMF ¶ 356.)

Claimant's testimony concerning his hazing of the players as well as his testimony regarding his interference with the players' right to contact the MLSPU was also inconsistent. As it relates to hazing, Claimant testified that he was never told to cease the hazing. (SMF ¶ 357.) Mr. Sakiewicz, however, testified that he approached Claimant and explicitly told him that he wanted the hazing to cease immediately. (SMF ¶ 358.) Mr. Debusschere corroborated the testimony of Mr. Sakiewicz, specifically testifying that Mr. Sakiewicz told Claimant to stop the hazing. (SMF ¶ 358.)

With regards to his interference with the players' right to contact the MLSPU, Claimant testified that he never told the players they were not allowed to bring issues to the MLSPU. (SMF ¶ 359.) However, several players, including without limitation Mr. [redacted] as well as [redacted] specifically testified that Claimant told the players not to contact the MLSPU.[67] (SMF ¶ 360.) In this same fashion, Claimant also denied calling Mr. [redacted] and/or Mr. [redacted] and asking them who reported the [redacted] issue to the MLSPU. (SMF ¶ 361.) Both Mr. [redacted] and Mr. [redacted] however, testified separately and unequivocally that Claimant did in fact call them and ask them who reported the [redacted] issue to the MLSPU – the call to Mr. [redacted] was actually confirmed by another Philadelphia Union player, Mr. [redacted] who happened to be present during Claimant's call. (SMF ¶ 362.)

Interestingly enough, Claimant further testified that he did not contact Robert Foose, the Executive Director of the MLSPU, to ask him to disclose the identity of the Philadelphia Union

[67] Significantly, additional players could have been produced to confirm Claimant's actions in this regard; however, Claimant agreed during the hearing that he would simply stipulate to the fact that the other players would testify in the same fashion as Mr. [redacted] and Mr. [redacted] In the interests of judicial efficiency, the Philadelphia Union agreed to this stipulation.

players who contacted MLSPU regarding the [redacted] issue – actually testifying that he never had a phone conversation with Mr. Foose during the time he was employed by the Philadelphia Union. (SMF ¶ 363.) Mr. Foose, however, unambiguously testified that Claimant not only called him, but that, during the call, Claimant actually asked Mr. Foose to identify the player that brought the [redacted] issue to his attention – to the attention of the MLSPU. (SMF ¶ 364.)

Another significant issue in which Claimant's testimony contradicted that of witnesses with absolutely no interest in the outcome of the instant litigation involved Claimant, contrary to the terms of the Employment Agreement, seeking other employment during the time he was employed with the Philadelphia Union. Indeed, Claimant testified that, during his employment with the Philadelphia Union, he did not look to see what other employment opportunities were out there. (SMF ¶ 365.) However, two independent witnesses, Michael Morris and Shep Messing, testified that Claimant reached out to them during the time he was employed as the head coach of the Philadelphia Union in an effort to find other employment. (SMF ¶ 366.) The testimony of these independent witnesses is further corroborated by Claimant's emailing of his resume to Mr. Paunovic. (SMF ¶ 256-264.) 256-264.)

Similarly, Claimant also testified that he never told Shep Messing that Mr. Sakiewicz did not know what he was doing and/or that the Philadelphia Union did not have any money. (SMF ¶ 367.) Mr. Messing, however, specifically testified that Claimant made both of these statements to him. (SMF ¶ 368.) Claimant also initially testified that Shep Messing did not bring him to the United States as a player, but, a few moments later, changed his testimony and explicitly stated "[a]nd I communicate that to Mr. Messing, who was very upset that he brought me here [to the United States], [yet] he didn't even have commission for my playing time here in United States, and I didn't give him anything." (SMF ¶ 369.)

Claimant's inconsistent testimony – testimony that directly conflicts with other witnesses – even reaches issues that are not technically material to the resolution of the instant litigation. Indeed, Claimant testified that he paid $25,000 to the United States Soccer Federation in order to take the head coaching position with the Philadelphia Union. (SMF ¶ 372.) When he was presented with the cancelled checks illustrating that the Philadelphia Union actually paid the full $75,000 required to release Claimant from his contract with the United States Soccer Federation, Claimant testified that the Philadelphia Union initially paid the $75,000, but that it later deducted $25,000 from his paycheck. (SMF ¶ 373.) The uncontroverted documents produced in this matter, however, illustrates that the Philadelphia Union paid the full $75,000 to release Claimant from his contract with the United States Soccer Federation and that the Philadelphia Union never deducted $25,000 from the payments it made to Claimant. (SMF ¶ 374.) Moreover, the express language of the Employment Agreement confirms that the Philadelphia Union paid the entire $75,000 – specifically outlining that Claimant would have to reimburse the Philadelphia Union for the $75,000 it paid to U.S. Soccer Federation if Claimant terminated the Employment Agreement prior to the start of the 2010 MLS season. (SMF ¶ 375.)

Similarly, Claimant testified that he did not have his UEFA Pro Coaching license as of June 1, 2009, and that he did not have it as of the date of his hearing testimony. (SMF ¶ 376.) However, Claimant testified that, prior to his employment with the Philadelphia Union – when he was working with the U.S. Soccer Federation – he went to Brazil for purposes of obtaining his UEFA Pro license. (SMF ¶ 377.) Additionally, the resume Claimant produced during discovery further illustrates that Claimant obtained (or claimed to obtain) a UEFA Pro Coaching License in Brazil in 2009. (SMF ¶ 378.)

As final examples, Claimant testified that he did not push anyone during the April 21, 2012 game against Chivas USA – the game in which Claimant received a red card and was ejected for "initiating contact with an opposing player." (SMF ¶ 379.) Not only did the League fine and suspend Claimant for initiating contact with an opposing player, but the Philadelphia Union produced a video of Claimant during the April 21, 2012 Chivas USA game, which unquestionably illustrates that Claimant actually physically pushed the opposing team's goalkeeper. (SMF ¶ 380.) Similarly, Claimant denies that he made certain statements to the players after the Toronto game – specifically denying that he said: (1) he was going to "see who falls out of the tree and who's left standing"; (2) "I've traded the leading scorer and I've traded the [redacted]"; and (3) "you can't do anything to me, I'm the GM, the manager, and I can never get fired." (SMF ¶ 381.) The testimony of the players, however, clearly establishes that Claimant made these statements to the players after the Toronto game. (SMF ¶ 382.)

To that end, the only consistency within Claimant's testimony is that it consistently conflicts with the testimony given by other witnesses – including those witnesses that have absolutely no interest in the outcome of the instant litigation. It may be understandable if Claimant's testimony simply conflicted with one or two interested witnesses, as he could argue that such conflicts were the result of those witnesses providing self-serving statements in attempt to further their position in the instant litigation. Here, however, witnesses with absolutely no incentive to fabricate their testimony, especially under oath, have presented testimony that directly conflicts with the testimony given by Claimant. If it did not in fact occur, why would Mr. Foose – an attorney and officer of the court – testify that he received a phone call from Claimant in which Claimant asked him to disclose the identity of the players that brought the [redacted] issue to the MLSPU? Similarly, if it did not actually occur, why would Mr. Messing

testify that Claimant made disparaging remarks about the Philadelphia Union and why would both Mr. Messing and Mr. Morris testify that Claimant contacted them in an effort to seek other employment opportunities? Additionally, what incentive would the players and the trainers have to fabricate testimony relative to facts and circumstances surrounding the May 31, 2012 trail run? As a final example, why would Mr. [redacted] and Mr. [redacted] fabricate testimony relative to Claimant's actions in interfering with the players' rights to contact the MLSPU? The simple answer to every one of these questions is that they would not; each of these witnesses testified in this fashion because it represented the truth. Indeed, not only were all of these witnesses under oath, but they had absolutely nothing to gain by committing perjury.

Simply put, Claimant either has difficulty remembering details, or he is simply fabricating facts in hopes of prevailing in the instant litigation. Either way, his testimony is untrustworthy and, as a result, any and all factual determinations, including inferences drawn therefrom, must be made in favor of the Philadelphia Union.

G. *Any Amounts Deemed Owed to Claimant by the Philadelphia Union Cannot Be Calculated Until After it is Determined whether Claimant received any Compensation or other Monies through December 31, 2015.*

The Employment Agreement contains a mitigation clause, Paragraph III(D), which explicitly provides as follows:

> Club shall have the right to mitigate and set off against its obligations to pay such Severance Payments any amounts Manager and/or Pino earns or receives as a result of any services Manager renders for, or rights granted by Pino to, another person or entity, whether as an employee, consultant or independent contractor, subsequent to such termination and through December 31, 2015[68] (the "Severance Period"), regardless of whether such services or rights are comparable in nature to the employment hereunder or to the rights granted under the Pino Agreement or soccer related.

(SMF ¶ 383.)

[68] The Employment Agreement initially stated December 31, 2012, but this was extended by the 2011 Extension Agreement. (Respondent Exhibit 5.)

Based upon this contractual provision, any amount deemed owed by the Philadelphia Union to the Claimant cannot actually be calculated until it is determined whether Claimant received any compensation or other monies through December 31, 2015. In this regard, it is worth noting that, in October of 2014 – since the conclusion of the 5-day Hearing – Claimant was able to secure employment as the Technical Director for Antigua & Barbuda.[69] Accordingly, it is quite obvious that, pursuant to Paragraph III(D), the Philadelphia Union would be entitled to offset should Claimant – contrary to the clear record evidence – prevail in any respect relative to the instant litigation.

Accordingly, in accordance with the express terms of the Employment Agreement – Paragraph III(D) – any award given to Claimant in this matter must be subject to two things: (1) it must be subject to Claimant providing his tax return for each year in which he is awarded any compensation; and (2) it must allow for the Philadelphia Union to credit any compensation received by Claimant during each year (as detailed within his tax return). In other words, any award given to Claimant must indicate that any amounts owed by the Philadelphia Union are not payable until it can be determined whether Claimant received any compensation for a given year.

IV. COUNTERCLAIMS

Equally important in this matter are the counterclaims of the Philadelphia Union.

A. Claimant has Refused to Reimburse the Philadelphia Union the Remaining Balance of the $85,000 Advance.

On or about June 1, 2009, the Philadelphia Union and Claimant's Limited Liability Company, Pino Sports, entered into an agreement whereby Claimant agreed to provide the Philadelphia Union with his marketing rights – to use Claimant's photographs, quotations, name, and image and likeness for publicity or promotional purposes (hereinafter, the "Pino

[69] http://antiguaobserver.com/abfa-hires-nowak-as-new-td/

Agreement"). (SMF ¶ 385.) On or about March 15, 2011, the Parties entered into an Advance and Pledge Consent Agreement wherein the Philadelphia Union agreed to advance Claimant the remainder of the 2011 fee and the entire 2012 fee the Philadelphia Union owed to Claimant pursuant to the Pino Agreement. (SMF ¶ 386.) At the Hearing, the Parties agreed that, of the total amount advanced to Claimant, **$46,680.33** was unearned at the time Claimant's employment was terminated. (SMF ¶ 387.) The Parties also agreed that the interest rate applicable to Claimant's unearned advance of $46,680.33 is 8%. (SMF ¶388.)

The record evidence establishes that Claimant owes this money and has absolutely no excuse for non-payment. Indeed, Claimant has not even attempted to offer a shred of evidence to dispute this debt. Accordingly, the Philadelphia Union respectfully requests the entry of an Order requiring Claimant to remit **$46,680.33, plus accumulated interest, costs and attorneys' fees** to the Philadelphia Union.

B. Claimant has Failed to Repay the Philadelphia Union the Remaining Balance of the $60,000 Loan that was Part of the 2011 Extension Agreement.

As part of the December 20, 2011 Extension Agreement, the Philadelphia Union loaned Claimant $60,000. (SMF ¶ 389.) The Parties agreed that, as of the date Claimant's employment was terminated, **$53,717** of the $60,000 loan remains outstanding. (SMF ¶ 390.) The Parties also agreed that the interest rate applicable to the unpaid loan balance is 7%. (SMF ¶ 391.)

The record evidence establishes that Claimant owes this money and has absolutely no excuse for non-payment. Indeed, Claimant has not even attempted to offer a shred of evidence to dispute this debt. Accordingly, the Philadelphia Union respectfully requests the entry of an Order requiring Claimant to remit **$53,717, plus accumulated interest, costs and attorneys' fees** to the Philadelphia Union.

C. **Attorneys' Fees and Costs.**

The counterclaims of the Philadelphia Union also include a request for attorneys' fees and costs. This claim is based upon the following language with the Agreement:

> With respect to any dispute arising hereunder, the prevailing party shall be entitled to prompt reimbursement from the other party for reasonable attorneys' fees and costs incurred in connection therewith.

(SMF ¶ 26.)

The Philadelphia Union's counterclaim in this regard is threefold: (1) it seeks its attorneys' fees and costs associated with having this matter removed from the United States District Court for the Eastern District of Pennsylvania to the American Arbitration Association; (2) it seeks the attorneys' fees and costs associated with defending Claimant's Arbitration Demand; and (3) it seeks the attorneys' fees and costs associated with the filing of its Counterclaims.

As attorneys' fees and costs are ongoing and continuing to accrue relative to the instant litigation, and, considering that such attorneys' fees and costs will continue to accrue through the issuance of the Award entered in this matter, it is assumed pursuant to the stipulation entered at the hearing of his matter that its counterclaim in this regard will be addressed through the submission of a fee petition after the issuance of the Award in this matter.

V. EXTENSION OF THE NOVEMBER 20, 2013 CONFIDENTIALITY ORDER

On or about November 20, 2013, your Honor issued an Order, which implemented the November 15, 2013 Protective Order submitted by the Parties. Pursuant to this Protective Order, the Parties agreed to keep all "information, documentation or testimony provided during discovery, hearings and/or at any arbitration of this matter" confidential. Paragraph 7 of the Protective Order specifically provided that it would remain in place until the "latter of the date

the final Arbitration Award is entered or the date the Arbitrator addresses the applicability of [the] Protective Award beyond the date of the final Arbitration Award."

In this regard, the Philadelphia Union continues to vehemently maintain that the Protective Order should remain in place indefinitely. In support of its position, the Philadelphia Union will not reiterate each and every argument it presented within the submissions it made prior to the entering of the November 15, 2013 Protective Order; rather, in the interests of judicial economy, it will simply incorporate those arguments herein by reference. However, it is important enough to reiterate that the Employment Agreement specifically contemplated all matters between the Parties to remain confidential, explicitly providing:

> (A)
>
> (1) **to treat all information, no matter how obtained, regarding Club, the Team, the Stadium, the Stadium operator, any affiliate of the foregoing and their respective owners, officers, employees and agents and the Team's players, as well as regarding the League and its affiliates**, other teams and other players, on the one hand, and the Manager and Pino, on the other hand, **as well as this Agreement**, the Pino Agreement and the negotiations related thereto, with the strictest confidentiality; and
>
> (2) **to not disclose such confidential information to any third party including the media, or otherwise use such confidential information**.

(SMF ¶ 24) (emphasis added.)

To that end, the Parties explicitly contracted to keep all information – including the Employment Agreement – confidential. This fact alone warrants the extending of the November 15, 2013 Protective Order indefinitely. Indeed, to do otherwise, would breach the Employment Agreement.[70]

Respectfully submitted,

BUCHANAN INGERSOLL & ROONEY PC

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Attorneys for Philadelphia Union

Dated: December 5, 2014

[70] Significantly, in the past, Claimant has opposed the extending of the November 15, 2013 Protective Order to the Award issued in this matter, as he, should he prevail, wants to use it to "vindicate" himself since the "public" has become aware of the reasons surrounding his termination. This argument, however, fails to take into account that the only reason the "public" has become aware of the circumstances surrounding his termination is because **he attached the termination letter to a pleading he publicly filed in the United States District Court for the Eastern District of Pennsylvania**. (SMF ¶ 342.)

CERTIFICATE OF SERVICE

I hereby certify that I am this day filing a copy of Philadelphia Union's Post Hearing Brief by Electronic Mail with the American Arbitration Association and serving a copy via electronic mail and United States First Class Mail, Postage Prepaid, upon the persons indicated below:

Clifford E. Haines, Esquire
Hollie Knox, Esquire
Haines & Associates
1835 Market Street, Suite 2420
Philadelphia, PA 19103

/s/ Thomas G. Collins
Thomas G. Collins, Esquire
Attorneys for Respondent/
Counterclaim Claimant

Date: December 5, 2014

EXHIBIT "C"
Tab 2

AMERICAN ARBITRATION ASSOCIATION

Piotr Nowak, Claimant/Counterclaim Respondent v. Pennsylvania Professional Soccer LLC and Keystone Sports and Entertainment LLC, Respondent/Counterclaim Claimant v. Pino Sports LLC Counterclaim Respondent	:	CASE NO. 14 166 01589 12 Arbitrator: Margaret R. Brogan

PHILADELPHIA UNION'S PROPOSED STATEMENT OF UNDISPUTED MATERIAL FACTS

Respondent/Counterclaim Claimant, Pennsylvania Professional Soccer LLC (hereinafter, "Philadelphia Union" and Respondent, Keystone Sports and Entertainment LLC (hereinafter "Keystone")[1] (the Philadelphia Union and Keystone will hereinafter collectively be referred to as "Respondent"), by and through their attorneys, Buchanan Ingersoll & Rooney PC, hereby submit the following Proposed Statement of Undisputed Material Facts as part of its Post-Hearing Brief.

PROCEDURAL HISTORY

1) Claimant/Counterclaim Respondent, Piotr Nowak (hereinafter, "Nowak" or "Claimant"), initiated the instant litigation on July 20, 2012, by filing a Complaint Seeking Expedited Declaratory Judgment against the Philadelphia Union in the United States District

[1] Of note, Claimant has included Keystone Sports and Entertainment LLC as a Respondent. Claimant, however, was employed at all times by Pennsylvania Professional Soccer LLC and not Keystone Sports and Entertainment LLC.

Court for the Eastern District of Pennsylvania (hereinafter, the "Complaint"). (*See* "Complaint Seeking Expedited Declaratory Judgment," marked as part of Respondent's Exhibit 72.")

2) On August 23, 2012, the Philadelphia Union filed a Motion to Dismiss the Complaint and to Compel Arbitration, arguing that the clear and unambiguous arbitration provision within Claimant's Employment Agreement required the claims raised within the Complaint to be litigated through arbitration. (*See* "Motion to Dismiss Plaintiff's Complaint and Compel Arbitration," marked as part of Respondent's Exhibit 72.")

3) On September 26, 2012, the Court granted the Philadelphia Union's Motion to Dismiss and Compel Arbitration, holding that the unambiguous language within the arbitration provision of Claimant's Employment Agreement clearly encompassed the claims raised within Claimant's Complaint. As a result, the Court entered an Order compelling Claimant to pursue his claims through arbitration. (*See* "September 26, 2012 Memorandum and Order," marked as part of Respondent's Exhibit 72.")

4) On or about December 5, 2012, Claimant filed the instant Demand for Arbitration, raising a "Wrongful Termination" claim against the Philadelphia Union. (*See* Claimant's December 5, 2012 Arbitration Demand.)

5) On or about January 8, 2013, the Philadelphia Union filed an Answering Statement with Counterclaims, raising two counterclaims against Claimant: (1) counterclaim for the remaining balance of a $60,000 loan extended to Claimant, as well as interest, attorneys' fees and the costs of collecting the remaining loan balance; and (2) counterclaim for attorneys' fees and costs incurred in defending both the instant litigation as well as the litigation Claimant initiated in the United States District Court for the Eastern District of Pennsylvania. (*See* Philadelphia Union's Answering Statement with Counterclaims.)

6) The Philadelphia Union's Answering Statement with Counterclaims also included a claim against Claimant's Limited Liability Company, Pino Sports, LLC ("Pino Sports"). More specifically, the Philadelphia Union is seeking to recover the unearned portion of the $85,000 advance it provided to Pino Sports in 2012, as well as interest, attorneys' fees and the costs of collecting the advance. (*See* Philadelphia Union's Answering Statement with Counterclaims.)

BACKGROUND

Pertinent Contractual Language

7) On or about June 1, 2009, Claimant and the Philadelphia Union entered into a Manager Employment Agreement (the "Employment Agreement"). (Respondent Exhibit 1; Arbitration Hearing Transcript, attached hereto as Exhibit "A," 258:7-13; (hereinafter cited as "Hearing Trans., ___").)

8) At the time he executed the Employment Agreement, Claimant was represented by an attorney, William Daluga, who, according to Claimant, "was one of the authors of the [Employment Agreement]." (Hearing Trans., 145:21-146:13, 244:18-20, 272:11-13, 621:21-24.)

9) In executing the Employment Agreement, Claimant agreed to be the Manager of the Philadelphia Union, responsible for, *inter alia*, coaching all Philadelphia Union games (including exhibition games), supervising all other coaching staff of the Philadelphia Union, and supervising the athletic trainers employed by the Philadelphia Union. (Respondent's Exhibit 1, at I(A)(1)-(12); Hearing Trans., 259:1-13, 260:5-11, 261:9-16, 261:19-22.)

10) Within the Employment Agreement, Claimant also agreed, *inter alia*, that he would (1) report to the Chief Executive Officer or Chairman of the Club; (2) obey and comply with all Team rules, regulations, policies and guidelines applicable to the coaching staff; and (3) obey and comply with all constitutions, bylaws, rules, regulations, policies, guidelines,

directives, instructions, rulings, orders and agreements of Major League Soccer ("MLS" or the "League"). (Respondent's Exhibit 1, at I(B).)

11) The Employment Agreement commenced June 1, 2009, and was originally set to expire on December 31, 2012 – unless "sooner terminated as provided [within the Employment Agreement]." (Respondent's Exhibit 1, at II.)

12) The Employment Agreement contained two (2) explicit termination provisions: (1) Paragraph I(C)(v); and (2) Paragraph III. (Respondent' Exhibit 1.)

13) Paragraph I(C)(v) of the Employment Agreement provides, in pertinent part:

> Manager expressly acknowledges and agrees that he shall be subject to discipline by the League…or Club…including without limitation, fines, suspension (with or without pay) or termination of this Agreement if:
>
> ***
>
> (v) he makes a statement or engages in conduct…that is materially prejudicial to the interests of the League or the Team or materially detrimental to the public image and/or reputation of the League, the Club and/or the game of soccer.
>
> …Club…shall determine, **in good faith and its sole discretion**, whether Manager has engaged in any of the above-listed behaviors.

(Respondent's Exhibit 1, at I(C)(v)) (emphasis added.)

14) Moreover, Paragraph III(A) of the Employment Agreement provides, in pertinent part:

> …Club may terminate this Agreement, and Manager's employment hereunder, upon written notice by Club to Manager in the event of the occurrence of any of the following:
>
> ***
>
> (2) …any material breach of this Agreement or the Pino Agreement…by Manager;

> (3) Manager's gross negligence or willful misconduct in performing his duties hereunder;
>
> ***
>
> (5) Manager's commission of any action or involvement in any occurrence that (x) brings Manager into public disrepute or (y) reflects in a materially adverse manner on the integrity, reputation or goodwill of Club or the Team;
>
> (6) Manager engages in any activity set forth in Paragraph I(C);
>
> (7) Manager's failure to comply in all material respects with Team Rules…or League Rules; or
>
> (8) Club is directed by the Commissioner of the League to terminate or suspend this Agreement as a result of the acts or omissions of Manager.

(Respondent's Exhibit 1, at III(A).)

15) The Employment Agreement also spoke to the specific application of the termination provisions, providing the Philadelphia Union with discretion to enforce the same. More specifically, Paragraph III(C) of the Employment Agreement provides, in pertinent part:

> Whether Club has terminated this Agreement pursuant to Paragraph III(A) or (B) shall be determined in good faith by Club **at its reasonable discretion**; provided that:
>
> (i) prior to terminating Manager pursuant to Paragraph III(A), club shall specify in reasonable detail the reason Manager is being so terminated and give Manager an opportunity to respond thereto;
>
> ***
>
> (iii) prior to terminating Manager pursuant to clause (2), (3), or (7) of Paragraph III(A), Club shall allow Manager fifteen (15) days to cure the occurrence, except that club shall have no obligation to provide Manager such opportunity to cure **if Club determines, in its good faith judgment**, that the occurrence is of a nature that is not curable or that Manager's continued employment during a cure period could be [sic] reasonably be expected to result in material harm to Club.

(Respondent's Exhibit 1, at III(C)) (emphasis added.)

16) Accordingly, pursuant to the express terms of the Employment Agreement, the Philadelphia Union could terminate the Employment Agreement if: (1) ***in its sole discretion***, it determined Claimant made a statement or engaged in "conduct...that is materially prejudicial to the interests of the League or the Team or materially detrimental to the public image and/or reputation of the League, ***the Club*** and/or the game of soccer"; and/or (2) if it determined – ***in its reasonable discretion*** – that Claimant engaged in any of the conduct outlined in Paragraph III (A)(1)-(8). (Respondent's Exhibit 1, at I(C)(v), III(C).)

17) Additionally, while the Employment Agreement provided Claimant with the ability to cure should the Philadelphia Union terminate the Employment Agreement pursuant to Paragraph III(2), (3), or (7), it further provided that the Philadelphia Union was under no obligation to provide Claimant with an opportunity to cure, if the Philadelphia Union determined – ***in its good faith judgment*** – that the occurrence is of a nature that is not curable or that the continued employment of claimant during a cure period could reasonably be expected to result in material harm to the Philadelphia Union. (Respondent's Exhibit 1, at III(C).)

18) Moreover, the Employment Agreement did not provide Claimant with the ability to cure if the Philadelphia Union determined – ***again, in its reasonable discretion*** – that Claimant engaged in any of the conduct outlined in Paragraph III(A)(4), (5), (6), and/or (8). (Respondent's Exhibit 1, at III(C).)

19) Before the parties entered into the Employment Agreement, the Philadelphia Union was required to negotiate a "buy-out" for Claimant relative to his then current contract with United States Soccer Federation. (Hearing Trans., 508:14-22, 509:3-10.)

20) The Philadelphia Union ultimately paid the United States Soccer Federation $75,000 to release Claimant from his contract. (Respondent Exhibit 69; Hearing Trans., 509:3-10, 510:3-13.)

21) Given that it invested significant resources, including the $75,000 payment to the United States Soccer Federation, to bring Claimant to the team, the Philadelphia Union had concerns about Claimant returning to U.S. Soccer while he was still under contract with the Philadelphia Union. (Hearing Trans., 510:14-18.)

22) Accordingly, the Parties agreed to put the following language within Paragraph VIII of the Employment Agreement:

> Furthermore, during the Term, [Claimant] shall not (1) engage in discussions with any other professional soccer team regarding employment by such team…

(Respondent's Exhibit 1, at VII.)

23) Claimant understood that, during the term of the Employment Agreement, he was prohibited from engaging in "any discussions with any clubs and if any clubs or federations or national teams would like to engage with me in discussion of the contract, that they need to seek the permission from the Philadelphia Union…" (Hearing Trans., 269:23-270:14.)

24) In executing the Employment Agreement, Claimant and the Philadelphia Union agreed to the following additional terms, as it relates to the pending litigation:

> (A)
> (1) to treat all information, no matter how obtained, regarding Club, the Team, the Stadium, the Stadium operator, any affiliate of the foregoing and their respective owners, officers, employees and agents and the Team's players, as well as regarding the League and its affiliates, other teams and other players, on the one hand, and the Manager and Pino, on the other hand, as well as this Agreement, the Pino Agreement and the negotiations related thereto, with the strictest confidentiality; and

> (2) to not disclose such confidential information to any third party including the media, or otherwise use such confidential information.
>
> ***
>
> (D) ...during the Term and for twelve months thereafter, Manager and the executives of the Club shall refrain from making any disparaging remarks regarding Club or the Team, its players, management, ownership or employees or the Stadium, on the one hand, and Manger or Pino, on the other hand.

(Respondent's Exhibit 1, at IX.)

25) In executing the Employment Agreement, Claimant explicitly agreed that any breach by him of the Agreement would cause irreparable injury to the Club, specifically agreeing to the following language:

> [Claimant] represents and agrees that he has extraordinary and unique knowledge, skill and ability as manager of a professional soccer team and its operations, that the services [Claimant] is to provide to [the Philadelphia Union] hereunder cannot be replaced or the loss thereof adequately compensated for in money damages and that any breach by [Claimant] of this [Employment] Agreement will cause irreparable injury to [the Philadelphia Union].

(Respondent's Exhibit 1, at VIII.)

26) The Employment Agreement also contained a clear and unambiguous arbitration provision, mandating the prompt reimbursement of reasonable attorneys' fees and costs to the prevailing party. (Respondent's Exhibit 1, at XIII.)

27) On or about December 20, 2010, the parties entered into an Extension Agreement (hereinafter, the "2010 Extension Agreement"), which, in effect, extended the original Employment Agreement through December 31, 2015. (Respondent's Exhibit 3.)

28) On or about December 20, 2011, the parties entered into another Extension Agreement (hereinafter, the "2011 Extension Agreement"), which rendered the 2010 Extension Agreement null and void. (Respondent Exhibit 5; Hearing Trans., 284:2-9.)

29) The 2011 Extension Agreement also confirmed the terms of the original Employment Agreement and that the Employment Agreement was extended until December 31, 2015. (Respondent Exhibit 5; Hearing Trans., 284:2-20.)

Facts leading up to 2012 Season

30) The Philadelphia Union made the playoffs in 2011 – in only its second year in existence. (Hearing Trans., 303:14-17.)

31) Overall, the President and CEO of the Philadelphia Union, Nick Sakiewicz, was pleased with how the 2011 season went and, heading into the 2012 season, he had no intention of terminating Claimant as the head coach of the Philadelphia Union. (Hearing Trans., 546:5-23.)

32) In fact, at the end of 2011 – on or about December 20, 2011 – the Philadelphia Union entered into the 2011 Extension Agreement with Claimant, extending Claimant's Employment Agreement through December 31, 2015. (Respondent Exhibit 5; Hearing Trans., 303:18-20, 546:24-547:2.)

33) As part the December 20, 2011 Extension Agreement, the Philadelphia Union also agreed to loan Claimant $60,000. (Respondent Exhibit 5; Hearing Trans., 303:21-23, 548:15.)

34) Additionally, on or about March 15, 2011, the Philadelphia Union entered into an Advance and Pledge Consent Agreement with Claimant, agreeing to advance Claimant the remainder of the 2011 fee and the entire 2012 fee it owed to Claimant pursuant to the Pino Agreement. (Respondent Exhibit's 2 and 4; Hearing Trans., 277:12-15, 278:5-12, 280:21-23.)

35) The Parties entered into the *original* Pino Agreement on or about June 1, 2009, wherein Claimant agreed to provide the Philadelphia Union with his marketing rights in

exchange for an annual payment of $85,000 – a payment that the Philadelphia Union was only required to make in semi-monthly installments. (Respondent Exhibit 2.)

36) After the 2011 season, Mr. Sakiewicz invited Claimant to a Board of Director meeting – partner meeting – to present the strategy for the upcoming 2012 season. (Hearing Trans., 549:6-550:3-7.)

37) Claimant testified that up until the beginning of the 2012 season, his job was never threatened. (Hearing Trans., 190:25-191:2-6.)

Players' Union Interference

38) In accordance with the terms of the Collective Bargaining Agreement, on or about March 15, 2012, around the end of the 2012 preseason training camp, representatives from the Major League Soccer Players Union (hereinafter, the "MLSPU" or "Players Union"), including its Executive Director, Robert Foose, visited with the Philadelphia Union's players. (Respondent Exhibit 66; Hearing Trans., 308:23-309:10, 428:15-19, 696:4-5, 697:22-698:22, 701:5-6, 984:2-6.)

39) Following this March 15, 2012 meeting, Mr. Foose contacted the Philadelphia Union's Technical Director, Diego Gutierrez, to advise him of a [redacted] issue that had been brought to the attention of the MLSPU. (Hearing Trans., 698:24-699:22, 701:5-6.)

40) Mr. Foose and Mr. Gutierrez exchanged emails from the initial March 15, 2012 meeting through March 20, 2012, ultimately – at least from the perspective of the MLSPU – resolving the issue. Mr. Foose testified on the point as follows:

> …[Mr. Foose] called Diego, talked it through. He said he would get back to me. We then had an e-mail exchange where [Diego] [redacted]

[redacted]

So I get that information back. I responded by e-mail to Diego and [Claimant] was copied on the e-mail that Diego had sent to me. I responded and said: [redacted]

So that was the gist of the e-mail exchange that happened, and at that point I considered the matter closed.

(Hearing Trans., 699:22-700:21, 701:5-6) (emphasis added.)

41) Claimant was aware of the fact that a [redacted] complaint was brought to the attention of the MLSPU, as Mr. Gutierrez not only informed him of the complaint, but Claimant was copied on the emails exchanged between Mr. Gutierrez and Mr. Foose. (Hearing Trans., 310:23-311:20, 312:9-13, 700:11-14.)

42) During the 2012 season (including preseason), the Philadelphia Union had two [redacted] (Hearing Trans., 230:6-22, 428:7-11, 946:9-21.)

43) After being made aware of the [redacted] issue, Claimant met with Mr. [redacted] and Mr. [redacted] in his office. (Hearing Trans., 378:18-23, 433:24-434:3, 949:17-21.)

44) During this meeting, Claimant initially asked Mr. [redacted] and Mr. [redacted] whether they or another member of the team raised an issue with the MLSPU relative to the [redacted]. (Hearing Trans., 949:22-950:4.)

45) During this meeting, Claimant also informed Mr. [redacted] and Mr. [redacted] that issues, including the [redacted] issues, should be brought to the Claimant and not the Players

Union – directing them not to contact the MLSPU. (Hearing Trans., 434:4-18, 451:22-452:3, 949:3-9.)

46) After meeting with Mr. [redacted] and Mr. [redacted] in his office, Claimant held a team meeting and communicated the same message to the team – that issues, including the [redacted] issue, should be brought to his attention and not the Players Union. (Hearing Trans., 434:13-23, 476:18-477:8, 950:14-22.)

47) More specifically, Mr. [redacted] testified that, during the team meeting, Claimant said:

> ...that we should not involve the Players Union for something that we can handle internally.

(Hearing Trans., 435:6-12.)

48) Claimant acknowledges that he told the players the following during this team meeting:

> ...So if any kind of issues will occur, I told them basically that please, if you have any kind of concerns, any issues...just to tell them if you have any kind of issues, please see us first so we will not have problems or questions from the Players Union about any kind of concerns you have or you might have in the future.

(Hearing Trans., 379:16-380:6.)

49) Following the team meeting, Claimant called Mr. [redacted] and, again, asked him who went to the MLSPU with the [redacted] issue, specifically asking Mr. [redacted] whether he was the one that brought the issue to the MLSPU. (Hearing Trans., 435:14-436:10.)

50) Another Philadelphia Union player, [redacted], was present at the time Mr. [redacted] received the phone call from Claimant and confirmed, through his testimony, that Claimant did in fact make this call to Mr. [redacted] (Hearing Trans., 436:12-19, 477:23-478:3.)

51) Following the team meeting, Claimant also called Mr. [redacted] and asked him who brought the [redacted] issue to the attention of the MLSPU – reiterating to Mr. [redacted] that there was no need to use the MLSPU for issues that arise; they can be handled internally. (Hearing Trans., 951-5-21.)

52) Claimant also contacted Mr. Foose – the head of the MLSPU – and informed him that he did not think it was appropriate for players to be talking to the MLSPU. (Hearing Trans., 704:23-705:18.)

53) During his conversation with Mr. Foose, Claimant also asked Mr. Foose to identify the player that brought the [redacted] issue to his attention – to the attention of the MLSPU. (Hearing Trans., 704:23-705:18.)

54) This was an "extremely unusual conversation" for Mr. Foose, as he never before had a similar conversation – a conversation where a coach asked him to disclose the identity of a player that raised an issue with the MLSPU. (Hearing Trans., 705:23-24, 706:22-707:5.)

55) Mr. Foose did not immediately raise this "extremely unusual conversation" with the League, as he was made aware of the communications between Claimant and Mr. [redacted] and he – the head of the MLSPU – was afraid Claimant would retaliate against Mr. [redacted] (Hearing Trans., 707:12-19, 708:17-24.)

56) Claimant believed that Mr. [redacted] brought the [redacted] issue to the attention of the MLSPU, and less than two weeks after Claimant made the telephone call to Mr. [redacted] specifically asking him whether he raised the issue with the MLSPU, Mr. [redacted] was traded from the Philadelphia Union. (Hearing Trans., 310:5-13, 438:25-439:8.)

57) After Mr. [redacted] was traded, the MLSPU brought the following issues to the attention of the League during a prescheduled meeting it had with the League on May 22, [redacted]

(1) the [redacted] issue; (2) two separate interference issues – Claimant informing players not to contact the Players Union and Claimant pressuring [redacted] to disclose the identity of individuals exercising their Union rights; and (3) their belief that Mr. [redacted] was traded in retaliation for Claimant's belief that Mr. [redacted] raised the [redacted] issue with the MLSPU. (Hearing Trans., 708:25-710:2, 773:16-18, 777:15-778:14, 779:3-17.)

58) Todd Durbin, the Executive Vice President of Competition, Player and Labor Relations for the League, summed up the May 22, 2012 meeting as follows:

> …the Players Union had an issue that not only was Mr. Nowak directing them not to bring issues to the Players Union but also seemed to be trying to find out who, in fact, had brought these issues to the Players Union and they were very concerned about retaliation taking place…one of their core assertions was that there was a trade of a player by the name of [redacted] and that they believed that not only was there the potential threat of retaliation, but that retaliation was taking place.

(Hearing Trans., 773:16-18, 779:3-17.)

59) On or about May 24, 2012, after he met with the MLSPU, Mr. Durbin called Mr. Sakiewicz and informed him that there were several complaints regarding Claimant interfering with players' rights to communicate with the MLSPU, and, as a result, the League was performing an investigation. (Hearing Trans., 563:23-564:5, 565:4-8, 779:19-6, 888:10-15.)

60) After speaking with Mr. Durbin, Mr. Sakiewicz called Claimant and the following conversation took place:

> …[Claimant] had expressed to me that there was a player who filed a grievance. He was pretty upset about it. He was determined to find out who that player would be.
>
> I told [Claimant] that we can't stand between the Players Union and the players. Having been a player myself and part of the Players Union, I knew that that was sacrosanct.

(Hearing Trans., 889:4-24.)

April 21, 2012 Red Card and Ejection

61) On April 21, 2012, Claimant coached the Philadelphia Union in a game against Chivas USA. (Respondent Exhibit 9; Hearing Trans., 306:11-22.)

62) During the game, Claimant received a red card and was ejected from the game. (Respondent's Exhibit 6; Hearing Trans., 197:7-9, 312:14-20.)

63) The Philadelphia Union produced a video to illustrate the actions taken by Claimant during the April 21, 2012 Chivas USA game to warrant his receipt of a red card and ejection from the game. (Respondent Exhibit 6; Hearing Trans., 389:20-392:20.)

64) Claimant testified that the video produced by the Philadelphia Union – Respondent Exhibit 6 – fairly and accurately reflected what happened on April 21, 2012. (Hearing Trans., 199:21-200:7.)

65) The video illustrates that a Philadelphia Union player, [redacted], engaged in a two-footed, studs-up challenge (tackle) on an opposing player, resulting in Mr. [redacted] receiving a red card and ejection from the game. (Respondent Exhibit 6; Hearing Trans., 390:7-8, 12-16.)

66) Mr. [redacted] challenge caused tempers to "flare" and an ensuing "melee." (Respondent Exhibit 6; Hearing Trans., 390:7-9.)

67) As part of the "melee," Claimant left the Coach's "Technical Area" – in violation of League rules – charged on to the field and pushed the goalkeeper for Chivas USA. (Respondent Exhibit 6 at 1:53 mark;[2] Hearing Trans., 390:7-8, 12-16.)

[2] Although it happens quickly, if you pause the video at the 1:53 minute mark, it is clear that Claimant pushes the opposing team's goalkeeper.

68) Although the video clearly illustrates that Claimant pushed the goalkeeper for Chivas USA, Claimant testified that he did not "push anybody." (Respondent Exhibit 6; Hearing Trans., 393:18-394:16.)

69) Although Claimant claims that he was protecting Mr. [redacted] at the time Claimant reached Mr. [redacted], the referee was already there taking control of the situation. (Respondent Exhibit 6 at 0:15 mark and 1:50 mark.)

70) Additionally, at the time Claimant reached Mr. [redacted], two to three Philadelphia Union players were already there or arriving at the same time as Claimant – one of which was right there to protect Mr. [redacted] from the goalkeeper – from the opposing player Claimant pushed. In fact, in response to being pushed by Claimant, the goalkeeper pushed that Philadelphia Union player who was in-between him and Claimant. (Respondent Exhibit 6 at 0:15 mark and 1:50 mark.)

71) After pushing the opposing team's goalkeeper (1:53 mark), Claimant was pulled out of the "melee" by Philadelphia Union player, [redacted] (0:16 mark). (Respondent Exhibit 6.)

72) Simply put, in violation of League rules, Claimant left the Technical Area, ran onto the field, and participated in a "melee" with the players, pushing a player on the opposing team. (Respondent Exhibit 6 at 1:53 mark; Hearing Trans., 390:7-8, 12-16.)

73) The League conducted an investigation into Claimant's conduct, concluding that Claimant, in violation of League rules, left the Technical Area, entered the field of play and "initiated contact with an opposing player."[3] (Respondent Exhibit 7.)

[3] As detailed within the 2012 Game Operations Manual, coaches are not permitted to leave the Technical Area and enter the field of play during a game. (Respondent Exhibit 67, pgs. 17, 73.) Additionally, it is considered a Major Game Misconduct for a coach to engage in "fighting" or "provoke a fight" during a game. (Respondent Exhibit 67, pg. 73.)

74) As a result of Claimant's actions during the April 21, 2012 Chivas USA game, not only was Claimant red-carded and ejected from the actual game, but the League took subsequent action against Claimant as well as the Philadelphia Union. (Respondent Exhibit 7 at PPS0002262; Hearing Trans., 392:23-393:9.)

75) More specifically, as a result of Claimant's inappropriate actions during the April 21, 2012 Chivas USA game, the League fined the Philadelphia Union $5,000. (Respondent Exhibit 7 at PPS0002262; Hearing Trans., 392:23-393:9.)

76) Additionally, as a result of his inappropriate actions during the April 21, 2012 Chivas USA game, the League also fined Claimant $5,000 and suspended him for two (2) games (Respondent Exhibit 7; Hearing Trans., 312:21-23, 394:19-25.)

77) This was not the first time Claimant received a red card ejection from a game for leaving the Coach's Technical Area; he also received a red card and was ejected for leaving the Technical Area during a U.S. Open Cup game against DC United on April 6, 2011. (Respondent Exhibit 8; Hearing Trans., 182:20-183:19, 183:20-184:19.)

78) It was also not the first time Claimant initiated physical contact with someone during his tenure with the Philadelphia Union; he also pushed another Philadelphia Union employee, Rick Jacobs, after a reserve game in 2011. (Respondent Exhibit 49; Hearing Trans., 531:23-532:8.)

79) As explained by Mr. Sakiewicz, Claimant's actions during the April 21, 2012 Chivas USA game were "out of control" and significantly embarrassing to the Philadelphia Union:

> It was more than infuriating…it was alarming, it was embarrassing. I know all the owners in the League, including Mr. Anschutz, whose name is on the trophy, who I worked for for six years, who are watching this,

> and the first thing that pops in my head is: What kind of team is Nick Sakiewicz running? It's, excuse my French, a shit show.
>
> And this was more than just heat of the moment, coach running onto the field, players engaging in a fight. This was the beginnings of a brand that Jay and I did not want to have as a club and it was hurtful, it was disappointing, it was alarming, and it was tough to watch.

(Hearing Trans., 558:5-18, 630:23-631:16.)

80) Claimants actions also reflected in a materially adverse manner on the integrity, reputation and goodwill of the Team, as evidenced by the announcers' reaction to Claimant's actions:

> And Peter Nowak lost his mind there. Yeah, he should be sent off. That's inexcusable. Inexcusable for a head coach to act in this manner.
>
> …and that is what Baldomero Toledo is telling him. It's like: What's your justification? Just walk off. He's telling him: Peter, just go.
>
> …Look at Peter Nowak. See, that's why he gets sent off. What are you doing on the field?

(Hearing Trans., 391:7-10, 15-17, 392:15-17.)

81) Claimant actions during the April 21, 2012 Chivas USA game did not comport with Philadelphia Union policies and procedures in at least two respects:

> …There is our purpose statement, which I alluded to earlier, which lays out a lot of detail about things like the brand, our core beliefs, our greatest imaginable challenge, which is to become one of America's most admired soccer brands; and then there's an employee manual. And then, of course, there's [Claimant's] contract, which addresses a lot of those responsibilities, roles, duties, and things that we expect out of [Claimant].

(Hearing Trans., 637:12-638:3.)

82) Claimant actually acknowledged that he received negative feedback as a result of his actions during the April 21, 2012 game against Chivas USA. (Hearing Trans., 384:15-385:6.)

Events Immediately Following the April 21, 2012 Chivas USA Game

83) As a result of his red card and ejection – for violating League rules by leaving the Technical Area and initiating contact with an opposing player during the April 21, 2012 Chivas USA game – the League suspended Claimant for two games. (Respondent Exhibit's 7; Hearing Trans., 312:17-23.)

84) The Philadelphia Union's next MLS game was against San Jose on April 28, 2012 – it was forced to play this game without its head coach, as this was the first of two MLS games Claimant was suspended for as a result of his actions during the April 21, 2012 Chivas USA game. (Respondent Exhibit's 7 and 9; Hearing Trans., 313:6-11.)

85) The Philadelphia Union lost the game against San Jose on April 28, 2012. (Respondent Exhibit 9.)

86) The Philadelphia Union's next game was against Seattle on May 5, 2012 – it was again forced to play without its head coach, as this was the second of the two MLS games Claimant was prohibited from coaching as a result of his actions during the April 21, 2012 Chivas USA game. (Respondent Exhibit's 7 and 9; Hearing Trans., 313:24-314:5.)

87) The Philadelphia Union also lost the game against Seattle on May 5, 2012. (Respondent Exhibit 9.)

88) The Philadelphia Union's next game was a League game against the New York Red Bulls, and, although Claimant was allowed to coach this game, the Philadelphia Union lost the game. (Respondent Exhibit 9; 314:21-24.)

89) The next game for the Philadelphia Union was a League game against FC Dallas, which resulted in a tie. (Respondent Exhibit 9; 314:25-315:3.)

May 26, 2012 Loss to Toronto

90) The next game was on May 26, 2012 against Toronto, which, at that point in the season, had not won a game. (Respondent Exhibit 9; 315:4-11.)

91) Toronto beat the Philadelphia Union on May 26, 2012 – obtaining its first win of the season. (Respondent Exhibit 9; 315:4-11, 316:6-9.)

92) After the game, Claimant admittedly made an "emotional statement" to the players. (Hearing Trans., 316:10-12, 316:25-317:5.)

93) More specifically, Claimant made the following statement to the players:

> We were supposed to have five days off, but not I'm going to think about how long that's actually going to be. We're going to get home, we're going to work hard, we're going to shake tree, and we're going to figure out who sticks and who doesn't…My job is not going anywhere, I can't be fired.
>
> Cancel your trips. We're going to go back and we're going to work hard.

(Hearing Trans., 954:21-955:4, 956:3-11, 460:8-19.)

94) Within his "emotional statement," Claimant also informed the players that:

> …he couldn't be fired…he wasn't afraid to do anything in regards to the team…
>
> …he wasn't afraid to shake the tree…he had traded away [redacted] and [the] leading goal scorer…[he] wasn't afraid to make moves and to roll with it.

(Hearing Trans., 1030:17-1031:13.)

95) Claimant acknowledges that the team was originally – prior to the Toronto game – scheduled to have at least four days-off starting on May 30, 2012. (Hearing Trans., 324:17-23.)

96) Three days after the Toronto game – on May 29, 2012 – the Philadelphia Union had a U.S. Open Cup game against the Rochester Rhinos. (Respondent Exhibit 9; Hearing Trans., 320:17-321:3.)

97) Claimant was unable to coach this game, as he was suspended from the game as a result of his receipt of a red card ejection for leaving the coach's Technical Area during the Philadelphia Union's last U.S. Open Cup game on April 6, 2011. (Respondent Exhibit 8; Hearing Trans., 182:20-183:19, 183:20-184:19, 321:4-21.)

98) Accordingly, as a result of his inappropriate on-field actions – including leaving the Coach's Technical Area on two separate occasions as well as his initiating contact with an opposing player – Claimant was suspended and unable to coach the Philadelphia Union for three (3) games in a seven (7) game stretch from May 5, 2012 through May 29, 2012. (Respondent Exhibit 9; Hearing Trans., 313:6-11, 313:24-314:5, 321:4-21.)

The May 31, 2012 Run – Refusing the Players Water and Making Injured Players Participate Against the Directives of the Athletic Trainers

99) As threatened in his "emotional statement" after the Toronto game, Claimant cancelled the players' scheduled days-off – requiring the players to cancel their vacation plans – and made the players, for the first time in team history, show up at a trail located at the Youth Soccer Center ("YSC"). (Hearing Trans., 333:6-8, 958:21-959:4, 1079:17-23, 1154:15-18.)

100) The trail was located approximately 100 yards from the YSC facility. (Hearing Trans., 958:18-20, 960:11-12, 1074:8-10, 1156:23-25.)

101) The trail was a blacktop/cement/pavement trail that was approximately two body widths wide, uneven in parts with rolling hills, and approximately 1.3 miles in length. (Hearing Trans., 461:17-25, 959:5-12, 1078:23-25.)

102) On that particular day, it was hot and sunny, about 80 degrees and humid.[4] (Hearing Trans., 462:2-7, 962:5-8, 1078:17-20.)

103) Claimant directed the players to run the trail, but did not tell the players how far he was making them run – Claimant simply told the players to keep running until he told them to stop. (Hearing Trans., 464:5-8, 961:15-25.)

1. Claimant's Denial of Water to the Players During 10-12 Mile Run

104) Claimant did not monitor or ensure that the players hydrated before the start of the run. (Hearing Trans., 343:10-16.)

105) Claimant initially made the players run three lengths of the trial – approximately 4 miles ("First Interval"). (Hearing Trans., 465:12-20.)

106) Generally speaking, it is the responsibility of the athletic trainers to ensure the players are appropriately hydrated during practices. (Hearing Trans., 1064:9-19.)

107) During the May 31, 2012 trail run, the athletic trainers brought 24 reusable "Gatorade" water bottles, which are 22-ounce "squirt" bottles, to the actual trail – there was essentially at least one 22-ounce squirt bottle available for each player. (Hearing Trans., 1069:15-25.)

108) During the run, Claimant admits that he told the players that they were not able to have water and he, in fact, did not let the players have water during the run. (Hearing Trans., 203:15-17, 206:15-19, 351:14-17.)

[4] Towards the end of the hearing, Claimant introduced – as Claimant Exhibit 13 – a Quality Controlled Local Climatological Data Report ("Weather Report"), which, according to Claimant, provides a fair assessment of the weather on May 31, 2012. It appears as though Claimant is offering this evidence to counteract the testimony of several witnesses relative to the weather during the May 31, 2012 trail run. Significantly, however, this Weather Report only details the weather *observed* at the Philadelphia International Airport, which is approximately 30 miles away from the YSC facility. Accordingly, it does not provide an accurate representation of the weather *at the YSC facility during the May 31, 2012 trail run – it certainly is not more credible than the witnesses who consistently testified as to what they actually experienced the weather to be during the May 31, 2012 trail run*.

109) Claimant admits that he took the reusable squirt bottles from the players and put them in the bushes. (Hearing Trans., 211:17-22, 361:19-22, 1258:16-22.)

110) [redacted] witnessed Claimant having an argument with the teams Athletic Trainers and, at one point, he saw Claimant take the reusable "squirt" water bottles and hide them in the woods – telling players "you guys don't need water." (Hearing Trans., 96222-963:4, 966:10-16.)

111) Paul Rushing – the Philadelphia Union's Head Athletic Trainer – described the argument he had with Claimant relative to Claimant's decision to deny the players water on May 31, 2012, as follows:

> …we had the bottles out, the water bottles out and the Gatorade squeeze bottles, and put those out; and the players started getting a drink, which is standard, and then [Claimant] got mad and took it [water] away. And then they all went on their next bout [interval trail run] and then I got in an argument about the water with him…He just said, 'no water'…in a harsh manner. And again, this whole thing was kind of snowballing and I was like, I couldn't believe it was happening. And…my job is to protect the players and to, you know, not put them in harm's way and do what I think is right and that's what I was hired for as the head trainer, and I felt like I wasn't allowed to do that. And, again, I was just really frustrated and really upset about that…
>
> …So when [the players] left again, we got into more of an argument…and [Claimant] physically took the bottles with the carriers and threw them in the bushes…
>
> **…[Claimant]…was basically saying…this is what I say and this is what I want you to do and if you're not with me, you're against me** kind of thing…

(Hearing Trans., 1076:15-1077:19) (emphasis added.)

112) One player, [redacted], testified that, after he completed the First Interval of the run, the following occurred:

> Again, I sort of happened upon it already occurring and [Claimant] was like pretty explicitly letting everybody know that they weren't going to have any water …
>
> And I remember having like a Kirkland Costco bottle, much like that sort of plastic bottle, in my hand. And he [Claimant] took the water bottle out of my hand and said that when you're thirsty, you lose focus – which I sort of thought at the time, well, if I'm thirsty and I get some water, then I'll be focused, I'll be ready to run some more – and then tossed it to the side.
>
> And then there were some hushed conversations going on between Paulie [Paul Rushing], John [Hackworth], and [Claimant] and I remember kind of questioning Paulie as to, you know, frankly: What the hell's going on? I mean, it's hot as hell, we're out here running. There's no reason why guys shouldn't have water. I certainly never had seen anything like that.

(Hearing Trans., 465:23-466:17.)

113) When another player, [redacted], finished the First Interval of the run, he not only witnessed the dispute between Claimant and Mr. Rushing regarding the players access to water, but he also specifically saw Claimant actually take water bottles from Mr. Rushing and throw them away from the players. (Hearing Trans., 1044:18-20, 1045:8-24.)

114) Mr. [redacted] also witnesses the following between Mr. Rushing and Claimant:

> …After both of them went back and forth about whether water should be distributed or not, Mr. Rushing…pretty much had a Pontius Pilate moment where he was like, 'You know what? You're in charge, but I refuse to have my hands in this because this isn't right. So if this is what you want to do, I'm washing my hands of this. I want no part of this. But this isn't right…[Claimant] – I remember him saying this distinctively – was like…'I don't care. I'm going to make men out of these guys.'

(Hearing Trans., 1046:13-1047:6, 1050:22-1051:10.)

115) After denying the players water once they completed the First Interval of the run, Claimant directed the players to keep running on the trail – to run additional Intervals. (Hearing Trans., 468:18-21.)

116) After initially arguing with Claimant regarding the players' access to water during the trail runs, Mr. Rushing – as he was concerned about players becoming dehydrated – tried to

sneak water to the players, but Claimant, once again, physically took the water bottles from Mr. Rushing, walked through the players and threw the water bottles into the woods/bushes. (Hearing Trans., 1079:24-1080:10.)

117) In total, the players ran three or four Intervals, totaling approximately 10-12 miles. (Hearing Trans., 213:25-214:3, 464:9-17.)

118) Claimant also admits that, during the run, he said the following to Mr. Rushing:

> No fucking water put the water back, water will make you lose focus and if you're thirsty you are weak.

(Hearing Trans., 212:2-25.)

119) Claimant testified that he denied the water to the players because a player, [redacted], was sick and he did not want the other players to get sick. (Hearing Trans., 206:15-25, 216:6-9.)

120) Claimant, however, testified that Mr. [redacted] was sent back to the locker room immediately after the warm-up. (Hearing Trans., 213:15-20.)

121) More importantly, Claimant never mentioned [redacted] as the reason why he would not let the players have water; the players all confirmed that Claimant simply stated:

> …water makes you weak. If you're thirsty, you're weak…If you're thirsty, you lose focus…

(Hearing Trans., 468:10-17, 469:14-17, 972:14-72, 1050:10-22, 1080:11-1081:4, 1162:11-13.)

122) Generally speaking, when a player is sick, the athletic trainers take one of the 22-ounce reusable squirt bottles and put different color tape on it to ensure that only the sick player uses that particular water bottle – and that the sick player does not drink out of the other water bottles. (Hearing Trans., 1136:12-1137:6.)

123) Claimant also testified that if the players were given individual disposable bottles of water or Gatorade, it would have probably alleviated his concerns relative to Mr. [redacted] stomach flu. (Hearing Trans., 358:18-22.)

124) Individual disposable bottles of water and Gatorade were in fact available at YSC at the time of the run. (Hearing Trans., 467:18-468:6.)

125) In fact, [redacted] testified that he attempted to drink out of an individual disposable water bottle, but Claimant took it out of his hands and threw it to the side. (Hearing Trans., 466:3-10.)

126) Mr. Rushing had brought three ice chests (one with wheels on it) filled with three cases of individual (not shared) 16.9-ounce disposable water bottles and three cases of individual (not shared) 20-ounce disposable Gatorade bottles to the YSC on the day of the May 31, 2012 trail run. (Hearing Trans., 1072:6-9, 1073:9-24, 1074:8-13, 1156:17-25; 1236:22-23.)

127) These disposable bottles of water and Gatorade were available to the Team – a short three (3) minute 100 yard walk from the trail – and could have been used to hydrate the players if Claimant was in fact concerned about Mr. [redacted] stomach flu. (Hearing Trans., 1072:6-9, 1073:9-24, 1074:8-13, 1156:17-25; 1236:22-23.)

128) The use of disposable bottles of water and Gatorade would have removed any alleged concern of cross contamination relative to Mr. [redacted] (Hearing Trans., 358:18-22.)

129) Claimant did not, however, direct the Athletic Trainers to provide the players with disposable water bottles, and, during his testimony, he never offered any explanation as to why he failed to do so. (Hearing Trans., 358:14-17.)

130) Claimant understood at the time that MLS games were actually being stopped to allow players to get a break – simply because it was too hot during the summer months. (Hearing Trans., 364:13-17.)

2. *Claimant's Forcing of Injured Players to Participate in Training Against the Directives of the Athletic Trainer*

131) Before the start of practice on May 31, 2012, Mr. Rushing informed Claimant inside the YSC facility that four players were on the injury list – [redacted] with a right big toe injury, [redacted] with a right ankle injury, [redacted] with gastroenteritis, and [redacted] with an ankle injury – and it was his opinion that they should not participate in the trail runs – they should remain in the facility on a bike. (Hearing Trans., 1066:14-1067:4, 1067-11-24, 1068:25-1069:5, 1082:6-17.)

132) Mr. Rushing was concerned about Mr. [redacted] participating in the run – even simply walking – because:

> ...[Mr. [redacted] suffered a toe injury...and obviously the big toe is the weightbearing part of your foot, you don't want to put weight on that foot if it's a fresh injury like that.

(Hearing Trans., 1082:6-12.)

133) Mr. Rushing wanted Mr. [redacted] on a bike, which is nonweightbearing and allows a player to get fitness without putting any pressure on the joint or the injured part of the body. (Hearing Trans., 1082:6-21.)

134) Mr. Rushing also did not want Mr. [redacted] or Mr. [redacted] participating in the trail runs because he was afraid they would aggravate their ankle injuries – neither of them had ankles that were ready for a 10 mile run on concrete. (Hearing Trans., 1083:7-1084:4.)

135) Mr. Rushing conveyed his concerns regarding Mr. [redacted] Mr. [redacted] and Mr. [redacted] to Claimant. (Hearing Trans., 1083:4-6, 1083:17-19, 1084:8-10.)

136) Claimant's response to Mr. Rushing was that everyone "was going to go outside" and, to Mr. Rushing's shock, Claimant made the injured players participate in the trail runs once outside. (Hearing Trans., 1067:25-1068:24.)

137) Claimant also informed Mr. Rushing that neither Mr. Rushing nor the team doctors were going to make decisions regarding the ability of a player to train or play in a game; these decisions were now going to be made by Claimant. (Respondent Exhibit's 13 and 27; Hearing Trans., 1075:16-20.)

138) Claimant also admitted during his testimony that he "ordered" players that were injured to participate in the trail run – at least walk – on May 31st – against the clear direction of the Athletic Trainer, Paul Rushing. (Hearing Trans., 213:25-3, 207:13-16, 340:7-12, 341:6-20, 342:18-22.)

139) Specifically, Claimant testified that he "ordered" [redacted] and [redacted] to participate in the May 31st run even though the Head Athletic Trainer, Mr. Rushing, informed Claimant that they had injuries and should not participate. (Hearing Trans., 339:5-16, 340:7-12, 341:6-20, 342:18-22.)

140) [redacted] was not planning on practicing as a result of an injury to his foot, but Claimant told him that he was required to run – when Mr. [redacted] told Claimant that he could not "run" because of an injury to his foot, Claimant said, "[w]ell, then you'll have to walk." (Hearing Trans., 1034:20-21, 1035:2-13.)

141) In fact, Claimant forced all injured players to participate in the 10-12 mile interval trail runs:

> Q. Did you instruct him to run on May 31st?
>
> A. …I told that the injury group that Paul Rushing was referring to would be the Group No. 3 and they will walk the trail.

Q. Okay. So, you did instruct him to walk the trail; correct?

A. Yes.

Q. And Paul Rushing had told you that he wanted him back inside the facility on the bike; correct?

A. That's what he indicated before we leave the facility. He was making strong case that those players have to be in the facility on the bikes.

(Hearing Trans., 341:6-20.)

142) Claimant admits that his requiring of the injured players to participate did not make the Athletic Trainer, Paul Rushing, happy. (Hearing Trans., 344:6-9.)

143) Claimant also acknowledges that he is not a licensed Athletic Trainer. (Hearing Trans., 262:10-13.)

144) As a result of their forced participation in the interval trail runs on May 31st, at least three players – Mr. [redacted], Mr. [redacted] and Mr. [redacted] – suffered set-backs with their injuries, likely requiring these players to miss additional playing time. (Respondent Exhibit 13; Hearing Trans., 1090:15-24; 1092:15-1093:10.)

145) Two of the injured players forced to participate in the May 31st run, [redacted] and [redacted], were unable to play in the next game for the Philadelphia Union. In fact, both players were unable to play for at least sixteen (16) days after the run. (Hearing Trans., 371:11-17, 1039:12-23, 1127:15-25.)

146) Additionally, at least one player – [redacted] – was injured during the interval trail runs. Mr. [redacted] testified directly on this point:

> I had pain in my foot the second day of the run, starting the run. A bit of pain that night. Tried to get through the first segment of the second – day run and [the Assistant Athletic Trainer] pulled me and said that's enough.
>
> ***

> ...Shortly after they sent me to Chip Hummer, the team doctor, the team physician, to get an MRI...It revealed I had a stress reaction. Dr. Hummer basically said had I gone any longer, it would have turned into a stress fracture. And subsequently I was on crutches for a few days, I couldn't put any weight on it...

(Hearing Trans., 475:5-476:12.)

147) In short, Mr. [redacted] was injured on May 31, 2012 during the trail runs – apparently due to the length and intensity of the running/training. (Respondent Exhibit 13; Hearing Trans., 475:5-476:17.)

148) As a result of the injury [redacted] suffered during the trail runs, he was unable to play for at least a week – missing at least one game. (Hearing Trans., 476:13-17, 1127:6-14.)

149) A "handful" of other players, including [redacted] (complaining that his "feet were on fire"), came to Mr. Rushing after the May 31, 2012 run seeking treatment – with several of the players being referred to a doctor the next day or within the next couple of days. (Hearing Trans., 1132:5-16.)

150) After the conclusion of the run, Mr. Rushing was "upset and confused," and worried about the status of his license as an athletic trainer and, as such, he decided – on his own accord – to contact John Gallucci, one of the medical coordinators for the League, and asked him for advice. (Hearing Trans., 1084:14-1085:4, 1089:10-14, 1107:8-1108:5).

151) Mr. Gallucci suggested that Mr. Rushing write a letter outlining everything that happened during the May 31, 2012 trail runs and send it to Philadelphia Union's chief medical officer, Dr. Chip Hummer. (Hearing Trans., 1089:3-6.)

152) Mr. Rushing followed Mr. Galucci's suggestion, drafting and sending – on May 31, 2012 – a letter to the Philadelphia Union's medical director, Dr. Chip Hummer. (Respondent Exhibit 13; Hearing Trans., 1089:19-1090:14.)

3. Excessiveness of Claimant's Actions during the May 31, 2012 Training

153) Mr. [redacted] has approximately [redacted] years experience playing in the MLS, specifically playing for approximately [redacted] different MLS teams and having approximately [redacted] different coaches; he also played for the United States National Team in the [redacted] and was a member of the United States National Team during the [redacted]. (Hearing Trans., 458:6-459:11.)

154) When asked whether the trail runs Claimant required the players to run on May 31, 2012 were usual or normal, Mr. [redacted] testified:

> It was roughly twice as long as I've ever run in my [redacted] years of professional soccer, and that's including my time with the [United States] National Team.

(Hearing Trans., 462:23-463:9, 463:24-464:3.)

155) In fact, Mr. [redacted] stated that this trail run was approximately 11 to 12 miles in total and he – in his [redacted] plus years playing professional soccer, including his time with the United States National Soccer Team – never had to run more than 6 miles at one time in a training session. (Hearing Trans., 462:23-463:9, 463:24-464:3.)

156) [redacted] who has been a player within Major League Soccer for [redacted] years and who also has experience playing for the United States Men's National Soccer team, testified that he had never previously been asked to run the distance he was asked to run by Claimant on May 31, 2012. (Hearing Trans., 968:8-13.)

157) Mr. [redacted] also testified that – in his [redacted] plus years playing professional soccer, including his time with the United States National Soccer Team – he was never asked to run where water was withheld from the players. (Hearing Trans., 466:18-22.)

158) Mr. [redacted] similarly testified that, in his [redacted] years of Major League Soccer experience, other than the May 31, 2012 trail run and the subsequent practice on June 7, 2012, a water limitation had never been placed on him. (Hearing Trans., 1022:21-25.)

159) Mr. [redacted] also testified that he believed the Claimant's actions during the May 31, 2012 training session were meant to "punish" the players. (Hearing Trans., 1025:12-16.)

4. Claimant's Placing of Water Limitations on Players During the June 7, 2012 Practice

160) On June 7, 2012, the team held a practice at the Stadium. (Hearing Trans., 487:6-12.)

161) During the June 7, 2012 practice, Claimant placed a water volume limitation on the players, informing each player that they were limited to one bottle of water for the entire practice. (Hearing Trans., 487:13-25.)

162) [redacted] described the water limitation as follows:

> …At that point we were allowed to have water and everyone had their own specific water bottle with differing amounts of water in it and you could only have what was filled up into that bottle, which maybe was half of the bottle for some people or a quarter of the bottle filled up for other people, but essentially it was a reminder that you don't need that much water to perform and the more water you need, the weaker you are.

(Hearing Trans., 973:21-974:10.)

163) [redacted] also discussed the additional water limitation imposed by Claimant on June 7, 2012:

> …in reaction to the game we just played against D.C. United, which was an Open Cup quarterfinal game in D.C., so the incident with the water and

> the running happened the week before in preparation for that game, we go to D.C. and win the game…And [the next] practice everybody is obviously excited, pretty tired, but we're practicing because we have a League game, and it comes to the point of the water break – because there's usually a standard water break during each practice – and…I remember [Claimant] making a comment of that we were going to get water, but that each person was only allowed to have one water bottle and if they finished that water, then that was the water for the day that they could have; and that…because we won our game in D.C., then…it was a possibility that we would go the rest of the season without, you know, having as much water…

(Hearing Trans., 1049:8-1050:9.)

164) Assistant Athletic Trainer, Steve Hudyma, also testified that Claimant wanted players to be limited in the volume of water they received at practice on June 7th. (Hearing Trans., 1162:17-21.)

The Knowledge of the MLSPU & the League re: the May 31, 2012 Run

165) On June 1, 2012 – the day after the May 31, 2012 trail runs – Mr. Foose had multiple conversations with the League concerning the length of the May 31, 2012 trail runs, the fact that Claimant withheld water from the players, that Claimant required injured players to participate in the May 31, 2012 run, and the confrontation Claimant had with medical staff. (Hearing Trans., 710:13-711:2, 713:5-12, 753:2-10.)

166) Mr. Foose communicated this information – information relating to Claimant's actions during the May 31, 2012 trail runs – primarily to Todd Durbin, Executive Vice President of Competition, Player and Labor Relations, who, at the time, was responsible for investigating the allegations of wrongdoing made against Claimant. (Hearing Trans., 714:6-22, 774:24-775:15.)

167) Mr. Durbin was also made aware of Claimant's actions on May 31, 2012 from Evan Dabby – as a result of Mr. Rushing's independent report to Mr. Gallucci – who was in charge of team trainers and medical operations for the League. (Hearing Trans., 782:13-22.)

168) Mr. Dabby specifically informed Mr. Durbin that the Philadelphia Union team trainer had a "very serious incident take place" during a training session – both as it related to having injured players participate in training and the withholding of hydration to players. (Hearing Trans., 782:13-22.)

169) At the time he received the information from Mr. Foose and Mr. Dabby – on or about June 1, 2012 – the League – through Mr. Durbin – was already investigating the MLSPU interference allegations against Claimant (made at the end of May, 2012). (Hearing Trans., 574:10-18, 779:21-781:11.)

170) According to Mr. Durbin, upon receipt of these additional allegations against Claimant – relating to the May 31, 2012 trail runs – "major alarm bells" went off. (Hearing Trans., 780:18-781:11.)

171) Although Mr. Foose obtained the information relating to the May 31, 2012 trail runs from the players of the Philadelphia Union, he did not disclose the identity of the players to the League. (Hearing Trans., 753:18-754:5.)

172) Mr. Durbin immediately informed Mr. Foose that the League would be conducting a thorough investigation. (Hearing Trans., 715:5-12.)

The League's Investigation into the May 31, 2012 Trail Runs

173) Again – reiterating for context purposes – at the time Mr. Durbin received the information from Mr. Foose and Mr. Dabby – on or about June 1, 2012 – the League – through Mr. Durbin – was already investigating the MLSPU interference allegations against Claimant (made at the end of May, 2012). (Hearing Trans., 574:10-18, 779:21-781:11.)

174) As the players of the Philadelphia Union were "extremely afraid" of the potential "consequences" or "retaliation" if it became known that they participated in the League's investigation, the MLSPU asked the League to put a Confidentiality Agreement in place. (Hearing Trans., 715:13-716:6.)

175) **There was only one other instance in which the MLSPU asked the League to put in place a Confidentiality Agreement relative to a League investigation into misconduct – that other instance involved Claimant during Claimant's tenure as the head coach of another MLS team, DC United.** (Hearing Trans., 716:7-717:5, 789:19-25.)

176) The MLSPU and the League where able to agree on the language of the Confidentiality Agreement and the League began its investigation into the allegations made against Claimant. (Hearing Trans., 717:6-718:12.)

177) Mr. Durbin was responsible for overseeing the investigation. (Hearing Trans., 786:16-19.)

178) Shortly after he was informed of the allegations relating to the May 31, 2012 training session, Mr. Durbin sat down with Brett Lashbrook, the Special Assistant to the Commissioner, to discuss how to conduct the investigation. (Respondent Exhibit 27; Hearing Trans., 8-19.)

179) Shortly thereafter, Mr. Durbin called and emailed Mr. Sakiewicz informing him about a series of allegations that were made against Claimant – the most immediate of which was that Claimant was not following the advice/input of the trainer. (Respondent Exhibit 11; Hearing Trans., 574:4-18, 887:25-888:9.)

180) Mr. Durbin's communications to Mr. Sakiewicz also informed him that the League was performing an investigation into these allegations – an investigation that was in addition to the investigation the League was already performing as a result of the players union interference allegations made against Claimant at the end of May, 2012. (Respondent Exhibit 11; Hearing Trans., 574:4-18, 887:25-888:9.)

181) In an email dated June 6, 2012 to Mr. Sakiewicz, Mr. Durbin also provided Mr. Sakiewicz with a letter dated May 31, 2012, from Mr. Rushing to the Philadelphia Union's Team Physician, Dr. Chip Hummer. (Respondent Exhibit 11; Hearing Trans., 575:5-19, 577:4-9.)

182) The May 31, 2012 letter of Mr. Rushing to Dr. Hummer informed Mr. Durbin of the following issues relative to the May 31, 2012 training session:

- That he felt the players' health was put at risk when they were not allowed to have water by Claimant during an 8-10 mile interval run in 80-82 degree heat;
- That he felt at least three players suffered set-backs with their injuries;
- That when he attempted to raise these issues with Claimant, he was advised by Claimant that neither he (Mr. Rushing) or any other member of the medical staff would make the determination as to which players are healthy enough to play in each game or to participate in training sessions – he was further told that these decisions were going to now be made by Claimant.

(Respondent Exhibit 11.)

183) In response, Mr. Sakiewicz sent an email to Mr. Durbin, assuring him that he had instructed the medical staff to continue to administer the highest level of medical care to the

players and, if anything should change or prevent them from doing that, Mr. Sakiewicz was to be notified immediately. (Respondent Exhibit 12.)

184) Thereafter, it was determined that the League would conduct a serious of interviews, and, after the completion of the interviews, Mr. Durbin would discuss the League's findings with Mr. Sakiewicz – before it put together a report formally detailing the League's findings. (Hearing Trans., 718:3-12.)

185) On Sunday, June 10, 2012, the League – through Mr. Durbin's investigation – conducted the contemplated series of interviews, initially interviewing Paul Rushing, the Head Athletic Trainer of the Philadelphia Union, and then interviewing the players. (Hearing Trans., 788:11-25, 791:7-9, 791:10-792:2, 826:19-23.)

186) Mr. Rushing was interviewed as part of Mr. Durbin's investigation approximately three times. (Hearing Trans., 1094:14-1095:6.)

187) A few days later, the League, through Mr. Durbin, issued the MLS Report – dated June 12, 2012 – which detailed the results of the investigation performed by the League relative to the allegations made against Claimant. (Respondent Exhibit 27; Hearing Trans., 792:8-10, 793:8-10.)

188) As of June 12, 2012, the League's investigation into the allegations against Claimant was complete. (Hearing Trans., 826:10-18.)

189) When questioned as to why Mr. Durbin did not interview Claimant, Mr. Durbin responded:

> The conclusion I came to, having heard the testimony of Mr. Rushing and, more importantly, the testimony that I did hear from the players, coupled with the testimony that was reported back to me by Mr. Lashbrook, **I didn't see a path forward at that point in time**.

(Hearing Trans., 827:23-828:4) (emphasis added.)

190) The League does not have formal due process rules or appeal procedures with respect to coaches. (Hearing Trans., 844:19-25.)

The Reaction of the League and MLSPU with respect to the Findings of the League's Investigation into the May 31, 2012 Trail Runs

191) Later in the day on June 10, 2012, after completing the interviews, Mr. Durbin contacted Mr. Sakiewicz and informed him that a formal report would be provided shortly, but that the testimony received from the players was "very disturbing." (Hearing Trans., 794:9-22.)

192) During their conversation on June 10, 2012, Mr. Durbin's view was that Claimant's employment needed to be terminated – **specifically informing Mr. Sakiewicz that he believed Claimant "needs to be fired."** (Hearing Trans., 796:11-14, 848:4-10.)

193) Mr. Durbin did not believe Claimant's actions could be corrected, specifically testifying:

> ...I wouldn't look at it as being narrowly focused as to whether or not after we notified the team, the President, and the Club of an issue as it relates to following specific instances, the medical personnel and the water, that the issues were behind us...because our issues were much bigger than that...We were talking about the players not feeling comfortable and safe in their work environment...

(Hearing Trans., 837:17-838:12.)

194) Mr. Foose believed Claimant's actions during the May 31, 2012 trail runs created a "very, very dangerous situation" for the players, specifically noting:

> ...it was a hot day, it was an extremely humid day – both of them were – and the length of the runs was completely out of whack with anything that I had ever heard of any coaching staff doing within the League.
>
> So, you know, every player was endangered with regard to the water because it is simply not safe to be out in those conditions and running that length – even for athletes as fit as ours it is not safe to be out and doing that – without access to water.

(Hearing Trans., 713:19-714:5.)

195) At the conclusion of the League's investigation into all of the allegations against Claimant, the MLSPU took the following position:

> We certainly took a position and I think our position really from June 1st on was very clear, **which was that [Claimant] needed to be removed as coach of the team and that it was not appropriate nor was it safe for our members to have him as coach of the team**. So from the moment we learned about the runs and the things that happened with those as well as the concussion issues, **our position was he can't continue as coach**.

(Hearing Trans., 719:22-720:10.)

196) Mr. Foose, who had led the MLSPU since its inception on April 1, 2003, testified that the MLSPU had never previously (or subsequently) taken the position that a coach needed to be removed from a team. (Hearing Trans., 696:4-7, 721:18-23, 798:2-11.)

197) The MLSPU in fact informed Mr. Durbin that they were contemplating a strike or withholding players from team activities if Claimant continued to coach the Philadelphia Union:

> So this was a conversation that took place between Jon Newman [counsel for MLSPU] and myself on the 10th and when we talked about what was going to be happening next, the Union, Players Union, given their concern, the health and safety concern, for the players, the environment that the players were in, felt that if [Claimant] was going to continue to be the coach, that there were discussions about whether or not the players would, in fact, report for training.

(Hearing Trans., 803:19-804:6.)

198) Simply put, the MLSPU believed that Claimant's actions warranted his termination – warranting him being "fired as the coach [of the Philadelphia Union]." (Hearing Trans., 763:6-15.)

199) Mr. Durbin – and the League – shared the same view as Mr. Foose, with Mr. Durbin specifically testifying that he believed Claimant "need[ed] to be fired." (Hearing Trans., 848:6-10; Respondent Exhibits No. 25 and 26.)

200) Both Mr. Durbin and Mr. Foose came to their conclusions – that Claimant needed to be fired – that he could not continue to coach the Philadelphia Union – on their own, completely independent of Mr. Sakiewicz or anyone else from the Philadelphia Union. (Hearing Trans., 720:2-10, 848:6-10.)

Mr. Sakiewicz's Knowledge of and Independent Investigation into Claimant's Actions During the May 31, 2012 Training Session

201) On May 31, 2012, shortly after the conclusion of the trail runs, Mr. Sakiewicz was made aware that Claimant required the players, including injured players, to run approximately 10 miles on the trails at YSC without hydration. (Hearing Trans., 570:4-10, 572:9-15.)

202) Later that same day – May 31, 2012 – Mr. Sakiewicz spoke with the team physician, Dr. Chip Hummer, for approximately 45-60 minutes, attempting to understand which players on the team were injured, the level of their respective injuries, the potential impact the lack of hydration can have on players, and the exact details of the length of the trails runs. (Hearing Trans., 890:16-10.)

203) Mr. Sakiewicz also asked Dr. Hummer to document his knowledge and opinion relative to the trail runs that took place on May 31, 2012. (Hearing Trans., 891:11-12.)

204) After speaking with Dr. Hummer – still on May 31, 2012 – Mr. Sakiewicz contacted Mr. Rushing and asked Mr. Rushing to describe the events that took place that morning during the trail runs. (Hearing Trans., 891:17-20, 1091:9-22.)

205) Mr. Rushing's conversation with Mr. Sakiewicz occurred after Mr. Rushing had made contact with Mr. Galucci at the League office and sent his May 31, 2012 letter to Dr. Hummer. (Hearing Trans., 1094:8-13.)

206) During their conversation, which was approximately an hour long, Mr. Rushing was "shaken," his "voice was cracking," and he was "very, very upset," as he was worried about

losing his Athletic Training License because of the events that took place during the May 31, 2012 trail runs. (Hearing Trans., 891:17-892:2.)

207) Mr. Sakiewicz, obviously alarmed by Claimant's actions, told Mr. Rushing that he no longer reported to Claimant and that he was to ensure that all players were appropriately hydrated, that he delivered the utmost care to the players, and that he should immediately contact Mr. Sakiewicz if anyone hindered his ability to comply with these directives. (Hearing Trans., 572:18-23, 573:7-13, 892:3-10.)

208) After speaking with Dr. Hummer and Mr. Rushing, Mr. Sakiewicz contacted Mr. Debusschere, the Philadelphia Union's Executive Vice President and CFO, and informed him of the situation related to the trail runs and directed Mr. Debusschere to monitor the team's training activities, to have a conversation with Josh Gros to investigate further what went on during the trail run and to obtain a timeline of the events, and to attend the next practice or have someone attend the team's next practice to ensure that the proper medical treatment was being provided to the players. (Hearing Trans., 892:14-23.)

209) Mr. Sakiewicz did not contact Mr. Durbin or anyone else within the League's Commissioner's office to discuss Claimant's actions relative to the May 31, 2012 trail runs. (Hearing Trans., 926:4-11.)

210) On or about June 6, 2012, Mr. Sakiewicz received a voicemail and an email from Mr. Durbin informing Mr. Sakiewicz that a series of allegations were made against Claimant – the most immediate is that Claimant was not following the advice/input of the trainer – and the League was performing an investigation into the allegations. (Respondent Exhibit 11; Hearing Trans., 574:4-18, 887:25-888:9.)

211) The investigation referred to in the June 6, 2012 email was in addition to the investigation the League was already performing as a result of the players union interference allegations previously made against Claimant (at the end of May, 2012), and of which Mr. Sakiewicz was previously made aware. (Respondent Exhibit 11; Hearing Trans., 574:10-18.)

212) Attached to Mr. Durbin's June 6, 2012 email to Mr. Sakiewicz was a letter dated May 31, 2012, from the Head Athletic Trainer of the Philadelphia Union, Paul Rushing, to the Philadelphia Union's Team Physician, Dr. Chip Hummer. (Respondent Exhibit 11; Hearing Trans., 575:5-19, 577:4-9.)

213) As of June 6, 2012, Mr. Sakiewicz was already aware of the circumstances of the May 31, 2012 trail run from his lengthy discussions with Mr. Rushing and Dr. Hummer. (Hearing Trans., 890:16-10, 891:17-892:2, 1091:9-22.)

214) Within his May 31, 2012 letter to Dr. Hummer, Mr. Rushing noted the following:

- That he felt the players' health was put at risk when they were not allowed to have water by Claimant during an 8-10 mile interval run in 80-82 degree heat;
- That he felt at least three players suffered set-backs with their injuries;
- That when he attempted to raise these issues with Claimant, he was advised by Claimant that neither he (Mr. Rushing) nor any other member of the medical staff would make the determination as to which players are healthy enough to play in each game or to participate in training sessions – he was further told that these decisions were going to now be made by Claimant.

(Respondent Exhibit 11.)

215) In response to Mr. Durbin's June 6, 2012 email, Mr. Sakiewicz sent Mr. Durbin an email informing Mr. Durbin that he instructed the medical staff to continue administering the highest level of medical care to the players and if anything should change or prevent them from doing that, they were to notify Mr. Sakiewicz directly. (Respondent Exhibit 12.)

216) On or about June 7, 2012, Dr. Hummer sent Mr. Sakiewicz an email, which attached another copy of Mr. Rushing's May 31, 2012 letter to Dr. Hummer, as well as a letter from Dr. Hummer to Mr. Sakiewicz dated June 7, 2012. (Respondent Exhibit 13; Hearing Trans., 576:12-20.)

217) Dr. Hummer's June 7, 2012 letter notified Mr. Sakiewicz of the following:

- Players running a significant distance in 82 degree heat on concrete without the availability of hydration may put the players at risk of electrolyte imbalance or subject them to risk of heat stroke;
- Players with existing lower extremity injuries could have those injuries exacerbated with increased healing time if they participated in a long distance run on a concrete surface on two consecutive training days;
- [redacted] relates his severe right lateral mid foot pain to the trail runs. His working diagnosis is mid foot capsular sprain and his return to play is indeterminate.

(Respondent Exhibit 13.)

Communications Between Mr. Sakiewicz and Mr. Durbin Subsequent to the Completion of the League's Investigation into the May 31, 2012 Training Session

218) On Sunday night, June 10, 2012, while Mr. Sakiewicz was in Florida, Mr. Durbin called him to advise him of the results of the multiple League investigations into Claimant's actions. (Hearing Trans., 577:22-578:22:8578:9-19.)

219) During their conversation, Mr. Durbin told Mr. Sakiewicz that the League was going to provide him with a report, but that, in the meantime, Claimant could not be near Philadelphia Union players. (Hearing Trans., 578:20-24, 580:21-581:5.)

220) Of note here, the League, and not the Philadelphia Union, technically employs the players. (Hearing Trans., 714:23-25, 787:6-11.)

221) Mr. Durbin informed Mr. Sakiewicz that he wanted Claimant to be terminated on Monday, June 11, 2012, sending Mr. Sakiewicz the following email on June 11, 2012:

> This cannot last until the weekend. You gave me your assurance this would happen wed. [sic]. It was my recommendation for it to happen this morning.

(Respondent Exhibit 26.)

222) Mr. Sakiewicz wanted additional time before making a final determination to terminate Claimant, as the Philadelphia Union had two games coming up, he wanted to receive and review the actual League report to confirm the results of the League's investigation, and he wanted time to talk to the Philadelphia Union owners and investors. (Hearing Trans., 580:21-581:19, 913:20-914:2.)

223) Mr. Durbin – within several back and forth emails with Mr. Sakiewicz on June 11, 2012 – informed Mr. Sakiewicz that Claimant had to be terminated by the morning of Wednesday, June 13, 2012 – **specifically telling Mr. Sakiewicz that Claimant "cannot train the team on [Wednesday, June 13, 2012]..."** (Respondent Exhibit's 25 & 26; Hearing Trans., 580:8-20; 909:2-910:9.)

224) Mr. Sakiewicz, who has been an executive in Major League Soccer for 19-20 years, had never seen an instance in which the League prohibited a coach from participation in practice – while coaches have been red carded and unable to coach in games, he had never experienced a coach being unable to practice or be around players between contests. (Hearing Trans., 593:2-13.)

225) On June 12, 2012, Mr. Durbin sent Mr. Sakiewicz an email attaching an MLS Report detailing the results of the League's investigation into the multiple complaints it received relative to Claimant. (Respondent Exhibit 27; Hearing Trans., 581:22-582:14.)

226) After receiving the June 12, 2012 email, including the MLS Report, from Mr. Durbin, Mr. Sakiewicz believed he had no choice but to terminate the Employment Agreement, specifically testifying:

> I fired [Claimant] for the six reasons that I outlined in my memo [Respondent Exhibit 36] that everybody has seen ad nauseam, principally because I was protecting the health and welfare of our players, and that was the primary reason.
>
> I was disgusted by all of this. I still am. I'm kind of emotional about it now because I'm having to recant it all. But as a former, player, you have to play with a smile on your face and I had a team with no smiles. And I needed to protect the health and welfare of those 30 guys in that locker room. That was first and foremost.
>
> But there were five other reasons why I terminated him, and they're all outlined in that memo [Respondent Exhibit 36].

(Hearing Trans., 588:5-21.)

227) Mr. Sakiewicz was left without a choice when it came to the timing of Claimant's termination because:

> Because the pressure – and I say "pressure," but it's probably a bad word – the strong recommendation from two men who I had greatly respected at the League, Todd Durbin and Don Garber, the report that I had been sent the day before corroborating a lot that was going on the weeks prior that I had known about, some of which that I had investigated myself, like the run, and it was an emergent situation.
>
> ***
>
> Because that phone call that I got on Sunday night [from Mr. Durbin on June 10, 2012], I mean, I didn't believe what I was hearing from Todd Durbin. And, again, you know, I've been a pretty consistent manager over 20-some-odd years. I don't knee-jerk decision make.
>
> This was a coach that I fought pretty hard to sign and bring to the club. This was a person's livelihood that I had in my hand and, you know, undisputed coaching capabilities. So I wasn't going to make a knee-jerk decision.

> But that report [MLS Report], when I received it on the 12th, was the final equation to what I was having to deal with for the six to eight weeks leading up to it.

(Hearing Trans., 588:23-589:11, 590:6-23.)

Additional Issues Uncovered and Addressed by the League During its Investigation

1. ***Concussions***

228) The Medical Policies and Procedures Manual for Major League Soccer contains concussion protocols – protocols that are, generally speaking, updated annually.[5] (Respondent Exhibit 68 at PPS0002573; Hearing Trans., 1102:7-1103:3, 1103:17-1104:5.)

229) Claimant would make light of the fact that players had concussions and, in fact, it was not uncommon for Claimant to call a player a "pussy" for having a concussion. (Hearing Trans., 479:3-18.)

230) Claimant would also tell players that they should not miss any time due to a concussion – you are weak if you can't play through a concussion. (Hearing Trans., 971:12-21.)

231) On June 1, 2012, Mr. Foose was also made aware of a pattern of abuse directed by Claimant against players who had suffered concussions. (Hearing Trans., 711:3-7.)

232) The complaints received from Philadelphia Union players relative to Claimant and his viewpoint on concussions was summed up by Mr. Foose as follows:

> Well, there are several things: a repeated suggestion that there's no such thing [as concussions], they don't exist, they're not real; a repeated suggestion that they don't have them in Germany, that players just take a pill and go on, the implication being that it's a toughness question; the denigration of players who had suffered them for not being able to get immediately back out on the field; statements about players who are recovering from concussions and happen to be eating at a training table and saying in front of the group or some group of players why do you need to eat, you're not even practicing, you don't have any need for food.

[5] Pursuant to Paragraph I(A)(9), Claimant is responsible for enforcing all League Rules applicable to players, coaching staff, trainers and doctors. (Respondent Exhibit 1.)

> Those types of statements then generally creating an atmosphere where players were afraid to speak up and be honest about their symptoms for fear of the reaction and the consequences that would come down on them from those disclosures.

(Hearing Trans., 759:23-760:22.)

233) The concussion issue was a huge issue for the MLSPU and Mr. Foose:

> ...The concussion issue is a huge issue for us and a big issue for me personally. I had at that point just spent the prior year before that working with the League to develop a concussion protocol and those efforts have continued today.
> It's a big issue in our sport. I spent yesterday actually at the White House listening to the President talk about how important this issue is and how much we need to change this sort of macho culture that can be out there with regard to this issue, that concussions have to be taken seriously...Players' lives are at risk. So my reaction was very, very strong on both of these cases that there had been a real sort of recklessness towards players' safety shown in Philadelphia.

(Hearing Trans., 711:15-712:8.)

234) Mr. Foose sits on the League's concussion committee and was part of that committee in May/June of 2012, when the issue relating to Claimant's treatment of concussions was brought to the attention of Mr. Foose and the MLSPU. (Hearing Trans., 712:10-16.)

235) Mr. Foose raised the issue relating to Claimant's treatment of concussions to the concussion committee:

> ...I [Mr. Foose] sent a lengthy e-mail detailing the information that I had learned, what had happened, and saying very forcefully that from my perspective we could not be successful as a concussion committee until we had removed people who had these kinds of attitudes from positions of management in the League, from coaching staffs and medical staffs, and that from my perspective this was completely unacceptable to be happening in our League.

(Hearing Trans., 712:17-713:4.)

236) Claimant's inappropriate handling of concussions – his creating of an atmosphere where concussion symptoms should be kept from the medical staff and not treated – was

addressed by the League during its investigation and included within the League's final report. (Respondent Exhibit 27.)

2. Hazing

237) Claimant brought the idea of spanking rookie players following training camps to the Philadelphia Union, as he also spanked players when he was the head coach of DC United. (Hearing Trans., 453:11-16, 969:8-970:21.)

238) Claimant admits that he participated in a practice following the training camps of 2010, 2011 and 2012 where players were spanked. (Hearing Trans., 382:3-10.)

239) Claimant would dip his hand in ice water and then spank the rookie players. (Hearing Trans., 438:4-24.)

240) Claimant would also strike players with a sandal. (Hearing Trans., 970:22-971:7.)

241) He also admits that [redacted] participated in the [redacted] training camp. (Hearing Trans., 382:15-23.)

242) Claimant physically spanked [redacted] (Hearing Trans., 382:15-23, 427:10-17, 552:12-25.)

243) The Philadelphia Union's CEO, Nick Sakiewicz, became aware of the "spanking" when he was shown a video of the ritual in 2011. (Hearing Trans., 526:22-527:2.)

244) As soon as he and Claimant were alone, Mr. Sakiewicz approached Claimant and told him that he did not want the "spanking" to happen again; he wanted Claimant to "cease doing it." (Hearing Trans., 527:6-19, 529:19-23.)

245) Mr. Debusschere also testified that he knew Mr. Sakiewicz had directed the Claimant to cease the "spanking." (Hearing Trans., 79:2-9.)

246) In March/April of 2012, Mr. Sakiewicz found out that, contrary to his direct order to Claimant, the rookie hazing ritual – including the spanking of [redacted] – had taken place at the conclusion of training camp in February of [redacted]. (Hearing Trans., 911:9-13.)

247) On or about June 4, 2012, the MLSPU became aware of the hazing issue. (Hearing Trans., 719:5-12.)

248) Mr. Foose and the MLSPU were concerned of the hazing, finding it to be "bizarre" and "trouble[ing] by the notion that players were being physically struck as part of the hazing." (Hearing Trans., 719:14-21.)

249) Claimant's inappropriate hazing of rookie players was addressed by the League during its investigation and included within the League's final report. (Respondent Exhibit 27.)

Additional Violations of Claimant's Employment Agreement

1. ***Claimant's Applying for Other Positions while Employed by the Philadelphia Union and Making Disparaging Remarks about the Philadelphia Union***

250) At the time Claimant was hired, the Philadelphia Union was required to "buy-out" Claimant from his then current contract with United States Soccer. (Hearing Trans., 508:14-22.)

251) The CEO of the Philadelphia Union, Nick Sakiewicz, negotiated a $75,000 buyout with Dan Flynn, the General Secretary of U.S. Soccer. (Hearing Trans., 509:3-10.)

252) The Philadelphia Union paid U.S. Soccer the $75,000. (Respondent Exhibit 69; Hearing Trans., 509:3-10, 510:3-13.)

253) Given that it invested significant resources – including the $75,000 payment to U.S. Soccer – to bring Claimant to the team, the Philadelphia Union had concerns about Claimant returning to U.S. Soccer while he was still under contract with the Philadelphia Union. (Hearing Trans., 510:14-18.)

254) Accordingly, the Philadelphia Union put a provision in the Employment Agreement prohibiting the Claimant from seeking employment with another professional soccer team during the time he was employed with the Philadelphia Union. (Respondent Exhibit 1; Hearing Trans., 510:24-511:16.)

255) The Employment Agreement also specifically provided that "during the Term and for twelve months thereafter, Manager and the executives of the Club shall refrain from making any disparaging remarks regarding Club or the Team, its players, management, ownership or employees or the Stadium, on the one hand, and Manger or Pino, on the other hand." (Respondent's Exhibit 1, at IX.)

256) On April 30, 2012, Claimant sent an email to Veljko Paunovic, which stated:

> Let's work the project together and I feel that it would be great to have you as my assistant coach wherever I & we can go. Let me know what do you think about this opportunity.

(Respondent Exhibit 15; Hearing Trans., 404:25-405:5.)

257) During his hearing testimony, Claimant was asked what he meant by "wherever I & we can go" and, in response, Claimant testified that he didn't know – he had "no recollection whatsoever." (Hearing Trans., 406:24-407:3.)

258) On the following day, May 1, 2012, at 9:50 a.m., Claimant sent another email to Mr. Paunovic, this time attaching his resume. (Respondent Exhibit 16; Hearing Trans., 407:15-20.)

259) Claimant sent Mr. Paunovic a resume that had been updated and included the Claimant's experience with the Philadelphia Union. (Respondent Exhibit 16; Hearing Trans., 408:7-21.)

260) Additionally, on the last page of Claimant's resume, Claimant wrote:

> My resume is enclosed for your review. Thank you in advance for your generous consideration. I may be reached at my telephone number or E-mail indicated above should You [sic] wish to contact me. I would be happy to make myself available for a professional Interview [sic] at your convenience.

(Respondent Exhibit 16; Hearing Trans., 408:25-409:5.)

261) Although the resume sent on May 1, 2012, to Mr. Paunovic was updated with his Philadelphia Union experience, at his deposition, Claimant unequivocally testified that, during the time he was employed by the Philadelphia Union, he never put together a resume or a CV. (Respondent Exhibit 64 at 37:9-11; Respondent Exhibit 16.)

262) On his resume, Claimant does not include his Philadelphia Union address – he only includes his personal email address. (Respondent Exhibit 16.)

263) Additionally, within one (1) minute of sending his resume to Mr. Paunovic – at 9:51 a.m., Claimant sent another email to Mr. Paunovic directing Mr. Paunovic to send future emails to his "personal email address." (Respondent Exhibit 17; Hearing Trans., 409:24-410:10.)

264) During his hearing testimony, Claimant was asked why he directed Mr. Paunovic to communicate with him at his personal email address and, in response, Claimant stated that he "ha[d] no clue." (Hearing Trans., 410:8-12.)

265) Claimant and former-player representative and current sports broadcaster, Shep Messing, were very close and, in fact, Mr. Messing acted as Claimant's advisor during the time Claimant was employed as the head coach of DC United – another Major League Soccer team; Mr. Messing's advisor relationship was to a degree where Claimant believed it necessary to give

Mr. Messing a championship ring after DC United won the MLS championship. (Hearing Trans., 662:9-663:4.)

266) Claimant would refer players to Mr. Messing to represent. (Hearing Trans., 679:14-20.)

267) Mr. Messing also recommended Claimant to Mr. Sakiewicz for the head coaching position with the Philadelphia Union. (Hearing Trans., 663:5-20, 682:15-19.)

268) According to the testimony of Mr. Messing – an unbiased and independent witness (Hearing Trans., 692:2-8.) – in April/May of 2010, before the start of the 2010 World Cup in South Africa, Claimant contacted Mr. Messing and told him that, if the United States Men's National Soccer Team did not do well in the World Cup, he wanted to take over for Bob Bradley as Head Coach of the United States Men's National Soccer Team. (Hearing Trans., 663:21-664:11, 665:4-18.)

269) The week after the United States Men's National Soccer Team lost in South Africa, Claimant called Mr. Messing and asked Mr. Messing to speak to Sunil Gulati – President of United States Soccer – and see if Claimant could become the next Head Coach of the United States Men's National Soccer Team – he wanted to take over for Bob Bradley, who was actually still under contract at the time. (Hearing Trans., 663:21-664:19, 665:19-23.)

270) Although he was reluctant to, Mr. Messing did in fact reach out to Mr. Gulati on Claimant's behalf – specifically notifying Mr. Gulati that Claimant was interested in Bob Bradley's Head Coaching position. (Hearing Trans., 667:23-668:14.)

271) Mr. Messing also testified that, during the time Claimant was employed by the Philadelphia Union, he met with Claimant for about an hour and Claimant made the following statements to him:

> …We spoke for an hour and the gist of – not the gist; that conversation was [Claimant] telling me: I have to get the hell out of Philadelphia. These guys are stupid. They don't know what they're doing and they're broke. They have no money…that also was a very shocking conversation to me because he was bad mouthing and slamming a team in the League…But he was off the wall at that point saying that they're stupid, they don't have a clue, and they're broke…

(Hearing Trans., 666:13-667:7; see also 683:6-10.)

272) Claimant also specifically told Mr. Messing that "Nick [Mr. Sakiewicz] doesn't have a fucking clue"; "[t]hey don't know what they're doing. They have no money." (Hearing Trans., 684:24-685:5, 685:18-21.)

273) Mr. Messing – again, an unbiased, independent witness – testified that the disparaging comments Claimant made about the Philadelphia Union and Mr. Sakiewicz were damaging to the reputation of the Philadelphia Union. (Hearing Trans., 692:21-693:5.)

274) In 2012, while Claimant was still employed by the Philadelphia Union, Claimant again contacted Mr. Messing, asking Mr. Messing whether he could find Claimant a coaching position in Europe. (Hearing Trans., 668:15-25, 669:10-25, 670:2-10.)

275) In particular, Claimant asked Mr. Messing to investigate a coaching position with the Polish National Team, a coaching opportunity in Scotland, and coaching possibilities in England. (Hearing Trans., 670:16-671:2.)

276) In 2012, Claimant also asked Mr. Messing for the contact information of sports agent, Michael Morris, as he thought Mr. Morris would be able to help Claimant find a coaching position in Europe. (Hearing Trans., 669:2-9, 671:16-672:4.)

277) Mr. Messing did provide Claimant with the contact information of sports agent Michael Morris. (Hearing Trans., 669:2-9.)

278) According to the testimony of an unbiased and independent witness – sports agent Michael Morris – Claimant, during the time he was employed by the Philadelphia Union, contacted Mr. Morris on 3 or 4 occasions asking Mr. Morris to find him a coaching position in the Emirates or in Europe. (Hearing Trans., 646:19-647:5.)

279) Additionally, according to Mr. Morris, Claimant, during the time he was employed by the Philadelphia Union, also sent Mr. Morris his CV – his resume. (Hearing Trans., 646:19-647:8.)

280) As requested by Claimant – again, during the time he was employed with the Philadelphia Union – Mr. Morris also testified that he actually reached out on Claimant's behalf to clubs in the U.K., America, Dubai and Europe – informing these clubs that Claimant was looking for a coaching position. (Hearing Trans., 647:15-648:5.)

281) As several of the clubs Mr. Morris reached out to on behalf of Claimant asked for a copy of Claimant's CV/resume, Mr. Morris sent Claimants CV/resume to the clubs. (Hearing Trans., 648:6-9.)

282) On or about May 24, 2012, Mr. Messing, again, a former teammate and acquaintance of Mr. Sakiewicz, called Mr. Sakiewicz unsolicited and informed him that Claimant: (1) sought employment with the United States Men's National Soccer; (2) was actively seeking employment in Europe; (3) asked for the contact information of Michael Morris, a well-known sports agent; and (4) was making disparaging remarks about Mr. Sakiewicz and the Philadelphia Union team – saying that the team is broke and that ownership doesn't have a clue as to what they are doing. (Hearing Trans., 565:18-566:5, 567:2-568:4, 672:5-674:10.)

2. *Claimant's Breaching of the Confidentiality Provision within the Employment Contract*

283) In executing the Employment Agreement, Claimant and the Philadelphia Union agreed to: (1) "**treat all information, no matter how obtained**, regarding Club, the Team, the Stadium, the Stadium operator, any affiliate of the foregoing and their respective owners, officers, employees and agents and the Team's players, as well as regarding the League and its affiliates, other teams and other players, on the one hand, and the Manager and Pino, on the other hand, **as well as this Agreement**, the Pino Agreement and the negotiations related thereto, with the strictest confidentiality"; and (2) **to not disclose such confidential information to any third party including the media**, or otherwise use such confidential information" (hereinafter, the "Confidentiality Provision"). (Respondent's Exhibit 1, at IX) (emphasis added.)

284) Claimant breached this Confidentiality Provision when he – also in blatant disregard of the Arbitration Provision within the Employment Agreement –filed the Eastern District of Pennsylvania lawsuit against the Philadelphia Union attaching a copy of the Employment Agreement, the 2011 Extension Agreement, and the June 13, 2012 Termination Letter. (*See* "Complaint Seeking Expedited Declaratory Judgment," marked as part of Respondent's Exhibit 72.")

285) The Employment Agreement explicitly prohibited Plaintiff from disclosing the Employment Agreement and/or any other information – no matter how obtained – regarding the Club, Team, League on the one hand and Claimant on the other hand. (Respondent's Exhibit 1, at IX.)

286) As a result of Claimant's filing of the Eastern District Complaint, ignoring the unambiguous arbitration provision ultimately enforced by the Court and without filing it under seal, information protected by the Confidentiality Provision became public – affecting the

Philadelphia Union – the media wrote about it, fans opined about it and there was a lot of traffic on social media. (Respondent Exhibit 72; Hearing Trans., 919:18-22, 921:14-20, 934:14-25.)

3. Additional League Rule Violations

287) As the head soccer coach of the Philadelphia Union, Claimant is charged with knowing League Rules, including without limitation ensuring that the Philadelphia Union fields a team consistent with such rules (defined broadly to include all constitutions, bylaws, rules, regulations, policies, guidelines, directives, instructions, rulings, orders and agreements). (Respondent Exhibit 1; Hearing Trans., 498:13-23, 499:9-16.)

288) On July 21, 2011, Claimant started an Academy Player in an exhibition game against Everton FC, an English Premier League team. (Hearing Trans., 539:25-540:8.)

289) It was a violation of the MLSPU rules to play an Academy Player in an exhibition game. (Hearing Trans., 540:3-20.)

290) The following day, on July 22, 2011, the Executive Vice President of Major League Soccer, Todd Durbin, sent an email to all MLS Coaches and all MLS Technical Directors providing them with a Memo outlining that all Trialist and Academy Players are not allowed to participate in gated exhibition games (hereinafter, the "Memorandum"). (Respondent Exhibit 37; Hearing Trans., 420:10-22.)

291) Claimant admits that he received the email from Todd Durbin forwarding the Memorandum. (Respondent Exhibit 37; Hearing Trans., 420:10-22, 498:13-23.)

292) After receiving the email with the Memorandum, Diego Gutierrez, who was hired by Claimant as the Sporting Director, contacted the Executive Director of the MLSPU, Robert Foose, and asked whether the Philadelphia Union could use Academy Players for their game

against Real Madrid. (Respondent Exhibit 37; Hearing Trans., 539:14-18.) Mr. Foose informed Mr. Gutierrez that he could not – it was prohibited. (Respondent Exhibit 37.)

293) Despite his receipt of the Memorandum and the conversation Mr. Gutierrez had with Mr. Foose, Claimant ignored a League rule and played an Academy Player during the Real Madrid game. (Respondent Exhibit 37; Hearing Trans., 497:8-24, 540:21-25, 540:21-25.)

294) Claimant's decision to play an Academy Player during the Real Madrid game after receipt of the Memorandum "caused a lot of angst around the League." (Respondent Exhibit 37; Hearing Trans., 540:21-541:24.)

295) On August 25, 2011 – approximately one month after Claimant allowed an Academy Player to play against Real Madrid, Claimant allowed a Trialist player to play in a gated exhibition game against the Harrisburg Islanders. (Respondent Exhibit 64 at 112:3-25; Hearing Trans., 419:6-8.)

296) Claimant's playing of the trialist player in the gated exhibition game against the Harrisburg Islanders was his second violation of the Memorandum sent by Mr. Durbin – second violation is approximately one month since the issuance of the Memorandum. (Respondent Exhibit 38.)

297) Claimant spoke with Mr. Durbin, informing Mr. Durbin that he understood it was a violation for the unsigned (Trialist) player to participate in the gated exhibition game, but that he decided to play the player anyway. He also informed Mr. Durbin that he disagreed with the rule and would do it again. (Respondent Exhibit 38.)

298) As a result of Claimant's action in blatantly ignoring a League Rule, the Commissioner of Major League Soccer, Don Garber, fined the Philadelphia Union $25,000. (Respondent Exhibit 38; Hearing Trans., 542:5-10.)

299) The Philadelphia Union was able to get the $25,000 fine reduced to $15,000 through negotiation with the League, but the other $10,000 was held in abeyance in case there were any future violations. (Respondent Exhibit 42; Hearing Trans., 542:22-25.)

300) The $15,000 fine was ultimately billed to the Philadelphia Union on February 22, 2012. (Respondent Exhibit 43; Hearing Trans., 542:18-25.)

301) The $10,000 that was held in abeyance was ultimately assessed against the Philadelphia Union. (Hearing Trans., 543:4-7.)

302) Within the Philadelphia Union organization, the Team Manager is responsible for the signing of all Homegrown Players. (Hearing Trans., 555:22-556:4.)

303) On or about May 1, 2012, the League concluded that the Philadelphia Union violated the League's Home Grown Player rule and sanctioned it as follows: (1) loss of $75,000 in allocation money; (2) a $35,000 fine payable immediately; and (3) should the player be transferred – which is a determination that will now solely be made by the League - the League will retain 2/3's of the transfer revenue with the Philadelphia Union only receiving 1/3. (Respondent Exhibit 44; Hearing Trans., 553:21-554:10.)

304) The team was also fined $5,000 for Claimant's leaving of the Technical Area during the April 21, 2012, game against Chivas USA. (Respondent Exhibit 7; Hearing Trans., 556:13-22.)

305) As a result of Claimant's violations of League Rules, the Philadelphia Union was required to pay $55,000 in fines from February 22, 2012, through April 26, 2012. (Respondent Exhibit's 7, 43, 44; Hearing Trans., 556:23-557:15.)

4. Insubordination

306) In or around August of 2011, Vice President of Operations, Rick Jacobs, came up with the idea of inviting all the high school coaches to PPL Park for a symposium where the Philadelphia Union could share its plan for rolling out its youth soccer program. (Respondent Exhibit 46; Hearing Trans., 532:19-25.)

307) Mr. Sakiewicz thought it was a good enough idea to warrant a collaborative, brainstorming session and asked Mr. Jacobs to send sent out an email. (Respondent Exhibit 46; Hearing Trans., 533:2-8.)

308) Mr. Jacobs agreed and sent such an email to a variety of people, mistakenly failing to copy Claimant on the email. (Respondent Exhibit 46; Hearing Trans., 533:2-8.)

309) Although Mr. Jacobs apologized for not including Claimant on the email, Claimant became very upset – inciting a significant amount of back-and-forth emails. (Respondent Exhibit 46; Hearing Trans., 533:14-16, 534:2-6, 535:14-22.)

310) Mr. Sakiewicz repeatedly asked Claimant to meet with him to discuss the issue of Mr. Jacobs leaving him off of the email, but Claimant refused to meet with him. (Respondent Exhibit 46; Hearing Trans., 535:14-536:7.)

311) Rather than meet with Mr. Sakiewicz, Claimant had his attorney send Mr. Sakiewicz correspondence advising Mr. Sakiewicz that he is not required to report him; rather, he reports to the owner of the Philadelphia Union, Jay Sugarman. In other words, Claimant was telling Mr. Sakiewicz – the CEO of the Philadelphia Union – that he does not have to listen to him. (Respondent Exhibit 47; Hearing Trans., 536:8-25.)

312) Mr. Sakiewicz responded to Claimant, citing to the pertinent provisions of the Employment Agreement clearly illustrating that Claimant reported to Mr. Sakiewicz. (Respondent Exhibit 48; Hearing Trans., 537:2-17.)

313) Additionally, although Mr. Sakiewicz – as corroborated by Mr. Debusschere – directed Claimant to cease spanking rookie players (hazing), he continued to do it – violating a direct order of Mr. Sakiewicz. (See, Facts 242-245, *supra.*)

Claimant's Actions Having a Negative impact on Integrity, Reputation and Goodwill of the Philadelphia Union

314) Claimant's actions during the April 21, 2012 Chivas USA game were "out of control" and significantly embarrassing to the Philadelphia Union. As Mr. Sakiewicz testified:

> It was more than infuriating…it was alarming, it was embarrassing. I know all the owners in the League, including Mr. Anschutz, whose name is on the trophy, who I worked for for six years, who are watching this, and the first thing that pops in my head is: What kind of team is Nick Sakiewicz running? It's, excuse my French, a shit show.
>
> And this was more than just heat of the moment, coach running onto the field, players engaging in a fight. This was the beginnings of a brand that Jay and I did not want to have as a club and it was hurtful, it was disappointing, it was alarming, and it was tough to watch.

(Hearing Trans., 558:5-18, 630:23-631:16.)

315) Claimants actions also reflected in a materially adverse manner on the integrity, reputation and goodwill of the Club and the Team, as evidenced by the announcers' reaction to Claimant's actions:

> And Peter Nowak lost his mind there. Yeah, he should be sent off. That's inexcusable. Inexcusable for a head coach to act in this manner.
>
> …and that is what Baldomero Toledo is telling him. It's like: What's your justification? Just walk off. He's telling him: Peter, just go.
>
> …Look at Peter Nowak. See, that's why he gets sent off. What are you doing on the field?

(Hearing Trans., 391:7-10, 15-17, 392:15-17.)

316) Claimant actions during the April 21, 2012 Chivas USA game further did not comport with Philadelphia Union policies and procedures in at least two respects. As Mr. Sakiewicz explained:

> ...There is our purpose statement, which I alluded to earlier, which lays out a lot of detail about things like the brand, our core beliefs, our greatest imaginable challenge, which is to become one of America's most admired soccer brands; and then there's an employee manual. And then, of course, there's [Claimant's] contract, which addresses a lot of those responsibilities, roles, duties, and things that we expect out of [Claimant].

(Hearing Trans., 637:12-638:3.)

317) Claimant actually acknowledged that he received negative feedback as a result of his actions during the April 21, 2012 game against Chivas USA. (Hearing Trans., 384:15-385:6.)

318) Additionally, the findings made by the MLS relative to Claimant – detailed within the MLS Report – had a significant negative impact on the position/posture of the Philadelphia Union with the League and the MLSPU. Mr. Sakiewicz specifically testified:

Q. Was the June 12th, 2012, report embarrassing to you?

A. That would put it lightly...It was beyond embarrassing.

Q. Did you feel like it had a detrimental impact on the team's position or posture with the League and the Players Union?

A. No question. It had a negative impact on the team's position in the League; with other owners who are our partners; for me personally and my reputation with the commissioner; senior executives at the League; other members; the President of Soccer United Marketing, Kathy Carter, who I had launched the League with; to multiple, multiple people. It was a very, very difficult thing to read.

(Hearing Trans., 591:2-17.)

319) Mr. Sakiewicz also had concerns about Claimant's actions affecting the organization, the fans, the sponsors, broadcast partners, affiliates, and investors. (Hearing Trans., 916:25-917:15.)

The Termination of the Employment Agreement

320) On June 13, 2012, at approximately 7:31 a.m., Nick Sakiewicz sent Claimant an email informing Claimant that he received a memo from the league concerning an investigation the league has been conducting and specifically outlining several of the findings made by the League. (Respondent Exhibit 34; Hearing Trans., 402:15-403:7, 582:15-25.)

321) Specifically, the June 13, 2012 email from Mr. Sakiewicz to Claimant notified Claimant of the following findings made by the League:

- Claimant jeopardized the health and safety of the players by restricting access to water during training;
- Claimant jeopardized the health and safety of injured players by requiring them to participate in training activities against the advice of the team medical staff;
- Claimant jeopardized the health and safety of the players by creating an atmosphere where concussion symptoms should be kept from the medical staff and not treated;
- Claimant engaged in inappropriate physical contact with rookie players as part of an annual "hazing";
- Claimant interfered with the players right to contact the MLSPU with concerns; and
- Claimant created an overall "culture of fear" where players did not believe they had the ability to raise and address concerns regarding their work environment without retribution.

(Respondent Exhibit 34; Hearing Trans., 583:5-10.)

322) Within the June 13, 2012 email, Mr. Sakiewicz also asked Claimant to meet him in his office at 9:00 a.m., to discuss the League's findings in detail. (Respondent Exhibit 34; Hearing Trans., 402:15-403:7, 583:2-4.)

323) Mr. Sakiewicz was "anxious" to meet with Claimant to discuss the findings of the League and to give Claimant an opportunity to respond. (Hearing Trans., 904:19-25.)

324) Claimant did in fact meet at the office of Mr. Sakiewicz on June 13, 2012, at approximately 9:00 a.m. (Hearing Trans., 151:13-21, 402:15-403:7, 583:11-13, 586:11-15.)

325) Present at the June 13, 2012 meeting was Claimant, Mr. Sakiewicz, and Mr. Debusschere. (Hearing Trans., 110:17-22, 583:14-17.)

326) The meeting lasted approximately 25-30 minutes. (Hearing Trans., 113:20-23, 584:4-11.)

327) During the meeting, Mr. Sakiewicz went through the six League findings with Claimant – as summarized in Mr. Sakiewicz's June 13, 2012 email – giving Claimant as much time as he wanted to discuss each finding. (Respondent Exhibit 34; Hearing Trans., 114:19-116:6, 117:8-119:6, 583:25-584:15, 907:2-5.)

328) During their discussion of the six League findings, Claimant was asked whether the findings were true and his response was simply "this isn't true" and "this is bullshit"; he did not offer any type of a substantive response to suggest that the League's findings were untrue. (Hearing Trans., 584:16-585:7, 915:25-916:7.)

329) Mr. Sakiewicz had previously discussed several of the issues, including the players' interference issue with Claimant on multiple occasions prior to the June 13, 2012 meeting. (Hearing Trans., 887:11-18.)

330) Mr. Sakiewicz's plan for the meeting with Claimant was explained as follows:

> My intention was to share the document with him that we drafted for his termination that outlined six points [Document 36] and went through each point diligently with him. And if he would have brought…concerns/ issues…objections/proof, anything in that meeting, Mr. Haines, I'm a reasonable guy, I hired [Claimant]…to a long-term agreement, I wanted to have a long run with [Claimant] and building our team, I would have

> listened. I would have given him 48 hours to explain each and every issue. But unfortunately the meeting lasted 25 or 30 minutes.

(Hearing Trans., 912:24:913:13.)

331) Claimant acknowledged during his testimony that, on the date of his termination, he was provided with a copy of the termination letter and made aware of issues within the termination letter. (Hearing Trans., 200:14-201:11.)

332) On June 13, 2012, at 9:33 a.m. – immediately after his June 13, 2012 meeting with Claimant concluded – Mr. Sakiewicz sent an email to the Commissioner of Major League Soccer, Don Garber, informing him that Claimant had been terminated. (Respondent Exhibit 31; Hearing Trans., 586:8-20.)

333) In response, Mr. Garber sent Mr. Sakiewicz an email asking "[h]ow did [Claimant] handle it?" (Respondent Exhibit 31; Hearing Trans., 586:8-24.)

334) Mr. Sakiewicz responded to Mr. Garber's inquiry, informing him that Claimant acted – in typical fashion – very poorly and blaming everyone else. (Respondent Exhibit 31; Hearing Trans., 586:21-587:3.)

335) During the June 13, 2012 meeting, Claimant was also provided with a copy of a termination letter that advised Claimant that the Philadelphia Union was exercising its discretionary right to terminate the Employment Agreement, pursuant to Paragraph III(A), as a result of:

- Claimant's various breaches of League Rules (including the League's CBA), including physical confrontations with players during a game resulting in a fine and multi-game suspension, interfering with the rights of players to contact the MLSPU, subjecting players to inappropriate hazing activities and engaging in behavior that put the health and safety of the players at risk;
- Claimant's material breaches of the Employment Agreement, including engaging in discussions regarding and otherwise actively seeking, employment by other

professional soccer teams in Europe and making disparaging remarks to third parties regarding the Philadelphia Union and its management;

- Claimant's demonstrating gross negligence, including putting the health and safety of players at risk by requiring injured players to participate in strenuous training activities, not allowing players to have water during such activities, ignoring the advice of the athletic trainers regarding which players are healthy enough to practice or play in games and creating an atmosphere where medical issues should be hid from medical staff;

- Claimant's committing actions that have reflected in a materially adverse manner on the integrity, reputation and goodwill of the Philadelphia Union (in the eyes of the League, U.S. Soccer, current and potential players, sponsors and fans);

- Claimant's multiple incidents of insubordination with respect to the Chief Executive Officer;

- Claimant's various material breaches of Team Rules, including creating a hostile work environment and culture of fear for players and other front office employees by orally berating and physically intimidating fellow employees.

(Respondent Exhibit 36; Hearing Trans., 111:2-4, 113:16-19.)

336) After walking Claimant through the reasons surrounding the Philadelphia Union's decision to exercise its discretionary right to terminate the Employment Agreement, Claimant was provided with two options: (1) he would be presented with an executed termination letter; or (2) he could sign a mutually agreeable separation agreement and release. (Hearing Trans., 111:5-10, 119:8-16.)

337) Claimant was then asked whether he had any questions and Claimant simply asked that the termination letter and separation agreement he sent to his attorney, William Daluga. (Hearing Trans., 111:11-14, 119:8-16.)

338) At Claimant's request, later that same day – on June 13, 2012 – Mr. Debusschere sent both the termination letter and the proposed Separation Agreement to Mr. Daluga. (Respondent Exhibit 63; Hearing Trans., 111:11-112:13.)

339) Approximately three to four weeks later, Claimant, through his counsel, notified the Philadelphia Union that he would be filing suit in Federal Court. (Hearing Trans., 113:1-8.)

340) As a result, the Philadelphia Union formally issued the termination letter to Claimant. (Hearing Trans., 113:1-8.)

Additional Actions Taken by Claimant that Had a Negative Impact on the Integrity, Reputation and Goodwill of the Philadelphia Union

341) The MLS Report (Respondent Exhibit 27) and the Termination Letter (Respondent Exhibit 26) were confidential documents, not made public by the Philadelphia Union; in fact, the Philadelphia Union attempted to keep everything confidential – for the good of Claimant, the Philadelphia Union and the League. (Hearing Trans., 919:18-22, 921:7-20, 922:9-11, 933:13-19.)

342) Information regarding the instant litigation – including the reasons for the termination of Claimant's employment – only became public because Claimant attached the termination letter to a pleading he filed in the United States District Court for the Eastern District of Pennsylvania. (Respondent Exhibit 72; Hearing Trans., 919:18-22, 921:14-20, 934:14-17.)

343) As a result of Claimant making this matter public – by attaching confidential documents to public filings – and errantly pursuing litigation as opposed to Arbitration – the fans and sponsors of the Philadelphia Union were affected – the media wrote about it, fans opined about it and there was a lot of traffic on social media. (Hearing Trans., 934:18-25.)

Claimant believes and has alleged in Court Filings that the MLS/MLSPU ordered his firing

344) During the pendency of the instant Arbitration, Claimant filed a separate lawsuit in the United States District Court for the Eastern District of Pennsylvania against the MLS and the MLSPU. (Respondent Exhibit 73.)

345) Claimant alleges in such litigation that his firing was ordered by Major League Soccer. (Respondent Exhibit 73; Hearing Trans., 1011:7-11.)

Claimant's Inconsistent/Contradicted testimony

346) Claimant testified that he did not "personally take water bottles away from the players" or "physically take anything out of anybody's hands." (Hearing Trans., 211:6-11, 211:23-25.)

347) [redacted] testified that he attempted to drink out of an individual, disposable, single use water bottle, but Claimant took it out of his hands and threw it to the side. (Hearing Trans., 466:3-10.)

348) Claimant testified that he did not "throw any bottles up into the woods." (Hearing Trans., 361:10-12.)

349) [redacted] testified that he specifically witnessed Claimant take the water bottles and hide them in the woods – telling players "you guys don't need water." (Hearing Trans., 96222-963:4, 966:10-16.)

350) Interestingly enough, Claimant later testified that he did take the water as described by [redacted] – contradicting his own testimony. (Hearing Trans., 1258:16-22.)

351) Claimant testified that, subsequent to the May 31, 2012 run, he did not limit the players to one water bottle per practice. (Hearing Trans., 216:18-25, 217:19-20.)

352) However, two players and the Assistant Athletic Trainer all testified that Claimant did in fact place volume water limitations on the players during a practice subsequent to the May 31, 2012 trail runs. ([redacted] – Hearing Trans., 973:21-974:10; [redacted] – Hearing Trans., 1049:8-1050:9; Steve Hudyma – Hearing Trans., 1162:17-21.)

353) Claimant testified that he did not advise Mr. Rushing that the medical staff would no longer make the determination as to which players are healthy enough to play in each game or

participate in the training sessions – such determinations would now be made by the Claimant. (Hearing Trans., 219:22-220:9, 366:16-367:4.)

354) Mr. Rushing, however, specifically testified that Claimant explicitly informed him that neither Mr. Rushing nor the team doctors were going to make decisions regarding the ability of a player to train or place in a game; these decisions were now going to be made by Claimant. (Respondent Exhibit's 13 and 27; Hearing Trans., 1075:16-20.)

355) Claimant testified that Philadelphia Union player [redacted] was able to play in the June 5, 2012 game – only five days following the May 31st run. (Hearing Trans., 371:7-10.)

356) [redacted] testified that he was unable to play until at least sixteen (16) days after the May 31, 2012 run. (Hearing Trans., 1039:12-23.)

357) Claimant testified that he was never told to cease the hazing. (Hearing Trans., 190:20-21, 1241:6-8.)

358) Mr. Sakiewicz, however, testified that he approached Claimant and explicitly told him that he wanted the hazing to cease immediately; Mr. Debusschere also testified that Claimant was told to stop the hazing. (Hearing Trans., 79:2-9, 527:6-19, 529:19-23.)

359) Claimant testified unequivocally that he never told the players they were not allowed to bring issues to the MLSPU. (Hearing Trans., 232:11-14.)

360) However, several players, including [redacted] and [redacted] specifically testified that Claimant told the players not to contact the MLSPU. (Hearing Trans., 434:4-23, 451:22-452:3, 476:18-477:8, 949:3-9, 950:14-22.)

361) Claimant also denied calling Mr. [redacted] and/or Mr. [redacted] and asking them who reported the [redacted] issue to the MLSPU. (Hearing Trans., 380:18-381:14.)

362) Both Mr. [redacted] and Mr. [redacted] however, testified unequivocally that Claimant did in fact call them and ask them who reported the [redacted] issue to the MLSPU – the call to Mr. [redacted] was actually confirmed by another Philadelphia Union player, [redacted] (Hearing Trans., 435:14-436:12-19, 436:10, 477:23-478:3, 951-5-21.)

363) Claimant testified that he did not contact Robert Foose, the Executive Director of the MLSPU, and ask him to disclose the identity of the Philadelphia Union players who contacted MLSPU regarding the [redacted] issue – **actually testifying that he never had a phone conversation with Mr. Foose during his time with the Philadelphia Union**. (Hearing Trans., 232:6-233:10.)

364) Mr. Foose, however, clearly testified that Claimant did in fact call him, telling Mr. Foose that he did not think it was appropriate for players to be talking to the MLSPU and asking Mr. Foose to identify the player that brought the [redacted] issue to his attention – to the attention of the MLSPU. (Hearing Trans., 704:23-705:18.)

365) Claimant testified that, during his employment with the Philadelphia Union, he did not look to see what other employment opportunities were out there. (Hearing Trans., 241:21-25.)

366) Both Michael Morris and Shep Messing, however, both testified that Claimant reached out to them during the time he was employed as the head coach of the Philadelphia Union in an effort to find other employment. (Hearing Trans., 646:19-647:5, 663:21-664:19, 665:4-23, 668:15-25, 669:2-25, 670:2-10, 671:16-672:4.)

367) Claimant also testified that he never told Shep Messing that the CEO of the Philadelphia Union, Nick Sakiewicz, did not know what he was doing and/or that the Philadelphia Union did not have any money. (Hearing Trans., 401:18-402:3.)

368) Mr. Messing, however, specifically testified that Claimant made both of these statements to him. (Hearing Trans., 666:13-667:7, 684:24-685:5, 685:18-21.)

369) Claimant also initially testified that Shep Messing did not bring him to the United States as a player (Hearing Trans., 244:6-8), but, a few moments later, changed his testimony and explicitly stated "[a]nd I communicate that to Mr. Messing, who was very upset that he brought me here [to the United States], [yet] he didn't even have commission for my playing time here in United States, and I didn't give him anything." (Hearing Trans., 245:18-22.)

370) Claimant testified that Mr. Sakiewicz reached out to him regarding the trade of [redacted] (Hearing Trans., 234:17-21.)

371) Mr. Sakiewicz not only testified that he had no involvement in the trading of [redacted] but he also emphatically testified that he "never in [his] 18 years of management ever told a manager to trade a player." (Hearing Trans., 563:4-12.)

372) Claimant testified that he paid $25,000 to the United States Soccer Federation in order to take the head coaching position with the Philadelphia Union. (Hearing Trans., 270:15-22.)

373) When presented with the cancelled checks illustrating that the Philadelphia Union actually paid the full $75,000 required to release Claimant from his contract with the United States Soccer Federation, Claimant testified that the Philadelphia Union initially paid the $75,000, but that it later deducted $25,000 from his paycheck. (Hearing Trans., 376:17-377:2.)

374) The uncontroverted documents produced in this matter illustrates that the Philadelphia Union paid the full $75,000 to release Claimant from his contract with the United States Soccer Federation (Respondent Exhibit 72) and that the Philadelphia Union never

deducted $25,000 from the payments it made to Claimant. (Respondent Exhibit 73; Hearing Trans., 1172:19-1174:24.)

375) In fact, the express language of the Employment Agreement confirms that the Philadelphia Union paid the entire $75,000 – specifically outlining that Claimant would have to reimburse the Philadelphia Union for the $75,000 it paid to U.S. Soccer Federation if Claimant terminated the Employment Agreement prior to the start of the 2010 MLS season. (Respondent Exhibit 1, at IV(D).)

376) Claimant testified that he did not have his UEFA Pro Coaching license as of June 1, 2009, and that he did not have it as of the date of his hearing testimony. (Hearing Trans., 264:5-15.)

377) However, Claimant testified that, prior to his employment with the Philadelphia Union – when he was working with the U.S. Soccer Federation – he went to Brazil for purposes of obtaining his UEFA Pro license. (Hearing Trans., 266:11-19.)

378) The resume Claimant produced during discovery further illustrates that Claimant obtained (or claimed to obtain) a UEFA Pro Coaching License in Brazil in 2009. (Respondent's Exhibit 22, at P000098.)

379) Claimant testified that he did not push anyone during the April 21, 2012 game against Chivas USA – the game in which Claimant received a red card and was ejected for "initiating contact with an opposing player." (Hearing Trans., 393:18-394:16.)

380) Not only did Major League Soccer fine and suspend Claimant for initiating contact with an opposing player, but Respondent Exhibit 6, which is a video of Claimant during

the April 21, 2012 Chivas USA game, unquestionably illustrates that Claimant actually physically pushed the opposing team's goalkeeper. (Respondent Exhibit 6 at 1:53 minute.[6])

381) Claimant denies that he made certain statements after the Toronto game – specifically denying that he said: (1) he was going to "see who falls out of the tree and who's left standing"; (2) "I've traded the leading scorer and I've traded the [redacted]"; and (3) "you can't do anything to me, I'm the GM, the manager, and I can never get fired." (Hearing Trans., 318:18-319:3, 319:19-22, 320:7-16.)

382) The testimony of the players, however, clearly establishes that Claimant made the following statements to the players after the Toronto game:

> ...he wasn't afraid to shake the tree...he had traded away [redacted] and [the] leading goal scorer...[he] wasn't afraid to make moves and to roll with it.

(Hearing Trans., 1030:17-1031:13.)

> we're going to shake tree, and we're going to figure out who sticks and who doesn't... My job is not going anywhere, I can't be fired.

(Hearing Trans., 954:21-955:4, 956:3-11, 460:8-19.)

Mitigation

383) The Employment Agreement contains a mitigation clause, Paragraph III(D), which explicitly provides as follows:

> Club shall have the right to mitigate and set off against its obligations to pay such Severance Payments any amounts Manager and/or Pino earns or receives as a result of any services Manager renders for, or rights granted by Pino to, another person or entity, whether as an employee, consultant or independent contractor, subsequent to such termination and through December 31, 2015[7] (the "Severance Period"), regardless of whether such

[6] Although it happens quickly, if you pause the video at 1 minute and 53 seconds, it is clear that Claimant pushes the opposing team's goalkeeper. This is the basis for the actions taken by Major League Soccer against the Philadelphia Union and the Claimant.

[7] The Employment Agreement initially stated December 31, 2012, but this was extended by the 2011 Extension Agreement. (Respondent Exhibit 5.)

> services or rights are comparable in nature to the employment hereunder or to the rights granted under the Pino Agreement or soccer related.

(Respondent Exhibit 1.)

384) Accordingly, any amount deemed owed by the Philadelphia Union to the Claimant cannot actually be calculated until it is determined whether Claimant received any compensation or other monies through December 31, 2015.

COUNTERCLAIMS

385) On or about June 1, 2009, the Philadelphia Union and Claimant's Limited Liability Company, Pino Sports, entered into an Agreement whereby Claimant agreed to provide the Philadelphia Union with his marketing rights – to use Claimant's photographs, quotations, name, and image and likeness for publicity or promotional purposes (hereinafter, the "Pino Agreement"). (Respondent's Exhibit 2.)

386) On or about March 15, 2011, the parties entered into an Advance and Pledge Consent Agreement wherein the Philadelphia Union agreed to advance Claimant the remainder of the 2011 fee and the entire 2012 fee the Philadelphia Union owed to Claimant pursuant to the Pino Agreement. (Respondent Exhibit 4; Hearing Trans., 277:12-15, 278:5-12, 280:21-23.)

387) The Parties agreed that, of the total amount advanced to Claimant pursuant to Respondent Exhibit 4, $46,680.33 was unearned at the time Claimant's employment was terminated. (Respondent Exhibit 4; Hearing Trans., 1171:3-18.)

388) The Parties also agreed that the interest rate applicable to Claimant's unearned advance of $46,680.33 is 8%. (Hearing Trans., 1171:3-18.)

389) The December 20, 2011 Extension Agreement also detailed a $60,000 loan that was made by the Philadelphia Union to Claimant. (Respondent Exhibit 5; Hearing Trans., 303:18-23.)

390) The Parties agreed that, as of the date Claimant's employment was terminated, $53,717 of the $60,000 loan remains outstanding. (Respondent Exhibit 5; Hearing Trans., 1170:2-25, 1171:15-18.)

391) The Parties also agreed that the interest rate applicable to the unpaid loan balance is 7%. (Hearing Trans., 1170:2-25, 1171:15-18.)

392) In total, the Philadelphia Union's counterclaims – what Claimant agrees is outstanding relative to the loan and advance provided to him by the Philadelphia Union – equals $100,397.33, plus interest attorneys' fees and costs.

Respectfully submitted,

BUCHANAN INGERSOLL & ROONEY PC

By: */s/ Thomas G. Collins*

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Dated: December 5, 2014

CERTIFICATE OF SERVICE

I hereby certify that I am this day filing a copy of Philadelphia Union's Proposed Statement of Undisputed Material Facts by Electronic Mail with the American Arbitration Association and serving a copy via electronic mail and United States First Class Mail, Postage Prepaid, upon the persons indicated below:

Clifford E. Haines, Esquire
Hollie Knox, Esquire
Haines & Associates
1835 Market Street, Suite 2420
Philadelphia, PA 19103

/s/ Thomas G. Collins
Thomas G. Collins, Esquire
Attorneys for Respondent/
Counterclaim Claimant

Date: December 5, 2014

EXHIBIT "E"

AMERICAN ARBITRATION ASSOCIATION

Piotr Nowak, Claimant/Counterclaim Respondent	:	CASE NO. 14 166 01589 12
v.	:	Arbitrator: Margaret R. Brogan
Pennsylvania Professional Soccer LLC and Keystone Sports and Entertainment LLC, Respondent/Counterclaim Claimant	:	
v.	:	
Pino Sports LLC Counterclaim Respondent	:	

THE PHILADELPHIA UNION'S REPLY TO CLAIMANT'S POST-HEARING BRIEF

Respondent/Counterclaim Claimant, Pennsylvania Professional Soccer LLC (hereinafter, the "Philadelphia Union") and Respondent, Keystone Sports and Entertainment LLC (hereinafter, "Keystone")[1] (the Philadelphia Union and Keystone will hereinafter collectively be referred to as "Respondent"), by and through their attorneys, Buchanan Ingersoll & Rooney PC, hereby submit the following Reply to Claimant's Post-Hearing Brief.

BUCHANAN INGERSOLL & ROONEY PC

By: */s/Thomas G. Collins*

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Dated: December 23, 2014

[1] Of note, Claimant has included Keystone Sports and Entertainment LLC as a Respondent. Claimant, however, was employed at all times by Pennsylvania Professional Soccer LLC and not Keystone Sports and Entertainment LLC.

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I. RESPONSE TO THE FACTUAL AVERMENTS WITHIN CLAIMANT'S POST-HEARING BRIEF

In the interests of judicial economy, the Philadelphia Union will not reiterate the facts as presented in its initial Post-Hearing Brief and/or within its factually supported Proposed Statement of Undisputed Material Facts. It will, however, address several factually unsupported and misleading statements made within Claimant's Post-Hearing Brief. For consistency purposes, the Philadelphia Union will address each such statement in the order in which it was presented within Claimant's Post-Hearing Brief.

A. The MLS Report.

Within his Post-Hearing Brief, Claimant states that the "heart of the basis for Mr. Nowak's termination for 'cause' are the contents of a putative MLS Investigation Report dated June 12, 2012 (the "MLS Report")...[y]et no one provided [Claimant] with a copy of the MLS Report prior to his termination meeting..." (Claimant's Post-Hearing Brief, pg. 11) (emphasis added.) Claimant correctly notes in this regard that his conduct was aptly described in the MLS Report (the "contents" referred to by Claimant) and that such conduct served as a basis for the Philadelphia Union exercising its discretionary right to terminate the June 1, 2009 Manager Employment Agreement (the "Employment Agreement"). The statement is, however, otherwise misleading in several material respects.

First, Claimant appears to suggest by inference that because a copy of the confidential MLS Report was not shared with him, that he was somehow unaware of the allegations against him. Claimant's premise in this regard is flawed in at least two respects. Initially, Claimant was an active participant in the conduct described in the MLS Report. Respectfully, Claimant was well aware of the nature of his misconduct given his active involvement in the matters precipitating his termination. Additionally, and as discussed more fully below, Claimant was

advised in fact by email of the allegations against him prior to his termination. Such email, as well as the Termination Letter provided to Claimant, mirrored the charges set forth in the MLS Report in detail. Again, respectfully, Claimant was well aware of the allegations against him prior to the termination meeting with Mr. Debusschere and Mr. Sakiewicz.

Second, Claimant's statement infers that the only reason for the termination of the Employment Agreement was the "contents" of the MLS Report. To the contrary, Claimant was terminated because of his conduct, which was accurately described in the MLS Report. It was the conduct itself, however, that brought about his termination – not the fact that it was described in the MLS Report. In short, Claimant attempts to side-step the fact that he actually engaged in the misconduct alleged in the MLS Report.

Third, as noted in the Termination Letter and outlined in great detail within the Philadelphia Union's Post-Hearing Brief, the "contents" of the MLS Report were not the sole basis for the Philadelphia Union exercising its discretionary right to terminate the Employment Agreement. To the contrary, there were several good faith reasons for the Philadelphia Union to exercise its discretionary right to terminate the Employment Agreement separate and independent of the MLS Report.

As it relates to the MLS Report, Claimant also argues that he was "prejudiced," and, in fact, that an "adverse inference should be drawn against [the Philadelphia Union]," because the players interviewed by the League, as detailed within the MLS Report, were never identified.[2] As a result, Claimant argues that he was "denied the ability to cross examine those who accused him." (Claimant's Post-Hearing Brief, pgs. 11-12.) Simply put, this thinly veiled "due process"

[2] To reiterate, as the players of the Philadelphia Union were "extremely afraid" of the potential "consequences" or "retaliation" if it became known that they participated in the League's investigation, the MLSPU asked the League to put a Confidentiality Agreement in place. (SMF ¶ 174.) As a result, the identity of the specific players providing the information resulting in the MLS Report has never been disclosed to Claimant *or the Philadelphia Union*.

argument is specious at best. As a starting point, Claimant is intimately familiar with every player that was on the Philadelphia Union's roster at the time in which the primary events contained within the MLS Report occurred. Most importantly, Claimant is aware of each of the players that were present during the May 31, 2012 trail run.[3] With this information, Claimant could have easily "cross examined" those who "accused him" by simply scheduling the depositions of each of these players during the discovery stage of the instant litigation.[4] Claimant also could have called these players during the 5-days of Hearing in this matter. By taking either of these actions, Claimant could have "cross examined" those who "accused him" while, at the same time, respecting the players MLSPU rights. What is relevant in this regard is what in fact occurred – not who the players may have registered complaints with as to the circumstances of the trail run, the interference, *etc.* Claimant, however, chose not to take either of these reasonable and, to be frank, expected actions.

Additionally, the witness list submitted by the Philadelphia Union prior to the Hearing listed numerous players the Philadelphia Union intended to call as witnesses during the Hearing. Claimant could have very easily cross-examined each of these players during the Hearing. However, Claimant – after hearing the testimony of [redacted], the first witness called by the Philadelphia Union to testify relative to the May 31, 2012 trail run – unilaterally offered to stipulate that all players would testify in the same manner as Mr. [redacted]. This point is important enough to immediately reiterate – Claimant, by his own initiative, proposed that the parties stipulate to the fact that all players – the same players Claimant now claims he was unable to "cross-examine" – would testify in the same fashion as Mr [redacted]. At Claimant's request, the

[3] During discovery, Claimant was also given a list of each and every player that played for the Philadelphia Union during the 2012 season. (Respondent Exhibit 60.)
[4] It is worth noting that there were only approximately 18 rostered players at the time of the May 31, 2012 trail run – all of which were identified as witnesses by Respondent during the discovery phase of the instant litigation.

parties – with the concurrence of the Arbitrator – agreed to this stipulation. Respectfully, Claimant likely sought this stipulation to avoid additional, duplicative and further damning testimony. The events of May 31st were accurately described by Mr. [redacted] and the other witnesses in this regard, and fairly detailed in the MLS Report. Claimant can not escape the hard facts which are not reasonably in dispute with respect to the circumstances of the run.

To that end, not only did Claimant fail to even attempt to "cross-examine" the players – the players he absolutely knew were on the team during the time period relevant to the MLS Report – during discovery, but he also limited – through a stipulation he initiated – his ability to cross examine the players the Philadelphia Union intended to call. With the foregoing known, any limit on the ability of Claimant "to cross examine those who accused him" was a result of Claimant's own actions or inactions and, thus, Claimant's "due process" argument is absolutely meritless and must fail.

B. <u>The Philadelphia Union's Investigation</u>.

Within his Post-Hearing Brief, Claimant mischaracterizes the record evidence as it relates to the investigations performed by the Philadelphia Union relative to: (1) Claimant's interference with the players' rights to contact the MLSPU; and (2) Claimant's actions during the May 31, 2012 trail run. Foremost, as it relates to the MLSPU interference, Claimant makes the following statement within his Post-Hearing Brief:

> Mr. Sakiewicz testified that he received a phone call from MLS on May 24, 2012 regarding the alleged interference by [Claimant] between the players and the [MLSPU] ***<u>but he did not begin an investigation</u>***.

(Claimant's Post-Hearing Brief, pg. 12) (emphasis added.)

This statement is simply untrue and certainly not supported by the portion of the Hearing Transcript cited by Claimant. Indeed, in support of his proposition that Mr. Sakiewicz never

performed an investigation into the MLSPU interference issue, Claimant cites to pages 887-888 of the Hearing Transcript. This portion of the Hearing Transcript only confirms that Mr. Sakiewicz received a phone call from the League on May 24, 2012; it does not address whether Mr. Sakiewicz performed an investigation into the MLSPU interference issue. Moreover, in making this statement, Claimant ignores the following testimony in which Mr. Sakiewicz discusses the actions he took following his receipt of the May 24, 2012 phone call from the League:

> Q. Now, with respect to the first call that you got that you described getting earlier about the putative interference of [Claimant], did you call [Claimant] in and ask him what that was all about?
>
> A. Yes. I called [Claimant] right after I hung up the phone with [Mr. Durbin] and I told him that we were under investigation for allegations against management telling the players not to contact their player representatives at the [MLSPU].
>
> Q. And what was [Claimant's] response?
>
> A. ...it was a long discussion...[Claimant] had expressed to me that there was a player who filed a grievance. He was pretty upset about it. He was determined to find out who that player would be.
>
> I told [Claimant] this was not good. I told [Claimant] that we can't stand between the [MLSPU] and the players. Having been a player myself and part of the [MLSPU], I knew that that was sacrosanct.

(Hearing Trans., 889:4-24; SMF ¶ 60.)

Accordingly, contrary to Claimant's assertion, upon receipt of the MLSPU interference allegations from the League, Mr. Sakiewicz did perform an investigation, specifically contacting Claimant to discuss the allegations made against him. During this conversation, Claimant admitted to the interference allegations and, as a result, no further investigation was required pending the findings of the MLS on the point.

Furthermore, Claimant, within his Post-Hearing Brief, also states that Mr. Sakiewicz "did not order any kind of an investigation" on May 31, 2012, when he learned of the actions taken by Claimant during the trail run that day. Rather, according to Claimant, Mr. Sakiewicz waited until June 6, 2012 to begin his investigation into Claimant's actions. (Claimant's Post-Hearing Brief, pg. 12.) This statement is, to put it mildly, disingenuous. Indeed, as outlined within the Philadelphia Union's Proposed Statement of Material Facts and within the Philadelphia Union's Post-Hearing Brief, it is indisputable that Mr. Sakiewicz, upon learning of Claimant's actions on May 31, 2012, immediately began an investigation into Claimant's actions during the May 31st trail run.[5] (SMF ¶¶ 201-217; Philadelphia Union's Post Hearing Brief, pgs. 28-31.)

In addition to misunderstanding the record evidence as it relates to the "timing" of the investigation,[6] Claimant's characterization of Mr. Sakiewicz's investigation as "shameful" is appalling given the circumstances. Indeed, even if, contrary to the clear record evidence, Claimant was able to establish or point to deficiencies within the investigation performed by Mr. Sakiewicz, it does not remedy the fact that Claimant actually engaged in the conduct that resulted in the termination of the Employment Agreement. As explained within the Philadelphia Union's Post-Hearing Brief, Claimant, through his testimony, either admitted to the conduct leading to the termination of the Employment Agreement (*e.g.*, refusing hydration to the players, forcing injured players to participate in the trail run, *etc.*) or the record evidence – proven mostly through independent witnesses – establishes that Claimant engaged in the conduct leading to the

[5] Again, in the interests of judicial economy, the Philadelphia Union will not reiterate the facts/arguments presented within its Proposed Statement of Material Facts and/or its Post-Hearing Brief; rather, it will incorporate the same herein by reference.

[6] It is also worth noting that Claimant cites to page 892 of the Hearing Transcript to substantiate his assertion that "[n]o evidence of any harm, injury or physical impact of the training incident is present anywhere." (Claimant's Post-Hearing Brief, pg. 13.) Page 892 of the Hearing Transcript provides absolutely no support for this statement. In addition, such a statement ignores the record evidence. (SMF ¶¶ 144-149; also see Argument Section of the Philadelphia Union's Post-Hearing Brief.)

termination of the Employment Agreement (*e.g.* MLSPU interference/retaliation, engaging in discussions with other professional soccer teams, inappropriate treatment of concussions, *etc.*).

Simply put, even if we were to assume, *arguendo*, that Claimant could point to certain deficiencies relative to Mr. Sakiewicz's investigation – a fact simply unsupported by the record evidence – the fact of the matter is that, again, Claimant actually engaged in the conduct resulting in the termination of the Employment Agreement. Claimant's arguments here are intended simply to distract from the real issue at hand – did Claimant in fact engage in the conduct described in the MLS Report, the email to Claimant the morning of his termination and in the Termination Letter? The testimony elicited at the Hearing leads to only one conclusion in this regard – a resounding "yes."

C. The Termination Meeting.

Claimant's Post-Hearing Brief also mischaracterizes the "Termination Meeting" that occurred on June 13, 2012. Foremost, contrary to Claimant's assertions, the emails and phone calls he received on June 13, 2012 were not the first time he was notified that the League was conducting an investigation into his conduct. (*See* Claimant's Post-Hearing Brief, pgs. 15.) Indeed, as noted above, immediately after receiving the phone call from the League concerning Claimant's interfering with the players rights to contact the MLSPU, Mr. Sakiewicz contacted Claimant and advised him of the complaint made against him by the MLSPU and the fact that the League was conducting an investigation into such allegations. (Hearing Trans., 889:4-24; SMF ¶ 60.)

Additionally, and most importantly, Claimant's Post-Hearing Brief incorrectly asserts that Claimant was not given the "opportunity to respond to the allegations set forth in the e-mail calling him to the termination meeting or the termination letter presented to him at the meeting

which reiterated these points…" (Claimant's Post-Hearing Brief, pgs. 15.) Although the theme of this statement is reiterated throughout Claimant's Post-Hearing Brief, it is simply not supported by and, in fact, contradicts the record evidence. To illustrate, Claimant's deposition testimony is extremely relevant in this regard and contrary to his arguments in the Post-Hearing Brief. During his deposition, Claimant testified as follows:

Q. Is this the [Termination] letter you were provided?

A. Yes…

Q. How were you provided it? Hand Delivery?

A. They asked me to come to the office…I received several e-mails and phone calls from the secretary of Mr. Sakiewicz asking me to come to the office as soon as I can.

And I received the e-mail that was - - it was not the report, but it was the other e-mail just basically saying you did that, you did that, you did that. Please come. It is urgent matter that we have to discuss. **And you have to come to the office to get - - to have the discussions.**

And I knew from that moment I received the e-mail that I am going to be terminated. I didn't know the reasons. **I read the reasons in the e-mail, but I tried maybe to find out a little bit more about what the termination is going to be all about…**

***

Q. What do you recall as to what they told you as to the basis for the termination?

A. ***Mr. Sakiewicz said that we have to let you go for the reason that we stated in the e-mail. And so I said: What is this all about? You believe what you wrote? I don't think it is - - all is false because I didn't do anything wrong.***

(Respondent Exhibit 64/Plaintiff's Deposition Transcript, 200:22-202:13) (emphasis added.)

Simply put, Claimant's deposition testimony confirms that he was not only given the opportunity to respond to the allegations surrounding the termination of the Employment Agreement, but such testimony confirms that Claimant did in fact respond to the reasons –

specifically stating that such reasons were "false because [he] didn't do anything wrong." This is another point worth immediately reiterating – notwithstanding Claimant's testimony during the Hearing, Claimant's deposition testimony not only confirms that Claimant was given notice of the reasons surrounding the termination of the Employment Agreement, but he was also given the opportunity and in fact responded to those reasons. Respondent was not obligated to accept Claimant's simple rejection of the allegations against him in the face of the compelling contrary evidence.

It is worth reiterating here that Claimant's deposition testimony on this point corroborates the Hearing testimony given by Mr. Sakiewicz and Mr. Debusschere. (SMF ¶¶ 327-328; Hearing Transcript, 76:13-77:9.) More specifically, both Mr. Sakiewicz and Mr. Debusschere testified at the Hearing that Claimant responded to the reasons surrounding the termination of the Employment Agreement by denying them – stating that they were "bullshit."[7] (SMF ¶¶ 327-328; Hearing Transcript, 76:13-77:9.) Simply put, Claimant did not have an adequate response because he in fact engaged in the conduct alleged.

Claimant also argues that the Philadelphia Union, through Mr. Sakiewicz, made the decision to exercise its discretionary right to terminate the Employment Agreement prior to the June 13, 2012 meeting and that this somehow supports the argument that Claimant was not given the opportunity to respond. This argument is, at best, again, a red herring. First, even if true, the specific language of the Employment Agreement actually contemplates that the decision to terminate the Employment Agreement will be made "prior to" notice and an opportunity to respond is given. Indeed, to reiterate, Paragraph III(C) provides, in pertinent part:

[7] Claimant's Post-Hearing Brief also notes that the June 13, 2012 meeting lasted 25-30 minutes. (Claimant's Post Hearing Submission, pg. 15.) Given this amount of time, it would be nonsensical to think that documents were simply handed to Claimant without discussion or that Claimant was asked to leave after he received the documents. Again, further supporting the fact that Claimant was clearly given an opportunity to respond during the June 13, 2012 meeting.

> Whether Club has terminated this Agreement pursuant to Paragraph III(A) or (B) shall be determined in good faith by [the Philadelphia Union] at its reasonable discretion; provided that (i) prior to terminating Manager pursuant to Paragraph III(A), [the Philadelphia Union] shall **specify in reasonable detail the *reasons Manager is being so terminated* and give Manager an opportunity to respond thereto**...

(SMF ¶ 15) (emphasis added.)

How could the Philadelphia Union specify the "reasons" Claimant was "being so terminated" if the decision to terminate the Employment Agreement had yet to be made? The answer is obvious, and, more importantly, whether or not the Philadelphia Union made the decision to terminate the Employment Agreement prior to the June 13, 2012 meeting is immaterial. Contractually, the Philadelphia Union was clearly free to decide in advance of the meeting that Claimant would be terminated. The Employment Agreement clearly contemplates such a sequence or timing of events (*e.g.*, (1) the decision to terminate, (2) notice to Claimant of the reasons for termination, and (3) Claimant's opportunity to respond.)

The material question is whether the Philadelphia Union gave Claimant notice and an opportunity to respond *before* it actually terminated the Employment Agreement. Here, these prerequisites were met without question. Again, the record evidence in this matter indisputably establishes that the Philadelphia Union did not actually terminate the Employment Agreement until: (1) *after* it provided Claimant with written notice *via* email of the reasons surrounding the termination of the Employment Agreement; (2) *after* it provided Claimant the Termination Letter and the opportunity to respond during Claimant's meeting with Mr. Sakiewicz and Mr. Debusschere; and (3) as noted above, *after* Claimant actually responded to the reasons provided.

To that end, even if the decision to terminate the Employment Agreement was made prior to the June 13, 2012 meeting, it is irrelevant because the Philadelphia Union complied with the plain language of the Employment Agreement in all aspects.

II. RESPONSE TO THE ARGUMENTS PROPOUNDED BY CLAIMANT WITHIN HIS POST-HEARING BRIEF

In the interests of judicial economy, the Philadelphia Union also will not reiterate each of the arguments it presented within its Post-Hearing Brief. It will, however, respond to several of the arguments made within Claimant's Post-Hearing Brief. For consistency purposes, each such argument will be addressed in the order in which it was presented within Claimant's Post-Hearing Brief.

A. The Philadelphia Union Did Provide Claimant with Notice and an Opportunity to Respond.

Within his Post-Hearing Brief, Claimant argues that the Philadelphia Union breached the Employment Agreement by failing to provide Claimant with notice of the reasons surrounding the termination of the Employment Agreement and by failing to provide him with the opportunity to respond to such reasons. As noted above and within the Post-Hearing Brief submitted by the Philadelphia Union, the record evidence indisputably establishes that Claimant was not only provided with notice and an opportunity to respond to the reasons surrounding the termination of the Employment Agreement, but that Claimant in fact discussed and responded to those reasons prior to the Philadelphia Union exercising its discretionary right to terminate the Employment Agreement. The Philadelphia Union notes that Claimant's arguments here are procedural in nature – Claimant does not appear to challenge the alleged conduct precipitating his termination. Simply put, he had no good excuse or explanation to provide – he was, however, afforded the opportunity to do so.

Foremost, as it relates to notice, Claimant argues the lack of notice within his Post-Hearing Brief, but – not surprisingly – he spends little time on the issue. It is rather clear from the record evidence that Claimant received an email as well as the Termination Letter on June

13, 2012. In this regard, both the email and the Termination Letter specify in "reasonable detail" the reasons surrounding the Philadelphia Union's decision to exercise its discretionary right to terminate the Employment Agreement. Indeed, even a cursory review of the email and the Termination Letter illustrates that Claimant was made fully aware of the exact reasons for the termination of the Employment Agreement. Accordingly, there is absolutely no question that the Philadelphia Union provided the notice – the "reasonable detail" – required in Paragraph II(C) of the Employment Agreement.

As for the opportunity to respond, Claimant's Post-Hearing Brief contains several unsupported assertions, but one stands out in particular. In this regard, Claimant's Post-Hearing Brief presents the following argument:

> Mr. Sakiewicz attempted to take the position that [Claimant] had the opportunity to respond during this termination meeting, but this testimony did not ring true. Mr. Debusschere testified that he did not recall [Claimant's] specific words but stated that [Claimant] denied and deflected. (citations omitted.) *[Claimant's] testimony, however, was both clear and credible*.

(Claimant's Post-Hearing Submission, pg. 21) (emphasis added.)

Claimant's Post Hearing Brief then goes on to cite to several pages of Hearing testimony in which Claimant specifically denies discussing any of the issues contained within the email and/or Termination Letter.

The interesting note here is that the purported "clear and credible" Hearing testimony of Claimant conflicts directly with the testimony Claimant gave during his deposition, which, in pertinent part, was as follows:

Q. What do you recall as to what they told you as to the basis for the termination [at the June 13, 2012 meeting]?

A. ***Mr. Sakiewicz said that we have to let you go for the reason that we stated in the e-mail. And so I said: What is this all about? You believe what you wrote? I don't think it is - - all is false because I didn't do anything wrong.***

(Respondent Exhibit 64/Plaintiff's Deposition Transcript, 200:22-202:13) (emphasis added.)

Simply put, Claimant's testimony during his deposition contradicts his alleged "clear and credible" Hearing Testimony and, more importantly, confirms that he was not only given the opportunity to respond to the reasons surrounding the termination of the Employment Agreement, but that he in fact responded to the identified reasons – specifically stating that such reasons were "false because [he] didn't do anything wrong."

Within his Post-Hearing Brief, Claimant eventually admits that, "from a technical standpoint," Claimant "could be said to have had an opportunity to respond."[8] (Claimant's Post-Hearing Brief, pg. 23.) However, Claimant then argues that such an opportunity to respond was not "meaningful," as Claimant did not have "a chance to absorb the charges and develop cogent responses to the allegations made against him." (Claimant's Post-Hearing Brief, pg. 23.) This argument fails for several reasons. First, the Employment Agreement only requires the Philadelphia Union to provide an opportunity to respond.[9] Here, the email was provided to Claimant in advance of the meeting with Mr. Sakiewicz and Mr. Debusschere. Claimant had time to digest the allegations in the email and respond during the meeting later that morning with Mr. Sakiewicz and Mr. Debusschere – he simply had no good response because the allegations were all true.

Additionally, even if we assume, *arguendo*, that the Philadelphia Union was required to give Claimant a more *meaningful* opportunity to respond, it would have been absolutely pointless

[8] Claimant only makes this statement relative to the "allegations set forth [by the Philadelphia Union] in the [June 13, 2012] email." (Claimant's Post-Hearing Brief, pg. 23.)
[9] To reiterate, at the time the Parties negotiated and agreed to the terms of the Employment Agreement, Claimant was represented by counsel. (SMF ¶ 8.).

under the circumstances to give, as Claimant argues, additional time "to absorb the charges and develop cogent responses to the allegations made against him." Indeed, even if Claimant was given all the time in the world to "absorb" the charges made against him, it would not change the fact that Claimant would have been unable to truthfully deny that he engaged in the conduct that resulted in the termination of the Employment Agreement. To this day, Claimant has no cogent response to the allegations against him. Frankly, the allegations are true and were clearly established factually at the Hearing. As explained above as well as within the Philadelphia Union's Post-Hearing Brief, Claimant either admitted to the conduct leading to the termination of the Employment Agreement (*e.g.*, refusing hydration to the players, forcing injured players to participate in the trail run, *etc.*) or the record evidence – proven mostly through independent witnesses – establishes that Claimant engaged in the conduct leading to the termination of the Employment Agreement (*e.g.* MLSPU interference/retaliation, engaging in discussions with other professional soccer teams, inappropriate treatment of concussions, *etc.*). Under these circumstances, the amount of time given to Claimant to "absorb" the charges against him is essentially inconsequential – form over substance, as it would not have changed the fact that Claimant's response should have been – "I did it."

To that end, the record evidence indisputably establishes that Claimant was not only provided with notice and the appropriate contractual opportunity to respond to the reasons surrounding the termination of the Employment Agreement, but that Claimant in fact discussed and responded to those reasons prior to the Philadelphia Union exercising its discretionary right to terminate the Employment Agreement. The Philadelphia Union clearly satisfied its contractual obligations on the issues of both notice and opportunity to respond.

B. **The Philadelphia Union Exercised its Discretionary Right to Terminate the Employment Agreement in Good Faith.**

Claimant also argues in his Post-Hearing Brief that the Philadelphia Union acted in "bad faith" when it exercised its discretionary right to terminate the Employment Agreement. Within its Post-Hearing Brief, the Philadelphia Union outlined in significant detail the "good faith" bases – which were numerous – for its decision to exercise its right to terminate the Employment Agreement. Although the Philadelphia Union still relies upon the same, it is important to reiterate a few points in response to the arguments presented by Claimant within his Post-Hearing Submission.

First, it must be reiterated that, pursuant to the express terms of the Employment Agreement, the Parties agreed to give the Philadelphia Union the sole discretion to terminate the Employment Agreement if the Philadelphia Union: (1) determines – ***in its reasonable discretion*** – that Claimant engaged in any of the conduct delineated in Paragraph III(A) of the Employment Agreement; and/or (2) if it determines, ***in its good faith discretion***, that Claimant made a statement or engaged in "conduct…that is materially prejudicial to the interests of the League or the Team or materially detrimental to the public image and/or reputation of the League, the [Philadelphia Union] and/or the game of soccer." (SMF ¶¶ 13-16.) To put it another way, the Parties, through their respective counsel, negotiated and agreed to provide the Philadelphia Union with the ability to terminate the Employment Agreement if it had a good faith basis to conclude that Claimant engaged in the conduct delineated in Paragraph I(C)(v) or Paragraph III(A) of the Employment Agreement.

At a minimum, the arguments presented within the Philadelphia Union's Post-Hearing Brief illustrate that the Philadelphia Union exercised its discretion to terminate the Employment Agreement in good faith. Although this should be obvious under the circumstances, the actions

of the two controlling entities in professional soccer – the League and MLSPU – further confirm this point. In fact, based upon the actions of both the League and the MLSPU, the Philadelphia Union not only had a good faith basis, but arguably was left with no choice but to exercise its discretionary right to terminate the Employment Agreement. To reiterate, the MLSPU independently – without input from the management of the Philadelphia Union – learned of the actions taken by Claimant relative to the players and immediately contacted the League, ultimately informing the League, for the first time in its existence, that it would consider striking – withholding its players from the Philadelphia Union – if Claimant was not removed as the Manager of the Philadelphia Union. Additionally, based upon the information it obtained from the MLSPU – not from the management of the Philadelphia Union – the League initiated an independent investigation into Claimant, ultimately determining that Claimant engaged in reprehensible conduct relative to the players and that such conduct warranted the termination of Claimant as the Manager of the Philadelphia Union. Significantly, after conducting its investigation and understanding the position of the MLSPU, the League issued a directive to the Philadelphia Union – explicitly informing the Philadelphia Union that Claimant was prohibited from having any further contact with the players.[10]

The League's position relative to Claimant's actions – as well as the position of the MLSPU – illustrates, ***at the very least,*** that the Philadelphia Union had a good faith basis to exercise its discretion and terminate the Employment Agreement. Indeed, the League and the MLSPU – again, the two primary entities controlling the business of professional soccer in the United States — not only believed that Claimant's actions were significant enough to warrant the termination of the Employment Agreement, but, again, they both actually took positions that left

[10] Again, the players are employed by the League and not the Philadelphia Union.

the Philadelphia Union with little choice, but to exercise its discretionary right to terminate the Employment Agreement.

Within his Post-Hearing Brief, Claimant attempts to attack the breadth of the investigation performed by the League as well as the investigation performed by the Philadelphia Union – the investigations ultimately resulting in the Philadelphia Union exercising its discretionary right to terminate the Employment Agreement. In particular, Claimant argues that the failure of *the League* to interview him and the failure of the Philadelphia Union to "insist" upon the League interviewing him is illustrative of the Philadelphia Union failing to act in good faith. Such an argument is absolutely unavailing. Foremost, this argument ignores the fact that Claimant was interviewed concerning the allegations against him during the June 13, 2012 termination meeting and *before* the Philadelphia Union actually exercised its discretionary right to terminate the Employment Agreement. It also ignores the fact that the investigations performed by the League and the Philadelphia Union not only came to the same conclusion (as did the investigation performed by the MLSPU), but both investigations also ascertained the truth. To reiterate once again, the record evidence in this matter establishes without question that the Claimant actually engaged in the conduct that resulted in the termination of the Employment Agreement. In other words, even if the breadth of the investigations was lax – a fact unsupported by the record evidence – there was absolutely no prejudice to Claimant because he in fact engaged in the conduct alleged. To the contrary, the investigations conclusively uncovered the truth – that Claimant engaged in conduct providing the Philadelphia Union with the basis to exercise its discretionary right to terminate the Employment Agreement. The alleged conduct in fact occurred. Accordingly, it is undeniable that the investigation performed into the actions taken by Claimant were, at the very least, performed in good faith.

Claimant's arguments, at best, are form over substance positions. Regardless of his creative attempts to muddy the waters on the point – the fact remains that the Philadelphia Union established through overwhelming credible evidence at the Hearing in this matter that Claimant engaged in the conduct alleged – conduct which clearly warranted his termination.

The factually similar case of *Haywood v. University of Pittsburgh*, 976 F.Supp.2d 606 (W.D. Pa. 2013), is relevant on this point. In *Haywood*, the parties entered into a contract wherein Mr. Haywood became the coach of the University's football program. As is pertinent to the instant litigation, Mr. Haywood, in executing the contract, agreed to give the University the discretion to unilaterally terminate the contract should the University determine that Mr. Haywood engaged in certain conduct enumerated within the contract. In other words, Mr. Haywood agreed to termination language very similar to the language agreed to by the Parties and contained within the Employment Agreement at issue in the instant litigation.

After the University determined that Mr. Haywood engaged in the conduct prohibited by the contract, it exercised its discretionary right to terminate the contract. Mr. Haywood filed suit alleging breach of contract and arguing, *inter alia*, that the University did not perform a good faith investigation into Mr. Haywood's conduct. In rejecting this argument, the Court held:

> The University is correct that under the employment contract it had the discretion under paragraph 14.1(F) to determine whether it had just cause to fire Haywood. When a party has the discretion to act under a contract, however, the implied duty of good faith requires the party to reasonably exercise that discretion. *The duty to act reasonably did not override the University's right to terminate the employment contract upon its determination that Haywood's conduct fell within the ambits of [the Termination Provision]*...Likewise, ***the duty of good faith did not require the University to take any specific action prior to terminating the employment contract***; rather, inherent in the University's right to determine whether just cause existed to terminate the employment contract was the implied duty to act reasonably to make that determination.

Haywood, 976 F.Supp.2d at 628.

In short, the duty to act in good faith does not require the taking of any specific, non-contractually obligated investigatory action, and, in the instant matter, the Employment Agreement does not contractually require the Philadelphia Union to take any specific investigatory action before exercising its right to terminate the Employment Agreement. The only requirement is that the Philadelphia Union exercise its discretionary right to terminate the Employment in good faith. As outlined above, the fact that the Philadelphia Union acted in good faith in this regard is absolutely indisputable. The fact that Mr. Nowak engaged in the conduct alleged is indisputable. Again, the two controlling entities of professional soccer in the United States came to the same conclusion as the Philadelphia Union – that the actions of Claimant were so reprehensible that he could no longer act as the coach of the Philadelphia Union.

C. **Claimant's Actions Were Not Curable.**

Within his Post-Hearing Brief, Claimant also argues that the Philadelphia Union breached the contract by not providing the Claimant with the ability to cure his conduct. The Philadelphia Union's Post-Hearing Brief outlines in great detail the reasons why Claimant's conduct was incurable and, in the interests of judicial economy, the Philadelphia Union will not reiterate those arguments herein. It is, however, worth pointing out that Claimant's arguments solely rest upon his unsubstantiated belief that his conduct can be cured by simply stating that he will not do it again. In other words, the effect or repercussions of Claimant's actions (*e.g.*, the trading of a player, the jeopardizing the health and safety of players, and actually exacerbating physical injuries by refusing to follow the advice of the athletic trainers) have absolutely no meaning if Claimant simply promises not to take the same actions in the future. To accept Claimant's position in this regard would essentially eliminate any circumstance in which an individual is unable to cure his or her conduct – as soon as the individual promises not to do it again, all is

forgiven and any harm magically disappears. Respectfully, this is an absurd position that finds no basis in the law and, to be frank, borders on ridiculousness. Claimant must live with the reality and consequences of his actions.

Moreover, it is worth reiterating that the Employment Agreement expressly provides the Philadelphia Union with the unilateral discretion to determine in good faith whether Claimant's actions were "not curable" and/or whether Claimant's "continued employment during a cure period could be reasonably…expected to result in material harm to the Club." (SMF ¶ 15.) Again, the Philadelphia Union already outlined its arguments relative to these points in its Post-Hearing submission and it will not reiterate each of these arguments herein. It is, however, worth reiterating that the positions of the League and the MLSPU relative to Claimant speak to the fact that the Philadelphia Union engaged in "good faith" when it determined that Claimant's actions were incurable and that Claimant's continued employment during the cure period would result in material harm. To reiterate, the League specifically directed the Philadelphia Union to remove Claimant from the players and the MLSPU actually threatened to strike should Claimant remain as the coach of the Philadelphia Union. Under these circumstances, it is nonsensical to even attempt to argue that the Philadelphia Union failed to make a good faith judgment when it determined that Claimant's actions were incurable and that material harm would occur if Claimant continued to remain employed during a cure period. How could the Philadelphia Union continue with Claimant when both MLS and the MLSPU had lost all confidence and trust in him? *See Church v. Tentarelli*, 2007 WL 5479832 (Pa.Com.Pl. Nov. 8, 2007) (where trust is vital to a contractual relationship, the loss of trust may be impossible to cure); *LJL Transp., Inc. v. Pilot Air Freight Corp.* 905 A.2d 991 (Pa.Super.2006) (Trial court recognized it as a case of first impression in Pennsylvania and cited cases from other jurisdictions which hold that some

types of dishonest conduct are so egregious and of such a nature that the aggrieved party may terminate the contract immediately even where a cure provision is specifically provided in the contract); *see, e.g., Southland Corp. v. Froelich,* 41 F.Supp.2d 227 (E.D.N.Y.1999) (franchisee's scheme to hide revenue from the franchisor irrevocably damaged the relationship of the parties permitting franchisor to terminate contract without opportunity to cure); *Larken, Inc. v. Larken Iowa City Ltd. Partnership,* 589 N.W.2d 700 (Iowa 1998) (hotel owner had right to terminate management agreement immediately despite notice and cure provisions, where manager engaged in self-dealings, which frustrated fundamental contract principles of fairness and honesty); *see also Leghorn v. Wieland,* 289 So.2d 745, 748 (Fla.Dist.Ct.App.1974) (actions of disloyalty and dishonesty make it impossible for defaulting party to remedy the breach; where a breach cannot be cured, "the giving of notice would be a useless gesture.")

To that end, the "cure" arguments presented by Claimant within his Post-Hearing Brief are meritless. The damage caused to the Philadelphia Union's reputation and that of Claimant with both MLS and the MLSPU was done and could not be reversed. No further investigation would clear Claimant of his inappropriate conduct. The Philadelphia Union, accordingly, appropriately exercised its discretion to deny Claimant the ability to cure his egregious conduct in good faith and in compliance with the plain language of the Employment Agreement.

D. Claimant's Seeking of Other Employment in Violation of the Employment Agreement.

As noted throughout the instant Reply Brief, the Philadelphia Union will not simply reiterate arguments already presented within its Post-Hearing Brief. The Philadelphia Union will, however, address several issues raised within Claimant's Post-Hearing Brief. Foremost, Claimant ignores the record evidence – namely the testimony of Mr. Messing and Mr. Morris – when he argues that he did not "direct any authorized representative [to] have a discussion with

another professional soccer team on his behalf." (Claimant's Post-Hearing Brief, pgs. 32-33.) Both of these individuals – independent witnesses with absolutely no interest in the outcome of the instant litigation – testified that Claimant in fact directed them to contact specific teams or teams generally located in specific areas in an attempt to secure Claimant alternative employment. Mr. Messing and Mr. Morris further testified that they in fact contacted these other teams to solicit their respective interest in employing Claimant. In other words, Claimant not only directed both Mr. Messing and Mr. Morris to "engage in discussions with [] other professional soccer teams," but Mr. Messing and Morris in fact engaged in such discussions on behalf of Claimant. (SMF ¶¶ 265-282.)

Simply put, it is absolutely clear that Claimant breached the Employment Agreement by authorizing representatives to "engage in discussions with [] other professional soccer teams" – one of these "professional soccer teams" happened to be U.S. Soccer, which is the entity that the Philadelphia Union paid $75,000 to obtain the ability to hire Claimant.

Claimant also points out that Mr. Sugarman testified during his deposition that Claimant's seeking of other employment was "not a major issue." In making this argument, it is clear that Claimant is grasping at straws. Mr. Sugarman simply stated that this was not a "major issue"; he did not testify that it was not an issue at all. If anything, this statement speaks to how outrageous Claimant's other conduct was. Indeed, in making this statement, Mr. Sugarman was simply illustrating that Claimant's other conduct – as outlined within the MLS Report – was so reprehensible that it was, *in his view*, the primary reason for the termination of the Employment Agreement. It does not mean that the other issues, including Claimant's breaching of the Employment Agreement by seeking other employment, were not valid, material reasons providing the Philadelphia Union with a good faith basis to exercise its discretionary authority to

terminate the Employment Agreement. To the contrary, it simply exemplifies the significance of the other conduct.

To that end, the record evidence establishes that Claimant breached the Employment Agreement by engaging in discussions with other professional soccer teams. Based upon the foregoing arguments, as well as the arguments contained with the Philadelphia Union's Post-Hearing Brief, Claimant's material breach in this regard clearly provided a separate and independent good faith basis for the Philadelphia Union to exercise its discretionary authority to terminate the Employment Agreement.

E. Claimant Still Does Not Acknowledge the Seriousness of His Actions.

Claimant's Post-Hearing Submission does address his actions during the May 31, 2012 trail run, but it fails to overcome the significant argument presented within the Philadelphia Union's Post-Hearing Brief. Accordingly, the Philadelphia Union will rely upon and incorporate herein the arguments presented in its Post-Hearing Submission. It is, however, worth addressing the following statement made by Claimant relative to the May 31, 2012 trail run:

> All of this ***hysteria*** was an overreaction to an [sic] training exercise that happened to take place after an unsatisfactory performance during the team's previous game. It is simply unacceptable to terminate [Claimant] for 'cause' based on the mere possibility of what could have happened but did not.

(Claimant's Post-Hearing Brief, pg. 41) (emphasis added.)

Claimant's statement in this regard is relevant in several respects. First, it illustrates that Claimant – incredibly – still does not understand the seriousness of his actions. He still fails to grasp the simple fact that he: (1) jeopardized the health and safety of players by forcing them to participate in unprecedented training activities without hydration; (2) jeopardized the health and safety of players by disregarding the

advice of the head athletic trainer and forcing injured players to participate in the unprecedented training activities; and (3) jeopardized the health and safety of the players by creating an atmosphere where the players felt they were required to hide concussions from the medical staff.

The fact that Claimant was lucky enough not to have a player "collapse" during the course of the run is not the point. The point – which has been made repeatedly by the Philadelphia Union as well as the League and the MLSPU – is that Claimant placed the health and safety of the players *at risk*. Additionally, Claimant continues to ignore the fact that the record evidence establishes that the injured players forced to participate in the trail run suffered setbacks, resulting in several players being unable to play for at least 16-days following the trail run. (SMF ¶¶ 144-149.)

Simply put, the fact that Claimant made this statement illustrates that he still does not grasp the seriousness of his actions. Fortunately for the players, the Philadelphia Union, MLS and the MLSPU all recognized the seriousness of Claimant's actions on May 31st. It further illustrates that it would have been pointless to give Claimant the opportunity to cure. Indeed, while Claimant may have said he would not have done it again, the fact of the matter is that Claimant still does not understand that his actions were inappropriate. Accordingly, it is absolutely indisputable that the Philadelphia Union had a good faith basis to exercise its discretionary right to terminate the Employment Agreement and to determine that Claimant's actions were incurable/that the continued employment of Claimant during the cure period would have caused material harm.

F. **Claimant Interfered with and Retaliated Against the Players for Exercising Their Right to Contact the MLSPU.**

Claimant's Post-Hearing submission does address the fact that he interfered with/retaliated against the players for exercising their rights to contact the MLSPU, but it fails to overcome the significant argument presented by the Philadelphia Union within its Post-Hearing Brief. Accordingly, the Philadelphia Union will rely upon and incorporate herein the arguments presented in its Post-Hearing Submission. It is, however, worth noting that while the Claimant cites to and attempts to discredit the testimony of the numerous witnesses confirming his interference with the rights of the players to contact the MLSPU, he fails to cite to his own Hearing Testimony:

> ...So if any kind of issues will occur, **I told them basically that please, if you have any kind of concerns, any issues**...just to tell them if you have any kind of issues, **please see us first so we will not have problems or questions from the Players Union about any kind of concerns you have or you might have in the future**.

(SMF ¶ 48) (emphasis added.)

Simply put, notwithstanding Claimant's attempt to poke holes in the compelling testimony of the other witnesses on this point, the fact of the matter is that Claimant admits to interfering with the players MLSPU rights - specifically telling them to contact him before contacting the MLSPU.[11]

It is also worth noting that Claimant does not address the record evidence relating to fact that he sought the identity of the player(s) who brought the [redacted] issue to the MLSPU. Quite

[11] Interestingly enough, Claimant's testimony in this regard conflicts with the testimony of his lone witness, Diego Gutierrez (as cited by Claimant on pg. 47 of Claimant's Post-Hearing Brief). If nothing else, this clearly calls the credibility of Mr. Gutierrez and his testimony into question.

frankly, this is not surprising considering the record evidence in this regard is supported by three players[12] and the head of the MLSPU, Robert Foose. Nonetheless, it is worth mentioning here.

Finally, with respect to the interference/retaliation issue, Claimant attempts to minimize his actions in this regard by mischaracterizing the testimony of Mr. Durbin. Specifically, Claimant argues that Mr. Durbin testified that "the interference allegations did not raise 'major alarm bells.'" Simply put, Mr. Durbin never made this statement. He simply stated that "major alarm bells" went off when he was made aware of the actions Claimant took during the May 31, 2012 trail run. (SMF ¶ 170.) This is quite a difference and the record in this regard clearly speaks for itself. There is no question that the League took the players interference/retaliation issue extremely seriously. Indeed, this issue was a major focal point within the MLS Report.

G. <u>The Philadelphia Union Lawfully Terminated the Employment Agreement Pursuant to Paragraph III(A)(5).</u>

Again, the Philadelphia Union will primarily rely upon the arguments presented in its Post-Hearing Brief relative to this particular issue. However, it must be noted that Claimant's comparison to the actions of others in the sport is immaterial to the contract Claimant executed with the Philadelphia Union. Moreover, the fact that Claimant believes "[r]ules and their breaches are a part of professional sports" is also immaterial to the plain language of the Employment Agreement executed between the Claimant and the Philadelphia Union. (Claimant's Post-Hearing Submission, pg. 56.)

However, even if such assertions of fact were material, Claimant has failed to identify any individual who engaged in the same or similar conduct as Claimant and was not relieved from his or her position. For instance, Claimant has not identified another coach – in any professional sport, let alone in Major League Soccer – that pushed a player on the opposing team

[12] Mostly Mr. [redacted] and Mr. [redacted] but a third player, Mr. [redacted] confirmed, through his testimony, that he was present at the time Mr. [redacted] received the phone call from Claimant. (SMF ¶ 50.)

– a push viewed on national television – and was not terminated from his or her position. Claimant also has not identified another coach in any professional sport that engaged in any of the conduct outlined in the MLS Report – conduct clearly embarrassing/humiliating to the Philadelphia Union in, at the very least, the eyes of the League and the MLSPU – that was not relieved from his or her duties. Without these comparators, Claimant's argument relating to "rules" being routinely breached in professional sports is nothing more than conjecture and certainly is not enough to establish bad faith on the part of the Philadelphia Union.

H. There is No Record Evidence to Substantiate Claimant's Alleged Bonus Damages.

Claimant's Post-Hearing Brief outlines, for the first time, that Claimant is making a claim for a bonus that he is allegedly entitled to as a result of his selection as the Coach of the League's 2012 All-Star game. There is absolutely nothing in the closed record evidence to establish that Claimant is entitled to this bonus and, thus, it must be denied as a matter of law.

III. COUNTERCLAIMS

Claimant acknowledges that he has failed to make payments on the Loan and/or the Advance since the termination of this Employment Agreement on June 13, 2012. Nonetheless, he maintains that he is not subject to the interest simply because his failure to pay the Loan or the Advance was a "consequential damage" of the Philadelphia Union's alleged breach of the Employment Agreement. Not surprisingly, Claimant fails to cite to any legal authority to support this proposition. The Loan and especially the Advance are debts Claimant owed distinct from the Employment Agreement. Accordingly, the actions of the Philadelphia Union relative to the Employment Agreement are irrelevant to the fact that Claimant owes the Loan, the Advance as well as the interests, costs and fees associated with the collection of the same.

To that end, Claimant owes the Philadelphia Union the principle amounts of the Loan and Advance as well as interest, costs and fees associated with the collection of the same.

Respectfully submitted,

BUCHANAN INGERSOLL & ROONEY PC

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Dated: December 23, 2014

CERTIFICATE OF SERVICE

I hereby certify that I am this day filing a copy of Philadelphia Union's Reply Brief by Electronic Mail with the American Arbitration Association and serving a copy via electronic mail and United States First Class Mail, Postage Prepaid, upon the persons indicated below:

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