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

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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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