UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF PENNSYLVANIA

PIOTR NOWAK, *Plaintiff* vs. PENNSYLVANIA PROFESSIONAL SOCCER, LLC, and KEYSTONE SPORTS AND ENTERTAINMENT, LLC, *Defendants.*	:	CIVIL ACTION No. 2:12-cv-04165-MAK

DEFENDANTS' MEMORANDUM OF LAW IN OPPOSITION TO PLAINTIFF'S MOTION TO VACATE THE APRIL 21, 2015 AAA INTERIM AWARD AND IN SUPPORT OF DEFENDANTS' CROSS MOTION TO CONFIRM THE INTERIM AWARD AS WELL AS THE AAA FINAL AWARD AND OPINION ENTERED ON NOVEMBER 5, 2015[1]

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[1] After consulting with opposing counsel, it is Defendants' understanding that Plaintiff will be re-filing his Memorandum of Law in Support of his Motion to Vacate the AAA Arbitration Award Entered on April 21, 2015 (Doc. No. 22) (previously stricken) on January 5th, with redactions consistent with the Court's December 18, 2015 Order (Doc. No. 42). This Memorandum is offered in opposition to Plaintiff's anticipated re-filed memorandum and in support of Defendants' re-filed Motion to Confirm the AAA Final Opinion and Award entered on November 5, 2015.

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I. INTRODUCTION AND PROCEDURAL HISTORY

This matter involves a relatively simple dispute between a Major League Soccer ("MLS" or the "League") Club, the Philadelphia Union,[2] and its Manager, Piotr Nowak ("Plaintiff" or "Nowak") (collectively, the "Parties"). The genesis of this matter stems from the Parties execution of a Manager Agreement (hereinafter, the "Agreement") on June 1, 2009, which made Nowak the "sole manager of the Team" potentially through December 31, 2012.[3] Pertinently, the Agreement expressly allowed the Philadelphia Union to unilaterally terminate the Agreement–without any further obligations to Nowak–if it, in its good faith discretion, determined that Nowak engaged in certain conduct delineated within the Agreement.

The inclusion of this language in the Agreement proved to be material since Nowak, shortly after the start of the 2012 season, 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 Agreement, but which also rose to such a significant level that the Philadelphia Union had no choice but to exercise such discretion, effective June 13, 2012. Indeed, as explained more thoroughly below and within the Post-Hearing Submissions, Nowak's conduct resulted in several players, through and together with the Major League Soccer Players' Union ("MLSPU"), lodging serious complaints with MLS.[4] As a result of these complaints, the MLS performed an independent investigation that culminated in the issuance of a formal MLS Report. The indisputable findings contained within the MLS Report, as well as the results of the Philadelphia Union's separate

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[2] The Philadelphia Union is operated by Defendants, Pennsylvania Professional Soccer, LLC ("PPS") and Keystone Sports and Entertainment, LLC ("Keystone") (collectively referred to as, "Defendants" or the "Philadelphia Union").
[3] The Agreement was amended on two occasions, the last of which was on December 20, 2011, wherein the parties, *inter alia*, extended the term of the Agreement to December 31, 2015.
[4] The complaints included, but were not limited to, Nowak: (1) requiring players to run an extensive distance on a hot, humid day, and, then, over the objections of the Athletic Trainers, denying them the ability to hydrate during the run; (2) interfering with and retaliating against players for exercising their rights to engage in union activity; (3) violating Team and League Rules (including initiating physical contact with an opposing player); (4) jeopardizing the health and safety of the players by refusing to follow the medical directives of Athletic Trainers including, *inter alia*, requiring injured players to train and ridiculing players who sustained concussions; and (5) hazing of players, which included Plaintiff physically slapping rookie players.

investigation,[5] left the Philadelphia Union with no choice, but to exercise its discretion to terminate the Agreement, pursuant to Paragraph III(A), effective June 13, 2012.

On July 20, 2012, Nowak filed a Declaratory Judgment action in the Eastern District of Pennsylvania seeking a declaration that the Philadelphia Union wrongfully terminated Nowak in violation of the Agreement. On September 26, 2012, this Court entered an Order directing Nowak to arbitrate his dispute. (Doc. No.'s 11 and 12.) On or about January 8, 2013, Nowak filed a Demand for Arbitration with the American Arbitration Association ("AAA"), generally alleging that the Philadelphia Union breached the Agreement. (Ex. "A.")[6] On January 8, 2013, Defendants filed an Answering Statement, denying Plaintiff's allegations, as well as asserting a Counterclaim Demand for Arbitration against Plaintiff and Pino Sports, LLC (hereinafter, "Pino Sports"). (Ex. "B.") Defendants' counterclaims against Plaintiff included: (1) a claim seeking the outstanding balance relative to a loan that was provided to Nowak through the Agreement (and its Addendums); and (2) the attorneys' fees and costs incurred in defending against the Demand for Arbitration and in seeking to collect the outstanding loan balance. Defendants' counterclaims against Pino Sports included: (1) a claim seeking reimbursement of an advance payment made to Pino Sports that was never earned; and (2) the attorneys' fees and costs incurred to collect the unearned advance. (*Id.*)

The Parties agreed to retain the services of Arbitrator Margaret Brogan, Esquire, to arbitrate both the Plaintiff's Demand for Arbitration and Defendants' Counterclaim Demand for Arbitration. After an extensive discovery process, the Arbitrator held 5 days of Hearings – May 28, 29, 30, and August 19, 20, 2014–which included the testimony of 15 witnesses, the admission of almost 90 Exhibits. (Ex. "M"-"O.") The Parties then submitted Post-Hearing Statements. (Ex.'s "C"-"F.")

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[5] The Post-Hearing Submissions illustrate that the separate investigation performed by the Philadelphia Union confirmed the information contained within the MLS Report and revealed other infractions of Nowak. (Ex.'s "C"-"F.")

[6] In accordance with the Court's December 18, 2015 Order (Doc. 42), all references to Exhibits refer to the publicly filed Joint Appendix (redacted Exhibits "A"-"L") and/or the Confidential Appendix (unredacted Exhibits "A"-"O") filed under seal. Both Appendices are duplicative in all respects except that the Confidential Appendix adds Exhibits "M"-"O," which, in accordance with the December 18, 2015 Order, are solely being filed under seal. (*See* Doc. 42.)

On April 21, 2015, the Arbitrator issued an Interim Award denying Plaintiff's claims and granting the Philadelphia Union's counterclaims. (Ex. "G.") The Arbitrator concluded that the record established that Nowak engaged in such egregious misconduct that the Philadelphia Union was well within its discretion to terminate the Agreement. (*Id.*) Specifically, the Arbitrator concluded, "based upon the credible testimonial and documentary evidence…," that Nowak violated Section III(A)(2), (3), and (7) of the Agreement by: (1) interfering with the players' rights to engage in union activities; (2) threatening the safety and health of the players by, over the objections of the Athletic Trainers,[7] requiring injured players to engage in a 10-mile run over an uneven surface in 80 degree heat, while denying the players the ability to hydrate during the run; (3) hazing rookie players,[8] by physically spanking them; (4) first breaching the express terms of the Agreement by seeking other employment and making disparaging statements about the Philadelphia Union and its management to a sports broadcaster; and (5) violating League and Team Rules when he received a red card ejection for initiating contact with an opposing player.[9] (*Id.*)

The Interim Award also awarded the Philadelphia Union fees and costs, directing it to file a Fee Petition within 60 days of the Interim Award. (*Id.*) The Philadelphia Union timely filed its Fee Petition, and, on November 5, 2015, the Arbitrator entered a Final Opinion and Award (hereinafter, the "Final Award"), which ordered Plaintiff to reimburse Defendants for all fees and costs it incurred. (Ex.'s "H" & "L.") Specifically, the Arbitrator ordered Nowak to reimburse the Philadelphia Union: (1) $381,317.00 in attorneys' fees and $20,910.11 in costs relative to the

[7] The Arbitrator further noted in this regard, "[Nowak's] attitude towards his certified trainers, in ignoring their advice, and telling them he was usurping their authority going forward, reflected very bad judgment, and showed that in his mind, he was always right. This indicated that [Nowak's] conduct could not have been 'cured.'" (Ex. "G," pg. 42.)
[8] The Arbitrator explicitly noted in this regard, "[Nowak's] description of what he did was quite unnerving, especially when he described how he put his hand in a bucket of ice water to ease his pain, obviously because he was hitting the young people so hard." (Ex. "G," pg. 43.)
[9] The Arbitrator also determined that the record established that the Philadelphia Union met all necessary prerequisites before it exercised its discretion to terminate the Agreement. Indeed, the Arbitrator determined that the Philadelphia Union provided Nowak with notice of the reasons surrounding the termination of the Agreement in advance of such termination and afforded Nowak an opportunity to respond. The Arbitrator also determined that the Philadelphia Union appropriately applied its discretion when it determined that Nowak's actions were unable to be cured. (Ex. "G," pg. 43.)

Arbitration; and (2) $52,031.78 in attorneys' fees and costs incurred in successfully compelling arbitration in the Eastern District litigation. (Ex. "L.")

On July 21, 2015, prior to the receipt of the Final Award, Nowak filed a Motion to Vacate the Interim Award. (Doc. 18.) Understanding the Final Award was forthcoming, this Court entered an Order on August 7, 2015, directing the Philadelphia Union to notify the Court within 2 business days following the issuance of the Final Award, and, thereafter, file a response to Plaintiff's Motion to Vacate within 20 days. (Doc. 29.) On November 9, 2015,[10] the Philadelphia Union notified the Court as requested and it now files the within Memorandum.

II. COUNTERSTATEMENT OF FACTS

It must be initially noted that, subsequent to the 5-days of Hearings, the Parties submitted extensive Post-Hearing Submissions. (Ex.'s "C"-"F.") Within the same, the Parties extensively outlined the facts leading to and resulting in the Philadelphia Union exercising its contractual discretion to terminate the Agreement pursuant to Section III(A). (*Id.*) In particular, the Philadelphia Union filed a Statement of Undisputed Facts that outlined 392 undisputed material facts, all of which contained specific citations to the record. (Ex. "C," Tab 2.) Additionally, the Philadelphia Union submitted an extensive Post-Hearing Submission, as well as a Reply Brief, both of which cited to and relied upon the 392 undisputed material facts. (Ex.'s "C" & "E.") Simply put, the Philadelphia Union has extensively outlined the relevant facts and for purposes of judicial economy, it will not reiterate such facts in this Memorandum. Unfortunately, within his Memorandum, Nowak takes great liberties with his description of the facts. Indeed, within his Memorandum, Nowak only provides select pieces of the puzzle, disingenuously describing record evidence out of context, and, in some cases, providing factually incorrect and misleading information. As a result, while, in the interests of judicial economy, the Philadelphia Union will not reiterate each of the 392 facts

[10] Although dated November 5, 2015, the Philadelphia Union did not receive the Final Award until late on Friday, November 6, 2015, notifying the Court of its receipt of the same on the next business day, November 9, 2015.

outlined within its Statement of Facts, it will address certain factually misleading or incorrect facts and provide the necessary context to those facts presented by Nowak within his Memorandum.[11]

A. There is No Record Evidence Illustrating that the Philadelphia Union was Facing Financial Difficulties/Pressures When It Terminated the Agreement.

Within his Memorandum, Nowak argues that "…it should have been apparent that the 'causes' for termination made by the [Philadelphia Union] were pretextual, and the termination was done for the purposes of saving money." (Doc. 22, pgs. 4-5.) Although Nowak now makes this factual argument, a review of Nowak's Post-Hearing Submissions demonstrates that Nowak never presented such an argument to the Arbitrator. If it was so "apparent" that the termination of the Agreement was to "save money," why did Nowak fail to present this argument within his Post-Hearing Submissions? (Ex.'s "D" and "F".) Similarly, if Nowak failed to present such a factual argument in his Post-Hearing Submissions, how could it have been "apparent" to the Arbitrator? Simply put, it was not presented by Nowak, as there was no record support for such an argument.

Moreover, Nowak misleadingly states that "[o]n May 28 and 29, the Team CFO and CEO discussed financial difficulties and pressures faced by the Team, including unpaid fees to the City of Chester." (Doc. 22, pg. 5.) This statement infers that the CFO (Dave Debusschere) and CEO (Nick Sakiewicz) testified that they were discussing the financial difficulties/pressures facing the Philadelphia Union on May 28 and 29, 2012–only a few weeks prior to the termination of the Agreement. This could not be further from the truth. First, there is absolutely no evidence that the CFO or CEO discussed the financial state of the Philadelphia Union on May 28 or 29, 2012–or on any other date in close proximity to the date in which the Philadelphia Union exercised its discretionary authority to terminate the Agreement. Second, the testimony relied upon by Nowak, when presented in context–when read in conjunction with the other Hearing testimony–clearly illustrates that the CFO and CEO both denied the existence of any financial difficulties relative to

[11] The Philadelphia Union will address each fact in the order it was presented within the Memorandum.

unpaid fees owed to the City of Chester. (Ex. "M," 56:17-57:9, 125:11-19; 522:7-524:24.) In short, there is no record evidence establishing that the Philadelphia Union was facing financial difficulties or pressures; this argument is simply a red herring unsupported by the record evidence.

B. Nowak Disingenuously Presents the Facts Relative to the Hazing in an Attempt to Mislead this Court.

Within his Memorandum, Nowak states "Team CEO Jay [sic] Sakeiwicz described rookie hazing as [a] 'bonding experience,' laughed while watching videos of the hazing of rookie players, and discussed the hazing with Nowak, but never told him to stop." (Doc. 22, pg. 5.) Taking this statement at face value, one would presume that the CEO of the Philadelphia Union–Nick Sakiewicz (misidentified by Nowak as Jay Sakeiwicz)–personally testified that he thought the slapping of rookie players was a "bonding experience," that he laughed while watching videos of the hazing, and that he never told Nowak to stop hazing the rookie players. This, however, could not be further from the truth, and, in fact, is contrary to the testimony of Mr. Sakiewicz. Indeed, Mr. Sakiewicz explicitly testified that when he became aware of the "spanking" through a video he was shown in 2011, he immediately approached Nowak and told him that he did not want the "spanking" to happen again; he wanted Nowak to "cease doing it." (Ex. "M," 526:22-527:2; 527:6-19, 529:19-23.) Additionally, the CFO, Dave Debusschere, also testified that he knew Mr. Sakiewicz had directed Nowak to immediately cease the "spanking" ritual. (*Id.*," 79:2-9.)

Accordingly, contrary to Nowak's implications, Mr. Sakiewicz never encouraged the hazing and he certainly did not testify that he laughed at the videos. Moreover, Mr. Sakiewicz absolutely testified – testimony that was corroborated by Mr. Debusschere–that he specifically told Nowak to cease the hazing activities. In short, the facts provided by Nowak in his Memorandum relative to the hazing of players are misleading, false and premised solely on Nowak's self-serving version of events–which the Arbitrator was free to and actually rejected given the competing and more credible testimony of Mr. Sakiewicz and Mr. Debusschere. (*See* Ex. "G," pg. 43.)

C. Nowak's Description of the May 31, 2012 Run is Misleading and Inaccurate.

Within his Memorandum, Nowak provides incorrect and misleading facts concerning the May 31, 2012 training run. In particular, Nowak–presumably in an attempt to minimize the effect of his actions relative to the health and safety of the players–asserts that it was not humid at the time of the run, that players were allowed to walk during the run, and that he cured his actions by subsequently making sure that the players were hydrated. (Doc. 22, pg. 5.) Nowak's presentation of these handpicked facts in such a self-serving fashion is disingenuous, and palpably misleading. To illustrate, the undisputed facts relative to the May 31st run, as established through the record, are delineated in detail within the Philadelphia Union's Statement of Facts. (Ex. "C," Tab 2, SMF ¶ 99-164; Tab 1, pgs. 12-22.) Although, in the interests of judicial economy, the Philadelphia Union will not restate every such fact herein, these facts clearly demonstrate the ineptness of Nowak's factual assertions. Indeed, even a cursory review of these facts, establishes that, on May 31st, Nowak, against the advice of the Athletic Trainers, forced all players, including injured players, to participate in a 10-mile run on an uneven surface in 80 degree heat without the ability to hydrate during the run.[12] Moreover, the record evidence establishes that the injured players forced to participate in the run suffered setbacks and other players actually sustained significant injuries during the run. (*Id.*, Tab 2, SMF ¶ 99-164; Tab 1, pgs. 12-22.)

These facts were confirmed by the Arbitrator in the Interim Award, and, in fact, formed the basis for the Arbitrator to hold that "Nowak engaged in egregious behavior, threatening the safety and health of his players, with respect to the May 31st training run." (Ex. "G," pgs. 40-42.) The Arbitrator's determination in this regard is relevant to the facts alleged by Nowak for several reasons. First, in holding that Nowak engaged in "egregious behavior," the Arbitrator did not mention or rely upon the humidity level on May 31st; it was entirely irrelevant and immaterial to her

[12] Actually, Nowak went so far as to forcefully take bottles of water out of players' hands and throw them in the woods, admittedly telling the players, "[n]o fucking water, put the water back, water will make you lose focus and if you're thirsty you are weak." (Ex. "C," Tab 2, SMF ¶ 99-164; Tab 1, pgs. 12-22.)

"egregious" determination in the Interim Award.[13] Second, while Nowak attempts to minimize the effect of his actions relative to the health and safety of the players by arguing that players were allowed to walk, the Arbitrator concluded that his actions during the May 31st run "crossed the line." In particular, the Arbitrator concluded that Nowak's actions in ignoring the advice of the Athletic Trainers and requiring all players, including those who were injured, to participate in a 10-mile run on uneven surface in 80 degree heat – whether by walking or otherwise – and without the ability to hydrate during the run threatened the health and safety of the players. In fact, as noted by the Arbitrator, the record evidence established that injured players suffered setbacks and other players were actually injured as a result of their participation in the run. (*Id.*, pg. 42.)

Finally, although Nowak maintains that he could have cured his actions by simply not engaging in similar actions in the future, he "misses the point." His actions on May 31st threatened the health and safety of his players; he put "his 'assets' as he called them, at significant risk of harm." Such actions cannot be cured–at least not without a time machine–as the threat he presented to the players had already transpired. It is impossible to go back in time and "cure" the setbacks suffered by the injured players or the other injuries sustained by the players during the run (both of which required players to miss playing time). (*Id.*, pg. 42; Ex. "C," Tab 2, SMF ¶144-149.) Also, and, in some respects, more importantly, it is impossible for Nowak to go back in time and return the water bottles he ripped out of the players hands, allowing the players to hydrate during the 10-mile run in 80 degree heat. Further, as stated by the Arbitrator, while Nowak maintains that he can "cure" his actions by simply not repeating his conduct, the record establishes that he engaged in similar actions only one week later–again limiting the amount of water available to the players during a training that occurred on June 7, 2012. (Ex. "C," Tab 2, SMF ¶160-164; Ex. "G," pg. 42.)

[13] Notably, in its Post-Hearing Submission, the Philadelphia Union aptly noted that the Climatology Data only details the weather observed at the Philadelphia Airport, which is about 30 miles away from where the run took place. Thus, it does not provide an accurate representation of the weather at time of the run; at the very least, it is not more credible than the witnesses who consistently testified as to what they experienced the weather to be. (Ex. "C," Tab 1, pg. 14, FN 9.)

D. Nowak Did Much More than "Explore" Other Job Opportunities.

Nowak also attempts to mislead this Court into believing that he was terminated for simply "exploring" other job opportunities through Mr. Shep Messing. (Doc. 22, pg. 6.) To the contrary, as held by the Arbitrator in the Interim Award, Nowak "attempted to **obtain** other work while employed as head coach of the Philadelphia Union" and his actions in this regard amounted to "a violation of the Employment Agreement." (Ex. "G," pg. 44.) This determination was based on the record, which is outlined in detail within the Philadelphia Union's Post-Hearing Submissions. (Ex. "C," Tab 1, pgs. 54-61; Tab 2, SMF ¶250-282; Ex. "E," pgs. 21-23.) In the interests of judicial economy, the Philadelphia Union will not reiterate all such facts/argument herein. The factual assertions of Nowak, however, require the Philadelphia Union to reiterate the fact that Nowak did not simply discuss "potential opportunities" with Mr. Messing, but, according to Mr. Messing–an independent and unbiased witness–Nowak actually directed Mr. Messing to reach out to another team for the purpose of obtaining a head coaching position with that team and Mr. Messing complied with Nowak's request in this regard. (Ex. "C," Tab 2, SMF ¶250-282.) Furthermore, the record also indisputably establishes that Nowak did not solely seek other employment through Mr. Messing, as inferred by Nowak; the record also establishes that, during his employment, Nowak also sought employment through sports agent, Michael Morris, and through his former player, Veljko Paunovic. (Ex. "C," Tab 1, pgs. 54-61; Tab 2, SMF ¶250-282; Ex. "E," pgs. 21-23.)

Lastly, the Arbitrator did not only find that Nowak breached the Agreement by seeking other employment; she also found that Nowak violated the Agreement in making disparaging comments to Mr. Messing, a sportscaster, about the Philadelphia Union and its management. (Ex. "G," pg. 44) This determination is supported by the record. (Ex. "C," Tab 1, pgs. 61-63; Tab 2, SMF ¶250-282.)

E. Nowak Interfered with and Retaliated Against Players' Engaging in Union Activity.

Nowak also attempts to challenge the Arbitrator's determination that he interfered with the players' union activity. (Doc. 22, pg. 6.) Such an attempt is futile, considering the record evidence

demonstrates that Nowak engaged in actions that are textbook examples of attempts to interfere with, restrain, or coerce employees from engaging in their protected right to consult with their union. (Ex. "C," Tab 1, pgs. 5-10, 42-46; Tab 2, SMF ¶38-60; Ex. "E," pgs. 25-26.) In the interests of judicial economy, the Philadelphia Union will not reiterate such facts herein. Even a cursory review of these facts, however, indisputably illustrates that the record,[14] as confirmed by the Arbitrator after assessing all credible testimonial and documentary evidence, establishes that Nowak interfered with and retaliated against players for engaging in union activity.

F. Nowak Forced Players to Hide Concussions.

Nowak attempts to create a picture of his sympathy relative to concussions by citing to his own, self-serving testimony concerning unidentified commentators purportedly stating that he was "going insane ordering the helmets, protective helmets, for goalkeepers and players." (Doc. 22, pg. 6.) Such unsubstantiated testimony does not overcome the overwhelming testimony illustrating that Nowak created an environment where players felt the need to hide or mask concussions. Indeed, the record evidence established that Nowak vilified players who suffered from concussion symptoms, calling them "pussies" or "weak." (Ex. "C," Tab 1, pgs. 73-75; Tab 2, SMF ¶228-236; Ex. "E," pgs. 25-26.) Nowak's actions in this regard, which he did not explicitly deny, threatened the health and safety of the players, and his purported attempt to order helmets/protective gear does not nullify the fact that his actions forced players to hide concussion symptoms or face severe consequences. (*Id.*; Ex. "G," pgs. 42-43.)

G. Nowak Attempts to Mislead this Court by Arguing that His Actions In Breaching the Agreement Occurred Before the Agreement was Terminated.

Nowak attempts to mislead this Court by disingenuously stating that his conversation with Mr. Messing occurred in the summer of 2011, over a year before the termination of the Agreement,

[14] Significantly, additional players could have been produced to confirm Nowak's actions in interfering with the players' union activity; however, counsel for Nowak agreed during the hearing that he would simply stipulate to the fact that the other players would testify in the same fashion as the players produced. In the interests of judicial efficiency, the Philadelphia Union agreed to this stipulation.

yet it was relied upon by as a reason for terminating the Agreement. (Doc. 22, pg. 7.) Nowak makes this misleading argument even though the undisputed record establishes that Mr. Messing did not notify the Philadelphia Union of his conversation with Nowak until May 24, 2012, a few weeks prior to the termination of the Agreement. In other words, notwithstanding the dates in which his conversations[15] took place with Mr. Messing, the Philadelphia Union was unaware of such conversations until just weeks prior to the termination. Thus, contrary to Nowak's implications, Mr. Messing did not inform the Philadelphia Union until May 24, 2012 that Nowak: (1) sought employment with the U.S. Men's National Soccer Team; (2) was actively seeking employment in Europe; (3) asked for the contact information of sports agent Michael Morris; and (4) made disparaging remarks about the Philadelphia Union/its management. (Ex. "C," SMF ¶282.)[16]

H. Nowak Did Not Object to the Admission of Dr. Hummer's Report; Nonetheless, the Arbitrator Did Not Reply Upon Dr. Hummer's Report.

Nowak attempts to create some "unreasonable and unjustified applications of the law" on behalf of the Arbitrator by arguing that she relied upon "unauthenticated hearsay statements made by Dr. Hummer…" (Doc. 22, pg. 9.) Nowak's assertion in this regard is misleading in several respects. First, Dr. Hummer's Statement was provided by Respondent at Ex. 13, by way of an attachment to an email and was clearly not offered for its substance, but only to illustrate that the statement was provided to the Philadelphia Union via email on June 7, 2012. (Ex. "N," Tab 13.) Moreover, the Philadelphia Union entered Exhibit 13 into evidence during the pendency of the Hearing on several occasions and Nowak never lodged an objection. (*See* Ex. "M," pgs. 368, 575, 576.) Accordingly, to the extent such an objection could be made, it was clearly waived by Nowak. Finally, and most importantly, while the "Background" section of the Interim Award notes that the

[15] While Nowak only references one conversation with Mr. Messing, there were several conversations that occurred between Nowak and Mr. Messing involving Nowak seeking other employment, or disparaging the Philadelphia Union and its management. (Ex. "C," Tab 1, pgs. 54-61; Tab 2, SMF ¶250-282; Ex. "E," pgs. 21-23.)

[16] Again, Nowak did not only seek other employment through Mr. Messing; during the time he was employed with the Philadelphia Union, Nowak also sought employment through sports agent, Michael Morris, and through a former player, Veljko Paunovic. (Ex. "C," Tab 1, pgs. 54-61; Tab 2, SMF ¶250-282; Ex. "E," pgs. 21-23.)

letter from Dr. Hummer was included in the record evidence, there is absolutely no indication within the Interim Award that the Arbitrator relied upon Dr. Hummer's letter when she concluded that Nowak's actions during the May 31st run–in which he, again, required players, including injured players, to participate in a 10-mile run in 80 degree heat without the ability to hydrate–threatened the health and safety of the players. Indeed, the Arbitrator does not even mention Dr. Hummer's letter in her holding in this regard. (Ex. "G," pgs. 41-42.)

It should also be stressed here that, while such an outcome is dictated by the simple use of common sense, the Head Athletic Trainer for the Philadelphia Union, Paul Rushing, specifically testified as to the dangers associated with players being forced to run 10-miles in 80 degree heat without hydration. In fact, Mr. Rushing also drafted a letter addressing this issue–a letter which he unquestionably authenticated during his hearing testimony. (Ex. "C," Tab 2, SMF ¶150-152, 181-182; Ex. "N," Tabs 11, 13.) Accordingly, to the extent the Arbitrator would be unable to come to this obvious, common sense conclusion on her own accord, the record establishes that a licensed athletic trainer provided direct competent testimony on this issue. Simply put, Dr. Hummer's letter was inconsequential to the Arbitrator's findings relative to the May 31st run.

I. Nowak Was Provided with Notice and the Opportunity to Respond.

Nowak attempts to assert a "misapplication of the law" by confusing two similar, but separate issues. Specifically, Nowak takes issue with the Arbitrator determining that while it "would have been better if [the Philadelphia Union] had allowed [Nowak] to review the [MLS] report when he was terminated," to the extent there was any prejudice, such prejudice was cured at the arbitration hearing where he had a full opportunity to respond to the MLS Report and confront witnesses. (Doc. 22, pg. 9.) Nowak's position in this regard ignores the fact that the Arbitrator recognized that the Agreement did not place any requirements on the Philadelphia Union relative to the MLS Report. Indeed, as held by the Arbitrator, once the Philadelphia Union decided to exercise

its discretionary right to terminate the Agreement, the plain language of the Agreement only required it to: (1) notify Nowak of the reasons surrounding the termination; and (2) provide him with the opportunity to respond to such reasons. (Ex. "G," pg. 45.) Here, the record establishes, and the Arbitrator held, that the Philadelphia Union complied with both requirements. Indeed, at a minimum, the record establishes that the Philadelphia Union: (1) sent Nowak an email outlining the reasons underlying the termination; (2) thereafter, met in-person with Nowak; (3) provided Nowak with a Termination Letter at the in-person meeting which reiterated the reasons;[17] and (4) provided Nowak with the opportunity to respond to the reasons during the in-person meeting. (Ex. "C," Tab 1, pgs. 37-40; Tab 2, SMF ¶320-340; Ex. "E," pgs. 7-14; Ex. "G," pg. 45.)

To that end, while the Arbitrator believed it would have been better if Nowak was provided with a copy of the MLS Report, she further understood that there was nothing legally requiring the Philadelphia Union to provide the actual MLS Report to Nowak. Moreover, notwithstanding when the MLS Report was provided to Nowak, the Philadelphia Union provided Nowak with notice and an opportunity to respond relative to each issue the Arbitrator found to be a valid basis for the termination of the Agreement. Simply put, the Arbitrator appropriately held that the Philadelphia Union met all necessary prerequisites in terminating the Agreement.

III. ARGUMENT

A. Standard of Review.

The Federal Arbitration Act, 9 U.S.C. §§ 1 *et seq.* ("FAA"), provides extremely limited bases to vacate an arbitration award. Vacatur is reserved for only a few, exceptional cases. Under the FAA, "[i]t is ... patently clear that judicial review of an arbitration award is extremely narrow

[17] Importantly, each and every basis relied upon by the Arbitrator in holding that the Philadelphia Union appropriately exercised its discretionary authority to terminate the Agreement was explicitly contained within the Termination Letter provided to Nowak during the June 13, 2012 in-person meeting. (Ex. "N," at Ex. 36; Ex. "G," pgs. 39-44.) Indeed, the Interim Award held that Nowak violated Section III(A)(2), (3) and (7) of the Agreement by interfering with the players' rights to engage in union activities, threatening the health and safety of the players, hazing rookie players, first breaching the Agreement, and violating League/Team Rules. Each of these "reasons" was explicitly outlined within the Termination Letter presented to Nowak on June 13, 2012. (Ex. "N," at Ex. 36; Ex. "G," pgs. 39-44.)

and severely limited." *Jeffrey M. Brown Assocs., Inc. v. Allstar Drywall & Acoustics, Inc.*, 195 F. Supp. 2d 681, 684 (E.D. Pa. 2002) "There is a strong presumption under the FAA in favor of enforcing arbitration awards." *Franko v. Am. Fin. Servs.*, 2009 WL 1636054 *9 (E.D. Pa. June 11, 2009); *see also Parsons Energy & Chems. Group, Inc. v. Williams Union Boiler,* 128 Fed. Appx. 920, 925 (3d Cir. 2005) (confirming award as, at worst, arbitrators erroneously interpreted statute, and "[v]acatur is appropriate in 'exceedingly narrow' circumstances, such as where arbitrators are partial or corrupt or manifestly disregard, rather than merely erroneously interpret the law"). As such, "an award is generally presumed valid and review is extremely deferential." *Id.* The party seeking vacatur of the award bears the burden of proving it is proper. *Id.* (citation omitted).

In the case, *sub judice*, Nowak haphazardly argues that the Interim Award should be vacated in accordance subsections 9 U.S.C. § 10(a)(2), (3), and (4). It is clear from a review his arguments that Nowak's Motion to Vacate cannot, as a matter of law, be sustained under any of these subsections. In fact, considering his arguments, it is evident that Nowak filed his Motion to Vacate solely in an attempt to obtain a second bite of the apple. As obtaining a second chance is without question not a ground for vacating an arbitration award under 9 U.S.C. § 10, Nowak's Motion to Vacate should be denied as a matter of law.

B. Vacatur is Not Appropriate under 9 U.S.C. §10(a)(3).

Nowak initially asks this Court to vacate the Interim Award under §10(a)(3), which only permits vacatur when the arbitrator is guilty of misconduct in refusing to postpone a hearing, refusing to hear evidence pertinent and material to the controversy, or of some other misbehavior prejudicing the rights of a party. Nowak presents two arguments in this regard: (1) the Arbitrator relied on the unauthenticated hearsay statements of Dr. Hummer; and (2) the fact that the Arbitrator held that Mr. "Nowak 'had the full opportunity to respond to the [MLS] report and to cross-examine his accusers'" and that such a holding "cannot be logically explained, as this 'opportunity' was two

years after the relevant termination." (Doc. 22, pgs. 11-12.) As these two arguments do not involve the Arbitrator's refusal to postpone a hearing or hear evidence, it is presumed that Nowak is arguing that these two arguments somehow amount to Arbitrator "misbehavior" resulting in prejudice to Nowak. To be frank, such an argument is not only frivolous, but borders on being disingenuous.

Both of these arguments are extensively addressed within Sections II.H. and II.I., *supra*, and, for efficiency purposes, such arguments will not be reiterated herein. In short, as argued in Section II.H., Nowak's reliance on the "unauthenticated hearsay statements" of Dr. Hummer to substantiate "misconduct" is irresponsible for several reasons, not the least of which was the fact that the Arbitrator did not rely on such statements in holding that Nowak's actions during the May 31st run were "egregious." Similarly, as argued in Section II.I., while the Arbitrator believed it would have been better if Nowak was provided with a copy of the MLS Report, she further understood and held that there was nothing legally requiring the Philadelphia Union to provide the MLS Report to Nowak.[18] Thus, the two arguments presented by Nowak do not even come close to establishing "misconduct" or resulting "prejudice" warranting the vacating of the Interim Award.

C. Vacatur is Not Appropriate under 9 U.S.C. §10(a)(4).

Nowak also seeks to vacate the Interim Award under §10(a)(4), which only permits a court to vacate an arbitration award where the arbitrator exceeded his/her powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made. When a party invokes §10(a)(4) and seeks to vacate an award on the basis that the arbitrator exceeded his power, a court must "determine if the form of the arbitrators' award can be **rationally derived** either from the agreement between the parties or from the parties ['] submissions to the arbitrators," only revising the terms of the award if they are "completely irrational." *Ario v. The Underwriting Members of Syndicate 53 at Lloyds for the 1988 Year of Account*, 618 F.3d 277, 295

[18] The Arbitrator further held that the Philadelphia Union complied with all necessary prerequisites prior to terminating the Agreement. (*See*, Section II.I., *supra*.)

(3rd Cir. 2010) (emphasis added) (citations omitted). This standard of review is so deferential, that a court may overturn an award only if there is "absolutely no support at all in the record justifying the arbitrator's determinations." *Id.; see also United Transp. Union Local 1589 v. Suburban Transit Corp.*, 51 F.3d 376, 379 (3rd Cir. 1995) (A court may not overrule an arbitrator simply because it disagrees. "There must be absolutely no support…in the record."). It is well-established that "mere legal error" does not provide a basis for vacating an arbitration award. *J.D. Shehadi, LLC v. U.S. Maint., Inc.*, 2011 WL 4632484 (E.D. Pa. Oct. 5, 2011). "Even an arbitrator's incorrect legal conclusion is entitled to deference." *Local 836 Int'l. Bhd. v. Jersey Coast Egg Producers*, 773 F.2d 530, 533 (3rd Cir. 1985); *Ario*, 618 F.3d at 296 (a review court, does not act to "correct factual or legal errors made by an arbitrator," and must "uphold an award even if the arbitrator engaged in 'improvident, even silly, factfinding.'") Accordingly, if the arbitrator is "even arguably construing or applying the contract and acting within the scope of his authority," a court will not overturn the award even if the "court is convinced he committed serious error." *United Paperworkers Int'l Union, AFL-CIO v. Misco, Inc.*, 484 U.S. 29, 36 (1960).

Here, Nowak seeks to vacate the Interim Award under §10(a)(4) by once again pointing to the Arbitrator's purported reliance on Dr. Hummer's letter and the timing of Nowak's receipt of the MLS Report. (Doc. 22, pg. 13.) For the same reasons discussed above, Nowak's reliance on these two arguments is misguided and certainly not enough to provide the grounds for vacating an arbitration award under §10(a)(4). As additional grounds for vacatur under §10(a)(4), Nowak wildly asserts the following arguments, all of which rely upon inaccurate, misleading, or out of context facts: (1) the Arbitrator's findings are inconsistent because she "highlights the several months prior to the June 2012 termination as the crucial period of events leading to termination," but then "accepts testimony about Nowak's inquiries about overseas teams in 2010 and 2011…"; (2) the Arbitrator "accepts that the conditions on May 31st were dangerous, and references the players'

complaints about it being very 'humid,' despite being presented with data reflecting comfortable temperatures and low humidity"; and (3) the Arbitrator states that "Sakiewicz made the sole decision to terminate Nowak, and also notes that Sakiewicz laughed at the hazing rituals and heard the CEO's testimony that such rituals are part of the 'bonding' experience." (Doc. 22, pgs. 13-14.)

As a starting point, even if, contrary to all record evidence, Nowak was able to establish all three of these assertions–which he cannot for the reasons outlined above–it still is not enough to even come close to establishing that the Arbitrator exceeded or so imperfectly executed her powers in holding that the Philadelphia Union appropriately exercised its discretionary right to terminate the Agreement. Indeed, at a minimum, these arguments do not address or affect the Arbitrator's finding that Nowak engaged in actions that were "textbook examples" of interfering with an employee's right to engage in union activities. (Ex. "G," pg. 39.) This fact alone was enough to provide the basis for the Philadelphia Union to exercise its discretionary authority to terminate the Agreement in accordance with Section III(A). Thus, the arguments presented by Nowak in an attempt to vacate the Interim Award under §10(a)(4) are moot as a matter of law.

Although clearly moot, it is worth briefly addressing each argument, individually. First, as outlined in Section II.G., *supra*, Nowak's attempt to create an inconsistency in the Interim Award by arguing that it relies upon events that occurred in 2010 and 2011 is, to put it simply, a blatant attempt at misdirection. Indeed, as explained in specific detail above, the record indisputably establishes that, while certain events occurred in 2010 and 2011, Mr. Messing did not notify the Philadelphia Union of such events until **May 24, 2012**–a few weeks prior to the termination of the Agreement. Thus, despite Nowak's attempt to mislead in this regard, the Interim Award is not internally inconsistent and it certainly does not even come close to establishing that the Arbitrator exceeded or so imperfectly executed her powers. Second, Nowak attempts to discredit the Arbitrator's factual determinations concerning the dangerous nature of the May 31st run by simply

pointing to the fact that he purportedly produced "data reflecting comfortable temperatures and low humidity." (Doc. 22, pg. 14.) Apparently, Nowak believes running 10-miles in 80 degrees while injured and without the ability to hydrate is "comfortable." Nonetheless, as noted in more detail in Section II.C., *supra*, Nowak's argument in this regard ignores several important and undisputed facts. In particular, it ignores the fact that Nowak, against the advice of the Athletic Trainers, forced injured players to take part in the 10-mile run and, as a result, injured players suffered setbacks.[19] (*See*, Section II.C., *supra*.) Simply put, the record indisputably establishes that Nowak threatened the health and safety of the players by creating dangerous conditions during the May 31st run–there is at least enough evidence to substantiate such a finding. As such, Nowak is unable to establish that the Arbitrator exceeded or so imperfectly executed her powers warranting vacatur.

Lastly, as outlined in more detail within Section II.B., *supra*, the manner in which Nowak attempts to self-servingly present the facts concerning his deplorable hazing rituals is, to be frank, disingenuous. Again, Mr. Sakiewicz explicitly testified–testimony that was corroborated by Mr. Debusschere–that he specifically told Nowak to cease the hazing activities. In short, the facts recited by Nowak relative to the hazing of rookie players are misleading and false, and premised solely on Nowak's version of events–which the Arbitrator was free to and actually rejected given the competing, contrary, and more credible testimony of Mr. Sakiewicz and Mr. Debusschere. Simply put, there is more than enough evidence within the record to substantiate the Arbitrator's determination regarding the hazing and, as a result, Nowak is unable to establish that the Arbitrator exceeded or so imperfectly executed her powers warranting vacatur.

D. Vacatur is Not Appropriate under 9 U.S.C. §10(a)(2).

In a last ditch effort, Nowak seeks to vacate the Interim Award under §10(a)(2), which allows a District Court to vacate an arbitration award "[w]here there was evident partiality or

[19] Further, otherwise healthy players were injured as a result of dangerous conditions created by Nowak during the run.

corruption in the arbitrators…" "[T]o show 'evident partiality,' 'the challenging party must show 'a reasonable person would have to conclude that the arbitrator was partial to the other party in the arbitration.'" *Martik Bros., Inc. v. Kiebler Slippery Rock, LLC*, 2009 WL 1065893 (W.D. Pa. Apr. 20, 2009) (citations omitted). "To overturn an award on the grounds of evident partiality, the moving party must demonstrate more than an appearance of impropriety." *Forest Elec. Corp. v. HCB Contractors,* 1995 WL 37586, at *3 (E.D. Pa. Jan. 30, 1995) (citations omitted). The party alleging such bias "must establish specific facts which indicate improper motives on the part of the arbitrator, and which establish that the arbitrator's conduct was so biased and prejudiced as to destroy fundamental fairness." *Id.*

Nowak has not put forth any evidence even remotely establishing evident partiality on behalf of the Arbitrator, and, to be frank, his position in this regard is, at best, irresponsible and, at worst, borders on being entirely disingenuous. Indeed, the only argument made by Nowak in this regard is his unsubstantiated and self-serving statement that he believed the Arbitrator had a "distaste for [his] hard-nosed approach to coaching."[20] (Doc. 22, pg. 15.) Nowak apparently believes this is enough to "establish specific facts which indicate improper motives on the part of the arbitrator, and which establish that the arbitrator's conduct was so biased and prejudiced as to destroy fundamental fairness." Asserting that a member of the Pennsylvania Bar was biased in this fashion is plainly irresponsible, especially when the argument has been made without citing to even one fact in support. At best, Nowak points to factual determinations made by the Arbitrator and argues that there was evidence in the record that supported a contrary conclusion. In other words,

[20] As an apparent example of the Arbitrator's purported "distaste" for Nowak's hard-nosed coaching style, Nowak points to the portion of the Arbitrator's Interim Award addressing concussions – arguing that the Arbitrator vilified Nowak concerning concussions when "there was no complained of problem of concussions." (Doc. 22, pg. 15.) Nowak's position in this regard is, once again, inaccurate and misleading. As outlined in more detail within Section II.F., *supra*, there was overwhelming testimony elicited during the Arbitration Hearing that indisputably illustrated that Nowak created an environment where players felt that they needed to hide concussions or face serious consequences. In particular, the testimony confirmed that Nowak would call players who suffered from concussion symptoms "pussies" or "weak." (*See*, Section II.F., *supra*.)

since the Arbitrator did not rule in his favor, "in could only be described as bias." (Doc. 22, pg. 15.) Again, this position is absurd, irresponsible, and under no circumstances can it amount to bias or prejudice destroying fundamental fairness, or allowing a reasonable person to conclude that the Arbitrator was somehow partial to the Philadelphia Union. Accordingly, this Court should dismiss Nowak's Motion to Vacate.

E. The Interim Award and Final Award Should be Confirmed Pursuant to §9.

The Philadelphia Union respectfully asks the Court to confirm the Interim Award and the Final Award as provided for in 9 U.S.C. §9, which provides that, where parties to an arbitration agreement have agreed that a judgment of the court shall be entered upon an arbitration award, a court "must" confirm the award unless the award is vacated, modified, or corrected. Here, the Agreement explicitly provides for judgment – relative to any arbitration decision involving a dispute over the terms of the Agreement – to be entered in this Court. (Ex. "N," at Ex. 1, ¶XIII.) Considering there are no valid grounds to vacate, modify, or correct either the Interim Award or the Final Award, it is respectfully requested that this Court enter an order confirming both the Interim Award and the Final Award consistent with the Agreement and the provisions of §9.

IV. CONCLUSION

Based on the foregoing, the Philadelphia Union respectfully requests this Court deny the Motion to Vacate the Interim Award, and grant the Philadelphia Union's Motion to Confirm.

Respectfully submitted,

s/Thomas G. Collins

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Dated: January 5, 2016

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing document was transmitted to the Court electronically for filing and for electronic service upon the following attorneys of record this day:

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