

**ARBITRAL AWARD**

(BAT 1892/22)

by the

**BASKETBALL ARBITRAL TRIBUNAL (BAT)**

**Mr. Benny Lo**

in the arbitration proceedings between

**Wasserman Media Group, LLC**

10900 Wilshire Blvd. Suite 1200, Los Angeles, CA 9S0024, USA

- Claimant -

represented by Mr. Blaž Tomažin Bolcar, attorney at law

vs.

**Mr. Augustine Rubit**

- Respondent -

represented by Mr. Miodrag Ražnatović, attorney at law

## 1. The Parties

### 1.1. The Claimant

1. Wasserman Media Group, LLC (“**Agent**” or “**Claimant**”) is an agency representing, *inter alia*, professional basketball players and coaches.

### 1.2. The Respondent

2. Mr. Augustine Rubit (“**Player**” or “**Respondent**”) is an American professional basketball player.

## 2. The Arbitrator

3. On 12 December 2022, Mr. Raj Parker, the Vice-President of the Basketball Arbitral Tribunal (“**BAT**”), appointed Mr. Benny Lo as arbitrator (“**Arbitrator**”) pursuant to Articles 0.4 and 8.1 of the Arbitration Rules of the Basketball Arbitral Tribunal in force as from 1 January 2022 (“**BAT Rules**”). Neither of the Parties has raised any objections to the appointment of the Arbitrator or to his declaration of independence.

## 3. Facts and Proceedings

### 3.1. Summary of the Dispute

4. On 4 May 2019, the Agent and the Player entered into a written agreement entitled “REPRESENTATION AGREEMENT” providing for the Player’s engagement of the Agent as his exclusive worldwide representative (“**Agreement**”).<sup>1</sup>
5. The Agreement provides relevantly as follows:

*“THIS REPRESENTATION AGREEMENT (“Agreement”) is entered into and effective as*

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<sup>1</sup> RfA, Exhibit C1.



**BASKETBALL**  
ARBITRAL TRIBUNAL

of May 4, 2019 (the “Effective Date”) by and between Wasserman Media Group, LLC (“Wasserman”) and Augustine Rubit (“Client”).

In consideration of the mutual covenants, agreements, representations and warranties contained herein, the parties hereto agree as follows:

1. Scope of Engagement. Wasserman hereby is engaged by Client to act as Client’s exclusive worldwide representative with respect to negotiating, executing and managing: (a) all opportunities, agreements, and the like, in connection with the marketing, licensing, or other use of commercialization of Client’s name, image, likeness, signature, or other personal attributes, including without limitation any and all endorsements, performance of services and appearances (“**Marketing Contracts**”); (b) all opportunities, employment, agreements, and the like with foreign and domestic professional basketball teams, leagues and/or clubs for Client’s professional basketball services, excluding such contracts with the National Basketball Association (“**NBA**”) and NBA member teams (“**Basketball Contracts**”); and (c) any other commercial or promotional activities and/or employment available to Client including, without limitation, exhibitions, clinics, speaking appearances, literacy works, resort, hotel, or club affiliations (“**Commercial Opportunities**”).
2. Term and Termination. The term of this agreement shall commence on the Effective Date and shall continue for a period of two (2) years, unless terminated or extended according to the terms herein (the “**Term**”). Upon the expiration of the initial two (2) year period, the Term shall be automatically renewed for continual successive two (2) year periods unless terminated by either party upon written notice delivered at least sixty (60) days prior to the expiration of the then current Term. Notwithstanding the foregoing, either party may terminate this Agreement if the other party materially breaches this Agreement and fails to cure such breach within thirty (30) days after receipt of written notice from the non-breaching party. Client acknowledges and agrees, however, that any termination of this Agreement shall not affect Client’s obligation to pay the Commissions (as defined below) set forth in Section 6 of this Agreement.
3. Wasserman’s Duties. Wasserman shall be responsible for negotiating, executing and managing Marketing Contracts, Basketball Contracts and Commercial Opportunities that arise during the Term. At Client’s request, Wasserman will also assist Client in coordinating appearances, merchandising activities and other commercial ventures. In addition, Wasserman will advise Client concerning general business issues, public relations and other matters pertaining to Client’s professional activities and career. Wasserman shall, subject to Client’s availability, use all reasonable efforts to procure employment for the Client with respect to the field or fields of endeavour specified in this Agreement in which Wasserman is representing Client.
4. Exclusivity of Representation. During the Term, Client agrees not to engage any other person, corporation or other entity to act on Client’s behalf in any manner which may conflict with Wasserman’s representation of Client as set forth in this Agreement. Client agrees that Wasserman shall be its sole and exclusive person and entity to act on Client’s behalf in regard to the services stated in this Agreement. Client also

*acknowledges and agrees that should Client enter into a Marketing Contract, Basketball Contract or Commercial Opportunity directly or indirectly through the services of any other person or entity, such action shall be deemed a material breach of this Agreement. Client agrees to refer to Wasserman all verbal or written inquiries, communications and offers for Client's services, including but not limited to Commercial Opportunities, Basketball Contracts and Marketing Contracts, that arise during the Term.*

[...]

6. *Compensation. As compensation for Wasserman's services described herein, Client agrees to pay Wasserman the following commissions on the Gross Value (as defined below) received by Client and/or any of Client's affiliates attributable to all Marketing Contracts, Basketball Contracts and Commercial Opportunities that are developed, negotiated and/or entered into during the Term, including any amendments, modification, renewals and/or extensions thereto executed after the termination of this Agreement (the "**Commissions**"):*
  - a. *Fifteen percent (15%) of the Gross Value received by Client pursuant to any Marketing Contracts or Commercial Opportunities.*
  - b. *Ten percent (10%) of the Gross Value received by Client pursuant to any Basketball Contracts that are entered into during the Term; provided however, Client and Wasserman acknowledge and agree that Wasserman may be paid such Commissions directly by the contracting team, league, or club and Client shall not be liable for such Commissions in the event Wasserman receives it directly from the contracting team, league, or club. Client acknowledges and agrees that Wasserman may partner with foreign agents to secure Basketball Contracts. Notwithstanding the foregoing or anything to the contrary contained herein, in the event Wasserman assists Client with entering into a Basketball Contract covering the 2019-20 season, and Client is required to pay (or a team is required to pay on behalf of Client) compensation to Client's former agent pursuant to such Basketball Contract for the 2019-20 season, Client shall pay Wasserman five percent (5%) of the Gross Value received by Client pursuant to such Basketball Contract for the 2019-20 season (the "**Reduced Commission**"). Client specifically acknowledges and agrees that the Reduced Commission is only applicable to the 2019-20 season, and only if Client (or a team on behalf of Client) is required to pay compensation to Client's former agent in connection with the 2019-20 season.*
  - c. *If within six (6) months after the effective date of the expiration or earlier termination of this Agreement, Client enters into any Marketing Contracts or Commercial Opportunities which produce compensation to Client, with any person or party that Wasserman had discussions or negotiations with concerning Client during the six (6) months preceding the expiration or earlier termination of this Agreement, as the case may be, then Wasserman shall be entitled to receive Commissions pursuant to this Section 5, as if Client had entered into such Marketing Contract or Commercial Opportunity during the Term of this Agreement.*

- d. For the purpose of this Agreement, “**Gross Value**” shall mean all pre-tax gross compensation (whether securities, royalties, base and/or incentive/bonus consideration of any kind) due, earned or received, directly or indirectly, by Client or by any person, corporation or other entity on Client’s behalf (regardless of whether such income is paid during the Term of this Agreement or thereafter). **All apparel and/or products provided for Client’s professional use shall be excluded from Gross Value.** Further, Wasserman shall not be entitled to any Commission on any award earned by Client as a pursue of prize pursuant to Client’s performance in an event, and/or paid by an event promoter, which is not otherwise negotiated by Wasserman.
- e. The Commissions set forth above shall extend to all cash compensation that Client may receive from all judgments, awards, settlements, damages, and proceeds relating to any suits, claims, actions and proceedings arising out of the breach of any Basketball Contracts, Marketing Contracts or Commercial Opportunities.

[...]

13. Governing law/Arbitration of Disputes. This Agreement shall be construed, interpreted, governed, and enforced in accordance with the laws of the State of California, without regard to any conflict of laws principles. The parties will attempt in good faith to resolve any controversy arising out of this Agreement. If these discussions are unsuccessful, and any unresolved dispute, claim or controversy arising out of or relating to this Agreement or the breach, termination, enforcement, interpretation or validity thereof, including the determination of the scope or applicability of this agreement to arbitrate, shall be determined by arbitration in Los Angeles, California, before one arbitrator. [...]

*For Arbitrations with respect to agency relationships subject to the jurisdiction of the California Labor Commissioner: Per Section 1700.45 of the California Labor Code, in arbitrations between Wasserman and Client, if applicable, reasonable written notice shall be given by Wasserman and/or Client to the Labor Commissioner of the State of California of the time and place of any arbitration hearing. The Labor Commissioner of the State of California or his or her authorized representative has the right to attend all arbitration hearings. Except as otherwise specified herein, arbitrations shall not be public.*

*Notwithstanding the foregoing, any disputes between Wasserman and Client related to fees owed by Client to Wasserman pursuant to any Basketball Contracts shall be submitted to the Basketball Arbitral Tribunal (BAT) in Geneva, Switzerland and shall be resolved in accordance with the BAT Arbitration Rules by a single arbitrator appointed by the BAT President. The seat of the arbitration shall be Geneva, Switzerland. The arbitration shall be governed by Chapter 12 of the Swiss Act on Private International Law, irrespective of the parties’ domicile. The language of the arbitration shall be English. The arbitrator shall decide the dispute ex aequo et bono. The prevailing party shall be entitled to recover all costs, fees, and attorneys’ fees from the other party in any such dispute.*

[...]

18. *Notice.* Notices to the parties shall be sent via electronic mail, express courier, overnight mail or U.S. Certified Mail to the addresses of the respective parties set forth below and shall be deemed communicated three business days after mailing. [...]"

6. On 7 July 2019, through the Agent's representation, the Player and the Greek club Olympiacos SFP BSA ("**BC Olympiacos**") entered into a written agreement entitled "CONTRACT FOR THE PROVISION OF ATHELETC SERVICES" ("**Olympiacos Contract**") for the 2019-2020 and 2020-2021 seasons. After the end of the 2019-2020 season, BC Olympiacos exercised its option to terminate the contract.<sup>2</sup>
7. On 9 July 2020, again through the Agent's representation, the Player and the Lithuanian club Vsl "Zalgirio krepšinio centras" ("**BC Zalgirio**") entered into a written agreement entitled "AGREEMENT ON SPORTS ACTIVITIES No. 20-21/04" ("**Zalgirio Contract**") for the 2020-2021 and 2021-2022 seasons.<sup>3</sup>
8. On the same day, the Player and BC Zalgirio entered into another written agreement entitled "ANNEX 1 TO AGREEMENT ON SPORTS ACTIVITIES NO. 20-21/04" ("**Zalgirio Contract Annex 1**")<sup>4</sup>.
9. The Zalgirio Contract Annex 1 mentions the Agent as the Player's agent and provides that the Player's salary of USD 450,000 for the 2020-2021 season is to be paid by 10 monthly instalments due on the 15<sup>th</sup> day of each month from September 2020 to June 2021. It also provides for the Player's and the BC Zalgirio's respective option to terminate the Zalgirio Contract unilaterally by 5 July 2021.
10. Also on 9 July 2020, the Agent and BC Zalgirio entered into a written agreement entitled "CONTRACT BETWEEN CLUB AND WASSERMAN MEDIA GROUP LLC" ("**Zalgirio-Wasserman Agreement**") in relation to agency services provided by the Agent to BC

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<sup>2</sup> Agent's submissions of 14 April 2023, Exhibit C17 (as redacted by the Agent); Answer, para. 4.

<sup>3</sup> RfA, Exhibit C2.

<sup>4</sup> RfA, Exhibit C2.

Zalgirio in connection with the Player.<sup>5</sup>

11. Between 8 and 26 June 2021, [Agent's former employee], who was working for the Agent at the time, exchanged the following correspondence over WhatsApp with the Player:<sup>6</sup>

8 June 2021

"[Agent's former employee]:

*I spoke to the club about your contract for the next season. When is good time to discuss with you?*

*The Player: We can talk about tit [sic] now"*

24 – 26 June 2021

"[Agent's former employee]:

*Nothing new to report for now Augustine. I still think beginning of July is when it should start up. But just wanted to check in with you that's all. Maybe if you like we can catch up with a call this weekend*

*The Player: Okay no worries here. I'll be waiting to see whatever pops up.*

*Either way, not going back to Zalgiris. I'm expecting a new experience.*

[Agent's former employee]:

*Agreeed. [sic] Ok [emoji]*

*Just let me know when your [sic] free and will check in today with you Augustine"*

12. On 3 and 14 July 2021 respectively, the Player and BC Zalgirio entered into two written agreements to amend clause 5 of the Zalgirio Contract Annex 1, such that, *inter alia*, the deadline for BC Zalgirio to issue its notice of termination was extended from 5 July 2021 to 15 July 2021 at first, and then further to 25 July 2021.<sup>7</sup>

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<sup>5</sup> RfA, Exhibit C2.

<sup>6</sup> Answer, Evidence 01.

<sup>7</sup> RfA, Exhibits C3 and C4.

13. By a notice dated 23 July 2021, BC Zalgirio issued a notice of termination of the Zalgirio Contract by exercising its option, with 25 July 2021 as the deemed date of termination.<sup>8</sup>
14. On 23 July 2021, the Player and BC Zalgirio entered into a written agreement entitled “*AGREEMENT OF TERMINATION OF THE 09-07-2020 AGREEMENT ON SPORTS ACTIVITIES NO. 20-21/04*” confirming the said termination of the Zalgirio Contract.<sup>9</sup>
15. In August 2021, [Agent’s former employee] ended his employment with the Agent and started his new position as an Associate General Manager of the Detroit Pistons.<sup>10</sup>
16. On 24 August 2021, through the Agent’s representation, the Player and FC Bayern München Basketball GmbH (“**FC Bayern**”) entered into an employment contract for the 2021-2022 season (“**Bayern Contract**”).<sup>11</sup>
17. On 19 March 2022, the Player sent the following message via WhatsApp to [Agent’s employee 1]:<sup>12</sup>

*“Good afternoon-*

*I personally, want to thank you, [Agent’s former employee], and the rest of Wasserman for everything you guys have done for me thus far. I have decided to part ways with Wasserman, and being that you are friends with \_\_\_\_\_, I hope you can respect that and know there are no ill feelings to you or the agency.*

*Again, I thank you all for everything you guys have done, but I firmly believe this is the next best step for me and my family moving forward.*

*I really feel like this might be the step I need!!”*

18. On 22 March 2022, the Agent replied to the Player’s foregoing message by the following email, attaching with its invoice no. 031466 dated 21 March 2022:<sup>13</sup>

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<sup>8</sup> RfA, Exhibit C5.

<sup>9</sup> RfA, Exhibit C6.

<sup>10</sup> RfA, Exhibit C12 ([Agent’s former employee]’s witness statement, para. 4); Answer, Evidence 02.

<sup>11</sup> Reply, para. 41.

<sup>12</sup> RfA, Exhibit C7.

<sup>13</sup> RfA, Exhibit C8.

*"I am an attorney at Wasserman Media Group, LLC ("Wasserman"). As you are aware, on May 4, 2019, you entered into a representation agreement with Wasserman (the "Wasserman Agreement"), whereby you engaged Wasserman to, pursuant to Section 1 of the Wasserman Agreement, act as your exclusive worldwide representative with respect to negotiating, executing, and managing all Basketball Contracts (as defined in the Wasserman Agreement), in exchange for the Commissions (as defined in the Wasserman Agreement) set forth in Section 6 of the Wasserman Agreement.*

*We are in receipt of your termination notice, sent via text message to [Agent's employee 1] on March 19, 2022 (the "Termination Notice"). Please note that, pursuant to the "Notice" procedure contained in Section 18 of the Wasserman Agreement, a text message is not a valid form of notice under the Wasserman Agreement. Therefore, we are notifying you that the Wasserman Agreement remains in effect. In addition, in the event you validly terminate the Wasserman Agreement in the future, please note that, pursuant to Section 2 of the Wasserman Agreement, the Wasserman Agreement will remain in effect until May 3, 2023 (the "Expiration Date").*

*Furthermore, you are required to immediately pay Wasserman a Commission, in the amount of Twenty-Two Thousand Five Hundred Dollars (\$22,500) net, with respect to your contract with Vsl "Zalgirio krepšinio centras" for the 2020-2021 season (the "Zalgirio Contract Commission"), as memorialized in invoice # 031466, dated March 21, 2022 (the "Invoice"). For your reference, the Invoice is attached hereto as Exhibit A.*

*With due consideration given to the foregoing, we hereby request: (i) you provide Wasserman with copies of all Basketball Contracts you enter into, or have entered into, from the date of the Termination Notice until the Expiration Date; (ii) you continue to pay Wasserman all Commissions on all Basketball Contracts you enter into, or have entered into, during the Term (as defined in the Wasserman Agreement) of the Wasserman Agreement, as you are contractually required to do so; and (iii) you immediately pay Wasserman the Zalgirio Contract Commission.*

*We thank you for your cooperation. However, in the event Wasserman is not compensated any required Commissions in a timely fashion, including, but not limited to, the Zalgirio Contract Commission, we will exercise all rights to collect such amounts, including but not limited to filing a claim with the Basketball Arbitral Tribunal, where you will be responsible for paying all Commissions, in addition to late payment penalties, interest, and any costs incurred by Wasserman in bring such an action.*

*Nothing in this letter shall be interpreted as a waiver or relinquishment of any right or remedy possessed by Wasserman, all of which are expressly reserved."*

19. On 22 March 2022, the Player replied to the Agent's above email, saying:<sup>14</sup>

*"Is Wasserman not the agency that represents me at the moment? I am confused."*

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<sup>14</sup> RfA, Exhibit C9.

20. The Agent responded on the same day as follows:<sup>15</sup>

*“Someone claiming to be you sent an attempted termination text to [Agent’s employee 1], asking to terminate your relationship with Wasserman. Can you please confirm that was you? If that was not in fact you, we of course very much still want to represent you. Feel free to give me a call if you’d like to discuss, \_\_\_\_\_. Thank you.”*

21. A few days later, on 25 March 2022, the Player sent the Agent the following letter:<sup>16</sup>

*“It is with sincere regret that I must inform you that I have decided to end our business relationship and terminate our “Wasserman Representation Agreement”, signed on the 4th of May 2019, and I no longer wish to retain you as my agent. At this time I feel it is in my best interest to go in a different direction.*

*I would also like to explain my reasons for this termination. I strongly believe that relationship between the Player and the Agent (representative) is based on mutual trust, confidence and personal relationship, built over the years. I have that kind of the relationship with [Agent’s former employee] and that was the only reason for signing Representation Agreement with Wasserman, having in mind that [Agent’s former employee] was part of your company as an agent.*

*Unfortunately, [Agent’s former employee] has officially left the agent business and is not anymore part of your company and is not any more an agent at all, there are not any ties between me and your company anymore. Also [Agent’s former employee] is the person who signed our Representation Agreement and as I said above, he is not an agent, nor part of your company any longer. I believe that me personally need to choose who is my agent (as I did with [Agent’s former employee] back in 2019, despite offers of many agents) and I don’t feel comfortable to be represented with somebody from your Company whom I didn’t choose and signed [sic] with. I hope you understand my point and would also like to underline that I was extremely surprised that I have not been officially informed by Wasserman about [Agent’s former employee]’s leaving the agents business and leaving the company. I found out in the official press release by the NBA team Detroit Pistons that [Agent’s former employee] is hired as Pistons’ new Assistant General Manager and is not part of Wasserman any longer, that he left agent business. Since he is the person who signed the Wasserman Representation Agreement and my agent, you supposed to officially inform me about the change well ahead of time.*

*Since that got me very unprepared, I had no other solution but to conclude my contract for season 2021/22 with your agent [Agent’s employee 1] and I am absolutely disappointed with the job he did. My Zalgiris contract had exclusive team option for season 2021/2022 extremely late in the summer, by July 25<sup>th</sup>, it was very badly handled summer regarding my contract, the team the option and I had no other solution that late in the summer, so with [Agent’s employee 1] I got stuck in Bayern Munich for season 2021/22 for likely the lowest money deal ever in my professional basketball career and that was a huge disappointment*

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<sup>15</sup> RfA, Exhibit C10.

<sup>16</sup> RfA, Exhibit C11.

for me.

*On top of that, your agent [Agent's employee 1] confirmed that deal with Bayern Munich for season 2021/2022 is absolutely terrible and confirmed on several occasions that Wasserman will not ask for any money from me for my Zalgiris 2020/21 contract, because of that really bad job done with Bayern Munich deal. Since I signed with Zalgiris contract for season 2020/2021 in summer 2020, it passed more than 18 months and I have never received any official information or any kind of notice from you regarding that payment. All of the sudden, after 18 months, despite promises by your agent [Agent's employee 1], despite I never heard from you any demand about the money, now all of the sudden you ask for it, which is also totally unacceptable.*

*Everything what [sic] I explained is the reason that I terminated our "Wasserman Representation Agreement", signed on the 4th of May 2019, based on article 2 (material breach of the agreement). Having in mind, that it's impossible to cure such a breach, because cure will mean returning my agent and person who signed the Representation Agreement [Agent's former employee] to your company, I do this termination with immediate effect, as of today 25<sup>th</sup> of March 2022."*

22. On 6 July 2022, the Agent became aware that the Player had signed again with FC Bayern, extending his term by a year until the end of the 2022-2023 season.<sup>17</sup>
23. Against the above background, it is the Agent's case herein that the Player prematurely terminated the Agreement on 24 July 2021. In particular, the Agent contended that the Player had no just cause for terminating the Agreement and is therefore liable to pay it commissions (i) for the 2020-2021 season in respect of the Zalgirio Contract; and (ii) for the 2022-2023 season in respect of the Player's new contract with FC Bayern.
24. On the other hand, it is the Player's case that he has lawfully terminated the Agreement on account of the Agent's material breach thereof by, first, failing to inform him of [Agent's former employee]'s leaving the Agent, and then by failing to cure such breach. On this basis, the Player therefore contended that the Agent has lost the right to claim commission for the 2022-2023 season. As regards the commission for the 2020-2021 season in respect of the Zalgirio Contract, the Player submitted that the Agent has waived its right to claim that commission and that such claim is time-barred under the *Verwirkung* principle.

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<sup>17</sup> RfA, para. 22; RfA, Exhibit C13.

25. Accordingly, the issues relate to whether the Agreement was validly terminated for a just cause, and whether the Agent is entitled to its claimed commissions.

### 3.2. The Proceedings before the BAT

26. On 25 November 2022, the Agent filed its Request for Arbitration (“**RfA**”) in accordance with the BAT Rules and duly paid the non-reimbursable handling fee of EUR 4,000.00 on 14 January 2022.

27. On 13 December 2022, the BAT informed the Parties that Mr. Benny Lo had been appointed as the Arbitrator in this case, invited the Player to file his Answer to the RfA by 9 January 2023, and fixed the advance on costs to be paid by the Parties by 23 December 2022 as follows:

<i>“Claimant (Wasserman Media Group, LLC)</i>	<i>EUR 3,500.00</i>
<i>Respondent (Mr. Augustine Rubit)</i>	<i>EUR 3,500.00”</i>

28. The Agent’s share of the advance on costs, in the amount of EUR 3,500.00, had earlier been paid on 20 June 2022.

29. After the BAT had previously extended the time limit upon the Player’s request, the Player filed his Answer (“**Answer**”) on 25 January 2023.

30. On 26 January 2023, the BAT informed the Parties that the Player had failed to pay his share of the advance on costs, and in view of such failure, invited the Agent to substitute for the Player’s share of the advance on costs by 6 February 2023.

31. On 27 January 2023, the BAT received the Player’s share of the advance on costs paid by the Agent in the amount of EUR 3,500.00.

32. On 7 February 2023, the BAT invited the Agent to file its reply to the Player’s Answer by 21 February 2023.

33. After the BAT had extended the said time limit upon the Agent's request, the Agent filed its Reply to the Player's Answer ("**Reply**") on 24 February 2023.
34. On 1 March 2023, the BAT invited the Player to file his Rejoinder to the Agent's Reply by 15 March 2023.
35. On 15 March 2023, the Player filed his Rejoinder to the Agent's Reply ("**Rejoinder**").
36. On 29 March 2023, the BAT invited the Parties to provide their answers to various questions by 12 April 2023 ("**Arbitrator's Questions**"), and requested them to pay an additional advance on costs by 12 April 2023 as follows:
- |   |                    |
|---|--------------------|
| <i>"Claimant (Wasserman Media Group, LLC)</i> | <i>EUR 750.00</i>  |
| <i>Respondent (Mr. Augustine Rubit)</i>       | <i>EUR 750.00"</i> |
37. On 4 April 2023, the BAT received an additional advance on costs paid by the Agent in the amount of EUR 750.00.
38. On 12 April 2023, the Player filed his reply to the Arbitrator's Questions.
39. After the BAT had extended the relevant time limit upon the Agent's request, the Agent filed its reply to the Arbitrator's Questions on 14 April 2023. In so doing, the Agent requested that its newly filed Exhibit C-17 be reviewed by the Arbitrator only and not to be shared with the Player for confidentiality.
40. On 18 April 2023, the BAT informed the Parties that the Player had failed to pay his share of the additional advance on costs, and in view of such failure, invited the Agent to substitute for the Player's share of the additional advance on costs by 28 April 2023.
41. On 19 April 2023, the BAT denied the Agent's request that Exhibit C-17 be considered unilaterally by the Arbitrator without making it known to the Player. The BAT invited the Agent, if it so wished, to submit a redacted version of Exhibit C-17 to remove any confidential information which it did not wish to reveal to the Player by 21 April 2023,

with a caveat that the redacted information would not be considered by the Arbitrator.

42. On 20 April 2023, the Agent submitted a redacted version of its Exhibit C-17.
43. On 26 April 2023, the BAT received the Player's share of the additional advance on costs, paid by the Agent, in the amount of EUR 750.00.
44. On 2 May 2023, the BAT declared that the exchange of submissions was completed and directed the Parties to file their respective costs submissions by 9 May 2023, including a detailed account of their costs and any supporting documentation in relation thereto.
45. On 4 May 2023, the BAT re-opened the proceedings and specifically invited the Agent to file its reply to the Player's submissions of 12 April 2023 under "*RESPONDENT'S ANSWER TO QUESTION NO. 5*" by 11 May 2023, with liberty for the Player to file a response thereto within 7 days thereafter.
46. On 11 May 2023, the Agent filed its submissions in reply to the Player's submissions of 12 April 2023 under "*RESPONDENT'S ANSWER TO QUESTION NO. 5*". The Player filed his reply submissions thereto on 18 May 2023.
47. On 18 May 2023, the Agent and the Player filed their respective costs submissions.
48. On 24 July 2023, the BAT informed the Parties that the proceedings have been conclusively closed.

#### **4. The Positions of the Parties**

49. The Arbitrator has fully considered all of the Parties' arguments as set out in their written submissions. To keep the length of this Award manageable, only the key points of the Parties' cases are highlighted below.

##### **4.1. The Agent's Position**

50. The Agent submitted that the Player's purported termination of the Agreement, whether by his WhatsApp of 19 March 2022 (see para. 17 above) or his letter of 25 March 2022 (see para. 21 above) was done without just cause. Nor did the Player warn the Agent about any breaches by written notice under clause 2 of the Agreement. In any case, the Agent submitted that a text message is not a valid form of notice by virtue of clause 18 of the Agreement and the Player thus failed to formally terminate the Agreement.<sup>18</sup>
51. In the Player's letter of 25 March 2022 (see para. 21 above), the Player gave three reasons for terminating the Agreement pursuant to clause 2 of the contract: (i) the departure of the [Agent's former employee]; (ii) the termination of the Zalgiris Contract and the signing of the Bayern Contract; and (iii) promises made by [Agent's employee 1]. The Agent submitted that none of those reasons gives rise to a just cause for termination.
52. Starting with [Agent's former employee]'s departure, the Agent submitted that the Agreement does not specify [Agent's former employee] as the Player's agent, nor did the Parties ever agree that [Agent's former employee] would be the Player's exclusive agent. The Agent submitted that [Agent's former employee]'s departure has not affected its performance of the Agreement in any way. In reply to the Player's allegation that [Agent's former employee] left the Agent without prior notice to the Player, the Agent submitted that [Agent's former employee] did personally inform the Player about his departure in August or September 2021 and sought to substantiate this allegation through [Agent's former employee]'s signed witness statement dated 11 August 2022.<sup>19</sup>
53. As to the Zalgirio Contract, the Agent submitted that it was procured by the [Agent's employee 2] and the Player had not made any comments about it until his letter of 25 March 2022 (see para. 21 above). The Player accepted its terms and signed it freely and never expressed any dissatisfaction. The Agent added that, if the Player was not satisfied with the Zalgiris Contract, he could have terminated the Agreement before 3

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<sup>18</sup> RfA, paras. 9, 16.

<sup>19</sup> RfA, para. 17; RfA, Exhibit C12.

May 2021 under clause 2 of the Agreement, but he did not do so.<sup>20</sup>

54. As for the Bayern Contract, the Agent submitted that it was procured by [Agent's former employee] and again the Player signed it freely after being informed of the market situation. Given FC Bayern's past and current performance, the Agent submitted it was and is a great environment for any player from the sporting perspective. The Agent added that the Player chose to sign again with FC Bayern for two more seasons (i.e. 2022-2023 and 2023-2024 seasons) on financial terms that are very similar to those presented by the Agent during the 2021-2022 season. Hence, the Agent submitted that the Bayern Contract for the 2021-2022 season could not be as bad as the Player asserts.<sup>21</sup>
55. The Agent further submitted that its agent [Agent's employee 1] did not tell the Player that "*deal with Bayern Munich for season 2021-22 is absolutely terrible*", nor did [Agent's employee 1] promise the Player that "*Wasserman will not ask for any money from me for my Zalgiris 2020/21 contract, because of that really bad job done with Bayer Munich deal*". The Agent relied on [Agent's employee 1]'s signed witness statement dated 11 July 2022. The Agent added that, even if the Player was not satisfied with the financial terms under the Bayern Contract, that cannot constitute a material breach of the Agreement on the Agent's part.<sup>22</sup>
56. As regards the commission for the 2020-2021 season in respect of the Zalgirio Contract, the Agent submitted that it is entitled to, but however agreed not to, charge that commission on the condition that the Player should remain loyal to the Agent for the new 2-year term until 4 May 2023 and would not terminate the Agreement prematurely without just cause. Therefore, once the Player terminated the Agreement, the Agent is entitled to and does claim such commission, which amounts to USD 22,500.00, being

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<sup>20</sup> RfA, paras. 17-18.

<sup>21</sup> RfA, paras. 17-18.

<sup>22</sup> RfA, para. 19; RfA, Exhibit C14.

5% of the Player's salary under the Zalgirio Contract for the 2020-2021 season.<sup>23</sup>

57. As the Player's purported termination of the Agreement was without just cause as aforesaid, the Agent submitted that the Player breached the exclusivity provisions in clause 4 of the Agreement by signing with FC Bayern for the 2022-2023 season (and possibly even longer) without informing the Agent of it. The Agent submitted that since the Player unlawfully terminated the Agreement, he is obliged to pay 10% of the gross value he received under his contract with FC Bayern for the 2022-2023 season.<sup>24</sup>
58. On quantum of the claim, the Agent proceeded on the assumption that the Player earns USD 400,000.00 under his contract with FC Bayern for the 2022-2023 season, and also requested the BAT to order the Player to disclose that contract and his bank statements showing payments he received from FC Bayern to date.<sup>25</sup>
59. In its Reply to the Player's Answer, the Agent added, *inter alia*, the following:
- (a) The Player's message of 19 March 2022 (see para. 17 above) was not just conveying his "*intention to terminate*" the Agreement as he alleges, but should be considered as the actual termination of the Agreement;<sup>26</sup>
- (b) In response to the Player's argument that the 2-year automatic renewal provision violates the FIBA Internal Regulations, the Agent submitted that the Player chose not to exercise his option under clause 2 of the Agreement to terminate by sending a written notice at least 60 days prior to the expiration. Citing BAT 0901/16, the Agent contended that "*a two-year term of a player-agent contract is lawful*" under the BAT jurisprudence, and "*any violations of FIBA Internal Regulations do not per se invalidate the contractual agreements between the Parties*";<sup>27</sup>

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<sup>23</sup> RfA, para. 20; Reply, para. 33.

<sup>24</sup> RfA, paras. 22-23.

<sup>25</sup> RfA, paras. 24-26.

<sup>26</sup> Reply, para. 38.

<sup>27</sup> Reply, paras. 46-47.

- (c) The Player has failed to specify which of the Agent's duties under clause 3 of the Agreement was allegedly breached. The Player's mere "*dissatisfaction with the level/amount of negotiated salary (which has never been expressed to Wasserman), the change of agents within the agency, etc., certainly cannot be construed as a breach of the Agreement. A contractual breach is established if the conduct is contrary to the agreed contractual obligations or amounts to professional wrongdoing. In the case at issue none of these can be established*";<sup>28</sup>
- (d) It is contrary to the principle of *pacta sunt servanda* if "*any player who has a valid agency contract can terminate it if he feels dissatisfied with his agent's working methods and/or results even if accepted by a player – even if the agent is not in breach of any of the contractual provisions*";<sup>29</sup>
- (e) In reply to the Player's argument that he entered into the Agreement only because of [Agent's former employee] and therefore his departure from the Agent constitutes a just cause for termination, the Agent said this is irrelevant and unacceptable. This is because (i) the Player entered into the Agreement with the Agent who was represented by [Agent's former employee]; (ii) the Payer "*has not expressed in any way (written / oral) that he is entering the Agreement solely because of [Agent's former employee]. Therefore, the Agreement cannot be interpreted as a [sic] inter partes agreement between the Player and [Agent's former employee]*"; and (iii) "*the Player's potential conditions / reservations in relation to the Agreement should have been brought to the Wasserman's attention prior to or at the time of the conclusion of the Agreement*";<sup>30</sup>
- (f) Further, the Agent "*has not been obligated to notify the Player about departure of its employee (e.g. as in the case of [Agent's former employee])*". But in any event, [Agent's former employee] did inform the Player personally about his departure

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<sup>28</sup> Reply, paras. 4, 21.

<sup>29</sup> Reply, para. 9.

<sup>30</sup> Reply, paras. 20-24.

even before its official announcement. The Agent relied on a supplemental witness statement of [Agent's former employee] dated 23 February 2023. The Agent also referred to the Player's WhatsApp message to [Agent's former employee] dated 29 August 2021, exhibited by the Player<sup>31</sup>, where the Player asked, *inter alia*, "Hey how's things your way? I'm sure you started working etc";<sup>32</sup>

- (g) In response to the Player's allegation that the Agent could have negotiated better terms and/or handled the termination of the Zalgirio Contract differently, the Agent emphasized that the Player was not a young, inexperienced or naïve player but had played in Europe for nine years since 2014 up to the summer of 2021. The Agent therefore submitted that the Player had "*a good understanding of the basketball market. He can in no way be considered a novice. He can be considered as a person who is aware of his position, his rights and his possibilities*";<sup>33</sup>
- (h) The Agent further stressed that (i) "*all his decisions were taken in agreement with*" with Player; (ii) "*it is the Player who decides whether to enter into a contractual relationship with a basketball club, with which basketball club and under what conditions*"; (iii) the Agent was not authorised to conclude any contracts, make any decisions, or sign any binding document in the name and on behalf of the Player; and (iv) although an agent commonly makes some suggestions to a player about received offers, the player is not bound to accept such offers and may conclude a contract with any club of his choice (even disregarding the agent's advice);<sup>34</sup>
- (i) The Agent contended that it fulfilled all its obligations through its agents by taking care of the Player and procuring contracts with BC Zalgirio and FC Bayern. Thereafter, it was the Player who confirmed the offers and decided to enter into contracts with them. Although the Agent's agents made some suggestions to the Player about clubs' offers, he was not forced to enter into any of these contracts or

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<sup>31</sup> Answer, Evidence 06.

<sup>32</sup> Reply, paras. 28-31; Reply, Exhibit C16.

<sup>33</sup> Reply, paras. 6-7.

<sup>34</sup> Reply, paras. 8; 25.

their amendments. Although “*looking back everyone would probably have done things at least a little bit different [...] this does not mean that the time the advice given and services provided to the Respondent were not the best possible*”;<sup>35</sup>

- (j) Although the termination of the Zalgirio Contract was postponed, [Agent’s former employee] was still putting the Player on the free agent market, knowing that they would have a good chance of signing with FC Bayern. As a result, the Bayern Contract was indeed procured eventually for the 2021-2022 season;<sup>36</sup>
- (k) Whilst the Agent accepted that the Bayern Contract for the 2021-2022 season was financially lower than the previous Zalgirio Contract, the Agent pointed out that the Player told [Agent’s employee 1] that he understood the situation because his 2020-2021 season with BC Zalgirio had not been good, as evidenced by his statistics in comparison to his average statistics. The Player thus agreed to sign the Bayern Contract freely after knowing the market situation. Moreover, given his decision to sign with FC Bayern for the 2022-2023 and 2023-2024 seasons, “*it can be reasonably assumed that he likes the environment and feels good at the club*”;<sup>37</sup>
- (l) The Player’s defence against the Agent’s claim for commission for the 2020/2021 season in respect of the Zalgirio Contract based on *Verwirkung* is inapplicable on the facts: (i) the Parties agreed that the Agent would not charge that commission so long as the Player remained loyal to the Agent; and (ii) the commission became due at the moment of the Player’s breach of loyalty by early termination of the Agreement; and therefore (iii) only “*less than 6 months had passed between the unjustified early termination and the filing of the Request for Arbitration*”;<sup>38</sup>
- (m) The Agent further submitted that its claim for commission for the 2022-2023 season is also based on clause 6(c) of the Agreement, as [Agent’s employee 1] had

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<sup>35</sup> Reply, paras. 26-27.

<sup>36</sup> Reply, para. 42.

<sup>37</sup> Reply, paras. 34-35.

<sup>38</sup> Reply, para. 32.

presented to the Player all options available on the EuroLeague market at the time for the 2022-2023 season during a meeting in Barcelona in February 2022. These include an informal offer at the range of USD 350,000.00 to USD 400,000.00 per year from FC Bayern. But the Player refused to renew with FC Bayern unless the offer was much bigger.<sup>39</sup>

60. In the RfA, the Agent sought the following relief:

“a) *The amount of:*

- *USD 22.500,00 with interests of 5% per annum running from 23 March 2022 until payment amounting to USD 761,30 at the time of filing this Request for Arbitration – for the 2020/2021 season;*
- *USD 40.000,00 representing 10% of the total value of the Respondent’s Contract entered into with FC Bayern München Basketball GmbH on [sic] for 2022/23 season with interests of 5% per annum running from the first day after the filing of this request for Arbitration.*

b) *All costs related to the BAT proceedings (non-reimbursable handling fee, advance on costs, etc.);*

c) *Legal fees and expenses in relation to BAT proceedings.”*

#### **4.2. The Player’s Position**

61. The Player first disputed the BAT’s jurisdiction over the claims brought by the Agent. This jurisdictional challenge will be elaborated and addressed in Section 5 below.

62. On the merits, it is the Player’s case that he had a special relationship with [Agent’s former employee] who personally gained his trust and confidence and was the only signing party of the Agreement as an agent. The Player submitted that it was [Agent’s former employee] who convinced him to terminate his previous agency contract with the BDA and to sign the Agreement. The Player submitted that he signed the Agreement not because of the Agent, but solely because of [Agent’s former employee]

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<sup>39</sup> Reply, paras. 15, 36-37.

and their relation. In support of this argument, the Player specifically referred to [Agent's former employee]'s following WhatsApp message on 4 March 2022:<sup>40</sup>

*"I think it's really going to come down to the person for you and not the agency. For example it's the same thing your [sic] going though now.... It's important that you choose the person and not the agency. I'm happy to give you my thoughts on the people at youfirst, octagon and others...."*

63. The Player submitted that the principal-agent relationship is predicated on trust, good faith and confidence, and if that trust is compromised, the principal can terminate the contract immediately: Article 404 of the Swiss Code of Obligation.<sup>41</sup>
64. The Player accepted that clause 18 of the Agreement requires a termination notice to be way of express courier. However, the Player submitted that his WhatsApp message of 19 March 2022 (see para. 17 above) was merely conveying his intention to terminate the Agreement, and he did not actually and formally terminate it until he sent his letter dated 25 March 2022 (see para. 21 above). The Player submitted that he decided to terminate the Agreement with the Agent because he signed it with [Agent's former employee] who left the Agent and was no longer a party with whom he signed the Agreement.<sup>42</sup>
65. As regards the 2-year automatic renewal provision in the Agreement, the Player submitted that it is against the FIBA Internal Regulations.<sup>43</sup> Later in his Rejoinder at para. 34, the Player confirmed that he will not pursue this line of his defence anymore because it is "*not that important for this BAT procedure*".
66. In relation to the Zalgiris Contract, the Player submitted, *inter alia*, that:<sup>44</sup>
- (a) The Player did express his dissatisfaction with the Zalgirio Contract and its annexes,

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<sup>40</sup> Answer, paras. 2-3, 18, 21, 40; Answer, Evidence 09.

<sup>41</sup> Answer, para. 20.

<sup>42</sup> Answer, paras. 10, 32-33.

<sup>43</sup> Answer, para. 3.

<sup>44</sup> Answer, paras. 6, 8, 22-24.

which is evidenced in his WhatsApp message of 24 June 2021 (see para. 11 above);

- (b) The Player listened and trusted [Agent's former employee]'s advice (i) not to use his buy-out option under the Zalgirio Contract which was valid until 15 July 2021; and (ii) to sign the two amendment agreements to extend the deadline for BC Zalgirio to terminate the contract from 5 July 2021 to 25 July 2021;
- (c) As a result, BC Zalgirio unilaterally terminated the Zalgirio Contract on 23 July 2021, leaving the Player unemployed at a terrible time when the job market was almost completely closed. If the Agent had advised him properly, he would be a free agent much earlier in the market when many higher paid jobs were still available;
- (d) Despite the short window between 7 June and 15 July 2021 for the Player's buy-out option, the Agent did not provide any other offers or at least solutions for clubs to take a close look at him, or give him any reason to terminate the Zalgirio Contract. The Agent did not provide any reasons why the Player should use his option but advised him not to use it;
- (e) Given the Player's expressed intention not to stay with BC Zalgirio, there was no need to give it more time to decide whether to keep or release him. Eventually, the Player is the only person who suffered financially from the Agent's malpractice.

67. The Player submitted that the Agent does not have any right to charge any fee in respect of the Zalgirio Contract for essentially three reasons:

- (a) First, the [Agent's employee 1] has admitted to the Player that the Bayern Contract *"is terrible financially for the Respondent and then confirmed to him that Wasserman will not request 5% of the contract from the Zalgiris 2020/21 deal, just as they didn't request it during the entire 2020/21 season"*; <sup>45</sup>
- (b) Second, the Agent has given inconsistent explanations as to why it did not demand

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<sup>45</sup> Answer, paras. 8, 25, 37.

payment for such agent fee for and only did so after 20 months, which “*is enough to invoke the Verwirkung since it has passed significant amount of time where the Claimant has failed to exercise his right and since the Respondent had reasonable grounds to rely on the assumption that the creditor would not avail himself of his rights or claim in the future*”: BAT 0480/13;<sup>46</sup> and

(c) Third, clause 6(b) of the Agreement expressly provides that “*Client shall pay Wasserman five percent (5%) of the Gross Value received by Client pursuant to such Basketball Contract for the 2019-20 season (the “Reduced Commission”). Client specifically acknowledges and agrees that the Reduced Commission is only applicable to the 2019-20 season, and only if Client (or a team on behalf of Client) is required to pay compensation to Client’s former agent in connection with the 2019-20 season*”.<sup>47</sup>

68. The Player further submitted that, as stated in his letter of 25 March 2022 (see para. 21 above), he learnt about [Agent’s former employee]’s departure through the media on 20 August 2021. The Player denied that [Agent’s former employee] had ever told him about it. The Player also submitted that because he had travelled from Dallas to Munich on 21 August 2022 to start preparations for the new season with his new club, it was impossible for him to meet [Agent’s former employee] in person for dinner in Los Angeles as the Agent and [Agent’s former employee] allege.<sup>48</sup>

69. The Player submitted that the Agent has materially breached the Agreement when it failed to notify him about [Agent’s former employee]’s departure and then failed to cure that material breach. Therefore, since the Player terminated the Agreement on the ground of such material and incurable breach by the Agent, the Agent “*has lost the right to request agent fee for the contract for the 2022/23 season which was concluded in*

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<sup>46</sup> Answer, paras. 34-36.

<sup>47</sup> Answer, para. 38.

<sup>48</sup> Answer, para. 28.

July 2023<sup>49</sup>.

70. The Player also denied that [Agent's employee 1] has ever presented him the offer allegedly made by FC Bayern in the amount of USD 400,000.00 for the 2022-2023 season. The Player submitted that, by reason of the confidentiality clause in his contract with FC Bayern for the 2022-2023 season, he cannot disclose that contract or his bank statements, despite the Agent's request for their disclosure.<sup>50</sup>
71. In his Rejoinder, the Player added, *inter alia*, the following:
- (a) The fact that "*the person with whom Respondent signed Representation Agreement quit his job without anyone by Claimant's side officially informing the Respondent, represents clear material breach of the Representation Agreement. It's not just any agent that left the Claimant, it's the one because of whom and within whom the Respondent signed Representation Agreement, the one who signed it by the Claimant's side and the one who confirmed to Respondent he has the right to change the agency since "you chose the person (agent) and not the agency", as those were the words of [Agent's former employee]*";<sup>51</sup>
- (b) While the Player maintained his complaints about the Agent's handling with (i) the termination of the Zalgirio Contract and (ii) the financially bad Bayern Contract, "*all of that are not legal basis for the termination of the Representation Agreement and the Respondent never claimed so. The reason for termination is the material breach of the Representation Agreement by the Claimant's side, first by not officially notifying that [Agent's former employee], within whom Mr. Rubit signed Representation Agreement, is leaving his job and then, by not curing that material breach (which was obviously incurable since [Agent's former employee] took NBA job at Detroit Pistons and never returned as an agent to represent the*

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<sup>49</sup> Answer, paras. 27-30, 41, 44.

<sup>50</sup> Answer, paras. 43, 45.

<sup>51</sup> Rejoinder, para. 2.

*Respondent*”;<sup>52</sup>

- (c) In response to the Agent’s argument that the Player has not specified which of its duties under clause 3 has been allegedly breached, the Player submitted that “*not all the potential scenarios can be covered by the contracts, which is the one of the reasons why there are disputes*”;<sup>53</sup>
- (d) The Player denied the Agent’s case that he only had mental reservation but had not expressed that he signed the Agreement only because of [Agent’s former employee]. In support, the Player referred to (i) his WhatsApp correspondence with [Agent’s former employee]<sup>54</sup>; and (ii) the fact that [Agent’s employee 1] verbally told the Player that the Agent would not charge him for the 2020-2021 season because he stayed with the Agent after [Agent’s former employee] left it;<sup>55</sup>
- (e) As to the Agent’s argument that it agreed not to charge for the 2020-2021 season on condition of the Player’s loyalty, the Player queried (i) why this arrangement was not recorded in writing in the Agreement like what the Parties did under clause 6(b); and (ii) why the Agent needs to reward the Player for not terminating the Agreement if it was normal for the Player to bear the obligation to pay;<sup>56</sup>
- (f) The Player denied that there was any verbal offer made by FC Bayern for the 2022-2023 season. As he was focusing on his games, the Player denied that he had any discussion with or ever instructed [Agent’s employee 1] to explore the market for that season or to negotiate with FC Bayern.<sup>57</sup>

72. Accordingly, in his Answer, the Player requested the BAT to decide as follows:

“a) *To deny the Claimant’s request in entirety because of lack of BAT jurisdictions,*

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<sup>52</sup> Rejoinder, paras. 8-9, 19, 29.

<sup>53</sup> Rejoinder, para. 4.

<sup>54</sup> Answer, Evidence 09.

<sup>55</sup> Rejoinder, paras. 17-18.

<sup>56</sup> Rejoinder, paras. 5-7, 22.

<sup>57</sup> Rejoinder, paras. 25-26.

*condemning the Claimant to pay all the arbitration costs of this BAT procedure and to pay his legal fees and expenses and also, condemning Claimant to pay Respondent's legal fees and expenses in the amount of 7.500 EUR.*

*Subsidiarity [sic], in case that the Arbitrator decided that BAT has jurisdiction to decide and rule upon Claimant's claims against Respondent, then Respondent here respectfully requests BAT to issue decision as follows:*

- b) To deny all of the Claimant's requests in entirety because of the facts and evidence provided here, condemning the Claimant to pay all the arbitration costs of this BAT procedure and to pay his legal fees and expenses and also, condemning Claimant to pay Respondent's legal fees and expense in the amount of 7.500 EUR."*

73. In his Rejoinder, the Player requested the BAT to decide as follows:

- "a) To deny the Claimant's request in entirety because of lack of BAT jurisdictions, condemning the Claimant to pay all the arbitration costs of this BAT procedure and to pay his legal fees and expenses and also, condemning Claimant to pay Respondent's legal fees and expenses in the amount of 7.500 EUR.*

*Alternatively, in case that the Arbitrator decided that BAT has jurisdiction to decide and rule upon Claimant's claims against Respondent, then Respondent here respectfully requests BAT to issue decision as follows:*

- b) To deny all of the Claimant's requests in entirety because of the facts and evidence provided here, condemning the Claimant to pay all the arbitration costs of this BAT procedure and to pay his legal fees and expenses and also, condemning Claimant to pay Respondent's legal fees and expense in the amount of 7.500 EUR."*

## **5. The Jurisdiction of the BAT**

74. Pursuant to Article 2.1 of the BAT Rules, "[t]he seat of the BAT and of each arbitral proceeding before the Arbitrator shall be Geneva, Switzerland, even if hearings, if any, are held in another place". Hence, the BAT arbitration is governed by Chapter 12 of the Swiss Act on Private International Law (PILA).

75. The jurisdiction of the BAT presupposes the arbitrability of the dispute and the exercise of a valid arbitration agreement between the parties.

76. The Arbitrator finds that the dispute referred to him is of a financial nature and is thus arbitrable within the meaning of Article 177(1) PILA.<sup>58</sup>
77. The jurisdiction of the BAT over the dispute results from the arbitration clause contained under paragraph 3 of clause 13 of the Agreement, which reads as follows:
- “Notwithstanding the foregoing, any disputes between Wasserman and Client related to fees owed by Client to Wasserman pursuant to any Basketball Contracts shall be submitted to the Basketball Arbitral Tribunal (BAT) in Geneva, Switzerland and shall be resolved in accordance with the BAT Arbitration Rules by a single arbitrator appointed by the BAT President. The seat of the arbitration shall be Geneva, Switzerland. The arbitration shall be governed by Chapter 12 of the Swiss Act on Private International Law, irrespective of the parties’ domicile. The language of the arbitration shall be English. The arbitrator shall decide the dispute ex aequo et bono. The prevailing party shall be entitled to recover all costs, fees, and attorneys’ fees from the other party in any such dispute”*
78. The Agreement is in writing and thus the arbitration agreement fulfils the formal requirements of Article 178(1) PILA.
79. With respect to substantive validity, the Arbitrator considers that there is no indication in the file that could cast doubt on the validity of the arbitration agreement under Swiss Law (referred to by Article 178(2) PILA).
80. The Player disputed the BAT’s jurisdiction over the present dispute on the grounds that (i) the Agent failed to “*try in good faith to resolve controversy arising out of this Agreement*”; and (ii) the dispute “*is not about fees, but it is about the breach, termination, enforcement, interpretation or validity of Representation Agreement and BAT could not go deciding about fees before solving this [sic] previous questions*”, which fall within the jurisdiction of the arbitration according to the JAMS Comprehensive Arbitration Rules and Procedures in Los Angeles, California, as provided for in paragraphs 1 and 2 of clause 13 of the Agreement.<sup>59</sup>

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<sup>58</sup> Decision of the Federal Tribunal 4P.230/2000 of 7 February 2001 reported in ASA Bulletin 2001, p. 523.

<sup>59</sup> Answer, para. 14.

81. The Player added that paragraph 3 of clause 13 of the Agreement provides for the BAT's jurisdiction "*for disputes related to fees owed by client to Wasserman, but question of fees can't be resolved separately and especially not before the dispute regarding relating to [sic] the breach, termination, enforcement, enforcement, interpretation or validity of Representation agreement is solved*".<sup>60</sup> In his Rejoinder at paras. 10-15, the Player maintained his jurisdictional challenge on those grounds.
82. Meanwhile, the Agent submitted that it "*has not requested from the BAT to determine that the Respondent has breached the Agreement, nor to the [sic] determine that the Agreement was terminated without just case [sic]. Wasserman requests the payment of agency fee*" owed by the Player under basketball contracts, which dispute falls within the BAT's jurisdiction under the last paragraph of clause 13 of the Agreement.<sup>61</sup>
83. In the Arbitrator's view, the wording in paragraph 3 of clause 13 of the Agreement, i.e. "[n]otwithstanding the foregoing, any dispute between Wasserman and Client related to fees owed by Client to Wasserman pursuant to any Basketball Contracts [...]", clearly covers the present dispute. The wording "*notwithstanding the foregoing*" evinces a clear intention that the BAT arbitration agreement in paragraph 3 is without prejudice to the California arbitration agreement in the "*foregoing*" paragraphs 1 and 2 of clause 13. Thus, even if issues over "*the breach, termination, enforcement, interpretation or validity*" of the Agreement are *prima facie* caught by the California arbitration agreement, where the Parties' dispute is "*related to fees owed by [the Player] to [the Agent]*", BAT arbitration applies. This is so even if incidental issues on breach, termination and interpretation may feature in such fee-related disputes. Otherwise, the BAT arbitration clause in paragraph 3 would be simply unworkable, as it is almost impossible to envisage such a fee-related dispute that does not turn on, the "*breach*", "*enforcement*", "*validity*" and/or "*interpretation*" of the relevant contractual clause. The wording in paragraph 3, which broadly refers to "*any disputes [...] related to fees owed by [the*

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<sup>60</sup> Answer, para. 16.

<sup>61</sup> Reply, paras. 13-14.

Player] to [the Agent]” thus mandates such type of dispute to be resolved before the BAT and not in California. Since paragraph 3 applies but not paragraph 1, there was no need for the Agent to attempt the good-faith negotiation as required for California arbitration in paragraph 1. The Player’s jurisdiction dispute is accordingly rejected.

84. For the above reasons, the Arbitrator rules and finds, pursuant to Article 1.3 of the BAT Rules, that he has jurisdiction to finally decide and rule upon the Agent’s claims.

## **6. Other Procedural Issues**

85. Neither Party has requested a hearing to be held, nor does the Arbitrator consider a hearing necessary. The Arbitrator will therefore decide the Agent’s claims based on the written submissions and the evidence on record.

## **7. Discussion**

### **7.1 Applicable Law – *ex aequo et bono***

86. With respect to the law governing the merits of the dispute, Article 187(1) PILA provides that the arbitral tribunal must decide the case according to the rules of law chosen by the parties or, in the absence of a choice, according to the rules of law with which the case has the closest connection. Article 187(2) PILA adds that the parties may authorize the arbitrators to decide “*en équité*” instead of choosing the application of rules of law. Article 187(2) PILA is generally translated into English as follows:

*“the parties may authorize the arbitral tribunal to decide ex aequo et bono”.*

87. Under the heading “Law Applicable to the Merits”, Article 15 of the BAT Rules reads as follows:

*“15.1 The Arbitrator shall decide the dispute ex aequo et bono, applying general considerations of justice and fairness without reference to any particular national or international law.*

15.2 If, according to an express and specific agreement of the parties, the Arbitrator is not authorised to decide *ex aequo et bono*, he/she shall decide the dispute according to the rules of law chosen by the parties or, in the absence of such a choice, according to such rules of law he/she deems appropriate. In both cases, the parties shall establish the contents of such rules of law. If the contents of the applicable rules of law have not been established, Swiss law shall apply instead.”

88. In his Answer at para. 20, the Player cited Article 404 of the Swiss Code of Obligations. In his Rejoinder at para. 16, the Player submitted that such citation “*was shown just as an example that is still in accordance with ‘ex aequo et bono’ and has a place in this dispute*”.
89. Since paragraph 3 of clause 13 of the Agreement expressly provides that the Arbitrator shall decide the dispute *ex aequo et bono*, and by virtue of Article 15 of the BAT Rules, quoted above, the Arbitrator agrees with the Agent that Swiss law as cited by the Player is not applicable to the case at hand.<sup>62</sup>
90. Consequently, the Arbitrator shall decide *ex aequo et bono* the issues submitted to him in these proceedings, without references to any particular national or international law.
91. The concept of “*équité*” (or *ex aequo et bono*) used in Article 187(2) PILA originates from Article 31(3) of the *Concordat intercantonal sur l’arbitrage*<sup>63</sup> (Concordat),<sup>64</sup> under which Swiss courts have held that arbitration “*en équité*” is fundamentally different from arbitration “*en droit*”:-

“*When deciding ex aequo et bono, the Arbitrators pursue a conception of justice which is not inspired by the rules of law which are in force and which might even be contrary to those rules.*”<sup>65</sup>

92. This is confirmed by Article 15.1 of the BAT Rules *in fine*, according to which the

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<sup>62</sup> Reply, para. 17.

<sup>63</sup> That is the Swiss statute that governed international and domestic arbitration before the enactment of the PILA (governing international arbitration) and, most recently, the Swiss Code of Civil Procedure (governing domestic arbitration).

<sup>64</sup> P.A. Karrer, Basler Kommentar, No. 289 ad Art. 187 PILA.

<sup>65</sup> JdT 1981 III, p. 93 (free translation).

Arbitrator applies “*general considerations of justice and fairness without reference to any particular national or international law*”.

93. In light of the foregoing considerations, the Arbitrator makes the findings below.

## 7.2 Findings

94. As the Agent’s claims are to enforce contractual payment obligations, the doctrine of *pacta sunt servanda* (which provides that parties who make a bargain are expected to stick to that bargain) is the principle by which the Arbitrator will examine their merits.

95. In the Arbitrator’s view, the factual and legal issues presented by the Parties outlined under Section 4 above give rise to two broad issues for consideration, namely:

(a) First, did the Player validly terminate the Agreement in March 2022? (“**Issue 1**”)

(b) Second, what if any relief should be awarded in the Agent’s claims? (“**Issue 2**”)

### 7.2.1. Issue 1 – Did the Player validly terminate the Agreement in March 2022?

96. The Player’s case is that he validly terminated the Agreement by his letter of 25 March 2022 (see para. 21 above) on the basis the Agent was in breach by failing to notify him that [Agent’s former employee] ceased to work for the Agent and then failing to cure that breach.

97. On the Agent’s case, the Agreement would have expired on 4 May 2023 under clause 2 thereof, but the Player prematurely terminated it by his WhatsApp message of 19 March 2022 (see para. 17 above) which the Agent considered to be invalid under clause 18 of the Agreement. The Agent denied having ever breached the Agreement and hence there was no just cause for termination of the Agreement by the Player.

98. In the Arbitrator’s view, the answer to Issue 1 turns on the interpretation of clauses 2,

3 and 18 of the Agreement (see para. 5 above) and their application to the facts.

99. Starting with clause 2 of the Agreement, it contains four interlinked sentences. Each of these sentences is considered in turn below.
100. The 1<sup>st</sup> sentence in clause 2 provides that the term of the Agreement “*shall commence on the Effective Date and shall continue for a period of two (2) years, unless terminated or extended according to the terms herein*”.
101. The “*Effective Date*” referred to in clause 2 is defined in the preamble of the Agreement as 4 May 2019 (see para. 5 above). Thus, on the plain and literal meaning of the 1<sup>st</sup> sentence, the Agreement came into effect on 4 May 2019 for a 2-year term until its expiry on 4 May 2021 unless it is “*terminated or extended according to the terms herein*”.
102. The 2<sup>nd</sup> sentence then provides, “[u]pon the expiration of the initial two (2) year period, the Term shall be **automatically renewed** for continual successive two (2) year periods **unless terminated by either party upon written notice delivered at least sixty (60) days prior to the expiration of the then current Term**” (emphasis added).
103. In other words, the Agreement would be automatically renewed each time upon its expiry for another 2-year term, unless either Party gives a notice of termination of the Agreement in writing to be delivered at least 60 days prior to the expiry (“**Proviso**”).
104. In this regard, it should be noted that the Player initially challenged the 2-year automatic renewal provision as violating the FIBA Internal Regulations. In rebuttal, the Agent submitted that such automatic contractual renewal arrangement is lawful and any violations of the FIBA Internal Regulations *per se* do not invalidate contractual agreements: BAT 0901/16. In reply, the Player conceded that the automatic renewal could “*lead only to possible sanctioning of [Agent’s former employee] by FIBA, but they are not that important for this BAT procedure*” and hence he “*will not further discuss*

*about it*.<sup>66</sup>

105. The Arbitrator accepts that the 2-year automatic renewal arrangement in clause 2 is valid and enforceable as a matter of contract, regardless of any potential violations of the FIBA Internal Regulations which, as held in BAT 0901/16, “*may result in disciplinary sanctions [but] the relevant rules do not provide for the nullity of the agreement*”.
106. As to the effect of the Proviso, the Parties were invited by the Arbitrator’s Questions to address whether it provides for a no-fault termination so long as a written notice was delivered 60 days or more prior to expiry, and particularly whether the Player had validly terminated the Agreement upon delivering his WhatsApp message dated 19 March 2022 (see para. 17 above) and/or his letter of 25 March 2022 (see para. 21 above), irrespective of whether the Agent was in breach as alleged by the Player.
107. In this connection, the Player submitted that clause 2 does provide for a mechanism for no-fault termination. He referred to other cases where the termination notice must be delivered within a “window period”, e.g. “*unless written notice is given by either Party to the other with an advance notice of no less than fifteen (15) and no more than thirty (30) days prior to the natural expiration date of the Agreement*”. By comparison, the Proviso only requires the termination notice to be delivered “*at least*” 60 days prior to the expiry. The Player thus contended that he has validly terminated the Agreement.<sup>67</sup>
108. On the other hand, the Agent has made no comments in this regard, whether in its submissions of 14 April 2023 in response to the Arbitrator’s Questions, or in its submissions of 11 May 2023 in response to the Player’s submissions of 12 April 2023. In its Reply at para. 46, however, the Agent submitted that “[t]he Player has had the possibility to terminate the Agreement by sending a written notice at least 60 days prior to the expiration of the term of the Agreement (as per paragraph 2 of the Agreement)”.

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<sup>66</sup> Answer, 3; Reply, paras, 46-47; Rejoinder, para. 34.

<sup>67</sup> The Player’s submissions of 12 April 2023, para. 18.

109. In the Arbitrator's view, the 2<sup>nd</sup> sentence of clause 2 expressly provides for a mechanism for no-fault termination by the giving of a written notice within the stated period, i.e. "*at least sixty (60) days prior to the expiration of the then current Term*". The written notice would stop the automatic renewal such that the Agreement would terminate upon its natural expiration. This is consistent with the 1<sup>st</sup> sentence of clause 2 which provides that the initial 2-year term may be "*terminated [...] according to the terms herein*". It also tallies with the starting phrase in the 3<sup>rd</sup> sentence, i.e. "[n]otwithstanding the foregoing", following which is the provision by which either Party may immediately terminate the Agreement anytime on the ground of the other's material breach, i.e. a fault-based termination mechanism (see below).
110. Hence, by the operation of both the 1<sup>st</sup> and 2<sup>nd</sup> sentences of clause 2, if no written termination notice is delivered before 5 March 2021 (i.e. 60 days prior to the initial expiry date of 4 May 2021), the Agreement would have been automatically renewed for 2 years up to 4 May 2023. By contrast, if a termination notice was delivered before 5 March 2021, the Agreement would not be automatically renewed but would have terminated upon its expiry on 4 May 2021. On the facts, as no such written notice was delivered before 5 March 2021, there can be no dispute that the Agreement has been validly renewed for a second 2-year term up to 4 May 2023 under this mechanism.
111. Thereafter, during the second 2-year term of the Agreement, either Party may terminate the Agreement simply by delivering a written notice before 5 March 2023 (i.e. 60 days prior to the new expiry date of 4 May 2023), whether or not that Party has a just cause which is not required for the no-fault termination under the 2<sup>nd</sup> sentence of clause 2.
112. It is not disputed that the Player expressed his intention to terminate the Agreement, first by his WhatsApp message of 19 March 2022 (see para. 17 above) and then by his letter of 25 March 2022 (see para. 21 above). Both of them predated 5 March 2023. Therefore, regardless of whether the Player had a just cause for termination, the Agreement would not be automatically renewed after 4 May 2023 due to the Player's the said message or letter, subject to satisfying the formality requirement under

clause 18.

113. Under clause 18, notice to the Parties “*shall be sent via electronic mail, express courier, overnight mail or U.S. Certified Mail to the addresses of the respective parties [...] and shall be deemed communicated three business days after mailing*”.
114. Since a WhatsApp text message does not fall within the defined forms of communication under clause 18, the Arbitrator agrees with the Agent that the Player’s WhatsApp message of 19 March 2022 (see para. 17 above) was not a valid notice for the purpose of termination under the 2<sup>nd</sup> sentence of clause 2. There is however no dispute that his letter of 25 March 2022 (see para. 21 above) was a valid notice.
115. Hence, by the application of the 2<sup>nd</sup> sentence, after the Player delivered his letter of 25 March 2022 (see para. 21 above), which was “*deemed communicated three business days after mailing*” under clause 18 and operated essentially as a notice of non-renewal, the Agreement was certainly terminated with effect of 4 May 2023 at the latest.
116. Turning to the 3<sup>rd</sup> sentence, it provides that “*either party may terminate this Agreement if the other party materially breaches this Agreement and fails to cure such breach within thirty (30) days after receipt of written notice from the non-breaching party*”. This is a fault-based termination mechanism by which either Party may terminate the Agreement with immediate effect on account of the other Party’s material breach.
117. Although the Player has complained about the Agent’s handling with (i) the termination of the Zalgirio Contract and (ii) the financial terms of the Bayern Contract, the Player does not rely on them as the legal basis for termination. Rather, it is the Player’s case that the reason for termination is the Agent’s material breach by failing to notify him about [Agent’s former employee]’s departure and then failing to cure such breach.<sup>68</sup>

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<sup>68</sup> Rejoinder, paras. 8-9, 19, 29.

118. The Arbitrator agrees with the Agent that it “*has not been obligated to notify the Player about departure of its employee (e.g. as in the case of [Agent’s former employee])*”.<sup>69</sup> Nothing in the Agreement imposes an obligation on the Agent to notify the Player about the leaving of its employees (e.g. [Agent’s former employee]) who had previously handled the Player’s matters.
119. Clause 3 of the Agreement (see para. 5 above) sets forth the Agent’s duties. They include (i) “*negotiating, executing and managing*” the Player’s contracts and opportunities, (ii) assisting him in “*coordinating appearances, mechanising activities and other commercial ventures*”, (iii) advising him “*concerning general business issues, public relations and other matters pertaining to Client’s professional activities and career*”, and (iv) using “*all reasonable efforts to procure employment for*” him in the specified fields. To notify the Player of the departure of the Agent’s former employees who had handled his case does not fall within any of the Agent’s duties under clause 3.
120. While the Arbitrator agrees with the Player that “*not all the potential scenarios can be covered by the contracts*”,<sup>70</sup> since it is the Player who sought to justify his termination on the ground of the Agent’s alleged material breach by not notifying him about [Agent’s former employee]’s departure, the Player bears the burden to prove that the Agent was obliged to so notify him. In the Arbitrator’s view, the Player has failed to discharge this burden. The Agent cannot be said to have been in breach of an obligation which it never undertook.
121. On the available evidence, the Player may well have established a special relationship of trust with [Agent’s former employee] who convinced him to sign the Agreement. That *per se* does not impose a contractual obligation on the Agent to notify the Player about [Agent’s former employee]’s departure. Nor could [Agent’s former employee]’s WhatsApp message of 4 March 2022 (see para. 62 above), which was sent after the Agreement had been concluded and thus is irrelevant to its interpretation, impose such

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<sup>69</sup> Reply, para. 31.

<sup>70</sup> Rejoinder, para. 4.

a contractual obligation on the Agent *ex post facto*.

122. In the absence of any contractual obligation on the part of the Agent to notify the Player about [Agent's former employee]'s departure, the Arbitrator rejects the Player's submission that the Agent has breached the Agreement by failing to notify him about [Agent's former employee]'s departure and then failing to cure such breach. The Player's complaint is therefore not a valid basis for terminating the Agreement for cause pursuant to the 3<sup>rd</sup> sentence of clause 2.
123. Finally, as to the last sentence of clause 2, it provides that "*any termination of this Agreement shall not affect Client's obligation to pay the Commissions (as defined below) set forth in Section 6 of this Agreement*". In other words, even if the Agreement is terminated, the Player remains obliged to pay the Agent the commissions as set out in clause 6. This takes us to the next issue on the Agent's claims and their legal basis.

#### **7.2.2. Issue 2 – What if any relief should be awarded in the Agent's claims?**

124. The Agent claims (i) commission of USD 22,500.00 in respect of the Zalgirio Contract for the 2020-2021 season ("**Zalgirio Commission**"); (ii) commission of USD 40,000.00 in respect of the Player's contract with FC Bayern for the 2022-2023 season ("**Bayern Commission**"); and (iii) interest on the foregoing commissions.

##### Zalgirio Commission

125. Starting with the claim for the Zalgirio Commission, the Agent submitted that it is based on (i) clause 6(b) of the Agreement and (ii) a separate oral agreement under which the Agent waived the right to claim the full amount of the agent fees as it promised to the Player that it would claim only 50% of any applicable agent fees. This alleged oral agreement is said to be supported by the fact that the Player only paid 50% of the agent fees for the Olympiacos Contract, as evidenced by the Agent's invoice dated 14 August

2020 and its bank statement dated 20 August 2020.<sup>71</sup>

126. Given the Agent's reliance on clause 6(b) of the Agreement, the starting point must be the text of the clause itself and any other related clauses in the Agreement.
127. Under the preamble of clause 6 (see para. 5 above), the Player agreed to pay the Agent "**commissions** on the **Gross Value** [...] received by [him or his] affiliates attributable to all [...] **Basketball Contracts** [...] that are developed, negotiated and/or **entered into during the term**, including any amendments, modifications, renewals and/or extensions thereto executed after the termination of this Agreement" (emphasis added).
128. By clause 6(b), the "commissions" as mentioned in the preamble of clause 6 include 10% "of the **Gross Value** received by [the Player] pursuant to any **Basketball Contracts** that are **entered into during the Term**" (emphasis added).
129. The term "Gross Value" is defined in clause 6(d) to mean "all pre-tax gross compensation (whether securities, royalties, base and/or incentive/bonus consideration of any kind) **due, earned or received**, directly or indirectly", by the Player or on his behalf. (emphasis added)
130. The term "*Basketball Contracts*" is defined in clause 1 to mean "all opportunities, employment, agreements, and the like with foreign and domestic professional basketball teams, leagues, and/or clubs for [the Player's] professional basketball services", excluding NBA contracts.
131. As the Zalgirio Contract clearly falls within the definition of "*Basketball Contracts*" and was entered into during the term of the Agreement (i.e. on 9 July 2020), the Agent is *prima facie* entitled to 10% of the "Gross Value" received by the Player under the Zalgirio Contract for the 2020-2021 season in the amount of USD 45,000.00 (i.e. 10%

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<sup>71</sup> The Agent's submissions of 14 April 2023, page 1; the Agent's submissions of 14 April 2023, Exhibit C17.

of his total salary of USD 450,000.00 for that season).

132. But as noted, the Agent only claims USD 22,500.00 due to its alleged oral agreement with the Player to charge only 50% of its entitlement under clause 6 (i.e. 5% of the “*Gross Value*” of the Zalgirio Contract, as opposed to 10% as set out in clause 6(b)).
133. The Player’s defence is that (i) the Agent is barred by the *Verwirkung* principle from claiming the Zalgirio Commission; and (ii) the Agent has confirmed to him that it would “*not request 5% of the contract from the Zalgiris 2020/21 deal*” (see para. 67 above).
134. The Agent rebutted this defence by arguing that although the Zalgirio Commission fell due originally at the end of the 2020-2021 season, the Agent has agreed not to charge it on the condition that the Player remains loyal to it. Only upon the Player’s breach of loyalty by premature termination in March 2022 did the Zalgirio Commission become due, such that there were less than 6 months before the Agent filed its RfA in November 2022. Hence, the Agent contended that the *Verwirkung* principle does not apply.<sup>72</sup>
135. The *Verwirkung* principle is well recognised under the BAT jurisprudence. It requires two prerequisites to be met: (i) that the creditor has failed during a significant period of time to exercise his right; and (ii) that the debtor had reasonable grounds to rely on the assumption that the creditor would not avail himself of his right or claim in the future. Despite the divergence as to what constitutes a significant period of time, the period of up to two years was in principle set as a limit: BAT 0480/13; 0593/14.
136. In the Arbitrator’s view, the Agent’s claim for the Zalgirio Commission does not fall foul of either limb of the *Verwirkung* principle and is therefore admissible.
137. On the first limb, it is worth noting that the Agreement does not expressly specify the exact point of time when the Agent’s commissions under clause 6(b) fall due. That clause is subject to two possible interpretations.

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<sup>72</sup> Reply, para. 32.

138. The first interpretation is that the Player's obligation to pay commissions is triggered by his entering into "*Basketball Contracts*" during the term of the Agreement. This is supported by the wordings in clause 6(d) which defines the term "*Gross Value*" as including all compensation "**due, earned or received**" by the Player. (emphasis added)
139. If such interpretation is correct, the commissions would become due as soon as "*Basketball Contracts*" (i.e., the Zalgirio Contract) are *concluded*, and the Agent would have waited around 20 months, as the Player alleged, until it first formally demanded the Zalgirio Commission by its letter of 22 March 2022 (see para. 67(b) above). The period of 20 months is less than the 2-year limit under the *Verwirkung* principle.
140. The alternative interpretation is that the Agent is only entitled to be paid when the Player receives payments pursuant to "*Basketball Contracts*" entered into during the term of the Agreement. This is supported by the wordings in clauses 6(b) and 6(d) under which the Player agreed to pay 10% of "*the Gross Value received by*" him, which includes "**base and/or incentive/bonus consideration of any kind**" (emphasis added).
141. Under the Zalgirio Contract, the Player earns a total salary of USD 45,000.00 which is divided into 10 monthly instalments payable on the 15<sup>th</sup> day of each month from September 2020 to June 2021 (see para. 9 above). As the Player's last salary instalment would not be paid until 15 June 2021, the Agent likewise would have to wait until that day to bill for its commission corresponding to that last instalment.
142. Accordingly, it would be natural and reasonable for the Agent to wait until the end of the season to issue one single invoice for the commission for the paid-up aggregate amount of the "*Gross Value*" (including particularly any bonus) for the whole season.
143. This is indeed exactly how the Agent had billed for its commission for the 2019-2020 season in respect of the Olympiacos Contract dated 7 July 2019 by issuing its invoice

dated 14 August 2020 which was paid by the Player on 20 August 2020.<sup>73</sup>

144. In the circumstances, even if the alternative interpretation of clause 6(b) is adopted, the Zalgirio Commission became due and payable on 15 June 2021 the earliest. By the time when the Agent demanded it on 22 March 2022 (see para. 18 above), only a period of around 9 months has elapsed. This also falls short of the 2-year time limit under the first limb of the principle of *Verwirkung*.
145. Furthermore, under either of the two possible interpretations of clause 6(b), it would not be reasonable for the Player to assume that the Agent would not avail itself of its right to the Zalgirio Commission, as the Agent delayed issuing its invoice by around only 9 months (i.e. from 15 June 2021 to 22 March 2022) or 20 months (i.e. from 9 July 2020 to 22 March 2022). Hence, the second limb of *Verwirkung* is not met in any event.
146. It only remains for the Arbitrator consider (i) the Player's allegation that the Agent has waived the Zalgirio Commission unconditionally; and (ii) the Agent's allegation that it has agreed not to charge the Zalgirio Commission on the condition of the Player's loyalty. Given the Parties' positions, it is therefore undisputed that the Agent has agreed to waive the Zalgirio Commission. The only dispute in this regard is whether such waiver was *conditional* upon the Player's so-called loyalty as alleged by the Agent.
147. In the Arbitrator's view, the Agent has failed to establish that the waiver was subject to such a condition. Apart from the witness statement of [Agent's employee 1] who is the Agent's employee, the Agent has submitted no other evidence, including objective contemporaneous evidence, to substantiate its allegation, despite the Player's denial. While the waiver was alleged to have been reached verbally, given its financial implications, one would naturally expect some trace in writing, such as relevant correspondence over WhatsApp which was frequently used by the Parties. However, no contemporaneous document whatsoever has been filed to corroborate the Agent's allegation and [Agent's employee 1]'s witness statement. On the available evidence,

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<sup>73</sup> Agent's submissions of 14 April 2023, Exhibit C17.

the Arbitrator is therefore not satisfied that the Agent has waived the Zalgirio Commission conditionally as the Agent alleged. Rather, the Arbitrator finds that the Agent has waived the Zalgirio Commission unconditionally and is not entitled to claim the same.

#### Bayern Commission

148. Turning to the Agent's claim for the Bayern Commission for the 2022-2023 season, the Agent submitted that it is based on clauses 4 and 6(c) of the Agreement as the Player's termination was unlawful.<sup>74</sup>
149. Clause 4 of the Agreement grants the Agent the exclusive rights to represent the Player. It provides that, "**d]uring the Term**, [the Player] *agrees not to engage other person to act on [his] behalf in any manner which may conflict with [the Agent's] representation*". By clause 4, the Player acknowledges and agreed that if he should enter into "*Basketball Contract [...] directly or indirectly through the services of any other person or entity, such action shall be deemed a material breach of this Agreement*", and he agreed "*to refer to [the Agent] all verbal or written inquiries, communications and offers for [his] services, including but not limited to [...] Basketball Contracts [...] that **arise during the Term***" (emphasis added).
150. It is the Agent's case that the Player committed a material breach under clause 4 by signing again with FC Bayern without informing it.<sup>75</sup> However, the wording of clause 4 is plain that the Agent enjoys exclusivity only "*during the Term*" of the Agreement. As noted above, although the Player validly terminated the Agreement by his letter of 25 March 2022 (in the sense of stopping its automatic renewal), the Agreement continued in effect until its expiry date on **4 May 2023**. Therefore, whether the Player has breached clause 4 turns on *when* he signed with FC Bayern for the 2022-2023 season.

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<sup>74</sup> RfA, paras. 21-23; Reply, para. 15.

<sup>75</sup> RfA, para. 22.

151. In the Arbitrator's Questions, the Player was invited to clarify when he signed with FC Bayern for the 2022-2023 season and to submit a copy of the contract.
152. In his submissions of 12 April 2023 at paras. 1 to 2, the Player submitted that he signed with FC Bayern in July 2022 and he could not disclose that contract for his duty to keep it confidential.
153. In its submissions of 11 May 2023 in response to the Player's submissions of 12 April 2023, the Agent made no comments on the Player's contract with FC Bayern for the 2022-2023 season. In its submissions of 14 April 2023, however, the Agent submitted that it did not possess any document related to the that contract and had learned about it from the media. That is the same stance taken by the Agent in its RfA at para. 21.
154. In this connection, the press release by FC Bayern dated 6 July 2022 as filed in RfA, Exhibit C13 reports that:
- "FC Bayern's basketball will be expecting **Augustine Rubit** back at the **Audi Dome** after the holidays: The 32-year-old power forward, one of Munich's most consistent performers in the past season, has extended his contract by another year until summer 2023. The U.S. professional was a fixture in Bayern's frontcourt and, like colleague \_\_\_\_\_, is entering his second season with the FCBB."*(original emphasis)
155. On the same day, the EuroLeague published an official announcement, as filed in Evidence 01 to the Player's submissions of 12 April 2023, that:
- "FC Bayern Munich has tied down Augustine Rubit on a new one-year contract, the club confirmed on Wednesday, Rubit (2.03 meters, 32 years old) is entering his second year at Bayern, with which he averaged 10.5 points, 4.9 rebounds and 1.4 assist last season in 36 Turkish Airlines EuroLeague games. [...]"*
156. In the absence of contrary allegations and evidence, these two articles, which are both dated 6 July 2022, tend to support the Player's case that he signed with FC Bayern in July 2022, i.e., before the Agreement expired and ceased to have effect on 23 May 2023. Given the undisputed fact that the Player signed this new contract without the Agent's involvement, he clearly breached the exclusivity provision in clause 4 and is thus liable to 10% of his remuneration under the new contract as compensation for the

commission the Agent would have earned under clause 6.

157. As to clause 6(c) (see para. 5 above), the Arbitrator takes the view that it cannot assist the Agent. As the Player correctly submitted in his Rejoinder at para. 14, clause 6(c) only pertains to “*Marketing Contracts or Commercial Opportunities*”, but not “*Basketball Contracts*” such as the Player’s contract with FC Bayern for the 2022-2023 season. Hence, the Arbitrator agrees that Agent’s reliance on clause 6(c) is misplaced.
158. The next question is the quantum of the Agent’s claim for the Bayern Commission.
159. The Agent submitted that, back in late January or early February 2022, FC Bayern had offered USD 400,000.00 to extend the Bayern Contract by one year for the 2022-2023 season. The Agent thus proceeded its claim based on the assumption that the Player earns at least USD 400,000.00 per year under its new contract with FC Bayern.<sup>76</sup>
160. The Player denied having ever received FC Bayern’s alleged offer of USD 400,000.00 for the 2022-2023 season. Despite the Agent’s request and the BAT’s invitation, the Player did not disclose his contract with FC Bayern for the 2022-2023 season for confidentiality reasons. The Player likewise refused to disclose his bank statements covering the relevant periods.<sup>77</sup>
161. In the Arbitrator’s view, even assuming the Player might have been bound to keep his contract with FC Bayern for the 2022-2023 season confidential, the Player has not explained whether he has ever sought FC Bayern’s consent to disclose the contract. Nor has it been suggested that FC Bayern cannot or would not waive such confidentiality. In the absence of that contract, and having considered the Parties’ arguments and the entire evidence including [Agent’s employee 1]’s witness statement (Exhibit C14 to the RfA), the Arbitrator is satisfied and finds that the Player earned no less than USD 400,000.00 under his employment with FC Bayern for the 2022-2023

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<sup>76</sup> RfA, paras. 24-26.

<sup>77</sup> Answer, paras. 43, 45; Player’s submissions of 12 April 2023, para. 14.

season.

162. Accordingly, the Arbitrator finds that the Agent is entitled to the Bayern Commission in the amount of **USD 40,000.00**, i.e., 10% of the Player's remuneration under his contract with FC Bayern for the 2022-2023 season.

#### Interest

163. As to interest, the Agent claims interest on the Bayern Commission at 5% per annum from the date of filing its RfA.
164. The Arbitrator is prepared to accept the usual rate of 5% per annum under well-established BAT jurisprudence from the date of 25 November 2022 as claimed.
165. Regarding the Agent's claim for interest on the Zalgirio Commission, as the claim for such commission has been rejected, the claim for interest has fallen away.

#### **7.2.3. Conclusion on Liability**

166. In conclusion, deciding the case *ex aequo et bono*, the Arbitrator finds that the Player is liable to pay the Agent the Bayern Commission in the amount of **USD 40,000.00**.
167. Moreover, the Arbitrator also finds it fair and reasonable to award the interest on the foregoing amount at the rate of 5% per annum from 25 November 2022.

#### **8. Costs**

168. In respect of arbitration costs, Article 17.2 of the BAT Rules provides:

*“At the end of the proceedings, the BAT President shall determine the final amount of the arbitration costs, which shall include the administrative and other costs of the BAT, the contribution to the BAT Fund (see Article 18), the fees and costs of the BAT President and the Arbitrator, and any abeyance fee paid by the parties (see Article 12.4). [...]”*

169. On 10 August 2023, the BAT Vice-President determined the arbitration costs in the present matter to be EUR 8,500.00.

170. As regards the allocation of the arbitration costs as between the Parties, Article 17.3 of the BAT Rules provides:

*“The award shall determine which party shall bear the arbitration costs and in which proportion. [...] When deciding on the arbitration costs [...], the Arbitrator shall primarily take into account the relief(s) granted compared with the relief(s) sought and, secondarily, the conduct and the financial resources of the parties.”*

171. The Agent has been successful for around 63% in value of its total claims made against the Player. Taking all these factors into account, and in the exercise of his discretion pursuant to Article 17.3 of the BAT Rules, the Arbitrator determines that the costs of the arbitration shall be borne 70% by the Player and 30% by the Agent.

172. In relation to the Parties’ legal fees and expenses, Article 17.3 of the BAT Rules provides:

*“as a general rule, the award shall grant the prevailing party a contribution towards any reasonable legal fees and other expenses incurred in connection with the proceedings (including any reasonable costs of witnesses and interpreters). When deciding [...] on the amount of any contribution to the parties’ reasonable legal fees and expenses, the Arbitrator shall primarily take into account the relief(s) granted compared with the relief(s) sought and, secondarily, the conduct and the financial resources of the parties.”*

173. Moreover, Article 17.4 of the BAT Rules provides for the maximum amounts a party can receive as a contribution towards its reasonable legal fees and other expenses (excluding the non-reimbursable handling fee). Considering the aggregate amount as claimed by the Agent in this arbitration, the maximum amount of contribution payable to the Agent’s reasonable legal fees and other expenses is EUR 7,500.00.

174. The Agent claims contribution of legal fees in the amount of EUR 4,900.00. The Agent also claims reimbursement of the non-reimbursable handling fee paid by it in the total amount of EUR 4,000.00 to start its claim.

175. Considering the relative complexity of the matter, and the reasons as stated in para. 171 above, the Arbitrator determines that it is fair and reasonable that the Agent is entitled to a contribution to its legal fees and expenses in the amount of **EUR 3,000.00**.
176. In addition, the Arbitrator determines that the Agent is entitled to 70% of the non-reimbursable handling fee paid by it, being the amount of **EUR 2,800.00**.

## **9. AWARD**

For the reasons set forth above, the Arbitrator decides as follows:

- 1. Mr. Augustine Rubit shall pay Wasserman Media Group, LLC the amount of USD 40,000.00 together with interest at 5% per annum on any outstanding balance (as may be the case from time to time) thereof from 25 November 2022 until payment in full.**
- 2. The costs of this arbitration until the present Award, which were determined by the Vice-President of the BAT to be in the amount of EUR 8,500.00, shall be borne by Mr. Augustine Rubit as to 70% and Wasserman Media Group, LLC as to 30%. Accordingly, Mr. Augustine Rubit shall reimburse the amount of EUR 5,950.00 to Wasserman Media Group, LLC as the costs of arbitration.**
- 3. Mr. Augustine Rubit shall pay Wasserman Media Group, LLC the further amount of EUR 5,800.00 as a contribution towards its legal fees and expenses (including the non-reimbursable handling fee).**
- 4. Any other or further-reaching requests for relief are dismissed.**

Geneva, seat of the arbitration, 16 August 2023

Benny Lo  
(Arbitrator)