



**FIBA**

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**FIBA Arbitral Tribunal (FAT)**

## **ARBITRAL AWARD**

**(FAT 0128/10)**

rendered by

**FIBA ARBITRAL TRIBUNAL (FAT)**

**Mr. Raj Parker**

in the arbitration proceedings

**Mr. Kevin Fletcher**

**- Claimant 1 -**

**Mr. Michael Hart**

**- Claimant 2 -**

**Mr. Ömer Kart**, c/o Yön Menajerlik Ltd, Yıldız Posta Caddesi  
Gömenoğlu Sok. Beyazoğlu Apt. No:16/28 Gayrettepe İstanbul, Turkey

**- Claimant 3 -**

**Mr. Elias Diamantopoulos**

**- Claimant 4 -**

vs.

**Beşiktaş Jimnastik Kulübü**

Süleyman Seba Caddesi, No: 48 BJK Plaza Akaretler, Beşiktaş 34357 İstanbul Turkey

**- Respondent -**



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### **1. The Parties**

#### **1.1. The Claimants**

1. Mr. Kevin Fletcher (hereinafter the “Player” or “Claimant 1”) is a professional basketball player and a citizen of the USA.
2. Mr. Michael Hart (hereinafter the “American Agent”) is a basketball players’ agent based in New Jersey, USA.
3. Mr. Ömer Kart (hereinafter the “Turkish Agent”) is a basketball players’ agent based in Istanbul, Turkey.
4. Mr. Elias Diamantopoulos (hereinafter the “Greek Agent”) is a basketball players’ agent based in Glyfada, Greece.
5. In these proceedings, the Claimants are represented by Mrs. Mine Sakmar Tunca and Mrs. Sevil Avci Subaşı of Sakmar Law Offices in Istanbul, Turkey.

#### **1.2. The Respondent**

6. Beşiktaş Jimnastik Kulübü (hereinafter the “Club” or the “Respondent”) is a Turkish basketball club based in Istanbul, Turkey. The Respondent has submitted an Answer in these proceedings signed by Mr. Şeref Yalcin, Director, and Mr. Ertune Sogancioglu, Vice President of Financial Affairs.



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### **2. The Arbitrator**

7. On 25 October 2010, the President of the FIBA Arbitral Tribunal (the "FAT") appointed Raj Parker as arbitrator (hereinafter the "Arbitrator") pursuant to Article 8.1 of the Rules of the FIBA Arbitral Tribunal (hereinafter the "FAT Rules"). None of the parties has raised objections to the appointment of the Arbitrator or to the declaration of independence issued by him.

### **3. Facts and Proceedings**

#### **3.1. Background Facts**

8. On 18 June 2009, the Player and the Club entered into a contractual agreement entitled "Agreement between Besiktas and Kevin Fletcher" (the "Contract"), under which the Club agreed to pay the Player certain salary and bonus payments in return for the Player playing basketball for the Club during the 2009/2010 basketball season.
9. The Player played for the Club during the 2009/2010 season and received a number of salary payments from the Club. However, during the 2009/2010 season the Club started to experience financial difficulties. As a result some of the salary payments for that season were not made on time, not paid in full or not paid at all. The Player has received no payments from the Club since 17 August 2010.
10. The 2009/2010 season has finished and according to the Player, the Club owes him a total of USD 141,000.00, being salary payments for January, February, March, April and May 2010. In addition, the Player also claims USD 15,000.00 as outstanding bonuses in respect of the Club reaching the Final 4 in Playoffs.



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11. The Player also claims that the Club owes him a total of USD 72,100.00 in contractual penalties for late payment.
12. The Turkish Agent claims that the Club owes him USD 14,000.00 in agent fees. The American Agent claims that the Club owes him USD 10,500.00 in agent fees. The Greek Agent claims that the Club owes him USD 10,500.00 in agent fees. Each of these claims is made pursuant to Clause VII of the Contract.

### 3.2. The Proceedings before the FAT

13. On 15 October 2010 the Claimants filed a Request for Arbitration in accordance with the FAT Rules.
14. By letter dated 12 November 2010, a time limit until 3 December 2010 was fixed for the Club to file the Answer to the Request for Arbitration. By the same letter, and with a time limit for payment until 26 November 2010, the following amounts were fixed as the Advance on Costs:

<i>"Claimant 1 (Mr. Kevin Fletcher)</i>	<i>EUR 3,000</i>
<i>Claimant 2 (Mr. Michael Hart)</i>	<i>EUR 1,000</i>
<i>Claimant 3 (Mr. Ömer Kart)</i>	<i>EUR 1,000</i>
<i>Claimant 4 (Mr. Elias Diamantopoulos)</i>	<i>EUR 1,000</i>
<i>Respondent (Besiktas JK)</i>	<i>EUR 6,000"</i>

15. On 3 December 2010 the Club filed its answer to the Claimants' Request for Arbitration.
16. The Club did not pay its share of the Advance on Costs. On 13 December 2010, the



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Arbitrator wrote to the Claimants inviting them to pay the Respondent's share of the Advance on Costs, in accordance with article 9.3 of the FAT Rules. The Club's share of the Advance on Costs was paid by the Claimants on 15 December and 20 December 2010.

17. The Arbitrator issued a procedural order dated 27 December 2010. Both parties responded to that order. On 27 January 2011, the Arbitrator closed the proceedings and asked the Parties to submit a summary of their costs, which they did.
18. On 10 January 2011, the Claimants submitted an invoice from Sakmar Law Offices in the amount of USD 5,000, being the costs incurred in respect of these proceedings.
19. The Respondent submitted a summary of its costs setting out total costs incurred of USD 2,200.
20. On 4 February 2011, the Parties were given the opportunity to file comments on the statement of costs of the other party. Claimants filed their comments on 9 February 2011. Respondent did not file any comments.
21. The Parties did not request a hearing. The Arbitrator decided in accordance with Article 13.1 of the FAT Rules not to hold a hearing and to deliver the award on the basis of the written submissions of the Parties.



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### 4. The Parties' Submissions

#### 4.1. The Claimants' Submissions

22. The Player submits that the Contract between him and the Club is valid and binding for the season 2009/2010 and that he has only received USD 209,000 of the total salary of USD 350,000 to which he was entitled. In addition, the Player submits that under the Contract he was scheduled to receive bonus payments totalling USD 15,000 in respect of the Club reaching the Final 4 of the Turkish league play-offs and these have not been paid.
23. The Player also claims a total of USD 72,100 for late payment penalties under Clause II Paragraph 2 of the Contract, both in respect of previous payments that were made late and in respect of payments that have not yet been made.
24. The Agents claim various amounts owing to each of them in respect of agency fees, under Article VII of the Contract.
25. The Claimants therefore make the following requests for relief:

*"Immediate payment from Club to Player in the amount of One Hundred Forty One Thousand American Dollars (USD 141,000.00) in past-due base salary.*

*Immediate payment from Club to Player in the amount of Seventy One Thousand One Hundred American Dolars [sic] (USD 72,100.00 USD) in late payment penalties as calculated in the attached spreadsheet under Article 11/2.*

*Immediate payment from Club to Player in the amount of Fifteen Thousand American Dollars (USD 15,000.00) in past-due bonus.*

*Immediate payment from Club to Turkish Agent in the amount of Fourteen Thousand American Dollars (USD 14,000.00) in past-due agent fee.*



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*Immediate payment from Club to American Agent in the amount of Ten Thousand Five Hundred American Dollars (USD 10,500.00) in past-due agent fee.*

*Immediate payment from Club to Greek Agent in the amount of Ten Thousand Five Hundred American Dollars (USD 10,500.00) in past-due agent fee.*

*Immediate payment reimbursement from Club to Player, American Agent, Greek Agent and/or Turkish Agent for FAT application fee, plus additional costs of arbitration, legal fees, and/or expenses related to this FAT case."*

### 4.2. The Club's Submissions

26. The Club submitted an answer to the Arbitrator in which it accepted the existence of a debt payable to the Player and admits its obligation to pay such a debt.
27. In its answer, the Club submits that "*owing to a global financial crisis*" it "*has had some troubles in cash flows*" and that the outstanding amount "*will be paid as quick [sic] as possible*".
28. In relation to the claims submitted by the American Agent and the Turkish Agent, the Club submitted that such claims "*are not acceptable*" because the Contract does not specify the amount each agent would receive.
29. The Club submitted that the Greek Agent is not mentioned in the player's contract of 18 June 2009 and so has no capacity to act as a party to the case.



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### **5. Jurisdiction and other Procedural Issues**

#### **5.1. The jurisdiction of FAT**

30. Pursuant to Article 2.1 of the FAT Rules, “[t]he seat of the FAT and of each arbitral proceeding before the Arbitrator shall be Geneva, Switzerland”. Hence, this FAT arbitration is governed by Chapter 12 of the Swiss Act on Private International Law (PILA).
31. The Respondent did not challenge the jurisdiction of FAT. Hence the Arbitrator asserts jurisdiction over the present dispute (Art. 186(2) PILA). For the sake of completeness, the Arbitrator will nevertheless examine the validity of the arbitration agreement contained in the Contract (see paragraphs 32-39 below).

##### **5.1.1 Arbitrability**

32. The jurisdiction of the FAT presupposes the arbitrability of the dispute and the existence of a valid arbitration agreement between the parties.
33. The Arbitrator notes that the dispute referred to him is clearly of a financial nature and is thus arbitrable within the meaning of Article 177(1) PILA.<sup>1</sup>

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<sup>1</sup> Decision of the Federal Tribunal 4P.230/2000 of 7 February 2001 reported in ASA Bulletin 2001, p. 523.



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### 5.1.2 Formal and substantive validity of the arbitration agreement

34. The existence of a valid arbitration agreement is to be examined in light of Article 178 PILA, which reads as follows:

*"1 The arbitration agreement must be made in writing, by telegram, telex, telecopier or any other means of communication which permits it to be evidenced by a text.*

*2 Furthermore, an arbitration agreement is valid if it conforms either to the law chosen by the parties, or to the law governing the subject-matter of the dispute, in particular the main contract, or to Swiss law."*

35. The jurisdiction of the FAT over the dispute between the Claimants and the Club results from Clause V of the Contract which reads as follows:

*"This Agreement shall be subject to the laws of Swiss (sic) and the regulation of FIBA and Court of Arbitration for Sport (CAS). Any dispute arising from or related to the present contract shall be submitted to the FIBA Arbitral Tribunal (FAT) in Geneva, Switzerland and shall be resolved in accordance with the FAT Arbitration Rules. The arbitrator shall decide the dispute ex aequo et bono. Awards of the FAT can be appealed to the Court of Arbitration for Sport (CAS), Lausanne, Switzerland. To the extent legally possible under Swiss law recourse to the Swiss Federal Tribunal against awards of the FAT and against decisions of the Court of Arbitration for Sport (CAS) upon appeal shall be excluded."*

36. As the present dispute relates to the amounts owing under the Contract, the Arbitrator concludes that Clause V of the Contract establishes the jurisdiction of the FAT over the dispute between the Player and the Club.

37. The Club did not seek to argue that Clause V of the Contract does not found jurisdiction in respect of the dispute between the Club and the various agents. In any case, the Arbitrator finds that Clause V of the Contract establishes such jurisdiction either because the page headed "Agent's Commission" (referred to further below) is



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part of the Contract, or because the dispute is “related” to the contract between Player and Club.

38. The Contract is in written form and thus the arbitration agreement fulfils the formal requirements of Article 178(1) PILA.
39. With respect to substantive validity, the Arbitrator considers that there is no indication which could cast doubt on the validity of the arbitration agreement under Swiss law (cf. Article 178(2) PILA). In particular, the wording “[a]ny dispute arising from or related to the present contract” clearly covers the dispute between the Claimants and the Club.

## 6. Discussion

### 6.1. Applicable Law – *ex aequo et bono*

40. 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*”, as opposed to a decision according to the rule of law referred to in Article 187(1). Article 187(2) PILA is generally translated into English as follows:

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

41. Under the heading “Applicable Law”, Article 15.1 of the FAT Rules reads as follows:

*“Unless the parties have agreed otherwise the Arbitrator shall decide the dispute ex*



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*aequo et bono, applying general considerations of justice and fairness without reference to any particular national or international law.”*

42. As mentioned above (see paragraph 35), the Contract expressly contemplates that the FAT arbitrator shall decide the dispute *ex aequo et bono*.
43. 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>2</sup> (Concordat),<sup>3</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>4</sup>*

44. In substance, it is generally considered that the arbitrator deciding *ex aequo et bono* receives “a mandate to give a decision based exclusively on equity, without regard to legal rules. Instead of applying general and abstract rules, he/she must stick to the circumstances of the case”.<sup>5</sup>
45. This is confirmed by Article 15.1 of the FAT Rules *in fine* according to which the arbitrator applies “general considerations of justice and fairness without reference to any particular national or international law”.

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<sup>2</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>3</sup> P.A. KARRER, Basler Kommentar, No. 289 *ad* Art. 187 PILA.

<sup>4</sup> JdT 1981 III, p. 93 (free translation).

<sup>5</sup> POUURET/BESSON, Comparative Law of International Arbitration, London 2007, No. 717, pp. 625-626.



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46. In light of the foregoing considerations, the Arbitrator makes the following findings:

### 6.2. Findings

#### 6.2.1 Relevant clauses of the Contract

47. The Contract commenced on 18 June 2009. Clause II paragraph 1 sets out the term of the Contract:

*“Club hereby employs Player as a skilled basketball player for a term of one (1) basketball season (2009/2010) to commence on the date hereof and to continue through the first day following the final game in which the Club participates in the 2009/2010 regular season and/or the 2009/2010 Turkish League playoffs for that season, whichever date occurs later.”*

48. In respect of the 2009/2010 season Clause II paragraph 2 provided for the Club to pay the Player *“a fully guaranteed Base Salary of USD 350,000.00”* in accordance with the following schedule:

<i>Upon passing the physical check (sic)</i>	<i>\$ 35,000 USD</i>
<i>September 30, 2009</i>	<i>\$ 35,000 USD</i>
<i>October 30, 2009</i>	<i>\$ 35,000 USD</i>
<i>November 30, 2009</i>	<i>\$ 35,000 USD</i>
<i>December 30, 2009</i>	<i>\$ 35,000 USD</i>
<i>January 30, 2010</i>	<i>\$ 35,000 USD</i>
<i>February 30, 2010 (sic)</i>	<i>\$ 35,000 USD</i>
<i>March 30, 2010</i>	<i>\$ 35,000 USD</i>
<i>April 30, 2010</i>	<i>\$ 35,000 USD</i>
<i>May 30, 2010</i>	<i>\$ 35,000 USD</i>

49. Clause II paragraph 2 included the following:

*“The payment of the guaranteed Base Salary, as stated in this Paragraph 2, to Player is*



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*not contingent upon anything other than the Player passing the Club's physical examination given within one (1) business day of Player's arrival at Club to begin an applicable training camp and the Player not materially breaching this Agreement."*

50. Clause II paragraph 2 also stated:

*"It is agreed that any payment to Player pursuant to the above shall be subject to an interest penalty of Fifty Dollars (\$50.00 USD) per day for each day said payment was due. In the event that any scheduled payments are not made by the Club within fourteen (14) days of the applicable payment date, the Player shall not have to perform in any practice sessions or any games until such time as all of said payments have been paid.*

51. Clause II paragraph 6 stated:

*"BONUSES: In addition to the guaranteed Base Salary to be paid to Player in Paragraph 2 above, the Club shall pay Player the following bonuses (collectively, "Bonuses") for each specific goal listed in this Paragraph 6 that is achieved by the Club in the 2009/2010 (all payable in the U.S. Dollars):*

<i>EUROPEAN CUP</i>	
<i>To pass each round of the EuroCup</i>	<i>5,000 USD</i>
<i>To qualify into Final 8</i>	<i>15,000 USD</i>
<i>To qualify into Final 4</i>	<i>25,000 USD</i>
<i>To qualify into Final Championship</i>	<i>35,000 USD</i>
<i>To qualify into Final Championship</i>	<i>45,000 USD</i>
<i>TURKISH LEAGUE</i>	
<i>To finish the league at the top 1</i>	<i>10,000 USD</i>
<i>PLAYOFFS</i>	
<i>Final 4</i>	<i>15,000 USD</i>
<i>Final</i>	<i>25,000 USD</i>
<i>Championship</i>	<i>50,000 USD</i>
<i>TURKISH CUP</i>	
<i>Championship</i>	<i>20,000 USD</i>

52. Clause IV paragraph b entitled "Early Termination" stated:

*"If any scheduled payment is not received by Player's bank within thirty (30) days of the date due, the Player's performance obligations shall cease, Player shall have the right, at Player's option, to terminate this Agreement and accelerate all future payments required under this Agreement only after the Player sends a notice of termination of his agreement in the end of the time limit of thirty (30) days and Player shall be free to leave Turkey with his FIBA Letter of Clearance to play basketball anywhere in the world Player chooses, but the duties and liabilities of Club under this Agreement shall continue in full*



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*force and effect.”*

### 6.2.2 The issues to be resolved

53. There are three elements of the Request for Arbitration that fall to be resolved:

- I. salary and bonus amounts owing in respect of the 2009/2010 season;
- II. amounts owing in respect of late payment penalties; and
- III. amounts owing to the Agents.

54. The Arbitrator deals with each of these matters in turn.

### 6.2.3 Salary and bonus payments

55. The Club does not dispute the dates or amounts of salary paid and unpaid, as set forth in the Request for Arbitration. The total amount of unpaid salary claimed by the Player is USD 141,000.

56. In respect of bonus payments, the Club does not dispute that it reached the Final 4 of the Turkish league play-offs (as alleged by the Claimants) and the parties are in agreement that the date of the final match of the season was 12 May 2010. The Club also does not dispute the amount owing by way of bonus, according to the terms of the Contract. The amount of the bonus payment claimed by the Player is USD 15,000.

57. In its answer to the Player's demand for payment of the outstanding amounts the Club stated:



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*“The Club, my client, admits the existence of a debt payable to the claimant (amount outstanding after payments made) for and in connection with the contract of 18.06.2009, which he made a subject-matter in this dispute, and admits its obligation to pay such debt. Owing to a global economic crisis going on in the whole world, my client has had some troubles in cash flows as is the case in other Clubs. Economic crisis now going on in our country is not specific to our country and is experienced all over the world in an unpredictable way. That amount which would remain after payments made are deducted from the debts payable to the player as he claimed will be paid as quick as possible.”*

58. It is apparent from this Answer that the Club does not dispute that it owes money to the Player. Rather, the Club states that it is unable to carry out its obligations due to lack of funds.
59. The fact that the Club does not have funds to meet its obligations does not mean that it does not have such obligations. Under the terms of the Contract the Club owes the Player money. Thus, the Arbitrator finds that the Player is entitled to USD 141,000 in respect of unpaid salary and USD 15,000 in respect of an outstanding bonus payment.

### 6.2.4 Late Payment Penalties

60. The Player claims late payment penalties amounting to USD 72,100.
61. In response, the Club stated:

*“Such allegation of the claimant is made under the designation of default fine and is exorbitant and is, so, unacceptable. Just so, at Baxter, Ames and Yenal vs our Club case, heard by FAT, under file number 0088/10, the FAT judge has ruled that a salary claim by the player, Lonny Baxter, for USD40,000 a month under a clause of his contract, as well as for a default fine of USD50 per day for each delayed day beyond ‘due date’, is exorbitant. Therefore, claim by the claimant Kevin Fletcher default fine amounting to USD72.100 is unjust and, so, must be dismissed.”*

62. The reference to the previous FAT decision is to a decision of this Arbitrator in which the Club was also a Respondent. The appropriate treatment of clauses providing for



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penalty payments has been considered and developed in a number of FAT decisions. In particular, this Arbitrator referred, in **FAT 0109/10 Plaisted v Basketball Club Zadar** to the appropriate treatment of such clauses. After referring to previous decisions that had considered the issue,<sup>6</sup> this Arbitrator stated:

*The Arbitrator considers the reasoning contained in both of these Awards to be persuasive and useful. Of course, each case must be judged according to its own facts and the various factors to be considered in relation to penalty payments may apply to a greater or lesser degree in different circumstances. It is, therefore, a matter for each Arbitrator to consider the features of the contract there being considered and whether the particular penalty payments claimed are excessive in the circumstances, deciding the matter ex aequo et bono. It is also the case that in considering the matters ex aequo et bono, each Arbitrator must come to his own view as to when a penalty payment is “excessive”.*

63. Although the clause under which the penalty payments are claimed in the present case is similar to that considered in **FAT 0109/10 Plaisted v Basketball Club Zadar**, it is necessary to consider each case according to its own circumstances, so that different approaches to penalty payment clauses may be necessary in different cases. However, in this case the Arbitrator considers that it is appropriate to apply a similar approach to the approach that was applied in that case.
64. The Player did not terminate the Agreement by reason of the Club having not made payments under the Contract, but continued to play for the Club for the remainder of the season.
65. By Clause I (set out above), the Contract between the Club and the Player ceased on the day after the final game in which the Club participated during the 2009/2010 season. The final game occurred on 12 May 2010, so the Contract ceased on 13 May 2010.

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<sup>6</sup> See FAT 0036/09 Petrosean v Women Basketball Club Spartak St Petersburg and FAT 0100/10 Taylor v KK Crvena Zvezda.



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66. Thus, the Arbitrator considers that it is appropriate that penalty payments be payable between the dates that payments were due and either the dates they were actually paid or the end of the season (if the payment was never paid). At the end of the season, the parties' contractual relations ceased, and outstanding payment obligations of the Club at that date were crystallised. At that date, there was one further payment obligation that had not fallen due, which later fell due on 30 May 2010.
67. In respect of payments that were paid on two different dates, although the clause does not specifically state what penalty payments apply where there is partial payment, the Arbitrator considers that the Parties' intention underlying the relevant clause is as follows:
- (a) for the period where no part of the payment has been made, the full penalty payment of USD 50 per day applies.
  - (b) for the period when partial payment has occurred, a *pro rata* proportion of the full penalty payment applies, based on the amount outstanding.
68. On this basis, the penalty payments payable under Clause II of the contract are as follows:

Due Date	Date for end of penalty payments	Days late	Penalty (USD)	Payment
30 September 2009	03 November 2009 11 November 2009	34 42	1,900 <sup>7</sup>	
30 October 2009	11 November 2009 22 December 2009	12 53	2,064.11 <sup>8</sup>	
30 November 2009	01 February 2010	63	3,150	

<sup>7</sup> This is calculated as 34 days at a rate of USD 50 per day and 8 days at a rate of USD 25 per day.

<sup>8</sup> This is calculated as 12 days at a rate of USD 50 per day and 41 days at a rate of USD 35.71 per day.



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30 December 2009	12 March 2010	72	3,600
30 January 2010	13 May 2010 <sup>9</sup>	103	5,150
28 February 2010	13 May 2010	74	3,700
30 March 2010	13 May 2010	44	2,200
30 April 2010	13 May 2010	13	650
Total			USD 22,414.11

69. Thus, the total penalty payments amount to USD 22,414.11. Once the position under the Contract in respect of penalty payments has been determined, it is necessary to consider the total amount arrived at to assess whether such an amount is excessive in light of all the circumstances of each case. However, in the circumstances of this case, deciding the matter *ex aequo et bono*, the Arbitrator does not consider that these penalty payments are excessive, and finds that USD 22,314.11 is payable to the Player.

#### 6.2.5 Interest

70. In the Request for Arbitration, the Player claimed penalty payments up to 20 September 2010. For the reasons given above, the Arbitrator finds that at the end of the season (12 May 2010), the parties' contractual relations ceased, and outstanding payment obligations of the Club at that date were crystallised, so that no further penalty payments accrued from 13 May 2010.

71. Since that date, the Player has been deprived of monies contractually due to him. The Club has not made any payments since 17 August 2010. It is a generally recognised principle that late payments of debts give rise to the payment of interest. The Player

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<sup>9</sup> This payment was actually received by the Player on 17 August 2010. However, for the reasons given in paragraphs 63-66, the date at which penalty payments stop is 13 May 2010.



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did not claim interest on the monies due in the Request for Arbitration, however, this was because the Player claimed that penalty payments continued to accrue until 20 September 2010.

72. Deciding *ex aequo et bono*, the Arbitrator finds that the Player is entitled to be compensated for the time-value of money in respect of salary and bonus payments that have not been paid. As the Player has been compensated (by way of contractual penalty payment) for the period between the due dates of outstanding payments under the Contract and the end of the season, the Arbitrator deems it equitable and appropriate to apply an interest rate of 5% per annum (which is in line with FAT jurisprudence) from that date until 20 September 2010.
73. Thus, interest is payable as follows:
- (a) 5% p.a. on USD 155,000<sup>10</sup> between 13 May 2010 and 30 May 2010;
  - (b) 5% p.a. on USD 190,000<sup>11</sup> between 31 May 2010 and 17 August 2010;
  - (c) 5% p.a. on USD 156,000<sup>12</sup> from 18 August 2010 until 20 September 2010.

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<sup>10</sup> The amount of USD 155,000 consists of the four salary payments of USD 35,000 and one bonus payment of USD 15,000 that were outstanding during this period.

<sup>11</sup> The amount of USD 190,000 consists of the five salary payments of USD 35,000 and one bonus payment of USD 15,000 that were outstanding during this period.

<sup>12</sup> The amount of USD 156,000 consists of the five salary payments of USD 35,000 and one bonus payment of USD 15,000 that were outstanding during this period, less the USD 34,000 paid by the Club on 17 August 2010.



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### 6.3. Agents' fees

74. Clause VII of the Contract stated:

*"The Player's Agents, Omer Kart, Michael Hart and Lou Diamond shall receive a total agent fee of 10% of the agreement (35,000 USD). In the case of players contract signed in Turkey for the coming years, Yon Menejerlik and Michael Hart and Lou Diamond will have the same benefit (10% of the contract). Yon Menejerlik LTD will also have a right to receive 10% of the of the release fee in the case that player signed with another Turkish team."*

75. A breakdown of the agents' fees is not provided under Clause VII, but it is provided on page 10 under the heading "Agent's [sic] Commission":

*"Upon the passing the physical check (herein and after referred as Player] passage (or deemed to have passed) of his physical examination for the Agreement year 2009/2010, Besiktas Sport Club Istanbul ("Club") agrees to pay a total agent fee of \$35.000USD to Yon Menejerlik ve Egitim LTD, Michael Hart and Lou Diamond*

*14.000USD fully payable to Omer Kart Yon Menejerlik LTD...*

*10.500 USD fully payable to Hart Sports Management Group –Michael Hart...*

*10.500 fully payable to Mr. Lou Diamond..." (sic)*

76. The Claimants have provided information in respect of the identity of the Greek Agent. Based on that information, the Arbitrator is satisfied that Mr. Diamantopolous (the Greek Agent), is the same person as Lou Diamond.

77. Despite his name being mentioned on page 10 (as referred to above), the Greek Agent does not appear to have signed the Contract under either name.

78. The Club's first submission in respect of Agent Fees is as follows:

*"...under Article 7 of said contract, headed Agent Fee, it has been decided to pay a total sum of USD35,000 to Ömer Kart, Michael Hart and Lou Diamond, as player's agents, and said contract does not give any information and clarification as to which agent would*



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*specifically get what level of fee. Therefore, such claims of agents are not acceptable.”*

79. The Arbitrator does not consider that this submission is correct. First, as set out above, the page of the Contract headed “Agent’s Commission” provides a breakdown. Second, even if no breakdown had been provided, the Club’s obligation would have been to pay the full amount, and it would have been a matter for the Agents to divide the fee amongst themselves. This is not necessary here, as the Agents agree about their respective contractual entitlements.

80. The second submission made by the Club in respect of Agent Fees is:

*“...the name of Elias Diamantopoulos, a Greek agent, identified in the petition as a claimant, is not mentioned in the player’s contract of 18.06.2998, and, further, the contract of 18.06.2009, a copy of which has been submitted by the claimant, has not been even signed by said Elias Diamantopoulos. Therefore, as the claimant Elias Diamantopoulos has no capacity to act as a party to the case, application filed by said Elias Diamantopoulos can not be considered to be a valid application and, to, all claims made by him must be dismissed.”*

81. The Arbitrator does not accept this submission. As set out above, the Claimant has established that Lou Diamond and Elias Diamantopolous are the same person: the Greek Agent. In respect of the Greek Agent not having signed the document, it is a generally accepted principle in many legal systems that a person who is not a signatory or party to a contract, but to whom a benefit is granted under the contract can enforce it, unless the contract in question expressly excludes this. This Contract contains no such exclusion. In fact, the sections of the Contract referred to above specifically envisage that the Greek Agent will be paid an Agent Fee. Deciding the matter *ex aequo et bono*, the Arbitrator considers that a similar principle should apply here.

82. For these reasons, the Arbitrator finds that the Club owes:

- (a) the American Agent USD 10,500;



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- (b) the Turkish Agent USD 14,000; and
- (c) the Greek Agent USD 10,500.

### **7. Costs**

83. Article 17.2 of the FAT Rules provides that the final amount of the costs of the arbitration shall be determined by the FAT President and may either be included in the award or communicated to the parties separately. Furthermore, Article 17.3 of the FAT Rules provides that, as a general rule, the award shall grant the prevailing party a contribution towards its reasonable legal fees and expenses incurred in connection with the proceedings.
84. On 21 March 2011, considering that pursuant to Article 17.2 of the FAT Rules “the FAT President shall determine the final amount of the costs of the arbitration which shall include the administrative and other costs of FAT and the fees and costs of the FAT President and the Arbitrator”, and that “the fees of the Arbitrator shall be calculated on the basis of time spent at a rate to be determined by the FAT President from time to time”, taking into account all the circumstances of the case, including the time spent by the Arbitrator, the complexity of the case and the procedural questions raised, the FAT President determined the arbitration costs in the present matter at EUR 4,900.00.
85. In the present case, the Claimants have been largely successful (except that the Player has not been successful in recovering the full amount of the penalty payments claimed). The arbitration costs shall therefore be borne entirely by the Club. The Club shall also pay the Claimants’ legal fees and expenses, to the extent they are reasonable.



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86. The costs incurred by the Claimants were the Advance on Costs for both sides (totalling EUR 11,980), the non-reimbursable fee of the FAT (EUR 3,967.50) and legal fees amounting to USD 5,000.
87. The Arbitrator considers that USD 5,000 for legal fees is excessive in this case. In all the circumstances of this case, the Arbitrator considers that a reasonable amount in respect of legal fees is USD 3,000.
88. The Arbitrator decides that in application of Article 17.3 of the FAT Rules:
- (i) the FAT shall pay to the Claimants EUR 7,080.00 by way of reimbursement of the Advance on Costs;
  - (ii) Respondent shall pay to Claimants an amount of EUR 4,900.00 being the difference between the costs advanced by Claimants (EUR 11,980.00) and the amount the Claimants will receive in reimbursement from the FAT;
  - (iii) Respondent shall pay to Claimants amounts of USD 3,000 and EUR 3,967.50 in respect of legal fees and expenses; and
  - (iv) the Claimants shall share the amounts referred to above in proportion to the rates at which they have paid those expenses.



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### 8. AWARD

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

- I. **Beşiktaş Jimnastik Kulübü is ordered to pay to Mr. Kevin Fletcher USD 141,000 in respect of unpaid salary.**
- II. **Beşiktaş Jimnastik Kulübü is ordered to pay to Mr. Kevin Fletcher USD 15,000 in respect of unpaid bonus payments.**
- III. **Beşiktaş Jimnastik Kulübü is ordered to pay to Mr. Kevin Fletcher USD 22,414.11 in respect of penalty payments.**
- IV. **Beşiktaş Jimnastik Kulübü is ordered to pay to Mr. Kevin Fletcher interest at 5% per annum in respect of the amounts and for the periods shown in the table:**

<b>Amount</b>	<b>Period for which interest is payable</b>
USD 155,000	13 May 2010 – 30 May 2010
USD 190,000	21 May 2010 – 17 August 2010
USD 156,000	18 August 2010 – 20 September 2010

- V. **Beşiktaş Jimnastik Kulübü is ordered to pay to Mr. Michael Hart USD 10,500 in respect of agent fees.**
- VI. **Beşiktaş Jimnastik Kulübü is ordered to pay to Mr. Ömer Kart USD 14,000 in respect of agent fees.**
- VII. **Beşiktaş Jimnastik Kulübü is ordered to pay to Mr. Elias Diamantopoulos USD 10,500 in respect of agent fees.**
- VIII. **Beşiktaş Jimnastik Kulübü is ordered to pay to the Claimants EUR 4,900 as a reimbursement of the Advance on Costs.**
- IX. **Beşiktaş Jimnastik Kulübü is ordered to pay to the Claimants USD 3,000 and EUR 3,967.50 as a contribution towards their legal fees and expenses.**



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**X. Any other or further-reaching claims are dismissed.**

Geneva, seat of the arbitration, 28 March 2011

Raj Parker  
(Arbitrator)