Arbitration CAS 2017/A/5242 Esteghlal Football Club v. Pero Pejic, award of 16 April 2018

Panel: Mr Bernhard Welten (Switzerland), Sole Arbitrator

Football
Termination of an employment contract with just cause by the player
Priority of specifically agreed early termination clauses over indicative principles based on FIFA and CAS jurisprudence
Termination without prior warning as termination with just cause
Liquidated damages/penalty clause
Reciprocity of liquidated damages/penalty clauses
Excessive character of a penalty clause

1. **If, instead of the delayed payment period of around three months based on CAS jurisprudence, the employment contract states that after a delayed payment for 45 days the whole contractual amount shall become due for payment and the player has just cause to terminate the employment contract, this specifically agreed clause between the parties has priority over the general indicative principle of the three months' delay based on FIFA and CAS jurisprudence and, therefore, this clause is to be considered an early termination clause.**

2. **If by contractual agreement an early termination clause setting a grace period of 45 days to comply with payment duties was concluded, this means therefore, that the parties did not wish to first set another grace period to pay before the early termination is possible and may be with just cause even if given without prior warning. This solution chosen by the parties complies with Swiss law (art. 102 of the Swiss Code of Obligations) and with the jurisprudence of the Swiss Federal Tribunal which clarifies that in case of a severe breach of a contract, the termination without prior warning is justified.**

3. **A contractual clause that states that a party shall pay *"the whole amount of the contract"* in case of a delay in the payments of more than 45 days has to be qualified as a liquidated damages or penalty clause. Even if the clause does not state an exact amount to be paid, this amount payable can be easily calculated.**

4. **Swiss law does not require penalty clauses to be "reciprocal" in order to be valid.**

5. **Article 163 para. 3 of the Swiss Code of Obligations (CO) is part of the public policy and as a consequence the judge must apply this norm even if the debtor of the penalty clause did not expressly request a reduction of it. Such a reduction is possible in case the penalty foreseen is significantly disproportionate, respectively excessive. In order to judge the excessive character of the contractual penalty, one must not decide abstractly, but, on the contrary, take into consideration all the circumstance of the case at hand. However, as the parties are free to fix the amount of the penalty in accordance to Article**

163 para. 1 CO, the judge must make use of his discretion. Under Swiss law, a penalty is considered as being excessive if such penalty is against justice and fairness. However, a reduction of the penalty shall never lead to a lower amount than the creditor would receive under general rules to calculate compensatory damages, i.e. in applying Article 17 para. 1 of the FIFA Regulations on the Status and Transfer of Players.

I. PARTIES

1. Esteghlal Football Club (the "Appellant" or "Esteghlal") is a professional football club with its registered office in Tehran, Iran. It is affiliated to the IR Iran Football Federation ("IRIFF") which is a member of the Asian Football Confederation ("AFC") and the Fédération Internationale de Football Association ("FIFA").

2. Mr. Pero Pejic (the "Respondent" or "Player") is a professional football player, born on 28 November 1982 and of Croatian nationality. He currently plays as a professional player with the Club Slaven Belupo Koprivnica, in the First League of Croatia.

II. FACTUAL BACKGROUND

A. Facts

3. On 2 August 2015, the Parties signed an employment contract ("Employment Contract") valid as from 26 July 2015 until *"the end of football season matches in 2016-2017"*.

4. On 8 June 2016, the Appellant sent a letter to the Player reminding him that the training session for the new season 2016/17 would start on 14 June 2016 and further requested the Player to come to the Appellant's management *"for more and final negotiation about the contract of the player and next cooperation"*.

5. On 9 June 2016, the Player wrote a letter to the Appellant and terminated the Employment Contract based on Article 6.7 of the Employment Contract which provides this right in case the Appellant did not pay the due amounts within 45 days of the due date stated in the Employment Contract. In addition, the Respondent requested a payment of USD 424,512 increased by taxes, corresponding to the remuneration for the season 2015/16 of USD 114,512 and the season 2016/17 of USD 310,000.

6. On 13 June 2016, the Appellant, amongst others, informed the Player that the unilateral termination of the Employment Contract is not valid and it invited the Player to come to its office to collect *"the remaining amount due for the sporting season 2015/16, i.e. of USD 109,512"*.

7. On 23 June 2016, the Player requested a payment for the season 2015/16 of USD 167,149.08 (including taxes and bonus) and USD 377,245.06 for the season 2016/17 (including taxes). The same day, the Appellant replied in writing and confirmed its offer to pay to the Player an amount

of USD 109,512 in cash in its office as it has embargo problems to transfer money abroad, insisting that the Employment Contract was valid and requesting the Player to report back to the Appellant.

8. On 24 June 2016, the Player emphasised that the Employment Contact had been terminated on 8 June 2016 and requested again the payment of USD 167,149.08 for the season 2015/16 (reduced to USD 114,512 in case the Appellant proves having paid the taxes) and USD 377,245.06 for the 2016/17 season.

9. On 24 June 2016, as well, the Appellant replied to the Player in confirming that the termination of the Employment Contract is not valid and, therefore, the Player is still considered to be under this Employment Contract and he shall come back to Tehran and start the training session by Sunday, 26 June 2016.

10. On 25 June 2016, the Appellant again informed the Player to come back and train with the team, otherwise the Appellant would be forced to impose penalties against the Player based on the Employment Contract.

11. On 30 July 2016, the Player signed an employment contract with the Albanian club Futboll Klub Kukesi ("FC Kukesi").

B. Proceedings before the FIFA Dispute Resolution Chamber ("DRC")

12. On 7 July 2016, the Player filed a claim against the Appellant before the DRC, requesting the payment of a total of USD 544,394 plus interest at 5% p.a. as from 1 January 2016. The amount was composed as follows:
   - USD 109,512 Outstanding salaries season 2015/16
   - USD 5,000 Bonus to play qualification in the Asian League, season 2015/16
   - USD 62,537 Corresponding to Rials 1,529,100,000, taxes season 2015/16
   - USD 310,000 Remuneration season 2016/17
   - USD 67,245 Corresponding to Rials 1,961,700,000, taxes season 2016/17

13. On 14 July 2016, the Player gave the details of his claim against the Appellant, based on FIFA's request of 14 July 2016.

14. On 19 August 2016, FIFA informed the Appellant about the claim filed by the Player and set a deadline until 8 September 2016 to file its position along with any documentary evidence.

15. On 19 September 2016, FIFA informed the Parties that the Appellant had not filed any reply and proofs within the deadline set. FIFA formally closed the investigation-phase and requested the Player to inform FIFA about his employment situation, including a copy of any related employment contract.

16. On 20 September 2016, the Player informed FIFA that he was playing for FC Kukesi in Albania since 30 July 2016 and provided the corresponding employment contract, showing a total net remuneration of EUR 50,000 for the 2016/17 season.

17. On 23 November 2016, the Appellant replied to the DRC stressing that it only received *"the accompanying letters without the attachments therein indicated"* and, therefore, requested the DRC to send it the claim again with all the relevant attachments.

18. On 5 December 2016, FIFA replied to the Appellant and provided proofs of the delivery of the Player's claim and enclosures via courier to the Appellant on 23 August 2016.

19. On 7 February 2017, the DRC informed the Parties about the Player's additional unsolicited correspondence of 7 February 2017 and it left the decision to the relevant decision-making body of the DRC to decide whether or not to take into account these additional unsolicited comments.

20. On 9 February 2017, the DRC decided as follows:

"1. The claim of the Claimant, Pero Pejić, is partially accepted.

2. The Respondent, Esteghlal Football Club, has to pay to the Claimant, ***within 30 days*** *as from the date of notification of this decision, outstanding remuneration in the amount of USD 109,512 plus 5% interest p.a. as follows:*

a. 5% p.a. as of 2 January 2016 on the amount of USD 36,012;

b. 5% p.a. as of 2 April 2016 on the amount of USD 49,000;

c. 5% p.a. as of 16 May 2016 on the amount of USD 24,500.

3. The Respondent has to pay to the Claimant, ***within 30 days*** *as from the date of notification of this decision, compensation for breach of contract in the amount of USD 255,000 plus 5% interest p.a. as from 7 July 2016 until the date of effective payment.*

4. In the event that the amounts plus interest due to the Claimant in accordance with the above-mentioned numbers 2. and 3. are not paid by the Respondent within the stated time limits, the present matter shall be submitted, upon request, to the FIFA Disciplinary Committee for consideration and a formal decision.

5. Any further claim lodged by the Claimant is rejected.

6. The Claimant is directed to inform the Respondent immediately and directly of the account number to which the remittance is to be made and to notify the Dispute Resolution Chamber of every payment received".

21. On 16 February 2017, the DRC sent this decision of 9 February 2017 by fax letter to the Parties.

22. On 22 respectively 26 February 2017, the Appellant respectively the Player requested the DRC to send the grounds of the decision of 9 February 2017.

23. On 18 May 2017, FIFA notified the Parties of the decision of 9 February 2017 with grounds (the "Decision"). The reasoning of the Decision can be briefly summarized as follows:

- The DRC did send the Appellant the proof that it received the Player's claim and enclosures by courier of 23 August 2016 and the Appellant's reply was only received by the DRC after the notification of the closure of the investigation-phase. Therefore, such statement could

not be taken into account.

- At the time when the Player terminated the Employment Contract, the Appellant had failed to pay more than 40% of the due salaries without a valid reason; this was considered as substantial and therefore, the Player had just cause to terminate the Employment Contract based on Article 14 RSTP, respectively Article 6.7 of the Employment Contract. The Appellant is therefore considered liable to pay the outstanding salaries for the season 2015/16 of USD 109,512 as well as 5% interest p.a. as stated before.
- The DRC rejected the Player's request for payment of taxes to be added to the outstanding salaries, as – based on Articles 6.6 and 7.7 of the Employment Contract – it was the Appellant's obligation to pay the taxes directly to the authorities. Further, the Player did not prove that he incurred any expenses in relation to the payment of taxes.
- Based on Article 17 para. 1 RSTP, the Appellant was liable to pay a compensation for breach of contract. However, as Article 6.7 of the Employment Contract is not reciprocal as it does not grant the same rights to both Parties, the DRC decided that this clause cannot be taken into consideration when determining the amount of compensation to be paid. Therefore, the DRC referred to the Article 17 para. 1 RSTP. The remuneration for the season 2016/17 was fixed on USD 310,000 and the Player earned with the new club FC Kukesi, Albania an amount of EUR 50,000. Therefore, such salary is deducted from the remuneration mentioned before which brings the compensation for breach of contract to an amount of USD 255,000, plus interest of 5% p.a. starting on 7 July 2016 when the claim was lodged.
- As the Player did not bring any proof regarding any bonus payments, the DRC rejected such claim of USD 5,000 for the 2015/16 season.

III. PROCEEDINGS BEFORE THE COURT OF ARBITRATION FOR SPORT ("CAS")

24. On 7 June 2017, the Appellant filed its Statement of Appeal in accordance to Article R48 of the Code of Sports-related Arbitration and requested that the appeal be submitted to a Sole Arbitrator ("Code").

25. On 17 June 2017, the Appellant filed its Appeal Brief in accordance to Article R51 of the Code.

26. On 17 July 2017, the CAS Court Office set the Respondent a deadline to file his Answer pursuant to Article R55 of the Code and requested if the Respondent agreed with the Appellant's request that the present case be submitted to a Sole Arbitrator.

27. On 20 July 2017, FIFA sent a clean copy of the Decision and informed that it would not intervene in the present arbitration proceeding.

28. On 10 August 2017, the Respondent requested to set his deadline to file an Answer only once the advance of costs had been paid by the Appellant. Further, the Respondent agreed that the present matter be submitted to a Sole Arbitrator for decision.

29. On 17 August 2017, the CAS Court Office stated that in the absence of any joint nomination of a Sole Arbitrator by the Parties it would be for the President of the CAS Appeals Arbitration Division to nominate the Sole Arbitrator.

30. On 14 September 2017, the CAS Court Office set a deadline to the Respondent to file his Answer in accordance with Article R55 of the Code, including the documents the production of which had been requested by the Appellant in its Appeal Brief. Further, the Parties were informed that pursuant to Article R54 of the Code, the President of the CAS Appeals Arbitration Division had appointed as Sole Arbitrator Mr. Bernhard Welten, attorney-at-law in Berne, Switzerland to decide this case.

31. On 19 September 2017, FIFA sent a copy of its whole file in relation to the procedure between the Parties to the CAS. The Parties were also requested to indicate whether they required that a hearing would take place in these proceedings.

32. On 26 September 2017, the Player filed his Answer in accordance with Article R55 of the Code.

33. On 7 October 2017, the Appellant indicated that it wishes that a hearing was held.

34. On 10 October 2017, the Respondent stated that he did not require that a hearing was held in these proceedings.

35. On 17 October 2017, the Parties were informed that the Sole Arbitrator had decided to hold a hearing and were requested to inform the CAS Court Office whether they would be available for such purpose on 2 or 6 November 2017.

36. On 20 October 2017, the Appellant indicated that it would be available to attend a hearing on 6 November 2017. The Respondent did not provide his availability within the relevant time limit.

37. On 24 October 2017, the CAS Court Office summoned the Parties for a hearing on 6 November 2017.

38. On 30 October 2017, the Appellant and the Player signed the Order of Procedure.

39. On 1 November 2017, the Sole Arbitrator decided that the request for production of documents filed by the Appellant was to be rejected, with the exception that the Player was ordered to disclose the exact total amounts he had received over the duration of his employment contract with FC Kukesi, including a specification of which amounts corresponded to fixed salary and which corresponded to bonuses.

40. On 2 November 2017, the Player confirmed that he had received a total amount of EUR 50,000 from FC Kukesi and that this entire amount corresponded to fixed salary (no bonuses had been received). The Respondent also indicated that he would not attend the hearing, as he considered it *"unnecessary and redundant because all the facts are contained (found) in material evidence"*. The Respondent also objected to Mr. Seyed Pendar Toufighi being heard as a witness and to his written witness statement.

41. On 2 November 2017, the CAS Court Office informed the Parties that the Player does not intend to attend the hearing. The CAS Court Office invited the Respondent to indicate whether, even if he could not attend the hearing in person, he would be willing to participate by videoconference. Moreover, the CAS Court Office informed the Parties that the Sole Arbitrator considered Mr. Toufighi as party representative rather than a witness and therefore rejected the admissibility of his witness statement, however, allowed his participation at the hearing as a party representative.

42. On 3 November 2017, the Player indicated that he would not attend the hearing, either in person or by videoconference *"because all the facts have been established in this process in material evidence […]"*.

43. On 3 November 2017, the CAS Court Office informed the Parties that the Player had indicated that he would not attend the hearing, but that, based on Article R55 of the Code, the Sole Arbitrator would nevertheless proceed with the hearing and render an award.

44. On 6 November 2017, a hearing was held in Lausanne. The Appellant was represented by Mr. Salvatore Civale, attorney-at-law, and Mr. Seyed Pendar Toufighi was heard as party representative by skype. Neither the Respondent nor his attorney attended the hearing. At the end of the hearing, the Appellant confirmed that its right to be heard had been fully respected.

IV. SUBMISSIONS OF THE PARTIES

45. In the following summaries, the Sole Arbitrator will not include every argument put forward to support the Parties' prayers for relief. Nevertheless, the Sole Arbitrator has carefully considered and taken into account all of the evidence and arguments submitted by the Parties, but limits his explicit references to those arguments that are necessary in order to justify his decision.

A. Appellant's Submissions and Requests for Relief

46. The Appellant's submissions, in essence, may be summarized as follows:
    - It is correct that Article 7 of the Employment Contract states the exact amounts and deadlines for the Appellant to pay the Player's salary. Up to now, the Player did not send any warning to the Appellant regarding outstanding salaries; he never put the Appellant in default. Nevertheless, with his letter sent on 9 June 2016, after having received the Appellant's letter of 8 June 2016, the Player terminated directly the Employment Contract for just cause and asked for compensation to be paid. Such termination letter should be considered non-valid and having no effect.
    - Based on the FIFA and CAS jurisprudence, only if the unpaid salary constitutes a substantial amount and if a certain time period of delay of payment has elapsed does the player have just cause to terminate the contract with immediate effect. Important is that the player offers his services during the contractual period and the time during which the amount was outstanding. The Appellant made several and substantial payments to the Player. The contract did foresee four instalments whereas all of the three first instalments were superior

to the yearly salary the Player earned with his new club in Albania during the 2016/17 season. The delay of payment of the Appellant did not meet the conditions of Article 6.7 of the Employment Contract; it is not a substantial breach of contract and it does not give the Player the right to terminate the Employment Contract with just cause. The Appellant never refused to pay; however, the Player did not follow the Appellant's invitation to come to Tehran and collect his money in cash. Due to the embargo in place, the Appellant was not able to wire any money abroad.

- The Appellant invited the Player with its letter of 8 June 2016 to come to Tehran to receive his salary in cash; the termination letter from the Player was only received the day after. The Appellant repeated thereafter its offer for the Player to come to Tehran and get his money. However, the Player maintained his position to terminate the Employment Contract for just cause.
- A clause to terminate the contract for just cause, based on CAS jurisprudence (CAS 2015/A/4039), has to be assessed on a case by case basis and generally a player only has the right to terminate the contract for just cause if his salaries have been delayed for three months or more. In the case at hand, the conditions of Art. 6.7 of the Employment Contract were not met and this clause is against the FIFA and CAS jurisprudence; therefore, it must be considered as null and void.
- The Player confirmed having received a total amount of USD 135,488. Therefore, the Appellant paid the full first instalment and made partial deposits for the second (USD 23,488) and third instalments (USD 14,000). The fourth instalment was only due on 15 May 2016; accordingly, the 45 days deadline ended on 30 June 2016 and, therefore, after the Player's termination letter of 9 June 2016. The Player refused to come to Tehran and get the payment in cash.
- In case the Sole Arbitrator should confirm that the Player had a just cause to terminate the Employment Contract, the compensation shall be reduced to a reasonable amount. All the Player's income generated from FC Kukesi, including bonuses, shall be deducted as well as any other economic agreements the Player signed. Further, the Player's absences for the trainings and all his misbehaviour should lead to a reduction of the compensation as well.
- Starting on 1 July 2016, the Appellant underwent several structural changes; therefore, the introduction of disciplinary sanctions against the Player as indicated in Article 6 of the Employment Contract, was delayed. As the Player left Iran and did not show up in the training camp between 14 to 30 June 2016, a sanction of USD 32,000 shall be deducted from any amounts due to the Player.
- Based on Iranian Law, section 22 Iranian Labour Code, the Player should at maximum receive USD 40,833.33 being twice the last monthly salary payment (USD 20,416.66) as the Employment Contract was closed for a total of two years.
- As the Player did not have just cause to terminate the Employment Contract, he breached his contractual duties in leaving the country and not coming back for the training camp. Based on FIFA and CAS jurisprudence, the absence of a player can constitute just cause for a club to unilaterally terminate the employment contract. Therefore, the Appellant claims a compensation equal to the remaining value under the Employment Contract and the replacement costs for a total of USD 830,000; this amount corresponds to USD 310,000 salary for the 2016/17 season, USD 320,000 for the transfer and salary of Mr. Robson

Ianuario de Paula, Brazil and USD 200,000 (IRR 6,500,000,000) salary costs for Mr. Ali Ghorbani, Iran. The Appellant had to purchase these two players in order to replace the Player.

- If the Sole Arbitrator decides that the Player did not have just cause to terminate the Employment Contract, the Player shall be suspended for six months pursuant to Article 17 RSTP.

47. In its prayers for relief, the Appellant requests as follows:

"a) *CAS has jurisdiction over the present dispute;*

b) *The Appeal of Esteghlal Football Club against the decision adopted by FIFA on 9 February 2017 (ref. No. 16-01238/ebo) is admissible;*

c) *The Player had no just cause to terminate the Employment Contract signed on 2 August 2015 and, therefore:*

c.1. the Appealed decision adopted by FIFA on 9 February 2017 (ref. No. 16-01238/ebo) is set aside;

c.2. the claim of the Club against the Player requesting to be awarded with a compensation for the Player's breach of contract, is upheld and in such a case:

c.2.A. - the amount of 830,000 USD (or any other amount considered fair by the Sole Arbitrator taking into account the specific circumstance of the case) is awarded in favour of the Appellant as compensation for the Player's breach of contract, OR

c.2.B. - the case is sent back to FIFA DRC for the quantification of the compensation due to the Club for the Player's breach of contract, in light of article 17 of the FIFA Regulations on Status and Transfer of Players;

d) *In the unlike case CAS shall deem that the Player had just cause to terminate the Employment Contract, the CAS is respectfully requested to set aside point 3 of the Appealed FIFA decision and significantly reduced the amount of compensation recognised to the Player in first instance, in light of the specific circumstances of the case;*

<u>in any and all the above-mentioned cases</u>

e) *Order the Respondent, Mr. Pero Pejić, to bear in full the costs of this arbitration proceeding;*

f) *Order the Respondent, Mr. Pero Pejić, to bear the legal costs and expenses born by the Appellant, Esteghlal Football Club, in relation to this appeal proceedings, in an amount to be determined at the discretion of the Sole Arbitrator;*

g) *Grant any other relief or orders it deems reasonable and fit to the case at stake".*

B. Respondent's Submissions and Requests for Relief

48. The Respondent's submissions, in essence, may be summarized as follows:

- It is uncontested, that the Player received a net amount of USD 135,488 in four instalments (12.08.2015 USD 50,000; 26.09.2015 USD 20,000; 18.11.2015 USD 10,875; 20.02.2016 USD 54,613) and therefore, a net amount of USD 114,512 remained unpaid. As the Appellant did not pay the taxes for the salary in the season 2015/16, further USD 62,637 (IRR 1,529,100,000) are due in addition.

- The Player has the contractual right based on Art. 6.7 of the Employment Contract to terminate the Employment Contract with his letter of 8 June 2016.
- Article 7.2 of the Employment Contract states that the salary for the season 2016/17 is USD 310,000, such net amount, increased by taxes of USD 67,245.06 (IRR 1,961,700,000) is due to the Player.
- The Appellant did send the International Transfer Certificate ("ITC") for the Player to FIFA on 13 August 2016 and with this confirmed that the Player validly and legally terminated the Employment Contract. Based on Article 6.7 of the Employment Contract it is obvious that the Appellant has the duty to pay the Player the whole amount as stated in the Employment Contract.
- As the Appellant did not reply within the deadline set by the DRC, it is not allowed to file new prayers; it is only allowed to ask for the Decision to be annulled. The claim for the damages of USD 830,000 is not realistic or rational;
- The Player requests in his counter claim that the payment for the season 2016/17 shall be USD 310,000 plus taxes as it is irrelevant that the Player signed a new contract with a third club for the 2016/17 season. This is stated in Article 6.7 of the Employment Contract where it is stated: *"… the club should pay the player the whole amount of the contract"*. The Appellant is therefore obliged to pay the exact amount stated in the Employment Contract and not a compensation for damages. FIFA has no competence in deciding against the Employment Contract and reduce the payment for the 2016/17 season.

49. In his prayers for relief, the Respondent requests as follows:

"1. Appeal by Appellant Football Club ESTEGHLAL of Iran-TEHRAN against the FIFA DECISION of the Dispute Resolution Chamber by 9 February 2017 (case ref. 16-01238/ebo) <u>is NOT admissible and NOT established.</u>

2. Counter attack by player Pero Pejić against the point 5. of the Decision rendered by the FIFA Dispute Resolution Chamber on February 9, 2017 is upheld.

3. The point 5. of the Decision rendered by the FIFA Dispute Resolution Chamber on February 9, 2017 is set aside and is replaced by the present arbitral award as follows:

♣ Football Club ESTEGHLAL of Iran-TEHRAN has to pay to the Player, within 30 days as from the date of notification of the decision, the amount of USD 55,000 (in words: fifty-five thousand) plus 5% interest p.a. from July 7, 2016 until the date of effective payment.

4. The Club ESTEGHLAL of Iran-TEHRAN has to pay the costs of this legal procedure, to the player, within 15 days as from the date of notification of this decision".

V. JURISDICTION

50. Article R47 of the Code provides as follows:

"An appeal against the decision of a federation, association or sports-related body may be filed with CAS if the statutes or regulations of the said body so provide or if the parties have concluded a specific arbitration agreement and if the Appellant has exhausted the legal remedies available to him prior to the appeal, in accordance with the statutes or regulations of that body".

51. The Appellant refers to Articles 58 FIFA Statutes stating that *"Appeals against final decisions passed by FIFA's legal bodies … shall be lodged with CAS within 21 days of notification of the decision in question"*.

52. The Respondent did not dispute CAS' jurisdiction to hear this dispute.

53. The Sole Arbitrator confirms in pointing out to Article 58 FIFA Statutes that the CAS has jurisdiction to decide this case. The Parties have further confirmed the jurisdiction of the CAS by signing the Order of Procedure.

VI. ADMISSIBILITY

54. Article 58 para. 1 FIFA Statutes states that an appeal has to be filed within 21 days from the notification of the decision.

55. The Decision was notified to the Parties on 18 May 2017. The Appellant filed its Statement of Appeal on 7 June 2017 and, therefore, within the 21-days deadline.

56. The Appeal filed by the Appellant is, therefore, admissible.

57. In his Answer of 26 September 2017, the Player requested in his prayers no. 2. and 3. that part of the Decision be amended. Therefore, the CAS Court Office informed the Player with its letter of 26 October 2017 that a counterclaim is no longer admissible in appeal proceedings under the Code and that the Player should have appealed the Decision if he wanted to challenge it. The Player was granted a deadline until 30 October 2017 to state if he intended to file a counterclaim and if so, whether he wished to maintain that counterclaim.

58. On 30 October 2017, the Player replied to the CAS and confirmed in pointing out to Article R39 of the Code that he had indeed lodged a counterclaim and that he wanted to maintain it *"if it in accordance with the Code"*.

59. The Sole Arbitrator points out to Article R55 of the Code which gives an overview about the details of the answer to be filed. The possibility to file a counterclaim is no longer provided by this Article. This is confirmed by D. Mavromati & M. Reeb, the Code of the Court of Arbitration for Sport, R39, N. 19: *"… Since the amendment of the CAS Code in 2010, counterclaims are only allowed in ordinary proceedings and are no longer admissible in appeal proceedings under Article R55 CAS Code"*.

60. Therefore, the Sole Arbitrator holds that the counterclaim filed by the Player in his prayers no. 2. and 3. is not admissible.

VII. APPLICABLE LAW

61. Article R58 of the Code states as follows:

"The Panel shall decide the dispute according to the applicable regulations and, subsidiarily, to the rules of law

chosen by the parties or, in the absence of such a choice, according to the law of the country in which the federation, association or sports-related body which has issued the challenge decision is domiciled or according to the rules of law the Panel deems appropriate. In the latter case, the Panel shall give reasons for its decision".

62. Article 57.2 of the FIFA Statutes provides as follows:

"The provisions of the CAS Code of Sports-related Arbitration shall apply to the proceedings. CAS shall primarily apply the various regulations of FIFA and, additionally, Swiss law".

63. In its Appeal Brief, the Appellant states that this dispute *"be decided in accordance with the FIFA regulations and, additionally, Iranian and Swiss Law in order to fill any gap"*. It refers in its Appeal Brief to the Iranian Labour Code in case the Sole Arbitrator concludes that the Player terminated the Employment Contract with just cause. Reason for this is that the Employment Contract has been negotiated and signed in Iran and the payment obligations do also exist in Iran.

64. The Employment Contract states in different articles that the Player has to respect all regulations of the IRIFF as well as the laws of the Islamic Republic of Iran. However, the Employment Contract does not state that the contract itself is governed by any specific rules or laws. Article 6.12 of the Employment Contract states that in case of a breach of any of the clauses in the Employment Contract, *"the only official authority in Iran is the Iran Football Federation and litigate to the FIFA"*.

65. The Player, in his Answer, did not refer to any specific applicable law beside FIFA Regulations.

66. As the Parties did not explicitly agree to any applicable law in the Employment Contract, as Article 57.2 of the FIFA Statutes provides that FIFA regulations shall apply primarily and Swiss law subsidiarily and as FIFA, which issued the Decision, is based in Switzerland, the Sole Arbitrator has decided that the FIFA regulations shall be applicable on a primary basis and that Swiss law shall apply in case there is a need to fill in any gap in the FIFA regulations.

VIII. MERITS

67. Before coming to the merits in this case, the Sole Arbitrator points out to its decision of 1 November 2017 regarding the rejected request for production of documents which had been filed by the Appellant. Based on Article R57 para. 3 of the Code, Article R44.3 of the Code is also applicable to appeal proceedings. Therefore, a party is ordered to produce documents in its custody or under its control if the party seeking such production demonstrates that such documents are likely to exist and to be relevant. Regarding the Appellant's request for *"any other Economic Agreement signed by the Player during the length of the Employment Contract"*, the Appellant did not show that such other agreements are likely to exist. Therefore, the Sole Arbitrator decided to reject this request. Regarding the requested *"Tax return of the Player for the years 2015, 2016 and 2017 filed with the competent authorities"*, the Sole Arbitrator is of the opinion that the tax returns are generally not relevant to this case as therein only a total number will be listed as revenue without possibly being split into income from football related activity or other activities. Further, these tax returns are not relevant as the Sole Arbitrator accepted the request and

ordered the Player to disclose the exact total amounts that he received over the duration of his employment contract with FC Kukesi. Finally, the Sole Arbitrator rejected also the Appellant's request for production of *"Banking Account balances/slips of the Player for the years 2015, 2016 and 2017"* as he considers these bank statements as not being relevant and going too far in the sense of being "fishing expeditions" for evidence. It is possible that payments of salary and bonus are made e.g. in cash like the Player experienced with the Appellant. Further we do not know how many bank accounts the Player has and any income shown therein, must not be based related to the Player's football activities. Such request must therefore be considered a "fishing expedition" for evidence and, therefore, the requirements of Article R44.3 of the Code are not fulfilled.

68. The main relevant articles, official comments and contractual clause to decide this case are:

- Article 14 RSTP, Terminating a contract with just cause

  "A contract may be terminated by either Party without consequences of any kind (either payment of compensation or imposition of sporting sanctions) where there is just cause".

- Article 17 RSTP, Consequences of terminating a contract without just cause

  "In all cases, the party in breach shall pay compensation. Subject to the provisions of article 20 and Annexe 4 in relation to training compensation, and unless otherwise provided for in the contract, compensation for the breach shall be calculated with due consideration for the law of the country concerned, the specificity of sport, and any other objective criteria. These criteria shall include, in particular, the remuneration and other benefits due to the player under the existing contract and/or the new contract, the time remaining on the existing contract up to a maximum of five years, the fees and expenses paid or incurred by the former club (amortised over the term of the contract) and whether the contractual breach falls within a protected period".

- FIFA Commentary to the RSTP to Article 14 RSTP in para. 2

  "The definition of just cause and whether just cause exists shall be established in accordance with the merits of each particular case. In fact, behaviour that is in violation of the terms of an employment contract still cannot justify the termination of a contract for just cause. However, should the violation persist for a long time or should many violations be cumulated over a certain period of time, then it is most probable that the breach of contract has reached such a level that the party suffering the breach is entitled to terminate the contract unilaterally. …"

- FIFA Commentary to the RSTP to Article 14 RSTP in para. 3 gives as example 1:

  "A player has not been paid his salary for over 3 months. Despite having informed the club of its default, the club does not settle the amount due. The player notifies the club that he will terminate the employment relationship with immediate effect. The fact that the player has not received his salary for such a long period of time entitles him to terminate the contract, particularly because persistent non-compliance with the financial terms of the contract could severely endanger the position and existence of the player concerned".

- Clause 6.7 of the Employment Contract provides as follows:

  "The contract will be annulled by the player if the club could not pay him the amounts after 45 days of the dates included in the contract and the club should pay the player the whole amount of the contract".

69. Moreover, the Sole Arbitrator considers it relevant to recall CAS' well-established jurisprudence concerning the just cause to terminate an employment contract on the basis of late payment of salaries: *"According to CAS jurisprudence "the non-payment or late payment of remuneration by an employer does in principle - and particularly if repeated […] - constitute 'just cause' for termination of the contract […]; for the employer's payment obligation is his main obligation towards the employee. If, therefore, he fails to meet this obligation, the employee can, as a rule, no longer be expected to continue to be bound by the contract in future. Whether the employee falls into financial difficulty by reason of the late or non-payment, is irrelevant. The only relevant criteria is whether the breach of obligation is such that it causes the confidence, which the one party has in future performance in accordance with the contract, to be lost. This is the case when there is a substantial breach of a main obligation such as the employer's obligation to pay the employee. However, the latter applies only subject to two conditions. Firstly, the amount paid late by the employer may not be 'insubstantial' or completely secondary. Secondly, a prerequisite for terminating the contract because of late payment is that the employee must have given a warning. In other words, the employee must have drawn the employer's attention to the fact that his conduct is not in accordance with the contract"* (see CAS 2006/A/1180, para. 26).

70. In this case it has been established respectively it is uncontested that the contractual payments were foreseen as follows:

    - USD 98,000 (40% of USD 245,000) on 2 August 2015 (after passing the medical test)
    - USD 73,500 until 1 January 2016 (30% of USD 245,000)
    - USD 49,000 until 1 April 2016 (20% of USD 245,000)
    - USD 24,500 until 15 May 2016 (10% of USD 245,000)

    Of these amounts the following payments were made by the Appellant:

    - USD 50,000 on 12 August 2015 (1st payment)
    - USD 20,000 on 26 September 2015 (2nd payment)
    - USD 10,875 on 18 November 2015 (3rd payment)
    - USD 54,613 on 20 February 2016 (4th payment)

71. Based on the before mentioned facts it is evident that from 2 to 12 August 2015, an amount of USD 98,000 was overdue, on 12 August 2015, this amount was reduced (1st payment) to USD 48,000 and remained unpaid until 26 September 2015 when this open amount was further reduced (2nd payment) to USD 28,000. On 18 November 2015, the open amount was once more reduced (3rd payment) to USD 17,125, before it was increased to USD 90,625 on 1 January 2016. With the 4th payment on 20 February 2016, the open amount was reduced to USD 36,012 and it was increased to USD 85,012 on 1 April 2016, respectively to USD 109,512 on 15 May 2016.

72. Based on Article 7.1 of the Employment Contract, the remuneration for the 2015/16 season is

a total of USD 245,000 which corresponds to a monthly payment of USD 20,416.66. Three monthly salaries correspond therefore to an amount of USD 61,250. Looking at the before mentioned payment schedule, respectively the unpaid amounts, the Sole Arbitrator ascertains that an amount of at least USD 61,250 was overdue from 2 to 12 August 2015 (USD 98,000 for 10 days), from 1 January to 20 February 2016 (USD 90,625 for 50 days), as well as from 1 April to 15 May 2016 (USD 85,012 for 45 days) and from 15 May to the termination date of 9 June 2016 (USD 109,512 for 24 days).

73. Instead of the delayed payment period of around three months based on CAS jurisprudence, the Employment Contract states in Article 6.7, that after a delayed payment for 45 days the whole contractual amount shall become due for payment and the Player has just cause to terminate the Employment Contract. This specifically agreed clause between the Parties has priority over the general indicative principle of the three months' delay based on FIFA and CAS jurisprudence and, therefore, Article 6.7 of the Employment Contract is to be considered an early termination clause.

74. Summing up, the Sole Arbitrator confirms that during 50 days from 1 January to 20 February 2016 an amount of USD 90,625 remained overdue and for a total of 69 days from 1 April to 9 June 2016 an amount of at least USD 85,012 remained unpaid. Moreover, the Appellant did not provide any adequate justification for the late payments (the economic embargo on Iran was only mentioned *en passant* and in any case no appropriate evidence was submitted). Therefore, the Player had twice the possibility based on Article 6.7 of the Employment Contract to terminate the Employment Contract and request payment of the outstanding amounts.

75. In light of the above, there can be no doubt that (i) the Appellant repeatedly breached the Employment Contract by consistently being in arrears with its payments; (ii) the amounts outstanding were substantial; and (iii) the amounts were outstanding for more than the 45 days provided for in Article 6.7 of the Employment Contract. The Sole Arbitrator is, therefore, of the opinion that the Player had just cause to terminate the Employment Contract based on its Article 6.7. The fact that on 8 June 2016 the Appellant, for the first time, asked the Player to come to Tehran in order to get the overdue amounts in cash does not change on the fact that the Player had just cause to terminate the Employment Contract.

76. Based on the CAS jurisprudence, the conditions to be met to have just cause to early terminate an employment agreement are (i) a substantial amount outstanding and (ii) an advance notice (warning) prior to the termination (see e.g. CAS 2006/A/1180). As stated before, it is a fact that the amount outstanding was substantial, so the first condition is certainly fulfilled. Regarding the second condition, the warning, it is not disputed by the Parties that the Player did not give such a warning to the Appellant before terminating the Employment Contract with his letter of 9 June 2016. Does this now mean that the Player did not have just cause to terminate the Employment Contract? The Sole Arbitrator is of the opinion that, although the Player did not give a warning to the Appellant before terminating the Employment Contract, the Player had just cause to terminate. First of all, Article 6.7 of the Employment Contract does give the Player the right to terminate if the Appellant does not pay him the amounts within 45 days of the dates stated in the contract which is considered to be a so called "early termination clause".

Article 6.7 of the Employment Contract does not require the Player to first send a warning and set another grace period to the Appellant; this was possibly agreed by the Parties because the four (4) payment dates were exactly agreed on and stated in the Employment Contract which means that with passing of these dates, the Appellant automatically was in delay and accordingly had overdue payables. This corresponds to Article 102 para. 2 Swiss Code of Obligations ("CO"). Second, as stated before, the Appellant had by contractual agreement a grace period of 45 days to comply with its payment duties to the Player and, therefore, the Parties did not wish to first set another grace period to pay before the early termination is possible. This solution chosen by the Parties in Article 6.7 of the Employment Contract complies not only with Swiss law – as stated before – but also with the jurisprudence of the Swiss Federal Tribunal ("SFT") which clarifies that in case of a severe breach of a contract, the termination without prior warning is justified (e.g. SFT 127 III 153). In other words, the Sole Arbitrator is satisfied with the behaviour of the Player, in terminating the Employment Contract without prior warning but in accordance with Article 6.7 of the Employment Contract.

77. In fact, even though the Appellant suggests that when the Player terminated the Employment Contract the Appellant had already offered him to pay the amounts outstanding in cash, this does not appear to be accurate. Indeed, although the Appellant did state that it was ready to pay the outstanding salary for the 2015/16 season in cash to the Player in Tehran, it apparently only did so in its letter of 13 June 2016, after the Player had already terminated the Employment Contract.

78. Therefore, the Appellant was in breach of contract when the Player terminated the Employment Contract with his letter of 9 June 2016. This right granted to the Player in Article 6.7 of the Employment Contract is a unilateral right to alter a legal relationship meaning that the Appellant only had to receive such termination notice in order that it was valid. In other words, the Sole Arbitrator is of the opinion that the Player rightfully terminated the Employment Contract with his letter of 9 June 2016 and, therefore, the Sole Arbitrator has to check the legal consequences of this rightful termination with just cause.

79. As the Employment Contract, therefore, ended on 9 June 2016, the Appellant has to pay the full salary for the 2015/16 season as agreed on in the Employment Contract. This means that the Appellant owes the Player an amount of USD 109,512. The DRC added in the Decision interests of 5% p.a. payable from the date when the amounts became due. Article 7.4 ss. of the Employment Contract states the payment dates as follows: pass of medical test/receipt of ITC (40% of the annual salary), 1 January 2016 (30%), 1 April 2016 (20%) and 15 May 2016 (10%). The DRC granted interests of 5% p.a. on the amount of USD 36,012 as of 2 January 2016, on USD 49,000 as of 2 April 2016 and on USD 24,500 as of 16 May 2016. The Sole Arbitrator confirms the interest payments of 5% p.a. which were accepted by the Respondent as he did not file any appeal against the Decision.

80. As the Employment Contract was terminated by the Player with just cause, the Sole Arbitrator has now to look at the compensation to be paid for the breach of contract by the Appellant. Article 17 para. 1 RSTP states that the calculation of the compensation shall be done with due consideration for the law of the country concerned, the specificity of sport and any other objective criteria, including the remuneration and other benefits due to the player under the

existing contract and/or the new contract, the time remaining on the existing contract as well as fees and expenses paid or incurred by the former club.

81. In this case, the Employment Contract was to run for another season, until 30 June 2017. The total salary was agreed on in Article 7.2 of the Employment Contract with an amount of USD 310,000. It is further uncontested, that the Player played the season 2016/17 with FC Kukesi and received a total payment of EUR 50,000. There are no further facts shown by the Parties regarding any further benefits foreseen for or received by the Player. The Sole Arbitrator's decision to disclose the exact total amounts that the Player received over the duration of his employment with FC Kukesi did not bring any additional facts either.

82. Article 6.7 of the Employment Contract states that in case of 45 days of delay in payment of the agreed instalments, the Player may annul the Employment Contract *"and the club should pay the player the whole amount of the contract"*. From the wording of this clause it is obvious that Article 6.7 of the Employment Contract does not constitute a so-called buyout clause as stated in the FIFA RSTP Commentary Article 17 lit. 1.3. However, it is the Sole Arbitrator's view that, in addition to being an early termination clause, Article 6.7 of the Employment Contract has to be qualified as a liquidated damages or penalty clause, as it states that the Appellant shall pay *"the whole amount of the contract"* in case of a delay in the payments of more than 45 days. Even if the clause does not state an exact amount to be paid by the Appellant, this amount payable can be easily calculated based on the wording of Article 6.7 of the Employment Contract: *"[…] the club should pay the player the whole amount of the contract"*. As the Employment Contract was closed for one more season (2016/17), it is the salary stated in the Employment Contract for this 2016/17 season to be paid to the Player as liquidated damages. In Article 7.2 of the Employment Contract, the Parties agreed to a total net amount of USD 310,000 for the 2016/17 season.

83. Looking at Article 6.7 of the Employment Contract, the DRC stated in the Decision as follows: *"[…] this clause is not reciprocal as it does not grant the same rights to both parties, and that, therefore, in accordance with the longstanding jurisprudence of the DRC in this regard, said clause cannot be taken into consideration in the determination of the amount of compensation"*. Therefore, the DRC applied the parameters listed in Article 17 para. 1 RSTP to assess the compensation and as a consequence deducted the salary earned by the Player from FC Kukesi in the amount of EUR 50,000 (in USD 55,000) from the net amount of USD 310,000 which brought the compensation to the amount of USD 255,000. The Sole Arbitrator is of the opinion that Article 6.7 of the Employment Contract was agreed on by the Parties and it possibly favours the Player when terminating the Employment Contract for just cause. However, in case the Player would terminate the Employment Contract without having just cause, he would become liable for damages to the Appellant and in such case, the compensation would be calculated based on the parameters set out in Article 17 para. 1 RSTP which in the end is not much different than the penalty stated in Article 6.7 of the Employment Contract. Therefore, the Sole Arbitrator is of the opinion that the DRC is wrong in stating that the clause is not reciprocal and he sees no reason to not apply this clause in this case. In any event, CAS jurisprudence has confirmed that *"Swiss law does not require "penalty clauses" to be "reciprocal" in order to be valid"* (see, for example, CAS 2013/A/3411, paragraph 95).

84. Article 17 para. 1 RSTP which is applied by the DRC, is calculating the compensation based on

the remuneration due under the existing employment contract. The difference of this calculation to a liquidated damages/penalty clause is that certain deductions from the salary are possible or even required under Article 17 para. 1 RSTP while a liquidated damages/penalty clause such as Article 6.7 of the Employment Contract defines a fixed amount to be paid, often independently from the salary due based on the employment contract. Such liquidated damages or penalty clause is not defined in the FIFA regulations. Therefore, in applying Swiss law, the Sole Arbitrator is looking at Articles 160 to 163 CO which govern such clauses. Article 163 CO states: *"[1]The parties are free to determine the amount of the contractual penalty. [2]The penalty may not be claimed where its purpose is to reinforce an unlawful or immoral undertaking or, unless otherwise agreed, where performance has been prevented by circumstance beyond the debtor's control. [3]At its discretion, the court may reduce penalties that it considers excessive".*

85. In general, there is no mitigation duty foreseen for the creditor, in the case at hand for the Player. However, Hermann Becker, Berner Kommentar, Article 163 CO N. 16 states that the fault involved by the debtor, here the Appellant, and creditor (Player) shall be considered when deciding if the agreed penalty shall be reduced. Further, the Swiss Federal Tribunal stated in its decision SFT 133 III 201, c. 5.2 that Article 163 para. 3 CO is part of the public policy and as a consequence the judge (and Sole Arbitrator) must apply this norm even if the debtor (Appellant) did not expressly request a reduction (see also TAS 2008/A/1491). In the case at hand, the Appellant did request that the compensation be reduced significantly. The Sole Arbitrator has, therefore, to check if a reduction of the penalty foreseen in Article 6.7 of the Employment Contract is justified. Such a reduction is possible in case the penalty foreseen is significantly disproportionate respectively excessive. SFT 133 III 201 states in this relation that to judge the excessive character of the contractual penalty, one must not decide abstractly, but, on the contrary, take into consideration all the circumstance of the case at hand. However, as the parties are free to fix the amount of the penalty in accordance to Article 163 para. 1 CO, the judge must make use of his discretion.

86. Under Swiss law, a penalty is considered as being excessive if such penalty has to be considered as being against justice and fairness. The Sole Arbitrator did consider all circumstances of this case. On one hand the payment of the salary for the remaining season can be considered as fair. Even Article 17 para. 1 RSTP is taking the salary of the remaining season(s) as starting point to calculate the compensation. On the other hand, the penalty amount being a full yearly salary could be considered as excessive because it would lead to an enrichment of the Player for the 2016/17 season in the amount received by FC Kukesi under his new employment contract of EUR 50,000; this corresponds to around 18% of the penalty calculated in accordance with Article 6.7 of the Employment Contract. Other points to be considered are the behaviour of the Player who did not agree to at least go back to Tehran to receive the offered salary payment for the 2015/16 season in cash and who did not participate in the hearing held on 6 November 2017, neither in person or being represented nor by skype. Therefore, this possible enrichment seems to be against the principal of fairness which does generally foresee that no party shall be disadvantaged or enriched. As the Player did not appeal the Decision, the Sole Arbitrator is bound by the maximum amount of USD 255,000 granted to the Player as compensation. Therefore, the Sole Arbitrator can leave it open, if the penalty of USD 310,000 would lead to the Player's enrichment and therefore would have to be considered as excessive and reduced based on Article 163 para. 3 CO. On the other hand, Hermann Becker, Berner Kommentar,

Article 163 CO N. 9 states that a reduction of the penalty shall never lead to a lower amount than the creditor (Player) would receive under general rules to calculate compensatory damages. In general, such a calculation is done as the DRC did, in applying Article 17 para. 1 RSTP. Therefore, the amount granted to the Player in the Decision of USD 255,000 is also the minimum amount to be granted as compensation respectively to which the Sole Arbitrator is allowed to reduce the liquidated damages under Swiss law. This signifies, in other words, that the Sole Arbitrator can only confirm the compensation granted in the Decision and accordingly reject the appeal.

87. To sum up, the Sole Arbitrator decides that the compensation to be paid to the Player shall be the amount of USD 255,000 as the DRC stated in the Decision. Nevertheless, the Sole Arbitrator has serious doubts that the salary disclosed by the Player for the 2016/17 season from FC Kukesi of EUR 50,000 is the full payment the Player received. This salary only corresponds to roughly 1/6 of the salary foreseen for the 2016/17 season in the Employment Contract and it does not make any sense to the Sole Arbitrator that the Player, out of his free decision, would waive such a payment. Further, the Sole Arbitrator would have expected to receive an extract of a bank account in which the salary of FC Kukesi was paid to the Player or a statement from FC Kukesi in order to support such statement made by the Player. Not having received any such proofs and further not coming to or participating by Skype in the hearing increases the doubts, the Sole Arbitrator has. In CAS 2009/A/1840 & 1851, the panel did in view of the considerable decline of the Player's remuneration not take the new salary into consideration in deciding the amount of compensation. As in the case at hand, the penalty amount agreed has to be assessed under Article 163 para. 3 CO and not Article 17 para. 1 RSTP, putting the Player's salary earned during the 2016/17 season completely aside would not make any difference to the result. The salary earned during the 2016/17 season from FC Kukesi is not considered when assessing if the penalty agreed in Article 6.7 of the Employment Contract is excessive or not.

88. On 7 July 2016, the date when the Player filed his claim against the Appellant before the DRC, the Player put the Appellant in default for the payment of the compensation. Therefore, the DRC granted interests of 5% p.a. starting from this date. The Sole Arbitrator, however, is of the opinion that based on Article 339 para. 1 CO with the termination of the Employment Contract all claims become due, including the claim for compensation. Therefore, the interests of 5% p.a. should be starting on 10 June 2016. As this would favour the Respondent which did not file an appeal against the Decision, the Sole Arbitrator is, therefore, prevented from changing the Decision regarding this point.

ON THESE GROUNDS

The Court of Arbitration for Sports rules that:

1. The appeal filed by Esteghlal Football Club against the decision of the FIFA Dispute Resolution Chamber dated 9 February 2017 is rejected.

2. The counterclaim filed by Mr. Pero Pejic is not admissible.

3. The decision of the FIFA Dispute Resolution Chamber dated 9 February 2017 is confirmed.

4. (…).

5. (…).

6. All other motions or prayers for relief are dismissed.