IN THE CIRCUIT COURT OF THE FIFTEENTH JUDICIAL CIRCUIT, IN AND FOR PALM BEACH COUNTY, FLORIDA

CASE NO.: 11- 11504 AI

FREEDOM SOCCER, LLC and
MAGICTALK SOCCER CLUB, LLC,

Plaintiffs,

v.

WOMEN'S SOCCER, LLC,

Defendant.

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PLAINTIFFS' VERIFIED MOTION FOR TEMPORARY INJUNCTION AND TO COMPEL DISPUTE RESOLUTION AND ARBITRATION

Plaintiffs Freedom Soccer, LLC and magicTalk Soccer Club, LLC (collectively, the "Team"), by and through undersigned counsel and pursuant to Rule 1.610 of the Florida Rules of Civil Procedure, the Florida Arbitration Code, Florida Statutes §§ 682.03, and the Federal Arbitration Act, 9 U.S.C. §§ 1 *et seq.*, respectfully move for an order (1) temporarily enjoining defendant Women's Soccer, LLC (the "League"), its officers, agents, servants, employees, and attorneys, and those persons in active concert or participation with it, from taking any action to terminate the Team's membership in the League without first exhausting the parties' agreed upon dispute resolution and arbitration process as set forth in Article XII ("Arbitration") of the Second Amended and Restated Limited Liability Company Agreement of Women's Soccer, LLC (the "LLC Agreement"); and (2) compelling the League's specific performance under the LLC Agreement's arbitration provision. In support of its motion, the Team states as follows:

PRELIMINARY STATEMENT

This is an extraordinary and possibly unprecedented dispute. Not in recent memory has a professional sports league in this country attempted to terminate ownership of a professional sports franchise in the middle of a season, much less an owner that, six months earlier, literally saved that league from extinction. However, that is exactly what the defendant in this case, the League, is trying to do. It is no coincidence that the League is doing so at a time when the sport of women's soccer is at its peak of popularity, nor that two of the world's most famous women's soccer players, Abby Wambach and Hope Solo, play for the Team. Making matters worse, the League is threatening to terminate the Team, the first-year South Florida entry in the League, while refusing to participate in arbitration—as the parties clearly agreed to in their league-wide LLC Agreement and Operating Agreement—until after the Team is terminated.

Accordingly, an immediate injunction is needed to maintain the status quo between the parties, allow them to promptly complete the arbitration process that they agreed to, and prevent the destruction of the incalculable value of the Team's franchise. Otherwise, the arbitration process that the parties agreed to will be rendered completely meaningless, the goodwill of the franchise will be destroyed, and South Florida and its hundreds of thousands of soccer fans (including tens of thousands of young soccer-playing girls who idolize the Team and its star players) will be deprived of their heroes and role models, just when the Team and its players are becoming part of the fabric of the South Florida community.

This lawsuit and motion for specific performance of the parties' arbitration agreement and for immediate injunctive relief to maintain the status quo between the parties arise out of a series of disputes between the Team (the owners and operators of Boca Raton's "magicJack" professional women's soccer franchise), on the one hand, and executives of the Women's

Professional Soccer League, on the other. Just six months ago, the Team purchased the failing Washington Freedom franchise, and in doing so saved the League, and the sport of women's professional soccer in this country. Over the past six months, following the expenditure of substantial monetary and other resources, the Team has turned a once-failing enterprise into a successful franchise, and the home for some of the most popular players from the United States Women's National Team—the runner-up in the recent, highly publicized international Women's World Cup.

Now that the Team and the sport of women's soccer are at their absolute zenith in popularity, the League has seized on disputes between the Team and the League, the merits of which are sharply contested, and indicated that it intends to terminate the Team's membership in the League, ignoring the parties' clear agreement to arbitrate their disputes ***prior*** to effectuating any termination and ***before*** destroying the Team's incalculable value and goodwill. Instead, from the League's communications it appears that at any moment the League intends to summarily and publicly terminate the Team, thereby capturing for itself and the other team owners the increased franchise value and goodwill that are the fruits of the Team's labor, and rendering a meaningless afterthought the confidential and efficient dispute resolution process the parties have agreed to (and which the League concedes applies here). This immediate summary termination is completely at odds with the parties' agreement to arbitrate such disputes promptly, that is, before the value of the Team's franchise is destroyed, the misappropriation of its assets cannot be prevented, and the arbitration process is rendered completely ineffectual. If this is allowed to happen, the Team and the community will suffer immediate and irreparable injury, for which there is no adequate remedy at law.

As the plain language of the LLC Agreement (attached hereto as Exhibit A) shows, the League agreed, in § 12.01 (the "Arbitration Provision"), to "promptly" resolve disputes in good faith using a confidential four-step arbitration process: 1) Dispute Notice; 2) meeting; 3) mediation; and 4) AAA arbitration. It is also clear that these procedures apply to any attempted termination of a League franchise under the Operating Agreement. (Attached hereto as Exhibit B). On July 5, 2011, the League affirmatively began the arbitration process by sending the Team a Dispute Notice, and has acknowledged more than once that the Team is entitled to arbitration if it contests the League's right to terminate. However, when asked directly whether it would agree to refrain from terminating until after the arbitration process is completed (and the Team has the opportunity to air not only its defenses, but also its own claims against the League, which include claims of fraud and misappropriation of Team assets), the League has refused to so stipulate.

Among other things, the League insists that the Team's only remedy is to wait until it is terminated and its membership interest is lost, and then pursue arbitration. This is a perverse reading of the LLC Agreement that would require the Team—before it can access the confidential and efficient dispute resolution mechanism for which it bargained—to suffer a public spectacle and irreparable damage to its hard-earned goodwill among its fans, while at the same time forcing the Team to pay the League's attorney fees and costs (regardless of which party ultimately prevails). Clearly the League intends in the meantime, given the enormous popularity of women's soccer at this time and the recent increased interest in investment in the League, to seize control of the Team's franchise and sell it to the highest bidder. This flagrant disregard for the explicit terms of the LLC Agreement stands to irreparably damage the Team

and violates the explicit terms of the parties' contract. Accordingly, the status quo must be maintained and the League must be compelled to arbitrate the parties' disputes.

FACTS

I. VERIFIED FACTS

1. Plaintiff, Freedom Soccer LLC ("Freedom Soccer"), is a women's professional soccer organization and one of six members of the Defendant Women's Soccer, LLC, also known as the Women's Professional Soccer League, the highest level of women's soccer in the United States. Freedom Soccer today operates a women's professional soccer team based in Boca Raton, Florida, playing under the name "magicJack." As is more fully described below, the home games are played at the soccer facilities at Florida Atlantic University. Some of the world's best female soccer players play for magicJack, including eight members of the United States Women's National Team that finished a close second in the FIFA Women's World Cup recently held in Germany. magicJack boasts among its players two of the biggest stars of that World Cup competition: Hope Solo, the United States goalkeeper, considered by many to be among the best female goalkeepers in the world; and Abby Wambach, the leading scorer for the United States in the World Cup competition, and currently the player/coach of magicJack.

2. In less than one year, Plaintiff magicTalk Soccer Club, LLC ("MagicTalk") purchased a majority interest in Freedom Soccer and its franchise, saved the League and women's professional soccer in America from extinction, and turned a once-failing organization into a successful and growing sports business in South Florida.

3. magicJack VocalTec Ltd., the ultimate parent of the majority owner of the Team, is led by its CEO, Dan Borislow. Mr. Borislow is an accomplished businessman and the inventor of the magicJack® device, a revolutionary product that uses Voice over Internet Protocol

technology to allow customers to talk on a standard telephone using only their magicJack device and a broadband Internet connection, without a telephone line. Since the device's launch in 2008, the highly successful company has sold over 7 million magicJack devices, leading to wide recognition of the "magicJack" brand name. After purchasing the Team, Freedom Soccer changed the Team's name to "magicJack," both to promote their affiliated companies and increase the visibility and good will associated with these successful business ventures. magicJack is also the name of a youth soccer club founded by Mr. Borislow in Palm Beach, Florida, one of many youth soccer teams throughout the country supported by Mr. Borislow.

4. At the end of 2010, in only the League's second season of operation, the League's flagship franchise—the Washington Freedom—was on the brink of collapse. Then based in Washington, D.C., the Washington Freedom had suffered years of losses in revenue, and its owner did not wish to continue to maintain the team as part of the League. Three of the League's franchises had already folded since the League's inception in 2009, the Los Angeles Sol, the St. Louis Athletica, and the FC Gold Pride, and a fourth team, the Chicago Red Stars, was on the brink of folding. Without at least six teams in the League in 2011, the League would have been forced to close operations.

5. During the period prior to purchase, MagicTalk was well aware that the League and its franchises were in serious financial trouble. After examining the books of the Freedom franchise and speaking to other owners in the League, it became clear that women's professional soccer franchises as they were operated had been money-losing propositions. In order to avoid a fate similar to other failed franchises, MagicTalk made clear to the owners of the Washington Freedom, to other League Members/Owners, and to League officials, that if it were to purchase the Team, the franchise would be run in an economically sound and viable fashion. To that end,

MagicTalk expressed an intention to cut the franchise's budget to more reasonable levels (preserving the capability to pay the best players in the league the most money and provide the best benefits) and avoid incurring certain expenses that had caused the League and its owners to lose substantial amounts of money.

6. During discussions with the League and other owners, MagicTalk was repeatedly assured that the League itself would become more economically focused in the upcoming season, that expenses would be cut at the League level to make the League office a profit center, that there would be increased League revenues, and that the League would be engaged in a number of measures that would make the business of the teams more economically viable. MagicTalk took these representations into serious consideration in determining to invest in the Freedom Soccer franchise.

7. The prospect of the League's demise, just prior to the Women's World Cup, scheduled to take place in Germany in June and July 2011, would have been an enormous embarrassment for women's soccer and for soccer in the United States, generally. Motivated by Mr. Borislow's desire to see women's professional soccer survive in the United States, his desire to exploit a new market in South Florida where his successful telecommunications businesses were based, his willingness to bring his business acumen to a failing economic enterprise, and his desire to increase the visibility of the already well-known and highly regarded "magicJack" brand, Mr. Borislow, his company and the Team decided to assist the League by purchasing a majority of the Washington Freedom franchise, through the newly formed entity, MagicTalk. This acquisition, which ensured the continued existence of the Washington Freedom franchise, saved the League from closing its operations and allowed women's professional soccer in the United States to continue. (See copies of media article attached hereto as Exhibit C).

8. As an existing franchise in the League, Freedom Soccer was party to two league-wide agreements relating to its membership in the League and its operations, the LLC Agreement and the Operating Agreement (see Exhibits A and B, respectively). After the acquisition in November 2010, the Team proceeded to sign many of the best players in the world, such as United States National Team members Shannon Boxx, Christie Rampone, Hope Solo, Jillian Loyden, and Lindsay Tarplay, some of whom had played for teams that had ceased operations after the 2010 season. The Team also assumed the existing contracts of National Team members Becky Sauerbrunn and Abby Wambach. The Team thus took the risk, at significant expense, of signing many players who would miss part of the 2011 season in June and July for the Women's World Cup.

9. With only three months remaining between the date of acquisition and the start of the 2011 season, the Team took prompt action to move the operation to South Florida and to institute cost saving measures that would allow the Team to get through its initial season. At the same time, the Team ensured that its players would receive the best compensation and housing. In March 2011, solidifying its relationship with the South Florida community, the Team signed an agreement with Florida Atlantic University to play magicJack's home games at the University's soccer stadium for the 2011 season. This venue, though smaller in capacity than desired by the League, was chosen for the reduced cost, natural grass and the anticipation that in the first season, the attendance numbers would not support a larger venue. The Team also perceived an opportunity to donate gate and concession proceeds from this venue to the University, potentially tens of thousands of dollars. The Team, however, had and continues to have every intention of moving to a larger venue if it could build attendance and goodwill in the community, thereby supporting the additional expense.

10. Immediately following the acquisition, however, the League began to take issue with several of the Team's cost-cutting measures, including its stadium size and certain personnel decisions, claiming these were violations of League operating rules. It became clear that, during the period February through May 2011, the League and the Team were in increasing conflict regarding the manner in which the Team was conducting its business operations, despite the fact that the Team had made its business approach clear to the League prior to acquiring the Team. In addition, the League began to penalize the Team and its operations with unilaterally imposed fines and suspensions during this period.

11. The number of complaints and penalties from the League continued to increase during June and July 2011, during which time many of the Team's players were participating in the Women's World Cup in Germany. On June 14, 2011, the Team received from the League's counsel, Pamela Fulmer, who was party to many of the communications from the League regarding the Team's violations, a "Notice of Hearing" indicating that the League was considering terminating the magicJack franchise, and wished to conduct a hearing before the Board of Governors before doing so, as required under Article 13.1 of the LLC Agreement.

12. This Notice of Hearing was sent at approximately the same time that the League's CEO, Anne-Marie Eileraas, was quoted in the press as candidly saying that many new potential investors had expressed an interest in acquiring franchises in the League due to the renewed interest in Women's soccer as the result of the upcoming Women's World Cup.

13. In July 2011, the United States National Team advanced to the finals of the Women's World Cup. Following a last minute goal by Abby Wambach, in a match that received worldwide attention, the United States beat Brazil in penalty kicks in the quarterfinals before suffering a heartbreaking loss to Japan in penalty kicks in the final. Several of magicJack's

players featured in the United States' run to the final, including the recently signed Megan Rapinoe and two of the tournament's biggest stars, Hope Solo and Abby Wambach. During that time, interest in women's soccer skyrocketed, and Wambach and Solo became household names in the American and international soccer communities, and in the community at large.

14. The United States Women's National Team's success in the World Cup garnered international attention, and immediately increased South Florida's interest in the magicJack franchise. Instantly, the Team's ticket offices were deluged with requests from fans and from youth soccer clubs in South Florida. Upon their return from Germany, Hope Solo and Abby Wambach were featured on the Late Show with David Letterman. The Team recently increased its stadium's capacity by 1500 seats to accommodate a sell-out crowd of 3500 in its first home game since the World Cup. Just prior to that July 28, 2011 match, Abby Wambach made a personal appearance at a department store in Boca Raton, Florida, which was attended by more than 500 young, mostly female, fans. On July 30, 2011, the Team played to another sellout crowd of over 3000 fans at the Florida Atlantic University Soccer Stadium, receiving their first win under Wambach as player/coach. Further contributing to its standing and goodwill among the South Florida community, the Team has made public its intention to pledge proceeds from gate ticket sales to Florida Atlantic University.

15. Ticket sales for magicJack's away games also skyrocketed, benefiting the League and the League's other members. The Team's first game after the World Cup was played in Rochester, New York against the Western New York Flash, and set a league attendance record at 15,404 people. All of the Team's away games to date, since the World Cup, have attracted sell-out crowds.

16. However , notwithstanding the outstanding track record of the Team, at very time that the Team's players and Mr. Borislow were attending the World Cup in Germany, the League continued its onslaught of complaints and threats regarding the operation of the Team. In early July 2011, the League sent two letters to the Team claiming that it had waived its contractual right to a hearing before the League regarding the "termination issues" raised by the League in June. The League's July 5, 2011 letter, a copy of which is attached as Exhibit D, purported to confirm that the Team had waived its right to a pre-termination hearing under Article 13 of the LLC Agreement, but confirmed the Team's right to proceed under the arbitration procedures set out in Article 12 of the LLC Agreement. The League then informed the Team that the next step in that process was good faith negotiation in an effort to resolve disputes, which, it suggested, should take place on August 30 or 31, 2011. The League threatened, however, that under Article 13.3(c) of the Operating Agreement, the Team would be responsible for paying all of the League's expenses (including attorney's fees) in connection with such dispute resolution, including the costs of confidential mediation and arbitration, steps 3 and 4 in the dispute resolution process.

17. That July 5 letter was followed by another letter from the League dated July 7, 2011, in which it once again offered the Team an opportunity to have a pre-termination hearing before the Board of Governors regarding "termination issues," such hearing to take place the first week of August 2011. The League also again "remind[ed]" the Team that if the Board were to take any disputed action, the Team would be "welcome to follow the dispute resolution procedures set forth in the Agreements." A copy of the League's July 7, 2011 letter is attached as Exhibit E.

18. On July 9, 2011, the League's CEO Anne-Marie Eileraas informed Mr. Borislow that it was investigating a complaint lodged against him by the WPS Players Union, and gave Mr. Borislow five days to respond. The League then refused Mr. Borislow's request for a one week extension to respond to the grievance. On July 14, 2011, the League issued its decision, unilaterally suspending Mr. Borislow from serving in any technical capacity with the Team for the remainder of the 2011 season. Thereafter, the League issued a press release regarding Mr. Borislow's suspension, creating further negative publicity around the Team.

19. During this period, the Team repeatedly attempted to contact the League in an effort to discuss its increasingly fractured relationship with the League and agree on a set of operating procedures for the remainder of the 2011 season. All such attempts having failed, the Team retained counsel for this matter. On July 21, 2011, the Team's counsel sent a letter to the League requesting that the pre-termination hearing before the Board of Governors proceed before the Board took any action with respect to "termination issues" and, that the League not take any steps in furtherance of termination until all dispute resolution procedures in the League Operating Agreement, including arbitration, were exhausted. Counsel also requested that the parties discuss an interim set of guidelines under which the Team could proceed to operate for the remainder of the season. A copy of counsel's July 21, 2011 letter is attached as Exhibit F.

20. By letter dated July 27, 2011, the League responded to the Teams' counsel, denying the Team's request for a Board of Governors' hearing, claiming that the hearing date the Team requested was too late, while failing to address the Team's request for a "stay" of any decision to terminate while the parties engaged in the contracted-for dispute resolution procedures, or for the opportunity to discuss interim operating guidelines. A copy of such July 27, 2011 letter is attached as Exhibit G.

21. Thereafter, in one last effort to stave off the drastic impact of immediate unilateral termination, counsel for the Team wrote to the League again on July 28, 2011, (i) once again requesting a pre-termination Board of Governors hearing, this time on August 30 or 31, the dates proposed earlier by the League for "good faith negotiation" of the parties' disputes, (ii) advising the League that, since it continued to ignore the Team's request for an agreed "stay" of termination pending arbitration, the Team had no choice but to seek injunctive relief in Court, and (iii) again requesting the opportunity to discuss a set of interim operating guidelines. A copy of such July 28, 2011 letter is attached as Exhibit H.

22. As of this date, the Team has received no substantive response to its counsel's July 28, 2011. Accordingly, to avoid the substantial irreparable harm that will result from the unilateral termination of its franchise, which is threatened at any moment, the Team was left with no choice but to seek the relief requested in this motion.

23. Concurrently with the League's actions against the Team, the League's CEO has continued to issue numerous public statements stating that there is renewed interest in Women's Professional Soccer from investors due to the success of the Women's World Cup. (See media article attached hereto as Exhibit I). This unnecessary publicity leads to the inescapable conclusion that the League intends to profit from the Team's calculated business decision months before the World Cup to sign eight of the United States National Team players, and further intends to exploit the renewed interest and goodwill, strip the Team of its ownership rights, misappropriate the Team's assets and attract a new investor or owner. Accordingly, in any dispute resolution proceeding that may ensue, the Team intends to lodge its own claims against the League, including for fraud and misappropriation of Team assets.

24. If the League is allowed to proceed with termination prior to exhausting the dispute resolution procedures, that contractually-mandated process would be rendered ineffectual. In that case, the Team and its ownership will have lost not only the Team's economic value, but the goodwill associated with the Team, the magicJack brand name, and the reputation the Team has built and is continuing to build locally and nationally. The resulting damage to the Team and the magicJack brand if the Team loses its franchise immediately—and without an opportunity to being allowed to defend itself in a confidential, efficient and unbiased arbitral forum—could not be restored even if the arbitrators ultimately decide that the termination was improper. Further, as noted above, the Team intends to pursue its own claims against the League, and both the Team and the League will benefit from the confidential nature of the process. The potential harm to the Team go well beyond the Team and its owners, and extend, for example, to the Florida college to which the Team has pledged its gate receipts and to the youth soccer players who attend the games to watch their idols. There is, moreover, no mechanism to prevent the League from moving the franchise back to the Washington, D.C., area, thus depriving the South Florida community of access to women's professional soccer and to the extremely popular United States Women's National Team players.

25. To be clear, the Team does not request that the Court resolve the highly contentious disputes between the League and the Team. As agreed to by the parties, that will be for the arbitrators to decide. The Team seeks only to invoke the arbitration process to which the League and its members are contractually bound, prior to the Team being unilaterally stripped of its goodwill, assets and value which cannot be calculated in money damages and which would be summarily destroyed. The Court should not allow the League to take such unilateral action prior to the dispute resolution process.

II. THE PARTIES' AGREEMENTS

The Arbitration Provision, LLC Agreement § 12.01 ("Resolution of Disputes Between Members or Between the League and a Member"), begins with a general statement of principles for resolving disputes that reads, in relevant part, as follows:

> The parties shall attempt in good faith to resolve any controversy, dispute or claim arising out of or relating to this Agreement . . . between (i) any Member [(*e.g.*, the Team)] . . . , on the one hand, and (ii) . . . the League or any employee, officer, or Governor of the League, on the other (collectively, a "Dispute"), ***promptly*** by negotiation between officers or employees who have authority to settle the Dispute.

LLC Agreement § 12.01(a) (emphasis added). The Arbitration Provision then sets forth a mandatory arbitration process of up to four steps.

- *First*, "[a]ny party may give any other party a written notice of (a "Dispute Notice") setting forth with reasonable specificity the nature of the Dispute and the identity of such first party's representatives who shall attend and participate in the meeting at which such parties shall attempt to settle the Dispute." *Id.*
- *Second*, [f]ollowing the receipt of a Dispute Notice, the representatives of such parties shall meet ***as soon as is practicable*** at a mutually acceptable time and place to negotiate in good faith a settlement of the Dispute, and shall meet thereafter as they deem reasonably necessary." *Id.* (emphasis added). These meetings "shall be confidential and shall be treated as compromise and settlement negotiations." *Id.*
- *Third*, if negotiations should fail, "the parties to the Dispute shall attempt in good faith to resolve any such Dispute promptly by confidential mediation before resorting to arbitration." *Id.* § 12.01(b).

- *Fourth*, ***should a dispute persist 15 days after mediation*** "then any party to the Dispute may initiate arbitration in accordance with the Commercial Arbitration Rules (the "AAA Rules") of the American Arbitration Association ("AAA") and ***such right to arbitration as set forth herein shall be the exclusive remedy for the resolution of disputes*** arising hereunder." *Id.* § 12.01(c) (emphasis added). The Arbitration Provision and subsequent provisions of Article XII provide further details regarding the location of the arbitration, composition of the panel, confidentiality of the proceedings, and limited appeal rights of the panel's decision. *Id.* §§ 12.01(c); 12.04; 12.05.

The parties' clear intention, therefore, was to resolve all disputes between the League and a League member with speed and confidentially, and certainly before the consequences of one party's actions rendered the whole process meaningless. *See City of Homestead v. Johnson,* 760 So. 2d 80, 84 (Fla. 2000) (courts "read provisions of a contract harmoniously in order to give effect to all portions thereof"); *Herian v. Southeast Bank, N.A.*, 564 So. 2d 213 (Fla. 4th DCA 1990) ("An interpretation of a contract which gives a reasonable, lawful and effective meaning to all of the terms is preferred to an interpretation which leaves a part unreasonable, unlawful or of no effect.").

There is also no doubt that the ultimate penalty a League member can suffer is termination from the League. As § 13.3(a) of the Operating Agreement (Article 13 being the "Termination" section) states:

> Effect of Termination by the League. In the event of a termination pursuant to Section 13.1(a) or (b), (i) the Membership Interest of the Member shall be deemed to be automatically transferred to the League and the Member automatically shall cease to be a Member of the League, (ii) the Member shall no longer have the right to operate any Team in the League, ...and (iv) the League shall have the right to operate the Team.

Accordingly, the parties agreed that this ultimate penalty is directly subject to the arbitration process that applies to all disputes between the parties. As stated in Operating Agreement § 13.3(d):

> Decisions Subject to Arbitration. Any decision by the Board of Governors to terminate this Agreement shall be subject to arbitration in accordance with the procedures described in Article XII of the LLC Agreement.

Rather than follow its own carefully crafted dispute resolution procedures, the League is intent on ignoring § 13.3(a) of the Operating Agreement § 13.3(d) and the Arbitration Provision in the LLC Agreement, avoiding the dispute resolution process, inflicting irreparable harm, and summarily dispensing the ultimate penalty on the Team.

If the Court does not maintain the status quo and compel specific performance of the arbitration agreement, the League will be able to bypass the whole process, take over the Team, destroy the value of the Team's membership interest, and render any subsequent dispute resolution process meaningless. For that reason, the law requires an immediate injunction and prompt compliance with the agreed-upon arbitration process.

ARGUMENT

The Team seeks an order compelling the League to specifically perform the Arbitration Provision and arbitrate the parties' dispute, as well as a temporary injunction to preserve the status quo until such arbitration can take place. The Team is entitled to the foregoing requested relief because the Arbitration Provision provides on its face that arbitration is "the exclusive remedy for the resolution of disputes." The parties thus never intended to give the League the option of unilaterally and summarily terminating the Team in the event of a dispute.

I. THE COURT SHOULD GRANT THE TEAM A TEMPORARY INJUNCTION

A temporary injunction should issue if a party (1) "'will suffer irreparable harm unless the status quo is maintained,'" (2) "'has no adequate remedy at law,'" (3) "'has a clear legal right to the relief granted, and (4) a temporary injunction will serve the public interest.'" *Wexler v. Lepore*, 878 So. 2d 1276, 1281 (Fla. 4th DCA 2004) (citations omitted). "The general function of a temporary injunction is to preserve the status quo until full relief can be granted in a final" procedure, whether that be in Court, or, as here, in arbitration. *Morgan v. Herff Jones, Inc.*, 883 So. 2d 309, 313 (Fla. 2d DCA 2004) (citation omitted). Its purpose is not to resolve disputes but rather to prevent irreparable harm. *Michele Pommier Models, Inc. v. Diel*, 886 So. 2d 993, 995-96 (Fla. 3d DCA 2004).

"The decision to grant or deny injunctive relief rests largely in the sound judicial discretion of the trial court." *Davis v. Joyner*, 409 So. 2d 1193, 1194 (Fla. 4th DCA 1982); *Groff G.M.C. Trucks, Inc. v. Driggers*, 101 So. 2d 58, 60 (Fla. 1st DCA 1958) (citations omitted); *see Willis v. Hathaway*, 117 So. 89, 93 (Fla. 1928) (citation omitted). A court may generally "exercise broad discretion in granting, denying, dissolving or modifying injunctions . . . ." *Wise v. Schmidek*, 649 So. 2d 336, 337 (Fla. 3d DCA 1995) (citation omitted).

A. The Team Will Suffer Irreparable Harm

If the League is allowed to ignore its agreement to arbitrate, the Team will suffer harm that is irreparable on its face. Indeed, the LLC Agreement explicitly says so. Section 12.03 of the LLC Agreement, which is a part of Article XII's detailed arbitration process and rules, states as follows:

> Section 12.03 Limitation. Nothing in this Article XII shall limit any Member's right to seek specific performance as set forth in Section 13.11.

Id. § 12.03. Section 13.11 of LLC Agreement, in turn, states:

> Specific Performance. **The parties hereto agree that irreparable damage would occur in the event any provision of this Agreement was not performed in accordance with the terms hereof** and that the parties hereto shall be entitled to specific performance of the terms hereof, in addition to any other remedy at Law or in equity.

Id. § 13.11 (emphasis supplied). It follows, then, that one provision of the LLC Agreement with which the parties must comply in accordance with its terms is the Arbitration Provision. Thus, by the explicit terms of the LLC Agreement, the League's attempt to ignore the Arbitration Provision inflicts "irreparable damage" on the Team.

Here, the League began the arbitration process on July 5, 2011 by serving a letter on the Team that satisfied the Arbitration Provision's first step, a Dispute Notice. Jul. 5, 2011 Ltr. from P. Fulmer (attached hereto as Exhibit D). First, the League's letter described the nature of the Dispute, namely whether or not the League could terminate the Team's ownership of the magicJack franchise. *Id.* (referencing "the possible termination of the Team from the League" and "the termination issues" set out in an earlier letter to the Team). Second, the League's letter identified the League representatives who would meet with the Team to attempt to negotiate the Dispute—namely the League's *de facto* general counsel and CEO—and suggested that such meeting take place on August 30 or 31, 2011. *Id.*

The League's Dispute Notice further stated that it understood the Team wished "to proceed with the dispute resolution procedures outlined in Article 12 of the [LLC Agreement]. We will proceed in accordance with your wishes." *Id.* After the League acknowledged that "Article 12.01(a) [(*i.e.*, the Arbitration Provision)] of the LLC Agreement requires that the League and the Team work together in good faith to attempt to achieve a negotiated resolution of any disputes," in the very next sentence, the League immediately violated that standard, writing

that the Team was free to invoke arbitration only "[i]n the event the League terminates the Team's membership." *Id.* The League could cite no provision of the LLC Agreement for the proposition that the Team may arbitrate a dispute concerning termination only after the termination takes effect, since there is none. The League's interpretation of the Arbitration Provision is the equivalent of permitting death row prisoners to appeal only after their sentence has been carried out.

The League's Dispute Notice further violated the League's good faith obligation to promptly conduct dispute resolution by proposing a confidential negotiation session, step two of the four-step process set forth in the Arbitration Provision, on August 30 or 31—eight weeks later. *Id.* Contrast this with the fact that after the League served its Dispute Notice, and as late as July 27, 2011, when the Team attempted to invoke its right to a pre-termination hearing before the Board of Governors, the League attempted to force the Team to appear at a hearing during the first week in August. It is clear, therefore, that the League was not "attempt[ing] in good faith to resolve [the Dispute] promptly by negotiation," as required by the Arbitration Provision, but rather was trying to rig the calendar to block the Team from arbitrating until after it had been terminated.

One reason behind the League's timing strategy is also explained in its Dispute Notice. There, the League cites the Operating Agreement's indemnification clause, under which, "in the event of a termination," the Team must indemnify the League against all expenses, including attorney fees, incurred in "the defense or settlement of any threatened, pending or completed action or suit . . . in connection with such termination," thereby threatening the Team with even more draconian penalties. July 5 Ltr. (Ex. D). Further, the League indicated it "intends to hold the Team responsible for paying any costs and expenses related to any such termination of the

Team, including any costs of mediation and/or arbitration related to such termination." *Id.* According to the League's reading of the Arbitration Provision and the Operating Agreement:

- *first*, disputes regarding termination can only be arbitrated post-termination (after the League has absconded with the franchise and terminated its membership), at which time the Team has the privilege of mediating and arbitrating nothing; and
- *second*, the Team is responsible for the League's arbitration costs and fees, even if the League is found to have wrongfully terminated the Team, or engaged in other malfeasance.

Thus, under the procedure envisioned by the League, not only would an arbitration come too late to restore the Team to the position it enjoyed before the termination ruined its accumulated goodwill and destroyed the franchise's value, but the Team would have to pay the League's unlimited costs and expenses for the privilege of righting the wrong inflicted by the League.

Damage that cannot be calculated monetarily falls within the definition of irreparable harm. *Liza Danielle, Inc. v. Jamko, Inc.*, 408 So. 2d 735, 738-39 (Fla. 3d DCA 1982) ("We recognize that impossibility of ascertaining the amount of plaintiff's legal damages may establish inadequacy of the legal remedy so as to support an award of injunctive relief, and additionally, may establish the requisite irreparable character of the injury . . . .") (citation omitted). The League, on the other hand, will not suffer any material harm if the Court enters a temporary restraining order to prevent termination prior to arbitration. The League has never pointed to any justification more compelling than its own convenience as to why termination must be immediate, whereas arbitration can wait for months.

In addition to the fact that the LLC Agreement defines violations of the Arbitration Provision as *per se* irreparable harm (LLC Agreement §§ 12.03; 13.11), the Arbitration Provision

itself specifically anticipates that irreparable harm may be caused if the status quo is not maintained while the arbitration proceeds. Thus, in § 12.01(c) of the Arbitration Provision, the LCC Agreement provides that nothing precludes a party from going into court for "injunctive or other provisional relief to prevent immediate and irreparable harm."[1] What the parties anticipated in the LLC Agreement, then, is exactly what is needed here, as the harm that will befall the Team if the status quo is not maintained is irreparable on its face.

If the League is allowed to abscond with the Team's franchise before an arbitration is convened to determine whether it had the right to do so (and to determine the merit of the Team's own fraud and misappropriation claims against the League[2]), then the goodwill that the Team has developed at great expense and effort will be destroyed in an instant. If the League has its way, once the franchise is terminated, there will be no way for the Team to retrieve it should the arbitration panel find in the Team's favor, and no way to quantify the Team's loss, which is made up principally of goodwill and other assets that cannot be measured in money. *See id.* at 738-39; *Lefebvre v. Weiser,* 967 So. 2d 405, 406 (Fla. 3d DCA 2007) (affirming temporary injunction where company was at risk of potential destruction, as well as loss of client goodwill). Indeed, one of the components of the harm to plaintiffs will be to the "magicJack" brand name, which heretofore has enjoyed fame, success, and enormous goodwill in the

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[1] Section 12.01(c) also contains a permissive forum selection clause, under which the parties waive certain procedural objections to suits such as this one in Delaware or that state where the League has its principal place of business. LLC Agreement § 12.01(c) (***"nothing contained in this Article XII shall be construed to limit or preclude*** the parties to the Dispute from bringing an action . . . such an action ***may*** be brought . . .") (emphasis supplied). This clause is not implicated by the Team's suit, since (1) its terms do not purport to bar a suit in an otherwise proper forum, and (2) this Court has personal jurisdiction over the League and venue is proper here.

[2] For example, such claims concern such wrongful acts by the League as its refusal to televise the Team's games and the League's attempt to misappropriate the Team's valuable trademarks, including magicJack's former team name of "Washington Freedom."

affiliated businesses run by the Team's ownership. *See Ferrellgas Partners, L.P. v. Barrow*, 143 Fed. Appx. 180, 190 (11th Cir. 2005) ("'[g]rounds for irreparable injury include loss of control of reputation, loss of trade, and loss of goodwill'" (citation omitted)). Further, the League will inflict immeasurable harm to the soccer community and the greater community of South Florida if it terminates the Team at the height of the Team's and soccer's popularity.

Thus, under Article 12.01(c) of the LLC Agreement, the Team has shown that an immediate injunction is needed to "prevent immediate and irreparable harm."

B. Plaintiffs Have No Adequate Remedy At Law

In considering whether to grant the Team's motion for emergency relief, the Court must determine whether monetary damages can adequately remedy the harm that would result if the League is permitted to engage in a pre-arbitration termination. As discussed above, absent an injunction, the League's wrongful pre-arbitration termination of the Team will cause *per se* irreparable harm (according to the LLC Agreement § 13.11), foreclose an arbitration panel from crafting full and meaningful relief for the Team, ruin the Team's accumulated goodwill, destroy the franchise's value, and cause the Team to incur the League's unlimited costs and expenses just to get the arbitration upon which the parties agreed. None of this is harm that can be readily calculated or redressed by a suit for damages. The impossibility of ascertaining the amount of Plaintiff's legal damages establishes the inadequacy of legal remedy so as to support award of injunctive relief. *Liza Danielle, Inc.*, 408 So. 2d at 738-39; *U.S. 1 Office Corp. v. Falls Home Furnishings, Inc.*, 655 So. 2d 209, 210 (Fla. 3d DCA 1995) (injunction was appropriate where movant faced the destruction of its business and it would be difficult to find a basis from which to calculate damages).

C. Plaintiffs Have a Clear Legal Right to the Relief Granted

Here, the Team's requested relief is a temporary injunction and order compelling the League to engage in arbitration—as set forth in the Arbitration Provision—before any termination takes effect. Under these circumstances, then, the merits of the underlying dispute are not at issue. *See Smith Barney Shearson, Inc. v. Berman*, 678 So. 2d 376, 377 (Fla. 3d DCA 1996) (in context of TRO seeking arbitration, applicant must show "substantial likelihood of success on the merits, that is, that he would prevail on his claim to compel arbitration"); *Arthur Andersen LLP v. Carlisle*, 129 S. Ct. 1896, 1900-01 (2009) (under FAA, underlying merits of appeal from denial of stay pending arbitration are irrelevant). Rather, the issue is whether the Team has a clear right to the relief sought—an order compelling the League to specifically perform its obligation to complete the dispute resolution process before any termination can take effect.

In this instance, the League has asserted a right to terminate the Team, and the Team has defenses and intends to assert fraud and misappropriation claims of its own against the League. But before this Court the Team need not, and has not sought to, prove anything about the underlying facts of the parties' disputes that bear on the merits of any attempted termination by the League, or of Plaintiffs' own claims—those are issues for the arbitrators to decide under the Arbitration Provision. Instead, the Team must only meet its burden of demonstrating a *prima facie* case that it is entitled to specific performance of the Arbitration Provision requiring arbitration ***before*** termination. The Team has shown more than a reasonable probability of success on this issue, and is entitled to an order compelling specific performance of the parties' agreement to arbitrate and a temporary injunction in aid of that order.

D. A Temporary Injunction Will Serve the Public Interest

There is nothing equitable about allowing a party to openly repudiate its contractual commitments and then avoid the consequences of its actions. Indeed, requiring parties to abide by their contractual commitments is consistent with the public interest, since it preserves the sanctity of contract. *See Pitney Bowes Inc. v. Acevedo*, No. 08-21808-CIV, 2008 WL 2940667, at *6 (S.D. Fla. July 28, 2008) ("[T]he public has a cognizable interest in the protection and enforcement of contractual rights."); *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. King*, 804 F. Supp. 1512, 1515 (M.D. Fla. 1992) ("the courts should strive to enforce contractual agreements"); *see also Merrill Lynch, Pierce, Fenner & Smith Inc. v. Ran*, 67 F. Supp. 2d 764, 781 (E.D. Mich. 1999) ("Unless the court enforces the terms of the contracts entered into by the sophisticated parties and entities in this case, the court will be undermining the legitimate business expectations not only of the parties here, but of all contracting parties."); *see Green Stripe, Inc. v. Berny's Internacionale*, 159 F. Supp. 2d 51, 57 (E.D. Pa. 2001) (concluding that "an injunction is consistent with the public interest in requiring parties to live up to their legal contracts"). This general principle argues in favor of granting the Team a temporary injunction to preserve its contractual right.

Moreover, in the case of agreements to arbitrate, there is an even stronger and long-recognized public interest in contract enforcement. *See Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 22 (1983) (FAA reflects congressional intent "to move the parties to an arbitrable dispute out of court and into arbitration as quickly and easily as possible"); *Roe v. Amica Mut. Ins. Co.*, 533 So. 2d 279, 281 (Fla. 1988) (calling arbitration under Florida's statute "a favored means of dispute resolution") (citation omitted); *Gale Grp., Inc. v. Westinghouse Elec. Corp.*, 683 So. 2d 661, 663 (Fla. 5th DCA 1996) (analyzing motion to compel arbitration

under Florida law: "Public policy favors arbitration as an efficient means of settling disputes, because it avoids the delays and expenses of litigation.") (citations omitted); *see also Global Tel*Link Corp. v. Scott*, 652 F. Supp. 2d 1240, 1247 (M.D. Fla. 2009) ("enjoining the parties to engage in alternative dispute resolution, as contractually agreed by the parties in the Agreement, is in furtherance of the public interest"). This more specific rule with respect to arbitration also weighs strongly in favor of the Team's request.

Finally, there is the public's interest, that is, the interest of the South Florida community, to be considered. In this instance, the public interest will clearly be served by ensuring that the Team has the ability to engage in a dispute resolution process before any termination takes effect. Just this past week, the Team attracted its largest crowds of the season to Florida Atlantic University's soccer stadium, and the press coverage of the Team and its star players has exploded. Indeed, the Team's stars have been featured on the Late Show with David Letterman and a recent local appearance by Abby Wambach, one of the Team's and the most famous soccer players in the world, drew 500 young fans and soccer players. (See media articles attached hereto as Exhibit J). In addition, the Team recently pledged proceeds from gate ticket sales to Florida Atlantic University, where magicJack plays its home games. Thus, South Florida has a clear interest in the orderly, fair and efficient resolution of the parties' disputes. *See Hilb Rogal & Hobbs of Fla., Inc. v. Grimmel,* 48 So. 3d 957, 962 (Fla. 4th DCA 2010) (public interest is served in enforcing contractual rights); *City of Oviedo v. Alafaya Utils., Inc.*, 704 So. 2d 206, 207 (Fla. 5th DCA 1998) (upholding injunction where public would suffer irreparable harm otherwise).

It is abundantly clear, therefore, that the public's interest in contract enforcement, its specific interest in arbitration of disputes, and the local community's interests will be served if the Team is allowed to complete its first season in South Florida. If the Team is successful in

arbitration, as it expects to be, the public interest is further served if the Team can return next year and continue to build local goodwill and pride.

E. No Bond Should Be Required.

While a bond may be required as a condition of a preliminary injunction under Rule 1.610(b) of the Florida Rules of Civil Procedure, it is within the Court's discretion to limit the bond requirement. *Cushman & Wakefield, Inc. v. Cozart*, 561 So. 2d 368, 369 (Fla. 2d DCA 1990) (noting that court has discretion with regard to amount of bond to be posted by party moving for a preliminary injunction). Cases interpreting Rule 65(c) of the Federal Rules of Civil Procedure, which contains the same language as the applicable Florida rule, have held that a court may, in an appropriate case, determine that a bond is completely unnecessary. *See, e.g., Temple Univ. v. White*, 941 F.2d 201, 219-20 (3d Cir. 1991) (equities of potential hardships weighed in favor of waiving bond requirement); *Coquina Oil Corp. v. Transwestern Pipeline Co.*, 825 F.2d 1461, 1462 (10th Cir. 1987) (holding that court has discretion to determine that security is unnecessary in "'absence of proof showing likelihood of harm'") (citation omitted); *Int'l Controls Corp. v. Vesco*, 490 F.2d 1334, 1356 (2d Cir. 1974) (holding that court may dispense with security when there is "'no proof of likelihood of harm to party enjoined'") (citations omitted).

Here, it would be unfair to require the Team to post a bond, as there is nothing the League stands to lose if it is compelled to arbitrate before terminating. In fact, given that the requested injunction merely preserves the Team's right to arbitration according to the LLC Agreement's Arbitration Provision, the League cannot prove any harm, whatsoever. Accordingly, no bond should be required.

II. THE COURT SHOULD COMPEL THE LEAGUE'S SPECIFIC PERFORMANCE OF THE DISPUTE RESOLUTION AND ARBITRATION PROVISIONS OF THE LLC AGREEMENT

"It is now an axiom of federal and Florida law that written agreements to arbitrate are binding and enforceable, and that in the absence of waiver a court must compel arbitration when an arbitration agreement and an arbitrable issue exist." *Bill Heard Chevrolet Corp., Orlando v. Wilson*, 877 So. 2d 15, 18 (Fla. 5th DCA 2004); *see also* Fed. Arbitration Act ("FAA") 9 U.S.C. § 2 (stating that arbitration clauses "shall be valid, irrevocable and enforceable"); Fla. Arbitration Code, Fla. Stat. § 682.02 (providing that arbitration clauses "shall be valid, enforceable and irrevocable"). Neither Florida nor federal law affords discretion; instead, they mandate that the court direct the parties to proceed to arbitration on issues within the agreement to arbitrate. *See, e.g., Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213, 218 (1985) (holding FAA "leaves no place for the exercise of discretion by a district court, but instead mandates that district courts *shall* direct the parties to proceed to arbitration on issues as to which an arbitration agreement has been signed") (citation omitted) (emphasis in original). Because public policy favors arbitration as an efficient means of settling disputes, "all questions concerning the scope or waiver of the right to arbitrate should be resolved in favor of arbitration rather than against it." *Bill Heard Chevrolet Corp.*, 877 So. 2d at 18.

A. The FAA mandates that the parties arbitrate their dispute.

The FAA provides for the enforcement of written agreements to arbitrate in contracts evidencing a transaction involving interstate commerce.[3] Because the present action is a claim

[3] The Supreme Court recently held that actions governed by the FAA pre-empt state law. *AT&T Mobility LLC v. Concepcion*, 131 S. Ct.1740, 1746-47 (2011). Since Florida law is consistent with the FAA, applying the federal statute instead of the state one is a distinction without a difference, here. *Seifert v. U.S. Home Corp.*, 750 So. 2d 633, 636 (Fla. 1999); *Kaplan v. Divosta Homes, L.P.*, 983 So. 2d 1208, 1211(Fla. 2d DCA 2008).

that involves interstate commerce, the FAA applies. *See Citizens Bank v. Alafabco, Inc.*, 539 U.S. 5, 572 (2003) (holding that that debt-restructuring agreements that were executed in Alabama by Alabama residents were nonetheless contracts evidencing transactions "involving commerce" whose arbitration clauses were enforceable pursuant to the FAA).

Here, Plaintiffs, companies headquartered in Florida, have sued a national sports league whose member teams are located in Georgia, Massachusetts, Florida, Pennsylvania, New Jersey and New York. The League is itself a Delaware LLC which formerly had its principal place of business in California, and its business is not limited to any one state. The business of the league—which in its most basic form consists of teams from various states meeting to play soccer matches—necessarily requires crossing state lines. Thus, the purpose of the LLC Agreement was to establish a business (the League) that is engaged in interstate commerce. *See Flood v. Kuhn*, 407 U.S. 258, 283-83(1972) ("professional sports operating interstate," including baseball, football, boxing, basketball, hockey and golf, are engaged in interstate commerce) (footnotes omitted). Therefore, the FAA applies to this case.

B. Referral to arbitration is mandated in this action.

Under either the FAA or Florida's Arbitration Code, "there are three elements for courts to consider in ruling on a motion to compel the arbitration of a given dispute: (1) whether a valid written agreement to arbitrate exists; (2) whether an arbitrable issue exists; and (3) whether the right to arbitration was waived." *Raymond James Financial Services, Inc. v. Saldukas*, 896 So. 2d 707, 711 (Fla. 2005); *Seifert*, 750 So. 2d at 636. Since waiver is not at issue, here, the question for this Court is whether the first two elements are satisfied in this action. They are and, therefore, this Court must compel arbitration.

1. A valid enforceable agreement containing an arbitration clause exists.

The first element requires an agreement to arbitrate. It cannot be disputed that the LLC Agreement is an enforceable agreement among the parties, and that it contains the Arbitration Provision. Consequently, the first element necessary to compel arbitration is satisfied.

2. The dispute between the parties is an arbitrable issue.

The second element requires the claims in the action to come within the scope of the arbitration clause. The League has already acknowledged that the parties' dispute—whether the Team can and should be terminated from the League—falls within the scope of the Arbitration Provision.

By its terms, the Arbitration Provision applies broadly to "any controversy, dispute or claim arising out of or relating to this Agreement or the breach, termination, enforceability or validity hereof" the Team and the League. LLC Agreement § 12.01(a). On July 5, in a Dispute Notice from its *de facto* general counsel), the League conceded that a dispute concerning termination of the Team fell within the expansive language of the Arbitration Provision. Further, it was the League that elected to begin the Arbitration Provision process by serving a Dispute Notice. That Notice concerned the "possible termination of the Team from the League." Def.'s Dispute Notice. In it, the League stated that the Arbitration Provision governed, and that the parties' next step in the arbitration process was a prompt confidential meeting to attempt negotiating a resolution to the parties' dispute in good faith. Under these circumstances, even though the League has failed to follow through on its obligations under the Arbitration Provision, it cannot now deny that the parties' dispute falls within the scope of the Arbitration Provision, and that the requests of that provision be given their full effect.

* * *

WHEREFORE, Plaintiffs respectfully request that this Court temporarily enjoin Defendant from taking any action to terminate Plaintiffs without participating in arbitration, enter an order compelling Defendant's specific performance of the parties' arbitration agreement, and grant all other relief as is appropriate under the circumstances.

VERIFICATION

Under penalty of perjury, I, Daniel Borislow, Chief Executive Office of Plaintiff magicTalk Soccer Club, LLC, which is the managing member of Plaintiff Freedom Soccer, LLC, declare that I have read Plaintiffs' Verified Motion for Temporary Injunction and to Compel Dispute Resolution and Arbitration and the facts as set forth above in the section entitled "Verified Facts" are true and correct.

Daniel Borislow

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail and electronic mail on this 2nd day of August, 2011, to Pamela Fulmer, Esq., SNR Denton US LLP, 525 Market Street, 26th Floor, San Francisco, CA 94105-2708 (pam.fulmer@snrdenton.com).

Of Counsel:

Louis S. Ederer, Esq.
Arnold & Porter LLP
399 Park Avenue
New York, NY 10022-4690

CARLTON FIELDS, P.A.
525 Okeechobee Boulevard
Suite 1200
West Palm Beach, FL 33401
Telephone: (561) 659-7070
Facsimile: (561) 659-7368
E-mail: jianno@carltonfields.com
E-mail: crosenberg@carltonfields.com

BY: Joseph Ianno, Jr.
JOSEPH IANNO, JR.
Florida Bar No: 655351
CHARLES M. ROSENBERG
Florida Bar No: 279064

Counsel for Plaintiffs Freedom Soccer, LLC and MagicTalk Soccer Club, LLC