**UNITED STATES DISTRICT COURT**
**NORTHERN DISTRICT OF ILLINOIS**
**EASTERN DIVISION**

| | |
|---|---|
| UNITED STATES SOCCER FEDERATION, INC.,<br><br>Plaintiff,<br><br>v.<br><br>UNITED STATES WOMEN'S NATIONAL SOCCER TEAM PLAYERS ASSOCIATION,<br><br>Defendant. | Case No. 1:16-cv-01923<br><br>Hon. Sharon Johnson Coleman |

**PLAINTIFF UNITED STATES SOCCER FEDERATION, INC.'S MOTION FOR SUMMARY JUDGMENT**


Matthew W. Walch
LATHAM & WATKINS LLP
330 North Wabash Avenue, Suite 2800
Chicago, Illinois 60611
(312) 876-7700

Kathryn H. Ruemmler (admitted *pro hac vice*)
LATHAM & WATKINS LLP
555 Eleventh St. NW, Ste. 1000
Washington, DC 20004
(202) 637-2200

Russell F. Sauer, Jr. (admitted *pro hac vice*)
Amy C. Quartarolo (admitted *pro hac vice*)
Michael Jaeger (admitted *pro hac vice*)
LATHAM & WATKINS LLP
355 South Grand Avenue
Los Angeles, California 90071
(213) 485-1234

Attorneys for Plaintiff
United States Soccer Federation, Inc.

# TABLE OF CONTENTS

Page

I. INTRODUCTION ........................................ 1

II. FACTUAL BACKGROUND ........................................ 3

A. USSF And The PA Negotiate A Series Of Collective Bargaining Agreements ........................................ 3
1. The 2001 and 2005 CBAs ........................................ 4
2. The 2013 CBA ........................................ 5
B. The Parties' Conduct Since March 2013 Has Been Consistent With the Terms of the 2013 CBA ........................................ 7
C. The PA's New Executive Director Denies the Existence of the 2013 CBA and Advises of "Intent to Engage in Action(s)" ........................................ 8
D. Imminent Events That Would Be Adversely Affected by a Strike ........................................ 8

III. LEGAL STANDARD ........................................ 9

IV. ARGUMENT ........................................ 10

A. USSF Is Entitled to a Declaration Confirming That The 2013 CBA Is Binding Upon The Parties ........................................ 10
1. Declaratory Relief Is Warranted ........................................ 10
2. The 2013 CBA Is a Valid and Enforceable Contract Consisting of the 2005 CBA, as Modified or Amended by the MOU ........................................ 12
a. The Parties' Statements and Actions at the Time of Contracting Confirm Their Agreement to the 2013 CBA ........................................ 12
b. The PA's Acting Executive Director and General Counsel Had Actual and Apparent Authority to Negotiate, Execute, and Bind the PA to the 2013 CBA ........................................ 15
(1) Mr. Langel Had Actual Authority to Enter into the 2013 CBA ........................................ 16
(2) Mr. Langel Had Apparent Authority to Enter into the 2013 CBA ........................................ 18
c. The PA's Subsequent Words and Actions Further Demonstrate Their Agreement to the 2013 CBA ........................................ 21
B. The PA's Statements Constitute an Anticipatory Breach of the 2013 CBA ........................................ 23
1. A Binding Contract Exists Consisting of the 2005 CBA as Modified by the MOU, With a Four-Year Term Ending on December 31, 2016 ........................................ 23
2. The PA's Repeated Denials of Enforceability of the 2013 CBA Are Definite and Unequivocal, and Constitute a Repudiation and Anticipatory Breach of the Contract ........................................ 23

V. CONCLUSION ........................................ 25

## TABLE OF AUTHORITIES

**Page(s)**

### CASES

*Abbott Labs v. Gardner*,
387 U.S. 136 (1967) ....................11

*Aetna Life Ins. Co. v. Haworth*,
300 U.S. 227 (1937) ....................10

*Anderson v. Liberty Lobby, Inc.*,
477 U.S. 242 (1986) ....................9

*Arlington LF, LLC v. Arlington Hosp., Inc.*,
637 F.3d 706 (7th Cir. 2011) ....................23, 25

*Arris Group Inc. v. British Telecommunications PLC*,
639 F.3d 1368 (Fed. Cir. 2011)....................11

*Bank of North Carolina v. Rock Island Bank*,
630 F.2d 1243 (7th Cir. 1980) ....................18

*Bd. of Educ. v. Sered*,
850 N.E. 2d 821 (Ill. Ct. App. 2006)....................12

*Blue Cross & Blue Shield Ass'n v. Am. Express Co.*,
No. 99-C-6679, 2005 WL 1838340 (N.D. Ill. July 25, 2005) ....................21

*Borg-Warner Corp. v. Anchor Coupling*,
16 Ill. 2d 234 (1958)....................13

*Bricklayers Local 21 of Ill. Apprenticeship & Training Program v. Banner Restoration, Inc.*,
385 F.3d 761 (7th Cir. 2004) ....................12

*C.L. Maddox, Inc. v. Coalfield Servs., Inc.*,
51 F.3d 76 (7th Cir. 1995) ....................23, 24

*Casati v. Aero Marine Mgmt. Co.*,
90 Ill. App. 3d 530 (1980) ....................23

*In re Cent. Illinois Energy Coop.*,
No. 15-1118, 2016 WL 299007 (C.D. Ill. Jan. 25, 2016)....................24

*Central States Southeast and Southwest Areas Pension Fund v. Kraftco*,
799 F.2d 1098 (6th Cir. 1986) ....................19

*Chicago & North Western R. v. Peoria & Pekin Union R.*,
46 Ill. App. 3d 95 (1977) ....................................................................................22

*Cloud Corp. v. Hasbro. Inc.*,
314 F.3d 289 (7th Cir. 2002) ...............................................................................18

*Curtis Casket Co. v. D.A. Brown & Co.*,
259 Ill. App. 3d 800 (1994) ................................................................................23

*Dawson v. General Motors*,
977 F.2d 369 (7th Cir. 1992) ...............................................................................13

*Dept. of Revenue v. Jennison-Wright Corp.*,
393 Ill. 401 (1946)..............................................................................................21

*Deveraux v. City of Chicago*,
14 F.3d 328 (7th Cir. 1994) .................................................................................10

*Dilek v. Watson Enters.*,
885 F. Supp. 2d 632 (S.D.N.Y. 2012)...................................................................20

*Evanston Ins. Co. v. Deer-Bell, Inc.*,
No. 1:07-cv-1160, 2009 WL 398969 (S.D. Ind. Feb. 13, 2009)...............................9

*Frain Camins & Swartchild, Inc. v. Bank of American Nat. Trust and Sav. Ass'n*,
No. 91 C 8165, 1994 WL 174149 (N.D. Ill. May 4, 1994) ....................................16

*Gariup v. Birchler Ceiling & Interior Co.*,
777 F.2d 370 (7th Cir. 1985) ...............................................................................12

*Geneva Intern. Corp. v. Petrof, Spol*,
608 F. Supp. 2d 993 (N.D. Ill. 2009)......................................................................9

*Global Poly Inc. v. Fred's Inc.*,
Case No. 03-C-4561, 2004 WL 2457782 (N.D. Ill. Oct. 29, 2004).........................17

*Gorman v. Tessmer*,
973 F.2d 520 (7th Cir. 1992) .................................................................................9

*Int'l Union, United Auto. v. Yard-Man, Inc.*,
716 F.2d 1476 (6th Cir. 1983) .............................................................................18

*International Union, United Auto. v. Stanadyne, Inc.*,
No. 88 C 4620, 1989 WL 84453 (N.D. Ill. July 19, 1989).....................................18

*Kinesoft Dev. Corp. v. Softbank Holdings*,
139 F. Supp. 2d 869 (N.D. Ill. 2001)............................................................ 16, 18, 22

*In re Kloster*,
469 N.E. 2d 381 (Ill. Ct. App. 1984)....................13

*La Van v. U.S.*,
382 F.3d 1340 (Fed. Cir. 2004)....................12

*Laborers' Pension Fund v. Hessen Pressure Washing*,
No. 06 C 3383, 2008 U.S. Dist. LEXIS 24503 (N.D. Ill. Mar. 25, 2008)....................16

*Lake Shore & M.S. Ry. Co. v. Richards*,
152 Ill. 59 (1894)....................24

*Locasto v. Locasto*,
518 F. Supp. 2d 1025 (N.D. Ill. 2007)....................13

*Mack Trucks, Inc. v. Int'l Union*,
856 F.2d 579 (3d. Cir. 1988)....................12

*In re Marriage of Olsen*,
124 Ill. 2d 19 (1988)....................25

*Maryland Casualty Co. v. Pacific Coal & Oil Co.*,
312 U.S. 270 (1941)....................10

*McNealy v. Caterpillar, Inc.*,
139 F.3d 1113 (7th Cir. 1998)....................12

*Moreau v. Local Union No. 247*,
851 F.2d 516 (1st Cir. 1988)....................19

*NLRB v. Brotherhood of Painters, Decorators, & Paperhangers, Local Union No. 1385*,
334 F.2d 729 (7th Cir. 1964)....................19

*NLRB v. Urban Tel. Corp.*,
499 F.2d 239 (7th Cir. 1974)....................16

*Operating Eng'rs Local 139 Health Benefit Fund v. Gustafson Constr. Corp.*,
258 F.3d 645 (7th Cir. 2001)....................12

*Opp v. Wheaton Van Lines, Inc.*,
231 F.3d 1060 (7th Cir. 2000)....................17

*Overnite Transportation Co. v. National Labor Relations Board*,
104 F.3d 109 (7th Cir. 1997)....................16

*Princeton Indus., Prods. v. Precision Metals Corp.*,
120 F. Supp. 3d 812 (N.D. Ill. 2015)....................18

*Progress Printing Corp. v. Jane Byrne Political Committee*,
601 N.E. 2d 1055 .......... 15, 19

*Real Estate Data, Inc. v. Sidwell Co.*,
809 F.2d 366 (7th Cir. 1987) .......... 21

*Reinsurance Co. of Am. v. Am. Centennial Ins. Co.*,
621 F. Supp. 516 (N.D. Ill. 1985) .......... 20

*Santelli v. Electro-Motive*,
188 F.R.D. 306 (N.D. Ill. 1999) .......... 21

*Sphere Drake Ins., Ltd. v. All Am. Life Ins. Co.*,
300 F. Supp. 2d 606 (N.D. Ill. 2003) .......... 20

*Spitzer v. Pate*,
No. 03 C 346, 2003 WL 22326583 (N.D. Ill. Oct. 10, 2003) .......... 10

*Townsend v. Daniel, Mann, Johnson & Mendenhall*,
196 F.3d 1140 (10th Cir. 1999) .......... 19

*Wis. Cent., Ltd. v. Shannon*,
539 F.3d 751 (7th Cir. 2008) .......... 11

*Wooster Republican Printing Co. v. Channel 17 Inc.*,
533 F. Supp. 601 (W.D. Mo. 1981) .......... 24

## STATUTES

28 U.S.C. § 2201 (2012) .......... 10

29 U.S.C. § 152(13) .......... 16

## RULES

Fed. R. Civ. P. 56 .......... 1

Fed. R. Civ. P. 56(a) .......... 9

## TREATISES

FARNSWORTH ON CONTRACTS § 7.13 .......... 22

Restatement (Second) of Contracts § 251 (1981) .......... 24

Pursuant to Federal Rule of Civil Procedure 56, Plaintiff United States Soccer Federation, Inc. ("US Soccer" or "USSF") hereby moves for summary judgment in its favor on its First Claim for Relief (Anticipatory Breach) and Second Claim for Relief (Declaratory Relief).

## I. INTRODUCTION

The theory of defendant United States Women's National Soccer Team Players Association (the "PA") has changed dramatically since the Complaint was filed and the parties first appeared in this Court. But, the incontrovertible facts have not changed. These facts did not support the PA's position then, and do not do so now.

In March 2013, USSF and the PA, through its long-time Acting Executive Director and General Counsel John Langel,[1] entered into a new four-year collective bargaining agreement expiring on December 31, 2016. As Mr. Langel testified during his deposition, and as multiple conversations and emails confirm, this new agreement consisted of the terms contained in the prior collective bargaining agreement (the "2005 CBA") as amended and modified by the Memorandum of Understanding (the "MOU") dated and executed on March 19, 2013 (collectively, the "2013 CBA"). As Mr. Langel testified, the 2013 CBA included, among other provisions, the "no-strike" clause carried over from the 2005 CBA.

In late 2014, the PA hired Richard Nichols as its new Acting Executive Director and General Counsel. Apparently, in order to secure his new position, Mr. Nichols may have promised the members of the PA that he could get them a better deal than the terms contained in the 2013 CBA. In an effort to do so, Mr. Nichols sought to create negotiating leverage by rejecting the 2013 CBA, contending that (i) the MOU does not contain a definite term[2] and thus is terminable at will,

[1] Mr. Langel, a senior partner at the Philadelphia-based law firm of Ballard Spahr LLP, is an experienced and highly-respected labor and employment lawyer.

[2] Notwithstanding Mr. Nichols' initial claim to the contrary, the MOU specifically provides as follows: "Term of WNT Contract – 4 years."

and (ii) the PA had not agreed to continue the unmodified terms of the 2005 CBA, and therefore, that the PA and its members were not bound by the "no-strike" clause.

After Mr. Langel refuted these assertions during his recent deposition,[3] Mr. Nichols and the PA abandoned their original arguments and manufactured a new one, now claiming that Mr. Langel – the PA's Acting Executive Director and General Counsel since its formation in 2000, the PA's chief negotiator and administrator for every collective bargaining agreement entered into with USSF and a veteran of countless collective bargaining negotiations – lacked the authority to bind the PA to the 2013 CBA. This new argument is equally specious.

The parties' historical relationship, the PA's Constitution and By-Laws and applicable judicial authority establish, as a matter of law, that Mr. Langel had both the actual and apparent authority to enter into the 2013 CBA on behalf of the PA. On March 19, 2013 USSF and Mr. Langel intended to and did reach a new agreement consisting of the terms of the 2005 CBA as modified by the MOU: the 2013 CBA. The terms of the 2013 CBA are confirmed not only by the parties' words at the time of contracting, but also by their course of performance. Indeed, after March 19, 2013, the PA accepted the benefits of and insisted on USSF's compliance with the terms of the MOU, as well as the terms of the 2005 CBA that were unaffected by the MOU.

Seventh Circuit law provides that, particularly in the collective bargaining context, manifestations of mutual agreement are sufficient to bind parties to an agreement, whether or not the terms of that agreement are memorialized in a signed document, are contained in the same document, or are written down at all. Moreover, course of performance is commonly regarded as the best evidence of the parties' intent to the extent there is a dispute concerning the existence of an agreement or the specific provisions thereof.

---

[3] Before this action was filed, USSF repeatedly urged Mr. Nichols to discuss the PA's position with Mr. Langel and review Mr. Langel's negotiating history. Mr. Nichols apparently did not do so.

Because Mr. Nichols – the current representative of the PA and a stranger to the parties' March 2013 agreement – has declined to accept these undisputed facts, there exists an irreconcilable controversy between the parties. Accordingly, USSF is entitled to an order confirming that USSF and the PA agreed to a four-year CBA consisting of the 2005 CBA as modified by the MOU, and finding that by denying its existence, the PA has anticipatorily breached the parties' agreement.

## II. FACTUAL BACKGROUND

### A. USSF And The PA Negotiate A Series Of Collective Bargaining Agreements

Since 1914, USSF has served as the United States' National Association member of the Fédération Internationale de Football Association ("FIFA"), the world governing body for the sport of soccer, and is recognized by the United States Olympic Committee ("USOC") as the National Governing Body for the sport of soccer in the United States. (Declaration of Sunil Gulati ("Gulati Decl.") at ¶ 7.) In connection with its mission to make soccer a preeminent sport in the United States, USSF selects, funds, trains and manages the various United States national soccer teams, including the Women's National Team ("WNT"), which represent the United States in international competitions including the World Cup and the Olympic Games. (*Id.* at ¶¶ 8-9.)

Since its inception in 2000, the PA has served as the exclusive bargaining representative of the WNT, and, through authorized representatives, has negotiated CBAs with USSF. (UF 6.) Until November 2014, the PA was represented by its General Counsel and Acting Executive Director, John Langel. (UF 7.)[4] Pursuant to the PA's Constitution and By-Laws, Mr. Langel, as Acting Executive Director, "is authorized to sign and execute all contracts in the name of the Association," including "[a]ll Collective Bargaining Agreements . . ."[5] (UFs 9-10.)

[4] Mr. Langel's history with the WNT goes back even further, as he represented players for several years before the PA was formed. (UF 8.)

[5] Mr. Langel's status as "Acting" Executive Director does not alter this authorization, as the Constitution further states that if the leaders of the PA "do not appoint an Executive Director, this function shall be filled

### 1. The 2001 and 2005 CBAs

Mr. Langel negotiated the first CBA between USSF and the PA, and executed it in March 2001 on behalf of the PA (the "2001 CBA").[6] (UFs 11-12.) It was made retroactive to cover the period from February 1, 2000 through December 31, 2004, covering the WNT's participation in the FIFA Women's World Cup in 2003 and the Summer Olympic Games in 2004. (UF 13.)

In Fall 2004, prior to the expiration of the 2001 CBA, USSF and the PA commenced negotiations for a new collective bargaining agreement. (*See* Gulati Decl. at ¶ 15.) The negotiations extended into early 2006. (*Id.*) Again, Mr. Langel negotiated on behalf of the PA. (UF 14.) USSF and the PA eventually reached agreement on a new collective bargaining agreement, this time covering an eight year period (two consecutive 4-year periods[7]) from January 1, 2005 through December 31, 2012 (the "2005 CBA"). (UF 15.) The 2005 CBA also was executed by Mr. Langel on behalf of the PA. (UF 16.)

As did the 2001 CBA, the 2005 CBA contained, among other terms, a comprehensive "No Strikes, No Lockouts" clause (UF 17), which reads as follows:

> Neither the Players Association nor any player shall authorize, encourage, or engage in any strike, work stoppage, slowdown or other concerted interference with the activities of the Federation during the term of this Agreement. . . . The Players Association shall not support or condone, any action of any player which is not in accordance with this Section 6.1 and the Players Association shall exert reasonable efforts to induce compliance therewith.

---

by the General Counsel of this Association, and the General Counsel is authorized to perform all the functions of the Executive Director during that period." (UF 10.)

[6] Each CBA consisted of two basic components: (a) a general agreement covering such topics as management rights, union rights, no strikes/no lockouts, and a grievance and arbitration mechanism; and (b) a Uniform Player Agreement (sometimes, the "UPA") covering such topics as player fitness, rights to the player's image and likeness, and compensation. (Gulati Decl. at ¶ 14.) Article IV of each "general agreement" provides that the UPA "was the product of collective bargaining between the parties, and its terms in its entirety are expressly made a part of this Agreement as if fully set forth herein." (*Id.*)

[7] The parties typically entered into CBAs covering at least a four year term (or "quad"), with the Women's World Cup in the third year, and the Olympics in the fourth year. (Declaration of Russell F. Sauer at ¶ 2, Ex. 43 (Transcript of the March 24, 2016 Deposition of John Langel, 87:14-88:13).)

2005 CBA, Art. VI, § 6.1; 2001 CBA, Art. VI, § 6.1.

**2. The 2013 CBA**

With the 2005 CBA set to expire by its terms on December 31, 2012, USSF and the PA commenced negotiations for a new collective bargaining agreement in Fall 2012. (UF 18.) The principal negotiators were Mr. Langel and his colleague Ruth Uselton (also of Ballard Spahr LLP), on behalf of the PA, and Sunil Gulati and Lisa Levine, on behalf of USSF. (UF 19.) During the negotiations, the PA sent several communications to USSF confirming the parties' mutual understanding that they were negotiating a full, four-year collective bargaining agreement. (UFs 20, 24, 28.) The parties' negotiations were contentious and continued into March 2013, in part because they were also negotiating details of the integration of the WNT into the National Women's Soccer League (the "NWSL"), a new women's professional soccer league. (UF 25.) The anticipated announcement of the league's launch, with WNT players expected to participate in the league, created considerable time pressure for the parties. (UF 26.) Mr. Langel kept the players informed of developments throughout the entire negotiating period (UF 27), and players periodically joined Mr. Langel for CBA negotiation sessions with USSF (UF 22).

Following multiple discussions regarding the concept (UF 21), on March 8, 2013, Mr. Gulati and Mr. Langel exchanged emails confirming that any issues from the 2005 CBA not covered in the MOU the parties were then negotiating would "carryover" unless inconsistent with, or adjusted by, the MOU. (UFs 29-30.) Mr. Langel understood the parties to be in agreement on the concept (UF 31), and their agreement was repeatedly confirmed in the parties' emails and telephone conversations between March 8 and March 18 (UF 41). Mr. Langel explained this "carryover" concept to the players both in writing and orally. (UF 32.)

The PA's Constitution and By-Laws set forth only two requirements for a binding CBA: (1) the signature of "a designated Player Representative or the Executive Director" and (2) "the

approval of a majority of the voting members." (UF 33.) On March 17, 2013, the members of the PA unanimously agreed on all outstanding issues except one. (UF 34, 35.) According to Mr. Langel, the "agreement" that had been unanimously ratified by the players was a four-year CBA consisting of the 2005 CBA, as modified or amended by the MOU. (UF 36.) The sole outstanding issue, concerning players' ability to play in Europe, was approved by the players in an email vote the following day. (UF 37.) Mr. Langel sent repeated updates to Mr. Gulati as to the progress of the votes. (UF 38.) On March 18, 2013, Mr. Langel sent an email (including his email signature block) to Mr. Gulati attaching the near-final version of the MOU and memorializing the parties' multi-part agreement:

> As we have previously agreed, the general principle we are working under is that the items we have not specifically covered in the Memorandum of Understanding would remain the same as under the prior CBA, but with appropriate increases/adjustments/changes.

(UF 39; *see also* UF 41.)[8] On March 19, Mr. Langel's colleague, Ms. Uselton, sent USSF the MOU for execution, with a cover email (including her email signature block) setting forth the same recitation of the parties' multi-part agreement. (UF 43.) Later that day, the parties exchanged the fully executed MOU signed by Dan Flynn, USSF's CEO, and Mr. Langel on behalf of the PA. (UFs 44-45.)[9] Per Mr. Langel, at the time of execution, the PA intended to enter into a CBA with USSF "consisting of the terms of the [2005 CBA] except to the extent modified, amended or altered by the [MOU]." (UF 46.)

Thus, as of March 19, 2013, the parties entered into the 2013 CBA, a binding CBA with a four-year term consisting of the 2005 CBA, as modified or amended by the MOU.

---

[8] As Mr. Langel confirmed, "appropriate increases/adjustments/changes" did not refer to further negotiations, but to updates to the terms of the 2005 CBA consistent with the terms of the MOU. (UF 40.)

[9] The parties left open for further discussion several issues not relevant to the current dispute and which they understood did not affect the binding nature of what they had agreed to. (UF 48.)

### B. The Parties' Conduct Since March 2013 Has Been Consistent With the Terms of the 2013 CBA

Recognizing the binding nature of the 2013 CBA, subsequent to March 19, 2013:

- The PA requested that USSF pay the players on the WNT the improved compensation and benefits retroactive to January 1, 2013, which were contingent on a condition involving "the signing of the new CBA." USSF did so. (UFs 51-52);
- The PA requested that USSF pay, and USSF paid, the PA a $425,000 "Signing Bonus" (UFs 49-50); and
- The PA filed its Form LM-2 Annual Report of Labor Organization for 2013, signed by two of its player-officers under penalty of perjury following a review with Mr. Langel, with the United States Department of Labor Office of Labor Management Standards, acknowledging receipt of the $425,000 "Signing Bonus" and several subsequent payments from USSF as "Payments under CBA" (UF 50).

In addition, USSF sought to comply and the PA insisted on compliance with terms of the 2013 CBA that carried over from the 2005 CBA. For example, after March 19, 2013:

- USSF requested that the PA exempt a player autograph signing session to benefit the victims of the Boston Marathon terrorist bombings from the limitations on the number of autograph signing sessions contained in Section 1(b) of the 2005 CBA. The PA granted the requested exemption. (UFs 53-54);
- USSF continued to submit print and digital creative pieces containing the images or likenesses of six or more WNT players to the PA for its approval because of the PA's position that its approval was required pursuant to Section 6 of the 2005 CBA. (UF 55.) The PA sometimes approved and sometimes denied requests by USSF for permission to use the player likenesses in promotional pieces, referencing Article VI of the 2005 CBA (UF 56);
- USSF created and aired a commercial promoting the WNT and the PA as required by Section 8.2 of the 2005 CBA (UF 57);
- The PA requested that USSF make certain payments in the manner set forth in Article VIII of the 2005 CBA (UF 58);
- The PA relied on Article III as it appeared in the 2005 CBA to question certain USSF rules and regulations in its player handbook (UF 59); and
- In connection with certain disputes, the PA threatened to invoke its rights under the grievance and arbitration mechanism contained in Article V of the 2005 CBA (UF 60).

Indeed, until Mr. Nichols assumed the role as new PA Executive Director, no one from the PA, no player and no player-agent – *no one* – ever suggested that the terms of the 2005 CBA that were unaffected by the MOU were not in full force and effect.

### C. The PA's New Executive Director Denies the Existence of the 2013 CBA and Advises of "Intent to Engage in Action(s)"

In late 2014, Mr. Nichols succeeded Mr. Langel as the representative of the PA. (UF 61.) Despite the terms of the 2013 CBA, on December 24, 2015, Mr. Nichols sent a letter to USSF purporting to provide notice under the National Labor Relations Act of the PA's intent to "engage in action(s) that shall serve to terminate and or modify, if applicable" the CBA and the MOU, and simultaneously reserving its right to challenge the existence of a CBA. (UF 62.)

In response to this letter, USSF twice requested that the PA verify its intention to abide by the terms of the 2013 CBA, including the "no strike" clause, through December 31, 2016. (UF 63.) Mr. Nichols replied via email on January 6, 2016, confirming unequivocally that:

> . . . ***it is the position of the WNTPA that the CBA no longer exists, and further, that the MOU is terminable at will***. . . Accordingly, it is simply not correct that "the current CBA does not expire until the end of this year" . . .

(UF 64 (emphasis added).) On February 3, 2016, representatives of the parties met in person, and, on multiple occasions, the PA refused to agree that it would not engage in a strike or other job action through the end of December 2016. (UF 66.)

### D. Imminent Events That Would Be Adversely Affected by a Strike

In order to prepare the WNT for the August 2016 Summer Olympic Games, USSF: (i) planned and held the "SheBelieves" tournament in March 2016; (ii) confirmed teams and venues for additional matches; and (iii) planned training camps for the WNT. (UF 67.) Arranging these events has, and will, cost USSF a substantial sum of money. (*Id.*)

Further, pursuant to applicable rules, USSF and the USOC must submit the roster for the WNT in advance of the Games. (UF 68.) If unable to do so by the required deadline due to a job action by the PA, USSF and the USOC would have to withdraw the WNT from the Olympics. (*See* Gulati Decl. at ¶ 51.) This action would expose USSF to a substantial fine from FIFA along with the possibility of a suspension by FIFA of USSF and all of its national teams from participating in subsequent FIFA competitions. (UF 69.)

Finally, USSF has provided substantial support to the NWSL, including providing front-office assistance, arranging for members of the WNT to play in the NWSL, and paying their NWSL salaries. (Gulati Decl. at ¶ 52.) Any job action by the PA could impact the rosters of all ten NWSL teams and eliminate many of the league's most recognizable players, jeopardizing the league's very existence just as its fourth season is getting underway. (*Id.*)

In view of the substantial investment USSF has made, and continues to make, in the NWSL and the harm that would befall USSF, the USOC, and the NWSL if the PA conducted an illegal job action in violation of the 2013 CBA, USSF filed this action seeking a declaration from this Court confirming the existence of the 2013 CBA. The PA has continued to raise the threat of a job action, most recently in an April 1, 2016 interview with ESPN, in which its counsel suggested that it is possible that the players "will have to strike" before they get their next CBA. (UF 70.)

## III. LEGAL STANDARD

A party is entitled to summary judgment when "there is no genuine dispute as to any material fact." Fed. R. Civ. P. 56(a); *see Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-48 (1986). The same standard applies to both declaratory relief and anticipatory breach claims. *See Evanston Ins. Co. v. Deer-Bell, Inc.*, No. 1:07-cv-1160, 2009 WL 398969, *1 (S.D. Ind. Feb. 13, 2009) (declaratory relief); *Gorman v. Tessmer*, 973 F.2d 520 (7th Cir. 1992) (anticipatory breach); *Geneva Intern. Corp. v. Petrof, Spol*, 608 F. Supp. 2d 993, 1004 (N.D. Ill. 2009) (same). "The

nonmovant may not rest upon mere allegations in the pleadings or upon conclusory statements in affidavits; it must . . . support its contentions with proper documentary evidence." *Spitzer v. Pate*, No. 03 C 346, 2003 WL 22326583, *1 (N.D. Ill. Oct. 10, 2003).

## IV. ARGUMENT

### A. <u>USSF Is Entitled to a Declaration Confirming That The 2013 CBA Is Binding Upon The Parties</u>

The current disagreement between the parties is sufficiently substantial, contested, and immediate to necessitate a declaration from this Court under the Declaratory Judgment Act (the "DJA"). The parties' negotiations and statements at the time of contracting, and conduct after execution, conclusively demonstrate as a matter of law that the parties agreed to a collective bargaining agreement with a four-year term comprised of the 2005 CBA as modified by the MOU.

#### 1. Declaratory Relief Is Warranted

The DJA provides that "[i]n a case of actual controversy within its jurisdiction . . . any court of the United States, upon filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought." 28 U.S.C. § 2201 (2012). Here, because the facts demonstrate "a substantial controversy, between parties having adverse legal interests, of sufficient immediacy and reality to warrant the issuance of a declaratory judgment," declaratory relief is appropriate. *Maryland Casualty Co. v. Pacific Coal & Oil Co.*, 312 U.S. 270, 273 (1941).

- **<u>Substantial Controversy</u>:** A "substantial controversy" is defined as one that is "definite and concrete" and "admitting of specific relief through a decree of a conclusive character, as distinguished from an opinion advising what the law would be upon a hypothetical set of facts." *Deveraux v. City of Chicago*, 14 F.3d 328, 330 (7th Cir. 1994), citing *Aetna Life Ins. Co. v. Haworth*, 300 U.S. 227, 240-41 (1937) (finding a substantial controversy). The instant matter is

definite and concrete: USSF claims there is an enforceable CBA that runs through the end of this year; the PA claims there is not. (*See* UFs 62- 64, 66.) Further, a declaratory judgment from this Court adjudicating the existence and terms of the current CBA would not be a mere advisory opinion. As their relationship stands now, the parties are at an impasse. A judgment from this Court would clarify the existence and terms of the agreement between the parties and whether the PA's threatened actions would violate that agreement.

- **Dispute Concerning Legal Rights:** A controversy between parties having "adverse legal interests" is interpreted to mean a "dispute as to a legal right." *Arris Group Inc. v. British Telecommunications PLC*, 639 F.3d 1368, 1374-75 (Fed. Cir. 2011) (finding an Article III case or controversy). Here, USSF asserts that the parties have contractual legal rights under the 2013 CBA; the PA, invoking the National Labor Relations Act, claims that it is not legally bound by a collective bargaining agreement with USSF. (*See* UFs 62-64.) The parties' respective positions constitute a dispute as to their legal rights.

- **Sufficiently Immediate and Real:** In determining whether a claim has "sufficient immediacy and reality," a court must consider "'the fitness of the issues for judicial decision and the hardship of the parties of withholding court consideration.'" *Wis. Cent., Ltd. v. Shannon*, 539 F.3d 751, 759-60 (7th Cir. 2008) (contested issue of law between the parties ripe for judicial determination), quoting *Abbott Labs v. Gardner*, 387 U.S. 136, 149 (1967). Here, the parties have staked out their respective positions on the issue to no avail; a judicial determination is now necessary. And, the need for such a determination is immediate, due, in part, to upcoming games, training camps, the NWSL season, and the Summer Olympics. (*See* UF 67.)

Because the instant dispute is substantial, implicates the parties' legal rights, and is real and immediate, declaratory relief is warranted.

### 2. The 2013 CBA Is a Valid and Enforceable Contract Consisting of the 2005 CBA, as Modified or Amended by the MOU

#### a. The Parties' Statements and Actions at the Time of Contracting Confirm Their Agreement to the 2013 CBA

Contract law is applied liberally in the collective-bargaining context "as a means of lessening strife and encouraging congenial relations between unions and companies." *McNealy v. Caterpillar, Inc.*, 139 F.3d 1113, 1123 (7th Cir. 1998). The Seventh Circuit has recognized that a CBA can be considerably broader than a single, signed document:

> The notion of an implied-in-fact CBA has a significant history. We have already recognized that "conduct manifesting an intention to abide and be bound by the terms of an agreement" suffices to support a finding of a CBA. We have also stated that the "crucial inquiry is whether the two sides have reached an 'agreement,' even though that 'agreement' might fall short of the technical requirements of an accepted contract."

*Id.* at 1121 (citations omitted); *see also Mack Trucks, Inc. v. Int'l Union*, 856 F.2d 579, 591-92 (3d. Cir. 1988) ("[a]doption of an enforceable labor contract does not depend on the reduction to writing of the parties' intention to be bound.").

Thus, a collectively-bargained contract may be made up of terms not memorialized in writing, memorialized in unsigned writings, memorialized in multiple writings, or some combination thereof – so long as there is evidence of agreement. *See Operating Eng'rs Local 139 Health Benefit Fund v. Gustafson Constr. Corp.*, 258 F.3d 645, 649 (7th Cir. 2001) (a party's actions constituted acceptance of offer of a modified contract); *Bricklayers Local 21 of Ill. Apprenticeship & Training Program v. Banner Restoration, Inc.*, 385 F.3d 761, 766 (7th Cir. 2004) (recognizing "the well-established principle that a collective bargaining agreement is not dependent on the reduction to writing of the parties' intention to be bound"); *Gariup v. Birchler Ceiling & Interior Co.*, 777 F.2d 370, 373 (7th Cir. 1985) (same); *Bd. of Educ. v. Sered*, 850 N.E. 2d 821, 827-28 (Ill. Ct. App. 2006) (same); *La Van v. U.S.*, 382 F.3d 1340, 1346-47 (Fed. Cir.

2004) (a contract may arise from multiple documents if intent to contract is demonstrated); *In re Kloster*, 469 N.E. 2d 381, 381 (Ill. Ct. App. 1984) (in a traditional contract setting, holding that a contract "may be composed of several writings. . . . whose terms do not conflict . . .").

Further, the fact that parties leave some issues to be decided later does not invalidate the binding nature of those terms to which they did agree. *See Dawson v. General Motors*, 977 F.2d 369, 374 (7th Cir. 1992) ("[O]ne party's acquiescence in the other's reliance on the preliminary agreement is a factor that supports enforcement."); *Borg-Warner Corp. v. Anchor Coupling*, 16 Ill. 2d 234, 243 (1958) (leaving certain issues for future agreement "does not preclude the existence of an enforceable contract."). Similarly, the fact that the parties state an intent subsequently to memorialize their multi-part agreement into a new, single document does not alter the binding nature of their multi-part agreement. *See Dawson*, 977 F.2d at 374 ("[t]he fact that a formal written document is anticipated does not preclude enforcement of a specific preliminary promise."); *Locasto v. Locasto*, 518 F. Supp. 2d 1025, 1030 (N.D. Ill. 2007) (finding an oral agreement enforceable because "the fact that parties anticipate a more formal future written agreement will generally not nullify an otherwise binding agreement.").

Here, the parties' negotiations establish that they had agreed to a new four-year CBA, comprised of the terms of the 2005 CBA, as modified by the MOU:

| | |
|---|---|
| 11/1/12 | The PA sent USSF an email titled "CBA - List of Issues for Discussion," attaching a document called "WNTPA Collective Bargaining Agreement Proposals." The PA stated that the negotiations were "for a collective bargaining agreement for the 2013 season and beyond." (UF 20.) |
| 11/2012 - 3/2013 | Mr. Langel and Mr. Gulati had multiple discussions regarding the concept that unchanged terms from the 2005 CBA would carry over to the new CBA. (UF 21.) |
| 2/28/13 | The PA sent USSF a memorandum titled "Response to US Soccer's February 19, 2013 Memo of Understanding – 2013-2016 Collective Bargaining Agreement." (UF 24.) |
| 3/7/13 | The PA sent USSF a memorandum titled "March 2013 – WNTPA Memo Regarding CBA Negotiations." (UF 28.) |

| | |
|---|---|
| 3/8/13 | The PA proposed to USSF that "[t]erms from the old CBA that we have not addressed remain unchanged unless inconsistent with the memo we will sign." (UF 29.) |
| 3/8/13 | USSF responded, confirming that "[t]he general principle that stuff that we have not specifically covered would remain the same (or be appropriately adjusted) as in the previous CBA seems sensible." (UF 30.) Mr. Langel took USSF's March 8 response "and the entire body of the discussions that we had had" to mean that "we were identifying issues that would be the modifications to the existing Collective Bargaining Agreement and in all other respects the Collective Bargaining Agreement would remain the same." (UF 31.) |
| 3/18/13 | The PA sent USSF a "Memorandum of Understanding and financial terms sheet" and noted that "[a]s we have previously agreed, the general principle we are working under is that items we have not specifically covered in the MOU would remain the same as under the prior CBA, but with appropriate increases/adjustments/changes."[10] (UF 39.) Mr. Langel testified that the March 18 email was "at least one" of multiple oral and written communications confirming his and Mr. Gulati's mutual understanding on the issue between March 8 and March 18. (UF 41.) |
| 3/19/13 | The PA sent USSF a revised draft of the MOU, and repeated that any unchanged 2005 CBA provisions would continue as part of the new CBA: "As we have previously agreed, the general principle we are working under is that items we have not specifically covered in the MOU would remain the same as under the prior CBA, but with appropriate increases/adjustments/ changes."[11] (UF 43.) Mr. Langel confirmed in his deposition that when the parties executed the MOU that same day, his intent was to "enter[] into a Collective Bargaining Agreement with US Soccer consisting of the terms of the expired Collective Bargaining Agreement except to the extent modified, amended or altered by the Memorandum of Understanding." (UF 46.) |

Coming to an agreement on the terms of the 2013 CBA in this manner made sense for the parties. Given the adversarial nature of the collective-bargaining process and these negotiations, and the time pressure the parties were under on account of the imminent opening of the NWSL's inaugural season (*see* UFs 25-26), the parties elected to agree to the continuation of certain

---

[10] Mr. Langel also stated in the email that "[w]e will address the specifics when we get to drafting the new CBA." Any attempt by the PA to re-interpret these words should be rejected. Mr. Langel made clear at his deposition that the MOU, combined with the parties' understanding that any unchanged provisions from the prior CBA would carry over, *was* the new CBA, even if the parties had not yet integrated their agreements into a single document. (*See* UFs 40, 42).

[11] During his deposition, Mr. Langel addressed his inclusion of the phrase "but with appropriate increases/adjustments/changes" in his confirming email, explaining that he meant that "the memorandum will be integrated into the Collective Bargaining Agreement . . . , that the [MOU] would modify the Collective Bargaining Agreement that was extant [*i.e.*, the 2005 CBA]. So we would have a merging of documents and integration." (*See* UF 40.) He confirmed that the remaining work was not "negotiations" of "substantive items," as those were settled; it was instead "[l]anguage, wordsmithing, that always happens when you move from a term sheet to a document." (*See id.*) Indeed, in his March 18 email, Mr. Langel went on to state: "We will address the specifics when we get to drafting the new CBA." (*See* UFs 39-40.)

traditional and non-controversial provisions – including the "Management Rights," "Union Rights," "Grievance and Arbitration Procedure," and "Integration, Entire Agreement" sections, as well as the "No Strikes, No Lockouts" clause. (*See* UF 47.) Under the pressing circumstances, the parties focused their negotiations on the issues that mattered to them – financial components such as salary and benefits and issues relating to the NWSL. Accordingly, they explicitly agreed that any 2005 CBA provisions unchanged by the MOU would continue. (*See* UFs 26, 31, 39, 41, 43.)

Thus, the evidence of intent at the time of contracting and the confirmation of that intent through recent discovery conclusively demonstrate that USSF and the PA, as of March 19, 2013, had come to a collectively-bargained binding agreement that, under federal law, was comprised of the terms of the MOU, and any terms from the 2005 CBA not altered or modified by the MOU. (*See* UFs 29-31, 39, 43 ("*As we have previously agreed*, . . . items we have not specifically covered in the MOU would remain the same as under the prior CBA.") (emphasis added).)

**b. The PA's Acting Executive Director and General Counsel Had Actual and Apparent Authority to Negotiate, Execute, and Bind the PA to the 2013 CBA**

At the commencement of this action, the PA disputed that the parties had agreed on a CBA with a four-year term. (*See* Dkt. 23 at 3-5.) However, just days after Mr. Langel categorically refuted that position at deposition (*see* UFs 23, 32, 36, 46), the PA abandoned that argument, and now contends that Mr. Langel lacked the authority to bind the PA. It is no surprise that this defense did not appear in the PA's initial filing, as it is belied by general principles of agency law, Mr. Langel's long history with the PA, and the parties' prior CBA negotiations. (*See, e.g.,* UFs 7-48.)

An agent may bind the principal to agreements with third parties. *See Progress Printing Corp. v. Jane Byrne Political Committee*, 601 N.E. 2d 1055, 1066; 235 Ill. App. 3d 292, 307-08 (1992) (recognizing the binding power of an agency relationship). The agency relationship in the union/employer context is to be construed liberally. *See NLRB v. Urban Tel. Corp.*, 499 F.2d 239,

243 (7th Cir. 1974) (stating that "the courts have always liberally construed the principles of agency" as to employers, and noting that this principle "is equally apropos to unions"); *see also* National Labor Relations Act, 29 U.S.C. § 152(13) ("In determining whether any person is acting as an 'agent' . . . , the question of whether the specific acts performed were actually authorized or subsequently ratified shall not be controlling."). According to the Seventh Circuit, "[a] union may create an agency relationship either by directly designating someone to be its agent (*i.e.* granting 'actual authority') or by taking steps that lead third persons reasonably to believe that the putative agent was authorized to take certain actions (*i.e.* allowing 'apparent authority' to exist)." *Overnite Transportation Co. v. National Labor Relations Board*, 104 F.3d 109, 113 (7th Cir. 1997). The issue of agency is appropriate for determination as a matter of law. *See Frain Camins & Swartchild, Inc. v. Bank of American Nat. Trust and Sav. Ass'n*, No. 91 C 8165, 1994 WL 174149, *9 (N.D. Ill. May 4, 1994) (granting summary judgment based on a finding of an agent's authority).

Here, the acts of the PA easily meet this low bar for a finding that Mr. Langel had both actual and apparent authority to bind it to the 2013 CBA.

**(1) Mr. Langel Had Actual Authority to Enter into the 2013 CBA**

An agent possesses actual authority to bind a principal when "the principal's words or actions (*i.e.*, the principal's 'manifestation' of intent) would lead a reasonable person in the agent's position to believe that he or she was so authorized." *Kinesoft Dev. Corp. v. Softbank Holdings*, 139 F. Supp. 2d 869, 899 (N.D. Ill. 2001) (holding reasonable to conclude that the agent possessed actual authority based on an email asking the agent to represent the principal's interests); *Laborers' Pension Fund v. Hessen Pressure Washing*, No. 06 C 3383, 2008 U.S. Dist. LEXIS 24503, *7-8 (N.D. Ill. Mar. 25, 2008) (agent of employer had actual authority to enter into CBA

where president of employer gave oral consent). Actual authority may also be implied by the facts and circumstances of the case. *See Global Poly Inc. v. Fred's Inc.*, Case No. 03-C-4561, 2004 WL 2457782, *4 (N.D. Ill. Oct. 29, 2004) ("An agent has implied authority for the performance or transaction of anything reasonably necessary to effect execution of his express authority."), citing *Opp v. Wheaton Van Lines, Inc.*, 231 F.3d 1060, 1064 (7th Cir. 2000). Here, the PA's Constitution and By-Laws expressly established Mr. Langel's actual authority to negotiate CBAs with USSF on behalf of the PA. (*See* UF 9.) Further, based on the concept articulated in *Global Poly* ("anything reasonably necessary . . ."), the requirements set forth in Article VIII(b) of the Constitution and By-Laws – that CBAs must be signed by the Executive Director or Player Representative and approved by a majority of voting members – give him at least the implied actual authority to do what is necessary to comply with those requirements. (*See* UF 33.)

Indeed, in connection with the 2013 CBA, Mr. Langel acted consistent with his actual authority. He negotiated with USSF on the PA's behalf, and kept the players informed throughout that process. (*See* UFs 19, 27.) As the conclusion of the negotiations neared, he arranged for a vote on the latest CBA proposal: the MOU, in combination with all provisions of the 2005 CBA not otherwise modified by the MOU. (*See* UFs 32, 34-36.) He explained that concept to the players in a combination of written and oral communications. (*See* UF 32.) The vote in favor was unanimous. (*See* UF 35.) Because there was still one outstanding issue on which the parties needed to reach agreement (concerning the players' ability to play in Europe), he conducted a second vote on that discrete issue, via email, which was approved by a majority vote. (*See* UF 37.) In addition, Mr. Langel executed the MOU on behalf of the PA (*see* UF 45), and his email signature block appears below each instance of his confirmation of the parties' multi-part

agreement, consisting of the 2005 CBA as modified by the MOU (*see* UFs 29, 39).[12] *See Princeton Indus., Prods. v. Precision Metals Corp.*, 120 F. Supp. 3d 812, 818-821 (N.D. Ill. 2015) (standard email signature block automatically attached at the bottom of an email constitutes a "signed writing" for contract purposes); *Cloud Corp. v. Hasbro. Inc.*, 314 F.3d 289, 295-96 (7th Cir. 2002) (upholding the validity of an electronic contracting document, particularly in light of the parties' subsequent performance under the contract at issue).

In agreeing to the 2013 CBA on behalf of the PA, Mr. Langel acted consistently with the scope of his actual authority, as outlined in the PA's Constitution and By-Laws. Moreover, the PA has acknowledged the propriety of Mr. Langel's actions, performing under and accepting the benefits of the 2013 CBA for nearly three-quarters of its term.[13]

**(2) Mr. Langel Had Apparent Authority to Enter into the 2013 CBA**

In addition to the fact that Mr. Langel had actual authority to enter into the 2013 CBA, as far as USSF was concerned he possessed apparent authority to do so. Apparent authority exists when "the words or conduct of the principal would lead a reasonable person in the third party's position to believe that the principal had so authorized the agent." *Kinesoft*, 139 F. Supp. 2d at 899 (finding apparent authority); *see also Bank of North Carolina v. Rock Island Bank*, 630 F.2d 1243, 1251 (7th Cir. 1980) ("principal, having placed the agent in a situation where he may be presumed

[12] Notably, the PA's Constitution and By-Laws do not require that the terms of a proposed CBA must be presented to the players *in writing* in order for their vote to be effective. The only requirements are that a majority of the players approve the CBA, and the Executive Director or a Players Representative sign it. (*See* UF 33.) Both requirements were met here.

[13] The PA's disavowal of the existence of the 2013 CBA while recently admitting the MOU's four-year term would also render the parties' agreement illusory, because it would mean that USSF was obligated to continue paying the players the improved financial terms contained in the MOU for four full years, but that the PA would have the unilateral option to strike at any time to seek even better terms. US Soccer would never have, and in fact did not, make such an agreement. "As in all contracts, [a] collective bargaining agreement's terms must be construed so as to render none nugatory and avoid illusory promises." *International Union, United Auto. v. Stanadyne, Inc.*, No. 88 C 4620, 1989 WL 84453, *2 (N.D. Ill. July 19, 1989) (construing the parties' agreement as a whole and rejecting the union's arguments), quoting *Int'l Union, United Auto. v. Yard-Man, Inc.*, 716 F.2d 1476, 1479-80 (6th Cir. 1983).

to have authority to act, is estopped as against a third person from denying the agent's apparent authority."); *Moreau v. Local Union No. 247*, 851 F.2d 516, 519-521 (1st Cir. 1988) (apparent authority sufficient to enforce side letters to a collective bargaining agreement, even if the agent lacked actual authority due to a failure to obtain membership approval). Apparent authority may exist to bind a principal based on a variety of factors. For instance, "[a]uthority may be inferred from custom or practice between the union and employer." *Central States Southeast and Southwest Areas Pension Fund v. Kraftco*, 799 F.2d 1098, 1113 (6th Cir. 1986), citing *NLRB v. Brotherhood of Painters, Decorators, & Paperhangers, Local Union No. 1385*, 334 F.2d 729, 731 (7th Cir. 1964). A principal may also grant an agent apparent authority by appointing the agent to a position that carries generally recognized duties. *See Townsend v. Daniel, Mann, Johnson & Mendenhall*, 196 F.3d 1140, 1146 (10th Cir. 1999) (upholding a jury's finding of apparent authority). Further, if the principal allows an agent to demonstrate authority and does nothing to contradict that impression, the agent possesses apparent authority. *See Progress Printing Corp.*, 601 N.E. 2d at 1066 (agent had apparent authority because principal created an "appearance of authority" based on prior acts).

Here, Mr. Langel has represented members of the WNT since even before the PA was formed. (*See* UF 8.) He served as the PA's General Counsel and Acting Executive Director from its inception in 2000. (*See* UF 7.) He was the lead negotiator on behalf of the PA in three successive CBA negotiations and executed each CBA on its behalf. (*See* UFs 11-12, 14, 16, 19, 45.) Players frequently joined Mr. Langel for CBA negotiation meetings with USSF and personally witnessed his statements and conduct on their behalf. (*See* UF 22.) Until the present dispute (several years into the term of the 2013 CBA), the PA never disputed or questioned Mr. Langel's authority to negotiate, execute and bind the PA to CBAs. Based on his position and

responsibilities, and the parties' history of negotiations and course of dealing, USSF acted reasonably in concluding that Mr. Langel had authority to bind the PA to the 2013 CBA.

No recognized exceptions to the apparent authority doctrine apply here, including the "duty to inquire" exception. The "duty to inquire" exception applies only if a third party knows or has good reason to know that an act exceeds an agent's power, and, in such circumstances, imposes a duty on that party to inquire into the agent's authority. *See Reinsurance Co. of Am. v. Am. Centennial Ins. Co.*, 621 F. Supp. 516, 520 (N.D. Ill. 1985) (noting that "courts seem to find the duty satisfied if there were no factors or circumstances that would have put a reasonably prudent person on notice of the agent's lack of authority"); *Sphere Drake Ins., Ltd. v. All Am. Life Ins. Co.*, 300 F. Supp. 2d 606, 618 (N.D. Ill. 2003) (holding that there was a duty to inquire where the principal had set yearly limits on the value of contracts the principal's agent could sign, and that the annual limit had already been reached). "The determination of whether a duty to inquire arose and/or the third party acted reasonably must be made in light of all the surrounding facts and circumstances." *Id.* at 618; *see also Dilek v. Watson Enters.*, 885 F. Supp. 2d 632, 645 (S.D.N.Y. 2012) (the duty to inquire may "evaporate" based on course of dealing).

Here, particularly given the specific facts and circumstances, USSF was not under any duty to inquire. Mr. Langel's long history of acting on behalf of the PA and negotiating and signing CBAs on its behalf established a course of dealing. Moreover, USSF was unaware of any evidence or red flags requiring further inquiry into his authority.[14] (*See* Gulati Decl. at ¶¶ 24, 28, 31, 32, 33; Levine Decl. at ¶¶ 14, 15.) Indeed, in the final stage of the negotiations of the 2013 CBA, Mr. Langel appeared to be acting consistently with the parties' course of dealing and within

[14] Nearly 10 years earlier, in 2004, USSF's outside counsel had been provided with a copy of the Constitution and By-Laws. (*See* Gulati Decl. at ¶ 32; Levine Decl. at ¶ 14.) The USSF negotiators of the 2013 CBA were not aware of the document, but even if they had been, nothing in it would have caused USSF to question whether Mr. Langel was acting beyond the scope of his authority. (*See* Gulati Decl. at ¶¶ 24, 28, 31, 32, 33; Levine Decl. at ¶¶ 14, 15.)

his authority. Specifically, Mr. Langel, in emails containing his signature block, confirmed the intent of the PA that unmodified terms from the 2005 CBA would continue (UFs 29, 39, 41); signed the MOU (UF 45); and kept USSF abreast of the status of the PA's votes on the CBA (UF 38). At no time during the 2012-2013 negotiations (or during any prior CBA negotiation, for that matter) was USSF given any reason under the law of agency to question Mr. Langel's apparent authority.[15]

USSF's reliance on Mr. Langel's actual authority, his implied actual authority, and his apparent authority was undoubtedly reasonable, particularly under the liberal construction courts and Congress have required for questions of agency in the employer/employee context. Simply put, there is no basis to invalidate the 2013 CBA based on an alleged lack of authority.

#### c. The PA's Subsequent Words and Actions Further Demonstrate Their Agreement to the 2013 CBA

Further evidencing the parties' agreement to the 2013 CBA, the parties acted consistent with the terms of the 2013 CBA (including the carryover provisions from the 2005 CBA) in the months and years that followed, before the instant dispute arose. Indeed, "there is no more convincing evidence of what the parties intended than to see what they did in carrying out its provisions." *Dept. of Revenue v. Jennison-Wright Corp.*, 393 Ill. 401, 408 (1946); *Real Estate Data, Inc. v. Sidwell Co.*, 809 F.2d 366, 374 (7th Cir. 1987) (relying on *Jennison-Wright* to reverse a lower court's finding that an express written provision was necessary to bind the parties); *Blue Cross & Blue Shield Ass'n v. Am. Express Co.*, No. 99-C-6679, 2005 WL 1838340, at *5 (N.D. Ill. July 25, 2005) ("Under Illinois law, the parties' actions under a contract 'is often the strongest

[15] Claiming the attorney-client privilege, the PA refused to allow Mr. Langel to testify about his oral communications with the players concerning the negotiations, including his explanations of what they were voting on and discussions about the continuation of unchanged terms of the 2005 CBA. Because the privilege cannot be used as both sword and shield, USSF objects to any effort by the PA to introduce evidence or argument concerning what the players believed they were voting on in that initial vote. *See Santelli v. Electro-Motive*, 188 F.R.D. 306, 308 (N.D. Ill. 1999) (barring the plaintiff from selectively introducing privileged evidence).

evidence of their intended meaning.'"), quoting *Chicago & North Western R. v. Peoria & Pekin Union R.*, 46 Ill. App. 3d 95, 101 (1977)). "Indeed, it stands to reason that course of performance may be used to interpret the intent of the parties, since such evidence likely reflects the parties' understanding of their agreement." *Kinesoft*, 139 F. Supp. 2d at 891 (parties' post-contracting conduct as indication of intent), citing FARNSWORTH ON CONTRACTS § 7.13, at 318 n. 30 ("show me what the parties did under the contract and I will show you what the contract means.").

The PA's words and actions since execution of the 2013 CBA and until the instant dispute arose have been entirely consistent with the scope of the parties' agreement. As a matter of law, such conduct corroborates the existence of a four-year CBA comprised of the 2005 CBA, as modified by the MOU. First, in its Form LM-2 Annual Report of Labor Organization for 2013 filed with the United States Department of Labor Office of Labor Management Standards, the PA explicitly acknowledged not only the $425,000 "signing bonus" it received for completing the CBA negotiations, but also additional payments which post-dated execution of the MOU, as "Payments Under CBA." (*See* UFs 49-50.) This document was reviewed by Mr. Langel with the players, and signed by two player-representatives (the PA's President and Treasurer), who expressly confirmed that they had reviewed the information and were attesting to its truth and accuracy. (*See id.*) Second, a term in the MOU required payments to certain players retroactive to January 1, 2013, expressly conditioned on "the signing of the new CBA." (UF 51.) Those payments were made, and accepted by the players following the execution of the MOU. (UF 52.) Third, in the years since signing the MOU, the PA has relied on and/or acknowledged terms found only in the 2005 CBA and not referenced anywhere in the MOU. Those provisions include autograph signing sessions (UF 54), rules regarding the use of player likenesses (UF 56),

instructions regarding payment to the PA (UF 58), amendments to the Player Handbook (UF 59) and grievance procedures (UF 60). USSF has done the same. (UFs 53, 55, 57.)

Mr. Langel's deposition testimony concerning his and the PA's intent is consistent both with the parties' communications at the time of contracting and thereafter, and no amount of *post hoc* revisionism by the PA's new representatives can obscure that fact.

### B. The PA's Statements Constitute an Anticipatory Breach of the 2013 CBA

Where, as here, parties are bound by a valid contract, and "one party repudiates the contract and refuses longer to be bound by it," an anticipatory breach has occurred. *Casati v. Aero Marine Mgmt. Co.*, 90 Ill. App. 3d 530, 535 (1980) (affirming lower court's finding of anticipatory breach) (internal quotation marks omitted). Further, "[t]o be a repudiation, a statement need only be 'sufficiently positive to be *reasonably understood* as meaning the breach will actually occur.'" *Arlington LF, LLC v. Arlington Hosp., Inc.*, 637 F.3d 706, 714 (7th Cir. 2011) (emphasis added), quoting *C.L. Maddox, Inc. v. Coalfield Servs., Inc.*, 51 F.3d 76, 81 (7th Cir. 1995). Here, Mr. Nichols' denials of the existence of the 2013 CBA, combined with his repeated refusals to provide assurances that the PA will comply with the no-strike clause, easily satisfy the Seventh Circuit standard for an anticipatory breach as a matter of law.

#### 1. A Binding Contract Exists Consisting of the 2005 CBA as Modified by the MOU, With a Four-Year Term Ending on December 31, 2016

As discussed in Section IV.A, USSF and the PA are parties to the 2013 CBA, made up of the 2005 CBA, as modified by the MOU.

#### 2. The PA's Repeated Denials of Enforceability of the 2013 CBA Are Definite and Unequivocal, and Constitute a Repudiation and Anticipatory Breach of the Contract

Declaration of nonexistence of a contract, if unjustified or unreasonable, operates as an anticipatory breach of that contract. For instance, in *Curtis Casket Co. v. D.A. Brown & Co.*, 259

Ill. App. 3d 800, 806 (1994), the court found an unjustified anticipatory repudiation where one party sent a letter "declaring the contract void for the reasons stated therein," which "evinced its clear intent not to proceed with the contract." *See also Wooster Republican Printing Co. v. Channel 17 Inc.*, 533 F. Supp. 601, 619 (W.D. Mo. 1981) (holding that a communication saying "the agreement would be rejected, that 'there will be no sale,' and that [the defendant] does not recognize and cannot honor the document of July 18, 1979" constitutes an anticipatory breach, and that "[a] more positive statement of repudiation cannot be imagined."). This standard has been applied in Illinois for over 100 years; in *Lake Shore & M.S. Ry. Co. v. Richards*, 152 Ill. 59, 80 (1894), the defendant's conclusion and communication that it was no longer bound by the contract "was a repudiation . . . was a denial of the right of the plaintiff to have and demand the substantial benefits of the contract as it existed between the parties."

The statements made by Mr. Nichols, the PA's current representative, constitute an unjustified declaration of the nonexistence of a contract and compel a finding that the PA has committed an anticipatory breach. The PA's first formal notice of its contention that the 2013 CBA is not a binding agreement came in Mr. Nichols' letter dated December 23, 2015 (sent via email to USSF on December 24, 2015), which read, in part, "the WNTPA reserves its inherent right to challenge USSF's claim of the existence of a collective bargaining agreement between the Parties." (UF 62.) After USSF asked Mr. Nichols to clarify the PA's position, Mr. Nichols confirmed on January 6, 2016 that, "it is the position of the WNTPA that the CBA no longer exists."[16] (UF 64.) Mr. Nichols went on to threaten termination of the MOU "unless significant progress is made in

[16] Refusal to give such assurances to a contracting partner constitutes an anticipatory breach. *See* Restatement (Second) of Contracts § 251 (1981) ("obligee may treat as a repudiation the obligor's failure to provide within a reasonable time such assurance of due performance as is adequate in the circumstances of the particular case."); *see also C.L. Maddox*, 51 F.3d at 81 (after repeated demands for assurances were ignored, a party was entitled "to anticipate that [the other party] would commit a breach, to suspend its own performance for the sake of self-protection . . ."); *In re Cent. Illinois Energy Coop.*, No. 15-1118, 2016 WL 299007, at *7 (C.D. Ill. Jan. 25, 2016); *Channel 17*, 533 F. Supp. at 619.

these negotiations by or before March 1st."[17] (UF 65.) Such statements have "'render[ed] unattainable' the point of the contract." *Arlington LF*, 637 F.3d at 713, quoting *In re Marriage of Olsen*, 124 Ill. 2d 19, 23 (1988).

## V. CONCLUSION

USSF respectfully submits that the uncontested evidence establishes as a matter of law that (i) it is entitled to a declaration from this Court confirming that the 2013 CBA is a binding and enforceable agreement consisting of the terms of the 2005 CBA as modified by the MOU, and including, among other provisions, a no-strike clause; and (ii) the PA has anticipatorily breached the 2013 CBA. Accordingly, USSF requests that the Court grant summary judgment in its favor on the First and Second Claims for Relief.

Dated: April 12, 2016

Respectfully submitted,

/s/ *Matthew W. Walch*
Matthew W. Walch
LATHAM & WATKINS LLP
*Attorneys for Plaintiff*
*United States Soccer Federation, Inc.*

---

[17] This implicit acknowledgment of the existence of the MOU does not make the repudiation of the CBA any less clear and unequivocal. As demonstrated above, the terms contained in the MOU were not the only terms the parties had agreed to on March 19, 2013; everything they had agreed to by that date constituted a CBA under controlling law. Mr. Nichols' rejection of the existence of a CBA to which the parties had agreed – and that included a no-strike/no-lockout clause – constitutes an anticipatory breach under Seventh Circuit case law, regardless of whether the PA contends that it may still be bound by certain other agreements or provisions.