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UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

ALEX MORGAN, et al., Plaintiffs, v. U.S. SOCCER FEDERATION, INC., Defendant.	Case No. 2:19-cv-01717-RGK-AGR Judge: Hon. R. Gary Klausner **DEFENDANT'S MEMORANDUM OF CONTENTIONS OF FACT AND LAW** Trial Date: May 5, 2020

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MEMORANDUM OF CONTENTIONS OF FACT AND LAW

Defendant U.S. Soccer Federation, Inc. ("U.S. Soccer") hereby submits its Memorandum of Contentions of Fact and Law pursuant to Rule 16-4 of the Local Rules of the United States District Court for the Central District of California. U.S. Soccer reserves the right to amend and/or supplement its contentions of fact and law based on the Court's ruling on the parties' Motions for Summary Judgment, the Court's rulings on the motions *in limine,* and other pre-trial filings:

I. INTRODUCTION

The U.S. Senior Women's National Team ("WNT") has achieved incredible successes both on and off the field. U.S. Soccer stands strongly behind the WNT and celebrates each and every such success. Indeed, it is through its coordinated efforts with the WNT and the long, sustained support from U.S. Soccer that women's soccer is growing in popularity both domestically and abroad.

The compensation that U.S. Soccer provides the WNT reflects U.S. Soccer's support for the team. In the past four out of five years, U.S. Soccer has paid the WNT *more* money than the Men's National Team ("MNT")—and considerably more in total over those years. Notwithstanding this fact, Plaintiffs allege that U.S. Soccer discriminated against the WNT because the female players did not have the opportunity for the same bonuses for certain matches as their male counterparts. But this is an unfair and misleading description. While Plaintiffs choose to focus solely on the match bonuses, these bonuses are only one piece of Plaintiffs' overall compensation. Plaintiffs ignore the many other components of their compensation—including guaranteed salaries, signing bonuses, insurance and other benefits, salaries for national league play, and an annual payment to their union for licensing rights—forms of compensation that the male players do not receive.

The reason there are differences between how the female players and the male players are compensated has nothing to do with discrimination. Through its union, the WNT specifically negotiated for and demanded a completely different

compensation structure from the men (who have a separate union). The female players opted for more security and less risk, demanding multiple forms of guaranteed compensation and benefits. In contrast, the male players assumed significant risk in their compensation; their payment is dependent on their success on the field, with no guaranteed payment. In addition, the specific bonuses U.S. Soccer provides to the teams in most instances is a function of the revenue that each team brings in for those matches. For example, FIFA unilaterally controls the prize money associated with the Men's World Cup and the Women's World Cup, and has historically provided *significantly* more prize money to winners of the Men's World Cup than to the Women's. In fact, in 2018, FIFA awarded $38 million to the Men's World Cup winner, but, in 2019, FIFA awarded only $4 million to the women's World Cup winner, the WNT. It is this wide disparity—and not any discriminatory act taken by U.S. Soccer—that dictates lower bonus payments to the WNT. U.S. Soccer has dedicated significant resources to promoting women's soccer and addressing this gap. Unfortunately, although FIFA has nearly doubled the available prize money to winners of the Women's World Cup every tournament since 2011, women's soccer is still far from attaining the level of popularity that men's soccer enjoys, and the larger prize monies that come with it.

To say that any differences in how U.S. Soccer compensates the WNT and the MNT are the result of discrimination by U.S. Soccer ignores the collective bargaining negotiations that resulted in the women's compensation structure and the differences in revenue generation between the women's and men's games, and is belied by (among many other things) the long history of U.S. Soccer's uncompromised dedication to the growth and advancement of women's soccer.

II. CLAIMS AND DEFENSES [L.R. 16-4.1(A)-(C)]

Below is a summary of the claims at issue in this case, along with a brief summary of key evidence in support of U.S. Soccer's case. However, this is not intended to be an exhaustive summary of all such evidence. U.S. Soccer notes that

some of the legal and factual contentions reflected in this Memorandum ultimately may not be issues for trial, depending on the Court's ruling on the parties' Motions for Summary Judgment.

A. Claim 1: Equal Pay Act (The Fair Labor Standards Act of 1938, as Amended by the Equal Pay Act, 29 U.S.C. §§ 206 *et seq.*)

1. Elements of Plaintiffs' EPA Claim

To recover under the Equal Pay Act ("EPA"), each Plaintiff must prove that U.S. Soccer paid her wages at a rate less than the average rate at which it paid appropriate male comparators working in the same establishment. 29 U.S.C. § 206(d)(1); *Hein v. Oregon Coll. of Educ.*, 718 F.2d 910, 917 (9th Cir. 1983). Appropriate male comparators are actual, identified male employees who perform equal work in jobs requiring equal skill, effort, and responsibility, under similar working conditions, and who are similarly situated with respect to any other factors, such as seniority, that affect the wage scale. *See* 29 U.S.C. § 206(d)(1); *Hein*, 718 F.2d at 916; *Strag v. Board of Trustees*, 55 F.3d 943, 948 (4th Cir. 1995).

2. U.S. Soccer's Defenses and Key Evidence in Support Thereof

Because Plaintiffs cannot establish the essential elements of their claim, their EPA claim fails as a matter of law. Although U.S. Soccer believes that Plaintiffs will not be able to meet this burden in their case in chief, U.S. Soccer is nonetheless prepared to offer evidence refuting Plaintiffs' EPA allegations. U.S. Soccer identifies below examples of key evidence upon which it will rely. This is not intended to be an exhaustive summary of all such evidence.

a. Plaintiffs Have Not Identified Male Comparators.

Because Plaintiffs do not intend to identify actual male comparators, much less to do so and then compare their wage rates to those comparators, U.S. Soccer is entitled to judgment as a matter of law. *Hein*, 718 F.2d at 917; *Strag*, 55 F.3d at 948.

Further, because the WNT and the MNT have been paid according to compensation arrangements that include different components, in a different establishment, and under an entirely different payment structure for different work that do not correlate to a common denominator, the WNT cannot be compared against the MNT.

b. U.S. Soccer Did Not Pay the MNT More Than the WNT.

Even if each WNT player could be compared to a MNT player or if the WNT could be compared to the MNT as a whole under the EPA, the law requires the Court to compare their total compensation for purposes of determining whether Plaintiffs demonstrate that they are paid less than male employees. *See Huebner v. ESEC, Inc.*, No. CV 01-0157-PHX-PGR, 2003 U.S. Dist. LEXIS 28289, at *7-8 (D. Ariz. March 26, 2003) (plaintiff could not establish pay discrimination because "her total compensation for the relevant time period was greater than that of any male"); *Diamond v. T. Rowe Price Assocs., Inc*., 852 F. Supp. 372, 396 (D. Md. 1994); *Marting v. Crawford & Co.*, 203 F. Supp. 2d 958, 996 (N.D. Ill. 2002) (plaintiff could not establish pay discrimination even though her base salary was lower than her male comparator because her total compensation was higher); *Bertotti v. Philbeck, Inc*., 827 F. Supp. 1005, 1009-10 (S.D. Ga. 1993) (comparing total compensation paid to plaintiff and male comparator and concluding: "Bertotti's actual wages received were, therefore, greater than either comparator, and her EPA claim must fail"); *Mitchell v. Developers Diversified Realty Corp*., No. 4:09-CV-224, 2010 WL 3855547, at *5 (E.D. Tex. Sept. 8, 2010) (the EPA "requires that Plaintiff receive total compensation at least equal to male employees with equal performance"). U.S. Soccer has paid the WNT more than the MNT in both total compensation and on a per-game since March 8, 2016, even when excluding the WNT's wages that are paid to the Women's National Team Players Association ("WNTPA") and the WNT's wages paid for playing in the NWSL. (2nd Irwin

Report at Exhibits 9.B. and 10.B.) Plaintiffs therefore cannot establish a *prima facie* case under the EPA.

In fact, during the first three years of the WNT collective bargaining agreement ("CBA") resulting from the 2016 negotiations, the WNT and its union were paid over $25 million, while the MNT saw only an $11 million payout. (Irwin Dec. Ex. 1 at 14; 2nd Irwin Dec. Ex. 1 at 11.) Indeed, according to the calculation method utilized by Plaintiffs' own expert, MNT players would have earned *more* had they been employed under the WNT CBA. (McCrary Dec. ¶ 2, Ex. 2 ¶ 49-52.) Amy Rodriguez Shilling and Meghan Klingenberg benefited from the guaranteed salary, injury protection, and severance pay, and as a result earned more under the WNT CBA than they would have under the MNT CBA. (*Id.*) In addition, Plaintiffs' own damages expert calculates that U.S. Soccer paid Plaintiffs more for friendlies under their own CBA than it would have paid them under the MNT CBA. (McCrary Dec. Ex. 2 ¶ 13-14.) Finally, the WNT has been paid more as a percentage of revenue generated by the team than the MNT. (McCrary Dec. ¶ 2, Ex. 2 at ¶ 31, 41-45.)

c. Plaintiffs Do Not Work in the Same Establishment, as Defined by Law, as the MNT.

The EPA applies only to employees working in the same "establishment." 29 U.S.C. § 206(d)(1). The term "establishment" refers to a "distinct physical place of business as opposed to an entire business or enterprise." *A.H. Phillips, Inc. v. Walling*, 324 U.S. 490, 496 (1945). On rare occasions, courts have expanded the term to encompass multiple physical locations, but the Ninth Circuit has "consistently rejected the extension of the statutory establishment requirement to separate offices of an employer that are geographically and operationally distinct." *Foster v. Arcata Assocs., Inc.*, 772 F.2d 1453, 1464 (9th Cir. 1985).

The undisputed facts show that the WNT and MNT are both geographically and operationally distinct. The WNT and MNT play in different venues in different

cities (and often different countries), and participate in separate competitions against completely different pools of opponents. (King Dec. Ex. 18-21.) In addition, the day-to-day functions and operations of the team are overseen by separate coaching staff, technical and medical staff, and Team Administrators. (King Dec. ¶ 3-4.) The head coaches of the WNT and MNT determine who plays on their respective teams, and the teams do not interchange players or compete with or against each other. (King Dec. ¶ 3; Gulati Dec. ¶ 62.) In addition, each team's individual Team Administrator participates in creating the budget for his/her respective team. (2nd King Dec. ¶ 2.) Finally, decisions related to game venue, opponents, hotel accommodations, and air travel are made by or in consultation with the individual team's Team Administrator, General Manager, and/or head coaches. (2nd King Dec. ¶¶ 3-5, 15; Hopfinger Dec. ¶ 1.)

d. The EPA Bars Plaintiffs' Claims for Services During the Workweek That Were Performed Entirely Within Foreign Countries.

The EPA does not apply to any of Plaintiffs' work during periods when their services during the workweek were performed entirely within a foreign country. *See* 29 U.S.C. § 213(f); *Hart v. Dresdner Kleinwort Wasserstein Securities*, LLC, No. 06 Civ. 0134(DAB), 2006 WL 2356157, *5-7 (S.D.N.Y. Aug. 9, 2006). Plaintiffs' claims are barred, in whole or in part, to the extent that the WNT's services during certain workweeks were performed entirely within foreign countries.

B. Claim 2: Title VII of the Civil Rights Act of 1964, as Amended (42 U.S.C. §§ 2000e, et seq.)

1. Elements of Plaintiffs' Title VII Claim

Title VII makes it unlawful for an employer "to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex or national origin[.]" 42 U.S.C. § 2000e-2(a)(1). Plaintiffs' Title VII discrimination claim is based on allegations of: (1) unequal pay; and (2) unequal working conditions with

respect to travel on commercial airplanes and games played on artificial turf. (They have since attempted to expand the claim to include other alleged differences in working conditions, but these claims were neither presented to the EEOC nor included in the Complaint.) To prevail on their claims of disparate treatment, Plaintiffs must show "by a preponderance of the evidence that the challenged employment decision was 'because of' discrimination." *Costa v. Desert Palace, Inc.*, 299 F.3d 838, 857 (9th Cir. 2002). Plaintiffs also seek punitive damages under Title VII, which requires them to establish that U.S. Soccer engaged in intentional discrimination "with malice or with reckless indifference to the federally protected rights of an aggrieved individual." 42 U.S.C. § 1981a(b)(1); *Kolstad v. Am. Dental Ass'n*, 527 U.S. 526, 544-45 (1999).

2. U.S. Soccer's Defenses and Key Evidence in Support Thereof

Plaintiffs cannot establish that U.S. Soccer engaged in intentional discrimination, much less with malice or reckless indifference to their federally protected rights. Although U.S. Soccer believes that Plaintiffs will not be able to meet this burden in their case in chief, U.S. Soccer is prepared to offer evidence refuting Plaintiffs' Title VII allegations. U.S. Soccer identifies below examples of key evidence upon which it will rely. This is not intended to be an exhaustive summary of all such evidence.

a. Plaintiffs' Title VII Unequal Pay Claim Fails for the Same Reasons as Their EPA Claim.

As an initial matter, if U.S. Soccer prevails on its EPA claim, then it prevails on Plaintiffs' Title VII claim for sex-based pay discrimination, for the same reasons set forth in Section II(A)(2).

b. Plaintiffs Cannot Point to Any Evidence of U.S. Soccer's Intent to Discriminate Because of Plaintiffs' Sex.

Title VII requires proof that the WNT players were paid less or were subject

to inferior working conditions "because of" their sex. 42 U.S.C. § 2000e-2(a)(1). Plaintiffs Carli Lloyd, Alex Morgan, Megan Rapinoe, and Becky Sauerbrunn are the Class Representatives for the Title VII pay discrimination class in this case, and each of those Class Representatives has been paid more by U.S. Soccer than any male soccer player during the Title VII Class Period. (2nd Irwin Report at Ex. 13.A, 13.B.) Furthermore, the four Class Representatives have also been paid, on average, more per game during that period than the four highest-paid male soccer players. (*Id.*) Indeed, the entire WNT has been paid more than the entire MNT during the Title VII class period, on both an overall and per-game basis. (*Id.* at Ex. 5.A.-10.A.) It has also been paid more in relation to the revenue generated by its activities than the MNT. (2nd McCrary Report at Section 3.3.) Meanwhile, the WNT's compensation arrangement was negotiated by a different union than the MNT's arrangement, and the arrangement covers different competitions, which prohibits Plaintiffs from comparing themselves to the MNT as a matter of law. For all these reasons, there is no basis for a finding of intent to discriminate based on sex.

c. Plaintiffs Cannot Point to Any Evidence of Sex Discrimination with Respect to Charter Flights and Artificial Turf.

As to charter flights, as an initial matter, any perceived differences between the WNT and MNT are de minimis. The WNT has flown charter flights for all team travel, including to friendly (non-tournament) matches, ever since the World Cup qualifying match in October 2018. (King Dec. ¶ 46.) The WNT also flew charter flights during the 2015 FIFA Women's World Cup, the Olympic qualifying match in 2016, and the 2016 Olympic Games (with the exception of one game). (King Dec. ¶ 47.) Similarly, the MNT has taken charter flights to non-friendly matches during the class period. (*Id.* ¶ 48.)

As to the remainder of the WNT's schedule during the class period, any differences in charter flights are due to numerous non-discriminatory differences

between the teams in how they operate and the games they play; thus, the mere fact that Plaintiffs flew fewer charters during periods of time in the past does not give rise to an inference of sex discrimination. *See Hawn v. Exec. Jet Mgmt., Inc.*, 615 F.3d 1151, 1156 (9th Cir. 2010) (a *prima facie* case of sex discrimination requires "a plaintiff [to] show an inference of discrimination. . . through comparison to similarly situated individuals"). The WNT did not fly charters to friendly matches until fall 2018, while the MNT flew six charter flights to friendly matches during the class period. (King Dec. ¶ 49) But each of these six charters was a result of a specific, non-discriminatory reason, such as an unusual location with limited commercial flights (Cuba). (*Id.* ¶ 50-54.) These factors have nothing to do with sex, and are instead legitimate, undisputed, non-discriminatory factors that explain any difference in flight accommodations.

The same is true with respect to playing surfaces—any differences are historical and explained by non-discriminatory factors. Neither team has played on artificial turf in a venue selected by U.S. Soccer since October 2017. (King Dec. Ex. 20-21, Def. Supp. Int. Ans. 2.) Prior to that time, between January 1, 2016 and July 26, 2017, each team played on artificial turf one time when U.S. Soccer chose the venue for the game. (*Id.*) In addition, the WNT played on artificial turf seven times during the second half of 2015 and three times during the second half of 2017 in venues chosen by U.S. Soccer. (*Id.*) Each of these instances was grounded in venue availability and in the desire for the WNT to play in different parts of the country. (*Id.*) And, while U.S. Soccer did pay to have temporary grass installed for an MNT match in one of these same stadiums in 2019, that fact is irrelevant because neither team has played on artificial turf since 2017. (*Id.*) Furthermore, that match was the last preparatory match for the 2019 Gold Cup, a competition that was played entirely on grass. (*Id.*) As with their complaints about commercial flights, Plaintiffs cannot present any evidence calling into question U.S. Soccer's legitimate, non-discriminatory reasons for WNT's more frequent game play on artificial turf during

late 2015 and 2017.

III. U.S. SOCCER'S COUNTERCLAIMS AND AFFIRMATIVE DEFENSES [L.R. 16-4.1(D)-(F)]

U.S. Soccer has no counterclaims. The following are the affirmative defenses that U.S. Soccer has pled and plans to pursue:

A. First Affirmative Defense (Challenged Pay Practices Not Based on Sex)

U.S. Soccer may rebut a *prima facie* case under the EPA (and Title VII) by showing that the disparity in pay is "a differential based on any other factor other than sex." 29 U.S.C. § 206(d)(1); *Maxwell v. City of Tucson*, 803 F.2d 444, 446 (9th Cir. 1986) ("Title VII incorporates the Equal Pay Act defenses, so a defendant who proves one of the defenses cannot be held liable under either the Equal Pay Act or Title VII."). It is undisputed that Plaintiffs' compensation arrangement with U.S. Soccer is driven by at least two factors other than sex: (1) the various trade-offs negotiated by Plaintiffs in the course of collective bargaining and (2) the significant differential in historical and potential revenue generation between WNT and MNT matches worldwide.

1. Plaintiffs' Pay Resulted from Compromises in Bargaining.

Throughout the contract negotiations relevant to this case, the WNTPA consistently demanded terms different from those in the CBA covering players on the MNT. (Gulati Dec. ¶ 66, 68, 73, Ex. 14, 15; Langel Dep. 71-77, 163-64, 188-89, 201-02, Ex. 14, 21, 25; King Dec. ¶ 7-8, 17, 23-24, 33, 38-40, 43, Ex. 1, 6, 8, 10, 13-15, 17.) As a result, the union obtained multiple compensation terms and other contract provisions that: (i) do not appear in the MNT's agreement, (ii) are valuable to WNT players, and (iii) represent a clear monetary cost to U.S. Soccer. This negotiation process, which led to the WNT having a different overall compensation structure from the MNT, is a legitimate "factor other than sex." *See. e.g., Perkins v. Rock-Tenn Servs., Inc.*, 700 F. App'x 452, 457 (6th Cir. 2017) ("There is no question

that the decisions made as a result of negotiations between union and employer are made for legitimate business purposes; thus, a wage differential resulting from status as a union member constitutes an acceptable 'factor other than sex' for purposes of the Equal Pay Act."). To hold otherwise would be contrary to foundational principles of labor law, which permit employees to organize into a bargaining unit of their own choosing and negotiate to achieve their desired compensation terms. *See* 29 U.S.C. §§ 158(d), 159(a).

During negotiations for the 2013-2016 CBA, the WNTPA never asked for the compensation terms it now asks the Court to impose. (Gulati Dec. ¶ 73; Langel Dep. 71-73.) Instead, the union demanded and obtained multiple items in its contract that were not included in the MNT's contract, including: (1) fixed WNT salaries, to be paid regardless of how often the player plays; (2) an additional salary for playing in the women's professional league; (3) salary continuation during periods of injury; (4) severance benefits; (5) insurance benefits; and (6) childcare assistance. (King Dec. Ex. 1, 8.) Those terms remained in effect during 2015 and 2016 and covered the first portion of the class period in this case. (Langel Dep. 73-77; King Dec. ¶ 14, Ex. 4.) Further, at the suggestion of the WNTPA's Executive Director, that same contract also contained a true-up clause: "If in any calendar year, the ratio of aggregate compensation of women's national team players to the aggregate revenue from all women's national team games. . . is less than the ratio of the aggregate revenue from all men's national team games. . . then U.S. Soccer will make a lump sum payment to the women's national team player pool to make the ratios equal." (Langel Ex. 25.)

However, in the 2016 negotiations, the WNTPA's new Executive Director demanded not only the same bonuses for friendly matches and the World Cup as those provided to the MNT, but also the following additional items, not found in the MNT's agreement: (1) a $4.2 million payment for certain rights to use player likenesses; (2) $150,000 annual WNT salaries and $100,000 annual NWSL salaries

for 24 players, regardless of whether or how often they played; (3) contributions to a 401(k) retirement account; (4) lifetime long-term disability insurance; (5) retiree health insurance; (6) an additional $3 million payment for playing a three-game "Victory Tour" after winning the Women's World Cup; (7) another $3 million payment for a three-game post-Olympics Victory Tour; and (8) the annual salary, benefits, and travel accommodations for a full-time paid childcare professional for every player with a child. (King Dec. Ex. 6.) He later lowered his salary demand from $150,000 to $100,000 but simultaneously demanded that the number of players receiving this guaranteed salary should be 30, rather than 24. (King Dec. Ex. 8.)

U.S. Soccer countered these proposals by offering a "pay-to-play" model—the same general model outlined in the MNT agreement. (King Dec. ¶ 22, Ex. 7.) The pay-to-play structure included no guaranteed salary, with players being compensated only when they played for the team. (King Dec. Ex. 7.) The WNTPA dismissed this proposal out of hand and insisted on a completely different structure from the MNT. (King Dec. Ex. 8; Gulati Dec. ¶ 79-80; Rapinoe Dep. 223.) For example, the WNTPA demanded "at least 30 WNT Players be signed to annual Player Contracts," ensuring them at least $100,000 in base compensation per year, regardless of how much they played, along with the same bonus structure as the MNT for friendly matches. (*Id.*) At the same time, the union did not drop its other initial demands. (King Dec. ¶ 28, 30, Ex. 8.)

As a result, the parties began negotiating a hybrid contract of annual salaries for some players, flat-fee game appearances for others, and performance bonuses for both categories. (King Dec. ¶ 31, 33, Ex. 13-17.) In addition, U.S. Soccer proposed three new "partnership" bonuses based on certain targets in sponsorship revenue, television ratings, and enhanced attendance—bonuses not found in the MNT agreement. (King Dec. ¶ 8, 37, Ex. 1, 12.) From there, the parties compromised within this overall structure. (Roux Dep. 46-49, Ex. 29; Langel Ex. 14-15, 19-21, 23; Gulati Dec. ¶ 79-80, Ex. 15; Rapinoe Dep. 223; King Dec. ¶ 33-44, Ex. 11, 12,

14-18.) Notably, when the salary commitments proposed by the parties went down, friendly bonuses climbed. (King Dec. Ex. 14-17.) Ultimately, the parties reached a final agreement specifying annual salaries, signing bonuses, an annual payment to the WNTPA in exchange for certain licensing rights, and annual NWSL salaries—none of which were contained in the MNT agreement. (Roux Dep. 145; King Dec. ¶ 8, 10, 11, Ex. 5, pp. 5, 14-15, 19, 23-24; 29-35.) All told, between these differences and others from the MNT, this new CBA has paid the WNT and its union ***more than 2.5 times as much*** as the MNT and its union during its first three years. (Irwin Dec. Ex. 1 at 14.)

After making these choices in contract negotiations, which has resulted in significantly more compensation than what the MNT received in the past several years, Plaintiffs cannot plausibly contend that their compensation arrangement reflects sex discrimination.

2. Revenue Differentials Are a Legitimate Factor Other Than Sex.

Additionally, the difference in revenue (and potential revenue) generated by WNT matches versus MNT matches is another non-discriminatory basis for any pay differential. *See Byrd v. Ronayne*, 61 F.3d 1026, 1034 (1st Cir. 1995) (employer had defense to pay discrimination claim where male attorney generated substantially greater revenues for the employer law firm than the female plaintiff); *Hodgson v. Robert Hall Clothiers*, 473 F.2d 589, 597 (3rd Cir. 1973) (even where male and female employees performed equal work and are legitimately separated by sex owing to the nature of the work, the employer lawfully paid the male employees more because the employer derived greater economic benefit from their work); *Bartges v. UNC Charlotte*, 908 F. Supp. 1312, 1327 (W.D.N.C.), *aff'd*, 94 F.3d 641 (4th Cir. 1996) (no pay discrimination against softball coach because other sports generated more revenue for the university).

The most significant differential arises from the substantial difference in prize

money potential between the Men's World Cup and the Women's World Cup. In 2010, FIFA paid $8 million in prize money to every soccer federation that qualified for the Men's World Cup and $30 million to the winner. (Gulati Dec. Ex. 8.) In contrast, the winner of the 2011 Women's World Cup received only $1 million from FIFA. (Gulati Dec. Ex. 9.) Similarly, in 2014, FIFA paid $8 million to every soccer federation that qualified for the Men's World Cup and $35 million to the winner, while U.S. Soccer received only $2 million for winning the 2015 Women's World Cup. (Gulati Dec. Exs. 10, 11.) In 2018, FIFA paid $38 million to the Men's World Cup winner, but only $4 million to the WNT for their 2019 World Cup win. (Gulati Dec.¶ 54, Ex. 12.) U.S. Soccer did not violate the law by agreeing to pay MNT players substantially higher bonuses if it could win a tournament that would pay U.S. Soccer exponentially more prize money, which in turn would cover the bonuses promised to the MNT players.

Beyond the World Cup prize money differentials, U.S. Soccer generated less revenue worldwide from the WNT relative to the MNT during its four-year cycles leading into collective bargaining negotiations. In fact, when U.S. Soccer executed the 2013 CBA, the WNT had just finished a four-year cycle during which U.S. Soccer had generated less than $15 million, in total, from all 78 WNT games, compared to almost $64 million from 69 MNT games. (Irwin Dec. Ex. 1 at 13.) Similarly, when U.S. Soccer finished negotiating the 2017 contract, it had just finished a four-year cycle during which it generated $55 million from 91 WNT games, while generating $80 million from 77 MNT games. (Irwin Dec. Ex. 1 at 13.) While the WNT's games have generated more revenue during the last five years than the MNT's games, this includes only one World Cup cycle for the MNT, compared to two for the WNT, and regardless, the WNT has been paid far more than the MNT during that period. (Irwin Dec. Ex. 1.) But the men had a greater potential for revenue generation due to greater prize money availability and higher game viewership. (McCrary Dec. ¶ 2, Ex. 2 at ¶ 5; Moses Dec. Ex. 1.) Indeed, if the MNT

had won two World Cups in that same period, U.S. Soccer would have received more than $60 million in additional FIFA prize money alone. (Gulati Dec. ¶ 54, Ex. 10.)

The WNT has achieved wonderful successes on the field and U.S. Soccer is deeply supportive of the WNT, those victories, and women's soccer generally. Indeed, U.S. Soccer has done much to raise the profile of women's soccer in this country and globally. (2nd Gulati Dec. ¶ 14, 16; Rapinoe Dep. 297, Ex. 32.) For example, U.S. Soccer has for years advocated to FIFA for increased prize money for the Women's World Cup and continues to do so today. (2nd Gulati Dec. ¶ 16.) Nevertheless, men's soccer continues to garner significantly more attention worldwide and has a much greater potential to generate revenue. (McCrary Dec. ¶ 2, Ex. 2 at ¶ 5; Moses Dec. Ex. 1; Irwin Dec. Ex. 1.) U.S. Soccer is not obligated by the anti-discrimination laws to "make up the difference" in the varying revenue streams. And, in any event, the WNT has actually been paid *more* as a percentage of revenue generated by the team than the MNT. (McCrary Dec. ¶ 2, Ex. 2 at ¶ 31, 41-45.)

B. Second Affirmative Defense (Liquidated Damages Improper Because U.S. Soccer Made Good Faith Efforts to Comply with All Applicable Laws and Regulations)

The EPA provides that a successful plaintiff is entitled to actual damages and liquidated damages in the amount equal to that of the actual damages. 29 U.S.C. § 261(d). Courts have discretion to deny an award of liquidated damages where the employer shows that it acted in good faith with reasonable grounds to believe that its actions did not violate the EPA. *Altman v. Stevens Fashion Fabrics*, 441 F. Supp. 1318, 1320 (N.D. Cal. 1977). As evidenced by its review of and reliance on prior submissions to the EEOC, U.S. Soccer acted in good faith with reasonable grounds to believe that its actions did not violate the EPA. (USSF_Morgan_004237 - USSF_Morgan_004413).

C. Third Affirmative Defense (Statute of Limitations)

The EPA generally provides for a two-year statute of limitations, except "a cause of action arising out of a willful violation," in which case the statute of limitations is three years. 29 U.S.C. § 255(a). It is Plaintiffs' burden to establish willfulness, and Plaintiffs cannot establish a willful violation. *See Flores v. City of San Gabriel*, 824 F.3d 890, 906-907 (9th Cir. 2016) (a violation is only willful if the employer "knew or showed reckless disregard for the matter of whether its conduct was prohibited by the [FLSA]" (citations omitted)). Even assuming a three-year statute of limitations, the maximum three years must be counted backwards from the date of each Plaintiff's consent to join the case, *i.e.*, no earlier than March 8, 2019, and in some cases later. There is no exhaustion requirement for administrative remedies under the EPA, and the filing of Plaintiffs' EEOC charges did not toll the statute of limitations for EPA violations. *Philbert v. Shulkin*, 2018 WL 1940447, at *5 (C.D. Cal. Jan. 22, 2018).

D. Fourth Affirmative Defense (Failure to Exhaust Administrative Remedies)

With respect to Title VII, before filing their suit, Plaintiffs were required to exhaust their administrative remedies by filing timely and sufficient charges with the appropriate administrative agency and obtaining a "right to sue" letter, but failed to do so with respect to their non-compensation claims. 42 U.S.C. § 2000e-5(b), (f)(3). The EEOC charges filed by the four Class Representatives contain no allegations of discrimination in any respect other than compensation. (Egan Dec. Ex. 1.) A plaintiff does not "sufficiently exhaust[ ]. . . administrative remedies under Title VII by merely mentioning the word 'discrimination' in his or her EEOC administrative charge." *Freeman v. Oakland Unified Sch. Dist.*, 291 F.3d 632, 637 (9th Cir. 2002) ("[T]he inquiry into whether a claim has been sufficiently exhausted must focus on the factual allegations made in the charge itself, describing the discriminatory conduct about which a plaintiff is grieving."). Plaintiffs' failure to

exhaust their administrative remedies is an affirmative defense. *Garcia v. Los Banos United Sch. Dist.*, 418 F. Supp. 2d 1194, 1212 (E.D. Ca. 2006).

IV. ANTICIPATED EVIDENTIARY ISSUES [L.R. 16-4.1(H)]

Although further evidentiary issues likely will arise, the following evidentiary issues have been raised to date:

A. Plaintiffs' Motions *In Limine*

1. Motion *in limine* to Exclude Evidence of Sum Revenues;

2. Motion *in limine* to Preclude Use Of USSF Payments To Union To Argue Payments Are Wages To Plaintiffs;

3. Motion *in limine* to Preclude Evidence Of Or Reference To Payments By Third Parties To Plaintiffs;

4. Motion *in limine* to Exclude Testimony And Argument About Plaintiffs' NWSL-Related Compensation;

5. Motion *in limine* to Preclude Evidence Of Or Reference To CBA And Negotiations As A Defense To EPA And Title VII Liability;

6. Motion *in limine* to Preclude Reference To USSF's Non-Profit Status;

7. Motion *in limine* to Exclude Defendant's Late Disclosed Witnesses;

8. Motion *in limine* to Preclude Justifications Based On Non-Job-Related "Factors Other Than Sex";

9. Motion *in limine* to Preclude Evidence Of Or Reference To Other International Soccer Team Payments;

10. Motion *in limine* to Exclude Defendant's Expert Testimony.

B. Defendant's Motions *In Limine*

Without prejudice to its right to bring additional motions *in limine*, Defendant has filed the following:

1. Motion *in limine* to exclude any (i) testimony or evidence

relating to collective-bargaining negotiations prior to 2012, (ii) testimony or evidence related to John Langel's complaint to the United States Olympic and Paralympic Committee in 2004, (iii) testimony or evidence related to the Report to the Board of Directors of USSF on Structure, Governance and Ethics prepared by The Consensus Management Group, and (iv) the Memorandum to the Board of Directors from the Governance Task Force;

2. Motion *in limine* to exclude the testimony of Plaintiffs' Expert Cook;

3. Motion *in limine* to exclude any testimony or evidence relating to USSF coaches' salaries (or salaries of anyone other than players on the WNT and MNT);

4. *Motion in limine* to exclude claims of discrimination not included in Plaintiffs' complaint and/or motion for summary judgment.

V. ISSUES OF LAW [L.R. 16-4.1(I)]

The legal issues germane to this case are detailed above. U.S. Soccer nonetheless believes the Court can rule on the following issues of law without the need for trial:

1. U.S. Soccer has a pending motion for summary judgment setting forth multiple bases on which the Court may grant judgment as a matter of law. Among other bases, the Court should dismiss Plaintiffs' claims based on the federal policy of non-intervention in the collective bargaining process. *Marshall v. Western Grain Co.*, 838 F.2d 1165 (11th Cir. 1988); *see also Grubic v. Los Angeles Superior Court*, 2009 WL 10698377 (C.D. Cal. Dec. 21, 2009).

2. The Court should dismiss Plaintiffs' claims for declaratory and injunctive relief, including their request that the Court "adjust" isolated aspects of the compensation provisions in the CBA covering Plaintiffs, as it would be contrary to the federal policy of non-intervention in the collective bargaining process and contrary to Section 8(d) of the National Labor Relations Act. 29 U.S.C. 158(d);

H. K. Porter Co., Inc. v. NLRB, 397 U.S. 99 (1970); *Marshall v. Western Grain Co.*, 838 F.2d 1165 (11th Cir. 1988). Further, with respect to Plaintiffs' allegations regarding non-compensation terms and conditions of employment (regarding air travel and field surfaces), even assuming that Plaintiffs could establish a violation of Title VII, the Court should not issue an injunction where, as here, the practice is unlikely to be repeated. *EEOC v. Goodyear Aerospace Corp.*, 813 F.2d 1539, 1544-45 (9th Cir. 1987); *see also Yarnall v. Phila. Sch. Distr.*, 180 F. Supp. 3d 366, 371-372 (E.D. Pa. 2016) (denying motion for injunctive relief where discriminatory events occurred two years prior to the filing of lawsuit and plaintiffs did not provide evidence warranting injunction); *Prise v. Alderwoods Grp., Inc.*, No. 06-1470, 2010 U.S. Dist. LEXIS 89857 (W.D. Pa. Aug. 31, 2010) ("The court simply cannot agree with plaintiff's argument that in every Title VII case in which a plaintiff prevails on a claim a permanent injunction should issue against the employer. If the court were to follow that reasoning, the standard for obtaining injunctive relief would be eviscerated."). Plaintiffs have not played on artificial turf for more than two years, and they have consistently taken charter flights for team travel for more than a year.

VI. BIFURCATION OF ISSUES [L.R. 16-4.3]

Defendant requests that, pursuant to Rule 42(b) of the Federal Rules of Civil Procedure, this Court bifurcate Plaintiffs' monetary damages claims from Plaintiffs' claims for declaratory and injunctive relief. Bifurcation of equitable issues from the legal issues in the instant case is appropriate. Requests for declaratory relief and injunctive relief are matters for the Court's consideration. *See Danjaq LLC v. Sony Corp.*, 263 F.3d 942, 962 (9th Cir. 2001) (bifurcation of legal and equitable issues is within the court's discretion and appropriate when legal questions are extricable from requests for equitable relief); *Granite State Ins. Co. v. Smart Modular Technologies, Inc.*, 76 F.3d 1023, 1027 (9th Cir. 1996) (the trial judge, rather than the jury, resolves issues presented by equitable defenses to plaintiff's "legal" claims). Moreover, Plaintiffs sought certification of separate classes seeking

injunctive relief separate from monetary damages. (*See* Dkt. 64.) Accordingly, U.S. Soccer believes that bifurcation of equitable issues, to be tried in the instant case, from the legal issues, if any, should be heard after jury trial.

VII. JURY TRIAL [L.R. 16-4.4]

Plaintiffs have timely requested a jury trial. As set forth above, Plaintiffs are not entitled to a jury trial on any declaratory relief/injunction claims, and any award of back pay under Title VII is also an equitable issue for the Court, not the jury.

VIII. ATTORNEYS' FEES [L.R. 16-4.5]

The EPA expressly authorizes attorneys' fees to prevailing plaintiffs. 29 U.S.C. § 216(b). Although the Ninth Circuit has not yet expressly ruled on the issue, some courts have held a defendant may recover attorneys' fees under the EPA if the plaintiffs litigate a claim in bad faith. *See Turlington v. Atlanta Gas Light Co.*, 135 F.3d 1428, 1437 (11th Cir. 1998).

Title VII, however, allows both prevailing plaintiffs and defendants to recover attorneys' fees. 42 U.S.C. § 2000e-5(k). In order for a prevailing defendant to recover attorneys' fees, the Court must find that the plaintiff's action was frivolous, unreasonable, or without foundation, even though not brought in subjective bad faith. *Forsberg v. Pacific N.W. Bell Tel. Co.*, 840 F.2d 1409, 1422 (9th Cir. 1988).

IX. ABANDONMENT OF ISSUES [L.R. 16-4.6]

U.S. Soccer believes that Plaintiffs have abandoned and/or waived the following claims or issues:

1. Any claim under Title VII based on any theory other than "unequal pay for equal work."

2. Any claim for damages under Title VII for any violation other than alleged pay discrimination.

U.S. Soccer abandons the following Affirmative Defenses:

1. Sixth Affirmative Defense — Improper Venue; and

2. Seventh Affirmative Defense — Ted Stevens Olympic and Amateur

Sports Act.

The Second and Eighth "Affirmative Defenses" listed in U.S. Soccer's answer are not traditional affirmative defenses in that U.S. Soccer does not bear their burden of proof. The Second "Affirmative Defense" states that Plaintiffs are not entitled to putative damages because U.S. Soccer's actions "fail to rise to the level required to sustain an award of punitive damages, do not evidence a malicious, reckless or fraudulent intent to deny Plaintiffs their protected rights, and are not so wanton or willful as to support an award of punitive damages." (Dkt. 42 at 17.) The Eighth "Affirmative Defense" notes that Plaintiffs claims are barred "because every decision U.S. Soccer made with respect to the conduct alleged in the Complaint was for legitimate business reasons and not for any discriminatory or other unlawful purpose. (*Id.* at 19.) U.S. Soccer continues to pursue those defenses, as noted elsewhere in this Memorandum. *See* Section I; Section II.A.

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Respectfully submitted,

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