
**ONE NATION, TWO TEAMS: THE U.S. WOMEN'S NATIONAL TEAM'S
FIGHT FOR EQUAL PAY**

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ABSTRACT

The United States Soccer Federation (USSF), embroiled in a long-simmering and well-documented equal pay lawsuit with members of its senior women's national team (the USWNT), won an important victory when U.S. District Court Judge Gary Klausner granted its motion for summary judgment to dismiss the USWNT's claim under the Equal Pay Act (EPA). Judge Klausner found that the USWNT failed to establish a prima facie case of wage discrimination under the EPA because the USWNT players received more total compensation than their male comparators. This article reviews the legal issues in the case and frames them within a broader policy dispute, comparing the two teams' current collective bargaining agreements and providing an overview of the disparate prize money awarded by the Fédération Internationale de Football Association (FIFA).

INTRODUCTION

The United States Women's National Team (USWNT) has achieved unprecedented success in women's soccer. Winners of four (out of only eight total) Fédération Internationale de Football Association (FIFA) Women's World Cups and four (out of only six total) Olympic gold medals, the USWNT has consistently performed at the most elite levels of the sport while garnering significant interest from a country whose population is relatively ambivalent towards the world's most popular sport.¹ The United States Men's National Team (USMNT), on the other hand, has never won a World Cup.² While the team has enjoyed a strong run of qualification and tournament play, often advancing to the knockout rounds,³ the USMNT failed to qualify for Russia 2018, the tournament's most recent iteration.⁴ The relative on-field success of the USWNT has also benefited the bottom line of the United States Soccer Federation (USSF, the "Federation," or "U.S. Soccer").⁵ Notably, the team's 2015 Women's World Cup victory turned an anticipated \$420,000 loss in 2016 into an expected profit of \$17.7 million.⁶ This projected profit was largely based on ticket and merchandise revenue generated during the Women's World Cup Victory Tour.⁷ Despite its on-field success and revenue potential, the USWNT has historically been paid less and performed under less favorable working conditions than their male counterparts.⁸ USSF, their common employer, is a nonprofit corporation recognized by the Internal Revenue Service (IRS) as exempt from federal taxes under section 501(c)(3) of the Internal Revenue Code.⁹ In its annual IRS information returns, USSF describes its mission as "promot[ing] and govern[ing] soccer in the United

1 See Leah Asmelash & Brian Ries, *These Stats Show How the USWNT Leads in Soccer – and How Far It Lags in Compensation*, CNN (July 8, 2019), <https://www.cnn.com/2019/07/08/sport/uswnt-btn-equal-pay-trnd/index.html>.

2 *Id.*

3 See Ryan Rosenblatt, *United States World Cup History: What's the Farthest the USMNT Have Progressed?*, SB NATION (July, 1 2014), <https://www.sbnation.com/soccer/2014/7/1/5861212/usa-belgium-2014-world-cup-history>.

4 Jennifer Calfas, *Why the U.S. Isn't Competing in the 2018 World Cup*, TIME (Apr. 30, 2018), <https://time.com/5258984/is-the-us-in-the-2018-world-cup/>.

5 See Jonathan Tannenwald, *Details of U.S. Soccer's Budget for National Teams*, NWSL, PHILA. INQUIRER (Mar. 7, 2016), <https://www.inquirer.com/philly/blogs/thegoalkeeper/Details-of-US-Soccers-budget-for-national-teams-NWSL.html>.

6 *Id.*

7 CAITLIN MURRAY, *THE NATIONAL TEAM: THE INSIDE STORY OF THE WOMEN WHO CHANGED SOCCER* 166 (2019).

8 See generally *id.* at 250.

9 *Nonprofit Explorer: United States Soccer Federation Inc*, PROPUBLICA, <https://projects.propublica.org/nonprofits/organizations/135591991> (last visited Aug. 16, 2020).

States in order to make it the preeminent sport recognized for excellence in participation, spectator appeal, international competitions and *gender equality*.”¹⁰ Its history of contract negotiations with the USWNT, however, suggests gender equality may not be as integral to the Federation’s mission as this IRS filing suggests.

The tension between USSF’s apparent commitment to gender equality and its labor relations with the senior women’s national team came to a boil in March 2016.¹¹ Emboldened after winning their third World Cup title in 2015, five USWNT players filed a charge of sex discrimination with the Equal Employment Opportunity Commission (EEOC) against USSF, on behalf of themselves individually and all similarly situated USWNT players.¹² The EEOC did not make a determination on the individual charges but instead issued a Notice of Right to Sue to each of the five players in February 2019.¹³ The following month, on International Women’s Day no less, four of those five players¹⁴ filed a class action lawsuit against USSF on behalf of themselves and all other similarly situated USWNT players. They brought suit in the United States District Court for the Central District of California, alleging violations of the Equal Pay Act (EPA) and Title VII of the Civil Rights Act of 1964 for unequal pay and unequal working conditions based on their sex.¹⁵ While the EEOC charges were still pending,

10 *Form 990 for the Year Ended March 31, 2019*, U.S. SOCCER FED’N 1 (emphasis added), https://cdn.ussoccer.com/-/media/project/ussf/governance/2019/ussf_2018_990_pd-copy (last visited Aug. 16, 2020) [hereinafter *USSF 2019 IRS Form 990*].

11 See Andrew Das, *Top Female Players Accuse U.S. Soccer of Wage Discrimination*, N.Y. TIMES (Mar. 31, 2016), <https://www.nytimes.com/2016/04/01/sports/soccer/uswnt-us-women-carli-lloyd-alex-morgan-hope-solo-complain.html>.

12 *Id.* This step is required in order to exhaust administrative remedies before a party can proceed with filing a federal employment discrimination lawsuit. See 29 C.F.R. § 1614.407 (2020).

13 Michael McCann, *Inside USWNT’s New Equal Pay Lawsuit vs. U.S. Soccer—and How CBA, EEOC Relate*, SPORTS ILLUSTRATED (Mar. 8, 2019), <https://www.si.com/soccer/2019/03/08/uswnt-lawsuit-us-soccer-equal-pay-cba-eoc-gender-discrimination>.

14 Hope Solo was the fifth USWNT player who filed an EEOC charge of discrimination. However, she was not a party to the lawsuit. USSF terminated her contract, forcing her to retire due to off-field incidents following the 2016 Summer Olympics. Andrew Das, *U.S. Soccer Suspends Hope Solo and Terminates Her Contract*, N.Y. TIMES (Aug. 24, 2016), <https://www.nytimes.com/2016/08/25/sports/hope-solo-suspended-for-six-months-by-us-soccer.html>. As a result, she has pursued her own legal action against USSF. See Michael McCann, *Key Elements in USWNT vs. U.S. Soccer: 2021 CBA Talks, the Hope Solo Case and More*, SPORTS ILLUSTRATED (May 11, 2020), <https://www.si.com/soccer/2020/05/11/uswnt-lawsuit-trial-appeal-hope-solo-case-cba-us-soccer>.

15 Andrew Das, *U.S. Women’s Soccer Team Sues U.S. Soccer for Gender Discrimination*, N.Y. TIMES (Mar. 8, 2019), <https://www.nytimes.com/2019/03/08/sports/womens-soccer-team-lawsuit-gender-discrimination.html>.

the USWNT and USSF signed a new collective bargaining agreement (CBA) in 2017.¹⁶ The new CBA provided better travel accommodations and per diems equal to the USMNT, along with guaranteed salaries and other benefits not afforded to the USMNT.¹⁷ The USWNT players, however, felt the CBA had not fully resolved their EEOC complaint and proceeded with the lawsuit.¹⁸ Four months after filing the equal pay lawsuit against its federation, the USWNT won its fourth Women's World Cup.¹⁹ As the final whistle blew, the cacophony of cheers and applause quickly gave way to chants of "equal pay" from the raucous crowd.²⁰ The chants also greeted the players throughout their post-World Cup celebrations, from the ticker-tape parade in New York City²¹ to the Victory Tour friendly—non-competitive—matches played in cities across the U.S.²²

The USWNT's success on the field, however, did not translate to success in court. On May 1, 2020, the district court granted in part USSF's motion for summary judgment, finding the USWNT failed to establish a prima facie case of wage discrimination.²³ Due to the difficulty comparing the rates of pay under the fundamentally different structures of the men's and women's CBAs, the potential for the USMNT to earn significantly more revenue in FIFA prize money, and the give-and-take bargaining

16 McCann, *supra* note 13.

17 See Grant Wahl, *U.S. Women, U.S. Soccer Agree to New CBA, End Labor Dispute*, SPORTS ILLUSTRATED (Apr. 5, 2017), <https://www.si.com/soccer/2017/04/05/uswnt-us-soccer-women-cba-labor-talks-agreement-1>.

18 See ESPN STAFF, *USWNT Lawsuit Versus U.S. Soccer Explained: Defining the Pay Gaps, What's at Stake for Both Sides*, ESPN (June 3, 2020), <https://www.espn.com/soccer/united-states-usaw/story/4071258/uswnt-lawsuit-versus-us-soccer-explained-defining-the-pay-gapswhats-at-stake-for-both-sides>.

19 Steven Goff, *The USWNT Victory Tour Begins, but the Larger Battle Remains over Equal Pay*, WASH. POST (Aug. 3, 2019), <https://www.washingtonpost.com/sports/2019/08/03/uswnt-victory-tour-begins-larger-battle-remains-over-equal-pay/>.

20 Peter Keating, *Analysis: What Equal Pay in Sports Really Means, as the Fight Goes on for U.S. Women's Soccer*, ESPN (May 14, 2020), https://www.espn.com/espnw/story/_/id/28971949/analysis-equal-pay-sports-really-means-fight-goes-us-women-soccer.

21 *Id.*

22 Josh Schafer, *USWNT Victory Tour as Much About Equal Pay, Growing Women's Soccer as It Is About a Trophy*, YAHOO SPORTS (Aug. 6, 2019), <https://sports.yahoo.com/uswnt-victory-tour-is-as-much-about-equal-pay-growing-womens-soccer-as-it-is-a-trophy-155256822.html>.

23 See *Morgan v. U.S. Soccer Federation, Inc.*, 445 F. Supp. 3d 635, 656, 663, 665 (C.D. Cal. 2020); Defendant's Motion for Summary Judgment on Plaintiff's Claims at 652, *Morgan*, 445 F. Supp. 3d 635 (No. 2:19-cv-01717), ECF No. 250. Only the part of Plaintiff's Title VII claim that related to (1) travel conditions and (2) personnel and support services survived. *Morgan*, 445 F. Supp. 3d at 665. See also *infra* note 162 and accompanying text.

history between the parties, the USWNT is unlikely to prevail on appeal.²⁴ However, public sentiment remains firmly on its side, providing leverage to achieve a favorable settlement with the Federation. USSF itself has indicated such a settlement is likely despite the favorable outcome in court.²⁵ The *New York Times* noted, in the wake of the summary judgment decision, “[t]he seemingly endless battles with its most popular players have unquestionably damaged—and continue to damage—U.S. Soccer’s reputation.”²⁶

This article examines the equal pay dispute between the two parties and argues why and how USSF should adopt an equal pay standard as a matter of policy. Part I provides an overview of the dispute, framing it as a larger policy argument between the parties, and presents a comparison of the two collective bargaining agreements at issue and the history of FIFA’s disparate prize money awards. Part II looks at the EPA itself, including its purposes and limitations in ensuring equal work is rewarded with equal pay. Part III dissects and analyzes the district court’s summary judgment decision. Part IV then shifts to a policy discussion and argues the nonprofit missions of USSF and FIFA mandate equal pay for women’s soccer players. And finally, Part V considers how the USWNT can leverage its victory in the court of public opinion, despite its loss in a court of law, to settle with USSF and makes specific recommendations to resolve the dispute, informed by the preceding analysis.

24 See Michael McCann, *The USWNT’s Lengthy Appeal Process and What Comes Next After Legal Setback*, SPORTS ILLUSTRATED (May 5, 2020), <https://www.si.com/soccer/2020/05/05/uswnt-us-soccer-lawsuit-appeal-chances-settlement-cba>.

25 See Andrew Das, *Can U.S. Soccer and Its Women’s Team Make Peace on Equal Pay?*, N.Y. TIMES (May 2, 2020), <https://www.nytimes.com/2020/05/02/sports/soccer/uswnt-equal-pay-women-soccer.html>.

26 *Id.*

I. AN OVERVIEW OF THE DISPUTE BETWEEN THE USWNT AND U.S. SOCCER

The long, fraught history of compensation disputes between the USWNT and U.S. Soccer is well-documented.²⁷ It is amplified by the current cultural climate, with the Time's Up movement growing out of the Me Too movement to shine a spotlight on wage inequality for women across industries.²⁸ This cultural moment has given the USWNT a heightened platform—and celebrity friends—to make its case for equal pay to the public.²⁹ For the most part, the USWNT has used this platform wisely, garnering massive public support and even prompting members of Congress to admonish USSF and threaten to withhold government funding for the U.S.-cohosted 2026 World Cup.³⁰ This successful securing of public sentiment thus begs the question: is an EPA lawsuit the best vehicle to achieve the larger policy goal of equal pay for women's national team players? To answer that, it is critical to understand each side's legal arguments.

A. *Reviewing the Core Legal Arguments*

The USMNT players are essentially paid on a per-game basis with performance bonuses, while the USWNT negotiated guaranteed salaries and other benefits for its players.³¹ This structural difference reflects the economic realities of the two teams, with the bulk of the male players' income derived from their respective club teams³² and the majority of the female players' pay coming from their national team duties.³³ To the USWNT,

27 See, e.g., MURRAY, *supra* note 7.

28 See Liz Clarke, *USWNT and Time's Up Join Forces: 'They're Not Willing to Wait Any Longer,'* WASH. POST (Aug. 2, 2019, 4:53 PM), <https://www.washingtonpost.com/sports/2019/08/02/uswns-equal-pay-advocacy-arm-will-team-up-with-times-up-movement/>.

29 See *id.*

30 See Des Bieler, *Senate Bill Would Block Federal Funds for 2026 World Cup Until USWNT Gets Equal Pay,* WASH. POST (July 10, 2019, 3:56 PM), <https://www.washingtonpost.com/sports/2019/07/10/senate-bill-would-block-federal-funds-world-cup-until-uswnt-gets-equal-pay/>.

31 See ESPN Staff, *supra* note 18.

32 In this Article, "club teams" or "clubs" refer to teams in domestic soccer leagues such as the NWSL, Major League Soccer, and the Football Association Women's Super League in England. They are distinguished from national teams like the USWNT, which are made up of players from various clubs around the world who are eligible to represent their country in international competitions like the World Cup.

33 See *id.*

its unmatched success on the field warrants pay equal to the USMNT.³⁴ The team believes it deserves a larger share of the revenue its success has generated for USSF.³⁵ In collective bargaining negotiations, USSF agreed to provide the USWNT a pay-to-play model similar to the structure of the USMNT CBA but without an equal bonus structure for friendlies³⁶ or an equal pay rate for the World Cup or other tournaments.³⁷ Because USSF would not budge on these issues, the USWNT bargained instead to secure guaranteed compensation and other benefits not provided in the USMNT CBA.³⁸ Its lawsuit alleges the written terms of the CBA establish that USSF has paid female players at a rate less than male players—even taking the fringe benefits into account—and that the players would have received higher pay if they were paid under the terms of the USMNT CBA.³⁹

In response, USSF maintained that the USWNT was actually paid more than the USMNT during the five-year class period from 2015 to 2019, both in total compensation and on a per-game basis.⁴⁰ During 2016 negotiations, USSF offered the USWNT the same pay-to-play proposal as the USMNT but with lower per-game fees for friendlies and lower bonuses for both friendlies and World Cup play.⁴¹ USSF admitted its offer did not include these terms because it was an intentionally low opening offer, the USWNT has historically generated less revenue than the USMNT from friendlies, and the USMNT has the potential to earn significantly higher prize

34 See McCann, *supra* note 13.

35 *Id.*

36 Friendly matches, or friendlies, refer to non-competitive, exhibition soccer games between two national teams. They are often scheduled leading up to a tournament to help fine-tune the squad or during intervals when there are no major tournaments to allow coaches to experiment with line ups.

37 See Meg Linehan, *\$67m in Damages: The Most Interesting Details of the Latest USWNT Equal Pay Filings*, ATHLETIC (Feb. 21, 2020), <https://theathletic.com/1625872/2020/02/21/67m-in-damages-the-most-interesting-details-of-the-latest-uswnt-equal-pay-filings/>.

38 *See id.*

39 See Alana Glass, *Jeffrey Kessler on the USWNT and Their Fight for Equal Pay*, FORBES (Oct. 1, 2019), <https://www.forbes.com/sites/alanaglass/2019/10/01/jeffrey-kessler-uswnt-and-their-fight-for-equal-pay/#2a8a161d78b5> (“As described in the court filing, if the men and women each played 20 friendly matches and won all of their games, the female players would earn a maximum of \$99,000 or \$4,950 per game. Meanwhile, the male players would earn an average of \$263,320 or \$13,166 per game. The compensation for a USWNT player would amount to just 38% of a similarly situated USMNT player.” *Id.*)

40 Defendant’s Notice of Motion and Motion for Summary Judgment on Plaintiffs’ Claims at 6, *Morgan v. United States Soccer Fed’n, Inc.*, 445 F. Supp. 3d 635 (C.D. Cal. 2020) (No. 2:19-cv-01717), ECF No. 171.

41 *Id.* at 17–18.

money from the FIFA World Cup.⁴² The two sides ended up with what USSF described as a hybrid contract that includes guaranteed salaries for some players, flat fee appearances for others, and performance bonuses for both types of players.⁴³ Most importantly, USSF argued the 2017 CBA had paid the USWNT over \$25 million in the ensuing three years, 2.5 times as much as the \$11 million the USMNT's CBA had paid during that same period.⁴⁴ The 2017 USWNT CBA provides several contract terms not present in the current USMNT CBA, including a six-figure salary guaranteed regardless of play; salary continuation during periods of injury; paid health insurance benefits; paid childcare assistance; paid pregnancy and parental leave; severance benefits; retirement benefits; bonuses tied to increased television ratings, sponsorship revenue, and ticket sales; over \$1 million per year for players' National Women's Soccer League (NWSL)⁴⁵ salaries; a \$230,000 signing bonus paid directly to the twenty-three players on the roster (\$10,000 each) when the CBA was executed; and an annual \$350,000 payment to the players' union in exchange for rights to the players' images and likenesses.⁴⁶ USSF argued that even taking out the NWSL salaries, money allocated to the union, and other benefits, the USWNT received roughly \$6 million more than the USMNT over the past five years.⁴⁷

USSF also argued that if any pay differential between the national teams existed, it was based on two factors unrelated to sex: (1) a good-faith belief the USMNT had generated and would continue to generate more revenue and profit for the Federation primarily due to the huge difference in potential FIFA prize money; and (2) terms and trade-offs negotiated by two different unions during the course of collective bargaining.⁴⁸ The basic structure of each team's collective bargaining agreement and FIFA's history

42 *Id.* at 18.

43 *Id.*

44 *Id.* at 19.

45 The NWSL is the women's professional soccer league in the U.S. There are currently nine clubs in the league, with plans to add two to three expansion clubs in the next two years. Despite the popularity of the USWNT, women's soccer leagues have historically struggled in the U.S., prompting USSF to offer to subsidize some of the salaries and operations to ensure the financial health of this league at the outset. See Jamie Goldberg, *National Women's Soccer League Enters New Era with U.S. Soccer's Role in League Set to Change*, OREGONIAN (Sept. 4, 2019), <https://www.oregonlive.com/portland-thorns/2019/09/national-womens-soccer-league-enters-new-era-with-us-soccers-role-in-league-set-to-change.html>. The relationship between USSF and the NWSL is explained in more detail below. See *infra* Section I.B.iii.

46 Defendant's Notice of Motion and Motion for Summary Judgment on Plaintiffs' Claims, *supra* note 40, at 1–2.

47 *Id.* at 2.

48 *Id.* at 14–15.

of prize money disparity are explored in the following sections.

B. *Separate but Equal? A Comparison of the Collective Bargaining Agreements*

Included among the thousands of pages of supporting documentation attached to the parties' motions for summary judgment was the full 2017 USWNT CBA.⁴⁹ The USMNT also issued a statement in support of the USWNT's position that provides additional context regarding the differences in both the terms and the negotiating history of the men's and women's CBAs. The USMNT's union argues USSF's comparison of the 2011 USMNT CBA in negotiating the 2017 USWNT CBA is part of a false narrative the Federation has been using "as a weapon against current and former members of the [USWNT]."⁵⁰ The 2011 USMNT CBA expired at the end of 2018, but the players' union and USSF have not agreed to a new CBA.⁵¹ As a result, the USMNT continues to play under this expired agreement.⁵² The USMNT contends its 2011 CBA was negotiated towards the end of the global economic crisis of the late 2010s, and as such, USSF claimed its economic future was uncertain and therefore could not agree to the compensation increases owed to the USMNT as a result of significantly increased revenue.⁵³ Under the 2011 USMNT CBA, player compensation increased by only 25% over the eight-year term of the agreement, about 2.5% per year, but USSF's revenues tripled during that time.⁵⁴ By 2017, the USMNT says USSF's revenues had again tripled along with its net assets, which amounted to \$168 million.⁵⁵

Both the USMNT and USWNT players' unions expected the USWNT's 2017 CBA negotiations to result in dramatic increases in USWNT compensation on par with USSF's substantial increases in revenue since the two teams last negotiated their respective collective bargaining agreements.⁵⁶ "Instead, the women's 2017–2021 CBA did not bring the women equality in working conditions and the women did not benefit from the dramatic

49 The full five-year agreement has not previously been made publicly available. See Linehan, *supra* note 37.

50 U.S. Soccer Players, *Statement About the USWNT 2017-2021 CBA*, U.S. NAT'L SOCCER TEAM PLAYERS ASS'N (Feb. 12, 2020), <https://ussoccerplayers.com/2020/02/statement-about-the-uswnt-2017-2021-cba.html> [hereinafter *USMNT Statement*].

51 *See id.*

52 *Id.*

53 *Id.*

54 *Id.*

55 *Id.*

56 *Id.*

increase in revenue associated with the USWNT.”⁵⁷ The USMNT further argues that the deal USWNT ended up with was worse financially than the USMNT’s 2011 CBA, negotiated six years prior and in its final year before expiration.⁵⁸ By insisting on this mark of comparison, the USMNT’s union contends, USSF showed it had no intention of fairly compensating the female players.⁵⁹ A comparative analysis of the 2017 USWNT CBA and the expired-yet-still-in-effect 2011 USMNT remains necessary to arrive at an acceptable settlement, as all of the legal arguments put forth by both sides are based on that comparison, and the USMNT has not yet agreed to a new CBA with USSF.

i. Guaranteed Salary vs. Pay-to-Play

One of the key distinctive features of the USWNT CBA is its guaranteed salary structure. Under the 2017 USWNT CBA, players under contract—as designated by USSF—earn a guaranteed annual base salary of \$100,000.⁶⁰ Contracted players will continue to earn this guaranteed salary for up to a year if they are unable to play due to injury.⁶¹ The number of contracted players is set to decrease over the lifetime of the agreement, dropping from seventeen players in 2020 to sixteen in 2021.⁶² The non-contract players only receive compensation when called up to the team.⁶³ Specifically, they receive \$4,250 each time they are called into USWNT training camp.⁶⁴ That figure drops to \$3,750 if the player has participated in a national team camp fewer than eight times—whether or not the player actually played a game.⁶⁵ The non-contract players are also eligible for the same performance bonuses as the contract players,⁶⁶ as detailed in the following section. If USSF elects to terminate a player who has been contracted for at least twelve months in the past year, as it recently did with Morgan Brian, the player receives severance for at least one month and up

57 *Id.*

58 *Id.*

59 *Id.*

60 U.S. Soccer Fed’n & U.S. Women’s Nat’l Team Players Ass’n, Collective Bargaining Agreement 2017-2021 art. 11(A)(5) (July 6, 2017) (on file with parties) [hereinafter 2017 USWNT CBA].

61 *Id.* at art. 6(D)(1).

62 *Id.* at art. 8(A)(1).

63 *See id.* at art. 11(A)(2).

64 *Id.* at art. 11(A)(3).

65 *Id.*; *Id.* at Exhibit A.

66 *See id.* at art. 11(A)(4).

to four months.⁶⁷

Like the non-contract USWNT players, the male players generally must be on the USMNT roster to be eligible for compensation from USSF, albeit at significantly higher rates.⁶⁸ However, the USMNT CBA also provides reduced training camp compensation amounts for friendly matches for players who were invited to training camp but did not make the roster for the match or matches associated with that camp.⁶⁹ USSF pays the USMNT players through appearance fees and bonuses, as detailed in the next section.

ii. Bonuses

USSF's unwillingness to provide the USWNT bonuses equal to the USMNT is one of the key points of contention in the equal pay lawsuit. USSF admits it offered lower bonuses for wins and ties in friendly matches, as well as lower bonuses for qualifying for the World Cup and making the World Cup roster.⁷⁰ This compensation decision was based on USSF's assessment that USWNT friendly matches typically brought in less revenue than USMNT friendlies and FIFA's enormous gap in World Cup prize money.⁷¹ Under both CBAs, the teams receive per-game and one-time bonuses based on factors such as the type of game (friendlies, qualifiers, or tournaments), the level of the opponent in FIFA's rankings, and the outcome. The USMNT receives \$5,000 for losses in friendlies and qualifiers and \$6,875 for losses in World Cup games.⁷² The USWNT, conversely, receives no bonus for losses and a total tournament rather than a per-game World Cup bonus.⁷³ Additionally, the bonus amounts in each category are significantly lower in the USWNT CBA than in the USMNT CBA.⁷⁴

67 *See id.* at art. 8(A)(2). In its opposition to the USWNT's motion for summary judgment, USSF noted Brian's contract was terminated in December 2019, but she continued to receive her annual salary as severance through the end of March 2020. *See* Defendant's Memorandum of Points and Authorities in Opposition to Plaintiffs' Motion for Partial Summary Judgment at 6, *Morgan v. U.S. Soccer Fed'n, Inc.*, 445 F. Supp. 3d 635 (C.D. Cal. 2020) (No. 2:19-cv-01717), ECF No. 186.

68 *See* U.S. Soccer Fed'n & U.S. Nat'l Soccer Team Players Ass'n, Collective Bargaining Agreement 2011-2018 Exhibit A (Nov. 23, 2011) (on file with parties) [hereinafter 2011 USMNT CBA].

69 *See id.* at Ex. A, § X.

70 Defendant's Notice of Motion and Motion for Summary Judgment on Plaintiffs' Claims, *supra* note 40, at 17–19.

71 *Id.* at 18–19.

72 2011 USMNT CBA, *supra* note 68, at Exhibit A, § XVI.

73 *See* 2017 USWNT CBA, *supra* note 60, at Exhibit A.

74 *Compare id. with* 2011 USMNT CBA, *supra* note 68, at Exhibit A, § XVI.

iii. NWSL Salaries

The NWSL is the third iteration of professional women's soccer in the U.S.⁷⁵ Since its inception, the NWSL has been subsidized by USSF, along with the Canadian national soccer federation, through the payment of the salaries of each respective federation's national team players.⁷⁶ The 2017 USWNT CBA sets the NWSL salaries on a tiered basis, with at least eleven Tier 1 players (designated by the Federation) receiving a slightly higher salary than their Tier 2 counterparts (\$72,500 and \$67,500, respectively, in 2019).⁷⁷ USSF has had direct management of the league, spending \$18 million on the NWSL,⁷⁸ but such oversight has recently transitioned to newly-appointed Commissioner Lisa Baird.⁷⁹

Neither USSF nor the USWNT has offered any explanation as to why the players' NWSL club salaries are negotiated within the same agreement as their national team compensation. However, it is worth noting that the same party (USSF) controls both the players' national team and club team livelihoods. The 2017 USWNT CBA notably prohibits the players from strikes and lockouts during the term of the agreement, a five-year period that runs from January 1, 2017, to December 31, 2021.⁸⁰ Perhaps, as the USMNT union postulated, the resulting unequal bargaining position left the members of the USWNT no reasonable alternative but to accept the compensation terms offered by USSF.⁸¹

C. *Eye on the Prize (Money): Should U.S. Soccer Be Responsible for FIFA's Shortcomings?*

USSF would not agree to provide the USWNT equal compensation related to World Cup play because, in its view, the men's and women's competitions are entirely different, with different qualifying processes, levels

75 See Leander Schaeerlaeckens, *How the NWSL Made American Women's Pro Soccer History*, YAHOO SPORTS (Apr. 16, 2016), <https://sports.yahoo.com/blogs/soccer-fc-yahoo/nwsl-makes-history-with-fourth-season-054334254.html>.

76 See *id.*

77 2017 USWNT CBA, *supra* note 60, at art. 9(C)(1)(a), Ex. A.

78 Jamie Goldberg, *National Women's Soccer League Enters New Era with U.S. Soccer's Role in League Set to Change*, OREGONIAN (Sept. 4, 2019), <https://www.oregonlive.com/portland-thorns/2019/09/national-womens-soccer-league-enters-new-era-with-us-soccers-role-in-league-set-to-change.html>.

79 See Grant Wahl, *NWSL Hires Lisa Baird as New Commissioner*, SPORTS ILLUSTRATED (Feb. 27, 2020), <https://www.si.com/soccer/2020/02/27/nwsl-commissioner-lisa-baird>.

80 2017 USWNT CBA, *supra* note 60, at art. 2, art. 26.

81 See USMNT Statement, *supra* note 50.

of opponents, and, most important to USSF's overall legal argument, prize money.⁸² USSF argues the USWNT players are asking the court to "force U.S. Soccer into paying them as though they negotiated a different contract, won competitions they did not play in, defeated opponents they never faced, and generated over \$60 million more in FIFA prize money for U.S. Soccer than they actually did."⁸³ A review of FIFA's history of providing significantly different prize money for the men's and women's most prestigious tournament is thus necessary to contextualize any forthcoming equal pay settlement between USSF and the USWNT.

FIFA is the governing body of world soccer.⁸⁴ It is comprised of 211 member national associations divided into six regional confederations.⁸⁵ The U.S. Soccer Federation is a member of the Confederation of North, Central America, and Caribbean Association Football, widely known by its acronym CONCACAF.⁸⁶ FIFA is a nonprofit organization with a three-pillar mission: (1) "to develop the game [of soccer] everywhere and for all[;]" (2) "to touch the world through a wide range of competitions[;]" and (3) "to build a better future through [soccer]."⁸⁷ FIFA acknowledges it accomplishes these goals through the revenue generated from the men's World Cup, played every four years.⁸⁸ A report issued by FIFA in February 2020 notes over \$6 billion in revenue from the 2015–2018 cycle and pledges to invest \$4 billion in "development and education," \$1 billion in women's soccer, and \$500 million in the development of soccer infrastructure by 2022.⁸⁹

According to FIFA data, over 3.5 billion people watched the most recent World Cup held in Russia in 2018.⁹⁰ Each of the sixty-four matches

82 Defendant's Memorandum of Points and Authorities in Support of Its Motion for Summary Judgment at 3–4, *Morgan v. U.S. Soccer Fed'n, Inc.*, 445 F. Supp. 3d 635 (C.D. Cal. 2020) (No. 2:19-cv-01717-RGK-AGR), ECF No. 171.

83 *Id.* at 25.

84 See *FIFA – Soccer's World Governing Body*, U.S. SOCCER, <https://www.ussoccer.com/history/organizational-structure/fifa> (last visited Jan. 22, 2021).

85 *FIFA Member Associations*, FIFA, <https://www.fifa.com/associations/> (last visited Jan. 22, 2021).

86 See *Host of the World's Game*, U.S. SOCCER, <https://www.ussoccer.com/history/organizational-structure/concacaf> (last visited Jan. 23, 2021).

87 *Federation Internationale de Football Association*, PROPUBLICA, <https://projects.propublica.org/nonprofits/organizations/980132529> (last visited Jan. 23, 2021); *The "Three Pillars" of FIFA's Mission*, FIFA (Jan. 19, 2017), <https://www.fifa.com/who-we-are/videos/the-three-pillars-of-fifa-s-mission-2863856>.

88 *The "Three Pillars" of FIFA's Mission*, *supra* note 87.

89 FIFA, MAKING FOOTBALL TRULY GLOBAL: THE VISION 2020-2023, at 4 (2020), <https://resources.fifa.com/image/upload/making-football-truly-global-the-vision-2020-2023.pdf?cloudid=z25oyskjgrxrudiu7iyim> [hereinafter *FIFA Vision 2020-2023*].

90 Press Release, FIFA, More than Half the World Watched Record-Breaking 2018 World Cup (Dec. 21, 2018), <https://www.fifa.com/worldcup/news/more-than-half>

averaged a live audience of 191 million, and the final attracted an audience of 1.12 billion people around the world.⁹¹ FIFA data also shows the most recent Women's World Cup held in France in 2019 was watched by over a billion people, making it the most-watched tournament in its relatively short twenty-eight-year history.⁹² The final was also the most-watched match in Women's World Cup history, with a total audience of over 263 million.⁹³ Each match averaged an audience of over 17 million viewers, more than double the per-match average audience from the 2015 Women's World Cup.⁹⁴ In contrast, 99.9 million people tuned into Super Bowl LIV in 2020.⁹⁵

With both the World Cup and the Women's World Cup steadily growing in overall and per-game worldwide viewership, the prize money has also increased.⁹⁶ The table below shows a comparison of the total and per-team prize money available in the 2018 World Cup⁹⁷ and the 2019 Women's World Cup.⁹⁸

the-world-watched-record-breaking-2018-world-cup.

91 *Id.*

92 *28 Years of Women's World Cup History*, FIFA (Apr. 18, 2019), <https://www.fifa.com/womensworldcup/news/28-years-of-women-s-world-cup-history>; PUBLICIS SPORT & ENTERTAINMENT, *FIFA WOMEN'S WORLD CUP FRANCE 2019: GLOBAL BROADCAST AND AUDIENCE REPORT 2-3* (2019), <https://img.fifa.com/image/upload/rvgxekduqpeolptbgcng.pdf>.

93 PUBLICIS SPORT & ENTERTAINMENT, *supra* note 92, at 2-3.

94 *Id.* at 2.

95 Stephen Battaglio, *Super Bowl 2020 Scores 99.9 Million TV Viewers with Chiefs Comeback*, L.A. TIMES (Feb. 3, 2020), <https://www.latimes.com/entertainment-arts/business/story/2020-02-03/super-bowl-2020-scores-99-9-million-tv-viewers-with-chiefs-comeback>.

96 See Richard Asfour, *Gender Pay Inequality in World Cup Prize Pools and International Football*, EVERYTHING MONEY: YOUR GUIDE TO MONEY BEHIND 2019 WOMEN'S WORLD CUP, <https://sites.duke.edu/2019womensworldcupfinances/how-countries-pay-their-players/> (last visited Jan. 23, 2021).

97 FIFA, *OFF THE PITCH: TROPHIES, AWARDS AND MORE. . . : STATISTICAL KIT 4* (2018).

98 FIFA, *STATISTICAL KIT: FIFA WOMEN'S WORLD CUP FRANCE 2019 60* (2019).

	2018 WORLD CUP	2019 WOMEN'S WORLD CUP
WINNER	\$38 million	\$4 million
RUNNERUP	\$28 million	\$2.6 million
THIRD PLACE	\$24 million	\$2 million
FOURTH PLACE	\$22 million	\$1.6 million
QUARTERFINALS ELIMINATION	\$16 million	\$1.45 million
KNOCKOUT STAGE ELIMINATION	\$12 million	\$1 million
GROUP STAGE ELIMINATION	\$8 million	\$750,000
TOTAL POT	\$400 million	\$30 million

On the women's side, these figures are double what was available in the previous Women's World Cup.⁹⁹ Despite this increase, the women's prize money remains substantially lower than the men's prizes.¹⁰⁰ The total prize money for the 2019 Women's World Cup was just 7.5% of the men's total, resulting in a difference in payment of \$370 million.¹⁰¹ The USWNT received just above 10% of what the French men's national team received for winning the entire tournament in 2018 and *half* of what male teams receive for not even making it out of the World Cup's opening group stage. These numbers do not align with the differentials in viewership for the two tournaments. According to the FIFA viewership data described above, the total viewership of the 2019 Women's World Cup was about 34% of the 2018 World Cup total audience, and the 2019 final-match audience was just

99 Nick Friend, *FIFA to Double Women's World Cup Prize Money*, SPORTS PRO MEDIA (Oct. 29, 2018), <https://www.sportspromedia.com/news/fifa-womens-world-cup-prize-money>.

100 *Id.*

101 Niall McCarthy, *The Gender Pay Gap at the FIFA World Cup Is \$370 Million [Infographic]*, FORBES (June 11, 2019), <https://www.forbes.com/sites/niallmccarthy/2019/06/11/the-gender-pay-gap-at-the-fifa-world-cup-is-370-million-infographic/#6126dbd12751>. According to the Australian players union, which represents both the men's and women's national soccer teams, the gap is adjusted to \$336 million when factoring in the lower number of teams in the women's tournament. See Grant Wahl, *Australia Players Union Writes to FIFA over 'Discrimination' in WWC Prize Money*, SPORTS ILLUSTRATED (June 3, 2019), <https://www.si.com/soccer/2019/06/03/australia-players-union-fifa-womens-world-cup-prize-money-discrimination>.

under 22% of the audience tuning into the men's final.

In response to FIFA's announcement that it would double the prize money for the 2019 Women's World Cup, international players union Fédération Internationale des Associations de Footballeurs Professionnels, commonly known as FIFPRO, criticized the measure.¹⁰² While the prize money for the women grew, the men's prize money also increased such that the difference between the two tournaments' financial rewards grew even greater.¹⁰³ The gap between the prize for winning the women's versus the men's tournament went from \$33 million¹⁰⁴ in the previous World Cup cycle to \$34 million.¹⁰⁵ A statement issued by the union noted: "This regressive trend appears to contravene FIFA's statutory commitment to gender equality."¹⁰⁶ Unions representing players in Australia, Norway, Sweden, and New Zealand have written to FIFA to protest the comparatively small gains, urging the governing body to move towards pay equality.¹⁰⁷ The Professional Footballers Australia union contends even if the total women's prize money continues to increase by 100% every four years, as it has done over the last two cycles, it will take until 2039 to achieve pay equality with the men's prize money, assuming it continues to grow at the same 12% rate.¹⁰⁸ FIFA President Gianni Infantino has conceded that critics of the prize money structure are "perfectly justified" and "have a 'fair point'" but characterized the increase in the women's prize total as one of many steps.¹⁰⁹

USSF maintains it has "for years" lobbied FIFA for increased Women's World Cup prize money and "continues to do so[.]"¹¹⁰ However,

102 Friend, *supra* note 99.

103 *Id.*

104 See Cork Gaines, *There Is an Enormous Disparity in How Much Prize Money FIFA Pays in the Men's and Women's World Cups*, BUS. INSIDER, (June 26, 2015), <https://www.businessinsider.com/fifa-womens-world-cup-prizes-2015-6>.

105 *Id.*

106 Christian Radnedge, *Soccer: FIEA Approves Prize Money Increase for 2019 Women's World Cup*, REUTERS, (Oct. 26, 2018), <https://www.reuters.com/article/us-soccer-fifa-women/soccer-fifa-approves-prize-money-increase-for-2019-womens-world-cup-idUSKCN1N01RV>.

107 *Id.*

108 'Is It Too Much to Ask?' Matildas Take Fight to FIFA over Fair Women's World Cup Pay, GUARDIAN (June 3, 2019), <https://www.theguardian.com/football/2019/jun/04/is-it-too-much-to-ask-matildas-take-fight-to-fifa-over-fair-womens-world-cup-pay>.

109 See Rob Harris, *FIFA Has \$2.7 Billion in Cash, but Won't Fix Women's World Cup Prize Money Gap*, PHILA. INQUIRER (Mar. 7, 2019), <https://www.inquirer.com/soccer/fifa-world-cup-prize-money-women-jill-ellis-20190307.html>. Infantino further indicated the difference in prize money boils down to differences in revenue generated by the men and women. However, much of FIFA's revenue from these events is derived from sponsorships, which are not sold separately for the two tournaments. See *id.*

110 See Defendant's Memorandum of Points and Authorities in Opposition to Plaintiffs'

it also must be noted the Federation stands to gain substantial revenue by securing increased prize money for the women. As former Federation president Sunil Gulati noted, USSF refused to provide equal World Cup bonuses not just because of the significant differences in prize money but because it was more likely to have to *actually pay* the USWNT for a successful tournament performance.¹¹¹

Motion for Partial Summary Judgment, *supra* note 67, at 23.

111 See Linehan, *supra* note 37; discussion *infra* Section III.B.

II. THE PROMISE AND LIMITATIONS OF THE EQUAL PAY ACT OF 1963

A. *An Introduction to the EPA and Its Goal to Ensure Equal Work Is Rewarded with Equal Wages*

The Equal Pay Act of 1963 (EPA) added the principle of “equal pay for equal work regardless of sex” to section 6 of the Fair Labor Standards Act.¹¹² In establishing the burden-shifting framework of EPA claims, the Supreme Court provided an overview of the legislative history of the Act in *Corning Glass Works v. Brennan*.¹¹³ The purpose of the Act, the Court noted, was to remedy the “serious and endemic” problem of employment discrimination “based on an ancient but outmoded belief that a man, because of his role in society, should be paid more than a woman even though his duties are the same.”¹¹⁴ The Eighth Circuit has described the EPA as a “broad charter of women’s rights in the economic field” which seeks to “overcome the age-old belief in women’s inferiority and to eliminate the depressing effects on living standards of reduced wages for female workers and the economic and social consequences which flow from it.”¹¹⁵ The *Corning Glass Works* Court further described the EPA as “broadly remedial,” noting “it should be construed and applied so as to fulfill the underlying purposes which Congress sought to achieve.”¹¹⁶

The EPA prohibits employers from compensating employees differently, on the basis of sex, for equal work in jobs that require “equal skill, effort, and responsibility . . . performed under similar working conditions[.]”¹¹⁷ There are four exemptions—three specific and one catchall—that allow disparate wages for employees of different sexes. These exemptions apply where such payments are made pursuant to “(i) a seniority system; (ii) a merit system; (iii) a system which measures earnings by quantity or quality of production; or (iv) a differential based on any factor other than

112 *Corning Glass Works v. Brennan*, 417 U.S. 188, 190–91 (1974) (finding a violation of the EPA where male nightshift workers were paid higher wages than female dayshift workers).

113 *Id.* at 195–97.

114 *Id.* at 195 (quoting S. Rep. No. 176, 88th Cong., 1st Sess., 1 (1963)).

115 *Shultz v. American Can Co.-Dixie Products*, 424 F.2d 356, 360 (8th Cir. 1970) (quoting *Shultz v. Wheaton Glass Co.*, 421 F.2d 259, 265 (3d Cir. 1970) (holding an employer violated the EPA by paying female machine operators who worked exclusively on the day shift twenty cents an hour less than male night-shift operators who performed nearly identical work)).

116 *Corning Glass Works*, 417 U.S. at 208.

117 29 U.S.C. § 206(d)(1).

sex.”¹¹⁸ The plaintiff bears the burden of proof to establish a prima facie case of wage discrimination.¹¹⁹ Specifically, plaintiffs at this stage must show they: (1) were paid less than coworkers of the opposite sex; (2) performed substantially equal work; and (3) carried out the work under similar working conditions.¹²⁰ One scholar has noted that “the prima facie standard under the EPA is defined in broad terms and requires an intricate factual examination of the compared jobs to determine whether the performance of the work requires substantially ‘equal skill, effort, and responsibility.’”¹²¹ Once a prima facie case has been established, the burden shifts to the defendant to show the differential is justified by one of the four affirmative defenses enumerated in the Act.¹²² Each of the prima facie elements and the catchall exception are explained in the following subsections.

i. Lesser Rate of Pay

Under the EPA, wage rate “refers to the standard or measure by which an employee’s wage is determined and is considered to encompass all rates of wages whether calculated on a time, commission, piece, job incentive, profit sharing, bonus, or other basis.”¹²³ Wages include all payments made as remuneration for employment and all forms of compensation, regardless of the time of payment or how the payment is characterized.¹²⁴ Fringe benefits—such as insurance, retirement benefits, and bonus structures—are also considered wages.¹²⁵

Courts have generally held that total remuneration is not the proper basis for comparing wages.¹²⁶ The Sixth Circuit has noted that the EPA

118 *Id.*

119 *See Corning Glass Works*, 417 U.S. at 195.

120 29 U.S.C. § 206(d)(1); *see also* 29 C.F.R. § 1620.13(a) (2020).

121 Deborah Thompson Eisenberg, *Stopped at the Starting Gate: The Overuse of Summary Judgment in Equal Pay Cases*, 57 N.Y.L. SCH. L. REV. 815, 831 (2013) [hereinafter Thompson Eisenberg, *Stopped at the Starting Gate*].

122 *Corning Glass Works*, 417 U.S. at 196.

123 29 C.F.R. § 1620.12(a) (2020).

124 29 C.F.R. § 1620.10 (2020).

125 29 C.F.R. § 1620.10 (2020); 29 C.F.R. § 1620.11(a) (2020).

126 *See, e.g., Bence v. Detroit Health Corp.*, 712 F.2d 1024, 1027 (6th Cir. 1983) (rejecting an employer’s total remuneration argument because females were paid at a lower commission rate than males for selling the same health club memberships at a higher frequency), *cert. denied*, 465 U.S. 1025 (1984); *Ebbert v. Nassau Cnty.*, No. 05-CV-5445(FB)(AKT), 2009 WL 935812, at *3 (E.D.N.Y. Mar. 31, 2009) (“As a matter of common sense, total remuneration cannot be the proper point of comparison. If it were, an employer who pays a woman \$10 per hour and a man \$20 per hour would not violate the EPA or the NYEPA as long as the woman negated the obvious disparity

“commands an equal *rate* of pay for equal work . . . [and the c]omparison of pay rates entails measuring the amount of pay against a common denominator, typically a given time period or quantity or quality of output.”¹²⁷ As a result, courts must identify the proper factor to measure pay rates.¹²⁸ “This must be a practical inquiry which looks to the nature of the services for which an employer in fact compensates an employee.”¹²⁹ In some circumstances, however, total remuneration may be an appropriate measure, provided that a plaintiff’s total compensation is not more than her comparator’s solely by virtue of working more.¹³⁰ For example, one district court found a plaintiff had not established a valid EPA claim despite receiving a smaller weekly salary than her male coworkers because, when her insurance benefits were factored in, she received greater total compensation than her comparators.¹³¹

ii. Substantially Equal Work

Federal regulations define equal work under the EPA as work that is equal in terms of its required skill, effort, and responsibility.¹³² The work does not have to be identical, but it must be “substantially equal.”¹³³ While there is no precise definition of substantially equal work, the regulations provide guidance for determining equal skill, effort, and responsibility and require that these terms are interpreted in consideration of the broad remedial purpose of the EPA.¹³⁴ Skill is measured by the experience, ability, education, and training necessary in the performance of a job.¹³⁵ Effort refers to the amount of physical or mental exertion a job requires.¹³⁶ Responsibility is the degree of accountability required to perform a job.¹³⁷

by working twice as many hours. Neither Congress nor the New York Legislature could have intended such an absurd result.”).

127 *Bence*, 712 F.2d at 1027.

128 *Id.*

129 *Id.*

130 *See id.* at 1027–28.

131 *Bertotti v. Philbeck, Inc.*, 827 F. Supp. 1005, 1010 (S.D. Ga. 1993).

132 29 C.F.R. § 1620.13(a) (2020).

133 *Id.*

134 29 C.F.R. § 1620.14(a) (2020).

135 29 C.F.R. § 1620.15(a) (2020).

136 29 C.F.R. § 1620.16(a) (2020).

137 29 C.F.R. § 1620.17(a) (2020).

iii. Similar Working Conditions

The EPA regulations note that generally, where jobs are found to require equal skill, effort, and responsibility, they are also likely to produce similar working conditions.¹³⁸ Similarity is a flexible standard, requiring a practical judgment “in light of whether the differences in working conditions are the kind customarily taken into consideration in setting wage levels.”¹³⁹ Working conditions also encompass the surroundings and hazards of a job, taking into account their intensity, frequency, and the severity of injury they may cause.¹⁴⁰ For example, a New York district court found female dispatcher/corrections officers did not work under similar conditions as higher-paid male corrections officers because the male officers worked directly with inmates in cell blocks and the female officers worked primarily in a secure control room.¹⁴¹

iv. Factor Other than Sex

As described above, once a plaintiff establishes the three elements of a prima facie wage discrimination case, the burden shifts to the employer to prove the pay disparity resulted from one of the EPA’s four exceptions. As the Fourth Circuit noted, “this statutory language requires that an employer submit evidence from which a reasonable factfinder could conclude not simply that the employer’s proffered reasons *could* explain the wage disparity, but that the proffered reasons *do in fact* explain the wage disparity.”¹⁴²

By far, the most commonly asserted defense is the catchall defense claiming pay differentials are based on a factor other than sex.¹⁴³ A study of 500 district court EPA cases decided between 2000 and 2011 found that employers typically offer a laundry list of reasons to justify their pay disparities.¹⁴⁴ The most commonly asserted factors “other than sex” were the length of service (informal seniority); qualifications in terms of experience, education, or performance; market forces or business judgment; and prior

138 29 C.F.R. § 1620.18(b) (2020).

139 29 C.F.R. § 1620.18(a) (2020).

140 *Id.*; see also *Corning Glass Works v. Brennan*, 417 U.S. 188, 202 (1974).

141 *Pfeiffer v. Lewis Cnty.*, 308 F. Supp. 2d 88, 101–02 (N.D.N.Y. 2004).

142 *E.E.O.C. v. Md. Ins. Admin.*, 879 F.3d 114, 121 (4th Cir. 2018) (emphasis in original) (internal citations omitted) (finding a prima facie case of wage discrimination where three female employees of an independent state agency earned less than at least one male comparator performing substantially equal work under similar working conditions).

143 See Thompson Eisenberg, *Stopped at the Starting Gate*, *supra* note 121, at 836.

144 *Id.* at 815–16.

or negotiated salaries.¹⁴⁵ The regulations do not specify what constitutes a reason other than sex, but they do note that the comparative average cost of employing one sex as a group does not qualify as a pay differential based on a factor other than sex.¹⁴⁶ The regulations also state that collective bargaining agreements are not a defense.¹⁴⁷ However, in practice, courts defer to the bargaining process itself and tend not to address the regulation prohibiting the use of collective bargaining agreements as an EPA claim defense.¹⁴⁸ As described below, the district court in *Morgan v. U.S. Soccer Federation* focused largely on the bargaining history of the two parties before ultimately finding the USWNT was not paid less than the USMNT over the class period when looking at total compensation rather than the rate of pay. Although the USWNT argued the collective bargaining agreement could not be used as a defense by USSF and cited the regulation, the district court did not address this point in its decision.

B. *Surviving Summary Judgment: A Hurdle Most EPA Claims Cannot Clear*

Due to the fact-intensive nature of EPA claims, courts have recognized that summary judgment is often inappropriate to resolve such claims.¹⁴⁹ In practice, however, federal district courts dismiss most equal pay claims at the summary judgment stage.¹⁵⁰ A study of 500 federal district court decisions considering an employer's summary judgment motion on an equal pay claim revealed that courts granted 68% of these motions from 2000 to 2011.¹⁵¹ Thus, about a third of the claims survived the summary judgment hurdle.¹⁵² At the appellate level, courts affirmed 92% of district court summary judgment grants in favor of employers from 2000 to 2009.¹⁵³

145 *Id.* at 837.

146 29 C.F.R. § 1620.22 (2020).

147 29 C.F.R. § 1620.23 (2020) (“Any and all provisions in a collective bargaining agreement which provide unequal rates of pay in conflict with the requirements of the EPA are null and void and of no effect.”).

148 *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.”).

149 Thompson Eisenberg, *Stopped at the Starting Gate*, *supra* note 121, at 816 (citing Brobst v. Columbus Servs. Int'l, 761 F.2d 148, 156 (3d Cir. 1985)).

150 *Id.*

151 *Id.* at 817.

152 *Id.*

153 Deborah Thompson Eisenberg, *Shattering the Equal Pay Act's Glass Ceiling*, 63 SMU L. REV. 17, 34 (2010) [hereinafter Thompson Eisenberg, *Shattering the Glass Ceiling*].

The study of district court decisions noted that summary judgment for employers was granted on the vast majority of EPA cases, largely regardless of the judge's political ideology or sex or the geographic location of the court.¹⁵⁴ The author of the study identified the strict interpretation of the prima facie equal work standard, and the liberal application of the "any factor other than sex" defense as the key barriers to trial for EPA claims.¹⁵⁵ The author noted:

[While the] prima facie standard under the EPA is defined in broad terms and requires an intricate factual examination of the compared jobs to determine whether the performance of the work requires substantially equal "skill, effort, and responsibility[.]" . . . some courts have required strict identity among compared jobs or imposed their own vision of "equal work" without applying the EPA's regulatory definitions.¹⁵⁶

Of the 500 decisions studied, 49% found the plaintiff failed to establish the prima facie equal work element.¹⁵⁷

Most of these decisions offered very little, if any, analysis of the equal work standard.¹⁵⁸ Out of the relatively small number of claims found to satisfy the prima facie standard (185 out of 500), the court denied summary judgment for employers in 144, or 79%, of such cases.¹⁵⁹ "This is an important finding because most legislative proposals to amend the EPA focus on narrowing the statute's defenses, not modernizing the prima facie standard."¹⁶⁰ However, because a significant majority of equal pay claims are lost at the prima facie level, courts typically never even reach the merits of the asserted defenses.¹⁶¹ Ultimately, the study argues that juries, rather than district court judges, should be making factual judgments about whether jobs are substantially equal.¹⁶² The next section explores how the district court in *Morgan v. U.S. Soccer Federation* resolved the summary judgment motions filed by both parties in line with the majority of cases reviewed in the study.

154 Thompson Eisenberg, *Stopped at the Starting Gate*, *supra* note 121, at 831.

155 *Id.* at 839.

156 *Id.* at 831, 33.

157 *Id.* at 833.

158 *Id.*

159 *Id.* at 835.

160 *Id.*

161 *Id.*

162 *See id.* at 834.

III. THE DISTRICT COURT'S SUMMARY JUDGMENT RULING AND THE COMPLEXITY OF COMPARING COMPENSATION STRUCTURES UNDER TWO VASTLY DIFFERENT CBAS

A. *How the District Court Disposed of the USWNT's EPA Claim*

Like the majority of cases examined in the study described above—and despite the prediction from many legal analysts that the case was likely to proceed to trial due to disputed facts offered by both parties and their experts—the district court granted USSF's motion for summary judgment as to the USWNT's EPA claim.¹⁶³ The court outlined the burden-shifting framework of EPA claims and the necessary elements to establish a prima facie case before shifting the burden to the defense to show any wage differential is justified by a factor other than sex.¹⁶⁴ Under this framework, the plaintiffs had to show that “(1) they performed substantially equal work as [US]MNT players, (2) under similar working conditions, and (3) [US]MNT players were paid more.”¹⁶⁵ Rather than analyze the three-prong test in order, the

163 See, e.g., Derek Helling, *Summary Judgment Would Give Either Side Tremendous Pull in USWNT Labor Dispute*, ADVOCACY FOR FAIRNESS IN SPORTS (Feb. 29, 2020), <https://advocacyforfairnessinsports.org/current-litigation/current-miscellaneous-cases/summary-judgment-would-give-either-side-tremendous-pull-in-uswnt-labor-dispute/>; Michael McCann, *Coronavirus, New U.S. Soccer Leadership and Their Impact on USWNT's Lawsuit*, SPORTS ILLUSTRATED (Mar. 25, 2020), <https://www.si.com/soccer/2020/03/25/us-soccer-uswnt-lawsuit-coronavirus-summary-judgment-trial-date>. With respect to the USWNT's Title VII claims, the court granted USSF's motion for summary judgment in part and denied it in part. *Morgan v. U.S. Soccer Fed'n, Inc.*, 445 F. Supp. 3d 635, 665 (C.D. Cal. 2020). The USWNT argued USSF violated Title VII by paying female players less than similarly situated male players and subjecting them to unequal working conditions in three areas—field surfaces, travel conditions (charter flights and hotels), and support services (medical and training support). *Id.* at 656–65. The court already held the USWNT was not paid less than the USMNT in its analysis of the EPA claims and thereby granted summary judgment to USSF on this point under Title VII as well. *Id.* at 657. The court also granted summary judgment in favor of USSF regarding the USWNT's claim USSF subjected the women's team to less favorable (and more dangerous) field surfaces more frequently than the men's team, finding the USWNT presented insufficient evidence that USSF's proffered reasons for the discrepancy (competitive advantage and scheduling necessities) were merely pretext for discrimination. *Id.* at 663. Conversely, the court found the USWNT did raise a genuine issue as to USSF's pretext regarding the claim that USSF provided charter flights more frequently to the USMNT than to the USWNT. *Id.* at 665. As a result, this claim, along with the claims regarding travel conditions and support services, which were not addressed by USSF in its motion for summary judgment, will proceed to trial. See *id.* at 665.

164 *Morgan*, 445 F. Supp. 3d at 652.

165 *Id.*

district court focused solely on the third element—whether USSF paid the male players more than the female players—in finding the USWNT failed to establish a prima facie EPA claim.¹⁶⁶

As noted in Part I, Section A, the USWNT argued that the written terms of its CBA established that its players were paid at a rate less than the USMNT players based on (1) a lower bonus structure than what is available under the men's CBA and (2) their expert's report that the female players would have received more under the men's CBA than they did under their own CBA, even taking into account the fringe benefits not afforded to the male players.¹⁶⁷ USSF argued it actually paid the USWNT *more* than the USMNT during the class period both in total compensation (\$24 million compared to \$18 million) and on a per-game basis (\$220,747 per game and \$212,639 per game, respectively).¹⁶⁸ The USWNT contended total compensation was the inappropriate method of comparing the two teams' wages, based on arguments the district court had already decided in an earlier phase of the case.¹⁶⁹

At the class certification stage, the district court rejected USSF's argument that the plaintiffs lacked standing because the four class representatives individually made more money than the highest-paid USMNT player during the class period.¹⁷⁰ In rejecting this argument, Judge Gary Klausner noted it "presuppos[ed] that there [could] be no discrimination under either Title VII or the EPA where a female employee's total [annual] compensation exceeded that of similarly-situated males, *regardless* of whether the female receiv[ed] a lower rate of pay than her male comparators."¹⁷¹ To hold otherwise, he explained, could lead to an "absurd result" where a woman paid at half the rate of a male coworker receives equal compensation solely by virtue of working twice as many hours.¹⁷² Despite the USWNT's characterization of USSF's total compensation argument as an attempt to relitigate the court's certification order, the court noted it could not conclude *at the class certification stage* that discrimination had not occurred based solely on the fact that some USWNT received greater total compensation than USMNT players without further evidence that the

166 *See id.* at 652–56.

167 Plaintiffs' Motion for Partial Summary Judgment at 6–7, *Morgan v. U.S. Soccer Fed'n*, 445 F. Supp. 3d 365 (C.D. Cal. 2020) (No. 2:19-CV-01717-RGK-AGR), ECF No. 170.

168 *See Morgan v. U.S. Soccer Fed'n, Inc.*, 445 F. Supp. 3d 635, 653 (C.D. Cal. 2020).

169 *See Plaintiffs' Motion for Partial Summary Judgment*, *supra* note 167, at 7–8.

170 *See Class Certification Ord.* at 5, *Morgan v. U.S. Soccer Fed'n, Inc.*, 445 F. Supp. 3d 365 (C.D. Cal. 2020) (No. 2:19-CV-01717-RGK-AGR), ECF No. 98.

171 *Id.*

172 *Id.* at 5–6 (citing *Ebbert v. Nassau Cnty.*, No. 05-CV-5445(FB)(AKT), 2009 WL 935812, at *3 (E.D.N.Y. Mar. 31, 2009)).

female players were not paid more by virtue of working more.¹⁷³ Instead, the district court found the plaintiffs had the burden of showing what evidence they had developed on this point at the summary judgment stage and did not satisfy this burden.¹⁷⁴ The court pointed to the “undisputed” evidence that, during the class period, the USWNT played 111 games and made \$24.5 million in total compensation, averaging \$220,747 per game, whereas the USMNT played 87 games and made \$18.5 million in total compensation with an average of \$212,639 per game.¹⁷⁵ “Based on this evidence, it appears that the [US]WNT did not make more money than the [US]MNT solely because they played more games. Rather, the [US]WNT both played more games and made more money than the [US]MNT per game. Under these circumstances, it is not ‘absurd’ to consider the total compensation received by the players.”¹⁷⁶

In wrapping up its analysis of the EPA claim, the district court addressed the plaintiffs’ two primary arguments as to how the USWNT CBA established a lower pay rate than the USMNT CBA. With respect to the lower bonus structure in the USWNT CBA, the court emphasized that focusing on the bonuses in isolation ignored the other compensatory benefits the players received under the terms of the CBA in contravention of the EPA, which requires all forms of compensation, including fringe benefits, to be considered wages.¹⁷⁷ As to the argument that the USWNT would have been paid more under the USMNT CBA, the district court pointed to the history of negotiations between the parties in finding untenable the comparison of what each team would have made under the other’s CBA because it “ignores the reality that [each team] bargained for different agreements which reflect different preferences, and that the [US]WNT explicitly rejected the terms they now seek to retroactively impose on themselves.”¹⁷⁸ Judge Klausner found this evidence, taken together, was insufficient to create a genuine issue of material fact for trial, thereby declining to address the remaining elements of the *prima facie* claim and granting summary judgment to USSF

173 See *Morgan v. U.S. Soccer Fed’n, Inc.*, 445 F.Supp.3d 635, 653–54 (C.D. Cal. 2020).

174 *Id.* at 654.

175 *Id.*

176 *Id.*

177 *Id.* (citing 29 C.F.R. § 1620.12(a) (2019); 29 C.F.R. § 1620.11(a) (2019); *Diamond v. T Rowe Price Assocs., Inc.*, 852 F. Supp. 372, 395 (D. Md. 1994) (granting summary judgment to employer on plaintiff’s EPA claim where plaintiff did not receive stock options and larger annual bonuses but did receive more total compensation than her comparators)).

178 *Id.* at 655 (noting in labor negotiations the USWNT union rejected the pay-to-play structure of the USMNT CBA and was willing to forgo higher bonuses to secure other guaranteed compensation and benefits not provided in the men’s CBA).

on the USWNT's EPA claim.

B. *Analysis of the Court's EPA Holding*

Ultimately, USSF has the stronger legal position. While the facts and public sentiment may be on the side of the USWNT, the law favors the Federation. However, there are flaws in the district court's EPA analysis that may lead to a successful appeal to get the EPA claim before a jury.

The district court found that in terms of total and per-game compensation, the USWNT had been paid more than the USMNT during the five-year class period. In so finding, the court dismissed the plaintiffs' arguments that lower bonuses made their *rate* of pay lower and that they would have received more compensation under the terms of the USMNT CBA because the players' union bargained for their guaranteed contract terms. However, the court failed to acknowledge that the five-year class period included two World Cups for the women in 2015 and 2019, both of which they won, and only one World Cup for the men in 2018, for which they failed to even qualify. The prize money available to the *winner* of the Women's World Cup is less than the prize money FIFA pays to men's national teams for *qualifying* for the World Cup.¹⁷⁹ The Federation admitted it had these historical revenue differentials in mind when it negotiated USWNT performance bonuses related to the 2015 and 2019 Women's World Cups.¹⁸⁰ It conceded that paying the USWNT equal bonuses for World Cup play would "break" the Federation financially without receiving "concomitant prize money."¹⁸¹ As a result, USSF rejected the USWNT union's demand for equal bonuses during the 2016 contract negotiations.¹⁸² In a declaration regarding his involvement in CBA negotiations attached to USSF's summary judgment filing, former Federation president Sunil Gulati stated:

One thing I do know is that I never would have authorized offering or accepting, and never would have recommended to the Board agreeing to, the same bonuses for Women's World Cup play that were contained in the [US]MNT's agreement for their World Cup play for very simple reasons. I believed the [US]WNT was much more likely to qualify for and succeed in their tournament than the [US]MNT was, and I believed that the [US]MNT's

179 See *supra* Section I.C.

180 See Defendant's Memorandum of Points and Authorities in Opposition to Plaintiffs' Motion for Partial Summary Judgment, *supra* note 67, at 20–21.

181 *Id.* at 18.

182 See Defendant's Motion for Summary Judgment at 21, *Morgan v. U.S. Soccer Fed'n, Inc.*, 445 F. Supp. 3d 635 (C.D. Cal. 2020) (No. 2:19-cv-01717-RGK-AGR), ECF No. 171.

participation and success in their tournament would result in the receipt of substantially more prize money from FIFA than the [US]WNT's participation and success in their tournament.¹⁸³

These facts are undisputed, and yet the district court failed to address them in concluding the USWNT received more compensation than the USMNT. The women's team may not have had to work more to earn greater total and per-game compensation than their male counterparts, but they certainly had to be more successful.¹⁸⁴

The court also provided no analysis of the USWNT's expert's assessment of wages. After reviewing the bargaining history between the parties since 2012, the court simply dismissed the USWNT's expert opinion that the players would have received more money under the USMNT, even taking into account the fringe benefits not provided to the men, because "the [US]WNT explicitly rejected the terms they now seek to retroactively impose on themselves."¹⁸⁵ However, the undisputed facts show the USWNT did not reject the terms of the USMNT CBA. Instead, they rejected the same pay-to-play structure that offered lower bonuses and appearance fees than what is provided to the men.¹⁸⁶ When it became clear that USSF was not going to agree to the same level of compensation for the USWNT under a pay-to-play model, the union shifted its priorities to try to secure other guaranteed compensation and benefits for the players. While courts are hesitant to interfere with the bargaining process in labor negotiations, it is an inaccurate characterization of the facts to say the USWNT explicitly rejected the terms of the USMNT CBA. Where, as here, the two labor agreements being compared are so fundamentally different, the hypothetical scenario outlined by the USWNT expert is useful.¹⁸⁷ If both teams played and won twenty friendly matches under their respective CBAs, the USMNT players would earn \$263,320 (\$13,166 per game), and the USWNT players would receive a maximum of \$99,000 (\$4,950 per game), 38% of the male

183 See Linehan, *supra* note 37.

184 See Das, *supra* note 25 ("By failing to qualify for the only men's World Cup played during the class window, the men became ineligible for millions of dollars in performance bonuses of their own. Those payments would have swelled their paydays from U.S. Soccer far beyond what the women could ever earn.")

185 Morgan v. U.S. Soccer Fed'n, Inc., 445 F. Supp. 3d 635, 655 (C.D. Cal. 2020).

186 See *id.* at 655.

187 Legal scholar Steven Bank has criticized the USWNT's argument that they would have received higher compensation under the USMNT CBA, characterizing it as "cherry picking the most favorable argument" and noting "comparing CBAs on upside only (when the WNT wins) ignores downside (when the WNT loses)." Steven Bank (@ProfBank), TWITTER (May 2, 2020, 12:25 PM), <https://twitter.com/ProfBank/status/1256636027369746433>.

players' earnings.¹⁸⁸

Even if the court had considered these facts and determined the USWNT established a prima facie EPA claim—assuming the other two elements are met—the players still may not have survived the summary judgment hurdle. As the study reviewed in Section B of Part II notes, courts tend to liberally apply the “any factor other than sex” defense in considering summary judgment motions on EPA claims. Here, USSF points to both revenue and collective bargaining as two non-sex-based factors for any pay disparity between its men’s and women’s senior national teams.¹⁸⁹ While the court did not explicitly evaluate these defenses in finding the plaintiffs failed to establish the necessary prima facie element of lesser pay, it indicated support for USSF’s position by citing the parties’ bargaining history to reject the USWNT’s approach to comparing the compensation of the two teams, noting the players were willing to forgo higher bonuses for other benefits.¹⁹⁰ As a result, it seems likely that the court would have granted summary judgment for the Federation even if it had found the USWNT established a prima facie case of wage discrimination under the EPA.

The fact-intensive nature of the court’s analysis and findings, however, suggests the case should have proceeded to trial to allow the jury to serve its role as trier-of-fact. A reasonable jury could look at the history of labor negotiations and determine that USSF’s control of both the national team and league salaries put the USWNT in an unequal bargaining position. Or, a reasonable jury could agree with the court’s assessment that the USWNT’s rejection of the pay-to-play structure and higher bonuses to secure guaranteed benefits makes the team’s approach to compensation comparison untenable. The point, as noted by the study of district court EPA summary judgment decisions, is that district court judges should not be making these “factual judgment calls.”¹⁹¹ However, whether on appeal or before a hypothetical jury, the USWNT appears unlikely to prevail on its EPA claims for three reasons: (1) the compensation structures of the USWNT and USMNT are so fundamentally different they are nearly impossible to compare to determine whether USSF has, in fact, paid the women at a lesser rate than the men; (2) differences in revenue generation, including FIFA prize money, is likely an acceptable non-sex-based factor in USSF’s compensation decisions; and (3) the players negotiated, through give and

188 See Glass, *supra* note 39.

189 See Defendant’s Motion for Summary Judgment, *supra* note 182, at 14–15.

190 See *Morgan*, 445 F. Supp. 3d at 655 (“This method of comparison not only fails to account for the choices made during collective bargaining, it also ignores the economic value of the ‘insurance’ that [US]WNT players receive under their CBA.”)

191 See Thompson Eisenberg, *Stopped at the Starting Gate*, *supra* note 121, at 834.

take, the terms of their agreement through the collective bargaining process, which courts tend to prefer not to interfere with. For each of these reasons, in addition to the general propensity of district courts to grant summary judgment in favor of employers in EPA cases, an EPA lawsuit was likely not the most effective weapon the USWNT could have chosen to fight its battle for equal pay.

IV. A POLICY PERSPECTIVE: APPLYING A NONPROFIT LENS

As a matter of policy, USSF and FIFA should set a standard of equal pay for male and female players. Unlike for-profit entities, neither FIFA nor USSF exists to maximize revenues. Both organizations are nonprofits and have specific charitable purposes their activities must support in order to retain the tax benefits afforded to them by their domestic jurisdictions.¹⁹² Among the charitable purposes identified by both FIFA and the Federation is the growth and development of the women's game.

A. *FIFA's Mission*

FIFA has identified the following mission to support and advance the game of women's soccer:

FIFA promotes the development of women's football and pledges to support women's football financially and to give players, coaches, referees and officials the opportunity to become actively involved in football. FIFA is helping to popularise the game by increasing public awareness and conducting information campaigns as well as overcoming social and cultural obstacles for women with the ultimate aim of improving women's standing in society.¹⁹³

Included with this mission statement is a list of objectives to achieve the goals stated therein.¹⁹⁴ Specifically, FIFA states it will work to: ensure that every girl and woman who wants to play soccer has the opportunity to do so; help member associations to overcome the main challenges of developing women's soccer; promote opportunities for women, both on and off the pitch; involve more former female players; have more quality top-level female coaches; help build sustainable professional national and regional women's soccer competitions at various levels; constantly improve the quality, organization, and expansion of women's soccer competitions; and encourage the promotion and marketing of women's soccer at all levels to grow participation, build a bigger audience, and target potential partners.¹⁹⁵

192 See generally Benoit Merkt, *Charitable Organisations in Switzerland: Overview*, WESTLAW (Mar. 1, 2020), [https://content.next.westlaw.com/8-633-1801?transitionType=Default&contextData=\(sc.Default\)&__lrTS=20170607012756718&firstPage=true](https://content.next.westlaw.com/8-633-1801?transitionType=Default&contextData=(sc.Default)&__lrTS=20170607012756718&firstPage=true); Alyssa Dirusso, *American Nonprofit Law in Comparative Perspective*, 10 WASH. U. GLOB. STUD. L. REV. 39 (2011).

193 *Women's Football Mission*, FIFA, <https://www.fifa.com/womens-football/mission/> (last visited Aug. 16, 2020) [hereinafter *FIFA Women's Soccer Mission*].

194 *Id.*

195 *Id.*

In addition to these broader goals, FIFA has identified the acceleration of women's soccer as one of its eleven goals to accomplish its vision for 2020–2023.¹⁹⁶ “Bolstering the women’s game, as well as the participation of women in football governance at all levels, is at the top of the game’s agenda around the world.”¹⁹⁷ To support these efforts, FIFA plans to reform competitions, including introducing additional regular global women’s competitions; modernize programs aimed at developing women’s soccer in a way that is tailored to the specificities of the women’s game; and create programs and policies that put women in a position to succeed on the pitch and assume global soccer leadership positions.¹⁹⁸ Significantly, FIFA also sets out to enhance the commercial value of women’s soccer through the evolution of FIFA’s commercial program, “taking into consideration the specific needs of the women’s game, whose distinct brand identity should be created and underpinned by an innovative digital strategy.”¹⁹⁹ FIFA expects the prioritization of these initiatives to further boost the commercial value of women’s soccer.²⁰⁰

B. USSF’s Mission

In its legal filings, USSF touts its own role in “championing women’s soccer within the United States and on the world stage” as a factor that has contributed to the USWNT’s unprecedented success.²⁰¹ USSF’s bylaws set forth the specific purposes of the nonprofit Federation, including “to promote, govern, coordinate, and administer the growth and development of soccer in all its recognized forms in the United States for all persons of all ages and abilities, including national teams and international games and tournaments.”²⁰² As noted in the introduction, USSF has described its mission to the IRS as promoting and governing soccer in the U.S. to achieve recognition for excellence in, among other things, gender equality.²⁰³

Undeniably, USSF’s support of women’s soccer and the USWNT has put the team in a position to achieve unparalleled success in the

196 See FIFA Vision 2020-2023, *supra* note 89, at 22.

197 *Id.*

198 *Id.*

199 *Id.*

200 *Id.*

201 Defendant’s Motion for Summary Judgment, *supra* note 182, at 1.

202 U.S. SOCCER FED’N, INC., BYLAWS OF THE UNITED STATES SOCCER FED’N, INC. art. 102(1) (last updated May 1, 2020), https://cdn.ussoccer.com/-/media/project/ussf/governance/2020/bylaws/202021-bylaw-book_final.ashx?la=en-us&rev=42540dd47a7f4c3eba252b8ae8bda610&hash=C6D2CE954680C6C563BEABDCFED9A7B0.

203 USSF 2019 IRS Form 990, *supra* note 10.

women's game. In its motion for summary judgment, USSF noted that star USWNT player Megan Rapinoe had even acknowledged the Federation was deserving of "a tremendous amount of credit" for "back[ing] the team in a very strong way" and "push[ing] the game" in the U.S. and abroad.²⁰⁴ Despite the evident support of women's soccer by both FIFA and USSF, the significant pay disparity between male and female players remains. As the women's game has grown in the U.S. and around the world, so have the rallying cries for equal pay.

C. *Adopting an Equal Pay Policy Furthers These Nonprofit Missions*

As described above, both FIFA and USSF have nonprofit missions to advance women's soccer regardless of how much revenue they receive by doing so. In fact, FIFA has described itself, along with its confederations and national member associations like USSF, as the guardians of the women's game.²⁰⁵ A key way to truly serve as a guardian of women's soccer is to provide the women with equal pay. This starts with FIFA, which should not only make the prize money for its men's and women's World Cups equal but also require its member associations to pay their national women's teams equal to their men's teams. Doing so will help accelerate the development of women's soccer around the world (one of FIFA's stated goals for the 2020–2023 period), resulting in a better, more competitive sports entertainment product to increase commercialization (also a stated goal) and continuing the trajectory of women's soccer gaining popularity around the world in recent years. The increase in commercial attention would then arguably lead to a reduction in the gap in revenue generated by the men's and women's teams.²⁰⁶

By not making the prize money equal, FIFA has essentially enabled its member associations to not pay their women's national team players equally, which stunts the overall development of the women's game. The lack of parity beyond the top ten or so ranked teams in women's soccer is on display during every CONCACAF World Cup and Olympic qualifying

204 Defendant's Memorandum of Points and Authorities in Support of its Motion for Summary Judgment, *supra* note 81, at 1.

205 FIFA Women's Soccer Mission, *supra* note 193.

206 For example, a 2017 research study found that individuals who previously viewed at least one professional women's soccer match were much more likely to watch a women's soccer event in the future. Lindsey Darvin & Michael Sagas, *Objectification in Sport Media: Influences on a Future Women's Sporting Event*, 10 INT'L J. SPORT COMM. 178, 191 (2017). "[T]hese results suggest that previously viewing at least one women's professional soccer event drastically affected an individual's event expectancies and future viewership intentions." *Id.*

tournament.²⁰⁷ Most recently, the USWNT cruised through the tournament to qualify for the 2020 (now 2021) Tokyo Summer Olympics.²⁰⁸ The disparity in the level of play was most stark during the USWNT's opening match against an inexperienced and ultimately defenseless Thailand in the 2019 Women's World Cup, which resulted in a 13-0 victory for the Americans.²⁰⁹ Notably, the Thai women's national team, which was playing in its first Women's World Cup, is supported by a wealthy patron, the chief executive of one of the country's largest insurance companies, who also serves as its general manager.²¹⁰ The family insurance company sponsors Thailand's women's league and employs women's national team players.²¹¹ The USWNT was roundly criticized for continuing to press for goals despite the match being well out of hand for the Thai team.²¹² In response, USWNT player Alex Morgan stated her hope that the tournament would expand to thirty-two teams and that the dramatic loss would "encourage[] FIFA to put a bit of pressure on those respective federations to put more efforts into their women's sides."²¹³

While the USWNT has received considerable support from its federation in comparison to many women's national teams around the world, its own success in relation to the rest of the field of teams is what has put it in the position to demand equal pay. The relative lack of on-field success of the USMNT only amplifies the unique message of the USWNT players. As discussed in Section A of Part I above, one of USSF's core arguments in justifying any wage differential between the two teams is its inability to provide the equal fees and bonuses requested by the USWNT because

207 See Meg Linehan, *USWNT Qualify for Olympics, Easily as Ever (and That's a Problem)*, ATHLETIC (Feb. 9, 2020), <https://theathletic.com/1595197/2020/02/09/uswnt-qualify-for-olympics-easily-as-ever-and-thats-a-problem/>. Of the qualifying tournament, goalkeeper Ashlyn Harris stated "I always respect my opponents[,] . . . I just want the best for women. I want them to have the same opportunities that I had, and I know that's difficult. I know they probably don't have the voice I do. If I can urge these federations in CONCACAF to continue to invest in these women's teams to give them a better chance to succeed, I think that's the goal. I'm rooting for them. I want everyone to have the access that I do. I also know that's not realistic, and that sucks." *Id.*

208 *Id.*

209 See Dan Wetzel, *No Place for Orange Slices: Why USWNT Was Right to Run Up Score Against Thailand*, YAHOO! SPORTS (June 11, 2019), <https://sports.yahoo.com/why-uswnt-was-right-to-run-up-score-against-thailand-020720143.html>.

210 Aimee Lewis, *US Defends Itself After Humiliating Thailand at Women's World Cup*, CNN (June 12, 2019, 6:56 AM), <https://www.cnn.com/2019/06/11/football/uswnt-womens-world-cup-thailand-record-spt-intl/index.html>.

211 *Id.*

212 See *id.*

213 *Id.*

the women's team has historically generated less revenue for friendlies and is eligible for far less FIFA prize money than the USMNT. However, the Federation's resistance to the USWNT's equal pay overtures and its disastrous "inherent inferiority" legal arguments, described in Section A of Part V, below, have ultimately made the USWNT *more* commercially viable. A report in the *Wall Street Journal* noted the rise in marketing deals centered on equality for women as evidence that "the U.S. women's equal pay-fight has spurred more marketing deals with the federation."²¹⁴ The USWNT home jersey, in which the players secured the team's fourth World Cup title, became the bestselling soccer jersey for men or women ever sold on the retailer's website in one season.²¹⁵ Nike struggled to meet the demand for the jersey following the World Cup.²¹⁶

Perhaps most significantly, an act of protest by the USWNT led to sales of a t-shirt that set a single-day record for the company that produced it, despite going on sale just one hour and forty-three minutes before the end of the day.²¹⁷ After legal filings became public in which USSF contended USWNT players did not perform equal work to USMNT players because they "inherently had less skill, ability and responsibility than men's players[,]” the USWNT players appeared for their next game (just two days later) wearing their pregame warm-up shirts inside out, hiding everything but the outline of the U.S. Soccer crest and, more significantly, the four stars representing the team's four World Cup wins.²¹⁸ T-shirts bearing the "4 Stars Only" empty crest went on sale that same night through a company called BreakingT, which has a licensing agreement with the USWNT players' union.²¹⁹ *Sports Illustrated* reporter Grant Wahl noted this "viral business opportunity" was "the perfect symbolism, a way to show the abject emptiness of the U.S. Soccer Federation while still honoring the players who

214 Rachel Bachman, *U.S. Women's Soccer Games Outearned Men's Games*, WALL ST. J. (June 17, 2019), <https://www.wsj.com/articles/u-s-womens-soccer-games-out-earned-mens-games-11560765600>.

215 Meg Kelly, *Are U.S. Women's Soccer Players Really Earning Less than Men?*, WASH. POST (July 8, 2019), <https://www.washingtonpost.com/politics/2019/07/08/are-us-womens-soccer-players-really-earning-less-than-men/>.

216 Caitlin Murray, *Why Nike Didn't Have Enough USWNT World Cup Jerseys to Meet Demand — and What It Cost the Players and Fans*, YAHOO! SPORTS (Oct. 10, 2019), <https://sports.yahoo.com/why-nike-didnt-have-enough-uswnt-world-cup-jerseys-to-meet-demand-and-what-it-cost-the-players-and-fans-171933947.html>.

217 Grant Wahl, *USWNT Invisible Crest Protest Becomes Hit T-Shirt—and Example of Players' Revenue Potential*, SPORTS ILLUSTRATED (Mar. 16, 2020), <https://www.si.com/soccer/2020/03/16/uswnt-protest-us-soccer-tshirt-crest-four-stars>.

218 *Id.*

219 *Id.*

have led the U.S. to its greatest soccer triumphs.”²²⁰

It should be noted, however, that an argument for equal pay among national teams is not an argument that salaries for men and women employed by the same clubs should be equal. Those clubs do not have nonprofit purposes to consider and can make compensation decisions purely driven by revenue generation and potential. Former Ballon d’Or²²¹ winner Ada Hegerberg, arguably the best player in the sport, is the highest-paid women’s soccer player in the world, earning an annual salary of around \$562,000 (with bonuses) from her club, Olympique Lyonnais.²²² That figure is significantly higher than the highest salaries awarded to players in the other prominent women’s soccer leagues around the world, including, notably, the U.S.²²³ It is also roughly 326 times less than what male superstar Lionel Messi is paid by his club, FC Barcelona.²²⁴ However, it is notable that the clubs that pay the highest women’s salaries are affiliated with successful men’s soccer clubs. These salary figures are dwarfed by the top men’s club salaries, but they show how an infusion of revenue generated by men’s soccer can help make women’s soccer more commercially successful. They also show how important national team compensation is to women players who do not receive the benefit of high club salaries.

Ultimately, the nonprofit missions of both FIFA and its member federations will be better served by making equal pay the standard in women’s national team compensation. That investment should, in turn, increase revenue generated by women’s soccer at both the national team and club level.

²²⁰ *Id.*

²²¹ The Ballon d’Or is one of the most prestigious individual awards in international soccer, typically awarded to the player considered to be the best in the world that year. See Sarah Mervosh & Andrew Das, *Ada Hegerberg Won the Ballon d’Or. Then She Was Asked if She Knew How to Twerk*, N.Y. TIMES (Dec. 3, 2018), <https://www.nytimes.com/2018/12/03/sports/soccer/ada-hegerberg-ballon-dor.html>.

²²² Grant Wahl, *The Intricacies and Ever-Changing Landscape of the Global Market for Women’s Players*, SPORTS ILLUSTRATED (July 6, 2019), <https://www.si.com/soccer/2019/07/06/global-market-womens-soccer-players-uswnt-europe-nwsl>. Hegerberg is Norwegian and famously has refused to play for her national team since August 2017 over equal pay concerns. Kellen Becoats, *Nike Signs Soccer Star Ada Hegerberg Away from Puma with ‘Game Changer’ Step Toward Equal Pay*, FORBES (June 8, 2020, 11:11 AM), <https://www.forbes.com/sites/kellenbecoats/2020/06/08/nike-signs-ada-hegerberg-lyon-equal-pay/#13bd4b843f84>. The Norwegian federation’s equal pay journey is discussed in Sections V.A and V.B, *infra*.

²²³ Wahl, *supra* note 217.

²²⁴ *Lionel Messi*, FC BARCELONA, <https://www.fcbarcelona.com/en/football/first-team/players/4974/lionel-messi> (last visited Jan. 23, 2021); Conor Pope, *Here Are the Highest Paid Women’s Footballers in the World – and How They Compare to the Highest Paid Men*, FOURFOUR TWO (Apr. 2, 2019), <https://www.fourfourtwo.com/us/news/highest-paid-women-footballers-ada-hegerberg-lyon>.

V. MOVING FORWARD: RECOMMENDATIONS TO RESOLVE THE DISPUTE

USSF won an important and significant victory in court—one that research suggests has a 92% chance of being upheld by the appellate court.²²⁵ However, the Federation has bungled the public perception of this case to such an extent that it has given the USWNT bargaining power in what seems to be an inevitable outcome, resolving the dispute through settlement.²²⁶ It is through this court of public opinion that the USWNT may finally be able to achieve its equal pay policy goal. To fully understand the leverage afforded by this public support despite losing in court, it is necessary to examine the sequence of events that led to a change in both USSF's leadership and legal representation.

In early March 2020, when both parties filed oppositions to the other party's motion for summary judgment, USSF's filing garnered intense scrutiny.²²⁷ Up to that point, USSF's arguments, both in court and publicly, had largely centered on revenue disparities between the two teams, flagging the huge difference in FIFA prize money as the primary culprit of any pay wage gap. However, the Federation controversially asserted that the jobs of male and female soccer players are not equal because women are inherently physically inferior.²²⁸ The filing explicitly stated, “[t]he overall soccer-playing *ability* required to compete at the senior men's national team level is materially influenced by the level of certain physical attributes, such as speed and strength, required for the job.”²²⁹

As media reports dissected these ostensibly sexist arguments, USSF sponsors like Coca-Cola, Budweiser, Visa, and Deloitte began speaking out against the Federation.²³⁰ Volkswagen issued a statement declaring it was “disgusted” by U.S. Soccer's “unacceptable” positions, noting “[w]e stand with the USWNT and the ideals they represent for the world, [and] [w]e demand that U.S. Soccer rise up to these values.”²³¹ The next day, USSF President, Carlos Cordeiro, issued a statement apologizing for the legal

225 See Thompson Eisenberg, *Shattering the Glass Ceiling*, *supra* note 153, at 34.

226 See Das, *supra* note 25.

227 See Graham Hays, *U.S. Soccer Chief Apologizes for ‘Offense and Pain’ as USWNT Protests*, ESPN (Mar. 11, 2020), <https://www.espn.com/soccer/united-states-usaw/story/4072953/us-soccer-chief-apologizes-for-offense-and-pain-as-uswnt-protest>.

228 See Defendant's Memorandum of Points and Authorities in Opposition to Plaintiff's Motion for Partial Summary Judgment, *supra* note 67, at 11.

229 *Id.*

230 See Kevin Draper & Andrew Das, ‘Blatant Misogyny’: U.S. Women Protest, and U.S. Soccer President Resigns, N.Y. TIMES (Mar. 12, 2020), <https://www.nytimes.com/2020/03/12/sports/soccer/uswnt-equal-pay.html>.

231 See *id.*

strategy and taking responsibility for not having reviewed the filing before its submission.²³² Cordiero's statement was ironically issued during the waning moments of the USWNT's final game in the She Believes Cup,²³³ an annual four-team, round-robin tournament hosted by U.S. Soccer to provide the USWNT a regular opportunity to play against elite competition.²³⁴ Megan Rapinoe, arguably the most famous women's soccer star in the world, responded to Cordeiro's statement live at the conclusion of ESPN's broadcast of the game, issuing an impromptu, impassioned statement of her own:

To every girl out there, to every boy out there, who watches this team, who wants to be on this team or just wants to live their dream out, you are not lesser just because you are a girl. You are not better just because you are a boy. We are all created equal and should have the equal opportunity to go out and pursue our dreams.²³⁵

The following evening, three days after the controversial filing, Cordeiro resigned.²³⁶ Cindy Parlow Cone, USSF Vice President and former USWNT player, then became the Federation's first female president, and the Federation hired new legal counsel.²³⁷

Collectively, these events tremendously weakened USSF's already precarious position in the court of public opinion.²³⁸ The Federation's victory in court is not enough to repair its damaged reputation. With new leadership and a new legal team in place, USSF seems primed to settle this case.²³⁹ However, the industry-wide shutdown of live crowds at sports events due to the COVID-19 pandemic has severely impacted USSF's revenue, prompting layoffs and other cost-saving measures that may hinder its ability to offer a settlement that will satisfy the USWNT.²⁴⁰ Despite this unforeseen complication, the longer this case drags out, the stronger the public support for the USWNT appears to be growing.²⁴¹ As the two sides presumably work behind the scenes to reach an acceptable settlement before the surviving

232 Hays, *supra* note 227.

233 *See id.*

234 *See* Defendant's Memorandum of Points and Authorities in Opposition to Plaintiff's Motion for Partial Summary Judgment, *supra* note 67, at 15.

235 *See* Hays, *supra* note 227.

236 Draper & Das, *supra* note 230.

237 *Id.*

238 *See* ESPN STAFF, *supra* note 18.

239 *Id.*; *See also* Das, *supra* note 25.

240 *See* Michael McCann, *U.S. Soccer's Financial Standing a Wild Card with Regard to USWNT Lawsuit*, SPORTS ILLUSTRATED (Apr. 21, 2020), <https://www.si.com/soccer/2020/04/21/us-soccer-finances-loan-uswnt-equal-pay-lawsuit>.

241 *See* Das, *supra* note 25.

Title VII claim on unequal working conditions goes to trial, this article recommends specific measures the parties can take to resolve the equal pay dispute and enter into a new collective bargaining agreement.

A. *FIFA Prize Money*

Although Part IV argued FIFA should award equal prize money for its men's and women's World Cup tournaments, the reality facing the USWNT and USSF at the bargaining table is that the prize money from the men's World Cup offers USSF substantially more potential revenue. The parties must find an acceptable solution to this issue whether or not the USWNT retains its guaranteed salary structure or opts for pay-for-play compensation like the USMNT in its next CBA. One possibility is putting the prize money awarded to both teams into a pot and allocating an equal percent of that pot to each team.²⁴² However, the USWNT may not be willing to agree to this plan considering it won the last World Cup while the USMNT failed to qualify. A second option would be to award the teams an equal percentage of the prize money they individually earn. The Norwegian Football Association (FA) recently negotiated a new CBA with its senior men's and women's national teams using this prize money model.²⁴³ Each team will receive 25% of the prize money the FA receives for that team's successful performances.²⁴⁴ However, given the vast difference in prize money available, this structure is more equitable than equal and thereby likely not acceptable to the USWNT.²⁴⁵ A perhaps more appealing compromise would be to give the USWNT a greater percentage of the prize money awarded to USSF as a result of its World Cup success, and the USMNT would receive a smaller percentage of any prize money it earns through World Cup play. USSF would then pay a lump sum to the USWNT players union to cover

242 See Grant Wahl, *Op-Ed: If the Goal Is Equity, the U.S. Women and Men Should Team Up to Bargain with U.S. Soccer*, L.A. TIMES (July 17, 2020, 3:00 AM), <https://www.latimes.com/opinion/story/2020-07-17/equal-pay-soccer-womens-national-soccer-team-world-cup>.

243 See Grant Wahl, *What FIFA and the Rest of the World Can Learn from Norway's Equitable Pay Agreement*, SPORTS ILLUSTRATED (Oct. 8, 2017), <https://www.si.com/soccer/2017/10/08/fifa-women-soccer-equal-pay-norway-gianni-infantino>.

244 *Id.* It should be noted, the Norwegian CBA may have been negotiated with an eye toward equal pay in large part to entice Ada Hegerberg to resume playing for the national team ahead of the 2019 Women's World Cup, but she was not satisfied with this equitable solution and opted not to play in the World Cup. See Bonnie D. Ford, *Why You Won't See Ada Hegerberg, the World's Best Player, at the Women's World Cup*, ESPN (June 5, 2019), <https://www.espn.com/soccer/fifa-womens-world-cup/story/3867349/why-you-wont-see-ada-hegerberg-the-worlds-best-player-at-the-womens-world-cup>.

245 See Wahl, *supra* note 242.

any difference in the prize money paid to the men after the previous year's World Cup after factoring in any other compensation already awarded to the women that year. Settling on an exact formula is beyond the scope of this article, but these are the types of arrangements both sides will need to consider in order to come to an agreeable resolution.

B. *Joint Bargaining*

While the Norwegian model is better described as equitable than equal due to the disparity in potential prize money, it represented a significant shift in the bargaining process for both national teams.²⁴⁶ As part of the deal, the men's team agreed to give up \$69,000 a year in marketing payments that would instead go to the women, along with an increase in the fixed payments paid to the women's team.²⁴⁷ In so doing, the Norwegian FA nearly doubled its fixed payments to the women's team, bringing the annual total to \$751,000 per year, which is exactly the same as what the male players will receive (\$69,000 less than their compensation under the previous CBA).²⁴⁸ Notably, the same union represents both the men's and women's national teams.²⁴⁹

The scathing statement issued by the USMNT union about the USWNT's 2017 CBA notes that the USWNT union typically negotiated their CBA after the men and describes how the two unions have worked together since 1999 with the goal of securing gains in pay and working conditions comparable to the men for the women.²⁵⁰ However, the women negotiated their 2017 CBA towards the end of the USMNT's 2011 CBA, making it easier for USSF to compare the USWNT's proposed compensation to figures agreed to by the USMNT union in 2010.²⁵¹ Thus, having two separate unions not only dilutes the bargaining power of both teams it makes revenue and compensation comparisons nearly impossible, presenting a significant hindrance to the efforts to achieve equal pay. The USWNT and USMNT should form one players' association, like the Norwegian union, in order to have access to the same USSF financial figures at the same moment in time and bargain with USSF together. Doing so will give both teams a stronger, more informed bargaining position and make it more difficult for USSF to use the USMNT's compensation against the USWNT

246 *Id.*

247 *Id.*

248 *Id.*

249 *Id.*

250 USMNT Statement, *supra* note 50.

251 *See id.*

in negotiations. Perhaps it will also result in a more similar compensation structure so that the two teams could better analyze their relative equality. In a recent *L.A. Times* op-ed, soccer journalist Grant Wahl advocated for this joint-bargaining structure, noting that “[t]he two . . . teams would have more leverage together, especially with the threat of a double-barreled work stoppage heading into 2022, when the men’s World Cup is scheduled.”²⁵² Wahl also noted that bargaining together would not require the teams to secure the exact same compensation terms, but instead would give them the opportunity to “creatively determin[e] what they view as ‘equal pay,’ while maintaining strict equity on apples-to-apples comparisons, such as travel support.”²⁵³

C. *Separate Sponsorships*

In its court filings, USSF admitted that its joint marketing of broadcast and sponsorship rights for the USWNT, USMNT, and other USSF properties makes it “impossible” to break down how those key revenues are allocated between the two teams.²⁵⁴ However, in the summer of 2019, Visa announced a five-year partnership with USSF in which over half of the funds are contractually required to support women’s soccer.²⁵⁵ Thus far, Visa’s unusual stance on formalizing how its sponsorship dollars are allocated is an anomaly among USSF partners, though other sponsors have made public statements in support of the USWNT’s fight for equal pay.²⁵⁶ Notably, Secret, a partner of USSF since March 2019, took out a full-page ad in the *New York Times* a week after the 2019 Women’s World Cup to announce it would donate \$529,000 to the USWNT player’s association (\$23,000 for each of the 23 players) to “help close the . . . gender pay gap.”²⁵⁷

USSF should allow separate sponsors for each senior national team. There can still be larger joint sponsors that support both teams as well as other USSF properties, but allowing individual team sponsors will

252 Wahl, *supra* note 242.

253 *Id.*

254 See Plaintiff’s Notice of Motion and Motion for Partial Summary Judgment; Memorandum of Points and Authorities in Support at 14, *Morgan v. U.S. Soccer Fed’n, Inc.*, 445 F. Supp. 3d 635, (C.D. Cal. 2020) (No. 2:19-cv-01717-RGK-AGR), ECF No. 170.

255 Kevin Draper, *Pushed by Consumers, Some Sponsors Join Soccer’s Fight over Equal Pay*, N.Y. TIMES (Aug. 5, 2019), <https://www.nytimes.com/2019/08/05/sports/soccer/womens-soccer-nike-sponsors.html>.

256 *Id.*

257 See *id.*; Secret Deodorant (@secretdeodorant), TWITTER (July 14, 2019, 5:25 AM), <https://twitter.com/SecretDeodorant/status/1150335540354584576?s=20>.

provide U.S. Soccer with a more accurate reflection of the revenue each team is generating when making compensation decisions. The USWNT has demonstrated its commercial viability independent of the USMNT, particularly in the aftermath of the 2019 Women's World Cup, and it should be rewarded for that success.

D. *NWSL Salaries*

At a minimum, the NWSL salaries should be removed from the USWNT CBA, separately negotiated, and memorialized in a separate contract. USSF is clearly counting the NWSL salaries as a benefit paid out to the USWNT players under their CBA. Actually, it is separate work from, and in addition to, the players' national team duties, and it should therefore be paid separately. For those same reasons, it should not be counted in any comparative compensation calculations for purposes of determining whether USSF has paid the USWNT a lesser rate of pay than the USMNT.

Recent increases in outside investment in the league suggest U.S. Soccer may step back from its role in subsidizing national team player salaries.²⁵⁸ In January 2020, the ownership group of French soccer club Olympique Lyonnais, which operates successful men's and women's club teams, acquired an 89.5% operating stake of the NWSL team based in the Seattle area.²⁵⁹ More recently, in July 2020, the NWSL announced an expansion team in Los Angeles beginning in 2022.²⁶⁰ The team, tentatively referred to as Angel City, is owned by more than thirty people, the vast majority of whom are women.²⁶¹ Notable owners include actresses Natalie Portman, Jennifer Garner, Eva Longoria, Jessica Chastain, and Uzo Aduba; Mia Hamm, Abby Wambach, Julie Foudy, Lauren Holiday, and other former national team players; and Serena Williams, her tech entrepreneur husband Alexis Ohanian, and their two-year-old daughter Olympia.²⁶² In an interview with the *New York Times*, club president Julie Uhrman noted part of the owners' mission in investing in the team was "embracing the fight for pay equity for women [athletes] by bolstering media coverage of the

258 See, e.g., Meg Linehan, *Angel City's Alexis Ohanian and Julie Uhrman on a Shared Vision for NWSL in LA*, ATHLETIC (July 21, 2020), <https://theathletic.com/1941373/2020/07/21/ohanian-uhrman-angel-city-nwsl-la/>.

259 See *NWSL's Reign FC Acquired by French Powerhouse OL Groupe*, ASSOCIATED PRESS (Dec. 19, 2019), <https://apnews.com/b93abe08c972d931d3c58e5dd51a1b8b>.

260 Avi Creditor, *NWSL Reveals 2022 Los Angeles Expansion Team with Loaded Ownership Group*, SPORTS ILLUSTRATED (July 21, 2020), <https://www.si.com/soccer/2020/07/21/nwsl-los-angeles-expansion-angel-city-ownership-group>.

261 See *id.*

262 *Id.*

league, securing new sponsorships and, ultimately, creating stronger revenue streams through increased viewership.”²⁶³ With such high-profile ownership, Angel City FC earned an estimated \$31 million media value across media platforms without spending anything on marketing.²⁶⁴ If this early interest is an indication of future success, it will bolster the value of the entire league and help the players achieve the kind of financial security male national players enjoy through their respective club contracts.

263 Gillian R. Brassil, *New Women's Soccer Team, Founded by Women, Will Press Equal Pay Cause*, N.Y. TIMES (July 21, 2020), <https://www.nytimes.com/2020/07/21/sports/soccer/angel-city-fc-nwsl.html>.

264 See Alexis Ohanian, *Angel City: Initializing a Women's Football Club in Los Angeles*, MEDIUM (July 29, 2020), <https://medium.com/initialized-capital/angel-city-initializing-a-womens-football-club-in-los-angeles-bd226d17748>.

CONCLUSION

It is no secret that men's soccer is vastly more popular and generates significantly more revenue than women's soccer in most, if not all, parts of the world. The USWNT, however, has proven that there can be an exception to this ostensible rule. Through its unprecedented success, particularly in comparison to the USMNT, it has built a tremendous following and platform and used that platform to advocate for equal pay. Despite this public support, there appears to be little hope the USWNT will prevail in its lawsuit against the Federation. However, as one writer noted, while the primary purpose of the lawsuit was equal pay, its secondary purpose was visibility: “[v]isibility for [the players] and for other chronically underpaid women’s teams[;] [v]isibility for the lack of opportunities girls and women have in sports compared to boys and men[;] [v]isibility for what U.S. Soccer says it stands for: to ‘promote and govern soccer in the U.S. in order to make it the pre-eminent sport recognized for excellence in participation, spectator appeal, international competitions, and gender equality.’”²⁶⁵ This visibility has given the USWNT leverage to settle the case with USSF and in future CBA negotiations.

As a matter of policy, however, USSF, FIFA, and other national federations should adopt an equal pay standard.²⁶⁶ Equal pay is an essential component in developing and growing the game of women's soccer around the world. It is an investment in women—in their skill and competitive spirit—that has the potential to yield substantial returns for FIFA and its national member associations in the form of increased ticket sales, TV ratings, and sponsorships. Not only does it make economic sense, but it also furthers the well-documented nonprofit missions of FIFA, USSF, and the other national federations. The growth and development of women's soccer are essential to these organizations' charitable purposes precisely because the game provides an opportunity to positively impact women's freedom and equality, which are still restricted in many parts of the world. As one writer noted, human rights are not “separate from women's soccer[;]” they are “a

265 Seth Vertelney, *Lose the Battle, Win the War? Why USWNT's Equal Pay Defeat Isn't a Total Catastrophe*, GOAL (May 5, 2020), <https://www.goal.com/en-us/news/uswnt-equal-pay-defeat-not-total-catastrophe/ljersb5mtfyw1f9ndusayral>.

266 In fact, England and Brazil, two elite federations, recently announced they have been paying their women's and men's players equally in terms of match fees, bonuses, and prizes. See Andrew Downie et al., *England's Men's and Women's Teams Receive Equal Pay*, *Says EA*, REUTERS (Sept. 3, 2020), <https://www.reuters.com/article/us-soccer-brazil-pay/brazil-pay-for-mens-and-womens-national-teams-idUSKBN25U101>.

defining aspect.”²⁶⁷ No matter the final outcome of the USWNT’s lawsuit against USSF, these arguments for investing in women’s soccer remain firm.

Unfortunately, while both FIFA and USSF were in a strong financial position to make moves toward equal pay before the COVID-19 pandemic, the industry-wide shutdown of all sports across the world has cost both of these entities a significant amount in projected 2020 revenue and beyond.²⁶⁸ One analysis estimated the sudden shutdown of the sports industry would wipe out at least \$12 billion in expected revenue.²⁶⁹ That’s in the U.S. alone, and that’s the economic reality both USSF and the USWNT will be facing as they negotiate a settlement to resolve their equal pay dispute. There were no easy answers pre-COVID, given the fundamentally different structures of the USMNT and USWNT compensation packages. Resolution now becomes more difficult as the full extent of the pandemic’s impact on the world economy remains unknown. What is known, however, and what should remain at the forefront of USSF’s and FIFA’s minds when making decisions about compensation for women’s national teams, is the impact equal pay will have on the growth and development of the women’s game in the United States and across the globe.

267 Allison Cary, *Falling in Love with France*, BACKLINE SOCCER (Apr. 29, 2020), <https://www.backlinesoccer.com/post/falling-in-love-with-france>.

268 See McCann, *supra* note 240; Arvind Sriram, *FIFA to Release \$150 Million to Member Associations Due to COVID-19 Pandemic*, REUTERS (Apr. 24, 2020), <https://www.reuters.com/article/us-health-coronavirus-soccer-fifa/fifa-to-release-150-million-to-member-associations-due-to-covid-19-pandemic-idUSKCN22623U>. However, FIFA has announced its plan to invest \$1 billion in women’s soccer from 2019 to 2022 will continue despite the financial impact of the coronavirus pandemic. Suzanne Wrack, *FIFA Says Planned £800m Investment in Women’s Football Will Not Be Cut*, GUARDIAN (Apr. 20, 2020), <https://www.theguardian.com/football/2020/apr/20/fifa-says-1bn-investment-in-womens-football-will-not-be-cut>.

269 ESPN Staff, *Sudden Vanishing of Sports Due to Coronavirus Will Cost at Least \$12 Billion, Analysis Says*, ESPN (May 1, 2020), https://www.espn.com/espn/otl/story/_/id/29110487/sudden-vanishing-sports-due-coronavirus-cost-least-12-billion-analysis-says.