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An Even Playing Field: The Goal of Gender Equity in World Cup Soccer

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The United States Women's National Soccer Team has dominated the sport since the inaugural Women's World Cup in 1991. Despite its success on the field, however, the team has had a contentious relationship over the last three decades with the United States Soccer Federation, the sport's governing body in the United States. The ongoing discord between the Women's National Team and the U.S. Soccer Federation culminated in March 2019, when twenty-eight players from the team filed a lawsuit alleging that the Federation had violated the Equal Pay Act by paying them less than it paid members of the Men's National Team.

This Article traces the history of strife between the Women's National Team and the U.S. Soccer Federation. The troubled relationship is a result of the mismatch between the team's superior results but lower pay compared to the Men's National Team. This mismatch has its roots in competing legal and societal forces. On the one hand, Title IX caused an explosion in the participation rate for women's soccer in the United States, which has led to the Women's National Team's unprecedented success. On the other hand, with the exception of the World Cup finals every four years, the viewership market for women's soccer remains much smaller than the market for men's soccer, which has resulted in lower revenue generation by the Women's National Team compared to the far less successful Men's National Team.

After explaining the history and cause of the turmoil between the Women's National Team and the U.S. Soccer Federation, this Article analyzes the merits of the players' Equal Pay Act claim. The Article contends that the Federation has the stronger position on the merits of the claim, but further argues that the Federation should renegotiate the Women's National Team's collective bargaining agreement in light of the Federation's mission of "gender equality." The Article proposes specific principles that might guide that renegotiation and lead to a successful resolution of the long-standing tensions between the Women's National Team and the U.S. Soccer Federation.

INTRODUCTION

Chants of "Equal Pay!" rang through France's Stade de Lyon immediately following the victory by the United States Women's National Soccer Team over the Netherlands in the finals of the 2019 Women's World Cup. Those same chants erupted at the ticker-tape victory parade in New York City celebrating the team

after its return from France. And who could argue against the idea that the U.S. women deserve to be treated equally, particularly given their success on the field?

The Women's National Team (WNT) is the most dominant national soccer team in the sport's history. With its victory in the 2019 Women's World Cup, the WNT has won four of the eight World Cup tournaments held for women.¹ That is the highest percentage of World Cup victories for any national soccer team, men or women.² In contrast, the United States Men's National Team (MNT) has failed to progress beyond the quarterfinal round of the quadrennial Men's World Cup since the inaugural men's tournament in 1930. The MNT did not even qualify for the most recent Men's World Cup in 2018.³

Yet despite its victories on the field and its success compared to the men's team, the WNT has struggled to achieve what its players consider equal pay and equal treatment from the United States Soccer Federation ("Federation" or "USSF"), the governing body for the sport of soccer in the United States. Over the last several decades, WNT players have alleged that the Federation has favored the MNT with more generous financial arrangements and better treatment. The long-term frustrations of WNT players were expressed in a letter by their

¹ Morgan Turner, *Past Women's World Cup Champions*, SPORTS ILLUSTRATED (June 7, 2019), <https://www.si.com/2019/06/07/womens-world-cup-winners-list-past-champions-finals> [<https://perma.cc/27JD-UX82>]. At the time of the WNT's first victory, in 1991, the tournament was called the "FIFA World Championship for Women's Football for the M&M's Cup." See CAITLIN MURRAY, *THE NATIONAL TEAM: THE INSIDE STORY OF THE WOMEN WHO CHANGED SOCCER 25* (2019) (internal quotation omitted). Despite the different name, that tournament was the preeminent international tournament for women's national teams and was what is today called the "Women's World Cup." The comparable tournament for men is technically called the "FIFA World Cup." Throughout this Article, the terms "Women's World Cup" and "Men's World Cup" are used to refer to these tournaments and distinguish between the women's and men's competitions. Both tournaments are held every four years, with the most recent Men's World Cup in 2018 and the most recent Women's World Cup in 2019.

² The most successful men's team, Brazil, has won five of twenty-two Men's World Cup tournaments. Tim Hackett, *List of World Cup Winners*, SPORTS ILLUSTRATED (June 11, 2018), <https://www.si.com/soccer/2018/world-cup-winners-list-past-history-champions-final> [<https://perma.cc/E9GE-N3FT>].

³ The best showing by the MNT in the Men's World Cup was in 1930 when it secured third place. Since then, the best result for the MNT has been a quarterfinal loss in the 2002 World Cup. The MNT failed to qualify for the 2018 World Cup when it lost 2–1 to Trinidad and Tobago on October 10, 2017. Andrew Das, *United States Misses World Cup for First Time Since 1986*, N.Y. TIMES (Oct. 10, 2017), <https://www.nytimes.com/2017/10/10/sports/soccer/usmnt-trinidad-world-cup.html> [<https://perma.cc/N9ZV-3AS2>].

attorney to the United States Olympic Committee in November 2004.⁴ The letter cataloged some of the players' complaints of mistreatment, including:

- discriminatory statements by Federation representatives that the Federation would not have a women's national team if it were not required;
- unequal pay compared to the men's team;
- unequal support with respect to matters such as equipment managers, trainers, massage therapists, meals, hotel accommodations, and transportation;
- unwillingness of the Federation to provide financial backing to the then-existing women's professional league, despite granting substantial financial support to the men's professional league; and
- lack of marketing support for the women's team.⁵

Since the time of that letter, the Federation has addressed some of these issues. For example, over the last several years the Federation has publicly celebrated the success of the women's team and recognized the positive impact the team has had on the sport of soccer.⁶ Moreover, since 2013 the Federation has made significant and ongoing financial investments in the domestic professional women's league, the National Women's Soccer League.⁷

⁴ See *Olympic Family—Functional or Dysfunctional?: Hearing on H.R. 521-26 Before the H. Subcomm. on Immigration, Border Security, and Claims of the H. Comm. on the Judiciary*, 109th Cong. 49–56 (2005) (letter from John B. Langel, Attorney, Ballard Spahr Andrews & Ingersoll LLP, to Jim Scheer, Acting Chief Exec. Officer & Chief of Sports Performance, U.S. Olympic Comm. (Nov. 15, 2004)).

⁵ *Id.* In addition to these comments about the WNT specifically, Sepp Blatter, the former head of FIFA (the governing body of international soccer), made discriminatory and derogatory public comments in 2004 when he stated that women's soccer would attract more attention from prospective viewers if the players wore tighter shorts. See Marcus Christenson & Paul Kelso, *Soccer Chief's Plan to Boost Women's Game? Hotpants*, *GUARDIAN* (Jan. 15, 2004, 9:42 PM), <https://www.theguardian.com/uk/2004/jan/16/football.gender> [<https://perma.cc/G3QN-3VH8>].

⁶ See Planet Fútbol (@si_soccer), *TWITTER* (Mar. 31, 2016, 10:42 AM), https://twitter.com/si_soccer/status/715595145907933185 [<https://perma.cc/AWB6-8ETW>] (stating “Our [the Federation’s] efforts to be advocates for women’s soccer are unwavering. For 30 years, we have been a world leader in promoting the women’s game and are proud of the long-standing commitment we have made to building women’s soccer in the United States and furthering opportunities in soccer for young women and girls around the world. This includes leading the successful campaign to introduce women’s soccer in the Olympics in 1996, the inclusion of prize money for the Women’s World Cup, and the establishment and support of the National Women’s Soccer League, which is now in its fourth year of play.”).

⁷ In an open letter released July 29, 2019, Federation President Carlos Cordeiro claimed that the Federation has invested “approximately \$18 million” in the National Women’s

Despite these positive developments, however, some of the issues identified in 2004 persist, and other new concerns have arisen. Specifically, the WNT players still assert that they are underpaid in comparison to the MNT players. In addition, the current WNT players point out that the Federation requires them to play their games on artificial turf more frequently than the MNT,⁸ which presents a greater risk of injury and diminishes the quality of the game. WNT players also note that they do not receive the same travel benefits as the MNT, exemplified by the fact that MNT traveled by chartered flights seventeen times in 2017, while that same year the WNT did not travel even once by chartered flight.⁹ These new grievances and the consistent claim of unequal pay led twenty-eight current WNT players to file a lawsuit in March 2019 alleging that the Federation has engaged in gender discrimination and violated the Equal Pay Act.

The WNT players' lawsuit has attracted extensive media attention and even resulted in proposed federal legislation.¹⁰ Part I of this Article explains the background of the dispute between the WNT players and the Federation. Part II examines a potential reason for the long-term tension between the parties. Part III describes the major differences between the WNT's collective bargaining agreement and the MNT's collective bargaining agreement. Part IV assesses the strengths of the WNT players' claim of unequal pay against the Federation. Finally, Part V discusses possible ways to address the concerns raised by the WNT players.

Soccer League "over the years." Letter from Carlos Cordeiro, President, U.S. Soccer, to U.S. Soccer Membership (July 29, 2019) [hereinafter Cordeiro Letter to Membership], <https://www.ussoccer.com/governance/board-of-directors/us-soccer-president-carlos-cordeiro/open-letter-july-29-2019-finding-common-ground> [<https://perma.cc/2S4W-WYLH>]. The Federation pays the salaries for most of the WNT players who play in the league. In fiscal years 2017 and 2018, for example, the Federation spent \$2.4 million and \$1.7 million on the NWSL, respectively. See U.S. SOCCER FED'N, 2018 ANNUAL GENERAL MEETING BOOK OF REPORTS § IV (Jan. 10, 2018), <https://www.flipsnack.com/ussoccer/2018-u-s-soccer-agm-book-of-reports.html> [<https://perma.cc/VS7Z-24QK>] [hereinafter U.S. SOCCER FED'N] (proposing a budget for fiscal year 2019).

⁸ Plaintiffs' Collective Action Complaint for Violations of the Equal Pay Act and Class Action Complaint for Violations of Title VII of the Civil Rights Act of 1964 ¶ 70, *Morgan v. U.S. Soccer Fed'n, Inc.*, No. 2:19-cv-01717 (C.D. Cal. Mar. 8, 2019) [hereinafter Plaintiffs' Collective Action Complaint].

⁹ *Id.* ¶ 73, at 13.

¹⁰ Shanna McCarriston, *Legislation Supporting USWNT's Fight for Equal Pay Introduced in Congress*, CBS SPORTS (July 23, 2019, 11:35 AM), <https://www.cbssports.com/soccer/news/legislation-supporting-uswnts-fight-for-equal-pay-introduced-in-congress/> [<https://perma.cc/ZG4C-LZKM>].

I

BACKGROUND OF THE CURRENT DISPUTE

The current dispute between the WNT players and the Federation involves allegations of unequal pay and disparate treatment compared to the MNT, particularly related to playing surfaces and travel accommodations. Those inequalities are reflected in the two teams' separate collective bargaining agreements. Before examining those agreements in detail, however, it is helpful to understand that the specific allegations at the root of the WNT players' current lawsuit come in the context of a long and contentious relationship between the Federation and generations of WNT players.

The origin for claims of mistreatment began as early as the mid-1980s when the Federation first fielded a women's national team.¹¹ At that time, international soccer competitions for women were just starting, there was no women's professional league, and players were treated by the Federation as the amateurs they were. The first WNT to compete internationally was cobbled together in 1985, practicing for less than a week before playing in a competition called the "Mundialito."¹² Given their minimal preparation for the tournament, it was not surprising that the team finished last among the four national teams participating.¹³ The cavalier approach taken by the Federation toward both the WNT and the tournament was exemplified by the uniforms that the women wore: oversized hand-me-downs with USA decals ironed on them.¹⁴

Six years later at the first Women's World Cup, the team was much more organized, with legendary UNC coach Anson Dorrance leading the team. Even so, in 1991 the women's international game was still in its earliest developmental stages, particularly compared to the men's game, which had been holding World Cup tournaments since 1930. The 1991 Women's World Cup, hosted by China, was not even televised in the United States. The difference in the men's and women's games was further demonstrated by the comparative treatment of the MNT and the WNT at the time by the Federation. When the MNT qualified for the 1990 Men's World Cup, each player on the MNT received a \$10,000

¹¹ See MURRAY, *supra* note 1, at 3–12 (summarizing the establishment of the first WNT and the experiences of the players on that team).

¹² See *id.* at 4–5.

¹³ See *32 Years of USWNT Glory*, FIFA (Aug. 18, 2017), <https://www.fifa.com/womens-football/news/32-years-of-uswnt-glory-2904417> [<https://perma.cc/3XRR-F4QM>] [hereinafter *32 Years of USWNT Glory*]. See also MURRAY, *supra* note 1, at 4–5.

¹⁴ See MURRAY, *supra* note 1, at 4–5.

bonus from the Federation. The MNT then proceeded to lose all three games they played in the tournament and were eliminated in the first round. In contrast, when the WNT qualified for the 1991 Women's World Cup, they did not receive a bonus payment. Instead, each player on the team received two T-shirts from the Federation.¹⁵ When the WNT went on to outscore their opponents 25–5 and win the inaugural Women's World Cup tournament, the players each received only a \$500 bonus payment from the Federation.¹⁶

Tensions between the players and the Federation increased in the mid-1990s when nine WNT players threatened to sit out the 1996 Olympic Games if they did not receive medal bonuses on the same terms as the men's Olympic soccer team.¹⁷ Initially, the Federation proposed that the WNT players would receive a bonus only if the team won the gold medal, while the men would receive a bonus for winning gold, silver, or bronze. In response to the threat by the nine players to sit out the tournament, the Federation locked those players out of a pre-Olympics training camp.¹⁸

The dispute was eventually resolved when the Federation agreed to pay the WNT players a bonus for winning either gold or silver. At the

¹⁵ *Id.* at 18.

¹⁶ *See id.* at 7–12. Just the year before, FIFA had awarded approximately \$500,000 in prize money to the winner of the 1990 Men's World Cup. *See* FIFA, COMMC'NS & PUB. AFFAIRS DIV., OFF THE PITCH, STATISTICAL KIT 6, https://www.fifa.com/mm/document/fifafacts/mencompwc/51/97/64/fwc_kit-6_ofthepitch.pdf [<https://perma.cc/Y55S-KZUT>] (giving prize money statistics for the Men's World Cup dating back to 1982). In the 1990 Men's World Cup, the football association for the winning men's team (Argentina) received 667,127 Swiss francs, which equated under the then current exchange rate to approximately \$484,000. *U.S. Dollar to Swiss Franc Spot Exchange Rates for 1990 from the Bank of England*, POUNDSTERLING LIVE, <https://www.poundsterlinglive.com/bank-of-england-spot/historical-spot-exchange-rates/usd/USD-to-CHF-1990> [<https://perma.cc/7H4L-X4CM>] (last visited Feb. 9, 2020). FIFA did not award prize money in the Women's World Cup until the fifth tournament in 2007. Nick Harris, *Number-Crunched: The Rise and Rise of the Women's World Cup*, SPORTING INTELLIGENCE (June 1, 2015), <http://www.sportingintelligence.com/2015/06/01/number-crunched-the-rise-and-rise-of-the-womens-world-cup-010601/> [<https://perma.cc/LPD3-LXYN>].

¹⁷ Under Olympic rules, the senior women's national team is permitted to participate in Olympic competition. On the men's side, teams are permitted to field only three players older than twenty-three years old, with the rest of the team composed of players under twenty-three. Consequently, the full senior MNT does not participate in Olympic competitions. *See International Association Football Federation*, OLYMPIC.ORG, <https://www.olympic.org/international-association-football-federation> [<https://perma.cc/2SLR-ZTS5>] (last visited Feb. 9, 2020).

¹⁸ *See* Grahame L. Jones, *Women Soccer Players Boycott Olympic Camp: Atlanta Games: Dispute Involving Top U.S. Players Hinges on Rejection of Contract Offers*, L.A. TIMES (Dec. 6, 1995, 12:00 AM), <https://www.latimes.com/archives/la-xpm-1995-12-06-sp-10918-story.html> [<https://perma.cc/B34L-HKEJ>].

same time, the men's team competed under a separate arrangement and were still entitled to receive a bonus for winning any medal—gold, silver, or bronze. Ultimately, the WNT went on to win the gold medal at the 1996 Olympics, the first Olympic Games with women's soccer as a medal sport. The men's team failed to finish in the top three.¹⁹ Consequently, the WNT players received a \$20,000 bonus for their performance, while the men's team received no bonus.²⁰ Although the WNT players did not achieve their goal of equal treatment to the men's team, they successfully used the threat of sitting out the competition to improve their position with the Federation.

The next, and perhaps most important, step in the development of women's soccer in the United States came in 1999 when the country hosted the Women's World Cup. The marketing budget for the tournament was approximately 10% of the amount spent to market the 1994 Men's World Cup, also held in the United States.²¹ At the time, most WNT players maintained second jobs because no women's professional league existed, and their national team wages were insufficient to allow them to devote all their time to playing soccer.²² Despite the part-time status of WNT players and the Federation's substantially lower investment in the Women's World Cup compared to the Men's World Cup five years earlier, the American public rallied behind the team, and excitement built as the team ran through its opponents. By the time the WNT reached the finals of the tournament, it had captured the nation's attention. The WNT played the final game against China before a sold-out Rose Bowl crowd of 90,000 spectators and won in a dramatic shoot-out victory.²³

As a result of their first-place finish, WNT players received bonuses of around \$50,000 each, with \$12,500 of this bonus coming from the Federation. The rest came from the tournament's organizing committee, which made an unexpected profit due to the significant public interest that developed around the team and the resulting ticket sales.²⁴ The bonus for winning the tournament represented a substantial increase over the \$500 bonuses received by members of the 1991 WNT after winning the inaugural Women's World Cup eight years earlier,

¹⁹ THE INT'L OLYMPIC COMM., *Atlanta 1996: Football*, OLYMPIC GAMES, <https://www.olympic.org/atlanta-1996/football> [<https://perma.cc/AS4R-JQ9V>].

²⁰ MURRAY, *supra* note 1, at 23.

²¹ *Id.* at 27.

²² *Id.* at 31.

²³ *32 Years of USWNT Glory*, *supra* note 13.

²⁴ MURRAY, *supra* note 1, at 53.

but it still paled in comparison to financial benefits available to the men's team. In 1998, MNT players received \$25,000 each for simply qualifying for the Men's World Cup. If the men had won the tournament, they each would have received \$388,000.²⁵ The MNT did not win the 1998 Men's World Cup, however, scoring only a single goal while losing all three of its first-round games and finishing last in the tournament.²⁶

After the 1999 Women's World Cup, the WNT engaged in lengthy and difficult collective bargaining agreement negotiations with the Federation. During the course of these negotiations, the WNT players again threatened not to play in the upcoming 2000 Olympic Games if an agreement could not be reached. But a deal eventually was reached, and for the first time the Federation provided WNT players with guaranteed compensation. This meant that team members would no longer experience the same degree of financial pressure, which had required many players to hold second jobs on top of playing soccer at the highest level of international competition.²⁷

In the years following the 1999 Women's World Cup, and in the wake of the huge upsurge in public support for the WNT, two professional women's leagues started and failed. The Women's United Soccer Association (WUSA) was founded in 2000 and folded after its third season in 2003.²⁸ Women's Professional Soccer (WPS) also lasted just three seasons, starting in 2009 and ceasing operations in 2012.²⁹ Unlike the men's domestic professional league, known as Major League Soccer (MLS), neither of these first two women's professional leagues received substantial financial assistance from the

²⁵ *Id.*

²⁶ *1998 FIFA World Cup France, Matches*, FIFA, <https://www.fifa.com/worldcup/archive/france1998/matches/index.html> [<https://perma.cc/VGX2-HB4A>] (last visited Feb. 7, 2020). Popular soccer commentator Roger Bennett created a podcast series entitled "American Fiasco" detailing the debacle of the MNT in the 1998 Men's World Cup. *American Fiasco*, NAT'L PUB. RADIO, <https://www.npr.org/podcasts/614158307/american-fiasco> [<https://perma.cc/PTB8-EJ2T>].

²⁷ MURRAY, *supra* note 1, at 66.

²⁸ Gretchen Miller, Jonathan Scheyer & Emily Sherrard, *Women's United Soccer Association*, SOCCER POLITICS, <https://sites.duke.edu/wcwp/research-projects/womens-soccer-in-the-u-s/womens-soccer-after-1999/womens-united-soccer-association/> [<https://perma.cc/M2KS-W966>] (last visited Feb. 9, 2020).

²⁹ *WPS Suspends Play for 2012 Season*, WOMEN'S PROF. SOCCER (Jan. 30, 2012, 1:00 PM), https://web.archive.org/web/20120218063335/http://www.womensprosoccer.com/Home/news/press_releases/120130-wps-suspends-2012season.aspx [<https://perma.cc/8XDN-BSJE>].

Federation.³⁰ The Federation's refusal to provide financial assistance to the WUSA or the WPS while granting millions of dollars of aid to the MLS fueled complaints of unequal treatment from some of the top WNT players.³¹

Despite its reluctance to back the first two attempts at women's professional leagues, in 2013 the USSF decided to put its financial support behind a third women's professional league, the National Women's Soccer League (NWSL). In a recent statement, USSF President Carlos Cordeiro said that the Federation has invested more than \$18 million in the NWSL over the last seven years, including paying the NWSL salaries for most of the WNT members playing in the league.³²

Yet even with the Federation's increased investment in women's professional soccer, tension between the WNT players and the Federation has continued. In 2016, the Federation filed a lawsuit against the WNT Players Association seeking a declaration that WNT players were not permitted under the terms of their then-existing collective bargaining agreement to strike prior to the 2016 Olympic Games.³³ The Executive Director of the Players Association had suggested to Federation representatives that the players would consider a strike unless a more favorable collective bargaining agreement could be reached following the WNT's victory in the 2015 Women's World Cup. The Illinois federal district court hearing the matter granted summary judgment for the Federation, finding that the WNT Players Association was subject to the collective bargaining agreement's "no strike" clause until December 31, 2016, after the 2016 Olympic Games.

Also in 2016, five WNT players filed a complaint with the Equal Employment Opportunity Commission (EEOC) claiming wage discrimination against the Federation.³⁴ According to the complaint,

³⁰ See MURRAY, *supra* note 1, at 80–84.

³¹ See *id.* at 83 (quoting WNT player Julie Foudy as stating, "[The USSF] had given \$10 million for MLS and we couldn't even get them to support a women's league.").

³² Andrew Das, *U.S. Soccer Says It Pays Women's Team More Than Men's Team*, N.Y. TIMES (July 29, 2019), <https://www.nytimes.com/2019/07/29/sports/soccer/us-soccer-equal-pay.html> [<https://perma.cc/L2D5-VBT5>].

³³ See *U.S. Soccer Fed'n, Inc. v. U.S. Women's Nat'l Soccer Team Players Ass'n*, 190 F. Supp. 3d 777 (N.D. Ill. 2016).

³⁴ 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> [<https://perma.cc/36ZY-LB4Z>] [hereinafter *Top Female Players*]; Juliet Spies-Gans, *USWNT Files Lawsuit Against U.S. Soccer in Fight for Equal Pay*, HUFFPOST (last updated Apr. 1, 2016), <https://www.huffpost.com>.

“The Federation pays top tier WNT players between 38% and 72% of the compensation the MNT players earn on a per game basis.”³⁵ Hope Solo, who at the time was the WNT’s goalkeeper and was one of the five players who signed the complaint with the EEOC, told the New York Times that the men’s team players “get paid more just to show up than we get paid to win major championships.”³⁶ In August 2018, Solo filed a complaint against the Federation in the Federal District Court for the Northern District of California alleging Equal Pay Act and Title VII violations.³⁷ A little more than six months later, the twenty-eight members of the current WNT player pool followed Solo’s lead, filing a separate lawsuit with the same claims against the Federation in the Federal District Court for the Central District of California.

II

AN EXPLANATION FOR THE LONG-STANDING TENSIONS

The brief history set forth above explains the context for the current lawsuit by WNT players against the Federation, but it does not explain the underlying cause for the persistently contentious relationship between the Federation and the players. One answer may be the disconnect between the extraordinary success of the team, particularly compared to the MNT, and the smaller audience for women’s soccer compared to men’s soccer. As for its success, the WNT has benefited, at least in the past, from a competitive advantage against its on-field opponents because of Title IX, the landmark 1972 federal legislation that caused a huge increase in female sports participation in the United States.³⁸ At the same time, the WNT has suffered from the structural disadvantage of the discriminatory viewing habits of the sports-spectating public. These discriminatory habits have resulted in a smaller market for the “product” of women’s soccer as compared to men’s soccer. The consequence of this smaller market has been lower revenue generation and, ultimately, less favorable economic terms in the WNT’s collective bargaining agreement with the Federation compared to the MNT’s collective bargaining agreement. It is perhaps

com/entry/uswnt-wage-discriminatory-suit-us-soccer_n_56fd33c3e4b0a06d5804ecac [https://perma.cc/TCU5-WPWE] (including a copy of complaint attached to the article).

³⁵ See Spies-Gans, *supra* note 34.

³⁶ *Top Female Players*, *supra* note 34.

³⁷ See Complaint for Violation of the Equal Pay Act & Discrimination & Demand for Jury Trial, *Solo v. U.S. Soccer Fed’n*, No. 3:18-cv-05215 (N.D. Cal. Aug. 24, 2018).

³⁸ ANDREI MARKOVITS, *WOMEN IN AMERICAN SOCCER AND EUROPEAN FOOTBALL: DIFFERENT ROADS TO SHARED GLORY* 98–105 (2019).

these competing structural forces—the advantage of Title IX and the disadvantage of a smaller market of spectators for women’s soccer than men’s soccer—that has played a significant part in the long-standing tension between the WNT players and the Federation.

A. Title IX’s Impact

Title IX states that “[n]o person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance”³⁹ Through the Civil Rights Restoration Act of 1987 (CRRA), Congress clarified that “Title IX applies directly to school athletic programs so long as any part of the school receives federal funding.”⁴⁰ The result of Title IX and the CRRA has been a dramatic increase in female sports participation. A report issued on the fortieth anniversary of Title IX by the National Coalition for Women and Girls in Education (NCWGE) detailed the impact of the law:

During the 1971–72 school year, immediately before [Title IX] passed, fewer than 300,000 girls participated in high school athletics. To put that number in perspective, only 7% of all high school athletes were girls. In 2010–2011, the number of female athletes had climbed by more than tenfold to nearly 3.2 million, or 41% of all high school athletes.

Title IX has also had a huge impact on women’s participation in college athletics. In 1971–1972, fewer than 30,000 women participated in college sports. In 2010–2011 that number exceeded 190,000—about 6 times the pre-Title IX rate. In 1972, women received only 2% of schools’ athletic budgets, and athletic scholarships for women were nonexistent. In 2009–2010, women received 48% of the total athletic scholarship dollars at Division I schools⁴¹

According to the NCWGE report, Title IX caused women’s soccer to experience some of the greatest participation gains of any sport. In particular, the number of college women’s soccer teams increased from 318 in 1991 to 959 in 2009.⁴² Soccer journalist Caitlin Murray quantified the effect of Title IX on youth soccer as follows: “In 1974,

³⁹ 20 U.S.C. § 1681(a) (2019).

⁴⁰ Elaine Chamberlain et al., *Athletics & Title IX of the 1972 Education Amendments*, 19 GEO. J. GENDER & L. 231, 235 (2018).

⁴¹ NAT’L COAL. FOR WOMEN & GIRLS IN EDUC., TITLE IX & ATHLETICS: PROVEN BENEFITS, UNFOUNDED OBJECTIONS 8 (2012).

⁴² *Id.*

only about 100,000 girls across the country were registered with the U.S. Youth Soccer Association. Today [in 2019], that number is in the millions.”⁴³ According to Murray, the women on the first WNTs in the 1980s “were some of the earliest beneficiaries of Title IX.”⁴⁴

The high participation numbers for women’s soccer in the United States has created a larger and more talented pool of potential national team players in the United States compared to other countries. In 2006, FIFA conducted a large-scale survey of its 207 member associations.⁴⁵ At that time, the United States had the highest number of registered female soccer players of any nation. Among the ten countries with the highest number of registered female players, the number of female players registered with the Federation (1.67 million) constituted 46% of all registered female players (a total of 3.668 million players).⁴⁶ The number of American female *youth* players (1.563 million) made up 57% of the female youth players among the top ten countries (2.664 million total female youth players).⁴⁷ In fact, the United States had almost four times more female youth players in 2006 (1.563 million) than the country with the second highest number of female youth players (Canada, with 407,000).⁴⁸

As a result of these high participation numbers for girls’ and women’s soccer in the United States, the WNT was at a later stage of development than its competition when the Women’s World Cup started in 1991. This was particularly the case given that other countries with long histories of success in men’s soccer heavily restricted or outright prohibited women’s soccer: England prohibited women from playing on their national association’s facilities until 1969, and Brazil banned women’s soccer altogether until 1979.⁴⁹ Thus, when Title IX mandated equal athletic opportunities for women in the United States, other top soccer countries either banned women from the sport or only

⁴³ MURRAY, *supra* note 1, at 7.

⁴⁴ *Id.*

⁴⁵ Matthias Kunz, *265 Million Playing Football*, FIFA MAG. BIG COUNT 10, 13 (July 1, 2007), https://www.fifa.com/mm/document/fifafacts/bcoffsurv/emaga_9384_10704.pdf [<https://perma.cc/LNK8-XYZ3>]. Each country has its own member association of FIFA. The USSF is the member association for the United States.

⁴⁶ *Id.*

⁴⁷ *Id.* at 15.

⁴⁸ *Id.*

⁴⁹ See *The History of Women’s Football in England*, THE FA, <http://www.thefa.com/womens-girls-football/history> [<https://perma.cc/FHH4-TCLA>] (last visited Feb. 9, 2020); Ryan Wallerson, *Why Women’s Soccer Was Banned in Brazil – Until 1979*, OZY (Oct. 25, 2016), <https://www.ozy.com/the-huddle/why-womens-soccer-was-banned-in-brazil-until-1979/72241> [<https://perma.cc/L89Y-TARN>].

recently permitted women to play. The advantage of Title IX accounts, at least in part, for the exceptional success of the WNT.⁵⁰

B. The Market for Women's Soccer

Despite the high participation rates for women's soccer in the United States and the on-field success of the WNT, the spectator market for women's soccer, both internationally and in the United States, is still smaller than the spectator market for men's soccer. University of Michigan professor Andrei Markovits explains this phenomenon:

Just because millions produce [i.e., play] a sport does not mean that they also will consume [i.e., watch] it. Just because millions bowl, run, swim, fish in no way means that millions will watch these sports on television or live at the venues even if performed by professionals. There is a major chasm between “doing” and “following” a sport—and nowhere is this more pronounced than among women.⁵¹

The size of the viewing market matters because it drives revenue, which ultimately determines the amount of money available to pay players. Internationally, the market for men's soccer is substantially larger than the market for women's soccer. The difference in scale is illustrated by the fact that worldwide 3.572 billion people watched the 2018 Men's World Cup,⁵² while 764 million watched the 2015 Women's World Cup.⁵³ As a consequence of this larger market for men's soccer, FIFA generates significantly greater revenue from the men's games.⁵⁴ This higher revenue passes down to national associations (like the Federation) through various payments, including much higher prize money for men's tournaments than for women's

⁵⁰ See MARKOVITS, *supra* note 38, at 15 (stating that the “massive advance of women as sports producers—i.e. as players— . . . is most definitely a direct consequence of the revolutionary impact in the United States of Title IX . . .”).

⁵¹ *Id.* at 139–40.

⁵² Media Release, *More Than Half the World Watched Record-Breaking 2018 World Cup*, FIFA (Dec. 21, 2018), <https://www.fifa.com/worldcup/news/more-than-half-the-world-watched-record-breaking-2018-world-cup> [<https://perma.cc/7A45-YAHH>].

⁵³ Media Release, *Record-Breaking FIFA Women's World Cup Tops 750 Million TV Viewers*, FIFA (Dec. 17, 2015), <https://www.fifa.com/womensworldcup/news/record-breaking-fifa-women-s-world-cup-tops-750-million-tv-viewers-2745963> [<https://perma.cc/4VCZ-R8WK>] (recognizing that comparable figures are not yet available from FIFA for the 2019 Women's World Cup).

⁵⁴ The USSF estimates that “the 2014 Men's World Cup generated 50 to 100 times the revenue worldwide as the 2015 Women's World Cup.” Letter from Kathryn H. Ruemmler, Attorney, Latham & Watkins LLP, to Greg Mucha, U.S. Equal Emp't Opportunity Comm'n, n.1 (May 31, 2016), <https://www.scribd.com/doc/314584338/US-Soccer-EEOC-Response> [<https://perma.cc/48U6-TS5Y>] (sending a response by the USSF to EEOC charges brought by five WNT players).

tournaments.⁵⁵ For example, FIFA awarded \$400 million in prize money to the teams participating in the 2018 Men's World Cup.⁵⁶ In contrast, FIFA provided \$30 million in prize money to the teams participating in the 2019 Women's World Cup.⁵⁷

FIFA justifies this disparity in prize money based on the differences in revenue from the tournaments. Following the 2018 Men's World Cup, FIFA reported that the tournament generated \$5.4 billion in revenue and a net profit of \$3.533 billion.⁵⁸ FIFA has not provided definitive revenue figures with respect to the 2015 or 2019 Women's World Cups, so a direct comparison of profitability is not possible.⁵⁹ Based on other information that FIFA has released, however, it does appear that there is a significant difference in revenue between the Men's and Women's World Cup. The value of television broadcasting rights drives FIFA's revenue from the tournaments. FIFA has reported that 95% of its income from television broadcasting rights generated during the 2015–18 fiscal cycle came from the 2018 Men's World Cup.⁶⁰ Television broadcasting rights constituted almost 50% of the total revenue earned by FIFA during the period.⁶¹

Within the United States, the markets for men's and women's soccer are closer in size than on the international level. In 2014, the last year that the MNT qualified for the Men's World Cup, the team averaged 4,306,933 viewers for its games televised on English-language channels.⁶² In 2015, a Women's World Cup year, the WNT averaged just under 60% of that figure, with 2,522,400 viewers per game.⁶³

⁵⁵ *Id.*

⁵⁶ See FIFA, FIFA FINANCIAL REPORT 2018, at 36 (2018), <https://resources.fifa.com/image/upload/xzshsoe2ayttyquuxhq0.pdf> [<https://perma.cc/9A5D-XXPW>] [hereinafter FIFA FINANCIAL REPORT 2018].

⁵⁷ *Id.* at 56.

⁵⁸ *Id.* at 34.

⁵⁹ See Rachel Bachman, *What Is the Women's World Cup Worth? Not Even FIFA Knows*, WALL ST. J. (Sept. 24, 2019, 1:17 PM), <https://www.wsj.com/articles/what-is-the-womens-world-cup-worth-not-even-fifa-knows-11569335578> [<https://perma.cc/9U69-MWW7>].

⁶⁰ See FIFA FINANCIAL REPORT 2018, *supra* note 56, at 16.

⁶¹ *See id.* at 141.

⁶² Lawrence Dockery, *USMNT Viewing Audiences for 2014-17 World Cup Qualifying Cycle*, WORLD SOCCER TALK (Apr. 21, 2019), <http://worldsoccertalk.com/2019/04/21/usmnt-viewing-audiences-2014-17-world-cup-qualifying-cycle/> [<https://perma.cc/R88H-LFM2>] [hereinafter *Viewing Audiences*]. The figures cited in this paragraph do not include viewers of Spanish-language channels such as Univision.

⁶³ Lawrence Dockery, *USWNT TV Ratings for 2015-19 Averaged 929K on US English-Language Television*, WORLD SOCCER TALK (July 13, 2019), <https://worldsoccertalk.com/2019/07/13/uswnt-tv-ratings-2015-19-averaged-929k-us-english-language-television/>

Of course, the MNT did not make the 2018 Men's World Cup, and so its average viewership in 2018 dropped to 431,818; on the other hand, the WNT's average viewership for 2019 is likely again to exceed 2,000,000.⁶⁴ Table 1 below shows the average viewership for English-language television broadcasts of WNT and MNT games over four-year periods when both teams made their respective World Cup tournaments.⁶⁵

Table 1. *Four-Year Average Viewership of WNT and MNT Games on English-Language Broadcasts*

Year	WNT Viewership		Year	MNT Viewership
2015	2,522,400		2014	4,306,933
2016	721,450		2015	728,550
2017	378,125		2016	965,842
2018	302,421		2017	819,842
Avg.	981,099		Avg.	1,705,292

Based on the data above, in a four-year cycle when both teams qualify for the World Cup, the English-language television audience for an MNT game is on average almost 75% larger than the audience for a WNT game.

The difference is even greater when non-English broadcasters are taken into account. According to the Federation's 2018 budget documents, viewership of WNT and MNT games in fiscal year 2017 (a non-World Cup year for either team) was as shown in Table 2.⁶⁶

[<https://perma.cc/9WS2-B2HJ>] [hereinafter *TV Ratings*]. As stated above, these figures do not include Spanish language viewers.

⁶⁴ *Id.* The average 2019 viewership as of the end of the 2019 Women's World Cup was 2,706,412 per game.

⁶⁵ *Viewing Audiences*, *supra* note 62 (providing MNT data); *TV Ratings*, *supra* note 63 (providing WNT data).

⁶⁶ U.S. SOCCER FED'N, *supra* note 7.

Table 2. *Total Viewers for U.S. Soccer–Controlled Matches (Matches That U.S. Soccer Could Commercialize)*

Team	No. of Events	Total Viewers	Avg./Game
WNT	12	5,340,000	440,000
MNT	8	15,410,000	1,930,000

The WNT does hold the record for the two most-watched soccer games in U.S. history, the 2015 and 2019 Women’s World Cup finals.⁶⁷ On average, however, more spectators watch the men’s team than the women’s team, at least when both teams qualify for the World Cup tournament. Of course, the MNT failed to qualify for the 2018 Men’s World Cup, but that failure was anomalous and the first time the team did not make the World Cup tournament since 1986. With recent changes to the World Cup qualification process, it is even more unlikely that the team will fail to qualify for the 2022 Men’s World Cup.⁶⁸ Also, because the United States will cohost the 2026 World Cup (with Canada and Mexico), the team should automatically qualify for that tournament.⁶⁹ All this is to say that although the Federation does not explicitly allocate broadcast revenue between the WNT and the MNT in either its financial statements or its budget documents, the MNT typically has a larger average television audience for its games than the WNT; consequently, more of the broadcast revenue earned by the Federation is attributable to the MNT.⁷⁰

⁶⁷ See Tom Hoffarth, *Viewership of Women’s World Cup Final Exceeds 14 Million on Fox*, L.A. TIMES (July 8, 2019, 8:18 PM), <https://www.latimes.com/sports/soccer/la-sp-world-cup-tv-ratings-20190708-story.html> [<https://perma.cc/9T3B-BWY>].

⁶⁸ See Brian Straus, *Concacaf Tweaks Format, Keeps Hex for World Cup Qualifying Ahead of 2022 Cycle*, SPORTS ILLUSTRATED (July 10, 2019), <https://www.si.com/soccer/2019/07/10/concacaf-world-cup-qualifying-changes-fifa-ranking-playoffs-usmnt> [<https://perma.cc/L3AS-8NWY>].

⁶⁹ Donald Wine II, *FIFA Should Give U.S., Mexico and Canada Automatic Qualification to 2026 World Cup*, SBNATION: STARS AND STRIPES (June 19, 2018, 7:15 AM), <https://www.starsandstripesfc.com/2018/6/19/17477786/world-cup-2026-usa-usmnt-mexico-canada-concacaf-fifa-automatic-qualification> [<https://perma.cc/F8CC-5JW4>].

⁷⁰ The Federation also does not separate revenue generated by each of the national teams from its sponsorship and licensing arrangement with Nike or its marketing arrangement with Soccer United Marketing. See *2018 Consolidated Financial Statements and Supplemental Schedules*, U.S. SOCCER FED’N, INC. 15–16 (2018), <https://www.ussoccer.com/governance/financial-information> [<https://perma.cc/Q3L9-39XZ>] [hereinafter *2018 Audited Financial Statements*]. Rather, in its annual budget document, the Federation says that it takes a “portfolio approach” with respect to the WNT and MNT. See U.S. SOCCER FED’N, *supra* note 7.

As for game revenue, a letter addressed to “Friends, Colleagues, and Supporters of U.S. Soccer” issued to the public by Federation President Carlos Cordeiro in July 2019 contends that for the period from 2009 to 2019, the WNT earned “gross revenue of \$101.3 million over 238 games, for an average of \$425,446 per game.”⁷¹ Over that same period of time, Cordeiro claims that the MNT has earned “\$185.7 million over 191 games, for an average of \$942,147 per game.”⁷² Cordeiro goes on in the letter to say that over the 2009–19 period, “WNT games have generated a net profit (ticket minus event expenses) in only two years (2016 and 2017)” and overall the WNT’s games have “generated a net loss of \$27.5 million.”⁷³ Cordeiro’s letter does not disclose the net profits or losses generated by the MNT over that same time period, but media reports state that a Federation spokesman said, “men’s games from 2009–2019 produced a net loss of \$3,130,980.”⁷⁴

The difference in market size between men’s and women’s soccer in the United States is also demonstrated by the domestic professional leagues. As previously described, two women’s professional leagues have started and failed since 2001. The current women’s professional league, the NWSL, has shown greater resilience and recently completed its seventh season.⁷⁵ Although the league has survived, it has hardly thrived. It has been difficult to follow the teams on television. For its 2017 and 2018 seasons, the NWSL had a broadcast arrangement only with A&E’s Lifetime channel, which did not cover any other sports, to televise one game each week.⁷⁶ That arrangement terminated at the outset of the 2019 season; however, following the WNT’s success at the Women’s World Cup, the league entered into an agreement to air fourteen NWSL matches on ESPN2 and ESPNEWS.⁷⁷ As for in-person attendance, average crowd size at NWSL games in

⁷¹ Cordeiro Letter to Membership, *supra* note 7.

⁷² *Id.*

⁷³ *Id.*

⁷⁴ Bachman, *supra* note 59.

⁷⁵ See Kelly Whiteside, *Women’s Pro Soccer League to Debut in U.S. Next Year*, USA TODAY (Nov. 21, 2012, 5:57 PM), <https://www.usatoday.com/story/sports/soccer/2012/11/21/new-womens-soccer-league-to-debut-next-year/1720343/> [<https://perma.cc/8HEC-RDPL>].

⁷⁶ Howard Megdal, *NWSL Announces End to Partnership with A&E; Here’s What It Means*, FORBES (Feb. 20, 2019, 4:42 PM), <https://www.forbes.com/sites/howardmegdal/2019/02/20/nwsl-announces-end-to-partnership-with-ae-leaving-league-without-broadcast-partner/#6dcac94e5a66> [<https://perma.cc/CM5S-Y2X6>].

⁷⁷ NWSL Media Staff, *14 NWSL Matches to Air on ESPN2 and ESPNEWS*, NWSL SOCCER (July 4, 2019), <http://www.nwslsoccer.com/news/article/14-nwsl-matches-to-air-on-esp2-and-espnews> [<https://perma.cc/6SC6-FXB9>].

2018 was just over 6,000 spectators.⁷⁸ In 2019, the maximum salary for an NWSL player who does not play for the WNT is \$46,200;⁷⁹ the minimum salary is \$16,538.⁸⁰ The salaries of WNT players who play in the NWSL are paid by the Federation and in 2019 ranged from \$67,500 to \$72,500.⁸¹

In comparison, the men's domestic professional league, the MLS, is now in its twenty-fourth season.⁸² Although the league operated at a deficit for many of those years, it has a stable and loyal spectator base, and multiple expansion teams have recently joined the league for an expansion fee of \$150 million.⁸³ Games are televised by Fox, ESPN, and Univision, which pay an average of \$90 million each year for the right to carry MLS games. The average attendance at MLS games in 2018 was almost 22,000 spectators.⁸⁴ The MLS Players Association reports that the average salary for an MLS player in 2019 (excluding certain marquee players, known as "Designated Players") was \$345,867.⁸⁵ The minimum salary for an MLS player in 2019 was \$70,250.⁸⁶ Many MNT players play outside the MLS, earning much higher salaries.⁸⁷

⁷⁸ *2019 NWSL Attendance*, SOCCER STADIUM DIG., <https://soccerstadiumdigest.com/2019-nwsl-attendance/> [<https://perma.cc/69QL-2ES2>] (last updated Oct. 12, 2019).

⁷⁹ Jamie Goldberg, *NWSL Increases Roster Size, Player Compensation Caps Ahead of 2019 Season*, OREGONIAN/OREGONLIVE (Jan. 10, 2019), <https://www.oregonlive.com/portland-thorns/2019/01/nwsl-increases-roster-size-player-compensation-caps-ahead-of-2019-season.html> [<https://perma.cc/DJV3-AUGK>].

⁸⁰ *Id.*

⁸¹ U.S. Soccer Federation & U.S. Women's Nat'l Team Player's Association, *Collective Bargaining Agreement* art. 11(B)(2) (2017–21) [hereinafter *Women's Nat'l Team Collective Bargaining Agreement*].

⁸² *MLS History*, MLS SOCCER (Jan. 1, 2018, 2:01 PM), <https://www.mlssoccer.com/league/history/> [<https://perma.cc/G3B2-CSL4>].

⁸³ Chris Smith, *Major League Soccer's Most Valuable Teams 2018: Atlanta United Debuts on Top*, FORBES (Nov. 14, 2018, 10:05 AM), <https://www.forbes.com/sites/chris-smith/2018/11/14/mls-most-valuable-teams-2018/#6f850ed22ee9> [<https://perma.cc/3RPJ-N5GT>].

⁸⁴ *2019 MLS Attendance*, SOCCER STADIUM DIGEST, <https://soccerstadiumdigest.com/2019-mls-attendance/> [<https://perma.cc/W56W-KY24>] (last updated Aug. 18, 2019).

⁸⁵ *Salary Guide*, MLS PLAYERS ASS'N, <https://mlsplayers.org/resources/salary-guide> [<https://perma.cc/QHV4-TMSX>] (last updated Sept. 13, 2019).

⁸⁶ Major League Soccer & Major League Soccer Players Union, *Collective Bargaining Agreement* § 10.1 (2015–19) [hereinafter *MLS Players Ass'n Collective Bargaining Agreement*], <https://mlsplayers.org/resources/cba> [<https://perma.cc/6AJT-2VVV>].

⁸⁷ In 2019, the English Premier League club Chelsea acquired MNT player Christian Pulisic from German club Dortmund for a transfer fee of \$73 million. Pulisic was reportedly paid \$1.1 million per year at Dortmund and is expected to make a significantly higher salary at Chelsea. Tom Huddleston Jr., *This 20-Year-Old Is Worth \$73 Million and Could Be the US's First Big Soccer Star*, CNBC (Jan. 2, 2019, 2:26 PM), <https://www.cnbc.com/>

The size of the international markets for men's and women's soccer, the attendance at NWSL games compared to MLS games, and the salaries that players on the national teams earn from their professional clubs are all relevant to the current dispute because they provide context for understanding why the WNT and the MNT take very different approaches in their collective bargaining agreements with the Federation. The WNT's collective bargaining agreement (WNT CBA) takes a more conservative approach than the collective bargaining agreement between the MNT and the Federation (MNT CBA). The WNT CBA provides WNT players with a guaranteed salary, but a lower potential upside than what MNT players can potentially earn under the MNT CBA.

As explained in more detail below, WNT players are ensured to receive payment from the Federation even if they get injured or if the NWSL ceases to operate. In contrast, the MNT CBA is structured on a "pay-to-play" basis, meaning that MNT players receive payments from the Federation only if they make the national team roster for a particular game or tournament; they have no guarantee that they will receive any payment if they fail to make the roster for whatever reason, including injury or illness. But MNT players are in a position to take more risks with their national team salary than WNT players because they earn significantly higher professional team salaries than WNT players.

The smaller market for women's soccer leads WNT players to make less in professional salaries and consequently to take a more conservative approach in their collective bargaining agreement with the Federation than do MNT players. With lower professional salaries and a greater dependence on their national team salaries by WNT players, there is a higher potential for tension between WNT players and the Federation over those salaries. This potential for dispute is compounded by the fact that the Federation also manages and heavily subsidizes the NWSL. As explained in the Federation's financial statements:

The Federation is not a Member of NWSL but, pursuant to the NWSL's limited liability company agreement, was appointed as Manager of NWSL and, in this capacity, the Federation performs management, governance, operational, administrative, and advisory services for NWSL The Federation does not receive any

management fees or rent from NWSL as part of the arrangement but does receive expense reimbursement.⁸⁸

With respect to the payment of WNT players' NWSL salaries, the Federation's financial statements show the following payments from the Federation to the NWSL over the last four years (see Table 3):

Table 3. *Federation Payments to the NWSL*

Year	Payments from the Federation to NWSL
2018	\$1,663,430 ⁸⁹
2017	\$2,390,703 ⁹⁰
2016	\$2,030,565 ⁹¹
2015	\$1,431,892 ⁹²

All these ties between the Federation and the NWSL means that WNT players are highly dependent upon the Federation for both their national team and professional team salaries.

The smaller market for women's soccer as compared to men's soccer, the resulting lower salaries for top female players relative to male players, and the significantly greater success by the WNT than the MNT have combined to cause a history of disputes between the WNT and the Federation. The next Part details the differences between the WNT CBA and the MNT CBA. These differences constitute the basis for the current lawsuit between the WNT players and the Federation.

III

TERMS OF THE NATIONAL TEAMS' COLLECTIVE BARGAINING AGREEMENTS

Against the backdrop of the long history of contention between the WNT and the Federation, the current dispute relates specifically to the terms of the WNT's collective bargaining agreement in comparison to

⁸⁸ 2018 Audited Financial Statements, *supra* note 70, at 22.

⁸⁹ *Id.* at 23.

⁹⁰ *Id.*

⁹¹ *Id.* at 21.

⁹² *Id.*

the MNT's collective bargaining agreement. These terms are examined below.

A. Annual Base Compensation

The first major difference between the WNT CBA and the MNT CBA is that select WNT players, designated as "WNT Contracted Players," receive a guaranteed annual salary of \$100,000 from the Federation for playing for the national team. This salary is called "Annual Base Compensation" in the WNT CBA. Each year, the Federation designates which players receive the Annual Base Compensation, with the number of WNT Contracted Players starting at twenty in 2017, the first year of the CBA, and decreasing by one player each year so that in 2021, the final year of the CBA, there will be sixteen WNT Contracted Players. The Annual Base Compensation is due to the WNT Contracted Players no matter how many games the WNT plays and regardless of whether or not the WNT Contracted Player actually plays in those games. The Federation is permitted to terminate a Player's status as a WNT Contracted Player, but if it does, the Player is entitled to up to four months of severance pay. In addition, the WNT CBA provides that the USSF will continue to pay a WNT Contracted Player's salary and benefits for up to one year if the Player is injured.

In contrast, the MNT CBA has no guaranteed payments for the members of the MNT. The MNT CBA is structured as a "straight pay-to-play system," meaning that MNT players are paid only if they make the roster for a particular game or tournament. If an MNT player is injured and cannot make the team's roster, he receives no payments from the Federation.

B. Professional Team Salary

As explained earlier, for WNT players who play professionally in the NWSL (which all the current WNT players do), the Federation pays their NWSL salaries. In 2019, the NWSL salary was set at \$72,500 for eleven "Tier 1" players and \$67,500 for another eleven "Tier 2" players.⁹³ This is in addition to the Annual Base Compensation of \$100,000 described above, which WNT Contracted Players receive for playing for the national team.

⁹³ Women's Nat'l Team Collective Bargaining Agreement, *supra* note 81, at art. 9(D)(1).

The Federation does not pay any professional team salaries for MNT players.⁹⁴

C. Game Bonuses

To understand the game bonus provisions of the two teams' CBAs, it is first necessary to understand that national teams play different types of games. First, national teams play so-called "friendlies," which are exhibition matches. Second, teams play tournament qualification games, which determine whether a team will participate in a particular tournament, like the World Cup. Not all national teams qualify to play in every tournament. For example, because of the MNT's record in qualification games leading up to the 2018 Men's World Cup, the team did not qualify to play in that tournament. Third, the teams play in actual tournament games. The World Cup is only one of the tournaments that the MNT and the WNT play in.⁹⁵ Finally, depending on a team's performance in a particular tournament, the team may play in "victory tour" games. For example, the WNT has played victory tour games after winning the Women's World Cup.

Players for the WNT and the MNT are paid different amounts for each type of game, with the amounts varying based on the outcome of the game and, in some instances, the quality of the opponent. In their current lawsuit against the Federation, WNT players allege that the game bonus provisions in their CBA discriminate against them when compared to the MNT CBA. For example, each player on the WNT receives \$8,500 if the team wins a friendly against a top-ranked opponent. The men, in contrast, receive \$17,625 each for a victory against a top-ranked opponent in a friendly. Moreover, the men receive \$5,000 for a loss in a friendly against an opponent of any rank. The women are paid game bonuses in friendlies only for wins or ties; they receive nothing if they lose a friendly.

⁹⁴ U.S. Soccer Federation & Men's Nat'l Team Players Ass'n, *Collective Bargaining Agreement Exhibit A (2011–18)* [hereinafter *Men's Nat'l Team Collective Bargaining Agreement*] (containing the 2011–18 Men's National Team Uniform Player Agreement, wage and bonus information, and sponsor appearance fee schedule).

⁹⁵ Other tournaments played in by the WNT include the Summer Olympics (every four years), the SheBelieves Cup (annually), and the Four Nations Tournament (upon invitation by China, which hosts the tournament). Other tournaments played in by the MNT include the Gold Cup (every two years) and the Confederations Cup (held every four years with participants determined by qualification; it discontinued after 2017). In 2016, the MNT also played in the Copa America Centenario Tournament, by invitation. *Competitions*, U.S. SOCCER (2020), <http://www.ussoccer.com/competitions> [<https://perma.cc/7KKE-9KAX>] (last visited Feb. 24, 2020).

The game bonus payments are even more disparate for tournament qualifying games. For example, a member of the WNT receives a maximum of \$3,000 for a win in a World Cup qualifying match. A member of the MNT may receive up to \$18,125 for a World Cup qualifying win. And again, the WNT players receive nothing for a World Cup qualifying loss, while the men receive \$5,000 for such a loss.

In addition, while the members of the WNT receive various tournament bonuses,⁹⁶ they do not receive bonus payments for individual games in tournaments. In contrast, members of the MNT receive both tournament bonuses and game bonuses for the team's results in individual tournament games. For example, each MNT player would have received the following payments for first-round games in the 2018 Men's World Cup if the team had qualified: \$6,875 for every loss; \$16,386 for every tie; and \$35,408 for every win. With three first-round games, an MNT player could have earned approximately \$106,000 in game bonuses if the team had qualified and won all three first-round games in the 2018 Men's World Cup. In actuality, however, because the MNT did not qualify for the tournament, the players earned none of these potential World Cup game bonuses.

Finally, with respect to game bonuses, members of the WNT receive payments for victory tour games. Under the WNT CBA, each member of the WNT received approximately \$60,800 for participating in four victory tour games following the 2019 Women's World Cup. This amount received would have been lower if the team had finished second or third in the tournament. The MNT CBA does not provide for any comparable victory tour payments.

D. Tournament Bonuses

In addition to game bonuses, players from both teams receive certain bonuses for qualifying for tournaments, making the roster to play in tournaments, and the team's performance in tournaments. For example, each WNT player received a \$75,000 bonus based on the team's qualification for and the player making the roster for the 2019 Women's World Cup. A member of the MNT would have received \$177,445 if the team had qualified and the player had made the roster for the 2018 Men's World Cup. Of course, the MNT players received none of these payments because the MNT did not qualify for the tournament.

⁹⁶ See *infra* Section III.D.

For winning the 2019 Women's World Cup, each WNT player received a \$110,000 bonus. If the MNT had won the 2018 Men's World Cup, each member of the MNT would have received a tournament bonus of approximately \$1,065,217. Again, because the MNT did not even make the tournament, the MNT players received none of this tournament bonus.

Table 4 summarizes the various payments provided for under the teams' collective bargaining agreements.

Table 4. *Payments for WNT and MNT Players*

Type of Payment	WNT Player	MNT Player
Guaranteed Payments		
Annual Base Compensation	\$100,000	\$0
Professional Team Salary (2019)	\$67,500–\$72,500	\$0
Game Bonuses		
Friendly (top-ranked opponent)		
Win	\$8,500	\$17,625
Tie	\$1,750	\$8,125
Loss	\$0	\$5,000
World Cup Qualifier		
Win	\$3,000	\$18,125
Tie	\$500	\$10,000
Loss	\$0	\$5,000
World Cup First-Round Game Bonuses		
Win	\$0	\$35,408
Tie	\$0	\$16,386
Loss	\$0	\$6,875
World Cup Victory Tour	\$60,800	\$0
World Cup Tournament Bonuses		
World Cup Qualification and Roster Bonus	\$75,000	\$177,445
World Cup First Place Bonus	\$110,000	\$1,065,217

E. Other Elements of CBAs

The WNT CBA also covers other benefits such as health, dental, and vision insurance, as well as maternity/adoption leave.⁹⁷ The MNT CBA does not provide health, dental, or vision insurance to MNT players. It also does not address the issues of paternity/adoption leave.

IV

ASSESSMENT OF WNT PLAYERS' CLAIMS

The lawsuit brought by the WNT players asserts claims against the Federation under both the Equal Pay Act⁹⁸ and Title VII of the Civil Rights Act of 1964.⁹⁹ According to the players' complaint:

The [Federation] discriminates against Plaintiffs, and the class that they seek to represent, by paying them less than members of the MNT for substantially equal work and by denying them at least equal playing, training, and travel conditions; equal promotion of their games; equal support and development for their games; and other terms and conditions of employment equal to the MNT.¹⁰⁰

Under the Equal Pay Act (the EPA):

No employer having employees subject to any provisions of this section shall discriminate, within any establishment in which such employees are employed, between employees on the basis of sex by paying wages to employees in such establishment at a rate less than the rate at which he pays wages to employees of the opposite sex in such establishment for equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions, except where such payment is made pursuant to . . . (iv) a differential based on any other factor other than sex¹⁰¹

Title VII prohibits discrimination in employment on the basis of sex, including discrimination in employment compensation. “[EPA] standards apply to Title VII discrimination claims of ‘unequal pay for equal work’”¹⁰² Moreover, like the EPA, Title VII provides an affirmative defense if unequal payments are based on “a differential based on any other factor other than sex.”¹⁰³

⁹⁷ Women's Nat'l Team Collective Bargaining Agreement, *supra* note 81, at art. 12(A), (C).

⁹⁸ 29 U.S.C. § 206(d) (2018).

⁹⁹ 42 U.S.C. § 2000e (2018).

¹⁰⁰ Spies-Gans, *supra* note 34, ¶ 4.

¹⁰¹ 29 U.S.C. § 206(d)(1).

¹⁰² Price v. N. States Power Co., 664 F.3d 1186, 1191 (8th Cir. 2011).

¹⁰³ 29 U.S.C. § 206(d)(1)(iv); 42 U.S.C. § 2000e-2(h).

As articulated by the Eighth Circuit:

The EPA prohibits pay discrimination on the basis of sex. A plaintiff must first establish a prima facie case that women were paid less than men in the same establishment for equal work requiring equal skill, effort, and responsibility and performed under similar working conditions. If a plaintiff establishes a prima facie case, the burden then shifts to the defendant to prove one of four statutory affirmative defenses. Those defenses require an employer to prove that any wage differential is explained by “[among other things] . . . (iv) a differential based on any other factor other than sex.”¹⁰⁴

Therefore, in assessing the strength of the players’ pay-based claims, relevant considerations include whether (1) the WNT and MNT are employed within the “same establishment”; (2) WNT players are paid at a rate less than the rate at which the Federation pays MNT players; (3) the WNT and the MNT are engaged in “equal work on jobs the performance of which requires equal skill, effort, and responsibility . . . performed under similar working conditions”; and (4) the disparate payment schemes under the WNT CBA and the MNT CBA are “based on any other factor other than sex.”

A. The “Same Establishment”

To come within the scope of the EPA, plaintiffs and comparator employees must be employed within the same “establishment.” The term “establishment” is not defined in the EPA, but the Ninth Circuit has interpreted the term using a “hybrid functional approach.”¹⁰⁵ This means that the court has refused to apply the EPA to “separate offices of an employer that are *geographically and operationally distinct*.”¹⁰⁶

Federal regulations also provide guidance on the meaning of the term “establishment” as used in the statute. EEOC regulations state that establishment refers to “a distinct physical place of business rather than to an entire business or ‘enterprise’ which may include several separate places of business.”¹⁰⁷ Therefore, “each physically separate place of business is ordinarily considered a separate establishment.”¹⁰⁸ The regulation goes on to state that only in “unusual circumstances” may “two or more distinct physical portions of a business enterprise

¹⁰⁴ *Price*, 664 F.3d at 1191 (internal citations omitted).

¹⁰⁵ *Winther v. City of Portland*, 1994 WL 118167, 21 F.3d 1119 at *1 (9th Cir. 1994).

¹⁰⁶ *Id.* (emphasis added).

¹⁰⁷ 29 C.F.R. § 1620.9(a) (2019).

¹⁰⁸ *Id.*

be[] treated as a single establishment.”¹⁰⁹ Such treatment may be appropriate where “a central administrative unit may hire all employees, set wages, and assign the location of employment; employees frequently interchange work locations; and daily duties may be virtually identical and performed under similar working conditions.”¹¹⁰

The Ninth Circuit’s decision in *Winther v. City of Portland*¹¹¹ helps in understanding the relevance of geographical and operational factors in assessing whether WNT players and MNT players are employed in the same establishment for purposes of the EPA. In *Winther*, the plaintiff worked for the Portland Bureau of Emergency Communications (BOEC) handling emergency police calls. She contended that she was underpaid in comparison to male employees of the Portland Fire Alarm Dispatch (FAD), which as the name indicates, handled emergency calls relating to the Portland Fire Department.

The *Winther* court began its analysis by stating that to determine what constitutes an establishment under the EPA the court had to consider “the nature of the services provided and the degree of central administration, such as budgeting, hiring, and day-to-day management, as well as the extent of physical separation.”¹¹² As to the physical component, the court said this “is a common-sense notion that refers to whether offices are physically contiguous or not.”¹¹³ Because the BOEC and FAD were not located in contiguous buildings, they were deemed physically separate.

As to operational considerations, the court said that the BOEC and FAD shared a centralized administration “at only the most general level.”¹¹⁴ While job classifications and salaries were determined centrally, the BOEC and FAD had separate collective bargaining agreements, budgets, management, hiring authority, and training.¹¹⁵ In addition, the departments served different functions and there was no interchange of personnel between them.¹¹⁶ All these considerations led the court to conclude that the BOEC and FAD were separate establishments, and therefore comparisons of employees’ salaries

¹⁰⁹ 29 C.F.R. § 1620.9(b).

¹¹⁰ *Id.*

¹¹¹ *Winther*, 21 F.3d at *1.

¹¹² *Id.*

¹¹³ *Id.*

¹¹⁴ *Id.* at *2.

¹¹⁵ *Id.*

¹¹⁶ *Id.*

between the two departments could not serve as the basis for an EPA claim.¹¹⁷

The WNT and the MNT share many of the same characteristics as the different departments in *Winther*. While the Federation provides general, centralized oversight of each of the teams, the two teams are each subject to separate management (their respective coaches) and each have their own collective bargaining agreements.¹¹⁸ Players for each team are selected by the team's coach, not by the Federation.¹¹⁹ Also, based on FIFA rules, the transfer of players between the WNT and the MNT is prohibited.¹²⁰ And according to the Federation, the two teams have "separate budgets that take into account the different revenue that the teams generate."¹²¹ In addition, although the teams play the same sport, they effectively operate in different markets. The MNT operates in the market for men's soccer and the WNT operates in the market for women's soccer, as explained above. In effect, the Federation operates the teams as separate lines of business.

¹¹⁷ *Id.*; see also *Price v. N. States Power Co.*, 664 F.3d 1186, 1191 (8th Cir. 2011) (holding that offices seventy-five miles apart, under separate supervision, and serving different customers did not constitute an establishment under the Equal Pay Act); *Foster v. Arcata Assocs. Inc.*, 772 F.2d 1453 (9th Cir. 1985) (holding that separate offices of a business did not constitute an establishment under the EPA where the offices had separate budgets, independent management, and served different functions). *But see* *Brennan v. Goose Creek Consol. Indep. Sch. Dist.*, 519 F.2d 53 (5th Cir. 1975) (holding that eleven elementary schools within a single school district constituted an establishment under the Equal Pay Act because a central authority was responsible for school janitors' employment and wages and also transferred the janitors from one school to another).

¹¹⁸ See *Gregg Berhalter to Be Head Coach of USA Men's National Soccer Team*, GLOBAL TEAM EVENTS, <https://globalteamevents.com/gregg-berhalter-head-coach-usa-mens-national-soccer-team/> [<https://perma.cc/9EZ7-GVC6>] (last visited Feb. 9, 2020); *Vlatko Andonovski Named Head Coach of U.S. Women's National Team*, U.S. SOCCER (Oct. 28, 2019), <https://www.ussoccer.com/stories/2019/10/vlatko-andonovski-named-head-coach-of-us-womens-national-team> [<https://perma.cc/K6T6-9M69>].

¹¹⁹ Alicia Rodriguez, *Why Has the USMNT Struggled? Start with How It Selects Players*, SBNATION (Jan. 29, 2019, 1:00 PM), <https://www.sbnation.com/2019/1/29/18199509/usmnt-roster-pool-demographics-latinx-foreign-born-players> [<https://perma.cc/MMX4-S9HL>] (discussing how the coach identifies the players he would like in the USMNT player pool).

¹²⁰ "FIFA competitions are separated for men and women." REGULATIONS: FIFA GENDER VERIFICATION, FIFA 4 (2011), <https://resources.fifa.com/image/upload/regulations-fifa-gender-verification-1454202.pdf?cloudid=ihf3yx6kw3insqt6r0i6> [<https://perma.cc/A84P-5NRY>]. Specifically, "[f]or FIFA's men's competitions, only men are eligible to play. For FIFA's women's competitions, only women are eligible to play." *Id.* at 7.

¹²¹ Plaintiffs' Collective Action Complaint, *supra* note 8, ¶ 70.

The issue of physical location is different for the teams than for a typical business. The Federation is headquartered in Chicago,¹²² but the teams train and play in tournaments at various and different locations around the world. For example, in advance of the 2019 Women's World Cup tournament in France, the WNT held a training camp in Portugal.¹²³ Meanwhile, the MNT trained in Chula Vista, California, in advance of their performance in the Gold Cup Tournament, which was also played in the summer of 2019 in various cities within the United States.¹²⁴

Based on these factors, it is feasible that a court could find that the WNT and the MNT do not constitute a single establishment for EPA purposes. If, however, the WNT players prevail on this issue because of the ultimate oversight of both teams by the Federation, WNT must also show that they are paid at a lower rate than the MNT players and that WNT players perform equal work to the MNT players. Finally, if the WNT players can make those showings, the Federation may still present as an affirmative defense that any disparity in payments between WNT players and MNT players is based on factors other than sex. A discussion of these issues follows.

B. Rate of Pay

The issue of whether the Federation pays WNT players at a rate less than it pays MNT players is complicated by the fact that game bonus, tournament bonus, and victory tour payments are all contingent on how the teams perform. Unquestionably, however, the MNT CBA provides for higher potential payments. A simple example illustrates this: if the MNT had won the 2018 Men's World Cup, each player on the team's World Cup roster would have received at least \$1,250,000 from the Federation for the tournament.¹²⁵ For winning the 2019 Women's

¹²² See *Chicago: Home to U.S. Soccer House*, U.S. SOCCER, <https://www.ussoccer.com/history/us-soccer-house> [<https://perma.cc/5FAX-TYEX>] (last visited Feb. 10, 2020) (describing the U.S. Soccer House, which serves as the headquarters for the Federation).

¹²³ James Nalton, *USWNT Prepare for World Cup with Training Camp in Portugal*, INT'L CHAMPIONS CUP (Jan. 9, 2019), <https://www.internationalchampionscup.com/en/articles/uswnt-world-cup-preparations-january-training-camp> [<https://perma.cc/RUB7-TC5Z>].

¹²⁴ *Berhalter Calls 27 Players to Chula Vista for U.S. MNT's 2019 January Camp*, U.S. SOCCER (Dec. 20, 2018), <https://www.ussoccer.com/stories/2018/12/berhalter-calls-27-players-to-chula-vista-for-us-mnts-2019-january-camp> [<https://perma.cc/27FU-JRB6>].

¹²⁵ This figure is composed of the \$108,695 for qualification ($\$2,500,000 / 23$); \$28,532 for first-round points bonus ($(\$218,750 \times 3) / 23$); three points is the minimum number of points needed to advance past the first round, though it is likely that a team advancing past the first round will have significantly more than three points); \$48,125 for the World Cup

World Cup, a WNT Contracted Player received at least \$346,870 from the Federation.¹²⁶

Thus, the Federation would pay MNT players at a rate of almost four times what it pays WNT players for winning their respective World Cup tournaments.¹²⁷ That said, the MNT did not win the 2018 Men's World Cup—as previously explained, the MNT did not qualify for the tournament. Consequently, the WNT players will receive significantly higher pay for their most recent World Cup performance, as compared to what the MNT received for theirs. Had the WNT also failed to qualify for their World Cup tournament—unimaginable in light of the team's history of success—WNT Contracted Players still would have received their \$100,000 Annual Base Compensation. So, while the MNT CBA provides for higher potential payments, the WNT players have in fact received higher payments in some years (and will again in 2019) based on their team's success and the lack of success by the MNT. In fact, disclosures required by tax law of the Federation's highest-paid employees over the last several years have shown that in two of the three most recent years in which national team players were among the Federation's highest compensated employees, members of the WNT rather than the MNT received the highest payments (see Table 5). This will certainly be the case for 2019, also a year in which the WNT won the Women's World Cup.

per game payment (\$6,875 x 7 games); \$195,652 for advancing to the second round (\$4,500,000 / 23); \$217,391 for the quarterfinal bonus (\$5,000,000 / 23); \$244,565 for the semifinal bonus (\$5,625,000 / 23); and \$407,609 for the first place bonus (\$9,375,000 / 23). This figure does not include any payments for World Cup Qualifying or friendly matches. Men's Nat'l Team Collective Bargaining Agreement, *supra* note 94, at Exhibit A.

¹²⁶ This figure is composed of the \$100,000 Annual Base Compensation for a WNT Contracted Player; \$75,000 for World Cup Qualifying and World Cup Roster Bonus (\$37,500 for each); \$110,000 for first place finish in the World Cup (\$2,530,000 / 23); and \$60,870 for participating in the four games of the World Cup victory tour (\$1,400,000 / 23). A WNT Contracted Player would, in reality, make more than this based on the team's performance in World Cup Qualifying and friendly matches. Women's Nat'l Team Collective Bargaining Agreement, *supra* note 81, at Exhibit A.

¹²⁷ $\$1,250,000 / \$346,870 = 3.6$. Men's Nat'l Team Collective Bargaining Agreement *supra* note 94; Women's Nat'l Team Collective Bargaining Agreement, *supra* note 81.

Table 5. *Players Listed in Tax Disclosures of Highest Compensated Employees*¹²⁸

Fiscal Year	Name	Team	Salary
2018	Christen Press	WNT	\$257,920
	Rebecca Sauerbrunn	WNT	\$256,720
	Kelly O'Hara	WNT	\$256,695
	Samantha Mewis	WNT	\$247,497
2016–17	No Players Listed		
2015–16	Lauren Holiday	WNT	\$225,450
	Meghan Klingenberg	WNT	\$225,450
	Alexandria Krieger	WNT	\$225,450
	Tobin Heath	WNT	\$225,450
2014–15 ¹²⁹	Clinton Dempsey	MNT	\$428,002
	Geoffrey Cameron	MNT	\$405,209
	Josmer Altidore	MNT	\$404,703
	Timothy Howard	MNT	\$398,495
	Jermaine Jones	MNT	\$395,920

Federation President Carlos Cordeiro contends that from 2010 to 2018 the Federation paid WNT players more than MNT players if FIFA prize money payments are not taken into account.¹³⁰ According to Cordeiro, over that time period, the Federation paid WNT players

¹²⁸ Information in this table is taken from the Federation's Form 990s as reported to the IRS. See *Financial Information: Form 990 and Audited Financial Statements*, U.S. SOCCER, <https://www.usoccer.com/governance/financial-information> [<https://perma.cc/W55F-S9UD>]. It is not clear whether these figures include NWSL salaries.

¹²⁹ Payments from fiscal year 2014–15 included payments related to the MNT's qualification for and performance in the 2014 Men's World Cup. The Federation's fiscal year runs from April 1 through March 31, so the 2015 fiscal year (Apr. 1, 2014–Mar. 31, 2015) included the 2014 Men's World Cup, which took place in June 2014.

¹³⁰ Cordeiro Letter to Membership, *supra* note 7.

\$34.1 million in salaries and bonuses while paying MNT players \$26.4 million.¹³¹ When FIFA prize money is included, Cordeiro reports that WNT players have received \$39.7 million from the Federation, compared to \$41 million for MNT players.¹³² Cordeiro justifies excluding FIFA prize money from the payment calculations by stating that money is “[s]eparate and apart from any funds controlled by U.S. Soccer.”¹³³ Cordeiro’s justification overstates the Federation’s lack of control, however, as FIFA prize money is paid to national associations (like the Federation), and those national associations then pay some portion of the prize money to its players under the terms of their collective bargaining agreement. For example, FIFA awarded \$4 million to the Federation for the WNT’s victory in the 2019 Women’s World Cup.¹³⁴ Under the WNT CBA, the WNT received \$2.53 million of that prize money.¹³⁵

In addition, the figures cited by Cordeiro include payments made by the Federation to the NWSL for WNT Contracted Players’ salaries. Those payments started in 2013.¹³⁶ While the financial and managerial support given by the Federation to the NWSL has helped the league survive, WNT players perform extra services for their NWSL salaries not performed by MNT players. Specifically, NWSL teams play twenty-four regular season games.¹³⁷

The higher total payments to top-earning WNT players in some years introduce doubt about whether WNT players can satisfy the requirement for their EPA claim that the Federation pays WNT players at a rate less than the rate at which it pays MNT players. That said, at least one court has held that different pay arrangements between men and women violate the EPA even if those arrangements result in substantially equal remuneration to both groups.

In *Bence v. Detroit Health Corporation*, the Sixth Circuit reviewed the compensation model used by a national health spa business that paid female employees a commission rate of 5% for sales of spa

¹³¹ *Id.*

¹³² *Id.*

¹³³ *Id.*

¹³⁴ See FIFA FINANCIAL REPORT 2018, *supra* note 56.

¹³⁵ See Women’s Nat’l Team Collective Bargaining Agreement, *supra* note 81, at Exhibit A.

¹³⁶ See *Financial Statements*, U.S. SOCCER FEDERATION 20–21 (2013), <https://www.usoccer.com/governance/financial-information> [<https://perma.cc/3XPR-FBMC>].

¹³⁷ Celia Balf, *NWSL Announces Full 2019 Schedule*, NWSL SOCCER (Feb. 22, 2019), <http://www.nwslsoccer.com/news/article/nwsl-announces-full-2019-schedule> [<https://perma.cc/D6MZ-GTUH>].

memberships while paying male employees a commission rate of 7.5%.¹³⁸ The employer divided spa operations into a men's division and a women's division, which operated on alternate days.¹³⁹ Male employees operated the men's division and female employees operated the women's division.¹⁴⁰ Thus, male employees sold spa memberships exclusively to men and female employees sold memberships only to women. The employer justified the different commission rates between men and women based on the fact that historical sales data showed 60% of all sales occurred to female clients and 40% occurred to male clients.¹⁴¹ In other words, the market for female spa membership was 50% larger than the market for male spa memberships. The employer reasoned that by paying its male employees a 50% higher commission rate than its female employees, the male and female employees would earn approximately equal amounts in total commission payments.¹⁴² This proved correct, as the court noted that the "total remuneration received by males and females was substantially equal although the females made more sales than the males."¹⁴³

Despite the substantially equal total remuneration between the male and female employees, the Sixth Circuit held that the commission arrangement violated the EPA.¹⁴⁴ The court found a violation because the lower commission rate for women "effectively locked female employees, and only female employees, into an inferior position regardless of their effort or productivity."¹⁴⁵ Thus, even if a court accepts the argument made by Federation President Cordeiro that WNT players made more than MNT players, which hinges on excluding FIFA bonuses from the calculation, WNT players may still have a colorable disparate pay claim. That is, a court could still find that the rate of pay under the WNT CBA discriminates against WNT players because of the higher game and tournament bonuses or because of the potential for higher total payments under the MNT CBA.¹⁴⁶ Assuming

¹³⁸ *Bence v. Detroit Health Corp.*, 712 F.2d 1024, 1026 (6th Cir. 1983).

¹³⁹ *Id.* at 1025.

¹⁴⁰ *Id.* at 1025–26.

¹⁴¹ *Id.* at 1027.

¹⁴² *Id.* at 1026.

¹⁴³ *Id.*

¹⁴⁴ *Id.* at 1031.

¹⁴⁵ *Id.*

¹⁴⁶ *But see Sowell v. Alumina Ceramics, Inc.*, 251 F.3d 678, 684 (8th Cir. 2001) (holding that the plaintiff, a female toolmaker, "was paid the same as, or more than, at least some male tool makers in the tool room," and failed to establish a prima facie case of wage discrimination).

the WNT players' claims survive this step of the analysis, the WNT players must also show that they are performing "equal work" to the male players.

C. "Equal Work"

As stated earlier, the EPA prohibits wage discrimination "for equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar work conditions, except where such payment is made pursuant to . . . a differential based on any other factor other than sex."¹⁴⁷ As explained by Judge Posner, "whether two jobs are the same depends on how fine a system of job classifications the courts will accept."¹⁴⁸ Judge Posner explained that the legislative history of the EPA indicated that "comparable" jobs do not satisfy the "equal work" requirement.¹⁴⁹ Rather, to come within the scope of the EPA jobs must "be *virtually* identical, that is, they would be very much alike or closely related to each other."¹⁵⁰ Other courts have stated that jobs need not be identical to be equal, but they must be "substantially equal."¹⁵¹

The WNT players contend that they perform equal work to the MNT players because, like the male players on the MNT, they "travel nationally and internationally as necessary for competitive games, which are the same in length, physical and mental demand, and playing environment and conditions throughout the United States and globally."¹⁵² Moreover, like the MNT players, the WNT players "must adhere to the same rules of the game of soccer as established by [FIFA]."¹⁵³ In particular, they "play on the same size field; use the same size ball; have the same duration of matches and play by the same rules regarding start and restart of play, offside, fouls and misconduct, free kicks, penalty kicks, throw-ins, goal kicks, corner kicks, etc."¹⁵⁴

¹⁴⁷ 29 U.S.C. § 206(d)(1) (2018).

¹⁴⁸ *Equal Emp't Opportunity Comm'n v. Madison Cmty Unit Sch. Dist. No. 12*, 818 F.2d 577, 580 (7th Cir. 1987).

¹⁴⁹ *Id.* at 582.

¹⁵⁰ *Id.* (emphasis added).

¹⁵¹ *See, e.g., Hodgson v. Corning Glass Works*, 474 F.2d 226, 234 (2d Cir. 1973) ("It is now well settled, however, that the jobs under analysis need not be identical in every respect before the Equal Pay Act is applicable; inconsequential differences can be disregarded as long as the jobs are 'substantially equal.'").

¹⁵² Spies-Gans, *supra* note 34, ¶ 47.

¹⁵³ *Id.* ¶ 48.

¹⁵⁴ *Id.* The equal treatment of women's soccer under the rules of the sport are confirmed in the most recent edition of the Laws of the Game. *See* THE INT'L FOOTBALL ASS'N BD.,

The Federation, on the other hand, contends that WNT players do not perform equal work because the WNT and MNT “play at different times, in different locations, [and] against different opponents.”¹⁵⁵

Courts have used a case-by-case, fact-intensive approach to determine whether two jobs involve “equal skill, effort and responsibility.” As stated in EEOC regulations, “What constitutes equal skill, equal effort, or equal responsibility cannot be precisely defined.”¹⁵⁶ Rather, this analysis often turns on a detailed examination of job duties and responsibilities. Both the WNT CBA and the MNT CBA expressly set forth the duties and responsibilities of women’s and men’s national team players.¹⁵⁷ These include:

- Playing duties—players must be fit and available for training and games, unless excused for good cause;
- Spokesperson duties—players shall serve as spokespersons for soccer and devote reasonable best efforts to promoting the sport;
- Time commitment—players must devote the time necessary to fulfill duties as a player and spokesperson;
- Post-game hospitality—players shall attend post-game hospitality functions unless excused for good cause;
- Conduct—players shall comport themselves as befitting membership on the national team;
- Federation rules—players must agree to comply with all reasonable rules and regulations of the Federation;
- Drug testing—players must consent to drug testing;
- Media sessions and interviews—players must participate in a reasonable number of media sessions and interviews;
- Hazardous activities—players agree not to engage in specified hazardous activities that involve a significant risk of personal injury.

Given the identical duties and responsibilities for players on both teams as set forth in their respective CBAs, there is a strong argument that

LAWS OF THE GAME 26 (2019), <http://static-3eb8.kxcdn.com/files/document-category/062019/frRhKJNjSBAtiyt.pdf> [<https://perma.cc/JR2N-ZL9D>] (stating that “women’s football is no longer a separate category and now has the same status as men’s football”).

¹⁵⁵ Defendant United States Soccer Federation’s Answer and Affirmative Defenses to Plaintiff’s Complaint ¶ 1, at 1, *Morgan v. U.S. Soccer Fed’n, Inc.*, No. 2:19-cv-01717-RGK-AGR (May 6, 2019).

¹⁵⁶ 29 C.F.R. § 1620.14(a) (2019).

¹⁵⁷ See Women’s Nat’l Team Collective Bargaining Agreement, *supra* note 81, at art. 10; Men’s Nat’l Team Collective Bargaining Agreement, Uniform Player Agreement, *supra* note 94, § 1.

they are engaged in equal work. Of course, some will contend, as the Federation has, that the teams' work is unequal because they compete against different opponents in different tournaments. Others may argue that because of the faster and more physical nature of the men's game, the players' work is inherently unequal. But as illustrated in *Bence*, even if employees operate in different markets and the difficulty of achieving success in those markets varies, the court may still conclude that those employees perform equal work.

The key to the "equal work" analysis is whether the employees perform the same tasks and hold the same duties and responsibilities as one another.¹⁵⁸ The fact that employees operate in different markets is not determinative.¹⁵⁹ Therefore, based on the express terms of the WNT and MNT collective bargaining agreements, a court is likely to find this element satisfied.

Nevertheless, even if the WNT players succeed in showing that they work in the same establishment as the MNT players, that they are paid at a lower rate than the men, and that they perform equal work, the Federation may still prevail if it can show that the WNT players' salaries are based on a factor "other than sex."

D. "Other than Sex"

Two factors "other than sex" potentially justify the Federation's payment of different salaries to the WNT players and the MNT players. The first is the economic market in which the two teams operate, and the resulting difference in revenue that they generate. The second is the different risk tolerances of the WNT and the MNT players, which explain the very different structures of the teams' CBAs.

As to the economic differences, the discussion above explained that the market for men's soccer is significantly larger than the market for women's soccer, particularly on the international level. As previously explained, FIFA states that it derives 95% of its broadcast revenue from the Men's World Cup, and the 2018 Men's World Cup generated over

¹⁵⁸ See *Brewster v. Barnes*, 788 F.2d 985, 991 (4th Cir. 1986) ("The crucial finding on the equal work issue is whether the jobs to be compared have a 'common core' of tasks, i.e., whether a significant portion of the two jobs is identical. The inquiry then turns to whether the differing or additional tasks make the work substantially different." (quoting *Brobst v. Columbus Servs. Int'l*, 761 F.2d 148, 156 (3d Cir. 1985))).

¹⁵⁹ See 29 C.F.R. § 1620.14(c) ("[T]he fact that jobs are performed in different departments or locations within the establishment would not necessarily be sufficient to demonstrate that unequal work is involved where the equal pay standard otherwise applies.").

\$5 billion in revenue. Courts have often held that revenue generation constitutes a legitimate reason “other than sex” for disparate salary arrangements.

For example, in *Hodgson v. Robert Hall Clothes, Inc.*, the Third Circuit held that economic benefit to the employer is a “reason other than sex” justifying salary differences.¹⁶⁰ In *Robert Hall*, the Secretary of Labor sued a clothing store that compensated its male employees at a higher rate than its female employees. According to the court, only male salespeople worked in the men’s clothing department and only female salespeople worked in the women’s clothing department because “the frequent necessity for physical contact between the sales persons and the customers . . . would embarrass both and would inhibit sales unless they were of the same sex.”¹⁶¹ The court noted that the “merchandise in the men’s department was, on the average, of higher price and better quality than the merchandise in the women’s department; and Robert Hall’s profit margin on the men’s clothing was higher than its margin on the women’s clothing.”¹⁶² As a result, the “men’s department at all times showed a larger dollar volume in gross sales, and a greater gross profit.”¹⁶³ Salespeople working at Robert Hall received both a base salary and incentive payments, with both higher for the male employees than for the female employees. The company explained the wage disparity by citing “economic factors, i.e., the higher profitability of the men’s department allowed it to pay the men more, and the lower profitability of the women’s department forced Robert Hall to pay the workers in that department less.”¹⁶⁴

In considering whether the company’s disparate payments were based on a factor “other than sex,” the Third Circuit stated that “the economic benefits to an employer could justify a wage differential.”¹⁶⁵ Thus, even though the male and female employees were performing equal work—both were selling clothing—the payment scheme used by Robert Hall did not violate the EPA. The court explained that

[i]t might take no more effort or skill to sell two different pairs of ten dollar shoes; but if the employer makes a four dollar profit on one pair as opposed to a two dollar profit on the other, the Secretary [of

¹⁶⁰ *Hodgson v. Robert Hall Clothes, Inc.*, 473 F.2d 589, 593 (3d Cir. 1973).

¹⁶¹ *Id.* at 592 (quoting *Hodgson v. Robert Hall*, 326 F. Supp. 1264, 1269 (D. Del. 1971)).

¹⁶² *Id.* at 590.

¹⁶³ *Id.* at 590–91.

¹⁶⁴ *Id.* at 592.

¹⁶⁵ *Id.* at 594.

Labor, based on the language of the Equal Pay Act and guidance issued] apparently allows a higher commission rate.¹⁶⁶

Summarizing its decision in favor of the employer, the court stated:

The overwhelming evidence which showed that the men's department was more profitable than the women's was sufficient to justify the difference in base salary. These statistics proved that Robert Hall's wage differentials were not based on sex but instead fully supported the reasoned business judgment that the sellers of women's clothing could not be paid as much as the sellers of men's clothing. Robert Hall's executives testified that it was their practice to base their wage rates on these departmental figures.¹⁶⁷

Courts have also recognized the relevance of an employee's economic benefit to the employer in the athletic context. Female coaches who receive lower pay than their male counterparts have often challenged their salaries under the EPA and Title VII. One such case is *Stanley v. University of Southern California*, a Ninth Circuit decision.¹⁶⁸ In *Stanley*, the court rejected the EPA claim brought by Marianne Stanley, the former head coach of the USC women's basketball team, even though the women's team enjoyed more postseason success than the men's team during Coach Stanley's four-year tenure as coach.¹⁶⁹ First, the court found that Coach Stanley's job was not "equal work" compared to the men's coach because coaching the men's team required "substantial public relations and promotional activities" that did not apply to Coach Stanley's position.¹⁷⁰

In addition, the court stated that "revenue generation is an important factor that may be considered in justifying greater pay."¹⁷¹ Over Coach Stanley's four years at USC, the women's basketball team generated revenue of \$50,262.¹⁷² During that same period of time, the men's team brought in revenue of \$4,725,784.¹⁷³ The court further rejected Coach Stanley's arguments that this difference in revenue resulted from unequal marketing efforts by the school and gender discrimination by sports fans. As to marketing, the court said that USC's decision to

¹⁶⁶ *Id.* at 595.

¹⁶⁷ *Id.* at 597.

¹⁶⁸ *Stanley v. Univ. of S. Cal.*, 13 F.3d 1313 (9th Cir. 1994).

¹⁶⁹ The Ninth Circuit did not specify how much less the women's team coach made than the men's team coach in *Stanley*, stating only that the district court "reviewed Coach Raveling's [the men's team coach] employment contract *in camera*." *Id.* at 1318.

¹⁷⁰ *Id.* at 1321.

¹⁷¹ *Id.* at 1323.

¹⁷² *Id.* at 1322 n.1.

¹⁷³ *Id.*

invest more money into marketing the men's basketball team "demonstrates, at best, a business decision to allocate USC resources to the team that generates the most revenue."¹⁷⁴ The Ninth Circuit also agreed with the district court that "societal discrimination in preferring to witness men's sports in greater numbers cannot be attributed to USC."¹⁷⁵ For all these reasons, the court rejected Coach Stanley's EPA claim. Other courts have reached the same result in lawsuits involving female coaches whose teams generate less revenue than the teams of male comparator coaches.¹⁷⁶

One final example, outside the sports context, illustrates the relevance of revenue generation in salary determination, even if the plaintiff's job performance is strong. In *Sobol v. Kidder, Peabody & Co.*,¹⁷⁷ the district court for the Southern District of New York affirmed an arbitration panel's finding of no violation of the EPA where the plaintiff contended that she received lower compensation than other managing directors at her investment banking firm. The court found that factors other than sex explained the compensation disparity. In particular, these factors included "profitability, market value, revenue generation, client relationships, product development abilities, product knowledge, leadership abilities and corporate citizenship."¹⁷⁸ Sobol headed Kidder, Peabody's utility industry group, which the defendant characterized as "a relatively slow-paced, unprofitable industry group."¹⁷⁹ In contrast, other groups at the firm such as "Media, Environmental, Restructuring, and M&A were 'busier and more profitable.'"¹⁸⁰ The defendant justified the pay differential between the plaintiff and other managing directors based on profitability: "M & A

¹⁷⁴ *Id.* at 1323.

¹⁷⁵ *Id.*

¹⁷⁶ *See, e.g.,* *Bartges v. Univ. of N.C. at Charlotte*, 908 F. Supp. 1312, 1323, 1326–27 (W.D.N.C. 1995) (granting summary judgment against the female assistant women's basketball and softball coach because "men's basketball is the most marketable and largest revenue sport at UNCC" and in light of the revenue-generating potential and community interest in the sports the plaintiff coached); *Deli v. Univ. of Minn.*, 863 F. Supp. 958, 961 (D. Minn. 1994) (rejecting disparate pay claims by women's gymnastics coach based on evidence that "the three teams [used for comparison purposes] enjoy[ed] significantly greater spectator attendance and generate[d] substantially more revenue for the University than the women's gymnastics team").

¹⁷⁷ *Sobol v. Kidder, Peabody & Co.*, 49 F. Supp. 2d 208 (S.D.N.Y. 1999).

¹⁷⁸ *Id.* at 215.

¹⁷⁹ *Id.* (internal quotation marks omitted).

¹⁸⁰ *Id.* (internal quotation marks omitted).

deals were highly profitable, utility deals tended to be ‘loss leaders and unprofitable.’”¹⁸¹

The court accepted the employer’s justification for the pay inequality. According to the *Sobol* court, a “firm’s practice of paying high revenue generators more than individuals who produce less does not violate the EPA.”¹⁸² According to the court, “Sobol compared herself to three senior M&A bankers who were considered extremely valuable assets to the firm” and “the Utility Group’s revenue production was sluggish during Sobol’s tenure.”¹⁸³ Thus, even if plaintiff performed high-quality work, the industry group she led was less profitable than other industry groups, justifying lower compensation and precluding a violation of the EPA.

With respect to the WNT and the MNT, an examination of the Federation’s audited financial statements and annual budget documents shows net revenue attributable to the operation of each of the teams over the last four years as shown in Table 6.

Table 6. *The Federation’s Net Revenue for the WNT and MNT*

Fiscal Year	WNT Net Revenue	MNT Net Revenue
2018	(\$5,095,777)	\$17,088,412
2017	\$903,810	\$42,181,508
2016	\$6,777,160	\$2,316,739
2015	(\$4,898,049)	(\$3,356,132)
Avg.	(\$578,214)	\$14,557,631

These figures, however, warrant some explanation and perhaps some skepticism. First, the Federation does not allocate to either team any share of the revenue it derives from sponsorships, television, licensing, or royalties. Clearly, the national teams are the source of

¹⁸¹ *Id.* (internal quotation marks omitted).

¹⁸² *Id.* at 220.

¹⁸³ *Id.* (citing *Sprague v. Thorn Americas, Inc.* 129 F.3d 1355 (10th Cir. 1997)) (finding it permissible to pay a female assistant manager less than male assistant managers where the female’s department produced less than 10% of revenues produced by the males’ departments); see also *Byrd v. Ronayne*, 61 F.3d 1026 (1st Cir. 1995) (affirming dismissal of discriminatory pay claim; the fact that one attorney brought in substantially more clients and revenue than plaintiff afforded the employer an affirmative defense to the EPA claim).

much (if not all) of this income, but the Federation's financial statements do not allocate it to either team. Second, the figures for 2017 and 2018 for the MNT include revenue related to the Copa America Centenario tournament. That tournament generated \$50 million of revenue in fiscal year 2017 and \$18.7 million in fiscal year 2018. While the MNT performed well in the tournament, the revenue resulted from the Federation serving as tournament host. Therefore, while it may be fair to attribute this revenue to the MNT (since it comes from a tournament in which the MNT participated), the revenue did not result directly from the performance of the MNT.¹⁸⁴

All that said, based on average game revenue,¹⁸⁵ television viewership, and tournament revenue (Copa America Centenario in 2016; Men's World Cup upcoming in 2026), the MNT does and will generate higher revenue for the Federation than the WNT. Moreover, the potential revenue from the MNT is significantly higher, given the larger FIFA prize money available for the Men's World Cup (\$400 million in 2018) compared to the Women's World Cup (\$30 million in 2019). These differences would most likely lead a court to conclude that any disparity in pay between WNT players and MNT players is based on a factor "other than sex."

In addition to a difference in revenue generation, courts have also upheld different salary arrangements with male and female employees based on the employees' choice to take or avoid risk. In other words, the risk tolerance of the employee has been considered a factor "other than sex" justifying disparate pay arrangements. This was illustrated in *Schleicher v. Preferred Solutions, Inc.*,¹⁸⁶ where the Sixth Circuit found no violation of the EPA even though a male employee was paid almost \$700,000 more than a female employee over a four-year period. The difference in payments between the two employees resulted from the male employee agreeing to payments based solely on 20% of a profit pool, with no guaranteed base salary; in contrast, the female employee opted for a base salary of \$100,000 and only 10% of the profit pool.¹⁸⁷ Despite the significant difference in amounts actually paid to these two employees, the court found no violation of the EPA because the lower-paid female employee chose the less risky salary arrangement. According to the trial court, and as affirmed by the Sixth

¹⁸⁴ Arguably, the strong performance by the MNT increased interest in the tournament among the U.S. viewing public, which indirectly increased the Federation's revenue as host.

¹⁸⁵ See *supra* Part II.

¹⁸⁶ *Schleicher v. Preferred Sols., Inc.*, 831 F.3d 746 (6th Cir. 2016).

¹⁸⁷ *Id.* at 749–50.

Circuit, the female employee’s “compensation differential was based on a factor other than sex—namely personal choice regarding the risk associated with the compensation structure.”¹⁸⁸

Depending on the negotiation history of the WNT CBA, this factor could also justify the different arrangements that the WNT players and the MNT players have with the Federation. Importantly, in *Schleicher* the court noted that the employer had offered both employees the same compensation model: the male employee elected the riskier model, while the female employee chose a more conservative approach. The Federation has claimed that it was the WNT players who “consistently rejected all proposals, most recently offered by U.S. Soccer during CBA negotiations in 2017, for a ‘pay-to-play’ structure similar to the one that the USMNT players accepted in their collective bargaining agreements.”¹⁸⁹ In contrast, the WNT players argue that “during collective bargaining for a new contract, [the Federation] rejected requests for compensation for the WNT players that would have been at least equal to that afforded to the male MNT players.”¹⁹⁰ The WNT players also contend that they proposed to the Federation a revenue-sharing model, showing their “willingness to share in the risk and reward of the economic success of the WNT,” but that the Federation “categorically rejected” the proposed model.¹⁹¹

If the Federation can show that it offered the WNT players an arrangement similar to the pay-to-play structure of the MNT CBA, the WNT’s rejection of that structure could constitute another basis “other than sex” for the different payment structures between the two teams.

V

NEXT STEPS

As analyzed above, the WNT players face an uphill challenge with respect to their disparate pay claim. The difference in revenue generation and the players’ acceptance of the CBA’s guaranteed payment structure make it likely that a court will ultimately reject the merits of their claim. Even so, it is understandable and even admirable that the WNT players have pressed the issue of equal pay. It is understandable because over the thirty-five-year history of the WNT

¹⁸⁸ *Id.* at 752 (internal quotation marks omitted).

¹⁸⁹ Defendant United States Soccer Federation’s Answer and Affirmative Defenses to Plaintiff’s Complaint, *supra* note 155, ¶ 1.

¹⁹⁰ Plaintiffs’ Collective Action Complaint, *supra* note 8, ¶ 62.

¹⁹¹ *Id.* ¶ 63.

the players have had to fight for every step of progress and respect that they have achieved. Sometimes that fight has been through threats to strike, and sometimes it has been through litigation. Because of the team's remarkable success on the field and the goodwill this has created with the American public, the team has made substantial progress for the women's game. Consider the \$500 bonus that the WNT players received in 1991 for winning the inaugural Women's World Cup compared to the hundreds of thousands of dollars that each team member received for their most recent World Cup victory.

The players' decision to litigate the current dispute is also admirable because they view their role as helping to smooth the way for future female athletes. If the WNT players can establish a new precedent for better treatment from the Federation, this will assist future generations of WNT players. It will also help women on other countries' national teams because those players will be able to point to the WNT as a model for how female athletes should be treated by their governing bodies.

So why should the Federation seek to accommodate the WNT players if it has the stronger legal position? Because this is an opportunity to advance the Federation's stated mission. The Federation's mission is "to promote and govern soccer in the United States in order to make it the preeminent sport recognized for excellence in participating, spectator appeal, international competitions and gender equality."¹⁹² The Federation has the opportunity to achieve a significant step toward its mission of gender equality by recognizing the extraordinary accomplishments of the WNT players and compensating them accordingly.

Of course, the difficult question to answer is what this means—what is "equal pay" given the different pay structures for the WNT and the MNT as well as the different amount of resources available in light of the substantial gap in FIFA prize money between men's and women's competitions? Absolute equality may be impossible to achieve and may not even be desirable. For example, because the MNT failed to qualify for the 2018 Men's World Cup, the MNT players' salaries from the Federation for the 2018–19 fiscal year were lower than the salaries of the WNT players. Likewise, because of their victory in the 2019 Women's World Cup, the WNT players' salaries will be higher in fiscal year 2019–20 than the salaries of the MNT players. Presumably, most

¹⁹² *Financial Information, FY 2017 Form 990: Part III, U.S. SOCCER* (emphasis added), <https://www.ussoccer.com/governance/financial-information> [<https://perma.cc/S4RP-GX8T>].

observers would regard these results as “fair” though not “equal.” Of course, any pay arrangement must also recognize the different situations for WNT players and MNT players with respect to the stability and profitability of men’s and women’s professional soccer leagues. The MNT players are far less dependent on payments from the Federation because of the high professional team salaries that they receive.

With these complications in mind, setting forth some guiding principles may assist in moving the parties toward an acceptable agreement, even if these principles leave some important details for future consideration. Three principles in particular should guide the parties. First, NWSL salaries should be considered as distinct from payments for national team service. Second, lump sum payments to the players’ associations should be paid in lieu of game bonuses. Third, prize money should continue to be paid to the team earning the prize.

A. NWSL Salaries Should Be Separate from Payments for National Team Service

One of the complicating factors in comparing MNT players’ salaries and WNT players’ salaries is the fact that the Federation pays the professional team salaries for a number of WNT players. Although this is unquestionably a benefit to the players (and to the NWSL), these payments should not be “counted” in assessing the equality of compensation between MNT players and WNT players. The simple reason for this position is that WNT players perform additional services for these payments. They play at least twenty-four professional team games a year for their NWSL salaries.

And why should the Federation continue to make these payments if they do not relate directly to national team service? Because the payments ensure that there is a stable and competitive women’s professional league in the United States, which provides regular training for current WNT players and serves as a developmental system for future WNT players. In effect, the payments made by the Federation for NWSL salaries are an investment in the future success of the WNT and, ultimately, of the Federation itself.

B. Eliminate Game Bonus Payments and Make Equal Lump-Sum Payments to the Players Associations

One of the areas of greatest disparity in payments between the teams is the unequal game bonuses. Under their current CBAs, an MNT

player receives an average of \$13,166 for a win in an international friendly;¹⁹³ a WNT player receives only \$6,750.¹⁹⁴ Moreover, MNT players receive game bonuses for losses while WNT players do not. Similar disparities exist in the bonus payments for tournament qualifying games.

The Federation has justified the lower game bonus payments it makes to the WNT players by citing the Annual Base Compensation that it pays to them but not to the MNT players. But the inconsistent compensation structures (pay-for-play with higher game bonuses for the MNT; base salary and lower game bonuses for the WNT) has created inequity. One way to address this would be simply to pay equal lump sums to each team's players association and to eliminate game bonuses altogether. One has to ask whether game bonuses, particularly for friendlies, serve any effective purpose. Do players work harder and perform better because of individual game bonuses? Most likely, they do not. Players are motivated by the fact that they are representing their country, especially MNT players who risk losing significantly higher salaries playing for their professional teams if they are injured playing for the national team. Players are also motivated by the fact that they are trying to make the roster for the national team or trying to qualify the team for a particular tournament (which will involve tournament bonuses).

Because the WNT players do not enjoy the same high amount of professional salaries as the MNT players, they continue to need the stability of a base salary from the Federation. If the Federation eliminated game bonuses and paid equal lump sums to each players association, this payment structure would accomplish the goal of equal treatment between the two teams and still provide the predictable payment stream that the women players need. The Norwegian Football Association announced such an arrangement in October 2017,¹⁹⁵ so a model exists for how the Federation might work with the players associations to equalize base payments to both teams. As for health insurance and other employee benefits, the Federation could continue

¹⁹³ The MNT CBA provides for different payment amounts based on the ranking of the opponent. The \$13,166 figure is an average of those payment amounts $((\$17,625 + \$12,500 + \$9,735) / 3)$.

¹⁹⁴ This figure is calculated in the same way as the average for a MNT friendly win $((\$8,500 + \$6,500 + \$5,250) / 3)$.

¹⁹⁵ 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> [<https://perma.cc/D2P8-F4XU>].

to provide these for the WNT in connection with their NWSL service, thereby avoiding the cost of extending health insurance to MNT players, who are most likely already covered by their professional teams.

C. Continue to Pass FIFA Prize Money Payments Through to the Team That Earns the Prize Money

The greatest disparity in potential payments under the two teams' CBAs is in tournament bonuses. This relates to the huge discrepancy in prize money awarded by FIFA. As mentioned previously, FIFA awarded \$400 million in prize money to participants in the 2018 Men's World Cup, compared to only \$30 million to participants in the 2019 Women's World Cup.¹⁹⁶

This substantial difference in prize money payments creates a perception of inequality. The difference in FIFA's revenue from the men's and women's World Cup tournaments is driven largely by the discriminatory viewing habits of soccer spectators worldwide. Although that issue is beyond the control of the U.S. Soccer Federation, the Federation should still seek to address the disparity in prize payments. With respect to the CBAs, the Federation should treat the two teams equally by allowing each of them to receive a set, equal percentage of any tournament bonuses that the team earns.¹⁹⁷ For example, each team could receive 50% of any FIFA prize money earned by the team's performance. The Federation should also use its influence within FIFA to lobby for closing the growing gap in prize money payments.

Prize money payments for the Women's World Cup have increased substantially over time, but the absolute difference between men's and women's prize money continues to expand, as shown in Table 7.

¹⁹⁶ See FIFA FINANCIAL REPORT 2018, *supra* note 56, at 37.

¹⁹⁷ Again, this is the approach taken by the Norwegian Football Association. See Wahl, *supra* note 195.

Table 7. *World Cup Prize Money Payments*

Year of WC (Men's/ Women's)	Women's World Cup Prize Money	Men's World Cup Prize Money ¹⁹⁸	Difference
1990 / 1991	\$0	\$54 million	\$54 million
1994 / 1995	\$0	\$71 million	\$71 million
1998 / 1999	\$0	\$103 million	\$103 million
2002 / 2003	\$0	\$156 million	\$156 million
2006 / 2007	\$5.8 million	\$270 million	\$264.2 million
2010 / 2011	\$5.8 million	\$348 million	\$342.2 million
2014 / 2015	\$15 million	\$358 million	\$343 million
2018 / 2019	\$30 million	\$400 million	\$370 million

The prize money for the 2022 Men's World Cup is budgeted to be \$440 million.¹⁹⁹ Following the success of the 2019 Women's World Cup, FIFA President Gianni Infantino proposed expanding the field from twenty-four to thirty-two teams and doubling the prize money.²⁰⁰ FIFA subsequently approved the increase in the number of Women's World Cup participants.²⁰¹ It has not yet officially acted on the proposed prize money increase. The Federation should use its influence to support a significant increase in the prize money for the women's tournament so that FIFA can fulfill its stated objective of "promot[ing]

¹⁹⁸ FIFA WORLD CUP RUSSIA 2018, OFF THE PITCH: STATISTICAL KIT 4, 6–8 (2018), <https://resources.fifa.com/image/upload/2018-fifa-world-cup-russiatm-off-the-pitch-statistical-kit.pdf?cloudid=fuhtpanmzaze9kiyqvvr> [<https://perma.cc/L9TP-HAX9>]; Drew Nantais, *Women's World Cup Prize Money: How Much Will the Winners Make in 2019? Purse, Payouts for Entire Field*, SPORTINGNEWS (June 28, 2019), <https://www.sportingnews.com/us/soccer/news/womens-world-cup-prize-money-how-much-winners-make-2019-purse-payouts/175riw9k9v9z51j12um36jh4yf> [<https://perma.cc/LU3K-PHGP>].

¹⁹⁹ See FIFA FINANCIAL REPORT 2018, *supra* note 56, at 35.

²⁰⁰ Victor Mather, *FIFA President Proposes Expansion of Women's World Cup and Doubling of Prize Money*, N.Y. TIMES (July 5, 2019), <https://www.nytimes.com/2019/07/05/sports/fifa-world-cup-expansion.html> [<https://perma.cc/FHT6-257P>].

²⁰¹ See *FIFA Council Unanimously Approves Expanded 32-Team Field for FIFA Women's World Cup*, FIFA (July 31, 2019), <https://www.fifa.com/womensworldcup/news/fifa-council-unanimously-approves-the-expansion-of-the-fifa-women-s-world-cup-to> [<https://perma.cc/MR73-59SK>].

the development of women's football and the full participation of women at all levels of football governance."²⁰²

These principles still leave important issues for negotiation between the Federation and the players. But based on the EPA analysis above, it is clear that not every aspect of the WNT CBA and the MNT CBA needs to be the same to satisfy legal requirements, and there are reasons "other than sex" that might justify differences between the two agreements. The major financial terms of the agreements should follow the principles set forth above, however, to further the Federation's mission to bring about greater gender equity.

CONCLUSION

The United States Women's National Team has dominated women's soccer since the first Women's World Cup in 1991. Over the last twenty-eight years, the team has served as an inspiration for soccer players of both sexes, showing that the United States can succeed at the highest levels of the sport. It has been particularly impactful, though, for women and girls, who have drawn inspiration from the determination and strength of WNT players. The team has accelerated the development of women's soccer through its success on the field and its leadership off it. That leadership has resulted in occasional conflict with the Federation, which historically failed to grant WNT players the compensation and respect they deserved.

The current dispute between the WNT players and the Federation presents an opportunity. It is an opportunity for the Federation to take a major step toward realizing an important part of its mission: promoting gender equality. The WNT players have asserted a claim of discriminatory pay. The legal analysis of this claim favors the Federation, but that provides an even greater opportunity for the Federation to show its support for gender equality by granting more equitable terms to the WNT—not because it is legally required to do so but because it is the right thing to do. By using its resources and its influence to better compensate the WNT players and advance the sport of women's soccer, the Federation might resolve the current dispute and also serve as a leader on the broader issue of gender equity.

²⁰² See FIFA STATUTES § 2(f) (2019), <https://resources.fifa.com/image/upload/fifa-statutes-5-august-2019-en.pdf?cloudid=ggymhxxv8jrdfbekrrm> [<https://perma.cc/L73P-5582>].

