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UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

ALEX MORGAN ET AL.,

Plaintiffs/Claimants,

vs.

UNITED STATES SOCCER FEDERATION, INC.,

Defendant/Respondent.

Case No. 2:19-CV-01717-RGK-AGR

Assigned to: Judge R. Gary Klausner

PLAINTIFFS' OPPOSITION TO DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

Date: March 30, 2020
Time: 9:00 a.m.
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I. INTRODUCTION

USSF's summary judgment motion fails on multiple levels. It does not come close to meeting the standards of Rule 56. It misstates the law and its misrepresents the facts.[1] It is also dismissive of this Court's prior ruling in this case, once again resurrecting the discredited and "absurd" claim that because the women played and won more games than the men's team—and therefore in many cases earned more total compensation than the men—that somehow excuses the undisputed fact that the USSF subjected WNT players to a discriminatory rate of pay causing them tens of millions of dollars in back pay damages. Minute Order on Plaintiffs' Motion for Class Certification ("Minute Order"), Dkt. No. 98, at 5–6. USSF also advocates for what amounts to a collective bargaining exemption from the Equal Pay Act ("EPA") and Title VII that appears nowhere in the statutes and nowhere in the case law. In fact, it is fundamentally inconsistent with the Supreme Court authority that has held that collective bargaining may not be used to perpetuate unlawful discrimination. Even worse, USSF represents to this Court that there are undisputed facts about various subjects knowing that such factual claims have been repudiated by its own witnesses. For the following reasons, this Court should deny USSF's frivolous summary judgment motion.

First, as noted above, USSF relies upon the erroneous total remuneration legal test—already rejected by this Court—to argue that, because "U.S. Soccer still paid the WNT players $6 million more than it has paid the MNT players," "[t]hese facts alone should result in the dismissal of Plaintiffs' pay discrimination claims." United States Soccer Federation's Memorandum of Points and Authorities in Support of Its Motion for Summary Judgment, Dkt. No. 171-1 ("USSF MSJ"), at 6 (emphasis removed). As this Court has already held: "[USSF's] argument presupposes that there can be no

[1] USSF submitted a Statement of Uncontroverted Facts with its motion, Dkt. No. 171-2, but fails to cite the document, or any individual fact, anywhere in its motion. Without proper citations, it has not shown which facts it believes support the arguments in its motion.

discrimination . . . where a female employee's total annual compensation exceeds that of similarly situated males. . . courts interpreting the EPA . . . have explicitly rejected this argument—for good reason." Dkt. No. 98 at 5 (footnote omitted). The correct legal test under the EPA and Title VII is "rate of pay" and, as shown in Plaintiffs' summary judgment motion, it is an undisputed fact that the female WNT players have been compensated at a *lower rate of pay* than the male MNT players. Plaintiffs' Motion for Partial Summary Judgment, Dkt. No. 170 ("Plaintiffs' MSJ"), at 5–7. USSF's stubborn refusal to accept this Court's ruling that its position of no discrimination based on "total compensation" is "absurd" (Minute Order, Dkt. No. 98, at 5–6) just underscores the strained desperation which permeates all of USSF's summary judgment arguments.

Second, USSF has utterly failed in its attempt to argue that summary judgment can be granted in its favor under the EPA because Plaintiffs do not work in the same "establishment" as MNT players. USSF's argument is based on an unprecedented and erroneous interpretation of the EPA's "same establishment" test that neither the case law nor common sense supports. Simply put, there is no requirement under the EPA that employees must work in the same location or in the same work group to be part of the "same establishment." *See Marcoux v. State of Maine*, 797 F.2d 1100, 1102 (1st Cir. 1986). To the contrary, the EPA is clear that the same establishment requirement has been satisfied where, as here, the male and female workers have a common employer who exercises control over both work sites. If this were not the law, any employer could evade the EPA by having its male employees work in one location and its female employees work in a different location a mile away. No court has ever accepted such an argument, which once again borders on the absurd.

Third, USSF's fantastical claim that there is no genuine issue of fact that the WNT and MNT players do not perform equal work is belied by the sworn testimony of its own witnesses. USSF's witnesses uniformly admitted that a WNT player's job requires equal skill, effort, and responsibility compared to that of an MNT player. This is why summary judgment should be granted on this requirement in favor of the

Plaintiffs, not USSF. Plaintiffs' MSJ at 9–12. USSF's offensive efforts to argue that the women cannot perform equal work because they are of different biological sexes and men are "stronger" and "faster" is not a factor other than sex that provides a defense to an EPA claim—it is a factor based squarely on sex that is direct evidence of intentional gender-based discrimination. What matters under the EPA is whether WNT players' jobs require substantially equal skill, effort and responsibilities as the MNT players. 29 C.F.R. § 1620.13(c). The undisputed facts demonstrate that each of these elements has been satisfied by the Plaintiffs, whose team, by USSF's own admission, is comprised of the "Best Athletes in the World."[2] And USSF's President, Carlos Cordeiro, admitted to the world that the WNT did not receive equal pay for equal work when he ran for President in 2018 on a platform committing to working to provide such equal pay and treatment without waiting for the WNT's collective bargaining agreement to expire.[3] It thus does not even pass the red face test for the USSF to argue that it is entitled to summary judgment on this element.

Fourth, USSF's attempt to invent a collective bargaining exemption to the EPA is legally bankrupt: EPA regulations are explicit that a collective bargaining agreement "does not constitute a defense" for USSF. 29 C.F.R. § 1620.23. The case law from the Supreme Court is equally clear: the fact that a group of employees accepts the continuation of a discriminatory pay rate in collective bargaining is not a defense to a claim under either Title VII or the EPA. Further, there is no factual support for USSF's contention that Plaintiffs did not pursue equal pay in collective bargaining in favor of other bargaining objectives. To the contrary, the undisputed facts, as testified to by USSF's own employees, is that the Plaintiffs repeatedly asked in bargaining for equal pay to the MNT, but the USSF was unwilling to offer the WNT the same rate of bonuses

[2] Plaintiffs' Request for Judicial Notice in Support of their Motion for Partial Summary Judgment, Dkt. No. 170-36 ("Plaintiffs' RJN"), Ex. 1, Dkt. No. 170-37.

[3] Plaintiffs' Statement of Undisputed Facts in Support of their Motion for Partial Summary Judgment, Dkt. No 170-1 ("Plaintiffs' SUF"), at No. 21.

for friendlies, tournaments or the World Cup that it agreed to provide in the MNT CBA. The fact that the MNT and WNT had separate unions and separate collective bargaining agreements is neither a legal nor factual defense to the Plaintiffs' EPA and Title VII claims.

Fifth, USSF's purported "revenue" justification for its discrimination against the WNT is a pre-textual sham. The undisputed fact, from USSF's own financial records, is that during the class period (*i.e.*, 2015 to date), USSF received more revenue and profit from the WNT than from the MNT, according to the only revenue reports that USSF separately attributes to the MNT and WNT. Recognizing this, USSF now attempts to recast its revenue justification for its World Cup rate of pay discrimination on the fact that FIFA pays different amounts in prize money to the federations, like USSF, that participate in the Men's and Women's World Cups. But a third party's payment to USSF—an amount that USSF did not even know at the time it negotiated either team's World Cup compensation provisions—is not a job-related factor that, under Ninth Circuit law, can justify a wage discrimination. To the contrary, the record is clear that FIFA payments to USSF did not in any way restrict the compensation that USSF could have offered for World Cup participation to the MNT and WNT and does not provide any defense for Plaintiffs' claims under either the EPA or Title VII.

Finally, USSF's exhaustion of administrative remedies defense to Plaintiffs' claims of working conditions discrimination in violation of Title VII is factually unsupportable. The Title VII class representatives' EEOC charges complained that USSF discriminated against them and other WNT players on the basis of sex with respect to not just compensation, but also with respect to other terms and conditions of employment. And the record demonstrates that the EEOC's investigation covered these claims of discrimination relating to the WNT's working conditions. All administrative remedies, thus, were exhausted. This additional ground for summary judgment asserted by USSF should be rejected out of hand, as USSF cannot demonstrate that there is no

genuine issue of material fact with regards to Plaintiffs' claims of working conditions discrimination.

II. LEGAL STANDARD

Summary judgment is not appropriate where a movant cannot establish that "there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a); *see also Anderson v. Liberty Lobby, Inc*., 477 U.S. 242, 250 (1986). A material fact in dispute arises when its existence or non-existence could lead a jury to different outcomes. *See Anderson*, 477 U.S. at 248. The burden of demonstrating that there are no genuine disputes of material facts lies with the moving party. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). In resolving the motion, the Court must view facts "in the light most favorable to the nonmoving party." *Ricci v. DeStefano*, 557 U.S. 557, 586 (2009). "[W]hat is required to defeat summary judgment is simply evidence 'such that a reasonable juror drawing all inferences in favor of the respondent could return a verdict in the respondent's favor.'" *Zetwick v. Cty. of Yolo,* 850 F.3d 436, 441 (9th Cir. 2017) (quoting *Reza v. Pearce*, 806 F.3d 497, 505 (9th Cir. 2015)). Additionally, "[t]he district court must not only properly consider the record on summary judgment, but must consider that record in light of the 'governing law.'" *Id.* (*citing Anderson*, 477 U.S. at 248).

III. USSF'S MOTION FOR SUMMARY JUDGMENT ON PLAINTIFFS' EQUAL PAY ACT CLAIMS MUST BE DENIED.

A. USSF's Motion for Summary Judgment Fails as a Matter of Law and Fact on the First EPA Element—Whether Plaintiffs Are Paid at a Lower Rate Than MNT Players.

USSF, once again, asks this Court not to compare the *rate of pay* at which it pays Plaintiffs as compared to the rate at which it pays their male comparators, but to compare the actual *total compensation* paid to the MNT (or certain MNT players) with the actual *total compensation paid* to the WNT, or certain WNT players. This argument is contrary to the prior ruling of this Court's Minute Order, Dkt. 98, at 5, USSF's own

admission that the "wage 'rate'" under the EPA refers to "***the standard or measure by which an employee's wage is determined***" (USSF MSJ at 7 (emphasis in original) (quoting 29 C.F.R. § 1620.12)), and the express language in the Equal Pay Act, which makes it clear that its discrimination prohibition is with respect to the "rate" of pay. 29 U.S.C. § 206(d)(1). This is the beginning and end of the USSF's head in the sand attempt to re-litigate its "absurd" total compensation argument. Plaintiffs' MSJ at 3.

USSF's cited cases (USSF MSJ at 8–9) have nothing to do with the governing rate of pay discrimination standard. They merely stand for the undisputed proposition—as set forth in the regulations to the EPA—that all compensation, including bonuses and benefits, should be considered in determining whether a rate of pay wage differential exists (which is exactly what Plaintiffs' damages expert did here). *See* Expert Economic Damages Report of Finnie B. Cook, Ph.D. on February 4, 2020 ("Cook Report"), Dkt. No. 167-7, ¶ 48. In *Huebner v. ESEC Inc.*, for example, the court compared pay from a "complicated [compensation] structure involving a base commission rate, an incentive factor, and a 'split' factor" and totaled the different categories of compensation to evaluate whether the rate of pay was discriminatory. No. CV 01-0157-PHX-PGR, 2003 U.S. Dist. LEXIS 28289 at *7 n.10 (D. Ariz. Mar. 26, 2003) (explaining that because "the commission structure … was not just one number" … the "'actual' commission rate" combining the different elements of pay was "the more appropriate comparison figure"). In *Berlotti v. Philbeck, Inc.*, the court similarly added the cost of health benefit premiums to plaintiff's compensation to conduct the rate of pay discrimination analysis. 827 F. Supp. 1005, 1010 (S.D. Ga. 1993). Neither these cases, nor USSF's other citations, stand for the "absurd" result advocated by USSF that total compensation can be used to establish an absence of discrimination "regardless of whether the female employee receives a lower rate of pay than her male comparators." Minute Order, Dkt. No. 98, at 5.[4]

[4] In all of USSF's cited cases, and unlike here, plaintiff alleged only that one form of her overall wages (usually base salary) was lower than the same form of wages paid to

USSF's motion on this first element also fails as a matter of fact. Indeed, the undisputed facts are that USSF paid Plaintiffs a lesser rate of compensation than their male counterparts in bonuses for friendlies, tournaments and the World Cup. Multiple USSF witnesses admitted these facts, including its 30(b)(6) witness on this issue. Plaintiffs' SUF No. 12–19, 66. This is not surprising, as the written compensation terms in the WNT and MNT collective bargaining agreements, on their face, establish lower rates of pay to the WNT players for all of these games. Plaintiffs' SUF No. 12–19. Further, USSF President Carlos Cordeiro admitted the existence of unequal pay and treatment during his 2018 campaign to become the USSF's President. He also admitted the fact that he and numerous other Board members had discussed this lack of equal treatment for years. Plaintiffs' SUF No. 20–23. It is frivolous for USSF to seek summary judgment on the basis of factual contentions which its own most senior employees have repudiated under oath.

There is also no merit to USSF's argument that the compensation structures for the WNT players and the MNT players are too different, as a matter of law, to be compared for Equal Pay Act purposes. USSF MSJ at 5–9. The case law cited by USSF is exactly the opposite. It simply instructs that a court should compare two different pay structures (containing different compensation elements), *Huebner*, 2003 U.S. Dist. LEXIS 28289 at *7 n.10, by evaluating whether—after taking the "measure of wage determination" (*i.e.*, performance results) into account—the women would have earned more had they been paid at the men's wage standard. *See also Mitchell v. Developers Diversified Realty Corp*. No. 4:09-CV-224, 2010 WL 3855547, at *5 (E.D. Tex. Sept. 8, 2010) (cited at USSF MSJ at 9) ("The statute merely requires that Plaintiff receive

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a male comparator, without accounting for other forms of wages as the EPA requires. *See Marting v. Crawford & Co.*, 203 F. Supp. 2d 958, 966 (N.D. Ill. 2002) (base salary); *Gallagher v. Kleinwort Benson Gov't Sec., Inc.*, 698 F. Supp. 1401, 1404 (N.D. Ill. 1988) (base salary); *Mitchell*, 2010 WL 3855547 at *5 (E.D. Tex. Sept. 8, 2010) (bonuses); *Berlotti v. Philbeck, Inc.*, 827 F. Supp. at 1010 (weekly base salary); *Huebner*, U.S. Dist. LEXIS 28289 at *7 n.10 (base commission rate).

total compensation at least equal to male employees *with equal performance*") (emphasis added). This is exactly the approach that was employed by Plaintiffs' expert here, who found that USSF's own undisputed compensation records demonstrated that the WNT class members would have collectively earned tens of millions of dollars more in compensation had they been compensated under the terms of the MNT CBA. *See generally* Cook Report, Dkt. No. 167-7. There is thus no plausible basis for summary judgment in favor of the USSF on this point.[5]

B. USSF's Motion for Summary Judgment Fails on the Second EPA Element—Whether Plaintiffs Work in the Same Establishment as the MNT.

The undisputed facts establish that, contrary to USSF claims, it is a single establishment employing the players of the MNT and the WNT, and it centrally administers all aspects of their employment. Plaintiffs' SUF No. 41–53. These are the dispositive facts which demonstrate Plaintiffs have satisfied the "same establishment" requirement of the EPA. Plaintiffs' MSJ at 12–13. USSF's attempt to evade this conclusion by arguing that the dispositive fact is that Plaintiffs play on a separate team

[5] The small economic value of the fringe benefits provided to the WNT, but not the MNT, cannot be disputed. Over the five-year damages period for Plaintiffs' Title VII claim, USSF paid $136,235, in total, across all class members, for health, dental and vision benefits, and $443,990, in total, across all class members, for severance, injury protection, and pregnancy or maternity leave. After offsetting these amounts, Plaintiffs' expert found, from USSF's own compensation records, that class members still would have received $63,822,242 more had they been paid at the MNT's wage rate. Cook Report, Dkt. No. 167-7, at ¶¶ 15, 48; Ex. 34 to the Further Declaration of Diana Hughes Leiden in Support of Plaintiffs' Opposition to Defendant's Motion for Summary Judgment; Expert Rebuttal Opinion Report of Finnie B. Cook, Ph.D, March 6, 2020 ("Cook Rebuttal Report"), at ¶ 15. Unless otherwise stated, all exhibit references are to the Declaration of Diana Hughes Leiden submitted with Plaintiffs' MSJ, Dkt. No. 170-2, or to the Further Declaration of Diana Hughes Leiden filed concurrently herewith.

in a separate location involving different games and opponents is refuted by the governing case law.

As the courts have recognized, a definition of "establishment" limited to one location is outdated as such a "narrow construction of the word … [that could] make proof of discrimination more difficult, thus frustrating congressional intent." *Brennan v. Goose Creek Consol. Indep. School Dist.*, 519 F.2d 53, 58 (5th Cir. 1975). *See also Grumbine v. United States*, 586 F. Supp. 1144, 1147–48 (D.D.C. 1984) ("giv[ing]… the term 'establishment' a geographic meaning . . . has little relevance to the Equal Pay Act provisions of the Fair Labor Standards Act."); *Rehwaldt v. Elec. Data Sys. Corp*., No. 95-876, 1996 WL 947568, at *6 (W.D.N.Y. Mar. 28, 1996) ("Disparate results would occur if the language of the regulation were applied literally. For example, … common sense would be ignored, if the same employer could operate two plants performing the same essential functions under the same management across the street from one another, but have each plant be deemed a separate establishment for Equal Pay Act claims."); *Tomchek-May v. Brown Cty.*, 581 F. Supp. 1163, 1166–67 (E.D. Wis. 1984) ("When the Equal Pay Act was extended to reach public schools and, later, professional employees, it became apparent that the narrow reading of the term 'establishment' would have a restrictive effect on the remedial purpose of the Equal Pay Act."). It would be particularly nonsensical in this case to rely on physical location as the touchstone for "establishment," because the MNT and WNT do not play in any single location on a regular basis, but play in various physical locations in different stadiums across the country and the world as part of their same job responsibilities. The Equal Pay Act would have no meaning at all if an employer could evade its requirements simply by locating its female employees in one physical location and its male employees in another location.

Nor is there any basis for the USSF's claim that the WNT and MNT are "operationally distinct" so that they should not be found to be in the same establishment. Rather, it is undisputed that USSF exercises centralized control over nearly every aspect

of the two teams' existence (and not merely compensation decisions as USSF claims), including budgeting, financial planning, the selection of game venues and logistics, scheduling, marketing, and decisions relating to broadcasting and licensing. Plaintiffs' SUF No. 45–53; Declaration of Tom King in Support of Defendant's Motion for Summary Judgment, Dkt. No. 171-21, ¶ 2 ("I am responsible for the non-technical operations of the … [WNT] and [MNT]. This includes scheduling, budgeting, staffing, logistics, and security. … I have had these responsibilities throughout my tenure with U.S. Soccer."), ¶¶ 46–54 (discussing how USSF and Mr. King made charter flight decisions for both the WNT and MNT). And, with only a few exceptions (*e.g.*, coaches and press officers), the majority of USSF employees exercise the same control over the essential operations of *both* the WNT and the MNT. Plaintiffs' SUF No. 41–43. This undisputed common administration by a common employer is, by itself, a sufficient factual basis to find that WNT players and MNT players work for the same establishment under the EPA. *See Brennan*, 519 F.2d at 58 (finding a single establishment based on common centralized control of wages, scheduling and job duties); *Grumbine*, 586 F. Supp. at 1148 (finding same establishment based on, among other things, degree of centralized personnel administration); *Marshall v. Dallas Indep. Sch. Dist.,* 605 F.2d 191, 193 (5th Cir.1979) (all schools in a district under the control of a central administrative office constitute a single establishment under the EPA). Further, as the National Governing Body for soccer in the United States, USSF must be "autonomous in the governance of its sport," meaning it "controls all matters central to governance." 36 U.S.C. § 220522(a)(5). Given this legal obligation, it cannot avoid liability by disclaiming its control over the WNT and MNT.

Finally, even if there were any question about whether the same establishment requirement has been satisfied by Plaintiffs, at most, this factual dispute would have to be resolved by the jury and USSF's motion for summary judgment on this element would still have to be denied. *See E.E.O.C. v. Maricopa Cty. Cmty. College Dist.*, 1982

WL 289 at *2 (D. Ariz. Apr. 8, 1982) (resolution of "establishment" question "is within the province of the fact finder" where "the material issues of fact are in dispute").

C. USSF's Motion for Summary Judgment Fails on the Third EPA Element—Whether Plaintiffs and MNT Players Perform Equal Work.

USSF witnesses, including their binding 30(b)(6) witness on this subject, have admitted, under oath, that WNT players expend equal amounts of effort, are just as skilled as MNT players in performing for their respective national teams, and have equal responsibilities. Plaintiffs' SUF No. 25, 26, 28. USSF cannot escape the consequences of these undisputed facts by now arguing that Plaintiffs do not perform equal work to MNT players. At bottom, their argument is that their female professional players, who USSF has proclaimed are the "Best Athletes in the World" (Plaintiffs' RJN, Ex. 1, Dkt. No. 170-37), do not perform equal work to the male professional players because they lack the men's allegedly superior "speed and strength." This argument is wrong as a matter of law, factually irrelevant, and simply confirmatory of the USSF's gender-based discriminatory intent.

As a matter of law, under the EPA, the "equal work" inquiry "is limited to a comparison of the jobs in question"; it does not include a "comparison of the individuals who hold the jobs."[6] *Stanley v. Univ. of S. Calif.*, 178 F.3d 1069, 1074 (9th Cir. 1999); *see also Hein v. Oregon Coll. Of Educ.*, 718 F.2d 910, 914 (9th Cir. 1983) ("The [EPA] explicitly applies to jobs that require equal skills, and not to employees that possess equal skill . . . [t]he only comparison that should be made in a prima facie case is a comparison of the skills required by a job."). This standard applies even for jobs, like prison guards, that have been sex segregated. *See Marcoux*, 797 F.2d at 1102.

Essentially, USSF is asking this Court to create a special exemption to the discrimination laws because women and men might have certain different physical

[6] And even if strength and speed of employees were a relevant consideration, there is not a single fact in the record establishing any comparison of the actual speed or strength of members of the MNT and members of the WNT.

characteristics on average. But that is the very biological discrimination that the EPA and Title VII prohibit. Consider the case of male and female firefighters. The only relevant consideration is whether their jobs require the same skill and effort and responsibilities. Once that is established, it would not be lawful to provide higher pay to a male firefighter because, on average, males might be able to lift more weight than women. That biological distinction is not a justification for discrimination—it is the prohibited discrimination itself. The record establishes that the jobs of the MNT and the WNT require substantially similar skills, effort and responsibility. That is the end of the inquiry. Plaintiffs' MSJ at 9–12.

Nor is there any special EPA exception or different standard for employers of professional athletes.[7] USSF's argument for such an exception due to the purported different physical and biological characteristics of men and women is based on the same "ancient but outmoded belief that a man, because of his role in society, should be paid more than a woman even though his duties are the same" that the EPA was enacted to rectify. *Rizo v. Yovino*, No. 16-15372, 2020 WL 946053 at *6 (9th Cir. Feb. 27, 2020) (quoting *Corning Glass Works v. Brennan*, 417 U.S. 188, 195 (1974)).

Incredibly, USSF claims that the WNT and MNT are in "separate universes" because, while both teams played matches in Europe, Canada, and the United States, only the MNT played games in Mexico, Central America, and the Caribbean, and only the WNT played games in Brazil. USSF MSJ at 12. But these type of differences in playing location and opponent have no relevance to the "equal work" analysis for athletes any more than it would be included for any other job whose employees perform

[7] The intent of Congress to treat athletes the same as other employees under the Equal Pay Act is evidenced by the resolution passed unanimously in the politically divided United States Senate in support of equal pay for the WNT. Plaintiffs' RJN, Ex. 2, Dkt. No. 170-38. Nor can there be any doubt that the Civil Rights Act, which contains Title VII, was intended to provide for equal treatment for athletes, given the fact that Title IX was expressly enacted to combat the pernicious stereotypes about the relative value of women in sports that USSF spouts as a purported defense to a Title VII claim here.

the same job in different locations. The job skills and effort and responsibilities are the same. It is all equal work requiring equal pay under the EPA. Arguing that the WNT did not win its two World Cups "against the most elite male soccer players in the world" (USSF MSJ at 11) is not a defense under the EPA; it is a tone deaf admission of blatant gender-based discrimination. *See, e.g. Hodgson, Sec'y of Labor, United States Dep't of Labor v. San Diego Unified School Dist.*, No. 70-175F, 1972 WL 263, at *4 (S.D. Cal. 1972) (finding the fact that female matron custodians were not permitted by school regulation to operate machinery male custodians used "cannot be used as a basis to distinguish between the duties of matron custodians and custodians.").[8]

Finally, there is no relevance to the two cases cited by USSF where male and female sports coaches were found to have different job responsibilities because they had different revenue generating responsibilities and skill requirements, such as media relations, relating to revenue generation and greater pressure to win. *See Stanley v. Univ. of S. Calif.*, 13 F.3d 1313, 1322–23 (9th Cir. 1994); *Weaver v. Ohio State Univ.*, 71 F. Supp. 2d 789, 800–801 (S.D. Ohio 1998).[9] There is no such evidence in this case that the WNT players and MNT players had different responsibilities with respect to revenue generation, different media skill requirements or greater pressure to win. To the contrary, all of the evidence is that their job responsibilities and skill requirements were the same in these areas. Plaintiffs' SUF No. 25, 28. When male and female coaches are found to perform substantially equal jobs, including in managing assistant coaches and their players and in preparing for the team's games, they have been found to satisfy the EPA's substantially similar jobs requirement. *See, e.g.*, *Perdue v. City of*

[8] Current regulations prohibit male and female soccer players from playing in the same competitions. *See* Declaration of Sunil Gulati in Support of Defendant's Motion for Summary Judgment ("Gulati Decl.") Dkt. No. 171-3, ¶ 62.

[9] The court in *Weaver* also relied on the greater number of games played by the men's ice hockey team compared to the women's field hockey team. 71 F. Supp. 2d at 800. It is undisputed that the WNT has played many more games than the MNT during the class period. *See* Exs. 35 & 36, MNT 2014–2019 Match Details, USSF_Morgan_055538; WNT 2014–2019 Match Details, USSF_Morgan_055539.

New York, 13 F. Supp. 2d 326, 334 (E.D.N.Y. 1998); *Burkey v. Marshall Board of Educ.,* 513 F. Supp. 1084 (N.D. W.Va. 1981). The same analysis applies here. USSF has adduced no evidence that there is any quantitative or qualitative difference between MNT players and WNT players in media appearance obligations or alleged revenue generation responsibilities,[10] and the only evidence in the record indicates that WNT players faced even greater pressure from USSF to win than the MNT did.[11] On this factual record, summary judgment on this element can only be granted in favor of the WNT. Plaintiffs' MSJ at 9–12. USSF has utterly failed to show that there are no genuine issues of material fact, which, at a minimum, precludes summary judgment from being granted in favor of the USSF on this third element of the EPA. *See Hein*, 718 F.2d at 901 (whether jobs are substantially equal is a question of fact); *Lavin-McEleney v. Marist*, 239 F.3d 476, 480 (2d Cir. 2001) ("Whether two positions are 'substantially equivalent' for Equal Pay Act purposes is a question for the jury"). This is especially true because USSF's President proclaimed to the world in 2018 that the USSF had to work toward providing equal pay for equal work. Plaintiffs' SUF No. 21.

D. Plaintiffs—Not USSF—Are Entitled to Summary Judgment on USSF's Claimed Justifications for Its Discrimination.

Under the EPA, USSF bears the burden to prove that one of the four non-gender based affirmative defenses set forth in the FLSA justifies its pay discrimination. *See Corning Glass*, 417 U.S. at 196–97. This means proving "'not simply that the employer's proffered reasons *could* explain the wage disparity, but that the proffered reasons *do in fact* explain the wage disparity.'" *Rizo*, 2020 WL 946053 at *4 (quoting *EEOC v. Md. Ins. Admin.*, 879 F.3d 114, 121 (4th Cir. 2018)) (emphasis in original) (additional citations omitted). This also means that the employer bears the burden of

[10] Revenue generation is not listed as a responsibility of either WNT or MNT players. Plaintiffs' SUF No. 27–28.

[11] Ex. 37, Dep. of Tom King on January 23, 2020, 76:22–79:22; Ex. 38, Plaintiff's Dep. Ex. 121 (King), Excerpts of USSF CBA Meeting Notes, USSF_Morgan_005638 at 5745–5748; Ex. 39, Dep. of John Langel on November 21, 2019, 177:20–178:19.

proving that "sex provided *no* part of the basis for the wage differential." *Id.* at *8 (internal quotation marks and citations omitted) (emphasis in original). To prevail on summary judgment on one of these affirmative defenses, USSF would have to prove that there is no genuine issue of material fact concerning its claimed non-gender based justification for the discrimination. As shown in Plaintiffs' motion for summary judgment, not only is it impossible for USSF to meet this factual burden, all of the undisputed facts go in the other direction so that summary judgment against USSF's defenses should be rendered in favor of Plaintiffs. Plaintiffs' MSJ at 13–18. Further, the Ninth Circuit recently has made it clear that the "any other factor other than sex" exception on which USSF relies does not encompass any "business reason" and is "limited to ***job-related*** factors." *Rizo*, 2020 WL 946053 at *5–6.[12] "The equal-pay-for-equal-work mandate would mean little if employers were free to justify paying an employee of one sex less than an employee of the opposite sex for reasons unrelated to their jobs." *Id.* at *7. Indeed, the Ninth Circuit has held that the "category [of business reasons is] so capacious that it can accommodate factors entirely unrelated to the work employees actually perform. The phrase sweeps in what *Corning Glass* described as business decisions that 'may be understandable as a matter of economics,' but which nonetheless 'became illegal once Congress enacted into law the principle of equal pay for equal work.'" *Id.* at *8. Applying this controlling legal standard, the USSF's argument for summary judgment in its favor on its defense that it discriminated on the basis of "other factors other than sex" is without any legal or factual support.

1. USSF's Purported Defense Based on "Compromises in Bargaining" Does Not Justify its Wage Discrimination as A Matter of Law.

[12] *See also id.* at *7 (noting that the Second, Fourth, and Tenth Circuits have held the same, "that pay classification systems must be rooted in legitimate differences in responsibilities or qualifications for specific jobs").

USSF's first affirmative defense is its claim that Plaintiffs' lower wage rate is the result of a CBA negotiation process which qualifies as an "other factor other than sex." USSF MSJ at 15–17. This is wrong as a matter of law. To begin with, the EPA regulations explicitly state that a collective bargaining agreement "does not constitute a defense available to [ ] an employer." 29 C.F.R. § 1620.23. And the case law holds that Title VII and EPA claims cannot be waived during collective bargaining any more than a collective bargaining agreement could justify a violation of the minimum wage law. *See, e.g. Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 51-52 (1974) ("an employee's rights under Title VII are not susceptible of prospective waiver"); *Wright v. Universal Maritime Serv. Corp.*, 525 U.S. 70, 76 (1998) (reaffirming *Alexander*); *Laffey v. Northwest Airlines Inc.*, 567 F.2d 429, 446–47 (D.C. Cir. 1976) *abrog'd on other grounds by McLaughlin v. Richland Shoe Co.*, 486 U.S. 128 (1988) ("Rights established under Title VII and Equal Pay Act are not rights which can be bargained away either by a union, by an employer, or by both acting in concert.").

Moreover, an agreement to wage discrimination in collective bargaining is not a "factor other than sex" justified under the EPA. *See also Anderson*, 779 F.2d at 444 ("the mere existence of a wage agreement cannot be considered a 'factor other than sex'").[13] This conclusion is reinforced by the Ninth Circuit's decision in *Rizo*, as the

[13] USSF cites *Perkins v. Rock –Tenn Servs., Inc.*, but this case does not change the analysis here. 700 F. App'x 452, 457 (6th Cir. 2017). In *Perkins*, the Sixth Circuit held that prior salary was a justification, contrary to the Ninth Circuit's recent holding in *Rizo*, and that the pay differential "was based on experience, the existence of an hourly position, wage earnings history, and the fact that [the male comparator's] pay was set by a collective bargaining agreement." *Id.* Whatever significance the collective bargaining had to the Sixth Circuit's analysis, that decision would clearly not be followed by the Ninth Circuit under *Rizo* for the same reason that the Ninth Circuit would not consider wage earnings history to be a basis for an EPA defense. USSF's other cited case, *Diamond v. T. Rowe Price Assocs., Inc.*, did not involve a collective bargaining agreement. 852 F. Supp. 372 (D. Md. 1994). It involved a female employee who was offered the same compensation as male employees but negotiated for a different, "unique" compensation system. *Id.* at 380, 392. *Diamond* has no application here, not only because it was not decided in the union context, but also because the

existence of a collective bargaining agreement would not be an "other factor" for discriminating relating to the job performance or requirements of the employees. *Rizo*, 2020 WL 946053 at *6. Indeed, it would create a collective bargaining exception to the EPA and Title VII that the statutes do not provide and that exists nowhere in the case law. While USSF may believe such an exemption should be created, that argument belongs in Congress, not before a federal court that must apply the law as Congress has enacted it.

Moreover, even if collective bargaining could provide a legally viable defense to an EPA or Title VII claim (it cannot), such a putative defense would not be a basis for summary judgment in favor of the USSF here, where the undisputed facts show that bargaining is not the cause of the wage discrimination. USSF makes the assertion that it is unknowable whether it would have agreed to equal pay if only the women had asked for such equal treatment during collective bargaining. But the undisputed facts are that the WNT repeatedly made just such an equal pay demand. Plaintiffs' SUF No. 6–7. By March 2016, more than a year before the 2017 CBA was executed, Plaintiffs filed an EEOC charge further putting USSF on notice of their demands for equal pay.

And, USSF's witnesses, including its 30(b)(6) witness on this subject, testified that despite the WNTPA's equal pay demand, USSF never offered to pay the WNT at the same bonus rate as the MNT for friendlies, tournaments and the World Cup. Plaintiffs' SUF No. 8. It is thus impossible for the USSF to obtain summary judgment in its favor on the ground that the Plaintiffs never asked for equal pay to the MNT during collective bargaining. USSF's own witnesses admit just the opposite: USSF would not have agreed to equal pay "no matter what the WNTPA had offered as a compromise." USSF MSJ at 20; *see also* Gulati Decl., Dkt. No. 171-3, ¶ 81 ("I never would have authorized offering or accepting … the same bonuses for Women's World Cup play that were contained in the MNT's agreement"). Indeed, at his deposition, USSF's

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WNT players were never offered a compensation package with the same opportunities and rates of pay as the MNT players. Plaintiffs' SUF No. 8.

former president, Sunil Gulati, admitted that he told the WNT players during negotiations that USSF's terms were the most he would give financially, and while he was willing to move money around to different forms of compensation, the WNT had to accept the overall value of the deal or there would be no deal at all.[14]

In any event, USSF cannot argue, as a matter of law, that negotiations with the employees' union, which did not end the discrimination, provide a valid defense to an EPA claim. *See e.g.*, *Alexander*, 415 U.S. at 51-52; *Wright*, 525 U.S. at 76; *Laffey*, 567 F.2d at 446–47; *Thibodeaux-Woody v. Houston Cmty. Coll.*, 593 F App'x. 280, 284–85 (5th Cir. 2014) (basing pay differential on salary negotiation was not a bona fide "factor other than sex"); *Drum v. Leeson Elec. Corp*., 565 F.3d 1071, 1073 (8th Cir. 2009) (reversing summary judgment and holding employer did not satisfy its burden to show wage disparity was based on factor other than sex by pointing to salary negotiations).

2. USSF Has Not Proven Any Revenue Differential Justifying the Plaintiffs' Lower Wages.

USSF faces an insurmountable problem in asserting revenue differentials as an "other factor" affirmative defense in this litigation: it admits that from 2015 to date—the entire class period—the WNT has generated more total revenues and profits for USSF than the MNT, according to USSF's own financial records with respect to the only revenues that it allocates between the MNT and WNT. Plaintiffs' SUF No. 55–61. Equally devastating to the USSF defense is that it admits that it did not do any revenue justification analysis at the time it negotiated and imposed the discrimination.[15] This renders the entire revenue justification defense a post-litigation pretext. Further, USSF admits that the majority of its revenues—which it generates from broadcasting, licensing and sponsorship for the WNT and MNT in joint marketing agreements through Soccer United Marketing ("SUM")—must be included in the revenue analysis,

[14] Ex. 40, Deposition of Sunil Gulati, Volume II, on December 18, 2019, 188:15–193:24; Ex. 41, Plaintiffs' Dep. Ex. 78 (Gulati), USSF_Morgan_005770–005773.
[15] Ex. 42, USSF 30(b)(6) Dep. Tr.(Gulati) 106:12–107:9.

but are not allocated by the teams, and such a breakdown "can't be done." Plaintiffs' SUF 61. It is thus also impossible for USSF to meet its burden to show that there was a revenue justification for the discrimination when USSF did not know what revenue allocation between the MNT and WNT should be made for the majority of its revenues, which are provided by the SUM joint marketing agreements.

Indeed, the record evidence indicates that if SUM had permitted individual marketing of WNT rights, the WNT likely would have done better than the MNT in the class period since 2015 for these jointly marketed rights as well. For example, two key sponsors of USSF, Visa and Coke, [redacted]; [redacted] USSF's actions to prevent sponsors from gaining WNT-only marketing thus prevented the WNT from demonstrating how much more revenue it could have generated since 2015 than the MNT.

Finally, apparently recognizing all of the above fatal problems with its purported revenue defense, USSF has now asserted a new "revenue" justification related just to

its discrimination with respect to World Cup compensation. Specifically, USSF is now claiming that the difference in potential prize money from the FIFA Men's and Women's World Cups—which is paid to the federations, like the USSF, not to any of the players—is a non-gender-based revenue factor that could justify its discrimination. But this is not the law as, under the Ninth Circuit's decision in *Rizo*, it would not be a job-related factor that could justify a wage differential. 2020 WL 946053 at *6. The amounts that FIFA chooses to give to the Federation in prize money are not connected to any difference in job responsibilities or required skills. Instead, passing on the discriminatory prize money differential of FIFA to the federation is exactly the perpetuation of discrimination that the EPA seeks to remedy, like the wage histories that *Rizo* excluded as a justification for an EPA violation. *Id.* at *8 (affirmative defenses that "perpetuat[e] sex-based wage disparities" serve to "frustrate the EPA's purpose as well as its language and structure"). It is well-established that USSF cannot rely upon a third party's discrimination as a justification for its own decision to discriminate in World Cup compensation between the MNT players and WNT players. *Ariz. Governing Comm. for Tax Deferred Annuity and Deferred Comp. Plans v. Norris*, 463 U.S. 1073, 1089 (holding that "employers are ultimately responsible for the compensation, terms, conditions, and privileges of employment provided to employees" and an employer who adopts a compensation scheme "that discriminates among its employees on the basis of race, religion, sex, or national origin violates Title VII regardless of whether third parties are also involved in the discrimination"). Even if such a business decision "may be understandable as a matter of economics … [it] nonetheless became illegal once Congress enacted into law the principle of equal pay for equal work." *Rizo*, 2020 WL 946053 at *10.

In addition, USSF's binding 30(b)(6) admissions establish both that it did not know the amounts of FIFA prize money for upcoming World Cup tournaments when

the men's and women's CBAs were signed[16] and that the [redacted] not the players.[17] The MNT's CBA explicitly disclaims that any MNT player has any rights to prize money from FIFA or otherwise. *See* Dkt. No. 170-7, at 36 ("Amounts paid by tournament organizers, promoters, or sponsors as prize money … or participation fees belong to the Federation, and may be shared with the Player Pool in the sole discretion of the Federation."). USSF cannot dispute any of these facts which establish that the FIFA prize money differential is not a justification for the USSF's independent decision to discriminate in World Cup compensation.

IV. PLAINTIFFS' WORKING CONDITIONS CLAIMS UNDER TITLE VII MUST PROCEED TO TRIAL.

A. Plaintiffs Exhausted Their Administrative Remedies.

USSF claims that Plaintiffs failed to exhaust their administrative remedies with regard to their non-compensation Title VII claims. Not so. The EEOC charges submitted by the WNT class representatives complained that USSF discriminated against them on the basis of sex with respect to compensation and other terms or conditions of employment including paying MNT players a higher per diem for domestic and international events than it paid to WNT players. *See* Dkt. 171-46, Plaintiffs' Charges of Discrimination with the EEOC. This fact alone is sufficient to establish that the EEOC charges encompass a discriminatory working conditions claim. But whether a specific claim is mentioned in an EEOC charge is not determinative. Even if a specific claim is not explicitly mentioned, courts hold that a plaintiff nevertheless exhausted administrative remedies if the claim encompasses alleged discrimination that falls within the scope of the EEOC's actual investigation. *See, e.g.*, *Freeman v. Oakland Unified School Dist.*, 291 F.3d 632, 636 (9th Cir. 2002) ("Even when an employee seeks judicial relief for claims not listed in the original EEOC

[16] Ex. 45, USSF 30(b)(6) Dep. Tr. (Berhalter) 221:15–227:12.
[17] Ex. 46, USSF 30(b)(6) Dep. Tr. (King) 62:21–25.

charge, the complaint 'nevertheless may encompass any discrimination like or reasonably related to the allegations of the EEOC charge.'") (quoting *Oubichon v. North Am. Rockwell Corp.*, 482 F.2d 569, 571 (9th Cir. 1973)). This means that the EEOC's investigatory jurisdiction extends over all allegations of discrimination that either "fell within the scope of the EEOC's actual investigation or an EEOC investigation which can reasonably be expected to grow out of the charge of discrimination.'" *Id.* (quoting *B.K.B. v. Maui Police Dep't*, 276 F.3d 1091, 1100 (9th Cir. 2002)).

Further, courts are required to construe the EEOC charge "with utmost liberality." *Sosa v. Hiraoka*, 920 F.2d 1451, 1458 (9th Cir. 1990); *see also Renati v. Wal-Mart Stores, Inc.*, No. 19-0525, 2019 WL 5536206, *10 (N.D. Cal. Oct. 25, 2019) (holding that general references to the employer's compensation system and references to earlier pay discrimination will properly exhaust a claim based on policies arising after the EEOC charge was filed because they are "like or reasonably related to the charge's claims when they are committed by the same defendant and with the same discriminatory intent").

Here, the record demonstrates that the EEOC actually investigated differences in working conditions related to the WNT's claim, as evidenced by its Requests for Information and Winston & Strawn, LLP's August 3, 2016 response letter.[18] In the very first paragraph of this response letter to Mr. Grzegorz Mucha, Cardelle B. Spangler of Winston & Strawn, LLP notes that "[t]his letter responds to the EEOC's Requests for Information seeking . . . (3) the differences in working conditions between the men and women's national teams."[19] The letter goes on to explain, in detail, differences in working conditions with respect to field surfaces, access to trainers and exercise equipment, access to practice fields and locker rooms during training camps, access to

[18] *See* Ex. 1 to the Declaration of Cardelle Spangler in Support of Plaintiffs' Opposition to Defendant's Motion for Summary Judgment, August 3, 2016 Letter to the EEOC, USSF_Morgan_004132.

[19] *Id.*

medical personnel and massage and physical therapists, coaching resources, and the development academy.[20] There can thus be no question that the EEOC examined differences in working conditions during its investigation. Moreover, USSF was well aware of this fact both during the EEOC process and prior to filing the instant motion, as its lawyers participated in the EEOC investigation. There is thus no basis for USSF to dispute that Plaintiffs exhausted their administrative remedies on their Title VII working conditions claim, let alone to seek summary judgment on these claims based on a disingenuous claim of a failure to exhaust administrative remedies with the EEOC.

B. Plaintiffs Have Demonstrated Material Issues of Fact in Support of their Title VII Working Conditions Claim.

USSF contends that it should prevail on summary judgment against Plaintiffs' Title VII working conditions claims because Plaintiffs have not shown that they have suffered injury due to working conditions differences because of their sex. But this argument is specious. In order to defeat summary judgment on this issue, Plaintiffs must only present "evidence such that a reasonable juror drawing all inferences in favor of the respondent could return a verdict in the respondent's favor." *Zetwick*, 850 F.3d at 441 (internal quotations omitted). USSF makes much of the fact that the MNT flew on more charter flights for alleged reasons that are unconnected to sex. USSF MSJ at 23. Likewise, USSF claims that both teams have been forced to play on artificial turf, though it admits that it paid to have temporary grass installed for a 2019 MNT match. USSF MSJ at 24. None of its contested factual assertions, however, demonstrate that no genuine issues of material facts exist to support Plaintiffs' claims of working conditions discrimination.

On the contrary, Plaintiffs have come forward with significant probative evidence in support of their working conditions discrimination claims under Title VII, including those relating to (1) discrimination in field surfaces for WNT and MNT matches (with

[20] *Id.* at USSF_Morgan_004143–004151.

the WNT forced to play more often on artificial turf instead of the safer and more desirable grass); (2) the amount of money allocated and spent on each team's travel, airfare, and room and board (as well as the MNT's greater access to charter flights); and (3) personnel resources and support service for each team, including medical care and training support. Indeed, Plaintiffs have submitted the expert report of Dr. Caren Goldberg, an expert in Human Resources standards, who analyzed this evidence and concluded that "USSF operated well below the range of acceptable and standard HR practice for a U.S.-based employer of U.S.-based employees regarding … its treatment of players on the WNT in connection with their working conditions when compared to USSF's treatment of players on the MNT."[21] USSF has not submitted any expert testimony in opposition on this subject.

While USSF tries to downplay the disparities in the WNT's and MNT's playing surfaces, this does not eliminate the issues of fact to be resolved by the jury. For example, USSF's own documents show that for domestic soccer matches, where USSF decides the field surface, the WNT played on inferior artificial turf more often and at a higher rate than the MNT.[22] Further, USSF testified that decisions on playing surfaces were not made with equal treatment or player safety in mind.[23]

Similar evidence of discrimination in working conditions has been adduced for the provision of air travel and hotel accommodations. While USSF suggests that the WNT players were offered inferior travel accommodations than the MNT players inconsequentially and for reasons unrelated to sex, the record clearly raises genuine issues of material fact to the contrary. For example, USSF's own financial records reveal that it spent over $4 million more on air travel and hotels for the MNT than it did

[21] Ex. 47, Expert Report of Caren Goldberg, Ph.D., February 4, 2020 ("Goldberg Report"), at 7.
[22] Plaintiffs Statement of Additional Undisputed Facts ("SAUF") filed concurrently herewith, No. 1.
[23] Ex. 45, USSF 30(b)(6) Dep. Tr. (Berhalter) 277–279.

for the WNT from fiscal years 2015 to 2020 despite the fact that the WNT played 30% more matches during this time.[24] Additionally, the MNT traveled on charter flights almost three times more often than the WNT traveled from 2014 to 2019 even though the WNT played 33 more games than the MNT played.[25] Similarly, the evidence shows that from fiscal years 2015 through 2020, USSF spent over $2 million more on hotel expenses for the MNT than it did for the WNT even though, again, the WNT played far more games than the MNT played.[26] Moreover, the evidence reveals that USSF has paid the head coaches for the MNT far more than it has for the head coaches of the WNT.[27] USSF has also provided less medical care and training resources for the WNT than the MNT.[28] Further, USSF budgets in advance to spend millions more on these various services for the MNT than for the WNT.[29]

Most tellingly, President Cordeiro testified that he and other Board members were aware of the lack of equal treatment for years but took no action to remedy it. Plaintiffs' SUF No. 23. In the face of all of this evidence in support of Plaintiffs' working conditions claim, there is simply no colorable basis for summary judgment.

V. CONCLUSION

For all of the foregoing reasons, Plaintiffs respectfully request that the Court deny Defendant's Motion for Summary Judgment in its entirety.

Dated: March 9, 2020

WINSTON & STRAWN LLP

By: */s/ Jeffrey L. Kessler*
Jeffrey L. Kessler

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[24] SAUF No. 2, 3.
[25] SAUF No. 4, 5.
[26] SAUF No. 3, 6.
[27] SAUF No. 7, 8.
[28] SAUF No. 9.
[29] SAUF No. 10.