

### Litigators of the Week: Latham Team Shoots and Scores for U.S. Soccer Federation

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By Jenna Greene  
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Our Litigators of the Week are Latham & Watkins partners Michele Johnson and Jamie Wine, who turned the tide for the U.S. Soccer Federation in high-profile—and highly sensitive—wage discrimination lawsuit by the U.S. Senior Women's National Team.

Represented by Winston & Strawn, the women players sought more than \$66 million in damages, alleging violations of the Equal Pay Act and Title VII of the Civil Rights Act of 1964.

Wine and Johnson were hired in mid-March in the wake of a PR nightmare, after U.S. Soccer's prior counsel from Seyfarth Shaw argued in court papers that the players did not have a claim because the men's and women's teams "do not perform equal work requiring equal skill, effort, and responsibility under similar working conditions."

Johnson and Wine promptly kicked that argument to the curb and refocused the case on the nitty-gritty of actual compensation.

It worked.

On May 1, U.S. District Judge R. Gary Klausner in the Central District of California dismissed the equal pay claims on summary judgment, leaving only lesser claims for discriminatory working conditions involving travel arrangements.

Johnson and Wine discussed the case with Lit Daily.

**Who is your client and what is at stake?**

Jamie Wine and Michele Johnson: Our client is U.S. Soccer Federation, a non-profit, member-based organization whose mission is to promote and develop soccer, in all its forms, in the U.S. It supports the U.S. women's and men's senior national teams, as well as 16 Youth National Teams, the Para-7-a-side team, Beach National Team and Futsal National Team, and their 113 members across the country and millions of players, coaches and referees at all levels.



Michele Johnson, left, and Jamie Wine, right.

This litigation concerns the U.S. Senior Women's National Team's (WNT) disheartening claim that U.S. Soccer—who has a long history of supporting the women's team and being one of the strongest advocates for female soccer—discriminated against the women on the basis of gender and did not provide them equal pay. U.S. Soccer's commitment to the women's team, and its core values, are at stake.

**In their complaint, the women soccer players said they "have been consistently paid less money than their male counterparts. This is true even though their performance has been superior to that of the male players," including winning world championships. That sounds pretty compelling. What was your overarching argument in response?**

Jamie Wine: The WNT have developed a strategy around a simple argument that has instant appeal—their claim that they do not make the same amount of money as the less successful men's team. While that message sounds very compelling in the court of public opinion, it is untempered to the actual facts.

What we did was prove that the women's team in fact made more than the men's team in total compensation and on a per game basis. Equally important is that the women's [collective bargaining agreement] was the result of extensive negotiations between the women's team and U.S. Soccer, during which the WNT chose to reject the men's high risk/high reward "pay-to-play" compensation model and instead chose a more stable model with guaranteed salaries and other benefits the men do not receive.

And lastly, any difference in potential bonuses for the female players and the male players is due almost entirely to the vastly different prize monies awarded—and solely controlled by FIFA (and not U.S. Soccer) —for the Men's World Cup versus the Women's World Cup.

**You came into this case late. Set the stage—what was the situation before U.S. Soccer announced you were hired on March 11?**

Michele Johnson: Fact discovery had been completed, and the parties were briefing their dueling summary judgment motions. On March 9, both sides filed opposition briefs to the other party's motion.

In that brief, U.S. Soccer's prior counsel made the argument that women have less skill, effort, and ability than men and therefore aren't entitled to equal pay. These arguments, naturally, led to a widespread public outcry, and resulted in the president of U.S. Soccer stepping down and outside counsel being fired. We were called the day after that brief was filed.

**How did you come to be hired? (Did you have a prior relationship with U.S. Soccer? Pitch for the work?)**

Jamie Wine: U.S. Soccer and Latham have a long-standing relationship. In the immediate wake of the backlash from prior counsel's filings, U.S. Soccer reached out to us based on our experience and success as trial lawyers, and asked if we would be willing to take over.

We took on this engagement with the express purpose of working with U.S. Soccer to correct the previous misstep in both tone and substance, and a commitment to refocus the case on U.S. Soccer's legitimate (and ultimately winning) defenses to the WNT's claims.

**Aside from strictly legal arguments, what did you keep in mind as you jumped into the fray?**

Michele Johnson: We kept our core values in mind—and the core values of U.S. Soccer, which has led the fight to increase the popularity and respect of women's soccer worldwide. As Jamie notes, one of the most disheartening aspects of the case is that plaintiffs are claiming that U.S. Soccer doesn't give them equal pay, when not only has U.S. Soccer paid them more than the men's team per

game and overall, but also U.S. Soccer has been the world leader in growing and supporting women's soccer, including by leading the charge to lobby FIFA to offer greater and greater prize money in the Women's World Cup in the first place.

As far as we can ascertain, the WNT is the highest paid female soccer team in the world. It is important to us to preserve U.S. Soccer's ability to continue championing the game of soccer for women and girls the world over.

**Five days after you were hired, you filed your first reply brief on March 16. How did you pull together such a speedy response? Who are the key members of your team?**

Jamie Wine: All the credit goes to our incredible and fantastically diverse team. We immediately pulled in one of our other partners (Kuan Huang), a counsel (Sarah Gragert), and one of our appellate partners (Michael Bern), along with a wonderful team of associates.

Together we quickly got up to speed, got our arms around the facts and the law, made strategic decisions about which arguments we wanted to pursue, and drafted the reply brief essentially over the course of a weekend. After that, we handled all the expert depositions, drafted a number of pre-trial briefs and other filings, worked on witness preparation, and otherwise prepared the case for trial. We were ready to go.

**Michele, in your Lit Daily Litigation Leaders profile last year, you said one hallmark of Latham litigators is to "jettison weak, or even decent, arguments in order to focus on our strongest ones." Was that one of your strategies in this case?**

Michele Johnson: It absolutely was. Jamie and I kept saying to each other: Obviously we don't believe that women have less skill or dedicate less effort, but legally that argument is unnecessary in the first place. It was a weak argument under the law, and needed to be jettisoned, immediately. We reframed the winning arguments, which the judge found persuasive, and turned the case around.

**Digging a bit deeper, outline for us your primary arguments supporting summary judgment for U.S. Soccer.**

Michele Johnson: Pay discrimination claims under the Equal Pay Act hinge on a plaintiff's ability to prove that the rate of pay was less than that paid to a comparable male worker. The rate of pay that U.S. Soccer paid to the WNT was simply higher than that paid to the men's team, both in the aggregate and per game over the past five years.

And whereas the men's team would have made more under their CBA if they had won the Men's World Cup than the women's team made under their CBA when they

won the Women's World Cup, the women specifically rejected that pay-to-play compensation structure. Instead, the women's team negotiated for fixed salaries regardless of whether they play, and other benefits like medical insurance and parental leave. There simply has been no discrimination.

There are for sure vast differences in World Cup prize money made available to women and men, but that is an area where U.S. Soccer and the women should continue to advocate together, with FIFA, for change.

**What stood out to you about Judge Klausner's decision? Any favorite line or passage?**

Jamie Wine: The media is reporting that the women are saying "both sides" were surprised by this result; but when you look at the facts and the law we always knew this was a probable outcome. Judge Klausner focused on the defenses we spelled out in our reply brief, and found what U.S. Soccer has said all along—that its commitment to the women's team is reflected in how it compensates the women, with equal pay, and that any differences in compensation structure are a result of the women's express preferences and choices.

They cannot now try to use an unfounded accusation of discrimination to get the best of both worlds—the higher bonuses available under the men's high risk/high reward contract, without trading off any of the benefits they receive under their own contract.

**Your work on the case has unfolded entirely against the COVID-19 pandemic. What challenges has that presented?**

Jamie Wine: Well, jumping into a case at this late stage with a trial looming, at the height of the backlash from the prior legal filings and with entirely new leadership at the federation, would have been incredibly challenging under any circumstance. Doing it while under lockdown made it even more so.

But perhaps most interestingly, the current situation has also underscored one of our primary arguments in this case. Due to COVID, very few soccer games have been played in 2020. Like unfortunately many in our country right now, the men, who get paid for play, are not getting paid at all right now from U.S. Soccer. The women, on the other hand, because of the guarantees in their CBA, are getting paid. That includes their \$100,000 salary to play for the National Team, and another separate salary for playing in the National Women's Soccer League, which U.S. Soccer also pays as part of its overall financial support of the women's game to ensure elite female soccer players have a

professional league in the U.S. to play in. This is the stability the women bargained for and it is playing out before our very eyes.

Michele Johnson: When we were hired, the trial date was May 5. As we made plans to gear up for a three-week trial, the hotel we had booked near the courthouse announced that it was shutting down entirely. There was a period of weeks during which we had to prepare for an in-person trial in a shuttered city. Also, the entire team got to experience taking and defending depositions remotely, including of our own expert witnesses that we had just met over Zoom. The good news is that we are used to working seamlessly across offices and geographies, so we came together quickly and deployed a strong trial team across the board without a hitch.

**A handful of claims remain—alleged discrimination related to how players travel and their hotel accommodations. Is a jury trial still on for June 16? If the courts are still closed, could you envision doing a virtual jury trial, with jurors watching from home?**

Michele Johnson: A jury trial is indeed still set for June 16, although plaintiffs are seeking leave to immediately appeal Judge Klausner's decision. If the court permits the appeal, the trial date likely will be stayed. But until then, we are once again preparing for an in-person jury trial.

Given that other states are starting to reopen even now, I would expect at most another short continuance, rather than proceeding with a virtual jury trial, but this case is on the front lines of that question. Either way, we look forward to defending the good faith and honorable conduct of U.S. Soccer, and will prove that any historical differences in these working conditions were not rooted in sex-based discrimination but rather competitive need—and since 2017 U.S. Soccer has eliminated these differences in any event.

**What will you remember most about this case?**

Jamie Wine: Working together with Michele, from the moment we got retained, to think about how best to present winning legal arguments without compromising our own or our client's core values. That has guided our strategy and every decision we have made in this case.

Michele Johnson: Same! We of course are spirited advocates for women and equal rights, as is our client, and we brought that commitment to the case from the first minute.

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