

1 Timothy W. Moppin (SBN 133363)  
Attorney at Law  
2 2015 Junction Avenue  
El Cerrito, California 94530  
3 Telephone: (510) 232-0442  
[timmoppin@aol.com](mailto:timmoppin@aol.com)

4 Richard M. Nichols (SBN 166638)  
Attorney at Law  
5 876 Arlene Way  
6 Novato, CA 94947  
[micholspc@gmail.com](mailto:micholspc@gmail.com)

7 Attorneys for Plaintiff  
8 HOPE SOLO

9  
10 UNITED STATES DISTRICT COURT  
11 NORTHERN DISTRICT OF CALIFORNIA  
12

13 HOPE SOLO,

14 Plaintiff,

15 v.

16 UNITED STATES SOCCER FEDERATION,

17 Defendant.  
18  
19  
20

Case No. 3:18-cv-05215

**PLAINTIFF'S OPPOSITION TO  
DEFENDANT'S MOTION TO DISMISS  
THE COMPLAINT PURSUANT TO  
RULE 12(B)(6)**

Date: February 21, 2019  
Time: 10:00 a.m.  
Dept.: Courtroom 11  
Judge: Hon. James Donato

Complaint Filed: August 24, 2018

21 **INTRODUCTION**

22 The purpose of a motion to dismiss for failure to state a claim under Federal Rules of Civil  
23 Procedure (FRCP), Rule 12(b)(6) ("Rule 12(b)(6)") is to test the formal sufficiency of the plaintiff's  
24 statement of the claim for relief. *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957); *Navarro v. Block*, 250 F.  
25 3d 729, 732 (9<sup>th</sup> Cir 2001). A motion for failure to state a claim is not a procedure for resolving a  
26 contest about the merits of the case. *Nielsen v. Union Bank of Cal., N.A.*, 290 F. Supp. 2d 1101, 1151  
27 (CD Cal. 2003). Dismissal for failure to state a claim is appropriate only when the plaintiff can prove no  
28 set of facts supporting relief. *Guerrero v. Gates*, 357 F. 3d 911, 916 (9<sup>th</sup> Cir. 2004). Thus, the motion is

1 viewed with disfavor and is rarely granted. *Gilligan v. Jamco Development Corp.*, F. 3d 246, 249 (9<sup>th</sup>  
2 Cir. 1997); *Gallardo v. DiCarlo*, 203 F. Supp. 2d 1160, 1164-1165 (CD Cal. 2002).

3 The legal sufficiency of a complaint is measured by whether it meets the pleading standards set  
4 forth in FRCP Rule 8. The party bringing a motion to dismiss for failure to state a claim bears the  
5 burden of demonstrating that the plaintiff has not met the pleading requirements of Rule 8(a)(2) in  
6 stating a claim. *Gallardo*, supra at 1165. Rule 8(a)(2) requires parties seeking relief in federal court a  
7 complaint to include a short and plain statement of the claim showing that the pleader is entitled to  
8 relief. FRCP Rule 8(a)(2). Each allegation must be simple, concise and direct. FRCP Rule 8(d)(1).

9 A complaint need only “give the defendant fair notice of what the plaintiff’s claim is and the  
10 grounds upon which it rests. *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 512 (2002); accord *Atchison,*  
11 *Topeka & Santa Fe Ry. v. Buell*, 480 U.S. 557, 568 n.15 (1987) (under Federal Rule 8, claimant has “no  
12 duty to set out all of the relevant facts in his complaint”). “Specific facts are not necessary in a  
13 Complaint; instead, the statement need only ‘give the defendant fair notice of what the . . . claim is and  
14 the grounds upon which it rests.’” *Epos Tech.*, 636 F. Supp.2d 57, 63 (D.D.C. 2009) (quoting *Bell*  
15 *Atlantic v. Twombly*, 550 U.S. 544, 555 (2007)).

16 Thus, the Federal Rules embody notice pleading and require only a concise statement of the  
17 claim, rather than evidentiary facts. Factual allegations must be enough to raise a right to relief above  
18 the speculative level. *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007). This plausibility  
19 standard does not require heightened fact pleading of specifics. Rather it requires enough facts to state a  
20 claim to relief that is plausible on its face. *Id.* at 555-556.

21 Because plaintiff Hope Solo’s (“plaintiff”) Complaint For Violation of the Equal Pay Act And  
22 Discrimination (“Complaint”) satisfies the pleading requirements of Rule 8, and sets forth a plausible  
23 claim for relief under the Equal Pay Act, the court should deny the Motion to Dismiss The Complaint  
24 Pursuant To Rule 12(b)(6) (“Motion to Dismiss”) made herein by defendant United States Soccer  
25 Federation (“defendant”) in its entirety.

## 26 DISCUSSION

### 27 **A. Legal Standard**

28 When considering a motion to dismiss a complaint for failure to state a claim pursuant to  
Federal Rule of Civil Procedure 12(b)(6), the court must assume as true all allegations contained  
in the complaint. *Chance v. Armstrong*, 143 F.3d 698, 701 (2d Cir. 1998). On FRCP 12(b)(6) motions,  
the court must assess the legal feasibility of the complaint and whether a plaintiff has pled claims for

1 which he or she is entitled to discovery. *Sims v. Artuz*, 230 F.3d 14, 20 (2d Cir. 2000); *Chance*, 143 F.3d  
2 at 701.

3 In *Ashcroft v. Iqbal*, 556 U.S. 662, 679 (2009), the Supreme Court held that courts  
4 should entertain a motion to dismiss by following a two-pronged approach:

5 [A] court considering a motion to dismiss can choose to begin by identifying  
6 pleadings that, because they are no more than conclusions, are not entitled to the  
7 assumption of truth. While legal conclusions can provide the framework of a  
8 complaint, they must be supported by factual allegations. When there are well pleaded  
9 factual allegations, a court should assume their veracity and then  
determine whether they plausibly give rise to an entitlement to relief.

10 A complaint containing allegations that, if proven, present a winning case is not subject to dismissal  
11 under Rule 12(b)(6) “no matter how unlikely such winning outcome may appear” to the district court.  
12 *Balderas v. Countrywide Bank N.A.*, 664 F. 3d 787, 791 (9<sup>th</sup> Cir. 2011). Plaintiff’s ability to prove his or  
13 her allegations, or possible difficulties in making such proof, is generally of no concern in ruling on  
14 Rule 12(b)(6) motions: “In considering a 12(b)(6) motion, we do not inquire whether the plaintiffs will  
15 ultimately prevail, only whether they are entitled to offer evidence to support their claims.” *Nami v.*  
16 *Fauver*, 82 F. 3d 63, 65 (3<sup>rd</sup> Cir. 1996); see *Allison v. California Adult Authority*, 419 F. 2d 822, 823 (9<sup>th</sup>  
17 Cir. 1969); *Peterson v. Grisham*, 594 F. 3d 723, 727 – court does not weigh potential evidence parties  
may present at trial.

18 **B. Plaintiff’s Complaint Contains a Plausible Claim For Relief Thus The Motion To Dismiss  
19 Should be Denied**

20 The analysis of whether a claim is plausible begins with a consideration of the elements of the  
21 claim. *Ashcroft v. Iqbal*, 556 U.S. 662, 675 (2009). The Equal Pay Act provides that “[n]o employer  
22 having employees subject to any provisions of this section shall discriminate . . . between employees on  
23 the basis of sex.” 29 U.S.C. § 206(d)(1). To state a claim under the Equal Pay Act, plaintiff must allege  
24 the following: “(1) the employer pays different wages to employees of the opposite sex; (2) the  
25 employees perform equal work on jobs requiring equal skill, effort, and responsibility; and (3)  
26 the jobs are performed under similar working conditions.” *Klein v. New York Univ.*, No. 07 Civ.  
160, 2008 WL 3843514, at \*3 (S.D.N.Y. Aug. 14, 2008) (citing *Corning Glass Works v.*  
*Brennan*, 47 U.S. 188, 195 (1974)).

27 Plaintiff’s Complaint satisfies the legal requirements for alleging a violation of the Equal  
28 Pay Act. See Compl. ¶¶ 23-28. Assuming that the violation is true, then there is necessarily

1 discrimination which is also sufficiently alleged. See Compl. ¶¶ 29-34. The Complaint sets forth a  
2 novel theory under the Equal Pay Act by a professional sports athlete “that can best be assessed after  
3 factual development,” thus dismissal is not justified under Rule 12(b)(6). *McGary v. City of Portland*,  
4 386 F. 3d 1259, 1270 (9<sup>th</sup> Cir. 2004); *Wright v. State of North Carolina*, 787 F. 3d 256, 263 (4<sup>th</sup> Cir.  
5 2015) - to extent plaintiff’s claims do not fall within “the four corners of our prior case law,” dismissal  
6 not justified under Rule 12(b)(6).

7 **C. There Is No Defect On The Face Of Plaintiff’s Complaint Warranting Dismissal Under Rule**  
8 **12(b)(6)**

9 As a general rule, a district court may not consider any material beyond the pleadings in ruling  
10 on a motion to dismiss under FRCP Rule 12(b)(6). *Lee v. City of Los Angeles*, 250 f. 3d 668, 688 (9<sup>th</sup>  
11 Cir. 2001). If the court considers matters outside the pleadings, it must treat the motion as one for  
12 summary judgment. See FRCP, Rules 12(b)(6), 56. Documents attached to the complaint and  
13 incorporated therein by reference are treated as part of the complaint when ruling on a Rule 12(b)(6)  
14 motion. *Harris v. Amgen, Inc.*, 788 F. 3d 916, 934. A complaint’s mere mention of the existence of a  
15 document is insufficient to incorporate the contents of a document. *Coto Settlement v. Eisenberg*, 593 F.  
16 3d 1031, 1038 (9<sup>th</sup> Cir. 2010).

17 There is no defect appearing on the face of the Complaint or the exhibit attached thereto that  
18 warrant dismissal under Rule 12(b)(6). The defendant has attached numerous documents extraneous to  
19 the Complaint in support of its Motion To Dismiss, and is attempting to ignore the facts of the  
20 Complaint and to argue its own facts. This is highly improper on a 12(b)(6) motion.

21 Documents not physically attached to the complaint can only be considered if the complaint  
22 refers to such document, the documents is central to plaintiff’s claim, and the document is accepted as  
23 authentic. See, e.g., *United States v. Corinthian Colleges*, 655 F. 3d 984, 999 (9<sup>th</sup> Cir. 2011). None of  
24 the documents attached by defendant are referenced in the Complaint. Further, the documents are not  
25 central to plaintiff’s claims, and in fact are the reason why the pay disparity exists. Plaintiff intends to  
26 challenge the collective bargaining agreement and FIFA Regulations as they perpetuate the wage  
27 differential that is the basis of plaintiff’s claims. The defendant’s extraneous documents should be  
28 disregarded when deciding this Rule 12(b)(6) motion.

Further, defendant request for judicial notice should be denied. A court may not take judicial  
notice of a document for the truth of the facts contained in it when those facts are essential to support a  
contention in the action. *Troy Group, Inc. v. Tilson*, 364 F. Supp. 2d 1149, 1152 (CD Cal. 2005). The  
defendant’s reliance on the FIFA Regulations is improper on a 12(b)(6) motion.

1                   **D. A 12(b)(6) Motion Cannot Be Used To Raise An Affirmative Defense**

2                   Ordinarily, a Rule 12(b)(6) motion cannot be used to raise an affirmative defense. Complaints  
3 need not contain any information about defenses and may not be dismissed for that omission. *Xechem,*  
4 *Inc. v. Bristol-Meyer Squibb Co.*, 372 F. 3d 899, 901 (7<sup>th</sup> Cir. 2004); see *Brownmark Films, LLC. v.*  
5 *Comedy Partners*, 682 F. 3d 687-690 (7<sup>th</sup> Cir. 2012) – “courts should usually refrain from granting Rule  
6 12(b)(6) motions on affirmative defenses” because “a plaintiff may state a claim even though there is a  
7 defense to that claim.” The choice for a defendant wishing to address an affirmative defense prior to  
8 trial is to file a Rule 56 motion for summary judgment.

9                   Accordingly, any discussion by defendant of any possible defense to the Complaint is improper  
10 on this Rule 12(b)(6) motion and should be disregarded. In fact, with respect to the alleged failure to  
11 exhaust administrative remedies, most courts hold that a motion for summary judgment is the  
12 appropriate procedural method for raising the defense of failure to exhaust administrative remedies. See,  
13 e.g., *Albino v. Baca*, 747 F. 3d 1162, 1170 (9<sup>th</sup> Cir. 2014).

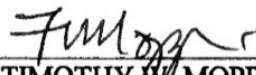
14                   **CONCLUSION**

15                   On a motion to dismiss under Rule 12(b)(6), the court must accept as true all the factual  
16 allegations set out in the plaintiff’s complaint, draw inferences from those allegations in the light most  
17 favorable to plaintiff, and construe the complaint liberally. *Rescuecom Corp. v. Google, Inc.*, 562 F. 3d  
18 123, 127 (2d Cir. 2009). All reasonable inferences from the facts are drawn in plaintiff’s favor in  
19 determining whether the complaint states a valid claim. *Braden v. Wal-Mart Stores, Inc.*, 588 F. 3d 585,  
20 595 – “*Twombly* and *Iqual* did not change this fundamental tenet of Rule 12(b)(6) practice.”

21                   Construing the Complaint liberally and in favor of plaintiff, the Complaint is legally sufficient  
22 and defendant’s Motion to Dismiss should be denied. Should the Court disagree, then plaintiff should  
23 be granted leave to amend to correct any deficiencies.

24 Date: January 14, 2019

Respectfully submitted

25 By:   
26 TIMOTHY W. MOPPIN, ESQ.  
27 RICHARD M. NICHOLS, ESQ.  
28 Attorneys for Plaintiff  
HOPE SOLO