8-1-2018

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MLS PROMOTION! CAN MLS’S SINGLE ENTITY STATUS PROTECT IT FROM “PRO/REL”?

I. INTRODUCTION: AN OFFER TO CREATE HEADLINES

In June 2017, Major League Soccer (MLS) received a massive media rights offer which, starting in 2023, promised to pay the league $4 billion over ten years.¹ As part of the proposed deal, MLS would be required to institute a structure of promotion and relegation.² MLS Commissioner, Don Garber, quickly acted to diffuse the situation by informing Riccardo Silva, founding partner of offeror MP & Silva Group, that MLS’s contractual obligations tied to its current deal with IMG prevented any engagement on the proposal.³ Commissioner Garber did not diffuse the situation, however, as promotion and relegation, a topic very familiar to the American soccer community, temporarily dominated the U.S. soccer news cycle.⁴ Indeed, the offer appeared to some as pure grandstanding aimed at eliciting just the widespread reaction it created, which is not altogether surprising given that Mr. Silva is an experienced businessman who had previously contracted with MLS for its television distribution rights, and also owns Miami FC of the United States’ second-tier professional league, the North American Soccer League (“NASL”).⁵ One can question the legitimacy of Mr. Silva’s media


². See Ourand, supra note 1 (noting promotion is prevalent in “most global soccer leagues”). Throughout this article, promotion and relegation will often be referred to as “pro/rel.”

³. See id. (quoting MLS Executive Vice President of Communications, Dan Courtemanche, who stated MLS was neither able, nor interested).


⁵. See Jeff Carlisle, Pro/Rel Component Made $4B Bid for MLS Media Rights as Non-Starter, ESPN (July 24, 2017), http://www.espnfc.us/major-league-soccer/19/blog/post/3164341/ was-$4b-bid-for-mls-media-rights-tied-to-adopting-pro-rel-
rights offer itself. However, his motives, which were informed by his history of staunch advocacy for introducing promotion and relegation to United States professional soccer, were doubtless to, at the very least, add fuel to the conversation at a time when MLS executives were holding annual meetings surrounding the MLS All-Star Game.

This comment explores the differences between open and closed league structures, legal issues surrounding MLS which could give rise to an antitrust challenge aimed at forcing it to adopt promotion and relegation, and the single entity defense, the major defense to such an action that MLS would undoubtedly raise. Ultimately, this comment concludes that due to economic and legal factors, such a lawsuit would only come from lower-level professional soccer teams seeking entry into MLS and that such a challenge would pierce MLS’s single entity defense, thus forcing a court to consider whether MLS violates Section 1 of the Sherman Antitrust Act (“Sherman Act”) under a full “rule of reason” analysis. Essentially, given a proper plaintiff, MLS would no longer enjoy the single entity defense upon which its structure was based when it was founded.

Section II will explore the American sporting landscape relevant to the discussion and provide a brief history of the formations of major American professional sports leagues before MLS, closing at the moment immediately preceding MLS’s founding. Section III will provide the legal backdrop to MLS’s formation, centering around the Sherman Act and Copperweld Corp. v. Independence Tube Corp., which opened the door to a “single entity” defense to anti-grandstanding.

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6. See id. (arguing “[i]t’s easy to make such an offer when you know the intended recipient is in no position to accept”).

7. See id. (noting Silva has “been pushing for a pro/rel system to be implemented in North American soccer for some time”).

8. For an accounting of the various sections of this comment, see infra notes 11–16 and accompanying text.

9. For further discussion of these conclusions, see infra notes 238–310 and accompanying text.

10. For further discussion of this conclusion, see infra notes 290–310 and accompanying text.

11. See infra notes 17–78 and accompanying text. The leagues to be covered in this comment include Major League Baseball (MLB), the National Football League (NFL), the National Basketball Association (NBA), the National Hockey League (NHL), and the now-defunct North American Soccer League (“NASL”).

12. 467 U.S. 752 (1984) (providing basis for MLS’s single entity structure and antitrust defense). For further discussion of Copperweld, see infra notes 135–144 and accompanying text.
trust litigation. Section IV will examine MLS's original structure, its early single entity victory, and consider how the single entity defense has changed since then. Section V will consider whether MLS could skirt a Section 1 antitrust attack by means of the single entity defense today. As a result of the aforementioned analysis, this comment will argue that MLS would likely be unsuccessful in deploying a single entity defense in an antitrust lawsuit today, but that such an outcome would require a specific plaintiff with a specific argument.

II. BACKGROUND

A. Pro/Rel vs. The American Sporting Tradition

MLS operates under a closed league structure wherein the league itself owns the teams, investors buy in to the league itself—a single league with no promotion and relegation—and players contract with league. This is novel in two ways: first, the majority of major professional soccer leagues around the world are open—using promotion and relegation—and second, in the United States, the other major leagues, while also closed, consist of individually-owned and -operated teams both competing on and off the field and working together economically. While the fact that MLS does not use promotion and relegation is the subject of debate among soccer fans and economists, the league is clear that it does not intend to move away from its closed structure any time soon.

14. For further discussion of MLS's structure and the single entity defense, see infra notes 180–241 and accompanying text.
15. For further discussion of MLS and the single entity defense today, see infra notes 242–308 and accompanying text.
16. For further discussion of this argument, see infra notes 310–321 and accompanying text.
17. For further discussion of MLS's initial structure, see infra notes 187–201 and accompanying text.
result, an interested party hoping for promotion and relegation to come to American professional soccer would need to find alternative means to force the league to adopt such a structure, such as antitrust litigation.\textsuperscript{20} Therefore, an examination of the landscape into which MLS entered is necessary, as it will provide both a useful historical sporting context and the relevant legal history concerning an antitrust challenge to the league.\textsuperscript{21}

1. Promotion and Relegation: A Crash Course

“Pro/rel”—the commonly used shorthand for promotion and relegation—is a simple enough sporting concept to understand.\textsuperscript{22} In a pro/rel system, the league is divided into multiple divisions representing different tiers of competition, and each division is placed hierarchically above or below others based on quality of competition.\textsuperscript{23} Teams in a given division play the other teams in their division, and after each season is completed, a set number of teams finishing highest in their division are “promoted” to the division sitting immediately higher than the one in which they just finished so well.\textsuperscript{24} Conversely, an equal number of teams finishing lowest in their division are “relegated” to the one immediately below the one in which they just finished so poorly.\textsuperscript{25} As such, each season sees each division with a different cast of teams competing against each other as did the previous season.\textsuperscript{26} This is how professional soccer is structured in Germany, for instance, where RasenBallsport Leipzig (“RB Leipzig”), which came in second place out of the eighteen teams in the 2016–2017 season of the Bundesliga—Germany’s top professional soccer division—climbed from a regional league in the fifth division all the way to the top

\textsuperscript{20} For further discussion of possible antitrust lawsuits, see infra notes 242–308 and accompanying text (discussing possible antitrust lawsuits).

\textsuperscript{21} For further discussion of this historical and legal history, see infra notes 22–175 and accompanying text.


\textsuperscript{24} See id. (explaining promotion).

\textsuperscript{25} See id. (explaining relegation).

division in just seven seasons. But Germany is not alone in its use of pro/rel. Outside of North America, “sports leagues are usually open.” In the context of soccer, England, France, Spain, Germany, and Italy—countries boasting high quality top divisions with which Commissioner Garber aims for MLS, as a top-flight league, to be compared—all operate using a pro/rel structure.

The rise of this open structure of promotion and relegation can be traced to the rise of professional soccer in England. In 1885, England first permitted professionalism in soccer, and, within a few years, two viable leagues emerged: the Football League and the Football Alliance. When the leagues eventually agreed to affiliate with one another in 1892, a league consisting mostly of Football League teams made up a first tier division, while a league


28. See Ross & Szymanski, supra note 23, at 627 (discussing usage of open league structure).

29. Id. (“[M]embership in the league is contingent on success.”).

30. See Murray, supra note 26 (listing teams promoted to and relegated from top divisions in Europe’s top leagues); see also Aaron Cranford, Don Garber Insists MLS Will Be One of World’s Best Leagues in 10 Years or Less, SBI SOCCER (Sept. 9, 2015, 7:50 PM), http://sbsoccer.com/2015/09/insists-worlds-leagues [https://perma.cc/T37U-3LE6] (quoting Commissioner Garber, “I do believe in 10 years’ time or less, people will think of us like Serie A, La Liga, and hopefully the way they think about the Premier League. If we continue to do things right and stay to our plan”).

31. See J.S., supra note 22 (comparing early English professional soccer to early American professional baseball).

32. See id. (discussing “the dawn of English” soccer). In England, what Americans call “soccer” is called “football.” See Football, OXFORD DICTIONARIES, https://en.oxforddictionaries.com/definition/football [https://perma.cc/8YU2-E3VC] (last visited Jan. 25, 2018) (“Any of various forms of team game involving kicking (and in some cases also handling) a ball, in particular (in the UK) soccer or (in the US) American football.”).
consisting of mostly Football Alliance teams made up the second.\textsuperscript{33} The leagues agreed that the top teams from the second division "would have the opportunity to ascend to the top if their performance warranted it."\textsuperscript{34}

As a result of England’s hierarchy of leagues and use of promotion and relegation, the wealthier and more effectively run a team is, the better its opportunity to purchase the services of higher quality players and coaches in order to be promoted.\textsuperscript{35} The initial, mostly logical, economic conclusions of this are, first, that relatively wealthier teams will tend to find themselves in higher divisions than relatively less wealthy teams, thus creating divisions with relatively more competition due to teams expending similar amounts of money on players and coaches finding themselves in the same divisions.\textsuperscript{36} Harkening back to the example of RB Leipzig, a key further conclusion in favor of pro/rel and implicating antitrust analyses of closed leagues, such as MLS, is that an investor can purchase or create a team in a lower division and, through economic strength and sporting merit, lead that team to the top.\textsuperscript{37} As a result, promotion can be seen as "provid[ing] a market-based means of permitting new entry, which will check the power of incumbent clubs to exercise market power."\textsuperscript{38}

This structure of multiple divisions with meritocratic movement of teams at the end of each season not only spread from England, but became recognized as the preferred structure for professional soccer.\textsuperscript{39} The practice was even codified in the official statutes of the Fédération Internationale de Football Association (FIFA).\textsuperscript{40} FIFA, founded in Paris, France in 1904, is the interna-

\textsuperscript{33.} See J.S., supra note 22 (explaining that such distinction between levels was possible because Football League was superior league).

\textsuperscript{34.} Id.

\textsuperscript{35.} See Ross & Szymanski, supra note 23, at 634 (arguing teams in lower divisions are likely to be promoted if they are “from a large drawing area that will generate revenue sufficient to support investment in a major league payroll”).

\textsuperscript{36.} See Ross & Szymanski, supra note 23, at 627 (arguing pro/rel “increas[es] effective competition among the teams in a league” and noting “[t]eams . . . relegated to a lower division after an unsuccessful year will play a lower standard of competition”).

\textsuperscript{37.} See id. (“For lesser teams in lower divisions, the allure of promotion to the top division enhances the incentive to invest in players and provides fans with new and innovative professional league competition, distinct from and qualitatively superior to the current minor leagues.”).

\textsuperscript{38.} Id. (arguing pro/rel not only helps avoid monopoly leagues, but also improves consumer welfare in various ways).

\textsuperscript{39.} See J.S., supra note 22 (discussing history of pro/rel).

\textsuperscript{40.} See Hank Stebbins, \textit{Blind Draw: How Major League Soccer’s Single Entity Structure and Unique Rules Have Impacted Soccer in the United States}, 13 WILLAMETTE SPORTS
The body organizes the quadrennial FIFA World Cup, played by qualifying countries' national teams, holds international tournaments of top private club teams, and generally "regulates league activity at the world level." Article 9 of the FIFA Statutes, entitled "Principle of Promotion and Relegation" and laying out the rules FIFA member organizations are required to follow, begins by stating that "[a] club’s entitlement to take part in a domestic league championship shall depend principally on sporting merit." It continues to state that "a club shall qualify for a domestic league championship by remaining in a certain division or by being promoted or relegated to another at the end of a season." Further, FIFA views pro/relegations not just as a matter of uniformity, but as "the very essence of [soccer]."
As a result, it comes as no surprise that almost 85% of countries in the world have followed England’s lead and employ promotion and relegation in their top-tier domestic leagues. Of particular interest to an investigation of MLS and its structure is that MLS, like the great leagues of Europe, is “bound by [the FIFA] statutes.” Major League Soccer, however, is one of the 15% of leagues that do not have pro/rel. Indeed, “MLS is probably the most well-known example of a closed [soccer] league.” To the American sports fan, however, that the United States’ top professional soccer league is in the minority by not having pro/rel might be surprising, given the makeup of other professional sports domestically.

2. Major League Baseball and the American Way of Doing Things

In the United States, the major sports leagues founded before MLS’s founding in 1995 were created as “closed leagues.” Baseball, of course, led the way. Shortly before the Football League was founded in England, professional baseball was established in the United States, and by 1900 both the National League and the international competition—including the FIFA World Cup. See Stebbins, supra note 40, at 13. The United States Soccer Federation (“USSF”) governs soccer in the United States. See id. The USSF is a member of the Confederation of North, Central American and Caribbean Association Football (“CONCACAF”) and FIFA. See What’s the Difference Between FIFA, CONCACAF, and USSF?, BACKLINE SOCCER (Oct. 26, 2016), http://backlinesoccer.com/whats-the-difference-between-fifa-concacaf-and-ussf [https://perma.cc/Y4H8-7U35]. An in-depth discussion of FIFA, its power rules, and how they relate to MLS is beyond the scope of this comment. However, as this comment is working on the assumption that because FIFA has allowed MLS to exist in its current form since inception, it will continue to do so into the future. Further, a detailed inquiry into the ability of FIFA to institute such a broad change in MLS would necessarily require more discussion than is prudent in this space.

46. See Grossobel, supra note 44 (citing GLOBAL CLUB FOOTBALL REPORT, supra note 18, at 54).

47. Id. (discussing “MLS and the legal framework of world [soccer]”).

48. See GLOBAL CLUB FOOTBALL REPORT, supra note 18, at 54–67 (listing all FIFA-recognized leagues and noting whether they use promotion and relegation).

49. Id. at 60. MLS features the largest number of teams competing in a single league in CONCACAF, the FIFA-sanctioned governing body for the region including the United States. See id. Other countries with top professional soccer leagues using a closed system include Trinidad & Tobago, the Dominican Republic, New Zealand, San Marino, and Australia. See id. at 60, 64, 66.

50. See id. at 60 (noting closed leagues are “typical” in North America).

51. See J.S., supra note 22 (suggesting promotion and relegation “never caught on in America” mostly because of “historical path-dependence” by noting MLB, NFL, NHL, and NBA).

52. See id. (comparing MLB’s rise to soccer’s rise in England).
American League had been formed. But unlike in England, where the Football League and Football Association were on different economic footing (thus allowing the League to assume a position dominant to the Association), America’s two foremost baseball leagues “were roughly evenly matched economically.” As a result, neither league was able to assert its supremacy over the other—though both were able to do just that to any other baseball league that tried to encroach on their collective fans and players—so they “signed a peace agreement that established the World Series as a post-season championship contest.” Thus, the general structure of Major League Baseball (MLB), for purposes of this examination, was in place.

Early in their developmental arcs, then, MLB and professional soccer in England had chosen separate courses, resulting in different economic outcomes and incentives. As previously noted, pro/rel arguably promotes team investment to achieve promotion, while allowing for market-based entry by prospective owners. Conversely, because the two dominant leagues in American baseball had joined forces as a “closed” league, where additional entrants could only join through league expansion and not promotion from a lower division, “MLB clubs . . . could always buy up the most talented young players” from “their [lower revenue] minor-league counterparts,” thus ensuring that MLB would provide the highest quality of play, continue to earn the highest revenues, and be able to do so at the exclusion of other teams.

From an economic perspective, the key differences between MLB and English professional soccer could be seen to be as follows: (1) in English professional soccer, efficient economic investment leads to improved results in the form of promotion from lower affiliated divisions to the top division; (2) in MLB, the league and its member teams use pre-existing economic advantages to exclude competition from potential rival clubs and leagues, which ensures

54. J.S., supra note 22 (discussing MLB’s early years).
55. Id. (internal quotations omitted).
56. See id. (providing rough background on MLB for historical context).
57. See id. (comparing MLB with professional soccer in England).
58. For further discussion of initial economic conclusions related to pro/rel, see supra notes 35–50 and accompanying text.
59. J.S., supra note 22 (chronicling baseball’s development).
their continued economic dominance and full control over entry.\textsuperscript{60} MLB teams even doubled-down on their exclusion of “minor league” teams from their league by creating what is commonly called the “farm system,” which is the systematic consolidation of multiple levels of minor league baseball for the sole purpose of developing players for the affiliated MLB team to use at its pleasure.\textsuperscript{61}

The National Hockey League (NHL), National Football League (NFL), and National Basketball Association (NBA) all followed in the footsteps of Major League Baseball.\textsuperscript{62} Each created a closed league system, as the NHL implemented an MLB-style farm system which allowed it to both develop players for the NHL and try to exclude potential rival leagues, and the NFL and NBA were able to utilize long-since established college leagues, which took the place of potential rival leagues, for player development.\textsuperscript{63} With such a strong tradition of closed leagues in the United States, that MLS is also closed comes as no surprise.\textsuperscript{64} However, to understand why it chose its particular ownership structure, one must look at both a previous attempt at professional soccer in the U.S., as well as antitrust case law leading up to the formation of MLS.\textsuperscript{65}

\begin{itemize}
\item \textsuperscript{60} See Ross & Szymanski, supra note 23, at 626–27 (“Because the leagues are almost always the sole providers of the highest quality club play in each sport, and in North America the leagues do not face reasonable substitutes for consumers’ patronage, the closed structure also has potentially important antitrust consequences.”); see also J.S., supra note 22 (arguing MLS’s owners, who control MLS teams, bought into the league “on the understanding they were buying into a protected club; were they suddenly to face the risk of relegation, those investments would likely come to naught”).
\item \textsuperscript{61} See J.S., supra note 22 (noting this action, taken in 1930s, “formalized the hierarchy”).
\item \textsuperscript{63} See J.S., supra note 22 (noting “closed leagues prevailed” in United States).
\item \textsuperscript{64} See id. (“The organizers of MLS, both in deference to local tradition and in order to rustle up financing, adopted the American closed-league model.”).
\item \textsuperscript{65} See infra notes 67–175 and accompanying text (discussing North American Soccer League and Section 1 of Sherman Antitrust Act). 
\end{itemize}
3. The North American Soccer League

Major League Soccer is not the first major professional soccer league in the United States. In 1967, the North American Soccer League ("NASL") was founded with the purpose of creating "such a splash that the American public couldn’t help but get swept up" in soccer fever. The league played its first season in 1968 and, in its sixteen years, featured some of soccer’s greatest ever players. However, financial difficulties forced its dissolution by 1985. As one critic opined, "[t]he biggest problem was with the league’s structure."

Like the other top U.S. sports leagues, the NASL was a closed league, however its being closed was not its downfall. Rather, "[e]ach team was separately owned and made autonomous decisions regarding player salaries and other expenditures unrestricted by any collectively agreed upon limits," which meant "large market franchises with heavy financial backing . . . could splash out cash on marquee signings, forcing their smaller market peers to try to keep up." This duality played out perhaps most acutely in attendance.

League attendance from 1977–83 averaged 13,000 per game. However, those numbers were skewed by the 28,000 average attendance for the well-off New York Cosmos and the three exceptional seasons in which they averaged 40,000 per game. The collapse of the NASL can therefore reasonably be linked to both the existence
of rich teams on the one hand and poor teams on the other, and the overall “financial toll that attracting high-caliber international players took on teams.” No doubt, in addition to the almost-century of precedent for closed league structure, what certainly weighed heavily in the minds of MLS’s founders was the failed, albeit glamorous, experiment that was the NASL. So when FIFA granted the United States Soccer Federation (“USSF”) the right to host the 1996 FIFA World Cup (in part by USSF promising it would create a top-flight soccer league), MLS’s founders aimed to create a league with financial parity, “strict financial control,” and power accumulated in a strong central league office which would ensure that the league, not the individual teams, would determine the league’s fate.

B. Legal Backdrop to MLS

As noted, MLS’s founders endeavored to structure the league in such a way that the league itself would retain maximum control over all aspects of the league. The idea was that doing so would allow MLS to expand methodically and on its own terms while minimizing the market factors that plagued the NASL—particularly those relating to player contracts. This scenario seemed ideal, but it was also one the major North American professional sports leagues, with the exception of the MLB, had found impossible to accomplish because of adverse antitrust litigation rulings. As a re-

76. Stebbins, supra note 40, at 14 (“Teams ended up paying too much for talent and ended up running out of money.”); see also Lennarz, supra note 67, at 142 (suggesting “overextension . . . doomed the NASL”).

77. See Stebbins, supra note 40, at 14 (asserting MLS’s “investors took note of the failure of the NASL and instituted a salary-cap, stringent player acquisition devices, and a cap on international players in an effort to avoid the same fate as the NASL”); see also Lennarz, supra note 67, at 142 (providing context for MLS’ founding and legal structure).


79. See id. (discussing MLS’s power over individual teams’ decisions, revenue sharing, and player contracts and movement); see also infra notes 77–78 and accompanying text.

80. See McChesney, supra note 78, at 142–43 (“The organizers of MLS wanted to avoid the problems that plagued and eventually destroyed the NASL. To maximize effectiveness, the start-up league sought to avoid disparity in the financial stability of team owners, maintain strict financial control and gain economies of scale in purchasing power, offer a league-wide integrated marketing program, control all major aspects of team operations and locations and to enforce salary caps consistent with United States law.”).

81. See Steven Bank, Should MLS Players Skip the Strike and Sue Instead?, AMERICAN SOCCER NOW (Mar. 1, 2015) [hereinafter Bank, Should MLS Players Skip], http://
sult, then-USSF President and MLS founder, Alan Rothenberg, and his team needed to find a way to ensure such litigation would not stop their fledgling league in its tracks.\textsuperscript{82} MLS’s founders determined that creating something that would skirt antitrust litigation based on a single entity defense was the best approach.\textsuperscript{83} In short, the founders of MLS would create their new league’s structure to comply with the Supreme Court’s decision in \textit{Copperweld Corp. v. Independence Tube Corp.}, which opened the door to such an approach.\textsuperscript{84}

1. The Sherman Antitrust Act and the Clayton Act

Due to concerns related to massive business growth in the second half of the nineteenth century, Congress passed the Sherman Act in 1890 “to prevent price-fixing arrangements and monopolization.”\textsuperscript{85} Section 1 of the Act states that “[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal.”\textsuperscript{86} The purpose of Section 1 is to address “price fixing, wage fixing, tying arrangements, market allocations, and concerted refusals to deal (group boycotts).”\textsuperscript{87} Sports leagues often find themselves subject to Section 1 scrutiny /americansoccernow.com/articles/should-mls-players-skip-the-strike-and-sue-instead [https://perma.cc/KHJ8-7WHE] (noting antitrust suits forced NBA, NFL, and NHL to allow free agency to players). The author also notes that in MLB, antitrust litigation also paved the path to free agency, although there, Curt Flood lost a case challenging MLB’s reserve clause. \textit{See id.} For further discussion of reserve clauses, see \textit{infra} note 159 and accompanying text.

82. \textit{See} Stebbins, \textit{infra} note 40, at 13–14 (discussing factors considered during MLS’s formation).

83. \textit{See id.} at 12 (“Rothenberg created the league as a single entity so that it would be exempt from antitrust challenge and be able to control labor costs.”); \textit{id.} at 13–14 (discussing factors considered during MLS’s formation); \textit{see also} Fraser v. Major League Soccer, L.L.C., 97 F. Supp. 2d 130, 132 (D. Mass. 2000) [hereinafter Fraser I] (“[Rothenberg] also consulted antitrust counsel in the hope of avoiding the antitrust problems which other sports leagues . . . had encountered.”), aff’d 284 F.3d 47 (1st Cir. 2002).

84. \textit{See} Stebbins, \textit{infra} note 40, at 15 (“Based on legal appearances, it seems that the MLS is running things from a single centralized office as necessitated by \textit{Copperweld.”}); \textit{see also} Copperweld Corp. v. Independence Tube Corp., 467 U.S. 752, 778 (1984) (Stevens, J., dissenting) (“Today the Court announces a new per se rule: a wholly owned subsidiary is incapable of conspiring with its parent under Section 1 of the Sherman Act.”).


87. Edelman & Doyle, \textit{infra} note 42, at 412–13 (“The danger combated by Section 1 of the Sherman Act, then, is concerted action that reduces consumers’ freedom of choice.”).
because the Act applies to labor markets as much as it does product markets.88

The Clayton Antitrust Act ("Clayton Act") was passed in 1914 to bolster the Sherman Act, and of relevance to a discussion of MLS are Sections 6 and 7.89 Section 7 forbids mergers and acquisitions which have the effect of "substantially . . . lessen[ing] competition, or . . . creat[ing] a monopoly."90 Section 6 provides a statutory exemption to Section 1 of the Sherman Act for labor unions and union members "act[ing] within the legitimate objectives of the union."91 Section 7, therefore, logically expands upon the earlier Sherman Act's prohibitions, whereas Section 6 is aimed at allowing and promoting collective bargaining, a key aspect of modern professional sports in the United States.92

a. Application of Sherman and Clayton to U.S. Professional Sports, Generally

From a cursory reading of the Sherman and Clayton Acts, one can appreciate that the major professional sports leagues in the United States, all of which operate with a closed structure, might run into trouble.93 This is true despite the fact that the Supreme Court has recognized sports as a unique setting in which the cooperation of independently-operated teams, which might otherwise be illegal for being "conspiracies in restraint of trade," is actually necessary for the operation of the league and therefore subject to less stringent scrutiny than other industries.94 Within the context of professional team sports, some "horizontal restraints on competition," which would otherwise doom an antitrust defendant, "are essential if the product is to be available at all."95

88. See id. at 413 (discussing Section 1 analysis, generally).
91. Edelman & Doyle, supra note 42, at 415; see also § 17 (representing codification of Section 6 of Clayton Act).
92. See Edelman & Doyle, supra note 42, at 415 ("This exemption was designed to further congressional policy favoring collective bargaining.").
93. See Stebbins, supra note 40, at 6 (citing Ross & Szymanski, supra note 23, at 628) ("Every major professional team sports league in the United States has been charged with monopolistic behavior.").
95. NCAA v. Bd. of Regents of Okla., 468 U.S. at 101; see also Robert M. Bernhard, MLS’ Designated Player Rule: Has David Beckham Single-Handedly Destroyed Major
However, the result of such a realization is not automatic exemption from antitrust examination.\footnote{See Bernhard, \textit{supra} note 95, 415–16 (discussing rule of reason analysis being employed due to special nature of sports); \textit{see also infra} note 102 and accompanying text (suggesting rule of reason analysis is preferred).} This is despite the fact that perhaps the most poignant example of a league being granted latitude in an antitrust suit comes in the form of the MLB's antitrust exemption.\footnote{See Fed. Baseball Club of Balt., Inc. v. Nat'l League of Prof'l Baseball Clubs, 259 U.S. 200, 208–09 (1922) (holding baseball games were "purely state affairs" and team travel to and from games was "a mere incident, not the essential thing").} In 1922, the Supreme Court held, in \textit{Federal Baseball Club of Baltimore, Inc. v. National League of Professional Baseball Clubs ("Federal Baseball")},\footnote{259 U.S. 200 (1992).} that the league did not violate Section 1 because it was not engaging in interstate commerce, which is a prerequisite for violation.\footnote{See id. at 209 ("That which in its consummation is not commerce does not become commerce among the States because the transportation that we have mentioned takes place.").} However, the Court’s ruling in \textit{Federal Baseball—sixty years before articulating the necessity of some horizontal restraints on trade in \textit{National Collegiate Athletic Ass’n v. Board of Regents of the University of Oklahoma}\footnote{468 U.S. 85 (1984).}—not only did not mention teams’ need for horizontal restraints on competition, but also is unique to baseball and has not been applied to other professional sports leagues.\footnote{See Stebbins, \textit{supra} note 40, at 6 (citing \textit{Federal Baseball}, 259 U.S. at 200) (noting that courts have held NBA, NFL, and NHL violated antitrust laws, but that "[b]aseball holds a unique exemption from antitrust law because, in a widely divided decision, the Supreme Court held that professional baseball did not involve interstate commerce"). The Court made its ruling despite the league having teams in multiple states, and even though those teams needed to travel from one state to another to exhibit baseball games.} Instead, courts consider the quality of a league’s restraint on trade within a given market to determine whether it passes the threshold necessary to have violated antitrust laws.\footnote{See Bernhard, \textit{supra} note 95, at 415 (citing NCAA v. Bd. of Regents of Okla., 468 U.S. 85, 101–05 (1984)) ("These recognitions have caused courts to forego traditional \textit{per se} antitrust analysis in favor of the rule of reason."); \textit{see also infra} notes 103–111 and accompanying text.}
Courts have used two analyses to determine whether a sports league has violated Section 1. First, is a per se analysis which is employed for “agreements . . . so consistently unreasonable that they may be deemed to be illegal per se, without inquiry into their purported justifications.” The per se analysis can be seen, therefore, as a shortcut for courts, reserved for those cases where parties engaged in “agreements or practices which because of their pernicious effect on competition and lack of any redeeming virtue” do not require any “elaborate inquiry as to the precise harm they may have caused or the business excuse for their use.” This analysis, however, seems to be falling out of favor, as a second analysis, a “rule of reason” test, has prevailed recently.

A rule of reason analysis considers the following: (1) the league’s “market power”; (2) whether the “anticompetitive effects . . . exceed any pro-competitive justifications” for the league’s action; and (3) resulting harm to the challenger. That it has come to be the favored test seems logical. As previously noted, courts have recognized the need for leagues to engage in some concerted action in restraint of trade in order to properly function as sports leagues. This is in line with what some commentators have described as “changing ideas in industrial economics” which “cast doubt on traditional notions about competitive effects.”

103. See infra notes 104–111 and accompanying text (discussing Section 1 analyses).
104. Mackey v. NFL, 543 F.2d 606, 619 (8th Cir. 1976) (suggesting per se illegality emerged “[a]s . . . courts gained experience with antitrust problems arising under the Sherman Act”).
105. Id. (quoting N. Pac. R.R. v. United States, 356 U.S. 1, 5 (1958)); see also Smith v. Pro Football, Inc., 593 F.2d 1173, 1181 (D.C. Cir. 1979) (“A [p]er se rule is a judicial shortcut; it represents the considered judgment of courts, after considerable experience with a particular type of restraint, that the rule of reason [as] the normal mode of analysis can be dispensed with.”).
106. See Edelman & Doyle, supra note 42, at 414 (arguing “courts are moving away from applying the per se test”); see also, e.g., Fraser v. Major League Soccer, 284 F.3d 47 (1st Cir. 2002) [hereinafter Fraser II]; N. Am. Soccer League v. NFL, 670 F.2d 1249 (2d Cir. 1982) [hereinafter NASL v. NFL]; Mackey, 543 F.2d at 619.
107. Edelman & Doyle, supra note 42, at 414. Edelman and Doyle argue that both the rule of reason and a “quick look or truncated Rule of Reason” analysis exists, but that courts employ the “full” rule of reason test more often. Id.
108. For further discussion of why the rule of reason analysis is favored, see infra notes 109–110 and accompanying text.
109. See, e.g., NCAA v. Bd. of Regents of Okla. 468 U.S. 85, 101 (1984) (“[W]hat is critical is that this case involves an industry in which horizontal restraints on competition are essential if the product is to be available at all.”).
110. Edelman & Doyle, supra note 42, at 414 (quoting Marc Edelman & C. Keith Harrison, *Analyzing the WNBA’s Age/Education Requirement from a Legal, Ethical,
ever, even if a league might otherwise succumb to a Section 1 attack based on a rule of reason analysis, three exemptions give them added protection. These exemptions are the “single entity” defense, the “statutory labor” exemption, and the “non-statutory labor” exemption.112

2. Single Entity Defense and Related Case law

Of greatest relevance is the single entity defense, which, when successfully argued, acts as something of an exemption for leagues engaging in behavior seemingly in violation of Section 1.113 The single entity defense finds its roots in the idea that “[i]t is fundamental in a Section 1 violation that there must be at least two independent business entities accused of combining or conspiring to restrain trade” within a defined economic market.114 The Supreme Court’s 1984 decision in Copperweld is the leading case defining the defense; however leagues had attempted to argue their teams were part of a “single business enterprise” before then, though largely to no avail.115

A rare example of a successful single entity defense is San Francisco Seals, Ltd. v. National Hockey League,116 where an NHL team sued the NHL for refusing to allow it to relocate, and alleged violations of both Section 1 and Section 2 of the Sherman Act.117 The United States District Court for the Central District of California held, first, that the relevant market was “the production of professional hockey games before live audiences” in the U.S. and Ca-
Within this market, the court found that the Seals did not compete with other NHL teams, but, rather, acted with them as “one single business enterprise” in the pursuit of the league’s main purpose in this market, which was to produce “sporting events of uniformly high quality appropriately scheduled as to both time and location so as to assure all members of the league the best financial return.”

However, the District Court’s finding in *San Francisco Seals* proved to be counter to the run of cases. In *North American Soccer League v. NFL* (“NASL v. NFL”), the NASL brought an action challenging an NFL rule banning “cross-ownership” of NFL teams by owners of teams in other major leagues. The Court of Appeals for the Second Circuit did recognize that the various NFL teams needed to cooperate, classifying the league as an unincorporated joint venture, but conducted a rule of reason analysis and found that the ban violated Section 1 of the Sherman Act. Key to the court in *NASL v. NFL* was that: (1) each NFL team was separately owned, (2) they did not share expenses, expenditures, or

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118. *Id.* at 969. The court looked to two Supreme Court cases to guide its definition of the relevant market:

In considering what is the relevant market for determining the control of price and competition, no more definite rule can be declared than that commodities reasonably interchangeable by consumers for the same purposes make up that part of the trade or commerce, monopolization of which may be illegal.

*Id.* (internal quotations omitted) (quoting United States v. E. I. du Pont de Nemours & Co., 351 U.S. 377, 395 (1956)).

Within this broad market, well-defined submarkets may exist which, in themselves, constitute product markets for antitrust purposes. The boundaries of such a submarket may be determined by examining such practical indicia as industry or public recognition of the submarket as a separate economic entity, the product’s peculiar characteristics and uses, unique production facilities, distinct customers, distinct prices, sensitivity to price changes, and specialized vendors.

*Id.* (internal citations omitted) (quoting Brown Shoe Co. v. United States, 370 U.S. 294, 325 (1962)).

119. *Id.* The court held that the league of teams cooperating as a single enterprise for the production of professional hockey games itself competed against “other similarly organized professional leagues.”

120. For further discussion of cases in which the single entity defense was not successfully employed, see *infra* notes 121–144 and accompanying text.

121. 670 F.2d 1249 (2d Cir. 1982).

122. See *id.* at 1250 (detailing NASL’s action and case’s posture).

123. See *id.* at 1250–51 (discussing NFL’s structure and court’s holding); see also *Los Angeles Mem’l Coliseum Comm’n v. NFL*, 726 F.2d 1381, 1388 (9th Cir. 1984) (citing NASL v. NFL, 670 F.2d at 1257–59) (“[T]he Second Circuit recognized the cooperation necessary among league members, even characterizing the NFL as a joint venture, but nonetheless applied rule of reason analysis and found the cross-ownership rule violated [Section] 1.”).
profits with each other, (3) each earned its own revenue from un-
shared sources, such as television, radio, parking, and concessions,
and (4) each charged different amounts for tickets.\(^{124}\) As a result,
the court held that the NFL teams were “separate economic entities
engaged in a joint venture,” because, although the league did en-

gage in a revenue sharing scheme, “the financial performance of
each team, while related to that of the others, [did] not . . . necessa-
rily rise or fall with that of the others.”\(^{125}\) The court stressed the

need to find that the NFL was not a single entity, warning that doing so “would permit league members to escape antitrust responsi-

bility for any restraint entered into by them,” even if “the benefit

would be outweighed by its anticompetitive effect.”\(^{126}\) Worse still,

the court worried that such a finding might allow restraints “adopted more for the protection of individual league members
from competition than to help the league.”\(^{127}\)

The Ninth Circuit furthered the Second Circuit’s reasoning in

Los Angeles Memorial Coliseum Commission v. NFL (“Raiders I”),\(^{128}\) a
case which involved a similar situation to that in San Francisco Seals,

but specifically rejected its holding.\(^{129}\) The NFL prevented the

Oakland Raiders’ proposed relocation by requiring a three-fourths
vote of the league’s team owners, who unanimously voted against

the relocation.\(^{130}\) In analyzing whether the NFL was a single entity,
the court noted that the teams needed to cooperate to produce a

product—“the NFL season culminating in the Super Bowl”—but

nonetheless held that such a need is insufficient to exempt cooper-

ating businesses from Section 1 scrutiny.\(^{131}\)

Following a similar analysis to that used in NASL v. NFL, the

Ninth Circuit also noted that teams compete against each other “to

acquire players, coaches, and management personnel.”\(^{132}\) Further,
certain teams in close proximity compete for “fan support, local tel-

\(^{124}\) See NASL v. NFL, 670 F.2d at 1252 (listing economic particularities of

NFL teams).

\(^{125}\) Id.

\(^{126}\) Id. at 1257.

\(^{127}\) Id.

\(^{128}\) 726 F.2d 1381 (9th Cir. 1984) [hereinafter Raiders I].

\(^{129}\) See id. at 1390 n.4 (“One district court case has reached the opposite

conclusion in a somewhat similar context.”).

\(^{130}\) See id. at 1385 (discussing factors causing Raiders to file lawsuit).

\(^{131}\) Id. at 1389 (“The necessity that otherwise independent business cooper-

ate has not, however, sufficed to preclude scrutiny under [Section] 1 of the Sher-

man Act.”).

\(^{132}\) Id. at 1390.
vision and local radio revenues, and media space."\textsuperscript{133} As a result of the foregoing, the court, citing the emergence of the United States Football League, which was in the middle of its second of only three seasons in existence, found that each team was a separate entity “in large part distinct from the NFL,” and that each club was able to produce football games without being a member of the NFL.\textsuperscript{134}

As deploying a single entity defense increasingly seemed a futile exercise to sports leagues by the mid-1980s, the Supreme Court’s decision in \textit{Copperweld} must have seemed a potential breath of new life for the defense.\textsuperscript{135} In \textit{Copperweld}, the Court considered whether a parent company and its wholly owned subsidiary could “constitute a combination or conspiracy” in such a way that would violate Section 1 of the Sherman Act.\textsuperscript{136} In doing so, the Court first looked to the language of the Sherman Act, and then a growing number of cases in which courts had created an “intra-enterprise conspiracy doctrine,” a court-created doctrine which stated liability under Section 1 “is not foreclosed merely because a parent and its subsidiary are subject to common ownership.”\textsuperscript{137}

The Court’s analysis, however, lead it to conclude that the doctrine had grown beyond its true scope.\textsuperscript{138} As a case in point, the Supreme Court in 1947 had held that a taxicab company owner had violated Section 1 when he acquired multiple taxicab companies in multiple cities, stating “the common ownership and control of the various corporate appellees are impotent to liberate the alleged combination and conspiracy from the impact of the Act.”\textsuperscript{139} Courts jumped on this language to build the intra-enterprise doctrine; however this legal conclusion somehow became separated from the facts that brought it about.\textsuperscript{140} The key was that the original acquisitions themselves “create[d] a combination illegal under [Section]
1,” and that the various companies shared common ownership was of no consequence “because restraint of trade was the primary objective of the combination, which was created in a deliberate, calculated manner.”141 Conversely, and relevant to the parties in the case it was deciding, the Court held that “[b]ecause coordination between a corporation and its division does not represent a sudden joining of two independent sources of economic power previously pursuing separate interests, it is not an activity that warrants [Section] 1 scrutiny.”142 Therefore, the Court concluded, Section 1 does not forbid “a single firm’s anticompetitive conduct,” whether or not that conduct “may be indistinguishable in economic effect from the conduct of two firms subject to [Section] 1 liability.”143 Only Section 2, which forbids monopolization and attempted monopolization, may apply.144

3. Labor Exemptions to Section 1 and Related Case Law

As previously mentioned, Section 6 of the Clayton Act provides a statutory exemption to Section 1 for collective bargaining.145 The exemption applies to union organizations and members “acting within the legitimate objectives of a union,” meaning “union members must act collectively in their own self-interest for legitimate union purposes, and not in combination with non-union or third party groups.”146 The exemption, however, only applies to the union’s actions, “and not the relationship between an employer and the union members.”147

Of more relevance to a potential challenge to MLS, and Section 1 challenges against sports leagues in general, is the so-called “non-statutory labor exemption,” which is based in common law.148 The non-statutory exemption has the same effect as the statutory

141. Id. at 761–62 (citations omitted) (stating original intent of acquisition, as evidenced by subsequent action, allowed for such ruling).
142. Id. at 770–71 (holding single entity defense applied).
143. Id. at 775 (determining single firms may restrain trade in ways separate firms may not).
144. See id. (“[T]he Act’s plain language leaves no doubt that Congress made a purposeful choice to accord different treatment to unilateral and concerted conduct.”).
145. See 15 U.S.C. § 17 (representing codification of Section 6 of Clayton Act); see also supra notes 91–92 and accompanying text.
146. Edelman & Doyle, supra note 42, at 415 (citing § 17) (introducing Section 6’s statutory labor exception).
147. Id. at 415 n.80 (quoting Andreas Joklik, The Legal Status of Professional Athletes: Differences Between the United States and the European Union Concerning Free Agency, 11 Sports L.J. 223, 239 (2004)).
148. See id. at 415–16 (arguing for its “important place” in sports law).
exemption, but can apply to additional situations, thus filling in some of the gaps. The exemption, applied pursuant to what is known as the “Mackey test,” is articulated by the Eighth Circuit in the 1976 case Mackey v. NFL, and “applies only where an alleged restraint of trade: (1) involves mandatory subjects of bargaining; (2) primarily affects the parties involved; and (3) is reached through bona fide, arm’s-length bargaining.” In 2004, the Second Circuit in Clarett v. NFL opted for an expanded non-statutory labor exemption which includes “any mandatory subject of bargaining where the exemption’s application would ensure the successful operation of the collective bargaining process.” Unlike the Mackey test, this broader test, which came to be known as the Clarett test, will ultimately protect collective bargaining agreements (CBAs) that negatively affect parties who were not involved in the bargaining of that agreement, but who are controlled the CBA by later entry to the bargained-for labor market as a covered class. As a result, where Mackey might not have afforded an exemption to a CBA negatively affecting college players not yet in the league like Maurice Clarett, the Clarett test does provide an exemption. In any event, that a court will employ either the relatively narrower Mackey test or the relatively broader Clarett test is evidence that the non-statutory labor exemption holds a prominent position in sports

149. See id. at 416 (“The non-statutory labor exemption comes for the public policy rationale that ‘employees are better off negotiation together rather than individually, and therefore labor law (rather than antitrust law) should apply to situations where collective bargaining occurs.”) (quoting Edelman & Harrison, supra note 110, at 14).

150. 543 F.2d 606 (8th Cir. 1976).

151. Edelman & Doyle, supra note 42, at 416 (citing Mackey, 543 F.2d at 614) (noting “many courts have followed the Mackey Test”).

152. 369 F.3d 124 (2d Cir. 2004).

153. See Edelman & Doyle, supra note 42, at 417 (quoting Clarett, 369 F.3d at 143) (internal quotations omitted).

154. See Clarett, 369 F.3d at 139 (holding “an NFL club would commit an unfair labor practice were it to bargain with [a prospective player coming out of college] individually without the union’s consent,” and that “[t]he terms and conditions of [that player’s] employment are instead committed to the collective bargaining table and are reserved to the NFL and the players union’s selected representative to negotiate”) (first citing Medo Photo Supply Corp. v. NLRB, 321 U.S. 678, 180 (1944); and then citing NLRB v. Allis-Chalmers Mfg. Co., 388 U.S. 175, 180 (1967)); see also Edelman & Doyle, supra note 42, at 416–17 (discussing Clarett test).

155. See Clarett, 369 F.3d at 138–39 (holding rule collectively bargained between NFL and NFL Players’ Association—forbidding college players with less than three full college football seasons played—from playing in NFL exempted under non-statutory labor exemption).
antitrust litigation. The reason for this is strong policy-based support for allowing employees to organize and use their collective strength to negotiate the terms of their employment, and the fact that the labor markets in the major U.S. professional sports consists of “players’ associations (unions) collectively bargain[ing] with teams (employers) to form a leagues collective bargaining agreement.”

This policy-based rationale for the non-statutory labor exemption can be seen in lawsuits where players have challenged contract-related restraints which impinge on their ability to pursue employment opportunities on the open market within the league, whether or not the court ended up finding for the league or the player. Many of the earlier challenges attacked reserve clauses, provisions of the player contract which effectively decreased the player’s ability to test the open market by “restricting the athlete’s right to change teams, even after the contract expires.”

For instance, in Mackey, the Eighth Circuit held that, under a rule of reason analysis, though not under a per se analysis, the NFL’s “Rozelle Rule” “constitute[d] an unreasonable restraint of trade,” thus violating Section 1. The rule, in the interest of maintaining competitive balance on the field, allowed the NFL’s Commissioner to compensate a team losing a player to another through free agency—reached at the conclusion of the player’s contract—by awarding the original team a player from the new team if the two teams were unable to find an agreeable arrangement on their own. The players contended, however, that the effect of the rule, which was a form of reserve clause, was to chill the market for play-

156. See Edelman & Doyle, supra note 42, at 415–16 (arguing non-statutory exemption “has an important place in sports law”).
157. Id. at 416.
158. See Bank, Should MLS Players Skip, supra note 81 (recapping player-initiated lawsuits aimed at reserve clauses).
159. Reserve Clause, BLACK’S LAW DICTIONARY (10th ed. 2014).
160. See Mackey v. NFL, 543 F.2d 606, 623 (8th Cir. 1976) (citing 15 U.S.C. § 1). The court did, however, suggest that some “restraint[s] on competition for players’ services” might not violate Section 1. See id.
161. See Mackey, 543 F.2d at 610–11 (discussing Rozelle Rule).
ers who had exercised contract options in order to reach free agency.\footnote{162}

Although the rule was technically the result of collective bargaining between the league’s teams and the players, the court found it was not subject to the non-statutory labor exemption, because the NFLPA was relatively weak at the time, thus precluding bona fide, arms-length bargaining, which is the third prong of the \textit{Mackey} test.\footnote{163} The court’s reasoning for this conclusion was three-fold: (1) the NFLPA was both new and underfunded relative to the teams with which it was bargaining, (2) the rule had been in place before the NFLPA had organized, and remained unchanged when agreed to by the NFLPA, and (3) there was no quid pro quo benefiting the players for its remaining so.\footnote{164} Indeed, although \textit{Mackey} resulted in a successful antitrust challenge, the key in its holding was that the court found the non-statutory labor exemption did not apply.\footnote{165}

Unfortunately, for players seeking to challenge league rules restricting their ability to pursue contracts on the open market, courts have applied the exemption to a wide range of challenges.\footnote{166} Examples include where the parties to the agreement are those affected by the restraint, “when the challenge is brought by an employee or potential employee while a [CBA] . . . is in place . . . or when the restraint . . . was unilaterally imposed by management during an impasse in collective bargaining relations.”\footnote{167} In \textit{Wood v.}

\footnote{162. See Wallace, \textit{supra} note 160 (explaining players’ original contention when case was at trial court level).}

\footnote{163. See \textit{Mackey}, 543 F.2d at 615–16; see also \textit{supra} note 151 and accompanying text (stating three prongs of \textit{Mackey} test). The reason the court found no \textit{bona fide}, arms-length bargaining was (1) the Rozelle Rule had been in place before the NFLPA had organized, (2) the NFLPA was both new and underfunded relative to the teams, (3) the Rule was unchanged when agreed to by the NFLPA, and (4) there was no \textit{quid pro quo} for its remaining so. See \textit{Mackey}, 543 F.2d at 615–16.}

\footnote{164. See \textit{id.} at 616 (detailing factors for holding non-statutory labor exemption did not apply).}

\footnote{165. See \textit{id.} (“In view of the foregoing, we hold that the agreements between the clubs and the players embodying the Rozelle Rule do not qualify for the labor exemption. The union’s acceptance of the status quo by the continuance of the Rozelle Rule in the initial collective bargaining agreements under the circumstances of this case cannot serve to immunize the Rozelle Rule from the scrutiny of the Sherman Act.”).}

\footnote{166. For further discussion of instances where courts apply non-statutory labor exemption, see \textit{infra} note 167 and accompanying text.}

National Basketball Ass’n,\(^{168}\) for instance, the Second Circuit considered the NBA entry draft—wherein teams select college players to play for their team and receive exclusive rights to employ the player for a period of time—and salary cap, which is the maximum amount a team can spend on player salaries during a given season.\(^{169}\) The court held that both fell within the non-statutory labor exception because both were “mandatory subjects of bargaining,” achieved through “bona fide arms-length negotiations” between the leagues teams and the NBA Players’ Association (“NBAPA”).\(^{170}\) That the plaintiff, Wood, was not personally part of the NBAPA when these provisions were bargained for was of no help to Wood, as the court stressed the policy of promoting collective bargaining.\(^{171}\) As a result, the non-statutory labor exemption has allowed leagues to restrict the labor market within the leagues themselves in ways which otherwise could violate Section 1 because the rules challenged came about through collective bargaining.\(^{172}\)

In *Brown v. Pro Football, Inc.*,\(^{173}\) players challenged a rule unilaterally imposed by the NFL’s teams during a collective bargaining impasse which created development teams of substitute players who would be paid a set salary.\(^{174}\) The Supreme Court held that non-statutory labor exemption applied to the teams’ rule, because unilateral employer action taken during or after a collective bargaining negotiation grows “out of, and [i]s directly related to, the lawful operation of the bargaining process” when the action “involve[s] a matter that the parties were required to negotiate collectively” and “concern[s] only the parties to the collective-bargaining relationship.”\(^{175}\)

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\(^{168}\) 602 F. Supp. 525 (S.D.N.Y. 1984), aff’d, 809 F.2d 954 (2d Cir. 1987).

\(^{169}\) See id. at 526 (detailing Wood’s allegations of Section 1 violations).

\(^{170}\) Id. at 528 (adopting Mackey test).

\(^{171}\) See id. at 529 (“Indeed the law could be no other way. The aim of federal labor policy is to promote peace in labor-management relations, not chaos and turmoil which adoption of plaintiff’s theory would produce.”).

\(^{172}\) See supra notes 148–166 and accompanying text (discussing non-statutory labor exemption).


\(^{174}\) See id. at 234–35 (noting plaintiffs included development players who argued they should be allowed to negotiate salaries individually).

\(^{175}\) Id. at 250. The Court noted, however, that “an agreement among employers could be sufficiently distant in time and in circumstances from the collective-bargaining process that a rule permitting antitrust intervention would not significantly interfere with that process.” See also Erick V. Prosser, Casenote, *Brady v. NFL: How the Eighth Circuit “Saved” the 2011 NFL Season by Supporting Negotiation, Not Litigation*, 19 Vill. Sports & Ent. L.J. 603, 615 (2012) (concluding “decertification is an attempt by the Players to end their collective bargaining relationship . . .
III. **Analysis**

With the legal, economic, and historical background in place, a framework for MLS’s formation could be crafted.\(^{176}\) As a result of the founders’ planning, the league was able to thwart a legal challenge to its single entity status early in its existence.\(^{177}\) However, as discussed below, developments since this early case, in addition to the precariousness of the case itself, have left the league vulnerable to another Section 1 attack.\(^{178}\) Ultimately, if raised by the proper plaintiff, the challenge would be able to successfully penetrate MLS’s single entity defense, thus forcing a court to employ a full rule of reason analysis under Section 1.\(^{179}\)

**A. MLS Joins the Scene and Scores a Quick Victory, but Will It Stand?**

In light of the foregoing, and with the benefit of hindsight, the economic and legal history of soccer and organized professional team sports, in general, in the United States provided a fairly clear path for Alan Rothenberg and the other founders of MLS.\(^{180}\) Generally, professional sports in the U.S. had evolved employing closed-league systems, wherein any affiliated leagues existed solely for player development purposes, young talent was initially acquired by means of an entry draft, and players’ unions collectively bargained with the owners of the leagues’ independently-owned and -operated teams.\(^{181}\) Specific to soccer, the NASL had been the most successful, and certainly the most glamorous, attempt at a top-tier league in the United States; however, issues with wealth disparity, overex-

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\(^{176}\) For further discussion of MLS’s initial structure, see *infra* notes 187–201 and accompanying text.

\(^{177}\) For further discussion of MLS’s successful use of the single entity defense, see *infra* notes 202–220 and accompanying text.

\(^{178}\) For further discussion of these developments, see *infra* notes 221–309 and accompanying text.

\(^{179}\) For further discussion of this conclusion, see *infra* notes 290–309 and accompanying text.


\(^{181}\) For further discussion of the development of professional sports in the United States, see *supra* notes 51–63 and accompanying text.
tension in the signing of star player contracts, and lack of cohesion plagued the league to the point of collapse.182

In the legal realm, the Sherman Act, specifically Section 1, loomed over the other major sports leagues—with the exception of the MLB—keeping them from exerting centralized power in a way that would not allow them to fully control the entire business of the league.183 That the players of the other leagues unionized and collectively bargained with the leagues offered a certain level of protection from the Sherman Act, but leagues were still subject to scrutiny under Section 1.184 Lastly, leagues had largely been unable to execute a full Section 1 single entity defense, although with the Supreme Court’s ruling in Copperweld, the criteria for how to do so was now apparent.185 So, when the United States was granted the 1996 FIFA World Cup along with a requirement that it create a top-tier league, the fact that Rothenberg’s group suggested creating a single entity pushed his bid to the top.186

1. MLS’s Early Structure

MLS organized in 1995 as a limited liability company (LLC) in Delaware, with its operational structure laid out in its LLC Agreement (“MLS Agreement”) and each team owned by the league itself, as opposed to separate parties.187 As such, investors hoping to be part of the league invest in the league itself and are given the option of either investing passively in the league as a whole or being

182. For further discussion of the NASL, see supra notes 67–76 and accompanying text. See also Stebbins, supra note 40, at 14 (noting other unsuccessful leagues such as the American Soccer League, the International Soccer League, the United Soccer Association, and the National Professional Soccer League).


184. For further discussion of the statutory and non-statutory labor exemptions, see supra notes 145–175 and accompanying text.

185. For further discussion of the single entity defense, see supra notes 113–144 and accompanying text.

186. See Stebbins, supra note 40, at 13 (“It is important to note two things here: (1) it is documented that a major reason the USSF selected the bid from the MLS group was because of its unique structure that would keep costs down while preventing antitrust challenges, and (2) that FIFA and the USSF only allowed one sanctioned Division 1 professional league in the United States.”).

187. See Remo Decurtins, Major League Soccer’s Exceptionalism in FIFA’s Transfer System: For How Much Longer?, 27 Marq. Sport L. Rev. 331, 333 (2017) (stating MLS was “structured ... as an entity of separately operated units (“single entity structure”) in the legal form of a limited liability company ... with the units being individual MLS teams”); see also Fraser I, 97 F. Supp. 2d 130, 132–33 (D. Mass. 2000) (outlining relevant MLS structure for antitrust challenge examination), aff’d 284 F.3d 47 (1st Cir. 2002); McChesney supra note 78, at 143 (“Technically, the league owns all of the teams.”).
granted “investor-operator” status with “the exclusive right to operate one or several MLS teams,” subject to conditions and obligations, by signing an operating agreement. Each investor then receives a seat on the league’s Management Committee, charged with “manag[ing] the business and affairs of MLS.” As investors have two investment options, not every team needs to be operated by a specific investor through an operating agreement, meaning MLS itself is capable of directly operating teams.

Unlike in NASL v. NFL, profits and losses are shared amongst the investors, insuring each investor, and each team, as an organizational unit, is interested in the health of the league. The league also receives all revenue, “owns and controls all trademarks, copyrights, and other intellectual property rights,” “receives the revenues from ticket sales,” regulates ticket policies, pays most of the league’s operational expenses, pays costs related to players, and pays for every team’s “game-related travel expenses, . . . league wide marketing expenses, and 50% of each individual team’s stadium rental expense.” Additionally, “the league owns all [national and international] broadcast rights, intellectual property rights, stadiums and other facilities, and sources of revenue like concessions and merchandizing deals.”

As for labor, because the league owns every team, “players contract[] directly with the league,” meaning all player contracts are MLS contracts, as opposed to contracts with a given team. As a result, a player first signs an MLS contract, and then the league

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188. Decurtins, supra note 187, at 333 (detailing MLS’s initial and current structure).

189. Fraser I, 97 F. Supp. 2d at 132. “The Management Committee has authority to manage the business and affairs of MLS,” which included, inter alia, setting guidelines for player assignments. Id.

190. See id. at 132 n.2 (“The league itself is authorized by the MLS Agreement to operate teams directly and . . . [as of April 2000] operates two teams.”).

191. See Decurtins, supra note 187, at 333 (“The individual investors thus have a direct economic interest in the financial well-being of the league as a whole.”). For further discussion of NASL v. NFL, see supra notes 124–125 and accompanying text. MLS’s profits and losses distribution operates “not unlike the distribution of dividends to shareholders in a corporation.” Fraser I, 97 F. Supp. 2d at 133.

192. Fraser I, 97 F. Supp. 2d at 133 (listing specifics relating to MLS’s economic and operational structure relevant to antitrust challenge).

193. Lennarz, supra note 67, at 142. This bundle of ownership, and centralization of resources, lays in stark contrast to those the NASL v. NFL court used in making its determination of a Section 1 violation. See NASL v. NFL, 670 F.2d 1249, 1252 (2d Cir. 1982); supra note 124 and accompanying text.

194. Lennarz, supra note 67, at 142 (arguing MLS’s structure allowed for financial stability, defense against antitrust challenges, and a positive relationship with USSF).
assigns him to a team.\textsuperscript{195} The majority of players are selected by the investor-operators of specific teams, however, to foster competitive balance on the field, MLS itself distributes the best players evenly throughout the league.\textsuperscript{196}

Pursuant to their operating agreement, teams’ investor-operators are given some control over their teams’ specifically local affairs, such as agreements for local broadcasts, services, and products—although the league curtailed even this control—and the investor-operators execute this power “as agents of MLS,” as opposed to separate entities.\textsuperscript{197} Investor-operators are required to pay for the costs of these approved local arrangements, as well as team administration—including coaches and general managers—and half of their stadium rental expenses not covered by MLS.\textsuperscript{198} For their trouble, MLS awards investor-operators a management fee, which gives them a portion of revenues from “local broadcast[s] . . . and sponsorship,” ticket sales, and “concessions and other sources” of stadium-related revenue.\textsuperscript{199} Investor-operators also may transfer or sell their rights, however such action requires Management Com-

\textsuperscript{195} Fraser I, 97 F. Supp. 2d at 132 (“[P]layers are hired by MLS as employees of the league itself and then are assigned to the various teams. Each player’s employment contract is between the player and MLS, not between the player and the operator of the team to which the player is assigned. MLS centrally establishes and administers rules for the acquisition, assignment, and drafting of players, and all player assignments are subject to guidelines set by the Management Committee. Among other things, the guidelines limit the aggregate salaries that the league may pay its players.”).

\textsuperscript{196} See id. at 132–33; see also Decurtins, supra note 187, at 332–33 (“In order to create competitive balance in the interest of the league as a whole, the central resource ‘players’ would have to be allocated by the league.”). Additionally, teams could trade players, although each trade required the express approval of the league’s central office. See Fraser I, 97 F. Supp. 2d at 133.

\textsuperscript{197} See Fraser I, 97 F. Supp. 2d at 133 (“Team operators do retain the ability to negotiate some purely local matters.”).

\textsuperscript{198} See Decurtins, supra note 187, at 333 (“Among others, they are obliged to hire, at their own expense and discretion, the coaches and other staff.”); see also McChesney, supra note 78, at 143 (suggesting investor-operators “have a financial stake in their respective team, but possess little decision making power. In addition, teams have a local manager and advisory committee which advises MLS management regarding local operating matters”).

\textsuperscript{199} Fraser I, 97 F. Supp. 2d at 133.

As of the time this action was filed, the management fee consisted of (a) 100\% of the first $1.24 million, and 30\% of the excess over $1.24 million, of local television broadcast and sponsorship revenues, the latter percentage subject to some specified annual increase; (b) 50\% of ticket revenues from home games, increasing to 55\% in year six of the league’s operation; and (c) 50\% of stadium revenues from concessions and other sources.

\textit{Id.}
mittee consent, which “may be withheld without cause.”

Passive investors, meanwhile, have neither the responsibilities nor the opportunities related to team operation, and receive only their portion of the league’s shared revenue.

2. Fraser: A Game Winner for Single Entity?

a. A Goal for Single Entity

As noted, this league structure was designed to allow MLS to defend against a Section 1 antitrust attack by utilizing the single entity defense. The league had an early opportunity to defend against such a lawsuit, when a group of players sued the league, asserting violations of Section 1 and 2 of the Sherman Act, as well as Section 7 of the Clayton Act. The players attacked the league’s direct control over player contracts and movement, alleging “an illegal conspiracy between multiple entities” sufficient to be an unreasonable restraint on trade “in the market for top division soccer players in North America,” in violation of Section 1. Essentially,

200. Id. (“Team operators derive whatever rights they may have exclusively from MLS, and the league may terminate these rights if a team operator violates these provisions or fails to act in the best interest of the league.”).

201. See id. (“Passive investors do not pay any team operating expenses or receive any management fee. They share in the general distribution of profits (and losses) resulting from league operations.”). For further discussion of MLS profit sharing, see supra note 191 and accompanying text.

202. See Lennarz, supra note 67, at 144 (noting that, theoretically, organizing MLS as a single entity “would remove any restraints on competition inherent in the MLS model from scrutiny . . . because there is a unity of entrepreneurial interests among the teams”).

203. See generally Fraser I, 97 F. Supp. 2d 130 (holding MLS is a single entity for purposes of Section 1, and sufficient injury and market definitions were not alleged for Section 7 victory); Fraser II, 284 F.3d 47 (1st Cir. 2002) (upholding lower court’s holdings on relevant market grounds).

204. Lennarz, supra note 67, at 148 (citing Fraser I, 97 F. Supp. 2d at 132) (focusing on how MLS “negotiate[ed] and execut[ed] contracts directly with players before determining which team they would play for”).
the players alleged that although the league and its teams were technically operating as a single LLC and, therefore, appeared eligible for *Copperweld*'s single entity defense, this structure was merely single entity in appearance, while actually consisting of separate legal entities collectively acting to horizontally restrict trade.205

The United States District Court for the District of Massachusetts disagreed with the players, however, and granted summary judgment for the league.206 The court held that “MLS’s operations should . . . be analyzed as the operations of a single corporation . . ., with its operator-investors treated essentially as officers and shareholders.”207 In making this conclusion, the court found that “[u]nder Delaware law, an LLC is a separate legal entity distinct from its members,” that those members’ “own undivided interests . . . are bound by the terms of their Agreement . . . and share in the overall profits and losses ratably according to their investment or as otherwise provided by the organizing Agreement.”208 The court also noted that “[t]he Federal Trade Commission has treated LLCs like corporations,” and held that MLS, an LLC, should be treated as a corporation for purposes of the inquiry.209 Invoking *Copperweld*, the court held that MLS was a single entity, and that as such, the individual investors were incapable of “combin[ing] or conspir[ing] with each other in pursuing the economic interests of the entity.”210

[...]

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Fraser I, 97 F. Supp. 2d at 131–32. 205. See Fraser I, 97 F. Supp. 2d at 131–32 (“The gist of [plaintiffs’] argument is that although MLS appears to be a single business entity, so that its method for hiring players centrally can be characterized as the act of a single economic actor for antitrust purposes, the organizational form is really just a sham that should be considered ineffective to insulate from condemnation what are in substance illegal horizontal restraints on the hiring of players resulting from the unlawful concerted behavior of the several MLS team operators.”).

206. See id. at 142 (granting summary judgment on counts I and IV).
207. Id. at 135 (holding single entity defense applied to MLS).
208. Id. at 134 (discussing why members of LLCs are members of single entity, not separate entities working together).
209. Id. at 135. The court further noted that Section 1 “is directed against contracts, combinations or conspiracies,” and as such “only prohibits collective activity by plural economic actors which unreasonably restrains competition.” Id. at 134 (citing Copperweld Corp. v. Independence Tube Corp., 467 U.S. 752, 769 (1984)).
210. Id. at 139. “MLS’s policy of contracting centrally for player services is unilateral activity of a single firm. Since § 1 does not apply to unilateral activity—even unilateral activity that tends to restrain trade—the claim set forth in Count I
b. *Fraser I* Goes Under Review

On appeal, the United States Court of Appeals for the First Circuit never produced a holding on single entity, because it held that under a rule of reason analysis, the players insufficiently defined the relevant market for restraint on trade, thereby making a single entity ruling unnecessary.211 However, in *dicta*, the court appeared willing to reverse the District Court’s holding on single entity.212 According to the court, “MLS does resemble an ordinary company,” but that appearance is inconclusive, and instead of being a single company under *Copperweld*, MLS seems more “a hybrid arrangement.”213 The court pointed to two main distinctions.214 First, the court found a “diversity of entrepreneurial interests that goes well beyond the ordinary company,” stemming from the investor-operator operating agreements which, according to the court, takes the investor-operators “part way along the path to ordinary sports team owners,” because they have personal economic interests in the individual teams they operate separate from the league and the other investors.215 Based on this diversity, the court seemed to view the league’s structure as being merely formally different than that of other sports leagues—which are not single entities—as opposed to actually different.216 The court reached this conclusion based on language in *Copperweld* stating that a parent company and

cannot succeed as a matter of law.” *Id.* (footnote omitted) (citing *Copperweld*, 467 U.S. at 776).

211. *See Fraser II*, 284 F.3d 47, 59 (1st Cir. 2002). The First Circuit held that the players were required to show “MLS exercised significant market power in a properly defined market, that the practices in question adversely affected competition in that market and that on balance the adverse effects on competition outweighed the competitive benefits.” *Id.* (citing Augusta News Co. v. Hudson News Co., 269 F.3d 41, 49 (1st Cir. 2001)).

212. *See id.* at 56 (“We also find that the case for applying single entity status to MLS and its operator/investors has not been established but that in this case the jury verdict make a remand on the Section 1 claim unnecessary.”); *see also Decurtins*, *supra* note 187, at 335 (arguing MLS’s single entity status received a “question mark” from the First Circuit).

213. *Fraser II*, 284 F.3d. at 56, 58 (suggesting MLS fits “somewhere between a single company (with or without wholly owned subsidiaries) and a cooperative arrangement between existing competitors”).

214. *See id.* at 57 (suggesting two “two functional differences” exist “that are significant for antitrust policy”).

215. *Id.* The court pointed to the fact that the investor-operators, with respect to the teams they operate, make independent hires, personally invest in their teams, keep a substantial share of revenue from their teams, and “[have] limited sale rights in [their] own team that relate to the specific assets and not just shares in the common enterprise.” *Id.*

216. *See id.* (“One might well ask why the formal difference in corporate structure should warrant treating MLS differently than the National Football League or other traditionally structured sports leagues.”).
its wholly-owned subsidiaries are single entities under Section 1, and that they share a “complete unity of interests.”

Second, the court expressed concern that the investor-operators, in also sitting on the Management Committee, are not the “mere servants of MLS” that subsidiaries of a parent company would normally be, but rather those in actual control of the league, because they represent “the majority of votes on the [Committee].” The court’s concern was a policy-based one: allowing a single entity defense for independent entrepreneurs collaborating to fix prices (player wages, for instance) just because they were technically operating under a single corporate entity—of which they were in actual control—would protect “mere front[s] for price fixing.” After considering these differences, the court concluded that MLS “present[ed] a more doubtful situation” than that in Copperweld, but in any event held that it need not answer questions about single entity, due to the players’ aforementioned failure to sufficiently define the relevant market.

c. American Needle Changes the Rules

With the First Circuit deciding Fraser II on relevant market grounds, one might have reasonably believed that the District Court’s single entity holding would serve as ample protection for MLS, but the District Court’s ruling itself does not represent an ironclad application of the single entity defense for every vertically integrated sports league. However, despite the fact that the District Court held that MLS was a single entity, it also cited dictum in Copperweld that could reasonably lead to the conclusion that if the individual actors within a single entity were to act in their own economic self-interest, rather than the interest of the entity itself, the

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217. See id. (quoting Copperweld Corp. v. Independence Tube Corp., 467 U.S. 752, 771 (1984)). The court did not decide, however, whether “unity of interest” was a legal requirement, or a factual statement made by the Copperweld court. See id. (citing Chicago Prof’l Sports Ltd. v. NBA, 95 F.3d 593, 598 (7th Cir. 1996)).

218. Id. (“MLS . . . has two roles: one as an entrepreneur with its own assets and revenues; the other (arguably) as a nominally vertical device for producing horizontal coordination, i.e., limiting competition among operator/investors.”).

219. Id. at 57–58 (refusing to go so far as to say MLS was such a price fixing front, but arguing “it does distinguish Copperweld by introducing a further danger and a further argument for testing it under [S]ection I’s rule of reason”).

220. Id. at 58 (suggesting courts would need to decide how to analyze such situations).

221. See Fraser I, 97 F. Supp. 2d 130, 135 (D. Mass. 2000) (recognizing a potential “independent personal stake” exception to single entity defense), aff’d 284 F.3d 47 (1st Cir. 2002).
defense might be excepted. Indeed, in the text the District Court cites, the Copperweld Court notes that “many courts have created an exception [to single entity] for corporate officers acting on their own behalf.” But while the District Court recognized some “independent personal stake” exemption to the single entity defense, it hesitated to decide on its breadth, preferring instead to note its existence and suggest it should be applied “conservatively.”

As a result, one commentator, interpreting a Seventh Circuit case subsequent to Copperweld and decided in the same year as MLS’s inaugural season, concluded that Copperweld perhaps does not stand for the proposition that all action by purported single entities is given the defense, but, rather, that it “applies to a particular set of facts.” In that case, Chicago Professional Sports Ltd. v. NBA, the Chicago Bulls and a national broadcast television station sued the NBA to allow the station to air Bulls games, while the NBA sought to limit the number of games the station would air and impose a “tax” on these broadcasts. The Seventh Circuit, invoking the now well-established notion that sports leagues require some level of cooperation between its member teams to produce its product, decided there was “no reason . . . a sports league cannot be treated as a single firm,” but hedged this with respect to the NBA—a closed league of individually owned and operated teams—by noting “the league looks more or less like a firm depending on

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222. Id. (citing Copperweld, 467 U.S. at 770 n.15 (dictum)) (suggesting single entity defense is unavailable when officers “act[ ] to promote an interest, from which they would directly benefit, that is independent from the corporation’s success”); see also Greenville Publ’g Co. v. Daily Reflector, Inc., 496 F.2d 391, 399–400 (4th Cir. 1974) (finding defendant newspaper corporation and its president “capable of conspiring under § 1 because president had a stake in a third newspaper which would directly benefit from plaintiff’s newspaper’s elimination”).

223. Copperweld, 467 U.S. at 770 n.15 (citations omitted).

224. Fraser I, 97 F. Supp. 2d at 135 (citations omitted).

225. McChesney, supra note 78, at 142 (arguing that in 1999 (before Fraser I) MLS could successfully invoke single entity). McChesney argued that “[a]s long as the league can show a unity of interest, it can not [sic] be capable of conspiring within the meaning of [S]ection 1,” and suggested that the factors to consider under Copperweld are “common objectives versus divergent economic interests, general guidelines determined by one consciousness rather than two, and a pre-existing unity of economic interest rather than the sudden joining of sources of power, previously pursuing divergent goals.” Id. (citing Copperweld, 467 U.S. at 770–72).

226. 95 F.3d 593 (7th Cir. 1996).

227. See id. at 595–96 (considering whether NBA was single entity when acting within broadcast market).
which facet of the business one examines." Ultimately, however, the court held that within the realm of the broadcast market, the NBA was more a single entity than a group of independent economic actors, and, as a result, single entity would protect it from a Section 1 inquiry.

In 2010, the Supreme Court revisited *Copperweld* in the context of professional sports in *American Needle, Inc. v. NFL*. The NFL’s member teams had created a separate entity called National Football League Properties ("NFLP") to handle their intellectual property business, wherein profits and losses were shared equally by the teams, and teams had the ability to withdraw from the agreement. NFLP entered into an exclusive licensing agreement with Reebok, and another company, American Needle, who had previously been authorized to create clothing with teams’ logos, sued. Almost immediately, the Court brought the *Fraser I* District Court ruling into question, stating it has “long held that concerted action under [Section] 1 does not turn simply on whether the parties involved are legally distinct entities,” and that what is required is “a functional consideration of how the parties involved in the alleged anticompetitive conduct actually operate.” The Court stated that what is important is not whether the parties are a “legally single entity,” but rather “whether the alleged contract, combination . . ., or conspiracy is concerted action—that is, whether it joins together separate decisionmakers.”

228. *Id.* at 598–99 (stating “NBA Basketball is one product from a single source,” but that “because the human capital of players is not readily transferable to other sports . . . the league looks more like a group of firms acting as a monopoly”). For further discussion of courts’ realization that sports leagues require some level of cooperation, see *supra* note 94 and accompanying text.

229. See *id.* at 600 ("[W]e conclude that when acting within the broadcast market the NBA is closer to a single firm than to a group of independent firms."). Of course, a successful single entity defense only protects against a Section 1 inquiry, and not a Section 2 inquiry, and the court noted that to succeed on that front, the plaintiffs needed to "establish[ ] that the NBA possesses power in a relevant market, and that its exercise of this power has injured consumers." *Id.*


231. See *id.* at 187 (considering whether this entity deserved single entity protection).

232. See *id.* ("American Needle alleg[es] that the agreement between the NFL, its teams, NFLP, and Reebok violated [Sections] 1 and 2 of the Sherman Act.").

233. *Id.* at 191 ("eschew[ing] such formalistic distinctions" of legal distinction).

234. *Id.* at 195 (internal quotations omitted) (citing *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752, 769 (1984)). In the related text in *Copperweld*, the Court states that "it is perfectly plain that an internal agreement to implement a single, unitary firm’s policies does not raise the antitrust dangers
Therefore, the test articulated in *American Needle* for determining whether the single entity defense applies is “whether there is a ‘contract, combination . . ., or conspiracy’ amongst ‘separate economic actors pursuing separate economic interests,’ such that the agreement ‘deprives the marketplace of independent centers of decision making,’ and therefore of ‘diversity of entrepreneurial interests,’ and thus of *actual or potential* competition.” 235 As a result, the Court seemed to echo the First Circuit’s concern that a broad application of the defense would allow for separate economic decision-makers to hide behind the formality of a single legal entity. 236 Of course, the Court noted that finding a single firm’s agreements not covered by single entity is more the exception than the rule, but that it is possible nonetheless. 237 As a result of this analysis, the Supreme Court held that NFLP was not protected by the single entity defense, thus opening it to scrutiny under Section 1, “at least with regard[,] to its marketing of property owned by the separate teams.” 238 The Court cited the fact that the individual NFL teams each owned their own intellectual property and had the ability to withdraw from the entity agreement to conclude that they would otherwise compete with each other to profit from their intellectual property. 239 Essentially, because NFLP’s actions were decided by

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235. *Id.* (emphasis added) (citations omitted) (quoting *Copperweld*, 467 U.S. at 769 and *Fraser II*, 284 F.3d 47, 57 (1st Cir. 2002)).

236. See *id.* at 200 (“Agreements made within a firm can constitute concerted action covered by [Section] 1 when the parties to the agreement act on interests separate from those of the firm itself, and the intrafirm agreements may simply be a formalistic shell for ongoing concerted action.”). For further discussion of the First Circuit’s concern in *Fraser II*, see *supra* notes 218–219 and accompanying text.

237. *Am. Needle*, 560 U.S. at 200 (“We generally treat agreements within a single firm as independent action on the presumption that the components of the firm will act to maximize the firm’s profits. But in rare cases, that presumption does not hold.”).

238. *Id.*

The Court focused on seven factors: that the NFL teams were independently owned, independently managed with separate corporate consciousness whose objectives are not common, that the teams compete with each other on the playing field, compete to attract fans, compete for gate receipts, compete for contracts with players and coaches, and that the teams had the potential to compete for their separately owned intellectual property.


239. See *Am. Needle*, 560 U.S. at 200 (“Apart from their agreement to cooperate in exploiting those assets, including their decisions as the NFLP, there would be nothing to prevent each of the teams from making its own market decisions.”).
the teams, the teams themselves owned their own intellectual property, and the teams would otherwise profit off of their own intellectual property and compete with each other for related revenue in doing so, by deciding to “license their separately owned trademarks collectively and to only one vendor . . . [they] deprive[d] the marketplace of independent centers of decisionmaking.”240 In light of American Needle, therefore, the requirements necessary for unity of interest seem more strict than perhaps MLS’s founders anticipated, potentially paving the way for a reconsideration of the league’s single entity status.241

B. Challenging Single Entity to Institute Pro/Rel

Even before American Needle, some commentators argued that MLS was not actually a single entity, and momentum grew after the decision.242 These arguments focus on a number of economic factors and structural changes and evolutions that arguably decrease the league’s unity of purpose under Copperweld and American Needle.243 With respect to MLS and pro/rel, the effects of these changes point in the direction of MLS no longer being eligible for single entity status.244 And while one set of commentators argues that the other major sports could be subject to “open competition as a remedy,” its relatively early analysis with respect to MLS’s his-

240. Id. at 197 (quoting Copperweld, 467 U.S. at 769). The Court added that if separate economic entities could avoid Section 1 scrutiny “simply by giving the ongoing violation [of Section 1] a name and label” by means of a collectively organized legal entity, “perhaps every agreement and combination in restraint of trade could be so labeled.” Id. (quoting Timken Roller Bearing Co. v. United States, 341 U.S. 593, 598 (1951)).

241. See Coppage, supra note 180, at 555–56 (“Although American Needle dealt with licensing for products and merchandise, the holding could potentially serve to create far more stringent requirements for determining what unity of interest means in a league governance context.”).

242. See Ross & Szymbanski, supra note 23, at 626 n.104 (arguing First Circuit’s discussion of MLS’s single entity status was correct, focusing on investor-operators’ actual control of league through Management Committee); see also Lennarz, supra note 67, at 195 (“Since Fraser, there are three developments stemming from league growth that weaken the alleged single entity status further” which has increased teams’ “identities as separate entities and weakening their legal claim to a complete unity of interest that would allow the league’s structure to fall under” Copperweld); Stebbins, supra note 40, at 4 (“The league’s current economic reality makes it vulnerable to an antitrust challenge.”); Coppage supra note 180, at 559–61 (arguing growth and league changes should no longer afford MLS single entity defense).

243. See, e.g., Lennarz, supra note 67, at 194–95 (focusing on three things: “the increased diversity of MLS operator-investor cadre, the Designated Player exception, and the proliferation of soccer-specific stadiums”).

244. For further discussion of MLS’s precarious position vis-à-vis the single entity defense, see infra notes 282–309 and accompanying text.
This section will discuss possible challenges to MLS’s single entity status, beginning with a challenge from the players, continuing to a challenge from an MLS shareholder, and ending with a challenge from a team currently playing at a level below MLS. Ultimately, a successful challenge to single entity, as well as Section 1, could come only from a lower-level club seeking entry to MLS.

1. Another Players’ Challenge

The league has undergone significant changes since Fraser, some of which call into question the league’s unity of purpose with regard to player acquisitions. Assuming the players were to file a Section 1-based lawsuit against MLS, as they did in Fraser, the market they would allege to have been restricted would necessarily be a labor market involving their services. Such a challenge would likely focus on two key developments: the Designated Player Rule, and the recent creation of a modified free agency system.

The Designated Player Rule came about in 2006, in advance of English soccer star David Beckham signing with MLS’s LA Galaxy. The rule “allows clubs to acquire up to three players whose total compensation and acquisition costs exceed the maximum budget charge, with the club bearing financial responsibility for the amount of compensation above each player’s budget charge.”

245. Ross & Szymanski, supra note 23, at 646 n.104 (arguing early on that Fraser “poses no obstacles to the imposition of open competition as a remedy for the major North American sports” other than MLS, but restricting any discussion of MLS to one footnote designed at making this point).

246. For further discussion of potential challenges, see infra notes 248–309 and accompanying text.

247. For further discussion of a lower-level club challenge, see infra notes 290–309 and accompanying text.

248. For further discussion of these changes and a potential player suit, see infra notes 249–281 and accompanying text.


250. See infra notes 251–268 and accompanying text; see also Lennarz, supra note 67, at 168 (“[T]here is only ever a single MLS team who can offer the player a contract which minimizes the impact of potential demand for the player from other MLS teams.”); Coppage, supra note 180, at 558 (“The . . . perhaps more serious change to the single entity immunity is the expansion of the Designated Player Rule.”).

251. See Lennarz, supra note 67, at 151 (noting Designated Player Rule was introduced in 2006 and is often referred to as “the Beckham rule”).

Typically, teams are capped insofar as how much they can “spend” on salaries for their team as a whole—a typical salary cap—and how much they can spend on individual player salaries. As previously discussed, players usually contract with MLS, not individual teams. The Designated Player Rule is one mechanism the league has introduced to allow investor-operators to personally pay more than the salary of a set number of players without the excess salary counting against the salary cap. As a result, whereas most players are assigned to a team in the sole interest of league balance, “[d]esignated [p]layers are usually free to choose their MLS team themselves.” For example, when U.S. Men’s National Team player Clint Dempsey returned to MLS in 2013, he expressed interest in playing in Seattle, Los Angeles, and Toronto, and, while each team expressed interest in signing him, Dempsey signed in Seattle.

Under American Needle, this rule—illustrated by the cases of Beckham, Dempsey, and others—arguably decreases teams’ unity of interest, because it is an example of investor-operators acting as individual actors working in their own self-interest, shielded only by the front of MLS unity. In Dempsey’s case, although his contract was negotiated by an MLS executive working in his capacity with the league, the general framework of a player picking their team is more typical of non-single entity leagues, and while the decision to send Dempsey to Seattle was presented as best for the league, some MLS investor-operators expressed confusion as to why Dempsey would not be subject to the league’s usual allocation process. If, as was the case in American Needle, teams would otherwise compete


254. For further discussion of MLS’s early labor structure, see supra notes 194–196 and accompanying text.

255. See MLS Designated Players, supra note 252 (“In 2017, a Designated Player that is 24 years old or older during the league year will carry the Maximum Budget Charge ($480,625) unless the player joins his club after the opening of the Secondary Transfer Window, in which case his budget charge will be $240,312.”).

256. Decurtins, supra note 187, at 348 (discussing international transfers to MLS, generally).


258. See Stebbins, supra note 40, at 24–25 (arguing Designated Player Rule exemplifies teams acting with entrepreneurial self-interest).

259. See Wahl, supra note 257 (quoting league official, “I think this signing will be helpful to everybody in the league”).
in profiting off of their intellectual property, if not for the existence of NFLP, then surely the Designated Player Rule indicates that teams not only would potential compete with each other for players, but are already actively doing so.⁶⁶⁰

The 2015 CBA also brought about a new form of free agency for MLS, which offered players who are twenty-eight years old and have played in the league for at least eight years the opportunity to pursue employment on a different team for a capped increase in salary.⁶⁶¹ On the surface, the existence of free agency might also support a finding that teams are now competing with each other for the services of skilled players, decreasing their unity of interest by engaging in bidding wars.⁶⁶² However, the mechanism the league and players bargained for, in capping pay increases and limiting the player pool to players with a long tenure, likely does not push the needle away from single entity.⁶⁶³ For example, one commentator suggests MLS’s free agency is like that of another single entity—the University of California—where all ten campuses are owned by the Regents of the University of California, which “employ[s] all faculty and staff system-wide.”⁶⁶⁴ There, tenured professors may move from one campus to another, and various campuses may try and

⁶⁶⁰. See Am. Needle, Inc. v. NFL, 560 U.S. 183, 198 (2010) (holding NFL teams “are . . . profit-maximizing entities, and their interests in licensing team trademarks are not necessarily aligned”) (citations omitted); see also Stebbins, supra note 40, at 25 (“Teams that can afford a high-level DP perform markedly better on the field and reap financial rewards off of the field.”).


⁶⁶². See Bank, Who Won Negotiations, supra note 261 (arguing full unrestricted free agency and restricted free agency require “economically independent teams bidding on a player to establish his market price”).

⁶⁶³. See id. (arguing MLS’s free agency “does nothing to establish the economic independence of the teams and therefore likely does not threaten the single-entity defense”).

⁶⁶⁴. Steven Bank, UCLA Faculty Voice: To Solve Labor Conflict in Major League Soccer, Look to UC, UCLA NEWSROOM (Feb. 26, 2015) [hereinafter Bank, UCLA Faculty Vote], http://newsroom.ucla.edu/stories/ucla-faculty-voice-to-solve-labor-conflict-in-major-league-soccer-look-to-uc [https://perma.cc/3HXE-WMLX]; see also Bank, Who Won Negotiations, supra note 261 (suggesting University of California has its own, similar form of free agency).
lure those tenured professors away from their current campus.\textsuperscript{265}

However, “the recruiting campus . . . can only offer a salary increase of one step on the university’s salary scale . . . [which is] typically not enough to induce a move on its own.”\textsuperscript{266} In addition, the campus where the tenured professor previously taught “has the opportunity to match that . . . increase to help induce the professor to remain,” though the campuses may not bid higher than the predetermined salary increase.\textsuperscript{267} MLS’s free agency system, therefore, appears to mirror the University of California’s and other single entities’ businesses, allowing for a very limited, predetermined amount of competition between teams on an equally limited number of older—usually less desirable—players, and as such more likely would not result in a court determining the teams had lost their unity of interest within the market for player services.\textsuperscript{268}

Whether or not these labor market factors would push the league into Section 1 scrutiny and out of the protection of single entity, however, the players themselves would not, realistically, bring a challenge to court.\textsuperscript{269} As previously discussed, the non-statutory labor exemption, even under the more restrictive \textit{Mackey} test, provides an exemption to Section 1 for “mandatory subjects of bargaining” which “primarily affect the parties involved” that are “reached through bona fide, arm’s-length bargaining,” which is exemplified by collective bargaining.\textsuperscript{270} It is worth noting both that neither the District Court nor the Court of Appeals, in \textit{Fraser}, mention the non-statutory labor exemption, and that the exemptions could not have applied in the lawsuit because the players had not yet unionized, meaning no collective bargaining had yet taken place.\textsuperscript{271} However, the players have since unionized, resulting in

\textsuperscript{265.} See \textit{id.} (discussing University of California’s form of free agency).

\textsuperscript{266.} \textit{Id.}

\textsuperscript{267.} \textit{Id.} (suggesting MLS should adopt such a system in order to provide players free agency without risking single entity status).

\textsuperscript{268.} See Bank, \textit{Who Won Negotiations}, \textit{supra} note 261 (“[F]reedom of movement with a pre-set raise that is a function of league policy rather than market forces does nothing to establish the economic independence of the teams and therefore likely does not threaten the single-entity defense.”).

\textsuperscript{269.} See Lennarz, \textit{supra} note 67, at 199 (“One additional factor that renders the single entity consideration irrelevant is the fact that recent precedent indicates the MLS Players’ union may not be capable of bringing an antitrust claim against the league as a bargaining tactic at all.”).

\textsuperscript{270.} Edelman & Doyle, \textit{supra} note 42, at 416 (discussing the \textit{Mackey} test). For further discussion of the non-statutory labor exemption, see \textit{supra} notes 148–175 and accompanying text.

\textsuperscript{271.} See generally \textit{Fraser II}, 284 F.3d 47, 58 (1st Cir. 2002) (ignoring any discussion of statutory or non-statutory labor exemption); \textit{Fraser I}, 97 F. Supp. 2d 130 (D. Mass. 2000), \textit{aff’d} 284 F.3d 47 (1st Cir. 2002). See also Lennarz, \textit{supra} note 67, at
collective bargaining agreements, including the most recent signed in 2015.272 As the Designated Player Rule and free agency were collectively bargained in connection with this most recent CBA, a Section 1 challenge centered around them by the players at this point would be exempted.273

One commentator notes the players might try to decertify as a union after the current CBA expires, thus removing the constraint.274 This commentator, however, also notes that doing so might be ineffective if doing so was “merely . . . a tactical maneuver,” and not the real end of the relationship between the players and the league.275 For instance, in Brady v. NFL,276 the NFLPA decertified in response to a threatened lockout by the league after the existing CBA expired in order to remove the non-statutory labor exemption, alleging the lockout “would constitute a group boycott and price fixing agreement” in violation of Section 1.277 The court in Brady did not address the non-statutory labor exception itself, however in oral argument the court intimated “that the exemption ends within six months to a year.”278 Whether six months, one year, or a shorter or longer period of time, the Brady court is mostly in line with Brown, in which the Supreme Court held that “an agreement among employers could be sufficiently distant in time and in circumstances from the collective-bargaining process

147–48 n.22 (citations omitted) (“In this case, by bringing an antitrust challenge before forming a collective bargaining unit, the MLS players could affirmatively avoid the scope of the exemption.”).


273. See Lennartz, supra note 67, at 147 n.22 (“The non-statutory labor exemption is a common law concept that removes certain aspects of labor-management collective bargaining agreements from antitrust scrutiny.”).

274. Decurtins, supra note 187, at 350–51 (noting courts decide whether decertification is sufficient “on a case-by-case basis”).

275. Id.

276. 644 F.3d 661 (8th Cir. 2011).


278. Prosser, supra note 175, at 648 (detailing positive outcomes for players in Brady).
that a rule permitting antitrust intervention would not significantly interfere with that [collective bargaining] process.”

As a result, would-be plaintiff players would have a difficult time proceeding to a Section 1 claim for two reasons: first, the high procedural hurdle of decertification necessary to successfully argue to a court that enough time has passed for intervention, and second, the legislative history and jurisprudence strongly favors the collective bargaining process, seemingly requiring a longer, rather than shorter, period of time. However, decertification is unlikely because the league, by offering small concessions such as limited free agency that does not call into question its single entity status, has shown a willingness and ability to capably negotiate with the players, and because the MLS Players Union, in the lead up to the 2015 CBA, strongly indicated its support of MLS as a single entity, which, even if only lip service to the league, shows that the players find negotiation preferable to litigation.

2. An Unsettled Investor-Operator Challenge

Another potential source of Section 1 lawsuit comes from the actual investor-operators in MLS. If an investor-operator looking to relocate the team it operates is overruled in that endeavor by the league—a situation similar to that in *Raiders I*—or is disgruntled when a designated player is awarded to another team, they could institute a lawsuit alleging a violation of Section 1. Whether or not such a challenge would be successful, however, it is unlikely in the context of pro/rel for two reasons: the first purely economic, and the second both economic and competitive. First, by maintaining a status as the top league in the country, a closed league can


280. See Edelman & Doyle, supra note 42, at 415–16 (discussing non-statutory labor exemption and policy favoring collective bargaining over antitrust litigation).

281. See Bank, *Should MLS Players Skip*, supra note 81 (suggesting MLS Players Union head, Bob Foose, went “out of his way to avoid brandishing the lawsuit threat” to “defuse tensions and facilitate negotiation”).

282. See Stebbins *supra* note 40, at 35 (suggesting investor-operators whose relocation is denied by MLS “would likely have a valid antitrust claim”).

283. See id. (arguing investor-operator would be successful if it “could establish that other operators prohibited the move for competitive reasons”). For further discussion of *Raiders I*, see supra notes 128–134 and accompanying text.

284. See Ross & Szymanski *supra* note 23, at 630–31 (discussing economics of promotion and relegation). For further discussion of initial economic conclusions of closed leagues, see supra notes 57–60 and accompanying text.
inhibit entry by new teams and permit it only when a significant expansion fee is paid, which generally decreases economic competition and allows the league to set “the number of franchises so as to maximize [the] average revenue per club.”285 Indeed, while soccer clubs around the world tend not to turn a profit—spending relatively more on player salaries than MLS—MLS and its teams continue to earn profits while quickly increasing in value, representing a strong financial investment for the investor-operators.286

Second, by opening the league to pro/rel, the litigious investor-operator, while potentially successful in the courtroom, would open itself to demotion.287 While such a demotion would make for sporting, as well as economic gains for the newly promoted club, demotion to a lower tier tends to decrease a given team’s revenue.288 Therefore, the economic incentives of maintaining a closed league with the financial success MLS has had, coupled with the downsides involved with a potential demotion, would likely be enough to keep an investor-operator from suing with the goal of instituting pro/rel.289

285. Id. at 630 (discussing economic reasons why closed leagues “restrict access to a point below the socially optimal level”); see also Chris Smith, Major League Soccer’s Most Valuable Teams, FORBES (Aug. 16, 2017, 10:00 AM), https://www.forbes.com/sites/chrissmith/2017/08/16/major-league-soccer-s-most-valuable-teams-2/#e4ce630b815d [https://perma.cc/YK87-9UNR] (“[P]rospective MLS team owners across the country are clamoring for a piece of the league, even with the next round of expansion now costing new owners a fee of $150 million, a whopping 275% increase from just five years ago when the Montreal Impact paid $40 million.”).

286. See Coppage, supra note 180, at 558 (suggesting “global clubs turning a profit is almost unheard of” whereas MLS currently sees “an unprecedented level of stability”); see also Smith, supra note 285 (“[T]he average MLS team is now worth $223 million, up 20% from last year.”).

287. For further discussion of the mechanics of pro/rel, see supra notes 22–38 and accompanying text.


The financial information indicates that promotion is financially attractive as well as desired by fans. Both revenues and attendance at league matches tend to increase substantially when teams are promoted. Moreover, the reward from promotion seems to endure for a while after a team is demoted, giving teams that are marginal for a higher league financial incentive to field teams that bounce back and forth between a higher and lower league.

Id. at 37.

289. See Ross & Szymanski supra note 23, at 629 (“We think it unlikely that clubs themselves would voluntarily introduce such a system.”).
3. A Rising Lower-Level Club Challenge

Based on the above discussion, a Section 1 challenge with the aim of instituting pro/rel would most likely come from below. Under pro/rel, if a team playing in a division directly below MLS won the league, then the next year it would have the benefit of playing in MLS, which would give it both the sporting and economic benefits of promotion. Currently, however, the only way a team can join MLS is through expansion, a process requiring a huge investment of up-front expansion fees, in addition to league approval. Under American Needle, to move past the single entity defense and subject the league to a full rule of reason analysis, a challenger would need to establish that the investor-operators, in forming MLS and actually controlling its decisions, are contracting or combining to consolidate their economic interests into one body, despite actually holding separate economic interests, and resulting in a deprivation of independent centers of decisionmaking in the relevant marketplace. The inquiry, therefore, would be about “substance over form.”

Generally, the challenger would argue first that, much like the NFL teams in American Needle, MLS teams compete on the field for wins, and off the field for various forms of revenue. First, the Designated Player Rule allows teams to compete for high quality players coming to MLS from other leagues, benefiting the teams with wealthier investor-operators who can afford to pay the addi-
tional salary. As discussed in analyzing a potential player challenge, the history of designated players being “assigned” to teams reveals that the typical player allocation process, which is aimed at creating sporting parity throughout the league, takes a back seat to the wishes of the player in question, who may be attracted to certain teams or markets for a variety of reasons. Teams financially able to take advantage of the Rule not only receive a player who will help them win more games but also the added opportunity for related revenue. As a result, the Rule and its application weighs heavily toward finding the single entity defense should not apply to MLS.

Second, since Fraser, the economics of being an investor-operator have changed, benefitting certain teams over others. For instance, teams may keep seventy percent of their ticket sales, revenue from parking and various stadium-related streams of income, revenue from local broadcast and sponsorship deals, sales from merchandise sold at their stadiums, and between two-thirds and three-quarters of player transfer fees accrued when selling players to teams in other leagues. This means that although investor-operators still rely on the league as a whole for a substantial portion of their revenue, they are also better able to rely on their own teams for revenue, “reduc[ing] the commonality of interest between the

296. See Lennarz, supra note 67, at 196–97 (conceding Designated Player Rule “does not necessarily destroy the hybrid entity concept that the First Circuit vaguely referenced in Fraser,” but that “there is no question that the introduction of the exception fundamentally alters the analysis of the league’s structure should any future legal inquiry into its entity status occur”) (internal quotations omitted).

297. For further discussion of the Designated Player Rule and examples of the process by which players join teams by it, see supra notes 250–260 and accompanying text.

298. See Stebbins, supra note 40, at 25 (“Teams that can afford a high-level DP perform markedly better on the field and reap financial rewards off of the field.”). For instance, after David Beckham signed a $225 million contract to play for the Los Angeles Galaxy as a Designated Player, “the team signed a $20 million [ ] jersey sponsorship deal and a new local television contract worth more than any other in league history.” Id. at 24. An investor-operator may be able to leverage a new Designated Player for additional in-stadium revenue, such as jersey sales, as well as other local revenue, a large portion of which the investor-operator may retain. See infra notes 301–305 and accompanying text.

299. For further conclusion of the Designated Player Rule, see supra note 260 and accompanying text.

300. See infra notes 301–306 and accompanying text. See generally Lennarz, supra note 67, at 197–98 (discussing investor-operators and their relationship to the league their team is in).

[investor-operators] and the league” and allowing them to make more independent economic and sporting decisions.302

Third, investor-operators are now fully responsible for stadium costs and ownership, player development, team travel, and front-office personnel salaries, including coaches and general managers.303 As a result of these changing benefits and obligations, investor-operators can now personally affect and keep a larger portion of their team-specific revenue, which increases their incentive to act in their own economic self-interest.304 For instance, by investing in coaches, general managers, training facilities, and development programs to field more competitive teams, and coupling these investments with a higher quality stadium, investor-operators may increase in-person viewership, and, as a result, income from the various streams of revenue discussed above.305 As a result, one commentator argues that “[i]nvestor-operators see the same ultimate costs and profits as they would were they more loosely organized.”306 Therefore, if this challenge came from a lower-level club, the First Circuit would ultimately have its day and MLS’s single entity defense would fail, because MLS seems even less of a “hybrid arrangement” today as it did in 2002.307 Indeed, the key may be the American Needle Court’s emphasis on “whether, from the viewpoint of third parties, teams are potential competitors,” and certainly, looking at the above factors, an outside club would see a league no

302. Lennarz, supra note 67, at 198 (arguing unity of interest among investor-operators decreases as more teams are operated by investors interested in only one team).

303. See Krasny, supra note 301 (reporting “MLS pays all normal player salaries,” but “[t]he rest of the operational expenses are largely up to the individual Investor-Operators”).

304. See supra notes 301–303 and accompanying text; see also Lennarz, supra note 67, at 197 (discussing changing incentives for investor-operators).

305. See Lennarz, supra note 67, at 196 (arguing “[t]eam ownership increases entity separation”). Stadium ownership constitutes an investment made by a specific team’s operator-investor in which the rest of the league has no stake. Stadium ownership is both an assumption of liability and a source of revenue for an individual team that further separates the unity of interest between that team and the rest of the league. Id.

306. Krasny, supra note 301.

307. See Fraser II, 284 F.3d 47, 58 (1st Cir. 2002) (“MLS and its operator/investors comprise a hybrid arrangement, somewhere between a single company . . . and a cooperative arrangement between existing competitors”; see also Lennarz, supra note 67, at 200 (“MLS probably no longer qualifies as ‘single entity’ from an antitrust standpoint.”).
different than any other major sport in the U.S.\textsuperscript{308} Therefore, given the proper plaintiff, the single entity defense would not protect MLS from a full-on rule of reason analysis of Section 1 of the Sherman Act.\textsuperscript{309}

IV. Conclusion

When MLS was founded in 1995, its creators followed the American sporting tradition, and disregarded the lead of the majority of soccer leagues, by creating a closed league structure.\textsuperscript{310} However, unlike MLB, the NFL, the NBA, and the NHL, the founders had a long history of antitrust litigation against those leagues and an unsuccessful, yet glamorous, previous professional soccer league from which to draw.\textsuperscript{311} As a result, the founders created MLS in a single entity structure in order to maintain centralized control, curb rapid growth while avoiding commercial failure, and spurn Section 1 attacks.\textsuperscript{312} Practically, the league’s decision to do so was informed by the failure of the NASL.\textsuperscript{313} Legally, the league’s decision to do so was informed by years of antitrust litigation involving the other major professional sports leagues, as well as the landmark case of \textit{Copperweld}, which seemed to open the door for the single entity defense.\textsuperscript{314} After an early-yet-precarious victory in \textit{Fraser}, MLS has spent the past decade and a half having its single entity status scrutinized, while also receiving calls to make a switch to pro/rel.\textsuperscript{315} In the same period, the league has undergone significant changes, particularly with respect to player contracts and investor-operator opportunity, which has decreased the league’s unity of interest in such a way that has further opened the league up to a

\begin{itemize}
  \item \textsuperscript{308} Jakobsze, \textit{supra} note 238, at 146 (arguing “[t]his viewpoint will be imperative when assessing the competitive reality of MLS”).
  \item \textsuperscript{309} For further discussion of a rule of reason analysis as part of a Section 1 challenge, see \textit{supra} note 108 and accompanying text.
  \item \textsuperscript{310} For further discussion of MLS’ founding, see \textit{supra} notes 180–186 and accompanying text.
  \item \textsuperscript{311} For further discussion of the NASL and antitrust cases prior to MLS, see \textit{supra} notes 67–175 and accompanying text.
  \item \textsuperscript{312} For further discussion of the reasons why MLS’s structure was chosen over others, see \textit{supra} note 186 & 202 and accompanying text.
  \item \textsuperscript{313} For further discussion of the NASL, see \textit{supra} notes 67–78 and accompanying text.
  \item \textsuperscript{314} For further discussion of the Sherman Act and the single entity defense, see \textit{supra} notes 85–144 and accompanying text.
  \item \textsuperscript{315} For further discussion of a potential Section 1 challenge from lower division club and its implication on MLS’ single entity status, see \textit{supra} notes 290–309 and accompanying text.
\end{itemize}
challenge to its single entity status.\textsuperscript{316} Such a challenge would ultimately be successful, but would necessarily need to come from the correct plaintiff.\textsuperscript{317}

Because of the non-statutory labor exemption, bolstered by \textit{Brady v. NFL}, another player challenge is highly unlikely to happen or be successful.\textsuperscript{318} Similarly, a current investor-operator would also be highly unlikely to bring such a challenge, because of the economic incentives of operating a closed league, and the uncertainty of instituting pro/rel.\textsuperscript{319} However, in the wake of \textit{American Needle}, and with the guidance of the First Circuit’s \textit{dicta} in \textit{Fraser}, a team seeking meritocratic entry into the league would be able to convince a court that, for purposes of displaying professional soccer matches, MLS should no longer be considered a single entity, thus opening the door to a full rule of reason analysis under Section 1.\textsuperscript{320} Without such a challenge or any change of heart from the league’s leaders, however, MLS will continue to operate as a closed league for the foreseeable future.\textsuperscript{321}

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\textsuperscript{316} For further discussion of these changes, see \textit{supra} notes 251–268 & 301–303 and accompanying text.

\textsuperscript{317} For further discussion of what how successful challenge would look, see \textit{supra} notes 248–309 and accompanying text.

\textsuperscript{318} For further discussion of a potential player challenge, see \textit{supra} notes 282–289 and accompanying text.

\textsuperscript{319} For further discussion of a potential investor-operator challenge, see \textit{supra} notes 290–309 and accompanying text.

\textsuperscript{320} For further discussion of such a challenge, see \textit{supra} notes 290–308 and accompanying text.

\textsuperscript{321} See Molinaro, \textit{supra} note 19 (reporting league not planning on adopting pro/rel).

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