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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

1. See John Ourand, *MLS Rebuffs Rich Offer Tied to Relegation*, SPORTSBUSINESS J. (July 24, 2017), <http://www.sportsbusinessdaily.com/Journal/Issues/2017/07/24/Leagues-and-Governing-Bodies/MLS.aspx> [<https://perma.cc/2ANK-JHQE>] (reporting MLS turned down offer). Compared to its current deal, signed with IMG, the offer, no doubt, represented a potential windfall for the league, as the league "[c]urrently . . . [is] bringing in an average of \$90 million per year in domestic rights" *Id.*; see also *U.S. Soccer Partner with IMG to Market Media Rights Until 2022*, MLS PRESS BOX (Oct. 22, 2014), <http://pressbox.mlssoccer.com/content/major-league-soccer-us-soccer-partner-img-market-media-rights-until-2022> [<https://perma.cc/2LHA-L39H>] (announcing MLS's deal with IMG).

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).

4. See Graham Parker, *Why MLS' \$4 Billion Headline Is About Forcing Uncomfortable Conversations*, FOURFOURTWO (July 26, 2017), <https://www.fourfourtwo.com/us/features/riccardo-silva-mls-4-billion-tv-rights-about-forcing-uncomfortable-conversations> [<https://perma.cc/Q542-3A2Y>] (suggesting grandstanding and timing-for-effect leading up to MLS All-Star Game influenced Silva's timeline).

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](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.⁶ 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.⁷

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.⁸ 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.⁹ Essentially, given a proper plaintiff, MLS would no longer enjoy the single entity defense upon which its structure was based when it was founded.¹⁰

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.¹¹ Section III will provide the legal backdrop to MLS's formation, centering around the Sherman Act and *Copperweld Corp. v. Independence Tube Corp.*,¹² which opened the door to a "single entity" defense to anti-

grandstanding [<https://perma.cc/V276-W3GR>] ("Privately, more than one MLS source referred to what Silva is doing as grandstanding.").

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.¹³ Section IV will examine MLS's original structure, its early single entity victory, and consider how the single entity defense has changed since then.¹⁴ Section V will consider whether MLS could skirt a Section 1 antitrust attack by means of the single entity defense today.¹⁵ 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.¹⁶

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.¹⁷ 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.¹⁸ 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.¹⁹ As a

13. See *infra* notes 135–144 and accompanying text; see also The Sherman Antitrust Act, 15 U.S.C. §§ 1–7 (2012).

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.

18. See FIFA, GLOBAL CLUB FOOTBALL REPORT 2017 54 (2017) [hereinafter GLOBAL CLUB FOOTBALL REPORT], https://resources.fifa.com/mm/document/footballdevelopment/proffootballdept/02/90/12/72/clubfootballreport_29.6.2017_neutral.pdf [<https://perma.cc/DS96-VSUZ>] (noting MLS is in minority of leagues using closed structure). For further discussion of the structures of the other major American professional sports leagues, see *infra* notes 51–64 and accompanying text.

19. See John Molinaro, *TFC Coach Vanney: MLS Not Ready for Promotion and Relegation*, SPORTSNET (July 27, 2017), <http://www.sportsnet.ca/soccer/tfc-toronto-fc-greg-vanney-mls-major-league-soccer-promotion-relegation/> [<https://perma.cc/R2GJ-W9K4>] (reporting “[Commissioner] Garber has long been on record as saying the league has no interest in embracing” pro/rel).

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.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.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.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.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.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.²⁵ As such, each season sees each division with a different cast of teams competing against each other as did the previous season.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

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

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

22. See J.S., *The Football Pyramid in America: Why is There No Promotion and Relegation in the United States?*, ECONOMIST (Nov. 23, 2016), <https://www.economist.com/blogs/gametheory/2016/11/football-pyramid-america> [<https://perma.cc/T7KQ-MZWG>] (noting “pro/rel” is preferred among Twitter users, and exploring why it is not utilized in top-tier American soccer).

23. See Stephen F. Ross & Stefan Szymanski, *Open Competition in League Sports*, 2002 WIS. L. REV. 625, 627 (2002) (discussing open league structures).

24. See *id.* (explaining promotion).

25. See *id.* (explaining relegation).

26. See Caitlin Murray, *Here Are All the Promotions and Relegations Across the [sic] Europe’s Top Leagues*, FOX SPORTS (May 29, 2017, 1:18 PM), <http://www.foxsports.com/soccer/gallery/promotion-relegation-premier-league-la-liga-bundesliga-serie-a-ligue-1-results-table-standings-051517> [<https://perma.cc/F8KL-AKPR>] (listing teams promoted to and relegated from top divisions in Europe’s top leagues).

division in just seven seasons.²⁷ But Germany is not alone in its use of pro/rel.²⁸ Outside of North America, “sports leagues are usually open.”²⁹ 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.³⁰

The rise of this open structure of promotion and relegation can be traced to the rise of professional soccer in England.³¹ In 1885, England first permitted professionalism in soccer, and, within a few years, two viable leagues emerged: the Football League and the Football Alliance.³² 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

27. See Kit Holden, *Why RB Leipzig Are the Most Hated Club in Germany: Owned by Red Bull, with a Crafty Sponsor's Name, They Have Outpriced Fan Power and Are Now Aiming at Bayern Munich*, DAILYMAIL (last updated Oct. 28 2016, 4:07 PM), <http://www.dailymail.co.uk/sport/football/article-3599158/Why-RB-Leipzig-hated-club-Germany-Owned-Red-Bull-crafty-sponsor-s-outpriced-fan-power-aiming-Bayern-Munich.html> (documenting RB Leipzig's rise to Bundesliga); *German Bundesliga Table - 2016-17*, ESPN, <http://www.espnfc.com/german-bundesliga/10/table?season=2016> [<https://perma.cc/RW4R-TXMD>] (last visited Aug. 29, 2017) (listing Bundesliga league standings, including which teams were promoted and relegated); see also Jason Humphreys, *Leipzig Before Red Bull: A City that Can Claim to Be the Home of German Football*, GUARDIAN (Feb. 11, 2017), <https://www.theguardian.com/football/englische-woche/2017/feb/11/rb-leipzig-red-bull-city-football-history> [<https://perma.cc/XC6J-C3LP>] (chronicling RB Leipzig's soccer history). RB Leipzig finished in first place in the NOFV-Oberliga Süd in 2009–10, amassing twenty-two more points, nine more wins, and eighteen more goals than the second place team in each category over a thirty-game season. See *Oberliga NOFV-Süd 2009/2010 Standings*, SPORTSTATS, <http://www.sportstats.com/soccer/germany/oberliga-nofv-sud-2009-2010/standings/> [<https://perma.cc/RWR4-KZUF>] (last visited Aug. 29, 2017) (listing final standings for 2009–10 Oberliga NOFV-Süd season).

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://sbisoccer.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.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.”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.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.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.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.”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.³⁹ The practice was even codified in the official statutes of the Fédération Internationale de Football Association (FIFA).⁴⁰ FIFA, founded in Paris, France in 1904, is the interna-

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

34. *Id.*

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”).

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”).

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.”).

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

39. See J.S., *supra* note 22 (discussing history of pro/rel).

40. See Hank Stebbins, *Blind Draw: How Major League Soccer’s Single Entity Structure and Unique Rules Have Impacted Soccer in the United States*, 13 WILLAMETTE SPORTS

tional governing body which organizes “professional soccer around the world.”⁴¹ 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.”⁴² 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.”⁴³ 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.”⁴⁴ Further, FIFA views pro/rel not just as a matter of uniformity, but as “the very essence of [soccer].”⁴⁵

L.J. 1, 13 (2015); *see also* FIFA, FIFA STATUTES: REGULATIONS GOVERNING THE APPLICATION OF THE STATUTES 73 (Apr. 2016 ed.) [hereinafter FIFA STATUTES], http://resources.fifa.com/mm/document/affederation/generic/02/78/29/07/fifas-tatutsweben_neutral.pdf [<https://perma.cc/UEQ4-7NB9>] (discussing FIFA’s “Principle of Promotion and Relegation”).

41. Stebbins, *supra* note 40, at 13 (discussing FIFA’s role in MLS’s formation); *see History of FIFA—Foundation*, FIFA, <http://www.fifa.com/about-fifa/who-we-are/history/index.html> [<https://perma.cc/Z68L-R8Y7>] (last visited Feb. 11, 2018) (discussing formation of FIFA).

42. Marc Edelman & Brian Doyle, *Antitrust and “Free Movement” Risks of Expanding U.S. Professional Sports Leagues into Europe*, 29 NW. J. INT’L L. & BUS. 403, 408 (2009) (noting European sports “[l]eague registration is regulated by each sport’s governing body [such as FIFA], rather than by the clubs themselves”). The UEFA Champions League and UEFA Europa League are international club soccer competitions administered by the Union of European Football Associations (“UEFA”), one of FIFA’s continental federations, and the two leagues play concurrent to European domestic league seasons. *See Europa League Explained*, BARCLAY’S PREMIER LEAGUE, <https://www.premierleague.com/uefa-europa-league-explained> [<https://perma.cc/YUF6-5TPN>] (last visited Apr. 16, 2018). Teams qualify for the leagues based on their performance within their domestic leagues, with the UEFA Champions League played by higher-finishing teams than the UEFA Europa League. *Id.* As a result, qualifying for either league is a feat of distinction. For further background on the UEFA Champions League, *see id.* For further background on the UEFA Europa League, *see From Fairs Cup via UEFA Cup to UEFA Europa League*, UEFA, <http://www.uefa.com/uefaeuropaleague/history/index.html> [<https://perma.cc/TVH7-JS39>] (last visited Aug. 29, 2017). For a discussion of FIFA’s role *vis-à-vis* MLS, *see infra* note 47 and accompanying text.

43. FIFA STATUTES, *supra* note 40, at 73.

44. *Id.* The result is MLS “is bound by their statutes.” Simon Grossobel, *Major League Soccer Challenged in CAS*, SQUIRE PATTON BOGGS (Aug. 22, 2017), <http://www.sports.legal/2017/08/major-league-soccer-in-defiance-of-fifa/> [<https://perma.cc/U39E-CSW7>].

45. Grossobel, *supra* note 44 (quoting *FIFA to Tackle Areas of Concern*, FIFA (March 12, 2008), <http://www.fifa.com/governance/news/y=2008/m=3/news=fifa-tackle-areas-concern-709098.html> [<https://perma.cc/QJ4S-RDLU>]). FIFA is, indeed, the main governing body for soccer throughout the world, overseeing the administration of domestic leagues, international club competition, and

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.⁴⁶ 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."⁴⁷ Major League Soccer, however, is one of the 15% of leagues that do not have pro/rel.⁴⁸ Indeed, "MLS is probably the most well-known example of a closed [soccer] league."⁴⁹ 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.⁵⁰

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."⁵¹ Baseball, of course, led the way.⁵² 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.⁵³ 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."⁵⁴ 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."⁵⁵ Thus, the general structure of Major League Baseball (MLB), for purposes of this examination, was in place.⁵⁶

Early in their developmental arcs, then, MLB and professional soccer in England had chosen separate courses, resulting in different economic outcomes and incentives.⁵⁷ As previously noted, pro/rel arguably promotes team investment to achieve promotion, while allowing for market-based entry by prospective owners.⁵⁸ 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.⁵⁹

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

53. See *Baseball Timeline*, PBS, <http://www.pbs.org/kenburns/baseball/timeline/> [<https://perma.cc/WZ4U-TUL7>] (last visited Sept. 3, 2017) (listing 1876 as year of National League's founding and 1900 as year of American League's founding).

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.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.⁶¹

The National Hockey League (NHL), National Football League (NFL), and National Basketball Association (NBA) all followed in the footsteps of Major League Baseball.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.⁶³ With such a strong tradition of closed leagues in the United States, that MLS is also closed comes as no surprise.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.⁶⁵

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”).

61. See J.S., *supra* note 22 (noting this action, taken in 1930s, “formali[z]ed [the] hierarchy”).

62. See *id.* (discussing these leagues). While the NHL was founded in 1917, the first American team, the Boston Bruins, joined in 1924. See Sean McIndoe, *Everything You Know Is Wrong: Original Six Edition*, GRANTLAND (Mar. 25, 2014), <http://grantland.com/the-triangle/original-six-toronto/> [<https://perma.cc/A2B9-EZ4Y>]. The NFL was founded in 1920. See *NFL Founded in Canton*, PRO FOOTBALL HALL OF FAME (Jan. 1, 2005), <http://www.profootballhof.com/news/nfl-founded-in-canton/> [<https://perma.cc/A8EU-R2YB>]. The NBA was founded, albeit under the name “Basketball Association of America,” in 1946. See Leonard Koppett, *The NBA—1946: A New League*, NBA (Dec. 7, 2007), http://www.nba.com/heritageweek2007/newleague_071207.html [<https://perma.cc/9TTL-D39Z>].

63. See J.S., *supra* note 22 (noting “closed leagues prevailed” in United States).

64. See *id.* (“The organi[z]ers of MLS, both in deference to local tradition and in order to rustle up financing, adopted the American closed-league model.”).

65. See *infra* notes 67–175 and accompanying text (discussing North American Soccer League and Section 1 of Sherman Antitrust Act).

3. *The North American Soccer League*

Major League Soccer is not the first major professional soccer league in the United States.⁶⁶ 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.⁶⁷ The league played its first season in 1968 and, in its sixteen years, featured some of soccer’s greatest ever players.⁶⁸ However, financial difficulties forced its dissolution by 1985.⁶⁹ As one critic opined, “[t]he biggest problem was with the league’s structure.”⁷⁰

Like the other top U.S. sports leagues, the NASL was a closed league, however its being closed was not its downfall.⁷¹ 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.”⁷² This duality played out perhaps most acutely in attendance.⁷³

League attendance from 1977–83 averaged 13,000 per game.⁷⁴ 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.⁷⁵ The collapse of the NASL can therefore reasonably be linked to both the existence

66. See *supra* notes 67–78 and accompanying text (discussing North American Soccer League).

67. Joseph Lennarz, *Growing Pains: Why Major League Soccer’s Steady Rise Will Bring Structural Changes in 2015*, 16 U. DENV. SPORTS & ENT. L.J. 137, 140 (2014).

68. See *id.* at 139 (“The NASL was a heady, ambitious undertaking featuring nationally televised games on network stations and legendary names on the field: Carlos Alberto, Georgio Chenaglia, Franz Beckenbauer, Johan Cruyff.”).

69. See *id.* at 139–41 (chronicling NASL’s rise and fall); see also *NASL 1968–84: A Review of the Golden Era*, NASL [hereinafter *NASL 1968–84*], <http://www.nasl.com/a-review-of-the-golden-era> [<https://perma.cc/HPZ5-WF87>] (last visited Sept. 5, 2017) (chronicling NASL’s rise and fall).

70. Lennarz, *supra* note 67, at 140.

71. See *id.* at 140–41 (noting NASL’s problems that led to its collapse). For further discussion of the NASL’s collapse, see *infra* notes 72–76 and accompanying text.

72. Lennarz, *supra* note 67, at 140. In the NASL, “player salaries . . . reached 70% of league revenues, compared with just 40% in the” NFL in 1983. *Id.* at 141.

73. See *NASL 1968–84*, *supra* note 69; see also *infra* notes 74–75 (discussing NASL attendance figures).

74. See *NASL 1968–84*, *supra* note 69 (providing attendance figures for NASL’s final years).

75. See *id.* (noting New York Cosmos’ ability to draw large crowds).

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.”⁷⁶ 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.⁷⁷ 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.⁷⁸

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.⁷⁹ 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.⁸⁰ 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.⁸¹ 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).

78. Brad McChesney, Comment, *Professional Sports Leagues and the Single Entity Defense*, 6 *SPORTS L.J.* 125, 143 (1999) (examining MLS’s founders’ aims when creating it).

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.⁸² MLS's founders determined that creating something that would skirt antitrust litigation based on a single entity defense was the best approach.⁸³ In short, the founders of MLS would create their new league's structure to comply with the Supreme Court's decision in *Copperweld Corp. v. Independence Tube Corp.*, which opened the door to such an approach.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."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."⁸⁶ The purpose of Section 1 is to address "price fixing, wage fixing, tying arrangements, market allocations, and concerted refusals to deal (group boycotts)."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. *See id.* For further discussion of reserve clauses, see *infra* note 159 and accompanying text.

82. *See* Stebbins, *supra* note 40, at 13–14 (discussing factors considered during MLS's formation).

83. *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."); *id.* at 13–14 (discussing factors considered during MLS's formation); *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. *See* Stebbins, *supra* note 40, at 15 ("Based on legal appearances, it seems that the MLS is running things from a single centralized office as necessitated by *Copperweld*."); *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.").

85. Edelman & Doyle, *supra* note 42, at 411.

86. 15 U.S.C. § 1 (2012).

87. Edelman & Doyle, *supra* 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).

89. See *id.* at 411, 415 (explaining U.S. competition law with respect to sports and soccer specifically). See generally 15 U.S.C. §§ 12–27; 29 U.S.C. §§ 52–53 (representing codification of Clayton Act).

90. 15 U.S.C. § 18 (representing codification of Section 7 of Clayton Act).

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.”).

94. See Ross & Szymanski, *supra* note 23, at 639 (citing Nat’l Collegiate Athletic Ass’n v. Bd. of Regents of Univ. of Okla. 468 U.S. 85 (1984) [hereinafter *NCAA v. Bd. of Regents of Okla.*]) (noting Section 1 analysis is different for sports leagues than for other industries).

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.⁹⁶ 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.⁹⁷ In 1922, the Supreme Court held, in *Federal Baseball Club of Baltimore, Inc. v. National League of Professional Baseball Clubs* ("Federal Baseball"),⁹⁸ that the league did not violate Section 1 because it was not engaging in interstate commerce, which is a prerequisite for violation.⁹⁹ However, the Court's ruling in *Federal Baseball*—sixty years before articulating the necessity of some horizontal restraints on trade in *National Collegiate Athletic Ass'n v. Board of Regents of the University of Oklahoma*¹⁰⁰—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.¹⁰¹ 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.¹⁰²

League Soccer's Single-Entity Defense?, 18 MARQ. SPORTS L. REV. 413, 415 (2008) (citing *NCAA v. Bd. of Regents of Okla.*, 468 U.S. at 101–03) (“[T]he Supreme Court has recognized that the essence of sports is producing competition.”).

96. See Bernhard, *supra* note 95, 415–16 (discussing rule of reason analysis being employed due to special nature of sports); see also *infra* note 102 and accompanying text (suggesting rule of reason analysis is preferred).

97. 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”).

98. 259 U.S. 200 (1922).

99. 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.”).

100. 468 U.S. 85 (1984).

101. See Stebbins, *supra* note 40, at 6 (citing *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.

102. See Bernhard, *supra* note 95, at 415 (citing *NCAA v. Bd. of Regents of Okla.*, 468 U.S. 85, 101–03 (1984)) (“These recognitions have caused courts to forego traditional *per se* antitrust analysis in favor of the rule of reason.”); see also *infra* notes 103–111 and accompanying text.

b. Section 1 Analyses: Per Se and the Rule of Reason

Courts have used two analyses to determine whether a sports league has violated Section 1.¹⁰³ 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.”¹⁰⁴ 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.”¹⁰⁵ This analysis, however, seems to be falling out of favor, as a second analysis, a “rule of reason” test, has prevailed recently.¹⁰⁶

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.¹⁰⁷ That it has come to be the favored test seems logical.¹⁰⁸ 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.¹⁰⁹ 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.”¹¹⁰ How-

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.¹¹¹ 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-

and Cultural Perspective: Women, Men, and the Professional Sports Landscape, 3 NW J.L. & Soc. POL’Y 1, 14 (2008)) (noting “all joint ventures are reviewed exclusively under the Rule of Reason”).

111. See, e.g., *id.* at 415–17 (discussing statutory labor exemption and non-statutory labor exemption); Stebbins, *supra* note 40, at 6–22 (discussing single entity defense); see also *infra* notes 113, 145, and 148 and accompanying text (discussing exemptions to Section 1).

112. For further discussion of the single entity defense, the statutory labor exemption, and the non-statutory labor exemption, see *infra* notes 113–175 and accompanying text.

113. See Bernhard, *supra* note 95, at 416–17 (describing single entity defense); see also McChesney, *supra* note 78, at 139 (arguing MLS could successfully argue single entity early on in its existence).

114. *San Francisco Seals, Ltd. v. NHL*, 379 F. Supp. 966, 969 (C.D. Cal. 1974).

115. See *id.* (holding NHL teams “act[ed] together as one single business enterprise” in “producing sporting events”); see also Bernhard, *supra* note 95, at 419 (noting importance of *Copperweld* decision).

116. 379 F. Supp. 966 (C.D. Cal. 1974).

117. See *id.* at 967 (listing relevant facts).

nada.¹¹⁸ 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.”¹¹⁹

However, the District Court’s finding in *San Francisco Seals* proved to be counter to the run of cases.¹²⁰ In *North American Soccer League v. NFL* (“*NASL v. NFL*”),¹²¹ the NASL brought an action challenging an NFL rule banning “cross-ownership” of NFL teams by owners of teams in other major leagues.¹²² 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.¹²³ 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

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)).

[W]ithin 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.” *Id.*

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) (“[The 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 unshared 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 engage in a revenue sharing scheme, “the financial performance of each team, while related to that of the others, [did] not . . . necessarily 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 responsibility 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 cooperating 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 cooperate has not, however, sufficed to preclude scrutiny under [Section] 1 of the Sherman Act.”).

132. *Id.* at 1390.

evision and local radio revenues, and media space.”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.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 *Copperweld* must have seemed a potential breath of new life for the defense.¹³⁵ In *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.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.”¹³⁷

The Court’s analysis, however, lead it to conclude that the doctrine had grown beyond its true scope.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.”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.¹⁴⁰ The key was that the original acquisitions themselves “create[d] a combination illegal under [Section]

133. *Id.*

134. *Id.*

135. See Stebbins, *supra* note 40, at 9 (“After *Copperweld* leagues consistently made the argument that a league is a single entity.”).

136. *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752, 759 (citing 15 U.S.C. § 1) (questioning whether “[t]he so-called intra-enterprise conspiracy doctrine,” which allows Section 1 violations by parents and subsidiaries “subject to common ownership”).

137. *Id.* (noting intra-enterprise conspiracy doctrine was based on Supreme Court “declarations”).

138. See *id.* at 760–61 (considering case law examples to illustrate).

139. *Id.* at 760 (quoting *United States v. Yellow Cab Co.*, 332 U.S. 218, 227–28 (1947)).

140. See *id.* (“The passage as a whole, however, more accurately stands for a quite different proposition.”).

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.¹⁴⁹ 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*,¹⁵⁰ 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.”¹⁵¹ In 2004, the Second Circuit in *Clarett v. NFL*¹⁵² 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.”¹⁵³ 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.¹⁵⁴ 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.¹⁵⁵ 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—prohibiting college players with less than three full college football seasons played—from playing in NFL exempted under non-statutory labor exemption).

antitrust litigation.¹⁵⁶ 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.”¹⁵⁷

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.¹⁵⁸ 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.”¹⁵⁹

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” “constitue[d] an unreasonable restraint of trade,” thus violating Section 1.¹⁶⁰ 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.¹⁶¹ 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.*

The Rozelle rule is named after Pete Rozelle, the [then] N.F.L. commissioner, because he put[] it into effect. It require[d] a team signing a player who had made himself a free agent to compensate that player’s former team by means of players and/or draft selections. Should these teams be unable to agree, then Rozelle arbitrate[d] the matter, fixing the compensation.

William N. Wallace, *Rozelle Rule Found in Antitrust Violation*, N.Y. TIMES (Dec. 31, 1975), <http://www.nytimes.com/1975/12/31/archives/rozelle-rule-found-in-antitrust-violation-rozelle-rule-judged-in.html?pagewanted=all>.

161. See *Mackey*, 543 F.2d at 610–11 (discussing Rozelle Rule).

ers who had exercised contract options in order to reach free agency.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 *Mackey* test.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.¹⁶⁴ Indeed, although *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.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.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."¹⁶⁷ In *Wood v.*

162. See Wallace, *supra* note 160 (explaining players' original contention when case was at trial court level).

163. See *Mackey*, 543 F.2d at 615–16; see also *supra* note 151 and accompanying text (stating three prongs of *Mackey* test). The reason the court found no 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 quid pro quo for its remaining so. See *Mackey*, 543 F.2d at 615–16.

164. See *id.* at 616 (detailing factors for holding non-statutory labor exemption did not apply).

165. See *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.")

166. For further discussion of instances where courts apply non-statutory labor exemption, see *infra* note 167 and accompanying text.

167. Lennarz, *supra* note 67, at 147 n.22 (citing *Brown v. Pro Football Inc.*, 518 U.S. 231 (1996); *Allen Bradley Co. v. Local Union No. 3, Int'l Bd. of Elec. Workers*, 325 U.S. 797 (1945); and *Wood v. NBA*, 602 F. Supp. 525 (S.D.N.Y. 1984), *aff'd*, 809 F.2d 954 (2d Cir. 1987)).

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

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).

173. 518 U.S. 231 (1996).

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-

and bring an antitrust lawsuit challenging the [league's] rules and bargaining tactics under the Sherman Act").

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.

180. See Tyler A. Coppage, Comment, *Taking the Training Wheels off MLS: Why the Single Entity Antitrust Exemption Should No Longer Apply*, 25 MARQ. SPORTS L. REV. 545, 546 (2015) ("All success stories build from lessons learned in failure, and MLS is no different.").

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).

183. For further discussion of the Sherman Act, 15 U.S.C. § 1 (2012), see *supra* notes 85–111 and accompanying text.

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.¹⁸⁸ Each investor then receives a seat on the league’s Management Committee, charged with “manag[ing] the business and affairs of MLS.”¹⁸⁹ 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.¹⁹⁰

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.¹⁹¹ 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.”¹⁹² 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.”¹⁹³

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.¹⁹⁴ As a result, a player first signs an MLS contract, and then the league

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.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.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.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.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.¹⁹⁹ Investor-operators also may transfer or sell their rights, however such action requires Management Com-

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.”).

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.

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

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”).

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.

Id.

mittee consent, which “may be withheld without cause.”²⁰⁰ 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.²⁰¹

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.²⁰² 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.²⁰³ 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 1.²⁰⁴ 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 plaintiffs assert a number of antitrust claims. In Count I, they allege that MLS and several of its investors who operate MLS teams (hereafter “operator-investors” or “operators”) have unlawfully combined to restrain trade or commerce in violation to § 1 of the Sherman Anti-Trust Act, 15 U.S.C. § 1, by contracting for player services centrally through MLS, effectively eliminating the competition for those services that would take place if each MLS team were free to bid for and sign players directly. In Count II, the plaintiffs assert as a second § 1 claim that all the defendants have conspired to impose anticompetitive “transfer fees” on player relocation that have the effect of restricting the ability of soccer players to move from one team to another, thus dampening competition for players’ services worldwide. Count III alleges that all defendants have jointly exercised monopoly power in violation of § 2 of the Sherman Act, 15 U.S.C. § 2. In Count IV, the plaintiffs allege that the transaction which brought MLS into existence violated § 7 of the Clayton Act, 15 U.S.C. § 18. Fi-

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

nally, the plaintiffs assert in Count V a California state law claim that certain contracts concerning players' promotional rights were unlawful contracts of adhesion. The plaintiffs seek declaratory and injunctive relief as well as damages.

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.”²¹⁷

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].”²¹⁸ 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.”²¹⁹ 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.²²⁰

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.²²¹ 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

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 1’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.²²² 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.”²²³ 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.”²²⁴

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.”²²⁵ In that case, *Chicago Professional Sports Ltd. v. NBA*,²²⁶ 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.²²⁷ 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

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.”²²⁸ 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.²²⁹

In 2010, the Supreme Court revisited *Copperweld* in the context of professional sports in *American Needle, Inc. v. NFL*.²³⁰ 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.²³¹ 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.²³² 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.”²³³ 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.”²³⁴

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.*

230. 560 U.S. 183 (2010).

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 decisionmaking,’ 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

that Section 1 was designed to police.” *Copperweld*, 467 U.S. at 769 (internal quotations omitted).

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.

Matthew J. Jakobsze, Comment, *Kicking “Single-Entity” to the Sidelines: Reevaluating the Competitive Reality of Major League Soccer After American Needle and the 2010 Collective Bargaining Agreement*, 31 N. ILL. U.L. REV. 131, 146 (2010) (citing *Am. Needle*, 560 U.S. at 196–97).

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 & Szymanski, *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.

tory—written in 2002—does not offer complete guidance on whether MLS could, by injunction, be forced to adopt pro/rel.²⁴⁵ 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.²⁴⁶ Ultimately, a successful challenge to single entity, as well as Section 1, could come only from a lower-level club seeking entry to MLS.²⁴⁷

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.²⁴⁸ 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.²⁴⁹ Such a challenge would likely focus on two key developments: the Designated Player Rule, and the recent creation of a modified free agency system.²⁵⁰

The Designated Player Rule came about in 2006, in advance of English soccer star David Beckham signing with MLS’s LA Galaxy.²⁵¹ 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.”²⁵²

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.

249. See *Am. Needle, Inc. v. NFL*, 560 U.S. 183, 204 (2010) (considering challenge brought by former licensee of intellectual property within market for teams’ “individually owned intellectual property”).

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”).

252. *MLS Designated Players*, MLS COMMUNICATIONS (Jan. 1, 2017, 12:00 PM), <https://www.mlssoccer.com/glossary/designated-player>.

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.²⁵³ As previously discussed, players usually contract with MLS, not individual teams.²⁵⁴ 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.²⁵⁵ 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.”²⁵⁶ 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.²⁵⁷

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.²⁵⁸ 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.²⁵⁹ If, as was the case in *American Needle*, teams would otherwise compete

253. See *MLS Roster Rules and Regulations*, MLS COMMUNICATIONS (Feb. 1, 2017, 11:00 AM), <https://www.mlssoccer.com/league/official-rules/mls-roster-rules-and-regulations> (“The maximum budget charge for a single player is \$480,625.”).

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).

257. See Grant Wahl, *How Seattle’s Stunning Clint Dempsey Deal Got Done*, SPORTS ILLUSTRATED (Aug. 5, 2013), <https://www.si.com/soccer/2013/08/05/clint-dempsey-seattle-sounders-mls> [<https://perma.cc/3GNZ-JXZP>] (chronicling Dempsey’s return to MLS).

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.²⁶⁰

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.²⁶¹ 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.²⁶² 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.²⁶³ 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.”²⁶⁴ There, tenured professors may move from one campus to another, and various campuses may try and

260. 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.”).

261. See Jason Davis, *The Start of Free Agency in MLS*, US SOCCER PLAYERS (Dec. 9, 2015), <https://ussoccerplayers.com/2015/12/the-start-of-free-agency-in-mls.html> [<https://perma.cc/RLQ2-MBBH>] (noting, however, that “bidding wars don’t appear to be in the offing, but there could be multiple teams interested in the same player”); see also Steven Bank, *Who Won the MLS Labor Negotiations? Single Entity*, AMERICAN SOCCER NOW (Mar. 5, 2015, 10:07 AM) [hereinafter Bank, *Who Won Negotiations*], <http://americansoccernow.com/articles/who-won-the-mls-labor-negotiations-single-entity> [<https://perma.cc/ES6H-26HF>] (“The deal allows free movement, but it doesn’t let different divisions of the single entity artificially bid up the price in the absence of independent evidence of market value via an offer from outside of the single entity.”).

262. 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”).

263. 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”).

264. 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.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.”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.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.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.²⁶⁹ As previously discussed, the non-statutory labor exemption, even under the more restrictive *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.²⁷⁰ It is worth noting both that neither the District Court nor the Court of Appeals, in *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.²⁷¹ However, the players have since unionized, resulting in

265. *See id.* (discussing University of California’s form of free agency).

266. *Id.*

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

268. *See Bank, Who Won Negotiations, 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.”).

269. *See Lennarz, 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.”).

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

271. *See generally Fraser II*, 284 F.3d 47, 58 (1st Cir. 2002) (ignoring any discussion of statutory or non-statutory labor exemption); *Fraser I*, 97 F. Supp. 2d 130 (D. Mass. 2000), *aff’d* 284 F.3d 47 (1st Cir. 2002). *See also Lennarz, 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.”).

272. See *Our Story*, MLSPA, <https://mlsplayers.org/about-us/> [<https://perma.cc/6TTY-T8QC>] (last visited Oct. 18, 2017) (“Formed in April 2003, the Players Association ensures protection of the rights of all MLS Players, while also promoting their best interests.”). See generally COLLECTIVE BARGAINING AGREEMENT BETWEEN MAJOR LEAGUE SOCCER AND MAJOR LEAGUE SOCCER PLAYERS UNION: FEBRUARY 1, 2015–JANUARY 31, 2020, <https://mlsplayers.org/wp-content/uploads/2017/04/Collective-Bargaining-Agreement-February-1-2015.pdf> [<https://perma.cc/FQA3-JZB3>] (latest CBA between MLS and MLSPA).

273. See Lennarz, *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).

277. *Id.* at 663 (outlining facts leading to lawsuit). See generally 15 U.S.C. § 1 (2012) (Section 1 of Sherman Act).

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.”²⁷⁹

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.²⁸⁰ 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.²⁸¹

2. *An Unsettled Investor-Operator Challenge*

Another potential source of Section 1 lawsuit comes from the actual investor-operators in MLS.²⁸² 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 1.²⁸³ 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.²⁸⁴ First, by maintaining a status as the top league in the country, a closed league can

279. *Brown v. Pro Football, Inc.*, 518 U.S. 231, 250 (1996) (holding to do so would also require consideration of National Labor Relations Board’s views). For further discussion of *Brown*, see *supra* notes 173–175 and accompanying text.

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/chris-smith/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.

288. See ROGER G NOLL, STAN. INST. FOR ECON. POL’Y RES., THE ECONOMICS OF PROMOTION AND RELEGATION IN SPORTS LEAGUES: THE CASE OF ENGLISH FOOTBALL 38 (2002), https://siepr.stanford.edu/sites/default/files/publications/01-16_0.pdf [<https://perma.cc/BRF8-5G6Y>] (“[T]eams that are relegated do worse financially than they would if they finished in the bottom group of teams in the higher league.”).

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.²⁹⁰ 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.²⁹¹ 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.²⁹² 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.²⁹³ The inquiry, therefore, would be about “substance over form.”²⁹⁴

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.²⁹⁵ 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-

290. See Stebbins, *supra* note 40, at 36 (“It would not be inconceivable if the owner of a lower division team filed a suit in an effort to force their way into the league.”).

291. See NOLL, *supra* note 288, at 36–37 (discussing benefits of promotions). For further discussion of pro/rel’s benefits to promoted teams, see *supra* note 288 and accompanying text.

292. See Smith, *supra* note 285 (reporting MLS expansion “fee of \$150 million, a whopping 275% increase from just five years ago”).

293. See *Am. Needle, Inc., v. NFL*, 560 U.S. 183, 195 (stating that to defeat single entity defense, “[t]he relevant inquiry, therefore, 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 decisionmakings, and therefore of diversity of entrepreneurial interests, and thus of actual or potential competition”) (citations omitted) (internal quotations omitted). For further discussion of *Am. Needle*, see *supra* notes 230–241 and accompanying text.

294. See Jakobsze, *supra* note 238, at 145. The author further noted that “the ‘competitive reality’ of the parties, rather than their respective legal designations” is important. *Id.* (quoting *Am. Needle*, 560 U.S. at 196).

295. See *Am. Needle*, 560 U.S. at 196–97 (finding NFL teams “compete with one another . . . to attract fans, for gate receipts, and for contracts with managerial and playing personnel”) (citations omitted).

tional salary.²⁹⁶ 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.²⁹⁷ 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.²⁹⁸ As a result, the Rule and its application weighs heavily toward finding the single entity defense should not apply to MLS.²⁹⁹

Second, since *Fraser*, the economics of being an investor-operator have changed, benefitting certain teams over others.³⁰⁰ 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.³⁰¹ 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).

301. See Isaac Krasny, *Unpacking the Major League Soccer Business Model*, MEDIUM (June 7, 2017), https://medium.com/@isaaccccccccc_94128/unpacking-the-major-league-soccer-business-model-827f4b784bcd [<https://perma.cc/9NMA-9FPQ>] (detailing current structure of MLS’s business model).

[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-[o]perators 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 [o]wnership of [s]tadiums [i]ncreases [e]ntity [s]eparation”).

[S]tadium 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.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.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.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.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.³¹² Practically, the league's decision to do so was informed by the failure of the NASL.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 *Copperweld*, which seemed to open the door for the single entity defense.³¹⁴ After an early-yet-precarious victory in *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.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

308. Jakobsze, *supra* note 238, at 146 (arguing “[t]his viewpoint will be imperative when assessing the competitive reality of MLS”).

309. For further discussion of a rule of reason analysis as part of a Section 1 challenge, see *supra* note 108 and accompanying text.

310. For further discussion of MLS' founding, see *supra* notes 180–186 and accompanying text.

311. For further discussion of the NASL and antitrust cases prior to MLS, see *supra* notes 67–175 and accompanying text.

312. For further discussion of the reasons why MLS's structure was chosen over others, see *supra* note 186 & 202 and accompanying text.

313. For further discussion of the NASL, see *supra* notes 67–78 and accompanying text.

314. For further discussion of the Sherman Act and the single entity defense, see *supra* notes 85–144 and accompanying text.

315. For further discussion of a potential Section 1 challenge from lower division club and its implication on MLS' single entity status, see *supra* notes 290–309 and accompanying text.

challenge to its single entity status.³¹⁶ Such a challenge would ultimately be successful, but would necessarily need to come from the correct plaintiff.³¹⁷

Because of the non-statutory labor exemption, bolstered by *Brady v. NFL*, another player challenge is highly unlikely to happen or be successful.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.³¹⁹ However, in the wake of *American Needle*, and with the guidance of the First Circuit's *dicta* in *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 1.³²⁰ 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.³²¹

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316. For further discussion of these changes, see *supra* notes 251–268 & 301–303 and accompanying text.

317. For further discussion of what how successful challenge would look, see *supra* notes 248–309 and accompanying text.

318. For further discussion of a potential player challenge, see *supra* notes 282–289 and accompanying text.

319. For further discussion of a potential investor-operator challenge, see *supra* notes 290–309 and accompanying text.

320. For further discussion of such a challenge, see *supra* notes 290–308 and accompanying text.

321. See Molinaro, *supra* note 19 (reporting league not planning on adopting pro/rel).

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