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A NEW KIND OF PITCH: THE RISE OF SPORTS-DEDICATED
PRIVATE EQUITY FUNDS AND THE FUTURE OF
THE SINGLE ENTITY DEFENSE

CHASE BROWNDORF*

Spurred on by promises of exponential growth, the flattening of traditional barriers to entry, and the dire need for capital as a result of the COVID-19 pandemic, at least three sports-dedicated private equity funds have been launched in the United States over the past two years. Yet as these funds accumulate investments and contemplate deployment of capital to acquire ownership interests, the federal antitrust regime—critical to the understanding of the business of sports—looms large. Specifically, in professional leagues that have largely insulated themselves from antitrust scrutiny by organizing and operating as “single entity leagues,” the prospect of losing single entity status rises as these funds acquire ownership stakes. This Article examines whether opening up ownership stakes to acquisition by private equity funds could spell the end of the single entity defense for these leagues, using Major League Soccer as a case study, and advocates for single entity leagues to select one exclusive fund as a “pre-approved institutional buyer” to counteract antitrust concerns.

I. INTRODUCTION

Upon announcing the launch of its first fund in October 2019, Arctos Sports Partners—a private equity group focused on partnering with professional sports leagues and owners to acquire minority stakes in franchises—identified a lofty goal of raising between \$1 billion and \$1.5 billion of investment capital.¹ A sizeable sum for a debut fund within a target industry historically hostile to private equity investment, the viability of Arctos’ strategy seemed uncertain.² However, by the conclusion of its third funding round in December 2020, Arctos had nearly reached its goal, raising approximately

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1. See *Mapping out the US’s largest first-time funds*, BUYOUTS INSIDER (Aug. 10, 2020), <https://www.buyoutsinsider.com/mapping-out-the-uss-largest-first-time-funds> [<https://perma.cc/DM42-AVD2>] (discussing Arctos Sports Partner capital goals).

2. See *id.*

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\$950 million from endowments, pension funds, and financial institutions, including the Petershill unit of Goldman Sachs—a group established to invest in private equity funds in new, untapped industries.³

Arctos' fund represents one of three sports-dedicated funds launched in the past two years, following in the footsteps of Dyal Capital Partners and RedBird Capital Partners.⁴ Both the Dyal and RedBird funds achieved success in 2020; Dyal was granted the right to purchase a number of minority stakes in individual National Basketball Association (“NBA”) franchises by the league’s owners in April, and RedBird (alongside others, including Dwayne “The Rock” Johnson) purchased the XFL in August.⁵ Now on the cusp of an inaugural acquisition, Arctos’ managers find themselves in an environment increasingly favorable to private equity investments in professional sports ownership. If the initial successes of Dyal and RedBird offer any indication, Arctos will not be the last private equity fund to venture into the sports ownership space.

The differences between traditional franchise owners and institutional investors, particularly private equity funds, are stark. Traditionally, extremely wealthy individuals purchase ownership interests by either using their own funds or by privately raising capital from a

3. See Dan Primack, *Private equity firm formed to buy into pro sports teams*, AXIOS (Apr. 29, 2020), <https://www.axios.com/private-equity-pro-sports-89dalc8ff7d6-4271-8567-c814a320e937.html> [<https://perma.cc/A3MZ-6WVH>] (reporting Arctos plans to invest up to \$300 million in passive minority stakes in sports franchises); see also Michael Long, *Report: Arctos Sports Partners’ coffers hit ‘US\$950m’*, SPORTS PROMEDIA (Dec. 1, 2020), <https://www.sportspromedia.com/news/arctos-sports-partners-capital-fundraising-investment> [<https://perma.cc/U3M5-954W>] (noting Arctos had previously raised \$421 million); Kaye Wiggins & Eric Platt, *Goldman Sachs’ Petershill unit in talks over minority stake in Permira*, FIN. TIMES (Mar. 5, 2020, 8:30 PM), <https://www.ft.com/content/a85426e2-5f1d-11ea-b0ab-339c2307bcd4> [<https://perma.cc/88Y8-6S2G>].

4. See Adam Le & Alex Lynn, *The new playbook: How private equity fell in love with sport*, PRIVATE EQUITY INT’L. (Nov. 3, 2020), <https://www.privateequityinternational.com/the-new-playbook-how-private-equity-fell-in-love-with-sport> [<https://perma.cc/5TAH-3TY7>]; see also Kirk Falconer, *High-profile sports investor RedBird raises bulk of Fund III’s \$1.7bn target*, BUYOUTS INSIDER (June 18, 2020), <https://www.buyoutsinsider.com/high-profile-sports-investor-redbird-raises-bulk-of-fund-iiis-1-7bn-target> [<https://perma.cc/EM4Y-AA9J>] (noting Redbird is currently negotiating stake in French soccer club).

5. See Luisa Beltran, *Private-Equity Firm Seeks \$2 Billion to Buy Stakes in NBA Teams*, BARRON’S (May 19, 2020, 12:19 PM), https://www.barrons.com/articles/private-equity-firm-nba-basketball-teams-stakes-51589905075?mod=HP_DAY_6 [<https://perma.cc/JB5V-LJXN>] (reporting Dyal helped NBA owners liquidate difficult-to-sell stakes); see also Dade Hayes, *XFL Acquired by Dwayne Johnson, Dany Garcia And RedBird Capital Partners*, DEADLINE (Aug. 3, 2020), <https://deadline.com/2020/08/xfl-acquired-by-dwayne-johnson-dany-garcia-redbird-capital-partners-120300289> [<https://perma.cc/8L4A-3R4B>] (noting famous actor Dwyane Johnson participating in private acquisition).

few other individuals.⁶ Such acquisitions are for indefinite periods, and owners hope to grow the valuation of their franchise and pass on their ownership interests via sale to other individuals or by transferring their interest to their descendants.⁷ In contrast, in the private equity context, fund managers “approach potential investors who agree to make a capital commitment to the fund for future investment.”⁸ A capital call subsequently occurs and the pooled capital is deployed into the target (known as the “portfolio company”) for a specified period, typically between seven and fifteen years.⁹ At the conclusion of the fund’s “life,” the fund managers sell or transfer their ownership stakes and return fund capital back to the investors, along with realized returns.¹⁰ The funds themselves, are typically organized as limited partnerships.¹¹ The fund managers serve as general partners, or “GPs,” and usually “step into the [target] companies they invest in,” oftentimes becoming board members and steering the strategic direction of the target company to “look for opportunities to add value” and “increase[e] the value of their [fund’s] investment.”¹² Investors in the fund are the limited partners, or “LPs,” and fiduciary duties are owed to the LPs from the GPs, as established under the Investment Advisers’ Act of 1940 at the federal level and individual state laws.¹³

6. See Scott Soshnick, *Investors Get Path to Buy Into Major League Baseball Teams*, BLOOMBERG (Oct. 16, 2009), <https://www.bloomberg.com/news/articles/2019-10-16/investors-get-path-to-buy-stakes-in-major-league-baseball-teams> [https://perma.cc/7AUR-BTEB]; see also Charles Curtis, *Steve Cohen paid \$2.475 billion for the Mets, but that’s nothing for MLB’s richest owner*, USA TODAY (Oct. 30, 2020), <https://ftw.usatoday.com/2020/10/mets-steve-cohen-buys-price-richest-owner> [https://perma.cc/D8FW-TW2H].

7. See John Boyle, *Seahawks In Good Hands Under Leadership Of Jody Allen*, SEATTLE SEAHAWKS (Feb. 28, 2019), <https://www.seahawks.com/news/seahawks-in-good-hands-under-leadership-of-jody-allen> [https://perma.cc/952Q-DX6L] (illustrating franchise ownership interests, in traditional path, may be passed on to decedent-owner’s descendants or beneficiaries).

8. Linda Zuo, *How Do Private Equity Funds Work*, THE CAPITAL (Feb. 9, 2020), <https://medium.com/the-capital/how-do-private-equity-funds-work-13da912936a2> [https://perma.cc/NKC8-KC2Y].

9. See *The Ultimate Guide to Private Equity*, DVS GROUP, <https://thedvsgroup.com/the-ultimate-guide-to-private-equity> [https://perma.cc/UCD4-NNBU] (last visited Jan. 12, 2021) (“Many funds have a 10-year life cycle. Although, that has been changing in recent years with some funds choosing life cycles closer to 15 or 20 years.”); see also *id.* (noting private equity firms commonly have multiple funds running on overlapping timelines); see also Zuo, *supra* note 8 (discussing investment horizon).

10. See Zuo, *supra* note 8 (discussing how private equity funds end).

11. See *id.* (explaining typical structure of private equity funds).

12. See *id.*

13. See Chris Witkowsky, *LPs fear an ‘erosion’ of fiduciary duty in fund contracts: ILPA survey*, BUYOUTS INSIDER (July 13, 2020), <https://www.buyoutsinsider.com/lps-fear-an-erosion-of-fiduciary-duty-in-fund-contracts-ilpa-survey> [https://

As private equity funds are introduced into the ownership mix of professional sports, the result will surely be significant operational challenges as leagues and their member clubs adjust accordingly.¹⁴ The legal ramifications of this move must also be considered. More specifically, if teams and leagues increasingly turn to private equity ownership models, the way in which courts view professional sports leagues in relation to the federal antitrust regime may be categorically altered.¹⁵ Increased antitrust scrutiny could particularly be seen in leagues that have historically operated as so-called “single entity leagues.”¹⁶ Such leagues are generally younger than the “Big Four” North American sports leagues, and the franchises that operate within them are comparatively less valuable.¹⁷ As a result, franchises in these leagues are prime targets for upstart, less mature private equity funds; yet acquisitions by these funds may dramatically alter the treatment of their parent leagues under the antitrust laws. This Article will examine the legal underpinnings of this phenomenon and offer insight into the challenges one league in particular—Major League Soccer (“MLS”)—may face.

The Article will proceed in four parts. Part II explores a number of factors that have bolstered private equity’s recent entrance into the professional sports ownership space.¹⁸ Part III delves deeper into the single entity classification problem inherent with professional sports leagues and related antitrust jurisprudence.¹⁹

perma.cc/8C9L-N2ZN] (“Fiduciary duty includes the duty of loyalty, which deals with conflicts of interest and covers situation like cross-fund investing, cherry-picking co-investments and other decisions that misalign the GP’s interests with the LP’s. Also, the duty of care refers to the time and attention a firm’s principals dedicate to the fund and investment decisions that may appear reckless in hindsight”); *see also* Zuo, *supra* note 8.

14. For further discussion of changes that may occur at the decision making level for both the league and clubs within MLS, *see infra* notes 109-161 and accompanying text.

15. For further discussion of presently existing antitrust treatment of sports leagues, potential conflicts, and potential ramifications, *see infra* notes 49-108 and accompanying text.

16. *Id.*

17. *See generally* Kurt Badenhausen, *The World’s Most Valuable Sports Teams 2020*, FORBES (July 31, 2020), <https://www.forbes.com/sites/kurtbadenhausen/2020/07/31/the-worlds-most-valuable-sports-teams-2020/?sh=7d89796d3c74> [https://perma.cc/VPY9-ZDSX] (discussing “Big Four,” including National Football League (“NFL”), Major League Baseball (“MLB”), National Basketball Association (“NBA”), and National Hockey League (“NHL”)).

18. For further discussion of the factors that have bolstered private equity entrance into professional sports, *see infra* notes 22-48 and accompanying text.

19. For further discussion of the single entity classification problem and related anti-trust jurisprudence, *see infra* notes 49-108 and accompanying text.

Part IV analyzes the impact that acquisition of minority ownership interests in sports franchises by private equity funds may have on the single entity question, using Major League Soccer (MLS) as a case study.²⁰ Finally, Part V concludes the Article with an exploration of actions a league could take to preserve its single entity status while still reaping the benefits which private equity investment has to offer.²¹

I. FACTORS ENTICING PRIVATE EQUITY FUNDS TO ENTER SPORTS OWNERSHIP

Private equity fund managers are not strangers to sports franchise ownership.²² Yet the funds they manage have *largely* been precluded from obtaining ownership stakes in North American franchises for a variety of reasons—ranging from fears that these funds could create an “arms race” in leagues without a salary cap to historical limits placed on prospective buyers related to permissible debt leverage.²³ In spite of this, the demand for institutional investment in sports has steadily increased as franchise valuations have

20. For further discussion of the impact of private equity ownership on the single entity question, see *infra* notes 109-161 and accompanying text.

21. For further discussion of actions the league could take to preserve its single entity status, see *infra* notes 162-174 and accompanying text. For further discussion of single entity status see *infra* Part V and accompanying notes 162-174.

22. See David Newton, *David Tepper signs Panthers purchase deal*, ESPN (May 15, 2018), https://www.espn.com/nfl/story/_/id/23509278/david-tepper-signs-carolina-panthers-purchase-deal [<https://perma.cc/32RZ-QU2Z>]; see also Kevin Dowd, *Private equity is dominating the NBA in 2020*, PITCHBOOK (Feb. 13, 2020), <https://www.pitchbook.com/news/articles/private-equity-is-dominating-the-nba-in-2020> [<https://perma.cc/AU8D-UJBD>] (“Rich guys like to own professional sports teams. Private equity produces a lot of rich guys. So it’s little surprise that buyout billionaires have been snapping up NBA franchises for the past two decades.”).

23. Alan M. Christenfeld & Barbara M. Goodstein, *Play Ball: Lending To Pro Sports Franchises*, 245 N.Y. L.J., at 2 (Apr. 7, 2011), https://www.cliffordchance.com/content/dam/cliffordchance/PDF/Play_Ball.pdf [<https://perma.cc/2D4L-R4MG>] (“Each major league attempts to police its respective franchises’ financing arrangements up front by conducting a review of every proposed financing . . . Moreover, lenders generally are required to execute a letter confirming their agreement to league rules and restrictions on financing terms.”); see also *As sports leagues resume play*, Hogan Lovells’ Sports, Media & Entertainment group identifies seven key trends to watch in the sports sector, HOGAN LOVELLS, LLP (Sept. 24, 2020), <https://www.hoganlovells.com/en/news/as-sports-leagues-resume-play-hogan-lovells-sports-media-and-entertainment-group-identifies-seven-key-trends-to-watch-in-the-sports-sector> [<https://perma.cc/EQA3-LU3R>]; Zachary A. Greenberg, *Tossing the Red Flag: Official (Judicial) Review and Shareholder-Fan Activism in the Context of Publicly Traded Sports Teams*, 90 WASH. U. L.REV. 1255, 1263 (2013) (illustrating that teams in leagues, such as MLB, without salary cap, could use influx of capital from private equity funds or public ownership options to “have the opportunity to stay competitive in the market for free agents who tend to seek the most lucrative contracts”).

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risen, and funds have seen success in their acquisitions of franchises in Europe—where league control is “generally less centralized and ownership restrictions are fewer.”²⁴ In fact, at least one U.S.-based sports-dedicated private equity fund (RedBird) has already taken advantage of acquisition opportunities abroad, possibly in an attempt to test the waters for an acquisition in the United States.²⁵

Since Fall 2019, four factors have worked in tandem to create an atmosphere ripe for private equity investment in franchise ownership—(1) an influx of sports professionals entering into agreements with fund managers to serve as directors/executives, (2) relaxation of ownership restrictions across several North American leagues, (3) the need for additional capital to offset losses stemming from the COVID-19 pandemic, and (4) the growing attractiveness of sports as an investment opportunity.²⁶ Each of these factors are discussed, in turn.

A. Influx of Sports Professionals to Private Equity

Despite opportunities for investment, private equity has been reluctant to enter the sports space in part because of unfamiliarity with the industry.²⁷ The business of sports carries with it unique risks that could impact a fund’s performance, such as a team’s on-field play, player injuries, so-called “emotional equity” held by fans, and lockouts and labor stoppages, all of which combine to present a tall barrier to entry for outsiders.²⁸ Yet recent partnerships between

24. Justin A. Casey & Gregory A. Marino, *A New Game in Town: The Rise of Private Equity and Institutional Investment in Sports*, FOLEY & LARDNER, LLP (Nov. 11, 2020), <https://www.foley.com/en/insights/publications/2020/11/private-equity-institutional-investment-sports> [https://perma.cc/8KLH-E7P3] (“In 2012, the English Premier League’s Manchester United was the only professional sports franchise valued at \$2 billion. Eight years later, more than 57 teams have reached that valuation worldwide.”).

25. *See American firm buys 85% stake in French soccer club Toulouse*, WASH. POST (July 20, 2020), https://www.washingtonpost.com/sports/soccer/american-firm-buys-85percent-stake-in-french-soccer-club-toulouse/2020/07/20/5356a7ae-ca85-11ea-99b0-8426e26d203b_story.html [https://perma.cc/5LR6-L3A9].

26. For further discussion of these four factors, see *infra* notes 27–48 and accompanying text.

27. *See* Beltran, *supra* note 5; Eben Novy-Williams, *NFL Owners May Soon Be Able to Borrow a Whole Lot More Money*, BLOOMBERG (Oct. 11, 2019), <https://www.bloomberg.com/news/articles/2019-10-11/nfl-owners-may-soon-be-able-to-borrow-a-whole-lot-more-money> [https://perma.cc/86TY-9DEK]; Scott Soshnick, *Investors Get Path to Buy Into Major League Baseball Teams*, BLOOMBERG (Oct. 16, 2019), <https://www.bloomberg.com/news/articles/2019-10-16/investors-get-path-to-buy-stakes-in-major-league-baseball-teams> [https://perma.cc/WLQ3-4XXR].

28. Le & Lynn, *supra* note 4 (discussing emotional (or “fan”) equity as concept similar to “brand equity,” referring to relationship between sports team outcomes and spending habits and general engagement of their fans); *see also* Mike

experienced fund managers and sports professionals are creating private equity firms with the sophistication and qualifications to tackle the unique challenges presented by sports and—most importantly—instilling confidence in prospective investors.

This pairing of sports professionals with fund managers is apparent in the three sports-dedicated funds described earlier, as well as in the influx of sports-specific special purpose acquisition companies (or “SPACs”).²⁹ Arctos, for example was co-founded by David “Doc” O’Connor, the former president of Madison Square Garden, Co., and numerous ex-MSG executives have been linked to the group, as well as the former Chief Strategy Officer at Fenway Sports Group and the former COO of the Arizona Coyotes.³⁰

B. Relaxation of League Ownership Restrictions

MLB kicked off a year, which has been noteworthy for the loosening of ownership restrictions across nearly all of the major North American sports leagues, with its Fall 2019 announcement that it would allow investment funds to take minority stakes in its member clubs.³¹ Taking a more centralized approach in April 2020, the NBA selected Dyal Capital Partners to form a fund to buy up minority stakes in its member franchises.³² MLS Commissioner Don

Lewis & Manish Tripathi, *Fan Equity Part 1: Measurement and Management of Sport Organization’s Brand Equity*, EMORY UNIV. AMP SERIES (Jan. 2015), <https://scholarblogs.emory.edu/esma/files/2014/03/AMP-Fan-Equity.pdf> [<https://perma.cc/BD9M-7S8T>].

29. See Brendan Coffey, *SPAC Recap: Sports-Related Investors Continue to March to Market*, SPORTICO (Sept. 28, 2020), <https://www.sportico.com/business/finance/2020/every-sports-spac-now-1234613825> [<https://perma.cc/9R3K-CNMM>]. SPACs differ primarily from private equity funds in that they are publicly traded entities on national stock exchanges. Although SPACs are not the subject of this Article, at least one sports-dedicated private equity fund discussed in this Article (RedBird Capital Partners) has created its own SPAC seeking similar acquisitions as its primary fund. See Jabari Young, *Private investment firm RedBird Capital announces plans to take a new sports company public*, CNBC (July 28, 2020), <https://www.cnbc.com/2020/07/28/private-investment-firm-redbird-capital-announces-plans-to-take-a-new-sports-company-public.html> [<https://perma.cc/6X8W-WMJ8>]. The RedBird-linked SPAC (named RedBall Acquisition Corp.) includes former Oakland Athletics’ executive Billy Beane on its Board of Directors. See *id.* For further discussion on the rise of sports-dedicated SPACs, see Chase Browndorf, *Sacrifice Fly: Advancing MLB Ownership Policies into the Post-COVID Era at the Expense of the Antitrust Exemption*, ARIZ. ST. SPORTS & ENT. L.J. (Spring 2021, forthcoming).

30. See *Leaders Under 40: Ari Segal*, LEADERS SPORTS AWARDS, <https://leadersin-sport.com/leaders-events/leaders-sports-awards-2020/leaders-under-40/ari-segal> [<https://perma.cc/FNY4-AFNU>] (last visited Jan. 2, 2021); see *Our Team*, ARCTOS SPORTS PARTNERS, <https://arctospartners.com/team> [<https://perma.cc/L4M5-CMQL>] (last visited Jan. 2, 2021); Primack, *supra* note 3.

31. See Soshnick, *supra* note 27.

32. See Novy-Williams, *supra* note 27; see also Beltran, *supra* note 5.

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Garber announced a similar policy change in July 2020, and even in the NFL—historically viewed as the most conservative league in terms of its ownership policies—a measure was recently approved to raise the acquisition debt limit in purchasing ownership stakes from \$350 million to \$1 billion alongside an increase in the permissible operating debt limit from \$350 million to \$500 million.³³

It is important to note that the league policy changes provide only for *minority* ownership stakes to be acquired, stemming largely from the fact that “[t]he leagues . . . don’t want partners who want or expect significant control or influence . . . who use leverage or . . . have a forced exit horizon.”³⁴ Instead, the leagues are hoping for “long-term, passive, financial partners.”³⁵ Whether or not the new policies fundamentally alter the chief decisionmakers at the club level, both existing majority and minority owners will have a newfound liquidity at their disposal, coupled with a “freedom of transferability . . . provid[ing] an exit strategy.”³⁶ Existing majority owners will be able to “cash out on a portion of the unrealized appreciation of their investment while preserving their control over management and day-to-day decisions.”³⁷

C. The Impact of COVID-19

In the year since Arctos’ fund formation was announced, the COVID-19 pandemic has plunged the sports industry into unprecedented financial distress. Preliminary studies estimate that revenue loss from ticketing alone, will result in a \$5.13 billion loss for MLB, a \$1.69 billion loss for the NBA, and a \$1.12 billion loss for the NHL.³⁸ In keeping pace with these figures, MLS Commissioner

33. See Jabari Young, *Major League Soccer to join other leagues in allowing private equity financing*, CNBC (July 11, 2020, 11:15 AM), <https://www.cnbc.com/2020/07/11/mls-join-nba-mlb-in-private-equity-financing.html> [https://perma.cc/A44C-WLMP]; see also Mike Ozanian, *Increase in NFL Debt Limit Will Help Sale Of Carolina Panthers*, FORBES (Mar. 30, 2018), <https://www.forbes.com/sites/mike-ozanian/2018/03/30/increase-in-nfl-debt-limit-will-help-sale-of-carolina-panthers> [https://perma.cc/8B4J-C2LX] (illustrating implications of raising both acquisition debt limits and operating debt limit, less significant increases in both in 2018 strongly facilitated sale of Carolina Panthers and financing for Los Angeles Rams’ and Chargers’ stadium in Inglewood, California); see also Casey & Marino, *supra* note 24.

34. Le & Lynn, *supra* note 4.

35. *Id.*

36. Greenberg, *supra* note 23, at 1262.

37. Casey & Marino, *supra* note 24.

38. See *Potential ticket revenue loss in selected sports leagues due to the coronavirus (COVID-19) pandemic in the United States in 2020*, STATISTA (July 23, 2020), <https://www.statista.com/statistics/1130000/ticket-revenue-loss-sports-leagues-corona> [https://perma.cc/W2MU-R5C9].

Don Garber estimates that in 2020, his league lost \$1 billion primarily from a decline in gate receipts—a devastating number for a comparatively less profitable league that derives a higher proportion of its revenue from ticketing than its counterparts and holds “far less lucrative TV contracts.”³⁹ As traditional revenue streams (i.e. ticketing) have dried up, commentators estimate a “potential 15% to 20% drop in team control and limited-partner positions” as ownership groups seek to “get out” of the sports business entirely.⁴⁰

Private equity funds are uniquely positioned to take advantage of the capital needs of sports franchises.⁴¹ In the past ten years — driven in part by historically low interest rates — fundraising by private equity firms has increased from \$60 billion to \$300 billion annually.⁴² At the same time, a significant rise in “dry powder” (capital available for investment, but not yet deployed) has occurred, reaching record levels with an estimate of \$1.45 trillion at

39. Ian Nicholas Quillen, *Major League Soccer's Financial Losses 'Deeper Than We Expected' In 2020, Says Don Garber*, FORBES (Dec. 8, 2020, 02:20 PM), <https://www.forbes.com/sites/ianquillen/2020/12/08/major-league-soccers-financial-losses-deeper-than-we-expected-says-don-garber> [https://perma.cc/RXR7-7TV2]; see also Michael McCann, *MLS's Force Majeure Move Draws Eyes to CBA and Antitrust Exemption*, SPORTICO (Dec. 30, 2020), <https://www.sportico.com/law/analysis/2020/mls-lockout-force-majeure-1234619307> [https://perma.cc/T966-VKW4].

40. Rebecca Cooper, *Minority owners of Washington's NFL team want to sell their stakes, according to report*, WASH. BUS. J. (July 6, 2020, 8:16 AM), <https://www.bizjournals.com/washington/news/2020/07/06/washington-nfl-team-minority-owners-want-to-sell.html> [https://perma.cc/V6SH-R3CP] (noting since pandemic, minority owners of Washington Football Team have sold their interests); see also Scott Polacek, *Report: Spurs Selling Minority Ownership Stake; '100% Committed' to San Antonio*, BLEACHER REPORT (Apr. 30, 2020), <https://bleacherreport.com/articles/2889595-report-spurs-selling-minority-ownership-stake-100-committed-to-san-antonio> [https://perma.cc/T8GU-PPJ8] (reporting since pandemic, minority owners of San Antonio Spurs have also sold their stakes); see also Jabari Young, *With sports on pause, new opportunities to buy stakes in cash-strapped teams could arise*, CNBC (May 2, 2020), <https://www.cnbc.com/2020/05/02/with-sports-on-pause-new-opportunities-to-buy-stakes-in-cash-strapped-teams-could-arise.html> [https://perma.cc/MW5U-BJGC]. Since the beginning of the pandemic, at least two major American sports teams have seen their minority owners initiate the process of selling their interests—the Washington Football Team and the San Antonio Spurs. See Cooper, *supra* note 40; Polacek, *supra* note 40.

41. See Justin Mitchell, *LPs undaunted on private equity amid covid: study*, BUYOUTS INSIDER (Dec. 16, 2020), <https://www.buyoutsinsider.com/lps-undaunted-on-private-equity-amid-covid-study/> [https://perma.cc/5JN6-N8XG] (reporting that while investors in private equity funds are certainly not completely unfazed by COVID-19, preliminary studies indicate that “LPs are overwhelmingly confident in their private equity investments’ ability to weather the coronavirus-fueled market downturn,” with eighty-four percent of respondents to recent survey indicating they “planned to either maintain their current allocation . . . or even pump more capital into it.”).

42. See Casey & Marino *supra* note 24.

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the close of 2019.⁴³ Given the losses that leagues and franchises have experienced as a result of COVID-19, it is likely that franchise valuations will temporarily decline, enabling funds to acquire ownership stakes at a steep discount, possibly as large as fifty to seventy percent.⁴⁴

D. Promises of Exponential Growth in Investments

Although sports team ownership has historically been labeled as “the vanity projects of the wealthy and civic-minded,” the past ten years have seen compounded annual growth rates across the four major sports leagues; sports leagues have outperformed the four major stock indices for the same period.⁴⁵ This significant growth has largely been driven by “ballooning media rights values” mainly from deals with streaming services like Amazon, Hulu, and YouTube, as well as loosening restrictions on sports betting.⁴⁶ As an added incentive, the signing of multi-million dollar league broadcasting deals corresponds with typical investment fund holding periods (typically seven to fifteen years), providing investors with an

43. Kate Rooney, *Private equity’s record \$1.5 trillion cash pile comes with a new set of challenges*, CNBC (Jan. 3, 2020), <https://www.cnbc.com/2020/01/03/private-equitys-cash-pile-comes-with-a-new-set-of-challenges.html> [<https://perma.cc/A5JP-TZXD>]; see also Casey & Marino *supra* note 24.

44. See Pat Evans, *Private Equity in the Owner’s Box*, FRONT OFFICE SPORTS (May 4, 2020), <https://frontofficesports.com/private-equity-in-the-owners-box> [<https://perma.cc/GF7D-J2HG>]; see also Andrew Woodman, *Hard-hit sports world finds new fans: private equity firms*, PITCHBOOK (July 20, 2020), <https://pitchbook.com/news/articles/sports-private-equity-investments-pandemic> [<https://perma.cc/U2X3-N7LC>].

45. Casey & Marino *supra* note 24; see Bryce Erickson, *An Investor’s View of Major League Sports Franchises: Outsized Returns or a Risky Play?*, MERCER CAPITAL, <https://mercercapital.com/article/investors-view-major-league-sports> [<https://perma.cc/3GNK-LQE3>] (last visited Jan. 2, 2021) (noting investments in four major sports leagues outperformed S&P 500, Dow, NASDAQ, and Russell 2000 since 2001).

46. Brad Adgate, *Expect TV Rights Fees For Sports to Soar*, FORBES (Nov. 11, 2020, 11:23 AM), <https://www.forbes.com/sites/bradadgate/2020/11/11/expect-tv-rights-fees-for-sports-to-soar/?sh=27b7555d48c2> [<https://perma.cc/LNF7-J3DY>] (noting it is possible that as AT&T looks to sell DirecTV, streaming provider such as Apple+, ESPN+, Amazon, or YouTube could step into “NFL Sunday Ticket” rights; further, MLS and NHL are, likewise, expected to begin negotiations in the early months of 2021, for deals expected to exceed \$1 billion); Wayne Barry, *Leagues finally cash in on sports betting by selling data*, AP NEWS (Jan. 7, 2020), <https://apnews.com/article/2fc27b7c558ceddd8669fb03acc15e3d> [<https://perma.cc/X6YV-56Z4>] (reporting in regards to sports betting in particular, leagues are beginning to realize significant gains by selling their official data to largest U.S. bookmakers and entering into long-term sponsorship agreements in sports betting space); see also Casey & Marino *supra* note 24.

all-but-guaranteed source of revenue for the life of the fund.⁴⁷ Indeed, with valuations soaring, the promise of significant returns, and a favorable atmosphere for “first movers,” sports teams represent a type of mature “unicorn,” for private equity funds seeking to invest.⁴⁸

II. THE HISTORICAL TREATMENT OF SPORTS LEAGUES UNDER THE ANTITRUST LAWS

In making changes to existing ownership policies and enabling a shift of sports franchise ownership to include private equity funds, sports leagues should be wary of the heightened antitrust scrutiny that may result.⁴⁹ This Part examines the historical application of the federal antitrust regime to professional sports leagues in the United States.⁵⁰

In the U.S., each of the “Big Four” sports leagues operates as “a type of unincorporated joint venture among individual teams.”⁵¹ While each of these leagues exerts a varying degree of control and supervision, their member clubs are individually owned and “[have] a different financial bottom line produced through non-shared revenues and expenses.”⁵² Sports leagues that operate in this traditional manner fall within the purview of Section 1 of the Sherman Act of 1890, which 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 . . . is declared to be illegal.”⁵³ The Sherman Act’s influence on sports has been particu-

47. See Adgate, *supra* note 46 (noting NFL-ESPN TV deal expected to be negotiated for about eight years; further MLB-Fox agreement runs through 2028 season); see also Casey & Marino *supra* note 24. The NFL-ESPN TV deal, for example, is expected to be negotiated for about eight years. See Adgate, *supra* note 46. The MLB-Fox agreement runs through the 2028 season. See *id.*

48. Ron Leuty, *The new unicorns: Why professional sports franchises are seeing soaring valuations*, S.F. BUS. TIMES (Apr. 8, 2016), <https://www.bizjournals.com/sanfrancisco/blog/2016/04/sports-baseball-franchises-giants-as-yankees-value.html> [<https://perma.cc/8UKN-QTB2>].

49. For further discussion of potential antitrust issues, see *infra* notes 49–108 and accompanying text.

50. See *id.*

51. *N. Am. Soccer League v. Nat’l Football League*, 670 F.2d 1249, 1253 (2d Cir. 1982) (illustrating “joint venture” nature of sports leagues by asserting that “if the owner of one team allowed it to deteriorate to the point where it usually lost every game, attendance at games in which that team was playing would fall precipitously, hurting not just that team, but every other team that played it during the season”); see also Lacie L. Kaiser, *The Flight From Single-Entity Structured Sport Leagues*, 2 DEPAUL J. SPORTS L. & CONTEMP. PROBS. 1, 1 (2004).

52. *N. Am. Soccer League*, 670 F.2d at 1250; see also Kaiser *supra* note 51, at 5.

53. Sherman Act of 1890, 15 U.S.C. § 1 (1994); see Kaiser, *supra* note 51, at 3 (explaining Sherman Act reflected Congress’s desire to create “a competitive busi-

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larly significant—because each league operates as the “highest coordinating power” within an exclusive market for that form of sport, “every league action, every league business judgment and every league decision can be characterized as an ‘antitrust issue.’”⁵⁴ This uniquely American phenomenon is in stark contrast to sports leagues in the European Union, where a broad “sporting exemption” to EU competition laws exists.⁵⁵ Given the nature of the EU’s sporting exemption and the clear judicial application of it, it is no wonder why private equity funds such as RedBird elected to invest first in European sports franchises.

While the application of the Sherman Act to a league action does not necessarily result in invalidation, American sports leagues have consistently tried to escape the bounds of Section 1, because successful Section 1 lawsuits can lead to treble damages.⁵⁶ Leagues have historically found success in two situations: (1) the unique case of professional baseball, via a “judicially created antitrust exemption”, and (2) when the league in question is able to establish

ness economy” that created “the best allocation of . . . economic resources, the lowest prices, the highest quality and the greatest material progress, while at the same time providing an environment conducive to the preservation of . . . democratic political and social institutions”).

54. Daniel E. Lazaroff, *The Antitrust Implications of Franchise Relocation Restrictions in Professional Sports*, 53 *FORDHAM L.R.* 157, 157 (1984).

55. Leah Farzin, *On the Antitrust Exemption for Professional Sports in the United States and Europe*, 22 *JEFFREY S. MOORAD SPORTS L.J.* 75, 100 (2015) (discussing how European Commission “stepped in” to address “gray areas” in judicial application of sporting exemption, eventually “embrac[ing] and expand[ing] the sporting exemption within competition law”); see also 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, 410-11 (2009) (arguing that EU “sporting exemption” arose in contradiction to United States’s antitrust treatment of sports because “U.S. and European competition law emerge[d] from different ideologies”; whereas Sherman Act was enacted in 1890 “to prevent price-fixing arrangements and monopolization,” EU competition law did not begin to emerge until 1958 and “was intended to address both antitrust concerns and a wide range of policy goals oriented towards the objectives of European economic integration”).

56. See Genevieve F.E. Birren, *NFL vs. Sherman Act: How the NFL’s Ban on Public Ownership Violates Federal Antitrust Laws*, 11 *SPORTS LAW J.* 121, 128 (2004) (“[T]o prevail under the rule of reason, the plaintiff must prove that there was (1) [a]n agreement among two or more persons or distinct business entities; (2) [w]hich is intended to harm or unreasonably restrain competition; (3) [a]nd which actually causes injury to competition[;]” further, rule of reason analysis has been held up as the proper form of scrutiny for sports leagues in a number of cases); see also Kaiser, *supra* note 51, at 19–20 (highlighting the application of treble damages in a sports antitrust decision); Michael McCann, *Advantages and Drawbacks of the XFL Operating as a Single-Entity Sports League*, *SPORTS ILLUSTRATED* (Jan. 26, 2018), <https://www.si.com/nfl/2018/01/26/xfl-single-entity-sports-leagues-advantages-drawbacks> [<https://perma.cc/WMY2-HBME>].

that it is operating as a single entity.⁵⁷ This Article focuses exclusively on this latter point (the so-called “single entity defense”).

A. The Single Entity Defense Explained

Under judicial interpretations of Section 1, if a sports league is treated as a single economic unit, a restriction with anticompetitive effects does not violate the Sherman Act.⁵⁸ This is due to the fact that an anti-competitive conspiracy requires more than one party.⁵⁹ On the contrary, if each team within a sports league could be deemed “separate and distinct business competitors,” actions taken by the league or its member-teams could represent an illegal restraint of trade.⁶⁰ As an illustration, in the context of sport franchise relocations, if all member-teams in a non-single entity league were to agree to relocate a franchise, this would likely be viewed as illegal action in restraint of trade, whereas the same action in a single entity league would “be nothing more than a mechanism for unilaterally determining where a product—the league sport—would be marketed.”⁶¹ Therefore, it is extremely advantageous for sports leagues to seek classification as a single entity league, in order to escape scrutiny under Section 1.⁶² While many

57. Lazaroff, *supra* note 54, at 158; *see also* Kaiser, *supra* note 51, at 3 (“Of all the federal antitrust legislation enacted, a sport league’s decision to structure as a single entity only affects liability under one particular statutory provision . . . Section 1 of the Sherman Act.”).

58. *See* Lazaroff, *supra* note 54, at 163 (“If, as some sports leagues have contended, a league should be treated for purposes of antitrust analysis as a single economic unit, a franchise relocation restriction agreed to by all league members could never violate section 1 of the Sherman Act.”).

59. *See* Nathaniel Grow, *There’s No “I” in “League”: Professional Sports Leagues and the Single Entity Defense*, 105 MICH. L. REV. 183, 185 (2006); *see also* Lazaroff, *supra* note 54, at 163 (noting that if “individual teams were deemed separate and distinct business competitors,” relocation restraints might reflect “horizontal business activity that could be labeled per se illegal”).

60. Lazaroff, *supra* note 54, at 163.

61. *Id.*

62. *See* Grow, *supra* note 59, at 185 (noting single entities may still be held liable under Section 2 of Sherman Act, which “prohibits monopolization of an industry by a single legal entity[;]” and further, Section 2 claims are much more rare and difficult to prove, with “few existing . . . claims [involving] upstart leagues suing established leagues for monopolizing a professional sport.” (quoting Karen Jordan, Note, *Forming a Single Entity: A Receipt for Success for New Professional Sports Leagues*, 3 VAND. J. ENT. L. & PRAC. 235, 237 (2001))); *see also* Kaiser, *supra* note 51, at 18 (noting that “[o]ne of the main differences between Section 1 and Section 2 violations is the requirement of two or more actors for a Section 1 violation but not a Section 2 violation[;]” and further, “being structured as a ‘single-entity’ would not protect sport leagues, no matter if they are traditionally structured or structured with the purpose of being a ‘single entity’ from antitrust liability under Section 2”).

questions about the bounds of the single entity defense remain unanswered, a series of judicial rulings (both within the sports context and outside of it) over the past fifty years has helped create a three-prong framework courts may use to determine if the single entity defense is applicable.⁶³

B. Early Cases

In a somewhat anomalous decision in the mid-1970s, the NHL succeeded at the district court level in putting forth a single entity defense in *San Francisco Seals v. National Hockey League*.⁶⁴ The *Seals* Court held that the league franchises were not economic competitors, but instead “all members of a single unit.”⁶⁵ Within a few years, however, sports leagues would struggle to establish that they were entitled to single entity status—a struggle that exists to the present day.

The United States Court of Appeals for the Second Circuit first addressed a single entity defense put forth by the NFL in the 1982 case of *North American Soccer League v. National Football League*.⁶⁶ In this instance, the North American Soccer League challenged the NFL’s policy banning its owners from “making or retaining any capital investment in any member of another league of professional sports teams.”⁶⁷ The NFL, predictably, argued that it should be classified as a single entity league, to which Section 1 would not apply.⁶⁸ The Second Circuit disagreed. While the NFL controlled national promotion of games, employed officials, and contracted for broadcasting purposes, each team represented a “discrete legal

63. See *Fraser v. Major League Soccer, L.L.C.*, 284 F.3d 47, 56 (1st Cir. 2002) (“[T]he Supreme Court has never decided . . . how far *Copperweld* applies to more complex entities and arrangements that involve a high degree of corporate and economic integration but less than that existing in *Copperweld* itself.”).

64. See 379 F.Supp. 966 (C.D. Cal. 1974).

65. *S.F. Seals v. Nat’l Hockey League*, 379 F.Supp. 966 at 969-70 (C.D. Cal. 1974) (“It is of course true that the member teams compete among themselves athletically for championship honors, and they may even compete economically, to a greater or lesser degree, in some other market not relevant to our present inquiry. But, they are not competitors in an economic sense in this relevant market.”); see also *id.* at 970 (“[T]he organizational scheme of the National Hockey League . . . imposes no restraint upon trade or commerce . . . but rather makes possible a segment of commercial activity which could hardly exist without it.”).

66. See generally 670 F.2d 1249 (2d Cir. 1982).

67. *N. Am. Soccer League*, 670 F.2d. at 1250; see also *Nat’l Football League v. N. Am. Soccer League*, 459 U.S. 1074, 1075 (1982) (Rehnquist, J., dissenting) (noting North American Soccer League argued that NFL policy was anticompetitive because it “exclude[d] [the NASL] from a substantial share of the market for professional sports capital and entrepreneurial skill”).

68. See *N. Am. Soccer League*, 670 F.2d at 1250.

entity . . . separately owned and operated with non-shared expenses, revenues, profits, losses, and capital expenditures.”⁶⁹ This line of reasoning was later expanded on by the Ninth Circuit in *Los Angeles Memorial Coliseum Commission v. National Football League*, which, again, refused to characterize the NFL as a single entity league because “[its] teams have independent value and separate identities on and off the field of play.”⁷⁰

C. Copperweld (1984)

The Supreme Court first outlined its view on the single entity defense not in the sports context, but rather in the context of manufacturing.⁷¹ In *Copperweld Corp. v. Independent Tube Corp.*, the Court reversed decades of precedent which had indicated that a parent company and any of its wholly-owned subsidiaries could be deemed separate entities capable of concerted action in restraint of trade.⁷² The *Copperweld* Court held that:

[T]he coordinated activity of a parent and its wholly owned subsidiary must be viewed as that of a single enterprise for purposes of § 1 of the Sherman Act. A parent and its wholly owned subsidiary have a complete unity of interest. Their objectives are common, not disparate; their general corporate actions are guided or determined not by two separate corporate consciousnesses, but one. They are

69. *Id.* at 1252 (“A member’s gate receipts from its home games varies from those of other members, depending on the size of the home city, the popularity of professional football in the area and competition for spectators offered by other entertainment . . . [a]s a result, profits vary from team to team”); *see also id.* (demonstrating that in 1978, two of NFL’s twenty-eight teams experienced losses, and in 1977, twelve teams experienced losses); *see also* Kaiser, *supra* note 51, at 6.

70. *See* 726 F.2d 1381, 1389-91 (9th Cir. 1984). The Court based its findings on a number of facts about the manner in which the NFL operated. First, it noted that “[t]he member clubs are all independently owned. Most are corporations, some are partnerships, and apparently a few are sole proprietorships.” *Id.* at 1389. Second, the Court stated that although approximately ninety percent of League revenue was divided equally among the teams, “profits and losses are not shared, a feature common to partnerships or other ‘single entities.’” *Id.* Finally, the Court analyzed the wide disparity in profits from team to team, noting that this could be “attributed to independent management policies regarding coaches, players, management personnel, ticket prices, concessions, luxury box seats, as well as franchise location.” *Id.* at 1390.

71. *See generally* *Copperweld Corp. v. Independent Tube Corp.*, 467 U.S. 752 (1984).

72. *See* *United States v. Citizens & S. Nat’l Bank*, 422 U.S. 86, 117 (1975) (“[A] business entity generally cannot justify restraining trade between itself and an independently owned entity, merely on the ground that it helped launch that entity, by providing expert advice or seed capital.”).

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not unlike a multiple team of horses drawing a vehicle under the control of a single driver.⁷³

In addition to the horse analogy, the *Copperweld* Court further illustrated that a subsidiary's "sole shareholder" is the parent and as such, the subsidiary acts only for the parent's benefit.⁷⁴ So long as concerted activity between a parent and its wholly owned subsidiary "does not deprive the market of independent sources of decision making," these activities would not violate Section 1.⁷⁵ The test that would emerge out of the *Copperweld* decision has come to be known as the "unity of interest" test.⁷⁶

For nearly two decades, most lower courts construed *Copperweld* as applying only in the parent-subsidary context and refused to grant professional sports leagues single entity status.⁷⁷ In a noteworthy exception to the greater trend, in *Chicago Professional Sports Ltd. Partnership v. National Basketball Association*, the Seventh Circuit argued that in the context of professional sports leagues, courts should approach each league's argument for single entity status on a case-by-case basis, one facet at a time.⁷⁸ Analyzing the case at bar, the Seventh Circuit held that the NBA could be classified as a single entity, in the limited circumstances involving national television broadcasting rights.⁷⁹

73. *Copperweld*, 467 U.S. at 771.

74. *Id.* (explaining that "[w]ith or without a formal 'agreement,' the subsidiary acts for the benefit of the parent, its sole shareholder" and that even when a parent and its subsidiary "do 'agree' to a course of action, there is no sudden joining of economic resources that had previously served different interests, and there is no justification for § 1 scrutiny").

75. *Id.*

76. Grow, *supra* note 59, at 186.

77. *See generally* Sullivan v. Nat'l Football League, 34 F.3d 1091, 1099 (1st Cir. 1995) ("We do not agree that *Copperweld* . . . applies to the facts of this case or affects the prior precedent concerning the NFL."); McNeil v. Nat'l Football League, 790 F. Supp. 871, 880 (D. Minn. 1992) (rejecting NFL's contention that *Copperweld* immunized it from antitrust liability and concluding that NFL was not single entity league).

78. *See* Chicago Prof'l Sports Ltd. P'ship v. Nat'l Basketball Ass'n., 95 F.3d 593, 598-600 (7th Cir. 1996) (noting that "[c]onflicts are endemic in any multi-stage firm, such as General Motors or IBM . . . but they do not imply that these large firms must justify *all* of their acts under the Rule of Reason" and further stating that "more than one characterization" for a sports league "is possible," and as a result, courts "must revisit the subject" depending on the challenged activity) (emphasis added); *see also* Grow, *supra* note 59 (noting 7th Circuit approach represents minority view, among its peer Courts of Appeals).

79. *See* Chicago Prof'l Sports Ltd. P'ship, 95 F.3d at 598.

D. MLS and Fraser

In 1993, Major League Soccer (“MLS”) formed as a limited liability company in the U.S. state of Delaware; the goal of the entity was to organize a single entity league to avoid violating anti-trust law.⁸⁰ MLS would be controlled by a central Board of Governors, based in New York City, which would handle player contracts, employ coaches and staff, and set prices for concessions, broadcasts, merchandise, and tickets.⁸¹ After the league initially struggled to take off, the board relaxed its centralized control, creating the “operator-investor” position for each team.⁸² Via contracts labeled “Operating Agreements,” each operator-investor was granted by the league the “exclusive right and obligation to provide Management Services” for a specific member-team.⁸³ In the relevant contracts, “Management Services” was defined broadly to include control over the team’s front office, location of the games, local media rights, and local marketing.⁸⁴ MLS, however, would continue to control all player contracts and “[make] business decisions that involved all of its teams.”⁸⁵ In effect, MLS appeared to be transitioning to a business model similar to that of the NFL, which had been refused single entity status in the aforementioned cases, with some important distinctions between the two leagues. For example, until 2002, a total of seven of the league’s ten teams were operated by a single

80. See *Fraser v. Major League Soccer*, 284 F.3d 47, 53 (1st Cir. 2002).

81. See *id.* In addition to these ownership and management rights over key aspects of MLS’s operations, at the time of the *Fraser* decision, the league supplied equipment, set teams’ schedules, negotiated all stadium leases and assumed all related liabilities, and paid the salaries of referees. *Id.* at 53. The structure and powers of the Board of Governors is similar to that of the NFL Executive Committee, as discussed in *Los Angeles Memorial Coliseum Commission v. National Football League*. The Ninth Circuit in that case discussed how territorial divisions were decided by the Executive Committee, which is “comprised of a representative of each club.” 726 F.2d 1381, 1385 (9th Cir. 1984).

82. See *Fraser*, 284 F.3d at 54 (noting Board of Governors would maintain control over hiring of commissioner, approving national television contracts, marketing decisions, league rules and policies, and – most importantly for this Article – sales of ownership interests; further noting under MLS Constitution, operator-investors can transfer their ownership stakes and operating rights to other current MLS operator-investors without prior consent from Board of Governors but transfers to outside investors would require two-thirds majority approval from Board); see also Issac Krasny, *Unpacking the Major League Soccer Business Model*, MEDIUM (June 7, 2017), <https://medium.com/@issackrasny/unpacking-the-major-league-soccer-business-model-827f4b784bcd> [<https://perma.cc/QK76-BQ2A>].

83. *Fraser*, 284 F.3d at 53-54 (stating at time of *Fraser* decision, nine MLS teams had contractually bound operator-investors, whereas three teams remained under League’s exclusive control).

84. See *id.* at 54.

85. Kaiser, *supra* note 51, at 16.

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investor—Phil Anschutz who operated five MLS franchises, and Lamar Hunt who operated two franchises.⁸⁶

MLS soon found its single entity status in the crosshairs of a suit alleging that its player reserve system violated Section 1 of the Sherman Act in *Fraser v. MLS*.⁸⁷ The First Circuit wrestled with the league’s unique structure, classifying it as a “hybrid arrangement” somewhere between *Copperweld*’s parent-subsidary model and a full-blown “cooperation arrangement between existing competitors” that would warrant antitrust scrutiny.⁸⁸ The MLS structure certainly differed from *Copperweld*’s “complete unity of interests” because although the operator-investors of the various teams constituted a majority of the league’s board of governors, the operator-investors were not totally subservient to the league as the subsidiary had been to the parent company in *Copperweld*.⁸⁹ The league, according to the First Circuit, had two roles: “one as an entrepreneur with its own assets and revenues” and “the other (arguably) as a nominally vertical device for producing horizontal coordination, i.e., limiting the competition among operator/investors.”⁹⁰

Ultimately, the First Circuit dismissed the plaintiff’s suit in *Fraser*—not because it was certain that MLS qualified for single entity status, but because the plaintiffs had failed to define a relevant market (a requirement of Section 1 not discussed in this Article).⁹¹ On appeal, the U.S. Supreme Court denied *certiorari*, leaving open the question of MLS’s single entity status to this day. In the nearly twenty years since *Fraser*, commentators have criticized the impact which the Court’s inaction on the single entity issue has had on a number of issues.⁹² For example, in the context of players’ rights,

86. See *Major League Soccer’s Single-Entity Structure*, LEX SPORTIVA (Oct. 9, 2019), <https://lexsportiva.blog/2019/10/09/mls> [<https://perma.cc/MK34-DQ39>] [hereinafter, *Major League Soccer’s Single Entity Structure*].

87. *Fraser*, 284 F.3d at 53.

88. *Id.* at 58 (court pointed to common franchising agreements and joint ventures that perform specific services for competitors as other structures occupying this “hybrid” space (citing *Northwest Wholesale Stationers, Inc. v. Pac. Stationery and Printing Co.*, 472 U.S. 284 (1985) (common purchasing entities); *Am. Motor Inns. v. Holiday Inns, Inc.*, 521 F.2d 1230, 1241 (3d Cir. 1975) (franchising agreements)).

89. *Id.*

90. *Id.*

91. See *id.* at 58-59 (stating, in telling piece of dicta, that MLS structure “present[ed] a more doubtful situation” than *Copperweld*).

92. See Mark W. Lenihan, *Major League Soccer Scores an Own Goal: A Successful Joint Venture Attains Market Power in an International Sport*, 62 DEPAUL L. REV. 881, 893 (2013) (arguing that MLS has “established itself as the preeminent domestic soccer league” since *Fraser* and faces “little to no threat of rival expansion or new

some commentators have argued that MLS's continued reliance on its single entity status has "significantly deterred players seeking greater contract and freedom of movement rights."⁹³

E. American Needle (2010)

In 2010, the single entity issue again made its way onto the Supreme Court's docket, this time in *American Needle v. National Football League*, in which actions taken by the NFL to exclusively license its intellectual property to Reebok were challenged as anticompetitive by a competitor of the apparel company.⁹⁴ The NFL had formed an associated entity—National Football League Properties (NFLP)—to market the teams' individually-owned intellectual property, and the *American Needle* Court was tasked with determining whether the NFL and NFLP could be classified as a single entity, such that NFLP's exclusive 10-year contract with Reebok would not represent an illegal restraint of trade.⁹⁵

In rejecting the single entity argument for the NFL once again, Justice Stevens held that NFL teams were independently owned, independently managed businesses, whose "general corporate actions are guided or determined [by] separate corporate consciousnesses . . . [t]he teams compete with one another . . . to attract fans, for gate receipts and for contracts with managerial and playing personnel."⁹⁶ *American Needle* serves to affirm the idea that when analyzing outside of the straightforward parent-subsidary circumstances as seen in *Copperweld*, courts will look at a number of factors to determine whether the single entity defense ought to be available.⁹⁷

entry," and as such, continued single entity status allows MLS to "restrain[] competition by forcing players to deal exclusively with MLS instead of individual teams").

93. Daniel S. MacMillan, *Is MLS Inherently Anticompetitive? The Strange Single-Entity Structure of Major League Soccer in Order to Legitimize American Professional Soccer*, 28 MARQ. SPORTS L. REV. 503, 507 (2018); see also Lenihan, *supra* note 92, at 893 (stating that MLS's single entity status "depresses salaries and limits movement" of players).

94. 560 U.S. 183, 183 (2010); see also Matthew J. Jakobsze, *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, 144 (2010) (stating American Needle argued that "because each individual team own[ed] their team logos and trademarks separately, their authorization to NFLP to restrict other vendors was a conspiracy").

95. See *Am. Needle v. Nat'l. Football League*, 560 U.S. 183, 195 (2010).

96. *Id.* at 196-97.

97. See Carolina I. Velarde, *Home-Field Disadvantage: How the Organization of Soccer in the United States Affects Athletic and Economic Competitiveness*, 117 MICH. L. REV. 963, 977 (2019) ("[T]he test to determine whether a party is a single entity depends on 'substance, not form.'").

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These factors include whether: “(1) the entities share a unity of interest, (2) the entities have a common decision-making structure, and (3) the entities serve to increase consumer welfare.”⁹⁸ This three-factor framework will be used for analysis purposes in Part IV of this Article.⁹⁹

F. Other Single Entity Leagues

Following in the footsteps of MLS, a number of other fledgling sports leagues in the U.S. have sought to carefully structure operations around the idea of obtaining single entity status at their creation.¹⁰⁰ These leagues include the Women’s National Basketball Association (WNBA), the Women’s United Soccer Association (WUSA), Ultimate Fighting Championship (UFC), and most recently, the reinvented XFL.¹⁰¹ In the case of the WNBA, each team was to be operated by an NBA team, but NBA Development would have ultimate control over the league, with revenues and costs being equally shared by all of the teams.¹⁰²

The single-entity model, however, fell out of favor in the mid-2000s.¹⁰³ WUSA would ultimately cease operations in 2003, and the WNBA moved away from single entity ownership in 2003.¹⁰⁴ As a result of the COVID-19 Pandemic, the reborn XFL was unable to finish its inaugural season in 2020, filed for Chapter 11 bankruptcy, and was subsequently purchased by an investment group led by RedBird Capital, as discussed earlier.¹⁰⁵ It is unclear whether the league will continue to operate in a single entity manner upon its return to play.

98. Grow, *supra* note 59, at 189.

99. For further discussion of the three-factor framework, see *infra* notes 109-161 and accompanying text.

100. See Heike K. Sullivan, *Fraser v. Major League Soccer: The MLS’s Single-Entity Structure Is A “Sham”*, 73 TEMP. L. REV. 865, 882-84 (2000) (chronicling number of leagues which formed in early 2000s as single entity enterprises).

101. See Kaiser, *supra* note 51, at 11-12; see also McCann, *supra* note 56 (noting that UFC, unlike other leagues mentioned, “involves individual fights rather than team play”); Sullivan, *supra* note 100, at 882.

102. See Kaiser, *supra* note 51, at 11.

103. See *id.* at 2, 12-20 (noting cause of decline in single entity leagues has been attributed to variety of factors overall, it has been argued that “the advantages of such a business structure are illusory in nature and are outweighed by the disadvantages of a ‘single entity’ structure”).

104. See *id.*

105. See Jordan Heck, *When will the XFL return? What to know about The Rock’s football league for 2022*, SPORTING NEWS (Oct. 1, 2020), <https://www.sportingnews.com/us/nfl/news/xfl-return-the-rock-football-league/qes-bar5bg0qfzdxoo7z3blo2> [<https://perma.cc/BA8G-94HU>].

Nevertheless, in deciphering whether a professional sports league organized to be a single entity league will pass muster, the analysis will likely focus on the precedent laid out in *Copperweld*, *Fraser*, and *American Needle*.¹⁰⁶ It is worth noting that many legal scholars believe that Supreme Court precedent exists that creates an “exception to the exception” for single entity leagues, known as the “sham test.”¹⁰⁷ In brief summation, if a corporate promoter seeks to create or maintain a single entity merely for purposes of avoiding antitrust scrutiny, then the courts may not grant such single entity protections to the promoter.¹⁰⁸

III. ANTITRUST LAWS AND FUTURE PRIVATE EQUITY INVESTMENT: MLS AS A CASE STUDY

Generally, the relaxation of ownership restrictions would represent a positive development in terms of American sports leagues’ antitrust liabilities. In the First Circuit’s landmark decision in *Sullivan v. National Football League*, the owner of the New England Patriots challenged NFL policy prohibiting him from selling shares of the franchise to the public as anticompetitive.¹⁰⁹ In *Sullivan*, the First Circuit ultimately deferred to the District Court’s finding “that NFL teams . . . compete against each other for the sale of their ownership interests,” opening up the league’s ownership policies to antitrust suits.¹¹⁰ By eliminating ownership restrictions in the manner currently being explored by the leagues as discussed in Parts I and II of this Article, leagues would seem to block off one avenue of attack from plaintiffs on antitrust grounds.¹¹¹ However, by permitting investment funds to acquire minority interests in league

106. For further discussion of important case precedent, see *supra* notes 71-99 and accompanying text.

107. MacMillan, *supra* note 93, at 515.

108. See *id.* at 516 (citing *Schenley Distillers Corp. v. United States*, 326 U.S. 432 (1946)).

109. 34 F.3d 1091, 1095 (1st Cir. 1994).

110. *Fraser v. Major League Soccer, L.L.C.*, 284 F.3d 47, 54 (1st Cir. 2002) (reporting component of MLS’s ownership structure identified by *Fraser* Court was its degree of restrictions on sales of interests to outside investors versus existing operator-investors already working within MLS ownership ranks); see also *Sullivan v. Nat’l Football League*, 34 F.3d 1091, 1098 (1st Cir. 1994); see also *N. Am. Soccer League v. Nat’l Football League*, 670 F.2d 1249, 1250 (2d Cir. 1982); (supporting idea that teams compete against one another in attracting prospective owners has been key argument put forth in antitrust suits filed against Big Four by rival leagues).

111. For further discussion of the ownership policy changes currently being explored, see *supra* notes 3-48 and accompanying text.

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franchises, leagues that have previously been deemed to be “single entity” leagues risk undermining continued classification as such.¹¹²

This Part analyzes the validity of this argument, particularly in the context of MLS.¹¹³ MLS is the ideal case study for this Article because of the commentary and analysis concerning the league’s single entity status in *Fraser*, the developments in the league’s operations in the years following the *Fraser* decision, Commissioner Don Garber’s recent announcement that the league will permit private equity funds to acquire minority stakes in the near future, and the antitrust implications likely to arise out of the league’s December 2020 invocation of a force majeure clause in its current collective bargaining agreement with its players’ union.¹¹⁴

A. Background & Developments in MLS Since Fraser

Many observers point to 2002-03 as an “inflection point” for Major League Soccer’s operations.¹¹⁵ The First Circuit’s decision in *Fraser* was handed down in March 2002, and the Supreme Court denied *certiorari* several months later.¹¹⁶ In 2003, the MLS Player’s Union was formed to negotiate the 2004 collective bargaining agreement.¹¹⁷ In the time since these two monumental developments, the organization and operations of MLS have changed so dramatically that calls have gained traction to subject the league to the “sham” test, discussed in Part III, to “determine if the sole purpose of the single-entity structure [is] to gain an exemption from

112. *See id.*

113. For further discussion of the validity of the argument, see *infra* notes 115–161 and accompanying text.

114. *See* McCann, *supra* note 39 (outlining scenario in which good-faith negotiations in January 2021 between MLS and Player’s Union would fail and stating that “[i]f MLS players decertified [their union] and sued, the league’s ability to invoke single-entity status would be crucial to the litigation”).

115. *Major League Soccer’s Single Entity Structure*, *supra* note 86.

116. 537 U.S. 885, 885 (2002) (denying *cert*).

117. *See* Lenihan, *supra* note 92, at 894 (noting Players Union has negotiated each CBA since its formation; further, existence of player’s union would have significant impact on league’s antitrust vulnerabilities, since “a sports league that undertakes anticompetitive measures . . . will not face antitrust scrutiny if the measures were collectively bargained for because of the non-statutory labor exemption . . .”; further, only in event of player’s union decertification would league no longer be shielded from antitrust scrutiny; however, if MLS is able to successfully argue single-entity status, claims under Section 1 would still be unsuccessful; ultimately, as result of continuation of MLS’s single entity status, “the Players Union is stripped of bargaining leverage because decertification would not expose the league to [Section 1 claims]”).

antitrust law under Sherman Act Section 1.”¹¹⁸ Developments in several important areas are discussed in turn.¹¹⁹

When *Fraser* was decided, MLS was comprised of only twelve teams and “was struggl[ing] to maintain a competitive balance between league clubs.”¹²⁰ To this point, eight of the first ten MLS Cup Finals featured either Los Angeles Galaxy or D.C. United.¹²¹ These two clubs accounted for six of the ten MLS Cup championships awarded during that period.¹²² MLS argued in the early 2000s that under a free market approach, “only the most affluent teams would acquire the best players . . . threatening the earning potential and growth of the league as a whole”—a key fear pedaled by opponents to private equity investment for years.¹²³ As a result, the single-entity structure was necessary.¹²⁴ By the 2020 season, however, MLS had 26 teams competing; and expansion teams in Austin, St. Louis, Charlotte, and Sacramento will bring this total to 30 teams by the 2023 season.¹²⁵ The operator-investors of these expansion teams represent experienced sports and business professionals: David Tepper, owner of the Carolina Panthers, is the operator-investor of the Charlotte expansion team, and St. Louis’s operator-investor group is headed by Carolyn Kindle Betz, an executive of Enterprise Rent-A-Car.¹²⁶ The average MLS team is now worth \$313 million, and the teams with the highest valuation, fan support, and on-field success are no longer confined to the urban centers of the east and west coasts.¹²⁷

118. MacMillan, *supra* note 93, at 516.

119. For further discussion of these developments, see *infra* notes 115-142 and accompanying text.

120. MacMillan, *supra* note 93, at 518.

121. See Drew Farmer, *MLS Cup Champions: Looking Back at 16 Years of MLS Cup Champions*, BLEACHER REPORT (Mar. 10, 2012), <https://bleacherreport.com/articles/1095716-mls-cup-champions-looking-back-at-16-years-of-mls-cup-champions> [<https://perma.cc/63D6-DUWE>].

122. See *id.*

123. See MacMillan, *supra* note 93, at 516.

124. *Id.*

125. See Christina Settimi, *MLS Expansion Teams In Charlotte, Sacramento And St. Louis Have To Wait Another Year To Play*, FORBES (July 17, 2020, 4:50pm EDT), <https://www.forbes.com/sites/christinasettimi/2020/07/17/mls-expansion-has-to-wait-another-year-in-charlotte-sacramento-and-st-louis> [<https://perma.cc/8QLD-NU74>]; see also Tom Bogert, *MLS expansion boom continues at unprecedented rate in modern sports*, MAJOR LEAGUE SOCCER (Oct. 21, 2019, 2:45 PM), <https://www.mlssoccer.com/post/2019/10/21/mls-expansion-boom-continues-unprecedented-rate-modern-sports> [<https://perma.cc/98G6-VL5S>].

126. See Settimi, *supra* note 125.

127. See Chris Smith, *Major League Soccer’s Most Valuable Teams 2019: Atlanta Stays On Top As Expansion Fees, Sale Prices Surge*, FORBES (Nov. 4, 2019, 9:40am EST), <https://www.forbes.com/sitez/chris-smith/2019/11/04/major-league-socers-most>

B. Free Agency & Players' Rights

Perhaps the most significant change to MLS operations in the post-*Fraser* period has come via the Designated Player Rule (first introduced in 2007) and the introduction of free agency in the 2015 Collective Bargaining Agreement.¹²⁸ The Designated Player Rule “allows clubs to acquire up to three players whose salaries exceed their [salary cap] budget charges, with the club bearing financial responsibility for the amount of compensation above each player’s budget charge.”¹²⁹ In summarizing the impact of the Designated Player Rule, Professor Michael McCann noted that the Rule “enables MLS clubs to spend far above the salary cap in order to secure the services of a superstar player who would otherwise play in a more lucrative league.”¹³⁰ The payments to designated players (in excess of the salary cap) are borne by the individual clubs via their operator-investors, which suggests “a degree of autonomy by league clubs from its parent MLS.”¹³¹ To illustrate the far-reaching consequences of the Rule, the Los Angeles Galaxy, consistently a top three team in terms of MLS club valuations, have used the Rule to acquire players David Beckham in January 2007 and Zlatan Ibrahimovic in 2018, with the latter being characterized as “the best MLS Designated Player of all time.”¹³²

valuable-teams-2019-atlanta-stays-on-top-as-expansion-fees-sale-prices-surge/#49d75cd51b58 [https://perma.cc/ZNK3-AQJA] (noting that Atlanta United ranks atop most of MLS’s valuation metrics).

128. See MacMillan, *supra* note 93, at 507-08.

129. Lenihan, *supra* note 92, at 896 (noting that Designated Player’s salary initially counted against team’s salary cap and was subsequently expanded to allow for three players on each team to qualify; and further, Designated Player Rule has, itself, shifted over time to give more power to operator-investors at expense of League); see also Jakobsze, *supra* note 94, at 168 (“Despite only ten of MLS’s sixteen teams having exercised their option to sign a Designated Player . . . [in 2009] the League increased the maximum number of DPs to permit three per team roster because the initial implementation of the Designated Player Rule increased MLS’s notoriety and respect throughout the world.”); MLS Communications, *MLS Roster Rules and Regulations 2018*, MLS: MEDIA RESOURCES, (Mar. 2, 2018), <https://www.mlssoccer.com/league/official-rules/mls-roster-rules-and-regulations> [https://perma.cc/3WKL-UDHW].

130. Jakobsze, *supra* note 94, at 167 (asserting that Designated Player Rule “encourages autonomous behavior by operator/investors” and subsequent competition between teams for players “bears greater resemblance to the traditional sports league”) (emphasis in original); see also Michael McCann, *In Pursuit of Free Agency, Players Could Challenge MLS’ Single-Entity Status*, SPORTS ILLUSTRATED (Jan. 26, 2015), <https://www.si.com/planet-futbol/2015/01/26/mls-cba-playersunion-free-agency-single-entity-lawsuit> [https://perma.cc/J9JR-8ST3].

131. MacMillan, *supra* note 93, at 510.

132. See Tom Bogert, *Atlanta United retain top spot in Forbes’ annual MLS team valuations*, MAJOR LEAGUE SOCCER (Nov. 28, 2019, 4:00 PM), <https://www.mlssoccer.com/post/2019/11/04/atlanta-united-retain-top-spot-forbes-an>

The introduction of free agency via the 2015 CBA has further undermined MLS's contention that it should be granted single entity status. The free agency system introduced does give players greater control over their contracts and movement between MLS clubs, but critics argue that "the mere existence of the single-entity structure suppresses the potential value of that player's contract."¹³³ Professor Steven Bank argues that "[f]ull, unrestricted, free agency of the kind now in operation . . . is antithetical to the single-entity structure. It requires a fully functioning market with economically independent teams bidding on a player to establish his market price."¹³⁴ In sum, the argument has been made that continued single entity status for MLS has enabled the league to maintain a "stranglehold" on player movement and salary bidding in the past decade.¹³⁵ To illustrate this point further, commentators believe that MLS's single entity status empowers the league in its 2020-21 labor negotiations with the player's union.¹³⁶ In the event that good-faith negotiations should fail and the players decertify their union, then "MLS's ability to invoke single entity status would be crucial to the litigation."¹³⁷

C. Technical Directors & Stadium Financing

In addition to the aforementioned changes in MLS operations and organization post-*Fraser* that highlight the negative consequences of continued single entity classification, various other examples of MLS ceding control to operator-investors in areas historically reserved for the league are evident. Teams are given unfettered discretion in hiring their own "Technical Directors"—akin to MLB general managers in their control over personnel and

nual-mls-team-valuations [https://perma.cc/9LLP-A6AY]; Dan Hajduky & Sachin Dave Chandan, *Zlatan Ibrahimovic, the best MLS Designated player of all time? We make the case*, ESPN (Oct. 13, 2019), https://www.espn.com/soccer/major-league-soccer/story/3963152/zlatan-ibrahimovic-the-best-mls-designated-player-of-all-time-we-make-the-case [https://perma.cc/K6VU-4XC3]; see also Robert M. Bernhard, *MLS' Designated Player Rule: Has David Beckham Single-Handedly Destroyed Major League Soccer's Single-Entity Antitrust Defense?*, 18 MARQ. SPORTS L. REV. 413, 426 (2008).

133. MacMillan, *supra* note 93, at 507.

134. Steven Bank, *Who Won the MLS Labor Negotiations? Single Entity*, AMERICAN SOCCER NOW (Mar. 5, 2015), http://americansoccernow.com/articles/who-won-the-mls-labor-negotiations-single-entity [https://perma.cc/A63X-ARMT].

135. MacMillan, *supra* note 93, at 509.

136. See McCann, *supra* note 39.

137. *Id.*

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the team's farm system.¹³⁸ Additionally, numerous MLS franchises have started to build soccer-specific stadiums, requiring the operator-investor to secure public and private financing without the assistance of MLS.¹³⁹

Some believe that the expansion and competitive balance of MLS, the introduction of free agency and the Designated Players Rule, and other factors indicate that the operator-investor's "autonomy and [individual] entrepreneurial interests" have weakened the MLS's "grip on the single-entity classification."¹⁴⁰ The July 2020 announcement from the MLS Commissioner that the league will modify its ownership policies to allow private equity funds to acquire minority interests in league franchises may increase the likelihood that courts may revisit MLS's single entity status, as discussed next.

D. A Fresh Analysis of MLS's Purported Single-Entity Status

Although the MLS policy regarding changes to the operator-investor structure likely will not be officially approved until sometime in 2021, MLS Commissioner Don Garber did acknowledge in a July 2020 appearance on CNBC's *Closing Bell* that the league was "close" to finalizing a plan.¹⁴¹ Assuming that an amendment to the MLS LLC Agreement is approved and regardless of whether the amendment would only permit private equity funds to acquire *minority* stakes in franchises, serious challenges could be brought al-

138. Lenihan, *supra* note 92, at 896; *see also* Jakobsze, *supra* note 94, at 165 (describing role of technical directors as "generally positioned higher than the coach in the front office and report[ing] directly to the owner" and noting further rise of technical directors over time, in 2008, only six out of fourteen MLS clubs had hired one, whereas by 2011, this number had risen to seventeen out of eighteen clubs.).

139. *Fraser v. Major League Soccer, L.L.C.*, 284 F.3d 47, 53 (1st Cir. 2002) (noting MLS "negotiate[d] all stadium leases and assume[d] all related liabilities" as key component of its single entity status); Thomas D. Stuck, *Facility Issues in Major League Soccer: What Do Soccer Stadiums Have to Do with Antitrust Liability?*, 14 MARQ. SPORTS L. REV. 551, 565 (2004) (noting Fraser Court undoubtedly could not have foreseen an instance where potential investors build soccer-specific stadium "in hopes of winning a bid for an expansion team" and further noting under these circumstances, "potential investors are acting solely under individual, entrepreneurial interests, hoping that MLS will grant them a team and the right to buy into the league - a \$25 million entrance fee"); *see also* Lenihan, *supra* note 92, at 896; Erik Spanberg, *Eastland proposal calls for \$50 million in taxpayer funding, focus on MLS youth academy*, CHARLOTTE BUS. J. (Oct. 26, 2020, 5:44 PM), <https://www.bizjournals.com/charlotte/news/2020/10/26/county-city-funding-for-eastland-makeover.html> [<https://perma.cc/VQS8-7GWT>].

140. Lenihan, *supra* note 92, at 896.

141. *How the 2020 Audi MLS Cup Playoffs will work: Qualifying and competition format*, MAJOR LEAGUE SOCCER (Sept. 11, 2020), <https://www.mlssoccer.com/post/2020/09/11/how-2020-audi-mls-cup-playoffs-will-work-qualifying-and-competition-format> [<https://perma.cc/VGE3-DHZZ>]; *see also* Young, *supra* note 33.

leging that such a significant change to the operator-investor structure, coupled with the changes to MLS operations discussed earlier in this Part, dismantle MLS's single entity status. The three-factor framework previously discussed informs this analysis.¹⁴²

1. *Unity of Interest*

Fraser relied heavily on language in *Copperweld* describing a “unity of interest” necessary for multiple related businesses to achieve single entity classification.¹⁴³ *Copperweld* described a “unity of interest” as existing when parties’ objectives are common and their “actions are guided or determined not by two separate corporate consciousnesses, but one.”¹⁴⁴ By inviting a regime where the corporate consciousness at the operator-investor level could be drastically altered and become divergent from the corporate consciousness of MLS, the private equity policy could be seen as undermining MLS's single entity status on the “unity of interest” point.

The argument advanced by MLS (and many other leagues) on the “unity of interest” idea is that “combination is essential to creating the ultimate product . . . [o]ne, two, or even a handful of teams cannot produce the ultimate league product: championship athletic competition.”¹⁴⁵ The common objective purportedly sought, under the single entity model, is the management and economic growth of the league.¹⁴⁶ However, when private equity funds are introduced to the equation—even as minority operator-investors, the objective sought changes. Now, the objective is to maximize value for the fund's fiduciaries.¹⁴⁷ Accomplishing the objective of value maximization (and avoiding fiduciary litigation) at the operator-investor level may require a number of actions by both the club's majority and minority interest-holders that may diverge from

142. For further discussion of the three-factor framework, see *supra* notes 143-161 and accompanying text.

143. *Fraser*, 284 F.3d at 58.

144. *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752, 771 (1984).

145. *Grow*, *supra* note 59, at 186-87.

146. *See id.* at 188.

147. *See Meinhard v. Salmon*, 164 N.E. 545, 546 (N.Y. 1928) (describing fiduciary duties owed in general partnerships in business, which by extension, can include private equity funds organized as limited partnerships); *see also generally Dodge v. Ford Motor Co.*, 204 Mich. 459, 507 (1919) (affirming principle of “shareholder primacy” in corporation context, stating that “[a] business corporation is organized and carried on primarily for profit of stockholders. The powers of the directors are to be employed for that end”).

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the objective of MLS as the parent entity of the club.¹⁴⁸ Maximization of club value for fiduciaries could take various forms, not merely the objective common with MLS to promote the product—competitive soccer.

Additionally, as previously discussed, investment funds are typically structured so as to have a limited life cycle: the managers “raise the capital for the fund, deploy that capital into investments, hold those investments [often for 7 to 15 years], and then sell those investments and return the capital to the fund’s investors.”¹⁴⁹ Commissioner Garber, himself, indicated that prior to the July 2020 announcement, MLS has historically “tended on the side of owners with strong local links,” who the league would be confident would be investing for the long term, rather than short term objectives common to private equity.¹⁵⁰ This previous policy allowed MLS to “know who [its] owners are so that [we] understand how long . . . their vision for participating in the league [is].”¹⁵¹ Whereas the league may continue to favor long-term stability at the operator-investor level, this goal may be at odds with investment funds established for limited terms (i.e. the seven to fifteen year range) by obtaining value and then cashing out of the ownership enterprise entirely, with little regard for the stability of the league after the fund’s holding period has ended.

Needless to say, permitting investment funds to acquire ownership stakes bucks the longstanding assertion that the MLS and its operator-investors constitute one “corporate consciousness.”¹⁵² The introduction of a new actor to the MLS ownership structure—the fund managers—severely undercuts the “unity of interest” argument for single entity classification.

148. See Velarde, *supra* note 97, at 978 (“While MLS might aspire to be the premier professional soccer league in the country, its individual team investors are likely most interested in making a profit.”).

149. Alexander J. Davie, *The Life Cycle of a Private Equity or Venture Capital Fund*, STRICTLY BUS. (June 29, 2017), <https://www.strictlybusinesslawblog.com/2017/06/29/the-life-cycle-of-a-private-equity-or-venture-capital-fund> [https://perma.cc/YH6M:J5JV].

150. Paul Nicholson, *MLS discusses private equity options for clubs to help cover pandemic losses*, INSIDE WORLD FOOTBALL (Oct. 27, 2020), <http://www.insideworldfootball.com/2020/07/13/mls-discusses-private-equity-options-clubs-help-cover-pandemic-losses> [https://perma.cc/8EXW-48CS].

151. *Id.*

152. *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752, 771 (1984).

2. *Common Decision-Making Structure*

At present, the decision-making structure inherent in MLS is fragmented between the league and its member clubs. At the league-level, the Board of Governors has the “sole authority to manage, control and make all decisions relating to MLS.”¹⁵³ This includes the approval rights over the annual budget, adoption of major policy changes, and expansion grants.¹⁵⁴ Each member franchise in the league is granted one “Governor” on the Board, with the requirement that the Governor be the “principal owner” of the franchise and hold “no less than a 35% ownership interest” in the club.¹⁵⁵

In spite of this apparent centralization at the league-level, much of the day-to-day operational decisions at the club-level are made without approval from the Board of Governors, leading some to classify MLS as a “mixed-mode centrally planned league” where the clubs “do[] not seem to have separate ownership in form,” but in practice, operator-investors “retain a large portion of the revenues from the activities of their teams; and each has limited sale rights in its own team that relate to specific assets and not just shares in the common enterprise.”¹⁵⁶

By allowing investment funds into the decision-making process within the member clubs, further fragmentation substantively and procedurally will occur at the club-level, and by extension, within the Board of Governors. The pendulum will undoubtedly swing more in the direction of the individual clubs’ autonomy, as fund managers may seek to exert influence over the management of club-retained revenue and assets in order to maximize value for their fiduciaries. Although statements from league officials indicate that MLS envisions that these funds will remain “passive” during the terms of their investment, unchecked fund managers could seek a greater say in personnel decisions, stadium financing, and other areas previously mentioned where clubs and Technical Directors have gained power, in order to maximize returns for their

153. Miki Turner, *A Look at the MLS Constitution (Part III): The Board of Governors*, SOCCERESQ (Nov. 12, 2019), <https://socceresq.com/2019/11/06/a-look-at-the-mls-constitution-part-iii-the-board-of-governors> [<https://perma.cc/ZW6D-Y5AQ>].

154. *See id.*

155. *See id.*

156. Marc Edelman & Elizabeth Masterson, *Could the New Women’s Professional Soccer League Survive in America? How Adopting A Traditional Legal Structure May Save More Than Just A Game*, 19 SETON HALL J. SPORTS & ENT. L. 283, 304 (2009); *see also id.* (arguing that MLS’s operator-investors act as “team managers” and not “ordinary stockholders”).

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funds' investors.¹⁵⁷ Indeed, in clubs with no clear “majority” operator-investor (i.e. where the “controlling” or “managing” operator-investor holds only a plurality), the role of the fund managers in key decisions could become especially significant.¹⁵⁸

3. *Enhancing Consumer Welfare*

Although the Sherman Act was not passed into law with sports specifically in mind, in the past several decades some commentators have noted that “sports leagues are every bit the commercial enterprises as every other business that’s subject to antitrust law.”¹⁵⁹ In recognizing that single entity status applies, a court must analyze whether such recognition benefits the ultimate consumer; if the single entity defense is upheld, the aggrieved consumer will likely be prevented from successfully challenging the alleged anticompetitive behavior. The idea of enhancing consumer welfare is certainly tied to the “sham” test discussed in Part III.¹⁶⁰ Allowing MLS to continue to reap the benefits of single entity status when its operations have changed so drastically since *Fraser* and its ownership structure will change in the coming months will undoubtedly detrimentally impacts a number of “consumers” bases. As noted before, single entity status has already been likened by some commentators as a “stranglehold” on players’ rights, yet potentially aggrieved consumers could also include fans, broadcasting companies and business entities passed over by the league for competitors, and even private equity firms shut out of the investment process.¹⁶¹ By effectively precluding any challenges to MLS’s behavior as anticompetitive,

157. See Le & Lynn, *supra* note 4 (“What leagues want is long-term, passive financial partners – the opposite of the strategy executed by most private equity firms.”).

158. Eben Novy-Williams, *LAFc gets record-setting valuation of more than \$700 million*, L.A. TIMES (Feb. 28, 2020, 4:42 PM), <https://www.latimes.com/business/story/2020-02-28/lafc-owners-buy-out-vincent-tan-stake-record-mls-valuation> [<https://perma.cc/UV5W-HKKU>]. (noting Los Angeles Football Club as good example of such arrangement; further noting LAFC’s operator-investor group totals over two dozen people, with three collectively serving as “controlling” group.).

159. *Competition Corner – Episode 9: How Antitrust Issues Play Out in Sports*, WINSTON & STRAWN LLP (Oct. 13, 2020), <https://www.winston.com/en/competition-corner/episode-9-how-antitrust-issues-play-out-in-sports.html> [<https://perma.cc/KH7J-6UGX>] [hereinafter, “Winston & Strawn”].

160. See MacMillan, *supra* note 93, at 515. For purposes of the analysis in this Subpart, “consumer” is construed broadly to encompass any injured participant in the relevant market, in addition to “consumers” who consume the sport product. See, e.g., *N. Am. Soccer League v. Nat’l Football League*, 670 F.2d 1249, 1250 (2d. Cir. 1982) (where Second Circuit stepped in to protect NASL—participant in market for “professional sports capital and entrepreneurial skill”—from NFL’s anticompetitive ownership policies).

161. Jakobsze, *supra* note 94, at 168; McCann, *supra* note 56.

competition in the relevant area (whether it be broadcasting, business opportunities, etc.) is stifled.

IV. THE NBA'S PRIVATE EQUITY MODEL AS A MEANS TO SALVAGE THE SINGLE ENTITY DEFENSE

Although veteran leagues such as MLS may be better equipped to withstand heightened antitrust scrutiny related to actions taken involving broadcasting, expansion, relocation, and players' rights, fledgling single-entity leagues already maimed by the COVID-19 pandemic may face a double bind: sacrifice their single entity protections to obtain much-needed capital from investment funds or turn away private equity and face serious financial repercussions. Perhaps the best course of action—for MLS and its single entity peers—may be to follow in the footsteps of the NBA.

A. The NBA-Dyal Exclusive Partnership

Rather than allow numerous private equity funds to obtain ownership interests in numerous teams furthering the narrative that each team is a “separate corporate consciousness,” these leagues could grant exclusivity to one singular fund in this space. The NBA did just that when it selected Dyal Capital Partners as the “league’s sole pre-approved institutional buyer.”¹⁶² Dyal is the only entity permitted to own stakes in multiple teams, and the NBA owners voted in favor of exempting Dyal from a policy that limits franchises from having no more than twenty-five beneficial owners.¹⁶³ Furthermore, in advance of its partnership with the NBA, Dyal subjected its LPs to a seven-year lock-up period, providing the NBA with a guarantee of its commitment for, at the very least, that timeframe.¹⁶⁴

This solution could be particularly practical in the MLS context, where the league has a high interest in preserving its single entity status amidst a potential lockout in 2021.¹⁶⁵ A number of hurdles needed to provide Dyal with access to the NBA’s minority stakes do not exist in MLS. As discussed, MLS has a history of one

162. Le & Lynn, *supra* note 4; *see also* Jakobsze, *supra* note 94, at 168; MacMillan, *supra* note 93, at 509-515.

163. *See id.*

164. *See* Alex Lynn, *Championship rings and All-Star tickets: Inside Dyal's NBA strategy*, PRIVATE EQUITY INT'L (Sept. 22, 2020), <https://www.privateequityinternational.com/championship-rings-and-all-star-tickets-inside-dyals-nba-focused-strategy> [<https://perma.cc/H48H-QJDQ>].

165. *See* McCann, *supra* note 39.

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operator-investor controlling more than one team.¹⁶⁶ Similarly, MLS does not have a limitation on the number of individuals that can serve in an operator-investor group; LAFC's operator-investor group includes over thirty individuals.¹⁶⁷ Such an exclusivity policy would bolster single entity leagues' argument that they are maintaining some semblance of a "parent-subsidiary" relationship, as in *Copperweld*, whereby the league has pre-approved which fund is entitled to ownership interests in its member clubs.

B. Potential Obstacles Preventing the Selection of an Exclusive Private Equity Fund

Nevertheless, potential obstacles to this strategy exist. A situation similar to that in *American Needle* could arise whereby a competitor fund to the one ultimately selected by the league files suit alleging anticompetitive behavior between the league and the pre-approved fund.¹⁶⁸ This predicament could soon arise in the NBA context, as Arctos—in a direct challenge to Dyal's exclusivity—reportedly sought permission to be allowed to purchase minority stakes in NBA teams in January 2021.¹⁶⁹ Whether such an arrangement where *both* Dyal and Arctos are permitted to purchase minority stakes in NBA clubs, is possible under the NBA's agreement with Dyal will surely have significant antitrust implications.

Likewise, a collective action problem at the club level could derail this plan. Individual franchises could oppose such a coordinated move by the league in an action similar to that taken by the Dallas Cowboys in the mid-1990s.¹⁷⁰ In that instance, the Cowboys—believing their intellectual property rights to be more valua-

166. See *Major League Soccer's Single Entity Structure*, *supra* note 86.

167. See Ian Thomas, *The overachieving owners of the Los Angeles Football Club*, L.A. Bus. J. (Mar. 1, 2018), <https://www.bizjournals.com/losangeles/news/2018/03/01/overachieving-owners-of-los-angeles-football-club.html> [<https://perma.cc/2GBX-RVKT>].

168. See Selin Bucak & Lina Saigol, *Sports are back on the pitch. So is private equity – and the competition is heating up*, MARKETWATCH (June 30, 2020), <https://www.marketwatch.com/story/sports-are-back-on-the-pitch-so-is-private-equity-and-the-competition-is-heating-up-2020-06-30> [<https://perma.cc/6ZGZ-S7XX>] (noting fierce competition between private equity funds seeking franchise acquisitions in Europe has already been reported).

169. See Eben Novy-Williams, Scott Soshnick & Brendan Coffey, *NBA Minority Stake Sales May Expand as Arctos Seeks to Join Dyal as Approved Investor*, SPORTICO (Jan. 8, 2021), <https://www.sportico.com/leagues/basketball/2021/arctos-nba-investments-1234619926> [<https://perma.cc/G9YV-QTQ5>].

170. See Winston & Strawn, *supra* note 159; see also Michael A. McCann, *American Needle v. NFL: An Opportunity To Reshape Sports Law*, 119 YALE L.J. 726, 733, n.31 (detailing efforts by Dallas Cowboys' owner Jerry Jones to "extricate his team from NFL licensing requirements").

ble than other NFL teams—objected to the NFL’s plan to assign all of its member club’s intellectual property to a joint licensing arm of the league, fearing that such a move would dilute its value.¹⁷¹ Certain members of leagues such as MLS may see value in auctioning off minority interests on their own, rather than pooling such minority interests to the league to later be sold off to one singular fund. Other club members may not see any value at all in participating in a league-wide effort; as an example, Dyal is expected to only acquire stakes in 5-8 NBA franchises.¹⁷²

An essential component of any league-wide strategy to preserve single entity status will be ensuring that these funds remain as passive as possible, by removing them, to the greatest extent feasible, from the day-to-day decisions at both the league and the club levels. In the NBA-Dyal partnership, for example, Dyal investors will be given access to tickets, concierge services, NBA All-Star Weekend events, and championship rings (should a team with which Dyal is invested wins the NBA Finals).¹⁷³ The extent to which Dyal investors will be entitled to true ownership “perks” (i.e. a voice in the management of the team) outside of this list is presently unknown.¹⁷⁴ A similar strategy in MLS could be implemented, with the league emphasizing the “investor” component of the “operator-investor” title.

V. CONCLUSION

Overall, the announcement that private equity funds will be permitted to acquire minority stakes in franchises across a number of single-entity and joint venture leagues may present one of the first major legal predicaments regarding the single entity question since *American Needle*. In the unique case of MLS, serious inquiries into whether the league continues to operate as a single entity or is merely operating under the guise of such will likely upend the league’s business already rattled by COVID-19. While investments in such leagues will almost certainly prove worthwhile for profit-

171. See *Dallas Cowboys Football Club, Ltd. v. Nat’l Football League Trust*, No. 95-9426, 1996 WL 601705 (S.D.N.Y. Oct. 18, 1996) (plaintiffs asserting that NFL’s centralized exclusive license policy constituted violation of Section 1 of Sherman Act); see also McCann, *supra* note 170, at 759–60 (describing how Dallas Cowboys and New England Patriots both sought out independent licensing contracts, drawing ire of league); *id.* at 760 (noting Cowboys would ultimately reach out-of-court settlement with NFL, which allowed them exemptions in certain areas to general licensing rule); Winston & Strawn, *supra* note 159.

172. See Lynn & Le, *supra* note 4.

173. See Lynn, *supra* note 164.

174. See *id.*

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seekers, fund managers should take strides to further understand the effect their investments may ultimately have on the league's antitrust liabilities.