
Blind Draw: How Major League Soccer's Single Entity Structure and Unique Rules Have Impacted Soccer in the United States

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I. INTRODUCTION

We begin with an extraordinary hypothetical, please play along. Imagine you grew up in Georgia. Not that Georgia.¹ The other Georgia, the capital is Tbilisi, not Atlanta.² In fact you grew up right in Tbilisi. From a young age you loved to play p'ekhburt', a game known in the United States as soccer.³ You developed tremendous skill by playing frequently as a child and turn into a very good player by the time you are a young adult. You post a highlight video online and e-mail the link out so that player agents and scouts from leagues all over the world can watch you play. Soon you sign an agent and then you sign a contract with a local professional team, Dinamo Tbilisi.⁴ After several years your contract with Dinamo runs out and you yearn to travel abroad. You ask your agent to see if any teams in the United States are interested. You have always wanted to play in the United States professional league, or Major League Soccer (MLS).⁵ Your agent informs you that there is interest from the New York Red Bulls. You fly to New York, meet with team officials and fall in love with the city. You fly home, your immigration paperwork is being processed and you decide to sign with the Red Bulls. The phone rings. It's the MLS office in New York.

Something has been overlooked. Another team has filed a discovery claim for your services prior to your meeting with New York. Remember that highlight video you e-mailed out all those years back? Dinamo wasn't the only team that saw it. The Columbus Crew, a Major League Soccer club based in Columbus, Ohio, pulled the video clip up when they heard you might be interested in coming to MLS. The Crew liked what they saw and they filed a discovery claim with the Major League Soccer office. Now you are no longer free to contract your services to the New York Red Bulls.⁶ Because the Crew filed a discovery

¹ *About Georgia*, (2014), <http://georgia.gov/about-georgia>, (last visited December 2014)

² Central Intelligence Agency, *The World Factbook: Georgia*, (2014), available online at <https://www.cia.gov/library/publications/the-world-factbook/geos/gg.html>.

³ *Id.*

⁴ *Id.*

⁵ Mark W. Lenihan, Note, *Major League Soccer Scores an Own Goal: A Successful Joint Venture Attains Market Power in an International Sport*, 62 DePaul L. Rev. 881 (2013).

⁶ 2014 MLS Roster Rules, MLSsoccer.com, <http://pressbox.mlssoccer.com/content/roster-rules-and-regulations>, (last visited December 20, 2014).

claim prior to the Red Bulls filing a claim the Crew owns your rights if you choose to play in MLS.⁷ Your options are to play your trade outside of the United States or to move to Columbus, Ohio.

a. THE DISCOVERY PROCESS

MLS was formed as a single legal entity. Because MLS is a single entity players do not sign contracts with individual teams, instead they sign a contract with the league. The discovery process is a mechanism for assigning unsigned international players to MLS teams. Each offseason, teams submit a list of six players whom they would be interested in signing. By doing so the team receives exclusive negotiating rights with those players until the end of the season. The players must be undrafted and unsigned in order for a claim to be valid. If there is a tie, meaning if two teams submit a discovery claim on the same day, then the team that is higher in the discovery ranking will obtain exclusive rights.⁸ The discovery ranking is established based on a club's record during the previous season. Teams with worse records get a better ranking. Teams who have submitted a discovery claim on a player can also accept assets in exchange for the right to negotiate with that player.⁹

The consequence of this rule is that you, in our example, are not able to contract with the team you would like. In fact, if multiple teams submit simultaneous discovery bids you must go to work for the employer who was least successful during the last cycle. The discovery system is one example of the unique player acquisition methods that MLS employs. There are number of examples of this rule frustrating players and teams.¹⁰ Protected by the league's single entity status these methods were developed in an effort to protect the league and encourage growth during the leagues infancy and have shaped how the business of soccer is done in the United States.

⁷ *Id.*

⁸ *Id.*

⁹ See Geoff Gibson, *Discovery Claims are an Embarrassment to MLS*, Stumptown Footy, (Feb 16 2013, 9:02 a.m.), <http://www.stumptownfooty.com/2013/2/16/3995274/discover-claims-embarrassment-mls-portland-timbers>.

¹⁰ *Id.*

b. PURPOSE

The purpose of this paper is to discuss MLS's player acquisition methods to determine if the methods employed are still beneficial, to whom they are beneficial, and what would occur if those methods were to undergo an antitrust challenge today. Throughout this analysis the health of soccer in the United States and the financial success of the league and the players remain paramount.¹¹ MLS underwent an antitrust challenge in *Fraser v. MLS* and came out classified as a "hybrid" single entity.¹² The First Circuit effectively gave MLS an exemption from traditional American antitrust law.¹³ That immunity protects the leagues system of player control.¹⁴ MLS has evolved since *Fraser*. The factual analysis about the league's activity would be much different now.¹⁵ Positive league-wide changes are occurring at a rapid rate. Stadiums are being built, city-backed investors are bidding to join the league, and fans are flocking to games.¹⁶ The league is growing and has a higher-level of talent on display.¹⁷

MLS's growth has placed it at a tipping point. The league's current economic reality makes it vulnerable to an antitrust challenge.¹⁸ Yet, the league and the players may not be able to financially survive such a challenge.¹⁹ The two parties in this conflict conduct a balancing act as they attempt to grow the popularity of soccer in the United States while creating a sustainable economic benefit for themselves. This conflict has plagued soccer in the United States since MLS's inception.²⁰ Players, administrators, and owners have all made sacrifices and followed unique rules in order to grow the game.²¹ This article sets out

¹¹ Matthew C Garner, *Time To Move On? Franchise Relocation in MLS, Antitrust Implications...and the Hope That FIFA is Not Watching*, 16 Sports Law. J. 159, 160 (2009).

¹² Omar Hafez Ayad, *Taking the Training Wheels Off the League: Major League Soccer's Dysfunctional Relationship with the International Soccer Transfer System*, 10 Vand. J. Ent. & Tech. L. 413 (2008).

¹³ *Id.*

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ See Don Garber interview, *Major League Soccer: State of The League Roundtable*, transcript available at http://www.asapsports.com/show_conference.php?id=105032 (last visited Dec. 21, 2015).

¹⁷ *Id.*

¹⁸ Lenihan, *supra* note 5.

¹⁹ *Id.*

²⁰ Matthew J. Jakobsze, Comment, *Kicking "Single-Entity" to the Sidelines: Reevaluating the Competitive Reality of Major League Soccer After American Needle and the 2010 Collective Bargaining Agreement*, 31 N. Ill. U. L. Rev. 131, 157 (2010).

²¹ *Id.* at 157, 158

to determine the current relevance and necessity of some of those rules. It will start by examining how the league was formed and the legal developments surrounding the league's current antitrust status. It will then examine the changes the league has undergone since the analysis conducted by the *Fraser* court. Part III will delve into the competitive realities that MLS faces and how those realities affect its legal future. Part IV will explore the rules governing talent acquisition in MLS and the impact of those rules. Part V will focus on possible legal action that could cause changes in the current system. Part VI will conclude with an analysis of the durability of the current system and the feasibility of change.

Ultimately, changes have occurred that make MLS vulnerable to an antitrust challenge. A challenge would be a setback short term but it may prove to be positive not only for the players but also for MLS and the growth of soccer in the United States. MLS's current form was necessary for the league to grow.²² It would be beneficial for MLS to re-examine the league's form and how that form impacts the league's place in world soccer. The players and the league would benefit from moving to avoid an antitrust challenge by re-structuring certain rules to allow players and clubs greater autonomy. Such a move would potentially thwart a legal challenge while enhancing the quality of the league.²³

c. SCOPE

Specific details from the most recent Collective Bargaining Agreement (CBA) between the Major League Soccer Players Union (MLSPU) and Major League Soccer are still limited.²⁴ The agreement announced on March 4, 2015 replaced the previous agreement that spanned the 2010-2014 seasons and expired on January 31, 2015. The new agreement will expire at the conclusion of the 2019 season.²⁵ The 2010-2014 CBA was agreed upon on principle but never completely finalized and the two sides operated

²² Lacie L. Kaiser, *The Flight from Single Entity Structured Sports Leagues*, 2 Depaul J. Sports L. & Contemp. Probs. 1, 2 (2004).

²³ Lenihan, *supra* note 5

²⁴ Jeff Carlisle, *How Major League Soccer Owners and Players Agreed on a CBA, Avoided a Strike*, ESPNFC, (March 6, 2015), <http://www.espnfc.us/major-league-soccer/19/blog/post/2334054/how-major-league-soccer-owners-and-players-agreed-a-cbaavoided-a-strike>.

²⁵ *Major League Soccer & MLS Players Union Reach Agreement in Principle on New CBA*, MLSsoccer.com, (March 5, 2015) <http://www.mlssoccer.com/news/article/2015/03/04/major-league-soccer-mls-players-union-reach-agreement-principle-new-cba>.

under a memorandum of understanding that established changes to the original 2003-2010 CBA.²⁶ For the purpose of legal analysis this article focuses on the rules followed from 2010-2014 that were established by the initial CBA and modified by the subsequent 2010 memorandum and will rely only on the publicly released details of the updates added as part of the March 2015 agreement.

II. THE HISTORY OF MAJOR LEAGUE SOCCER AND THE SINGLE ENTITY DEFENSE TO ANTITRUST ACTIONS IN PROFESSIONAL SPORTS

"I often think about that. I think about when foreign people are hired to come here to do [soccer] jobs. . . I think it can be very foreign for them - very, very difficult to understand all of the rules, and, I think more importantly, to understand why the rules are in place. . . . I think without that understanding of why the rules are there and what the methodology is behind them, you won't have enough appreciation or respect for [them]. And if you don't I think you're in an impossible situation, because they're not going to go away. – Jason Kreis, Head Coach, NYCFC²⁷

a. ANTITRUST ISSUES IN PROFESSIONAL SPORTS

Congress uses the power given to it by the Commerce Clause to prohibit certain anti-competitive restraints on trade.²⁸ Every major professional team sports league in the United States has been charged with monopolistic behavior.²⁹ Various courts have declared the National Basketball Association (NBA), the National Football League (NFL), and the National Hockey League (NHL) to be in violation of antitrust legislation.³⁰ Baseball holds a unique exemption from antitrust law because, in a widely divided decision, the Supreme Court held that professional baseball did not involve interstate commerce.³¹

Via the “non-statutory labor exemption” the NBA, NFL, and NHL impose restraints on trade that would be considered improper but for the fact that those restraints are bargained for during a valid collective

²⁶ *Report: MLS, Players Never Finalized Previous Labor Deal*, SI.Com Planet Futbol, (March 11, 2015) <http://www.si.com/planet-futbol/2015/03/11/mls-labor-agreement-never-finalized-2010-14-deal>.

²⁷ Graham Parker, *Expansion Draft Offers Insight into NYCFC and Orlando City SC's Ambitions*, ESPN (Sept. 25, 2014), <http://www.espnfc.com/major-league-soccer/19/blog/post/2054926/major-league-soccer-new-york-city-fc-and-orlando-city-ambitions-on-display-in-expansion-draft>

²⁸ U.S. Constitution, Art. I, § 8

²⁹ Stephen F. Ross, & Stefan Szymanski, *Open Competition in League Sports*, 2002 Wis. L. Rev. 625, 628 (2002).

³⁰ *Id.*

³¹ *Federal Baseball Club of Baltimore, Inc. v. National League of Professional Baseball Clubs*, 42 S. Ct. 465 (1922); *See also* Stuart Banner, *The Baseball Trust: A History of Baseballs Antitrust Exemption* (2013).

bargaining process.³² If football, hockey, or basketball owners behave improperly during a labor dispute or negotiation, the players can decertify the relevant players union and file an action in court to invalidate any restraint on trade that they feel is improper.³³

MLS players have not had that ability. The *Fraser v. MLS* decision left the players with no recourse other than a strike in the event of a labor dispute.³⁴ In *Fraser*, the First Circuit declared that MLS was not in violation of antitrust law; meaning decertification for a new antitrust challenge was out of the question.³⁵ Circumstances have changed.³⁶ In order to understand why MLS operates in its current manner and why MLS is now potentially susceptible to an antitrust action it is necessary to review the development and interpretation of the Sherman Act.

i. *The Sherman Act*

The Sherman Antitrust Act went into effect in 1890 in an effort to encourage competition and eliminate restraints on trade.³⁷ It was enacted in response to the “robber barons” of the 19th century. The Act is intended to discourage anti-competitive and monopolistic behavior.³⁸ Section 1 of the Sherman Act states, “Every contract, combination ... or conspiracy, in restraint of trade or commerce among the several States ... is declared to be illegal.”³⁹ Section 1 prohibits any concerted action that unreasonably restrains interstate trade or commerce.⁴⁰ Courts use two analyses to determine if a party is in violation of the act: the per se analysis, and the Rule of Reason analysis.⁴¹ The per se analysis is a strict analysis to determine if any agreement is directly anti-competitive.⁴² The Supreme Court held that sports is “an industry in which horizontal restraints on competition are essential if the product is to be available at all,” and that “the

³² Kaiser, *supra* note 22

³³ *Id.*

³⁴ *Id.*

³⁵ *Id.*

³⁶ *Id.*

³⁷ Garner at 162, *supra* note 11

³⁸ David Woods, *Hybrid Single Entities and the Market Power Requirement for Conspiracies to Monopolize Following Frazier: Are Courts Putting Form Over Substance?*, 2004 U. Ill. L. Rev. 1261, 1264 (2004).

³⁹ Jakobsze, *supra* note 20

⁴⁰ 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, 415 (2008).

⁴¹ Jakobsze *supra* note 20

⁴² *Id.*

integrity of the ‘product’ cannot be preserved except by mutual agreement.”⁴³ Thus, courts have foregone the per se analysis in favor of the Rule of Reason when evaluating athletic endeavors.⁴⁴

A Rule of Reason analysis is more subtle. It is a “fact-intensive inquiry whereby an agreement or restraint is deemed unlawful only if it causes an anti-competitive injury that outweighs pro-competitive effects.”⁴⁵ Courts examine several factors for the Rule of Reason factual analysis when determining if an agreement unreasonably restrains trade, including the rationale behind the restraint and the restraint’s impact on the relevant market.⁴⁶ Under Section 1 anti-competitive behavior is acceptable only if after a thorough examination of the facts the negative restraint is deemed necessary to create a greater positive effect. For a Section 1 analysis it is important to remember three things: (1) that there must be concerted action, meaning more than one actor, (2) if there is a pro-competitive rationale for the restrictive behavior courts will overlook it, and, (3) establishing relevant market power is essential.

Section 2 of the Sherman Act prohibits monopolization and attempted monopolization in interstate commerce.⁴⁷ Section 2 makes any “person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person . . . to monopolize any part of trade or commerce among the several States” a guilty party.⁴⁸ Section 2 bans three acts related to the concept of unfair market power.⁴⁹ (1) Monopolization, applicable when an actor has actually garnered the power necessary to control prices or excludes competition.⁵⁰ (2) Attempting to monopolize, when an actor commits an act or tries to enhance monopoly status with a “dangerous probability of success.”⁵¹ Finally, (3) conspiring to monopolize.⁵²

⁴³ Bernhard, *supra* note 40

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ *Id.* at 415, 416

⁴⁸ *Sherman Antitrust Act*, 15 U.S.C. §2 (2002)

⁴⁹ Bernhard, *supra* note 40.

⁵⁰ *Id.*

⁵¹ *Id.*

⁵² *Id.*

ii. *Copperweld and Early Decisions*

Since Section 1 of the Sherman Act requires a “contract, combination ... or conspiracy,” a single legal entity, or an “intra-enterprise” agreement, does not violate the Act. The seminal case on the single entity defense is *Copperweld Corp. v. Independence Tube Corp.*⁵³ In *Copperweld*, the Supreme Court held that a corporation and its wholly owned subsidiary could not “conspire” within the meaning of the Sherman Act.⁵⁴ *Copperweld* distinguished parent-subsidiary relationships from joint ventures by clarifying that parent-subsidiary acts are “unilateral” rather than “concerted,” and do not implicate Section 1.⁵⁵ An agreement between separate economic actors is “concerted” and does implicate Section 1. Even actors participating in a joint venture that substantially and unreasonably reduces competition in an outlined market violates Section 1 because a joint venture is “concerted” and not “unilateral.”⁵⁶

Every major sports league in the U.S. has had to face significant antitrust litigation.⁵⁷ Standard procedures like player drafts, salary caps, and reserve contract clauses that prevent players from changing teams when a contract runs out are all technically illegal restraints on competition. These violations have been allowed due to collective bargaining and non-statutory labor exemptions.⁵⁸ Since *Copperweld*, leagues have turned to the single entity defense when players unions have disbanded to file antitrust action and when renegade owners have filed antitrust claims.⁵⁹ Each league has tried to skirt antitrust law by labeling itself as a single entity incapable of conspiring under Section 1 of the Sherman Act.⁶⁰ For the most part the use of the defense has not served sports leagues well.⁶¹

After *Copperweld* leagues consistently made the argument that a league is a single entity.⁶² The structure of the argument was that the league acted as the parent company and teams as subsidiaries of that

⁵³ 467 U.S. 752 (1984)

⁵⁴ Paul D. Abbott, *Anti-Trust and Sports-Why Major League Soccer Succeeds Where Other Sports Leagues Have Failed*, 8 Sports Law Journal 1, 8 (2001).

⁵⁵ Jakobsze, *supra* note 20, at 141

⁵⁶ *Id.*

⁵⁷ Abbott, *supra* note 54, at 8.

⁵⁸ *Id.*

⁵⁹ *Id.*

⁶⁰ *Id.*

⁶¹ Jakobsze, *supra* note 20.

⁶² *Id.*

parent company.⁶³ Leagues argued that a league should be classified as one entity incapable of conspiring, rather than a joint venture, because there is a “unity of interest” in producing the entertainment that is “the league” and no single team has the capacity of putting out this product on its own.⁶⁴ There was a lot of litigation on the issue and Courts had a hard time classifying if actions taken by or within sports leagues were separate or unilateral.⁶⁵ The distinction is still difficult to make because professional sports all require some level of centralized decision-making in order for an effective product to be produced.⁶⁶ Ultimately very few sports leagues that attempted to claim antitrust immunity on the basis of the single entity defense were successful.⁶⁷ Some commentators have speculated that these early failures were attributable to the general difficulty courts have in applying antitrust laws combined with the difficulty of clearly applying the standard laid out in *Copperweld*.⁶⁸ The Supreme Court eventually clarified how the *Copperweld* decision applied to professional sport in *American Needle v. National Football League*.⁶⁹

iii. American Needle

With *American Needle v. National Football League* the Court determined that the NFL was not a single entity for the purpose of collectively licensing its intellectual property.⁷⁰ The case was a chance to clarify when a single entity defense is appropriate for a professional sports league.⁷¹ The case stemmed from a product licensing issue. Each NFL team owns its own intellectual property.⁷² The NFL had traditionally allowed all teams to license their intellectual property individually for apparel providers, television, and other commercial entities.⁷³ The NFL created NFL Properties, LLC as a separate entity in

⁶³ *Id.*

⁶⁴ *Id.*

⁶⁵ *Id.* at 142; see also James A. Keyte, *American Needle Reinvigorates the Single-Entity Debate*, 23 ANTITRUST 3, at 48, Summer 2009.

⁶⁶ Jakobsze, *supra* note 20.

⁶⁷ See, e.g., *Sullivan v. NFL*, 34 F.3d 1091, 1099 (1st Cir. 1994); *L.A. Mem'l Coliseum Comm'n v. NFL*, 726 F.2d 1381, 1388-90 (9th Cir. 1984); *N. Am. Soccer League v. NFL*, 670 F.2d 1249, 1252 (2d Cir. 1982); *McNeil v. NFL*, 790 F. Supp. 871 (D. Minn. 1992); *Levin v. NBA*, 385 F. Supp. 149, 150 (S.D.N.Y. 1974)

⁶⁸ Jakobsze, *supra* note 20, at 142-43.

⁶⁹ 130 S. Ct. 2201 (2010).

⁷⁰ *Id.*

⁷¹ Jakobsze, *supra* note 20, at 143.

⁷² *Id.*

⁷³ *Id.*

an effort to collectivize the intellectual property business that teams had previously done individually.⁷⁴ Until 2001 NFL Properties licensed its intellectual property to a number of vendors to manufacture apparel. American Needle was one of those vendors. In 2001 NFL Properties granted an exclusive license to Reebok to manufacture apparel for a 10-year period.⁷⁵ American Needle filed a claim asserting that the NFL, the individual teams, and Reebok had violated Sections 1 and 2 of the Sherman Act. The claim was based on the premise that because each individual team owned their own intellectual property separately the authorization by NFL Properties to restrict outside vendors was a conspiracy.⁷⁶

The Northern District of Illinois and the 7th Circuit ruled for the NFL holding that the league operated as single entity with a primary economic power base.⁷⁷ American Needle petitioned the Supreme Court for Review and the NFL joined asking for a complete single entity certification that would let the league establish restraints in areas beyond intellectual property including: player salaries, player movement, ticket sales, and other types of product sales.⁷⁸ The Court unanimously denied the NFL's petition, holding that the NFL and its teams did not exist as a single enterprise.⁷⁹ In doing so, the Court clarified *Copperweld* by choosing to focus on the actual activities of the parties rather than their legal form.⁸⁰ Even with a centralized management entity the league was not a single entity. Despite organizing to market their brands through a single outlet the teams were still "separate, profit-maximizing entities," and their interests in profit making through licensing team trademarks were not the same.⁸¹ The court did say that the teams were partially united in promoting the NFL but ultimately decided that the teams had diverse competing interests that prevented classification as a single entity.⁸²

⁷⁴ *Id.*

⁷⁵ *Id.*

⁷⁶ *Id.*

⁷⁷ *American Needle*, *supra* note 65

⁷⁸ Jakobsze, *supra* note 20, at 144.

⁷⁹ *Id.* at 145.

⁸⁰ *Id.*

⁸¹ *Id.*

⁸² Jakobsze, *supra* note 20.

To reach its final determination in distinguishing the NFL from a single entity the Court focused on a number of pertinent factors: (1) the independent ownership of the teams, (2) the uncommon profit-focused objectives of the independently managed teams, (3) that the teams compete for fans, (4) that the teams compete for ticket sales, and (5) that the teams compete for on and off-field talent. Finally, the Court outlined that if, from the viewpoint of a third party, the teams were potential competitors off the field it would establish that they were likely not a single entity.⁸³ The bottom line was that because the teams competed for profit off the field in a non-cohesive manner they could not be classified as a single entity. This is an important distinction for the purpose of classifying Major League Soccer's recent growth.

b. FORMING MLS IN THE SHADOW OF *SHERMAN*, FIFA, AND *BOSMAN*

A look at American soccer history is required to understand MLS's structure and why the league's policies pertaining to salary and player movement are highly restrictive.⁸⁴ Major League Soccer was formed with the *Copperweld* decision and the failure of other U.S. based professional soccer leagues in mind. Alan Rothenberg, the President of World Cup USA 1994, in concert with the United States Soccer Federation, formed the league in 1995. The formation process was focused on keeping costs down and avoiding the antitrust problems that other leagues had encountered.⁸⁵ Rothenberg created the league as a single entity so that it would be exempt from antitrust challenge and able to control labor costs.⁸⁶ Under the framework established MLS owned all of the teams in the league.⁸⁷ To garner needed capital, MLS sought outside investors (operator-investors) who, for a fee, would operate specific MLS teams subject to certain conditions and obligations.⁸⁸

⁸³ Jakobsze, *supra* note 20, at 145-46; *see also* Kaiser, *supra* note 22, at 8.

⁸⁴ N. Jeremi Duru, *This Field is Our Field: Foreign Players, Domestic Leagues, and the Unlawful Racial Manipulation of American Sport*, 84 Tul. L. Rev. 613 (2010).

⁸⁵ Aaron Staenberg, *Anti-Trust Law and Sports Franchise Relocation: Why the Single-Entity Defense Falls Short*, 9 Willamette Sports L.J. 1, 12 (2002).

⁸⁶ *Id.*

⁸⁷ *Id.*

⁸⁸ Abbott, *supra* note 54, at 4.

i. *The Formation and Form of MLS*

The Fédération Internationale de Football Association (“FIFA”) is a Swiss-based governing body that organizes professional soccer around the world. The United States Soccer Federation (“USSF”) is the entity that governs soccer in the U.S. The USSF exists as part of FIFA’s international framework. FIFA organizes and promotes professional soccer around the world and uses national governing bodies like the USSF to organize and regulate national leagues and international competitions. In 1998 FIFA awarded the USSF the right to host as well as the right to procure valuable sponsorship rights to the 1994 World Cup.⁸⁹ The World Cup is an international soccer tournament organized by FIFA and is the world’s most watched sporting event.⁹⁰ In exchange for the privilege of hosting the World Cup, the USSF agreed to establish a FIFA governed Division I professional soccer league in the U.S.⁹¹

After being awarded the World Cup the USSF set out to establish the professional league. The USSF received offers from several investors that hoped to establish and manage the new league that the USSF would govern.⁹² Investors presenting the plan that would become MLS were awarded the right to establish the officially sanctioned league. It is important to note two things here: (1) it is documented that a major reason the USSF selected the bid from the MLS group was because of its unique structure that would keep costs down while preventing antitrust challenges, and (2) that FIFA and the USSF only allowed one sanctioned Division 1 professional league in the United States.⁹³

USSF President and league founder Alan Rothenberg was focused on creating a sustainable league.⁹⁴ Rothenberg consulted with counsel and potential investors in determining what structure might be most conducive to long-term success.⁹⁵ Significant time was spent with antitrust professionals creating a

⁸⁹ Garner, *supra* note 11, at 162.

⁹⁰ *FIFA World Cup*, <http://www.fifa.com/aboutfifa/worldcup/> (last visited Dec. 25, 2014).

⁹¹ Garner, *supra* note 11, at 162.

⁹² Diana C. Taylor, Comment, *Aimed at Goal?: The Sustainability of Major League Soccer’s Structure*, 9 *Willamette Sports Law Journal* 1, (2011).

⁹³ *Id.*

⁹⁴ Garner, *supra* note 11, at 161.

⁹⁵ *Id.* at 162.

plan that would immunize the league from an early antitrust challenge.⁹⁶ Rothenberg spent ample time exploring the failure of other professional American Soccer Leagues.⁹⁷ This research shaped MLS's structure.

At the time of MLS's inception the United States had never been able to support a professional soccer league long-term. MLS's restrictive player policies stem from the rapid deaths of the American Soccer League ("ASL") in 1929, the International Soccer League ("ISL") in 1965, the United Soccer Association ("USA") and the National Professional Soccer League ("NPSL"), who banded together to form the North American Soccer League ("NASL"), which collapsed in 1984.⁹⁸ The NASL existed from 1968 until 1984 and until MLS it was the most successful professional soccer league in U.S. history.⁹⁹ Despite initial success and a number of international superstars playing for the league it failed. The NASL's rise was meteoric but its subsequent fall is generally credited to the financial toll that attracting high-caliber international players took on teams.¹⁰⁰ Teams ended up paying too much for talent and ended up running out of money. There was also a limited amount of American talent playing in the league and some have speculated that the lack of U.S. bred on-field talent led to a lack of American fan interest.¹⁰¹ When MLS was created investors took note of the failure of the NASL and instituted a salary-cap, stringent player-acquisition devices, and a cap on international players in an effort to avoid the same fate as the NASL.¹⁰²

MLS was formed as a limited liability company ("LLC").¹⁰³ The league is owned by a number of independent team operators and is governed by a management committee dubbed the Board of Governors ("The Board").¹⁰⁴ The Board mainly consists of the team operators.¹⁰⁵ The Board is in control of all league and individual team operations. MLS owns all of the teams in the league along with team equipment, ticket

⁹⁶ *Id.*

⁹⁷ *Id.*

⁹⁸ Duru, *supra* note 84, at 622.

⁹⁹ *Id.* at 619

¹⁰⁰ *Id.*

¹⁰¹ *Id.* at 620.

¹⁰² *Id.*

¹⁰³ Carner, *supra* note 11, at 162.

¹⁰⁴ *Id.*

¹⁰⁵ *Id.*

rights, and broadcast rights.¹⁰⁶ The Board determines the schedule, and at the outset, it negotiated stadium leases and hired support personnel at the league and team level.¹⁰⁷ MLS pays, hires, and places the league's players.¹⁰⁸

Based on legal appearances, it seems that the MLS is running things from a single centralized office as necessitated by *Copperweld*.¹⁰⁹ The operator and investors of each MLS team possess the "exclusive right and obligation to provide Management Services for a Team within its Home Territory."¹¹⁰ That right includes things like local promotion, marketing tickets, and managing local television broadcasts. MLS team operators are not like team owners in other sports because they don't fully own their franchise. They are paid a management fee, receive a percentage of profits from specific revenue sources, and are able to sell their franchise rights subject to the permission of the board. They cannot relocate without the permission of the board and must acquire talent through the mechanisms imposed by the league.¹¹¹

A team operator can make player personnel moves based on the Rules and Regulations that MLS has established and the league's players have approved through collective bargaining, but the league must give final sign off on player movement.¹¹² High-level players are often assigned to teams through a number of devices that often seem arbitrary, unfair, and confusing. All players sign a standard player contract with MLS, regardless of how they enter the league.¹¹³ Operators can trade players amongst themselves, draft players, and suggest that the league acquire and assign players to their team, but the league has final say. Each team is subject to a salary cap that is imposed by the league every year based on its annual budget. The 2014 salary cap was \$3.1 million per team excluding the salary of designated players. Players are paid by and are employees of the league.¹¹⁴

¹⁰⁶ Taylor, *supra* note 92, at 3.

¹⁰⁷ *Id.*

¹⁰⁸ *Id.*

¹⁰⁹ *Id.*

¹¹⁰ *Id.*

¹¹¹ *Id.* at 4.

¹¹² MLS Rules and Regulations, *supra* note 6.

¹¹³ Taylor, *supra* note 92.

¹¹⁴ *Id.* at 3.

Because MLS owns all of the players and since the Board consists of team operators it has been suggested that through the league structure operators can organize and set player prices at whatever level they want.¹¹⁵ Because FIFA and the USSF only allow one Division 1 level professional soccer organization, there is no other Division 1 soccer league to which professional soccer players in the United States may turn. Meanwhile, MLS continues to claim that because it exists as a single entity “incapable of conspiring with itself,” it is not subject to Section 1 of the Sherman Act.

ii. *Fraser v. Major League Soccer*

In *Fraser v. Major League Soccer*, in 1998 several MLS players banded together and filed a claim against MLS.¹¹⁶ The *Fraser* case became the first time a professional league in the U.S. survived a challenge to its single entity status.¹¹⁷ The players alleged that team investors violated Section 1 of the Sherman Act by “agreeing not to compete for player services,” and Section 2 of the Sherman Act by monopolizing, or attempting to monopolize, the “market for services of . . . professional soccer players in the [United States].”¹¹⁸ The primary allegation was that league operators had restricted the market for soccer players in the United States and conspired to impose anti-competitive “transfer fees” on player relocation that had the effect of restricting the ability of soccer players to move.¹¹⁹ The league requested summary judgment on the players’ Section 1 claim arguing that MLS operated as a single entity and could not by itself commit a violation of the Sherman Act.¹²⁰ The players argued that in spite of its legal form the idea that the league was a single entity was a “sham” and that the league should not be allowed to impose “illegal horizontal restraints on the hiring of players.”¹²¹ The league was granted summary judgment on the single entity claim at the trial court level.¹²² As to the players’ market restriction claims a jury found for the league, holding

¹¹⁵ *Id.*

¹¹⁶ *Fraser v. MLS*, 284 F.3d 47 (1st Cir. 2002).

¹¹⁷ Lenihan, *supra* note 5, at 888.

¹¹⁸ Ayad, *supra* note 12, at 423.

¹¹⁹ Michael P. Waxman, *Fraser v. MLS, LLC: Is There a Sham Exception To the Copperweld Single Entity Immunity?*, 12 Marq. Sports L. Rev. 487, 491 (2001).

¹²⁰ *Fraser*, 284 F.3d at 55.

¹²¹ *Id.*

¹²² Lenihan, *supra* note 5, at 888.

that the players were unable to establish that MLS had the necessary relevant market power.¹²³ The jury concluded that the players had failed to establish that the relevant geographic market was the United States and that the relevant product market was limited to Division 1 professional soccer players.¹²⁴

The players appealed. The 1st Circuit refused to reverse the District Court's single entity ruling.¹²⁵ The Court was skeptical of the District Court ruling and dubbed MLS a "hybrid" single entity but ultimately chose not to make a decisive ruling on the players' sham argument or MLS's single entity defense. The Court reinforced the *American Needle* standard that the substantive activities of an organization are as important as legal structure for purposes of determining if an organization is a single entity.¹²⁶ But ultimately the court declined to make a ruling on the single entity issue because the players had been unable to prove a relevant market at the trial level for either the Section 1 or Section 2 claims.¹²⁷ It is important to recognize that the court conducted a review of the single entity discussion and suggested that the league may have been closer to a joint venture than a single entity. Specifically, the court discussed: (1) the diversity of entrepreneurial interests that went well beyond those present within an ordinary company, and (2) that the "analogy to a single entity is weakened and the resemblance to a [joint] venture strengthened" by the fact the franchise investor operators were not acting like employees of MLS but were in control.¹²⁸ Nevertheless, the court did not reverse the District Court's decision that the league was a single entity and upheld the jury's market power decision.¹²⁹

Because of the *Fraser* decision MLS has been considered outside the reach of the Sherman Act. Unions can typically challenge restrictive multi-party unilateral action through decertification.¹³⁰ After the *Fraser* decision and due to the league's single entity status MLS's restrictive action has not been subject to

¹²³ *Id.*

¹²⁴ *Fraser v. MLS*, 284 F.3d 47 (1st Cir. 2002).

¹²⁵ Matt Link, *MLS Scores Against Its Players: Fraser v. Major League Soccer, LLC*, 1 Depaul J. Sports L. & Contemp. Probs. 76 (2003).

¹²⁶ *Id.*

¹²⁷ Carner at 168, *supra* note 11, at 168.

¹²⁸ *Id.*

¹²⁹ *Fraser*, 284 F.3d 47.

¹³⁰ Jakobsze, *supra* note 20, at 153.

antitrust scrutiny through decertification.¹³¹ The league has been able to employ the non-statutory labor exemption in collective bargaining negotiation without the threat of a Sherman action if the union is dissatisfied.¹³² The MLSPU's only available remedy has been to strike.¹³³ Since the *Fraser* decision in 2002 much has changed in MLS. The league still exists in the shadow of U.S. antitrust law and it has been argued that MLS is not only no longer a single entity but that a jury could reasonably conclude that "MLS exercises power over a unique relevant market: American soccer."¹³⁴

iii. *FIFA and the Bosman decision*

MLS's rules stand in conflict with major European soccer leagues where the world's best and wealthiest clubs typically compete.¹³⁵ While the European policy is obviously inconclusive for the purpose of the U.S. court system, it is important to recognize MLS's conflict with the standard practice of the elite leagues of the world. European federations no longer allow reserve clauses in player contracts or international player caps.¹³⁶ MLS still uses a reserve clause for players unless the player has been in the league for eight years and is over twenty-eight years old.¹³⁷ The "reserve clause" allows teams or leagues to retain a player's rights even when that player's contract has expired.¹³⁸ Traditionally reserve clauses and international player caps were permitted, but FIFA instituted rule changes in 2001 that effectively ended the practice.¹³⁹ The European rule changes were in response to a decision made by the European Court of Justice (ECJ) in *Union Royale Belge des Societes de Football Ass'n v. Bosman*.¹⁴⁰

¹³¹ *Id.* at 154.

¹³² *Id.*

¹³³ *Id.* at 155.

¹³⁴ Lenihan, *supra* note 5, at 893.

¹³⁵ MLS Rules and Regulations, *supra* note 6.

¹³⁶ James G. Irving, *Red Card: The Battle Over European Football's Transfer System*, 56 U. Miami L. Rev. 667 (2002).

¹³⁷ *Major League Soccer & MLS Players Union Reach Agreement in Principle on New CBA*, MLSsoccer.com, (Mar. 5, 2015), <http://www.mlssoccer.com/news/article/2015/03/04/major-league-soccer-mls-players-union-reach-agreement-principle-new-cba>.

¹³⁸ *Id.*

¹³⁹ Ayad, *supra* note 12, at 428.

¹⁴⁰ Case C-415/93, *Union Royale Belge des Sociétés de Football Ass'n ASBL v. Bosman*, 1995 E.C.R. I-4921.

Jean-Marc Bosman was a Belgian player whose contract with his Belgian club, RC Liege, was set to expire at the end of the 1990 season.¹⁴¹ At that time FIFA rules prevented a player from leaving his or her national association to play in another country if that player was bound by contract.¹⁴² RC Liege was and remains a member club of the Royal Belgian Football Association (URBFA).¹⁴³ The Belgian Association policy allowed teams to retain any player after the expiration of the player's contract if a new contract offer was made to that player.¹⁴⁴ The policy was in line with FIFA regulations that explicitly allowed clubs to maintain contract rights if a club made any offer to a player no matter how poor the terms of the new offer were.¹⁴⁵ The Belgian Association only required that if a club wanted to retain a player the club must make the new contract offer prior to the expiration of the previous contract.¹⁴⁶

In 1990, prior to the end of Bosman's contract, RC Liege offered him a new contract that would have paid him only a quarter of what he was currently earning.¹⁴⁷ Bosman rejected the offer and signed a contract with Dunkirk, a member club of the French Football Federation (FFF).¹⁴⁸ The regulations that the URBFA adopted from FIFA and followed mandated that RC Liege place Bosman on a transfer list but allowed RC Liege to demand compensation from any club seeking Bosman's services.¹⁴⁹ That compensation was for the training and development of the player as well as a transfer fee.¹⁵⁰ RC Liege asked for over 11 million Belgian francs (Bfr) for Bosman's services.¹⁵¹ The amount requested was high for a player of Bosman's quality and four times what the RC Liege had originally paid to acquire him.¹⁵² Despite the unusually high transfer fee request Dunkirk and RC Liege were able to negotiate a temporary

¹⁴¹ Irving, *supra* note 136, at 677.

¹⁴² *Id.* at 678

¹⁴³ *Id.*

¹⁴⁴ *Id.*

¹⁴⁵ Ayad, *supra* note 12, at 418.

¹⁴⁶ Irving, *supra* note 136, at 677.

¹⁴⁷ *Id.*

¹⁴⁸ Leander Schaelaekens, *Bosman: The Unintended Legacies of the Man Who Changed World Soccer*, Soccer Gods, (Feb. 13, 2015), <http://soccer gods.com/2015/02/13/jean-marc-bosman-legacy/>.

¹⁴⁹ Ayad, *supra* note 12, at 418.

¹⁵⁰ *Id.*

¹⁵¹ *Id.*; Irving, *supra* note 136, at 678.

¹⁵² *Id.*

one year transfer for 1.2 million Bfr.¹⁵³ Doubting Dunkirk's ability to pay even the more nominal fee, RC Liege and the URBFA prevented the transfer by refusing to send Bosman's International Transfer Certificate to the French Federation.¹⁵⁴ RC Liege retained Bosman's rights and under the URFBA's rules Bosman was suspended from play for the next season since he had not transferred and he did not accept RC Liege's original offer.¹⁵⁵ Due to the URFBA's rules Bosman was barred from plying his trade.

Bosman filed suit against RC Liege, the URBFA, and FIFA's European Arm, the Union of European Football Associations (UEFA).¹⁵⁶ The suit wound through the Belgian court system and after four years ended up in front of the European Court of Justice.¹⁵⁷ The ECJ is a high court for member states of the European Union.¹⁵⁸ The ECJ held that the required payment of transfer and development fees after the cessation of a player's contract prohibited the free movement of workers and violated Section 48 of the European Union's Treaty of Rome.¹⁵⁹ The action that the URBFA had taken and that FIFA policy supported was invalidated and the court ordered the payment of transfer fees for out-of-contract players to cease. Going further the ECJ held that the imposition of league-wide nationality restrictions was also unlawful.¹⁶⁰ It took several years but in response to the ruling FIFA instituted new rules regarding player transfers that prevented associations from charging for ITC's.¹⁶¹ That rule change along with the ECJ's *Bosman* ruling effectively banned requisite out-of-contract transfer fee policies in Europe.¹⁶²

In contrast, MLS rules stipulate that a "team retains the rights to the player indefinitely following the expiration of a contract only if attempts were made to re-sign the player."¹⁶³ If a team attempts to sign a player they retain his rights even if he is out of contract. MLS rules also stipulate that after the completion

¹⁵³ Irving, *supra* note 136, at 678.

¹⁵⁴ *Id.*

¹⁵⁵ Ayad, *supra* note 12, at 419.

¹⁵⁶ *Id.*

¹⁵⁷ Irving, *supra* note 136.

¹⁵⁸ *Id.* at 672.

¹⁵⁹ Ayad, *supra* note 12 at 420.

¹⁶⁰ Duru, *supra* note 84, at 626.

¹⁶¹ See FIFA, *Regulations for the Status and Transfer of Players*,

http://www.fifa.com/mm/document/affederation/administration/status_transfer_en_25.pdf [hereinafter FIFA Regulations].

¹⁶² Ayad, *supra* note 12, at 428.

¹⁶³ 2014 MLS Roster Rules, *supra* note 6.

of a player's contract the team possesses "the right of first refusal" over the player's contract as long as the team attempted to re-sign the player.¹⁶⁴

From 2010-2014 the MLS through its Re-Entry Draft process allowed veteran players to be selected by another team if their current team did not attempt to resign a player at the value of his former contract.¹⁶⁵ However, the re-entry rule only protected players after they had spent three years in the league and the player still had no say in where he ended up.¹⁶⁶ As part of its March 2015 agreement with the MLSPU, MLS instituted a controlled free agency process that allows veteran players to leave for another team but caps the amount of salary increase at between fifteen and twenty-five percent based on the value of the players previous contract.¹⁶⁷ However, the free agency option will only be available to players if they have spent eight years in the league and are at least twenty-eight years old.¹⁶⁸ That means the clause only covers thirteen percent of MLS Players.¹⁶⁹ All other players will be subject to a reserve clause or a form of the re-entry draft. In either situation the player will not control his fate. The takeaway is that the vast majority of MLS players are subject to a modified reserve clause that European associations do not condone and FIFA does not support.¹⁷⁰

Further, MLS has an international player quota. FIFA does allow associations to promote "homegrown" rules ensuring that a small number of citizen players from a club's home county must be present within a team. But because of the *Bosman* decision teams cannot directly discriminate via league-wide international restrictions. MLS's Roster Rules and Regulations conflict with that policy.¹⁷¹ MLS Teams start with eight international roster slots, and can trade for more slots, and there is no limit on the number of international slots that a club can possess.¹⁷² However, the total number of international players

¹⁶⁴ Ayad, *supra* note 12 at 426.

¹⁶⁵ *Id.* at 429.

¹⁶⁶ *Id.*

¹⁶⁷ *Id.*

¹⁶⁸ *Id.*

¹⁶⁹ Brian Straus, *Bob Foose, & Todd Dunivant Reveal New Details on 'Best Deal' for MLS CBA*, SI.com Planet Futbol, (March 6, 2015) <http://www.si.com/planet-futbol/2015/03/06/mls-cba-deal-players-union-bob-foose-todd-dunivant>.

¹⁷⁰ *Id.*

¹⁷¹ *Id.* at 431

¹⁷² *Id.*

allowed in the league is limited. MLS rules state, “a total of 152 international slots are divided among the clubs.”¹⁷³ This stands in contrast with European policies that put a stop to roster quotas after the *Bosman* ruling.¹⁷⁴

Ultimately FIFA regulations mandate that the law of a league’s home country is the final arbiter of league conduct.¹⁷⁵ European leagues must follow the FIFA regulations and comply with the *Bosman* ruling because they operate under the purview of the ECJ.¹⁷⁶ The MLS is not under the same pressure.¹⁷⁷ The league’s practices violate U.S. law and FIFA’s best practices but the league is protected from FIFA and the Sherman Act because of the *Fraser* ruling and the non-statutory labor exemption.¹⁷⁸ The restraints on player movement that MLS employs may impact the league’s ability to attract the talent to become an elite league.¹⁷⁹ The world’s top leagues and top players participate in a transfer system that allows out-of-contract players freedom of movement and thus a choice in where they ply their trade. The MLS prohibits that behavior and while it may have initially done so to promote the growth of the league the argument can be made that by diverging with the top leagues in the world by prohibiting player movement MLS does itself a disservice.¹⁸⁰ The leagues that MLS aspires to emulate, the international federations it must do business with to achieve international prominence, and the talent it must attract to garner elite status are no longer accustomed to or likely to support the level of player control that MLS maintains.¹⁸¹ If MLS hopes to achieve its stated goal of becoming a top league world-wide by 2022 it will need to get in step with the player protections that top leagues abide by.¹⁸²

¹⁷³ *Supra* note 6.

¹⁷⁴ Duru, *supra* note 84, at 626.

¹⁷⁵ Ayad, *supra* note 12, at 431.

¹⁷⁶ Duru, *supra* note 84, at 627.

¹⁷⁷ *Id.* at 628

¹⁷⁸ Abbott, *supra* note 54, at 8.

¹⁷⁹ Ayad, *supra* note 12, at 442.

¹⁸⁰ *Id.*

¹⁸¹ *Id.* See also Garber, *supra* note 16.

¹⁸² *Id.*

III. MLS'S STRUCTURE AND THE CURRENT ECONOMIC REALITY

The league's circumstances have changed since the *Fraser* decision. It is now a well-funded growing league that is no longer substantively a single entity. Because of the decision in *Fraser* player wages have been artificially suppressed and illegal player movement restrictions exist due to the Union's inability to implicate the league for antitrust violations. In this section we will examine the growth that has occurred and demonstrate how the league has transformed from a single entity into a competitive joint venture. Each discussion of a relevant change will be followed by an analysis of how that indicator would affect the court's analysis today.

a. MLS FRANCHISES NOW ACT WITH ENTERPRENUERIAL INTEREST

MLS has projected that total stadium revenues will average between \$14-\$15 million per year between 2011-2015.¹⁸³ Ticket sales have skyrocketed and MLS averages more fans per game than the NBA and the NHL. The league has added soccer specific stadiums and new expansion franchises have helped the league and individual clubs to even greater profits.¹⁸⁴ TV networks are now paying the league \$75 million a year for television rights.¹⁸⁵ There is money being made and teams are competing for it by investing in players, stadiums, and innovation.

i. *The Designated Player Rule*

The idea that the league's single entity reality died with the signing of David Beckham has been well documented by journalists and legal scholars alike.¹⁸⁶ As discussed, the league assigns each team a salary budget at the start of every year. The 2014 salary cap was \$3.1 million to be split amongst 20 players. Teams can carry 30 players but only the first 20 count against the standard salary cap. The maximum

¹⁸³ Lenihan, *supra* note 5, at 897.

¹⁸⁴ *Id.* at 905.

¹⁸⁵ Jonathon Ourand & Christopher Botta, *MLS's Big Play*, Sports Business Journal Online, (May 12, 2014), <http://www.sportsbusinessdaily.com/Journal/Issues/2014/05/12/Media/MLS-TV.aspx>.

¹⁸⁶ Lenihan, *supra* note 5, at 904.

amount that an individual player can be paid is \$387,500.¹⁸⁷ There are a number of exceptions to this rule.¹⁸⁸

The most notable is the Designated Player Rule.

The league recognized that the addition of internationally well-known, expensive on-field talent would help increase fan interest.¹⁸⁹ In 2007 when it signed well-known international star David Beckham the league created the designated player rule.¹⁹⁰ This rule creates an exception to the salary cap and allows teams to go beyond the salary cap threshold to pay certain Designated Players (“DPs”) higher amounts. Typically, the individual club who chooses to sign the DP bears the financial responsibility for the amount of compensation paid to the player beyond the \$387,500 maximum under the salary cap. DP slots only count as \$387,000 against the cap no matter how much the individual player is paid.¹⁹¹ If a team signs a DP below the age of 20 only \$150,000 counts against the teams salary budget and a DP between the ages of 21-23 counts as \$200,000 against the salary budget.¹⁹² In 2014 each team was given two DP slots. A team can also purchase a third DP slot for a one-time fee of \$150,000 that will be split amongst teams that do not have three DP’s.¹⁹³

Many teams have taken advantage of this rule. It has had a massive financial and on-field impact for teams that have utilized it effectively. In 2007, the Los Angeles Galaxy signed David Beckham to a \$255 million five-year contract.¹⁹⁴ Shortly after that time the team’s ticket sales jumped an unprecedented amount; the team signed a \$20 million dollar jersey sponsorship deal and a new local television contract worth more than any other in league history.¹⁹⁵ Since Beckham’s signings a number of other teams have

¹⁸⁷ MLS Rules and Regulations, *supra* note 7.

¹⁸⁸ *Id.*

¹⁸⁹ Jakobsze, *supra* note 20, at 162.

¹⁹⁰ Taylor, *supra* note 92, at 7.

¹⁹¹ MLS Rules and Regulations, *supra* note 6.

¹⁹² *Id.*

¹⁹³ *Id.*

¹⁹⁴ Kurt Badenhausen, *David Beckham Departs MLS After Earning \$255 Million*, Forbes Online, (Nov. 30, 2012 12:49 p.m.) <http://www.forbes.com/sites/kurtbadenhausen/2012/11/30/david-beckham-departs-mls-after-earning-255-million/>.

¹⁹⁵ *LA Galaxy land 10-year \$55 Million Local TV Deal*, The Sporting News Online, (Nov. 16, 2011), <http://www.sportingnews.com/soccer/story/2011-11-16/la-galaxy-land-10-year-55-million-local-tv-deal>.

signed DP's both international and American.¹⁹⁶ Those signings have paid off on the field as indicated by the fact that of the four teams to reach the semi-finals of the most recent MLS Cup all four had Designated Players who played a significant role in their success.¹⁹⁷ One of those four teams, the New England Revolution, suffered an unprecedented mid-season losing streak before signing as a DP German-born United States National Team star Jermaine Jones who subsequently helped the team reverse its fortune and reach the MLS Cup final match.¹⁹⁸ Teams that can afford a high-level DP perform markedly better on the field and reap financial rewards off of the field.¹⁹⁹ The budget assigned to each team by the league only pays a portion of these players salary. These teams pay the rest of revenue generated by each individual team through allocation money, ticket sales, contracts, and other sources of revenue.²⁰⁰

In reaching the decision that Major League soccer was a single entity the *Fraser* District Court placed significant emphasis on the fact that the league paid all salaries. That emphasis coupled with the DP rule and the First Circuit's doubt that the clubs operated with a "complete unity of interest" due to the various costs and revenues not shared by the clubs puts the league's single entity defense in a precarious situation.²⁰¹ Because of the DP Rule individual operators now have increased independent expenses and the league no longer pays all player contracts.²⁰² The costs that the DP salaries create make team's previous independent expenditures look miniscule in comparison.²⁰³ The "unity of interests" the court searched for in *Copperweld* and *American Needle* are rapidly disappearing as DP contracts rise. DP's bring teams financial success that is not always shared with the league and cost each team individual investment. At the

¹⁹⁶ Graham Parker, *Michael Bradley and Jermaine Jones Make Case for MLS Designated Players*, The Guardian Online, (September 29, 2014 8:43 a.m.) <http://www.theguardian.com/sport/2014/sep/29/michael-bradley-jermaine-jones-mls-designated-players>.

¹⁹⁷ MLS Results, ESPN, <http://www.espnfc.com/major-league-soccer/19/scores> 2014 MLS records at mlssoccer.com/2014 (last visited Dec. 29, 2014).

¹⁹⁸ Andrew Celani, *9 Things to Know Ahead of Revolution-Galaxy MLS Cup*, CBS Boston, (Dec. 3, 2014 8:00 AM), <http://boston.cbslocal.com/2014/12/03/9-things-to-know-ahead-of-revolution-galaxy-mls-cup/>.

¹⁹⁹ MLS Rules and Regulations, *supra* note 6.

²⁰⁰ Duncan Day, *The Designated Player: Major League Soccer's Business Model*, (Aug. 14, 2014 10:41 a.m.), <http://www.forbes.com/sites/duncanday/2014/08/14/the-designated-player-major-league-soccers-business-model/2/>.

²⁰¹ Bernhard, *supra* note 40, at 428.

²⁰² *Id.*

²⁰³ *Id.*

beginning of the 2015 season there were 47 DP's in the league.²⁰⁴ Every DP that signs takes the league further from its single entity status and closer to a joint venture akin to the NFL, the NBA, and the NHL.²⁰⁵

ii. *Development of Soccer Specific Stadiums*

A number of commentators have suggested that MLS investors' involvement in stadium planning, financing, and management puts the league's single entity defense in peril.²⁰⁶ Since 2007 one MLS team has relocated, the league has added seven teams, and four more teams are set to join the league in the near future. Current MLS Commissioner Don Garber has indicated that he expects the league to expand to 24 teams by 2020.²⁰⁷ Several cities are actively competing to be the next MLS expansion site to be selected.²⁰⁸ One condition that the league has placed on those cities is that they have a stadium plan in place. Garber has said "three key areas" that he evaluates when looking at expansion proposals are "1. How the market supports soccer. . .[;] 2. Current or future facilities where an MLS team would play its games. . .[; and] 3. The desire of an investor . . . to place a team in [a] specific market."²⁰⁹

Private funding is not always available when teams decide to build a stadium. Teams display significant entrepreneurial zeal while working to find financing for stadiums. In some cases teams have resorted to paying lobbyists to garner support for public financing.²¹⁰ The more that operators' actions indicate economic interests diverse from the interests of MLS the less effective the single entity defense will be in protecting the league from Section 1 scrutiny.²¹¹ Issues surrounding the development of MLS stadiums are a significant factor because stadium development demonstrates a lack of unity between the interests of operator-investors and the league. Stadiums are a significant cost and a significant revenue stream. Individual operators are undertaking risk and potentially gaining an economic benefit separate from

²⁰⁴ Gabriel Del Los Rios, *Class of 2015: The 47 Designated Player in MLS*, MLSsoccer.com, (Mar.13, 2015), <http://www.mlssoccer.com/news/article/2015/03/05/class-2015-47-designated-players-mls>.

²⁰⁵ Lenihan, *supra* note 5, at 892.

²⁰⁶ 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 (2004).

²⁰⁷ Garber, *supra* note 16.

²⁰⁸ *Id.*

²⁰⁹ Stuck, *supra* note 206, at 556.

²¹⁰ *Id.*

²¹¹ *Id.*

the league in working to secure financing for a stadium.²¹² The MLS requires expansion teams to have a stadium plan in place and potential owners are working independently to secure financing for those stadiums to gain entry to the league in order to obtain an economic benefit and thus are demonstrating a diversity of interests separate from the league.

iii. *How the Domestic Player Rule impacts the Relevant Market Definition*

Perhaps most important to any new antitrust claim that may be brought against the league is MLS's requirement that each team feature no more than eight international players.²¹³ For roster purposes MLS players are classified as domestic and international.²¹⁴ Domestic players are U.S. citizens, green card holders, or those holding special asylum exemptions.²¹⁵ The league allows each team eight international roster slots. The international roster slots may be traded between teams so that a team may have more than eight internationals. Ultimately, the league capped the number of international players at 152 in 2014.²¹⁶ The league has promoted homegrown talent in an effort to avoid the fate of the NASL by keeping costs low and fostering fan interest in local players.²¹⁷ The league's recognition of the importance of domestic U.S. based players and restriction on international players is an indicator that the league itself views its relevant market as the United States.²¹⁸ The leagues own recognition of the U.S. as a market would allow an antitrust suit to overcome the hurdle that stopped *Fraser*.

iv. *The Youth Movement*

Recently MLS began requiring individual teams to build academies for youth players in order to develop young talent.²¹⁹ Individual teams use youth academies to develop players to play for their professional franchise. The team may profit from the players development by signing the player at a young

²¹² *Id.*

²¹³ Lenihan, *supra* note 5, at 902.

²¹⁴ *Id.*

²¹⁵ *Id.*

²¹⁶ MLS Regulations, *supra* note 6.

²¹⁷ Ayad, *supra* note 12, at 439.

²¹⁸ *Id.*

²¹⁹ Christopher Botta, *MLS Steps Up Its Game with Youth Academies*, (July 1, 2013).

<http://www.sportsbusinessdaily.com/Journal/Issues/2013/07/01/In-Depth/Soccer-academies.aspx>.

age and promoting that player to the professional club or by selling that player's contractual rights in the future.²²⁰ When the league sells a player developed by an individual club that club receives seventy-five percent of the profit with the league retaining twenty-five percent.²²¹ Several teams have also started United Soccer League (“USL”) franchises. The USL is a lower division professional soccer league in the United States. Not all MLS clubs own a USL Franchise.²²² Team operators who have purchased USL Franchises have indicated that they intend to use these franchises to further cultivate new talent.²²³ Independent teams’ unilateral operation of USL franchises and operation of youth academies in an effort to benefit from owning the rights of talented young players is a further indication of distinct entrepreneurial interest.

b. THE NEW OPERATORS ARE DIVERSE, INDEPENDENT, AND ORGANIC

“Teams definitely have their own way of doing business, on and off the field, which is good.” – Bruce Arena, Head Coach LA Galaxy, Former US Men’s National Team Head Coach²²⁴

A factor that courts have considered when determining if a professional league is a single entity or not is if the league’s teams existed as independent entities prior to joining the league.²²⁵ During *Fraser* it worked in the league’s favor that all of the league’s teams had been created simultaneously as part of the league.²²⁶ Two things have happened since *Fraser* that would change the courts current analysis of that issue: (1) new investors are competing to join the league; and (2) teams that already existed as independent entities have joined the league.

²²⁰ Andrew Lewellen, *The Future of U.S. Soccer: Homegrown Players*, Grantland, (July 20, 2012), <http://grantland.com/the-triangle/the-future-of-u-s-soccer-homegrown-players/>.

²²¹ *Seattle Sounders Finalize Transfer Deal for DeAndre Yedlin to Tottenham*, MLSsoccer.com, (Aug. 13, 2014), <http://www.mlssoccer.com/news/article/2014/08/13/seattle-sounders-finalize-transfer-deal-deandre-yedlin-tottenham>.

²²² *Seattle Sounders Announce Creation of USL Pro Team, S2, for 2015 Season*, MLSsoccer.com, (Oct. 14, 2014), <http://www.mlssoccer.com/news/article/2014/10/14/seattle-sounders-announce-creation-usl-pro-team-s2-2015-season>.

²²³ Jamie Goldberg, *Timbers Announce Launch of USL Pro Team T2*, (Oct.14, 2014 at 10:35 AM), http://www.oregonlive.com/timbers/index.ssf/2014/10/portland_timbers_announces_usl.html.

²²⁴ Steven Goff, *A Few Good Minutes with Los Angeles Galaxy Coach Bruce Arena*, The Washington Post, (Aug. 25, 2014).

²²⁵ Edward Mathias, *Big League Perestroika? The Implications of Fraser v. Major League Soccer*, 148 U. Pa. L. Rev. 203, 210 (1999).

²²⁶ *Fraser v. MLS*, 284 F.3d 47, 59 (1st Cir. 2002).

i. *Competition for Entry Between Outside Investors*

Independent investors are competing to join the league.²²⁷ Investors from Las Vegas, Miami, Sacramento, and Minneapolis all met with league officials in 2014 in an effort to obtain franchise rights.²²⁸ The investors are forming committees, making investments, and actively competing for the right to enter the league.²²⁹ In 2014, LAFC paid the highest expansion fee in MLS history.²³⁰ The fact that expansion teams are competing against each other in order to gain entry to the league is a demonstration of interest from diverse, independent operators separate from the league. The interests of the new operators may conflict with the interest of other franchises. LAFC will be directly competing for fans, merchandise sales, and talent with crosstown club LA Galaxy.²³¹ This competitive reality helps rebut the unitary interest presumption that the MLS projected in *Fraser*.²³²

ii. *Expansion Through Organically Developed Franchises*

The league has also recently added four teams that existed prior to the beginning of MLS. The league added the Seattle Sounders, the Portland Timbers, the Vancouver Whitecaps, and the Montreal Impact between 2009-2012.²³³ Each of these organizations existed as USL franchises prior to joining MLS. In the case of Portland, Vancouver, and Seattle the franchises have been some of MLS's most successful on and off the field.²³⁴ Portland hosted the MLS All-Star Game and world famous German club Bayern

²²⁷ Stuck, *supra* note 206, at 565.

²²⁸ Garber, *supra* note 16.

²²⁹ *Scorpions Owner Talks Possibility of MLS Expansion*, KENS5 Eyewitness News, (Aug. 26, 2014 at 5:14 PM) <http://www.kens5.com/story/news/local/2014/08/15/scorpions-soccer-mls-expansion/14094933/>.

²³⁰ Grant Wahl, *The Inside Story of How New MLS Team Went From Dream to Reality*, (Nov. 7, 2014)

<http://www.si.com/soccer/planet-futbol/2014/11/07/henry-nguyen-tom-penn-mls-lafc-los-angeles-football-club>.

²³¹ *Id.*

²³² Gabriel Feldman, *The Puzzling Persistence of a Single-Entity Argument For Sports Leagues: American Needle and the Supreme Courts Opportunity to Reject a Flawed Defense*, 2009 Wis. L. Rev. 835, 882 (2009).

²³³ Jan Sonnenmair, Leah Nash, & Ryan Williams, *Soccer Spectacle in the Northwest*, *The New York Times*, (May 20, 2014), <http://www.nytimes.com/2014/05/25/travel/soccer-as-spectacle-in-the-pacific-northwest.html>.

²³⁴ *Id.*

Munich in 2014.²³⁵ Seattle has led the league in attendance while seeing tremendous success on the field.²³⁶ Part of the success of these clubs has been seen because the teams already existed and competed in lower level professional leagues in the U.S.²³⁷ The new franchises already had fan support and name recognition in place.²³⁸ The league doubled down on franchises that existed independent from MLS by introducing established soccer club Orlando City for entry into the league in 2015.²³⁹

The entry of these teams into MLS has been great for the growth of the league but their prior existence may make them diverse and independent from the league for the purpose of legal analysis. MLS owners have traditionally had a strong unity of interest argument because all of the league's owners became shareholders in the league at the same time.²⁴⁰ NFL owners have a unity of interests hurdle because a number of NFL teams existed as competitors prior to the formation of the NFL.²⁴¹ Prior to *Fraser*, MLS teams had not been competitors before the formation of the league.²⁴² That is no longer the case.²⁴³ The expansion franchises mentioned above simply converted a lower division club into an MLS club.²⁴⁴ These new clubs were separate economic actors prior to the leap to MLS. They were not purchased by MLS; they sought and paid for admittance.²⁴⁵ The new clubs were and remain separate actors with competitive interests.²⁴⁶

²³⁵ Erik Siemers, *Timbers to Host Reigning European Champions for 2014 MLS All-Star Game*, Portland Business Journal Online (Dec. 12, 2013 at 2:56 PM) <http://www.bizjournals.com/portland/blog/2013/12/timbers-to-host-reigning-european.html>).

²³⁶ Mike Prindiville, *Seattle Sounders Break MLS Attendance Record, Average 44,038 Fans Per Game*, NBCsports Online, (Oct. 29, 2013 at 10:08 AM), <http://prosoccertalk.nbcsports.com/2013/10/29/seattle-sounders-break-mls-attendance-record-average-44038-fans-per-game/>.

²³⁷ Paul Tenorio, *MLS Hopes to Rekindle Portland Expansion Magic in Orlando*, Orlando Sentinel online, (Sep. 5, 2014 at 6:24 PM), <http://www.orlandosentinel.com/sports/orlando-city-lions/os-orlando-portland-mls-0906-20140905-story.html#page=1>.

²³⁸ *Id.*

²³⁹ *Id.*

²⁴⁰ Garber, *supra* note 16.

²⁴¹ Jakobsze, *supra* note 20, at 141.

²⁴² *Id.* at 147.

²⁴³ Ayad, *supra* note 12.

²⁴⁴ *Id.*

²⁴⁵ Chris Smith, Forbes.Com, *Major League Soccer's Most Valuable Teams*, (Nov. 20, 2013), <http://www.forbes.com/sites/chris-smith/2013/11/20/major-league-soccers-most-valuable-teams/>.

²⁴⁶ *Id.*

IV. COMPETITIVE PROBLEMS INHERENT TO MLS'S CURRENT FORM

"In MLS, you have a group of owners that collectively have ruled it unacceptable for people like me to join one specific MLS team . . . depending on the player's choice. . . I, for sure, want much more to belong to a team and a city than to be 'owned' by a league." – Mix Diskerud, US Men's National Team Player, now with NYCFC²⁴⁷

a. PLAYER ACQUISITION SOUP: PLAYER DISTRIBUTION IN MLS

Major League Soccer has a number of mechanisms in place to allocate players to clubs while attempting to maintain its status as a single entity.²⁴⁸ Mechanisms that have come under fire recently due their prohibitive nature and the inconsistent way that the rules have been administered.²⁴⁹ The rules may no longer be necessary and the differences between MLS and European player movement regulations are a major hurdle that the MLS must overcome if it plans to achieve its objective of becoming an elite world league.²⁵⁰

i. *The Mechanics of Player Distribution in MLS*

Until we have other ways to do business, we are never going to produce great teams . . . because of the rules, the financial restrictions, and the way of doing things that are sometime apparent and sometimes not apparent. It makes it difficult to produce a really good team over time." – Bruce Arena, LA Galaxy Head Coach, Former US Men's National Team Head Coach.

MLS players end up on a MLS team one of seven primary ways. (1) Using the league's allocation ranking system. The allocation system determines what team has first priority in being able to sign a US National Team player who signed with the league after playing abroad, or a former MLS player who returns to the league after having gone abroad in a transaction that involved a transfer fee.²⁵¹ Players also may join a team: (2) As a Designated Player; (3) by entering the MLS Superdraft; (4) through a Discovery Claim;

²⁴⁷ Alex Labidou, Goal.com, *Mix Diskerud Talks about U.S. Future and Failed Portland Timbers Move*, (May 7, 2013), <http://www.goal.com/en-us/news/66/united-states/2013/05/07/3959876/mikkel-diskerud-talks-about-us-future-and-failed-portland>.

²⁴⁸ MLS rules and Regulations, *supra* note 6.

²⁴⁹ Elliott Turner, *Option Years Are Confusing and May Not be Legal, so MLS Should Find Out*, Soccer Gods (Nov. 5, 2014), <http://soccer gods.com/2014/11/05/option-years-are-confusing-and-may-not-be-legal-so-mls-should-find-out/>.

²⁵⁰ *MLS Goal: Be Among World Soccer Elite by 2022*, Associated Press, <http://www.si.com/soccer/2013/02/27/mls-goal-be-among-world-soccer-elite-2022>.

²⁵¹ MLS Rules and Regulations, *supra* note 6.

(5) through the league's Weighted Lottery; (6) via the NASL/USL allocation order; or (7) through a modified form of free agency available if a player is twenty-eight years old and has been in the league for at least eight years.²⁵² The NASL/USL allocation order is a means of assigning players from lower level U.S. domestic leagues.²⁵³ Players can be waived based on performance at any time during the MLS season, although seventy percent of current player contracts are financially guaranteed.²⁵⁴ Players can also be called up on short notice if teams have injury issues.

The league controls player movement and that works in its favor for establishing its status as a single entity. In contrast, the restrictive rules frustrate parties involved in the system making an eventual challenge more likely.²⁵⁵ For the reasons discussed above, a single entity defense will likely no longer be effective.²⁵⁶ In order for the league to justify its restrictive rules the rules must have a pro-competitive benefit.²⁵⁷ Originally the league's rules benefited players because they ensured the league's survival, the survival of the league ensured work for players, and this was the pro-competitive benefit.²⁵⁸ The league is now growing rapidly and it would be hard for the league to argue that there is a competitive benefit that outweighs the anti-competitive nature of the player allocation rules and specific player allocation decisions. Reviewing specific instances where the player acquisition rules were applied helps highlight how the league artificially restricts the market for players and in some cases owner-operators.

ii. *The Allocation Sagas of Dempsey and Jones*

Clint Dempsey is arguably the most successful American soccer player of the modern era.²⁵⁹ He began his career in MLS after entering the league through the MLS Superdraft. In 2007, Dempsey was able to secure a move to Europe to play in the English Premier League.²⁶⁰ He truly became a star as a member

²⁵² *Id.*

²⁵³ *Id.*

²⁵⁴ *Id.*; see also Steven Goff, *MLS Union and Management Preparing for Collective Bargaining Negotiations*, Washington Post (Nov. 21, 2014).

²⁵⁵ *Id.*

²⁵⁶ Stuck, *supra* note 206, at 569.

²⁵⁷ *Id.*

²⁵⁸ *Id.*

²⁵⁹ Ben Rycroft, *Clint Dempsey Move Exposes Gray Area in MLS Rules*, CBC Sports, (Aug. 5, 2013, 11:29 PM), <http://www.cbc.ca/sports-content/soccer/opinion/2013/08/clint-dempsey-move-exposes-grey-area-in-mls-rules.html>.

²⁶⁰ *Id.*

of the U.S. Men's National Team (USMNT) and English clubs Fulham and Tottenham FC. In 2013 at the age of 30 Dempsey's rights were bought by MLS from Tottenham FC for \$9 million dollars. Dempsey was allocated to the Seattle Sounders and slated to receive \$24 million in salary over a three-year period.²⁶¹ The problem was that Seattle was not first in the league's allocation order; the Portland Timbers, Seattle's biggest rival, were first in the allocation order and possessed the right of first refusal according to the league's allocation rule.²⁶² Also problematic were reports that the league had agreed to help Seattle pay for Dempsey.²⁶³

The allocation order is the process used to determine which teams have the right of first refusal to negotiate with returning US Men's National Team Players who sign with the league after playing abroad.²⁶⁴ The allocation process was established by the league and agreed to by the MLS Players Union during collective bargaining.²⁶⁵ It has been reported that Dempsey's representatives indicated that he preferred to play for franchises based in Seattle, LA, or Toronto and that the league and Dempsey's representatives felt that Seattle would be the best fit.²⁶⁶

A number of franchise operators indicated that they were not comfortable with how Dempsey's move to Seattle was handled by the league.²⁶⁷ MLS issued a clarifying statement indicating that Dempsey was a Designated Player due to the size of his contract and thus was not subject to the allocation order.²⁶⁸ Prior to that statement it was not entirely clear how a player who by definition was subject to both the Allocation Order and Designated Player rules would be distributed.²⁶⁹ In its statement the league outlined how the allocation process worked and cited former USMNT players Carlos Bocanegra and Claudio

²⁶¹ Grant Wahl, *How Seattle's Stunning Clint Dempsey Move Got Done*, Sports Illustrated, (August 5, 2013), <http://www.si.com/soccer/2013/08/05/clint-dempsey-seattle-sounders-mls>.

²⁶² *Id.*

²⁶³ *Id.*

²⁶⁴ MLS Rules and Regulations, *supra* note 6.

²⁶⁵ Jakobsze, *supra* note 20.

²⁶⁶ Wahl, *supra* note 230.

²⁶⁷ *Id.*

²⁶⁸ *Id.*

²⁶⁹ *Major League Soccer Issues Statement on USMNT Allocation Process*, MLSsoccer.com, (Aug. 3, 2013), <http://www.mlssoccer.com/news/article/2013/08/03/major-league-soccer-issues-statement-usmnt-allocation-process>.

Reyna's respective returns to the league after playing abroad as examples of how the rules worked.²⁷⁰ The difference with Dempsey was that the option to sign Dempsey was not presented to every franchise and reports indicated that it was not determined if other operators would have been willing to pay his salary. Dempsey was simply labeled a Designated Player and placed by the league.²⁷¹ The league rules do indicate that DPs "of a certain threshold-as determined by the league-are not subject to allocation ranking."²⁷² That threshold is not clear.

In 2014 the ambiguous way that DP's are assigned became even more pronounced. The New England Revolution signed Jermaine Jones, a member of the USMNT who had been playing abroad. Jones signed for \$4.7 million over a 2-year period. At the time of Jones' signing both the Chicago Fire and the Revolution presented the league with equivalent offers for Jones.²⁷³ Protocol requires that the league alert all teams to the potential designated player signing.²⁷⁴ Both Chicago and New England expressed equivalent interest so the league solved the problem by conducting what was termed a "blind draw." It is unclear what process was used for the draw, whether a blindfold was involved, if straws were used, or if paper slips were placed in a fishbowl.

It is easy to make light of the situation but as MLS becomes more financially secure it is difficult to digest the manner in which it makes multi-million dollar decisions that impact players lives, change the course of franchises, and affect fans. These actions do not correspond with MLS's stated intention to become an elite league.²⁷⁵ The anti-competitive behavior becomes even more difficult to understand when viewed through the prism of the league's single entity status that is ripe for a challenge.

²⁷⁰ *Id.*

²⁷¹ *The Dempsey Route: Allocation in Focus, but Another "Rule Change" a Bigger Issue for MLS*, NBC Sports online, (Aug. 5, 2013 at 9:40 PM), <http://prosoccertalk.nbcsports.com/2013/08/05/clint-dempsey-seattle-sounders-transfer-news-latest-major-league-soccer/>.

²⁷² MLS Rules and Regulations, *supra* note 7.

²⁷³ Bill Littlefield, *Jermaine Jones and the Bizarre Rules of MLS*, Only a Game with Bill Littlefield, (Aug. 30, 2014), <http://onlyagame.wbur.org/2014/08/30/jermaine-jones-mls-revolution-2>.

²⁷⁴ *Id.*

²⁷⁵ Garber, *supra* note 16.

Because MLS is still classified as a single entity, this behavior has been accepted. Fans, operators, and players have gone along with the league's rules and subsequent lack of regard for those rules due to the difficulty soccer leagues have had establishing themselves in the United States.²⁷⁶ The idea that the league's survival trumps fairness will decline as the league continues to grow. The type of arbitrary assignment evidenced with the Dempsey and Jones signings may make the league susceptible to a lawsuit brought by a disgruntled operator.

V. POSSIBLE OUTCOMES

a. FORCED CHANGE VIA LAWSUIT

i. *Franchise Operator Lawsuit*

A team operator can sell franchise rights to outside investors or relocate.²⁷⁷ The MLS Board will prevent franchise relocation if two-thirds of The Board votes against it or if the relocation is deemed to be "against the best interests of the league."²⁷⁸ If the league rejects relocation it must pay the team operator fair market value for the franchise. This rule is an example of a rule established to maintain stability and centralize control over franchises.²⁷⁹

If an operator wanted to relocate and was not allowed to by the league that operator could challenge the league's status as single entity.²⁸⁰ If the operator could establish that other operators prohibited the move for competitive reasons he would likely have a valid antitrust claim under the Sherman Act. If an operator feels that his team has been slighted by a player assignment that operator may challenge MLS in court. A team operator could be successful if that operator could demonstrate that MLS was in control of the relevant market and that a league ruling does not have competitive justification that outweighed the anti-competitive restraint.²⁸¹ For example, in the case of the Clint Dempsey and Jermaine Jones transfers back to MLS it

²⁷⁶ Wahl, *supra* note 261.

²⁷⁷ *Id.*

²⁷⁸ *Id.*

²⁷⁹ *Id.*

²⁸⁰ Los Angeles Mem'l Coliseum v. Nat'l Football League (Raiders I), 726 F.2d 1381 (9th Cir. 1984), *cert. denied* 469 U.S. 990 (1984).

²⁸¹ Garner, *supra* note 11, at 164.

would be difficult for the league to suggest that not following its own pre-determined rules and establishing its own arbitrary rule out of convenience was a valid justification that outweighed any competitive restraint.²⁸² In *Fraser*, the MLS suggested that it established competitive restraints in the form of player allocation rules because there was justification that outweighed the restraint.²⁸³ An operator represented by MLS who agreed to the restraints could take umbrage with the league's inconsistent application of the rules and file a lawsuit that would cause the courts to re-evaluate the relevant market and re-examine MLS's single entity status.

ii. *Lawsuit brought by the Owner of a Lower-Division Team*

“Because you are selling, in sports, the product of competition, in which each team has a separate interest from the other teams . . . those leagues that you are interested in, they all obviously are organized along independent ownership where the teams compete . . . they have this relegation system, which I actually think is brilliant. For those of you who are not soccer fans worldwide, in the second-tier leagues, the best teams can play their way into the top league, and the worst teams in the top league play themselves into the second league. It creates yet another competitive inducement for teams to improve themselves and creates tremendous interest for fans . . .” - Jeffrey Kessler, Attorney, represented MLS Players in *Fraser v. MLS*²⁸⁴

In 1993 MLS was granted the exclusive right to operate the only Division I professional soccer league in the United States by the USSF.²⁸⁵ MLS is now growing through expansion and by poaching clubs from the Division II leagues in the United States.²⁸⁶ It would not be inconceivable if the owner of a lower division team filed suit in an effort to force their way into the league.

A monopoly argument from a U.S. based professional soccer team in a lower division is relevant for MLS because soccer in the United States is the only professional sport whose highest level of professional competition was granted to the league as an exclusive right by an international governing

²⁸² Wahl, *supra* note 230.

²⁸³ Garber, *supra* note 16.

²⁸⁴ *Panel III: Restructuring Professional Sports Leagues*, 12 *Fordham Intell. Prop. Media & Ent. L.J.* 413, 434, 450 (2002).

²⁸⁵ Lenihan, *supra* note 5, at 901.

²⁸⁶ *Id.*

body.²⁸⁷ Leagues like the NBA and the NFL have competed with leagues like the ABA and the USFL that were able to claim an equivalent product.²⁸⁸ The MLS does not have that concern since FIFA and the USSF are only willing to sanction one Division I pro league in the United States.²⁸⁹ Potential competitors to MLS are stuck with Division II status and are prevented from entering the relevant marketplace unless they pay MLS an expansion fee and the MLS Board approves their application to enter the league.²⁹⁰ An owner from the USL or the NASL that was able to pay the expansion fee, had a suitable MLS stadium plan in place, and was denied admission to MLS could potentially file a claim under the Sherman Act. The owner of such a team could argue that FIFA, the USSF, and MLS were conspiring to limit entry into the Division I soccer marketplace in the U.S.

A promotion and relegation system similar to most soccer leagues worldwide has been frequently discussed but never realized in the United States.²⁹¹ One of the more vocal advocates of the system is U.S. Men's National Team Head Coach Jurgen Klinsmann.²⁹² The crux of the promotion and relegation argument is that the practice may (1) increase consumer welfare by increasing effective competition among the teams in the league; (2) increase player wages; and in Klinsmann's case (3) it may more effectively develop talent for the U.S. Men's National Team.²⁹³ A suit or the threat of a suit from a lower division team may be the most effective way to force USSF and MLS into a system of promotion and relegation.²⁹⁴ Promotion and relegation prevents monopolistic behavior by top professional leagues and allows lower division professional teams an alternate entry point to the highest level.²⁹⁵ If MLS were concerned with a challenge from the owner of a lower division team MLS could prevent antitrust liability by establishing a system that allows teams from lower divisions to enter the league if they achieve a requisite level of success.

²⁸⁷ *Id.*

²⁸⁸ David Sweet, *From the ABA to the USFL Failed Leagues Succeed Online*, Wall St. J. (Sep. 15, 1999).

²⁸⁹ Lenihan, *supra* note 5, at 901.

²⁹⁰ Stuck, *supra* note 206.

²⁹¹ Franco Panizo, *Klinsmann: I'm a Deep Believer in Promotion and Relegation*, Soccer by Ives, (Oct. 9, 2014), <http://www.sbisoccer.com/2014/10/klinsmann-promotion-relegation.html>.

²⁹² *Id.*

²⁹³ *Id.*

²⁹⁴ Ross & Szymanski, *supra* note 29.

²⁹⁵ *Id.*

Many FIFA-backed national federations sponsor a promotion and relegation system that knocks several of the teams with the worst record out of the Division I league and down to the Division II league while simultaneously promoting the best performing teams from the Division II league.²⁹⁶

The promotion and relegation system increases fan welfare because it forces owners to invest profits in improving the overall quality of the on-field product.²⁹⁷ Teams that are relegated lose out on valuable television contracts, ticket sales, and merchandising income.²⁹⁸ By incentivizing success the system encourages team owners to invest in athletes.²⁹⁹ Fan interest is increased because teams are either competing to win titles or to avoid being forced out of or to gain entry into the top league.³⁰⁰ Player wages are increased as more teams compete for talent and the financial incentives that come with promotion to the top tier league kick in.³⁰¹ Many argue that such a system would produce more talented players because lower division clubs would offer younger players the opportunity to develop while incentivizing consistent effort from players in Division I to prevent being sent back to a lower league.³⁰²

It is unlikely that MLS officials would support such a system. Such a challenge and result seems speculative. Nonetheless, because of the growth of soccer in the U.S. and the desire for promotion and relegation by some influential factions of the U.S. Soccer community, a lawsuit from a lower division team aiming to enter MLS may not be as far-fetched as it seems.³⁰³

iii. *Player Lawsuit*

Prior to the March 2015 CBA agreement players indicated that they would strike if they did not receive the ability to become free agents.³⁰⁴ Due to the financial constraints on labor inherent in a strike it may be more effective and more feasible to have players challenge the league in court on a specific issue

²⁹⁶ Ross & Szymanski, *supra* note 29, at 638.

²⁹⁷ *Id.*

²⁹⁸ *Id.*

²⁹⁹ Ross & Szymanski, *supra* note 29, at 639.

³⁰⁰ *Id.*

³⁰¹ *Id.*

³⁰² *Major League Soccer Issues Statement on USMNT Allocation Process*, *supra* note 269.

³⁰³ *Major League Soccer Issues Statement on USMNT Allocation Process*, *supra* note 269.

³⁰⁴ Jeff Carlisle, *MLS, Players agree to Mediation for Collective Bargaining Agreement*, ESPNFC, (Feb.12, 2012). <http://www.espnfc.com/major-league-soccer/story/2296491/mls-and-players-union-hire-mediators-for-cba-talks>.

rather than to undergo an extended strike.³⁰⁵ If players could convince a fact-finder that the relevant market has changed it is likely that because of the designated player rule, the diverse expansion teams, and the financial incentive inherent in the development of youth academies MLS would no longer be classified as a single entity.³⁰⁶ The change in classification that would result from a successful lawsuit would allow players to negotiate from a better position and would lead to increased wages and greater player movement possibilities.³⁰⁷

B. SELF DETERMINATION THROUGH COLLECTIVE BARGAINING

The most efficient solution for the league would be if the MLS Board recognized that it is no longer effectively a single entity. The arbitrary application of league rules has demonstrated that the current restrictive player allocation mechanisms no longer have a competitive justification that outweighs the anti-competitive restraint imposed. A new fact-finder could determine that the relevant geographic and product market for MLS is the U.S.³⁰⁸ The ideal solution would be for the league to recognize its position, create cognizable rules, and allow players greater autonomy of movement. The announcement of the new restricted free-agency clause as part of the March 2015 agreement was a step in the right direction but does little to eliminate the lack of control the majority of players possess over their careers. More significant changes would go a long way toward preventing a lawsuit and establishing legitimacy in the eyes of players and fans.

VI. CONCLUSION

Eventually MLS will not be a single entity. This will happen through the court system, by the league's own design, or through collective bargaining with the players union. It could be a lawsuit brought by the players union, it could be a lawsuit brought by an owner, or it could be a lawsuit brought by the owner of a minor-league team. It may also be a gradual process that began with this modified version of

³⁰⁵ *Player Salary Information*, MLS Players Union, (Sep. 15, 2014), available at http://www.mlspayers.org/salary_info.html.

³⁰⁶ Lenihan, *supra* note 5, at 902.

³⁰⁷ *Id.*

³⁰⁸ *Id.*

free agency. The most favorable outcome is that the league will begin to partially remove the proverbial lifejacket from owners and acknowledge that the league is now a joint venture and thus subject to antitrust laws.³⁰⁹

Investment in youth academies, stadiums, and minor league teams is positive for the league and the growth of soccer in the U.S. These developments indicate stability and foresight. The consistent evolution of the league is demonstrative of the quality stewardship that the league has been fortunate to have. The league needed strict rules in place in order to shepherd the league in its infancy. Initially the anticompetitive restraints in place had a pro-competitive benefit: the restraints insured the league's survival.³¹⁰ The league is now approaching twenty years in existence. Investment is at an all time high.³¹¹ With all of the positive development clubs and players still operate under arcane regulations that prevent the league from soaring to new heights. Restraints that were necessary are no longer required. They slow the growth of clubs, inhibit player movement, and artificially suppress wages. It is in the best interest of the league to recognize that it is highly susceptible to an antitrust challenge at this juncture. The league should begin to work with the players union to modify the leagues structure and ease restriction on player movement. Granting clubs more autonomy and easing restrictions on player movement would promote fan interest, encourage local investment in clubs, and would place MLS in in closer concert with the elite soccer leagues of the world.³¹²

³⁰⁹ Ayad, *supra* note 12.

³¹⁰ Lenihan, *supra* note 5, at 902.

³¹¹ Garber, *supra* note 16.

³¹² Ayad, *supra* note 12.