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## Kicking "Single-Entity" to the Sidelines: Reevaluating the Competitive Reality of Major League Soccer after American Needle and the 2010 Collective Bargaining Agreement

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# Kicking “Single-Entity” to the Sidelines: Reevaluating the Competitive Reality of Major League Soccer after *American Needle* and the 2010 Collective Bargaining Agreement

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## I. INTRODUCTION

“MLS was founded on the principle that our owners would not be competing against each other for a player's services. When we think of free agency, it is that concept of internal bidding. There will not be internal bidding for a player's services.”<sup>1</sup>

—Don Garber, Commissioner of Major League Soccer

Suppose an ambitious young athlete who played for a nationally recognized sports team was dissatisfied with the manner in which he and his teammates were assigned to different teams and how they were compensated.<sup>2</sup> As a result, he asked that each team be required to bid at the end of each season for the various players.<sup>3</sup> Under his proposal, each player could choose to play during the following year for the team that made the most attractive offer.<sup>4</sup> The owners denied the young athlete's request, realizing that, if implemented, his proposal could have devastating effects on the league.<sup>5</sup> A team that had an exceptionally lucrative, athletically interesting, or otherwise successful campaign could be broken up and restructured at the end of the season.<sup>6</sup> Moreover, a team could become the dominant team in the league by acquiring all the star players, while other teams would be stuck picking up the pieces.<sup>7</sup> As a result, the owners denied the young athlete's request, saying that the overall profitability of the league would be diminished as a result of the individualistic mindset of the players.<sup>8</sup>

This story seems commonplace in any given decade, as the struggle to find a balance between a league's reserve clause<sup>9</sup> and athletes' desire for

1. Leander Schaerlaeckens, *Players Still Left Without Freedom of Movement*, ESPNSOCCERNET.COM (Mar. 22, 2010), <http://soccernet.espn.go.com/columns/story?id=760003&sec=mls&root=mls&cc=5901> (quoting MLS Commissioner Don Garber shortly after the 2010 Collective Bargaining Agreement was reached in principle on March 20, 2010).

2. *Adapted from* Myron C. Grauer, *Recognition of the Nat'l Football League as a Single Entity Under Section 1 of the Sherman Act: Implications of the Consumer Welfare Model*, 82 MICH. L. REV. 1, 4 (1983).

3. *Id.*

4. *Id.*

5. *Id.*

6. *Id.*

7. Grauer, *supra* note 2, at 4-5.

8. *See id.* at 4.

9. Most reserve clauses are agreements by professional sports team owners that attempt to restrict whether employee-players may freely contract with other sports teams

free agency<sup>10</sup> has plagued labor relations within sports leagues since most leagues' inceptions.<sup>11</sup> There are valid points to each side: players wish to sell their services on the open market to the highest bidder, with hopes of attaining fair market value for their skills, and argue any reserve clause is a group boycott; while owners contend that a reserve clause is necessary to maintain a competitive balance within a league, as it keeps the best athletes from being bought out by the wealthiest owner, and veteran players from driving up costs, financially threatening small-market teams.<sup>12</sup> Owners further argue that such an internal system of "assigning"<sup>13</sup> and compensating players causes the league to operate inefficiently, and inhibits the league's efforts to succeed in the competitive environment of the sports-entertainment business.<sup>14</sup> This inherent conflict often is resolved during collective bargaining negotiations, wherein the financially stronger party usually attains more favorable terms.<sup>15</sup> But such means of resolution may not be the case for leagues with a single-entity structure, as the unique anti-trust defense considerably advantages the bargaining position of the league,

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within a league when a player's contract term has expired. *Powell v. NFL*, 930 F.2d 1293, 1295 (8th Cir. 1989).

10. Free agency refers to the ability of players to freely contract with a team of the player's choice. *Id.*

11. See generally *Madison Square Garden, L.P. v. NHL*, 270 Fed. Appx. 56, 59 (2d Cir. 2008); *Fraser v. Major League Soccer, L.L.C.*, 284 F.3d 47 (1st Cir. 2002); *NBA v. Williams*, 45 F.3d 684 (2d Cir. 1995); *Powell*, 930 F.2d 1293; Darren Rovell, *The Early Days of Free Agency*, ESPN.COM (Nov. 21, 2000) <http://static.espn.go.com/mlb/s/2000/1121/893718.html>.

12. See PHIL BREAUX, INTRODUCTION TO SPORTS LAW & BUSINESS 58 (Bent Tree Press ed., 8th ed. 2007).

13. Should a league permit free agency, owners would no longer have the power to delegate to what team a player would play for, but instead would be forced to bid against other owners for players' contracts. Competition for contracts increases demand and allows players to seek more lucrative compensation. Thus, a lack of assigning increases the cost of labor, which is a major operating cost of a league.

14. See Grauer, *supra* note 2, at 4. Grauer argues that, [Leagues] should be deemed single entit[ies] in part because [their] component parts, the individual teams, could not produce the ultimate product, [the entertainment of competition], on their own. A decision within the [League] by the teams on how to allocate players should therefore be viewed as efficiency producing because it aids in the production of the product at the highest possible level of quality, and not as anticompetitive because the teams in producing this product are not competing against each other economically any more than are the partners within one law firm.

*Id.* at 5, n.24. *But see Am. Needle, Inc. v. NFL*, 130 S. Ct. 2201, 2214 n.7 (2010).

15. See BREAUX, *supra* note 12, at 58.

and in turn poses a significant barrier to unions during labor relations.<sup>16</sup> This is particularly evident when comparing the structure of the traditional sports league with that of Major League Soccer (MLS or “League”), and the difficulties that the league’s player representative, Major League Soccer Players Union (MLSPU or Union), has faced when negotiating with Major League Soccer’s unique single-entity structure.

The negotiation of the 2010 Collective Bargaining Agreement between MLS and MLSPU fully exemplified these difficulties. The previous collective bargaining agreement (CBA) between the parties, finalized in 2003, allowed the League to restrain players’ services, and allocate players to any team within the League as it saw fit, with minimal notice.<sup>17</sup> During negotiation of the 2010 CBA, the Union sought an increase of the League’s minimum salary, guaranteed contracts,<sup>18</sup> and a changing of the League rules to include free agency.<sup>19</sup> The Union’s proposals came at a time when the League enjoyed success and expansion,<sup>20</sup> despite the 2009 recession.<sup>21</sup> But, since the legal benefits of the League’s single-entity status<sup>22</sup> outweighed the

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16. Liz Mullen & Tripp Mickle, *Free Agency Among MLS Union’s Proposals*, SPORTS BUS. J., Aug. 3, 2009, at 7, available at <http://www.sportsbusinessjournal.com/article/63183>.

17. Collective Bargaining Agreement Between Major League Soccer and Major League Soccer Players Union, Dec. 1, 2004 – Jan. 31, 2010 §§ 8.2, 15.1, 18.1, available at <http://www.mlspu.org/cba.html> [hereinafter 2003 CBA]; see also Major League Soccer, *Roster Regulation*, <http://www.mlssoccer.com/regulations> (last visited Sept. 6, 2010) (detailing the league’s regulations and methods of player allocation, waivers, drafts, trades, and the “right of first refusal”).

18. MLS could terminate most players’ contracts “if the Player fails, in the sole and absolute discretion of MLS, to exhibit sufficient skill or competitive ability . . . .” 2003 CBA, *supra* note 17, § 18.8. Since not all MLS players’ contracts were guaranteed, MLSPU sought to amend the 2010 CBA to include guaranteed contracts for the full length of the contract, for all MLS players. Mullen & Mickle, *supra* note 16, at 7. In addition, not only did the League keep an upper hand through non-guaranteed contracts, it maintained control by giving players one-year option-contracts, wherein the League held the option to extend at its discretion. Thomas Olshan, *CBA: MLS v. Player’s Union*, SOCCERHYPE.COM (Dec. 7, 2009) [http://www.soccerhype.com/page/show\\_article/117621/39256](http://www.soccerhype.com/page/show_article/117621/39256). These practices will likely continue for non-veteran players. *Id.*

19. Mullen & Mickle, *supra* note 16, at 7.

20. Doug McIntyre, *Further Expansion on the Docket for MLS*, ESPNSOCCERNET.COM (Apr. 15, 2009), <http://soccer.espn.go.com/columns/story?id=637087&sec=mls&root=mls&cc=5901> (noting that MLS added five expansion teams between 2005 and 2009, and plans to add three more expansion teams by the 2012 season); see also Doug McIntyre, *Montreal Bids for a 2011 MLS Expansion Slot*, ESPNSOCCERNET.COM (June 25, 2009), <http://soccer.espn.go.com/columns/story?id=657253&sec=mls&root=mls&cc=5901> (discussing a future MLS team in Montreal).

21. Tripp Mickle, *MLS Clubs Hopeful as Ticket Buyers Renew*, SPORTS BUS. J., Nov. 16, 2009, at 7, available at <http://www.sportsbusinessjournal.com/article/64094>.

22. See *infra* Part II.B.2.

bargaining pressure imposed by MLSPU,<sup>23</sup> the League refused free agency as a term in the CBA and sought to continue its suppressive practices against its employees. When the 2003 CBA expired on February 25, 2010,<sup>24</sup> and negotiations for the 2010 CBA reached an impasse, the players threatened to strike in order to leverage their bargaining position<sup>25</sup>—a drastic measure that jeopardized the League—a league that has just started to gain popular ground.<sup>26</sup>

Labor stoppage loomed over the League until March 20, 2010, five days before the 2010 MLS season opener, when the parties reached an agreement on a five-year labor contract.<sup>27</sup> As part of the new CBA, a majority of players received guaranteed contracts, the salary cap increased, minimum salaries increased for senior roster players, and player contracts have a limit on the number of option years they can have.<sup>28</sup> Notably missing from the 2010 CBA is MLSPU's ultimate goal—free agency.<sup>29</sup> In its place, the League instituted a “re-entry draft” for players who are released from their team.<sup>30</sup> Had the Union's proposals been successful, the implementation of their terms would have provided considerable relief from a league that had the most owner-friendly collective bargaining agreement of American sports leagues.<sup>31</sup> Instead, the 2010 CBA can be characterized, at best, as a baby step towards realizing the same benefits afforded to professional athletes in other leagues.<sup>32</sup>

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23. See *infra* Part III.C.

24. The initial expiration date was January 31, 2010, but was extended twice to February 12, 2010 and February 25, 2010 in an effort by both parties to come to an agreement and avoid a work stoppage. Associated Press, *MLS, Players Union Extend Talks to Feb. 25*, ESPNSOCCERNET.COM (Feb. 11, 2010), <http://soccernet.espn.go.com/news/story?id=740397&sec=mls&cc=5901>.

25. MLSPU voted to strike if a new CBA was not reached by March 25, 2010—the first game of the 2010 season. Associated Press, *MLS Players Vote in Favor of Strike*, ESPNSOCCERNET.COM (Mar. 11, 2010), <http://soccernet.espn.go.com/news/story?id=754272&sec=mls&cc=5901>.

26. See McIntyre, *supra* note 20.

27. *MLS Avoids Strike with 5-year CBA*, ESPNSOCCERNET.COM (Mar. 20, 2010), <http://soccernet.espn.go.com/news/story?id=758671&sec=mls&cc=5901>. The agreement came with the considerable aid of the Federal Mediation and Conciliation Service. See *id.*

28. Ives Galarcep, *MLS Announces Details of CBA*, SOCCERBYIVES.NET (Mar. 23, 2010), [http://www.soccerbyives.net/soccer\\_by\\_ives/2010/03/mls-announces-details-of-cba.html](http://www.soccerbyives.net/soccer_by_ives/2010/03/mls-announces-details-of-cba.html).

29. See *MLS Avoids Strike with 5-year CBA*, *supra* note 27.

30. See *infra* Part IV.A.5.

31. Mullen & Mickle, *supra* note 16, at 7.

32. See Kyle McCarthy, *Monday MLS Breakdown: New MLS CBA Satisfies Significant Objectives for League and Players Union*, GOAL.COM (Mar. 22, 2010), <http://www.goal.com/en-us/news/1110/major-league-soccer/2010/03/22/1843991/monday-mls-breakdown-new-mls-cba-satisfies-significant>.

MLS players will not realize these benefits until courts recognize the competitive reality of MLS and discard the League's tenuous single-entity exemption. Players have a considerably diminished bargaining power to negotiate changes in the atmosphere of a single-entity employer, as the threat of union decertification no longer exposes such an employer to anti-trust liability, and the single-entity structure of the League allows it to unilaterally implement CBA terms without fear of antitrust violations. Employees are thus relegated to the backbone of labor warfare—striking—which yields minimal results when employers are permitted to permanently replace striking employees<sup>33</sup> and players' careers hold short life-spans.

Thus, MLS teams should only be allowed to combine as a multiemployer bargaining unit when negotiating with players' unions, and should not be classified as a single-entity. The distinction, which to the naked eye may be slight, is not only important when identifying how the entity results in a disparate bargaining position between a newly formed union and a single-entity league, but also is significant when such a single-entity employer is given leeway to unilaterally implement terms and conditions of employment without being subject to antitrust scrutiny.

In addition to the new terms of the CBA, the League's expansion has also caused a change in the way teams do business, with a trend of diverging team interests. Their divergence is evident in teams' use of a Technical Director position in the front office to manage player personnel<sup>34</sup> and initiate trades,<sup>35</sup> in an increase in the number of designated players allowed on each team,<sup>36</sup> in the addition of a youth development system for each team,<sup>37</sup> and a re-entry draft.<sup>38</sup> To top off the era of change, the Supreme Court recently reviewed whether the business decisions of National Football League (NFL) teams could be considered that of a single-entity.<sup>39</sup> In ultimately holding they were not, the Court supplemented antitrust law jurisprudence such that the competitive reality of MLS deserves reevaluation.

This Comment explores whether Major League Soccer's single-entity defense remains viable after the 2010 CBA and the Supreme Court's *American Needle v. National Football League* opinion,<sup>40</sup> and argues that, using the Court's reasoning in *American Needle*, coupled with the increasing disparities between MLS teams, the teams' major business decisions should be

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33. See *Mastro Plastics v. NLRB*, 350 U.S. 270, 278 (1956); *NLRB v. Mackay Radio*, 304 U.S. 333, 345 (1938).

34. See *infra* Part IV.A.1.

35. See *infra* Part IV.A.3.

36. See *infra* Part IV.A.2.

37. See *infra* Part IV.A.4.

38. See *infra* Part IV.A.5.

39. See *Am. Needle, Inc. v. NFL*, 130 S. Ct. 2201 (2010).

40. See *id.*

exposed to antitrust scrutiny. Part II of this Comment details the Sherman Antitrust Act, the National Labor Relations Act (NLRA), and how professional sports leagues have tried to side-step antitrust scrutiny through the nonstatutory labor exemption and the single-entity defense. Part II also briefly analyzes the Supreme Court's most recent pronouncement on antitrust law, *American Needle, Inc. v. National Football League*.<sup>41</sup> Part III provides background information on the League's organizational structure and player contracts, as well as an overview of the suit that challenged the League's single-entity status, *Fraser v. Major League Soccer, L.L.C.*<sup>42</sup> Part III also examines the effect *Brown v. Pro Football, Inc.* and a league with an underserved single-entity exemption have on MLS players. Part IV argues that recent business changes, implemented to accommodate the growth of the League, have produced a significant disparity of interests amongst MLS teams to nullify the League's tentative single-entity status. This Comment concludes that MLS teams do not have a "unity of interest" in the labor market, and thus should be exposed to antitrust scrutiny.

## II. THE BALANCE BETWEEN ANTITRUST LAW AND LABOR RELATIONS LAW

### A. THE SHERMAN ANTITRUST ACT

Section 1 of the Sherman Act provides, "Every contract, combination . . . or conspiracy, in restraint of trade or commerce among the several States . . . is declared to be illegal."<sup>43</sup> The goal upon its inception was to promote competition in order to maximize social welfare,<sup>44</sup> as competition breeds ingenuity, keeping prices low for consumers, and maximizing a business' output.<sup>45</sup>

Courts have not taken a literal approach to the language of the Sherman Act, since read literally, section 1 would address the entire body of private contract.<sup>46</sup> Instead, when evaluating agreements under the Sherman Act, courts use two types of analyses: the per se analysis, and the Rule of Reason analysis.<sup>47</sup> The per se analysis is a strict application of any anticompetitive agreement, which presumes that a violation of section 1 voids the agreement as illegal despite any procompetitive effects or motive that a

41. *Am. Needle, Inc.*, 130 S. Ct. 2201.

42. 284 F.3d 47 (1st Cir. 2002).

43. 15 U.S.C. § 1 (2006).

44. ROGER D. BLAIR & DAVID L. KASERMAN, ANTITRUST ECONOMICS 53-56 (2d ed. 2009).

45. *Id.*

46. *Nat'l Soc'y of Prof'l Eng'rs v. United States*, 435 U.S. 679, 688 (1978); *Texaco Inc. v. Dagher*, 547 U.S. 1, 5 (2006).

47. *Texaco, Inc.*, 547 U.S. at 5.



defendant may claim.<sup>48</sup> This standard applies to agreements like group boycotts and price-fixing.<sup>49</sup> A Rule of Reason analysis, in contrast, is a “fact-intensive inquiry whereby an agreement or restraint is deemed unlawful only if it causes an anticompetitive injury that outweighs procompetitive effects.”<sup>50</sup> A court balances multiple factors for the Rule of Reason to determine whether an agreement unreasonably restrains trade, including “the restraint’s rationales, history, and impact on the relevant market.”<sup>51</sup> In applying Rule of Reason, courts typically review:

[W]hether the restraint imposed is such as merely regulates and perhaps thereby promotes competition or whether it is such as may suppress or even destroy competition. To determine that question the court must ordinarily consider the facts peculiar to the business to which the restraint is applied; its condition before and after the restraint is imposed; the nature of the restraint and its effect, actual or probable. The history of the restraint, the evil believed to exist, the reason for adopting the particular remedy, the purpose or end sought to be attained, are all relevant facts. This is not because a good intention will save an otherwise objectionable regulation or the reverse; but because knowledge of intent may help the court to interpret facts and to predict consequences.<sup>52</sup>

The Rule of Reason analysis is favored over the per se analysis for restraints involving joint ventures, and therefore is more commonly used when evaluating business actions within a sports league.<sup>53</sup>

#### B. SPORTS LEAGUES’ ATTEMPTS TO SIDE-STEP ANTITRUST LIABILITY

In order to maintain a competitive balance and still avoid antitrust scrutiny, sports leagues have turned to the nonstatutory labor exemption and the single-entity defense<sup>54</sup> in order to impose restraints on players and other organizations that contract with a league.

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48. Michael A. McCann, *American Needle v. NFL: An Opportunity to Reshape Sports Law*, 119 YALE L.J. 726, 736-37 (2010) (citations omitted).

49. *Id.* at 736 n.54.

50. *Id.* at 737.

51. *Id.* (citations omitted).

52. *Bd. of Trade of Chi. v. United States*, 246 U.S. 231, 238 (1918).

53. *See Nat’l Collegiate Athletic Ass’n v. Bd. of Regents*, 468 U.S. 85 (1984); *Major League Baseball Props., Inc. v. Salvino, Inc.*, 542 F.3d 290, 338 (2d Cir. 2008).

54. Nathaniel Grow, *There’s No “I” In “League”*: *Professional Sports Leagues and the Single Entity Defense*, 105 MICH. L. REV. 183, 202-04 (2006).

1. *The National Labor Relations Act and the Nonstatutory Labor Exemption*

If the goal of antitrust law is to protect against collusion, the goal of labor relations law has been the exact opposite—to encourage it.<sup>55</sup> While Congress has deemed competition between separate economic actors essential in furtherance of commerce, Congress has also encouraged the harmonious relationship between employers and employees for the same reason.<sup>56</sup> Yet, for a considerable length of time after the passing of the Sherman Act, courts interpreted all labor relations between unions and employers as collusion.<sup>57</sup> It was not until Congress passed the Clayton Act,<sup>58</sup> the Norris-LaGuardia Act,<sup>59</sup> and the National Labor Relations Act<sup>60</sup> that labor agreements were recognized as necessary “to eliminate the causes of certain substantial obstructions to the free flow of commerce”<sup>61</sup> and given a statutory exemption.

In order to further facilitate the employer-employee relationship, the Supreme Court added a nonstatutory labor exemption for terms and conditions negotiated in a collective bargaining agreement between an employer

55. Mackey v. NFL, 543 F.2d 606, 611 (8th Cir. 1976) (“The statutory exemption was created to insulate legitimate collective activity by employees, which is inherently anti-competitive but is favored by federal labor policy, from the proscriptions of the antitrust laws.”) (citing Apex Hosiery Co. v. Leader, 310 U.S. 469 (1940)).

56. Sean Treadwell, Note, *An Examination of the Nonstatutory Labor Exemption From the Antitrust Laws, in the Context of Professional Sports*, 23 FORDHAM URB. L.J. 955, 960 (1996) (“The statutory labor exemption attempted to reconcile the conflicting public policies of the antitrust laws and the labor laws: fostering competitive business relationships in a free enterprise system, while improving the working conditions of laborers and reducing industrial strife.”) (citation omitted).

57. See *Loewe v. Lawlor*, 208 U.S. 274 (1908) (applying the Sherman Act to labor organizations); *Vehgelahn v. Guntner*, 44 N.E. 1077 (Mass. 1896).

58. 15 U.S.C. § 17 (2000) (“Nothing contained in the antitrust laws shall be construed to forbid the existence and operation of labor . . . organizations, instituted for the purposes of mutual help . . . or to forbid or restrain individual members of such organizations from lawfully carrying out the legitimate objects thereof . . .”).

59. 29 U.S.C. § 101 (2000).

60. 29 U.S.C. §§ 151-60 (1947).

61. National Labor Relations Act of 1935, 29 U.S.C. § 151 (1988).

It is hereby declared to be the policy of the United States to eliminate the causes of certain substantial obstructions to the free flow of commerce . . . by encouraging the practice and procedure of collective bargaining and by protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment . . . .

and a designated bargaining representative.<sup>62</sup> The nonstatutory labor exemption permits restraints of trade in labor relations that would otherwise be antitrust violations because the benefits derived from seamless employer-employee agreements outweigh any anticompetitive effects that such agreements may have on a given marketplace.<sup>63</sup> Thus, courts have favored labor relations law over antitrust law by permitting unions and employers to mutually agree in CBAs on restrictions affecting wages, hours, and working conditions.<sup>64</sup>

## 2. *The Single-Entity Defense and the Struggle to Apply Copperweld*

Antitrust suits against professional sports leagues are hardly uncommon since “[a]ntitrust litigation is one of the weapons that athletes use to remove restraints that limit their ability to negotiate for higher salaries or for changes in other aspects of their working conditions.”<sup>65</sup> As such, “courts have not hesitated to apply the Sherman Act to club owner imposed restraints on competition for players’ services.”<sup>66</sup>

Courts have repeatedly used the Rule of Reason when examining restraints imposed by professional sports leagues because those leagues and their independently-owned franchises have traditionally been viewed as joint ventures between separate economic actors.<sup>67</sup> “Joint ventures are associations ‘of two or more persons formed to carry out, a single business enterprise for profit, for which purpose they combine their [resources], skill, and knowledge.’”<sup>68</sup>

It was not until *Copperweld Corp. v. Independence Tube Corp.*<sup>69</sup> that sports leagues renewed their interest in the single-entity defense.<sup>70</sup> Upon

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62. See *Local 189, Amalgamated Meat Cutters v. Jewel Tea*, 381 U.S. 676 (1965); *United Mine Workers v. Pennington*, 381 U.S. 657 (1965).

63. See *Jewel Tea*, 381 U.S. at 692-94.

64. *Clarett v. NFL*, 306 F. Supp. 2d 379, 391 (S.D.N.Y. 2004), *rev'd on other grounds*, 369 F.3d 124 (2d Cir. 2004). The agreement is exempt from antitrust scrutiny so long as the agreement affects only the parties to it; is the result of good-faith, arms length bargaining; and the agreement is free from any motive to impose direct restraints on commercial competition, or to monopolize unlawfully a relevant business market. See *Jewel Tea*, 381 U.S. at 689-90; Elinor R. Hoffmann, *Labor and Antitrust Policy: Drawing a Line of Demarcation*, 50 BROOK L. REV. 1, 32-33 (1983).

65. MICHAEL J. COZZILLO & MARK S. LEVINSTEIN, *SPORTS LAW: CASES AND MATERIALS* 420 (1997).

66. *Mackey v. NFL*, 543 F.2d 606, 617 (8th Cir. 1976) (citations omitted).

67. *McCann*, *supra* note 48, at 737-38 (citation omitted).

68. *Id.* (citation omitted).

69. 467 U.S. 752, 752 (1984).

70. James A. Keyte, *American Needle Reinigorates the Single-Entity Debate*, ANTITRUST, Summer 2009, at 48 (“As the principles outlined in *Copperweld* yielded their progeny, however, the single-entity debate gained renewed vigor.”); see also *McNeil v.*

ruling that a firm and its subsidiary had not violated section 1 of the Sherman Act, the United States Supreme Court in *Copperweld* held,

A parent and its wholly owned subsidiary have a complete unity of interest. Their objectives are common, not disparate; [and] their general corporate objectives are guided or determined not by two separate corporate consciousnesses, but one . . . . With or without a formal ‘agreement,’ the subsidiary acts for the benefit of the parent, its sole shareholder. If parent and a wholly owned 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 . . . . But in reality, the parent and subsidiary *always* have a ‘unity of purpose or a common design.’<sup>71</sup>

*Copperweld* distinguishes parent-subsidiary relationships from joint ventures in that parent-subsidiaries acts are “unilateral” rather than “concerted,” and thus do not implicate section 1.<sup>72</sup> “Conduct that ‘deprives the marketplace of independent centers of decisionmaking that competition assumes,’ without the efficiencies that come with integration inside a firm,” is classified as concerted action.<sup>73</sup> Any agreement between *separate* economic actors that has the effect of substantially and unreasonably reducing competition in a particular market violates section 1.<sup>74</sup> As a result, the first issue to determine is whether separate economic actors are in agreement, as “[section 1] does not reach conduct that is ‘wholly unilateral.’”<sup>75</sup>

*Copperweld* opened up the argument that teams within a league function as a single-entity, where the league acts as the parent company and teams are subsidiaries.<sup>76</sup> Teams claim the league should be classified as a single-entity, rather than a joint venture, because they have a “unity of interest” in producing the entertainment package that is “the league,” and no single team has the capacity of putting out this product on its own.<sup>77</sup> Unfor-

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NFL, 790 F.Supp. 871, 880 (D. Minn. 1992) (discussing defendant NFL’s argument that cases like *North American Soccer League* and *Los Angeles Memorial Coliseum Commission*, which were decided prior to *Copperweld*, are distinguishable).

71. *Copperweld*, 467 U.S. at 771-74.

72. *Id.* at 768.

73. *Chi. Prof'l Sports Ltd. P'ship. v. NBA.*, 95 F.3d 593, 598 (7th Cir. 1996) (citing *Copperweld*, 467 U.S. at 769).

74. *Copperweld*, 467 U.S. at 768

75. *Id.*

76. *See Chi. Prof'l Sports Ltd. P'ship.*, 95 F.3d at 598-99.

77. *Id.* at 598-99 (wherein the Seventh Circuit reasoned, “We see no reason why a sports league *cannot* be treated as a single firm in this typology. It produces a single product;

tunately though, courts still have had substantial difficulties classifying whether actions taken by or within sports leagues are separate or wholly unilateral,<sup>78</sup> mainly because “competitive sports require (or at least benefit substantially) from some centralized decision making in order for the product to be produced.”<sup>79</sup> Despite many sports leagues’ attempts to claim anti-trust immunity on the basis of the single-entity defense, few have been successful.<sup>80</sup> This lack of success may be attributable to courts’ difficulties in applying antitrust laws<sup>81</sup>—not only because sports leagues require some aspects of cooperation between teams, but also due to the conflicting standards in *Copperweld*.<sup>82</sup> The Supreme Court was recently given the opportunity to clarify when it granted certification in *American Needle v. National Football League*.<sup>83</sup>

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cooperation is essential (a league with one team would be like one hand clapping) . . . .”); see also *Am. Needle, Inc. v. NFL*, 538 F.3d 736, 743 (7th Cir. 2008) (noting that no one team can create “NFL football”), *rev’d*, 130 S. Ct. 2201 (2010).

78. Keyte, *supra* note 70, at 48 (discussing three different ways courts have interpreted and applied *Copperweld*’s “unity of interest” requirement for single entities).

79. Chris Sagers, *American Needle, Dagher, and the Evolving Antitrust Theory of the Firm: What Will Become of Section 1?*, THE ANTITRUST SOURCE, Aug. 2009, at 4, available at <http://new.abanet.org/antitrust/Searchable%20Antitrust%20Library/antitrust-source-Aug09-Sagers8-12f.pdf> (“Specifically, teams need some means by which to schedule games and they need some agreement on the rules by which games will be played.”).

80. 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); *Smith v. Pro Football, Inc.*, 593 F.2d 1173, 1179 (D.C. Cir. 1978); *McNeil v. NFL*, 790 F. Supp. 871 (D. Minn. 1992); *Levin v. NBA*, 385 F. Supp. 149, 150 (S.D.N.Y. 1974); but see *Am. Needle, Inc. v. NFL*, 538 F.3d 736 (7th Cir. 2008), *rev’d*, 130 S. Ct. 2201 (2010); *Fraser v. Major League Soccer, L.L.C.*, 284 F.3d 47 (1st Cir. 2002).

81. Jonathan C. Tyras, *Players Versus Owners: Collective Bargaining and Antitrust after Brown v. Pro Football, Inc.*, 1 U. PA. J. LAB. & EMP. L. 297, 299 (1997) (“Although other industries lend themselves to straightforward antitrust evaluation in terms of pro-competitive and anti-competitive effects, the nature of a self-regulated, cooperative, and yet competitive, sports league raises the question of whether sports leagues should be subject to antitrust law at all.”).

82. Keyte, *supra* note 70, at 49.

Much of the confusion over *Copperweld* stems from the Court’s observation that a parent and its wholly owned subsidiary share a “complete unity of interest.” The question is whether the Court’s use of the phrase was a limiting principle to guide lower courts or, instead, merely a description of the particular factual context before it.

*Id.* at 49 (citation omitted).

83. 130 S. Ct. 2201 (2010)

3. American Needle, Inc. v. National Football League, et al.<sup>84</sup>

In *American Needle v. National Football League*<sup>85</sup>, the Court was asked to determine whether the NFL is a single-entity for the purposes of collectively licensing its intellectual property.<sup>86</sup> Because courts—like the First Circuit in *Fraser*<sup>87</sup>—have had substantial difficulties classifying sports leagues in light of *Copperweld*,<sup>88</sup> *American Needle* provided a seminal opportunity to clarify the instances where the single-entity defense is appropriate.<sup>89</sup>

The NFL is an unincorporated association of thirty-two separately owned professional football teams.<sup>90</sup> Each has its own name, colors, logos, and ownership of its own intellectual property—at least up until 1963.<sup>91</sup> Up until then, teams individually trademarked logos, did their own marketing, and separately arranged to license their intellectual property.<sup>92</sup> In 1963, NFL teams formed a separate entity, NFL Properties, LLC (NFLP).<sup>93</sup> The goal of its formation was to do collectively with intellectual property what the teams already did individually.<sup>94</sup> Between NFL Properties' incorporation and 2000, NFLP licensed intellectual property to multiple vendors to manufacture items, such as jerseys, shirts, and other apparel.<sup>95</sup> One such

84. *Id.*

85. *Id.*

86. *Id.*

87. *See Fraser v. Major League Soccer, L.L.C.*, 284 F.3d 47 (1st Cir. 2002); *see also infra* Part III.B.

88. *See supra* Part II.B.2.

89. Keyte, *supra* note 70, at 49-50.

[The] contradictory perspectives on the “complete unity of interest” language in *Copperweld* highlight the need for Supreme Court clarification on this issue alone: the state of the law is not useful for any collaborative ventures when what for some circuits is dispositive is for others legally irrelevant. In the sports league context especially, *Copperweld* is of far reaching importance: if a “complete unity of interest” truly is a limiting principle, single-entity status for any league restraint will be a dubious proposition; however, if the language is merely descriptive, there is a lot of bad law out there that has blocked the potential early resolution of any number of cases involving sports leagues and other legitimate joint ventures.

*Id.*

90. *Am. Needle v. National Football League*, 130 S. Ct. 2201, 2207 (2010).

91. *Id.*

92. *Id.*

93. *Id.*

94. *Id.*

95. *Am. Needle*, 130 S. Ct. at 2207.

vendor was American Needle, Inc., who previously held a license to manufacture headwear from NFLP.<sup>96</sup>

In 2001, NFLP granted an exclusive license to Reebok International Ltd. for ten years, while permitting all other competitors' licenses to expire.<sup>97</sup> As a result, American Needle filed an antitrust action, claiming NFLP, the teams individually, and Reebok had all conspired in violation of section 1 and section 2 of the Sherman Act.<sup>98</sup> American Needle alleged that because each individual team owns their team logos and trademarks separately, their authorization to NFLP to restrict other vendors was a conspiracy.<sup>99</sup> The NFL responded that it was immune from section 1 liability because NFLP constitutes a single entity when collectively promoting NFL football by licensing the NFL teams' intellectual property, and therefore is incapable under *Copperweld* of conspiring with itself.<sup>100</sup>

After the Northern District of Illinois ruled for the NFL, the Seventh Circuit agreed, saying that "nothing in [section] 1 prohibits the NFL teams from cooperating so the league can compete against other entertainment providers."<sup>101</sup> In coming to this radical conclusion, "[t]he court noted that football itself can only be carried out jointly," and that "NFL teams share a vital economic interest in collectively promoting NFL football . . . to compete with other forms of entertainment . . . ."<sup>102</sup> The court noted that the teams' collective product was "NFL football," and thus it followed "'that only one source of economic power controls the promotion of NFL football,' and 'it makes little sense to assert that each individual team has the authority, if not the responsibility, to promote the jointly produced NFL football.'"<sup>103</sup>

When American Needle petitioned the Supreme Court for review, the NFL joined, and sought a broad single-entity certification that would allow the league considerable leeway to establish wide restraints in areas, like players' salaries and movement, ticket sales, and other types of merchandizing.<sup>104</sup>

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96. *Id.*

97. *Id.*

98. *Am. Needle, Inc., v. NFL*, 538 F.3d 736, 738 (7th Cir. 2008), *rev'd*, 130 S. Ct. 2201 (2010).

99. *Id.*

100. *Am. Needle*, 130 S. Ct. at 2207.

101. *Id.* at 2208.

102. *Id.* (citations omitted).

103. *Id.*

104. Lester Munson, *Antitrust Case Could be Armageddon*, ESPN.COM (Jul. 17, 2009), [http://sports.espn.go.com/espn/columns/story?columnist=munson\\_lester&id=4336261](http://sports.espn.go.com/espn/columns/story?columnist=munson_lester&id=4336261).

The Supreme Court unanimously ruled that the NFL teams did not exist as a single enterprise for the purposes of section 1.<sup>105</sup> In doing so, the Court determined that

[t]he relevant inquiry, therefore, is whether there is a “contract, combination . . . or conspiracy” amongst “separate economic actors pursuing separate economic interests,” such that the agreement “deprives the marketplace of independent centers of decisionmaking,” and therefore of “diversity of entrepreneurial interests,” and thus of actual or potential competition.<sup>106</sup>

The Court reaffirmed its reverence to substance over form in determining whether an entity is capable of conspiring under section 1.<sup>107</sup> Writing for the Court, Justice Stevens expanded on *Copperweld* by inquiring into the “competitive reality” of the parties, rather than their respective legal designations.<sup>108</sup> He continued, saying “it is not dispositive that the teams have organized and own a legally separate entity that centralizes the management of their intellectual property.”<sup>109</sup>

In response to the NFL’s argument that the team share a common interest in promoting the NFL brand, and formed NFLP in order to market their NFL brands through a single outlet, the Court opined that “[teams] are still separate, profit-maximizing entities, and their interests in licensing team trademarks are not necessarily aligned.”<sup>110</sup> While acknowledging that the teams are “partially” united in their economic interest in promoting the NFL as a parent firm, the Court characterized teams as having distinct, potentially competing interests.<sup>111</sup>

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105. *Am. Needle*, 130 S. Ct. at 2208 (citing *Am. Needle, Inc. v. NFL*, 538 F.3d 736, 743 (7<sup>th</sup> Cir. 2008)).

106. *Id.* at 2212 (citations omitted).

107. *Id.* at 2212 (citing *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752, 773 n.21 (1984)).

108. *Id.*

[I]t is not determinative that two parties to an alleged § 1 violation are legally distinct entities. Nor, however, is it determinative that two legally distinct entities have organized themselves under a single umbrella or into a structured joint venture. The question is whether the agreement joins together “independent centers of decisionmaking.” If it does, the entities are capable of conspiring under § 1, and the court must decide whether the restraint of trade is an unreasonable and therefore illegal one.

(quoting *Copperweld*, 467 U.S. at 769) (citation omitted).

109. *Id.* at 2213.

110. *Am. Needle*, 130 S. Ct. at 2213.

111. *Id.*



In analyzing whether the NFL teams “possess[ed] either the unitary decisionmaking [sic] qualities or the single aggregation of economic power characteristic of independent action,” the Court focused on seven factors: that the NFL teams were independently owned, independently managed with separate corporate consciousness whose objectives are not common, that the teams compete with each other on the playing field, compete to attract fans, compete for gate receipts, compete for contracts with players and coaches, and that the teams had the potential to compete for their separately owned intellectual property.<sup>112</sup> The Court emphasized that the inquiry is whether, from the viewpoint of third parties, teams are potential competitors.<sup>113</sup> This viewpoint will be imperative when assessing the competitive reality of MLS.

### III. MAJOR LEAGUE SOCCER’S BACKGROUND

#### A. AN OVERVIEW OF MLS’S STRUCTURE AND ITS PLAYERS’ CONTRACTS

Major League Soccer, L.L.C. was formed in 1995, on the coattails of the United States’ successful hosting of the 1994 FIFA World Cup.<sup>114</sup> MLS learned from other professional sports leagues<sup>115</sup> and its Division-1 predecessor, the North American Soccer League (NASL), and sought to avoid “Catch-22” situations<sup>116</sup> by growing relatively slowly and ensuring that

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112. *Id.* at 2212.

113. *Id.* at 2213 (“To a firm making hats, the Saints and the Colts are two potentially competing suppliers of valuable trademarks.”).

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

115. *McCann*, *supra* note 48, at 746-49 (citations omitted).

116. Andrei S. Markovits & Steven L. Hellerman, *Soccer in America: A Story of Marginalization*, 13 U. MIAMI ENT. & SPORTS L. REV. 225, 247 (1995-96).

Realizing that only top quality soccer would draw major league-type crowds to matches, the owners of the NASL had competed with each other in lavishing huge contracts upon players from abroad. Revenues never matched the salary outlay for these players, though without these players there would be no revenue at all, as the quality of play on the field would not draw spectators, nor attract a network television contract. That there were few American players on these teams was a powerful factor in limiting spectatorship both in-person and on television, once Pele had retired in 1978. But American players were simply not good enough to provide the league with the necessary quality of play . . . . The only alternative would have been to build slowly, with limited revenue and an emphasis on home-grown talent.

American players make up a majority of each team.<sup>117</sup> To achieve this stability, the League's creator, Alan Rothenberg, dreamt up an ideal single-entity league whereby the league would control the actions of all teams, investors would have minimal decision-making input, and all league actions would be exempt from antitrust liability under *Copperweld*.<sup>118</sup> Investors, however, were not attracted to the idea of minimal team control, and sought hands-on involvement—including the chance to manage a team that could contend for a championship.<sup>119</sup> As a result, the League compromised its legal structure to appease investors—a decision that may come back to haunt them in the long term as the League continues to grow.<sup>120</sup>

The structure of MLS is unique to professional sports, and thus far its hybrid single-entity status has been successful in avoiding antitrust liability.<sup>121</sup> Instead of the teams being individually owned by separate individuals or companies, the League owns all teams, as well as all team equipment, tickets rights, intellectual property, and broadcast rights.<sup>122</sup> On paper, a board of governors retains centralized control over all League operations, apportions profits and losses to each team, and generally controls operations of each individual team.<sup>123</sup> In contrast, the team's day-to-day operations of each team are managed by a specific owner/investor—a corporation or a small group of individuals.<sup>124</sup> Each owner/investor actually owns stock in the League, retains a seat on MLS's Board of Governors, and thus is characterized as an "equity holder."<sup>125</sup> Thus, the League is essentially controlled by the individuals who manage each team.<sup>126</sup>

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117. See *Roster Regulation*, *supra* note 17. MLS rules limit each team to eight international (foreign, non-American) players. *Id.*

118. See PAUL C. WEILER & GARY R. ROBERTS, *SPORTS AND THE LAW* 186, 495-96 (3d ed. 2004) (discussing MLS's original structure and why MLS decided on its current hybrid single-entity corporation).

119. *Fraser*, 284 F.3d at 53-54; see also Marc Edelman, *Why the "Single Entity" Defense Can Never Apply to NFL Clubs: A Primer on Property-Rights Theory in Professional Sports*, 18 *FORDHAM INTELL. PROP. MEDIA & ENT. L.J.* 891, 900-03 (2008) (detailing how a single-entity structure is problematic when dealing with wealthy owners with large egos who want to take credit for a team's success and do not want to become faceless investors).

120. See *infra* Part IV.B.

121. *Fraser*, 284 F.3d at 53, 58.

122. *Id.* at 53.

123. *Id.*

124. *Id.*

125. *Id.* See also Brief for ATP Tour et al. as Amici Curiae Supporting Petitioner, *Am. Needle, Inc., v. NFL*, 130 S. Ct. 2201 (2010) (No. 08-661), available at [http://www.abanet.org/publiced/preview/briefs/pdfs/09-10/08-661\\_RespondentAmCu4SportsGroups.pdf](http://www.abanet.org/publiced/preview/briefs/pdfs/09-10/08-661_RespondentAmCu4SportsGroups.pdf).

126. *Fraser*, 284 F.3d at 53-54.

The League permits each operator/investor to individually benefit from their management of the team by hiring—at their own expense and discretion—local staff, local promotions, selling of home tickets, and local broadcast rights on behalf of MLS.<sup>127</sup> These actions are not subject to League oversight.<sup>128</sup> Operator/investors are compensated by MLS by a “management fee,” which is apportioned through 50% of local ticket sales and concessions, the first \$1,125,000 of local broadcast revenues, 100% of overseas tour revenues, and 50% of net revenues from the MLS Championship Game.<sup>129</sup>

Player contracts are negotiated with the League itself and not individual teams—unlike most professional sports leagues.<sup>130</sup> “MLS recruits the players, negotiates [players’] salaries, pays them from league funds, and, to a large extent, determines where each of them will play.”<sup>131</sup> Additionally, the League attempts to balance talent among the teams by restricting the composition of each team’s roster, the method a team uses to acquire players, draft rules, trade restraints, discovery signing limits, and limitations of when players may be picked up off waivers and in lotteries.<sup>132</sup>

#### B. MLS’S NARROW ESCAPE IN *FRASER*

The League’s structure was specifically designed to do two things: provide longitudinal support through a centralized investment system, and avoid antitrust liability.<sup>133</sup> Considered by many to be a “sham,”<sup>134</sup> this structure arguably provides a way for MLS to exercise monopoly power without liability. In 1997, the organizational structure of the League was challenged by a number of the League’s players in *Fraser v. Major League Soccer*, who claimed, among other issues, that: (1) despite the League’s structural form as a single entity, the teams substantively acted independent of one another; and (2) the League’s rules unlawfully constrained the players’ ability to freely market their abilities, and the teams’ agreement not to compete for players’ services amounted to a group boycott.<sup>135</sup>

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127. *Id.* at 54.

128. *Id.*

129. *Id.*

130. *Id.* at 53.

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

132. *See Roster Regulation*, *supra* note 17.

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

134. *See* Pepper Brill, Note, *Major League Soccer or Major League Sham? Players Bring Suit to Bite the Hand that Feeds Them*, 1999 COLUM. BUS. L. REV. 585, 588 (1999) (quoting *Fraser v. Major League Soccer, L.L.C.*, 7 F. Supp. 2d 73 (D. Mass. 1998), *aff’d*, 284 F.3d 47 (1st Cir. 2002)).

135. *Fraser*, 284 F.3d at 54-55. The players’ Complaint in *Fraser* provides:

The First Circuit went through a detailed rendition of the structure of the League and recognized that MLS has separate contractual relationships with its operator/investors. The court noted that those operator/investors' rights mimic some of the same rights held by team owners in traditional sports leagues.<sup>136</sup> MLS team owners "do some independent hiring and make out-of-pocket investments in their own teams; they 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."<sup>137</sup>

As a result, the court found that because operator/investors are not mere servants of MLS, but in reality effectively control it—by having the majority of votes on the managing board—MLS's analogy to a single entity is weak, and more closely resembles a collaborative venture.<sup>138</sup> The court reasoned that while "a stockholder may be insulated by *Copperweld* when making ordinary governance decisions," he may not automatically be insulated or "protect[ed] when the stockholder is also an entrepreneur separately contracting with the company."<sup>139</sup> The court recognized that MLS effectively has two roles: "one as an entrepreneur with its own assets and revenues" and "the other . . . as a nominal vertical device for producing horizontal coordination, i.e., limiting [the] competition among operator/investors."<sup>140</sup> The court noted that "[t]he problem is especially serious where, as here, the

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Rather than engaging in competition for players' services, the MLS Defendants have combined and conspired to eliminate such competition among themselves, through, among other things, group boycotts, concerted refusals to deal except on uniform terms, combining assets, and the creation of a "sham" single entity. This is accomplished by the MLS Defendants combining their assets and jointly adopting and imposing "rules" and "policies" that have the purpose and effect of eliminating all competition and preventing players from offering their services to MLS Member Teams in a competitive market. Players desiring to play major league professional soccer in the United States are forced to negotiate with the "sham" MLS "single entity" and sign the MLS Standard Player Agreement. In doing so, players make a year-round commitment to MLS for a salary that is well below what it would be in a competitive market.

Heike K. Sullivan, *Fraser v. Major League Soccer: The MLS's Single-Entity Structure is a "Sham,"* 73 TEMP. L. REV. 865, 894 n.259 (2000).

136. *Fraser*, 284 F.3d at 57.

137. *Id.*

138. *Id.*

139. *Id.*

140. *Id.*

stockholders are themselves potential competitors with MLS and with each other.”<sup>141</sup>

Despite those sentiments, the court found that the plaintiff-players failed to prove a relevant market, and sided with the League.<sup>142</sup> In doing so, the court did not explicitly designate MLS as a single-entity, simply calling it a hybrid organization and a hybrid single-entity.<sup>143</sup>

C. SETTING THE PITCH: THE SINGLE-ENTITY STATUS AND *BROWN V. PRO FOOTBALL* NEGATIVELY AFFECT COLLECTIVE BARGAINING NEGOTIATIONS IN MAJOR LEAGUE SOCCER

Courts have not hesitated to apply antitrust scrutiny to leagues’ unilateral implementation of restraints on players or on teams’ competition for players’ services.<sup>144</sup> But, courts have permitted restraints on competition when the restraints have been the product of a collective bargaining agreement and arm’s-length negotiating between a union and an employer.<sup>145</sup> The application of section 1 to teams that independently employ players ensures that players have an effective alternative to disruptive work stoppages.<sup>146</sup> Because a group of employers who are not potential competitors and have a “unity of interest” cannot be found to have violated the Sherman Act’s proscription against concerted action, players cannot argue the employers’ restraints on trade are an agreement between separate economic actors.<sup>147</sup> Therefore, players have a considerably diminished bargaining power to negotiate changes in the atmosphere of a single-entity employer, as the threat of union decertification no longer exposes such an employer to antitrust scrutiny, and the single-entity structure of the League allows it to unilaterally implement CBA terms without fear of antitrust liability. Employees are thus relegated to the backbone of labor warfare—striking—

141. *Fraser*, 284 F.3d at 57.

142. *Id.* at 59-61.

143. *Id.* at 58.

144. *See Radovich v. NFL*, 352 U.S. 445 (1957); *Smith v. Pro Football, Inc.*, 593 F.2d 1173 (D.C. Cir. 1978); *Mackey v. NFL*, 543 F.2d 606 (8th Cir. 1976); *Kapp v. NFL*, 390 F. Supp. 73 (N.D. Cal. 1974); *Robertson v. NBA*, 389 F. Supp. 867 (S.D.N.Y. 1975).

145. *See, e.g., Mackey v. NFL*, 543 F.2d 606 (8th Cir. 1976).

146. Brief for National Football League et al. as Amici Curiae Supporting Petitioner at 3, *Am. Needle, Inc., v. NFL*, 130 S. Ct. 2201 (2010) (No. 08-661), (filed Sept. 25, 2009), available at [http://www.abanet.org/publiced/preview/briefs/pdfs/07-08/08-661\\_PetitionerAmCu4LeaguePlayersOrgs.pdf](http://www.abanet.org/publiced/preview/briefs/pdfs/07-08/08-661_PetitionerAmCu4LeaguePlayersOrgs.pdf).

147. Karen Jordan, *Forming A Single Entity: A Recipe for Success for New Professional Sports Leagues*, 3 VAND. J. ENT. L. & PRAC. 235, 247 (2001) (“[T]he single-entity structure helps the newest leagues avoid facing responsibility for player restraints under antitrust laws.”).

which yields minimal results when employers are permitted to permanently replace striking employees<sup>148</sup> and players' careers hold short life spans.

### 1. *Brown's Effect on Collective Bargaining Negotiations*

Before *Brown v. Pro Football, Inc.*, courts had not permitted unilateral restraints outside the collective bargaining process to receive a non-statutory labor exemption, instead permitting an exemption only when there had been agreement between an employer and a union.<sup>149</sup> While the non-statutory labor exemption was originally granted to the collective bargaining process so that employees would benefit from concerted action,<sup>150</sup> employers have enjoyed an advantage in collective bargaining since *Brown* swayed the pendulum back in their favor.

In *Brown*,<sup>151</sup> the 1987 collective-bargaining agreement between the NFL and the National Football League Players Association (NFLPA) expired, leaving the parties to negotiate a new contract.<sup>152</sup> One of the drawn-out issues revolved around the salaries of developmental squad players—the NFL had offered a \$1000 weekly salary, and the NFLPA sought individually negotiated salaries between each team and each developmental squad player.<sup>153</sup> The parties eventually reached an impasse over the term, whereafter the NFL unilaterally implemented their last-best-offer and sanctioned any team that acted otherwise.<sup>154</sup> In turn, the NFLPA challenged these fixed salary levels, which all twenty-eight NFL-member clubs had imposed, post-impasse, on all developmental squad players, as a violation of section 1 of the Sherman Act.<sup>155</sup> The players claimed that the NFL clubs conspired to unreasonably restrain trade by agreeing to pay the same wage for developmental players—a noncompete agreement—instead of negotiating individual contracts with these practice players.<sup>156</sup>

The Supreme Court noted in *Brown* that bargaining with multiple employers is not unlike bargaining with a single employer:<sup>157</sup> no employer

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148. See *Mastro Plastics Corp. v. NLRB*, 350 U.S. 270 (1956); *NLRB v. Mackay Radio & Tel. Co.*, 304 U.S. 333 (1938).

149. See *Connell Constr. Co. v. Plumbers & Steamfitters Local 100*, 421 U.S. 616 (1975) (limiting the non-statutory labor exemption as inapplicable to any agreement outside the context of a collective bargaining agreement).

150. See *id.*

151. *Brown v. Pro Football, Inc.*, 518 U.S. 231 (1996).

152. *Id.* at 234.

153. *Id.*

154. *Id.*

155. *Id.*

156. *Brown*, 518 U.S. at 225.

157. *Id.* at 239 (“[N]o one . . . has argued that labor law does, or should, treat multi-employer bargaining differently [than bargaining with a single employer].”).

within a multiemployer bargaining unit may unilaterally withdraw during negotiations absent unusual circumstances;<sup>158</sup> joint implementation of proposed collective bargaining terms is a familiar practice in the context of multiemployer bargaining;<sup>159</sup> and, as a defense to a union's strike against one of their members, nonstriking members of a multi-employer bargaining unit may temporarily lock out employees in order to preserve the multi-employer unit.<sup>160</sup> In addition, "multiemployer bargaining benefits both management and labor, by saving bargaining resources, by encouraging development of industry-wide worker benefits programs that smaller employers could not otherwise afford, and by inhibiting employer competition at the workers' expense."<sup>161</sup>

The Supreme Court went on to reiterate the purpose of the non-statutory labor exemption as encouraging meaningful collective bargaining by shielding some restraints on competition imposed through the bargaining process from antitrust sanctions.<sup>162</sup> The Supreme Court went further to allow employers' post-impasse imposition of a term concerning a mandatory subject of bargaining—wages, hours, or other terms and conditions of employment—to receive a nonstatutory labor exemption to antitrust scrutiny, so long as the imposed term was reasonably comprehended pre-impasse,<sup>163</sup> and the collective bargaining process was free of any unfair labor practices.<sup>164</sup> Yet, while the Court in *Brown* had considerable difficulty applying section 1 scrutiny to the unilateral imposition of terms and conditions after impasse of multiple employers, it "did not connect single bargaining employ[ment] status to *Copperweld* or single-entity status."<sup>165</sup> It did, though, offer a limitation as to when labor relations law protection yields to antitrust law—when the collective bargaining process no longer exists, as evidenced by decertification of a union.<sup>166</sup>

158. *Charles D. Bonanno Linen Serv., Inc. v. NLRB*, 454 U.S. 404, 405-06 (1982). But, both unions and employers may withdraw prior to negotiations by giving timely, unequivocal notice, *id.*, or upon mutual consent of the union and the association. *Retail Ass'n*, 120 N.L.R.B. 388 (1958).

159. *Brown*, 518 U.S. at 239 (citations omitted).

160. *NLRB v. Truck Drivers Int'l Bhd. of Teamsters Local 449*, 353 U.S. 87, 93-97 (1957).

161. *Brown*, 518 U.S. at 240 (citing *Charles D. Bonanno Linen Serv., Inc.*, 242 U.S. at 409 n.3).

162. *Id.* at 238.

163. *Id.* ("The new terms must be 'reasonably comprehended' within the employer's pre-impasse proposals (typically the last rejected proposals)" for fear that an employer will undermine the union's status.).

164. *Id.* at 238-39.

165. *McCann*, *supra* note 48, at 745 (citing *Brown*, 518 U.S. at 248-49).

166. *Brown*, 518 U.S. at 250. The Court suggested that the nonstatutory labor exemption lasts until collapse of the collective-bargaining relationship, as evidenced by decertification of the union, when it stated, "Our holding is not intended to insulate from antitrust re-

Since the NLRA requires both employers and unions to bargain collectively, by imposing a duty to "meet . . . and confer in good faith with respect to wages, hours, and other terms and conditions of employment,"<sup>167</sup> but does not compel either party to make an agreement or any concessions,<sup>168</sup> employers are not guilty of unfair labor practices if they negotiate to an impasse.<sup>169</sup> *Brown* has been criticized in this respect, as not creating a pressure atmosphere that would prove helpful in collective bargaining.<sup>170</sup> In fact, impasse often is used as a bargaining tactic,<sup>171</sup> and certainly may be brought about intentionally by management in light of *Brown* in order to unilaterally impose terms, and still gain a nonstatutory labor exemption from antitrust scrutiny without union approval.

## 2. *The Futility of Union Decertification in Light of the Single-Entity League*

As mentioned above, when impasse is reached, management may unilaterally impose terms and conditions and still gain a nonstatutory labor exemption<sup>172</sup>—a seemingly inequitable advantage over a players' union in the process of collective bargaining.<sup>173</sup> Some say *Brown* unnecessarily sacrificed antitrust goals to facilitate the goals of labor law,<sup>174</sup> and as a result it is hard to argue that player-employees benefit from this type of exemption. As hinted in *Brown*, unions typically can expose multiemployer unila-

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view every joint imposition of terms by employers, for an agreement among employers could be sufficiently distant in time and in circumstances from the collective-bargaining process that a rule permitting antitrust intervention would not significantly interfere with that process." *Id.* (citing *Brown v. Pro Football, Inc.*, 50 F.3d 1041, 1057 (D.C. Cir. 1995) (suggesting that exemption lasts until collapse of the collective-bargaining relationship, as evidenced by decertification of the union)).

167. 29 U.S.C. §§ 158(a)(5), 158(d) (1988); *NLRB v. Borg-Warner Corp.*, 356 U.S. 342, 348-49 (1958).

168. *NLRB v. Am. Nat'l Ins. Co.*, 343 U.S. 395, 402 (1952).

169. *Charles D. Bonanno Linen Serv., Inc. v. NLRB*, 243 N.L.R.B. 1093, 1094 (1979).

170. Shawn Treadwell, *An Examination of the Nonstatutory Labor Exemption From the Antitrust Laws, In the Context of Professional Sports*, 23 *FORDHAM URB. L. J.* 955, 972 (1996) (citing Archibald Cox, *The Duty to Bargain in Good Faith*, 71 *HARV. L. REV.* 1401, 1423 (1958)).

171. *Charles D. Bonanno Linen Serv., Inc.*, 243 N.L.R.B. 1093, 1094 (1979) ("[I]mpasse may be brought about intentionally . . . [to] increase economic pressure on one . . . [side], and thus increase the desire for agreement.").

172. See *infra* Part III.C.1.

173. Jonathan C. Tyras, *Players Versus Owners: Collective Bargaining and Antitrust after Brown v. Pro Football, Inc.*, 1 *U. PA. J. LAB. & EMP. L.* 297, 298 (1997).

174. Michael C. Harper, *Multiemployer Bargaining, Antitrust Law, and Team Sports: The Contingent Choice of a Broad Exemption*, 38 *WM. & MARY L. REV.* 1663, 1667 (1996).



teral action through decertification,<sup>175</sup> but when these teams are characterized as a single-entity, their post-impose unilateral imposition of terms and conditions will not be exposed to antitrust scrutiny when a union decertifies—a loophole that perverts the purpose of the NLRA<sup>176</sup> and the nonstatutory labor exemption. Courts have accurately characterized labor relations in analyzing the NFL, but due to *Fraser*, this single-entity loophole currently remains in MLS.

Major League Soccer Players' Union's push for free agency is eerily reminiscent of the same movement by the National Football League Players Association's in the 1980's.<sup>177</sup> An issue throughout the NFL's labor history with its players has been some form of a restriction on free agency: by blacklisting, boycott, draft and tampering rules, reserve clauses, or now forms of veteran and restricted free-agencies.<sup>178</sup> Generally, a players' association can respond to a perceived injustice or concerted restraint on player movement by decertifying the union, which exposes separate economic employers to antitrust liability.<sup>179</sup> Prior to filing an antitrust suit (*McNeil v. NFL*<sup>180</sup>), the NFL Players Association was required to do just that: it decertified, disclaimed all interest as the representative of the players in collective bargaining, and reformed as a professional organization in order to take up the antitrust case against the league.<sup>181</sup>

As a result, the players were able to prove that the nonstatutory labor exemption no longer applied; because the NFLPA was no longer the bargaining representative of the players,<sup>182</sup> the previously agreed upon restraints were removed, and the NFL teams were subject to section 1 scrutiny. The NFL responded that it was a single-entity, incapable of conspiring under the Sherman Act, based on then NFL Commissioner Paul Tagliabue's testimony about his belief that the NFL's business relationship is that of co-

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175. See *supra* note 166 and accompanying text.

176. The NLRA was established to “define and protect the rights of employees and employers, to encourage collective bargaining, and to eliminate certain practices on the part of labor and management that are harmful to the general welfare.” BASIC GUIDE TO THE NATIONAL LABOR RELATIONS ACT, at 1 (1997), available at [http://www.nlr.gov/nlr/shared\\_files/brochures/basicguide.pdf](http://www.nlr.gov/nlr/shared_files/brochures/basicguide.pdf).

177. See Scott E. Backman, *NFL Players Fight for Their Freedom: The History of Free Agency in the NFL*, 9 SPORTS LAW. J. 1, 29-30 (2002).

178. *Id.* at 2 n.1.

179. See *Brown v. Pro Football, Inc.*, 518 U.S. 231, 250 (1996) (“[The] exemption lasts until collapse of the collective-bargaining relationship, as evidenced by decertification of the union.”); *Powell v. NFL*, 930 F.2d 1293, 1303 n.12 (8th Cir. 1999) (“The League concedes that the Sherman Act could be found applicable . . . if a challenged restraint . . . [affects] employees ceased to be represented by a certified union.”).

180. *McNeil v. NFL*, 790 F. Supp. 871 (D. Minn. 1992).

181. *Id.* at 876 n.2; see also Backman, *supra* note 177, at 29-30.

182. *McNeil*, 790 F. Supp. at 885-886.

owners, and not of independent economic competitors.<sup>183</sup> The district court rejected this argument outright based on precedent in other circuits when the NFL raised similar claims.<sup>184</sup> Not only is *McNeil* significant for its detail of the procedure by which a union must go through to subject employer-imposed restraints to antitrust scrutiny, but it also proved that the NFL's actions were subject to section 1 scrutiny.

When *Fraser* was litigated, the Major League Soccer Players' Union had not yet formed and there was no collective bargaining agreement between the players and the League.<sup>185</sup> *Fraser* effectually granted the League an undeserved antitrust exemption, and due to the ongoing mischaracterization of the League's business structure, the League continues to be portrayed as a single-entity.<sup>186</sup> Since MLSPU was formed in 2003, the players have continued to receive more favorable terms and conditions of employment. As such, decertification during negotiation for the 2010 collective bargaining agreement, in light of *Fraser* as precedent, would have been a risky endeavor. The Union will likely refrain from that course of action until the MLS teams' diversity of entrepreneurial interests has grown, and will no longer draw doubt from antitrust courts like the First Circuit. However, it is arguable whether the MLS teams have reached such diversity yet.<sup>187</sup>

### 3. *The Futility of Striking in Light of Labor Laws and the Single-Entity League*

The mischaracterization of MLS as a single-entity subverts the purpose of the NLRA, which seeks to decrease work stoppages and provide a forum for amiable relations between employers and employees. The presence of a single-entity employer in labor relations results in just the opposite—more labor stoppages—which poisons sport-entertainment products that have all continued to grow.<sup>188</sup> Because the results of a MLSPU decertification and antitrust suit seeking to expose teams to antitrust scrutiny are still just as tenuous as the MLS business structure, the players were forced to resort to a strike threat in order to leverage their bargaining position. Yet,

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183. *Id.* at 878.

184. Backman, *supra* note 177, at 34 n. 212 (citing L.A. Mem'l Coliseum Comm'n v. NFL, 726 F.2d 1381, 1389 (9th Cir. 1984); N. Am. Soccer League v. NFL, 670 F.2d 1249, 1257 (2d Cir. 1982).

185. See Major League Soccer Players Union, *About the MLS Players Unions*, MLSPLOYERS.ORG, [http://www.mlspu.org/about\\_mlspu.html](http://www.mlspu.org/about_mlspu.html) (last visited Sept. 6, 2010).

186. *Fraser v. Major League Soccer, L.L.C.*, 284 F.3d 47, 59 (1st Cir. 2002).

187. See *infra* Part IV.

188. See Lester Munson, *Antitrust Case Could be Armageddon*, ESPN.COM (Jul. 17, 2009), [http://sports.espn.go.com/espn/columns/story?columnist=munson\\_lester&id=4336261](http://sports.espn.go.com/espn/columns/story?columnist=munson_lester&id=4336261).

the MLS players' strike threat was significantly diminished since employers are allowed to hire temporary replacements for striking employees.<sup>189</sup> Since only a limited number of American-born players have succeeded in playing abroad,<sup>190</sup> the League can pick from pools of foreign talent to make up for any perceived loss in value, should the players strike.<sup>191</sup> In addition, owners can always outlast the players, since players have short careers and an inherent fear of making careers even shorter by taking a stand.<sup>192</sup>

Finally, many would argue that fans likely would not respond well to the widespread use of replacement players. While there may be an abundance of foreign talent available to provide fans with a quality product, fans desire players they can identify with, and want to see the League showcase local American talent.<sup>193</sup> Because each sports league competes with each other for fan support and against other forms of entertainment,<sup>194</sup> the use of replacement players by the League will likely strip MLS of its global respect. Nevertheless, the use of replacement players remains a powerful rebuttal for a league that can pull quality employee-players from around the world. For a league like MLS, whose popular support is just now reaching actualization, a lengthy labor stoppage would be its doom.

189. *NLRB v. Mackay Radio & Tele. Co.*, 304 U.S. 333, 345-46 (1938) (permitting an employer to protect and continue his business by supplying places left vacant by strikers, and not requiring an employer to discharge the replacement workers when strikers seek to resume their employment).

190. See YANKS ABROAD – EUROPEAN SOCCER, MADE IN AMERICA, Player Database, <http://yanks-abroad.com/get.php?mode=players> (last visited Dec. 27, 2010) (listing nearly all American soccer players currently playing on teams outside of the United States); see also Isaac Heath, *YA Exclusive: Another Star Gone*, YANKS ABROAD – EUROPEAN SOCCER, MADE IN AMERICA (Sept. 22, 2009), <http://yanks-abroad.com/get.php?mode=content&id=5227> (describing Chicago Fire forward Chris Rolfe's departure from MLS to Danish team Aalborg).

191. Kristian Dyer, *Reversal of Trend for Player Movement Between MLS and Europe*, ESPNsoccer.net.com (June 29, 2009), <http://soccer.net.espn.go.com/columns/story?id=658062&cc=5901>.

192. See Backman, *supra* note 177, at 20; see also NFL Players Association, *About Us, History, The 1980's – Era of Change*, <http://nflplayers.com/user/template.aspx?fmid=182&lmid=239&pid=1515&type=c> (last visited Jan. 9, 2010).

193. See Markovits & Hellerman, *supra* note 116 and accompanying text; see also Kartik Krishnaiyer, *MLS Outperforming EPL on American TV*, MAJORLEAGUESOCCERTALK.COM (Nov. 2, 2009), <http://www.majorleaguesoccertalk.com/mls-outperforming-epl-on-american-tv/6920>.

194. See Tim Bezbatchenko, *Bend it For Beckham: A Look at Major League Soccer and Its Single Entity Defense to Antitrust Liability After the Designated Player Rule*, 76 U. CIN. L. REV. 611, 635 (2008).

## D. THE 2010 COLLECTIVE BARGAINING NEGOTIATIONS

The Major League Soccer Players' Union sought an increase of the League's minimum salary, guaranteed contracts,<sup>195</sup> and a changing of the League rules to include free agency<sup>196</sup> as terms of the 2010 collective bargaining agreement.<sup>197</sup> The League fiercely opposed free agency, and held strong on the other issues.<sup>198</sup> When the 2003 CBA expired, negotiations for the 2010 CBA reached an impasse, and the players threatened to strike in order to leverage their bargaining position.<sup>199</sup> As a result, the 2010 collective bargaining negotiations delineated the tumultuous course of action that a union is subjected to if it is pitted against a group of conspiring employers, and exemplified why the misdiagnosis of a multiemployer bargaining group as a single-entity is unfair and dangerous to employees. Yet, while the players' push for free agency is not without merit—as there is considerable evidence that their salaries are suppressed compared to similar leagues—their push for free agency almost was the League's undoing.

Major League Soccer had good reason to resist free agency. Ever mindful of the failed leagues of the past,<sup>200</sup> and the knowledge that it would likely take considerable time to establish a collective soccer community,<sup>201</sup>

195. The MLS could terminate most players' contracts "if the Player fails, in the sole and absolute discretion of MLS, to exhibit sufficient skill or competitive ability . . ." 2003 CBA, *supra* note 17. Since not all MLS players' contracts were guaranteed, MLSPU sought to amend the new CBA to include guaranteed contracts for the full length of the contract, for all MLS players. Mullen & Mickle, *supra* note 16, at 7. In addition, not only did the League keep an upper hand through non-guaranteed contracts, it maintained control by giving players one-year option contracts, wherein the League held the option to extend at its discretion. Thomas Olshan, *CBA: MLS v. Players' Union*, SOCCERHYPE.COM, (Dec. 7, 2009), [http://www.soccerhype.com/page/show\\_article/117621/39256](http://www.soccerhype.com/page/show_article/117621/39256). These practices will likely continue for non-veteran players. *Id.*

196. Mullen & Mickle, *supra* note 16.

197. *Id.*

198. *International Union Says MLS Lockout Possible*, ESPNSOCCERNET.COM (Jan. 5, 2010), <http://soccer.net.espn.go.com/news/story?id=721186&sec=mls&cc=5901>.

199. MLSPU voted to strike if a new CBA was not reached by March 25, 2010, the first game of the 2010 season. Associated Press, *MLS Players Vote in Favor of Strike*, ESPNSOCCERNET.COM (Mar. 11, 2010), <http://soccer.net.espn.go.com/news/story?id=754272&sec=mls&cc=5901>.

200. See Markovits & Hellerman, *supra* note 116.

201. Lacie L. Kaiser, *The Flight From Single-Entity Sports Leagues*, 2 DEPAUL J. SPORTS L. CONTEMP. PROBS. 1, 14-15 (Spring 2004).

New leagues do not enjoy the fan base, sponsorship opportunities, broadcasting revenue, and stadium revenue that established sport leagues do. Newly formed sport leagues have to be content with limited success at least for the first few years . . . [as their] main concern [ought to be] . . . establishing the financial stability for the teams. Because single-entity structures provide the league an opportunity to share revenues and

MLS used the single-entity status to appropriate financial losses amongst all investors in the early years and achieved a competitive balance by unilaterally implementing rules<sup>202</sup> that kept teams from inflating the cost of labor.<sup>203</sup> Since MLS's inception, all player contracts have been solely between the League and the player, not with any individual team.<sup>204</sup> MLS's centralized contracting makes it unique, as the League "recruits the players, negotiates [player] salaries, pays them from League funds,<sup>205</sup> and, to a large extent, determines where each of them will play."<sup>206</sup> If the MLS were to allow free agency, teams would be competing against each other for player contracts—and thereby would entirely negate any "unity of interest" they previously held in the labor market, since each team would be acting primarily on its own behalf, rather than with a primary purpose of serving the League.

MLS opposes free agency because it is cited as the main force behind driving up labor costs.<sup>207</sup> By forcing players to contract centrally with the League, MLS strips players of their ability to pit teams against each other, and allows the League to artificially suppress the cost of players' contracts. "[U]sing centralized decision-making eliminates the competition for those services that would take place if each team could bid for and sign players

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losses among its members, it is able to support weaker market teams and promote competitive balance among the teams. Sport leagues that maintain centralized control over both league and individual team operations are able to ensure that teams do not compete with each other off the playing field.

*Id.* (citations omitted).

202. Jordan, *supra* note 147, at 247 ("Under the single-entity system, management maintains control over player movement and thus can distribute the talent, ensuring parity that will create competitive matches.") (citation omitted).

203. Pepper Brill, Note, *MLS or Major League Sham? Players Bring Suit to Bite the Hand that Feeds Them*, 1999 COLUM. BUS. L. REV. 585, 588 (1999) (arguing MLS's financial stability has come at the expense of the players who are forced to work in a restrictive labor market, and the single-entity structure may be good for the league's fiscal health, but allows MLS to unilaterally dictate terms (like the allocation of players to teams)).

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

205. While almost all players' salaries are paid by the League, the Designated Player Rule—implemented in the 2007-2008 season—allows each team to sign two players to contracts wherein the League pays \$415,000, and the team itself pays any remaining salary exceeding that amount. *Roster Regulation*, *supra* note 17.

206. *Fraser*, 284 F.3d at 53. This differs from the structure of Major League Baseball, National Hockey League, National Football League, and the National Basketball Association, wherein all player contracts are between the player and the individual team. *Roster Regulation*, *supra* note 17.

207. See generally D. Albert Daspin, Note, *Of Hoops, Labor Dupes and Antitrust Ally-Oops: Fouling Out the Salary Cap*, 62 IND. L.J. 95 (1986) (discussing economic benefits and drawbacks of the salary cap as a means of curtailing labor costs in the NBA, and the salary cap's potential antitrust effects).

directly."<sup>208</sup> MLS has also opposed free agency because of a desire to maintain control over players. MLS's "decision-making process also restricts players' ability to move [from] one team to another, hampering competition for their services."<sup>209</sup> Not only can MLS allocate to what team players are to play for, they also control group licensing for players, which gives the League the ability to veto any endorsement or commercial choices players may receive.<sup>210</sup>

Even though the Union's proposal for free agency came at a time when the League enjoyed success and expansion,<sup>211</sup> that success would likely not be enough for management to generously compromise whatever remains of their single-entity system. The effects of free agency on a single-entity league are devastating—ranging from the loss of control to increased labor costs and exposure to antitrust liability. Free agency completely destroys any unity of entrepreneurial interest teams may have had in the labor market, and leaves room for argument that the League as a whole should not be a single-entity. Should the MLS teams bid independently on players, acting on their own behalf to arrange contracts, there is considerable room for argument that their objectives off the field would be disparate, guided by separate consciousnesses, and no longer on the parent's—MLS's—behalf. As a result, the League would likely be required to entirely renounce whatever "hybrid" status they retained post-*Fraser*, and accept their structure as a joint venture. As a joint venture, League-wide restrictions on player movements would likely get a rule of reason analysis, whereby players would have to prove that the anticompetitive effects outweigh the precompetitive effects in order to persuade a court to strike down the restraints.

On March 20, 2010, five days before the 2010 MLS season opener, the parties reached an agreement on a five-year labor contract.<sup>212</sup> The agreement came somewhat unexpectedly, as only days prior, both parties had cited fundamental disagreements.<sup>213</sup> As part of the new CBA, a majority of

208. Jordan, *supra* note 147, at 241.

209. *Id.*

210. *Id.*

211. Doug McIntyre, *Further Expansion on the Docket for MLS*, ESPNSOCCERNET.COM (Apr. 15, 2009), <http://soccernet.espn.go.com/columns/story?id=637087&sec=mls&root=mls&cc=5901> (noting that MLS added five expansion teams between 2005 & 2009 and plans to add three more expansion teams by the 2012 season). *See also* Doug McIntyre, *Montreal Bids for a 2011 MLS Expansion Slot*, ESPNSOCCERNET.COM (June 25, 1009), <http://soccernet.espn.go.com/columns/story?id=657253&sec=mls&root=mls&cc=5901> (discussing a future MLS team in Montreal).

212. *MLS Avoids Strike with 5-year CBA*, *supra* note 27. The agreement came with the considerable aid of the Federal Mediation and Conciliation Service. *See id.*

213. *See* Associated Press, *Keller: Strike Vote Isn't About Money But Player Rights*, ESPNSOCCERNET.COM (Mar. 12, 2010),

players receive guaranteed contracts, salary cap increases, minimum salary increases for senior roster players, and player contracts with a limit on the number of option years they can have.<sup>214</sup> Notably missing from the 2010 CBA is MLSPU's ultimate goal—free agency.<sup>215</sup> In its place, the League will institute a “re-entry draft” for players who are released from their team.<sup>216</sup> As a result, the 2010 CBA can be characterized, at best, as a baby step towards realizing the same benefits afforded to professional athletes in other leagues.<sup>217</sup>

#### IV. ANALYSIS OF THE COMPETITIVE REALITY OF MLS'S LABOR RELATIONS

Many factors go into the production of each respective League game—from rules of the game, field dimensions, scoring methods, and game scheduling to labor relations, player discipline, and other off-field regulations.<sup>218</sup> Agreement between teams on issues, such as the rules of the game, exemplifies how cooperation is necessary to achieve the end product.<sup>219</sup> While each team may have a differing opinion over what rule should be implemented, the game cannot exist without a unified agreement amongst teams.<sup>220</sup> In contrast, sports teams generally possess autonomy over personnel and salary decisions concerning players, coaches, and administrators, as well as ticket prices, stadium leases, and equipment purchases—also factors that go into producing the “product” that is the respective competitive sport.<sup>221</sup>

In a competitive sports league, other than the pure single-entity envisioned by Alan Rothenberg, each team has a goal of having a winning repu-

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<http://socccernet.espn.go.com/news/story?id=754773&sec=mls&cc=5901>; see also Grahame L. Jones, *MLS Players Would Make Big Mistake With Strike, AEG Chief Says*, L.A. TIMES (Mar. 15, 2010), available at <http://articles.latimes.com/2010/mar/15/sports/la-sp-mls-leiweke-20100316>.

214. Ives Galarcep, *MLS Announces Details of CBA*, SOCCERBYIVES.NET (Mar. 23, 2010), [http://www.soccerbyives.net/soccer\\_by\\_ives/2010/03/mls-announces-details-of-cba.html](http://www.soccerbyives.net/soccer_by_ives/2010/03/mls-announces-details-of-cba.html).

215. See *MLS Avoids Strike with 5-year CBA*, *supra* note 27.

216. See *infra* Part IV.A.5.

217. See Kyle McCarthy, *Monday MLS Breakdown: New MLS CBA Satisfies Significant Objectives for League and Players Union*, GOAL.COM (Mar. 22, 2010), <http://www.goal.com/en-us/news/1110/major-league-soccer/2010/03/22/1843991/monday-mls-breakdown-new-mls-cba-satisfies-significant>.

218. McCann, *supra* note 48, at 740 (citations omitted).

219. *Id.*

220. *Id.*

221. *Chi. Prof'l Sports Ltd. P'ship. v. NBA.*, 95 F.3d 593, 600 (7th Cir. 1996) (“[T]he ability of sports teams to agree on a TV contract need not imply an ability to set wages for players.”).

tation; because “[a]n individual team’s greater athletic success, other things equal, usually means greater profitability in gate receipts, broadcast revenues, and the sale of ancillary products like memorabilia and sponsorship rights.”<sup>222</sup> The apportionment of revenue through ticket sales, concessions, local broadcast revenues, and the MLS Championship Game, all reflect a team’s on-field performance.<sup>223</sup> Thus, the incentives permitted to each operator/investor as a “management fee” encourage each operator/investor to act in his own best interest to individually benefit from the success of his team.<sup>224</sup> It directly follows that any business investor will seek out the best players possible to field a quality team in order to achieve a successful season and therefore a profitable end. As a result, teams act with a high degree of independent decision-making prohibited under *American Needle* and *Copperweld*. Since teams make individual decisions over players, it follows that their collective action in restricting players ought to be subject to antitrust law.<sup>225</sup>

Courts have generally agreed with this assessment, “typically deem[ing] off-field horizontal restraints on competition—such as player movement restrictions, entry drafts, and analogous devices designed to maintain competitive balance—as predominately anticompetitive.”<sup>226</sup> In fact, when the NFL argued that, since player-restraints operate solely in the labor market, they are outside the scope of antitrust laws, it was expressly rejected and the teams were subjected to antitrust scrutiny.<sup>227</sup> The *McNeil* court pointed out that “antitrust laws apply to restraints that operate solely within a labor market,”<sup>228</sup> and that antitrust laws protect sellers of employ-

222. Sagers, *supra* note 79, at 5.

223. Just days before the Real Salt Lake club won its first League championship, the owner sold a forty-nine percent stake in the team—showing a team’s competition outside League-play generates independent value. See Associated Press, *Real Salt Lake Gains Financial Partner*, ESPNSOCCER.NET.COM (Nov. 18, 2009), <http://soccer.net.espn.go.com/news/story?id=700501&sec=mls&cc=5901>; Report: Real Salt Lake vs. Los Angeles, ESPNSOCCER.NET.COM (Nov. 22, 2009), <http://soccer.net.espn.go.com/report?id=285079&cc=5901>.

224. Interestingly, though not surprisingly, teams within MLS generate considerably differing annual revenues, and thus have been assessed at different net worth—bolstering the argument that investors have an incentive to compete for the best players in order to individually benefit financially. Compare McCann, *supra* note 48, at 748 (citation omitted), with PRESENTATION TO THE MLS/AAA BASEBALL TASK FORCE OVERVIEW OF MLS TEAM PERFORMANCE, <http://www.portlandonline.com/index.cfm?a=233846&c=49070>.

225. Powell v. NFL, 930 F.2d 1293, 1298-99 (8th Cir. 1989).

226. McCann, *supra* note 48, at 740 (citing Mackey v. NFL, 543 F.2d 606, 619 (8th Cir. 1976)); Smith v. Pro Football, Inc., 593 F.2d 1173, 1188-89 (D.C. Cir. 1978)).

227. McNeil v. NFL, 790 F.Supp. 871, 880-81 (D. Minn. 1992).

228. *Id.* at 881 (citing Fed’l Trade Comm’n v. Super. Ct. Trial Lawyers Ass’n, 493 U.S. 411 (1990)).



ment services—specifically permitting professional athletes affected by league rules “to challenge conspiracies among their employers.”<sup>229</sup>

A. MLS TEAMS ACT WITH A DIVERSITY OF ENTREPRENEURIAL INTERESTS IN THE LABOR MARKET

While MLS was able to avoid antitrust liability by the First Circuit in *Fraser*, the League may not remain immune from antitrust scrutiny forever. Since the League is still in its infancy compared to other professional sports leagues in the United States, and especially compared to professional soccer leagues abroad, MLS will attempt to harness a generation that has grown up with and embraced soccer.<sup>230</sup> As the League grows, its actions in accommodating that growth may subject the League to other claims of collusion like those in *Fraser*.

In the ten years since *Fraser*, MLS has expanded in teams and grown in fan interest. Soccer-specific stadiums have sprung up in eight cities,<sup>231</sup> and up-and-coming investors, like Red Bull and Andell Holdings, have taken control of teams.<sup>232</sup> The League has developed an internationally respected talent pool by adding a youth development system and drawing in big name international players like David Beckham, Cuauhtémoc Blanco, Freddie Ljunberg, and Thierry Henry through the Designated Player Rule.<sup>233</sup> In addition, MLS teams have garnered respect after fairing well in home matches against world-class foreign clubs like F.C. Barcelona, Chelsea F.C., Manchester United, and Fulham F.C., to sell-out crowds.<sup>234</sup>

Because the hybrid structure of the League was deemed tentative at best by the First Circuit,<sup>235</sup> any major League operational changes will likely draw antitrust scrutiny from MLSPU. While the League will likely be hard-pressed to overtly abandon its single-entity structure—since the status

229. *Id.* (citing *Radovich v. NFL*, 352 U.S. 445, 449-52 (1957); 2 PHILLIP AREEDA & DONALD F. TURNER, *ANTITRUST LAW: AN ANALYSIS OF ANTITRUST PRINCIPLES AND THEIR APPLICATION* 119 §§ 338b-338c at 199 (1978)).

230. *Garber Confident About Labor Negotiations*, ESPNSOCCER.NET.COM (Nov. 16, 2009), <http://soccernet.espn.go.com/news/story?id=699660&cc=5901>.

231. Scott Powers, *Not A Bad Decade: Major League Soccer Has Seen Expansion, Success Under Don Garber*, ESPNCHICAGO.COM (Aug. 11, 2009), [http://sports.espn.go.com/chicago/columns/story?columnist=powers\\_scott&id=4385196](http://sports.espn.go.com/chicago/columns/story?columnist=powers_scott&id=4385196).

232. *Id.*

233. Steve Davis, *Beckham Rule to be Revisited: Additional DP Slot Could Be in the Cards*, ESPNSOCCER.NET.COM (Dec. 28, 2009), <http://soccernet.espn.go.com/columns/story?id=718334&sec=mls&root=mls&cc=5901>. See *infra* Part IV.A.2 for more on the Designated Player Rule.

234. Powers, *supra* note 231.

235. *Fraser v. Major League Soccer, L.L.C.*, 284 F.3d 47, 59 (1st Cir. 2002) (“The case for expanding *Copperweld* is debatable and, more so, the case for applying the single entity label to MLS.”).

grants exemption from section 1 of the Sherman Antitrust Act, as well as many other benefits discussed below—a move to a decentralized structure will appropriately reflect the increasingly autonomous behavior of the teams. Ultimately, the single-entity structure will lose its viability for an established sports league.<sup>236</sup> Owners may lose financial incentive to improve their clubs, and may have difficulty maximizing profits without free agency, as marquee players usually drive teams' financial success in ticket sales.<sup>237</sup> Some of these ways in which the League has grown have potentially exposed it to antitrust scrutiny, and may fuel the players' argument that, even before free agency is implemented, the teams do not function as a single-entity in the labor market, despite the centralized player-contracting format. Taking into consideration the Supreme Court's recent statements on what constitutes a single-entity in *American Needle*, it may be in the League's best interest to avoid another drawn-out litigation process like the one it experienced in *Fraser*—a litigation process, which was the main objective of retaining the single-entity structure.<sup>238</sup>

In handling *American Needle*, the Seventh Circuit distinguished between output<sup>239</sup> and input when it observed that "individuals seeking employment with any of the [National Football] league's teams would view the league as a collection of loosely affiliated companies that all have the independent authority to hire and fire employees."<sup>240</sup> While the Supreme Court did not make such a distinction between input and output, it did look to whether, from the viewpoint of third parties, the teams were potential competitors.<sup>241</sup> This is consistent with previous antitrust cases that characterize the teams as distinct buyers of professional athletes' services.<sup>242</sup> This analysis into the competitive reality of a group of independent actors looks past the corporate formalities and into the substance of the parties' relationships. Indeed, "it is not dispositive that teams have organized . . . [as] legal-

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236. Jordan, *supra* note 147, at 248.

237. *See id.*

238. *See supra* text accompanying note 72.

239. *Am. Needle, Inc. v. NFL*, 538 F.3d 736, 741 (7th Cir. 2008), ("[F]rom the perspective of fans, a professional sports league can be seen as 'a single source' of entertainment that produces 'one product,' even though the league's member teams are distinguishable."), *rev'd*, 130 S. Ct. 2201 (2010).

240. *Id.*

241. *Am. Needle*, 130 S.Ct. at 2212-17.

242. *See Chi. Prof'l Sports Ltd. P'ship. v. NBA.*, 95 F.3d 593, 599-600 (7th Cir. 1996) ("[F]rom the perspective of college basketball players who seek to sell their skills, the teams are distinct, and because the human capital of players is not readily transferable to other sports . . . the league looks more like a group of firms acting as a monopsony." The Seventh Circuit later added that the league "is best understood as a joint venture when curtail-  
ing competition for players who have few other market opportunities.").

ly separate entit[ies] that centralize management”<sup>243</sup> since “[a]greements made within a firm can constitute concerted action covered by § 1 when the parties to the agreement act on interests separate from those of the firm itself, and the intrafirm agreements may simply be a formalistic shell for ongoing concerted action.”<sup>244</sup>

For the Court in *American Needle*, the fact that teams in NFLP separately controlled and owned their intellectual property—and had the *potential* for competition—carried the day.<sup>245</sup> The Court continued, noting that “[i]n making the relevant licensing decisions, NFLP is therefore ‘an instrumentality’ of the teams.”<sup>246</sup> While the corporate formation of MLS teams differs from that of NFLP, both entities’ individual parts have the potential to compete, and attempt to get around antitrust liability by acting through a third party intermediary.<sup>247</sup> Indeed, just like NFLP, “[a]part from their agreement to cooperate in exploiting [players], there would be nothing to prevent each of the [MLS] teams from making its own [labor] market decisions” relating to the hiring and firing of players and coaches.<sup>248</sup>

From the viewpoint of prospective professional soccer players looking to play in Major League Soccer, teams are potential economic competitors with diverging centers of decision-making: they have distinct technical directors that act as general managers in overseeing player personnel; they compete for marquee athletes to take up spots as designated players (DPs); they make trades and pull players up from their independent youth development teams; and players are separately selected by teams in the rookie draft and now the re-entry draft.

Despite these forms of individualized decision-making, Major League Soccer remains committed to masquerading as a single-entity, and believes that by refusing to implement free agency it will continue to appear as such.<sup>249</sup> It follows that, while teams may be interdependent in some respects, their internal rule banning competition for other teams’ players is an agreement amongst separate economic actors, pursuing separate economic interests, that deprives the labor market of independent centers of decision-making.

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243. *Am. Needle*, 130 S.Ct. at 2213.

244. *Id.* at 2215.

245. *See id.*

246. *Id.* at 2215 (citing *U.S. v. Sealy*, 388 U.S. 350, 352-54 (1967)).

247. *Id.* at 2215-17.

248. *See Am. Needle*, 130 S.Ct. at 2214-15.

249. *See* Schaerlaeckens, *supra* note 1.

### 1. *Teams' Technical Director*

The addition of a technical director front-office position for each MLS team epitomizes how teams pursue separate economic interests and have a diversity of entrepreneurial interests. A technical director is generally positioned higher than the coach in the front office and reports directly to the owner.<sup>250</sup> Technical directors typically are former players who have considerable experience and credibility in the world market, and have an exceptional ability to recognize and evaluate talent.<sup>251</sup> The director is responsible for picking first-team players, negotiating contracts with designated players,<sup>252</sup> overseeing youth development programs, managing the salary cap,<sup>253</sup> and scouting locally and abroad.<sup>254</sup> Technical directors facilitate players' direct negotiations with individual clubs, rather than with MLS itself.<sup>255</sup> Just as NFL "football players . . . negotiate their pay individually with their employers,"<sup>256</sup> MLS teams, through their general managers, are starting to compete with each other over players, coaches, and management personnel.<sup>257</sup>

As of February 2008, six of fourteen clubs had technical directors.<sup>258</sup> As of the publication of this Comment, seventeen out of eighteen teams slated for the 2011 season have a technical director, or a comparable position as general manager, director of player relations, or club management.<sup>259</sup> As a result, the single-entity defense is withering quickly, and there

250. See Steve Davis, *Technical Director Trend the Way to Go*, ESPNSOCCERNET.COM (Feb. 13, 2008), <http://soccernet.espn.go.com/columns/story?id=507155&cc=5901>.

251. See L.E. Eisenmenger, *The Role of the Technical Director*, USSOCCERPLAYERS.COM (Aug. 17, 2009), <http://www.ussoccerplayers.com/ussoccerplayers/2009/08/the-role-of-the-technical-director.html>.

252. See Zac Lee Rigg, *Frank Klopas: Chicago Fire Not Done Shopping for Designated Players*, GOAL.COM (Jul. 20, 2010), <http://www.goal.com/en-us/news/1110/major-league-soccer/2010/07/20/2033436/frank-klopas-chicago-fire-not-done-shopping-for-designated>.

253. Eisenmenger, *supra* note 251.

254. See *id.*

255. See *id.* (noting that "technical director[s] would presumably negotiate future contracts.").

256. *Brown v. Pro Football, Inc.*, 518 U.S. 231, 249 (1996).

257. *L.A. Mem'l Coliseum Comm'n v. NFL*, 726 F.2d 1381, 1390 (9th Cir. 1984).

258. Davis, *supra* note 250.

259. The Chicago Fire employ Frank Klopas as a technical director. *Front Office and Staff, Chicago Fire Soccer Club*, CHICAGO-FIRE.COM, <http://www.chicago-fire.com/content/front-office-and-staff> (last visited Sept. 19, 2010). The New York Red Bulls employ Erik Soler as a sporting director and general manager. *New York Red Bulls, Red Bull New York Staff List*, NEWYORKREDBULLS.COM, <http://www.newyorkredbulls.com/club/front-office> (last visited Sept. 19, 2010). L.A. Galaxy

seems to be no argument that teams with this type of front office position do not have the potential for competition through independent decision-making regarding signing and developing professional players.

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employs Bruce Arena as both a head coach and as general manager. *LA Galaxy, Front Office & Staff*, LAGALAXY.COM, <http://www.lagalaxy.com/coaches#arena> (last visited Sept. 19, 2010). D.C. United employs Dave Kasper as a general manager. *D.C. United, Dave Kasper*, DCUNITED.COM, <http://www.dcunited.com/technical-staff/dave-kasper> (last visited Sept. 19, 2010). The Kansas City Wizards employ Peter Vermes as technical director and head coach. See Eisenmenger, *supra* note 251. The Columbus Crew employ Mark McCullers as a general manager. *Columbus Crew, Staff*, THECREW.COM, <http://www.thecrew.com/club/staff> (last visited Sept. 19, 2010). The Colorado Rapids employ Paul Bravo as a technical director. *Colorado Rapids, Paul Bravo*, COLORADORAPIDS.COM, <http://www.coloradorapids.com/content/paul-bravo> (last visited Sept. 19, 2010). FC Dallas employs Barry Gorman as the team's technical director. *FC Dallas, Front Office and Staff*, FCDALLAS.COM, <http://www.fcdallas.com/front-office> (last visited Sept. 19, 2010). The New England Revolution employs Mike Burns as a vice president of player personnel. *New England Revolution, Front Office, Mike Burns-Vice President-Player Personnel, Biography*, REVOLUTIONSOCCER.NET, <http://www.revolutionsoccer.net/team/index.cfm?ac=MgersandExecsbio&bio=31983> (last visited Sept. 19, 2010). The Philadelphia Union employs two people to oversee player training and club development, *Peter Nowak and John Hackworth, Philadelphia Union, Technical Staff*, PHILADELPHIAUNION.COM, <http://www.philadelphiaunion.com/content/technical-staff> (last visited Sept. 19, 2010). Toronto F.C. has a manager/director of soccer, Mo Johnson. *Toronto FC, Coaching Staff*, TORONTOFC.CA, <http://www.torontofc.ca/coaching-staff> (last visited Sept. 19, 2010). Chivas USA has a vice president of soccer operations, Stephen Hamilton. *Chivas USA, Executives*, CDCIVASUSA.COM, <http://www.cdchivasusa.com/club/executives> (last visited Sept. 19, 2010). Houston Dynamo most recently had Oliver Luck as their president and general manager. Houston Dynamo Media Relations, *Oliver Luck Resigns as Dynamo President/GM*, HOUSTONDYNAMO.COM (Jun. 10, 2010), <http://www.houstondynamo.com/news/2010/06/oliver-luck-resigns-dynamo-presidentgm>. The Portland Timbers (a 2011 expansion team) employ Gavin Wilkinson as a technical director. See Simon Borg, *Portland Timbers Name Spencer Head Coach*, MLSSOCCER.COM (Aug. 10, 2010), <http://www.mlssoccer.com/news/article/portland-timbers-name-spencer-head-coach>. The San Jose Earthquakes employ John Doyle as their general manager of soccer operations. *San Jose Earthquakes, John Doyle*, SJEARTHQUAKES.COM, <http://www.sjearthquakes.com/club/bios/john-doyle> (last visited Sept. 19, 2010). Real Salt Lake employs Garth Lagerwey as their general manager & Senior VP of Soccer Operations. *Real Salt Lake, Garth Lagerwey*, REALSALTLAKE.COM, <http://www.realsaltlake.com/club/bios/garth-lagerwey> (last visited Sept. 19, 2010). The Seattle Sounders general manager, Adrian Hanauer, is also a part owner of the team. *Seattle Sounders Football Club, Adrian Hanauer*, SOUNDERSFC.COM, <http://www.soundersfc.com/Team/Staff-Members/Adrian-Hanauer.aspx> (last visited Sept. 19, 2010). The Vancouver Whitecaps, another expansion team set to start play in the 2012 season, have yet to name a general manager/technical director.

## 2. *The Designated Player Rule*

The most publicized example of teams pursuing disparate interests is the recent addition of the Designated Player Rule.<sup>260</sup> Added in 2007, purportedly to lure David Beckham to MLS,<sup>261</sup> the Designated Player Rule permits each team to individually sign three players above the salary budget, but all costs in excess of \$415,000 must be paid by the individual team's operator/investor.<sup>262</sup> This payment scheme is significant in light of MLS's centralized contracting format, as individual teams end up doling out the additional costs for designated players, which are by no means the modest salaries drawn by average MLS players.<sup>263</sup>

The individuality of these additional team costs undermine the single-entity scheme. Prior to the Designated Player Rule, teams acted without separate interests and were subservient to the parent, MLS. The Designated Player Rule not only allows teams to pursue players separately from the MLS and other teams (potentially competing for the same players), it *encourages* autonomous behavior by operator/investors.<sup>264</sup> As a result of teams competing against one another for players, the contractual arrangement bears greater resemblance to the traditional sports league.<sup>265</sup>

The League may respond that the teams' pursuit of DPs are in the League's best interest, as the signing of big caliber players that the Designated Player Rule encourages only brings the MLS credibility and notoriety.<sup>266</sup> This rule has brought in world-class players, like Thierry Henry,<sup>267</sup> Rafael Marquez,<sup>268</sup> and rumors of Ronaldinho.<sup>269</sup> In addition, the League

260. Bezbatchenko, *supra* note 194, at 632-37.

261. *Id.* at 612.

262. *Roster Regulation*, *supra* note 17.

263. *Id.* The base salaries for the 2009 designated players were, respectively: Cuauhtémoc Blanco (Chicago Fire), \$2.77 million; Guillermo Barros Schelotto (Columbus Crew), \$650,000; Luciano Emilio (D.C. United), \$720,000; David Beckham (L.A. Galaxy), \$5.5 million; Landon Donovan (L.A. Galaxy), \$900,000; Shalrie Joseph (New England Revolution), \$425,000; Juan Pablo Angel (New York Red Bulls), \$1.5 million; Freddie Ljunberg (Seattle Sounders FC), \$1.3 million. *2009 MLS Player Salaries—By Club*, *MLS Players Union*, MLSPLAYERS.ORG, [http://www.mlspayers.org/salary\\_info.html](http://www.mlspayers.org/salary_info.html) (last visited Sept. 19, 2010).

264. Bezbatchenko, *supra* note 194, at 637.

265. *Id.*

266. Ives Galarcep, *The Arms Race Begins in MLS*, FOXSPORTS.COM (Jul. 21, 2010), <http://msn.foxsports.com/foxsoccer/mls/story/galaxy-pursuit-of-ronadinho-a-sign-of-the-arms-race-beginning-in-mls>.

267. Red Bull New York Media Relations, *New York Red Bulls Sign International Star Thierry Henry*, NEWYORKREDBULLS.COM (Jul. 14, 2010), <http://www.newyorkredbulls.com/news/2010/07/new-york-red-bulls-sign-international-star-thierry-henry>.

268. Red Bull New York Media Relations, *New York Red Bulls Sign Mexican National Team Captain Rafa Marquez*, NEWYORKREDBULLS.COM (Aug. 2, 2010),

will point to *Copperweld's* deference to businesses to most efficiently coordinate its divisions to achieve its common goal.<sup>270</sup> Finally, the League would likely argue it has not strayed from the tenants of *Copperweld*,<sup>271</sup> because it still has the ability to assert full control at any moment should any team not act in the League's best interest.

Despite only ten of MLS's sixteen teams having exercised their option to sign a Designated Player as of 2009,<sup>272</sup> the League increased the maximum number of DPs to permit three per team roster<sup>273</sup> because the initial implementation of the Designated Player Rule increased MLS's notoriety and respect throughout the world.<sup>274</sup> Should this practice continue to ex-

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<http://www.newyorkredbulls.com/news/2010/08/new-york-red-bulls-sign-mexican-national-team-captain-rafa-marquez>.

269. See Galarcep, *supra* note 266.

270. *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752, 770-71 (1984) (“[A] rule that punished coordinated conduct simply because a corporation delegated certain responsibilities to autonomous units might well discourage corporations from creating divisions with their presumed benefits. This would serve no useful antitrust purpose but could well deprive consumers of the efficiencies that decentralized management may bring.”).

271. The Court noted in *Copperweld* that the relationship between a parent and its wholly owned subsidiary is

[N]ot unlike a multiple team of horses drawing a vehicle under the control of a single driver. With or without a formal “agreement,” the subsidiary acts for the benefit of the parent, its sole shareholder. If a parent and a wholly owned 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 . . . . [I]n reality a parent and a wholly owned subsidiary *always* have a “unity of purpose or a common design.” They share a common purpose whether or not the parent keeps a tight rein over the subsidiary; the parent may assert full control at any moment if the subsidiary fails to act in the parent's best interests.

*Id.* at 771-72.

272. Steve Davis, *Beckham Rule to be Revisited: Additional DP Slot Could Be in the Cards*, ESPN.SOCERNET.COM (Dec. 28, 2009), <http://soccernet.espn.go.com/columns/story?id=718334&sec=mls&root=mls&cc=5901>.

273. Jeffrey Marcus, *M.L.S. Expands Designated Player Rule*, N.Y. TIMES (Apr. 1, 2010), <http://goal.blogs.nytimes.com/2010/04/01/m-l-s-expands-designated-player-rule/>.

274. See *id.* The biggest criticism has been that the Designated Player Rule has allowed big-name players who are at the tail end of their career to receive lavish contracts, and are more akin to “appearance fees” than payment for services due to the amount of time these players end up playing. See Avery Raimondo, *MLS Designated Player Dissection: Absences Highlight Flaws in MLS Schedule*, GOAL.COM (Sept. 6, 2010), <http://www.goal.com/en/news/1884/north-america/2010/09/06/2105120/mls-designated-player-dissection-absences-highlight-flaws-in-mls->. This trend seems eerily reminiscent of how the NASL failed as a Division 1 league in the United States. See Markovits & Hellerman, *supra* note 116 and accompanying text.

pand, it fuels the argument that teams do not act with a unity of interest and are more akin to a joint venture than a single-entity.

### 3. *Trades*

While the League attests that it does not permit investors to bid against each other over player contracts, in practice this goal is far from possible. If there truly were no potential for competition in labor relations, individual teams would not be making trades for players, as that implies competition and adversarial positions. In order to actualize the dream of managing a team that wins a championship, each investor/operator commonly makes trades and deals for players to fill a team's talent gaps. A prime example occurred during the 2008-09 season when Brian McBride decided to return to MLS after four and a half years at Fulham F.C. of the English Premier League.<sup>275</sup> McBride had played in MLS for the Columbus Crew for eight years before leaving for a lucrative career abroad, and eventually became captain of Fulham.<sup>276</sup> MLS initially allocated the rights to sign McBride to the 2007 expansion team Toronto F.C., but McBride, a native of the Chicago area, expressed interest in returning home to play for the Chicago Fire.<sup>277</sup> Toronto and Chicago arranged a trade,<sup>278</sup> which exemplifies their pursuing of diverse interests. Had this been a perfect single-entity, teams would not be acting individually to attain players, and McBride would have been initially assigned to Chicago to maximize League efficiency and capitalize on McBride's ability to draw hometown fans in a large market.

### 4. *Youth Development Teams*

Another way to draw from the local talent pool, which has individual teams seeking out players rather than the League, is the launch of youth development teams for MLS clubs.<sup>279</sup> In 2006, MLS required all clubs to establish youth development teams to acquire, outside of the annual draft,

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275. Associated Press, *McBride Traded for Barrett, Pick, Future Considerations*, ESPNSOCCERNET.COM (Jul. 30, 2008), <http://soccernet.espn.go.com/news/story?id=558640&sec=mls&cc=5901>.

276. *Id.*

277. *Id.* Interestingly, single-entities draw criticism for permitting star players to influence their destination, while other players are not afforded similar opportunities. Jordan, *supra* note 147, at 244 (citation omitted).

278. The Fire acquired McBride from Toronto FC for Chad Barrett, a first-round pick in the 2009 draft and players to be named later. *McBride Traded for Barrett, Pick, Future Considerations*, *supra* note 275.

279. *MLS Launches Youth Development Initiative*, MLSOCCER.COM (Nov. 10, 2006), [http://web.mlssnet.com/news/mls\\_events\\_news.jsp?ymd=20061110&content\\_id=78269&vkey=mlscuppr2006&fext=.jsp](http://web.mlssnet.com/news/mls_events_news.jsp?ymd=20061110&content_id=78269&vkey=mlscuppr2006&fext=.jsp).



top young players from each team's respective local area.<sup>280</sup> These youth development teams will permit MLS teams to sign up to two players from their Home Grown Player List per year, through the 2010 season.<sup>281</sup> On this Youth Development Initiative, MLS Deputy Commissioner Ivan Gazidis said, "MLS clubs will be able to invest resources in scouting and developing talented young players who will ultimately have the opportunity to graduate directly onto the first team roster. Those clubs which develop the best programs will reap the rewards on their senior roster."<sup>282</sup>

While it is encouraging that the MLS (and soccer in the United States) has grown enough to initiate youth development clubs for each MLS team, the fact that each team has the ability to withhold the home-grown player from other teams in the League shows individualized interest, and opposes the *American Needle* requirement that teams refrain from "pursuing separate economic interests" or act with "independent centers of decision-making" in order to be a single-entity.

## 5. Expansion

Major League Soccer will be adding three new teams by the 2012 season—the Portland Timbers,<sup>283</sup> the Vancouver Whitecaps,<sup>284</sup> and the Montreal Impact<sup>285</sup>—all of which were existing teams from different leagues.<sup>286</sup> When MLS first started, it created all the teams—no team existed before the League's inception.<sup>287</sup> As the League is expanding, it is looking to capitalize off of preexisting fan-bases that support teams in certain marketplaces in order to minimize competition for professional soccer in that market and take advantage of areas where consumers demand the product. Although these "expansion teams" were in second-tier leagues, each team competed with the MLS for fans, players, coaches, and sponsorships. By joining and presumably being supplanted into the MLS operator-investor system,<sup>288</sup> the expansion teams' loss of corporate autonomy epitomizes *American*

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280. *Id.*

281. *Id.*

282. *Id.*

283. See Associated Press, *Portland Timbers Choose John Spencer to Lead Team in MLS*, THE SEATTLE TIMES (Aug. 10, 2010), available at [http://seattletimes.nwsourc.com/html/sounders/2012587470\\_webtimbers10.html](http://seattletimes.nwsourc.com/html/sounders/2012587470_webtimbers10.html).

284. Reuters, *Vancouver Awarded MLS Franchise*, ESPN.SOCERNET.COM (Mar. 18, 2009), <http://soccernet.espn.go.com/feature?id=629179&sec=mls&cc=5901>.

285. Jonah Freedman, "Passionate" Montreal Named as 19th MLS City, MLSSOCCER.COM (May 9, 2010), <http://www.mlssoccer.com/news/article/passionate-montreal-named-19th-mls-city>.

286. See *supra* notes 283-85.

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

288. See *supra* Part III.A.

*Needle's* proscription against "depriv[ing] the marketplace of independent centers of decisionmaking that competition assumes and demands."<sup>289</sup> And with rumors of a twentieth team in the mix for the 2013 season,<sup>290</sup> the possibility is real that by expanding in this fashion, MLS no longer has the characteristics of a single firm.<sup>291</sup>

## 6. *Re-entry Draft*

The final example of how Major League Soccer's single-entity status is slipping is by its use of a re-entry draft. A re-entry draft was agreed upon by MLSPU and MLS as a compromise when the parties could not agree on free agency.<sup>292</sup> This re-entry draft allows players who are released from their team, who had a nonguaranteed contract, to get a second chance at being picked up by another MLS team while the League retains the player's contractual rights.<sup>293</sup> Players sought a way to be exposed to every other team in the League, and when the League refused free agency, the players settled with this form of player movement.

While the re-entry draft does not significantly impact the way teams compete for players, it was bargained for by the Union, and thus is given a non-statutory labor exemption from antitrust scrutiny.<sup>294</sup> Should the Union feel the culmination of the six aforementioned individualized decision-making schemes would be sufficient to establish that the League in fact does not exist as a single-entity and will be concerted action under the *American Needle* standard, by depriving the marketplace of independent centers of decision-making and of a diversity of entrepreneurial interests, and the Union subsequently decertifies, the re-entry draft will be a factor considered when evaluating Major League Soccer in an antitrust suit.

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289. *Am. Needle, Inc. v. NFL*, 130 S. Ct. 2201, 2205 (2010) (citing *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752, 768-69 (1984)).

290. *MLS Adds Montreal, Wants 2nd NY Club*, MLSSOCCERNET.COM (May 7, 2010), <http://sports.espn.go.com/sports/soccer/news/story?id=5170713>.

291. *But see Chi. Prof'l Sports Ltd. P'ship. v. NBA*, 95 F.3d 593, 599 (7th Cir. 1996). NBA's creation of teams in Toronto and Vancouver is different than how MLS is expanding now in that the NBA *created* teams, while the MLS is now absorbing teams from lower leagues and supplementing their roster with MLS superdraft picks. This Comment contends that this does not make MLS look like a single firm, as the Seventh Circuit suggested it made the NBA appear. *See id.*

292. Schearlaeckens, *supra* note 1.

293. *Id.*

294. *See Clarett v. NFL*, 369 F.3d 124, 139 (2004) ("The players union's representative possesses 'powers comparable to those possessed by a legislative body both to create and restrict the rights of those whom it represents.'" (quoting *Trans World Airlines, Inc. v. Indep. Fed'n of Flight Attendants*, 489 U.S. 426, 458-59 (1989))).

## B. LOOKING FORWARD

As mentioned previously, MLSPU's push for free agency may require players to fight off the field much like the National Football League Players' Association's did in the late 1980s.<sup>295</sup> Historically, players associations have succeeded in getting free agency when a league has grown to such an extent that players feel they could survive a strike or lockout,<sup>296</sup> or through antitrust suits.<sup>297</sup> Yet, players understand that playing for a young league means paying their dues to gain notoriety and an increased salary.<sup>298</sup> As Major League Soccer gains a following and no longer runs a deficit, players will continue to seek to be rewarded for the time they have spent on the short end of the contract. Of note, the League has increased its average salaries with each generation of players,<sup>299</sup> a sign of both growth and an increase in talent. Owners have argued that "absent restraints on player mobility, there arises a lack of sufficient capital to build these leagues,"<sup>300</sup> but the League has less leeway to argue that restrictions on player movement are necessary to achieve a competitive balance since other means are avail-

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295. Backman, *supra* note 177, at 2 ("Labor relations in the [NFL] . . . have been a model of discord since the League's inception . . . . [T]he history of professional football reflects a series of grueling labor disputes and court battles in which players repeatedly fought for economic freedom.")

296. See Liz Mullen & Tripp Mickle, *MLS Player-Side Sources Float Strike Threat*, SPORTS BUS. J., Nov. 9, 2009, at 3, available at <http://www.sportsbusinessjournal.com/article/64006>.

297. See Brief for Nat'l Football League Players Association, *supra* note 146.

In professional football, basketball, and hockey, player-employees achieved their right to choose their employer in a competitive market at a meaningful point in their careers through antitrust suits that have protected the competitive markets for their services. Owners in these sports have repeatedly attempted to suppress competition in the player services market (as well as other markets), but those efforts have been consistently struck down by the courts.

*Id.* at 2.

298. Jordan, *supra* note 147, at 247-48 ("Many players understand the effects playing in a single-entity league will have on their potential salary. Nevertheless, they play as an opportunity to create exposure for themselves and their sport, and to create a foothold for the sport in the American professional sports market.")

299. Compare 2007 MLS Player Salaries: Aug. 31, 2007: Alphabetical, available at [http://www.mlspayers.org/files/8\\_31\\_07\\_salary\\_info\\_alpha.pdf](http://www.mlspayers.org/files/8_31_07_salary_info_alpha.pdf), and 2008 MLS Player Salaries: Oct. 7, 2008: Alphabetical, available at [http://www.mlspayers.org/files/9\\_7\\_08\\_salary\\_info\\_alpha.pdf](http://www.mlspayers.org/files/9_7_08_salary_info_alpha.pdf), with 2009 MLS Player Salaries: Sept. 15, 2009: Alphabetical, available at [http://www.mlspayers.org/files/september\\_15\\_2009\\_salary\\_information\\_\\_alphabetical.pdf](http://www.mlspayers.org/files/september_15_2009_salary_information__alphabetical.pdf).

300. Jordan, *supra* note 147, at 247 (citation omitted).

able to ensure the steady growth of the league.<sup>301</sup> Once a league has garnered enough of a foothold in a market, there is less fear of a league folding, and thus the owners' argument that teams are codependent is weakened when there is steady demand from both fans and potential investors.<sup>302</sup> In addition, "[a]n individual team's greater athletic success . . . usually means greater profitability in gate receipts, broadcast revenues, and the sale of ancillary products like memorabilia and sponsorship rights," which in turn will likely increase the value of a league as a whole.<sup>303</sup>

In light of what MLS denies—free agency—the rules that are allowed do not seem to promote competition and likely would not pass a rule of reason analysis, if litigation ever gets to that stage.<sup>304</sup> MLS's rules suppress competition and allow teams to artificially depress players' salaries in order to further the minimal returns that teams see in ticket sales, sponsorships, and other revenues. When the League has grown strong enough in popular support to survive a labor stoppage, Major League Soccer Players Union will likely strike in order to finally realize the benefits that employees in other sports leagues have—the ability to freely contract with teams of their choice without restriction or reservation.

## V. CONCLUSION

The Major League Soccer Players Union suggested free agency as a term for the 2010 collective bargaining agreement, but received a stern refusal from the League. Major League Soccer uses its tenuous hybrid single-entity structure to artificially suppress the cost of labor and avoid antitrust liability, and fears that allowing free agency would sky rocket players' salaries and in turn render the League unprofitable. As a result, the union threatened to strike if its demand was not met. Only when the League was faced with the possibility of a labor stoppage that would continue into the start of the season did both parties come to an agreement—just five days before the League's first game.

Players have a considerably diminished bargaining power to negotiate changes in the atmosphere of a single-entity employer, as the threat of union decertification no longer exposes such an employer to antitrust liability, and the single-entity structure of the League allows it to unilaterally implement CBA terms without fear of antitrust violations. Employees are thus

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301. McCann, *supra* note 48, at 739-41 (discussing revenue sharing, advertising, stadium usage, and other revenue generators) (citations omitted).

302. Sagers, *supra* note 79, at 5. ("[S]ingle-entity structuring may be essential for leagues in their infancy, but of little use to well-established professional sports leagues.") (citation omitted).

303. *See id.*

304. *See* Bd. of Trade of Chi. v. United States, 246 U.S. 231, 238 (1918).

relegated to the backbone of labor warfare—striking—which yields minimal results when employers are permitted to permanently replace striking employees and players’ careers hold short life-spans.

MLS teams should only be allowed to combine as a multiemployer bargaining unit when negotiating with players’ unions, and should not be classified as a single-entity. The distinction, which to the naked eye may be slight, is not only important when identifying how the entity results in a disparate bargaining position between a newly formed union and a single-entity league, but is also significant when such a single-entity employer is given leeway to unilaterally implement terms of employment, without being subject to antitrust scrutiny.

Despite the inability of the parties to agree to a form of free agency, Major League Soccer’s business relations have evolved since *Fraser* and the 2003 CBA. From the viewpoint of prospective professional soccer players looking to play in Major League Soccer, teams are potential economic competitors with diverging centers of decision-making: they have distinct technical directors that act as general managers in overseeing player personnel; they compete for marquee athletes to take up spots as Designated Players; they make trades and pull players up from their independent youth development teams; and players are separately selected by teams in the rookie draft and now the re-entry draft.

Apart from their agreement to cooperate in exploiting players, there would be nothing to prevent each of the MLS teams from making its own labor market decisions relating to the hiring and firing of players and coaches. Despite these forms of individualized decision-making, Major League Soccer remains committed to masquerading as a single-entity, and believes that by refusing to implement free agency it will continue to appear as such. It follows that, while teams may be interdependent actors within a league in some respects, their internal rule banning competition for other teams’ players is an agreement amongst separate economic actors, pursuing separate economic interests, that deprives the labor market of independent centers of decision-making.

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