

# Taking the Training Wheels Off MLS: Why the Single Entity Antitrust Exemption Should No Longer Apply

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# COMMENTS

## TAKING THE TRAINING WHEELS OFF MLS: WHY THE SINGLE ENTITY ANTITRUST EXEMPTION SHOULD NO LONGER APPLY

TYLER A. COPPAGE\*

### I. INTRODUCTION

Soccer is the most popular sport in the world.<sup>1</sup> In American history, however, the sport has struggled to carve out a sustainable niche in a sports-saturated culture.<sup>2</sup> In 1996, Major League Soccer (MLS) set out to change all that in its inaugural season.<sup>3</sup> A mere seventeen years later, MLS has nearly doubled in size and is flourishing.<sup>4</sup> With such growth naturally comes an increased level of scrutiny on all fronts. This Comment will examine the league's susceptibility to an antitrust challenge in the time since MLS's single entity exemption was first challenged in *Fraser v. Major League Soccer*. More specifically, this Comment will use the high-profile transfers of Clint Dempsey, Michael Bradley, and Jermain Defoe to illustrate how current MLS roster rules, including the limited free agency added in 2015, potentially violate federal antitrust law.

To begin this pursuit, Part II provides a brief history of soccer in America and a more in-depth account of the history of MLS, including developments in

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1. E.g., *The World's Most Popular Sport is Soccer/Football*, TOPEND SPORTS, <http://www.topendsports.com/world/lists/popular-sport/> (last visited Apr. 18, 2015).

2. See, e.g., AM. SOCCER HIST. ARCHIVES, <http://homepages.sover.net/~spectrum/> (last updated Mar. 28, 2015).

3. See *generally 1996 Season Recap*, MLS SOCCER, <http://www.mlssoccer.com/history/season/1996> (last visited Apr. 18, 2015).

4. See *2012 Season Recap*, MLS SOCCER, <http://www.mlssoccer.com/history/season/2012> (last visited Apr. 18, 2015).

MLS since *Fraser* was decided in 2002. Part III focuses on the development of antitrust law in the sports realm and how the law governs Major League Soccer—specifically, how MLS gained a single entity exemption from antitrust litigation. Part IV goes on to discuss the transfer of Clint Dempsey from Tottenham to Seattle Sounders, the transfer of Michael Bradley from AS Roma to Toronto FC, and the transfer of Jermain Defoe from Tottenham to Toronto FC as a means of establishing a lens through which the issue can be viewed. Part V analyzes how the changes in both the MLS and antitrust law will require a court to eliminate the single entity antitrust exemption MLS currently enjoys. Part V will then go on to discuss the future of MLS and how changes are necessary for the league to become a global force in the sport, especially in light of New York City Football Club, the result of a partnership between Manchester City and the New York Yankees. Specifically, legislation mirroring the Union of European Football Associations' (UEFA) Financial Fair Play might be necessary in America if the league is to legally achieve the competitive balance MLS desires.

## II. HISTORY AND BACKGROUND

The history of soccer in America is tumultuous, characterized by brevity and failure.<sup>5</sup> Although the focus of this Comment is on MLS, this account must also include a brief discussion of the North American Soccer League and how Fédération Internationale de Football Association (FIFA) used the 1994 World Cup to breathe life into soccer in America.<sup>6</sup> Understanding the historical underpinnings behind MLS ultimately being successful provides insight into why roster rules, like a salary cap, were adopted in the first place. All success stories build from lessons learned in failure, and MLS is no different.

### A. Historical Underpinnings

Many recognize England as the birthplace of modern soccer, or football as it is known in the rest of the world.<sup>7</sup> In America, however, Pasuckuakohowog (a game played by Native Americans) may have at least helped to give rise to the game known as soccer today.<sup>8</sup> Literally, the word is translated to mean,

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5. See e.g., AM. SOCCER HIST. ARCHIVES, *supra* note 2.

6. See Randy Harvey, *U.S.'s Bid for 1994 World Cup Comes to Head*, L.A. TIMES (July 4, 1988), [http://articles.latimes.com/1988-07-04/sports/sp-3978\\_1\\_world-cup](http://articles.latimes.com/1988-07-04/sports/sp-3978_1_world-cup).

7 E.g., Julie-Ann Amos, *The History of Soccer — Over 2000 Years of Sporting Evolution*, THEHISTORYOF (June 17, 2008), <http://www.thehistoryof.net/the-history-of-soccer.html>.

8. *The American Indians and Pasuckuakohowog*, HIST. OF FOOTBALL REALLY (Sept. 28, 2009 4:11 AM), <http://historyoffootballreally.blogspot.com/2009/09/american-indians-and-pasuckuakohowog.html> [hereinafter *Pasuckuakohowog*].

“they gather to play ball with the foot.”<sup>9</sup> Unlike the game today where flopping (or diving) has reached near-epidemic levels,<sup>10</sup> Pasuckuakohowog was extremely violent and was sometimes played with up to 500 players on each side.<sup>11</sup> It is difficult to imagine that the sport known as soccer evolved from such violent beginnings, but “the beautiful game” no doubt has interesting roots.<sup>12</sup> Jump forward a few hundred years, and America finally took the first steps toward establishing a professional league.<sup>13</sup>

Like other sports in America, soccer was largely an amateur endeavor until technology evolved and allowed nationwide competition to be possible.<sup>14</sup> As evidenced by the number of failed leagues and the fact that MLS did not take off until 1996, soccer is still a budding professional sport in America when compared with the titans that are Major League Baseball (MLB), the National Basketball Association (NBA), and the National Football League (NFL).<sup>15</sup> Of these major leagues, the NBA is the youngest, formed in 1946.<sup>16</sup> In comparison, the major leagues in the United States dwarf MLS’s eighteen-year existence. In light of this information, it is perhaps not surprising that any attempt at forming a professional league was largely unsuccessful.

Somewhat surprisingly, England’s successful professional soccer league in the late 19th century was based on the structure provided by professional baseball in the United States.<sup>17</sup> The league was popular in England, so the next logical step was to try it out in America, where urban centers contained large foreign populations.<sup>18</sup> America’s first attempt at a professional soccer league came in 1894.<sup>19</sup> Unfortunately, the American League of Professional

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9. *Id.*

10. See Laura Williamson & Dominic King, *Diving is the Cancer of Football and We Must Stamp Out, Says FIFA Chief*, DAILY MAIL ONLINE, <http://www.dailymail.co.uk/sport/football/article-2215289/FIFA-chief-Diving-cancer-football.html> (last updated Oct. 9, 2012).

11. *Pasuckuakohowog*, *supra* note 8.

12. See, e.g., Sean Wilsey, *The Beautiful Game: Why Soccer Rules the World*, NAT’L GEOGRAPHIC MAG. (June 2006), available at <http://ngm.nationalgeographic.com/2006/06/soccer/soccer-text>.

13. Steve Holroyd, *The First Professional Soccer League in the United States: The American League of Professional Football (1894)*, AM. SOCCER HIST. ARCHIVES, <http://homepages.sover.net/~spectrum/alpf.html> (last updated Sept. 4, 2000).

14. See, e.g., *id.*

15. See, e.g., *History of Major League Baseball*, PEOPLE HIST., <http://www.thepeoplehistory.com/baseballhistory.html> (last visited Apr. 18, 2015).

16. See *NBA Seasons Recaps*, NBA (July 1, 2014), <http://www.nba.com/history/nba-season-recaps/index.html>.

17. Holroyd, *supra* note 13.

18. *Id.*

19. *Id.*

Football (ALPF) experiment failed, and the league folded before one full season was completed.<sup>20</sup> Plagued by lackadaisical ownership and poor attendance, the league was not sustainable, and perhaps as a product of the general attitude toward professional sports at the time, it took many years before anyone learned from these mistakes on a national scale.<sup>21</sup> For example, the Saint Louis Soccer League functioned from 1907–1939, but as the name might indicate, the league was restricted to the Saint Louis area, perhaps indicating a difficulty in taking a league nation-wide.<sup>22</sup>

In the time since the ALPF folded, there have been no fewer than thirty-three failed professional soccer leagues in America.<sup>23</sup> The most interesting of those leagues was the North American Soccer League (NASL).<sup>24</sup> The NASL began in earnest in 1968 after the United Soccer Association and National Professional Soccer League merged to form one, reputable league.<sup>25</sup> The NASL was able to attract global soccer icons like Pelé, Franz Beckenbauer, and Johan Cruyff, just to name a few.<sup>26</sup> For a brief period in time, the focal point of world soccer was on the United States, but it failed to lay a successful foundation for soccer in this country.<sup>27</sup> Poor organization and a lack of business acumen in operation led to the NASL declining just as rapidly as it came to prominence.<sup>28</sup> However, this failure in particular might have been the most instructive for the eventual founders of Major League Soccer. For example, the carefree spending of NASL clubs and the subsequent failure probably made the salary cap system the MLS uses that much more attractive.<sup>29</sup>

The missteps of the NASL are worth mentioning, if for no other reason than for the staggering proportion of mistakes. When the league started to stare failure in the face in 1980, teams were spending, on average, 70% of their revenue on player salary.<sup>30</sup> If the average team was spending 70%, the

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20. *Id.*

21. *Id.*

22. See David Litterer, *St. Louis Soccer League (SLSL) - 1907-1939*, AM. SOCCER HIST. ARCHIVES, <http://homepages.erver.net/~spectrum/sls1.html> (last updated Aug. 28, 2002).

23. See generally AM. SOCCER HIST. ARCHIVES, *supra* note 2.

24. See David Litterer, *North American Soccer League I (NASL) 1967-1984*, AM. SOCCER HIST. ARCHIVES, <http://homepages.erver.net/~spectrum/nasl/naslhist.html#HISTORY> (last updated Mar. 8, 2008).

25. *Id.*

26. Clive Gammon, *The NASL: It's Alive but on Death Row*, SI (May 7, 1984), <http://www.si.com/vault/1984/05/07/626590/the-nasl-its-alive-but-on-death-row>.

27. *Id.*

28. See, e.g., *id.*

29. See, e.g., *id.*

30. J.D. Reed, *It's Time for Trimming Sails in the NASL*, SI (Dec. 1, 1980), available at <http://www.si.com/vault/1980/12/01/825203/its-time-for-trimming-sails-in-the-nasl-three-franchises->

Cosmos were making a mockery of financial responsibility, paying the likes of Johan Cryuff \$500,000 per year.<sup>31</sup> These spending habits, coupled with a stagnant economy, yielded a \$30 million deficit for the league.<sup>32</sup> By 1985, the league was left with only two teams willing to take the field.<sup>33</sup> While there was optimism that play would resume in 1986, the plan never came to fruition, and the NASL closed up shop for good.<sup>34</sup>

### B. Birth of Major League Soccer

With the exception of the NASL, which was something of a supernova,<sup>35</sup> MLS has been the only world-class, sustainable soccer league in American history.<sup>36</sup> The inaugural season of MLS was in 1996, and the league contained ten teams.<sup>37</sup> These ten teams each selected sixteen players in a draft and the rest is history.<sup>38</sup> MLS Cup '96 ended in a thrilling contest, with D.C. United overcoming the L.A. Galaxy in the final.<sup>39</sup> The first season seemed to be at least a modest success.

The next staple year in MLS history came in 2007 when the L.A. Galaxy signed global soccer icon David Beckham.<sup>40</sup> Not only did MLS announce that Beckham would be slated to earn \$250 million over five years, the introduction of the Designated Player Rule allowed Beckham to be signed in the first place.<sup>41</sup> While the deal was lucrative for David Beckham, his former club Re-

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are-on-the-verge-of-going-under-as-the-league-grapples-with-the-effects-of-overexpansion-the-recession-and-union-troubles.

31. Compare *id.*, with John Leptich, *Birkenmeier's Goal is to Help Save Soccer*, CHI. TRIB. (Sept. 8, 1985), [http://articles.chicagotribune.com/1985-09-08/sports/8502280932\\_1\\_sting-north-american-soccer-league-goalkeeper-victor-nogueira](http://articles.chicagotribune.com/1985-09-08/sports/8502280932_1_sting-north-american-soccer-league-goalkeeper-victor-nogueira) (reporting Hubert Birkenmeier's salary to be \$160,000 per year with the Cosmos).

32. Reed, *supra* note 30.

33. Associated Press, *NASL Suspends Operations for 1985, Maybe Forever*, VICTORIA ADVOCATE, Mar. 28, 1985, at B4.

34. Litterer, *supra* note 24.

35. Compare Reed, *supra* note 30, with Leptich, *supra* note 31 (reporting Hubert Birkenmeier's salary to be \$160,000 per year with the Cosmos).

36. See David Litterer, *Major League Soccer (1996-Present)*, AM. SOCCER HIST. ARCHIVES, <http://homepages.sover.net/~spectrum/mls.html> (last updated Nov. 10, 2011).

37. *1996 Season Recap*, *supra* note 3.

38. *Id.*

39. *Id.*

40. *2007 Season Recap*, MLS SOCCER, <http://www.mlssoccer.com/history/season/2007> (last visited Apr. 18, 2015).

41. Robert M. Bernhard, *MLS' Designated Player Rule: Has David Beckham Single-Handedly Destroyed Major League Soccer's Single Entity Antitrust Defense?*, 18 MARQ. SPORTS L. REV. 413, 426 (2008). This salary figure can be qualified by the fact that it quantifies Beckham's potential earnings over the five-year period from both salary and endorsements. Kurt Badenhausen, *David Beck-*

al Madrid missed out, as the Galaxy paid no transfer fee; in other words, Madrid received no financial compensation for losing Beckham.<sup>42</sup> While this seems inconsequential because it happens regularly in world soccer, it is critically important for the purposes of the antitrust discussion this Comment will undertake in Part V.

David Beckham began his professional playing career at Manchester United, one of the most prestigious clubs in the world.<sup>43</sup> From there, Beckham moved to Real Madrid, the most successful club in the history of European soccer.<sup>44</sup> His third career move was to the L.A. Galaxy, a transfer that shocked the sports world.<sup>45</sup> Rarely does a player move from such prestige to a relatively unknown club while they still have value left for top-tier clubs.<sup>46</sup> This transfer was perhaps a signal that MLS was beginning to be a player in global soccer. Although Beckham was not in his prime at the time of the transfer, it was still a bold move to play in a lesser league. To better understand this watershed moment, it is helpful to look at the league's rules.

### C. MLS Roster Rules

MLS rules require each team to adhere to a salary cap; in 2014, the figure was \$3,100,000.<sup>47</sup> The Designated Player Rule is a rule that allows teams to use two roster spots to exceed the salary cap because those two salaries only count against the cap up to \$368,750 for players over twenty-three years of age.<sup>48</sup> These spots can be used on younger players, only counting against the cap for roughly \$150,000 each.<sup>49</sup> This mechanism allowed David Beckham to

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*ham Departs MLS After Earning \$255 Million*, FORBES (Nov. 30, 2012), <http://www.forbes.com/sites/kurtbadenhausen/2012/11/30/david-beckham-departs-mls-after-earning-255-million/>.

42. *David Beckham – Transfer History*, TRANSFERMARKT, <http://www.transfermarkt.com/david-beckham/transfers/spieler/3139> (last visited Apr. 18, 2015) [hereinafter *Beckham Transfers*].

43. *Id.*

44. *Id.*; Manuel Traquete, *World Football: The 11 Most Successful European Clubs in History*, BLEACHER REP. (Nov. 5, 2010), <http://bleacherreport.com/articles/510011-world-football-the-11-most-successful-european-clubs-in-history/page/12>.

45. *Beckham Transfers*, *supra* note 42.

46. See, e.g., *Andrea Pirlo – Transfer History*, TRANSFERMARKT, <http://www.transfermarkt.com/en/andrea-pirlo/transfers/spieler/5817> (last visited Apr. 18, 2015) (showing that Pirlo, a world-class player in a similar position, went to Juventus at around the same age Beckham went to Los Angeles).

47. *Roster Rules and Regulations*, PRESS BOX, <http://pressbox.mlssoccer.com/content/roster-rules-and-regulations> (2014) [hereinafter *MLS Rules*] (current rules also allow for a third designated player spot to be purchased).

48. *See id.*

49. *Id.*

earn such a large amount while the Galaxy stayed within the league-mandated salary cap.<sup>50</sup> Going forward, the Designated Player Rule and any potential expansions to the rule will attempt to allow MLS teams to attract more talented players while still striving for competitive balance.<sup>51</sup>

Allocation is another mechanism within MLS roster rules to ensure an even playing field.<sup>52</sup> The allocation process dictates that MLS teams will be positioned in an allocation order in accordance with their performance the previous year, the least successful clubs ranking at the top of the list.<sup>53</sup> This process is in place for occasions when a U.S. National Team player or former MLS player returns from playing abroad.<sup>54</sup> When a team successfully claims a player through the allocation process, it is placed at the bottom of the allocation order.<sup>55</sup>

### III. LEGAL HISTORY

Beginning with *Copperweld*, moving to *Fraser*, and finally to *American Needle*, this part of the Comment will provide a look at how MLS gained single entity exemption from antitrust litigation. Critically, the Supreme Court in *American Needle* might have set precedent that could undermine how the single entity exemption applies.

#### A. Antitrust Background

The Sherman Antitrust Act bluntly states that “every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal.”<sup>56</sup> Put more simply, any concerted action that unreasonably restrains interstate trade or commerce is illegal under antitrust law. Likewise, the Clayton Act is “an Act to protect trade and commerce against unlawful restraints and monopolies.”<sup>57</sup> These Acts are the foundation of antitrust law in America, and therefore, antitrust cases are often brought under these statutes.<sup>58</sup>

As a defense to antitrust litigation, leagues have often tried to assert a sin-

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50. See Bernhard, *supra* note 41, at 425–26.

51. See *id.* at 425–27.

52. See *MLS Rules*, *supra* note 47.

53. *Id.*

54. *Id.*

55. *Id.*

56. Sherman Antitrust Act, 15 U.S.C. § 1 *et seq.* (2012).

57. Clayton Act, 15 U.S.C. § 12 *et seq.* (2012).

58. See generally *The Antitrust Laws*, FED. TRADE COMM’N, <http://www.ftc.gov/tips-advice/competition-guidance/guide-antitrust-laws/antitrust-laws> (last visited Apr. 18, 2015).



gle entity defense.<sup>59</sup> A single entity defense, at bottom, is when a league claims to be one, unified entity incapable of conspiring to restrain trade in violation of antitrust law.<sup>60</sup> At issue in single entity cases is the notion that the leagues themselves are not actually engaged in concerted action, that the league and all of the teams produce a single product.<sup>61</sup> While the *Fraser* decision *infra* serves to show that courts sometimes apply single entity status, many federal appellate courts do not adopt a similar stance.<sup>62</sup>

The next step is to unpack what qualifies as an “unreasonable” restraint on interstate commerce for antitrust purposes. The level of cooperation necessary would most likely be in violation of antitrust law in other contexts.<sup>63</sup> To resolve this dilemma, rule of reason analysis is the appropriate test because professional sports require off-field cooperation to create on-field competition.<sup>64</sup> Generally speaking, rule of reason analysis begins with the plaintiff showing that an agreement had a substantially anticompetitive effect.<sup>65</sup> Then, the defendant must prove the competitive advantages achieved by the conduct in question.<sup>66</sup> The burden then shifts back to the plaintiff to show that the conduct is not reasonably necessary to achieve the defendant’s legitimate objective or that the end can be achieved by less restrictive means.<sup>67</sup> Ultimately then, the court weighs the pro-competitive and anticompetitive effects and makes a determination.<sup>68</sup>

Applying this framework to a potential claim against MLS, a plaintiff would first attempt to show anticompetitive effects of MLS rules regarding player movement and salaries. For example, a player could show that three players on a roster, the Clint Dempsey-types of the world, have uninhibited earning power; they earn what the market dictates. However, for the other twenty players on a roster that are limited by the salary cap, they cannot earn what they could in an unrestricted market.<sup>69</sup> In turn, MLS then has the oppor-

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59. MATTHEW J. MITTEN ET AL., SPORTS LAW AND REGULATION: CASES, MATERIALS, AND PROBLEMS 630 (2013).

60. *Id.*

61. *Id.* at 413.

62. *Id.* at 414.

63. *See id.*

64. *Id.* at 422.

65. *Law v. Nat’l Collegiate Athletic Ass’n*, 134 F.3d 1010, 1019 (10th Cir. 1998).

66. *Id.*

67. *Id.*

68. *Id.*

69. *See generally* MLS PLAYERS UNION, 2013 MLS PLAYER SALARIES: SEPTEMBER 15, 2013: ALPHABETICAL, *available* at <http://www.mlspayers.org/files/September%2015,%202013%20Salary%20Information%20>

tunity to show that the anticompetitive effects are necessary. In the time of *Fraser*, the justification of competitive balance might have been applicable. A court might also have been lenient in light of the struggles the league faced. Today, however, with three Designated Player spots and players of significantly different talent levels entering the league, these same justifications might not hold up.

Following the MLS showing that the restrictions are necessary, the plaintiff then has the opportunity to show that there are less restrictive means to achieve the same goal.<sup>70</sup> In this case, there may well be less restrictive means to achieve competitive balance. The survival of the league is not in question and other leagues around the world function without a salary cap.<sup>71</sup> This would lead a court to make the ultimate determination as to whether the pro-competitive effects outweigh the anticompetitive effects. If the anticompetitive effects prevail, the league's practices cannot stand.<sup>72</sup> In a MLS context, if the restrictions from the league are anticompetitive and have no real pro-competitive justification, the restriction will be declared illegal.

When approaching an antitrust problem, a court must also determine the relevant market as well as market power within it.<sup>73</sup> For antitrust purposes, the relevant market includes product market and geographical market.<sup>74</sup> While geographical market is the physical area being considered, the product market describes the groups of producers of similar products that have the ability to take business away from one another.<sup>75</sup> After the proper market is determined, a court must then decide if the party being accused of an antitrust violation has the requisite power in that market to actually restrain commerce.<sup>76</sup> Some case law can better illustrate these antitrust principles.

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70. See, e.g., PHILLIP AREEDA, *THE RULE OF REASON IN ANTITRUST ANALYSIS: GENERAL ANALYSIS* 8 (Federal Judicial Center 1981).

71. See, e.g., Dayn Perry, *No, Baseball (Still) Doesn't Need a Salary Cap*, CBS SPORTS (Dec. 5, 2013), <http://www.cbssports.com/mlb/eye-on-baseball/24350073/no-baseball-still-doesnt-need-a-salary-cap>.

72. See generally, e.g., L.A. Memorial Coliseum Comm'n v. Nat'l Football League, 726 F.2d 1381 (9th Cir.), cert. denied, 469 U.S. 990 (1984).

73. Robert G. Harris & Thomas M. Jorde, *Antitrust Market Definition: An Integrated Approach*, 72 CAL. L. REV. 3, 4 (1984).

74. MITTEN, *supra* note 59, at 432–33 (citing L.A. Memorial Coliseum Comm'n v. Nat'l Football League, 726 F.2d 1381).

75. *Id.*

76. See *id.*

### B. Copperweld

One of the first relevant cases in deciphering antitrust law and its application to MLS is *Copperweld Corp. v. Independence Tube Corp.*<sup>77</sup> In *Copperweld*, the petitioner purchased Regal Tube Co. from Lear Siegler, Inc.<sup>78</sup> In the purchase agreement, Lear Siegler agreed not to compete with the petitioner for five years following the sale.<sup>79</sup> A subsidiary of Lear Siegler subsequently competed with Regal, only to have the petitioner warn them to cease.<sup>80</sup> The respondent filed this suit, alleging a violation of Section 1 of the Sherman Antitrust Act.<sup>81</sup> The Supreme Court held that a parent company and their subsidiary were not capable of conspiring for purposes of the Sherman Antitrust Act because they were the same entity.<sup>82</sup> This holding provided the foundation upon which the court made its decision in the soccer-specific case *Fraser v. Major League Soccer*.<sup>83</sup>

### C. Fraser

Moving to the realm of soccer, *Fraser* involved a group of players suing the league and the operator/investors for agreeing not to compete for player services and for monopolizing player services, otherwise preventing another entity from being a top-tier league in America.<sup>84</sup> The court relied heavily on the notion that the appellant failed to prove that MLS had significant power over the relevant market, i.e. global soccer.<sup>85</sup> Based on this failure, the court affirmed the lower court and granted Major League Soccer single entity immunity from antitrust litigation, treating the league as a parent company and the teams as subsidiaries, as discussed in *Copperweld*.<sup>86</sup> By deciding the case in this way, the court acquiesced to the idea that MLS is a single entity, effectively allowing the league to escape liability under section 1 of the Sherman Act.

This case deserves more discussion because it is the only case thus far that discusses antitrust in a soccer context. It is notable that the court used the

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77. 467 U.S. 752 (1984).

78. *Id.*

79. *Id.*

80. *Id.* at 756–57.

81. *Id.* at 757–58.

82. *See id.* at 777.

83. *See generally* 284 F.3d 47 (1st Cir. 2002).

84. *Id.* at 54–55.

85. *E.g., id.* at 55.

86. *See id.* at 71.

market power test to arrive at the conclusion, not finding it necessary to engage in a full rule of reason analysis as courts in other cases involving sports issues have done.<sup>87</sup> The court specifically held that Fraser failed to prove the relevant market.<sup>88</sup> As MLS continues to grow, such a showing might not be as difficult because the market is quite simply global soccer.<sup>89</sup> Continued, sustained growth in MLS and more talent in the league would mean that the league has a strong enough foothold in world soccer to no longer need legal protection from antitrust litigation. The bells may be chiming just about now, as the arrival of Dempsey, Bradley, and Defoe signal at least a small leak from across the pond.

#### D. American Needle

More recently, the Supreme Court explicitly opened the door to challenging single entity exemptions granted to sports leagues. In *American Needle, Inc. v. National Football League*, the thirty-two teams that comprise the NFL came together to form National Football League Properties (NFLP).<sup>90</sup> The petitioner in the case had a non-exclusive license agreement with the NFLP, but it was not renewed.<sup>91</sup> When the NFLP signed an exclusive agreement with Reebok, the petitioners filed suit alleging an antitrust violation.<sup>92</sup> The Court unanimously decided to not extend single entity immunity, using a nut and bolt as an example.<sup>93</sup> While the nut and the bolt must go together to function in the end, the factories producing the two parts must still be subject to antitrust litigation.<sup>94</sup>

The *American Needle* decision could be critical for any legal challenges to MLS's single entity exemption moving forward, and because the Supreme Court decided this case, leagues with exemptions have a lot less wiggle room within the once-comforting antitrust protection. Although *American Needle* dealt with licensing for products and merchandise, the holding could potentially serve to create far more stringent requirements for determining what unity

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87. See, e.g., Nat'l Collegiate Athletic Ass'n v. Bd. of Regents of the Univ. of Okla., 468 U.S. 85 (1984).

88. *Fraser*, 284 F.3d at 71.

89. See Joe Prince-Wright, *MLS Ranked Seventh Best Soccer League Globally . . . Can it Break into the Top Five?*, PROSOCCERTALK (April 23, 2013), <http://prosoccertalk.nbcsports.com/2013/04/23/mls-ranked-seventh-best-soccer-league-globally-can-it-break-into-the-top-five/>.

90. *Am. Needle, Inc. v. Nat'l Football League*, 560 U.S. 183, 185–87 (2010).

91. *Id.* at 187.

92. *Id.*

93. *Id.* at 199.

94. *Id.*

of interest means in a league governance context.

#### IV. CLINT DEMPSEY, MICHAEL BRADLEY, & JERMAIN DEFOE

A recent, high profile example of MLS rules coming into play and potentially implicating antitrust law was Clint Dempsey's move from Tottenham, an English Premier League team, to the Seattle Sounders in MLS.<sup>95</sup> What was particularly interesting about that move was that MLS, not the Sounders, paid the transfer fee, differentiating it from the Beckham deal.<sup>96</sup> Prior to Dempsey's move to Seattle, the team was second in the allocation rankings behind the Portland Timbers, meaning the Timbers actually had first option to sign him.<sup>97</sup> While the roster rules allow for teams to move up the allocation order by compensating the teams above them,<sup>98</sup> there is no indication that Portland received any compensation when Seattle leapfrogged them in the order.<sup>99</sup> This combination of factors seems to unveil a problematic hole in MLS rules and provides a lens through which MLS can be viewed for antitrust purposes today.

Compared to Beckham, Clint Dempsey took a drastically different path to become one of the most expensive MLS players ever. Born and raised in Texas,<sup>100</sup> Dempsey came up through MLS and moved to Fulham in the English Premier League, a more prestigious league than MLS.<sup>101</sup> After a fantastic season at Fulham in 2010–11, Dempsey moved to Tottenham, one of the most respected clubs in the league.<sup>102</sup> While not on the level of his teammate Gareth Bale, Dempsey was a solid rotation player on a top-tier squad. In light of these developments, moving back to MLS with Seattle was slightly bizarre.<sup>103</sup>

Even more recently, Clint Dempsey's countryman Michael Bradley made

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95. See, e.g., Doug McIntyre, *Spurs Announce Clint Dempsey Move*, ESPN FC (Aug. 2, 2013), [http://espnfc.com/news/story/\\_/id/1512434/clint-dempsey-join-seattle-sounders-tottenham-sources-say?cc=5901](http://espnfc.com/news/story/_/id/1512434/clint-dempsey-join-seattle-sounders-tottenham-sources-say?cc=5901).

96. Grant Wahl, *How Seattle's Stunning Clint Dempsey Deal Got Done*, SI (Aug. 5, 2013), <http://www.si.com/soccer/2013/08/05/clint-dempsey-seattle-sounders-mls>.

97. *MLS Allocation Rankings*, MLS SOCCER, <http://www.mlssoccer.com/allocation> (last updated Feb. 10, 2015).

98. *MLS Rules*, *supra* note 47.

99. William Conwell, *If Clint Dempsey Signs with the Sounders, What Do the Timbers Get?*, STUMPTOWN FOOTY (Aug. 2, 2013 5:11 PM), <http://www.stumptownfooty.com/2013/8/2/4584038/if-clint-dempsey-signs-with-the-sounders-what-do-the-timbers-get>.

100. *Clint Dempsey*, ESPN FC, [http://espnfc.com/player/\\_/id/39928/clinton-dempsey?cc=5901](http://espnfc.com/player/_/id/39928/clinton-dempsey?cc=5901) (last visited Apr. 18, 2015).

101. *Id.*

102. *Id.*

103. See Wahl, *supra* note 95.

a move from AS Roma in Italy to Toronto FC in MLS while in the prime of his career, which has puzzled many soccer enthusiasts.<sup>104</sup> To make it happen, MLS, not Toronto, paid a reported \$10 million to AS Roma.<sup>105</sup> Joining Bradley in Toronto will be Jermain Defoe, a long-time striker for Tottenham in the English Premier League and a well-known player for the England National Team.<sup>106</sup> All three of these transfers illustrate the fact that MLS, not teams, pay for player transfers.<sup>107</sup> So long as MLS remains a single entity for antitrust purposes following *Fraser*, the fact that the league pays the transfer fee is inconsequential. In practice though, competitive balance is ruined while MLS power in the market for soccer players globally continues to grow.

The story of MLS changed dramatically with the introduction of David Beckham, and that legacy is felt today by the likes of Clint Dempsey and Michael Bradley as they make the mega-money moves back to MLS. However, the fact that Dempsey is a returning American makes a difference as to how the roster rules are applied.<sup>108</sup> Michael Bradley's situation is an ongoing example that could prove to be even more controversial. The stories of Dempsey and Bradley are continuing to unfold but provide excellent illustrations of how the MLS rules are limiting players earning ability in violation of the law. Further, players are disproportionately being disadvantaged because only a maximum of three players on a given roster have uncapped earning ability. Previously, MLS may not have had the requisite power in the global soccer market for this issue to raise real concern. Today though, the likes of Clint Dempsey, Michael Bradley, and Jermain Defoe have changed this assumption.

## V. SOLUTION OR PREDICTION

Using the history of MLS and the legal history of antitrust in soccer, one logical conclusion arises: MLS should no longer be exempt from antitrust litigation under the single entity defense. As MLS continues to grow and become more viable globally, the league may no longer need the single entity defense to protect itself. FIFA continues to push MLS to adopt a European model of

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104. Frank Isola, *Michael Bradley's Move to MLS Team Toronto FC Is a Head-Scratcher*, N.Y. DAILY NEWS (Jan. 12, 2014), <http://www.nydailynews.com/sports/soccer/isola-bradley-move-mls-head-scratcher-article-1.1577369>.

105. Nick Firchau, *Serie A Side AS Roma Say Michael Bradley Sold to Major League Soccer for Record Fee*, MLS SOCCER (Jan. 10, 2014), <http://www.mlssoccer.com/news/article/2014/01/09/report-serie-side-roma-say-michael-bradley-sold-major-league-soccer-record-f>.

106. *Jermain Defoe: Tottenham Striker to Join MLS Side Toronto*, BBC SPORT (Jan. 10, 2014), <http://www.bbc.com/sport/0/football/25680333>.

107. See, e.g., Wahl, *supra* note 95.

108. See *MLS Rules*, *supra* note 47.

soccer leagues and doing so could perhaps allow the league to avoid the consequences of losing immunity in another suit along the lines of *Fraser*. Furthermore, the introduction of New York City Football Club also introduces Manchester City to MLS and creates the potential for more unequal footing.

#### A. Recent Change

Since MLS was granted single entity immunity in *Fraser*, the league has undergone some major changes in structure. One of the most glaring is ownership. When MLS began in 1996, the league devised an operator-investor scheme to remedy the problems that riddled the NASL.<sup>109</sup> Under this plan, investors would provide a certain amount of money for portions of expenses while MLS itself would pay for the rest.<sup>110</sup> At the outset, only six operator-investors controlled the ten teams.<sup>111</sup> More recently, however, there has been an influx of wealthy investors, bringing an unprecedented level of stability to MLS.<sup>112</sup> This notion is given added weight by the fact that the league is still expanding while remaining financially stable.<sup>113</sup> Globally, soccer clubs turning a profit is almost unheard of, so for MLS to continue to receive preferential legal treatment by way of the single entity immunity could be a stretch going forward.<sup>114</sup> For the league itself, an incentive to change is non-existent because teams turn profits and attract better players. This, however, is the basis for antitrust scrutiny: when concerted actors manipulate commerce to have their cake and eat it too.

The next, and perhaps more serious change in relation to the single entity immunity is the expansion of the Designated Player Rule. When David Beckham came to MLS in 2007, a team was only allowed to have one Designated Player.<sup>115</sup> The 2010 collective bargaining agreement changed the rule,<sup>116</sup> al-

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109. Bernhard, *supra* note 41, at 414.

110. *Id.*

111. *Id.*

112. *Id.* See also, e.g., *Major League Soccer Announces New York Expansion Team: New York City Football Club*, MLS SOCCER (May 21, 2013), <http://www.mlssoccer.com/news/article/2013/05/21/major-league-soccer-announces-new-york-expansion-team-new-york-city-football> [hereinafter *MLS Announces NYFCF*].

113. Mike Pesca, *Major League Soccer Finally on Solid Footing, But Hasn't Reached Big Time*, NPR (Mar. 1, 2013), <http://www.npr.org/2013/03/01/173271245/major-league-soccer-finally-on-solid-footing-but-hasnt-reached-big-time>.

114. See, e.g., SIMON KUPER & STEFAN SZYMANSKI, *SOCERNOMICS* 6 (Nation Books, 2d ed. 2012).

115. See Joshua Mayers, *Major League Soccer Adds Second DP Slot, Can Purchase a Third (League Release)*, SEATTLE TIMES NEWSPAPER (April 1, 2010 8:38 AM), [http://seattletimes.com/html/soundersfcblog/2011498898\\_major\\_league\\_soccer\\_adds\\_secon.html#continue](http://seattletimes.com/html/soundersfcblog/2011498898_major_league_soccer_adds_secon.html#continue).

lowing two Designated Players per roster and permitting each club to buy a third.<sup>117</sup> This expansion seems to inch MLS that much closer to the European-style, which allows free player movement via the transfer process.<sup>118</sup> This undoubtedly gives MLS more power over the global market for soccer players, which would change the reasoning the court relied upon in *Fraser*.<sup>119</sup> The effects of the original Designated Player Rule are present in MLS today, as players such as Thierry Henry, Tim Cahill, Landon Donovan, and Robbie Keane have all moved to MLS as Designated Players.<sup>120</sup> While these players are in the latter stages of their careers, they are nonetheless world-famous players that competed at the highest level of European competition at one time or another.<sup>121</sup> The trend will likely continue as current superstars such as Cristiano Ronaldo have expressed their desire to play in America one day.<sup>122</sup>

This development seems to indicate that the MLS has a more powerful presence in the global market for soccer players. No longer does the league need legal protection in order to remain viable, and the way in which Clint Dempsey moved back to the MLS illustrates the need for MLS to be proactive. Elsewhere in the world, teams with the financial resources available can attempt to sign another player. The recent transfer of Radamel Falcao illustrates this principle.<sup>123</sup> Falcao moved to AS Monaco, a French club, while Spanish and English giants failed in their pursuits.<sup>124</sup> In the case of Dempsey, Seattle did not pay the transfer fee; MLS paid it.<sup>125</sup> This behavior would seemingly

116. Although this implicates the antitrust labor exemptions, an issue beyond the scope of this Comment, this example illustrates the way in which player movement in MLS changed in the time since *Fraser*. 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/?\\_r=0](http://goal.blogs.nytimes.com/2010/04/01/m-l-s-expands-designated-player-rule/?_r=0).

117. Mayers, *supra* note 114.

118. See *In Soccer, What is a Transfer and How Does it Work?*, EXPLAINING SOCCER (July 1, 2009), <http://explainingsoccer.typepad.com/explaining-soccer/2009/07/in-soccer-what-is-a-transfer-and-how-does-it-work.html>.

119. See *Fraser*, 284 F.3d at 55.

120. *Designated Players*, MLS PRESS BOX (Mar. 23, 2015), <http://pressbox.mlssoccer.com/content/designated-players>.

121. See, e.g., *Thierry Henry*, TRANSFERMARKT, <http://www.transfermarkt.co.uk/en/thierry-henry/transfers/spieler/3207> (last visited Apr. 18, 2015).

122. *Ronaldo: I Hope to Play in MLS*, ESPN FC (Aug. 6, 2012), [http://espnfc.com/news/story/\\_/id/1129968/cristiano-ronaldo:-i-hope-to-play-in-mls-one-day?cc=5901](http://espnfc.com/news/story/_/id/1129968/cristiano-ronaldo:-i-hope-to-play-in-mls-one-day?cc=5901) [hereinafter *Ronaldo*].

123. Tim Poole, *Why is £50m Super Striker Falcao Snubbing Real, United and Co. for Lowly Monaco (with a Crowd Lower than Luton's...)?*, DAILY MAIL ONLINE, <http://www.dailymail.co.uk/sport/football/article-2333257/Why-Radamel-Falcao-joining-Monaco-Manchester-United-Real-Madrid-co.html> (last updated May 30, 2013).

124. *Id.*

125. Wahl, *supra* note 95.



not be tolerated if the league did not enjoy the single entity exemption. Seeing that the court in *Fraser* relied on the lack of market power,<sup>126</sup> and MLS is enjoying a greater influence in the global market,<sup>127</sup> trouble could be on the horizon.

In light of *American Needle*, that trouble could rear its ugly head as soon as another player files suit alleging an antitrust violation. MLS should not have a free pass to engage in concerted action that limits interstate trade. The court in *Fraser* showed a general leniency and deference, perhaps because the league might not have survived to tell about it if antitrust scrutiny applied to the rules a decade ago.<sup>128</sup> Presently, such deference is not necessary. Having the league pay transfer fees for the likes of Clint Dempsey and Michael Bradley functions as if a company is assigning an employee to a franchise. Practically speaking, this model does not work well in a sports context because as talent in the league increases, competitive balance will actually decrease. This is due to the league being able to pick and choose where the stars go.<sup>129</sup> There does not appear to be anything in place to prevent MLS from assigning marquee names to New York and Los Angeles, the largest and most popular markets, exclusively when the influx occurs. Antitrust law is the proper tool to prevent that action.

The most recent, and perhaps most damning, evidence of the fact that MLS should not be considered a single entity for antitrust purposes is the limited free agency provision in the 2015 MLS collective bargaining agreement (MLS CBA). Heading into negotiations, MLS players vowed to reject any offers that did not include free agency.<sup>130</sup> The provision they received grants players at least twenty-eight years old that have eight years of MLS experience free agency.<sup>131</sup> MLS still places a cap on how much money the player can earn if they enter free agency,<sup>132</sup> but the critical takeaway for antitrust purposes is that MLS teams will now directly compete with one another for free agent services. This flies in the face of MLS being considered a single entity because, as the Court wrote in *American Needle*, a nut and a bolt need one an-

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126. *Fraser*, 284 F.3d at 55.

127. See, e.g., *Ronaldo*, *supra* note 121.

128. See generally 284 F.3d 47.

129. See *Standings: 2013 Regular Season*, MLSSOCCER, <http://www.mlssoccer.com/standings/2013> (last updated Apr. 18, 2015) (showing Seattle as a playoff team the year before Dempsey joined the squad).

130. Richard Sandomir, *MLS and Union Reach Deal Giving Free Agency to Veterans*, NY TIMES (Mar. 4, 2015), [http://www.nytimes.com/2015/03/05/sports/soccer/mls-and-union-reach-deal-giving-free-agency-to-veterans.html?\\_r=0](http://www.nytimes.com/2015/03/05/sports/soccer/mls-and-union-reach-deal-giving-free-agency-to-veterans.html?_r=0).

131. *Id.*

132. *Id.*

other to be useful, but the factories producing the two products are not a single entity.<sup>133</sup> MLS teams competing for player services off the field need one another for competition on the field, but like all other major professional leagues in America, antitrust scrutiny must apply because at the most basic level, this is an illustration of economic competitors agreeing to restrain trade.

Major League Soccer could also attempt to solve the problem itself by adopting a European model of league governance. In Europe, the major leagues are in action from August until late spring.<sup>134</sup> Instead of a playoff system, the European system calls for a table of promotion and relegation to be used.<sup>135</sup> Adopting this schedule and system would allow players to flow more freely from Europe to America and vice versa. As presently constituted though, MLS roster rules create a real roadblock to that free movement. Going forward, two options stand out—adopt the European model or lose the single entity immunity in a subsequent legal challenge.

### B. Financial Fair Play

The UEFA Financial Fair Play is legislation applicable to teams in the jurisdiction of UEFA, or Europe.<sup>136</sup> The structure of FIFA is to govern globally while member confederations govern more locally on their respective continents.<sup>137</sup> UEFA governs Europe and consequently the most successful club teams in world soccer.<sup>138</sup> Financial Fair Play is intended to cap transfer expenditures in any given transfer window.<sup>139</sup> With oil tycoons and royal families purchasing club teams, there has been a recent influx of unabashed spend-

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133. *Am. Needle, Inc. v. Nat'l Football League*, 560 U.S. at 199.

134. See, e.g., *2013/14 Barclays Premier League Scores & Fixtures*, ESPN FC, <http://www.espnfc.com/barclays-premier-league/23/scores?date=20130817> (last visited Apr. 18, 2015).

135. E.g., *2014/15 Serie A Table*, ESPN FC, <http://www.espnfc.com/italian-serie-a/12/table> (last visited Apr. 18, 2015).

136. *Financial Fair Play*, UEFA, <http://www.uefa.org/protecting-the-game/club-licensing-and-financial-fair-play/index.html/> (last updated Jan. 12, 2015) [hereinafter *FFP*]. The FFP standards are in place to (1) introduce more discipline and rationality in club football finances; (2) to decrease pressure on salaries and transfer fees and limit inflationary effect; (3) to encourage clubs to compete with(in) their revenues; (4) to encourage long-term investments in the youth sector and infrastructure; (5) to protect the long-term viability of European club football; and (6) to ensure clubs settle their liabilities on a timely basis. *Id.*

137. *Confederations*, FIFA, <http://www.fifa.com/aboutfifa/organisation/confederations/index.html> (last visited Apr. 18, 2015).

138. *UEFA Member Associations*, UEFA, <http://www.uefa.com/memberassociations/index.html> (last visited Apr. 18, 2015).

139. See *FFP*, *supra* note 136.

ing, which many believe hurts the game.<sup>140</sup> The MLS salary cap system prevents this sort of spending on some level, but the three Designated Player Spots allow teams to spend freely on three players, and Toronto FC recently spent quite a hefty sum of money on Jermain Defoe and Michael Bradley.

Although the positive effects of Financial Fair Play have yet to be seen, a similar policy might soon be necessary in America with MLS. With continued expansion, more valuable television rights, and the allure of American culture, the day may soon arrive when the Cristiano Ronaldo-type player wants to play in America during his prime.<sup>141</sup> When that day arrives, MLS must be ready for the implications it brings for competitive balance. Without question, trying to achieve that balance while remaining competitive globally is incredibly challenging.

### C. Globalization

The beginning of this globalization process has already begun for MLS. New York City Football Club (NYCFC) entering MLS in 2015 has already changed the landscape of the league.<sup>142</sup> Most glaringly, Manchester City is a partner in the ownership group and has taken to promoting the team with the world-class players that play for their squad.<sup>143</sup> In fact, rumors have already begun to swirl about potential marquee signings for the club in its inaugural season.<sup>144</sup> MLS roster rules will apply to them, just as any other team; however, the loan system that is prevalent in world soccer might present a new issue. Manchester City could theoretically transfer a player in and then loan them to NYCFC, using the club as a minor league team of sorts. While this is mere speculation at this point, that behavior would create a sort of competitive imbalance that a salary cap could not hope to cure. Single entity antitrust immunity would be for naught.

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140. See, e.g., *Arab Group Agrees Man City Deal*, BBC SPORT, [http://news.bbc.co.uk/sport2/hi/football/teams/m/man\\_city/7591735.stm](http://news.bbc.co.uk/sport2/hi/football/teams/m/man_city/7591735.stm) (last updated Sept. 1, 2008).

141. See, e.g., *Ronaldo, supra* note 122 (illustrating that the desire to play in America already exists for some of the best players).

142. See, e.g., *Frank Lampard Finally Signs MLS Contract to Play with NYCFC*, ESPN FC (Jan. 10, 2015), <http://www.espnfc.us/story/2237691/frank-lampard-finally-signs-mls-contract-to-play-with-nycfc>.

143. See, e.g., Paul Nicholson, *City Boost Their NYCFC Presence Using Player Assets and a Viral Video*, INSIDE WORLD FOOTBALL (Nov. 19, 2013), <http://www.insideworldfootball.com/world-football/football-americas/concacaf-news/13639-city-boost-their-nycfc-presence-using-player-assets-and-a-viral-video>.

144. E.g., Andy Clayton, *Report: Barcelona Star Xavi the Prime Target for New York's New MLS Franchise*, N.Y. DAILY NEWS, <http://www.nydailynews.com/sports/soccer/report-barcelona-star-xavi-prime-target-nycfc-article-1.1579074> (last updated Jan. 15, 2014).

## VI. CONCLUSION

MLS has seen stunning levels of growth since arriving on the scene in 1996.<sup>145</sup> Once, the league looked as if it would meet the same fate so many attempted leagues met before, but it has soldiered on.<sup>146</sup> Part of that survival process was undoubtedly winning single entity antitrust immunity in the *Fraser* decision. That legal protection gave MLS wide latitude to control teams and players in order to achieve stable but competitive soccer. Today though, that protection is no longer necessary. MLS is now attracting the best American players as well as some very talented Europeans and the three Designated Player spots available to each team allow clubs to pay that talent an amount equal to what they deserve. For the other players on the rosters though, a strict salary cap applies and serves to limit their earning capacity. It is time to take the training wheels off MLS and allow the league to become a truly global operation.

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145. *E.g.*, Alex Morrell, *After Flirting with Failure, Major League Soccer Popularity Now Surging*, FORBES (Nov. 8, 2013), <http://www.forbes.com/sites/alexmorrell/2013/11/08/after-flirting-with-failure-major-league-soccer-popularity-now-surging/>.

146. *See id.*