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# IS MLS INHERENTLY ANTICOMPETITIVE? THE STRANGE SINGLE-ENTITY STRUCTURE OF MAJOR LEAGUE SOCCER IN ORDER TO LEGITIMIZE AMERICAN PROFESSIONAL SOCCER

DANIEL S. MACMILLAN\*

## I. INTRODUCTION

Major League Soccer (MLS) is the U.S. Soccer sanctioned Division I professional soccer league in the United States and Canada, and operates under a unique corporate framework for a professional sports league.<sup>1</sup> MLS is organized as a limited liability company (“LLC”) under Delaware law, and utilizes an exemption that allows it to organize the league’s corporate structure as a single-entity.<sup>2</sup>

Given the global power of soccer and the attention that sports demand in American popular culture, an uninterested party may expect that the United States would not have an issue supporting a major, professional league for soccer. Though soccer is commonly regarded as the most popular sport in the world, this trend does not hold true in the United States.<sup>3</sup> Basketball leads the country in participation among youth athletes, and “American” football is by far the largest revenue generating sport.<sup>4</sup> Major League Soccer has a complicated

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1. *Professional Council*, U.S. SOCCER, <http://www.usoccer.com/about/affiliates/professional-soccer> (last visited July 30, 2018).

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

3. *Most Popular Sports in the World*, MOST POPULAR SPORTS IN THE WORLD, <http://mostpopularsports.net/in-the-world> (last visited July 30, 2018).

4. Bruce Kelley & Carl Carchia, “Hey, Data Data—Swing!”, ESPN (July 11, 2013), [http://www.espn.com/espn/story/\\_/id/9469252/hidden-demographics-youth-sports-espn-magazine](http://www.espn.com/espn/story/_/id/9469252/hidden-demographics-youth-sports-espn-magazine); Steven Kutz, *NFL Took in \$13 Billion in Revenue Last Season — See How It Stacks Up Against Other Pro Sports*

history in the United States, and even today, despite its recent growth, many fans are skeptical for the future of the league and for soccer in North America.<sup>5</sup>

This Comment examines the single-entity framework as employed by MLS, and analyzes the reasons that MLS should transition to a corporate structure that better allows for the legitimization of American soccer on an international level. Further, this Comment will explore the anticompetitive nature of the single-entity organization of MLS and how that relates to the control that players have over their contracts, transfers, options, and designations. Since the landmark decision in *Fraser v. Major League Soccer*, updates in the Collective Bargaining Agreement (CBA) have given a greater deal of control to the player, but the existence of MLS' quasi-single-entity status will continue to unfairly restrict players' freedom of movement and the right to sell their services to the highest bidder.<sup>6</sup> Though the players union has recently negotiated a quasi-free-agency provision in the 2015 CBA, pursuing legal action in the First Circuit Appeals Court will give players the strongest opportunity to prove the anticompetitive effects of the single-entity system in court, and force the court to exercise its jurisdiction in further defining the legal status of Major League Soccer. This analysis will explore the nature of the single-entity status of MLS, the relationship that players have with teams and their owners, and the basis for a lawsuit that could potentially overturn the MLS single-entity structure for good.

## II. HISTORY OF MLS AND INTERNATIONAL SOCCER

Most national and international attention towards soccer comes from well-established foreign leagues like the German Bundesliga, Mexico's Liga MX, and the English Premier League.<sup>7</sup> The creation of the Division I American professional league came with the awarding of the 1994 World Cup to

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*Leagues*, MARKETWATCH (July 2, 2016), <http://www.marketwatch.com/story/the-nfl-made-13-billion-last-season-see-how-it-stacks-up-against-other-leagues-2016-07-01>.

5. Emmett Knowlton, *Despite Growth, MLS in a Catch-22 with Stars Young and Old*, BUS. INSIDER (Feb. 23, 2016), <http://www.businessinsider.com/mls-in-a-catch-22-with-stars-young-and-old-2016-2>.

6. See *Fraser*, 284 F.3d 47; see also COLLECTIVE BARGAINING AGREEMENT BETWEEN MAJOR LEAGUE SOCCER AND MAJOR LEAGUE SOCCER PLAYERS UNION, <https://www.mlssplayers.org/images/Collective%20Bargaining%20Agreement%20-%20February%201,%202015.pdf> (last visited July 30, 2018); Steven Bank, *Who Won the MLS Labor Negotiations? Single Entity*, AMERICAN SOCCER NOW (Mar. 5, 2015), <http://americansoccernow.com/articles/who-won-the-mls-labor-negotiations-single-entity>.

7. Christopher Harris, *Most Popular Soccer Leagues on US Television, Ranked*, WORLD SOCCER TALK (Aug. 2, 2016), <http://worldsoccertalk.com/2016/08/02/popular-soccer-leagues-us-television-ranked/>; Joe Tansy, *Statistically Ranking the World's Top 10 Football Leagues*, BLEACHER REPORT (Jan. 14, 2014), <http://bleacherreport.com/articles/1922780-statistically-ranking-the-worlds-top-10-football-leagues>.

America.<sup>8</sup> The selection included a great deal of pressure from soccer's international governing body, Fédération Internationale de Football Association (FIFA), to bring competitive soccer to North America and build rapport with American sports fans.<sup>9</sup>

This was not the first attempt to bring professional soccer to the American masses—the North American Soccer League (NASL) had become the first league to reach Division I recognition, but had faded away due to “wide disparities in the financial resources of the league’s independently owned teams and a lack of centralized control.”<sup>10</sup> In order to combat the failures of NASL, USSF president Alan Rothberg founded Major League Professional Soccer (MLPS) using a plan to keep centralized control over league and individual team operations.<sup>11</sup>

After a successful World Cup, MLS was officially formed in 1995 as a limited liability company (LLC) under Delaware law.<sup>12</sup> The league is owned by a group of independent investors and authority is consolidated under a board of governors—this unique corporate structure ensures centralized control.<sup>13</sup> Since the creation of the league, the power given to players has been widely disregarded, and the legal formation of the league as a single-entity has safeguarded the league and its individual owners from having to provide certain labor protections that are widely used in other American professional sports. Regardless, in his 2016 ‘State of the League Address,’ MLS commissioner Don Garber stated that MLS “[r]emain[s] very focused on building a league that can be one of the top leagues in the world and one that everybody who cares about the game can be proud of.”<sup>14</sup>

#### *A. The Single-Entity Framework and the Importance of the Fraser Decision*

Major League Soccer operates very differently than the other major professional leagues in America. Unlike the four major professional sports—baseball, basketball, hockey, football—whose teams hold their own entity status separate from the league itself, MLS league operates as a

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8. Grant Wahl & Brian Straus, *The Birth of a League: Key Figures from MLS's Inaugural Season Relive the League's Humble Beginnings*, SPORTS ILLUSTRATED, 2015, <http://www.si.com/longform/2015/mls/>.

9. *Id.*

10. *Fraser*, 284 F.3d at 52.

11. *Id.* at 53.

12. *Id.*

13. *Id.*

14. Alicia Rodriguez, *WATCH: MLS Commissioner Don Garber's 2016 State of the League Address*, MLS CUP PLAYOFFS (Dec. 9, 2016), <http://www.mlssoccer.com/post/2016/12/09/mls-commissioner-don-garber-hold-state-league-address-friday>.

single-entity LLC, with the twenty-two individual teams represented as members of the board of governors.<sup>15</sup> Centralized league governance is key to ensuring a stable compensation market for player services, and to protect the overall character of the league. While team owners assert that the single-entity system is necessary for the continued existence of the league itself, player advocates and industry critics argue the league's corporate structure is not a single-entity at all.<sup>16</sup> Antitrust attorney Mark Levinstein calls MLS "[a] cartel with a reserve clause that is executed by the teams agreeing to let the league be the signatory on their contracts."<sup>17</sup>

MLS has operated under an LLC single-entity framework since its inception, and any successes in business correlate strongly with the league's success in court.<sup>18</sup> Only years after MLS' creation, a group of professional soccer players including Iain Fraser, brought suit against MLS, nine independent operator/investors, and the United States Soccer Federation ("USSF"), alleging violations of Sherman Act sections 1 and 2.<sup>19</sup> In 2000, the U.S. District Court for the District of Massachusetts concluded that under the decision in *Copperweld v. Independence Tube*, MLS and its operator-investors were uniquely integrated, and therefore did comprise a single-entity that would exempt MLS from federal antitrust claims under Sherman Act Section 1.<sup>20</sup> The First Circuit Court of Appeals saw the case on appeal in 2002 and refused to allow the district court's rubber stamp of "single-entity" to stand without scrutiny.<sup>21</sup> It determined that MLS was "[a] hybrid arrangement, somewhere between a single company (with or without wholly owned subsidiaries) and a cooperative arrangement between existing competitors."<sup>22</sup> Therefore, MLS could not be scrutinized under the *Copperweld* theory of parent-subsidary, and because plaintiffs were unable to satisfy certain procedural requirements of the antitrust suit, the court was not obligated to exercise jurisdiction over the

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15. Elizabeth Cotignola, *Major League Loophole: A Look at MLS's Shaky Single-Entity Status*, SOCCER WIRE (Jan. 30, 2015), <http://www.soccerwire.com/news/pro/mls/major-league-loophole-a-look-at-mlss-shaky-single-entity-status/>.

16. Jorge Arangure Jr., *'It is Simply a Cartel': The Story Behind MLS Winning the Labor Wars Against Players*, VICE SPORTS (Mar. 3, 2015), [https://sports.vice.com/en\\_us/article/it-is-simply-a-cartel-the-story-behind-mls-winning-the-labor-wars-against-players](https://sports.vice.com/en_us/article/it-is-simply-a-cartel-the-story-behind-mls-winning-the-labor-wars-against-players).

17. *Id.*

18. Cotignola, *supra* note 15.

19. *See Fraser*, 284 F.3d at 53.

20. *See Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752 (1984); *see also Fraser*, 97 F. Supp. 2d at 132-33.

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

22. *Id.* at 58.

single-entity question at all.<sup>23</sup> This decision was critical to the league's continued support of the single-entity system, and has significantly deterred players seeking greater contract and freedom of movement rights from challenging its 'cartel-like' structure in court.<sup>24</sup>

### *B. Free Agency Under the 2015 Collective Bargaining Agreement*

As of February 1<sup>st</sup>, 2015, the MLS and the MLS Players Union signed a new collective bargaining agreement that changed the landscape of professional soccer in the United States.<sup>25</sup> For the first time in league history, Major League Soccer players will have the ability to become free agents, and there will be greater amounts of money allocated to teams by the league itself.<sup>26</sup>

Sections 29.5 and 29.6 of the collective bargaining agreement define the scope of MLS free agency.<sup>27</sup> Players whose contracts have expired and those whom have declined their player options for the next season, will be eligible to participate in the newly created free agent market, subject to certain limitations.<sup>28</sup> Players that meet the requirements for free agency will be able to negotiate their next contract under certain restraints imposed by MLS in the 2015 CBA.<sup>29</sup> Players earning up to \$100,000 in base salary may be compensated at 125% of his previous year's base salary; players earning between \$100,000 and \$200,000 in base salary up to 120%; and players earning more than \$200,000 in base salary up to 115% or a greater percentage determined under Section 29.8.<sup>30</sup> While the free agency provisions included in the new CBA give players a greater share of control over their contracts and freedom of movement between league clubs, the mere existence of the single-entity structure suppresses the potential value of that player's contract.<sup>31</sup> "The deal allows free movement, but it doesn't let different divisions of the

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23. *Id.* at 60-61.

24. Arangure Jr., *supra* note 16.

25. COLLECTIVE BARGAINING AGREEMENT BETWEEN MAJOR LEAGUE SOCCER AND MAJOR LEAGUE SOCCER PLAYERS UNION, *supra* note 6.

26. SI Staff, *MLS, Players Union Ratify New CBA - Free Agency, Salary Details*, SPORTS ILLUSTRATED, July 16, 2015, <https://www.si.com/planet-futbol/2015/07/16/mls-cba-players-union-ratify-free-agency>.

27. COLLECTIVE BARGAINING AGREEMENT BETWEEN MAJOR LEAGUE SOCCER AND MAJOR LEAGUE SOCCER PLAYERS UNION, *supra* note 6, §§ 29.5 and 29.6.

28. *Id.*

29. *Id.* § 29.6(b)(iii). "Free Agency [] is available for Players who will be at least twenty-eight (28) years old in the year in which the immediately preceding League Season concluded and have at least eight (8) MLS Service Years." *Id.*

30. *Id.*

31. Bank, *supra* note 6.

single-entity artificially bid up the price in the absence of independent evidence of market value via an offer from outside of the single-entity.”<sup>32</sup>

The inclusion of a free agency period is a large step toward further protections for Major League Soccer players, but the work is far from over as MLS still holds a great deal of power over the teams and players.<sup>33</sup> It is very difficult to have conversations about the fair market value of a player contract when there is such a great amount of cooperation between the league and its clubs. In discussing the outcomes of the 2015 CBA, UCLA Law Professor Steven Bank asserts the difficulty of enforcing freedom of contract rights under the single-entity structure:

Full, unrestricted, free agency of the kind now in operation in post-Bosman European football is antithetical to the single-entity structure. It requires a fully functioning market with economically independent teams bidding on a player to establish his market price. Even restricted free agency in operation in most American sports leagues would still require economically independent teams to bid on the players.<sup>34</sup>

Going forward with the new CBA,<sup>35</sup> players should use the legal system and the CBA to eventually fight for the elimination of the single-entity status in Major League Soccer.

### *C. Bosman Ruling and its Effect on International Soccer*

The case of *Union Royale Belge des Sociétés de Football Ass’n ASBL v. Bosman* was a landmark decision that changed the landscape of international soccer.<sup>36</sup> Jean-Marc Bosman was a Belgian football player that challenged the rights to his player contract before the European Court of Justice.<sup>37</sup> After completing the term of his contract with Belgian Club RFC Liège, Bosman intended to test the market in order to sell his player services to another franchise only to be blocked by RFC Liège.<sup>38</sup> In response to the transfer request from

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32. *Id.*

33. *Id.*

34. *Id.*

35. *Id.*

36. *Union Royale Belge des Sociétés, de Football Ass’n ASBL v. Bosman*, Cour d’Appel [CA] [Court of Appeal] Liège, Dec. 15, 1995, EUROPEAN COURT REPORTS [ECR] 1995, I-04921, C-415/93, 5040 (Belg.), available at <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:61993CJ0415&from=EN>.

37. Bobby McMahon, *Why the Bosman Ruling Never Brought the Chaos So Many Predicted*, FORBES, Dec. 15, 2015, <https://www.forbes.com/sites/bobbymcmahon/2015/12/15/the-threat-of-players-using-the-bosman-rule-has-been-more-powerful-than-invoking-it/#62fe5c982004>.

38. *Id.*

Bosman, the club cut his salary and refused to transfer him to USL Dunkerque of the French League.<sup>39</sup> As a result of the case before the European Court of Justice, the court held that a player at the end of his contract was entitled to sell his services to any club within the European Union and that the former club was not entitled to a fee upon that player's transfer.<sup>40</sup>

This decision outlined the scope of a free agent market for European soccer, and allowed for the greater access to rights over player contracts than had been realized before. Though the Bosman case does not hold precedential value in United States courts, it demonstrates that for a soccer league to be fully competitive on an international stage, players must have the right to sell their services to the highest bidder. Freedom of movement and a greater deal of player control over contracts has undoubtedly raised the quality of soccer in Europe,<sup>41</sup> and there is no hope for the legitimization of Major League Soccer without a full-fledged free agency system in place.

#### *D. The Designated Player Rule*

The Designated Player Rule has been a large source of contention since its creation in 2007, and is seen as a glaring example of the league's stranglehold on player movement and salary bidding.<sup>42</sup> The league's official definition of the Designated Player Rule is as follows: "The Designated Player Rule allows clubs to acquire up to three players whose salaries exceed their [salary cap] budget charges, with the club bearing financial responsibility for the amount of compensation above each player's budget charge."<sup>43</sup>

Designated Player slots are used both to retain current MLS players and more importantly to acquire players from the international market.<sup>44</sup> As it is commonly known, the "Beckham rule" was first used in order for the LA Galaxy to sign English superstar David Beckham to an MLS contract.<sup>45</sup> Designated players are used as a tool of the league to balance competition and ensure that certain teams are not left without premier talent and that others can

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39. *Id.*

40. *Id.*; see *Bosman*, 1995 E.C.R. I-04921.

41. Aron Yassin & David Carlson, *Player Movement, Club Football, and the National Game*, SOCCER POLITICS, <https://sites.duke.edu/wcwp/research-projects/players-and-migration/player-movement-club-football-and-the-national-game/#fn-2281-5> (last visited July 30, 2018).

42. Cotignola, *supra* note 15.

43. MLS Communications, *MLS Roster Rules and Regulations 2018*, MLS: MEDIA RESOURCES, (Mar. 2, 2018), <https://www.mlssoccer.com/league/official-rules/mls-roster-rules-and-regulations>.

44. *Id.*

45. Cotignola, *supra* note 15.

sustain players that will bring an overall benefit to the league itself.<sup>46</sup> “The ‘Beckham Rule’ is a mechanism that assigned the maximum budget charge—\$400,000 in 2007 and \$480,625 for 2017—against the club’s salary cap with the additional salary being the sole responsibility of the team owner.”<sup>47</sup> While this may seem like a righteous aim on the part of the league, its effects have denied significant rights to players and has left MLS in a precarious position when arguing in favor of its single-entity protection. Prior to the 2007 MLS season, only three players were bringing in a salary of over \$400,000.<sup>48</sup>

In his 2015 article for *Sports Illustrated*, Michael McCann explained that the Designated Player Rule “enables MLS clubs to spend far above the salary cap in order to secure the services of a superstar player who would otherwise play in a more lucrative league.”<sup>49</sup> Payments to designated players are mostly taken on by the individual clubs via their operator-investors, which suggests that there a degree of autonomy by league clubs from its parent MLS.<sup>50</sup>

The Designated Player Rule is a direct competitor to the idea of creating a true free agency system. A free agent market must be occupied by economically independent entities that are able to bid for player services amongst themselves.<sup>51</sup> This is directly opposed to the judicial rationale that has allowed MLS to continually operate as a single-entity.<sup>52</sup> “If the teams are economically independent, . . . then MLS would likely flunk the single-entity defense for antitrust purposes.”<sup>53</sup>

### III. OVERVIEW OF ANTITRUST JURISDICTION

#### *A. Section 1 Jurisdiction Requirements*

Section 1 of the Sherman Antitrust Act provides that every contract, combination, or conspiracy that is a restraint of trade or commerce shall be illegal in order to protect the consumer welfare and to encourage competition.<sup>54</sup>

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46. See generally *id.*

47. Weston Jenson, *MLS History: The Beckham Rule and the Rise of the Designated Player*, SB NATION (Feb. 19, 2017), <http://www.rslsoapbox.com/2017/2/19/14331556/beckham-rule-designated-player>.

48. *Id.*

49. Michael McCann, *In Pursuit of Free Agency, Players Could Challenge MLS’ Single-Entity Status*, SPORTS ILLUSTRATED, Jan. 26, 2015, <https://www.si.com/planet-futbol/2015/01/26/mls-cba-players-union-free-agency-single-entity-lawsuit>.

50. *Id.*

51. See generally *id.*

52. *Id.*

53. Bank, *supra* note 6.

54. Sherman Antitrust Act, 15 U.S.C. § 1 (2018).

In order for a court to exercise jurisdiction over a Sherman Act claim, the conduct in question must (1) be a concerted action; (2) that causes an unreasonable restraint; (3) of interstate trade or commerce.<sup>55</sup> According to the decision issued in the United States First Circuit Court of Appeals in *Fraser v. Major League Soccer*, MLS and its operator-investors comprise a single-entity, and thus cannot meet the concerted action requirement for jurisdiction under Section 1.<sup>56</sup> Section 1 prohibits price-fixing and tries to encourage economic actors to make decisions individually and let the market decide the other forces at play.<sup>57</sup>

*B. MLS Unique Single-Entity Structure and an Analysis of Fraser and Copperweld*

The case of *Fraser v. Major League Soccer* was the first major litigation surrounding antitrust law and the power MLS holds over its players.<sup>58</sup> As discussed above, unlike other professional leagues, the MLS operates as a “single-entity” and has an applied immunity through legal precedent and the history of Section 1 of the Sherman Act.

MLS has, to say the least, a unique structure, even for a sports league. MLS retains significant centralized control over both league and individual team operations. MLS owns all of the teams that play in the league (a total of 12 prior to the start of 2002), as well as all intellectual property rights, tickets, supplied equipment, and broadcast rights. MLS sets the teams’ schedules; negotiates all stadium leases and assumes all related liabilities; pays the salaries of referees and other league personnel; and supplies certain equipment.<sup>59</sup>

This, however, is not the norm for sports leagues, and single-entity status has often been rejected in other circuits.<sup>60</sup> In opposition to those jurisdictions that have struck down the single-entity structure, the First Circuit relied heavily on their interpretation of *Copperweld Corp. v. Independence Tube Corp.*, holding that “[M]LS and its operator-investors were uniquely integrated and did

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55. *Id.*

56. *Fraser*, 284 F.3d 47.

57. *Id.*

58. *Id.*

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

60. *See, e.g.*, *Los Angeles Mem’l Coliseum Comm’n v. Nat’l Football League*, 726 F.2d 1381, 1388–90 (9th Cir. 1984); *N. Am. Soccer League v. Nat’l Football League*, 670 F.2d 1249, 1256–58 (2d Cir. 1982); *Smith v. Pro Football, Inc.*, 593 F.2d 1173, 1185–86 (D.C. Cir. 1978); *Mackey v. Nat’l Football League*, 543 F.2d 606, 620 (8th Cir. 1976).

comprise a single-entity.”<sup>61</sup> Because their actions were not of a type from which they could benefit directly, independent of the league’s success, the league and its operator-investor run clubs are still considered to be a single economic unit in terms of federal antitrust law under Section 1.<sup>62</sup>

The ruling in the *Fraser* decision was based largely on the court’s interpretation of a case that had nothing to do with sports. In *Copperweld*, the US Supreme Court determined that a business entity was not subject to Section 1 if there existed a “complete unity of economic interest.” Chief Justice Berger explains that if a parent company has 100% control of the subsidiary in economic terms, we can treat them as one.

[T]he coordinated activity of a parent and its wholly owned subsidiary must be viewed as that of a single enterprise for purposes of § 1 of the Sherman Act. A parent and its wholly owned subsidiary have a complete unity of interest. Their objectives are common, not disparate; their general corporate actions are guided or determined not by two separate corporate consciousnesses, but one.<sup>63</sup>

This is how the courts currently treat the MLS—organized as an LLC, the Board of Governors is comprised of operator-investors from each league club and the interests of the league and its individual clubs are not considered to be divergent.

After the decision in *Fraser*, soccer players in the American professional league were discouraged and frightened that MLS would continue to take advantage of their skilled labor. American soccer has grown and as the MLS continues to expand there should be more attention brought to the wellbeing of the player. The MLS Board of Governors’ concerns for league protection were once well-founded, but if the MLS wants to be recognized as a legitimate professional league by the world soccer community it must sacrifice a degree of control to the benefit of their greatest commodity—the players. The 2015 CBA contains more protections for the players, even though the provisions are tempered to fit MLS’ single-entity status.

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61. *Fraser*, 284 F.3d at 56.

62. Cotignola, *supra* note 15.

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

IV. BREAKING THE SINGLE-ENTITY: ANALYSIS OF THE *FRASER* AND *COPPERWELD* DECISIONS

*A. Fraser v. Major League Soccer*

In the 2002 *Fraser* decision, players were unable receive an analysis under the non-per-se rule for antitrust challenges as *Fraser* was unable to establish a showing that the league possessed significant market power so that the league would be found to be unreasonably restraining competition.<sup>64</sup> According to the precedent set in the First Circuit, players would need to show that, (1) MLS exercised significant market power, (2) in a properly defined market, and (3) that the practices in question adversely affected competition in that market. If the players were able to prove these three elements, they must prove that the adverse effects on competition outweighed the competitive benefits for the league.<sup>65</sup>

*B. American Needle v. NFL*

So what has changed since *Fraser*, and why would the First Circuit treat another challenge any differently? Since the *Fraser* decision, the entire landscape of the league has changed and MLS has moved further away from being considered a “single-entity.”<sup>66</sup> At the league’s inception there were a total of twelve teams, and the league needed to ensure that it was not going to crumble in the years following its creation.<sup>67</sup> The 2008 decision of *American Needle v. National Football League* offers a strong precedent against the idea that a professional sports league can be founded, and continue to operate, under the framework of the single-entity corporate structure.<sup>68</sup>

In *American Needle*, the US Supreme Court determined that the National Football League and its associated apparel company were not to be considered a single-entity in order to act as a bar to antitrust claims under Section 1.<sup>69</sup> Defendant apparel vendor, American Needle, Inc., argued that because NFL teams individually owned the rights to logos and trademarks, their licensing contract with Reebok to produce exclusive apparel was a concerted action in

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64. See *Fraser*, 284 F.3d 47.

65. *Augusta News Co. v. Hudson News Co.*, 269 F.3d 41 (1st Cir. 2001).

66. Cotignola, *supra* note 15.

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

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

69. *Id.*

violation of Section 1.<sup>70</sup> In his opinion, Justice Stevens explains the true nature of NFL teams under the league system.

NFL teams do not possess either the unitary decision making quality or the single aggregation of economic power characteristic of independent action. Each of them is a substantial, independently owned, independently managed business, whose “general corporate actions are guided or determined” by “separate corporate consciousnesses,” and whose “objectives are” not “common.”<sup>71</sup>

MLS can provide stronger showings of centralization and cooperation between the league and its clubs than the NFL, and the decision in *American Needle* does not bolster the idea that professional sports leagues are justified in organizing as a single-entity.<sup>72</sup> Justice Stevens continues to write, “[t]he teams compete with one another, not only on the playing field, but to attract fans, for gate receipts and for contracts with managerial and playing personnel.”<sup>73</sup> Arguably, MLS clubs compete in a very similar manner. Clubs are competing for wins, fan support, ticket sales and more every time they make a decision. It is likely that the precedential value handed down in *American Needle* can aid MLS players in their quest to gain control over their player contracts and freedom of movement.

### C. The “Sham Test” for Exempting Businesses from Antitrust Action

The *Fraser* court interpreted the *Copperweld* decision to give no basis for piercing the corporate veil and allowing a full examination of the corporate structure of MLS.<sup>74</sup> The *Fraser* court concluded that the players’ argument portraying MLS as a sham toward the end of horizontal price fixing was without merit and that “[t]he extent of real economic integration is obvious.”<sup>75</sup>

In his article 2001 article for the *Marquette Sports Law Review*, Professor Michael Waxman argues that the *Copperweld* decision was not about “piercing the [corporate] veil” and that the court incorrectly applied the holding to the facts of the case.<sup>76</sup> Waxman argues that the *Fraser* court went too far in

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70. *Id.*

71. *Am. Needle, Inc.*, 560 U.S. at 196.

72. McCann, *supra* note 49.

73. *Am. Needle, Inc.*, 560 U.S. at 196-97.

74. *See Fraser*, 284 F.3d 47.

75. *Id.* at 59.

76. Michael P. Waxman, *Fraser v. MLS, L.L.C.: Is There a Sham Exception to the Copperweld Single Entity Immunity?*, 12 MARQ. SPORTS L. REV. 487, 493 (2001).

extending the protections of corporation law through the *Copperweld* decision, and moreover, that the *Copperweld* decision was wrongly interpreted in the case of a professional sports league.<sup>77</sup> In analyzing the role of MLS operator-investors as shareholders, the Fraser Court discussed the findings from the lower court.<sup>78</sup> “[T]he district court stressed that both sides of the supposed conspiracy were parts of the same corporate entity; and it noted that ‘unlike MLS, NFL football clubs do not exist as part of an overarching corporate structure.’”<sup>79</sup>

Precedent from the US Supreme Court suggests that when a single-entity is formed with the purpose of avoiding a classification under the law, that the entity should not be considered a single-entity for purposes of antitrust law.<sup>80</sup> Here the avoidance of antitrust law claims would likely fit the requirement of a “clear legislative purpose.”<sup>81</sup>

#### *D. Fraser Incorrectly Applies the Copperweld “Sham Test”*

The *Copperweld* case doesn’t discuss bridging the gap between antitrust law and corporate law.<sup>82</sup> The Court does address and hold that a parent and its “wholly owned subsidiary” will be considered a single-entity, but the *Copperweld* decision did not consider the line of analysis under the “sham test.”<sup>83</sup> Judge O’Toole was too quick to accept incorporation on its face as a sufficient basis for avoiding the full single-entity sham test.<sup>84</sup> Thus, creating a broad antitrust exemption for all businesses that qualify as a single-entity.<sup>85</sup>

Further, the sham exception is necessary to prevent corporate abuse under Section 1.<sup>86</sup> Incorporation should not be a full and immediate bar to antitrust challenges—there must be an exception that analyzes parent companies and their wholly owned subsidiaries.<sup>87</sup> In *Copperweld*, the court sidesteps the question of conspiracy and determines that “[a]ny anticompetitive activities and their wholly owned subsidiaries may be policed adequately without resorting to

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77. *Id.*

78. *Fraser*, 284 F.3d at 56.

79. *Id.*

80. Waxman, *supra* note 76, at 494; see *Schenley Distillers Corp. v. U.S.*, 326 U.S. 432 (1946).

81. *Schenley Distillers Corp.*, 326 U.S. 432 (1946); *Kavanaugh v. Ford Motor Co.*, 353 F.2d 710, 717 (7th Cir. 1965).

82. Waxman, *supra* note 76.

83. *Copperweld*, 467 U.S. 752.

84. See generally *id.*

85. *Copperweld*, 467 U.S. 752; Waxman *supra* note 76.

86. Waxman, *supra* note 76.

87. *Id.*

an intra-enter-prise conspiracy doctrine.”<sup>88</sup> This argument in favor of the MLS single-entity structure as applied by the court in the *Fraser* decision was based on the landscape of the league in 2002. If a court were to revisit the issue and take an extended look at the lack of unity of economic interest between MLS and its league clubs, the policy approach applied by the court in *Fraser* should not apply to the MLS of today. If MLS was subjected to the “sham” defense to antitrust immunity in it would be necessary to do a full valuation of MLS’ corporate structure to determine if the sole purpose of the single-entity structure was to gain an exemption from antitrust law under Sherman Act Section 1.

#### *E. Using the “Sham” Test to Access Antitrust Claims*

The First Circuit Court should use the “Sham Test” to determine that MLS’ single-entity structure is insufficient to act as a full bar to Antitrust claims. In their challenge of the MLS’ corporate structure, Ian Fraser and other MLS players argued that the single-entity structure is merely a sham to allow for horizontal price fixing among league clubs.<sup>89</sup> According to the decision in *Schenley Distillers Corporation v. U.S.*, “[o]ne does not have the choice of disregarding the corporate entity in order to avoid the obligations which the statute lays upon it for the protection of the public.”<sup>90</sup> Categorical standards should not be a means by which a corporate entity can overcome all antitrust challenges in a world of open markets.<sup>91</sup> Using the “sham test” to analyze the single-entity structure will reveal the true nature of this unique corporate structure—to escape liability from antitrust claims under Section 1.

The *Fraser* court declined to exercise its jurisdiction in 2002 for deciding if the single-entity structure of MLS would hold up under a full Rule of Reason analysis because there was such an obvious unity of economic interest.<sup>92</sup> Application of a full Rule of Reason analysis would reveal the anticompetitive effects that the single-entity structure has on player salaries and their freedom of movement between league clubs. The MLS today is much different than it was at the time the *Fraser* decision was handed down in 2002.<sup>93</sup> McCann asserts that “[a]s MLS has become more popular in the U.S., clubs have become

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88. *Copperweld*, 467 U.S. at 776-77.

89. *Fraser*, 284 F.3d at 59.

90. *Schenley Distillers Corp.*, 326 U.S. at 437.

91. Waxman, *supra* note 76.

92. *Fraser*, 284 F.3d at 59.

93. MLS has grown significantly since its inception. See Ahiza Garcia, *Major League Soccer’s Plan to Become Truly Major*, CNN MONEY (Mar. 3, 2017), <http://money.cnn.com/2017/03/03/news/mls-growth-don-garber/index.html>; see also Sam Stejskal, *A Look Back at the History of MLS Expansion*, MAJOR LEAGUE SOCCER (Feb. 28, 2017), <https://www.mlssoccer.com/post/2017/02/28/look-back-history-mls-expansion>.

competitive with each other and seemingly more autonomous.”<sup>94</sup> Further, the application of the Designated Player Rule, in practice, exemplifies the departure from MLS’ complete unity of economic interest, as league clubs compete against each other in many different aspects. Moreover, the *American Needle* decision suggests that it is time for the court to reconsider the necessity of the single-entity.

The court recognized the dangers of horizontal cooperation between operators and investors, but distinguished the situation of the MLS from the case in *Copperweld* without deciding what legal approach to actually take.<sup>95</sup> This line of reasoning offered by the court is confusing, and the courts allowance of the “hybrid” entity is an injustice done onto the players.

The court declined to exercise its jurisdiction because the players were unable to establish the basis for a Section 1 claim under a per-se Rule of Reason analysis.<sup>96</sup> Further, the players could not establish a case for anticompetitive behavior under the non per-se or full Rule of Reason analysis.<sup>97</sup> Using the “sham test” to pierce the corporate veil will allow the court to find that MLS and its league clubs are conspiring against the players to restrict player salaries and freedom of movement.

#### *F. Per Se/Quick Look Rule of Reason Analysis*

There may be a renewed argument to apply the “per se Rule of Reason” which requires a much lower bar to reach, rather than subjecting the MLS procedures to the full Rule of Reason analysis. The per se rule uses a presumption of illegality and the plaintiff must only prove that there is an agreement.<sup>98</sup> If an agreement is found to exist, the per se rule of reason analysis suggests that the agreement implicitly violates antitrust law under Section 1.<sup>99</sup>

The *Fraser* court concluded that MLS’ fragile nature necessitates collaborative structure—if the league were to fail, salaries would drop, which does not increase competition among players in the market.<sup>100</sup> However, this rationale does not hold true today. The league is more popular than ever before

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94. McCann, *supra* note 49.

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

96. *Id.*

97. *Id.*

98. Matthew Mitten, *Why and How the Supreme Court Should Have Decided O’Bannon v. NCAA*, 62 ANTITRUST BULL. 62 (2017).

99. *Id.*

100. *Fraser*, 284 F.3d at 59.

and is expanding very quickly.<sup>101</sup> If players continue to play with suppressed salaries and without full rights to freedom of movement and contract, there is no way for the league to reach its full potential and compete on an international level.<sup>102</sup> Though the Bosman case will not hold precedential value in the First Circuit, players should argue that the MLS must protect their rights as has been established in foreign soccer. It is evident that as the league expands it will only increase its already dominant market power in the US and Canada and will further deprive players of the full market value of their services. While it is unlikely that a court will infer market power, the players should assert anticompetitive effects using a full Rule of Reason analysis.

### *G. Non Per-Se/Full Rule of Reason Analysis*

If the First Circuit again declined to apply the per-se or ‘quick look’ Rule of Reason analysis, the court should conclude that a full Rule of Reason analysis is necessary to determine if the single-entity framework caused anticompetitive effects in the marketplace. The decision handed down in *Fraser* affirmed the single-entity framework employed by the MLS in order to centralize control over the league and its players.<sup>103</sup> This decision continues to hold precedential value and protects the league’s single-entity status for purposes of the Sherman Act. At the time of the *Fraser* decision, the league was comprised of just twelve teams and was struggled to maintain a competitive balance between league clubs.<sup>104</sup> In its justification of the single-entity structure, the league argued that under a free market approach, only the most affluent teams would acquire the best available players, upsetting the competitive balance and threatening the earning potential and growth of the league as a whole.<sup>105</sup> However, in 2017, Major League Soccer will operate with twenty-two league clubs, and a plan to expand to twenty-eight teams by the year 2022.<sup>106</sup> The expansion of the Designated Player Rule has all but replaced the role of free agency in the process of acquiring players from foreign leagues and gives an unfair advantage to players with established prestige and the clubs that can afford them.<sup>107</sup> While

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101. Thomas Barrabi, *Is Major League Soccer Scoring with Fans?*, FOX BUSINESS (June 2, 2016), <http://www.foxbusiness.com/features/2016/06/02/is-major-league-soccer-scoring-with-fans.html>.

102. Cotignola, *supra* note 15.

103. *Fraser*, 284 F.3d 47.

104. *Id.* at 53.

105. *See generally Fraser*, 284 F.3d 47.

106. Brian Straus, *MLS Expansion: In-Depth Look at All Cities, Bids for Growth to 28*, SPORTS ILLUSTRATED, Dec. 21, 2016, <http://www.si.com/planet-futbol/mls-expansion-prospective-cities-bids-28-teams>.

107. *See generally Cotignola, supra* note 15.

salaries continually increase for the league's top players, nationals and non-designated players are not reaping the benefits of the league's continued growth.

A full Rule of Reason analysis requires a case-by-case, fact specific analysis in which the Plaintiff must plead and prove the anticompetitive effects of the challenged league restraint.<sup>108</sup> If players (plaintiffs) are able to prove that anticompetitive effects exist, the burden shifts to the league (defendants) to prove that the conduct or restraint achieves a procompetitive effect.<sup>109</sup> The inquiry continues, and the plaintiff must then respond with a showing that the restraint is not reasonably necessary to achieve procompetitive effects, or that those procompetitive effects can be achieved in a substantially less restrictive manner.<sup>110</sup> At this stage in the inquiry, the trier of fact must attempt to balance the anticompetitive and procompetitive effects to determine the net effect on the situation.<sup>111</sup> If the jury determines that the anticompetitive justifications outweigh the procompetitive justifications, the conduct in question shall be considered to be an unreasonable restraint of trade, and therefore is illegal because of its negative effect on consumer interests.<sup>112</sup> If the inverse is true, the court will uphold the conduct providing a net benefit for the consumer marketplace.<sup>113</sup>

Courts have provided examples of acceptable procompetitive justifications for restricting consumer choice in the market under federal antitrust law.<sup>114</sup> These include maintaining competitive balance between league clubs by increasing inter-brand competition and ensuring that the league remains financially viable.<sup>115</sup> Conversely, courts will not accept any conduct that results in a reduction of player safety or any measure that aims solely to increase profitability by the league and its clubs.<sup>116</sup>

Application of a full Rule of Reason analysis would give the players a greater chance to prevail in a court of law and strike down the single-entity defense. The Rule of Reason analysis attempts to determine whether the restraint imposed is justified by legitimate business purposes and is no more

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108. Mitten, *supra* note 98.

109. *Id.*

110. *Id.*

111. *Id.*

112. *Id.*

113. Mitten, *supra* note 98.

114. *See* Law v. Nat'l Collegiate Athletic Ass'n, 134 F.3d 1010 (10th Cir. 1998).

115. *See generally* Am. Needle, Inc., 560 U.S. 183.

116. *See* Mackey v. Nat'l Football League, 543 F.2d 606 (8th Cir. 1976); *see also* Mitten, *supra* note 98.

restrictive than necessary.<sup>117</sup> Here, the players would argue that a free market approach and a corporate structure where teams compete against themselves for the good of the league would be a less restrictive manner in which to organize the league. Players would need to prove, most likely using a market analysis, that a corporate structure more akin to that of the NFL or NBA would (1) lead to increases in player salaries, and (2) an increase in ability for players to move from club to club.<sup>118</sup>

## V. PROPOSED SOLUTION

Though Major League Soccer continues to grow as a professional league in America, there is no easy solution to give power back to the players and ensure that their rights as employees are not violated and that the labor they provide is used in the best way possible by league management. The analysis of the single-entity system under the framework of the Fraser decision will ultimately hinge on the net effects of league governance. Nevertheless, there are certain labor protections and bars to antitrust claims that must be overcome before players can successfully bring suit in the First Circuit.

### *A. Labor Protections*

There are multiple protections available to the players that believe they are being treated unfairly by league governance, and to league governance that believes it is being treated unreasonably by its players. First, the statutory labor exemption (SLE) protects players' rights to collective bargaining and to use a strike as a tool to force the hand of the league in negotiating terms between the players and the league.<sup>119</sup> On the side of the league, the statutory labor exemption immunizes multi-employer collective bargaining and other conduct like lockouts.<sup>120</sup> The statutory labor exemption does not immunize jointly agreed CBA terms, rather, the SLE protects unilateral action—the Non-Statutory Labor Exemption (NSLE) will protect agreed upon terms.<sup>121</sup> Second, the NSLE extends beyond impasse because of the ongoing collective bargaining relationship.<sup>122</sup> The basis of this is a collective agreement between

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117. Mitten, *supra* note 98.

118. *Id.*

119. *Id.*

120. *Id.*

121. *Id.*

122. *Id.*

league clubs and the players' union if impasse is reached in collective bargaining, there is no agreement.<sup>123</sup>

*B. Prerequisites to Antitrust Suits: Disclaimer or Decertification of Players' Union*

If the players were to bring a claim in the form of an antitrust lawsuit under Section 1 before the expiration of the current CBA, the claim would be barred by the non-statutory labor exemption.<sup>124</sup> The labor exemption will continue to exist and act as a bar to antitrust claims until the bargaining relationship between the league and the players' union is terminated either by a disclaimer of interest NLRB by decertification.<sup>125</sup> The NSLE applies only to league clubs and its players, and only considers parts of the agreement that were bargained for at arms-length. If the NSLE applies, antitrust claims are barred.<sup>126</sup> This promotes the freedom to bargain and to contract between the league and its players.<sup>127</sup> In the *Fraser* decision, players were not forced to decertify the union, as there was no union present.<sup>128</sup> For a claim under the current structure of the collective bargaining relationship, players would need to need to act in one of two ways: (1) submit a claim for decertification to the National Labor Relations Board (NLRB), or (2) have the players' union publicly disclaim their authority to represent the players in collective bargaining.<sup>129</sup> Both methods have been effective in clearing the way for an antitrust suit, but a judgment from the NLRB is seen as a more concrete method of decertifying the players' union and removing authorization to bargain on behalf of the players.<sup>130</sup>

*C. Bringing an Antitrust Suit Against MLS*

The proposed solution to break up MLS' single-entity structure once-and-for-all would come in the form of a player-based lawsuit against MLS. This would require MLS players to decertify or disclaim the services of the players' union. It is unlikely the players could take action until the expiration of the current collective bargaining agreement, but at the end of the term players should submit a claim to the NLRB and move to bring suit against MLS. This

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123. *Id.*

124. *Id.*

125. *Id.*

126. *Id.*

127. *Id.*

128. *See generally Fraser*, 284 F.3d 47.

129. Mitten, *supra* note 98.

130. *Id.*

is not without significant risks—there is no guarantee that the court will accept the “sham test” to pierce the corporate veil. Moreover, it is impossible to tell how the court will come out when analyzing the net benefit or harm of the single-entity itself.

In order to overcome the presumption of legality after the *Fraser* decision, a lawsuit against the MLS alleging violations of the Sherman Antitrust Act must outline the specific anticompetitive effects of the single-entity league structure. In the new age of MLS, the league would be better suited for long-term growth and establishing an international prestige if it were to re-structure the league.

To this end, I propose that the MLS works to eliminate the single-entity status that has been used to create a “cartel-like” atmosphere in American professional soccer.<sup>131</sup> Here, players organized against MLS would have to plead and prove that the anticompetitive effects of restricting player movement and freedom to contract are caused by restraints imposed under the league’s single-entity system. This can be accomplished by (1) showing clear anticompetitive effects of league-imposed limits like team salary caps and maximum individual player salaries, (2) showing with market analysis that the product is restrained by the conduct in question, and (3) defining the geographic area in which players can find alternative employment.<sup>132</sup> Plaintiffs would need to show actual negative effects on the price or quantity compared to the results of an unrestrained, free market.<sup>133</sup>

First, using the “sham” argument as advanced by Professor Waxman, players would prove that the single-entity structure is used solely for the basis of avoiding antitrust claims and suppressing player salaries and freedom of movement. Second, players would need to prove that there is no lesser restrictive within the single-entity structure to achieve the same procompetitive effects. Here, there is no way to effectively bid up player salaries when league clubs exist as a single entity under the league.

The arguments asserted on behalf of the league will revolve around the concept of league stability as the net benefit of restricting player wages and freedom of movement. MLS was created in order to protect against antitrust claims from the players, and ensure that centralized control of the league would lead to future prosperity. Though this logic was sufficient to convince the First Circuit that the single-entity should remain, the past and current growth of the league point to a decentralization of economic interest between league clubs and a strong base to sustain a transition period into a fully free market approach. Conversely, players’ must recognize that there are real opportunities for player

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131. See Arangure Jr., *supra* note 16.

132. Mitten, *supra* note 98.

133. *Fraser*, 284 F.3d at 59.

salaries to rise to a level that is unsustainable for some clubs in a free market league organization. If league clubs are forced to overspend in order to compete against each other, it could destabilize the league to the point of no return.

If indeed the players are successful in pleading and proving the anticompetitive effects of the single-entity, it may be beneficial to put in place some restrictions on free agency and player movement and rearranging a salary cap during or until the end of the 2022 expansions, or as a condition of the next collective bargaining agreement. Though this may be seen as minimal progress, the elimination of the single-entity league structure would pave the way for stronger competition in the global market for soccer players, and would likely lead to legitimization and further growth of MLS. Moving forward, this would give MLS a better opportunity to grow its brand and expand its global influence into the international soccer landscape.

## VI. CONCLUSION

The current state of Major League Soccer is volatile, and without strong, transparent leadership to encourage competition for players by league clubs, MLS players will continue to be looked down upon by the outside world, and the MLS will continue to hold massive power over its athletes. The existence of the Designated Player Rule acts as a pseudo-free agency mechanism that only works to benefit the most well-paid players, and those clubs that are able to acquire such players.

It has become increasingly difficult to argue that league clubs, through their operator-investors, have a complete unity of interest. While this scenario existed and was acknowledged in the *Fraser* decision, the decision not to analyze the anticompetitive effects under a full Rule of Reason inquiry is detrimental to fairness under existing federal antitrust protections in Section 1. If players were to bring an amended suit in the First Circuit, it would be unlikely that the court would again decline to exercise its judgment in applying a full Rule of Reason analysis to determine if the single-entity is in fact anticompetitive.

While it is impossible to predict the outcome of the court's balancing of the potential anti and procompetitive effects, MLS players should not stand idly by and accept the small concessions for quasi-free agency that were granted in the 2015 CBA. Players should be justified in their fears of work stoppage, but should not wait for the expiration of the current agreement to organize and develop a plan to secure greater rights to contract and move freely. If players are unsuccessful in pleading and proving the anticompetitive effects of the single-entity structure, the reemergence of players' rights will likely lead to further concessions from the league. With further investigation into the market

for MLS players and the continued expansion of the league, the issue of increased players' rights will be brought to the forefront of the conversation. Even if the players are not willing to bring the issue to the First Circuit, organization of a lawsuit under this rationale can be used leverage in future labor negotiations with MLS.