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Joseph Lennarz
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Growing Pains: Why Major League Soccer's Steady Rise Will Bring Structural Changes in 2015

**Growing Pains: Why Major League Soccer's Steady Rise Will
Bring Structural Changes in 2015**

Joseph Lennarz¹

Synopsis:

The purpose of this paper is to explain why Major League Soccer's upcoming Collective Bargaining Agreement (CBA) renewal will likely bring structural changes to the league. The paper is divided into four sections. The first section examines the league's founding, with a particular focus on how historical precedent influenced the legal structure chosen by the league's architects. This part explains how the league's unique structure was designed to promote financial stability, potentially shield the league from antitrust liability, and foster the symbiotic relationship between Major League Soccer (MLS) and the United States Soccer Federation (USSF). This section concludes with a discussion of developments in the league's overall structure since the league's founding.

The second section looks at three groups of specific mechanisms the league has in place governing player pay and movement. The first group primarily supports the overarching goal of controlling costs and maintaining competitive balance. The second group is

¹ Joe is a graduate of UCLA School of Law and a managing partner at Ascension Athlete Management, a boutique player agency that specializes in placing young, up-and-coming soccer players with clubs that will help facilitate their continued growth and movement up the American soccer development pyramid. He would like to thank Bill Ordower, Mark Abbott, and Don Garber at the MLS league office, Rich Motzkin and Aaron Maines at Wasserman Media Group, and Rob Zarkos at Real Salt Lake for their invaluable assistance. He would also like to thank Steve Derian at UCLA School of Law for his guidance, encouragement, and ample patience. Joe can be reached via email at joe@ascensionathletes.com.

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geared towards boosting the acquisition and development of talent. The third group consists of player-friendly measures that help to balance out some of the league's anticompetitive controls. Together, these mechanisms have allowed MLS to carefully and deliberately build from the ground up without overextending its resources or taking unnecessary risks.

The third section examines a variety of factors stemming from the league's growth, each of which will put pressure on the league to alter some aspects of its structure during the upcoming CBA renewal. The first factor is the financial growth of the league, which has been robust enough to render some of the league's financial stability measures unnecessary. Financial growth has also allowed the league's operator-investor cadre to focus on the individual success of their teams rather than the well-being of the league as a whole, putting pressure on the league to loosen some competitive balance measures and increase team autonomy. The second factor is the increased quality of the on-field product, which puts pressure on the league to increase player friendly measures in order to retain current talent and increase talent interchange with outside leagues in order to allow the level of play to continue to rise. The third factor is the changing antitrust status of the league, and specifically the way the league's growth has rendered "single-entity" structural considerations obsolete. Altogether, these growth-related factors indicate that the league's structure will change in some way during the CBA renewal process.

The final section advocates for two structural changes that would address the issues discussed in section three. The first alteration is a new player salary system based on the "soft" cap and retention funds system used by the National Basketball Association (NBA). This system would pool all player salary funds together, eliminat-

ing some of the salary inequity problems inherent in the current system, and would allow greater autonomy by individual teams without sacrificing competitive balance measures or risking the league's financial stability. The second alteration is a replacement of the current "Bona Fide offer" element of the Re-Entry Draft with an arbitration provision similar to that used by Major League Baseball (MLB). This change would make the Re-Entry Draft a legitimately viable route for MLS players on expiring contracts looking to receive new contracts that accurately reflect their performance value, without destroying the league's single-buyer system. Together these two changes would help the league to adjust its structure to align with its current position in the sports landscape, and accommodate further growth towards its goal of becoming an elite soccer league by 2022.

I. Historical Perspective on MLS' Current Legal Structure

1. MLS Architects Learn From The NASL's Failure

The founding of Major League Soccer is inextricably intertwined with the failure of its forbearer, the North American Soccer League (NASL). The NASL was a heady, ambitious undertaking featuring nationally televised games on network stations and legendary names on the field: Carlos Alberto, Georgio Chenaglia, Franz Beckenbauer, Johan Cruyff.² The league formed in 1967, debuted in 1968, and fluctuated from five to twenty four teams over the course of its lifespan, which was sixteen colorful years. The idea

² Andy Crossley, *June 1, 1980 – Washington Diplomats vs. New York Cosmos, FUN WHILE IT LASTED* (Jul. 3, 2013, 12:57 AM), www.funwhileitlasted.net/2013/07/03/june-1-1980-washington-diplomats-vs-new-york-cosmos/.

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was to make such a splash that the American public couldn't help but get swept up and reward the league with the television ratings and attendance numbers it would need to sustain such a costly production; a 1976 Sports Illustrated article quotes then-commissioner Phil Woosnam as saying "if you give soccer a little television exposure, it will be off and running."³ And indeed, the very same article trumpets a television audience of ten million Americans tuning in to watch Pele's debut with the New York Cosmos on June 15th of that year.⁴

By the 1980s, the outlook had soured considerably. The biggest problem was with the league's structure. Each team was separately owned and made autonomous decisions regarding player salaries and other expenditures unrestricted by any collectively agreed upon limits. This meant that large market franchises with heavy financial backing like the New York Cosmos and Chicago Sting could splash out cash on marquee signings, forcing their smaller market peers to try to keep up. As San Diego Sockers owner Bob Bell put it, "they (the Cosmos) go into a country and pay, say, \$500,000 for a player- I have to go in there next, and I can't afford it."⁵ *Fun While It Lasted*, a website dedicated to preserving the archives of sports ventures that no longer exist, has page upon page of news articles, match-day pamphlets, and photographs from the era that together paint a picture of a league in which the glamorous heavyweights, sporting talented rosters and expansive venues

³ Melissa Ludtke, *Soccer Is Getting a Toehold*, Sports Illustrated, Aug. 30, 1976, at 66, 66, available at <http://sportsillustrated.cnn.com/vault/article/magazine/MAG1091476/index.htm>.

⁴ *Id.*

⁵ J.D. Reed, *It's Time for Trimming Sails in the NASL*, SPORTS ILLUSTRATED, Dec. 1, 1980, at 22, 23, available at <http://sportsillustrated.cnn.com/vault/article/magazine/MAG1123998/2/index.htm>.

packed with fans, won league titles like clockwork and staged friendlies against international competition while underdogs scraped along in a state of underfunded anonymity.⁶ In 1983, player salaries had reached 70% of league revenues, compared with just 40% in the National Football League (NFL) at that time.⁷ By the time the league, hemorrhaging money and losing franchises, was able to broker a salary cap of \$825,000 per team payroll with its player's union in 1984,⁸ the damage was already done. The NASL folded after that season.

Ten years later, the United States hosted the 1994 World Cup, a tremendous success by all indicators. As part of the winning bid that secured the right to host, the United States Soccer Federation (USSF) had promised the sport's international governing body, Federacion Internationale de Football Association (FIFA), that they would establish a bona fide top division professional soccer league in the United States.⁹ USSF President Alan Rothenberg headed the committee tasked with fulfilling this promise. Rothenberg, a prominent sports lawyer and former part-owner of the NASL's Los Angeles Aztecs, designed an innovative league structure that clearly drew from both of these aspects of his experience. Assisting Rothenberg was Mark Abbott, then a young associate at Rothenberg's firm and today the Deputy Commissioner and Presi-

⁶ See generally Andy Crossley, *NASL (1968-1984)*, FUN WHILE IT LASTED (Mar. 25, 2012, 3:12 PM), <http://www.funwhileitlasted.net/soccer/nasl-galleries-1968-1984/>.

⁷ Reed, *supra* note 4, at 23.

⁸ Clive Gammon, *The NASL: It's Alive but On Death Row*, SPORTS ILLUSTRATED, May 7, 1984, at 74, 76, available at <http://sportsillustrated.cnn.com/vault/article/magazine/MAG1122044/1/index.htm>.

⁹ David Litterer, *An Overview of American Soccer History*, THE AMERICAN SOCCER HISTORY ARCHIVES (last updated May 31, 2010), <http://homepages.sover.net/~spectrum/overview.html>.

dent of MLS. When the new league formed in 1994, it did so with a construction unlike any other sports league anywhere.

2. A Unique Structure Is Created For The New League

Rothenberg and Abbott's design centered around the concept of a centralized league structure, where a powerful league office exercising a high degree of control over its member teams would be able to avoid both the overextension problems that doomed the NASL and the antitrust challenges that some of the country's other prominent sports leagues were facing around that time. The basic idea according to Abbott is that they realized "sports leagues are business partnerships," and by organizing as a single entity the league structure could reflect that idea.¹⁰ They created MLS as a single limited liability corporation that owns all of its teams. Under this model, players contract directly with the league, and the league owns all broadcast rights, intellectual property rights, stadiums and other facilities, and sources of revenue like concessions and merchandizing deals.¹¹ While some alterations to the design were necessary in order to attract investors (discussed below), the main concept remained unchanged when MLS began play in 1996. This innovative structure influenced the character of MLS in three main ways: 1) the league's financial stability, 2) the league's vulnerability to antitrust challenges, and 3) the league's relationship with USSF.

¹⁰ Interview with Mark Abbot, President and Deputy Commissioner, Major League Soccer (Dec. 2013) (regarding the league and the structure he and Mr. Rothenberg had created).

¹¹ PAUL C. WEILER, GARY R. ROBERTS, ROGER I. ADAMS & STEPHEN F. ROSS, *SPORTS AND THE LAW: TEXT, CASES, AND PROBLEMS* 551 (Fourth ed. 2011).

a. Single-Entity Structure Fosters Financial Stability

The MLS' single entity structure is first and foremost a way for the league to pool its resources and keep costs under control. With each team simply a function of the league rather than an autonomous business venture, the league can afford to support fledgling and small-market teams with the successes of its marquee teams, rather than allowing a gap to build between the 'haves' and 'have-nots.' Strict control over expenditures like player salaries and advertising keeps these costs at a level affordable for the league as a whole. Presenting a unified corporate front to potential sponsors allows the league to secure lucrative partnerships with companies like Adidas, and packaging television rights as a league makes them more attractive to national broadcasters like ESPN.¹² A news article written during the 1994 unveiling observes that the single entity structure made it easier for the league to expand in a more cautious and purposeful manner, closely scrutinize potential expansion bids even as a fledgling enterprise, because the centralization of resources provided financial stability.¹³

¹² For example, Adidas re-upped its sponsorship deal with MLS in 2010, four years before the previous deal would have expired, extending the terms to \$25 million dollars a year (a 66% increase in value) through 2018. The company cited MLS' steady growth and wide reach into all facets of American soccer including youth development. Tripp Mickle, *Adidas Ups MLS Bet with \$200M Deal*, SPORTS BUSINESS DAILY (Aug. 30, 2010), [http://www.sportsbusinessdaily.com/Journal/Issues/2010/08/20100830/This-Weeks-News/Adidas-Ups-MLS-Bet-With-\\$200M-Deal.aspx](http://www.sportsbusinessdaily.com/Journal/Issues/2010/08/20100830/This-Weeks-News/Adidas-Ups-MLS-Bet-With-$200M-Deal.aspx).

¹³ Matt White, *World Cup USA '94: A Model Failure: The NASL's Collapse Serves as a Painful Reminder of What a New League Should Not Do*, LOS ANGELES TIMES (July 3, 1994), http://articles.latimes.com/1994-07-03/news/ss-11408_1_world-cup.

b. Single-Entity Structure May Provide Antitrust Immunity

The second key feature of the MLS' single entity structure is its potential to negate the viability of a challenge brought under Section 1 of the Sherman Antitrust Act. In order to succeed, such a claim must show that two or more entities conspired to illegally restrain trade in a relevant market.¹⁴ Theoretically, by organizing the league as a single entity, Rothenberg and Abbott's model would remove any restraints on competition inherent in the MLS model from scrutiny under this statute because there is a unity of entrepreneurial interests among all the teams. If the league is considered a single entity for antitrust purposes, it means that aspects of MLS' structure that prevent competition between the member clubs, such as the draft and other allocation processes, cannot be the "naked restraints" on trade that they would otherwise be because the member clubs are not considered separate competitors. The viability of this design feature was almost immediately tested in a lawsuit brought by MLS players, described below.

c. Single-Entity Structure Allows Increased Cooperation With The USSF

The third key feature of MLS' structure is the relationship it creates between the league and the United States Soccer Federation (USSF), the sport's governing body in the United States. A close relationship between the two entities is inherent in the very origin of the league, an entity created by the USSF's Board of Governors as part of an initiative to bring world class soccer to the United States and raise the game's profile across the country. Just as the league sprung out of the gate as a vessel for the country's enthusi-

¹⁴ See WEILER ET AL., *supra* note 10, at 174.

asm for soccer built up by our national team's successes, MLS' popularity inevitably remains tied to that of the team representing the United States on the world stage. Even the always-optimistic NASL was "keenly aware that Americans will not flock to watch soccer until the U.S. field a top flight national team."¹⁵ In his wonderful account of a season spent following a minnow of Italian soccer through a dream season in that country's second highest tier of competition, *The Miracle of Castel di Sangro*, Joe McGinnis references the thrilling spectacle of the 1994 World Cup as the driving force behind his conversion from soccer ignoramus to full-blooded fanatic.¹⁶ Further deepening the ties between the two organizations is the fact that Soccer United Marketing, MLS' promotional arm, handles those duties for the U.S. National Team as well.

A critical aspect of this relationship is that it is mutual and symbiotic- the domestic league is buoyed by the successes of the boys in red white and blue, and the national squad depends on a strong domestic league to develop talent and hone the skills of its players when they are not on national duty. Discussing the relationship, Mark Abbot emphasized MLS' autonomy but agreed that the U.S. National Team's successes have tangible positive benefits for MLS, and that MLS' contribution to development plays a significant role in those successes.¹⁷ Because MLS has such a strong central structure, with strict controls over which players will join the league and where they will play, there is a significant obliga-

¹⁵ See Ludtke, *supra* note 2.

¹⁶ McGinnis had never followed the sport before the 1994 World Cup, and he became so enamored of the games and players (particularly Italy's Roberto Baggio) he saw at that tournament that he decided to imbed with an Italian team from a tiny provincial town for an entire season. See JOE MCGINNIS, *THE MIRACLE OF CASTEL DI SANGRO* (2000).

¹⁷ Interview with Mark Abbott, *supra* note 9.

tion on part of the league itself to make sure it is developing young talent eligible to represent the United States and complying with the other various expectations of the USSF in regards to the U.S. men's national team. As detailed below, MLS fulfills this obligation through a handful of mechanisms that ensure talented American players are nurtured by the league and are put in the best position to succeed should they be called upon by the national team.

3. MLS' Structure Evolves Over Time

a. The Operator-Investor Alteration

Before proceeding to the details of the league's player controls, it is important to note some developments to the initial structure. The original model saw one significant practical change before it could even be implemented. While the initial concept called for investors who would simply own a piece of the league itself, there was little demand for the opportunity to bevy up millions of dollars to passively invest in a sports league. Instead, the league decided to offer a special class of stock that gives investors control over team operations such as deciding where games will be played, setting ticket prices, negotiating local broadcast rights and merchandizing deals, hiring a coach, and choosing players through the MLS' player movement controls discussed below.¹⁸ These "operator-investors" split revenues from the sources they control with the league 50-50, while the league directly takes national broadcast rights revenues and merchandizing revenues, which are used to pay player salaries and other expenses before profit is distributed among the shareholders.¹⁹ The league's executives, including

¹⁸ See WEILER ET AL., *supra* note 10, at 211 and 212.

¹⁹ See WEILER ET AL., *supra* note 10, at 552.

President Abbott and the league's Commissioner, Don Garber, are elected by a Board of Governors. Each operator-investor group is given a seat on this board, making the league "essentially controlled by the individuals who manage each team."²⁰ The league office also includes a Player Competition Committee that manages player contracts and oversees MLS' various player movement and salary mechanisms.

b. The Players Bring An Antitrust Challenge

The antitrust challenge testing the league's structure manifested in the form of *Fraser v. MLS*, a case brought by eight of the league's players against the league, its investors, and the USSF in 2002.²¹ The players had opted not to form a player's union prior to bringing their claims in *Fraser*, and had no established collective bargaining relationship with the league. Thus, their claims were not barred by the non-statutory labor exemption to management-labor disputes that courts have fashioned to accommodate the tension between antitrust laws and Federal statutes that protect workers from application of antitrust laws in some circumstances.²² The

²⁰ Matthew J. Jakobsze, *Kicking "Single-Entity" to the Sidelines: Reevaluating the Competitive Reality of Major League Soccer after American Needle and the 2010 Collective Bargaining Agreement*, 31 N. ILL. U. L. REV. 131, 147 (2010).

²¹ *Fraser v. Major League Soccer*, 97 F. Supp.2d 130 (D. Mass. 2000), *aff'd*, 284 F.3d 47 (1st Cir. 2002).

²² The non-statutory labor exemption is a common law concept that removes certain aspects of labor-management collective bargaining agreements from antitrust scrutiny. Courts have applied this exception when the restraint affects primarily the parties to the agreement (Allen Bradley), and when the challenge is brought by an employee or potential employee while a collective bargaining agreement between labor and management is in place (Wood) or when the restraint being challenged was unilaterally imposed by management during an impasse in collective bargaining relations between labor and management (Brown). In this case, by bringing an antitrust challenge before forming a collective bargaining unit, the MLS players could affirmatively avoid the scope of the exemption. *See generally* Allen Bradley Co. v. Local Union No. 3, Int'l

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players alleged (among other claims) that MLS' control over player employment - negotiating and executing contracts directly with players before determining which team they would play for - constituted an illegal conspiracy between multiple entities (the various teams who would otherwise compete for their services) to unreasonably restrain trade in the market for top division soccer players in North America under Section 1 of the Sherman Antitrust Act.²³

At trial, the case centered on the question of whether or not the league constituted a single entity and was thus immune to such a claim. The defendants referenced Copperweld v. Independence Tube Corp., a landmark antitrust case finding that a parent company cannot conspire with a wholly owned subsidiary for purposes of a Sherman Section 1 claim because they are not separate entities.²⁴ The district court found this argument persuasive, and the plaintiffs appealed. The First Circuit Court of Appeals took a different perspective entirely, focusing instead on the question of relevant market. The court examined whether the plaintiffs had properly defined the market in which the defendants' collaborative efforts were unfairly restraining competition to the detriment of the plaintiffs. The First Circuit found the plaintiffs had not shown that the MLS exercised significant market power in the market they had attempted to define, being the market for top division professional soccer players in the United States.²⁵

Bhd. Of Elec. Workers, 325 U.S. 797 (1945); Wood v. NBA, 602 F. Supp. 525 (S.D.N.Y. 1984); Brown v. Pro Football Inc., 518 U.S. 231 (1996).

²³ See *Fraser*, 97 F. Supp.2d at 132.

²⁴ *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752, 753 (1984).

²⁵ *Fraser v. Major League Soccer*, 284 F.3d 47 (1st Cir. 2002).

In focusing on the market question, the First Circuit declined to make a definitive ruling on the single entity issue, instead declaring that while “MLS is manifestly more than an arrangement for individual operator/investors by which they can cap player salaries...it is hard to treat the corporate integration [of separate teams that would otherwise compete] as conclusive” and that “there are functional differences between this case and Copperweld that are significant for antitrust policy.”²⁶ The court concluded that the league was a sort of hybrid entity serving two roles, “one as an entrepreneur of its own assets and revenues; the other (arguably) as a nominally vertical device for producing horizontal coordination, i.e. limiting competition among operator/investors.”²⁷ Having already dismissed the plaintiff’s claims via the relevant market issue, the court left the question of whether this hybrid entity could be liable under an otherwise valid Sherman 1 claim unanswered.

c. A Collective Bargaining Relationship Is Formed

The MLS Players Union formed after Fraser was decided, and reached their first collective bargaining agreement (CBA) with MLS in 2004.²⁸ A second CBA followed the first in 2010, with a term set to run through the 2014 season.²⁹ The current CBA is not publicly available (the 2004 CBA is), but the league and union released a joint statement upon its ratification detailing the key updates. Among the developments from iteration to iteration has been a shift towards guaranteed contracts, a steady increase in the salary cap number, and increased consideration paid to the players

²⁶ *Id.* at 57

²⁷ *Id.*

²⁸ MAJOR LEAGUE SOCCER PLAYERS UNION, ABOUT THE MLS UNION (2014), available at http://www.mlspayers.org/about_mlspu.html.

²⁹ *Id.*

for things like media appearances and mid-season friendlies (exhibition games) against non-MLS opponents.³⁰ The 2010 agreement came just days before the scheduled start of the season, and the reportedly tense atmosphere of the negotiations was a result of the league's refusal to allow a free agency element that would require teams to compete with each other for players.³¹ The Re-Entry Draft (discussed in the next section) that resulted as a compromise will almost certainly be scrutinized and revisited during the upcoming negotiations.

d. Beckham Arrives, Bringing New Structural Element

One of the prominent milestones in MLS history came on July 21, 2007 when English dead ball maestro and international celebrity David Beckham debuted as a member of the Los Angeles Galaxy in front of a sold out crowd at the (then) Home Depot Center, capping a month-long media frenzy over the winger-cum-midfielder's move from Spanish giant Real Madrid.³² Beckham's arrival seemed designed to increase interest in MLS from casual fans, the type of consumer not yet enamored with the sport or league but willing to tune in with a high profile athlete like Beckham involved. His signing was a collaborative effort between MLS and AEG, Phil Anschutz's massive sports entertainment conglomerate.

³⁰*Collective Bargaining Agreement Released*, SOCCER AMERICA DAILY (Mar. 23, 2010 2:20 PM), <http://www.socceramerica.com/article/37359/collective-bargaining-agreement-released.html>.

³¹ Allegedly, the main goal of the players' union was to secure free agency for veteran players. The league was unwilling to acquiesce, offering instead the Re-Entry Draft compromise along with an increase in guaranteed contracts for players. *MLS Unveils Labor Agreement Details*, AOL NEWS (Mar. 23, 2010), <http://www.aolnews.com/2010/03/23/mls-unveils-labor-agreement-details>.

³² GRANT WAHL, *THE BECKHAM EXPERIMENT: HOW THE WORLD'S MOST FAMOUS ATHLETE TRIED TO CONQUER AMERICA* 61 (2009).

erate that is the operator-investor of the Galaxy. Also involved were MLS equipment sponsor Adidas, and Beckham's various personal sponsors such as Pepsi and Motorola, who saw an opportunity to bring their spokesman's already sizeable brand to the lucrative U.S. market. The deal bore a widely published "value" of \$250 million dollars.³³ While this vastly inflated number was a murky combination that included royalties Beckham would earn from merchandizing, endorsement earnings, and other revenue streams relating to the image rights he retained as part of the deal, Beckham's actual player salary was \$32.5 million dollars over five years³⁴ in a league where the team salary cap at the time was about \$2.1 million dollars per year.³⁵ The league rule that facilitated Beckham's signing, introduced in November 2006 and still bearing the nickname "the Beckham rule," is called the Designated Player exception.³⁶

The Designated Player (DP) exception in its original form allowed each MLS team to sign one player to its roster with the first \$400,000 of the player's salary paid for normally by MLS, and the remainder the responsibility of the operator-investor group of that particular team.³⁷ Teams could also trade their Designated Player slot if so desired.³⁸ Only the \$400,000 paid by the league counted

³³ *Id.* at 31.

³⁴ *Id.*

³⁵ The salary cap would increase in the year following Beckham's arrival, but only by about 4%, to \$2.3 million dollars. Tripp Mickle, *Debate highlights MLS salary cap split*, SPORTS BUSINESS DAILY (Nov. 26, 2007), <http://www.sportsbusinessdaily.com/Journal/Issues/2007/11/20071126/This-Weeks-News/Debate-Highlights-MLS-Salary-Cap-Split.aspx>.

³⁶ 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, 425-27 (2008).

³⁷ See WAHL, *supra* note 31, at 42.

³⁸ See Bernhard, *supra* note 35.

towards that team's salary cap. This means Beckham's actual cost to the league was just \$2 million over the five year period, and the Galaxy retained most of their salary cap room to fill the rest of their roster.³⁹ The rule was clearly created specifically to allow for Beckham's arrival- at the time only three other players in league were making a large enough salary to qualify.⁴⁰ By 2009, six teams featured at least one Designated Player on their rosters. In 2010 the league expanded the Designated Player exception to allow each team two Designated Players and lowered the cap-impacting portion of these players' salaries to \$335,000 each, per season.⁴¹

II. The Current League Structure Regarding Its Players

MLS' centralized structure allows it to maintain a high level of control over its players and the spending decisions made by its teams. This control has manifested in a variety of structural instruments that help the league address a variety of considerations like fostering league growth, keeping costs low, protecting the league from open competition on the vast and wealthy international market for players, and allowing teams some autonomy in competitive decision-making. These instruments can be roughly divided into three categories. The first category consists of instruments that help keep costs down and the teams competitively balanced. The second category contains those that promote on-field growth by boosting talent acquisition and the development of

³⁹ See WAHL, *supra* note 31, at 42.

⁴⁰ See MAJOR LEAGUE SOCCER PLAYERS UNION, 2007 MLS PLAYER SALARIES: AUGUST 31, 2007: ALPHABETICAL, *available at* http://www.mlspayers.org/files/8_31_07_salary_info_alpha.pdf.

⁴¹ Joshua Meyers, *Major League Soccer adds second DP slot, can purchase a third (league release)*, THE SEATTLE TIMES (Apr. 1, 2010 8:38 AM), http://seattletimes.com/html/soundersfcblog/2011498898_major_league_soccer_adds_secon.html.

young players. The third category is made up of instruments that benefit the players, fostering a good relationship with the player's union and making the league an attractive place to play.

1. Controlling Costs and Maintaining Competitive Balance

a. The Salary Cap

MLS uses a fixed salary cap as the basic control element of their player pay system. Subject to the exceptions detailed below, each team may not exceed the cap number when assembling their player payroll each season. This prevents teams from spending more than their rivals to gain an advantage, which both aids competitive balance and keeps the cost of fielding a competitive team from rising above a set point. The current MLS salary cap is approximately \$2.95 million dollars per team, and the cap will have increased 34% from the 2010 number by the time the current CBA expires in 2014.⁴² The league refers to this number as a "budget" rather than cap, in part because the funds are paid out by the league and in part because there are numerous exceptions to the number.⁴³ For example, a club must only count the salaries of its top eighteen to twenty-one players towards the cap number, depending on various factors.⁴⁴ This leaves as many as nine players designated as off-budget on the maximum active senior roster of thirty players.

⁴² MLS PRESS BOX, ROSTER RULES AND REGULATIONS ¶I (2014), available at <http://pressbox.mlssoccer.com/content/roster-rules-and-regulations>.

⁴³ *Id.*

⁴⁴ *Id.*

b. The Superdraft

Like the National Basketball Association (NBA) and National Football League (NFL), MLS uses a player draft to allocate previously-amateur rookies among its teams. The draft is the foremost example of a competition restraint that gives the buyers (teams) monopsony power in the market for player services. In other words, players can only sell their services to a single team, the team that selected them in the draft, and thus they have much lower bargaining leverage than they would on an open, unrestrained market. This effect is critical to the MLS structure, which creates a similar monopsony power for teams at all facets of player acquisition, as detailed below. Teams draft in reverse order of their finishing spot from the previous season, and may trade draft picks.⁴⁵ The majority of draft prospects are NCAA college seniors who have exhausted their college eligibility, a class of players that appears to be losing relevance as more MLS players are acquired via different means.

c. Allocation Ranking

The allocation ranking is the mechanism used to determine which MLS club has first priority to acquire a U.S. National Team player who signs with MLS after playing abroad, or a former MLS player who returns to the league after having gone to a club abroad.⁴⁶ The allocation rankings may also be used in the event two or more clubs file a request for the same player on the same day when the Discovery period (discussed below) opens in December.⁴⁷ The allocations are ranked in reverse order of finish for the 2012 season, taking playoff performance into account. Once the club uses

⁴⁵ *Id.* ¶II(C) and (D).

⁴⁶ *Id.* ¶II(A).

⁴⁷ *Id.*

its allocation ranking to acquire a player, it drops to the bottom of the list.⁴⁸ A ranking can be traded, provided that part of the compensation received in return is the other club's ranking. At all times, each club is assigned one ranking. The rankings reset at the end of each MLS League season.⁴⁹

The allocation ranking serves the same purpose as the Superdraft, to prevent competition among MLS clubs for the services of a single player. It accounts for returning veteran players who have left the league for playing opportunities elsewhere, a smaller pool than those who are assigned to a team via the Superdraft. This is a significant group of players nonetheless since those who have piqued the interest of foreign clubs enough to warrant a signing are often among the most talented in the league, and U.S. National Team players (in addition to their exceptional on field prowess) have accrued valuable experience and public exposure by playing in high stakes international competition while representing a national fan base. By assigning their acquisition rights to a single MLS team, the league ensures that league-wide demand for these players will not be a factor.

d. Allocation Money

Allocation money is a pool of funds separate from the salary cap, made available to teams in a variety of scenarios. Those scenarios are: when a team fails to qualify for the MLS Cup Playoffs, when a team transfers a player outside of MLS for value, when a team is in its expansion year, when a team qualifies for CONCACAF Champions League, and when a team purchases a third Designated Player roster spot.⁵⁰ The terms and amounts are determined by the

⁴⁸ *Id.*

⁴⁹ *Id.*

⁵⁰ *Id.*

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MLS Competition Committee. This instrument reinforces competitive balance (by allocating extra funds to weaker teams) and incentivizes certain behavior that is beneficial to the league as a whole, such as selling players for value and competing in interleague competition like the CONCACAF Champions league.

Each year the MLS Competition Committee determines the allocation amount to be made available to each club. Allocation money can be traded by clubs. Allocation money does not count against a club's salary cap and can be used: To sign players new to MLS (that is, a player who did not play in MLS during the previous season), to re-sign an existing MLS player, subject to League approval, to "buy-down" a player's salary budget charge below the League maximum of \$368,750, or in connection with the exercise of an option to purchase a player's rights or the extension of a player's contract for the second year provided the player was new to MLS in the immediately prior year.⁵¹ The league does not release how much allocation money is available to each club. This prevents players in negotiations from leveraging a club's financial situation (or at least the precise amount of funds available) to earn a larger contract.

e. Discovery Rules

The MLS utilizes a "Discovery Rules" system that, in the same vein as the Superdraft and allocation ranking, allows teams to make autonomous choices about which players they would like to try to acquire without directly competing with each other for a given player's services. MLS teams may make discovery claims on players not yet under MLS contract who are not subject to the allocation ranking or draft mechanisms. This provides teams a way

⁵¹ *Id.*

to sign foreign players with no previous MLS experience. Each team has the opportunity to make six discovery signings per season and expansion teams may make ten discovery signings in their inaugural season.⁵² A team may have up to ten discovery claims on unsigned players at any time and may remove or add players at any time. The last day for discovery claims is the roster freeze and trade deadline date, which was September 13, 2013 for the current season. If multiple teams claim the same player using a discovery slot, the team that filed the claim first will have first rights to the player. Discovery claims expire following each season.

Crucially, the league maintains a policy to “protect interests of MLS clubs in scouting and negotiations with prospective players,” that it will not publicize the names of players on club discovery lists, nor specify if a discovery claim has been filed on a particular player.⁵³ Additionally, should a club fail to reach an agreement with a discovery list player during a given season that results in that player signing with MLS, the team retains the right of first refusal in any future negotiation between that player and MLS. This means that teams cannot directly compete between each other for discovery players, since presumably they don’t know who is on their rivals’ discovery list and even word of a failed negotiation would simply let them know a player’s rights have been claimed. For international players interested in playing in MLS, this makes it impossible to leverage value from having multiple teams interested, since they can only negotiate with the one team that holds their discovery rights.

⁵² *Id.* ¶II(E).

⁵³ *Id.*

f. The Movement Clause

The 2004-2010 CBA includes a clause stipulating that the MLS may move players from team to team at the league's discretion.⁵⁴ In practice, this effectively means that unless a player can negotiate special terms to be added to their Standard Player Agreement, they have no control over their own movement from MLS team to MLS team. The clause facilitates the various other player movement rules by ensuring that teams can unilaterally shift around their rosters to make discovery signings, use allocation funds, and otherwise benefit from player movement mechanisms. The league and union's official joint press release, which lists the changes to the CBA made in 2010, makes no mention of eliminating this clause or otherwise giving players some input regarding moves,⁵⁵ and anecdotal evidence suggests that the vast majority of MLS players find themselves entirely at the whim of their employers in regards to where they will ply their trade.

For example, Argentinian striker Maximiliano Urruti officially signed with Toronto FC on August 16, 2013, after a saga that included a long flirtation with the club and the player voluntarily

⁵⁴ Article 8, Section 2 of the MLS Collective Bargaining Agreement, 2004-2010 reads, in part, "a Player's services may be assigned to the central MLS player pool or to any Team (or Reserve Team or Developmental Squad) in the League." COLLECTIVE BARGAINING AGREEMENT BETWEEN MAJOR LEAGUE SOCCER AND MAJOR LEAGUE SOCCER PLAYERS UNION DECEMBER 1, 2004 – JANUARY 31, 2010 §8.2, *available at*

http://www.mlspayers.org/files/collective_bargaining_agreement_final.pdf.

⁵⁵ The press release discussed salary and overall budget increases, detailed the logistics of the new Re-Entry Draft mechanism, and mentioned various small concessions like increased per diems; a major player movement concession like trade veto power or some other alteration of this clause would have almost certainly warranted mentioning. *MLS Announces CBA Changes*, US NATIONAL SOCCER PLAYERS (Mar. 23, 2010), <http://www.ussoccerplayers.com/2010/03/mls-announces-cba-changes.html>.

leaving his erstwhile club in Argentina, Newell's Old Boys, without an actual contract offer from MLS.⁵⁶ When Maple Leaf Sports and Entertainment, the sports conglomerate that controls Toronto FC as an operator-investor, fired the team's general manager just a few weeks later,⁵⁷ the prized new signing found himself as an expendable asset under the new regime. With only thirty seven minutes logged on field with Toronto, the Argentine was sent via trade almost three thousand miles west and across the border to join the Portland Timbers on September 9th, 2013.⁵⁸ Ostensibly, this move would not have happened so close on the heels of the laborious move from Argentina if Urruti had a say in the matter. According to Richard Motzkin, Executive Vice President and Managing Executive for Global Soccer at Wasserman Media Group, "only the Landon Donovans" of the MLS world (meaning top tier players with exceptional talent and name recognition value) have enough leverage to protect themselves contractually from sudden trades via special conditions like trade veto clauses.⁵⁹

⁵⁶ Dave Rowaan, *Toronto FC's six month relationship with Maximiliano Urruti*, SB NATION WAKING THE RED (Sept. 10, 2013 8:00 AM), <http://www.wakingthered.com/2013/9/10/4714066/maxi-urruti-toronto-fc-trade-portland-timbers-newells-old-boys>

⁵⁷ Jeff Carlisle, *Source: Toronto to name MLS exec GM*, ESPN FC (Sept. 19, 2013), http://espnfc.com/news/story/_/id/1558190/toronto-fc-hire-bezbatchenko-gm?cc=5901.

⁵⁸ *Toronto FC deal Argentine striker Maximiliano Urruti to Portland Timbers for Bright Dike, 2015 draft pick*, MLSSOCCER.COM (Sept. 9, 2013), <http://www.mlssoccer.com/news/article/2013/09/09/toronto-fc-deal-argentine-striker-maximiliano-urruti-portland-timbers-bright>.

⁵⁹ The author spoke with Mr. Motzkin about MLS' player movement controls in October, 2013. Mr. Motzkin represents a number of MLS' marquee players, as well as prominent American internationals playing abroad.

2. Boosting Talent Acquisition and Developing Young Players

a. The Designated Player Exception

The Designated Player rule today allows each team to carry up to three Designated Players, adding “star power” to rosters where the salary cap would otherwise be prohibitive. The rule is mainly used to bring high-profile foreign veterans to the league, though it can also be used to retain current players who would otherwise leave internationally.⁶⁰ Under the current iteration, Designated Players cost team cap space only as much as follows: \$368,550 for players over the age of 23, and \$200,000 for players aged 21-23. Players under the age of twenty one are not eligible for Designated Player status. Unlike in the rule’s original manifestation, the current Designated Player slots cannot be traded. The third slot must be “bought” for \$150,000 in allocations funds to be distributed among the clubs who do not have three Designated Players. Currently, every club has at least one Designated Player, and about a quarter of them have three. The Designated Player salaries range from around \$400,000 per year, barely more than the amount counting against the cap, to over \$5 million.⁶¹ There is no mention of the Designated Player in the 2004-2010 collective bargaining agreement, owing to the rule’s creation in 2006. The only publicly available enumeration of the rule is in the MLS’ Roster Rules,⁶²

⁶⁰ Players like the Galaxy’s Omar Gonzalez and San Jose’s Chris Wondolowski were given Designated Player contracts after playing on normal ones for their respective teams.

⁶¹ *Player Salary Information: 2013 Salaries - Alphabetical*, MAJOR LEAGUE SOCCER PLAYERS UNION, available at http://www.mlssoccer.com/salary_info.html.

⁶² See MLSSOCCER.COM, *supra* note 41.

meaning it must have been added to the collective bargaining agreement via addendum or created via some separate agreement.

b. The Home Grown Player Exception

The Home Grown Player exception allows MLS clubs to circumvent the MLS Superdraft, signing previously amateur youth players to their squads directly as long as those players have been training in the club's youth development program for at least one year prior to the signing. Each team may sign as many Home Grown players as they wish, and two may be offered contracts "similar" to Generation Adidas players (discussed below) that do not count towards a team's cap number. Additionally, a team selling a Home Grown player under contract to a team outside the league receives a larger percentage of the profit than they would for normal players.⁶³ While MLS is opaque about how this rule is applied (the Roster Rules simply say that players qualifying must "meet the League's Homegrown Player criteria") thus far in practice it appears that players training as part of the U.S. National Team development program are not eligible, while players that have been training with a club may retain eligibility even when they go off to college to play as an NCAA athlete, so long as they have participated in at least 80 games as part of the MLS club's program.⁶⁴ The stated goal of the Home Grown player exception is

⁶³ Under normal circumstances, a MLS team making an interleague transfer of a player under contract ("selling" him by voiding his current contract and allowing him to agree with the new club) receives sixty-six percent of the proceeds and MLS receives the rest. Conversely, a team that sells a Home Grown player nets seventy-five percent of the proceeds. Andrew Lewellen, *The Future of U.S. Soccer: Home Grown Players*, GRANTLAND.COM (July 20, 2012), http://www.grantland.com/blog/the-triangle/post/_id/32695/the-future-of-u-s-soccer-homegrown-players.

⁶⁴ Kyle McCarthy, *Monday MLS Breakdown: Application of the Home Grown Player Rule Keeps Overarching Goal in Mind*, GOAL.COM, (Jan.

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to ensure that promising American-born players begin their professional careers at home rather than overseas, a crucial consideration for the league's ability to stock its rosters with talented players.

The Home Grown designation incentivizes clubs to invest in their youth development programs, behavior that is both good for the league and for the USSF. It also removes these players from other entry mechanisms, while preserving the single-buyer relationship with the club who has designated them as Home Grown. According to Aaron Maines, Director of Global Soccer at Wasserman Media Group, the designation is unilateral on the part of the team.⁶⁵ This means that once a team successfully tags a player as Home Grown, they have gained exclusive signing rights, and that player cannot seek nomination for the Superdraft pool or otherwise position themselves to contract with a different MLS club. This eliminates any potential leverage the player would otherwise gain by knowing that the club with which they qualify as a Home Grown player would not have to count their salary towards the cap and thus could probably pay them more than a club that acquired them via one of the salary-capped means.

c. Generation adidas

Generation adidas is a joint program between MLS and adidas that is dedicated to developing exceptional domestic talent in a more professional environment than that offered by NCAA programs. Each year, a handful of top domestic underclassmen and youth national team players are signed to the league and placed in

9, 2012), <http://www.goal.com/en-us/news/1110/major-league-soccer/2012/01/09/2838136/monday-mls-breakdown-application-of-the-home-grown-player>.

⁶⁵ The author spoke with Mr. Maines, a FIFA-certified agent with a large MLS clientele, in October of 2013.

the SuperDraft through this program. The players are chosen a year earlier and removed from their college or other amateur program in order to train in a professional environment before entering MLS.⁶⁶ The players lose their NCAA eligibility, but are given access to an education fund set up by MLS to help them get a degree within ten years of leaving school to enter the Generation adidas program.⁶⁷ Generation adidas contracts do not count against a team's salary cap, and generally last four years although team options can be used to shorten that period.⁶⁸ Similar to the Home Grown player exception, this incentivizes MLS teams to contract with domestically-developed players, benefitting the future of the league and the USSF.

d. International Roster Spots

Borrowing from European leagues, MLS has implemented a cap on the number of international players plying their trade in the league at any one time. In 2013, a total of 152 international slots were divided among the 19 clubs.⁶⁹ Each club began with eight international slots, which are tradable. There is no limit on the number of international slots on each club's roster. The remaining roster slots must belong to domestic players. For clubs based in the United States, a domestic player is either a U.S. citizen, a permanent resident (green card holder) or the holder of other special

⁶⁶ Travis Clark, *A History of Generation Adidas: Part One*, TOPDRAWERSOCCER.COM (Jan. 16, 2013), http://www.topdrawersoccer.com/college-soccer-articles/a-history-of-generation-adidas:-part-one_aid28345.

⁶⁷ See MLSSOCCER.COM, *supra* note 41.

⁶⁸ L.E. Eisenmenger, *McCabe Explains Generation Adidas*, U.S. NATIONAL SOCCER PLAYERS (Jan. 8, 2010), <http://www.ussoccerplayers.com/2010/01/mccabe-explains-generation-adidas.html>.

⁶⁹ See MLSSOCCER.COM, *supra* note 41.

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status (e.g., refugee or asylum status). The three MLS clubs based in Canada – Montreal Impact, Toronto FC and Vancouver Whitecaps FC – also have eight international slots, but American players do not require one. MLS clubs based in Canada are required to have a minimum of three Canadian domestic players on their rosters.

The purpose of this restriction is twofold. First, it serves the league on a short-term basis, bolstering fan appeal by filling team rosters with players that are more familiar and relatable, and reducing the costs of scouting and other logistical expenses by (mostly) limiting the pool of potential players to those more easily accessible. It also serves the goal of developing American talent for the international stage, again bolstering the future of the USSF in addition to MLS' own long-term prospects.

e. Retention Funds

The most recently introduced mechanism to incentivize certain behaviors by members clubs is a retention funds system used to retain key players who would otherwise depart for foreign leagues when their contract expires. If the MLS Competition Committee deems a player on an expiring deal to be a “Core Player” (ostensibly one whose talent is an asset to the league and who is likely to receive offers elsewhere), the club will be given extra funding towards a contract extension that would keep that player in the league.⁷⁰ Fourteen players, such as MLS lifer and U.S. international Graham Zusi, have been re-signed to contracts bolstered by

⁷⁰ Jonah Freedman, *Retention Funds Explained: MLS Reveals List of 14 Players Like Graham Zusi Re-Signed Under Initiative*, MLSSOCCER.COM (Aug. 2, 2013), <http://www.mlssoccer.com/news/article/2013/08/02/retention-funds-explained-mls-reveals-list-14-players-graham-zusi-re-signed->.

retention funds since the initiative was introduced in the offseason following the 2012 season.⁷¹

3. Maintaining Relationship With Players' Union Via Player Friendly Elements

a. Guaranteed Contracts

The main concession to players that has evolved over the course of MLS' collective bargaining relationship with its players' union is the move towards guaranteed contracts. In contact sports, where injuries can instantly and drastically affect a player's ability to perform, the difference between guaranteed contracts and terminable ones is very significant for players. The 2004 CBA defines three tiers of player contracts- fully guaranteed, which cannot be voided other than for off-field conduct issues or other violations of the CBA, semi-guaranteed which can only be voided at the end of a year for injury or performance reasons (and at any time for conduct violations), and non-guaranteed which can be voided whenever but are only available for players on 30-day trial contracts.⁷² How players were categorized between these three tiers is unspecified in the publically available portions of the agreement.

According to Commissioner Garber, the current CBA includes fully guaranteed contracts for all players who are at least 24 years old and have at least three years' experience in MLS, which qualified approximately 55% of the league's player pool at the time.⁷³

⁷¹ *Id.*

⁷² *MLS Players Union Resources: Collective Bargaining Agreement*, 48-49, MAJOR LEAGUE SOCCER PLAYERS UNION, <http://www.mlspayers.org/resources.html>.

⁷³ *MLS Unveils Labor Agreement Details*, AOL NEWS (Mar. 23, 2010) <http://www.aolnews.com/2010/03/23/mls-unveils-labor-agreement-details>.

He did not specify how contracts of non-qualified players would be treated. Since the previous CBA only allowed non-guaranteed contracts for trial players,⁷⁴ it follows that the portion of the player pool not qualifying for guaranteed contracts probably plays on terms similar to the old “semi-guaranteed” definition.

b. The Re-Entry Draft

The second player-friendly alteration to MLS rules already in place is the Re-Entry Draft. The MLS Re-Entry Draft was created in the 2010 MLS collective bargaining agreement for MLS players whose current contracts have expired or will expire due to their current team declining to exercise an option. Before the introduction of this process, players’ rights were simply retained by their current club in perpetuity, forcing the player to either re-sign with that club or negotiate an assignment of the rights to a different club if he wished to continue playing in the league.⁷⁵ The creation of the Re-Entry Draft was seen as a concession to the players’ union in lieu of free agency for players in this situation.⁷⁶

The Re-Entry Draft consists of two rounds. Teams pick players in the reverse order of the previous season’s final standings, and may opt to decline to pick. In the first round, teams may select players whose options have been declined and essentially pick up their option, or extend a “Bona Fide Offer” to a player out of contract. A “Bona Fide Offer” must meet minimum standards, such as a term of three years and a raise of 5% from the player’s last base salary

⁷⁴ Trial players are players brought in for 30-day test runs with a team, generally not as active roster players.

⁷⁵ See AOL NEWS, *supra* note 41.

⁷⁶ Leander Schaerlaekens, *Players Still Left Without Freedom of Movement*, ESPN FC (Mar. 22, 2010), <http://espnfc.com/columns/story?id=760003&cc=5901>.

for veteran players or previous base salary for younger players.⁷⁷ Teams may not select their own players in the first round of the Re-Entry Draft. In the second round, the same players are available, but clubs need only extend a “genuine offer” to them without the minimum standards imposed in the first round.⁷⁸ The Re-Entry Draft offers little opportunity for players to significantly improve on their current contract terms, since teams have no incentive to offer a player more than 105% of their current salary, and a player with an overvalued contract will simply be passed over until the second round. Thus far, it has mainly been a mechanism to re-assign veterans who no longer fit their current team’s roster and have little interest from international clubs but may still have some value to other MLS teams.⁷⁹

4. Overall, MLS Rules Control Costs And Protect The League From Competition

The roster and payroll rules of the MLS together form a system that favors control over open competition. MLS teams are able to make autonomous personnel decisions and otherwise pursue on-field success independently from the rest of the league, but they are prevented from directly competing with one another for any single player’s services. This leaves each player the binary decision of signing with the team that holds his rights, or not signing (or re-

⁷⁷ Ridge Mahoney, *Blueprint For New Era of MLS*, SOCCER AMERICA DAILY (Nov. 9, 2010), <http://www.socceramerica.com/article/40334/blueprint-for-new-age-of-mls.html>.

⁷⁸ See MLSSOCCER.COM, *supra* note 41.

⁷⁹ During an average year, about thirty percent of the eligible players are selected, mostly in the second round when they are offered smaller contracts than their previous ones. See Simon Borg, *Califf, Casey Among 14 Picked in Stage 2 Re-Entry Draft*, MLSSOCCER.COM (Dec. 14, 2012), <http://www.mlssoccer.com/news/article/2012/12/14/total-14-players-selected-stage-2-mls-re-entry-draft>.

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signing) with MLS at all. Regardless of whether a player is an amateur entering through the Superdraft or as a Home Grown player, a veteran joining via Discovery or as a Designated Player, or a veteran on an expiring contract whose rights were claimed via the Re-Entry draft, there is only ever a single MLS team who can offer the player a contract which minimizes the impact of potential demand for the player from other MLS teams.

This single-buyer system controls payroll costs, and protects the league's teams from competition on the international transfer market. Collective league ownership of player contracts helps the league increase its leverage and market power when competing with foreign leagues in the market for players. The league as a single bargaining unit has much greater ability to pay transfer fees to acquire key players, negotiate high transfer fee terms that help retain current players, and otherwise compete on the international market than each individual team would. This system has contributed greatly to MLS' ability to slowly and carefully build without overextending resources or taking big risks. MLS will likely continue to prioritize these considerations as it attempts to forge a new collective bargaining agreement with its players' union that better accommodates its current position as well as future growth.

III. Why We Can Expect Changes in 2014

MLS rules, as discussed above, are exceptionally restrictive and reflect the league's complex considerations like competitive balance, cost control, protection from the international transfer market, and contribution to the USSF. However, many of these considerations are changing significantly as the league grows and matures. The factors that shaped MLS' structure when the league was in its infancy related to establishing the league's legitimacy as a professional sports league able to survive in the American sports

market. When league executives sit down with players' union representatives to replace the CBA that expires in 2014, the goal will be pushing an established national league into the top tier of American sports and increased relevancy on the international scene. That will require a re-evaluation of the league's structure in light of the changed circumstances.

First, the league has grown from a financial standpoint. This changes the equation for maintaining stability, and how the league should view competitive balance. It also affects the league's relationship with its players' union, particularly since increased cash flow has highlighted inequity between the salaries of different players and a low correlation between players' performance and how much they are paid. Second, the quality of the players on the field has grown. This puts pressure on the league to alter its player movement restrictions, especially since the goal is to continue this upward trend in quality. Finally, growth has negated any consideration of the single entity classification, allowing the league to make any structural changes it deems necessary without worrying about how those changes would affect a single entity status consideration.

1. Financial Growth of the League

a. Growth Decreases Need for Financial Stability Measures

MLS has been growing at a steady and robust rate for more than a decade by almost every statistical indicator available. Nine new teams have joined MLS since 2005,⁸⁰ with the aforementioned

⁸⁰ In 2005, Chivas USA and Real Salt Lake joined the league. They were followed by: the Houston Dynamo in 2006; the Toronto FC in 2007; the Seattle Sounders in 2009; the Philadelphia Union in 2010; the Portland Timbers and

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New York City FC announced as the tenth⁸¹ and Orlando City as well as three additional yet-unnamed teams set to join them by 2017.⁸² Game attendance rates nearly tripled between 2002 and 2012, reaching a record high of just over six million attendees league-wide.⁸³ Per-game averages over the same span also increased significantly: the league was able to leapfrog the NBA in 2011, becoming America's third most well attended sports league with an average of 17,872 attendees per match.⁸⁴ Contributing to these numbers is the fact that all but five of the league's teams now play in soccer-specific stadiums where MLS teams are the owners or primary tenants,⁸⁵ rather than playing as secondary tenants in football or general-purpose stadiums as MLS teams did in the league's early years. Twelve of these facilities having been built or heavily renovated within the past decade,⁸⁶ with both D.C. United

Vancouver Whitecaps in 2011; and the Montreal Impact in 2012. *See MLS History: Clubs*, MLSSOCCER.COM, <http://www.mlssoccer.com/history/club>.

⁸¹ Dan Dickinson, *Major League Soccer Makes It Official: NYC FC To Join League in 2015*, GOTHAMIST.COM (May 21, 2013), http://gothamist.com/2013/05/21/major_league_soccer_makes_it_offici.php.

⁸² In addressing Orlando City's (now successful) expansion bid, league officials reiterated Commissioner Garber's earlier comments regarding the scope of expansion, confirming that the league will add three additional teams before 2020, bringing the total number to twenty-four. Jeff Carlisle, *Orlando City Seeks Fast Track to Join MLS*, ESPN FC (Aug. 6, 2013, 1:00 PM), http://espnfc.com/blog/_name/soccerusa/id/3067?cc=5901.

⁸³ *Statistics*, MLSSOCCER.COM, available at <http://www.mlssoccer.com/stats/season>.

⁸⁴ Fred Dreier, *MLS Passes NBA as Third Best-Attended American Sport*, SPORTING NEWS, <http://www.sportingnews.com/soccer/story/2011-11-07/mls-passes-nba-as-third-best-attended-american-sport>.

⁸⁵ Technically, Chivas USA is not a primary tenant or owner, because it is a tenant in the AEG-owned Stub Hub Center, the primary home of the Los Angeles Galaxy. The only other teams with long-term plans to remain in stadiums that are not soccer-specific with a MLS team as owner or primary tenant are Seattle, New England, and Vancouver. *See Clubs*, MLSSOCCER.COM, <http://www.mlssoccer.com/history/club>.

⁸⁶ *Id.*

⁸⁷ and the San Jose Earthquakes⁸⁸ set to begin play in their own soccer-specific stadiums within the next three years. Orlando City was able to earn its expansion slot in part by securing a deal to build a new soccer-specific stadium in time for its first MLS season in 2015.⁸⁹

While the league, as a privately held corporation, closely guards most of its financial data, indicators like revenues and team valuations point to steady growth in recent years. A recent Forbes article placed the value of eight MLS teams over \$100 million dollars, with Seattle and the LA Galaxy both close to \$200 million.⁹⁰ The market value of an expansion franchise has increased significantly: In 2005, the price tag on an expansion franchise was \$10 million dollars.⁹¹ By 2012 the amount had increased to \$40 million dollars, and when NYCFC begins play in 2015 it will have paid \$100 million dollars for the right to join MLS.⁹² The salary

⁸⁷ *Plans for World-Class Soccer Stadium Announced*, DCUNITED.COM (July 25, 2013), <http://www.dcunited.com/news/2013/07/plans-for-world-class-soccer-stadium-announced>.

⁸⁸ *New Stadium Opening in 2015*, SJEARTHQUAKES.COM, <http://www.sjearthquakes.com/newstadium>.

⁸⁹ Simon Veness, *Orlando City's Stadium Plans Boost Major League Soccer Ambitions*, THE GUARDIAN (Aug. 15, 2013), <http://www.theguardian.com/football/2013/aug/15/orlando-city-mls-expansion-stadium-deal>.

⁹⁰ Chris Smith, *Major League Soccer's Most Valuable Teams*, FORBES.COM (Nov. 20, 2013), <http://www.forbes.com/sites/chris-smith/2013/11/20/major-league-soccer-most-valuable-teams/>.

⁹¹ In 2005, just after MLS' contraction period, the owner of the minor league Rochester Rhinos said he felt "uncomfortable" with the \$10 million dollar expansion fee it would cost him to join MLS. Robert Wagman, *Several Cities Vie for Expansion Teams as Complications Delay Decision*, SOCCERTIMES.COM (May 16, 2005), <http://www.soccertimes.com/mls/2004/may16.htm>.

⁹² NYCFC will pay a \$100 million dollar expansion fee, more than double the amount paid by the Montreal Impact in 2011. That number may, however, be inflated by factors such as stadium rent (no public announcement has been made as to where the team will play) or sponsorship complications (Manchester City

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cap has risen steadily to more than double what it was ten years ago,⁹³ and the number of players on Designated Player contracts has risen in each year of the rule's existence.⁹⁴ In a 2012 interview with the New York Times, Timbers owner Merritt Paulson admitted that his team was "cash-flow positive" and profitable at an operating level, before adding that there "are a lot more teams that are now cash-flow positive," and that the teams that are still losing money "are not losing a lot of money."⁹⁵ Forbes would agree with this assessment- in its valuation article, it lists eight teams with negative operating income at an average of -\$3.31 million, while the rest of the league averages a positive operating income of \$5.54 million.⁹⁶

All of this evidence of financial growth means that the league has less rationale for maintaining its conservative approach to player salaries and movement. While the early MLS needed to keep its teams on a short leash to avoid overextending resources and to buoy small or nascent franchises with the successes of the marquee ones, today the league's foothold is firmly established. The league is not in danger of collapsing if a few franchises struggle (as evi-

is sponsored by Nike, while MLS has an equipment deal with Adidas).
Christopher Savino, *NYFC More About Major League Soccer Than New York City*, BUSINESS OF SOCCER (May 22, 2013),
<http://www.businessofsoccer.com/2013/05/22/nycfc-more-about-major-league-soccer-than-new-york/>.

⁹³ See Mickle, *supra* note 34.

⁹⁴ By the trade deadline of 2013, there were thirty-three Designated Players league-wide. In fact, all but five teams ended their 2013 season with at least two Designated Players. *Designated Players*, MLS PRESSBOX (Aug. 19, 2013),
<http://pressbox.mlssoccer.com/content/designated-players>.

⁹⁵ The New York Times, *Q&A With Portland Timbers Owner Merritt Paulson*, GOAL: THE NEW YORK TIMES SOCCER BLOG (Mar. 14, 2012),
http://goal.blogs.nytimes.com/2012/03/14/qa-with-portland-timbers-owner-merritt-paulson/?_r=0.

⁹⁶ See Smith, *supra* note 89.

denced currently by the presence of woeful Chivas USA, firmly last in the league in attendance and revenue), and player salaries are no threat to eat up revenues at an unsustainable rate.⁹⁷ Commissioner Garber justified the league's stance against free agency in 2010 by stating that only two franchises turned a profit in 2009, and thus the league needed to "make sure we have some runway" before considering revolutionary changes to the league's structure.⁹⁸ Just four years later, the seeds of profitability sown by expansion and stadium ownership seem from an outside perspective to have laid that runway. When it comes to a new CBA in 2014, MLS may have a hard time justifying some of its limitations on a financial stability basis.

b. Growth Alters Competitive Balance Considerations

It is no secret that MLS trumpets its competitive balance as a key selling point for fans. Even during the league's darkest hour, the contraction of 2002, Commissioner Garber spoke of fans needing to believe in the single entity concept because "it ensures competitive balance."⁹⁹ In 2011, J. Todd Durbin, Vice President for Player Relations and Competition, spoke of the goal of ensuring that each

⁹⁷ In fact, MLS player salaries constitute a smaller percentage of team revenues than in any major foreign league. About twenty-one percent of MLS revenues go to player salaries, while the ratio for European teams ranges from roughly thirty to sixty percent. See F. Matthews, *Is Greed Good?, Part II: Hey MLS Corporate, Ante Up!*, THE SHIN GUARDIAN (June 5, 2013), <http://theshinguardian.com/2013/06/05/is-greed-good-part-ii-hey-mls-corporate-ante-up/>.

⁹⁸ Grant Wahl, *Garber: Promotion/Relegation Not Happening Any Time Soon in MLS*, SI.com (Nov. 19, 2010),

http://sportsillustrated.cnn.com/2010/writers/grant_wahl/11/19/qa.garber

⁹⁹ Jack Bell, *SOCCER: Major League Soccer Eliminates Two Teams*, THE NEW YORK TIMES (Jan. 9, 2002), <http://www.nytimes.com/2002/01/09/sports/soccer-major-league-soccer-eliminates-two-teams.html>.

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year every team would have a legitimate chance to win the league.¹⁰⁰ That this sounds suspiciously similar to the NFL's "Every Given Sunday" mantra is probably not mere coincidence: Commissioner Garber spent sixteen years in the NFL league office before coming to MLS.¹⁰¹ The strong central structure with its salary cap, allocation order, and other balancing mechanisms has certainly had an effect on the level of parity in the league.

A table published on the MLS website shows that Supporter's Shield winners, the teams finishing the regular season with the best record each year, are significantly less dominant than their counterparts in the top European leagues.¹⁰² Scoring is the same across leagues, three points for a win and one for a tie. In MLS, the Shield winners average less than two points per game, while table-topping teams in each of Europe's five biggest leagues all average close to 2.5 points per game.¹⁰³ A study compiling three different metrics that indicate a league's competitive balance- standard deviation in points earned per game, average change from year to year in a team's points earned per game, and goal differential for each team- for the world's top fifteen leagues found that the MLS is the most

¹⁰⁰ Leander Schaerlaekens, *Parity is a Problem for MLS*, ESPN.COM (Feb. 3, 2011), http://espn.go.com/sports/soccer/news/_id/6076247/parity-problem-mls.

¹⁰¹ Garber's successful stint as the NFL's Senior Vice President and Managing Director of NFL International caught the eye of Lamar Hunt and Robert Kraft, both NFL owners and major MLS stakeholders, and he left the NFL to join MLS in 1999. Michael Marsh, *The Soccer Don*, CIGAR AFFICIONADO, May-June 2006, available at http://www.cigaraficionado.com/webfeatures/show/id/The-Soccer-Don_8749.

¹⁰² Andrew Wiebe, *Supporters' Shield Winners Can't Match Dominance of European Table-Toppers – And That's A Good Thing*, MLSSOCCER.COM (Sept. 27, 2013), <http://www.mlssoccer.com/news/article/2013/09/27/supporters-shield-winners-cant-match-european-table-toppers-and-maybe-thats->.

¹⁰³ *Id.*

competitively balanced among them.¹⁰⁴ Indeed, this has translated to some thrilling scenarios- for example, with two weeks remaining in the 2013 regular season, only six teams had been mathematically eliminated from playoff contention, and only three had clinched playoff spots.¹⁰⁵

But is parity really a keystone of fan appeal? If so, how do you explain the perennial four-or-five horse race and world's most popular sports league that is the English Premier League (EPL)? In his paper "Economic Design of Sporting Contests," Stefan Szymanski examines whether or not higher parity among teams in a sports league actually has a positive effect on fan appeal. Otherwise stated, does a high level of uncertainty of outcome actually increase fan interest? First, Szymanski breaks down outcome uncertainty into three levels: the individual match, the "season" (meaning the closeness of the championship race), and the championship (variety amongst the teams that actually win over a period of years.)¹⁰⁶ At the individual match level, there appears to be significant consensus among the studies done that "demand for match tickets peaks at the point where a home team's probability of winning is about twice that of the visiting team," which is of course far less uncertainty than most leagues offer.¹⁰⁷ More ambi-

¹⁰⁴ Alex Olshansky, *The Lalas Proclamation: Is MLS The Most Competitive League In The World?*, THE SHIN GUARDIAN (Nov. 1, 2013), <http://theshinguardian.com/2013/11/01/the-lalas-proclamation-is-mls-the-most-competitive-league-in-the-world/>.

¹⁰⁵ The New York Red Bulls, Sporting Kansas City, and Portland Timbers had each secured enough points to earn a playoff spot regardless of the results of their final two games. Who would join them and in what seeding remained in doubt due to a large number of the remaining games pitting two playoff contenders against each other. See *Statistics*, MLSSOCCER.COM, <http://www.mlssoccer.com/stats/season>.

¹⁰⁶ Stefan Szymanski, *The Economic Design of Sporting Contests*, 41 J. Econ. Lit. 1137, 1155-56 (2003).

¹⁰⁷ *Id.* at 1156

guity exists at the other levels, in part because of the difficulty of controlling for other relevant factors. However, of 22 studies across all three levels, Szymanski finds that ten offer strong support for the hypothesis that higher uncertainty means more fan interest, seven offer weak support, and five contradict it.¹⁰⁸ At the very least, this should give pause to the idea that high levels of competitive balance are a holy grail for attracting fans. As another study on the subject concluded “the evidence suggests that uncertainty of outcome has been an overworked hypothesis in explaining the demand for professional sports.”¹⁰⁹

If a high level of competitive balance is not necessarily the optimum level of competitive balance in terms of fan appeal, then it seems reasonable to ask whether preserving this high level is really a compelling argument for maintaining the restrictive league structures that fosters it. Adding legitimacy to such a question is the fact that league management may face internal pressure to sacrifice some competitive balance measures in the name of team autonomy. According to Wasserman’s Aaron Maines, the most compelling source of pressure to reduce some of the league’s centralized control will likely come from the operator-investors themselves.¹¹⁰

c. Growth Allows Operator-Investors to Prioritize Team Control and Success

In the early days of MLS, when investments were a gamble on future returns and ownership was consolidated, the well-being of the league as a whole was paramount. In an MLS landscape where most teams are on solid financial footing, and each team has a

¹⁰⁸ *Id.*

¹⁰⁹ PAUL DOWNWARD ET AL., SPORTS ECONOMICS THEORY, EVIDENCE AND POLICY 206 (Butterworth-Heinemann, 2009).

¹¹⁰ *See* Maines, *supra* note 64.

separate operator-investor group behind it, teams are likely to prioritize their own individual success. Tim Leiweke, formerly CEO of Galaxy owners AEG and currently general manager of Toronto FC's ownership group Maple Leaf Sports Enterprises, has often urged the league to lower restrictions enough to allow him to build a dominant side.¹¹¹ To Leiweke, the "dynasty" model is simply good business for the league at the expense of the minnows, but even smaller market owners in a financially strong MLS may want to see a loosening of some control elements.

Sports ownership is "as much or more a consumer good as it is an economic investment," and owners are often more concerned with the personal satisfaction of bringing acclaim and championships to their hometowns than they are in seeing a profitable return.¹¹² This reality forced MLS to alter its approach from the outset in order to attract investment. The financiers sinking millions of dollars into the new league wanted some individuated, visible stake in specific teams beyond just stock shares. Today, as more of the operator-investor cadre likely feels the league has grown to a point of stability, they have less reason to prioritize the collective interest of the league over the success of their team. These operator-investors, who control the league via its Board of Governors, may opt for increased autonomy and decreased restrictions which will allow them to take a bigger role in orchestrating their team's successes

¹¹¹ The author was present to hear Tim Leiweke speak to a class at UCLA in 2012, where he addressed competitive balance issues in MLS. Leiweke advocated his position that MLS should loosen spending restrictions to allow larger market teams like the Galaxy and Red Bulls to build more expensive teams than their smaller market competitors, which he asserted would boost overall fan interest in MLS. His comments were a reiteration of previous public statements such as one in 2008 to the same effect. Grant Wahl, *Galaxy Wants Another Rules Rewrite*, SI.COM (Sep. 23, 2008), <http://www.theoffside.com/world-football/aeg-wants-to-tilt-the-mls-rules-a-little-more-in-the-galaxys-favor.html>.

¹¹² See WEILER ET. AL., *supra* note 10, at 551.

even if the cost is a dent in profitability. Consider the Twitter response by Merritt Paulson, owner of the small-market but profitable Portland Timbers, to rival Seattle's signing of Clint Dempsey: "if it is possible, this just makes me want to beat Seattle more."¹¹³

d. Growth Adds Urgency to Collective Bargaining Salary Issues and Television Contracts

Another important consideration stemming from growth is the effect it has on the league's relationship with its players' union. Historical precedent indicates that changes in labor-management relations in the sports league context occur during periods of growth. Landmark sports law cases challenging restrictions that ultimately affect how much of the revenue a league is bringing in will go to the players, like Flood v. Kuhn (challenging baseball's Reserve Clause that prevented players from leaving as free agents unless their original team declined to re-sign them) and Mackey v. NFL (challenging football's "Rozelle Rule" that required compensation from new team to old when a player left in free agency) were brought during periods of growth for MLB and the NFL, respectively.

For a specific example, consider events that led to loosening of restrictions on player movement in the NFL. The AFL-NFL merger of 1970 resulted in the first Superbowl, which grossed \$3.8 million dollars, the most ever for a single-day sporting event.¹¹⁴ ABC's *Monday Night Football* debut that year expanded the league's live broadcast presence across all three major providers of the time, the Superbowl repeatedly broke its own television ratings

¹¹³ To be fair, he did also laud the move as good for MLS as a whole. Merritt Paulson, TWITTER.COM (Aug. 6, 2013), <https://twitter.com/MerrittPaulson>.

¹¹⁴ B. Duane Cross, *The AFL: A Football Legacy*, CNNSI.COM (Jan. 22, 2001), http://sportsillustrated.cnn.com/football/news/2001/01/22/afl_history_2/.

record four times over the next decade, and five new franchises were introduced to the league between 1966 and 1976.¹¹⁵ This growth was a significant factor in the four-year-old NFL Player's Union decision to challenge the league in Mackey in 1972. The union's successful challenge to the Rozelle Rule eventually gave the players a new CBA and "a substantial increase in collective bargaining leverage" which they were able to use to secure a larger portion of the huge revenues the league was enjoying.¹¹⁶

Simply put, when the size of the revenue pie increases, there is incentive for the parties divvying it up to reconsider the apportionment. A recent *Guardian* article includes a chart comparing 2013 MLS payrolls for each team as a percentage of that team's revenue as compared with EPL teams and other prominent international clubs. The difference is stark; MLS clubs average about 20.7% of revenues spent on player salaries, while the EPL averages about 70%, and the top international clubs average about 42% of revenue.¹¹⁷ With all signs pointing to an increasing revenue flow for the league and its teams, and potential new owners writing hundred million dollar checks to get a piece of the action, it seems only natural that the MLS Players' union may want to re-examine the league structure and how it governs where that money goes.

¹¹⁵ *History: 1971-80*, NFL.COM, <http://www.nfl.com/history/chronology/1971-1980>.

¹¹⁶ Erick V. Passer, *Brady v. NFL: How the Eighth Circuit Saved the 2011 Season by Supporting Negotiation, Not Litigation*, 19 *Vill. Sports & Ent. L. J.* 603, 618-19 (2012), available at <http://digitalcommons.law.villanova.edu/cgi/viewcontent.cgi?article=1015&context=mslj>.

¹¹⁷ *2013 Hypothetical MLS Team Wages*, The Shin Guardian, http://shinguardian.files.wordpress.com/2013/06/mls_wage.png.

e. Growth Highlights Inequity in Player Salaries

One specific reason the players' union may seek changes to MLS' structure in the upcoming CBA negotiations is that the current structure creates an exceptionally high level of inequity in player salaries. Athletic talent exists on a bell curve, and as rare as professional-caliber athletes are, great professional athletes are exponentially rarer. Since the difference between a good and great player can be the difference between an average team and a championship team, the earning gap in sports between the best and the very good is proportionately far greater than difference between their respective skill levels. This phenomenon occurs across sports, and is reinforced in collective bargaining by players' unions who (unlike, say, steelworkers' unions) generally focus on pushing the compensation ceiling higher for star players rather than ensuring that marginal players earn closer to what their more talented colleagues do.

However, pay inequity is particularly high in the payrolls of MLS rosters. The league's top earners, mostly aging European superstars like Marco DiVaio and Thierry Henry, are paid 100 times more than what their lowest paid colleagues make and ten to thirty times the league average of about \$140,000.¹¹⁸ When Clint Dempsey took the field in his home debut for Seattle in September, he faced a Portland squad which, in its entirety, made less in guaranteed compensation in 2013 than he alone did.¹¹⁹ Tom Brady does not

¹¹⁸ Liviu Bird, *MLS player salaries: Analysis, charts and tables*, Sounder at Heart (May 6, 2013, 4:15 PM), <http://www.sounderatheart.com/2013/5/6/4306550/mls-player-salaries-analysis-charts-and-tables>.

¹¹⁹ *Player Salary Information*, Major League Soccer Player's Union, http://www.mlplayers.org/salary_info.html (follow 2013 Salaries, Surveys through 9/15/13 "Player Salaries - Alphabetical" hyperlink); see also Bird, *supra* note 117, MLS Table by Salary.

earn a hundred times what his long snapper makes, and LeBron James does not earn more than the entire roster of the Milwaukee Bucks. A recent article on Galaxy rookie Kofi Apare, who is playing on a league minimum contract worth \$35,000 a year, highlights this inequity with anecdotes about Apare's lifestyle as compared with his Designated Player teammate Landon Donovan. The article elaborates on the phenomenon with a handful of comparisons, most memorably a graph showing that Donovan and fellow Designated Player Robbie Keane account for 70% of the Galaxy's payroll, before tying the phenomenon to the league's structure which is deemed "byzantine."¹²⁰

Negative press aside, this remarkable inequity is almost certainly of concern to the players' union. A players' union relies on the solidarity of its members to have any power; players must feel like they are "all in the same boat" in order for a union to be able take actions that may detriment some for the good of all. Focusing on top salaries may be the accepted industry norm, but structurally enforced inequity well beyond typical levels warrants a different approach in this particular scenario. Apare's description of practicing with Donovan and Keane, and being hesitant to commit a hard tackle on them knowing that they are hundreds of times more "valuable" than he is, is indicative that this inequity affects player solidarity.¹²¹ This gives the players' union, whose cooperation during the upcoming CBA negotiations is critical to the league's future success, significant motivation to see the salary structure changed to increase paycheck equality and collective interest amongst its members.

¹²⁰ David Peisner, *The Low-Budget, High-Pressure Life Of An MLS Rookie*, BuzzFeed Sports, (Nov. 1, 2013), <http://www.buzzfeed.com/djpeisner/the-low-budget-high-pressure-life-of-an-mls-rookie>.

¹²¹ *Id.*

Preserving this inequity is probably not in the best interests of the league itself, either. As Chris Anderson and David Sally explain in their new soccer analytics book *The Numbers Game*, assembling a team of “Galácticos and galoots” will produce a much weaker side then will spreading talent more evenly across the roster. While inserting a few *Galácticos* (borrowing the nickname given to Real Madrid’s star-studded cast assembled under Florentino Pérez) into an otherwise average lineup will have a tangible impact on a team’s long-term success, the impact will be greater if instead the weakest players, or “galoots,” are replaced by players that are closer to the team average. This means better overall teams can be assembled via a salary structure that incentivizes teams to purchase a handful of solid players at positions of need rather than investing in one or two star players. For MLS, incentivizing this would mean altering their structure to eliminate the Designated Player exception and finding a way to allow teams discretionary spending that isn’t tied to a few specific players.

f. Growth Highlights Low Pay to Performance Correlation

In addition to exceptionally high salary inequity, the current MLS system also produces an exceptionally low correlation between player pay and performance. Conventional wisdom holds that soccer does not lend itself easily to statistical analysis. The open, flowing nature of the game, the variety of playing styles and coaching philosophies, and disparate roles in each starting lineup make it difficult to quantify a team or individual player’s performance. However, technology is rapidly improving our ability to record and analyze an increasingly enormous number of performance metrics. As Chris Anderson and David Sally write in their new soccer analytics book *The Numbers Game*, “The days of

relying on pure gut instinct, conjecture, and tradition to judge what constitutes good and bad soccer are over; instead, we can turn to objective proof.”¹²² The OPTA sports data company tracks and calculates a hefty set of metrics (termed “match events”) which are then used to do an admirably consistent job of rating a player’s performance in a given shift on a scale of one to ten. The “events” recorded range from defensive (passes broken up, tackles attempted/completed, shots blocked, corners conceded), to offensive (shots attempted, chances created, dribbles attempted/completed), to general (fouls conceded, ground covered).¹²³ All told, the OPTA statisticians quantify between 1,600 and 2,000 individual events per match, which are then used to come up with individual player scores using formulae not available to the public.¹²⁴

Applying average ratings of MLS players as compiled by the OPTA engine to payroll breakdowns, MLS player salaries are significantly skewed from perfect correlation to performance. While variance occurs in virtually every team sport, the salaries of MLS players seem to be particularly detached from correlation with their performance. To illustrate this disparity, the attached exhibit contains a list of 39 MLS players, along with their age, 2013 guaranteed compensation, salary classification, number of

¹²² CHRIS ANDERSON & DAVID SALLY, *THE NUMBERS GAME: WHY EVERYTHING YOU KNOW ABOUT SOCCER IS WRONG* 13 (Penguin Books, 2013).

¹²³ Whoscored.com provide publically available OPTA match statistics for about a dozen of the world’s most popular leagues and competitions, including MLS league play. Coverage of each match includes approximately thirty types of match events, recorded for all players, and overall ratings calculated using OPTA’s formulas. See generally, *Football Statistics*, WhoScored.com, <http://www.whoscored.com/Statistics>.

¹²⁴ *The Data Collection Process*, OPTASports.com, <http://www.optasports.com/about/how-we-do-it/the-data-collection-process.aspx>.

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starts on the season, and 2013 season OPTA rating.¹²⁵ Each one usually plays a common role which could loosely be described as an attacking midfielder or winger. They are all speedy, offensive-minded players who like to cut in from the touchline, dribble frequently, and mix chance creation for teammates with shot attempts of their own. None are middle-of-the-park creative distributors, and none are target strikers who sit on the defense's back line.

Comparing various players listed in the exhibit, it is hard to find much correlation between rating and pay check, even accounting for age. Teammates Chad Barrett and Saer Sene are remarkably similar across the board, except that the former made half as much this season as the latter. Soony Saad scored an above-average OPTA rating yet brought home less than 20% of what many in his peer group earned. Mike Magee was one of the league's best players this year, and earned the least out of Chicago's four primary attacking weapons. The list is littered with examples of such discrepancy.

So what causes MLS salaries to stray so far from correlation with performance? The salary cap exceptions combined with a lack of player mobility. Players that come into the league on Designated Player, Generation adidas, or Home Grown contracts make more money initially because teams can pay them without eating up salary cap space. Where open competition for players would correct for this discrepancy over time, the buyers (teams) on the market for MLS players have little incentive to renegotiate with underpaid players because there is little risk of losing the players to other teams. In other words, the issue is not as much that Mike Magee greatly outperformed his contract this year, it is that the Chicago Fire have no reason to pay him significantly more next

¹²⁵ See *infra* Exhibit A.

year. As the overall amount of money involved grows, the pressure to adjust MLS' rules to account for this issue will grow as well.

g. Broadcast Rights Contracts Increase Importance of Collective Bargaining Relationship

The one area where MLS has been unable to improve is television viewership. This past season, MLS games on ESPN drew a paltry average of less than 300,000 viewers, while games on NBC Sports averaged a woeful 100,000 viewers.¹²⁶ That highly-anticipated David Beckham debut, a star-studded affair in which the Galaxy took on no less than English behemoth Chelsea? It earned a television rating of 1, meaning slightly less than a million viewers, and as Grant Wahl pointed out in his book on Beckham, only a tad more than half the viewership that the final game of the Women's College World Series of softball had earned the month prior.¹²⁷ While many theories have been posited as to why the league struggles to attract television viewers even with robust attendance figures, almost everyone can agree that the league's current broadcast deals do it no favors. MLS has nationwide television contracts that place games on ESPN, NBC, its subsidiary NBC Sports, Spanish-language Univision, and Univision's alternate channel UniMas. While the league uses the game-a-week schedule that is common for soccer across the globe, the regularity of its scheduling seems to end there. There is no standardized start time (like the NFL's 1:00 and 4:15 EST schedule), games are often switched from one channel to another just days before the date, and no "marquee game" slot has been fixed.¹²⁸

¹²⁶ Peisner, *supra* note 119.

¹²⁷ See Wahl, *supra* note 31, at 64.

¹²⁸ See Jason Davis, *MLS Faces Tough Questions on TV versus Tickets*, US National Soccer Players.com, (Aug. 21, 2013),

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Much of this has to do with the low leverage with which MLS entered this last set of contracts. Broadcast partners do not have exclusive windows set for MLS games, and appear to cherry pick games depending on the rest of their programming and the sports programming of rival broadcasters.¹²⁹ Fixing these issues would go a long way towards increasing the league's television audience. A recent article in *The Guardian* conglomerates four of the most common suggestions to help MLS establish a foothold in the live sports programming marketplace: 1) build consistent scheduling by picking a time slot and sticking with it, 2) institute flexible programming that allows the league to pick enticing matchups to put in its nationally televised slots, 3) claim a holiday as its own the way the NFL has done with Thanksgiving and the NBA with Christmas, and 4) fill in the gaps in the sports world's scheduling by finding a way to be relevant when the competition is at its slowest points.¹³⁰ Whether it is by these methods or others, MLS certainly knows the television deals it makes in 2014 must include some significant changes from the current ones in order to jumpstart this lagging aspect of its growth.

Current ratings will certainly not give the league much more leverage in its upcoming negotiations, but the industry-wide timing could not be better. Live sports programming- because of its "DVR-proof" nature, the high level of ancillary programming (such as highlight shows and sports debate shows) it enables, and its appeal to lucrative 18-35 male demographics- has been sky-

<http://www.ussoccerplayers.com/2013/08/mls-faces-tough-questions-on-tv-versus-tickets.html>.

¹²⁹ *Id.*

¹³⁰ Jay Bell, *How Can MLS Attract TV Viewers?*, *The Shin Guardian*, (Oct. 24, 2013), <http://www.theguardian.com/football/the-shin-guardian-blog/2013/oct/24/mls-four-ways-attract-viewers>.

rocketing in value.¹³¹ Most of the country's major sports programming has already been locked in to long-term deals: the NFL, MLB, NASCAR, PGA Tour, and NCAA Men's Basketball tournament have all signed television deals lasting until at least 2021, while the NBA's current deal extends until 2016.¹³² The new broadcasters looking to compete with ESPN as 24-hour sports networks (such as beIN Sport and Fox Sports 1) are hungry for content to fill their schedules. The time to make the jump to a mainstay of American sports on TV is now; FC Dallas operator Dan Hunt called the upcoming negotiations "the most important in league history."¹³³ MLS has a very good chance to boost its television ratings to levels more commensurate with its attendance numbers (and booming online traffic)¹³⁴ if it can capitalize on these

¹³¹ See Todd Spangler, *Sports Fans: Get Ready to Spend More Money to Watch your Favorite Teams*, Variety, (Aug. 13, 2013, 3:00 PM), <http://variety.com/2013/tv/news/sports-fans-to-spend-more-money-to-watch-favorite-teams-1200577215/> (discussing how the average cost of live sports programming increased by 12% in 2013, double that of non-sports programming, and on-trend with growth patterns of the past decade. Because sports are often packaged into basic programming bundles, the cost is spread out among consumers regardless of their individual interest. For example, ESPN and ESPN2 together cost an average of \$5.71 per subscriber, while most channels cost less than \$1.).

¹³² *Id.*

¹³³ Matt Barbour, *FC Dallas' Dan Hunt: "Life-changing" MLS TV contract could be closer than it seems*, MLSSoccer.com, (Sept. 5, 2013), <http://www.mlssoccer.com/news/article/2013/09/05/fc-dallas-dan-hunt-life-changing-mls-tv-contract-could-be-closer-it-seems>.

¹³⁴ See Christopher Botta, *Playoff Races, U.S. Team help MLS Web Numbers Surge*, Sports Business Journal, (Oct. 28, 2013), <http://www.sportsbusinessdaily.com/Journal/Issues/2013/10/28/Leagues-and-Governing-Bodies/MLS-web.aspx> (discussing how MLS revamped its website operations in 2010, and has been steadily building its online presence since then. For example, web traffic numbers for the league and its team sites exceeded five million users in September 2013, a 113% increase from a year earlier. The league's collective online properties were the most-frequented digital soccer properties for 22 of the past 24 months, beating out competitors like ESPN.).

factors by securing a better set of broadcast deals in 2014. Recognizing the critical nature of their next broadcast deal, the league brought on Gary Stevenson, a sports marketing and media rights expert who most recently helped the PAC-12 Network land a \$3 billion dollar broadcast deal, to make the most of the opportunity.¹³⁵

The television deal is significant for the league's collective bargaining relationship with its players, because the league will almost certainly need to reach a new CBA with the union without suffering a protracted legal dispute in order to secure the new broadcast deal it needs. Knowing this, the union will likely see the 2014 CBA renewal as a golden opportunity to press the issue on gaining some leverage for its members, while remaining cognizant of the fact that any serious labor dispute would be disastrous for both sides by killing the league's upward momentum. This delicate balance will play out behind closed doors, but there is plenty of reason to believe some kind of significant change will result.

2. Growth in Quality of the On-Field Product

a. Talented Players Require More Player-Friendly Rules

MLS has shown significant growth in recent years in the quality of soccer being played on the field. Like financial growth, this increase in talent has highlighted problem areas of the current league structure and increased pressure for change. In the league's first

¹³⁵ Christopher Botta, *Garber, MLS set for TV Talks*, Sports Business Journal, (Aug. 5, 2013), <http://www.sportsbusinessdaily.com/Journal/Issues/2013/08/05/Leagues-and-Governing-Bodies/Garber-MLS-TV.aspx> (discussing how Stevenson will serve as President and Managing Director of MLS Business Ventures).

decade or so of existence, MLS play could euphemistically be described as “scrappy” or “staccato,” as matches seemed to trend towards frenetic skirmishes that bounced around the pitch with little sense of rhythm or natural flow to the game. Goals seemed to result as frequently from random opportunities or defensive errors as from deliberate offensive build-ups. Teams that were capable of playing in a coherent style trended towards the direct, long ball approach of the Tony Pulis-era Stoke City teams that leaned more on physical strength and endurance than technical skill, creativity, or vision. This kick-and-run style game is often derided as the crutch of an untalented squad, while the “right way” to play- as Thierry Henry put it in a 2011 interview¹³⁶- requires the ability to retain possession and pick apart a defensive scheme rather than forcing a way through it. While there are limited statistics available for early MLS games, match report sheets would probably show comparatively low percentages of passes completed, high numbers of long aerial passes attempted, and few touches involved in each chance creation.

Many of today’s MLS teams play much more purposeful, individualized styles. The league maintains a reputation for scrappy play, but there are coherent tactical philosophies manifested on the field. The free-flowing, aggressive teams deployed by Caleb Porter and Jason Kreis (of Portland and Kansas City, respectively) deploy mainly in a 4-3-3 or 4-4-2 diamond formation, press high up the field when not in possession, complete a high number of short passes and overlapping runs, and almost always win the possession

¹³⁶ Simon Evans, *Thierry Henry Interview*, Reuters Soccer Blog, (February 28, 2011), <http://blogs.reuters.com/soccer/2011/02/28/thierry-henry-interview/>, (discussing having a club identity, and how passing the ball on the ground is the way football should be played.)

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battle by a significant margin.¹³⁷ Bruce Arena's Galaxy is proficient as a counterattacking squad that sits back in its own half in a 4-4-2 formation, luring the opposition into stretching the space between its players before counterattacking quickly down the wings. When using this strategy, they consistently attempt a high number of "through passes" (meaning a pass into space behind defenders that a teammate will run on to) and crosses in to the opponent's goal area per game.¹³⁸ The first style requires attacking players who are comfortable with the ball at their feet in traffic and a pair of holding (defensive) midfielders with exceptionally good field vision and a high work rate, while the second style requires very disciplined defensive players with long passing ability and attacking players with both great speed and the ability to beat a defender one-on-one. Unsurprisingly, all three teams are among the league's best. This evolution is only possible because rosters are now filled with talented players who have specific, developed skillsets.

It is difficult to find objective measures by which to measure the growing talent level in the league because meaningful inter-league competition is rare. Offseason friendlies with European giants feature neither first-team squad choices nor meaningful outcomes, but two good indicators do exist. The first is CONCACAF Champions League, a season-long tournament featuring the top teams from each league in FIFA's North-and-Central-America confederation. Four MLS teams compete each year, with qualification earned the season prior by achieving the best regular-season record, winning the U.S. Open Cup (a similar season-long tournament

¹³⁷ Major League Soccer 2013, WhoScored.com, <http://www.whoscored.com/Regions/233/Tournaments/85/USA-Major-League-Soccer>

¹³⁸ OPTA League Comparative Statistics, Whoscored.com

featuring American teams from MLS and lower level leagues), or making the MLS Cup finals.¹³⁹ The tournament tests not just a team's talent but depth as well, since the farther a team advances, the more mid-week games it will have to play in addition to the regular league games each weekend. While no MLS team has yet won CONCACAF Champions League in its modern form (from 2008 until present), in each year the overall record of MLS teams in the competition has improved, Real Salt Lake reached the finals in 2011, and there are three MLS teams currently competing in this year's eight-team quarterfinal.¹⁴⁰

The second indicator is the number of MLS players selected to compete in U.S. Men's National Team games. The national team squad is assembled on a game-by-game basis (with rosters locked for the duration of major competitions) by its coaching staff who selects, depending on the nature of the contest, the best eighteen players available or a mix of current top players with promising young players who have the potential to one day represent their country on the biggest stage. Four years ago, Bob Bradley took only four MLS players with him to South Africa in his roster of twenty-three. Of the fifty-five players that earned call-ups in the past twelve months, twenty-five ply their trade in MLS.¹⁴¹ An

¹³⁹ Pablo Maurer, *CCL: How North American Teams Qualify for CONCACAF Champions League*, Sounders FC, (Mar. 31, 2013, 4:24 PM), <http://www.soundersfc.com/news/articles/2013/03-march/how-teams-qualify-for-the-concacaf-champions-league.aspx>.

¹⁴⁰ See Scott French, *Galaxy: Champions league Opener*, ESPN LA (July 27, 2010 6:52 PM), http://espn.go.com/blog/los-angeles/soccer/post/_id/2301/galaxy-champions-league-opener; see also, *Commentary: MLS teams must plan for CONCACAF Champions League success by starting at home*, MLS Soccer.com (Mar. 21, 2014, 5:43 AM), <http://sports.yahoo.com/news/commentary-mls-teams-must-plan-181454951--mls.html>.

¹⁴¹ This number includes Clint Dempsey (re-entered MLS mid-season) but does not include exported former MLS players such as Geoff Cameron and Brek

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MLS-dominated U.S. National Team cruised to victory in this past summer's Gold Cup (the CONCACAF quadrennial national team tournament) with impressive showings by MLS lifers such as Chris Wondolowski, Kyle Beckerman, and Omar Gonzalez.¹⁴² Projected 2014 World Cup rosters include as many as ten or eleven MLS players, with at least seven almost certain to earn a ticket.¹⁴³ Making this more impressive is the fact that the man making these selections, German legend Jürgen Klinsmann, has shown a preference for German-American players developed in his home country who play there or elsewhere in Europe.¹⁴⁴

An increase in the talent level of the MLS is significant for structural purposes because it puts pressure on the league to distribute payroll dollars more evenly and increase interchange with other soccer leagues. MLS players will likely be increasingly uncomfortable with earning wages that are small fractions of those earned by high-priced Designated Player imports as more and more of

Shea. See *All USA National Football Team Players (2013-2014 statistics)*, 11v11.com, <http://www.11v11.com/teams/usa/tab/players>; compared with a Roster of all MLS Players, MLS Soccer.com, <http://www.mlssoccer.com/players>.

¹⁴² *USA National football Team players: CONCACAF Gold Cup 2013*, 11v11.com, <http://www.11v11.com/teams/usa/tab/players/season/2013/comp/425>.

¹⁴³ Ives Galarcep, *A look at the projected U.S. World Cup squad*, Goal.com, (Oct. 17, 2013, 1:27 AM), <http://www.goal.com/en-us/news/1679/us-national-team/2013/10/17/4338887/ives-galarcep-a-look-at-the-projected-us-world-cup-squad>.

¹⁴⁴ German-born players such as Fabian Johnson, Timothy Chandler, and Terrence Boyd have joined Jermaine Jones as U.S. national team regulars, and Klinsmann has expressed a keen interest in the future national team allegiance of young dual-citizenship players like John Anthony Brooks and Julian Green. See generally Mathew Wagner, *The Ten Best German-American Soccer Players*, American Soccer Now.com, (Mar. 8, 2013, 10:31 AM), <http://americansoccernow.com/articles/who-are-the-10-best-german-american-soccer-players>.

them find their worth validated by national team call-ups. As front office personnel from outside the league see more and more MLS players competing at the international level, the demand for their services will increase, pressuring the league to facilitate more equitable contracts or risk losing quality players from the outset of their careers or after their first contracts expire. Blue chip youngsters like Darlington Nagbe and Diego Fagundez may think twice about re-signing with MLS when the time comes if offers from overseas are available and the comforts of home soil come with the unpalatable qualifiers of inequitably low salaries and strictly controlled movement from team to team. Their peers in the next generation may even hesitate to commit to beginning their careers in MLS at all. This issue is sure to be highlighted next summer in Brazil, when the World Cup brings together the entire international soccer community.

By increasing a player's ability to control their own movement within the league and secure a salary in-line with their performance, MLS could keep its position as an attractive option for up and coming American players both in MLS and abroad, and further its standing among potential international signings. While MLS already boasts a 45% foreign-born player pool, many of these internationals were actually developed as soccer players in the U.S., and another significant number arrived in MLS already in the twilight of their careers.¹⁴⁵ An increased player interchange with other leagues would raise the quality and quantity of foreign playing styles, tactics, and philosophies that American players are exposed to. Experiencing different playing styles is an extremely valuable asset for a player as an individual, particularly one on

¹⁴⁵ Kevin Baxter, *Is MLS Failing to Develop U.S. Players?*, LA Times, (June 2, 2013), <http://articles.latimes.com/2013/jun/02/sports/la-sp-baxter-soccer-20130602>.

whom the hopes of a nation may one day rest as he takes the field at a World Cup.

For the likes of Omar Gonzalez and Matt Besler, American defenders playing in MLS and likely to earn spots in Brazil, regularly marking opponents like Panamanian Blas Perez and Italian Marco DiVaio (MLS players developed in Latin countries, where a much more cerebral and Machiavellian style of play predominates) is an invaluable learning experience that will serve them well next summer. This same type of multicultural development applies for MLS exports like Geoff Cameron, an American now playing for Stoke City in England. A high level of cross-pollination improves the quality of individual players and of a league as a whole. Legendary Italian Serie A striker and EPL manager Gianluca Vialli sums up this phenomenon when he writes “one thing I’ve learned in my two and a half years of research is that diversity- of playing styles, training, techniques, tactical systems- is at the heart of footballing success.”¹⁴⁶ As MLS players take the stage next summer to showcase just how far the league has come, the focus on how the league can alter its structure to better develop, gain, and retain talented players in MLS and on the U.S. National Team will surely increase.

3. Single Entity Status Is Irrelevant And Should Not Hinder Change

Going back to the league’s founding, we know that a significant consideration in choosing the restrictive single entity structure was the possibility that such a structure would protect the league from a potential antitrust challenge brought by the players under Section 1

¹⁴⁶ Gianluca Vialli, & Gabriele Marcotti, *THE ITALIAN JOB: A JOURNEY TO THE HEART OF TWO GREAT FOOTBALLING CULTURES* 90 (London: Bantam, Print. 2007).

of the Sherman Antitrust Act. When such a challenge was brought, the appellate court declined to answer the single entity question, but indicated that they had some doubts as to the validity of the league's position. Since Fraser, there are three developments stemming from league growth that weaken the alleged single entity status further: the increased diversity of MLS' operator-investor cadre, the Designated Player exception, and the proliferation of soccer-specific stadiums. Each of these developments serves in some way to separate the interests of each MLS club from the others, thus increasing their identities as separate entities and weakening their legal claim to "a complete unity of interest" that would allow the league's structure to fall under the Copperweld precedent.

a. The Designated Player Exception Increases Entity Separation

The Designated Player exception furthers the divergent economic interests of the league's clubs because it allows teams to contract with an employee (the player) separately from the league. While the league still pays a portion of the player's salary, the majority is paid by a given club which increases that operator-investor's independent expenses and divests some control over players from the league itself. Before the exception was introduced, every club technically had an equal interest in all of the league's players. Now, because teams are paying out of pocket for Designated Players, the unity of interest is diminished and will continue to diminish as the value of these contracts rises.¹⁴⁷ Allowing teams to sign up to three players on their own terms, or choose not to, gives them

¹⁴⁷ See 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, 421 (2008).

interests separate from each other. This does not necessarily destroy the “hybrid entity” concept that the First Circuit vaguely referenced in *Fraser* because “the league is likely still much closer to a ‘unity of interests’ than other U.S. professional sports leagues, and may be treated accordingly in the eyes of the law.”¹⁴⁸ However, there is no question that the introduction of the exception fundamentally alters the analysis of the league’s structure should any future legal inquiry into its entity status occur.

b. Team Ownership of Stadiums Increases Entity Separation

The proliferation of soccer specific stadiums does more than just contribute to the overall picture of growth for the league. It also increases the separation of interests between operator-investors and the league as a whole. When the league began play, none of the teams played in soccer-specific stadiums. Rather, they were second tenants to established franchises in other sports leagues, and the operator-investors split the stadium rental costs 50/50 with the league itself.¹⁴⁹

Today, almost all the league’s teams play in soccer-specific stadiums owned by the operator-investor groups who control each team. Like Designated Player contracts, stadium ownership constitutes an investment made by a specific team’s operator-investor in which the rest of the league has no stake. Stadium ownership is both an assumption of liability and a source of revenue for an individual team that further separates the unity of interest between that team and the rest of the league. The impact of this trend was predicted by Thomas Stuck in 2004, when he warned that “the

¹⁴⁸ *Id.* at 429.

¹⁴⁹ *See Weiler, supra* note 10.

more autonomy operator-investors wield, or the more their actions display entrepreneurial interests separate from those of MLS, the less effective the single entity-defense will be in protecting the league from Section 1 scrutiny.”¹⁵⁰ Stuck was particularly concerned with expansion teams building stadiums as part of their MLS bid (as we see currently in Orlando), and existing teams building soccer-specific stadiums in part via public financing (such as D.C. United’s new stadium plan.)¹⁵¹ In the first scenario, an MLS investor-hopeful is acting purely as an entrepreneur in building a new stadium, and will likely need to negotiate with the league over the terms of the stadium’s use.¹⁵² In the second scenario, an operator-investor is negotiating with the public individually and may push for terms that are not completely in line with the league’s wishes, which “smack(s) of entrepreneurial interests.”¹⁵³

c. Diversified Operator-Investor Cadre Increases Entity Separation

The nascent MLS opened its doors carrying just a small cadre of operator-investors,¹⁵⁴ with heavyweight financiers such as Phil Anschutz, Lamar Hunt, and Robert Kraft owning stakes that stretched across multiple teams. This reinforced the single-entity concept, with ownership interests closely aligned with the league rather than any individual team. Currently, there are nineteen

¹⁵⁰ Thomas D. Stuck, *Facility Issues in Major League Soccer: What Do Soccer Stadium Have to Do with Antitrust Liability?*, 14 Marq. Sports L. Rev. 55, 563

¹⁵¹ *Id.*

¹⁵² *Id.* at 566.

¹⁵³ *Id.* at 565.

¹⁵⁴ *Id.* at 554 n.33 (naming nine-operator investor in the suit. At least three were tied to Phil Anschutz and at least two to Lamar Hunt, meaning a maximum of six separate operator-investor groups).

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separate operator-investor groups, one behind each team.¹⁵⁵ Almost all of these groups, at least publicly, are controlled by investors that have no stake in the other teams. With recent sale of the Columbus Crew's operator-investor rights to Precourt Sports Ventures by Hunt Sports Group,¹⁵⁶ leaving FC Dallas as the Hunts' remaining MLS property, only Houston and Los Angeles now share a common investor in AEG, Phil Anschutz's massive sports conglomerate.¹⁵⁷ This effects the single entity designation in a way similar to the effect of the Designated Player and team-owned stadiums- it reduces the commonality of interest between the operator-investors and the league. Certainly Anthony Precourt (the proud new operator-investor of the Columbus Crew) still shares some unity of interest with the league that pays his players, pays out his share of collective revenue, and makes his investment worth something. However, he will need to attract crowds to his Columbus Crew Stadium, perhaps by investing in some Designated Players with his own money, and beat other MLS teams whose particular successes and failures he has no direct interest in so long as they don't fail entirely. It seems an easy argument to make that he, like eighteen others, have developed some entrepreneurial interests of their own.

¹⁵⁵ See MLS Club History, *supra* note 84. (Each individual club page lists the owner behind their respective operator-investor groups, with Phil Anschutz only appearing twice; Houston Dynamo and Los Angeles Galaxy.)

¹⁵⁶ *Precourt Sports Ventures acquires Columbus Crew*, Thecrew.com, (July 30, 2013), <http://www.thecrew.com/news/2013/07/precourt-sports-ventures-acquires-columbus-crew>.

¹⁵⁷ See *supra* text accompanying note 154.

d. Brady v. NFL May Negate MLS Players' Union's Ability To Bring Antitrust Claims

One additional factor that renders the single entity consideration irrelevant is the fact that recent precedent indicates the MLS Players' union may not be capable of bringing an antitrust claim against the league as a bargaining tactic at all. In 2011, an unsuccessful CBA renegotiation between the NFL and its players' union resulted in union decertification and a lawsuit in which the players claimed violation of the Sherman Antitrust Act. On appeal, the Circuit Court found that the injunction issued against the NFL's lockout of its players was prohibited by the Norris-LaGuardia Act, because the union's decertification did not automatically remove it from protections regarding parties in an ongoing labor dispute.¹⁵⁸ In doing so, the court left open whether or not members of a decertified union can bring antitrust challenges in an ongoing labor dispute, and if not at what point the "dispute" effectively ends for purposes of the non-statutory labor exemption to antitrust liability. The fact that such a strategy may be precluded makes it unlikely that MLS players would see league structure changes as an opportunity to re-open the issues in Fraser, even in the case of a serious collective bargaining dispute.

e. Single Entity Status Is Irrelevant And Should Not Hinder Change

Together these four factors should mitigate any consideration of the league's legal classification as "single entity" going forward. While there are certainly important elements of the league's structure that both support the single entity classification and have separate justifications relating to the business aspects of the league,

¹⁵⁸ See Passer, *supra* note 115, at 638.

the “single entity” structure itself has no value outside of antitrust law. Because of the diversification of the operator-owner cadre, the introduction of the Designated Player exception, and the proliferation of soccer-specific stadiums, MLS probably no longer qualifies as “single entity” from an antitrust standpoint. Regardless, even a decertified players’ union is likely barred from bringing a claim - at least for some significant time after decertification - under the non-statutory labor exemption. As MLS leadership enters this critical period of collective bargaining with the player’s union, both sides should be well aware that the preservation of some semblance of single entity from a legal perspective is no longer a relevant factor in the decisions they make about the league’s future.

IV. Predicting Changes In 2014

Growth of the MLS since its last collective bargaining agreement has changed the landscape of the league in a variety of ways. The steady revenue streams that operator-investors enjoy have helped the league expand, and lessened the need for restrictions in the name of financial stability. The increasingly large amounts of money spent on bringing in star players has highlighted the inequity between those players and their low-salaried peers, and brought increased scrutiny to the skewed payroll numbers that result from players being unable to leverage new contracts when they play well. The league is filled with more talented players playing attractive, stylized soccer, increasing the pressure to lower the structural barrier between MLS and international leagues. Growth has ended the single entity debate, and allowed operator-investors to worry less about the league as a whole and more about how they can bring championships to their respective fan bases. The 2014 collective bargaining agreement will reflect this new landscape, by

altering the league's approach to player salaries and player movement. If we can learn anything from the league's past, it is that MLS will approach these changes carefully and deliberately, altering the structure in ways that address new realities without jeopardizing the progress it has made towards becoming one of the world's great soccer leagues.

a. Streamlining Player Salary Mechanisms

The 2014 collective bargaining agreement will almost certainly change the way MLS players are paid. Limitless contracts allowed for a select group of players and a strict cap for others is not an optimal method for allowing discretionary spending when the players all belong to the same collective bargaining unit. Since the overall goal is to keep player salaries at a percentage of revenues that is safe for the league's future while allowing operator-investors to invest more in their team's success if they so choose, the league would be wise to look to a source that currently operates a successful model with the same goals in mind: the NBA.

The National Basketball Association (NBA) uses a "soft" salary cap system designed to balance the interests of deep pocketed franchises with their thriftier competitors. The league has an annual per-team salary cap, currently a little over \$58 million dollars. The salaries of all players on a team's active roster count towards each team's salary cap, with a complex system accounting for mid-season trades, injury reserves, and other contingencies. Teams may exceed the salary cap in certain specific situations, primarily by executing contracts that will allow them to keep players whose increased value would otherwise prohibit their current teams from offering them what competing teams could on the open market. Teams that end up with payrolls exceeding a given amount, called the tax level, must pay a "luxury tax" on the amount in excess of

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the tax level at a current rate of 100% (1\$ for every 1\$ above the tax level) that will change to an incremental rate in later years according to the league's current CBA.¹⁵⁹ The tax level is calculated using the average amount of "Basketball Related Income" (BRI) that each team has generated that year, and the funds collected via tax are split between the league's non-taxed teams or used for "league purposes."¹⁶⁰

In addition to these salary cap provisions, the NBA also places 10% of each player's salary into an escrow fund where it is held until the total BRI and total player payroll information can be calculated. The funds held in escrow are used as a buffer to help ensure the players get the share of BRI they agreed upon, but not more: If player salaries are at or below the CBA-mandated percentage of total BRI, the funds held in escrow are returned to players (along with any additional funds needed to reach the stipulated percentage), but if they are over the BRI percentage set then the money is returned to the owners. The league also implements a minimum payroll requirement, and any team that fails to meet this minimum must distribute the amount of the shortfall amongst its players at the end of the year.¹⁶¹

As with the team's payroll as a whole, individual player salaries are capped at a maximum amount, based on the number of years the player has been in the league. Currently, a player in his first six years may only be offered a maximum of 25% of the team salary cap, a player in his seventh to ninth year may be offered 30%, and a player with more than nine years' experience can make 35% of the cap, or about \$19 million dollars for the 2012-2013

¹⁵⁹ Larry Coon, *NBA Salary Cap FAQ*, Cbafaq.com, (last updated Jan. 15, 2014), <http://www.cbafaq.com/salarycap.htm#Q21>.

¹⁶⁰ *Id.* at Question 22

¹⁶¹ *Id.* at Question 15

season.¹⁶² However, the maximum amount is only applicable in the first year of a multi-year contract, subject then to a complex set of limits on how much a player's salary can increase from year to year.¹⁶³ These limits, depending on a player's classification, a team's status as a tax payer or non-tax payer, and other such variables, range between 4.5% and 7.5% raise per year.¹⁶⁴

The overall effect of these various restraints is a fairly tight control of how much teams are spending overall and on individual players, without handicapping a team's ability to fill a roster on their own terms. Competitive balance is preserved by preventing the wealthiest teams from buying up all the best players and dis-incentivizing teams from spending too much overall, but also forcing "welfare" recipient teams to spend enough to actually field a competitive roster. Financial stability is achieved by capping the overall percentage of revenue that is spent on players each year, and by redistributing some of the largesse spent by the wealthier teams to the less wealthy teams. The model also allows the league to incentivize certain types of behavior- in the NBA's case, that means keeping star players on their current teams, but cap exceptions could also be crafted towards other goals like developing young talent.

For MLS, a similar model would look something like this: a cap number set each year via collective bargaining the way it is now, with exceptions for the types of behaviors the league would like to incentivize, such as retaining current players that are eligible to play for the U.S. national team or signing homegrown players. The salary cap number, rather than being essentially an amount paid to players by the league on behalf of a given team, could be distribut-

¹⁶² *Id.* at Question 16

¹⁶³ *Id.* at Question 17

¹⁶⁴ *Id.* at Question 25

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ed as a payment from the league to each team, becoming a true salary “budget.” All players on a team’s roster would be paid from this sum, including the players that are currently classified as off-budget. Teams would need to be required to spend the entirety (or a high percentage) of the lump sum on player salaries, or face the same penalty that lows-spending NBA teams do of owing the missing amount to their current roster of players.

A luxury tax could be assessed by the league for teams using their own funds on top of the “budget,” though rates needn’t be as high as they are for NBA teams since the extra funds expended would already be direct from a team’s pocket in addition to the amounts contributed to the league through team revenues and then redistributed via salary budget. The tax could be put towards operating expenses, which would ostensibly help to raise the next year’s salary budget sum. In order to keep player salaries tied to revenues, a retention fund system could be used that would act as a buffer, keeping player salaries from exceeding a certain percentage of revenues. Because the league is understandably guarded about its financial data relating to revenues, this could be calculated internally and published simply as an overall number rather than a percentage of revenues.

By adopting this system, the MLS league structure would sacrifice some control over costs and competitive balance measures in the name of team autonomy and concession to players’ interests.¹⁶⁵ players on a team's roster would be paid from the same source, regardless of whether they were contracted under a certain exception. Even if teams were given a Designated Player-type excep-

¹⁶⁵ These measures would shift the balance between these interests in the opposite direction from how they affected the NBA, which was coming from a position of higher team autonomy and a higher share of revenues directed to player salaries.

tion, there would be less incentive to sign that player to a contract inequitably larger than his teammates' because all salaries would be coming out of the same pool of funds. This would incentivize teams to spread available funds across their rosters, increasing the overall quality, rather than investing heavily in a select few players. Operator-investors could look abroad more frequently, with the ability to sign more players to mid-level wages instead of a few large contracts and many paltry ones. The league would still be protected from overextension of resources by a combination of the cap and the retention fund system, while owners would have increased autonomy over which players to sign and how much to spend on them.

b. Bolstering the Re-Entry Draft

MLS' system for handling player movement is almost sure to see some liberalizing changes in the upcoming collective bargaining agreement. Unlike with payroll structure, no major American sports league offers a helpful direct analogy because every one of these leagues is operating in essentially a closed universe of talent. The NFL, NBA, and MLB are the de facto destination for the best players in each respective sport, and thus retention of talent in the face of international competition is a non-factor. As a young and relatively small league in a global sport, MLS must protect itself from talent drain in addition to juggling financial stability and competitive balance issues. Therefore, simply opening up player movement by eliminating the re-entry draft, discovery rules, allocation order, and similar functions is not a feasible way to accommodate the league's growth. Instead, the current rules are likely to be modified to accommodate the need for higher player input in movement and increased cross-pollination with international

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leagues, without jeopardizing MLS' ability to protect itself from the open market.

One alteration that would work in conjunction with a restructured salary cap to increase compensation and leverage for MLS veterans without jeopardizing the league's competitive balance and financial security would be to include an arbitration element in the Re-Entry Draft. The current Re-Entry Draft rules offer little opportunity for a player to secure a more lucrative and favorable contract. Players 25 and younger are guaranteed only a continuation of the terms they would have been playing under should their team have picked up their option, while veteran players are only guaranteed at least a 5% increase in their salary. As such, the Re-Entry Draft is not currently a viable option for a player who has played beyond expectations and would like a contract that reflects his performance. Currently, these players must either negotiate an extension before their contract expires, or leave MLS for opportunities elsewhere.

A glance at recent Re-Entry Draft results confirms that the pool of players in the current model is mostly a boneyard of veterans who no longer fit the rosters of their old teams but did not command enough interest to facilitate a trade. An attached exhibit lists the fourteen players selected in the 2012 Re-Entry Draft along with their guaranteed compensation for 2012 and 2013, respectively.¹⁶⁶ Of the ten who played in MLS in 2013, nine received a lower guaranteed compensation than the year before and the tenth received the same.¹⁶⁷ The mechanism is simply a last resort for players who would like to continue playing in MLS, but were

¹⁶⁶ See *infra* Exhibit B.

¹⁶⁷ *Id.*

unable to broker a new deal with their current team and were not deemed valuable enough for a sign-and-trade deal.

Contract arbitration as used in Major League Baseball is a clever method for attaching an appropriately valued contract to a player at or near the end of a current deal. MLB's specific eligibility and procedural rules for arbitration are complex but the concept itself is simple: after negotiation, the player and team each simultaneously submit a final offer of contract terms to a neutral arbitrator. The arbitrator picks whichever offer they believe to be the most equitable, based on the player's past performance, indicators of future performance, salaries of comparable players, and related factors.¹⁶⁸ The arbitrator may not split the difference, and must pick one of the two offers.¹⁶⁹ Thus, both sides are forced to make a realistic determination of the player's worth and submit an offer they believe closely reflects the player's "true" value. Most of the time, arbitration-eligible players are able to come to terms with the team before submitting offers because it is preferable to both sides to avoid risk.¹⁷⁰ For the MLS Re-Entry Draft, this could be accommodated by simply allowing the team to make an offer before the arbitration process is used.

The obvious criticism of using arbitration in soccer is that the sport is traditionally far less statistics-driven than baseball, making objective analogies to comparable players more difficult. However, as Chris Anderson and David Sally show in *The Numbers Game*, the past decade or so has seen a massive increase in the proliferation of soccer analytics. OPTA and Prozone are now just two of dozens of companies tracking, conglomerating, and analyzing data

¹⁶⁸ Thomas Gorman, *The Arbitration Process, Baseball Prospectus*, (Jan. 31, 2005), <http://www.baseballprospectus.com/article.php?articleid=3732>.

¹⁶⁹ *Id.*

¹⁷⁰ *See id.*

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points from soccer games, some for public consumption and others in the direct employ of teams.¹⁷¹ Tracking a player's touches, movement, and even heart rate during a game are all very feasible and together offer more than enough data to make informed decisions about a player's value relative to his peers. In fact, MLS itself has already entered the "stat revolution," partnering with Adidas to harvest statistical data through chips implanted in player's cleats.¹⁷²

Another hurdle to overcome would be the pay inequity and pay-to-performance correlation problems inherent in the current MLS system. Because the arbitration method relies on statistical comparisons to similar players as a way to argue that the player in question deserves similar pay, it would only be effective if coupled with a player pay system that at least loosely correlates pay with performance. The payroll restructuring suggested above would assist in correcting this issue, as would any other player pay alteration that helps the league eliminate its problems with inequity and low pay-to-performance correlation.

Replacing the "Bona Fide Offer" aspect of the Re-Entry Draft with an arbitration provision would convert the process into a method for veteran MLS players to receive new contracts that actually reflect the player's value, without the open competition of free agency that MLS so clearly wants to avoid. Depending on how significantly the league would want to alter its player movement restrictions, the "genuine offer" provision of the Re-Entry Draft second round could also be replaced with an arbitration element, or the "Bona Fide Offer" element currently used in the first round. This would increase leverage for young players nearing the end of

¹⁷¹ See Anderson & Sally, *supra* note 121, at 1.

¹⁷² *Id.* at 17.

their rookie deals and mid-level veteran players with some years of solid contribution left to give, because they would no longer be forced to choose between renegotiating with a team that has no incentive to better their current contract, leaving MLS, or being re-assigned to a new team on contract similar to their current one. Increased leverage for this type of player would most likely lead to considerations like trade veto options becoming more commonplace, making the league a more attractive destination for foreign talent with a desire to play somewhere specific in the U.S. but lacking the top-tier clout to sign a Designated Player contract. Most importantly, it would constitute a concession to the player's union desire to increase player leverage without introducing free agency and destroying the league's closed system.

V. Conclusion

David Peisner's article on Galaxy rookie Kofi Opare accurately captures the sentiment that seems to pervade most of the discussion around MLS's structure and relationship with its players. Yes, it is problematic to have most players making so little money while a small group makes so much. Yes, it is stifling to the league's growth and integration with the soccer world to exercise centralized control over which players can play where. But these issues can be solved, and they are only relevant because the league has carefully and sustainably built its way up to the point where it is prominent enough for people to take notice of things like player salary inequality and how players move from team to team. In other words, for this dialogue to exist at all is exciting for American soccer fans, and evidence of significant accomplishment.

Tied directly to this optimistic quality of the MLs structure debate is the fact that everyone involved, from fans to players and agents to team and league officials, seems to believe that all parties have

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the best interests of American soccer at heart. Hundreds of opinions regarding MLS' structure have been articulated in writing, most of them advocating for change of some sort, and yet virtually none of them conclude that MLS leadership has been motivated thus far by anything other than to better American soccer's place in the sporting world. A cynical take would emphasize the way the MLS' structure funnels revenue to the league's coffers by keeping the players' share so low, but even the harshest of informed critics seem to concede that the main rationales for this aspect are survival and growth, not profiteering. For example, Peisner's criticism is weighted by ample discussion of the NASL's failures, and how this influenced the understanding of MLS' architects that keeping costs low was a matter of life and death for the young league.

MLS enters its 18th year as the longest running professional soccer league in U.S. history, a significant landmark directly attributable to its centralized, highly-controlled structure. The debate is not whether MLS' structure was appropriate to accomplish the league's early objectives- a decade of sustained growth has proven Mr. Abbott and Mr. Rothenberg's blueprint to be a wise one. The question now is whether the league has matured enough to sustain the liberalizing changes to its structure that are necessary for it to take the next step. We know that there will be significant pressure for MLS to loosen its grip on its teams and players in the next few years, and we can be cautiously confident that the league is robust enough to survive any ensuing growing pains. What remains to be seen is whether and how the league will adjust its model in a way that allows the growth and maturation to continue towards the ultimate goal of becoming an elite soccer league by 2022.

Exhibit A: Player Pay and Performance Correlation Among Attacking Midfielders

<u>Player Name</u>	<u>Age, Season Appearances</u>	<u>OPTA Rating, 2013 Guaranteed Compensation</u>
Lloyd Sam, NYR	29, 24	6.56, \$130,000
Peguy Luyindula, NYR	34, 24	6.38, \$80,000
Soony Saad, SKC	21, 25	6.74, \$46,500
C.J. Sapong, SKC	24, 29	6.86, \$92,000
Oscar Boniek Garcia, HST	29, 27	7.39, \$161,250
Diego Fagundez, NER	18, 33 (Home Grown)	6.85, \$127,196
Chad Barrett, NER	28, 21	6.41, \$110,709
Saer Sene, NER	27, 24	6.45, \$211,537
Justin Mapp, MON	29, 28	7.02, \$135,500
Andres Romero, MON	23, 31	6.55, \$48,000
Sanna Nyassi, MON	24, 22	6.48, \$147,625
Rodney Wallace, PRT	25, 31	7.17, \$150,000
Darlington Nagbe, PRT	23, 38 (Generation adidas)	7.13, \$266,000
Khalif Alhassan, PRT	23, 34	6.51, \$89,250
Luis Gil, RSL	20, 34 (Generation adidas)	6.60, \$213,833
Lamar Neagle, SEA	26, 32	7.08, \$48,400
Gyasi Zardes, LAG	22, 29 (Home Grown)	6.84, \$173,000
Landon Donovan, LAG	31, 24 (Designated)	7.45, \$2,500,000
Hector Jimenez, LAG	25, 27	6.57, \$46,500

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Attiba Harris, COL	28, 30	6.95, \$173,275
Deshorn Brown, COL	22, 32 (Generation adidas)	6.77, \$113,000
Nick LaBrocca, COL	28, 24	6.39, \$138,333
Mike Magee, CHI	29, 22	7.57, \$191,666
Patrick Nyarko, CHI	27, 30	7.27, \$249,500
Dilly Duka, CHI	23, 31	6.75, \$273,000
Joel Lindpere, CHI	32, 25	6.60, \$205,000
Domonic Oduro, CLC	28, 34	7.02, \$122,015
Bernardo Anor, CLC	25, 20	6.98, \$46,500
Sebastien Le Toux, PHI	29, 32	6.90, \$212,812
Danny Cruz, PHI	23, 32	6.57, \$126,500
Bobby Convey, TOR	30, 21	6.69, \$215,000
Chris Pontius, DCU	26, 22	6.95, \$361,000
Nick DeLeon, DCU	23, 25	6.68, \$105,400
Kyle Porter, DCU	23, 27	6.59, \$54,992
Camilo Sanvezzo, VAN	25, 32	7.33, \$247,500
Russell Tiebert, VAN	20, 24 (Home Grown)	6.82, \$65,600
Shea Salinas, SJQ	27, 28	7.03, \$100,219
Fabian Castillo, FCD	21, 33	6.62, \$66,250
Tristan Bowen, CHV	21, 22 (Home Grown)	6.31, \$156,363

Exhibit B: 2012 Re-Entry Draft Players Selected

<u>Player, Team</u>	<u>Age, 2013 Games Played</u>	<u>Salary, 2012 to 2013</u>
Danny Califf, None	Retired	NA
Colin Clark, Los Angeles Galaxy	29, 11	\$110,000 to \$80,000
Chad Barrett, New England Revolution	28, 21	\$253,333 to \$105,000
Connor Casey, Philadelphia Union	32, 31	\$400,000 to \$175,000
Eric Avila, Chivas USA	26, 28	\$158,000 to \$120,000
Stephen Keel, FC Dallas	30, 8	\$65,000 to \$46,5000
Paulo Araujo Jr., Vancouver Whitecaps	Played in NASL	\$65,000 to \$60,000
Lovell Palmer, Real Salt Lake	29, 19	\$96,250 to \$71,500
Dan Gargan, San Jose Earthquakes	30, 8	\$88,000 to \$88,000
John Thorrington, DC United	34, 14	\$170,000 to \$150,000
Will Hesmer, NONE	Retired	NA
Hunter Freeman, New York Cosmos	Left MLS	NA
Ty Harden, San Jose Earthquakes	29, 7	\$98,666 to \$68,415
Brian Jorden, BSV Schwarz-Weiß Rehden	Left MLS	NA

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