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10. Section 48.
11. Subsection 48(3).
12. *Canada (Director of Investigation and Research) v. Nutrasweet* (1990), 32 C.P.R. (3d) 1 at 34; *Commissioner of Competition v. Canada Pipe Company*, 2006 FCA 233 at ¶64.
13. Section 77.
14. Section 75.
15. Michael Osborne, *Report of Michael Osborne*, commissioned by the Canadian Radio-television and Telecommunications Commission, for Proceeding N° 2006-14, Review of regulatory framework for wholesale services and definition of essential service, available online <http://www.crtc.gc.ca/eng/publications/reports/osborne07.htm>.
16. *Canada (Director of Investigation and Research) v. Warner Music Canada Ltd.*, (1997), 78 C.P.R. (3d) 321 at 329 (Comp. Trib.)
17. *Molnlycke AB v. Kimberly-Clark of Canada Ltd.* (1991), 32 C.P.R. (3d) 493
18. *Eli Lilly and Co. v. Apotex Inc.*, 2004 FCA 232 and 2005 FCA 361.
19. "Sideline apparel" is trademarked apparel sold to fans. See CFL Press Release, "CFL Announces New Five-Year Reebok Deal", August 26, 2008, <http://www.cfl.ca/article/cfl-announces-new-five-year-reebok-deal>.
20. *American Needle* at 12.
21. *American Needle* at 2.
22. Paragraph 45(1)(c). In *Warner Music* at 333, however, the Tribunal noted that, for purposes of Section 75, it did not make sense to speak of "ample supply" of IP. The CFL would likely rely on this reasoning to argue that IP licensing does not fall within the ambit of s. 45(1)(c) at all, since it does not make sense to speak of "production or supply" of IP, which is licensed, not supplied. Against this, "supply" is broadly defined in the Act as, "in relation to an article, sell, rent, lease or otherwise dispose of an article or an interest therein or a right thereto, or offer so to dispose of an article or interest therein or a right thereto".
23. Canada, Competition Bureau, *Competition Collaboration Guidelines*, p. 17.
24. *American Needle* at 18.
25. *American Needle* at 19.
26. Canada, Competition Bureau, *Competition Bureau Concludes Examination into National Hockey League Franchise Ownership Transfer and Relocation Policies* - Technical Backgrounder, March 31, 2008, <http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/02640.html>.
27. *Competition Act*, s. 103.1.
28. *Competition Act*, s. 77(2).
29. *Warner Music* at 333.

**DOES AMERICAN NEEDLE OPEN THE
DOOR FOR MORE
COMPETITION BETWEEN
SOCCER CLUBS IN THE
UNITED STATES?
CHRISTOPHER E. WARE***

This article considers whether Major League Soccer, the United States' only first-division men's soccer league, can successfully mount a single-entity defense to a Section 1 claim after *American Needle* and explains why *American Needle* might lead to more first-division soccer competition.

When potential soccer investors met in the mid-nineties to revive professional first-division soccer, they did not want to compete with one another.¹ They knew the story of the prior first-division soccer league in the United States, the North American Soccer League - too much competition between teams led to imbalanced rosters with star power concentrated on teams in major markets (mostly the New York Cosmos), league receipts that did not match exploding player salaries,² and short-

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sighted attempts to recoup the owners' investments through expansions that diluted the fan base and talent pool.³

So, instead of starting independently-owned teams in multiple cities to compete for local affections, players, and sponsorships, the investors created one company, Major League Soccer Limited Liability Company ("MLS LLC").⁴ The investors then purchased shares in the single-entity and the active investors' representatives sat on MLS LLC's board.⁵ The Board controlled MLS LLC's player salaries, allocated players to MLS teams, allocated MLS teams to certain markets, controlled sponsorships, and distributed profits or losses to MLS LLC's investors.⁶

Later, MLS LLC's investors created a subsidiary, Soccer United Marketing ("SUM"), to exploit opportunities to market professional soccer.⁷ SUM manages the commercial rights to MLS properties, United States Soccer Federation properties (USSF, in turn, designates MLS as the only first-division soccer league in the U.S.), and trademarks of other soccer entities.⁸ SUM also creates soccer competitions with international teams and enters into agreements for the broadcast rights to various competitions.⁹ SUM's slogan, "One Sport. One Company," echoes its investors' desire to avoid competing with each other.

But MLS's investors did not disregard the benefits that flow from competition. MLS LLC's operating agreement allows it to allocate control of local clubs to local investors.¹⁰ MLS pays the investor-operators a management fee that is connected to revenues raised by the clubs at a local level, including televi-

sion and radio, ticket sales, stadium concessions, and parking. Investor-operators "provide exclusive management services" and are given significant leeway in managing their teams.¹¹ Specifically, they "hire, at their own expense and discretion" the team's staff, coaches and general managers.¹² Investor-operators are allowed to sell their operating rights to other investors, a necessity for individuals that want the chance for a fair return on their local investment in a local club.¹³

Despite these modifications, when MLS's players challenged MLS LLC's salaries and player allocations, MLS LLC claimed that its LLC structure provided a single-entity defense to Section 1. The district court agreed based on the League's structure and because "unlike competition in most markets, where the value of an enterprise would usually be enhanced if its competitors grew weaker, the value of the right to operate an MLS team would be diminished . . . by the weaknesses of other teams, their operators and the league as a whole."¹⁴ The players' focus on aspects of the investor-operator arrangements were "unavailing." "MLS is what it is . . .," the court held. "As a single entity, it cannot conspire or combine with its investors...."¹⁵

The First Circuit Court of Appeals partly disagreed, finding that MLS and its investors "comprise a hybrid arrangement somewhere between a single company (with or without wholly owned subsidiaries) and a cooperative arrangement between existing competitors."¹⁷ MLS won, however, on the larger issue—the Circuit Court accepted that the single-entity issue "need not be answered definitively" because the players

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claim “would have been defeated by the jury’s finding that the market alleged in [the Section 2 portion of the complaint] had not been proved.”¹⁸

The Supreme Court’s *American Needle* opinion’s emphasis on competitive reality and treatment of the claim that NFL Properties is a single-entity suggests that the First Circuit’s instincts were correct: MLS/SUM agreements with or between their investor-operators cannot avoid Section 1 scrutiny.

After *American Needle* a court that looks at MLS’s investor-operator “hybrid” structure must look to “competitive reality” to decide whether the structure joins together “independent centers of decision-making” not simply the form of ownership, corporate structure or contracts.¹⁹

Contrary to the district court’s holding in *Fraser*, MLS LLC’s single-entity form is not determinative. “An ongoing § 1 violation cannot evade § 1 scrutiny simply by giving the ongoing violation a name and a label.”²⁰ “Agreements made within a firm can constitute concerted action covered by § 1 when the parties to the agreement act on interests separate from the firm itself, and the intrafirm agreements may simply be a formalistic shell for ongoing concerted action.”²¹ The Court directly refuted the idea that the need to cooperate to produce a soccer game immunizes other agreements. “[E]ven if leaguwide agreements are necessary to produce football, it does not follow that concerted activity in marketing intellectual property is necessary to produce football.”²² MLS investor-operators’ commonality of interests in League success

and sharing of profits and losses with other members are not determinative either. Commonality of interests “exist[] in every cartel” and if sharing “in profits or losses from a venture meant that the venture was immune from § 1, then any cartel could evade the antitrust law simply by creating a joint venture to serve as the exclusive seller of their competing products.”²³

American Needle opens the door for challenges to MLS LLC and SUM’s dominance of professional soccer in the United States. Other professional soccer clubs, leagues and suppliers can now challenge MLS/SUM agreements that impede opportunities to secure stadia, broadcast rights, games, official sanctioning or players²⁴ with the knowledge that such agreements are covered by § 1. It is difficult to envision how MLS LLC’s or SUM’s investors could beat back challenges by arguing that agreements that restrict competition between investors are per se legal agreements between single-entities. The factors that were decisive in the district court’s *Fraser* decision - e.g., centralized structure and commonality of interests - could not convince the Supreme Court to immunize NFL Properties from Section 1 scrutiny, while the Supreme Court’s description of single-entities made up of parties that “act on separate interests” could serve as a description of MLS’s investor-operator agreements.

The relevant question then is how to analyze whether a particular MLS LLC/SUM agreement is an unreasonable “restraint of trade.” In the sports league context, the easier way to frame the question is does the agreement reduce opportunities for fans to watch games (output) more than it helps

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the League jointly produce games that fans want to watch (efficiency)?²⁵

When output is considered, there is a strong argument that the MLS investors' agreements as to League structure were and still are reasonable. Those agreements increased opportunities to watch first-division soccer in the U.S. because no opportunities existed when the soccer investors created MLS in the 1990s. Likewise, numerous MLS LLC agreements that govern core league functions - *e.g.*, the Commissioner's purchase of paper, agreements regarding rules for handing out red cards or the announcement that a team will follow a set schedule that fans can rely upon - assist the investor-operator's ability to offer a joint product that fans can and want to watch.

But MLS/SUM agreements could decrease fans opportunity to watch first-division soccer games in the future by restricting opportunities for non-MLS clubs to compete as first-division soccer teams. There are two other men's professional soccer leagues in the United States, the new North American Soccer League and the United Soccer League.²⁶ NASL and USL second-division teams are not in small out of the way cities that could never support a first division or MLS team. St. Louis, Miami, Baltimore, and Minneapolis have second division teams - but no MLS team. Other current second-division cities (*e.g.*, Miami and Tampa Bay) used to have first-division MLS teams. And MLS recently decided to swallow up other second-division teams by expanding to Montreal, Vancouver, and Portland.²⁷

MLS LLC might not be able to expand its

way out of competing with lower-division teams for soccer fans forever. After all, it cost Portland's newest MLS LLC investor \$40 million to join MLS and the City of Portland \$85 million dollars to build a stadium that met MLS's requirements.²⁸ Since MLS payrolls hover around 3 million dollars per team,²⁹ a competitive Baltimore, Minneapolis, or St. Louis club could pay quality players for years without exceeding MLS's entry costs, and, unlike the professional football teams in those cities that must participate in the NFL's league schedule to reach a competitive championship game, soccer teams in Baltimore, Minneapolis, and St. Louis have potential high-level opponents outside of the MLS league structure.³⁰

How a court will weigh the various hypothetical arguments concerning whether MLS/SUM agreements limit output of first-division soccer or are necessary to produce first-division soccer is impossible to predict. Still, the need to weigh output and efficiency, instead of only looking at corporate structure or commonality of interests, should reduce the possibility of agreements that bar other soccer clubs or leagues from competing at the first-division level. That is potentially bad news for MLS LLC and SUM, but potentially good news for soccer fans.

END NOTES:

- Christopher E. Ware is co-chair of the White Collar Litigation and Corporate Compliance group and a member of the Product Distribution and Franchise Team at Reinhart Boerner Van Deuren.
- 1. Tim Betzbatchenko, *Bend It For Beckham: A Look At Major League Soccer and Its Single-Entity Defense To Antitrust Liability*

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- After the Designated Player Rule*, 76 University of Cincinnati Law Review 611, 624 (2008); Clifford Mendelsohn, *Fraser v. Major League Soccer: A New Window of Opportunity For The Single-Entity Defense In Professional Sports*, 10 Sports Lawyers Journal 69, 71 (2003); *Fraser v. Major League Soccer LLC*, 97 F.Supp.2d 130, 132 (D. Mass. 2000).
2. Mendelsohn, *Fraser v. Major League Soccer* at 71 (2003).
 3. NASL existed from 1968 to 1984. *Fraser v. Major League Soccer LLC*, 284 F.3d 47, 52 (1st Cir. 2002).
 4. Omar Hafez Ayad, *Take The Training Wheels Off The League: Major League Soccer's Dysfunctional Relationship With The International Transfer System*, 10 Vanderbilt Journal of Entertainment and Technology Law, 413, 421-422 (2008); *Fraser*, 284 F.3d 53-54.
 5. Neal R. Stoll and Shepard Goldfein, *Fraser v. Major League Soccer – Sports Leagues As A Single Entity?*, 223 New York Law Journal 3 (2000).
 6. Ayad, *Take The Training Wheels Off The League*, 421; *Fraser* 284 F.3d 54.
 7. Soccer United Marketing Company Overview, <http://www.sumworld.com/company-overview/> last checked September 30, 2010; SUM Key Executives Don Garber, <http://www.sumworld.com/about/> last checked September 30, 2010.
 8. *Id.*; USSF's dominance of U.S. soccer and its close relationship with SUM and MLS is outside the scope of this paper. However, the competitive impact of that relationship is already under close scrutiny in a lawsuit challenging the fees USSF charges promoters that sanction international matches. Matthew Futterman, Judge's Ruling Questions U.S. Soccer's Power, *The Wall Street Journal*, September 28, 2010. MLS LLC's subsidiary, SUM, also promotes international soccer matches. *Infra* at note 9.
 9. *Id.*; Bloomberg Businessweek Company Information, <http://investing.businessweek.com/research/stocks/private/snapshot.asp?privcapId=58275017> last checked September 30, 2010.
 10. Ayad, *Take The Training Wheels Off The League* at 421 (internal quotation marks omitted).
 11. *Id.*
 12. *Id.*
 13. *Fraser*, 97 F.Supp.2d at 134-5, 136.
 14. *Fraser*, 97 F.Supp.2d at 136.
 15. *Id.* at 139.
 16. The MLS, along with various leagues and tours, relied on the *Fraser* district court's reasoning in their amici curae brief to the court, arguing that a league is a single entity when "there is an absence of competition . . . that fundamentally flows from the interdependence and cooperation necessary to produce a league or circuit product." Brief for ATP Tour, Inc., WTA Tour, INC, Major League Soccer, L.L.C., and National Association For Stock Car Auto Racing, Inc., as *Amici Curae* In Support Of Respondents at 8.
 17. *Fraser*, 284 F.3d at 58 (1st Cir. 2002).
 18. *Id.* at 59, 60-1.
 19. *American Needle, Inc v. National Football League et al.*, 560 U.S. ___, 130 S.Ct. 2201, 2212 (2010)
 20. *Id.* at 2213.
 21. *Id.* at 2215.
 22. *Id.* at 2214, n. 7.
 23. *Id.* at 2215 (citations and internal quotations omitted).
 24. Such agreements could take numerous forms: Withholding the use of intellectual property to advertise games, restrictive player contracts, boycotts, restrictive contracts with foreign professional teams that travel in the United States and so on.
 25. Robert H. Bork, *The Antitrust Paradox* 264, 273 (1978) (Stating that the restriction of output should be the primary concern when horizontal agreements that eliminate

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competition are analyzed and proposing a rule of reason when such agreements create efficiency). Professor Bork addresses sports leagues specifically, but only in the context of activities that can only be carried out jointly. *Id.* at 278.

26. Beau Dure, "Off-field Issues Could Halt Three Leagues, Leave Fans Cold," *USAToday*, December 9, 2009. The USSF forced the leagues to combine in the near future by refusing to sanction either alone as a second division league.
27. Major League Soccer LLC, Hoover's In-Depth Company Records, August 4, 2010. Expanding to preclude competition and high entry costs raise Section Two issues that are beyond the scope of this article.
28. Mark Larabee, "Stadium Costs Trip Up Major League Soccer Team," *The Oregonian*, March 6, 2009.
29. Player Salary Information, Major League Soccer Players Union, surveys through August 12, 2010. http://www.mlsplayers.org/salary_info.html.
30. MLS First-division, second-division and amateur clubs compete for the United States Open Cup championship. The winner of the Open Cup qualifies for the CONCACAF Champions League, the only club championship that pits clubs from the United States, Canada, the Caribbean and Mexico against one another. The winner of the CONCACAF title, not the MLS champion, is given the right to play in the international FIFA Club World Cup. Currently, four MLS teams and one second division team, the Puerto Rico Islanders, compete in the CONCACAF league on the field. SUM manages the CONCACAF trademark.

CASES TO WATCH DECISIONS OF INTEREST

SUZANNE L. WAHL*

Significant Recent Decisions

Trade Association Cases

Starr v. Sony BMG Music Entertainment, 592 F.3d 314 (2d Cir. 2010). Plaintiffs alleged that digital music sellers had conspired to fix prices for digital music through a pair of joint ventures and the Recording Industry Association of America ("RIAA"), a trade association. The Second Circuit reversed the Southern District of New York's dismissal of the complaint and found that the complaint met *Twombly* standards.

Starr is interesting as the Second Circuit rejected many of the defendants' *Twombly* arguments, finding, for example, that a plaintiff does not have to allege facts that "tend to exclude independent self-interested conduct as an explanation for defendants' parallel behavior" but only "enough factual matter (taken as true) to suggest that an agreement was made." In finding that the plaintiffs had met *Twombly*, the court accepted as true that the RIAA "provided a forum and means through which defendants could communicate about pricing, terms and use restrictions." *Id.* at 318.

Sports Cases

Race Tires America, Inc. v. Hoosier Racing Tire Corp., 614 F.3d 57 (3d Cir. 2010). Confronted with a sanctioning body's