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Home-Field Disadvantage: How the Organization of Soccer in the United States Affects Athletic and Economic Competitiveness

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NOTE

HOME-FIELD DISADVANTAGE: HOW THE ORGANIZATION OF SOCCER IN THE UNITED STATES AFFECTS ATHLETIC AND ECONOMIC COMPETITIVENESS

Carolina I. Velarde*

The United States men's soccer team failed to qualify for the 2018 World Cup. In the aftermath, soccer followers questioned the organizational structure supervised by the United States Soccer Federation. An analysis of the relationships between professional soccer leagues reveals potentially anticompetitive practices that may contribute to the subpar performance of the U.S. Men's National Team. This Note argues that the United States Soccer Federation is engaged in economically anticompetitive behavior that impedes the development of American soccer. Certain reforms, including an open-league system and player transfer fees at the youth development level, would enhance the economic and athletic competitiveness of soccer in the United States.

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INTRODUCTION

On October 10, 2017, the United States men’s soccer team failed to qualify for the World Cup for the first time since 1986.¹ Following its defeat, sports analysts, coaches, players, and fans called for change in soccer team development in the United States.² Despite its success in other sports, the United States has struggled to reach the status of countries like Argentina, Brazil, Italy, England, the Netherlands, and Spain as an elite soccer nation.³ Further, notwithstanding its large population, the United States has failed to produce a single player with the skill and fan base of international stars like

1. *United States Fails to Qualify for 2018 World Cup After Loss in Trinidad*, ESPN (Oct. 10, 2017), <http://www.espn.com/soccer/world-cup-qualifying-concacaf/story/3226130/united-states-fails-to-qualify-for-2018-world-cup-after-loss-in-trinidad> [https://perma.cc/3QWK-HS9X].

2. Kevin Baxter, *After U.S. Team Misses Qualifying for World Cup, Ex-Coach Bruce Arena Writes About State of U.S. Soccer*, L.A. TIMES (May 7, 2018, 4:25 PM), <http://www.latimes.com/sports/soccer/la-sp-bruce-arena-20180507-story.html#> [https://perma.cc/X9RA-M35R]; Bryan Armen Graham, *USA’s World Cup Failure Was a Catastrophe Years in the Making*, GUARDIAN: SPORTBLOG (Oct. 11, 2017, 4:58 PM), <https://www.theguardian.com/football/blog/2017/oct/11/usa-world-cup-2018-qualifying-soccer-football> [https://perma.cc/E89N-GUTB] (“[T]he US must address a series of systemic failures and uncomfortable truths in the months and years to come. More money is flowing into domestic soccer and youth development than ever. But for all the talk of Major League Soccer’s hard-won stability, America’s top domestic league appears to have done more for the Caribbean nations than the United States itself. Far more insidious, and alarmingly resistant to change, is the pay-to-play culture that’s made soccer a sport that’s primarily played by upper-middle class white kids.”); e.g., ESPN FC, *Taylor Twellman Goes Off on the U.S. Men’s Soccer Team Missing the World Cup*, YOUTUBE (Oct. 10, 2017), <https://www.youtube.com/watch?v=q3kuMy9wUaw>.

3. Neil Paine, *Why Isn’t the U.S. Men’s National Team Better at Soccer?*, FIVETHIRTYEIGHT (June 16, 2014, 3:41 PM), <https://fivethirtyeight.com/features/why-isnt-the-u-s-mens-national-team-better-at-soccer/> [https://perma.cc/82WE-ARQ6]; see also Karl Matchett, *Power Ranking the 25 Best Soccer Nations Based on Per Capita*, BLEACHER REP. (Mar. 19, 2013), <https://bleacherreport.com/articles/1573794-power-ranking-the-25-best-soccer-nations-based-on-per-capita> [https://perma.cc/3M2N-FH3Y] (“When (or if) the United States takes the game seriously, there is such a potential pool of talent available that it might be hard to stop them.”).

Lionel Messi or Ronaldinho.⁴ Perhaps this is simply the result of a lack of American interest in the sport itself. Or, conversely, the lack of interest may actually be a consequence of the team's poor performance.⁵ Either way, improving American performance on the global stage and increasing American fandom go hand in hand. Professional soccer's anticompetitive structure is ripe for a reform that could both improve athletic performance and increase fan base interest. Indeed, in the aftermath of the United States' unsuccessful attempt to qualify for the 2018 World Cup, critics argued that American lack of interest is caused by the United States Soccer Federation's (USSF) unusual organizational structure.⁶

This Note argues that the USSF is engaging in economically anticompetitive behavior that inhibits the development of soccer in the United States. It contends that USSF should instead conform with Fédération Internationale de Football Association (FIFA) regulations by adopting a promotion and relegation system and improving the transfer system at the youth development level. Part I explains the organizational structure of USSF, the differences between professional soccer and other American sports leagues, and the USSF and FIFA governing rules. Part II argues that USSF's anticompetitive practices amount to a violation of Section 1 of the Sherman Act. These practices degrade the athletic competitiveness of American soccer, inhibiting the improvement and expansion of development teams.⁷ Part III proposes reforming the organizational structure of soccer in the United States by adopting the FIFA regime in place of the current, anticompetitive USSF rules.

4. Matchett, *supra* note 3; Elliott Turner, *Why Can't the United States Develop a Male Soccer Star?*, GUARDIAN (Mar. 16, 2016, 5:45 AM), <https://www.theguardian.com/football/2016/mar/16/why-cant-america-develop-a-soccer-star> [<https://perma.cc/5CN4-D54J>].

5. John Tauer, *Why Aren't Americans More Interested in Soccer? Why Is the U.S. Bad at Soccer?*, PSYCHOL. TODAY (June 27, 2010), <https://www.psychologytoday.com/us/blog/goal-posts/201006/why-aren-t-americans-more-interested-in-soccer-why-is-the-us-bad-soccer> [<https://perma.cc/K92T-DGVM>] ("American soccer faces the classic chicken or the egg dilemma, because until they win, interest will not grow, but until interest grows, most American youth will be unlikely to turn down opportunities in other sports to focus on soccer."). In addition, interest in soccer has been growing among younger audiences. In 2012, the results from the ESPN Sports Annual Report poll indicated that soccer was the most popular sport among twelve-to-twenty-four-year-olds, ahead of the NBA, MLB, and college football. Roger Bennett, *MLS Equals MLB in Popularity with Kids*, ESPN (Mar. 7, 2014), http://www.espn.com/soccer/news/story/_/id/1740529/mls-catches-mlb-popularity-kids-says-espn-poll [<https://perma.cc/WC5L-LUJ6>].

6. Stephen Gray, *The Problems with US Soccer, Examined by an Englishman*, URBANPITCH (Oct. 17, 2017), <http://urbanpitch.com/problems-us-soccer-examined-englishman/> [<https://perma.cc/B2FE-2E3A>]; Billy Haisley, *U.S. Soccer Tries to Fix Its Problems by Building a Bigger Bureaucracy*, DEADSPIN (June 6, 2018, 4:19 PM), <https://deadspin.com/u-s-soccer-tries-to-fix-its-problems-by-building-a-big-1826615481> [<https://perma.cc/C9G7-SYRH>] (discussing the creation of dubious management positions for the U.S. men's national team).

7. This Note generally uses the term "economic competitiveness" to refer to market behavior and "athletic competitiveness" for quality of player and team performance.

I. GETTING THE BALL ROLLING

This Part provides background information on the structure of professional and youth soccer. Section I.A explains the configuration of organized soccer in the United States market. Section I.B explains how professional soccer is different from other sports leagues in the context of antitrust law. Finally, Section I.C sets forth two key structural rules in soccer that most countries follow but the United States has refused to adopt.

A. *The Main Players in Soccer's Organizational Structure*

International soccer is hierarchical, and FIFA sits at the top.⁸ FIFA is the governing body that oversees international organized soccer.⁹ It generates hundreds of millions of dollars of revenue annually from its promotion and oversight of tournament play.¹⁰ FIFA is divided into four general bodies: the Congress, the Executive Committee, the general secretariat, and a collection of standing and ad hoc committees.¹¹ These bodies govern the status of players, their transfer across teams, and compliance with relevant regulations.¹² The next level in the hierarchy consists of six confederations, divided roughly by continent.¹³ Each continental confederation has a governing body, oversees a collection of national associations for each member country, and can create separate rules and regulations *so long as they comply with those of FIFA*.¹⁴ Similarly, each national association can create its own rules, *provided they do not conflict with the corresponding confederation's rules or FIFA's rules*.¹⁵ The national associations oversee all the individual clubs, which are separated into divisions according to their level of competition.¹⁶ The United States is a member of the Confederation of North, Central, America, and Caribbean Association Football (CONCACAF), one of the six continental

8. The FIFA Statutes are the overarching rules that guide FIFA's governing system. See FIFA, FIFA STATUTES: REGULATIONS GOVERNING THE APPLICATION OF THE STATUTES; STANDING ORDERS OF THE CONGRESS (2018), <https://resources.fifa.com/image/upload/the-fifa-statutes-2018.pdf?cloudid=whhncbdzio03cuhmwfxa> [<https://perma.cc/C3ME-KXCK>] [hereinafter FIFA STATUTES].

9. *Factbox: What Is FIFA and Why Is It Such an Important Organization?*, REUTERS (May 20, 2015, 9:25 PM), <https://www.reuters.com/article/us-soccer-fifa-factbox/what-is-fifa-and-why-is-it-such-an-important-organization-idUSKBN0O603Z20150521> [<https://perma.cc/DU6W-MVDU>].

10. *Financial Reports*, FIFA, <https://www.fifa.com/governance/finances/index.html> [<https://perma.cc/TRD7-HUBT>].

11. Christina Lembo, Comment, *FIFA Transfer Regulations and UEFA Player Eligibility Rules: Major Changes in European Football and the Negative Effect on Minors*, 25 EMORY INT'L L. REV. 539, 541–42 (2011).

12. *Id.*

13. *Id.*

14. *Id.*

15. *Id.*

16. *Id.*

confederations.¹⁷ USSF is the national association governing the sport in the United States.¹⁸

Article 14 of the FIFA Statutes provides that member associations like USSF can “manage their affairs independently and ensure that their own affairs are not influenced by any third parties.”¹⁹ As a result, USSF determines the structure of professional and amateur soccer organizations in the United States.²⁰

This Note focuses on the “Professional League Organization Members.”²¹ These member leagues are organized into three divisions or tiers, separated so that each division is roughly equal in athletic competitiveness and quality.²² Division I consists of Major League Soccer (MLS) alone, the preeminent professional soccer league.²³ Division II, likewise, consists of only the United Soccer League (USL).²⁴ The North American Soccer League (NASL) was also a Division II member until USSF stripped its second division status in the fall of 2017.²⁵ In April 2017, USL announced the launch of

17. *About Concacaf*, CONCACAF, <https://www.concacaf.com/en/concacaf/about-concacaf/> [https://perma.cc/42H7-MDPX].

18. See Ted Stevens Olympic and Amateur Sports Act, 36 U.S.C. §§ 220501–29 (2012). USSF is the national association member of both CONCACAF and FIFA. USSF, BYLAWS OF THE UNITED STATES SOCCER FEDERATION, INC. 1 (2018), <https://www.usoccer.com/~media/files/governance/2018/20180817-2018-19-bylaw-book.pdf?la=en> [https://perma.cc/97WH-28DF].

19. See FIFA STATUTES, *supra* note 8, at 12.

20. See *infra* Section II.C.

21. USSF’s membership categories are: (1) Associate, (2) Disabled Service Organization, (3) Indoor Professional League, (4) National Affiliate, (5) National Association, (6) Other Affiliate, (7) Professional League, (8) State Association, (9) Life Member, and (10) Individual Sustaining Member. *Federation Services: Membership*, U.S. SOCCER, <https://www.usoccer.com/about/federation-services/resource-center/membership> [https://perma.cc/37SN-URM7].

22. See generally *Soccer Organizations: Professional Council*, U.S. SOCCER, <https://www.usoccer.com/about/affiliates/professional-soccer> [https://perma.cc/FAN4-J4HE]. In the United States, Division I is the highest tier. In other countries, this tier system is fundamental to the promotion and relegation system, as teams in the bottom of the leaderboard for Division I are relegated to Division II while the best teams in Division II are promoted to Division I. See Daniel Nussbaum, *The Impact of Sports League Structure on Fan Welfare* (May 4, 2016) (unpublished B.A. thesis, Amherst College), https://www.amherst.edu/system/files/media/Daniel%2520Nussbaum%2520Thesis_1.pdf [https://perma.cc/SEY2-XM3W].

23. *Soccer Organizations: Professional Council*, *supra* note 22.

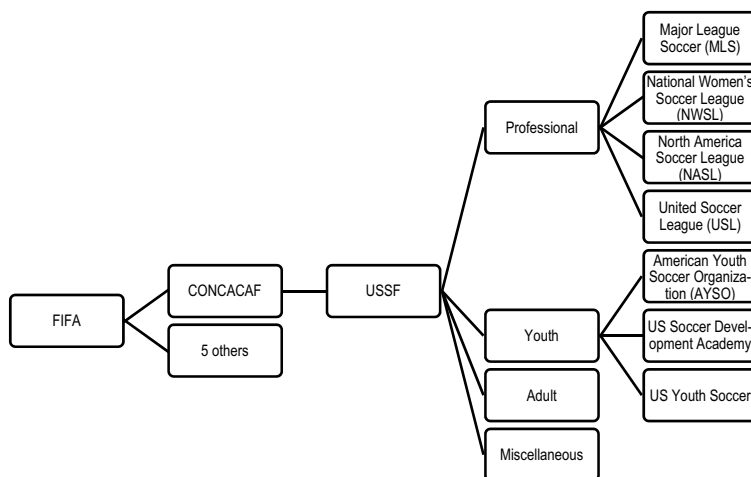
24. *Id.*

25. Jeff Rueter, *From Raúl to Ruin: The Rise and Fall of the NASL, Once MLS’s Challenger*, GUARDIAN: SPORTBLOG (Nov. 10, 2017, 5:00 AM), <https://www.theguardian.com/football/blog/2017/nov/10/from-raul-to-ruin-the-rise-and-fall-of-the-nasl-once-mls-challenger> [https://perma.cc/CC7C-UGAW].

a Division III league.²⁶ The following chart reflects a partial representation of this organizational structure:²⁷

FIGURE 1

Partial representation of the organizational structure of soccer in the United States²⁸



B. *Different Ball Games: The Traditional U.S. Sports League Model and the Soccer Model*

Both the structure and the culture of soccer in the United States are distinct from those of the other professional sports leagues. The National Football League (NFL), Major League Baseball (MLB), the National Basketball Association (NBA), and the National Hockey League (NHL) traditionally

26. *USL to Launch Third-Division League in 2019*, USL (Apr. 2, 2017, 10:31 AM), https://www.uslsoccer.com/news_article/show/775757-usl-to-launch-third-division-league-in-2019 [<https://perma.cc/J8UE-9KUP>].

27. For a full list of national and international governing bodies, as well as U.S. Soccer affiliates, see *About U.S. Soccer: Organizational Structure*, U.S. SOCCER, <https://www.ussoccer.com/about/about-us-soccer/organizational-structure> [<https://perma.cc/HK65-HGFP>].

28. For more information, see Lembo, *supra* note 11, at 541–42; Alanna Fairbairn, *What's the Difference Between FIFA, CONCACAF, and USSF?*, BACKLINE SOCCER (Oct. 26, 2016), <http://backlinesoccer.com/whats-the-difference-between-fifa-concacaf-and-ussf> [<https://perma.cc/2443-5J7R>]; *About U.S. Soccer: CONCACAF, U.S. SOCCER*, <https://www.ussoccer.com/about/about-us-soccer/organizational-structure/concacaf> [<https://perma.cc/SA9M-PLS3>]; *supra* Section I.A.; *infra* Sections II.B, II.C.

dominate the sports market.²⁹ Those leagues are built on contractual agreements among independently owned member teams, which compete both economically and athletically.³⁰

This business model, where a single organizing body (the league) sets the underlying rules of competition among independent teams, has given rise to antitrust questions. In *National Collegiate Athletic Ass'n (NCAA) v. Board of Regents of the University of Oklahoma*, the NCAA faced an antitrust challenge to its control over television-broadcast rights.³¹ While the Supreme Court ultimately concluded that the NCAA went too far in restraining competition, it also made it clear that sports leagues require a high level of cooperation among competitors for their products to exist.³² When sports teams within a league agree to certain restrictions, they necessarily exclude potential competitors, suppliers, and distributors of their products.³³ Accordingly, the Court did not condemn the agreements as per se illegal and stated that the decision “rest[ed] in large part on [the Court’s] recognition that a certain degree of cooperation is necessary if the type of competition that petitioner and its member institutions seek to market is to be preserved.”³⁴

USSF has faced similar antitrust lawsuits for restricting competition. For example, in 2001 the Los Angeles Memorial Coliseum Commission sued USSF and MLS.³⁵ The lawsuit alleged that the organizations had conspired to prevent other professional soccer matches from competing with MLS- or USSF-sponsored teams.³⁶ According to the plaintiffs, USSF used “its position as the purported sanctioning body for all professional soccer matches held in the United States” to adopt and enforce blackout dates against non-MLS teams.³⁷ When USSF does approve a non-MLS match, it “requires the payment of substantial fees,” a barrier to compete that MLS does not have to

29. Edward Mathias, Comment, *Big League Perestroika? The Implications of Fraser v. Major League Soccer*, 148 U. PA. L. REV. 203, 208 (1999).

30. *Id.*

31. 468 U.S. 85 (1984). As a nonprofit and amateur sports organization, the NCAA is distinguishable from the major professional sports leagues discussed in this Section. *NCAA*, 468 U.S. at 88, 120. However, the Court’s discussion in this case is broadly applicable beyond college sports alone. *See id.* at 85 n.18 (discussing analogues between the NCAA’s restraint of trade in the college football television market to restraints of trade in other markets).

32. *Id.* at 101, 104. The Court also quoted Judge Bork, “When a [hypothetical] league of professional lacrosse teams is formed, it would be pointless to declare their cooperation illegal on the ground that there are no other professional lacrosse teams.” *Id.* at 101 (quoting ROBERT H. BORK, *THE ANTITRUST PARADOX* 278 (1978)).

33. *See id.* at 101.

34. *Id.* at 117.

35. Business Wire, *Lawsuit Charges U.S. Soccer Federation and Major League Soccer with Conspiracy to Deprive L.A. Soccer Fans of World-Class Matches*, GENERAL ONEFILE (Nov. 13 2001), http://go.galegroup.com/ps/i.do?p=ITOF&sw=w&u=lom_umichanna&v=2.1&id=GALE%7CA80016374&it=r&asid=ca834292f1e4c5fdc81749ee56608461 [https://perma.cc/L47W-YQTP].

36. *Id.*

37. *Id.*

overcome.³⁸ The plaintiffs argued that such restrictions on economic competition amount to unlawful restraints on trade, just as in *NCAA*.³⁹

But American professional soccer is distinct in a crucial way: it is structured as a so-called single-entity league. While teams in the NFL, NBA, and MLB retain economic autonomy apart from their leagues, MLS teams do not.⁴⁰ MLS is held as a single corporation rather than as a collection of individually owned teams.⁴¹ When founder Alan Rothenberg designed the league, he ensured that MLS would centrally own and operate the teams, assign players and team personnel, and set local ticket and concession prices.⁴² Though MLS has investors, those investors own shares in MLS itself, not in individual teams.⁴³ And, unlike in other leagues, operators may run more than one team at once.⁴⁴

Because of this structure, “MLS retains significant centralized control over both league and individual team operations.”⁴⁵ This single-entity structure has shielded MLS from antitrust lawsuits brought under Section 1 of the Sherman Act, which requires at least two colluding parties.⁴⁶ For example, at the time of *Fraser v. Major League Soccer* in 2002, the league owned all of its teams, as well as “all intellectual property rights, tickets, supplied equipment, and broadcast rights.”⁴⁷ It was undisputed that “MLS sets the teams’ schedules; negotiates all stadium leases and assumes all related liabilities; [and] pays the salaries of referees and other league personnel.”⁴⁸ But the league’s control over player employment was most significant: it had sole responsibility for negotiating and paying players’ contracts.⁴⁹ When the plaintiffs argued that all this control amounted to illegal price fixing, the First Circuit

38. *Id.*

39. *Id.*; Grahame L. Jones, *Coliseum Commission Puts Up a Red Card*, L.A. TIMES (Nov. 13, 2001), <http://articles.latimes.com/2001/nov/13/sports/sp-3525> [https://perma.cc/QA74-AHZR].

40. See Mathias, *supra* note 29, at 208–09.

41. *Id.* at 203–04 (citing Denise Kiernan, *MLS: Living Single?*, VILLAGE VOICE, Sept. 30, 1997, at 133).

42. *Id.* at 221.

43. *Id.*

44. *Id.* at 222.

45. *Fraser v. Major League Soccer*, L.L.C., 284 F.3d 47, 53–54 (1st Cir. 2002).

46. See *infra* Section II.A. But see *Am. Needle, Inc. v. Nat’l Football League*, 560 U.S. 183, 195 (2010) (“The relevant inquiry . . . is whether there is a ‘contract, combination . . . or conspiracy’ . . . such that the agreement ‘deprives the marketplace of independent centers of decisionmaking,’ and therefore of ‘diversity of entrepreneurial interests.’” (first quoting *Copperweld Corp. v. Indep. Tube Corp.*, 467 U.S. 752, 769 (1984), then quoting *Fraser*, 284 F.3d at 57)).

47. 284 F.3d at 53.

48. *Id.*

49. *Id.* MLS also “recruits the players, negotiates their salaries, pays them from league funds, and, to a large extent, determines where each of them will play.” *Id.*

disagreed.⁵⁰ Instead, the court found that MLS achieved “real economic integration,” meaning that the single-entity structure was not merely “a sham for horizontal price fixing” but rather created real economic competition and “new opportunities for players.”⁵¹

USSF and MLS continue to rely on the *Fraser* decision when they wield decisionmaking authority over their member leagues and teams.⁵² The plaintiffs’ argument in *Fraser* was doomed to fail because it alleged a conspiracy *within* MLS, a single entity; but USSF is different. It is a distinct body from MLS and USL, and *Fraser* has nothing to say about whether an allegation of a conspiracy among those entities might stick.

C. *Offside: Lining up the Open-League System and Transfer Fees with Competition Laws*

Although soccer players are traded from one team to another like assets, soccer teams in the United States cannot move from one division to another. In the rest of the soccer-playing world, by contrast, teams are moved between divisions based on their season’s performance. Imagine if the Cleveland Browns were kicked out of the NFL and a team from the new Alliance of American Football league was invited to take their place.⁵³ This is called the promotion and relegation (or open-league) system, which has been adopted by all other major soccer leagues worldwide.⁵⁴ Under the promotion and relegation system, the worst-performing teams in a season are demoted, or relegated, to the lower division.⁵⁵ Meanwhile, the top-performing teams are elevated, or promoted, to the higher division.⁵⁶

50. *Id.* at 59.

51. *Id.* The First Circuit also stated that the case for expanding *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752 (1984), was “debatable” and the case for applying the single-entity label to MLS even more so. *Id.* The court went on to state that “the venture [could not] be condemned by *per se* rules and present[ed] at best a debatable case under the rule of reason.” *Id.*

52. Transfer fees and solidarity payments are forms of compensation that are negotiated when a player leaves a team to move to another team. *See infra* Section I.C.

53. The Alliance of American Football is a new professional football league looking to compete with the NFL. *See* ALLIANCE AM. FOOTBALL, <https://aaf.com/> [<https://perma.cc/Z8PP-LWF6>].

54. Nussbaum, *supra* note 22 (comparing a closed league, where entry to the league is based on the approval of current members, with open leagues where the promotion and relegation system is used and there is a hierarchy of divisions). The promotion and relegation system is included in the FIFA Statutes. FIFA Statute IV.9 explicitly states that “[a] club shall qualify for a domestic league championship by remaining in a certain division or by being promoted or relegated to another at the end of the season.” FIFA STATUTES, *supra* note 8, at 73.

55. *Premier League and Football League: Ups & Downs and European Qualification*, BBC (May 28, 2018), <https://www.bbc.com/sport/football/43402150> [<https://perma.cc/XP9H-8VFS>].

56. *See id.*

The number of teams that are promoted and relegated varies by league. For example, in England, the top three and bottom three teams are promoted and relegated, respectively, while in Scotland, two teams move up and down.⁵⁷ The risks of relegation or hopes for promotion are built into the culture of professional soccer. For example, following “Calciopoli,” the match-fixing scandal in Italy’s Serie A in 2006,⁵⁸ the most severe penalty faced by the teams involved was relegation to Serie B.⁵⁹ Juventus started the next season in Serie B at a thirty-point deficit that kept it out of the running to qualify for the UEFA Champions League.⁶⁰

In the United States, however, teams outside of MLS have no hope of moving up. For example, despite winning the NASL title in 2012, 2013, 2015, and 2016,⁶¹ the New York Cosmos still had to face the same subpar competition from other NASL teams in 2017. Meanwhile, regardless of how poorly the worst team in MLS performs, that team will remain in Division I without risk of being sent down to USL in Division II. For instance, after five seasons of poor results, in 2012, Toronto FC conceded 62 goals and earned the lowest points total—23 in 34 games⁶²—in club history.⁶³ Similarly, in 2013, DC United earned 3 wins in 34 MLS games, “the fewest points per game of any team in league history[,] and scored the fewest goals ever in an MLS campaign.”⁶⁴ Yet both Toronto FC and DC United remained Division I teams. USSF’s concentration of power and support for MLS has allowed it to main-

57. *Id.*

58. Rangan Basu, *Calciopoli 2006: The Match-Fixing Scandal That Got Juventus Relegated*, SPORTSKEEDA (Oct. 30, 2015), <https://www.sportskeeda.com/football/calciopoli-2006-match-fixing-scandal-juventus-relegated> [https://perma.cc/9A32-XJMZ].

59. John Hooper, *Juventus Hit Rock Bottom as Italy’s Cheats Are Relegated*, GUARDIAN (July 14, 2006, 7:17 PM), <https://www.theguardian.com/football/2006/jul/15/newsstory.europeanfootball> [https://perma.cc/W5Q3-X6N2]. Serie A and Serie B are respectively the Division I and Division II leagues in Italy.

60. The UEFA Champions League is the annual continental competition between qualifying clubs around the world. See *History: Background*, UEFA.COM: UEFA CHAMPIONS LEAGUE, <https://www.uefa.com/uefachampionsleague/history/background/index.html> [https://perma.cc/WG5P-QSFC]. The point deficit for Juventus was later reduced to nine points. *10 Years Ago Today, Juventus Were Relegated from Serie A*, FOX SPORTS (Jul. 14, 2016, 4:24 PM), <https://www.foxsports.com/soccer/story/10th-anniversary-of-juventus-relegation-to-serie-a-071416> [https://perma.cc/G6BK-CFR6].

61. J.S., *Why Is There No Promotion and Relegation in the United States?*, ECONOMIST (Nov. 23, 2016), <https://www.economist.com/game-theory/2016/11/23/why-is-there-no-promotion-and-relegation-in-the-united-states> [https://perma.cc/3EM7-YM6E].

62. Generally in soccer, teams earn three points per victory, one point per tie, and zero points per loss. The maximum amount of points for 34 games would be 102 points. What this point total indicates is that Toronto FC lost far more than they won.

63. Taylor Rockwell, *The 10 Worst Teams in MLS History*, PASTE (Dec. 1, 2015, 1:24 PM), <https://www.pastemagazine.com/articles/2015/12/the-10-worst-teams-in-mls-history.html> [https://perma.cc/PY9A-MZ6T].

64. *Id.*

tain a closed-league structure, which is common in other American sports but unique in the context of global soccer.⁶⁵

In 2016, Deloitte released a report that considered the implementation of a promotion and relegation system in American professional soccer.⁶⁶ According to the report, live and broadcast audiences indicated that club soccer in the United States has yet to “fully tap into the sport’s popularity.”⁶⁷ The report also noted that “[t]his presents long term challenges to the business models and sustainability of clubs throughout the leagues.”⁶⁸

The Deloitte report concluded that promotion and relegation could assist pro clubs in capitalizing on the untapped potential of soccer in the United States.⁶⁹ The report found evidence that “movement of teams between leagues can, over time, be of a net benefit, increasing overall match attendance.”⁷⁰ In particular, the report found that even if the attendance gap between the Division I league—MLS—and the (at-the-time) Division II league—NASL—was large, the evidence of the “uplifts achieved by former NASL/USL teams entering MLS demonstrates that movement between divisions in the medium term could also be of a net overall benefit in terms of attendance in US soccer.”⁷¹

Beyond increasing attendance and match-day revenue, the report found that the system could have a variety of other beneficial effects. These include broader interest in leagues and seasons, “more compelling content for broadcasters,” “motivated ownership at all levels,” furtherance of the United States as “a global soccer nation,” and “long term growth of the sport.”⁷² Last, the report determined that the increased opportunities and competition fostered by a promotion and relegation system would assist with player development at all levels.⁷³ The report also suggested that “[t]he intensity of competition for players would increase, as would the emphasis for clubs . . . to develop their coaching infrastructure.”⁷⁴ While the report considered a number of business risks that would arise from adopting the open-

65. See Nussbaum, *supra* note 22; Jack Pitt-Brooke, *MLS Stands Alone as a Closed Shop in the World of Football. Meet the Two Men Trying to Change That*, INDEPENDENT (Mar. 3, 2018, 1:08 PM), <https://www.independent.co.uk/sport/football/major-league-soccer-promotion-relegation-usa-mls-la-galaxy-close-shop-a8237506.html> [<https://perma.cc/FFH7-XQT3>].

66. SPORTS BUS. GRP., DELOITTE, PROFESSIONAL CLUB SOCCER IN THE USA: AN ANALYSIS OF PROMOTION AND RELEGATION (2016), <https://www2.deloitte.com/content/dam/Deloitte/uk/Documents/sports-business-group/deloitte-uk-deloitte-sbg-silva-summary-document-091116.pdf> [<https://perma.cc/8KSW-GV8P>] [hereinafter DELOITTE REPORT].

67. *Id.* at 3.

68. *Id.*

69. *Id.* at 4.

70. *Id.*

71. *Id.*

72. *Id.*

73. *Id.*

74. *Id.* at 7.

league system, it concluded that those risks could be mitigated.⁷⁵ By contrast, the longer-term growth prospects of club soccer may be inhibited by the current closed-league system.⁷⁶ The closed-league system aims to maximize owners' profitability and protect a league's financial sustainability at the expense of product quality and competitive risk.⁷⁷

Like an open-league structure, the transfer-fee market provides another avenue for improving the athletic and economic competitiveness of American soccer. These reforms include training compensation and solidarity payments. Training compensation is a fee the first professional club that signs a player pays to the youth club (or clubs) he played for after his twelfth birthday.⁷⁸ It is also paid each time a professional is transferred before the end of the season of his twenty-third birthday.⁷⁹ Solidarity payments are related: any club that contributed to a player's training or education between the player's twelfth and twenty-third birthdays receives a percentage of a transfer fee that was paid to the player's former club.⁸⁰

The transfer market's regulatory foundation is based on FIFA's Regulations on the Status and Transfer of Players (RSTP).⁸¹ Some soccer leagues around the globe implement narrower transfer fee rules than what FIFA suggests.⁸² FIFA's transfer fee rules have not always been in line with European competition law.⁸³ In 2000, FIFA faced pressure to comply with the European Court of Justice's (ECJ) 1995 *Bosman* ruling.⁸⁴ In *Bosman*, the ECJ ruled that transfer fees were incompatible with the right of free movement of persons, thus limiting free transfers only to the end of contracts.⁸⁵ To reconcile the increasingly exorbitant transfer fees with European competition law, the Union of European Football Associations (UEFA), which oversees competitions in Europe, established the UEFA Financial Fair Play regulations in

75. See *id.* at 5.

76. *Id.* at 6.

77. *Id.*

78. FIFA, REGULATIONS ON THE STATUS AND TRANSFER OF PLAYERS 25 (2018) <https://resources.fifa.com/image/upload/regulations-on-the-status-and-transfer-of-players-2018-2925437.pdf?cloudid=c83ynehmkp62h5vgwg9g> [<https://perma.cc/C5PU-878V>].

79. *Id.*

80. *Id.*

81. Chapter VII, Article 20 states that “[t]raining compensation shall be paid to a player's training club(s): (1) when a player signs his first contract as a professional, and (2) each time a professional is transferred until the end of the season of his 23rd birthday.” *Id.*

82. See *infra* notes 86–87 and accompanying text.

83. See, e.g., Thanassis Cambanis, *Antitrust Officials Give Yellow Card; FIFA Must Rewrite Transfer Rules*, WALL STREET J. (June 20, 2000, 12:01 AM), <https://www.wsj.com/articles/SB961445209957549428> (on file with the *Michigan Law Review*).

84. *Id.*

85. Case C-415/93, *Union Royale Belge des Sociétés de Football Ass'n ASBL v. Bosman*, 1995 E.C.R. I-5040.

2011.⁸⁶ These regulations impose sanctions if teams spend significantly more on fees than they earn overall,⁸⁷ which can hamper the appraisal of a soccer player's worth.⁸⁸ But some still question whether UEFA's Financial Fair Play Regulations will actually help promote competition between smaller, less-funded teams and deep-pocketed teams, such as Manchester United.⁸⁹

USSF has argued that, unlike UEFA's rules and European competition law, FIFA's RSTP rules are at odds with U.S. antitrust laws.⁹⁰ So far, United States courts have avoided addressing this issue, and the merit of this argument is unclear. On the one hand, in Europe, transfer fees could be considered anticompetitive under EU competition law because teams with deep pockets might have an advantage when negotiating contracts.⁹¹ By contrast, antitrust laws in the United States do not punish participants for being wealthier than their competitors.⁹² But on the other hand, transfer fees alone do not fall under either Section 1 or 2 of the Sherman Act. For a Section 1 violation, at least two parties must conspire to restrain trade.⁹³ For a Section 2 violation, a party must be a monopolist or attempting to monopolize a market.⁹⁴ Neither theory of liability applies in this context. As the European controversies show, there are legitimate antitrust issues to be sorted out when regulating transfer fees. But USSF's selective concern about antitrust in this context is suspect. Instead of an outright prohibition, USSF should adopt transfer fees because of their player development benefits. Rules comparable to FIFA's RSTP or UEFA's Financial Fair Play could be adopted at the same time to assuage fairness concerns. In addition, an open-league system would likely encourage the transfer of players from one division to an-

86. *Financial Fair Play: All You Need to Know*, UEFA.COM (June 30, 2015, 12:12 PM), <http://www.uefa.com/community/news/newsid=2064391.html> [https://perma.cc/K8AQ-Z84N].

87. The rule states that "clubs can spend up to €5 million more than they earn per assessment period (three years)," but clubs can exceed this level to a certain limit "if it is entirely covered by a direct contribution/payment from the club owner(s) or a related party." *Id.*

88. UEFA's Financial Fair Play regulations are in line with European law. *See State Aid: Vice President Almunia and UEFA President Platini Confirm Financial Fair-Play Rules in Professional Football Are in Line with EU State Aid Policy*, EUR. COMM'N (Mar. 21, 2012), http://europa.eu/rapid/press-release_IP-12-264_en.htm [https://perma.cc/LF9S-3VM3].

89. *See e.g.*, Gareth B. Jenkins, *Football, Financial Fair Play and the Future of FIFA*, WARWICK, <https://warwick.ac.uk/newsandevents/features/footballfairplay/> [https://perma.cc/N54Z-QASP] (quoting Professor Wyn Grant and Dr. Christian Stadler).

90. *See infra* note 173 and accompanying text.

91. *See* Jenkins, *supra* note 89.

92. *See* *Brown Shoe Co. v. United States*, 370 U.S. 294, 370 (1962).

93. 15 U.S.C. § 1 (2012) ("Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal.")

94. *Id.* § 2 ("Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony . . .").

other as teams attempt to strengthen their rosters. This would lead to more transfer fees and additional revenue for teams that helped develop players.

While the United States is often an exporter of sports entertainment to the rest of the globe, in soccer it lags behind. Other countries follow FIFA's rules: they have established promotion and relegation systems to regulate competition across different divisions and they accept transfer fees as compensation for developing players. USSF does not apply either rule. Instead, USSF has enabled MLS and USL to conspire to take a competitor out of the market, thereby further concentrating the professional soccer market.

II. BENDING THE STRUCTURE OF SOCCER IN THE UNITED STATES

According to a 2007 FIFA report, over twenty-four million people play soccer in the United States.⁹⁵ In 2014, more than three million young Americans played formally for youth soccer clubs.⁹⁶ As global soccer becomes more competitive and interest in youth teams increases, USSF will face pressure to provide a better platform for developmental soccer in the country. This Part examines how USSF engages in anticompetitive behavior that prevents the improvement and expansion of development teams. Section II.A shows how the relationship between USSF, MLS, and USL is a conspiracy to restrain trade in violation of the Sherman Act. Section II.B then discusses how USSF's role enables a horizontal agreement between MLS and USL that keeps NASL from challenging MLS's control of professional soccer. Finally, Section II.C explains how the scheme constrains both the economic and the athletic competitiveness of soccer in the United States.

A. Conspiracy Under Section 1 of the Sherman Act

Soccer antitrust suits typically arise under Section 1 of the Sherman Act, which has three main components: (1) there must be a contract, combination, or conspiracy; (2) that arrangement must have produced a restraint of trade; and (3) the restraint must affect trade and commerce among the several states.⁹⁷ The first element means a violation must involve at least two parties. A single entity, as MLS considers itself to be, is not implicated by Section 1 of the Sherman Act. Section 1 makes it illegal for competing businesses and other entities, including nonprofit organizations⁹⁸ like USSF, to

95. Matthias Kunz, *265 Million Playing Football*, FIFA MAG., Jul. 2017, at 13, https://www.fifa.com/mm/document/fifafacts/bcoffsurv/emaga_9384_10704.pdf [<https://perma.cc/33KK-7PHQ>].

96. *Who Is US Youth Soccer?*, US YOUTH SOCCER, <https://www.usyouthsoccer.org/about/who-is-us-youth-soccer/> [<https://perma.cc/F6CB-48Q9>].

97. 15 U.S.C. § 1 (2012); PAUL C. WEILER ET AL., SPORTS AND THE LAW 188 (5th ed. 2015).

98. *See Am. Soc'y of Mech. Eng'rs, Inc. v. Hydrolevel Corp.*, 456 U.S. 556 (1982).

conspire in ways that unreasonably harm economic competition.⁹⁹ Many antitrust actions against other sports leagues are brought under Section 1.¹⁰⁰

In the past, to escape antitrust liability, the NFL, MLB,¹⁰¹ NBA, and NHL often argued—with mixed results—that they are in fact single entities, and therefore, they should not be subjected to Section 1 challenges.¹⁰² For example, the court in *San Francisco Seals, Ltd. v. NHL* explained that Section 1 of the Sherman Act requires at least two independent business entities.¹⁰³ The court held that in the production of professional hockey games before live audiences, the San Francisco Seals team was not an entity independent from the NHL.¹⁰⁴ In the context of American football, however, the Second Circuit rejected the single entity defense in *North American Soccer League v. NFL*.¹⁰⁵ It concluded that characterizing the NFL as a single entity would create an antitrust “loophole” that could allow the league to adopt restraints to protect individual franchise owners.¹⁰⁶ The Ninth Circuit also rejected the single-entity defense in *Los Angeles Memorial Coliseum Commission v. NFL*, holding that, as a matter of law, the NFL was subject to Section 1 liability.¹⁰⁷

Yet, in 2010, the Supreme Court finally proclaimed in *American Needle, Inc. v. NFL* that the test to determine whether a party is a single entity depends on “substance, not form.”¹⁰⁸ In *American Needle*, the plaintiff sued the NFL and the National Football League Properties (NFLP), an entity formed by NFL teams to develop, license, and market the teams’ names, colors, log-

99. *Standard Oil Co. v. United States*, 221 U.S. 1 (1911) (citing *United States v. Trans-Missouri Freight Ass’n*, 166 U.S. 290 (1897)).

100. Michael S. Jacobs, *Professional Sports Leagues, Antitrust, and the Single-Entity Theory: A Defense of the Status Quo*, 67 IND. L.J. 25, 26 (1991) (stating that many sports litigations “allege that the teams of the various professional sports leagues, by collectively adopting and implementing certain rules and regulations, have violated section 1 of the Sherman Antitrust Act”). Under Section 1, players also litigate league rules that affect their mobility (alleging that such rules wrongfully limit their salaries) and challenge the legality of player drafts and other exclusionary league rules. Owners of teams and municipalities have also used Section 1 to challenge league rules restricting franchise expansion and relocation. *Id.* at 26–27 & nn.7–9.

101. The MLB is also different from these other sports leagues because of the sport’s reserve system, which enjoys an exemption from federal antitrust laws. See WEILER ET AL., *supra* note 97, at 197 (noting that the Court in *Flood v. Kuhn*, 407 U.S. 258 (1972), distinguished baseball from other sports operating interstate that are not exempt: football, boxing, basketball, and presumably hockey and golf; soccer was not mentioned).

102. See WEILER ET AL., *supra* note 97.

103. 379 F. Supp. 966, 969 (C.D. Cal. 1974).

104. *San Francisco Seals*, 379 F. Supp. at 972.

105. 670 F.2d 1249, 1257 (2d Cir. 1982).

106. *N. Am. Soccer League*, 670 F.2d at 1257 (“To tolerate such a loophole would permit league members to escape antitrust responsibility for any restraint entered into by them that would benefit their league or enhance their ability to compete even though the benefit would be outweighed by its anticompetitive effects.”).

107. 726 F.2d 1381, 1390 (9th Cir. 1984).

108. 560 U.S. 183, 184 (2010).

os, trademarks, and related intellectual property.¹⁰⁹ The Supreme Court rejected the NFL's single-entity defense and decided that the appropriate inquiry is whether the agreement joins together "separate economic actors pursuing separate economic interests" in a way that "deprives the marketplace of independent centers of decisionmaking."¹¹⁰

Since *American Needle*, if an agreement indeed joins separate economic actors, then a court could find that the parties were in a conspiracy in violation of Section 1 of the Sherman Act. Accordingly, a court would have to decide whether the restraint of trade is unreasonable. After *American Needle*, it would be hard for MLS to argue that it is a single entity. In *Fraser*, a court has already expressed doubt regarding MLS's single-entity claim.¹¹¹ Now, under the separate-economic-actors test from *American Needle*, it is unlikely that a court will find that MLS is a single entity: it is an organization composed of separate investors with interests in separate teams, such that each team-organization has separate economic interests. While MLS might aspire to be the premier professional soccer league in the country, its individual team investors are likely most interested in making a profit. Even if MLS were to successfully argue that it is a single entity, MLS is still a separate economic actor from USL: USL is a distinct business organization that oversees a different professional soccer league with its own investors and teams. Therefore, if the relevant market is all of professional soccer, where MLS and USL are indeed horizontal competitors, a party could make out a viable claim under Section 1 of the Sherman Act alleging that MLS, USL, and USSF's concerted action is in restraint of trade.

B. USSF: *The Twelfth Man*¹¹² on the Field

The close-knit relationship between USSF and MLS can be tracked to the origins of MLS itself. In 1990, Alan Rothenberg, who has been called "the

109. *American Needle* 650 U.S. at 183.

110. *Id.* at 195 (quoting *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752, 769 (1984)). After applying this test, the Court in *American Needle* held that the concerted action between the NFL and NFLP constituted a concerted action that was not outside the scope of Section 1.

111. *Fraser v. Major League Soccer*, 284 F.3d 47, 57 (1st Cir. 2002) ("MLS and its operator/investors have separate contractual relationships giving the operator/investors rights that take them part way along the path to ordinary sports team owners: they do some independent hiring and make out-of-pocket investments in their own teams; they retain a large portion of the revenues from the activities of their teams; and each has limited sale rights in its own team that relate to specific assets and not just shares in the common enterprise. *One might well ask why the formal difference in corporate structure should warrant treating MLS differently than the National Football League or other traditionally structured sports leagues.*" (emphasis added)).

112. Generally, soccer teams have a maximum of eleven players on the field. The term twelfth man implies that a team's fans or the referee may play a potentially helpful role in the game.

most influential person in U.S. soccer history”¹¹³ and “Soccer’s Mr. America,”¹¹⁴ was elected president of USSF.¹¹⁵ USSF won the 1994 World Cup bid by committing to create a professional league by 1992.¹¹⁶ Rothenberg unveiled the plan for MLS in 1993.¹¹⁷ At this point, Rothenberg was the leader in every facet of American soccer: he was the chairman and chief executive officer of the U.S. World Cup organizing committee, president of USSF, and chairman of MLS.¹¹⁸

The alleged conspiracy between USSF and MLS was formally challenged in 2017. NASL sued USSF, MLS, and USL in 2017, claiming the three organizations participate in a conspiracy in violation of Section 1 of the Sherman Act.¹¹⁹ That litigation is currently underway. USSF might respond that all the other leagues—including MLS and USL—are subsidiaries, as they operate under the umbrella of USSF.¹²⁰ If a court recognized such a relationship, then USSF could invoke *Copperweld Corp. v. Independence Tube Corp.*, in which the Supreme Court held that a parent corporation and its subsidiaries constituted a single firm for antitrust purposes and were exempted from Section 1.¹²¹

But a claim that USSF, MLS, and USL comprise a single entity should fail as a defense after *American Needle*.¹²² First, all three agencies are individually incorporated and managed.¹²³ Second, most courts analyze this defense under the test developed in *Sullivan v. NFL*, in which the critical inquiry is whether the alleged antitrust conspirators have a “unity of interests,” or if any of the defendants has pursued interests “diverse from those of the coop-

113. Heike K. Sullivan, *Fraser v. Major League Soccer: The MLS’s Single-Entity Structure Is a “Sham,”* 73 TEMP. L. REV. 865, 888 (2000) (quoting Jerry Langdon, *Rothenberg the Rozelle of U.S. Soccer*, GANNETT NEWS SERV., Aug. 18, 1998).

114. Steve Berkowitz, *Alan Rothenberg: Soccer’s Mr. America*, WASH. POST (June 7, 1994), <https://www.washingtonpost.com/archive/sports/1994/06/07/alan-rothenberg-soccers-mr-america/42adb8d4-bcc1-4b5d-97cf-0ec4ff81a211/> [<https://perma.cc/QX44-UVC4>].

115. *Id.*

116. *New League Is Unveiled for U.S.*, N.Y. TIMES (Dec. 20, 1993), http://www.nytimes.com/1993/12/20/sports/20iht-league_0.html (on file with the *Michigan Law Review*).

117. *Id.*

118. See Berkowitz, *supra* note 114.

119. Complaint, *N. Am. Soccer League v. U.S. Soccer Federation*, No. 1:17-cv-5495 (E.D.N.Y. Sept. 19, 2017).

120. See *supra* note 18 and accompanying text.

121. 467 U.S. 752, 771–72 (1984).

122. *American Needle, Inc. v. NFL*, 560 U.S. 183 (2010).

123. *Company Overview of Major League Soccer, LLC*, BLOOMBERG, <https://www.bloomberg.com/research/stocks/private/snapshot.asp?privcapid=4312581> [<https://perma.cc/P2BD-4Q85>]; *Company Overview of United Soccer Leagues, LLC*, BLOOMBERG, <https://www.bloomberg.com/research/stocks/private/snapshot.asp?privcapid=62366513>, [<https://perma.cc/M9HF-D2DW>]; *Company Overview of U.S. Soccer Federation, Inc.*, BLOOMBERG, <https://www.bloomberg.com/research/stocks/private/snapshot.asp?privcapid=6519300> [<https://perma.cc/KB22-T3QD>].

erative itself.”¹²⁴ Like the NFL teams in *Sullivan*, USSF, MLS, NASL, and USL have diverse interests: they compete with one another for “fan support, players, coaches, ticket sales, local broadcast revenues, and the sale of team [merchandise].”¹²⁵ They are likely separate entities to the extent that they are able to reach an agreement or collude with one another.

Even more worrisome than the preferential relationship between USSF and MLS is the public relationship between MLS and USL. USL has agreed not to compete with MLS for Division I status, USSF has approved USL’s Division II status, and USSF has declined to renew NASL’s Division II’s status.¹²⁶ Throughout, MLS has developed its relationship with USL and strengthened its bond with USSF. In 2014, MLS and USSF announced an eight-year, \$720 million broadcasting agreement with ESPN, FoxSports, and Univision in exchange for the networks’ rights to telecast both MLS and U.S. Men’s and Women’s National Team competitions through the end of 2022.¹²⁷ Under the deal, USSF and MLS would together receive \$90 million each year while networks would be obligated to provide substantial marketing and promotional support to both organizations.¹²⁸

Although MLS, NASL, and USL are independent entities that compete for resources and fans, all three are subject to USSF supervision.¹²⁹ In other words, USSF has a vertical relationship with all three agencies. This supervision facilitates a “hub-and-spoke conspiracy” among upstream and downstream institutions through vertical restraints.¹³⁰ A hub-and-spoke conspiracy involves “a cartel in which a firm (the hub) organizes collusion (the rim . . .) among upstream or downstream firms (the spokes) through vertical restraints” facilitated by the hub.¹³¹ This collusion may violate anti-trust law where the “agreement among the spokes (the rim) is per se unlaw-

124. 34 F.3d 1091, 1099 (1st Cir. 1994) (quoting *City of Mt. Pleasant v. Associated Elec. Coop., Inc.*, 838 F.2d 268, 274–77 (8th Cir. 1988)).

125. *Id.* at 1098.

126. Brian Straus, *U.S. Soccer Not Extending NASL’s Division 2 Sanctioning into 2018*, SPORTS ILLUSTRATED: PLANET FUTBOL (Sept. 5, 2017), <https://www.si.com/soccer/2017/09/05/nasl-division-sanctioning-us-soccer-usl> [<https://perma.cc/N7L7-ASY5>]; see *infra* note 150.

127. See John Ourand & Christopher Botta, *MLS’s Big Play*, SPORTS BUS. J. (May 12, 2014), <http://www.sportsbusinessdaily.com/Journal/Issues/2014/05/12/Media/MLS-TV.aspx> [<https://perma.cc/XFW7-VVNN>]; *MLS, U.S. Soccer Sign Landmark TV and Media Rights Partnerships with ESPN, FOX & Univision Deportes*, MLS (May 13, 2014, 10:17 AM), <https://www.mlssoccer.com/post/2014/05/13/mls-us-soccer-sign-landmark-tv-and-media-rights-partnerships-espn-fox-univision> [<https://perma.cc/NEE7-9JSE>].

128. Ourand & Botta, *supra* note 127.

129. See *supra* Section I.A.

130. A vertical restraint is a restraint in competition in a vertical contract, such as between a manufacturer and a retailer.

131. Barak Orbach, *Hub-and-Spoke Conspiracies*, ANTITRUST SOURCE, Apr. 2016, https://www.americanbar.org/content/dam/aba/publishing/antitrust_source/apr16_orbach_4_11f.authcheckdam.pdf [<https://perma.cc/9B6N-L7RU>]; see also *infra* Figure 2.

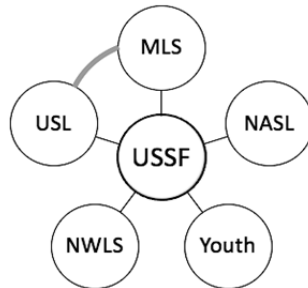
ful, such as fixing prices, or allocating territories or customers among competing spokes.”¹³²

When some restraints on competition are inherent in the nature of the enterprise, however, some courts apply the “quick look” approach instead of declaring that a restraint is *per se* illegal.¹³³ For example, in *NCAA*, the Supreme Court used a quick look approach, reasoning that—even if the case involved a fairly obvious restriction on output—the restraint occurred in the context of a *necessary* restriction on competition.¹³⁴ A court would likely review the restraints created between USSF, MLS, and USL similarly. To properly regulate soccer in the country, the United States needs an organization to oversee and monitor the sport. USSF is that organization.

USSF’s vertical relationships with each of the “spokes” reduces the need for horizontal restraints, but it enables the anticompetitive practices.¹³⁵ Enforcement in hub-and-spoke cartels is relatively efficient since the hub can terminate and punish spokes that do not comply with its policies. In return, the hub collects some collusive profits.¹³⁶ Supervision from the hub can eliminate the problems of selecting and coordinating collusive strategies, monitoring members and deterring defections, and preventing entry or expansion of nonmembers.

FIGURE 2

Representation of Hub-and-Spoke Conspiracy Between USSF, MLS, and USL



132. Orbach, *supra* note 131.

133. This distinction is significant because, unlike the *per se* analysis, under a quick look approach, the defendant may offer procompetitive justifications for the alleged anticompetitive conduct.

134. *NCAA v. Bd. of Regents of Univ. of Okla.*, 468 U.S. 85, 117 (1984).

135. USSF could argue that nonprice restraints on trade are not the types of restraints with which United States antitrust laws are concerned. See *Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 551 U.S. 877, 889–99 (2007) (holding that application of *per se* rule is unwarranted as to vertical agreements to fix minimum resale price).

136. Orbach, *supra* note 131, at 2.

NASL's decision to include USL as a defendant in its lawsuit alleging collusion is key to proving the hub-and-spoke cartel structure. What separates an unlawful conspiracy of vertical relationships from a lawful vertical arrangement is proof of a horizontal agreement (the rim) among competitors.¹³⁷ It would be hard to dispute that this structure allows for an agreement between USL and MLS not to compete. In the last twenty years, USSF has colluded with MLS to engage in anticompetitive practices that severely affect the economic competitiveness of soccer in the United States. This, in turn, damages the *athletic* competitiveness of soccer teams in the country. NASL's conspiracy arguments are not unreasonable. Although MLS and USSF point at other countries' arrangements to justify a single Division I league, both MLS and USSF actively advocate against the promotion and relegation system that most countries enforce.¹³⁸ The concerted action of separate economic actors—USSF, MLS, and USL—to remove NASL from the professional soccer market, after NASL openly expressed an interest in challenging MLS's control of Division I, should raise red flags for antitrust regulators.¹³⁹ NASL claims that USSF shields MLS from competition.¹⁴⁰ It allows for a "clearly defined hierarchy of lower-tier 'minor leagues'" that do not pose any competitive threat to MLS's dominant status in Division I while developing a deeper, broader talent pool from which MLS can draw players.¹⁴¹

In contrast, NASL wanted to directly compete with MLS. As NASL developed, some team owners began to articulate a different vision for soccer in the United States—one that conflicted with that of USSF, MLS, and USL.¹⁴² Bill Peterson, the new NASL Commissioner, started calling for changes to the USSF-sponsored soccer structure, including the introduction of promotion and relegation.¹⁴³ As a Division II league, the implementation of the promotion and relegation system would allow NASL teams to compete with MLS teams for a slot in Division I. Some, like the CEO of NASL team Miami FC, argue that "[b]y adopting the rules followed by virtually every other soccer playing nation around the globe, soccer in America will be

137. *Id.* at 3.

138. *Fraser v. Major League Soccer, L.L.C.*, 284 F.3d 47, 53 (1st Cir. 2002); J.S., *supra* note 61. USSF—the hub of the conspiracy—sanctioned only one Division I professional league, arguing that "sanctioning rival leagues would dilute revenues, drive up costs, and thereby dim the long-term prospects for Division I soccer in the U.S." *Fraser*, 284 F.3d at 53. This is in line with MLS's contention that "no other country has sanctioned more than one Division I league within its borders." *Id.*

139. See generally Kartik Krishnaiyer, *The Changing Relationship Between MLS, NASL and USL*, WORLD SOCCER TALK (Aug. 30, 2015), <http://worldsoccertalk.com/2015/08/30/the-changing-relationship-between-mls-nasl-and-usl/> [<https://perma.cc/H33N-5N4S>].

140. Complaint, *supra* note 119, at 22.

141. *Id.*

142. See Krishnaiyer, *supra* note 139.

143. NASL Chief Calls for Promotion and Relegation, FOURFOURTWO (Aug. 10, 2015), <https://www.fourfourtwo.com/us/news/nasl-chief-calls-promotion-and-relegation> [<https://perma.cc/6YYW-Q5G6>].

open, resulting in better teams through all divisions, compelling story lines to increase fan excitement and greater financial success for everyone involved in this beautiful game.”¹⁴⁴ NASL expressed its desire to compete with MLS, but MLS ultimately reached an agreement with USL (which at the time was a Division III league) “to house reserve teams for MLS clubs” and feature “an intricate set of player loans and affiliations between clubs in [MLS and USL] leagues.”¹⁴⁵ This type of explicit, nonprice agreement between horizontal competitors is evidence of collusion to restrain economic competition.

In 2015, NASL submitted a formal application to USSF for Division I status.¹⁴⁶ In its application, NASL asked for a waiver of anticompetitive restrictions such as time zone and stadium capacity requirements, but otherwise met all the Professional League Standards needed to obtain Division I status at the time.¹⁴⁷ According to NASL, instead of granting the application for Division I status, USSF held the application and did not make a decision for over nine months and, meanwhile, proposed new and more restrictive Professional League Standards.¹⁴⁸ These new standards effectively forced NASL out of Division II. Ultimately, USSF denied NASL’s application to enter Division I in 2016¹⁴⁹ and instead granted provisional Division II status to USL.¹⁵⁰ In addition, USL announced its plan to launch a separate Division III league in 2019.¹⁵¹ In effect, USSF created a market division wherein MLS takes Division I soccer and USL takes Division II and III. Under *United States v. Sealy, Inc.*, such market divisions are inherently anticompetitive and considered per se illegal under Section 1 of the Sherman Act.¹⁵²

Even if USSF and MLS intended to protect the long-term interests of Division I in good faith, “good motives will not validate an otherwise anticompetitive practice.”¹⁵³ As NASL argued in its September 2017 lawsuit, this hard-lined Division structure is itself anticompetitive and unlawful because

144. *Miami FC Taking Promotion-Relegation Fight to Court of Arbitration for Sport*, ESPN (Aug. 3, 2017), <http://www.espnfc.com/miami-fc/story/3171424/miami-fc-taking-promotion-relegation-fight-to-court-of-arbitration-for-sport> [https://perma.cc/WR4B-54JA].

145. See Krishnaiyer, *supra* note 139.

146. Complaint, *supra* note 119, at 24–25.

147. *Id.* at 25.

148. *Id.* at 26.

149. *Id.*

150. *USL Granted USSF Provisional Division 2 Status*, USL (Jan. 6, 2017, 9:08 PM), http://www.uslsoccer.com/news_article/show/741595 [https://perma.cc/SY76-DMQA].

151. *USL to Launch Third-Division League in 2019*, *supra* note 26.

152. 388 U.S. 350, 357 (1967) (holding that market divisions in the form of territorial limitations were unlawful under the Sherman Act without any necessity for inquiry as to the business justifications or impacts on the market); see also *United States v. Topco Assocs., Inc.*, 405 U.S. 596, 608–10 (1972) (holding that market divisions were per se illegal despite arguments that such practices increased competition by enabling members of the association to compete with larger regional and national chains).

153. *NCAA v. Bd. of Regents of Univ. of Okla.*, 468 U.S. 85, 101 n.23 (1984).

the application criteria arbitrarily favor MLS.¹⁵⁴ In addition, the close relationship between MLS and USL with USSF is important for branding. For example, prospective owners heavily weigh a league's affiliation with MLS when deciding which league to join. Warren Smith, the founder of USL club Sacramento Republic FC, stated that, when balancing his options, affiliation with MLS was the "trigger point" in his decision to join USL.¹⁵⁵

USSF's rejection of the promotion and relegation system that FIFA endorses also amounts to a restraint of trade.¹⁵⁶ It allows USSF to maintain control over the rigid hierarchy it created and eliminate competitors, like NASL, that challenge USSF's closed league system. Similarly, MLS is opposed to adopting promotion and relegation because team owners fear their investments could be undermined.¹⁵⁷ Relegation would risk those investments.¹⁵⁸

Given these anticompetitive effects, USSF should provide procompetitive justifications for holding NASL to the new, harsher Professional League Standards. These justifications must go beyond arguments that *athletic* competition from teams in Division I or Division II sports leagues would destabilize the quality of the Division I league.¹⁵⁹ Indeed, a direct rivalry across divisions would foster *economic* competition, which is the goal of antitrust law in the United States. USSF, MLS, and USL need a sufficient procompetitive justification that outweighs the negative effects that their hub-and-spoke conspiracy has on the economic competitiveness of the United States soccer market. And, if USSF, MLS, and USL cannot sufficiently justify their hub-and-spoke conspiracy in procompetitive terms, then USSF should embrace a market shake-up for its impact on both economic *and* athletic competition.

154. Brian Straus, *NASL Files Antitrust Lawsuit vs. U.S. Soccer over Division Sanctioning*, SPORTS ILLUSTRATED (Sept. 19, 2017), <https://www.si.com/soccer/2017/09/19/nasl-us-soccer-antitrust-lawsuit-division-sanctioning> [https://perma.cc/SH9M-KTQ7].

155. Nate Sulat, *Building the Soccer Pyramid: Aspiring Markets Face a Choice Between USL PRO and NASL*, MLS (Apr. 25, 2014, 7:13 PM), <https://www.mlssoccer.com/post/2014/04/25/building-soccer-pyramid-aspiring-markets-face-choice-between-usl-pro-and-nasl> [https://perma.cc/CT7F-E6A4].

156. Jeff Carlisle, *MLS Union Director Condemns Youth Clubs' Lawsuit as 'Terrible for Players'*, ESPN (July 2, 2016), <http://www.espn.com/soccer/united-states/story/2906712/mls-union-director-condemns-youth-clubs-lawsuit-as-terrible-for-players> [https://perma.cc/MGC6-UDN2].

157. J.S., *supra* note 61.

158. *Id.*

159. See Zachary Zagger, *Marketing Deal Joined US Soccer, MLS at Hip, Judge Told*, LAW360 (Oct. 31, 2017), <https://www.law360.com/articles/979619/marketing-deal-joined-us-soccer-mls-at-hip-judge-told> (on file with the *Michigan Law Review*) ("Given [the] anticompetitive effect, Kessler argued the burden shifts to U.S. Soccer to prove procompetitive justifications for holding NASL to the standards, and that those justifications cannot simply be that competition from another sports league would destabilize MLS. That is competition, which antitrust law seeks to promote.").

C. *Calling the Foul: The Conspiracy Between USSF, MLS, and USL Inhibits the Growth of Developmental Soccer in the United States*

Although NASL's lawsuit focuses on USSF's anticompetitive Professional League Standards, the effects of the collusion between USSF, MLS, and USL extend beyond professional soccer. Besides the economic effects associated with eliminating a competitor, the horizontal agreement between USSF, MLS, and USL further affects the athletic competitiveness of youth development teams and leagues.¹⁶⁰ USSF's facilitation of the horizontal agreement between MLS and USL took a competitor out of the market, therefore concentrating the market. But apart from effects on economic competition, this restriction also affects the athletic competitiveness of youth development teams and leagues.¹⁶¹ This is best represented through USSF's objection to youth teams' collection of transfer fees for the players they helped develop.¹⁶²

In 2007, USSF created the U.S. Soccer Developmental Academy under the U.S. Youth Soccer umbrella.¹⁶³ Most of the teams in the Development Academy operate under a pay-to-play model, in which players pay thousands of dollars in fees per year just to be on the team.¹⁶⁴ In contrast, MLS

160. Youth development teams are formal training programs through which young players can develop soccer skills for both recreational and competitive purposes. Michael Sokolove, *How a Soccer Star Is Made*, N.Y. TIMES MAG. (June 2, 2010), <https://www.nytimes.com/2010/06/06/magazine/06Soccer-t.html> (on file with the *Michigan Law Review*).

161. See Turner, *supra* note 4.

162. See Liviu Bird, *Youth Clubs File for Compensation, Solidarity on USMNT Stars' Transfers*, SPORTS ILLUSTRATED: PLANET FUTBOL (Sept. 3, 2015), <https://www.si.com/planet-futbol/2015/09/03/solidarity-compensation-us-soccer-dempsey-bradley-yedlin-fifa-drc> [<https://perma.cc/3SNA-ZAAN>].

163. See *supra* Figure 1. As of 2014, US Youth Soccer has more than 5,550 clubs as members. Christian Hambleton & Michael K. Wheeler, *Guest Post: Are U.S. Youth Clubs Leaving Money on the Table?*, JETLAW (June 20, 2014), <http://www.jetlaw.org/2014/06/20/guest-post-are-u-s-youth-clubs-leaving-money-on-the-table/> [<https://perma.cc/ZJS8-D3DG>].

164. Under the pay-to-play model, teams typically charge each player a fee of around \$1,200 a year (which can increase to \$2,200 for traveling expenses). See Hambleton & Wheeler, *supra* note 163; see also Peter Staunton, *How Many Howards and Dempseys Are the US Losing Due to Pay to Play?*, GOAL (Oct. 13, 2017, 7:00 AM), <http://www.goal.com/en/news/how-many-howards-or-dempseys-are-the-us-losing-due-to-pay-to/4c10dtk0u17c16q7nsa1g3x4y> [<https://perma.cc/ES3N-ZKJC>] (discussing how Brad Guzan's first club, the Chicago Magic, charged \$25 for a tryout and \$2,095 upon registration for a season, and Jozy Altidore played for Boca Raton Junior Soccer Club, where the Academy Program charged \$3,000 per month plus \$125 for a uniform). When equipment, apparel, and other auxiliary fees are taken into account, annual costs for parents might reach \$10,000. Rick Eckstein, *Until Youth Soccer Is Fixed, US Men's National Team Is Destined to Fail*, CONVERSATION (Oct. 13, 2017, 12:19 AM), <https://theconversation.com/until-youth-soccer-is-fixed-us-mens-national-team-is-destined-to-fail-85585> [<https://perma.cc/UW6G-SEWH>]. The annual costs for an MLS Developmental Academy team to operate its U-16 and U-18 teams are around \$600,000 on average. See Hambleton & Wheeler, *supra* note 163. Many youth clubs offer scholarships, though those are limited and raise different issues. See Staunton, *supra* (noting that there are often stories about

teams have official “youth divisions” that are subsidized by the league, such that players can join for free.¹⁶⁵ This economic edge, along with the prestige of playing for a professional league youth team (MLS) instead of a recreational youth team (Development Academy), results in a closed talent loop for MLS to recruit and retain players.

Experts, analysts, and industry members agree that youth development is a central contributor to U.S. soccer’s failures.¹⁶⁶ Player development in the United States “will only improve when youth clubs can prosper financially from producing an elite player.”¹⁶⁷ MLS academies have been the biggest advance in U.S. youth development in the last decade.¹⁶⁸ And unlike non-MLS academies, MLS academies are free.¹⁶⁹ This “free and elite instruction” model is in direct contradiction to the “entrenched pay-to-play” model, which non-MLS youth teams must use, as they do not have an alternative source of funding.¹⁷⁰ Since the majority of MLS players come up from unsubsidized non-MLS academies,¹⁷¹ the talent pool is sharply restricted to affluent families. Non-MLS academies could move away from the pay-to-play system by following two regulations that FIFA has designed to address this issue: training fees and solidarity payments.¹⁷² USSF and MLS, however, have routinely argued that these fees are illegal and accordingly discourage youth teams from collecting them.¹⁷³

In response, some youth teams have tried to challenge USSF and MLS’s objections to solidarity payments. For example, in 2008 a prominent youth

parents complaining to the scholarship recipients and saying, “I am paying for your kid to be here”).

165. See Staunton, *supra* note 164.

166. See Turner, *supra* note 4.

167. *Id.*

168. *Id.*

169. *Id.*

170. *Id.*

171. *Id.*; see Sulat, *supra* note 155.

172. See Turner, *supra* note 4.

173. *Examining the Governance and Integrity of International Soccer: Hearing Before the Subcomm. on Consumer Prot., Prod. Safety, Ins., and Data Sec. of the Comm. on Commerce, Sci., and Transp.*, 114th Cong. 46–47 (2015). In a written response to a question from Senator Maria Cantwell, USSF responded that:

Consistent with the ruling in *Bosman* and given the antitrust laws of this country, U.S. Soccer agreed in *Fraser* that it would not enforce transfer fee or similar restrictions that FIFA might impose on the movement of players who were “out of contract.” Some aspects of the current FIFA RSTP may be considered applicable to out-of-contract players and, therefore, the *Fraser* order would apply in those circumstances. In addition, U.S. Soccer concluded, with the advice of outside counsel, that enforcing the RSTP with respect to the training compensation and solidarity payment mechanisms could be found to violate the antitrust laws of the United States given their potential impact on the mobility of players.

club, the Dallas Texans,¹⁷⁴ filed a formal petition with the FIFA Dispute Resolution Chamber, which is an independent arbitration tribunal set up to settle private legal disputes.¹⁷⁵ They requested solidarity payments from Fulham, a major professional club in the English Premier League, for the transfer of Clint Dempsey, a star on the U.S. national team and one of American soccer's most prominent exports.¹⁷⁶

Even though the court never decided the merits of the case, the issue drew attention from politicians. USSF was called to testify at a hearing before the United States Senate.¹⁷⁷ At the hearing, a representative for USSF commented on the *Dallas Texans* case, saying that "enforcing the RSTP with respect to the training compensation and solidarity payment mechanisms could be found to violate the antitrust laws of the United States given their potential impact on the mobility of players."¹⁷⁸ He added that "[USSF] has chosen not to enforce those aspects of the RSTP system that are of questionable legal validity in this country and which might expose [USSF] to increased legal risk."¹⁷⁹ Then, the general counsel of USSF sent a fax to FIFA that disputed any payment because "the Texans were 'not a direct member of US Soccer' and the payment 'directly contravenes US law.'"¹⁸⁰ The Texans subsequently withdrew their claim.¹⁸¹

174. The Dallas Texans are one of USSF's Development Academy clubs. *DA Club Directory*, U.S. SOCCER DEV. ACAD., <http://www.ussoccerda.com/all-clubs> [<https://perma.cc/Y98T-62YC>]. Most players' families pay an annual fee to participate, even though the club manages its budget so that every team has scholarships available to players who are unable to pay. *History/Vision*, DALL. TEXANS SOCCER CLUB, <https://www.dallastexans.com/page/show/2425798-history-vision> [<https://perma.cc/UHB3-LG6W>]. The club has relied on sponsors to reduce its club dues. *Id.*

175. See Bird, *supra* note 162.

176. See Liviu Bird, *More U.S. Youth Clubs, Including Dempsey's, Join Compensation Fight*, SPORTS ILLUSTRATED: PLANET FUTBOL (July 15, 2015), <https://www.si.com/planet-futbol/2015/07/15/us-youth-clubs-training-compensation-yedlin-crossfire-dallas-texans-dempsey> [<https://perma.cc/K5WK-S33T>]. In response to the petition, Fulham stated that United States laws prevented those payments, and therefore did not pay the transfer fees demanded by the Texans (and technically required by FIFA rules). *Id.* Instead, MLS received the full payment for Dempsey's transfer. *Id.* The Dallas Texans also sued in federal court seeking a declaration that MLS could not file an antitrust complaint if the teams asked for the player development fees. *Dall. Texans Soccer Club v. Major League Soccer Players Union*, No. 4:16-CV-00464, 2017 WL 1174602, at *2 (E.D. Tex. Mar. 29, 2017). The court dismissed the case on jurisdictional grounds and never ruled on the merits of the case. *Id.* at *4.

177. Liviu Bird, *U.S. Soccer Answers to Senate over Youth Club Compensation Dispute*, SPORTS ILLUSTRATED: PLANET FUTBOL (Sept. 10, 2015), <https://www.si.com/planet-futbol/2015/09/10/us-soccer-senate-youth-club-compensation-solidarity> [<https://perma.cc/Z6MD-WM3P>].

178. *Id.*

179. *Id.*

180. See Turner, *supra* note 4.

181. *Id.*

USSF also claims that a confidential consent decree prohibits youth clubs in the United States—which are also under the USSF umbrella¹⁸²—from taking solidarity payments.¹⁸³ Some of these youth clubs are “actively seeking \$850,500 from clubs at home and abroad,” which “could fully fund hundreds of players’ participation in youth soccer for one year” and marginally reduce reliance on the current pay-to-play model.¹⁸⁴ The pay-to-play model assumes that the better an athlete, the more money a parent will pay.¹⁸⁵ But this excludes a significant portion of the talent pool who cannot afford to participate. This shortsighted model inhibits the development of American soccer stars.

Further, American youth teams currently do not benefit from player transfers. For example, when U.S. national team star DeAndre Yedlin transferred to the prominent English team Tottenham, his old American team FC Crossfire did not receive solidarity fees for the transfer.¹⁸⁶ Instead, MLS took 100% of the transfer fee, including the portion meant for his youth clubs.¹⁸⁷ Crossfire filed a petition with FIFA’s Executive Committee for the right to collect fees on Yedlin’s \$4 million transfer from Seattle Sounders (MLS) to Tottenham.¹⁸⁸ Crossfire received permission from FIFA to file a complaint with FIFA’s Dispute Resolution Chamber.¹⁸⁹

The success of European club teams’ youth development shows how the American model could be improved. Non-MLS youth sports leagues, for the most part, are community based and run by volunteers rather than professionals.¹⁹⁰ European club teams rely on a well-financed youth soccer culture.¹⁹¹ For example, Wesley Sneijder started at the Dutch team AFC Ajax’s youth academy when he was only seven years old.¹⁹² Eventually, when he was 23, the Spanish team Real Madrid acquired him from Ajax for 27 million euros.¹⁹³ That transaction included a transfer fee for Ajax’s academy, which finances the system going forward.¹⁹⁴ The current structure of soccer in the United States restrains the athletic and economic competitiveness of teams

182. See *supra* note 18 and accompanying text.

183. See Bird, *supra* note 162.

184. *Id.*

185. Sokolove, *supra* note 160.

186. Bird *supra*, note 177.

187. See *id.*

188. Jorge Arangure Jr., *Youth Clubs File Class Action Lawsuit vs. MLS Players Union and Dempsey, Yedlin and Bradley*, VICE SPORTS (July 1, 2016, 6:15 PM), https://sports.vice.com/en_us/article/4xzx53/youth-clubs-class-action-mls-players-union-dempsey-yedlin-bradley-solidarity-payments [https://perma.cc/VW7P-SHD4].

189. *Id.* The Chamber has not issued a decision at the time of publication.

190. See Sokolove, *supra* note 160.

191. See *id.*

192. *Id.*

193. *Id.*

194. *Id.*

and players. An open-league structure in which teams can be promoted and relegated across divisions would further athletic and economic competition. With teams and leagues in direct competition with each other, the open-league system would create a better product for consumers over time. Likewise, solidarity payments and transfer fees would provide youth development teams with needed resources to train future U.S. soccer stars.

III. CHANGING THE RULES OF THE GAME

USFF, MLS, and USL's conduct amounts to unlawful anticompetitive coordination, and it is time for policies to change or regulators to intervene. First, USFF and other professional soccer leagues should implement FIFA's RSTP promotion and relegation system. This will effectively eliminate the market division and foster competition. Accordingly, teams will compete athletically for slots in other leagues, and the leagues will compete economically for attendance, viewers, and marketing deals. The quality of both types of competition will improve under this merit-based system. Demoted teams will work harder to earn their spots back, and players will similarly work harder to move to higher, more lucrative divisions.¹⁹⁵ Likewise, team owners and leagues will be motivated to recruit better coaches and players, finance better infrastructure, and attempt to cultivate a sustainable long-term plan for the team, instead of playing to win a single match or tournament.¹⁹⁶ Inevitably, this would require investments in youth development programs.

But there are some risks to adopting a promotion and relegation system in American soccer.¹⁹⁷ For instance, the introduction of competitive risk (relegation) and reward (promotion) could lead to a surge in player costs: if players become more valuable commodities (due to their performance), club owners' interest in those players grows. Additionally, team owners might feel that promotion and relegation is a major new business risk that could undermine their investment. But there are strategies from the European system that could mitigate these concerns. For example, cost control mechanisms, such as UEFA's Financial Fair Play Regulations, could prevent teams from spending more than they earn on players, capping market values.¹⁹⁸ And new

195. See e.g., Billy Haisley, *Chart: The Average Player Salaries in Soccer Leagues Around the World*, DEADSPIN (Nov. 14, 2014, 1:20 PM), <https://deadspin.com/chart-the-average-player-salaries-in-soccer-leagues-ar-1658856283> [<https://perma.cc/5CCB-9F6E>] (ranking the salaries for different sports leagues around the world).

196. See e.g., Chris Smith, *Soccer's Highest-Paid Coaches*, FORBES (May 7, 2014, 9:46 AM), <https://www.forbes.com/sites/chris-smith/2014/05/07/soccers-highest-paid-coaches/> [<https://perma.cc/B3XM-HQFY>] (listing and explaining the salaries for well-coveted coaches around the world).

197. See DELOITTE REPORT, *supra* note 66.

198. Even if there are some increased costs, increased competition means increased revenue to account for higher costs. Also, ruinous-competition arguments are not sufficient to win antitrust claims.

equity structures, revenue distributions, and market incentives could be used to reassure investors.¹⁹⁹

Another necessary step is allowing youth teams to collect transfer and solidarity fees. Even if USSF and MLS are correct and allowing the collection of transfer and solidarity fees would be a violation of U.S. antitrust laws, USSF could follow UEFA's model and create standards to ensure that RSTP complies with U.S. antitrust law.²⁰⁰ Transfer and solidarity payments are crucial to improve youth clubs, because they would fill in—and likely grow—the source of income for those development teams, which would allow youth soccer to exit the pay-to-play model.²⁰¹

Under the current rules, MLS plays a role in negotiations over transfers with foreign clubs.²⁰² Speculators anticipate that MLS will approve a new rule that would allow MLS teams to keep 100% of transfer fees for homegrown players.²⁰³ It is unclear whether the new rule would eliminate MLS's role in those negotiations. If the rule change affects MLS's position in negotiations while increasing the teams' autonomy, the rule could also affect the vitality of the league's single-entity antitrust defense. Additionally, this new rule could foster economic competition between MLS teams.²⁰⁴ If and until such a rule is implemented, MLS will continue to gift each team with the right of first refusal for any youth players within a certain distance from the team's home. Subsequently, until rules change, this system will allow MLS to keep

199. See DELOITTE REPORT, *supra* note 66.

200. For example, the United States could follow the UEFA initiative to reconcile transfer fees and solidarity payments with European competition law. See *supra* notes 86–87 and accompanying text.

201. Grant Wahl, *Landon Donovan Won't Run for President but Eyes Active Role in Shaping U.S. Soccer*, SPORTS ILLUSTRATED: PLANET FUTBOL (Nov. 9, 2017), <https://www.si.com/soccer/2017/11/09/landon-donovan-us-soccer-president-election-sunil-gulati> [<https://perma.cc/J2AM-E7HK>] (interviewing Landon Donovan, former captain of the US men's national team, who said that he believes “in a perfect world pay-to-play [would be] eliminated,” but that we do not live in a perfect world, and continuing to say that one way to change the paradigm would be to incorporate training compensation to incentivize clubs and change “clubs' mindsets into ‘let's develop players because that's where we can make the most money’”).

202. See Paul Tenorio, *Keep the Profit: Proposed Transfer-Fee Changes Give MLS Teams Incentive to Sell*, FOURFOURTWO (Nov. 6, 2017), <https://www.fourfourtwo.com/us/features/keep-profit-proposed-transfer-fee-changes-give-mls-teams-incentive-sell> [<https://perma.cc/DN8X-LGPC>].

203. See *id.* A Homegrown Player under MLS's definition is a player who has been a member of a club's youth academy for at least one year and has met the necessary training and retention requirements. *MLS Roster Rules and Regulations 2018*, MLS (Mar. 2, 2018, 6:00 PM), <https://www.mlssoccer.com/league/official-rules/mls-roster-rules-and-regulations> [<https://perma.cc/7FSP-FB55>]. Currently, twenty-five percent of any homegrown transfer goes to MLS. Tenorio, *supra* note 202.

204. See Terence D. Brennan, *For MLS, Liberalization Breeds Exposure*, MEDIUM (Nov. 11, 2016), <https://medium.com/@terryblaw/for-mls-liberalization-breeds-exposure-d7627ff6cde6> [<https://perma.cc/6AKL-63BY>].

the best players in MLS teams, instead of allowing players to choose where they play.

Some have argued that the adoption of transfer fees in the United States would have anticompetitive results. USSF has expressed concern that transfer fee payments for development teams result in overpayment, as both parents and future teams would pay a club.²⁰⁵ Yet, if the pay-to-play model is eliminated, youth teams would not receive money from parents anymore, thus neutralizing any double-payment worries.²⁰⁶ Some, such as the Fédération Internationale de Footballeurs Professionnels (FIFPro),²⁰⁷ argue that transfer fees are anticompetitive because only a few top clubs can afford to buy elite players. These teams then go on to dominate their leagues, while poorer clubs do not advance.²⁰⁸ FIFA's 2017 Global Transfer Market Report, however, shows that high transfer fees are not universal, and only about fourteen percent of all worldwide transfers last year involved transfer fee payments.²⁰⁹ Therefore, it is possible that concerns about market imbalance are overblown, and some disparity between international teams is natural.

On the other hand, the value of international transfers within CONCACAF is quickly increasing. Only five percent of the world's international transfers occur in CONCACAF, but according to an April 2016 FIFA report, the average transfer value in the region has grown from \$500,000 in 2011 to \$1,100,000 in 2015.²¹⁰ The report also stated that "[t]he fast growth of CONCACAF's two top leagues—MLS and the MX Liga—is partly reflected by the increase in the average value of players from North and Central America."²¹¹ Players from the United States have been involved in the most transfers in the last five years—1,022—and the average fee per player for the region is \$745,000.²¹² If one youth team were to receive that full amount for a player,²¹³ that money could allow the team to sponsor hundreds of scholar-

205. See Turner, *supra* note 4.

206. See *id.*

207. FIFPro is the worldwide representative organization for all professional soccer players.

208. Miriam Quick, *How Does a Football Transfer Work?*, BBC (Aug. 29, 2017), <http://www.bbc.com/capital/story/20170829-how-does-a-football-transfer-work> [<https://perma.cc/PNB3-PUYK>].

209. *Id.*; see also FIFA TMS Global Transfer Market: Record International Transfers in 2016, FIFA (Jan. 27, 2017), <http://www.fifa.com/governance/news/y=2017/m=1/news=fifa-tms-global-transfer-market-2017-record-international-transfers-in-2865353.html> [<https://perma.cc/M363-WH3Y>].

210. FIFA TMS, PLAYER NATIONALITIES IN THE TRANSFER MARKET 2016, at 11 (2016), <https://www.fifatms.com/wp-content/uploads/2018/04/Player-Nationalities-in-the-Transfer-Market-Report.pdf> [<https://perma.cc/3RSP-D5WW>].

211. *Id.*

212. *Id.*

213. But see Owen Gibson, *FIFA Statistics Show 28% of Transfer Fees Go to Agents and Third Parties*, GUARDIAN (Jan. 8, 2013, 3:29 PM), <https://www.theguardian.com/football/2013/jan/08/fifa-transfers-agents-third-parties> [<https://perma.cc/EE72-MCGK>].

ships for players who otherwise could not afford to pay to play. Those scholarships would expand the talent pool in development leagues from which MLS eventually draws. Therefore, while the amount of money in the market increases, youth development teams are missing out on opportunities to obtain additional funds that will allow them to support their soccer players.

The MLS Players' Union also objects to allowing youth teams to collect transfer fees and solidarity payments.²¹⁴ The Players' Union fears that transfer fees and solidarity payments will devalue American soccer players and hurt their chances of getting recruited abroad.²¹⁵ According to the Players' Union executive director Bob Foose, "it would be an act of antitrust against its US player members and illegal in the US for the US Youth Clubs to enforce . . . an award from the FIFA DRC of . . . training compensation."²¹⁶ Yet soccer history shows that international soccer superstars are transferred and recruited around the world, often to play in teams that do abide by the transfer fees and solidarity payments regime. As the Neymar transfer shows, no price is too high for a highly coveted player who might change the fate of a team.²¹⁷ In contrast, U.S. players are not as popular abroad because of the inferior quality of U.S. professional soccer vis-à-vis professional soccer in countries such as Netherlands, England, Spain, and Italy.

As European clubs directly fund development academies to train elite players, USSF must reassess the sustainability of a youth development system that lacks funds from training compensation and solidarity payments. But when asked whether the United States could develop a unique system that follows FIFA guidelines, a USSF representative responded that it would not be possible because "the stated goal of the RSTP system is to compensate amateur teams for their investment in player development."²¹⁸ Further, unlike in many other countries, the cost of player training and development in the United States is typically borne by families of young players.²¹⁹ Thus, while teams abroad continue molding future soccer stars, USSF supports structural impediments that limit the athletic competitiveness of its talent.

Ending pay-to-play would improve diversity in the sport and open opportunities for talented children who would otherwise not have the money

214. See Arangure, *supra* note 188.

215. Jorge Arangure Jr., *MLS Players Union Executive Director Calls Lawsuit Against Dempsey, Yedlin, Bradley "A Shakedown for Money,"* VICE SPORTS (July 2, 2016, 1:30 PM), https://sports.vice.com/en_us/article/jp7938/mls-players-union-executive-director-calls-lawsuit-against-dempsey-yedlin-bradley-a-shakedown-for-money [<https://perma.cc/P8KV-QW99>].

216. *Id.*

217. See Cork Gaines, *Neymar's Move to PSG Will Cost the French Soccer Giant More than \$500 Million,* BUS. INSIDER (Aug. 6, 2017, 8:00 AM), <https://www.businessinsider.com/how-much-neymar-salary-transfer-fee-psg-barca-2017-8> [<https://perma.cc/Q8K4-39QQ>].

218. Bird, *supra* note 177.

219. See Turner, *supra* note 4.

to afford enrolling in a youth club team.²²⁰ It would also increase the available pool of players for coaches to recruit. As the chairman of USSF's diversity task force put it, "The [current] system is not working for the underserved community. It's working for the white kids."²²¹ Indeed, research suggests that "[a]bout 25 percent of American families have incomes over US \$100,000 annually, yet they produce 35 percent of youth soccer players."²²² Meanwhile, "the 25 percent of families with incomes below \$25,000 account for only 13 percent of youth soccer players."²²³

But economic status does not equate to athletic ability. For example, Tim Howard—goalkeeper for the United States men's national soccer team—has discussed how receiving an offer from Tim Mulqueen, a former goalkeeping coach of Rutgers University men's team, was a life-altering opportunity.²²⁴ In 1991, Mulqueen waived the standard \$25 fee for private coaching sessions because Howard's mother could not afford it.²²⁵ Had Mulqueen insisted on full payments for his services, Howard likely would not have worked his way through the United States Olympic Development Training Program or developed an international career.²²⁶ Apart from enhancing athletic competition, tapping into lower-income and inner-city neighborhoods should help expand and diversify the soccer audience and market.²²⁷

Unfortunately, the pending NASL lawsuit will probably not succeed in its push for these changes. In the NASL complaint, the organization essentially makes an argument about ruinous competition—that the collusion between USSF, MLS, and USL put NASL out of business.²²⁸ But antitrust laws were enacted for "the protection of competition, not competitors."²²⁹ Put another way, the purpose of the Sherman Act is to ensure a fair marketplace for consumers, not to prevent individual businesses from failing. Future challenges should instead focus on how any USSF-facilitated collusion affects the

220. Scott Gleeson, *Hope Solo Says Youth Soccer in the U.S. Has Become a 'Rich, White Kid Sport,'* USA TODAY (June 28, 2018, 10:43 AM), <https://www.usatoday.com/story/sports/soccer/2018/06/28/hope-solo-youth-soccer-united-states-cost/741378002/> [<https://perma.cc/5FTW-U9NS>]; see also Wahl, *supra* note 201.

221. Les Carpenter, *'It's Only Working for the White Kids': American Soccer's Diversity Problem,* GUARDIAN: SPORTSBLOG (June 1, 2016, 6:00 AM), <https://www.theguardian.com/football/blog/2016/jun/01/us-soccer-diversity-problem-world-football> [<https://perma.cc/NN7D-4N8B>].

222. Eckstein, *supra* note 164.

223. *Id.*

224. Staunton, *supra* note 164.

225. *Id.*

226. *Id.*

227. But USSF seems more concerned with the expansion of MLS into youth development academies than with supporting the growth of non-MLS US Youth clubs and programs. See *id.*

228. Complaint, *supra* note 119.

229. *Brown Shoe Co. v. United States*, 370 U.S. 294, 320 (1962) (emphasis omitted).

American soccer market writ large—from barriers for new players and teams entering the market, to control of how consumers can watch and attend matches.

Alternatively, a path outside the courtroom exists to promote soccer reform: appealing to FIFA. FIFA could intervene and sanction USSF for not abiding by the RSTP guidelines and not adopting a promotion and relegation regime. If FIFA persuaded USSF to create a Division I league in exchange for the United States' opportunity to host the 1994 World Cup, it probably also has enough leverage to force these proposed changes.²³⁰ Further, because USSF exists under the FIFA umbrella, FIFA could require USSF to be more transparent in its business with MLS. FIFA could first ask USSF to reveal the contents of the infamous consent decree²³¹ that prohibits USSF from allowing youth teams to collect training compensation and solidarity payments. FIFA could also demand stricter conflict of interest policies to prevent biases in USSF's business relationships with its affiliate organizations. Still, from an economic and athletic performance perspective, USSF should encourage competition between professional soccer leagues.

CONCLUSION

The lack of competition in American professional soccer leagues led to a weak U.S. Men's National Team that shocked fans when it failed to qualify for the 2018 World Cup. In light of this colossal failure, fans are demanding change.

U.S. soccer's problems are rooted in anticompetitive policies across its professional leagues and youth teams. The men's national team's recent failure is the result of years of USSF's inadequate administration. Changes in the organizational structure of the sport have been a long time coming. For years, advocates for the adoption of promotion and relegation in professional soccer have attributed the sport's slow development to the lack of athletic and economic competition within and across professional leagues. Yet, in response to these calls for better competition, USSF has enabled collusion between MLS and USL, which further concentrates the professional soccer market and constrains the development of the sport.

By adopting promotion and relegation and putting an end to the pay-to-play model in youth development, USSF can strengthen American soccer on the field and in the market. The failure to qualify to the 2018 World Cup was a wake-up call for fans of soccer in the United States. Now it is time for the antitrust regulators to blow the whistle on the anticompetitive behavior off the field.

230. See *supra* note 116 and accompanying text.

231. See *supra* notes 166, 183 and accompanying text.