

# A 2016 Copa America Bump for Major League Soccer? Strengthening the Case for Legal Action Arising from the Corrupted 2022 World Cup Bid

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A 2016 COPA AMERICA BUMP FOR MAJOR  
LEAGUE SOCCER? STRENGTHENING THE CASE  
FOR LEGAL ACTION ARISING FROM THE  
CORRUPTED 2022 WORLD CUP BID

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ABSTRACT

*Governmental and private investigations have generated evidence of corruption in the bidding process to host the 2022 FIFA World Cup, which went to Qatar rather than the United States. One economic study has shown an increase in professional soccer attendance in European countries that host the World Cup and the European Championships. Accordingly, Major League Soccer and its investor-operators could pursue tort and unfair competition claims to argue that denial of a 2022 World Cup USA will result in lowered attendance, and thus lost profits and diminished business value. Key differences in American and European soccer leagues and sports markets might render the assumption that MLS would see a World Cup bump in attendance dubious, however, thus precluding a successful action for damages. The United States recently hosted the 2016 Copa America, a regional soccer tournament similar to the European Championship. An ordinary least squares regression analysis of MLS attendance data immediately before and after the Copa America reveals an increase in attendance correlated with the tournament, thus supporting application of the World Cup bump in a legal action for money damages related to the corrupted 2022 World Cup bid. This Article suggests the need for further research in economics about the impact of nations hosting major*

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*soccer tournaments and in evidence law about applying economic studies from one product, business, or market to another product, business, or market.*

TABLE OF CONTENTS

INTRODUCTION ..... 622

I. INTERNATIONAL SOCCER AND WORLD CUP CORRUPTION ..... 627

II. LEGAL ACTIONS BASED UPON THE LOST WORLD  
CUP BUMP ..... 635

*A. The World Cup/Euro Cup Bump* ..... 636

*B. Legal Recourse for U.S. Soccer Interests* ..... 637

III. DUBIOUS ASSUMPTIONS IN ECONOMIC MODELS ..... 643

IV. KEY DIFFERENCES IN U.S. AND EUROPEAN MARKETS  
AND PRODUCTS WEAKEN THE ASSUMPTION OF AN MLS  
WORLD CUP BUMP ..... 650

*A. Differences Without a Difference* ..... 651

*B. Key Differences in Markets and Products* ..... 653

*C. Positive Factors Insufficient to Overcome Key  
Differences* ..... 659

V. THE 2016 COPA AMERICA CENTENARIO: CONFIRMING AN  
MLS ATTENDANCE BUMP ..... 662

*A. The Euro Cup and Copa America* ..... 662

*B. Our Study* ..... 664

*C. Data and Analysis* ..... 665

CONCLUSION ..... 670

## INTRODUCTION

The Fédération Internationale de Football Association (FIFA) in 2009 solicited bids from national soccer associations for rights to host the 2022 edition of the biggest sporting event on the planet: the World Cup.<sup>1</sup> With financial and logistical support from Major League Soccer (MLS),<sup>2</sup> the United States Soccer Federation (USSF) had the strongest bid based upon existing stadiums and infrastructure as well as U.S. experience hosting sporting mega-events.<sup>3</sup> The USSF nevertheless lost to the Qatar Football Association (QFA) despite Qatar's numerous problems ranging from a lack of stadiums to dangerously hot playing conditions.<sup>4</sup> In light of the reputation of FIFA's Executive Committee (ExCo) for corruption,<sup>5</sup> commentators speculated that bribery had sent the World Cup to Qatar.<sup>6</sup>

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<sup>1</sup> Letter from Jérôme Valcke, Secretary General, FIFA, to Member Associations of FIFA Eligible to Bid for the 2018 and/or 2022 FIFA World Cup (Jan. 15, 2009), <http://www.fifa.com/mm/document/affederation/administration/99/74/80/20182022invitationbidcirculare.pdf> [<https://perma.cc/Z6KN-QSC2>]; see Daniel Gandert & Harry Epstein, *The Court's Yellow Card for the United States Soccer Federation: A Case for Implied Antitrust Immunity*, 11 VA. SPORTS & ENT. L.J. 1, 5 (2011) (characterizing the FIFA World Cup as “the largest sporting event in the world”).

<sup>2</sup> See *USA Bid Receives \$2 Million Dollar Donation from MLS Club Owners and Soccer United Marketing*, U.S. SOCCER (Nov. 19, 2010), <http://www.ussoccer.com/stories/2014/03/17/11/23/usa-bid-receives-two-million-dollar-donation-from-mls-club-owners-and-sum> [<https://perma.cc/2CQH-TNHJ>] [hereinafter *USA Bid Receives*].

<sup>3</sup> See Jeff Todd & R. Todd Jewell, *Reclaiming Economic Legacy: One Legal Strategy for a 2022 FIFA World Cup USA*, 44 CAP. U.L. REV. 245, 254 (2016) [hereinafter Todd & Jewell, *Reclaiming*].

<sup>4</sup> Jeff Todd & R. Todd Jewell, *Major League Soccer and the Corrupted 2022 FIFA World Cup Bidding: Proving Harm and Recovering Damages*, 41 VT. L. REV. 23, 33–34 (2016) [hereinafter Todd & Jewell, *MLS*]; see also Kate Youd, Comment, *The Winter's Tale of Corruption: The 2022 FIFA World Cup in Qatar, the Impending Shift to Winter, and Potential Legal Actions Against FIFA*, 35 NW. J. INT'L L. & BUS. 167, 171 (2014).

<sup>5</sup> E.g., Ali Eghbal, Note, *Enough Is Enough: FIFA Must Incorporate Principles from the Administrative Procedure Act of 1946 to Combat Ongoing Executive Committee Corruption*, 22 SW. J. INT'L L. 385, 387–88 (2016) (characterizing FIFA corruption as “the norm, not the exception” and noting that accusations against the Executive Committee date back to the 1980s); Guillermo Jorge, *Fixing FIFA: The Experience of the Independent Governance Committee*, 21 SW. J. INT'L L. 165, 167 (2014) (calling the ExCo “the setting for extensive logrolling, favor exchanges, and power-broking among global, regional, and local players”).

<sup>6</sup> E.g., Travis L. Marmara, Note, *Free Kick: FIFA's Unintended Role in Illuminating Jurisdictional Gaps of International Criminal Courts*, 41 BROOK. J.

Ongoing governmental investigations and evidence from FIFA itself are confirming that speculation.<sup>7</sup> FIFA is a Swiss non-profit corporation,<sup>8</sup> and the Swiss Office of the Attorney General (OAG) has launched an investigation into corruption in the 2018 and 2022 World Cup bidding processes.<sup>9</sup> The Swiss OAG has procured computer records from FIFA and frozen the bank accounts of several FIFA executives.<sup>10</sup> The Swiss have assisted the U.S. Department of Justice (DOJ), which has indicted forty-one individuals and corporations, and is actively investigating twenty-four unindicted co-conspirators, including persons associated with World Cup bidding and with the QFA.<sup>11</sup> Several persons have pled guilty, given testimony, and agreed to \$190,000,000 in forfeiture.<sup>12</sup> FIFA has cooperated with the Swiss investigations,<sup>13</sup> and in the U.S. prosecutions, it has submitted a claim for restitution as a victim.<sup>14</sup> FIFA internal investigations and disciplinary proceedings have led to public acknowledgement of corruption by many of the ExCo members who voted on the 2022 World Cup, including findings that Mohamad Bin Hammam, a Qatari billionaire with links to the QFA, acted specifically to influence the vote for his home country.<sup>15</sup>

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INT'L L. 1393, 1396, 1412–13 (2016); Samuel Morris, Comment, *FIFA World Cup 2022: Why the United States Cannot Successfully Challenge FIFA Awarding the Cup to Qatar and How the Qatar Controversy Shows FIFA Need Large-Scale Changes*, 42 CAL. W. INT'L L.J. 541, 549–53 (2012).

<sup>7</sup> See *infra* text accompanying notes 8–15.

<sup>8</sup> Bruce W. Bean, *An Interim Essay on FIFA's World Cup of Corruption: The Desperate Need for International Corporate Governance Standards at FIFA*, 22 ILSA J. INT'L & COMP. L. 367, 370 (2016).

<sup>9</sup> Marmara, *supra* note 6, at 1396; *The Office of the Attorney General of Switzerland seizes documents at FIFA*, FED. COUNCIL (May 27, 2015), <https://www.admin.ch/gov/en/start/documentation/media-releases.msg-id-57391.html> [<https://perma.cc/9S3L-L4CC>] [hereinafter *OAG Seizes*].

<sup>10</sup> *U.S. Department of Justice Charges Leaders of FIFA, Affiliate Soccer Organizations, and Sports Marketing Companies in 47-Count Indictment*, 109 AM. J. INT'L L. 672, 675–76 (Kristina Daugirdas & Julian Davis Mortenson eds., 2015) [hereinafter *DOJ Charges Leaders*].

<sup>11</sup> Bean, *supra* note 8, at 367–69, 375.

<sup>12</sup> *Id.* at 369; Todd & Jewell, *Reclaiming*, *supra* note 3, at 260.

<sup>13</sup> Todd & Jewell, *MLS*, *supra* note 4, at 50.

<sup>14</sup> Fédération Internationale de Football Association's Victim Statement and Request for Restitution, *United States v. Hawit*, No. 15-CR-252 (E.D.N.Y. Mar. 16, 2016); Rebecca R. Ruiz, *Seeking Millions, FIFA Has Bigger Aim*, N.Y. TIMES, Mar. 17, 2016, at B9, B11.

<sup>15</sup> See, e.g., Michael J. Garcia & Cornel Borbély, *Report on the Inquiry into the 2018/2022 World Cup™ Bidding Process*, FIFA ETHICS COMMITTEE 240–49,

This mounting evidence of corruption opens some legal avenues of redress for MLS.<sup>16</sup> For example, MLS could seek money damages by asserting tortious interference with prospective economic advantage against individuals like Bin Hammam.<sup>17</sup> Assuming sufficient evidence that persons affiliated with the QFA participated in the scheme, FIFA rules also permit leagues to pursue arbitration against soccer officials under Swiss law,<sup>18</sup> and MLS could recover under the Swiss Federal Act on Unfair Competition (FAUC).<sup>19</sup> Entities related to MLS might also have claims, such as the MLS investors who have management agreements to operate individual teams (investor-operators) in exchange for a percentage of ticket sales and concessions.<sup>20</sup> All options require the claimants to show that the USSF losing the right to host the World Cup

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[http://resources.fifa.com/mm/document/affederation/footballgovernance/02/89/87/97/aus\\_bel-ned\\_eng\\_esp-por\\_jpn\\_kor\\_qat\\_report\\_neutral.pdf](http://resources.fifa.com/mm/document/affederation/footballgovernance/02/89/87/97/aus_bel-ned_eng_esp-por_jpn_kor_qat_report_neutral.pdf) [<https://perma.cc/NJD6-H4E9>] (describing FIFA's findings with regard to various allegations of impropriety surrounding the Qatari bid); see *FIFA Executive Committee 2010: Where are they now?*, RTE SPORT (Dec. 1, 2015, 4:57 PM), <https://www.rte.ie/sport/soccer/2015/1201/750480-fifas-executive-committee-where-are-they-now/> [<https://perma.cc/F2LR-2H46>] (reporting on the indictments, investigations, suspensions, and bans of the 2010 ExCo members); David Conn, *Thailand FA president Worawi Makudi gets 90-day football suspension*, GUARDIAN (Oct. 12, 2015, 4:16 PM), <http://www.theguardian.com/football/2015/oct/12/fifa-worawi-makudi-thailand-suspended-90-days> [<https://perma.cc/KWT7-MF36>] (reporting that FIFA suspended or banned nine voters for the 2022 World Cup and that two more "resigned before being exposed for having taken bribes"); see also HEIDI BLAKE & JONATHAN CALVERT, *THE UGLY GAME: THE CORRUPTION OF FIFA AND THE QATARI PLOT TO BUY THE WORLD CUP 3* (2015) (characterizing Bin Hammam as the architect of the corrupt scheme to buy the 2022 World Cup for Qatar).

<sup>16</sup> See *infra* text accompanying notes 17–24.

<sup>17</sup> Todd & Jewell, *MLS*, *supra* note 4, *passim*.

<sup>18</sup> FIFA STATUTES arts. 66–68 (2015) (requiring persons, teams, and leagues within FIFA to submit to arbitration in the Court of Arbitration for Sport, which shall apply FIFA regulations as well as Swiss law).

<sup>19</sup> BUNDESGESETZ GEGEN DEN UNLAUTEREN WETTBEWERB [UWG] [SWISS FED. ACT ON UNFAIR COMPETITION] Dec. 19, 1986, SR 241, arts. 4a, 9–10 (Switz.) [hereinafter SWISS FED. ACT ON UNFAIR COMPETITION] (permitting monetary and equitable relief for persons whose economic interests are harmed by acts of unfair competition).

<sup>20</sup> Tim Bezbatchenko, Comment, *Bend it for Beckham: A Look at Major League Soccer and its Single Entity Defense to Antitrust Liability After the Designated Player Role*, 76 U. CIN. L. REV. 611, 624–25 (2008); Tyler A. Coppage, Comment, *Taking the Training Wheels Off MLS: Why the Single Entity Antitrust Exemption Should No Longer Apply*, 25 MARQ. SPORTS L. REV. 545, 558 (2015); Remo

somehow damaged them.<sup>21</sup> Two sports economists, Bastien Drut and Stefan Szymanski, have done research that seems to make such a showing possible.<sup>22</sup> Examining data about attendance at professional soccer games in nations that host international soccer tournaments like the World Cup, they concluded that the tier-one leagues of those nations see a significant bump in attendance in the year of the tournament and in subsequent seasons.<sup>23</sup> Applied to MLS and using the most conservative assumptions, a World Cup bump would have generated an additional \$294 million in attendance revenues for the 2022 through 2026 seasons and a \$261 million increase in business value.<sup>24</sup>

Whether the Drut and Szymanski findings apply to MLS is an open question.<sup>25</sup> Most of their data are for the English Premier League (EPL), Germany's Bundesliga, France's Ligue 1, and Italy's Serie A,<sup>26</sup> four well-established leagues from countries where soccer is the top sport and clubs have the world's top talent.<sup>27</sup> By contrast, the two-decade-old MLS competes with four other U.S. professional team sports and has its talent limited by a single-entity structure where the league owns all teams and restricts player salaries.<sup>28</sup> The assumption that the fledgling MLS will see

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Decurtins, *Major League Soccer's Exceptionalism in FIFA's Transfer System: For How Much Longer?*, 27 MARQ. SPORTS L. REV. 331, 333 (2017); Matthew J. Jakobsze, Comment, *Kicking "Single-Entity" to the Sidelines: Reevaluating the Competitive Reality of Major League Soccer After American Needle and the 2010 Collective Bargaining Agreement*, 31 N. ILL. U.L. REV. 131, 147–48 (2010).

<sup>21</sup> See, e.g., Warren A. Seavey, *Principles of Torts*, 56 HARV. L. REV. 72, 73 (1943) (noting that "the causing of harm is predominantly the basis of tort actions.").

<sup>22</sup> See generally Bastien Drut & Stefan Szymanski, *The Private Benefit of Public Funding: The FIFA World Cup, UEFA European Championship and Attendance at Host Country League Football* (Apr. 2014) (unpublished manuscript) (on file with the University of Michigan Department of Kinesiology), <http://www.soccernomics-agency.com/wordpress/wp-content/uploads/2014/04/The-private-benefit-of-public-funding.pdf> [<https://perma.cc/3CXA-5KMW>].

<sup>23</sup> See *infra* Section II.A.

<sup>24</sup> Todd & Jewell, *MLS*, *supra* note 4, at 40–43.

<sup>25</sup> See *infra* text accompanying notes 26–29.

<sup>26</sup> See Drut & Szymanski, *supra* note 22, at 4–5, 13. The one non-European tournament that they measured was the 2002 World Cup, which was co-hosted by Japan and Korea. *Id.*

<sup>27</sup> See Bean, *supra* note 8, at 372–73.

<sup>28</sup> See Diana C. Taylor, *Aimed at the Goal?: The Sustainability of Major League Soccer's Structure*, 9 WILLAMETTE SPORTS L.J. 1, *passim* (2011) (comparing and



a similar World Cup bump to Europe's top leagues may not be reasonable enough to support an economic model of MLS's lost attendance and related damages.<sup>29</sup>

The Drut and Szymanski article suggests a means to gauge the vitality of its applicability to MLS, however: in addition to the World Cup, they studied attendance related to the UEFA European Championships (the Euro Cup), a tournament limited to the top national teams from European countries.<sup>30</sup> In 2016, the United States hosted the Copa America Centenario, a regional tournament similar to the Euro Cup but comprised of sixteen of the best national teams from North, Central, and South America and the Caribbean.<sup>31</sup> If MLS were to see an increase in attendance associated with the Copa America—especially if that increase were comparable to that observed by Drut and Szymanski for European

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contrasting MLS with European leagues and with other U.S. professional sports leagues); *see* Bezbatchenko, *supra* note 20, at 635 (writing that “MLS competes with the NFL, NBA, MLB, and NHL in today’s saturated sports market”); Decurtins, *supra* note 20, at 345–48 (contrasting the transfer and salary rules of European leagues with MLS); Mark W. Lenihan, Comment, *Major League Soccer Scores an Own Goal: A Successful Joint Venture Attains Market Power in an International Sport*, 62 DEPAUL L. REV. 881, 899 (2013) (noting questions about MLS quality related to salary structure).

<sup>29</sup> *See, e.g.*, John W. Hill et al., *Increasing Complexity and Partisanship in Business Damages Expert Testimony: The Need for a Modified Trial Regime in Quantification of Damages*, 11 U. PA. J. BUS. L. 297, 311 (2009) (writing that courts exclude economics expert testimony based upon damages models that make unrealistic and unfounded comparisons); Robert M. Lloyd, *Proving Lost Profits after Daubert: Five Questions Every Court Should Ask Before Admitting Expert Testimony*, 41 U. RICH. L. REV. 379, 399–400 (2007) (same); Jeff Todd & R. Todd Jewell, *Dubious Assumptions, Economic Models, and Expert Testimony*, 42 DEL. J. CORP. L. 1 (forthcoming 2017) [hereinafter Todd & Jewell, *Dubious*] (same).

<sup>30</sup> Drut & Szymanski, *supra* note 22, at 1–5 (France hosted twenty-four national teams in the most recent tournament in June and July, 2016); *see* UEFA EURO 2016: France, UEFA (last visited Apr. 3, 2018), <http://www.uefa.com/uefaeuro/about-euro/index.html> [<https://perma.cc/2T8Q-D2CU>].

<sup>31</sup> *See* Sam Stejskal, *Copa America*, MAJOR LEAGUE SOCCER (June 2, 2016, 11:40 AM), <http://www.mlssoccer.com/meta/competition/copa-america/centenario-101> [<https://perma.cc/VFP5-QFR8>] (providing details about the tournament); Chris Smith, *The Secret Success Story of the Copa America*, FORBES (June 30, 2016, 11:14 AM), <https://www.forbes.com/sites/chris-smith/2016/06/30/the-secret-success-story-of-the-copa-america/#ade6de045e75> [<https://perma.cc/2QFE-QT9Q>] (reporting that 1.5 million fans attended matches while television broadcasts reached another 1.5 billion homes).

leagues—then that Copa America bump would support a claim for damages for loss of the 2022 World Cup USA.<sup>32</sup>

This Article tests the assumption that MLS would have a World Cup bump by performing a regression analysis of attendance data for MLS clubs before and after the 2016 Copa America Centenario. Part I provides background information on MLS, corruption in the 2022 World Cup bid, and the ensuing governmental and private investigations. Part II turns to the economic impact on professional soccer leagues of hosting a World Cup by summarizing the Drut and Szymanski study and applying their findings to potential legal actions by MLS or its investor-operators. Part III then cites legal and economic sources to explain why tribunals exclude economic models based upon problematic assumptions, in particular, assumptions that inapt products and markets are similar. Part IV explicates key differences between the European and American sports markets and soccer products to show why the World Cup bump might not apply to MLS. Part V contains the authors' own economic model, a regression analysis of MLS attendance data before and after the 2016 Copa America Centenario, and concludes that MLS saw an increase in attendance of more than 900 fans per game in games played just prior to or after the Copa America, giving evidence of a Copa America bump. The Article concludes with implications for MLS, applicability beyond MLS, and recommendations for future research in both law and economics.

## I. INTERNATIONAL SOCCER AND WORLD CUP CORRUPTION

FIFA is the worldwide governing body of soccer.<sup>33</sup> Its members are 211 national associations that oversee amateur and professional soccer within their respective countries.<sup>34</sup> These national associations are also grouped into six regional confederations: The Confederation of North, Central America, and Caribbean Association Football (CONCACAF); Confederación Sudamericana de Fútbol (CONMEBOL); Union des Associations Européennes de

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<sup>32</sup> See Rebecca Haw Allensworth, *Law and the Art of Modeling: Are Models Facts?*, 103 GEO. L.J. 825, 830 (2015) (writing that “the authority of a model is derived from its exposure to a process of critical review”).

<sup>33</sup> *DOJ Charges Leaders*, *supra* note 10, at 673.

<sup>34</sup> Todd & Jewell, *Reclaiming*, *supra* note 3, at 249–51; *Associations*, FIFA, <http://www.fifa.com/associations/> [<https://perma.cc/HLQ6-H8MT>].

Football (UEFA); Confédération Africaine de Football (CAF); Asian Football Confederation (AFC); and Oceania Football Confederation (OFC).<sup>35</sup> By contract with FIFA and by U.S. federal law, the USSF is the national association for the United States and is part of CONCACAF.<sup>36</sup> One right of FIFA membership is the ability to host the “largest sporting event in the world,”<sup>37</sup> the quadrennial FIFA World Cup, which the USSF did in 1994.<sup>38</sup>

The 1994 World Cup marked a global debut of sorts for U.S. soccer.<sup>39</sup> On the field, the U.S. Men’s National Team (USMNT) advanced from the group stage in front of the home crowd—and has done so three more times in subsequent tournaments.<sup>40</sup> Off the field, the United States set and still holds the attendance record for a World Cup, even with subsequent tournaments in traditional soccer nations like Germany and Brazil.<sup>41</sup> Perhaps the most notable event was the birth of MLS.<sup>42</sup> As consideration for awarding the 1994 World Cup, FIFA required the USSF to establish a tier-one professional league.<sup>43</sup> Ten teams opened MLS play in

<sup>35</sup> *Associations*, *supra* note 34.

<sup>36</sup> *ChampionsWorld LLC v. U.S. Soccer Fed’n, Inc.*, 726 F. Supp. 2d 961, 966 (N.D. Ill. 2010) (citing 36 U.S.C. §§ 220501–220529); *Associations*, *supra* note 34; FIFA, STANDARD COOPERATION AGREEMENT arts. 3, 5, [http://www.fifa.com/mm/document/affederation/administration/75/81/23/standard\\_cooperation\\_agreement\\_efs\\_d\\_47345.pdf](http://www.fifa.com/mm/document/affederation/administration/75/81/23/standard_cooperation_agreement_efs_d_47345.pdf) [<https://perma.cc/VL4Q-XXHD>]; see Gandert & Epstein, *supra* note 1, at 3–8 (describing the structure of FIFA, the place of the USSF within it, and the Ted Stevens Amateur and Olympic Sports Act).

<sup>37</sup> Gandert & Epstein, *supra* note 1, at 5 (opining that FIFA “could be described as the most powerful IF [International Federation], with the FIFA World Cup being the largest sporting event in the world”).

<sup>38</sup> *History: Timeline*, USSOCCER, <http://www.ussoccer.com/about/history/timeline> [<https://perma.cc/5LVJ-2BL4>].

<sup>39</sup> Michael Lewis, *How USA was chosen to host World Cup 94: the inside story of a historic day*, GUARDIAN (July 4, 2015, 6:00 PM), <https://www.theguardian.com/football/2015/jul/04/usa-world-cup-94-inside-story> [<https://perma.cc/D2NX-G29N>].

<sup>40</sup> Ryan Rosenblatt, *United States World Cup history: What’s the farthest the USMNT have progressed?*, SB NATION (July 1, 2014, 12:41 PM), <http://www.sbnation.com/soccer/2014/7/1/5861212/usa-belgium-2014-world-cup-history> [<https://perma.cc/2GX3-DSBQ>].

<sup>41</sup> *FIFA World Cup All Time Statistics*, FIFA, <http://www.fifa.com/fifa-tournaments/statistics-and-records/worldcup/> [<https://perma.cc/SA5M-X7DL>] (listing the 1994 World Cup USA average attendance as 68,991, 2006 World Cup Germany as 52,491, and 2014 World Cup Brazil as 52,918).

<sup>42</sup> *History: Timeline*, *supra* note 38.

<sup>43</sup> Taylor, *supra* note 28, at 2.

1996.<sup>44</sup> Despite limited television exposure compared to the big four U.S. professional sports leagues, the National Football League (NFL), Major League Baseball (MLB), National Basketball Association (NBA), and National Hockey League (NHL),<sup>45</sup> MLS has done well in its short existence: the number of teams has more than doubled to 22,<sup>46</sup> expansion fees have increased from \$5 million to \$110 million,<sup>47</sup> and per-game attendance has increased to an average higher than the NHL or NBA.<sup>48</sup>

With increasing interest by U.S. fans in World Cup soccer, the tens of thousands of spectators at each World Cup match, and a global media reach of 3 billion people,<sup>49</sup> another World Cup in the United States would fulfill MLS Commissioner Don Garber's

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<sup>44</sup> See, e.g., Gandert & Epstein, *supra* note 1, at 35 ("MLS is a creation of the USSF. MLS was created as part of a promise from USSF to FIFA that a professional soccer league would be started in exchange for being able to host the 1994 FIFA World Cup."); *History: Timeline*, *supra* note 38 (presenting a detailed timeline of MLS's formation and seminal events).

<sup>45</sup> Todd & Jewell, *MLS*, *supra* note 4, at 43–44.

<sup>46</sup> *History: Timeline*, *supra* note 38; *MLS Teams*, YAHOO! SPORTS, <http://sports.yahoo.com/soccer/mls/teams/> [<https://perma.cc/ZP6L-5U66>].

<sup>47</sup> Christopher Savino, *Franchise Fees in MLS Increasing at a Rate of 18% Since Inaugural Season*, BUSINESS OF SOCCER (2012), <http://www.businessofsoccer.com/2013/06/11/franchise-fees-in-mls-increasing-at-a-rate-of-18-since-inaugural-season/> [<https://perma.cc/D936-KHEN>]; Kevin Baxter, *Expansion L.A. soccer team plans new stadium on Sports Arena site*, L.A. TIMES (May 17, 2015, 6:00 PM), <http://www.latimes.com/sports/soccer/la-sp-la-soccer-stadium-20150518-story.html> [<https://perma.cc/44EN-LL99>].

<sup>48</sup> Fred Dreier, *MLS passes NBA as third best-attended American sport*, SPORTING NEWS (Nov. 7, 2011), <http://www.sportingnews.com/soccer-news/205972-mls-passes-nba-as-third-best-attended-american-sport> [<https://perma.cc/5X6M-PCD4>].

<sup>49</sup> *FIFA World Cup group stages break new ground in TV viewing*, FIFA (June 28, 2014), <http://www.fifa.com/worldcup/news/y=2014/m=6/news=fifa-world-cuptm-group-stages-break-new-ground-in-tv-viewing-2388418.html> [<https://perma.cc/BRC2-5P58>]; *World Cup final sets U.S. TV record*, ESPNFC (July 15, 2014), <http://www.espnfc.us/fifa-world-cup/story/1950567/world-cup-final-most-watched-soccer-game-in-us-history-more-than-26-million-viewers> [<https://perma.cc/58LS-RQ9C>] (describing the exceeded expectations of television viewership 2014 World Cup final); Warren S. Grimes, *The FIFA World Cup and Dysfunctional Television Distribution in the United States*, 21 SW. J. INT'L L. 155, 155 (2014) (finding that the 2014 World Cup U.S.-Belgium match drew 21.6 million U.S. viewers and the final between Germany and Argentina drew 26.5 million U.S. viewers).

goal of the United States “becoming a soccer nation.”<sup>50</sup> Accordingly, when FIFA solicited associations to bid for hosting rights to the 2018 and 2022 World Cups,<sup>51</sup> the USSF registered a bid for 2022 along with other non-European associations: Australia, Japan, Korea, and Qatar.<sup>52</sup> USSF and MLS work together on national team issues,<sup>53</sup> so MLS played an important role in the bid.<sup>54</sup> Part of its support was logistical, such as providing office space in its New York headquarters and having Commissioner Garber serve as a member of the bid committee.<sup>55</sup> Part of this support was financial, with MLS and its marketing arm contributing \$2 million to the bid committee.<sup>56</sup> Under FIFA rules in effect in 2010, the ExCo had sole power to select the winning bid.<sup>57</sup> Twenty-two ExCo members voted by secret ballots in rounds, and the association with the lowest vote tally in each round was eliminated until one achieved a majority.<sup>58</sup> Though the USSF survived to the final round, the QFA prevailed with fourteen votes versus eight.<sup>59</sup>

All objective criteria pointed to the USSF as having the stronger bid.<sup>60</sup> The United States has dozens of large modern stadiums, mild summers throughout most of the country, and experience hosting mega sporting events like the 1994 World Cup and

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<sup>50</sup> *Major League Soccer attendance is up, but TV ratings lag as U.S. Soccer mulls future*, USA TODAY (Nov. 17, 2017, 8:50 PM), <https://www.usatoday.com/story/sports/mls/2017/11/17/mls-attendance-up-tv-ratings-lag-as-us-mulls-future/107770250/> [<https://perma.cc/WS8G-YG64>].

<sup>51</sup> Letter from Jérôme Valcke, *supra* note 1; *USA Bid Committee to Focus on 2022 FIFA World Cup*, USSOCCER.COM (Oct. 15, 2010), <http://www.ussoccer.com/stories/2014/03/17/13/52/usa-bid-committee-to-focus-on-2022-fifa-world-cup> [<https://perma.cc/A5XP-53Q5>] [hereinafter *USA Bid Committee*].

<sup>52</sup> *USA Bid Committee*, *supra* note 51 (announcing USA Bid Committee’s decision to withdraw its 2018 FIFA World Cup bid to “focus on the 2022 campaign”).

<sup>53</sup> Todd & Jewell, *MLS*, *supra* note 4, at 53 (claiming that “MLS and the USSF collaborate on national team issues”).

<sup>54</sup> *USA Bid Receives*, *supra* note 2.

<sup>55</sup> *Id.*

<sup>56</sup> *Id.*

<sup>57</sup> Morris, *supra* note 6, at 547; see Garcia & Borbély, *supra* note 15, at 8–36 (summarizing the FIFA rules in effect in 2009–2010 as well as the bidding process).

<sup>58</sup> Frank Keogh, *The World Cup in their hands: Who are the FIFA 22?*, BBC SPORT (Dec. 2, 2010, 3:23 PM), <http://news.bbc.co.uk/sport2/hi/football/9101371.stm> [<https://perma.cc/U3RC-9LPT>].

<sup>59</sup> Garcia & Borbély, *supra* note 15, at 34–36; Morris, *supra* note 6, at 548–49.

<sup>60</sup> Todd & Jewell, *Reclaiming*, *supra* note 3, at 254.

1996 Olympics.<sup>61</sup> By contrast, Qatar lacks world-class stadiums and major tournament hosting experience, not to mention having dangerously hot 120-degree summers and posing a security risk.<sup>62</sup> Qatar does not lack resources, however: it is the richest country per capita, and with the backing of the emirate, the QFA Bid Committee outspent the USSF bid committee by four-to-one.<sup>63</sup>

Some witnesses and documents illustrate that the QFA paid ExCo members for their votes.<sup>64</sup> For example, Phaedra Almajid, a former employee of the Qatar bid committee, claimed to be present when committee members made payments to three African ExCo members; she later withdrew the allegation, but only under threat of lawsuit by a Qatar bid committee member.<sup>65</sup> The QFA has repeatedly and vociferously denied that its bid committee engaged in illicit conduct.<sup>66</sup> What cannot be denied is that many of

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<sup>61</sup> *Id.*

<sup>62</sup> *Id.* at 254–55; see Eghbal, *supra* note 5, at 391 (writing that FIFA ignored its own assessment of the health risk and a security briefing that Qatar presented a high risk of a terrorist attack).

<sup>63</sup> See Caitlin Murray, *Is the US ready—or even willing—to host the 2026 World Cup?*, GUARDIAN (Apr. 4, 2016, 5:00 PM), <http://www.theguardian.com/football/blog/2015/aug/10/is-the-us-ready-or-even-willing-to-host-the-2026-world-cup> [<https://perma.cc/CT6C-3K6Y>] (estimating that the QFA spent \$42 million on its bid activities).

<sup>64</sup> See, e.g., *Amadou Diakite appeals FIFA ban*, ESPN (May 10, 2011, 3:18 PM), [http://espn.go.com/sports/soccer/news/\\_id/6521474/suspended-fifa-official-amadou-diakite-appeals-ban-cas](http://espn.go.com/sports/soccer/news/_id/6521474/suspended-fifa-official-amadou-diakite-appeals-ban-cas) [<https://perma.cc/RUY6-KT93>] (reporting that ExCo member Diakite told undercover reporters that Qatar bid committee members offered \$1 million in bribes to African ExCo members).

<sup>65</sup> See BLAKE & CALVERT, *supra* note 15, at 119–20; Joshua D. Winneker, *It's Time to Blow the Whistle on Performance Enhancing Drugs*, 20 LEWIS & CLARK L. REV. 55, 81 (2016); Mark Hosenball, *FBI probe includes 2018, 2022 World Cup host awards: U.S. official*, REUTERS (June 3, 2015, 2:38 PM), <http://www.reuters.com/article/us-soccer-fifa-fbi-idUSKBN00J26X20150603> [<https://perma.cc/6B2S-VP4E>]. *But see* Garcia & Borbély, *supra* note 15, at 249–72 (documenting reasons why Almajid's accounts are not credible).

<sup>66</sup> See, e.g., Hamad bin Khalifa bin Ahmad Al Thani, *Qatar had the strongest bid for the 2022 FIFA World Cup. Here's why*, GUARDIAN (June 20, 2014, 9:59 AM), <http://www.theguardian.com/commentisfree/2014/jun/20/why-qatar-had-strongest-bid-for-2022-fifa-world-cup> [<https://perma.cc/CZC9-MVAS>]; *Qatar FA hits back at English football chief Dyke*, DAILY MAIL (June 3, 2015, 10:11 AM), <http://www.dailymail.co.uk/wires/afp/article-3108896/Qatar-hits-English-football-chief-Dyke.html> (quoting statement from Sheik Hamad bin Khalifa bin Ahmad Al-Thani welcoming the Swiss investigations and noting that a prior internal investigation cleared the organization of “any wrongdoing”); *Qatar*

the ExCo members in 2010 were corrupt: half have been suspended or banned by FIFA, resigned voluntarily from FIFA while under investigation, or have been indicted or investigated by law enforcement from the United States and other countries.<sup>67</sup>

FIFA commissioned an investigation by former U.S. Attorney Michael J. Garcia into corruption in the 2018/2022 bidding process and posted that report to the public in June 2017.<sup>68</sup> This report as well as an earlier summary of it by FIFA's ethics chief show that it has found corruption in the bid, including by Bin Hammam, who at the time was president of the AFC and had a vote for the 2018 and 2022 bids.<sup>69</sup> With voluminous electronic records and eyewitness reports, two *Sunday Times* investigative journalists have also characterized Bin Hammam as orchestrating the "campaign to buy World Cup support" for his native country.<sup>70</sup> He arranged for the other Asian bidders—from Japan and Korea—to support each other in later rounds of voting if their bids were eliminated.<sup>71</sup> He also supported the joint Spanish/Portuguese bid for the 2018 World Cup with Asian ExCo votes, in exchange for votes for the Qatar 2022 bid from ExCo members from Spain and Argentina,

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*2022 World Cup bid committee denies corruption allegations and says Mohamed Bin Hammam had no association with them*, DAILY MAIL (June 1, 2014, 11:27 AM), <http://www.dailymail.co.uk/sport/football/article-2645377/Qatar-2022-World-Cup-bid-committee-denies-corruption-allegations-say-Mohamed-Bin-Hamman-no-association-them.html> [hereinafter *Qatar Bid Committee Denial*].

<sup>67</sup> Todd & Jewell, *MLS*, *supra* note 4, at 24.

<sup>68</sup> See Garcia & Borbély, *supra* note 15, at 8–36, *passim*; see *FIFA statement on recent media coverage regarding the "Garcia Report,"* FIFA (June 27, 2017), <http://www.fifa.com/governance/news/y=2017/m=6/news=fifa-statement-on-recent-media-coverage-regarding-the-garcia-report-2898791.html> [<https://perma.cc/CH9X-MBQM>].

<sup>69</sup> Garcia & Borbély, *supra* note 15, at 230–49; Hans Joachim Eckert, *Statement of the Chairman of the Adjudicatory Chamber of the FIFA Ethics Committee on the Report on the Inquiry into the 2018/2022 FIFA World Cup Bidding Process Prepared by the Investigatory Chamber of the FIFA Ethics Committee* 28 (Nov. 13, 2014), [http://www.fifa.com/mm/document/affederation/footballgovernance/02/47/41/75/statementchairmanadjeckert\\_neutral.pdf](http://www.fifa.com/mm/document/affederation/footballgovernance/02/47/41/75/statementchairmanadjeckert_neutral.pdf) [<https://perma.cc/U999-BW2U>] [hereinafter Eckert Summary]; Keogh, *supra* note 58.

<sup>70</sup> BLAKE & CALVERT, *supra* note 15, at 3; see also *Mohamed Bin Hammam resigns from football, banned for life*, FIFA (Dec. 17, 2012), <http://www.fifa.com/governance/news/y=2012/m=12/news=mohamed-bin-hammam-resigns-from-football-banned-for-life-1973422.html> [<https://perma.cc/SZ65-VLNT>].

<sup>71</sup> See BLAKE & CALVERT, *supra* note 15, at 176–77.

as well as Ricardo Teixeira of Brazil.<sup>72</sup> He secured other votes through lavish junkets and cash payments, including to members of several African national soccer associations.<sup>73</sup> The most notable of the bribes involved ExCo member Jack Warner of Trinidad and Tobago, with payments of over \$1 million wired to Warner and to Warner's sons Daryll and Daryan.<sup>74</sup> Bin Hammam also paid hundreds of thousands of dollars in legal and detective fees to support the appeal of suspended ExCo member Reynald Temarii, an appeal that kept his seat vacant during the balloting and essentially eliminated a vote that would have gone to the USSF.<sup>75</sup> All told, the vote swapping, bribes, and support for Temarii were more than enough to steer the 2022 World Cup away from the USSF.<sup>76</sup> The investigative journalists have written that an agent of Bin Hammam who made illicit payments was also employed by the Qatar bid committee; the QFA denies any more than a passing association with Bin Hammam.<sup>77</sup>

These private sources of facts about bid corruption have received a boost from U.S. and Swiss criminal investigations.<sup>78</sup> The DOJ unsealed indictments and convictions in May and December

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<sup>72</sup> *Id.* at 212; see also Owen Gibson, *FIFA under new pressure over Mohamed bin Hammam's Qatar 2022 role*, GUARDIAN (Apr. 22, 2015, 5:00 PM), <http://www.theguardian.com/football/2015/apr/22/fifa-mohamed-bin-hammam-qatar-2022-world-cup> [<https://perma.cc/YAE7-263L>] (reporting that FIFA president Sepp Blatter "confirmed that a 'bundle' of votes were traded between Qatar and Spain/Portugal").

<sup>73</sup> Garcia & Borbély, *supra* note 15, at 232–33.

<sup>74</sup> BLAKE & CALVERT, *supra* note 15, at 390–97; Garcia & Borbély, *supra* note 15, at 233–37.

<sup>75</sup> BLAKE & CALVERT, *supra* note 15, at 256–57, 261–63, 266; David Bond, *FIFA bans Adamu and Temarii over World Cup vote claims*, BBC SPORT (Nov. 18, 2010), <http://news.bbc.co.uk/sport2/hi/football/9203378.stm> [<https://perma.cc/F93X-LLZQ>]; Garcia & Borbély, *supra* note 15, at 240–49.

<sup>76</sup> See, e.g., Todd & Jewell, *MLS*, *supra* note 4, at 55 (listing ten tainted votes).

<sup>77</sup> Compare BLAKE & CALVERT, *supra* note 15, at 72–73, 101–02, 122 (describing deputy chief executive of the Qatar Bid Committee Ali Al-Thawadi as the point of contact between Bin Hammam and the Bid Committee, and explaining how Najeeb Cherikal contracted with the Bid Committee to provide "international relations" services and also made illicit payments on behalf of Bin Hammam), with *Qatar Bid Committee Denial*, *supra* note 66 (acknowledging acquaintance with Bin Hammam as a FIFA executive but denying any wrongdoing or association with Bin Hammam as part of winning the World Cup bid).

<sup>78</sup> See Brantley Adams, *World Cup 2022: From FIFA to Terrorism*, 5 MISS. SPORTS L. REV. 191, 196 (2016).



of 2015 against several persons associated with international soccer for racketeering, money laundering, and wire fraud.<sup>79</sup> The indicted include several ExCo members who voted on the 2022 World Cup like Warner and Teixeira, while the convicted include Daryan Warner.<sup>80</sup> The U.S. charges do not relate to the World Cup, but the FBI continues to investigate World Cup bid corruption, and former Attorney General Loretta Lynch has stated that additional charges are likely.<sup>81</sup> The FBI has interviewed Almajid,<sup>82</sup> and Bin Hammam remains a subject of investigation because he is listed as “Co-Conspirator #8” in the superseding indictment because of the payments to Jack Warner.<sup>83</sup>

Further, FIFA is a Swiss entity, so Swiss officials are also involved.<sup>84</sup> Part of this is assistance with U.S. actions: the Swiss Federal Office of Justice has arrested the accused, assisted with extradition, frozen bank accounts, and shared information.<sup>85</sup> The Swiss OAG is also conducting its own investigation of the 2018 and 2022 World Cup bids.<sup>86</sup> The Swiss OAG has seized nine terabytes of data from FIFA, as well as frozen numerous Swiss bank accounts,

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<sup>79</sup> Superseding Indictment at 37, *United States v. Hawit*, No. 15-CR-252 (E.D.N.Y. Nov. 25, 2015), <http://www.justice.gov/opa/file/797261/download> [<https://perma.cc/HG6U-C4GF>]; Indictment, *United States v. Webb*, No. 15-CR-252 (E.D.N.Y. May 20, 2015), <http://www.justice.gov/opa/file/450211/download> [<https://perma.cc/69SL-PWBV>]; *Nine FIFA Officials and Five Corporate Executives Indicted for Racketeering Conspiracy and Corruption*, DEP'T OF JUST. (May 27, 2015), <http://www.justice.gov/opa/pr/nine-fifa-officials-and-five-corporate-executives-indicted-racketeering-conspiracy-and> [<https://perma.cc/CM63-5W2J>]; *Sixteen Additional FIFA Officials Indicted for Racketeering Conspiracy and Corruption*, DEP'T OF JUST. (Dec. 3, 2015), <http://www.justice.gov/opa/pr/sixteen-additional-fifa-officials-indicted-racketeering-conspiracy-and-corruption> [<https://perma.cc/7DRK-85H7>]; see also Bean, *supra* note 8, at 367–69 (summarizing the indictments and the Attorney General's relevant statements).

<sup>80</sup> Todd & Jewell, *Reclaiming*, *supra* note 3, at 259–60.

<sup>81</sup> Bean, *supra* note 8, at 369–70; Todd & Jewell, *Reclaiming*, *supra* note 3, at 259–60.

<sup>82</sup> Hosenball, *supra* note 65.

<sup>83</sup> Superseding Indictment at 34, *United States v. Hawit*, No. 15-CR-252 (filed Nov. 25, 2015) (“At various times relevant to the Indictment, Co-Conspirator #8 was a high-ranking official of FIFA and AFC, the regional confederation representing much of Asia.”).

<sup>84</sup> See, e.g., Bean, *supra* note 8, at 370, 375.

<sup>85</sup> *DOJ Charges Leaders*, *supra* note 10, at 675–76.

<sup>86</sup> *Id.* at 676; see also *OAG Seizes*, *supra* note 9.

because of information related to eighty-one “suspicious bank [activities].”<sup>87</sup> Based upon a tip from a whistleblower, the OAG raided FIFA headquarters in June 2016 and seized additional documents.<sup>88</sup>

## II. LEGAL ACTIONS BASED UPON THE LOST WORLD CUP BUMP

The mounting evidence of corruption seemingly means little for MLS.<sup>89</sup> After all, the corruption will not alter the fact that the QFA will host in 2022.<sup>90</sup> FIFA’s investigation of the 2018 and 2022 bids confirmed some wrongdoing, but FIFA’s ethics chief nevertheless concluded that the corruption did not affect the outcome of the bid.<sup>91</sup> The result is that FIFA will not strip the QFA of hosting rights or call for a rebid.<sup>92</sup> Also, the World Cup does not directly involve MLS.<sup>93</sup> Professional leagues do not host the tournament or field its teams, so it is the USSF that lost the hosting right, and it is the USMNT that lost the automatic qualifying slot as host team.<sup>94</sup> The USSF and MLS do collaborate on USMNT issues, but MLS remains a separate entity with no grounds to challenge the QFA as host.<sup>95</sup> If MLS is interested in recovering money damages rather than seeking a 2022 World Cup USA, however, then the evidence of corruption matters because this once-a-generation opportunity

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<sup>87</sup> *OAG Seizes*, *supra* note 9; Todd & Jewell, *Reclaiming*, *supra* note 3, at 260.

<sup>88</sup> *Swiss authorities search FIFA HQ as part of criminal investigation*, GUARDIAN (June 3, 2016, 8:18 AM), <https://www.theguardian.com/football/2016/jun/03/swiss-authorities-search-fifa-headquarters-criminal-investigation-2018-2022-world-cup> [<https://perma.cc/9RYP-DH4B>].

<sup>89</sup> See Todd & Jewell, *MLS*, *supra* note 4, at 34.

<sup>90</sup> See Vincent Sheu, Note, *Corrupt Passions: An Analysis of the FIFA Indictments*, 18 TEX. REV. ENT. & SPORTS L. 65, 81 (2016).

<sup>91</sup> See Eckert Summary, *supra* note 69, at 40 (calling the occurrences of illicit acts “of very limited scope”); see also Bean, *supra* note 8, at 378 (“Notwithstanding this *prima facie* case and the stark details of the Qatari bribes, Eckert announced that the Ethics Committee had concluded that the selection of Russia and Qatar for the 2018 and 2022 World Cups was not the result of bribery and corruption.”).

<sup>92</sup> Bean, *supra* note 8, at 379; see also Eckert Summary, *supra* note 69, at 40 (writing that the illicit actions did not reach the “threshold of returning to the bidding process, let alone reopening it”).

<sup>93</sup> Todd & Jewell, *MLS*, *supra* note 4, at 34.

<sup>94</sup> See *id.* at 30.

<sup>95</sup> *Id.* at 30–31, 53; Todd & Jewell, *Reclaiming*, *supra* note 3, at 250–51.

could have benefitted MLS by providing the means for a significant bump in attendance that correlates to increased revenue.<sup>96</sup>

*A. The World Cup/Euro Cup Bump*

In a 2014 study, economists Drut and Szymanski examined professional soccer attendance in nations that hosted ten international soccer championships.<sup>97</sup> These include the six World Cups in England (1966), West Germany (1974), Italy (1990), France (1998), Japan and Korea as joint hosts (2002), and Germany (2006).<sup>98</sup> The study also includes the four European Championships in West Germany (1988), England (1996), the Netherlands as co-host (2000), and Switzerland as co-host (2008).<sup>99</sup> The dependent variable was average annual attendance at league games.<sup>100</sup> Because tournament hosts are typically named about six years in advance of the tournament, the authors gathered public data about league attendance starting five seasons before the tournament, the season immediately preceding it (European league championships are in the spring while tournaments are in the summer), and the five seasons following it.<sup>101</sup> The attendance data for Japan and Korea were provided by individuals rather than a public source.<sup>102</sup> The largest number of observations were for tier-one leagues, although the authors also studied several tier-two leagues and the English tier-three and tier-four leagues.<sup>103</sup> In addition to time, the authors had to account for other variables that could affect attendance, such as an individual club's standing within the league—based on studies that better teams draw larger crowds—as well as whether a club's stadium hosted a tournament game.<sup>104</sup>

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<sup>96</sup> Todd & Jewell, *MLS*, *supra* note 4, at 34–35.

<sup>97</sup> Drut & Szymanski, *supra* note 22, at 2.

<sup>98</sup> *Id.* at 5.

<sup>99</sup> *Id.*

<sup>100</sup> *Id.* at 9.

<sup>101</sup> *Id.* at 5, 11.

<sup>102</sup> *Id.* at 5.

<sup>103</sup> *Id.* at 8 (noting that 44 percent of observations were for “top division clubs for every country,” with the remainder for second-tier club attendance across various countries, and third- and fourth-tier club attendance in England).

<sup>104</sup> *See id.* at 5–8.

Through a “regression approach,” the authors arrived at “a better estimate of the size and significance of the hosting effect.”<sup>105</sup> Their analysis revealed “a clear change before and after the mega event.”<sup>106</sup> Based on a full sample of eleven World Cups and Euro Cups, the league season in which the tournament takes place—which immediately precedes the tournament—saw “a significant increase in average attendance of around 1,000 fans per game.”<sup>107</sup> The next season averages another 1,000, with about 700 per game average the following three seasons.<sup>108</sup> The increase was highest for tier-one teams—with 1,300 fans per game in the year the tournament takes place and the seasons following showing growth to “around 3,900–4,400 per game after five years”<sup>109</sup>—and for clubs whose stadiums hosted tournament matches.<sup>110</sup>

Drut and Szymanski also took a more detailed look at average attendance data in English soccer before and after the 1996 European Cup held in England.<sup>111</sup> Using a regression approach, the authors found results similar to those from the full sample of eleven mega events: average attendance in the first season after Euro ’96 went up by about 1,300 fans, and there were smaller increases for each season up to five years after Euro Cup ’96.<sup>112</sup> Furthermore, the authors estimate that the revenue bump associated with a World Cup in the UK would be approximately €500 million over five years.<sup>113</sup>

### *B. Legal Recourse for U.S. Soccer Interests*

Losing the chance to host the 2022 World Cup USA directly impacts MLS: its single-entity structure means that—unlike most professional leagues where the teams are franchises—MLS owns

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<sup>105</sup> *Id.* at 7.

<sup>106</sup> *Id.* at 11.

<sup>107</sup> *Id.*

<sup>108</sup> *Id.*

<sup>109</sup> *Id.*

<sup>110</sup> *Id.* These numbers show an average percentage increase between 17–21 percent for clubs whose stadiums hosted a tournament game, and between 8–20 percent for non-hosting clubs for each of five seasons following the tournament. *Id.* at 2.

<sup>111</sup> *Id.* at 13–19.

<sup>112</sup> *Id.* at 18.

<sup>113</sup> *Id.* at 20.

the teams.<sup>114</sup> Accordingly, all lost ticket sales mean lost revenue for MLS, which in turn diminishes the business value of MLS.<sup>115</sup> In a prior article, we explored the potential for MLS to win a judgment under New York law for tortious interference with prospective economic advantage against Bin Hammam.<sup>116</sup> MLS faces few procedural obstacles to suing Bin Hammam in New York for tortious interference with prospective economic advantage.<sup>117</sup> MLS is headquartered in New York City, and Bin Hammam is subject to jurisdiction there under the *Calder* effects test.<sup>118</sup> The choice of law balances to New York, the place where the last element of the tort—harm via lost revenues—would be completed.<sup>119</sup> If MLS serves him properly, the resulting judgment (though not including interest) is likely enforceable in Qatar.<sup>120</sup>

The substantive law also favors MLS.<sup>121</sup> Under New York law, tortious interference requires:

the plaintiff must allege that “(1) it had a business relationship with a third party; (2) the defendant knew of that relationship and intentionally interfered with it; (3) the defendant acted solely out of malice, or used dishonest, unfair, or improper

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<sup>114</sup> Todd & Jewell, *MLS*, *supra* note 4, at 35–36; *see About Major League Soccer*, MLS PRESSBOX, <http://pressbox.mlssoccer.com/content/about-major-league-soccer> [<https://perma.cc/5SA7-NECX>] (“Major League Soccer is structured as a single, limited liability company (single-entity). In the single-entity business structure, club operators own a financial stake in the League, not just their individual team.”). For more details about the single-entity structure, *see*, e.g., Bezbatchesenko, *supra* note 20, at 623–40; Decurtins, *supra* note 20, at 333–36; Jakobsze, *supra* note 20, at 147–48; Lenihan, *supra* note 28, at 882, 888–89.

<sup>115</sup> Todd & Jewell, *MLS*, *supra* note 4, at 34–43.

<sup>116</sup> *See id.* at 50–56, 58–65.

<sup>117</sup> *Id.* at 51–52, 58.

<sup>118</sup> *See id.* at 51; *Calder v. Jones*, 465 U.S. 783, 788–90 (1984); *see also Schultz v. Boy Scouts of Am. Inc.*, 480 N.E.2d 679, 682 (N.Y. 1985) (holding that the state where a corporation has its national headquarters is its domicile).

<sup>119</sup> Todd & Jewell, *MLS*, *supra* note 4, at 51–52; *see Schultz*, 480 N.E.2d at 683; *Devore v. Pfizer, Inc.*, 867 N.Y.S.2d 425, 428 (App. Div. 2008). Because the final element of tortious interference, harm, will not materialize until the World Cup in 2022, MLS’s claim is not ripe until then, so the statute of limitations will not bar the claim. *See Kronos, Inc. v. AVX Corp.*, 612 N.E.2d 289, 290, 292 (1993); N.Y. C.P.L.R. 214(4) (McKinney 2017) (providing three-year limitations period).

<sup>120</sup> *See* Todd & Jewell, *MLS*, *supra* note 4, at 59–65.

<sup>121</sup> *See id.* at 53–55.

means; and (4) the defendant's interference caused injury to the relationship."<sup>122</sup>

Element one seems to kill the claim because the USSF, not MLS, was the bidder for the World Cup hosting rights.<sup>123</sup> The plaintiff can be an entity in a close business relationship with the bidder, however, such as a wholly owned subsidiary.<sup>124</sup> FIFA rules require that professional leagues like MLS be sanctioned by national associations like the USSF,<sup>125</sup> plus "MLS and the USSF collaborate on national team issues, the MLS president served on the USA Bid Committee, and MLS donated office space and \$2 million to the bid."<sup>126</sup> Regarding the second element of tortious interference, Bin Hammam, as an ExCo voter, would have known the importance of the 2022 World Cup to MLS because this fact was cited in FIFA's evaluation of the USSF bid.<sup>127</sup> The acts of bribery, vote-swapping, and paying for Temarii's appeal specifically to deny the USSF a vote show the intention required in element two and "improper means" in element three.<sup>128</sup> Finally, but for Bin

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<sup>122</sup> *Kirch v. Liberty Media Corp.*, 449 F.3d 388, 400 (2d Cir. 2006) (citing *Carvel Corp. v. Noonan*, 350 F.3d 6, 17 (2d Cir. 2003) (referring to the cause of action as "the tort of intentional interference with prospective economic relations")).

<sup>123</sup> See Todd & Jewell, *MLS*, *supra* note 4, at 31–33, 53.

<sup>124</sup> *Kirch*, 449 F.3d at 400–01.

<sup>125</sup> Todd & Jewell, *MLS*, *supra* note 4, at 35 (citing *Professional Council, U.S. SOCCER FED'N*, <http://www.ussoccer.com/about/affiliates/professional-soccer> [<https://perma.cc/7HS2-JKG6>] (listing MLS as a member of the USSF Professional Council)); *Associations: USA: U.S. Soccer Federation*, FIFA, <http://www.fifa.com/associations/association=usa/> [<https://perma.cc/H8H7-RPTG>] (listing MLS as the National League for the USSF).

<sup>126</sup> Todd & Jewell, *MLS*, *supra* note 4, at 53; see *USA Bid Receives*, *supra* note 2; see also Gandert & Epstein, *supra* note 1, at 34 (calling MLS an "affiliate" of the USSF that "can be viewed as a member of the association").

<sup>127</sup> 2022 FIFA WORLD CUP BID EVALUATION REPORT: USA, FIFA (2010), <http://www.fifa.com/mm/document/tournament/competition/01/33/74/56/b9gate.pdf> [<https://perma.cc/APM4-HRDT>] [hereinafter USA BID EVALUATION REPORT].

<sup>128</sup> See Todd & Jewell, *MLS*, *supra* note 4, at 53–55; *Carvel Corp. v. Noonan*, 818 N.E.2d 1100, 1103–04 (2004) (requiring the defendant's conduct to be "criminal or independently tortious," or the defendant to use "wrongful means" like force or fraud or meritless litigation); see also N.Y. PENAL LAW § 180.00 (McKinney 2017) ("A person is guilty of commercial bribing in the second degree when he confers, or offers or agrees to confer, any benefit upon any employee, agent or fiduciary without the consent of the latter's employer or principal, with intent to influence his conduct in relation to his employer's or principal's affairs.").

Hammam's pacts with six voters, bribes to three more, and legal fees to another to keep a pro-USSF vote out of the process altogether, the USSF more likely than not would have won the bid.<sup>129</sup> That lost bid resulted in injury to MLS in the loss of revenue that additional spectators would have generated.<sup>130</sup>

Bin Hammam has sufficient personal assets to satisfy a large judgment.<sup>131</sup> And the judgment would be large, even when assuming the lowest World Cup bump percentage estimated by Drut and Szymanski and the most conservative financial variables.<sup>132</sup> Doing an ordinary least squares regression analysis based on game-level attendance from 2004 to 2015, and based on an assumption of twenty-four MLS teams by 2026,<sup>133</sup> the five-year attendance for MLS from 2022 to 2026 is predicted to be 44,670,464, which means 4,121,961 more fans would have attended if there were a World Cup USA.<sup>134</sup> At \$54 per ticket (and assuming no increase in price except by inflation and without considering game-day concession sales), MLS lost revenue equals \$271 million.<sup>135</sup> Only the portion of revenues that lead to profit are recoverable as actual damages, but revenues do allow for computation of the diminution in MLS's business value as measured by revenue multiples.<sup>136</sup> Taking

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<sup>129</sup> See Todd & Jewell, *MLS*, *supra* note 4, at 55–56.

<sup>130</sup> See *id.* at 56–57.

<sup>131</sup> See BLAKE & CALVERT, *supra* note 15, at 6 (referring to Bin Hammam's "Doha mansion"); *id.* at 11–15 (describing how Bin Hammam earned billions as construction in Doha boomed along with Qatar's oil and gas revenues); *About Us*, KEMCO GRP., <http://www.kemco-qatar.com/AboutUs.html> [<https://perma.cc/3CK2-HYU4>] ("Since 1985 KEMCO became a Sole Proprietorship owned by Mr. Mohammed Bin Hammam Al Abdulla.").

<sup>132</sup> See Todd & Jewell, *MLS*, *supra* note 4, at 57–58, 66.

<sup>133</sup> *MLS sets new attendance records, Seattle hold highest average in league*, MAJOR LEAGUE SOCCER (Oct. 26, 2015, 1:18 PM), <https://www.mlssoccer.com/post/2015/10/26/mls-sets-new-attendance-records-seattle-hold-highest-average-league> [<https://perma.cc/F9JN-76CG>] (stating league-wide total attendance as 7,225,053).

<sup>134</sup> Todd & Jewell, *MLS*, *supra* note 4, at 36–40. These estimates were based on the assumption that MLS would expand to twenty-four teams by 2022. *Id.* at 35–36, 38. MLS has subsequently announced plans to expand to twenty-six teams. Ben Couch, *MLS announces expansion process and timeline*, MAJOR LEAGUE SOCCER (Dec. 15, 2016, 4:33 PM), <http://www.mlssoccer.com/post/2016/12/15/mls-announces-expansion-process-and-timeline> [<https://perma.cc/4MQG-RDLN>].

<sup>135</sup> Todd & Jewell, *MLS*, *supra* note 4, at 38–39.

<sup>136</sup> *Id.* at 42–43. Experts have a number of market approaches to value a business, including "[u]sing known ratios from valuing comparables to measure losses." Mark A. Allen, Robert E. Hall & Victoria A. Lazear, *Reference Guide*

the most conservative estimate of a 4.3 revenue multiple—determined by dividing the Los Angeles Football Club expansion fee of \$110 million by the *Forbes* estimate of annual revenues of \$26.5 million per team—MLS would suffer actual damages of at least \$261 million and potentially as much as \$1 billion.<sup>137</sup>

If the U.S. DOJ or Swiss OAG uncovers sufficient evidence of corruption by any current active football officials or organization—such as establishing a conspiratorial link between the QFA and Bin Hammam or showing independent bribes paid by the QFA or its agents—then MLS could pursue arbitration against them in the CAS under Swiss anticorruption law.<sup>138</sup> FIFA rules require that disputes among confederations, associations, teams, players, or officials be resolved through FIFA’s internal dispute resolution mechanisms—and they expressly prohibit recourse to national courts.<sup>139</sup> Those rules also allow for application of Swiss law and submission of claims to arbitration in the CAS.<sup>140</sup> The Swiss FAUC expressly prohibits private sector offering and accepting of bribes and other “undue advantage” that harm a person or company’s business interests.<sup>141</sup> It also provides for the recovery

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*on Estimation of Economic Damages*, in FED. JUDICIAL CTR., REFERENCE MANUAL ON SCI. EVIDENCE 425, 444 (3d ed. 2011).

<sup>137</sup> See Todd & Jewell, *MLS*, *supra* note 4, at 42–43; Chris Smith, *Major League Soccer’s Most Valuable Teams 2015*, FORBES (Aug. 19, 2015, 12:32 PM), <http://www.forbes.com/sites/chris-smith/2015/08/19/major-league-soccer-s-most-valuable-teams-2015-2/#2715e4857a0b78003b643ba4> [hereinafter Smith, *Most Valuable MLS Teams*]; Baxter, *supra* note 47 (showing that the Los Angeles Football Club paid a \$110 million expansion fee).

<sup>138</sup> Todd & Jewell, *MLS*, *supra* note 4, at 67–69; see Todd & Jewell, *Reclaiming*, *supra* note 3, at 273 (concluding that the alleged corrupt acts of Bin Hammam and persons associated with the QFA are proscribed by article 4a of the FAUC).

<sup>139</sup> FIFA STATUTES, *supra* note 18, at art. 67, §§ 2, 3(c); *id.* at art. 68, § 2. See Youd, *supra* note 4, at 179 (quoting 2 AARON N. WISE & BRUCE S. MEYER, INT’L SPORTS L. & BUS. 1461 (1999)) (“FIFA rules require all those subject to its jurisdiction to waive any right to take recourse to the courts ....”).

<sup>140</sup> FIFA STATUTES, *supra* note 18, at art. 66 (recognizing CAS power to resolve FIFA disputes applying Swiss law).

<sup>141</sup> SWISS FED. ACT ON UNFAIR COMPETITION, *supra* note 19, at art. 4a; see Michael Ritscher & Stefan J. Schröter, *Country Reports: Switzerland*, in INT’L HANDBOOK ON UNFAIR COMPETITION 547, *passim* (Frauke Henning-Bodewig ed. 2013) (analyzing Swiss unfair competition law with a focus on the FAUC); Todd & Jewell, *Reclaiming*, *supra* note 3, at 272–73 (translating the relevant provisions of art. 4a into English).



of money damages.<sup>142</sup> National courts recognize that CAS awards are valid, and any arbitral award should be confirmed by Qatari courts because Qatar is a party to the New York Convention.<sup>143</sup>

MLS is not the only entity that could pursue a claim in court or through arbitration.<sup>144</sup> MLS may own all teams, but new teams come into the league through individuals or companies that pay an expansion fee and then become part of the MLS Board of Governors.<sup>145</sup> Most of these investors then procure separate contracts for local operation of the teams, thus becoming investor-operators.<sup>146</sup> Part of the compensation is one-half of the revenue from ticket sales and from concessions.<sup>147</sup> A team like the Seattle Sounders plays in an NFL stadium, and a 21 percent attendance bump in just its first year following the World Cup would mean an increase from 44,247 to an NFL-level 53,096 per game—and attendance would continue to increase for years thereafter.<sup>148</sup> One-half of lost ticket revenue plus concessions (estimated at \$73) over a seventeen-game home season times five seasons equates to several million dollars in lost revenue.<sup>149</sup> *Forbes* estimated that ten of the then-nineteen MLS teams in 2013 were profitable,<sup>150</sup> so a joint action

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<sup>142</sup> SWISS FED. ACT ON UNFAIR COMPETITION, *supra* note 19, at art. 9, § 3.

<sup>143</sup> Sean Rassel, *The Necessity for National Federations to Stand Up for Themselves*, 20 MICH. ST. INT'L L. REV. 797, 811, 820 (2012); see Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, 21 U.S.T. 2518 (the New York Convention).

<sup>144</sup> Lenihan, *supra* note 28, at 888.

<sup>145</sup> Bezbatchenko, *supra* note 20, at 624–25; Lenihan, *supra* note 28, at 888; Taylor, *supra* note 28, at 3–4; see Decurtins, *supra* note 20, at 333–34 (writing that investors benefit from the league as a whole as well as individually).

<sup>146</sup> Bezbatchenko, *supra* note 20, at 624–25.

<sup>147</sup> *Id.* at 625; Decurtins, *supra* note 20, at 333.

<sup>148</sup> Todd & Jewell, *MLS*, *supra* note 4, at 31 (citing *MLS sets new attendance records, Seattle hold highest average in league*, MAJOR LEAGUE SOCCER (Oct. 26, 2015), <http://www.mlssoccer.com/post/2015/10/26/mls-sets-new-attendance-records-seattle-hold-highest-average-league> [<https://perma.cc/Z4FY-G33K>]; *NFL Attendance—2015*, ESPN, [http://www.espn.com/nfl/attendance/\\_/year/2015](http://www.espn.com/nfl/attendance/_/year/2015) [<https://perma.cc/8B2Q-AETY>] (last visited Apr. 3, 2018) (reporting the average per game attendance for each NFL team during the 2015 season)); see *Facilities*, SEATTLE SOUNDERS FC, <http://www.soundersfc.com/team/facilities> [<http://perma.cc/S4WH-9EHQ>] (stating that both the Sounders and the Seahawks play in the 67,000-person-capacity CenturyLink field).

<sup>149</sup> Todd & Jewell, *MLS*, *supra* note 4, at 38–39.

<sup>150</sup> Chris Smith, *Major League Soccer's Most Valuable Teams*, FORBES (Nov. 20, 2013, 1:00 PM), <https://www.forbes.com/sites/chrissmith/2013/11/20>

by investor-operators to recover lost profits might be worth the time and cost of litigation or arbitration.<sup>151</sup>

### III. DUBIOUS ASSUMPTIONS IN ECONOMIC MODELS

Economists use regression analysis to construct sophisticated models that handle large amounts of data and numerous variables to show relationships that allow an inference of particular causal factors.<sup>152</sup> As business litigation has grown more complex, this powerful tool has become “ubiquitous” to support economists’ expert testimony about damages in cases including commercial torts.<sup>153</sup> Under the Supreme Court’s *Daubert* trilogy as well as state analogues,<sup>154</sup> courts routinely admit such testimony.<sup>155</sup> Economic models are nevertheless open to challenge by the opposing party, who sometimes succeed by turning the complexity of the model on itself and attacking the assumptions underlying it.<sup>156</sup> All economic models rely upon assumptions, which are the explicit or implicit arguments that markets behave a certain way or that particular businesses are similar or that certain events would

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/major-league-soccers-most-valuable-teams/#20964ea419a6 [http://perma.cc/D8A5-HP8X]; see Decurtins, *supra* note 20, at 336–37 (writing that, based on publicly available information the majority of teams seem to operate at a profit).

<sup>151</sup> Todd & Jewell, *MLS*, *supra* note 4, at 67–68; see 16 LEE S. KREINDLER ET AL., N. Y. PRAC., N.Y. L. OF TORTS § 21:107 (2016) (“In an action for business torts ... the appropriate measure of damages is the amount of loss sustained by the plaintiff, including lost opportunities for profit, or stated differently, the amount which the plaintiff would have made except for the defendant’s wrong.”).

<sup>152</sup> *E.g.*, Allensworth, *supra* note 32, at 836–37; David L. Rubinfeld, *Reference Guide on Multiple Regression*, in FED. JUDICIAL CTR., REFERENCE MANUAL ON SCIENTIFIC EVIDENCE 303, 305, 309–10 (3d ed. 2011); Alan O. Sykes, *An Introduction to Regression Analysis*, in CHICAGO LECTURES IN LAW AND ECONOMICS 1, 1 (Eric A. Posner ed., 2000).

<sup>153</sup> Allensworth, *supra* note 32, at 835; Hill et al., *supra* note 29, at 297–98.

<sup>154</sup> Todd & Jewell, *Dubious*, *supra* note 29, at 38–39 (concluding that state courts use the same rationales as federal courts in ruling on the admissibility of economic expert testimony); see Fed. R. Evid. 702 (amended Apr. 17, 2000, effective Dec. 1, 2000) (enumerating the standards for the admission of expert testimony); see generally *Kumho Tire Co. v. Carmichael*, 526 U.S. 137 (1999); *Gen. Elec. Co. v. Joiner*, 522 U.S. 136 (1997); *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579 (1993).

<sup>155</sup> Hill et al., *supra* note 29, at 302; Molly L. Zohn, Note, *How Antitrust Damages Measure Up with Respect to the Daubert Factors*, 13 GEO. MASON L. REV. 697, 727 (2005).

<sup>156</sup> Todd & Jewell, *Dubious*, *supra* note 29, at 45–48.

have occurred.<sup>157</sup> If even one key assumption is “dubious,” however, then the model’s results are suspect.<sup>158</sup> In litigation, this means that courts exclude expert testimony relying upon the model, sometimes resulting in the plaintiff losing the case.<sup>159</sup>

One category of dubious assumptions is when the modeler makes inapt comparisons to markets, businesses, or products.<sup>160</sup> Comparisons are common in complex litigation like antitrust and commercial tort cases where the plaintiff claims that a competitor has prevented it from entering a market or winning a contract.<sup>161</sup> Because the business lacks a record by which to compute damages, courts allow plaintiffs to make a comparison to another “yardstick” business or product that is substantially similar.<sup>162</sup> The underlying assumption is that, but for the anticompetitive act or tortious conduct, plaintiff would have performed like the comparator, thus providing a measure for damages.<sup>163</sup> To establish the evidentiary foundation, the expert must show that something like the but-for

<sup>157</sup> *E.g.*, Allensworth, *supra* note 32, at 828 (claiming that models blend science and art so that “choices and assumptions” go into the model); JONATHAN SCHLEFER, *THE ASSUMPTIONS ECONOMISTS MAKE* 278 (2012) (writing that economists “need a sound argument for why [their] assumption is generally realistic”); *id.* at 25 (writing that economists “make simplified assumptions about the world we inhabit and construct imaginary economies—in other words, models—based on those assumptions”); see Kenneth G. Dau-Schmidt, *Relaxing Traditional Economic Assumptions and Values: Toward a New Multidisciplinary Discourse on Law*, 42 SYRACUSE L. REV. 181, 183 (1991) (listing neoclassical assumptions common to economics); Daniel M. Tracer, Note, *Overcharge but Don’t Overestimate: Calculating Damages for Antitrust Injuries in Two-Sided Markets*, 33 CARDOZO L. REV. 807, 821 (2011) (writing about the “practical concerns” of calculating lost profits in antitrust cases because the “incredibly complex calculation ... requires many assumptions to be made about the plaintiff, the defendant, the markets in which they operate, and other related and uncertain future conditions”).

<sup>158</sup> Robert M. Solow, *A Contribution to the Theory of Economic Growth*, 70 Q.J. OF ECON. 65, 65 (1956) (“When the results of a theory seem to flow specifically from a special crucial assumption, then if the assumption is dubious, the results are suspect.”).

<sup>159</sup> Hill et al., *supra* note 29, at 311; Lloyd, *supra* note 29, at 399–400; Todd & Jewell, *Dubious*, *supra* note 29, at 38.

<sup>160</sup> Todd & Jewell, *Dubious*, *supra* note 29, at 22–25.

<sup>161</sup> Roger D. Blair & Amanda Kay Esquibel, *Yardstick Damages in Lost Profit Cases: An Econometric Approach*, 72 DENV. U.L. REV. 113, 113–14 (1994).

<sup>162</sup> *Id.*

<sup>163</sup> *Id.* at 114.

scenario has actually happened, either to it or to a similar firm, under comparable circumstances.<sup>164</sup>

When the yardstick is not a reasonable comparator, however, courts reject the assumption as too speculative.<sup>165</sup> In one pre-*Daubert* case, *Home Placement Service, Inc. v. Providence Journal Co.*, the plaintiff used its own offices in Nashville as a yardstick for damages at its Providence franchise.<sup>166</sup> The court concluded that the comparison failed to account for differences between the markets, such as different regional rental patterns, unemployment, colleges, and summer rentals.<sup>167</sup> As economic models have become more complex, the number of assumptions underlying them has increased, thus exposing them to more points of attack.<sup>168</sup> Consider *Lippe v. Bairnco Corp.*, where the defendant asbestos manufacturers filed for bankruptcy, and the experts for a trust of asbestosis victims performed numerous calculations to value the companies and determine the potential tort liabilities, which were based in part upon comparisons to other businesses.<sup>169</sup> The trial court excluded the testimony because of “indicia of unreliability” like the expert’s “inability to explain a number of variables and assumptions used in his analysis, such as price/earnings multipliers, income projections, and which companies were comparable to those being valued.”<sup>170</sup>

The single assumption that unlike comparators are similar can doom even the most sophisticated damages model.<sup>171</sup> In *American Booksellers Association v. Barnes & Noble, Inc.*, independent bookstores alleged that the defendant large bookstores received secret discounts not available to them in violation of federal anti-trust law and California unfair competition law.<sup>172</sup> They relied

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<sup>164</sup> Roger D. Blair & William H. Page, “*Speculative*” *Antitrust Damages*, 70 WASH. L. REV. 423, 436 (1995).

<sup>165</sup> Blair & Esquibel, *supra* note 161, at 117.

<sup>166</sup> *Home Placement Serv., Inc. v. Providence Journal Co.*, 819 F.2d 1199, 1205 (1st Cir. 1987).

<sup>167</sup> *Id.*

<sup>168</sup> Todd & Jewell, *Dubious*, *supra* note 29, at 45.

<sup>169</sup> *Lippe v. Bairnco Corp.*, 99 Fed. Appx. 274, 276–79, 282 (2d Cir. 2004).

<sup>170</sup> *Id.* at 279.

<sup>171</sup> Todd & Jewell, *Dubious*, *supra* note 29, at 45–46.

<sup>172</sup> *Am. Booksellers Ass’n v. Barnes & Noble, Inc.*, 135 F. Supp. 2d 1031, 1035 (N.D. Cal. 2001).

upon an expert's economic simulation model to show the difference in prices paid between plaintiffs and defendants as proof of causation as well as amount of damages.<sup>173</sup> The trial court granted summary judgment to defendants for plaintiffs' claims for damages under the Robinson-Patman Act.<sup>174</sup> The court found the model "entirely too speculative to support a jury verdict" because the "model contains entirely too many assumptions and simplifications that are not supported by real-world evidence."<sup>175</sup> Notably, the court ruled that, even if the model were admissible to prove causation, the online and mail-order defendants would still be entitled to summary judgment because the model relied entirely upon competition between "physical stores in the same geographic location."<sup>176</sup>

Courts have shown skepticism when economists opine that American and European consumers will respond to the same product in the same way.<sup>177</sup> *Schonfeld v. Hilliard* was a fraud and contract case related to plaintiffs' attempt to start a television network that used BBC programming.<sup>178</sup> The trial court granted summary judgment for the defendant, holding that "Schonfeld could not prove, with reasonable certainty, the existence or amount of damages for lost profits."<sup>179</sup> The Circuit Court affirmed,<sup>180</sup> noting the "seemingly endless list of assumptions upon which [the] expert relied in determining lost profits" and his failure to account for market risks.<sup>181</sup> One assumption was that a new business entity would see profits of \$112 to \$269 million despite introducing "*a new product*, the 'Americanized' version [of BBC international news], into *a new market*, the United States."<sup>182</sup> Citing the "chilly reception" that New York courts give to "claims for profits lost in unsuccessful entertainment ventures" because of "the changing whims and artistic tastes of the general public," the

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<sup>173</sup> *Id.* at 1037.

<sup>174</sup> *Id.* at 1042.

<sup>175</sup> *Id.* at 1041–42.

<sup>176</sup> *Id.* at 1042.

<sup>177</sup> *See generally* *Schonfeld v. Hilliard*, 218 F.3d 164, 173 (2d Cir. 2000).

<sup>178</sup> *Id.* at 168–70.

<sup>179</sup> *Id.* at 171 (citing *Kenford Co. v. County of Erie*, 493 N.E.2d 234 (N.Y. 1986)).

<sup>180</sup> *Id.* at 172–73.

<sup>181</sup> *Id.* at 173–74.

<sup>182</sup> *Id.* at 171, 173 (emphasis in original).

court found that the assumptions about financing, advertising, and market reach relied upon by the expert were unrealistic.<sup>183</sup>

Another case rejecting assumptions about the fungibility of products across markets is *Lithuanian Commerce Corp. v. Sara Lee Hosiery*, where the Lithuanian distributor brought fraud, contract, tortious interference, and other claims against a U.S. manufacturer for allegedly defective pantyhose.<sup>184</sup> The court cited *General Electric Co. v. Joiner* and other authority for the proposition that courts should reject expert testimony that is too speculative as a matter of law.<sup>185</sup> The court ruled the testimony of the damages expert inadmissible because of “dubious assumptions,” including several unfounded comparisons.<sup>186</sup> The expert failed to distinguish between former and current clients of Sara Lee; he compared Lithuanian Commerce Corp. to two domestic distributors that would not face the same tax, tariff, and import restrictions; and he relied upon a study of U.S. women’s purchasing patterns for pantyhose to predict the amount of purchases by Baltic women.<sup>187</sup> Commentators have suggested that this last type of assumption is problematic because a model’s reliance on a single study brings a risk of being misled by an error or statistical fluke.<sup>188</sup>

Courts have also faulted testimony that fails to distinguish product quality.<sup>189</sup> The court in *In re Live Concert Antitrust Litigation* excluded expert testimony because the regression analysis omitted important explanatory variables.<sup>190</sup> Plaintiffs alleged that Clear Channel engaged in monopolistic practices in its promotion of music concerts that resulted in higher ticket prices.<sup>191</sup> They submitted expert testimony based on regression analysis to

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<sup>183</sup> *Id.* at 174.

<sup>184</sup> *Lithuanian Comm. Corp. v. Sara Lee Hosiery*, 179 F.R.D. 450, 454 (D.N.J. 1998).

<sup>185</sup> *Id.* at 457 (citing *General Electric Co. v. Joiner*, 118 S. Ct. 512, 519 (1997); *Target Mkt. Pub., Inc. v. ADVO, Inc.*, 136 F.3d 1139, 1143 (7th Cir. 1998)).

<sup>186</sup> *Id.* at 460–62.

<sup>187</sup> *Id.* at 460–61.

<sup>188</sup> Kevin A. Kordana & Terrance O’Reilly, *Daubert and Litigation-Driven Econometrics*, 87 VA. L. REV. 2019, 2026 (2001) (quoting *The New NBER: Has Scholarship Been Hurt?*, BUS. WK., Oct. 6, 1980, at 95 (quoting Feldstein)).

<sup>189</sup> *See generally In re Live Concert Antitrust Litig.*, 863 F. Supp. 2d 966, 982 (C.D. Cal. 2012).

<sup>190</sup> *Id.*

<sup>191</sup> *Id.* at 969.

show the increase in ticket prices from 2000 (the year Clear Channel acquired promotion company SFX) until 2006 for rock concerts and the resulting damages.<sup>192</sup> The court concluded that the expert had failed to test the assumption of increased ticket prices relating to a monopoly by failing to account for two major variables, including changes in artist quality during the time period.<sup>193</sup> In another antitrust case, *Freeland v. AT&T Corp.*, the court ruled expert testimony inadmissible for omitting variables based on unsupported assumptions that changes in the quality of a product were not relevant.<sup>194</sup> Plaintiffs alleged the illegal tying of cell phones to cell plans, but the expert did not account for price differences related to the switch from analog to digital phones and the incorporation of cameras into phones.<sup>195</sup> Court skepticism is not limited to economics experts.<sup>196</sup> In *Pfizer Inc. v. Advanced Monobloc Corp.*, the court excluded a marketing expert's testimony, in part for assuming without sufficient support that the product in question, a premium women's shave gel, would have achieved the same market coverage as the plaintiff's bargain men's shave gel.<sup>197</sup>

*Lithuanian Commerce Corp.* is instructive because it suggests that a model need not have any one glaring problematic assumption to fail.<sup>198</sup> Some assumptions are open to dispute, such as if the expert and the opponent disagree on a single assumption like whether a variable is necessary.<sup>199</sup> The issue is then one of probability so that the court should admit the testimony and allow the jury to resolve the matter.<sup>200</sup> Courts will rule as a matter of law, however, where the expert makes so many disputable assumptions

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<sup>192</sup> *Id.* at 976–77.

<sup>193</sup> *Id.* at 978–79.

<sup>194</sup> *Freeland v. AT&T Corp.*, 238 F.R.D. 130, 148–49 (S.D.N.Y. 2006).

<sup>195</sup> *Id.*

<sup>196</sup> See generally *Pfizer Inc. v. Advanced Monobloc Corp.*, No. 97C-04-037-WTQ, 1999 WL 743927, at \*15–16, 24 (Del. Super. Ct. Sept. 2, 1999).

<sup>197</sup> *Id.*

<sup>198</sup> See *id.*

<sup>199</sup> David L. Faigman, Christopher Slobogin & John Monahan, *Gatekeeping Science: Using the Structure of Scientific Research to Distinguish Between Admissibility and Weight in Expert Testimony*, 110 NW. U. L. REV. 859, 865–66 (2016) (arguing that disputes over key variables in a regression analysis should go to the jury rather than be excluded by the judge).

<sup>200</sup> *Id.*

that the model itself is dubious.<sup>201</sup> One commentator writes that courts view models like that in *Lithuanian Commerce Corp.* with “extreme skepticism” because of the “cumulative effect” of the numerous assumptions.<sup>202</sup> In that and other cases, the courts do not identify a single assumption as particularly problematic; instead, the accumulation of unsupported assumptions weakens the force of the conclusions to the point that they are speculative.<sup>203</sup>

Arbitral tribunals like CAS are not bound by rules of evidence, so they have considerably more discretion in choosing what to admit.<sup>204</sup> This discretion may not allow for an economic model based upon dubious assumptions.<sup>205</sup> After all, the recognition by courts and legal commentators that economic models with unreasonable assumptions are suspect accords with economics scholars.<sup>206</sup> To explain or predict the “real” world, economic models must have assumptions that are “founded on reality.”<sup>207</sup> Without a “sound argument” for why the underlying assumptions are “generally realistic,” the integrity of the model’s results are open to dispute.<sup>208</sup> As Nobel laureate Robert M. Solow writes, “When the results of a theory seem to flow specifically from a special crucial assumption, then if the assumption is dubious, the results are suspect.”<sup>209</sup> More recently, Yew-Kwang Ng concluded that unrealistic assumptions are acceptable—unless they change the results in a meaningful

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<sup>201</sup> Hill et al., *supra* note 29, at 314.

<sup>202</sup> Lloyd, *supra* note 29, at 402, 409.

<sup>203</sup> Hill et al., *supra* note 29, at 309–10; *see, e.g.*, *Three Crown Ltd. P’ship v. Salomon Bros., Inc.*, 906 F. Supp. 876, 894 (S.D.N.Y. 1995) (excluding expert testimony because the “damages would rest upon numerous assumptions without the type of support required under the case law”).

<sup>204</sup> Antonio Rigozzi & Brianna Quinn, *Evidentiary Issues Before CAS*, in *INT’L SPORTS L. & JURIS. OF THE CAS: 4TH CONFERENCE CAS & SAV/FSA LAUSANNE* 39 (Michele Bernasconi ed., 2014), [https://lk-k.com/?year=2014&lawyer=antonio-rigozzi&expertise=&s=&post\\_type=publication](https://lk-k.com/?year=2014&lawyer=antonio-rigozzi&expertise=&s=&post_type=publication) [<https://perma.cc/G38V-SY4Q>].

<sup>205</sup> SCHLEFER, *supra* note 157, at 276.

<sup>206</sup> *Id.* at 276–77.

<sup>207</sup> *Id.* at 277.

<sup>208</sup> *Id.* at 278; *see id.* at xiv (writing that “the real disputes arise about assumptions that underlie a model ... and whether it is at least not wildly inconsistent with experience”).

<sup>209</sup> Solow, *supra* note 158, at 65; *see* Jack Melitz, *Friedman and Machlup on the Significance of Testing Economic Assumptions*, 73 J. POL. ECON. 37, 44 (1965) (writing that “any discrepancy between ‘auxiliary’ assumptions and reality raises some likelihood that the experiment is invalid”).



way or are misleading.<sup>210</sup> Paul Pfleiderer characterizes an economic model “built on assumptions with dubious connections to the real world” as “harmful” when its results are applied to inform decision-making.<sup>211</sup> Given that arbitral tribunals necessarily apply economic models to render a decision about the cause and amount of damages, an economic model with unreasonable assumptions might fail not merely because of the mandates of U.S. evidence law but also because of the expectations of the field of economics.<sup>212</sup>

#### IV. KEY DIFFERENCES IN U.S. AND EUROPEAN MARKETS AND PRODUCTS WEAKEN THE ASSUMPTION OF AN MLS WORLD CUP BUMP

Assuming that MLS attendance following a World Cup will mirror what has happened in European countries seems reasonable, at least in a broad sense. After all, MLS offers a similar product as the top European leagues; MLS has even been ranked as the number seven professional soccer league in the world, behind the major European leagues (EPL, Bundesliga, Spain’s La Liga Primera, and Serie A), but on top of lesser European leagues like the Netherlands’ Eredivisie and France’s Ligue 1.<sup>213</sup> As U.S. courts have made clear, however, specific differences in product quality can preclude economists from assuming that a comparison is reasonable, and commentators recognize that MLS talent does not measure up to the quality of the top European leagues.<sup>214</sup> Those

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<sup>210</sup> Yew-Kwang Ng, *Are Unrealistic Assumptions/Simplifications Acceptable? Some Methodological Issues in Economics*, 21 PAC. ECON. REV. 180, 182 (2016).

<sup>211</sup> Paul Pfleiderer, *Camaleones: El Mal Uso de Modelos Teoricos en Finanzas y Economia* [Chameleon: The Misuse of Theoretical Models in Finance and Economics], 16 REVISTA DE ECONOMIA INSTITUCIONAL 23 (2014), <https://www.gsb.stanford.edu/gsb-cmis/gsb-cmis-download-auth/359071> [<https://perma.cc/ZDB3-ETRE>].

<sup>212</sup> See generally Rigozzi & Quinn, *supra* note 204, at 39.

<sup>213</sup> Joe Prince-Wright, *MLS ranked seventh best soccer league globally ... can it break into the top five?*, NBC SPORTS (Apr. 23, 2013, 9:04 AM), <http://soccer.nbcsports.com/2013/04/23/mls-ranked-seventh-best-soccer-league-globally-can-it-break-into-the-top-five/> [<http://perma.cc/4XS5-N6BF>]; see Decurtins, *supra* note 20, at 336 (explaining that MLS ranks sixth globally in terms of attendance as of 2016).

<sup>214</sup> *E.g.*, Lenihan, *supra* note 28, at 899 (noting the disparity in salary between MLS and top European leagues); Tim Hill, *67% of players say an MLS team would survive the Premier League. Are they right?*, GUARDIAN (Mar. 24, 2016,

differences become even more pronounced when contrasting the European sports market where soccer reigns supreme with the U.S. market and its four other professional sports leagues that are each the best in the world.<sup>215</sup> Based as it would be upon a single study of European league attendance with nothing to link it specifically to MLS or American consumers, the MLS damages model could very well be rejected by a tribunal, whether a U.S. court or arbitral body.<sup>216</sup>

#### A. Differences Without a Difference

Some differences are unlikely to make applying the Drut and Szymanski study unreasonable.<sup>217</sup> For example, Drut and Szymanski examined attendance for European tier-one and tier-two leagues, which are tied to each other through the process of promotion and relegation.<sup>218</sup> MLS does not have promotion and relegation, so the on-field performance of its teams bears no relation to what happens in the minor league USL or NASL.<sup>219</sup> Because Drut and Szymanski had the largest observations for tier-one

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8:57 AM), <https://www.theguardian.com/football/blog/2016/mar/24/mls-premier-league-comparison> [<http://perma.cc/56MD-63QC>] (opining that the very best team in MLS would barely avoid relegation in the EPL); Thomas Hautmann, *How would the best MLS team fare in the Premier League?*, FOX SPORTS (Mar. 23, 2016, 4:30 PM), <http://www.foxsports.com/soccer/story/how-would-the-best-mls-team-fare-in-the-premier-league-032316> [<http://perma.cc/G6ZY-VPDJ>] (opining that the very best team in MLS would be relegated in the EPL because the MLS team could not survive the long season with its small payroll). Even Commissioner Garber targets 2022 as the year that MLS hopes to be among the world's best leagues, thus tacitly conceding that MLS is not there yet. *Id.*

<sup>215</sup> Hill, *supra* note 214.

<sup>216</sup> See generally SCHLEFER, *supra* note 157, at 208.

<sup>217</sup> See Drut & Szymanski, *supra* note 22, at 2.

<sup>218</sup> *Id.* (stating that “the worst performing teams at the end of the season are relegated to the next level down, to be replaced by the best performing teams from the lower level”).

<sup>219</sup> Chris Smith, *New Report Supports MLS Promotion/Relegation, But League Still Says No*, FORBES (Nov. 22, 2016, 12:11 PM), <http://www.forbes.com/sites/chris-smith/2016/11/22/new-report-supports-mls-promotion-relegation-but-league-still-says-no/#37125c131b9f> [<https://perma.cc/9CDK-7QFQ>]; see Lenihan, *supra* note 28, at 901 (writing that “American soccer has officially become a one-league show” because MLS has expanded in part through the addition of minor league teams).

leagues,<sup>220</sup> and because the World Cup bump is far more pronounced in tier-one leagues,<sup>221</sup> this difference is likely irrelevant.<sup>222</sup>

Also, our prior article assumed the higher attendance bump for teams whose *cities* would host a World Cup match, while Drut and Szymanski looked at teams whose *stadiums* hosted a World Cup or Euro Cup match.<sup>223</sup> The USSF proposed large NFL or major college stadiums like the Meadowlands in New Jersey or the Rose Bowl in Pasadena; by contrast, MLS teams have intentionally moved away from massive NFL stadiums to play in separate, soccer-specific stadiums.<sup>224</sup> Because MLS fan attendance has grown steadily even as teams change venues,<sup>225</sup> this assumption likewise seems reasonable.<sup>226</sup>

Another difference is league size.<sup>227</sup> FIFA desires that top-tier national leagues have no more than twenty teams.<sup>228</sup> Five top European leagues observe this limit.<sup>229</sup> By contrast, MLS expanded to twenty-two teams for the 2017 season, with clubs in Los Angeles and Miami expected shortly thereafter.<sup>230</sup> MLS has announced expansion plans—including a \$150 million expansion fee each—for four more teams and may even seek to grow to thirty or more.<sup>231</sup> League size is likely irrelevant when put in the context

<sup>220</sup> The authors had 4,263 total observations, with 44 percent for tier-one clubs, 30 percent for tier-two clubs, and the remainder for English tier-three and tier-four clubs. Drut & Szymanski, *supra* note 22, at 8.

<sup>221</sup> *Id.* at 2, 11 (reporting that the World Cup had no effect on English tier-three and tier-four attendance and that “[d]ivision two teams seem [sic] more modest increases”).

<sup>222</sup> See *supra* text accompanying notes 220–21.

<sup>223</sup> Compare Todd & Jewell, *MLS*, *supra* note 4, at 37 (using the host city for MLS clubs without regard for the specific stadium), with Drut & Szymanski, *supra* note 22, at 5 (classifying clubs based on “whether their stadium was used to host championship games or not”).

<sup>224</sup> Compare USA BID EVALUATION REPORT, *supra* note 127, at 11–13, with Taylor, *supra* note 28, at 10–11.

<sup>225</sup> Lenihan, *supra* note 28, at 897 (noting a 7 percent increase in MLS attendance from the 2010 to the 2011 seasons); Taylor, *supra* note 28, at 10 (reporting that by 2010, nine of the then sixteen teams in 2010 played in soccer specific stadiums).

<sup>226</sup> Taylor, *supra* note 28, at 10.

<sup>227</sup> *Id.* at 7.

<sup>228</sup> *Id.*

<sup>229</sup> *Id.*

<sup>230</sup> Couch, *supra* note 134.

<sup>231</sup> *Id.*

of market size.<sup>232</sup> MLS is the only tier-one soccer league in the U.S. and Canada, which have a combined population of 360 million.<sup>233</sup> By contrast, the top five tier-one leagues (by starting player salaries) play in five European countries with a combined population of 323 million.<sup>234</sup>

### B. Key Differences in Markets and Products

These markets differ in one key respect that could affect the applicability of the World Cup Bump to MLS, however.<sup>235</sup> Soccer

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<sup>232</sup> See *supra* text accompanying notes 233–34.

<sup>233</sup> Lenihan, *supra* note 28, at 901; Taylor, *supra* note 28, at 7; see *World Factbook: United States*, CENT. INTELLIGENCE AGENCY, <https://www.cia.gov/library/publications/the-world-factbook/geos/us.html> [<https://perma.cc/ZSU4-LSTD>] (last visited Apr. 3, 2018) (listing the U.S. population as 323,995,528); *World Factbook: Canada*, CENT. INTELLIGENCE AGENCY, <https://www.cia.gov/library/publications/the-world-factbook/geos/ca.html> [<https://perma.cc/HW5Q-BUMB>] (last visited Apr. 3, 2018) (listing the Canadian population as 35,362,905).

<sup>234</sup> SPORTING INTELLIGENCE, GLOBAL SPORTS SALARIES SURVEY 26–27, 32–39 (2016), <http://www.globalsportssalaries.com/> [<https://perma.cc/9A2X-XPBP>] (listing the EPL, La Liga, Serie A, Bundesliga, and Ligue 1 as the top European soccer leagues by average player salary); see *World Factbook: France*, CENT. INTELLIGENCE AGENCY, <https://www.cia.gov/library/publications/the-world-factbook/geos/fr.html> [<https://perma.cc/9HZW-YDJ9>] (last visited Apr. 3, 2018) (listing the population of France as 66,836,154); *World Factbook: Germany*, CENT. INTELLIGENCE AGENCY, <https://www.cia.gov/library/publications/the-world-factbook/geos/gm.html> [<https://perma.cc/4V7W-P45W>] (last visited Apr. 3, 2018) (listing the population of Germany as 80,722,792); *World Factbook: Italy*, CENT. INTELLIGENCE AGENCY, <https://www.cia.gov/library/publications/the-world-factbook/geos/it.html> [<https://perma.cc/TJY9-VVUW>] (last visited Apr. 3, 2018) (listing the population of Italy as 62,007,540); *World Factbook: Spain*, CENT. INTELLIGENCE AGENCY, <https://www.cia.gov/library/publications/the-world-factbook/geos/sp.html> [<https://perma.cc/VHN9-BJ7Z>] (last visited Apr. 3, 2018) (listing the population of Spain as 48,563,476); *World Factbook: United Kingdom*, CENT. INTELLIGENCE AGENCY, <https://www.cia.gov/library/publications/the-world-factbook/geos/uk.html> [<https://perma.cc/XN3W-4MA6>] (last visited Apr. 3, 2018) (listing the population of the UK as 64,430,428). Further, this population number is high because some Welsh teams are in the EPL and others in a separate Welsh tier-one league, while Scotland and Northern Ireland have separate tier-one leagues. See Seb Patrick, *10 Things You Should Know About the English Premier League*, BBC AMERICA, <http://www.bbcamerica.com/anglophenia/2014/08/10-things-know-english-premier-league> [<https://perma.cc/PA79-R8PP>] (last visited Apr. 3, 2018).

<sup>235</sup> See *infra* text accompanying notes 236–37.

is far and away the most popular sport in Europe,<sup>236</sup> so the top leagues effectively do not compete against other sports for fans.<sup>237</sup> That reasoning does not hold for MLS, which must contend with tier-one professional leagues for four different sports: the NFL, MLB, NBA, and NHL.<sup>238</sup> The NFL is a special category because gridiron football is almost exclusive to the United States, so it has no international comparison, yet it is the highest-grossing sports league in the world.<sup>239</sup> MLS has also avoided direct competition with the NFL.<sup>240</sup> Although European soccer leagues play fall to spring, MLS schedules its season spring to fall.<sup>241</sup> Even during the September and October overlap, MLS plays primarily on Saturdays and midweek rather than on Sundays.<sup>242</sup>

The MLS season goes head-to-head with the MLB season, however, and has some overlap with the NBA and NHL.<sup>243</sup> Like soccer, these three sports do have global interest, especially in Latin America and Asia for baseball and Europe for basketball and hockey.<sup>244</sup> MLB, NBA, and NHL are regarded as the top

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<sup>236</sup> Drut & Szymanski, *supra* note 22, at 4; *see* Coppage, *supra* note 20, at 545 (“Soccer is the most popular sport in the world ....”).

<sup>237</sup> Taylor, *supra* note 28, at 1–2.

<sup>238</sup> Bezbatchenko, *supra* note 20, at 635 (“MLS competes with the NFL, NBA, MLB, and NHL in today’s saturated sports market.”); Decurtins, *supra* note 20, at 331 (claiming that MLS “does not compete in terms of importance with the four major American sports leagues”).

<sup>239</sup> Ike Ejiochi, *How the NFL makes the most money of any pro sport*, CNBC (Sept. 4, 2014, 9:32 AM), <http://www.cnbc.com/2014/09/04/how-the-nfl-makes-the-most-money-of-any-pro-sport.html> [<https://perma.cc/3WMC-KUJE>]; *see* Taylor, *supra* note 28, at 2 (characterizing the NFL as “the global powerhouse in American football”); Kevin Seifert, *How American Football Is Becoming a Worldwide Sport*, ESPN (May 5, 2016), [http://www.espn.com/nfl/story/\\_id/15273529/how-american-football-becoming-worldwide-sport-europe-china-beyond](http://www.espn.com/nfl/story/_id/15273529/how-american-football-becoming-worldwide-sport-europe-china-beyond) [<https://perma.cc/M7V2-UUJN>] (chronicling the slow growth of the “uniquely American” version of football in foreign countries and conceding that “it will be a while—if ever—before international prospects feed the NFL talent pool on a regular basis”).

<sup>240</sup> Taylor, *supra* note 28, at 9.

<sup>241</sup> *Id.*

<sup>242</sup> For example, if one searches “September 2017” matches on the MLS Schedule website, most are on Saturdays or midweek, with only five played on Sundays. *Schedule*, MAJOR LEAGUE SOCCER, <http://www.mlssoccer.com/schedule> [<https://perma.cc/87GB-ENBL>] (last visited Apr. 3, 2018).

<sup>243</sup> Taylor, *supra* note 28, at 9.

<sup>244</sup> *Id.* at 2.

leagues in the world in their respective sports because the top players in the world come to the United States to play.<sup>245</sup> American fans who attend MLB, NBA, and NHL matches are accustomed to seeing Japanese pitchers or Dominican sluggers in their prime or medalists from the most recent Olympics.<sup>246</sup>

To see current World Cup champions in a given professional match, however, an American sports fan would have to do what the best players in the world do: go to Europe.<sup>247</sup> Consider the professional clubs for players that made their national teams' rosters for the most recent World Cup, which Brazil hosted in 2014.<sup>248</sup> With twenty-two players selected to make an international team, MLS tied for ninth with Portugal's Primeira Division.<sup>249</sup> Contrast that with how many players the top five European leagues provided: EPL (105), Serie A (81), Bundesliga (73), La Liga (62), and Ligue 1 (47).<sup>250</sup> Seven European teams provided over eleven players and thus could theoretically have fielded a team.<sup>251</sup> Of the twenty-two MLS players to make an international roster, fifteen of those played for the USMNT, which filled the remainder of its slots with four players each from the EPL and Bundesliga and the rest from European or Mexican leagues.<sup>252</sup> By contrast, the roster

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<sup>245</sup> *Id.*; see Lenihan, *supra* note 28, at 909 (offering examples of the "finest players" in Japan's top Nippon Professional Baseball league leaving for MLB).

<sup>246</sup> Taylor, *supra* note 28, at 21 (calling the NFL, NBA, MLB, and NHL "the top destinations for athletes in their sports" where "American fans are accustomed to[ ] top athletes assembled in one place"); see Seifert, *supra* note 239 (writing that "[i]nternational athletes now represent 20 percent of NBA players and 25 percent of Major League Baseball players").

<sup>247</sup> Taylor, *supra* note 28, at 2 (writing that "Americans go abroad to get the best-rate soccer action"); see Decurtins, *supra* note 20, at 346–47 (contrasting the strict MLS rule limiting the number of foreign-born players with the more open European rules that mandate only a small number of players be homegrown).

<sup>248</sup> *2014 FIFA World Cup Brazil™*, FIFA, <http://www.fifa.com/worldcup/archive/brazil2014/> [<https://perma.cc/47B2-X9KS>] (last visited Apr. 3, 2018).

<sup>249</sup> *Which Leagues and Clubs Have the Most Players at the 2014 World Cup?*, GOAL (June 5, 2014), <http://www.goal.com/en/news/1717/editorial/2014/06/05/4861228/which-league-and-clubs-have-the-most-players-at-the-2014> [<https://perma.cc/RE4T-U4FF>].

<sup>250</sup> *Id.*

<sup>251</sup> *Id.*

<sup>252</sup> Jack Bell, *Countdown to 2014 World Cup Brazil: U.S. Soccer Team Unveils Preliminary World Cup Roster*, N.Y. TIMES (May 12, 2014), <https://www.nytimes.com/2014/05/13/sports/soccer/us-soccer-team-unveils-preliminary-world-cup-roster.html>.

for eventual champion Germany contained only players from Europe's top leagues: nineteen from the Bundesliga, four from the EPL, two from Serie A, one from La Liga, and none from MLS.<sup>253</sup> The runner-up Argentine National Team featured only three players from its home Argentine Primera Division; sixteen players on its twenty-three man roster were from Serie A, La Liga, EPL, or Ligue 1, while none were from MLS.<sup>254</sup>

This difference in international talent is a simple issue of money: similar to the NFL, MLB, NBA, and NHL, the top European leagues pay huge salaries to acquire and retain the best players.<sup>255</sup> On a per-player basis, EPL teams Manchester City and Manchester United pay as much as the New York Yankees or NBA franchises—despite the latter having rosters half the size as the soccer clubs.<sup>256</sup> Professional soccer prior to MLS failed in part because the North American Soccer League (NASL) in the 1970s and 1980s attempted to follow the European model by signing high-priced talent; with poor management and a lack of sufficient revenue, however, the league folded.<sup>257</sup> To avoid that fate, MLS deliberately structured itself as a single entity so that the league and not individual teams contracted with players, and those contracts were limited by strict salary caps.<sup>258</sup> At least initially, the lower overall talent

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<sup>253</sup> Rob Goldberg, *Germany World Cup Roster 2014: Full 26-Man Squad and Starting 11 Projections*, BLEACHER REPORT (May 8, 2014), <http://bleacherreport.com/articles/1976561-germany-world-cup-roster-2014-full-23-man-squad-and-starting-11-projections> [https://perma.cc/U5FZ-HGP8]; see *2014 FIFA World Cup Brazil*<sup>TM</sup>, *supra* note 248 (listing the final match score as 1–0 in favor of Germany).

<sup>254</sup> Telegraph Sport, *Argentina World Cup 2014 squad*, TELEGRAPH (June 2, 2014, 10:45 PM), <http://www.telegraph.co.uk/sport/football/teams/argentina/10810410/Argentina-World-Cup-2014-squad.html> [https://perma.cc/85L5-MPRQ]; see *2014 FIFA World Cup Brazil*<sup>TM</sup>, *supra* note 248 (showing the Argentine national team falling to the German squad in the final match 0–1 in extra time).

<sup>255</sup> SPORTING INTELLIGENCE, *supra* note 234, at 26–27, 32–39.

<sup>256</sup> Cork Gaines, *The Cleveland Cavaliers top the list of the highest-paid sports teams in the world*, BUS. INSIDER (Nov. 14, 2016, 1:45 PM), <http://www.businessinsider.com/highest-paid-sports-teams-2016-11/#20-golden-state-warriors-666-million-average-pay-per-player-1> [https://perma.cc/67PH-ESVC]. Real Madrid and Barcelona of La Liga have salaries in the Top 20 worldwide, and Paris Saint Germain of Ligue 1 are 35th after topping the list in 2015. *Id.*

<sup>257</sup> Coppage, *supra* note 20, at 548–49; Decurtins, *supra* note 20, at 332–33.

<sup>258</sup> Coppage, *supra* note 20, at 548, 558; Bezbatchenko, *supra* note 20, at 623–24.

level in MLS was guided by the necessity of surviving by controlling costs.<sup>259</sup>

As interest in MLS grew, it responded to criticism of offering a “dull product” by implementing the Designated Player rule.<sup>260</sup> This permitted individual teams a limited number of roster slots to pay players at a global market rate but have only a fraction of that salary count against the team’s cap.<sup>261</sup> The most notable example is David Beckham: the Los Angeles Galaxy hired the Manchester United and Real Madrid superstar for \$250 million.<sup>262</sup> While MLS paid \$400,000 of his salary, the team investor-operator covered the rest.<sup>263</sup> Proponents argue that the rule benefits league marketing efforts because it can attract fans with international soccer’s biggest names, and it improves league quality by exposing all players to talent from the top international clubs.<sup>264</sup> Critics counter that the Designated Player rule hurts the quality of MLS: teams pay a high price for a handful of players who are past their prime, while the salary cap on young American talent forces home-grown superstars to leave for European leagues in search of better pay.<sup>265</sup> To be sure, MLS salaries are growing: the total payroll increased 22 percent from 2015 to 2016.<sup>266</sup> On a per-player basis, however, MLS averages \$313,438 for starters, which is a third of the average for Ligue 1 (\$961,638) and a tenth of the EPL (\$3,218,523).<sup>267</sup> The combination of salary cap and Designated Player rule means that MLS talent is split between emerging youngsters and aging superstars while the cash-rich European teams

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<sup>259</sup> Bezbatchesko, *supra* note 20, at 641–42.

<sup>260</sup> *Id.* at 639.

<sup>261</sup> *Id.* at 633; Lenihan, *supra* note 28, at 895, 898–900.

<sup>262</sup> Bezbatchesko, *supra* note 20, at 633–34; Coppage, *supra* note 20, at 549–50.

<sup>263</sup> Bezbatchesko, *supra* note 20, at 633–34.

<sup>264</sup> *Id.* at 634; Coppage, *supra* note 20, at 559.

<sup>265</sup> Coppage, *supra* note 20, at 559 (writing that the designated players “are in the latter stages of their careers”); Lenihan, *supra* note 28, at 908–09 (opining that MLS “los[es] young talent to the highest bidder”); Taylor, *supra* note 28, at 20 (writing “if the league becomes a retirement home for international stars past their prime, the long-term stability of the league will suffer”).

<sup>266</sup> SPORTING INTELLIGENCE, *supra* note 234, at 44; *see* Coppage, *supra* note 20, at 559 (claiming that “MLS has a more powerful presence in the global market for soccer players”).

<sup>267</sup> Compare SPORTING INTELLIGENCE, *supra* note 234, at 44, *with id.* at 26, 38. The other top European leagues all average over \$1 million per starting player: La Liga (\$1,635,869), Serie A (\$1,459,436), Bundesliga (\$1,372,610). *Id.* at 32, 34, 36.



feature those players in their prime.<sup>268</sup> This difference might be enough for a court to rule that the quality of the MLS soccer “product” precludes a comparison to the products offered by the top European leagues.<sup>269</sup>

The difference in the age of the comparator leagues also challenges the reasonableness of applying Drut and Szymanski to MLS.<sup>270</sup> The professional soccer leagues of England, France, Germany, and Italy have each existed for over 100 years, with the first champions of England crowned in 1889,<sup>271</sup> France in 1894,<sup>272</sup> Italy in 1898,<sup>273</sup> and Germany in 1903.<sup>274</sup> Granted, the leagues did not have competitions during the World Wars,<sup>275</sup> and they may have existed in other forms.<sup>276</sup> MLS, by contrast, is only two decades old and is still in a growth mode: MLS has seen its total attendance increase 40 percent in the ten years since 2006;<sup>277</sup> MLS already

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<sup>268</sup> Lenihan, *supra* note 28, at 908–09; see Decurtins, *supra* note 20, at 350 (writing that MLS struggles to acquire mid-range foreign talent while talented Americans have better financial prospects in foreign leagues).

<sup>269</sup> See Taylor, *supra* note 28, at 20 (“Fans [of MLS] want to see a quality product, and eventually that product will have to compete against top European leagues.”).

<sup>270</sup> See text accompanying notes 271–79.

<sup>271</sup> *Premier League>>Champions*, WORLDFOOTBALL, <http://www.worldfootball.net/winner/eng-premier-league/> [https://perma.cc/F7NW-ESG4].

<sup>272</sup> *France>>Ligue 1>>Champions*, WORLDFOOTBALL, <http://www.worldfootball.net/winner/fra-ligue-1/> [https://perma.cc/L5HF-Y2NA].

<sup>273</sup> *Italy>>Serie A>>Champions*, WORLDFOOTBALL, <http://www.worldfootball.net/winner/ita-serie-a/> [https://perma.cc/M7VN-MMTN].

<sup>274</sup> *Germany>>Bundesliga>>Champions*, WORLDFOOTBALL, <http://www.worldfootball.net/winner/bundesliga/> [https://perma.cc/8GCR-9HLP].

<sup>275</sup> For example, French soccer halted with World War I, resumed in the late 1920s and 1930s, paused again with World War II, but then has operated continuously since the late 1940s. See *France>>Ligue 1>>Champions*, *supra* note 272; *Football in France and the significance of World War 1*, WORLDSOCCER (Dec. 6, 2014), <http://www.worldsoccer.com/blogs/football-france-significance-world-war-1-358236> [https://perma.cc/P6SB-LGFN].

<sup>276</sup> For example, the EPL technically dates from 1992, but it formed by splitting from the Football League, which was established over 125 years ago in 1888. *History*, PREMIER LEAGUE, <http://www.premierleague.com/history> [https://perma.cc/3A7M-MWXJ]; Phil Shaw, *Establishing the Template*, FOOTBALL LEAGUE (2013), <http://www.fl125.co.uk/history/1888-1914> [https://perma.cc/WXV6-3GH2].

<sup>277</sup> Jeff Carlisle, *MLS sets average attendance record in 2016 as Seattle Sounders lead all clubs*, ESPN (Oct. 24, 2016), <http://www.espn.com/soccer/major-league-soccer/story/2980505/mls-sets-average-attendance-record-in-2016-as-seattle-sounders-lead-all-clubs?src=%E2%80%A6> [http://perma.cc/TF34-SSC4]; see Coppage, *supra* note 20, at 563 (characterizing the MLS levels of growth as “stunning”).

sees substantial year-over-year growth, such as in 2011 when its attendance surpassed the NBA and NHL because of a 7 percent increase and in 2015 when the league had a per-game average increase of 12.7 percent;<sup>278</sup> and several teams with the highest attendance are expansion clubs.<sup>279</sup> One might therefore question whether the World Cup would provide the spur for dramatic attendance increases for a league that already sees sizeable annual growth and where expansion is the norm.<sup>280</sup>

### *C. Positive Factors Insufficient to Overcome Key Differences*

Something that militates toward reasonableness is that Drut and Szymanski included Japan and Korea—which co-hosted the 2002 World Cup—in their study.<sup>281</sup> These nations have tier-one leagues comparable to MLS in age, with Japan’s forming in 1993 and Korea’s in 1983,<sup>282</sup> and soccer is not necessarily the top professional sport in those countries.<sup>283</sup> The problem is that Drut and Szymanski did not obtain data about these two countries from a public source,<sup>284</sup> nor did they specify whether the World Cup bump in those two countries was comparable to that in the European countries.<sup>285</sup> One therefore cannot determine if Japanese and Korean professional league attendance was greater or less than attendance following the five European World Cups.<sup>286</sup>

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<sup>278</sup> Lenihan, *supra* note 28, at 897; Ian Thomas & David Broughton, *Expansion Teams Boost MLS To Highest Average Attendance In League History*, SPORTS BUS. DAILY (Oct. 26, 2015), <http://www.sportsbusinessdaily.com/Daily/Issues/2015/10/26/Leagues-and-Governing-Bodies/MLS.aspx> [<https://perma.cc/9VP8-UC62>].

<sup>279</sup> Thomas & Broughton, *supra* note 278.

<sup>280</sup> Lenihan, *supra* note 28, at 897.

<sup>281</sup> Drut & Szymanski, *supra* note 22, at 5.

<sup>282</sup> *K League*, KOREA FOOTBALL ASS’N, [http://www.kfa.or.kr/eng/league/league\\_k.asp](http://www.kfa.or.kr/eng/league/league_k.asp) [<https://perma.cc/7PBC-8865>] (stating that the predecessor to the professional K League, the Super League, was launched in 1983); *Ninety Years of the JFA*, JAPAN FOOTBALL ASS’N, [http://www.jfa.jp/eng/about\\_jfa/history/](http://www.jfa.jp/eng/about_jfa/history/) [<https://perma.cc/DP2G-HNHE>] (“The J. League, the nation’s first professional league, kicked off its first matches in 1993.”).

<sup>283</sup> Drut & Szymanski, *supra* note 22, at 4.

<sup>284</sup> *Id.* at 5 n.3 (noting that the Japanese data was supplied by Professor Takeo Hirata and the Korean data by Jai-Ku Sun and Byungju Kang).

<sup>285</sup> *See generally id.*

<sup>286</sup> *See generally id.*

Other differences between MLS and European leagues could enhance the potential for a World Cup bump.<sup>287</sup> European leagues typically do not have postseason playoffs to determine league champions, although they do have brief playoff series to determine relegation or promotion.<sup>288</sup> For instance, at the end of the regular season, the sixteenth-ranked team in the Bundesliga has a two-game playoff with the third-ranked team in the German Second Division (2. Bundesliga), with the winner competing in the Bundesliga next season and the loser relegated to the second division.<sup>289</sup> MLS follows the example of other American sports leagues by having a postseason playoff to determine that season's champion.<sup>290</sup> The World Cup is itself a large playoff: the top thirty-two teams that qualify in their regionals play in groups, with top group performers advancing to single-elimination games until a champion is determined.<sup>291</sup> If that format leads World Cup fans to watch professional soccer, then MLS should not suffer by offering a similar format.<sup>292</sup> Another difference mentioned above was league schedules: European leagues play fall to spring, while MLS plays spring to fall.<sup>293</sup> The World Cup is typically in the summer—except for the controversial move to hold the 2022 World Cup Qatar in winter to avoid the dangerous desert heat<sup>294</sup>—so MLS could benefit by resuming its season within days of the close of the World Cup.<sup>295</sup>

These positive factors may not be enough to support the assumption that MLS would see a World Cup Bump like European

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<sup>287</sup> *Id.* at 7.

<sup>288</sup> Taylor, *supra* note 28, at 6–7.

<sup>289</sup> *What is the relegation/promotion playoff?*, BUNDESLIGA, <http://www.bundesliga.com/en/news/Bundesliga/noblmd34-what-is-the-relegation-promotion-play-off.jsp> [<https://perma.cc/8JA7-CYMX>].

<sup>290</sup> Taylor, *supra* note 28, at 7.

<sup>291</sup> Todd & Jewell, *Reclaiming*, *supra* note 3, at 251.

<sup>292</sup> *Id.* at 294.

<sup>293</sup> See Taylor, *supra* note 28, at 9.

<sup>294</sup> *FIFA Executive Committee confirms November/December event period for Qatar 2022*, FIFA.COM (Mar. 19, 2015), <http://www.fifa.com/worldcup/news/y=2015/m=3/news=fifa-executive-committee-confirms-november-december-event-period-for-q-2567789.html> [<https://perma.cc/2EUZ-ADAJ>]; Youd, *supra* note 4, at 174–75.

<sup>295</sup> See Taylor, *supra* note 28, at 14 (arguing that MLS teams could “profit from additional ticket sales” following a World Cup because, unlike other American sport championships, the tournament does not mark the end of the season).

leagues by offsetting the significant differences in the U.S. and European markets and products.<sup>296</sup> Yet the European-focused paper by Drut and Szymanski is the only extant study on the correlation between international competition and professional soccer attendance,<sup>297</sup> so any economic model of MLS attendance and damages related to the lost 2022 World Cup would necessarily have to rely upon it.<sup>298</sup> Models based upon single studies are not necessarily flawed, but their results will be met with more suspicion.<sup>299</sup> Furthermore, the Drut and Szymanski study has been published only as a working paper and thus has not been vetted by the normal scholarly refereeing system.<sup>300</sup> Peer review is but one factor in a *Daubert* analysis so that experts may rely upon non-peer-reviewed studies,<sup>301</sup> but the lack of an underlying study's engagement by other scholars nevertheless invites criticism.<sup>302</sup> Without additional data and research pertaining to MLS and American markets, MLS or the investor-operators would take a significant risk by pinning multi-year, multimillion-dollar litigation or arbitration on an economic model with such obvious vulnerabilities.<sup>303</sup>

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<sup>296</sup> See, e.g., Taylor, *supra* note 28, at 18 (“In order to compete with the instant accessibility of top European leagues, MLS is trying to improve the quality of its matches and find ways to distinguish their product from these leagues.”).

<sup>297</sup> Drut & Szymanski, *supra* note 22, at 4.

<sup>298</sup> See generally JEFFREY M. WOOLDRIDGE, *ECONOMETRIC ANALYSIS OF CROSS SECTION AND PANEL DATA* (2d ed. 2010).

<sup>299</sup> See text accompanying notes 184–88 (describing court and commentator distrust of economic models based upon a single study).

<sup>300</sup> See *supra* note 22 (indicating that the paper is available on the *Soccernomics* website); Drut & Szymanski, *supra* note 22, at 1 n.1 (including author contact information but no publication in a peer-reviewed journal).

<sup>301</sup> *Daubert v. Merrell Dow Pharm.*, 509 U.S. 579, 593 (1993); see *id.* (recognizing that “in some instances well-grounded but innovative theories will not have been published”); see also *Nilavar v. Osborn*, 738 N.E.2d 1271, 1289 (Ohio Ct. App. 2000) (permitting expert testimony where expert relied on work-life tables not subjected to peer review or widely accepted by the scientific community but which had been published for at least nine years and were more conservative than a study that the opposing expert said was authoritative).

<sup>302</sup> D.H. Kaye, *The Dynamics of Daubert: Methodology, Conclusions, and Fit in Statistical and Econometric Studies*, 87 VA. L. REV. 1933, 1997 (2001) (criticizing expert’s “resistance theory” because “[i]t has never been published or examined by other economists”).

<sup>303</sup> Joni Hersch & Blair Druhan Bullock, *The Use and Misuse of Econometric Evidence in Employment Discrimination Cases*, 71 WASH. & LEE L. REV. 2365, 2367–68 (2014).

V. THE 2016 COPA AMERICA CENTENARIO: CONFIRMING AN  
MLS ATTENDANCE BUMP

Drut and Szymanski not only found an attendance bump following five European World Cups, but also following four Euro Cups, the quadrennial European championship tournament for UEFA's national teams.<sup>304</sup> The Euro Cup is similar to the Copa America, which was hosted by the USSF in 2016.<sup>305</sup> This Part examines MLS attendance before and after the Copa America and concludes that MLS saw an increase of 917 fans per game attributable to the tournament.<sup>306</sup> This finding not only supports the general result of Drut and Szymanski's study, it also suggests that the Copa America bump is of a similar magnitude to the World Cup bump.<sup>307</sup> Thus, our results argue for the reasonableness of the assumption that a 2022 World Cup USA would have resulted in increased MLS attendance comparable to European leagues but for the unlawful intervention in the bidding and subsequent awarding of the 2022 World Cup to Qatar.<sup>308</sup>

A. *The Euro Cup and Copa America*

While few if any sporting events can match the global interest in the World Cup, FIFA confederations nevertheless engage continents through similar tournaments every four years.<sup>309</sup> For example, the UEFA Euro Cup started in 1960 with four teams, but the tournament field has expanded over the decades.<sup>310</sup> The French Football Federation hosted the 2016 Euro Cup, which featured the twenty-four European national teams that had advanced from fifty-three teams participating in nine group qualifiers.<sup>311</sup> Like the World Cup, the tournament spanned about a month during

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<sup>304</sup> Drut & Szymanski, *supra* note 22, at 1–5; *UEFA EURO 2016: France*, *supra* note 30.

<sup>305</sup> Stejskal, *supra* note 31.

<sup>306</sup> Drut & Szymanski, *supra* note 22, at 11.

<sup>307</sup> See *infra* text accompanying notes 371–73.

<sup>308</sup> Todd & Jewell, *MLS*, *supra* note 4 at 34–35.

<sup>309</sup> Letter from Jérôme Valcke, *supra* note 1.

<sup>310</sup> *UEFA EURO 2016 Competition Format*, UEFA, <http://www.uefa.com/uefa/euro/about-euro/format/index.html> [https://perma.cc/XMP2-323P] (last visited Apr. 3, 2018).

<sup>311</sup> *Id.*

June and July,<sup>312</sup> and ten cities across the country hosted matches.<sup>313</sup> The teams first played in groups of four and then advanced to a knockout format,<sup>314</sup> with the Portuguese national team defeating the host French squad 1–0 in the final.<sup>315</sup> Total tournament attendance was 2,427,303, with an average of over 47,000 spectators per game.<sup>316</sup>

The Copa America is the CONMEBOL equivalent of the Euro Cup and typically features the national teams of its ten South American member associations as well as two invited teams.<sup>317</sup> Because 2016 marked the centennial of the Copa America, CONMEBOL along with CONCACAF and the USSF planned a special one-off tournament, the Copa America Centenario, to be held in the United States.<sup>318</sup> The field was expanded to sixteen teams, with the ten CONMEBOL national teams joined by the host United States, Mexico, and four qualifying teams from Central America and the Caribbean.<sup>319</sup> The tournament ran from June 3 through June 26.<sup>320</sup> Of the ten venues, three were the homes of MLS teams (CenturyLink Field in Seattle, Camping World Stadium in Orlando, and Gillette Stadium in Foxborough); six the homes of NFL or major college teams while the MLS squads in that city have a different stadium (Levi's Stadium in Santa Clara, the Rose Bowl in Pasadena, Soldier Field in Chicago, Lincoln Financial Field in Philadelphia, MetLife Stadium in East Rutherford, and NRG Stadium in Houston); and one an NFL stadium in a city without an MLS team (University of Phoenix Stadium in Glendale).<sup>321</sup> The USMNT performed well, making it out of the group stage and finishing fourth in a 1–0 loss to Colombia

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<sup>312</sup> *Id.*

<sup>313</sup> *UEFA EURO 2016: France, supra* note 30 (listing Bordeaux, Lens, Lille, Lyon, Marseille, Toulouse, Saint-Etienne, Nice, Paris and Saint-Denis).

<sup>314</sup> *UEFA EURO 2016 Competition Format, supra* note 310.

<sup>315</sup> *Matches*, UEFA, <http://www.uefa.com/uefaeuro/season=2016/matches/index.html#md/7> [<https://perma.cc/E7MZ-XBVB>] (last visited Apr. 3, 2018).

<sup>316</sup> Chris Burke, *UEFA Euro 2016 by numbers*, UEFA (July 11, 2016), <https://web.archive.org/web/20160712130233/http://www.uefa.com/uefaeuro/news/newsid=2390063.html> [<https://perma.cc/H5A5-2MNX>].

<sup>317</sup> Stejskal, *supra* note 31.

<sup>318</sup> *Id.*

<sup>319</sup> *Id.*

<sup>320</sup> *Id.*

<sup>321</sup> *Id.*

in the third-place game.<sup>322</sup> The Chilean team prevailed as tournament champions by beating Argentina on penalty kicks.<sup>323</sup> The total attendance for the thirty-two games was nearly 1.5 million, which averaged over 46,000 and was thus equivalent to the 2016 Euro Cup per-game average.<sup>324</sup>

### B. *Our Study*

Our purpose is to establish a legitimate basis from which to compare a potential World Cup bump in the United States to previous estimates provided by Drut and Szymanski.<sup>325</sup> For litigation purposes, their estimates are problematic based on the discussion in Part IV, *supra*; however, their study does provide a framework for analysis.<sup>326</sup> The authors gathered attendance data from the approximate time of venue announcement up to the tournament, and then they gathered attendance data for five years after the tournament.<sup>327</sup> These data allowed Drut and Szymanski to test for an attendance effect of hosting the World Cup by comparing attendance in games around the tournament to the longer-term attendance average for each host nation.<sup>328</sup>

The announcement that the Copa America Centenario would be played in the United States occurred on May 1, 2014.<sup>329</sup>

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<sup>322</sup> Tom Dart, *USA end Copa América with Colombia loss but show fight and flair in defeat*, GUARDIAN (June 25, 2016, 10:19 PM), <https://www.theguardian.com/football/2016/jun/25/usa-beaten-colombia-copa-america-centenario> [<https://perma.cc/47E6-ZJBP>].

<sup>323</sup> Aaron Timms, *Chile win Copa América once again as Argentina title drought continues*, GUARDIAN (June 26, 2016, 11:34 PM), <https://www.theguardian.com/football/2016/jun/26/chile-win-copa-america-argentina-match-report-penalty-shoot-out> [<https://perma.cc/2HCN-JTNG>].

<sup>324</sup> Sergei Klebnikov, *Successful Copa America 2016 Smashes Records*, FORBES (June 26, 2016, 4:47 PM), <http://www.forbes.com/sites/sergeiklebnikov/2016/06/26/successful-copa-america-2016-smashes-records/#4330b5f3734b>.

<sup>325</sup> Drut & Szymanski, *supra* note 22, at 2, 6–7.

<sup>326</sup> Hersch & Bullock, *supra* note 303, at 2367–68.

<sup>327</sup> Drut & Szymanski, *supra* note 22, at 5, 11.

<sup>328</sup> *Id.* at 5–11.

<sup>329</sup> *E.g.*, Jeff Carlisle, *U.S. to host Copa America*, ESPNFC (May 1, 2014), <http://www.espnfc.us/copa-america/story/1803812/united-states-to-host-combined-2016-copa-america-centenario> [<https://perma.cc/HW4T-CK7F>]; Andrew Das, *U.S. Will Host Expanded Copa América in 2016*, N.Y. TIMES (May 1, 2014), [https://www.nytimes.com/2014/05/02/sports/soccer/us-will-host-expanded-copa-america-in-2016.html?\\_r=0](https://www.nytimes.com/2014/05/02/sports/soccer/us-will-host-expanded-copa-america-in-2016.html?_r=0).

The first game of the Copa was played on June 3, 2016,<sup>330</sup> and our article was written in the winter of 2017.<sup>331</sup> Based on the Drut and Szymanski framework, the sample of games that might be influenced by a Copa bump consists of 932 MLS regular-season games: 731 games played between May 2, 2014 and June 2, 2016 and 201 played between June 3, 2016 and the end of the 2016 regular season.<sup>332</sup> In a manner similar to Drut and Szymanski, we can compare attendance in games pre- and post-Copa to that in other MLS games.<sup>333</sup>

### C. Data and Analysis

Our data set contains information on attendance from every regular-season game from the start of the 2007 season to the end of the 2016 regular season.<sup>334</sup> This time period is chosen because it is the “designated player era” of MLS<sup>335</sup> and represents a period in MLS’s history in which average player salaries were increasing dramatically<sup>336</sup> as was the number of high-quality players.<sup>337</sup> We delete home games for a team that no longer exists, Chivas USA,

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<sup>330</sup> Stejskal, *supra* note 31.

<sup>331</sup> *See generally* Todd & Jewell, *MLS*, *supra* note 4, at 2367–68.

<sup>332</sup> *Major League Soccer Scores*, ESPNFC, <http://www.espnfc.us/major-league-soccer/19/scores> [<https://perma.cc/RL5U-HFB7>] (last visited Apr. 3, 2018) (reporting scores and statistics for each MLS game; statistics noted in the sentence came from compiling and counting the number of games played each day in the noted range).

<sup>333</sup> *See generally id.*

<sup>334</sup> The data was collected from the ESPN FC website by one of the authors as well as a student assistant. *See generally id.*

<sup>335</sup> Dennis Coates, Bernd Frick & Todd Jewell, *Superstar Salaries and Soccer Success: The Impact of Designated Players in Major League Soccer*, 17 J. SPORTS ECON. 716, 720 (2016) (writing that “MLS established the DP rule in 2007”).

<sup>336</sup> *E.g.*, Todd Jewell, *Major League Soccer in the USA*, in HANDBOOK ON THE ECONOMICS OF PROFESSIONAL FOOTBALL 351, 360, 360 n.7 (John Goddard & Peter Sloane eds., 2014) (referencing data from the MLS players’ website and an average team wage bill that increased from \$2 million to \$2.9 million from 2006 to 2007).

<sup>337</sup> R. Todd Jewell, *The Effect of Marquee Players on Sports Demand: The Case of US Major League Soccer*, 18 J. SPORTS ECON. 239, 240–41 (2017) [hereinafter Jewell, *Marquee Players*] (“MLS’s DP rule is essentially an exemption to the salary cap. The rule allows teams to sign players of higher quality than would be possible under a hard cap, effectively expanding the pool of potential players and increasing the quality of the league overall.”).



which folded after the 2014 season.<sup>338</sup> The resulting data comprise 2,697 regular season games.<sup>339</sup> Our goal is twofold: first, we want to predict attendance growth in MLS net of any potential Copa America bump; and second, we want to test for the existence of a Copa America bump. In order to identify the time pattern of MLS attendance, it is necessary to eliminate the influence of other factors that are related to attendance.<sup>340</sup> Based on past research, we can identify several factors that influence attendance demand in MLS.<sup>341</sup> For instance, we expect that the month<sup>342</sup> and day of the game<sup>343</sup> will influence attendance.<sup>344</sup> Based on our 2007 to 2016 MLS sample, attendance is highest at the beginning of the season, falls through the next few months, and rises again at the end of the season.<sup>345</sup> This monthly pattern of attendance is likely due to the excitement of the start of the season, the drop in excitement that comes with mid-season games, and anticipation of playoff soccer as the season comes to a close. Games played on the weekend have higher attendances than those played Monday through Friday due to increased demand.<sup>346</sup>

As discussed above, MLS operates in an ultracompetitive market for sports entertainment.<sup>347</sup> Thus, the local market for sports entertainment is an important factor in determining MLS attendance.<sup>348</sup> Studies on demand in sports have generally tried

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<sup>338</sup> Jeff Carlisle, *Chivas USA to suspend operations after 2014 MLS season*, sources say, ESPNFC (Sept. 29, 2014), <http://www.espnfc.com/major-league-soccer/story/2061689/chivas-usa-to-suspend-operations-after-mls-seasonsources-say> [https://perma.cc/LTG6-LZX8].

<sup>339</sup> *Major League Soccer Scores*, *supra* note 332.

<sup>340</sup> See WOOLDRIDGE, *supra* note 298, at 3 (referencing the need to hold other factors constant when determining whether a change in one variable causes a change in another variable).

<sup>341</sup> Jewell, *Marquee Players*, *supra* note 337, at 241 (referencing factors that influence MLS attendance demand).

<sup>342</sup> *Id.* at 243.

<sup>343</sup> *Id.*

<sup>344</sup> *Id.*

<sup>345</sup> *Id.* at 244.

<sup>346</sup> *Id.* at 247 (writing that “attendance is 12 [percent] lower on weekdays than on weekends”).

<sup>347</sup> See Section IV.B *supra*.

<sup>348</sup> R. Todd Jewell & David J. Molina, *An Evaluation of the Relationship between Hispanics and Major League Soccer*, 6 J. SPORTS ECON. 160, 161, 164 (2005) (referencing market potential as a determinant of MLS attendance and other sport entertainment options as a factor in market potential).

two strategies in adjusting for factors related to the local sports entertainment market.<sup>349</sup> First, studies have used measures of market size (*e.g.*, population and income) and market saturation (*e.g.*, number and types of entertainment competition) to capture the effect of the sports entertainment market.<sup>350</sup> For data like the MLS attendance sample in which there are repeated observations on individual units over time (referred to as panel data), the researcher has another option.<sup>351</sup> With panel data, the researcher often chooses a second strategy of fixed- or random-effects estimation.<sup>352</sup> This second strategy identifies a single coefficient for each unit (in our case, each MLS club) that encompasses the combined effects of all factors related to the MLS club that are not directly controlled for using other independent variables.<sup>353</sup>

In our estimation, we chose the strategy of a fixed-effect estimation.<sup>354</sup> Thus, we estimate a club-specific effect that controls for the effect of competition from other sports entertainment, potential fan base, and anything else that might influence attendance in a given city that is not directly measured by another independent variable.<sup>355</sup> We also used a fixed-effect approach to control for differences in attendance that may be due to other factors, like the visiting team, team quality, and star-power of players.<sup>356</sup> After adjusting for other factors such as weekday effects,

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<sup>349</sup> *Id.* at 166–67.

<sup>350</sup> *Id.* at 167–68 (using population per square mile and per capita income in the local metropolitan statistical area (MSA) to indicate market size, and using the existence of other professional sports teams in the MSA to indicate market saturation).

<sup>351</sup> PETER KENNEDY, *A GUIDE TO ECONOMETRICS* 281–88 (6th ed. 2008) (discussing panel data).

<sup>352</sup> *Id.* at 282–86 (discussing fixed-effects and random-effects models, the advantages of each, and the appropriate use of each).

<sup>353</sup> *Id.* at 281–82 (discussing the use of panel data to control for “a myriad of unmeasured explanatory variables that affect the behavior of people” which would otherwise cause estimation bias); *id.* at 283 (referencing ways to control for the bias associated with unmeasured variables by “modeling the presence of a different intercept” for each observational unit).

<sup>354</sup> *See supra* text accompanying note 352.

<sup>355</sup> *See* KENNEDY, *supra* note 351, at 293 (providing mathematical details on estimating fixed-effects models).

<sup>356</sup> *See, e.g.*, Drut & Szymanski, *supra* note 22, at 7 (claiming that individual club attendance is “highly dependent on team performance in” league games); Jewell, *Marquee Players*, *supra* note 337, at 241 (finding a correlation between superstars and attendance).

month effects, home-team effects, and away-team effects, the time pattern of MLS attendance can be predicted as a linear time-trend, where the magnitude of the time-trend results from an ordinary least squares (OLS) regression incorporating the controls for other factors.<sup>357</sup> The estimated Copa America bump (pre and post) is the average deviation from the predicted linear-attendance trend for the 932 games that might be influenced by the Copa.<sup>358</sup>

The resulting forecast equation for MLS attendance at regular-season games is the following:  $Attendance = (270 \times Year) + (917 \times Copa\ Game) + weekday\ effects + month\ effects + home-team\ effects + away-team\ effects$ .<sup>359</sup> The variable *Year* indicates the season, from 2007 to 2016, and the variable *Copa Game* equals 1 if the game occurred in the pre- or post-Copa-America period.<sup>360</sup> This equation implies that, on average and controlling for the effects of season, day, month, home-team, and away-team, MLS regular-season attendance increased by 270 fans per game each year from 2007 to 2016.<sup>361</sup> This 1.4 percent annual increase is consistent with the general observation that MLS is a growing league in terms of game-day attendance.<sup>362</sup>

Most relevant for the current study, the equation suggests that the 932 games pre- and post-Copa-America had, on average, 917 more fans than other games in the sample, controlling for other factors that determine demand for MLS game-day attendance.<sup>363</sup>

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<sup>357</sup> Multiple regression analysis is a means of analyzing voluminous data by incorporating several variables into a single formula, and OLS is a common type of multiple regression. Todd & Jewell, *MLS*, *supra* note 4, at 37–38. When the estimation is linear in nature, OLS has “a large number of desirable properties.” *Id.* at 38 (quoting KENNEDY, *supra* note 351, at 43).

<sup>358</sup> See KENNEDY, *supra* note 351, at 293.

<sup>359</sup> The authors also attempted estimates separating the sample into MLS cities that did and did not host Copa America games, but found no significant difference across host and non-host cities in the Copa bump. The impact of the Copa America appears to be consistent on attendance across the entire league rather than varying across host and non-host cities as found by Drut and Szymanski. Drut & Szymanski, *supra* note 22, at 8.

<sup>360</sup> See *supra* text accompanying note 33.

<sup>361</sup> See *supra* text accompanying notes 341–45, 355–60.

<sup>362</sup> Based on a sample average of 18,960 fans per game, an increase of 270 fans per game represents a 1.4 percent change per year. See *supra* text accompanying notes 277–79; see also Stephanie Andale, *Average—Definition—How to Calculate Average*, STATISTICS HOW TO (Dec. 11, 2014), <http://www.statistics.howto.com/average> [<https://perma.cc/AUK2-GBNX>].

<sup>363</sup> See *supra* text accompanying notes 359–60.

Although the Copa America bump is smaller than that found by Drut and Szymanski, it is significant in both a statistical and an economic sense.<sup>364</sup> In the statistical sense, the results show that the *t*-statistic<sup>365</sup> for the coefficient on *Copa Game* is 2.87, significant at the 1 percent level.<sup>366</sup> “Economic significance” refers to the absolute magnitude of the implied causal relationship<sup>367</sup>—in this case, the size of any impact that the Copa America had on overall attendance (and more importantly revenue) in MLS.<sup>368</sup> In percentage terms, 917 fans per game is an increase of 4.8 percent over the sample average of 18,960 fans per game.<sup>369</sup> As compared to the estimated yearly growth of 1.4 percent discussed above, the Copa America bump is nearly three times as large.<sup>370</sup> Overall, the Copa America bump from May 1, 2014 to the end of the 2016 regular season is estimated to be 854,644 fans.<sup>371</sup> In monetary terms, if fans spend an average of \$73,<sup>372</sup> then the Copa America bump is over \$63 million in revenue.<sup>373</sup> If, as reported in *Forbes*, MLS generated \$461 million in revenue in 2014, a Copa America bump of \$63 million represents a substantial increase in overall league revenues.<sup>374</sup> And, if the results of Drut and Szymanski with respect

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<sup>364</sup> See Drut & Szymanski, *supra* note 22, at 20.

<sup>365</sup> David H. Kaye & David A. Freedman, *Reference Guide on Statistics*, in FED. JUDICIAL CTR., REFERENCE MANUAL ON SCIENTIFIC EVIDENCE 211, 299 (3d ed. 2011) (defining “*t*-statistic” as a statistical test that “indicates how far away an estimate is from its expected value, relative to the standard error”); *id.* at 300 (writing that, if the *t*-statistic is large, then the results of the results are “beyond the usual range of sampling error”).

<sup>366</sup> See *id.* at 300 (writing that a *t*-statistic “bigger than 2 or smaller than -2” has a significance of 5 percent, which is “hard to explain on the basis of sampling error”).

<sup>367</sup> See Stephen T. Ziliak & Deirdre N. McCloskey, *Size Matters: The Standard Error of Regressions in the American Economic Review*, 33 J. SOCIO-ECONS. 527, 528 (2004) (discussing the difference between statistical significance and economic significance and concluding that “fit is not *the same thing* as scientific importance; a merely statistical significance cannot substitute for the judgment of a scientist and her community about the largeness or smallness of a coefficient”).

<sup>368</sup> See *infra* text accompanying notes 371–74.

<sup>369</sup> 917 divided by the sample average of 18,960 fans per game equals 0.048, or 4.8 percent. See Andale, *supra* note 362.

<sup>370</sup> See *supra* text accompanying note 362.

<sup>371</sup> See *supra* text accompanying note 359.

<sup>372</sup> Todd & Jewell, *MLS*, *supra* note 4, at 39.

<sup>373</sup> See *supra* text accompanying notes 371–72.

<sup>374</sup> See Smith, *Most Valuable MLS Teams*, *supra* note 137.

to a continued bump in attendance over a five-year period hold in the case of Copa America Centenario, this bump will continue for at least three more years.<sup>375</sup>

#### CONCLUSION

Finding a Copa America bump in MLS attendance supports the conclusion by Drut and Szymanski of a tier-one soccer league attendance increase associated with international tournaments.<sup>376</sup> It also supports Commissioner Garber's assertion that the United States is becoming a soccer nation.<sup>377</sup> American soccer fans increased their attendance at MLS games in response to an international tournament hosted in the United States just as European soccer fans increased their attendance at European professional league games in response to international tournaments hosted in their nations.<sup>378</sup> Of more immediate relevance to legal actions contemplated by MLS and its investor-operators, the Copa America bump bolsters the assumption that MLS would have seen a World Cup bump comparable to that of the European leagues despite the differences in the American and European leagues and markets.<sup>379</sup> While complex transnational dispute resolution is never certain, these results suggest that a tribunal would not reject a damages model if MLS or its investor-operators were to initiate litigation or arbitration for lost profits and diminution of business value caused by corruption in the 2022 World Cup bidding.<sup>380</sup>

Our findings of a Copa America bump are not limited to MLS legal actions.<sup>381</sup> For example, expert testimony supported by

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<sup>375</sup> See Drut & Szymanski, *supra* note 22, at 2.

<sup>376</sup> See *id.*

<sup>377</sup> *Major League Soccer Attendance Is Up, but TV Ratings Lag as U.S. Soccer Mulls Future*, USA TODAY (Nov. 17, 2017, 8:50 PM), <https://www.usatoday.com/story/sports/mls/2017/11/17/mls-attendance-up-tv-ratings-lag-as-us-mulls-future/107770250/> [<https://perma.cc/2YC4-K4C8>]; Aaron Cranford, *Don Garber insists MLS will be one of world's best leagues in 10 years or less*, SBI (Sep. 9, 2015, 7:50 PM), <http://sbisoccer.com/2015/09/insists-worlds-leagues> [<https://perma.cc/A33W-ERHR>].

<sup>378</sup> See *supra* text accompanying notes 361–75; Drut & Szymanski, *supra* note 22, at 2.

<sup>379</sup> See *supra* text accompanying notes 114–30.

<sup>380</sup> See *supra* text accompanying notes 121–30.

<sup>381</sup> See *supra* text accompanying notes 204–12.

economic models is used for a range of litigation purposes like valuation, class certification, and proving discrimination.<sup>382</sup> A number of recent articles have examined the assumptions underlying those models, concluding that opposing counsel are more likely to attack a model's assumptions rather than its methods and that some courts engage in careful analysis of economic models.<sup>383</sup> This Article suggests that imperfect comparisons—such as between different markets and different products—are sometimes acceptable and thus need not necessarily result in exclusion of the expert's testimony.<sup>384</sup> Additional research on assumptions—particularly interdisciplinary research and analyses of data—could help courts and practitioners better understand economic models.<sup>385</sup>

More economic studies of attendance are also warranted. For example, Drut and Szymanski do not distinguish the attendance bump associated with the World Cup versus the Euro Cup, so one study might focus only on regional tournaments and the extent, if any, the attendance increase differs from the World Cup.<sup>386</sup> Also, the most recent World Cups were held outside of Europe: South Africa hosted in 2010 and Brazil in 2014.<sup>387</sup> Research on tier-one attendance in those nations could show the extent to which the international tournament bump applies outside of OECD member countries and is thus generalizable.<sup>388</sup>

Finally, the Copa America bump is preliminary because our Article does not measure the five-year bump period identified by Drut and Szymanski.<sup>389</sup> A study of attendance data from the

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<sup>382</sup> *E.g.*, Anthony J. Casey & Julia Simon-Kerr, *A Simple Theory of Complex Valuation*, 113 MICH. L. REV. 1175, 1178 (2015); Hersch & Bullock, *supra* note 303, at 2368; Todd & Jewell, *Dubious*, *supra* note 29, at 49.

<sup>383</sup> *E.g.*, Allensworth, *supra* note 32, at 865 (writing that “many [trial courts] engage in thoughtful, detailed analysis of modeling choices”); Hill et al., *supra* note 29, at 331 n.253 (“Assumptions that form the inputs to valuation models are the most likely aspect of a damages expert’s report and testimony that opposing counsel will attack.”); Todd & Jewell, *Dubious*, *supra* note 29, *passim* (explicating cases to identify the types of assumptions that trial courts find problematic).

<sup>384</sup> *See supra* Part III.

<sup>385</sup> *See supra* Part III.

<sup>386</sup> *See* Drut & Szymanski, *supra* note 22, at 20.

<sup>387</sup> Todd & Jewell, *Reclaiming*, *supra* note 3, at 255–56.

<sup>388</sup> *See List of OECD Member Countries—Ratification of the Convention on the OECD*, OECD, <http://www.oecd.org/about/membersandpartners/list-oecd-member-countries.htm> [<https://perma.cc/WU35-HPTL>].

<sup>389</sup> *See* Drut & Szymanski, *supra* note 22, at 11.

2017, 2018, and 2019 MLS seasons will better show the extent to which MLS attendance compares to the European leagues.<sup>390</sup> Such a study would not be too late to help MLS and its investor-operators because their claims are “not even ripe until 2022.”<sup>391</sup> The results of additional economic research will help determine whether a tortious interference or unfair competition claim is warranted—and, if so, the extent of the damages.<sup>392</sup>

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<sup>390</sup> *See supra* text accompanying notes 340–45.

<sup>391</sup> Todd & Jewell, *MLS*, *supra* note 4, at 58.

<sup>392</sup> *See supra* Part II.