THE GILDED OCTAGON: UNIONIZATION TO GIVE MIXED MARTIAL ARTISTS A FIGHTING CHANCE AGAINST THE UFC'S COERCIVE CONTRACTS

"Solidarity. Union. It is the love, the only love left in this country, that dare not speak its name."[1]

INTRODUCTION

Why would anyone want to unionize when unions are dying—if not already dead?[2] Despite a decades-long decline,[3] unions are very much still alive in the world of sports.[4] Labor relations authors writing on professional sports emphasize that "[u]nions are integral to professional sports and are here to stay."[5] These unions provide athletes with rights, protections, and bargaining power not otherwise obtainable by the individual in his or her own capacity.[6] Since the first longstanding players union was formed in baseball in 1954,[7] other team sports have experienced the creation of their own players

1. THOMAS GEOGHEGAN, WHICH SIDE ARE YOU ON?: TRYING TO BE FOR LABOR WHEN IT'S FLAT ON ITS BACK 8 (1991).

2. *See* Keith N. Hylton, *Symposium: Law and the Future of Organized Labor in America*, 49 WAYNE L. REV. 685, 686–89 (2003) (opining the "central and inescapable fact of American unionism in our time is decline.").

3. Noam Scheiber, *N.F.L. Players May Have an Ally in Their Protests: Labor Law,* N.Y. TIMES (Oct. 12, 2017), https://www.nytimes.com/2017/10/12/business/economy/nfl-players-kneeling-national-anthem-labor-laws.html.

4. *See* Maury Brown, *As Unions Dwindle, the Value of Those in Pro Sports Never More Important*, FORBES (Sept. 5, 2016, 4:45 PM), https://www.forbes.com/sites/maurybrown/2016/09/05/as-unions-dwindle-the-value-of-those-in-pro-sports-never-more-important/#36cc2c692533.

5. E.g., BERRY ET AL., LABOR RELATIONS IN PROFESSIONAL SPORTS 1 (1986).

6. *See* Robert A. McCormick, *Baseball's Third Strike: The Triumph of Collective Bargaining in Professional Baseball*, 35 VAND. L. REV. 1131, 1150 (1982).

7. BERRY ET AL., *supra* note 5, at 51-52. Attempts to organize baseball players started as early as 1885. *Id.* at 51. However, the Major League Baseball Players' Association was the organizing effort that survived and continues to exist today. *Id.*at 53.

unions.[8] What the sports industry has yet to see, however, is a successful union comprised of athletes who participate in a professional non-team sport.[9]

Mixed Martial Arts (MMA), one of the fastest growing sports in the United States and the world,[10] is a combat sport in which two individual fighters go head to head inside the Octagon.[11] MMA bouts take place under the promotion, production, regulation and distribution of the Ultimate Fighting Championship (UFC).[12] The UFC came to be, for all intents and purposes, in 1993 after a "no rules"[13] fighting event to find the "ultimate fighter."[14] In January 2001, Zuffa Entertainment (Zuffa, LLC) bought the UFC.[15] By 2008, the Zuffa empire not only had its pay-per-view model in full swing, pulling in buys ranging in seven figures, but it also had its reality television show, *The Ultimate Fighter*, on Spike TV to build up the pay-per-view headliners and develop an endless number of new stars.[16] Lorenzo Fertitta, former UFC co-owner,[17] commented on his company's prominence

8. *See* BERRY ET AL., *supra* note 5; *see also* Michael Macklon, *The Rise of Labor Unions in Pro Sports*, INVESTOPEDIA (July 5, 2011, 2:00 AM), http://www.investopedia.com/financial-edge/0711/the-rise-of-labor-unions-in-pro-sports.aspx (providing an overview of professional sports player associations in recent times).

9. The term "non-team" is used to describe a sport in which there is a single person playing, i.e. tennis, golf, NASCAR, boxing, and Mixed Martial Arts (MMA). Timothy S. Bolen, *Singled Out: Application and Defense of Antitrust Law and Single Entity Status to Non-Team Sports*, 15 SUFFOLK J. TRIAL & ADVOC. 80, 81-82 (2010).

10. Brendan S. Maher, Article, *Understanding and Regulating the Sport of Mixed Martial Arts*, 32 HASTINGS COMM. & ENT. L.J. 209, 210 (2010).

11. The "Octagon" is "a mat surrounded by an eight-sided 'cage'" in which UFC bouts take place. *Id.* at 216.

12. Andy Bull, *The Fight Game Reloaded: How MMA and UFC Conquered the World*, THE GUARDIAN (Mar. 4, 2016, 8:43 PM), https://www.theguardian.com/sport/2016/mar/04/the-fight-game-reloaded-how-mma-conquered-world-ufc. It is important to note that there are other MMA promoters who also control the aspects surrounding live MMA bouts, but the UFC "has been the clear dominant brand in MMA." John Morgan & Ken Hathaway, *Can Bellator Surpass the UFC as MMA's Dominant Brand? Bellator Fighters – and the Boss – Weigh In,* MMA JUNKIE (Feb. 17, 2017, 3:30 PM), http://mmajunkie.com/2017/02/can-bellator-surpass-the-ufc-as-mmas-dominant-brand-bellator-fighters-and-the-boss-weigh-in. As such, this Article focuses solely on the UFC and its fighters.

13. CLYDE GENTRY III, NO HOLDS BARRED: THE COMPLETE HISTORY OF MIXED MARTIAL ARTS IN AMERICA 53-54 (2011).

14. *Id.* at 43-55.

15. *Id.* at 274. Zuffa, LLC is the holding company for the UFC. Both names are used interchangeably throughout this Article.

16. *Id.* at 283.

17. In 2016, Hollywood sports and entertainment representation firm William Morris Endeavor-International Management Group (WME-IMG) purchased the UFC from Zuffa, LLC for $4 billion. Daniel Miller et al., *WME/IMG's $4-Billion Deal for UFC Shows the Power of Sports*, LA TIMES (July 11, 2016, 6:39 PM), http://www.latimes.com/entertainment/envelope/cotown/la-et-ct-business-ufc-wme-img-20160711-snap-story.html.

in the world of fighting: "We are like football and the NFL. The sport of mixed martial arts is known by one name: UFC."[18]

The UFC, under both its previous holding company, Zuffa, LLC,[19] and its now-current holding company, Endeavor, dominates the MMA industry with its control of "approximately 90% of the revenues derived from live Elite Professional MMA bouts."[20] Because the UFC is a private company, it is difficult to know exactly how well it is doing financially. However, based on a UFC document that was released to potential investors in July 2016, the UFC had earned $592 million in the twelve-month period leading up to the second quarter of 2016.[21] Notably, 76 percent of these earnings came from content[22] – "in other words, fights."[23] This statistic alone proves that the fighters are the driving force behind the UFC's revenue, and yet these same fighters receive an estimated 15.6 percent of such revenue.[24] Moreover, projections indicate that fighters will continue to drive the revenue to staggering heights in the years to come; the UFC's revenue is forecast to grow by $354 million from 2016 to 2019, and ultimately be worth $7.8 billion.[25]

Yet, the disparity between UFC revenue and fighter pay[26] is but one problem that has grasped the mixed martial artists' attention. While some

18. *Id.*; Matthew Miller, *Ultimate Cash Machine*, FORBES (Apr. 17, 2008, 7:20 PM), https://www.forbes.com/forbes/2008/0505/080.html.

19. *See* Miller, *supra* note 18. "Zuffa" means "fight" in Italian. *Id.*

20. Le v. Zuffa, LLC, 216 F. Supp. 3d 1154, 1159 (D. Nev. 2016). The term "Elite Professional MMA" is used by the plaintiffs to modify bouts, fighter services, and fighter. This Article will use the term consistent with the definitions put forth in the complaint. *See id.* at 1165.

21. Scott Harris, *For Love, Not Money: How Low Fighter Pay is Undermining MMA*, BLEACHER REPORT (Jan. 11, 2017), http://bleacherreport.com/articles/2685605-for-love-not-money-how-low-fighter-pay-is-undermining-mma.

22. "Content" is "broadly defined as UFC event broadcasts and the various ways in which these broadcasts are monetized, from pay-per-views to Fight Pass, the UFC's subscription streaming service." *Id.*

23. *Id.*

24. *Id.* To put this into perspective, "NFL players receive 40 percent of local revenue, 45 percent of sponsorship money and 55 percent of revenue from media sales." *Id.* Further, the estimated median salary for a UFC fighter is $42,000. *Id.* In contrast, the NBA's 2015 minimum salary was $525,093; rookies in the National Football League (NFL), Major League Baseball (MLB), and National Hockey League (NHL) made $435,000, $507,500, and $575,000 respectively. *Id.*

25. Darren Rovell, *A Look at the Business of the UFC One Year After its Historic Sale,* ESPN (July 12, 2017), http://www.espn.com/mma/story/_/id/19955598/a-look-ufc-one-year-historic-sale.

26. It requires mentioning that several UFC fighters are paid extremely high amounts; however, an underlying premise of this Article is that the UFC, and professional sports in general, "are attractive to enter yet difficult to exit," Sharron Hunter-Rainey & Linda C. Rodríguez, *The Gilded Cage: Contemporary Slavery in American Professional Sports Teams*, 22 PROC. INT'L ASS'N FOR BUS. & SOC'Y 44, 44 (2011), and thus present MMA fighters with a "gilded Octagon"

have referred to the UFC's monopoly over mixed martial arts as fair,[27] others have taken issue with it and have looked to the judicial system for recourse.[28] In 2014, a group of former and current MMA fighters filed a class action antitrust lawsuit against Zuffa, LLC seeking relief for damages arising out of the UFC's "anticompetitive scheme to maintain and enhance its (a) monopoly power . . . in the market for promotion of live Elite Professional mixed martial arts . . . bouts, and (b) monopsony power[29] in the market for live Elite Professional MMA Fighter services."[30]

Among the acts that the fighter class allege to constitute an anticompetitive scheme are various clauses (hereinafter collectively referred to as the "Coercive Clauses") within the UFC's exclusivity contracts with its fighters.[31] The first clause is the "Exclusivity Clause" itself, which "restricts fighters from appearing in other rival MMA events and includes various termination and extension clauses that can be triggered at the UFC's sole discretion."[32] This clause allows the UFC to effectively extend the exclusivity of the contract indefinitely.[33] The next clause is the "Champions Clause," which "prevents fighters from soliciting competing bids from other MMA [p]romotions even after the end of his or her original UFC contract term."[34] Next, are the "Right to First Offer" and "Right to Match" Clauses, which give the UFC the option to match the conditions and financial terms of any offer made to a UFC fighter for a bout, even after the term of the fighter's contract has expired.[35] Further, the plaintiff class challenges the "'Ancillary Rights' Clause grant[ing] the UFC exclusive and perpetual worldwide personality and identity rights not only of the UFC Fighter, but of 'all persons associated with' the athlete."[36] In addition, "[t]he 'Promotion

(this author's adaptation of the term "gilded cage" as used in the Hunter-Rainey and Rodríguez paper).

27. *See* GENTRY III, *supra* note 13, at 286.

28. *See* John Barr, *Fighters Claim UFC Restricts Earnings*, ESPN (Dec. 16, 2014), http://www.espn.com/mma/story/_/id/12037883/antitrust-lawsuit-filed-ufc-parent-company-claims-monopoly.

29. Monopsony power is defined as "market power on the buy side of the market." Weyerhaeuser Co. v. Ross-Simmons Hardwood Lumber Co., Inc., 549 U.S. 312, 320 (2007) (citing Blair & Harrison, *Antitrust Policy and Monopsony*, 76 CORNELL L. REV. 297 (1991)). In other words, "monopsony is to the buy side of the market what a monopoly is to the sell side and is sometimes colloquially called a 'buyer's monopoly.'" *Weyerhaeuser*, 549 U.S. at 320 (internal citation omitted).

30. Le v. Zuffa, LLC, 216 F. Supp. 3d 1154, 1159 (D. Nev. 2016).

31. *Id.* at 1167.

32. *Id.*

33. *Id.*

34. *Id.*

35. *Id.*

36. *Id.*

Clause' requires UFC Fighters to attend, cooperate and assist in the promotion of bouts in which they fight and, as required by the UFC, *any other* bouts, events, broadcasts, press conferences and sale of merchandise, for no additional compensation."[37] Last, the UFC has the power to perpetually retain the rights to a retired fighter pursuant to the "Retirement Clause."[38] Each of these clauses alone, and in tandem, have the effect of tying a fighter to the UFC's ultimate and overwhelming control, and in some ways, forever.

At the time of this writing, there has not been a definitive ruling on the case. However, the plaintiffs have survived Zuffa's motion to dismiss, based on the court's finding that the plaintiffs had plead sufficient facts showing that the UFC's system is "anticompetitive such that 'the effect is "to foreclose competition in a substantial share of the line of commerce affected."'"[39] Likewise, Zuffa's subsequent motion for summary judgment is still pending before the court.[40]

This Article contends that an MMA fighter union is not only possible but is the best viable mechanism for the athletes to manage the UFC's arguably anticompetitive and coercive contractual provisions. It has been said that two obstacles stand in the way of fighters forming a union: 1) their status as independent contractors, and 2) the arms-length nature of the sport.[41] Part I argues that although their contracts typically classify them as independent contractors, UFC fighters are, in fact, employees and entitled to unionize under the National Labor Relations Act (NLRA). Notwithstanding the UFC's express contractual representation that the fighter is an independent contractor, and that nothing in the agreement shall be construed as making the fighter an employee,[42] an analysis under common law agency's right to control test leads to a contrary finding.[43]

Part II refutes the contention that fighters cannot unionize because of the arms-length and individualistic nature of professional MMA by showing that

37. *Id.* at 1168.

38. *Id.*

39. *Id.* at 1169 (quoting Allied Orthopedic Appliances, Inc. v. Tyco Health Care Group LP, 592 F.3d 991, 996 (9th Cir. 2010)).

40. *See generally* Defendant Zuffa, LLC's Motion for Summary Judgment, No. 2:15-cv-01045-RFB-PAL (filed July 30, 2018), https://www.scribd.com/document/385078581/Motion-for-Summary-Judgment [hereinafter "Motion for Summary Judgment"].

41. John S. Nash, *Why Isn't There a Union In MMA?*, BLOODY ELBOW (July 19, 2013, 8:00 AM), https://www.bloodyelbow.com/2013/7/19/4533358/why-isnt-there-a-union-in-mma (quoting interview with Dr. James B. Dworkin, Purdue University North Central).

42. Jeffrey B. Aris, *The Fight as an Independent Contractor*, SHERDOG (June 29, 2013), http://www.sherdog.com/news/articles/The-Fight-as-an-Independent-Contractor-53481 (quoting UFC's 2013 contract with Eddie Alvarez).

43. *See* discussion *infra* Part I.

the fighters share a "community of interest" necessary to form an appropriate bargaining unit. Using the National Labor Relation Board's community-of-interest doctrine, which requires a wide variety of factors to be considered, this section establishes that although fighters do not conclusively comprise a bargaining unit under 5 U.S.C.A. § 7112, stipulation is a possible avenue for fighters to embark upon in furthering their organizing efforts. This section further contends that the stifling effect of the UFC's Coercive Clauses on the bargaining unit as a whole raises troubling constitutional questions with respect to fighters' human and social capital.[44]

Finally, while the court in *Le v. Zuffa, LLC* has yet to render a decision as to the fighters' antitrust class action claim under the Sherman Act,[45] there are, in theory, three possible outcomes of the case. One outcome is that the fighters' claim succeeds, and the UFC is enjoined from engaging in anticompetitive activity by way of the Coercive Clauses. Another possible outcome is the exact opposite – the fighters' claim fails, and the UFC is free to continue its use of the Coercive Clauses. The last, and least likely, outcome is that the court finds MMA is exempt under federal antitrust laws similar to that which has plagued baseball for decades.[46] Part III argues that in any one of the aforementioned outcomes, a fighter union is the best option moving forward because without a collective voice, MMA fighters will be unsuccessful in their attempts to protect their rights and interests in the wake of a decision that has the potential to change the future of their careers.

I. MISCLASSIFIED: UFC FIGHTERS ARE EMPLOYEES, NOT INDEPENDENT CONTRACTORS

"[I]ndustrial democracy was born" in 1935, when the National Labor Relations Act (NLRA, or "the Act") was enacted into law.[47] The NLRA granted employees the right to organize and bargain collectively with their employers through elected representatives.[48] The Act, however, does not provide a clear definition of "employee."[49] Accordingly, courts have relied, among other tests, on the common law of agency as the controlling standard

44. *See* discussion *infra* pp. 429-32.

45. *See* Motion for Summary Judgement, *supra* note 40.

46. *See* discussion *infra* Part III.

47. Arnold Ordman, *Fifty Years of the NLRA: An Overview*, 88 W. VA. L. REV. 15, 15 (1985).

48. *Id.*

49. Thomas M. Murray, *Note: Independent Contractor or Employee? Misplaced Reliance on Actual Control Has Disenfranchised Artistic Workers Under the National Labor Relations Act*, 16 CARDOZO ARTS & ENT. L.J. 303, 303 (1998).

when determining employment status.[50] Also known as the "right to control" test, the general common law of agency considers several factors when determining whether one acting for another is a "servant"[51] or an independent contractor. The Second Restatement of Agency provides the following factors:

> (a) the extent of control which, by the agreement, the master may exercise over the details of the work;
>
> (b) whether or not the one employed is engaged in a distinct occupation or business;
>
> (c) the kind of occupation, with reference to whether, in the locality, the work is usually done under the direction of the employer or by a specialist without supervision;
>
> (d) the skill required in the particular occupation;
>
> (e) whether the employer or the workman supplies the instrumentalities, tools, and the place of work for the person doing the work;
>
> (f) the length of time for which the person is employed;
>
> (g) the method of payment, whether by the time or by the job;
>
> (h) whether or not the work is a part of the regular business of the employer;
>
> (i) whether or not the parties believe they are creating the relation of master and servant; and
>
> (j) whether the principal is or is not in business.[52]

The United States Supreme Court has recognized that this list of factors is non-exhaustive and no one factor is determinative.[53]

The standard UFC contract contains a provision that provides for a fighter's independent contractor status, and maintains that nothing within the agreement should be construed as creating an employer-employee relationship.[54] A UFC fighter challenge to the misclassification as an

---

50. *Id.*; *see also* NLRB v. United Ins. Co., 390 U.S. 254, 256 (1968) (finding that the common-law agency test is to be applied when distinguishing an employee from an independent contractor); ROBERT W. WOOD & WOOD LLP, XPERTHR EMPLOYMENT LAW MANUAL 266 (2017), https://www.xperthr.com/employment-law-manual/independent-contractors-federal/266/ (explaining that there is not a single test used by federal and state agencies, but the common law right to control is the controlling standard for most purposes).

51. The comments to § 220 of the Restatement elaborate:

> The word 'servant' does not exclusively connote a person rendering manual labor, but one who performs continuous service for another and who, as to his physical movements, is subject to the control or to the right to control of the other as to the manner of performing the service. The word indicates the closeness of the relation between the one giving and the one receiving the service rather than the nature of the service or the importance of the one giving it.

RESTATEMENT (SECOND) OF AGENCY § 220 cmt. a (AM. LAW INST. 1958).

52. RESTATEMENT (SECOND) OF AGENCY § 220(2) (AM. LAW INST. 1958).

53. Cmty. for Creative Non-Violence v. Reid, 490 U.S. 730, 752 (1989).

54. Aris, *supra* note 42.

independent contractor would require a federal court to undertake an analysis using the right to control test.[55] Without a court classifying them as employees, UFC fighters would be unable to appreciate the rights and protections of the NLRA because the Act specifically excludes independent contractors from its scope.[56] A brief consideration of the agency law factors, however, shows that UFC fighters would likely overcome this preliminary hurdle to unionization.

A. The UFC's Control Over the Details of Elite Professional MMA Fighter Services

This first factor considers the extent to which the "master" controls the manner and means by which the product is accomplished.[57] The hiring party's discretion over when and how long to work, and *de facto* close supervision of the "servant" indicates an employee-employer relationship.[58] Under a UFC contract, a fighter agrees to a set number of one-on-one bouts with an opponent designated by the UFC.[59] While the UFC obviously cannot dictate the specific details of the fighter's strategy and movements during his or her bout, the promoter dictates who the fighter will fight, when the fight will happen, and where the fight will take place.[60] In addition, the UFC's 2014 uniform deal with Reebok[61] undercuts fighters' independence, initiative and decision-making authority with regard to which sponsor logos they can wear during their fights.[62]

---

55. *See* Cmty. for Creative Non-Violence, 490 U.S. 730; Hilton Int'l Co. v. NLRB, 690 F.2d 318 (1982); NLRB v. United Ins. Co., 390 U.S. 254 (1968).

56. 29 U.S.C. § 152(3) (2012). *See also* H.R. REP. No. 245, at 18 (1947), *reprinted in* 1 NLRB, LEGISLATIVE HISTORY OF THE LABOR-MANAGEMENT RELATIONS ACT, 1947, at 309 (1948) (clarifying Congress' intent to exclude independent contractors from the definition of employee).

57. *See* Cmty. for Creative Non-Violence, 490 U.S. at 751.

58. *See* RESTATEMENT (SECOND) OF AGENCY § 220 cmt. h (AM. LAW INST. 1958).

59. Jonathan Snowden, *The Business of Fighting: A Look Inside the UFC's Top-Secret Fighter Contract*, BLEACHER REPORT (May 14, 2013), http://bleacherreport.com/articles/1516575-the-business-of-fighting-a-look-inside-the-ufcs-top-secret-fighter-contract.

60. Bull, *supra* note 12. The UFC's matchmakers have been referred to as "quite possibly the most powerful . . . people in all of MMA." Ben Fowlkes, *Powerful, But a Little Misunderstood: UFC Matchmakers Joe Silva and Sean Shelby*, MMAJUNKIE (Aug. 20, 2013, 1:30 PM), http://mmajunkie.com/2013/08/powerful-but-a-little-misunderstood-ufc-matchmakers-joe-silva-and-sean-shelby. The matchmakers are in charge of hiring and firing fighters, putting together fight cards, and finding replacement fighters in the event of an injury. *Id.* One matchmaker put it simply: they are "the camp counselors to, like, 400 grownup kids." *Id.* (quoting interview with Sean Shelby).

61. Tristen Critchfield, *UFC Signs 6-Year Deal with Reebok; Rankings to Determine Fighter Pay*, SHERDOG (Dec. 2, 2014), http://www.sherdog.com/news/news/UFC-Signs-6Year-Deal-with-Reebok-Rankings-to-Determine-Fighter-Pay-78115.

62. *See* NLRB v. United Ins. Co., 390 U.S. 254, 258 (1968). On average, "if a fighter gets [four] fights a year, they stand to lose $100,000 of sponsorship money, and women fighters will

The UFC controls many other aspects surrounding fight night as well.[63] For example, fighters are under a contractual obligation to "cooperate and assist in the advertising, publicity, and promotion" of the fighters' own bouts, as well as any other UFC events.[64] This obligation requires that fighters make appearances at press conferences and interviews *without additional compensation*.[65] While in attendance, fighters are restricted from wearing anything that bears a logo other than Reebok.[66]

Moreover, the UFC engages in *de facto* supervision over its fighters through the UFC Anti-Doping Program.[67] Externally administered by the United States Anti-Doping Agency (USADA), the program requires all athletes under contract to submit to testing, both in and out of competition, at any time and at any place.[68] The program also requires fighters to comply with the Ultimate Fighting Championship Policy for Whereabouts, which essentially unilaterally permits the UFC to locate and communicate with a fighter at any given time through USADA.[69] Three failures in a twelve month period to meet the obligations of the Whereabouts Policy will be deemed an anti-doping policy violation,[70] which could result in various consequences for the fighter.[71]

Given the UFC's considerable amount of control over the manner and means by which fighters provide their Elite Professional MMA services, including a significant degree of *de facto* supervision through USADA, this factor strongly suggests that fighters have an employer-employee, as opposed to independent contractor, relationship with the UFC.

---

fiscally lose more" as a result of the Reebok deal. Andrew Brennan, *Why Is the UFC-Reebok Deal Exploiting UFC Fighters and Condoning Pay Gaps?*, FORBES (May 16, 2016, 1:22 PM), https://www.forbes.com/sites/andrewbrennan/2016/05/16/is-it-the-ufc-or-is-it-reebok-that-is-exploiting-ufc-fighters-and-condoning-pay-gaps/#16ab1ab84a93.

63. Snowden explains that the "fighter's main responsibility is to show up and fight," but recognizes that "there is more to it than that. Snowden, *supra* note 59.

64. *Id.* (quoting Article III of UFC's standard contract).

65. *Id.* (quoting Article III of UFC's standard contract).

66. *See* Critchfield, *supra* note 61; *see also* Brennan, *supra* note 62 (explaining how detrimental the UFC-Reebok deal is to fighters regardless of whether they are in the Octagon or not).

67. *See* RESTATEMENT (SECOND) OF AGENCY § 220 cmt. h (AM. LAW INST. 1958).

68. U.S. ANTI-DOPING AGENCY (USADA), UFC ANTI-DOPING POLICY 11 (April 1, 2017), https://ufc.usada.org/wp-content/uploads/UFC-anti-doping-policy-EN.pdf.

69. *Id. See generally* ULTIMATE FIGHTING CHAMPIONSHIP POLICY FOR WHEREABOUTS (July 1, 2015), https://ufc.usada.org/wp-content/uploads/UFC-whereabouts-policy-EN.pdf [hereinafter WHEREABOUTS POLICY].

70. WHEREABOUTS POLICY, *supra* note 69, at 2.

71. USADA, *supra* note 68, at 20 (listing the possible consequences including "forfeiture of title, ranking, purse or other compensation").

B. Fighters Are Not Engaged in a Distinct Occupation or Business

The primary focus of this factor is whether the worker had a separate business when he or she went to work for the hiring party.[72] If the hired party did not have a distinct occupation or business in the trade at the time of employment, then the hired party is considered to be an employee.[73] UFC fighters are typically not engaged in a distinct trade or calling, and do not hold themselves out in business.[74] In fact, many UFC fighters supplement their fighting income by working as martial arts instructors, or by taking up other everyday jobs.[75] Moreover, fighters are not likely to be held to be independent contractors because their work as Elite Professional MMA fighters is wholly integrated into the UFC's operation.[76]

Furthermore, the UFC provides fighters with a benefit that is the hallmark of employer-employee relationships – health insurance.[77] The provision of fringe benefits, like health insurance, is an indication that the individual is an employee.[78] Although the fighters do not receive general medical coverage, each contracted fighter is guaranteed up to $50,000 in coverage for accidents per year.[79] An "unprecedented move in combat sports history,"[80] this insurance policy further strengthens the case that UFC fighters are employees rather than independent contractors.

---

72. Khara Singer Mack, *Litigating Claims of Misclassification of Employees as Independent Contractors*, 133 AM. JUR. TRIALS 213, § 34 (database updated Sept. 2018).

73. *Id.*

74. *Cf.* S.G. Borello & Sons, Inc. v. Dept. of Indus. Rel., 769 P.2d 399, 409 (Cal. 1989) (finding that sharefarmers did not hold themselves in a distinct trade or calling, but instead performed "typical farm labor for hire whenever jobs were available."); *see also* Tania S., *17 Everyday Jobs UFC Fighters Held Outside the Octagon*, THERICHEST (Sept. 26, 2016), https://www.therichest.com/sports/mma-sports/17-everyday-jobs-ufc-fighters-held-outside-the-octagon/ ("From handymen to middle-managers to college professionals, these UFC fighters have worked (and some continue to do so) as garbagemen, doctors, and even teachers at one point of their life to either make a living or balance out their fighting career.").

75. Tania S., *supra* note 74.

76. *Cf.* Alexander v. FedEx Ground Package System, Inc., 765 F.3d 981, 995 (9th Cir. 2014) (finding the distinct occupation or business factor to favor the hired parties because their services were wholly integrated into the hiring party's operations) (citing Estrada v. FedEx Ground Package System, Inc., 64 Cal.Rptr.3d 327, 334 (Cal. Ct. App. 2007)).

77. *See* Brian Hemminger, *Hurts So Good: New Details Emerge About the UFC Health Insurance Plan*, MMAMANIA (May 9, 2011, 7:21 PM), https://www.mmamania.com/2011/5/9/2162589/hurts-so-good-new-details-emerge-about-the-ufc-health-insurance-plan.

78. *See* Nationwide Mut. Ins. Co. v. Darden, 503 U.S. 318, 324 (1992) (quoting Cmty. for Creative Non-Violence v. Reid, 490 U.S. 730, 751-52 (1989)).

79. Hemminger, *supra* note 77.

80. *Id.*

C. The UFC's Control Over MMA Bouts and Fighters' Skill

"The custom of the community as to the control ordinarily exercised in a particular occupation is of importance."[81] This, together with the degree of skill required in the occupation is "often of almost conclusive weight."[82] These two factors have thus been combined and looked at together. Given that the UFC revolutionized the fight business and stands as the leading MMA promoter,[83] its control over fighters participating in MMA bouts is customary. However, there are several other organizations that promote MMA events in a fashion similar to the UFC.[84]

Indeed there is no question that there is a high degree of skill required to provide Elite Professional MMA Fighter services. As one journalist put it: "[i]f you want to reach the top of the heap, the Ultimate Fighting Championship, you must have the strength of a weightlifter, the cardio of a marathoner, the flexibility of a yoga instructor and the hand-to-hand fighting skills of a Navy SEAL."[85] While a high degree of skill would usually denote independent contractor status, there is an exception when the occupation is an incident of the business establishment.[86] The UFC is in the business of promoting Elite Professional MMA bouts; therefore the incidental skill required of its fighters gives conclusive weight to the assertion that fighters are better classified as employees.[87]

D. The UFC Supplies the Tools and the Place of Work

A hired party is likely to be considered an employee when the hiring party supplies the tools and place of work.[88] One pivotal tool Elite Professional Fighter use when rendering services is a mat,[89] and more generally the Octagon itself. Each live bout promoted by the UFC is held

81. RESTATEMENT (SECOND) OF AGENCY § 220, cmt. i (AM. LAW INST. 1958).

82. *Id.*

83. *Discover UFC: The UFC*, http://www.ufc.com/discover/ufc (last visited Sept. 29, 2018).

84. *See* Sean Smith, *10 Best MMA Promotions of All Time*, BLEACHER REPORT (May 26, 2014), http://bleacherreport.com/articles/2075613-10-best-mma-promotions-of-all-time.

85. Gary D'Amato, *UFC Fighters Master Multiple Skills Before Stepping in Octagon*, JOURNAL SENTINEL (Aug. 10, 2011), http://archive.jsonline.com/sports/etc/127495458.html/.

86. *See* RESTATEMENT (SECOND) OF AGENCY § 220 cmt. i (AM. LAW INST. 1958).

87. *Cf.* RESTATEMENT (SECOND) OF AGENCY § 220 cmt. i (AM. LAW INST. 1958) (explaining that a highly skilled cook who may contract against interference is normally a servant if regularly employed).

88. *See* Cmty. for Creative Non-Violence v. Reid, 490 U.S. 730, 751-52 (1989).

89. *See The Importance of Using Martial Arts Mats*, HEALTHY DIET BASE (Oct. 12, 2015), http://www.healthydietbase.com/the-importance-of-using-martial-arts-mats/.

inside the iconic Octagon.[90] More general than the Octagon, though, is the arena in which the events are held. The UFC has recently entered into an "anchor tenant" deal with AEG and MGM Resort's T-Mobile Arena in Las Vegas, Nevada.[91] Pursuant to this agreement, the UFC will host four annual events at the arena.[92] This, along with the many other arenas in which the UFC hosts live MMA events, is the place of work for Elite Professional MMA Fighters. Notwithstanding the fact that fighters train in facilities not provided by the UFC,[93] each instance in which the fighters provide services for the UFC – fighting or promotional – the work place is provided by the UFC.[94] As such, this factor weighs in favor of fighters being employees of the UFC.

E. Length of Fighters' Contract Terms

The longer the period of employment, the more likely the hired party is an employee.[95] Although not every term is the same for every fighter, one can get a general idea of a typical term from Eddie Alvarez's contract with the UFC.[96] This specific contract's term was eight fights or forty months, whichever occurred first.[97] This length of time is only partial evidence of a continuing relationship.[98] The main indicator of an intent to maintain an ongoing relationship is the "Champions Clause," which prevents fighters from going to other MMA promotions even after the end of their original UFC contract term.[99] Even in the event of a fighter retiring, their contractual relationship with the UFC continues.[100] Any given fighter's contract, then, is further evidence that the fighter is an employee of the UFC.

---

90. *See* Allie Shriver, *UFC: All About the Octagon*, UFC VIP EXPERIENCE (May 29, 2014, 4:50 PM), http://social.ufcvipexperience.com/ufc-all-about-the-octagon.

91. *UFC Announces 'Anchor Tenant' Agreement with T-Mobile Arena in Las Vegas*, MMAJUNKIE (Mar. 3, 2017, 9:45 PM), http://mmajunkie.com/2017/03/ufc-announces-anchor-tenant-agreement-with-t-mobile-arena-in-las-vegas.

92. MMAJUNKIE, *supra* note 91.

93. Andre Piccininni, *Top 20 MMA Camps and Gyms*, THESPORTSTER (June 3, 2015), https://www.thesportster.com/mma/top-20-mma-camps-and-gyms/.

94. *See UFC 2017 Schedule*, UFC, http://www.ufc.com/schedule/event (last visited Sept. 29, 2018).

95. *See* Cmty. for Creative Non-Violence v. Reid, 490 U.S. 730, 752–53 (1989).

96. *See* Snowden, *supra* note 59.

97. Snowden, *supra* note 59.

98. *Cf.* Cmty. for Creative Non-Violence, 490 U.S. at 752–53 (holding retention for less than two months was a short period of time and weighed toward a finding that the hired party was an independent contractor).

99. *See supra* note 34 and accompanying text.

100. *See* Video Deposition of Cung Le at 121, Exhibit 18 to Declaration of Suzanne Jaffe Nero, Le v. Zuffa, L.L.C., No. 2:15-cv-01045-RFB-(PAL), Docket No. 574-19 (D. Nev. July 30, 2018)

F. Method of Payment

When a worker is paid by the job, as opposed to hourly, it suggests that the worker is an independent contractor.[101] The UFC pays its fighters in accordance with the contractually agreed upon amount for each bout.[102] Fighters may also receive money from pay-per-view revenue sharing agreements and other side agreements.[103] Fighters also receive compensation from the UFC as determined by the tiered system under the Reebok deal.[104] As much of the information regarding fighter pay is not available to the public,[105] it is difficult to characterize the payment method one way or another, however, even the aforementioned evidence – limited as it may be – indicates a method of payment inconsistent with a per job basis, and thus suggests the fighters are employees.

G. Fights Are a Part of the UFC's Regular Business

When an individual's work is essential and integral to the hiring party's regular business, the individual will likely be classified as an employee.[106] Approximately 76 percent of the UFC's revenues are from live Elite Professional MMA bouts.[107] Nearly all of the UFC's revenue streams – including pay-per-view and live event ticket sales – are centered around one thing: fights.[108] This is a clear indication that the services that Elite Professional MMA Fighters provide is essential and integral to the UFC's business, because "UFC without fighters is only three letters of the alphabet."[109]

("I was still stuck in the contract for over a year and a half after I retired. And I couldn't – at one point I couldn't even be a commentator somewhere else. . . . I couldn't even negotiate that I was going to fight with someone else because UFC has it that I still had two fights left on my contract . . . . So I couldn't go to Bellator even to talk with anyone else. . . . I was stuck.").

101. RESTATEMENT (SECOND) OF AGENCY § 220 cmt. j (AM. LAW INST. 1958).

102. John S. Nash, *What Do UFC Fighters Make?*, BLOODY ELBOW (Sept. 29, 2016, 10:00 AM), https://www.bloodyelbow.com/2016/9/29/13040024/ufc-fighter-pay-union-association.

103. Nash, *supra* note 102.

104. Critchfield, *supra* note 61.

105. Nash, *supra* note 102.

106. Julien M. Mundele, Note, *Not Everything that Glitters is Gold, Misclassification of Employees: The Blurred Line Between Independent Contractors and Employees Under the Major Classification Tests*, 20 SUFFOLK J. TRIAL & APP. ADVOC. 253, 270 (2015).

107. *See supra* notes 22–24 and accompanying text.

108. *See* Adam Grossman, *UFC Uses New Media to Secure $4 Billion Score*, FORBES (July 12, 2016, 10:19 AM), https://www.forbes.com/sites/kurtbadenhausen/2016/07/12/ufc-esports-use-new-media-to-cash-in-on-traditional-channels/#1cf165e93e04; *see also supra* notes 14–16 and accompanying text.

109. Josh Gross, *UFC Fighters Make First Steps to Unionize: 'It's a Fight for What's Right'*, THE GUARDIAN (Dec. 1, 2016, 12:04 PM), https://www.theguardian.com/sport/2016/dec/01/ufc-

H. Parties' Understanding of the Relationship

The belief as to existence of a relationship is not determinative of whether the "master and servant" relationship exists.[110] If, however, the "belief indicates an assumption of control by the one and submission to control by the other," then it is likely that such a relationship exists.[111] It has long been understood by both the UFC and the contracting fighter that the fighter maintains independent contractor status, based on the agreed upon contractual provision.[112] Despite this common perception amongst the parties, the nature of control maintained by the UFC, and submitted to by the fighter, undercuts this understanding and further indicates an employee relationship.[113]

I. The UFC is in Business

The final factor requires a determination of whether the principal has a business.[114] In other words, does the principal gain some benefit from the services rendered, and if so, are those services a part of the business?[115] The UFC produces more than forty live MMA events a year and broadcasts to nearly 800 million television households in over 129 countries across the world.[116] Notwithstanding the revenue the UFC receives from gyms, nutrition programs, and apparel,[117] over three quarters of its revenue is received from fight-related content.[118] Therefore, the UFC is very much in the business of fighting, and undoubtedly profits from fighting as a part of that business.[119]

While the agency factors are close, as the preceding analysis shows, they weigh in favor of an employer-employee relationship existing between the UFC and the fighters. In light of the current UFC system, and the manner in

---

fighters-union-wme-img-better-treatment (quoting former welterweight champion Georges St-Pierre).

110. RESTATEMENT (SECOND) OF AGENCY §220 cmt. m (AM. LAW INST. 1958).

111. *Id.*

112. *See supra* note 54 and accompanying text.

113. *See* discussion *supra* Subsection I.A.

114. *See* RESTATEMENT (SECOND) OF AGENCY § 220(j) (AM. LAW INST. 1958).

115. Robin Perry, *Proving the Existence of an Employment Relationship*, 22 AM. JUR. PROOF FACTS 3d 353, § 30 (database updated Sept. 2018).

116. *Discover UFC: The UFC*, UFC, http://www.ufc.com/discover/ufc (last visited Oct. 3, 2018).

117. *See id.*

118. *See supra* notes 22-24 and accompanying text.

119. *See supra* notes 22-23 and accompanying text.

which it treats its athletes, fighters are undoubtedly within the scope of the NLRA as employees.[120]

II. FIGHTERS' APPROPRIATE BARGAINING UNIT AND THE UFC'S NEED TO RECOGNIZE IT

Zev J. Eigen, a labor law professor at Northwestern University, has recognized MMA fighters' need for a "collective voice to assert and protect their rights and interests."[121] Dr. James B. Dworkin agrees, but points out that one of the main obstacles to a fighter union is the individualistic nature of the sport of MMA.[122] The concern is that, aside from the logistic difficulties that arise from the arms-length relationship that fighters have with one another,[123] a fighter union cannot be recognized by the National Labor Relations Board (NLRB) as an appropriate bargaining unit unless there is a community of interest among the group.[124] Notwithstanding these concerns, the fighters can in fact constitute an appropriate bargaining unit through a stipulation with the UFC.

Believed to be "the touchstone of an appropriate bargaining unit,"[125] the community of interest test requires an evaluation of a number of factors to determine whether a group of employees share common concerns and interests regarding the terms and conditions of their employment.[126] Courts and the NLRB look to factors such as the similarity in skills, job functions, wages, fringe benefits, work hours, and work clothes – to name a few.[127] The purpose of the test, and in turn an appropriate bargaining unit, is to ensure that employees retain "the fullest freedom in exercising the rights guaranteed by [the NLRA]."[128]

At first glance, UFC fighters do not seem to satisfy the community of interest test with flying colors. The core skills required to be in the UFC are there, but they vary in degree – as evidenced by the variance in wages, number of fight cards each athlete manages to appear on, and fighter

120. *See* Nash, *supra* note 41; *see also* Aris, *supra* note 42 (giving an analysis as to UFC fighters' status as independent contractors).

121. Nash, *supra* note 41.

122. *See id.*

123. *See id.*

124. *See* 29 U.S.C. § 159(b) (2012); *see also* Francis M. Dougherty, Annotation, *"Community of Interest" Test in NLRB Determination of Appropriateness of Employee Bargaining Unit*, 90 A.L.R. FED. 16, § 2 (1988) (describing the community-of-interest doctrine as the test used in appropriate unit determinations).

125. Uyeda v. Brooks, 365 F.2d 326, 329 (6th Cir. 1966).

126. Doughterty, *supra* note 124.

127. *Id.*

128. 29 U.S.C. § 159(b) (2012).

rankings.[129] They do, however, have similar job descriptions: enter the Octagon and fight; promote the UFC.[130] And similar work clothes: Reebok gear.[131] Plus, every contracted fighter enjoys the fringe benefit of insurance for accidents beyond those occurring on fight night.[132] Law professors writing on the subject of labor relations in professional sports contend, however, that an attempt "[t]o suggest that all interests are equal and all solutions to [athletes'] problems are the same, or even compatible, ignores reality."[133] The reality in professional sports is that player association[134] membership is diverse; a union will have a "million-dollar-a-year superstar . . . [and a] $40,000-a-year rookie," each with differing star appeal, skill level, interests, and outlooks.[135] Accordingly, sports unions would rarely meet the community of interest standard.

One way to deal with this reality in the realm of MMA is an unambiguous stipulation between the UFC and the fighters as to the composition of the bargaining unit.[136] Courts and the NLRB will recognize a stipulated bargaining unit as long as it is not contrary to public policy.[137] A stipulation would permit a bargaining unit without the ordinary community of interest, and thus eliminate the fighters' second hurdle to unionization.[138] This is not to say that the difficulties created by a constantly shifting union membership would immediately disappear in the presence of a stipulated bargaining unit.[139] While those complications present a "herculean task" for a fighter union in negotiating a collective bargaining agreement, it is not

129. *See UFC Fighter Rankings*, UFC, http://www.ufc.com/rankings?id= (last visited Oct. 1, 2018).

130. *See supra* notes 59-60, 64 and accompanying text.

131. *See supra* notes 61-62, 66 and accompanying text.

132. *See supra* notes 77-78 and accompanying text.

133. BERRY ET AL., *supra* note 5, at 14-15.

134. Professional sports players' collectives are called associations but are unions in reality. *Id.* at 14.

135. *Id.*

136. *See* Dougherty, *supra* note 124, at § 3; *see also* Methodist Home v. NLRB, 596 F.2d 1173, 1176 (4th Cir. 1979) (holding that the clear and unambiguous language of a stipulation as to the composition of a bargaining unit cannot be overcome or modified by the community of interest test).

137. Dougherty, *supra* note 124, at § 3.

138. *See supra* notes 41, 122 and accompanying text.

139. *See* Nash, *supra* note 41; *see also* BERRY ET AL., *supra* note 5, at 15 (describing the problems associated with the short lifespan of professional athletes and ever-changing rosters).

impossible.[140] The success of other players' associations are the leading example of this.[141]

The true herculean task fighters would face is getting the UFC to consider the existence of a fighter union at all, not to mention stipulating to its composition.[142] The UFC has historically been hostile to the idea of fighter unionization, and with their "tremendous amount of leverage . . . [the UFC] can tell the athlete to go away, to pound sand."[143] While the previous owners during the UFC's Zuffa Era may have shrugged off sanctions from the NLRB,[144] the new Endeavor[145] ownership may not be so willing to potentially violate labor law by attempting to prevent the fighters from organizing.[146] But assuming NLRB sanctions do not faze Endeavor and the UFC, would a Thirteenth Amendment violation cause them to reevaluate?

The suggestion is not that any attempt to block a fighter union is a violation of the Thirteenth Amendment. Instead, the violation is grounded in the UFC's Coercive Clauses.[147] Professor Zev Eigen has identified the "Champions Clause" specifically as a potential violation of the Thirteenth Amendment because you cannot "force someone to work for you."[148] This dilemma has reared its ugly head once before in the infamous case *Flood v. Kuhn*.[149] Curt Flood was a professional major league baseball player who challenged the league's reserve system;[150] among his allegations was the

140. *See* Nash, *supra* note 41; *see also* Craig W. Palm, *Strife, Liberty, and the Pursuit of Money: Labor Relations in Professional Sports*, 4 VILL. SPORTS & ENT. L.J. 1, 3-4 (1997) (recognizing the difficulty players associations have in agreeing on what bargaining position to take but noting sports unions' ability to boast generous average salaries notwithstanding those difficulties).

141. *See* Brown, *supra* note 4.

142. *See* Harris, *supra* note 21.

143. *See id.* (quoting attorney and faculty associate director at Wharton Sports Business Initiative at the University of Pennsylvania, Scott Rosner).

144. Gross, *supra* note 109; *see also* Station Casinos, Inc., 358 N.L.R.B. 637 (2012) (affirming an order finding the casino in violation of the NLRA for threatening an employee engaged in union activities).

145. WME-IMG announced its new holding company's name, Endeavor, in October 2017. Gregory Smith, *The "Endeavor" Era Begins as New UFC Owners Undergo Name Change*, MMA IMPORTS (Oct. 9, 2017), http://mmaimports.com/2017/10/endeavor-era-begins-new-ufc-owners-undergo-name-change/.

146. *See* Gross, *supra* note 109 ("[W]hen the sale went down and the Fertitta family handed control of the UFC to WME/IMG . . . the baked-in sense of the way the MMA world worked was quickly challenged.").

147. *See supra* notes 31–38 and accompanying text.

148. Snowden, *supra* note 59; *see also supra* note 100 and accompanying text.

149. 316 F. Supp. 271 (S.D.N.Y. 1970), *aff'd*, 443 F.2d 264 (2d Cir. 1971), *cert. granted*, 404 U.S. 880 (1971), *aff'd*, 407 U.S. 258 (1972).

150. "The total effect of [the reserve system] . . . was [o]nce a player signed his first professional baseball employment contract, he became property of his team. His contract could be renewed by

claim that the reserve system was a form of involuntary servitude in violation of, *inter alia*, the Thirteenth Amendment.[151] The court rejected his argument on the ground that the essential element of compulsory service was not satisfied because he was free to "retire and embark upon a different enterprise outside organized baseball."[152] Turning back to UFC fighters, this would likely be a court's holding were a Thirteenth Amendment challenge raised against the Coercive Clauses. Faced with an economic definition of modern involuntary servitude, however, a court may follow a broader interpretation.

Professors Sharron Hunter-Rainey and Linda C. Rodriguez explained modern involuntary servitude in the context of American professional sports using social capital theory in their paper *The Gilded Cage: Contemporary Slavery in American Professional Sports Teams*.[153] The essential premise is, independent of time and place, modern involuntary servitude exists when laborers reap some benefits, but do not realize full returns on their human and social capital.[154] Human capital theory is defined as "invest[ments] in unique skills enabling [workers] to command premium wages."[155] The inability to leverage human and social capital—"opportunities available as a result of whom one knows" by virtue of resources "being embedded in social networks"—is the basis of the modern involuntary servitude phenomenon among athletes in professional sports.[156]

The UFC's Coercive Clauses, when examined through the lens of modern involuntary servitude reveals an uncomfortable truth. Each of the UFC's Coercive Clauses alone and in tandem effectually eliminate a fighter's ability to leverage their human capital – Elite Professional MMA Fighter services – and their social capital – exploitation of their image and goodwill as Elite Professional MMA Fighters.[157] Under the Coercive Clauses, a fighter is unable to share in the wealth he or she helps generate for the UFC.[158] Instead, the UFC retains a disproportionate share of the profit

---

the team, year after year, without his consent and at salaries he never agreed to accept." LIONEL S. SOBEL, PROFESSIONAL SPORTS & THE LAW 91 (1977).

151. *Flood*, 316 F. Supp. at 272.

152. *Id.* at 281.

153. 22 PROC. OF THE INT'L ASS'N FOR BUS. & SOC'Y 44 (2011).

154. Hunter-Rainey & Rodríguez, *supra* note 26, at 47.

155. *Id.*

156. *Id.* at 47-48.

157. *See* discussion *supra* pp.4-6; *see also* Jeffrey B. Same, *Breaking the Chokehold: An Analysis of Potential Defenses Against Coercive Contracts in Mixed Martial Arts*, 2012 MICH. ST. L. REV. 1057, 1064-70 (2012) (detailing the specific effects of the UFC's Coercive Clauses).

158. *See* Hunter-Rainey & Rodríguez, *supra* note 26, at 49; *see also* Nash, *supra* note 102 (calculating UFC fighters' share of revenue at 12-14% based on Dave Meltzer's July 2016 report estimating UFC's gross revenue at $608,692,000).

generated by the fighters' efforts.[159] The fighters are thus bound to the UFC via "'gilded cage' slavery, which is attractive to enter yet difficult to exit."[160]

To illustrate this point, consider the opinion of John Fitch, a highly regarded welterweight fighter, on his negotiating experience with Dana White and the UFC: "Working for free and selling our rights away for lifetime, that's a little different. . . . We tried to negotiate five- or [ten]-year deals with them, but it wasn't good enough. It was all or nothing. He wanted our lifetime. He wanted our souls forever."[161] A seemingly obvious counterargument is that the fighters agree to negotiate a contract with the UFC and are not left without a choice – they can go somewhere else.[162] However, as is the case with most sports, fighters do not "have an enormous selection of corporations to choose from when contracting," and therefore the lack of contractual freedom is a part of the "sacrifice each athlete must make to enjoy the fruits of his [or her] labor."[163] Because the UFC is the MMA industry leader,[164] telling a fighter to "go somewhere else" would be similar to telling a major league baseball player to just play in a minor league.[165]

There is no way to be sure that a court would accept this broader approach to involuntary servitude, however, the ramifications that would follow a court accepting this view would have dire consequences for the future of the UFC.[166] All it would take is one brave fighter displeased with the UFC's attempts to block fighter union efforts to challenge the UFC's Coercive Clauses under this modern theory, and the worldwide leader of MMA would be faced with much more than disregardable sanctions.[167] This realistic possibility would likely force Endeavor and the UFC to recognize a fighter union effort and stipulate to a bargaining unit.

---

159. *See* Hunter-Rainey & Rodríguez, *supra* note 26, at 47.

160. *Id.* at 44; *see also* Kevin Iole, *UFC Drops Fitch, AKA Fighters*, YAHOO! SPORTS (Nov. 19, 2008), https://www.yahoo.com/news/ufc-drops-fitch-aka-fighters-054200825--mma.html (quoting UFC President Dana White, "It's a whole other world out there, believe me, and let these guys go out there and see what they find.").

161. Iole, *supra* note 160 (quoting John Fitch).

162. *But see* Video Deposition of Cung Le at 121, Exhibit 18 to Declaration of Suzanne Jaffe Nero, Le v. Zuffa, L.L.C., No. 2:15-cv-01045-RFB-(PAL), Docket No. 574-19 (D. Nev. July 30, 2018). It is clear from Cung Le's deposition testimony that going somewhere else simply isn't feasible under a UFC contract.

163. Peter M. Macaluso, Note, *Bang the Gavel Slowly: A Call for Judicial Activism Following the Curt Flood Act*, 9 B.U. PUB. INT. L.J. 463, 478 (2000).

164. *See supra* note 20 and accompanying text.

165. *See* Nash, *supra* note 41.

166. Although there is no statutory remedy currently in place, a fighter could "sue under the Thirteenth Amendment directly for damages pursuant to the logic of *Bivens v. Six Unknown Named Agents*, [403 U.S. 388 (1999)]." Baher Azmy, *Unshackling the Thirteenth Amendment: Modern Slavery and a Reconstructed Civil Rights Agenda*, 71 FORDHAM L. REV. 981, 986 (2002).

167. *See supra* note 144 and accompanying text.

III. NO MATTER WHAT, A UNION IS THE WAY TO GO

A number of mechanisms for UFC fighter contract reform, including individual antitrust action against the UFC, seeking federal regulation, and free agency, have been suggested.[168] At the time of this writing, the plaintiff-class of Elite Professional MMA Fighters in *Le v. Zuffa, LLC* is trying their hand at an antitrust challenge against the UFC. The court in *Le v. Zuffa, LLC*, however, has yet to render a decision as to the fighters' claim under the Sherman Act.[169] There are, in theory, three possible outcomes of the case. In the first scenario, the fighters' claim succeeds, and the UFC is enjoined from engaging in anticompetitive activity by way of the Coercive Clauses. Another possible scenario is the exact opposite – one in which the fighters' claim fails, and the UFC is free to continue its use of the Coercive Clauses. The last, and least likely, outcome is that the court finds MMA exempt under federal antitrust laws in a manner similar to that of baseball. In any one of the aforementioned outcomes, a fighter union is the best option moving forward because without a collective voice, MMA fighters will be unsuccessful in their attempts to protect their rights and interests.

A. Fighter Victory: Invalidation of Coercive Clauses

In the event the fighters are victorious in their antitrust action, their successful challenge to the Coercive Clauses would require the UFC to restructure their fighter restraint system.[170] During the 1970s, major changes to player restraint systems took place in football, hockey, and basketball.[171] The impetus for changing these systems was antitrust; the players associations, however, were present in the wake of the successful challenges to engage in good faith collective bargaining with the team owners on behalf of the victorious players.[172] This is precisely why the UFC fighters need a union to fall back on. A union would ensure fighters have a collective voice in negotiating what is to take the Coercive Clauses' place. Without one, there is no feasible way for fighters to protect their rights and interests, and the UFC could very likely reconfigure the provisions in a way that complies with federal antitrust law, but fundamentally restricts fighters in a similar fashion.

168. *See* Same, *supra* note 157, at 1084.

169. 15 U.S.C. § 2 (2012); *see also* Motion for Summary Judgement, *supra* note 40.

170. *See* Robert A. McCormick, *Baseball's Third Strike: The Triumph of Collective Bargaining in Professional Baseball*, 35 VAND. L. REV. 1131, 1160 (1982).

171. *Id.*

172. *Id.*

B. The UFC Comes Out on Top: The Chokehold Continues

A ruling in favor of the UFC would be a devastating loss for the fighters because it would mean that the UFC is under no obligation to restructure any of its Coercive Clauses. The UFC would continue to exploit fighters, giving them no choice but to accept the terms of the contract or forget about fighting for the UFC.[173] While collective bargaining on the Coercive Clauses themselves would be out of the ordinary,[174] a subsequent antitrust claim challenging the Coercive Clauses would be barred by *res judicata*.[175] Therefore, an NLRB recognized fighter union would provide fighters with the leverage they would need to at least get the UFC to enter into good faith bargaining over the unfavorable terms of the fighters' contract.[176]

C. "It's All Over! Just Like That!"[177]: MMA's Very Own Antitrust Exemption

In an unlikely turn of events, the District Court of Nevada could follow the United States Supreme Court's – now aberrational – reasoning in *Federal Baseball Club of Baltimore, Inc. v. National League of Professional Baseball Clubs*[178] and hold that MMA is not "trade of commerce" for purposes of the Sherman Act.[179] Under the precedent established by Justice Holmes in 1922, MMA would be a "purely state affair" because the business is giving exhibitions of MMA bouts, and the transport of fighters across state lines is a mere incident.[180] Even notwithstanding the subsequent erosion of Holmes' logic in *Federal Baseball Club of Baltimore*, due mainly in part to later courts increasing the scope of the Commerce Clause,[181] an exemption is still

173. *See* Same, *supra* note 157, at 1065 n.50.

174. *See* McCormick, *supra* note 170, at 1161 (citing *Professional Sports: Has Antitrust Killed the Goose that Laid the Golden Egg?*, 45 ANTITRUST L.J. 290, 370 (1976)).

175. *See* Robert A. McCormick, *Interference on Both Sides: The Case Against the NFL-NFLPA Contract*, 53 WASH. & LEE L. REV. 397, 421 n.114 (1996).

176. *See* 29 U.S.C. § 158(d) (2012).

177. Former UFC announcer Mike Goldberg's signature catchphrase in honor of a knockout. *See* Jeffrey Harris, *Mike Goldberg Shares Video Clip of Him Announcing "It's All Over" for UFC 214 Main Event*, 411MANIA.COM (July 30, 2017), https://411mania.com/mma/mike-goldberg-video-clip-ufc-214/.

178. 259 U.S. 200 (1922).

179. *Id.* at 209.

180. *See id.* at 208-09. *But see* Radovich v. Nat'l Football League, 352 U.S. 445 (1957) (holding football to be interstate commerce because radio and television transmissions were an integral part of the business); Wash. Prof. Basketball Corp. v. Nat'l Basketball Ass'n, 147 F. Supp. 154 (S.D.N.Y. 1956) (holding professional basketball to be interstate commerce because it is a multistate business coupled with interstate transmission through broadcasting rights).

181. Macaluso, *supra* note 163, at 467 (citing United States v. Lopez, 514 U.S. 549 (1995)).

possible.[182] Being the first professional sport to join the antitrust exemption ranks with baseball, MMA would, in that case, not be regulated by federal law.[183]

As was the case with baseball, the only way MMA would escape the grasp of an exemption would be through congressional action.[184] In 1998, Congress passed the Curt Flood Act of 1998[185] (Curt Flood Act) as an amendment to the Clayton Act.[186] Narrow in scope, the Curt Flood Act granted major league baseball players standing to sue under federal antitrust laws – eliminating baseball's antitrust exemption with respect to players and their salaries.[187] Although many saw this legislation as a victory for baseball players,[188] the fact remained that the athletes continued to resort to the collective bargaining process to achieve their goals.[189] Therefore, MMA athletes would likely be in the same position as major league baseball players.[190] Accordingly, even in this highly implausible situation, collective action would likely be UFC fighters' only recourse against the Coercive Clauses, and any future discourse between the fighters and the UFC.[191]

---

182. *See* Flood v. Kuhn, 407 U.S. 258 (1972); *see also* Toolson v. N.Y. Yankees, Inc., 346 U.S. 356 (1953). *But see, e.g.*, Radovich v. National Football League, 352 U.S. 445 (1957) (denying antitrust exemption for football); United States v. Int'l Boxing Club, 348 U.S. 236 (1955) (denying antitrust exemption for professional boxing); Deesen v. Prof'l Golfers' Ass'n, 358 F.2d 165 (9th Cir. 1966), *cert denied*, 385 U.S. 846 (1966) (applying federal antitrust law to professional golf).

183. *See* Macaluso, *supra* note 163, at 466.

184. *See Toolson*, 346 U.S. at 364; *see also Flood*, 407 U.S. at 282-84 (reasoning that any alteration to baseball's antitrust exemption should come from congressional legislation).

185. 15 U.S.C. § 26 (2012).

186. Macaluso, *supra* note 163, at 476 (citing 15 U.S.C. § 12).

187. Macaluso, *supra* note 163, at 477 (citing 144 CONG. REC. H9942-03, H9943 (daily ed. Oct. 7, 1998) (statement of Rep. Hyde)). According recent decisions, the Curt Flood Act exception does not apply to others "employed in the business of organized professional baseball." The Act is instead only applicable to the employment of major league baseball players. Wyckoff v. Office of the Commissioner of Baseball, No. 16-37950-cv, 2017 WL 3856454, at *29 (2d Cir. Aug. 31, 2017) (citing 15 U.S.C. §26(b)), *cert. denied*, 138 S. Ct. 2621 (2018); *see also* Right Field Rooftops, LLC v. Chicago Cubs Baseball Club, LLC, 870 F.3d 682, 689 (7th Cir. 2017) (reaffirming that the Curt Flood Act carve out from the baseball antitrust exemption only applies only to major league baseball players), *cert. denied*, 138 S. Ct. 2621 (2018).

188. Edmund P. Edmonds, *The Curt Flood Act of 1998: A Hollow Gesture After All These Years?*, 9 MARQ. SPORTS L.J. 315, 317 (1999).

189. *See id.* at 342.

190. *See* Macaluso, *supra* note 163 at 480 (asserting that "[o]verall, the [Curt Flood] Act accomplishes little" for major league baseball).

191. *See* McCormick, *supra* note 170, at 1161; *see also* John S. Nash, *Competition or Collective Bargaining – What Would Benefit MMA Fighters More?*, BLOODY ELBOW (Mar. 19, 2018, 12:01 PM), https://www.bloodyelbow.com/2018/3/19/17039396/competition-or-collective-bargaining-what-would-benefit-fighters-more-mma (asserting that union solidarity and strike power would mitigate, if not eliminate, many unilateral and unfair made decisions by the UFC).

In many ways, a fighter union addresses the shortcomings of the other mechanisms available to fighters.[192] Congressional action would likely not prevent most of the issues fighters face through the Coercive Clauses,[193] and the free agency model would not function well in the MMA industry.[194] Although antitrust law provides fighters with a viable preliminary option,[195] the reality is that fighters' best interests ultimately fall into the hands of a union.[196] This reality has not gone unnoticed either; veteran fighter Tim Kennedy claims, "[the] sport isn't going to exist in 10 years if we . . . keep this course [without a fighters association]."[197]

CONCLUSION

Disparity of power has led to unionization in professional sports because "the strengths emanating from our nation's labor laws proved too strong to resist."[198] Recognizing these strengths, several UFC fighters have made the first steps to organize by creating the Mixed Martial Arts Athlete Association (MMAAA).[199] The association hopes to establish a formal collective bargaining agreement with the UFC.[200] Attorneys and professors alike, however, have expressed concerns with the obstacles to establishing a union that will be recognized by the NLRB: independent contractor status and arms-length relationships.[201] This Article demonstrates that these concerns can be laid to rest; and despite the inherent difficulties, a fighter union is the best option for fighters. A fighter union not only ensures that fighters are not entering a gilded Octagon, but promotes the ethical success of a sport that "showcase[s] the human body and mind at their finest."[202] The love that MMA fighters have for their sport need not be met with fear to fight for what

192. *See* Same, *supra* note 157, at 1091.

193. *See id.* at 1089.

194. *See* Nash, *supra* note 191; Same, *supra* note 157, at 1090.

195. *See supra* note 167 and accompanying text.

196. *See* Same, *supra* note 157, at 1093.

197. *See* Dan Stupp & Ken Hathaway, *UFC's 206 Tim Kennedy: Without Fighters Association, MMA Won't Exist in 10 Years*, MMAJUNKIE (Dec. 8, 2016, 5:30 PM), http://mmajunkie.com/2016/12/ufc-206s-tim-kennedy-without-fighters-association-mma-wont-exist-in-10-years; *see also supra* note 134 (clarifying that although many professional sports collectives are called "associations" they are unions in reality).

198. BERRY ET AL., *supra* note 5, at 1.

199. Gross, *supra* note 109.

200. *Id.*

201. *See supra* note 41 and accompanying text.

202. Same, *supra* note 157, at 1087.

is right; a union delivers the solidarity fighters need to stand up for their intrinsic worth.[203]

*Madelynn A. Hefner**

203. *See* Gross, *supra* note 109.

* J.D., Southwestern Law School, Concentration in Entertainment and Media Law, 2019; B.A., Business Administration, Entertainment and Tourism Management Concentration, California State University, Fullerton, 2015. I sincerely thank Professors Alexandra D'Italia and Arthur McEvoy for their invaluable feedback in developing this note. Many thanks to William Dietz, Giordan Roque, Tina Robinson, Kelsey Finn, and Jared Graff for their skillful editing. A special thank you to my good friend, Josh Dreon, for entertaining many late-night conversations on this topic during my writing process. And finally, I dedicate this note to my parents, Hollis Hefner and Jan Salvo. I am forever grateful for your unyielding love and support.