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140 CHARACTERS OR LESS: A LOOK AT MORALS CLAUSES IN ATHLETE ENDORSEMENT AGREEMENTS

*Lauren Rosenbaum**

“What kind of person celebrates death? It’s amazing how people can HATE a man they never even heard speak. We’ve only heard one side”¹

—Rashard Mendenhall

I. INTRODUCTION

One hundred and forty characters or less can stimulate product sales.² One hundred and forty characters or less can garner national attention.³ One hundred and forty characters or less can be grounds for termination.⁴ Twitter and social media in general can create a dangerous medium of expression for athletes.⁵ When an athlete is a party

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1. *Mendenhall v. Hanesbrands, Inc.*, 856 F. Supp. 2d 717, 720 (M.D.N.C. 2012) (quoting the text of Mendenhall’s tweet).

2. The number is significant because Twitter messages are limited to 140 characters. Scott Simon, *Inspiration in 140 Characters, Long Before Twitter*, NPR (May 14, 2011, 7:52 AM), <http://www.npr.org/2011/05/14/136302111/inspiration-in-140-characters-long-before-twitter>.

3. See generally Joe Reedy, *Axford Talks Oscar Perfection, Francona on Facing Russell Wilson*, FOX SPORTS ON MSN (March 3, 2014, 2:23PM), <http://msn.foxsports.com/ohio/story/axford-talks-oscar-perfection-francona-on-facing-russell-wilson-030314> (discussing John Axford’s gain of 2,500 followers); Scott Stump, *Texas Man, 65, Going for Ellen’s Retweet Record: ‘I’m Flabbergasted’*, TODAY.COM (March 6, 2014, 8:21AM), <http://www.today.com/tech/texas-man-65-going-ellens-retweet-record-im-flabbergasted-2D79325798> (discussing how a man with five followers has had his photograph retweeted 149,990 times).

4. See generally Ed Pilkington, *Justine Sacco, PR Executive Fired over Racist Tweet, ‘Ashamed’*, THEGUARDIAN.COM (Dec. 22, 2013, 6:26PM), <http://www.theguardian.com/world/2013/dec/22/pr-exec-fired-racist-tweet-aids-africa-apology> (discussing the termination of a PR executive after she tweeted, “Going to Africa. Hope I don’t get AIDS. Just kidding. I’m white!” after boarding a plane to Africa).

5. See generally Len Berman, *When Social Media Gets Athletes in Trouble*, MASHABLE (Jan. 4, 2010), <http://mashable.com/2010/01/04/social-media-athletes/>; Erik Brady & Jorge L. Ortiz, *For Athletes, Social Media Not All Fun and Games*, USA TODAY (July 31, 2013, 9:10PM), <http://www.usatoday.com/story/sports/2013/07/31/for-athletes-social-media-not-all-fun-and-games/2606829/>.

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to an endorsement contract containing a morals clause, his or her social media usage may cause issues when the usage violates the clause.⁶ However, it is likely that an athlete-endorsee could succeed on a breach of contract claim against the endorser for termination of the endorsement agreement based upon the endorsee's alleged breach of the morals clause.⁷ This Comment will explore the potential grounds for recovery in such an instance.

Social media creates a platform that allows individuals to quickly disseminate their ideas, beliefs, and comments publicly. These platforms take the form of "blogs, social networking sites . . . , virtual social worlds, collaborative projects, content communities, and virtual gaming worlds."⁸ One of the social networking websites is Twitter, which allows individuals to share posts limited to 140 characters, called Tweets, with others browsing the website or others accessing the site through mobile device applications.⁹ Not only are individuals using social networking to connect with others, but social networking is also increasingly being used for sports marketing and development.¹⁰

Based upon recent issues with social media, it is difficult to research morals clauses in relation to athlete endorsement agreements because athletes rarely take disputes over the rescission of their respective contracts to court and minimal secondary research is available.¹¹ This Comment seeks to fill that research void. Part II of this Comment discusses what a morals clause is and its purpose in an endorsement agreement. Part III examines the history and evolution of the use of morals clauses in employment contracts, particularly in the entertainment and sports industries. Part IV of this Comment discusses the contract principles implicated in the study of morals clauses. Part V

6. See David T. Miller, *Attention to Detail Paramount When Crafting Endorsement Deals*, SPORTS BUS. DAILY GLOBAL (July 25, 2011), <http://www.sportsbusinessdaily.com/Journal/Issues/2011/07/25/Opinion/David-Miller.aspx>.

7. See e.g., *Mendenhall*, *supra* Note 1, 856 F. Supp. 2d at 717 (surviving a motion to dismiss).

8. Jamie P. Hopkins et al., *Being Social: Why the NCAA has Forced Universities to Monitor Student-Athletes' Social Media*, 13 PGH. J. TECH. L. & POL'Y 1, 5 (2013) (citing Andreas M. Kaplan & Michael Haenlein, *Users of the World, Unite! The Challenges and Opportunities of Social Media*, BUS. HORIZONS 61 (2010)).

9. Hopkins et al., *supra* note 8, at 7 (citing Daniel Nations, *What is Twitter?*, ABOUT.COM, <http://webtrends.about.com/od/socialnetworking/a/what-is-twitter.htm> (last visited Oct. 10, 2012)).

10. Hopkins et al., *supra* note 8, at 10 (citing Keith N. Hampton et al., *Social Networking Sites and Our Lives*, PEW INTERNET (June 16, 2011) <http://articles.latimes.com/2009/jun/17/business/fit-myspace17>).

11. Sarah D. Katz, Note, *Reputations . . . A Lifetime to Build, Seconds to Destroy: Maximizing the Mutually Protective Value of Morals Clauses in Talent Agreements*, 20 CARDOZO J. INT'L & COMP. L. 185, 195 (2011).

examines court decisions in determining issues related to the termination of a contract for the violation of a morals clause. Part VI contains an analysis of a recent case, *Mendenhall v. Hanesbrands*, which discusses the facets of Rashard Mendenhall's claim, as well as the court's reasoning in its decision to deny Hanesbrands' motion for judgment on the pleadings. Finally, Part VII of this Comment provides insight into how an athlete may prevail against an endorser in court when the endorser terminates its agreement with the athlete, pursuant to the contract's morals clause.

II. WHAT IS A MORALS CLAUSE AND WHAT DOES IT DO?

A morals clause is "a provision within a contract, usually an endorsement deal or an employment agreement, that enable[s] one party to unilaterally terminate the agreement if the individual engages in conduct that could have some sort of negative impact upon the particular company or organization."¹² The crux of these morals clauses is moral behavior, conduct considered to be acceptable in the eyes of society.¹³

Morals clauses are a form of protection afforded to the endorser company from the athlete-endorsee's immoral behavior.¹⁴ Endorsers have an interest "in protecting [their] good name[s], reputation[s], and the image of its product[s]."¹⁵ These clauses have grown in popularity due to the maturity level of the athlete-endorsees, the importance of the endorsers' moral character, and the amount of money at stake.¹⁶ Additionally, morals clauses may be viewed as a deterrent, creating incentives for athletes to act in a certain manner.¹⁷ Overall, morals clauses are valuable because they increase "certainty and predictabil-

12. Courtney Ray, Symposium Transcript, *2008 Seton Hall University School of Law Sports & Entertainment Symposium: From the Arena to the Streets – The Pressures Placed on Athletes, Entertainers, and Management*, 19 SETON HALL J. SPORTS & ENT. L. 381, 482 (2009) (specifically the section detailing Fernando Pinguelo's presentation).

13. Fernando M. Pinguelo & Timothy D. Cendrone, *Morals? Who Cares about Morals? An Examination of Morals Clauses in Talent Contracts and What Talent Needs to Know*, 19 SETON HALL J. SPORTS & ENT. L. 347, 352 (2009) (citing Bernard Gert, *The Definition of Morality*, STAN. ENCYCLOPEDIA OF PHIL., Feb. 11, 2008, <http://plato.stanford.edu/entries/morality-definition/>).

14. Pinguelo & Cendrone, *supra* note 13, at 352.

15. James T. Gray, *Sports Law Practice* § 7.08(13)(b) (3d ed., 2012).

16. Daniel Auerbach, *Morals Clauses as Corporate Protection in Athlete Endorsement Contracts*, 3 DEPAUL J. SPORTS L. CONTEMP. PROBS. 1, 2 (2005). The large amount of money involved in endorsement contracts is why endorsers include morals clauses. See also Casey Shilts et al., *Making the Pitch Player Endorsements in Professional Sports*, 25 ENT. & SPORTS L. 2, 4 (2008).

17. Adam Epstein, *An Exploration of Interesting Clauses in Sports*, 21 J. LEGAL ASPECTS OF SPORT 5, 23 (2011).

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ity,”¹⁸ and their ambiguity gives endorsers flexibility in terminating agreements, while also reducing the likelihood of external intervention.¹⁹ Generally, endorsers are attracted to endorsees who behave in a manner consistent with “the ideals and ideas of society.”²⁰

Morals clauses cover illegal drug use,²¹ drug dependency,²² criminal conduct,²³ and public criticism injuring the athlete or endorser’s reputation or the value of the endorser.²⁴ In general, a morals clause may include behavior that “(a) is not ‘with due regard’ to ‘social conventions and public morals and decency’; (b) ‘shocks, insults or offends’ the community; or (c) ‘reflects unfavorably’ on the person, the financier, the producer, the employer, or the distributor.”²⁵ The language of morals clauses determine whether the clause’s interpretation is strict—prohibiting conduct that may bring the individual into public disrepute or involving moral turpitude—or lenient—only allowing for termination of the contract when the individual is arrested or convicted of a crime.²⁶ The specificity of these clauses may be the subject of negotiation between the prospective endorsee and endorser.²⁷ Additionally, the terminology used in the clauses is often ambiguous, allowing for discretion in the interpretation of the clause.²⁸ When determining whether to invoke the morals clause, the endorser must balance the cost of abandoning its relationship with the endorsee against the damage experienced when associated with the tarnished image of the endorsee.²⁹

Morals clauses may be utilized when the individual did not actually commit any acts within the confines of the clause.³⁰ Depending on the

18. Katz, *supra* note 11, at 188.

19. *Id.* at 219–23.

20. Affidavit of Jon Franklin, J.D. at 1, *Kratter v. Hackett*, No. 08CV02709, 2010 WL 3810098 (D. Colo. May 20, 2010).

21. MATTHEW J. MITTEN ET AL., *SPORTS LAW AND REGULATION: CASES, MATERIALS AND PROBLEMS* 526 (3d ed. 2013).

22. *Id.*

23. Auerbach, *supra* note 16, at 4, 13 (stating Nike’s morals clause is triggered by indictment of a crime). In general, three classes of morals clauses regarding criminal conduct are used: (1) crimes involving moral turpitude; (2) petty crimes not involving moral turpitude; and (3) crimes that involve moral turpitude, but moral turpitude is not an element of the crime. *Twentieth Century-Fox Film Corp. v. Lardner*, 216 F.2d 844, 851–52 (9th Cir. 1954).

24. James T. Gray, *supra* Note 15, at § 7.08. .

25. THOMAS D. SELZ ET AL., 2 *ENTERTAINMENT LAW 3D LEGAL CONCEPTS AND BUSINESS PRACTICES* § 9:107 (2013).

26. Shilts et al., *supra* note 16, at 4 (citing Auerbach, *supra* note 16, at 7–8).

27. Auerbach, *supra* note 16, at 8 (citing Leigh Augustine-Schlossinger, *Endorsement Contracts for Professional Athletes*, 32 *COLO. LAW.* 43 (2003)).

28. *Id.* at 8.

29. *Id.* at 14.

30. Ray, *supra* note 12, at 485.

language of the clause, “false allegations” or “suspicion of misconduct” may be sufficient to terminate an endorsement agreement pursuant to a morals clause.³¹ A morals clause may also be based upon the perception of wrongdoing, rather than actual facts.³² Additionally, past conduct may constitute a breach of a morals clause when the endorsee’s behavior, unknown to the endorser at the time of contracting, becomes public during the timespan of the agreement.³³ In essence, a morals clause gives endorsers the power to terminate an agreement with the endorsee when the athlete’s behavior is detrimental to the endorser’s interests or to the value of the relationship.³⁴ However, an endorser is not obligated to utilize its termination power if the endorsee violates the morals clause.³⁵ An endorser may only publicly distance itself from the endorsee’s actions.³⁶ In addition to providing endorsers with the ability to terminate the agreement, a morals clause may also call for monetary or other relief.³⁷

Morals clauses vary between endorsers.³⁸ For example, Reebok’s endorsement agreements include a provision entitled “Morals,” which reads,

31. Pinguelo & Cendrone, *supra* note 13, at 353; Shilts et al., *supra* note 16, at 4.

32. James T. Gray, *supra* Note 15, at § 7.08(13)(b). This type of clause may read:

We shall have the right to terminate this agreement upon immediate written notice in the event our client is of the *belief* that artist’s actual or alleged conduct occurring or reported subsequent to the execution of the agreement and client’s and the public’s *perception* thereof create the result that a public association of an artist with our client may be injurious to or embarrassing to our client or inconsistent with the best interests, reputation or marketing position of the product.

Id. (emphasis added). Another example of a broad morals clause based upon the endorser’s belief may read, “[The endorser] shall have the right to terminate this agreement if [the endorsee] becomes involved in any situation or occurrence which *in the [endorser’s] reasonable opinion*, subjects either [the endorsee] or [the endorser] to ridicule, contempt or scandal.” 2-29 THE LAW OF ADVERTISING § 29.03(1)(n) n. 5 (2013) (emphasis added).

33. SELZ ET AL., *supra* note 25, at § 9:107.

34. Noah B. Kressler, *Using the Morals Clause in Talent Agreements: A Historical, Legal, and Practical Guide*, 29 COLUM. J.L. & ARTS 235, 235 (2005).

35. Epstein, *supra* note 17, at 23. Relevant considerations for the endorser in deciding whether to terminate the agreement include “(1) the severity of the [endorsee’s] transgressions and the company’s audience, (2) the company’s investment in the ad campaign . . ., (3) whether other commercials or individuals are available to fill the void by terminating the [endorsee], and (4) the likelihood of litigation brought by the athlete.” Brian R. Socolow, *Armstrong’s Endorsement Contracts and the “Morals Clause,”* SPORTS LITIG. ALERT (Loeb & Loeb LLP, New York, N.Y.), Nov. 2, 2012 [hereinafter *Armstrong’s Endorsement*].

36. *Armstrong’s Endorsement*, *supra* note 35.

37. Andrew A. Schwartz, A “Standard Clause Analysis” of the Frustration Doctrine and the Material Adverse Change Clause, 57 UCLA L. REV. 789, 815 (2010) (citing Brian R. Socolow, *What Every Player Should Know About Morals Clauses*, MOVES MAG., Aug. 2008, at 188, available at <http://www.loeb.com/articles-articles-20080903-whateveryplayershouldknowaboutmorals-clauses>).

38. James T. Gray, *supra* Note 15, at § 7.08 (13)(a).

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[t]he commercial value of the Endorsement is impaired by Athlete's commission of any act or involvement in any occurrence which violates widely-held principles of public morality or decency, is a felony or crime of moral turpitude in the jurisdiction in which it is committed, or reflects unfavorably on Athlete, Reebok or Reebok Products.³⁹

Additionally, the increased speed at which information is disseminated via social media may lead to more injurious conduct, creating a greater need for morals clauses.⁴⁰ However, traditional morals clauses may be too broad to encompass an individual's conduct on social media; therefore, some suggest adding a clause detailing acceptable social media etiquette.⁴¹

While morals clauses are used in a variety of contracts, these clauses can be especially valuable in endorsement agreements because these agreements are "high-risk, high-reward."⁴² An endorsement contract is an agreement which gives the endorsee a right to compensation in return for allowing the endorser to associate the endorsee's value, derived from his or her fame or athletic ability, with the endorsee's product or service in an effort to enhance the product or service's goodwill.⁴³

While endorsement agreements can be an important source of an athlete's income,⁴⁴ these agreements may also be a pivotal part of a company's marketing strategy.⁴⁵ Consumers generally view celebrity-endorsed products more favorably than products that are not endorsed by a celebrity.⁴⁶ An athlete may be chosen as an endorsee "because the [athlete] projects an image, idea, or concept that the company wants consumers to associate with a product."⁴⁷ Endorsements allow the celebrity's credibility to transfer to the product; however, when the celebrity's negative attributes are imputed upon the

39. Katz, *supra* note 11, at 210 n. 141.

40. Pinguelo & Cendrone, *supra* note 13, at 367–68. See generally Porcher L. Taylor, III & Timothy D. Cendrone, *The Reverse-Morals Clause: The Unique Way to Save Talent's Reputation and Money in a New Era of Corporate Crimes and Scandals*, 28 *CARDOZO ARTS & ENT. L.J.* 65, 109–12 (2010).

41. Nicholas A. Persky, *Rules of Endorsement: Attorneys Can Use Case Law and the FTC Guides to Steer Celebrity Clients Toward a Safe Harbor for Endorsements Made on Social Media*, 35 *L.A. L.A.W.* 35, 38 (2012).

42. *Id.*

43. Auerbach, *supra* note 16, at 1 (quoting CAL. BUS. & PROF. CODE § 18895.2(d) (West 1997 & Supp. 1998) (California state law definition)).

44. James T. Gray, *supra* Note 15, at § 7.01.

45. See generally James T. Gray, *supra* Note 15, at § 7.02.

46. Kressler, *supra* note 34, at 240 (citing Charles Atkin & Martin Block, *Effectiveness of Celebrity Endorsers*, 23 *J. ADVERTISING RES.* 57, 57 (Feb./Mar. 1983)).

47. Hayes Hunt & Brian Kint, *Celebrity Endorsements: Your Morals Clause Return Policy*, 246(101) *GC MID-ATLANTIC* 5 (Nov. 21, 2012).

endorser, its value may be reduced.⁴⁸ Endorsers use morals clauses as protection because athletes are subjected to increased scrutiny.⁴⁹ Thus, endorsers add these provisions to endorsement contracts as added protection for their own brands.⁵⁰

III. THE HISTORY OF MORALS CLAUSES

Morals clauses are also common in employment contracts. The clauses began to emerge in the 1920's, gaining popularity during the McCarthy Era, known for allegations of Communism.⁵¹ In 1921, Roscoe "Fatty" Arbuckle—a popular comedian who signed a contract with Paramount Pictures for three-years, worth \$3 million—was charged with rape and murder after a female was found in his bathroom nearly dead.⁵² As a result of this incident, studios began adding morals clauses to contracts with their respective talent to prevent damage to their brand.⁵³

During the McCarthy Era, these clauses were used to limit political behavior rather than immoral behavior.⁵⁴ The clauses used during this time were significantly broad, allowing wide discretion in the termination of the agreements.⁵⁵ Many of these clauses read, "the per-

48. Kressler, *supra* note 34, at 240–41 (citations omitted). In general, factors considered in the choice of an endorsee include "trustworthiness, values, image, reputation, and publicity risk." *Id.* at 241 (citing Alan R. Miciak & William L. Shanklin, *Choosing Celebrity Endorsers*, 3 MGTG. MGMT. 50, 54 (Winter 1994)).

49. Pinguelo & Cendrone, *supra* note 13, at 366–368 (citations omitted).

50. Auerbach, *supra* note 16, at 3.

51. See generally *Scott v. RKO Radio Pictures, Inc.*, 240 F.2d 87 (9th Cir. 1957) (finding that the discharge of a motion picture employee was justified based upon his breach of the morals clause in his contract); *Twentieth Century-Fox Film Corp. v. Lardner*, 216 F.2d 844 (9th Cir. 1954); *Loew's, Inc. v. Cole*, 185 F.2d 641 (9th Cir. 1950) (finding that the company could terminate Lardner for his conviction stemming from his refusal to testify at a Congressional hearing).

52. Ray, *supra* note 12, at 483 (citations omitted); Kressler, *supra* note 34, at 236.

53. Ray, *supra* note 12, at 483 (citations omitted). In 1921, Universal Studios utilized a morals clause that read,

The actor (actress) agrees to conduct himself (herself) with due regard to public conventions and morals and agrees that he (she) will not do or commit anything tending to degrade him (her) in society or bring him (her) into public hatred, contempt, scorn, or ridicule, or tending to shock, insult or offend the community or outrage public morals or decency, or tending to the prejudice of the Universal Film Manufacturing Company or the motion picture industry. In the event that the actor (actress) violates any term or provision of this paragraph, then the Universal Film Manufacturing Company has the right to cancel and annul this contract by giving five (5) days' notice to the actor (actress) of its intention to do so.

Pinguelo & Cendrone, *supra* note 13, at 355 n. 30 (quoting *Morality Clause for Films*, N.Y. TIMES, Sept. 22, 1921, at 8, available at <http://query.nytimes.com/mem/archive-free/pdf?res=9A02E0DC123EEE3ABC4A51DFBF66838A639EDE>).

54. Auerbach, *supra* note 16, at 3.

55. Ray, *supra* note 12, at 485.

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son was not allowed ‘to engage in conduct with due regard to public conventions and morals, and not act in a manner to degrade him in society and bring him into public hatred, contempt, scorn, ridicule, or that would tend to shock or insult or offend the community.’”⁵⁶

From the 1960s to the 1980s, morals clauses were drafted to include conduct that fell outside the bounds of society’s definition of acceptable behavior.⁵⁷ More recently, sports employers have included these clauses in their contracts. In *Haywood v. University of Pittsburgh*, the court found that the morals clause in former Pittsburgh head football coach Michael Haywood’s employment contract was enforceable.⁵⁸

Today, essentially all endorsement contracts include some sort of morals clause.⁵⁹ In general, an employer does not have an interest in an employee’s conduct outside the scope of his employment.⁶⁰ However, endorsement agreements present a different set of circumstances in which the endorser has an interest in the employee’s—the endorsee’s—conduct.

Recent termination of endorsement agreements as a result of violations of morals clauses include: AFLAC ending its endorsement agreement with Gilbert Gottfried after he made jokes regarding the tsunami in Japan on Twitter;⁶¹ Jaguar terminating its agreement with Stephanie Rice after she made a homophobic comment on Twitter;⁶² and Oakley and Nike severing their contracts with Oscar Pistorius after he was charged with the death of his girlfriend.⁶³ After Tiger Woods was involved in a car accident and allegations of infidelity surfaced, Accenture, AT&T, Gatorade, and Tag Heuer terminated their endorsement agreements with him based upon the contracts’ morals clauses.⁶⁴ Additionally, Nike terminated professional football player,

56. *Id.* at 486. A clause may also read, “The individual shall not conduct himself in such a manner as to commit an offense involving moral turpitude under federal and state law or local ordinances . . . and not conduct oneself in a way that would offend against the decency, the scorn, the contempt of social society.” *Id.* at 486–87 (quoting *Twentieth Century-Fox Film Corp. v. Lardner*, 216 F.2d 844, 847–48 (9th Cir. 1954)).

57. Ray, *supra* note 12, at 485.

58. See generally *Haywood v. Univ. of Pittsburgh*, 976 F. Supp. 2d 606 (W.D. Pa. 2013).

59. Ray, *supra* note 12, at 485 (citing Auerbach, *supra* note 16, at 4).

60. *Id.* at 489 (Rick Karcher speaking).

61. Doug Wood, *Social Media and Negotiating Celebrity Endorser Morals Clauses*, 27(3) ENT. L. & FIN. NEWSLETTER 1 (2011).

62. *Id.* at 1.

63. Eric Kalis, *Attorneys Play Crucial Role in Protecting High-Profile Clients; Bad Public Image Can Cost Millions*, MIAMI DAILY BUS. REV., May 28, 2013, at A1.

64. Paul A. Czarnota, *Athlete Privacy Rights and Endorsement Contracts: An Analysis of U.S., U.K., and Australian Law*, 11 VA. SPORTS & ENT. L.J. 460, 468 (2012) (citations omitted). Nike chose to continue its relationship with Woods. John Gibeaut, *Hold That Tiger: After Tiger Woods Scandal, More Lawyers are Teeing up ‘Morals Clauses’*, 96 A.B.A. 16 (Sept. 2010); Jeff

Michael Vick's, endorsement agreement after he pled guilty to dog fighting charges.⁶⁵ Finally, Nike, Trek Bicycle, and Easton-Bell Sports all terminated their relationships with Lance Armstrong after his alleged participation in a doping ring.⁶⁶ As shown by the foregoing examples, a wide range of conduct may lead to the termination of an endorsement agreement for a violation of morals clauses.

IV. PRINCIPLES OF CONTRACT LAW

Contract principles provide the basis for analyzing morals clauses in endorsement agreements and determining whether those clauses are enforceable. In general, based upon the freedom of contract doctrine, individuals are allowed to contract for the gain or loss of rights, such as the restrictions on an endorsee's conduct in an endorsement agreement.⁶⁷ As an initial matter, for a contract as a whole to be enforceable, there must be mutual assent between the parties.⁶⁸ A plaintiff in a breach of contract action must establish that (1) a contract exists and the terms of the contract were agreed upon by both parties, (2) the plaintiff performed his obligations pursuant to the contract, (3) the defendant did not perform his obligations, and (4) the defendant's breach caused the plaintiff's damages.⁶⁹

Additionally, for a contract to be rescinded after a breach, the breach must be material; if the breach is non-material, only damages may be awarded.⁷⁰ A material breach occurs when a party does not perform a fundamental element of the contract, making it impossible for the other party to perform his obligations or defeating the central purpose of the agreement.⁷¹ This can be interpreted to mean that if the athlete fails to perform a specific portion of the contract (such as complying with the morals clause) so essential to the agreement (an

Glor et al., CBS Evening News, Saturday Edition (Dec. 12, 2009) (transcript available on LexisAdvance).

65. *Nike Terminates Endorsement Contract with Michael Vick*, FOX NEWS (August 25, 2007) (available at <http://www.foxnews.com/story/2007/08/25/nike-terminates-endorsement-contract-with-michael-vick/>).

66. Catherine Dunn, *Protecting Your Brand and Image with a Well-Built Morals Clause*, CORP. COUNS. (Oct. 19, 2012).

67. Yvette Joy Liebesman, *When Selling Your Personal Name Mark Extends to Selling Your Soul*, 83 TEMP. L. REV. 1, 18 (2010) (citing Rober Braucher, *Freedom of Contract and the Second Restatement*, 78 YALE L.J. 598, 599-600 (1969)).

68. *See Revels v. Miss N.C. Pageant Org., Inc.*, 176 N.C. App. 730, 733-34 (2006).

69. *O'Brien v. Ohio State Univ.*, 2007-Ohio-4833 ¶ 44 (Ct. App. Sept. 20, 2007) (discussing the elements of a breach of contract claim pursuant to Ohio state law).

70. *Bernsen v. Innovative Legal Mktg., LLC*, 2012 U.S. Dist. LEXIS 115325, 2012 WL 3525612 (E.D. Va. June 20, 2012).

71. *O'Brien*, 2007-Ohio at ¶ 56.

act bringing the athlete into public disrepute), the endorser could rescind the contract.⁷² The endorser may do this because the athlete's reputation makes it impossible for the endorser's company to use the athlete as a representative of the brand or product, which would reduce the value of the brand or product when used in conjunction with the athlete's image.⁷³ However, when an athlete brings a claim against an endorser for breach of contract after the attempted rescission, the athlete is alleging that, because the endorser is not allowing him to act in his role as an endorsee, the endorser is making it impossible for the athlete to perform his contractual obligations. Therefore, the endorser is violating the contract's implied covenant of good faith and fair dealing. The question of whether the morals clause has been breached is one of fact, premised upon the clause's language and the specific behavior that occurs.⁷⁴

To determine whether a particular breach of a contract was material, the court generally uses a five-prong test.⁷⁵ The court will examine: (1) "the extent to which the injured party will be deprived of the benefit which he reasonably expected"; (2) "the extent to which the injured party can be adequately compensated for the part of that benefit of which he will be deprived"; (3) "the extent to which the party failing to perform will suffer forfeiture"; (4) "the likelihood that the party failing to perform will cure his failure, taking account of all the circumstances including any reasonable adequate assurances"; and (5) "the extent to which the behavior of the party failing to perform comports with standards of good faith and fair dealing."⁷⁶

Due to the broad nature of many morals clauses, endorsers may be at risk that the court will determine the agreement is too ambiguous. In general, ambiguous language will be interpreted in favor of the non-drafting party.⁷⁷ However, based upon legal precedent, a finding of ambiguity is unlikely.⁷⁸

72. *Id.*

73. *Id.*

74. Kressler, *supra* note 34, at 245 (citing *Loew's, Inc. v. Cole*, 185 F.2d 641, 649 (9th Cir. 1950)).

75. *O'Brien*, 2007-Ohio at ¶ 60 (citing *Liability*, 2006 Ohio 1104 ¶ 100-04).

76. *Id.*

77. Katz, *supra* note 11, at 221 (citing *Warner Bros. Pictures v. Columbia Broad. Sys.*, 216 F.2d 945 (9th Cir. 1954)).

78. See generally *infra* Part IV.

V. THE LEGAL PRECEDENT REGARDING MORALS CLAUSES

Morals clauses are generally enforceable.⁷⁹ The controversy in the following cases arose when each individual's respective employer terminated the individual's employment pursuant to a morals clause in the employment contracts after each refused to testify at a Congressional hearing regarding Communism in the motion picture industry.⁸⁰ In *Scott v. RKO Radio Pictures, Inc.*, the court found that Scott's refusal to testify in front of Congress was grounds for justifiably rescinding his contract.⁸¹ Because Scott breached the express morals clause in the agreement, which required him to act with "due regard to the public conventions and morals," the court held that his contract was lawfully terminated for good cause, and that his discharge was made in good faith.⁸²

Similarly, in *Twentieth Century-Fox Film Corp. v. Lardner*, the court found for Twentieth Century-Fox Film Corporation, holding that Lardner breached the express and implied conditions of his employment contract.⁸³ The court noted that there exists an implied condition in employment contracts that requires "the employee [to]

79. See generally *Nader v. ABC TV, Inc.*, 150 Fed. App'x. 54, 56 (2d Cir. 2005) In a breach of contract claim for wrongful termination, Nader argued that the morals clause was "too ambiguous or vague," and that his actions did not fall within the confines of the morals clause. *Id.* The court found Nader's arguments unpersuasive. *Id.*

80. *Id.* at 644-645.

81. *Scott v. RKO Radio Pictures, Inc.*, 240 F.2d 87, 91 (9th Cir. 1957). The morals clause in Scott's agreement read,

[a]t all times commencing on the date hereof and continuing throughout the production or distribution of the pictures, the producer will conduct himself with due regard to the public conventions and morals and will not do anything which will tend to degrade him in society or bring him into public disrepute, contempt, scorn or ridicule, or that will tend to shock, insult or offend the community or public morals or decency or prejudice the corporation or the motion picture industry in general; and he will not wilfully do any act which will not wilfully his capacity fully to comply with this agreement, or which will injure him physically or mentally.

Id. at 87-88.

82. *Id.* at 91.

83. *Twentieth Century-Fox Film Corp.*, 216 F.2d at 850; *Scott*, 240 F.2d at 88. Lardner's morals clause read,

the artist shall perform the services herein contracted for in the manner that shall be conducive to the best interests of the producer, and of the business in which the producer is engaged, and if the artist shall conduct himself, either while rendering such services to the producer, or in his private life in such a manner as to commit an offense involving moral turpitude under Federal, state or local laws or ordinances, or shall conduct himself in a manner that shall offend against decency, morality or shall cause him to be held in public ridicule, scorn or contempt, or that shall cause public scandal, then, and upon the happening of any of the events herein described, the producer may, at its option and upon one week's notice to the artist, terminate this contract and the employment thereby created.

Lardner, 216 F.2d at 849.

conduct himself with such decency and propriety as not to injure the employer in his business.”⁸⁴ By refusing to testify during the Congressional hearings, Lardner violated this implied condition and allowed Twentieth Century-Fox Film Corporation to lawfully terminate his employment agreement.⁸⁵

Similarly, in *Loew’s, Inc. v. Cole*, the court found that the clause requiring the employee to “act ‘with due regard to public conventions’” included the requirement that Cole obey the law, and his conduct’s effect on the public’s opinion of the employer.⁸⁶ The court found since a jury could find Cole guilty of contempt of Congress, he failed to act in accordance with public convention and, by extension, the morals clause of his employment agreement.⁸⁷ This breach of the agreement allowed Loew’s, Inc. to lawfully terminate its contract with Cole.⁸⁸

In *Nader v. ABC Television, Inc.*, the court found that Nader’s conduct—which resulted in an arrest, and the subsequent media attention—violated the morals clause.⁸⁹ Therefore, the termination of his employment, through rescission of the contract, was justified.⁹⁰ Under their agreement with Nader, ABC could terminate his employment for conduct that “*in the opinion of ABC*”, rather than *actual* public opinion, was detrimental to the company.⁹¹ In response to Nader’s allegations that the clause was ambiguous and vague, the court

84. *Id.* at 850.

85. *See id.* at 850–51.

86. *Loew’s, Inc.*, 185 F.2d at 649, 661–62. (finding that “the actual effect of Cole’s conduct upon public opinion” was a material issue in the case). Cole’s morals clause read,

[t]he employee agrees to conduct himself with due regard to public conventions and morals, and agrees that he will not do or commit any act or thing that will tend to degrade him in society or bring him into public hatred, contempt, scorn or ridicule, or that will tend to shock, insult or offend the community or ridicule public morals or decency, or prejudice the producer or the motion picture, theatrical or radio industry in general.

Id. at 644.

87. *Id.* at 648.

88. *See id.* at 662.

89. *Nader*, 150 Fed. Appx. at 55.

90. *Id.* Nader’s morals clause read,

[i]f, in the opinion of ABC, Artist shall commit any act or do anything which might tend to bring Artist into public disrepute, contempt, scandal, or ridicule, or which might tend to reflect unfavorably on ABC, any sponsor of a program, any such sponsor’s advertising agency, any stations broadcasting or scheduled to broadcast a program, or any licensee of ABC, or to injure the success of any use of the Series or any program, ABC may, upon written notice to Artist, immediately terminate the Term and Artist’s employment hereunder.

Nader v. ABC Television, Inc., 330 F. Supp. 2d 345, 346 (S.D.N.Y. 2004).

91. *Nader*, 330 F. Supp. 2d at 346 (emphasis added).

noted that morals clauses were historically considered valid and enforceable.⁹²

In *Galaviz v. Post-Newsweek Stations*, Galaviz filed suit, alleging breach of contract when Post-Newsweek terminated her employment as a result of a breach of the morals clause in her contract after numerous altercations between Galaviz and various boyfriends.⁹³ Specifically, Galaviz alleged two separate breach of contract theories: (1) she had not breached the morals clause, which would have allowed for her termination before the expiration of the employment agreement, and (2) Post-Newsweek did not comply with the twenty-four hours notice requirement included in the morals clause.⁹⁴ Each of the altercations resulted in media coverage, including Galaviz's association with Post-Newsweek.⁹⁵ The court noted the public nature of Galaviz's employment was a consideration when determining the applicability of the morals clause to her conduct.⁹⁶ Galaviz, like other plaintiffs alleging breach of contract as a result of termination in response to an alleged violation of a morals clause, argued the clause was ambiguous, but the court disagreed.⁹⁷

In *Haywood v. University of Pittsburgh*, the court upheld the enforceability of the morals clause in its head football coach's employment contract.⁹⁸ Haywood's employment with the University was terminated after he was arrested for his involvement in a domestic

92. Kressler, *supra* note 34, at 245 (quoting *Nader v. ABC Television, Inc.* No. 04-5034-CV, 2005 WL 2404546, at 2 (2d Cir. Sept. 30, 2005)).

93. *Galaviz v. Post-Newsweek Stations*, 2009 U.S. Dist. LEXIS 59603, at 2–3, 12–17 (W.D. Tex. 2009). The morals clause in Galaviz's employment contract read,

[i]f at any time Employee fails to conduct . . . herself with due regard to public morals and decency, or if Employee commits any act or becomes involved in any situation or occurrence tending to degrade Employee in the community or which brings Employee into public disrepute, contempt, or scandal, or which materially and adversely affects the reputation or business interests of PNS or the standing of PNS as a broadcast licensee, whether or not information in regard thereto becomes public, PNS shall have the right to terminate the Agreement on twenty-four (24) hours notice to Employee.

Id. at 10–11.

94. *Id.* at 24–25.

95. *Id.*

96. *Id.* at 23.

97. *Galaviz*, 2009 U.S. Dist. LEXIS 59603, at 27.

98. See generally *Haywood v. Univ. of Pittsburgh*, 976 F. Supp. 2d 606 (W.D. Pa. 2013). Haywood's morals clause stated that the university could terminate the contract

if Haywood engaged in conduct 'that is seriously prejudicial to the best interests of the University or its intercollegiate athletics programs; that violates the University's or Department's then-current mission; that brings the University into disrepute; or that reflects dishonesty, disloyalty, willful misconduct, gross negligence, moral turpitude or refusal or unwillingness to perform his duties.'

Id. at 7–8.

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dispute.⁹⁹ In his complaint, Haywood alleged breach of contract, stating that the University failed to act in good faith in deciding to terminate his employment.¹⁰⁰ The court explained that a party may be found to have breached its duty of good faith when it unreasonably used its contractual power of discretion.¹⁰¹ Under this duty, the University was required to act reasonably when deciding whether to terminate the employment contract.¹⁰² Ultimately, the court found that a reasonable jury could find that the University had acted in good faith.¹⁰³

In *Bernsen v. Innovative Legal Marketing, LLC*, the court found that the morals clause in Bernsen's employment agreement required Bernsen to abstain from acting in a manner "tending to bring him into public disrepute."¹⁰⁴ The court noted that the morals clause gave Bernsen notice of the restraints put upon his actions, and was not ambiguous.¹⁰⁵ Ultimately, the court held that there was no evidence showing Innovative Legal Marketing (ILM) and its clients were harmed by Bernsen's actions, and that ILM may not have even considered the actions to be relevant to its decisions.¹⁰⁶ Therefore, the court denied ILM's motion for summary judgment regarding Bernsen's breach of contract claim.¹⁰⁷ Additionally, the court noted that, pursuant to Virginia law, it is improper to terminate an agreement when an immaterial breach occurs when the contract does not state an immaterial breach allows for its termination; rather, the party harmed by the breach is limited to recovery of damages.¹⁰⁸ The morals clause present in Bernsen's agreement differed from others in that it did not specifically state remedies available to ILM for violations of the

99. *Id.* at 7–8. Specifically the university decided to end its relationship with Haywood because he "br[oke] through the barricaded door of the residence, engag[ed] physically with [the other party], and act[ed] in a way which led to [his] arrest." *Id.* at 30.

100. *Id.* at 39–40.

101. *Id.* at 47.

102. *Id.* at 48.

103. *Id.* at 67.

104. *Bernsen v. Innovate Legal Mktg., LLC*, 2012 U.S. Dist. LEXIS 115325, at 12 (E.D. Va. June 20, 2012). The morals clause in Bernsen's agreement read, "Talent agrees to not commit any act or do anything which may tend to bring Talent into public disrepute, contempt, scandal or ridicule or which might tend to reflect unfavorably on the Network, their clients or on the Talent." *Id.*

105. *Bernsen*, 2012 U.S. Dist. LEXIS 115325, at 12, 14.

106. *Id.* at 24.

107. *Bernsen v. Innovative Legal Mktg., LLC*, 885 F. Supp. 2d 830, 831 (E.D. Va. 2012). The court noted a "jury could find that the evidence of ILM's continued payment and use of Bernsen's endorsement after repeated incidents potentially violative of the morality clause in the Agreement demonstrate[d] ILM's intent to" continue the relationship. *Id.* at 834.

108. *Bernsen*, 2012 U.S. Dist. LEXIS 115235, at 15–16 (quoting *RW Power Partners, L.P. v. Virginia Elec. & Power Co.*, 899 F. Supp. 1490, 1502 (E.D. Va. 1995)).

clause.¹⁰⁹ Therefore, since the contract did not specifically allow for termination of the agreement as a result of a violation of the morals clause, ILM would be limited to damages in the event of a non-material breach.¹¹⁰

In *Team Gordon, Inc. v. Fruit of the Loom, Inc.*, Team Gordon brought a breach of contract claim against Fruit of the Loom based upon Fruit of the Loom's decision not to renew its sponsorship agreement, Fruit of the Loom's alleged nonpayment of fees to Team Gordon, and Fruit of the Loom's alleged wrongful termination of the agreement in bad faith.¹¹¹ Fruit of the Loom based its decision to terminate the agreement on Gordon's behavior—Gordon threw his helmet at another person, and referred to him as “a ‘piece of shit.’”¹¹² Gordon argued the morals clause provision should have been strictly construed because it required Fruit of the Loom to exercise its discretion.¹¹³ Fruit of the Loom argued that its agreement with Team Gordon was terminated pursuant to the contract's morals clause, which allowed for termination for “‘any adverse publicity.’”¹¹⁴ Ultimately, the court refused to grant Fruit of the Loom's motion for summary judgment of the breach of contract claim, explaining that Team Gordon failed to meet the reasonable expectations of performance and conduct required for compliance with the agreement.¹¹⁵

Chris Webber, a former NBA player, brought a claim against Fila for wrongful termination. In arbitration, Webber was awarded \$2.61

109. *Id.* at 17–18.

110. *Id.*

111. *Team Gordon, Inc. v. Fruit of the Loom, Inc.*, 2009 U.S. Dist. LEXIS 16917, at 12 (W.D.N.C. Feb. 19, 2009).

112. Def.'s Mem.in Supp. of Mot. for Summ. J. at 10, *Team Gordon, Inc. v. Fruit of the Loom, Inc.*, 2009 U.S. Dist. LEXIS 16917 (W.D.N.C. July 23, 2008). The incident cited was not the first instance in which Gordon participated in detrimental behavior. *Id.* at 11. On a previous occasion, Fruit of the Loom had warned Gordon of termination after he “retaliated against another [NASCAR] driver.” *Id.* After the current instance, Jim Beam, another sponsor, took action against Gordon, warning of termination. *Id.* at 12.

113. Team Gordon, Inc.'s Trial Br. at 9, *Team Gordon, Inc. v. Fruit of the Loom, Inc.*, 2010 WL 3055175 (W.D.N.C. Jan. 24, 2010).

114. *Team Gordon*, 2009 U.S. Dist. LEXIS 16917, at 10; Def.'s Memo. in Supp. of Mot. for Summ. J. at 9, *Team Gordon, Inc. v. Fruit of the Loom, Inc.*, 2009 U.S. Dist. LEXIS 16917 (emphasis in original). The morals clause allowed for termination of the

[a]greement if Gordon ‘commits or has committed any act, or is charged with a felony, or has been or becomes involved in any situation or occurrence involving fraud, moral turpitude or otherwise reasonably tending to bring him into public disrepute, contempt, scandal or ridicule, or reasonably tending to shock, insult or offend any class or group of people, or reflecting unfavorably upon [Fruit of the Loom's] reputation or its products.’

Id. at 10–11.

115. *Team Gordon*, 2009 U.S. Dist. LEXIS 16917 at 21, 27.

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million because Fila terminated his endorsement agreement after he was fined for possession of marijuana.¹¹⁶ The arbitrator determined that the language of the morals clause in the endorsement agreement between Webber and Fila only allowed for termination “if [Webber was] *convicted* of a crime”; therefore, termination was not legally justified based upon an administrative fine, demonstrating that the language of morals clauses determine the prohibited conduct.¹¹⁷

Generally, in employment contracts, termination for the violation of a morals clause is justified if an employer reasonably foresees substantial harm to the value of the employee’s performance as a result of the employee’s behavior.¹¹⁸ However, in some cases, employees have prevailed in challenging legal conduct occurring outside the scope of employment based upon the employee’s reasonable expectation of privacy.¹¹⁹ Overall, courts tend to defer to the employer “when any business interest is at stake.”¹²⁰ In general, an employee has a duty to abstain from acting in a manner that may have detrimental effects on the employer’s interests or the employee’s performance.¹²¹ Whether this duty is breached is determined by taking into account the nature of the employment and the purported acts rendering the employee unable to perform his employment duties.¹²² The determination of whether a party to a contract may terminate its relationship with the other party based upon the other party’s violation of a morals clause is fact intensive. Ultimately, the specific conduct must fall within the

116. Pinguelo & Cendrone, *supra* note 13, at 377 (citing *Prematurely Terminated – Kings’ Webber Wins Ruling Against Fila*, CNN/SI, July 8, 1999, <http://sportsillustrated.cnn.com/basketball/nba/news/1999/07/08/webberfilaap/>).

117. Pinguelo & Cendrone, *supra* note 13, at 377

118. Joseph M. Perillo & John E. Murray, Jr., *Corbin on Contracts* § 34.8 (2013). In one instance, a district terminated a high school teacher’s employment after she “post[ed] on her Facebook page that she thought residents of the school district were ‘arrogant and snobby’ and that she was ‘so not looking forward to another year [at the school].’” Patricia Sánchez Abril et al., *Blurred Boundaries: Social Media Privacy and the Twenty-First Century Employee*, 49 AM. BUS. L.J. 63, 69 (2012) (citing *H.S. Teacher Loses Job Over Facebook Posting*, BOSTONCHANNEL.COM (Aug. 18, 2010), <http://www.thebostonchannel.com/r/2460937/detail.html>). Additionally, a flight attendant’s employment was terminated “for posting suggestive pictures of herself in her company uniform.” *Id.* (citing *Compl., Simonetti v. Delta Airlines Inc.*, No. 1:05-cv-2321, 2005 WL 2897844 (N.D. Ga. Sept. 7, 2005)). Finally, employees of a pizza chain “were fired after posting a ‘prank’ video on Youtube that showed them preparing sandwiches at work while one put cheese up his nose and mucus on the food.” *Id.* (citing Stephanie Clifford, *Video Prank at Domino’s Taints Brand*, N.Y. TIMES, Apr. 16, 2009, at B1).

119. Lieberman, *supra* note 67, at 62 (citing Marisa Anne Pagnattaro, *What Do You Do When You Are Not at Work?: Limiting the Use of Off-Duty Conduct as the Basis for Adverse Employment Decisions*, 6 U. PA. J. LAB. & EMP. L. 625, 629–30 (2004)).

120. Abril et al., *supra* note 117, at 94.

121. Kressler, *supra* note 34, at 246 (citations omitted).

122. *Id.*

contractual language of the morals clause, and the endorser must act reasonably and in good faith when terminating the relationship.

VI. AN IN-DEPTH EXAMINATION OF *MENDENHALL*
v. HANESBRANDS, INC.

Fans' criticism regarding athletes' controversial messages on Twitter may be grounds for the termination of an endorsement agreement by the endorser. In 2011, Rashard Mendenhall made comments on Twitter in reaction to the death of Osama Bin Laden.¹²³ Those comments led to Hanesbrands' termination of its endorsement agreement with Mendenhall for its brand, Champion.¹²⁴ However, Mendenhall argued that his endorsement agreement with Hanesbrands, "required [him] to use social media to express his views on 'off-the-field issues.'"¹²⁵ If this were true, Mendenhall complied with his obligations pursuant to the agreement. Further, it was likely clear that the discussion of these issues would probably raise controversy among fans; therefore, Hanesbrands should have foreseen the potential negative implications of Mendenhall's conduct.

The case of *Mendenhall v. Hanesbrands, Inc.*, involved an endorsement contract between Mendenhall and Hanesbrands that contained a morals clause.¹²⁶ Mendenhall did not allege that the morals clause itself was unenforceable; rather, he alleged that the use of the clause to terminate his agreement with Hanesbrands was unreasonable and violated the parties' understanding of Mendenhall's use of Twitter to

123. Kressler, *supra* note 34, at 246 at 23–24 (citations omitted).

124. Mendenhall had previously made comments that may have been deemed controversial. In the past, he had tweeted his beliefs regarding "Islam, women, parenting, and relationships, and made comments in which [he] compared the NFL to the slave trade." *Mendenhall v. Hanesbrands, Inc.*, 856 F. Supp. 2d 717, 720 (M.D.N.C. 2012). While these statements may have been determined to be controversial or to the detriment of the value of the Champion brand or Hanesbrands, Hanesbrands did not terminate his endorsement agreement. *Id.* In terminating its agreement, Hanesbrands wrote, "While we respect Mr. Mendenhall's right to express sincere thoughts regarding potentially controversial topics, we no longer believe that Mr. Mendenhall can appropriately represent Champion and we have notified Mr. Mendenhall that we are ending our business relationship." Compl. at ¶ 39, *Mendenhall v. Hanesbrands, Inc.*, 856 F. Supp. 2d 717 (M.D.N.C. 2012).

125. Pl.'s Memo. in Opp'n to Def.'s Mot. for J. on the Pleadings at 1, *Mendenhall v. Hanesbrands, Inc.*, 856 F. Supp. 2d 717 (M.D.N.C. 2012). The extended agreement between Mendenhall and Hanesbrands included "a provision regarding 'Social Media,' contemplating that Mr. Mendenhall would make use of certain social media to express his 'thoughts and views regarding his partnership with the Champion brand, playing in the NFL and off-the-field issues.'" Compl. at P15, *Mendenhall v. Hanesbrands, Inc.*, 856 F. Supp. 2d 717 (M.D.N.C. 2012).

126. See generally *Mendenhall*, 856 F. Supp. 2d 717.

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express his opinions.¹²⁷ The morals clause in Mendenhall and Hanesbrand's agreement read:

If Mendenhall commits or is arrested for any crime or becomes involved in any situation or occurrence (collectively, the "Act") *tending to bring* Mendenhall into public disrepute, contempt, scandal, or ridicule, or tending to shock, insult or offend [sic] the *majority of the consuming public* or any protected class or group thereof, then we shall have the right to immediately terminate this Agreement. [Hanesbrands, Inc.'s] decision on all matters arising under this Section 17(a) shall be conclusive.¹²⁸

Based upon the language used in the agreement—"tending to"—Hanesbrands had broad latitude in its decision making, allowing for immense discretion in determining whether to continue or to sever its relationship with Mendenhall.¹²⁹ Mendenhall alleged Hanesbrands' over-encompassing interpretation of the clause was inconsistent with the parties' course of dealing.¹³⁰ Therefore, Hanesbrands breached the contract because, in terminating the agreement, Hanesbrands violated the implied covenant of good faith and fair dealing.¹³¹ This implied duty of good faith required Hanesbrands use its discretionary power in a reasonable manner, with proper motive, and in a way that was consistent with the parties' reasonable expectations.¹³² In general, the implied covenant of good faith and fair dealing requires a party using its discretionary power—such as its power to terminate an endorsement agreement—to not act in an arbitrary, irrational, or unreasonable manner.¹³³

Mendenhall argued that in other cases involving similar morals clauses, violent or alleged criminal behavior was used as the basis for

127. *Id.* at 725; *see also* Pl.'s Memo. in Opp'n to Def.'s Mot. for J. on the Pleadings at 8, *Mendenhall v. Hanesbrands, Inc.*, 856 F. Supp. 2d 717 (M.D.N.C. 2012).

128. Pl.'s Memo. in Opp'n to Def.'s Mot. for J. on the Pleadings at 2, *Mendenhall v. Hanesbrands, Inc.*, 856 F. Supp. 2d 717 (M.D.N.C. 2012) (emphasis added); *see also* Joseph M. Perillo & John E. Murray, Jr., *supra* Note 119, at § 34.8. . This morals clause was not the original. The original clause stated that "Hanesbrands could not terminate Plaintiff unless he was 'arrested for and charged with, or indicted for or convicted of any felony or crime involving moral turpitude.'" Reply Memo. in Further Supp. of Def.'s Mot. for J. on the Pleadings at 3, *Mendenhall v. Hanesbrands, Inc.*, 856 F. Supp. 2d 717 (M.D.N.C. 2012). Hanesbrands stated that it "specifically bargained for the new [provision], which broadened the scope of Hanesbrands' termination rights to include other situations or occurrences which would potentially result in damage to [Mendenhall's] public image or reputation." Memo. in Supp. of Def.'s Mot. for J. on the Pleadings at 5, *Mendenhall v. Hanesbrands, Inc.*, 856 F. Supp. 2d 717 (M.D.N.C. 2012).

129. SELZ ET AL., *supra* note 25, at § 9:107.

130. *Mendenhall*, 856 F. Supp. 2d at 725.

131. *Id.* at 720.

132. *Id.* (The court noted that Hanesbrand could not "act arbitrarily, irrationally or unreasonably in exercising [its] discretion.")

133. Joseph M. Perillo & John E. Murray, Jr., *supra* Note 119, at § 34.8 n. 32.

terminating the agreements.¹³⁴ In a public statement, Hanesbrands stated that they “no longer believe[d] that Mr. Mendenhall [could] appropriately represent Champion and [they had] notified Mr. Mendenhall that [they were] ending [the] business relationship.”¹³⁵ While the morals clause required that Mendenhall be brought into public disrepute, Mendenhall cited both negative and positive reactions to his comments.¹³⁶ This dichotomy of comments led the court to find that the facts regarding the public’s reaction to Mendenhall’s tweets were in dispute.¹³⁷

To show Hanesbrands’ violation of the duty of good faith and fair dealing, Mendenhall pointed to Hanesbrands’ relationship with Charlie Sheen, who had publicly made controversial comments regarding the 9/11 attacks.¹³⁸ Because Hanesbrands allowed Sheen to comment on the attacks, it was unreasonable for Hanesbrands to view Mendenhall, making similar comments, as having violated the morals clause.¹³⁹ Ultimately, Sheen’s statements regarding 9/11 were not enough for Hanesbrands to terminate his contract; the termination of the celebrity’s contract with Hanesbrands arose as a result of Sheen’s criminal charges.¹⁴⁰

Based on the above reasoning, Mendenhall may have ultimately succeeded in his breach of contract claim against Hanesbrands for violating their duty of good faith and fair dealing. Hanesbrands terminated its relationship with Mendenhall based upon its own belief rather than the actual belief of the public.¹⁴¹ In its statements, Hanesbrands noted it disagreed with the comments Mendenhall made regarding the death of Osama bin Laden on Twitter.¹⁴² Conversely, the

134. Pl.’s Memo. in Opp’n to Def.’s Mot. for J. on the Pleadings at 7, *Mendenhall v. Hanesbrands, Inc.*, 856 F. Supp. 2d 717 (M.D.N.C. 2012) (citing *Galaviz v. Post-Newsweek Stations*, 380 Fed. Appx. 457 (5th Cir. 2010); *Nader v. ABC Television, Inc.*, 330 F. Supp. 2d 345 (S.D.N.Y. 2004)).

135. *Mendenhall*, 856 F. Supp. 2d at 722.

136. *Id.* at 727. While it is unclear what the term “public disrepute” meant, the court seemed to imply that the term required an overwhelmingly negative response to the statements. *Id.* at 726.

137. *Id.*

138. Pl.’s Memo. in Opp’n to Def.’s Mot. for J. on the Pleadings at 9, *Mendenhall v. Hanesbrands, Inc.*, 856 F. Supp. 2d 717 (M.D.N.C. 2012); see also David Donovan, *NFL Star Wins Key Ruling in Endorsement Suit*, N.C. LAW. WEEKLY (May 4, 2012).

139. See *Mendenhall*, 856 F. Supp. 2d at 725.

140. See *Mendenhall*, 856 F. Supp. 2d at 725.

141. See generally *Mendenhall*, 856 F. Supp. 2d at 717. . Arguably, if Hanesbrands intended the agreement to be rescinded for its own disagreement rather than the public’s disagreement, the contract may have been illusory. Above the Law, *When Celebrity Tweeting Goes Wrong and the Resulting Lawsuit Goes (Sort of) Right*, ABOVE THE LAW (Apr. 18, 2012, 9:00PM).

142. See Pl.’s Memo. in Opp’n to Def.’s Mot. for J. on the Pleadings at 8, *Mendenhall v. Hanesbrands, Inc.*, 856 F. Supp. 2d 717 (M.D.N.C. 2012).

court was unable to find sufficient evidence to show that the majority of public comments in response to Mendenhall's tweets were negative.¹⁴³ However, what some individuals fail to recognize is that *public*, not *endorser*, *disrepute* is essential.¹⁴⁴ Therefore, because Hanesbrands ended its relationship with Mendenhall based upon its own disapproval of his statements,¹⁴⁵ Hanesbrands' termination of its endorsement agreement with Mendenhall constituted a violation of the implied covenant of good faith and fair dealing. Based upon this outcome, it is plausible that an athlete-endorsee could succeed on a claim of violation of the duty of good faith and fair dealing when the endorser acts based upon its own disapproval of the athlete-endorsee's conduct, instead of the public's view of the conduct.

VII. ATHLETES MAY PREVAIL IN AN ACTION AGAINST AN ENDORSER FOR TERMINATION

When an athlete-endorsee's contract with an endorser is terminated via rescission by the endorser due to an alleged breach of the morals clause, the athlete-endorsee may pursue a breach of contract claim against the endorser. To do so, the athlete-endorsee should allege that his conduct fell outside of what the morals clause covered.¹⁴⁶ In such a case, the court would examine the meaning of the morals clause, based upon its language and a determination of what it would cover, and then the court would determine whether the endorsee's conduct fell within the purview of that clause. The court would also need to determine whether or not the breach was material.¹⁴⁷

While morals clauses tend to be broad, depending upon the exact language of the clause, an athlete-endorsee may be able to argue that his conduct fell outside the confines of the provision.¹⁴⁸ For instance,

143. *Mendenhall*, 856 F. Supp. 2d at 726–27.

144. Hopkins et al., *supra* note 8, at 24. According to Black's Law Dictionary, *disrepute* is “[a] loss of reputation; dishonor.” Katz, *supra* note 11, at 213 n. 150 (quoting Black's Law Dictionary (9th ed. 2009)). However, the Court of Arbitration for Sport “has defined ‘bringing a person into disrepute’ as ‘lowering the reputation of the person in the eyes of ordinary members of the public to a significant extent.’” *Id.* at 215 (quoting Nicholas D'Arcy v. Australian Olympic Committee, CAS 2008/A/1539 (May 27, 2008), <http://jurisprudence.tas-cas.org/sites/CaseLaw/Shared%20Documents/1539.pdf>).

145. Pl.'s Memo. In Opp'n to Def.'s Mot. For J. on the Pleadings at 8, *Mendenhall v. Hanesbrands, Inc.*, 856 F. Supp. 2d 717 (M.D.N.C. 2012).

146. *See generally Nader*, 150 Fed. App'x. 54 (holding that the claim that Nader's conduct was not within the coverage of the morals clause was meritless).

147. *See Bernsen*, 2012 U.S. Dist. at 15–16 (noting that “[w]here the breach is not material and the contract does not explicitly state that an immaterial breach will excuse future performance, termination of the contract is improper, and the injured party is limited to damages for the breach”).

148. *See generally Mendenhall*, 856 F. Supp. 2d at 717.

actual, as opposed to potential, public disrepute must occur for the morals clause to be triggered. Although no single or clear definition of public disrepute exists, it may be interpreted as when an individual loses his good reputation or is dishonored in the eyes of the public.¹⁴⁹ A morals clause requiring a showing that public opinion regarding the conduct is actually negative may read as, “The endorser is entitled to terminate this agreement with the endorsee, if the endorsee acts in a manner bringing the endorser or the endorser’s products into public disrepute, disfavor, contempt, scandal or ridicule, or engages in conduct the majority of the public disfavors.”¹⁵⁰ With this type of clause, the endorser would need to show the public *actually* disagreed with or viewed the product less favorably than it did before the endorsee’s conduct, and that the endorsee’s conduct was the reason for the change in opinion.

While Hanesbrands was extended broader protection pursuant to the morals clause in its agreement with Mendenhall by using the word “*tending*,” thus, allowing for the acts to not necessarily bring about the consequences outlined in the clause, the clause also required the disrepute to extend from the “*majority*” of the public.¹⁵¹ This majority requirement necessitated a showing of extensive disapproval, a fact Hanesbrands would not have been able to show because of the mixed reactions to Mendenhall’s comments.¹⁵² An additional issue with this majority requirement is the difficulty in determining whether a majority of individuals disapprove of Mendenhall’s comments, as such a showing would require a quantitative measure of public opinion.¹⁵³ While the word “*tending*” requires no more than an inference of disrepute, the actual response from the public did not imply that the majority of the public disapproved of Mendenhall’s conduct.¹⁵⁴

Additionally, the athlete-endorsee may base his breach of contract claim on a purported violation of the duty of good faith and fair dealing.¹⁵⁵ To determine whether this duty was breached, the court may look at the clauses that have resulted in breaches justifying termination and clauses that have not resulted in breaches justifying termination. The court may also look at the public’s opinion in determining whether the athlete-endorsee’s actions brought him into public disre-

149. Katz, *supra* note 11, at 213 n. 150 (quoting Black’s Law Dictionary (9th ed. 2009)) (defining disrepute is “[a] loss of reputation; dishonor”).

150. See generally Parts III–V.

151. See *Mendenhall*, 856 F. Supp. 2d at 726–27.

152. *Id.*

153. See generally *id.*

154. *Id.*

155. *Id.* at 722.

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pute.¹⁵⁶ The community, time, and place of the endorsee's conduct will determine whether his conduct "shock[s] the conscience of the community, and affect[s] the value of the [endorsee's] performance."¹⁵⁷ Determining if a morals clause has been violated pursuant to public values is a fact-sensitive inquiry and changes over time with fluctuating attitudes of the community.¹⁵⁸ Adding to this difficulty is the fact no single definition of "moral" or "moral turpitude" exists.¹⁵⁹

To avoid issues regarding the standard by which an alleged violation of the morals clause is measured, the endorser should specifically detail the means that will be used to determine whether a violation has occurred.¹⁶⁰ Additionally, the agreement may provide more protection for the endorsee and endorser when it is specifically tailored to the individual parties.¹⁶¹ For instance, by precisely detailing past conduct in which the athlete has engaged, the endorser may protect itself from potential disrepute from similar actions that may occur in the future.¹⁶² A morals clause between an endorsee and endorser may detail a public statements trigger.¹⁶³ This trigger could ban "acts and/or statements to those that intend (rather than just 'tend') to cause harm to [the endorser's] interests, products, and brands," and "specify what medium of communication" the clause covers.¹⁶⁴ By requiring intention, an athlete-endorsee may be protected from misconstrued statements or statements meant to be harmless, like those made by Mendenhall.¹⁶⁵ Reebok's Endorsement Agreement includes a section regarding "Damaging Statements," which reads,

Athlete or any person authorized by Athlete, at any time during the Term makes damaging or unfavorable public statements regarding Athlete's association with Reebok, or Reebok products, programs or personnel, or speaks favorably of Competitors or their products in a manner which has the effect of discrediting Reebok Products or promoting the products of a Competitor.¹⁶⁶

156. See generally Pl.'s Memo. In Opp'n to Def.'s Mot. For J. on the Pleadings, *Mendenhall v. Hanesbrands, Inc.*, 856 F. Supp. 2d 717 (M.D.N.C. 2012).

157. Joseph M. Perillo & John E. Murray, Jr., *supra* Note 119, at § 34.8.

158. Pinguelo & Cendrone, *supra* note 13, at 352.

159. *Id.* at 352, 375 (citing Martin J. Greenberg, *College Coaching Contracts Revisited: A Practical Perspective*, 12 *MARO. SPORTS L. REV.* 127, 215-216 (2001)). According to Black's Law Dictionary, moral turpitude is "conduct that is contrary to justice, honesty, or morality." Katz, *supra* note 11, at 207 n. 118 (quoting Black's Law Dictionary (9th ed. 2009)).

160. See Auerbach, *supra* note 16, at 10.

161. Katz, *supra* note 11, at 189; see also Gibeaut, *supra* note 64.

162. See generally SELZ ET AL., *supra* note 25, at § 9:107.

163. Katz, *supra* note 11, at 225.

164. *Id.*

165. See generally *Mendenhall*, 856 F. Supp. 2d at 717.

166. Katz, *supra* note 11, at 225 n. 209.

However, in a case like *Mendenhall*, this specific clause would not provide the endorser with any protection because the statements were not made in relation to Champion.¹⁶⁷

Additionally, a general morals clause may require an endorsee to resign his rights to his social media accounts.¹⁶⁸ An added social media clause may be added to the endorsement agreement as well.¹⁶⁹ By including this clause, the exact methods and prohibited conduct would be detailed. This may potentially deter the athlete-endorsee from acting in a manner that is restricted by the clause and would provide protection to the endorser.¹⁷⁰

Finally, when terminating an endorsement agreement, endorsers should act consistently by taking similar action concerning different endorsees whose conduct mirrors one another.¹⁷¹ Conversely, an athlete pursuing an action against an endorser for termination may find effective arguments in distinctive actions taken by the endorser against similar actions by two endorsees. By showing these differences, the athlete-endorsee may be able to show that the endorser acted in an unreasonable and arbitrary manner in terminating the relationship, violating the contract's implied covenant of good faith and fair dealing.

VIII. CONCLUSION

Athletes will continue to find themselves in hot water as a result of their statements on social media. Therefore, athletes and their representatives must develop a method of ensuring the athlete acts permissibly when involved in an endorsement contract containing a morals clause. Furthermore, athlete representatives should strive to obtain a morals clause favorable to the athlete, and explicitly detailing behavior that is impermissible.

Mendenhall's modest success in his case against Hanesbrands may signal the availability of recourse for athlete-endorsees whose en-

167. See generally *Mendenhall*, 856 F. Supp. 2d at 717.

168. Taylor & Cendrone, *supra* note 40, at 111. If a provision regarding social media is included in the endorsement agreement, it should include "current [and] future, yet undiscovered social media." *Id.* at 112. The broader the clause, the more likely endorsee's conduct will be covered and allow for termination. Wood, *supra* note 38. Some agencies go as far as taking over their athlete's Twitter accounts. They "window dress the Twitter [page] and get [the athlete] involved in charities" because "general managers and owners look at [the pages]." Kalis, *supra* note 63.

169. *In Wake of Scandals, Marketers Should Pay Extra Attention to Morals Clauses*, IMPACT (Jan. 27, 2013).

170. See Epstein, *supra* note 17, at 23–24.

171. See generally Pl.'s Memo. in Opp'n to Def.'s Mot. for J. on the Pleadings, *Mendenhall v. Hanesbrands, Inc.*, 856 F. Supp. 2d 717 (M.D.N.C. 2012).

endorsement contracts are terminated based upon the endorser's subjective disagreement with the athlete-endorsee's conduct. Endorsers should take note, and ensure that termination of these agreements is based upon public opinion when the clause requires public disrepute. Additionally, endorsees should carefully examine the circumstances of the termination of the relationship, taking note of any evidence denoting the decision to end the contract, due to the endorser's disagreement.

Courts have yet to fully examine the evolution of social media and a tech-savvy public's impact upon the termination of endorsement agreements stemming from alleged violations of the morals clause. Because the endorser may bear substantial liability if the court finds for the endorsee, it seems unlikely that a case regarding this issue will ever fully be litigated. However, based upon the outcome of the *Mendenhall* case, it is possible an athlete could prevail in a breach of contract action against an endorser that terminated its agreement with that athlete pursuant to the contract's morals clause. Prior to *Mendenhall*, an athlete-endorsee might not have pursued legal action, believing it to be fruitless. However, *Mendenhall* ignites hope for an athlete-endorsee wishing to pursue an action for the termination of his endorsement agreement based upon a violation of the duty of good faith and fair dealing or based upon the thought that his conduct fell outside of the morals clause. Like athletes, these endorsement agreements are no longer infallible.