
Out of the Octagon and into the Courtroom: The UFC's Antitrust Lawsuit

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Out of the Octagon and into the Courtroom: The UFC's Antitrust Lawsuit

Cover Page Footnote

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Out of the Octagon and into the Courtroom: The UFC's Antitrust Lawsuit

I. Introduction

Mixed Martial Arts has taken over the world of sports in recent years, becoming wildly popular both in the United States and abroad. The Ultimate Fighting Championship and its President Dana White have grown the sport to unimaginable heights in the last twenty years, however, with growth comes growing pains, as the company has found itself involved in several fighter lawsuits.

This comment will first provide a brief introduction the sport of Mixed Martial Arts and an overview of the Ultimate Fighting Championship and its ascension to the top mixed martial arts promotion in North America. It will then explore the current lawsuit, *Cung Le, et al. v. Zuffa, LLC d/b/a Ultimate Fighting Championship*, and explain the issues, parties, and procedural history of the case. Finally, this Comment will explain potential avenues of resolving the case.

A. The Ultimate Fighting Championship and the sport of Mixed Martial Arts.

The Ultimate Fighting Championship, commonly known as “the UFC,” is the largest mixed martial arts (MMA) promotion in the western world. The UFC headquartered in Las Vegas, Nevada,¹ promotes MMA bouts in the United States and abroad, televises those events live via a Pay-Per-View (PPV) or network television, and licenses, sells, and distributes MMA merchandise (apparel, video games, gyms, etc.).² The Mixed martial arts, took various fighting disciplines and placed them under one banner, with each discipline becoming a component of MMA. In the words of the athletes, “[MMA] is a unique blend of various martial arts disciplines,” including boxing, Muay Thai, judo, wrestling, Brazilian jiu-jitsu, taekwondo, and karate. MMA differs from other professional combat sports, such as boxing, because the rules of MMA allow for kicks, takedowns,

¹ *UFC Corporate Office Headquarters*, June 22, 2019. <https://corporateofficeheadquarters.org/ufc/>.

² *Cung Le v. Zuffa, LLC*, 108 F. Supp. 3d 768, 771 (N.D. Cal. 2015).

chokeholds, joint-locks, or any strikes below the waist.”³ The UFC is composed of twelve weight classes, four for women and eight for men. Overall, the UFC roster at any given moment has upwards of 600 fighters.⁴

B. *History*

The UFC has become an eponym for MMA to most Americans, the same way the MLB is an eponym for the sport of baseball. MMA as a sport is relatively new, emerging roughly in the 1990’s and the UFC formed in 1993.⁵The twenty-seven-year history of the UFC is complex, but can be divided into three phases; the Dark Ages, the Zuffa era, and the Endeavor era. The UFC was created to answer the question of which discipline of martial arts was superior? The early UFC relied on the freakshow element of pitting a boxer against a sumo wrestler. At its inception, the UFC was advertised as a no holds barred contest, referees were not allowed to stop a fight, judges were not involved, groin strikes were legal, and gloves were optional. The UFC used the tagline no holds barred and predicated itself on being a violent spectacle. The emphasis on violence saw the sport of MMA be banned in states, which created the Dark Ages for the UFC. Senator John McCain led the charge against the sport attempting to outlaw it as he viewed the sport as “human cockfighting”.⁶ The Senator penned a letter to all the state Governors asking them to outlaw the infant sport.⁷ The bans that McCain championed remained in effect until 2016 when New York became the last state to legalize the sport. Senator McCain was not opposed to all combat sports

³ *Id.*

⁴ Zane Simon, *List of Current UFC fighters*, Apr 19, 2022, <https://www.bloodyelbow.com/2013/1/29/3928296/ufc-roster-current-list-fighters>.

⁵ Thomas Gerbasi, *Revisiting UFC 1: The Beginning*, UFC, Nov. 11 2019, <https://www.ufc.com/news/revisiting-ufc-1-beginning>.

⁶ Matt De La Rosa, *Historic MMA Rivalries, Part Five: Politicians vs. MMA*, Bleacher Report, Feb. 25 2009, <https://bleacherreport.com/articles/129309-historic-mma-rivalries-part-5-politicians-vs-mma>.

⁷ *Id.*

as he was an avid fan of boxing. Senator McCain was one of the architects and chief supporters of the *Muhammad Ali Boxing Reform Act*.⁸

For the fledgling sport to remain legal, state commissions were created to oversee the sport. State commissions were already utilized for boxing and therefore were adopted to provide oversight for mixed martial arts. The state commissions in conjunction with the UFC created the first version of the Unified Rules of MMA. The Unified Rules are the “official” rules of MMA, governing the UFC in the United States and internationally. The unified rules are not universal as some states, nations, and promotions have revised or added additional rules to the unified rules.⁹ The unified rules provided sweeping regulation and much-needed structure to the sport. Structural changes created by the Unified Rules included weight classes, time limits, round limits, the scoring system, penalties, and banning of certain techniques. The Unified Rules borrowed heavily from boxing rules as MMA was viewed as an offspring of boxing, therefore the rules were carried over. These rules were the foundation for modern MMA and forever linked MMA and boxing. The Unified Rules and government intervention ensured that MMA would remain legal in the United States.

The Dark Ages ended with the “TUF Boom”. The Ultimate Fighter (TUF) was a reality show conceived by Zuffa to introduce the sport to a wide audience. The show was broadcast on network television at a time when all other UFC events were Pay-Per-View (PPV). The show's penultimate bout-Bonner v. Griffin- has been deemed the fight that saved the UFC.¹⁰ The fight brought in new viewers to the sport and the UFC. After the fight, the UFC began its ascension to

⁸ Muhammad Ali Boxing Reform Act, H.R. 1832, 106th Cong. (2000). Available at: <https://www.govtrack.us/congress/bills/106/s305>.

⁹ *Unified Rules of Mixed Martial Arts*, UFC, <https://www.ufc.com/unified-rules-mixed-martial-arts>.

¹⁰ Ben Fowlkes, *Today in MMA History: Forrest Griffin and Stephan Bonnar save the UFC- or the story goes*, Apr. 9, 2020, <https://mmajunkie.usatoday.com/2020/04/forrest-griffin-vs-stephan-bonnar-ufc-tuf-finale-today-in-mma-history>.

the company Americans know today. Following the TUF Boom, the UFC entered a period of rapid expansion. The UFC began acquiring other MMA promotions domestically and abroad. The UFC purchased World Fighting Alliance (WFA), World Extreme Cagefighting (WEC), PRIDE, and Strikeforce. The UFC became the largest MMA promotion absorbing fighters from the purchased organizations and failed promotions including EliteEC and Affliction. The UFC roster increased in size with the absorption of fighters from all of the former promotions. Due to many of the premier promotions shutting down and the UFC signing the top-tier talent from these defunct promotions, new rising MMA fighters had only one option: the UFC. During this period, the UFC marketed fighters to become household names, and stars emerged such as Ronda Rousey, Connor McGregor, Jon Jones, and Brock Lesner. The UFC increased its promotion schedule to put on more events, thirty-one events were held in 2013, up from twenty-three shows in 2010.¹¹ Events were aired both on Pay-Per-View and broadcast on network television-FOX-for free. Reebok and the UFC partnered so all fighters would wear standardized Reebok fight kits during fight week, this was done to create a uniform look for the sport. After the Reebok deal fighters were barred from having individual sponsors on their fight attire. UFC fight kits transitioned from looking like NASCAR suits to an MLB-style uniform.

The Endeavor era is the current era of the UFC. Endeavor became the owners after a 4-billion-dollar purchase of the UFC. Endeavor oversaw the UFC's new exclusive broadcast deal with ESPN (a subsidiary of Disney).¹² The ESPN deal saw free fights aired on ESPN, ESPN+, and ABC along with the continued PPV events. Under Endeavor the UFC, Venum became the new UFC outfitter replacing Reebok. Finally, Endeavor went public as a company, therefore the UFC

¹¹ David Lange, *Ultimate Fighting Championship (UFC) Statistics & Facts*, Statista, Aug 29, 2019, <https://www.statista.com/topics/3376/ultimate-fighting-championship-ufc/#dossierKeyfigures>.

¹² Marc Raimondi, *UFC inks apparel deal with Venum that will begin in 2021*, ESPN, Jul. 10, 2020, https://www.espn.com/mma/ufc/story/_/id/29440946/ufc-inks-apparel-deal-venum-which-begins-2021.

became a publicly-traded company, a distinction from other major sports promotions.¹³ All of the major sports leagues are privately held companies. Additionally, the UFC going public was unique in the combat sports realm, as top boxing promotions (Top Rank Inc., Golden Boy Promotions, and Mayweather Promotions LLC) are privately held¹⁴. Sports teams including the Green Bay Packers and Manchester United are publicly traded companies.¹⁵

C. Procedural History

The case was filed in 2014 in the United States District Court Northern District of California.¹⁶ The UFC filed a motion to transfer the venue, which was granted, now the case is before the United States District Court of Nevada. The UFC has attempted to resolve the case short of a trial twice, with a motion to dismiss (filed in 2015) and a motion for summary judgment (filed in 2018), but both were denied.¹⁷ The motion to dismiss was denied after the court reasoned

The lawsuit alleges that the UFC created a monopoly and a monopsony over the professional MMA industry in the United States. The UFC created the monopoly and monopsony by engaging in unfair business practices including, buying all rival MMA promotions, directly forcing other MMA promotions to close, and restrictions placed on venues.¹⁸ Resulting from the monopoly the plaintiffs allege that without competition UFC engaged in unfair business

¹³ Echo Wang, *UFC-owner Endeavor raises \$511 million in IPO, valued at \$10.3 billion*, Reuters, Apr. 28, 2021, <https://www.reuters.com/article/us-endeavor-group-ipo/ufc-owner-endeavor-raises-511-million-in-ipo-valued-at-10-3-billion-idUSKBN2CF2YR>.

¹⁴ *Boxing Promoters Industry in the US - Market Research Report*, Mar. 14, 2022, <https://www.ibisworld.com/united-states/market-research-reports/boxing-promoters-industry/#:~:text=The%20companies%20holding%20the%20largest,Promotions%20and%20Mayweather%20Promotions%20LLC>.

¹⁵ Weston Blasi, *Here are the public sports teams you can invest in*, Market Watch, Feb. 12 2021, <https://www.marketwatch.com/story/the-boston-red-sox-will-no-longer-be-taken-public-here-are-the-sports-franchises-you-can-invest-in-11613070621>.

¹⁶ *Timeline*, UFC Antitrust Lawsuit, <https://www.ufcclassaction.com/timeline> (last visited June 25, 2022).

¹⁷ *Id.*

¹⁸ *Cung Le v. Zuffa, LLC*, 108 F. Supp. 3d 768, 771 (N.D. Cal. 2015) (Compl. available at: <https://angeion-public.s3.amazonaws.com/www.FighterClassAction.com/docs/ECF+No.+1+-+Complaint.pdf>).

practices.¹⁹ The UFC allegedly kept fighters pay the minimum, purposely tanked a fighter's value entering free agency and the UFC contracts prevented champions from entering into free agency, etc.

Antitrust lawsuits are not new to the professional sports world as nearly every major North American sports league has faced one. The MLB cannot be held liable under the Sherman Act as baseball does not qualify as interstate commerce.²⁰ The UFC lawsuit differs from other antitrust cases as the case obtained class action distinction. Class actions allege that due to the alleged practice being so widespread it is in the court's best interest to merge all the cases into one. A class action saves time and resources for the court, instead of handling litigation on a case-by-case basis.²¹ Class actions often affect many individuals, in this case, every fighter who has fought in the UFC. No other antitrust sports lawsuit involved every player in the league. Class actions, due to their size and publicity, often bring about substantive changes to an industry. Famously, the Master Tobacco Settlement of 1998²² required that tobacco companies no longer target youth, placed restrictions on advertising, and banned free tobacco products along with a billion-dollar payment fund established. This settlement fundamentally changed the tobacco industry, as many of their business practices were no longer allowed. The court certified two classes, an identifying class, and a bout class.

Bout Class: All persons who competed in one or more live professional UFC-promoted MMA bouts taking place or broadcast in the United States from December 16, 2010, to June 30, 2017. Bout Class excludes all persons

¹⁹ *Id.*

²⁰ *National League of Professional Baseball Clubs*, 259 U. S. 200 (1922).

²¹ Cornell Law School ,*Class Action*, https://www.law.cornell.edu/wex/class_action.

²² *Master Settlement Agreement*, Public Health Law Center at Mitchell Hamline School of Law, <https://www.publichealthlawcenter.org/topics/commercial-tobacco-control/master-settlement-agreement>.

who are not residents or citizens of the United States unless the UFC paid such persons for competing in a bout fought in the United States. Identity Class: Every UFC Fighter whose Identity was expropriated or exploited by the UFC, including in UFC Licensed Merchandise and/or UFC Promotional Materials in the United States from December 16, 2010, to June 30, 2017

The two classes are distinguishable. The Bout class is the larger of the groups as it includes every individual who fought in the UFC between 2010 and 2017. The Identifying class is the smaller class only incorporating individuals whose name, image, or likeness was used in UFC promotional material or UFC merchandise. For example, the identity class includes fighters whose image was used on promotional posters without the fighters receiving compensation. The final update in the case occurred in June 2021, with a demand for a jury trial. A second identical complaint was filed to expand the class from 2017 until the current date.²³ This was done to ensure that all active UFC fighters would be eligible for relief.

II. *The Case*

This section explores the current lawsuit-*Cung Le, et al. v. Zuffa, LLC d/b/a Ultimate Fighting Championship*.²⁴ It will further explain the issues in question, the parties, and the procedural history of the case. The lawsuit originated from the Zuffa era and litigation has continued into the Endeavor era.

A. *The Plaintiffs*

The lawsuit was filed by three former UFC fighters, Cung Le, Jon Fitch, and Nate Quarry. Four additional fighters were added to the complaint. As of 2022, the original fighters who filed the suit were either retired from the sport or no longer competing for the UFC. The fighters

²³ *Le supra* note 18.

²⁴ *Cung LE et al, v. ZUFFA, LLC, d/b/a Ultimate Fighting Championship and UFC.*, 2015 WL 10008670 (D.Nev.).

themselves each had an impressive resume and high professional success. Cung Le fought in the main event slot for events and served as a coach on TUF. Both honors require a fighter to have notability and high-end talent. Jon Fitch was a champion outside the UFC in the World Series of Fighting, competed for a UFC title, and fought in the main event. At the time of his departure from the UFC, he was ranked in the top 15. Notably Dana White the UFC President complained about Fitch's fighting style calling him boring. Nate Quarry²⁵ had a winning UFC record and was in the top 25 for middleweights. Other fighters had less notable careers but did have main event title fights.

Main event slots-regardless of their championship status-are 5 rounds instead of the standard 3. Fighters who compete in this bout slot tend to be the highest-paid individuals on the card and may receive PPV points. A fighter is placed in the main event slot to sell shows as their name appears on all marketing materials. Therefore, the UFC wants to place only high-profile, well-known, and top-end talent in these positions, so the show sells better. Moreover, these slots remain reserved for a fighter with star power and top-level talent.

Cung was not the first case involving the UFC and a former fighter. The UFC has been involved in other high-profile lawsuits filed by fighters. Former title challenger Mark Hunt filed suit after the promotion allowed Brock Lesner to fight despite not undergoing the required United States Anti-doping Association (USADA) testing. The UFC also sued former champion Randy Couture to prevent him from fighting in another promotion. While not litigation, UFC President and face of the organization Dana White has publicly criticized fighters for both their in-cage and out-of-cage performance.

²⁵ Nate Quarry, UFC, <https://www.ufc.com/athlete/nate-quarry> (last visited June 30, 2022).

B. *The Complaint and Allegations*

The complaint alleges that the UFC violated Section 2 of the Sherman Act, 15 U.S.C. §

2.²⁶ The complaint states,

This is a civil antitrust action under Section 2 of the Sherman Act, 15 U.S.C. § 2, for treble damages and other relief arising out of Defendant's overarching anticompetitive scheme to maintain and enhance its (a) monopoly power in the market for the promotion of live Elite Professional mixed martial arts ("MMA") bouts,¹ and (b) monopsony power in the market for live Elite Professional MMA Fighter services.

Monopoly power is defined as 'the power to control prices or exclude competition.' Mere proof of exclusionary conduct is not sufficient to prove a dangerous probability of success; other proof of market power is required.²⁷ Mere market dominance does not create a monopoly on its own. The court examines a potential monopoly in three stages, market power, exclusionary conduct, and business justification.²⁸ First-market power in this tier the court examines the percent of sales in a defined geographic area, the durability of the business model, and if new competition would disrupt the business model.²⁹ Second-exclusionary conduct A this tier the court will ask, were the practices used to achieve market superiority predatory in nature, or was the product the best available?³⁰ The final tier is business justification. At this stage, the question before the court

²⁶ Monopolizing trade a felony; penalty, 15 U.S.C.A. § 2.

²⁷ *Le v. Zuffa, LLC*, 216 F. Supp. 3d 1154, 1161 (D. Nev. 2016).

²⁸ *Monopolization Defined*, Federal Trade Commission, <https://www.ftc.gov/advice-guidance/competition-guidance/guide-antitrust-laws/single-firm-conduct/monopolization-defined>.

²⁹ *Id.*

³⁰ *Id.*

is the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident.³¹ If after the third stage the court finds the business practice to be based on mere power then a monopoly will exist.

The elite fighter was a term explicitly created for litigation.³² The term was used to distinguish top-tier talent, based on certain criteria from professional fighters to define a class. In traditional sports NBA, NFL, and MLB, the individual teams within the league create the market and competition. Teams vie for the same talent that exists within a league by acquiring free agents and trading. Teams also compete to draft new talent through a draft or recruit talent internationally. A player has the opportunity to move from one team to another, based on the contract presented to them. In individual sports, such as MMA, this is not possible, as interleague competition is nonexistent. Fighters sign to a promotion and then only fight fighters from the same promotion. The UFC does not currently engage in crossover events with other promotions. The UFC has unofficially cross-promoted events as it allowed fighters to fight in other promotions.³³ This included Chuck Liddell fighting in Pride FC in 2003.³⁴

The fighters intend to prove that the UFC created a monopoly and engaged in unfair business practices that negatively affected all members of the class and the sport itself. The fighters state the unfair business practices were a result of 1) the UFC Has Leveraged its Monopoly and Monopsony Power to Deny Necessary Inputs to Would-Be Rival MMA Promoters and 2) The UFC's Exclusionary Scheme Included the Use of Threats, Intimidation, and Retaliation Against

³¹ *Id.*

³² *Le v. Zuffa, LLC*, 216 F. Supp. 3d 1154, 1161 (D. Nev. 2016).

³³ Damon Martin, *Rampage Jackson Reveals How the UFC Hated Him for Beating Chuck Liddell*, Bleacher Report, June 26, 2013, <https://bleacherreport.com/articles/1685451-rampage-jackson-reveals-how-the-ufc-hated-him-for-beating-chuck-liddell>.

³⁴ *Id.*

MMA Fighters Who Work With or For Would-Be Rivals or Speak Out Against the UFC 3) The UFC Uses Exclusive Contracts with Physical Venues and Sponsors to Impair and Foreclose Would-Be Rival MMA Promoters. and 4) After Impairing Actual or Potential Rival Promoters in the Relevant Output Market Through the Scheme Alleged Herein, the UFC Acquired Those Would-Be Rivals that it Did Not Put Out of Business or Relegate to the “Minor Leagues”.³⁵

C. Analysis of the Allegations

1. The UFC Has Leveraged its Power to Deny Any Would-be Rival Promoters

A primary argument for the UFC monopoly was their absorption or purchase of rival MMA promotions. In December 2006, the UFC announced the acquisition of actual or potential rival promoters World Extreme Cagefighting (“WEC”) and World Fighting Alliance (“WFA”).³⁶

The UFC blocked the creation of potential rivals by engaging in anti-competitive practices. Affliction Entertainment was a startup promotion with Golden Boy Promotion, the UFC banned Affliction clothing brands from sponsoring any fighters once the venture was announced.

In 2011 the final major competitor to the UFC was Strikeforce. Strikeforce was on the cusp of becoming a major MMA promotion, especially as the promotion was a pioneer in women's MMA. Ronda Rousey fought for the promotion before its dissolution. Strikeforce had announced its intentions to co-promote globally with Russian promotion M-1 and Dream, a Japanese promotion.³⁷ To prevent the rise of Strikeforce, the UFC began to counter-promote events. The UFC would put on events on the same night that Strikeforce was promoting a show to minimize ticket sales and viewership. The strategy was to minimize the possible profit of Strikeforce,

³⁵ Marc Raimondi, *Dana White: Conor McGregor pulled from UFC 200, because he wouldn't attend press conference*, MMA Fighting, Apr 19, 2016, <https://www.mmafighting.com/2016/4/19/11464766/dana-white-conor-mcgregor-pulled-from-ufc-200-because-he-wouldnt>

³⁶ *Cung LE et al. v. ZUFFA, LLC, d/b/a Ultimate Fighting Championship and UFC.*, 2015 WL 10008670 (D.Nev.).

³⁷*Id.*

therefore lowering the promotion's profitability. The strategy worked as Strikeforce was purchased by the UFC in 2011.

2. *Rival Promotions and Minor League Promotions*

The complaint alleges the absorption of all rival MMA promotions resulted in the creation of minor league promotions. Rival promotions that were not put out of business or bought out by the UFC, have been relegated to minor league status. MMA promotions that continue to operate do not attempt to compete with the UFC, due to their dominance instead the promotions choose to act as minor league training grounds for up-and-coming talent. Resurrection Fighting Alliance, Titan Fighting Championship, Invicta Fighting Championship, and Legacy Fighting Championship, CEO's have stated that their market strategy is to avoid direct competition with the UFC.³⁸ The promotions also have clauses that allow for talent to opt-out out fight in the UFC if the fighter were to be "called up".³⁹

The second-largest United States-based promotion-Bellator-has been publicly called a minor league by UFC President Dana White. The fighters in this promotion constitute the high level of MMA talent that constitutes elite talent. Yet, the fighters from Bellator lack the star power and marketability of their UFC counterparts. The way of gaining notoriety according to former fighters is to beat other fighters whom fans already know.⁴⁰ Therefore fighting in the UFC makes sense as UFC fighters have larger name recognition. Former Bellator champions Ben Askern and Mike Chandler were relatively unknown to the average MMA fan before they entered into the

³⁸ *Cung LE et. al. v. ZUFFA, LLC, d/b/a Ultimate Fighting Championship and UFC*, 2015 WL 10008670 (D.Nev.).

³⁹ *Id.*

⁴⁰ *Id.*

UFC. Once entering the UFC their marketability skyrocketed. Ben Askern has used that star power to leverage himself into money fights with celebrities.⁴¹

D. Remedies Sought

The fighters hope to receive damage and payment for the actions of the UFC. The court has already granted class status to the fighters, therefore, satisfying some of the remedies. Finally, the fighters allow the court to use their judgment and award additional relief.

E. The Response to the suit by the UFC

The plaintiffs must prove that the UFC existed as a monopoly until the conclusion of the suit the UFC remains innocent. The UFC decided to fight the allegations alleged in the suit. The UFC mounted its defense and has filed a motion to dismiss and a motion for summary judgment. A motion to dismiss and a motion for summary judgment, while they have a different standard of proof and narrow scope, provide an insight into the possible defenses the UFC will utilize at trial. In both motions, the UFC has stated its reason for believing that the company has not engaged in monopolistic or monopolistic practices. In the motion to dismiss the UFC asserted three arguments. “1) exclusive dealing arrangements are common, procompetitive, and an integral feature of the sports and entertainment businesses; 2) Plaintiffs failed to allege specific facts plausibly showing that Zuffa’s exclusive dealing arrangements foreclose competition in either relevant market; ... 3) the UFC has no duty to deal with competitors.”⁴²

The UFC argued that their use of exclusivity clauses contained in the contracts (Champion’s Clause, Promotion Clause, etc.) were standard provisions used in the areas of sports and entertainment law. Furthermore, the exclusivity provisions on their own do not create anti-

⁴¹ Liam Happe, *Jake Paul vs. Ben Askren: The Retired UFC Star Knew He Would Lose, Claims, Belal Muhammad*, DAZN, May 7, 2021 <https://www.dazn.com/en-US/news/boxing/jake-paul-vs-ben-askren-the-retired-ufc-star-knew-he-would-lose-claims-belal-muhammad/1k19btbt9kg6s13gbdjsjked56>.

⁴² *Le v. Zuffa, LLC*, 216 F. Supp. 3d 1154, 1167 (D. Nev. 2016).

competitive behavior. The clause's intent or effect, “is to ‘foreclose competition in a substantial share of the line of commerce affected.’”⁴³ The UFC by filing both motions have signaled not only their innocence but belief that fighters lack the requisite evidence to win the case.

The primary defense of exclusive dealings as common practice within the sports and entertainment industry. The statement is true as in the sports and entertainment industry exclusivity contracts or clauses are often used to prevent talent from leaving. In the music industry, Exclusive Artist Recording Agreements tie an artist to one record label for a period of the artist's career.⁴⁴ Under this provision the artist will not be able to record or create music for other labels.⁴⁵ The UFC can also assert that other individual sports have exclusive contracts for broadcasting rights. In tennis, ESPN has exclusive broadcasting rights to The Championship and Wimbledon.⁴⁶ This broadcasting contract could be argued by the UFC as analogous to the UFC broadcasting deal. Exclusive contracts and clauses-in film, television, and theater industries-prevent writers and actors from changing studios.⁴⁷

III. Solutions

A. Previously Proposed Solutions

What comes next and how does the sport of MMA progress from here? While the case is still ongoing it is unable to predict what the remedies will be other than the relief sought by the plaintiff. Point *H* allowed for the court to impose any additional penalties that the court sought fit

⁴³ *Le v. Zuffa, LLC*, 216 F. Supp. 3d 1154, 1167 (D. Nev. 2016).

⁴⁴ *Exclusive Recording Artist Agreement*, Securities Exchange Commission, <https://www.sec.gov/Archives/edgar/data/1263364/000119312508233516/dex101.htm>.

⁴⁵ *Exclusive Artist Recording Agreement-Getting Started in the Music Business*, Texas Music Office, https://gov.texas.gov/music/page/tmlp_contractsextra.

⁴⁶ Dave Nagle, *ESPN, AELTC Sign 12-Year Agreement to Extend Exclusive Relationship for The Championships, Wimbledon through 2035*, ESPN, July 9, 2021, <https://espnpressroom.com/us/press-releases/2021/07/espn-aeltc-sign-12-year-agreement-to-extend-exclusive-relationship-for-the-championships-wimbledon-through-2035/>.

⁴⁷ Joe Otterson, *How Exclusive Contracts Leave Writers and Actors Scrambling to Navigate Supercharged Job Market*, Variety, Dec. 23, 2021 <https://variety.com/2021/tv/entertainment-industry/exclusive-deals-streamers-prestige-television-1235142536/>.

and which were not already stated. Additional remedies the court has the power to impose range from monetary penalties to in rare circumstances a break up of the company. The Supreme Court ordered the breakup of Standard Oil.⁴⁸ The court can offer an equitable solution by telling the defendant how to amend their business practices, as in the case of *United States v. Paramount Pictures*.⁴⁹ Finally, as an indirect result of the court's ruling, Congress can pass legislation to prevent the practice from occurring again. Congressional action has derived from an antitrust lawsuit.

The two most commonly proposed solutions for MMA are extending the Ali Act to MMA or the creation of the fighters' union. Both solutions have stalled out or never gained immense traction. The Ali Act expansion has been introduced to Congress. Former champion and member of the UFC Hall of Fame, Randy Couture attended congressional hearings to get the expansion passed.⁵⁰ The bill was introduced but Congress took no further action on it.⁵¹ A fighters union has been touted in both boxing and MMA, but it has failed to materialize. In 2016, an MMA fighters association was conceived.⁵² The fighters association was made up of high-profile fighters including current and former champions but still failed to gain momentum or be recognized by the UFC.⁵³ Unionization and organizing remains a popular idea and has seen widespread support from fighters with one study finding nearly 80% of fighters support the idea and only 6% of fighters

⁴⁸ See *Standard Oil Co. v. United States*, 221 U.S. 1 (1911).

⁴⁹ *United States v. Paramount Pictures*, 334 U.S. 131, 148 (1948).

⁵⁰ Farah Hannoun, Ken Hathaway, *Randy Couture still lobbying for changes in the Ali Act to add MMA fighters*, USA Today, Sep. 20 2019, <https://mmajunkie.usatoday.com/2019/09/andy-couture-lobbying-for-ali-act-ufc-bellator-lopsided-power-video>.

⁵¹ Muhammad Ali Expansion Act, H.R. 44, 115th Cong. (2017). Available at: <https://www.congress.gov/bill/115th-congress/house-bill/44>.

⁵² Damon Matin, *MMA fighters form union: We're tired of getting screwed*, NY Post, Dec. 1 2016, <https://nypost.com/2016/12/01/mma-fighters-form-union-were-tired-of-getting-screwed/>.

⁵³ *Id.*

reject the idea.⁵⁴ Support for unionization exists across promotions and fighter experience levels.⁵⁵ Unionization would also be subject to litigation as only employees can unionize, not independent contractors. Boxers and MMA fighters per their contracts are independent contractors. These proposed solutions -the Ali Act Expansion and a Fighters Union- lie outside of the court's purview originating from either the fighter's collective power or from Congressional action.

With both proposed and ideal options being unattainable, what substantive options are available to the court? Two major options remain available for the court, first a UFC Fighter's Council and the second ruling that fighters are employees of the UFC. Neither solution is better than the other and the solutions could work in tandem. Moreover, both solutions have historical precedent in other sports and industries. The only hindrance is that neither of these solutions has been used in boxing which MMA has always been linked.

B. A UFC Fighter's Council for Shared Governance

The more pragmatic solution would be the creation of a fighter's council. This can be achieved by the court ordering the UFC to change its business practices. The distinction between a council and a union or association lies with the organization's power. A council gives fighters a seat at the decision-making level as a form of shared governance, allowing fighters to voice their opinion on issues and bring up fighter issues. Compared to a union which allows fighters to strike and negotiate for a collective bargaining agreement. Athlete councils exist and are a widespread industry standard for sports in which athletes are independent contractors. Notable sports organizations with an athlete's council are the Association of Tennis Professionals (ATP)⁵⁶,

⁵⁴ Chad Dundas, *MMA fighters overwhelmingly support unionization, despite no clear path forward*, The Athletic, June 3, 2020, <https://theathletic.com/1850784/2020/06/03/mma-fighters-support-association-unionization-no-clear-path/>.

⁵⁵ *Id.*

⁵⁶ *ATP Announces 2021-2022 Player Council*, ATP Tour, Dec. 29, 2020 <https://www.atptour.com/en/news/atp-announces-2021-2022-player-council>.

Professional Golf Association (PGA)⁵⁷, Nascar, Team USA (Olympics)⁵⁸, and all of Team USA's individual sports subsidiaries (USA Wrestling, USA Fencing, etc.). The councils are not just for show and have substantive power as demonstrated by the PGA Players Advisory Council. The Player Advisory Council recommended the ban on the golf practice of "green booking", which was sent to the PGA policy council.⁵⁹

Each council operates differently but some general principles include ten or more elected seats and seats reserved for specific groups with unique needs. Councils have a grievance process, advocate for the athlete's needs when competing and suggest policy or rule changes. A UFC Fighters Council could consist of ten elected seats, six at large seats along with four seats reserved for a women's representative, a men's representative, a champions representative, and an international representative. Elections could happen every four years, like other elected offices. A fighter's policy recommendation would have to be approved by the UFC and by state athletic councils. Historical issues of fighter pay, rule changes, open scoring, and weight cutting issues could be handled in part by the council. Additionally, the creation of a new 165 lbs. weight class, a proposal that has been routinely brought up by fighters and fans alike.⁶⁰ The class has been proposed as a more natural option for fighters who fall in between the current lightweight (155 lbs.) and welterweight (170 lbs.). If the UFC intends to keep using boxing names for weight classes, bridge weight would be the most applicable. While not a union, a court order placing

⁵⁷ Brain Wacker, *Rory McIlroy elected chairman of the PGA Tour's Player Advisory Council*, Feb. 16, 2021, <https://www.golfdigest.com/story/roly-mcilroy-voted-chairman-pga-tour-players-advisory-committee>.

⁵⁸ *Leadership Team Governing Documents*, Team USA, <https://www.teamusa.org/team-USA-Athlete-Services/athletes-advisory-council/about-aac>.

⁵⁹ Garry Smits, *Ban on 'green-reading books' one step closer after vote by PGA Tour Player Advisory Council*, Florida Times-Union, June 16, 2021 <https://www.jacksonville.com/story/sports/golf/2021/06/16/pga-tour-player-advisory-council-votes-ban-green-reading-books/7673930002/>.

⁶⁰ Jeb Meshew, *Morning Report: Nate Diaz, Dustin Poirier say they're fighting for new 165-pound title in UFC 230 main event*, MMA Fighting, Sep 26 2018, <https://www.mmafighting.com/2018/9/26/17903334/morning-report-nate-diaz-dustin-poirier-say-theyre-fighting-for-165-pound-title-ufc-230-main-event>.

fighters in the decision-making room would still provide them access, something fighters have historically been denied. Finally, it would place the UFC and fighters in a similar situation as to other leagues that operate with independent contractor athletes.

A fighter's council does not act as a silver bullet to solve all the issues with the power imbalance between fighters and the UFC. Sports in which athletes were already represented by an athletic council have also created a union, due to the power difference. This distinction led to the creation of the Players Association of Tennis Professionals (PATP), a union for tennis players. The union was announced in 2020 and has yet to make substantive changes. Tennis players had a council available and still chose to form PATP, demonstrating players were unsatisfied with the council and chose to organize on their own.

A fighter's council acting as a pseudo union may have larger implications than just in for the fighter in the cage it may extend to the referees as well. The major sports leagues (NFL⁶¹, NBA⁶², and MLS⁶³) have a union as a counterpart to the Player's Associations of the respective league. The shared governance may also include a seat for an MMA referee. The referees for UFC, and all MMA, events are provided by the state athletic commissions. The distinction may recreate a challenge as the referees are outside individuals employed by the state and not an independent organization.

C. Classification as Employees, not Independent Contractors

⁶¹ *Home of the NFLRA*, National Football League Referees Association, <https://www.nflra.com/>.

⁶² *Purpose*, National Basketball Referees Association, <https://www.nbra.net/>.

⁶³ Jeff Carlisle, *Professional Referee Organization accused by refs union of violating CBA*, ESPN, June 13, 2016, <https://www.espn.com/soccer/major-league-soccer/story/2892550/professional-referee-association-accused-by-refs-union-of-violating-cba>.

The second, more legal solution would be to rule that combat fighters are employees and not independent contractors. The court has the power to overrule a contract between the contracted parties if the court finds that the independent contractor is an independent contractor in name only. The court applies a ten-factor control test to determine if an individual is an independent contractor or employee. The present exists for a court to find that an individual is an employee and not an independent contractor. Courts have tested contractual employment relationships to determine if the contracted relationship accurately reflects the relationship created by the work. Courts have held for the contractual relationship and overturned the contracted relationship. United States v. Silk, 331 U.S. 704, 705, 67 S. Ct. 1463, 1464, 91 L. Ed. 1757 (1947), FedEx Home Delivery v. NLRB, 385 U.S. App. D.C. 283, 563 F.3d 492 (2009),

The fighters benefit from this legal distinction as if they are found to be employees then they can unionize.⁶⁴ Employment classification would also trigger workplace protections and safety standards.

D. Current law

The overall question of an athlete's employment status remains undetermined with differentiating answers based on the level and sport. Statutes provide little guidance on the classification of athletes. All leagues that have an associated union (players association) will be classified as an employee. Therefore, athletes for the MLB, NBA, MLS, NHL, and NFL are athletes. Under the California Tax Code-Tax Decision 2363- athletes who compete on a team are employees and athletes competing individually are independent contractors.⁶⁵ The decision stated,

⁶⁴ *Your Rights to Unionize*, AFL-CIO, <https://aflcio.org/formaunion/rights-unionize>.

⁶⁵ Total and Partial Unemployment, TPU 415.4, https://www.edd.ca.gov/uibdg/Total_and_Partial_Unemployment_TPU_4154.htm.

[a]mong the sports in which the participating athletes have been considered to be employees are football, baseball, basketball, and hockey. Among those in which they have been considered not to be employees are golf, boxing, wrestling, skating, and midget auto racing. In the first group of cases above, there was generally an owner, manager, trainer, coach, or captain who had the right to direct and control the details of the player's activity. In contrast, in the second group of cases, the sport was generally one that involved athletic competition between individuals rather than teams.

The Chair of the National Labor Relations Board (NLRB), issued a memo in September of 2021, which sought to change the status of collegiate athletes.⁶⁶ The memo stated that the NLRB Chair updated her position that certain athletes at Academic Institutions were entitled to National Labor Relations Act protections as they were employees. Guidelines were issued to offices for compliance with the new position taken by the NLRB. The memo was narrow in scope as the only sport explicitly named was football. The reasons stated for the employee status expansion were due to the social and economic power athletes possess, the economic service that the Northwestern Football team provides to the school, and the overbearing requirements placed upon athletes by the National Collegiate Athletic Association (NCAA). Athletes' social power derived from their calls for action in the wake of the murder of George Floyd and athletes' power to restart the 2020 college football season following its cancellation due to COVID-19. College athletes receive both

⁶⁶ *NLRB General Counsel Jennifer Abruzzo Issues Memo on Employee Status of Players at Academic Institutions*, National Labor Relations Board, Sep. 29, 2021, <https://www.nlr.gov/news-outreach/news-story/nlr-general-counsel-jennifer-abruzzo-issues-memo-on-employee-status-of>.

scholarships and can be compensated by outside entities. The NLRB cited alumni donations, application, and overall prestige of the university as services provided by the Northwestern football team.⁶⁷ Finally, the NCAA regulations placed on athletes regarding practice hours, grade point average standards, employment, gift policy, etc. were controlled by Northwestern therefore Northwestern acted as an employer.

Statutes only define that athletes who compete on a team are employees. Individual athletes are therefore independent contractors. This distinction is often reiterated in the athlete contract. NASCAR drivers, PGA golfers, Olympians, Professional tennis players all share this distinction- of an independent contractor- despite some of the athletes being part of a team. The UFC stated that the fighters were independent contractors, per their contractions in sections 112-3. (Comp. 38.05)⁶⁸ As evident by the contractual case law and NLRB memo, an athlete's employee relationship can change. The common law economic test for determining the employment relationship between two parties. The six factors for the test are:

- 1) the degree of the alleged employer's right to control the manner in which the work is to be performed;
- 2) the alleged employee's opportunity for profit or loss depending upon his managerial skill;
- 3) the alleged employee's investment in equipment or materials required for his task, or his employment of helpers;
- 4) whether the service rendered requires a special skill;
- 5) the degree of permanence of the working relationship;
- and 6) whether the service rendered is an integral part of the alleged employer's business.⁶⁹

⁶⁷ *NLRB General Counsel Jennifer Abruzzo Issues Memo on Employee Status of Players at Academic Institutions*, National Labor Relations Board, Sep. 29, 2021, <https://www.nlr.gov/news-outreach/news-story/nlr-general-counsel-jennifer-abruzzo-issues-memo-on-employee-status-of>.

⁶⁸ *Cung LE et. al., v. ZUFFA, LLC, d/b/a Ultimate Fighting Championship and UFC*, 2015 WL 10008670 (D.Nev.).

⁶⁹ *Harris v. Diamond Dolls of Nevada, LLC*, 521 F. Supp. 3d 1016 (D. Nev. 2021).

E. Application of the Employment-Independent Relationship Test

1. The degree of the alleged employer's right to control the manner in which the work is to be performed

The UFC -or any MMA promotion- does not control the style of how an individual chooses to fight once they enter the octagon. A fighter, their corner, and coaches, choose the style and manner that an individual will fight. A fighter prior to fight night plans for their opponent identifying their weaknesses. Mixed martial arts, as the name implies, is a mixing of fighting disciplines, therefore a wide array of techniques exists. All modern fighters have to know and implement all facets of martial arts into their game plan. Even with a well-rounded skill set, fighters still rely on their strengths in a fight. The two ways to win a fight are by, one referee stoppage (knockout, technical knockout, or submission) or two a judge's decision. The method of victory a fighter chooses to pursue, or the style used to secure the victory does not matter as both yields the same outcome. Fighters can choose any fighting style they want to use to secure victory. California Tax Code-Tax Decision 2363 stated that the level of freedom to choose the athletic style in individual sports cuts for an independent contractor⁷⁰.

This position should be revisited as the style used to secure victory in individual sports is analogous to selecting a style in a team sport. In the NFL, teams choose to primarily run or pass the ball, whichever best fits their players. An NBA team may choose to run a pick and roll, run a fast break, or prioritize the three-pointer, all valid offensive strategies used to win. The same logic should be applied to MMA – a fighter's strategy should be, at minimum, a neutral factor. A fighter's style is a tactical decision equivalent to a team's style of play. Fighters such as Khabib Nurmagomedo chose to grapple to secure submission and Israel Adesanya chose to knock out

⁷⁰ Total and Partial Unemployment, TPU 415.4, https://www.edd.ca.gov/ui/bdg/Total_and_Partial_Unemployment_TPU_4154.htm.

opponents. Both submission and a knockout result in a victory on the fighter's record. The UFC has no control over how a fighter chooses to fight, in the same way, the NBA or NFL has control over a team winning a game. While both the league and promotion do not interfere with the athletes' decisions, yet different legal results occur. Moreover, this element would likely be cut for an independent contractor but should be revisited.

The UFC has control over fighters as the promotion decides when they want to offer a bout to a prospective fighter. A fighter can approach the promotion with a potential fight, but the UFC can decline. Importantly the UFC has the power to determine where on the card a fighter's bout will take place. Litigation revealed that the UFC would purposely place a pending free agent fighter on the undercard to tank their potential value. This is done to prevent a fighter from getting too much spotlight and momentum before entering the market. Additionally, the UFC has the power to pull a fighter from a card or call off a bout, even when both fighters are healthy. The UFC has pulled fighters from cards for multiple reasons. The UFC pulled Conor McGregor from 200 after Conor missed a press conference.⁷¹ Conor stated he was training for the fight. The UFC also pulled Timo Feucht from a UFC Fight Island event because Neo-Nazi ties emerged. The McGregor bout was rescheduled while Feucht was released from the promotion. The control of the promotion to unilaterally pull an individual from a fight card means that a fighter will not be able to make money.

The UFC exerts a great deal of control over fighters outside of the cage as well. After the Reebok and UFC deal, fighters were required to wear a preset Reebok fight kit on fight night and only wear Reebok attire to all fight-related events. This deal limited the fighters' ability to earn

⁷¹ Marc Raimondi, *Dana White: Conor McGregor pulled from UFC 200, because he wouldn't attend press conference*, MMA Fighting, Apr 19, 2016, <https://www.mmafighting.com/2016/4/19/11464766/dana-white-conor-mcgregor-pulled-from-ufc-200-because-he-wouldnt>.

outside income from sponsorships. Before the deal, companies would pay the fighter to have their logo on the fighter's shorts, walk-out outfit, or on a corner banner. Former champion Vitor Belfort claimed the Reebok deal cost him “millions in sponsorships”.⁷² Fighters during fight-related events can now only be sponsored by brands associated with the UFC, as individual brand ambassadors.⁷³ Fighters are permitted to obtain additional sponsorships from non-partnered companies.⁷⁴

In-cage or on-the-field sponsorships were more valuable to an individual brand as consumers wanted to use the equipment or attire that their favorite professional athletes were wearing or using. Consumers nearly crashed a website after they flocked to buy the iconic red polo worn by Tiger Woods.⁷⁵ People want the polo because it was worn by Tiger and has a special meaning in the golf community. After Zion Williamson's Nike shoe exploded, the stock fell.⁷⁶ Nike was no longer seen as a “good” brand due to the incident. In tennis, an independent contractor sport, players are endorsed to only wear one brand's attire and only use one brand of racket. For men ranked in the top 50, they can make enough money from appeal and racket endorsements to make ends meet without winning on tour.⁷⁷ Tennis endorsements can equate to more than ten times

⁷² Scott Harris, *Vitor Belfort Slams UFC Reebok Deal, Says He's Lost Millions*, Bleacher Report, Mar 30, 2016, <https://bleacherreport.com/articles/2629029-vitor-belfort-slams-ufc-reebok-deal-says-hes-lost-millions>.

⁷³ Mike Heck, *Crypto.com to sponsor UFC fight kits in reported \$175 million deal*, MMA Fighting, July 7, 2021, <https://www.mmfighting.com/2021/7/7/22566630/crypto-com-to-sponsor-ufc-fight-kits-in-reported-175-million-deal>.

⁷⁴ Matthew Wadleigh, *Browns News: Odell Beckham Jr. Not Ruling Out a Return to Cleveland After Deshaun Watson Blockbuster Trade*, Sportscasting, Mar. 23, 2022, <https://www.sportscasting.com/browns-news-odell-beckham-jr-return-cleveland-after-deshaun-watson-blockbuster-trade/>.

⁷⁵ David Matthews, *Demand for Tiger Woods' signature red shirt nearly crashes golf retailer's website*, NY Daily News, Apr 14, 2019, <https://www.nydailynews.com/sports/ny-sports-golf-masters-tiger-woods-red-polo-shirt-golf-town-sold-out-20190414-ueydlzds7bgcpjgqxr2sw2upum-story.html>.

⁷⁶ Charles Curtis, *Nike's stock dropped after Zion Williamson's shoe exploded*, USA Today, Feb. 21 2019, <https://ftw.usatoday.com/2019/02/nike-stock-zion-williamson-injury>.

⁷⁷ Tim Newcomb, *The Anatomy Of A Tennis Player's Sponsorship Deals*, May 4 2020, <https://www.forbes.com/sites/timnewcomb/2020/05/04/the-anatomy-of-a-tennis-players-sponsorship-deals/?sh=49f06d9c789c>.

a tournament's prize-winning.⁷⁸ Moreover, endorsements, especially on-field ones, are more lucrative deals.

In summary, this factor could cut for either an independent contractor or an employee based on the nature of the UFC's business. Due to the UFC's control over a fighter's ability to make money from outside sponsorships and the UFC's unilateral control over a fighter's ability to make money this factor likely cuts towards an employment relationship.

2. *The alleged employee's opportunity for profit or loss depends upon his managerial skill*

In assessing the opportunity for profit or loss the fighters the court examines the ability of an individual to profit independently. In the context of MMA, the opportunity for profit or loss consists of two components, 1) in-cage performance and 2) outside-of-the-cage performance. The line between in-cage and out-of-cage opportunities becomes blurred as successful fighters often receive the cage opportunities. The only in-cage performance opportunity for profit or loss exists in of-the-night bonuses. Every fighter who wins their fight becomes eligible for a fight-of-the-night bonus on top of their standard purse. The bonuses consist of one fight of the night and two performances of the night. In total four fighters received the night bonuses. There is no standard number of wins needed to fight for a title but the more victories inside of the cage results in higher profile fights. Fighters who win amazingly can often progress faster up the UFC rankings.

The second component is outside of the octagon. A fighter outside of the octagon performance is just as important as their inside-the-cage performance. A fighter's outside-of-the-cage performance includes trash-talking, fan admiration, rivalry, social media presence, etc. A fighter can turn their in-cage success into outside-of-the-cage success as well. Fighters have used

⁷⁸ Beth Timmins and Michael Race, *Emma Raducanu set to earn millions after US Open win*, BBC, Sep. 13 2021, <https://www.bbc.com/news/business-58508806>.

their success and popularity to appear in movies⁷⁹ and network television⁸⁰. As mentioned above, fighters remain barred from having sponsorships for fight-related events but can have out-of-fight sponsorships.⁸¹ Fight-related events may be the marquee event for individual sponsorships, but fighters still provide fighters the opportunity for profit elsewhere.

The only opportunity for profit or loss unavailable to fighters is the ability to fight outside of the UFC. Fighters per their contract exclusivity clause-cannot compete in other organizations or promotions. This limits a fighter's ability to compete in non-MMA events such as celebrity boxing matches. Celebrity matches or cross-discipline matchups (boxing and MMA) while requested by fighters do not always materialize. Outside of the octagon fights can net fighters a massive paycheck. Former UFC champion Tryon Woodly at the height of his championship reign made \$500,000 a fight without bonuses.⁸² Woodly's boxing rematch with Jake Pual earned each fighter a \$2,000,000 purse to show.⁸³ The exclusivity contract clause prevents fighters from exploring more lucrative opportunities.

This factor likely cuts for an independent contractor relationship as the ability for a fighter to maximize profit and loss exists. Despite the fighters' diminished profitability due to the exclusivity clause in the contract, other opportunities exist. A fighter based on their performance and their outside-of-the-cage presence allow for-profit and loss from sponsorship deals. This factor could cut the other way if the court finds that the ability to collect from their specialized skill.

3. *The alleged employee's investment in equipment or materials required for his task, or his employment of helpers*

⁷⁹ Ronda Rousey, IMBD, <https://www.imdb.com/name/nm3313925/>.

⁸⁰ ABC, *Dancing With the Stars: Paige VanZant*, ABC, <https://abc.com/shows/dancing-with-the-stars/cast/paige-vanzant>.

⁸¹ UFC, *UFC Outfitting Frequently Asked Questions*, Jan. 12, 2012, <https://ufc.ru/news/ufc-outfitting-frequently-asked-questions#:~:text=6..or%20other%20official%20UFC%20events>.

⁸² Jesse Holland, *Jake Paul payouts: Tyron Woodley quadruples biggest UFC salary with multimillion dollar purse*, MMA Mania, Aug. 31 2021, <https://www.mmamania.com/2021/8/31/22650163/jake-paul-payouts-tyron-woodley-quadruples-biggest-ufc-salary-with-multimillion-dollar-purse-mma>.

⁸³ *Id.*

A fighter bears a substantial portion of the cost of a fight. In preparation for a fight, the fighter will spend approximately \$10,000 on camp.⁸⁴ A fight camp is the training a fighter goes through before fight night. A normal camp lasts anywhere from 8-10 weeks.⁸⁵ A fighter camp expenses include gym membership, training gear (pads, shorts, headgear), supplements, training staff, and coaches. If a fighter brings more than one coach to a fight, which is standard, then the fighter pays for their travel expenses, hotel, airfare, etc.⁸⁶ The fighter also pays for all their pre-fight medical examinations.⁸⁷ A fighter must pass medical examinations before they can fight. CAT scans, blood tests, and eye exams are all paid for by the fighter or their insurance company. Finally, for all international events, fighters must pay taxes or fees on their winnings before leaving the country.⁸⁸ In total a fighter can spend upwards of \$14,000.

On fight night the UFC provides the venue and the equipment needed to compete. At every event, the UFC provides the fighters with their new gloves and new fight kit.⁸⁹ For the international competition the UFC covers travel expenses for a fighter and a coach of their choice. Travel expenses include hotel, round trip airfare, and visa fees if applicable. Only one hotel room is provided for both the fighter and the coach. For domestic fights, the flights are not covered by the UFC, but hotels are. Additionally, the UFC provides its training facility – the UFC Apex – for fights occurring in Las Vegas, Nevada. The total amount to put on a UFC show varies based on the event and its PPV status. Examining two events that both took place in July of 2016, UFC 200 totaled over \$12 million in expenses while UFC dos Anjos v. Alvarez had only \$1.5 million in

⁸⁴ *Id.*

⁸⁵ *Id.*

⁸⁶ Damon Martin, *John Cholish Explains How Much It Costs to Be a UFC Fighter*, Bleacher Report, May 23 2013, <https://bleacherreport.com/articles/1649483-john-cholish-explains-how-much-it-costs-to-be-a-ufc-fighter>

⁸⁷ *Id.*

⁸⁸ *Id.*

⁸⁹ *Id.*

expenses.⁹⁰ Both event expenditures were calculated without fighter compensation. The UFC invests more money into an event, compared to a fighter, therefore the third factor is cuts to employee relationships.

4. *Whether the service rendered requires a special skill*

A special skill is a skill that is not possessed by members of the general public, and usually requires substantial education, training, or licensing.⁹¹ A professional fighter would qualify as a specialized skill, due to the level of training required to enter the UFC. In theory, anyone *can* fight in the UFC as there are no formal requirements, but the UFC does not just allow them to fight in the promotion. The UFC maintains its reputation as a premier and high-level organization by maintaining a high level of entry. In the current era of the UFC even the most inexperienced fighter-CM Punk-still trained for over a year at a prestigious MMA gym before his first bout.⁹² Fighters often train their entire life in a specific discipline before entering the UFC. Former Olympians, NCAA wrestlers, professional football players, and other MMA promotional champions have entered the UFC. Additionally, fighters have committed to solely training MMA for a well-rounded game plan as if it were its own discipline. After entering the UFC, athletes continuously train in preparation for their next bout. Referred to as fight camps, which start 8-12 weeks before the fighter, can see fighters training twice a day six days a week.⁹³ This factor clearly cuts for an independent contractor relationship based on the level of training.

5. *The degree of permanence of the working relationship*

⁹⁰ John S. Nash, *Zuffa Finances: The Economics of a UFC event*, Bloody Elbow, Sep. 23 2019, <https://www.bloodyelbow.com/2019/9/23/20858442/zuffa-finances-the-economics-of-a-ufc-event>

⁹¹ 18 U.S.C. § 1028(d)(7).

⁹² Damon Martin and Guilherme Cruz, *CM Punk retired from UFC competition as he returns to professional wrestling*, MMA Fighting, Aug. 31, 2021, <https://www.mmafighting.com/2021/8/31/22651075/cm-punk-retired-from-ufc-competition-as-he-returns-to-professional-wrestling>.

⁹³ Damon Martin, *Chris Weidman Details His Training and Nutrition to Get Ready for Anderson Silva*, Bleacher Report, Jul. 3, 2013, <https://bleacherreport.com/articles/1693204-chris-weidman-details-his-training-and-nutrition-to-get-ready-for-anderson-silva>.

There exists a level of permanence of relationship in an MMA contract. The contract will run until completion unless the UFC grants the fighter's release. The sport is transient in nature as fighters after their contract expires and the free-agent period starts fighters do change promotions. ONE Championships and Bellator MMA have signed former UFC fighters including former champions.⁹⁴ Fighters sign and move based on a variety of factors including money, competition, and overall treatment of the promotion. Fighters also get signed from lower promotions or other major promotions.

Additionally, the UFC does not control when a fighter will compete. A fighter does not have to accept every fight that they are offered. A fighter can choose to sit out and not fight for any reason. Fighters have voluntarily taken time off to have surgery to fix a lingering injury, take extra time to recover from an injury, spend more time with their family, or hold out for a title opportunity.⁹⁵ When offered a fight, fighters can also turn down a fight willingly. A fighter may turn down a fight due to the time to train, the stylistic match-up, or the rank of the opponent. A fighter may determine that the risk outweighs the reward ratio and that the circumstances were not good enough to take the fight. The inverse is true as well, as fighters have an anytime, anywhere mentality. This means a fighter may choose to fight anyone presented to them regardless of the opponent. Additionally, a fighter may choose to step in on short notice. A short-notice fight may be taken to save an event from being canceled, collect a larger paycheck, and replace a person in a title fight or main event. Notably, a fighter may utilize both strategies throughout their career.

⁹⁴ Brain Campbell, *Ex-UFC stars discuss respective ONE Championship moves being better for their careers*, CBS, Mar. 6 2019, <https://www.cbssports.com/mma/news/ex-ufc-stars-discuss-respective-one-championship-moves-being-better-for-their-careers/>.

⁹⁵ Mike Bohn, *Dana White: UFC fighters turning down fights are 'worried about losing'*, MMA Mania, Nov. 19 2012, <https://www.mmamania.com/2012/11/19/3662984/dana-white-ufc-fighters-turning-down-fights-worried-losing-short-notice-mma>.

Former champion Micheal Bisping stepped up on short notice to win the title and then held out to secure a fight with George St. Pierre.⁹⁶

Unlike in traditional team sports, UFC fighters are signed on a per bout (fight) basis, not on a per-year basis. Once the allotted number of bouts are up, then the fighter is no longer under contract and can change promotions. UFC contracts have no time requirement if the number of bouts is completed. For example, a fighter signed to a three-bout contract could fulfill the contract in a year fighting three times or in three years fighting once a year. If the UFC fighter becomes a UFC champion, then the UFC solely can extend the contract without consulting the fighter. The contract externship lasts for a one-year term or three fights. After a UFC contract, the UFC has a 90-day exclusive negotiating period with the fighter. Additionally, the UFC has a match clause that allows the UFC to match a rival promotion offer for up to a year. At most, the UFC solely can prevent a fighter from receiving a new contract for 27 months after the contract's completion.⁹⁷ 12 months via the champion clause, 90 days negotiating period, and 12 months for the match period.⁹⁸ A fighter's contract is tolled in the event of injury, retirement, or any other reason the fighter cannot complete. As a result, a fighter cannot wait out the terms of the contract. Finally, the UFC retains the rights to a fighter in perpetuity if the fighter retires with bouts remaining on their contract.⁹⁹

The UFC can release an individual from their contract before the completion of the term. The UFC often releases fighters before the completion of their contract if the fighter is not meeting the standards of the UFC. The most common reason for a fighter's release includes poor

⁹⁶ David Deibert, *Michael Bisping gets long-awaited title shot, faces Luke Rockhold on short notice at UFC 199*, Saskatoon Star Phoenix, May 18 2016, <https://thestarphoenix.com/sports/mma/michael-bisping-gets-long-awaited-title-shot-faces-luke-rockhold-on-short-notice-at-ufc-199>.

⁹⁷ Marc Raimondi, *Dana White: Conor McGregor pulled from UFC 200, because he wouldn't attend press conference*, MMA Fighting, Apr 19, 2016, <https://www.mmafighting.com/2016/4/19/11464766/dana-white-conor-mcgregor-pulled-from-ufc-200-because-he-wouldnt>.

⁹⁸ *Id.*

⁹⁹ *Id.*

performance in the octagon. Unranked fighters who would appear on the prelims of a UFC event are often cut following a string of defeats. This is done to “clean house” as demonstrated by the September 2021 releases. UFC fighters can be released for events outside of the cage. Former Champion BJ Penn was released following a bar fight in his native Hawaii.¹⁰⁰ Luis Pena was arrested on domestic violence charges in October 2021 and was subsequently released.¹⁰¹ Finally, health conditions can be the reason for a fighter's release, as demonstrated by Corey Anderson.¹⁰² A fighter's release releases them from all contractual obligations of the UFC and does not subject them to the perpetuity retirement clause.

Overall, the length of the contract cuts in favor of an employee relationship. A fighter is in a contract until the completion of the contract. Retirement will not free a fighter of the contract and competition of the contract allows the UFC to unilaterally extend it. The factors that cut toward an independent contractor relationship include the transient nature of the sport as fighters move around promotions and fighters do not create their schedule.

6. *Whether the service rendered is an integral part of the alleged employer's business.*

The best example of the UFC business model comes from UFC President Dana White. White stated-when talking about the UFC's move to fight island-that “We're not stopping,” said Dana White on ESPN. “We will keep finding a way to put on the fights. I'm in the fight

¹⁰⁰ Khadrice Rollins, *BJ Penn Officially Released From UFC Contract*, Sports Illustrated, Sep 25 2019, <https://www.si.com/mma/2019/09/26/bj-penn-released-ufc-contract-dana-white>.

¹⁰¹ Milan Ordonez, *Luis Peña cut by UFC after arrest, Dana White says they can punish 'any' fighter for domestic violence*, Bloody Elbow, Oct. 13 2021, <https://www.bloodyelbow.com/2021/10/13/22723733/report-luis-pena-cut-from-ufc-roster-after-recent-domestic-violence-arrest-mma-news>.

¹⁰² Brett Okamoto, *UFC issues after heart scare led Corey Anderson away*, ESPN, Aug. 12, 2020, https://www.espn.com/mma/story/_/id/29646636/ufc-issues-heart-scare-led-corey-anderson-away.

business”.¹⁰³ Simply the UFC’s business revolves around putting on fights. To put those fights on the UFC needs the fighters on its roster. Additionally, those fighters need to be of high quality, as the UFC promotion prides itself on being the highest level of competition by having the highest level of fighters. In 2015, 46.8% of the UFC’s total revenue was directly related to their PPV events-residential PPV buys accounted for 32%, PPV ticket sales accounted for 7.9% and commercial PPV buys accounted for 6.9%.¹⁰⁴ Factoring in non-PPV events and ticket sales-3.1%-the total revenue from live events totals 49.9%.¹⁰⁵ The right to broadcast the non-PPV events-domestically and internationally- accounted for 34.6%.¹⁰⁶ Fightpass, the UFC’s streaming service, accounted for 2.3%. Moreover, 86.8% of all revenue brought in by the UFC in 2015 was a direct result of the fighters stepping into the cage on fight night.¹⁰⁷ Without the fighters on the UFC roster the UFC would not be a viable business, therefore the fighters are integral to the business. The fighters are just as important to the UFC as the baseball players are to the MLB. The UFC President states that the UFC business revolves around fighting and the statistics of the business reinforce that notion, therefore the factor cuts for employee relationships.

F. Summary of the Employment Independent Contractor test.

After evaluating all the factors, UFC fighters were evaluated to be employees of the UFC. Four out of six factors cut toward an employee relationship created while two cuts for an independent contractor relationship. Only two-specialized skills and nature of the business factors

¹⁰³ Kenny Lee, *Dana White and the UFC’s motto: ‘The Show Must Go On’*, MMA Blog, Dec. 29, 2020, <https://mmasucka.com/2020/12/29/dana-white-the-show-must-go-on/#:~:text=%E2%80%9CWe’re%20not%20stopping%2C,m%20in%20the%20fight%20business.>

¹⁰⁴ John S. Nash, *What we now know about the UFC’s finances*, Bloody Elbow, Sep. 23 2019, <https://www.bloodyelbow.com/2019/9/9/20851990/what-we-now-know-about-the-ufc-finances.>

¹⁰⁵ *Id.*

¹⁰⁶ *Id.*

¹⁰⁷ *Id.*

squarely cut in favor of one or the other. The remaining four factors have elements that would allow a court to find the factor in favor of an independent contractor relationship. The relationship between the UFC and the fighters remains in flux. A court may have to look at the Many fighters' belief that the UFC has misclassified them as independent contractors instead of employees- but treats them as employees.¹⁰⁸ The UFC has continuously stated that the fighters, per their contracts, are to be classified as independent contractors. The question remains until the end of the suit.

VI. Conclusion

In conclusion, *Le v Zuffa, LLC*¹⁰⁹, has the potential to be a historic decision. If the court finds in favor of the fighters, the court can fundamentally change the sport of MMA in the United States and globally. The court has the power not only to change the structure of the sport but the business model of North America's biggest promotion. The trial has not started so it is near impossible to guess the outcome of a court case of such magnitude. The paper instead focused on the possible effects the case could have on the MMA landscape. For the fighters, the best option not sought would be to allow the fighters to unionize by deeming the fighters as employees of the promotion. This classification would also put fighters in the same position as college athletes and their North American league counterparts. Another favorable option would be for courts to order the creation of a fighter council. The pseudo-union would place the fighters in a similarly situated position as the athletes who also compete as independent contractors. Moreover, both options would place fighters in a better situation than they are currently in as the fighters would have a business-making decision power something that they have lacked since MMA's inception. The

¹⁰⁸ Vincent Salminen, *UFC Fighters Are Taking a Beating Because They are Misclassified as Independent Contractors. An Employee Classification Would Change the Fight Game for the UFC, Its Fighters, and MMA*, Pace Intellectual Property, Sports & Entertainment Law Forum, Vol. 7, Iss. 1, 2017, <https://digitalcommons.pace.edu/cgi/viewcontent.cgi?article=1062&context=pipsel#::~:~:text=Many%20fighters%20believe%20the%20UFC,contractors%2C%20they%20suffer%20many%20disadvantages.>

¹⁰⁹ *Cung Le v. Zuffa, LLC*, 108 F. Supp. 3d 768, 771 (N.D. Cal. 2015).

most favorable outcome for the UFC is to be acquitted and have the judge enforce that the business plan that the UFC has adopted is legal. The UFC does not want to change and has attempted to stop the lawsuit before it goes to trial. The UFC's defense of industry standards will be viable. Fighters, fans, and the UFC patiently await the decision and fall out of the case.