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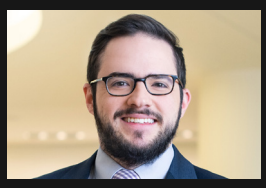

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FTX FALLOUT: HOW SPONSORSHIP PARTNERS ARE MOVING FORWARD

MORGAN JOHNSON

Prior to its collapse, cryptocurrency exchange FTX spent millions in sponsorship dollars securing the naming and promotional rights to National Basketball Association stadiums, Formula 1 organizations, esports teams and celebrity endorsements. However, after the cryptocurrency exchange—once valued at over $32 billion—collapsed, many sponsorship partners entered bankruptcy courts for relief. As a result, FTX's bankruptcies have significantly disrupted the sport and entertainment marketing departments across the country.

In April 2021, FTX signed a 19-year, $135 million contract with Miami-Dade County for the naming rights to the professional sports arena that is home to the Miami Heat. Shortly after FTX's collapse, Miami-Dade County filed a motion in the Bankruptcy Court for the District of Delaware for relief from the bankruptcy stay and permission to terminate the agreement. Miami-Dade County motioned the court for relief on the basis of the financial hardship that Miami-Dade County would face (FTX owed nearly $23 million as of January 1, 2023) and other reputational hardships if it continued to be associated with FTX. The Bankruptcy Court granted the motion, terminating the parties' agreement, which permitted Miami-Dade County to remove signage from the arena.

Prior to its demise, FTX partnered with the esports organization, TSM, paying $210 million for a multi year agreement that resulted in the organization and its respective teams being renamed, "TSM FTX." FTX sponsored TSM's esports teams and offered a league--wide sponsorship for the League of Legends Championship Series (LCS). In August of 2021, Riot Games, the publisher for League of Legends, and FTX entered into an agreement for FTX to be the "Official Cryptocurrency Exchange Partner of the LCS." The agreement was intended to run through at least 2028, and contained escalating yearly fees, with $12.5 million due in 2022. Similar to Miami-Dade County, LCS filed a motion in the Bankruptcy Court, seeking to either compel FTX to reject the agreement or to be granted relief from the bankruptcy stay to terminate the agreement. Notably, LCS cited the agreement's "morality clause," which allowed for termination if a party brought "the Impacted Party's products and services into material public disrepute." LCS has claimed that the damage of being associated with FTX has been done, and that nothing could cure the violation of this morality clause. The LCS filing currently remains under consideration by the court.

Much like TSM and Miami-Dade County, Formula 1 team Mercedes-AMG Petronas sought to terminate a sponsorship agreement based on FTX's ongoing financial troubles. In a September 2021 press release, Mercedes-AMG Petronas boasted of a "long-term relationship" with FTX; however, less than a year later, the Formula 1 team sought to suspend its partnership agreement with FTX. FTX petitioned the Bankruptcy Court for relief, which permitted Mercedes-AMG Petronas to terminate the agreement with FTX.

Celebrities and influencers who partnered with cryptocurrencies and/or exchanges have also faced scrutiny for these close arrangements. In various class action filings in November and December of 2022 in the Southern District of Florida, high-profile athletes and entertainers , have been named as defendants in several lawsuits. In their complaints, plaintiffs claimed these celebrities are official "Brand Ambassador[s] for FTX" and that they should be liable for failed cryptocurrencies and/or exchanges. Attorneys for these celebrities are now seeking to maneuver their clients out of these lawsuits and extricate them from the collateral damage of the FTX collapse.

FTX's rise and fall highlights the potential pitfalls for celebrities and influencers who have collaborated with various cryptocurrencies and/or exchanges, the importance of minimizing exposure with careful attention to all federal and state advertising and promotion regulations, as well as legal counsel skilled in these rapidly developing industries.

DO NOT PASS GO: THE PLIGHT OF NEW SOCCER COMPETITIONS IN EUROPE

NATALIE NELSON AND BILLY PRICE

The 2022 FIFA World Cup wasn't the only showdown being watched by soccer fans last year. Indeed, sports fans and antitrust watchers alike are awaiting a final decision from the European Court of Justice (ECJ) regarding the European Super League (Super League). An initial December 2022 decision ruled against the Super League and found that the international soccer governing body was not anticompetitive, and the ECJ will have a final say on the matter in early 2023.

In 2021, a group of 12 renowned soccer clubs challenged FIFA's economic position as the arbiter of world soccer with the announcement of the new Super League. In its original form, the Super League was designed as a closed competition, consisting only of its founding members and their designated competitors. Simply put, it was a competition reserved for the best teams and intended to compete with UEFA's Champion's League.

Putting the Super League into a broader context, European soccer is governed primarily by two institutions, FIFA and the Union of European Football Associations (UEFA). As participating members of a national association regulated by the Fédération Internationale de Football Association (FIFA) and the Union of European Football Associations (UEFA), clubs, like the 12 challenging teams, must comply with the rules promulgated by each institution.[1] In order for the Super League to become a reality and compete with UEFA's Champion's League, FIFA and UEFA would have to agree to its creation.

UEFA, alongside several of its national associations, stated that any club or athlete choosing to participate in the Super League would be banned from future FIFA/UEFA competitions, including the World Cup. As a result, athletes would not be able to represent their national teams and the clubs would no longer be able to participate in their domestic leagues. The company responsible for the Super League's creation, the European Super League Company SL, responded by filing a complaint with the Madrid Commercial Court, asserting that FIFA's and UEFA's actions constitute "anticompetitive" behavior that runs contrary to EU competition law."[2] The Madrid Commercial Court sided with the Super League by granting an injunction, and subsequently referred the case to the ECJ, seeking a preliminary ruling.[3]

Eventually, the ECJ published an opinion weighing strongly in favor of FIFA and UEFA. Among other things, this opinion addressed the Super League's allegations that FIFA and UEFA are anticompetitive by imposing a prior approval requirement on all new competitions and threatening sanctions against those in noncompliance.[4] The ECJ held that the FIFA and UEFA framework "pursues legitimate objectives," and even though they hold a dominant position in the market, they are not violating their "special responsibility" to ensure that their actions do not "prevent the development of genuine undistorted competition."[5] Therefore, according to the ECJ, FIFA's and UEFA's rules do not violate European Union (EU) competition law.

As the ECJ's initial decision makes clear, soccer in the EU appears to enjoy an exemption from otherwise strict antitrust and anti-monopoly laws, echoing baseball's privileged status in the United States, which benefits from a judicially created exemption from antitrust law dating back to 1922.[6] This exemption for soccer might seem odd since the EU is generally regarded as a jurisdiction that enforces antitrust laws more vigorously than the United States. Despite these historical differences, both the EU and U.S. are evolving their antitrust strategies. If the final ECJ judgment confirms the initial decision, observers will watch closely to see if it cements a European exemption to antitrust laws for soccer, or if the ECJ grounds its decision on another legal basis. An exemption could be out of step with both Europe's generally strict approach to antitrust enforcement and the United States' recent trend of strengthening antitrust enforcement for sports and non-sports alike.

If the final decision from the ECJ creates an exemption for soccer from antitrust laws, it could represent a departure from Europe's historically strict approach to antitrust enforcement, as well as the United States' recent shift to a stricter approach. If the ECJ finds that FIFA and UEFA acted anticompetitively, it could demonstrate that the EU is joining the U.S. in looking skeptically at claims that sports should enjoy greater protection from competition laws. The final decision is expected in the first half of 2023.

[1] FIFA Statute Article 22; UEFA Statute Article 50.

[2] AG Paragraphs 14, 17.

[3] AG Paragraphs 17-18.

[4] AG Paragraphs 17, 18, 63, 83.

[5] AG Paragraph 127.

[6] Zach Osterman, *Fed. Baseball Club, Inc. v. Nat'l League of Prof'l Baseball Clubs*, 259 U.S. 200 (1922); see also Flood v. Kuhn, 407 U.S. 258 (1972) (declining to revoke the judicially-created exemption on *stare decisis* grounds).

PAY-FOR-PLAY: THE STATUS OF COLLEGE ATHLETES AS EMPLOYEES

GRANT MULKEY AND AUSTIN TAPURO

In a potentially game-changing move, the National College Players Association (NCPA), filed an unfair labor practice charge with the National Labor Relations Board (NLRB or Board) Region 32 against the University of Southern California (USC), the Pac-12 Conference and the National Collegiate Athletics Association (NCAA) as joint employers. The charge was filed on behalf of USC's Football Bowl Subdivision (FBS) football players and NCAA Division I men's and women's basketball players. The charge alleges that joint employers "interfered with, restrained, and coerced" the exercise of the college athletes' collective bargaining rights by misclassifying them as "student-athletes." Region 32 recently found that the charge had merit; absent a settlement, the charge will be heard by an administrative law judge in the coming months. The NCPA also filed an identical charge against the University of California, Los Angeles (UCLA), the Pac-12 Conference and the NCAA, although the charge against UCLA was subsequently dropped.

The NCPA's charge follows the direction of Memorandum GC 21-08 (Memo) issued by NLRB General Counsel Jennifer Abruzzo to the NLRB's regional offices on September 29, 2021. The Memo outlines the General Counsel's intent to reinterpret the definition of "employee" under the National Labor Relations Act (NLRA or the Act) as it relates to college athletes. General Counsel Abruzzo takes the position that certain college athletes — referred to as "Players at Academic Institutions" — are employees under the Act. Furthermore, colleges and universities that label college athletes as "student-athletes" inaccurately lead these employees to believe that they are not protected by the Act, thus causing a negative effect on their engagement in concerted activity in violation of Section 8(a)(1) of the Act. As a result, the Memo encourages athletes and athlete-advocates to file unfair labor practice charges against colleges and universities. Although the Memo signals a significant change in interpreting the Act, the Memo only offers guidance and does not reflect the NLRB's stance on the issue.

Notably, the Memo considers the likelihood of exerting jurisdiction over athletic conferences, even if some of their member schools are public colleges and universities. Because the NLRB's jurisdiction is limited to private-sector employers, the NLRB could decide to exert jurisdiction over the Pac-12 Conference and NCAA as joint employers with USC. The resulting ripple effects of such a decision are unclear, particularly because the overwhelming majority of FBS football teams and NCAA Division I men's and women's basketball teams are associated with public colleges and universities.

The NLRB's joint employer standard could significantly bolster efforts to extend coverage of the NLRA to college athletes. The NLRB recently issued a notice of proposed rulemaking to significantly alter its criteria to determine when multiple employers constitute a "joint employer" under the Act. Currently, an employer must both possess and actually exercise substantial direct and immediate control over the terms and conditions of employment of the other employer's

employees. Under the proposed rule, multiple employers would be a joint employer if they "share or codetermine those matters governing employees' essential terms and conditions of employment." Under this broader standard, it will be easier for college athletes and their advocates to establish joint employer status among the NCAA, its conferences and member schools.

This is not the first time the NLRB has been confronted with whether college athletes are "employees." In 2014, Northwestern University football players filed a representation petition in an attempt to unionize the football team. In a unanimous decision, the NLRB declined to assert jurisdiction, as issuing decisions regarding both union and non-union teams could lead to different standards at different schools — from the amount of money players receive to the amount of time they can practice — and create competitive imbalances on the field. The Board expressly declined to decide whether the football players were employees under the Act. Six years later, the College Basketball Players Association (CBPA), filed the first unfair labor practice charge against the NCAA since the Northwestern football players' unsuccessful effort to unionize.

The movement to recognize and protect the employment rights of college athletes extends beyond efforts made before the NLRB. Advocates are also moving the ball down the field in Congress and the courts. Hard on the heels of the Memo, Sens. Chris Murphy and Bernie Sanders introduced the College Athlete Right to Organize Act in Congress, which reflects the broader support for college athletes. This bill would amend the NLRA's definitions of "employee" and "employer" to make college athletes employees of their respective college, whether private or public, with all of the rights of any other employee protected by the Act. College athletes have also alleged in Johnson v. NCAA that they are employees for purposes of the Fair Labor Standards Act (FLSA). The U.S. District Court for the Eastern District of Pennsylvania found that the athletes had plausibly alleged that they are "employees" of the NCAA and their individual schools for purposes of the FLSA, and the case has moved up to the Third Circuit Court of Appeals.

These game-changing plays in the world of college athletics indicate a potential significant shift to increased employment rights for college athletes. The shift toward college athletes having NLRA rights is even more likely given the NLRB's current Democratic majority (3-1), but that decision is still months away. After being heard by an administrative law judge, the NCPA's case will likely be decided by the NLRB, but that decision could be appealed in the courts before final resolution.

THE LINE UP

ERICK ORANTES AND ETHAN SANDERS

01 **$133 THOUSAND.** In an update to a previous article by Abigail Flores and David Kim in the Fall 2022 edition of At the Corners, Hermès, the luxury fashion brand and owner of the famous Birkin faux-fur-covered bags, won its trial against the artist and Non-fungible tokens (NFT) creator Mason Rothschild. A jury found that Rothschild, who had created approximations of the iconic Birkin bags as NFTs, calling them "MetaBirkins," had infringed on Hermès' copyright and awarded the fashion company $133,000 in damages. Jurors found that the "MetaBirkins" NFTs were not protected speech and not protected by the First Amendment, but were instead subject to intellectual property laws which bar the sale of copies and imitations. NFT creators will need to take extra care in light of the decision as other fashion brands have already moved to secure their own rights, such as Louis Vuitton, which recently filed a trademark application for design marks that include digital content such as NFTs.

02 **$8 BILLION.** Although Disney and Warner Bros. Discovery own the rights to televise the National Basketball Association (NBA) through the end of the 2024-25 season, potential bidders for the rights have already begun expressing interest. Comcast's NBCUniversal, which last owned the NBA's broadcasting rights over 20 years ago, has expressed interest in acquiring NBA broadcasting rights, including the rights to playoff games, with some games to air exclusively on NBCUniversal's streaming service, Peacock. NBCUniversal is not alone – both Apple and Amazon have also expressed interest, and sources expect the NBA to open up negotiations for the rights to outside bidders, instead of re-signing with Disney and Warner Bros., as the NBA did in 2014. Early projections of the value of the rights deal are still speculative, but predictions are in the range of $8 billion per year, up from the NBA's current $2.6 billion-per-year deal.

03 **PIXEL.** A new class action in Pennsylvania alleges that ESPN tracks users' activities on the ESPN.com website and links the users to their Facebook accounts, using a pixel installed on the backend of the website called the "Facebook pixel." The lawsuit alleges that ESPN has "profited handsomely" by selling users' personal video-viewing data and information to Meta, the parent company of Facebook, without the users' consent. According to the plaintiffs, such disclosure of personally-identifiable information without a customer's consent is in violation of the Video Privacy Protection Act. ESPN has since filed a Motion to Compel Arbitration, under ESPN.com's Terms of Use.

04 **100,000.** Popular livestreamer Adin Ross may face legal challenges from the National Football League (NFL) after livestreaming the Super Bowl. Ross streamed the game on Kick, an online streaming platform, which does not claim under its terms of service any ownership or responsibility over the content streamers posted on its site. The stream amassed over 100,000 viewers, which the NFL could not monetize since the NFL must grant licenses for people to broadcast its events. Many attorneys have taken to social media to comment on the situation and highlight the possible copyright infringement claims and personal responsibility Ross may face. As of now, the NFL has yet to pursue any legal action against Adin Ross.

05 **WORLD CUP AUGMENTED REALITY DEBUT.** Fans got to enjoy the FIFA World Cup's Augmented Reality App in Qatar in December 2022. When fans opened the app, cameras displayed the field, player and game statistics appeared, along with several overlays, heat signatures and other metrics. FIFA wants to combine the fan experience with its data analytics for more interactions as more sports leagues have developed their own apps to do the same. With the control of the data and the app all under the ownership of FIFA, technology will enhance fan experience at their games and analytics will be constantly adapted regarding ownership and copyright concerns. betting revenue, thereby making it an attractive location for sportsbooks.

For more information on these and other esports, sports technology & wagering topics, please subscribe to our quarterly *At the Corners* newsletter.

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