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Carl J. Gaul IV
American University Washington College of Law, Carl.Gaul@student.american.edu

THE ULTIMATE FIGHTING CHAMPIONSHIP AND ZUFFA: FROM 'HUMAN COCK-FIGHTING' TO MARKET POWER

CARL J. GAUL IV*

The Ultimate Fighting Championship ("UFC") is the premier mixed martial arts ("MMA") promotion in the world and is the most recent athletic organization to attain a dominant market share that arguably constitutes a monopoly or monopsony. Antitrust law prohibits organizations from restraining trade or intentionally stamping out market place competition to attain or maintain monopoly power. The UFC's behavior has raised significant concerns about competition in two separate markets: the MMA Promotional Market and Elite MMA Labor Market. While the MMA Promotional Market appears more competitive than it has ever been, the Elite MMA Labor Market has seen significant reductions in competition. This reduction in competition has left MMA fighters vulnerable to exploitation and coercion. Without some regulatory oversight and with major gaps in relevant legislation, the fighters are left with few choices.

* J.D. 2018, American University Washington College of Law; B.A. Economics and Philosophy, Cornell College. The author would like to express gratitude to all who assisted in bringing this piece together, especially Professor N. Jeremi Duru and the American University Business Law Review Executive Board and Staff.

INTRODUCTION

Mixed martial arts ("MMA") has grown faster than any sport in the world for the last twenty-five years.[1] From brutal beginnings with almost no rules or regulations to a mainstream sport captivating millions of fans and earning billions of dollars, the MMA community is facing one problem common to every sport in its early days, a single economic entity dominating market place competition.[2] The Ultimate Fighting Championship ("UFC") emerged as the first major MMA promotion and has been the driving force behind the growth of the sport as a whole.[3] As a result, the UFC and its former parent company, Zuffa, LLC ("Zuffa"),[4] have grown to be the most powerful organization in the MMA industry, having achieved what can only be described as market dominance.[5] The association of the sport with the organization is so prevalent that many consumers confuse the organization

1. Derek Bolender, *MMA: Get to Know the Fastest Growing Sport in America*, BLEACHER REP. (June 4, 2008), http://bleacherreport.com/articles/27230-mma-get-to-know-the-fastest-growing-sport-in-america; Daniel Schorn, *Mixed Martial Arts: A New Kind of Fight*, CBS NEWS (Dec. 10, 2006), http://www.cbsnews.com/news/mixed-martial-arts-a-new-kind-of-fight/.

2. Paul Gift, *Former FTC Commissioner: UFC Investigations, Antitrust Lawsuit 'Ultimately About Consumers'*, SBNATION (Apr. 12, 2016, 8:00 AM), http://www.bloodyelbow.com/2016/4/12/11404276/former-commissioner-joshua-wright-ftc-investigation-antitrust-lawsuit-ufc-news; *see also* Law v. NCAA, 134 F.3d 1010 (10th Cir. 1998); Fed. Baseball Club of Baltimore, Inc. v. Nat'l League of Prof'l Baseball Clubs, 259 U.S. 200, 207–08 (1922); Radovich v. NFL, 352 U.S. 445 (1957).

3. Andrew Binner, *The Rise of Mixed Martial Arts*, AL–JAZEERA (Apr. 11, 2014), http://www.aljazeera.com/sport/othersports/2014/04/rise-mixed-martial-arts-201441094427103582.html.

4. Darren Rovell & Brett Okamoto, *Dana White on $4 billion UFC Sale: 'Sport Is Going to the Next Level*, ESPN (July 11, 2016), http://www.espn.com/mma/story/_/id/16970360/ufc-sold-unprecedented-4-billion-dana-white-confirms (explaining that Zuffa recently sold a majority share in the UFC. This sale does not affect the overall analysis of this comment).

5. Greg Byron, *Industry Dominance: The UFC and its 'Monopoly' in the MMA Market*, MMA CORNER (Jan. 24, 2014), http://themmacorner.com/2014/01/24/industry-dominance-the-ufc-and-its-monopoly-in-the-mma-market/; *see also* Am. Tobacco Co. v. United States, 328 U.S. 781, 792–95 (1946) (analyzing the degree of market control necessary to achieve market dominance).

with the sport itself; the UFC is synonymous with MMA the way "Kleenex" is synonymous with "tissue."[6]

The UFC formed in November 1993 and quickly became a political pariah.[7] Senator John McCain described mixed martial arts as "human cock–fighting"[8] and led a successful campaign against the sport, forcing it into temporary anonymity.[9] When the UFC returned to the public eye, it was a regulated, professional, and respectable sport.[10]

The UFC's market success began after it was purchased by Zuffa in January 2001.[11] Between 2001 and 2010, the UFC's viewership increased exponentially, due in large part to the more than tripling number of pay–per–view events produced annually and effective marketing.[12] The UFC then entered deals with Spike TV and Fox Sports, which further expanded the UFC and MMA consumer base.[13] Zuffa then bought out the UFC's five top competitors[14] leaving only small competitors, all with hardly a fraction of Zuffa's market share.[15]

6. Martin Rogers, *UFC Sold to WME–IMG for $4 Billion; Dana White Will Still Run Day–to–Day Operations*, USA TODAY (July 11, 2016), http://www.usatoday .com/story/sports/ufc/2016/07/11/ufc-sale-wwe-img-dana-white/86937834/ (quoting UFC president Dana White confusing the organization for the sport itself, "no other sport compares to UFC").

7. *See* Amy Silverman, *John McCain Breaks Up a Fight*, PHX. NEW TIMES (Feb. 12, 1998), http://www.phoenixnewtimes.com/news/john-mccain-breaks-up-a-fight-642 2460.

8. *Id.*

9. *Id.*

10. *See, e.g.*, N.J. ADMIN. CODE §§ 13:46–24A.01–.17, 13:46–24B.1–.5 (2010); Adam Hill, *A Timeline of UFC Rules: From No–Holds–Barred to Highly Regulated*, BLEACHER REP. (Apr. 24, 2013), http://bleacherreport.com/articles/1614213-a-timeline-of-ufc-rules-from-no-holds-barred-to-highly-regulated# (detailing the MMA comm unity's regulatory response to John McCain's crusade against "human cock–fighting").

11. Matthew Miller, *Ultimate Cash Machine*, FORBES (Apr. 17, 2008), https://ww w.forbes.com/forbes/2008/0505/080.html (detailing the market success and revenue growth following Zuffa's purchase of the UFC).

12. Kelefa Sanneh, *Ultimate Fighting Versus Boxing*, NEW YORKER (May 22, 2015), http://www.newyorker.com/news/sporting-scene/ultimate-fighting-versus-box i ng.

13. Michael David Smith, *Spike TV Says Goodbye to the UFC*, MMA FIGHTING (Aug. 18, 2011), http://www.mmafighting.com/2011/08/18/spike-tv-says-goodbye-to-the-ufc#2912082.

14. Chris Harty, *5 MMA Organizations Bought Out by UFC*, RICHEST (Jan. 16, 2016), http://www.therichest.com/sports/mma-sports/5-mma-organizations-bought-out-by-ufc/ (detailing Zuffa's purchases of the World Fighting Alliance, World Extreme Cagefighting, Pride Fighting Championship, International Fight League, and Strike force).

15. Dave Doyle, *Is Bellator a Real Rival to the UFC?*, MMA FIGHTING (Nov. 8, 2013), http://www.mmafighting.com/2013/11/8/5079324/fightweets-is-bellator-a-real-rival-to-the-ufc.

Through business expertise and acquisitions, Zuffa gained control of at least 90% of the MMA Promotional Market and more than 60% of the Elite MMA Labor Market.[16] While this market dominance is an impressive feat of business expertise, it raises concerns about potential antitrust violations.[17] Zuffa's market dominance is at least partially the result of eliminating competition through mergers and acquisitions supplemented by stringent non–compete agreements preventing fighters from participating in other promotions.[18] While these transactions are not *per se* illegal, such business practices become illegal when their result or purpose is to restrain trade or suppress competition.[19] And, although antitrust law has been applied unevenly in the world of professional athletics,[20] it is clear that exercising market power in a way that harms competition is illegal.[21]

Firms with market power maintain their dominance by preventing new competitors from entering the market, or by constructing barriers to market entry, and market power presents the opportunity for firms to raise prices such that consumers are forced to pay more than they would in a competitive market.[22] These business practices destroy the "potentiality of competition" and are the exact kind of practices prohibited by the Sherman Antitrust Act ("Sherman Act").[23] The simplest example of this business practice is anticompetitive monopolization that creates or maintains barriers to market entry. A monopoly occurs when a single company controls all or nearly all of the market for a given type of product or service, dominating the market.[24] As a result, the dominant firm has no incentive to set competitive prices, improve products, or produce at a competitive level because consumers have no substitute seller to buy from.[25]

A monopsony is the mirror image of a monopoly—where monopoly is the

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16. *See infra*, Figures 1, 2, 3, & 4.

17. Am. Tobacco Co. v. United States, 328 U.S. 781, 810 (1946).

18. Byron, *supra* note 5.

19. Law v. NCAA, 134 F.3d 1010 (10th Cir. 1998); *see also Am. Tobacco Co.*, 328 U.S. 781, 810.

20. *Compare* Radovich v. NFL, 352 U.S. 445 (1957), *with* Fed. Baseball Club of Baltimore, Inc. v. Nat'l League of Prof'l Baseball Clubs, 259 U.S. 200, 218 (1922).

21. *See, e.g.*, Mackey v. NFL, 543 F.2d 606, 622 (8th Cir. 1976).

22. *See* James May, *Antitrust in the Formative Era: Political and Economic Theory in Constitutional and Antitrust Analysis*, 50 OHIO ST. L.J. 257, 355 (1989).

23. Standard Oil Co. v. United States, 221 U.S. 1, 74 (1911).

24. May, *supra* note 22, at 266.

25. John D. Culbertson & Roy Weinstein, *Antitrust Aspects of Barriers to Entry*, *in* UCLA LAW FIRST ANNUAL INST. ON US AND EU ANTITRUST ASPECTS OF MERGERS AND ACQUISITIONS (2004); Shuntian Yao & Lydia Gan, *Monopoly Innovation and Welfare Effects*, ECONS. (Feb. 16, 2010), http://www.economics-ejournal.org/economics/discussionpapers/2010-10/file.

domination of a market on the selling side, a monopsony is the domination of a market on the buying side.[26] Monopsony occurs when there is a single buyer of a product or service.[27] While different in structure, monopoly and monopsony create the same distortion of economic competition.[28] Market entry becomes impossible when a business dominates the market for an essential product input and prevents the input producers from selling to other businesses.[29] Specialized, non–unionized laborers are uniquely vulnerable to monopsonies because their performance and work are product inputs and individual laborers do not have bargaining power comparable to a large business.[30]

In 1890, Congress began to address the issue of dominant firms exercising market power by passing the Sherman Act[31] to prevent anticompetitive business practices that restrain trade or result in monopolization.[32] The Sherman Act was a response to a small number of businessmen dominating markets, not through superior skill and effective business, but by "the use of means which made it impossible for other persons to engage in fair competition."[33] Such practices were viewed as economically destructive.[34] Consequently, the Sherman Act section 1 prohibits "[e]very contract, combination in the form of a trust or otherwise, or conspiracy, in restraint of

26. Law v. NCAA, 134 F.3d 1010 (10th Cir. 1998); Smith v. Pro Football, 593 F.2d 1173 (D.C. Cir. 1978); Jonathon M. Jacobson, *Monopsony 2013: Still Not Truly Symmetric*, ANTITRUSTSOURCE (Apr. 12, 2013), https://www.wsgr.com/attorneys/BIOS/PDFs/jacobson-0413.pdf.

27. Fraser v. Major League Soccer, 284 F.3d 47, 62–63 (1st Cir. 2002) (defining a monopoly as "the power to pay lower than competitive wages for the services being acquired without having the sellers of those services — the players — turn to another league or team for employment"); *In re* Beef Indus. Antitrust Litig., 907 F.2d 510, 514 (5th Cir. 1990) ("[M]onopoly is the term used to describe the situation where there is only one seller of a product, monopsony where there is only one buyer . . . .") (quoting R. POSNER & F. EASTERBROOK, ANTITRUST: CASES, ECONOMIC NOTES AND OTHER MATERIALS 148 (2d ed. 1981)).

28. Vogel v. Am. Soc'y Of Appraisers, 744 F.2d 598, 601 (7th Cir. 1984) (equating Sherman Act violations of monopoly and monopsony in that "[j]ust as a sellers' cartel enables the charging of monopoly prices, a buyers' cartel enables the charging of monopsony prices; and a monopoly and monopsony are symmetrical distortions of competition from an economic standpoint").

29. *See, e.g.*, Standard Oil Co. v. United States, 337 U.S. 293, 294, 295–96, 305–06 (1949) (affirming an injunction to keep Standard Oil Co., the largest seller of oil gasoline in the area, from enforcing or entering exclusive supply contracts with any independent dealer in petroleum products and automobile accessories).

30. Jacobson, *supra* note 26, at 6.

31. Sherman Antitrust Act, 15 U.S.C. § 1 (2012).

32. May, *supra* note 22, at 292–96.

33. 21 CONG. REC. S3152 (Apr. 8, 1890) (statement by Rep. Hoar).

34. *Id.*

trade or commerce among the several States, or with foreign nations."[35] Section 2 outlaws the acquisition and maintenance of monopoly power.[36] It is not illegal to acquire monopoly power, but it is illegal to do so by intentionally eliminating competition or preventing competitors from entering the market.[37]

Application of antitrust law to sports has been, at best, inconsistent.[38] While baseball has been largely exempted from antitrust law,[39] every other sport and league is subject to every facet of antitrust law. There has not yet been a ruling on antitrust law in regards to MMA.

This Comment will explore the antitrust implications of Zuffa and the UFC's business practices from 2001-2015. Section II of this Comment will focus on the antitrust laws, their purpose, and application to various business practices. It will also explain Zuffa and the UFC's industry dominance and business practices. Section III will apply antitrust law to Zuffa's business practices, the MMA Promotional Market, and the Elite MMA Labor Market. Section IV will recommend two specific changes necessary to stop injurious behavior in the MMA industry: acquisition of collective bargaining power by the fighters through an athletes association or union and expansion of the Muhammad Ali Boxing Reform Act to MMA.

35. 15 U.S.C. § 1 (2012); *see* May, *supra* note 22, at 265 (addressing the extensive debate over the legislative intent behind the Sherman Antitrust Act and the Clayton Antitrust Act as to whether the intention was consumer welfare or anti-cartelization); FTC & DOJ, ANTITRUST GUIDELINES FOR COLLABORATIONS AMONG COMPETITORS 3 (2000).

36. 15 U.S.C. § 2.

37. United States v. Microsoft Corp., 253 F.3d 34, 50 (D.C. Cir. 2001) (quoting United States v. Grinnell Corp., 384 U.S. 563, 570–71 (1966)) (explaining that illegal monopolization has two elements: "(1) the possession of monopoly power in the relevant market and (2) willful acquisition or maintenance of that power").

38. *Compare* Radovich v. NFL, 352 U.S. 445 (1957) (reversing judgment for defendants because "the volume of interstate business involved in organized professional football places it within the provisions of the antitrust laws"), *with* Fed. Baseball Club of Baltimore, Inc. v. Nat'l League of Prof'l Baseball Clubs, 259 U.S. 200, 218 (1922) (affirming judgment for defendants because conduct charged against defendants was not an interference with commerce amongst the States and therefore not within purview of the Antitrust Acts).

39. Flood v. Kuhn, 407 U.S. 258 (1972) ("Justice Blackmun delivered the opinion of the Supreme Court that longstanding exemption of professional baseball's reserve system from federal antitrust laws is an established aberration in which Congress has acquiesced and is entitled to benefit of stare decisis, and any inconsistency or illogic is to be remedied by the Congress and not by the Supreme Court."); *see* Curt Flood Act of 1998, 112 Stat. 2824, 15 U.S.C. § 26b (2012) (removing baseball's exemption from antitrust law with respect to the major–league baseball player market).

II. BEHAVIOR PROHIBITED BY ANTITRUST LAW AND ZUFFA'S BUSINESS PRACTICES

Antitrust law is the blanket definition of all laws that are intended to prevent anticompetitive business practices.[40] The legislative intent to punish anticompetitive conduct should not be confused with the intent to punish big business.[41] A big business is defined as a business that dominates a market through superior efficiency rather than anticompetitive practices.[42] While pro–competitive business practices increase supply and reduce prices, anticompetitive practices reduce supply and raise prices.[43] The following sections will outline the steps required to find an abuse of market power: (a) establishing a relevant market in which a business may exercise market power; (b) the methods by which market power is exercised including barriers to market entry, market foreclosure, and exclusionary practices; (c) the methods courts use to determine whether an antitrust violation occurred; and (d) the unique applications of antitrust law to sports and professional athletics. The Section will conclude by summarizing Zuffa's business practices.

A. Establishing the Relevant Market

Antitrust laws are designed to protect markets and the competitive process from anticompetitive behavior. Thus, antitrust analysis requires a market in which competition may have been harmed. A market is defined as a set of goods or services that are reasonably interchangeable with one another.[44] In

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40. *Antitrust Laws and You*, DOJ (Jan. 5, 2017), https://www.justice.gov/atr/antitrust-laws-and-you.

41. 21 CONG. REC. S2461 (Apr. 8, 1890) (explaining that the purpose of antitrust law is only to regulate the conduct of businesses in so far as they harm competition); Thomas C. Arthur, *A Workable Rule of Reason: A Less Ambitious Antitrust Role for the Federal Courts*, 68 ANTITRUST L. J. 337, 380 (2000). *See generally* 21 CONG. REC. S2461-62 (daily ed. Apr. 8, 1890) (statement of Sen. Sherman) (explaining the purpose of the Sherman Act is to alleviate the harms induced by trusts and combinations which collaborate to dominate the American economy through harm to competition).

42. *See* Verizon Commc'ns, Inc. v. Law Offices of Curtis V. Trinko, 540 U.S. 398, 872, 879 (2004); Standard Oil Co. v. United States, 221 U.S. 1, 525–26 (1911) (interpreting the Sherman Act as targeting only those who "shall monopolize or attempt to monopolize," that is, those who act to obtain monopoly power rather than those who merely possess it); Arthur, *supra* note 41, at 380.

43. Thomas G. Krattenmaker et al., *Monopoly Power and Market Power in Antitrust Law*, 76 GEO. L.J. 241, 248 (1987).

44. Rothery Storage & Van Co. v. Atlas Van Lines, Inc., 792 F.2d 210, 218 (D.C. Cir. 1986). It is important to note that there is some dispute as to whether it is necessary to the antitrust analysis to define the market. *Compare* Nat'l Hockey League Players Ass'n v. Plymouth Whalers Hockey Club, 419 F.3d 462, 466, 470 (6th Cir. 2005) (ruling that identifying a relevant market is necessary to bring action under federal antitrust law), *with* United States v. Brown Univ., 5 F.3d 658, 669 (3d Cir. 1993) (citing 7 P. Areeda, Antitrust Law 1503 at 376) ("[C]ourts typically allow proof of the defendant's 'market

defining a market, the court must look to all reasonable substitutes for the product or services in question.[45] A firm cannot have market dominance or a monopoly in a market where its product can be easily substituted with a competitor's "because the ability of consumers to turn to another supplier restrains a firm from raising prices above the competitive level."[46] The relevant market must include all other products "reasonably interchangeable by consumers for the same purposes."[47] Courts accept evidence of direct, indirect, or even probable injury to competition as sufficient to support a successful antitrust claim.[48]

Whether two products are in the same market depends on consumers' ability to use them for the same purposes.[49] For example, in *United States v. Aluminum Co. of America*,[50] the Supreme Court found the defendant monopolized the virgin aluminum ingot market.[51] Rejecting the argument that recycled aluminum could be used in place of pure virgin ingot,[52] the Court explained that although recycled aluminum could be used in the place of virgin ingot, it was not a reasonable substitute because recycled aluminum cannot serve all the same purposes as virgin ingot.[53] As a result, the products were not reasonably interchangeable and they were not in the same market.[54] A broader market definition would have undermined the government's argument against Aluminum Company because market power was only demonstrable in the virgin ingot market.[55]

Contrastingly, in *United States v. E. I. Du Pont De Nemours & Co.*,[56] the

power' [instead of defining a relevant market] due to the difficulty of isolating the market effects of challenged conduct . . . .").

45. United States v. Microsoft Corp., 253 F.3d 34, 81 (D.C. Cir. 2001).

46. *Id.* at 50 (quoting *Rothery Storage & Van Co.*, 792 F.2d at 218).

47. Fred Johnson Cement Block Co. v. Waylite Co., 184 F. Supp. 855, 857 (D. Minn. 1960).

48. *See* Am. Tobacco Co. v. United States, 328 U.S. 781, 809–10 (1946) (accepting evidence companies acting in concert as evidence of collusion and harm to competition); Addamax Corp. v. Open Software Found., 888 F. Supp. 274, 281 (D. Mass. 1995) (accepting internal memoranda concerning intentionally anticompetitive conduct as evidence of anticompetitive conduct); Stop & Shop Supermkt. Co. v. Blue Cross & Blue Shield, 239 F. Supp. 2d 180, 184 (D.R.I. 2003) (accepting evidence that output had been reduced and prices increasing as evidence of probable anticompetitive conduct).

49. United States v. Aluminum Co. of America, 148 F.2d 416, 425–26 (2d Cir. 1945).

50. 148 F.2d 416 (2d Cir. 1945).

51. *Id.* at 423.

52. *Id.*

53. *Id.* at 434–44.

54. *Id.*

55. *Id.* at 425–26.

56. 351 U.S. 377 (1956).

Court held that defining the relevant market requires that all products that are reasonably interchangeable with the one in question be included in the relevant market, but products that are not reasonably interchangeable should be excluded.[57] Here, the government argued that Du Pont had market power in the cellophane wrapping market.[58] The Court rejected this argument because although Du Pont did have market power over the cellophane wrapping market, cellophane wrapping was reasonably interchangeable with a number of other wrapping products that could be used for all the same purposes.[59]

B. Prohibited Conduct in the Relevant Market: Foreclosure, Exclusion, and Barriers to Entry

For a monopoly to profitably exercise market power and maintain its market dominance, there must be barriers to market entry.[60] Otherwise, new firms will enter the market offering products at a more competitive price.[61] The only way a monopoly can profit from the exercise of market power is if consumers have no reasonable substitute producer to buy from.[62]

Among other things, monopolies prevent market entry through exclusionary conduct such as implementing exclusive contracts and foreclosing inputs.[63] The Clayton Act section 3,[64] proscribes exclusive dealings contracts which "substantially lessen competition or tend to create a monopoly in any line of commerce" by prohibiting one or more of the parties from dealing with competitors.[65] Input foreclosure occurs when the supplier of an input is forced to only deal with a single buyer.[66] Should a buyer create an exclusive dealings contract with each supplier of a given input, the buyer's competitors will be unable to access the input entirely

57. *Id.* at 395–400.

58. *Id.*

59. *Id.*

60. CHRISTOPHER L. SAGERS, ANTITRUST 46–47 (2d ed. 2014) (explaining the economic principals of how monopolies profit from excluding competition).

61. *Id.* at 48 (explaining that monopolies are able to maximize their profits by selling their products at an above competitive–market price).

62. *Id.* at 196 (explaining the importance of excluding competitors from the market and maintaining market power or market dominance in order to continue charging monopoly prices).

63. *See, e.g.*, Standard Oil Co. v. United States, 337 U.S. 293, 314–15 (1949) (finding that Standard Oil used an exclusive contracting scheme to foreclose inputs, specifically transportation, from competitors).

64. 15 U.S.C. § 14 (2012).

65. *Id.*

66. United States v. Dentsply, 399 F.3d 181, 187 (3d Cir. 2005).

foreclosing the market to competitors.[67] Such arrangements restrain trade by preventing the relevant market from growing in size and scope.[68] Under recent jurisprudence, an exclusive dealings contract must foreclose at least thirty percent of the relevant market to competitors,[69] have a term greater than one year, and not be easily terminated to violate the Clayton Act section 3.[70]

For example, in *Standard Oil Co. v. United States*, the Supreme Court held that an exclusive contracting agreement violated antitrust law due to market foreclosure.[71] Standard Oil formed contracts with 6.7% of the railway market, preventing competitors from using those railways in a cost–effective manner.[72] Due to this inhibition on competitors, an essential input to the sale of oil, transportation, was foreclosed and the practice reduced competition in the oil market.[73] The Supreme Court held that the contracting scheme was anticompetitive in violation of the Clayton Act section 3.[74]

In contrast, the Supreme Court balanced its approach to input foreclosure in *Tampa Electric Co. v. Nashville Coal Co.*,[75] when it held that for exclusive dealings contracts to violate antitrust law, the contracts must foreclose a significant portion of the market to competitors and harm competition.[76] In this case, an electrical company entered a twenty-year exclusive dealings contract with a coal company.[77] The Supreme Court held that all contracts foreclose the market in some capacity and that the foreclosure must be significant enough to have a negative impact on competition.[78] Because the portion of the market foreclosed by the contract was less than one percent, the Court found that there was no negative impact on competition.[79]

A more extreme example of input foreclosure is a monopsony; an economic phenomenon which forces all suppliers of a product or service to

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67. *Id.*

68. *Id.* at 191 ("[W]hen a monopolists' actions are designed to prevent one or more new or potential competitors from gaining a foothold in the market by exclusionary conduct, its success in that goal is not only injurious to the potential competitor but also to competition in general . . . .").

69. Omega Envtl., Inc. v. Gilbarco, Inc., 127 F.3d 1157, 1162–63 (9th Cir. 1997) (finding foreclosure of thirty–eight percent of the relevant market to be lawful).

70. Roland Mach. Co. v. Dresser Indus., Inc., 749 F.2d 380, 395 (7th Cir. 1984).

71. Standard Oil Co. v. United States, 337 U.S. 293, 314–15 (1949).

72. *Id.* at 305.

73. *Id.* at 314–15.

74. *Id.*

75. 365 U.S. 320 (1961).

76. *Id.* at 333–35.

77. *Id.* at 322.

78. *Id.* at 333–35.

79. *Id.*

deal with a single buyer.[80] When a company achieves monopsony power it is able to set its buying prices below the market price and sometimes below the suppliers' production costs.[81] Such a monopsony was alleged in *In re Beef Industries Litigation*,[82] where a major beef packer, IBP, was alleged to have acquired monopsony power and used it anticompetitively.[83] IBP was acquitted of the charges because the court found that that IBP did not abuse its position of market dominance.[84] Further, the court stated, "[i]f IBP had monopsony power, it would take illegal advantage of that situation by reducing its purchases of fed cattle in order to reduce its costs and make a higher profit on each head of cattle processed."[85] In other words, IBP acted procompetitively, as a big business rather than restraining trade.

C. Modes of Antitrust Analysis

The relevant modes of antitrust analysis are *per se* and rule of reason analysis.[86] Courts implement *per se* analysis when the violations are based on business practices that are expressly prohibited due to their well–established anticompetitive effects.[87] Examples of *per se* violations include: group boycotts, concerted refusals to deal, and agreements among competitors not to compete.[88] Courts do not give *per se* violations the benefit of any balancing test because these violations do not have any procompetitive justifications.[89] For example, in *United States v. Andreas*,[90] the defendant companies were caught red–handed colluding to fix the price and production rate of their goods. Further, ranking executives were recorded saying "the competitor is our friend, the consumer is our enemy."[91] Such business practices have a clear harmful effect on competition,

80. *See generally* Culbertson & Weinstein, *supra* note 25.

81. *Id.*

82. *See generally* Meat Price Investigators Assoc. v. Iowa Beef Processors Inc., 907 F.2d 510 (5th Cir. 1990).

83. *Id.* at 515.

84. *Id.*

85. *Id.* at 516.

86. Geoffrey D. Oliver, *Of Tenors, Real Estate Brokers and Golf Clubs: A Quick Look at Truncated Rule of Reason Analysis*, 24 A.B.A. ANTITRUST 40 (2010) (asserting that 'quick look' rule of reason is a tool for courts during summary judgment to save time when there is a clear outcome to the case without doing a full–blown rule of reason analysis; this method is known as a truncated rule of reason analysis).

87. 15 U.S.C. § 1 (2012); May, *supra* note 22, at 365.

88. May, *supra* note 22, at 365.

89. *The Antitrust Laws*, FTC, https://www.ftc.gov/tips-advice/competition-guidance/guide-antitrust-laws/antitrust-laws (last visited Nov. 16, 2016).

90. *See generally* United States v. Andreas, 150 F.3d 766 (7th Cir. 1998).

91. JAMES M. LIEBER, RATS IN THE GRAIN: THE DIRTY TRICKS AND TRIALS OF ARCHER DANIELS MIDLAND, THE SUPERMARKET OF THE WORLD (2002).

consumers, and markets.[92] Courts will not accept any arguments in favor of these or similar practices.[93]

Rule of reason analysis is an in depth economic analysis conducted to determine whether a business practice is anticompetitive or restrains trade.[94] Practices challenged under the rule of reason are given the benefit of a balancing test weighing procompetitive benefits of the practice against potentially anticompetitive effects.[95] Rule of reason jurisprudence interprets the Sherman Act to prohibit business practices which have the "actual or probable" effect of imposing an undue restraint on trade and requires a balancing test.[96] This balancing test incorporates economic benefits brought about by potentially justifiable restraints of trade, such as contracts.[97] Specifically, courts will balance: (1) whether there is a potential harm to the competitive process; and (2) whether there are procompetitive justifications for the allegedly illegal behavior, called "efficiencies," to determine whether there is an illegal net anticompetitive effect.[98]

The term "efficiencies" refers to economic and competitive benefits that ultimately reach consumers resulting from business practices challenged under antitrust law.[99] The concept of efficiencies was first introduced in *United States v. Addyston Pipe & Steel*[100] where the court held that contracts in restraint of trade are legal so long as they are ancillary to a lawful purpose.

This *Addyston* ruling is interpreted today to allow restraints of trade that directly benefit consumers.[101] For example, in *Broadway Music Inc. v. Columbia Broadcast System, Inc.*,[102] the defendant music companies allegedly engaged in a horizontal price fixing agreement.[103] This agreement

92. May, *supra* note 22, at 365.

93. *Id.*

94. PHILLIP AREEDA ET. AL., ANTITRUST LAW: AN ANALYSIS OF ANTITRUST PRINCIPLES AND THEIR APPLICATION, 15–16 (1978).

95. May, *supra* note 22, at 365.

96. Arthur, *supra* note 41, at 388; *see, e.g.*, Am. Tobacco Co. v. United States, 328 U.S. 781, 794 (1946) (the Court focused its industry analysis on a set number of years, 1931–1939, in which the defendants were alleged to have violated the antitrust laws); Standard Oil Co. v. United States, 221 U.S. 1, 74 (1911).

97. United States v. Microsoft Corp., 253 F.3d 34, 50 (D.C. Cir. 2001); United States v. Addyston Pipe & Steel Co., 85 F. 271, 282 (6th Cir. 1898).

98. *Microsoft Corp.*, 253 F.3d at 50; *Addyston Pipe & Steel Co.*, 85 F. at 282.

99. Thomas B. Leary, *Efficiencies and Antitrust: A Story of Ongoing Evolution*, FTC (Nov. 8, 2002), https://www.ftc.gov/public-statements/2002/11/efficiencies-and-antitrust-story-ongoing-evolution.

100. 85 F. 271 (6th Cir. 1898).

101. *See, e.g.*, Broadway Music Inc. v. Columbia Broad. Sys., Inc., 441 U.S. 1 (1979).

102. 441 U.S. 1 (1979).

103. *Id.* at 2.

would have been illegal under antitrust laws, if not for the fact that Broadway Music was able to demonstrate that the agreement benefited consumers by reducing costs; the horizontal agreement allowed music producers to avoid repeat transactions, each one with associated costs that reached consumers.[104] This increased efficiency justified the otherwise illegal behavior by benefiting consumers.[105]

Rule of reason analysis incorporates market data and industry analysis, when both relevant and available, as this information provides direct evidence of the effects that business practices have had on the relevant market.[106] This method is exemplified in *American Tobacco Co. v. United States*[107] where the Supreme Court focused on a set number of years, 1931–1939, in which the defendants were alleged to have violated antitrust laws.[108] The Court compared the defendants' rate of cigarette production and sales to the rest of the tobacco industry.[109] The size of the defendant companies in relation to competitors was found to be enough to establish a conspiracy to restrain trade and to monopolize the tobacco industry.[110] The Court went on to justify the method of economic analysis based on the commonly held belief that insurmountable competition discourages market entry by new market competitors.[111]

D. Antitrust Law in the Sports Industry and Labor Markets

Competition between firms creates the best products and the best market conditions for employees within that industry.[112] Labor market competition forces firms to offer employees competitive wages or risk losing employees to firms offering higher wages.[113] The result is usually a split of the best employees between different companies within the relevant industry.[114]

Professional sports are unique in that dividing the best employees into different promotions reduces the quality of the final product.[115] This is

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104. *Id.* at 21.

105. *Id.*

106. *See* Am. Tobacco Co. v. United States, 328 U.S. 781 (1946).

107. *Id.*

108. *Id.* at 794.

109. *Id.*

110. *Id.* at 796 (quoting United States v. Swift & Co., 286 U.S. 106, 116 (1932)) ("Size carries with it an opportunity for abuse that is not to be ignored when the opportunity is proved to have been utilized in the past.").

111. *Id.* at 813 (quoting United States v. Aluminum Co. of America, 148 F.2d 416, 427 (1945)).

112. GEORGE J. BORJAS, LABOR ECONOMICS 188 (7th ed. 2015).

113. *Id.*

114. *Id.*

115. *See* Sherwin Rosen & Allen Sanderson, *Labor Markets in Professional Sports* 4

because the most competitive products in the sports industry are the best athletes competing against each other,[116] hence, football's Super Bowl, soccer's World Cup, and the pinnacle of every other sport.

Team sports, such as football, basketball, and baseball have dealt with this problem by defining different teams as separate economic entities[117] and defining games, the product, as joint ventures.[118] Individual sports like MMA present a paradox with production of the most desirable product on the one side and the antitrust issue of competition on the other. The best product necessitates most, if not all, of the best athletes in the sport competing in a single promotion.[119]

A strong example of increasing market place competition while uniting more athletes in a single promotion took place in *Fraser v. Major League Soccer, LLC*.[120] In *Fraser*, the defendant, Major League Soccer ("MLS"), acquired another soccer league in order to make itself more competitive on an international scale.[121] Rather than eliminate competing teams from the industry and create a less competitive market, MLS promoted competition within the soccer industry internationally by acquiring a competitor to better compete (economically and athletically) with international teams.[122]

On the other hand, labor market competition is inhibited in various professional sports by contractual clauses that limit athletes' ability to change employers.[123] Infamously, the National Football League ("NFL") implemented what was known as the "Rozelle Rule"[124] while Major League Baseball ("MLB") implemented the "Reserve Clause."[125] The function of the Rozelle Rule was to allow the NFL to manage disputes between players and teams when the player wanted to move to a different team for increased

(Nat'l Bureau of Econ. Research, Working Paper No. 7573, 2000).

116. *Id.*

117. Am. Needle, Inc. v. NFL, 560 U.S. 183, 196 (2010) (defining sports teams as legally distinct entities and cooperation between teams as joint ventures); Fraser v. Major League Soccer, 284 F.3d 47, 55 (surveying conflicting opinions as to whether sports teams constitute distinct entities).

118. *Am. Needle*, 560 U.S. at 196. *See generally* Roger G. Noll, *The Organization of Sports Leagues* (Stanford Inst. for Econ. Policy Research, Discussion Paper No. 02–43, 2003).

119. Rosen & Sanderson, *supra* note 115, at 6 (explaining how top athletic performers draw large audiences while even slightly less competitive athletes see significantly smaller audiences and therefore incomes drop off).

120. *See* 284 F.3d 47 (1st Cir. 2002).

121. *Id.* at 55.

122. *Id.* at 59.

123. *See, e.g.*, Flood v. Kuhn, 407 U.S. 258 (1972); Toolson v. N.Y. Yankees, 346 U.S. 356 (1953); Mackey v. NFL, 543 F.2d 606 (8th Cir. 1976).

124. *Mackey*, 543 F.2d at 610.

125. *Toolson*, 346 U.S. 362 n. 10.

wages.[126] The disputes would be resolved by the NFL Commissioner, Pete Rozelle, by instructing the team receiving the moving player to pay the player's previous team a fee.[127] The actual effect of the Rozelle Rule reduced player mobility and depressed player wages.[128] The Rozelle Rule was found to be an unreasonable restraint of trade in violation of the Sherman Act section 1 because the rule was not essential to the league's function and it was more restrictive than necessary.[129]

Contractual restrictions on athletes' abilities to move from one organization to another should be no more restrictive than necessary and essential to the organization's function, otherwise, the restrictions may violate antitrust law.[130] Despite the presence of antitrust laws, lack of wage competition due to a dominant firm with monopsony power has been a prevailing problem for athletes throughout the sports industry, most notably in baseball.[131] Baseball was exempt from antitrust laws until relatively recently.[132] For decades, the MLB enforced the Reserve Clause, which kept players bound to the team they first signed with for the extent of their career and after retirement.[133] The MLB's contracting scheme was challenged in *Toolson v. New York Yankees*[134] and *Flood v. Kuhn*.[135] In *Toolson*, the Supreme Court held that baseball is a pastime, not a part of interstate commerce and, therefore, the contracting scheme was outside the constitutional scope of the Commerce Clause.[136] In *Flood*, the Supreme Court held that the legality of the MLB's contracting scheme was a political question.[137] This holding was met with criticism, none more harsh than that of Justice Marshall stating in his dissent that "[t]o non–athletes it might appear that petitioner was virtually enslaved by the owners of major league baseball clubs who bartered among themselves for his services."[138] Despite

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126. *Mackey*, 543 F.2d at 615.

127. *Id.*

128. *Id.*

129. *Id.* at 622–23.

130. *Id.* at 620.

131. Andrew Tarman, *The Effect of Monopsony Power in Major League Baseball on the Salaries of Players with Less Than Six Years in the Major*, ILL. WESLEYAN U. DIGITAL COMMONS 1, 1 (2005).

132. *See* The Curt Flood Act of 1998, 112 STAT. 2824, 15 U.S.C. § 26b (2016) ("An Act requiring the general application of the antitrust laws to major league baseball, and for other purposes.").

133. Toolson v. N.Y. Yankees, 346 U.S. 356, 357, 362–64 (1953).

134. 346 U.S. 356 (1953).

135. 407 U.S. 258 (1972).

136. *Toolson,* 346 U.S. 356-57.

137. *Flood*, 407 U.S. 258, 273–74.

138. *Id.* at 289 (Marshall, J. dissenting).

the judiciary's avoidance of applying antitrust law to baseball, baseball players advocated for themselves and improved market conditions for themselves by engaging in collective bargaining.[139] Rather than fight an uphill battle against the dominant firm, baseball players unionized forming the Major League Baseball Players Association ("MLBPA") to demand minimum contractual terms and collective bargaining opportunities.[140]

Athletes in the boxing industry faced similarly coercive contracts prior to the passage of the Muhammad Ali Boxing Reform Act ("Ali Act").[141] Although there was no monopolist, boxers faced coercive and one–sided contracts.[142] Among other things, the Ali Act set minimum safety and contract requirements for participants in the boxing industry.[143] Regular conflicts of interest among judges and referees resulted in questionable outcomes as to who won or lost a bout.[144] The most important feature of the Ali Act is to prohibit contracts allowing managers and promoters to unfairly control and manipulate athlete pay.[145]

139. *Id.* at 294.

140. Clarett v. NFL, 369 F.3d 124, 130–131 (2d Cir. 2004) (quoting Brown v. Pro Football, 50 F.3d 1041, 1056 (D.C. Cir. 1995)) (holding that "the non–statutory labor exemption waives antitrust liability for restraints on competition imposed through the collective bargaining process, so long as such restraints operate primarily in a labor market characterized by collective bargaining"); MLBPA Basic Agreement, art. III (2012–2016); *Our History*, MAJOR LEAGUE BASEBALL PLAYERS, http://www.mlbplayers.com/ViewArticle.dbml?ATCLID=211042995&DBOEMID=34000 (last visited Sept. 30, 2017).

141. 15 U.S.C. § 6301 (2012).

142. H.R.5365, 114th Cong. (2015); John S. Nash, *Congressman Markwayne Mullin Talks About Bringing the Ali Act to MMA*, BLOODY ELBOW (Apr. 18, 2016), http://www.bloodyelbow.com/2016/4/18/11449348/congressman-markwayne-mullin-talks-about-bringing-the-ali-act-to-mma.

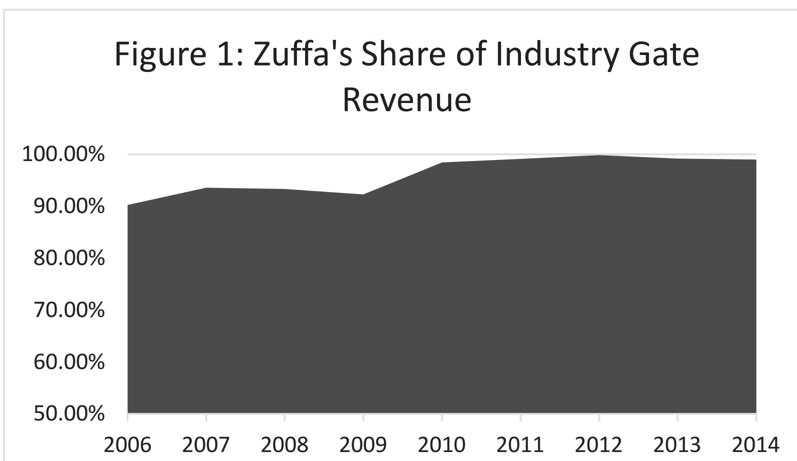
143. Brad Ehrlichman, *In This Corner: An Analysis of Federal Boxing Legislation*, 34 COLUM. J.L. ARTS 421, 421, 423 (2011).

144. *Id.* at 423.

145. H.R.5365, 114th Cong. (2015).

E. Zuffa's Business Practices

Zuffa's business practices implicate two closely related, but technically distinct, markets: the MMA Promotional Market and the Elite MMA Labor Market (fighters ranked in the top thirty world–wide). Zuffa controls an enormous share of both markets. A company's level of control over a given market is readily demonstrated by its share of industry revenue.[146] Figure 1 below, illustrates Zuffa's enormous share of industry gate revenue.[147] As it demonstrates, since 2006, Zuffa has taken in a minimum 90.23% of industry gate revenue, a maximum of 98.85%, and averaged 96.11%.[148]



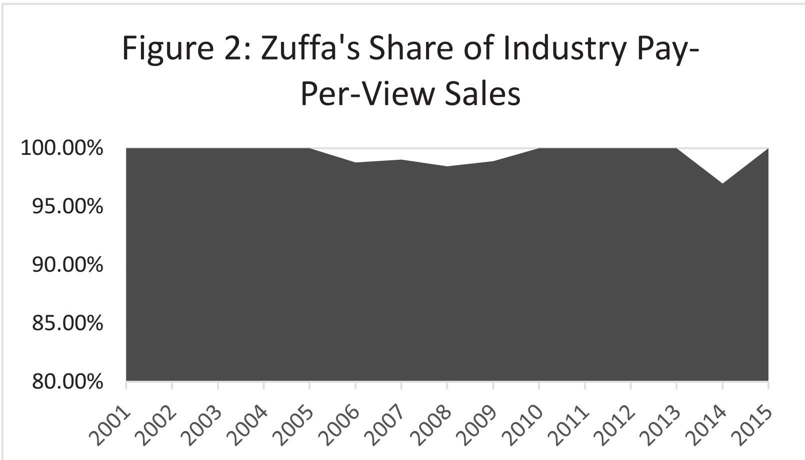
Further, as demonstrated in Figure 2 below, Zuffa averaged 99.47% of industry pay–per–view sales from 2008 to 2015.[149]

146. Am. Tobacco Co. v. United States, 328 U.S. 781 (1946); Nobody in Particular Presents, Inc. v. Clear Channel Commc'ns, Inc., 311 F. Supp. 2d 1048, 1102 (D. Colo. 2004).

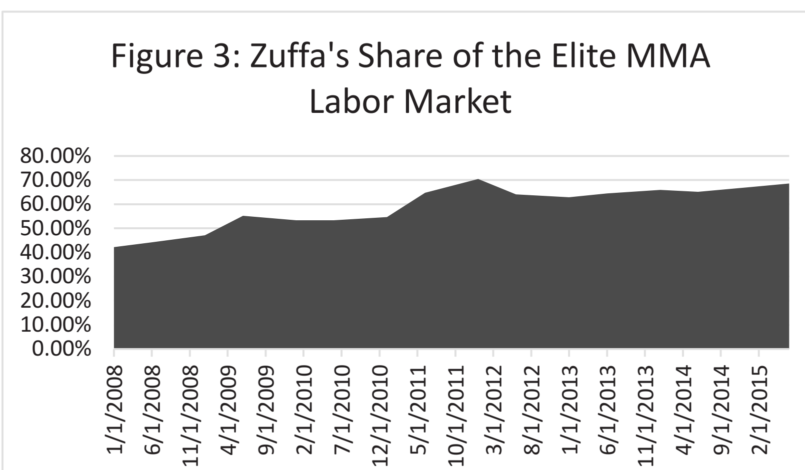
147. Figure 1 was created using information compiled from: *Live Gate & Atten dance*, PAYOUT THE BUS. OF MMA, http://mmapayout.com/blue-book/live-gate-att endance/ (last visited Mar. 15, 2017).

148. *See* Figure 1.

149. *See infra* Figure 2. Figure 2 was created using information compiled from: *Pay–per–View*, PAYOUT THE BUS. OF MMA, http://mmapayout.com/blue-book/pay-per-view/ (last visit-ed Mar. 15, 2017).



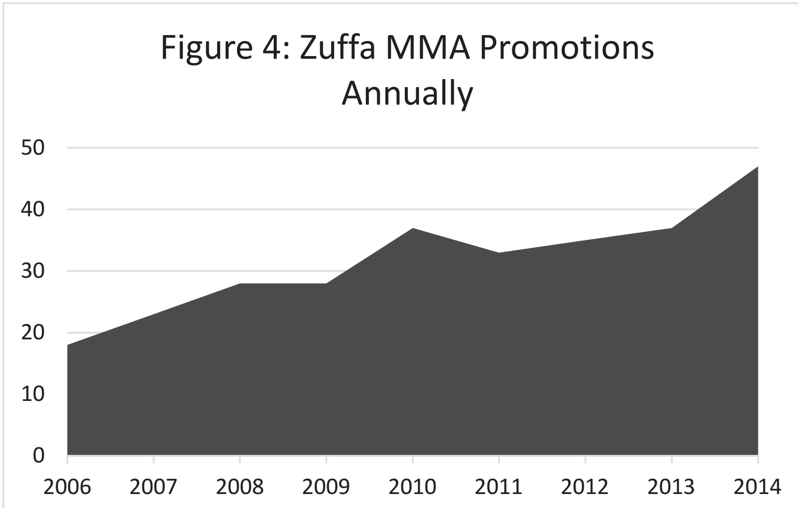
As demonstrated in Figure 3 below, Zuffa has steadily grown its dominant share in the Elite MMA Labor Market: in 2008, Zuffa's share was 42.29% and rose to 68.67% in 2015.[150]



Additionally, as demonstrated in Figure 4 below, Zuffa has increased the number of MMA promotions every year while lowering the cost to consumers by expanding out of pay–per–view only and into television.[151]

150. Figure 3 was created using information compiled from: *Current MMA Rank ings*, FIGHT MATRIX, http://www.fightmatrix.com/mma-ranks/ (last visited Mar. 15, 2017) and SHERDOG, http://www.sherdog.com/ (last visited Mar. 15, 2017).

151. Sanneh, *supra* note 12. Figure 4 was created using information compiled from: *Blue Book*, PAYOUT THE BUS. OF MMA, http://mmapayout.com/blue-book/ (last visited



Zuffa's market dominance alone is not enough to cause an antitrust injury.[152] However, several of Zuffa's business practices do raise antitrust concerns, specifically Zuffa's (1) specific intent to reduce competition through the purchase of PRIDE FC,[153] (2) indefinite contractual length,[154] (3) widespread use of non-compete clauses,[155] and (4) reduction in fighter pay that was not followed by a significant reduction in labor market share.

First, specific intent to reduce competition was revealed (accidentally) by the UFC during litigation in an internal memo to the UFC from one of its lawyers; the purpose of the PRIDE FC acquisition was "to stop others from buying Pride and to acquire Pride to shut the business down and acquire its fighters for the UFC."[156] Zuffa acquired two additional firms under similar circumstances, Strikeforce and World Extreme Cagefighting ("WEC").[157]

Mar. 15, 2017).

152. Arthur, *supra* note 41, at 380.

153. *Id.*

154. *See* Zane Simon, *UFC Fighter Contract Details Revealed and Analyzed*, BLOODY ELBOW (May 14, 2013) (quoting section 4.2 of Eddie Alvarez's UFC contract), http://www.bloodyelbow.com/2013/5/14/4330572/ufc-fighter-contracts-rev ealed-dana-white-fertitta-mma-news.

155. Paul Gift, *Dissecting the Fighter's Antitrust Lawsuit Against the UFC, Part 2*, BLOODY ELBOW (Dec. 18, 2014), https://www.bloodyelbow.com/2014/12/18/7414 267/mma-ufc-fighter-antitrust-lawsuit-monopoly-monopsony-cung-le-nate-quarry-jon-fitch-part-2.

156. Cung Le v. Zuffa, 2:15-cv-01045-RFB-PAL, 2016 U.S. Dist. LEXIS 69813, at *23 (D.C. Nev. 2016).

157. Harty, *supra* note 14.

Strikeforce distinguished itself by promoting female fighters which quickly gained traction and viewership.[158] Before acquiring Strikeforce, Zuffa weakened the business through the practice of "counter–programming," or strategically planning UFC events to occur at the same time as Strikeforce events in order to reduce Strikeforce viewership, TV ratings, and thereby company value.[159] The WEC similarly attempted to distinguish itself by promoting fights in smaller weight classes.[160] Both of these MMA promotions were competing with the UFC by offering competitive wages, lower prices to consumers, and a product that, in one way or another, was distinguishable from what the UFC produced until Zuffa eliminated them as competitors.[161]

Second, the UFC's Championship Clause prevents top-ranked fighters from negotiating with other organizations or leaving the UFC by "automatically extend[ing] the contract if the fighter should win a UFC title."[162] This clause states:

> If, at the expiration of the Term, Fighter is then a UFC champion, the Term shall automatically be extended for the period commencing on the Terminate Date and ending on the later of (i) one (1) year from the Termination Date; or (ii) the date on which Fighter has participated in three (3) bouts promoted by ZUFFA, regardless of weight class or title, following the Termination Date ("Extension Term").[163]

The Champions Clause extends indefinitely, holding the fighter bound to Zuffa.

Third, Zuffa's contracts always contain non–compete clauses which prevent the fighters from participating in other promotions for the extent of the contractual relationship without Zuffa or the UFC's express consent.[164] The UFC's contracts allow them to hold a fighter on contract without having any fights (and therefore keeping the fighter from generating income) for

158. Josh Gross, *UFC Buys Rival Strikeforce*, ESPN (Mar. 13, 2011), http://espn.go.com/extra/mma/news/story?id=6209923.

159. MMAjunkie Staff, *Saturday's Strikeforce Show Countered by Spike TV "UFC's Ultimate Fighters" Special*, MMA JUNKIE (May 12, 2010), http://mmajunkie.com/2010/05/saturdays-strikeforce-show-countered-by-spike-tv-ufcs-ultimate-fights-special.

160. Harty, *supra* note 14.

161. *See id.* (detailing Zuffa's purchase of the WEC once it had success marketing fighters who were physically smaller than those in the UFC and, similarly, Strikeforce was purchased once it had success marketing female fighters).

162. Simon, *supra* note 154.

163. *Id.*

164. Jeffrey B. Same, Comment, *Breaking the Chokehold: An Analysis of Potential Defenses Against Coercive Contract in Mixed Martial Arts*, 2012 MICH. ST. L. REV. 1057, 1062, 1072, 1086 (2012).

years at a time.[165] These non–compete clauses also prevent other promotions from competing for the athlete's contracts by offering higher wages than the UFC.

Fourth, in 2015, the UFC eliminated one of the primary income generators for fighters as part of the Reebok Deal of 2015 ("Reebok Deal") and greatly increased revenue in the process.[166] Previously, fighters made up for the low wages paid by the UFC by wearing articles of clothing and flying a banner with brand logos in exchange for payment.[167] The Reebok Deal eliminated that source of income by requiring fighters to wear Reebok clothing[168] and excluding all other clothing sponsorships.[169] This resulted in widespread criticism for its effect on fighter income.[170]

In a competitive labor market, reduction in pay leads to laborers working elsewhere;[171] however, industry data indicates that the UFC's share in the Elite MMA Labor Market held steady through 2015 despite the reduction in fighter income.[172] While some fighters have left the UFC for more competitive wages elsewhere, the number of fighters who have been able to leave is a small portion of the UFC's large fighter roster, which contains over four-hundred fighters.[173] It is important to note that the fighters who left the

165. Marc Raimondi, *UFC Says Georges St. Pierre is Still Under Zuffa Contract*, MMA FIGHTING (Oct. 17, 2016), http://www.mmafighting.com/2016/10/17/13313082/ufc-says-georges-st-pierre-is-still-under-zuffa-contract (detailing a dispute between Zuffa and a contracted fighter after failure to come to a payment agreement and the fighter claimed to have been released from his contract); Guilherme Cruz, *Jose Aldo Requests to be Released from the UFC*, MMA FIGHTING (Sept. 27, 2016), https://www.mmafighting.com/2016/9/27/13083694/jose-aldo-requests-his-release-from-the-ufc (detailing another dispute between Zuffa and a contracted fighter who wanted to be released after being repeatedly deceived; the UFC refused); Paul Gift, *Does the Length of Fight Careers Matter in the UFC Antitrust Lawsuit*, BLOODY ELBOW (Dec. 30, 2014), bloodyelbow.com/2014/12/30/7465287/mma-ufc-antitrust-law suit-fight-career-length.

166. Andrew Brennan, *Why Is The UFC–Reebok Deal Exploiting UFC Fighters and Condoning Pay Gaps?*, FORBES (May 16, 2016), http://www.forbes.com/sites/andrewbrennan/2016/05/16/is-it-the-ufc-or-is-it-reebok-that-is-exploiting-ufc-fighters-and-condoning-pay-gaps/#70dce6cd657f; Gareth A. Davies, *UFC's £45 Tie-Up With Reebok a Big Deal as Fighters Get Dressed for Financial Success*, TELEGRAPH (Dec. 2, 2014), http://www.telegraph.co.uk/sport/othersports/ufc/11268220/UFC-signs-70-mill ion-deal-with-Reebok-will-see-500-fighters-wearing-firms.html (detailing the amount Reebok paid the UFC in exchange for the Reebok Deal contract; $70 million in revenue that was previously unrealized).

167. *Id.*

168. *Id.*

169. *Id.*

170. *Id.*

171. BORJAS, *supra* note 112, at 188.

172. *See supra* Figure 4.

173. Zane Simon, *Fighters Talk Moving to Bellator: "There is No Negotiation" With the UFC*, BLOODY ELBOW (Apr. 6, 2016), http://www.bloodyelbow.com/2016/

UFC by choice for more competitive contracts were all well-known names in the sport and major revenue generators with significantly more bargaining power than the average fighter.[174]

III. ZUFFA'S MARKET DOMINANCE

Zuffa appears to have significantly increased competition in the MMA Promotional Market by lowering prices and increasing output, but has decreased competition in the labor market and, arguably, acted in restraint of trade. The UFC possesses dominant market shares in both the MMA Promotional Market and the Elite MMA Labor Market.[175] The market for MMA Promotions is the sales side of the UFC's business while the Elite MMA Labor Market is the input side. These market definitions are appropriate because neither is reasonably interchangeable with other products or services. Elite MMA Promotions consist of one–on–one violence with limited rules.[176] The only promotion that is comparable in concept and scope is professional wrestling; both involve minimal rules and one-on-one hand to hand combat.[177] However, the dominant firm in professional wrestling, World Wrestling Entertainment ("WWE"), is a subsidiary of WME–IMG, which purchased a controlling share of the UFC from Zuffa in 2016.[178] Therefore, even if professional wrestling were reasonably interchangeable with MMA, this point would be irrelevant for purposes of antitrust analysis since the organizations dominating the two industries are owned by the same holding company. Defining the relevant labor market as Elite MMA Fighters is also appropriate because no other athletes, or laborers, are reasonably interchangeable with MMA fighters which qualify as "elite" or are ranked in the top thirty world-wide. The fact that other athletes are not interchangeable with MMA fighters has been demonstrated by attempts by other athletes to compete in the UFC and, for the most part, failing.[179]

4/6/11378328/ufc-vs-bellator-fighters-speak-out-ben-henderson-josh-thomson-matt-mitrione-mma-news.

174. *Id.*

175. *See supra* Figures 1, 2, 3, & 4.

176. *See What Is MMA and the UFC?*, UFC, http://www.ufc.com/discover/sport (last visited Nov. 16, 2016) (defining MMA as "[a] full contact sport . . . with minimal rules . . . promoted as a competition to determine the most effective martial art for unarmed combat situations").

177. Michael Wickham, *Differences Between WWE and UFC*, EZINE ARTICLES (Sept. 5, 2010), http://ezinearticles.com/?Differences-Between-WWE-and-UFC&id=4967504.

178. Rogers, *supra* note 6.

179. *See, e.g.*, Brett Okamoto, *Mickey Gall Submits CM Punk by Rear–Naked Choke in First Round*, ESPN (Sept. 11, 2016), http://www.espn.com/mma/story/_/id/17517456/cm-punk-submitted-mickey-gall-debut-ufc-203 (detailing a former professional

Neither the UFC nor Zuffa have committed a *per se* violation of antitrust law. Any argument that the UFC and Zuffa have committed a *per se* violation of antitrust law is without merit as there have been no boycotts, price fixes, or other established *per se* antitrust violations comparable to the actions in *United States v. Andreas*.[180] As a result, the proper mode of analysis is rule of reason. Rule of reason analysis requires a relevant market, market data, a history of the relevant entity's business practices, and an economic analysis of the effects those practices have on the market.[181] Under rule of reason analysis, if Zuffa's business practices are justified by procompetitive benefits which increase efficiency and benefit consumers then it has not violated antitrust law.

Additionally, it is clear that the business of Elite MMA Promotions and activity in the Elite MMA Labor Market, fighters constitutes "trade or commerce among the several states" within the meaning of the Sherman Act.[182] It is also uncontroversial to define the relevant geographic markets as international because MMA promotions occur throughout the world and fighters from dozens of countries enter the Elite MMA Labor Market.[183]

To violate antitrust law, Zuffa must have exercised its market power in an anticompetitive manner which harmed competition.[184] Such an exercise of market power appears differently in the two relevant markets. In the MMA Promotional Market, exercise of market power would be characterized by increasing prices and decreasing supply while still profiting.[185] On the other hand, exercise of market power in the Elite MMA Labor Market would be characterized by decreasing wages without losing laborers.[186]

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wrestler's failed attempt to compete in the UFC); Michael David Smith, *UFC: 118 Randy Couture Submits James Toney*, MMA FIGHTING (Aug. 28, 2010), http://www.mmafighting.com/2010/08/28/ufc-118-randy-couture-submits-james-toney (detailing a former boxing world champion's failed attempt to compete in the UFC). *But see* Lewis Mckeever, *UFC 200's Mark Hunt: Brock Lesnar is 'Juiced to the Gills'*, BLOODY ELBOW (June 9, 2016), http://www.bloodyelbow.com/2016/6/9/11894244/ufc-200s-mark-hunt-brock-lesnar-is-juiced-to-the-gills (detailing a professional wrestler's success competing in the UFC, despite serious questions about his use of performance enhancing drugs).

180. *See Are UFC Contracts, Like a Diamond, Forever?*, COMBAT SPORTS L. (Sept. 28, 2015), https://combatsportslaw.com/2015/09/28/are-ufc-contracts-like-a-diamond-forever/ (detailing an arguably coercive contracting practice that was discontinued by the UFC).

181. Oliver, *supra* note 86.

182. *See* United States v. Int'l Boxing Club, 348 U.S. 236, 240–41 (1955).

183. FighterMan, *100 New Countries Join The Fight*, MMA FED'N (May 10, 2016), http://mmafederation.com/2016/05/10/100-new-countries-to-join-the-fight/.

184. United States v. Microsoft Corp., 253 F.3d 34, 51 (D.C. Cir. 2001).

185. *Id.*

186. Tejvan Pettinger, *Monopsony Exploitation*, ECONS. HELP (Jan. 6, 2012), http://www.economicshelp.org/blog/4840/labour-markets/monopsony-exploitation/ (exercising monopsony power allows employers to decrease wages without losing

A. MMA Promotional Market Analysis

Zuffa dominates the MMA Promotional Market,[187] but that alone is not sufficient to violate antitrust law.[188] Under rule of reason analysis, Zuffa's business practices are suspect. The pattern of eliminating competing firms reduces competition, thus implicating the Clayton Antitrust Act[189] and the Antimerger Act of 1950,[190] which prohibit mergers and acquisitions when "the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly."[191]

In almost identical fashion to *Standard Oil*,[192] Zuffa bought out competition, took control of management, and attained market dominance. The UFC took control of the World Fighting Alliance, the WEC, International Fight League, Strikeforce, and PRIDE FC with the aforementioned specific intent to reduce competition.[193] The UFC's consistent reaction to competing firms offering innovative products distinguishable from the UFC's is to buy them out.[194]

The actual effects of these practices are demonstrated in Figure 1, Figure 2, Figure 3, and Figure 4, which show the gradual increase in various indicators of market share approaching, if not exactly, 100%.[195] Such a level of promotional market dominance reduces competition in the market for MMA fighters and reduces the number of competitors in the market for MMA promotions.[196]

Despite eliminating competitors from the industry for the MMA Promotional Market, the UFC has not reduced the level of competition in the industry, evidenced by the consistent increase in the number of MMA events

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employees because employees have no other employers to turn to or use as bargaining leverage).

187. *See supra* Figures 1, 2, & 3 (holding a more than ninety percent share of industry pay-per-view sales and gate attendance as well as more than a sixty share of the relevant labor market).

188. *Microsoft Corp.*, 253 F.3d at 50 (quoting United States v. Grinnell Corp., 384 U.S. 563, 570–71 (1966)) (defining the illegal monopolization as having two elements: "(1) the possession of monopoly power in the relevant market and (2) willful acquisition or maintenance of that power").

189. 15 U.S.C. §§ 12–27 (2012); 29 U.S.C. §§ 52–53 (2012).

190. 15 U.S.C. § 18.

191. *Id.*

192. 221 U.S. 1, 31 (1911) (detailing the extent of Standard Oil's elimination of competition throughout the United States to corner the market on crude oil).

193. *See generally* Harty, *supra* note 14.

194. *Id.*

195. *See supra* Figures 1, 2, 3, & 4.

196. *See supra* Figure 4; *see also* SAGERS, *supra* note 60, at 46–47 (demonstrating that the probable effects of any one firm dominating a market include reduction in output, increase in prices above market levels, and other restraints of trade).

the UFC promotes annually.[197] Further, the UFC has reduced prices for consumers by bringing the UFC to TV rather than just pay–per–view.[198] Increasing production while lowering prices is the exact opposite of the anticompetitive tendency to reduce output while raising prices. In other words, the UFC's conduct in the market for MMA Promotional Market has been procompetitive. Therefore, the UFC likely has not violated antitrust law or conducted itself in an anticompetitive manner in the market for MMA Promotional Market.

Zuffa's business practices in the market for MMA Promotional Market are comparable to the defendant's actions in *Fraser v. Major League Soccer*.[199] Like MLS, the UFC bought out competition and, in the process, increased the level of competition in the relevant market. The acquisitions of competing firms and MMA promotions[200] eliminated major competitors in the MMA Promotional Market. Nonetheless, the number of events produced by the UFC indicates an increase in competition.[201]

While the UFC's acquisitions appear to have increased competition in the MMA Promotional Market, these acquisitions have reduced labor market competition. This effect was not seen in *Fraser* because there was still an international community of teams competing in the labor market for soccer players.[202] The economic effect of Zuffa's acquisitions was the creation of a monopsony in which the UFC was the only buyer of a specific input: Elite MMA Labor. Although the market for elite MMA fighters is a labor market, it is also protected by antitrust law designed to prevent monopsony as well as monopoly.[203]

B. Elite MMA Labor Market Analysis

Zuffa's consistent reaction to firms that offer a product which is able to compete with the UFC's is to buy them out.[204] When the WEC produced professional MMA in weight–classes that the UFC did not, the UFC bought

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197. Smith, *supra* note 13; *see also supra* Figure 4.

198. Smith, *supra* note 13.

199. Fraser v. Major League Soccer, 284 F.3d 47, 52–55 (1st Cir. 2002).

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

201. *See supra* Figure 4.

202. *See* Jacobson, *supra* note 26 (explaining that the only difference in antitrust analysis regarding a labor market monopsony is viewing laborers as "consumers" of labor subject to the same protections as consumers of any other good or service). *See generally Fraser*, 284 F.3d at 47.

203. *See* Jacobson, *supra* note 26.

204. Harty, *supra* note 14.

out the WEC.[205] The same is true of Strikeforce,[206] the acquisition that brought one of MMA's greatest stars and revenue generators to the UFC, Ronda Rousey.[207] When Invicta FC produced a women's straw–weight division (115 pounds), which the UFC did not have, the UFC bought out each fighter's contract to form their own women's straw–weight division.[208] Historically, whenever another MMA firm creates a distinguishable or competitive product, the UFC acquires it and thereby reduces labor market competition.

The market impact of these business practices is clear: reducing the number of firms competing in a labor market reduces employee wage competition and limits those employees to fewer potential employers.[209] While there are a small number of firms who are also in the professional MMA market, none are comparable to the UFC in terms of size, wages, or overall promotional quality.[210]

The UFC grew its own labor market share by eliminating viable wage competitors by acquiring and out-competing them.[211] In doing so, the UFC created unequal bargaining positions between the UFC and its athletes.[212] The result of unequal bargaining positions has been fighters' inability to significantly influence contractual terms or wages.[213] The UFC is able to offer fighters lower wages than they would if the fighters had any bargaining power.[214] Without the opportunity to receive competitive wages from any other promotion, the UFC is often the only option.[215]

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205. *Id.*

206. Josh Gross, *UFC Buys Rival Strikeforce*, ESPN (Mar. 13, 2011), http://espn.go.com/extra/mma/news/story?id=6209923.

207. Nathan Ryan, *Power Rankings: UFC's 10 Biggest Draw Cards Based on Star Power*, FOX SPORTS (Jan. 1, 2016), http://www.foxsports.com.au/ufc/power-rankings-ufcs-10-biggest-draw-cards-based-on-star-power/news-story/03df1b7fc2c827cdf90081e2138b3e09.

208. Zane Simon, *UFC Announces Signing of 11 Women Strawweights for TUF Season, Winner Becomes First UFC 115lb Champ*, BLOODY ELBOW (Dec. 11, 2013) [hereinafter Simon, *UFC Announces*], http://www.bloodyelbow.com/2013/12/11/5201972/ufc-strawweight-tuf-invicta-contracts-first-champion-gadelha-esparza-calderwood-torres-mma-news.

209. BORJAS, *supra* note 112, at 187–89.

210. Riley Kontek, *Power Ranking the Top 5 MMA Organizations Outside the UFC*, BLEACHER REP. (May 6, 2013), http://bleacherreport.com/articles/1630207-power-ranking-the-top-5-mma-organizations-outside-the-ufc.

211. Snowden, *supra* note 200.

212. *Id.*

213. Same, *supra* note 164, at 1064–66; Brennan, *supra* note 166.

214. Same, *supra* note 164, at 1066.

215. *Id.*

The UFC's behavior in the Elite MMA Labor Market is distinguishable from IBP's actions in the beef industry.[216] While IBP did not "reduce its costs and make a higher profit" by decreasing output, the UFC used its monopsony power to reduce its costs through the Reebok Deal. The Reebok Deal had the "actual effect"[217] of allowing the UFC to "take . . . advantage of that situation by reducing its [payment of fighters] in order to reduce its costs and make higher profit on each [fight]."[218] Zuffa's use of monopsony power to reduce wages and thereby increase profits from promotions is the exact inverse of the IBP's legal practices.

As an input to the final product of MMA promotions, widespread application of exclusive dealings contracts requires a foreclosure analysis.[219] The non–compete clauses present in every Zuffa signed fighter's contract constitutes an exclusive dealings agreement.[220] Both consumers and competition are injured by a foreclosure of an input preventing "potential competitors from gaining a foothold in the market by exclusionary conduct."[221]

Zuffa's labor market share is identical to the market share that is foreclosed to competitors: sixty–six percent.[222] These metrics are identical because Zuffa includes non–compete clauses in all of its fighter contracts.[223] Sixty–six percent is well over the 6.7% market foreclosure found to violate the Clayton Act section 3 in *Standard Oil Co. v. United States*[224] and the thirty percent minimum consensus market share.[225] Further, Zuffa fighter contracts are neither short-term nor easily terminated.[226] Specifically, the "Championship Clause" permits Zuffa to extend some contracts indefinitely.[227] Fighter contracts have also been used to prevent fighters who no longer want to work for the UFC from competing in other promotions.[228]

216. *In re* Beef Indus. Antitrust Litig., 907 F.2d 510 (5th Cir. 1990).

217. Standard Oil Co. v. United States, 221 U.S. 1, 74 (1911).

218. *In re* Beef Indus. Antitrust Litig., 907 F.2d at 516.

219. Standard Oil Co. v. United States, 337 U.S. 293, 313–14 (1949).

220. Simon, *supra* note 154.

221. United States v. Dentsply Int'l. Inc., 399 F.3d 181, 191 (3d Cir. 2005) (citing LePage's, Inc. v. 3M, 324 F.3d 141 (3d Cir. 2003)).

222. *See supra* Figure 3.

223. Gift, *supra* note 155.

224. *Standard Oil Co.*, 337 U.S. at 305.

225. SAGERS, *supra* note 60, at 157.

226. Roland Mach. Co. v. Dresser Indus., Inc., 749 F.2d 380, 395 (7th Cir. 1984).

227. Simon, *supra* note 154.

228. Cruz, *supra* note 165.

The "Championship Clause"[229] is a near replica of the MLB's "Reserve Clause."[230] Like the Reserve Clause, the UFC's Championship Clause prevents fighters from negotiating with other organizations or leaving the UFC by "automatically extend[ing] the contract if the fighter should win a UFC title."[231] In and of itself, holding an athlete on contract is not illegal; however, when compared to the average career length of an MMA fighter,[232] it is evident that the UFC takes near complete control over a fighter's career.[233]

The actual or probable effects of Zuffa's control over the labor market are: (1) harming to both labor market and promotional market competition; and (2) creating barriers to market entry. The UFC's unilateral application of the Reebok Deal significantly reduced the ability of fighters to generate income.[234] The fact that fighters have not left the UFC in significant numbers is evidence that: (1) there are few MMA promotions that compete with the UFC in the MMA labor market and;[235] (2) the exclusive dealings contracts are not easily terminated.

However, even if the Elite MMA Labor Market is monopsonized, this is not dispositive of an antitrust violation; although written in the context of a monopoly, *Trinko*[236] authoritatively states that market power sufficient "to charge monopoly prices—at least for a short period—is what attracts 'business acumen' in the first place."[237] In other words, a short period allowing the opportunity to charge monopoly prices is the economy's reward for superior efficiency.[238] Further, "the possession of monopoly power will not be found unlawful unless it is accompanied by an element of anticompetitive conduct."[239]

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229. Nathaniel Grow, *Defining the "Business of Baseball": A Proposed Framework for Determining the Scope of Professional Baseball's Antitrust Exemption*, 44 U.C. DAVIS L. REV. 557, 561–62 (2010) (explaining that the "reserve clause" was "a provision included at the time in all baseball player contracts that precluded players from negotiating future contracts with anyone but their current employer").

230. *Id.* at 561; Toolson v. N.Y. Yankees, 346 U.S. 356, 362 n. 10 (1953).

231. Simon, *supra* note 154.

232. Gift, *supra* note 155 (conducting an analysis of the average career length of elite MMA fighters to be five hundred thirty–three days within which fighters average 3.3 bouts).

233. *See id.*

234. Brennan, *supra* note 166.

235. BORJAS, *supra* note 112, at 188; *see also supra* Figure 3.

236. Verizon Commc'ns, Inc. v. Law Offices of Curtis V. Trinko, LLP, 540 U.S. 398 (2004) (quoting United States v. Grinnell Corp., 384 U.S. 563, 570-71 (1996)).

237. *Id.* at 407.

238. *Id.*

239. *Id.*

The UFC's contracting scheme is anticompetitive. The contracting scheme provides that (1) fighters cannot compete in other promotions for the duration of their contractual relationship; (2) the contracts can last indefinitely; and (3) the contracts are not easily terminated.[240] Because of these contractual elements, fighters can be forced to accept uncompetitive, potentially below cost, wages.[241] Therefore, through this series of contractual clauses, Zuffa has successfully foreclosed sixty–six percent of the market and likely violated the Clayton Act section 3 prohibition on widespread exclusive dealings. Although no single act alone would violate the Sherman Act, simultaneous use of coercive contracting practice to require stringent non–compete agreements, use of contract length to hold fighters in a contract for a period longer than average career length,[242] and reducing fighter income amounts to restraint of trade for purposes of the Sherman Act section 2.[243]

C. Balancing Pro and Anti–Competitive Effects

To counterbalance anticompetitive effects and restraints of trade, the UFC must demonstrate that the practices generate "efficiencies," or practices that, in the end, benefit consumers.[244] There are significant factors that weigh in the UFC's favor in the MMA Promotional Market. MMA has grown faster than any other sport since its formation in 1993, and the UFC is widely acknowledged as the driving factor behind that growth.[245] Without the UFC's growth, marketing, and attraction of both new fighters and fans to MMA, the MMA industry would not produce the revenue or fighter pay that it does.[246] It is also probable that the UFC's competitors in the MMA Promotional Market benefit from the UFC's success in expanding the

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240. *See* Simon, *supra* note 154; Gift, *supra* note 155.

241. *See* Simon, *supra* note 154; Brennan, *supra* note 166; Same, *supra* note 164, at 1072; *see also supra* Figure 3.

242. *See* Simon, *supra* note 154; Brennan, *supra* note 166; Same, *supra* note 164, at 1072; *see also supra* Figure 3.

243. *See* 15 U.S.C. § 1 (2012) ("Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal.").

244. *See* Smith v. Pro Football, 593 F.2d 1173, 1185 (D.C. Cir. 1978) (explaining that sometimes natural monopolies may be justified by efficiencies such as an economy of scale that provides the lowest possible costs for consumers); United States v. Addyston Pipe & Steel Co., 85 F. 271, 282 (6th Cir. 1898) (holding that contracts which restrain trade are enforceable when "[t]he covenant embodying it is merely ancillary to the main purpose of a lawful contract").

245. David Segal, *Fighting a Cage Match to Turn the UFC Into a National Phenomenon*, N.Y. TIMES (Mar. 27, 2016), http://www.nytimes.com/2016/03/27/business/fighting-a-cage-match-to-turn-the-ufc-into-a-national-phenomenon.html?_r=0.

246. *See* Binner, *supra* note 3 (describing the rise of MMA synonymously with the rise of the UFC).

market. Despite eliminating many competitors from the industry for MMA promotions, the UFC has increased industry competition in two respects: consistently increasing the number of MMA events the UFC produces annually[247] and reducing the cost of viewership by expanding outside of pay-per-view.[248]

Additionally, not every firm that competed with the UFC was eliminated by a UFC buyout; competitors simply went out of business due to business decisions gone wrong.[249] Importantly, some of these competitors went out of business after Zuffa's most recent acquisitions, disqualifying an illegal merger claim against Zuffa under the Clayton Act.[250] The UFC became a monopoly without buying out its competitors, but by means of superior efficiency. Companies which achieve market dominance through superior efficiency are not necessarily safe from antitrust claims.[251] However, the UFC does not present insurmountable competition nor has it created insurmountable barriers to market entry, as evidenced by the rise of ONE FC and Bellator.[252]

The UFC's pattern of increasing production while lowering prices is the exact opposite of the anticompetitive tendency to reduce output while raising prices. While the UFC's history of counter–programming may appear predatory, this practice is common, legal, and has even been used by the UFC's competitors to draw viewership away from UFC events.[253] Therefore, the UFC has not violated antitrust law nor conducted itself in an anticompetitive manner in the MMA Promotional Market, but rather has increased competition.

Although the MMA Promotional Market remains competitive, the labor market for Elite MMA Labor Market is not. The UFC's unilateral application of the Reebok Deal significantly reduced the ability of fighters to generate income.[254] The fact that fighters have not left the UFC in significant numbers is evidence that there are few MMA promotions that can offer wages comparable to the UFC's or effectively compete with the UFC in the Elite

247. *See supra* Figure 2.

248. Smith, *supra* note 13.

249. Clarett v. NFL, 369 F.3d 124, 134 n.14 (2d Cir. 2004) (quoting Brown v. Pro Football, 50 F.3d 1041, 1056 (D.C. Cir. 1995)) (holding that "the non–statutory labor exemption waives antitrust liability for restraints on competition imposed through the collective bargaining process, so long as such restraints operate primarily in a labor market characterized by collective bargaining").

250. Tarman, *supra* note 131.

251. *See, e.g.*, Am. Tobacco Co. v. United States, 328 U.S. 781 (1946) (holding that power to monopolize and intent to monopolize are sufficient to sustain an antitrust claim).

252. Doyle, *supra* note 15.

253. MMAjunkie Staff, *supra* note 159.

254. Brennan, *supra* note 166.

MMA Labor Market.[255] But, even if the Elite MMA Labor Market is monopsonized, this is not always dispositive of an antitrust violation.[256] Most convincing is the UFC's steady labor market share despite reducing fighter income through the Reebok Deal.[257] The effects of the Reebok Deal and its aftermath create a strong case that the UFC has exercised monopsony power; in a competitive labor market, a reduction in income should lead to laborers moving to a different company, but this has not been the case.[258] If a greater number of fighters leave the UFC for more competitive wages, as is expected by economic theory, it will be more likely that a court will find that greater profits at the expense of fighters was Zuffa's reward for superior efficiency under *Trinko*.[259] However, there is little evidence to suggest that significant numbers of fighters are leaving the UFC, though not for lack of trying.[260]

The UFC may also be able to raise a strong defense of its activity in the MMA labor market under *United States v. Addyston Pipe and Steel*.[261] Such a defense would proceed by claiming that the UFC's labor market dominance creates efficiencies that benefits both consumers in the promotional market and MMA fighters in the labor market. Increasing the number of fighter contracts the UFC holds may be what allows the UFC to increase the number of promotions it holds annually, increasing output, and decrease the price of viewership, thereby benefiting consumers. Fighters may benefit from the UFC's labor market dominance due to the increase in prestige that comes with being a dominant UFC fighter; increasing the number of fighters in the promotion increases the athletic competitiveness of the promotion. Further, the increases in promotional viewership has significantly increased wages for the UFC's most dominant and popular fighters.[262] The argument that

255. BORJAS, *supra* note 112, at 187; *see also supra* Figure 3.

256. United States v. Microsoft Corp., 253 F.3d 34, 50 (D.C. Cir. 2001) (quoting United States v. Grinnell Corp., 384 U.S. 563, 570–71 (1966)) (defining the illegal monopolization as having two elements: "(1) the possession of monopoly power in the relevant market and (2) willful acquisition or maintenance of that power").

257. Brennan, *supra* note 166.

258. *See supra* Figure 3 (demonstrating the UFC's labor market share holding steady after the inception of the Reebok Deal, decreasing by only 2.67% of the market).

259. 540 U.S. 398 (2004).

260. Raimondi, *supra* note 165 (detailing a dispute between Zuffa and a contracted fighter after failure to come to a payment agreement and the fighter claimed to have been released from his contract); Cruz, *supra* note 165 (detailing another dispute between Zuffa and a contracted fighter who wanted to be released after being repeatedly deceived; the UFC refused); Gift, *supra* note 165.

261. 85 F. 271, 282 (6th Cir. 1898) (holding that contracts which restrain trade are enforceable when the "covenant embodying it is merely ancillary to the main purpose of a lawful contract").

262. Mike Bohn & John Morgan, *UFC 202 Salaries: Conor McGregor Pulls in Record $3 Million; Nate Diaz Gets $2 Million*, MMA JUNKIE (Aug. 20, 2016), http://

labor market dominance increases competition in the promotional market is strong, but the argument that this dominance benefits fighters is quite weak. Zuffa would have to argue that the extensive contractual restrictions imposed on fighters by their contracts are "merely ancillary to the main purpose of [the] lawful contract[s], and necessary to protect the covenantee in the [full] enjoyment of the legitimate fruits of the contract"[263] and that the contracts are not "more restrictive than necessary."[264] It is unlikely that this argument would succeed because it would require the UFC to argue that reducing fighter pay and preventing those fighters from finding employment elsewhere is a "legitimate fruit of the contract," which it is not.[265]

There is also some argument that the UFC's labor market foreclosure has damaged competition in the MMA Promotional Market. This argument proceeds by claiming that the UFC's dominance in the labor market and use of non-compete contracts harms competition by preventing other would–be employers from hiring top-thirty fighters and, thereby, prevents other MMA promotions from competing effectively for viewership.[266] Competition is injured by foreclosure when "potential competitors [are prevented] from gaining a foothold in the market by exclusionary conduct."[267] However, in the context of the UFC and Zuffa, this argument is without merit because the harm is entirely to competitors, not competition and "[i]t can't be said often enough that the antitrust laws protect competition, *not* competitors."[268] While the UFC's competitors in the promotional market are certainly harmed by this practice, the evidence suggests that the UFC's behavior in the MMA Promotional Market is procompetitive.[269] Further, there is no basis for a claim that competitors have been prevented from gaining a foothold in the MMA Promotional Market. Bellator and ONE FC are companies which have a foothold and compete with the UFC in the MMA Promotional Market. Therefore, competitors have not been prevented from gaining a foothold in the market and the competitive harm appears to be entirely in the Elite MMA Labor Market as a result of the Reebok Deal.

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mmajunkie.com/2016/08/fc-202-salaries-conor-mcgregor-pulls-in-record-3-million-purse-nate-diaz-gets-2-million-1.

263. United States v. Addyston Pipe & Steel Co., 85 F. 271, 282 (6th Cir. 1898).

264. Mackey v. Nat'l Football League, 543 F.2d 606, 622-23 (8th Cir. 1976).

265. *Addyston Pipe,* 85 F. at 282.

266. United States v. Syufy Enters., 903 F.2d 659, 668 (9th Cir. 1990.

267. United States v. Dentsply, 399 F.3d 181, 186-87 (3d Cir. 2005) (quoting LePage's Inc. v. 3M, 324 F.3d 141, 159 (3d Cir. 2003)).

268. *Id.* at 188.

269. *See supra* Figures 1, 2, 3, & 4.

IV. NECESSARY CHANGES IN THE MMA INDUSTRY

Although UFC fighters have been harmed by the organization's business practices, no regulatory agency is likely to come to their aid. Therefore, UFC fighters must protect themselves from unfair business practices by doing one or both of two things: (1) acquire collective bargaining power through an association or union; and (2) lobbying for the expansion of the Ali Act[270] to cover MMA.[271] The heart of the issue for MMA fighters is lack of bargaining power,[272] which can be remedied by unionization and collective bargaining, and lack of access to revenue data for use in contractual negotiations,[273] which can be remedied by expansion of the Ali Act.

Federal agencies are unlikely to interfere with the UFC's business practices because there is no indication that consumers have been harmed. The Federal Trade Commission ("FTC") rarely acts in such circumstances as the antitrust and competition preservation policies are geared toward protecting consumers.[274] Further, the FTC's Bureau of Competition investigated the UFC in 2012 following the Strikeforce acquisition and concluded that "no further action is warranted and the investigation is now closed."[275]

Two fighters associations have already begun the unionization process: the Mixed Martial Arts Athletes Association ("MMAAA")[276] and the Professional Fighters Association ("PFA").[277] Further, several of the UFC's highest level fighters have recently formed the MMAAA.[278] Fighters joining any of these organizations would likely lead to the formation of a bilateral cartel between the fighter's association and the UFC. While some problems do come with unionization, the benefits of collective bargaining outweigh

270. 15 U.S.C. § 6301 (2012).

271. Rob Maysey, *Battle Lines Being Drawn: Why the Muhammad Ali Act Should Apply to MMA*, MMAFA (July 1, 2008), http://mmafa.tv/battle-lines-being-drawn-why-the-muhammad-ali-act-should-apply-to-mma/.

272. Snowden, *supra* note 200.

273. *Id.*; *see also* Abhinay Muthoo, *The Economics of Bargaining*, UNIV. OF WARWICK 25 (2017), https://www2.warwick.ac.uk/fac/soc/economics/staff/amuthoo/publications/unesco.pdf (explaining how asymmetric information in bargaining situations works to the disadvantage of the party lacking information).

274. Gift, *supra* note 155.

275. Luke Thomas, *Federal Trade Commission Ends Second Investigation of UFC*, MMA FIGHTING (Nov. 24, 2015), http://www.mmafighting.com/2015/11/24/9796478/federal-trade-commission-ends-second-investigation-of-ufc.

276. *See MMAFA Mission Statement*, MMAFA, http://mmafa.tv/about-mmafa/ (last visited Sept. 30, 2011).

277. *See* PROF'L FIGHTERS ASS'N, profighters.org (last visited Nov. 16, 2016).

278. Brett Okamoto, *UFC Fighters Form Mixed Martial Arts Athletes Association*, ABC NEWS (Nov. 30, 2016), http://abcnews.go.com/Sports/ufc-fighters-form-mixed-martial-arts-athletes-association/story?id=43889432.

the detriments. That said, some of the problems with unionization are not present in the formation of an association; namely, a union's vulnerability to challenges based on fighters' status as independent contractors rather than employees.[279] The ability to set minimum contractual requirements in favor of the fighters would prevent coercive contracting and give the fighters a seat at the negotiation table whenever a major change is considered for the sport. This would prevent events like the UFC's Reebok Deal.[280] When the deal was made, fighters did not have any say in the matter and the result was untold losses in fighter income.[281] A MMA fighters' union would be able to use its ability to bargain collectively and prevent such deals happening in the future without the fighters' consent.

MMA fighters are far from the first athletes to be exploited by a dominant firm. Athletes within tennis, NASCAR, and boxing have all been injured by anticompetitive business practices by their governing bodies; each group of athletic competitors has reacted differently.[282] Tennis reacted by forming a players association through which effectively took the place of promoters in the sport.[283] Stock car racers have effectively submitted to the sport's governing body, the National Association of Stock Car Auto Racing ("NASCAR"), and accepted the resulting bargaining positions as the status quo.[284] Boxing, the sport most comparable to MMA, has seen the benefit of legislative action in the form of the Ali Act.[285] The MMAAA and the PFA

279. *See id.* (clarifying the UFC fighters are not employees, but are rather independent contractors that do not receive many of the labor and employment benefits of federal employment laws including protections for unions).

280. Brennan, *supra* note 166.

281. Guilherme Cruz, *Vitor Belfort Says He Lost "Millions of Dollars" with UFC–Reebok Deal, But Free Agency Isn't the Solution*, MMA FIGHTING (Mar. 30, 2016), http://www.mmafighting.com/2016/3/30/11327066/vitor-belfort-says-he-lost-millions-of-dollars-with-ufc-reebok-deal; Jesse Holland, *Brendan Schaub Loses Six Sponsors Following Announcement of UFC Deal With Reebok*, MMA MANIA (Dec. 9, 2014), http://www.mmamania.com/2014/12/9/7361523/brendan-schaub-loses-six-sponsors-following-announcement-ufc-reebok-uniforms-mma.

282. S. Joseph Modric, *The Good Ole' Boys: Antitrust Issues in America's Largest Spectator Sports*, 1 DEPAUL J. SPORTS L. & CONTEMP. PROBS. 156, 170–71 (2003) (outlining the antitrust issues in the National Association for Stock Car Auto Racing and how participants have reacted to the issue); Jonathan Snowden, *Combating the UFC Monopoly: Tennis as a Model for Organizing Fighters*, BLOODY ELBOW (Mar. 16, 2011, 7:29 PM), http://www.bloodyelbow.com/2011/3/16/2053887/combating-the-ufc-monopoly-tennis-as-a-model-for-organizing-fighters (proposing that MMA fighters follow the lead of tennis players who faced many of the problems MMA fighters do currently).

283. *History*, ATP WORLD TOUR, http://www.atpworldtour.com/en/corporate/history (last visited Nov. 16, 2016).

284. *See* Ky. Speedway, LLC v. NASCAR, Inc., 588 F.3d 908, 914, 920–21 (6th Cir. 2009).

285. 15 U.S.C. § 6301 (2012).

are both currently lobbying for the expansion of the Ali Act to cover MMA.[286]

Congress passed the Ali Act in 2000, an amendment to the Professional Boxing Safety Act of 1996,[287] with the intent to prevent the anticompetitive and unfair business practices which were common in the boxing industry.[288] Legislation has been introduced in Congress to expand the Ali Act to MMA.[289] Expansion of the Ali Act to MMA would entail three main changes to the sport: (1) third party organization(s) controlling the fighter ranking system, thereby preventing conflicts of interest and manipulation; (2) revenue transparency; and (3) make coercive contracting clauses unenforceable.[290] The only parts of the Ali Act which should be expanded to cover MMA are the formation of third party ranking committees and mandating revenue transparency. Rather than expand the enforceability of contracts clauses to cover MMA, the fighters should join one of these unions and negotiate for more favorable contracts.

The UFC's control over the ranking system has been used as a coercive tool during contractual negotiations.[291] Such practices were once common in boxing and are being used in MMA to push fighters into unfavorable contracts.[292] Formation of an independent rankings committee would increase the likelihood that rankings are objective and based on fighter skills and accomplishments rather than what is expedient for the UFC. This area of the Ali Act has been effective in the boxing industry and would likely work just as well in MMA.[293] The Ali Act ensures compliance with rankings provisions by preventing promoters from receiving the revenue from events:

286. *See* Brett Okamoto, *Ali Amendment Could Expand Federal Law's Coverage To MMA*, ESPN (May 19, 2016), http://www.espn.com/mma/story/_/id/15589773/bill-aims-expand-muhammad-ali-boxing-reform-act-mma.

287. 15 U.S.C. § 6301.

288. H.R. REP. NO. 106-449, pt. 1 at 1, 7–8 (1999), *as reprinted in* 2000 U.S.C.C.A.N. 329.

289. H.R. 5365, 114th Cong. § 2 (2016).

290. Nash, *supra* note 142.

291. Ben Fowlkes, *With Ali Act, A Long Battle for MMA's Future is Just Beginning*, MMA JUNKIE (June 14, 2016, 12:45 PM), http://mmajunkie.com/2016/06/with-ali-act-a-long-battle-for-mmas-future-is-just-beginning (detailing the UFC's coercive negotiation tactic of removing fighters from official rankings and thereby reducing the fighter's contracting value during difficult negotiations).

292. *See generally* Scott Baglio, Note, *The Muhammad Ali Boxing Reform Act: The First Jab at Establishing Credibility in Professional Boxing*, 68 FORDHAM L. REV. 2257, 2268–69 (2000) (emphasizing and explaining the contractual abuses in the box-ing industry).

293. Lydia De Pillis, *The Battle to Protect Fighters in the Fastest Growing, Least–Regulated Sport in America*, WASH. POST (Apr. 23, 2016), https://www.washingtonpost.com/business/economy/the-battle-to-protect-fighters-in-the-fastest-growing-least-regulated-sport-in-america/2016/04/22/b9484fe0-fc21-11e5-886f-

> [U]ntil, with respect to a change in the rating of a boxer previously rated by such organization in the top 10 boxers the organization–(1) posts a copy, within 7 days of such change, on its Internet website or home page, if any, including an explanation of such change, for a period of not less than 30 days; and (2) provides a copy of the rating change and explanation to an association to which at least a majority of the State boxing commissions belong.[294]

Within the sports industry, almost every organization discloses revenue other than the UFC.[295] The purpose of revenue disclosures is to allow athletes the same access to information as the promotion. Revenue disclosures would allow fighters to see how much money the promoters make from their fights and likely lead to increased fighter wages. The UFC distributes a smaller percentage of revenue to its athletes than any other major sports organization.[296] Disclosure of revenue would balance the scales between the UFC and its fighters while negotiating and resolve much of the controversy surrounding the UFC's treatment of its fighters by making the bargaining positions between the fighters and the UFC more equal.

The Ali Act's provisions regarding enforceability of coercive contracts should not be expanded to cover MMA because these provisions have not been effective in the boxing industry and there is no indication that they would be any more effective in the MMA industry. These provisions were included in the Ali Act because boxers were commonly coerced into unfavorable contracts which gave the promoters an unreasonable amount of power over the boxer's life and career. Although the unenforceability provisions were well intended, they have never been effective because they have *never* been enforced.[297] The problem with the enforcement provisions is that, although section 6309(b)(3) grants the United States Attorney General the power to "bring a civil action against any individual who is reasonably believed to be in violation of any provision of the Ali Act,"[298] the provision also provides that "[n]othing in this chapter authorizes the enforcement of any provision of this chapter against the Federal Trade Commission, the United States Attorney General, or the chief legal officer . . . for . . . failing to act in an official capacity."[299] In other words, the

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294. 15 U.S.C. § 6307c(c) (2012).

295. *See, e.g.*, *Which Professional Sports Leagues Make the Most Money?*, HOW MUCH, https://howmuch.net/articles/sports-leagues-by-revenue (last visited Nov. 16, 2016).

296. Snowden, *supra* note 200.

297. Ehrlichman, *supra* note 143, at 439–40.

298. 15 U.S.C. § 6309(b)(3).

299. *Id.* § 6309(e)(1).

enforcing body is not required to enforce this area of law and, more importantly, the enforcing bodies in fact do not enforce the Ali Act.[300] The state boxing commissions "are most likely not equipped to enforce the Ali Act" for those states that have boxing commissions, "are understaffed and under-funded."[301] Unfortunately, these provisions have been hamstrung by lack of funding and Congressional disinterest in remedying the issue.[302] Boxers are also authorized to bring civil actions "in the appropriate Federal or State court and recover damages suffered,"[303] but there are issues with this provision as well. Due to the resources consumed and length of litigation,[304] fighters are often unable to pursue their chosen career while participating in litigation against coercive contracts. As a result, fighters are likely to accept an unfair (and possibly illegal) contracts if it means they are able to pursue the dream of a title belt, even if the fighter's chances of retaining a title belt are little more than a pipe-dream.

CONCLUSION

The UFC is responsible for the incredible growth rate in the MMA industry and has increased the competitiveness of the MMA Promotional Market by immeasurable proportions. However, the UFC has accomplished this feat, in part, through behavior injurious to its labor market, MMA fighters. The best course of action for MMA fighters to halt this injurious behavior is to unionize, lobby for the expansion of the Ali Act to cover MMA, and insist on fairness in contractual negotiations and the resulting obligations.

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300. *But see* Baglio, *supra* note 292, at 2284–85 (analyzing the potential positive effects of the Ali Act, but overlooking the fact that enforcement clauses are ineffective without funding for enforcement personnel).

301. *But see* Devin J. Burstein, Note, *The Muhammad Ali Boxing Reform Act: Its Problems and Remedies, Including the Possibility of a United States Boxing Administration*, 21 CARDOZO ART & ENT. L. J. 433, 462 (2003).

302. *See, e.g.*, S. 275, 108th Cong. (2004) (federal legislation to provide funding for Ali Act enforcement has been introduced repeatedly since 2002 and never voted on).

303. 15 U.S.C. § 6309(d).

304. *See, e.g.*, Le v. Zuffa*,* No. 2:15cv–01045–RFB–PAL, 2016 WL 6134520, at *2 (D. Nev. Oct. 19, 2016) (an antitrust lawsuit against the UFC that began in 2014 and is both still active and appears far from over as of November 2016).