THE SPORTS LAWYER

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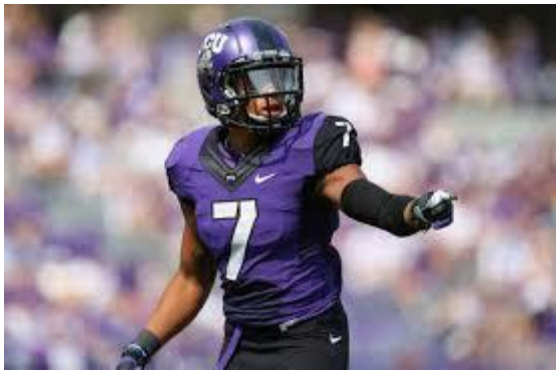
Top Programs Implicated in the FBI's Investigation into NCAA Basketball Recruiting

On September 26, 2017, federal authorities arrested four assistant coaches of Division I schools in the National Collegiate Athletic Association ("NCAA") for their alleged involvement in bribery, fraud, and corruption schemes with managers, financial advisors, and representatives of sportswear companies, including Adidas. These arrests were the result of a three-year secret investigation into the criminal activities present in NCAA basketball recruiting. On Friday, February 23, documents obtained through discovery during the federal investigation into NCAA recruiting became public that detail the expenditures of some of the controversy's central figures, and which point to the involvement of at least twenty Division I basketball programs and more than twenty-five players in illegal recruiting tactics.

The documents obtained during discovery reveal the expenditures of former NBA agent Andy Miller, along with his former associate Christian Dawkins, and his agency, ASM Sports. These reports list cash payments and entertainment and travel expenses for prospective collegiate and professional players and their families, linking these potential impermissible benefits and preferential treatment to families and players at schools including Duke, North Carolina, Texas, Kentucky, Michigan State, University of Southern California and Alabama. These documents specifically link some of college basketball's most prominent players, including Michigan State's Miles Bridges and Duke's Wendell Carter, to extra benefits for themselves or their family members. These expenditures range anywhere from the purchase of meals to thousands of dollars in "loans" and "advances." Further, ESPN has reported that a telephone wire tap recorded Sean Miller, Arizona's men's basketball coach, discussing with Dawkins a $100,000 bribe to ensure that DeAndre Ayton, a highly sought-after center from the Bahamas, signed with his team. Dawkins and two Adidas officials are charged with wire fraud and set for trial in October, Andy Miller has yet to be charged in the case, and it is still unclear whether Sean Miller will now be involved in the federal case that landed his former assistant Emanuel Richardson federal charges.

"These assistant coaches, low-level shoe company and sports management employees are now facing prison terms, while the very people they worked for, whose pockets they allegedly were lining with millions of dollars of cash, have entirely escaped federal prosecution…[b]y definition, these criminal defendants are fall guys," says Steven Haney, Dawkins' attorney. In a statement on Friday, February 23, NCAA President Mark Emmert said, "These allegations, if true, point to systematic failures that must be fixed and fixed now if we want college sports in America. Simply put, people who engage in this kind of behavior have no place in college sports." This information, published just weeks before the NCAA men's basketball tournament and threatening to cause serious repercussions for numerous teams projected to be involved, shows that this federal investigation has the potential to cause a major shift in the realm of NCAA recruitment.

— Elizabeth Shearon



Former TCU Player Sues University, Big 12 for Forcing Him to Play Through Injuries

On January 31, 2018, former Texas Christian University ("TCU") football player, Kolby Listenbee, filed a lawsuit for damages against TCU head coach Gary Patterson, athletic director Chris Del Conte, TCU, the Big 12 Conference, and a group of assistant TCU coaches, physicians and trainers in a Dallas County Civil Court of Texas seeking damages in excess of $1,000,000. On February 21, 2018, Listenbee amended the complaint, adding the stories of five more players involved with the football program. Listenbee alleges that TCU and its staff pressured and harassed him into playing injured. He further contends there was a pattern of "systematic misconduct" before he enrolled at TCU in 2012. Listenbee played for TCU from 2012-2015.

During the third quarter of TCU's game against Southern Methodist University on September 19, 2015, Listenbee fell awkwardly while making a catch and sustained an injury in his pelvic region. The injury caused Listenbee to experience serious inflammation in the cartilage which combines the two pubic bones. Following the injury, Listenbee alleges the football coaches and training staff were "malicious" and "grossly negligent" in how they responded to the pelvic injury. He contends the training staff frequently injected him with pain and steroidal medications to mask the pain and allow him to play. Listenbee alleges that in spite of repeatedly informing team doctors and coaches that he was still in pain, they not only cleared him to play, but Listenbee claims that Coach Patterson threatened to dismiss him from both the team and school if he did not play in TCU's October 3, 2015, game against the University of Texas. Moreover, in the amended complaint, Listenbee added the stories of five players to highlight TCU's alleged systematic misconduct of pressuring players to play injured. Listenbee contends, in part, that he endured "losses in value and losses in profits, including, but not limited to NFL career earnings, track & field earnings and endorsement earnings" and is seeking damages of $1,000,000.

"TCU takes tremendous pride in its long-standing tradition of excellence in providing a positive experience for its student-athletes, especially in the areas of care, prevention and rehabilitation of athletic injuries," TCU's official statement said. TCU declined to comment on specifics of the lawsuit. The defendants are represented by TCU's general counsel. Listenbee could not be reached for comment. Listenbee is represented by Derek H. Potts and Timothy Micah Dortch of Potts Law Firm in Dallas. A court date has not yet been announced.

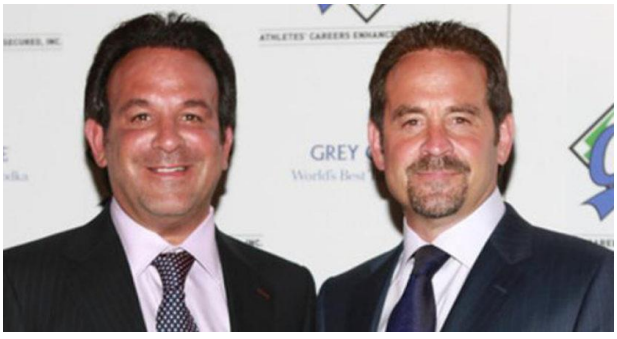
— Michael Basist

Major League Baseball

Former Agent Sues MLB Agency Alleging PED Scheme

On Friday February 2, 2018, Juan Nunez, a former employee of the agency 'ACES', filed suit against the agency and its founders, Sam and Seth Levinson in Kings County, New York for breach of contract, tortious interference with contract, breach of implied duty of good faith and fair dealing, conspiracy to defraud, and unjust enrichment. Nunez's complaint stems from the Levinson's alleged conduct in the Biogenesis scandal.

On May 30, 2006, Nunez was hired by ACES to help recruit and sign baseball players from the Dominican Republic. Although he was not an agent, Nunez was to receive 25% of any fees ACES collected from the contracts of the players he signed. Nunez's complaint highlights several episodes that illustrate his alleged causes of action that range from ignoring a directive from the MLB Player's Association, ("MLBPA") to picking up performance enhancing drugs (PEDs) from Biogenesis and delivering them to Nelson Cruz. Much of Nunez's complaint details the Levinson's attempted cover up of Melky Cabrera's positive test for PEDs. Prior to Cabrera testing positive for PEDs in June of 2012, Sam Levinson had already worked out a 5-year, $75 million contract with the Philadelphia Phillies, which constituted tampering since Cabrera was still under contract with the San Francisco Giants. Nunez was told that the suspension had to be reversed or else they would lose the commissions from the upcoming contract.



Sam Levinson told Nunez that he discussed the positive test with Anthony Bosch, the founder of Biogenesis, and that Bosch said to tell Cabrera to say he took a pill called Extenze which caused the positive test. Nunez claims that he was told to accompany Cabrera to a meeting with the MLBPA and went "over the Extenze story that Cabrera was going to tell the Union" prior to the meeting. During the meeting, Cabrera admitted that used a substance that was like a "Dominican Bengay" after the MLBPA did not believe the Extenze story. After the meeting, Cabrera gave Nunez a substance called "Friccilicont" and was told to give it to Bosch who knew what to do and "put the stuff in it" so that Cabrera could hand it over to the MLBPA. Nunez claims that Sam Levinson approved of the new plan. After realizing that MLB would discover that the cream had been tampered with, Nunez alleges that the Levinsons came up with the idea to create a fake company that distributed the cream and were instrumental in the creation of the fake website. Nunez was then instructed to print fake labels with the fake company's name to give to MLB. After MLB discovered the fake company, Nunez alleges that the Levinsons coerced him into taking the fall for the cover up by promising to take care of him financially. Nunez is seeking over $2 million in unpaid commissions, $500,000 in fees that were promised by the Levinsons, and for material breaches, "an amount to be determined at trial, but which exceeds several million dollars."

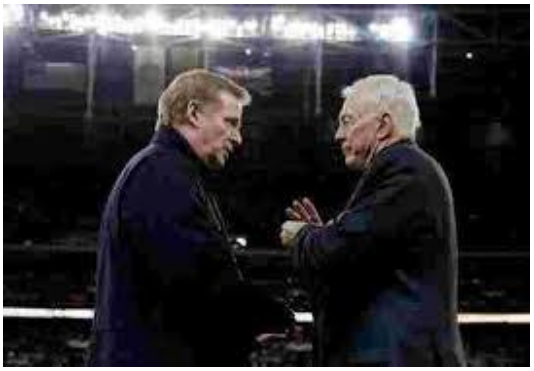
The Levinsons released a statement saying, "This is nothing more than a shakedown by a man broken by his

own criminal actions. We will take the fight to Mr. Nunez for any meritless and defamatory claims, and we will seek all available remedied and damages that his criminal behavior has caused."

— Christopher Hemway

National Football League

Goodell Seeks Millions from Jerry Jones to Recoup Legal Fees



NFL Commissioner Roger Goodell has begun proceedings seeking to recover $2M in legal fees from Dallas Cowboys owner Jerry Jones. Goodell, after being encouraged by other owners to do so, is seeking to recover the legal fees incurred by the NFL related to defending the Ezekiel Elliott suspension and protecting the compensation committee from Jones's threatened lawsuit over Goodell's contract extension.

The split between Goodell and Jones dates back to when the NFL made the decision in August to suspend Ezekiel Elliott for violating the league's personal conduct policy. Jones was a vocal advocate of Elliott's and repeatedly voiced his opposition to the suspension, both publicly and privately with the league investigators. Jones also had the Cowboys submit a sworn statement in support of Elliot and had their General Counsel work with the NFLPA throughout the process. At the same time, Jones was working to convince other owners on the compensation committee to offer Goodell a much smaller contract extension than what was being discussed by the committee. Jones argued that Goodell was being overpaid and as a non-voting member of the committee, continued lobbying against the deal. Finally, once Elliott exhausted all his appeals in trying to overturn his sus pension, Jones hired an attorney and threatened to sue the compensation committee in order to prevent them from finalizing Goodell's contract extension. The threat set up a very public debate over Goodell's compensation and created conflict among owners. However after several messages from either side Jones backed away from his threat to sue. The animosity however remained with the other owners, with many of them confronting Jones over his conduct. Goodell is invoking clause FC-6 of the 1997 League Constitution and Bylaws which states that if a team "'joins, has a direct, football-related financial interest in, or offers substantial assistance in any lawsuit or other legal, regulatory, or administrative proceeding' against the league" and they do not receive a judgment on the merits and their relief sought they must reimburse the league any expenses associated with the claim. The Commissioner or his designee have the power to designate the amount to be paid. Jones has filed an appeal of the decision and will present his case in front of Roger Goodell who has not exercised his option of appointing someone else to hear the appeal.

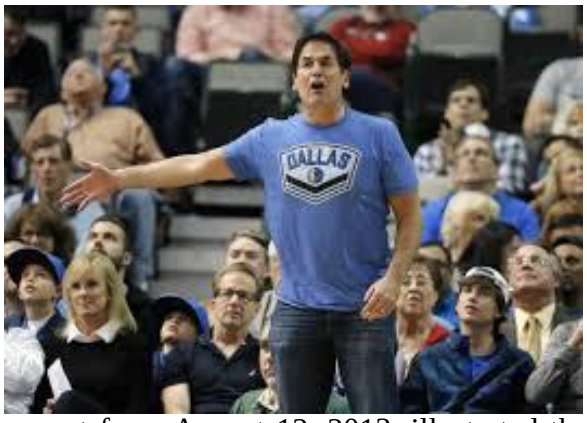
The NFL has yet to issue an official comment on the subject. The Cowboys have also kept quiet regarding the situation, with CEO Stephen Jones saying, "I'll let Jerry address that at the appropriate time." The appeal has been set for Monday March 5.

— Tyler Cochrane

National Basketball Association

NBA Commissioner Responds to Report of Dallas Mavericks' Hostile Work Environment

On February 23, 2018, NBA Commissioner Adam Silver sent a memo to all thirty teams establishing a confidential hotline for all team and league employees to voice concerns of workplace misconduct in response to a Sports Illustrated exclusive report detailing widespread allegations of sexual harassment and domestic violence within the Dallas Mavericks organization from over a dozen current and former employees. Mavericks owner Mark Cuban has accepted full responsibility for the lack of action taken in response to several internal complaints, but the league vows to commit time and resources of its own to provide employees with a safe work environment.



Dating back as far as 1998, the Mavericks' human resources department was made aware of alleged inappropriate workplace behavior conducted by CEO Terdema Ussery towards multiple women. Hired in the summer of 1998, Buddy Pittman, head of human resources, did little to curtail the routine harassment experienced by the team's female employees. Following countless efforts to obtain help from the human resources department, which were not successful, in 2007 at least two women in the organization began to take contemporaneous notes of experiences ranging from inappropriate remarks to having their thighs grabbed during meetings. One woman's account from August 12, 2013, illustrated the office's culture of systematic abuse when she was told to "just take" it from Ussery because "he's the boss." Regarding domestic violence, Mavs.com full time writer Earl K. Sneed was arrested at the Mavericks facility in 2012 and charged with assault following a domestic dispute with a girlfriend. Sneed kept his job and in 2014 a similar incident occurred with a Mavericks colleague, who only upon reporting her abuse was informed of his past transgressions. Mark Cuban claims with respect to both situations that he was not aware of the details because he deferred to leaders within the Mavericks organization and trusted that they would properly handle any issues. On the other hand, male and female employees alike find it hard to believe that Cuban did not know exactly what was going on, but instead chose to turn a blind eye because of the organization's financial success. Hours after the publication of the Sports Illustrated report, the Mavericks decided to establish a hotline for counseling of past and current employees as well as mandatory sensitivity training for all employees.

"I'm embarrassed, to be honest with you, that it happened under my ownership, and it needs to be fixed," said Mark Cuban. Cuban has declined to comment specifically on allegations against Terdema Ussery until the conclusion of an investigation currently being handled by Evan Krutoy, from Krutoy Law, a New York firm.

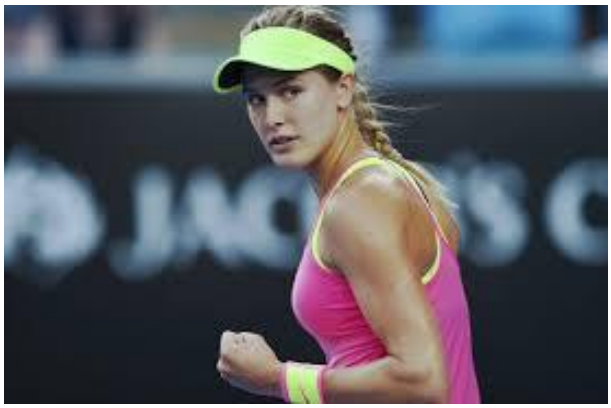
The NBA plans to "ensure that we all have a full understanding of issues related to sexual harassment and expectations for how we should behave in the workplace," wrote Adam Silver in his memo to the thirty teams.

— Brad Spielberger

Other News

Bouchard, USTA Reach Settlement Agreement in U.S. Open Head Injury Case

On February 23, 2018, Eugenie Bouchard reached a settlement with the United States Tennis Association ("USTA") over Bouchard's negligence liability lawsuit stemming from an incident at the U.S. Open in 2015. The terms of the settlement are confidential and have not been disclosed.

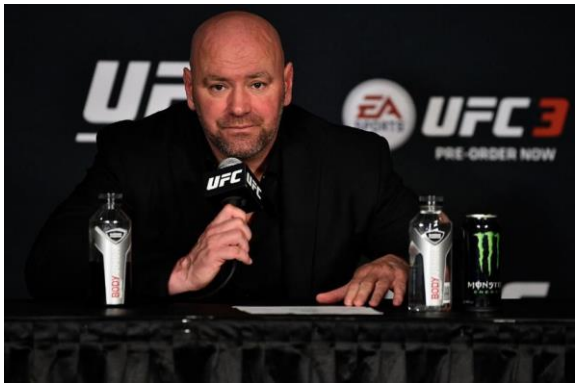


In September 2015, Bouchard, a popular Canadian tennis player, was a competitor in the U.S. Open in New York, and had just finished playing a mixed doubles match. Shortly after the match, she returned to the locker room of the Billie Jean King National Tennis Center to take an ice bath and slipped on the wet tile floor of a physiotherapy room inside the facility's locker room. The fall resulted in her withdrawing from the rest of her matches in the competition, including singles and doubles events, and she sustained a concussion and burns. Once ranked No. 5 in the world and placing as a finalist at Wimbledon in 2014, Bouchard now ranks No. 116 and blames the injuries she sustained during the fall sent her into a downward spiral that she has never been able to recover from.

In October 2015, Bouchard filed suit against the USTA and the USTA National Tennis Center in the U.S. District Court for the Eastern District of New York for damages due to physical and emotional suffering, as well as lost earnings on and off the tennis court. On February 22, 2018, the jury decided that USTA should pay 75 percent of the damages owed to Bouchard, but also found that she bore contributory negligence of 25 percent. The following day, Bouchard was scheduled to testify about how the accident had harmed her career and the jury was set to determine what damages the USTA should pay, but after several hours of closed-door talks between the parties, a settlement was reached and that phase of the trial was cancelled.

"I feel vindicated that I got the [jury] verdict yesterday. Just relief and happiness right now," Bouchard told a reporter outside the courtroom. Bouchard was represented by Benedict Morelli of the Morelli Law Firm in New York. "USTA certainly wishes Ms. Bouchard the best in her career," said Alan Kaminsky. Kaminksy of Lewis Brisbois Bisgaard & Smith, LLP in New York represented USTA.

— Hailey Barnett



Fighters Seek Class Certification for $1.6 Billion UFC Antitrust Case

On February 16, 2018, a group of mixed martial artists ("the fighters"), including former UFC fighters Cung Le, Jon Fitch, Nathan Quarry, and Brandon Vera, requested for class certification in a lawsuit claiming that UFC's parent company, Zuffa LLC ("Zuffa"), violated antitrust law. The fighters allege that the UFC stifled wages and blocked rival competitors in the market by using anti-competitive schemes.

In December of 2014, a proposed class consisting of current and former UFC fighters filed an action in United States District Court for the Northern District of California stemming from Zuffa's alleged monopolization of the MMA fighter market. After, in June of 2015, the case was transferred to the United States District Court for Nevad a where Judge Richard F. Boulware denied Zuffa's motion to dismiss three months later. With discovery coming to a close, the fighters are requesting for two class certifications for the lawsuit. The first proposed class consists of fighters whose identities or likenesses were used by Zuffa, while the second class of fighters consists of those who fought in at least one UFC event broadcasted in the United States. Each class is alleged to contain more than 1,200 members who seek to resolve issues regarding Zuffa's alleged violations of antitrust laws. The fighters claim these violations are rooted in three of types of conduct by Zuffa: long-term exclusive contracts with fighters, coercing fighters to re-sign with the company, and acquiring other MMA promotions. Ultimately, the fighters allege the effect of this conduct equates to an anti-competitive scheme to establish market dominance thereby substantially lowering fighter compensation. The fighters seek $1.6 billion in damages based on a "foreclosure share" model created by economist Hal Singer.

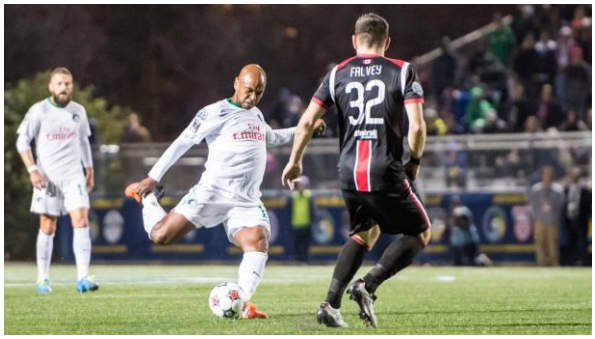
"Now that fact discovery and expert discovery are over, we feel that we have put together a power case both for class certification and for the merits," said Eric L. Cramer of Berger & Montague PC from Philadelphia, Pennsylvania, one of the attorneys representing the fighters. "We look forward to trying the case someday soon in Las Vegas," Cramer went on to say. Neither Zuffa nor their counsel were available for comment at the time of this writing. Zuffa is represented by William A. Isaacson, Richard J. Pocker, and other of Boies Schiller Flexner LLP located in Las Vegas, Nevada and Donald J. Campbell and J. Colby Williams of Campbell & Williams located in Las Vegas, Nevada.

— Ricky Legg

NASL Announces Cancellation of 2018 Season after Injunction Appeal is Denied

On February 23, 2018, U.S. Circuit Judge Richard C. Wesley affirmed the District Court's decision to deny a preliminary injunction filed by the North American Soccer League ("NASL"). Judge Wesley held that the NASL failed to demonstrate a clear likelihood of success on the merits of its antitrust claim under the heightened standard applicable to mandatory preliminary injunctions. *See* N. Am. Soccer League, LLC v. United States Soccer Fed'n, Inc., No. 17-3585, 2018 U.S. App. LEXIS 4343 (2d Cir. N.Y. Feb. 23, 2018).

On September 1, 2017, the U.S. Soccer Federation ("USSF") decided to revoke the NASL's Division II status. On September 19, 2017, NASL filed an antitrust suit against the USSF in the Federal Court in the Eastern District of New York. The NASL alleged that the USSF conspired with its membership and related entities in adopting, amending, and applying its standards in a way that precludes the NASL and others from competing in Division I and II competitions thereby creating a monopoly and violating Section 1 of the Sherman Act. *See* 15 U.S.C. §1. The NA SL sought (1) a preliminary injunction preserving the status quo which would allow the NASL to play in the 2018 Season and (2) a declaratory judgement and permanent injunction striking down the USSF's Professional League Standards and other divisional rules. On November 4, 2017, U.S. District Judge Margo K. Brodie denied the preliminary injunction. The NASL appealed the decision.



In a fifteen-page opinion, Circuit Judge Wesley agreed with District Judge Brodie and held that the NASL did not meet the heightened legal standard by showing "a clear or substantial likelihood of success on the merits." To win its appeal, the NASL needed to show that (1) "a contract, combination, or conspiracy amongst separate actors pursing separate economic interests such that the agreement deprives the marketplace . . . of actual or potential competition" existed or that (2) an unreasonable restraint on competition violated §1 of the Sherman Act. Judge Wesley concluded that there was "insufficient evidence of concerted action because the [USSF Board's promulgation of the Standards and marketing agreement with Soccer United Market (SUM)] did not tend to exclude the possibility of independent action" under the *Monsanto* standard. In regards to restraint on competition, NASL established that an adverse effect on competition existed in the USSF's market power to exclude competition through its standards, shifting the burden to the USSF to provide evidence that the Standards had procompetitive effects. The USSF satisfied this requirement by showing that the minimum team requirement, time-zone, market-size, financial viability, and stadium-capacity requirements sustained fan

interest, stabilized the leagues financially, and prevented free riding. Thus, Circuit Judge Wesley affirmed the

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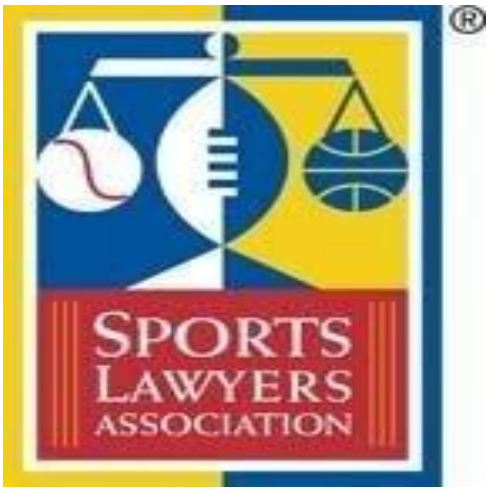
District Court's decision to deny the NASL's preliminary injunction.

". . . [P]laying the 2018 Season is no longer a possibility." Commissioner Rishi Sehgal stated. "The focus of the antitrust suit now shifts to securing the long-term advancement of soccer in this country, not only for the NASL, but for all soccer fans, clubs, and communities impacted by the USSF's restrictions on competition." NASL is represented by Jeffrey L. Kessler of Winston & Strawn, LLP in New York, New York. No statement was made by the USSF. The USSF is represented by Gregory G. Garre of Latham & Watkins, LLP in Washington, D.C. The antitrust lawsuit is ongoing.

— Angela Guertin



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