

# OWNING SHARES OF ATHLETES AND THE 13<sup>TH</sup> AMENDMENT

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Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.<sup>1</sup>

#### INTRODUCTION

On October 17, 2013, Arian Foster, a Houston Texans player, and Fantex Holdings (“Fantex”) reached an agreement to create an Initial Public Offering (“IPO”) where investors could invest in Foster’s future brand earnings.<sup>2</sup> The contract with Fantex contains an option where Foster can leave the agreement within the first two years of the deal; however, there is no mention in the Registration Statement filed with the Securities and Exchange Commission (“SEC”) detailing whether Foster can terminate the agreement after the first two years.<sup>3</sup> While Foster has no obligation to seek out additional endorsements to maximize his value according to the Fantex prospectus, there could be a

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<sup>1</sup> U.S. CONST. amend. XIII, § 1.

<sup>2</sup> Peter Lattman & Steve Eder, *If You Like a Star Athlete, Now You Can Buy a Share*, N.Y. TIMES, (Oct. 17, 2013, 8:31 AM), [http://dealbook.nytimes.com/2013/10/17/want-a-piece-of-a-star-athlete-now-you-really-can-buy-one/?\\_r=1](http://dealbook.nytimes.com/2013/10/17/want-a-piece-of-a-star-athlete-now-you-really-can-buy-one/?_r=1).

<sup>3</sup> See Fantex, Inc., Registration Statement (Form S-1) (Oct. 31, 2013) available at <http://www.sec.gov/Archives/edgar/data/1573683/000104746913010117/a2217205zs-1a.htm>; see generally Registration Under the Securities Act of 1933, SECURITIES & EXCHANGE COMMISSION, <http://www.sec.gov/answers/regis33.htm> (last visited May 27, 2014) (stating that all companies seeking to be registered with the SEC must file a Registration Statement as well as a Prospectus including: descriptions of the company’s properties, description of the security being offered, detailed information about company management and independently audited financial statements).

situation in the future where shareholders could attempt to force Mr. Foster to generate value for their shares.<sup>4</sup>

The Fantex prospectus and plan to create a stable of athlete and celebrity brands raises several important questions including the possible invocation of the 13<sup>th</sup> Amendment of the Constitution. The press releases and prospectus state that an investor is not investing directly in Arian Foster, but instead is investing in his brands. In reality there is no way to delineate the physical being that is the athlete from the sale of shares in the brand.<sup>5</sup> Additionally, Fantex plans to offer an IPO for San Francisco 49ers tight end Vernon Davis, but details of the Davis IPO are not yet available. At the time of writing, the SEC has not approved the proposed transaction, and at this time they have not publicly addressed the legality of the filing.

Part I of this article examines the evolution of 13<sup>th</sup> Amendment cases with respect peonage.<sup>6</sup> Part II discusses the nature of the Fantex filing by addressing the areas where the company avoided a clear invocation of the 13<sup>th</sup> Amendment.<sup>7</sup> Additionally, this section will examine the contractual implications and restrictions that NFL players such as Arian Foster and Vernon Davis have under the NFL Collective Bargaining Agreement. Part III will look at the tenuous relationship between professional sports and allegations of

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<sup>4</sup> See Fantex, *supra* note 3 (highlighting that, while the Fantex prospectus clarifies that investors are investing in Fantex as opposed to Arian Foster's brand directly, the two are effectively inseparable. Additionally, Fantex plans to offer an IPO for San Francisco 49ers tight end Vernon Davis; however, details of the Davis IPO are not yet available).

<sup>5</sup> See Lattman, *supra* note 2; see Fantex, *supra* note 3; see Darren Rovell, *Fantex to Offer Arian Foster Stock*, ESPN, (Oct. 18, 2013, 3:02 AM), [http://espn.go.com/nfl/story/\\_id/9838351/fantex-brokerage-services-offer-stock-arian-foster-houston-texans](http://espn.go.com/nfl/story/_id/9838351/fantex-brokerage-services-offer-stock-arian-foster-houston-texans) (noting that the structure of Davis' deal with Fantex is slightly different as the Davis deal is only for ten percent of future earning and additionally, Fantex acquires the same share of future earnings from Davis' share of the company, The Duke Marketing LLC).

<sup>6</sup> See BLACK'S LAW DICTIONARY, 1249 (9th ed. 2009) (stating that peonage is defined as the "[i]llegal and involuntary servitude in satisfaction of a debt"); see also Alfred J. Sciarrino & Susan K. Duke, *Alimony: Peonage or Involuntary Servitude?*, 27 AM. J. TRIAL ADVOC. 67 (2003) (stating that peonage can be viewed as forcible compulsion to perform a form of labor in order to satisfy a debt).

<sup>7</sup> See generally Fantex, *supra* note 3. Fantex has made specific statements in their filing that investors are investing in brands not the athlete's directly, as well as proposing to limit shareholder remedies directly against Foster, and presumably Davis.

slavery, the dissolution of reserve clauses, and the rise of free agency. Finally, Part IV looks at the rise of third party player ownership (“TPPO”), which has developed into a booming industry outside of North America and has caused concerns for major soccer federations.

## I. THE MODERN THIRTEENTH AMENDMENT

The 13<sup>th</sup> Amendment to the Constitution, the hallmark of the reconstruction amendments following the Civil War, was ratified in late 1865.<sup>8</sup> The reconstruction amendments erased any limitation to who may be counted as a person.<sup>9</sup> The 13<sup>th</sup> Amendment raised new challenges for the courts by forcing half the country to adopt a new consistent line of governance. The legislative debate and the actual wording used in the Amendment were hotly contested with both sides viewing the scope of the amendment differently.<sup>10</sup> In the roughly 150 years since the ratification of the reconstruction amendments, the Supreme Court has clarified and broadened the scope beyond the original thirty two words contained in Section 1 of the 13<sup>th</sup> Amendment.<sup>11</sup>

### A. *Early 13<sup>th</sup> Amendment Cases*

Among the first series of cases to determine the extent of the 13<sup>th</sup> Amendment was a group of five cases, known as the *Civil Rights Cases*.<sup>12</sup> The *Civil Rights Cases* centered on restrictions on African Americans with respect to their ability to use and access properties owned and operated exclusively by whites.<sup>13</sup> Justice Bradley delivered the Court’s 8-1 opinion, stating that the 13<sup>th</sup>

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<sup>8</sup> Derrick A. Bell, Jr., *Racial Remediation: An Historical Perspective on Current Conditions*, 52 NOTRE DAME L. REV. 5, 11 (1976).

<sup>9</sup> MICHAEL S. GREVE, *THE CONSTITUTION: UNDERSTANDING AMERICA’S FOUNDING DOCUMENT* 79-81 (2013).

<sup>10</sup> EDWIN MEESE III, MATTHEW SPALDING & DAVID F. FORTE, *THE HERITAGE GUIDE TO THE CONSTITUTION* 380-384 (2005). The debate in Congress centered on whether the 13<sup>th</sup> Amendment conferred only the right of a human not to be held as property or whether it extended personal liberties.

<sup>11</sup> *See generally* U.S. CONST. amend. XIII, § 2 (authorizing Congress to enact legislation to properly enforce section 1).

<sup>12</sup> The *Civil Rights Cases*, 109 U.S. 3 (1883). The five consolidated cases were *United States v. Stanley*, *United States v. Ryan*, *United States v. Nichols*, *United States v. Singleton*, and *Robinson v. Memphis & Charleston R.R. Co.*

<sup>13</sup> *Id.*

Amendment does not extend beyond the prohibition against involuntary servitude and, therefore, does not apply to exclusion from places of private accommodation.<sup>14</sup> The lone dissenting voice on the Court was Justice Harlan who posited that the 13<sup>th</sup> Amendment and subsequent acts of Congress were purposefully designed to prevent racial segregation in places of public and private accommodation.<sup>15</sup> The Court's majority held that Congress overstepped its legislative authority by regulating in the domain of the States. These cases were the predecessors to the separate but equal doctrine found in *Plessy v. Ferguson*.<sup>16</sup>

### *B. Expansion of the 13<sup>th</sup> Amendment*

The second wave of Supreme Court cases interpreting the 13<sup>th</sup> Amendment were *Bailey v. Alabama* and *United States v. Reynolds*.<sup>17</sup> In December 1907, Alonzo Bailey entered into a contract with the Riverside Company. The contract specified that Bailey was to be a farmhand for the period of December 30, 1907 to December 30, 1908.<sup>18</sup> In consideration, Bailey was initially paid \$15, and the parties agreed to a salary of \$12 per month.<sup>19</sup> Bailey worked throughout January and into February and then ceased performing his obligations under the terms of the contract.<sup>20</sup> Bailey was charged under an Alabama statute, which criminalized the failure to repay the money to his employer or to cultivate his employer's land as *prima facie* evidence of intent to defraud the injured party.<sup>21</sup> Bailey was convicted and ordered to pay \$30 plus costs, otherwise he would be sentenced to hard labor for a period of twenty days for the \$30 and 116 days for the court costs.<sup>22</sup> Bailey appealed his conviction on the grounds that his conviction violated the protections established by the 13<sup>th</sup> Amendment.<sup>23</sup> In a

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<sup>14</sup> *Id.* at 21.

<sup>15</sup> *Id.* at 27 (Harlan, J., dissenting).

<sup>16</sup> *Plessy v. Ferguson*, 163 U.S. 537 (1896) (notably, Justice Harlan was the lone dissenting voice in this case as well).

<sup>17</sup> *Bailey v. Alabama*, 219 U.S. 219 (1911); *U.S. v. Reynolds*, 235 U.S. 133 (1914).

<sup>18</sup> *Bailey*, 219 U.S. at 229.

<sup>19</sup> *Id.*

<sup>20</sup> *Id.* at 230.

<sup>21</sup> *Id.* at 227.

<sup>22</sup> *Id.* at 231.

<sup>23</sup> *Id.* at 230-31.

6-3 decision, the Supreme Court held that the Alabama statute violated the prohibitions against peonage incorporated by Section 2 of the 13<sup>th</sup> amendment.<sup>24</sup> The Court's majority held that money owed from the terms of a contract constitutes a mere debt barring a showing of "intent to injure or defraud."<sup>25</sup> Justice Hughes went on to state that, while the purpose of the Alabama law was to punish fraud, the effect was to punish the failure or refusal to complete a personal service contract regardless of fraud or intent to injure.<sup>26</sup>

In *Reynolds*, the Defendant appeared as surety for Ed Rivers who was convicted of petit larceny in Alabama.<sup>27</sup> Reynolds paid the \$15.00 fine and \$43.75 costs adjudged against Rivers in exchange for a contract to work as a farmhand for nine months and twenty four days at a rate of pay of \$6.00 per month.<sup>28</sup> Rivers ceased working for Mr. Reynolds, who then had a warrant for Rivers arrest issued. Rivers was fined \$.01 for violating his contract and ordered to pay \$87.05 in costs.<sup>29</sup> In *Reynolds*, the Court held that the threat of imprisonment attached to a mere breach of contract action violated the 13<sup>th</sup> Amendments abolishment of peonage.<sup>30</sup>

The 1940s produced two significant challenges to the doctrine of earlier cases in *Taylor v. Georgia* and *Pollock v. Williams*.<sup>31</sup> Both cases centered on alleged violations of the prohibitions against peonage. In *Taylor*, the appellant entered into a contract to perform manual labor for \$1.25 a day until he earned \$19.50, after he received \$19.50 in advance.<sup>32</sup> Taylor was convicted under a Georgia statute criminalizing the failure to perform under a

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<sup>24</sup> *Bailey v. Alabama*, 219 U.S. 219, 241 (1911); see U.S. CONST. amend. XIII, §2 (stating that "Congress shall have power to enforce this article by appropriate legislation.").

<sup>25</sup> *Bailey*, 219 U.S. at 234.

<sup>26</sup> *Id.* at 238. The dissent authored by Justice Holmes centered on his interpretation of what constituted fraud, and in said respect the dissent viewed the sentence given to Bailey as in compliance with the 13<sup>th</sup> Amendment. *Id.* at 245 (Holmes, J., dissenting).

<sup>27</sup> *U.S. v. Reynolds*, 235 U.S. 133, 139 (1914).

<sup>28</sup> *Id.* at 140.

<sup>29</sup> *Id.*

<sup>30</sup> *Id.* at 150.

<sup>31</sup> *Taylor v. Georgia*, 315 U.S. 25 (1942); *Pollock v. Williams*, 322 U.S. 4 (1944).

<sup>32</sup> *Taylor*, 315 U.S. at 27.

personal service contract.<sup>33</sup> The Supreme Court held that the Georgia statute violated the 13<sup>th</sup> Amendment for the same reasons that they had found in *Bailey*.<sup>34</sup> *Pollock* involved a personal service contract, which was not performed and a Florida statute, which criminalized the non-performance of said contract.<sup>35</sup> The Court held that Florida's statute, which created a presumption of fraud, violated the 13<sup>th</sup> Amendment.<sup>36</sup> *Taylor* and *Pollock* were instrumental in the establishment of clarity with respect to determining to what extent states were able to criminalize non-performance of personal service contracts.

### *C. The Limitations of the 13<sup>th</sup> Amendment*

During the 1960s and 1970s, the Supreme Court clarified and overruled the early conglomeration of the *Civil Rights Cases* by establishing that Congress did in fact have the power to regulate both public and private activity with respect to racial discrimination.<sup>37</sup> It was not until 1988 that the Supreme Court once again addressed interpretation of the 13<sup>th</sup> Amendment. In *United States v. Kozminski*, two intellectually challenged men were discovered working on Kozminski's farm. The men lived in deplorable conditions and did not receive general care.<sup>38</sup> The two men stated that they worked seventeen-hour days for what was initially reported to be \$15.00 per week. Later they worked for nothing.<sup>39</sup> The two men would face physical abuse or be institutionalized if they ceased working.<sup>40</sup> The Defendants were charged under 18 U.S.C. 1584, which forbids the holding of another in involuntary servitude.<sup>41</sup> In her opinion, Justice O'Connor struggled with whether the 13<sup>th</sup> Amendment was intended to apply to psychological coercion, eventually reaching

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<sup>33</sup> *Id.* at 28.

<sup>34</sup> *Id.* at 29.

<sup>35</sup> *Pollock*, 322 U.S. at 6.

<sup>36</sup> *Id.* at 25.

<sup>37</sup> See *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409 (1968); *Palmer v. Thompson*, 403 U.S. 217 (1971); *Runyon v. McCrary*, 427 U.S. 160 (1976); *Memphis v. Greene*, 451 U.S. 100 (1981). While historically and legally significant, the interpretations of the 13<sup>th</sup> Amendment in these cases are not relevant to the Fantex proposal.

<sup>38</sup> *U.S. v. Kozminski*, 487 U.S. 931 (1988).

<sup>39</sup> *Id.*

<sup>40</sup> *Id.* at 936.

<sup>41</sup> *Id.* at 934; see 18 U.S.C. § 1584 (2008).

the conclusion that “the use or threatened use of physical or legal coercion is a necessary incident of a condition of involuntary servitude.”<sup>42</sup> The *Kozminski* decision is the most recent in the line of cases interpreting the 13<sup>th</sup> Amendment and is relevant to potential implications for the Fantex proposed IPO because of the legal obligations created by commercial law. Shareholders hold remedies that could legally coerce Mr. Foster to continue actively seeking opportunities to generate revenue.

The interpretations of the 13<sup>th</sup> Amendment, as provided by the Supreme Court, establish some clarity with respect to what is contained within its scope; however, they have never addressed the Fantex style corporate ownership of an individual. While Fantex proposes to offer the opportunity for investors to invest in the brand of Arian Foster and Vernon Davis, there is no clear mechanism that separates the brands of these men from the men themselves.<sup>43</sup> The decision of Mr. Foster or Mr. Davis to no longer actively promote his brand may lead to a situation where they are legally coerced into continuing with said promotion under their Fantex agreement. This brings into play the provisions that Justice O’Connor found to be incorporated into the 13<sup>th</sup> Amendment.<sup>44</sup>

## II. FANTEX AND THE OWNING OF (BRANDED) ATHLETES

On October 31, 2013, Fantex filed a Form-S-1 Registration statement with the SEC.<sup>45</sup> The 207-page filing details the nature of what Fantex is proposing to list in an exchange market along with background about the company, its directors, as well as perceived risks of the investment. The offering has been met with largely negative opinions as a business investment, with the exception of ESPN’s Darren Rovell, who believes this is the next

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<sup>42</sup> *Id.* at 953.

<sup>43</sup> See Chris Gaylord, *Texans RB Foster an IPO. More to Follow on ‘Jock Exchange’?*, CHRISTIAN SCI. MON. (25 Nov. 2013, 2:33 PM), <http://www.cnbc.com/id/101226195>. It has been reported that Fantex will also be seeking out other athletes and entertainers to offer as part of the company’s line up of celebrity brand shares.

<sup>44</sup> See Kenneth T. Koonce Jr., *United States v. Kozminski: On the Threshold of Involuntary Servitude*, 16 PEPP. L. REV. 3 (1989).

<sup>45</sup> The Civil Rights Cases, 109 U.S. 3 (1883).



step of fantasy sports.<sup>46</sup> While the business soundness of investing in athletes or their brands may not make the offering qualify for blue-chip status, there are several other legal hurdles that could impact the viability of the listing of athletes in an exchange.

#### A. *The Anatomy of the Arian Foster Fantex Agreement*

The agreement between Fantex and Arian Foster is composed of Fantex making a one-time payment of \$10 million to Arian Foster in exchange for twenty percent of Foster's future earnings on and off the football field.<sup>47</sup> This agreement, according to Fantex, allows Fantex to offer stock as well as tracking stock of the Arian Foster and Vernon Davis brands. This means that investors will be able to not only invest in Fantex, but either additionally or alternatively invest in the player based components.<sup>48</sup> The key feature of tracking stock versus parent stock is that shareholders have a financial interest in only the specific unit being tracked like Arian Foster's or Vernon Davis' brand.<sup>49</sup>

The Fantex registration statement details the company's plan to offer 1,055,000 shares of Fantex Series Arian Foster common stock in addition to 100,000,000 shares of common platform stock.<sup>50</sup> Fantex describes their business as brand acquisition, marketing, and brand development with a focus in advertising and strategic partnering.<sup>51</sup> The agreement requires Mr. Foster to make "on-going payments and reports" regarding his income.<sup>52</sup> Interestingly, the registration statement requires that Fantex reports that shareholders have no right to pursue claims directly

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<sup>46</sup> See Darren Rovell, *Stock to be Offered in Vernon Davis*, ESPN (Oct. 31, 2013, 2:53 PM), [http://espn.go.com/nfl/story/\\_id/9906543/vernon-davis-san-francisco-49ers-next-join-fantex-brokerage-services](http://espn.go.com/nfl/story/_id/9906543/vernon-davis-san-francisco-49ers-next-join-fantex-brokerage-services); see also *Arian Foster Injury Comes At Bad Time For Fantex; Pundits Poke Holes in Investment*, SPORTS BUS. DAILY. (Oct. 22, 2013), <http://www.sportsbusinessdaily.com/Daily/Issues/2013/10/22/Finance/Foster-IPO.aspx>.

<sup>47</sup> Fantex, *supra* note 3, at 6 (detailing exclusions from what is defined as Arian Foster Brand Income).

<sup>48</sup> See *Tracking Stocks*, SEC, <http://www.sec.gov/answers/track.htm> (last visited May 27, 2014).

<sup>49</sup> *Id.*

<sup>50</sup> See Fantex, *supra* note 3, at 15.

<sup>51</sup> *Id.* at 19.

<sup>52</sup> *Id.* at 23.

and, instead, defer to Fantex.<sup>53</sup> The filing further details the penalties for Mr. Foster including interest calculated at the prime rate plus three percent and other remedies available at law.<sup>54</sup> The filing states that Mr. Foster has no obligation to generate brand income; however, this provision poses potential issues on both a constitutional level and under the myriad of case law on obligations to shareholders.<sup>55</sup> Unlike traditional stock offerings where investors become partial owners of a company, the Fantex offering is selling the opportunity to become partial owner of Arian Foster's brand, which is indistinguishable from the person himself.

### *B. What Obligation does Fantex have to the Shareholders*

While Fantex's registration statement disclaims any obligation on behalf of Arian Foster to continue seeking endorsements to maximize the value of his brand, a strong case exists for the obligation to protect the interests of shareholders that the public company has. While there is a debate over whether *Dodge v. Ford* is still the pinnacle case elucidating a corporation's obligation to maximize value for shareholders, there is still a strong contingent of legal scholars which advocates for corporate profit maximization.<sup>56</sup> There has been a concerted effort by Stout and others to state that *Dodge* no longer reflects properly on corporate society and that law professors should no longer teach the case. It is not a stretch to believe that even these scholars would see a breach of corporate duties owed to shareholders in the Fantex proposal if Foster was allowed to attempt to generate no revenue.<sup>57</sup>

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<sup>53</sup> *Id.* at 10; see generally Cindy A. Schipani, *Corporate Governance and Shareholder Remedies: The US Experience and Australia's Proposals for Reform*, 6 BOND L. REV. 28 (1994). Shareholder remedies include bringing a derivative lawsuit whereby the shareholders launch litigation for the benefit of the corporation.

<sup>54</sup> See Fantex, *supra* note 3, at 10.

<sup>55</sup> *Id.*; see generally Richard W. Duesenberg, *The Business Judgment Rule and Shareholders Derivative Suits: A View from the Inside*, 60 WASH. U. L. Q. 311 (1982). Duesenberg provides an overview of the historical evolution of derivative lawsuits, citing historically significant cases.

<sup>56</sup> See *Dodge v. Ford*, 170 N.W. 668, 684 (Mich. 1919).

<sup>57</sup> See Lynn A. Stout, *Why We Should Stop Teaching Dodge v. Ford*, 3 VA. L. & BUS. REV. 163 (2008).

In the event that Fantex owes some duty to shareholders, their duty is to maximize value for shareholders in accordance with the prevailing view of *Dodge*, or at minimum to not allow Foster to sit idle because it would be cause for shareholders to push for a new board of directors. If there is an obligation to produce or make a concerted effort to produce some value for shareholders, then there exists the possibility that there could be an invocation of the 13<sup>th</sup> Amendment. The laws governing corporations were not created with a vision of individuals attempting to sell themselves or their “brands” on an exchange. The common law has never dealt with an issue such as the proposed Fantex offering. It is likely, as indicated by the Supreme Court cases discussed in Part I, that any attempt by Fantex to compel Arian Foster, Vernon Davis, or any other brand Fantex acquires to actively seek out some form of value maximization opportunities would possibly be a violation of the 13<sup>th</sup> Amendment.

### *C. The NFL Collective Bargaining Agreement and Fantex*

The 316 pages of the NFL-NFL Players Association (“NFLPA”) collective bargaining agreement make no reference to Fantex or to players selling themselves or brands.<sup>58</sup> The agreement does clearly explicate the role agents are allowed to have with NFL players.<sup>59</sup> The agreement requires that the NFLPA must authorize any agents representing NFL players.<sup>60</sup> While it is unclear whether Fantex will take an active role in the negotiation of any future contracts of the brands they hold under Article 48 of the agreement, any representative is required to go through a registration process including passing a written

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<sup>58</sup> *NFL – NFLPA Collective Bargaining Agreement*, at 211, NFLPA, (Aug. 4, 2011), available at <https://images.nflplayers.com/mediaResources/files/2011CBA.pdf>. See generally David M. Wachutka, *Collective Bargaining Agreements in Professional Sports: The Proper Forum for Establishing Performance-Enhancing Drug Testing Policies*, 8 PEPP. DISP. RESOL. L.J. 147 (2007). Collective bargaining agreements are negotiated and agreed upon by the National Football League (NFL) and the National Football League Players Association (NFLPA). *Id.* The resulting agreement is designed to clarify the conditions and restrictions on an NFL player’s employment in the league. *Id.*

<sup>59</sup> See *NFL – NFLPA*, *supra* note 58.

<sup>60</sup> *Id.*

examination.<sup>61</sup> Article 51 of the agreement, titled *Miscellaneous Items*, clarifies the endorsements that are the NFL and players restrict. Notably Section 1(a) states; “[n]o Club may reasonably refuse to permit a player to endorse a product.”<sup>62</sup> NFL players are restricted in what attire they can wear on game-days and from endorsing other products in team uniforms or on team property without expressed consent of the NFL.<sup>63</sup>

There is nothing contained in the NFL-NFLPA collective bargaining agreement that explicitly outlaws a player from selling himself or his brand on a publicly traded exchange. There are restrictions on the ability of Fantex to act on behalf of the players because the agreement governs relationships with agents. The NFLPA restrictions on agents could potentially raise a conflict of interest between Foster’s NFL agent and Fantex, if, for example, Foster opts for an incentive laden deal instead of a contract with more guaranteed money.<sup>64</sup> While there are no explicit prohibitions against players like Foster and Davis from engaging in deals with Fantex or any other similar company, it is unlikely that the NFLPA would be supportive of deals that could so easily result in the exploitation of its members.

### III. PROFESSIONAL SPORTS AND CONNECTIONS TO SLAVERY

Professional sports have played a pivotal role in breaking down cultural walls. Jackie Robinson broke the color barrier in professional baseball, but a remnant of oppression lingered over professional sports in the form of the reserve system. Prior to the challenge by Curt Flood in 1969, reserve clauses were in place across professional sports and were unilaterally imposed by the

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<sup>61</sup> *Id.*

<sup>62</sup> *Id.* at 215.

<sup>63</sup> *Id.*

<sup>64</sup> See Bill Baker, *When the New Orleans Saints drafted Ricky Williams 10 years Ago, It Set the Franchise Back*, THE TIMES-PICAYUNE, (Apr. 18, 2009, 10:04 PM), [http://blog.nola.com/saintsbeat/2009/04/history\\_shows\\_that\\_thennew\\_orl.html](http://blog.nola.com/saintsbeat/2009/04/history_shows_that_thennew_orl.html). In 2000 Ricky Williams was a star running back at the University of Texas. *Id.* Upon being drafted by the New Orleans Saints, he signed what is considered to be one of the worst contracts in the history of sports. *Id.* Williams agreed to an eight-year contract for \$68 million; however, the contract was structured so that nearly all of the money was tied to various achievements. *Id.* Williams subsequently was injured and received only a fraction of the \$68 million. *Id.*

owners of professional teams.<sup>65</sup> The restrictions placed on players meant that a specific team owned them, even after the expiration of their contracts. The restriction made players unable to sign with any team willing to have them. They were eternally at the will of their employers who operated on an understanding of the system with the other owners throughout the leagues.

The use of reserve clauses in professional sports gave professional owners almost entire control over a player's ability to decide when, where, and if they were going to play. Initially, professional leagues argued that it was in the public interest to have these clauses to ensure the continued success of professional baseball.<sup>66</sup> Despite the anticompetitive principles contained within the reserve clauses, the Supreme Court held that antitrust principles did not apply to Major League Baseball ("MLB").<sup>67</sup> The antitrust exemption did not preclude clubs and leagues from being subject to the 13th amendment. While no player challenged the clauses on 13th amendment grounds, the prohibition against slavery has been featured prominently in arguments opposing the system.

#### *A. Flood v. Kuhn*

Curt Flood was a baseball player for the St. Louis Cardinals for twelve seasons. On October 7, 1969, the Cardinals traded Flood and a handful of other players to Philadelphia.<sup>68</sup> Flood refused the trade for numerous reasons, including the poor facilities and the generally poor ability of the Phillies at the time.<sup>69</sup> Flood argued that he was being treated as though he was a piece of property, and he sent a letter to then commissioner Bowie Kuhn expressing his displeasure at not being able to consider offers from various clubs in addition to Philadelphia.<sup>70</sup> Flood

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<sup>65</sup> Ralph K. Winter & Michael S. Jacobs, *Antitrust Principles and Collective Bargaining by Athletes: Of Superstars in Peonage*, 81 *Yale L.J.* 1 (1971).

<sup>66</sup> See E. W. Eckard, *The Origin of the Reserve Clause: Owner Collusion Versus "Public Interest"*, 2 *J. SPORTS ECO.* 113 (2001).

<sup>67</sup> See *Fed. Baseball Club v. Nat'l League*, 259 U.S. 200 (1922).

<sup>68</sup> See *Flood v. Kuhn*, 407 U.S. 258 (1972).

<sup>69</sup> BRAD SNYDER, *A WELL-PAID SLAVE: CURT FLOOD'S FIGHT FOR FREE AGENCY IN PROFESSIONAL SPORTS* (2006).

<sup>70</sup> See Curt Flood, *Curt Flood's Letter to Bowie Kuhn*, (Mar. 15, 2007, 8:38 PM), [http://mlb.mlb.com/news/article.jsp?ymd=20070315&content\\_id=1844945](http://mlb.mlb.com/news/article.jsp?ymd=20070315&content_id=1844945).

elected to challenge the reserve clause as violating antitrust principles and sued for injunctive relief eliminating the reserve clause.<sup>71</sup> In addition to his antitrust arguments, Flood argued that the reserve system constituted a form of peonage in violation of the 13th Amendment.<sup>72</sup> While the Supreme Court ruled 5-3 against Flood, the Court struggled with the decision in alleviating Flood's claims because the Court granted the MLB a one of a kind antitrust exemption.<sup>73</sup> The Court dismissed Flood's involuntary servitude arguments but noted the arguments in Justice Marshall's dissent, which was joined by Justice Brennan.<sup>74</sup>

While Flood lost the decision at the Supreme Court, he was instrumental in bringing about a change that would be completed with the decision of Arbitrator Peter Seitz that brought about an end to baseball's reserve clause.<sup>75</sup> Shortly after Flood's death in 1997, Congress enacted the *Curt Flood Act of 1998*, which granted MLB players the same rights under antitrust laws as other professional athletes.<sup>76</sup> The *Curt Flood Act* only applies to player-ownership issues that relate to employment conditions.<sup>77</sup>

### *B. Mackey v. NFL*

In *Mackey v. NFL*, Mackey, the President of the NFLPA, challenged the legality of the "Rozelle Rule" which prescribed that a team who lost a free agent would get value back.<sup>78</sup> This resulted in the commissioner's office sending players to new teams as compensation. Mackey's suit alleged that the NFL was engaging

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<sup>71</sup> See *Flood*, 407 U.S. at 258.

<sup>72</sup> *Id.*

<sup>73</sup> *Id.* at 269. The decision was unique as Justice Blackmun devoted five pages to explaining the history of baseball, including an entire paragraph devoted to former player's names. Additionally, Justice Blackmun referred to the precedential decisions in *Federal Baseball* and *Toolson* as an "aberration" confined to baseball. *Id.* at 287 (Justice Powell did not participate in the decision because he owned shares in Anheuser-Busch, the owner of the St. Louis Cardinals).

<sup>74</sup> *Id.* at 289.

<sup>75</sup> See Roger I. Abrams, *Arbitrator Seitz Sets Players Free*, SOC'Y FOR AM. BASEBALL RES. (Fall 2009), <http://sabr.org/research/arbitrator-seitz-sets-players-free>.

<sup>76</sup> 15 U.S.C. § 26 (1995).

<sup>77</sup> See Eric Michel, *Amateur Draft "Signing Bonus Pools": The Latest Inequity Made Possible By Baseball's Archaic Antitrust Exemption*, 11 WILLAMETTE SPORTS L.J. 46, 58 (2013).

<sup>78</sup> See *Mackey v. NFL*, 543 F.2d 606 (8th Cir. 1976).

in a *per se* violation of Section 1 of the Sherman Act.<sup>79</sup> Justice Lay stated that the labor of a human being is not a commodity or article of commerce.<sup>80</sup> Justice Lay's statement is contained within the *Clayton Act* and is often associated with the International Labour Organization.<sup>81</sup> Edwin Witte called the inclusion of the foregoing statement the Magna Carta of organized labor, and it impacts directly on the Fantex proposal.<sup>82</sup> Mackey's victory was significant and gave greater freedom to NFL players to choose which team they will play for. While the language contained in the *Clayton Act* is made in reference to antitrust law, it is conceivable that there is a wider application to issues regarding the value and sale of athlete's brands than the simple statement made in reference to antitrust law.

### C. *The Bosman Ruling*

Jean Marc Bosman was a European professional soccer player for R.C. Liegeois in Belgium. In 1990, following the expiration of his contract, R.C. Liegeois offered Bosman a contract that he viewed as insultingly low.<sup>83</sup> The Club then offered Bosman a transfer that would require a team taking him to pay him twelve million Belgian Francs. With no suitors, Bosman signed with a French club; however, his previous club did not send his registration certificate and suspended him preventing him from playing.<sup>84</sup> Bosman challenged European soccer's transfer system at the European Court of Justice, which held that sports did not fall within the Treaty of Rome.<sup>85</sup> While the Treaty of Rome did not

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<sup>79</sup> *Id.*

<sup>80</sup> *Id.* at 617. While the *Clayton Act* addresses issues relating to antitrust law, the interpretation that the labor of a person is un-detachable from the person is potentially relevant to the statement by Fantex that the brand of Foster and Davis are different from the person himself.

<sup>81</sup> See 15 U.S.C. § 17 (1914). See *Declaration of Philadelphia*, DATABASE OF LABOR LEGISLATION, [http://www.ilocarib.org.tt/cariblex/conventions\\_23.shtml](http://www.ilocarib.org.tt/cariblex/conventions_23.shtml) (last visited May 27, 2014).

<sup>82</sup> See THE PRESENT LABOR SITUATION: COMPULSORY INVESTIGATION AND ARBITRATION (1917).

<sup>83</sup> Peter Antonioni & John Cubin, *The Bosman Ruling and the Emergence of a Single Market in Soccer Talent*, 9 EUR. J. OF L. & ECO. 2, 157 (2000).

<sup>84</sup> *Id.* at 158.

<sup>85</sup> *Id.* See also, *Treaty Establishing the European Economic Community*, available at [http://www.ab.gov.tr/files/ardb/evt/1\\_avrupa\\_birligi/1\\_3\\_antlasmalar/1\\_3\\_1\\_kurucu\\_an](http://www.ab.gov.tr/files/ardb/evt/1_avrupa_birligi/1_3_antlasmalar/1_3_1_kurucu_an)

address sports, the Court found that the transfer system unjustifiably infringed on Bosman's ability to seek employment.<sup>86</sup> Bosman's inability to seek employment outside of Belgium effectively bound him to his Flemish team. In the event that Foster attempts to leave the Arian Foster brand being sold by Fantex, there is likely a judicial challenge, which will combine the invocation of the 13<sup>th</sup> Amendment with securities law.

Professional sports have a tenuous relationship with the concept of slavery because of their system of traditionally owning a player's rights and restricting a player's ability to freely choose where they apply their trade.<sup>87</sup> The three cases cited illustrate that professional sports and the historical concepts of slavery and peonage share some common features; however, the Fantex IPO arguably extends beyond the scope of any of these cases or historic professional sports systems. The Fantex offering has the potential to impact the entire life of Foster or Davis in the event that a *Dodge* like interpretation applies to Fantex's obligations. That would mean Fantex had to hold Foster and Davis responsible for maximizing shareholder value by continuing to seek new money making opportunities.

#### IV. THIRD PARTY PLAYER OWNERSHIP: THE PREDECESSOR TO FANTEX?

While portions of the American media treat the proposed Fantex IPO as an innovative idea, third party's ownership of athletes is nothing new and has caused concerns about exploitation for years. The market for star athletes was likely born in ancient Greece when slave owners used gladiators as entertainment and money-makers; however, one need look no further than Brazil to see this modern day trade of human beings. The practice is simple. An agent or investor will invest in a player and loan the player out to soccer clubs in Europe. If the player

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tlasmalar/1957\_treaty\_establishing\_eec.pdf (last visited May 27, 2014). The Treaty of Rome established the European economic community, proposing a common market place for workers and services amongst member states.

<sup>86</sup> *Id.*

<sup>87</sup> While there are similarities between the reserve systems and traditional connotations of slavery, there is no evidence that the reserve systems or professional sports had any systemic punishment scheme similar to the abuses perpetrated against slaves in America.



performs to the club's liking, the team will arrange to purchase the player from the seller. The agent takes upwards of sixty percent and the remainder is allocated to the player's former team or others holding a fractional share in the athlete.<sup>88</sup> Fantex's attempt to commodify the future earnings of Arian Foster and Vernon Davis in a stock is North America's newest expansion of third party player ownership.

#### *A. European Reaction to Third Party Player Ownership*

The reaction to TPPO in European soccer leagues has been one of concern because the practice has evolved to be the only method for European clubs to obtain top-level soccer talent from South America and Africa. The national leagues of England, France and Poland have attempted to implement bans on the practice.<sup>89</sup> The reaction of FIFA, soccer's governing body, has been to recommend a global ban on the practice because of concerns over the corruption of the sport by owners who have competing loyalties with players playing on opposing teams.<sup>90</sup> The English Premier League ("EPL") has been one of the leaders combatting TPPO by implementing rules U36 and U37, which prohibit clubs from paying a fee to a third party representing a player; however, U37 allows for English clubs to buy out third parties in order to alleviate the burden on any future transfers of the player.<sup>91</sup>

The Union of European Football Associations ("UEFA") has expressed concern over the inconsistent disassembly of the TPPO practice because of the abolishment of the practice handicapping

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<sup>88</sup> Ed Malyon, *Ending Third-Party Ownership a Tricky Deal*, ESPNFC (Dec. 7, 2011, 12:22 PM), [http://espnfc.com/blog/\\_name/espnfcunited/id/2117?cc=5901](http://espnfc.com/blog/_name/espnfcunited/id/2117?cc=5901).

<sup>89</sup> Adreas Vou, *Third Party Ownership – The Invisible Hand Behind Some of Football's Biggest Transfers*, JUST-FOOTBALL (Jul. 4, 2013), <http://www.just-football.com/2013/07/third-party-ownership-basics-explained-falcao/>.

<sup>90</sup> Daniel Geey, *United Kingdom: Football Match Fixing: Are UEFA's Third Party Ownership Disclosure Regulations Strong Enough?*, MONDAQ (Sept. 5, 2013), <http://www.mondaq.com/x/261182/Sport/Football+Match+Fixing+Are+UEFAs+Third+Party+Ownership+Disclosure+Regulations+Strong+Enough>.

<sup>91</sup> See *Premier League Hand Book 2013/14*, at 192-193, BARCLAYS PREMIER LEAGUE (2013), available at <http://m.premierleague.com/content/dam/premierleague/site-content/News/publications/handbooks/premier-league-handbook-2013-14.pdf>.

clubs in countries who have banned the practice.<sup>92</sup> UEFA representatives expressed awareness that the rules may impact the countries in which owners shop their star players.<sup>93</sup> As the threat to the integrity of sports became clearer, Gianni Infantino, UEFA General Secretary, raised concerns over the morality of owning the economic rights of a human being.<sup>94</sup> Infantino echoes words similar to those arguing for the end to slave trade by stating: “[t]his would be unacceptable in society and has no place in football. Footballers (like everyone else) should have the right to determine their own future.”<sup>95</sup> While European soccer is attempting to end this practice, it is interesting that some are viewing the practice in North America as a unique opportunity to take fantasy sports beyond fantasy and actually own their favorite athletes.<sup>96</sup>

### *B. Third Party Player Ownership already here in North America?*

North America’s most popular soccer league, Major League Soccer (“MLS”), has banned the practice of third party player ownership; however, two other professional North American soccer leagues, the United Soccer Leagues (“USL”) and the North American Soccer League (“NASL”), have not banned the practice.<sup>97</sup> While the days of TPPO’s global practice appear to be numbered, the practice is so large that the aptly named Traffic Sports of Brazil, who deals in TPPO, owns two teams in the NASL.<sup>98</sup> The North American landscape is arguably more complicated than other countries, particularly in South America where workers’ rights and restrictions on player representation do

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<sup>92</sup> Andy Brown, *UEFA to Investigate Impact of Third Party Finance Deals*, *WORLDSPORTSLAWREPORT* (Dec. 2011), [http://www.e-comlaw.com/world-sports-law-report/article\\_template.asp?Contents=Yes&from=wslr&ID=1385](http://www.e-comlaw.com/world-sports-law-report/article_template.asp?Contents=Yes&from=wslr&ID=1385).

<sup>93</sup> *Id.*

<sup>94</sup> Gianni Infantino, *No Place for Third-Party Ownership*, UEFA (Mar. 19, 2013), <http://www.uefa.org/about-uefa/news/newsid=1931937.html>.

<sup>95</sup> *Id.*

<sup>96</sup> Rovell, *supra* note 5.

<sup>97</sup> L. E. Eisenmenger, *Player Agent Mike Wheeler Explains Third-Party Ownership in MLS*, *EXAMINER*, (Dec. 27 2010), <http://www.examiner.com/article/player-agent-mike-wheeler-explains-third-party-ownership-mls-part-1-of-4>.

<sup>98</sup> *Id.* Traffic Sports owns the Miami Blues and the Atlanta Silverbacks and were projected to factor into the purchase of teams in North Carolina and Minnesota.

not have the same level of attention. The USL and NASL are likely operating opportunistically in allowing TPPO. They hope to attract MLS players, belonging to team owners, away from MLS with the ambition of developing those players and being awarded a lucrative transfer fee. This would provide sustainability for their second tier leagues.

TPPO is a trend that is slowly being pushed out of major professional soccer; however, the practice is likely to remain in countries and environments where players grow up poor and require investment from a private investor because public financing for youth development programs is unavailable. The use of TPPO in North America is continuing to operate in much of the same legal quagmire that Fantex appears to want to enter. While there has never been a lawsuit challenging TPPO on 13th Amendment grounds in the United States, European soccer league officials draws associations to slave ownership and begs the question as to whether or not a U.S. court would outlaw the practice.<sup>99</sup> The prevalence of the practice in South America and Africa, as well as the owner's control of top players, has caused the plan to force TPPO to slow to a glacial pace.

While TPPO may have slowed in soccer, it remains prevalent in other sports such as tennis, where it takes most players years on amateur circuits, in which they incur large travel bills that they are unable to pay themselves.<sup>100</sup> The practice suitably compares to the sale of stud racehorses. There, a trainer raises many horses with the hopes that one or more may be a successful racehorse that can be sold for multiples of the trainer's investment.<sup>101</sup> In many ways, TPPO's practice of TPPO was the predecessor to the concept propagated by Fantex; however, it has long been viewed in a less favorable light than the novelty surrounding the Fantex IPO.

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<sup>99</sup> See Infantino, *supra* note 94.

<sup>100</sup> See generally, J. Wertheim, *Camila Giorgi has Talent to Stay on Tour, but Finding Finances a Struggle*, SPORTS ILLUSTRATED (Jan. 10 2014, 2:12 PM), <http://sportsillustrated.cnn.com/tennis/news/20140110/camila-giorgi/>.

<sup>101</sup> Gabriele Marcotti, *The Stud Fees of Modern Soccer: Third-Party Ownership take a Foothold Around the World; Strikers in the Stable*, WALL ST. J. (Feb. 7, 2012, 2:32 PM), <http://online.wsj.com/news/articles/SB1000142405297020436940457720484252610555>.

## CONCLUSION

The promoters of Fantex have called their offering the “first registered trading platform of its kind,” and describe themselves as a brand building company; however, their attempted IPO poses a far greater number of questions than answers in multiple sectors.<sup>102</sup> From an investment perspective, many media members in the financial sector have chided this IPO as nothing short of a horrible idea. In a 2013 article, Felix Salmon noted numerous problems and comical risks associated with the Fantex IPO. One problem is the possibility that Fantex itself could go bankrupt, and as sole operator and participant of the proposed exchange, investors would be left with nothing.<sup>103</sup> Salmon’s article also notes that author Michael Lewis discovered that the U.S. Patent and Trademark Office has an application on record for a similar idea called the A.S.A. Sports Exchange. The main difference is that the A.S.A. application was for a publically traded trust fund comprised of athlete’s future earnings.<sup>104</sup> Salmon wrote that the absurdity of the investment is the main objection to the offering; however, there are likely more substantial issues with the IPO than it simply being a terrible investment.

The bigger issue is whether the offering sufficiently skates around the 13th Amendment. It is unlikely that it does—given that there is a very real possibility that in order to comply with US corporate laws the company cannot simply do nothing, despite Foster and Davis’s prerogative. The 13th Amendment is unique in a number of ways in that it applies to both government and private sectors. It is also the only Constitutional amendment that actively governs the labor force.<sup>105</sup> While it can be argued that the lack of recent attention to the 13th Amendment is a sign of

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<sup>102</sup> *Fantex Fact Sheet*, FANTEX (Jan. 17, 2014), [https://d677014be477887a628d-26e00d075e12750d95ac8208d5a715be.ssl.cf2.rackcdn.com/assets/media/Fantex\\_Fact\\_Sheet.pdf](https://d677014be477887a628d-26e00d075e12750d95ac8208d5a715be.ssl.cf2.rackcdn.com/assets/media/Fantex_Fact_Sheet.pdf).

<sup>103</sup> Felix Salmon, *Bad Investment of the Day, Fantex Edition*, REUTERS (Oct. 18 2013), <http://blogs.reuters.com/felix-salmon/2013/10/18/bad-investment-of-the-day-fantex-edition/>.

<sup>104</sup> *Id.* (quoting Michael Lewis, *The Jock Exchange*, UPSTART BUS. J. (Apr. 16, 2007, 12:00 AM), <http://upstart.bizjournals.com/culture-lifestyle/culture-inc/sports/2007/04/16/The-Jock-Exchange.html>).

<sup>105</sup> James Gray Pope, *What’s Different About the Thirteenth Amendment, and Why Does It Matter?*, 71 MD. L. Rev. 189, 190 (2011).

progress, it is still of utmost importance in protecting workers against abuse of power by those with power over them. As James Gray Pope points out, the 13th Amendment “unambiguously attacks relations defined by subjugation and domination.”<sup>106</sup> The Fantex offering cannot escape the dominant relationship that is necessary to successfully operate their proposed exchange.

Fantex attempted to subvert invocation of the 13th Amendment in a number of semantic ways, including stating that the investor is solely investing in the brand of these athletes; however, this brand relationship is distinguishable from the traditional view and is, in fact, legally inseparable from Arian Foster and Vernon Davis.<sup>107</sup> Additionally, Fantex has attempted to subvert invocation of the 13th Amendment by disclosing in their registration statement that Foster is under no obligation to seek out additional opportunities to grow his brand. Unfortunately, this notion does not correlate to nearly a 100 years of case law since *Dodge* that seem to dictate shareholder remedies where boards of directors fail to advance their corporation.

The Fantex concept is an anomaly. As more and more sports leagues move away from any attachment to concepts of slavery through the demise of the reserve clauses in North America and the coming end to third party player ownership in most major soccer leagues, Fantex is seemingly trying to bring about the opportunity for oppression of under-informed athletes. While Darren Rovell drew comparisons between this offering and the next level of fantasy sports, the Fantex proposition exceeds all concepts of fantasy, and instead is the fractional sale of athletes.<sup>108</sup>

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<sup>106</sup> *Id.* at 201.

<sup>107</sup> Fantex, *supra* note 3.

<sup>108</sup> See Rovell, *supra* note 5. See Fantex, *supra* note 3. Fantex limits maximum ownership of any tracking stock to one percent. *Id.*

