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NOT EVERYONE QUALIFIES: A COMPARATIVE LOOK AT ANTITRUST LAW AND NASCAR'S CHARTER SYSTEM

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I. INTRODUCTION

The National Association of Stock Car Auto Racing (NASCAR) has become the largest and most influential motor sports league in the world. Multi-million-dollar contracts for drivers, sponsors, and equipment make an investment into a team a huge financial risk. As a result, many teams are not created or created fairly. Most recently, Michael Waltrip Racing (MWR), which had committed sponsors and employees, was forced to shut down due to the economic costs of running a team.[1] In response to this, teams formed the Race Team Alliance (RTA), a non-union association of team owners with a goal of getting more equity in individual teams.[2] The RTA, in conjunction with NASCAR, formed a chartering system. In this system, teams acquire a nine-year charter from NASCAR, which allows them to compete in the thirty-six sanctioned points paying Sprint Cup Races.[3] Thirty-six charters were granted, leaving only four "open" positions for non-chartered teams to compete for each week.[4]

The new system's affect is two-fold. First, the system guarantees a starting position for thirty-six cars, whether their performance is good or not. Most teams with charters are long standing, and have substantial sponsorship

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1. Brant James, *Michael Waltrip Racing Bids Goodbye to NASCAR with Homestead Finale*, USA TODAY, Nov. 21, 2015, http://www.usatoday.com/story/sports/nascar/2015/11/21/michael-waltrip-racing-homestead-final-race-clint-bowyer-martin-truex-jr/76186922/.

2. *See generally Race Team Alliance*, http://raceteamalliance.com/ (last visited Dec. 14, 2017).

3. NASCAR hosts two exhibition races per year, which a charter does not automatically qualify a team to compete in.

4. *Fast Facts for NASCAR's Team Owner Charter System*, NASCAR (Feb. 9, 2016), http://www.nascar.com/en_us/news-media/articles/2016/2/9/fast-facts-nascar-team-owner-charter-system.html.

and financing.[5] Second, the system assures that certain teams are not guaranteed a starting position. For some teams who do not race every weekend, this is not a terrible outcome.[6] For other teams, lacking a guaranteed starting position can be a serious detriment. For example, Wood Brothers Racing has raced in NASCAR since 1950.[7] The team ran a full-time schedule until 2006.[8] The team continued to run in each season, but with a limited schedule.[9] The team started full-time racing again in 2016.[10] NASCAR did not award the Wood Brothers a charter when the system was created due to its lack of full-time racing in the last three years.[11] The Wood Brothers, who has continuously raced in NASCAR for over sixty years, is not guaranteed a starting position in each race. The Wood Brothers, like others similarly situated teams, face serious issues: sponsors are less willing to sign on with a team not guaranteed a starting position (or at the least are only willing to pay a lower amount), teams may miss out from revenue from race winnings, and drivers may miss out on points in races and the playoffs because a driver is not guaranteed a position. Additionally, teams miss out on the value of a charter.

Teams like the Wood Brothers may challenge this system under antitrust law. Antitrust law's purpose is to prevent unfair restraints of trade. This paper will analyze the antitrust implications of NASCAR's new charter system. First, it will go through the history of NASCAR leading up to the implementation of the charter system. This paper will then analyze antitrust law and its application to professional sports, and more specifically NASCAR. The final section will examine NASCAR's charter system and its application to antitrust law.

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5. For example, teams such as Hendrick Motor Sports (formed in 1984), Stewart-Hass Racing (formed in 2009), and Joe Gibbs Racing (formed in 1992). *See About | Hendrick Motorspots*, HENDRICK MOTORSPORTS, http://www.hendrickmotorsports.com/about (last visited Dec. 14, 2017); *see also Stewart Hass Racing*, NASCAR (Mar. 1, 2016), http://www.nascar.com/en_us/news-media/articles/team-profiles/stewart-haas-racing.html; *see also Joe Gibbs Racing*, NASCAR (Mar. 1, 2016), http://www.nascar.com/en_us/news-media/articles/team-profiles/joe-gibbs-racing.html.

6. For example, teams such as Circle Sport Racing (formed in 2012) and Premium Motorsports. *See* CSTMG, https://www.cstmg.racing (last visited Dec. 14, 2017); *see also* PREMIUM MOTOR SPORTS, http://www.premiummotorsports.net/ (last visited Dec. 14, 2017).

7. *History*, WOOD BROTHERS RACING, http://woodbrothersracing.com/history-2/ (last visited Dec. 14, 2017).

8. Lee Spencer, *Unable to Get a Charter, Wood Brothers Leave the RT*A, MOTORSPORT (Feb. 12, 2016), http://www.motorsport.com/nascar-cup/news/unable-to-get-a-charter-wood-brothers-leave-the-rta-673136/.

9. *Id.*

10. *Id.*

11. *Id.*

II. NASCAR, MONEY, AND TIME

NASCAR's charter system is a direct result of its past. NASCAR's past saw major changes, whether they were safety innovations, technological advances, or corporate involvement. As a result, money continuously flowed into NASCAR from its creation, with everyone wanting a piece. Recently, NASCAR has seen stagnant television ratings and difficult sponsorship acquisition due to the 2008 recession. Therefore, teams who have invested millions into race teams required equity for their teams. In response, NASCAR and the teams created the charter system.

A. History

NASCAR's history is a collection of rapid expansion and development. NASCAR was born in Daytona in 1947.[12] Bill France met with other promoters atop the Streamline Hotel and created NASCAR.[13] NASCAR's fundamental purpose was to centralize stock car racing in the south.[14] In 1950, Darlington Motor Speedway, the first asphalt speedway, was built.[15] Racing continued to take place at the beaches in Daytona until 1959, when Daytona International Speedway (DIS) was built.[16] A 2.5-mile racing coliseum, DIS hosted the famed Daytona 500 that same year, and each year since.[17] Atlanta Motor Speedway and Charlotte Motor Speedway were both built in 1960.[18] The sixties saw massive development in both tracks and revenue.[19]

NASCAR's first major financial step was corporate sponsorship in 1971.[20]

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12. *About NASCAR*, NASCAR, http://www.nascar.com/en_us/news-media/articles/about-nascar.html (last visited Dec. 14, 2017).

13. Micahel A. Cokley, *In the Fast Lane to Big Buck: The Growth of NASCAR*, 8 SPORTS LAW J. 67, 70 (2001).

14. *Id.*

15. *Id.*

16. *Id.* at 70–71.

17. *About NASCAR, supra* note 12.

18. *Id.*

19. *See id.*

> ([Bill] France [NASCAR's Chairman and CEO] opened the 2.66-mile Alabama International Motor Speedway (now known as Talladega Superspeedway), the largest and fastest motorsports oval in the world. New tracks sprang up in Brooklyn, Michigan, (70 miles Southwest of Detroit), Dover, Delaware, (between Philadelphia and Baltimore) and Pocono, Pennsylvania, two hours from New York City.).

20. *Id.* NASCAR was known as the Grand National Series prior to corporate sponsorship.

The RJ Reynolds Tobacco Company put its name on the newly minted NASCAR Winston Cup Series.[21] NASCAR became the largest motorsport ever spectated in 1976.[22] Shortly after, with the 1979 Daytona 500, NASCAR became the first live telecast motorsports race in history.[23]

NASCAR's history went through major changes in the 1980s to the present. Safety innovations have drastically changed the sport,[24] especially after the death of Dale Earnhardt.[25] NASCAR also created a new playoff structure named the "Chase for the Nextel Cup" in 2004, instituted the same year as a new title Sponsor.[26] NASCAR's rapid expansion led to money flowing in, but also high cost to teams. With so much money involved, the sport has had to rapidly change its structure as a way to succeed.

NASCAR's changes, which typically happen rapidly, are due to its general structure. From the beginning, NASCAR has had one man in control.[27] This is currently CEO Brian France.[28] Additionally, NASCAR is a private for profit institution, so it does not have to take input from teams or labor unions, unique to professional sports.[29] This innate ability to make changes without burdens from those around the sport has led to rapid expansion and growth and serious economic pressures both on NASCAR and the race teams, requiring more equity and financial viability in each individual team.

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21. *Id.*

22. *Id.*

23. *About NASCAR, supra* note 12.

24. *Id.*

25. Dale Earnhardt's death created multiple waves throughout the sport. First, Dale Earnhardt was a marketing machine both for NASCAR and himself. *See* Don Coble, *Ten After 3: Dale Earnhardt Built an Incredible Marketing Machine*, JACKSONVILLE, Feb. 12, 2011, http://jacksonville.com/sports/racing/2011-02-12/story/ten-after-3-dale-earnhardt-built-incredible-marketing-machine. Second, NASCAR was forced to create many safety innovations. Part of these changes was the Head and Neck Restraint (HANS) device to prevent whiplash and broken necks, new and tougher standards for seat belts, and the creation of the Car of tomorrow (CoT), a newer and safer car that redistributed the impact exerted during a crash. *See generally* Ed Hinton, *The Death of Dale Earnhardt Accelerated NASCAR's Safety Revolution,* ESPN (Feb. 7, 2011), http://espn.go.com/racing/nascar/cup/columns/story?id=6116145&columnist=hinton_ed.

26. *About NASCAR, supra* note 12. Sprint and Nextel merged three years later, changing the title sponsor to the Sprint Cup Series.

27. S. Joseph Modric, *The Good Ole' Boys: Antitrust Issues in America's Largest Spectator Sport*, 1 DEPAUL J. SPORTS L. CONTEMP. PROBS. 159, 161–162 (2003).

28. *Id. See* Cokley, *supra* note 13, at 72.

29. Modric, *supra* note 27, at 163.

B. Growth

One thing has been concrete since NASCAR's creation—money was going to be the key. Bill France, NASCAR's first president, set out to create uniform rules, a points championship, and race winnings. NASCAR's first champion, Robert "Red" Byron, won a total of $1250 for the title.[30] In comparison, Kyle Busch, the 2015 Sprint Cup Champion, won $8,393,925.[31] A family business from the start, Bill France handed over NASCAR to his two sons upon retirement.[32] Bill France Jr. was president of NASCAR until 1998, when the first non-France took over the role of president in Mike Helton.[33] Bill France Jr. remained CEO until his son, Brian France, took over in 2003.[34]

NASCAR now has tracks across the country, including Las Vegas, Kansas, the Sanoma Valley, and upstate New York.[35] In the early 2000s NASCAR was averaging over 190,000 people per race, making it the third-largest spectator sport in the world.[36] NASCAR's television ratings continuously rose in the 1990s, and NASCAR signed a $400 million dollar deal with FOX, NBC, and TBS.[37] NASCAR's television revenue in 1999 was estimated at $100 million alone.[38] NASCAR signed a new television contract with Fox Sports and NBC in 2014. The deal was worth a total of $8.2 *billion*.[39]

With massive expansion come lawsuits. NASCAR has been sued throughout the years for anything ranging from contract disputes to injuries.

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30. Cokley, *supra* note 13, at 71.

31. *Id.* at 71–72; *see* Jerry Bonkowski, *Kyle Busch Won 2015 Sprint Cup Title, but Harvick, Logano Earned More*, NBC SPORTS (Dec. 6, 2015), http://nascar.nbcsports.com/2015/12/06/kyle-busch-won-sprint-cup-title-but-harvick-earned-more-money-in-2015/.

32. Bonkowski, *supra* note 31.

33. Cokley, *supra* note 13, at 72. For example, upon Dale Earnhardt's death, it was Helton who announced his passing. Due to a recent restructure, Helton is now the Vice Chairman of NASCAR, but his role in the company has not seen substantial changes. *See* Jeff Owens, *Mike Helton Named NASCAR Vice Chairman*, SPORTING NEWS (Feb. 9, 2015), http://www.sportingnews.com/nascar-news/4635117-mike-helton-named-nascar-vice-chairman-brian-france-nascar-officials-board-of-directors.

34. Owens, *supra* note 33.

35. *See 2017 NASCAR Schedule*, NASCAR, https://www.nascar.com/monster-energy-nascar-cup-series/schedule/ (last visited Dec. 14, 2017).

36. Cokley, *supra* note 13, at 82.

37. *Id.* at 84. Compared to the $3 million-dollar deal signed in 1985.

38. *Id.*

39. Bob Pockrass, *How NASCAR Landed a Staggering TV Deal Despite Ratings Decline*, SPORTING NEWS (Aug. 15, 2013), http://www.sportingnews.com/nascar-news/4517344-nascar-tv-coverage-network-contract-fox-sports-1-nbc-deal-ratings.

NASCAR has gone to great lengths to protect drivers, fans, and the sport in general. These changes have included the size, power, and structure of cars; catch fences to prevent debris from entering the stands; window nets to prevent things from entering the cockpit; and, roof flaps to prevent the cars from getting airborne. Yet, not all injuries can be prevented.[40]

With all this money flowing into the sport, NASCAR saw numerous owners try to join the cause. With the overall number of owners and teams, NASCAR had even more growth, although some of it could not be sustained. Therefore, teams required more viability and equity in their individual cars to make the long-term success of the team, and the sport, more likely. As a result, NASCAR and the race teams created a new ownership structure.

C. Pre-Charter Ownership Structure

NASCAR's ownership structure had been substantially the same from its inception until 2016, with minor changes. Through much of its history, owners would supply the car, sponsors, and team to the driver in exchange for his service. Early in NASCAR history, many drivers owned their own cars, but as NASCAR grew, more money was needed to compete in NASCAR, and many teams began to rule multiple cars. This led to less success by single car and driver owned teams.[41] Multicar team owners like Junior Johnson, Rick Hendrick, and Jack Roush found success in the 1980s.[42] As multicar teams success flourished, more and more teams sprung up in the 1990s. Joe Gibbs Racing, Robert Yates Racing, Dale Earnhardt Incorporated, and Richard Childress Racing all had multiple cars in the 1990s.[43]

With the success of larger teams, many became so large that smaller teams could not compete. For example, at one time during the 2000s, Jack Roush

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40. Hinton, *supra* note 25. As seen in the death of NASCAR drivers Adam Petty, Kenny Irwin, and Dale Earnhardt all in a one-year period. Fans are not immune, which can be seen as recently as 2015 when Austin Dillion's car entered the stands at DIS, and debris injured some fans. *See* Holly Cain, *Dillon Shaken, but OK After Massive Wreck*, NASCAR (July 6, 2015), http://www.nascar.com/en_us/news-media/articles/2015/7/5/last-lap-wreck-daytona-austin-dillon-coke-zero-400.html.

41. For example, only Alan Kulwicki and Tony Stewart are the only two owner-drivers to have won the NASCAR Championship. *See* Christopher Leone, *Tony Stewart and the Greatest Owner/Drivers in NASCAR History*, BLEACHER REPORT (Dec. 14, 2011), http://bleacherreport.com/articles/983520-tony-stewart-and-the-greatest-ownerdrivers-in-nascar-history.

42. Cokley, *supra* note 13, at 70.

43. *Id.* at 72. *See generally supra* note 4–5. Richard Childress Racing had been a single car team with Dale Earnhardt for a number of years before adding Mike Skinner as a second team in the late 1990s.

owned five full time Sprint Cup teams.[44] NASCAR, wanting to level the playing field while also reducing the cost of ownership, restricted the number of teams an owner could have to four.[45] Many teams maxed out with four cars, while many single car teams were also able to foster.[46] NASCAR saw a variety of teams, but money and resources became a major issue.[47] In the late 2000s and early 2010s, teams began to form "alliances."[48] Essentially, teams that had the same manufacturer would create agreements where they would share information, resources, and even team members.[49] These alliances reduced some costs, but long-term financing and equity was still an issue.

D. Post-Charter Ownership Structure

In 2014, NASCAR teams created the Race Team Alliance (RTA).[50] The RTA's primary function is "[t]o provide an organization through which its members can collectively preserve, promote and grow the sport of stock car racing and thereby advance the long term interests of the racing teams."[51] The RTA consists of fourteen major NASCAR race teams.[52] The first, and to date

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44. Jamie McMurray, Matt Kenseth, Carl Edwards, Greg Biffle, and David Ragan all drove for Roush Racing in 2007. *See 2008 Sprint Cup Team/Driver Chart*, JAYSKI, http://www.jayski.com/pages/2008teams.htm (last visited Dec. 14, 2017).

45. This rule came with exceptions. For example, if a team wanted to develop a driver that currently raced in a lower division, NASCAR would grant that team a waiver for a fifth car for up to five races. *E.g.* Bob Pockrass, *Austin Dillon to Make Sprint Cup Debut at Kansas or Phoenix in Mike Curb-Owned Car*, SPORTING NEWS (Mar. 29, 2011), http://www.sportingnews.com/nascar-news/2055404-austin-dillon-to-make-sprint-cup-debut-at-kansas-or-phoenix-in-mike-curb-owned.

46. *See generally* Marty Smith, *You Think Your Fuel Bill is High? NASCAR Teams in a Budget Squeeze*, ESPN (Apr. 5, 2008), http://espn.go.com/racing/nascar/cup/columns/story?columnist=smith_marty&page=DoorToDoor080326.

47. Pat DeCola, *RCR Forms Technical Alliance With Circle Sport-Leavine Family Racing*, NASCAR (Jan. 21, 2016), http://www.nascar.com/en_us/news-media/articles/2016/1/21/richard-childress-racing-alliance-circle-sport-leavine-family-racing-ty-dillon.html. *See* Kenny Bruce, *Furniture Row's Move to Toyota Eased by JGR Alliance*, NASCAR (Feb. 9, 2016), http://www.nascar.com/en_us/news-media/articles/2016/2/9/furniture-row-racing-manufacturer-switch-to-toyota-joe-gibbs-racing-alliance.html; Darrell Waltrip, *Kevin Harvick, Stewart-Haas Benefit from Hendrick Motorsports Alliance*, FOX SPORTS (Mar. 18, 2015), http://www.foxsports.com/nascar/story/kevin-harvick-stewart-haas-racing-benefit-from-hendrick-motorsports-sprint-cup-alliance-031815.

48. *Id.*

49. *Id.*

50. *Who We Are,* RACE TEAM ALLIANCE, http://raceteamalliance.com/#5 (last visited Dec. 14, 2017).

51. *Id.*

52. *Id.*

major, objective of the RTA was to create long-term equity in race teams.[53] NASCAR listened, and in 2016 NASCAR created the current charter system.[54]

The charter system created a "charter" for each team. The charter guarantees a starting position for each points paying event.[55] NASCAR granted thirty-six charters at the start of the 2016 season.[56] The thirty-six teams selected charters based upon their attempts to qualify for every event in the prior three years.[57] Prior to 2016, forty-three cars could enter an event; that number has been reduced to forty.[58] The first charters issued are for nine years.[59] The charter system creates a minimum performance standard whereby if a team finishes in the bottom three in owners' points in three consecutive years, their charter may be revoked.[60] Charters may be leased to another team once every five years for one full season. [61]

Likely the biggest outcome from the new system is that charters may be sold on the open market.[62] For example, MWR was awarded two charters, but without an operation, the charters were not necessary.[63] As a result, MWR chose to sell its charters to other teams.[64] Both Stewart-Haas Racing and Joe Gibbs Racing had four cars but three charters; both teams acquired their fourth charter from MWR.[65] Although the price of the charters was not released, many in NASCAR have speculated the selling price of a charter is in the range of $5 million to $10 million.[66]

By creating the charter system, NASCAR has created a guaranteed starting position in each race. The value of a starting spot in race winnings

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53. *Id.* *See* Tom Jensen, *Rick Hendrick Says Race Team Alliance, NASCAR Deal Could Be Near*, FOX SPORTS (Sep. 8, 2015), http://www.foxsports.com/nascar/story/race-team-alliance-rta-rick-hendrick-rob-kauffman-brian-france-sprint-cup-franchise-090815.

54. *Fast Facts for NACAR'S Team Owner Charter System, supra* note 4.

55. *Id.* Currently there are 36 points paying events.

56. *See NASCAR's 36 Charter Teams*, NASCAR, Feb. 9, 2016, http://www.nascar.com/en_us/news-media/articles/2016/2/9/nascar-36-charter-teams-list.html.

57. *Id.*

58. *Fast Facts for NASCAR's Team Owner Charter System*, *supra* note 4.

59. *Id.*

60. *Id.*

61. *Id.*

62. *Id.*

63. Chris Smith, *NASCAR's Most Valuable Teams Grow Even Richer with New Charter System*, FORBES, Feb. 17, 2016, http://www.forbes.com/sites/chrissmith/2016/02/17/nascars-most-valuable-teams-grow-even-richer-with-new-charter-system/#193cc6b31ec8.

64. *Id.*

65. *Id.*

66. *Id.*

and sponsorships is astronomical. A charter's advantage is that it creates equity in every team granted a charter. The disadvantage, it creates equity *only* in teams with a charter. Some teams are not guaranteed a starting spot, race winnings and sponsorships, and some teams are not members of the RTA and were not as involved in the negotiating process. Therefore, some teams are inherently precluded from the benefits afforded to others.

The awarded charters, although awarded merit based, restrict some teams from competing in the sport altogether. Additionally, the field has less cars competing than years prior, leaving only four spots for non-chartered teams to compete for. Non-chartered teams like the Wood Brothers, who left the RTA the day after it was not awarded a charter, could bring an antitrust claim against NASCAR, the RTA, and its comprising teams, claiming that this new charter system is an unreasonable restraint of trade in violation of Section 1 of the Sherman Act.

III. ANTITRUST LAW AND SECTION 1 ANALYSIS

Section 1 of the Sherman Act states that "Every contract, combination [. . .], or conspiracy, in restraint of trade or commerce [. . .] is declared to be illegal."[67] When parties act in concert to create an unreasonable restraint on trade, their actions are considered a violation of Section 1. For example, when two parties agree on a pricing structure, the two parties have collectively agreed to change the price to something other than what the free market would dictate the price to be. Interference in a market will lead to an analysis of the restraint to determine if the restraint is reasonable.

Courts will either apply the per se rule or the rule of reason when analyzing Section 1 claims. A violation is a per se violation when the action by the parties is so egregiously anticompetitive that analysis does not need to look into the facts of the case.[68] The per se test is applied when it is clear, on its face, that a violation is blatantly illegal, typically in situations such as price fixing.[69] The charter system here does not violate Section 1 so blatantly that it will be analyzed under the per se rule analysis. Therefore, a court will go through the rule of reason analysis.

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67. 15 U.S.C.S. § 1 (LexisNexis 2017).

68. Mark C. Anderson, *Self-Regulation and League Rules Under the Sherman Act*, 30 CAP. U.L. REV. 125, 129 (2002) (citing Jay Dratler, Jr., LICENSING OF INTELLECTUAL PROPERTY § 5.02 (2001)).

69. *Id.*

A. The Rule of Reason Test

Under the rule of reason, a court looks at multiple factors when determining if a restraint is unreasonable.[70] First, each party must act in concert.[71] Second, the parties acting in concert must affect competition a particular market.[72] Third, the procompetitive effects of the restraint must outweigh the negative effects from the restraint.[73] The third prong goes through a burden shifting analysis.[74] The burden originally falls upon the plaintiff to show the anticompetitive effects.[75] If the plaintiff does so, the burden then shifts to the defendant to show the procompetitive justifications.[76] If the defendant does so, the burden shifts back to the plaintiff to show a less restrictive means exists to create the benefits.[77] If the burden is not met at each step of the analysis, the analysis stops.[78] At the conclusion of the burden shifting, a court will balance the net positive and negative effects to determine if the restraint is a violation of Section 1.[79]

Courts have also created a "quick look" analysis that does not fully evaluate the effects of the restraint.[80] This analysis first requires the defendant to illustrate the anticompetitive effects with the burden then shifting to the defendant to show the procompetitive justifications.[81] This test likely does not apply here because the restraint must have a basic, easily identifiable, economic impact that is not illegal per se.[82] NASCAR's charter system is intricate enough to require further analysis.

B. Single Entity Defense

NASCAR may try to exempt itself from Section 1 analysis by claiming the

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70. *Id.* at 130.
71. *Id.*
72. *Id.*
73. *Id.*
74. Anderson, *supra* note 68, at 130.
75. *Id.*
76. *Id.*
77. *Id.*
78. *Id.*
79. *Id.*
80. Anderson, *supra* note 68, at 130–31.
81. *Id.* at 131.
82. Id.

single entity defense. Section 1's function is to prevent "concerted action."[83] A single entity exists when separately incorporated companies act with unilateral behavior while being wholly owned by the same parent company, and are not within the grasp of Section 1.[84] The Supreme Court did not intend to punish a corporation for choosing one corporate form over another, but did state that a separately incorporated firm must still be a wholly owned subsidiary of the parent corporation to claim the defense.[85] When two corporations who are owned together act unilaterally, they are not conspiring to defraud the public, but are working towards the same corporate goal.[86] Therefore, under *Copperweld*, a corporation may be a completely separate, yet wholly owned, subsidiary to satisfy the single entity defense.

Courts have also interpreted *Copperweld* to create a "unity-of-interests" test.[87] A unity of interest exists when a corporate parent does not have strong ownership in the subsidiary, but the parent has strong corporate control and the subsidiary is "interdependent" of the parent.[88] An example provided by Modric is *Williams v. I.B. Fischer Nevada*.[89] In *Williams*, a defendant had a contractual agreement not to move to another Jack-In-The-Box management position for six months after termination of employment at the first Jack-In-The-Box.[90] Because Jack-In-The-Box franchises are independently incorporated but have a unity of interests, the court held that the single entity defense applied.[91]

The Supreme Court most recently visited the single entity defense in professional sports in *American Needle v. NFL*.[92] In *American Needle*, the Court held that NFL properties, the licensor of all intellectual property rights for NFL teams, and each NFL team, was not a single entity under Section 1.[93] The Court stated that each NFL team is a unique corporate actor that is wholly

83. Copperweld Corp. v. Independence Tube Corp., 467 U.S. 752, 767–68 (1984).

84. *Id.* at 768.

85. *Id.* at 766–67. *See* Natasha G. Menell, *The Copperweld Question: Drawing the Line Between Corporate Family and Cartel*, 101 CORNELL L. REV. 467, 478–79 (2016).

86. Menell, *supra* note 85, at 478.

87. *Id.* at 480.

88. *Id.*

89. *Id.* at 481. *See* Williams v. I.B. Fischer Nev., 999 F.2d 445, 447 (9th Cir. 1993).

90. *Williams*, 999 F.2d at 447 (citing Williams v. I.B. Fischer Nev., 794 F. Supp. 1026, 1029 (D. Nev. 1992)).

91. *Id.*

92. *See* American Needle, Inc. v. Nat'l Football League, 560 U.S. 183 (2010).

93. *Id.* at 196.

separate in its actions and ownership.[94] This is because each team still sells their individual merchandise and competes with other NFL teams to do so.[95] Therefore, Section 1 of the Sherman Act applied.[96]

NASCAR has not gone through a single entity defense analysis in a court of law. NASCAR's ability to settle most cases before they go to trial avoids this analysis.[97] Some have argued that NASCAR is not a single entity because its general structure is the same as other major professional sports leagues.[98] This argument focuses on NASCAR's President operating much like the Commissioner of a professional league, and the professional league's teams operating similarly to NASCAR race teams.[99] The teams may agree to compete against each other in both scenarios, but NASCAR teams not only compete against other teams on the track, but off because of the need for sponsors, drivers, and teams/equipment.[100]

In terms of the charter system and NASCAR, the single entity defense does not apply. The corporate parents (NASCAR) do not wholly own teams, nor do they share a unity of interests, much like *American Needle*.[101] Although an entwinement of economic interests exists, NASCAR, a separate corporate entity, issued the charters to team owners, separate corporate entities. Therefore, the actions were concerted between two wholly separate corporations and the single entity defense does not apply.

IV. ANTITRUST LAW, PROFESSIONAL SPORTS, AND CASE COMPARISONS

Because Section 1 applies, case law from other professional sports organizations will give a better understanding on how courts will interpret the NASCAR charter system. Courts generally go through the rule of reason analysis when analyzing two similarly instituted league decisions: (1) franchise ownership and location; and (2) membership and eligibility. Like charters, the league awards a franchise to a specific ownership group. Each league has rules based on franchise ownership and location.[102] The league, by

94. *Id.* at 196–97.

95. *Id.* at 197.

96. *Id.* at 200.

97. *E.g.* In re Motorsports Merch. Antitrust Litig., 160 F. Supp. 2d 1392 (N.D. Ga. 2001) (antitrust litigation regarding merchandise sales, settled before trial).

98. Modric, *supra* note 27, at 173.

99. *Id.*

100. *Id.*

101. *See American Needle*, 560 U.S. at 183.

102. *See* Comment, *Leveling the Playing Field: Relevant Product Market Definition in Sports*

vote of the member franchises, creates these requirements.[103] Furthermore, the leagues, through the member franchises, vote on relocation of franchises.[104] This has been the subject of much antitrust litigation. Courts have also looked at collaborative decisions in leagues such as collectively licensed intellectual property rights. Additionally, non-team sports, such as tennis and golf, have their membership requirements set by the league. The league, by making these decisions, creates antitrust issues much like NASCAR with its creation of the charter system.

A. National Football League

The National Football League (NFL) has gone through substantial antitrust litigation. Most pointed were the battles of Oakland Raiders Owner Al Davis. In *Raiders I*, Davis sued the NFL after a league vote denied him the right to move to Los Angeles, where the Rams already played.[105] The Raiders claimed that the NFL and its member franchises violated Section 1 by preventing the move of the Raiders from Oakland to Los Angeles.[106] The Court held that the restraint violated Section 1 because a jury had concluded that the evidence submitted supported a balance in favor of the Raiders.[107] The court considered factors such as geographic scope of competition, reasonable substitutes in the area, financial viability, and competitive balance.[108] The factors, weighed by the jury and affirmed by the Ninth Circuit, held the restraint to be unreasonable.[109]

The most prominent antitrust lawsuit involving the NFL is *American Needle v. NFL*.[110] Beyond the single entity defense, *American Needle* held that the rule of reason should apply to teams and professional sports organizations.[111] As stated above, American Needle, Inc. claimed the NFL

Franchise Relocation Cases, 2000 U. CHI. LEGAL F. 245, 255–57 (2000) (which discusses NFL league rules on franchise location).

103. *Id.*

104. *Id.*

105. Los Angeles Mem'l Coliseum Comm'n v. Nat'l Football League, 726 F.2d 1381, 1385–86 (9th Cir. 1984).

106. *Id.* at 1386.

107. *Id.* at 1396.

108. *Id.* at 1392–95.

109. *Id.* at 1396. *See* Los Angeles Mem'l Coliseum Comm'n v. Nat'l Football League, 791 F.2d 1356 (9th Cir. 1986) ("Raiders II") (holding that although the Raiders were successful in getting the move approved, the Raiders failed to show any damages by failing to move immediately).

110. *American Needle*, 560 U.S. at 183.

111. *Id.* at 203–04.

violated Section 1 of the Sherman Act by conspiring with teams by requiring them to license all team merchandise through the National Football League Properties (NFLP).[112] American Needle, who was the beneficiary of this license for many years, brought suit after the NFL licensed all properties exclusively with Reebok.[113] The Court held that the merchandising scheme was a violation of Section 1.[114] The court reasoned that even though teams may share a common economic interest, the teams are not a single entity and are therefore acting in concert.[115] The Supreme Court, overturning the Seventh Circuit, remanded the case so the rule of reason may be applied to the restraint.[116]

American Needle drastically altered Section 1 application to professional sports leagues. Most importantly, *American Needle* held that the single entity defense did not apply to professional sports teams licensing property rights collectively. Additionally, *American Needle* held that the rule of reason applies when teams create agreements between themselves and the professional sports organization.[117]

B. Major League Soccer

Major League Soccer (MLS) has the most distinct ownership structure of any North American professional sports organization. MLS retains ownership of each franchise and assigns "operator/investors" to manage each individual franchise.[118] Each operator/investor then gets a portion of the profits because they invested in the franchise, but they would not outright own the franchise.[119] This ownership structure was challenged in *Fraser v. Major League Soccer*.[120] In *Fraser*, the Court determined that the MLS's ownership structure was unique to antitrust Section 1 litigation.[121] Although similar to other sports franchises, in that the franchises still competed both on the field

112. *Id.* at 187–88.

113. *Id.*

114. *Id.* at. 204.

115. *Id.* at 201.

116. *American Needle*, 560 U.S. at 201.

117. *Id.*

118. Fraser v. Major League Soccer, 284 F.3d 47, 53–54 (1st Cir. 2002).

119. *Id.* Owners receive one-half of local ticket sales and concessions, the first $1,125,000 of broadcast revenue that increased by a percentage each year, all overseas revenue, and one-half of MLS Championship Game revenue and exhibition games.

120. *Id.* at 55.

121. *Id.* at 60.

and in the market place, the franchises were all still owned by MLS.[122] Therefore, the First Circuit held that the MLS and its franchises were a single entity because of each party's economic interests.[123] Yet, the court did not determine if the MLS and its franchises would be exempt from Section 1 because of the single entity defense.[124] The court held that the single entity defense and the rule of reason would lead to the same result, and the difference did not matter.[125] The crux of *Fraser*, in respect to the rule of reason, is that MLS has to compete against other North American soccer organizations; and more importantly, MLS has to compete with far better known and resourced international soccer organizations.[126] Therefore, the procompetitive justifications offered by MLS would not have changed the holding of the court and the broader control of the MLS on player contracts does not tip the balance back to the players.[127]

On at least one other occasion a court has stated that Section 1 applies to MLS.[128] Although a district court case, the Court held that the MLS has acted in concert sufficient enough to survive a summary judgment motion.[129]

C. Non-Team Sports

Non-team sports have a more similar application to NASCAR's charter system. NASCAR teams, although owners may own multiple cars, operate much like individual athletes. Each team, like each athlete, is granted a charter to compete in the sport. Further, NASCAR grants each charter to compete in NASCAR sanctioned events; similar to non-team sports organizations allowing individuals to compete in tournaments/events. Golf and tennis are two prime examples. Both sports host tournaments that set standards for eligibility to compete in these events.

1. Professional Golfers Association

The Professional Golfers Association (PGA) has eligibility requirements to compete in most events. In *Deesen v. Professional Golfers Association* the

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122. *Id.* at 56.
123. *Id.* at 60.
124. *Fraser*, 284 F.3d at 60.
125. *Id.* at 60–61.
126. *Id.* at 59, 62.
127. *Id.* at 61–62.
128. ChampionsWorld LLC v. U.S. Soccer Fed'n, Inc., 726 F. Supp. 2d 961, 970 (N.D. Ill. 2010).
129. *Id.*

Ninth Circuit held that Section 1 applies to the PGA in hosting these events.[130] In *Deesen*, a professional golfer challenged the PGA's decision to terminate his contract and make him ineligible for tournaments.[131] A committee assembled by the PGA made the decision.[132] The Court held that Section 1 analysis applied, and that the PGA was justified in terminating Deesen's contract.[133] The Court reasoned that the PGA's actions were not unreasonable because the standard "insure[d] that professional golf tournaments are not bogged down with great numbers of players of inferior ability.[134] The purpose is thus not to destroy competition but to foster it by maintaining a high quality of competition."[135] Therefore, the PGA's eligibility and competition requirements do not violate Section 1 of the Sherman Act.

Since *Deesen*, a 1966 decision, other courts have revisited Section 1's application to the PGA. In *Toscano v. Professional Golfers Association*, the court held that the PGA contracting with individual sponsors is not a Section 1 violation.[136] The contracts included an agreement to use PGA rules, which prohibit non-PGA events (including Senior Tour events).[137] The Court held that the contracts, which were negotiated between sponsors and the PGA, were not concerted action under Section 1 because the PGA set the terms and the sponsors agreed to them.[138]

2. Association of Tennis Professionals

The Association of Tennis Professionals (ATP) had their current "tiered" system challenged under Section 1 in *Deutsher Tennis Bund v. ATP Tour, Inc*.[139] In *Deutscher*, a German tennis tournament challenged the "Brave New World" tiered tennis structure, which put emphasis on more prestigious events while limiting smaller tournaments.[140] Under this system, the German tennis tournament was downgraded from the first tier to the second tier.[141] The Third

130. 358 F.2d 165 (9th Cir. 1966).
131. *Id.* at 168.
132. *Id.*
133. *Id.* at 169–70.
134. *Id.* at 170.
135. *Id.* at 170.
136. 258 F.3d 978, 985 (9th Cir. 2001).
137. *Id.* at 981–82.
138. *Id.* at 985.
139. 610 F.3d 820 (3rd Cir. 2010).
140. *Id.* at 825.
141. *Id.* at 826–27.

Circuit held that the tiered program does not violation Section 1 of the Sherman Act.[142] The ATP provided procompetitive justifications in defense of the program, including more competitive tournaments, an entertaining product, new investments due to a calendar change, higher payments to players, and expanded geographic scope.[143] Under the rule of reason, the Court concluded that a relevant market had also not been established because the German tennis tournament did not prove by "[a] preponderance of the evidence the existence of a relevant product market within a relevant geographic market."[144] Therefore, the further analysis of Section 1 was not necessary.[145]

D. NASCAR's Previous Case Law

NASCAR has been involved in litigation throughout its history. The primary litigation has focused on track selection and race location in NASCAR.[146] NASCAR is a corporation primarily owned by the France family.[147] The France family also owns International Speedway Corporation (ISC).[148] ISC currently owns thirteen tracks, twelve of which are on the NASCAR schedule.[149] Eight of the twelve have two races, meaning ISC hosts twenty of NASCAR's thirty-six sanctioned events.[150] This led to Kentucky Speedway suing NASCAR for a race date in 2009.[151] NASCAR was successful in its Section 1 defense.[152] NASCAR's success hinged on the lack of evidence illustrating concerted or colluded action by NASCAR and ISC.[153] NASCAR and Kentucky Speedway eventually agreed upon a race date, which

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142. *Id.* at 833–35.

143. *Id.* at 833.

144. *Id.* at 828–29.

145. *Id.*

146. *See* Meri J. Van Blarcom-Gupko, *Should NASCAR Be Allowed to Choose the Tracks at Which It's Series Races Are Run?*, 16 SETON HALL J. SPORTS & ENT. L. 193, 200–202 (2006).

147. *Id.* at 201.

148. *Board of Directors*, INTERNATIONAL SPEEDWAY CORP., http://www.internationalspeedwaycorporation.com/The-Team/Board-of-Directors.aspx (last visited Dec. 14, 2017).

149. *Our Facilities*, INTERNATIONAL SPEEDWAY CORP., http://www.internationalspeedwaycorporation.com/What-We-Do/Speedway-Management.aspx (last visited Dec. 14, 2017).

150. *Id.*

151. Ky Speedway v. Nat'l Ass'n of Stock Car Auto Racing, 588 F.3d 908, 908–11 (6th Cir. 2009).

152. *Id.* at 920–921.

153. *Id.*

was a disaster in its first year due to parking and traffic, but since has become a success.[154]

NASCAR has also done its best to avoid antitrust litigation. For example, NASCAR has settled litigation for merchandise antitrust claims,[155] used standing to defeat challenges to sponsorship limitations,[156] and successfully argued its limited involvement in tires used at a racetrack to avoid Section 1 analysis.[157]

V. NASCAR'S CHARTER SYSTEM'S BENEFITS OUTWEIGH THE RESTRAINTS

NASCAR's charter system would go through the full rule of reason analysis. This is because the charter is not egregiously anticompetitive on its face. For a full rule of reason analysis to occur, NASCAR would have to set a predetermined price for all teams to pay to purchase a charter agreed upon unilaterally by teams that were granted a charter.[158] A court, in application of the rule of reason, will determine that the charter system is not a violation of Section 1.

A. Concerted Action

A court will first determine if the actions in creating the charter system between NASCAR and team owners is concerted action.[159] For an action to be concerted, it must be the actions of "individual [actors]" acting together.[160] A court will look at the actions of the parties involved to determine if the individual actors came together to make a decision. Here, as discussed in the single entity defense section, NASCAR and each race team are an individual and independent corporation. Although these corporations may share some similar interests, the corporations are direct competitors both on the track and off it. Each team competes for drivers, teams, sponsors, and research and development. Therefore, the single economic corporations of NASCAR and each race team acting together is concerted action.[161]

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154. Terry Blount, *Kentucky Speedway Gets a Mulligan*, ESPN (July 12, 2011), http://espn.go.com/rpm/nascar/cup/columns/story?columnist=blount_terry&id=6759250.

155. *See* In re Motorsports Merch. Antitrust Litig, 160 F. Supp. 2d 1392, 154 (N.D. Ga. 2001).

156. *See* AT&T Mobility v. NASCAR, 494 F.3d 1356, 1357 (11th Cir. 2007).

157. *See* M & H Tire Co. v. Hoosier Racing Tire Corp., 733 F.2d 973, 974 (1st Cir. 1984).

158. This alone may not even meet the per se standard.

159. Anderson, *supra* note 68, at 128.

160. *American Needle*, 560 U.S. at 191 (citing United States v. Sealy, Inc., 388 U.S. 350, 353 (1967)).

161. *Cf id*. at 197.

B. Interstate Trade or Commerce

A court will then determine if the actor's restraint affects interstate commerce.[162] Here, NASCAR's charter system directly decides who may compete in the Sprint Cup Series. NASCAR green lights specific race teams while it waves the caution on others, in that it does not guarantee a starting position for their race team. This prevents certain teams from race winnings, sponsorship revenues, and other commerce such as salary to employees of race teams and purchasing of racing resources. Race teams, sponsors, and employees are associated with multiple states, whether the race team be incorporated in one state and the sponsor in another, or the race winnings be collected from another state. NASCAR's charter system directly influences interstate commerce.

C. Rule of Reason

Finally, a court will then go through the balancing test of the rule of reason analysis to determine if a restraint is unreasonable.[163] First, the plaintiff must prove the negative effects of a restraint.[164] Here, a challenger to the charter system could argue multiple things. One could argue that the charter system prevents teams that would otherwise be able to compete from competing. The charter system's guarantee could push sponsors to teams who have charters—typically the already larger and better funded teams—and away from the smaller already underfunded teams without a charter. Sponsors may not even want to put their brand on a car at all. Additionally, a team such as the Wood Brothers may argue that if offered an opportunity to purchase a charter, the team would have done so. By preventing the Wood Brothers from purchasing a charter, and awarding charters based on a standard NASCAR itself created, it could be argued that NASCAR and other team owners prevented certain teams from the benefits of a charter.

Second, the burden then shifts to the defendant to prove the procompetitive justifications for the restraint.[165] Here, NASCAR would argue that the charter system creates economic stability, competitive balance, and a financial future even for defunct teams. Charters guarantee a starting position to full-time teams who have shown a record of long standing racing in NASCAR. By also guaranteeing the starting position and a higher likelihood

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162. Anderson, *supra* note 68, at 128.

163. *Id.* at 129–30.

164. *Id.*

165. *Id.*

of sponsorship, a charter would keep teams financial viable. Additionally, more sponsorship would lead to long-term success of race teams in NASCAR. Race teams who no longer race in NASCAR would also be allowed to lease and/or sell a charter to another race team, thereby creating more equity into a race team.

Third, the burden would then shift back to a plaintiff to prove a lesser alternative means than the restraint.[166] Here is likely where the balance would tip to NASCAR's favor. A plaintiff could argue that the prior system created value in a race team due to the tangible property a team owns (for example, cars, parts, and tools). Charters have been valued in the millions,[167] and the equity in a race team without a charter is substantially less. A plaintiff could also argue that NASCAR could grant charters to each team competing full-time, which is decided at the beginning of a season. Unfortunately, this substantially reduces the value of a charter.

Fourth, a court would then balance the prior three factors to determine if a restraint is unreasonable.[168] Here, NASCAR's charter systems procompetitive effects substantially outweigh any negative impact of the restraint. Each team with a charter has become substantially more valuable. Additionally, NASCAR has created fail-safes. Teams without a charter can still compete in NASCAR, with four open positions available in each race. Furthermore, teams who do not have a charter but make the playoffs are guaranteed a starting position in the championship race if they make a deep playoff run. Therefore, antitrust law applies to NASCAR's charter system, and through the rule of reason analysis, a court is likely to find that the new charter system is not an unreasonable restraint on commerce.

VI. CONCLUSION

NASCAR started as a small sanctioning body for southern stock car racing. Over time, the sport grew into a nationally raced, nationally televised, and nationally sponsored enterprise. With the mass growth, money poured into the sport faster than gas into a fuel tank. When money is up for grabs, everyone wants a piece. NASCAR teams, sponsors, and drivers all enjoyed the massive expansion that took place throughout the first fifty years of the sport. The auto industry collapse followed quickly by the economic recession contracted NASCAR's growth, which has seen stagnant television viewership

166. *Id.*
167. Smith, *supra* note 63.
168. *Id.*

and sponsorship struggles throughout the past ten years. As such, teams, fearing the worst, approached NASCAR through the RTA and asked for more money. In turn NASCAR created a chartering system, where thirty-six teams qualify for each event. The charter creates millions of dollars in equity in a NASCAR team.

The problem with guaranteeing a starting position for some is that NASCAR did not guarantee a starting position for others. This raises an antitrust Section 1 issue, where NASCAR, in concert with race teams, created an economic restraint. Certain teams would be afforded a charter, an economic value in the millions, while other teams were left to forge for themselves.

Comparatively, NASCAR's charter system is not unprecedented. The NFL has had Section 1 claims against the organization for a multitude of reasons. Similar to the charter system, the NFL faced liability, and eventual defeat, in franchise relocation cases like *Raiders I*. A court will go through a rule of reason analysis to determine if the franchise relocation restraint is reasonable. MLS has a franchise structure that is authorized by the league, similar to NASCAR, but MLS franchises are still subsidiaries of MLS, and are protected by the single entity defense, whereas NASCAR and its race teams are not. Though, even in the MLS challenge, the court said the balance of the rule of reason favored the MLS. Non-team sports like golf and tennis have also had eligibility restraints. NASCAR's charter system is similar to an eligibility requirement. Courts have consistently held that tournaments and organizations acting together to set competitive requirements is reasonable, and therefore not a violation of Section 1. Even NASCAR itself has gone through antitrust litigation, but has done its best to avoid negative judgments.

A Section 1 claim against NASCAR's charter system would likely fail. Although NASCAR and its race teams acted in concert in interstate commerce, the restraint has procompetitive affects that outweigh any net negative impact. A charter creates millions of dollars in equity, attracts sustainable sponsors, and levels the playing field between smaller and larger teams. Therefore, the rule of reason analysis of Section 1 tips in NASCAR's favor, and they would end up in victory lane.