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BLACKLISTED: SAFE SPORT'S DISCIPLINARY POLICY RESTRAINS A COACH'S LIVELIHOOD*

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I. INTRODUCTION

Imagine devoting your life to a small Olympic sport and, through your reputation, building a career as a coach. For years, you have created world-class athletes. Parents and athletes around the country hold you in high esteem. Now picture a disgruntled athlete or parent—whose only desire is to have the team fire you—making an allegation of sexual abuse to the newly created U.S. Center for Safe Sport (Center). Under the Center's procedures, the allegation is turned over to the local police. After a thorough investigation, the police rightfully find that the allegation is false and dismiss the complaint. However, despite the proper authorities performing a full investigation and finding the claim to lack merit, the Center launches its own investigation and finds you guilty based solely on “he said, she said” testimony. Accordingly, the Center revokes your membership and issues a lifetime ban.

Due to the ban and your National Governing Body's (NGB) rules, the team terminates your employment and no club or team in the United States is allowed to hire you. Your only option is to coach privately. However, due to the NGB publishing your name with the allegation on a list of banned members, and the NGB's rule that prohibits banned coaches from interacting with athletes at competitions, no parent or athlete will hire you. As a result, the Center's sanction has effectively “blacklisted” you from your respective sport and your career as a coach is over.

While this scenario is hypothetical, it is not far from reality. Further, should this scenario occur, it is foreseeable that a disciplined coach may claim that the Center's actions are a restraint of trade in violation of section 1 of the Sherman Act. For this reason, the Center's disciplinary rules and procedures must be analyzed under the Sherman Act.

This Article will first cover the series of events that brought about the U.S. Olympic Committee's (USOC) creation of the Center. From there, it will explore the proposed procedures for investigating and disciplining coaches

accused of sexual abuse. Next, an analysis will be given regarding section 1 of the Sherman Act, including both the per se rule and the rule of reason, and will then further explore the application of various disciplinary rules to the Act. Finally, the Article will apply section 1 to the Center's discipline rules and procedures, and determine whether a coach could bring a successful section 1 claim against the Center.

II. HISTORICAL PERSPECTIVE OF THE U.S. CENTER FOR SAFE SPORT

According to Scott Blackmun, CEO of the USOC, about “one in four girls and one in six boys will be sexually abused before they turn [eighteen].”¹ While those national statistics are staggering, Olympic sports are not immune to this issue. In fact, according to Scott Blackmun, “[sexual abuse] happens in sports, if not more, than society at large.”² This can be seen by the decades of sexual abuse scandals that have plagued Olympic sports, such as USA Volleyball,³ USA Swimming,⁴ USA Gymnastics,⁵ and US Speedskating⁶—just to name a

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1. Wesley G. Pippert, *Olympic Committee President Calls Preventing Sexual Abuse Most Important Role*, NAT'L PRESS CLUB (Oct. 21, 2014), <http://www.press.org/news-multimedia/news-olympic-committee-president-calls-preventing-sexual-abuse-most-important-role>.

2. *Id.*

3. See Elliott Almond, *She Says She's Haunted by Coach's Misconduct: Volleyball: Julie Bremner Took Six Years to Come Forward with Her Story of Sexual Abuse*, L.A. TIMES (Oct. 19, 1995), http://articles.latimes.com/1995-10-19/sports/sp-58618_1_volleyball-officials; Shaun Assael, *AAU Launches Review of Policies as Volleyball Coach Rick Butler Steps Aside*, ESPN (July 28, 2015), http://espn.go.com/espn/otl/story/_/id/13311608/aau-launches-review-policies-volleyball-coach-rick-butler-steps-aside.

4. See Rachel Sturtz, *The Sex-Abuse Scandal Plaguing USA Swimming*, OUTSIDE, <http://www.outsideonline.com/o/outdoor-adventure/water-activities/swimming/The-Sex-Abuse-Scandal-Plaguing-USA-Swimming.html> (last visited Dec. 15, 2016).

5. See Matt Bonesteel, *USA Gymnastics Routinely Ignored Warnings of Sexual Abuse by Coaches, Report Alleges*, WASH. POST (Aug. 4, 2016), <https://www.washingtonpost.com/news/early-lead/wp/2016/08/04/usa-gymnastics-routinely-ignored-warnings-of-sexual-abuse-by-coaches-report-alleges/>; Amy R. Connolly, *Former U.S. Olympics Gymnastic Coach Charged with Child Molestation*, UPI (Aug. 25, 2015), http://www.upi.com/Top_News/US/2015/08/25/Former-US-Olympics-gymnastic-coach-charged-with-child-molestation/5491440514327/; Marisa Kwiatkowski et al., *Out of Balance: How USA Gymnastics Protected Coaches over Kids*, INDYSTAR (Aug. 4, 2016), <http://www.indystar.com/story/news/investigations/2016/08/04/usa-gymnastics-sex-abuse-protected-coaches/85829732/>; Scott M. Reid, *USA Gymnastics Tightens Rules on Banned Coaches*, ORANGE COUNTY REG. (Nov. 9, 2011), <http://www.ocregister.com/articles/gymnastics-326108-boger-coaches.html>.

6. See Jared S. Hopkins, *US Speedskating Completes Andy Gabel Investigation*, CHI. TRIB. (Mar.

few.

Though these scandals may be unsettling, it should come as no surprise. Countless stories, such as Bridie Farrell's,⁷ depict that young athletes aspiring to make the Olympics will do anything to reach their goals, including remaining silent in the face of sexual abuse. Further, because "[s]exual abuse of children is a crime of opportunity[, a]ctivities such as closed practices, unsupervised team trips[,] and overnights provide ample opportunity for abuse to take place."⁸ As a result, sexual predators have been drawn to the amateur sports environment and now plague Olympic sports.

It was not until ESPN and ABC's coverage of the USA Swimming sexual abuse scandal in 2010 that the pandemic of sexual abuse within Olympic sports truly came to light and change began to occur.⁹ Prior to the 2010 investigation, the USOC took a hands-off approach to sexual abuse, as the USOC left the policy creation and investigation of sexual abuse to each sport's NGB.¹⁰ Thus, creating a system where each NGB had its own, if any, sexual abuse policy without any oversight by the USOC over how incidents of sexual abuse should be handled.

However, after national publicity and an investigation into USA Swimming, the magnitude of the sexual abuse claims within USA Swimming forced the USOC, along with USA Swimming, to act. By May 1, 2014, more than 100 USA Swimming coaches were identified and issued a lifetime ban.¹¹ Further, as of August 8, 2016, the number has grown to over 130,¹² "making this one of the worst sexual abuse scandals in the U.S. Olympics sports world."¹³ While the number of USA Swimming coaches banned is astonishing, "[m]any of these coaches had well-known, long histories of sexual abuse, yet [USA Swimming]

24, 2014), http://articles.chicagotribune.com/2014-03-24/sports/chi-andy-gabel-us-speedskating-20140324_1_bridie-farrell-three-time-olympic-speedskater-female-teammate; Michael O'Keeffe & Christian Red, *Bridie Farrell Says N.Y. Law 'Doesn't Protect Children'*, N.Y. DAILY NEWS (Mar. 29, 2016), <http://www.nydailynews.com/news/crime/bridie-farrell-n-y-law-doesn-protect-children-article-1.2581893>.

7. See O'Keeffe & Red, *supra* note 6.

8. Danielle Deak, Comment, *Out of Bounds: How Sexual Abuse of Athletes at the Hands of Their Coaches Is Costing the World of Sports Millions*, 9 SETON HALL J. SPORTS L. 171, 172–73 (1999).

9. Megan Chuchmach & Avni Patel, *USA Swimming Coaches Molested, Secretly Taped Dozens of Teen Swimmers*, ABC NEWS (Apr. 9, 2010), <http://abcnews.go.com/Blotter/abc-news-investigation-usa-swimming-coaches-raped-molested/story?id=10322469>; Sturtz, *supra* note 4.

10. Sturtz, *supra* note 4.

11. *Id.*

12. *Individuals Suspended or Ineligible – Permanently*, USA SWIMMING, <http://www.usaswimming.org/ViewMiscArticle.aspx?TabId=1963&mid=10011&ItemId=5107> (last updated Aug. 8, 2016).

13. Sturtz, *supra* note 4.

enabled these men to continue to coach for years.”¹⁴

To respond to the USA Swimming scandal and the lack of NGB oversight, in 2012, the USOC implemented the “SafeSport” policy, for every NGB to adopt, with its sole purpose “to protect athletes competing under the Olympic umbrella from misconduct.”¹⁵ Within the policy’s introduction, it broadly states that “[a]ll forms of misconduct are intolerable and in direct conflict with the Olympic Ideals.”¹⁶ From there, the policy identifies and defines six types of misconduct (including sexual misconduct); provides reporting and investigation procedures; and establishes adjudication and discipline procedures for all forty-seven NGBs of the USOC to adopt and follow.¹⁷

Although the SafeSport policy was a big step forward for the USOC in tackling the sexual abuse culture within Olympic sports, the USOC recognized that in order for the SafeSport policy to be truly effective, claims would need to be investigated and enforced by an entity that is independent from any NGB, or even the USOC. Thus, in June 2014, the USOC’s board of directors approved the creation of the Center. In announcing its creation, Scott Blackmun stated:

[T]here is no national agency today that is responsible for the safety and well-being of young athletes and we're in position to lead this important effort. . . . [T]he National Center for Safe Sport will help fill that vacuum by providing training and resources, promoting open dialogue and conducting investigations on a national level.¹⁸

To launch the Center, the USOC announced that it will make the initial financial contribution, and after the first year, it will then be funded by contributions from every NGB.¹⁹ Further, the USOC announced that

14. *Id.*

15. Paul J. Greene, *How the USOC's SafeSport Policies Are Tackling Athlete Abuse and Harassment*, LAWINSPO (Sept. 7, 2015), <http://www.lawinsport.com/articles/item/how-the-usoc-s-safesport-policies-are-tackling-athlete-abuse-and-harassment>.

16. *Id.* (citation omitted); U.S. OLYMPIC COMM., SAFESPORT POLICIES ii, http://cdn.lawinsport.com/pdf/090712_USOC_Safe_Sport_Policy_FINAL.pdf (last visited Dec. 15, 2016).

17. Greene, *supra* note 15; U.S. OLYMPIC COMM., *supra* note 16.

18. Greene, *supra* note 15 (citation omitted); U.S. Olympic Comm., *U.S. Olympic Committee Announces Formation of U.S. Center for Safe Sport Advisory Council*, TEAMUSA (Feb. 9, 2015), <http://www.teamusa.org/News/2015/February/09/US-Olympic-Committee-Announces-Formation-Of-US-Center-For-Safe-Sport-Advisory-Council>.

19. U.S. Olympic Comm., *supra* note 18. However, it is unclear at this moment how much financing each NGB must contribute—contribution based on the size of an NGB’s gross operating revenue or a flat rate contribution.

participation in the Center will be mandatory for all forty-seven NGBs, as membership in the USOC will be conditioned on an NGB's participation in the entity.²⁰

III. U.S. CENTER FOR SAFE SPORT PROCEDURES

Since the Center will not be fully operational until early 2017, and no official procedures for investigation and enforcement have been released, no one knows definitively how it will operate. However, for the purpose of this Article, it will be assumed that the Center will follow similar procedures as those established by the current SafeSport policy. Further, it will also be assumed that each of the forty-seven NGBs, and their members, will contractually agree to give the Center exclusive jurisdiction over investigation and discipline of sexual misconduct.

a. Filing Requirements

Under the assumption that the Center will follow similar procedures as the current SafeSport policy, a SafeSport complaint may be filed with the Center by any individual, including NGB and non-NGB members.²¹ Further, since the current SafeSport policy does not provide a statute of limitations for filing a complaint, an individual may file a complaint at any time, including for sexual misconduct that occurred decades prior.²²

While the lack of a statute of limitations may increase the number of complaints that the Center receives, and the risk that an innocent coach will be disciplined for a decade-old accusation, this increase will be softened by two rules that are designed to prevent false accusations. First, given the gravity a sexual abuse accusation can have on a coach's reputation, the new procedures will prohibit individuals from filing a complaint in bad faith, and make it a separate ground for disciplinary action.²³ Second, since sexual abuse allegations are also criminal in nature, the new procedures will require any individual filing a complaint of sexual abuse to also file the same complaint with local law enforcement.²⁴ By including both of these rules in the filing

20. *Id.*; see Mel Paramasivan, *Including Athletes is Key to Addressing Safeguarding in Sport*, SPORTANDDEV (Oct. 16, 2015), <https://www.sportanddev.org/en/article/news/including-athletes-key-addressing-safeguarding-sport>. This requirement was unanimously endorsed by the NGB Council in 2013. U.S. Olympic Comm., *supra* note 18.

21. U.S. OLYMPIC COMM., *supra* note 16, at 3, 12.

22. See U.S. OLYMPIC COMM., *supra* note 16.

23. *Id.* at 14.

24. *Id.* at 13. Thus, subjecting the individual to possible criminal charges for filing a false report if

procedures, the Center aims to reduce the risk that an innocent coach is disciplined and prevented from earning a living.

b. Investigation

Upon filing an accusation, local law enforcement's criminal investigation will be given priority and the Center will suspend its investigation until the criminal investigation, if any, is completed. However, if there is a "reasonable belief" that the alleged sexual misconduct did occur, the coach may be suspended immediately pending final resolution of both law enforcement and the Center's investigation.²⁵ Although this interim suspension—pending final outcome—is for the protection of minor children and can be appealed by the coach to the American Arbitration Association (AAA),²⁶ it prevents a coach from earning a living based solely on a belief of guilt, and can ruin a coach's reputation even if the suspension is lifted. Further, despite local law enforcement's decision not to prosecute due to lack of evidence, the Center may continue with its own investigation.

c. Hearing

After completing an investigation, the Center will hold a hearing if the complaint is deemed credible.²⁷ While the accused coach may appear in-person for the hearing, the hearing will be held primarily through written briefs, without witnesses or live testimony. Unlike the current SafeSport policy, the evidence gathered during an investigation, along with written briefs, will be administratively reviewed by only one individual, the hearing officer.²⁸ The hearing officer will act similar to an administrative law judge and will determine guilt based on a preponderance of the evidence standard.²⁹

Since a determination of guilt would ruin a coach's reputation and bar him from coaching, it is also assumed that the Center will adopt similar procedural due process guarantees as those provided under the current SafeSport policy.³⁰ Thus, the Center will be required to inform the coach of the sexual abuse allegation and the evidence brought against him, and provide him with a

the individual makes a SafeSport complaint in bad faith. *Id.* at 14.

25. *Id.* at 15.

26. *Id.* at 16.

27. *Id.*

28. *Id.* (instructing that a hearing be held by a panel).

29. *Id.* at 18.

30. *Id.* at 17.

reasonable opportunity to respond to the allegation.³¹ Further, although the hearing is primarily performed through written briefs, the coach will have the right to be represented by legal counsel at his expense.³² Lastly, in applying the current SafeSport policy, the coach will also have a right to a decision by a hearing officer, who is unbiased and free of conflicts of interests, and a right to appeal any decision rendered.³³

d. Discipline

If the allegation of sexual misconduct is proven by the preponderance of the evidence, the Center will be required to impose a “proportionate and reasonable” sanction.³⁴ The sanctions available to the Center are very broad, and range from a warning to a permanent suspension and expulsion from the sport and its facilities.³⁵

While the factors for determining which sanction to impose for sexual misconduct are unknown at this time, there are several factors that the current SafeSport policy utilizes,³⁶ which the Center may adopt. Based on the SafeSport policy, the hearing officer will be required to consider:

- a) The legitimate interest of the USOC in providing a safe environment for its participants[;]
- b) The seriousness of the offense or act[;]
- c) The age of the accused individual and alleged victim when the offense or act occurred[;]
- d) Any information produced by the accused individual, or produced on behalf of the individual, in regard to the individual’s rehabilitation and good conduct[;]
- e) The effect on the USOC’s reputation[;]
- f) Whether the individual poses an ongoing concern for the safety of the USOC’s athletes and participants[; and]
- g) Any other information, which in the determination of the Panel, bears on the appropriate sanction[.]³⁷

31. *Id.*

32. *Id.* at 16–17.

33. *Id.* at 16.

34. *Id.* at 18.

35. *Id.*

36. *Id.*

37. *Id.*

After weighing the above factors, the hearing officer will issue a “proportionate and reasonable” sanction that the coach can appeal to AAA.³⁸ Lastly, in addition to the entire investigation and hearing process being confidential, the hearing officer’s decision will also remain confidential until the coach has exhausted his right to appeal.³⁹ After that time, the decision will be published for all members to see.

IV. SECTION 1 OF THE SHERMAN ACT

As discussed above, the Center will be empowered by all forty-seven NGBs with the power to expel and permanently ban coaches from their respective sport, and effectively restrain them from earning a living in their profession. Due to this restraint, it is important to explore section 1 of the Sherman Act to discover whether the Center’s exercise of such power is an illegal restraint of trade.

a. Framework

Under section 1 of the Sherman Act, “[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal.”⁴⁰ However, for a restraint of trade to be found illegal, courts have judicially interpreted section 1 to require that the restraint be unreasonable.⁴¹ Thus, to prevail on a section 1 claim under the Sherman Act, an accused coach must prove that: (1) the Center participated in an agreement, (2) the agreement unreasonably restrained trade, and (3) the agreement affects interstate trade.⁴²

As for the first element of a section 1 claim, since all NGBs will be required to contractually agree to the jurisdiction and authority of the Center, as well as uphold and enforce any sanction imposed, the requirement that the Center participate in an agreement that restrains trade will be met. As for the third element, some courts have held that for this element to be satisfied, the correct inquiry is whether the rule is commercial and regulates commercial

38. *Id.* at 19.

39. *Id.* at 18.

40. Sherman Antitrust Act, 15 U.S.C. § 1 (2016).

41. *NCAA v. Bd. of Regents*, 468 U.S. 85, 98 (1984); *Law v. NCAA*, 134 F.3d 1010, 1016 (10th Cir. 1998).

42. *See Law*, 134 F.3d at 1016; *Denver Rockets v. All-Pro Mgmt., Inc.*, 325 F. Supp. 1049, 1062 (C.D. Cal. 1971).

activity,⁴³ rather than “whether the entity promulgating the rule is commercial.”⁴⁴ Of the cases that have applied this standard, the courts were addressing certain NCAA rules—eligibility, recruiting, etc.—that sought to preserve amateurism and integrity in college sports.⁴⁵

However, this standard has not been fully adopted by all courts as a number of courts have disagreed and held NCAA rules that affect compensation satisfy the third element.⁴⁶ Thus, the Center’s rules most likely will be found distinct from the NCAA rules because the Center seeks to regulate the commercial profession of coaching, unlike the NCAA’s regulation of unpaid amateur athletes. Further, since all NGBs conduct business and hold competitions nationally, and the Center will have national jurisdiction to conduct its investigations and expel members, the interstate commerce requirement will most likely be met.

Lastly, as for the second element, although a lifetime ban by the Center would prevent a coach from coaching and restrain him from earning a living, that restraint must be unreasonable to be illegal. Thus, the question then turns on whether the restraint is an unreasonable restraint, which requires an in-depth analysis. To determine whether the Center’s conduct unreasonably restrains trade, a court may apply one of two approaches: the per se rule or the rule of reason.⁴⁷

1. Per Se

In determining whether to apply the per se rule, the U.S. Supreme Court has held that this approach may only be invoked “when [the] surrounding circumstances make the likelihood of anticompetitive conduct so great as to render unjustified further examination of the challenged conduct.”⁴⁸ While this standard for application is strict, the U.S. Supreme Court issued this restriction on applying the per se rule because once the Center’s conduct is identified as illegal per se, a court would not need to examine how the Center’s enforcement

43. See *Bassett v. NCAA*, 528 F.3d 426, 433 (6th Cir. 2008); *Worldwide Basketball & Sport Tours, Inc. v. NCAA*, 388 F.3d 955, 959 (6th Cir. 2004); *Smith v. NCAA*, 139 F.3d 180, 185–86 (3d Cir. 1998); *Pennsylvania v. NCAA*, 948 F. Supp. 2d 416, 424–28 (M.D. Pa. 2013); *Pocono Invitational Sports Camp, Inc. v. NCAA*, 317 F. Supp. 2d 569, 584 (E.D. Pa. 2004).

44. *Bassett*, 528 F.3d at 433 (citing *Worldwide Basketball & Sport Tours, Inc.*, 388 F.3d at 959).

45. *Bassett*, 528 F.3d at 433; *Worldwide Basketball & Sport Tours, Inc.*, 388 F.3d at 959; *Smith*, 139 F.3d at 185–86; *Pennsylvania*, 948 F. Supp. 2d at 424–28; *Pocono Invitational Sports Camp, Inc.*, 317 F. Supp. 2d at 584.

46. See *Bd. of Regents*, 468 U.S. at 104–13; *O'Bannon v. NCAA*, 802 F.3d 1049, 1066 (9th Cir. 2015); *Law*, 134 F.3d at 1024.

47. *Law*, 134 F.3d at 1016.

48. *Bd. of Regents*, 468 U.S. at 103–04.

impacts a NGB's coaching market or the procompetitive justifications for the Center's decision to expel a coach.⁴⁹

Although the application of the per se rule is restricted, and most courts apply the rule of reason to determine the legality of conduct in the sports industry, courts have applied the per se rule in a sports context when the conduct amounts to a group boycott.⁵⁰ This can be seen in *Blalock v. Ladies Professional Golf Ass'n*, where a professional golfer was suspended by the executive board of the Ladies Professional Golf Association (LPGA) for allegedly illegally moving her ball during a tournament.⁵¹ At the time of the executive board's decision, the board consisted of several members that were also professional golf players that competed against the suspended player.⁵² The suspended player argued that the board's decision constituted a concerted refusal to deal, and thus, an illegal group boycott in violation of section 1 of the Sherman Act.⁵³

In considering the player's section 1 claim, the court first noted that before a concerted refusal to deal can be illegal, "two threshold elements must be present: (1) there must be some effect on 'trade or commerce among the several States', and (2) there must be sufficient agreement to constitute a 'contract, combination . . . or conspiracy.'"⁵⁴ However, since the LPGA conducted business and tournaments nationally, and prohibited its members through contracts (the LPGA's constitution and by-laws) not to deal with a suspended player, the court held that both threshold elements were met.⁵⁵

With the threshold met, the court then addressed the legality of a group boycott as applied to a sports organization. In considering the player's group boycott argument, the court noted that the LPGA's suspension and exclusion of the player from golf constituted a group boycott, and "[group boycotts are] conclusively presumed to be unreasonable restraints of trade, simply by virtue of their obvious and necessary effect on competition."⁵⁶ Although the LPGA

49. *Law*, 134 F.3d at 1016.

50. *See Blalock v. Ladies Prof'l Golf Ass'n*, 359 F. Supp. 1260 (N.D. Ga. 1973).

51. *Id.* at 1262–63.

52. *Id.*

53. *Id.* at 1263.

54. *Id.* (citing *Denver Rockets v. All-Pro Mgmt., Inc.*, 325 F. Supp. 1049, 1062 (C.D. Cal. 1971)).

55. *Blalock*, 359 F. Supp. at 1263.

56. *Id.* at 1264 (citing *N. Pac. Ry. Co. v. United States*, 356 U.S. 1, 5 (1958)); *see Fashion Originators' Guild, Inc. of Am. v. FTC*, 312 U.S. 457, 467–68 (1941) (applying the per se rule of illegality to a concerted refusal to deal, or "group boycott"); *see also E.A. McQuade Tours, Inc. v. Consol. Air Tour Manual Comm.*, 467 F.2d 178, 187 (5th Cir. 1972) (holding that when a group boycott creates exclusionary or coercive conduct, the arrangement is a "naked restraint of trade" and application of the per se rule is justified).

argued that, like *Molinas v. National Basketball Ass'n*⁵⁷ and *Deesen v. Professional Golfers' Ass'n of America*,⁵⁸ the rule of reason should apply to sports industry self-regulation, the court noted that those cases “did not involve a completely unfettered, subjective and discretionary determination of an exclusionary sanction by a tribunal wholly composed of competitors”⁵⁹ Thus, the court concluded that the per se rule applied and the PGA's suspension violated section 1 of the Sherman Act.⁶⁰

While *Blalock* is one case that has applied the per se approach and held that a sport association's disciplinary action constituted an illegal group boycott, other courts have also recognized this analysis in the sports context.⁶¹ For example, in *Justice v. National Collegiate Athletic Ass'n*, although the court found that the NCAA's actions did not constitute a group boycott, the court did state that “[s]ports organizations have not been given unlimited discretion in adopting rules and regulations.”⁶² In making this statement, the court recognized that sport organizations “have been subjected to treatment under the per se rule when the purpose of a regulation is to eliminate business competition . . . or when the regulation does not satisfy the basic tenets of procedural fairness.”⁶³

In recognizing the application of the per se rule to sports industry self-regulations that lack procedural safeguards, the court in *Justice* acknowledged *Denver Rockets v. All-Pro Management, Inc.*⁶⁴ and elaborated on its holding.⁶⁵ In *Denver Rockets*, the court held that a rule, which prohibited any team of the National Basketball Association (NBA) from drafting a player who graduated high school in the last four years, was an illegal group boycott under the per se rule.⁶⁶ In reaching this decision, the court noted that the per se rule applies to group boycotts, unless the sports organization's regulation meets a three-prong test:

57. 190 F. Supp. 241 (S.D.N.Y. 1961).

58. 358 F.2d 165 (9th Cir. 1966).

59. *Blalock*, 359 F. Supp. at 1267–68.

60. *Id.* at 1268.

61. Marc Edelman, *Are Commissioner Suspensions Really Any Different from Illegal Group Boycotts? Analyzing Whether the NFL Personal Conduct Policy Illegally Restrains Trade*, 58 CATH. U. L. REV. 631, 647–49 (2009).

62. *Justice v. NCAA*, 577 F. Supp. 356, 380 (D. Ariz. 1983).

63. *Id.* (referencing *M & H Tire Co., Inc. v. Hoosier Racing Tire Corp.*, 560 F. Supp. 591, 604 (D. Mass. 1983); *Linseman v. World Hockey Ass'n*, 439 F. Supp. 1315, 1321 (D. Conn. 1977); *Blalock*, 359 F. Supp. at 1264–68; *Denver Rockets v. All-Pro Mgmt., Inc.*, 325 F. Supp. 1049, 1064–65 (C.D. Cal. 1971)).

64. 325 F. Supp. at 1049.

65. *Justice*, 577 F. Supp. at 380–82.

66. *Denver Rockets*, 325 F. Supp. at 1059, 1066.

(1) There is a legislative mandate for self-regulation “or otherwise.” In discussing the history of the New York Stock Exchange in *Silver*, the Court suggests that self-regulation is inherently required by the market’s structure. From this basis, it has been argued that where collective action is required by the industry structure, it falls within the “or otherwise” provision of *Silver*.

(2) The collective action is intended to (a) accomplish an end consistent with the policy justifying self-regulation, (b) is reasonably related to that goal, and (c) is no more extensive than necessary.

(3) The association provides procedural safeguards which assure that the restraint is not arbitrary and which furnish a basis for judicial review.⁶⁷

If the sports organization can show that the regulation meets the three-prong test above, then the group boycott is not per se illegal and the rule of reason analysis should be applied.⁶⁸

In applying this three-prong test to the NBA’s four-year rule, the court noted that there is no provision in the NBA’s constitution or by-laws “for even the most rudimentary hearing before the four-year college rule is applied [or] any provision whereby an individual player might petition for consideration of his specific case.”⁶⁹ Thus, due to the lack of basic procedural safeguards, such as an opportunity to be heard, the court held that the NBA rule did not meet the three-prong test and was a per se illegal group boycott.⁷⁰

Although *Blalock*, *Justice*, and *Denver Rockets* are the main cases that have analyzed and recognized the application of the per se approach to rules and by-laws of sports organizations that lack procedural safeguards, there are a number of cases that have taken a similar approach to sports industry self-regulation.⁷¹ For example, the court in *Linseman v. World Hockey Ass’n* applied the three-prong approach to the World Hockey Association’s twenty-year-old age minimum and held that the rule was a per se illegal group

67. *Id.* at 1064–65 (citing *Silver v. N.Y. Stock Exch.*, 373 U.S. 341 (1963) (recognizing an exception to the per se illegality of group boycotts and allowed a group boycott to be analyzed under the rule of reason)) (citation omitted).

68. *Denver Rockets*, 325 F. Supp. at 1064.

69. *Id.* at 1066.

70. *Id.*

71. Edelman, *supra* note 61, at 647–49.

boycott due to the lack of procedural safeguards for the prospective players and the arbitrariness of the rule.⁷² Similarly, in the context of disciplinary rules, although the court in *Brenner v. World Boxing Council* held that the disciplinary action was reasonable, the court recognized the application of the three-prong test when it stated, “[a]bsent a facial showing of anticompetitive purpose underlying the adoption or enforcement of a rule, the disciplinary activity of a sports organization must be evaluated under either the [three-prong test] or the rule of reason.”⁷³

While these cases demonstrate the application of the three-prong test to sports, this test has also been recognized in a non-sports context. For example, the court in *McCreery Angus Farms v. American Angus Ass’n* held that a private professional association’s suspension of its member constituted a group boycott and failed the three-prong test because the association had a complete monopoly over the “purebred Black Aberdeen Angus” market and the suspension lacked “even the most basic and elemental requirements of a fair hearing.”⁷⁴

As shown by the cases above, courts tend to apply the per se rule to group boycotts when a regulation lacks procedural safeguards that would prevent competitors from disciplining each other⁷⁵ or from receiving basic due process.⁷⁶ This result is not surprising as some states, such as California, have adopted a common law right to procedural safeguards, known as the fair procedure doctrine, when a private association’s disciplinary action would affect a member’s livelihood.⁷⁷

In the context of the Center, if a coach were to be found guilty of sexual misconduct, the Center could expel and permanently ban the coach from the sport. Further, since all NGB certified clubs are prohibited from employing a banned coach or allowing a banned coach to interact with athletes at competitions, a permanent ban would be considered a group boycott under the above cases. However, if the Center can meet the three-prong test, the sanction will escape the per se rule and will be analyzed under the rule of reason—a more complex standard.

In applying the three-prong test to the Center, the first prong will be satisfied because self-regulation is inherently required in the sports industry. As

72. *Linseman v. World Hockey Ass’n*, 439 F. Supp. 1315, 1321–23 (D. Conn. 1977).

73. *Brenner v. World Boxing Council*, 675 F.2d 445, 455 (2d Cir. 1982).

74. *McCreery Angus Farms v. Am. Angus Ass’n*, 379 F. Supp. 1008, 1019 (S.D. Ill. 1974).

75. *See Blalock v. Ladies Prof’l Golf Ass’n*, 359 F. Supp. 1260, 1267–68 (N.D. Ga. 1973).

76. *See Linseman*, 439 F. Supp. at 1321–23; *McCreery Angus Farms*, 379 F. Supp. at 1019; *Denver Rockets v. All-Pro Mgmt., Inc.*, 325 F. Supp. 1049, 1066 (C.D. Cal. 1971).

77. Elizabeth L. Croke, *Practice Tips: Applicability of the Fair Procedure Doctrine*, 32 L.A. LAW. 18 (2009); *see generally Pinsky v. Pac. Coast Soc’y of Orthodontists*, 1 Cal. 3d 160 (1969).

for the second prong, a permanent ban would be intended to accomplish an end consistent with preventing sexual abuse, and would be reasonably related to that goal by preventing a coach from having contact with athletes.

However, for the third element—no more extensive than necessary—of the second prong, is difficult to predict. On one hand, a permanent banishment may be necessary to prevent a sexual predator from having access to young athletes. On the other hand, a permanent ban may be found too extensive as our justice system for criminal conduct is based on a belief of rehabilitation—even some criminals are eventually released and allowed to work again.

For the third prong, if the Center adopts procedures similar to the current SafeSport policy—notice, hearing, right to appeal, unbiased hearing officer, guidelines for degree of discipline—the third prong will most likely be met. However, it is important to emphasize that the Center will have the power to impose exclusionary self-regulation unlike any sport regulation courts have addressed before. This is because unlike cases involving the NCAA or professional sports, the Center's sole purpose is to investigate and discipline members for criminal conduct that is usually left to local law enforcement. With its sole purpose so distinct from other exclusionary self-regulation in the sports industry, a court may require a heightened degree of procedural safeguards compared to cases that have required only basic notice and hearing procedures to avoid the per se rule. Thus, the adoption of sufficient procedural safeguards will be important if the Center is to avoid classification of its sanctions as per se illegal group boycotts.

While the per se rule established by the above cases may be applicable to the Center, there have been significant developments in case law since those cases were decided that favor the rule of reason approach and makes the application of the per se rule to the sports industry unclear. For example, the court in *United States Trotting Ass'n v. Chicago Downs Ass'n* stated that, "in the context of organized sports and sanctioning organizations, courts should be hesitant to fasten upon tags such as 'group boycott' and 'per se' in order to preclude inquiry into the business necessity for or precise harm occasioned by particular rules or practices."⁷⁸ Further, the court in *Brant v. United States Polo Ass'n*, in recognizing a Supreme Court decision that held that a restraint is not per se illegal based solely on a lack of procedural safeguards, stated that "[t]he most [a] Plaintiff could argue . . . would be that the lack of procedural due process and fair play in the suspension process . . . evidences an anticompetitive motive or intent."⁷⁹ Thus, this analysis of the Center's

78. U.S. Trotting Ass'n v. Chi. Downs Ass'n, 665 F.2d 781, 790 (7th Cir. 1981); *Martin v. Am. Kennel Club, Inc.*, 697 F. Supp. 997, 1001 (N.D. Ill. 1988) (alteration in original).

79. *Brant v. U.S. Polo Ass'n*, 631 F. Supp. 71, 78 (S.D. Fla. 1986); see *Nw. Wholesale Stationers*,

disciplinary rules under section 1 must turn to the rule of reason approach in examining the legality of the Center's enforcement.

2. Rule of Reason

In applying the rule of reason, a court must analyze a restraint's effect on competition through a burden shifting proof.⁸⁰ To explain this burden shifting framework, the court in *Law v. NCAA* stated:

[T]he plaintiff bears the initial burden of showing that an agreement had a substantially adverse effect on competition. If the plaintiff meets this burden, the burden shifts to the defendant to come forward with evidence of the procompetitive virtues of the alleged wrongful conduct. If the defendant is able to demonstrate procompetitive effects, the plaintiff then must prove that the challenged conduct is not reasonably necessary to achieve the legitimate objectives or that those objectives can be achieved in a substantially less restrictive manner. Ultimately, if these steps are met, the harms and benefits must be weighed against each other in order to judge whether the challenged behavior is . . . reasonable.⁸¹

Given the in-depth analysis and balancing test that the rule of reason offers, courts have shown a preference for the application of the rule of reason over the per se rule when it comes to sports organizations. This can be seen in *Justice*, where the court analyzed an NCAA rule that prohibited schools from compensating athletes.⁸² After applying the rule of reason and finding the NCAA's sanction reasonable, the court noted that "actions by sports organizations in preserving the integrity of the sport and fair competition are reasonable restraints under the rule of reason, even if they operate to exclude some competitors and thus have an incidental anticompetitive effect."⁸³

This preference was further clarified in the landmark case of *NCAA v. Board of Regents*, which held that the application of the per se rule to the NCAA's

Inc. v. Pac. Stationery & Printing Co., 472 U.S. 284, 293 (1985) (holding that "no lack of procedural protections would convert [a section 1 violation] into a *per se* violation.").

80. *Law v. NCAA*, 134 F.3d 1010, 1019 (10th Cir. 1998).

81. *Id.* (citations omitted).

82. *Justice v. NCAA*, 577 F. Supp. 356, 382–83 (D. Ariz. 1983).

83. *Id.* at 382 n.17.

horizontal restraint was inappropriate.⁸⁴ Although the Court recognized that the *per se* rule is typically applied to horizontal price fixing, the Court stated that:

This decision is not based on a lack of judicial experience with this type of arrangement, on the fact that the NCAA is organized as a nonprofit entity, or on our respect for the NCAA's historic role in the preservation and encouragement of intercollegiate amateur athletics. Rather, what is critical is that this case involves an industry in which horizontal restraints on competition *are essential if the product is to be available at all.*⁸⁵

As emphasized, the Supreme Court has taken a preference to the rule of reason in the context of sports, and the significance of this position has been noted by other courts. As explained by the court in *Blubaugh v. American Contract Bridge League*, “[w]hen the trade allegedly being restrained concerns a competitive sport, . . . the *per se* rule creates problems because the competition would be impossible without collective agreements among competitors about the rules of the competition and enforcement of those rules.”⁸⁶

In recognizing the Supreme Court’s position, courts have since generally analyzed “cases involving restrictions in sports and other competitive leagues under the rule of reason.”⁸⁷ This can be seen in *Law*, where the court applied the rule of reason analysis to an NCAA rule that limited the amount of compensation certain coaches could receive.⁸⁸ After applying the rule of reason, the court held that the NCAA’s rule violated section 1 because it failed to produce a procompetitive justification that would enhance competition in intercollegiate sport.⁸⁹

Although the above cases dealt with NCAA rules, courts have also applied the rule of reason to other sport organizations and their disciplinary rules. For example, in *Molinas v. National Basketball Ass’n*, where an athlete was disciplined for gambling on sports, the court noted that “[s]urely, every disciplinary rule which a league may invoke, although by its nature it may

84. *NCAA v. Bd. of Regents*, 468 U.S. 85, 100–01 (1984).

85. *Id.* (emphasis added).

86. *Blubaugh v. Am. Contract Bridge League*, No. IP 01-358-C H/K, 2004 U.S. Dist. LEXIS 3178, *43 (S.D. Ind. Feb. 18, 2004).

87. *Id.* See Kelly M. Vaughan, Note, *First and Goal: How the NFL's Personal Conduct Policy Complies with Federal Antitrust Law*, 96 CORNELL L. REV. 609, 628 (2011).

88. See *Law v. NCAA*, 134 F.3d 1010, 1019–24 (10th Cir. 1998).

89. *Id.* at 1020.

involve some sort of a restraint, does not run afoul of the anti-trust laws.”⁹⁰ After making this notation, the court held that “a disciplinary rule invoked against gambling seems about as reasonable a rule as could be imagined.”⁹¹

In addition to *Molinas*, a disciplinary rule for use of certain drugs has also been found reasonable under the rule of reason.⁹² In *Cooney v. American Horse Shows Ass'n*, the court noted that “disciplinary action can be considered unreasonably anticompetitive in effect only if the regulation is enforced in an arbitrary or discriminatory manner, or where the restraint is broader than reasonably necessary to accomplish the legitimate goal of the regulation.”⁹³ Thus, after finding that the disciplinary rule did not violate the above standard, the court held that the rule was not an unreasonable restraint in violation of section 1.⁹⁴

Lastly, the court in *Brant*, where a polo player was disciplined for violating league rules by verbally abusing the umpire, also held that a disciplinary rule for in-game misconduct was reasonable under the rule of reason.⁹⁵ In coming to this conclusion, the court noted that “a sports rule designed to proscribe ‘intentionally or carelessly dangerous, abusive, hostile or disorderly’ conduct is facially neutral, and quite apparently designed and intended to preserve the integrity of the game itself . . .”⁹⁶ Thus, the court held that the rule was procompetitive and reasonable under the rule of reason test.⁹⁷

In applying the rule of reason to the Center, its disciplinary action will most likely be found reasonable. Based on the above cases, disciplinary rules that are designed to preserve the integrity of the sport—drug rules, in-game misconduct rules, anti-sports gambling rules—and that are applied in a non-arbitrary or discriminatory manner have been found procompetitive and reasonable under the rule of reason. However, if the disciplinary rule is applied arbitrarily or discriminatorily, and there was a lack of procedural safeguards to prevent such application, a court might find that the anti-competitive effects outweigh any procompetitive justifications. Thus, for the Center’s disciplinary action to be found reasonable under the rule of reason, the Center must not enforce its rules or issue sanctions, such as a permanent ban, in an arbitrary or discriminatory manner.

90. *Molinas v. NBA*, 190 F. Supp. 241, 244 (S.D.N.Y. 1961).

91. *Id.*

92. *Cooney v. Am. Horse Shows Ass'n*, 495 F. Supp. 424, 431–33 (S.D.N.Y. 1980).

93. *Id.* at 431.

94. *Id.* at 431–33.

95. *Brant v. U.S. Polo Ass'n*, 631 F. Supp. 71, 76–77 (S.D. Fla. 1986).

96. *Id.* at 76.

97. *Id.* at 76–77.

V. PER SE OR RULE OF REASON: WHICH ONE SHOULD APPLY

As discussed in the rule of reason section, courts have been hesitant to label sports industry self-regulation under the categories of “per se” or “group boycott.” Thus, a banned coach would have an uphill battle to persuade a court that a permanent ban by the Center is per se illegal or an illegal group boycott. However, while this would be a difficult argument, it is not an impossible argument. As stated previously, the Center will not be like any other sports entity that courts have previously analyzed under section 1.

When the Supreme Court established a preference for the rule of reason, it did so by stating that “horizontal restraints on competition are *essential if the product is to be available at all.*”⁹⁸ Further, courts have since continued to apply this reasoning to a number of association rules—amateurism rules, drug testing rules, in-game misconduct rule, sport gambling rules, etc.—because those rules were held to be related to the functionality or substance of the sport, or to preserving the integrity of the sport. Thus, the rules were held essential for the sport to be available.

However, the rules established by the Center are not “essential for the sport to be available” because they do not relate to the functionality or substance of the sport. Rather, the Center seeks to expand the criminal justice system by investigating and disciplining members for criminal misconduct, even if the criminal justice system found no guilt. By assuming the role of the criminal justice system, the Center’s disciplinary rules become distinct from any other “essential” rules courts have recognized because the Center seeks to enforce rules that are already sovereign laws—with their own adjudication. Further, while it could be argued that these disciplinary rules established by the Center relate to the integrity of the sport, courts have only upheld integrity rules when the rule seeks to preserve the integrity or nature of the game, not rules that relate to actions by members that occur outside of the sport and do not affect the game itself.

Due to these distinctions, it is not a forgone conclusion that the Center’s disciplinary action will be analyzed under the rule of reason. Rather, the argument for classifying its disciplinary action as a group boycott can be made due to the uniqueness of the Center’s authority, the breadth of the Center’s disciplinary rules, and the severity a permanent ban would have on a coach’s livelihood. Further, although the Supreme Court has held that a restraint is not per se illegal based solely on a lack of procedural safeguards, courts have continued to examine procedural safeguards as a factor because a lack of

98. *NCAA v. Bd. of Regents*, 468 U.S. 85, 101 (1984) (emphasis added).

procedural safeguards can produce arbitrary or discriminatory enforcement, which is anti-competitive. Thus, due to the severity a sexual misconduct sanction can have on a coach's livelihood, courts will most likely scrutinize how the rules are enforced (like in the group boycott cases) to ensure that the rule is not applied arbitrarily and to minimize the risk that an accused coach is innocent.

However, given the preference for the rule of reason, the argument for *per se* treatment will be a stretch and it should be anticipated that a court will apply the rule of reason analysis. In applying the rule of reason to the Center's disciplinary rules and searching for anti-competitive effects, a court's decision on the reasonableness of the rule will come down to whether the Center adopts enough procedural safeguards to prevent a permanent ban from being enforced arbitrarily in an anti-competitive manner—such as requiring an unbiased, conflict-free hearing officer and establishing a list of factors for determining the sanction's severity.

VI. CONCLUSION

Once created, the new Center will play an essential role in preventing sexual abuse within Olympic sports. Through its ability to investigate and discipline any claims of misconduct within any of the forty-seven NGBs, the Center stands in a position to affect real change within the culture of Olympic sports. However, with this power comes certain risks. More specifically, the risk that a disciplined coach will allege that the Center's disciplinary rules violate section 1 of the Sherman Act.

While it is unlikely that a coach could successfully bring a section 1 claim due to the thorough procedures the Center plans to adopt, it remains a risk that the Center must remain aware of. To help minimize this risk, the Center must structure its enforcement procedures in a manner that would ensure that its rules are not enforced in an arbitrary or discriminatory manner. As shown in the above cases, the only time that courts have found a Sherman Act violation for enforcing a disciplinary rule has been when the organization has lacked basic procedural safeguards. Thus, by adopting procedures sufficient to prevent sanctions from being applied arbitrarily or discriminatorily, the risk of an innocent coach bringing a successful section 1 claim will be greatly alleviated.