

NATIONAL SPORTS LAW

NEGOTIATION COMPETITION 2022

FINAL ROUND

“Skeching a New Path Forward”

GENERAL FACTS FOR BOTH TEAMS

The rapid reputational downfall of a superstar can be devastating for a number of different parties—even those beyond the downfallen superstars themselves. A common term in sports marketing is the “halo effect”—a term signifying the cognitive bias subconsciously associating those we have a positive impression of with those who those positive people are associated with. In sports, the halo effect is the driving force behind endorsement deals: if we love our favorite athletes, we will also love the products they supposedly love as well.

However, the opposite of the halo effect—deemed by many as the “horn effect” or “devil effect”—is true as well. Thus when our favorite superstars fall down the wrong path, the brands they endorse are quick to disassociate in order to not be pulled down that wrong effect as well. While some may deem this to be “cancel culture” or a form of disloyalty, the companies whose brands stand to suffer great reputational harm by standing with suddenly unpopular figures would simply call this good business.

Such an event recently occurred with a young superstar in Major League Baseball (MLB): Fernando Tatis Jr. of the San Diego Padres. After quickly establishing himself as a top prospect with the Padres, Tatis spent just a few years in the minor leagues before making the Padres’ 2019 opening day roster. Despite some early injury trouble, Tatis did not disappoint once he reached the majors, hitting 22 home runs with a .317 batting average in 84 games during his 2019 rookie year, placing third in Rookie of the Year voting for the National League. He then followed up that rookie campaign by placing fourth in MVP voting during the shortened 2020 season and third in MVP voting in 2021, leading the National League with 42 home runs during that 2021 year. It seemed that the only direction Tatis and his Padres could go from there was up.

As a result of this success, Tatis earned fame—and fortune. By the end of 2021, Tatis had signed endorsement deals with a huge number of brands, including Gatorade, Jack in the Box, BMW, T-Mobile, and Dairy Queen. Tatis was also the cover athlete for the 2021 iteration of MLB’s flagship video game, *MLB The Show*. Chief among these endorsement deals, however, was Tatis’s endorsement deal with footwear and apparel company Adidas. With Adidas, Tatis had the opportunity to develop his own shoe line, a variant of Adidas’s UltraBOOST DNA line showcasing the pink color that Tatis famously always includes with his uniform equipment to honor his mother.

During the 2021-22 offseason, however, Tatis faced some trouble. For most of that winter, MLB and the MLB Players Association were embroiled in fierce collective bargaining negotiations, culminating in a three-month lockout by MLB of the players between December 2, 2021 and March 10, 2022. During the lockout, club officials were prohibited from having contact with the players. As such, it was a big surprise to Padres officials when an X-ray during Tatis’s pre-spring training entrance physical revealed a fractured scaphoid bone in Tatis’s left wrist, as no such injury had been reported to the team before Tatis reported to camp. As it turned out, Tatis had suffered the injury during a motorcycle accident in the Dominican Republic over the offseason, and neither he nor his agent had reported the accident to the Padres at the time, or even after the lockout and before Tatis reported to camp. Even more concerning was that when Tatis was asked by reporters when the accident occurred, his response was “Which one?”

Tatis then spent most of the 2022 season rehabbing his wrist, hoping to join the Padres towards the tail end of their playoff hunt. In August 2022, however—just before Tatis was set to return to the Padres—trouble struck again. On a Friday evening just about one week prior to Tatis’s much anticipated season debut, ESPN’s Jeff Passan announced that Tatis had been suspended for 80 games for violating MLB’s performance-enhancing drug policy. It was later revealed that Tatis tested positive for the banned substance clostebol, a synthetic steroid developed by the East German Olympic doping program back in the 1960s and 1970s. According to Tatis and his family, Tatis had used a spray called trofobol to treat a ringworm breakout caught during a haircut and that he was unaware that the spray contained a steroid.

Many in the press lambasted this purported excuse, speculating instead that Tatis was futilely trying to cover up the fact that he used performance enhancing drugs to return more quickly from his motorcycle accident injury—or that he had perhaps been using performance enhancing

drugs all along. Among those reacting to the news with less than trust that his rationale for using the substance had been based in error and negligence was Adidas. Releasing a statement citing their “clear policy on doping” and noting that “sport should be fair,” Adidas announced that they would be terminating their partnership with Tatis while quickly scrubbing his name and image from their website and other promotional materials.

Adidas is not the only footwear company that dips their toes into the baseball market, however. To the contrary, the baseball endorsement market—as with similar markets in basketball, football, and other sports—is fiercely competitive, with brands like Adidas, Nike, and Under Armour constantly jockeying for the best endorsers to feature in each sport.

One footwear brand that has long attempted to break into this market is Skechers. But the best players in each sport are quickly snatched up by Adidas, Nike, and Under Armour; indeed, Skechers famously sued Adidas in 2018 after Adidas was implicated in an FBI investigation involving illegal payments made to college basketball players to drive them to certain, Adidas-signed schools. Skechers claimed in this lawsuit that Adidas, by making these illegal payments, unfairly competed in the endorsement market, denying Skechers’s ability to compete for athletes’ services. The lawsuit—which added to another lawsuit by Adidas against Skechers over alleged infringement of Adidas’s “three-stripe” trademark—was voluntarily dismissed by Skechers less than a week after it was filed.

In baseball, Skechers has long been forced to settle for former players rather than the splashy current players who prefer the more prestigious footwear brands. While Skechers boasts as their chief endorser Dodgers future Hall-of-Fame pitcher Clayton Kershaw, beyond that their clientele features long-retired players like Mariano Rivera, Ozzie Smith, and Pete Rose. Skechers has long since hoped to add a young superstar to their endorsement stable to elevate their brand within the baseball ecosystem and hopefully lure more current players in due time.

Seeing an opportunity with Tatis following his dropped contract with Adidas, Skechers approached his representatives hoping to sign the young star to their Skechers baseball brand, and Tatis’s representatives have agreed to meet today. Both parties have given their representatives full authorization to be creative and—if possible—craft a mutually beneficial agreement to advance each side’s interests.

CONFIDENTIAL FACTS FOR SKECHERS

Skechers has long desired to do more to break into the sports apparel market. While they are pleased with their market share in the casual sneaker brand, expansion of the brand has been a key plank in their strategic planning for decades. However, Skechers has found entry into the apparel brand to be challenging, not due to an inability to design and produce quality products, but due to the dirty tricks employed by their competitors in keeping Skechers and others out of the Nike-Adidas oligopoly.

This dim view of the sports apparel market is largely colored by Skechers's experiences suing Adidas for unfair competition in 2018 after Adidas was caught bribing college basketball players and their families to steer them to certain schools with Adidas apparel contracts. Based on those revelations, Skechers, who has long tried and failed to win young big-name basketball players as endorsers for their fledgling basketball shoe brand, accused Adidas for not playing fair by effectively laundering hundreds of thousands of dollars to amateur athletes while denying Skechers the honest chance to compete to have their shoes on those athletes' feet.

Skechers executives thought Adidas's public comments dropping Tatis because of how "sport should be fair" were painfully ironic, given their own inability to play fair. At the same time, however, Skechers sees opportunity in Tatis's dismissal—not only to stick it to their archrival, but to also make a strong step towards being a player in the baseball apparel market.

Up until now, gathering baseball endorsers has been a major challenge for Skechers. Until they signed Dodgers' ace Clayton Kershaw in 2019, the only successes they had in the area was with retired players like Mariano Rivera and Pete Rose. Rivera and Rose are obviously big names but having your shoes on the actual field has been proven to be much more effective than showing retired players in commercials. Indeed, if anything, these players have just led to Skechers gaining an "old man" reputation within the sport, which is clearly not what the company wants for a brand image. While the company thought that signing Kershaw would help with that reputation and help to bring in more active players, it has, if anything done the opposite. Skechers executives were particularly stung when Kershaw's teammate Walker Buehler joked about Kershaw's Skechers deal in an interview, saying that he "asked [Kershaw] if he would rather have the money for the Skechers deal, or the respect of his peers, and he chose the Skechers cleats."

But while the veteran Kershaw is not necessarily a trend-setter within the sport, Fernando Tatis Jr. certainly is. When Tatis burst onto the scene as a rookie in 2019, his provocative, high-energy playstyle was quickly emulated by many others within the sport. Additionally, Tatis's signature shoe with Adidas has been a top seller. Skechers would be thrilled to have Tatis lend his style and energy to their brand, and they feel that Tatis signing on would certainly lead to more interest from other young players within the sport shortly thereafter.

At the same time, Skechers's baseball apparel unit is still fairly new, and the company does not want to take a huge financial leap into the market just yet—particularly when such a leap would require a gamble on a player like Tatis. Tatis's positive reputational value is matched only by his more recent negative reputational value, particularly given the narrative surrounding his ongoing suspension for performance enhancing drugs. Like many others—including medical experts and, clearly, Adidas—Skechers executives simply do not buy Tatis's bizarre excuse that the clostebol cream he took was meant to fight a ringworm infection. The more realistic explanation is that he took the steroid to heal faster from his wrist injury which, while being senseless and reckless, is at least understandable, lining up with Tatis's strong competitive spirit. His unwillingness to come clean yields questions about the extent to which he actually regrets his actions and, more importantly, the likelihood of him doing something similarly reckless again in the future.

Skechers threw much more money at Clayton Kershaw than they would have liked in order to sign him in 2019—\$750,000 per year for a five-year commitment. But Skechers executives were willing to make such a commitment because of Kershaw's squeaky-clean image and his fame in the lucrative Los Angeles market. Tatis, in those same executives' eyes, has none of that going for him. As such, committing to paying Tatis anything close to the \$750,000 yearly figure Kershaw is getting—or even half that figure—would be a steep ask.

At the same time, Skechers would be willing to pay more—far more, even—if they are able to lock up Tatis to a longer-term arrangement that provides the company ample opportunity for Skechers to exit the deal if Tatis screws up again. An even better arrangement would backload much of the promised money to later years after Tatis has proven that he is no longer a brand liability waiting to happen. In short, Tatis's youth and exciting brand image makes him a worthy gamble, but Skechers would like to reduce the risk of that gamble as much as possible.

To this end, if Tatis is willing to sign for five or more years in a backloaded arrangement that provides Skechers with ample opportunity for termination in case of a backslide, the company

would be willing to pay upwards of \$1 million per year on average. If Tatis insists on a shorter-term deal, the company would insist on paying him far less than Kershaw’s \$750,000—preferably something closer to half that figure. Regardless, Skechers would have no interest in any guaranteed term less than three years in length. After all, there is little point to signing Tatis if they cannot build a multi-year marketing campaign around him and his brand. And Skechers has no interest in signing Tatis if there is any real prospect that he will embarrass the Skechers brand by jumping ship back to Adidas any time soon.

The specific terms of a termination clause within the agreement will be of particular importance to Skechers higher ups. In light of Tatis’s recent spotty history, Skechers insists on having a fairly robust termination clause should he get into any more trouble. While they want this to be a long-term relationship, they need Tatis to understand that they are taking on a risk, and want to be protected should Tatis continue to stay off the field for non-baseball related reasons like injuring himself again or—more crucially—having a repeat performance enhancing drug suspension that, per the terms of the MLB Joint Drug Agreement, would put him out for a full season rather than the mere 80 games he is currently in the midst of missing.

Concerning off-field injuries, executives privately acknowledge that they likely will not even want to terminate the agreement if Tatis injures himself doing something like dirt biking again. At the same time, they would like to have the leverage of an opt-out in case they wish to renegotiate the deal in the event of such an injury. On performance enhancing drugs, they are willing to acknowledge that Tatis’s clostebol ingestion this year may have simply been a mistake framed around wanting to get back as soon as possible rather than malfeasance. But a second instance would suggest otherwise, and they would certainly not want to be associated with Tatis’s tarnished brand if he gets suspended a second time. Furthermore, Skechers executives cannot predict the future, and it is difficult to predict what fresh scandals could be down the road.

With this in mind, the ideal termination clause would also function less as a specific list of termination events and more as a broader morals clause in case any other issues come up in the future. Having a broad morals clause that allows for termination if the athlete “commits any act which shocks or offends the community” is standard in the industry, and such clauses always explicitly refer to suspensions for performance enhancing drugs as such an act. Skechers would insist on such a clause’s inclusion within the contract.

Concerning the coverage of the agreement, Skechers assumes that the agreement will cover cleats and casual shoes, and their design staff is excited to work with Tatis to create his own shoe line given his strong sense of style. Preferably, Tatis's work with Skechers in shoes would cover not only baseball cleats—a central component to Clayton Kershaw's deal with the brand—but also casual, everyday sneakers. That latter element is something that Kershaw has not shown much interest in or aptitude for; his role in that area has simply been to model existing Skechers lines. Given Tatis's well-renowned fashion sense, Skechers would love for him to be involved more directly in the design process. They also feel that this is something Skechers can offer that Adidas perhaps was not, given that Tatis's design input with Adidas seemed from the outside to be limited to redesigns of the already existing UltraBOOST DNA shoe line.

Beyond that, for baseball, they do not have much to offer. They know that Tatis also used Adidas batting gloves, but Skechers does not make batting gloves and has no plans on doing so moving forward. Tatis will unfortunately be out of luck if he is looking for batting gloves as part of the agreement. What Skechers does have, on the other hand, is a fashionable casual apparel line that their designers feel fits well with Tatis's off-field style. They would love to get him into the Skechers factory to check out and model some of this apparel and would be willing to add on an extra \$200,000 per year for this kind of agreement. Such an agreement should, of course, require Tatis to agree to regularly wear Skechers apparel off-the-field on his own.

Finally, Skechers also wants, as is customary for these types of arrangements, for Tatis to make a certain number of annual appearances at Skechers events, including at their factory employee picnic and at release events for new shoe and clothing lines. Skechers also expects Tatis to agree to appear in a certain number of commercials for the brand. In an ideal world, Skechers would be able to lock Tatis in for three to five appearances per year plus another three to five additional appearances to film commercials and shoot advertisements.

These appearances would presumably be just Tatis, rather than joint appearances with Clayton Kershaw. At the request of the Skechers board of directors, Kershaw's account manager reached out to the pitcher to get a feel for Tatis's reputation within the sport to help better evaluate the risk of signing Tatis. While Kershaw said that he liked Tatis as a person and feels that he would be a good sign for Skechers, he did express a good deal of hesitation about linking his public image with Tatis's, given Tatis's recent transgressions. As Kershaw remains the brand's standard-bearer, Skechers wants to be sure that they honor his wishes as best as they can.

CONFIDENTIAL FACTS FOR FERNANDO TATIS JR.

Fernando Tatis Jr. cannot imagine his life being at an any worse place than it is at this current moment. He is still a young, hyper-athletic, superstar talent at the start of an unprecedented thirteen-year, \$340 million contract. But Tatis is on the sidelines while his teammates are on a remarkable playoff run, having missed the entire season due entirely to what others see as his own negligence: first to his offseason motorcycle accidents and second due to an unlucky series of events that left him suspended and deemed a cheater after testing positive for clostebol.

At the same time, Tatis is defensive, feeling that much of the controversy surrounding him is overblown. After all, the circumstances around both of his “scandals” were not purely his fault. While going motorcycling in the Dominican Republic last offseason led to his wrist injury, the accidents were in large part due to the terrible Dominican roadway system that has not only injured but taken the lives of many, including other Dominican baseball players like former Cardinals outfield prospect Oscar Taveras, former Royals pitcher Yordano Ventura, and former journeyman infielder Andy Marte. In light of those tragedies, Tatis simply feels lucky to still be alive. Waiting until spring training to tell the Padres about his injuries was a poor decision in hindsight, but the accidents were during a lockout where the rules surrounding when and how players can speak with club personnel were murky, to put it mildly.

Similarly, Tatis sees the positive test for clostebol as just more bad luck. Ringworm is a major issue in the Dominican Republic, and while Tatis has been careful in checking what substances enter his body, the cream that he used to treat his condition was recommended by his father and the family physician in the Dominican. After a long talk with Padres personnel including the team doctor and general manager A.J. Preller, Tatis now knows better, and knows that every substance he takes will be cleared by the Padres first. He is fully confident that nothing like what happened this past year will ever happen again.

Because of the unfortunate nature of all of the events surrounding him this year, Tatis was incredibly hurt when Adidas publicly dropped him following his suspension. While Tatis understands that Adidas needs to take steps to protect their image, he felt that, given his explanation as to how clostebol got into his system, Adidas’s statement implicitly branding him as a cheater was way over the line. Tatis does not see himself a cheater, just ill-informed, and for Adidas to publicly cast doubt onto his perfectly reasonable rationalization was rather harsh.

Tatis was absolutely thrilled to sign with Adidas after his rookie year and had a great relationship with them for two full years. In his mind, Adidas represents Tatis at the peak of his popularity and power. Tatis also still loves the Adidas brand, and in particular the feel of their apparel. As willing as he is to hear Skechers out, his preference is still to end up back with Adidas once he rehabilitates his image and reputation. Sure, he understands fully that if Adidas is ever willing to bring him back into the fold—a big “if”—it will take significant time and likely require him to take less money than he would elsewhere, but he would be willing to wait in order to give Adidas a chance to take him back.

As such, even if he can get a good deal from Skechers Tatis would strongly prefer for that deal to be as short as possible so that he can switch back to Adidas as soon as possible. Taking things year-by-year would be the best-case scenario, and hopefully Skechers will see that as the best option for their own reasons as well. But even if Skechers is not willing to go for a single-year guarantee, Tatis would strongly prefer any agreement to be shorter than three years to allow him to reassess his options as soon as possible.

Of course, Tatis would be more willing to accept a longer-term deal if Skechers was willing to pay him at what he sees as his full, untarnished market value. Tatis sees himself and his current situation as comparable to someone like former New York Yankees superstar Alex Rodriguez, who famously was making \$1 million per year from Nike even while suspended for an entire season in 2014 due to performance enhancing drugs allegations. While Rodriguez’s deal was a ten-year deal signed in 2005, that \$1 million per year figure should be a baseline number for any sort of agreement given the near-identical circumstances.

At his peak value, however, Tatis feels that he is very comparable to Philadelphia Phillies superstar Bryce Harper, who is rumored to make over \$2 million in a ten-year deal with Under Armour. As Skechers seems to be trying to do with Tatis, Under Armour threw money at Harper to establish a fledgling baseball brand. If Skechers insists on a long-term arrangement, Harper’s payout is a target for what Tatis feels he should be able to get from Skechers.

One reason that Tatis still feels tied to Adidas is the same reason why he is nervous about signing with a new apparel company: style is a major part of his brand. Tatis feels that he is known not only for his on-field play but also the flashy suits and casual wear that the Padres’ social media team loves to feature in posted pictures showing the team boarding the plane to their next destination. This sense of style is also reflected in his on-field equipment; the flash of pink that is

includes in every uniform getup is reflective of who Tatis feels that he is as a person and as a public figure.

For these reasons, Tatis would be very particular in what sort of apparel a deal with Skechers would cover; he does not want to limit his style by forcing him into a particular brand. He is happy to sign a deal that covers baseball cleats and casual shoes; in fact, he is excited for the opportunity to design his own new line, given how much fun he had designing with Adidas. With Adidas, Tatis's shoe line was just based on the already-existing UltraBOOST DNA line. Since Skechers's baseball line is so new, he hopes that he can have more of a role in designing his look: it is one reason why he is even willing to consider a move to Skechers rather than just waiting to see if Adidas will take him back. Such an opportunity would also hopefully extend to his own line of Skechers casual sneakers as well.

However, Tatis is not particularly interested in extending any Skechers deal beyond shoes. For example, while batting gloves were part of Tatis's deal with Adidas, to his knowledge Skechers does not make any baseball equipment beyond cleats and Tatis is far too paranoid about making sure that he does not mess with his swing to trust something as important as batting gloves to a manufacturer who has never made them before. He would much rather have the freedom and flexibility to choose his own batting gloves—especially if he can get more money with additional deals like the deals he already has for fielding gloves and other on-field equipment.

Tatis understands that the way these deals work, he will not simply be given these items for free; he will be asked to make a certain number of public appearances and film and shoot a certain number of advertisements as part of the arrangement. But Tatis wishes to limit his appearances on behalf of the Skechers brand as much as possible. His reasons are twofold. The first reason is related to his desire to eventually end up back with Adidas. Associating his brand image with a direct competitor may, simply put, make Adidas less interested in re-signing him and confusing customers.

The second reason is very much related to his recent controversies; since his suspension, Tatis has strived to stay under the radar as much as possible to not draw any attention to himself and expose himself to negative questions and difficult situations. He does understand that these appearances are a huge part of why Skechers would want to make this deal, but still, less is better. All in all, if Tatis does not have to commit to more than three appearances per year—including ad shoots and filming—he would feel much better about the arrangement. Private appearances that

do not require him to closely associate his image with Skechers would be better, especially if those appearances are at closed events like employee picnics.

One thing that would make Tatis feel far better about making appearances on behalf of Skechers would be if he did not have to do it alone. Tatis has a good relationship with Skechers's other flagship client, Clayton Kershaw, and Kershaw's sterling reputation could rub off on Tatis in a very positive way. Furthermore, Tatis feels that the burgeoning Dodgers/Padres rivalry represented by the two stars could make for fun commercials and fun appearances in similar fashion to the Dairy Queen commercials he filmed with Dodgers star Cody Bellinger last year. Tatis would be willing to add an additional two appearances or advertisement shoots per year if those appearances or shoots are with Kershaw.

Finally, given the circumstances surrounding these talks, Tatis understands that Skechers will likely want some protection in case he continues to screw up off-the-field. Tatis recognizes that he made ample mistakes over the past calendar year. However, he firmly believes that those mistakes do not define who he is as a person and that he will come back stronger and as a better person by the time he returns to the field in 2023.

If this deal with Skechers is to be a long-term relationship—which, Tatis emphasizes, is not his preference—the arrangement needs to be built on trust and confidence in Tatis's ability to rehabilitate his brand, image, and personality. He acknowledges that a broad morals clause that allows for termination if the athlete “commits any act which shocks or offends the community” is standard in the industry, that that such clauses always explicitly refer to suspensions for performance enhancing drugs as such an act. Tatis still feels that such a clause is not necessary—given the fact that he did not knowingly take steroids—but he is willing to accept this standard clause in the contract if Skechers insists on its inclusion. What he is more hesitant to accept, however, is a termination clause that also allows Skechers to cancel the contract if he gets hurt again in an off-field accident. Such a clause does not reflect the real-world fact that he is a human being who might get hurt for reasons entirely outside of his control. If Skechers insists on such a clause, he will insist on a shorter deal, or alternatively will want a similar opt-out that allows him to get out of the deal if Adidas is willing to re-sign him.