NATIONAL SPORTS LAW NEGOTIATION COMPETITION 2024

FINAL ROUND

"Double Agent"[1]

GENERAL FACTS FOR BOTH TEAMS

Breakups are never easy. Conflict often arises in how to split up one shared life into two. One common concern when this occurs is a simple one: how to split up friends.

The same, of course, is true in client-oriented businesses like sports agencies.

On the morning of Monday, September 16, 2024, partners at New York-based Supreme Sports Group ("Supreme") opened their emails to an unwelcome surprise: a resignation email from one of their top professional football agents, Scottie Moreno, dated at 8:30 PM the previous evening. Even more concerning for the partners is the events that followed throughout the course of that momentous Monday: notices from three of Moreno's clients stating that they were terminating their services with Supreme effective immediately. Each of the three departing clients are starting-caliber players on NFL teams on rookie contracts.

After making some calls and piecing things together, the partners discovered that Moreno had taken a job with rival agency El Juego Sports Management ("El Juego"), and that the department clients all left Supreme to continue their representation with Moreno at his new firm. While it seems clear that Moreno had waited until after he had submitted his resignation letter to try and convert his clients to his new firm, Moreno had signed a non-solicitation agreement that

[1] Please note that this fact pattern is based on real-life litigation. However, a significant amount of information in this fact pattern (including but not limited to the names of the parties) has been changed or added for academic purposes and to protect the privacy of the real-life individuals and organizations involved. Per NSLNC Rules 6(a-d), while competition teams are permitted and encouraged to look outside of the fact pattern for additional *background* information, any outside information must not change any material fact within the fact pattern. Specific to this negotiation problem, please consider the real-life events that serve as a factual basis for this fact pattern to be entirely unrelated to the circumstances described herein. Any facts about the real-life litigation cannot be used to affect this negotiation problem in any material way.

would prevent him from soliciting Supreme clients for a period of six months after terminating his employment with the firm.

This solicitation agreement reads (in relevant part):

> For a period of six (6) months following the termination (voluntary or otherwise) of Executive's employment relationship with the Company, Executive shall not directly or indirectly, or by action in concert with others, either for Executive's own benefit or for the benefit of any other person or entity, solicit, encourage or induce any Applicable Client (as defined below) to sever, terminate, reduce, limit or otherwise diminish such Applicable Client's relationship with the Company or any of its Affiliates. "Applicable Client" means any person or entity that (i) was a client of the Company within the six (6) month period preceding the termination of Executive's employment with the Company with whom Executive, or other employees of the Company reporting to or working with Executive, had dealings while Executive was employed with the Company, or (ii) was a prospective client of the Company who was actively solicited by the Company within the six (6) month period preceding the termination of Executive's employment with the Company where the Executive participated in such solicitation. This provision shall not apply to clients of the Company who were represented by Executive prior to the Effective Date.

Beyond this clause, the contract is clear that Moreno was an at-will employee who could leave (or be fired from) the firm at any time without restriction.

Based on the partners' interpretation of this language, on Thursday, September 19, 2024, Supreme filed a lawsuit against Moreno in New York state court, alleging one count of breach of contract. Prior to Moreno's answer to the litigation, both he and the Supreme partners agreed to send representation to meet today to discuss the possibility of a settlement. While both Moreno and the Supreme partners have been clear that they reserve the right to reject any settlement offer that does not meet their interests, both parties have given their representatives full authorization to be as creative as they can to try to find a solution that fits both sides' needs.

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CONFIDENTIAL FACTS FOR SUPREME SPORTS GROUP

September 16 was an especially chaotic day for everyone at Supreme. News of Scottie Moreno's sudden departure for El Juego set about a frenzy as the partners sought to mitigate any potential aftershocks. The partners were informed of the departure of Moreno's three clients right as they were making sure that no other agent was also leaving, and the news left them less than pleased and ready for immediate action. It seemed clear that Moreno had covertly been working behind the scenes getting ready for this move. His clients must have known for weeks that he would be moving to El Juego, given their seemingly coordinated notices.

Yet while Moreno's departure was sudden, it was not necessarily the biggest of surprises for Supreme's partners. Moreno had never really played by the rules; he constantly complained about Supreme's client intake system, which assigned clients to agents based on seniority and client load, feeling that he could take on more clients and more complicated negotiations before the partners felt that he was ready. Moreno had only been with the firm for four years; he was still learning the ropes and frankly had performed under Supreme's projections for the contracts he had received for the non-rookie players he was assigned. It takes time to build up relationships with the various actors at the NFL clubs, and the partners already had established relationships with the general managers and owners at every club—having them handle the negotiations for Supreme's most valuable players only makes sense.

Similarly, Moreno had constantly complained about Supreme's above-market cut of the commission earned from clients, feeling that he earned too little for the work that he did. Yet Moreno was never asked to pay a dime for any of the pre-draft training or equipment costs for the players he represented, and Moreno had a habit of promising his clients quite a bit to that end, leaving Supreme to pay the bill. Supreme's partners have no idea what his arrangement with El Juego is going to be, but Supreme would be surprised if El Juego was as generous with their investments as Supreme has been for Moreno's clients over the past four years.

With the two percent commission they take from football clients (with one percent given to the agents assigned to the player in question), Supreme stands to lose quite a bit of money from the three players' departure. While the three players that Moreno took with him are not from the most lucrative position groups (thanks to Supreme's seniority system of assigning clients), the players—two running backs and one middle linebacker—are all on their rookie contracts with extensions soon on the horizon. Based on comparable players who have recently signed extensions, Supreme's analysis department projects the two running backs to earn

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extensions or free agent contracts of around two years, $20 million (total) each, while the linebacker would be expected to sign a new contract for around three years for $30 million (total) each. This means that if Moreno and the players had stayed, Supreme's cut of those earnings would be two percent of $70 million ($1.4 million).

Supreme's partners do of course understand that there is always risk with NFL players, especially given the three clients' position groups—the three players could get hurt, leave for a different firm, or simply not find a strong market in free agency. And, of course, NFL contracts are generally not fully guaranteed, meaning that there is always risk that not all of the listed value is ultimately collected. But given the youth of the players, Moreno's close relationship with them, and the fact that the linebacker at the very least should have a fairly long career, there is much less variance for these players than if they were older or less talented. Supreme's partners feel that they would have received at least $750,000 from these players for the rest of their careers if Moreno had stuck around. Combined with the roughly $250,000 investment Supreme put into pre-draft training and equipment for each player, Supreme is out approximately $1.5 million—and without much income from the players to date, given their rookie contracts.

Still, the partners feel reasonably confident that Moreno does not personally have the money to make Supreme whole, and it hardly seems worth it to try. There is of course the risk that they lose this lawsuit—or, perhaps more problematically, the NFLPA gets involved and takes Moreno's side. The partners have a good relationship with NFLPA leadership and do not feel that they will want to take sides in this dispute, but they also know that there has been a strong push within the NFLPA to promote player freedom of movement between agents. The NFLPA could conceivably read Supreme's action as counter to that philosophy and make a mess of the situation. They may not have the ability to get involved—Supreme's partners are unsure whether this lawsuit is one that would be forced within the NFLPA's exclusive arbitration procedures.[2] And without the ability to sue El Juego directly for their poaching of both their agent and their players, given the lack of privity of contract and a bevy of case law showing that intentional interference claims in this area go nowhere,[3] pushing too hard to try to recover from Moreno's personal bank account may not be worth the effort.

Instead, Supreme would prefer a much cleaner approach: one where Moreno and Supreme simply continue their arrangement where Supreme retains a percentage of the earnings derived from the three players. Supreme knows that they would be hard pressed to retain the two

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[2] *See* NAT'L FOOTBALL LEAGUE PLAYERS ASSOC., NFLPA REGULATIONS GOVERNING CONTRACT ADVISORS § 5 (2016), *available at* https://nflpaweb.blob.core.windows.net/website/RegulationsAmendedAugust2016.pdf.
[3] *See, e.g.*, Speakers of Sport v. ProServ, 178 F.3d 862 (7th Cir. 1999).

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percent of the clients' earnings that they had in the past since they will no longer be investing in their success (even if they feel they are entitled to it, given the terms of Moreno's breached contract), but they feel that at least getting one percent would be more than fair to pay for the breach of contract and compensate them for their previous investments. If anything, the partners feel that Moreno should jump at this opportunity, given the volatility of NFL players' careers; if even one of the players suffers a career ending injury today, Supreme could be earning far less than any one-time payment that they could get from Moreno directly.

Even if Moreno is receptive to such an arrangement, however, Supreme still wants some sort of damages payment as part of any settlement. After all, Supreme loses players all of the time for a variety of legal reasons: the bigger issue here is Moreno's own breach of his employment contract. Forcing Moreno (or El Juego on his behalf) to pay out of pocket for that clear breach—even if such a payment is a relatively nominal figure like $50,000—would serve as a deterrent to Supreme's other agents if they are thinking of trying something similar soon.

Looking to the future, Supreme wants to protect themselves from any other bad actions that Moreno may engage in as he transitions to his new firm. While the partners were not always the biggest fans of Moreno, he was fairly popular around the office and thus may be able to convince some of his friends to follow him to El Juego. Extension of Moreno's non-solicitation clause and the inclusion of clear liquidated damages for the solicitation of those staffers and agents—somewhere around $100,000 per staffer and $250,000 per agent—is clearly necessary.

Similarly, while Moreno's other clients with Supreme are either towards the end of their career or are otherwise not worth Supreme making a fuss about, there are several of the partners' own clients—all in much more valued position groups like quarterbacks and wide receivers—who were referred to Supreme by the three clients Moreno left with and whose loss would be substantial. Supreme would like to reinforce the non-solicitation clause in Moreno's contract to add clear liquidated damages if Moreno uses his clients to poach those players later. Given the value of these remaining players, such damages should be at least $1 million per player.

Finally, Supreme will insist on the inclusion of a confidentiality clause to any agreement. While there is some value to the details of an agreement getting out there as a deterrent—especially if the deal is particularly punitive—Supreme feels that there may be problems if the NFLPA were to get their hands on the agreement if they were to see it as restrictive on players' movement. They may ask for it anyway, but this would at least give the parties cover for as long as possible. A confidentiality clause is standard practice for this sort of settlement agreement and Supreme's partners see no reason why Moreno would object, but this inclusion is essential.

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CONFIDENTIAL FACTS FOR SCOTTIE MORENO

Scottie figured that Supreme would not react well to his departure to El Juego, and especially not well to his taking of three of his clients with them. Yet he in no way thought that Supreme would act *this* aggressively to his departure. Going from working together for four (mostly) productive years to filing a lawsuit three days later seems awfully antagonistic, especially when he really does not feel like he did anything wrong.

Yes, he may have technically breached the non-solicitation clause in his contract, but in his experience those clauses are barely worth the paper they are written on in the sports agent world. While the NFLPA does not have any regulations that specifically restrict non-solicitation clauses in Contract Advisor employment contracts, Scottie knows that they very much frown on anything that restricts their players from being able to freely choose their agents. And there's nothing that Scottie did to specifically induce his three clients from coming with him—they all voluntarily told Scottie months ago when Scottie brought up the possibility of leaving without Scottie even asking that they would come with him if he were to leave.

And that attitude is the crux of why Scottie left. Maybe he acted a little unprofessionally in the way that he left Supreme, but both his and his clients' actions in this regard has matched how Supreme was to work for as an employer. Scottie is thankful to Supreme for helping him get his start in the business, Supreme took a higher percentage of his commission than other firms (2/3 of the 3 percent commission they charged clients), paid him less than other firms, and implemented a seniority system to client intake that drove Scottie crazy. The three players that Scottie took with him are all solid, starter-caliber players—two running backs and one middle linebacker—but whenever they would refer one of their college teammates in more lucrative position groups (quarterbacks, edge rushers, and wide receivers) Supreme's partners would tell Scottie that those higher-paid positions were for the partners and often lose those clients because the partners did not put in the kind of day-to-day care into their representation that attracted those players to Scottie in the first place. El Juego is the complete opposite—when an agent recruits a client, they get that client. That is how Scottie feels it should be.

Regardless, Scottie feels the NFLPA's position on non-solicitation agreements is especially relevant because Scottie feels strongly that his next step in the case is to file to force arbitration under the NFLPA's exclusive arbitration procedures.[4] Scottie is not 100 percent sure

[4] *See* NAT'L FOOTBALL LEAGUE PLAYERS ASSOC., NFLPA REGULATIONS GOVERNING CONTRACT ADVISORS § 5 (2016), *available at* https://nflpaweb.blob.core.windows.net/website/RegulationsAmendedAugust2016.pdf.

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that this dispute fits squarely within the explicitly listed circumstances in which the NFLPA requires arbitration to handle disputes regarding contract advisors and players, having never gone through the process before. But he is at least reasonably confident that even if it is not covered within their exclusive arbitration provisions the NFLPA will at least back him up in trying to place the dispute within the governing authority of the NFLPA, given their strong interests in client freedom of representation and Supreme's clear disregard of that basic philosophy. Similarly, he knows that this distaste of restrictions on player choice of representation will push the dispute in his favor if it gets to that point.

Still, if Scottie would be happy to get rid of this lawsuit now and not have to worry about any of that moving forward. As a younger agent with just the three players on rookie contracts, he is not exactly all that financially liquid right now; part of the reason he left Supreme in the first place was because he was being paid far less than he is worth. He does have about $250,000 in savings, towards upgrading his living situation from his current small one-bedroom apartment across the river in the New Jersey suburbs. El Juego has also pledged to provide up to $100,000 towards litigation costs if needed, but they would rather not get involved at all given that they are not named in the lawsuit (for good reason, given the lack of privity of contract and a bevy of case law showing that intentional interference claims in this area go nowhere[5]). And Scottie would strongly prefer to not start off his relationship with his new employer by asking them for money to pay for this kind of thing.

Scottie has not been able to talk with any of the Supreme partners since he tendered his resignation, but he sees the negotiation going one of two ways: one preferred way and one less-than-preferred way. The preferred way for Scottie would be that Supreme will ask him or El Juego to make some sort of one-time payment for the breach of contract. As Scottie sees it, a payment of this type could mostly be a simple show of force; Supreme's way of showing their other agents to show that Supreme is not messing around with the non-solicitation clause if they have thoughts on following in Scottie's footsteps.

The less-preferred way that this negotiation could go is that Supreme could insist on receiving a percentage of his earnings from the three clients moving forward. This would be a fairly unprecedented step, though he remembers from his time at Supreme some of his colleagues "joking" about it as something an agency should do to stop agents from taking clients to other firms during the near-constant water cooler chats about similar instances they heard about at the other big firms.

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[5] *See, e.g.,* Speakers of Sport v. ProServ, 178 F.3d 862 (7th Cir. 1999).

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Scottie hopes that the partners have not decided to actually implement that vision, but he would fight back hard against such an approach if they are indeed seeking to use him as a test case. Given the transient nature of player representation anyway—clients switch agents all the time, often for no reason—there is no reason why Supreme should have any right to earnings from his clients moving forward. And given that Scottie's arrangement with El Juego has them taking half of the three percent commission (with Scottie getting the other 1.5 percent), giving Supreme their standard two percent would either leave Scottie earning almost nothing for his continued efforts in representing his clients and risk upsetting Scottie's new employer if they cannot get their promised share. A one-time payment is much more appropriate to compensate Supreme for any investment they have made into him or his clients—and even a one-time payment more than something nominal and focused simply as a deterrence feels grossly inappropriate simply given the inherent competitive and cutthroat nature of the agent business.

Supreme may also look to enact some sort of poaching clause structure that would outline penalties for him recruiting any other Supreme employees or clients. Scottie does not really have a problem with this sort of structure—he's not planning on recruit any of his former colleagues to come work with him at El Juego anyway, and the three clients he already took with him are the only three that he had closer relationships with and/or will ultimately be profitable when looking forward to their future deals. His six other Supreme clients are all on what is likely their last contract or are players one bad day away from the practice squad or from being on their last contract entirely. The NFLPA may have a huge problem with a poaching clause given the restrictive influence it would have on player mobility in their representation and Scottie would not to be involved in the conflict that would result their discovery of the idea, but it's not a big deal to him personally. Scottie wholeheartedly agrees with the NFLPA that if one of his left-behind clients (or the higher-value clients that his clients referred to Supreme) want to join him at El Juego that should be entirely their choice, but it is not something that he feels too strongly about.

Ultimately, Scottie's preferred settlement would be a simple one: a nominal payment from him to Supreme for the technical breach (preferably an amount that only pays Supreme's legal fees for the filing) and a confidentiality clause to prevent word from getting out on either end about how little the settlement ended up being. Whether Supreme would be on board with such an approach Scottie has no idea, but he knows that the more complicated a settlement gets, the less interested he would be in signing it. He wants more than anything just to have this whole situation behind him so that he can move on to better days with his new firm.

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