Mock Negotiation: eSports Investment and Team Ownership

October 11, 2019 | 1:30 pm – 3:00 pm

Program Description
Join us for an insider’s perspective on how to negotiate and close a high-profile deal to invest in or own an eSports team. Hear from in-house and outside in eSports and observe mock negotiations as our team battles for bragging rights to the ultimate client partnership opportunity. Witness firsthand how industry experts will role play their best strategies and priorities for negotiating a mutually beneficial deal, and entry into this fast-growing segment of interactive entertainment and sports.

Speakers
- Seth Steinberg, Digital Arts Law, San Francisco, CA
- Krista Hiner, ESG Law, Seattle, WA
- Scott Rupp, BITKRAFT, Esports Ventures, San Francisco, CA
- Roger Quiles, Quiles Law, New York, NY
- Chris Carvalho, Former COO Kabam, Roblox Board Member, San Francisco, CA

Program Materials
1. Esports Negotiation and Investment
2. FaZe Clan Claims ‘Fortnite’ Star Tfue Is Using Its Secrets to Launch a Competitor
3. Gamer Agreement
4. Inside the Lawsuit That Could Shake Up the Entire Esports Industry by Michael McCann
5. The Coming Evolution of the Video Game Industry by Ethan Wham
6. How esports Compares to Traditional Sports by Chris Carvalho
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October 11-13, 2019 | Las Vegas, NV

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Speakers

• **Moderator**
  • Seth Steinberg | Digital Arts Law

• **Panelists**
  • Chris Carvalho | Former COO Kabam and Board Member, Roblox
  • Krista Hiner | ESG Law
  • Scott Rupp | BITKRAFT Esports Ventures
  • Roger Quiles | Quiles Law
eSports vs. Traditional Sports
Valuations, Top Sports Franchises, Revenue Composition
October 11, 2019, Chris Carvalho
Franchise Values: eSports Growth and Potential Creates Revenue Multiples Twice as High as Traditional Sports

Revenue Multiples

Source: Konvoy Ventures, Forbes and Pitchbook
## Valuations – Top Traditional Sports Franchises

<table>
<thead>
<tr>
<th>Rank</th>
<th>Team</th>
<th>Sport</th>
<th>League</th>
<th>Value (USD billion)</th>
<th>Growth (2018–19)</th>
</tr>
</thead>
<tbody>
<tr>
<td>1</td>
<td>Dallas Cowboys</td>
<td>American football</td>
<td>NFL</td>
<td>$5.500</td>
<td>4%</td>
</tr>
<tr>
<td>2</td>
<td>New York Yankees</td>
<td>Baseball</td>
<td>MLB</td>
<td>$4.600</td>
<td>15%</td>
</tr>
<tr>
<td>3</td>
<td>Real Madrid</td>
<td>Association football</td>
<td>La Liga</td>
<td>$4.240</td>
<td>4%</td>
</tr>
<tr>
<td>4</td>
<td>FC Barcelona</td>
<td>Association football</td>
<td>La Liga</td>
<td>$4.020</td>
<td>~1%</td>
</tr>
<tr>
<td>5</td>
<td>New York Knicks</td>
<td>Basketball</td>
<td>NBA</td>
<td>$4.000</td>
<td>11%</td>
</tr>
<tr>
<td>6</td>
<td>Manchester United</td>
<td>Association football</td>
<td>EPL</td>
<td>$3.810</td>
<td>~8%</td>
</tr>
<tr>
<td>7</td>
<td>New England Patriots</td>
<td>American football</td>
<td>NFL</td>
<td>$3.800</td>
<td>3%</td>
</tr>
<tr>
<td>8</td>
<td>Los Angeles Lakers</td>
<td>Basketball</td>
<td>NBA</td>
<td>$3.700</td>
<td>12%</td>
</tr>
<tr>
<td>9</td>
<td>Golden State Warriors</td>
<td>Basketball</td>
<td>NBA</td>
<td>$3.500</td>
<td>13%</td>
</tr>
<tr>
<td>10</td>
<td>New York Giants</td>
<td>American football</td>
<td>NFL</td>
<td>$3.300</td>
<td>0%</td>
</tr>
<tr>
<td></td>
<td>Los Angeles Dodgers</td>
<td>Baseball</td>
<td>MLB</td>
<td>$3.300</td>
<td>10%</td>
</tr>
</tbody>
</table>

The Dallas Cowboys, the most valuable sports franchise, has almost ~$1B in annual revenue (vs. $25M for the top eSports franchise)

Source: Forbes (2019)
## Valuations – Top eSports Franchises

<table>
<thead>
<tr>
<th>Team</th>
<th>Valuation($M)</th>
<th>Revenue($M)</th>
<th>Rev Multiple</th>
</tr>
</thead>
<tbody>
<tr>
<td>Cloud9</td>
<td>310</td>
<td>22</td>
<td>14.1</td>
</tr>
<tr>
<td>TSM</td>
<td>250</td>
<td>25</td>
<td>10.0</td>
</tr>
<tr>
<td>Team Liquid</td>
<td>200</td>
<td>17</td>
<td>11.8</td>
</tr>
<tr>
<td>Echo Fox</td>
<td>150</td>
<td>11</td>
<td>13.6</td>
</tr>
<tr>
<td>OpTic</td>
<td>130</td>
<td>10</td>
<td>13.0</td>
</tr>
<tr>
<td>Fnatic</td>
<td>120</td>
<td>11</td>
<td>10.9</td>
</tr>
<tr>
<td>Gen G</td>
<td>110</td>
<td>12</td>
<td>9.2</td>
</tr>
<tr>
<td>G2 Esports</td>
<td>105</td>
<td>8</td>
<td>13.1</td>
</tr>
<tr>
<td>Immortals</td>
<td>100</td>
<td>5</td>
<td>20.0</td>
</tr>
<tr>
<td>Envy Gaming</td>
<td>95</td>
<td>5</td>
<td>19.0</td>
</tr>
<tr>
<td>100Thieves</td>
<td>90</td>
<td>5</td>
<td>18.0</td>
</tr>
<tr>
<td>Counter Logic</td>
<td>50</td>
<td>4</td>
<td>12.5</td>
</tr>
<tr>
<td><strong>Average</strong></td>
<td><strong>142.5</strong></td>
<td><strong>11.25</strong></td>
<td><strong>13.8</strong></td>
</tr>
</tbody>
</table>

Source: Konvoy Ventures, Forbes (2018)
## eSports Revenue Composition

<table>
<thead>
<tr>
<th>eSports Market Revenue</th>
<th>% of Total Revenue</th>
</tr>
</thead>
<tbody>
<tr>
<td>Sponsorships</td>
<td>39.67%</td>
</tr>
<tr>
<td>Advertising</td>
<td>19.19%</td>
</tr>
<tr>
<td>Media Rights</td>
<td>17.74%</td>
</tr>
<tr>
<td>Game Publisher Fees</td>
<td>12.85%</td>
</tr>
<tr>
<td>Merch &amp; Tickets</td>
<td>10.55%</td>
</tr>
</tbody>
</table>

Source: Konvoy Ventures, Forbes (2018)
A new lawsuit claims Tfue "betrayed" his teammates. Meanwhile, his lawyer says FaZe Clan is attempting to avoid consequences for violating California law by forum shopping.

The esports world was shaken this spring when Tfue, one of its biggest stars, sued his gaming organization in an effort to be free of what he described as an "oppressive" contract.
Now, FaZe Clan is firing back in a suit of its own that claims it was "betrayed" by the *Fortnite* player who's still bound by their deal.

Turner "Tfue" Tenney in May sued FaZe Clan, claiming his contract entitled the organization to up to 80 percent of his earnings. The gamer also claimed FaZe Clan is limiting his ability to pursue his profession in violation of California law, passed on a lucrative brand deal because of a conflict of interest and failed to pay him his share of sponsorship earnings.

The gaming organization on Thursday sued Tenney for breach of contract. FaZe maintains that he was an adult when he signed the deal, they took on risk in bringing on an unknown gamer, they made multiple efforts to renegotiate with him that were rejected and that he's bound by their deal until Oct. 27, 2021.

"In breach of the Gamer Agreement, Tenney has: filed lawsuits in the improper forum of California, after Tenney agreed in the Gamer Agreement that litigation would occur exclusively in New York; disparaged FaZe Clan; stolen FaZe Clan's confidential information; interfered with FaZe Clan's contracts and business relationships; and he is advocating for others to leave and compete against FaZe Clan," writes attorney Justin Kattan in the complaint.

The gaming org is now claiming that Tfue is using its trade secrets to launch a rival company and is trying to poach its members. (Read the full complaint, below.)

"FaZe Clan has since come to learn and believe that Tenney's true objective for the past several months has been to get out of the Gamer Agreement at all costs so that he could start a new esports organization or otherwise compete against FaZe Clan — and Tenney's lawsuits and public statements are all in service of that goal," writes Kattan. "Tenney is directly or indirectly inducing other members of FaZe Clan to reconsider their contracts with FaZe Clan and even their membership in the organization entirely."

FaZe Clan also claims Tenney has earned more than $20 million since signing with them and they've only received about $60,000. The organization is suing for breach of
contract, misappropriation of trade secrets and commercial disparagement, among other claims.

Tenney's attorney Bryan Freedman on Thursday sent The Hollywood Reporter a statement in response to the complaint: "Faze Clan's lawsuit in New York is a ridiculous and obvious attempt to avoid the consequences of its clear violations of California law. Filing the lawsuit in New York is actually an admission that Faze Clan has no defense to these violations of California law. Ask yourself, why is Faze Clan afraid to litigate its wrongful conduct in California? The answer is obvious. Faze Clan will lose. In the New York lawsuit, Faze Clan actually admits to violating California's Talent Agencies Act by procuring employment without a license. Equally egregious is the fact that Faze Clan is suing Turner under its illegal contract for the monies it publicly represented that it was not collecting. This is the first time in the history of Esports that an Organization has had the audacity to try and enforce contractual provisions that are so clearly illegal against one its gamers."

**Aug. 1, 3:15 p.m.** Updated with a statement from Tenney's attorney.
UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

FAZE CLAN INC.,
Plaintiff,
vs.

TURNER TENNEY p/k/a “TFUE”
Defendant.

Case No.

COMPLAINT

Jury Trial Demanded

FaZe Clan Inc. (“Plaintiff” or “FaZe Clan”), by its attorneys, Dentons US LLP, for its Complaint against Turner Tenney p/k/a “TFue” (“Defendant” or “Tenney”), states as follows:

INTRODUCTION

1. FaZe Clan is compelled to bring this litigation because Tenney, a member of FaZe Clan’s Fortnite esports team, has not only betrayed FaZe Clan and his teammates, he has caused them serious damage and stands to do more.

2. Tenney joined FaZe Clan in April 2018. He was an exciting prospect, so FaZe Clan offered Tenney a written contract—the Gamer Agreement, which Tenney negotiated and signed. FaZe Clan welcomed Tenney and promptly began the process of training, promoting, endorsing and supporting him in his gaming career. As part of the FaZe Clan team—and free from the distractions that burden many solo players—FaZe Clan taught Tenney how to be more than just a skilled gamer. FaZe Clan taught him to be a professional. It schooled Tenney in the business, social media and gaming practices that have made FaZe Clan successful. And he certainly has been successful. It is understood that Tenney has earned over $20 million since joining FaZe Clan in April 2018, when he was earning virtually nothing.

3. Tenney’s social media statistics demonstrate the massive impact FaZe Clan has had on his career. The announcement that Tenney had joined FaZe Clan went out on April 30,
**GAMER AGREEMENT**

This Gamer Agreement (this “Agreement”), dated as of April 27, 2018 (“Effective Date”), is entered into by and between Company (as defined below) and Gamer (as defined below). For the purposes of this Agreement, each of Company and Gamer may be individually referred to herein as a “Party” and collectively as the “Parties”. This Agreement shall be subject to the terms and conditions attached hereto as Exhibit A, which are hereby incorporated by reference herein (the “T&Cs”). Capitalized terms used herein but not otherwise defined shall have the respective meanings assigned to such terms in the T&Cs.

<table>
<thead>
<tr>
<th>Company</th>
<th>Faze Clan Inc., a Delaware corporation with its principal place of business at 7288 Mulholland Drive Los Angeles, CA 90068, (“Company”) with a mission to be one of the top three professional gaming teams at any time in the video game series, “Fortnite”.</th>
</tr>
</thead>
<tbody>
<tr>
<td>Gamer</td>
<td>Turner Tenney p/k/a (“Tfue”), an individual with an address at (Gamer)</td>
</tr>
<tr>
<td>Team</td>
<td>Company’s competitive, online, e-sport video gaming team for the Game, which, as of the Effective Date, consists of four (4) Gamers: Turner Tenney, Thang Thanh Phan, Dennis Leopore and Brendan Martin O’Brien. Notwithstanding the foregoing or any term contained herein, Company, in its sole discretion, may increase or decrease the number of Gamers on the Team from time to time.</td>
</tr>
<tr>
<td>Term[; Right of First Refusal]</td>
<td>Unless earlier terminated by the Parties pursuant to the terms of the T&amp;Cs attached hereto and incorporated by reference herein, the initial Term of this Agreement shall be six (6) months from the Effective Date (“Term”). At the end of the Term, and notwithstanding anything to the contrary set forth in this Agreement (including the T&amp;Cs), this Agreement shall be automatically extended for an additional thirty-six (36) months, provided the following conditions have been met (“Extended Term”): (i) throughout the Term, Gamer has received the Monthly Fee (as defined below) from Company on a timely basis, (ii) throughout the Term, Gamer has appeared in one (1) Company-created content published once per month on either Company’s YouTube or Twitter platform, (iii) a FaZe Clan member has appeared in Gamer-created content published on one of Gamer’s personal, social media platforms, (iv) Company has supplied Gamer with gaming set-up, including commercially standard quality gaming headsets, monitors, computer, computer equipment and, upon Gamer and Company’s mutual agreement, a gaming chair to be used for the purposes of this Agreement, and (v) Company has provided Gamer with FaZe Clan Player Kit and FaZe Clan Merchandise.</td>
</tr>
</tbody>
</table>

[At the end of the Extended Term, Gamer and Company shall enter into a thirty (30) day negotiation period (the “Negotiation Period”) regarding the renewal terms for this Agreement; provided, however, if an agreement is not reached during the Negotiation Period, Gamer shall be entitled to seek an offer from third party organizations during the thirty (30) day period following the Negotiation Period (the “Free Agent Period”). In the event a third party organization makes an offer to Gamer that Gamer desires to accept, Gamer must provide Company a copy of the offer and Company shall have five (5) business days from receipt of the offer to match the terms of such offer (“Matching Offer”). In the event a Matching Offer is made, Gamer hereby affirms that Gamer will accept Company’s Matching Offer; provided, however, in the event a new agreement is not executed during the Negotiation Period or Company does not provide Gamer with a Matching Offer, this Agreement will be terminated.]

<table>
<thead>
<tr>
<th>Gamer Services</th>
<th>In exchange for the Compensation, Gamer shall render the following Services</th>
</tr>
</thead>
<tbody>
<tr>
<td>● Play on the Team, which includes participating in tournaments and training sessions with the Team and representing the Team, including at events arranged by Company or where Company decides to participate, and provide publicity and promotional services as required by Company including, but not limited to, content creation but no more than three (3) days per month for a total of 24 hours in any</td>
<td></td>
</tr>
</tbody>
</table>
Participate in marketing activities, including for or on behalf of Company, sponsors and brands, as requested by Company from time to time;

Represent Company’s sponsors and partners in accordance with the terms and guidelines provided by the Company to Gamer, and use and wear Company’s and sponsors’ merchandise, in addition to any obligations Gamer may have in accordance with brand agreements, in public places, in social media and as otherwise reasonably requested by Company. Company will provide Gamer with such merchandise as needed;

Represent the Company in social media as instructed by Company from time to time and in accordance with the Social Media Policy;

Participate in all the Team’s training sessions and the training program as determined by the Company. The Team’s Gamers will agree upon a training session schedule together with the Team’s manager at least three (3) months in advance, to be provided to Company; and

Participate in all LAN (Local Area Network) Tournaments, Major Tournaments, League Matches and Online Tournaments as requested by Company (collectively, “Tournaments and/or Matches”).

| Compensation | As full and complete consideration for the Services to be provided, and all rights granted, by Gamer hereunder, and provided Gamer is not in breach or default of the terms of this Agreement (including, without limitation, the T&Cs attached hereto and incorporated by reference herein), Company shall pay Gamer the following compensation:

- USD $2,000 per month ("Monthly Fee"). Notwithstanding the foregoing, such Compensation shall be subjected to a review at the end of each six (6) month period of the Term, as of the Effective Date. As the result of such reviews, Gamer’s Compensation may, at Company’s sole discretion, increase by up to twenty-five (25%) percent or decrease by up to twenty-five (25%) percent.

- All income generated by Gamer from cash prizes (each, a “Prize” and collectively, “Prizes”) won in any Tournaments and/or Matches shall be split (after any payments to the Team coach) as follows: 80% to the Gamer, and 20% to the Company.

- All other income (including, but not limited to, salaries, earnings, fees, royalties, bonuses, share of profits, and gifts, etc.) generated in connection with Gamer’s Services (whether individually or as part of the Team) from the following sources shall be split as follows:
  - in-game/sticker ("In-Game Merchandise"): 50% to Gamer and 50% to Company;
  - merchandise and apparel exclusively featuring Gamer’s personal brand and manufactured by or in conjunction or consultation with Company (after deducting all costs in connection with such merchandise and apparel) will be negotiated separately.
- **Payment Terms**

  - The Monthly Fee shall be payable by Company on the 30th of each month during the Term for the Services provided during the prior month.

  - All Prizes and other income generated in connection with this Agreement shall be payable to, and collected by, Company, and Company shall account and pay Gamer his/her share of such income on a monthly basis, within thirty (30) days after the end of each month; provided, however that any Prizes received from Tournaments and/or Matches over $5,000 will be paid to Gamer within thirty (30) days of receipt thereof by Company. Gamer acknowledges and agrees that Company shall have the right to include a direction of payment clause in all contracts entered into by Gamer, directing all income to be paid directly to Company. In the event that any person or entity pays any income directly to Gamer, Gamer agrees that he/she shall promptly transfer all such income to Company for collection and accounting.

  - With respect to the calculation of income payable to Gamer in connection with any Prizes or In-game Merchandise only, Gamer acknowledges and agrees that Company shall have the right to deduct two percent (2%) of all such Prizes and In-game Merchandise revenue shares as a bonus payable to the Team’s Company-designated coach.

  - Payment of Compensation hereunder is contingent upon mutual execution of this Agreement and Gamer’s completion of and delivery to Company of a W-9 form, which form shall be provided to Gamer by Company.

- **Expenses**

  Company shall not be responsible for the payment and/or reimbursement of any costs or expenses incurred by Gamer in connection with this Agreement unless such costs and expenses have been pre-approved by Company in writing. Gamer shall invoice Company for all pre-approved costs and expenses as and when incurred, along with a copy of all receipts detailing such costs and expenses, and Company shall pay such invoices within thirty (30) days of the invoice date.

- **Relationship of Parties**

  Each Party is an independent contractor and is solely responsible for all of its own employees, subcontractors, labor costs and, except as otherwise provided herein, expenses.
<table>
<thead>
<tr>
<th>Insurance</th>
<th>(including without limitation timely payment of all income taxes, payroll taxes and related withholdings) arising in connection therewith. Gamer agrees that Company is not responsible for any insurance coverage(s) for Gamer and accordingly, Gamer shall assume responsibility for obtaining all required insurance coverage(s) for Gamer, which may include, but is not limited to, worker’s compensation, health insurance and/or automobile insurance.</th>
</tr>
</thead>
<tbody>
<tr>
<td>Miscellaneous</td>
<td>This Agreement shall be governed and construed in accordance with the laws of the State of New York without regard to its conflict of laws principles. The Parties submit exclusively to the state or federal courts located in New York, NY for any claim hereunder and each Party consents to the jurisdiction thereof. This Agreement, together with the T&amp;Cs and all other exhibits, schedules and attachments referenced herein or therein, contains the entire agreement and understanding between the Parties with respect to the subject matter hereof and supersedes and cancels all previous negotiations, agreements, commitments, and writings in respect thereto. This Agreement (including, all terms and conditions referenced herein) may be supplemented or amended, and the observance of any provisions hereof may be waived (either generally or any particular instance, and either retroactively or prospectively) only with the written consent of both Parties; provided, that in the event that there are changes to the rules and regulations of any League Match, Major Online Tournament, a LAN Tournament or any the leagues or new leagues for which the Company and/or the Team is or become a member, the Company shall have the right to amend this Agreement in order to comply with such rules and regulations and the Gamer acknowledges and agrees that he will be bound by such amendments. Failure of a Party to enforce its rights hereunder will not be construed as a waiver of such rights. All remedies, whether at law, in equity, or pursuant to this Agreement will be cumulative. Gamer’s Services are personal and unique in nature and Gamer may not assign any of its rights or obligations under this Agreement without Company’s prior written consent. Company may freely assign any and all rights and obligations under this Agreement in whole or in part to any other Party. All notices sent shall be in writing and delivered by personal delivery; first class certified or registered mail, return receipt requested; U.S. Express mail, or an express overnight service (such as Federal Express); or by email, using the addresses set forth above or such other address designated by a Party in writing. Notice is deemed to have been given when actually received. This Agreement may be executed in two or more counterparts (including by facsimile or e-mailed PDF), each of which shall be deemed an original, but which together shall constitute one and the same instrument and will become effective when one or more such counterparts have been signed by each Party and delivered to the other Party.</td>
</tr>
</tbody>
</table>

[Signature Page Follows]
IN WITNESS WHEREOF, the Parties have caused this Agreement to be duly executed and delivered as of the Effective Date.

“COMPANY”

By: _________________________    __________________________
Name:       Turner Tenney
Title: President of Esports

“GAMER”

By: ____________________________
Name: Erik Anderson
Title: President of Esports
EXHIBIT A
TERMS & CONDITIONS

1. Definitions. Capitalized terms used in these T&Cs but not otherwise defined shall have the respective meanings assigned to such terms in the Agreement.

2. Gamer Rights and Responsibilities.
   a. Gamer shall render all Services in a first-class, professional manner and shall be subject to the instructions and direction of Company and its designated representatives.
   
   b. Gamer shall render all Services in compliance with Company’s Social Media Policy attached hereto as Schedule I and incorporated by reference herein, which may be updated from time to time during the Term of the Agreement (the “Social Media Policy”).
   
   c. Gamer shall not engage in any activities that interfere with or delay the rendering of Gamer’s Services hereunder. Company’s determination in all manners respecting the performance of Gamer’s Services will be final and controlling.
   
   d. Gamer, along with the other Gamers on the Team, can elect a Team captain (the “Captain”) who will be the person responsible for communicating directly with the Company’s management team. The Captain will also be responsible for (i) working with the Team to agree upon, and maintain and oversee, a practice/training schedule that is shared with, and agreed upon by, the Company at least three (3) months in advance, and (ii) ensuring the Gamers attend all Tournaments and/or Matches.
   
   e. Gamer will perform the Services at location(s) to be determined in Company’s sole discretion. Company will book and pay for the reasonable costs in connection with any travel related to the Services (including, without limitation, flight and hotel expenses to any Tournaments and/or Matches in which such expenses are not otherwise covered by any league related to Fortnite).
   
   f. Gamer shall comply with Company’s traveling routines, reporting requirements and safety policies as instructed by Company from time to time.
   
   g. Gamer shall actively participate in finding new business opportunities and shall bring all such new opportunities promptly to Company’s attention.
   
   h. Gamer will not accept any money, services or other valuable consideration, other than the Compensation payable by Company hereunder, for the inclusion of any matter in connection with the Services or for the endorsement of any company, product or service in connection with the Services. Further, Gamer shall not visibly wear any product name or logo during the provision of Gamer’s Services hereunder, without Company’s prior written consent. If Company approves the inclusion of any logo or trademark, which logo or trademark is proprietary to Gamer, then Gamer hereby grants Company the right to include such logo or trademark in the exhibition, promotion, advertising, merchandising and other exploitation of the Services.
   
   i. Gamer shall be afforded three (3) weeks of paid time off during each calendar year of the Term, provided, such time off shall be subject to Company’s prior written approval, not to be unreasonably withheld.
3. **Fines for Failure to Provide Services.**

   a. In the event that Gamer fails to participate in training sessions and/or Tournaments and/or Matches, other than with a Valid Absence (as defined below), then without limiting Company’s other rights and remedies hereunder, Company shall have the right to impose the following fines, per occurrence, represented below as a percentage of Gamer’s Monthly Fee, which will be subtracted from the Compensation payable to Gamer in the pay period directly after the imposition of any fine (unless such fines exceed the amount of the Compensation, in which case Gamer shall pay such amount exceeding such Compensation to Company): (i) failure to show at a training session, or showing up late or not fully prepared: twenty-five (25%) percent of Monthly Fee; or (ii) failure to meet at a League Match or Major Online Tournament, the use of any controlled substances prohibited under federal or state law or the gambling at any gaming facility or operation (including any electronic or internet-based gaming facility or operation) in connection with the Game: fifty (50%) percent of Monthly Fee. In addition to the foregoing, in the event Gamer fails to meet at a LAN Tournament or breaches Gamer’s confidentiality obligations under the confidentiality provisions of this Agreement, Gamer hereby agrees to pay Company a cash amount equal to one hundred and twenty-five (125%) percent of monthly compensation, plus all travel costs incurred by Company.

   b. For purposes of the Agreement a “Valid Absence” means Gamer’s failure to participate with Company’s written approval obtained no less than twenty four (24) hours prior to a training session or a League Match, or no less than seven (7) days prior to a Major Online Tournament or a LAN Tournament. In the event that Gamer is unable to obtain such written approval within the foregoing time limits due to sickness or an emergency situation, and Gamer provides documentation to Company’s satisfaction, then such absence shall also be considered a Valid Absence.

4. **Intellectual Property.**

   a. **Results and Proceeds.** Gamer’s Services hereunder shall be performed on a “work-made-for-hire” basis, and as such, all right, title and interest in and to all results and proceeds from the Services, including, but not limited to, all work product, deliverables and content, and all intellectual property rights therein and related thereto (collectively, “Results and Proceeds”) shall be owned exclusively by Company in perpetuity, throughout the universe, and in all media now known or hereafter devised. If any Results and Proceeds are not deemed to be a “work-made-for-hire,” Gamer hereby assigns in full to Company all right, title and interest in and to any and all intellectual property rights (together with all goodwill) in and to the Results and Proceeds without any right of revocation. As the rightful owner, Company has the unlimited right to cut, edit, add to, subtract from, arrange, rearrange, or otherwise modify the Results and Proceeds. Notwithstanding anything to the contrary contained in the Agreement, Company shall be under no obligation to actually use Gamer’s Services, any of the Results and Proceeds, or to otherwise exercise any of the rights granted to Company hereunder. Any termination of the Agreement under any of the terms or provisions hereunder, or by reason of any legal right on the part of either party hereto, will not diminish, impair or otherwise affect any of the rights granted to Company herein or in the Results and Proceeds created up through the date of termination.

   b. **Third Party Materials.** Gamer shall not use or incorporate any materials, content, copyrights, trademarks, designs, logos, insignia, or any other intellectual property (including, without limitation, any rights of publicity/privacy) of any third party (“Third Party Materials”) in connection with the Services or any Results and Proceeds without Company’s prior written consent, and shall be responsible for obtaining all rights for, and making all related payments with respect to any clearances, permissions or consents necessary to use, any such pre-approved Third Party Materials.
c. Gamer Name and Likeness. Commencing upon the earlier of (i) the start of the Services hereunder or (ii) Gamer’s execution of the Agreement, and continuing for the period up to and including the expiration of the Exclusivity Period (defined below), Gamer hereby grants to Company an exclusive, transferrable, assignable, sublicenseable, royalty free, fully paid, universal right and license, but not the obligation, to use and authorize others to use Gamer’s name(s), voice, image, photograph, personal characteristics, signature, actual or simulated likeness, expressions, performance, attributes, personal experiences and biographical information (collectively “Name and Likeness”) in connection with (i) the advertising, publicity, promotion, merchandising, exhibition, and other exploitation of the Services, and (ii) all versions and formats and the businesses, services, programs and/or products of Company, and their licensees, sublicensees, assigns, advertisers and sponsors (including all advertising, publicity, promotion and materials associated therewith), in any manner, in any and all media and by any means now known or hereafter devised (including, but not limited to, use in and in connection with publishing, by-products, tie-ins, merchandise, commodities and services of every kind). Without limiting the generality of the foregoing, Company may include photographs or other images or depictions of the Name and Likeness of Gamer in or in relation to any exploitation of the Services, including any promotional films and videos in any manner and by any means throughout the universe in all media now known or hereafter devised.

5. Exclusivity and Matching Right.

a. Throughout the Term (the “Exclusivity Period”), unless Gamer has obtained Company’s prior written consent, Gamer shall not: (i) provide services or otherwise work for or be employed by a gaming company or other gaming brands or any companies that already have an agreement with Company; (ii) appear in, sponsor or be sponsored by, or otherwise promote or endorse, directly or indirectly, any brands, products or services other than the brands, products and services approved in writing by Company; (iii) promote, sponsor, endorse (using Gamer’s Name and Likeness or otherwise) or render services for or on behalf of any companies with products or services competitive with a product or service of Company or a sponsor or advertiser of Company. The parties acknowledge and agree that with respect to Company's prior approval over any sponsorship and/or endorsement opportunity, that Company shall be entitled to negotiate the terms and conditions of any such opportunities presented to Gamer with the goal of increasing the value of such opportunities to Gamer and Company, and that throughout the Exclusivity Period Company will also work to source sponsorship and/or endorsement opportunities on behalf of Gamer.

b. In addition to the foregoing, during the Exclusivity Period, Company shall have approval over any and all third-party requests for Gamer’s services. Accordingly, Gamer shall notify Company immediately after Gamer’s receipt of the third party request. Nothing in this paragraph shall in any way (i) obligate Company to approve any third-party request or (ii) be deemed to limit the exclusivity provisions set forth in the Agreement. Gamer shall also be prohibited from entering into any agreements, which require any third party to exploit any merchandising in connection with Gamer’s business or businesses to the exclusion of Company’s ability to exploit any merchandising with such third party.

c. If at any time prior to the end of the Exclusivity Period, or within three (3) months thereafter, Gamer receives an offer from another Fortnite team to join such team upon lawful termination of the Agreement by Gamer (“Offer”), Gamer shall be obligated to provide the Offer to Company and the identity of the party providing the Offer, and Company shall have the right to match such Offer during a period of fifteen (15) business days following Company's actual receipt of the Offer (the “Matching Right”). If Company elects to exercise the Matching Right, Company shall inform Gamer within said fifteen (15) business day period, and Company shall, automatically have exclusive rights to Gamer’s services on the same terms as the Offer, as supplemented by all of the terms and conditions of the Agreement not inconsistent therewith, if Company elects to move forward with the Matching Right (provided that Company shall not be required to match any term which may not be as easily met by one
person as another and/or any term which is not readily reducible to a determinable sum of money). Provided that Company decides not to go forward with the Matching Right, and provided that Gamer is not in breach of the Agreement, Gamer shall be free to enter into an agreement based on the Offer. If Gamer does not accept the Offer, then Company’s Matching Right shall revive and shall apply to any future Offer.

6. **Gamer Incapacity; Termination.**

   a. **Gamer Incapacity.** An event of Gamer incapacity shall be deemed to occur if Gamer is unable to fully render the Services in accordance with the terms of the Agreement as the result of any physical, mental or other impairment (e.g. Gamer’s illness causing mental disability, or impairment of Gamer’s voice, appearance and/or mobility) (“**Gamer Incapacity**”). Without limiting any other rights of Company under the Agreement, in the event of Gamer Incapacity, (i) Company shall not be obligated to pay or credit Gamer with any compensation during such Gamer Incapacity and (ii) Company shall have the right to suspend the Agreement during such period of Gamer Incapacity and shall have the right, but not the obligation, to extend the Agreement by the length of any such suspension. If any Gamer Incapacity continues for at least seven (7) days in the aggregate, Company shall have the right to terminate the Agreement without any further obligation to Gamer except for payment of Compensation for all Services satisfactorily completed prior to the effective date of such termination.

   b. **Termination for Convenience.** Company may terminate the Agreement at any time upon thirty (30) days’ prior written notice to Gamer in the event that Company wishes, in its sole discretion, to replace Gamer with a new person on the Team; provided that Gamer shall be paid for all Services satisfactorily completed prior to the effective date of such termination.

   c. **Termination for Morals Breach.** In the event that Gamer takes any action that: (i) constitutes an offense involving moral turpitude under federal, state or local laws or (ii) in Company’s sole discretion, (A) brings Company, Gamer, any sponsor, partner, or joint venturer of Company or Gamer, or any of their respective affiliates, employees, representatives, and agents (collectively, the “**Company Parties**”), into public disrepute, contempt, scandal, or ridicule, (B) insults or offends the community or any substantial organized group thereof, or (C) might tend to injure the success of any Company Party’s products or services, then at the time of any such action or at any time after Company learns of any such action, Company shall have the right, at its sole and absolute discretion, to immediately terminate the Agreement by written notice to Gamer and Company shall have no further obligation or liability to Gamer with respect to payment of Compensation for any Services rendered following the date upon which such action occurred. Company’s decision on all matters arising under this paragraph shall be conclusive.

   d. **Termination for Material Breach.** Each party shall have the right to terminate the Agreement if the other party commits a material breach of its representations, warranties, covenants or other obligations hereunder. If such breach is remediable and the breaching party fails to remedy such material breach within a period of thirty (30) days after being notified in writing to do so from the non-breaching party, such termination shall be effective upon the expiration of such thirty (30) day period. Otherwise, termination shall be effective immediately upon notice thereof. In furtherance of the foregoing, Company will also have the right to terminate the Agreement for a “**Gamer Material Breach,**” which for purposes of the Agreement includes, without limitation: (i) Gamer making disparaging remarks about the Team or any party involved with the Team, Company, any sponsor or other commercial partner, or any of their respective employees, agents or assigns; (ii) insubordination, dishonesty, resignation, or betting on e-sports leagues; (iii) failure, refusal, or neglecting to perform the Services at the times and places and in the manner required or to fulfill Gamer’s other obligations under
the Agreement; (iv) Gamer’s absence from training or any Tournaments and/or Matches without Valid Absence two (2) times or more during the Term; (v) Gamer’s breach of the confidentiality provisions of the Agreement; (vi) Gamer’s breach of the non-compete provisions of the Agreement; (vii) Gamer’s non-compliance with any Tournaments and/or Matches rules and regulations; (viii) Gamer’s express or implied promotion of other brands than those brands approved by Company; and (ix) Gamer appearing visibly intoxicated and/or under the influence of any illegal substance in public (including online content). Upon termination for a Gamer Material Breach or otherwise pursuant to this subparagraph (e), Company shall have no further obligation to Gamer (including, but not limited to, any obligations to pay any further Compensation).

e. **Obligations Upon Termination.** Upon termination of the Agreement for any reason, Gamer shall promptly provide Company all Results and Proceeds (in any stage of completion through the date of termination), all documents or other media containing Confidential Information, and all equipment Gamer has received from Company during the Term; provided, that, at Company’s election, Gamer can pay for such equipment instead of returning it to Company. Unless termination is pursuant to a Gamer Material Breach, Company shall pay Gamer the applicable Compensation for Services rendered through the effective date of termination. Additionally, notwithstanding anything to the contrary contained in the Agreement, in the event of termination for a Gamer Material Breach, Gamer shall be prohibited from playing video games publically (on-line or in live tournaments) or professionally for a period of six (6) months from the effective date of such termination. Company’s use of Gamer’s Services after termination of the Agreement shall not be deemed a reinstatement or renewal of the Agreement without the written agreement of the parties hereto.

7. **Representations and Warranties.**

   a. **Gamer Representations and Warranties.** Gamer hereby represents and warrants to Company that: (i) it has the full right and authority to enter into the Agreement and furnish the Services of Gamer as required hereunder and grant to Company the rights granted hereunder including, but not limited to, in the Name and Likeness and Results and Proceeds without the permission of, or obligation to, any third party; (ii) it has not entered into any agreement, oral or written, express or implied, which could conflict with the Agreement; (iii) all material furnished by, and all Services rendered by, Gamer hereunder shall comply with Company’s rules and policies and shall not violate the civil or proprietary rights of others; (iv) the Results and Proceeds and any Third Party Materials used or provided by Gamer under the Agreement will not violate the rights of any third party, including, without limitation, intellectual property rights; (v) to the extent required hereunder, it has obtained or will obtain all rights, clearances, permissions, consents and releases related to any Third Party Materials used and/or incorporated into any Results and Proceeds hereunder; and (vi) it will at all times be in compliance with all applicable state, federal and foreign anti-corruption and anti-bribery laws.

   b. **Company Representations and Warranties.** Company hereby represents and warrants to Gamer that: (i) it has full right and authority to enter into the Agreement and written materials supplied by Company to Gamer shall not infringe upon the rights of any third party; and (ii) it will at all times be in compliance with all applicable state, federal and foreign corruptions and anti-bribery laws.

8. **Indemnification; Limitation of Liability.**

   a. **Indemnification.** Each party shall at all times indemnify, defend and hold harmless the other party, its affiliated companies, partners and parent companies, and each of their respective officers, directors and employees, from and against any and all liabilities, claims, costs, damages, reasonable settlements and expenses (including without limitation reasonable attorneys’ fees and court costs) brought by a third party, to the extent arising out of or attributable to any material breach or allegation which, if
true, would constitute a material breach of such party’s obligations or representations and warranties hereunder. If it so elects, the indemnified party shall have the rights at its sole cost to engage its own counsel in connection with such claim or may assume defense on its own behalf in the event the indemnifying party fails to adequately defend or if the indemnified party’s insurance carrier requires that such carrier defends any claim as a condition of coverage. The obligations under this subparagraph (b) shall survive the termination or expiration of the Agreement.

b. Company Liability Limitation; Injunctive Relief; Set-Off. Gamer agrees that the rights and remedies of Gamer in the event of a breach of the Agreement by Company shall be limited to the right to recover money damages, if any, in an action at law and in no event shall Gamer be entitled to enjoin or restrain the exploitation of the Services and/or any Results and Proceeds. The rights granted by Gamer under the Agreement shall not terminate by reason of any such breach herein by Company. Gamer agrees that the Services provided by Gamer are of a special, unique, unusual, extraordinary and intellectual value and character, the loss of which would cause Company irreparable harm and could not be adequately compensated by money damages in an action at law. Company shall be entitled to seek injunctive and other equitable relief to restrain, enjoin or prevent any breach or threatened breach of any obligation herein by Gamer, in addition to any other rights that Company may have in equity or at law. In the event Company incurs any damages as a result of any breach of the Agreement by Gamer, Company shall have the right, in addition to any other remedies, to withhold and offset any payments due Gamer under this or any other agreement between the parties in an amount reasonably necessary to cover Gamer’s indemnity obligations under this paragraph or to cover any damages incurred by Company.

9. Confidentiality; Statements by Gamer.

a. Gamer acknowledges and agrees that Gamer will be provided with and/or gain access to and become acquainted with non-public, proprietary and/or confidential information concerning the finances, operations, sponsors, technology, sales and marketing techniques, customers, suppliers, know-how, business plans, prospects of and other information related to: (i) the Company’s business, operations and/or sponsors, (ii) the Company’s business partners, including without limitation: (A) confidential personal and/or business information and business secrets of the Company; (B) trade secrets of the Company; (C) plans, prospects, policies, practices, and procedures of the Company; (D) licenses and agreements of any nature; (E) the existence of the discussions between the parties related to the Agreement and (iii) all other proprietary and confidential information of every nature and source (collectively, “Confidential Information”). Gamer shall not disclose to any third party any information with respect to such Confidential Information or with respect to the terms and provisions of the Agreement, except: (i) where such information has already been released to the public by Company; (ii) to the extent necessary to comply with law or the valid order of a court of competent jurisdiction or government agency, provided Gamer notifies Company of said law or order; or (iii) on a must-know basis to Gamer’s representatives upon the express condition that Gamer shall in such cases secure said representatives’ agreement to comply with this confidentiality restriction. The terms of the Agreement shall be deemed Confidential Information of Company.

b. Other than as provided for in this subparagraph (b), Gamer and/or Gamer’s representatives shall not issue any press releases nor make any other statements about Gamer’s Services, the Team, Company, its affiliates, agents and/or employees, or any other party involved in the Services (e.g. the sponsors) in any media (including, without limitation, any online or print communications) without Company’s prior written consent. Gamer and/or Gamer’s representatives may not disclose any Confidential Information relating to Gamer’s Services or the Agreement. Further, Gamer and/or Gamer’s representatives shall not use any name, logo, trademark or other proprietary mark of Company or their parents, subsidiaries, affiliates, licensees, sub-licensees and/or assignees in any manner without Company’s prior written approval.
c. Notwithstanding the foregoing, Gamer shall have the right to make accurate, non-
derogatory, non-disparaging, incidental statements or references about Gamer’s Services and the Team, and as specifically permitted as part of the Services. Further, Gamer shall be permitted, after the termination of the Agreement, to make truthful statements or references about Gamer’s Services, the Team or Company, without divulging any Confidential Information.

d. The confidentiality obligations set forth in the Agreement shall survive the Term and/or any termination of the Agreement for a period of three (3) years from such expiration or termination date.
SCHEDULE I
SOCIAL MEDIA POLICY

The following Social Media Policy shall apply to Gamer (referred to as “You” below) in connection with the Services and the Agreement. The Social Media Policy may be updated from time to time by Company:

You agree that when using any sites in connection with performing the Services, you will act in a manner consistent with the goals of the Site, and by way of example, and not as a limitation, you specifically agree that:

1. You will not bring Company (or any of its employees, agents, clients, talent, representatives or partners (“Affiliates”)) into public disrepute, contempt, scandal, or ridicule.

2. You will not violate any applicable local, state, national or international law, including but not limited to any rule, regulation, decree or ordinance.

3. You will not post information on or download information from any site unless you have all rights and authority necessary to do so.

4. You will not post any inappropriate, defamatory, vulgar, obscene, sexually explicit, potentially libelous or slanderous, infringing, harmful, harassing, threatening, illegal, anything relating to death or other material or information that any site views as objectionable to such site, including but not limited to text, graphics, audio and video files.

5. You will not defame, abuse, harass, stalk, threaten, embarrass, cause distress, unwanted attention or discomfort or otherwise violate the legal rights (including without limitation rights of privacy and publicity) of any other user or representative of such site, or Company.

6. You may express your disagreement with someone’s point-of-view but personal attacks, or attacks based on another person’s race, national origin, ethnicity, religion, gender, sexual orientation, disability or other such condition or circumstance, are strictly prohibited.

7. You will not impersonate another person or entity, including but not limited to a representative of Company, or communicate under a false name or a name that you are not entitled or authorized to use.

8. You will not post surveys, contests, chain letters, pyramid schemes, unnecessarily long messages, unnecessary or repetitive posts, multiple ratings for the same item, meaningless text, spamming, offensive declarations or other similarly disruptive content.

9. You will not falsify or delete any author attributions, legal or other proper notices or proprietary designations or labels of the origin or source of software or other material posted on any site.

10. You will not directly or indirectly disparage any other Team member, Company or any of its Affiliates.
Turner Tenney’s lawsuit against FaZe Clan is a game-changer. Could this dictate the

By MICHAEL MCCANN May 30, 2019

Are professional esports players, many of whom are relatively young
and unseasoned in business dealings, being played by the more sophisticated organizations that employ them?

This question lies at the heart of a complaint recently filed by Turner Tenney, a player professionally known as Tfue, in Los Angeles Superior Court. Tenney argues that his gamer contract violates California law. If Tenney prevails, the validity of other players’ contracts with gaming companies would be called into question.

Tenney, 21, has sued FaZe Clan, Inc., an esports entertainment company with whom Tenney signed an agreement in April 2018. The agreement concerns Tenney’s membership on FaZe Clan’s team for Fortnite. Tenney, by many accounts, is the LeBron James or Naomi Osaka of Fortnite—he is among the game’s top players and wins tournament after tournament.

In the esports world, Tenney is also a genuine celebrity. He is one of the most prominent influencers of products and services. Tenney views his contract with FaZe Clan as grossly failing to capture his high standing within esports.

Tenney’s case has been assigned to Judge Patricia Nieto. It will be litigated in the Stanley Mosk Courthouse in downtown Los Angeles. The first hearing is scheduled for September 20, 2019.

**Breaking down Tenney’s contract from a legal perspective**

*The Blast* recently published a copy of Tenney’s contract. The contract invites debate on a variety of levels, including with respect to the appropriate category for Tenney’s working relationship with FaZe Clan.

The language of the contract indicates that Tenney is an “independent contractor” of the esports company. However, as explained below,
California law might nonetheless recognize him as an employee. Tenney, meanwhile, seems to regard his relationship with FaZe Clan as governed by agency law. He views his relationship with FaZe Clan as one between a client artist and a talent agency. Regardless, Tenney agreed to join FaZe Clan and team-up with a Fortnite team that contractually includes three other top players: Thang “SpaceLyon” Phan, Dennis “Cloak” Lepore and Brendan “Jaomock” O’Brien.

Tenney’s contract specifically requires that he play in tournaments and training sessions on behalf of FaZe Clan, a Delaware corporation that conducts business in Los Angeles. It also calls for him to offer up to three days a month in “publicity and promotional services,” a phrase that includes promotion through streaming videos and other content creation. In addition, Tenney is obligated to wear FaZe Clan clothing as well merchandise associated with FaZe Clan’s sponsors. Further, Tenney must participate in FaZe Clan’s social media campaigns.

Tenney also assents to represent only FaZe Clan within the industry. To that end, the gamer agreement includes an exclusivity/non-compete clause that ensures that Tenney won’t endorse other gaming companies or join other Fortnite teams.

In exchange, FaZe Clan must compensate Tenney in several ways. First, the company agreed to pay him a monthly fee of $2,000 for the first six months of the contract. At the conclusion of the initial six-month period, FaZe Clan had the option to extend the deal for three years (which it did) and, at FaZe Clan’s sole discretion, increase or decrease the monthly fee by as much as 25%. Stated differently, Tenney’s monthly base pay for FaZe Clan ranges from $1,500 to $2,500.

Similar to restricted free agency in the NFL, Tenney’s contract also empowers FaZe Clan to prevent Tenney from signing with a rival for a
period of time after his contract term ends and to match a competing offer during an additional period of time. These terms go into effect following the expiration of Tenney’s three-year term (this expiration is set to occur in 2021, unless Tenney’s contract is voided or bought out before then). During the first 30 days, FaZe Clan will enjoy an exclusive window to re-sign Tenney. If no such deal is struck, and if Tenney signs with a competitor between days 31 and 60, FaZe Clan could match the offer. Only after those two months could Tenney sign with another company without restriction.

Tenney is also entitled to 80% of cash prizes from playing in Fortnite tournaments, with the remaining 20% going to FaZe Clan. As to income generated by in-game merchandise, appearances, touring and sign-up bonuses, Tenney and FaZe Clan evenly split those proceeds.

The contract also contemplates finder’s fees for brand deals that feature Tenney and that are associated with creation platforms (such as Twitch or YouTube) or social media website accounts managed by Tenney or FaZe Clan. If Tenney brings such a deal to FaZe Clan, he and FaZe Clan split the income, but if FaZe Clan finds the deal, FaZe Clan keeps 80% of the proceeds.

**Understanding Tenney’s case and its parallels to Curt Flood’s case against Major League Baseball in 1970**

Tenney’s complaint, which is authored by attorneys Bryan Freedman and Jesse Kaplan of Freedman + Taitelman, insists that the contract Tenney signed with FaZe Clan is “grossly oppressive, onerous, and one-sided.” Among other objections, the attorneys maintain that the 80% finder’s fee is unjust given that Tenney is the artist performing the services and given that *his* celebrity—and rather than that of FaZe Clan—is the primary draw.
The complaint also stresses that Tenney did not understand what he was signing, and that Tenney is not alone among esports players who are easy prey for opportunistic gaming companies. These companies, the complaint asserts, exploit the players. These players lack a formal union and often sign contracts without the benefit of proper business advice and without a healthy dose of skepticism toward the intentions of gaming companies. Stated more bluntly, Tenney’s complaint depicts esports players as young adults who don’t realize the rights that they are contractually giving away.

Further, while versions of esports have been around since the days of the Atari 2600, the more contemporary version of esports with online play has experienced rapid growth in recent years. Along with such growth has been a surge in accompanying revenue. One key reason for this development is the appealing content created by top players such as Tenney. Indeed, revenue generation in esports reflects the design of videos by charismatic players, whose work is arguably akin to performing art and athletic performance (while some debate the connection between esports and athletics, one defensible definition of athleticism includes the kinds of hand-eye skills and other traits essential to esports; such a definition is under review by the International Olympic Committee, which is considering whether to add esports to the Olympic Games).

Along those lines, Tenney’s complaint stresses that esports players perform, act, direct and edit their videos and then stream those videos to their millions of followers through YouTube and Twitch. With numerous views of the videos, advertising dollars and sponsorship opportunities are generated. Where the resulting revenue ought to go is less settled.

Tenney’s high profile illustrates these points. His YouTube channel has
10.9 million subscribers, while his Twitch channel has 6.1 million followers. According to an in-depth article by Patricia Hernandez of Polygon, Tenney is the most watched Fortnite streamer on Twitch. Tenney’s complaint emphasizes that “sponsors are willing to pay for Tenney to perform in and create videos that will, at least in part, promote their goods, services and brands.” Yet the deal he signed with FaZe Clan limits his capacity to profit from his talents.

In some ways, Tenney’s complaint is reminiscent of Curt Flood’s case against Major League Baseball 50 years ago. Flood, a centerfielder, argued that while he voluntarily signed a contract to play professional baseball, baseball’s system of contracts was illegally rigged to prevent players from ever becoming free agents. Thus, players became tantamount to “property” for a team, a status that for Flood began when he signed his first pro contract at age 18.

Baseball contracts at the time contained a “reserve clause,” which enabled a team to renew a player’s contract on a year-to-year basis, typically with modest annual pay increases, for as long as the team saw fit. This arrangement was problematic for several reasons, including that baseball owners in the 1960s enjoyed surging revenues due to the growth of television broadcasts. During this same period, players’ salaries largely plateaued. Although the U.S. Supreme Court ruled against Flood in 1972 on account of baseball enjoying an exemption from federal antitrust law, three years later baseball arbitrator Peter Seitz effectively endorsed Flood’s arguments in a grievance involving pitchers Andy Messersmith and Dave McNally. The Seitz decision brought about free agency in baseball, and Flood’s case played a key role.

Tenney’s complaint draws on these same sentiments in depicting FaZe Clan as swindling Tenney and preventing him from joining other teams.
To that point, Tenney’s attorneys hope the lawsuit will “shift the balance of power to the gamers and content creators/streamers—those who are actually creating and driving the industry.” Likewise, the attorneys assert that FaZe Clan illegally “owns” the streaming content Tenney creates and, through the exclusivity clause, prevents him from offering his talents to competing companies.

These restraints, Tenney’s attorneys charge, are particularly damaging since they deny Tenney the opportunity to seek his own promotional deals and fully profit from the use of his name, image and likeness—in other words, an argument similar to the one Ed O’Bannon raised in his case against the NCAA and one that is the subject of current legislation in California. Indeed, the complaint notes, an unrestrained Tenney might attract more lucrative deals and not be “saddled with an 80% finder’s fee.”

**Tenney’s legal claims under California law**

Building on these points, the complaint charges the right of first refusal/matching clause “undoubtedly violates” Section 16600 of the California Business and Professions Code. Section 16600 generally prohibits companies from restraining the ability of former employees and former independent contractors to join a rival company. This area of law is problematic for FaZe Clan with respect to the two-month negotiation window following the expiration of Tenney’s contract. However, California’s broad prohibition on non-competes doesn’t apply to current workers. FaZe Clan will likely insist that Tenney’s restraints prior to the completion of the three-year term are mere conditions of his ongoing working relationship—a relationship that Tenney voluntarily assented to by signing the gamer contract.

The complaint also contends that the gamer agreement signed by Tenney
violates California’s Talent Agency Act. The Act requires that business and individuals who act in the capacity of an agent do so with an agent license obtained through California’s Labor Commissioner. An “agent” who fails to obtain such a license takes the risk that the labor commissioner will render any negotiated contracts void and compel the agent to return any commissions to the client.

Further, a talent manager—who advises clients on career goals and maximizing marketability—can run afoul of the state’s agency act if the manager’s work grows into contract negotiation on behalf of the client. Tenney asserts that FaZe Clan is in violation of the act since, in his view, the company “continuously and systematically procure and attempts to procure employment and engagements for Tenney as an artist” and does so without a license. Tenney has filed a separate petition with the California Labor Commissioner with respect to the agency question.

Tenney also maintains that FaZe Clan has failed to share profits with him as contractually required. To illustrate, Tenney’s complaint asserts that he created and performed in a video for sponsor Digital Storm, a manufacturer of gaming computers. The video garnered over 19 million views, but Tenney insists without accompanying financial gain to him. Tenney charges that FaZe Clan has unlawfully retained payments that should have been paid to Tenney.

Along those lines, Tenney contends that FaZe Clan has breached its fiduciary duty to act with loyalty. “FaZe Clan,” the complaint asserts, “rejected at least one sponsorship deal on Tenney’s behalf due to a glaring conflict of interest.” This purported deal would have been with HyperX, makers of headsets and headphones. Tenney claims that FaZe Clan “passed on the sponsorship deal” because it “perceived that
HyperX was a competitor of another sponsor that did business with FaZe Clan.” Tenney argues that in passing on the deal, “FaZe Clan knowingly acted against Tenney’s interest by preventing third-parties from helping Tenney source sponsorship deals.”

Further, Tenney maintains that FaZe Clan has engaged in an unfair business practice under Section 17200 of the California Business and Professions Code. A Section 17200 claim asserts that the defendant is liable for unfair competition acts and fraudulent business practices. Here, Tenney alleges that FaZe Clan has denied him the chance to sign deals with other companies and to profit off of his marketability.

Through their complaint and accompanying petition to the California Labor Commissioner, Tenney’s attorneys request that their client’s contract with FaZe Clan be rendered void and unenforceable. They also demand that FaZe Clan disgorge and repay Tenney sponsorship, fee, commission and other monies. Likewise, the attorneys seek compensatory and punitive (punishment) damages. Lastly, they ask that FaZe Clan be permanently enjoined from violating California law—a demand that, if granted, would impact FaZe Clan’s relationships with other players.

**FaZe Clan’s likely defenses**

FaZe Clan will answer Tenney’s complaint and, over time, raise a series of legal arguments designed to rebut his assertions.

One key argument will be the most basic: Tenney, as an adult, voluntarily and lawfully signed the contract that he is now protesting.

Tenney’s complaint notes that he was only 20 years old when he signed the deal with FaZe Clan. Keep in mind; a 20-year-old person is older
than some players in the NBA, NHL and MLB, older than numerous soccer, tennis and golf professionals, and older than many professional actors and musicians. For purposes of the contract law, 20 is essentially the same as 40 or 60: Tenney was clearly an adult when he signed the contract.

In California, as in other states, a person who is 18 or older is generally bound by the contracts they sign. The fact that Tenney apparently regrets the fact that he underestimated the degree to which his career would take off after signing with FaZe Clan is not a legal claim. It is an acknowledgement of regret.

Expect FaZe Clan to also reject Tenney’s assertion that the gaming company has violated Section 16600 of the California Business and Professions Code. While it’s true that California law makes it extremely difficult for employers to enforce non-compete agreements with respect to former workers, Tenney still has a working relationship with FaZe Clan. Tenney, of course, contends that the relationship is only a product of an illegal (and, by inference, unenforceable) gamer agreement. However, at least in regard to Tenney while he is actively working for FaZe Clan, the non-compete argument is unlikely to prevail.

That said, the de facto restricted free agency portion of Tenney’s contract is far more vulnerable. As explained above, FaZe Clan has a temporary right after the three-year term ends to block Tenney from negotiating with other companies and to match a competitor’s offer. Such a provision might not withstand scrutiny since it resembles a non-compete. However, it’s also a term that is not set to go into effect until 2021—and thus might not yet be ripe for judicial review.

Further, while Tenney contends that FaZe Clan has acted as an agent for purposes of California’s Talent Agency Act, FaZe Clan will probably
refute such a deduction. The company can assert that the gamer agreement depicts Tenney as an independent contractor of FaZe Clan—not a client of FaZe Clan.

It’s possible that Tenney is neither an independent contractor nor a client. He might instead be an employee who is owed the benefits and protections of employment. Last year, the California Supreme Court held in *Dynamex Operations West, Inc. v. Superior Court* that a worker is only an independent contractor if he or she (A) is free from the control and direction of the hirer in connection with the performance of the work, both under the contract for the performance of such work and in fact; (B) performs work that is outside the usual course of the hiring entity's business; and (C) is customarily engaged in an independently established trade, occupation, or business of the same nature as the work performed for the hiring entity. As a seasoned player, Tenney, it would seem, is performing work within the usual course of FaZe Clan’s business.

FaZe Clan will likely also argue that California state court is not the appropriate venue for the litigation. The gamer agreement contains a choice of law provision, which instructs that the agreement “shall be governed and construed in accordance with the laws of the State of New York” and that the parties “submit exclusively to the state or federal courts in New York, NY for any claim” related to the contract.

Further, FaZe Clan will object to Tenney’s request for injunctive relief. The gamer agreement expresses that the remedy of breach by FaZe Clan "shall be limited to the right to recover money damages.” While Tenney’s attorneys would argue the contract isn’t just breached, but also unenforceable, and while the California Labor Commissioner has the right to impose injunctive relief, FaZe Clan will attempt to mitigate any
potential exposure from the lawsuit.

It’s also apparent that FaZe Clan will challenge the facts as retold by Tenney. As detailed by Hernandez in her *Polygon* story, FaZe Clan owner Ricky Banks has actively used Twitter and YouTube to dispute Tenny’s claims. In sum and substance, Banks argues that Tenney has grossly exaggerated the degree to which FaZe Clan has profited from him. FaZe Clan, Banks reports, has only taken in $60,000 from activities related to Tenney.

Banks also stresses that Tenney is neglecting to acknowledge the instrumental role played by Banks and FaZe Clan in helping him to become an esports star. This point is similar to when sports teams note that while a star player earned his or her stardom, the team—and its coaching, brand and infrastructure—facilitated.

**Impact on the industry**

Tenney’s lawsuit is a potential game-changer. As explained above, the enforceability of other gamers’ contracts is at stake. Further, pretrial discovery—where both sides are ordered by the court to share information with the other side—could be unwelcomed news for both Tenney and FaZe Clan officials. They might be obligated to provide sworn testimony and offer financial documents, emails, texts and other evidence that they would prefer to keep confidential.

It is also possible that Tenney’s lawsuit, like many lawsuits, will simply end in a settlement. A settlement would involve Tenney and FaZe Clan agreeing to terminate the contract under a set of conditions that both sides accept.

There are also larger themes at stake. A key one is the notion that
esports players are inadequately informed about the contracts they sign. A relatively straightforward, but probably incomplete, remedy to that concern would be for players to hire attorneys, particularly those with esports expertise. An attorney would assist in the drafting and interpretation of a contract. But an attorney might not be aware of other players’ salaries and conditions of players’ employment. That said, there are now dedicated esports attorneys, including Bryce Blum and his colleagues at the Electronic Sports Gaming Law firm as well as esports attorneys at large firms such as Michael Wall of Foley & Lardner.

A more complete, but also more difficult to obtain, solution would involve the formation of a union or trade association for esports players.

Several entities function in some ways like a union for players, including with respect to educating them on best practices for careers. Ellen Zavian and Jim Schmitz detail these entities in an article published by the Association of Corporate Counsel’s Docket magazine.

For example, there is a League of Legends Players’ Association or LOLPA, which is for pro gamers who play League of Legends. LOLPA was formed by Riot Games, the game’s publisher. There is also the Overwatch Players’ Association, which was created by a former coach and former player of the Overwatch game. These organizations are no doubt helpful, but they are game specific and not owned by the players themselves. They also lack the formal recognition of a union that could comprehensively bargain with gaming companies in accordance with federal labor law.

A number of commentators have outlined other potential benefits of a union or players’ association. For instance, in a recent *Texas Review of Entertainment and Sports Law* article, attorney Uriah Tagle noted the role of age among esports players, and how many gamers “peak” at 24
years old. Like professional athletes, seasoned gamers are susceptible of being replaced by younger, faster players. A union could help these gamers prepare for what should be decades of a post-playing career.

SI will keep you updated on major developments in Tenney’s litigation and esports and the law.

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Instructions

The articles listed below can be accessed by clicking on the links below.

The Coming Evolution of the Video Game Industry by Ethan Wham
http://www.project-disco.org/innovation/041819-coming-evolution-of-the-video-game-industry/

How esports Compares to Traditional Sports by Chris Carvalho
https://www.linkedin.com/pulse/numbers-live-esports-vs-traditional-sports-chris-carvalho/?published=t