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## Fastball Down the Middle- How Major League Baseball's Players Association Can Hit a Homerun By Implementing Its Own Human Equity Fund

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FASTBALL DOWN THE MIDDLE – HOW MAJOR LEAGUE  
BASEBALL’S PLAYERS ASSOCIATION CAN HIT A  
HOME RUN BY IMPLEMENTING ITS OWN  
HUMAN EQUITY FUND

I. INTRODUCTION

The news broke on a Monday that yet another record-breaking Major League Baseball contract was signed.<sup>1</sup> The San Diego Padres pledged themselves to a young up-and-coming superstar.<sup>2</sup> Fernando Tatis Jr., whom they traded for just four and a half years prior, signed a new deal with the Padres.<sup>3</sup> The new deal is the longest in baseball history and would pay Tatis Jr. \$340 million throughout the contract.<sup>4</sup> San Diego was committing itself to another fourteen years with the star shortstop.<sup>5</sup> This deal was unique because Tatis Jr. signed it at such a young age compared to others signing a major league contract.<sup>6</sup> Underneath this deal, though, was a contract many were unaware Tatis Jr. had already signed.<sup>7</sup>

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1. See Dayn Perry & R.J. Anderson, *Fernando Tatis Jr., Padres Agree to Mammoth 14-Year, \$340 Million Contract Extension*, CBS SPORTS (Feb. 22, 2021), <https://www.cbssports.com/mlb/news/fernando-tatis-jr-padres-agree-to-mammoth-14-year-340-million-contract-extension/#:~:text=Fernando%20Tatis%20Jr.%20and%20the%20San%20Diego%20Padres,years%20of%20the%20deal%2C%20according%20to%20Scott%20Miller> [<https://perma.cc/KVH3-XFS3>] (“Fernando Tatis Jr. and the San Diego Padres have agreed to a record-breaking 14-year extension, the club announced Monday.”).

2. See Jared Diamon, *Fernando Tatis Jr., 22, Agrees to the Longest Baseball Contract Ever with the Padres*, WALL ST. J. (Feb. 18, 2021), [https://www.wsj.com/articles/fernando-tatis-contract-san-diego-padres-11613622904?mod=Article\\_inline](https://www.wsj.com/articles/fernando-tatis-contract-san-diego-padres-11613622904?mod=Article_inline) [<https://perma.cc/LM94-6552>] (stating widely held view Tatis Jr. is star in league).

3. See Scott Merkin, *Sale is Sold: Shields Dealt to White Sox*, MLB (June 4, 2016), <https://www.mlb.com/news/white-sox-padres-complete-james-shields-trade-c182092484> [<https://perma.cc/Y54H-E3QN>] (discussing trade involving Fernando Tatis Jr.).

4. See Perry, *supra* note 1 (“It will also become the third-largest contract in MLB history in terms of total value behind just Mike Trout’s and Mookie Betts’ current deals. At 14 years, Tatis Jr.’s extension is the longest contract, which breaks the record of 13 years shared by Giancarlo Stanton and Bryce Harper.”).

5. See Diamon, *supra* note 2 (stating Tatis Jr. will be Padre for life because of his new contract).

6. See *id.* (“No player has ever received such a large contract this early in his career.”).

7. See Jared Diamon, *The Padres Owe Fernando Tatis Jr. \$340 Million. He Owes an Investment Fund Millions from His Payday.*, WALL ST. J. (Feb. 19, 2021), <https://www.wsj.com/articles/fernando-tatis-jr-340-million-investment-fund-padres-11613732572?tesla=Y> [<https://perma.cc/D3C9-XW4K>] (claiming Tatis Jr. may owe up to \$30 million to Big League Advance).

When Tatis Jr. was an up-and-coming minor leaguer in the Padres organization, he signed a deal with an investment company stipulating that the company would receive a portion of his future earnings in exchange for an upfront cash payment.<sup>8</sup> Tatis Jr. signed the deal because he wanted to improve his financial situation while playing through the minor league system.<sup>9</sup> However, signing the deal now requires a substantial portion of Tatis Jr.'s record-setting contract to go to the investment company instead of Tatis Jr.<sup>10</sup> This deal was the product of an industry that has been growing in athletics.<sup>11</sup>

The next frontier of business investments appears to be in the sports world, through businesses that provide upfront money to players in return for a share of their future profits.<sup>12</sup> These compa-

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8. See *id.* (discussing how deal with Big League Advance is Tatis Jr.'s most important - most important what?); see also Weston Blasi, *Fernando Tatis Jr.'s \$340 Million Contract Will Be Shared with a Firm That Invested in Him When He Was a Teenager*, MARKETWATCH (Feb. 18, 2021), <https://www.marketwatch.com/story/fernando-tatis-jr-s-340-million-contract-will-be-shared-with-a-firm-that-invested-in-him-as-a-teenager-11613679240#:~:text=When%20Tatis%2C%2022%2C%20was%20a%20teenager%20playing%20Single-A,exchange%20for%20a%20percentage%20of%20their%20future%20earnings> [<https://web.archive.org/web/20220101225506/https://www.marketwatch.com/story/fernando-tatis-jr-s-340-million-contract-will-be-shared-with-a-firm-that-invested-in-him-as-a-teenager-11613679240>] (“Players like Tatis then agree to give up anywhere between 1% and 12% of future MLB earnings. The typical deal is for 8% of future earnings, but the firm has not stated details of Tatis’s contract, according to Sportico. The contract applies to MLB earnings and not endorsements.”).

9. See Ken Rosenthal, *Rosenthal: The Deal That Will Cost Fernando Tatis Jr. Part of His Contract*, ATHLETIC (Feb. 18, 2021), <https://theathletic.com/2397422/2021/02/18/fernando-tatis-jr-padres-extension-big-league-advance-mlb/> [<https://perma.cc/UA4Y-MZ8A>] (outlining Tatis Jr.’s plan to use BLA money to improve his body for better prospect reaching major league team?).

10. See Jeff Sanders, *Deal in 2017 Will Cost Fernando Tatis Jr. Millions*, SAN DIEGO UNION-TRIB. (Feb. 20, 2021), <https://www.sandiegouniontribune.com/sports/padres/story/2021-02-19/fernando-tatis-big-league-advance-padres-michael-schwimer> [<http://web.archive.org/web/20220331140422/https://www.sandiegouniontribune.com/sports/padres/story/2021-02-19/fernando-tatis-big-league-advance-padres-michael-schwimer>] (“For every \$50,000 advanced to a player, he gives up 1 percent of his future big-league earnings; the player owes the company nothing if he never plays in the majors. If Tatis Jr. chose the maximum \$500,000 — and BLA does not disclose the particulars of its arrangements — his deal will put \$34 million in BLA’s coffers over the next 14 years.”).

11. See Rosenthal, *supra* note 9 (stating BLA owner believes he is filling void by helping players).

12. See Jake Seiner, *Minor Leaguers Seek Investors, Donations to Make Ends Meet*, ASSOCIATED PRESS (Apr. 4, 2019), <https://apnews.com/article/minor-league-baseball-ap-top-news-mlb-baseball-az-state-wire-ac3fd2516c4a4f218f5ab311731cbe50> [<https://web.archive.org/web/20220331014237/https://apnews.com/article/minor-league-baseball-ap-top-news-mlb-baseball-az-state-wire-ac3fd2516c4a4f218f5ab311731cbe50>] (discussing different businesses have started to function to help minor league players make additional money).

nies seek returns on their investments by using advanced algorithms to formulate a player's future earning potential.<sup>13</sup> However, some troubling developments have already occurred within this new industry.<sup>14</sup>

These companies see themselves as helping underserved minor league players.<sup>15</sup> However, there are concerns about how they operate and whether they are having a positive impact on the players.<sup>16</sup> For example, one agent who has expressed concern for these businesses wants to present ideas to the Major League Baseball Players Association ("MLBPA") addressing how to potentially handle these businesses while protecting players.<sup>17</sup>

This Comment reviews potential options that the MLBPA could implement to address concerns about this new industry.<sup>18</sup> In Section II, this Comment discusses the history and background of the MLBPA, including a discussion of the development of venture capital in sports contracts and some examples of prominent income-sharing contracts.<sup>19</sup> Next, the Section provides some of the legal background of options available to the MLBPA.<sup>20</sup> In Section III, this Comment looks to the failures of the current system, the benefits of MLBPA intervention, and the feasibility and desirability

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13. See Ken Rosenthal, *Rosenthal: Company That Offers Minor Leaguers Up-Front Payments Drawing Scrutiny Within Baseball*, ATHLETIC (Apr. 20, 2018), <https://theathletic.com/322664/2018/04/20/rosenthal-company-that-offers-minor-leaguers-up-front-payments-drawing-scrutiny-within-baseball/> [https://perma.cc/5Q5V-Q7M2] ("Schwimer said BLA uses a proprietary algorithm to value every player in the minors.").

14. See *id.* (stating three issues with these companies including: athlete exploitation, singling out Latin American players, excluding agents during first contact with athlete).

15. See Rosenthal, *supra* note 9 ("Schwimer, in contrast, believes he is providing a service to minor leaguers while they are still underpaid.").

16. For further discussion of the issues raised about these companies, see *infra* notes 117-137 and accompanying text.

17. See Ronald Blum, *Moneyball: Tatis Took Cash as Prospect, Owes Part of Fortune*, ASSOCIATED PRESS (Feb. 23, 2021), <https://apnews.com/article/mlb-baseball-michael-schwimer-fernando-tatis-jr-fernando-tatis-db06c151fdf5a2650414b02447509e8c> [https://web.archive.org/web/20220331015407/https://apnews.com/article/mlb-baseball-michael-schwimer-fernando-tatis-jr-fernando-tatis-db06c151fdf5a2650414b02447509e8c] (outlining plan Scott Boras developed to give greater power to MLBPA).

18. For further discussion of the potential options open to the MLBPA, see *infra* notes 162-206 and accompanying text.

19. For further discussion of the history and background of the MLBPA and venture capital in sports, see *infra* notes 27-112 and accompanying text.

20. For further discussion of the relevant law surrounding the MLBPA's options, see *infra* notes 56-87 and accompanying text.

of the options open to the MLBPA.<sup>21</sup> Section III continues with an analysis of the potential sources of investment funds the MLBPA could attempt to pursue and the laws restricting its access to these funds.<sup>22</sup>

## II. BACKGROUND

This section provides the necessary background to understand how venture capital groups operate within minor league baseball.<sup>23</sup> Subsection A discusses the interaction between the MLBPA and minor league baseball.<sup>24</sup> Subsection B explains the role of venture capitalists in sports.<sup>25</sup> Subsection C then explains relevant law that may apply to a venture capitalist investing in minor leaguers, broken down by the source of income a player may receive.<sup>26</sup>

### A. Major League Baseball Players Association

Professional baseball players not on a major league roster play for the major league teams' minor league affiliates.<sup>27</sup> The major league teams pay the minor league players' salaries and any additional food costs they may incur during the season.<sup>28</sup> Minor league baseball has six different competitive levels, and pay is commensurate with each respective level.<sup>29</sup> When drafted to the minor

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21. For further discussion of the failures of the current system, see *infra* notes 117-137 and accompanying text.

22. For further discussion of the potential finance sources to fund a new company, see *infra* notes 162-196 and accompanying text.

23. For further discussion of the background of venture capital group operations within minor league baseball, see *infra* notes 27-112 and accompanying text.

24. For further discussion of the interaction between the MLBPA and minor league baseball, see *infra* notes 27-36 and accompanying text.

25. For further discussion of the role of venture capital in sports, see *infra* notes 37-55 and accompanying text.

26. For further discussion of the relevant laws that may apply to a venture capitalist firm investing in minor leaguers, see *infra* notes 56-87 and accompanying text.

27. See Robert Pannullo, *The Struggle for Labor Equality in Minor League Baseball: Exploring Unionization*, 34 ABA J. LAB. & EMP. L. 443, 444-46 (2020) ("With only 1,200 players in MLB, the 6,000-plus minor league players represent the majority of all professional baseball players.").

28. See *id.* at 446 (stating MLB owners pay salaries, food expenses, make roster decisions for promotions and releases of players, and control contracts of minor league players and coaches).

29. See *id.* ("At the lowest levels . . . players are paid \$1,100 per month. At the highest level . . . players can earn \$ 2,150 per month. [P]layers are paid only during the five-month regular season; they are not paid during spring training and cannot earn overtime wages.").

leagues, some baseball players are offered lofty signing bonuses<sup>30</sup>; however, most players do not sign these lofty signing bonuses because the players are not offered these bonuses by the team and are therefore underpaid relative to the poverty level in the United States.<sup>31</sup>

After three failed attempts, major league baseball players unionized in 1966 and formed their first collective bargaining agreement in 1968—posing a potential solution to under compensation of major league players.<sup>32</sup> The newly formed players association achieved substantial success in establishing minimum salaries, a process to hear grievances by players, and an unrestricted free agency.<sup>33</sup> However, the MLBPA does not represent any minor league baseball players' interests.<sup>34</sup> As a result, the MLBPA has used issues affecting minor league players to gain more for major league players.<sup>35</sup> There is a fear within the MLBPA that representation is a zero-sum game such that vying for minor leaguers and their interests directly detracts from effectively representing major league players.<sup>36</sup>

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30. See Jim Callis, *Here Are '21 Draft Bonus Pools, Pick Values*, MLB (May 27, 2021), <https://www.mlb.com/news/2021-mlb-draft-bonus-slots#:~:text=IN%202019%2C%20teams%20set%20a%20record%20with%20%24316%2C560%2C984,%248%2C416%2C300%2C%20which%20was%20%241%2C000%20more%20than%20the%20allotment> [<https://perma.cc/J9VH-9SQB>] (stating first overall pick this coming year can earn signing bonus just over \$8.4 million).

31. See Pannullo, *supra* note 27, at 447–48 (2020) (“The median signing bonus for players drafted in 2016, however, was \$50,000, with over forty percent of players earning less than \$10,000 and twenty percent earning less than \$1,000.”).

32. See *id.* at 450 (finding the players attempted to form union in 1885, 1914, 1946, and succeeded in forming one in 1966).

33. See *id.* (“Within his first eight years as head of the MLBPA, Miller helped the players achieve groundbreaking goals, including league minimum salaries, an arbitration process for grievances, and unrestricted free agency for players.”).

34. See *id.* at 451 (finding MLBPA has no duty to represent minor league players because they are not in MLBPA unit).

35. See Garrett R. Broshuis, *Touching Baseball's Untouchables: The Effects on Minor League Baseball Players*, 4 HARV. J. SPORTS & ENT. L. 51, 55 (2013) (“In fact, the two most recent CBAs have established a disturbing trend in which the MLBPA concedes a bargaining chip with negative effects for minor leaguers in order to achieve something positive for major leaguers.”).

36. See Bill Shaikin, *Minor League Baseball Players Exploring Union as They Continue to Battle Low Wages*, LOS ANGELES TIMES (Sept. 15, 2018), <https://www.latimes.com/sports/mlb/la-sp-mlb-column-20180915-story.html> [<https://web.archive.org/web/20220331020055/https://www.latimes.com/sports/mlb/la-sp-mlb-column-20180915-story.html>] (discussing MLBPA viewpoint that minor league player negotiations subtract from whole pie major league players can take from).

## B. Venture Capital in Sports Contracts

To combat the smaller income of many minor league players, some players turn to venture capitalists.<sup>37</sup> Baseball is not the first sport to experience investment contracts for future return on up-front investments on its athletes.<sup>38</sup> Golfers, tennis players, and poker players have signed these agreements as a way to jumpstart their training and careers.<sup>39</sup> For example, in poker, players get backers to put up their entrance fee, and then backers receive a portion of the poker player's winnings.<sup>40</sup> Additionally, golf and tennis players have to pay lofty entrance fees and yearly travel fees, so they similarly encourage investors to foot the bill and receive part of the players' winnings in return.<sup>41</sup> However, baseball was not privy to such agreements until 2008.<sup>42</sup> The first attempt at creating future income agreements looked substantially similar to a stock exchange where one could purchase a share in the athlete's "stock" for the ability to retain a certain percentage of their future income.<sup>43</sup>

Since 2007, multiple types of income-sharing agreement companies have formed specific to baseball.<sup>44</sup> The first type of income-sharing agreement acts like a stock exchange, where an Initial Public Offering ("IPO") occurs, and the price can fluctuate throughout

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37. For further discussion of baseball players who entered into these types of contracts see *infra* notes 102–112 and accompanying text.

38. See Jeff Schwartz, *The Corporatization of Personhood*, 2015 U. ILL. L. REV. 1119, 1128 (2015) (stating equity investment is more prominent in sports than any other sector).

39. See *id.* ("Junior golfers and tennis players . . . have been known to accept money from investors in exchange for a share in their future earnings. Poker players have similar arrangements; investors may provide all or part of the entry fee for a specific tournament in exchange for a share of the prize money.").

40. See Alexandra Berzon, *Full House: \$1 Million Hold 'Em Ante*, WALL ST. J. (June 30, 2012), <https://www.wsj.com/articles/SB10001424052702304830704577496963159635408> [<https://perma.cc/6XC5-ZLGY>] (discussing poker players using investors to pay \$1 million entrance fee for poker tournament).

41. See Roy Furchgott, *For Sports Investors, Dividends May Be Ringside Seats*, N.Y. TIMES (Dec. 29, 1996), <https://www.nytimes.com/1996/12/29/business/for-sports-investors-dividends-may-be-ringside-seats.html> [<https://perma.cc/TAU7-SB7D>] ("Professional golfers need about \$75,000 a year to travel and play in tournaments; bowlers require \$30,000 to \$45,000. Tennis players need about \$70,000 for travel, tournament costs and outlays for coaches.").

42. See Schwartz, *supra* note 38, at 1128 (finding Randy Newsom's 2008 contract was first equity contract signed by baseball player).

43. See *id.* ("On his website, Real Sports Investments, he attempted to raise \$50,000 by selling 2500 shares of himself for \$20 apiece. Each share would entitle the holder to 0.002% of his pay should he make it to the major league.").

44. For further discussion of companies involved in income sharing agreements, see *infra* notes 45–55 and accompanying text.

the player's career.<sup>45</sup> These funds operate similarly to the stock exchange for companies, the difference being that the stock represents an individual's potential income, not a company's potential profitability.<sup>46</sup> Another type of income-sharing agreement is formed when players pool together, allowing many minor league players to receive a future portion of their pool-mate's earnings if they make it professionally.<sup>47</sup> Finally, hedge fund-type companies have invested in particular players in exchange for a portion of their future earnings.<sup>48</sup>

One of the more prominent investment companies in Minor League Baseball is Big League Advance, LLC ("BLA").<sup>49</sup> In 2016, BLA was formed by a former Major League player, Michael Schwimer.<sup>50</sup> BLA uses analytics to determine the best players to invest in and "[p]layers choose what percentage of their future career earnings they want to give Big League Advance."<sup>51</sup> In exchange, BLA gives the player an upfront lump sum of money that players may utilize at their discretion.<sup>52</sup> Players have no obligation to pay anything back to BLA unless they make it to the major

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45. See Nicole Medeiros, Note, *From Sports Stadiums to the Stock Exchange: The Economic Agency Costs of Fantex's Income-Share Agreements with Professional Athletes*, 13 HASTINGS BUS. L.J. 373, 374 (2015) (reviewing Fantex's success in securing professional athletes and launching their IPOs on their exchange).

46. See Jason Fernando, *Initial Public Offering (IPO)*, INVESTOPEDIA (Nov. 30, 2021), <https://www.investopedia.com/terms/i/ipo.asp> [<https://perma.cc/GXC5-X693>] (describing how SEC regulates IPOs, with IPO being offered to be part owner of business, allowing company to receive funds in exchange for ownership stake).

47. See Tom Goldman & Kenny Malone, *Some Baseball Players Are Entering 'Income Pooling' Agreements To Fix Imbalance*, NAT'L PUB. RADIO (Oct. 25, 2019), <https://www.npr.org/2019/10/25/773532516/some-baseball-players-are-entering-income-pooling-agreements-to-fix-imbalance> [<https://perma.cc/426K-6YED>] ("Nobody has to pay a cent until they've made it to the majors and they've made \$1.6 million. Then that guy has to kick 10% of his salary back to his pool mates.").

48. See *Player Investment*, BIG LEAGUE ADVANCE, <https://bigleagueadvance.com/minor-league-player-investment/> [<https://perma.cc/T5DM-VYMH>] (last visited Feb. 8, 2022) (discussing BLA's purpose in providing minor league baseball players with money to pursue their dream).

49. See Elizabeth Strom, *Big League Advance "Invests" in Prospects. Some Find That Problematic.*, SBNATION DRAYS BAY (Sept. 3, 2018), <https://www.draysbay.com/2018/9/3/17814788/big-league-advance-invests-in-prospects-some-find-that-problematic> [<https://perma.cc/8UNE-6GN5>] ("BLA seems to be the first to specialize in minor league baseball players.").

50. See *Player Investment*, *supra* note 48 (showing BLA has several members on staff, including owner, who played minor league baseball or worked in baseball).

51. See *id.* (discussing BLA use of analytics to find players).

52. See *id.* ("Players receive an upfront investment from Big League Advance in exchange for an agreed upon percentage of their future Major League earnings.").

leagues.<sup>53</sup> BLA operates with the expectation that most of their investments will not come to fruition, but its hope is that one or two players sign a multi-million dollar major league contract which will more than make up for the losses on its other investments.<sup>54</sup> When a player does make it to the professional level, BLA expects immediate payment.<sup>55</sup>

### C. Relevant Laws

#### 1. *Hedge Fund Laws*

Hedge funds are an investment tool used by wealthy individuals that can be regulated by the Securities Exchange Commission (“SEC”).<sup>56</sup> A hedge fund is an investment instrument where investors pool their money together, and a fund manager directs the investment money into high-return investments.<sup>57</sup> These funds provide more freedom to invest aggressively and more diversely than other fund options.<sup>58</sup> Hedge funds can bypass a lot of government oversight if they fall outside of the Investment Company Act of 1940 (“ICA”).<sup>59</sup> The ICA restricts the types of investments that a fund can make, so it is paramount for hedge funds’ success to avoid falling under this law—otherwise, any MLBPA’s hedge fund would have to comply with the ICA’s restrictions.<sup>60</sup>

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53. *See id.* (stating players who do not reach professional levels do not owe any money to fund).

54. *See id.* (“[W]e expect that we will lose money on the vast majority of players we sign. It is extremely difficult to predict which minor league players will end up becoming successful Major League players. More than 90% of minor league players will never play a single day in the Major Leagues. Even top ranked prospects have a hard time making it to the Major Leagues. To illustrate that point, from 2009–2013, 54 players that were ranked as a team’s #1 or #2 prospect, AND were top 100 overall prospects, are either out of baseball or unlikely to make it to arbitration.”).

55. *See* Complaint at 4, *Mejía v. Big League Advance Fund I LP*, No. 1:18-cv-00296 (D. Del. Aug. 31, 2018) (stating BLA representative showed up at Mejía’s home in Dominican Republic expecting payment on Mejía’s professional salary).

56. For further discussion of the laws impacting hedge funds, see *infra* notes 57–68 and accompanying text.

57. *See* Sham Gad, *Guide to Hedge Funds*, INVESTOPEDIA (Apr. 4, 2021), <https://www.investopedia.com/articles/investing/102113/what-are-hedge-funds.asp> [<https://perma.cc/3AMT-5KPB>] (stating hedge fund is just investors bringing their money together in order to invest funds from common pool of money).

58. *See id.* (“A hedge fund is just a fancy name for an investment partnership that has freer rein to invest aggressively and in a wider variety of financial products than most mutual funds.”).

59. *See* 15 U.S.C.S. §§ 80a-1–(b)(8) (LexisNexis 2018) (directing SEC to regulate companies that put themselves out as companies that invest, reinvest, or trade in securities).

60. *See id.* (stating ICA places restrictions on what investments companies can make).

Hedge funds are usually exempt from coverage under the ICA when they have less than one hundred beneficial owners and they only offer their securities to private investors.<sup>61</sup> Another way hedge funds can ensure they do not fall under the ICA is if their investors are all qualified purchasers or institutions.<sup>62</sup> When hedge funds are not covered under the ICA, they can invest in a larger variety of types of investments.<sup>63</sup> It also allows them to forego compliance with regulatory compliance requirements with the SEC.<sup>64</sup>

The Investment Advisors Act of 1940 (“IAA”), created additional restrictions on registration with the SEC for the investor of a fund.<sup>65</sup> The IAA outlines which advisers need to be registered with states.<sup>66</sup> It also outlines which advisers need to be registered with the SEC.<sup>67</sup> This is based on the asset levels included in the fund and could produce additional restrictions and regulatory burdens for the advisers that qualify under this law.<sup>68</sup>

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61. *See id.* § 80a-3(c)(1) (“Any issuer whose outstanding securities (other than short-term paper) are beneficially owned by not more than one hundred persons (or, in the case of a qualifying venture capital fund, 250 persons) and which is not making and does not presently propose to make a public offering of its securities.”).

62. *See id.* § 80a-3(c)(7)(A) (“Any issuer, the outstanding securities of which are owned exclusively by persons who, at the time of acquisition of such securities, are qualified purchasers, and which is not making and does not at that time propose to make a public offering of such securities. Securities that are owned by persons who received the securities from a qualified purchaser as a gift or bequest, or in a case in which the transfer was caused by legal separation, divorce, death, or other involuntary event, shall be deemed to be owned by a qualified purchaser, subject to such rules, regulations, and orders as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors.”).

63. *See* Gad, *supra* note 57 (explaining hedge funds are able to invest in different types of assets than mutual funds).

64. *See* Goldstein v. S.E.C., 451 F.3d 873, 875 (D.C. Cir. 2006) (“Such companies are, for example, foreclosed from trading on margin or engaging in short sales, 15 U.S.C. § 80a-12(a)(1), (3), and must secure shareholder approval to take on significant debt or invest in certain types of assets, such as real estate or commodities, *id.* § 80a-13(a)(2). These transactions are all core elements of most hedge funds’ trading strategies.” (internal citation omitted)).

65. *See* 15 U.S.C.A. § 80b-3a (West 2019) (outlining requirements creating duty to register for adviser).

66. *See id.* § 80b-3a(a)(1)(A)-(B) (prohibiting advisers from registering under 80b-3 unless they have at least \$25 million in assets or amount deemed appropriate).

67. *See id.* § 80b-3a(b) (describing which advisers this regulation applies to).

68. *See* Andriy Blokhin, *Are Hedge Funds Registered with the Securities and Exchange Commission (SEC)*, INVESTOPEDIA (Apr. 24, 2021), <https://www.investopedia.com/ask/answers/101415/are-hedge-funds-registered-securities-and-exchange-commission-sec.asp#:~:text=hedge%20funds%20are%20typically%20required%20to%20register%20with,limit%20is%20raised%20to%20%24150%20million%201%20%EF%BB%BF> [https://perma.cc/NR8S-VYWJ] (outlining specific asset levels triggering additional oversight from state, federal agencies for adviser).

## 2. *The Use of Pension Fund Monies*

Pension funds, seek ways to receive a return on the monies provided by those covered by the fund.<sup>69</sup> A pension plan is a retirement instrument that provides retirees a fixed income for life, and is administered by a business or labor union.<sup>70</sup> The body responsible for administering the pension plan, called the plan fiduciary, is responsible for managing the plan's investments.<sup>71</sup> These plans are set up to vest after a certain amount of time.<sup>72</sup> They base the payment in the plan off of service time, age at retirement, and the amount of compensation received.<sup>73</sup>

Fiduciaries are required to comply with the responsibilities of fiduciaries laid out in trust law, and therefore can be held personally responsible for investments that do not pass the required tests.<sup>74</sup> The Supreme Court has noted “[a]n ERISA fiduciary must discharge his responsibility ‘with the care, skill, prudence, and diligence’ that a prudent person ‘acting in a like capacity and familiar with such matters’ would use.”<sup>75</sup> This means prudent investments must be made in the context of the whole portfolio and done with “reasonable care, skill, and caution.”<sup>76</sup> One particularly important

69. For further discussion of the laws impacting the use of pension fund monies, see *infra* notes 70–78 and accompanying text.

70. See Dana Anspach, *What is a Pension?*, BALANCE (Jan. 22, 2022), [https://www.thebalance.com/what-is-a-pension-and-how-do-you-get-one-2388766#:~:text=key%20Takeaways%201%20A%20pension%20is%20a%20retirement,compensation%2C%20and%20age%20at%20retirement.%20More%20items.%20.%20\[https://perma.cc/4BLS-KZ48\]](https://www.thebalance.com/what-is-a-pension-and-how-do-you-get-one-2388766#:~:text=key%20Takeaways%201%20A%20pension%20is%20a%20retirement,compensation%2C%20and%20age%20at%20retirement.%20More%20items.%20.%20[https://perma.cc/4BLS-KZ48]) (explaining pensions are set up and run by employers).

71. See *id.* (stating whoever runs plan funds also manages benefits), see also *Tibble v. Edison Int'l*, 575 U.S. 523, 528 (2015) (finding law of trusts is source for determining ERISA fiduciary's requirements).

72. See 29 U.S.C.A. § 1002(21)(A) (West 2019) (“[A] person is a fiduciary with respect to a plan to the extent (i) he exercises any discretionary authority or discretionary control respecting management of such plan or exercises any authority or control respecting management or disposition of its assets, (ii) he renders investment advice for a fee or other compensation, direct or indirect, with respect to any moneys or other property of such plan, or has any authority or responsibility to do so, or (iii) he has any discretionary authority or discretionary responsibility in the administration of such plan.”).

73. See Anspach, *supra* note 70 (describing elements used to determine eligibility).

74. See *Fiduciary Responsibilities*, U.S. DEP'T OF LAB., <https://www.dol.gov/general/topic/health-plans/fiduciaryresp> [https://perma.cc/QUA9-DP5R] (last visited Jan. 14, 2021) (“Fiduciaries who do not follow these principles of conduct may be personally liable to restore any losses to the plan, or to restore any profits made through improper use of plan assets.”).

75. See *id.* (quoting 29 U.S.C.S. § 1104 (LexisNexis 2021)) (clarifying fiduciaries' duty to reevaluate funds composition).

76. See RESTATEMENT (THIRD) OF TRUSTS § 90(a) (Am. L. Inst. 2007) (stating investment decision should reflect trusts overall strategy).

rule is the “exclusive benefit rule.”<sup>77</sup> Under an ERISA pension plan, “[t]he fiduciary ‘shall discharge his duties with respect to a plan solely in the interest of the beneficiaries and . . . for the exclusive purpose of . . . providing benefits to participants and their beneficiaries.’”<sup>78</sup>

### 3. *Union Dues*

Another area in which the MLB can get involved in minor league players’ financial situation is through union dues, which unions receive from their members and which helps the union conduct its business.<sup>79</sup> Members of a union are supposed to pay union dues.<sup>80</sup> Union dues go towards much of the administrative costs of running a union and paying these helps ensure the union can function as an entity.<sup>81</sup> The dues are usually a fraction of the total wages made or a set monthly rate.<sup>82</sup> The business can set aside the percent of the wage that goes to union dues, or the employee must pay their monthly fee.<sup>83</sup>

However, union dues, restrictions, and disclosure requirements can be regulated heavily.<sup>84</sup> Federal laws, state laws, and opinions from the court direct this area of the law.<sup>85</sup> The National Labor Relations Act is the primary federal law that affects this area.<sup>86</sup> The Supreme Court has also weighed in on which activities

77. See Daniel Fischel & John H. Langbein, *ERISA’s Fundamental Contradiction: The Exclusive Benefit Rule*, 55 U. CHI. L. REV. 1105, 1107 (discussing major flaws of this rule, including how it impacts fiduciaries’ abilities to invest pension funds).

78. See *id.* at 1109 (outlining requirement for fiduciaries).

79. For further discussion of the laws impacting the use of union dues, see *infra* 80–87 and accompanying text.

80. See Megan McRobert, *Union Dues Explained*, UNIT. (Mar. 3, 2021), <https://guide.unitworkers.com/union-dues-explained/> [<https://perma.cc/X6BD-D82R>] (explaining members of union pay dues regularly for being member).

81. See *id.* (describing some activities union dues get paid for).

82. See *id.* (explaining percentage break-down for certain unions dues).

83. See *id.* (noting some unions’ methods for calculating union dues).

84. See *Union dues*, NAT’L LAB. RELATIONS BD., <https://www.nlr.gov/about-nlr/rb/rights-we-protect/the-law/employees/union-dues> [<https://perma.cc/QAV5-C5VL>] (last visited Sept. 23, 2021) (“Federal law allows unions and employers to enter into ‘union-security’ agreements which require all employees in a bargaining unit to become union members and begin paying union dues and fees within 30 days of being hired . . . . If you work in a state that bans union-security agreements, (27 states), each employee at a workplace must decide whether or not to join the union and pay dues, even though all workers are protected by the collective bargaining agreement negotiated by the union.”).

85. See *id.* (stating collection of union dues are subject to federal laws, state laws, court rulings).

86. See Harry Hutchinson, *Reclaiming The Labor Movement Through Union Dues? A Postmodern Perspective In The Mirror Of Public Choice Theory*, 33 U. MICH. J.L. REFORM 447, 456 (2000) (“On the other hand, despite this decision, employee Beck

a union can use their members' dues, narrowly construing union dues as designated for activities "necessary to 'performing the duties of an exclusive representative of the employees in dealing with the employer on labor-management issues.'"<sup>87</sup>

#### D. Prominent Income-sharing Contracts

Several well-known American professional athletes have signed some type of income-sharing contract.<sup>88</sup> Most of these players are in the NFL and MLB, and they are primarily involved in venture capital and stock exchange-type funds.<sup>89</sup> This section provides examples of income-sharing contracts held by well-known players, in both the NFL and the MLB.<sup>90</sup>

##### 1. NFL Contracts

Several football players have signed contracts that provide a share of their income to investors.<sup>91</sup> Two players of note are Vernon Davis, who played for the San Francisco 49ers when he signed his investment-sharing deal, and Kendall Wright, who played for the Tennessee Titans when he signed his own deal.<sup>92</sup> Vernon

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rights have not been enforced uniformly by the National Labor Relations Board (NLRB) or the President of the United States.”).

87. See *Comm’n Workers of Am. v. Beck*, 487 U.S. 735, 739 (1988) (reviewing union’s use of nonunion employees’ dues for activities not connected to collective bargaining); see also *id.* at 762-63 (quoting *Ellis v. Brotherhood of Ry.*, 466 U.S. 435, 448 (1984)) (restricting union dues collected or expended to those activities used exclusively for bargaining activities).

88. See Jordan Moore, *Human Capital Equity Returns: Evidence from the National Football League*, SSRN (Apr. 26, 2020), <https://ssrn.com/abstract=3587424> [<https://perma.cc/T2CG-JRD7>] (“Between April 2014 and April 2016, in which ten active players in the National Football League (NFL) [sold] equity claims to their future labor income.”); see also Blum, *supra* note 17 (discussing how Tatis Jr. is son of former baseball player while explaining how he will pay BLA portion of his salary).

89. See Moore, *supra* note 88, at 1 (“The proceeds from the [IPOs of these equity] contracts total more than \$38 million and value the human capital of these athletes at more than \$357 million.”); see also Blum, *supra* note 17 (stating BLA has signed many players who have yet to make MLB roster).

90. For further discussion of the NFL players with these contracts, see *infra* notes 91–101 and accompanying text.

91. See Moore, *supra* note 88, at 2 (“Between April 2014 and April 2016, six active players in the National Football League (NFL) sold equity claims on a percentage of their future labor income to Fantex, a private firm.”).

92. See Tom Zanki, *Fantex Primes 6th Football Player Brand’s \$2.7M IPO*, LAW360 (June 24, 2015), <https://www.law360.com/articles/671903/fantex-primes-6th-football-player-brand-s-2-7m-ipo> [<https://perma.cc/9AKM-WQCA>] (discussing major offerings, including Vernon Davis, E.J. Manuel, Mohamed Sanu, Alshon Jeffery, and Michael Brockers); see also Complaint at 3, *Fantex, Inc. v. Wright*, CGC-18-56355U (Cal. Super. Ct. Sept. 6, 2018) (“Under the Brand Agreement entered into between Fantex and Wright . . . Fantex purchased an interest in . . . Wright’s

Davis is one of the few players who has spoken about his deal with Fantex, LLC (“Fantex”), which makes IPO-style investments for players’ future income.<sup>93</sup> The details of Vernon Davis’s income-sharing agreement were revealed when Davis spoke about his contract with Fantex.<sup>94</sup> Davis revealed that he signed away ten percent of his future earnings in exchange for a \$4 million IPO.<sup>95</sup> His deal with Fantex stipulated that he would provide Fantex with a portion of the income he received from his players contract and other incomes including “corporate endorsements and appearance fees . . . .”<sup>96</sup>

A less rosy example can be seen with Kendall Wright, who was sued by Fantex for not paying his share of the income agreement that he signed with the company.<sup>97</sup> Kendall Wright’s contract, on the other hand, was only revealed after he was sued by Fantex.<sup>98</sup> The lawsuit came after Wright attempted to forego payment of Fantex’s apportionment of his income.<sup>99</sup> Wright’s contract provided him with \$3.1 million upfront for ten percent of his future earnings.<sup>100</sup> The court upheld the validity of the income-sharing

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‘Brand Income’ consisting of ‘Gross Monies’ payable to Wright as a result of his activated in the ‘Field’ . . . .”).

93. See William Alden, *Vernon Davis Breaks His Silence Over Fantex I.P.O.*, N.Y. TIMES (June 4, 2014), <https://dealbook.nytimes.com/2014/06/04/vernon-davis-breaks-his-silence-over-fantex-i-p-o/?mtrref=search.yahoo.com&gwh=C7479C194D417E208D54C93DD88342A6&gwt=regi&assetType=REGIWALL> [http://web.archive.org/web/20220331141253/https://dealbook.nytimes.com/2014/06/04/vernon-davis-breaks-his-silence-over-fantex-i-p-o/?mtrref=search.yahoo.com&gwh=C7479C194D417E208D54C93DD88342A6&gwt=regi&assetType=REGIWALL] (discussing SEC requirement stopped Vernon Davis from commenting on IPO). For further discussion of an IPO, see *supra* note 46 and accompanying text.

94. See Medeiros, *supra* note 45, at 378 (analyzing how Fantex pays players in exchange for future stake in their lifetime earnings).

95. See Alden, *supra* note 93 (“Mr. Davis received \$4 million through the I.P.O., which sold 421,100 shares and raised \$4.2 million from investors.”). For further discussion of an IPO, see *supra* note 46 and accompanying text.

96. See Alden, *supra* note 93 (discussing deal did not include income unrelated to his brand).

97. See Complaint at 3, Fantex, Inc., CGC-18-56355U (“Wright is obligated to pay the amounts due to Fantex within 15 days after his receipts of such ‘Brand Income’ amounts.”).

98. For further discussion of how the contract was revealed, see *supra* note 97 and accompanying text.

99. See Complaint at 3, Fantex, Inc., CGC-18-56355U (arguing Wright did not uphold his contract by not properly paying Fantex for part of his earnings).

100. See Tim Daniels, *Kendall Wright Ordered to Pay Nearly \$400,000 in Fantex Suit*, BLEACHER REP. (Aug. 18, 2018), <https://bleacherreport.com/articles/2791557-kendall-wright-ordered-to-pay-nearly-400000-in-fantex-suit> [https://perma.cc/LA2R-745F] (“Fantex . . . filed a successful lawsuit alleging Wright failed

contract and required Wright to pay the balance of what he owed to Fantex.<sup>101</sup>

## 2. *MLB Contracts*

The more famous agreements that have been made in professional baseball that involve an income-sharing agreement include the agreement signed by Fernando Tatís Jr. of the San Diego Padres and the agreement signed by Francisco Mejía, who currently plays for the Tampa Bay Rays.<sup>102</sup> Both of these agreements were signed with BLA, but they have made headlines for different reasons.<sup>103</sup> Tatís Jr. signed his agreement with BLA to help pay for significant expenses he thought necessary for future success in the major leagues, such as nutritionists and personal trainers.<sup>104</sup> Like all BLA agreements, his contract is subject to privacy provisions, making it difficult to know precisely how much of his new contract is earmarked for BLA.<sup>105</sup>

Another well-known BLA contract is known for more infamous and controversial reasons.<sup>106</sup> Francisco Mejía is currently a catcher with the Tampa Bay Rays.<sup>107</sup> Mejía filed a lawsuit in 2018 against BLA, which the United States District Court for the District of Dela-

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to pay after he agreed to a contract of \$3.1 million for 10 percent of his future earnings.”).

101. See *Fantex, Inc. v. Wright*, 2018 Cal. Super. LEXIS 5206, at 6(a)(6) (Cal. Super. Ct. 2018) (finding in favor of Fantex, awarding damages of \$386,055.83).

102. See Blum, *supra* note 17 (discussing aspects of deal Tatís Jr. signed, including impact of deal for BLA); see also Rick Archer, *MLB Player Says Fund Made ‘Unconscionable’ Loan Deal*, LAW360 (Apr. 13, 2018), <https://www.law360.com/articles/1033493/mlb-player-says-fund-made-unconscionable-loan-deal> [<https://perma.cc/J73E-9RSX>] (discussing details in lawsuit against BLA including arguments raised in complaint); see also *Francisco Mejía*, BASEBALL REFERENCE, <https://www.baseball-reference.com/players/m/mejiafr01.shtml> [<https://perma.cc/6SRR-V34W>] (last visited Aug. 28, 2021) (showing Francisco Mejía playing for Tampa Bay Rays, noting his stats for his career).

103. For further discussion of Mejía’s and Tatís Jr.’s income-sharing contracts, see *infra* notes 104–112 and accompanying text.

104. See Blum, *supra* note 17 (“Tatís Jr. told The Athletic in 2018 he signed the BLA deal at first to afford a personal trainer, higher quality food and better housing.”).

105. See *id.* (discussing how Mejía’s contract became available because of lawsuit he filed against BLA).

106. See Archer, *supra* note 102 (“Cleveland Indians catcher Francisco Mejía, in a Delaware federal court suit claiming an ex-Major Leaguer’s investment fund induced him to sign away more than 10 percent of his lifetime earnings in exchange for a \$360,000 loan, was hit with a counterclaim Thursday claiming his suit breached a confidentiality clause in the agreement.”).

107. See BASEBALL REFERENCE, *supra* note 102 (showing Francisco Mejía playing for Tampa Bay Rays and noting stats for his career).

ware ultimately dismissed with prejudice.<sup>108</sup> However, in the lawsuit, Mejía allegedly “received \$360,000 as part of agreements in which Mejía agreed to repay the company 10% of future earnings.”<sup>109</sup>

Mejía accused BLA of creating an unconscionable contract and targeting players who were comparatively less educated than others.<sup>110</sup> Mejía’s lawsuit alleges BLA approached Mejía when he needed “to pay for medical treatments for his ailing mother.”<sup>111</sup> The suit also alleged a great deal of other issues that are cause for concern, such as the lack of a translator present during the negotiation and conflict of interest issues with BLA’s attorney.<sup>112</sup>

### III. ANALYSIS

Both players and agents have expressed concern over the current system that has allowed for the growth of these income-sharing contracts.<sup>113</sup> MLBPA intervention could potentially bring about significant benefit to the organization.<sup>114</sup> To enjoy those benefits, the MLBPA would need to implement a new plan in accordance with applicable statutory regimes.<sup>115</sup> This section first explores failures of the current system, then explains the benefits to the MLBPA of implementing their own system, and finally provides the MLBPA with potential options for implementing their own fund.<sup>116</sup>

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108. See Order Granting Stipulation of Dismissal, *Mejía v. Big League Advance Fund I LP*, No. 1:18-cv-00296 (D. Del. August 31, 2018), ECF No. 38 (granting BLA’s stipulation for dismissal of lawsuit with prejudice).

109. See *id.* (outlining details of contract Mejía signed).

110. See Complaint at 5, *Mejía*, No. 1:18-cv-00296 (alleging contract was unconscionable because, among other reasons, BLA “[e]xploit[ed] . . . the underprivileged, unsophisticated, uneducated and the illiterate”).

111. *Id.* (complaining Mejía was targeted because his mother needed medical treatments, BLA knew Mejía did not speak any English, and BLA knew Mejía was not highly educated).

112. For further discussion of the issues raised in Mejía’s lawsuit, see *infra* notes 132–137 and accompanying text.

113. For further discussion of the failures of the current system, see *infra* notes 117–137 and accompanying text.

114. For further discussion of the benefits of a new system, see *infra* notes 138–161 and accompanying text.

115. For further discussion of the relevant laws surrounding the MLBPA’s options, see *supra* notes 56–87 and accompanying text.

116. For further discussion of the failures of the current system, see *infra* notes 117–137 and accompanying text. For further discussion of the benefits that could be gained, see *infra* notes 138–161 and accompanying text. For further discussion of the potential options, see *infra* notes 162–206 and accompanying text.

## A. Failures of the Current Income-Sharing System

The two most prominent and significant drawbacks underlying the current system for players to share income are a lack of control and the potential for abuse.<sup>117</sup> Currently, Major League Baseball and the MLBPA have no control over what occurs in this new income-sharing market.<sup>118</sup> This is because these income-sharing businesses do not operate in connection with the players' negotiations of contracts, which is the traditional avenue through which the MLBPA could exert control *vis-à-vis* deciding who could become an agent.<sup>119</sup>

This is particularly problematic because the MLBPA has shown a lack of willingness to leave its control to other entities.<sup>120</sup> Prior to the MLBPA taking control in 1988, agents were left to their own devices.<sup>121</sup> The MLBPA decided to take the opportunity to change the status quo and created restrictions and controls over agents to regulate who could represent players.<sup>122</sup> Therefore, it would not be unprecedented for the MLBPA to exert its sphere of influence over a previously unregulated aspect of the sport.<sup>123</sup> These players are not under the MLBPA's protection as a union, but they are future union members, and at some point would be entitled to the benefit of union representation.<sup>124</sup> As the sole bargaining entity for major league players, the MLBPA has a duty to ensure that its future players are not taken advantage of by harsh business practices.<sup>125</sup> In

117. For further discussion of the failures of the current system, see *infra* notes 118–137 and accompanying text.

118. See Blum, *supra* note 17 (“Entities such as Big League Advance are not granted any bargaining rights, and thus the MLBPA most likely doesn’t have any control over Big League Advance.”).

119. See *id.* (“While they have oversight authority with respect to agents, that is derived from the MLBPA granting certified agents certain rights that the MLBPA has under the CBA, specifically to negotiate individual player contracts.”).

120. See James Masteralexis et al., *Enough is Enough: The Case for Federal Regulation of Sport Agents*, 20 JEFFREY S. MOORAD SPORTS L.J. 69, 94 (2013) (stating major sports leagues regulations are designed to ensure agents are able to competently able to represent players).

121. See *id.* (“The MLBPA Regulations Governing Player Agents were first promulgated in 1988 by the MLBPA’s Executive Board.”).

122. See *id.* at 95 (noting MLBPA required all agents to recertify after major overhaul of regulations in 2010).

123. For further discussion of how the MLB began certifying agents, see *supra* notes 120–122 and accompanying text.

124. For further discussion of MLBPA hesitation towards representing minor league baseball players, see *supra* notes 34–36 and accompanying text.

125. See 2017–2021 MLB-MLBPA COLLECTIVE BARGAINING AGREEMENT, art. II, available at [https://d39ba378-ae47-4003-86d3-147e4fa6e51b.filesusr.com/ugd/b0a4c2\\_95883690627349e0a5203f61b93715b5.pdf](https://d39ba378-ae47-4003-86d3-147e4fa6e51b.filesusr.com/ugd/b0a4c2_95883690627349e0a5203f61b93715b5.pdf) [<https://perma.cc/7NJN-ZH7Y>] (last visited Aug. 27, 2021) (“The Clubs recognize the Association as the

fact, one agent, Scott Boras, counsels his clients to reject any deals offered by these companies.<sup>126</sup> Mr. Boras is additionally attempting to recommend a solution whereby the MLBPA operates and regulates a system similar to that run by outside investment companies.<sup>127</sup>

BLA tends to target foreign players, which intrinsically can lead to some abuse in how income-sharing deals are structured and negotiated.<sup>128</sup> The Mejía lawsuit illustrates how this industry exploits players who are simply attempting to act in their best interests and get a head-start in their professional careers.<sup>129</sup> However, the Mejía case is complicated because Mejía has dropped the suit and recanted what he alleged in the lawsuit.<sup>130</sup> Nonetheless, the documents that have been revealed paint a troubling picture.<sup>131</sup>

In the lawsuit, Mejía made several startling accusations.<sup>132</sup> First, Mejía alleged that no translator was present when reviewing

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sole and exclusive collective bargaining agent for all Major League Players, and individuals who may become Major League Players during the term of this Agreement, with regard to all terms and conditions of employment, provided that an individual Player shall be entitled to negotiate in accordance with the provisions set forth in this Agreement (1) an individual salary over and above the minimum requirements established by this Agreement and (2) Special Covenants to be included in an individual Uniform Player's Contract, which actually or potentially provide additional benefits to the Player.”).

126. See Blum, *supra* note 17 (stating Boras recommends none of his clients sign income equity deal).

127. See *id.* (“Boras has a plan for a model where a player would be able to give up a percentage of income in exchange for upfront money in a plan that would be sent to the players’ association for approval.”).

128. See *id.* (stating BLA particularly looks for Latin American players, then attempts to entice them with cheaper deals, hoping they land at least one of them).

129. See Archer, *supra* note 102 (“The complaint said the fund, founded by Schwimer, makes a practice of approaching ‘young, uneducated and unsophisticated’ minor league prospects with offers of cash advances in exchange for a percentage of future earnings.”).

130. See Jerry Crasnick, *Padres Catcher Francisco Mejía Drops Lawsuit Over Earnings Cut*, ESPN (Aug. 30, 2018), [https://www.espn.com/mlb/story/\\_/id/24523401/padres-catcher-francisco-mejia-drops-lawsuit-disputed-payment](https://www.espn.com/mlb/story/_/id/24523401/padres-catcher-francisco-mejia-drops-lawsuit-disputed-payment) [https://perma.cc/JT34-UXE6] (reviewing Mejía’s statement where he said BLA never “deceived” him).

131. For further discussion of the issues presented at Mejía’s contract negotiation, see *infra* notes 132–137 and accompanying text.

132. See Archer, *supra* note 102 (“The suit claims Mejía — who it said spoke no English at the time, had a ninth-grade education and need for money to pay for medical treatments for his ailing mother — signed three contracts with BLA in the fall and winter of 2016 for escalating amounts of cash and future earnings percentages.”).

the contracts he signed.<sup>133</sup> Second, BLA paid the attorney representing the players at BLA contract signings, creating an inherent conflict of interest.<sup>134</sup> Third, BLA representatives threatened Mejía when he did not pay what he allegedly owed to BLA.<sup>135</sup> The thrust of Mejía's argument was that BLA negotiated and structured an unconscionable contract.<sup>136</sup> Together, these allegations highlight a significant prospect of abuse by these companies in how they approach these players.<sup>137</sup>

### B. Benefits of Implementing an Income-Sharing System

The MLBPA could seize numerous benefits by taking control over this new industry.<sup>138</sup> Control is one of the most important factors in any business.<sup>139</sup> Whenever a company has a position, it can influence what the industry standard will be.<sup>140</sup> By influencing control over the industry, the MLBPA could help increase the bare requirements that each contract would require.<sup>141</sup> By raising the standards within their business, minor league players would likely feel more comfortable, protected, and represented in considering

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133. See Complaint ¶ 19, *Francisco Mejía v. Big League Advance Fund I, L.P.*, No. 1:18-cv-00296 (D. Del. Feb. 21, 2018) (complaining interpreter was not there when deal was signed).

134. See *id.* ¶ 20 (“On information and belief, BLA hired and paid for an attorney to ‘represent’ Plaintiff; however, this lawyer served as BLA’s lawyer, not Plaintiff’s.”).

135. See *id.* ¶ 21 (complaining BLA threatened legal action against Mejía, BLA also threatened to stop him from playing baseball again if he did not pay them).

136. See *id.* ¶ 23–26 (“BLA representatives threatened to sue Plaintiff and prevent him from playing baseball if he did not pay under the contract. BLA representatives also attempted to have Plaintiff give up even more of his earnings for more money, but he refused.”).

137. For further discussion of claims raised in the complaint, see *supra* notes 132–136 and accompanying text.

138. For further discussion of the potential benefits that could be realized by the MLBPA, see *infra* notes 139–161 and accompanying text.

139. See James Chen, *Corporate Governance*, INVESTOPEDIA (July 4, 2021), <https://www.investopedia.com/terms/c/corporategovernance.asp> [<https://perma.cc/FDC6-TDEV>] (“Corporate governance is the structure of rules, practices, and processes used to direct and manage a company.”).

140. See *What Is the Relevance of “Industry Standards” Under the Law?*, HG, <https://www.hg.org/legal-articles/what-is-the-relevance-of-industry-standards-under-the-law-36794> [<https://perma.cc/3T7W-8UY7>] (last visited Sept. 22, 2021) (“It creates a means to communicate simply and concisely, and allows those within the industry to develop goals both internally and with their business trading partners.”).

141. See *id.* (discussing importance of industry standards, including how they send signals to market); see also Chen, *supra* note 139 (discussing how corporate governance is controlling factor for businesses operations). For further description of the issues found in the current system because of a lack of control, see *supra* notes 120–127 and accompanying text.

income-sharing agreements without threat of exploitation.<sup>142</sup> Additionally, implementing its own income-sharing system would leave the MLBPA better positioned to protect its future members.<sup>143</sup> While the MLBPA does not know if every person who receives a new contract will be its prospective member of the association, it is still advantageous for minor leaguers to experience competition in the industry which will lead to improved contract terms.<sup>144</sup> The protections given through operating its own business, such as ensuring players are adequately represented during the negotiation, can offset some of the fears.<sup>145</sup> While the MLBPA's company will not be giving money away for free, it can ensure the market is competitive to ensure players receive more for less.<sup>146</sup>

Another benefit that MLBPA could receive from implementing a plan would be improving the growth of the sport.<sup>147</sup> Helping provide minor league players with a more significant source of income so they do not live in terrible conditions can only further benefit the sport.<sup>148</sup> The MLBPA's decision to not collectively bargain for and represent minor league players has left some players facing harsh working and living conditions.<sup>149</sup> Moreover, minor leaguers'

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142. See Kevin Kerridge, *5 Factors That Cause Customers to Leave Your Business (And How to Stop Them)*, INC., <https://www.inc.com/kevin-kerridge/switcher-psychology-how-to-gain-customers-from-competitors-while-keeping-your-own.html> [<http://web.archive.org/web/20220331141816/https://www.inc.com/kevin-kerridge/switcher-psychology-how-to-gain-customers-from-competitors-while-keeping-your-own.html>] (last visited Mar. 10, 2022) (discussing factors influencing customers to switch businesses).

143. For further discussion of how the MLBPA does not represent minor league baseball players, see *supra* notes 34–36 and accompanying text.

144. See Umberto Fedeli, *Three Strategic Ways Businesses Compete*, SMART BUS. (Sept. 1, 2016), <https://www.sbnonline.com/article/three-strategic-ways-businesses-compete/> [<https://perma.cc/8KJM-U3N8>] (finding “customer service,” “innovation,” “best price, best value, [and] low cost” are important ways businesses compete). For further discussion of concerns over how players are being treated, see *supra* notes 128–137 and accompanying text.

145. For further discussion of the allegations in the complaint, see *supra* notes 128–137 and accompanying text.

146. See Jason Saltzman, *Why Competition is Good*, ENTREPRENEUR (Oct. 28, 2014), <https://www.entrepreneur.com/article/239043> [<https://perma.cc/5EWJ-ZD5P>] (stating competition is good because it creates better product in long run).

147. For further discussion of how growth could occur, see *infra* notes 148–153 and accompanying text.

148. See Dirk Hayhurst, *An Inside Look into the Harsh Conditions of Minor League Baseball*, BLEACHER REP. (May 14, 2014), <https://bleacherreport.com/articles/2062307-an-inside-look-into-the-harsh-conditions-of-minor-league-baseball> [<https://perma.cc/A8NN-65MC>] (discussing conditions endured by one minor league baseball player stating his monthly pay was as low as \$300 per month after “housing, taxes, clubhouse dues and insurance were taken out . . .”).

149. See Pannullo, *supra* note 27, at 444 (“Although minor leaguers are not—and never have been—part of the MLBPA bargaining unit . . .”).

low wages compared to their major league counterparts have not helped provide these players a steady, strong, or reliable source of income.<sup>150</sup> However, by creating new competition in this industry, the MLBPA could help younger, ambitious players receive the money they need to succeed in reaching the major leagues.<sup>151</sup> MLBPA intervention would also directly benefit the players in receiving more favorable contract terms.<sup>152</sup> This would help the future of the sport as these players could experience an improvement in their overall working conditions.<sup>153</sup>

One additional benefit of the MLBPA stepping up to the plate would be creating a new source of income for older players either through the use of pension monies or the players themselves investing into a hedge fund.<sup>154</sup> These players would receive new diversified investments with a return that has been shown possible in a different context.<sup>155</sup> By providing a new investment instrument for current players and former players, they will be able to invest their monies and see that return.<sup>156</sup> Either way, MLBPA intervention would provide financial security and economic certainty to both

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150. See *MLB Raising Minimum Salary for Minor Leaguers in 2021*, APNEWS (Feb. 14, 2020), [https://www.espn.com/mlb/story/\\_/id/28702734/mlb-raising-minimum-salary-minor-leaguers-2021](https://www.espn.com/mlb/story/_/id/28702734/mlb-raising-minimum-salary-minor-leaguers-2021) [<https://perma.cc/44N7-8N9S>] (laying out minimum pay for each level of minor league baseball was Rookie ball at \$400 per-week, single-A at \$500 per-week, double-A \$600 per-week, and Triple-A \$700 per-week while explaining minor league players are paid for five months of year).

151. See Rosenthal, *supra* note 9 (“He said after signing with BLA that he wanted to hire a personal trainer, eat better food and get a better apartment. He used the money to upgrade not only his training regimen in the U.S., but also his offseason practice field in his native Dominican Republic.”).

152. See Blum, *supra* note 17 (stating system could be implemented where cost to player is limited through loan based repayment).

153. See Pat O’Donnell, *The Effect of Income and Working Conditions on Job Satisfaction*, THE COLL. OF N.J. 1, 5 (May 18, 2015) (“Clark (1996) also found that overall job satisfaction included every variable used in the study, and found that income is correlated with overall job satisfaction.”); see also Jack Harris, *One Pitcher Fights for a Better Life for Fellow Angels Minor Leaguers. It’s Working*, L.A. TIMES (Sept. 15, 2021), <https://www.latimes.com/sports/angels/story/2021-09-15/angels-minor-leagues-kieran-lovegrove-players-living-conditions> [<http://web.archive.org/web/20220331142315/https://www.latimes.com/sports/angels/story/2021-09-15/angels-minor-leagues-kieran-lovegrove-players-living-conditions>] (stating minor league players often live paycheck to paycheck because of low pay they receive).

154. See Brian Barnier, *Hedge Fund*, INVESTOPEDIA (Sept. 4, 2021), <https://www.investopedia.com/terms/h/hedgefund.asp> [<https://perma.cc/65RW-R2KW>] (“Hedge funds aim for the greatest possible returns and take the greatest risks while trying to achieve them.”).

155. See Moore, *supra* note 88 (discussing potential return on investment from agreements comparable to what BLA does).

156. For further discussion of how a new investment instrument could be created, see *infra* notes 162–179 and accompanying text.

more established major league players and younger minor league players.<sup>157</sup>

These benefits show why the MLBPA should look towards creating a system analogous to that gaining popularity throughout the sports world, but with more constraints and direct regulation.<sup>158</sup> By acting now, the MLBPA could help not only its current members, but its future members as well.<sup>159</sup> They can help secure the game's future through an action other than collectively bargaining on behalf of minor league players.<sup>160</sup> Most importantly, they could exert their control over the industry to improve the conditions in this expanding market.<sup>161</sup>

### C. The MLBPA's Potential Options

For the MLBPA to compete with already-existing funds, the MLBPA would need to maintain compliance with applicable laws and regulations and establish terms that reasonably and meaningfully compete with these businesses.<sup>162</sup> The MLBPA could create its own company or institute a subsidiary of the MLB, like MLB Players, Inc.<sup>163</sup> The MLBPA would also receive several benefits from

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157. For further discussion of the logic on why MLBPA intervention would make players more secure, see *supra* notes 154–156 and accompanying text.

158. For further discussion of both the shortcomings of the MLBPA's current position on income-sharing contracts and the benefits of MLBPA intervention in this growing trend, see *supra* notes 117–157 and accompanying text.

159. For further discussion of the ability of the MLBPA to help minor league players, see *supra* notes 147–153 and accompanying text. For further discussion of the MLBPA excluding the same minor leaguers from current representation who will be their future members, see *supra* notes 34–36 and accompanying text.

160. For further discussion of how minor league players' interests are not represented by the MLBPA, see *supra* notes 34–36 and accompanying text.

161. For further discussion of controlling such a business and how that would allow the MLBPA to impact how the sector operates, see *supra* notes 138–146 and accompanying text.

162. See Cheryl Conner, *The '8 Great' Challenges Every Business Faces (And How To Master Them All)*, FORBES (Mar. 4, 2013), <https://www.forbes.com/sites/cheryl-snappconner/2013/03/04/the-8-great-challenges-every-business-faces-and-how-to-master-them-all/?sh=6de359183891> [<https://perma.cc/L3BZ-LFLH>] (stating businesses need to understand regulations impacting them in order to compete).

163. See, e.g., *MLB Players, Inc.*, MLB PLAYERS, <https://www.mlbplayers.com/mlbpi> [<https://perma.cc/PY9L-PRE3>] (last visited Jan. 5, 2022) (“MLB Players, Inc. is the for-profit corporate subsidiary of the Players Association. It is charged with managing all commercial activities of the organization.”). For further discussion of potential options for the MLBPA to create its own company, see *infra* notes 172–179 and accompanying text.

implementing such a business, and those benefits would pass on to its members.<sup>164</sup>

The MLBPA would need to secure funding for the business to avoid the pitfall of most businesses—failing for lack of sufficient funds.<sup>165</sup> There are several options the MLBPA could take to secure funding.<sup>166</sup> These options include the potential to create a stand-alone company,<sup>167</sup> using pension fund money to fund a new MLBPA lead company,<sup>168</sup> or using a portion of union dues to finance the fund.<sup>169</sup> Another option includes certifying a company as a MLBPA certified fund.<sup>170</sup> All these options would provide the new company funding to invest into minor league baseball players as they request advanced funds for a portion of their future earnings.<sup>171</sup>

### 1. *Normal Investment Options*

One format available to the MLBPA for a company is to set up the funding option as a typical hedge fund.<sup>172</sup> This would be done by seeking investors for each round of investment opportunities.<sup>173</sup> Utilizing investment tactics like these would allow the company to improve the fund and deliver a return on its contributors' investments.<sup>174</sup> The competition between the established income-shar-

164. For further discussion on the benefits that minor leaguers could receive from implementation of a new system, see *supra* notes 138–161 and accompanying text.

165. See Melissa Horton, *The 4 Most Common Reasons a Small Business Fails*, INVESTOPEDIA (Mar. 31, 2021), <https://www.investopedia.com/articles/personal-finance/120815/4-most-common-reasons-small-business-fails.asp> [<https://perma.cc/N9MK-THTS>] (finding funding as main reason for businesses failing).

166. For further discussion of the funding options available, see *infra* notes 172–196 and accompanying text.

167. For further discussion of the MLBPA creating a standalone company, see *infra* notes 172–179 and accompanying text.

168. For further discussion of the MLBPA potentially using pension funds to fund a business, see *infra* notes 180–189 and accompanying text.

169. For further discussion of the MLPBA potentially using union dues to fund a business, see *infra* notes 190–196 and accompanying text.

170. For further discussion of the MLBPA potentially using certification as a way to influence funds, see *infra* notes 197–206 and accompanying text.

171. For further discussion of the feasibility and desirability of the MLBPA's potential options, see *infra* notes 172–206 and accompanying text.

172. See Troy Segal, *How to Form a Hedge Fund*, INVESTOPEDIA (Dec. 22, 2020), <https://www.investopedia.com/articles/financial-theory/11/how-to-legally-form-a-hedge-fund.asp> [<https://perma.cc/BPC9-SCJW>] (discussing process of setting up hedge fund).

173. See *id.* (explaining need to attract individuals with large sums of money to invest in fund).

174. See *id.* (“You’ll need to convince them to become investors by touting a track record of repeated success with your initial funding, a clear and understanda-

ing investment companies would create a reasonable and workable baseline for the MLBPA hedge fund to compete.<sup>175</sup> That baseline would include the amount offered by the fund and the portion of the players income that would be received by the fund.<sup>176</sup> This option would be the most straightforward for the MLBPA, as creating this new business would need to abide by the well-established laws affecting hedge funds.<sup>177</sup> On the flip side, the MLBPA would need to ensure it did not exceed regulatory requirements to qualify as a hedge fund type of investment in order to avoid additional compliance issues.<sup>178</sup> There would, however, need to be additional requirements for disclosure to respective agencies whether it is the registration of the fund itself or the advisors.<sup>179</sup>

## 2. *Pension Funds*

For the MLBPA to create and run a fund, it would need to ensure it has the resources to operate.<sup>180</sup> The MLBPA may be able to get that funding from the Major League Baseball Players Pension Plan (“MLBPA Fund”).<sup>181</sup> The pension fund would invest money to earn a return, meaning the MLBPA Fund could contribute funds to MLBPA’s player investment fund subject to certain federal restrictions.<sup>182</sup> The restrictions come mostly from ERISA, which defines the scope of the MLBPA Fund’s manager as a fiduciary of the pen-

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ble investment strategy that has a specific mandate, and a highly-skilled and experienced team on the front and back ends.”).

175. See *Relevance of “Industry Standards,” supra* note 140 (stating industry standards are minimum requirements needed for each business to compete in industry).

176. See Rosenthal, *supra* note 9 (discussing how BLA provides certain amount of money for each percent of future income).

177. See Segal, *supra* note 172 (outlining issues with forming hedge fund, state laws that could impact it, and federal laws to be aware of).

178. For further discussion of the characteristics that elevate a hedge fund to heightened scrutiny, see *supra* notes 56–68 and accompanying text.

179. For further discussion of some applicable registration requirements, see *supra* notes 56–68 and accompanying text.

180. See Conner, *supra* note 162 (“Too often executives and small business owners fail to focus enough on cash flow generation. In order to head off this problem, businesses must either be adequately capitalized and must shore up cash reserves to meet all obligations as they are needed and to handle downturns and emergencies that may arise.”).

181. See *Major League Baseball Players Pension Plan (MLBPA)*, SOVEREIGN WEALTH FUND INST., <https://www.swfinstitute.org/profile/598cdaa50124e9fd2d05b6ee> [<https://perma.cc/A5KE-9XPU>] (last visited Sept. 5, 2021) (outlining basic facts of pension plan).

182. See Eric Whiteside, *How Do Pension Funds Work?*, INVESTOPEDIA (Aug. 29, 2021), <https://www.investopedia.com/articles/investing-strategy/090916/how-do-pension-funds-work.asp> [<https://perma.cc/NE32-C9SS>] (stating ERISA does not say what pension plan can specifically invest in).

sion fund.<sup>183</sup> As long as the MLBPA ensures compliance with those requirements, the pension fund could contribute its own funds to finance the MLBPA player investment option.<sup>184</sup>

The biggest issue the MLBPA would face is ensuring the fiduciary for the fund agreed with investing in such an investment.<sup>185</sup> Fiduciaries need to exercise control over the funds of the pension and must be able to defend why they are making the investments they are making.<sup>186</sup> This means the fiduciary cannot solely perform social investing with the pensions funds.<sup>187</sup> There must be an actionable return the fiduciary can use as a reason to invest in the fund.<sup>188</sup> However, a return is possible with these types of investments, which helps the MLBPA to justify the fiduciary's investment and diversify into a new type of investment such as this.<sup>189</sup>

### 3. *Union Dues*

The MLBPA could also take advantage of new types of investments by diverting union dues to an income-sharing program.<sup>190</sup> There may be some issues with diverting funds without the consent of the players, but the MLBPA could rely on a comparable method to work around these issues by using an opt-in option for the play-

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183. See 29 U.S.C.A. § 1104(a)(1) (West 2019) (requiring fiduciary to do job in interest of participants and beneficiaries).

184. See Whiteside, *supra* note 182 (“An emerging trend is to put some money into alternative investments, in search of higher returns and greater diversity.”).

185. See 29 U.S.C.A. § 1104(a)(1) (requiring exclusive purpose to fiduciary of providing benefits and paying expenses for plan); see also *Fiduciary Responsibilities*, U.S. DEP'T OF LAB., <https://www.dol.gov/general/topic/health-plans/fiduciaryresp> [<https://perma.cc/S9Q5-7CVT>] (last visited Sept. 5, 2021) (“The primary responsibility of fiduciaries is to run the plan solely in the interest of participants and beneficiaries and for the exclusive purpose of providing benefits and paying plan expenses.”).

186. For further discussion of why the fiduciary has a responsibility to beneficiaries, see *supra* notes 74–78 and accompanying text.

187. See Fischel, *supra* note 77, at 1147 (“A principal reason most of the pressures for social investing in recent years have been directed at ERISA-exempt funds, such as state and local pension plans and university and other charitable endowments, is that within the universe of private pension funds that ERISA governs, the perception has been that the exclusive benefit rule forecloses the issue.”).

188. See *id.* (finding Department of Labor does not allow for social investing because of sacrifice of financial return required under exclusive benefit rule).

189. See RESTATEMENT (THIRD) OF TRUSTS § 90(b) (Am. L. Inst. 2007) (stating there is duty to diversify investments unless it is not prudent to do so under circumstances); see also Moore, *supra* note 88, at 25 (“The [internal rate of return] range[s] from -7.5% to 16.5% with an average of 5.9%.”).

190. For further discussion of the MLBPA's option to use union dues to fund a business, see *infra* notes 191–196 and accompanying text.

ers.<sup>191</sup> This is like what unions already do in other contexts to fund political operations.<sup>192</sup>

In the political context, the Supreme Court has found that unions are not able to use union dues for their political operations.<sup>193</sup> Unions have instead used opt-ins to allow for those members who are most interested in contributing to the political operations of the union.<sup>194</sup> They earmark those funds specifically for those political operations, and if anyone does not want to contribute to those operations, they do not need to agree to be part of them.<sup>195</sup> This could be an excellent way to spur the funds necessary to start providing an income-sharing fund option to the players, by allowing the players who have had success at the professional level the option to help benefit the future of the game.<sup>196</sup>

#### 4. *Certify a Company*

Another potential option for the MLBPA to get a hold of this market would be seeking to enact some controlling measures over the industry similar to the MLBPA's insertion into the previously

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191. For further discussion of the laws surrounding the use of union dues, see *supra* notes 79–87 and accompanying text. See also *Can Union Dues Be Used for Political Purposes?*, WEINSTEIN L. GRP., PLLC, <https://www.twglawfirm.com/new-york-construction-accident-lawyer/can-union-dues-be-used-for-political-purposes/> [<https://perma.cc/TLW4-3EYS>] (last visited Sept. 23, 2021) (finding political spending by unions is funded through voluntary donations).

192. See *id.* (“They get voluntary donations from both members and non-members. These donations are typically funneled through another organization, like a PAC or a political advocacy non-profit.”).

193. See *Comm’n Workers of Am. v. Beck*, 487 U.S. 735, 745 (1988) (ruling unions need to separate out costs in connection with collective bargaining from other activities).

194. For further discussion of how unions can fund political operations, see *supra* notes 191–192 and accompanying text.

195. See James Sherk, *Workers Can Opt Out of Union Dues*, HERITAGE FOUND. (July 2, 2013), <https://www.heritage.org/jobs-and-labor/commentary/workers-can-opt-out-union-dues> [<https://perma.cc/9UWV-BNKF>] (discussing union members are able to opt out of part of their union dues because of First Amendment disagreements on how unions spend dues).

196. See Daniel R. Epstein, *We Should Stop Calling Players “Millionaires”*, SBNA-TION (July 23, 2019), <https://www.beyondtheboxscore.com/2019/7/23/20703711/stop-calling-players-millionaires-mlbpa-mlb-owners-players-strasburg-harper-machado-minor-league-pay> [<https://web.archive.org/web/20220320130328/https://www.beyondtheboxscore.com/2019/7/23/20703711/stop-calling-players-millionaires-mlbpa-mlb-owners-players-strasburg-harper-machado-minor-league-pay>] (finding there are at least 1200 players in MLBPA at any one time). For further discussion of how current major league players' wealth could be used to help support minor league players, see *supra* notes 190–195 and accompanying text.

unregulated realm of agency.<sup>197</sup> While the MLPBA does not necessarily have the same power over these companies that it had over agents, there is still the ability to control these companies through other means.<sup>198</sup> One potential option is by certifying any company that opens up its processes and procedures to the MLBPA and satisfies the MLBPA's standards for conduct.<sup>199</sup> By doing this, the MLBPA would have a few benefits, the first being that the MLBPA would not need to operate its own business.<sup>200</sup> A second benefit would be that any business that opens up its internal operations to the union would then be placed under the MLBPA's watchful eye and close control.<sup>201</sup>

This approach could be a viable and beneficial option because while the MLBPA does not have collective bargaining power over these companies like it has over agents, the MLBPA would still have the ability to put its name behind companies that comply with its requests, giving it the benefit of its affiliation.<sup>202</sup> The law gives MLBPA the ability to restrict who can act as agents for the players.<sup>203</sup> As the players associations fight to stop agent misconduct, the MLBPA could similarly fight to counter third-party investment companies' misconduct perpetrated against the MLBPA's members and future members by certifying the companies in a nonofficial

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197. For further discussion of the actions the MLBPA took to regulate agents, see *supra* notes 120–122 and accompanying text.

198. For further discussion of why the MLBPA does not have legal authority over investment funds, see *supra* notes 118–119 and accompanying text.

199. See *5 benefits of Professional Certifications*, MBO PARTNERS (Apr. 1, 2021), <https://www.mbopartners.com/blog/how-manage-small-business/five-benefits-of-professional-certification/> [<https://perma.cc/NB3Y-V4JY>] (stating certification shows company is committed to higher standards).

200. For further discussion of MLBPA starting its own business, see *supra* notes 162–179 and accompanying text.

201. See Sam Reisman, *Cannabis Orgs Launch Business Certification Pilot Program*, LAW360 (Oct. 15, 2020), <https://www.law360.com/articles/1320009/cannabis-orgs-launch-business-certification-pilot-program> [<https://perma.cc/27BF-W56E>] (discussing organization created in cannabis industry to provide certification to companies and alleviate concern of state attorneys general).

202. See Richard T. Karcher, *Fundamental Fairness in Union Regulation of Sports Agents*, 40 CONN. L. REV. 355, 360 (2007) (“[T]he teams ‘may not bargain with any agent other than one designated by the union and must bargain with the agent chosen by the union.’”).

203. See *id.* at 363 (“Initial certification requirements may include submitting to the players association an application disclosing certain personal and financial information, payment of fees, attending a seminar, passing an exam, having achieved a certain level of education, or obtaining a certain level of malpractice insurance. The unions have also established, unilaterally, regulations that all agents must abide by in order to maintain certification and represent players.”).

capacity.<sup>204</sup> MLBPA certification would help keep athletes on notice as to which funds they can trust.<sup>205</sup> While certification is not a particularly simple process, the players association can certify by placing its name behind certain companies and not others.<sup>206</sup>

#### IV. CONCLUSION

Players that have participated in these funds appear to have an overall positive view of participating.<sup>207</sup> Even the Mejía situation resolved itself, and he recanted his story and apologized.<sup>208</sup> These funds do allow players to receive an upfront, life-changing amount of money.<sup>209</sup> However, the MLBPA frowns upon these deals because of the large amount of money a player may be missing out on by sacrificing a portion of all future earnings.<sup>210</sup> Agents are also getting cut out of the negotiations because agents have had a negative view of these deals and their ramifications to the players.<sup>211</sup>

With no legislative control over these entities, the MLBPA needs other options.<sup>212</sup> If the MLBPA creates its own fund, it will

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204. *See id.* at 361 (stating players associations police agents by enforcing regulations they have passed).

205. *See id.* at 364 (“When the unions act in this capacity they have a legitimate interest to ensure, among other things, that agents have and maintain a certain level of competency, do not charge players excessive fees, and do not violate their fiduciary duties owed to their players.”).

206. *See MLB Players, Inc.*, MLB PLAYERS, <https://www.mlbplayers.com/mlbpi> [<https://perma.cc/PG3Z-DSPK>] (last visited Sept. 8, 2021) (discussing MLBPA’s for-profit subsidiary responsible for MLBPA’s business affairs).

207. *See* Phil Rosenthal, *Chicago White Sox DH Yermín Mercedes Tells HBO’s ‘Real Sports’ About His Private Equity Backers: ‘Nobody Believed in Me at That Point. And They Believed in Me’*, CHI. TRIB. (June 22, 2021), [https://news.yahoo.com/chicago-white-sox-dh-yerm-120000253.html?fr=sycsrp\\_catchall](https://news.yahoo.com/chicago-white-sox-dh-yerm-120000253.html?fr=sycsrp_catchall) [<https://perma.cc/7J9L-RSM3>] (discussing player felt BLA was there to support his dream).

208. *See* Crasnick, *supra* note 130 (reversing statements Mejía made in his lawsuit).

209. *See* Darren Heitner, *The Story of Big League Advance, Which Hit A Grand Slam With Fernando Tatís Jr.*, OUTKICK, <https://www.outkick.com/the-story-of-big-league-advance-which-hit-a-grand-slam-with-fernando-tatis-jr/> [<https://perma.cc/QSU7-TWJE>] (last visited Oct. 14, 2021) (“Big League Advance provides that player with desperately coveted funds when he needs it most.”).

210. *See* Rosenthal, *supra* note 13 (reviewing MLBPA’s stance in memo written to players not supporting BLA).

211. *See* Heitner, *supra* note 209 (“Schwimer says that he has found that agents do not want to be realistic with their clients about the likelihood that they will never make it to free agency at the highest level of professional baseball. Worse, if an agent approves the deal when a player is in Minor League Baseball but the player exceeds his expectations, then the player will likely blame the agent.”).

212. *See* Jeff Passan, *MLBPA Continues to Fight ‘Brand Agreement’ Bill*, ESPN (June 20, 2019), [https://www.espn.com/mlb/story/\\_/id/27089441/mlbpa-continues-fight-brand-agreement-bill](https://www.espn.com/mlb/story/_/id/27089441/mlbpa-continues-fight-brand-agreement-bill) [<https://perma.cc/RAC5-DZ98>] (stating MLBPA is fighting passage of bill designed to regulate these businesses because MLB and

also have to consider how to operate the fund to maximize its ability to invest in the athletes.<sup>213</sup> Certification presents one viable way to open up these funds to outside scrutiny and internal control.<sup>214</sup> Either way, the MLBPA could gain some level of control over this booming industry that is impacting its future union members.<sup>215</sup> While this control does not foreclose the ability for players to work with non-union backed companies, it would at least create a choice the players could make.<sup>216</sup> The obvious detriments to the MLBPA would be its need to be regulatory compliant for any of these potential plans.<sup>217</sup> Not only this, they would also need to add a new level of business knowledge for all these activities as these are things the MLBPA has never attempted to do.<sup>218</sup>

Overall, the MLBPA should be concerned over its future members giving up a large chunk of its potential future earnings for a small sum, and the possible abuse players receive from these unregulated companies.<sup>219</sup> The MLBPA starting its own business to compete against the current businesses or institute its own certification program to certify companies that comport with its standards is a viable response.<sup>220</sup> Implementing one of these programs would help the MLBPA gain control over these currently non-MLBPA-reg-

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MLBPA believe it does not go far enough). It appears the bill that passed in 2019 in Delaware was never signed, meaning it never took effect. *House Bill 180*, DEL. GEN. ASSEMBLY, <https://legiscan.com/DE/bill/HB180/2019> [<https://perma.cc/X2B8-PR3A>] (last visited Oct. 14, 2021) (showing lack of Governor's signature on bill).

213. For further discussion of how the MLBPA could fund a new venture, see *supra* notes 172–196 and accompanying text.

214. For further discussion of MLBPA certification of funds, see *supra* notes 197–206 and accompanying text.

215. For further discussion of the control MLBPA could gain over the industry, see *supra* notes 138–146 and accompanying text.

216. For further discussion of MLBPA's lack of ability to forbid funds from existing, see *supra* notes 118–119 and accompanying text.

217. For further discussion of funds' legal compliance, see *supra* notes 56–87 and accompanying text.

218. For further discussion on the history and activities of the MLBPA, see *supra* notes 27–36 and accompanying text.

219. For further discussion of the issues raised against new fund companies, see *supra* notes 128–137 and accompanying text.

220. For further discussion of the options proposed in this article to gain control over the income-sharing industry, see *supra* notes 172–206 and accompanying text.

ulated businesses and provide the necessary protection for its members.<sup>221</sup>

*Ryan Thomas\**

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221. For further discussion of the benefits the MLBPA could receive by acting to control the industry, see *supra* notes 138–161 and accompanying text.

\* J.D., Candidate Class of 2023, Villanova University Charles Widger School of Law; I would like to thank my family, friends, and mentors for all their support throughout my academic career. I also want to thank my mother, who is still supporting me and guiding me every day from above, I love you to the moon and back. Finally, I would like to thank those on the Journal who helped make this possible, Jackie Gillen, Rachel Young, Nick Burnosky, and Maddy Hewitt, thank you for all your hard work and for helping guide me through the process.