



Three Point Shot

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Welcome to *Three Point Shot*, a newsletter brought to you by the Sports Law Group at Proskauer. *Three Point Shot* aims to bring you the latest in sports law-related news and provide you with links to related materials. We hope you enjoy this and future issues. Any feedback, thoughts or comments you may have are both encouraged and welcome.

Showtime and Top Rank Slug It out over "Fight of the Century"

Who said boxing was dead?

Fight fans still bitter over the May 2015 Floyd Mayweather–Manny Pacquiao bout that [was far more mega-bore](#) than mega-brawl may at long last get the slugfest they have been waiting for. A couple of small caveats: Mayweather has ceded the spotlight to his home television network, Pacquiao to his promotion company, and the boxing ring to a courtroom.

Welcome to the rematch.

Some twelve months after the two fighters chased each other around the ring for 12 lifeless rounds en route to a Mayweather unanimous decision, Mayweather's [then-exclusive television partner](#) Showtime Networks, Inc. sued Pacquiao promoter Top Rank, Inc. for \$682,754 in legal fees it says it is owed after the network hired outside counsel to defend itself in litigation stemming from the admission that Pacquiao stepped into the ring an injured fighter and, therefore, fans allegedly did not get their money's worth. ([Showtime Networks Inc. v. Top Rank, Inc.](#), No.16-cv-03904 (S.D.N.Y. filed May 25, 2016)).

Indeed, just days after the final bell had rung and less than a week [after having sworn under the penalty of perjury](#) that he did not have injuries entering the fight, Pacquiao and Top Rank [released a joint statement](#) acknowledging that the fighter had suffered a right shoulder injury during training. Soon thereafter, Pacquiao [had surgery](#) to repair what turned out to be a torn rotator cuff.

Yet if the injury made for a snoozer of a fight, it has already ignited its fair share of fireworks in the courtroom.

In the immediate aftermath of Pacquiao's injury revelation, disgruntled viewers [who had paid around \\$100 apiece](#) to watch the bout filed the aforementioned class-action suits against Top Rank, Showtime and other parties involved in the staging of the event. The suits generally alleged that Pacquiao was unfit to fight and that he and Top Rank had concealed the injury, with plaintiffs ultimately asserting claims for consumer protection violations, unjust enrichment, negligent misrepresentation and conspiracy. Eventually, the

U.S. Judicial Panel on Multidistrict Litigation consolidated the viewers' suits, which involved common questions of fact, into the so-called "[Fight of the Century MDL](#)."

Showtime alleges that, having previously signed a distribution agreement with Top Rank (that contained an indemnification clause), it approached the promotion company demanding it fulfill its contractual duty in the face of the putative class action suits. Top Rank offered the services of its own legal counsel to Showtime, but Showtime maintained that under the parties' contract, it reserved the right to "employ separate counsel and control its own defense at [Top Rank's] expense...of such Asserted Liability if, in the reasonable opinion of counsel to [Showtime]...a conflict or potential conflict exists [between Top Rank and Showtime] that would make such separate representation advisable...." This potential conflict, Showtime alleges, was supported in large part by the difference in each party's knowledge of Pacquiao's pre-fight injury: Top Rank is alleged to have concealed the injury; Showtime, having had little to no access to Pacquiao's training camp, maintains that it knew nothing at all. Showtime also claims that the parties' legal defenses and strategies were not aligned and that this created a potential conflict of interest that made Showtime's decision to employ its own counsel "advisable" and proper under the parties' agreement. Throughout, Top Rank countered that no conflict existed that would require Showtime to employ separate counsel as per the contract terms, and as such, it refused to come out of its corner to reimburse Showtime for its attorney's fees.

Ultimately, Showtime's independently retained counsel secured a [dismissal without prejudice](#) of the claims against the network in the multidistrict litigation, with a court in California's Central District ruling that Showtime "was unaware that Defendant Pacquiao had suffered any shoulder injury at all times" in the lead up to the fight.

Its initial victory secured in the undercard, Showtime has [now set its eyes and attack squarely on Top Rank](#). In addition to requesting indemnification plus interest of its legal costs, Showtime is seeking damages for breach of contract and a declaration that it is not obligated to indemnify Top Rank for any claims the promoter might bring against Showtime in relation to the ongoing class-action suits.

Yet if Top Rank's [counterpunch statements](#) are any indication, this has the makings of an action-packed bout capable of going the distance, with the Top Rank chairman hollering across the ring that Showtime's lawsuit was rash, particularly since the parties had begun settlement talks.

It may not be the fight we asked for, but it is the one we are getting.

At long last, let's get it on.

Soccer Legend Pelé Calls for a Yellow Card against Samsung

After the World Cup in 1966, Brazilian soccer superstar Pelé [vowed](#) to never again play in a World Cup. In Brazil's opening match, the Bulgarian defenders kicked and stamped Pelé, forcing him to sit on the sidelines in Brazil's second game against Hungary. In the final group game against Portugal, the Portuguese defenders – having learned from the Bulgarians – adopted a similar tactic, striking at Pelé every chance they got. However, despite the [persistent and violent fouls](#) on Pelé, the referee refused to send off any Portuguese defenders, and Pelé and the Brazilian team were knocked out of the tournament. Of course, Pelé did return to play in, and win, the 1970 World Cup for Brazil. Fifty years after getting booted around by the Bulgarian and the Portuguese teams, in a case brought in federal court in Chicago against Samsung, Pelé is hoping for a more penal referee.

In March 2016, Pelé filed a lawsuit against Samsung in the United States District Court for the Northern District of Illinois. According to the complaint, Samsung improperly used a Pelé look-alike in a nationally distributed advertisement for its new 4K SUHD TV set that ran in a major New York publication. (See [Pelé IP Ownership LLC v. Samsung Electronics Co., Ltd.](#), No. 16-03354 (N.D. Ill. amended complaint filed May 25, 2016)). Though Pelé and Samsung had come close to executing a license agreement for Pelé to appear in Samsung's advertising campaign, Pelé contends that Samsung abruptly pulled out at the eleventh hour and decided to go in a different direction. Pelé asserts, in essence, that Samsung subbed him out for a look-alike, in what amounted to an illegal slide tackle of his valuable persona and publicity rights. The complaint requests a total of [\\$30 million in damages](#).

The [advertisement at issue](#) was published in October 2015. Although Pelé's name is not expressly mentioned, a partial face shot of a man who, it is alleged, "very closely resembles" Pelé, takes up approximately two-thirds of the full-page advertisement. Moreover, a superimposed ultra-high-definition television screen next to the image of the man features two soccer players, one of whom is performing a "[modified bicycle or scissors-kick](#), perfected and famously used by Pelé." Beneath the Samsung television, and adjacent to the alleged look-alike's mouth, is a supposed first-person endorsement of the product.

Pelé's complaint against Samsung makes several allegations, including a claim under § 43(a) of the Lanham Act for false endorsement and a state claim for violation of right of publicity. Generally speaking, a false endorsement is actionable where the defendant uses the celebrity's persona without permission to suggest false endorsement or association – that is, making a false or misleading representation of fact in connection with goods or services that is likely to cause consumer confusion as to sponsorship or approval. For example, courts have found viable false endorsement claims where t-shirts for sale bore a celebrity's name and likeness, a website's masthead included an image of a celebrity, and an advertisement featured a character dressed in a well-known person's signature costume. In fact, the current dispute brings to mind a notable case involving Woody Allen, where a New York court ruled in favor of Allen on his false endorsement claim over a video store chain's magazine advertisement that depicted a look-alike holding a membership card, with VHS tapes of Allen's movies in the background. (See [Allen v. Nat'l Video, Inc.](#), 610 F. Supp. 612 (S.D.N.Y. 1985)). Similarly, the state law right of publicity generally protects an individual's persona from unauthorized exploitation, where the plaintiff's name, likeness, identity or voice is used, typically for commercial advantage or advertising, without prior consent.

In claiming that Samsung's actions diminished Pelé's endorsement value and unfairly enriched the defendant, Pelé is seeking monetary damages, injunctive relief barring Samsung from using Pelé's identity without permission, and an order requiring Samsung to place corrective advertising in the publication where the advertisement appeared. In response, Samsung has struck back and filed several motions to dismiss. Beyond arguments relating to lack of jurisdiction and improper venue, Samsung argues that Pelé has, among other things, failed to plead his false endorsement claim under the Lanham Act with heightened specificity pursuant to Federal Rule of Civil Procedure 9(b), which generally requires parties to state with particularity claims related to fraud. Samsung also believes Pelé's state consumer protection claims are similarly out-of-bounds for an alleged failure to plead the requisite intent, causation and substantial harm elements required under the statute. Lastly, and most interestingly, Samsung counterattacks Pelé's state right of publicity claim, [arguing](#) that under choice of law principles, New York law

(and not Illinois) should apply because it is the state with the most significant relationship to the claim. Such a determination would be significant because, as Samsung contends, Pelé's IP licensing company, as named plaintiff, would lack standing to bring such a claim because the rights under the New York right of publicity statute are nontransferable and only a natural person has a right of action under the statute.

In his 22-year career, Pelé dribbled, kicked, and scored his way to three World Cup wins, but at the age of 74 he is seeking what may be his first victory in the U.S. judicial arena. While Samsung allegedly was looking for an [assist](#) from a Pelé look-alike to boost its HDTV sales, Pelé is asking the Chicago court to kick this ball out of play. Indeed, instead of a last-minute goal, Samsung, if its defenses fail to hold, might be facing a [yellow card](#) that carries with it a hefty monetary penalty.

50 Cent's Boxing Company Avoids a Chapter 11 K.O.

Curtis Jackson III (a/k/a "50 Cent") has been in the news for many reasons since he burst onto the music scene in 2003 and later became involved in a host of business ventures beyond the recording studio. Most recently, however, the sports side of his finances took a hit when 50 Cent's boxing promotion company, SMS Promotions LLC (SMS), filed for Chapter 11 bankruptcy ([In re SMS Promotions LLC, No. 15-20901 \(Bankr. D. Conn. filed May 26, 2015\)](#)).

SMS, which 50 Cent launched in 2012, was supposed to be a joint venture with an established boxer, but that [plan was thwarted](#) when the boxer was incarcerated on domestic violence charges. Nonetheless, 50 Cent fought on and started SMS by himself – saying he had experience in the industry from boxing when he was younger. Initially, SMS appeared to be doing well and [signed](#) several promising [boxers](#). Soon, however, [two of SMS's more famous fighters](#), including featherweight titlist Yuriorkis Gamboa, grew unhappy with their representation and sought to escape from their contracts. This appears to have contributed to SMS's financial duress and its filing for Chapter 11 bankruptcy protection in May 2015.

However, SMS was not out for the count. In January 2016, the [bankruptcy court found](#) Gamboa's promotional contracts were still valid and the parties appeared to have later reconciled their differences. 50 Cent also rolled with the punches by [settling](#) with another SMS boxer, Ryan Martin – releasing him from his contract in exchange for 20 percent of all gross earnings for any fight the boxer participates in for the next three years as well as a percentage of his signing bonus and sponsorship deals. This reduced SMS's unsecured non-priority claims, excluding insider claims, to roughly \$72,000 from around \$2.3 million, giving 50 Cent more than a puncher's chance to emerge from corporate insolvency.

Getting a second wind, SMS recently asked the court to dismiss the bankruptcy case, saying it could operate with the amount of unsecured debt outstanding and that such debt did not justify the costs associated with going through bankruptcy. The U.S. Trustee in the Chapter 11 case also moved the court to dismiss SMS's filing for failure to confirm a reorganization plan within certain time limits or otherwise convert the case to a Chapter 7 bankruptcy. In May, a Connecticut bankruptcy judge granted the Trustee's motion and dismissed SMS's Chapter 11 case, allowing SMS to avoid a conversion to a Chapter 7 liquidation, which would have been a knockout blow. ([In re SMS Promotions LLC, No. 15-20901 \(Bankr. D. Conn. May 20, 2016\) \(Dismissal Order\)](#)). Ding, ding, ding: SMS lives to fight another day.

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