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SPORT *AND* SPECTACLE: SHOULD MMA BE PROTECTED UNDER THE FIRST AMENDMENT?

Jason J. Cruz*

Should a sport where one individual chokes another individual until the person "taps out" receive First Amendment protection? A recent case in New York pitting a mixed martial arts (MMA) organization and the state of New York drew upon the overarching issue as to whether sports deserve First Amendment protection. This article will look at this recent challenge as an MMA organization sought protection under the First Amendment from a statewide ban on professional MMA.

MMA is grabbing mainstream appeal. Despite being ostracized by some for its violent overtones, the sport is the fastest growing in terms of popularity. A seven year television deal with the Fox Network solidified its relevance in the sports landscape.[1] Estimated at $90 million dollars, the pact ensured that MMA's biggest organization, the Ultimate Fighting Championships (UFC)[2], would be on Fox at least four times a year in its first full

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[1] Josh Gross, *UFC, Fox agree to seven year deal*, ESPN (August 18, 2011, 7:10 PM), http://espn.go.com/mma/story/_/id/6874530/ufc-reaches-seven-year-broadcast-deal-fox-networks.

[2] Ultimate Fighting Championships is owned by Zuffa, LLC. For purposes of this paper, the Plaintiffs in this lawsuit will be referred to as Zuffa instead of listing the complete lists of Plaintiffs.

year under the terms of the contract.[3] Prior to the advent of Fox's new all-sports networks, FS1 and FS2, some of the organization's content was found on Fox cable network, FX.

When FS1 and FS2 launched in August 2013, the need for live sports was at a premium. Based on the first months of the network ratings, it became clear that UFC content was vital to the early success of the network.

Notwithstanding its national appeal, the UFC is expanding its footprint globally. It has brokered television deals in India[4] and Latin America[5] with the intent of filtering its product to an audience that will be intrigued to see more. It recently devised a strategy in which it is localizing its product and focusing on international expansion. In early 2014, it created a digital network, known as "Fight Pass," to provide fans with a library of its own content as well as events from organizations that Zuffa has acquired.[6]

Despite its success and global popularity, it is still not allowed in the biggest market in the United States – New York. 2014 saw Zuffa's chances end once again on the Assembly, floor as a bill which would have legalized professional MMA stalled without a vote.[7] The year prior, it contributed $35,000 to New

[3] Steve Cofield, *FOX and UFC announce official partnership; Four UFC fight cards on FOX and 32 live fight nights on FX each year*, YAHOO! SPORTS (August 18, 2011, 1:58 PM), http://sports.yahoo.com/blogs/mma-cagewriter/fox-ufc-announce-official-partnership-four-ufc-fight-175821520.html;_ylt=AwrTceEX2hlV1R4A890nnIlQ;_ylu=X3oDMTByNzhwY2hkBHNlYwNzcgRwb3MDMgRjb2xvA2dxMQR2dGlkAw--.

[4] *UFC partners with SIX for TUF India*, UFC (September 11, 2012), http://www.ufc.com/news/ufc-details-indian-expansion-091112-press-release.

[5] *UFC announces TUF Latin America*, UFC (April 29, 2014), http://www.ufc.com/news/tuf-latin-america-press-release.

[6] Chuck Mindenhall, *Zuffa launches UFC Fight Pass as part of globalization efforts*, MMA FIGHTING (December 28, 2013, 6:58 PM), http://www.mmafighting.com/2013/12/28/5251928/zuffa-launches-ufc-fight-pass-as-part-of-globalization-efforts.

[7] Steven Marrocco, *UFC's Marc Ratner on MMA in New York: 'We're not going to get it done this year,'* MMAJUNKIE (June 9, 2014, 4:30 PM),

York legislators in the first half of 2013 with the hopes of a vote, but to no avail.[8] With other states such as Connecticut, Minnesota and South Carolina passing measures to legalize MMA in recent years, New York stands alone as the sole state in which professional mixed martial arts is not legalized.[9]

While it continues to plow forward each and every legislative session with hopes of getting closer to its goal, Zuffa, along with a plethora of its fighters and supporters filed a lawsuit in November 2011 against the state of New York seeking to invalidate the state ban on MMA.[10]

The lawsuit is as complex as it is long. This article, however will focus on the First Amendment claims made by Zuffa. The Plaintiffs claim that MMA is an expressive form of conduct and protected under the First Amendment. The legal theory is unique as the general standard is that sport is not protected under the First Amendment. In September 2013 the Southern District of New York dismissed the First Amendment claims, but did the court make the right decision?[11]

Part I will look at what is MMA and summarize the procedural history of the lawsuit as well as the disposition of the legal theories as it has been mapped out through the motions by the parties. Part II will look at the court's dismissal of the First

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http://mmajunkie.com/2014/06/ufcs-marc-ratner-on-mma-in-new-york-were-not-going-to-get-it-done-this-year.

[8] Robert Harding, *Zuffa, UFC's parent company, contributes more than $30,000 to the New York state legislators, party committees*, AUBURN CITIZEN (July 16, 2013, 3:08 PM), http://auburnpub.com/blogs/eye_on_ny/article_265a5022-ee44-11e2-b73e-0019bb2963f4.html#.UeXMjE6yVqg.twitter.

[9] Alaska and Montana do not have Athletic Commissions and thus do not regulate the sport of mixed martial arts although professional MMA is legal in those states.

[10] Post Staff Report, *UFC Files lawsuit arguing New York's fight ban violates First Amendment*, NEW YORK POST (November 11, 2011, 11:30 PM), http://nypost.com/2011/11/15/ufc-files-lawsuit-arguing-new-yorks-fight-ban-violates-first-amendment/.

[11] Jones v. Schneiderman, 974 F. Supp. 2d 322, 333 (S.D.N.Y. 2012).

Amendment claim and the important cases that hinged on the decision. Part III gives a scenario where MMA could satisfy the threshold elements for expressive conduct and Part IV concludes with several issues arising from Zuffa's unsuccessful claim.

PART I

A. What is MMA?

MMA is a full-combat sport that is a combination of amateur wrestling, boxing, jiu jitsu and other martial arts disciplines. The sport of MMA can trace its roots back to ancient Greece with a combat sport known as Pankration.[12] The combat sport of vale tudo which developed in Brazil was brought to the United States by the famed Gracie family in 1993.[13] The term "Mixed Martial Arts" is thought to be coined by Los Angeles Times columnist Howard Rosenberg.[14] A television reviewer, Rosenberg, spent the $14.95 pay-per-view fee to watch UFC 1.[15] Despite the sheer violence that occurred in the Octagon, Rosenberg wrote about the great sportsmanship the fighters had for one another.[16]

The Ultimate Fighting Championships, or UFC for short was the idea of promoter Rorion Gracie, pay-per-view entrepreneur Bob Meyrowitz and Southern California business executive Art Davie.[1718] In its infancy in North America around the time of

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[12] JOHN R. LITTLE & CURTIS F. WONG, ULTIMATE MARTIAL ARTS ENCYCLOPEDIA 29-32 (1st ed. 2000).

[13] Can Sönmez, *UFC 1: The Beginning*, MIXED MARTIAL ARTS, http://www.mixedmartialarts.com/news/364131/ufc.

[14]Howard Rosenberg, *'Ultimate' Fight Lives Up to Name : Television: Pay-Per-View Battle, Instead of Being Merely Gory and Funny, Gets Interesting After the First Two Bouts*, L.A. TIMES (November 15, 1993), http://articles.latimes.com/1993-11-15/entertainment/ca-57200_1_ultimate-fighting-championship.

[15] *Id.*

[16] *Id.*

[17] CLYDE GENTRY, III, NO HOLDS BARRED: EVOLUTION 24 (2001).

UFC 1, the sport had few rules, and there were questions about how it should be regulated.

Dubbed, "Human Cockfighting," by Senator John McCain in 1997, the sport has evolved since the days when it was more spectacle than sport.[19] Perceptions of the sport in its infancy drew the ire of those without an understanding of it. Famously, Bernard Hopkins appeared on an episode of The Jim Rome radio show denouncing the sport.[20] He also has been quoted as comparing the sport of MMA to gay pornography.[21] Ironically, both McCain and Hopkins have made a 180 degree turn on the sport.[22]

While McCain and Hopkins have warmed to the sport over the years since the first UFC, New York has not.

In 2001, Lorenzo and Frank Fertitta purchased the UFC from Semaphore Entertainment.[23] The acquisition was due in part

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[18] Matthew Miller, *Fertitta Brothers turn Ultimate Fighting Champtionship into a juggernaut*, WASH POST (August 8, 2012), http://www.washingtonpost.com/business/fertitta-brothers-turn-ultimate-fighting-championship-into-a-juggernaut/2012/08/10/eb88c618-e007-11e1-a19c-fcfa365396c8_story.html.

[19] Dennis Cauchon, *Amateur Fighting rounds up crowds and controversy*, USA TODAY (March 27, 2006, 11:00 PM), http://usatoday30.usatoday.com/news/nation/2006-03-27-toughman-popularity_x.htm.

[20] Interview by Jim Rome with Bernard Hopkins (May 22, 2007).

[21] Scott Haber, *Bernard Hopkins compares MMA to gay pornography*, (October 14, 2009), http://www.bloodyelbow.com/2009/10/15/1086161/bernard-hopkins-compares-mma-to.

[22] Jesse Holland, *Video: 20 years after calling it 'human cockfighting,' Senator John McCain finally gives MMA its due*, MMAMANIA (Feb. 9, 2014, 12:01 AM), http://www.mmamania.com/2014/2/9/5394282/video-20-years-after-human-cockfighting-senator-john-mccain-gives-mma-its-due-ufc (last visited June 17, 2014);; Ariel Helwani, *Bernard Hopkins Changes Tune on MMA, Showers Fighters With Praise*, MMAFIGHTING (August 3, 2011, 7:21 PM), http://www.mmafighting.com/2011/08/03/bernard-hopkins-changes-tune-on-mma-showers-fighters-with-prais.

[23] Miller, *supra* note 18.

from the Fertitta's old friend, Dana White.[24] It was White that advised the Fertitta brothers of the opportunity.[25] Since its purchase, Zuffa, the company owning the UFC, have made changes to the old UFC structure. Some of the changes include adding weight divisions and outlawing some moves like head butts and kicking a downed opponent for a fighter's safety.[26]

While success was not immediate, Zuffa grew in popularity as more fans began to embrace the sport. Despite the general acceptance of the sport, it still has its adamant detractors.[27]

B. The New York Ban on MMA

The 2011 lawsuit stems from a law[28] that was drafted and enacted prior to the current evolution of the MMA sport.[29] The

[24] *Id.*
[25] *Id.*
[26] *UFC History*, COMPLETE MARTIAL ARTS, http://www.completemartialarts.com/whoswho/ufc/ufchistory.htm (last visited on September 22, 2014).
[27] Mike Ozanian, *Assemblyman Bob Reilly Tells Me Why He Does Not Want MMA in New York*, FORBES (June 10, 2011), http://www.forbes.com/sites/mikeozanian/2011/06/10/assemblyman-bob-reilly-tells-me-why-he-does-not-want-mma-in-new-york/.
[28] The law passed in 1997 which created a ban on professional MMA reads: "A "combative sport" shall mean any professional match or exhibition other than boxing, sparring, wrestling or martial arts wherein the contestants deliver, or are not forbidden by the applicable rules thereof from delivering kicks, punches or blows of any kind to the body of an opponent or opponents. " "For the purposes of this section, the term "martial arts" shall include any professional match or exhibition sanctioned by any of the following organizations: U.S. Judo Association, U.S. Judo, Inc., U.S. Judo Federation, U.S. Tae Kwon Do Union, North American Sport Karate Association, U.S.A. Karate Foundation, U.S. Karate, Inc., World Karate Association, Professional Karate Association, Karate International, International Kenpo Association, or World Wide Kenpo Association. The commission is authorized to promulgate regulations which would establish a process to allow for the inclusion or removal of martial arts organizations from the above list."
See N.Y. Unconsolidated Laws §8905-a (McKinney).
Subsection 3 of §8905-a provides that a person who "knowingly advances or profits" from a combative sport is guilty of a class A misdemeanor and, if

purpose of the bill was to "prevent any professional match or exhibition which constitutes a "combative sport" from being held within the State."[30] A 1997 Memorandum introduced by New York State Senator Roy Goodman accompanied the legislation at issue. "Our State has recently witnessed the emergence of a new type of professional fighting event which is reminiscent of the ancient fight-to-the death matches which were undertaken by gladiators during Roman times."[31] New York argues that the legislative history reflects the fact the intent of the Legislature in 1997 "was to completely ban professional matches or exhibitions of the style of personal combat that was then known as 'Ultimate Fighting' or 'Extreme Fighting.'"[32] Although the New York ban on professional mixed martial arts originated from the early days of MMA which were unregulated by promoters, pitted recognizable mismatches between combatants and glorified violence, the latest version of the sport has made strides in disassociating itself from the sport in 1997. The evolution of the evolution of MMA has been highlighted by the success of Zuffa as the company attempted to rebrand the company from sideshow to sport. It is one of the reasons that MMA supporters push for overturning the legislative

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convicted twice or more within a five-year period, of a class E felony. "Advancing" is defined to include conduct directed toward the creation, establishment or performance of a combative sport, acquisition or maintenance of premises, paraphernalia, equipment or apparatus therefor, and the "solicitation or inducement of persons to attend or participate therein," as well as the actual conduct, financing or promotional phases of the sport. "Profiting from" is defined as accepting or receiving money or other property with intent, or pursuant to an agreement or understanding to participate in the proceeds of a combative sport activity.

[29] N.Y. State S. Introducer's Mem. in Supp. re L. 1997 Ch. 14.

[30] I*d.* The Memorandum was attached as an Exhibit in Support of New York State's Memorandum in Support of Motion to Dismiss.

[31] *Id.* It's worthy to note that the "Statement in Support" indicates that fives states passed legislation banning combative sporting events including Illinois, Missouri, Kansas, Ohio and South Carolina. All of these states now allow mixed martial arts.

[32] Defendant's Supplemental Memorandum of Law in Support of His Motion to Dismiss the First Amended Complaint at 3, Jones v. Schneiderman, 888 F. Supp. 2d 421 (S.D.N.Y.) (No. 46 Civ. 8215).

ban on professional mixed martial arts in New York.[33] However, a majority of legislators in the state of New York do not believe in the revolution.

C. Zuffa files its Original Complaint in New York

Zuffa filed its lawsuit against New York on November 15, 2011.[34] In its original Complaint, Zuffa argued that banning MMA because of its supposed violent message is unconstitutional.[35] It alleged that the live performance of MMA communicates a message to its audience in attendance. [36]

"There can be no doubt that the live performance of MMA conveys a message: the perceived message of MMA was the primary reason that live professional MMA (and only live professional MMA) was banned in New York,"[37] according to the original Zuffa Complaint. Zuffa contends in its original Complaint that the lawmakers in New York misinterpret the message of MMA citing the New York lawmakers believe violence is the message.[38] Zuffa argues that "MMA may be about violence, but for most, MMA carries a message of discipline, challenge and inspiration.[39]

To combat the stigma, Zuffa argued that MMA is sport. "MMA is an organic process in which fighters are constantly testing new moves and responses to new moves, seeing what the human body can accomplish."[40]

Relying on *Brown v. Entertainment*, Zuffa argued that banning MMA because of the allegation that it has a violent message

[33] Amateur MMA is legal in the state of New York. However, there is no regulatory body governing the amateur fights.
[34] Complaint, Jones v. Schneiderman, 888 F. Supp. 2d 421 (S.D.N.Y. 2012) (No. 11 Civ. 8215 KMW).
[35] *Id.* para 112.
[36] *Id.* para 111.
[37] *Id.*
[38] *Id.* para 113.
[39] *Id.*
[40] *Id.* para 119.

is unconstitutional. The Supreme Court in *Brown* held that video games qualify for First Amendment protection.[41] In that case, the Court struck down a California law imposing restrictions on violent video games.

D. Procedural History

After Zuffa filed its lawsuit, New York brought a motion to dismiss the claims from the lawsuit. On August 16, 2012, Judge Kimba Wood of the New York District Court for the Southern District ruled in favor of New York in dismissing Zuffa's claims for Equal Protection and Due Process violations.[42] Zuffa was granted an opportunity to file an Amended Complaint.[43]

E. Zuffa's First Amended Complaint

Zuffa's first Amended Complaint was considerably longer than the first. The first Amended Complaint brought back the Equal Protection and Due Process claims. New York requested the opportunity to file a Motion to Dismiss Zuffa's first Amended Complaint. After a hearing on the Motion to Dismiss, the court dismissed all but the claim that the New York law is vague on its face. Zuffa's six other claims were dismissed.

In its first amended Complaint it argued that banning MMA would be "a patent violation of the First Amendment." [44] Zuffa argues that, "[w]hile there surely are spectators who watch solely because of what they perceive as "violence," countless fans watch professional MMA because of its excitement as entertainment and because of the variety of positive messages conveyed.[45]

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[41] Brown v. Entm't Merch. Ass'n, 131 S.Ct. 2729, 2733 (2011).
[42] Order on Zuffa's Motion to Dismiss at 3, Jones v. Schneiderman, 888 F. Supp. 2d 421 (S.D.N.Y.) (No. 46 Civ. 8215).
[43] Order re Amendment of Pleadings and Defendant's Second Motion to Dismiss, *Jones*, 888 F. Supp. 2d 421 (2012) (No. 11 Civ. 8215).
[44] Complaint at 9, *Jones*, 888 F. Supp. 2d 421 (2012) (No. 11 Civ. 8215).
[45] *Id.*

As noted in the first Amended Complaint, MMA is part sport and part theatre. But, some opponents disapprove and believe it more spectacle than sport.[46]

F. New York's Motion to Dismiss Zuffa's First Amended Complaint

A Motion to Dismiss is a formal request to the court to dismiss a claim in a pleading.[47] It allows a court to dismiss a complaint for failure to state a claim upon which relief can be granted.[48] In order for a claim to survive a CR 12(b)(6) motion, it "must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face."[49] In deciding such a motion, the court must take the allegations of the complaint to be true and "draw all reasonable inferences in favor of the plaintiff."[50] A complaint will not be dismissed unless "it appears beyond doubt, even when the complaint is liberally construed, that the plaintiff can prove no set of facts which would entitle him to relief."[51]

New York focused on the contention that MMA is not expressive conduct protected by the First Amendment. Zuffa claimed that the audience is the critical element in proving its claim as it is entertainment intended for an audience.[52] However, New York argued that regardless of an audience, it cannot be the decisive factor on whether it should be protected by the First

[46]Daphne Burnham, *A barbaric UFC spectacle demeans us all*, Vancouver Sun (June 16, 2014), http://www.canada.com/vancouversun/news/westcoastnews/story.html?id=8419a325-09e5-41f3-869c-8a756cacbf15.

[47] *See* Fed. R. Civ. P. 12.

[48] Fed. R. Civ. P. 12(b)(6).

[49] *See* Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009).

[50] Bernheim v. Litt, 79 F.3d 318, 321 (2d Cir. 1996).

[51] Scutti Enters., LLC v. Park Place Entm't Corp., 322 F.3d 211, 214 (2d Cir. 2003).

[52] Defendant Schneiderman's Reply Memorandum of Law in Support of His Motion to Dismiss the First Amended Complaint at 1, Jones v. Schneiderman, 888 F. Supp. 2d 421 (S.D.N.Y. 2012) (No. 1:11-cv-08215).

Amendment.[53] Rather, it is not who is watching or how many, but rather the particularity and comprehensibility of the intended message.[54]

Under *Johnson* and *Spence*, the court looked to whether there is a "particularized message" and whether there is a "great likelihood" that the message will be understood by those viewing it.[55]

G. The Motion to Dismiss Hearing

In March 2013, the case seemingly fell in Zuffa's favor as the court questioned New York's position. In a surprising twist to the litigation between the two sides, counsel for New York conceded that the statute exempts third parties identified in the text of the legislation that could feasibly sanction professional MMA in the state.[56] Based on this concession, the judge ordered the parties to mediation and held the motion to dismiss in abeyance until the conclusion of the mediation.

While the hearing seemed like a win for Zuffa, New York threw a wrench into this happy ending that may have allowed professional MMA in the state. New York cancelled the settle-

[53] *Id.*
[54] *See* Texas v. Johnson, 491 U.S. 397, 404 (1989); Spence v. Washington 418 U.S. 405, 410-411 (1974).
[55] *Johnson*, 491 U.S. at 404; *Spence*, 418 U.S. at 411.
[56] Luke Thomas, *Professional mixed martial arts in New York could soon become reality, but hurdles remain*, MMAFighting.com, (Feb. 13, 2013, 2:55 PM), http://www.mmafighting.com/2013/2/15/3992360/professional-mma-mixed-martial-arts-new-york-reality-regulated-mma-news;; *See also* Plaintiffs' Response to Defendant's Supplemental Memorandum of Law in Support of His Motion to Dismiss the First Amended Complaint Jones v. Schneiderman, 974 F. Supp. 2d 322 (S.D.N.Y. 2013) (No. 11-cv-08215) (citing Feb. 13 Hearing Tr. At 45-6, 49)

ment conference citing that it would not, under any circumstances, allow professional mixed martial arts in the state.[57]

As a repercussion, additional briefing was allowed which addressed the issue of third party sanctioning and the effect of either allowing or prohibiting such sanctions.[58]

In the additional briefing, New York claimed that the intent of the Legislature in 1997 "was to completely ban professional matches or exhibitions of the style of personal combat that was then known as 'Ultimate Fighting' or 'Extreme Fighting.'" [59] New York went on to argue that "the exclusion of events sponsored by certain martial arts organizations from the definition of the prohibited 'combative sport' was not intended to permit practitioners of Ultimate Fighting to evade the purpose of the state."[60]

Zuffa argued that New York and the state attorney general had many interpretations of the MMA ban.[61]

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[57] Jason Cruz, *New York Digs in Against Zuffa in Motion to Dismiss*, MMAPAYOUT (Apr. 22, 2013), http://mmapayout.com/2013/04/new-york-digs-in-against-zuffa-in-motion-to-dismiss/.

[58] Endorsed Order, Jones v. Schneiderman, Jones v. Schneiderman, 974 F. Supp. 2d 322 (S.D.N.Y. 2013) (No. 1:11-cv-08215).

[59] Defendant Schneiderman's Reply Memorandum of Law in Support of His Motion to Dismiss the First Amended Complaint at 3, Jones v. Schneiderman, 974 F. Supp. 2d 322 (S.D.N.Y. 2013) (No. 1:11-cv-08215).

[60] *Id.*

[61] Plaintiff's Response to Defendant's Supplemental Memorandum of Law In Support of His Motion to Dismiss the First Amended Complaint, Jones v. Schneiderman, 974 F. Supp. 2d 322 (S.D.N.Y. 2013) (No. 1:11-cv-08215-) (arguing that New York had at least 5 different positions of its interpretation of the MMA Law. 1) the ban effectively banned professional MMA but allows amateur MMA; 2) "the 1997 legislature provides a procedure by which a sport claiming to be a 'martial art' or to have similar characteristics can enter the New York market under the sponsorship of a listed organization." (citing New York's First Motion to Dismiss Reply Brief at 6); 3) there was a possibility under circumstances under the law if sanctioned with a listed organization; 4) professional MMA could be sanctioned by a listed organization; and 5) "exempt organizations apparently can sanction many combative sports, including those not mentioned in the ban, but not MMA").

H. Court Dismisses Seven of Plaintiffs' Claims

On September 30, 2013, the court dismissed 7 of the 8 causes of action in Zuffa's lawsuit against New York. The only cause of action remaining for Zuffa was its claim that the New York statute banning professional MMA was constitutionally vague.[62] Despite the dismantling of most of its claims, Zuffa remained positive about the remaining cause of action.[63]

In dismissing Zuffa's First Amendment claim, it determined that "live, professional MMA intends to communicate a particularized message," but had "not established a great likelihood that its message will be understood by those viewing it."[64] The court opinion stated that if the person engaging in conduct intends thereby to express an idea, his or her conduct is not necessarily protected speech.[65] The court sided with the crux of New York's argument that despite a willingness to express conduct in front of an audience, if the audience does not understand that a message is being conveyed, it should not receive First Amendment protection. The court determined that professional MMA matches and exhibitions are not protected by the First Amendment.[66] Despite Zuffa's efforts, the court did not find a "greater likelihood" that viewers will understand the message that MMA intended to convey.[67]

The court held that an actor's subjective intent is an important consideration but the court must also look to the objective component "that requires consideration of whether, under the circumstances, the particular conduct is likely to be understood or

[62] Jones v. Schneiderman, 974 F. Supp. 2d 322, 327 (S.D.N.Y. 2013).
[63] *Federal Court Supports UFC's Fight for NY*, UFC Press Release, (October 2, 2013), http://www.ufc.com/news/federal-court-supports-ufc-fight-for-mma-in-ny.
[64] *Jones*, 974 F. Supp. 2d at 334.
[65] *See id.*
[66] *Id.*
[67] *Id.*

perceived as expressing a particular message.[68] In dismissing Zuffa's First Amendment claim, the court cited *Church of Am. Knights of the Ku Klux Klan v. Kerik*, that, "[T]he party asserting that its conduct is expressive bears the burden of demonstrating that the First Amendment applies, and that party must advance more than a mere 'plausible contention' that its conduct is expressive."[69] The trial court essentially held that viewers will not have a "great likelihood" that they would understand the message. Unlike in *Spence* where the court held that displaying an American flag upside down conveyed some sort of expression, the court determined that an audience would not understand what would be conveyed by the fighters.[70]

Without making an "esthetic [or] moral judgment[]" regarding MMA, the court concluded that the nature of professional MMA is such that the audience is not likely to receive the particularized artistic, technical, and personal messages that Plaintiffs allege MMA fighters *intend* to convey.[71] It held that Zuffa did not carry its burden of demonstrating "more than a mere 'plausible contention'" that viewers are likely to perceive live, professional MMA as conveying the alleged expressive messages.[72]

The court remained consistent in prior court rulings, which found sport, not protected under the First Amendment. The court held that "competitive conduct stands in sharp contrast to the public performances that courts have found communicating an expressive message."[73] While courts have held certain public performances are within the purview of the First Amendment,

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[68] *Id.*; ***see also*** Grzywna ex rel. Doe v. Schenectady Cent. Sch. Dist., 489 F. Supp. 2d 139, 146 (N.D.N.Y. 2006).
[69] 356 F.3d. 197, 205 (2d Cir 2004) (quoting Clark v. Cmty, for Creative Non-Violence, 468 U.S. 288, 293 n.5 (1984))
[70] *Jones*, 974 F. Supp. 2d at 334.
[71] *Id.* (citing Brown v. Entm't Merchs. Ass'n, 131 S.Ct. 2729, 2733 (2011)).
[72] *Id.*
[73] *Id.* (citing Hurley, 515 U.S. at 568; Schad v. Borough of Mount Ephraim, 452 U.S. 61, 65-66 (1981); Cockrel v. Shelby Cnty. Sch. Dist., 270 F.3d 1036, 1049 (6th Cir. 2001)).

courts have "generally been unwilling to extend First Amendment protection to sports or athletics."[74]

In addressing Zuffa's contention that martial arts styles and techniques exhibited in a professional MMA match or exhibition should receive First Amendment protection, it rebutted by determining that "[a]ll organized competition routinely involves contrasting styles, techniques, and strategy…"[75]

The court provided two examples to analogize its rationale in determining that MMA should not receive protection under the First Amendment. First, it looked at a chess player's decision to respond to certain chess maneuvers and defenses which may evince something about the player's style. Next, the court queried the use of a professional Ultimate Frisbee player's "decision to throw an outside-in forehand, rather than a hammer, may express a position on a preferred tactic or strategy."[76]

The two examples reflect the court's posture with respect to its view on sports and the possibility of First Amendment protection. The court rationalized its decision by concluding that if constitutional protection would be granted in the above instances, "the line between conduct and speech would be meaningless."[77]

PART II

A. Sport and the First Amendment

The Free Speech Clause of the First Amendment "exists principally to protect discourse on public matters, but…it is diffi-

[74] *Id* (citing Maloney v. Cuomo, 470 F. Supp. 2d 205, 213 (E.D.N.Y. 2007) aff'd, 554 F.3d 56 (2d. Cir. 2009)
[75] *Id.* at 335.
[76] *Id.*
[77] *Id.* (citing City of Dallas v. Stanglin, 490 U.S. 19, 25 (1989) ("It is possible to find some kernel of expression in almost every activity a person undertakes.")).

cult to distinguish politics from entertainment, and dangerous to try."[78]

Case law to date reflects the fact that First Amendment scrutiny is triggered by nude dancing[79], marching[80] and a violent video game.[81] Yet, riding bicycles[82], boxing[83] and roller skating[84] are not. There appears to be some incongruity between what is protected by the First Amendment and what is not protected.

The seminal point made by the courts in determining First Amendment protection is that it must be "sufficiently imbued with the elements of communication."[85] The court determined that recognition of the message to be communicated is also made known.[86] According to *Johnson*, in providing constitutional protection, there should be, "at the very least, [1] an intent to convey a 'particularized message' along with [2] a great likelihood that the message will be understood by those viewing it."[87] Commenters have concluded that "athletes in only a few sports are sufficiently close to being theatrical performers or dancers to merit constitutional protection."[88] Others disagree with the legal premise that

[78] *Brown,* 131 S.Ct. at 2733.
[79] Barnes v. Glen Theatre, Inc. 501 U.S. 560, 581 (1991) (Souter J., concurring); Schad v. Borough of Mount Ephraim, 452 U.S. 61, 65-66 (1981).
[80] Shuttlesworth v. City of Birmingham, 394 U.S. 147 (1969).
[81] *Brown,* 131 S.Ct..
[82] Five Borough Bicycle Club v. City of New York, 684 F. Supp. 2d 423 (S.D.N.Y. 2010).
[83] Top Rank, Inc. v. Fla. State Boxing Comm'n, 837 So.2d 496, 498 (Fla.Dist.Ct.App.2003).
[84] Sunset Amusement Co. v. Board of Police Comm'rs of Los Angeles, 101 Cal.Rptr. 768 (1972).
[85] Texas v. Johnson, 491 U.S. 397, 404 (1989).
[86] Jones v. Schneiderman, 974 F. Supp. 2d 322, 333 (S.D.N.Y. 2013).
[87] Zalewska v. Cnty. Of Sullivan, N.Y., 316 F.3d 314, 319 (2d Cir. 2003) (quoting Hurley v. Irish Am. Gay, Lesbian & Bisexual Grp. Of Bos., 515 U.S. 557, 569 (1995)).
[88] Michael T. Morley, "Exceedingly Vexed and Difficult": Games and the First Amendment; Weigand v. Village of Tinley Park, 114 F. Supp. 2d 734 (N.D. Ill. 2000) 112 Yale L.J. 361, 368 (2002).

denies free speech protection to sports that are performed in front of and with the intention of being seen by an audience.[89]

Courts appear to be apprehensive in affording sports activity First Amendment protection. A question has been raised as to what the difference is between sport and other audience-oriented entertainment such as movies and musical performances which receive such protection under the First Amendment.[90] According to one theory, courts have provided three explanations for denying sports.[91]

First, a court has determined that those participating in sport do not intend to communicate any ideas or information to their audience and thus their actions are not considered expressive acts.[92] Under this premise, the court assumes that no message can be conveyed during a sporting event. This requires the court to determine that each participant involved in a sport does not intend to convey a message that someone in attendance may understand. This could be based upon the belief that since sporting events is not determined as it may be in a musical performance or play, that there could not be a communication.[93]

Second, another court distinguished sports from art in that an audience would not necessarily know the message for which the athletes would be conveying.[94] However, with art, it is assumed that the artist intends to convey a certain message. In a case involving boxing, the court concluded in its opinion, "[W]e are not con-

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[89] Genevieve Lakier, *Sport as Speech*, 16 U. Pa. J. Const. L. 1101 (2014), a*vailable at* http://ssrn.com/abstract=2247620.
[90] *Id.* at 1117.
[91] *Id.* at 1118.
[92] *See* Murdock v. Jacksonville, 361 F.Supp. 1083, 1096 (M.D. Fla. 1973).
[93] In determining to dismiss Zuffa's First Amendment claim, it held that competitive conduct such as MMA stands in "sharp contrast to the public performances that courts have found communicate an expressive message." Jones v. Schneiderman, 974 F. Supp. 2d 322, 334 (S.D.N.Y. 2013).
[94] *See* America's Best Family Showplace Corp. v. City of New York, 536 F. Supp. 170, 174 (E.D.N.Y. 1982).

vinced that a boxing match, in which police officers participate, inexorably conveys any message other than that police officers can be pugilists."[95] Nevertheless, the same could be said for an art display. While the artist might intend to communicate a message through their art, the viewer of the art may not necessarily know the message.

Finally, similar to the previous distinguishing factors, the courts have denied First Amendment protection for sport due to the competition component. [96] Due to the unknown nature of the result of the match, game or fight, there cannot be protection under the First Amendment.[97] Courts, as in the Zuffa lawsuit, have not considered the ancillary expressive activities occurring during the audience-oriented event.[98] Thus, activities which convey messages as fans waving signs, a fighter carrying an American flag to the ring as he or she walks out pre-fight or a fighter being interviewed in the ring post-fight are not considered by courts as expressive conduct when it comes to First Amendment protection.

In the Zuffa lawsuit, the court opined that Zuffa had not demonstrated a "great likelihood" that viewers will understand that message.[99] In its decision to dismiss Zuffa's First Amendment claim, it highlighted the requirement that while the actor's subjective intent is an important consideration, "there is an objective component that requires consideration of whether, under the circumstances, the particular conduct is likely to be understood or perceived as expressing a particular message."[100] So, while Zuffa may contend that its fighters intend to convey a message when

[95] *Jones*, 974 F.Supp. 2d at 334 n.5 (citing Fighting Finest, Inc. v. Bratton, 898 F. Supp. 192, 195 (S.D.N.Y.1995)).
[96] *See* Interactive Digital Software Ass'n v. St. Louis County, 200 F. Supp. 2d 1126, 1134 (E.D. Mo. 2002).
[97] *Jones*, 974 F.Supp. 2d at 334.
[98] Jones v. Schneiderman, 974 F.Supp.2d 322, 336 n.6 (S.D.N.Y. 2013) (citing Rumsfeld v. Forum for Academic & Inst'l Rights, Inc., 547 U.S. 47, 66 (2006)).
[99] *Jones*, 974 F.Supp.2d. at 333.
[100] *Id. See also* Grzywna *ex rel.* Doe v. Schenectady Cent. Sch. Dist., 489 F. Supp. 2d 139, 146 (N.D.N.Y. 2006).

they are performing inside the Octagon, the eight-sided cage in which the fighters battle, the court believes that the audience in attendance does not know the message the fighters intend to convey. The court would only concede that Zuffa could prove a "plausible contention" of expressing messages.[101] Thus, on this basis, the court dismissed Zuffa's claim.

1. Courts do not recognize out of sport conduct as form of expressive conduct

In its lawsuit, Zuffa described extracurricular activities occurring prior to and after the fight as expressive conduct and argued that these actions were protected under the First Amendment.[102] It's apparent that the music chosen to walkout to the fight, the apparel worn and the conduct made prior to a fight could be seen as expressive conduct.[103] However, the court determined that these things should not be considered when determining First Amendment protection.[104] In citing *Rumsfeld v. Forum for Academic & Institutional Rights, Inc.*, the court did not consider "pre-fight and post-fight antics" whether MMA should be granted First Amendment protection.[105] The court stated that "[t]he primary conduct target by the Ban is professional MMA and conduct that materially aids a specific phase of an MMA event. "[106] It went on to state, "[i]t is this conduct, not the surrounding fanfare that

[101] *Jones*, 974 F.Supp.2d. at 333.
[102] Plaintiffs' first amended Complaint, September 24, 2012, ¶¶208-256.
[103] *See* Ladan Shelechi, Note, *Say Uncle: New York's Chokehold Over Live Performance of Mixed Martial Arts: Whether Combat Sports Are Protectable Speech and How Much Regulation is Appropriate for Inherently Dangerous Sports*, 33 Loy. L.A. Ent. L. Rev. 205, 228 (2013), *available at* http://digitalcommons.lmu.edu/elr/vol33/iss2/4.
[104] *Jones*, 974 F.Supp.2d. at 333 n.6.
[105] *Id.* (citing Rumsfeld v. Forum for Academic & Inst'l Rights, Inc., 547 U.S. 47, 66 (2006) ("If combining speech and conduct were enough to create expressive conduct, a regulated party could always transform conduct into 'speech' simply by talking about it.")).
[106] *Id.*

must convey the particularized message likely to be understood by those viewing it."[107]

In deciding to dismiss Zuffa's First Amendment claim, the court did not take into consideration any of the backstory of fighters, the dramatics of an entrance by a fighter to the Octagon or post-fight interviews. These were all items highlighted by Zuffa in its First Amended Complaint.[108] Yet, the court did not want to extend First Amendment protection to sports such as MMA for concern that it could be interpreted too broadly. The extreme example would be the belief that any conduct "done to engage or entertain an audience" is "automatically protected."[109] As a result of this concern, the Supreme Court has not adopted a test for expressive conduct for a "live performance" or "entertainment."[110] Rather, it "has consistently protected only those activities sufficiently imbued with elements of communications."[111]

2. Brown v. Entertainment Merchants Association

In the first Amended Complaint, Zuffa cited the *Brown* ruling as evidence that the New York law banning professional MMA negates a presumptive violent message it may have had to some.[112] As indicated above, courts have denied First Amendment protection on the conclusion that sport does not intend to convey a message. However, the *Brown* ruling addresses this notion.

In *Brown*, the Supreme Court reviewed whether a California law imposing restrictions on violent video games comports with the First Amendment.[113] The case was based upon a California state law which prohibited the sale or rental of "violent video

[107] *Id.*
[108] First Amended Complaint para. 220-38, *Jones*, 888 F. Supp. 2d 421 (2012) (No. 11 Civ. 8215).
[109] *Jones*, 974 F.Supp.2d. at 336 n.7.
[110] *Id.*
[111] *Id.*
[112] First Amended Complaint para. 10, *Jones*, 888 F. Supp. 2d 421 (2012) (No. 11 Civ. 8215).
[113] *Brown*, 131 S. Ct. at 2733.

games" to minors requiring a label denoting one must be 18.[114] The Court acknowledged that video games qualify for First Amendment protection.[115]

The Court identified that even though video games are "interactive" as the video game player "participates in the violent action on screen and determines its outcome" the violent action in video games is nothing new.[116] The Court analogized the interactivity of video games where the player can choose their own result to literature by stating that "choose-your-own-adventure" stories have been a part of books since at least 1969.[117] The Court cites Judge Posner in stating that "all literature is interactive" rationalizing that "the better it is, the more interactive."[118] In *Brown*, the Court states that books are similar in nature to video games when it comes to the interactive nature as each compels the player or reader to become involved. For video games, the player chooses their own way in the game. For literature, the reader determines how involved they are in the book (i.e., the characters, story, subject matter, etc.) and from that it encourages the reader to make decisions upon the characters based upon the book. The Court acknowledged the dissent's take on books and video games as being "different in kind," yet the Court did not believe that it was constitutionally significant.[119]

Zuffa *utilizes Brown* in rebutting any argument that the ban on professional MMA is legitimate due to the violent nature of the sport. Zuffa argued, "[e]ven if violence were the message of mixed martial arts, the Supreme Court has made clear that banning MMA, or anything that promotes it, for that reason is a patent

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[114] Adam Liptak, *Justices Reject Ban on Violent Video Games for Children*, N.Y. Times (June 27, 2011), http://www.nytimes.com/2011/06/28/us/28scotus.html.
[115] Brown, 131 S. Ct. at 2733.
[116] *Id.* at 2738.
[117] *Id.*
[118] *Id.*
[119] *Id.* at 2737 n. 4.

violation of the First Amendment."[120] Zuffa contends that while outsiders may believe that MMA is premised upon violence, justifying a ban due to the violent nature of the sport would be prohibited by the Supreme Court ruling in *Brown*. As Zuffa articulates, "MMA is part sport and part theatre."[121]

Taking this into consideration, First Amendment protection should be granted in sport if it is determined that a participant intends to convey a message and it would be understood by the spectators in attendance.

3. Spence v. Washington and Texas v. Johnson

While *Brown* is an important case in the Zuffa lawsuit, the two key elements to determine First Amendment protection were outlined in *Spence* and *Johnson*.

One of the underlying cases for which Judge Kimba Wood decided the First Amendment claim was centered on an individual violating a Washington state statute. A college student hung a United States flag from the window of his apartment on private property in Seattle, Washington.[122] The student owned the flag. The flag was hung upside down and attached to the front and back was a peace symbol made of black tape.[123] The Seattle Police arrested Spence under Washington's "improper use" statute.[124] Spence claimed that the flag display was in protest against the invasion of Cambodia and the killings at Kent State University[125]. The basis of his protest was to indicate that America stood for peace.[126]

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[120] First Amended Complaint para. 10, *Jones*, 888 F. Supp. 2d 421 (2012) (No. 11 Civ. 8215).
[121] *Id.*
[122] Spence v. Washington, 418 U.S. 405, 405 (1974).
[123] *Id.* at 406.
[124] *Id.* Notably, charges were not brought regarding Washington's flag desecration statute.
[125] *Id.* at 408.
[126] *Id.*

The State conceded that Spence was engaging in a form of communication and hanging the flag took the place of printed or spoken words.[127] While the Court was cautious on determining whether Spence's activity fell within the scope of the First and Fourteenth Amendments, it balanced this against freedom of speech.

The Court conceded that Spence engaged in a form of communication.[128] This was one of the factors when it concluded that the nature of Spence's activity, "combined with the factual context and environment in which it was undertaken, lead to the conclusion that he engaged in a form of protected expression.[129]

Similarly, *Texas v. Johnson*, decided by the U.S. Supreme Court 15 years after *Spence*, invalidated prohibitions on desecrating the American flag. The Court held that defendant Gregory Lee Johnson's act of flag burning was protected speech under the First Amendment.[130] Johnson burned a flag at a political demonstration at the 1984 Republican National Convention.[131] Although no one was injured, he was convicted of flag desecration in violation of a Texas statute.[132] The Supreme Court held that Johnson's conviction for flag desecration was inconsistent with the First Amendment.[133] The Court first determined that the First Amendment protected non-speech acts such as Johnson's act of burning the flag. As such, it also determined that his act constituted expressive conduct, which would permit him to invoke the First Amendment in challenging his conviction. While *Johnson* differed from

[127] *Id.* at 409.
[128] *Id.*
[129] *Id.* at 409-10.
[130] Texas v. Johnson, 491 U.S. 397, 397 (1989).
[131] *Id.*
[132] *Id.*
[133] *Id.*

Spence in certain aspects[134], the Supreme Court in both held that each had a right to First Amendment protection.

Applying the standards set in *Spence* and *Johnson* against Zuffa's claim that MMA should be protected by the First Amendment, the question of whether a message would be understood by those viewing it is key. In comparing Zuffa's claim with *Spence* and *Johnson*, the two cases involve improper use of the American flag and burning of the flag, the expressive conduct was certain as the defendants admitted the conduct. Moreover, the Courts concede that both actions in *Spence* and *Johnson* had the intent to convey a "particularized message." Undoubtedly the message in both cases would be understood by those viewing it. In *Spence*, hanging an American flag upside down with a peace sign conveyed a message that would be understood by those that would see it. In *Johnson*, the act of burning a flag at a demonstration conveyed a message that would be understood by those that saw it. The court in the Zuffa case ruled that it could not determine whether an audience would understand the message that its fighters would be communicating in the Octagon.[135]

PART III

A. Presenting a Case for Expressive Conduct

Although the court determined that Zuffa had not met its burden to survive a Motion to Dismiss, there are examples of fighters expressing conduct that would satisfy the test in *Spence*. Moreover, the expressive conduct would have a greater likelihood to be understood by those viewing it. One such example involves one of the most popular fighters for the UFC.

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[134] Notably, Spence's flag display was on private property as opposed to Johnson burning the American flag in public after a demonstration. *Spence*, 418 U.S. at 405; *Johnson*, 491 U.S. at 397.

[135] *Jones*, 974 F.Supp.2d. at 334.

Arguably, Ronda Rousey is one of the UFC's biggest draw in 2014. She has been heralded as the UFC's biggest star ever by the UFC president Dana White.[136] Rousey is a female that is the top star in a male-dominated league. Despite being in the minority, her fighting style within the ring has made her a fan favorite. Her move of choice when attempting to win matches is an arm bar.[137] The move demands discipline, skill and technique in executing the move on her opponent. What makes Rousey's "finishing maneuver" so good is that many of her opponents specifically train to defend against her armbar. Thus, Rousey has produced counters to her opponents' defense and developed variations on how to get an opponent in the position of vulnerability. This should be considered a form of art. Similar to jazz or rap where musicians "freestyles," Rousey decides moves based on her opponents actions and reacts to them.

As indicated above, the elements that would provide constitutional protection include 1) an intent to convey a "particularized message" along with 2) a great likelihood that the message will be understood by those viewing it.[138] With Rousey's performances within the Octagon, she satisfies the elements as identified in *Spence*. First, it's clear that Rousey is conveying a message of determination and skill. The audiences, who have become accustomed to her fighting style, understand her message. But it is not the first element that would be the obstacle. Rather, it's whether there would be a "great likelihood" that the message would be understood by those viewing it. The court in Zuffa ruled that

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[136] Kevin Iole, *Dana White's Unhinged Unadulterated Approach Providew Window Into Crazy UFC World*, Yahoo Sports: Cagewritter (Feb. 13, 2014, 11:15 PM), http://sports.yahoo.com/news/dana-white-s-unhinged--unadulterated-approach-provides-window-into-crazy-ufc-world-041549121-mma.html#content_body_0.

[137] *Technique: Ronda Rousey's armbar submission*, ESPN Photo, http://espn.go.com/espn/techniques/gallery/_/id/10476426/ronda-rousey-armbar-submission (last visited June 28, 2014).

[138] Zalewska, 316 F.3d at 319 (quoting Hurley v. Irish-American Gay, Lesbian & Bisexual Grp. of Bos., 515 U.S. 557, 569 (1995)).

sports are competitive conduct and inquires as to whether the activity is primarily communicative and expressive.[139] It's clear that Rousey will attempt to submit her opponent with the armbar. This, the audience understands and anxiously watches to see if Rousey can complete her goal or if her opponent can successfully defend it. Based on her performances within the Octagon, one might argue that she has transformed her fighting style inside the Octagon to that of expressive conduct.

As a woman, Rousey conveys another message whenever she steps into the Octagon. She is a role model to many female audience members that are either aspiring fighters or look to her as a sign of strength in a workplace that is predominantly male and a society that is male dominated.[140] Since this is the case, whenever she enters the Octagon, she conveys the message of strength. In a recent interview, she spoke about her image as a female fighter and specifically talked about her look which was defined as "strong and sexy."[141] One may argue that Rousey's performances within the Octagon transcend the legal parameters from which the court decided to dismiss Zuffa's First Amendment claim short of the discovery phase of litigation.

PART IV

A. Conclusion

On March 31, 2015, Judge Kimba Wood granted New York's Summary Judgment motion which dismissed Zuffa's cause

[139] *Jones*, 974 F.Supp.2d. at 334.

[140] While all of Rousey's opponents are female, it is common for women fighters to spar with male fighters for a variety of reasons including the lack of women fighters involved in the sport at this time.

[141] Bobbi Brown, *An Intimate Conversation with Ronda Rousey*, Yahoo! (Sept. 4, 2014), https://www.yahoo.com/beauty/an-intimate-conversation-with-ufc-fighter-ronda-rousey-96113736978.html.

of action that the New York law was unconstitutionally vague.[142] In its opinion, the Court offered the advice in dicta, that Zuffa's claims might be best brought in state court to seek a declaratory judgment.[143] On April 23, 2015, Zuffa filed its Notice of Appeal with the Second Circuit Court of Appeals.[144] In a press release, Zuffa announced it had retained former U.S. Solicitor General, Paul Clement and his law firm to head up the appeal.[145] The appeal is pending as of the time of this writing.

The sport of MMA is deserving of First Amendment protection as it is expressive conduct that has a great likelihood that its message will be understood by the audience. Zuffa's argument that its sport should be protected by the First Amendment is a viable and should have lasted past the initial state for a Motion to Dismiss. The dismissal of Zuffa's First Amendment claim reflects the court's concern with extending the protection into sports. Despite the U.S. Supreme Court ruling in *Brown,* courts cannot reconcile protecting other expressive audience activities such as music and the arts but not sports. It is surprising that the court granted New York's Motion to Dismiss rather than allow the claim litigated. The court should have granted the opportunity for the parties to determine whether an audience would understand the message. Even if there is disagreement on this issue, there appeared to be sufficient evidence which would have negated a motion to dismiss.

There are several overarching issues that have been posed with the unsuccessful challenge for First Amendment protection by Zuffa. First, is there a real distinction between spectator sport and

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[142] Opinion & Order, Jones, et al. v. Schneiderman, et al., U.S. District Court of the Southern District of New York, 11-CV-8215(KMW)

[143] Id at 22.

[144] Notice of Appeal to the United States Court of Appeals for the Second Circuit, 11-cv-08215(KMW)(GWG), April 21, 2015

[145] "Former United States Solicitor General Paul Clement to represent UFC in Appeal of New Yorks (sic) MMA ban," UFC.com, April 21, 2015, http://www.ufc.com/news/Former-United-States-Solicitor-General-Paul-Clement-to-Represent-UFC?id=

art in light of the *Brown* decision? While art, music and literature have been afforded the protection of the First Amendment, sport has not due in part by the fact that the outcome is not known. Yet, this argument was mitigated in *Brown*.[146] Second, how particular must the message be for a court to determine that an audience understands what an individual (or team) is communicating? Under *Hurley*, the U.S. Supreme Court clarified *Spence* and the requirement of the type of message communicated to receive First Amendment protection. MMA should be able to satisfy this element of particularized message under this. Finally, how do courts define expressive conduct so that an activitiy may receive First Amendment protection? Here, the ruling dismissing Zuffa's First Amendment claim continues the hesitancy to allow sports to receive protection under the First Amendment.

In a 2014 interview with the New York Times, UFC Light Heavyweight Champion Jon Jones, a named plaintiff in the lawsuit, stated his "mission was to change the image…from modern-day barbarianism to an artful blend of martial arts."[147] Jones added, "[T] eaching martial art is moving us toward a more peaceful society."[148] He wants the UFC viewed as an artful blend of martial arts rather than modern-day barbarianism.[149] If Jones would be successful with his interpretation of how the sport of MMA should be, Zuffa would have a viable argument that MMA should receive First Amendment Protection.[150] Unfortunately for supporters of MMA, that is not the case.

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[146] Brown, 131 S. Ct. at 2737-38.

[147] William Rhoden, *A Face of a Brutal Sport is Trying to Change Its Image*, N.Y. Times (Apr. 24, 2014), http://www.nytimes.com/2014/04/25/sports/a-face-of-mixed-martial-arts-is-trying-to-change-its-brutal-image.html.

[148] *Id.*

[149] *Id.*

[150] In April 2015, Jones was stripped of his UFC Light Heavyweight title by the UFC and suspended indefinitely as a result of a hit and run accident in New Mexico in which Jones fled the scene. Jones was sought for a felony charge of leaving the scene of the accident involving personal injury. He was arrested and posted bail. The case is pending as of May 9, 2015. (See UFC Statement on Jon Jones, April 28, 2015, http://www.ufc.com/news/UFC-Statement-on-Jon-Jones-042815)