

M., K., & S. International

~ Attorneys at Law ~

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November 4, 2016

Mr. Jesse Fahey
555 South George Street
Charlotte, North Carolina 28203

Re: Details Concerning The Disposition Of Gonzalez' Record Homerun Baseball

Dear Mr. Fahey,

In our meeting on October 2, 2017, you asked M., K., & S. International to provide you with an evaluation of several options regarding the disposition of Gonzalez' record-breaking homerun baseball. In our follow-up meeting, on November 2, 2017, you asked the firm to provide you with further considerations surrounding the option to keep Gonzalez' homerun baseball, donate it to Major League Baseball for public display, and finally to sell it at sometime in the future. As requested, the purpose of this letter is to provide you with further considerations surrounding this option.

We are pleased that you sought our firm's support to resolve this very exciting matter. We understand that there is a substantial amount of public and private interest surrounding the baseball, and that you have already received a \$500,000 offer to sell it. In our last meeting, we

shared with you some good news. American's baseball memorabilia expert, Mr. Mike Jones, provided the firm with an initial valuation of the baseball. According to Mr. Jones, the baseball, if sold sometime in the future, would likely auction for approximately \$1,000,000. Of course, Mr. Jones cautioned the firm that valuing such an item is highly speculative. After considering this, and the advantages and disadvantages of numerous options presented to you by the firm, you leaned towards the option to keep Gonzalez' homerun baseball, then donate it to Major League Baseball for public display, and finally to sell it at sometime in the future. We will explain the details surrounding this option more fully, after first establishing several important facts.

Major League Baseball's single season homerun record is probably the most well known accomplishment in all of professional sports. In 1927, Babe Ruth hit 60 homeruns, and held the record for 33 seasons. In 1961, Roger Maris broke Babe Ruth's record, when he hit 61 homeruns. In 1998, Philip Ozersky, sitting in the bleachers, caught Mark McGwire's record-breaking 70th homerun. According to the New York Times, Mr. Ozersky subsequently bought insurance for the baseball, then, for seven weeks, allowed McGwire's team to display it. He then allowed two other organizations to display the record-breaking baseball to the public for two additional weeks.¹ Finally, three and a half months after he caught it, Ozesky sold the baseball at auction for \$3,005,000. In 2001, Barry Bonds broke Mark McGwire's record for the largest number of homeruns hit in a single season with 73. Barry Bonds' 73rd homerun landed in a group of people. Two people in the group subsequently sued each other for the baseball, and it was eventually sold at auction in 2003 for \$450,000.²

¹ *No. 70 Goes after Another Record*, N.Y. Times, Jan. 4, 1999, at B1

² <http://www.nytimes.com/2003/06/26/sports/baseball>

During the 2017 baseball season, Atlanta Brave outfielder, Manuel Gonzalez, hit 74 homeruns, hitting the record-setting homerun ball on September 29, 2017. On October 2, 2017, you informed our firm that you had caught Gonzalez’ record-breaking homerun baseball. In our initial interview, you said that you attended the last game of the Brave’s season on September 29, 2017, with your friend, George Mahoney. Near the end of the game, Gonzalez hit a homerun into the bleachers, and you caught it. After catching the baseball, you put it in your pocket, and brought it home with you, which is where it currently is. Since the incident, you mentioned that you have been besieged with phone calls from journalists wanting interviews, and from other people who want to buy the baseball. According to media reports, Gonzalez would like the ball back for sentimental reasons, and he does not want to pay a lot of money for it. Additionally, you stated that your friend Mr. Mahoney believes he is entitled to a share of proceeds from any sale, because he provided you with the ticket to attend the baseball game.

Over our two meetings, you identified three important decision-making considerations, which you wanted further details on before finalizing a path forward. First, you wanted to know if you owned the baseball, and if anyone else had a claim to it. Second, you wanted to know the tax implications of selling the baseball sometime in the future. Finally, you wanted to know the details surrounding the procurement of insurance and how to protect your public reputation from assertions that you are “greedy.” The following discussion will address these considerations.

1. The Baseball Is Your Property

Since you were the first person to make a “possessory step” (i.e. catching the ball) towards the homerun baseball you are the sole owner of the baseball. The host team, or Major League Baseball, owns any baseball that stays on the playing field. However, once the ball leaves the playing field and goes into the spectators’ area, legal commentators consider the

baseball to be abandoned property.³ In 2002, this legal commentary was affirmed in a California Superior Court case, which decided a suit between two people claiming Barry Bonds' record-breaking homerun baseball. In *Popov v. Hayashi*, the court held that when a person completes a significant step necessary to achieve possession of a homerun baseball, that person is entitled to a possessory interest in the baseball.⁴ In other words, once a baseball is hit over the outfield fence, it becomes abandoned property, and the first person to possess it becomes the owner. In your case, when you caught Gonzalez' baseball, you took possession of it. Therefore, any claims to ownership from Mr. Gonzalez, Mr. Mahoney, or others, would be unfounded. The baseball is your property.

2. *You Will Owe Income Tax On The Income From The Sale Of The Baseball In The Year That You Decide To Sell The Baseball*

If you move forward with the decision to keep the baseball and sell it at auction at a later date, you will owe income tax on the income from the sale of the baseball in the year that you decide to sell the baseball. The following elaborates on the tax implications associated with the possession and the future sale of the baseball.

2.1 *For Income Tax Purposes The Baseball Is Valued At The Date Of Sale*

Tax law states that a taxable event is an event that creates a duty to pay tax. The issue of taxes and catching homerun baseballs is nothing new. Section 61 of the Internal Revenue Code states broadly that "gross income means all income from whatever source derived." Most tax experts believe that the IRS considers catching a baseball "self-created property." Self-created property is not taxable until the taxpayer sells the property. An example of self-created property

³ Paul Finkelman, *Fugitive Baseballs and Abandoned Property: Who Owns the Home Run Ball?* 23 Cardozo L. Rev. 1609 (2002).

⁴ <https://www.quimbee.com/cases/popov-v-hayashi>

is fish caught by a professional fisherman. The fisherman does not have to pay tax until the fish is actually sold.⁵

We should note that several legal commentators argue that the taxable event is in fact catching the ball, and not selling (or otherwise transferring) the ball to someone else later. The analogy is that the act of catching a record-breaking homerun baseball is like finding a bag of money in the street. These commentators argue that catching the baseball is effectively “an accession to wealth,” because it increases the catcher’s wealth immediately.⁶ It could be argued that this position is supported by an IRS regulation that provides, “treasure trove, to the extent of its value in United States currency, constitutes gross income for the taxable year in which it is reduced to undisputed possession.”⁷ Were the IRS to hold this position, you would owe income tax on the appraised value of the baseball in the 2017 tax year.⁸ However, this argument is weaker than the alternative. Most commentators do not consider a record-breaking homerun baseball to be a “treasure trove.”

For two reasons, the IRS and the courts have considered finding valuable property, such as a record-breaking homerun baseball, self-created property, not immediately taxable. First, until a found item other than cash is sold, estimates of its value, even from skilled appraisers like Mr. Jones, are only estimates (this is called a valuation problem). Second, until the item is sold, the finder might have no way to pay the tax (this is called a liquidity problem). There are no valuation and liquidity problems when the found item is cash because we know what cash is worth and it can be used to pay the tax. For these reasons, in a number of analogous situations,

⁵ <http://www.law360.com/articles/691103/>

⁶ Treasury reg. § 1.61-14(a), T.D. 6272, 22 FR 9419

⁷ Sheldon I. Banoff & Richard M. Lipton, *More on Historic Homers: Do Auction Prices Control?*, 90 J. of Taxation 189 (1999).

⁸ Joseph M. Dodge, *Accession to Wealth, Realization of Gross Income, and Dominion and Control: Applying the “Claim of Right Doctrine” to Found Objects, Including Record-Setting Baseballs*, 4 Fla. Tax Rev. 685 (2000)

like commercial fishing, the IRS considers the taxable event to be selling the fish, not the catching the fish.⁹

Similar to a fisherman who obtains a fishing license, baseball fans pay for their ticket, which gives them the right to catch any balls that are hit their way. Assuming that a fan catching a baseball is comparable to catching a fish, the value of a record-setting homerun baseball is unique and not readily determinable until sold. In summary, the most likely scenario is that your baseball is not taxable until such time that the baseball is sold and the value can be accurately determined.

2.2 The Baseball Will Be Subject To Income Tax In The Year Of Sale

As per above, you will likely not owe tax until you sell the baseball. At the date you sell the baseball, the income that you receive from the baseball will be subject to the income tax rate of that year.¹⁰ Because of the valuation problem described above, we cannot accurately predict how much tax you would be required to pay. However, for your consideration, if Mr. Jones' appraisal is accurate, the ball will likely be sold for over \$413,201 (i.e. the highest tax bracket), in which case income from the sale would be subject to a 39.6% tax. So, if the ball is sold for \$1,000,000, the income from that sale would be subject to \$396,000 in taxes.

As per our in-person discussion, we would caution you that here are several risks associated with estimating the amount of tax likely to be paid. First, tax brackets are subject to change. Second, and most importantly, the value of the baseball is subject to change. In the worst-case scenario, the ball could decrease in value should Gonzalez' record be broken sometime in the future. On the other hand, in a best-case scenario, the baseball could increase in value, as the record becomes more historic.

⁹ Lawrence A. Zelenak & Martin McMahon, Jr, *Taxing Baseballs and Other Found Property*, 84 Tax Notes 1299 (Aug. 30, 1999).

¹⁰ <http://www.bankrate.com/finance/taxes/tax-brackets.aspx>

3. *It Is Advisable To Procure Insurance And To Protect Your Public Reputation*

If you decide to move forward with the option to keep the ball, then donate it to Major League Baseball for its display, and finally to sell it sometime in the future, the firm recommends that you procure insurance on the baseball, and use our firm's public relations expert to help protect your public reputation throughout the process.

3.1 *Procure Insurance For The Baseball*

Although insurance might increase the cost of keeping the baseball, insurance is highly recommended. According to the New York Times, Mr. Ozersky bought insurance for the Mark McGwire's record-breaking baseball, which he carried while the baseball was put on display for three and a half months. We suggest you follow Mr. Ozersky's precedent.

Insurance is something most collectors do not think about, but they should, especially if the collectible is worth what your baseball is likely worth. When it comes to insuring your baseball against unforeseen loss, your existing homeowners policy likely will not compensate you for the market value of the baseball. Moreover, there are affordable options to protect the baseball's value in the event of burglary, theft, fire, flood, breakage, or natural disasters. Coverage is also available for loss or damage that happens during shipping, personal transit, and exhibition. We spoke with Ms. Mary Smith, the Underwriting Director who heads the collectibles division for America's largest insurer of sports memorabilia, and she strongly advised insurance.

Ms. Smith emphasized that your homeowners insurance will not protect your valuable collectable. She said that the insurance company would pay a claim based on the replacement

value at the time of the loss.¹¹ This is highly advantageous, because it would account for the appreciation in value from the time in which the baseball is first appraised. While the costs for this type of specialty coverage varies, Ms. Smith said the rate would likely be around 0.64% of the value of the baseball per year. So, if the baseball is valued at \$1,000,000, such a policy would cost \$6,400, with a \$1,000 deductible. We appreciate that this cost is probably unexpected, so, should you decide to donate the baseball to Major League Baseball for its display, we would be prepared to negotiate with Major League Baseball to have them cover the cost. Given the benefit that Major League Baseball would get from displaying the record-breaking baseball, it is likely that they would readily pay the price.

3.2 Protect Your Public Reputation Through A Social Media Plan

You stated that an important consideration in the disposition of Gonzalez' record-breaking homerun baseball is the effect of your decision on your reputation in the community. As previously mentioned, our firm has a media-relations expert, Mr. Douglas Johnson, who is prepared to help manage the effects of your decision on your reputation. We have arranged for Mr. Johnson to attend next Friday's meeting, at which time he will answer any questions that you might have. In the meantime, you should consider the following.

In the age of social media, it is important to have a social media plan in place. First, you need to monitor what is being said about your brand on social channels, and also within the search engine results pages. Responding quickly to a negative situation is important. How should you respond depends on the nature of the situation. You need to listen to what your audience has to say, and be as honest and open as you can be about the situation. Moreover, you need to be careful about how much you put out to media, but at the same time you want to be as transparent as possible. People respect transparency, even if they disagree with the decision you make.

¹¹ <http://www.cardboardconnection.com/how-to-insure-your-sports-card-and-memorabilia-collection>

Finally, it is important to know that there are going to be “trolls” out there—we suggest you do not address them. How you interact with social media will have a big impact on your reputation. Since you have identified this as important, please do not hesitate to contact us at anytime before next Friday’s meeting, should you have any questions.¹²

To sum up, you should rest assured that the baseball is your property. Should you decide to move forward with the option to keep the baseball, donate it to Major League Baseball, and then to sell it sometime in the future there are some important steps that your should take. First, you should procure insurance to protect against the risk of loss. Second, you should develop a social media plan to protect your reputation throughout the process. Finally, when you decide to eventually sell the baseball, you likely have to pay income tax on the income you receive from the sale, in that particular tax year.

We would like to again thank you for choosing M., K., & S. International to support you throughout this exciting matter. We look forward to meeting you again this upcoming Friday, November 11, 2017, to review the details of this letter, and to finalize a path forward for the disposition of Gonzalez’ record-breaking homerun baseball. At that time, we will discuss the estimated costs associated with any further legal services.

Please feel free to contact us at 704-618-9426 should you have any questions about the matters here discussed, or any other issues.

Very truly yours,

Matt Stiles

¹² <http://www.forbes.com/sites/jabezlebreth/2014/11/04/company-reputation-management-with-social-media/3/#7e4c36b74ae7>