Tossing the Red Flag: Official (Judicial) Review and Shareholder-Fan Activism in the Context of Publicly Traded Sports Teams

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INTRODUCTION

For some, it comes after their team squanders away a fourth quarter lead in the playoffs, engages in a hasty trade,[1] or makes an ill-advised substitution. For others, an indefensible draft choice, announcement of team relocation,[2] or decision not to re-sign a star player[3] triggers the thought. Whether at a sports bar or on their own living room couch, at one time or another, every sports fan has transported him or herself to the owner's box and imagined, "If I ran that team, things would be different." Although the average fantasy league owner may envision leading his team to the Promised Land on the field, the pressures in the front office, with the need to balance stadium financing, ticket and concession sales, and upcoming contract negotiations, make the business of sports an entirely different ballgame.

In the last fourteen years the professional sports world has survived seven bankruptcy filings[4] and nearly collapsed in 2011, when two major

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1. *See* Jonathan Abrams, *Celtics Break Up Their Fantastic 5*, N.Y. TIMES, Feb. 24, 2011, http://www.nytimes.com/2011/02/25/sports/basketball/25nba.html; Greg Payne, *Doc Rivers: Timing of Trade was Off*, ESPN.COM (May 16, 2011, 4:27 PM), http://sports.espn.go.com/boston/nba/news/story?id=6555870 (suggesting the Celtics' management's decision to trade Kendrick Perkins led to a decline in team chemistry and, ultimately, a poor playoff performance).

2. *See* Mary Foster, *Owners Approve Hornets' Move to New Orleans*, USA TODAY (May 10, 2002, 8:48 PM), http://www.usatoday.com/sports/nba/hornets/2002-05-10-owners-relocation.htm (describing the voting process as only involving team owners and that a defeated arena finance referendum played a large role in the decision to move); Associated Press, *Sonics Tell NBA of Intent to Move SuperSonics to Oklahoma City*, ESPN.COM (Nov. 3, 2007, 1:20 AM) [hereinafter *Sonics Tell NBA*], http://sports.espn.go.com/nba/news/story?id=3091416 (describing financial troubles that forced team owners to relocate); Andrew Adam Newman, *Pro Bono Campaign Aims to Keep the Kings in Sacramento*, N.Y. TIMES, Mar. 1, 2011, http://www.nytimes.com/2011/03/02/business/media/02adco.html (illustrating the efforts that fans and community members will undertake to keep their team from relocating due to budget constraints).

3. *See* Paul Coro, *Phoenix Suns Ex-Star Amar'e Stoudemire Felt Unappreciated*, ARIZ. REPUBLIC (Jan. 6, 2011, 9:16 PM), http://www.azcentral.com/sports/suns/articles/2011/01/06/20110106phoenix-suns-amare-stoudemire-unappreciated.html (describing the Suns' inability to negotiate a maximum contract and failure to convey Stoudemire's value to the team); William C. Rhoden, *Cleveland's Venom Validates James's Exit*, N.Y. TIMES, July 9, 2010, http://www.nytimes.com/2010/07/10/sports/basketball/10rhoden.html (illustrating fans' anger and betrayal over LeBron James's departure to Miami as many burned his jersey in the streets of Cleveland).

4. Steven Church & Dawn McCarty, *Dallas Stars, L.A. Dodgers Make Delaware Home Court for Sports Bankruptcies*, BLOOMBERG (Sept. 29, 2011, 11:01 PM), http://www.bloomberg.com/news/

leagues locked out their players and shut down operations.[5] More than two-thirds of the teams comprising the National Basketball Association (NBA) operated at a loss during the 2009 season.[6] Coupled with the

2011-09-30/dallas-stars-l-a-dodgers-make-delaware-home-court-for-sport-bankruptcies.html; *see also* Steven Church, *Cubs File Bankruptcy, Plan Sale to Ricketts Family*, BLOOMBERG.COM (Oct. 12, 2009, 5:03 PM), http://www.bloomberg.com/apps/news?pid=newsarchive&sid=a7Piey9m.a7g; Jonathan Stempel, *Texas Rangers file bankruptcy*, REUTERS (May 24, 2010, 4:10 PM), http://www.reuters.com/article/2010/05/24/us-texasrangers-bankruptcy-idUSTRE64N41N20100524; Craig Harris & Carrie Watters, *Coyotes File for Bankruptcy; Move to Canada Next?* USA TODAY (May 6, 2009, 7:50 PM), http://www.usatoday.com/sports/hockey/nhl/coyotes/2009-05-05-Balsillie-offer-to-buy-phoenix-coyotes_N.htm.

5. The NFL lockout, which lasted 136 days, beginning in March 2011, was the first experienced by the league since 1987. *See* Vinnie Iyer & Clifton Brown, *NFL Lockout Ends as Owners, Player Reps Agree to 10-Year CBA* (Jul. 25, 2011, 10:14 AM), http://aol.sportingnews.com/nfl/feed/2010-09/nfl-labor-talks/story/nfl-lockout-ends-owners-nflpa-10-year-deal-2011-season-cba-labor-agreement; Simon Evans, *NFL Announces Lockout of Players*, REUTERS (Mar. 12, 2011, 2:30 PM), http://www.reuters.com/article/2011/03/12/us-nfl-lockout-idUSTRE72B25I20110312. Although the NFL season has since commenced, the NBA struggled immensely to solve labor disputes of its own and played a shortened 66-game season after a 161-day lockout to begin the 2011 season. Steve Aschburner, *Sides Make Deal Official, Camps Begin Friday*, NBA.COM (Dec. 8, 2011, 9:09 PM), http://www.nba.com/2011/news/features/steve_aschburner/12/08/labor-agreement/index.html. More recently, the National Hockey League announced a players strike on September 15, 2012. Katie Strang, *NHL Imposes League-Wide Lockout*, ESPN.COM (Sept. 16, 2012, 11:18 AM), http://espn.go.com/nhl/story/_/id/8382911/nhl-officially-locks-players-cba-expires. As of December 17, the league had been locked out for 92 days, which has resulted in the cancellation of 527 total games. Brian Stubits, *NHL Lockout: NHL Cancels Games Through Dec. 30*, CBSSPORTS.COM (Dec. 10, 2012, 11:08 AM), http://www.cbssports.com/nhl/blog/eye-on-hockey/21346694/nhl-lockout-nhl-to-cancel-games-through-dec-30-on-monday. On January 6, 2013, 113 days after announcing a lockout, the NHL and its union, the National Hockey League Players' Assocation (NHLPA), reached a tentative agreement. Katie Strang, *NHL, Union Have Tentative Agreement*, ESPN.COM (Jan. 6, 2013, 1:14 PM), http://espn.go.com/nhl/story/_/id/8817955/nhl-nhlpa-reach-tentative-agreement. Nevertheless, in addition to disappointing fans and the players, the NHL lockout claimed countless victims in local businesses at thrive in stadium areas. *See, e.g.*, Toronto Associated Press, *Study: Lockout Hurting Businesses*, FOXSPORTS.COM (Dec. 4, 2012, 4:44 PM), http://msn.foxsports.com/nhl/story/lockout-hits-canadian-merchants-near-arenas-120412 (finding that business is down by about 35 percent for bars and about 11 percent for restaurants near hockey stadiums in Winnipeg, Vancouver, Toronto, Montreal, and Calgary); Josh Brown & Josh Cooper, *NHL Lockout Taking Toll on Nashville Businesses*, USA TODAY (Nov. 26, 2012, 9:03 AM), http://www.usatoday.com/story/sports/nhl/predators/2012/11/26/nashville-nhl-lockout-impact/1726529/ (describing the struggles of local Nashville business owners during the NHL lockout); Ashley Yarchin, *NHL Lockout Leads to More Fallout for St. Louis Businesses*, KSDK.COM (Nov. 25, 2012, 1:18 AM), http://www.ksdk.com/news/article/348699/3/NHL-lockout-leads-to-more-fallout-for-St-Louis-businesses (same).

6. *See NBA Team Values: The Business of Basketball*, FORBES, http://www.forbes.com/lists/2011/32/basketball-valuations-11_rank.html (last visited Nov. 3, 2012) [hereinafter *NBA Team Values*] (indicating that seventeen of the thirty teams in the NBA operated at a loss during the 2009–2010 season); Chad Ford, *Can George Cohen Save NBA's Season?*, ESPN.COM (Oct. 17, 2011), http://espn.go.com/nba/story/_/page/mediator-111018/nba-lockout-george-cohen-save-season (suggesting that up to 22 or 23 teams could stand to lose money under the current regime). *But see* Nate Silver, *Calling Foul on N.B.A.'s Claims of Financial Distress*, N.Y. TIMES (July 5, 2011, 10:45 AM), http://fivethirtyeight.blogs.nytimes.com/2011/07/05/calling-foul-on-n-b-a-s-claims-of-financial-distress/ (arguing that the five to seven percent operating margin of the NBA is well within the operating margin of most Fortune 500 companies); Larry Coon, *Is the NBA Really Losing Money?*, ESPN.COM (July 12, 2011,

debilitating effects of the current extended economic instability, all professional franchises should be reevaluating their ownership structures and investigating new sources of revenue.[7] Although the notion of a publicly owned and traded sports team is not a new business revelation,[8] current economic conditions have reactivated largely dormant discussions of the opportunity.[9] A publicly owned and traded model for sports teams is versatile, serving the interests of several constituencies, yet brings distinct advantages and disadvantages. Rather than evaluate these benefits and

12:39 AM), http://sports.espn.go.com/nba/columns/story?columnist=coon_larry&page=NBAFinancials-110630 (suggesting that several teams' reported losses are fictitious—a function of methods of accounting rather than pure losses).

7. Recent ownership turnover amongst professional sports teams may provide an opportunity to explore these new options. Earlier in the spring, Shahid Khan paid $760 million to take control of the NFL's Jacksonville Jaguars. Simon Evans, *New Jacksonville Owner Has Grand Plans for Jaguars*, REUTERS (Mar. 5, 2012, 3:18 PM), http://www.reuters.com/article/2012/03/05/us-nfl-khan-idUSTRE8241O720120305. Emerging from a section 363 bankruptcy sale, baseball's Los Angeles Dodgers landed in the hands of an ownership group headed by Earvin "Magic" Johnson. *See* Jamie Mason, *Dodgers to be Sold for Record $2B*, THE DEAL PIPELINE (Mar. 28, 2012, 11:18 AM), http://www.thedeal.com/content/restructuring/dodgers-to-be-sold-for-record-2b.php; Matthew Futterman, *$2 Billion Dodgers Price Tag Shatters Records: Group Led by Magic Johnson Wins Baseball Team with Bid of $2.15 Billion*, WALL ST. J. (Mar. 29, 2012, 11:35 AM), http://online.wsj.com/article/SB10001424052702303404704577308483250633906.html. Yet another baseball franchise under new management is the San Diego Padres, whose sale to the O'Malley family and PGA tour standout Phil Mickelson garnered league approval on August 16, 2012. Eric Matuszewski, *Padres' Sale to O'Malley Family, Golfer Mickelson Backed by MLB*, BLOOMBERG.COM (Aug. 17, 2012), http://www.businessweek.com/news/2012-08-16/padres-sale-to-o-malley-family-phil-mickelson-approved-by-mlb. Perhaps the biggest recent headline in the sports world came when Manchester United, the international soccer giant, announced an initial public offering. Lee Spears & Tariq Panja, *Manchester United Seeks Up to $333 Million in IPO*, BLOOMBERG.COM (July 31, 2012), http://www.businessweek.com/news/2012-07-30/manchester-united-seeks-up-to-333-million-in-ipo.

8. *See, e.g.*, Robert Bacon, *Initial Public Offerings and Professional Sports Teams: The Regulations Work, but Are Owners and Investors Listening?*, 10 SETON HALL J. SPORT L. 139 (2000); Brian R. Cheffins, *Playing the Stock Market: "Going Public" and Professional Team Sports*, 24 J. CORP. L. 641 (1999); Jorge E. Leal Garrett & Bryan A. Green, *Considerations for Professional Sports Teams Contemplating Going Public*, 31 N. ILL. U. L. REV. 69 (2010); Ryan Schaffer, *A Piece of the Rock (or the Rockets): The Viability of Widespread Public Offerings of Professional Sports Franchises*, 5 VA. SPORTS & ENT. L.J. 201 (2006); Eugene J. Stroz, Jr., *Public Ownership of Sports Franchises: Investment, Novelty, or Fraud?*, 53 RUTGERS L. REV. 517 (2001); *see also* John K. Harris, Jr., *Fiduciary Duties of Professional Team Sports Franchise Owners*, 2 SETON HALL J. SPORT L. 255 (1992).

9. *See, e.g.*, Garrett & Green, *supra* note 8, at 70–71 (citing the Minnesota Twins, Chicago White Sox, Pittsburgh Pirates, San Francisco Giants, Philadelphia Phillies, and Sacramento Kings as giving serious consideration to going public); Jeffrey Goldfarb, *Mets Owner Could Find Financial Solution in Stands*, REUTERS (Feb. 15, 2011), http://blogs.reuters.com/columns/2011/02/15/mets-owner-could-find-financial-solution-in-stands/ (suggesting that an initial public offering would "ease [the owner's] financial burden"); *see also* Associated Press, *76ers Officially Sold to New Owners*, ESPN.COM (Oct. 18, 2011, 7:59 PM), http://espn.go.com/nba/story/_/id/7117764/joshua-harris-david-blitzer-jason-levien-smith-part-new-philadelphia-76ers-ownership-group (highlighting the underlying principles of public ownership in the team's website, NewSixersOwner.com, which "solicit[s] fan feedback in an attempt to energize the fan base").

drawbacks from the owner's box, this Note examines the publicly owned and traded model of sports teams as a means of checks and balances—a mechanism for fan-shareholders to hold majority owners accountable for their decisions on and off the field of play.

While the decisions posed throughout this analysis are ultimately left to current sports team ownership, this Note is meant to serve as a thought experiment to provoke questions and to spark discussion regarding the viability of a public model of sports team ownership. In an expansion upon preceding scholarship, I hope not only to highlight the corporate governance implications of such a model, but also to bring the concepts to life, using numerous contemporary examples to drive the discussion.

Part I describes the three models of public ownership that have been implemented in recent years, while Parts II and III identify the various advantages and disadvantages of public ownership of sports franchises. Part IV then introduces a basic overview of rudimentary corporate law concepts that would undoubtedly come into play should a sports team pursue a public ownership model. In an attempt to marry corporate law theories with their practical application, Parts V, VI, and VIII draw on real-life examples to bring the corporate law concepts to life. These illustrations provide further analysis and pose numerous questions related to instances in which shareholders might pursue collective action. Part VII proposes a new corporate structure for sports franchise owners to consider. Limited liability companies and limited partnerships maximize the parties' contractual freedom while allowing them to modify or eliminate fiduciary duties. Finally, Part IX highlights additional considerations, including negative externalities, which may also factor into a sports team's decision to "go public."

I. VARIATIONS AND CURRENT EXAMPLES OF PUBLICLY OWNED AND TRADED SPORTS TEAMS

Three primary forms of public sports team ownership exist. First, the most common form of public ownership in this context arises when a large publicly traded corporation owns a sports franchise as just a small slice of its operating portfolio.[10] As part of a diversified portfolio, an indirectly traded sports franchise generates a trivial portion of the corporation's profits. For example, the Anaheim Angels of Major League Baseball (MLB) and Ducks of the National Hockey League (NHL) were at one time

10. Garrett & Green, *supra* note 8, at 71–72.

owned by corporate giant Disney.[11] Thus, when evaluating the viability and potential for financial return of these franchises, fan-investors contemplate the financial health of Disney—whose primary business and other holdings greatly outweigh the profit generated by the Ducks and Angels. This other business, not the franchise, ultimately drives the stock's value.[12]

Yet a second, largely unused, but wildly successful model of public ownership is the community-owned franchise—a nonprofit corporation that sells shares to generate capital but does not grant equity ownership or other benefits to its shareholders.[13] Rather than earn a return on their investment or receive dividends, shareholders of a community-owned sports team derive purely sentimental value from stock ownership.[14] The National Football League's (NFL) Green Bay Packers is the only sports franchise that has adopted this community-ownership model, and the franchise has enjoyed incredible success since 1923.[15] After five stock sales to the general public (1923, 1935, 1950, and two in 1997), nearly 112,000 shareholders, holding 4.75 million shares of stock, now own a slice of the storied franchise.[16] In 2011, the Packers initiated another public offering in order to fund renovations to historic Lambeau Field.[17]

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11. Schaffer, *supra* note 8, at 205 (describing numerous publicly traded media, entertainment, and communications companies that at one time owned professional sports teams); *see also* Garrett & Green, *supra* note 8, at 71–72 (describing a similar relationship of corporate ownership between the Fox Group and the Los Angeles Dodgers before being acquired by current owner Frank McCourt). See Arash Markazi, *AEG Being Put up for Sale*, ESPN.COM (Sept. 19, 2012, 12:33 PM), http://espn.go.com/espn/print?id=8397131&type=story, for an interesting issue that arises when a conglomerate, which owns a sports franchise, is placed under new ownership.

12. *See* Garrett & Green, *supra* note 8, at 71–72 (illustrating the same relationship applied to the Dodgers and its former owner, the Fox Group).

13. *E.g.*, *Shareholders*, PACKERS.COM, http://www.packers.com/community/shareholders.html (last visited Nov. 3, 2012) (describing the history and basic information regarding the Green Bay Packers' stock ownership); *see also* Garrett & Green, *supra* note 8, at 90; Schaffer, *supra* note 8, at 206.

14. *See generally* Stroz, *supra* note 8, at 542, 548 ("Fans will likely get more enjoyment out of framing their stock certificate, bragging of their ownership to friends, and attending the annual meetings (with or without the ability to vote) than they will from a return on the investment.").

15. Garrett & Green, *supra* note 8, at 90; *see also* Schaffer, *supra* note 8, at 206; *supra* note 13 and accompanying text.

16. Schaffer, *supra* note 8, at 206.

17. Associated Press, *Want to be an NFL Owner? Packers Plan First Stock Sale Since '97*, NFL.COM (Oct. 10, 2011, 4:36 PM) [hereinafter *Want to be an NFL Owner?*], http://www.nfl.com/news/story/09000d5d823017f9/article/want-to-be-an-nfl-owner-packers-plan-first-stock-sale-since-97 (describing that the offering is meant to fund renovations to Lambeau Field and shares will be sold for $200 each). The team's most recent stock offering began on December 6, 2011 and concluded on February 29, 2012. *Shareholders*, PACKERS.COM, http://www.packers.com/community/shareholders.html (last visited Nov. 4, 2012). Upon completion of the offering, the organization sold over 268,000 shares and added more than 250,000 new shareholders. *Id.* Proceeds from the offering will

Although shareholders retain voting rights and attend an annual shareholder meeting, the shares are subject to control, transferability, and dividend limitations.[18] Nevertheless, such restrictions have not stopped hordes of “Cheeseheads” from purchasing stock to “become a part of the Packers’ tradition and legacy.”[19] For nearly a century, the Green Bay Packers have taken advantage of their corporate structure to regain financial stability in the face of insolvency, construct new facilities, and maintain and renovate the numerous faces of their stadium, Lambeau Field.[20] Although this community-based ownership structure provides no true financial return for its investors, the Green Bay Packers capitalized on an opportunity to tap into a previously undiscovered and underutilized source of capital while providing intangible value to its shareholders.

The third model, and the central focus of this Note, is what Jorge Garrett and Bryan Green coin a “sports team corporation”[21]—a sports team company that is publicly traded, independent of its relationship with another publicly traded corporate entity. Perhaps the most critical distinction between a sports franchise owned by a publicly traded company (indirectly traded) and the third model, a sports team corporation[22] (one that is independently publicly traded), lies in its primary source of revenue.[23] Professors Garrett and Green illustrate this point with an insightful example:

> [C]onsider the following example. Fox Group owns the Los Angeles Dodgers. When potential investors evaluate the possibility of investing in the Los Angeles Dodgers, their decision to invest primarily evaluates Fox Group’s ability to generate profits, because it is the business front that generates the majority of the revenue for the corporation. In contrast, when a sports team corporation owns a team, the investors primarily are investing on the basis of the *team’s*

support the $143 million expansion of Lambeau Field, which includes new video boards, a new sound system, and nearly 7,000 additional seats. *Id.*

18. Schaeffer, *supra* note 8, at 206–07.

19. *Id.* at 206 (quoting Greenbay Packers, Inc. 1997 Common Stock Offering Document 2 (Nov. 14, 1997)).

20. *See* Daniel J. Alesch, *The Green Bay Packers: America’s Only Not-for-Profit, Major League Sports Franchise*, 8 WIS. POL’Y RES. INST. REP. 1 (Nov. 1995), http://www.wpri.org/Reports/Volume 8/Vol8no9.pdf.

21. Garrett & Green, *supra* note 8, at 71–72.

22. *Id.* at 71.

23. *Id.*

ability to raise revenue—though they might also invest for other non-economic reason, such as love for the game.[24]

I. ADVANTAGES OF PUBLIC OWNERSHIP

The success of sports franchises' public offerings depends on the relative weight given to various advantages and disadvantages associated with the business decision. Several factors weigh in favor of adopting a publicly owned corporate structure, including instant capitalization, flexibility, and a competitive advantage to teams willing to pursue an initial public offering.[25] One such advantage relates to the financing of team stadiums and subsequent renovations.[26] In the United States, stadiums are typically publicly funded with taxpayer dollars.[27] In fact, during the twentieth century, of the $20 billion spent on sports facilities, approximately $15 billion came from public subsidies.[28] In the midst of the economic decline, however, taxpayers have voiced their disapproval of these plans.[29] The public's attitude mirrors that of local governments seeking to funnel public funds into true necessities. As a result, sports franchises have been forced to scan the economic landscape in pursuit of alternate means of financing large-scale stadium projects.[30] Although not a sports corporation in its purest form, the Green Bay Packers illustrates the efficacy of utilizing a public offering to raise capital sufficient for stadium construction and renovation.[31]

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24. *Id.* at 71–72 (citing Cheffins, *supra* note 8, at 645–48).

25. *See* Bacon, *supra* note 8, at 141–44; Cheffins, *supra* note 8, at 649–56; Garrett & Green, *supra* note 8, at 72–80; Schaffer, *supra* note 8, at 211–18; Stroz, *supra* note 8, at 521–22.

26. *See* Bacon, *supra* note 8, at 141–44; Cheffins, *supra* note 8, at 649–52; Garrett & Green, *supra* note 8, at 72–73; Schaffer, *supra* note 8, at 211–13.

27. Cheffins, *supra* note 8, at 650.

28. *Id.*

29. Garrett & Green, *supra* note 8, at 75; Schaffer, *supra* note 8, at 212; *see also* Newman, *supra* note 2 (suggesting that Sacramento taxpayers' sound rejection of public financing for a new arena contributed to the Maloof brothers' consideration of relocation). At one time, Pacific Bell Park, home to the San Francisco Giants of the MLB, was the only privately financed major league baseball stadium built since 1962. *See* AT&T Park History, MLB.COM, http://sanfrancisco.giants.mlb.com/sf/ballpark/information/index.jsp?content=history (last visited Nov. 3, 2012); *see also* Marc Edelman, *The House that Taxpayers Built: Exploring the Rise in Publicly Funded Baseball Stadiums from 1953 Through the Present*, 16 VILL. SPORTS & ENT. L.J. 257 (2009). For a modern example related to the financing of the Dallas Cowboys' $1.2 billion stadium, see Aaron Kuriloff & Darrell Preston, *In Stadium Building Spree, U.S. Taxpayers Lose $4 Billion*, BLOOMBERG.COM (Sept. 4, 2012, 11:01 PM), http://www.bloomberg.com/news/2012-09-05/in-stadium-building-spree-u-s-taxpayers-lose-4-billion.html; *Seattle City Council OKs arena deal*, ESPN.COM (Sept. 24, 2012, 11:04 PM), http://espn.go.com/nba/story/_/id/8422214/seattle-city-coun cil-approves-new-arena-deal.

30. Garrett & Green, *supra* note 8, at 75.

31. *Id.* at 90–91; *see also*, *Want to be an NFL Owner?*, *supra* note 16 (describing that the

In addition, a public offering affords ownership with a new level of flexibility and "enhances the ability of a current owner to liquidate part of his or her investment."[32] Whereas owners of privately held corporations struggle to find a market for their shares, or ownership interest, under a sports corporation model, team owners would not necessarily be at the mercy of the team's fluctuation in value.[33] The freedom of transferability supplied by the issuance of shares provides an exit strategy[34] for current owners which can be a valuable asset given the deteriorating economics of private sports franchise ownership.[35] Although "wealthy individuals are often motivated to own a professional sports franchise[,] . . . . [they] may soon be unwilling to blindly subsidize . . . losses from their own pocket."[36] Moreover, under a public ownership regime, majority owners would not be forced to surrender their control at the expense of the liquidation opportunity.[37] Depending upon the degree of initial control (measured by number of shares owned), the majority owner can recoup his investment on a portion of shares, yet remain in control of the organization.[38] In essence, the sports corporation model allows the owner to "have his cake and eat it too."

A third advantage for sports franchises adopting the publicly owned corporate structure is its profound impact on on-field performance. Owners may allocate the revenue generated by public offerings to the team's salary allowance, ensuring the opportunity to pursue the highest quality players and ultimately gain a competitive advantage.[39] Although several American sports leagues function with a salary cap, which is

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offering is meant to fund renovations to Lambeau Field as did previous offerings in 1997).

32. Garrett & Green, *supra* note 8, at 77.

33. *See* Schaffer, *supra* note 8, at 215. ("A lot of the owners are . . . not as liquid as they were five years ago. In the past, a lot of owners have been willing to subsidize their teams, but as annual losses rise to $10 million, $20 million, or more, some owners are being stretched to the breaking point." (citing Cheffins, *supra* note 8, at 655)).

34. Cheffins, *supra* note 8, at 653.

35. *See* Garrett & Green, *supra* note 8, at 78; *NBA Team Values*, *supra* note 6. The Los Angeles Dodgers also recently filed for bankruptcy and fetched over $2 billion in a section 363 sale to an ownership group led by Magic Johnson, the biggest professional sports team sale in history. *See* Mason, *supra* note 7; Richard Sandomir, *Group Led by Magic Johnson Wins Auction to Buy Dodgers for $2.15 Billion*, N.Y. TIMES, Mar. 27, 2012, http://www.nytimes.com/2012/03/28/sports/baseball/sale-of-dodgers-nears-a-resolution.html?_r=0. Moreover, in a recent Forbes independent valuation, twenty teams in the NFL are valued at $1 billion or more. *NFL Team Valuations*, FORBES, http://www.forbes.com/nfl-valuations/ (last visited Nov. 3, 2012). Only the Dallas Cowboys, however, eclipsed the $2 billion mark. *Id.*

36. Schaffer, *supra* note 8, at 215.

37. Garrett & Green, *supra* note 8, at 77–78; Schaffer, *supra* note 8, at 215–17.

38. *See* Garrett & Green, *supra* note 8, at 77–78; Schaffer, *supra* note 8, at 215.

39. Garrett & Green, *supra* note 8, at 75–77.

notably absent in Major League Baseball,[40] "a sale of shares to the public could be a strategy 'through which owners of teams falling behind in revenue have the opportunity to stay competitive in the market for free agents'"[41] who tend to seek the most lucrative contracts. Given the symbiotic relationship between salary, talent, and revenue, teams utilizing this strategy would likely realize long-term gains.[42] Small market teams such as the Oakland Athletics, featured in the recent blockbuster film *Moneyball*,[43] could capitalize on this strategy to level the financial playing field opposite deep-pocketed teams such as the New York Yankees and Boston Red Sox.[44] In addition to these primary advantages, the sports corporation offers other ancillary benefits, such as the ability to generate new fan interest through transferable shares, with others to be borne out of time and experience.[45]

III. DISADVANTAGES OF PUBLIC OWNERSHIP

A sports franchise contemplating "going public" should bear in mind the various hurdles and costs involved in the decision. Not to be ignored are the costs associated with the initial public offering itself, which typically constitute approximately 15 percent or more of the offering's proceeds.[46] The investment bankers serving as underwriters for the transaction will command a significant fee consisting of the spread—the difference between the offering price and the discounted price at which the

40. Major League Baseball has historically functioned without a salary cap. *See* Carol D. Rasnic & Reinhard Resch, *Limiting High Earnings of Professional Athletes: Would the American Concept of Salary Caps be Compatible with Austrian and German Labor Laws?*, 7 WILLAMETTE SPORTS L.J. 57, 68 (2010); Natalie L. St. Cyr Clarke, Note, *The Beauty and the Beast: Taming the Ugly Side of the People's Game*, COLUM. 17 J. EUR. L. 601, 628 (2011). The league's newest collective bargaining agreement, reached in November 2011, remains without a salary cap. *See* Collective Bargaining Agreement, http://bizofbaseball.com/docs/2012-16CBA.pdf.

41. Garrett and Green, *supra* note 8, at 76 (quoting Schaeffer, *supra* note 8 at 214).

42. As evidenced by the free agency market in every major sports league, the most talented players tend to "follow the money" and sign with the team offering the highest value contract, evidenced by LeBron James's highly publicized departure from Cleveland. Assuming that sports team corporation stocks are closely correlated with on-field success, those teams adopting this model ultimately bring higher returns on investment to their investors.

43. MONEYBALL (Columbia Pictures 2011).

44. Garrett & Green, *supra* note 8, at 77 ("Note, however, that this advantage is premised on the underlying assumption that teams located in thriving economic markets will not follow the same path of going public."). This statement assumes that these large market teams do not also utilize the sports team corporation model to the same extent and with the same success as smaller market teams. Otherwise, the gap between team economic values would likely still exist.

45. Garrett & Green, *supra* note 8, at 79–80.

46. Schaffer, *supra* note 8, at 219.

investment bank first purchases the shares.[47] For example, of the $60 million raised by the Cleveland Indians in the team's initial public offering in 1998, $6.2 million constituted expenses associated with the transaction.[48] Apart from the pure transaction costs are the high administrative costs, which have dissuaded some franchises from pursuing a public offering and forced others to implement a minimum purchase requirement.[49] These costs include those required for annual auditing and accounting reviews, holding annual meetings, distributing and responding to shareholder proxies, and various legal fees associated with the Security and Exchange Commission's (SEC) annual and quarterly reporting requirements.[50]

In addition, a public offering exposes corporate entities to the various requirements imposed by the SEC regulatory regime.[51] Annual reporting and disclosure statements subject these teams to an elevated level of public scrutiny,[52] which drives, in large part, the professional leagues' anti-public ownership stance.[53] Teams forced to comply with the SEC's strict public disclosure scheme may find themselves with reduced bargaining power

47. Paying the investment bank by offering the spread between the discounted purchase price and the initial offering price is just one of many ways to procure the services of an investment bank. Oftentimes, for larger offerings, a conglomerate of several investment banks will pool resources to purchase the company's shares and perform various functions for the client throughout the process. *See* JOHN C. COFFEE & HILLARY A. SALE, SECURITIES REGULATION: CASES AND MATERIALS, 76–78 (Foundation Press 11th ed. 2009).

48. Garrett & Green, *supra* note 8, at 82.

49. Schaffer, *supra* note 8, at 220.

50. *Id.*

51. The SEC requires, among other things, quartersly (10-Q) and annual (10-K) reports that disclose the public company's financial statements. *See* 17 C.F.R. § 249.308(a) (2011); 17 C.F.R. § 249.310 (2012). In addition, the company must make other important ongoing disclosures such as the annual report to shareholders and Management Discussion and Analysis (MD&A). *See* 17 C.F.R. § 229.303 (2011). Professor Hillary A. Sale describes the SEC's regulatory regime surrounding disclosure as "dictat[ing] what, when, why, and how much they must say." Hillary A. Sale, *The New "Public" Corporation*, 74 LAW & CONTEMP. PROBS. 137, 144 (2011). In addition, the increased use of technology, blogging, and other mass communication devices allow for the dissemination of information at a rate never before experienced by corporations. *See id.* Moreover, the public availability of financial information may also have consequences at the negotiating table. Bacon, *supra* note 8, at 160; Schaeffer, *supra* note 8, at 221.

52. *See* Bacon, *supra* note 8, at 158–60; Cheffins, *supra* note 8, at 658–60; Garrett & Green, *supra* note 8, at 83–84; Schaffer, *supra* note 8, at 221–22; Stroz, *supra* note 8, at 530–31.

53. *See* Cheffins, *supra* note 8, at 656–58; Garrett & Green, *supra* note 8, at 84; Schaffer, *supra* note 8, at 208. Although the NFL strongly advocates an anti-public ownership positions, its policies are believed to violate federal antitrust laws, leaving the league without much incentive to curtail public officerings such as the Packers'. *See* Drew D. Krause, *The National Football League's Ban on Corporate Ownership: Violating Antitrust to Preserve Traditional Ownership—Implications Arising From William H. Sullivan's Antitrust Suit*, 2 SETON HALL J. SPORTS L. 175 (1992); Genevieve F.E. Birren, *NFL vs. Sherman Act: How the NFL's Ban on Public Ownership Violates Antitrust Laws*, 11 SPORTS LAW. J. 121, 134 (2004).

when it comes to stadium negotiations,[54] player contract negotiations,[55] and other business decisions, due to the widespread availability of their financial data. Moreover, in the face of the new regulations imposed by the Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank Act), sports corporations will be drifting into uncharted regulatory waters.[56]

Franchise owners must also overcome the barriers imposed by their respective sports leagues, which function as private governing bodies. Currently, the NHL and and NBA permit the sale of stock to the public, subject to limitations such as restrictions on dividends.[57] In addition, offerings may be subject to review by teams' respective leagues in order to ensure compliance with their own bylaws and rules.[58] Like the NHL, the MLB permits public ownership, but also maintains the requirement of a majority shareholder,[59] along with restricted voting rights.[60] Although its regulations are generally believed to violate antitrust laws, the NFL remains steadfast in its unwritten policy disfavoring public ownership, emanating from the league constitution.[61] After judicial intervention, relating to the New England Patriots' public stock sale,[62] however, the

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54. Schaffer, *supra* note 8, at 221.

55. Garrett & Green, *supra* note 8, at 84.

56. In response to the financial crisis of 2008, on July 21, 2010, the federal government passed the Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 1376 (codified at 12 U.S.C. §§ 5301 to 5325) (Supp. 2011)). The purpose of this Act was to "reshape the U.S. regulatory landscape, reduce systemic risk and help restore confidence in the financial system." Mary L. Schapiro, SEC Chairman, Testimony on "Enhanced Oversight After the Financial Crisis: The Wall Street Reform Act at One Year" (Jul. 21, 2011), http://www.sec.gov/news/testimony/2011/ts072111mls.htm. Given the law's infancy, much remains to be seen regarding the legislation's effectiveness and implementation.

57. Bacon, *supra* note 8, at 144 (explaining that the NHL restricts the teams' abilities to distribute cash dividends). The NBA, on the other hand, allows its teams to make dividend payouts to stockholders. *See* Scott C. Lascari, *The Latest Revenue Generator: Stock Sales by Professional Sports Franchises*, 9 MARQ. SPORTS L.J. 445, 453 (1999).

58. *See, e.g.*, Constitution and Bylaws of the National Football League (Rev. 2006), *available at* static.nfl.com/static/content//public/static/html/careers/pdf/co_.pdf (last visited Jan. 6, 2012); Major League Constitution (Rev. 2008), *available at* http://www.bizofbaseball/docs/MLConstitutionJune2005Update.pdf (last visited Jan. 6, 2013); Constitution of National Hockey League, *available at* www.bizofhockey.com/docs/NHLConsitution.pdf (last visited Jan. 6, 2013); Bylaws of National Hockey League, *available at* http://bizofhockey.com/docs/NHLBy-Laws.pdf (last visited Jan. 6, 2013).

59. Major League Baseball requires that no team distribute more than forty-nine percent of its ownership interests in public stock. Schaffer, *supra* note 8, at 208.

60. Bacon, *supra* note 8, at 145.

61. *Id.* Article 3.5 of the NFL Constitution "prohibits corporate ownership of franchises, and 75 [percent] of NFL owners must approve all transfers of ownership interests in NFL clubs." Schaffer, *supra* note 8, at 209 & n.48; *see also* Sullivan v. National Football League, 34 F.3d 1091, 1095 (1st Cir. 1994).

62. *See Sullivan*, 34 F.3d 1091 (upholding antitrust violations on remand in federal district

NFL's resistance to public ownership has lost traction.[63] Perhaps the largest cost of "going public," viewed from the owner's box, is the imposition of fiduciary duties and responsibilities to shareholders.[64] While viewed from the owner's perspective as a consequence of his decision, these duties immediately arm shareholders with a means to ensure that front office decisions are properly made, whether they are to re-sign a player, build a new stadium, or raise ticket prices. This system of checks and balances between corporate fiduciaries and shareholders is addressed in the sections that follow, as sports franchises provoke unique issues within the realm of corporate law.

IV. CORPORATIONS, FIDUCIARY DUTIES, AND THE BUSINESS JUDGMENT RULE

Corporations have long been considered legal fictions, existing merely as paper ghosts.[65] Over two centuries ago, the Supreme Court identified the modern corporation as "an artificial being, invisible, intangible, and existing only in contemplation of law."[66] Even in the midst of the Industrial Revolution, the Court anticipated a centuries-long debate over

court).

63. Bacon, *supra* note 8, at 145–46.

64. *See* Garrett & Green, *supra* note 8, at 84–86; Schaffer, *supra* note 8, at 227–29.

65. Corporations derive their powers from state corporation statutes that subtly vary from jurisdiction to jurisdiction. The evolution of the corporate form has led to the adoption of limited liability company statutes as well as benefit corporation statutes. For examples of limited liability company statutes, see ARIZ. REV. STAT. ANN. §§ 29-601 to 29-857 (2008 & Supp. 2012) and IND. CODE ANN. §§ 23-18-1-1 to 23-18-13-1 (West 2011 & Supp. 2012). For examples of a benefit corporation statute, see MASS. GEN. LAWS ch. 156E, §§ 1–16 (2012) and CAL. CORP. CODE §§ 14600–14631 (West Supp. 2013).

66. Trs. of Dartmouth Coll. v. Woodward, 17 U.S. (4 Wheat.) 518, 636 (1819). The Supreme Court went on to describe the characteristics of a corporation:

> Being the mere creature of law, it possesses only those properties which the charter of its creation confers upon it, either expressly, or as incidental to its very existence.
>
> . . . .
>
> . . . [A]t common law, [a corporation] is a collection of individuals, united into one collective body under a special name, and possessing certain immunities, privileges and capacities, in its collective character, which do not belong to the natural persons composing it. Among other things, it possesses the capacity of perpetual succession, and of acting by the collected vote or will of its component members, and of suing and being sued in all things touching its corporate rights and duties. It is, in short, an artificial person, existing in contemplation of law, and endowed with certain powers and franchiseswhich, though they must be exercised through the medium of its natural members, are yet considered as subsisting in the corporation itself, as distinctly as if it were a real personage. Hence, such a corporation may sue and be sued by its own members, and may contract with them in the same manner, as with any strangers.

Id. at 636, 667–68.

the "personhood" of the corporate entity, stating that a corporation, though purely artificial, operated "as distinctly as if it were a real personage."[67] Since then, the Supreme Court has eroded the once firm constitutional line between persons and corporations,[68] now affording them many of the same rights granted to natural persons. The most notable characteristic of corporations, however, is the inherent partition between ownership, granted to the stockholders, and control, given to the executive committee and management. Fiduciary duties, borne out of both statutory[69] and common law,[70] regulate this relationship and define the operating limits of those wielding control as well as the rights of corporate owners.

A. Fiduciary Duties

As currently structured, the owner of a professional sports team "owes no duties to fans."[71] Although fans fund the team (and owner) when they invade the concourse and empty their wallets at the team shop and overpriced concession stands, they remain without any guarantee that the owner has their best interests at heart. Some have argued that sports franchise owners, in fact, do owe fiduciary duties to the general public

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67. *Id.* at 667; *see also* Providence Bank v. Billings, 29 U.S. (4 Pet.) 514, 562 (1830) ("The great object of an incorporation is to bestow the character and properties of individuality on a collective and changing body of men.").

68. The Supreme Court first explicitly equated corporations with natural persons in *County of Santa Clara v. Southern Pacific Railroad Co.*, 118 U.S. 394, 396 (1886). Just two years later, the Court again imputed the characteristics of personhood to corporations under the Fourteenth Amendment. Pembina Consol. Silver Mining & Milling Co. v. Pennsylvania, 125 U.S. 181, 189 (1888) (holding that, with respect to the equal protection clause of the Fourteenth Amendment, "[u]nder the designation of 'person' there is no doubt that a private corporation is included"); *see also* Nw. Nat'l Life Ins. Co. v. Riggs, 203 U.S. 243, 253 (1906), (finding that a corporation "may invoke the protection of [the equal protection] clause of the Fourteenth Amendment"). Moreover, corporations continue to gain recognition from the Supreme Court of their fundamental rights flowing from the protection afforded by the Fourteenth Amendment. *See, e.g.*, First Nat'l Bank of Boston v. Bellotti, 435 U.S. 765, 770 (1978) ("Freedom of speech and the other freedoms encompassed by the First Amendment always have been viewed as fundamental components of the liberty safeguarded by the Due Process Clause, . . . and the Court has not identified a separate source for the right when it has been asserted by corporations." (internal quotations omitted) (citations omitted)); Citizens United v. Fed. Election Comm'n, 558 U.S. 310 (2010) (holding that drawing upon corporate funds for election-related expenditures constitutes a valid exercise of a corporation's freedom of speech).

69. The Delaware General Corporation Law (DGCL) points to the substantive division between corporate ownership and control in § 141(a), which states: "The business and affairs of every corporation . . . shall be managed by or under the direction of a board of directors . . . ." DEL. CODE ANN. tit. 8 § 141(a) (2011).

70. Other corporate law concepts, such as the business judgment rule, are creatures of Delaware (or other applicable state) common law.

71. Schaffer, *supra* note 8, at 227.

when analyzed as a public trust.[72] Alternatively, the sports corporation model, in addition to outlining various corporate formalities, imposes certain fiduciary duties upon its board of directors, which would largely be comprised of the team's current ownership.[73] Rather than create a fiduciary relationship between the owners and the general public, as suggested under the public trust regime,[74] the corporate form substantiates the relationship between corporate directors and shareholder-fans. When "bound by fiduciary ties[,] [a] trustee is held to something stricter than the morals of the market place. Not honesty alone, but the punctilio of an honor the most sensitive, is then the standard of behavior."[75] The courts have since discerned two critical duties imposed upon corporate directors: loyalty and care. Under the sports team corporation model, these duties of loyalty and care would govern team ownership in the same manner that they serve as guideposts for director decision-making for the likes of Apple and General Electric.

1. *Duty of Loyalty*

The duty of loyalty "defines *what* the directors are to seek to accomplish."[76] This duty encapsulates the affirmative responsibility of directors to act with the corporation's best interests at heart and to place

72. Harris explains the qualities of sports franchises lending themselves to qualify as a public trust:

> Fans' feelings of "ownership" of their home teams are deeply rooted in the phenomenon of pride in one's hometown. The rights of ownership are not actual; there is no document or deed transferring title from owner to public. Rather, the feelings are more of a "beneficial" ownership, where the owner of record acts for the ultimate benefit of the beneficiaries—much like in a trust. The "deed of trust" . . . is implied. . . . This ownership may seem to be only of a symbolic nature, but, to any fan, it is genuine. A professional sports franchise, as contrasted with other businesses, engenders this kind of feeling of beneficial ownership in its fans. Often it repays the public's support with an "income" or benefit which, while intangible, nevertheless, is real to the fans and bonds those fans all the more to the team. . . . Consequently, some ownership and management decisions can be guided by a sense of fiduciary responsibility to the public.

Harris, *supra* note 8, at 255–56.

73. Sullivan v. Nat'l Football League, 34 F.3d 1091 (1st Cir. 1994)

74. *See generally* Harris, *supra* note 8.

75. Meinhard v. Salmon, 164 N.E. 545, 546 (N.Y. 1928).

76. Clark W. Furlow, *Good Faith, Fiduciary Duties, and the Business Judgment Rule in Delaware*, 2009 UTAH L. REV. 1061, 1063. The duty of loyalty mandates directors:

> protect the interests of the corporation committed to his charge," while simultaneously "refrain[ing] from doing anything that would work injury to the corporation, . . . deprive it of profit or advantage which his skill and ability might properly bring to it, or . . . enable it to make in the reasonable and lawful exercise of its powers."

Guth v. Loft, Inc., 5 A.2d 503, 510 (Del. 1939).

the interests of the corporation above those of their own.[77] Breaches of directors' duty of loyalty typically arise in the form of a corporate opportunity or an interested director transaction. The corporate opportunity doctrine is meant to "'preclude[] a director or officer from appropriating for himself a business opportunity that 'belongs' to the corporation.'"[78] Thus, in the event a corporation fails to take advantage of a business opportunity, directors generally may not take advantage of the opportunity for their own benefit if:

> (1) the corporation is financially able to exploit the opportunity; (2) the opportunity is within the corporation's line of business; (3) the corporation has an interest or expectancy in the opportunity; and (4) by taking the opportunity for his own, the corporate fiduciary will thereby be placed in a position inimicable to his duties to the corporation.[79]

In contrast with this corporate opportunity doctrine, a director may breach his or her duty of loyalty if shareholders demonstrate that a director participated in an interested director transaction. Such transactions "turn upon the involvement of the director in the contract or transaction to which the corporation is a party."[80] These directors "appear[] on both sides of a transaction or . . . receive[] a personal benefit from a transaction not received by the shareholders generally."[81] Importantly, an interested director transaction may be cleansed by the approval of a majority of disinterested board members[82] or a majority of disinterested shareholders.[83]

77. The duty of loyalty "embodies not only an affirmative duty to protect the interests of the corporation, but also an obligation to refrain from conduct which would injure the corporation and its stockholders or deprive them of profit or advantage. In short, directors must eschew any conflict between duty and self-interest." Ivanhoe Partners v. Newmont Mining Corp., 535 A.2d 1334, 1345 (Del. 1987) (citing Guth v. Loft, Inc., 5 A.2d 503 at 510); *see also* Weinberger v. UOP, Inc., 457 A.2d 701, 710 (Del. 1983)).

78. Shapiro v. Greenfield, 764 A.2d 270, 277 (Md. Ct. Spec. App. 2000) (alteration in original) (citation omitted).

79. Broz v. Cellular Info. Sys., Inc., 673 A.2d 148, 155 (Del. 1996).

80. *Shapiro*, 764 A.2d at 277.

81. Cede & Co. v. Technicolor, Inc., 634 A.2d 345, 362 (Del. 1993). An interested director transaction may also arise

> where a corporate decision will have a materially detrimental impact on a director, but not on the corporation and the stockholders . . . . [because] a director cannot be expected to exercise his or her independent business judgment without being influenced by the adverse personal consequences resulting from the decision.

Rales v. Blasband, 634 A.2d 927, 936 (Del. 1993).

82. *See* DEL. CODE ANN. tit. 8, § 144(a)(1) (2011); *Shapiro*, 764 A.2d at 277.

83. *See* § 144(a)(3).

Traditionally, the duty of good faith constituted an independent fiduciary duty[84] "describ[ing] the state of mind of a director" with which he or she must act in accordance with other fiduciary duties.[85] Recently, however, Delaware corporate law jurisprudence subsumed the standard of good faith under one's fiduciary duty of loyalty,[86] noting that a "director cannot act loyally towards the corporation unless she acts in the good faith belief that her actions are in the corporation's best interest."[87] Good faith continues to be a nebulous concept,[88] but it is most often implicated in connection with allegations of directors' breach of their duty to monitor, alternatively characterized as director oversight liability.[89]

Directors' duty to monitor[90] "is an obligation to prevent harm to the corporation"[91] and remains in play with respect to both the corporation's compliance with applicable law as well as the corporation's business

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84. *See Technicolor, Inc.*, 634 A.2d at 361 (stating that "a shareholder plaintiff assumes the burden of providing evidence that directors, in reaching their challenged decision, breached any one of the triads of their fiduciary duty—good faith, loyalty or due care").

85. Furlow, *supra* note 76, at 1063.

86. *See* Stone *ex. rel.* AmSouth Bancorporation v. Ritter, 911 A.2d 362, 370 (Del. 2006) (finding the "obligation to act in good faith does not establish an independent fiduciary duty that stands on the same footing as the duties of care and loyalty").

87. *Id.* at 370 (quoting Guttman v. Huang, 823 A.2d 492, 506 n.34 (Del. Ch. 2003)) (internal quotation marks omitted).

88. In fact, the concept of good faith in this context is defined in terms of its opposite, bad faith, which generally describes instances where "the fiduciary intentionally acts with a purpose other than that of advancing the best interests of the corporation." *Ritter*, 911 A.2d at 369 (citing *In re* Walt Disney Co. Derivative Litig., 906 A.2d 27, 67 (Del. 2006)). In the last decade, the Delaware Supreme Court has identified three categories of bad faith worthy of imposing liability. The first, "classic, quintessential" notion of bad faith involves "subjective bad faith" which unveils "actual intent to do harm." *See, e.g.*, *In re* Walt Disney Co. Derivative Litig., 906 A.2d at 64. A second category of bad faith occurs "where the fiduciary acts with the intent to violate applicable positive law." *See, e.g.*, *Ritter*, 911 A.2d at 369 (citing *In re* Walt Disney Co. Derivative Litig., 906 A.2d at 67). Third, "where the fiduciary intentionally fails to act in the face of a known duty to act, demonstrating a conscious disregard for his duties," bad faith may be found. *See In re* Walt Disney Co. Derivative Litig., 906 A.2d at 67.

89. Justice Randy Holland considered violation of *Caremark*'s duty to monitor as a failure to act in good faith, and thus, a breach of the duty of loyalty. *See* Eric J. Pan, *A Board's Duty to Monitor*, 54 N.Y.L. SCH. L. REV. 717, 732 & n.92 (2009) (citing Justice Holland in *Stone v. Ritter*, who wrote, "[T]he *Caremark* standard for so-called 'oversight' liability draws heavily upon the concept of director failure to act in good faith").

90. Professor Hillary A. Sale considers Chancellor Allen's opinion in *In re Caremark*, which formally solidified the imposition of directors' duty to monitor, "one of the most prominent Delaware opinions of all time." Hillary A. Sale, *Monitoring* Caremark*'s Good Faith*, 32 DEL. J. CORP. L. 719, 719 (2007). The duty to monitor continues to be "the duty most affected by federal statutory and regulatory changes." *Id.* at 722. Furthermore, the duty to monitor epitomizes "the theories about agency costs inherent in the separation of ownership and control." *Id.*

91. Pan, *supra* note 89, at 720; *see also*, Stephen M. Bainbridge, Star Lopez & Benjamin Oklan, *The Convergence of Good Faith and Oversight*, 55 UCLA L. REV. 559, 561 (2008).

performance.[92] Chancellor Allen, in *In re Caremark*, summarized the obligation as "a duty to attempt in good faith to assure that a corporate information and reporting system, which the board concludes is adequate, exists, and that failure to do so under some circumstances may, in theory at least, render a director liable for losses caused by non-compliance with applicable legal standards."[93] The Delaware Supreme Court, in *Stone v. Ritter*, built upon the foundations of *Caremark*, outlining the two potential routes shareholder plaintiffs may take to assert what has become known as a *Caremark* claim for directors' failure to adequately monitor the business:

> (a) the directors utterly failed to implement any reporting or information system or controls; *or* (b) having implemented such a system or controls, consciously failed to monitor or oversee its operations thus disabling themselves from being informed of risks or problems requiring their attention. In either case, imposition of liability requires a showing that the directors knew that they were not discharging their fiduciary obligations . . . demonstrating a conscious disregard for their responsibilities.[94]

The excessive risk-taking that characterized the subprime mortgage-backed securities markets has caused directors' duty to monitor to take center stage amongst recent shareholder derivative litigation.[95] In the wake of the collapse of financial giants Bear Sterns, Lehman Brothers, and AIG, corporate monitoring and oversight guidelines will continue to evolve and likely grow. As President Obama noted:

> [W]e have a financial system with the same vulnerabilities that it had before [the] crisis began. . . . [I]f there aren't rules in place to guard against the recklessness of a few, and they're allowed to . . . take on excessive risk, it starts a race to the bottom that results in all of us losing.[96]

92. *In re* Caremark Int'l Inc. Derivative Litig., 698 A.2d 959, 970 (Del. Ch. 1996).

93. *Id.*

94. *Ritter*, 911 A.2d at 370.

95. *See generally In re* Citigroup, Inc. S'holder Derivative Litig., 964 A.2d 106 (Del. Ch. 2009) (dismissing a shareholder derivative suit brought against corporate directors, citing their failure to monitor, as well as wasteful investment relating to the unreasonably risky subprime mortgage debt that comprised a large part of Citigroup's operating portfolio).

96. President Barack Obama, Remarks by the President to the Business Roundtable (Feb. 24, 2010), *available at* http://www.whitehouse.gov/the-press-office/remarks-president-business-roundtable; *see also* RICHARD A. POSNER, A FAILURE OF CAPITALISM: THE CRISIS OF '08 AND THE DESCENT INTO DEPRESSION 322–23 (2009) ("[N]o single bank, in the highly competitive financial intermediation industry, could justify to its shareholders reducing its risk taking . . . and therefore their

It is unlikely that excessive risk-taking among professional sports teams will result in consequences as severe as the economic collapse of 2008. Nevertheless, the duty to monitor assumes an important role within a sports corporation's governance structure because the sports corporation model shifts the directors' focus to profit maximization and shareholders' return on investment. In fact, numerous examples, to be highlighted later in this Note, illustrate the duty to monitor's importance in the world of professional sports.[97]

2. The Duty of Care

When engaging in the decision-making process, corporate directors must do so under the auspice of the duty of care, which "defines *how* they are to pursue that goal."[98] The landmark case of *Smith v. Van Gorkom*[99] first explicitly introduced the duty of care as a limitation upon directors' previously unbridled decision-making power:

> [F]ulfillment of the fiduciary function . . . . imposes on a director an affirmative duty to protect those interests and to proceed with a critical eye in assessing information. . . . Thus, a director's duty to exercise an informed business judgment is in the nature of a duty of care . . . .[100]

In attacking a corporate decision premised on a violation of the duty of care, plaintiff shareholders must show that the directors were grossly negligent in informing themselves as to the decision.[101] Plaintiffs find little success in shareholder derivate suits based upon directors' breach of their duty of care due to the utilization of § 102(b)(7) of the Delaware General Corporation Law (DGCL) in many organizations' certificates of incorporation, which shelters directors from liability for breaches of the duty of care.[102]

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return on equity, merely because the risks that it and its competitors were taking might precipitate a financial crisis. . . . There would only be one effect of the bank's altruism . . . the bank would lose out in competition with its daring competitors.").

97. *See infra* Part VI.

98. Furlow, *supra* note 76, at 1063.

99. 488 A.2d 858 (Del. 1985).

100. *Id.* at 872–73.

101. *Id.* at 873. Relevant to any due care analysis is the extent to which corporate directors may rely on reports, opinions, or other statements presented by other directors, employees, or outside professionals or experts. These opinions and expert information are generally protected by the business judgment rule such that directors may rely on them without threatening compliance with the duty of care. *See* DEL. CODE ANN. tit. 8, § 141(e) (2011).

102. In response to the landmark decision of *Smith v. Van Gorkom*, the Delaware legislature, in

B. Business Judgment Rule

Shareholders wishing to challenge a corporate decision are initially faced with the challenge of overcoming the business judgment rule presumption afforded to directors. An offspring of Delaware statutory law,[103] the business judgment rule famously imposes "a presumption that in making a business decision the directors of a corporation acted on an informed basis, in good faith and in the honest belief that the action taken was in the best interests of the company."[104] Directors' decisions will be largely immunized from judicial scrutiny,[105] provided that they arrived at the decision within the confines of the duty of care and the duty of loyalty. The presumption of validity afforded by the business judgment rule will not apply, however, if the corporation's decision "cannot be 'attributed to any rational business purpose,'"[106] providing another weapon in the plaintiff shareholder's arsenal for attacking corporate decisions. Although shareholders face a high burden, and often fall short, the business judgment rule and accompanying fiduciary duties provide a useful lens through which to view sports franchise decision-making.

1986, adopted § 102(b)(7). Furlow, *supra* note 76, at 1064. The statute allows corporate directors to include in the corporation's certificate of incorporation:

> [a] provision eliminating or limiting the personal liability of a director to the corporation or its stockholders for monetary damages for breach of fiduciary duty as a director, provided that such provision shall not eliminate or limit the liability of a director: (i) For any breach of the director's duty of loyalty to the corporation or its stockholders; (ii) for acts or omissions not in good faith or which involve intentional misconduct or a knowing violation of law; (iii) under § 174 of this title; or (iv) for any transaction from which the director derived an improper personal benefit. No such provision shall eliminate or limit the liability of a director for any act or omission occurring prior to the date when such provision becomes effective.

DEL. CODE ANN. tit. 8, § 102(b)(7) (2011).

103. *Van Gorkom*, 488 A.2d at 872. The business judgment rule finds its origins in DGCL § 141(a), which appropriates all powers of management of corporate affairs to the board of directors. *See* § 141(a).

104. Aronson v. Lewis, 473 A.2d 805, 812 (Del. 1984). The business judgment rule applies only where the board of directors makes a decision and is absent from an analysis of a board's failure to act. *Id.* at 813. The presumption may apply, however, when the board's failure to act stems from a conscious decision to do so. *Id.*

105. *See* Brehm v. Eisner, 746 A.2d 244, 264, 266 (Del. 2000) ("Courts do not measure, weigh or quantify directors' judgments. We do not even decide if they are reasonable in this context. . . . To rule otherwise would invite courts to become super-directors, measuring matters of degree in business decisionmaking. . . . Such a rule would run counter to the foundation of our jurisprudence."); Cede & Co. v. Technicolor, Inc., 634 A.2d 345, 361 (Del. 1993) (holding when "the business judgment rule attaches to protect corporate officers and directors and the decisions they make, . . . our courts will not second-guess these business judgments").

106. *In re* Walt Disney Co. Derivative Litig., 906 A.2d 27, 74 (Del. 2006) (quoting Sinclair Oil Corp. v. Levien, 280 A.2d 717, 720 (Del. 1971)).

V. IS WINNING CHAMPIONSHIPS A RATIONAL BUSINESS PURPOSE?

As previously discussed, corporate directors are granted protection by the business judgment rule when their decision involves a rational business purpose.[107] Jurisprudence surrounding the concept of business purpose suggests that generating profit for the shareholders is the primary goal of a corporation.[108] Some jurisdictions, however, have adopted "constituency statutes" which effectively broaden the range of permissible business purposes and constituencies upon which the corporate directors may hinge their decisions.[109] In contrast to a valid business purpose is the concept of waste, which, if properly alleged and proved by plaintiff shareholders, will strip the directors of their business judgment rule protection.[110] Corporate waste functions as an "outer limit[]"[111] to the application of the business judgment rule and arises when the directors initiate an "exchange of corporate assets for consideration so disproportionately small as to lie beyond the range at which any

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107. *See supra* Part IV.

108. *See, e.g.*, Dodge v. Ford Motor Co., 170 N.W. 668, 684 (Mich. 1919) ("A business corporation is organized and carried on primarily for the profit of the stockholders. The powers of the directors are to be employed for that end. The discretion of directors is to be exercised in the choice of means to attain that end, and does not extend to a change in the end itself."). In his 2010 decision, Chancellor Chandler of the Delaware Court of Chancery reaffirmed this notion, stating, "I cannot accept as valid . . . a corporate policy that specifically, clearly, and admittedly seeks *not* to maximize the economic value of a for-profit Delaware corporation for the benefit of its stockholders . . . ." eBay Domestic Holdings, Inc. v. Newmark, 16 A.3d 1, 34 (Del. Ch. 2010).

109. Although not appearing in every state, constituency statutes are gaining popularity, including in the alternate form of benefit corporations. Currently, "benefit corporation[s] [are] recognized in Maryland, California (which also has the flexible purpose corporation), Hawaii, Vermont, Virginia, New Jersey and (as of February 14, 2012) New York." Evangeline Gomez, *The Rise of the Charitable For-Profit Entity*, FORBES (Jan. 13, 2012, 6:16 PM), http://www.forbes.com/sites/evangelinegomez/2012/01/13/the-rise-of-the-charitable-for-profit-entity/. The Pennsylvania legislature provides a prototypical constituency statute that reads as follows:

> (a) General Rule. —In discharging the duties of their respective positions, the board of directors, committees of the board and individual directors of a business corporation may, in considering the best interests of the corporation, consider to the extent they deem appropriate:
> (1) The effects of any action upon any or all groups affected by such action, including shareholders, employees, suppliers, customers and creditors of the corporation, and upon communities in which offices or other establishments of the corporation are located. . . .
> (b) Consideration of interests and factors. —The board of directors, committees of the board and individual directors shall not be required, in considering the best interests of the corporation or the effects of any action, to regard any corporate interest or the interests of any particular group affected by such action as a dominant or controlling interest or factor. . . .

15 PA. CONS. STAT. § 1715(a)(1), (b) (West 1995).

110. *See* Brehm v. Eisner, 746 A.2d at 255, 262–66.

111. *Id.* at 264.

reasonable person might be willing to trade . . . [and] where directors irrationally squander or give away corporate assets."[112]

While sports franchises are "interested in generating profits," their success is also based on the team's on-field success and post-season achievement.[113] The sports team corporation functions amid the tension created by these two competing motives, which do not always act in concert. Winning often comes at a hefty price. Consider the Chicago Blackhawks of the NHL who won the Stanley Cup in 2010.[114] Although the team sat atop the NHL ranks, team ownership admitted that the team had run out of cash several times during the season and that it would take at least four years to remedy their financial situation after their championship season.[115] The Florida Marlins of Major League Baseball experienced the same incongruous outcomes. In 1997, the team won the World Series, yet reported losses of $34 million.[116] Conversely, Major League Baseball's Pittsburgh Pirates are in the midst of nineteen consecutive losing seasons,[117] but continue to make profits despite being cellar-dwellers.[118] For a majority of big-market teams, however, generating profit and winning games go hand-in-hand.[119] Nonetheless, as the sports corporation model gains momentum, courts will be entrusted with the task of untangling the complicated business model. For example, Joe Lacob, majority owner of the NBA's Golden State Warriors, proclaims on the team's official website, "We are all about winning."[120] Under a sports corporation model, the Delaware judiciary may face an

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112. *Id.*

113. Garrett & Green, *supra* note 8, at 86.

114. Jeff Z. Klein, *Blackhawks Win First Stanley Cup in 49 Years*, N.Y. TIMES, June 9, 2010, http://www.nytimes.com/2010/06/10/sports/hockey/10flyers.html?pagewanted=all.

115. Melissa Harris, *Exclusive: Blackhawks Finish Stanley Cup Season in the Red*, CHICAGO BREAKING NEWS (July 30, 2010), http://articles.chicagobreakingnews.com/2010-07-30/news/28515931_1_wirtz-corp-s-wirtz-corp-rocky-wirtz.

116. Andrew Zimbalist, *The Capitalist; A Miami Fish Story*, N.Y. TIMES (Oct. 18, 1998), http://www.nytimes.com/1998/10/18/magazine/the-capitalist-a-miami-fish-story.html?pagewanted=all&src=pm.

117. Gabe Lacques, *Pirates Lose to Cardinals, Clinch 19th Straight Losing Season*, USA TODAY (Sept. 14, 2011, 3:20 PM), http://content.usatoday.com/communities/dailypitch/post/2011/09/pittsburgh-pirates-losing-season-streak-continues/1#.UMnuwYPBGuJ.

118. *See* Alan Robinson, *Financial Records Show Pittsburgh Pirates Win While Losing*, USA TODAY (Aug. 23, 2010, 11:58 AM), http://usatoday30.usatoday.com/sports/baseball/nl/pirates/2010-08-22-1957305623_x.htm?csp=34sports.

119. Examples like the Chicago Blackhawks in 2010 and the Florida Marlins in 1997 represent outliers compared to the typical financial success of professional sports teams that experience success within their respective leagues.

120. THE OFFICIAL SITE OF THE GOLDEN STATE WARRIORS, http://www.nba.com/warriors/ (last visited Jan. 12, 2012).

issue of first impression regarding whether this pronounced corporate objective would satisfy the judiciary as a rational business purpose. Whereas a decision to increase ticket prices illustrates a tight nexus to shareholder profits (due to increased revenue), decisions to construct a new practice facility or to resign a player to a maximum contract represent more tenuous relationships to shareholder profits, which remain the ultimate goal of corporate existence.[121]

VI. A NEW BREED OF SHAREHOLDER DERIVATIVE SUIT

In the NBA's recent lockout, Derek Fisher, the president of the National Basketball Players Association (NBPA), admonished team owners when he said, "We've run into situations where teams have either mismanaged spending, overpaid staff, or made decisions on rosters and personnel that weren't in their best interest—things that we're now being asked to take the hit for."[122] Armed with the ammunition provided by corporate jurisprudence, shareholders would be in a position to critically examine sports franchise owners' decisions and to file a shareholder derivative suit[123] or direct action,[124] if necessary. The shareholder power that accompanies a franchise's decision to go public will cause team owners to make prudent decisions in the shadow of potential litigation.

Without the advantage of well-developed judicial commentary on the corporate enterprise, courts first dealt with the notion of "fan activism" in

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121. *See supra* note 108 and accompanying text.

122. Coon, *supra* note 6.

123. "Devised as a suit in equity, the purpose of the derivate action was . . . to protect the *interests of the corporation* from the misfeasance and malfeasance of 'faithless directors and managers.'" J. Travis Laster, *Goodbye to the Contemporaneous Ownership Requirement*, 33 DEL. J. CORP. L. 673, 676 (2008) (quoting Kamen v. Kemper Fin. Servs., Inc., 500 U.S. 90, 95 (1991)). A derivative claim is one that belongs to the corporation, which an individual or class brings against the corporation's directors on behalf of the corporation. Zachary D. Olson, *Direct or Derivative: Does it Matter After* Gentile v. Rossette*?*, 33 J. CORP. L. 595, 598 (2008). In fact, "[t]he nature of the action is two-fold. First, it is the equivalent of a suit by the shareholders to compel the corporation to sue. Second, it is a suit by the corporation, asserted by the shareholders on its behalf, against those liable to it." Aronson v. Lewis, 473 A.2d 805, 811 (Del. 1984). "The recovery in a derivative suit 'must go to the corporation'. . . ." Olson, *supra*, at 598 (citing Tooley v. Donaldson, Lufkin, & Jenrette, Inc., 845 A.2d 1031, 1036 (Del. 2004)).

124. In contrast to a derivative action, a direct action "is a claim belonging to an individual (or class of individuals) that is appropriately brought by that individual (or class) on his or her (or their) own behalf." Olson, *supra* note 123, at 598. In this instance, the recovery "flows directly to the stockholders, not to the corporation." *Id.* (quoting *Tooley*, 845 A.2d at 1036). The initial inquiry as to whether a prospective plaintiff should pursue a direct or derivative action is, "To whom does the claim belong?" *Id.* An alternative inquiry is whether the shareholder suffered harm independent of damages to the corporation. *See* Daniel S. Kleinberger, *Direct Versus Derivative and the Law of Limited Liability Companies*, 58 BAYLOR L. REV. 63, 93 (2006).

Shlensky v. Wrigley.[125] For years, the Chicago Cubs failed to install lighting and schedule night games,[126] which the plaintiff alleged was resulting in lost profits.[127] In deferring to the directors' decision not to install lights at Wrigley Field as a valid exercise of business judgment, the court found that the decision did relate to the Cubs' financial interests with respect to the team's property values and the potential effect on the surrounding neighborhood, which might affect the public's willingness to attend games.[128] Notably, in the context of a competitive environment such as a professional sports league, the court added, "it cannot be said that directors, even those of corporations that are losing money, must follow the lead of the other corporations in the field."[129]

The events surrounding LeBron James's television special, "The Decision,"[130] represent just a few of numerous recent transactions which shareholders of a publicly traded sports corporation could have taken to the court, literally. Might Cavaliers shareholders bring a derivative suit claiming that Dan Gilbert, the team's owner, breached his fiduciary duty by failing to acquire enough talent to entice LeBron James to remain in

125. 237 N.E.2d 776 (Ill. App. Ct. 1968).

126. The Chicago Cubs, in fact, did not install lighting until 1988, at which point they played the team's first night game in franchise history. *See Cubs Timeline*, THE OFFICIAL SITE OF THE CHICAGO CUBS, chicago.cubs.mlb.com/chc/history/timeline10.jsp (last updated June 19, 2012).

127. The plaintiff specifically alleged that the scheduling of night games by other franchises was done specifically to maximize attendance and therefore maximize revenue and income. *Wrigley*, 237 N.E.2d at 777. Moreover, he alleged, "if the directors continue to refuse to install lights at Wrigley Field and schedule night baseball games, the Cubs will continue to sustain comparable losses and its financial condition will continue to deteriorate." *Id.*

128. *Id.* at 780–81.

129. *Id.* at 781.

130. The summer of 2010 saw NBA owners and player agents circling the star-infested waters of the free agency market. Dwyane Wade, Chris Bosh, Amar'e Stoudemire, Paul Pierce and Dirk Nowitzki, in addition to Rudy Gay and Joe Johnson, headlined a star-studded cast of free agents. Ian Thomsen, *Bracing for the 2010 Sweepstakes*, SPORTS ILLUSTRATED (Nov. 20, 2008, 1:10 PM), http://sportsillustrated.cnn.com/2008/writers/ian_thomsen/11/20/free.agent.primer/index.html. Nevertheless, LeBron James stole the limelight when he formally announced his decision to leave the Cleveland Cavaliers and to "take [his] talents to South Beach and join the Miami Heat" as part of a one-hour ESPN special. *LeBron James' Decision: The Transcript*, ESPN.COM (July 8, 2010, 11:35 PM), http://espn.go.com/blog/truehoop/post/_/id/17853/lebron-james-decision-the-transcript. James's appearance on The Decision provoked unbridled hostility amongst fans in Cleveland and quickly branded LeBron James a "villain." In an interview that followed the television event, James reflected:

> I would probably change a lot of it. The fact of having a whole TV special, and people getting the opportunity to watch me make a decision on where I wanted to play, I probably would change that. Because I can now look and see if the shoe was on the other foot and I was a fan, and I was very passionate about one player, and he decided to leave, I would be upset too about the way he handled it. . . . It basically turned me into somebody I wasn't.

Tom Weir, *LeBron James Expresses Regrets about 'The Decision*,*'* USA TODAY (Dec. 6, 2011, 1:57 PM), http://content.usatoday.com/communities/gameon/post/2011/12/lebron-james-expresses-regrets-about-the-decision/1.

Cleveland? Considering the fact that James's departure meant a loss of approximately $100 million according to some, while saddling local businesses with $48 million in losses—$150 million including the playoffs—the argument can be made that Gilbert's duty of loyalty required him to do everything in his power to retain LeBron James in order to maintain the profitability of the Cleveland Cavaliers.[131]

The sports corporation model may have kept the Los Angeles Dodgers out of bankruptcy. In October 2011, Major League Baseball filed a complaint alleging that owner Frank McCourt "looted" nearly $190 million from the team to pay personal obligations, among other personal uses.[132] Appropriating corporate funds for personal use represents a clear example of a breach of a director's duty of loyalty.[133] The astute investor or well-informed fan, by initiating a shareholder derivative lawsuit at the first suggestion of McCourt's improper behavior, could have played a large role in possibly preventing the team's 2011 bankruptcy by limiting the magnitude of McCourt's financial misappropriation.

Similarly, decisions to sign minimal contributors to outlandish contracts would also be subjected to scrutiny under the waste exception to directorial protection of the business judgment rule.[134] In 2010, the NBA's Phoenix Suns acquired small forward Josh Childress as part of a trade[135] and agreed to pay him $33.5 million over five years.[136] As a result of his poor performance, Childress saw action in only fifty-four of eighty-two

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131. Robert Schoenberger & Teresa Dixon Murray, *How Much is LeBron James Worth to Northeast Ohio?*, CLEVELAND.COM (June 28, 2010, 6:53 PM), http://www.cleveland.com/business/index.ssf/2010/06/how_much_is_lebron_james_worth.html. *But see* Kurt Badenhausen, *Cavaliers' Profit Soars Without LeBron James*, FORBES (Jan. 27, 2011, 4:00 PM), http://www.forbes.com/sites/kurtbadenhausen/2011/01/27/cavaliers-profits-soar-without-lebron-james/.

132. *MLB, Frank McCourt Trade Legal Jabs*, ESPN.COM (Oct. 25, 2011, 5:10 PM) http://espn.go.com/los-angeles/mlb/story/_/id/7146959/major-league-baseball-claims-frank-mccourt-took-190m-los-angeles-dodgers.

133. *See supra* Part IV.A.1.

134. *See supra* Part V.

135. Associated Press, *Childress Traded to Phoenix*, ESPN.COM (July 14, 2010, 4:54 PM), http://sports.espn.go.com/nba/news/story?id=5380252.

136. *Josh Childress*, SPOTRAC, http://www.spotrac.com/nba/phoenix-suns/josh-childress/ (last visited Nov. 3, 2012). A "sign-and-trade" in the NBA refers to a free agent's decision to sign with his most recent team that can offer the player more money over a longer period of time than a new team could offer under the collective bargaining agreement. That player, after signing with their previous team, is subsequently traded, under contract, to another team. This exchange allows the acquiriring team to receive a player that it would not otherwise be able to afford given the league's salary cap restrictions. For an example of a recent high-profile sign-and-trade deal involving the Phoenix Suns's Steve Nash and the Los Angeles Lakers, see Ethan Sherwood Strauss, *NBA Free Agency 2012: Do Sign-and-Trade Deals Undermine the New CBA?*, BLEACHER REPORT (July 11, 2012), http://bleacherreport.com/articles/1255130-nba-free-agency-2012-why-sign-and-trade-deals-make-the-new-cba-worth less.

games during the regular season and averaged only five points per game, after totaling nearly twelve points per game the previous season with the Atlanta Hawks.[137] In the absence of any connection to profitability or even to winning games, the Suns' front office decision to sign Childress serves as another example of the application of fiduciary principles courts would need to address in the context of sports team corporations.

Other decisions, such as one not to increase ticket prices in order to maintain their affordability, would present the courts with new questions regarding the team's profit motive.[138] But, it may be the case that a reduction in ticket prices would actually improve the team's financial prospects.[139] The construction of a new practice facility or weight room, while unrelated to profitability, is designed to improve the team's on-field performance. Might these directorial decisions fail judicial scrutiny as well? The critical question then "becomes what 'form of success will be applied to a sports franchise that has gone public.'"[140]

Several recent examples also illuminate the role of the duty to monitor in sports team corporation ownership decision-making. Plaxico Burress, a heralded wide receiver, formerly of the Super Bowl champion New York Giants, was imprisoned for two years after pleading guilty to a felony weapons charge.[141] The organization ultimately failed to resign Burress and instead missed the playoffs altogether during the two seasons following Burress's incarceration.[142] Given the corporate directors' duty to protect the corporation from harm stemming from illegal activities, did John Mara and Steve Tisch, current owners of the team,[143] breach their fiduciary duties in failing to monitor their players' extracurricular activities? Presumably, the team lacked a reporting or oversight system to monitor athletes' use or ownership of handguns. Compare this isolated

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137. *Josh Childress Stats*, ESPN.COM, http://espn.go.com/nba/player/stats/_/id/2373/josh-childress (last visited Nov. 4, 2012).

138. Garrett & Green, *supra* note 8, at 86.

139. Upon completion of the New York Yankees' new stadium, ticket prices remained so high that the team had trouble selling season ticket packages. As a result, the front office actually reduced ticket prices in order to induce fans to purchase tickets and ultimately improve the team's profits. *See* Richard Sandomir, *Yankees Slash the Price of Top Tickets*, N.Y. TIMES, Apr. 28, 2009, http://www.nytimes.com/2009/04/29/sports/baseball/29tickets.html.

140. Garrett & Green, *supra* note 8, at 86 (citation omitted).

141. John Eligon, *Burress Will Receive 2-Year Prison Sentence*, N.Y. TIMES, Aug. 20, 2009, http://www.nytimes.com/2009/08/21/nyregion/21burress.html.

142. Ohm Youngmisuk, *Osi: Giants Not the Same without Plax*, ESPN.COM (Feb. 5, 2011, 9:40 AM), http://sports.espn.go.com/new-york/nfl/news/story?id=6091581.

143. THE OFFICIAL SITE OF THE NEW YORK GIANTS, http://www.giants.com/team/staff.html (last visited Nov. 4, 2012).

incident with the startling information uncovered in *The Mitchell Report*[144] that named a countless number of Major League Baseball players, including José Canseco, Roger Clemens, Ken Caminiti, and Barry Bonds (former league MVPs), who used steroids or performance-enhancing drugs during their careers.[145]

> Since 1991, Major League Baseball's Drug Policy has covered performance enhancing substances expressly. That policy states in part: "If any club covers up or fails to disclose to [the Commissioner's] office any information concerning drug use by a player, the Club will be fined in an amount up to $2 million, the highest allowable amount under the Major League Constitution."[146]

The Mitchell Report suggested that teams failed to implement any kind of reporting system within the clubhouse walls.[147] Does this qualify as a "sustained or systematic failure of the board to exercise oversight— . . . an utter failure to attempt to assure a reasonable information and reporting system exists"[148] such that team shareholders could establish a lack of good faith essential to oversight liability? Undoubtedly, the sports team corporation presents a host of novel applications of traditional corporate law doctrines.

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144. In response to the controversies unearthed in the book, *Game of Shadows*, which chronicled the use of steroids and other performance-enhancing drugs in Major League Baseball, former Senator George Mitchell spearheaded an independent government investigation into the use of performance-enhancing drugs (PEDs) in the major leagues. Once completed, the Mitchell Report charged seven MVPs and thirty-one all-stars with having used some form of steroids or performance-enhancing substance. *Mitchell Report: Baseball Slow to React to Players' Steroid Use*, ESPN.COM (Dec. 14, 2007, 11:29 AM), http://sports.espn.go.com/mlb/news/story?id=3153509.

145. *See Players Listed in the Mitchell Commission Report*, ESPN.COM (Dec. 13, 2007, 9:17 PM), http://sports.espn.go.com/mlb/news/story?id=3153646.

146. GEORGE J. MITCHELL, REPORT TO THE COMMISSIONER OF BASEBALL OF AN INDEPENDENT INVESTIGATION INTO THE ILLEGAL USE OF STEROIDS AND OTHER PERFORMANCE ENHANCING SUBSTANCES BY PLAYERS IN MAJOR LEAGUE BASEBALL 292–93 (2007), *available at* http://files.mlb.com/mitchrpt.pdf. Most recently, the Milwaukee Brewers' star left fielder and 2011 National League MVP, Ryan Braun, tested positive for performance-enhancing drugs. Mark Fainaru-Wada & T.J. Quinn, *Ryan Braun Tests Positive for PED*, ESPN.COM (Dec. 12, 2011, 7:32 PM), http://espn.go.com/espn/otl/story/_/id/7338271/ryan-braun-milwaukee-brewers-tests-positive-performance-enhancing-drug; Bob Nightengale, *Ryan Braun Tests Positive for PED, says 'It's BS,'* USA TODAY (DEC. 10, 2011), http://content.usatoday.com/communities/dailypitch/post/2011/12/ryan-braun-steroids-50-game-suspension-appeal/1. *But see* Tyler Kepner, *Braun's Name is Cleared, but Questions Linger*, N.Y. TIMES, Feb. 24, 2012, http://www.nytimes.com/2012/02/24/sports/baseball/ryan-brauns-name-is-cleared-but-questions-linger.html (describing Braun's innocence due to a procedural error).

147. MITCHELL, *supra* note 146, at 293–94.

148. Stone *ex rel.* Amsouth Bacorporation v. Ritter, 911 A.2d 362, 370 (Del. 2006) (quoting *In re* Caremark Int'l Inc. Derivative Litig., 698 A.2d 959, 971 (Del. Ch. 1996)) (internal quotation marks omitted).

VII. FIXING THE GAME: LLCS, MASTER LIMITED PARTNERSHIPS, AND FIDUCIARY DUTIES

Sports franchise owners may be able to avoid obligations under their fiduciary duties with careful corporate planning. Several states, most notably Delaware, have enacted alternative entity statutes[149] that provide the benefits of the traditional corporation with a newfound flexibility that only freedom of contract can afford.

Importantly, these governance structures allow potential users to rely on the public for financing. Limited liability companies, which may take the form of member-managed or manager-managed organizations,[150] are permitted to sell LLC "interests"[151] that come with varying rights and privileges as outlined in the operating agreement.[152] When publicly traded, limited partnerships, called "master limited partnerships"[153] also allow for the establishment of various limited partnership interests,[154] which can be organized into classes with varying rights and privileges[155] and be publicly traded.[156]

Delaware's Limited Liability Company Act (LLC) and Revised Uniform Limited Partnership Act (DRULPA) both espouse an explicit "policy . . . to give maximum effect to the principle of freedom of contract and to the enforceability of"[157] their respective agreements. This affords founding individuals the chance to draft and enforce various provisions tailored specifically to the organization's purpose, finances, parties, and goals. According to the alternative entity statutes, among the issues "up for

149. Of these alternative entity statutes, the Delaware Limited Liability Company Act, DEL. CODE ANN. tit. 6, §§ 18-101 to -1109 (2005 & Supp. 2010), the Delaware Revised Uniform Limited Partnership Act, DEL. CODE ANN. tit. 6, §§ 17-101 to -1111**,** and the Delaware Revised Uniform Partnership Act, DEL. CODE ANN. tit. 6, §§ 15-101 to -1210, have gained the greatest traction amongst both new and established organizations. For examples of alternative entity statutes, see *supra* note 66.

150. *See* § 18-402, which allows for either management structure. Sports franchises would likely be organized as manager-managed LLCs such that the owners retain membership status, while vesting the day-to-day affairs of the LLC in its managers, which might include its other executives, general managers, and coaches.

151. § 18-215(a).

152. §§ 18-302, -404 (allowing for the creation of classes or other groupings of members and managers, respectively).

153. *See generally* John Goodgame, *Master Limited Partnership Governance*, 60 BUS. LAW. 471 (2005); Anne E. Conaway Stilson, *The Agile Virtual Corporation*, 22 DEL. J. CORP. L. 479, 525 (1997) (explaining the nature of a master limited partnership).

154. § 17-218.

155. *Id.*

156. § 17-702 allows for the assignment or sale of a partnership interest, unless specifically addressed in the partnership agreement.

157. § 15-103(d); § 17-1101(c); *see also* § 18-1101(b).

negotiation" is the imposition of parties' fiduciary duties to each other and to third parties.[158] The Limited Liability Company Act states:

> To the extent that, at law or in equity, a member or manager or other person has duties (including fiduciary duties) to a limited liability company or to another member or manager or to another person that is a party to or is otherwise bound by a limited liability company agreement, the member's or manager's or other person's duties may be expanded or restricted or eliminated by provisions in the limited liability company agreement . . . .[159]

The Delaware Limited Partnership Act contains similar language that allows for the elimination of fiduciary duties amongst its partners, limited partners, the limited partnerships, and third persons.[160] This language stands in stark contrast to that contained in the Delaware Revised Uniform Partnership Act (DRUPA), which plainly states, "relations among the partners and between the partners and the partnership are governed by the partnership agreement."[161] Still, all three Delaware statutes fix a baseline measure of conduct: the implied covenant of good faith and fair dealing.[162]

Sports franchise owners should be careful to explicitly enumerate which duties are owed and which are not, as Delaware courts have struggled to determine the default position of the alternative entity statutes since their inception. While the various statutes allow for the termination or modification of fiduciary duties, the question remains whether the fiduciary duties exist in the first place.[163] For several years following the statute's amendment in 2004, Delaware case law examining the issue failed to endorse a unified front. On some occasions, Delaware courts declared that, even in the absence of explicit language in the contractual agreement, fiduciary duties did not apply.[164] In an overwhelming majority

158. Both statutes provide for the modification or elimination of parties' fiduciary duties owed to each other and to the entity. *See, e.g.*, § 17-1101; § 18-1101.

159. § 18-1101(c).

160. § 17-1101(d).

161. § 15-103(a).

162. DRUPA specifically prohibits a partnership agreement from "eliminat[ing] the implied contractual covenant of good faith and fair dealing." § 15-103(b)(3). Similarly, DRULPA and the LLC Act also carve out the implied contractual covenant of good faith and fair dealing from elimination. *See* § 17-1101(d); *see also* § 18-1101(c).

163. *See generally* Myron T. Steele, *Freedom of Contract and Default Contractual Duties in Delaware Limited Partnerships and Limited Liability Companies*, 46 AM. BUS. L. J. 221 (2009) (describing Delaware courts' struggle to decipher the default position of the state's limited liability company and limited partnership statutes with respect to fiduciary duties).

164. Chancellor Chandler, in *Fisk Ventures, LLC v. Segal*, No. 3017-CC, 2008 WL 1961156 (Del. Ch. May 7, 2008), held, "In the context of limited liability companies, which are creatures not of the

of cases, however, the courts found that fiduciary duties occupied the default position for limited liability companies and limited partnerships.[165] Chief Justice Steele of the Delaware Supreme Court advocates the minority view that the body of the contract is the sole source of duties and obligations and must affirmatively call for the imposition of fiduciary duties.[166]

Delaware and other states provide numerous organizational vehicles to current and prospective sports franchise owners, each with its own benefits and shortcomings. Yet among them all, the limited liability company and

state but of contract, those duties . . . must be found in the LLC Agreement or some other contract." *Id.* at *8. In the Chancellor's view, the imposition of fiduciary duties required an affirmative statement or intent based upon the LLC agreement. Similarly, Chancellor Chandler again opined, "For Shakespeare, it may have been the play, but for a Delaware limited liability company, *the contract's the thing* . . . that 'defines the scope, structure, and personality of limited liability companies.'" R & R Capital, LLC v. Buck & Doe Run Valley Farms, LLC, No. 3803-CC, 2008 WL 3846318, at *1 (Del. Ch. Aug. 19, 2008) (quoting *Fisk Ventures*, 2008 WL 1961156, at *1).

165. In *Twin Bridges Limited Partnership v. Draper*, No. Civ.A. 2351-VCP, 2007 WL 2744609 (Del. Ch. Sept. 14, 2007), Vice Chancellor Parsons held that "[u]nless the partnership agreement preempts fundamental fiduciary duties, 'a general partner is obligated to act fairly and prove fairness when making self-interested decisions.'" *Id.* at *20 (quoting McGovern v. Gen. Holding, Inc., No Civ.A 1296-N, 2006 WL 1468850 (Del. Ch. May 18, 2006)). Thus, according to Vice Chancellor Parsons, fiduciary duties reflected the default position governing relations in a limited partnership. In the context of master limited partnerships, fiduciary duties appear to still apply in the absence of ane express waiver of limitation. *See, e.g.*, *In re* Inergy L.P., No. 5816-VCP, 2010 WL 4273197 at *12 (Del. Ch. Oct. 29, 2010) ("[I]n construing an MLP agreement, 'principles of contract preempt fiduciary principles where the parties to a limited partnership *have made their intentions to do so plain*.'" (emphasis added) (quoting *Twin Bridges*, 2007 WL 2744609, at *12)). Vice Chancellor Noble also adhered to this default position in *In re Atlas Energy Resources, LLC*, No. 4589-VCN, 2010 WL 4273122 (Del. Ch. Oct. 28, 2010), when he wrote, "[I]n the absence of explicit provisions in a limited liability company agreement to the contrary, the traditional fiduciary duties owed by corporate directors and controlling shareholders apply in the limited liability company context." *Id.* at *6. Yet another recent adoption of the default position came in 2011. Vice Chancellor Laster concluded, "Unless limited or eliminated in the entity's operating agreement, the member-managers of a Delaware limited liability compan[y] owe traditional fiduciary duties to the LLC and its members." Phillips v. Hove, No. 3644-VCL, 2011 WL 4404034, at *24 (Del. Ch. Sept. 22, 2011). In a recent decision, Vice Chancellor Parsons reaffirmed his position regarding master limited partnerships, noting, "Only 'if the partners have not expressly made provisions in their partnership agreement . . . will [a court] look for guidance from the statutory default rules, traditional notions of fiduciary duties, or other extrinsic evidence.'" *In re* Encore Energy Partners LP Unitholder Litig., No. 6347-VCP, 2012 WL 3792997, at *7 (Del. Ch. Aug. 31, 2012) (alteration in original) (quoting *In re* LJM2-Co. Inv., L.P. Ltd. Partners Litig., 866 A.2d 762, 777 (Del. Ch. 2004). Newly appointed Chancellor Strine offers a convincing argument supporting default fiduciary duties as applied to limited liability companies in *Auriga Capital Corp. v. Gatz Properties, LLC*, 40 A.3d 839 (Del. Ch. 2012). His conclusion largely relies on section 18-1104 of the Delaware Limited Liability Company Act, which provides, "'[i]n any case not provided for in this chapter, *the rules of law and equity* [including fiduciary duties] *shall govern*.'" *Id.* at 849 (quoting DEL. CODE ANN. tit. 6, § 18-1104). Vice Chancellor Laster recently reaffirmed the Delaware Chancery Court's position with respect to default fiduciary duties and Delaware LLCs in *Feeley v. NHAOCG, LLC*, No. 7304-VCL, 2012 WL 5949209 (Del. Ch. Nov. 28, 2012).

166. *See generally* Steele, *supra* note 163; *Q&A with Chief Justice Myron T. Steele of the Delaware Supreme Court*, PRAC. L. COMPANY (Dec. 1, 2011), us.practicallaw.com/3-515-1049.

master limited partnership stand out as offering maximum flexibility through freedom of contract, while permitting for the outright elimination of fiduciary duties, all while granting the owners the ability to flex their financial muscles in the public markets.

VIII. FAN ACTIVISM IN OTHER CONTEXTS

Once formed as a sports team corporation, franchise owners will be forced to combat everyday pressures associated with running a publicly-owned corporation, including the risk of hostile takeover. Consider the Texas Rangers' 2010 bankruptcy and subsequent sale as an illustration.[167] After deciding upon an auction to solve the team's struggling financial situation that forced it into a Chapter 11 bankruptcy, the Rangers entertained bids from Mark Cuban, the well-known media tycoon who also owns the NBA's Dallas Mavericks, and Nolan Ryan, one of the greatest pitchers in MLB history who previously played for the Rangers. Ultimately, Nolan Ryan's ownership group outbid Mark Cuban's.[168] Nevertheless, the risk that Cuban's group would outbid Ryan's would not be one that Rangers executives could ignore in the face of their fiduciary duties. Under a sports corporation model, however, Cuban's dream of owning the Rangers would be far from dead. In fact, he could easily implement stealth acquisitions of Rangers stock on the open market or engage in a public tender offer[169] to force Ryan to recognize his substantial interest in the team. The adoption of the sports team corporation model may force new owners to evaluate potential defensive mechanisms[170] to prevent takeover.

Sports franchise shareholders would also play a large role in the context of corporate acquisitions. In the event the directors choose to place

167. *See generally* Stempel, *supra* note 4.

168. After a fierce bidding war, the Nolan Ryan-led ownership group, with a "bid worth more than $608 million," defeated Mark Cuban for ownership of the Texas Rangers. Ana Campoy & Matthew Futterman, *Nolan Ryan Group Wins Texas Rangers*, WALL ST. J. (Aug. 5, 2010, 9:25 AM), http://online.wsj.com/article/SB10001424052748703748904575411033436250908.html.

169. If Mark Cuban personally accumulated 5 percent or more of the sports team corporation, he would be required to register with the SEC under Rule 13-D. 17 C.F.R. § 240.13d-1. If instead, he chose to acquire 5 percent or more of the outstanding stock of the Texas Rangers through a business entity tender offer, he would be subject to registration under SEC Rule 14-D. 17 C.F.R. § 240.14d-1. Statements under both rules require disclosure of the holder's intent to take over ownership of the company.

170. Potential defensive mechanisms include poison pills (shareholder rights plans), the use of a staggered board, self-tendering, golden parachutes for key executives, as well as a supermajority clause requiring greater than a simple majority of shareholders to approve any acquisition, among countless others.

the franchise up for sale or relinquish their ownership, shareholder interests will be placed front and center.[171] While the corporation's long-term strategy often factors into transactional questions, the moment a team owner (or the league, such as is the case with the New Orleans Hornets) declares that the franchise is seeking new ownership, the directors' roles change.[172] Rather than look to partner with or sell to the group that best reflects the team's current goals, culture, and mission, the *Revlon* duties imposed upon directors require them to focus solely on maximizing shareholder profit.[173] As the Delaware Supreme Court described:

> *Unocal* permits consideration of other corporate constituencies. Although such considerations may be permissible, there are fundamental limitations upon that prerogative. A board may have regard for various constituencies in discharging its responsibilities, provided there are rationally related benefits accruing to the

171. *See generally* Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc., 506 A.2d 173 (Del. 1986).

172. *Id.* In Justice Moore's landmark decision, he articulates the point at which "[t]he directors' role changed from defenders of the corporate bastion to auctioneers charged with getting the best price for the stockholders at a sale of the company." *Id.* at 182.

173. *Id.* The judicial landscape of the corporate takeover environment is typically analyzed under the "enhanced scrutiny standard," first introduced in *Unocal Corp. v. Mesa Petroleum Co.*, 493 A.2d 946 (Del. 1985). Under this standard, the defendant directors shoulder the burden of proving that they had "reasonable grounds for believing that a danger to corporate policy and effectiveness existed" as well as that the defensive mechanisms they implemented were reasonable in relation to the threat. *Id.* at 955. Further, Delaware jurisprudence has built upon this foundation and broken the second prong down into disparate inquiries. *See* Unitrin, Inc. v. Am. Gen. Corp., 651 A.2d 1361 (Del. 1995). In his opinion, Justice Holland opined the relevant questions as, "first, . . . whether the [action implemented by the board] was draconian, by being either preclusive or coercive and; second, if it was not draconian, . . . whether it was within a range of reasonable responses to the threat." *Id.* at 1367. When responding to a hostile takeover attempt, many corporations engage a "white knight"—a friendly bidder courted to rescue the target from to original bidder. *See* CHARLES R.T. O'KELLEY & ROBERT B. THOMPSON, CORPORATIONS AND OTHER BUSINESS ASSOCIATIONS: CASES AND MATERIALS 835 (Wolters Klewer 6th ed., 2010). Nevertheless, there comes a point, as described in *Revlon*, when the corporate directors effectively place the corporation up for sale by engaging or soliciting offers from other, more desirable candidates. The Delaware Supreme Court in the famous *Time* decision added:

> Under Delaware law there are, generally speaking and *without excluding other possibilities*, two circumstances which may implicate *Revlon* duties. The first . . . is when a corporation initiates an active bidding process seeking to sell itself or to effect a business reorganization involving a clear break-up of the company. However, *Revlon* duties may also be triggered where, in response to a bidder's offer, a target abandons its long-term strategy and seeks an alternative transaction involving the breakup of the company.

Paramount Commc'ns, Inc. v. Time Inc., 571 A.2d 1140, 1150 (Del. 1989) (emphasis added) (citation omitted). Subsequent case law has interpreted the phrase "without excluding other possibilities" to include a change of corporate control. *See, e.g.*, Paramount Commc'ns, Inc. v. QVC Network Inc., 637 A.2d 34 (Del. 1994). Thus, any transaction that involves a sale of control, even if not a formal merger or acquisition, triggers the *Revlon* duties of directors to ignore outside constituencies and pursue the highest price for shareholders. *Id.*

> stockholders. However, such concern for non-stockholder interests is inappropriate when an auction among active bidders is in progress, and the object no longer is to protect or maintain the corporate enterprise but to sell it to the highest bidder.[174]

The Seattle Supersonics' sale[175] illustrates the issues accompanying sports team corporations in this context. After encountering difficulty renegotiating the terms of the team's lease of its state-owned arena, Seattle's owners, led by Starbucks chairman Howard Schultz, agreed to put their team up for sale in 2006.[176] Schultz openly stated that he "turned down higher offers from potential buyers that he felt would move the team immediately."[177] Under the *Revlon* framework, Schultz would have breached his fiduciary obligation to the team's shareholders to achieve the highest price for the team and to reap the highest return for its shareholders. As Justice Moore added in *Revlon*, outside considerations, such as fan loyalty, are alien to a corporate auction.[178] The only goal is to maximize profit. If, for example, an ownership group based in St. Louis offered a higher price for the team than their Seattle counterpart, Schultz would have been forced to sell to the group from St. Louis. In this instance, Howard Schultz would have likely faced a shareholder derivative suit alleging a breach of fiduciary duty stemming from his decision to consummate the sale with the knowledge that higher offers had been made.

Oftentimes, as the result of financial instability, the ownership group contemplates relocating the team.[179] The sports corporation model would also promote fan activism in this context. Certain provisions in the franchise's articles of incorporation can require a majority, or even a supermajority, vote of the shareholders to approve team relocation. Separate and apart from the decision to sell the team, the Seattle Sonics owners, who initially pledged to keep the team in Seattle, eventually relocated the team and its WNBA affiliate to Oklahoma City—leaving thousands of loyal, disgruntled fans behind.[180] Under a sports corporation

174. *Revlon*, 506 A.2d at 182 (citation omitted).

175. *See Sonics tell NBA*, *supra* note 2.

176. *See* Associated Press, *Sonics, Storm Sold to Group from Oklahoma City*, ESPN.COM (July 19, 2006, 3:08 AM), http://sports.espn.go.com/nba/news/story?id=2522944.

177. *Id.*

178. *See* Revlon, Inc. v. McAndrews & Forbes Holdings, Inc., 506 A.2d 173, 182 (Del. 1986) (noting that when a sale becomes inevitable, directors' only duty is to negotiate the highest price for its stockholders).

179. *See supra* note 2.

180. *See* J.A. Adande, *Sonics Saga Sends out a Bad Message*, ESPN.COM (July 2, 2008),

model, shareholder-fans in Seattle, while simultaneously creating a new stream of operating capital for ownership, could have voiced their support through the shareholder voting process and ultimately kept their home team in Seattle.

The current situation involving the NBA's Sacramento Kings offers an insightful illustration of the potential application of corporate fiduciary principles in the context of team relocation. Swimming in debt and general frustration,[181] the hotel tycoons, the Maloof brothers, contemplated the sale of their NBA franchise, the Sacramento Kings. Based on a price that valued the franchise at $525 million,[182] a Seattle-based group led by Microsoft CEO Steve Ballmer, hedge fund manager Chris Hansen, and the Nordstrom family[183] agreed in January 2013 to purchase a sixty-five percent stake with plans to relocate the team to Seattle and fill the void left by the SuperSonics.[184] Sacramento fans quickly took to the social media airwaves to air their disgust upon hearing the news of the impending sale.[185] Right on cue, Sacramento Mayor, and former NBA player, Kevin Johnson portended things to come when we tweeted "Bottom line Sacramento: it's not over . . . #keepthefaith #playingtowin."[186] Johnson then went to work and engaged billionaire investor Ron Burkle and 24 Hour Fitness founder, Mark Mastrov in attempt to make good on his promise.[187] The group submitted a "competitive offer" to the NBA on

http://sports.espn.go.com/nba/columns/story?columnist=adande_ja&page=sonicsmove_080702.

181. *See* Dale Kasler, *Maloofs' Woes an Issue for NBA*, Sacramento Bee (Apr. 30, 2011), http://www.sacbee.com/2011/04/30/3591030/maloofs-woes-an-issue-for-nba.html.

182. Sam Amick, *Sacramento Kings Reach Agreement with Seattle Group*, USA TODAY (Jan. 21, 2013), http://www.usatoday.com/story/sports/nba/kings/2013/01/20/sacramento-seattle-maloofs-chris-hansen-sonics-supersonics/1850631/; *see also* Ken Belson & Howard Beck, *Seattle Investor Plans to Buy the Kings and Move Them*, N.Y. TIMES. (Jan. 21, 2013), http://www.nytimes.com/2013/01/22/sports/basketball/maloof-family-selling-sacramento-kings-to-seattle-investor.html?_r=0. For more financial information about the Sacramento Kings franchise see http://www.forbes.com/teams/sacramento-kings/.

183. *See* Amick, *supra* note 182.

184. *Id. See also* Belson & Beck, *supra* note 182.

185. *See, e.g.*, *Twitter Reaction to Kings' Prospective Sale and Relocation*, SPORTSILLUSTRATED.COM (Jan. 9, 2013), http://nba.si.com/2013/01/09/sacramento-kings-seattle-sale/; Sean Highkin, *Kings Fans Take Fight for Their Franchise to Tumblr*, USA TODAY (Mar. 30, 2013) http://www.usatoday.com/story/gameon/2013/03/30/sacramento-kings-fans-tumblr-social-media-seatlle/2038863/; *Keep the Kings in Sacramento*, FACEBOOK.COM (last visited Mar. 30, 2013), https://www.facebook.com/pages/Keep-the-Kings-in-Sacramento/137652962952855.

186. *See Twitter Reaction to Kings' Prospective Sale and Relocation*, SPORTSILLUSTRATED.COM (Jan 9, 2013), http://nba.si.com/2013/01/09/sacramento-kings-seattle-sale/.

187. *See* Associated Press, *NBA Receives Bid for Kings from Sacramento Group*, (Mar. 1, 2013), http://www.nba.com/2013/news/03/01/kings-sacramento/bid.ap/index.html [hereinafter *NBA Receives Bid*]; Jack Robinson, *Mayor Names Investors Bidding to Keep Kings*, Sacramento Bus. J. (Feb. 28, 2013), http://www.bizjournals.com/sacramento/news/2013/02/28/mayor-names-investors-bidding-to-keep.html?page=all.

March 1, 2013 on what Mayor Johnson described as a "proud day for Sacramento!"[188]

One week after submitting the bid, NBA Commissioner David Stern found that the "counteroffer to keep the Sacramento Kings from moving tot Seattle needs to be increased financially before the league's owners would even consider the bid."[189] With that recognition, Mayor Johnson again pursued other avenues of financing and assembled a "true Dream Team [of investors]" and went on to say, "This Fab Four is a bracket buster."[190] The Sacramento-based group added Vivek Ranadive, the CEO of TIBCO Software,[191] and Qualcomm CEO, Paul Jacobs.[192] This new investor group hopes to catch the league owners' attention with a new bid that will overtake the offer by the Seattle-based group. The two groups will meet in front of a committee of NBA owners on April 3 to advocate their positions ahead of the Board of Governors meeting April 18–19.[193]

Though the NBA Board of Governors will be the ultimate arbiters of the bidding war, the vignette provides for a useful examination of the role of the competing *Revlon* and *Unocal* standards of Delaware corporate law in the sports corporation context. Should this be a case that calls for the auctioneering rationale of *Revlon*, the group offering the highest price will prevail, regardless of the decision's effects on the team, its fan base, the arena, relocation costs, and other considerations. If, however, the *Unocal* standard might apply, a prospective board of directors may consider such "other constituenties" when evaluating competing bids. This developing story is just one example of the many ways in which the sports corporation model would transform corporate relationships as a result of the imposition of fiduciary duties upon its management.

188. *See NBA Receives Bid*, *supra* note 187.

189. Associated Press, *David Stern: Sacramento's King Bid Less than Seattle's*, USA TODAY (Mar. 8, 2013), http://www.usatoday.com/story/sports/nba/2013/03/08/david-stern-sacramento-kings-seattle-sonics-supersonics/1974731/.

190. Associated Press, *Paul Jacobs Joins Sacramento's Bid*, ESPN.com, (Mar. 26, 2013), http://espn.go.com/nba/story/_/id/9098853/qualcomm-ceo-paul-jacobs-joins-sacramento-bid-keep-kings.

191. Sam Amick, *New Potential Owner Emerges for Sacramento Kings*, USA TODAY (Mar. 21, 2013), http://usatoday.com/story/sports/nba/2013/03/21/sacramento-kings-golden-state-warriors-vivek-ranadive-mark-mastrov-ron-burkle/2007283/.

192. *Id. See also* Associated Press, *Tycoon Joins Team to Keep Kings in Sacramento*, SACRAMENTO BEE (Mar. 22, 2013), http://www.sacbee.com/2013/03/22/5284788/tycoon-joins-team-to-keep-nba.html; Dave Kasler et al., *New Lead Investor Joins Effort to Keep Kings in Sacramento*, SACRAMENTO BEE (Mar. 22, 2013), http://www.sacbee.com/2013/03/22/5283532/new-lead-investor-joings-efforts.html.

193. Bob Condotta, *Sacramento Group Could Boost Chances of Keeping Kings with Arena Vote, New Investor*, SEATTLE TIMES (Mar. 25, 2013), http://www.seattletimes.com/html/nba/2020640635_sacramento26.html.

IX. OTHER CONSIDERATIONS

A. The Sports Corporation as Legalizing Gambling

Although the sports corporation model provides owners with an unlimited source of revenue in the general public, sports corporation initial public offerings create a negative externality unique to the sports world: the effective full-scale legalization of sports gambling. In 1992, the federal government enacted the Professional and Amateur Sports Protection Act which banned any "lottery, sweepstakes, or other betting, gambling, or wagering scheme"[194] based on amateur or professional competitive games.[195] While the ban applies to all fifty states, the government exempts four states[196] pursuant to a grandfather clause contained in the statute.[197] The widespread adoption of the sports corporation model would effectively legalize wagering on professional, and potentially amateur,[198] competitions through an alternative vehicle—the stock market. The viability of this threat to a sharply pronounced public policy rests on the critical assumptions found in the efficient market hypothesis[199]—namely that stock prices would immediately incorporate and reflect information from the field of play such as wins, losses, trades, and key free agent signings.

In the absence of data reflecting this relationship among American sports teams, numerous studies involving European soccer clubs[200] traded

194. 28 U.S.C. § 3702(2) (2006).

195. *See* §§ 3702–3704.

196. Nevada (odds-makers), Montana, Oregon, and Delaware (parlay bets) are exempt. *See* ANTHONY N. CABOT & KEITH C. MILLER, THE LAW OF GAMBLING AND REGULATED GAMING 550 (Carolina Academic Press, 2011).

197. § 3704.

198. This would require that amateur sports entities (athletic departments) be publicly traded and raise revenue through various offerings rather than rely on traditional fundraising and ticket and merchandise sales.

199. *See* Ronald J. Gilson & Reinier H. Kraakman, *The Mechanisms of Market Efficiency*, 70 VA. L. REV. 549, 555 (deifning market efficiency to mean that "prices at any time fully reflect all available information" (citing Eugene Fama, *Efficient Capital Markets: A Review of Theory and Empirical Work*, 25 J. CORP. FIN. 383 (1970) (internal quotation marks omitted)); *In re* Polymedica Corp. Sec. Litig., 432 F.3d 1, 8 (1st Cir. 2005) ("In an efficient market, . . . [information is] said to have been absorbed into, and [is] . . . therefore reflected in, the stock price").

200. *See generally* Adrian Bell et al., *Over the Moon or Sick as a Parrot? The Effects of Football Results on a Club's Share Price*, ICMA CENTRE (2009); Ramzi Benkraiem et al., *Sporting Performances and the Volatility of Listed English Football Clubs* (Montpellier Bus. Sch., Working Paper); Jason Berkowitz, *Does Winning Really Matter? An Examination of EPL Club Performance and Earnings* (Dep't of Fin., Univ. N.C. Charlotte, Working Paper, 2011); Frederic Palomino et al., *Information Salience, Investor Sentiment, and Stock Returns: The Case of British Soccer Betting*, J. CORP. FIN. (2008). Recent headlines suggest that the link between on-court performance and stock

on the Dow-Jones STOXX Football Index[201] support the proposition that stock prices accurately reflect and respond to on-field performance.[202] With this knowledge, the sports corporation inadvertently creates an avenue for sports arbitrageurs to realize short-term gains that would otherwise have been illegal under the Professional and Amateur Sports Protection Act.[203] Further, this mode of trading would provide a new platform for legalized trading on information such as trade rumors or draft choices, which is neither banned nor contemplated under current legislation. Using creative investment mechanisms such as put and call options, short sales, covered calls, and the creation of synthetic stock, investors are provided the opportunity to participate in sports gambling cloaked in the legitimacy of the stock market.[204]

Just as the introduction of stock mirrors the otherwise illicit sports gambling enterprise, so too does it foster an environment inducing greed, mischief, and covert transactions. While sports gambling revealed a dark side to athletics related to point shaving and game fixing, the otherwise legal introduction of publicly owned sports franchises presents the same issue merely by a different name—insider trading. Owners and players become insiders and all trade rumors, hints of relocation, draft selections, and other corporate news becomes subject to the powerful reach of Rule 10b-5 of the Securities Exchange Act.

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price may be found in the United States. *See* Ken Belson, *Lin Soars, and So Does Stock Price for MSG*, N.Y. TIMES, Feb. 13, 2012, http://www.nytimes.com/2012/02/14/sports/basketball/as-lins-stock-rises-so-does-msgs.html; Michael McHugh, *The Jeremy Lin Stock Market: Up Goes Knicks-Owner Madison Square Garden; Nike, Too*, FORBES (Feb. 29, 2012, 11:38 AM), http://www.forbes.com/sites/ycharts/2012/02/29/the-jeremy-lin-stock-market-up-goes-knicks-owner-madison-square-garden-nike-too/. Even more recently, the Knicks' decision not to re-sign Lin, a restricted free agent, proved to have a negative impact on The Garden's stock price. After reaching $38.80 per share on July 5th (up from $29.49 on the day of Jeremy Lin's first start), the stock has fallen almost 9 percent, down to $35.50, since the Knicks decided not to match the Houston Rockets' offer sheet for Lin. Stephen Smith, *As Jeremy Lin Heads South, So Does MSG Stock*, CBS NEWS (Jul. 20, 2012, 2:05 PM), http://www.cbsnews.com/8301-31751_162-57476864-10391697/as-jeremy-lin-heads-south-so-does-msg-stock/.

201. Dow Jones STOXX European index was first introduced in 1998. *See* STOXX, http://www.stoxx.com/index.html (last visited Nov. 4, 2012).

202. *See generally* Bell et al., *supra* note 200 (finding that match results affect share price in addition to other variables); Benkraiem et al., *supra* note 200, at 3–4 (suggesting that sporting performances "have . . . a significant impact on the stock market valuation of football clubs"); Berkowitz, *supra* note 200 (finding that from 1993–2008 game performance impacted stock performance of publicly traded clubs); Palomino et al., *supra* note 200 (finding that markets are very fast at incorporating good news and slower in incorporating bad news about game outcomes).

203. *See supra* note 194 and accompanying text.

204. *See generally* Michael Kaplan, *Wall Street Uses Algorithms to Make Sports Betting Like Stock Trading*, WIRED (Nov. 1, 2010, 12:00 PM), http://www.wired.com/magazine/2010/11/ff_midas/all/1.

B. Innovative Player Contracts

Team owners may also take advantage of a liquid market to introduce innovative clauses into player contracts as a result of the stock value's sensitivity to team performance.[205] Rather than provide the substantial up-front guarantee, negotiations may instead focus on the inclusion of stock options vesting over the life of the particular contract and subject to certain termination or good standing conditions. Players could likewise be protected. Perhaps free agency or restricted free agency may be grounded in the franchise's continued good standing with the SEC. In the event of an SEC investigation or other proceeding, professional athletes would be granted numerous rights related to their continued employment with the team, such as the right to test the free agency market. Lastly, the potential for hostile takeovers and ownership changes creates a need to prepare for various contingencies. A change of ownership likely means a change of management or coaching staff, and can profoundly affect the employment or compensation status of the team's players.[206] These threats shift the focus to the inclusion of "tin parachutes"[207] meant to protect the most important, non-executive employees of teams, like head coaches, in the event of a change of ownership. Clauses like these represent just a few of the possibilities borne out of the wedding of sports franchises and the public stock exchange. The widespread adoption of the sports corporation model will undoubtedly create fertile ground for creative lawyering by sports agents and team ownership alike.

X. CONCLUSION

205. This assumes the findings related to European soccer clubs (discussed above) are applicable to the market for American sports franchises. Although the phenomenon has not been widely studied, recent events involving Jeremy Lin's emergence in the NBA suggest a similar link in American professional sports between on-field performance and stock price. *See supra* note 200 and accompanying text.

206. This has become a stronger concern given the new flexibility afforded the NBA's "amnesty clause" included in the 2011 collective bargaining agreement. The amnesty clause allows teams to waive a player while preventing his salary from counting against the salary cap or luxury tax. Jeff Zillgitt & J. Michael Falgoust, *NBA Amnesty Provision Provides Teams with Flexibility*, USA TODAY (Dec. 14, 2011, 2:49 AM), http://www.usatoday.com/sports/basketball/nba/story/2011-12-13/nba-amnesty-provision-provides-teams-with-flexibilitiy/51892272/1. Ultimately this allows team management to "get out of bad contracts." *Id.*; *see also* Associated Press, *Mike Holmgren to Leave Browns*, ESPN.COM (Oct. 16, 2012), espn.go.com/espn/print?id=8511711&type=story (providing an example of front office turnover when a sports franchise is bought by a new owner).

207. Similar to golden parachutes, compensation packages that accrue to a company's top executives in the event of a change of control or hostile takeover, a tin parachute offers compensatory benefits to some of the company's key employees outside of the executive team. *See* O'KELLEY & THOMPSON, *supra* note 173, at 835.

The sports team corporation model, while currently lacking widespread adoption, should continue to gain momentum, especially in the context of professional sports teams and leagues experiencing financial turmoil. The model grants management a novel method of capital accretion, but sacrifices total control in the process and imposes substantial responsibilities upon those in charge. For the fans sitting in the nosebleeds, sports corporations, by issuing publicly traded stock, grant never-before-seen rights to such shareholder-fans to hold team owners accountable for their business decisions in various contexts. Shareholder-fans take on an active role in the governance of the franchise, serving as a check on directorial decisions on everything from stadium renovations to player contracts. Sports team corporation directors and other team owners should realize that this business model incentivizes dual participation in management of the franchise. While team owners remain in the driver's seat,[208] they would nevertheless be accountable to shareholder-fans seeking both monetary and non-monetary returns on their investments. Operating within the confines of modern corporate governance rules is hardly a sacrifice when compared to the limitless opportunity for capital infusion into the franchise that allows a team to renovate a stadium or court a high-profile free agent.

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208. *See* DEL. CODE ANN. tit 8, § 141(a) (2011).

* J.D. (2013), Washington University in St. Louis School of Law; B.A. in Psychology (2010), Washington University in St. Louis. I would like to first thank the editorial staff of the *Washington University Law Review* for their tireless efforts, thoughtful edits, and insightful comments and suggestions. I would also like to thank Bonnie Keane and members of the faculty for their guidance and expertise as I worked to develop this thought experiment applying established principles of corporate law in a novel arena. Finally, thank you to my family—the best team around.