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## NOTES

# PERMEATING THE GOOD OLD BOYS CLUB: WHY HOLDING THE COMMISSIONER OF BASEBALL TO A FIDUCIARY DUTY OF LOYALTY IS IN THE “BEST INTERESTS” OF THE GAME

### INTRODUCTION

When Major League Baseball—most affectionately regarded as “The National Pastime”—was founded in 1876, there was no national audience. There was no free agency, no multi-million dollar player contracts, and no grossly-lucrative endorsement, merchandising, or television deals. The simplicity of the game undercut any readily apparent need for the League’s pioneer founders to implement a strong, centralized league office or an individual to preside over it.<sup>1</sup> But as the simple game developed into a business, the breadth of operations became difficult to control locally and the opportunities to corrupt the nascent concept of a professional sports league were exploited by individuals on and off the field. The slowly brewing pot of conflict boiled over in 1920, when the beloved “Shoeless” Joe Jackson and seven of his “Chicago Black Sox” teammates were accused of fixing the 1919 World Series for a cut of the gambling payout they facilitated.<sup>2</sup> With team owner and public confidence in the informal league office irreparably harmed, the Major League Baseball clubs unanimously voted for the creation of a single, impartial commissioner to oversee the operations of the League.<sup>3</sup> Since the office’s birth in 1921, the Commissioner of Major League Baseball has seen his powers adapt to and expand with the evolution of the game’s on- and off-field components in spite of a magnitude of legal challenges by players, coaches, and owners.<sup>4</sup>

Today, Major League Baseball is not only still an American staple, but a multi-billion dollar international business enterprise.<sup>5</sup> At the heart of this

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1. MICHAEL J. COZZILLO ET AL., *SPORTS LAW CASES AND MATERIALS* 23 (2d ed. 2007).

2. See E. ASINOF, *EIGHT MEN OUT* (1987).

3. *Charles O. Finley & Co. v. Kuhn*, 569 F.2d 527, 532 (7th Cir. 1978), *cert. denied*, 439 U.S. 876 (1978).

4. The early parameters of the Commissioner of Major League Baseball’s powers stemmed from legal clashes over the office’s broad discretion in the use of disciplinary powers. Matthew B. Pachman, *Limits on the Discretionary Powers of Professional Sports Commissioners: A Historical and Legal Analysis of Issues Raised by the Pete Rose Controversy*, 76 VA. L. REV. 1409, 1417 (1990). Often, these disciplinary actions came from disputes arising out of improper dealings by owners or players in regard to league rules. See *id.* at 1414. While it is important to consider how courts have treated the Commissioner’s power to punish individuals in the “best interests” of the game, this note will analyze whether this power extends to the Commissioner’s power to determine who may or may not own a team.

5. The growth of Major League Baseball’s revenue streams, like many other sports leagues’, has been astounding. Despite the flailing economy as a whole, the League reported revenues of \$7

organization is the Commissioner, whose responsibilities are no longer relegated to the simple operations of the game, but the management of a cash cow medusa comprised of thirty separate entities simultaneously “cooperating” for the greater benefit of the League and “competing” for labor and revenue.<sup>6</sup> Many exorbitantly wealthy individuals have often pooled their millions in an effort to buy the right to own and operate a Major League Baseball franchise. But who gets the privilege to own one of these teams? What happens when a team falls into severe financial distress? What is the extent of the Commissioner’s powers in determining whether to hand that owner a shovel to dig itself out of a financial grave, to dig that owner out himself, or to whistle towards the sky as he kicks dirt into the hole?

In recent years, the answers to these questions have been severely clouded. The concurrent financial struggles of the Los Angeles Dodgers and the New York Mets have brought to light what only “outcast” owners and the media will readily admit: team ownership in Major League Baseball is by and large a “good old boys club”<sup>7</sup> that is greatly influenced by the Commissioner and his inner circle. In 2011, the Los Angeles Dodgers filed for bankruptcy when majority owner Frank McCourt and his wife began divorce proceedings, calling into question the team’s ownership rights, and exposing less-than-admirable use of team funds.<sup>8</sup> The year was not any better for the New York Mets, as majority owner Fred Wilpon and his brother-in-law were accused of being integrally related to the infamous Bernie Madoff fraud, and were slapped with a \$1 billion lawsuit by the trustee of the victims of that Ponzi scheme.<sup>9</sup> However, Commissioner Bud Selig has treated the two situations disparately:

Selig approved a \$25 million loan to the Mets last November when they faced a cash crunch yet left the principal owner Fred Wilpon to fix his financial woes. With the Dodgers, Selig invoked his ‘best interests of

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billion dollars in 2010—over a 6 percent increase from the previous season. Maury Brown, *MLB Revenues Grown From \$1.4 Billion in 1995 to \$7 Billion in 2010*, BIZOFBASEBALL.COM (Apr. 14, 2011), [http://www.bizofbaseball.com/index.php?option=com\\_content&view=article&id=5167:mlb-revenues-grown-from-14-billion-in-1995-to-7-billion-in-2010&catid=30:mlb-news&Itemid=42](http://www.bizofbaseball.com/index.php?option=com_content&view=article&id=5167:mlb-revenues-grown-from-14-billion-in-1995-to-7-billion-in-2010&catid=30:mlb-news&Itemid=42). 2010’s numbers represent a staggering 254 percent increase in revenues over the last fifteen years. *Id.*

6. COZZILLIO ET AL., *supra* note 1.

7. In reference to Major League Baseball, the phrase “good old boys club” was first coined by Marge Schott. Cliff Radel, *Former Reds Owner Discusses Her 3 Great Loves*, CINCINNATI ENQUIRER, Feb. 26, 2002, [http://www.enquirer.com/editions/2002/02/26/loc\\_radel\\_marge\\_schott.html](http://www.enquirer.com/editions/2002/02/26/loc_radel_marge_schott.html). Schott was the majority owner of the Cincinnati Reds before she was “forced to sell her majority stake in the Reds by Major League Baseball” after inflammatory racial remarks. *Id.*

8. William C. Rhoden, *Dissecting the Twin Tales of Teams in Distress*, N.Y. TIMES, May 6, 2011, [http://www.nytimes.com/2011/05/07/sports/baseball/07rhoden.html?\\_r=1&ref=losangeles\\_dodgers](http://www.nytimes.com/2011/05/07/sports/baseball/07rhoden.html?_r=1&ref=losangeles_dodgers).

9. Richard Sandomir, *The Dodgers, the Mets and the Commissioner*, N.Y. TIMES, Apr. 30, 2011, [http://www.nytimes.com/2011/05/01/sports/baseball/01dodgers.html?ref=losangeles\\_dodgers](http://www.nytimes.com/2011/05/01/sports/baseball/01dodgers.html?ref=losangeles_dodgers).

baseball' powers, installed a monitor, Tom Schieffer, to run the team, and refused to approve a local cable-television deal with Fox that McCourt said would guarantee long-term stability.<sup>10</sup>

Many critics have cried favoritism in response to the uneven treatment of the two teams, and have urged the Commissioner to act in a more evenhanded manner.<sup>11</sup> However, Selig's seemingly superior treatment of Fred Wilpon and the Mets is not an outlier in the League's dealings with financially unstable teams.<sup>12</sup> It is also not the first time that Selig has appeared to squeeze someone out of the ownership picture altogether.<sup>13</sup> Although there might be meritorious reasons to approve or deny these ownership requests, no working standard exists on which to evaluate the Commissioner's decision-making process. Without this standard, his decisions could easily be just as arbitrary as a hunch that a manager uses on the field. When commenting on the dynamic between the League, the owners, and the judicial system in the Dodgers' bankruptcy proceedings, bankruptcy attorney Thomas Salerno said, "That's always been a concern of leagues with these bankruptcies—that they have a bankruptcy judge deciding what is 'good faith' . . . Sports leagues are not used to having that kind of oversight."<sup>14</sup> This note will argue that the Commissioner's conduct *should* be evaluated based on a good faith standard when making decisions regarding ownership changes of financially distressed teams.<sup>15</sup>

Part I of this note will first provide a brief overview of the traditional structure of a professional sports league and why the unique legal implications of such a corporate anomaly make challenging the Commissioner's powers difficult.<sup>16</sup> It will then introduce the "best interests of the game" power granted to the Commissioner's office by the Major League Constitution, and the breadth of that power as determined by *Charles O. Finley & Co., Inc. v. Kuhn*.<sup>17</sup>

Part II of this note will examine Commissioner Selig's seemingly uneven treatment of franchises in financial flux since the turn of the

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10. *Id.*

11. *See, e.g.*, Rhoden, *Dissecting the Twin Tales of Teams in Distress*, *supra* note 8.

12. *See, e.g.*, Bill Shaikin, *Frank McCourt Goes on a Fishing Expedition*, L.A. TIMES, Sept. 26, 2011, <http://www.latimes.com/sports/la-sp-0927-mlb-dodgers-20110927,0,3903262.story>.

13. *See, e.g.*, *Piazza v. Major League Baseball*, 831 F. Supp. 420 (E.D. Pa 1993); *see also*, Radel, *supra* note 7.

14. Bill Shaikin, *Bankruptcy Judge Rules Against Frank McCourt*, L.A. TIMES, Sept. 30, 2011, <http://www.latimes.com/sports/la-sp-1001-dodgers-mccourt-20111001,0,4004563.story>.

15. It should be acknowledged that the Commissioner's power with regards to choosing who may or may not own a team is not absolute. Issues like team ownership bids must also be approved by the other half of the "good old boys club"—a majority of the League's current owners. MAJOR LEAGUE CONST., art. II, § 4. Still, it may be argued that the desire to be part of this inside circle and close to the Commissioner provides owners with more than enough incentive, and maybe even fear, to share the Commissioner's opinions.

16. COZZILLIO ET. AL., *supra* note 1.

17. *Charles O. Finley & Co. v. Kuhn*, 569 F.2d 527 (7th Cir. 1978).

century. In doing so, it will closely inspect the bankruptcy proceedings of the Los Angeles Dodgers, including the significantly divergent positions of owner Frank McCourt and the Commissioner.<sup>18</sup> It will also chronicle Commissioner Selig's handling of three other MLB franchises facing financial troubles over the course of the last five years—the Florida Marlins, the Texas Rangers, and the New York Mets—to expose the lack of discernible decision-making process exhibited by the Office of the Commissioner.

Part III of this Note will tackle the threshold challenges of bringing a breach of fiduciary duty claim against the Commissioner and adduce arguments that prove Major League Baseball should be treated as a traditional corporation when faced with a lawsuit implicating the Commissioner's duties to the League and its members. It will contend that despite Major League Baseball's status as an unincorporated association, the Commission still owes the League and its teams the same fiduciary duties of care and loyalty as would a director or officer of a traditional corporation. Next, it will discuss whether the Major League Constitution's waiver of recourse clause precludes an owner from bringing a breach of fiduciary duty claim against the Commissioner, and consequently conclude that the manager of an unincorporated association cannot limit his liability for a breach of fiduciary duty of loyalty.

Part IV will then turn to the battle between a plaintiff's desire to invoke a fiduciary duty of loyalty claim and a defendant's contention that he has exercised sound business expertise and fulfilled his fiduciary duty of care. It will liken the issue of court deference to the Commissioner's "best interests" power to corporate law's "business judgment rule." It will next explore the current uncertainty regarding Delaware's treatment of a fiduciary's duties of care, good faith, and loyalty, and where a hypothetical claim brought by former Los Angeles Dodgers owner Frank McCourt would fall.

Finally, Part V will argue that judicial treatment of Major League Baseball as the American legal system's favorite son demands that the Commissioner's "best interest of the game" power be held to an appropriate standard *for* the actual best interest of the game. It will contend that, at the very least, the Commissioner be asked to account for the steps he has taken when aiding the financial endeavors of member clubs as well as any disparity in his decision-making process. This type of scrutiny will ensure that personal favoritism or lasting grudges do not affect a current or prospective owner's ability to control a Major League Baseball team.

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18. See *In re Los Angeles Dodgers LLC*, 465 B.R. 18 (Bankr. D. Del. 2011).

## I. STRUCTURE OF THE LEAGUE AND ITS IMPLICATIONS

### A. MAJOR LEAGUE BASEBALL: AN UNTRADITIONAL “TRADITIONAL” LEAGUE

Major League Baseball is governed by three documents: (1) the Major League Constitution (MLC); (2) the Basic Agreement with the Major League Baseball Players Association (the collective bargaining agreement); and (3) the Major League Rules.<sup>19</sup> The Major League Constitution “constitutes an agreement among the Major League Baseball Clubs, each of which shall be entitled to the benefits of and shall be bound by all the terms and provisions.”<sup>20</sup> Article II of the MLC establishes The Office of the Commissioner of Baseball as “an unincorporated association also doing business as Major League Baseball.”<sup>21</sup> This clause structures the League as what is commonly referred to as the “traditional” sports league model.<sup>22</sup> Each team is owned separately by an individual or group of individuals<sup>23</sup> and is legally considered a member club of the league.<sup>24</sup> While these member clubs are clearly established as revenue-generating business operations, the League itself is a non-profit entity which distributes excess income to the owners of each member club.<sup>25</sup> Within this structure, the commissioner’s office handles day-to-day league operations, while the individual teams are left to handle matters such as team operations relating to the game itself, facilities, marketing and sale of tickets, and local broadcasting contracts.<sup>26</sup> Although this traditional model has significant commercial benefits for the league and team owners, its unique structure remains slippery enough to prevent the legal field from comfortably grasping its place amongst games and businesses.<sup>27</sup>

However, unlike every other professional sports league, Major League Baseball is completely exempt from antitrust status.<sup>28</sup> This has made it increasingly difficult to challenge the Commissioner of Major League Baseball’s powers on these grounds outside the arena of labor disputes, and in particular, his ability to influence ownership decisions. In *Piazza v. Major League Baseball*, two individuals brought suit against the Office of

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19. See MAJOR LEAGUE CONST. The Major League Constitution was originally adopted as the “Major League Agreement” on January 12, 1921, and has undergone periodic amendments throughout its ninety-year existence. *Id.*

20. MAJOR LEAGUE CONST., art. I.

21. MAJOR LEAGUE CONST., art. II, § 1.

22. COZZILLIO ET. AL., *supra* note 1.

23. *Id.*

24. MAJOR LEAGUE CONST., art. II.

25. COZZILLIO ET. AL., *supra* note 1.

26. *Id.* at 20–21.

27. *Id.*

28. For a history of the development of baseball’s unique antitrust exemption, see Thomas J. Ostertag, *Baseball’s Antitrust Exemption: Its History & Continuing Importance*, 4 VA. SPORTS & ENT. L.J. 54 (2004).

the Commissioner, Major League Baseball, and various major league clubs to challenge the denial of their partnership's ownership application.<sup>29</sup> The unsuccessful bidders, Vincent Piazza and Vincent Tirendi, alleged two wrongful grounds of denial: first, that the League's "background character check" led to false accusations that the two had mafia ties; and second, they felt that the League did not fairly evaluate the bid because it had no intention of letting the San Francisco Giants relocate to Tampa Bay, Florida.<sup>30</sup> Aside from the typical antitrust challenges that repeatedly assault major sports leagues, the plaintiffs claimed that MLB violated the First and Fifth Amendments to the Constitution on due process claims, denial of equal protection, and restriction of their freedom to contract.<sup>31</sup> Still, these claims were closely tied to the historic antitrust exemption, as Piazza and Tirendi argued that the "unique" exemption by the federal courts allowed them to sue the private entity under the terms of the Constitution as acting "with the authority of the government."<sup>32</sup> Despite the creativity of the direct constitutional claims, the court swiftly dismissed them for lack of evidence that the government exerted "'significant,' active encouragement" of MLB's denial of the team's sale.<sup>33</sup>

With one possible avenue to challenge closed, the court seemed to open another familiar door that had been all but triple-steel-reinforced; the judge—in stark contrast with relevant judicial precedent of the Supreme Court and other circuits—held that the Federal Baseball Antitrust Exemption was limited to the player reserve system, and not team ownership.<sup>34</sup> As a result, MLB's motion to dismiss the federal antitrust claims was denied and a judgment on the case's merits was to follow the development of a factual record.<sup>35</sup> With the League's legally supreme status in peril, the Commissioner settled the suit before the judge reached a verdict.<sup>36</sup> However, while this decision seemed to have revived the

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29. *Piazza v. Major League Baseball*, 831 F. Supp. 420 (3d Cir. 1993).

30. *Id.* at 423.

31. *Id.*

32. *Id.* at 425.

33. *Id.* at 426 (citing *S.F. Arts & Athletics, Inc. v. U.S. Olympic Comm.*, 483 U.S. 522, 547 (1987)).

34. *Id.* at 421.

35. *Id.* at 438–40.

36. Mitchell Nathanson, *The Irrelevance of Baseball's Antitrust Exemption: A Historical Review*, 58 RUTGERS L. REV. 1, 42 (2005). Along with the settlement, a third and creative challenge quietly perished without address. The plaintiffs' raised a civil rights claim under 42 U.S.C. § 1983 that Major League Baseball "denied them the right to participate in the purchase of a Major League Baseball team from an owner who contracted to sell the team to plaintiffs" and "acted in concert with the City of San Francisco to prevent the Giants from being relocated." *Piazza*, 831 F. Supp. at 426–27. In a possibly replicable line of reasoning, the court denied Baseball's motion to dismiss for failure to establish the element of "acting under color of state law" because the Mayor of San Francisco publically stated that he pleaded with MLB to do everything it could to keep the team in the city (as Mayors often do), thus showing evidence of

possibility of challenging the Commissioner's powers on antitrust issues, the case did not gain much momentum as later courts explicitly declined to follow its deviation from past precedent.<sup>37</sup>

### **B. THE COMMISSIONER: THE PRESIDENT OF THE GOOD OLD BOYS CLUB AND HIS "BEST INTERESTS" POWERS**

The near impossibility of bringing an antitrust claim is just one barrier to challenging the Commissioner's power. Another rather famous barrier—the Commissioner's "best interests of baseball" clause—is as antique and enduring as the League's antitrust exemption. However, while an owner may sidestep the antitrust exemption by holding the Commissioner to a fiduciary duty of loyalty, Selig's broad powers under the "best interests" clause absolutely must be addressed and conquered to successfully bring any breach of fiduciary duty claim. *Charles O. Finley & Co., Inc. v. Kuhn* marked perhaps the most significant decision regarding the Commissioner of Major League Baseball's power. In this preeminent case, the Seventh Circuit first addressed the breadth of the Commissioner's "best interests of baseball" power.<sup>38</sup> Commissioner Bowie Kuhn had determined that the Oakland Athletics' sale of three player contracts to the New York Yankees and Boston Red Sox was contrary to the best interests of the game, its integrity, and the public's confidence in the League.<sup>39</sup> The court reasoned that the Commissioner must have the authority to determine whether any act—not just ones that break the Major League Rules or moral standards—is "not in the best interests of baseball" to prevent a potentially disastrous judicial venture into the "complex" rules and code of the game.<sup>40</sup> It further held that the court was in no position to determine whether Kuhn's decision to disallow the player assignments was right or wrong, but did believe the Commissioner acted in good faith throughout his investigation and deliberation of the issue.<sup>41</sup> Overcoming the breadth of this power will be an essential element to the hypothetical case that Frank McCourt will bring within this note.

## **II. A CASE STUDY OF FOUR TROUBLED FRANCHISES**

In order to create a basis on which an owner could challenge the Commissioner of Major League Baseball's motives and decision-making

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concerted activity. *Id.* Although this could potentially be a compelling ground for challenge in the future, it is not within the scope of this note.

37. See, e.g., *Baseball at Trotwood, LLC v. Dayton Prof'l Club, LLC*, 113 F. Supp. 2d 1164, 1175 n.24 (S.D. Ohio 1999); *McCoy v. Major League Baseball*, 911 F. Supp. 454 (W.D. Wash. 1995).

38. *Charles O. Finley & Co. v. Kuhn*, 569 F.2d 527, 530 (7th Cir. 1978).

39. *Id.* at 531.

40. *Id.* at 539.

41. *Id.*

process, it is essential to evaluate the nature of his past actions. To do this, one must first look towards the source of controversy. The notion that Major League Baseball is a “good old boys club” has lingered for over a century. However, questions concerning the disparate treatment of certain owners (and potential owners) have never been more prevalent than in the case of the Los Angeles Dodgers. This section will provide a thorough taxonomy of the very public heavyweight battle between Bud Selig, the Commissioner of Major League Baseball, and Frank McCourt, the owner of the Los Angeles Dodgers. It will then analyze Selig’s treatment of franchises in similar situations—a task that McCourt aimed to expose, but was denied in a Delaware bankruptcy court.<sup>42</sup>

### A. THE LOS ANGELES DODGERS

Frank McCourt bought a struggling Los Angeles Dodgers franchise from the Fox Entertainment Group, Inc. in 2004.<sup>43</sup> The deal had two separate agreements which allotted for a \$330 million payment for the franchise and a \$100 million payment for the real estate surrounding the stadium.<sup>44</sup> The purchase—which consisted of a \$125 million loan from Fox to an affiliate of McCourt—was “unanimously approved by the Major League Baseball and supported by the Commissioner.”<sup>45</sup> Selig further approved McCourt’s plan to reorganize the team’s operations by creating a new entity through the structured securitization of the team’s future ticket sales.<sup>46</sup>

The Dodgers enjoyed on-field success immediately following McCourt’s acquisition. The team made the playoffs in four of the following six years and ranked in the top three in total attendance from 2004-2010.<sup>47</sup> However, problems began when Frank and Jamie McCourt separated in 2009. Ms. McCourt brought public the apparent commingling of the couple’s lavish lifestyle and the team’s internal operations when she filed

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42. Order Scheduling Evidentiary Hearing at 11, *In re Los Angeles Dodgers LLC*, 465 B.R. 18 (Bankr. D. Del. 2011) (No. 11-12010) [hereinafter Order Scheduling Evidentiary Hearing].

43. Emergency Motion for Interim and Final Orders (i) Authorizing Debtors to Obtain Postpetition Financing Pursuant to 11 U.S.C. §§ 105, 362, and 364, and (ii) Scheduling a Final Hearing Pursuant to Bankruptcy Rules 4001(B) and 4001(C) at 4–5, *In re Los Angeles Dodgers LLC*, 465 B.R. 18 (Bankr. D. Del. 2011) (No. 11-12010), 2011 WL 2535793 [hereinafter Emergency Motion for Postpetition Financing].

44. *Id.*

45. *Id.*

46. *Id.* at 5–6. McCourt and the Dodgers stressed this point heavily in their filing, noting that leveraged positions that helped contribute to strained funds were disclosed to and approved by the Commissioner, and that approval estops the Commissioner from arguing that team structure is disallowable. *Id.*

47. The Dodgers had the second highest attendance in the League from 2004 to 2007, the third highest attendance in 2008 and 2010, and the League’s highest attendance in 2009. *MLB Attendance Report*, ESPN, [http://espn.go.com/mlb/attendance/\\_/year/](http://espn.go.com/mlb/attendance/_/year/) (last visited Feb. 10, 2013).

for divorce in October of 2009.<sup>48</sup> Along with claiming half-ownership of the team, Ms. McCourt claimed she had the right to “enjoy[] all prerequisites, emoluments, and benefits of co-ownership of an/or employment by the Dodger Entities.”<sup>49</sup> Among those “prerequisites” and “benefits” were unlimited travel expenses that included flights on private jets and five-star hotels, five nights of business lunches and dinners per week, Dodger payment of private country club fees and expenses, and access to her “Dodger credit card.”<sup>50</sup> The petition also listed multiple real estate holdings, including two homes in Holmby Hills, California, two Malibu residences, two properties in Massachusetts, a ski condo in Vail, Colorado, and undeveloped property in Montana and Cabo San Lucas, Mexico.<sup>51</sup>

The perceived image that ownership was wasting team funds combined with an on-field drop in performance frustrated Dodgers fans in 2010, and ticket sales declined sharply towards the end of the season. Attendance problems would drop even more severely the next season when, on top of frustration with the McCourt’s public divorce, a San Francisco Giants fan was brutally beaten outside Dodgers Stadium on opening day.<sup>52</sup> With ownership uncertainty, a dismal start, and fans fearing for their safety, the Dodgers filled approximately 600,000 fewer seats in 2011 and fell from third to tenth in attendance.<sup>53</sup> The decrease in the previously securitized ticket streams exacerbated financial constraints and sent Frank McCourt into financial flux.

The revelations about the McCourt tenure evidently surprised Bud Selig, the Commissioner of Major League Baseball. It also commenced the very public deterioration of the personal relationship between McCourt and Selig. After months of watching the Los Angeles Dodgers get dragged through the mud of the McCourt divorce, Commissioner Selig sprang into action with his ace in the hole—the Commissioner’s “best interests of the

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48. Petition for Dissolution of Marriage, *McCourt v. McCourt*, No. BD514309, 2010 WL 4746193 (Cal. Super. Ct. Oct. 26, 2010) [hereinafter *Jamie McCourt Divorce Petition*].

49. *Id.* Attachment 9 at 1–3. In her declaration portion of the divorce petition, Ms. McCourt eloquently explained that her and her husband’s “marital lifestyle since [they] bought the Dodger Assets in 2004 [was] inextricably intertwined with [the couple’s] ownership of the Dodgers. As a result, many of our expenses were paid directly by the Dodger entities.” *Id.* Declaration of Petitioner Jamie McCourt at 12.

50. *Id.* Attachment 9 at 1–3. Ms. McCourt requested these things and spousal support to “maintain the financial status quo and [her] lifestyle.” *Id.* Declaration of Petitioner Jamie McCourt at 13.

51. *Id.* Declaration of Petitioner Jamie McCourt at 13.

52. Ian Lovett, *Dodger Stadium Beating Highlights Fans’ Unease*, N.Y. TIMES, Apr. 9, 2011, [http://www.nytimes.com/2011/04/10/sports/baseball/10dodgers.html?\\_r=1&scp=1&sq=bryan%20stow&st=cse](http://www.nytimes.com/2011/04/10/sports/baseball/10dodgers.html?_r=1&scp=1&sq=bryan%20stow&st=cse).

53. See *MLB Attendance Report*, ESPN, [http://espn.go.com/mlb/attendance/\\_/year/](http://espn.go.com/mlb/attendance/_/year/) (last visited Feb. 10, 2013).

game” power.<sup>54</sup> On April 20, the Commissioner released a statement that he would be appointing a representative “to oversee all aspects of the business and the day-to-day operations of the club,” citing “deep concerns regarding the finances and operations” of the team.<sup>55</sup> The decision meant that the League was effectively taking control of the team and running it for the remainder of the season.

Struggling with cash flow problems, the Dodgers began negotiations with FOX Sports to formulate a new deal that would extend the broadcaster’s exclusive rights and provide the Dodgers with funds to meet operating expenses.<sup>56</sup> The proposed deal would hinge on a \$385 million loan from FOX Sports to a media subsidiary owned by McCourt.<sup>57</sup> But the McCourt divorce battle continued to weave its way into team affairs, as Jamie McCourt’s ongoing assertions of partial ownership of the Dodgers threatened to roadblock any potential deal involving the team’s business affairs. The McCourts eventually worked out a complicated divorce settlement that postponed any decision of team ownership until August 1, 2011 while simultaneously guiding terms on which the massive loan would be disbursed.<sup>58</sup>

The divorce settlement first stipulated that \$235 million of the \$385 million loan would be distributed to the Dodgers, with \$23.5 million of that sum used to repay FOX Sports’ previous cash advances and the rest used to meet current Dodgers’ payroll and operating expenses.<sup>59</sup> Another \$80 million of the deal would pay off the debt of various McCourt subsidiaries.<sup>60</sup> \$50 million would be held in a court managed account and paid to Ms. McCourt should her claim of ownership interest in the Los Angeles Dodgers be denied.<sup>61</sup> Finally, Mr. and Ms. McCourt would be allotted \$5 million each for legal fees accrued during the divorce proceedings and another \$5 million each to use as they pleased.<sup>62</sup>

All media deals such as the Dodgers’ proposed FOX Sports deal must be reviewed and approved by the Commissioner.<sup>63</sup> From the time negotiations commenced, Frank McCourt urged Selig to approve various forms of the FOX Sports deal. On June 20, the Commissioner sent a detailed letter to the Dodgers rejecting the proposal, pursuant again to this

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54. Press Release, Major League Baseball Comm’r Allan H. (Bud) Selig, MLB Statement Regarding the Dodgers (Apr. 20, 2011), *available at* [http://mlb.mlb.com/news/press\\_releases/press\\_release.jsp?ymd=20110420&content\\_id=18038724&vkey=pr\\_mlb&fext=.jsp&c\\_id=mlb](http://mlb.mlb.com/news/press_releases/press_release.jsp?ymd=20110420&content_id=18038724&vkey=pr_mlb&fext=.jsp&c_id=mlb).

55. *Id.*

56. Emergency Motion for Postpetition Financing, *supra* note 43, at 10.

57. *Id.* at 11.

58. Binding Term Sheet at 1–3, McCourt v. McCourt, No. BD514309, 2011 WL 2420345 (Cal. Super. Ct. June 17, 2011).

59. *Id.* at 1.

60. *Id.*

61. *Id.*

62. *Id.*

63. MAJOR LEAGUE CONST., art. VIII, § 4(f).

“best interests of baseball” power.<sup>64</sup> Selig’s general argument revolved around his belief that McCourt was handicapping the future of the team for a quick fix of his personal financial issues.<sup>65</sup> He cited how the transaction with FOX during the exclusive contracting window would preclude the team from capitalizing on a competitive market for media rights after the current deal’s expiration.<sup>66</sup> Instead, it would accelerate the club’s future media revenue payments into the \$385 million loan to fix short term liquidity problems while leaving the team susceptible to similar financial crisis as early as 2013.<sup>67</sup> Furthermore, the League argued that McCourt would be leveraging the team even further than it already was by dividing the club’s assets and borrowing against them, while personally guaranteeing payment.<sup>68</sup> Selig was particularly concerned with McCourt’s personal guarantees when he received documents that stated the owner had only \$264,000 in liquid assets.<sup>69</sup> However, the most emphatic argument the Commissioner made was his objection to the manner in which the proceeds of the deal would be allocated. He took great exception to the fact that a large portion of the \$385 million loan would go towards non-baseball purposes such as the McCourt divorce settlement and personal use.<sup>70</sup> He also lumped the \$80 million debt payment to Dodger affiliates as a non-baseball purpose.<sup>71</sup> The length of the deal also played a large role in the decision, as Selig argued that if McCourt were forced to sell the team, any future owner would be locked into a below-market-value deal for seventeen years without enjoying the benefit of the up-front loan the team would get under McCourt’s ownership.<sup>72</sup> The letter ends with a strong accusation that Selig has consistently reiterated in court filings, interviews, and press releases:

As the Dodgers’ control owner, you have the duty to manage the Club “for its own sake, in a sound fiscal manner, and not for the benefit of another business,” and a contractual commitment to operate the Dodgers “with the intention of being profitable and with respect to all operations and control in the best interests of the Los Angeles Dodgers and Major League Baseball.” Instead, you have run the Club consistently for your own benefit and that of your family members, and your lifestyle, with little or no regard for the distinction between the Club’s finances and your own.<sup>73</sup>

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64. Letter from Bud Selig, Comm’r, Major League Baseball, to Frank McCourt, Owner, L.A. Dodgers Baseball Club 7–8 (June 20, 2011) (on file with author).

65. *Id.* at 10–11.

66. *Id.* at 2–3.

67. *Id.* at 3, 8.

68. *Id.* at 5, 9–11.

69. *Id.* at 10.

70. *Id.* at 5–7.

71. *Id.*

72. *Id.* at 8–9.

73. *Id.* at 10–11.

The Commissioner's unwavering rejection was not well received by the Dodgers organization. The team released a statement on behalf of McCourt claiming that they had complied with all of Selig's requests, and that the divorce court deemed the transaction should be consummated immediately as it was in the team's best interests.<sup>74</sup> He accused Selig of unfairly prohibiting a \$235 million injection into the franchise that could potentially lead to the destruction of the Los Angeles Dodgers.<sup>75</sup> The spat between owner and Commissioner became even more personal as McCourt threatened to "explore vigorously" the team's options to seek remedy against Selig and his decision.<sup>76</sup>

The decision sent Frank McCourt scrambling for a way to find financing. With other obligations fast approaching, the Dodgers were forced to file for Chapter 11 bankruptcy.<sup>77</sup> On June 27, 2011, Frank McCourt and the Dodgers filed motions in the District of Delaware's U.S. Bankruptcy Court seeking the court's authorization to obtain post-petition financing and the ability to satisfy its obligations under the collective bargaining agreement.<sup>78</sup> Having no way of covering the team's operational expenses over the next twelve months, the main goal of the motions was to convince the court to allow the Dodgers to obtain a bridge loan that would buy McCourt time to sell the team's lucrative television rights.<sup>79</sup> McCourt's preference was to obtain outside financing from the private hedge fund Highbridge Capital.<sup>80</sup> In consideration of the loan, Highbridge would have "super-priority" liens on all of McCourt's personal, real, and intangible assets.<sup>81</sup> The Dodgers would also have to pay a particularly high interest rate of LIBOR plus 7 percent monthly and would have to complete repayment of the loan within one year of filing the bankruptcy petition.<sup>82</sup>

The Office of the Commissioner of Baseball filed an objection to McCourt's motion, claiming that the Highbridge financing plan would be yet another example of McCourt over-leveraging his club to siphon its

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74. Press Release, L.A. Dodgers Baseball Club, Statement from Steve Susman, Susman Godfrey (June 20, 2011), available at [http://mlb.mlb.com/news/press\\_releases/press\\_release.jsp?ymd=20110620&content\\_id=20772822&vkey=pr\\_la&fext=.jsp&c\\_id=la](http://mlb.mlb.com/news/press_releases/press_release.jsp?ymd=20110620&content_id=20772822&vkey=pr_la&fext=.jsp&c_id=la).

75. *Id.*

76. *Id.*

77. Los Angeles Dodgers Holding Company LLC Chapter 11 Bankruptcy Petition, *In re Los Angeles Dodgers Holding Company LLC*, 465 B.R. 18 (Bankr. D. Del. 2011) (No. 11-12010), available at <http://online.wsj.com/public/resources/documents/dodgers.pdf>.

78. Emergency Motion for Postpetition Financing, *supra* note 43; Los Angeles Dodgers LLC's Motion for Authority to Perform All Obligations Under Collective Bargaining Agreements, *In re Los Angeles Dodgers LLC*, 465 B.R. 18 (Bankr. D. Del. 2011) (No. 11-12010), 2011 WL 2678237 [hereinafter Motion to Perform CBA Obligations].

79. Emergency Motion for Postpetition Financing, *supra* note 43, at 15.

80. The loan would afford the Dodgers \$60 million pending an interim order and an aggregate total of \$150 million if approved by the bankruptcy court. *Id.* at 25.

81. *Id.* at 17-23.

82. *Id.*

revenues for personal use.<sup>83</sup> He accused McCourt of alienating “fans, sponsors, and business partners, and . . . erod[ing] public confidence in the Club.”<sup>84</sup> Selig first argued that McCourt failed to satisfy the Bankruptcy Code’s burden of proving that “that no better offers, bids, or timely proposals [were] before the court”<sup>85</sup> because Major League Baseball would give the Dodgers a loan on “substantially better terms” than the Highbridge financing.<sup>86</sup> He explained that the MLB loan would eliminate “excessive fees,” such as the \$4.5 million commitment fee, while simultaneously charging an interest rate 3 percent lower than Highbridge’s loan.<sup>87</sup> The cut in interest rate alone would save McCourt approximately \$4.5 million over the course of one year.<sup>88</sup> Another important component of the MLB loan was its unsecured status. Unlike the Highbridge loan, which would encumber all of McCourt’s assets, the loan from the League would not require any collateral from the debtors.<sup>89</sup>

Selig’s second objection was that Frank McCourt’s solicitation of the Highbridge loan, as well as the loan itself, violated Major League Baseball’s Governing Documents (the “Governing Documents”) and applicable provisions of the Bankruptcy Code. Section III of the MLB Ownership Guidelines requires that the Commissioner “review and approve any agreement that extends loans or other financial accommodations to a Major League Baseball Club.”<sup>90</sup> The League argued that pursuant to Section 365(c) of the Bankruptcy Code, the Trustee may not assign a contract that would violate the agreements between a club and the League found in the Governing Documents without the consent of the League.<sup>91</sup> Furthermore, any restrictions on this section would be excepted because the Highbridge loan would extend debt financing to the benefit of the debtor under Section 365(e)(2)(B) of the Code.<sup>92</sup> Selig further reasoned that the incompatibility of the Highbridge loan and the Governing Documents represented an “uncurable breach” that rendered the reorganization plan impossible without materially impairing the value of the club.<sup>93</sup>

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83. Objection of Major League Baseball to Debtors’ Motion to Obtain Post-Petition Financing and for Related Relief at 1, *In re Los Angeles Dodgers LLC*, 465 B.R. 18 (Bankr. D. Del. 2011) (No. 11-12010), 2011 WL 2678238 [hereinafter “MLB Objection to Highbridge Loan”].

84. *Id.* at 3–4.

85. *Id.* at 11 (quoting *In re Phase-I Molecular Toxicology Inc.*, 285 B.R. 494, 495–96 (Bankr. D.N.M. 2002) (citation omitted)).

86. *Id.*

87. *Id.* at 10, 11–12.

88. *Id.*

89. *Id.* at 12.

90. *Id.*; MLB OWNERSHIP GUIDELINES, § III.

91. MLB Objection to Highbridge Loan, *supra* note 83, at 17–18; 11 U.S.C. § 365(e)(1) (2006).

92. MLB Objection to Highbridge Loan, *supra* note 83, at 17–18; 11 U.S.C. § 365(e)(2)(B).

93. MLB Objection to Highbridge Loan, *supra* note 83, at 18.

Although the majority of the motion was directed towards the plan, the Commissioner revealed his ultimate goal within the filing: the ousting of McCourt as the owner of the Los Angeles Dodgers. The language throughout the document evidences Selig's quickly waning patience for McCourt's antics. He accused McCourt of bad faith, claiming the team's bankruptcy petition was a vehicle to "circumvent the Club's obligations under its constituent, governing documents" and to convince the court to authorize an "additional debt financing and sale of key assets in violation of . . . the obligations that the club has to [Major League Baseball]."<sup>94</sup> Despite the Code's clear requirement to make a good faith effort to obtain unsecured credit before a loan of Highbridge's nature, McCourt made no effort to obtain credit from his "most significant strategic relationship and obvious source of a DIP loan."<sup>95</sup>

However Selig did not stop there. Hoping to completely undermine McCourt's credibility and intentions within the document, the Commissioner diligently recounted all of McCourt's past infringements of League agreements: his abandoned promise to provide \$30 million of liquid equity upon purchase of the team, nondisclosure of reorganizational activities, severe overleveraging of the franchise, and the siphoning of team funds for personal benefits.<sup>96</sup> Finally, Selig ominously questioned whether the bankruptcy was valid *ab initio*. He argued that because he had appointed a monitor to make all substantial financial decisions for the team, McCourt had no authority to file a Chapter 11 petition without first receiving approval.<sup>97</sup> McCourt "simply disregarded this requirement" when he brought the team into bankruptcy anyway.<sup>98</sup> This, Selig argued, raised the ultimate threshold issue of "whether or not Mr. McCourt should be permitted to retain control of the team in chapter 11."<sup>99</sup>

McCourt spurned the League's DIP financing plan by officially bringing the personal battle with the Commissioner into federal bankruptcy court. The Dodgers filed a motion to compel production of documents and deposition witnesses in an attempt to justify McCourt's refusal to negotiate

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94. *Id.* at 3.

95. *Id.* The term "DIP" is shorthand for "Debtor-in-Possession"—that is a "Chapter 11 [ ] debtor that continues to operate its business as a fiduciary to the bankruptcy estate." BLACK'S LAW DICTIONARY (9th ed. 2009), available at Westlaw BLACKS. A "DIP Loan" refers to post-petition financing of the debtor-in-possession under section 364 of the Bankruptcy Code. See James S. Rankin, *Defensive Debtor-in-Possession Financing* 3 (Am. Bank. Inst., Mar. 17, 2012) (unpublished working paper), available at <http://www.abiworld.org/committees/newsletters/financialadvisors/vol9num1/dip.pdf>. The "hierarchy" of post-petition financing options under section 364, *id.*, is at the heart of the argument between McCourt and the Commissioner regarding the Highbridge DIP loan.

96. *Id.* at 2–7.

97. *Id.* at 3–4.

98. *Id.*

99. *Id.* at 4–5.

loan terms with Commissioner Selig and the League.<sup>100</sup> McCourt's argument was simple: since the commencement of McCourt's divorce, the Commissioner had been acting with the ulterior motive of ousting Frank McCourt as the owner of the franchise. More specifically, he accused Selig of bad faith and abuse of power when he denied the FOX Sports deal with the explicit purpose of "creat[ing] a liquidity crisis" that would "force McCourt to miss a payroll."<sup>101</sup> The team further asserted that "MLB has not acted in good faith and has treated the Dodgers more severely than other baseball teams in comparable circumstances" while "the Commissioner has afforded far more favorable treatment and consideration to other owners who face financial circumstances far more dire than the [Dodgers]."<sup>102</sup> To prove this point, McCourt requested documents concerning the financial troubles of the New York Mets and any League transactions within that context, any Commissioner investigation or monitoring—or decisions not to investigate or monitor—similarly situated teams, and team records of compliance with MLB's Debt Service Rule.<sup>103</sup> This information would then be compared to similar documents relevant to dealings specific to the Dodgers and any internal records expressing the League's consideration towards forcing an ownership change or terminating the franchise.<sup>104</sup> The motion requested that the judge respect McCourt's exercise of proper business judgment in dismissing the League as a viable lender if discovery provided sufficient evidence to establish Selig's purported bias against him.<sup>105</sup> Judge Gross, ruling in favor of the MLB, emphatically denied the motion.<sup>106</sup>

## B. THE NEW YORK METS

On March 12, 2009, the infamous Bernard Madoff pleaded guilty to fraud charges brought against him for conducting a massive Ponzi scheme that shocked the world.<sup>107</sup> Fred Wilpon, Saul Katz, and Sterling Equities—the ownership group of the New York Mets and admitted friends of Madoff<sup>108</sup>—were among the thousands of individuals defrauded by one of

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100. Debtors' Motion to Compel Production of Documents and Certain Deposition Witnesses at 2, *In re Los Angeles Dodgers LLC*, 457 B.R. 308 (Bankr. D. Del. 2011) (No. 11-12010), 2011 WL 2623436 [hereinafter "Motion to Compel Production"].

101. *Id.* at 2–3.

102. *Id.* at 6–8.

103. *Id.* at 9.

104. *Id.*

105. *Id.* at 2, 11.

106. *In re Los Angeles Dodgers LLC*, 457 B.R. 308, 313–14 (Bankr. D. Del. 2011).

107. Ben Levisohn, *Madoff Pleads Guilty to Ponzi Scheme*, BUSINESSWEEK.COM (March 12, 2009), [http://www.businessweek.com/bwdaily/dnflash/content/mar2009/db20090312\\_431966.htm](http://www.businessweek.com/bwdaily/dnflash/content/mar2009/db20090312_431966.htm).

108. Press Release, N.Y. Metropolitan Baseball Club, Statement from Fred Wilpon, co-founder and chairman, and Saul B. Katz, co-founder and president of Sterling Equities, on behalf of the Sterling Equities partners and their families (Feb. 4, 2011) [hereinafter Sterling Equities

the largest financial scandals the industry has ever seen. Over a year and a half later, the trustee of Madoff's bankruptcy estate sued Wilpon and his various entities, accusing them of being beneficiaries—not victims—of the spurned financial wizard's web of deceit.<sup>109</sup> The lawsuit contended that the Sterling partners and their affiliates were educated investors that earned “approximately \$300 million in fictitious profits” while turning a blind eye towards their friend's questionable investment practices.<sup>110</sup> The trustee sought nearly \$1 billion from the Mets' owners, stating that they “knew or should have known” that their revenue stream was too good to be true, but the team's dependency on Madoff's investment income led them to choose a path of inaction over investigation.<sup>111</sup> Wilpon and his constituencies hotly contested the trustee's accusations, claiming that they had no reason to suspect Madoff of the crimes he committed and were fooled along with securities experts at the SEC.<sup>112</sup>

The lawsuit and its monetary consequences compounded the \$500 million in losses realized by the team as a result of their Madoff investments,<sup>113</sup> sending the Mets into an immediate financial crisis that prompted owner Fred Wilpon to issue a statement reinforcing his ability to maintain ownership of a financially dysfunctional team.<sup>114</sup> Commissioner Selig, who was not shy about referring to his thirty-year friendship with Wilpon, extended the Mets a \$25 million emergency loan to help the team cover operating expenses.<sup>115</sup> The loan, when viewed in contrast with his later dealings with McCourt and the Dodgers, elicited immediate comparisons and conclusions drawn by the media.<sup>116</sup> As the public battle

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Statement], available at [http://newyork.mets.mlb.com/news/press\\_releases/press\\_release.jsp?ymd=20110204&content\\_id=16569244&vkey=pr\\_nym&fext=.jsp&c\\_id=nym](http://newyork.mets.mlb.com/news/press_releases/press_release.jsp?ymd=20110204&content_id=16569244&vkey=pr_nym&fext=.jsp&c_id=nym).

109. Complaint at 1, *Picard v. Katz*, 462 B.R. 447 (Bankr. S.D.N.Y. 2011) (No. 11-CV-3605), available at <http://graphics8.nytimes.com/packages/pdf/0204sterlingcomplaintfinal.PDF>.

110. *Id.* at 1.

110. *Id.* at 1–2.

110. *Id.*

111. Michael Rothfeld & Chad Bray, *Madoff Trustee Buzzes Mets*, WALL ST. J., Feb. 5, 2011, <http://online.wsj.com/article/SB10001424052748704709304576124104225741650.html>.

112. Sterling Equities Statement, *supra* note 108.

113. Press Release, N.Y. Metropolitan Baseball Club, Statement by Robert B. Fiske Jr., Karen E. Wagner and David L. Caplan of Davis Polk & Wardwell LLP on behalf of the Sterling defendants (Feb. 4, 2011), available at [http://newyork.mets.mlb.com/news/press\\_releases/press\\_release.jsp?ymd=20110204&content\\_id=16569274&vkey=pr\\_nym&fext=.jsp&c\\_id=nym](http://newyork.mets.mlb.com/news/press_releases/press_release.jsp?ymd=20110204&content_id=16569274&vkey=pr_nym&fext=.jsp&c_id=nym).

114. Press Release, N.Y. Metropolitan Baseball Club, Statement from Fred Wilpon and Jeff Wilpon regarding the New York Mets (Jan. 28, 2011), available at [http://newyork.mets.mlb.com/news/press\\_releases/press\\_release.jsp?ymd=20110128&content\\_id=16523814&vkey=pr\\_nym&fext=.jsp&c\\_id=nym](http://newyork.mets.mlb.com/news/press_releases/press_release.jsp?ymd=20110128&content_id=16523814&vkey=pr_nym&fext=.jsp&c_id=nym).

115. Barry M. Bloom, *Commissioner Mum on Mets Loan Issue*, MLB.COM (Feb. 26, 2011), [http://mlb.mlb.com/news/print.jsp?ymd=20110226&content\\_id=16745764&vkey=news\\_mlb&c\\_id=mlb](http://mlb.mlb.com/news/print.jsp?ymd=20110226&content_id=16745764&vkey=news_mlb&c_id=mlb).

116. See Rhoden, *Dissecting the Twin Tales of Teams in Distress*, *supra* note 8; see also, Richard Sandomir, *The Dodgers, the Mets and the Commissioner*, N.Y. TIMES, Apr. 30, 2011, <http://www.nytimes.com/2011/05/01/sports/baseball/01dodgers.html?ref=losangelesdodgers>.

against Madoff's estate continued to drain the team's operating expenses, Wilpon sought to generate funds by shopping a \$200 million share of the franchise to wealthy hedge fund investor David Einhorn.<sup>117</sup> Negotiations on the deal that could have led to an eventual transfer of majority ownership to Einhorn—another long-time friend of Selig's—hit a snag in July of 2011 when Wilpon suddenly became dissatisfied with the terms of the deal.<sup>118</sup> The deal officially died in the beginning of November.<sup>119</sup> Still, a carefree Selig refused to impose a timetable for repayment of the MLB loan on Wilpon despite the absence of finite sale plans and any apparent end to the period without the promised cash influx.<sup>120</sup> Instead, the Commissioner approved another bridge loan—this time \$40 million from an outside lender—in the midst of his uncompromising stance against Frank McCourt's efforts to negotiate his loan with Highbridge Capital.<sup>121</sup>

### C. MARK CUBAN, THE TEXAS RANGERS, AND THE CHICAGO CUBS

Another curious case during Commissioner Selig's tenure was the 2010 sale of the Texas Rangers franchise out of Chapter 11 bankruptcy.<sup>122</sup> In December of 2009, former Rangers owner Tom Hicks selected a group led by Hall of Fame pitcher Nolan Ryan and attorney Chuck Greenberg as the exclusive bidders in the sale of his team.<sup>123</sup> The two sides reached an agreement in January of 2010 that Selig reportedly approved over dissenting creditors and two higher bids.<sup>124</sup> As creditors continued to oppose the deal, Hicks, who had already defaulted on team loans, and Major League Baseball brought the team into voluntary Chapter 11 bankruptcy proceedings to facilitate a pre-packaged plan of reorganization

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117. Press Release, N.Y. Metropolitan Baseball Club, New York Mets select David Einhorn as preferred partner (May 26, 2011), available at [http://newyork.mets.mlb.com/news/press\\_releases/press\\_release.jsp?ymd=20110526&content\\_id=19597134&vkey=pr\\_nym&fext=.jsp&c\\_id=nym](http://newyork.mets.mlb.com/news/press_releases/press_release.jsp?ymd=20110526&content_id=19597134&vkey=pr_nym&fext=.jsp&c_id=nym).

118. David Waldstein, *Mets Said to Have Reworked Sale Terms*, N.Y. TIMES, July 20, 2011, [http://www.nytimes.com/2011/07/21/sports/baseball/mets-continue-sale-talks-with-einhorn-and-possibly-others.html?\\_r=1](http://www.nytimes.com/2011/07/21/sports/baseball/mets-continue-sale-talks-with-einhorn-and-possibly-others.html?_r=1).

119. Press Release, N.Y. Metropolitan Baseball Club, Statement from the New York Mets (Sept. 1, 2011), available at [http://newyork.mets.mlb.com/news/press\\_releases/press\\_release.jsp?ymd=20110901&content\\_id=24047990&vkey=pr\\_nym&fext=.jsp&c\\_id=nym](http://newyork.mets.mlb.com/news/press_releases/press_release.jsp?ymd=20110901&content_id=24047990&vkey=pr_nym&fext=.jsp&c_id=nym).

120. Mike Puma, *Baseball Says Mets Can Wait to Pay Back Loan*, N.Y. POST, Oct. 11, 2011, [http://www.nypost.com/p/sports/mets/selig\\_no\\_rush\\_for\\_mets\\_to\\_pay\\_gQcrWKKz1GJWzF8LdjpOpL](http://www.nypost.com/p/sports/mets/selig_no_rush_for_mets_to_pay_gQcrWKKz1GJWzF8LdjpOpL).

121. *Mets Recently Took Out \$40 Million Loan*, WALL ST. J., Dec. 12, 2011, <http://online.wsj.com/article/APac131e93b69d4e11b535b0eb436bba6e.html?KEYWORDS=madoff+mets>.

122. David Brown, *Nolan Ryan Wins Ownership of Rangers After Exhausting Auction*, YAHOO! SPORTS (Aug. 5, 2010, 5:12 AM), [http://sports.yahoo.com/mlb/blog/big\\_league\\_stew/post/Nolan-Ryan-wins-ownership-of-Rangers-after-exhau?urn=mlb-260375](http://sports.yahoo.com/mlb/blog/big_league_stew/post/Nolan-Ryan-wins-ownership-of-Rangers-after-exhau?urn=mlb-260375).

123. *Tom Hicks Selects Nolan Ryan-Chuck Greenberg Group for Texas Rangers*, DALLAS BUS. J. (Dec. 16, 2009, 9:15 AM), <http://www.bizjournals.com/dallas/stories/2009/12/14/daily23.html>.

124. Matthew Futterman, *Texas Rangers Make Bankruptcy Play*, WALL ST. J., May 25, 2010, <http://online.wsj.com/article/SB10001424052748704792104575264950799613356.html?KEYWORDS=bankruptcy>.

that would push a sale to the Ryan-Greenberg group.<sup>125</sup> The filing came on the heels of the Commissioner's threats to utilize his "best interests of baseball" power to seize the team and force the sale<sup>126</sup> to what he openly admitted was his favored group.<sup>127</sup> Meanwhile, former lenders claimed the plan fell short of what the creditors were owed, and contested the plan so vehemently that they threatened to sabotage the process at the expense of Ryan and Greenberg's bid.<sup>128</sup> In the middle of the feud between creditors and the League, outspoken Dallas Mavericks owner Mark Cuban injected himself into the bidding process, joining partner Jim Crane to make the most competitive offer to purchase the team.<sup>129</sup> The judge presiding over the court-ordered auction process eventually awarded the team to the Ryan-Greenberg group when Cuban and Crane withdrew their more lucrative bid after a technicality washed away the surplus of their offer.<sup>130</sup>

This was not the first instance that Cuban's efforts to purchase a Major League Baseball team were denied. When Sam Zell and the Chicago Tribune opened bidding for the financially embattled Chicago Cubs in 2008, Cuban's \$1.3 billion offer was the highest initial bid.<sup>131</sup> Cuban, who is largely credited for the drastic turnaround of the NBA's Dallas Maverick's franchise, has stated that a sports franchise owner must function with two purposes in mind: "first, it's to work hard to win a championship year after year, and second, to be the caretaker of the franchise in the community."<sup>132</sup> As owner of the Mavericks, Cuban—Forbe's 188th richest individual in America<sup>133</sup>—has happily paid some of the highest NBA

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125. *Id.*

126. *Id.*

127. Maury Brown, *Selig Pleased the Texas Rangers Auction Will Respect MLB's Right to Choose Owner*, BIZOFBASEBALL.COM (July 6, 2010, 5:33 PM), [http://bizofbaseball.com/index.php?option=com\\_content&view=article&id=4506:selig-pleased-texas-rangers-auction-will-respect-mlbs-right-to-choose-owner&catid=70:mlb-club-sales&Itemid=157](http://bizofbaseball.com/index.php?option=com_content&view=article&id=4506:selig-pleased-texas-rangers-auction-will-respect-mlbs-right-to-choose-owner&catid=70:mlb-club-sales&Itemid=157).

128. Maury Brown, *Creditors Would Rather Have Greenberg/Ryan Out of Picture on Texas Rangers Sale*, BIZOFBASEBALL.COM (July 20, 2010, 11:37 AM), [http://bizofbaseball.com/index.php?option=com\\_content&view=article&id=4548:creditors-would-rather-have-greenbergryan-out-of-picture-on-texas-rangers-sale&catid=70:mlb-club-sales&Itemid=157](http://bizofbaseball.com/index.php?option=com_content&view=article&id=4548:creditors-would-rather-have-greenbergryan-out-of-picture-on-texas-rangers-sale&catid=70:mlb-club-sales&Itemid=157).

129. Richard Sandomir, *Ryan and Mark Cuban Start Texas Showdown in Rangers' Auction*, N.Y. TIMES, Aug. 4, 2010, <http://www.nytimes.com/2010/08/05/sports/baseball/05rangers.html?sq=Mark%20cuban%20&st=cse&adxnnl=1&%20texas%20rangers%20bankruptcy=&scp=3&adxnnlx=1324656108-qQ2NtPz8MNgYVfE9LBIKJw>.

130. Maury Brown, *Greenberg-Ryan Win Texas Rangers Auction After Cuban-Crane Concede*, BIZOFBASEBALL.COM (Aug. 5, 2010, 1:29 AM), [http://bizofbaseball.com/index.php?option=com\\_content&view=article&id=4608:greenberg-ryan-win-texas-rangers-auction-after-cuban-crane-concede&catid=70:mlb-club-sales&Itemid=157](http://bizofbaseball.com/index.php?option=com_content&view=article&id=4608:greenberg-ryan-win-texas-rangers-auction-after-cuban-crane-concede&catid=70:mlb-club-sales&Itemid=157). The Greenberg-Ryan deal was ultimately valued higher because the Cuban offer included approximately \$13 million in "breakup fees" that would be paid as a penalty to the Greenberg-Ryan group should they lose the auction.

*Id.*

131. Richard Sandomir, *Cuban Wants Cubs, But Will Baseball Want Him?*, N.Y. TIMES, Aug. 3, 2008, <http://www.nytimes.com/2008/08/03/sports/baseball/03cubs.html?pagewanted=all>.

132. *Id.*

133. *Mark Cuban—Forbe's 400 Richest Americans*, FORBES, <http://www.forbes.com/profile/mark-cuban/> (last visited Dec. 18, 2011).

luxury tax numbers in an effort to accomplish these goals.<sup>134</sup> Yet despite the seemingly perfect fit of a limitlessly wealthy owner in a non-salary cap system, MLB sources repeatedly leaked that there was “no way Bud and the owners” would allow Cuban to become the owner of the historically tortured franchise.<sup>135</sup> Red Sox owner John Henry summarized the situation as such: “The commissioner’s office abhors owners who speak their minds and fight for the rights of their respective franchises.”<sup>136</sup> The Commissioner seemed capable of using his influence over the good old boys to block any “maverick” owner that might publicly question his decisions. The Cubs, like the Rangers, eventually sold the team out of bankruptcy in 2009.<sup>137</sup>

#### D. THE FLORIDA MARLINS

The Commissioner has also left his fingerprints on the Florida Marlins’ twenty-year history. Current owner Jeff Loria purchased the team with the aid of an interest free loan from Major League Baseball in a set of controversial transactions between the League, the Montreal Expos, the Florida Marlins, and the Boston Red Sox.<sup>138</sup> Commissioner Selig played a vital role in shaping a deal that would essentially ship Loria to the Marlins, facilitate Florida’s former owner John Henry’s purchase of the Boston Red Sox, and the League’s purchase of Loria’s former team—the Montreal Expos.<sup>139</sup> Aside from his desire to contract the Montreal franchise, Selig had accomplished all of his goals regarding the transaction.

However it is not only the Commissioner’s acts, but also his inaction, that highlight his power over the circumstances surrounding the Marlins today. Under Selig’s watch, Loria received more than \$198 million of MLB revenue-sharing income over the last six years while consistently claiming fiscal difficulties in defense of his perpetual bottom-five roster payrolls.<sup>140</sup> This extra revenue, coupled with Loria’s intentional suppression of front office expenditures, has made the Marlins one of the most profitable teams

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134. See generally, Larry Coon, *Larry Coon’s NBA Salary Cap FAQ: 2011 Collective Bargaining Agreement*, <http://www.cbafaq.com/salarycap.htm> (last updated Feb. 18, 2013). A “luxury tax” is a payment imposed on high spending teams used to facilitate the processes of revenue sharing and competitive balance. *Id.*

135. See, e.g., Report: ‘Zero Chance’ that MLB will Accept Cuban’s Cubs Bid, ESPN.COM (Nov. 7, 2008, 9:56 AM), <http://sports.espn.go.com/mlb/news/story?id=3687712>. The Chicago Cubs have not won the World Series since 1908, making their 104-season championship drought the longest (by far) in all of the four major professional sports. *Longest Active Title Droughts in Sports*, FOXSPORTS.COM (June 15, 2011, 7:58 PM), <http://msn.foxsports.com/mlb/lists/longest-active-title-droughts-in-sports-061511#tab=photo-title=Starving+for+a+trophy&photo=29901688>.

136. Sandomir, *Cuban Wants Cubs, but Will Baseball Want Him?*, *supra* note 131.

137. *Bankruptcy Judge Approves Sale of the Cubs*, N.Y. TIMES DEALBOOK (Sept. 25, 2009, 5:39 AM), <http://dealbook.nytimes.com/2009/09/25/bankruptcy-judge-gives-ok-to-sale-of-the-cubs/>.

138. See Hal Bodley, *Loria Paints Bright Picture*, USA TODAY (Apr. 9, 2002, 4:58 AM) <http://www.usatoday.com/sports/baseball/comment/bodley/2002-04-09-bodley.htm>.

139. Shaikin, *Frank McCourt goes on a fishing expedition*, *supra* note 12.

140. *Id.*

of the last five years—but at the expense of the team’s on-field play and stadium attendance.<sup>141</sup> Despite these annual profits, Loria was allowed to cry poor and threaten relocation of the Marlins long enough to work a deal in which the Marlins paid only \$155 million for the construction of the team’s new stadium, while saddling the Miami-Dade County taxpayers with the \$409 million balance.<sup>142</sup>

After the truth behind the Marlins’ fiscal stability surfaced, the SEC began an investigation into the propriety of the team’s new stadium deal with the county.<sup>143</sup> The subpoenas have primarily targeted the Marlins, hinting the team may have improperly aided the campaign efforts of local and state leaders.<sup>144</sup> The subpoenas also demand any minutes from Loria’s internal board discussions concerning the stadium, including meetings between Loria and Commissioner Selig regarding the matter.<sup>145</sup> It has already been well documented that Robert DuPuy, Major League Baseball’s former president and chief operating officer, played a significant role in pushing the controversial deal through.<sup>146</sup> The quickly forming storm clouds ominously indicate that one of two scenarios has played out: either the Commissioner played an integral role in Loria’s scheme to find back-door financing for the Marlins’ new home; or, he conveniently looked the other way as his right hand man facilitated an unlawfully lopsided deal that could expose both the team and League to heightened scrutiny and monetary liability.<sup>147</sup>

### III. BRINGING A CLAIM FOR BREACH OF FIDUCIARY DUTY: THRESHOLD ISSUES

The remainder of this note will argue that, based on his disparate treatment of Major League Clubs and their owners during financial struggles, Commissioner Selig has breached his fiduciary duty of loyalty to the Los Angeles Dodgers and Major League Baseball as a whole. The case of Frank McCourt and the Los Angeles Dodgers makes for an interesting test for the viability of the fiduciary duty legal strategy because the extensive media coverage of the tenuous owner-Commissioner relationship juxtaposed with the New York Mets’ struggles has raised speculation as to

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141. Maury Brown, *The Florida Marlins Love Living on Welfare*, BIZOFBASEBALL.COM (Mar. 1, 2008, 1:05 PM), [http://www.bizofbaseball.com/index.php?option=com\\_content&view=article&id=1970:the-florida-marlins-love-living-on-welfare&catid=26:editorials&Itemid=39](http://www.bizofbaseball.com/index.php?option=com_content&view=article&id=1970:the-florida-marlins-love-living-on-welfare&catid=26:editorials&Itemid=39).

142. Jeff Passan, *Marlins’ Profits Came at Taxpayer Expense*, YAHOO! SPORTS (Aug. 24, 2010), <http://sports.yahoo.com/mlb/news?slug=jp-marlinsfinancials082410>.

143. Jeff Passan, *SEC Targets Marlins’ Shady Business*, YAHOO! SPORTS (Dec. 3, 2011), [http://sports.yahoo.com/mlb/news?slug=jp-passan\\_marlins\\_sec\\_stadium\\_malfeasance\\_120211](http://sports.yahoo.com/mlb/news?slug=jp-passan_marlins_sec_stadium_malfeasance_120211).

144. *Id.*

145. *Id.*

146. *Id.*

147. *Id.*

the true motives of Commissioner Selig's lending policies.<sup>148</sup> Accordingly, the note theorizes what could have happened had McCourt and the Dodgers challenged Selig's powers in court as opposed to agreeing to sell the team out of bankruptcy.<sup>149</sup>

#### A. THE EXISTENCE OF A FIDUCIARY DUTY

Although a breach of fiduciary duty claim does not implicate the virtually unbeatable court-made antitrust exemptions Major League Baseball enjoys, it nonetheless encounters multiple potential barriers to success. An individual or company's right to bring a breach of fiduciary duty claim rests on the theory of agency law and how its principles operate within a business setting.<sup>150</sup> A fiduciary's obligation to act in the best interests of the principal party is inherent in the nature of an agency relationship.<sup>151</sup> A principal may have recourse against an agent who intentionally or negligently strays from this duty.<sup>152</sup> In the corporate context, a fiduciary is generally liable for violations of two types of fiduciary duties: the individual's fiduciary duty of care, and the individual's fiduciary duty of loyalty. It is therefore common sense that the penultimate threshold to bringing a claim for breach of fiduciary duty is the existence of the duty itself.

The unique qualities of Major League Baseball's governance structure pose significant hardship to a Club owner seeking recourse against the Commissioner or the League as a whole. Because the League is categorized as an unincorporated association, a Commissioner could theoretically argue that the principles of corporate fiduciary duties are wholly inapplicable. When owner Al Davis and the Oakland Raiders challenged former NFL Commissioner Paul Tagliabue on the grounds of breach of fiduciary duty, the California Court of Appeal bent over backwards to reject the theory.<sup>153</sup> The court recognized that because the NFL was a unique business organization that did not neatly fit the "model of fiduciary duties owed by majority shareholders to their corporation and to minority shareholders," the "question of whether the NFL or its commissioner owes fiduciary duties to one of the NFL's member clubs" was a matter of first impression.<sup>154</sup> It

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148. Rhoden, *Dissecting the Twin Tales of Teams in Distress*, *supra* note 8.

148. Sandomir, *The Dodgers, the Mets and the Commissioner*, *supra* note 9.

149. Bill Shaikin, *MLB Agreement Says Frank McCourt Must Sell Dodgers by End of April*, L.A. TIMES, Dec. 7, 2011, <http://articles.latimes.com/2011/dec/07/sports/la-sp-1208-dodgers-mlb-20111208-9>.

150. "Agency is the fiduciary relationship that arises when one person (a "principal") manifests assent to another person (an "agent") that the agent shall act on the principal's behalf and subject to the principal's control, and the agent manifests assent or otherwise consents so to act." RESTATEMENT (THIRD) OF AGENCY § 1.01 (2006).

151. *Id.*

152. *Id.*

153. *Oakland Raiders v. Nat'l Football League*, 32 Cal. Rptr. 3d 266 (Ct. App. 2005).

154. *Id.* at 275–76.

argued that a fiduciary relationship between the Commissioner and a member team could not possibly exist because a fiduciary is required to act in the best interests of the beneficiary, and the job requirements of a league commissioner often mandate him to do the opposite.<sup>155</sup> The court justified this line of reasoning by highlighting acts like arbitrating and enforcing rules where the team may disagree, or hurting the team's competitiveness by employing his disciplinary powers to punish a player or coach.<sup>156</sup> As a result, its "comprehensive review of the NFL constitution" showed that there was no reason to find the Commissioner had agreed to assume any fiduciary responsibilities with respect to the league's member clubs.<sup>157</sup>

The court couples the most restrictive view of the league constitution with the most literal application of the definition of a fiduciary duty in an effort to avoid the very nature of a voluntary association.<sup>158</sup> Instead, a perhaps "less comprehensive" review of the Major League Constitution's contents would have sufficed. Article I plainly states that the Constitution is an agreement among the member clubs, "each of which shall be entitled to the benefits of and shall be bound by all the terms and provisions" of the document.<sup>159</sup> Article II of the Constitution gives the Commissioner the power to do what is necessary to ensure that "the best interests of the national game of Baseball" are protected for the benefit of the parties to the agreement.<sup>160</sup> Contrary to the *Oakland Raiders* court's view, the most logical interpretation of the actual governing documents is the most literal reading of the document: the "benefits" of the agreement would include the Commissioner's good faith judgment to act in the best interests of the game. Accordingly, each team should have the right to enjoy those benefits, as provided in Article I.<sup>161</sup> It would be illogical to argue that the Commissioner does not owe a fiduciary duty to the League as a whole when the document mirrors the inherent nature of the fiduciary relationship—a commissioner (the agent) must act in the best interests of the association (the principal).<sup>162</sup> To segregate a commissioner's duty to protect a financially distressed team for the benefit of a league from a commissioner's duty to treat each financially distressed team evenhandedly would be equally illogical.

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155. "The breadth of the commissioner's powers plainly shows that there are numerous and varied potential circumstances in which the commissioner may be required to act against the best interests of the Raiders as a member club." *Id.* at 280 (emphasis in original).

156. *Id.* at 281.

157. *Id.* at 280.

158. Although *Oakland Raiders v. National Football League* addresses the constitution of the National Football League, the constitutions of each league remain fundamentally the same. See CONST. AND BYLAWS OF THE NAT'L FOOTBALL LEAGUE, available at [http://www.nfl.com/static/content/public/static/html/careers/pdf/co\\_.pdf](http://www.nfl.com/static/content/public/static/html/careers/pdf/co_.pdf). As such, this note will treat the court's decision as applying to the Major League Constitution as well.

159. MAJOR LEAGUE CONST., art. I.

160. MAJOR LEAGUE CONST., art. II.

161. MAJOR LEAGUE CONST., art. I.

162. RESTATEMENT (THIRD) OF AGENCY § 1.01 (2006).

The National Conference of Commissioners on Uniform State Laws recognized the same tension and uncertainty between corporate and association law that the *Oakland Raiders* court highlighted.<sup>163</sup> It drafted the Revised Uniform Unincorporated Nonprofit Association Act (RUUNAA) to provide insight as to where this type of organizational structure falls within the law, and to create a more comprehensive guide for governing unincorporated associations.<sup>164</sup> The conference also recognized the need to protect both a voluntary association and its members from managers that breach their fiduciary duties. Section 23 of RUUNAA explicitly states, “A manager owes to the unincorporated nonprofit association *and to its members* the duties of loyalty, care and good faith.”<sup>165</sup> Although Delaware has yet to adopt RUUNAA, it did adopt its predecessor, the Uniform Unincorporated Nonprofit Association Act in 1997.<sup>166</sup> This act broadly states that “principles of law and equity” govern unincorporated associations unless otherwise stated.<sup>167</sup> The state’s embracement of the Act is evidence that its legislature intended for unincorporated associations to be protected by the rest of Delaware law—a body of law which happens to be the richest compilation of corporate law in the nation. Furthermore, the MLB Constitution’s designation of the Commissioner as chief executive officer and Chairman is evidence that the League intended his position to be guided by the same principles as a corporate CEO and board director.<sup>168</sup>

## B. WAIVER OF RECOURSE

Once McCourt has established that a fiduciary duty exists, a major obstacle still remains: does he have standing to bring such a claim?<sup>169</sup> Article VI, Section 2 of the MLB Constitution states that it is in the best

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163. See generally, NAT’L CONFERENCE OF COMM’RS ON UNIF. STATE LAWS, REPORT TO THE HOUSE OF DELEGATES ON REVISED UNIFORM UNINCORPORATED NONPROFIT ASSOCIATION ACT (2008).

164. *Id.* at 2–3.

165. REVISED UNIFORM UNINCORPORATED NONPROFIT ASSOCIATION ACT § 23 (2008) (emphasis added). The comments of the Act clarify that the duties included in the section are intended to mean the fiduciary duties of individuals exercising managerial authority—a category Commissioner Selig certainly falls within. *Id.* § 23 cmt. 1.

166. Act of June 25, 1997, 71 Del. Laws Ch. 79 (codified at DEL. CODE ANN. tit. 6, §§ 1901–1916 (2011)).

167. DEL. CODE ANN. tit. 6, § 1902 (2011).

168. MAJOR LEAGUE CONST., art. II, § 2(a).

169. Although this note addresses these issues as if McCourt filed a personal lawsuit against the Commissioner outside of bankruptcy, the actual litigation involving the Dodgers bankruptcy proved fatal to McCourt’s bid to delve into the Commissioner’s favoritism. As the Commissioner pointed out, the Dodgers—and not McCourt—were the litigating party to the case. Opposition of Major League Baseball to the Debtors’ Motion to Compel Production of Documents and Certain Deposition Witnesses at 12, *In re Los Angeles Dodgers LLC*, 468 B.R. 652 (Bankr. D. Del. 2011) (No. 11-12010), 2011 WL 2637695 [hereinafter MLB Opposition to Motion to Compel]. Judge Gross eventually noted that a bankruptcy court was not the correct venue for McCourt to put the Commissioner on trial. Order Scheduling Evidentiary Hearing, *supra* note 42, at 11.

interests of the game for teams to accept and comply with the decisions of the Commissioner, and to be “finally and unappealably bound” by his actions pursuant to the Major League Constitution.<sup>170</sup> It further provides that each team “waive[s] such right of recourse to the courts as would otherwise have existed in their favor.”<sup>171</sup> Throughout the Dodgers’ bankruptcy proceedings, the Commissioner repeatedly asserted that McCourt was subject to the League’s governing documents, including this waiver of recourse provision.<sup>172</sup> As such, the Commissioner argued, McCourt lacked standing to litigate against the Commissioner because he had forfeited his right to challenge the Commissioner’s decisions in court.<sup>173</sup> On its face, the provision seems detrimental to any hypothetical challenge that McCourt may bring. However, another look into the general principles of association and corporate law will prove otherwise.

Again, RUUNAA serves as a helpful guide to the governance issues presented by McCourt’s hypothetical challenge of the Commission’s Powers.<sup>174</sup> Much like the principles of traditional corporate law, Section 23(e) of RUUNAA allows an unincorporated association to contract around the default rules proposed in the uniform code.<sup>175</sup> It states that an association’s governing documents may limit, and even eliminate, a manager’s liability for certain actions or nonfeasance.<sup>176</sup> However this ability to limit liability is not unchecked, as the section later explicitly states that a breach of fiduciary duty of loyalty does *not* fall within its parameters.<sup>177</sup> Although the section’s comments distinguish a fiduciary’s duty of loyalty from a more general duty of good faith,<sup>178</sup> this separation of analysis was common due to the muddled judicial history regarding what is, and what is not, a fiduciary duty.<sup>179</sup> The Committee—apparently realizing the distinction runs counter to Delaware’s rulings that “good faith” is a subsidiary of a director’s fiduciary duty of loyalty<sup>180</sup>—has since put forth amendments that eliminate the comments that confuse its desire to shield an

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170. MAJOR LEAGUE CONST., art. VI, § 2(a).

171. *Id.*

172. See Motion of Major League Baseball to Terminate Exclusivity or, In the Alternative, to Compel the Debtors to Seek Assumption or Rejection of the Baseball Agreements at 14, *In re Los Angeles Dodgers LLC*, 468 B.R. 652 (Bankr. D. Del. 2011) (No. 11-12010), available at <http://www.scribd.com/doc/66102703/MLB-Motion-to-Terminate>.

173. MLB Opposition to Motion to Compel, *supra* note 169, at 12.

174. See REVISED UNIFORM UNINCORPORATED NONPROFIT ASSOCIATION ACT (RUUNAA) § 23(e) (2008).

175. *Id.*

176. *Id.*

177. “The governing principles in a record may limit or eliminate the liability of a manager . . . for damages for any action taken, or failure to take any action, as a manager, *except liability for . . . breach of the duty of loyalty . . .*” RUUNAA § 23(e)(4) (emphasis added).

178. See RUUNAA § 23 cmt.2.

179. See generally Claire A. Hill & Brett H. McDonnell, *Stone v. Ritter and the Expanding Duty of Loyalty*, 76 FORDHAM L. REV. 1769 (2007).

180. See *Stone v. Ritter*, 911 A.2d 362, 370 (Del. 2006).

unincorporated association's manager from acts of bad faith.<sup>181</sup> This approach is consistent with state statutes that specifically carve out breaches of fiduciary duty and acts in bad faith as exceptions to a business entity's ability to contract around a manager's fiduciary duties.<sup>182</sup>

Still, these new principles will undoubtedly face a familiar defense that old common law has repeatedly upheld this exact waiver of recourse provision.<sup>183</sup> In *Charles O. Finley & Co., Inc. v. Kuhn*, the court found the Article VII, Section 1 waiver was in accordance with the common law principle that courts should generally refrain from reviewing the issues centered on the bylaws of a voluntary association.<sup>184</sup> However, the court *did* explicitly acknowledge the existence of exceptions to non-reviewability—one of which opens the door for the challenge central to this note.<sup>185</sup> It stated that matters and actions of private association may be subject to review “where the rules, regulations or judgments of the association are in contravention to the laws of the land or in disregard of the charter or bylaws of the association.”<sup>186</sup> Under this exception, a Major League owner could successfully argue that the waiver of recourse runs contrary to the long-determined principle that an agent, manager, and director of an organization must abide by his fiduciary responsibilities to his organization.<sup>187</sup>

The concurring opinion of Chief Judge Fairchild took an even more liberal approach.<sup>188</sup> He characterized the narrow exceptions and binding force provided by the majority as “sweeping” and arguably contrary to the then current trend that such waivers were unenforceable and void in the state of Illinois.<sup>189</sup> He further surmised, “While the scope of review of the Commissioner's decision is extremely narrow, I believe that it could be

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181. HARMONIZED REVISED UNIFORM UNINCORPORATED NONPROFIT ASSOCIATION ACT § 23 (Amendments to RUUNAA, Proposed Draft for Approval 2011), available at [http://www.uniformlaws.org/Shared/Docs/Harmonization\\_of\\_Business\\_Entity\\_Acts/huunaa\\_amdr\\_aft\\_jul11.pdf](http://www.uniformlaws.org/Shared/Docs/Harmonization_of_Business_Entity_Acts/huunaa_amdr_aft_jul11.pdf).

182. See, e.g., DEL. CODE ANN. tit. 8, § 102(b)(7) (2011) (allowing provisions that shield directors from liability “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 . . .”). Interestingly, this statute only provides that a corporation can shield its directors from *monetary* liability for breaches, but generally still allows plaintiffs to bring suit for equitable relief. *Id.* Although a hypothetical challenge would likely center around enjoining the Commissioner's unfair practices when aiding financially distressed team or forcing out disliked owners, courts have generally ignored this notion when evaluating the MLB's waiver of recourse clause.

183. See MLB Opposition to Motion to Compel, *supra* note 169, at 12–13.

184. *Charles O. Finley & Co., v. Kuhn*, 569 F.2d 527, 530 (7th Cir. 1978). This principle is firmly grounded in the justification that the parties to a voluntary association are informed, intelligent, and possessed equal bargaining power while negotiating the contract and association bylaws. *Id.*

185. *Id.* at 544.

186. *Id.*

187. See *Stone v. Ritter*, 911 A.2d 362 (Del. 2006).

188. *Charles O. Finley & Co.*, 569 F.2d at 545–46 (Fairchild, J., concurring).

189. *Id.*

overturned if Finley could establish that he was denied a fair hearing because the Commissioner was *biased* or *motivated by malice*.<sup>190</sup>

Although the Chief Judge spoke directly to the procedural issue of fair hearing implicated within *Finley*,<sup>191</sup> there is no indication that he intended this reasoning to be limited to a due process analysis. This interpretation would add significant momentum to any prospective claim brought against Commissioner Selig for breaching his fiduciary duty by acting in bad faith, and would have been particularly helpful to Frank McCourt's hypothetical allegations that Selig's personal biases were the basis for disparate scrutiny.<sup>192</sup> In court, McCourt would have advanced the strong argument that the judge's reasoning turned not on procedural due process, but instead on the presence of bias or malice that infiltrated the Commissioner's decision.<sup>193</sup>

#### IV. THEORIES OF THE CLAIM

This note has thus far outlined a plan of attack that Frank McCourt could have used to conquer the initial hurdles of bringing a breach of fiduciary duty claim against the Commissioner.<sup>194</sup> However after these threshold issues have been addressed, a plaintiff still must establish that the defendant did in fact breach his fiduciary duty. The Commissioner could have done this in two ways: a breach of his fiduciary duty of care or a breach of his fiduciary duty of loyalty.<sup>195</sup> The constant struggle between a plaintiff's desire to bring a claim for fiduciary duty of loyalty and a defendant's efforts to nudge the court towards a duty of care analysis has been well documented.<sup>196</sup> It has been further clouded by the Delaware decisions of *In re the Walt Disney Company Derivative Litigation*—which indicated that a director's duty of good faith was a separate fiduciary duty<sup>197</sup>—and *Stone v. Ritter*—which seemed to back-track a few steps in claiming that good faith was a “subsidiary element” of the fiduciary duty of loyalty.<sup>198</sup> Because McCourt's accusations that Commissioner Selig's

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190. *Id.* at 546 (Fairchild, J., concurring) (emphasis added). Although Chief Judge Fairchild thought bias and malice would be valid grounds to challenge Kuhn's decisions, he acknowledged that he would not overturn the decision in this particular case because the District Court had heard and ruled on evidence and testimony regarding the issue. *Id.*

191. *Id.*

192. *Id.*

193. *Id.*

194. It should be noted that although the Major League Constitution's waiver of recourse clause has been characterized as a threshold issue—without overcoming it, there would be no claim—it is likely that it would be argued simultaneously with the rest of the case due to its dependence on a breach of fiduciary duty of loyalty.

195. *Smith v. Van Gorkom*, 488 A.2d 858, 872–73 (Del. 1985).

196. See generally William T. Allen, Jack B. Jacobs & Leo E. Strine, Jr., *Function Over Form: Reassessment of Standards of Review in Delaware Corporation Law*, 56 BUS. LAW. 1287 (2001).

197. *In re Walt Disney Co. Derivative Litig.*, 906 A.2d. 27, 63–67 (Del. 2006).

198. *Stone v. Ritter*, 911 A.2d 362, 370 (Del. 2006).

personal animus towards McCourt has dismantled the objectivity of his decision-making process rather than the traditional “interested director” duty of loyalty, his case seems to fly directly into the uncharted territory of “duty of good faith” as presented by *Disney* and *Stone*.<sup>199</sup> This section will continue to walk us through McCourt’s hypothetical challenge of the Commissioner’s powers by showing how McCourt could bypass the defendant-friendly safe haven of the business judgment rule and successfully navigate the ever-evolving concepts of the duties of good faith and loyalty.

**A. OVERCOMING THE COMMISSIONER’S SAFE HAVEN: THE “BEST INTERESTS” CLAUSE DISGUISED AS THE BUSINESS JUDGMENT RULE**

A director’s fiduciary duty of care focuses on the reasonableness of the individual’s decision-making process, but does not attempt to evaluate the substantive quality of the ultimate decision.<sup>200</sup> The doctrine, known as the business judgment rule, broadly protects a director when he makes an informed, good faith decision using his professional judgment and expertise.<sup>201</sup> This deference to a fiduciary’s business judgment is predicated on the policy argument that allowing intense judicial scrutiny of business decisions will inhibit business growth by discouraging managers and directors to take beneficial risks.<sup>202</sup> In order to conquer this doctrine in Delaware, a plaintiff has the burden to prove that the defendant directors acted with “gross negligence” throughout their decision-making process.<sup>203</sup>

Article II of the Major League Agreement conveys virtually limitless power to the Commissioner while running the broad operations of the game and its day-to-day business operations.<sup>204</sup> Broadly speaking, one may compare Article II’s “best interest” clause to a built-in business judgment rule inherent in the MLB governing documents—and courts have sometimes treated the power strikingly similar to their deference to a corporate officer’s decision-making process in the past.<sup>205</sup> Commissioner Selig repeatedly highlighted that line of reasoning throughout the bankruptcy proceedings of the Los Angeles Dodgers, and would likely

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199. See *supra* notes 197–198 and accompanying text.

200. See *Kamin v. Am. Express Co.*, 383 N.Y.S.2d 807, 812 (Sup. Ct. 1976), *aff’d*, 54 A.D.2d 654 (N.Y. App. Div. 1976).

201. *Id.*

202. William T. Allen, Jack B. Jacobs & Leo E. Strine, Jr, *Realigning the Standard of Review of Director Due Care with Delaware Public Policy: A Critique of Van Gorkom and its Progeny as a Standard of Review Problem*, 96 NW. U. L. REV. 449, 449–50 (2002).

203. *Smith v. Van Gorkom*, 488 A.2d 858, 873 (Del. 1985).

204. MAJOR LEAGUE CONST., art. II.

205. See, e.g., *Atlanta Nat’l League Baseball Club, Inc. v. Kuhn*, 432 F. Supp. 1213, 1222 (N.D. Ga. 1977) (“What conduct is ‘not in the best interests of baseball’, is, of course, a question which addresses itself to the Commissioner, not this court.”).

continue to do so in any other defense of his power.<sup>206</sup> The doctrine presumes good faith, and McCourt would bear the burden of rebutting that presumption by showing that Selig's actions were uninformed and not in the best interests of baseball.<sup>207</sup> Therefore, if challenged in the corporate context under business judgment rule, his decision in the case of the Dodgers—and the process that led to that decision—would likely be evaluated on a rational basis standard that would isolate it from any other similar decisions.<sup>208</sup> Given the Commissioner's hands-on investigation that produced his letter detailing the "best interests" basis for his denial of the proposed television deal with FOX Sports to McCourt,<sup>209</sup> it is highly unlikely the court would find Selig to be an uninformed director. Further, the court would be unlikely to find Selig's decision irrational or unreasonable when analyzed in the narrow confines of the Dodgers' owner's actions alone. Selig would continue to advance the nature of the owner's lavish lifestyle detailed in the McCourt divorce and correlate the non-baseball related payouts of the FOX Sports loan as evidence of McCourt's refusal to change his methods of ownership.<sup>210</sup> Without the benefit of reviewing his leniency in other situations of financially distressed teams, the inflammatory nature of the Dodgers' recent history would lead any reasonable person to conclude that the Commissioner was not grossly negligent or irrational in his in deciding whether this particular situation was in the best interests of the game.<sup>211</sup>

Instead, the circumstances of his case would advise McCourt to tip-toe around the business judgment rule. Although the Delaware legislature's enactment of Section 102(b)(7) reinforced the rule by allowing a corporation to further protect its directors by amending its certificate of incorporation to eliminate liability for duty of care,<sup>212</sup> it has also had the effect of diverting plaintiff suits toward breach of duty of loyalty claims. As a result, the provision has evolved into an affirmative defense that directors have used to funnel these suits back into the realm of duty of care, and

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206. See MLB Opposition to Motion to Compel, *supra* note 169, at 12–13. The *Atlanta National League Baseball Club* court's justification that it "[could] not say [the Commissioner's] decision was either arbitrary or wrong" might induce one to argue McCourt's case under this line of reasoning. However, this notion is dangerously flawed because the Commissioner could easily argue that the documented facts of McCourt's exploitations of team funds show his decision was far from arbitrary. *Atlanta Nat'l League Baseball Club*, 432 F. Supp. at 1222. It would be best to avoid any path that would lead to this type of deference.

207. *McGowan v. Ferro*, 859 A.2d 1012, 1036 (Del. Ch. 2004).

208. See *Van Gorkom*, 488 A.2d 858.

209. Letter from Bud Selig to Frank McCourt, *supra* note 64.

210. *Id.*

211. This note is not meant to defend McCourt's quality of ownership—to do so would be nearly impossible. However, it *does* contend that any actual or perceived bias in aiding or not aiding an owner's effort to climb out of financial distress is *not* in the best interests of the game as set forth in the Major League Constitution.

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

consequently the exculpatory certificates.<sup>213</sup> Commissioner Selig would likely supplement his plea for deference to his “best interests judgment” by pointing again to the MLB Constitution’s waiver of recourse, in an attempt to invoke a 102(b)(7) defense.

But not all “uninterested director” roads under the statute lead towards the dead-end business judgment rule. In *Malpiede v. Townson*, the Supreme Court of Delaware indicated that there may be a way to lift the bar created by 102(b)(7).<sup>214</sup> A plaintiff who pleads facts sufficient to establish a possible breach of loyalty or bad faith would surpass the affirmative defense afforded by the legislature and allow for the assertion of the respective breach of fiduciary duty case.<sup>215</sup> Therefore, where Judge Gross found that his hearings were “not a referendum on the commissioner or other teams” because the Dodgers’ bankruptcy was solely concerned with the team’s affairs,<sup>216</sup> a civil court would certainly be deemed an acceptable venue for a personal challenge centered on accusations of prejudiced and unfair enforcement of MLB rules. In filing his complaint, McCourt would be free to make these very accusations, as well as advance the arguments and preliminary evidence brought forth in Part II of this note without the presupposed deference that has benefitted commissioners in the past. The abundance of information uncovered by the media, coupled with the high publicity and transparency of the Mets and Dodgers’ legal and ownership situations, would likely be enough to warrant the extensive discovery that McCourt was denied in the Los Angeles Dodgers’ bankruptcy proceedings.<sup>217</sup>

#### **B. TESTING THE MURKY WATERS OF GOOD FAITH AND THE DUTY OF LOYALTY**

While a fiduciary duty of care analysis would be confined to the Commissioner’s judgment in this one specific case, either a breach of a duty of good faith or loyalty claim would likely open the door to a more complete and comprehensive review. In 2006, the Delaware Supreme Court made a fairly distinct doctrinal statement by explicitly recognizing that “the universe of fiduciary misconduct is not limited to either disloyalty in the classic sense . . . or gross negligence.”<sup>218</sup> There is, in fact, a wide gap in which a director or officer’s actions will fall between a traditional conflict of interest transaction and the gross negligence required in *Smith v. Van Gorkom*’s duty of care analysis.<sup>219</sup> The court seemed to ultimately pry a

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213. *Emerald Partners v. Berlin*, 726 A.2d 1215, 1223 (Del. 1999).

214. *Malpiede v. Townson*, 780 A.2d 1075 (Del. 1985).

215. *Id.* at 1094.

216. Order Scheduling Evidentiary Hearing, *supra* note 42, at 11.

217. Shaikin, *Bankruptcy Judge Rules Against Frank McCourt*, *supra* note 14.

218. *In re Walt Disney Co. Derivative Litig.*, 906 A.2d 27, 667 (Del. 2006).

219. *Id.*

fiduciary's duty of good faith from the grasp of the business judgment rule by focusing on two types of bad faith conduct: (1) subjective bad faith,<sup>220</sup> and (2) a conscious disregard of one's responsibilities.<sup>221</sup> The latter of the two, despite being less reprehensible, still did not fall under the saving grace of 102(b)(7).<sup>222</sup> This liberation of the fiduciary concept of good faith was short lived, as Delaware's high court promptly reined good faith in under the umbrella of duty of loyalty less than one year later in *Stone v. Ritter*.<sup>223</sup> Under the court's analysis, the duty of good faith was merely a subsidiary of the duty of loyalty, and would not be considered an independent ground for liability.<sup>224</sup>

Although *Stone v. Ritter* questions the success of a claim based solely on the grounds of a breach of good faith, it specifically recognizes the duty's existence within the duty of loyalty.<sup>225</sup> Presumably then, a finding of bad faith would still come through the existence of conduct within the *Disney* court's two categories.<sup>226</sup> For similar reasons as to why *McCourt*'s case would fail under the business judgment rule, it would be equally unlikely that the owner could succeed if he asserted the first category of subjective bad faith.<sup>227</sup> However, *McCourt* may effectively argue that Selig's lack of recognizable standards in deciding when and when not to enforce his investigative and lending powers falls squarely within *Disney*'s middle ground of "conscious disregard of one's responsibilities."<sup>228</sup>

One way a fiduciary may exhibit bad faith is by intentionally acting with a purpose other than advancing the best interests of the corporation.<sup>229</sup> Article II, Section 4 of the Major League Constitution provides that in acting in the best interests of the League, the Commissioner shall exercise his authority to maintain "the integrity of, and public confidence in the national game of Baseball."<sup>230</sup> The public's perception of the competitiveness of the League and its member teams are embedded in the definitions of both integrity and public confidence.<sup>231</sup> *McCourt* would be apt to point out that the lack of a cohesive standard in facilitating the

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220. *Id.* at 64–66.

221. *Id.* at 67.

222. *Id.*

223. *Stone v. Ritter*, 911 A.2d 362, 370 (Del. 2006).

224. *Id.*

225. *Id.*

226. The *Stone v. Ritter* court did not implement this evaluation process because it was a classic monitoring system case. *Id.* at 364. Instead, it followed the standards set forth in *In re Caremark Intern. Inc. Derivative Litigation*, 698 A.2d 959 (Del. Ch. 1996). *Stone v. Ritter*, 911 A.2d at 370.

227. In this context, *McCourt* would have to show evidence that Selig's disparate treatment of owners was used to purposefully harm the League as a whole. There is no evidence that any of the Commissioner's actions were laced with an underlying desire to hurt the League. *Walt Disney Co.*, 906 A.2d at 67.

228. *Id.* at 66.

229. *Id.* at 67.

230. MAJOR LEAGUE CONST., art. II, § 4.

231. *Id.*

rehabilitation of financially struggling franchises is in stark opposition of these very goals.<sup>232</sup> The claim is further strengthened by the fact that the MLB Constitution renders the presence of an *actual* bias irrelevant—merely the public’s perception of a bias would suffice.<sup>233</sup> Commissioner Selig would be left to defend himself against a notion already present in the media that his personal agendas have consistently guided his decisions. He would have to account for his steadfast refusal of the Dodgers’ financing from sources outside of Major League Baseball,<sup>234</sup> while he has let Fred Wilpon and the New York Mets sit on a no-payment \$25 million League loan<sup>235</sup> and approved further debt financing from an outside lender when that money ran out a year later.<sup>236</sup> The Commissioner would likewise be called to explain why he believed guiding the Texas Rangers into bankruptcy at the expense of creditors while simultaneously fending off a higher bidder in Cuban helped the public’s confidence in the national game of baseball.<sup>237</sup> McCourt would further inquire as to why Selig—outside of a potential disruption to his mild-mannered “good old boys club”—would deny the bid of a potential owner who pledged virtually limitless funds to resurrecting a historically tortured and debt-ridden Cubs franchise was in the best interests of the team or the League.<sup>238</sup>

Under *Disney*, McCourt may also show that the Commissioner lacked good faith by intentionally failing to act in the face of a known duty to do so.<sup>239</sup> Article II, Section 2(b) gives the Commissioner broad powers to investigate, on his own accord, any act he perceives to be detrimental to the best interests of baseball.<sup>240</sup> Selig consistently relies on this power to defend any actions that consequently lead to questioning his authority.<sup>241</sup> If McCourt were to bring this suit, he should contend that the Commissioner’s constant reliance on this broad power demands that he invoke it whenever his fiduciary obligation to act in the game’s best interests require him to do so. This theory would be advanced most efficiently by raising the question of how the Commissioner makes these determinations, while simultaneously comparing the Dodgers’ situations with the Mets’ and Marlins’ to prove that the Commissioner’s process and substance of his decisions are inconsistent. He would have to define the rubric that guided him to the decision that irresponsible spending on a lavish marriage

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232. *Id.*

233. *Id.*

234. MLB Objection to Highbridge Loan, *supra* note 83.

235. Puma, *Baseball Says Mets Can Wait to Pay Back Loan*, *supra* note 120.

236. *Mets Recently Took Out \$40 Million Loan*, *supra* note 121.

237. Brown, *Greenberg-Ryan Win Texas Rangers Auction After Cuban-Crane Concede*, *supra* note 130.

238. *Report: ‘Zero Chance’ that MLB Will Accept Cuban’s Cubs Bid*, *supra* note 135; Sandomir, *Cuban Wants Cubs*, *supra* note 131.

239. *In re Walt Disney Co. Derivative Litig.*, 906 A.2d 27, 67 (Del. 2006).

240. MAJOR LEAGUE CONST., art. II, § 2(d).

241. *See, e.g.*, MLB Opposition to Motion to Compel, *supra* note 169.

warranted a fiscal monitor that stripped McCourt of his ownership rights<sup>242</sup> while the potential liability in a multibillion-dollar lawsuit that implicated the Wilpons in a massive securities fraud scheme did not.<sup>243</sup> McCourt would also call to light how Selig continuously acquiesced to Marlins owner Jeff Loria's repeated manipulation of the MLB revenue sharing rules,<sup>244</sup> and how he may have aided the "swindlers who run the Florida Marlins" rob an entire county blind.<sup>245</sup> By highlighting the Commissioner's past trend of picking and choosing when to invoke his best interests power in the face of his own contentions that he has a duty to act, McCourt would have a strong case when bringing his bad faith claim under *Disney's* inaction avenue.<sup>246</sup>

#### V. FINDING A PLACE FOR THE COMMISSIONER'S CONDUCT— AND GOOD FAITH

Two final questions remain: (1) how, exactly, should the duty of good faith operate within the duty of loyalty after *Stone v. Ritter*?; and, (2) should the Commissioner's game of favorites fall within that category? *Stone v. Ritter* has clarified that as a subsidiary element of the duty of loyalty, a director may be liable *indirectly* for acting in bad faith, but that bad faith alone will not create liability without proving more.<sup>247</sup> Does a conscious disregard of one's responsibility fueled by the favoritism of a partial decision maker's personal relations prove enough disloyalty to warrant culpability? I propose it does. To find a case where a corporate director or officer acted with subjective bad faith, yet still remained loyal, would be an incredibly difficult task.<sup>248</sup> To find the same for a manager of an unincorporated association who, as suggested in Section III, owes a fiduciary duty to *each member* of that association would be virtually impossible. Likewise, protecting the "integrity" and "public perception"<sup>249</sup> of baseball by disproportionately aiding teams is counter-intuitive to what a reasonable person would find as a good faith effort to act "in the best interests of the game." Commissioner Selig has not met his duty to act in good faith towards the Dodgers, or Major League Baseball.<sup>250</sup> As such, he should be forced to defend himself in a suit for a breach of fiduciary duty of loyalty to both entities.<sup>251</sup> Even if McCourt were to lose such a challenge, the goal of this note will have been accomplished: the Commissioner would

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242. Sandomir, *The Dodgers, the Mets and the Commissioner*, *supra* note 9.

243. *Id.*

244. Maury Brown, *The Florida Marlins Love Living on Welfare*, *supra* note 141.

245. Jeff Passan, *Marlins' Profits Came at Taxpayer Expense*, *supra* note 142.

246. *In re Walt Disney Co. Derivative Litig.*, 906 A.2d 27, 67 (Del. 2006).

247. *Stone v. Ritter*, 911 A.2d 362, 370 (Del. 2006).

248. See Hill & McDonnell, *supra* note 179, at 1774.

249. MAJOR LEAGUE CONST., art. II, § 4.

250. *Walt Disney Co.*, 906 A.2d 27.

251. *Stone v. Ritter*, 911 A.2d at 370.

have been held to a fiduciary standard, and the public's confidence in the integrity of the League's manager—and the national game—would be restored.

## **CONCLUSION**

This note has discussed the broad power afforded to the Commissioner of Major League Baseball by the League's governing documents. Recently, Commissioner Bud Selig has used these powers to take a hands-on approach in shaping the ownership statuses of several financial distressed teams. His actions have led both the media and public to question the impartiality of his decision-making process. As a result, the Commissioner has undermined the integrity and public perception of the game he has been entrusted to protect. Because the "best interests of baseball" power is steadfastly used to defend blatantly questionable decisions, the limits of the clause must be tested in court. As this note details, the proper vehicle to bring such a challenge of the Commissioner's power is a lawsuit that claims he has breached his fiduciary duty of loyalty to the league and its member teams.

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