

# Trust the Process: How the NBA Can Combat Its “Tanking” Problem in Court

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*ABSTRACT: “Tanking” (when teams purposely lose in the short term to obtain higher draft picks that (they hope) will help them win in the long term) is one of the most pressing problems facing the National Basketball Association (“NBA”). Tanking harms the integrity and, more importantly, the financial health of the NBA. Prior and proposed changes were and are inadequate to remedy the problem of tanking. This Note argues that tanking is a breach of fiduciary duties owed by NBA teams to each other, based on the theory that the NBA is a partnership and the teams are its members. By suing tanking teams, non-tanking teams can utilize the judicial process to extract damages from tanking teams. This will deter teams from tanking. This is a new solution to this problem—a legal solution.*

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## I. INTRODUCTION

“Tanking” is one of the most pressing problems facing the National Basketball Association (“NBA” or “the league”).<sup>1</sup> In a broad sense, “tanking” is a term used to describe when sports teams lose games on purpose to secure some sort of future competitive advantage.<sup>2</sup> The pervasiveness of tanking in the NBA presents significant problems to the league.<sup>3</sup> The Commissioner of the NBA, Adam Silver, has recognized this, saying, “We are gonna have to react and change incentives a bit. I do think it’s frustrating.”<sup>4</sup>

First, this Note explores the history of tanking in the NBA, from its origins to the many attempts to stop it.<sup>5</sup> Next, this Note identifies the harms tanking inflicts on the NBA and argues that the prior (and other proposed) solutions were and are inadequate.<sup>6</sup> Finally, this Note offers a solution to the tanking problem. While most suggestions for fixing the tanking problem center around reforming and revising the NBA draft, this Note offers a new solution—a legal solution.<sup>7</sup>

This Note contends that the NBA is a partnership, its teams are its members, and the teams thus owe each other fiduciary duties. Tanking

1. Associated Press, *In a Thriving NBA, Tanking Is the Problem Silver Can't Solve*, USA TODAY (Apr. 13, 2018, 8:03 PM), <https://www.usatoday.com/story/sports/nba/2018/04/13/in-a-thriving-nba-tanking-is-the-problem-silver-cant-solve/33821481> (“Tanking is the problem the NBA commissioner can’t solve.”). The NBA is a sports league that generates over \$5 billion in revenue annually. Michael Bohlin, *Report: NBA Revenue Projected to Reach \$8 Billion Next Season*, CBS SPORTS (Sept. 16, 2016, 3:34 PM), <https://www.cbssports.com/nba/news/report-nba-revenue-projected-to-reach-8-billion-next-season>.

2. See Mark Deeks, *What Actually Is Tanking, and Which NBA Teams Actually Do It?*, SBATION (Jan. 10, 2014, 10:52 AM), <https://www.sbnation.com/2014/1/10/5266770/nba-draft-lottery-tanking-gm>.

3. See *infra* Section III.A.

4. Scott Gleeson, *Mark Cuban Says Mavs ‘Did Everything Possible to Lose’ After Missing Playoffs*, USA TODAY: SPORTS (May 17, 2017, 1:05 PM), <https://www.usatoday.com/story/sports/nba/mavericks/2017/05/17/mark-cuban-admits-mavericks-did-everything-possible-to-lose/101792012> (quoting NBA Commissioner Adam Silver).

5. See *infra* Part II.

6. See *infra* Part III.

7. See *infra* Part IV.

constitutes a breach of these duties. By suing a tanking team, non-tanking NBA teams can extract damages from the tanking team. The prospect of these damages will “change incentives”<sup>8</sup> by making it costlier to tank, which will deter teams from tanking.

## II. TANKING IN THE NBA

In this Note, more narrowly, the term “tanking” refers to when NBA teams purposely lose in the short term to obtain higher picks in the NBA draft that (they hope) will help them win in the long term. This narrower concept of tanking is especially pervasive<sup>9</sup> in the NBA.<sup>10</sup> This brand of tanking within the NBA emerged in the early 1980s<sup>11</sup> and has plagued the league ever since.<sup>12</sup> The league attempted to deter tanking in the 80’s by instituting the draft lottery system, but this did not solve the problem.<sup>13</sup>

In fact, since the introduction of the lottery system,<sup>14</sup> the league has reformed the system five separate times<sup>15</sup> (with limited effect) and has recently passed a sixth reform package.<sup>16</sup> The history of tanking in the NBA

8. Gleeson, *supra* note 4 (quoting NBA Commissioner Adam Silver).

9. See John Gonzalez, *In Defense of Tanking*, RINGER (Sept. 18, 2017, 8:30 AM), <https://www.theringer.com/nba/2017/9/18/16317072> (“The lottery is inarguably the best and sometimes only way for small-market teams to secure quality players. From a long-term asset acquisition and competition standpoint, tanking could prove to be a smart strategy for the little guys who dream of becoming giants.”); Zach Lowe, *Blatant Tanking to Get Slightly Less Valuable for Some NBA Teams*, ESPN (Sept. 28, 2017), [http://www.espn.com/nba/story/\\_/id/20849861/zach-lowe-nba-draft-lottery-reform-potential-ramifications](http://www.espn.com/nba/story/_/id/20849861/zach-lowe-nba-draft-lottery-reform-potential-ramifications) (“They tank because in basketball more than any sport, singular superstars drive winning, and the only fail-safe way to get one is to draft very high in the right year. That is the best way to keep them, too; rookie first-round picks enter the league on four-year, cost-controlled contracts, and then proceed into restricted free agency—where incumbent teams can match any rival offer.”).

10. This narrow approach is how NBA teams primarily tank. However, there are other, less prevalent, types of strategic tanking that occasionally surface in the NBA. For example, the 2005–06 Phoenix Suns “benched [star players] [Steve] Nash and Raja Bell for [a] late-season game, all but assuring [an opposing team] win that would” ensure that the Suns would receive a lower playoff seed that would pit them against the higher seeded Los Angeles Lakers. JACK MCCALLUM, SEVEN SECONDS OR LESS: MY SEASON ON THE BENCH WITH THE RUNNIN’ AND GUNNIN’ PHOENIX SUNS 28 (2006). For the Suns, this was precisely “the matchup they wanted.” *Id.*; see also J. Francis Wolfe, *Top 10 Most Obvious Tank Jobs in NBA History*, SPORTSTER (Mar. 10, 2015), <http://www.thesportster.com/basketball/top-10-most-obvious-tank-jobs-in-nba-history> (describing ten instances of obvious tanking in the NBA).

11. See *infra* notes 17–33 and accompanying text (describing the initial catalyst for the tanking tactic beginning in the 1980s).

12. See *infra* Section II.B.

13. BILL SIMMONS, THE BOOK OF BASKETBALL: THE NBA ACCORDING TO THE SPORTS GUY 154 (2009) (“The unseemly saga [of tanking in the 1983 season] spurred the creation of a draft lottery the following season. And even that didn’t totally solve the taking problem . . .”).

14. See *infra* notes 34–35 and accompanying text.

15. See *infra* notes 36–71 and accompanying text (reviewing in detail the past five reformations of the NBA draft lottery).

16. See *infra* notes 107–09 and accompanying text (describing the sixth reform to the NBA draft lottery).

suggests that this newest reform attempt will be as ineffective as the prior five. A survey of this history sheds light not only on the pervasiveness of the problem of tanking, but also on the inadequacy of the fixes that have been attempted and the resulting need for a new solution. This section provides an overview of tanking in the NBA by looking at the roots of tanking, its evolution and persistence, and the NBA's many unsuccessful attempts to fix the problem.

#### A. THE ORIGINS OF TANKING IN THE NBA

The prospects of Michael Jordan,<sup>17</sup> Hakeem Olajuwon,<sup>18</sup> Charles Barkley,<sup>19</sup> and John Stockton<sup>20</sup> hung over the 1983–84 season and were a temptation to bad teams. These talented players would be entering the NBA in the 1984 draft following the season. This pool presented an incredibly promising draft class.<sup>21</sup>

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17. Jordan is a member of the Naismith Memorial Basketball Hall of Fame and is widely regarded as one of the greatest players to ever play in the NBA. *Michael Jordan*, NAISMITH MEM'L BASKETBALL HALL OF FAME, <http://www.hoophall.com/hall-of-famers/michael-jordan> (last visited Dec. 13, 2018); NBA.COM STAFF, *Legends Profile: Michael Jordan*, NBA, <http://www.nba.com/history/legends/profiles/michael-jordan> (last visited Dec. 13, 2018). A small sampling of Jordan's accomplishments includes winning six NBA championships (and winning the Most Valuable Player award in all six of them) and winning the Most Valuable Player award for regular season play five times. *Michael Jordan's Honors*, NBA: MICHAEL JORDAN CAREER RETROSPECTIVE, [http://www.nba.com/jordan/list\\_honors.html](http://www.nba.com/jordan/list_honors.html) (last visited Dec. 13, 2018).

18. Olajuwon is also a member of the Hall of Fame. *Hakeem Olajuwon*, NAISMITH MEM'L BASKETBALL HALL OF FAME, <http://www.hoophall.com/hall-of-famers/hakeem-olajuwon> (last visited Dec. 13, 2018); NBA.COM STAFF, *Legends Profile: Hakeem Olajuwon*, NBA, <http://www.nba.com/history/legends/profiles/hakeem-olajuwon> (last visited Dec. 13, 2018) (“Hakeem Olajuwon staked his claim as one of the greatest players in NBA history. Long considered a physical marvel since his days at the University of Houston, his aesthetic and productive play—highlighted by his Houston Rockets' back-to-back NBA titles—earned him a place among the game's best.”).

19. Barkley is another member of the Hall of Fame. *Charles Barkley*, NAISMITH MEM'L BASKETBALL HALL OF FAME, <http://www.hoophall.com/hall-of-famers/charles-barkley> (last visited Dec. 13, 2018); NBA.COM STAFF, *Legends Profile: Charles Barkley*, NBA, <http://www.nba.com/history/legends/profiles/charles-barkley> (last visited Dec. 13, 2018) (“Barkley was perhaps the greatest anomaly in basketball history. Listed as 6-6 but actually closer to 6-4, he played power forward as well as anyone in the history of the NBA, often dominating players half a foot taller. . . . Barkley is one of only four players in NBA history to have compiled at least 20,000 points, 10,000 rebounds and 4,000 assists.”).

20. Stockton also is a member of the Hall of Fame. *John Stockton*, NAISMITH MEM'L BASKETBALL HALL OF FAME, <http://www.hoophall.com/hall-of-famers/john-stockton> (last visited Dec. 13, 2018); NBA.COM STAFF, *Legends Profile: John Stockton*, NBA, <http://www.nba.com/history/legends/profiles/john-stockton> (last visited Dec. 13, 2018) (“[Stockton] left the NBA after 19 seasons with the Utah Jazz, holding a mass of assists records, including the career mark (15,806). . . . He [also] led the league in steals twice and, with a career total of 3,265, he retired as the NBA's all-time leader.”).

21. See SIMMONS, *supra* note 13, at 154 (describing Olajuwon and Jordan “as draft prizes”); Wolfe, *supra* note 10 (“The 1984 NBA Draft is one of the most notable drafts in the history of the NBA, yielding future Hall of Famers . . .”).

According to the draft system at that time, the top pick in the draft would be awarded to either the worst team in the Eastern Conference ("the East") or the worst team in the Western Conference ("the West"). A coin flip determined which team received the number one pick.<sup>22</sup> The 1983 Houston Rockets were enticed by the prospect of drafting Jordan or Olajuwon in the upcoming 1984 draft.<sup>23</sup> So, the Rockets decided to tank during the 1983 season in an attempt to secure a top pick in the draft.<sup>24</sup>

About halfway through the season, "the Rockets were 20-26, five games out of last place."<sup>25</sup> It was at this point that the "suspicious demise" of the 1983-84 Rockets began.<sup>26</sup> Over the remainder of the season, the team went 9-27.<sup>27</sup> Along the way, the Rockets made lineup decisions that were designed to produce losses.<sup>28</sup> NBA commentator Bill Simmons describes these lineup decisions well in his book, *The Book of Basketball*, where he writes, "[The Rockets] g[ave] lousy guys big minutes and everything else. Things peaked in Game 81 when a washed-up Elvin Hayes played *every minute* of Houston's overtime loss to the Spurs."<sup>29</sup> This sort of blatant tanking had never been seen in the NBA.<sup>30</sup>

Ultimately, the Rockets ended up with the worst record in the West, won the coin flip, and received the number one pick in the draft.<sup>31</sup> With the prized pick, the Rockets drafted Olajuwon and went on to win a pair of NBA titles.<sup>32</sup>

22. Wolfe, *supra* note 10 ("This draft is also the last time that a lottery system was not employed . . .").

23. See Kevin Spain & Benjamin Hochman, *Thank the 1983-84 Rockets for the NBA Lottery*, NOLA.COM: SPORTS (May 22, 2007), [http://blog.nola.com/tpsports/2007/05/thank\\_the\\_1983\\_84\\_rockets\\_for\\_t.html](http://blog.nola.com/tpsports/2007/05/thank_the_1983_84_rockets_for_t.html) (quoting former Rockets player Major Jones on the 1983-84 season, saying "I think (the draft) crept into [the] equation").

24. See *id.* While the league "never acknowledged" the tanking of the 1983-84 Rockets and the general manager at the time, Ray Patterson, denies it, the overwhelming consensus is that the Rockets did tank. See *id.*

25. *Id.*

26. *Id.*

27. *Id.*; SIMMONS, *supra* note 13, at 154 (noting that the Rockets lost "14 of their last 17, including 9 of their last 10" games).

28. See Spain & Hochman, *supra* note 23.

29. SIMMONS, *supra* note 13, at 154; see also Spain & Hochman, *supra* note 23 ("[P]eople toward the end of the bench got playing time." (quoting former Rockets player Major Jones on the 1983-84 season)).

30. See SIMMONS, *supra* note 13, at 154 (describing the Rocket's tank job as an "unseemly saga" that "spurred the creation of a draft lottery the following season"); Wolfe, *supra* note 10 ("[T]he Rockets intentional losing that season is the reason that the NBA went to a lottery system in the very next draft.").

31. Wolfe, *supra* note 10 ("The Rockets got [Olajuwon] and would eventually win a pair of titles in 1994 and 1995 behind the 7-foot center.").

32. *Id.*

In response to the Rockets' tanking, the league decided to make a change and introduced the lottery system for the next draft.<sup>33</sup>

B. *THE DRAFT LOTTERY AND REFORMS*

In June of 1984, “[t]he NBA Board of Governors . . . voted to adopt a lottery system among the non-playoff teams to determine their order of selection in the first round of the NBA Draft beginning in 1985.”<sup>34</sup> This system did away with the coin flip system.<sup>35</sup> Instead, the order non-playoff teams selected in the NBA draft would be determined by means of a random lottery, giving all non-playoff teams even odds of receiving the top pick.

Following the 1985 draft, the league passed its first lottery reform. This “procedural change” made it so “the Lottery determines the order of selection for the first three teams only. The remaining non-playoff teams select in inverse order of their regular season records.”<sup>36</sup> The league used this lottery system up until the 1990 draft.

Prior to the 1990 Draft, the league instituted its second iteration of draft lottery reform. Under this revised system, “the chances for all non-playoff teams to get a top pick [were] determined by record.”<sup>37</sup> This made the lottery a “weighted lottery,”<sup>38</sup> which meant that out of eleven teams included in the lottery, “[t]he team with the worst record during the regular season [would] receive[] 11 chances at the top pick (out of a total of 66), the second worst team [would] g[e]t 10 chances and the team with the best record among the non-playoff clubs would g[e]t one chance.”<sup>39</sup> The weighted nature of this

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33. *Id.* Tanking has been the main focus of this and subsequent draft reforms; however, the proposed solutions have, at times, been colored by related competitive considerations. For example, the league has not introduced a totally random lottery because, while this would reduce tanking incentives, it would also threaten the competitive balance of the league. Grant Hughes, *Best Potential Fixes to NBA Draft Lottery System*, BLEACHER REP. (Aug. 8, 2014), <https://bleacherreport.com/articles/2157010-best-potential-fixes-to-nba-draft-lottery-system>. The reasoning behind the league’s concern for its competitive balance is that in a totally random draft order the best team (or teams) in the league could get very high draft picks. As a result, there is an increased risk of talent consolidation that would decimate the competitive balance of the league. In short, the draft is designed, in part, to help bad teams get better, but not reward bad “tanking” behavior.

34. *NBA Draft Lottery History*, NBA: NBA HISTORY (May 19, 2015, 10:43 AM), <http://www.nba.com/news/draft/evolution-of-the-draft-lottery> (“Under the system adopted prior to the 1985 NBA Draft, the NBA Lottery determines the order of selection for the non playoff teams (or the teams holding their picks through trades) for the first round only. Teams pick in inverse order of their records in the second round (or, prior to the draft being reduced to two rounds in 1989, in all succeeding rounds).”).

35. See Spain & Hochman, *supra* note 23; Wolfe, *supra* note 10.

36. *NBA Draft Lottery History*, *supra* note 34.

37. Spain & Hochman, *supra* note 23.

38. *Id.*

39. *NBA Draft Lottery History*, *supra* note 34.

system is a feature of the current system.<sup>40</sup> This draft reform, however, failed to effectively deter tanking, as evidenced by the 1989–90 New Jersey Nets.

"[T]he [1989–90] New Jersey Nets thought they could take advantage of the fact that the 1990 draft would be the first draft that was weighted according to losses."<sup>41</sup> The Nets tanked, going 17–65 over the course of the season.<sup>42</sup> Ultimately, the Nets tanking netted them the number one pick in the 1990 draft. With this pick, the Nets selected Derrick Coleman.<sup>43</sup> At the time, Coleman was considered to have massive potential; some have even speculated that he had the potential to be "the best power forward ever."<sup>44</sup>

In November of 1993, the NBA Board of Governors modified the draft lottery, "increas[ing] the chances of the teams with the worst records in the league winning one of the top three picks in the draft while decreasing the lottery chances of the teams with the best records."<sup>45</sup> The odds of the worst team in the league receiving the number one pick in the draft rose from 16.7% to 25%.<sup>46</sup> The odds of the team with the best record included in the lottery decreased from 1.5% to 0.5%.<sup>47</sup> This system was first implemented in the 1994 draft.<sup>48</sup>

40. Spain & Hochman, *supra* note 23.

41. Wolfe, *supra* note 10.

42. *Id.* ("[T]he Nets were terrible and assured a very high draft pick.")

43. *Id.* (describing Coleman as a player who ended up being "talented but mercurial"). Coleman, however "never lived up to expectations and certainly was not the franchise cornerstone that the Nets had given up the 1989–90 season for." *Id.*

44. *NBA Draft Busts*, SPORTS ILLUSTRATED (June 23, 2006), <https://www.si.com/photos/2006/06/23-onba-draft-busts>. Ultimately, however, Derrick Coleman did not live up to these lofty expectations. Cf. Randy Miller, *How Former NBA Bust Derrick Coleman Became a Hero*, NJ.COM (Mar. 4, 2016, 4:10 PM), [http://www.nj.com/nets/index.ssf/2016/03/why\\_former\\_nets\\_and\\_sixers\\_star\\_derrick\\_coleman\\_is.html](http://www.nj.com/nets/index.ssf/2016/03/why_former_nets_and_sixers_star_derrick_coleman_is.html) (referring to Coleman as a "bust").

45. *NBA Draft Lottery History*, *supra* note 34.

46. *Id.*

47. *Id.* This was in response to what had occurred in the 1993 NBA Draft, where the Orlando Magic, who had the worst odds among lottery teams of nabbing the top pick, defied odds and drew the number one pick. Kevin Zimmerman, *NBA Draft Lottery History: When the Worst Has Won*, SBNATION (May 21, 2013, 9:00 AM), <https://www.sbnation.com/nba/2013/5/21/4348616/nba-draft-lottery-history-derrick-rose-lebron-james>.

48. *NBA Draft Lottery History*, *supra* note 34. The 1994 draft was also the first to feature ping pong balls:

Under the system, 14 ping pong balls numbered 1 through 14 are placed in a drum. There are 1,001 possible combinations when four balls are drawn out of 14, without regard to their order of selection. Prior to the Lottery, 1,000 combinations are assigned to the Lottery teams based on their order of finish during the regular season. Four balls are drawn to the top to determine a four-digit combination. The team that has been assigned that combination will receive the number one pick. The four balls are placed back in the drum and the process is repeated to determine the number two and three picks. (Note: If the one unassigned combination is drawn, the balls are drawn to the top again.)

*Id.*

The next and fourth draft lottery reform was passed in October of 1995.<sup>49</sup> The Board of Governors expanded the size of the draft lottery “from 11 [teams] to 13<sup>50</sup> to account for the addition of expansion teams Toronto and Vancouver.”<sup>51</sup> This reform also altered the lottery odds.

While the revised odds left the worst team with “a 25% chance of winning the first pick, teams two through six ha[d] slightly fewer chances, team seven ha[d] the same number of chances and teams eight through 12 ha[d] slightly more chances. The number of chances for team 13 did not change.”<sup>52</sup> This fourth reform, like the previous three, did little to deter tanking, as the 1996–97 season would reveal.

In the 1996–97 season, multiple teams tanked to get the top pick in the 1997 draft. The prize this time? Tim Duncan.<sup>53</sup> Of particular significance are the tanking seasons of the San Antonio Spurs and the Boston Celtics.<sup>54</sup> Early in the season, the Spurs’ “star center” David Robinson suffered a season-ending injury.<sup>55</sup> The Spurs then “relied on an aging Dominique Wilkins,” who led “them to a meager record of 20–62.”<sup>56</sup>

Meanwhile, Celtics fans endured “the worst season the Celtics” ever had.<sup>57</sup> The Celtics were even worse than the Spurs, finishing with an abysmal record of 15–67.<sup>58</sup> However, the Celtics’ tanking “strategy backfired horribly.”<sup>59</sup> While the Spurs won the lottery, the Celtics were left with the third and sixth picks in the 1997 draft.<sup>60</sup> To no one’s surprise, the Spurs selected Duncan with the number one pick.<sup>61</sup> Duncan would go on to be a perennial

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49. *Id.*

50. There would now be 13 non-playoff teams in the lottery, with 16 playoff teams drafting after the lottery, totaling 29 teams in the league. *See id.*

51. *NBA Draft Lottery History*, *supra* note 34.

52. *Id.*

53. Duncan would go on to have a Hall of Fame career, winning five NBA championships (and Finals MVP in three of those), two league MVP awards, and numerous other accolades. *NBA Players: Tim Duncan Profile and Basic Stats*, LAND OF BASKETBALL.COM, [https://www.landofbasketball.com/nba\\_players/d/tim\\_duncan.htm](https://www.landofbasketball.com/nba_players/d/tim_duncan.htm) (last visited Dec. 13, 2018). Nicknamed “The Big Fundamental” for his well-rounded style of play, “it’s hard to find a modern player with a better combination of offensive and defensive résumés than Duncan.” Neil Paine, *Farewell to Tim Duncan, the Greatest Two-Way Player in Modern NBA History*, FIVETHIRTYEIGHT (Jul. 11, 2016, 4:23 PM), <https://fivethirtyeight.com/features/farewell-to-tim-duncan-the-greatest-two-way-player-in-modern-nba-history>.

54. *See SIMMONS*, *supra* note 13, at 261 (“The Grizzlies, Spurs, Celtics and Nuggets spent the last two months desperately trying to outtank each other for Duncan.”).

55. Wolfe, *supra* note 10.

56. *Id.*

57. *Id.*

58. *Id.*

59. *Id.*

60. *Id.*

61. *Id.*

All-Star for the Spurs, leading them to five NBA titles.<sup>62</sup> After Duncan, the next draft prospect to trigger a significant tanking effort was LeBron James.

LeBron received more attention than any draft prospect in the history of the NBA.<sup>63</sup> As a high schooler, LeBron was featured on the cover of *Sports Illustrated* and was heavily covered by every major sports news outlet.<sup>64</sup> LeBron<sup>65</sup> was a native of Akron, Ohio, "and the [Cleveland] Cavaliers were well aware of how their franchise could benefit from landing the homegrown future superstar."<sup>66</sup>

Therefore, heading into the 2002 season, the Cleveland Cavaliers "trade[d] their three best scorers . . . without getting much value in return."<sup>67</sup> The Cavaliers had decided to tank.<sup>68</sup> As a result, the Cavaliers went 17–65, won the lottery, and selected LeBron with the first pick in the 2003 draft.<sup>69</sup>

The fifth draft lottery reform was minor. The NBA Board of Governors simply added a team to the lottery.<sup>70</sup> With the addition of the Charlotte Bobcats to the league, the 2004 Draft would feature fourteen teams in the lottery, as opposed to the prior number of thirteen.<sup>71</sup>

62. *Id.* The Celtics, however, used their 1997 picks "to select Chauncey Billups and Ron Mercer. To add insult to the whole incident, [the Celtics] traded away Billups after just half a season in Boston." *Id.*

63. *See id.* ("Everyone who paid even the slightest bit of attention to basketball in 2002 knew about the hype surrounding then-high schooler LeBron James . . .").

64. Grant Wahl, *Ahead of His Class*, *SPORTS ILLUSTRATED* (Feb. 18, 2002), <https://www.si.com/vault/2002/02/18/318739/ahead-of-his-class-ohio-high-school-junior-lebron-james-is-so-good-that-hes-already-being-mentioned-as-the-heir-to-air-jordan>.

65. LeBron continues to build on an accolated career, having already won three NBA championships (winning MVP in all three) and the regular season MVP award four times. *LeBron James*, *BASKETBALL REFERENCE*, <https://www.basketball-reference.com/players/j/jamesleo1.html> (last visited Dec. 13, 2018).

66. Wolfe, *supra* note 10.

67. *Id.*

68. *Cavs Owner Disputes Lucas' Claims*, *ESPN* (Jan. 14, 2010), <http://www.espn.com/nba/news/story?id=4825853> (quoting Cavaliers coach at the time John Lucas as saying: "They trade all our guys away and we go real young, and the goal was to get LeBron . . .").

69. Wolfe, *supra* note 10.

70. *NBA Draft Lottery History*, *supra* note 34.

71. *Id.* ("The Bobcats, as part of their expansion agreement were locked into the fourth position in the 2004 Draft and therefore did not have a chance to receive other picks in the Lottery."). There would now be 14 non-playoff teams in the lottery, with 16 playoff teams drafting after the lottery, totaling 30 teams in the league. *See id.*

The next egregious episode of tanking occurred in the 2006–07 NBA season. Excitement over draft prospects Greg Oden<sup>72</sup> and Kevin Durant<sup>73</sup> inspired several teams to tank in their pursuit.<sup>74</sup> Notably, the Celtics and the Seattle SuperSonics decided to tank.<sup>75</sup>

The “Celtics did all that they could to ensure that they had a shot at . . . Durant or Oden.”<sup>76</sup> The Celtics tanking was never more blatant during a late season game versus the Charlotte Bobcats: “Despite having been up by 18 points in the third quarter, [the head coach of the Celtics] benched his best player in Paul Pierce and went with a [worse] lineup. . . . The Celtics obviously couldn’t close out the game and the Bobcats won.”<sup>77</sup> The Celtics ended up with the second-worst record in their history and the second-worst record in the league that season, finishing 24–58.<sup>78</sup> The Celtics, however, only drew the fifth pick in the 2007 draft.<sup>79</sup>

Meanwhile, the SuperSonics fared slightly better in the 2006–07 season, finishing 31–51. They managed to draw the second pick, which they used to draft Kevin Durant.<sup>80</sup> The SuperSonics doubled-down on their tanking venture on draft night by trading Ray Allen, the SuperSonics star guard, to the Boston Celtics so they could acquire the fifth pick of that year’s draft, Jeff Green.<sup>81</sup>

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72. Oden was “[h]ailed as the best center prospect since [Hall of Famer] Patrick Ewing.” Dan Karpuc, *Is Greg Oden’s Career Finally and Thankfully Over Yet?*, HUFFPOST (Oct. 12, 2014), [https://www.huffingtonpost.com/dan-karpuc/is-greg-odens-career-fina\\_b\\_5670469.html](https://www.huffingtonpost.com/dan-karpuc/is-greg-odens-career-fina_b_5670469.html). Oden disappointed in the NBA, though, and is considered (even by himself) to be one of the worst draft “busts” in history. Jeff Goodman, *Greg Oden: ‘I’ll Be Remembered as the Biggest Bust in NBA History’*, ESPN (Nov. 12, 2016), [http://www.espn.com/espn/otl/story/\\_/id/18022504/greg-oden-says-remembered-biggest-bust-nba-history](http://www.espn.com/espn/otl/story/_/id/18022504/greg-oden-says-remembered-biggest-bust-nba-history).

73. Durant was also highly sought after heading into the 2007 draft. Maurice Brooks & Stefan Swiat, *The Great Debate: Oden or Durant?*, NBA, [http://www.nba.com/news/toppick\\_debate.html](http://www.nba.com/news/toppick_debate.html) (last visited Dec. 13, 2018) (comparing Durant to Jordan and Olajuwon and noting that he possesses “a killer instinct[,] . . . great athleticism[,] and incredible skill . . . that collects championship hardware”). Durant has become one of the NBA’s best players, winning the regular season MVP award for the 2013 season, the NBA Championship (and the Finals MVP) in the 2016–17 and 2017–18 seasons, and leading the league in scoring four times. *NBA Players: Kevin Durant Profile and Basic Stats*, LAND OF BASKETBALL.COM, [http://www.landofbasketball.com/nba\\_players/d/kevin\\_durant.htm](http://www.landofbasketball.com/nba_players/d/kevin_durant.htm) (last visited Feb. 12, 2019).

74. Wolfe, *supra* note 10 (“Greg Oden and Kevin Durant [were] both viewed as future NBA superstars.”).

75. *Id.*

76. *Id.*

77. *Id.* (noting that there were other “egregious late-game performances in the league that year” by the Celtics).

78. *Id.*; *NBA Standings – 2006–07*, ESPN, [http://www.espn.com/nba/standings/\\_/season/2007](http://www.espn.com/nba/standings/_/season/2007) (last visited Dec. 13, 2018).

79. *Id.*

80. *NBA Standings, supra* note 78.

81. Berry Tramel, *Time to Scrap the NBA Lottery*, NEWSOK (Sept. 29, 2017, 11:30 AM), <http://newsok.com/time-to-scrap-the-nba-lottery/article/5566022> (noting that this trade would “clearly . . . cost the franchise in the near-term”).

The SuperSonics continued their tanking after the 2007 draft for the next two seasons.<sup>82</sup> In the 2007–08 season, the SuperSonics went 20–62 and drew the number four draft pick,<sup>83</sup> using it to select Russell Westbrook.<sup>84</sup> After the 2008 draft, the SuperSonics were relocated and morphed into a new franchise—the Oklahoma City Thunder.<sup>85</sup> The Thunder tanked during the 2008–09 season, going 23–59 and drawing the number three pick.<sup>86</sup> The franchise used this pick to select James Harden.<sup>87</sup> The selections of Durant, Westbrook, and Harden produced tantalizing early success for the Thunder, as this core led them to the 2012 NBA Finals, where they lost to LeBron’s Miami Heat. However, after this loss, the Thunder’s bright future quickly dimmed with the departure of James Harden in 2012 and Kevin Durant in 2016. The short-lived trio is widely likened to “The Greatest Dynasty That Never Was.”<sup>88</sup>

The 2010s gave way to the most blatant, explicit tanking exercise by a team in the history of the NBA.<sup>89</sup> The Philadelphia 76ers (“76ers”) admitted to tanking for multiple seasons.<sup>90</sup> The general manager of the team, Sam Hinkie, “assembled a roster designed to lose in the present in hopes of building a foundation that can win in the future.”<sup>91</sup> This was done “with the blessing of ownership.”<sup>92</sup> The repeated mantra of Hinkie, and consequently the 76ers, was “Trust the Process.”<sup>93</sup>

82. Wolfe, *supra* note 10 (noting “consecutive seasons of tanking”).

83. Tramel, *supra* note 81; *see also* Wolfe, *supra* note 10 (noting the SuperSonics’ season allowed them to draft Russell Westbrook).

84. In the 2016 season, Westbrook became “the second player ever to average a triple double for an entire season.” Chris Barnewall, *NBA Awards: Russell Westbrook Wins 2016–17 MVP After Averaging a Triple Double*, CBS SPORTS (June 27, 2017), <https://www.cbssports.com/nba/news/nba-awards-russell-westbrook-wins-2016-17-mvp-after-averaging-a-triple-double>. As a result, “Westbrook was named the league’s [MVP] after . . . one of the most competitive MVP races ever.” *Id.*; Wolfe, *supra* note 10 (noting “consecutive seasons of tanking”).

85. *See* Tramel, *supra* note 81.

86. *Id.*

87. Harden is currently one of the best players in the NBA, having led the league in assists in the 2016 season, making the All-NBA First Team four times, and winning the NBA Sixth Man of the Year Award in 2012. *NBA Players: James Harden Profile and Basic Stats*, LAND OF BASKETBALL.COM, [http://www.landofbasketball.com/nba\\_players/h/james\\_harden.htm](http://www.landofbasketball.com/nba_players/h/james_harden.htm) (last visited Dec. 13, 2018).

88. Brad Callas, *The Greatest Dynasty That Never Was*, MEDIUM (Feb. 26, 2017), <https://www.medium.com/@bradcallas/the-greatest-dynasty-that-never-was-4f930aba19eo>.

89. *See* Wolfe, *supra* note 10 (describing the 76ers’ tank job as the most overt in NBA History).

90. Jon Krawczynski, *NBA Owners Vote Down Changes to Lottery System*, NBA (Oct. 22, 2014, 6:47 PM), <http://www.nba.com/2014/news/10/22/lottery-reform-vote.ap> (“Hinkie has been unapologetic about his approach . . .”).

91. *Id.*

92. *Id.*

93. Nathaniel Friedman, *Sam Hinkie Saw the Future*, GQ (June 19, 2017), <https://www.gq.com/story/sam-hinkie-trust-the-process-forever>.

“The Process” began in the 2013 Draft, when the 76ers drafted Nerlens Noel.<sup>94</sup> The team drafted Noel “knowing that [he] had a torn ACL and would be unlikely to contribute.”<sup>95</sup> Subsequently, the 76ers went 19–63 in the 2013–14 season.<sup>96</sup> This netted them the third pick in the 2014 draft.<sup>97</sup> The team used this pick to gain yet another injured player, Joel Embiid.<sup>98</sup> The next season, the 76ers were even worse, going 14–49.<sup>99</sup> This extended period of egregious tanking fixed the 76ers “at the center of the [tanking] debate.”<sup>100</sup>

Amidst the extended tanking of the 76ers, the league began considering reforming the draft lottery for a sixth time. The five previous reforms had done little to deter teams, like the 76ers, from tanking. The extent of the problem made it “[o]ne of the biggest issues on the agenda when the NBA’s owners arrived in New York for the board of governors meetings” in 2014.<sup>101</sup>

The NBA’s Competition Committee put forth a reform proposal that “would have drastically reduced the worst team’s odds of winning the lottery while also increasing the chances that the teams with the best record in the lottery field would jump up to the top of the board.”<sup>102</sup> Additionally, the proposal “would have made it possible for the worst team to plummet all the way to seventh in the order.”<sup>103</sup> The proposal fell six votes short of passing.<sup>104</sup>

NBA Commissioner Adam Silver tried to explain why the proposal failed. He suggested that “the owners were concerned about unintended consequences.”<sup>105</sup> He added,

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94. Wolfe, *supra* note 10. Noel was “the projected top pick in many mock[] [drafts].” Jason Patt, *NBA Mock Draft Roundup: Nerlens Noel the Likely Top Pick, but No Consensus*, SBNATION (June 27, 2013, 8:00 AM), <https://www.sbnation.com/nba/2013/6/27/4468732/nba-draft-2013-cavaliers-nerlens-noel-alex-len>.

95. Wolfe, *supra* note 10.

96. *Id.*

97. *Id.*

98. *Id.* (describing Embiid as “another injured prospect with no chance of playing for the [76ers] anytime soon”).

99. *Id.* (“Over [these] . . . two seasons, the [76ers] have only managed to accumulate 33 wins in total, a figure that 22 teams have already surpassed in [the 2015] season alone.”).

100. Krawczynski, *supra* note 90. The 76ers did make the playoffs in the 2017–18 season. *Sixers Clinch First Playoff Berth in Six Seasons Thanks to Pacers’ Victory*, ESPN (Mar. 26, 2018), [http://www.espn.com/nba/story/\\_/id/22913915/philadelphia-76ers-clinch-first-postseason-berth-six-seasons](http://www.espn.com/nba/story/_/id/22913915/philadelphia-76ers-clinch-first-postseason-berth-six-seasons). However, this achievement does not justify tanking, as tanking is a breach of fiduciary duties. Rather, any realized benefit from tanking comes at the expense of other teams in the league. See *infra* Section III.A.2 (detailing the harm tanking does to other teams through lower ticket sales and revenue). This principle also applies to the limited success enjoyed by the Thunder after the SuperSonics tanked. See *supra* notes 75, 81–88 and accompanying text.

101. Krawczynski, *supra* note 90 (noting that one of the main goals of the “meetings was thwarting the tanking strategy employed most brazenly by the Philadelphia 76ers”).

102. *Id.*

103. *Id.*

104. *Id.* (“The proposal needed 23 votes for approval but only received 17, with 13 lining up to vote against it . . .”).

105. *Id.* (quoting NBA Commissioner Adam Silver).

I think we all recognize we need to find the right balance between creating the appropriate incentives on one hand for teams to, of course, win, and on the other hand allowing for appropriate rebuilding and the draft to work as it should in which the worst performing teams get the highest picks in the draft.<sup>106</sup>

A sixth draft lottery reform would not be passed by the Board of Governors for three more years.

In the summer of 2017, the NBA board of governors convened and passed the sixth draft lottery reform.<sup>107</sup> Again, the changes were intended to deter tanking. The biggest and most important piece of this reform involved the adjustment of lottery odds; “[t]he other changes [were] minimal.”<sup>108</sup>

Under the revised lottery odds, “the three worst teams each [have] a 14 percent chance of getting the No. 1 pick.”<sup>109</sup> Only one team voted against this reform—the Thunder. Perhaps unsurprisingly, the General Manager of the Thunder remains Sam Presti, who spearheaded the tanking of the SuperSonics and Thunder from 2006–09. Presti and the Thunder “wanted the status quo” because they believe “that the lottery gives small-market teams [like the Thunder] another option in trying to build a winner—selling out a season or two for the chance to get a great draft pick that could transform the franchise.”<sup>110</sup>

In sum, tanking is a problem that has plagued the NBA for years. As the next section will detail, tanking harms the NBA. Still further, no solution the league has implemented has addressed the problem.

### III. THE HARMS OF TANKING AND THE INADEQUACY OF OTHER SOLUTIONS

#### A. *THE HARMS OF TANKING*

Tanking presents at least two major problems to the NBA. First, tanking damages the brand of the NBA. Second, tanking damages teams through lower ticket sales and revenue, which in turn harms the rest of the league by diminishing profits shared through revenue-sharing contracts. These are just some of the problems tanking presents—tanking is “hurting the league in ways we can’t even see yet.”<sup>111</sup>

106. *Id.*

107. This will be implemented in the 2019 draft. *NBA Board of Governors Approves Changes to Draft Lottery System*, NBA (Sept. 28, 2017, 6:20 PM), <http://www.nba.com/article/2017/09/28/nba-board-governors-approves-changes-draft-lottery-system>.

108. Tramel, *supra* note 81.

109. *Id.* (noting that previously “the team with the worst record had a 25 percent chance, the second-worst team was 19.9 percent and the third-worst team was 15.6 percent”).

110. *Id.*

111. Dieter Kurtenbach, *A 3-step Process to Fix the NBA’s Tanking Problem*, FOX SPORTS (Apr. 10, 2017, 8:21 AM), <https://www.foxsports.com/nba/story/a-3-step-process-to-fix-the-nbas-tanking-problem-041017>.

## 1. Tanking Damages the Brand of the NBA

Tanking encourages a less competitive basketball product that damages the brand of the NBA. There is concern within the NBA “with the effect of tanking on competition.”<sup>112</sup> These concerns revolve around the “decimation of the integrity of the game.”<sup>113</sup> In other words, losing on purpose runs counter to the inherently competitive nature of sports.<sup>114</sup> Tanking, therefore, threatens a fundamental aspect of NBA basketball—competition. This threat has league officials concerned that it will lead to alienation of fans.<sup>115</sup>

The anti-competitive nature of tanking was highlighted, perhaps no better, in a game between the Minnesota Timberwolves and Memphis Grizzlies in April 2006. In that game, the Grizzlies ended up winning; however, “they simply did not want [to win].”<sup>116</sup> SBNation recounts the egregiously anti-competitive nature of this game:

[The Grizzlies] were unable to play worse than the Timberwolves, who unashamedly let Mark Madsen<sup>117</sup> shoot seven three pointers in a bid to have one of the 10 worst records in the league, thereby keeping a conditional pick they owed to the Clippers. You couldn’t try harder to lose, and any veneer of competitiveness was dispensed with. It was noxious. It was toxic. It was everything professional sport should not be.<sup>118</sup>

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112. Gonzalez, *supra* note 9.

113. Sean Deveney, *NBA Draft Lottery Reform Is Misguided, Addresses Wrong Kind of Tanking*, SPORTINGNEWS (Oct. 5, 2017), <http://www.sportingnews.com/nba/news/nba-draft-lottery-rules-odds-results-picks-tanking-sixers-trust-the-process/19x54rlolwblz1angxq9r33qp3>.

114. See *Sport*, MERRIAM-WEBSTER, <https://www.merriam-webster.com/dictionary/sport> (last visited Dec. 13, 2018) (defining a “sport” as “a contest or game in which people do certain physical activities according to a specific set of rules and *compete against each other*” (emphasis added)); Adrian Wojnarowski, *NBA’s Hope for Draft Lottery Reform Tied to Research Showing Fans Hate Tanking*, ESPN (Sept. 21, 2017) [hereinafter Wojnarowski, *NBA’s Hope for Draft Lottery Reform Tied to Research Showing Fans Hate Tanking*], [http://www.espn.com/nba/story/\\_/id/20774528/nba-draft-lottery-reform-rooted-fans-disinterest-watching-teams-tank](http://www.espn.com/nba/story/_/id/20774528/nba-draft-lottery-reform-rooted-fans-disinterest-watching-teams-tank) (“We need to continue to focus on competitive play and owe it to our fans . . . to do that.” (quoting President of League Operations Byron Spruell)); Adrian Wojnarowski, *NBA Passes Legislation on Draft Lottery Reform, Resting Healthy Players in Regular Season*, ESPN (Sept. 29, 2017) [hereinafter Wojnarowski, *NBA Passes Legislation on Draft Lottery Reform, Resting Healthy Players in Regular Season*], [http://www.espn.com/nba/story/\\_/id/20851002/nba-board-governors-votes-pass-legislation-draft-lottery-reform-guidelines-resting-healthy-players](http://www.espn.com/nba/story/_/id/20851002/nba-board-governors-votes-pass-legislation-draft-lottery-reform-guidelines-resting-healthy-players) (“[T]here was a perception in many of our communities that the best path to rebuilding their teams was to race to the bottom.” (quoting League Commissioner Adam Silver)).

115. Deveney, *supra* note 113; see also Dave Schilling, *NBA Tanking May Be Traumatic but It Works*, GUARDIAN (Nov. 30, 2016, 5:00 AM), <https://www.theguardian.com/sport/blog/2016/nov/30/nba-tanking-dallas-mavericks> (“From a fan’s perspective, tanking can be traumatic.”).

116. Deeks, *supra* note 2.

117. Madsen was a terrible three-point shooter. He made zero three pointers in his nine-year NBA career. *Mark Madsen*, BASKETBALL REFERENCE, <https://www.basketball-reference.com/players/m/madsema01.html> (last visited Dec. 13, 2018).

118. Deeks, *supra* note 2.

This was a prime example of the “decimation of the integrity of the game” that the NBA is afraid of.

Unfortunately, the NBA’s fears of fan alienation are becoming reality. League officials referenced an internal study this year that found that “many fans continue to say that . . . tanking is making them less interested in the league.”<sup>119</sup> Generally, this is reflected in declining viewership league wide<sup>120</sup> and lower ticket sales for tanking teams.<sup>121</sup>

## 2. Tanking Lowers Ticket Sales and Revenue

Tanking teams generally have lower ticket sales and revenue, which in turn, harms the rest of the league through the operation of revenue sharing contracts.<sup>122</sup> Data showing the attendance of NBA games since the 2001 season reveals that tanking teams generally have lower ticket sales.<sup>123</sup>

For example, during the 2001 season,<sup>124</sup> the Cavaliers averaged 14,539 fans per game and ranked 19th in the NBA (based on a percentage of maximum attendance).<sup>125</sup> In 2002, when tanking,<sup>126</sup> the Cavaliers’ attendance dropped to 11,496 fans per game and ranked 22nd in the NBA.<sup>127</sup> After

119. Wojnarowski, *NBA’s Hope for Draft Lottery Reform Tied to Research Showing Fans Hate Tanking*, *supra* note 114.

120. Daniel Holloway, *NBA Regular-Season Ratings Dipped in 2016-17*, VARIETY (Apr. 14, 2017, 3:33 PM), <http://variety.com/2017/tv/news/nba-regular-season-ratings-1202031083> (“National NBA telecasts across the three channels and cable network NBA TV averaged 1.19 million total viewers for the season ending on Wednesday—down 6% from the 2015-16 season . . .”).

121. *See infra* Section III.A.2.

122. *See generally* Nadelle Grossman, *What Is the NBA?*, 25 MARQ. SPORTS L. REV. 101 (2014) (discussing how NBA revenues are affected by different aspects regarding the team, such as revenue sharing aspects, management, and gate receipts); John Lombardo, *Inside NBA’s Revenue Sharing: How Complex Plan Will Shift \$140 Million to Needy Teams*, SPORTS BUS. J. (Jan. 23, 2012), <http://www.sportsbusinessdaily.com/Journal/Issues/2012/01/23/Leagues-and-Governing-Bodies/NBA-revenue.aspx>.

123. *See generally* *NBA Attendance Report-2018*, ESPN, [http://www.espn.com/nba/attendance/\\_/sort/homePct](http://www.espn.com/nba/attendance/_/sort/homePct) (last visited Dec. 13, 2018) (providing attendance reports for each team since 2001).

124. While ESPN’s NBA Attendance Reports only give one year to demarcate what year the statistics apply to, it is clear that the given year refers to when the season *ended*. This is easily inferred because ESPN lists only 66 games played under the 2012 attendance report. *See NBA Attendance Reports-2012*, ESPN, [http://www.espn.com/nba/attendance/\\_/year/2012/sort/homePct](http://www.espn.com/nba/attendance/_/year/2012/sort/homePct) (last visited Dec. 13, 2018). This corresponds with the 2011-12 NBA season, which was shortened from 82 games to 66 games because of a lockout caused by a labor crisis. NBA.COM STAFF, *Season Review: 2011-12*, NBA (Aug. 23, 2017, 3:14 PM), <http://www.nba.com/history/season-recap/2011-12>. Thus, while ESPN’s NBA Attendance Report lists the statistics for 2012, they actually refer to the 2011-12 season. This is true of all other seasons and the statistics are treated as such for the purposes of this Note.

125. *NBA Attendance Report-2002*, ESPN, [http://www.espn.com/nba/attendance/\\_/year/2002/sort/homePct](http://www.espn.com/nba/attendance/_/year/2002/sort/homePct) (last visited Dec. 13, 2018).

126. *See supra* notes 63-69 and accompanying text.

127. *NBA Attendance Report-2003*, ESPN, [http://www.espn.com/nba/attendance/\\_/year/2003/sort/homePct](http://www.espn.com/nba/attendance/_/year/2003/sort/homePct) (last visited Dec. 13, 2018).

drafting LeBron James in 2003,<sup>128</sup> the Cavaliers' attendance rose during the 2003 season to 18,287, ranking 14th in the league.<sup>129</sup> Table 1 below illustrates this trend.

Table 1<sup>130</sup>

Team	Tanking or Not Tanking?	Average Fan Attendance	League Rank (based on a percentage of maximum attendance)
2001–02 Cavaliers	Not Tanking	14,539	19th out of 29
2002–03 Cavaliers	Tanking	11,496	22nd out of 29
2003–04 Cavaliers	Not Tanking	18,287	14th out of 29

Consider also the 2006–09 SuperSonics/Thunder.<sup>131</sup> In the 2005 season, the SuperSonics averaged 16,198 fans per game, ranking 9th in the NBA.<sup>132</sup> When the SuperSonics began to tank in the 2006 season, the average attendance and league rank correspondingly plummeted through the 2007 season.<sup>133</sup> This is depicted in Table 2 below.

Table 2<sup>134</sup>

Team	Tanking or Not Tanking?	Average Fan Attendance	League Rank (based on a percentage of maximum attendance)
2005–06 SuperSonics	Not Tanking	16,198	9th out of 30
2006–07 SuperSonics	Tanking	15,955	12th out of 30
2007–08 SuperSonics	Tanking	13,355	20th out of 30

128. *TBT: LeBron James Drafted in 2003*, NBA: CLEV. CAVALIERS, <http://www.nba.com/cavaliers/tbt-lebron-james-drafted-2003> (last visited Dec. 13, 2018).

129. *NBA Attendance Report–2004*, ESPN, [http://www.espn.com/nba/attendance/\\_/year/2004/sort/homePct](http://www.espn.com/nba/attendance/_/year/2004/sort/homePct) (last visited Dec. 13, 2018).

130. *See supra* notes 124, 128 and accompanying text.

131. *See supra* notes 74–88 and accompanying text.

132. *NBA Attendance Report–2006*, ESPN, [http://www.espn.com/nba/attendance/\\_/year/2006/sort/homePct](http://www.espn.com/nba/attendance/_/year/2006/sort/homePct) (last visited Dec. 13, 2018).

133. The 2008–09 and 2009–10 seasons are not appropriate to consider in this context, as the franchise moved to Oklahoma City from Seattle during these seasons and attendance numbers changed in connection to the move. *See supra* note 85 and accompanying text.

134. *NBA Attendance Report–2008*, ESPN, [http://www.espn.com/nba/attendance/\\_/year/2008/sort/homePct](http://www.espn.com/nba/attendance/_/year/2008/sort/homePct) (last visited Dec. 13, 2018); *NBA Attendance Report–2007*, ESPN, [http://www.espn.com/nba/attendance/\\_/year/2007](http://www.espn.com/nba/attendance/_/year/2007) (last visited Dec. 13, 2018); *NBA Attendance Report–2006*, *supra* note 132.

The most recent (and egregious) example of tanking, the 2013–15 76ers,<sup>135</sup> also shows the negative impact tanking has on fan attendance. While attendance increased minimally from the 2013–14 season through the 2015–16 season, the 76ers fell from 29th in the league to 30th (and last) in the league.<sup>136</sup> When the 76ers stopped tanking in the 2016–17 season, their numbers began to improve.<sup>137</sup> This improvement has continued into the 2017–18 season, where the 76ers have averaged 20,678 fans per game and rank third in the NBA.<sup>138</sup> This is illustrated in Table 3 below.

Table 3<sup>139</sup>

Team	Tanking or Not Tanking?	Average Fan Attendance	League Rank (based on a percentage of maximum attendance)
2012–13 76ers	Not Tanking	16,717	22nd out of 30
2013–14 76ers	Tanking	13,869	29th out of 30
2014–15 76ers	Tanking	13,940	30th out of 30
2015–16 76ers	Tanking	14,881	30th out of 30
2016–17 76ers	Not Tanking	17,330	23rd out of 30
2017–18 76ers	Not Tanking	20,678	3rd out of 30

When graphed in comparison to the league average fan attendance, the effect of these teams’ tanking is quite visible.<sup>140</sup> While the league’s average fan attendance has remained relatively steady, the attendance of these tanking teams has fluctuated.<sup>141</sup> The average attendance tends to drop when a team is tanking and rebounds when a team stops tanking.<sup>142</sup> This is illustrated in Table 4.

135. See *supra* notes 89–101 and accompanying text.

136. *NBA Attendance Report–2016*, ESPN, [http://www.espn.com/nba/attendance/\\_/year/2016/sort/homePct](http://www.espn.com/nba/attendance/_/year/2016/sort/homePct) (last visited Dec. 13, 2018); *NBA Attendance Report–2015*, ESPN, [http://www.espn.com/nba/attendance/\\_/year/2015/sort/homePct](http://www.espn.com/nba/attendance/_/year/2015/sort/homePct) (last visited Dec. 13, 2018); *NBA Attendance Report–2014*, ESPN, [http://www.espn.com/nba/attendance/\\_/year/2014/sort/homePct](http://www.espn.com/nba/attendance/_/year/2014/sort/homePct) (last visited Dec. 13, 2018).

137. *NBA Attendance Report–2017*, ESPN, [http://www.espn.com/nba/attendance/\\_/year/2017/sort/homePct](http://www.espn.com/nba/attendance/_/year/2017/sort/homePct) (last visited Dec. 13, 2018).

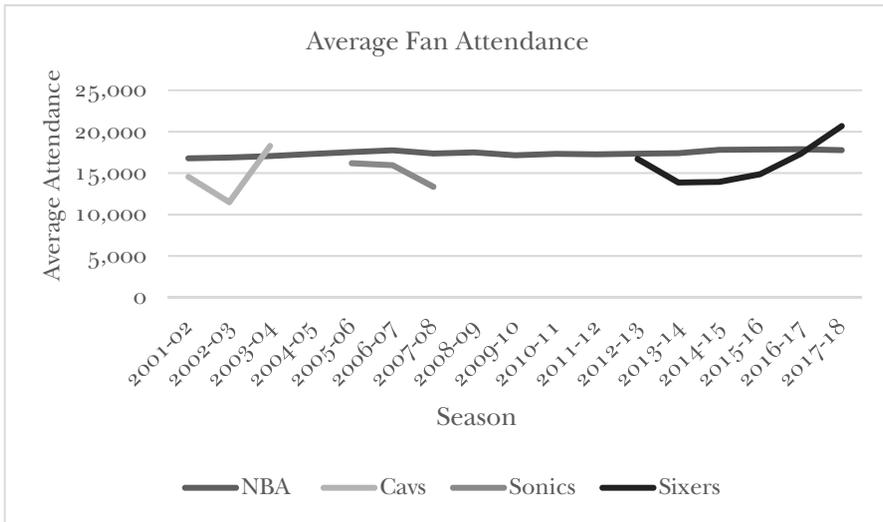
138. *NBA Attendance Report–2018*, ESPN, [http://www.espn.com/nba/attendance/\\_/year/2018/sort/homePct](http://www.espn.com/nba/attendance/_/year/2018/sort/homePct) (last visited Dec. 13, 2018); see also *76ers Break Team Record for Season Tickets, Expect to Sell Out at Home*, ESPN (June 21, 2017), [http://www.espn.com/nba/story/\\_/id/19702019/76ers-break-team-record-season-tickets-expect-sell-home](http://www.espn.com/nba/story/_/id/19702019/76ers-break-team-record-season-tickets-expect-sell-home) (“The Sixers have sold a franchise-record 14,000 season tickets for 2017–18 and expect to sell out all of their home games. . . . They’re first in the league in new full-season ticket packages.”).

139. *NBA Attendance Report–2013*, ESPN, [http://www.espn.com/nba/attendance/\\_/year/2013/sort/homePct](http://www.espn.com/nba/attendance/_/year/2013/sort/homePct) (last visited Dec. 13, 2018). See *supra* notes 131–33.

140. See *infra* Table 4.

141. See *infra* Table 4.

142. While this is very visible with the Cavaliers and the 76ers, *infra* Table 4, the data for the SuperSonics is cut short of the “rebound” for reasons expressed *supra* note 85.

Table 4<sup>143</sup>

In short, when teams tank, they tend to have lower average fan attendance; they sell fewer tickets. Lower ticket sales results in lower revenue. Lower revenue hurts the team.<sup>144</sup> The team is hurt directly because they are bringing in less money. This loss in revenue also hurts the rest of the league through the operation of revenue sharing contracts, which “call[] for all teams to contribute an annually fixed percentage, roughly 50 percent, of their total annual revenue, minus certain expenses such as arena operating costs, into a revenue sharing pool.”<sup>145</sup> With 14 NBA teams having lost money at the end of the 2016–17 season, nearly half the league relies on the revenue gained from the revenue sharing contracts to stay afloat.<sup>146</sup> Thus, the financial

143. See *NBA Attendance Report–2012*, ESPN, [http://www.espn.com/nba/attendance/\\_/year/2012/sort/homePct](http://www.espn.com/nba/attendance/_/year/2012/sort/homePct) (last visited Dec. 13, 2018); *NBA Attendance Report–2011*, ESPN, [http://www.espn.com/nba/attendance/\\_/year/2011/sort/homePct](http://www.espn.com/nba/attendance/_/year/2011/sort/homePct) (last visited Dec. 13, 2018); *NBA Attendance Report–2010*, ESPN, [http://www.espn.com/nba/attendance/\\_/year/2010/sort/homePct](http://www.espn.com/nba/attendance/_/year/2010/sort/homePct) (last visited Dec. 13, 2018); *NBA Attendance Report–2009*, ESPN, [http://www.espn.com/nba/attendance/\\_/year/2009/sort/homePct](http://www.espn.com/nba/attendance/_/year/2009/sort/homePct) (last visited Dec. 13, 2018); *NBA Attendance Report–2005*, ESPN, [http://www.espn.com/nba/attendance/\\_/year/2005/sort/homePct](http://www.espn.com/nba/attendance/_/year/2005/sort/homePct) (last visited Dec. 13, 2018); see also *supra* notes 125, 127, 129, 132, 134, 136–39.

144. See Michael Grant, *Want to Stop Tanking in the NBA? Kill the Draft*, COMEBACK (Sept. 20, 2017), <http://thecomeback.com/nba/stop-tanking-nba-kill-draft.html> (“Tanking is bad for business, especially in the NBA where there is already a chasm between the great teams and everyone else.”); Wojnarowski, *NBA Passes Legislation on Draft Lottery Reform, Resting Healthy Players in Regular Season*, *supra* note 114 (“It . . . is my hope . . . that teams step up and see that there is a larger obligation to [the] fans.” (quoting NBA commissioner Adam Silver)).

145. Lombardo, *supra* note 122.

146. Brian Windhorst & Zach Lowe, *A Confidential Report Shows Nearly Half the NBA Lost Money Last Season. Now What?*, ESPN (Sept. 19, 2017), [http://www.espn.com/nba/story/\\_/id/20747413/a-confidential-report-shows-nearly-half-nba-lost-money-last-season-now-what](http://www.espn.com/nba/story/_/id/20747413/a-confidential-report-shows-nearly-half-nba-lost-money-last-season-now-what).

harm tanking causes is a direct harm to and threatens the viability of the rest of the league.

## B. *THE INADEQUACY OF OTHER SOLUTIONS*

### 1. Prior Solutions

The prior solutions attempted by the NBA have been insufficient. Thus far, these have all come as draft lottery reforms.<sup>147</sup> These reforms have not gone far enough to deter tanking behavior.

The first two draft reforms<sup>148</sup> did nothing to deter the 1989 Nets from tanking for Derrick Coleman.<sup>149</sup> The third<sup>150</sup> and fourth<sup>151</sup> reforms did not stop multiple teams from tanking for Tim Duncan in the 1996–97 season<sup>152</sup> nor did they stop the Cavaliers from tanking for LeBron James in the 2002–03 season.<sup>153</sup> The fifth reform<sup>154</sup> passed in 2003 did not deter the Celtics and SuperSonics from tanking for Greg Oden and Kevin Durant in the 2006–07 season.<sup>155</sup> Still further, the SuperSonics continued to tank through 2009<sup>156</sup> and the 76ers embarked on history's most egregious tanking campaign from 2013–15.<sup>157</sup> In sum, the prior solutions have been insufficient.

Although the league will be instituting draft lottery reforms in the 2019 Draft, additional lottery reforms have not significantly deterred tanking behavior before.<sup>158</sup> Still further, the character of these reforms is unlikely to have an effect any more significant than prior reforms.<sup>159</sup> Such draft reforms alone are insufficient to stop tanking.

### 2. Other Proposed Solutions

Most proposals to stop tanking consist of additional draft reforms.<sup>160</sup> However, like past draft reforms, future draft reforms will be insufficient to

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147. See *supra* notes 33–110 and accompanying text.

148. See *supra* notes 36–40 and accompanying text.

149. See *supra* notes 41–44 and accompanying text.

150. See *supra* notes 45–48 and accompanying text.

151. See *supra* notes 49–52 and accompanying text.

152. See *supra* notes 53–62 and accompanying text.

153. See *supra* notes 63–69 and accompanying text.

154. See *supra* notes 70–71 and accompanying text.

155. See *supra* notes 72–81 and accompanying text.

156. See *supra* notes 80–86 and accompanying text.

157. See *supra* notes 89–100 and accompanying text.

158. See *supra* notes 33–101 and accompanying text.

159. See *supra* notes 33–100; *infra* note 163 and accompanying text.

160. See Jody Avirgan, *The 6,493 Best Ideas to Prevent Tanking in the NBA*, FIVETHIRTYEIGHT (Apr. 29, 2015, 3:06 PM), <https://fivethirtyeight.com/features/the-6493-best-ideas-to-prevent-tanking-in-the-nba>.

stop tanking.<sup>161</sup> While draft “[r]eform may change team behavior on the fringes,”<sup>162</sup> “[a] reverse-order draft, even one warped a bit by lottery odds, encourages losing.”<sup>163</sup>

Indeed, team owners even consider draft reforms insufficient fixes. Owner of the Dallas Mavericks, Mark Cuban, does not “think [that] only changing the draft will be the ultimate answer.”<sup>164</sup> Other team executives agree with Cuban. Former Assistant General Manager of the 76ers, Ben Falk, said that “[t]he issue is not the draft lottery, so tweaking the draft lottery doesn’t solve anything.”<sup>165</sup> Falk, instead argues “that tanking is a symptom of the current [Collective Bargaining Agreement] (CBA).”<sup>166</sup>

While most proposals to stop tanking center on draft reforms, some, like Falk, have argued that tanking can be remedied by “chang[ing] the [current] CBA rules.”<sup>167</sup> Falk in particular advocates changes to rookie deals under the CBA;<sup>168</sup> others have suggested changing free agency rules.<sup>169</sup>

Under the current CBA, “a first-round [draft] pick not only plays for 4 years at a very low salary, but also has restricted free agency at the end.”<sup>170</sup> After this period of restricted free agency, the team holds “team options for the final two years” of the player’s contract.<sup>171</sup> Ultimately, this “create[s] a

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161. Lowe, *supra* note 9 (“Flattening the odds in the NBA’s draft lottery . . . will not end tanking and may not reduce it much.”).

162. *Id.*; see also Ben Falk (@bencfalk), TWITTER (Sept. 7, 2017, 3:39 PM), <https://twitter.com/bencfalk/status/905923426203860992> (“[Y]ou wouldn’t get rid of tanking, you’d just change where tanking happens: to the middle, instead of to the bottom.”); Gonzalez, *supra* note 9 (“Part of the concern . . . is that the league might simply swap one set of tankers for another. Instead of teams that are already awful and try to be more awful, the league might wind up with teams on the fringe of the playoffs suddenly taking late-season dives in order to avoid a tough playoff matchup and land on a more comfortable lottery cushion.”).

163. Lowe, *supra* note 9.

164. *Id.* (quoting Mark Cuban).

165. Ben Falk (@bencfalk), TWITTER (Sept. 7, 2017, 3:38 PM), <https://twitter.com/bencfalk/status/905923050427875328>.

166. Gonzalez, *supra* note 9.

167. Ben Falk (@bencfalk), TWITTER (Sept. 7, 2017, 3:41 PM), <https://twitter.com/bencfalk/status/905924100740308995> (“The only way to [fix tanking] is to change the CBA rules. Anything else is putting a band-aid on a broken leg.”).

168. See *infra* note 171 and accompanying text.

169. Free agents are “free to sign with any team.” *Free Agency Explained*, NBA (Mar. 29, 2016, 9:50 AM), <http://www.nba.com/news/free-agency-explainer>.

170. Ben Falk (@bencfalk), TWITTER (Sept. 7, 2017, 3:40 PM), <https://twitter.com/bencfalk/status/905923789065682947>. “Restricted free [agency]” means that the team can “match[] the terms of [an] offer” made to the player by another team during free agency to retain the player. *Free Agency Explained*, *supra* note 169.

171. Ben Falk (@bencfalk), TWITTER (Sept. 7, 2017, 3:40 PM), <https://twitter.com/bencfalk/status/905923846741610496>. “[T]eam options” allow teams to decide whether to retain a player at a fixed salary or release him to free agency, which “gives teams incredible control and upside with extremely limited downside.” *Id.*; *Free Agency Explained*, *supra* note 169 (“A *team option* grants the original team the right to keep a player for another year.”).

structure that ends up with haves and have-nots.”<sup>172</sup> To fix tanking, Falk suggests changing these rookie contracts by limiting them to one year deals followed by a player option.<sup>173</sup>

However, it is not clear that altering rookie contracts will be sufficient to stop tanking. While Falk’s proposal will make it more likely that rookies will leave their teams sooner for free agency, it is not a guaranteed outcome. Players may simply choose to resign with the team that drafted them.

Further, the incentive to tank to draft talented players does not disappear simply because those players might play on shorter contracts. Look no further than the 1996–97 Spurs.<sup>174</sup> The Spurs tanked that year to draft Tim Duncan.<sup>175</sup> The very next season the Spurs won the championship with significant help from Tim Duncan.<sup>176</sup> This evidences that perhaps more significantly, the incentive to tank and draft great players would still exist, even if those players played on shorter rookie contracts. In short, this proposal, in isolation, is insufficient to effectively deter tanking.

Others’ proposals suggest changing free agency rules.<sup>177</sup> For example, some proposals go as far as to suggest that the NBA draft be entirely eliminated and that “[a]ll available incoming players should be free agents.”<sup>178</sup> Under such a system, players would be able to sign with any team they wanted that offered them a contract. While doing away with the draft in this way could eliminate tanking,<sup>179</sup> it would cause other problems. In particular, small-market teams would likely be harmed by this system, as “free agency has traditionally favored big-market teams” who can provide broader market exposure to the athletes and often offer more exciting free times.<sup>180</sup> This would harm the competitive parity of the NBA, albeit in a different way.

In sum, there is a perverse incentive to tank in the NBA. Bad teams have an incentive to tank to improve. The various draft reforms have tinkered with

172. Ben Falk (@bencfalk), TWITTER (Sept. 7, 2017, 3:41 PM), <https://twitter.com/bencfalk/status/905924043064442880>.

173. Ben Falk (@bencfalk), TWITTER (Sept. 7, 2017, 3:41 PM), <https://twitter.com/bencfalk/status/905923911690461184> (“An extreme example: imagine if rookies signed 1 year deals + a player option. Who’d tank?”); *Free Agency Explained*, *supra* note 169 (“A *player option* grants the player the power to decide whether to stay for another year or become a completely unrestricted free agent.”).

174. See *supra* notes 53–62 and accompanying text.

175. See *supra* text accompanying notes 53–54.

176. Tim Duncan led the Spurs that season in scoring. Duncan played nearly 40 minutes per game, averaging 21.7 points, 11.4 rebounds, 2.4 assists, 2.5 blocks, and .9 steals per game. *1998–99 San Antonio Spurs Roster and Stats*, BASKETBALL REFERENCE, <https://www.basketball-reference.com/teams/SAS/1999.html> (last visited Dec. 13, 2018).

177. See Falk, *supra* note 167; Grant, *supra* note 144.

178. Grant, *supra* note 144.

179. Tanking is a symptom of the draft. Teams will not tank if they have nothing to tank for. Thus, eliminating the draft would destroy the incentive to tank.

180. Wojnarowski, *NBA Passes Legislation on Draft Lottery Reform, Resting Healthy Players in Regular Season*, *supra* note 114.

the lottery odds to shift incentives. Ultimately, however, in any draft system,<sup>181</sup> there will always be an incentive to tank. The prior solutions have been insufficient to stop tanking. The proposed solutions are also insufficient to solve the problem. Most of the proposals either recycle draft reform ideas, decrease the incentive to tank only slightly, or cause significant harm to the league in other areas. It is time for a new solution—a legal solution.

#### IV. A NEW SOLUTION—A LAWSUIT

This Note proposes that non-tanking NBA teams can sue a tanking team under New York partnership law.

[T]he NBA's Constitution does not select a governing law. . . .

Regardless[,] . . . the inquiry seems fairly clear: New York law governs. To refresh, if the NBA is a partnership, the applicable law is the law of the jurisdiction of its chief executive office. Because the NBA's corporate office and headquarter[s] are in New York, New York law governs. . . . [E]ven if the NBA is solely a contractual relationship among its members, New York law governs. That is because New York is the state with the most ties to the transaction given that the NBA's corporate office and headquarter[s] are in New York.<sup>182</sup>

The damages imposed on a tanking team in a successful suit would be a strong financial deterrent against tanking. Because different business entity structures correspondingly assign different rights and responsibilities to involved parties, this section first establishes that the NBA is a partnership and that its teams are its members. Second, it details that teams owe each other fiduciary duties and that tanking is a breach of those duties. Third, it proposes a new remedy—that non-tanking teams can sue tanking teams for breaches of fiduciary duties, and courts can and should impose fines to deter such tanking behavior.

##### A. *THE NBA IS A PARTNERSHIP*

The NBA is a partnership.<sup>183</sup> First, it is not any kind of statutory entity that requires registration with the Secretary of State. This forecloses the

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181. While a purely random draft order would eliminate the incentive to tank, it would have other negative consequences to the NBA. See *supra* notes 146–64 and accompanying text.

182. Grossman, *supra* note 122, at 123–24 (footnotes omitted).

183. *Id.* at 103 (“[T]he Ninth Circuit described the NBA as a New York joint venture.”). While the decision of the Ninth Circuit was made in an antitrust context, it is instructive that, under New York law, joint ventures have the same fiduciary duties as partners. See Grossman, *supra* note 122, at 115.

possibility that the NBA is a corporation, a limited partnership, or a limited liability company.<sup>184</sup>

Second, the Constitution and Bylaws of the NBA do not explicitly classify the NBA as any certain kind of business entity. Rather, “the NBA’s structure is surprisingly opaque,”<sup>185</sup> which is particularly “odd . . . given the NBA’s outsized role in our society and economy.”<sup>186</sup> The only organizational form the Constitution and Bylaws assign the NBA is “Association.”<sup>187</sup> Generally, “[a]n association is an organization in which people unite to pursue a common purpose.”<sup>188</sup>

While the league does not claim to be a partnership,<sup>189</sup> “[p]artners need not enter into an express contract to form a partnership. Rather, a partnership exists where two or more persons carry on as co-owners a business for profit.”<sup>190</sup> Under New York law, “[i]f the purpose . . . is commercial in nature . . . and has not been created through any other explicitly organizational form, then the association is a partnership.”<sup>191</sup> If the purpose is non-commercial in nature, however, “then the association is a nonprofit unincorporated association, or NUA.”<sup>192</sup> Thus, to establish what business entity this association constitutes, it is necessary to determine the common purpose of the NBA.

The purpose of the NBA is commercial because the members of the association (the teams) share profits. While the NBA Constitution asserts that the association “shall not be operated for profit,”<sup>193</sup> the reality is that the NBA is operated for profit. While the nominal purpose of this association could be to operate a basketball league, “the more likely view is that the team members have associated to create [the league] . . . to maximize the collective revenues of the entire league.”<sup>194</sup>

184. Grossman, *supra* note 122, at 105 (“The NBA has not been incorporated, formed as a limited partnership or limited liability company, or organized through any other organizational form by making a filing with a Secretary of State. Rather, it is constituted through two private agreements—its Constitution and Bylaws.”).

185. *Id.* at 103.

186. *Id.* at 104.

187. See NAT’L BASKETBALL ASS’N, CONSTITUTION AND BY-LAWS OF THE NATIONAL BASKETBALL ASSOCIATION art. 1, at 5 (2012).

188. Grossman, *supra* note 122, at 103.

189. See *id.* at 103–06 (noting that the league explicitly claims it is non-commercial in nature).

190. *Id.* at 114 (citing REVISED UNIF. P’SHIP ACT § 202(a) (1997)); see also *id.* at 114–15 (“That is true even where parties do not specifically intend to form a partnership, or where they legally categorize their relationship as something other than a partnership.”).

191. *Id.* at 103, 123–24.

192. *Id.* at 103.

193. NAT’L BASKETBALL ASS’N, *supra* note 187, art. 2, at 5; Grossman, *supra* note 122, at 106 (“[T]he NBA Constitution declares a non-commercial purpose.”).

194. Grossman, *supra* note 122, at 125.

In the NBA, there are multiple revenue sharing mechanisms in place that indicate the purpose of this association is commercial in nature.<sup>195</sup> For example, teams are required to contribute six percent of their gross gate receipts to the association.<sup>196</sup> It is impossible to separate the purpose of the NBA from its profit seeking. “NBA teams clearly generate profits for their owners” and the pursuit of this profit drives the association.<sup>197</sup> The purpose *is* profit and the purpose is therefore commercial. Here, the profit-driven, commercial purpose of the NBA qualifies the NBA as a partnership.<sup>198</sup> Because the purpose of the association is commercial, the NBA is a partnership.<sup>199</sup> Because the NBA is a partnership, its teams owe each other certain duties.<sup>200</sup>

### B. PARTNERSHIPS AND FIDUCIARY DUTIES

The classic, seminal case addressing partnerships and fiduciary duties is *Meinhard v. Salmon*.<sup>201</sup> In that case, two business partners, Meinhard and Salmon, entered into a joint venture and leased a real estate property in New York City.<sup>202</sup> Salmon, without telling Meinhard, took the opportunity to renew

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195. See *id.* at 107–08 (“There are three primary sources of NBA team revenues; one is gate receipts. The other two primary sources of team revenues stem from contracts entered into by the NBA on behalf of all of the teams. First, the NBA, on behalf of the teams, generates revenues from granting the right to nationally and internationally broadcast games to radio, television, and cable networks. The NBA teams equally share these revenues. Second, the NBA—or more specifically, NBA Properties Inc., a separate entity owned by the NBA teams—generates revenues from the grant of exclusive licenses to merchandise team names, insignias, and other similar intellectual property. The teams also equally share these merchandising royalties. In addition to the sharing of broadcasting and merchandising revenues, the Collective Bargaining Agreement (CBA) between the NBA and the NBA Players Association—the union representing the NBA players—provides for revenue sharing among teams . . . . One primary way . . . is through a luxury tax. That is, every team that exceeds a maximum team salary cap must pay the NBA a tax in the amount of that excess. Those tax proceeds are then either used by the NBA or shared by non-tax-paying teams.” (footnotes omitted)); Lombardo, *supra* note 122.

196. NAT’L BASKETBALL ASS’N, *supra* note 187, art. 31(b), at 42 (“[E]ach Member shall be required from time to time to contribute to the capital of the Association an amount equal to six percent (6%) of the gross gate receipts derived from all Regular Season Games played in each Season, or \$30,000 per Season, whichever is greater.”). “[G]ross gate receipts” is defined as “the actual receipts derived by any Members from the sale of tickets.” *Id.* art. 31(c), at 42.

197. Grossman, *supra* note 122, at 106–07.

198. *Id.* at 115 (“[J]ust sharing profits leads to a presumption that parties have formed a partnership.”).

199. See *supra* notes 186–91 and accompanying text.

200. See Grossman, *supra* note 122, at 126–27 (“There are numerous consequences that would flow from the NBA’s categorization as a partnership. Importantly, each member would owe a fiduciary duty to the other members. That means each member would have a duty to act with the requisite degree of care in making partnership decisions. Moreover, each member would have a duty to act loyally, in the best interest of the NBA, and not in the member’s own self-interest.” (footnote omitted)); *supra* notes 198–99; *infra* notes 201–14.

201. *Meinhard v. Salmon*, 164 N.E. 545 (N.Y. 1928).

202. *Id.* at 545–46.

the property’s lease at the end of the lease term, not in the name of the joint venture, but solely in his own name.<sup>203</sup> Meinhard subsequently sued Salmon, claiming that Salmon had breached a duty he owed to Meinhard.<sup>204</sup> The New York Court of Appeals agreed.<sup>205</sup>

In an opinion by Chief Judge Cardozo, the New York Court of Appeals found that the joint venture assigned Meinhard and Salmon “duties akin to those of partners” in a partnership.<sup>206</sup> Therefore, Meinhard and Salmon owed each other certain duties—fiduciary duties, which include the duty of loyalty and the duty of care. The court held that Salmon breached the fiduciary duty of loyalty that he owed to Meinhard by renewing the lease in his own name without disclosing the opportunity to do so to Meinhard.<sup>207</sup>

“The duty of loyalty requires partners to act in the best interest of the partnership and refrain from acting in their own personal interest.”<sup>208</sup> Cardozo described “the standard of behavior” as “[n]ot honesty alone, but the punctilio of an honor the most sensitive.”<sup>209</sup> Additionally, “[p]artners . . . owe a duty of care, which generally requires partners to make business decisions in good faith.”<sup>210</sup> These broad “duties arise because of the trust and confidence placed in, and accepted by, the partners to manage the association.”<sup>211</sup>

The dissent, written by Judge Andrews, has also been followed by courts since *Meinhard*.<sup>212</sup> Under this alternative approach, the scope of the duties owed are derived from the content of the agreement.<sup>213</sup> In *Meinhard*, Judge Andrews reasoned that the duties imposed on Salmon by the majority went beyond the scope of Meinhard and Salmon’s agreement.<sup>214</sup> Typically, this approach is applied when the parties have formally contracted their agreement.<sup>215</sup>

203. *Id.* at 546.

204. *See id.*

205. *See id.* at 549–50.

206. *Id.* at 546.

207. *Id.* at 546–47 (“Joint adventurers, like copartners, owe to one another, while the enterprise continues, the duty of the finest loyalty.”).

208. Grossman, *supra* note 122, at 115.

209. *Meinhard*, 164 N.E. at 546–47.

210. Grossman, *supra* note 122, at 115–16 (citing J. WILLIAM CALLISON & MAUREEN A. SULLIVAN, PARTNERSHIP LAW & PRACTICE: GENERAL AND LIMITED PARTNERSHIPS § 12.2 (2013)).

211. *Id.* at 116 (citing CALLISON & SULLIVAN, *supra* note 210, § 12.2).

212. ROBERT W. HILLMAN & MARK J. LOWENSTEIN, RESEARCH HANDBOOK ON PARTNERSHIPS, LLCs AND ALTERNATIVE FORMS OF BUSINESS ORGANIZATIONS 208 (2015).

213. *Meinhard*, 164 N.E. at 552 (Andrews, J., dissenting) (stating “that the written contract defines their rights and duties”).

214. *Id.* (“It seems to me that the venture so inaugurated had in view a limited object and was to end at a limited time. There was no intent to expand it into a far greater undertaking lasting for many years. . . . This interest terminated when the joint adventure terminated.”).

215. HILLMAN & LOWENSTEIN, *supra* note 212, at 208.

To determine whether tanking is a breach of fiduciary duties, it is first necessary to establish what duties NBA teams owe each other. Under the majority's approach in *Meinhard*, NBA teams owe each other certain fiduciary duties—the duty of loyalty and the duty of care.<sup>216</sup> These duties stem from the structure of the NBA as a partnership with its teams as its members.<sup>217</sup>

Under the minority's approach in *Meinhard*, the scope of the duties owed by NBA teams must be derived from the contract forming the NBA.<sup>218</sup> Generally, these duties are too narrow<sup>219</sup> and too arbitrarily enforced to adequately address tanking.<sup>220</sup> The most applicable provision is Article 34, which provides, “[i]n circumstances where a rule is not provided by the Constitution and By-Laws, rules, regulations, resolutions, or agreements of the Association, each Member shall conduct its operations in accordance with

216. See *supra* notes 198–201 and accompanying text. The duty of care requires NBA members “to make business decisions in good faith.” Grossman, *supra* note 122, at 116. Tanking is not likely a breach of this duty. Business decisions are generally afforded a greater degree of judicial deference. *40 West 67th Street v. Pullman*, 790 N.E.2d 1174, 1179 (N.Y. 2003) (“The business judgment rule is a common-law doctrine by which courts exercise restraint and defer to good faith decisions made . . . in business settings . . .”). To that end, there is little to no evidence that “tanking” is not done in good faith, and certainly not enough evidence to overcome the presumption against judicial review of business judgments. *Id.* at 1182 (noting that courts “have withheld deference in the face of evidence that the [decision maker] acted illegitimately”).

217. Even if the NBA is simply a joint profit-making venture (as found by the 9th Circuit), the majority's approach will impose the same fiduciary duties as partnerships. See *supra* note 183 and accompanying text.

218. See *supra* note 213 and accompanying text.

219. See, e.g., NAT'L BASKETBALL ASS'N, *supra* note 187, art. 2, at 5 (“The Association shall not be operated for profit.”); *Id.* art. 31(b), at 42 (“[E]ach Member shall be required from time to time to contribute to the capital of the Association . . .”); *Id.* art. 35(a), at 44 (“Each Member shall provide and require in every contract with any of its Players that they shall be bound and governed by the provisions of this Article.”); *Id.* art. 41, at 54 (“No person, other than the Commissioner, shall have the right to issue any information concerning business transacted at meetings of the Board of Governors or reveal or make public any official business of the Association.”).

220. Here, Article 35A(c) should be considered:

Any person who gives, makes, issues, authorizes or endorses any statement having, or designed to have, an effect prejudicial or detrimental to the best interests of basketball or of the Association or of a Member or its Team, shall be liable to a fine not exceeding \$1,000,000 to be imposed by the Commissioner.

NAT'L BASKETBALL ASS'N, *supra* note 187, art. 35A(c), at 47. This provision has only been invoked once in a matter related to tanking. In 2018, the Commissioner fined Dallas Mavericks' owner Mark Cuban \$600,000 for comments indicating that his team was planning on tanking. Des Bieler, *Mark Cuban Fined \$600,000 for Saying His Mavericks Plan on 'Tanking'*, WASH. POST (Feb. 21, 2018), <https://www.washingtonpost.com/news/early-lead/wp/2018/02/20/mark-cuban-admits-that-tanking-is-the-best-option-for-his-18-40-mavericks>. Despite this recent development, this discipline is an inadequate solution to tanking. First, the Commissioner's powers under this provision only cover *statements*. This provision does not reach *behavior* beyond the making of statements. Therefore, the root of the problem—tanking behavior—cannot be directly remedied by a fine imposed under this provision. If anything, such fines will only achieve the effect of incentivizing teams and their owners to remain silent whilst tanking.

its own business judgment."<sup>221</sup> Tanking is likely governed by this provision because no other applicable rule is "provided by the Constitution and By-Laws, rules, regulations, resolutions, or agreements of the Association."<sup>222</sup> Thus, each team is entitled to operate "in accordance with its own business judgment."<sup>223</sup> This likely forecloses judicial review of tanking.

Ultimately, however, the approach of the dissent in *Meinhard* only forecloses tanking from being a breach of a fiduciary duty if the NBA is not a partnership.<sup>224</sup> Unlike the joint venture in *Meinhard* however, the league is a partnership.<sup>225</sup> Therefore, teams owe each other the same broad-based fiduciary duties that the majority in *Meinhard* identified.<sup>226</sup>

The duty of loyalty requires NBA teams "to act in the best interest of the [NBA] and refrain from acting in their own personal interest."<sup>227</sup> While this analysis may, in some instances, be "tricky," because "members also seek to maximize profits . . . [C]ourts . . . regularly resolve disputes among business owners who operate competing firms."<sup>228</sup>

Here, there is a universal harm that hurts both tanking teams and the rest of the NBA. Tanking teams suffer financially as they have fewer fans attend games.<sup>229</sup> The rest of the league is also harmed financially because they receive less revenue when tanking teams contributes six percent of their gross gate receipts to the league as a part of revenue sharing.<sup>230</sup>

In sum, under the majority's approach in *Meinhard*, tanking teams violate the fiduciary duty of loyalty they owe to other teams. This duty is violated because tanking inflicts a financial harm on the rest of the league. Teams that tank cannot be said to be acting "in the best interest" of the NBA when their tanking hurts the NBA.<sup>231</sup> Therefore, tanking teams breach the duty of loyalty they owe to the rest of the league.

### C. HOW TO DETERMINE WHEN A TEAM IS TANKING

A key part of such litigation will be determining when a team is actually tanking, thus breaching the fiduciary duty of loyalty they owe other teams in the NBA. This is not an insurmountable hurdle. First, circumstantial evidence

221. NAT'L BASKETBALL ASS'N, *supra* note 187, art. 34, at 44.

222. *Id.*

223. *Id.*

224. See *Meinhard v. Salmon*, 164 N.E. 545, 551 (N.Y. 1928) (Andrews, J., dissenting) ("Were this a general partnership between Mr. Salmon and Mr. Meinhard, I should have little doubt as to the correctness of this result.")

225. See *supra* note 198 and accompanying text.

226. See *Meinhard*, 164 N.E. at 546 (majority opinion) ("Joint adventurers, like copartners, owe to one another, while the enterprise continues, the duty of the finest loyalty.")

227. Grossman, *supra* note 122, at 115.

228. *Id.* at 127.

229. See *supra* Section III.A.2.

230. See *id.*

231. See Grossman, *supra* note 122, at 115 (quoting CALLISON & SULLIVAN, *supra* note 210, § 12.4).

is sufficient proof in many legal contexts. There is not always a bright line evidentiary test available. Sometimes it is enough that you “know it when [you] see it.”<sup>232</sup>

Second, expert testimony can provide valuable guidance for courts.<sup>233</sup> In many contexts, courts are asked to evaluate evidence which they do not have the expertise to evaluate on their own. However, with the assistance of expert witnesses, courts are able to make such evaluations. Basketball experts (e.g., former GMs, owners, and players) could provide valuable and sufficient expert testimony to help guide courts. Third, teams at times have admitted to tanking. While this would likely change when tanking teams face the prospects of litigation, the precedent remains.<sup>234</sup>

#### D. EXTRACTING DAMAGES FROM TANKING TEAMS

##### 1. Calculating Damages

The remedy for breach of fiduciary duties in New York<sup>235</sup> is damages amounting to the “loss sustained, including lost opportunities for profit on properties by reason of the faithless fiduciary’s conduct.”<sup>236</sup> Calculating the damages by a team’s tanking is impossible to calculate with absolute certainty. However, absolute certainty is not required.<sup>237</sup>

A court should calculate damages—for each tanking year—by looking at the gross gate receipts in the most recent non-tanking year and subtracting the gross gate receipts in the tanking year. This would reveal the net gross revenue lost by the tanking team. The court would then apply the six percent contribution figure set out in the NBA Constitution.<sup>238</sup> This would approximate the “loss sustained” by the league. If tanking occurs over multiple years, then the approximate loss sustained by the league during each tanking season would be added together to calculate total damages.<sup>239</sup>

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232. *Jacobellis v. Ohio*, 378 U.S. 184, 197 (1964) (Stewart, J., concurring).

233. See FED. R. EVID. 702 (“A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify . . .”). This rule “is premised on an assumption that the expert’s opinion will have a reliable basis in the knowledge and experience of his discipline.” *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579, 592 (1993).

234. See *supra* notes 4, 90 and accompanying text.

235. See Grossman, *supra* note 122, at 117.

236. 105 E. Second St. Assocs. v. Bobrow, 573 N.Y.S.2d 503, 504 (N.Y. App. Div. 1991).

237. See *Jetson Air Ctr., Inc. v. Green Drake Leasing Co.*, 513 N.Y.S.2d 176, 176 (N.Y. App. Div. 1987) (“Here, the plaintiff presented sufficient evidence as to the amount of damages and it is apparent that the jury properly applied experience and common sense to the facts proved and awarded damages reasonably calculated to be the result of the appellant’s breach.” (citing *Borne Chem. Co. v. Dictrow*, 85 A.D.2d 646, 651 (N.Y. App. Div. 1981))).

238. See NAT’L BASKETBALL ASS’N, *supra* note 187, art. 31 (b), at 42.

239. The total damages would likely be distributed in accordance with the in-place revenue sharing mechanisms, just as if the money had originally been contributed. It may also be appropriate for courts to award treble or punitive damages in order to increase the deterrent effect of the imposition.

The following table illustrates these damage calculations as applied to the 2013–15 76ers.<sup>240</sup>

Table 5

Most Recent Non-Tanking Year Gross Gate Receipts	Subtract Tanking Years Gross Gate Receipts	Expected Gross Revenue Lost	Apply 6% Contribution Figure	Total Damages
\$27,000,000 (2012–13)	\$22,000,000 (2013–14)	\$5,000,000	\$3,000,000	\$9,000,000
\$27,000,000 (2012–13)	\$21,000,000 (2014–15)	\$6,000,000	\$3,600,000	
\$27,000,000 (2012–13)	\$23,000,000 (2015–16)	\$4,000,000	\$2,400,000	

## 2. The Deterrent Effect of Damages

Ultimately, the remedy of damages imposed by the Court will deter tanking. Imposing damages on tanking teams will make tanking a more expensive decision. This will reduce the incentive to tank in the first place. Indeed, with some NBA teams not profitable,<sup>241</sup> the heightened expense of tanking under this solution may threaten the financial health of the team. Further, a breaching team would then have less money to promote and improve their team, which, in turn, may have a negative effect on the health of the franchise.

Even in the unlikely event that a breaching team was not in a financial position to pay damages, it is important to note that team owners are not shielded from liability. Because the NBA is a partnership, its members and their owners do not have immunity. Still further, there is league precedent

240. See *supra* notes 89–101 and accompanying text.

241. See Grossman, *supra* note 122, at 106–07.

for fining owners directly.<sup>242</sup> In short, team owners can afford to pay damages,<sup>243</sup> even if the team itself cannot.

## V. CONCLUSION

Previously attempted and proposed fixes have not, and will not, sufficiently prevent detrimental tanking behavior by teams. In the words of NBA commentator Zach Lowe, “[s]haking one branch of the tree isn’t enough,” rather, the League must “change every part of th[e] system.”<sup>244</sup> By identifying that, as members of the NBA partnership, teams owe each other fiduciary duties, that tanking is a breach of those duties, and that Courts can and should impose fines on tanking teams when non-tanking teams sue, this proposal makes tanking more expensive. In short, the solution offered in this Note provides the NBA with a new strategy which, if implemented, will provide a strong deterrence against tanking.<sup>245</sup>

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242. The NBA Constitution contains many provisions that allow for the direct fining of owners. See, e.g., NAT’L BASKETBALL ASS’N, *supra* note 187, art. 15, at 290 (“If a charge that a . . . Owner has committed any of the offenses described in Article 13, [which sets criteria for termination of ownership or membership,] is sustained, . . . the Governors may . . . instead direct the . . . Owner to pay a stated fine . . .”); *Id.* art. 35A(f), at 48–49 (authorizing the Commissioner to impose a fine of up to \$5,000,000 on an Owner who “entice[s], induce[s], persuade[s], or attempt[s] to entice, induce or persuade, any Player who is under contract to, or whose exclusive negotiating rights are held by, any other Member of the Association to enter into negotiations for or relating to his services”); *Id.* at 49 (authorizing the Commissioner to impose a fine on an Owner who bets on NBA games); *Id.* art. 35A(i), at 51 (authorizing the Commissioner to impose a fine on an Owner who fails a drug testing program instituted by the Board of Governors); *Id.* art. 41, at 54 (authorizing the commissioner to fine an Owner up to \$250,000 for disclosing non-public business information of the NBA); *Id.* art. 44, at 55 (authorizing the Commissioner to fine an Owner for violations by affiliates or subsidiaries); *Id.* arts. 45–46, at 56–58; *supra* note 220 (imposing no more than a \$1,000,000 fine on an offending Owner for harming the league).

243. See generally *The NBA’s Billionaire Owners*, FORBES, <https://www.forbes.com/pictures/edik45flemf/the-nbas-billionaire-owners> (last visited Dec. 13, 2018) (indicating the net worth of various NBA team owners, such as and Dallas Mavericks’ owner, Mark Cuban, worth \$2.5 billion).

244. Lowe, *supra* note 9.

245. This approach is particularly attractive because it does not require changing the NBA Constitution or By-Laws, which would require the (unlikely) support of tanking owners.