SPIRITED AWAY: THE SILNA BROTHERS' INFAMOUS DEAL AND THE EXPLOSION OF NBA MEDIA RIGHTS

MICHAEL A. WRAPP*

INTRODUCTION

"The truth of the matter is, it's about the biggest hold-up I've ever seen in business. It was highly unethical."[1] That is how John Y. Brown, Jr. ("Brown"), the former owner of the Kentucky Colonels of the American Basketball Association ("ABA"), described the deal consummated between the owners of the other ABA team denied entry into the National Basketball Association ("NBA") at the time of the 1976 NBA-ABA merger, the Spirits of St. Louis, and the owners of the four ABA teams entering the NBA, the New York Nets, the Indiana Pacers, the Denver Nuggets, and the San Antonio Spurs.[2] Essentially, in addition to receiving payment for any Spirits player drafted by NBA teams in the aftermath of the merger, which amounted to roughly $2.2 million, the Spirits' owners, brothers Daniel ("Dan") and Ozzie Silna and their lawyer, Donald Schupak, were guaranteed a one-seventh share of each of the four former ABA teams' NBA "visual media" rights revenue in perpetuity under the terms of the deal.[3] While their perpetual share of NBA media rights revenue may have seemed relatively

*J.D./MBA, University of Notre Dame, 2014. I would like to thank Associate Dean and Professor Ed Edmonds of Notre Dame Law School for his guidance and encouragement throughout the writing process.

[1] Darren Rovell, *Can the Best Business Deal of All Time Get Even Better?*, ESPN, Sept. 7, 2012, http://espn.go.com/blog/playbook/dollars/post/_/id/1525/can-the-best-deal-of-all-time-get-even-better.

[2] *Id.* At the time he owned the Colonels, Brown was also the president and majority owner of Kentucky Fried Chicken. He went on to become the governor of Kentucky from 1979 to 1983. Monte Burke, *The NBA Finally Puts an End to the Greatest Sports Deal of All Time*, FORBES, Jan. 7, 2014, http://www.forbes.com/sites/monteburke/2014/01/07/the-nba-finally-puts-an-end-to-the-greatest-sports-deal-of-all-time/; *John Y. Brown Jr.*, NAT'L GOVERNORS ASS'N, http://www.nga.org/cms/home/governors/past-governors-bios/page_kentucky/col2-content/main-content-list/john-y-brown-jr.html (last visited May 1, 2014).

[3] Burke, *supra* note 2. When combined, the four one-seventh shares amount to approximately fifty-seven percent of one team's full share. *Id.*

insignificant in 1976, an era in which the future of professional basketball appeared to be relatively modest,[4] it has since become incredibly valuable in light of the dramatic growth in the league's popularity over the years.[5] In fact, contrary to Brown's criticism of the deal on ethical grounds, many have praised it as "the greatest sports deal of all time"[6] or even "the best business deal of all time."[7] Regardless of its controversial ethical dimensions, the deal clearly remains an especially strange yet undeniably significant part of the ABA's colorful legacy.[8]

This article will examine the evolution of media rights in the NBA through the lens of the Spirits of St. Louis settlement agreement and subsequent negotiations. Part I will discuss the brief yet memorable history of the Spirits franchise prior to the 1976 merger of the NBA and the ABA. Part II will discuss the NBA-ABA merger and the media rights agreement that the team's owners made with the NBA when the Spirits were barred from joining the league as an expansion team. Then, part III will analyze the evolution of NBA media rights since the time of the agreement, with a particular focus on recent developments. Finally, part IV will address the impact that the substantial changes in this area have had on the ramifications of the NBA's agreement with the owners of the Spirits, eventually describing the recent lawsuit filed by the owners and the associated settlement discussions between the owners and the league.

4 Rovell, *supra* note 1.
5 *Remember the ABA: Spirits of St. Louis*, REMEMBER THE ABA, http://www.remembertheaba.com/spirits-of-st-louis.html (last visited May 1, 2014).
6 Burke, *supra* note 2; *ESPN 30 for 30 Volume II: Free Spirits* (ESPN television broadcast Oct. 8, 2013).
7 Rovell, *supra* note 1; *ESPN 30 for 30 Volume II: Free Spirits*, *supra* note 6.
8 The "deal is as much a part of [ABA] history as red, white and blue basketballs, the [three]-point line and the big Afros of Julius Erving and Darnell Hillman. It is a lasting memory of how, through luck or prescience, the Silnas and their lawyer, Donald Schupak, capitalized on the league's growing popularity." Richard Sandomir, *Payout May Come for an A.B.A. Team That Is Long Gone*, N.Y. TIMES, Jan. 7, 2014, *available at* http://www.nytimes.com/2014/01/07/sports/basketball/payout-may-come-for-an-aba-team-that-is-long-gone.html?_r=3.

I. THE SPIRITS OF ST. LOUIS: THE ABA'S WILDEST FRANCHISE

The ABA was born in 1967, and only survived for nine tumultuous seasons, featuring a constantly changing cast of teams and players prior to merging with the NBA in 1976.[9] Despite its aspirations as a rival league, it was distinct from the NBA in a number of significant ways, even aside from its trademark use of red, white, and blue basketballs.[10] ABA games were more fast-paced and exciting than NBA games and often featured fights among players.[11] Furthermore, the NBA eventually adopted a number of innovations from the ABA, including the three-point line and the slam-dunk contest, which have had a substantial impact on the game as a result.[12] In the words of famed NBC Sports anchor Bob Costas, who began his career broadcasting games over the radio for the Spirits of St. Louis, the ABA was "freewheeling. And there was a sense of camaraderie in the ABA because the league was always hanging by a thread and was always seeking the validation and recognition that it deserved. . . . It's almost as if we were part of an adventure that nobody else quite understands."[13] Like the ABA itself, the Spirits of St. Louis franchise was short-lived yet memorable, mythical yet relatively unappreciated in its own time.[14] While the franchise existed for only two years, Costas contends that it embodied the wild essence of the ABA more fully than any other franchise.[15]

[9] William Powell, *Q&A: A Conversation with Bob Costas*, ST. LOUIS MAG., Aug. 2013, http://www.stlmag.com/St-Louis-Magazine/August-2013/Q-A-A-Conversation-With-Bob-Costas/.
[10] *See* Sandomir, *supra* note 8.
[11] *ESPN 30 for 30 Volume II: Free Spirits, supra* note 6.
[12] Powell, *supra* note 9. Indeed, it is incredibly difficult to imagine how different today's NBA would be without the incorporation of the three-point shot.
[13] *Id.* When the Spirits played their first season in 1974, Costas, then twenty-two years old, dropped out of Syracuse University and moved to St. Louis to call the team's games for KMOX 1120 AM. *Id.*; REMEMBER THE ABA, *supra* note 5.
[14] Costas explains that "[t]he ABA had a strange split personality. On the one hand, the ABA people knew what a great thing they had, how talented their players were and how entertaining. It was almost like we didn't want to share our little secret with the world. Yet there was such pride in a league that had to endure so much simply to survive, and we wanted the world to know how great our players were. It was an obvious contradiction, but both feelings were understandable. I'll tell you this: we saw so many of our players do well after the [NBA-ABA] merger, it was an incredible feeling for those of us who had been in the ABA. We could say to the world, 'See, we told you so.'" TERRY PLUTO, LOOSE BALLS: THE SHORT, WILD LIFE OF THE AMERICAN BASKETBALL

A. *Acquisition and Beginnings in St. Louis*

The owners of the Spirits, brothers Dan and Ozzie Silna and their lawyer Donald Schupak, had aspired to own a professional basketball team for many years.[16] In particular, the desire to purchase a team came from Dan, who, when cut from his college basketball team, decided that owning a team would be the best course of action if he were no longer able to play the sport.[17] In early 1974, the Silnas attempted to buy the NBA's Detroit Pistons for $4.85 million, but Fred Zollner, the Pistons' owner, rejected their offer, later selling the team to William Davidson for $7 million.[18] As a result of their failure to purchase the Pistons, they shifted their focus to the ABA.[19] When they purchased the Carolina Cougars for $1 million in the summer of 1974, the Silnas and Schupak viewed their purchase as a means of eventually entering the NBA, believing that a merger between the NBA and ABA was inevitable.[20] According to Costas and others, they were primarily interested in becoming involved in the NBA, and actually purchased the team in reliance on the premise that a merger would occur.[21]

ASSOCIATION—AS TOLD BY THE PLAYERS, COACHES, AND MOVERS AND SHAKERS WHO MADE IT HAPPEN 437 (1990).

[15] In Costas' words, "If you wanted to take a single franchise that captured everything, just about everything, that was crazy about the ABA, look no further than the Spirits of St. Louis." *ESPN 30 for 30 Volume II: Free Spirits*, *supra* note 6. He asserts that the ABA "was a crazy league to begin with, and the Spirits were the craziest of *all* the teams." Powell, *supra* note 9. *See also* PLUTO, *supra* note 14, at 349 (referring to the Spirits as "the wildest team of them all"). Speaking even more broadly about the legacy of the franchise, Mike D'Antoni, former head coach of the Los Angeles Lakers, New York Knicks and Phoenix Suns, who played for the Spirits during the 1975–76 season, boldly proclaimed that it "exemplified everything that's right about sports and everything that's wrong about sports." *ESPN 30 for 30 Volume II: Free Spirits*, *supra* note 6.

[16] Monte Burke, *Revisiting 'The Greatest Sports Deal of All Time'*, FORBES, MAY 12, 2011, http://www.forbes.com/sites/monteburke/2011/05/12/revisiting-the-greatest-sports-deal-of-all-time/. "The Silna brothers are the sons of Latvian immigrants who came to the U.S. via Palestine in the 1930s. [Their] father started a textile business in New Jersey. After graduating from Columbia then Fordham Law School, Dan joined his father's business. In 1969[,] Dan and Ozzie started their own knitting company. Two years later, they sold it but continued to run operations." *Id.* *See also* PLUTO, *supra* note 14, at 349.

[17] Burke, *supra* note 16.

[18] *Id.*

[19] *Id.*

[20] REMEMBER THE ABA, *supra* note 5; Burke, *supra* note 16.

[21] *ESPN 30 for 30 Volume II: Free Spirits*, *supra* note 6.

Upon purchasing the Cougars, the Silnas promptly moved the franchise to St. Louis, which was the largest U.S. television market without professional basketball at that time,[22] christening their new team the Spirits of St. Louis in honor of Charles Lindbergh's plane, *The Spirit of St. Louis*.[23] Given that the team inherited just four players from the Cougars, only one of whom, veteran Joe Caldwell, was considered a starter, the Spirits were essentially analogous to an expansion team.[24] Veteran guard Steve Jones, who came to the Spirits from the Denver Nuggets, said that although the team claimed it was looking for veteran leadership, it apparently had no idea what it was actually looking for.[25] Nevertheless, Harry Weltman, the team president and general manager, set ambitious goals for the franchise, hoping he could quickly build a roster that would be attractive to the NBA in the event of a merger.[26] Despite Weltman's relative lack of experience, he was able to sign a number of very promising young players, including the supremely gifted but disruptive Marvin Barnes, the 1974–75 ABA Rookie of the Year,[27] hardworking power forward Maurice Lucas,[28] unpredictable New York playground legend Fly

[22] The NBA's Hawks franchise had played in St. Louis from 1955 to 1968 prior to moving to Atlanta, winning a championship in 1957–58 behind the play of Bob Pettit. *Atlanta Hawks Franchise Index*, BASKETBALL-REFERENCE.COM, http://www.basketball-reference.com/teams/ATL/ (last visited May 1, 2014); *B.S. Report - Bob Pettit and Rick Fox*, ESPN: The B.S. Report with Bill Simmons (Mar. 10, 2014) (downloaded using iTunes); *ESPN 30 for 30 Volume II: Free Spirits*, *supra* note 6.
[23] Burke, *supra* note 16; PLUTO, *supra* note 14, at 351; REMEMBER THE ABA, *supra* note 5.
[24] PLUTO, *supra* note 14, at 356–57.
[25] *Id.* at 359 ("The first guy I dealt with there was Rudy Martzke. I think Rudy said that the Spirits were looking for veteran leadership or something. I don't think they had any idea what they were looking for. They did pay me the $75,000 I wanted, and I ended up on the most incredible, bizarre basketball team that the world has ever seen.").
[26] In Weltman's words, "We had to operate first class and have the best team we could as fast as we could so that we would be attractive to the NBA when the merger came, and we thought it was coming within a year or two." *Id.* at 351; Weltman v. Silna, 739 F. Supp. 477, 479 (E.D. Mo. 1990), *aff'd*, 936 F.2d 358 (8th Cir. 1991).
[27] PLUTO, *supra* note 14, at 356–57; REMEMBER THE ABA, *supra* note 5. As a rookie, Barnes averaged twenty-four points and 15.6 rebounds per game on fifty percent shooting, despite an atrocious shot selection. PLUTO, *supra* note 14, at 367. Teammate Steve Jones recalls that Barnes "had every physical ingredient you'd want in a big man and he had the killer spirit to go with it. He didn't just want to beat you, he wanted to embarrass you. But so much of what Marvin did was counterproductive to his career. He disdained practice. He stayed up all night. He didn't listen to anyone about anything, but then he'd come out and play a great game." *Id.* at 364.
[28] PLUTO, *supra* note 14, at 357, 383. Fellow ABA player Gene Littles notes that "Maurice Lucas was the first player I had ever seen who was into serious stretching. Guys would be shooting around during warm-ups and he would be on the floor, turning his body into a pretzel. Now most guys do that. Back then, no one did and it was

Williams,[29] and the athletic Gus Gerard, who would average nearly sixteen points per game as a rookie.[30] As Weltman later recalled, "I thought we did very well in the face of overwhelming odds. We got no help from the team from Carolina. We were like an expansion team and we pulled together a lot of talent very quickly."[31]

B. *The Escapades of Marvin 'Bad News' Barnes*

Marvin 'Bad News' Barnes was likely the most talented and undoubtedly the wildest of all the Spirits' players.[32] While Barnes' talent was undeniable, and the owners' high hopes for the franchise largely depended on it, his brash style alienated many St. Louis fans.[33] Although his antics were endless and often truly bizarre, the team's management usually turned a blind eye to them simply because of his supreme talent.[34] Seventeen games into his professional career, Barnes abandoned the Spirits, disappearing just before they were set to play the Nets in New York.[35] Allegedly, teammate Joe Caldwell had shown Barnes his contract, which contained

strange. He also was into a health-food diet—no red meat, just chicken and fish, when everyone else was eating steaks and hamburgers. Maurice was doing anything he could to get an edge." *Id.* at 383.

[29] *Id.* at 357–58. Williams' career in the ABA lasted only one year. As a bench player for the Spirits, he averaged 9.4 points per game and shot forty-seven percent from the field. Despite his mercurial nature and inconsistent play, Costas recalls that "[t]he fans liked Fly. He was a very flamboyant character and he smiled a lot, like a big kid. A couple of times a month, he'd have some games where he'd come off the bench and go for [twenty-five] points, and people would go crazy." *Id.* at 360–61.

[30] *Id.* at 358, 368. Gerard averaged 15.6 points and 8.1 rebounds per game during his rookie season. *Id.* at 368.

[31] *Id.* at 388.

[32] *ESPN 30 for 30 Volume II: Free Spirits*, *supra* note 6.

[33] According to Costas, "A lot of people in St. Louis resented Marvin. He had the Super Fly image—the wide-brimmed hats, the long, floor-length mink coats, the platform shoes, the big cars and, of course, the [thirteen] telephones. He became the trademark of the team, and the town did not relate vey well to 'that sort of Negro,' to use Marvin's phrase." PLUTO, *supra* note 14, at 367.

[34] As teammate Steve Jones recalls, "Marvin would walk into a game [twenty] minutes before it was time to start. People would be taped and ready to go out for warm-ups, and Marvin would stroll into the dressing room with all this food—steak and gravy, black-eyed peas, greens, mashed potatoes. He would be eating it while someone taped his ankles, then he'd tell the ballboy, 'I got some women coming in tonight. I need five tickets—and get me some body lotion, too.' He loved to stand in front of a mirror and put lotion on himself. I think he saw himself as this great ladies' man, a guy with his own harem. Once, he spent the entire pregame layup drill in full uniform, sitting in the stands and talking to this girl. [Coach] MacKinnon ripped into Marvin for that and didn't start him. Then he brought Marvin off the bench and Marvin went for [forty] points and [twenty]-some rebounds. That was the kind of talent he was. He thought he was Superman, and for a while, he was." *Id.* at 366–67.

[35] *Id.* at 364–65.

various provisions not included in Barnes' contract.[36] After examining Barnes' contract, Caldwell concluded that it was indeed "deficient in certain respect[s]."[37] Among other provisions, Barnes wanted to address the lack of a provision in his contract that would insure him in the event of injury, as well as some tax-related issues that were causing him financial problems.[38] Caldwell allegedly agreed to introduce Barnes to his agent and accompanied Barnes and the agent, Marshall Boyer, to LaGuardia Airport.[39] Barnes and Boyer, who proposed that Barnes leave the team, then boarded a plane to Dayton, Ohio, where they were eventually found in a pool hall.[40] The Spirits agreed to restructure Barnes' contract, but indefinitely suspended Caldwell for his alleged influence on Barnes' decision to leave the team, eventually deciding to terminate him altogether.[41] Caldwell, who was not paid his salary of $220,000 for the 1974–75 season and never played for another ABA or NBA team, later filed a number of lawsuits stemming from the incident.[42]

Another particularly noteworthy incident occurred when the Spirits played a game against the Virginia Squires in Norfolk, the day after playing a game against the Nets in New York.[43] As usual, Barnes missed the team's early-morning flight out of LaGuardia Airport.[44]

---

[36] *ESPN 30 for 30 Volume II: Free Spirits*, *supra* note 6; PLUTO, *supra* note 14, at 364–65.
[37] Caldwell v. Munchak, 548 F. Supp. 755, 756–57 (N.D. Ga. 1982).
[38] *ESPN 30 for 30 Volume II: Free Spirits*, *supra* note 6; PLUTO, *supra* note 14, at 365.
[39] *Munchak*, 548 F. Supp. at 757.
[40] *Id.*; PLUTO, *supra* note 14, at 366; *ESPN 30 for 30 Volume II: Free Spirits*, *supra* note 6.
[41] PLUTO, *supra* note 14, at 365; *Munchak*, 548 F. Supp. at 759.
[42] First, Caldwell filed suit seeking payment of his $220,000 salary, which Tedd Munchak, the owner of the Carolina Cougars, the Spirits' predecessor franchise, had irrevocably guaranteed. *Munchak*, 548 F. Supp. at 760. In a subsequent suit, he claimed that the circumstances surrounding his suspension and other ABA and NBA teams' subsequent failure to hire him constituted a "concerted refusal to deal" or a "group boycott." Caldwell v. Am. Basketball Ass'n, Inc., 825 F. Supp. 558, 560, 564 (S.D.N.Y. 1993), *aff'd*, 66 F.3d 523 (2d Cir. 1995). The defendant-appellees in the suit "offered evidence that Caldwell's physical limitations accounted for his inability to secure employment as a professional basketball player after 1975. In that regard, the record show[ed] that: (i) Caldwell was [thirty-three] years old at the time of his suspension and less than two percent of NBA players during the five basketball seasons between 1976 and 1981 were [thirty-four] years old or older; (ii) Caldwell had sustained a torn ligament during the 1971 season; and (iii) Caldwell had sustained an additional injury in an automobile accident in January, 1975." Caldwell v. Am. Basketball Ass'n, Inc., 66 F.3d 523, 526 (2d Cir. 1995).
[43] PLUTO, *supra* note 14, at 379.
[44] *Id.* at 379–80.

After subsequently missing all of the other flights to Norfolk, Barnes, desperate to get there before that night's game in order to avoid a suspension, chartered a plane.[45] About ten minutes prior to the start of the game, as the team was discussing strategy, primarily how to handle Barnes' absence, Barnes burst through the double doors at the back of the dressing room and, with a huge grin on his face, proclaimed, "Boys, game time is on time."[46] According to Steve Jones, "Marvin was wearing a big, wide-brimmed hat and his floor-length, $10,000 mink coat. He had a bag of McDonald's hamburgers and fries with him. Then he proclaimed, 'Have no fear, BB is here.' He opened the coat, and underneath he was wearing his Spirits uniform."[47] While he did not start the game, Barnes still managed to tally [forty-three] points and [nineteen] rebounds.[48]

Much like the Spirits franchise, Barnes quickly began to fade into obscurity after his two years of ABA stardom. Comparing Barnes' career trajectory to those of more dedicated Spirits players who went on to have successful careers in the NBA, Rod Thorn, who coached the team during the 1975–76 season, reflected,

> I have never seen a player lose so much talent so fast. He had two good years in the ABA, then he was finished. In the NBA, he was just a shell of himself, and he hadn't turned [twenty-five]. All the late nights, all the missed flights, all the lack of discipline caught up to him all at once and he just couldn't play anymore. It was sad to see him just waste that talent.[49]

While in the NBA, Barnes played for four teams in four years, averaging merely 9.2 points per game on forty-four percent shooting.[50] Near the tail end of his career, as a player for the Boston

[45] *Id.* at 380.
[46] *Id.*
[47] *Id.* Players on the team often called Barnes by the nickname 'BB' because "his head was supposedly as small as a BB." *Id.* at 379.
[48] *Id.* at 380.
[49] *Id.* at 389.
[50] *Id.*

Celtics, he regularly used drugs before, after, and during games while on the bench.[51] "He had great talent, but that talent was lost in all the excess, and after just a couple of years, he was finished when he should have been entering his prime."[52]

C. *The Inaugural Season: 1974–75*

After a rocky start, the team eventually turned its inaugural season around by trading for Freddie Lewis, who former ABA and NBA coach Hubie Brown described as an NBA-caliber point guard talent that never had a chance to show what he could do in the NBA.[53] According to Costas, it was the veterans who pulled the team together, particularly Lewis, Steve Jones, guard Mike Barr, and two other veteran additions, Don Adams and Goo Kennedy.[54] Despite finishing with a record of 32–52, the Spirits made the playoffs, setting up a first-round matchup with Julius Erving and the defending champion New York Nets, who had finished with a record of 58–26.[55] The Spirits played the Nets eleven times during the regular season, and had lost every time by an average of nineteen points.[56] Incredibly, after losing the first game of the series, the Spirits won four straight games to eliminate the Nets, accomplishing arguably the greatest playoff upset in ABA history.[57] In the second round, the Spirits were competitive early against the eventual champion Kentucky Colonels, but reality set in when the team lost Lewis to an

[51] *ESPN 30 for 30 Volume II: Free Spirits*, *supra* note 6.
[52] PLUTO, *supra* note 14, at 363. Barnes' life after basketball remained tumultuous and was marred by his struggles with addiction, as well as occasional periods of homelessness and imprisonment. He recently passed away at the age of sixty-two. Bruce Weber, *Marvin Barnes, Enigmatic Basketball Player, Dies at 62*, N.Y. TIMES, Sept. 9, 2014, *available at* http://www.nytimes.com/2014/09/10/sports/basketball/marvin-barnes-enigmatic-basketball-player-dies-at-62.html?_r=0.
[53] PLUTO, *supra* note 14, at 359.
[54] *Id.* at 368.
[55] *Id.* at 19, 369.
[56] *Id.* at 369.
[57] Powell, *supra* note 9; *ESPN 30 for 30 Volume II: Free Spirits*, *supra* note 6.

ankle injury in the fourth game of the series.[58] Nevertheless, excitement about the team had finally started to grow, and everyone looked toward the next season with optimism.[59]

D. *The Final Season: 1975–76*

Unfortunately, the Spirits' second and final season was tumultuous from the beginning. Coach Bob MacKinnon left the team after the 1974–75 season.[60] Rod Thorn, formerly an assistant with the Nets, became the Spirits' new head coach, but he was fired and replaced by older, more experienced coach Joe Mullaney in the middle of the season.[61] Steady veteran Steve Jones left the team prior to the start of the season, signing with the Portland Trail Blazers of the NBA.[62] Weltman added guard Don Chaney, formerly of the Boston Celtics, and M.L. Carr to the roster.[63] Then, when the Utah Stars franchise folded in early December, it sold its best players, including future NBA legend Moses Malone, to the Spirits.[64] Perhaps the biggest transaction of the ABA season occurred just a few days later when management addressed a growing rift between the professional Lucas and the out-of-control Barnes by shipping Lucas to Kentucky for shot-blocking center Caldwell Jones.[65] Despite the Spirits' impressive roster, they never recaptured the magic of the prior season's playoff run, finishing with a disappointing record of 35–49 and missing the playoffs.[66] Thorn observed that "[t]he team had potential, at

[58] PLUTO, *supra* note 14, at 371.
[59] *Id.*
[60] *Id.* at 372–73.
[61] *Id.* at 384–85. In Weltman's words, "Rod was thrown into a situation that was very difficult and very pressurized. We had a feeling that the merger was coming soon and we felt we had to win now to prove our legitimacy to get a better shot at getting into the NBA. Rod worked hard, but the team just wasn't winning and we had to make a change. Joe Mullaney was an experienced coach and I thought he might be more effective with the team. It was nothing personal about Rod, it was just a judgment I made at that time." *Id.*
[62] *Id.* at 373–74.
[63] *Id.* at 373.
[64] *Id.* at 386–87.
[65] *Id.* at 383–84, 387, 402.
[66] Powell, *supra* note 9; PLUTO, *supra* note 14, at 19; REMEMBER THE ABA, *supra* note 5.

least on paper. Of course, this was the prime example of how paper doesn't win games."[67] Although the Spirits' run came to an abrupt and disappointing end, many of the team's members played in the NBA in 1976–77 and went on to have successful NBA careers.[68]

E. *Lack of Financial Success*

Although the team was quite a spectacle both on and off the court, the Spirits failed to attain any measure of financial success during their brief history. In fact, "[d]espite making the playoffs in their first year, the Spirits were far from a successful franchise, selling only 600 season tickets in an arena with [18,000] seats."[69] Costas recalls that on average, the team probably had only about 3,000 fans in attendance at its home games, even though tickets cost just three, five or seven dollars.[70] Amidst the tumult of the 1975–76 season, attendance plummeted.[71] "For games against lesser teams like [the] Virginia [Squires], it was not uncommon to see only 400 or 500 fans in the cavernous St. Louis Arena."[72] Even for games against premier teams such as the Kentucky Colonels, the defending ABA champions, the New York Nets, featuring Julius Erving, or the Denver Nuggets, featuring rookie sensation David Thompson, attendance routinely hovered around a mere 800 to 1,000 fans per game during the 1975–76 season.[73] The Silnas spent between $2 million and $3 million on the team and had "zero cash flow."[74]

[67] PLUTO, *supra* note 14, at 373; Powell, *supra* note 9 ("They had a good team. Or at least on paper they had a good team. But the team never really cohered like basketball teams have to. So they never found a rhythm, and there was internal strife, because there was a lot of immaturity on the team.").
[68] PLUTO, *supra* note 14, at 388–89.
[69] Burke, *supra* note 16. While Burke states that the Spirits' arena had only 10,000 seats, this is presumably an error, as a number of other sources indicate that the arena seated 18,000 people. PLUTO, *supra* note 14, at 350; REMEMBER THE ABA, *supra* note 5.
[70] PLUTO, *supra* note 14, at 387; *ESPN 30 for 30 Volume II: Free Spirits*, *supra* note 6. Costas remembers one particular game against the San Antonio Spurs "where we had an announced crowd of 808 in an 18,000-seat arena. Terry Stembridge and I started counting the crowd. We came up with a little over 500." PLUTO, *supra* note 14, at 387.
[71] REMEMBER THE ABA, *supra* note 5.
[72] *Id.*
[73] *Id.*
[74] Burke, *supra* note 16. "Interestingly, if the ABA had [survived for] one more season, plans were in place to move the Spirits to Salt Lake City, where they would have become the 'Utah Rockies.'" REMEMBER THE ABA, *supra* note

Ultimately, "[t]he Spirits lost money in both of the two years the team played, an experience not uncommon to member teams of the ABA."[75] Indeed, when the ABA finally folded in the summer of 1976, twenty-eight different teams had accumulated a total of about $50 million in losses in just nine years.[76]

II. THE 1976 NBA-ABA MERGER

While a merger between the NBA and ABA had been considered a possibility since at least 1970, player opposition to such a merger precluded it from taking place for a number of years.[77] Among other reasons, players presumably opposed a merger because the existence of multiple leagues fostered competitive bidding for their services and drove up their salaries as a result.[78] In 1970, Oscar Robertson and player representatives from each of the other thirteen NBA teams filed an antitrust suit against the NBA and the ABA to enjoin the leagues from merging or entering into a non-competition agreement.[79] Joe Caldwell, who was a party to the *Robertson* suit as an NBA player representative, continued to oppose a merger and promoted competitive bidding for players' services during his time as both president of the ABA Players Association ("ABAPA") and the Spirits' ABAPA player representative.[80]

---

5. Prior to folding during the 1975–76 season, the Utah Stars had actually discussed the possibility of combining franchises with St. Louis, "making one super team out of two that had pretty decent talent." PLUTO, *supra* note 14, at 386–87.

[75] Caldwell v. Am. Basketball Ass'n, Inc., 825 F. Supp. 558, 564 (S.D.N.Y. 1993), *aff'd*, 66 F.3d 523 (2d Cir. 1995).

[76] PLUTO, *supra* note 14, at 428.

[77] Robertson v. Nat'l Basketball Ass'n, 389 F. Supp. 867, 873 (S.D.N.Y. 1975).

[78] *Id.*

[79] Robertson v. Nat'l Basketball Ass'n, 70 Civ. 1526, 1970 WL 532 (S.D.N.Y. Apr. 17, 1970). In addition to seeking an injunction against an NBA-ABA merger, the players alleged that the reserve clause, uniform player contract, and college draft violated antitrust laws. *Robertson*, 389 F. Supp. at 873 ("The litigation began after reports in the spring of 1970 of a proposed merger between the NBA and the ABA. Plaintiffs' amended complaint charges defendants with conspiring to restrain competition for the services and skills of professional basketball players through such devices as the college draft, the reserve clause in the Uniform Player Contract (the Uniform Contract), the compensation plan attached to the reserve clause, and various boycott and blacklisting techniques. The complaint further alleges that the NBA and the ABA seek to effectuate a non-competition agreement, merger or consolidation.").

[80] *Caldwell*, 825 F. Supp. at 569.

Nevertheless, at the beginning of the 1975–76 season, the Denver Nuggets and the New York Nets applied for membership in the NBA, effectively ushering in the beginning of the end for the ABA and rendering what would be the league's final season a "lame-duck."[81] As a result, three of the ABA's franchises folded, leaving the league with only seven teams.[82] The ABA and its remaining teams quickly realized that the league must either merge with the NBA or dissolve.[83] After six years in the court system, a settlement in the *Robertson* suit was finally approved on July 30, 1976, paving the way for a merger by eliminating the threat of preventative legal action by the players.[84] Finally, "[i]n the summer of 1976, the [NBA], tired of competing with the ABA for talent and wary of future litigation, decided to merge with the upstart league, which, at the time, had seven franchises. Executives from both leagues met that June in Hyannis, [Massachusetts] to hash out the terms of the merger."[85] The Virginia Squires folded prior to the meeting, leaving just six ABA franchises remaining.[86]

A. *The Merger Negotiations*

During the merger negotiations, David Stern, outside counsel for the NBA from 1966 to 1978, worked to build consensus among the various parties involved.[87] Under the eventual merger agreement, the New York Nets, Indiana Pacers, Denver Nuggets, and San Antonio Spurs

[81] Burke, *supra* note 16.
[82] *Id.*
[83] *ESPN 30 for 30 Volume II: Free Spirits*, *supra* note 6.
[84] Robertson v. Nat'l Basketball Ass'n, 72 F.R.D. 64 (S.D.N.Y. 1976), *aff'd*, 556 F.2d 682 (2d Cir. 1977); PLUTO, *supra* note 14, at 427–28.
[85] Burke, *supra* note 16.
[86] *Id.*
[87] *ESPN 30 for 30 Volume II: Free Spirits*, *supra* note 6; PLUTO, *supra* note 14, at 430–31 ("While [NBA Commissioner] Larry O'Brien was important to the merger, so was a young lawyer named David Stern. . . . O'Brien was given a lot of latitude by the NBA owners to get the deal done, and O'Brien relied a lot on Stern for legal advice and all that."). Stern, who became the league's general counsel in 1978, retired on February 1, 2014 after spending exactly thirty years as commissioner of the NBA. *David Stern, Three Decades as NBA Commissioner*, NBA.COM, http://www.nba.com/david-stern/ (last visited May 1, 2014).

each entered the NBA as expansion teams for a cost of $3.2 million per team.[88] While these former ABA teams could not take part in the 1976 NBA draft or receive media rights revenue for three years, they were allowed to retain their players upon entering the league.[89] Unfortunately for the Spirits and their owners, the NBA did not view St. Louis as a viable market for professional basketball and did not want to maintain a team there after its own St. Louis franchise, the Hawks, had already moved to Atlanta.[90] Brown, the owner of the Kentucky Colonels, readily accepted $3.3 million to fold his franchise, which was also barred from entering the NBA.[91] Unlike Brown, on the other hand, the Silnas were very angry about being excluded from the NBA.[92] In fact, given their well-known desire to become part of the NBA, which motivated their initial purchase of the Spirits franchise, they essentially felt like spurned lovers when they were not allowed to enter the league through the merger.[93] Consequently, the Silnas and their lawyer, Schupak, adopted an aggressive negotiating position, taking advantage of the four ABA expansion teams' desperation to enter the NBA.[94]

88 BILL SIMMONS, THE BOOK OF BASKETBALL 124 (2010). "The Nets also had to pay the Knicks $4.8 million over ten years for violating their [territorial] rights." *Id.*
89 *Id.*; Burke, *supra* note 16.
90 *ESPN 30 for 30 Volume II: Free Spirits*, *supra* note 6.
91 According to ESPN business reporter Darren Rovell, Brown "was an easy customer." When asked what he wanted in exchange for folding his franchise, he replied, "Well, what do you think is fair?" Asked if he would accept $2 million, Brown replied that he would. Then, "[f]our hours later, after the Silnas went into the room, it became $3.3 million." Rovell, *supra* note 1. In his typical fashion, Bill Simmons provides an amusing yet incisive analysis of the disparities involved in the merger agreement. In Simmons' words, "Kentucky owner John Y. Brown received $3 million for folding his [ABA] franchise, then spent half that money to buy [the NBA's] Buffalo [Braves]. So the four ABA teams that joined the NBA got crushed financially, but Brown bought in and pocketed $1.5 million? Huh?" SIMMONS, *supra* note 88, at 125.
92 *ESPN 30 for 30 Volume II: Free Spirits*, *supra* note 6.
93 *Id.*
94 Although in retrospect it may appear that the Silnas "snookered the league, or, more accurately, the Nets, the Pacers, the Nuggets, and the Spurs, who dealt directly with the brothers," Michael Goldberg, the ABA's former general counsel, recalls that the four teams were desperate to enter the NBA and were thus entirely willing to satisfy the Silnas' demands. Sandomir, *supra* note 8. In fact, Carl Scheer, former general manager of the Nuggets, believed that if the four teams did not agree to a deal with the Silnas, the entire agreement with the NBA would fall through and the teams would simply be forced to dissolve. Rovell, *supra* note 1.

B. *'The Greatest Sports Deal of All Time'*

"The Spirits' owners "went right into the eve of the merger demanding to become a part of the NBA. [Schupak] . . . was a sharp attorney. He knew that the Spirits would never get into the NBA, but he also knew that there would be no merger until he was satisfied."[95] Rather than merely accepting a $3.3 million payment in exchange for folding their franchise, Schupak and the Silnas negotiated their own deal, devising a plan to remain connected to the NBA that they hoped might eventually enable them to obtain the franchise they had always wanted.[96] During the 1975–76 season, when it became clear that a merger would likely occur, the owners of the remaining seven ABA teams held a meeting.[97] "At that meeting, [according to Dan], Ozzie [had] proposed that any team not taken by the NBA should be compensated with a [one-seventh] share (because there were seven teams left) of the [television] revenue of the teams that did make it in. Dan says the other owners all agreed."[98] In the actual merger negotiations, Schupak reiterated this proposal, wearing the other teams' owners out with his demands.[99] Thus, in addition to compensation for any Spirits players drafted by NBA teams, which amounted to roughly $2.2 million, the Silnas and Schupak received a one-seventh share of each of the four former ABA teams' NBA "visual media" rights revenue in perpetuity.[100]

---

[95] PLUTO, *supra* note 14, at 431–32.
[96] Burke, *supra* note 16; *ESPN 30 for 30 Volume II: Free Spirits*, *supra* note 6.
[97] Burke, *supra* note 16.
[98] *Id.* Dan notes that because only four former ABA teams entered the NBA, ultimately leaving only the Spirits out after the Colonels had folded, perhaps the one-seventh share of television revenue should actually have been a one-fifth share. *Id.*
[99] "Of all the deals cut in Hyannis, St. Louis made the best one. Schupak wore everyone out with his demands. He is a hard-driving New York lawyer, and the other ABA owners were these nice men from the hinterlands. He just kept talking and talking, pushing and pushing, and exhausted everyone who was listening to him. In the end, they gave him what he wanted." PLUTO, *supra* note 14, at 432.
[100] Burke, *supra* note 2. When combined, the four one-seventh shares amount to approximately fifty-seven percent of one team's full share. *Id.* According to Michael Goldberg, the ABA's former general counsel, "Schupak said they'd take TV rights in perpetuity as a kind of Hail Mary to get money down the road. . . . What was missing was someone saying, 'Thirty years, [fifty] years, or until something happens, and it's over.'" Sandomir, *supra* note 8. Under the terms of the agreement, Schupak receives ten percent of the Silnas' proceeds from the settlement. Cork Gaines, *NBA Is Negotiating to Get out of 'The Greatest Sports Business Deal of All Time'*, BUS. INSIDER, Nov. 12,

III. THE EVOLUTION OF NBA MEDIA RIGHTS

Amazingly, given that the Spirits' owners demanded a perpetual one-seventh share of the television revenue of the four ABA teams entering the NBA and $2.2 million, as well as the fact that Brown had accepted $3.3 million for folding his Kentucky Colonels franchise, in a sense the four ABA teams' owners apparently valued a perpetual one-seventh share of their combined television rights at about $1 million.[101] This valuation makes much more sense when considered in light of the state of television rights related to professional basketball at the time. Indeed, these ABA owners were probably only familiar with television rights in a relatively minimal sense. After all, the ABA as a whole remained somewhat mysterious precisely because it received such paltry media coverage, particularly compared to contemporary sports ventures.[102] Michael Goldberg, former general counsel for the ABA, contends that "the only way to appreciate this . . . is to go back in a time capsule to the bidding wars [for players' services] between the leagues; the [NBA] is tiring of them, and saying, 'Let's take four teams, but not St. Louis and Kentucky, and we'll move on.'"[103]

A. *NBA Media Rights in 1976*

Even the NBA received relatively minimal media attention in 1976. In the words of Carl Scheer, former general manager of the Denver Nuggets, "NBA television was modest at best. . . . In fact, the Finals were delayed and were not shown live in the late [1970s]. . . . [M]ost so-called

---

2013, http://www.businessinsider.com/nba-is-negotiating-to-get-out-of-the-greatest-sports-business-deal-of-all-time-2013-11.

[101] Rovell, *supra* note 1.

[102] According to Costas, "In an era where sports is overexposed and overtelevised, the ABA is the last significant sports venture that has any mystery about it. Julius Erving symbolizes the ABA, and the mystique that exists about Julius to this day is there because he began his career in 'the other league.' How many people really saw Julius with the Virginia Squires? And the ABA lasted from 1967 to [1976], so it wasn't in the dark ages, yet there was no national television contract, no cable deal, not even ESPN or CNN to show you what was happening in the ABA. Virtually everything that is known about it comes by word of mouth, as if it happened centuries ago. The ABA was like basketball's Wild West, and Julius Erving, George Gervin, James Silas and all the other ABA stars were the gunfighters. They are men of legend known to millions, but whose actual deeds were seen by few." PLUTO, *supra* note 14, at 23.

[103] Sandomir, *supra* note 8.

experts thought that [professional] basketball had a very modest future."[104] It is important to remember that the settlement agreement with the Spirits' owners was consummated at a time when the NBA was floundering "in its mid-1970s doldrums, before Magic Johnson, Larry Bird and Michael Jordan."[105] In the late 1970s, the NBA's television contract with CBS was very modest in scope.[106] As part of the merger agreement, the four former ABA teams did not receive any NBA television revenue for three years, but "[w]hen the cash started to flow to the former ABA teams," the Silnas began receiving a few hundred thousand dollars annually.[107]

B. *Explosive Growth of NBA Media Rights*

As the league's popularity began to explode in the 1980s and 1990s, thanks in large part to talented and charismatic players Johnson, Bird and Jordan, its television rights fees escalated in concert, and rights were sold to CBS, then NBC, as well as the TNT and TBS cable networks, for hundreds of millions of dollars.[108] By 1990, when the NBA's television contract paid out over $200 million annually in cable and network revenue, the league's media rights revenues had grown astronomically since 1976.[109] The NBA, like the other major sports leagues aside from the National Football League, has traditionally broadcast its games by relying on a mix of national broadcasts negotiated by the league and local broadcasts negotiated by individual franchises.[110] However, in recent years, the league's "visual media" rights have also expanded to

[104] Rovell, *supra* note 1.
[105] Sandomir, *supra* note 8.
[106] Jon Wertheim, *Best Sports Deal Ever? How the Silnas Outsmarted the NBA*, SPORTS ILLUSTRATED, Apr. 9, 2014, http://sportsillustrated.cnn.com/nba/news/20140409/silna-brothers-nba/; REMEMBER THE ABA, *supra* note 5.
[107] Some sources state that "the Silnas began receiving somewhere close to $200,000 annually" in 1979. Burke, *supra* note 16. Others maintain that according to court documents, the Silnas received their first payments during the 1980–81 season, and that these initial payments amounted to $521,749. Richard Sandomir, *No Team, No Ticket Sales, but Plenty of Cash: Former A.B.A. Owners Ozzie and Daniel Silna Earn Millions from N.B.A.*, N.Y. TIMES, Sept. 6, 2012, *available at* http://www.nytimes.com/2012/09/07/sports/basketball/former-aba-owners-ozzie-and-daniel-silna-earn-millions-from-nba.html?_r=0; Wertheim, *supra* note 106.
[108] Burke, *supra* note 16; REMEMBER THE ABA, *supra* note 5.
[109] PLUTO, *supra* note 14, at 433.
[110] *Club and League IP Rights—Broadcast Rights*, 11 BUS. & COM. LITIG. FED. CTS. § 125:17 (3d ed.).

include revenue streams that did not exist in 1976, such as international broadcasts, the league's own NBA TV network, out-of-market broadcasts, and online broadcasts.[111]

New media rights revenue streams have sometimes provoked litigation. In fact, the rapid growth of revenues "realized from the broadcast of sporting events, the property rights and issues surrounding those rights are an important and contentious area of sports and intellectual property law."[112] For instance, the NBA has successfully defended itself against litigation concerning exclusive broadcasting territories and related out-of-market media packages such as NBA League Pass.[113] In spite of such occasional challenges, NBA media rights revenues from more traditional sources have continued to grow in an explosive manner. "In 1997[,] the NBA negotiated a $2.6 billion deal with NBC and Turner. In 2002[,] the league made a $4.6 billion deal with ABC/ESPN and TNT."[114] In 2007, the NBA extended its broadcast deals with ABC/ESPN and TNT for another eight years for roughly $930 million annually.[115] These deals, which began with the 2008–09 season, run through the 2015–16 season.[116]

After months of speculation and anticipation, in early October 2014, the NBA completed negotiations on mammoth nine-year extensions of its deals with ABC/ESPN and TNT.[117] The

---

111 Cork Gaines, *NBA Will Pay Two Brothers $500 Million to Get out of Crazy Business Deal Made in 1976*, BUS. INSIDER, Jan. 7, 2014, http://www.businessinsider.com/nba-will-pay-two-brothers-500-million-to-get-out-of-crazy-business-deal-made-in-1976-2014-1; Sandomir, *supra* note 8; Spirits of St. Louis Basketball Club, L.P. v. Denver Nuggets, Inc., 906 N.Y.S.2d 776, at *1 (Sup. Ct. 2009), *aff'd*, 922 N.Y.S.2d 349 (App. Div. 2011) (discussing international broadcasts, the NBA TV network, and out-of-market broadcasts as new revenue streams for the NBA).
112 *Club and League IP Rights—Broadcast Rights*, *supra* note 110.
113 *See* Kingray, Inc. v. NBA, Inc., 188 F. Supp. 2d 1177 (S.D. Cal. 2002) (granting the NBA's motion to dismiss and finding that plaintiffs lacked standing and allegations did not support price fixing claim or claim for restriction of output).
114 Burke, *supra* note 16.
115 *Id.* "[ABC/ESPN] has been paying the NBA about $485 million a year under its existing contract, while [TNT] has paid about $445 million annually." Ben Cohen & Shalini Ramachandran, *NBA Reaches Long-Term Rights Deals with Disney, Time Warner*, WALL ST. J., Oct. 5, 2014, *available at* http://online.wsj.com/articles/nba-reaches-long-term-rights-deals-with-disney-time-warner-1412557587.
116 John Ourand & John Lombardo, *NBA Ready to Discuss Rights Deal*, SPORTSBUS. J., May 13, 2013, http://www.sportsbusinessdaily.com/Journal/Issues/2013/05/13/Media/NBA-TV-rights.
117 Richard Sandomir, *N.B.A. Is Said to Continue Network Deals*, N.Y. TIMES, Oct. 5, 2014, *available at* http://www.nytimes.com/2014/10/06/sports/basketball/nba-said-to-be-near-new-tv-deal-for-24-billion.html?ref=basketball&_r=1.

new deals, which begin with the 2016–17 season and run through the 2024–25 season, are worth a total of $24 billion and nearly triple the average annual rights fees of the previous deals.[118] In order to effectuate an increase in average annual rights fees from $930 million to $2.66 billion, the league plans to begin with a $2.1 billion fee in 2016–17, then "escalate in year-over-year increments to a peak of $3.1 billion in the final year."[119] Representing a 186% increase from the current deals, the NBA's new deals are indicative of media companies' growing need for and belief in the power of live sports content.[120] The presence of relatively new competitors such as Fox Sports 1 and NBC Sports Network in the marketplace, who have joined the ranks of networks looking for live sports programming, further magnifies the value of the league's media content.[121] The NBA's dramatic increase in rights fees is also a product of its status as the only major North American sports league that truly has worldwide appeal.[122] Ultimately, the new deals will increase hours of coverage and live game broadcasts, while resulting in unprecedented revenue growth for the league.[123]

While these deals will certainly generate substantial revenue for the league, they may also chart a course for the future evolution of NBA media content. NBA Commissioner Adam Silver

[118] *Id.*

[119] *Id.*; Zach Lowe, *How the NBA's New TV Deal Could Blow Up the Salary Cap*, GRANTLAND, Oct. 6, 2014, http://grantland.com/the-triangle/nbas-new-tv-deal-blow-up-the-salary-cap.

[120] Darren Rovell, *NBA: New TV Deal Shows League's Unique Position*, ESPN, Oct. 6, 2014, http://espn.go.com/nba/story/_/id/11653435/new-tv-deal-shows-league-unique-position ("[S]ports programming is one of the few sectors remaining in which watching live is crucial for most audiences. . . . As we are starting to move away from television and on to other ways to watch—tablet, mobile—this equation hasn't changed. The rest of the TV world outside of sports is proving harder and harder to monetize."); Brian Baxter, *In-House Teams Get an Assist on NBA's TV Mega-Deal*, AM. LAW., Oct. 6, 2014, http://www.americanlawyer.com/id=1202672550607/Covington-InHouse-Teams-Get-an-Assist-on-NBAs-TV-MegaDeal?slreturn=20141011204706; Sandomir, *supra* note 117.

[121] Rovell, *supra* note 120; Ourand & Lombardo, *supra* note 116. While leaving a March 2013 event related to the launch of Fox Sports 1, former commissioner Stern, smiling wryly, observed, "It's always nice to have competition." Ourand & Lombardo, *supra* note 116.

[122] Rovell, *supra* note 120; Baxter, *supra* note 120.

[123] Rovell, *supra* note 120. Turner's package will increase to sixty-four games, including fifty-two Thursday night games, while ESPN and ABC will televise a total of one hundred NBA games each regular season. In addition, ESPN will begin broadcasting NBA Development League and Summer League games across its various platforms. Baxter, *supra* note 120.

has stated that the deals are intended to cover new terrain and reach millennial consumers who have a different approach to the traditional cable or satellite package.[124] In particular, the league has agreed to partner with ABC/ESPN to develop a new online video service that will make live regular season games available to people that are neither cable nor satellite television customers.[125] According to Washington Wizards owner and NBA Media Committee Chair Ted Leonsis, the service will likely target the worldwide mobile audience, providing customers with a broad array of payment options.[126] The deals also provide a framework for revenue from advertisements on jerseys, essentially enabling the networks to obtain some advertising money in the event that the league decides to sell jersey sponsorships to third parties.[127] Although some team owners wanted to consummate twenty-year media rights deals, the potential for continued development of emerging technologies and new revenue streams such as these weighs in favor of

[124] *Over-The-Top Service Seen as Key Ingredient in NBA's New Media Rights Deal*, SPORTSBUS.DAILY, Oct. 7, 2014, http://www.sportsbusinessdaily.com/Daily/Issues/2014/10/07/Media/NBA-Media-Main.aspx [hereinafter *Key Ingredient*].

[125] Cohen & Ramachandran, *supra* note 115. Although this may seem surprising given that ESPN derives its huge profits from the "pay-TV ecosystem," the network was surely aware that this package of games could have been sold to a third party if it did not agree to provide an online service. *Id.*

[126] Rovell, *supra* note 120; *Key Ingredient*, *supra* note 124. "[T]he idea, as Leonsis explains it, is for ESPN and the NBA to be able to sell digital packages to mobile customers worldwide with a large choice of payment systems. Imagine a person in Beijing buying a season's worth of a team's games for his phone, or even just particular highlight packages, or maybe even for just a quarter of live action on the spot after following the game on Twitter. That's all possible, and it's not hard to visualize. Although nothing is for sure, that idea was worth hundreds of millions of dollars to the NBA in this deal." Rovell, *supra* note 120. It is not yet clear whether ESPN's new service will compete with NBA League Pass, the streaming package of out-of-market games that is currently handled by Turner. *Key Ingredient*, *supra* note 124. The NBA will retain an equity stake in the online service. Cohen & Ramachandran, *supra* note 115.

[127] Sean Highkin, *Report: NBA's Media Rights Deal Includes Revenue from Ads on Jerseys*, PROBASKETBALLTALK, Oct. 13, 2014, http://probasketballtalk.nbcsports.com/2014/10/13/report-nbas-media-rights-deal-includes-revenue-from-ads-on-jerseys. Apparently, if a national brand with a jersey sponsorship deal would have bought time on ESPN or TNT's NBA game telecasts, then the two networks would get specific commitments from that company to also buy advertising during any nationally televised games featuring that sponsored team. "Sources familiar with the TV deals admit both networks pushed hard to be allowed to sell ads on team jerseys outright, but the league balked at handing over the potentially lucrative rights. Under the new TV deals, NBA teams maintain the rights to sell the jersey advertising, which has an estimated value ranging from around $800,000 for small-market teams like the Memphis Grizzlies to more than $10 million for large-market teams like the Los Angeles Lakers." *Id.*

the league's ultimate decision to agree to shorter deals.[128] Indeed, all indications are that the value of sports media rights will continue to grow at a rapid pace.[129]

IV. THE SILNAS REAP THEIR REWARDS

While the Silnas only received a few hundred thousand dollars annually when the four former ABA teams began receiving NBA television revenue in 1979, they received a total of approximately $180 million from their settlement agreement between 1979 and 2007.[130] As a result of his minor ownership stake in the Spirits of St. Louis, Schupak has received ten percent of the proceeds paid to the Silnas by the four former ABA teams.[131] As of January 2014, the Silnas had received an estimated $300 million from the settlement agreement.[132] Under the current media rights deal, each of the four former ABA teams contribute about $4.75 million per year to the Silnas.[133] For instance, during the 2010–11 NBA season, the New York Knicks

128 Rovell, *supra* note 120. According to Commissioner Silver, technology companies such as Google and Apple may even be prepared to bid on the NBA's next offering of media rights. *Id.*
129 Sandomir, *supra* note 117. In January 2015, the NBA expanded its agreement with Chinese Internet company Tencent Holdings Ltd. Eben Novy-Williams, *NBA Expands China Business with Five-Year Tencent Extension*, BLOOMBERG BUS., Jan. 30, 2015, http://www.bloomberg.com/news/articles/2015-01-30/nba-expands-china-business-with-five-year-tencent-extension. Under the deal, which is valued at about $700 million, Tencent will carry a record number of live NBA games and original NBA programming, including the regular season, playoffs, NBA Finals, draft and All-Star Game. Furthermore, "the NBA and Tencent will make the first-ever NBA League Pass offering in China, giving fans access to [a] full season of live and on-demand games." *Id.*
130 Burke, *supra* note 16. According to some sources, the Silnas did not actually begin receiving payments under the settlement agreement until 1980. Wertheim, *supra* note 106; Sandomir, *supra* note 107. "The Silnas tried to get back into basketball by buying the Nets in 1979 from Roy Boe. But the deal never happened. The Silnas got out of their knitting business in 1982. Dan ran a photo-finishing shop in New Jersey from 1983 until 2008. Ozzie still runs an embroidery business in California and is active in coastal conservation projects in his home town of Malibu." Burke, *supra* note 16. Interestingly, the Silnas have also experienced some bad luck with regard to their finances. According to multiple sources, they were clients of Bernard L. Madoff, and lost all of the money they had invested with him, allegedly collecting $24 million in fictitious profits. *Id.*; Darren Rovell, *Greatest Sports Deal Undone . . . by Madoff?*, CNBC, Feb. 5, 2009, http://www.cnbc.com/id/29030647/Greatest_Sports_Deal_Undone_By_Madoff; Sandomir, *supra* note 107 (According to lawsuits filed against the Silnas by the trustee for the victims of Madoff's Ponzi scheme, the Silnas and their relatives, family trusts, and two corporate entities collected $24 million in fictitious profits.).
131 Gaines, *supra* note 100. Schupak currently runs an investment firm called SGI Cambium, of which he is the founder and CEO. Burke, *supra* note 16; *SGI Cambium Merchant Bank - Executives*, SGI CAMBIUM GLOBAL MERCHANT BANK, http://www.sgicambium.com/about_executives.html (last visited May 1, 2014).
132 Burke, *supra* note 2.
133 Burke, *supra* note 16.

received an estimated $31 million in shared NBA television revenue.[134] Meanwhile, the New Jersey Nets, formerly the New York Nets and now known as the Brooklyn Nets, one of the four former ABA teams that must pay the Silnas, received $26.25 million.[135] The Silnas received $19 million combined from the four former ABA teams.[136]

A. *Shifting Perceptions of the Silnas' Deal*

The owners of the four former ABA teams apparently regretted their shortsighted deal with the Silnas almost immediately. "The former ABA owners attempted to buy out the Silnas in 1979. They tried again in 1995. The Silnas never considered either offer."[137] Another of the numerous occasions on which the owners attempted to buy out the Silnas was reportedly just prior to the financial crash in 2008.[138] Although the deal was insignificant to Indiana Pacers owner Herb Simon when he purchased the team in 1983 for $11 million, it has certainly mattered to him in more recent years.[139] In response to Simon's complaints about the deal, Dan Silna has essentially stated that Simon should consider himself fortunate to own a franchise that has appreciated in value so dramatically.[140] According to Forbes' valuation, the Indiana Pacers franchise was worth approximately $830 million as of January 2015.[141] While Simon's return on

[134] *Id.*
[135] *Id.*
[136] *Id.* Other sources indicate that the Silnas received an amount closer to $17.5 million during the 2010–11 season. Wertheim, *supra* note 106; Sandomir, *supra* note 107. Nevertheless, regardless of the precise amount of the Silnas' receipts, this example serves as a helpful illustration of how their media rights have impacted the four former ABA teams' annual media revenues.
[137] Burke, *supra* note 16. Apparently, "[i]n the early 1980s, the teams discussed buying out the Silnas for $5 million to $6 million but did not pursue it. They offered substantially more in the late 1990s, but the Silnas rejected the offer." Sandomir, *supra* note 107.
[138] Sandomir, *supra* note 8.
[139] In Simon's words, "Something went wrong somewhere. . . . The intent of the deal [with the Silnas] was not to have it in perpetuity. It was to compensate them for the loss of their franchise. It's just an egregious situation now. . . . This deal has gone way beyond its original intent. It has to be restructured." Burke, *supra* note 16.
[140] *Id.*
[141] *The Business of Basketball List – Forbes*, FORBES, http://www.forbes.com/nba-valuations/list/ (last visited Feb. 7, 2015). According to Forbes, the most valuable NBA franchise as of January 2015 was the Los Angeles Lakers, valued at $2.6 billion. *Id.* In fact, the average NBA franchise is now worth $1.1 billion, a seventy-four percent increase over last year's average value, with eleven franchises now worth at least $1 billion. Kurt Badenhausen, *Lakers Top 2015 List of NBA's Most Valuable Teams; Average Franchise Is Now Worth Record $1.1 Billion*,

investment is certainly very favorable, it is important to note that the Silnas' deal, unlike Simon's ownership of the Pacers franchise, does not require the payment of operating expenses or the accumulation of debt.[142] Rather, the Silnas' money is essentially pure profit.[143]

B. *Legal Battles with Harry Weltman*

Much like the NBA at large, the Spirits' owners have had to contend with litigation as the value of their share of NBA media rights revenue has appreciated. Upon realizing the true value of this media rights revenue, former Spirits president and general manager Harry Weltman, who at one time had a limited partner's share in the team, filed a lawsuit against the Silnas and Schupak in 1989.[144] Originally, "[t]he investors formed the Spirits of St. Louis on October 14, 1974, and filed [an] amendment purporting to remove Weltman as a limited partner in April 1975."[145] Evidently, when the team struggled in St. Louis, the partnership experienced financial difficulties and had to seek out additional investors.[146] Weltman was concerned about potential personal liability stemming from the partnership's financial difficulties.[147] When he expressed his concern to Schupak, Schupak assured him that he would be removed from the ranks of the limited partners and would thus be shielded from any further potential liability.[148] Schupak also assured him that this change of status would be reflected in an amended certificate of limited

FORBES, Jan. 21, 2015, *available at* http://www.forbes.com/sites/kurtbadenhausen/2015/01/21/average-nba-team-worth-record-1-1-billion-2/. The league's prosperous outlook was buoyed by former Microsoft CEO Steve Ballmer's agreement to purchase the Los Angeles Clippers for an astonishing price of $2 billion in the wake of the Donald Sterling scandal. Sharon Terlep & Amol Sharma, *NBA Seeks to Double Rights Fees from Disney, Time Warner*, WALL ST. J., July 14, 2014, *available at* http://online.wsj.com/articles/nba-seeks-to-double-rights-fees-from-disney-time-warner-1405387769 ("Anticipation of a rich national television contract was a factor behind the $2 billion price former Microsoft Chief Executive Steve Ballmer agreed to pay for the Los Angeles Clippers.").

142 Burke, *supra* note 16.

143 *Id.*

144 Weltman v. Silna, 879 F.2d 425 (8th Cir. 1989).

145 *Id.* at 427.

146 Weltman v. Silna, 936 F.2d 358, 359 (8th Cir. 1991).

147 *Id.*

148 *Id.*

partnership.[149] After amending a memorandum to expressly state that Weltman had resigned as a limited partner, Schupak sent the memorandum amendments to Weltman by both telex and mail.[150] Essentially, Weltman's lawsuit claimed that the amendment was invalid, and that he was, therefore, entitled to a percentage of profits under the original partnership agreement.[151] As such, he demanded a share of the television media rights payments paid, or to be paid, to the Spirits partnership under the merger settlement agreement, but the Silnas and Schupak refused to pay him.[152] Ultimately, the amendment, which did not include Weltman as a limited partner, was deemed to be valid, and thus Weltman was not entitled to the judgment he sought.[153]

C. *Recent Lawsuit Filed by the Silnas*

In recent years, the growth of NBA media rights has been so explosive and dynamic that even the Silnas, who have made hundreds of millions of dollars from their 1976 settlement agreement, filed a lawsuit against the four former ABA teams and the NBA, asserting claims regarding new revenue streams by invoking the settlement's broad definition of broadcast revenues.[154] First, their lawsuit alleged that the four teams had refused to pay them their fair share of international visual media broadcast revenue.[155] In addition, the suit accused the NBA of excluding from payments to the Spirits' owners "revenues . . . from the broadcast of NBA games on NBA TV and on cable television signals that broadcast beyond the geographical limit

[149] *Id.*
[150] *Id.*
[151] Weltman v. Silna, 739 F. Supp. 477, 478 (E.D. Mo. 1990), *aff'd*, 936 F.2d 358 (8th Cir. 1991).
[152] *Id.* at 479.
[153] *Id.* at 482.
[154] Spirits of St. Louis Basketball Club, L.P. v. Denver Nuggets, Inc., 906 N.Y.S.2d 776 (Sup. Ct. 2009), *aff'd*, 922 N.Y.S.2d 349 (App. Div. 2011). At the time the 1976 settlement was negotiated, young lawyer David Stern, the NBA's outside counsel, foresaw the danger of a perpetual contract and thus tried to indemnify the league from any future disputes that might arise from it. Wertheim, *supra* note 106. Schupak countered by inserting "an intentionally broad definition of broadcast revenues, a clause that could one day make the contract applicable to distribution channels unimaginable in 1976. 'I was blunt during these discussions,' Schupak wrote in a 2012 legal declaration. 'Rather than narrow the definition of [television] revenues, I insisted instead that we add a new sentence [to] emphasize that this was a broad definition that could not be evaded or made obsolete.'" *Id.*
[155] *Spirits*, 906 N.Y.S.2d 776, at *1.

allocated to individual teams for broadcast of their own games—notwithstanding the clear language of the [agreement] entitling the Spirits to share in such revenues."[156] Furthermore, the suit alleged that the NBA violated the Spirits' access and audit rights by refusing to allow "access to the NBA's records sufficient to permit the Spirits to audit the NBA's visual media broadcast revenues."[157] In September 2012, the Silnas attempted to obtain what they considered "their fair share of international television money and other revenues."[158] As of November 2013, a judge's ruling had granted the Silnas a share of all Internet revenue received by the four former ABA teams.[159]

D. *Recent Settlement Agreement*

Amid concerns that the Silnas' percentage of NBA media rights revenue might increase given that they "were suing for a share of 'visual media' that did not exist in 1976, including online broadcasts, the NBA's own network, and international broadcasts," the NBA engaged the brothers in settlement talks.[160] Negotiations between the league and the Silnas gathered momentum during the last six to nine months of 2013 and early January 2014.[161] Apparently, the eventual settlement reached in early January was made possible by the Silnas' growing reluctance to continue fighting the league.[162] For its part, the NBA had sought a way to end its deal with the Silnas for many years, but recently became particularly intent on doing so given the enormous expectations surrounding its new media rights deals.[163] Under the new agreement

[156] *Id.*
[157] *Id.*
[158] Rovell, *supra* note 1; Sandomir, *supra* note 107 ("In Manhattan federal court on Thursday, lawyers for the Silna brothers and the league argued over whether the men are owed more money beyond what they get from the [NBA]'s national broadcast and cable television contracts.").
[159] Gaines, *supra* note 100.
[160] Gaines, *supra* note 111.
[161] Sandomir, *supra* note 8.
[162] Burke, *supra* note 2; Sandomir, *supra* note 8.
[163] "The league's media rights deals expire after the 2015–16 season, and it does not want any" of the money from its new deals "going the [Silnas'] way." Burke, *supra* note 2. As one NBA executive noted prior to the completion

between the league and the Silnas, the Silnas "will receive a $500 million upfront payment, financed through a private placement of notes by JPMorgan Chase and Merrill Lynch, according to three people with direct knowledge of the agreement."[164] In addition, the deal will end the NBA's massive perpetual payments to the Silnas and settle the federal lawsuit filed by the Silnas "that demanded additional compensation from sources of television revenue that did not exist in 1976, including NBA TV, foreign broadcasting of games and League Pass, the service that lets fans watch out-of-market games."[165] The Silnas will continue to receive some television revenue, some of which will come from the "disputed sources named in the [recent] lawsuit, through a new partnership that is to be formed with the Nets, the Pacers, the Nuggets and the Spurs."[166] Nevertheless, unlike its predecessor, the new agreement contains a buyout clause, which, if exercised, would allow the NBA to end the deal at any time.[167]

V. CONCLUSION

NBA media rights have evolved dramatically since the time of the NBA-ABA merger in 1976. As revenues have grown explosively and new forms of "visual media" have emerged, the NBA's antiquated media rights settlement deal with the owners of the Spirits of St. Louis has had an increasingly significant impact.[168] Just as the Spirits' brief yet colorful history began to fade into relative obscurity at the time of the merger, the team's owners have since spirited away hundreds of millions of dollars as a result of the deal. Essentially, the deal, which can only be

---

of the new deals, even if the league's annual media rights fees had only increased, as expected, to close to $2 billion, then the Silnas' windfall would have swelled to $36 million annually in the absence of a new settlement agreement. Wertheim, *supra* note 106. In Costas' words, "My guess is that for the [NBA], the upside is that in the foreseeable future, there will come a time when they will not have to look at this and blanch and it will be in the past." Sandomir, *supra* note 8.

[164] Sandomir, *supra* note 8.
[165] *Id.*
[166] *Id.*
[167] Gaines, *supra* note 111; Sandomir, *supra* note 8.
[168] Gaines, *supra* note 111; Sandomir, *supra* note 8; Spirits of St. Louis Basketball Club, L.P. v. Denver Nuggets, Inc., 906 N.Y.S.2d 776, at *1 (Sup. Ct. 2009), *aff'd*, 922 N.Y.S.2d 349 (App. Div. 2011).

fully understood in the context of the circumstances surrounding the merger,[169] is a product of a bygone era, a reminder of a time not so long ago in which sports ventures were not yet "overexposed and overtelevised."[170] Much like the ABA as a whole, perhaps the deal will one day be remembered in somewhat legendary and mysterious fashion. After all, in light of the recent settlement agreement between the Silnas and the NBA, the league is now capable of fully terminating the deal at any time.[171] For now, however, the "greatest sports deal of all time" lives on, albeit in altered form, a wild vestige of a franchise that was truly emblematic of the wild league known as the ABA.[172]

[169] *See* Sandomir, *supra* note 8.
[170] PLUTO, *supra* note 14, at 23.
[171] Gaines, *supra* note 111; Sandomir, *supra* note 8.
[172] *ESPN 30 for 30 Volume II: Free Spirits*, *supra* note 6; Powell, *supra* note 9; PLUTO, *supra* note 14, at 349 (referring to the Spirits as "the wildest team of them all").