

**Florida Coastal School of Law**

---

**From the Selected Works of Roger M. Groves**

---

Summer 2011

**📖 New Age Athletes as Social Entrepreneurs;  
Proposing A Philanthropic Paradigm Shift And  
Creative Use of Limited Liability Company Joint  
Ventures**

Roger M Groves, *Florida Coastal School of Law*



Available at: [https://works.bepress.com/roger\\_groves/9/](https://works.bepress.com/roger_groves/9/)



WAKE FOREST  
JOURNAL OF BUSINESS AND  
INTELLECTUAL PROPERTY LAW

---

VOLUME 11

2010 - 2011

NUMBER 2

---

**NEW AGE ATHLETES AS SOCIAL ENTREPRENEURS -  
PROPOSING A PHILANTHROPIC PARADIGM SHIFT AND  
CREATIVE USE OF LIMITED LIABILITY COMPANY JOINT  
VENTURES**

Roger M. Groves<sup>†</sup>

“If LeBron were an IPO, I’d buy it . . . At 21, I wasn’t remotely as mature as LeBron.”

–Warren Buffet<sup>1</sup>

“I want to . . . do things differently than anyone has ever done them before. Of course, I grew up watching Michael [Jordan] . . . and he set the roadmap. I want to run my own business. I want to *be* my own business.”

–LeBron James<sup>2</sup>

While professional athletes in this country’s four most popular professional leagues have significant player salaries, this article

---

<sup>†</sup> Roger M. Groves is an associate professor at Florida Coastal School of Law, former tax judge, and former equity partner at Howard & Howard, Attorneys PC. Emphatic appreciation is extended to Clarence Sydnor, Jonathan Northington, and Tier Brown for their valuable contributions as research assistants.

<sup>1</sup> Tim Arango, *Lebron Inc., The Building of a Billion-Dollar Athlete*, Dec. 10, 2007, at 100, 102, available at [http://money.cnn.com/2007/11/28/news/newsmakers/lebron\\_james.fortune/index.htm?postversion=2007112807](http://money.cnn.com/2007/11/28/news/newsmakers/lebron_james.fortune/index.htm?postversion=2007112807). Buffet is one of several financial advisors, when asked, for James and his companies. According to Buffet, James and his CEO, childhood chum Mr. Maverick Carter, who replaced James’ established agent, “Neither of them needs my help, but I am available if they need me.” *Id.*

<sup>2</sup> *Id.* at 100, 104. The above passages focus on James’ profit making enterprises, but stem from the desire of a young player to take control of his own economic fortunes. This article extends the opportunity to those with the same new age mentality to also take control over his charitable activities, and the not-for-profit entities he can own to accomplish his charitable goals.

focuses on the National Basketball Association (“NBA”).<sup>3</sup> The NBA players are Exhibit A for an unrealized opportunity. They comprise a group of the world’s most talented employees for this particular industry who, by virtue of both wealth and cultural connectivity, have an extraordinary “giving back” impact on urban America. If the vast majority of those players would establish charitable foundations and pool their funds they could do something unprecedented— they could have transformative effects on entire communities. Such like-minded players can be termed “New Age Athletes.”<sup>4</sup>

### THE PRE-ENLIGHTENMENT STATUS QUO

The term “New Age Athlete” is a bit of a misnomer because the reference is not just to those who are chronologically new in years on the planet. Each year there will be rookie players as young as nineteen years old joining an NBA roster but choosing to translate their instant multi-million dollar income into a multi-million dollar consumption of goods and services with little or no capital contributions to charitable causes or the ownership of assets to better the lives of others.

What’s worse is that some of those players have a short-lived career in the NBA, and an even shorter financial plan or post-playing landing spot, en route to a life of despair.<sup>5</sup> Sixty percent of NBA

---

<sup>3</sup> The three other major professional leagues are the National Football League, Major League Baseball, and the National Hockey League.

<sup>4</sup> This author defines New Age Athletes as those professional athletes with the perspective to create their own sophisticated exempt entities, including private foundations, public charities or donor-advised funds to joint venture with other for-profit entities (corporations and limited liability companies) to make major and sustainable improvements in underserved communities. That perspective includes a focus on building assets that generate revenue rather than spending on consumer goods that do not.

<sup>5</sup> Ten-year veteran Ray Williams became exemplifies the tragic case in point. He was a 1977 NBA top-10 draft pick, compared favorably to the former captain of the New York Knicks, led the team in scoring over his first four years, once scoring fifty-two points, and later signed a three-year \$1.5 million contract. *See* Bob Hohler, *Desperate Times: Ex-Celtic Williams, Once a Top Scorer, is Looking for an Assist*, THE BOSTON GLOBE (July 2, 2010) [http://www.boston.com/sports/basketball/celtics/articles/2010/07/02/desperate\\_times/](http://www.boston.com/sports/basketball/celtics/articles/2010/07/02/desperate_times/) (last visited Mar. 19, 2011). Seven years after his retirement and following several failed financial and employment efforts, Williams filed for bankruptcy. *Id.* After filing for bankruptcy protection a second time in 1994, he is reportedly homeless, sleeping in a 1992 Buick. *Id.* He “rests his head on a pillow of tattered towels . . . tunes his boom box to gospel music, closes his eyes, and wonders.” *Id.* He is now fifty-five years old, a diabetic and unemployed. *Id.* He has not “fallen prey to drugs, alcohol, or gambling,” but rather a lack of financial wherewithal and training. *Id.* He retired in 1987 without a college degree or professional skills. *Id.* He was a substitute teacher, delivered mail,

players are reportedly broke within five years after retirement.<sup>6</sup> As summed up by Danny Schayes, former NBA player turned businessman, “Guys go broke because they surround themselves with people who help them go broke.”<sup>7</sup> Ex-Knicks Mark Jackson turned into a successful national television broadcaster once he got rid of a business manager he couldn’t trust. “It turns out the guy was forging Jackson’s signature on checks—an estimated \$2.6 million worth—to feed a gambling jones.” Jackson said, “And it wasn’t like I was a rookie. I was a veteran.”<sup>8</sup>

There are examples of this in every other major sport. The National Football League (“NFL”) is one such league with players lacking economic vision and savvy. Within two years of retirement, seventy-eight percent of former NFL players have “gone bankrupt or are under financial stress because of joblessness or divorce.”<sup>9</sup> Mark

---

and tended bar; he had been a cleaner, handyman, high school girl’s basketball coach, bakery worker, and golf course groundskeeper. *Id.* But Williams “had trouble holding the jobs partly because he had spent his life training for little else but playing basketball. *Id.* If he had established a foundation during his decade-long NBA career perhaps he would have evolved, become involved in ventures with other business persons and nonprofits to build elderly housing units, or counsel low-income youth. Then he may have had a landing spot and a future career off the court. Williams may be financially alone, but not in circumstance.

Latrell Sprewell was a four-time NBA All-Star, with estimated lifetime league earnings of over \$96 million, but lost his home to foreclosure in May 2008 after his multi-million dollar yacht had been repossessed in 2007. Mark Riddix, *Seven Costly Pro Athlete Screw-Ups*, YAHOO! SPORTS (Mar. 10, 2010), <http://sports.yahoo.com/top/news?slug=ys-investopediamoneyloss031010>. Rick Reilly, *Life of Reilly*, ESPN.COM (July 1, 2008), <http://sports.espn.go.com/espnmag/story?id=3469271> [hereinafter Reilly, *Life of Reilly*].

NBA All-Star Kenny Anderson’s estimated lifetime earnings of \$60 million did not prevent him from filing for bankruptcy in October 2005. Dan Le Batard, *Former NBA Player Kenny Anderson is Finding Life’s Riches After Career*, MIAMI HERALD (Apr. 11, 2010), <http://www.miamiherald.com/2010/04/11/1573889/finding-lifes-riches.html>. Scottie Pippen, a key part of six NBA championships with Michael Jordan and the Chicago Bulls, lost over \$27 million through questionable investments and owes over \$5 million to the U.S. Bank despite earning over \$120 million during his seventeen-year NBA career. *Id.* As summed up by Danny Schayes, former NBA player turned businessman, “Guys go broke because they surround themselves with people who help them go broke.” Rick Reilly, *Life of Reilly*, ESPN.COM (July 1, 2008), <http://sports.espn.go.com/espnmag/story?id=3469271> [hereinafter Reilly, *Life of Reilly*].

<sup>6</sup> Reilly, *Life of Reilly*, *supra* note 5.

<sup>7</sup> *Id.*

<sup>8</sup> *Id.*

<sup>9</sup> Pablo Torre, *How (and Why) Athletes Go Broke*, SPORTS ILLUSTRATED, Mar. 23, 2009, available at <http://sportsillustrated.cnn.com/vault/article/magazine/>

Brunell has been a three-time Pro Bowl quarterback in the NFL and has a Super Bowl ring from 2009 with the New Orleans Saints.<sup>10</sup> He has made nearly \$52 million during his fifteen-year career. But a series of disastrous real estate acquisitions led to his announcement that he will file for bankruptcy.<sup>11</sup> Baseball all-star Jack Clark was thirty-six years old and still playing with the Boston Red Sox when he filed for personal bankruptcy.<sup>12</sup> At that time, Clark had been in the league for eighteen years. He claimed to have assets of almost \$4.8 million.<sup>13</sup> But he listed debts of more than \$11.4 million, including owing money on seventeen of his eighteen automobiles.<sup>14</sup> Those cars included a 1990 Ferrari that cost \$717,000 and three Mercedes Benzes costing him between \$103,000 and \$143,000.<sup>15</sup> At the time of filing, he owed about \$400,000 in federal and state taxes, and lost approximately \$1 million in a drag-racing venture.<sup>16</sup> George Best was described as “soccer’s first pop icon.”<sup>17</sup> Compared often to Joe Namath, Best rose from public housing projects in Belfast, Northern Ireland to be the most notable worldwide soccer hero of the working class.<sup>18</sup> Best owned fashion boutiques, hair salons, a travel agency and nightclubs, but had a long history of alcohol abuse.<sup>19</sup> After having a liver transplant at age fifty-six, Best died at age fifty-nine.<sup>20</sup> Though he amassed nearly \$100 million during his career, he summed up his financial life on the BBC, stating: “I spent a lot of money on booze [women] and fast cars. The rest I just squandered.”<sup>21</sup>

---

MAG1153364/index.htm; see also *For Ex-Pro Athletes, Big Bucks Often Fleeting*, NAT’L PUB. RADIO (Mar. 23, 2009),

<http://www.npr.org/templates/story/story.php?storyId=102302881>.

<sup>10</sup> *QB Brunell Says He’ll File for Bankruptcy*, ESPN.COM (June 25, 2010), <http://sports.espn.go.com/nfl/news/story?id=5326679> (last visited Aug. 29, 2010).

<sup>11</sup> *Id.*

<sup>12</sup> *Sports People: Baseball; Jack Clark Files for Bankruptcy*, NYTIMES.COM, (Aug. 8, 1992)

<http://query.nytimes.com/gst/fullpage.html?res=9E0CE0DD1639F93BA3575BC0A964958260>.

<sup>13</sup> *Id.*

<sup>14</sup> *Id.*

<sup>15</sup> *Id.*

<sup>16</sup> *Id.*

<sup>17</sup> Jack Bell, *George Best, Soccer Star and Pop Icon, Is Dead at Fifty-Nine*, NYTIMES.COM, (November 26, 2005)

<http://query.nytimes.com/gst/fullpage.html?res=9C02E3DA1731F935A15752C1A9639C8B63&sec=&spon=&pagewanted=print>.

<sup>18</sup> *See id.*

<sup>19</sup> *Id.*

<sup>20</sup> *Id.*

<sup>21</sup> *Id.*

As the Mark Jackson testimonial reveals, this is not a malady of simple ignorance.<sup>22</sup> Even Joe Gibbs, a Hall of Fame NFL coach and successful businessman in the race car world, admitted that it took him four and a half years for him to recover financially from his business ventures, despite multi-million dollar contracts of his own spanning several years.<sup>23</sup> Gibbs said, “[A]ll it takes is one mistake . . . signing up for the wrong open-ended venture of some kind, and you would wind up in a mess like [that of Mark Brunell].”<sup>24</sup>

#### THE EMBRYONIC NEW AGE ATHLETIC MOVEMENT

The new perspective for athletes is to use sophisticated private foundations in partnership with other for-profit entities to make major and sustainable improvements in communities from which they come. One such example is a player who is now retired after nearly a decade in the NBA. A testimonial to his status as a New Age Athlete is codified in the State of the Union address in January 2007 by President George W. Bush:

The greatest strength we have is the heroic kindness, courage and self-sacrifice of the American people. You see this spirit often if you know where to look. And tonight we need only look above to the gallery. Dikembe Mutombo grew up in Africa amid great poverty and disease. He came to Georgetown University on a scholarship to study medicine but Coach John Thompson took a look at Dikembe and had a different idea. Dikembe became a star in the NBA and a citizen of the United States. But he never forgot the land of his birth or the duty to share his blessings with others. He built a brand new hospital in his old hometown. A friend has said of this good-hearted man, “Mutombo believes that God has given him this opportunity to do great things. And we are proud to call this son of the Congo a citizen of the United States of America.”<sup>25</sup>

---

<sup>22</sup> See *supra*, note 8.

<sup>23</sup> See NPR Staff, *Ex-Redskins Coach Teaches NFL Players About Money*, NPR (Aug. 21, 2010), <http://www.npr.org/templates/story/story.php?storyId=129325429>.

<sup>24</sup> Transcript of *Ex-Redskins Coach Teaches NFL Players About Money*, NPR (Aug. 21, 2010), <http://www.npr.org/templates/transcript/transcript.php?storyId=129325429>.

<sup>25</sup> Transcript of *President Bush's 2007 State of the Union Address*, WASH. POST (Jan. 23, 2007, 11:15 PM), <http://www.washingtonpost.com/wp-dyn/content/article/2007/01/23/AR2007012301075.html>.

A statistical review of current NBA players reveals that many are focused on such charitable projects. NBA teams in the aggregate pay their players a total of over \$2 billion per year.<sup>26</sup> The twenty-five highest paid NBA players have a combined salary of over \$450 million.<sup>27</sup> That purchasing power would make those twenty-five players the 213th richest nation in the world, not far behind American Samoa.<sup>28</sup>

Many of these top twenty-five players have cultural connectivity with crisis-burdened urban areas, and as such, high-octane potential to be investors, as some already are, in urban projects. An investigative analysis found 89 NBA player charities.<sup>29</sup> Income from endorsements can also be funneled into foundations, which in total can result in significant amounts of pooled assets. LeBron James' high school graduation gift endorsement from Nike was \$90 million and, commencing with 2007, he led the NBA in endorsements with an estimated \$25 million in that year alone. His total endorsement package was \$170 million.<sup>30</sup> In light of his entrepreneurial perspective, LeBron James is the poster child for the "New Age Athlete."

While there is no readily available information on the actual percentage of salary donated to charity, if that top twenty-five allocated even .05% of their salaries to their foundations there would be over \$22 million annually, with the potential to be \$67 million in three years before adding any interest or economic return on the invested funds.

The potential is far greater once the entire NBA pool of players is considered. There are approximately 440 players on team rosters

---

<sup>26</sup> The NBA total payroll for 2009-2010 was \$2,297,367,718. *USA Today Salaries Database, 2009-10 NBA Salaries by Team*, USA TODAY, <http://content.usatoday.com/sportsdata/basketball/nba/salaries/team> (last visited Mar. 25, 2011).

<sup>27</sup> *USA Today Salaries Database, 2009-10 NBA Top 25 Player Salaries*, USA TODAY, <http://content.usatoday.com/sportsdata/basketball/nba/salaries/player/top-25> (last visited Mar. 25, 2011).

<sup>28</sup> CENTRAL INTELLIGENCE AGENCY, *The World Factbook: GDP (PURCHASING POWER PARITY)*, <https://www.cia.gov/library/publications/the-world-factbook/rankorder/2001rank.html>.

<sup>29</sup> Michael C. Lewis, et al., *NBA Player Charities Often a Losing Game*, THE SALT LAKE TRIBUNE, Dec. 27, 2008, available at [http://replay.waybackmachine.org/20090308111949/http://www.sltrib.com/arts/ci\\_11314692](http://replay.waybackmachine.org/20090308111949/http://www.sltrib.com/arts/ci_11314692).

<sup>30</sup> Tim Arango, *Lebron Inc.: The Building of a Billion-Dollar Athlete*, FORTUNE, Dec. 10, 2007, at 100, 106.

over the course of the season.<sup>31</sup> Of those players, only 130 appeared to have functional foundations from investigations to date.<sup>32</sup> A survey of NBA player foundations indicates that from the total of 433 players, only 43 filed the required IRS Form 990, and only 38% of NBA players' foundations met the minimum criteria for what is customarily regarded as qualitative philanthropy, a primary component of which is an analysis of the amount of funding actually devoted to charitable programs, rather than administration.<sup>33</sup>

Hence, there are significant opportunities for some level of charitable giving among those who have, at least, a great tax incentive to establish a foundation.<sup>34</sup> As discussed below, therein lies the opportunity to collectively provide a transformative impact of historic proportions on communities in need.

#### THE PHILANTHROPIC OPPORTUNITY

Despite the accumulation of astronomical wealth by professional players, sophisticated philanthropy has no legs without a mentality of humility and service. Benjamin Franklin was explaining to his mother in a letter why he had devoted so much of his life to public service. He is quoted as saying, "I would rather have it said, 'He lived usefully,' than, 'He died rich.'"<sup>35</sup>

The professional athlete, already rich, may be highly motivated to assist victims of breast cancer if his mother was one. Two facts poignantly point to NBA player foundations as focusing in that area. Approximately 72% of NBA players are African Americans.<sup>36</sup> African-American women are particularly victimized by breast cancer.<sup>37</sup> A recent study concluded that "African-American women ages 35 to 44 have a death rate from breast cancer twice that of white

---

<sup>31</sup> NBA.com,

<http://www.nba.com/statistics/player/PRA.jsp?league=00&season=22009&conf=OVERALL&position=0&splitType=9&splitScope=GAME&qualified=Y&yearsExp=-1&sortOrder=9&splitDD=> (last visited Feb. 21, 2011).

<sup>32</sup> Database compiled from various web-based sources, including the NBA players association website.

<sup>33</sup> *Id.*

<sup>34</sup> The tax incentives include deductions for charitable contributions under section 501(c)(3) of the Internal Revenue Code.

<sup>35</sup> BARACK OBAMA, *THE AUDACITY OF HOPE* 361 (2006).

<sup>36</sup> See David Freeman, *20 Second Timeout*, BLOGSPOT.COM, (Mar. 6, 2006), <http://20secondtimeout.blogspot.com/2006/03/lebron-james-and-cavaliers-deliver.html>.

<sup>37</sup> See Brenda Wilson, *For Black Women Breast Cancer Strikes Younger*, NATIONAL PUBLIC RADIO (Dec. 7, 2009), <http://www.npr.org/templates/story/story.php?storyId=120985060>.

women the same age.”<sup>38</sup> Mothers, grandmothers, siblings and spouses may individually or collectively have influence with those professional athletes, and either they or someone they know has been or likely will be victimized by breast cancer. If that influence group is already involved or will become involved with player’s private foundations, connectivity to such health-focused projects exist for the foundation.

Motherly influence has indeed been reflected in some player foundations. Larry Hughes, a former NBA shooting guard, had an annual salary of \$12.8 million and \$60 million through 2010.<sup>39</sup> His foundation was established by his mother, with a goal to assist families of organ donors and recipients, specifically children.<sup>40</sup> Jamaal Magloire was a center for the Miami Heat during the 2009-10 season, and had a salary of over \$1 million.<sup>41</sup> In 2002 while Magloire played for the Toronto Raptors, his mother inspired the Youth Deserve a Chance to Dream Foundation designed particularly to assist the youth of Toronto, Canada. The foundation’s goal is to create opportunities to improve the lives of young people by strengthening underfunded local community youth services through donations and fundraisers.<sup>42</sup>

This same influence group may sensitize the player to related issues for African-American women. Infant mortality rates and low birth weights are disproportionately worse among African-Americans.<sup>43</sup> One commonly identified factor is the lack of adequate resources for sufficient prevention, education, and screening.<sup>44</sup> Player foundations may provide the resources, be it through establishing their own clinics or infusing cash into existing governmental or nonprofit organizations.

Similarly, access to qualitative health care insurance is a factor. So, while overall cancer rates in the United States are declining, African-Americans often lag behind in those gains with their diminished access to private health insurance, and disease detection

---

<sup>38</sup> *Id.*

<sup>39</sup> See USA TODAY, <http://content.usatoday.com/sports/basketball/nba/salaries/playerdetail.aspx?Iname=H&player=181> (last visited June 7, 2010).

<sup>40</sup> See NATIONAL BASKETBALL ASSOCIATION, [http://www.nba.com/playerfile/larry\\_hughes/bio.html](http://www.nba.com/playerfile/larry_hughes/bio.html)

<sup>41</sup> See USA TODAY, <http://content.usatoday.com/sports/basketball/nba/salaries/playerdetail.aspx?Iname=M&player=238> (last visited June 7, 2010).

<sup>42</sup> See YOUTH DESERVE A CHANCE TO DREAM, [http://youthdeserveachancetodream.com/index.php?option=com\\_content&task=view&id=12&Itemid=26](http://youthdeserveachancetodream.com/index.php?option=com_content&task=view&id=12&Itemid=26).

<sup>43</sup> See Wilson, *supra* note 43.

<sup>44</sup> *Id.*

occurring later, rather than sooner.<sup>45</sup> Foundations may contribute to insurance programs with the charitable purpose of bridging the private insurance gap. As discussed below, such an effort may include joint ventures or other collaborative actions with private for-profit service providers of insurance.

Further, these athletes; foundations can participate in a myriad of other project types and programs designed specifically for low-income communities, sharing many tax benefits with for-profit joint venturers. A federally sponsored multi-billion dollar tax credit program (New Markets Tax Credits) provides incentives to lure investors into projects designed to revitalize urban communities in America.<sup>46</sup> This author has examined the projects that received tax credits and identified some as “properly purposed projects.”<sup>47</sup> Such projects include healthcare clinics as well as funds to provide working capital for small minority developers of low income housing. A larger representative list of such projects that received new markets tax credits is listed in Appendix A.<sup>48</sup> Several other projects can be aligned with the federal income tax incentives to assist economically distressed areas.<sup>49</sup> A New Age Athlete may have a foundation that contributes capital or other resources to existing private-public partnerships to add housing in an area designated for tax breaks as an empowerment zone or enterprise zone.<sup>50</sup> This gives the Athlete the ability, through the use of such ventures, to gain tax-exempt financing, non-recognition and exclusion of gross income, bond credits, tax credits, expense deductions, and favorable depreciation rates. The aggregation of those benefits has often been the missing piece that

**Comment [AF1]:** I had to look this up on the BNA website and found [http://subscript.bna.com/pic2/lsll.nsf/8e9ea8728473b3be852569f9005d302a/2d129faf114523d985257411006181bd/\\$FILE/HowtoCiteBNA.pdf](http://subscript.bna.com/pic2/lsll.nsf/8e9ea8728473b3be852569f9005d302a/2d129faf114523d985257411006181bd/$FILE/HowtoCiteBNA.pdf) which explains how to cite BNA stuff. Does the original spading packet have a date that we can add? Please check this.

---

<sup>45</sup> See *id.*

<sup>46</sup> To view the federal authorizing statute, see 26 U.S.C. § 45D (2000); see also Roger Groves, *The De-Gentrification of New Markets Tax Credits*, 8 FLA. TAX REV. 213 (2007).

<sup>47</sup> The term “properly purposed projects” was used to describe the types of projects considered well-designed for the *residents* of low income core urban communities, as opposed to “problematic purposed projects” that provide new housing and entertainment venues for upper income individuals. See generally Groves, *id.* The article advocated closing loopholes in the new markets tax credits law so the credits are only provided for properly purposed projects that assist the low income residents. Currently the credits are allowed for opera houses, convention centers, museums, and high rise condominiums that the low income residents cannot likely afford.

<sup>48</sup> See *infra* Appendix A; see also Groves, *supra* note 46.

<sup>49</sup> See generally James Edward Maule, *Tax Incentives for Economically Distressed Areas*, 597 Tax Mgmt. (BNA) U.S. Income, (Date).

<sup>50</sup> See *id.*

allows the venture to make economic sense—essentially gap financing.<sup>51</sup>

### THE JACKSONVILLE, FLORIDA ILLUSTRATION

In most urban cores where the poor, historically-disenfranchised reside, a common litany of maladies is faced daily that are uncommon to the general US population: infant mortality, diabetes, prostate cancer, and asthma, just to name a few.<sup>52</sup> Jacksonville, Florida is just one of several major cities that falls into this morbidity sink hole and therefore presents a philanthropic opportunity. The city population now approaches 1 million residents, nearly 30% of which are African-American.<sup>53</sup> While the City of Jacksonville comprises the entirety of Duval County and is the largest city in square miles in the contiguous 48 states of this country,<sup>54</sup> it has an overconcentration of African Americans in economically-depressed areas, particularly in north and northwest Jacksonville.<sup>55</sup> Approximately 90% of the tenants of low income public housing provided by the City are African-American.<sup>56</sup> Just over 41% of the

---

<sup>51</sup> See *id.*

<sup>52</sup> See, e.g., Floyd J. Malveaux & Sheryl A. Fletcher-Vincent, *Environmental Risk Factors of Childhood Asthma in Urban Centers*, 103 ENVTL. HEALTH PERSPECTIVES 59 (1995) (discussing increased asthma morbidity and mortality among African Americans in urban centers).

<sup>53</sup> The 2003 estimate from the U.S. Census Bureau was 773,781, with a percentage change from April 1, 2000 to July 1, 2003 of 5.2%. African Americans represent 29.0% of the Jacksonville population according to the 2000 US Census. See U.S. CENSUS BUREAU, STATE AND COUNTY QUICKFACTS (2008), available at <http://quickfacts.census.gov/qfd/states/12/1235000.html>.

<sup>54</sup> See generally *Jacksonville's Consolidated Government*, JOURNAL (Jacksonville Historical Soc'y), available at <http://www.jaxhistory.com/journal11.html#journal> (last visited Feb. 22, 2011).

<sup>55</sup> The United States Justice Department filed suit against the City of Jacksonville and its Housing Authority claiming violations of the federal Fair Housing Act. The Justice Department alleged a “long standing pattern and practice by the City and the Jacksonville Housing Authority of refusing to site public housing anywhere except predominantly black neighborhoods.” See Press Release, U.S. Dep’t of Justice, *City of Jacksonville and Its Housing Authority Agree to Build New Public Housing Units to Comply with Fair Housing Act* (Oct. 18, 2000), available at <http://www.usdoj.gov/opa/pr/2000/October/611cr.htm> (announcing a settlement of the lawsuit, where the City agreed to build 225 new public housing units outside of the African American communities, and pay over \$380,000 in damages to complainants).

<sup>56</sup> See *id.*

African-American residents live on city blocks that are greater than 80% black.<sup>57</sup>

#### INFANT MORTALITY

The infant mortality rate for African-Americans in Jacksonville is 16.2 deaths per 1,000 births.<sup>58</sup> That rate is 122% higher than the white population generally and 20% higher than the rate among African-Americans in Florida as a whole.<sup>59</sup> From a global perspective, the Jacksonville rate among African Americans is slightly better than Lebanon, but worse than the countries of Bahrain, Malaysia, Panama, Jamaica, and Argentina.<sup>60</sup> As stated by the most recent authoritative study regarding Jacksonville infant mortality, African-American infants in Jacksonville are more than twice as likely to die within the first year of life than white babies.<sup>61</sup>

#### THE ASTHMA EPIDEMIC

One may initially think asthma is not a serious health issue, since heart disease, cancer, and AIDS take far more lives per year.<sup>62</sup> But a recent Jacksonville-area health department study revealed startling statistics about asthma-related morbidity and mortality, starting with the fact that asthma is now the most common chronic illness of Jacksonville children.<sup>63</sup> The study then notes “remarkable disparities” in asthma deaths between blacks and whites in Jacksonville.<sup>64</sup> The death rates among African Americans were 117% higher than that of whites.<sup>65</sup> Beyond the tragedy of death is the drain

---

<sup>57</sup> Lois M. Quinn & John Pawasarat, *Racial Integration in Urban America: A Block Level Analysis of African American and White Housing Patterns*, U. OF WIS.-MILWAUKEE, <http://www.uwm.edu/dept/eti/integration/integration.htm> (revised Jan. 2003).

<sup>58</sup> Urvaksh Karkaria, *Duval Black Infants at Higher Risk of Dying*, FLA TIMES-UNION, Apr. 5, 2006, at G-1; see NAT'L HEALTHY START ASSOC., <http://www.healthystartassoc.org/p1.html> (stating infant mortality refers to the death of a child prior to the first birthday).

<sup>59</sup> Karkaria, *supra* note 64.

<sup>60</sup> *The World Factbook*, CENTRAL INTELLIGENCE AGENCY, <https://www.cia.gov/library/publications/the-world-factbook/rankorder/2091rank.html>.

<sup>61</sup> *Too Young to Die; Solutions Offered*, FLA. TIMES-UNION, Aug. 29, 2005, at B-6.

<sup>62</sup> *Finding Solutions*, FLA. TIMES-UNION, Feb. 21, 2008, [http://jacksonville.com/tu-online/stories/022108/opi\\_248942343.shtml](http://jacksonville.com/tu-online/stories/022108/opi_248942343.shtml).

<sup>63</sup> Sudhir Prabhu, *Asthma: Control and Prevention*, 6 DUVAL CNTY. HEALTH DEP'T HEALTH POL'Y & EVALUATION RES. INST. 1, 1 (Nov. 2007).

<sup>64</sup> *Id.* at 2.

<sup>65</sup> *Id.* (The study and this statistic covered years 2000-2005).

on the individuals who survive, and the millions of dollars in health care costs following emergency room visits and overall hospitalization to treat the asthma attack. The disproportionate effect on African-Americans is again striking. In 2005, the hospitalization rate in Jacksonville for asthma was 91.2% higher for blacks than whites, and blacks were over two and a half times more likely to be treated in the emergency room for an attack than whites.<sup>66</sup> The inadequacy of emergency room care is that it “only [treats] the asthma attack, not the long-term problem,” which is often addressed early by primary physicians through preventive care.<sup>67</sup> These points, coupled with the fact that the “numbers of minorities with asthma is increasing exponentially” led the author of the study to conclude that asthma is a “local epidemic.”<sup>68</sup>

The same study suggests means of ameliorating the epidemic. The primary asthma prevention targets include:

1. Decreasing the occurrence of asthma through eliminating the environmental “triggers” (e.g. mold, dust, allergens, bug feces, industrial pollution).<sup>69</sup>
2. Increasing access to quality health care.<sup>70</sup>
3. Increasing education and community awareness and prevention activism.<sup>71</sup>
4. Reducing obesity and low birth weights, both of which are linked as an associated adverse factor.<sup>72</sup>

Dare we have the audacity to hope that some of those professional NBA players with \$15-21 million dollar salaries use their respective foundations to bring these curative solutions to reality? To reduce the above environmental triggers, foundations could, for example, be part of a team that engages law firms (or with pro bono

---

<sup>66</sup> *Id.* at 5.

<sup>67</sup> Larry Hannan, *Asthma in Duval a ‘Local Epidemic’*, FLA. TIMES-UNION, Feb. 8, 2008, [http://www.jacksonville.com/tu-online/stories/020808/met\\_244927017.shtml](http://www.jacksonville.com/tu-online/stories/020808/met_244927017.shtml).

<sup>68</sup> *Id.*

<sup>69</sup> Sudhir Prabhu, *Asthma: Control and Prevention*, DUVAL CNTY. HEALTH DEP’T., CTR. FOR HEALTH STATS. REPORT, Nov. 2007, at 1, 15, available at <http://www.dchd.net/services/hper/new/Reports/Reports%20in%20PDF/Volume%206,%202007/asthmafinal.pdf>; see also Larry Hannan, *Asthma in Duval a ‘Local Epidemic’*, FLA. TIMES-UNION, Feb. 8, 2008, [http://jacksonville.com/tu-online/stories/020808/met\\_244927017.shtml](http://jacksonville.com/tu-online/stories/020808/met_244927017.shtml).

<sup>70</sup> Hannan, *supra* note 75.

<sup>71</sup> *Id.*

<sup>72</sup> Prabhu, *supra* note 75, at 12.

efforts of firms) to write letters to landlords to rehabilitate mold-ridden rental units that house asthma suffering residents, or partially subsidize the cost of mold elimination. As to access to quality health care, those without health insurance already have some assistance through the Duval County Health Department.<sup>73</sup> But that department has found that “grants are difficult to get because every community in the country wants them.”<sup>74</sup> The player foundations can be an alternate source for grants, or a collaborative link to governmental sources. In light of the needs described above for Jacksonville, Florida, foundations may infuse capital or contribute to health care plans to increase access by those who are unable to afford commercial insurance.<sup>75</sup> And since these athletes are already the highest-profile examples of physical exercise, they are uniquely positioned to inspire others to minimize obesity, and thereby assist in reducing the adverse affects of that factor on the incidence of asthma. The player can make appearances at obesity awareness workshops as easily as he can appear at car dealership-sponsored golf tournaments. And his foundation can just as easily co-sponsor or outright fund those events.

The effect of remedial efforts from the player foundations can also reduce the public burden of paying for the inadequacies in asthma-related health care. African American asthma patients in Duval County’s emergency rooms are almost twice as likely to be covered under public sources, i.e. Medicaid, Medicare and KidCare.<sup>76</sup> If player foundations infuse sufficient funds into existing support structures to help these patients receive preventive care opportunities to prevent the attacks, or assist in the purchase of commercial insurance, then the incidence of emergency room visits would decrease, and so would the public costs associated with emergency room visits and hospital care. The potential savings could be significant. In 2005, Duval County costs for asthma related emergency room visits totaled almost \$8 million, equating to 7.5 % of the state total.<sup>77</sup> Nearly one in five ER asthma-related visits in Duval County were African American children between the ages of five and

---

<sup>73</sup> Hannan, *supra* note 75.

<sup>74</sup> *Id.*

<sup>75</sup> Legislative changes may be required, and proposed laws that add non-governmental entities to the mix to reduce the public burden of health care for low income residents is politically viable.

<sup>76</sup> Prabhu, *supra* note 75, at 12.

<sup>77</sup> *Health Care Costs: Asthma-Related Hospitalizations and Emergency Room Visits*, DUVAL CNTY. HEALTH DEP’T., CTR. FOR HEALTH STATS. REPORT, Nov. 2007

**Comment [AF2]:** This is not the article cited in FN75 so this needs to be a complete citation. The supra has been removed and we need to pull the source and add the information. It is on the 7th page.

fourteen, a rate 260% higher than the asthma-related ER visits of whites in Duval County.<sup>78</sup>

These disparities are revealed to show how much progress can be made with a focused attention on those in greatest need. Reducing this disparity can have the desirable effect of saving lives *and* saving dwindling public funds. As discussed below, player foundations can joint venture with for-profit members of limited liability companies to help achieve these laudable goals. But after the contemplation of laudable projects there remains the task of determining which type of legal vehicles are well-suited for those initiatives. The following sections discuss a creative and atypical type of LLC organizational structure that the IRS has authorized, albeit primarily through private letter rulings, as joint venture vehicles which this author opines are indeed well suited for New Age Athlete projects.

#### PLANTED PHILANTHROPIC SEEDS AND POOLED ASSETS

Amid negative stories of professional player criminality and tragedy, the positives are obscured, including the significant charitable activities among players through their foundations. In at least a few instances players have begun to pool their foundation funds for common projects. The Dikembe Mutombo foundation is the gold standard for these projects.

Dikembe Mutombo entered Georgetown University on an academic scholarship, intent on becoming a physician. His motivation was to help fill a health care void in his homeland of the Democratic Republic of the Congo, a void that affected him deeply since his mother died while trying to reach a hospital that was too far away for the medical assistance she needed.<sup>79</sup> While a pre-med major at Georgetown, his 7'2" frame did not go unnoticed by then-Georgetown basketball coach John Thompson. After becoming an All-American at Georgetown, Mutombo then had a near-decade long career in the NBA.<sup>80</sup> In his last years of basketball, and as recently as the 2006-2007 season, he was earning over \$2 million annually.<sup>81</sup> Throughout

---

<sup>78</sup> The actual percentage was 18%. *Asthma Disparities: Hospitalizations and Emergency Room Visits*, DUVAL CNTY. HEALTH DEP'T., CTR. FOR HEALTH STATS. REPORT, Nov. 2007.

<sup>79</sup> *African Success: Biography of Dikembe Mutombo*, AFRICAN SUCCESS, <http://www.africansuccess.org/visuFiche.php?id=458&lang=en> (last updated Aug. 8, 2008).

<sup>80</sup> *Id.*

<sup>81</sup> *NBA Player Salaries – Dikembe Mutombo*, USATODAY.COM, <http://content.usatoday.com/sportsdata/basketball/nba/salaries/player/Dikembe-Mutombo> (last visited Feb. 20, 2011).

**Comment [AF3]:** Same comment as FN83.  
Info was on page 5-6.

his playing years he used his earnings to make progress toward his collegiate dream of making a health care difference. Over several years, Mutombo donated over \$15 million through his own private foundation to bring to fruition a \$29 million project. On December 4, 2007, Mutombo opened a 10-acre, 150-bed hospital in the Democratic Republic of the Congo in memory of his mother—The Biamba Marie Mutombo Hospital & Research Center. The hospital provides care to the nation's poorest and helps to train future health professionals.<sup>82</sup> The hospital has inpatient beds, outpatient facilities, a research laboratory, and has nearly completed a project to provide the nation with its first state of the art CT scanner, while employing nearly 400 staff members.<sup>83</sup>

This pooling of funds is particularly important if the goal is to have transformative effects on entire communities. Consistent with the model envisioned in this article, Mutombo's foundation has pooled resources and partnered with other health initiatives like the World Health Organization, the Centers for Disease Control, the Bill Clinton Global Initiative, a tripartite research alliance with the Swiss Tropical Institute, the University of Kinshasa School of Public Health, UNICEF; and continues an ongoing discussion to open a bank with microfinance opportunities for the nation's developing small business community.<sup>84</sup> In conjunction with the Church of Jesus Christ of Latter-Day Saints, quality well water has been made available for not only the hospital, but also the nearby public school system.<sup>85</sup>

The accomplishments of Mutombo's foundation may also inspire New Age Athletes to see that enhanced goodwill and positive reputational aids can flow from effectively doing the right thing for the right reasons. Mutombo has received international recognition for his efforts, including honors at the domestic level such as *USA Weekend Magazine's* "Most Caring Athlete Award," and FOXSports.com's designation as the most generous athlete in the world.<sup>86</sup> As noted above, the State of the Union address in January 2007 included accolades from President George W. Bush.<sup>87</sup> Most recently, in January 2010, Mutombo was recognized as a humanitarian by

---

<sup>82</sup> See DIKEMBE MUTOMBO FOUND., INC., <http://www.dmf.org> (last visited June 7, 2010).

<sup>83</sup> See generally *id.*

<sup>84</sup> *Id.*

<sup>85</sup> *Id.*

<sup>86</sup> See *id.*

<sup>87</sup> See Transcript of *President Bush's 2007 State of the Union Address*, *supra* note 25; see also *State of the Union Address*, THE DIKEMBE MUTOMBO FOUND., <http://www.dmf.org/videoplayer.php?video=5> (last visited June 7, 2010) (featuring a video clip of the 2007 State of the Union address).

President Barack Obama and given the John Thompson Jr. Legacy of a Dream Award.<sup>88</sup>

Another active foundation with pooled fund activity was established by Dirk Nowitzki, a perennial star with the Dallas Mavericks. He has a salary of over \$15 million annually, with certain incentives, and a guaranteed \$60 million over the next three years.<sup>89</sup> His foundation focuses on improving the health of children globally and has received significant donations from the foundation of Dikembe Mutombo, as well as the Make a Wish Foundation.<sup>90</sup>

### PRIMARY PHILANTHROPIC TAX VEHICLES

There are three primary types of charitable organizations a socially-conscious professional athlete might consider to house and distribute charitable funds. Sophisticated donors may funnel contributions through public charities, private foundations, or the more obscured new category—donor advised funds.<sup>91</sup> The vehicle choice is likely made based on the weighting of primarily four factors: donor

---

<sup>88</sup> See Lauren Burgoon, *Obama Praises Mutombo as Humanitarian at MLK Award Celebration* (Jan. 19, 2010), <http://www.georgetown.edu/story/1242662901514.html> (last visited Mar. 19, 2011).

<sup>89</sup> *NBA Player Salaries – Dirk Nowitzki*, USATODAY.COM, <http://content.usatoday.com/sportsdata/basketball/nba/salaries/player/Dirk-Nowitzki> (last visited Feb. 20, 2011) (citing Nowitzki's salary for the 2006-2007 season).

<sup>90</sup> *Dirk Nowitzki Found. – Projects*, THE DIRK NOWITZKI FOUND., <http://web.archive.org/web/20080105121343/http://www.dirk-nowitzki-foundation.org/en/projects.php> (last visited Feb. 20, 2011) (accessed by searching <http://www.dirk-nowitzki-foundation.org/en/projects.php> in the Internet Archive Index).

<sup>91</sup> Public charities and private foundations have the same root qualification. Both can gain exemption from federal income tax for meeting three primary criteria under section 501(c)(3): (1) Being organized exclusively for charitable, educational, religious, or scientific purposes, (2) no part of the net earnings benefit any private shareholder or individual, and (3) no substantial part of its activities involves lobbying for legislation or on behalf of a candidate for public office. I.R.C. § 501(c)(3) (2006). The principal distinction between them is that the funding sources for public charities requires a receipt of more than one-third of its support each year from "gifts, grants, membership fees," and less than one-third of its support from investment income. I.R.C. § 509(a)(2) (2006). Major philanthropists are typically donating their own funds, and developing investment income, not raising funds primarily through solicitations from the general public. Athlete foundations typically use their own funds and have higher percentages of investment income than allowed for public charity status. The donor-advised funds are organizations true to their entitlement. The donor can only advise how the funds will be used, which essentially means a recommend only position. The New Age Athlete, and even current players, direct the use of primarily their own funds and therefore prefer to veto rather than merely advise to a separate decision-maker.

control, deductibility, distribution penalties, and excise taxes.<sup>92</sup> If the major donor emphatically wishes to control the recipients of the gift, the private foundation is widely regarded as the preferred vehicle.<sup>93</sup> A private foundation is a not-for-profit entity that must first qualify as exempt from federal taxation under Section 501(c)(3) of the Internal Revenue Code.<sup>94</sup> Thus the private foundation is regarded here as the vehicle of first opportunity. There are some tax advantages to public charities, but professional athletes may find it difficult to qualify for that status.<sup>95</sup>

#### **SECTION 4944 AND JOINT VENTURE OPPORTUNITIES WITH FOR-PROFIT ENTITIES**

Based on the above analysis, the New Age Athlete establishes a private foundation for major difference-making properly purposed projects. However, the player's foundation is not likely to achieve these large scale benefits as a stand-alone entity. It is more likely that joint venturing with other entities, even for-profit entities, is required. Section 4944 of the Internal Revenue Code is an obscurely helpful authority for reaching the limits of joint venture opportunities with private, for-profit entities. Section 4944 and its attendant regulations as enabling authority are intended as a penalty and prohibition against activities that jeopardize exempt status.<sup>96</sup> In fact, by overtly determining which activities jeopardize tax exempt status, the IRS also provides guidance as to what activities do *not* jeopardize exempt status. Particularly relevant to this article is the use of joint ventures, and investments made by tax exempt entities into for-profit entities.

#### **WAKING UP TO INVESTMENTS IN PROFITABLE ENTITIES**

Once the type of charitable entity is selected, which for these athletes is often a private foundation, the next issue is what types of activities are advisable. Consistent with a difference-making approach of New Age Athletes through pooling of funds is the concept that a

---

<sup>92</sup> See Victoria B. Bjorklund, *Current Devs. in Giving to Donor-Advised Funds Supporting Orgs. and Private Founds.*, SM089 ALI-ABA 93, 116 (2007) (providing additional details of these factors).

<sup>93</sup> See *id.* The primary reason is because athletes' foundations typically receive over one third of their support from private sources, e.g. investment income or contributions from other than the general public, and as such qualify as private foundations but are disqualified from public charity status.

<sup>94</sup> I.R.C. § 509.

<sup>95</sup> *Id.*

<sup>96</sup> Section 4944 provides for penalties when a private foundation "invests any amount in such a manner as to jeopardize the carrying out of any of its exempt purposes." I.R.C. § 4944.

private foundation can have a portfolio of investments. With the rare exceptions noted above, NBA player foundations examined to date have yet to pool their funds or develop a portfolio of investments. To have a major impact on communities, pooling of funds may be necessary to amass the amount of capital required.. But even if funds are pooled, investments may need to be placed in more than one area since the magnitude of the problem is so great and accumulated over the decades. If, for example, the athletes chose to help the city of Jacksonville, Florida improve health care in its needy north side, the investments could involve a new community clinic specializing in the infant mortality and asthma issues faced most acutely, and a separate investment in existing nonprofit organizations that also contribute to solving these problems. Yet another investment may be necessary for providing capital to service providers (nurses and technicians), and still another investment that may be necessary is an equity capital fund for small businesses, designed to assist that same community (e.g., providers of durable medical equipment for infants and asthmatics). Through greater use of portfolio investments, the New Age Athlete can enhance the effectiveness of his private foundation in achieving socially entrepreneurial goals. As discussed below, however, portfolio investments by private foundations must be carefully orchestrated, since certain investments may subject the foundation to high excise taxes or even a loss of exempt status.

#### **PROGRAM-RELATED INVESTMENTS VERSUS JEOPARDIZING INVESTMENTS**

Section 4944 of the Internal Revenue Code imposes excise taxes when a private foundation “invests any amount in such a manner as to jeopardize the carrying out of any of its exempt purposes . . . .”<sup>97</sup> Those taxes can be substantial and a very clear deterrent to any questionable investment. The tax can be imposed on both the foundation and separately by any and all managers of the foundation.<sup>98</sup> The amount of the tax is two-tiered: an initial 10% of an investment that jeopardizes the exempt purposes is imposed on *both* the foundation and the manager(s);<sup>99</sup> a second tax is imposed if the investment is not removed from jeopardy within the taxable year.<sup>100</sup> That second tier tax is 25% on the foundation, and 5% on the

---

<sup>97</sup> *Id.*

<sup>98</sup> *Id.* § 4944(a)-(b).

<sup>99</sup> *Id.* § 4944(a)(1)(2).

<sup>100</sup> *Id.* § 4944 (b).

manager(s).<sup>101</sup> In essence, Congress is so concerned about the potential abuse of exempt entities investing in potentially for-profit ventures that it will impose these substantial penalties even without causing a loss of exempt status. The concern is apparently increasing currently. Until 2006, the first tier taxes were only 5% of the amount invested.<sup>102</sup>

The adverse consequences for investing without carefully navigating the minefield of investments cannot be overstated. It bears repeating that these jeopardy excise taxes are imposed *each* tax year. So there is sufficient incentive for the foundation to quickly divest itself of any such investments or pay a heavy consequence. Of course, the conundrum exists that if the foundation truly believes in its investment, and chooses to invest despite the penalties, the consequences can be severe if there is a long deliberative process by the IRS, or if the foundation seeks to appeal IRS rulings and litigation is protracted. Also noteworthy is the fact that private foundations are subject to other excise taxes beyond the jeopardizing investments. Sections 4940 through 4945 along with a daunting array of companion regulations are even greater cause for very careful analysis before a foundation invests in for-profit ventures.<sup>103</sup> A comprehensive chart of

---

<sup>101</sup> *Id.* § 4944 (b)(1)(2). Managers have an additional concern because they are joint and severally liable under I.R.C. § 4944(d)(1). So if there are two managers and only one of them suggested the jeopardizing investment, the second manager would be equally liable though she was not directly responsible for making the investment. The only saving grace is that the manager liability is capped at \$10,000 for the first tier tax, and \$20,000 for the second tier tax. I.R.C. § 4944(d)(2).

<sup>102</sup> The current taxes were imposed through Pub. L. No. 109-280, Title XII, § 1212(d) (2006).

<sup>103</sup> There is a tax on the private foundation's net investment income (the amount that gross income plus capital gain net income exceeds certain deductions). I.R.C. § 4940(c). There is a tax on each act of self-dealing between foundation manager(s) or other certain other foundation contributors and the private foundation. I.R.C. § 4941(a)(1)(2). There is a tax when the private foundation fails to distribute certain types of its income within certain periods (i.e. "undistributed income" is taxed, but excluded from that amount are certain qualifying distributions so only amounts in excess of qualifying distributions are taxed as undistributed income). I.R.C. § 4942(a)-(e). There is also an excise tax on "excess business holdings" (i.e., where a private foundation has stock or other interest in a business enterprise beyond certain permitted amounts). I.R.C. § 4943(a)(c). Generally, the foundation can own up to 20% of the voting stock of a corporation, subject to reduction based on the amount of voting stock owned by substantial contributors to the foundation. I.R.C. § 4943(c)(2)(A). Finally, the private foundation is taxed for each amount spent to carry on propaganda, influence a specific public election, or allow certain travel or grants to organizations that do not qualify as primarily operating with exempt purposes. I.R.C. § 4945(a)-(h). Each of these excise taxes imposes the two-tiered approach where an initial tax is followed by an additional tax if the investment continues without correcting whatever conditions gave rise to the tax. The most

the various types of excise taxes, the amount of tax, and upon whom the tax is imposed is appended as Appendix B.<sup>104</sup> The investment decision, therefore, is a high risk game.

An exception to the jeopardy excise tax exists for what are called program-related investments (“PRI’s”).<sup>105</sup> An investment will not be considered a jeopardizing investment if it meets two criteria: (1) the “primary” purpose is to accomplish its exempt purposes, and (2) no “significant” purpose of the investment is for production of income or appreciation of property.<sup>106</sup>

So investments significantly related to the foundation’s exempt purpose are program-related, and thus not in jeopardy of losing exempt status or having the excise taxes applied. Conversely, investments made primarily for the production of income or property appreciation are subject to those excise taxes. Obviously then, the question remains: what factors determine whether the primary purpose of the investment is for exempt purposes rather than income production or property appreciation? As described below, there is ample authority for the conclusion that a private foundation composed of professional athletes can be a member in a limited liability company with for-profit members and still have a primarily exempt purpose (without losing exempt status and without being subject to excise taxes due to jeopardizing investments).

#### **PROPERLY PURPOSED INVESTMENTS AS PRI’S FOR THE NEW AGE ATHLETE AND THE CREATIVE USE OF LLCs**

The IRS has already provided guidance to private foundations on portfolio development, albeit through obscure sources. The vehicle necessary is a creative joint venture with for-profit entities and non-exempt individuals through a limited liability company. In Private Letter Ruling 200610020, the IRS was asked to rule on whether a private foundation could invest in an LLC with other non-exempt members without jeopardizing its exempt status and/or being subject to the excise tax under Section 4944.<sup>107</sup> Stated in the affirmative, the entity sought the IRS endorsement of the investments as program-related investments (PRIs).

---

severe consequence among the excise taxes is for excess business holdings—200% of such holdings as the second tier tax. I.R.C. § 4943(b).

<sup>104</sup> See *infra*, Appendix B.

<sup>105</sup> I.R.C. § 4944(c).

<sup>106</sup> *Id.*

<sup>107</sup> I.R.S. Priv. Ltr. Rul. 2006-10-020 (Mar. 10, 2006).

The private foundation proposed an organizational structure whereby the members of the LLC invest (via capital contributions) into a common fund (“the Fund”). The members would include the foundation, composed of individual professional athletes, and for-profit entities.<sup>108</sup> The Fund is designed to invest in businesses in low-income communities owned by minorities or other disadvantaged groups who have lacked access to conventional financing on reasonable terms. The overall intent is to enhance the economic well-being of those communities. An additional mission of the LLC is to educate individual LLC members on entrepreneurship and financing. The Fund will make qualified investments into “Portfolio Companies” (i.e., the target businesses in low-income communities).<sup>109</sup>

In order to qualify as a PRI, and to avoid a jeopardizing investment, excise taxes, or exemption loss, the LLC must comply with the two-pronged requirements noted above (primary charitable purpose and no significant purpose for income production or property appreciation).<sup>110</sup> The IRS concluded there was a primary charitable and educational purpose because there was a sufficient nexus between the recipients of the investment (the Portfolio Companies) and the charitable purpose (improving the economic well-being of low-income communities). The nexus was evidenced by (1) having the Portfolio Companies actually operate in the target communities, (2) those companies being part of the pool of those denied conventional financing, and (3) those companies selected were based on the ability to fill community needs.<sup>111</sup> The educational program was further evidence of the charitable purpose, since individual LLC members must participate in that activity; this included training on how to evaluate business opportunities, the principles of angel investing, and a process to give them practical business experience.<sup>112</sup>

The IRS also found that the LLC investment was not made for income production or property appreciation.<sup>113</sup> Deriving factors from its regulations, the IRS stated that the non-income purposes were

---

<sup>108</sup> Individual members also include former athletes, coaches or managers of a professional sports team. *Id.*

<sup>109</sup> The Portfolio Companies would start in a designated metropolitan area. At least 67% of the individuals in the business must be a member of a group that has been traditionally denied access to equity funding or credit due to gender, minority or low-income status. *Id.*

<sup>110</sup> Technically a third requirement is that the exempt entity not engage in propaganda and legislative efforts. I.R.C. § 501(c)(3) (2006). That was not an issue in I.R.S. Private Letter Ruling 2006-10-020. *See id.*

<sup>111</sup> *Id.* The IRS cited Rev. Rul. 77-111, 1971-1 C.B. 144 and Rev. Rul. 74-587, 1974-2 C.B. 162 as primary authority for the nexus analysis at page 9.

<sup>112</sup> I.R.S. Priv. Ltr. Rul. 2006-10-020 (Mar. 10, 2006).

<sup>113</sup> *Id.*

evidenced by the following: (1) private investors investing solely for profit would not likely make the same LLC investment on the same terms as the LLC,<sup>114</sup> (2) the LLC members expected a lower return on their investment than private sector investors (angel investors) due to the risky nature of the Fund's investment criteria in low-income communities without conventional financing, and (3) the foundation is authorized through the LLC's Operating Agreement to assure that the Fund's activities remain charitable. This latter power in the foundation included the ability to veto any non-charitable investment objectives, liquidate any non-charitable investment, redeem any Fund investment that jeopardized the foundation's status as a PRI, or alternatively cap its investment return.<sup>115</sup>

There are several other private letter rulings consistent with the ruling mentioned above. The IRS found a PRI for a private foundation's investment in a for-profit corporation that was a financial intermediary for the foundation's mission of supporting biodiversity and environmental sustainability. The for-profit corporation's own investment was also a PRI because it furthered the accomplishment of the foundation's exempt purpose.<sup>116</sup> The IRS also endorsed as a PRI the foundation's ownership of stock in for-profit businesses.<sup>117</sup> The foundation's mission was to create jobs for the unemployed and underemployed, and alleviate economic depression.<sup>118</sup> The businesses selected by the foundation operated in an area designated as a priority development region due to high unemployment rates.

The Regulations also authorize PRI treatment of a foundation's capital contributions if conventional financing is not available, but depend on the foundation's funds to fill in the gap for the amount of equity capital necessary to make the loan.<sup>119</sup> This is acceptable even when the private foundation purchases the common stock of a for-profit corporation, even if that stock appreciates in value and the foundation profits thereby.<sup>120</sup>

---

<sup>114</sup> The Private Letter Ruling actually only states "investors" would not likely make the investment on the same terms as the foundation. This author presumes the IRS meant non-exempt investors since it referred to them as those who would invest "solely for profit."

<sup>115</sup> I.R.S. Priv. Ltr. Rul. 2006-10-020 (Mar. 10, 2006).

<sup>116</sup> I.R.S. Priv. Ltr. Rul. 2001-36-026 (June 11, 2001).

<sup>117</sup> I.R.S. Priv. Ltr. Rul. 1999-43-044.

<sup>118</sup> *Id.*

<sup>119</sup> 26 C.F.R. § 53.4944-3(b). This was example (3) of (10) that the IRS provides as guidance for what are will be deemed adequate circumstances for PLI treatment.

<sup>120</sup> *Id.*

**Comment [AF4]:** Does this need a date like the other IRS letter ruling?.

In each circumstance, the IRS approved the private foundation's joint venturing with for-profit entities such as LLCs, corporations, and private individuals. In each instance, the foundations were allowed to invest their own funds jointly with funds of for-profit entities, even if the LLC or corporation in which they both contributed funds was a for-profit business. And saliently, the IRS allowed PRI status for the foundation's investments as long as their funds were used in furtherance of the foundation's exempt purposes and the governing documents for the LLC or corporation provided oversight by the foundation that the funds shall be used for those exempt purposes.

#### APPLICATION TO THE NEW AGE ATHLETE

If, for example, a professional athlete or a group of athletes wanted to have transformative effects on the health care issues facing those in acute need in the city of Jacksonville, the IRS has endorsed sophisticated joint ventures through the players' respective foundations. Certainly, individualized efforts can occur without these joint ventures. A single player could make a simple contribution from his foundation to targeted individuals. Or a player could infuse funds into targeted nonprofit organizations that in turn allocate resources to those targeted individuals. But if the mission is to provide real and sustainable solutions, such big issues take big resource allocations. As noted above, the Jacksonville issues of infant mortality and asthma are pervasive among a community of nearly a quarter million people.<sup>121</sup> These maladies have causes that are complex and long-developing in genetics, environment, class, and race. Dissolving the health care disparity, in this author's view, is therefore not likely solved by governmental subsidies alone, nor by nonprofit organizations alone, which are often already under-resourced.<sup>122</sup> The private sector has a role to play, and these athletes have a propitious opportunity to make

---

<sup>121</sup> See *supra* text accompanying notes 64–74.

<sup>122</sup> See Roger M. Groves, *More Private Equity, Less Government Subsidy, and More Tax Efficiency in Urban Revitalization: Modeling Profitable Philanthropy and Investment Incentives*, 8 FLA. ST. U. BUS. REV. 93, 95–97 (2009). As a matter of tax policy, the incentives provided by the government should be better designed to reduce governmental dependence, and market-based benefits further that goal. This can be accomplished by increasing the private sector contribution to charitable projects for our society's most needy, which are currently dominated by governmental programs. The premise of the article is that the preferred method of increasing investor participation in charitable projects is to increase the amount of investment return rather than tax deductions, and increased private equity participation should reduce the need for governmental subsidies.

large contributions as part of, and in connection with the governmental and third sectors.

There are also existing major corporations available as joint venture partners from the private sector. Indeed, a few of the newly-established private sector initiatives seeking to provide assistance in disadvantaged areas include major corporate enterprises. The Goldman Sachs Group, Inc. funded its own foundation in 1999 with a \$200 million donation.<sup>123</sup> Grants have been awarded in excess of \$114 million since its inception.<sup>124</sup> January 2010 initiatives were created specifically to “deploy the firm’s capital to help transform distressed communities into sustainable and vibrant neighborhoods of choice and opportunity.”<sup>125</sup> The most recent projects may well be part of its larger effort to reestablish itself as a good corporate citizen after the recent economic crisis.<sup>126</sup> The value of that intangible asset of goodwill, like many assets, is more appreciated when it is lost. As snarkily stated by one of the most highly visible business journals, “Without Goldman, there wouldn’t be a Wall Street for the public to hate.”<sup>127</sup> If Goldman Sachs is dedicating its own capital for urban

---

<sup>123</sup> Goldman Sachs Corporate Engagement, <http://www2.goldmansachs.com/citizenship/corporate-engagement/index.html> (last visited Feb. 20, 2011).

<sup>124</sup> Investment Banks Guide – Goldman Sachs, <http://www.investmentbanksguide.com/goldman+sachs/> (last visited Feb. 20, 2011).

<sup>125</sup> Goldman Sachs Urban Investments, <http://www2.goldmansachs.com/services/financing/urban-investments/our-approach.html> (last visited Feb. 20, 2011).

<sup>126</sup> Goldman Sachs Group, Inc., along with Morgan Stanley and JPMorgan Chase & Co, received a toxically controversial \$12.9 billion of taxpayer dollars as a government bailout under the TARP. See Paritosh Bansal, *Goldman’s Share of AIG Bailout Money Draws Fire*, REUTERS (Mar. 18, 2009), <http://www.reuters.com/article/idUSTRE52H0B520090318>. It was made potentially worse by the press announcements that the bank “set aside about \$16.7 billion for compensation—on track to pay each of its 31,700 employees close to \$700,000 [during 2009]” and executives were looking forward to multi-million dollar paydays. DealBook, *Bonuses Put Goldman in Public Relations Bind*, N.Y. TIMES (Oct. 16, 2009), <http://dealbook.blogs.nytimes.com/2009/10/16/bonuses-put-goldman-in-public-relations-bind>. Goldman paid back the borrowed funds by June 2009. CitiGroup, which received \$45 billion, was clearly nervous about being among the last of the big banks to pay back TARP funds. At the writing of this article, CitiGroup CEO Vikram Pandit stated the company was “focused on repaying [the remaining \$20 billion] TARP as soon as possible.” Bradley Keoun, *Citi Pushes For TARP Payback*, BLOOMBERG BUSINESSWEEK (Dec. 8, 2009), [http://www.businessweek.com/bwdaily/dnflash/content/dec2009/db2009128\\_444863.htm](http://www.businessweek.com/bwdaily/dnflash/content/dec2009/db2009128_444863.htm).

<sup>127</sup> David Reilly, *JPMorgan’s Biggest Asset May be Goldman*, BLOOMBERG BUSINESSWEEK, (Dec. 4, 2009),

projects to improve its goodwill, who better to partner with than foundations of professional athletes that carry considerable cache in those same urban communities?

Private Letter Ruling 200610020 allows a model for joint ventures in an LLC between an exempt player foundation and a non-exempt private sector corporate entity.<sup>128</sup> This hypothetical foundation would be composed of several professional athletes. In the Jacksonville circumstance, those athletes could be current or former players for the Jacksonville Jaguars, those who were raised in Jacksonville, those with any other basis of affinity with the city, or those who self-identify with the low-income target community. The foundation would be just one member of a for-profit LLC.<sup>129</sup> Other members would be for-profit entities or individuals, which could include corporations that have local business activity, historically or as part of its growth model.<sup>130</sup>

All the members would then make capital contributions into a fund. The fund would be the principal asset of a for-profit LLC, and the vast majority of that fund would then be used for the Jacksonville health care initiative. As in PRI 200610020, 15% of the funds would be used to pay the expenses of operation, including educational programs. In Private Letter Ruling 200610020, technical assistance and training through educational programs were provided to the fund recipient entrepreneurs who lacked access to conventional financing due to the high risk nature of ventures within the low-income community. Educational programs were also available as funding options for athlete members who sought active involvement in the programs. For the Jacksonville initiative, the educational programs would assist those providing health care assistance in Jacksonville. Further, the athlete members could receive training in how to evaluate health care services and preferred investment methods to be value-added in meeting charitable goals.

---

[http://www.businessweek.com/bwdaily/dnflash/content/dec2009/db2009124\\_691950.htm](http://www.businessweek.com/bwdaily/dnflash/content/dec2009/db2009124_691950.htm).

<sup>128</sup> I.R.S. Priv. Ltr. Rul. 2006-10-020 (Mar. 10, 2006).

<sup>129</sup> An LLC could also be organized as a not-for-profit entity. *See e.g., DEL. CODE ANN. tit. 6, §18-106* (2005). In a few states, a new middle ground entity between profit and nonprofit, known as an L3C can be formed. *See Cassady V. Brewer & Michael J. Rhim, Using the 'L3C' for Program-Related Investments*, 21 *TAX'N EXEMPTS* 11, 11 (2009).

<sup>130</sup> State statutes typically allow an LLC to have corporate members and individual members. *See, e.g., DEL. CODE ANN. tit. 6 § 18-101* (2005) (Delaware statute allows many things to be members of the LLC including natural people and corporations).

One significant benefit to the New Age Athlete is that effective use of foundations during their playing days can help them transition into careers after their on-field career has ended. In the Jacksonville example, the player foundation members may envision a transition into owning and/or operating stand alone health clinics within the target community, subsidiary out-patient clinics, or wings of existing hospital facilities. Nurses, nurse assistants, and lab technicians in these entities, who have cultural connectivity with the target residents, could be employed or trained to provide pre-natal care to reduce infant mortality or reduce asthma. If the athletes use foundations during their playing days, while they are highly visible, they can maximize their goodwill with their team, and presumably increase their bargaining power for upcoming contracts. That visibility also increases their bargaining power to negotiate favorable terms for a corporate rate joint venture while the intangible asset of a brand name is most valuable. Once the athlete's playing career is over, or even during the end of his or her career, this bargaining power could likely be decreased and make the transition to other industries more difficult.

The LLC is particularly well-suited for joint ventures because of their statutory flexibility in management and profit distribution. Unlike the typical C corporation, the LLC determines whether to manage itself through a single manager or through members as managers.<sup>131</sup> These managers need not possess any particular amount of ownership interest.<sup>132</sup> Following the private letter rulings and regulations, a foundation must have primary authority to assure the invested amounts by members into the fund shall be distributed consistent with the charitable and educational purposes of the foundation.<sup>133</sup> Under LLC statutes, the foundation can be the LLC manager without having to force its corporate members to give up majority ownership interests in the LLC. Regarding distributions, the LLC operating agreement may govern the allocation of profits among members, even if that allocation is different from a corporate dollar-

---

<sup>131</sup> See, e.g., DEL. CODE ANN. tit. 6 § 18-404 (2005) ("A limited liability company agreement may provide for classes or groups of managers having such relative rights, powers, and duties as the limited liability company agreement may provide . . .").

<sup>132</sup> See, e.g., DEL. CODE ANN. tit. 6 § 18-402 (2005) ("Unless otherwise provided in a limited liability company agreement, the management of a limited liability company shall be vested in its members in proportion to the then current percentage or other interest of members in the profits of the limited liability company owned by all of the members.").

<sup>133</sup> See I.R.S. Priv. Ltr. Rul. 2001-36-026 (Dec. 13, 2005).

per-share distribution based on respective ownership interests.<sup>134</sup> That flexibility would allow the foundation and the for-profit members to adjust their respective profits to meet the complex requirements of the excise tax statutes and regulations in order to retain PRL status for the foundation's investment and the LLC distributions.<sup>135</sup>

## CONCLUSION

NBA players have a propitious opportunity to do something unprecedented. They may now pool funds through their respective private foundations, and use these pooled funds to create transformative effects on entire communities in need. Jacksonville, Florida is just one of many large urban communities that could be the beneficiary of such targeted efforts. Through its regulations and private letter rulings, the IRS has now provided reliable and consistent guidance for the type of joint ventures-through-LLCs that are well designed to pursue those goals. To reapply a worn cliché—the ball is in their court.

---

<sup>134</sup> See, e.g., DEL. CODE ANN. tit. 6 § 18-1101 (2005) (“to give the maximum effect to the principle of freedom of contract and to the enforceability of [LLC] agreements”); *Elf Atochem N. Am., Inc. v. Jaffari*, 727 A.2d 286, 292 (Del. 1999) (“... commentators observe that only where the agreement is inconsistent with the mandatory statutory provisions will the members’ agreement be invalidated.”). Thus, there is no statutory mandate that LLCs divide their profits in exact accord with the ownership interests of the members.

<sup>135</sup> As Attachment B reveals, there are four excise tax statutes to consider. Retaining in the LLC too large an amount of undistributed funds, for example, could trigger excise taxes of very significant tax liability.

**APPENDIX A**  
**Properly Purposed Projects**

§ —Community healthcare centers

§ —Small Business Development funds and Nontraditional financing to support businesses located in low income areas

§ —Child care, Head Start and other non-profit facilities

§ —Real estate financing to small businesses, non-profit community centers, day care centers, charter schools, food distributors, health and social service centers...

§ —Projects ...designed to be more affordable to end users, so that businesses can remain in the low income communities

§ —Facilities - enhance access for charter schools in distressed areas

§ —Economic development to Hispanic Latino communities...originate debt investments in ...nonprofit community organizations.

§ —Working capital loans to community based housing developers, and operators of community facilities, ...and senior centers

**ATTACHMENT-APPENDIX B***ARRAY OF POTENTIAL EXCISE TAXES  
FOR A PRIVATE FOUNDATION ON ITS INVESTMENTS*

<b>TYPE</b>	<b>1<sup>ST</sup> TIER Calculation</b>	<b>2<sup>ND</sup> TIER Calculation</b>	<b>MANAGER JOINT &amp; SEVERABLE?</b>
Net Investment Income (§ 4940)	Gross Investment + Capital Gain – Deductions x 2%	None	No
Self-Dealing (§ 4941)	<ul style="list-style-type: none"> <li>• 10% on Self-Dealer</li> <li>• 5 % on Manager (20K cap)</li> </ul>	<ul style="list-style-type: none"> <li>• 200% on Self Dealer</li> <li>• 50% on Manager (20K cap)</li> </ul>	No
Undistributed Income (§ 4942)	30% of undistributed amount	100% of undistributed amount	No
Excess Business Holdings (§ 4943)	10 % of excess holdings	200% of excess holdings	No
Jeopardizing Investments (§ 4944)	<ul style="list-style-type: none"> <li>• 10% on Foundation</li> <li>• 10% on Manager (10K cap)</li> </ul>	<ul style="list-style-type: none"> <li>• 20% on Foundation</li> <li>• 5% on Manager (20K cap)</li> </ul>	Yes
Taxable Expenditures (propaganda, etc.) (§ 4945)	<ul style="list-style-type: none"> <li>• 20% on Foundation</li> <li>• 5% on Manager (10K cap)</li> </ul>	<ul style="list-style-type: none"> <li>• 100% on Foundation</li> <li>• 50% on Manager (20K cap)</li> </ul>	Yes