

**BEFORE THE NATIONAL BASKETBALL
ASSOCIATION BOARD OF GOVERNORS**

In the Matter of the Termination of the National
Basketball Association Membership of

LAC Basketball Club, Inc.

DONALD STERLING'S ANSWER TO CHARGE

INTRODUCTION

On the basis of remarks made in a living room during a “lovers’ quarrel,” which were illegally recorded and then disclosed months later in retaliation for a lawsuit by Mr. Sterling’s wife, the NBA seeks to forcibly strip Mr. Sterling and his wife of their ownership interest in the Los Angeles Clippers. The NBA’s use of this illegal recording constitutes a clear and blatant violation of Mr. Sterling’s California constitutional rights. The authors of the charge did not have the courage, decency, or honesty to acknowledge the circumstances surrounding Mr. Sterling’s jealous rant or even that the source of their information was borne from the “fruit of the poisonous tree.” So, in reality, Mr. Sterling is being banned for life, fined \$2.5 million, and stripped of his ownership for a purely private conversation with his lover that he did not know was being recorded and that he never intended would see the light of day. We do not believe a court in the United States of America will enforce the draconian penalties imposed on Mr. Sterling in these circumstances, and indeed, we believe that preservation of Mr. Sterling’s constitutional rights requires that these sham proceedings be terminated in Mr. Sterling’s favor. This is particularly true when over its entire history the NBA has never fined anyone as much as \$2.5 million, never suspended any owner for life, and never undertaken to confiscate an owner’s team for *any* offense, much less an alleged offense originating in a conversation in a private setting that was illegally recorded.

GENERAL DENIAL AND RESERVATION OF RIGHTS

Donald Sterling and LAC Basketball Club, Inc. deny generally and specifically every allegation in the charge and specifically deny that any lawful grounds exist to terminate the membership of LAC Basketball Club, Inc. in the NBA. Donald Sterling and LAC Basketball Club, Inc. reserve their right to supplement this response at any time before the hearing on this matter and do not waive any future factual or legal arguments that may be omitted in this

response. Furthermore, this answer shall not in any way be a waiver or deemed a waiver of any of Donald Sterling's or LAC Basketball Club, Inc.'s rights or remedies under state or federal law, including, without limitation, the right to have such matters adjudicated by a court of law.

MR. STERLING SHOULD RETAIN OWNERSHIP OF THE LOS ANGELES CLIPPERS

I. Because the Conversation that V. Stiviano Illegally Recorded Invades Mr. Sterling's Rights Under the California Constitution and Cannot Be Used for *any* Purpose, These Proceedings Must be Terminated

The California Penal Code *criminalizes* the act of recording another's confidential communication without their consent. Cal. Penal Code § 632(a). The Penal Code further provides that except for prosecuting an individual for committing the crime of illegally recording another, "*no* evidence obtained as a result of . . . recording a confidential communication in violation of this section shall be admissible in *any* judicial, administrative, legislative, or *other proceeding*." Cal. Penal Code § 632(d) (emphasis added). The Commissioner's charge and the planned hearing is an "other proceeding."¹ While the NBA constitution states that "Strict rules of evidence shall not apply, and all relevant and material evidence submitted prior to and at the hearing may be received and considered" (Charge, Ex. 2, Art. 14(e)), the protection of section 632(d) is no mere rule of evidence or procedure. Rather, courts have held that section 632(d) "embodies a state *substantive interest* in the privacy of California citizens from exposure of their confidential conversations to third parties." *Feldman v. Allstate Ins. Co.*, 322 F.3d 660, 667 (9th Cir. 2003) (emphasis added). In fact, this right flows directly from the California Constitution's right-to-privacy guarantee. *Id.*; *Rattray v. City of National City*, 51 F.3d 793, 797 (9th Cir. 1994).

¹ Significantly, *all* of the harmful effects alleged by the NBA in paragraphs 27-54 relate *only* to the illegal recording.

Mr. Sterling expected—and had—a *constitutional right* not to have his private confidential communications recorded. The California Supreme Court has unequivocally declared as much in the context of telephone calls: “California clearly has an interest in protecting the privacy of telephone conversations of California residents while they are in California. . . .” *Kearney v. Salomon Smith Barney, Inc.*, 39 Cal. 4th 95, 104 (2006). Because Ms. Stiviano flagrantly encroached upon this right, this conversation is not usable in *any proceeding*, including this one, and the NBA’s continued use of this illegally recorded conversation is nothing less than a direct and blatant invasion of Mr. Sterling’s California constitutional guarantee of privacy. Mr. Buchanan, the NBA’s General Counsel, has admitted that “the charge is based *solely* on a recording. . . .” (Ex. 1 attached hereto (emphasis added).) Incredibly, the Commissioner never acknowledges in the charge that the conversation occurred in a private setting or that Mr. Sterling did not know he was being recorded in the charge. (Charge, Ex. 3 (“Cooper: Let me ask you. Let’s start talking about the tape. Did you know you were being recorded? Sterling: No, of course not. Of course not. No.”); Ex. 2, Declaration of Donald T. Sterling attached hereto, ¶¶ 4-5.) This entire proceeding is therefore predicated on a constitutional violation and, on this basis alone, should be terminated.

Reportedly, Ms. Stiviano is under criminal investigation for possible extortion, and other issues connected with the illegal recording, a fact that the NBA did not bother to disclose and which did not deter reliance on her “testimony.”

II. The Commissioner Has Not Established a Violation of the NBA Constitution

The Commissioner charges Mr. Sterling with various violations of Article 13. But when the facts here are applied to the NBA constitution and the various provisions the Commissioner bootstraps to the NBA constitution, the cornerstone of the Commissioner’s charge crumbles. A jealous rant to a lover never intended to be published cannot offend the NBA rules.

A. Article 13(d) is not a “catch-all” provision

The first count in the Commissioner’s charge is brought under Article 13(d) of the NBA constitution. Article 13(d) provides that owners or members may be terminated if they: “Fail or refuse to fulfill its contractual obligations to the Association, its Members, Players, or any other third party in such a way as to affect the Association or its Members adversely.” (Charge, Ex. 2, Art. 13(d).) A plain reading of this paragraph shows that it was intended to provide a termination remedy for owners that did not pay or otherwise fulfill contractual obligations to the NBA, the other members, players, or a third party. For instance, if an owner did not contribute their portion of revenue sharing, failed to pay players’ salaries, or breached a contract with a sponsor, termination might lie under Article 13(d). There is no evidence and there are no allegations that Mr. Sterling or the Clippers have failed to fulfill any of these contractual obligations.

Article 13(d) was not meant to be the “catch-all” provision the Commissioner urges. This reading is buttressed by the fact that such a catch-all provision *already exists* earlier in the very same article, Article 13(a), which states that any owner that “willfully violate[s] any of the provisions of the Constitution and By-Laws, resolutions, or agreements of the Association” may be terminated. (Charge, Ex. 2, Art. 13(a).) The Agreement and Undertaking (Charge, Ex. 5) and the Joint Venture Agreement (Charge, Ex. 6) are examples of the “agreements of the Association” referenced in Article 13(a). But because Article 13(a) requires a “willful” component, which the Commissioner cannot prove and knows he cannot prove, he has attempted to create a second catch-all provision where there is none without the express willfulness requirement. As such, Count I is fatally flawed from the very start.

B. Even if Article 13(d) applies here, Mr. Sterling did not violate paragraph 2 of the Agreement and Undertaking and as a result did not violate Article 13(d)

Even if the Commissioner were correct in his overly expansive reading of Article 13(d), he still does not establish that Mr. Sterling violated that article. In Count I, the Commissioner charges Mr. Sterling with violating paragraph two of an Agreement and Undertaking dated July 26, 2005, which states in pertinent part that Mr. Sterling agreed not to “take or support, and to cause their respective affiliates not to take or support, any position or action that may violate or be inconsistent with any NBA Rule or any right of any NBA Entity or NBA Team, or which may have a material adverse impact on any of the NBA Entities or NBA Teams.” (Charge, Ex. 5, ¶ 2.) In particular, the Commissioner claims that the “material adverse impact” of Mr. Sterling’s constitutionally protected private conversation “undermined and called into question the NBA’s commitment to diversity and inclusion; damaged the NBA’s relationship with its fans; harmed NBA players and Clippers team personnel; and impaired the NBA’s relationship with marketing partners and licensees, and with government and community leaders.” (Charge ¶ 89.) The charge does not establish that Mr. Sterling violated Article 13(d) of the NBA constitution.

1. Mr. Sterling was illegally recorded during an inflamed lovers’ quarrel in which he was clearly distraught; he did not take or support a position or action

The Commissioner’s charge rests solely on comments made to Ms. V. Stiviano during an illegally recorded private conversation that occurred in her living room. As stated above, this conversation is not usable for *any* purpose and should not be considered as evidence against Mr. Sterling. But nevertheless, because the Commissioner has based the charge on the transcript of the illegal recording (Charge, Ex. 1), Mr. Sterling addresses it here.

Mr. Sterling did not “take or support” any “position or action” in the events giving rise to the charge, a prerequisite to violating paragraph two of the Agreement and Undertaking. Mr.

Sterling was engaged in a lovers' tiff stemming from his jealous reaction to Ms. Stiviano's statement that she was going to "bring four gorgeous black guys to the game." (Charge, Ex. 3, p. 1.) Mr. Sterling's ego was obviously bruised by this remark suggesting that she was cavorting with younger, "gorgeous" men. It's facially ludicrous that what Mr. Sterling said in these circumstances could produce the equivalent of a death penalty while Kobe Bryant called a referee a "fucking faggot" on national television sustaining only a modest \$100,000 fine. Mr. Sterling did not deny that the words he uttered were "stupid, foolish, [and] uneducated." (*Id.*, p. 5.) But he also said—in a portion of the interview far less quoted in the media—that when "you get upset you say things." (*Id.*) It is beyond dispute to anyone who actually listened to the recording (and not just read the transcript) that Mr. Sterling was distraught—indeed, in tears—during the conversation. While this of course does not justify what Mr. Sterling said, it should be a mitigating factor because *everyone* has uttered words in the heat of an argument they later regretted; this is part of being human. Mr. Sterling has admitted that he was jealous, and Ms. Stiviano was aware of her position in relation to Mr. Sterling, telling him "And you're in love with me." (Charge, Ex. 1, p. 3.)

It is also apparent that Ms. Stiviano baited Mr. Sterling—in this distressed and vulnerable state—into saying many of these hurtful comments. (*Id.*, pp. 1, 2, 4.) Throughout the argument, Mr. Sterling tried to end the conversation, but Ms. Stiviano continued to try and elicit responses from him. Ms. Stiviano's persistent instigating continued when Mr. Sterling said that he was not a racist. When Ms. Stiviano first asked Mr. Sterling: "What's wrong with minorities? What's wrong with black people?," Mr. Sterling replied, "Nothing. Nothing." (Charge, Ex. 1, p. 1.) The following passage is particularly illustrative:

Ms. Stiviano: I don't understand how you can have so much hate towards minorities.

Mr. Sterling: I don't have any hate, I love them.

Ms. Stiviano: I cannot understand. . .

Mr. Sterling: Why would you say I hate. . .

Ms. Stiviano: How a person like you who's elevated, who's here still feels he's above the world and you can't even be seen with someone in which is considered of a different skin color?

Mr. Sterling: They can be with me all day long and all night long.

Ms. Stiviano: I can't believe that a man who's educated, a man who's a scholar, a man...

Mr. Sterling: Well, believe it, and stop talking about it. Let's finish our discussion with a period, okay? You're not making any good points. You can't believe this man—that's all I am.

Despite Mr. Sterling's repeated requests to end the conversation, Ms. Stiviano continued. It is evident that Ms. Stiviano intended to provoke a response from a flustered and vulnerable Mr. Sterling that she knew was "in love with her" and that she knew she was recording. Perhaps this is no surprise. When asked on an interview with Dr. Phil on May 20, 2014 if she enjoyed the limelight, Ms. Stiviano responded: "Absolutely!" and further stated, "Are you kidding me? I get to experience first-hand what it is to be a celebrity in LA." As she stated in her text message to a Clippers executive, she perceives this all as a game: "LET THE GAMES BEGAN. . . ." (Anders Decl., Ex. C.)

In short, not even the Commissioner alleges that Mr. Sterling intended to harm the NBA with his comment. Nor could he. This was an argument between a jealous man and the woman he loved that should never have left the privacy of the living room. And while Mr. Sterling said some terrible words in the passion of the argument—as he has already publicly admitted and for

which he has apologized—he has not taken a “position” or an “action” in the sense that it would be commonly understood in that paragraph of the Agreement and Undertaking. If Mr. Sterling’s lovers’ tiff is a “position” or “action,” the NBA ownership should be put on notice that any of their private comments and conversations—including their most intimate—will now be considered a “position” or “action” under the Agreement and Undertaking, and if some of those comments happen to leak, it may become grounds for their termination as owners. Putting it most simply, stripping Mr. Sterling of his ownership because of a private lovers’ quarrel that was not intended to harm the NBA in any way *or even become public* is an outrageous punishment.

2. Mr. Sterling’s comments on Anderson Cooper’s television interview do not violate the NBA constitution

Aside from the illegally recorded and private conversation with Ms. Stiviano, the Commissioner charges Mr. Sterling with “criticiz[ing] African Americans for not supporting their communities; and publicly disparag[ing] NBA legend Magic Johnson” on an interview with Anderson Cooper. (Charge ¶ 88.) While Mr. Sterling’s opinions may be unpopular and false, they remain opinions. First, the contribution of groups of all races and ethnicities to their communities is an important social issue and is discussed often. For example, when questioned last year about the image of “minorities in Hollywood,” civil rights activist and music legend Harry Belafonte responded: “I think one of the great abuses of this modern time is that we should have had such high-profile artists, powerful celebrities. But they have turned their back on social responsibility. That goes for Jay-Z and Beyoncé, for example.” Although there is much literature casting doubt on this position, it remains an undeniable matter of social importance that merits discussion, and one side should not be silenced in that discussion because it may be unpopular. Second, while Mr. Sterling’s opinion of Magic Johnson may also be unpopular, is the NBA willing to set a standard that an individual can be punished for voicing a negative

opinion of a popular player? If so, such a standard will make short shrift of many players and coaches. It will also needlessly suppress free speech. The Commissioner does not allege and cannot allege that these facts could independently sustain the charge to terminate Mr. Sterling's ownership interest.

3. Because Mr. Sterling is locked out of his office at Staples Center, he cannot conduct his own investigation or research as to the materiality of the impact of the illegally recorded leaked tape

Even if Mr. Sterling's fight with Ms. Stiviano constitutes a "position or action" (which it does not), that position or action must violate an NBA rule or have a material adverse impact on the NBA. (Charge, Ex. 5, ¶ 2.) The Commissioner charges Mr. Sterling's position or action as having a material adverse impact on the NBA. (Charge ¶¶ 87-90.) In support, the Commissioner provides declarations from several officers and employees of the NBA, in addition to a "report" from Richard E. Lapchick² and a survey and expert report from Sara Parikh demonstrating the materiality of the impact. Mr. Sterling cannot adequately respond to the NBA's allegations because he is prohibited from entering his office at Staples Center or having any involvement with the Los Angeles Clippers to retrieve relevant information that he could use in his defense. Accordingly, among other things, he cannot verify how many season ticket holders have demanded refunds, how many individuals purchased season tickets after the illegal recording was released, how merchandise and concession sales were impacted after the illegal recording was released, and if any new companies were interested in sponsoring the Clippers. Nor does

² Richard Lapchick is the endowed chair and director of the DeVos Sport Business Management Program. This program was founded by and is named for Richard DeVos and his wife, the owners of the Orlando Magic—a team that has already announced how it is going to vote in this matter. In view of this fact, it cannot be seriously contended that this "report" is neutral. Moreover, as discussed below, Mr. DeVos has made highly controversial comments against individuals with HIV/AIDS and generously supports anti-homosexual causes with impunity.

Mr. Sterling have the time to retain and conduct an effective survey analysis to counter the survey proffered by the Commissioner.

The “material adverse impact” the Commissioner claims is also highly questionable. Under paragraph 2, the league cannot force Mr. Sterling to sell because of *any* adverse harm to the NBA, the adverse harm must be *material*. The Commissioner has not made such a showing. The only demonstrable harm was that some sponsors temporarily withdrew their support (but for the most part, quickly reinstated it). As the Commissioner alleges, the sponsors “universally stated that if the NBA did not take swift and decisive action to penalize Mr. Sterling, they would need to reevaluate their relationship with the Clippers.” (Charge ¶ 45.) The Commissioner, however, took such an action in the form of a lifetime ban and \$2.5 million fine, and the overwhelming majority of sponsors reinstated their sponsorship as quickly as they withdrew it.

The players did not boycott any games when TMZ first leaked the illegal recording—when emotions were at their very highest—and it is *pure speculation* to say that the players will not play for the Clippers next season (or will not play at all) if the Sterlings are not removed entirely from the NBA. The Commissioner does not even allege this. The charge merely states that: “Clippers players have universally expressed reservations about continuing to play for the Clippers next season,” that players “considered boycotting playoff games,” and “several teams engaged in silent protests against Mr. Sterling.” (Charge ¶¶ 39, 41.) But expressing reservations, considering boycotts, and engaging in silent protests hardly qualifies as a “material adverse impact” on the league. The same can be said of the “call[s] for protests and boycotts of the Clippers and/or the NBA” from “civic leaders and social welfare organizations.” (*Id.* ¶ 51.) The Commissioner acknowledges the speculative nature of the harm when he alleges that “the *threat* [of protests or a boycott] remains if LAC’s membership is not terminated.” (*Id.* (emphasis

added).) A threat is not a material adverse impact. Finally, even the survey that Sara Parikh conducted only shows that some fans would supposedly be “less *likely* to support the LA Clippers if Donald Sterling remains the owner.” (Parikh Report ¶ 35 (emphasis added).) This is simply more speculation.

4. Mr. Sterling was instrumental in fostering the diverse body of players, coaches, general managers, employees, and fans on which the NBA prides itself

The Commissioner goes through great lengths to outline the NBA’s commitment to diversity and inclusion. The achievements of the NBA on this front, which are well documented in Exhibit A to the Declaration of Kathy Behrens, are commendable. But the Commissioner completely spurns and never acknowledges the role of Mr. Sterling in attaining these goals. As the longest-tenured owners in the NBA, the Sterlings have employed five African American coaches, scores of African American players, an African American general manager who held that job for 22 years, and staff who helped the NBA receive a laudable “A+” in racial hiring practices. Indeed, Mr. Sterling recently terminated a Caucasian head coach and traded for an African American head coach who is now among the most highly paid and respected in the league.

Mr. Sterling was also active in the African American community. Before the illegally recorded comments were leaked, Mr. Sterling was set to receive his second lifetime achievement award from the NAACP for plans to create a multimillion-dollar endowment at Los Angeles Southwest College, which has a predominantly African American student body. Mr. Sterling similarly received an award from the NAACP in 2009 because of his “unique history of giving to the children of L.A.” and for being “very kind to the minority youth community,” donating 2,000 to 3,000 tickets *a game* to youth groups. The Commissioner intentionally ignores all of these facts in the charge and fails to call them to the attention of the Board of Governors. Over the

Sterlings' 30-year ownership, there has been only a single accusation of race discrimination involving the Clippers, and that was resolved in Mr. Sterling's favor.

C. Mr. Sterling did not violate paragraph 2 of the Joint Venture Agreement, and as a result did not violate Article 13(d)

The second count in the Commissioner's charge is also brought under Article 13(d) of the NBA constitution. In this count, the Commissioner charges Mr. Sterling with violating Article II of the Amended and Restated Joint Venture Agreement, which is titled "Purpose of Venture." (Charge, Ex. 6, Art. II.) The "purpose of venture" as stated in Article II is "The Joint Venture shall consist of professional basketball teams, each of which shall be operated by a Joint Venturer. The Joint Venturers shall use their best efforts to see to it that the sport of professional basketball is conducted according to the highest moral and ethical standards." (*Id.*)

As discussed above in section II.A, Article 13(d) is not a catch-all provision, so any violation of another agreement should be brought under Article 13(a) of the NBA constitution, which requires a *willful* violation. All the same, Mr. Sterling still did not violate Article II of the Joint Venture Agreement. The article requires that Mr. Sterling use his "best efforts" to ensure that "the sport of professional basketball is conducted according to high moral and ethical standards." (Charge, Ex. 6, Art. II.) It is virtually inconceivable that Article II was intended to regulate a private lovers' quarrel. This is apparent from the article's language. Mr. Sterling was not "conducting" the "sport of professional basketball" when he was arguing with Ms. Stiviano in her living room. Under the Commissioner's interpretation of Article II, any immoral or unethical comment—even a private one—could become the basis for a forced termination.

And further, the Commissioner is hard-pressed to claim that when Mr. Sterling *actually* conducted the sport of professional basketball that he did not use his best efforts to "adhere to the basic principles of diversity, inclusion, and respect for others that are integral to the NBA's

efforts to conduct the sport of professional basketball in accordance with the highest moral and ethical standards.” (Charge ¶ 93.) As discussed above in section II.B.4, Mr. Sterling has been instrumental in promoting a diverse and inclusive NBA.

In short, Article II *is not meant to oversee morals and ethics in the home*; it is meant to govern morals and ethics in conducting the sport of professional basketball. Because the Commissioner only charges Mr. Sterling with the former, he has not properly sustained his burden in showing that Mr. Sterling violated Article II of the Joint Venture Agreement.

D. Mr. Sterling did not violate or breach a contractual or common law duty of loyalty to the NBA

The third and fourth counts of the Commissioner’s charge involve alleged breaches of the fiduciary duty of loyalty. (Charge ¶¶ 96-100, 101-104.) More specifically, the Commissioner has stated that Mr. Sterling has not supported the NBA “in the attainment of its proper purposes.” (*Id.* ¶¶ 97, 102.) Mr. Sterling did not violate any fiduciary duty of loyalty to the NBA in Ms. Stiviano’s living room, and counts three and four should accordingly be rejected.

The Commissioner misapprehends the scope of the fiduciary duty of loyalty that members of an association or joint venture owe one another. The fiduciary duty of loyalty includes:

- An obligation not to favor one’s interests over those of the joint venture;
- An obligation not to unfairly manipulate or control corporate processes;
- An obligation not to retain control or to appropriate for oneself an opportunity that belongs to the joint venture.

In other words, a fiduciary duty of loyalty is meant to bar self-dealing and situations where a fiduciary’s personal interest might conflict with the interest of those to whom that person owes the duty of loyalty.

The Commissioner has not charged Mr. Sterling with self-dealing or dealing in a manner where Mr. Sterling’s decision-making might have been consciously or subconsciously influenced because of a conflict of interest. For example, a partner who directed business to his or her best friend instead of a more qualified candidate might violate a fiduciary duty of loyalty to the partnership. Likewise, an individual who took a lucrative business opportunity for his or herself when it was offered to a partnership might violate the duty of loyalty. In a nutshell, the duty of loyalty is about not putting your interests before those of the association. There are no allegations in Counts III or IV that Mr. Sterling was in fact “disloyal” to the interests of the NBA by putting his interests before those of the NBA and its members. Instead, the Commissioner vaguely alleges that “LAC has espoused views.” (Charge ¶¶ 99, 103.) “Espousing views” is not a breach of the duty of loyalty. The other allegations in this paragraph, such as “LAC has . . . alienated a wide segment of the NBA community” (*id.* ¶¶ 99, 103), are consequences of the leak of the illegal recording and do not constitute a “breach.”

But even under the Commissioner’s amorphous and markedly expanded duty of loyalty to “support the Association in the attainment of its proper purposes,” Mr. Sterling still did not breach a duty. He did nothing to undermine the NBA’s attainment of its “proper purposes,” a vague term that the Commissioner never defines. Presumably, the Commissioner is referring to the NBA’s policy of diversity and inclusion. (Charge ¶ 29.) As has been discussed at length in this response, Mr. Sterling played a vital role *in helping* the NBA attain this purpose. An illegally recorded private conversation in a living room cannot possibly be considered a failure to support the Association in attaining its “proper purpose,” especially when it flies in the face of Mr. Sterling’s public conduct and the way he runs the Clippers. And without any allegation of

actual intent to breach the duty of loyalty, Counts III and IV become even weaker. Mr. Sterling did not breach a contractual or common law duty of loyalty.

E. Mr. Sterling did not violate Article 13(a) of the constitution because he did not willfully violate any provision of the constitution or other contract

The fifth count charges Mr. Sterling with violating Article 13(a) of the NBA constitution. Article 13(a) provides that an owner may be terminated if they “*Willfully* violate any of the provisions of the Constitution and By-Laws, resolutions, or agreements of the association.” (Charge, Ex. 2, Art. 13(a) (emphasis added).) The Commissioner tethers three separate provisions of the Constitution to this alleged violation of Article 13(a). None withstand even the slightest of scrutiny.

1. Mr. Sterling did not willfully violate Article 24(m) because any alleged destruction of evidence occurred prior to the commencement of the Commissioner’s investigation

First, the Commissioner claims Mr. Sterling violated Article 24(m), which requires an owner to cooperate with the Commissioner to provide evidence and testimony requested in connection with any of the Commissioner’s investigations. (Charge, Ex. 2, Art. 24(m).) According to the Anders Declaration, the NBA became aware of the illegal recording on the evening of April 24, 2014. (Anders Decl. ¶ 29.) Mr. Anders is notably silent on when he was retained to begin the investigation, but it can be inferred from the Commissioner’s declaration that the investigation began on April 26, 2014. (Silver Decl. ¶¶ 6-9.) According to Mr. Anders’s Declaration, an unnamed employee told Mr. Anders that he or she was asked by Mr. Roeser sometime between April 9 and April 25 to delete the recording and text message history after Mr. Roeser got off the phone with Mr. Sterling (the implication being that Mr. Sterling told Mr. Roeser to delete the recording and text message history). These facts—and the allegations that are missing—amply demonstrate that Mr. Sterling did not violate Article 24(m).

First, because the NBA did not start its investigation until April 26, Mr. Sterling had no obligation whatsoever to produce or even retain these documents because that obligation exists only “in connection with all actions, hearings, or investigations.” (Charge, Ex. 2, Art. 24(m).) That fact disposes of this portion of the charge altogether. Second, the Commissioner does not allege that Mr. Sterling was ever *asked* to produce documents or other evidence; he does not allege that he sent a document-retention letter to Mr. Sterling; he does not even allege that he told Mr. Sterling he was starting an investigation. He identifies virtually no obligation Mr. Sterling had to contact the NBA. Finally, the NBA is relying on *triple* hearsay from an anonymous source that is predicated on assumption and a complete lack of personal knowledge.³ This anonymous source did not hear Mr. Sterling instruct Mr. Roeser to delete the recording. On top of that, Mr. Sterling will not even have an opportunity to cross-examine the witness. In any event, because Mr. Sterling was under no obligation whatsoever to produce documents to the NBA before the Commissioner required him to do so, he could not and did not violate Article 24(m).

2. Mr. Sterling did not violate Article 35A(c) or Article 35A(d) because he did not willfully make any statement or engage in any conduct having a prejudicial or detrimental effect on the best interests of the NBA

The second and third NBA constitutional provisions underlying Mr. Sterling’s alleged violation of Article 13(a) are Article 35A(c) and Article 35A(d). Article 35A(c) prohibits any person from making a statement that has or is designed to have “an effect prejudicial or detrimental to the best interests of basketball or of the Association or of a Member or its Team, shall be liable to a fine not exceeding \$1,000,000 to be imposed by the Commissioner.” (Charge,

³ As Shelly Sterling’s response amply demonstrates, this is far from the only instance where the Commissioner relies upon hearsay, many times from declarants who lack personal knowledge of the conversations they are attesting to. The fact that the Sterlings will be unable to cross-examine these witnesses underscores the patent unfairness of this procedure.

Ex. 2, Art. 35A(c).) Article 35A(d) similarly prohibits an owner from engaging in “conduct prejudicial or detrimental to the Association.” (Charge, Ex. 2, Art. 35A(d).) Mr. Sterling did not *willfully* violate either of these Articles.

The Commissioner does not specify any particular statement or acts that had any prejudicial effect on the NBA. He does not allege that Mr. Sterling’s statements in the illegally recorded conversation or in his interview with Anderson Cooper violate these sections. Instead, the Commissioner alleges that Mr. Sterling “provid[ed] false and misleading information to Mr. Anders in connection with the Commissioner’s investigation of the Recording” and “issu[ed] a false and misleading public statement on April 26 regarding the authenticity of the TMZ recording.” (Charge ¶ 109.)

There are many problems with these allegations. First, and most importantly, the Commissioner does not allege or identify any prejudicial or detrimental effect of Mr. Sterling’s or the Clippers’ purported statements questioning the authenticity of the tape. This is a prerequisite to violating Articles 35A(c) and 35A(d) and Counts IV and V fall on this ground alone. In addition, the public was not privy to Mr. Sterling’s statement to Mr. Anders so it is impossible to see how this statement could have prejudiced the NBA. Second, assuming that Mr. Sterling was aware that the illegal recording was authentic at the time he was asked, under the Commissioner’s interpretation of the NBA constitution, an owner must automatically and publicly admit guilt when accused or risk facing termination of their team ownership. This interpretation was surely not contemplated by the NBA constitution and would infringe on basic principles against self-incrimination. Third, the illegally recorded conversation occurred on September 12, 2013. It is perfectly natural that a busy individual would forget the precise details of a conversation that occurred several months earlier and might question the authenticity of a

recording saying words that he was surprised to hear himself utter. (Anders Decl. ¶ 10.) For these reasons, Mr. Sterling did not *willfully* make any statement or engage in any conduct prejudicial or detrimental to the league.

F. Mr. Sterling did not violate Article 13(c) of the constitution because the Commissioner’s fine is not 30 days overdue, and in any event, the fine was improperly issued

The final count, Count VI, charges Mr. Sterling with a violation of Article 13(c) of the NBA Constitution. Article 13(c) provides that an owner may not “fail to pay any dues . . . within thirty (30) days after Written Notice from the Commissioner of default in such payment.” (Charge, Ex. 2, Art. 13(c).) The Commissioner is incorrect that Mr. Sterling has violated Article 13(c).

1. The violation is not yet ripe

At the outset, this violation is not ripe. Mr. Sterling was notified that his fine was in default on May 14, 2014. (Charge ¶ 113.) As such, he has until at least June 13, 2014 to pay the fine. Because this 30-day time period has not yet expired, there has been no violation of Article 13(c).

2. The maximum permissible fine in the circumstances was \$1 million

According to the NBA’s general counsel, the Commissioner’s fine against Mr. Sterling was levied under Article 24. (Charge, Ex. 4.) Article 24 allows the Commissioner to levy a fine of up to \$2.5 million “*wherever there is a rule for which no penalty is specifically fixed.*” (Charge, Ex. 2, Art. 24(l) (emphasis added).) But there is such a rule here, and that rule provides for only a maximum \$1 million penalty. Article 35A(c) punishes a person who “makes . . . any statement having, or designed to have, an effect prejudicial or detrimental to the best interests of basketball.” According to the NBA’s letter, “The penalties set forth in paragraphs 1 and 2 above are based on the recordings released on April 26 and 27.” (Charge, Ex. 4.) Because Article

35A(c) directly deals with the matter of speech having a prejudicial effect on the NBA, and because that is precisely what the Commissioner is charging, the NBA constitution fixes a specific penalty for the alleged conduct. As such, even if a violation occurred, the maximum amount Mr. Sterling could have been fined is \$1 million. The Commissioner exceeded his authority in issuing a \$2.5 million fine.

III. Expelling the Sterling Family Runs Afoul of General Principles Governing Private Associations Because It Would Result in an Unfair and Discriminatory Administration of the NBA's Rules

Under both New York and California law, while private associations are granted some deference in expelling members, they may not expel any members at will. There are certain rules governing how members may be lawfully expelled. If the Commissioner's request to terminate Mr. Sterling's ownership is granted in these circumstances, the NBA will violate those rules.

A. The punishment against Mr. Sterling is arbitrary and capricious and is grossly disproportionate to past punishments imposed by the NBA

As stated above, the magnitude of the NBA's punishment against Mr. Sterling is unparalleled. Judging in terms of the punishment already imposed, and the Commissioner's current request, Mr. Sterling's offense is far and away the worst offense that any player, coach, or owner has ever committed in the history of the NBA. In the past, the NBA has either punished offensive speech with a modest fine or ignored it. Consequently, even if Mr. Sterling violated the NBA constitution, the Commissioner's request to terminate Mr. Sterling as an owner, coupled with the punishment he already imposed, would result in unfairly disparate treatment, which would render the exclusion unlawful because of such an arbitrary punishment. On top of that punishment, forcing a sale rather than allowing the team to pass by succession to

the remaining spouse or heirs would trigger an avoidable capital gains tax estimated to be more than \$300 million to \$500 million.

For comparison, the below is a non-exhaustive list of *publicly available* examples of past *public* acts of conduct by NBA owners, coaches, and players. Some were punished; many were not.

Speech-Related Conduct

- A player was fined \$100,000 but not suspended for referring to a referee as a “fucking faggot” on television.
- Jason Collins—the first openly homosexual player in the NBA—reported that he heard negative comments from another player during a game.⁴ The NBA has not announced that it was investigating or taking any action concerning the matter.
- An owner donated \$500,000 to the National Organization for Marriage, which advocates around the nation to legally ban marriage between homosexual couples. LGBT advocacy groups called for a boycott. The NBA took no action despite these threats of a boycott. On the topic of HIV/AIDS, the same owner had this to say in an interview 2010: “When HIV first came out President Reagan formed a commission, and I was honored to be on that commission. I listened to 300 witnesses tell us that it was everybody else’s fault but their own. Nothing to do with their conduct, just that the government didn’t fix this disease. At the end of that I put in the document, it was the conclusion document from the commission, that actions have consequences and you are responsible for yours. AIDS is a disease that people gain because of their actions. It wasn’t like cancer. We all made the exceptions for how you got it, by accident, that was all solved a long time ago. . . . That’s when they started hanging me in effigy because I wasn’t sympathetic to all their requests for special treatment. Because at that time it was always someone else’s fault. I said, you are responsible for your actions too, you know. Conduct yourself properly, which is a pretty solid Christian principle.” The NBA similarly took no action.
- When talking to a newspaper reporter, a former NBA player referred to his legal counsel as “big-time Jew lawyers” and referred to the Jewish people as “some crafty people” because “they are hated all over the world.” The same player also used an anti-homosexual epithet directed to a fan. Former NBA commissioner

⁴ It is worth noting that Mr. Collins admirably stated the following in reaction to these comments: “We’re all human. Everyone is entitled to their own opinions. You hope that if someone has a negative opinion, that they would keep it to themselves. But at the same time, I understand that in the NBA, we’re a bunch of individuals and this is America and everyone’s entitled to their opinion.”

David Stern stated that the remarks against homosexuals were “inappropriate and insensitive” and merited a suspension but did not suspend the player or ban him from future NBA activities.

- In response to an Asian player’s “tweet” asking to guess where he ate a meal, another player responded “Panda Express.” The NBA took no action although it was reported in several media outlets.
- Referring to Yao Ming, a player stated (on a television show): “Tell Yao Ming, ‘ching chong yang wah ah soh.’” And although the statement offended many in the Chinese community, the NBA neither fined nor suspended the player. Last month, that same player—now a former player—was accused of publicly mocking (on Instagram) a picture of a man with ectodermal dysplasia, a rare genetic disorder affecting one’s appearance. Despite being a minority owner of the Sacramento Kings, the NBA has yet to take any action against this individual.
- After Mr. Sterling’s illegally recorded private comments were leaked, a former player and current Knicks executive “tweeted”: “Black people your Focusing on the wrong thing. We should be focusing on having our own, Own team own League! To For Self!!” The NBA ignored this call for a racially homogenous league.

Past Owner Punishments

- An owner was suspended for nearly a year for signing a player to a secret contract, which violated the salary cap rules.
- An owner was fined \$25,000 and suspended two games for being convicted of drunk driving.
- An owner was fined \$100,000 for confronting referees on a court after the game and using inappropriate language toward them.
- Multiple owners were fined undisclosed sums (reported at between \$100,000 and \$500,000) for making public comments on Twitter about the collective bargaining process during the 2011 NBA lockout.

Non-Speech-Related Player Punishments

- A player was suspended 72 games plus playoffs for punching a fan. That same player was suspended seven games for a domestic violence incident, among other past suspensions.
- A player was suspended for 82 games (reduced to 68 games by an arbitrator for being too severe) for choking his coach and threatening to kill him.

- A player was suspended for 11 games for kicking a cameraman in the groin such that the cameraman needed to be carried away on a stretcher. The same player was suspended six games and fined \$20,000 for head-butting a referee.
- A player was suspended for seven games for pleading guilty to a reckless driving charge that resulted in the death of a passenger.

No owner, coach, or player has ever been fined close to \$2.5 million, banned for life, and forced to sell their property for *any* offense, let alone an alleged *private speech-related* offense. The NBA claims a commitment to diversity and inclusion, but it appears to have ignored many public statements undermining those principles in the past. In fact, the only permanent bans of record—other than the ban the Commissioner currently requests—involve gambling violations and repeated violations of the NBA’s substance-abuse policy. And further, as far as Mr. Sterling is aware, no one in the NBA has ever been punished for speaking in a private constitutionally protected setting. In view of these facts, the Commissioner’s request to compel Mr. Sterling to sell the Los Angeles Clippers is internally inconsistent with prior punishments, is discriminatory, and is arbitrary and capricious.

B. The procedures of the NBA constitution are unfair—both facially and as applied in this setting

The NBA constitution provides a meager five business days for Mr. Sterling to review the immense charge and “additional evidence in support of charge,” perform factual and legal research, and draft a response. This time is woefully inadequate for individuals with a billion-dollar enterprise on the line to investigate and sufficiently respond to a charge as severe as divesting a member of ownership of a team. On the other hand, the Commissioner and members have as much time as they need to research, prepare, and file a charge. On top of that, the NBA constitution provides no internal avenue for review or appeal and in fact prohibits “any and all recourse to any court of law to review any such decision.” (Charge, Ex. 2, Art. 13(j).) These procedures are strikingly improper with so much at stake.

But the rule is far worse as applied here. The Commissioner and his office—who have been following media reports closely (Declaration of Michael Bass and accompanying exhibits)—almost certainly knew that Mr. Sterling was in the process of retaining counsel to represent him. Once Mr. Sterling retained counsel, he was unable to provide his attorneys with the pertinent documents, which were located in his office at Staples Center. When Mr. Sterling’s counsel requested that Mr. Sterling be granted access to his office, the NBA refused the request. As such, Mr. Sterling’s counsel *still* have not had access to Mr. Sterling’s files and are forced to rely exclusively on the Commissioner’s evidence.

Even further, the NBA refused Mr. Sterling’s request for an extension of time to respond. This position was cemented in the Commissioner’s press conference of May 20, 2014, where he stated: “In terms of additional time, the answer has been no.” The Commissioner indicated an unwillingness to deviate from the procedures enumerated in the constitution. The NBA, with its own vast resources and at least one of the nation’s largest law firms behind it, took 23 days from the time TMZ leaked the illegal recording to file its charge. The charge is 30 pages long, contains 15 statements and declarations, an expert report, survey evidence, and what appears to be approximately 1,000 pages of exhibits. Despite the extent and magnitude of the charges, the NBA refused to provide Mr. Sterling with more than five business days to respond. These are impermissible tactics. The basic charges aside, how can Mr. Sterling possibly retain experts and respond to the NBA’s extensive survey and forensic evidence in five business days, including a holiday weekend? How can he obtain declarations from anyone in the Clippers organization when he is barred from the premises? The procedures insisted upon by the Commissioner under these circumstances—especially with so much at stake for Mr. Sterling—offend the most rudimentary maxims of fairness.

C. Mr. Sterling’s hearing will be neither fair nor impartial, and many owners have already announced their agreement with the Commissioner

The result of the Commissioner’s request in the charge is preordained, and Mr. Sterling will receive neither a fair nor impartial hearing. For instance, in a news conference on May 20, 2014, the Commissioner stated: “We know we’re doing the right thing, and I know I have the owners behind me.” Another news outlet reported that a league source told Yahoo Sports: “Adam has the votes—all of them, I believe.” Many owners have already said as much themselves, *even before the charge and Mr. Sterling’s response was filed*. A few examples include:

- Chicago Bulls: “We completely support Commissioner Silver’s decision today regarding Clippers owner Donald Sterling, and praise him for his prompt investigation and action. The Commissioner was correct to ban Mr. Sterling from all official NBA business, to levy the stiffest allowable fine, **and we will support his recommendation to press for Mr. Sterling to relinquish his ownership of the Los Angeles Clippers franchise**. We believe Commissioner Silver’s decision reflects the best interests of the NBA and public civility.”
- Cleveland Cavaliers: “It is shocking that anyone could hold the kind of offensive and feeble minded views that are being attributed allegedly to the Clippers owner, Donald Sterling. **The diverse staff members of the Cleveland Cavaliers franchise are unified in encouraging Commissioner Silver and the NBA to respond with swift and appropriate action** consistent with a strong zero tolerance approach to this type of reprehensible behavior.”
- Detroit Pistons: “I am proud of Adam Silver for providing the leadership and strength necessary in this situation. **He has my full support.**”
- Golden State Warriors: “We applaud the firm punishment handed out today by NBA Commissioner Adam Silver and appreciate the swiftness with which the NBA conducted its investigation. **Similarly we anticipate that the NBA Board of Governors will act promptly to put this chapter behind us.**”
- Houston Rockets: “This kind of behavior can’t be allowed in the NBA by owners, players or anybody. **This guy has no place in the family of the NBA.** Whatever it takes, we have to make sure this kind of event never happens again.”
- Miami Heat: “Great job Adam. The @NBA is in good hands. **You have my full support.**”

- New Orleans Pelicans: “In light of the serious matter facing our league, a matter that transcends sports, the New Orleans Pelicans fully support the decisions made today by NBA Commissioner Adam Silver **and will fully support his recommendations moving forward.**”
- Orlando Magic: “**We are whole-heartedly behind Adam’s recommendation and plan to vote accordingly.**”
- Phoenix Suns: “I applaud the actions taken today by Commissioner Silver in response to the disturbing comments made by Donald Sterling. Commissioner Silver’s decision upholds the principles of diversity, tolerance and respect for all people that the NBA and Phoenix Suns represent. **The Commissioner has my full support.**”
- Sacramento Kings: “Great leadership today from @NBA Adam Silver. **Very clear message** about who we are as a league & **where we’re going.** #NBA3.0 #secondthemotion.

The import of these statements is that the owners have already admitted that they are going to follow the Commissioner, who has now effectively assumed the role of prosecutor, jury, and executioner. These proceedings will be a spectacle meant to mollify the popular opinion, not a fair and impartial hearing: the outcome of these proceedings became a foregone conclusion weeks ago.

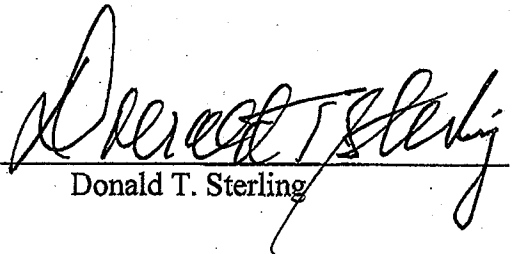
IV. Forcing the Sterling Family to Sell the Los Angeles Clippers Would Result in an Egregious Forfeiture Because the Sterling Family Would Have to Pay an Enormous but Avoidable Capital Gains Tax

If the Sterlings are forced to sell their interest in the Los Angeles Clippers, they will face vast and avoidable financial consequences. Upon a forced sale of the team, the Sterlings would be subject to a capital gains tax of approximately 33 percent. This would result in the Sterling family owing several hundred million dollars in taxes they would otherwise not owe if the team passed through the probate process. In other words, if the Los Angeles Clippers passed to the Sterlings’ heirs and they subsequently sold the team, they would pay immensely reduced capital gains taxes—by several orders of magnitude. Accordingly, a forced sale of the team would result in an egregious forfeiture to the Sterling family.

CONCLUSION

For all the foregoing reasons, Donald Sterling and LAC Basketball Club, Inc. request that the Charge be denied and that the Membership of Donald Sterling and LAC Basketball Club, Inc. not be terminated.

Dated: May 27, 2014


Donald T. Sterling



National Basketball Association

Richard W. Buchanan
Executive Vice President &
General Counsel

May 19, 2014

By Overnight Mail and Email

Maxwell M. Blecher, Esq.
Blecher, Collins, Pepperman & Joye
515 South Figueroa Street
Suite 1750
Los Angeles, CA 90071
mblecher@blechercollins.com

Dear Mr. Blecher:

I have your email requesting a 3-month delay of the time period set forth in the NBA Constitution for a response to the Charge that was initiated today.

The language of Paragraph 14 of the Constitution setting forth the procedure for termination of an NBA Membership is mandatory regarding the time allotted for a response: "The Member or Owner so charged, shall, within five (5) days after receipt of the charges, file with the Commissioner its written answer thereto." That is the rule to which all NBA Owners, including Mr. Sterling, have agreed.

There are good reasons for that rule. Time is of the essence when a charge is made to terminate an NBA Membership, and particularly so in this case, given the overwhelming and unprecedented harm to the NBA that has occurred and is continuing to occur by reason of Mr. Sterling's ownership of the team. Accordingly, the rule set forth in the Constitution must be adhered to.

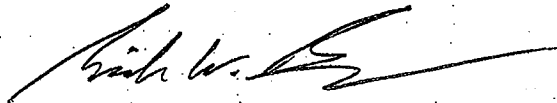
Adherence to this rule is not in any way unfair to Mr. Sterling. The factual and legal issues here are not at all complex. The Charge is based solely on a recording that Mr. Sterling admits is authentic and events directly related thereto. The NBA's authority to act is clearly set forth in the NBA Constitution. Mr. Sterling has known about the existence of the recording since April 9, and he and his counsel already have been afforded multiple opportunities to be heard: (i) at an in-person interview, (ii) through the submission of any materials or other evidence to the NBA, and (iii) in a direct conversation with the Commissioner. He declined them all. Moreover, he is now being given a full eight (8) days (because of three (3) intervening non-business days) to respond to the Charge.

Maxwell M. Blecher, Esq.
May 19, 2014
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Given this pattern of non-cooperation and failure to avail himself of multiple prior opportunities to be heard, and the more than adequate time to respond provided for by the Constitution, Mr. Sterling's request for an additional 3-month delay is entirely unjustified and cannot be granted. His answer to the Charge is due on May 27.

Please contact me if you have any questions.

Sincerely,

A handwritten signature in black ink, appearing to read "Richard W. Buchanan", with a long horizontal flourish extending to the right.

Richard W. Buchanan

**BEFORE THE NATIONAL BASKETBALL
ASSOCIATION BOARD OF GOVERNORS**

In the Matter of the Termination of the National
Basketball Association Membership of

LAC Basketball Club, Inc.

DECLARATION OF
DONALD STERLING

Donald Sterling, under penalty of perjury, declares as follows:

1. I am over the age of 18 and have personal knowledge of the factual matters set forth in this Declaration and, if called to testify, could and would competently and truthfully testify thereto.

2. I make this declaration in opposition of the Charge initiated by the Adam Silver, Commissioner of the National Basketball Association, dated May 18, 2014.

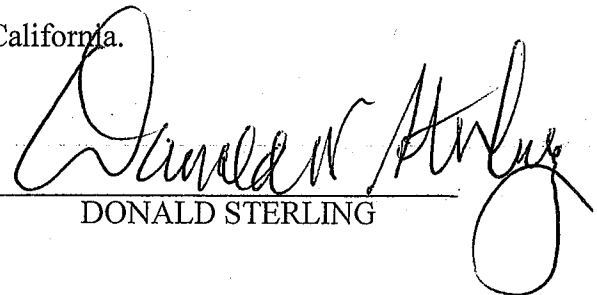
3. On several occasions, I was with Ms. Stiviano in the living room of her home. Specifically, on or about September 12, 2013, I was with Ms. Stiviano in the living room of her home. At that time I had a private conversation with her.

4. At no time did Ms. Stiviano disclose to me that she was recording our private conversation.

5. At no time did I give my consent to Ms. Stiviano to record our private conversation.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Executed on May 22, 2014 at Los Angeles, California.


DONALD STERLING