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UNITED STATES BANKRUPTCY COURT
DISTRICT OF ARIZONA

In re DEWEY RANCH HOCKEY, LLC, COYOTES HOLDINGS, LLC, COYOTES HOCKEY, LLC, and ARENA MANAGEMENT GROUP, LLC, Debtors.	Case No. 2:09-bk-09488 (Jointly Administered) Chapter 11 **EMERGENCY MOTION UNDER BANKRUPTCY CODE SECTIONS 105(a) AND 502(c) TO ESTIMATE CITY OF GLENDALE'S CLAIM FOR PURPOSES OF DISTRIBUTION** **Hearing Date: TBD** **Hearing Time: TBD**
This Filing Applies to: ■ All Debtors ❒ Specified Debtors	

DEWEY RANCH HOCKEY, LLC, COYOTES HOLDINGS, LLC, COYOTES HOCKEY, LLC ("**Coyotes Hockey**"), and ARENA MANAGEMENT GROUP, LLC ("**Arena Management**", and collectively, the "**Debtors**"), debtors-in-possession in the above-captioned Chapter 11 cases (these "**Cases**"), file this Motion under sections 105(a) and 502(c) of the United States Bankruptcy Code (the "**Bankruptcy Code**") for an order estimating the claims of the City of Glendale (the "**City**") against the Debtors that may arise from the "Arena Management And Use Lease Agreement" (the "**AMULA**").

The highly-anticipated sale of Coyotes Hockey's and Arena Management's assets to an affiliate of the National Hockey League (the "**NHL**") is complete, and therefore, the Debtors must now administer and wind down these Cases through a Chapter 11 plan. The Debtors, however, cannot make any distribution to creditors under a Chapter 11 plan until they know what the City's claim under the AMULA may be. Without this Court's estimation of the City's claim, creditors and the Debtors cannot set aside an appropriate distribution reserve for the City, make distributions to other creditors, and wind down these Cases.

The parties do not yet know what the ultimate treatment of the AMULA will be -- that is, whether the lease will be rejected or modified with a new buyer. Notwithstanding that uncertainty, and while the parties wait to see whether the NHL will find a purchaser to resell the assets it purchased, this Court has the power, and should now exercise that power, to estimate the City's claim against the Debtors under Bankruptcy Code § 502(c) and allow these Cases to proceed to a creditor distribution. This Court should now find that the AMULA can be rejected under Bankruptcy Code § 365(a) and that the City's resulting rejection damages are capped under Bankruptcy Code § 502(b)(6).

The City cannot avoid a finding that the AMULA can be rejected. Even though the NHL's bid as approved by this Court contemplates the possible rejection of the AMULA and relocation of the Phoenix Coyotes professional hockey team (the "**Coyotes**"), the City actively supported that bid, which ultimately succeeded. By virtue of supporting the NHL's bid, the City waived its arguments that rejection of the AMULA could not occur because the City would be disproportionately harmed, or that the City was entitled to specific performance. The City also actively refused a non-refundable offer of $25,000,000 that would have reduced the City's

capped damages in their entirety. The City's claims against the Debtors, therefore, amount to nothing.

This Motion is supported by the "Debtors' Memorandum of Points and Authorities in Support of Motion to Sell Substantially All of Coyotes Hockey's Assets (Glendale Issues)," dated June 5, 2009 [Docket No. 287], the "Debtors' Motion for an Order Approving Rejection of the Arena Lease Under Bankruptcy Code § 365(a) Effective as of the Closing Date of a Relocation Sale," dated August 11, 2009 [Docket No. 611], the "Memorandum of Points and Authorities in Support of Debtors' Motion for an Order Approving Rejection of the Arena Lease Under Bankruptcy Code § 365(a) Effective as of the Closing Date of a Relocation Sale," dated August 18, 2009 [Docket No. 685], the "Debtor's Reply to Drawbridge's Objection to Debtors' Motion for an Order Approving Rejection of the Arena Lease Under Bankruptcy Code § 365(a) Effective as of the Closing Date of a Relocation Sale," dated August 31, 2009 [Docket No. 850], and "Debtor's Reply to City of Glendale's Reply to Memorandum of Points and Authorities in Support of Debtors' Motion for an Order Approving Rejection of the Arena Lease Under Bankruptcy Code § 365(a) Effective As of the Closing Date of a Relocation Sale," dated August 31, 2009 [Docket No. 853] (collectively, the "**AMULA Briefing**"), the entire record before the Court, and by the following memorandum of points and authorities.

BACKGROUND

Jurisdiction and Venue

1. On May 5, 2009 (the "**Petition Date**"), the Debtors filed their voluntary petitions for relief under Chapter 11 of Title 11 of the United States Code (the "**Bankruptcy Code**") in the United States Bankruptcy Court for the District of Arizona (the "**Court**").

2. The Debtors continue to operate as debtors-in-possession in accordance with

Bankruptcy Code §§ 1107 and 1108.

3. The Court has jurisdiction over the Cases under 28 U.S.C. §§ 157 and 1334. This matter constitutes a core proceeding under 28 U.S.C. § 157(b)(2).

4. Dewey Ranch Hockey, LLC, is an Arizona limited liability company with its principal place of business located in Yavapai County, Arizona. The remaining Debtors are affiliates of Dewey Ranch Hockey, LLC. Accordingly, venue of these Cases is proper in the District of Arizona under 28 U.S.C. §§ 1408 and 1409.

5. The statutory predicates for the relief requested in this Motion are Bankruptcy Code §§ 105(a) and 502(c).

6. No trustee or examiner has been appointed in these Cases. An official committee of unsecured creditors was appointed on May 21, 2009 [Docket No. 176].

Facts Concerning The Debtors

7. In support of this Motion, the Debtors incorporate by reference the statements set forth in the "Omnibus Statement of Facts in Support of Chapter 11 Petitions And First Day Motions" [Docket No. 7].

The Sale Hearing For The Sale Of The Coyotes

8. Contemporaneously with the commencement of these Cases, the Debtors sought to sell substantially all of Coyotes Hockey's assets to PSE Sports & Entertainment, LP ("**PSE Sports**"), under an asset purchase agreement (the "**PSE Bid**") that contemplated the relocation of the Phoenix Coyotes professional hockey team (the "**Coyotes**"), to Hamilton, Ontario. *See* "Motion of the Debtors for an Order Under Sections 105(a), 363, and 365 of the Bankruptcy Code (i) Authorizing Coyotes Hockey, LLCs Sale of Substantially All of Its Assets, Free and

Clear of Liens, Claims, and Encumbrances, Subject to Higher and Better Offers, and (ii) Approving an Asset Purchase Agreement" filed on May 5, 2009, Docket No. 18.

9. Uncertain of whether or not a qualified competing bidder would submit a bid to keep the Coyotes in Glendale, Arizona, the National Hockey League (the "**NHL**"), submitted the "Asset Purchase Agreement Among Coyotes Hockey, LLC, Arena Management Group, LLC, Coyotes Newco, LLC And Arena Newco, LLC" (the "**NHL Bid**"), to purchase substantially all of Coyotes Hockey's and Arena Management's assets. *See* "NHL's Brief In Support Of The Sale Of Assets To And Assumption Of Liabilities By Coyotes Newco, LLC and Arena Newco, LLC" dated August 27, 2009 [Docket No. 820] (the NHL Bid is Exhibit 1 of Docket No. 820). Like the PSE Bid, however, the NHL Bid contemplated a possible rejection of the AMULA and relocation of the Coyotes if the NHL could not find a purchaser that would keep the team in Glendale, Arizona. The NHL Bid provided in pertinent part:

> (b) The Sellers agree not to reject the AMULA prior to the latest date on which they are required to make such determination under the Bankruptcy Code and to use their reasonable best efforts to obtain an Order extending such date until the last day of the 2009-10 Season (but not later than June 15, 2010), including seeking the Consent of the City to such extension. Team Seller and Arena Seller further agree that, if they reject the AMULA, the Sellers shall take all actions required to ensure that such rejection does not become effective until the day after the last day of the 2009-10 Season (but not later than June 15, 2010).
>
> (c) From and after the date of this Agreement, the Buyers will use their commercially reasonable efforts to negotiate with the City an amendment to the AMULA upon terms and conditions mutually satisfactory to the Buyers and the City, which terms shall include the ability of the Buyers to assign the AMULA to any Person approved by the NHL. In the event that the Buyers and the City agree to execute an amendment to the AMULA prior to the effective date of any rejection of the AMULA by the Sellers, then (i) the Sellers shall withdraw any motion to reject the AMULA and take such other action as may be required to obtain an Order of the Bankruptcy Court determining that the AMULA is not rejected,

> and (ii) the AMULA will be treated as an Added Contract in accordance with Section 2.9(b), subject to such amendment, and thereafter shall be deemed an Assumed Contract.

NHL Bid, Section 2.12, page 23. Accordingly, if the NHL could not find a buyer to keep the Coyotes in Glendale, the AMULA would be rejected no later than June 15, 2010. The NHL Bid, therefore, assured the City of only one additional season of Coyotes hockey. It guaranteed nothing else.

10. This Court held a sale hearing to consider both the PSE Bid and the NHL Bid on September 10 and 11, 2009 (the "**Sale Hearing**"). Even before the scheduling of the Sale Hearing, Glendale vehemently opposed the PSE Bid and each of the Debtors' and PSE Sports' efforts to relocate the Coyotes under the terms of the PSE Bid. *See* Docket Nos. 87, 281-84, 376, 512, 556, 756, 839, and 924. Early in the Cases, Glendale even commenced against the Debtors an adversary proceeding seeking an injunction against rejection of the AMULA and relocation of the Coyotes. *See* Complaint dated May 19, 2009, Adversary Proceeding No. 09-ap-00540.

11. The City's posture with respect to the NHL was drastically different from its stance with respect to the Debtors and PSE Sports, despite that the NHL Bid contemplated a possible rejection of the AMULA and relocation of the Coyotes. In fact, the City expressed -- at all times during these Cases -- enthusiastic support of the NHL Bid. The transcripts of the Sale Hearing illustrate the City's inflexible support for the NHL and the NHL Bid in response to the Court's probing of this issue.

> CITY COUNSEL: [W]e do believe that if the NHL prevails and does acquire this team, the City will once again be in a place where it is -- where its interests are reasonably protected. And it does have the ability to keep this team in Glendale.
>
> THE COURT: ***Let me ask you I mean, that's tantamount to saying that the City supports the NHL bid***.

> CITY COUNSEL: ***We have no objection whatsoever to the NHL bid***.
>
> * * *
>
> ***I'm standing here to urge you to accept the NHL bid and the NHL and the City believe that all of the requisite documents and so forth can be processed appropriately with an acknowledgement of no objection by the City***.
>
> * * *
>
> THE COURT: Well to go back to the bottom line, the City of Glendale supports the asset purchase agreement submitted by the National Hockey League?
>
> CITY COUNSEL: ***We have no objections whatsoever to it. Yes***.
>
> THE COURT: And that -- is that a support of or just no objection, there is a difference.
>
> CITY COUNSEL: Is -- well let me ask: Does the Court -- what is the difference in terms of -- we vehemently object to the PSE bid. We much prefer the . . . NHL bid.
>
> THE COURT: All right.
>
> CITY COUNSEL: ***We're urging the Court to approve the NHL bid***.

September 10 Hearing Transcript, 101:7-11, 13-16, 23-25, 102:1, 107:16-25, 108:4-5 (emphasis added). The Court ensured to make the City's position entirely clear. The City was not simply refusing to object to the NHL Bid; it outright backed the NHL Bid and had "no objection whatsoever to it."

12. The importance of the City's support for the NHL Bid cannot be understated. The Court itself recognized the significance between actively supporting the NHL Bid and expressing no objecting to it:

> THE COURT: ***Well in my mind there is a difference between not objecting and supporting. So again, I want to make sure I***

understand the City's position. You're telling me it's not objecting. And so is it supporting the bid or just not objecting?

CITY COUNSEL: ***We support the bid***.

THE COURT: All right.

September 10 Hearing Transcript, 108:6-12.

13. Indeed, the Court and the City's counsel discussed the City's unqualified support for the NHL Bid, and further discussed at length the possible legal ramifications of that support. The Court specifically discussed that the City's position directly affected its argument that the AMULA could not be rejected or that the PSE Bid should not prevail because such rulings would effect a "disproportionate harm" on the City. As reflected by the exchange between the City's counsel and the Court at the Sale Hearing, the City had made its decision.

> THE COURT: Then let me ask a difficult question for you and your client. But I think I should have to ask it and get it on the record. The possibility then is come the spring of next year and assuming that there is no buyer for the team in Glendale, the City is not going to contest the league when it goes to sell it to a buyer somewhere else. Right? I know you don't want to answer that question, but I think it's fair to ask it.
>
> CITY COUNSEL: Well, the NHL will own the team or an NHL affiliate will own the team. It will not be a bankruptcy debtor. There will be issues for this Court to determine. There maybe at that point claims resolutions still going on. All of the other fun things to -- that are going to --
>
> THE COURT: But that's really neither here nor there in terms of --
>
> CITY COUNSEL: That's right.
>
> THE COURT: -- this question.
>
> CITY COUNSEL: ***And it's neither here nor there as to what then are the arrangements that happen between the City and the NHL. The City and the NHL will have agreements. They will be part of the NHL's bid, as they are***. And the City and the NHL will then either come to agreements or they won't. But it won't be

a 363 sale, God forbid, in this Court. It won't be another Chapter 11 proceeding under the new code that will own that team. There will be an NHL affiliate that will own that team and that transaction will proceed.

THE COURT: ***Well the reason I think I have to pursue that is, in part, one of the City's arguments is the disproportionate harm to the City of rejection***. Right?

CITY COUNSEL: Yes.

THE COURT: And it seems to me that cases, when they look at that, particularly the Ninth Circuit cases you have to in a blunt sense crystal ball the future. ***You have to talk about well what happens to the City if it goes that route. And what happens to everybody else under both assumptions. And I mean assumptions in a legal sense, not in the bankruptcy sense***.

CITY COUNSEL: Absolutely.

THE COURT: On both assumption and rejection.

CITY COUNSEL: Yes.

THE COURT: And so to analyze that in part I have to look at, "Okay, one option would be sell it to the NHL. They've said we'll commit to keep it there for the coming season." But they have said almost from day one if we can't find a buyer in Glendale at that point in time then we will consider looking elsewhere. And I'm not asking the City to say, "We won't file a lawsuit if that happens." ***But what I want the City to acknowledge is that's part of the analysis the Court has to consider in looking at that business judgment disproportionate harm analysis***.

CITY COUNSEL: ***And we do***. And let me explain why. We have told you time and time again and it seems that there is no serious dispute once again that in Mr. Kroop's words there is a hugely disproportionate harm to the City. If the PSE bid prevails we fought on the first day of this case, and we're standing here to say again: We will suffer huge and disproportionate harm to any benefit conferred upon any other creditor, or on the creditor body generally. Or on Mr. Moyes or on anyone else. We are comfortable with that conclusion. Others could agree or disagree; we haven't heard anyone disagree. We --

* * *

THE COURT: I think there has been some disagreement about that inference, but that's neither here nor there. That's the City's position.

CITY COUNSEL: Correct.

THE COURT: The harm to that is so -- I think your words are "almost catastrophic" that you think this is an easy analysis this is a gimme in a golf sense. Right? . . . We're at the Y in the road.

CITY COUNSEL: ***-- we have to take it. And the other path is to put our lot in with the NHL*** . . . . ***So given the two choices that we have, we are prepared to put our lot in with the NHL***. It's not our preferred choice, but it's where we are today. And this Court does require parties to actually make choices. We're there. ***It gives us the ability to mitigate our harm. It gives the City, as a body politic, the right to control its own future and to make responsible decisions. And not have those decisions made for them by PSE or these debtors. That's the right that it bargained for seven years ago, that's the right it retains***. . . . We wish it were not so, but it is. As -- we can avoid the irreparable harm --

THE COURT: But let me come back to my basic question, and I think --

CITY COUNSEL: Yes.

THE COURT: I think I have to, in making that analysis on the disproportion of harm analysis, consider the probability of what happens if NHL buys it and it stays there for the coming season, but at the end of that season there is no buyer. And the league has made clear that beyond that, they're then going to look for a buyer potentially and maybe even probably somewhere else.

CITY COUNSEL: Then we've had a misunderstanding. I want to make it very clear. The City has every confidence that if the NHL --

CITY COUNSEL: [The City] has every confidence that the Coyotes will be playing here next year and for many years beyond, if the NHL is the successful bidder. The NHL has stated in its papers that it also believes that and will make reasonable efforts to make that happen. We believe that will in fact happen. This is not a concession to the team moving in the least. Or a recognition that the team may leave.

September 10 Hearing Transcript, 102:1-25, 103-105, 106:8-9, 13-22, 107:3-15 (emphasis added).

14. The exchange quoted above makes it abundantly clear that the City was willing to take the risk that the NHL may direct the rejection of the AMULA and relocate the Coyotes. Given the City's own balancing of interests between the PSE Bid and the NHL Bid, the City chose the NHL.

15. In addition to its overwhelming support for the NHL Bid, the City refused PSE Sports' offer to purchase the City's claims against the Debtors for $50,000,000 if the PSE Bid was approved and the Coyotes were successfully relocated to Hamilton, Ontario. This offer by PSE Sports was specifically intended to reduce the damages the City claimed it would suffer as a result of the AMULA's rejection and the Coyotes' relocation. *See* "PSE Sports & Entertainment LP's Notice Of Amended Asset Purchase Agreement And Bid With Offer To Purchase Glendale Claim" filed on September 7, 2009 [Docket No. 919].

16. The City's position did not change during the second day of the Sale Hearing.

> CITY COUNSEL: The City is a political body. If at some point the City directs those of us here in the courtroom, both lawyers and the City representatives, to change our mind, we of course will, ***but the City remains enthusiastically in support of the NHL bid***.

September 11 Hearing Transcript, 201:4-10.

17. The City, therefore, openly and "enthusiastically" supported the NHL Bid, despite the real possibility that the NHL may need to relocate the Coyotes and direct the Debtors to reject the AMULA at the conclusion of the 2009-2010 hockey season. The City had determined that the disproportionate harm that may occur with respect to the NHL Bid was a better option than the harm that it may suffer with respect to the PSE Bid.

18. The Court took the matters raised at the Sale Hearing under advisement. *See* Minute Entry Dated September 11, 2009 [Docket No. 969].

The City's Refusal Of A Guaranteed $25 Million

19. On September 15, 2009, PSE Sports filed a summary of its final PSE Bid [Docket No. 973] (the "**PSE Summary**"). The PSE Summary also outlined a $50,000,000 cash offer to purchase the City's claims, so long as, among other things, the PSE Bid was approved and that the City allowed PSE Sports to use Jobing.com Arena consistent with past practices pending the move to Hamilton, Ontario. Importantly, the $50,000,000 cash offer to the City was not conditioned on the City supporting the PSE Bid. *See* PSE Summary, pages 2-3.

20. The same day, the City filed the "City Of Glendale's Confirmation Of Support For The NHL Bid," which effectively rejected the $50,000,000 cash offer and specifically requested that the Court approve the NHL Bid. *See* Docket No. 974.

21. PSE Sports eventually sweetened the deal for the City and revised its $50,000,000 cash offer contained in the PSE Summary that was rejected by the City. As set forth in the "Amended Summary Of Final Bid By PSE Sports & Entertainment, LP," filed on September 23, 2009 [Docket No. 998] (the "**Amended Summary**"), PSE Sports agreed to provide the City an up-front $25,000,000 payment that would become non-refundable on entry of an order approving the sale of the Coyotes to PSE Sports (after acceptance of the relocation fee). In other words, if the NHL appealed the order approving PSE Sports' purchase and prevailed, the City would still keep the $25,000,000 non-refundable payment by PSE Sports. Like the previous offer, this offer was not conditioned on the City's support for the PSE Bid. The City merely needed to accept the money.

22. As reflected by the Amended Summary, the City's council held a meeting on September 22, 2009, at which the City's council indicated that the NHL had imposed a December 31, 2009, deadline to find a Glendale purchaser of the Coyotes. *See* Amended Summary, page 2. PSE Sports, therefore, agreed to allow the Coyotes to stay in Glendale for the upcoming 2009-2010 season, which effectively allowed the City (and other creditors) to receive the benefit of the NHL Bid in terms of the guaranteed amount of time the Coyotes would play in Glendale. *See* Amended Summary.

23. At a hearing concerning the Debtors' request to mediate the issues discussed at the Sale Hearing, the Court recognized that PSE Sports' amended offer to purchase the City's proofs of claim reflected a significant amount of money. The Court also emphasized that the City had rights that could not be performed by the Debtors. As stated by the Court:

> THE COURT: Well, in fairness, I mean hasn't -- and again I'm taking it at face value as stated, ***that PSE has now made a fairly significant monetary offer to the City of Glendale. I think in a simple sense, at least as I look at it, the City sits in a precarious position. They have all these rights, as we all know, against a bunch of companies, and has no ability to perform on any of those obligations***. I think from day one the NHL has said, "We're going to stand by the City of Glendale and try and make a NHL franchise work out."
>
> But even the NHL has kind of said, "If that can't be done, Judge, by the end of this coming season, then we're going to have to look at some place else." ***And at least, you know, to an old bankruptcy judge, $25 million cash today no matter what happens is a lot of money***.

September 23 Hearing Transcript, 25:16-25, 26:1-5 (emphasis added).

24. The City never accepted PSE Sports' amended offer. The City declined the $50,000,000 offer, which included the guaranteed $25,000,000 payment in event the NHL prevailed on appeal of an order approving the PSE Bid. *See* "City Of Glendale's Supplemental

Objection To Debtors' Motion For Order Compelling NHL To Attend Mediation" filed on September 24, 2009 [Docket No. 1007] (the "**City Supplement**").

25. The Court ultimately denied both the PSE Bid and the NHL Bid. *See* Amended Minute Entry/Order dated September 30, 2009 [Docket No. 1020].

Stipulated Sale Of Assets Under Revised NHL Bid

26. The NHL and the Debtors agreed to sell Coyotes Hockey's and Arena Management's assets to an NHL affiliate under a revised NHL Bid (the "**Revised NHL Bid**"). Although slightly revised from the bid submitted in connection with the Sale Hearing (which was also modified), the new NHL Bid also contemplated the relocation of the Coyotes and the rejection of the AMULA if the NHL cannot sell the assets to a Glendale buyer before the end of the 2009-2010 hockey season. *See* Revised NHL Bid, Sections 2.12, pages 29-30, which is attached to the "Stipulated Order Approving Amended And Clarified Bid" dated November 2, 2009 [Docket No. 1079] (the "**Stipulated Order**").

27. The City, along with the NHL, the Debtors, and other interested parties stipulated to the sale under the Revised NHL Bid and submitted the Stipulated Order, which the Court approved and entered on November 2, 2009. The sale of the Coyotes to the NHL affiliate under the Revised NHL Bid closed on November 2, 2009. The NHL -- through an affiliate -- now operates under the AMULA, and if it cannot find a buyer to repurchase the assets and keep the Coyotes in Glendale, it may direct the Debtors to reject the AMULA and relocate the Coyotes at the end of the 2009-2010 hockey season.

28. The City placed all hope in the Revised NHL Bid and the NHL to keep the Coyotes in Glendale.

RELIEF REQUESTED AND BASIS FOR RELIEF

29. By this Motion, the Debtors seek entry of an order under Bankruptcy Code §§ 105(a) and 502(c) estimating the value of the City's claim against the Debtors.

30. Bankruptcy Code § 502(c) provides that "[t]here shall be estimated for purpose of allowance under this section -- (1) any contingent or unliquidated claim, the fixing or liquidation of which, as the case may be, would unduly delay the administration of the case . . . ." 11 U.S.C. § 502(c).

31. There can be no dispute that the City's claims against the Debtors are contingent and unliquidated for purposes of Bankruptcy Code § 502(c). The Debtors will not know the ultimate disposition of the AMULA until the NHL finds a Glendale buyer or until the NHL directs the Debtors to reject the AMULA. The Debtors' creditors should not be forced to wait for these events to unfold, and these Cases should not be held hostage because of circumstances completely out of the control of creditors, the Debtors, and their advisors. These Cases must proceed with creditor distributions. *See In re Dant & Russell, Inc.*, 951 F.2d 246, 248 (9th Cir. 1991) ("Section 502(c) permits the estimation of contingent or unliquidated claims so that delay in the administration of the estate may be avoided"); *In re Corey*, 892 F.2d 829, 834 (9th Cir. 1989) (holding that estimation of claim under section 502(c) was appropriate to avoid delay in confirming plan and making distributions to creditors under plan); *In re Lee Holding Co.*, 178 B.R. 976, 982 (Bankr. S.D. Ohio 1995) (stating that scope of Bankruptcy Code § 502(c) includes estimation of unliquidated claims for lease rejection damages); *see also* 11 U.S.C. § 105(a) (providing that "[t]he court may issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title").

32. As set forth below, if the NHL directs the Debtors to reject the AMULA under the Revised NHL Bid, the City's claims against the Debtors would be zero. Despite the Court's previous reluctance to rule on the AMULA issues,[1] it is now time -- in the context of Bankruptcy Code § 502(c) -- to find that the AMULA is a lease that can be rejected under Bankruptcy Code § 365, and the City's damages resulting from such rejection would be capped under Bankruptcy Code § 502(b)(6). The City also actively refused payment of $25,000,000, which would have reduced its prospective claim against the Debtors to zero dollars.

The AMULA Is A Lease That Can Be Rejected

33. The Debtors incorporate here by this reference all of the factual and legal arguments set forth in the AMULA Briefing supporting the Debtors' argument that the AMULA is a single lease under Arizona law that may be rejected under Bankruptcy Code § 365. The City is not entitled to specific performance of the AMULA. *See* AMULA Briefing, Docket No. 287, Sections II, III, and IV.A; Docket No. 611, Sections A and B; Docket No. 685, Sections II, III, and IV.A; and Docket No. 853, ¶¶ 13-32.

34. Any argument that the Court should deny a prospective rejection of the AMULA because the City would suffer disproportionate harm, or that the City is entitled to specific performance of the AMULA, is belied by the City's own actions in these Cases. As set forth above, the City enthusiastically supported the NHL Bid as originally submitted and as modified as the Revised NHL Bid, but such bids contained provisions that the AMULA may be rejected and the Coyotes may be relocated. From a legal perspective, there is no practical difference

[1] Notwithstanding the substantive AMULA Briefing, the Court declined to rule on AMULA issues twice. *See* Minute Entry/Order dated June 15, 2009 [Docket No. 341]; *and see* Amended Minute Entry/Order dated September 30, 2009 [Docket No. 1020].

among the PSE Bid and the two NHL bids in this regard. They both bear the real risk of disproportionate harm to the City and relocation of the Coyotes.

35. The City cannot overwhelmingly support the NHL Bid and the Revised NHL Bid while at the same time argue that it will be disproportionately harmed if the AMULA is rejected. Likewise, the City cannot argue that the Debtors must specifically perform the AMULA after it has urged the Court to accept the NHL Bid and the Revised NHL Bid. The City intentionally waived these known arguments and alleged rights when it chose to side with the NHL and take its chances that the NHL will find a Glendale buyer. "Waiver" is an "intentional relinquishment of a known right." *See Northern Ariz. Gas Serv. v. Petrolane Transp.*, 145 Ariz. 467, 476, 702 P.2d 696, 705 (Ariz. Ct. App. 1984) ("A waiver is an intentional relinquishment of a known right. It may be express or inferred from conduct"); *accord City of Tucson v. Koerber*, 82 Ariz. 347, 356 313 P.2d 411, 418 (Ariz. 1957) ("Waiver is the voluntary and intentional relinquishment of a known right or such conduct as warrants an inference of the relinquishment of such right."); *Albert v. Joralemon*, 271 F.2d 236, 239-241 (9th Cir. 1959) (applying Arizona law and holding that lessor waived its rights to demand performance under lease by acquiescing in lessee's attempt to terminate the lease).

36. As demonstrated above, waiver can be inferred from the City's conduct vis-a-vis the PSE Bid, the NHL Bid, and the Revised NHL Bid. The City's conduct here is much like that of the lessor in *Joralemon*, where the lessor acquiesced in the lessee's attempts to terminate the lease. The City has acquiesced in a prospective rejection of the AMULA and relocation of the Coyotes by supporting the NHL Bid and the Revised NHL Bid, despite those bids' terms on rejection of the AMULA and relocation of the Coyotes.

37. Separate and apart from waiver, which independently defeats the City's disproportionate harm and specific performance arguments, the City is judicially estopped from asserting these arguments. The doctrine of judicial estoppel is described by the Ninth Circuit as follows:

> Judicial estoppel . . . precludes a party from gaining an advantage by taking one position, and then seeking a second advantage by taking an incompatible position. [citations omitted]. . . [T]he policies underlying preclusion of inconsistent positions are general consideration of the orderly administration of justice and regard for the dignity of judicial proceedings . . . judicial estoppel is intended to protect against a litigant playing fast and loose with the Court . . . . [citations and quotes omitted]

Rissetto *v. Plumbers and Steamfitters Local 343*, 94 F.3d 597, 600-01 (9th Cir. 1996). Additionally, "[j]udicial estoppel enables a court to protect itself from manipulation." *Id.* at 603. Three factors guide a judicial estoppel determination: Whether (1) there are inconsistent positions; (2) the court was successfully persuaded to accept the position; and (3) absent estoppel, the party would gain an unfair advantage or impose an unfair detriment on another party.[2] *Hamilton v. State Farm First & Casualty Company*, 270 F.3d 778, 782-83 (9th Cir. 2001). These criteria are not prerequisites and do not form an exhaustive list of factors to determine the applicability of the doctrine. *Id.* at 783.

38. Each judicial estoppel factor is met here. Should the City assert here or in the future that it would suffer disproportionate harm if the AMULA is rejected or that it is entitled to specific performance of the AMULA, it would have taken inconsistent positions before this Court. The City already supported the NHL Bid and the Revised NHL Bid, both of which contemplated a rejection of the AMULA and relocation of the Coyotes. As recognized by the

[2] The Ninth Circuit has not adopted a position on whether a party must demonstrate that the party to be precluded has gained some advantage from the prior inconsistent position. *Rissetto*, 94 F.3d at 601.

Court at the Sale Hearing, the City's active and unabated support of the NHL Bid (as opposed to simply having no objection) drastically changed the landscape with respect to the disproportionate harm and specific performance arguments. It was no secret that the NHL may direct the rejection of the AMULA and relocate the Coyotes. Yet, the City "put its lot with the NHL." *See* September 10 Hearing Transcript, 105:1-2. The first factor is met.

39. The second and third factors are also met. It cannot be disputed that the City's position with respect to the NHL, and the City's opposition to the PSE Bid by virtue of its disproportionate harm and specific performance arguments, persuaded, or at least influenced, the Court's decision to deny the PSE Bid. The City would thus gain an unfair advantage over the Debtors absent judicial estoppel. The City admittedly took its chances with the NHL Bid and the Revised NHL Bid, which means it was risking a possible future rejection of the AMULA and a relocation of the Coyotes. After siding with the NHL, the City cannot now fight that same rejection and relocation here against the Debtors in the context of determining the value of its claim for distribution purposes.

40. Accordingly, all elements of judicial estoppel are present. Under these circumstances, the City is judicially estopped from asserting its disproportionate harm and specific performance arguments.

41. The City will undoubtedly argue that it never waived any argument or that it is not judicially estopped. The City may claim that it reserved all rights with respect to rejection of the AMULA and specific performance, even though it supported the NHL throughout these Cases. *See, e.g.*, Stipulated Order, page 17, paragraph 26 ("[T]he City of Glendale has otherwise reserved all of its rights with respect to any action to reject the AMULA"). The City, however, can only reserve those rights it currently had when it stipulated to the Stipulated Order , which at

that time excluded at least the disproportionate harm and specific performance arguments. Indeed, in the City's own words when it rejected PSE Sports' Amended Summary offer to purchase the City's claims (which included the non-refundable $25,000,000 cash payment):

> Particularly, if the City were to accept PSE's offer it would be giving up its most valuable and fundamental right in connection with these cases -- the right to specifically enforce the Team's commitment to play its home games in Glendale for 30 years. As the City has repeatedly stated since the beginning of these cases, the loss of such right would be devastating and incalculable in light of the substantial economic and emotional investments that the City, its taxpayers and local business owners have made in the Team, the Jobing.com Arena and the Westgate City Center in reliance on the Team's commitment.

City Supplement, page 2. But by previously choosing the NHL Bid and the Revised NHL Bid, the City placed all of the risk with the NHL and itself that this would happen. If the parties cannot find a Glendale buyer, this Court should not allow the City to run back to this Court to fight a rejection of the AMULA based on disproportionate harm and specific performance. It gave up those arguments long ago.

42. The AMULA, therefore, may be rejected by the Debtors under Bankruptcy Code § 365.

The City's Damages Are Capped Under Bankruptcy Code § 502(b)(6)

43. The Debtors incorporate here by this reference all of the facts and legal arguments set forth in the AMULA Briefing supporting that all damages flowing from a prospective rejection of the AMULA are capped in accordance with Bankruptcy Code § 502(b)(6). *See* AMULA Briefing, Docket No. 287, Section IV.B, pp. 32-39; Docket No. 611, Section C, pp. 6-7; Docket No. 685, Section IV, pp. 17-29; Docket No. 850, ¶¶ 19-20, pp. 7-9 (analyzing *In re El Toro Materials Co.*, 504 F.3d 978 (9th Cir. 2007)); and Docket No. 853, ¶¶ 33-35, pp. 12-13.

44. The analysis does not end with the capped claim. The City actively refused a $25,000,000 non-refundable payment from PSE Sports, which would have been non-refundable even if the NHL prevailed on appeal of any order approving the PSE Bid. The City did not even need to support the PSE Bid to obtain the benefits of this valuable proposal. Under these circumstances, the City effectively refused a security deposit for its claims, which would have effectively reduced the capped claim to zero dollars. *See In re AB Liquidating Corp.*, 416 F.3d 961 (9th Cir. 2005) (holding that security deposit reduces lessor's § 502(b)(6) capped claim).

45. In *AB Liquidating*, a Chapter 11 corporate debtor rejected a commercial lease under Bankruptcy Code § 365(a). The lessor's actual damage claim was $5,000,000 and its capped claim under Bankruptcy Code § 502(b)(6) was $2,000,000. The lease, however, required a security deposit of $1,000,000, which the debtor had provided to the lessor in the form of a letter of credit. The issue on appeal to the Ninth Circuit was whether the $1,000,000 security deposit should be applied against the actual damage claim or the capped claim. In other words, the issue was whether the security deposit should reduce the actual damage claim from $5,000,000 to $4,000,000 or, alternatively, reduce the § 502(b)(6) capped claim from $2,000,000 to $1,000,000. The lessor, of course, argued that the security deposit should reduce the actual damage claim, not the capped claim. The creditors' committee took the opposite position, arguing that the security deposit should reduce the capped claim. The Ninth Circuit agreed with the committee and held that the $1,000,000 proceeds of the letter of credit/security deposit must be deducted from the lessor's $2,000,000 capped claim. Accordingly, the lessor's total allowable claim was $1,000,000 (*i.e.*, the $2,000,000 capped claim less the $1,000,000 security deposit). *Id.* at 963-965.

46. The $25,000,000 offer from PSE Sports is no different than the security deposit in *AB Liquidating*. All the City needed to do was accept the PSE Sports offer -- it was not required to support the PSE Bid. The City refused that offer, and it may later find itself without a Glendale buyer and face the rejection of the AMULA and relocation of the Coyotes. Under these circumstances, this Court should reduce the City's capped claim by $25,000,000 in accordance with *AB Liquidating*.

47. Using the City's own calculation of its capped claim, its damages are zero dollars after factoring in the $25,000,000 non-refundable payment. Attached to this Motion as Exhibit "**A**" is the City's calculation of its capped damages.[3] The City's own calculation of its capped damages is approximately $22,736,294.38,[4] which is approximately $1.3 million less than the $25,000,000 the City refused to take from PSE Sports. Under these circumstances, assuming the City's claims are capped under Bankruptcy Code § 502(b)(6), its claim against the Debtors should be estimated to be zero dollars.

48. Assuming the City and the NHL find a Glendale buyer, the Debtors submit that the City would have mitigated its damages entirely, and as such, would have no claim against the Debtors. *See, e.g., Camelback Land and Investment Co. v. Phoenix Entertainment Corp.*, 2 Ariz. App. 250, 254, 407 P.2d 791, 795 (Ariz. Ct. App. 1965) (lessor has duty to mitigate its damages); *Dushoff v. Phoenix Co.*, 22 Ariz. App. 445, 449, 528 P.2d 637, 641 (Ariz. Ct. App.

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[3] The Court will recall that this is the same calculation the City provided to the Court and parties at the Sale Hearing.

[4] The City's damages are actually less than this number. In accordance with the "Second Stipulated Interim Order Partially Granting Emergency Motion For Order Authorizing Debtors To Obtain Postpetition Financing" dated October 28, 2009 [Docket No. 1061], the $441,032.80 in "Postpetition City Parking Fees (segregated account)" and any other similar money held by the Debtors was turned over to the City. Its damage calculation, therefore, is at least $441,032.80 less.

1974) ("in a commercial lease transaction, if the tenant abandons the premises, the lessor is under a duty to make reasonable efforts to rent it at a fair rental").

49. The Court, therefore, should estimate the City's claims against the Debtors to be zero dollars under Bankruptcy Code § 502(c).

CONCLUSION

50. WHEREFORE, the Debtors respectfully request that the Court enter an Order: (a) estimating the City's claim against the Debtors to be zero dollars for purposes of distribution under a prospective Chapter 11 plan; and (b) granting any other relief that is just and proper.

Dated: November 13, 2009.

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EXHIBIT A

City of Glendale Financial Analysis for Court

City Claims (assuming *arguendo* full application of §502(b)(6))

Prepetition Claim under AMULA	4,466,869.58
Rejection Claim under AMULA (assuming full cap)	5,578,392.00
Tax Guaranty	12,250,000.00
Postpetition City Parking Fees (segregated account)	441,032.80
Total Claims	$22,736,294.38

City of Glendale

Financial Impact of Phoenix Coyotes Relocation

Direct and Indirect Revenue Loss

Summary

Fiscal Year	Total Direct Revenue Loss	Total Indirect City Sales Tax	Total Direct & Indirect City Sales Tax	Net Present Value of Cash Flows				
				Total Direct Revenue Loss	Total Indirect City Sales Tax	Total Direct & Indirect City Sales Tax	NPV*	No Days
							5.33%	
2009-10	$2,898,853	$7,428,650	$10,327,503	$2,898,853	$7,428,650	$10,327,503	1.0000000	0
2010-11	2,936,252	10,059,399	12,995,651	2,787,670	9,550,365	12,338,034	0.9493971	360
2011-12	2,981,971	10,662,773	13,644,743	2,687,814	9,610,943	12,298,757	0.9013549	720
2012-13	3,028,106	11,501,055	14,529,161	2,591,282	9,841,956	12,433,239	0.8557438	1080
2013-14	3,074,661	13,685,599	16,760,259	2,497,979	11,118,737	13,616,717	0.8124407	1440
2014-15	3,121,639	14,248,957	17,370,595	2,407,810	10,990,632	13,398,442	0.7713289	1800
2015-16	3,169,043	14,704,946	17,873,989	2,320,682	10,768,394	13,089,076	0.7322974	2160
2016-17	4,429,661	15,036,774	19,466,435	3,079,682	10,454,182	13,533,865	0.6952411	2520
2017-18	4,483,992	15,529,312	20,013,305	2,959,703	10,250,276	13,209,979	0.6600599	2880
2018-19	4,538,790	15,880,068	20,418,858	2,844,274	9,951,386	12,795,660	0.6266589	3240
2019-20	4,594,059	16,238,856	20,832,915	2,733,227	9,661,278	12,394,505	0.5949482	3600
2020-21	4,649,801	16,769,855	21,419,657	2,626,404	9,472,321	12,098,724	0.5648421	3960
2021-22	4,706,021	17,149,056	21,855,077	2,523,648	9,196,344	11,719,993	0.5362595	4320
2022-23	4,762,721	17,536,935	22,299,657	2,424,812	8,928,461	11,353,273	0.5091232	4680
2023-24	5,407,407	18,003,948	23,411,354	2,613,725	8,702,390	11,316,115	0.4833601	5040
2024-25	5,465,080	18,411,400	23,876,480	2,507,929	8,449,005	10,956,934	0.4589007	5400
2025-26	5,523,246	18,856,678	24,379,924	2,406,362	8,215,459	10,621,822	0.4356790	5760
2026-27	5,581,907	19,395,796	24,977,703	2,308,858	8,022,730	10,331,588	0.4136324	6120
2027-28	5,641,068	19,834,390	25,475,458	2,215,255	7,788,994	10,004,249	0.3927014	6480
2028-29	5,750,732	20,283,007	26,033,738	2,144,043	7,562,106	9,706,149	0.3728296	6840
2029-30	5,810,902	20,741,871	26,552,773	2,056,847	7,341,862	9,398,709	0.3539634	7200
2030-31	5,871,584	21,211,214	27,082,797	1,973,156	7,128,067	9,101,223	0.3360518	7560
2031-32	5,932,780	21,691,272	27,624,052	1,892,833	6,920,527	8,813,360	0.3190466	7920
2032-33	5,994,495	22,182,286	28,176,781	1,815,744	6,719,058	8,534,802	0.3029019	8280
2033-34	6,056,732	22,684,505	28,741,237	1,741,760	6,523,479	8,265,239	0.2875742	8640
2034-35	6,119,495	23,198,180	29,317,675	1,670,758	6,333,617	8,004,375	0.2730222	9000
Total	$122,530,997	$442,926,781	$565,457,778	$62,731,111	$226,931,218	$289,662,330		

* Discount Rate is based on the current Bond Buyer's Index for Municicpal Tax-exempt Revenue Bonds having an "A1" Moody's rating and an "A+" S&P rating and 30-year maturity as of 9-10-09.

Prepared by:
TLHocking Associates LLC
June 1, 2009