

1 C. Taylor Ashworth, 010143
Alan A. Meda, 009213
2 STINSON MORRISON HECKER LLP
1850 North Central Avenue, Suite 2100
3 Phoenix, Arizona 85004
Telephone: (602) 279-1600
4 Facsimile: (602) 240-6925
tashworth@stinson.com
5 ameda@stinson.com

6 J. Gregory Milmoie (*admitted pro hac vice*)
Shepard Goldfein (*admitted pro hac vice*)
7 SKADDEN, ARPS, SLATE, MEAGHER & FLOM LLP
4 Times Square
8 New York, New York 10036
Telephone: (212) 735-3000
9 Facsimile: (212) 735-2000
gregory.milmoie@skadden.com
10 shepard.goldfein@skadden.com

11 Anthony W. Clark (*admitted pro hac vice*)
SKADDEN, ARPS, SLATE, MEAGHER & FLOM LLP
12 One Rodney Square
Wilmington, Delaware 19899
13 Telephone: (302) 651.3000
Facsimile: (302) 651.3001
14 anthony.clark@skadden.com

15 Attorneys for the National Hockey League

16 **UNITED STATES BANKRUPTCY COURT**
17 **FOR THE DISTRICT OF ARIZONA**

18 In re) Case No. 2:09-bk-09488-RTBP
19 DEWEY RANCH HOCKEY, LLC,) (Jointly Administered)
20 COYOTES HOLDINGS, LLC,) Chapter 11
21 COYOTES HOCKEY, LLC, and) **Motion of National Hockey League for a**
22 ARENA MANAGEMENT GROUP, LLC,) **Determination that Debtors' NHL**
23 Debtors.) **Membership Rights May Not Be**
24) **Transferred to PSE or an Affiliate**
25) **Thereof**

24) Date: TBD
25) Time: TBD
26) Location: U.S. Bankruptcy Court
27) 230 N. First Ave, Courtroom 703
28) Phoenix, AZ 85003

26 This filing applies to:

- 27 All Debtors
28 Specified Debtors

TABLE OF CONTENTS

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

PRELIMINARY STATEMENT..... 1

BACKGROUND..... 2

 A. The NHL's Rules and Procedures Concerning Transfer of Ownership. 2

 B. Relevant Proceedings Relating to PSE's Application to Transfer Ownership
 of the Coyotes. 3

 C. The NHL Board of Governors' Decision to Reject Mr. Balsillie as an NHL
 Owner. 4

ARGUMENT..... 6

I. The Bankruptcy Code Cannot Be Invoked to Abrogate The NHL's Transfer Consent
 Rights. 6

 A. The NHL's Transfer Consent Right is Not an Anti-Assignment Provision..... 7

 1. By-Law 35 is Not an Anti-Assignment Provision on its Face. 7

 2. By-Law 35 Cannot Be Viewed as a *De Facto* Anti-Assignment
 Provision. 8

 B. In Any Event, § 365(c) Protects the NHL's Transfer Consent Rights. 9

 1. The NHL's Transfer Consent Rights Are Precisely About Personal
 Trust and Confidence. 9

 2. In Any Event, Applicable Law Excuses the NHL from Accepting Mr.
 Moyes' Choice of Buyer..... 11

 (a) Corporate Governance Law Excuses the NHL from
 Accepting Performance. 11

 (b) Intellectual Property Law Excuses the NHL from Accepting
 Performance. 14

 C. The Debtors Cannot Assume and Assign the NHL Constitution and By-Laws
 Pursuant to 365(a). 15

II. The NHL Board of Governors' Rejection of Mr. Balsillie as a Fellow Owner Cannot
 Violate Any Implied Duty of Good Faith and Fair Dealing. 16

 A. Applicable Law on Good Faith and Fair Dealing 17

 1. Moyes Has No Reasonable Expectation to Sell His Club to Someone
 Who is Not Approved by the Board of Governors. 17

 2. A Potential Buyer's Perceived Untrustworthiness Is a Legitimate
 Business Reason to Reject a Prospective NHL Owner..... 19

 3. This Court Should Not Second-Guess the NHL's Legitimate Business
 Decision. 20

 B. The NHL Indisputably Exercised Good Faith and Fair Dealing in Rejecting
 Mr. Balsillie. 21

CONCLUSION..... 22

TABLE OF AUTHORITIES

CASES

Adelphia Communications Corp. v. Rigas (In re Adelphia Communications Corp.),
No. 02-41729, 2004 WL 2186582 (S.D.N.Y. Sept. 27, 2004).....13

In re Ames Department Stores, Inc., 316 B.R. 772 (Bankr. S.D.N.Y. 2004)..... 8

Arnstein v. America Society of Composers, Authors & Publishers, 29 F. Supp. 388
(S.D.N.Y. 1939).....11

Board of Trade of Chicago v. Johnson, 264 U.S. 1 (1924).....12

Branagan v. Buckman, 122 N.Y.S. 610 (Sup. Ct. 1910)11

Burger King Corp. v. Agad, 941 F. Supp. 1217 (N.D. Ga. 1996).....20

Burger King Corp. v. H&H Restaurants, LLC, No. 99-2855, 2001 WL 1850888
(S.D. Fla. Nov. 30, 2001) 17, 18

In re Cedar Chemical Corp., 294 B.R. 224 (Bankr. S.D.N.Y. 2003)13

Charles O. Finley & Co. v. Kuhn, 569 F.2d 527 (7th Cir. 1978).....14

Chicago Professional Sports LP v. NBA, 95 F.3d 593 (7th Cir. 1996)14

In re Claremont Acquisition Corp., Inc., 113 F.3d 1029 (9th Cir. 1997).....16

In re Crow Winthrop Operating Partnership, 241 F.3d 1121 (9th Cir. 2001) 8

In re Dean, 174 B.R. 787 (Bankr. E.D. Ark. 1994).....12

Ernie Haire Ford, Inc. v. Ford Motor Co., 260 F.3d 1285 (11th Cir. 2001)..... 17, 18, 19

Everex System, Inc. v. Cadtrak Corp., 89 F.3d 673 (9th Cir. 1996).....15

Fishman v. Estate of Wirtz, 807 F.2d 520 (7th Cir. 1986).....10

Gramercy Equities Corp. v. Dumont, 531 N.E.2d 629 (N.Y. 1988)12

In re Fleming Cos., 499 F.3d 300 (3d Cir. 2007).....8, 9

In re Hernandez, 285 B.R. 435 (Bankr. D. Ariz. 2002)15

Hyde v. Woods, 94 U.S. 523 (1876)12

L.A. Memorial Coliseum Commission v. NFL, 791 F.2d 1356 (9th Cir. 1986) 3

Leal v. Allstate Insurance Co., 17 P.3d 95 (Ariz. Ct. App. 2000)..... 16, 17

Levin v. NBA, 385 F. Supp. 149 (S.D.N.Y. 1974).....10

McDonald's Corp. v. C.B. Management Co., 13 F. Supp. 2d 705 (N.D. Ill. 1998).....20

1	<i>Mid-South Grizzlies v. NFL</i> , 550 F. Supp. 558 (E.D. Pa. 1982)	13
2	<i>Mid-South Grizzlies v. NFL</i> , 720 F.2d 772 (3d Cir. 1983)	11
3	<i>In re Morande Enterprises, Inc.</i> , 335 B.R. 188 (M.D. Fla. 2005).....	7
4	<i>N.C.P. Marketing Group, Inc. v. Blanks</i> , 337 B.R. 230 (D. Nev. 2005)	15
5	<i>Oakland Raiders v. NFL</i> , 113 Cal. Rptr. 2d 255 (Cal. App. 2001)	14
6	<i>Oakland Raiders v. NFL</i> , 32 Cal. Rptr. 3d 266 (Ct. App. 2005).....	13
7	<i>Perlman v. Catapult Entertainment, Inc.</i> (In re Catapult Entertainment, Inc.),	
8	165 F.3d 747 (9th Cir. 1999)	10, 15
9	<i>Professional Hockey Corp. v. World Hockey Association</i> , 191 Cal. Rptr. 773	
	(Ct. App. 1983).....	10, 11
10	<i>Riesen v. Dayton Country Club Co.</i> (In re Magness), 972 F.2d 689	
11	(6th Cir. 2002)	7, 10, 12, 13
12	<i>Riko Enterprises, Inc. v. Seattle Supersonics Corp.</i> , 357 F. Supp. 521	
	(S.D.N.Y. 1973).....	3
13	<i>Rivermont Inn, Inc. v. Bass Hotels & Resorts, Inc.</i> , 113 S.W.3d 636 (Ky. App.	
14	2003)	20, 21
15	<i>Rolscreen Co. v. Pella Products of St. Louis, Inc.</i> , 64 F.3d 1202 (8th Cir. 1995)	19
16	<i>In re Schick</i> , 235 B.R. 323 (Bankr. S.D.N.Y. 1999).....	10, 12
17	<i>In re Sizzler Restaurants International, Inc.</i> , 225 B.R. 466	
	(Bankr. C.D. Cal. 1998)	19, 20
18	<i>Svela v. Union Oil Co.</i> , 807 F.2d 1494 (9th Cir. 1987)	20
19	<i>In re Todd</i> , 118 B.R. 432 (Bankr. D.S.C. 1989).....	12
20	<i>Vasco v. Mobil Oil Corp.</i> , 698 F. Supp. 102 (D. Md. 1988).....	20

21
22
23
24
25
26
27
28

1 The National Hockey League (the "NHL" or "League") hereby moves this Court for entry
2 of an Order that Debtors' NHL membership rights may not be transferred to PSE or an affiliate
3 thereof, and that, accordingly, PSE is not and cannot be a Qualified Bidder under the Court's July 6,
4 2009 Bid Procedures (Dkt. no. 408).¹

5 **PRELIMINARY STATEMENT**

6 The NHL Board of Governors has unanimously voted that Mr. Balsillie is not qualified as a
7 matter of character and integrity to be the owner of an NHL team. Unless and until that
8 determination is invalidated under League rules, Mr. Balsillie's relocation application is moot, the
9 NHL will not investigate or consider his application (at enormous time and expense), and he cannot
10 become a Qualified Bidder within the meaning of the Bidding Procedures Order. The Bidding
11 Procedures Order contemplated that either PSE or the Debtors could challenge the NHL's
12 determination that any prospective bidder was not a Qualified Bidder. To avoid the waste of
13 precious time and the needless expenditure of substantial sums (and without shifting the burden of
14 proof), the NHL hereby requests declaratory relief that the exercise of its right to disapprove Mr.
15 Balsillie as an NHL owner not be invalidated as an impermissible "*de facto*" anti-assignment clause,
16 or otherwise.

17 As set forth herein, the law is clear: there is no appropriate basis on which to invalidate the
18 Board's decision. On its face, By-Law 35 is not an anti-assignment provision under 11 U.S.C. §
19 365(f). Moreover, as a matter of law, it cannot be deemed a "*de facto*" anti-assignment provision
20 because it does not unduly restrict the ability of owners to sell their Clubs. In any event, because
21 By-Law 35 is precisely about a proposed assignee's trustworthiness, under § 365(c), the NHL
22 Constitution and By-Laws is unassignable. Further, a variety of applicable laws "excuse" the NHL
23 from having to accept an owner that its Board has deemed not of sufficient "character and
24 integrity" to be a trustworthy partner. There is no contrary authority. Finally, because the Board's
25 vote to disapprove Mr. Balsillie is binding on the Debtors pursuant to Article 5.11 of the NHL
26 Constitution, their challenge to the Board's vote would create an incurable default that in turn

27 _____
28 ¹ In support of this Motion, the NHL has filed concurrently herewith the Declaration of Craig Leipold ("Leipold Decl.") and the Declaration of Jeremy M. Jacobs ("Jacobs Decl.").

1 makes the Debtors incapable of assuming and assigning the NHL Constitution and By-Laws. It
2 also would saddle the estate with unnecessary and unpayable administrative expenses.

3 As to the NHL's good faith and fair dealing in voting on Mr. Balsillie's transfer application,
4 the settled law is that the Court may not "second-guess" the NHL Board's decision under the
5 indisputable facts of this case. Where, as here, the NHL Board has a significant degree of
6 discretion to accept or reject Mr. Balsillie, the law requires only that the NHL not so capriciously
7 exercise its discretion as to thwart Mr. Moyes' reasonable expectations in owning an NHL
8 franchise – that any proposed purchaser be evaluated in the manner provided in By-Law 35. The
9 law is clear that this implied covenant cannot be violated unless no reasonable person would have
10 made the same decision as the NHL Board. Nor does it matter if PSE claims, as it already has, that
11 the owners had ulterior "motives;" as long as the owners had a legitimate business reason to reject
12 Mr. Balsillie – here, his established untrustworthiness in their eyes – any other motives the Debtors
13 or PSE may speculate about are legally irrelevant.

14 In short, this Court should put an end to Mr. Moyes' and Mr. Balsillie's jointly devised
15 scheme to force entry into the League through the Bankruptcy "side door;" there is only a front
16 door, and it is now unavailable to Mr. Balsillie in accordance with the NHL's Constitution and By-
17 Laws, consistent with the Bankruptcy Code, and well within any duty of good faith and fair dealing
18 the NHL Board may have to Mr. Moyes. Thus, in the absence of any other relocation bidders (and
19 none has emerged in the current circumstances), this Court should proceed without PSE's fictional
20 bid looming over the Glendale community and continuing to harm the value of the Club.

21 **BACKGROUND**

22 **A. The NHL's Rules and Procedures Concerning Transfer of Ownership.**

23 The ownership interests and rights of an NHL member club (a "Member Club") are defined
24 by the consent agreement that each owner executes when it joins the League, as well as the NHL
25 Constitution and By-Laws and related resolutions that constitute valid and enforceable contracts
26 between the League and its members. See Riko Enters., Inc. v. Seattle Supersonics Corp., 357 F.
27 Supp. 521, 524 (S.D.N.Y 1973) ("The NBA constitution is a contract between the member teams
28

1 of the NBA."); L.A. Mem'l Coliseum Comm'n v. NFL, 791 F.2d 1356, 1359 (9th Cir. 1986) (the
2 NFL Constitution and Bylaws are "the contract" between the league and its members).

3 Pursuant to Article 3.5 of the NHL Constitution: "No membership or ownership interest in
4 a Member Club may be sold, assigned or otherwise transferred except (a) with the consent of three-
5 fourths of the members of the League" (5/13/09 Daly Decl. ¶ 10, Ex. A.) Upon receipt of an
6 application for transfer, the Commissioner is to conduct an investigation as he deems appropriate
7 and to submit the application to the members for approval, along with his recommendations and all
8 information that he deems pertinent.

9 Section 35 of the NHL By-Laws identifies two considerations that are relevant to the
10 members' determination of whether to grant consent. The first relates to whether the potential
11 owner is "willing and able to commit sufficient financial resources to provide for the financial
12 stability of the franchise." The second is "[w]hether the persons who would be holders of an
13 ownership interest in the Member Club are of good character and integrity." (Id. ¶ 11, Ex. B.)

14 **B. Relevant Proceedings Relating to PSE's Application to Transfer Ownership of**
15 **the Coyotes.**

16 On May 5, 2009, PSE and the Debtor entered into an APA premised on the Court voiding
17 the NHL's consent rights regarding transfer of ownership (and/or relocation). (6/15/09 Op. at 1-2.)
18 Without the NHL's approval and over the NHL's objection, the Debtors then moved this Court for a
19 sale order based on that APA. (Id.) In considering the Debtors' application and whether it could
20 disregard the NHL's consent rights as anti-assignment provisions, the Court noted the law as it
21 relates to *de facto* anti-assignment provisions. The Court also observed that it is "significant . . .
22 that in 2006 the NHL approved PSE to become a member of the NHL." (Id. at 8.) The Court then
23 stated that the NHL must exercise its discretionary power to consider PSE's application in
24 accordance with the covenant of good faith and fair dealing and stated that it appeared the NHL
25 could not withhold its consent "[a]bsent some showing by the NHL that there have been material
26 changes in PSE's circumstances since 2006." (Id. at 8-9.)

27 Thereafter, the Court entered a Bid Procedures Order requiring that any bidders, including
28 PSE, "comply with and be approved under all of the NHL's applicable ownership transfer

1 requirements, including, without limitation, as set forth in Articles 3.5 and 3.6 of the NHL
2 Constitution, By-Law 35 . . . of the NHL By-Laws, and the applicable Procedural Guidelines."
3 (7/6/09 Bid Procedure Orders ¶ 17.) The Bid Procedures Order also provides that an "Acceptable
4 Potential Bidder" cannot be a "Qualified Bidder" unless it is approved for ownership transfer by the
5 NHL. (Id. ¶¶ 19-20.)

6 C. **The NHL Board of Governors' Decision to Reject Mr. Balsillie as an NHL**
7 **Owner.**

8 On May 22, 2009, PSE submitted an application to transfer ownership in the Coyotes from
9 the Debtors. Upon receipt of the application, the NHL undertook its standard though expedited
10 process for considering the application, including: (i) soliciting background materials regarding
11 PSE and Mr. Balsillie; (ii) employing investigators, accountants and attorneys to conduct
12 background investigations of PSE and Mr. Balsillie; and (iii) evaluating the results of those
13 investigations. The NHL then convened a meeting of the Executive Committee and the Board of
14 Governors on July 29, 2009, to consider the application (as well as the applications of the
15 Reinsdorf and Ice Edge groups). (Second Daly Decl. ¶ 11.)

16 The Executive Committee met on the morning of July 29 to discuss the League's
17 investigation and due diligence regarding each potential ownership group. (Id.) Members of the
18 Executive Committee read and discussed a written report that had been prepared regarding each
19 group. (Jacobs Decl. ¶ 4, Ex. A.) With respect to the PSE application, members of the Executive
20 Committee orally reported on their prior dealings with Mr. Balsillie. Mr. Craig Leipold, the
21 current owner of the Minnesota Wild and the former owner of the Nashville Predators, read to the
22 Executive Committee a lengthy statement that he personally had prepared recounting his dealings
23 with Mr. Balsillie and his significant concerns about approving him as an NHL owner. (Leipold
24 Decl. ¶ 3, Ex. A.)

25 During both the Executive Committee and Board of Governors meetings, it was
26 emphasized that the Board of Governors was only considering and voting upon the suitability of
27 each group as owners under Article 3.5 and By-Law 35 of the NHL Constitution and By-Laws.
28 (Jacobs Decl. ¶ 6.) The Executive Committee and Board also were reminded that they should not

1 consider the fact that any of the potential ownership groups may want to relocate the Coyotes in
2 considering whether they met the League's criteria for ownership of an NHL Club, and in fact there
3 was no discussion during either meeting related to Mr. Balsillie's interest in relocating the Coyotes
4 to Hamilton, Ontario. (Id.)

5 As discussed more fully in the declarations of Craig Leipold and Jeremy M. Jacobs, owner
6 of the Boston Bruins and Chairman of the NHL Board of Governors, the Executive Committee
7 then interviewed Mr. Balsillie on a wide range of issues. During the interview, the Executive
8 Committee provided Mr. Balsillie an opportunity to explain his prior conduct and dealings with
9 several NHL owners that had troubled the Executive Committee and caused it to question Mr.
10 Balsillie's suitability as an NHL owner. For example, Mr. Leipold questioned Mr. Balsillie about a
11 number of actions that Mr. Balsillie had taken in connection with a proposed purchase of the
12 Predators in 2007 that Mr. Leipold felt had the purpose and effect of destabilizing the Predators.
13 (Leipold Decl. ¶¶ 6-15.) None of Mr. Balsillie's responses alleviated any of Mr. Leipold's very
14 serious concerns about Mr. Balsillie's character and integrity. (Id. ¶ 15.)

15 Likewise, other Executive Committee members inquired about inconsistent statements and
16 questionable actions taken by Mr. Balsillie since his previous interview with the Executive
17 Committee in 2006. (Jacobs Decl. ¶¶ 9-15.) For example, the Committee asked Mr. Balsillie to
18 explain his actions in connection with his proposed purchase of the Pittsburgh Penguins, including
19 reneging on his commitment to keep the Penguins in Pittsburgh. (Id. ¶¶ 11-12.) Again, Mr.
20 Balsillie's responses were unsatisfactory and did not allay the Executive Committee's concerns
21 about Mr. Balsillie's trustworthiness and willingness to be a good partner within the League and to
22 comply with League rules and procedures. (Id. ¶ 16.)²

23
24 _____
25 ² The Debtors and Mr. Balsillie are under the misimpression that his character as a potential new
26 owner should be ignored because some current owners have had their own legal issues (for which some
27 have been disciplined by the League). Mr. Balsillie both ignores the critical difference between him as an
28 applicant and someone who already is in the League, as well as the nature of his untrustworthiness as found
by the Board of Governors. It is not so much the significant and highly publicized legal troubles that Mr.
Balsillie has had in the past that influenced the owners' votes; rather, it was how he interacted directly with
these owners and how, as a result, they could not trust him as a good business partner. See supra pp. 4-6.

1 After Mr. Balsillie's interview, the Executive Committee deliberated and then voted
2 unanimously to recommend disapproval of Mr. Balsillie's application for transfer of ownership,
3 finding that he lacks the good character and integrity required under Article 3.5 and By-Law 35 of
4 the NHL Constitution and By-Laws. (Jacobs Decl. ¶ 16.) In a meeting later that afternoon,
5 following a report regarding the interviews and the Executive Committee's deliberations, as well as
6 a discussion regarding the relevant standard under the NHL Constitution and By-Laws (the Board
7 was read Article 3.5 and By-Law 35 as part of this discussion), the NHL Board of Governors voted
8 to disapprove Mr. Balsillie's application. (Id. ¶ 17.) Twenty-six teams voted to disapprove; three
9 teams abstained from the vote; and one team was absent. (Id.)

10 ARGUMENT

11 The issue of whether Mr. Balsillie is, or can ever be, approved as an NHL owner (and,
12 accordingly, a Qualified Bidder under this Court's July 6, 2009 Bid Procedures Order), is now ripe
13 for the Court to decide. The NHL Board of Governors has voted on Mr. Balsillie; there is no
14 dispute about the criteria under By-Law 35; there is no dispute that Mr. Balsillie's character and
15 trustworthiness were the subject of the NHL's investigation and analysis; and there is no dispute
16 that the NHL Board of Governors deliberated and decided to reject Mr. Balsillie's ownership
17 application on that basis. See supra pp. 4-6.

18 The questions for this Court are now legal ones: can the Bankruptcy Code be invoked to
19 override the NHL's Transfer Consent Rights? And, if not, can the law of good faith and fair
20 dealing provide a basis for this Court to second-guess the NHL Board of Governors' decision that
21 Mr. Balsillie would not be a trustworthy business partner? The answer to both questions is no.

22 **I. THE BANKRUPTCY CODE CANNOT BE INVOKED TO ABROGATE THE** 23 **NHL'S TRANSFER CONSENT RIGHTS.**

24 The Debtors and PSE have never expressly asserted in this case that Section 35 of the
25 NHL's By-Laws is an anti-assignment provision on its face. Nor could they: it merely requires
26 that a prospective buyer of a Club have sufficient character and integrity in the view of three-
27 fourths of the NHL Board of Governors to be a good partner. Nevertheless, the Debtors and PSE
28 have suggested in the past that By-Law 35 effectuates an anti-assignment provision. Under well-

1 established law it is not. Moreover, pursuant to § 365(c), the NHL Constitution and By-Laws
2 cannot be invalidated because (i) while not a "personal services" contract, the NHL Constitution
3 and By-Laws is an executory contract directly built upon personal trust and confidence in the
4 obligee, and (ii) applicable law relating to associations, joint ventures and intellectual property
5 excuse the NHL from having to accept Mr. Moyes' preferred buyer.

6 **A. The NHL's Transfer Consent Right is Not an Anti-Assignment Provision**

7 Under § 365(a) of the Bankruptcy Code, a trustee "may assume or reject any executory
8 contract or unexpired lease of debtor." 11 U.S.C. § 365(a). It is hornbook law that an executory
9 contract may not be assumed in part and rejected in part, but instead must be assumed *cum onere*.
10 See 3 Collier on Bankruptcy ¶ 365.03[3] (Alan N. Resnick & Henry J. Somme eds., 15th ed. Rev.
11 2009). There is no dispute among the parties in this case that the NHL's Constitution and By-Laws,
12 including By-Law 35, is an executory contract that the Debtors must assume if they wish to
13 transfer the Club to PSE or anyone else.

14 The only way under the Code that the Debtors can avoid By-Law 35 is to demonstrate as a
15 threshold matter that it is an anti-assignment provision under § 365(f)(1), which authorizes the
16 assumption and assignment of an executory contract "notwithstanding a provision in an executory
17 contract . . . that prohibits, restricts or conditions the assignment of such contract." 11. U.S.C. §
18 365(f)(1). Executory contracts can either be anti-assignment provisions on their face or *de facto*;
19 By-Law 35 is neither.

20 **1. By-Law 35 is Not an Anti-Assignment Provision on its Face.**

21 Perhaps it goes without saying, but By-Law 35 does not, on its face, prohibit transfers of
22 NHL Clubs. Instead, it is merely a consent right, based in part on the character and integrity of the
23 prospective buyer, that is analogous to many cases in which consent rights are upheld under § 365.
24 See, e.g., In re Morande Enters., Inc., 335 B.R. 188 (M.D. Fla. 2005) (§ 365(f) inapplicable where
25 consent right was based on franchisor's legitimate business interests); Riesen v. Dayton Country
26 Club Co. (In re Magness), 972 F.2d 689 (6th Cir. 1992) (country club membership).

1 Here, the Debtors and PSE have not seriously argued that By-Law 35 facially prevents
2 transfers of ownership, an assertion that would be belied by the numerous ownership transfers in
3 the NHL that occur on an ongoing basis.

4 **2. By-Law 35 Cannot Be Viewed as a *De Facto* Anti-Assignment Provision.**

5 The Debtors are left with the proposition that By-Law 35 is a *de facto* anti-assignment
6 provision merely because the NHL Board of Governors may vote down a prospective buyer based
7 on the Board's assessment of that person's "character and integrity" – i.e., whether the Clubs view
8 him as a trustworthy business partner. The argument is fanciful both as a matter of law and fact.

9 The law with respect to *de facto* anti-assignment provisions is relatively sparse but clear for
10 purposes here. For example, while courts are to "look beyond the literal wording of a contractual
11 provision to see whether it operates as a *de facto* anti-assignment clause," In re Crow Winthrop
12 Operating P'ship, 241 F.3d 1121, 1124 (9th Cir. 2001), a provision will only be deemed as such
13 when it is "so restrictive" as to prevent the bankruptcy estate from realizing the full value of the
14 assets to be sold. See In re Ames Dep't Stores, Inc., 316 B.R. 772, 795-96 (Bankr. S.D.N.Y. 2004)
15 (supermarket "use" restriction was not a *de facto* anti-assignment provision); In re Fleming Cos.,
16 499 F.3d 300, 307-08 (3d Cir. 2007) (no *de facto* anti-assignment provision even where contract
17 obligation itself made the assets less valuable; not anti-assignment merely to enforce the
18 underlying contract); cf. Crow, 241 F.3d at 1124 (*de facto* anti-assignment provision found where
19 value of assets would be "significantly reduced" or "eliminated" by change in ownership provision
20 contained in settlement agreement). Or, as this Court observed, § 365(f) can be relied on "not to
21 enforce contract terms effectively barring assignment." (6/15/09 Op. at 8.)

22 The application of these cases is equally straightforward, especially where the Debtors
23 would have to show that the character component itself in By-Law 35 somehow prevents Moyes
24 from selling the Club to anyone. However, unlike in Crow, the character screen reflected in By-
25 Law 35 has virtually no discernable effect on an owner's ability to sell a Club, which of course is
26 readily apparent in this case. Even in what the Debtors and PSE assert is a failing professional
27 hockey marketplace, the Debtors have one bidder who wishes to purchase the team who easily
28 passed the NHL's character assessment (and another is still under evaluation). Nor, as a matter of

1 law, can the Debtors assert that it should be relieved of its contractual obligation to seek out buyers
2 who are likely to pass the character screen of By-Law 35. This is the executory contract that Mr.
3 Moyes has with the NHL, and § 365 may not be used to modify that contract even if, *arguendo*, the
4 estate would be more valuable without it. See In re Fleming, 499 F.2d at 307-08. In any event,
5 while Mr. Balsillie has offered what the Debtors claim is more money for the Club, it is not By-
6 Law 35 and the NHL's character test that accounts for a facial dollar difference between the
7 Glendale-only and PSE offers; it is the difference in location. Because, as this Court has already
8 observed, Mr. Moyes only owns the right to play in his Phoenix "home territory," By-Law 35 has
9 virtually no impact on the value of the estates' assets. Hence, § 365(f) has no applicability at all to
10 the NHL's Transfer Consent Rights, and the NHL's disapproval of Mr. Balsillie as an NHL owner
11 cannot be overcome based on the Bankruptcy Code.³

12 **B. In Any Event, § 365(c) Protects the NHL's Transfer Consent Rights.**

13 **1. The NHL's Transfer Consent Rights Are Precisely About Personal**
14 **Trust and Confidence.**

15 The NHL readily acknowledges the Court's observation that the NHL's Constitution and
16 By-Laws is not a "personal services" contract. Yet, this does not end the threshold inquiry into
17 whether the NHL's Constitution and By-Laws, including By-Law 35, concern contractual
18 relationships premised on trust and confidence in the obligee. As reflected by the substantial due
19 diligence the League conducts regarding applicants to become NHL owners, it absolutely does,
20 which is why the current focus of this case is on the NHL Board of Governors' assessment of Mr.
21 Basillie's character as a potential NHL owner.

22 It is a fundamental principle of bankruptcy law that § 365(f) of the Code will not invalidate
23 a change in ownership provision where the executory contract is based "upon personal trust or
24 confidence" in the contracting party. See 3 Collier, supra, § 365.06 (emphasis added) (in addition
25 to pure personal service contracts, § 365(f) does not apply to contracts where personal trust and

26 ³ In addition, Mr. Balsillie cannot assure adequate performance of the Constitution and By-Laws
27 under section 365(b)(1)(c). While Balsillie has mouthed his commitment to comply with the NHL
28 Constitution and By-Laws (other than By-Laws 35 and 36), his past and current behavior toward League
members belie these assurances. See supra pp. 4-6.

1 confidence in the execution of the contract are important to the party – here, the NHL – who has
2 the contractual right to reject a transfer of ownership); see also In re Magness, 972 F.2d at 696
3 ("[C]ontracts in which the personality of one of the parties is material[] are not assignable.
4 Whether the personality of one or both parties is material depends on the intention of the parties, as
5 shown by the language which they have used, and upon the nature of the contract."); Perlman v.
6 Catapult Entm't, Inc. (In re Catapult Entm't, Inc.), 165 F.3d 747, 752 (9th Cir. 1999) (endorsing the
7 approach in Magness and stating that § 363(c)(1) applies to contracts in which "the identity of the
8 contracting party is material to the agreement"). Or, as the court observed in In re Schick: "A duty
9 is not delegable if the obligee has relied on the obligor's 'personality' (i.e., his honesty, skill,
10 reputation, character, ability, wisdom or taste) . . . or the obligor has promised to act in good
11 faith" 235 B.R. 318, 323 (Bankr. S.D.N.Y. 1999) (emphasis added).

12 Here, there is no dispute that one of the primary criteria for evaluating a proposed owner is
13 whether he has the personal character that would make him a trustworthy partner in carrying out
14 joint decision-making of this highly-integrated joint venture. Indeed, a new owner's "character" is
15 one of just two factors listed in Section 35 of the NHL's By-Laws. Further, both the Debtors and
16 PSE agree that Mr. Balsillie's trustworthiness is a determinative factor in the NHL Board of
17 Governors' judgment as to whether to approve or disapprove the Debtor's request to transfer the
18 Coyotes to PSE – they simply disagree with the Board's decision.

19 We also wish to emphasize how important those character and trustworthiness
20 considerations are in the context of professional sports leagues. The NHL Board of Governors,
21 like the governing bodies of every professional sports league, is made up of joint decision-makers
22 in an economically interdependent venture. As such, it is extremely important to have the right to
23 choose who your fellow owners will be. See generally Levin v. NBA, 385 F. Supp. 149, 151-53
24 (S.D.N.Y. 1974) (rejecting antitrust challenge to consent rights relating to membership in the
25 NBA); Fishman v. Estate of Wirtz, 807 F.2d 520, 562 (7th Cir. 1986) (same); Prof'l Hockey Corp.
26 v. World Hockey Ass'n, 191 Cal. Rptr. 773, 777 (Ct. App. 1983) ("The bylaws provide for board
27 approval of a new team owner. This requirement rests upon the unspoken premise [that] the league
28 as a whole will suffer if one team is financially weak, unable to meet its obligations. The league's

1 good will, credibility and financial strength are involved."); see also Mid-S. Grizzlies v. NFL, 720
2 F.2d 772, 788 (3d Cir. 1983).

3 Accordingly, this case involves one of those relatively rare situations where, outside of the
4 personal services contract area, the character and trustworthiness of a potential assignee of an
5 executory contract is fundamental to the contracting parties and success of the venture. And no
6 one involved in this case believes, or has asserted, otherwise.

7 **2. In Any Event, Applicable Law Excuses the NHL from Accepting Mr.**
8 **Moyes' Choice of Buyer.**

9 Even if the Court were able to ignore the inapplicability of § 365(f), the Debtors' ability to
10 assign a contract is still subject to other limitations imposed by Bankruptcy Code § 365(c). Under
11 § 365(c)(1), a debtor may not assume or assign an executory contract if:

12 (A) applicable law excuses a party, other than the debtor, to such
13 contract . . . from accepting performance from or rendering
14 performance to an entity other than the debtor or the debtor in
15 possession, whether or not such contract . . . prohibits or restricts
16 assignment of rights or delegation of duties; and

17 (B) such party does not consent to such . . . assignment

18 11 U.S.C. § 365(c)(1). Because applicable law excuses the NHL from accepting performance from
19 someone other than the Debtors, the Debtors cannot assume or assign the Constitution and By-
20 Laws to a prospective owner that has been rejected by the NHL Board of Governors.

21 **(a) Corporate Governance Law Excuses the NHL from Accepting**
22 **Performance.**

23 The NHL is a joint venture organized as an unincorporated association. It has long been the
24 case that an unincorporated association has the "sole power to say who shall belong and who shall
25 not." Arnstein v. Am. Soc'y of Composers, Authors & Publishers, 29 F. Supp. 388, 393 (S.D.N.Y.
26 1939) (voluntary unincorporated association has right to refuse plaintiff's attempt to join
27 association); see also Branagan v. Buckman, 122 N.Y.S. 610, 612-14 (Sup. Ct. 1910) (as a matter
28 of common law, an unincorporated association has right not to accept the purchaser of a member's
interest in the association). See generally 6 Am. Jur. 2d Associations and Clubs § 17 (2008)
("Membership in a voluntary unincorporated association generally is held to be a privilege which
may be accorded or withheld, and not a right which can be gained independently and then enforced.

1 Generally, courts will not compel admission to a voluntary association" (citations omitted);
2 6A N.Y. Jur. 2d Associations and Clubs § 17 (2009) ("The right of a membership in a voluntary
3 unincorporated association is a privilege which may not be transferred or sold without the consent
4 of the association."). Accordingly, under § 365(c)(1), the law governing unincorporated
5 associations excuses the NHL from accepting performance under the NHL Constitution and By-
6 Laws from any party other than the Debtors. See In re Magness, 972 F.2d at 696 (Ohio law
7 prohibiting courts from interfering in the internal workings of associations in the application of
8 their rationally developed rules and procedures prevented debtor from assuming and assigning
9 contract for golf membership in private club).

10 The NHL also is considered a joint venture among its thirty Member Clubs to create the
11 product of NHL Hockey. A joint venture is a "special combination of two or more persons where
12 in some specific venture a profit is jointly sought." Gramercy Equities Corp. v. Dumont, 531
13 N.E.2d 629, 632 (N.Y. 1988) (citations omitted). The law is clear that courts may look to
14 partnership law for guidance in assessing the rights of members of a joint venture. Id. And, under
15 applicable partnership law, a partner may not assign its partnership interests absent the consent of
16 its partners. See, e.g., N.Y. P'ship Law § 40 (McKinney 2006). In the context of this case,
17 therefore, the Court may look to analogous partnership law to find that, under § 365(c)(1),
18 membership in the NHL may not be assigned unless the other members agree to admit the assignee
19 as a substitute Club owner. See In re Schick, 235 B.R. at 325 (applying principle to partnership
20 membership); see also In re Todd, 118 B.R. 432, 434 (Bankr. D.S.C. 1989) (recognizing that a non-
21 selling partner has a "legitimate interest in the identity of his partner, which is worthy of protection
22 by way of the protective provisions of . . . the partnership agreement"); In re Dean, 174 B.R. 787,
23 790 (Bankr. E.D. Ark. 1994); Bd. of Trade of Chi. v. Johnson, 264 U.S. 1, 12-15 (1924); Hyde v.
24 Woods, 94 U.S. 523, 525 (1876). As the court observed in an action involving NFL membership:

25 [A] league is more like a partnership. While each club initially
26 contributes its own capital, the various participants to a large extent
27 share in the joint profits of the venture. This participation in profits
28 is achieved through various arrangements, such as the pooling of
television receipts . . . between home and visiting clubs. Thus, a
decision on access to membership is basically a decision as to

1 whether particular individuals (or their business entities) will be
2 allowed to participate in the partnership venture.

3 Mid-S. Grizzlies v. NFL, 550 F. Supp. 558, 568 (E.D. Pa. 1982) (emphasis added) (citing John C.
4 Weistart & Cym H. Lowell, The Law of Sports § 3.16, at 315 (1979)), aff'd, 720 F.2d 772 (3d Cir.
5 1983).⁴ In essence, the Debtors and PSE are asking this Court to rewrite the NHL Constitution and
6 By-Laws to remove the NHL's Transfer Consent Rights, which this Court may not do under the
7 Code. See Adelphia Commc'ns Corp. v. Rigas (In re Adelphia Commc'ns Corp.), No. 02-41729,
8 2004 WL 2186582, at *12 (S.D.N.Y. Sept. 27, 2004) ("[I]f the Bankruptcy Court is going to use its
9 discretionary equitable powers to exercise the fullest possible extent of its control over the debtor,
10 it must first determine that, under the relevant contracts and applicable corporate or partnership law,
11 it is awarding property only to those with a legitimate claim to it, and not using those equitable
12 powers, in effect, to rewrite contracts and reorder property relations among non-debtor entities in a
13 manner that is wholly unauthorized by the Bankruptcy Code."); see also In re Magness, 972 F.2d at
14 697 (where the character of members is part of the bundle of rights the debtor had purchased, the
15 court cannot "re-shape that for which the debtor bargained" by allowing assignment of the contract
16 over the objection of the counterparties to the contract).

17 Indeed, given the unique nature of professional sports leagues, courts have been quite
18 cautious not to interfere with their autonomy and internal governance. For example, in dismissing
19 challenges made by the Raiders to the NFL's application of its Constitution and By-laws, the court
20 in Oakland Raiders v. NFL, 32 Cal. Rptr. 3d 266 (Ct. App. 2005), reasoned that:

21 Given the unique and specialized nature of this association's
22 business – the operation of a professional football league – there is
23 significant danger that judicial intervention in such disputes will
 have the undesired and unintended effect of interfering with the

24

25 ⁴ There also is precedent for applying § 365(f) itself by way of analogy to a partnership agreement,
26 even in the absence of a partnership agreement. For example, in In re Cedar Chemical Corp., 294 B.R. 224
27 (Bankr. S.D.N.Y. 2003), a member of a "task force" filed for bankruptcy and attempted to assign its
28 membership interest in the task force under § 365(f). In recognizing the potential § 365(c) issue, the court
 noted that the task force agreement "was similar to a partnership agreement, and partnership membership is
 not ordinarily assignable under non-bankruptcy law in the absence of the other parties' consent." Id. at 230.
 Much more so than the task force in Cedar Chemical, the League is an interdependent group of Member
 Clubs formed into an enterprise to achieve the goal of producing, promoting and selling NHL Hockey.

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

League's autonomy in matters where the NFL and its commissioner have much greater competence and understanding than the courts.

Id. at 284; see also Chicago Prof'l Sports LP v. NBA, 95 F.3d 593, 597 (7th Cir. 1996) ("Courts must respect a league's disposition of [internal] issues, just as they respect contracts and decisions by a corporation's board of directors."). Accordingly, courts do not interfere with a league's internal decision-making unless it "plainly contravenes the association's bylaws." Oakland Raiders v. NFL, 113 Cal. Rptr. 2d 255, 262-63 (Ct. App. 2001).

Likewise, courts have acknowledged that they lack the knowledge and experience of League executives and members regarding the production, promotion and sale of professional sports. See, e.g., Charles O. Finley & Co. v. Kuhn, 569 F.2d 527, 539 (7th Cir. 1978) (affirming dismissal of claim by major league baseball team against the Commissioner of baseball based on allegedly arbitrary and capricious conduct in the interpretation and enforcement of internal baseball rules and procedures because "[w]hether he was right or wrong is beyond the competence and the jurisdiction of this court to decide") (alteration in original). Similarly here, the Court lacks the knowledge and experience of the Board of Governors in determining what makes a good partner in the production, promotion and sale of NHL Hockey.

In sum, applicable law relating to the structure and governance of professional sports leagues confirms that, under § 365(c), the NHL Board of Governors has the legal right – independent of its Constitution and By-Laws – to determine who may be a member of the League and that courts should be extremely hesitant to interfere with these fundamental League decisions.

(b) **Intellectual Property Law Excuses the NHL from Accepting Performance.**

Finally, separate and apart from the governance considerations, the sale of the Club's assets here necessarily contemplates assignment of certain intellectual property rights that belong to the NHL. One of the primary benefits of being an NHL Member Club is the right to promote the team itself as an NHL team. Among the NHL's copyright and trademark rights are the NHL Shield, the names, logos, symbols, and other indicia of the League, including the Conference and Division names and logos, and League award, trophy and program names, such as the Stanley Cup. (6/5/09 Bettman Decl. ¶ 14.)

1 Federal intellectual property law prohibits an assignment of such personal intellectual
2 property rights without the property owner's consent. See N.C.P. Mktg. Group, Inc. v. Blanks (In
3 re N.C.P. Mktg. Group, Inc.), 337 B.R. 230, 236-38 (D. Nev. 2005), aff'd, 279 F. App'x 561 (9th
4 Cir. 2008), cert. denied sub. nom. N.C. Mktg. Grp., Inc. v. BG Star Prods., Inc., 129 S. Ct. 1577
5 (2009) (mem.). This is because "copyright and trademark licensors share a common retained
6 interest in the ownership of their intellectual property – an interest that would be severely
7 diminished if a licensee were allowed to sub-license without the licensor's permission." Id. at 236
8 (quoting Miller v. Glenn Miller Prods., 318 F. Supp. 2d 923, 938 (C.D. Cal. 2004), aff'd, 454 F.3d
9 975 (9th Cir. 2006)). Trademarks, for instance, "allow their owners to protect the good will of their
10 name and products." Id. at 236. Thus, an owner "has a significant interest in controlling to whom
11 the mark is transferred because the subsequent value of the trademark will be based entirely on
12 good will." Id. (citing Stork Rest., Inc. v. Sahati, 166 F.2d 348, 354 (9th Cir. 1948)). Similarly,
13 the Ninth Circuit has held that non-exclusive patent licenses are not assignable under § 365(c)(1)
14 because they are "personal and assignable only with the consent of the licensor." In re Catapult
15 Entm't, Inc., 165 F.3d at 750 (quoting Everex Sys., Inc. v. Cadtrak Corp. (In re CFLC, Inc.), 89
16 F.3d 673, 680 (9th Cir. 1996)); see also In re Hernandez, 285 B.R. 435, 439-40 (Bankr. D. Ariz.
17 2002) (both exclusive and non-exclusive patent licenses are not assignable under § 365(c)(1)
18 without licensor's consent).

19 Accordingly, because the NHL has the legal right, beyond the Bankruptcy Code, to
20 determine who may license its intellectual property, it similarly has the right to determine who may
21 use that intellectual property in the context of a proposed transfer of a Club.

22 **C. The Debtors Cannot Assume and Assign the NHL Constitution and By-Laws**
23 **Pursuant to § 365(a).**

24 Finally, in the particular circumstances of this case – and in particular the NHL Board of
25 Governors' binding vote rejecting Mr. Balsillie as an NHL owner – the Debtors are incapable of
26 assuming and assigning the NHL Constitution and By-Laws pursuant to § 365(a). Not only would
27 the Debtors' challenge to the Board's vote create an incurable default, it also would saddle the
28 estate with administrative expenses beyond what it can pay.

1 First and foremost, the Debtors should not undertake a process that would create an
2 incurable default under the NHL Constitution and thereby jeopardize the Debtors' ability to transfer
3 its assets to any successful bidder. In the Ninth Circuit, the existence of an incurable default is an
4 absolute bar to assumption of an executory contract under § 365 of the Bankruptcy Code. See In re
5 Claremont Acquisition Corp., Inc., 113 F. 3d 1029, 1034-45 (9th Cir. 1997) (holding that incurable
6 default was absolute bar to debtor's attempted assumption and assignment of franchise agreement).
7 With respect to a determination of suitability to be an owner, the NHL Constitution is clear that the
8 determination of the Board of Governors is final and not subject to challenge. See NHL
9 Constitution Article 5.11 ("Such vote shall be binding upon all Member Clubs, whether represented
10 by the vote or not."). Thus, if the Debtors attempt to challenge it, that challenge will violate the
11 NHL Constitution. In other words, once rung, this bell cannot be unrung – it would be
12 irresponsible from a fiduciary duty perspective for the Debtors to pursue this course of action and
13 thereby create a legal bar to any assignment of the NHL Constitution to any bidder. When coupled
14 with the lack of financing, the only rational course under the circumstances is for PSE to bear this
15 burden and risk itself.

16 Equally important, the Debtors should not be permitted to pursue a review of the NHL's
17 determination that PSE is not a Qualified Bidder at the expense of the estate. As noted in the First
18 Declaration of William L. Daly, the Debtors have no financing to satisfy costs incurred to
19 challenge to the NHL's determination. (5/13/09 Daly Decl. ¶¶ 30, 36.) Therefore, it would be
20 inappropriate for them to incur further administrative expenses for such an effort. This is
21 especially true where, as here, it remains entirely unclear whether the proposed sale of the Debtors'
22 assets will generate cash for administrative creditors.

23 **II. THE NHL BOARD OF GOVERNORS' REJECTION OF MR. BALSILLIE AS A**
24 **FELLOW OWNER CANNOT VIOLATE ANY IMPLIED DUTY OF GOOD FAITH**
25 **AND FAIR DEALING.**

26 The question of whether a professional sports league has complied with the covenant of
27 good faith and fair dealing when it has exercised its discretion to reject as an owner a proposed
28

1 purchaser of one of its Clubs appears to be one of first impression.⁵ Several courts, however, have
2 examined this issue in the context of franchisors rejecting proposed purchasers of their franchisees
3 pursuant to consent rights similar to those retained by the NHL. Several other courts have ruled on
4 the applicability of the covenant of good faith and fair dealing in other aspects of the franchisor-
5 franchisee relationship, including discretionary decisions regarding the operations of franchises and
6 the termination of franchisees. These lines of cases are fully applicable here.

7 **A. Applicable Law on Good Faith and Fair Dealing**

8 **1. Moyes Has No Reasonable Expectation to Sell His Club to Someone**
9 **Who is Not Approved by the Board of Governors.**

10 Under the first line of cases, where franchisors are accused of violating the covenant of
11 good faith and fair dealing in rejecting proposed purchasers of their franchisees, the standard
12 applied by courts is that the franchisor "cannot capriciously exercise discretion accorded it under a
13 contract so as to thwart the contracting parties' reasonable expectations." Ernie Haire Ford, Inc. v.
14 Ford Motor Co., 260 F.3d 1285, 1291 (11th Cir. 2001). Thus, in Burger King Corp. v. H&H
15 Restaurants, LLC, No. 99-2855, 2001 WL 1850888 (S.D. Fla. Nov. 30, 2001), a Burger King
16 franchisee ("H&H") claimed that Burger King violated the covenant of good faith and fair dealing
17 by rejecting a buyer to whom the franchisee wished to sell all 29 of its restaurants. Id. at *1. The
18 franchise agreement provided that H&H could sell its restaurants "provided [Burger King's]
19 consent to the assignment or sale of stock first be obtained, which consent will not be unreasonably
20 withheld upon compliance with the conditions imposed by [Burger King] on such assignment or
21 sales." Id. at *3. Burger King's asserted basis for rejecting the sale was concern, based on prior
22 experience with the buyer, that the buyer did not have the necessary skill to operate the restaurants,
23 ultimately placing "the Burger King brand at unreasonable risk." Id. at *4. H&H, on the other
24 hand, claimed that Burger King's disapproval of the sale "was based on arbitrary and pretextual

25 _____
26 ⁵ The law is unequivocal that the NHL owes no duty of good faith and fair dealing to Mr. Balsillie or
27 PSE, as they are not parties to any contract with the NHL. See, e.g., Leal v. Allstate Ins. Co., 17 P.3d 95, 99
28 (Ariz. Ct. App. 2000) ("[I]t is well established that a third-party claimant, a stranger to the contract, cannot
sue for . . . breach of the duty of good faith."). Thus, any argument that the NHL has violated a duty of good
faith with respect to Mr. Balsillie or PSE is likewise meritless.

1 reasons, and that Burger King's true motivation in disapproving the sale was to force a sale at a
2 drastically reduced price to certain pre-approved buyers identified by Burger King." Id.

3 The court held that H&H's breach of good faith and fair dealing claim failed because
4 Burger King's refusal to consent to the sale "was not capricious nor in contravention of the parties'
5 expectations." Id. at *7. It first noted that a party's decision will not violate the covenant "unless
6 no reasonable party . . . would have made the decision." Id. (alteration in original). The court next
7 observed that "the central purpose of the franchise agreement was the sale of food, not the transfer
8 of restaurants." Id. Burger King's refusal to consent to the sale of the restaurants did not preclude
9 H&H from the sale of food, and therefore was not capricious nor contrary to the parties' reasonable
10 expectations. Id. Accordingly, the court granted Burger King's motion for summary judgment on
11 H&H's breach of good faith and fair dealing claim.

12 The Burger King court relied heavily on a prior decision regarding the denial of consent to
13 a sale and relocation of a Ford dealership, Ford, 260 F.2d 1285. In Ford, the franchisee ("EHF")
14 proposed to sell his franchise to CarMax through a transaction that was conditioned on the
15 franchise being relocated to CarMax's "superstore." Id. at 1289. The Dealership Agreement
16 between EHF and Ford provided that EHF could not move the dealership "without the prior written
17 consent of [Ford]" and that Ford could determine "in its best judgment, the . . . locations . . . of
18 authorized dealers." Id. at 1288-89. After Ford rejected the proposed relocation and transfer of
19 ownership, EHF filed suit claiming that Ford violated the duty of good faith and fair dealing. It
20 claimed that Ford's motive was improper because, among other things, "[p]rior to rejecting the
21 transaction, [Ford] performed a limited amount of due diligence Additionally, had [Ford]
22 adhered to its own relocation manual, nine of the ten factors listed therein favored the [relocation]."
23 Id. Ford proffered several reasons for its rejection, including that the proposed relocation
24 conflicted with its market plan and that the relocation to CarMax's used car lot may have upset
25 other franchisees and devalued the brand. See id.

26 The court held that Ford did not violate any duty of good faith and fair dealing:

27 [T]he central purpose of the Dealership Agreement was to sell cars,
28 not to relocate the dealership. In disapproving the relocation, [Ford]
did not preclude [EHF] from selling cars. Instead, based on "its best

1 judgment," [Ford] forbid relocation of the dealership to a site where,
2 granted, [EHF] would have financially benefited. Although [Ford's]
3 decision was not in [EHF's] best interests, it was neither capricious
4 nor in contravention of the parties' reasonable expectations.

5 Id. at 1292. The court therefore concluded that the district court appropriately granted summary
6 judgment on EHF's claim for breach of the covenant of good faith and fair dealing. Id.; see also
7 Rolscreen Co. v. Pella Prods. of St. Louis, Inc., 64 F.3d 1202, 1212 (8th Cir. 1995) (no breach of
8 the duty of good faith and fair dealing by manufacturer that terminated distributor where distributor
9 claimed termination was based on manufacturer's personal dislike of successor to distributor's
10 president and motive to install its former employee in that position, because manufacturer had no
11 obligation to accept successor).

12 **2. A Potential Buyer's Perceived Untrustworthiness Is a Legitimate**
13 **Business Reason to Reject a Prospective NHL Owner.**

14 Under the second line of cases, where franchisors are accused of violating the covenant in
15 discretionary decisions regarding the operations of franchises and in terminating franchises, the
16 standard applied by the courts is whether the franchisor had good cause or a legitimate business
17 reason for the discretionary decisions. See In re Sizzler Rests. Int'l, Inc., 225 B.R. 466, 475 (Bankr.
18 C.D. Cal. 1998). If good cause exists, there is no violation of the duty of good faith, regardless of
19 the franchisor's motive. See id.

20 For example, in Sizzler, the franchisee ("Triple S") claimed that Sizzler breached the
21 covenant of good faith and fair dealing by violating various provisions of the license agreements
22 that vested discretion in Sizzler with respect to its selection of franchise locations and its marketing
23 concepts. See id. at 473. The court set forth several ground rules for its analysis. First, the inquiry
24 into Sizzler's decision-making process should not look to the results of the process, but is more
25 appropriately aimed at determining whether the process itself was "legitimate, i.e., honest or within
26 accepted commercial practices." Id. at 474. Second, breach of the implied covenant requires a
27 showing that Sizzler acted "with bad faith or an evil motive." Id. (citations omitted). Finally, if
28 Sizzler had "good cause or a legitimate business reason" for its discretionary decision, its motive is
immaterial to a determination of good faith performance. Id. at 475. The court held that Sizzler
did not violate the covenant of good faith and fair dealing because Sizzler offered evidence that it

1 had good cause for undertaking its business strategies. Id. at 475. Furthermore, Triple S could not
2 show that "Sizzler acted dishonestly or outside accepted commercial practices, or that it did so with
3 improper motives or arbitrarily, capriciously, or in a manner inconsistent with the reasonable
4 expectations of the parties." Id. at 476.

5 Similar reasoning is applied by courts examining whether franchisors breached a duty of
6 good faith and fair dealing when they terminated certain franchisees. In McDonald's Corp. v. C.B.
7 Management Co., 13 F. Supp. 2d 705 (N.D. Ill. 1998), the franchisee ("CB") alleged that
8 McDonald's violated its duty of good faith and fair dealing in terminating CB's franchise because it
9 acted with an improper motive – retaliation for a previous lawsuit that CB filed. Id. at 712. The
10 court held that the only relevant inquiry was whether McDonald's had good cause to terminate CB's
11 franchise and, since the undisputed facts showed that CB had violated the franchise agreement,
12 CB's allegations of a pretextual scheme were irrelevant. Id.

13 **3. This Court Should Not Second-Guess the NHL's Legitimate Business**
14 **Decision.**

15 Finally, numerous courts have recognized that it is not their place to second-guess the
16 legitimate business decisions of a party that has been accused of violating a duty of good faith and
17 fair dealing. In Svela v. Union Oil Co., 807 F.2d 1494 (9th Cir. 1987), for example, the Ninth
18 Circuit affirmed the lower court's finding that Union Oil's decision not to renew Svela's service
19 station franchise was made in good faith and in the normal course of business, stating that it would
20 not second-guess the economic decisions of franchisors. Id. at 1501; see also Vasco v. Mobil Oil
21 Corp., 698 F. Supp. 102, 104 (D. Md. 1988) ("Good faith' has been uniformly interpreted as
22 meaning subjective good faith, that is, an honest evaluation of the franchisor's own business needs,
23 and in applying that standard courts are not entitled to second-guess franchisor's economic
24 decisions."). Similarly, in Sizzler, the court "decline[d] to second-guess the result reached [by
25 Sizzler's exercise of its discretion], as long as the decision-making process was honest or was
26 within accepted commercial practices." 225 B.R. at 474. Likewise, the court in Burger King Corp.
27 v. Agad, 941 F Supp. 1217 (N.D. Ga. 1996), found that Burger King had valid business reasons for
28 taking the challenged actions and therefore held that "defendants cannot use the implied covenant

1 of good faith and fair dealing to second guess BKC's legitimate business decisions." Id. at 1222;
2 see also Rivermont Inn, Inc. v. Bass Hotels & Resorts, Inc., 113 S.W.3d 636, 643 (Ky. App. 2003)
3 ("A franchisee 'cannot use the implied covenant of good faith and fair dealing to second-guess [a]
4 legitimate business decision.'") (citation omitted; alteration in original).

5 **B. The NHL Indisputably Exercised Good Faith and Fair Dealing in Rejecting Mr.**
6 **Balsillie.**

7 As this Court is aware, on July 29, 2009, the NHL Board of Governors voted unanimously
8 to deny Mr. Balsillie's application for transfer of ownership of the Coyotes. In prior filings, Deputy
9 Commissioner William L. Daly has set out the NHL's procedures, deliberation and voting with
10 respect to Mr. Balsillie's ownership application. (See Second Daly Decl. ¶¶ 11-20.) After
11 reviewing a written background report on Mr. Balsillie, interviewing him, and discussing his prior
12 actions and dealings with NHL owners, the NHL Executive Committee deliberated and concluded
13 that Mr. Balsillie lacked the trustworthiness to be a suitable business partner. (See supra pp. [].)
14 The Executive Committee thus unanimously recommended to the Board of Governors that it
15 disapprove Mr. Balsillie's application for ownership. (Jacobs Decl. ¶ 16.) The Board's unanimous
16 rejection of Mr. Balsillie was based on its finding that he lacks the good character and integrity
17 required under Article 3.5 and Section 35 of the NHL Constitution and By-Laws.

18 The NHL Board's exercise of its discretion was not capricious, but rather was a proper and
19 legitimate application of its consent rights. It is beyond dispute that a "reasonable person" could
20 make the same decision. And, because the central purpose of Moyes' agreement with the NHL is
21 the operation of an NHL Club – not the sale of the Club outside of the procedures outlined in By-
22 Law 35 – the Board's rejection of a prospective owner on character grounds cannot contravene
23 Moyes' reasonable expectations as an NHL owner. Moyes could not have reasonably believed that
24 he could sell the Club to anyone, irrespective of his character, when By-Law 35 makes that subject
25 a fundamental part of his contract with the League.

26 Finally, as discussed above, the Board had good cause to reject Mr. Balsillie: his perceived
27 unwillingness to comply with the NHL Constitution and By-Laws and his lack of trustworthiness
28 are legitimate business reasons to deny his application. As such, any allegation that the rejection

1 was based on improper motives or bias against him is both false and irrelevant; likewise, discovery
2 over the Board's motive would be highly wasteful where the undisputed facts before the Board
3 more than provide good cause for its decision. The procedures employed by the League and the
4 grounds on which the Board's decision was based amply demonstrate that the NHL acted in good
5 faith in denying Mr. Balsillie's ownership application, and the Court should not second-guess the
6 Board's decision.

7 **CONCLUSION**

8 WHEREFORE, for the reasons set forth above, the NHL respectfully requests that the
9 Court enter an Order that Debtors' NHL membership rights may not be transferred to PSE or an
10 affiliate thereof, and that, accordingly, PSE is not and cannot be a Qualified Bidder under the
11 Court's July 6, 2009 Bid Procedures.

12
13 DATED: August 7, 2009

14 STINSON MORRISON HECKER LLP

15 By: /s/ Alan A. Meda (#009213)
16 C. Taylor Ashworth, 010143
Alan A. Meda, 009213

17 and

18 SKADDEN, ARPS, SLATE, MEAGHER & FLOM, LLP
19 J. Gregory Milmo
20 Shepard Goldfein
Anthony W. Clark

21 Attorneys for the National Hockey League
22
23
24
25
26
27
28