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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-09-09488  
(Jointly Administered)

Chapter 11

**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**

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**”), the debtors-in-possession in the above-captioned cases (the “**Debtors**”), respectfully move the Court for an order under sections 105(a), 365(a) and 502(b)(6) of Title 11 of the United States Code (the “**Bankruptcy Code**”) approving rejection of the *Arena Management, Use, and Lease* dated as of November 29, 2001, among the City of Glendale, Arizona (the “**City**”), Arena Management, Coyotes Hockey, Glendale-101 Development LLC, and Coyote Center Development LLC (the “**Lease**”), with such rejection taking effect as of the closing date of any sale of the Debtors’ assets that includes a relocation of the Phoenix Coyotes

professional hockey team (the “**Team**”) outside of Glendale, Arizona (a “**Relocation Sale**”).<sup>1</sup>

## **TIMING**

1. The Debtors are not asking the Court to order rejection of the Lease prior to the September 10, 2009 auction, because rejection of the Lease may not be necessary if the Court approves a sale of the Debtors’ assets that keeps the Team in Glendale under the terms of a renegotiated Lease.<sup>2</sup>

2. Under the Court’s “Minute Entry/Order” dated August 5, 2009 (Docket No. 572), an auction for the sale of the Debtors’ assets is scheduled to begin at 9:00 a.m. on September 10, 2009 (the “**Sale Hearing**”) at which all qualified bids will be considered. The Minute Entry/Order also suggests that it may be appropriate to submit certain issues to the Court for resolution prior to the Sale Hearing.

3. Accordingly, the three discrete legal issues set forth below should be resolved prior to the Sale Hearing:

- (a) determining that the Lease is a lease that can be rejected by the Debtors under Bankruptcy Code § 365(a) subject to the Court’s approval;
- (b) determining that the City is not entitled to injunctive relief in the form of specific performance for breach of the Lease; and
- (c) determining that all claims for damages resulting from rejection of the Lease are capped under Bankruptcy Code § 502(b)(6).

## **JURISDICTION AND VENUE**

4. On May 5, 2009 (the “**Petition Date**”), the Debtors filed their voluntary petitions

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<sup>1</sup> A copy of the Lease is attached to the Debtors’ Memorandum (defined below) at Docket No. 287.

<sup>2</sup> Any Relocation Sale will necessarily require rejection of the Lease. *Rejection of the Lease may also be required even if the Team remains in Glendale.* For example, under the terms of the *Asset Purchase Agreement* submitted by Glendale Hockey LLC and Glendale Arena LLC on July 24, 2009 (Exhibit A to Docket No. 478, the “**Glendale Hockey APA**”), the potential buyers will negotiate a “successor/substitute” Lease with the City. *See* Glendale Hockey APA § 2.12. This provision of the Glendale Hockey APA appears to contemplate (and likely requires) that the Lease will be rejected under Bankruptcy Code § 365(a) in conjunction with the Court’s approval of a

for relief under Chapter 11 of the Bankruptcy Code in the United States Bankruptcy Court for the District of Arizona.

5. The Debtors continue to operate their businesses and manage their properties as debtors-in-possession in accordance with Bankruptcy Code §§ 1107 and 1108.

6. The Court has jurisdiction over these cases and the matters raised in this Motion under 28 U.S.C. §§ 157 and 1334. The matters raised in this Motion constitutes core proceedings under 28 U.S.C. § 157(b)(2).

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

8. An Official Committee of Unsecured Creditors was appointed on May 21, 2009 (the “**Committee**”).

9. The statutory predicates for the relief requested in this Motion are Bankruptcy Code §§ 105(a), 365(a), and 502(b)(6).

#### **INCORPORATION OF MEMORANDUM IN SUPPORT OF MOTION**

10. The Debtors have already briefed the issues raised in this Motion in “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) (“**Memorandum**”). Accordingly, the Debtors respectfully incorporate the Memorandum herein in its entirety as support for this Motion and reserve the right to file a supplemental memorandum in reply to any objection to this Motion.

11. The City has also briefed the issues that are raised in this Motion; and,

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successor/substitute Lease.

accordingly, the issues are ripe for resolution by the Court.<sup>3</sup>

## ARGUMENT

### A. The Lease is Subject to Rejection Under Bankruptcy Code § 365(a)

12. As explained in Section II of the Memorandum (pages 1-10), the Lease is an unexpired lease of nonresidential real property which the Debtors are entitled to reject under Bankruptcy Code § 365(a), subject to approval of the Court, because:

- state law governs whether an instrument constitutes a lease for the purposes of Bankruptcy Code § 365;<sup>4</sup>
- the Lease is a lease under Arizona law because it contains all of the necessary characteristics of a lease;<sup>5</sup>
- the language of the Lease makes clear that the parties intended the Lease to be a lease;<sup>6</sup> and
- the various provisions of the Lease are not severable.<sup>7</sup>

13. Accordingly, the Debtors are entitled to reject the Lease under Bankruptcy Code

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<sup>3</sup> See “Objection of the City of Glendale, Arizona to Motion of the Debtors for Entry of an Order (A) Authorizing Conduct of an Auction of Coyotes Hockey, LLC’s Assets; (B) Establishing Procedures to be Employed in Connection with the Sale Including Approval of Termination Fee; and (C) Approving Form and Manner of Notice of Conditional Cure Notice and Solicitation Notice” (Docket No. 86); see also “City of Glendale’s Supplemental Objection to the Debtors’ Sale Motion” (Docket No. 281).

<sup>4</sup> See, e.g., *In re Safeguard Self-Storage Trust*, 2 F.3d 967, 972 (9th Cir. 1993) (applying state law to determine whether an instrument “meets the definition of a lease” for Bankruptcy Code purposes).

<sup>5</sup> See, e.g., *Joy Enters v. Reppel*, 112 Ariz. 42 (1975) (a lease is created where an instrument “described the property to be leased, gave a definite agreed term, a definite and agreed price of rental and included the time and manner of payments.”); see also Lease § 19.7 (the Lease “shall be governed in all respects by the laws of the State of Arizona.”).

<sup>6</sup> See, e.g., Lease § 9.2 (“the City hereby *leases* the Exclusive Team Spaces to the Team, and the Team *leases* the Exclusive Team Spaces from the City”) (emphasis added).

<sup>7</sup> See, e.g., *In re Or. Arena Corp.*, 2006 U.S. Dist. LEXIS 10042 at \*\*5 (D. Ore. 2006) (applying state law to find agreements indivisible for purposes of Bankruptcy Code § 365); *In re Qintex Entertainment, Inc.*, 950 F.2d 1492, 1496 (9th Cir. 1991) (applying state law to find that contract is not severable).

§ 365(a) subject to the Court's approval.<sup>8</sup>

**B. The City is Not Entitled to Specific Performance**

14. The City has previously asserted that it is entitled to injunctive relief in the form of specific performance for any breach of the Lease, requiring Coyotes Hockey to play every home game at the Arena through the 2035 NHL season and precluding Coyotes Hockey from playing home games elsewhere until the 2036 NHL season. As explained in Section III of the Memorandum (pages 11-26), the City's argument should be rejected as it offends both Arizona law and bankruptcy policy. More specifically, specific performance is not available to the City because:

- the City has an adequate remedy at law (*i.e.*, the City's claim for damages that result from rejection of the Lease is quantifiable and can be calculated with reasonable certainty);<sup>9</sup>
- the City's request for an injunction requiring Coyotes Hockey to play its home games in the Arena *for the next 26 years* violates public policy and would inappropriately require the Court to supervise Coyotes Hockey's performance during those years;<sup>10</sup> and
- the specific performance provision of the Lease constitutes an unenforceable prepetition waiver of one of the most valuable rights under the Bankruptcy

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<sup>8</sup> See Bankruptcy Code § 365(a) ("a trustee, subject to the court's approval, may assume or reject any executory contract or unexpired lease of the debtor.").

<sup>9</sup> See, e.g., *Dialog4 Sys. Eng'g GmbH v. Circuit Research Labs, Inc.*, 2009 U.S. Dist. LEXIS 28719, \*26-27 (D. Ariz. 2009) (under Arizona law, specific performance is an extraordinary remedy that is not permitted if there is an adequate remedy at law).

<sup>10</sup> See, e.g., 2 Arizona Civil Remedies (2nd ed.) § 6.11.2.4 ("Before the court orders specific performance, it must be assured that after it orders specific performance it will be able to supervise that performance with relative ease."); *New Park Forest Assocs. II v. Rogers Enters., Inc.*, 552 N.E.2d 1215, 1220 (Ill. App. 1990) (declining to grant specific performance of a lease when there was nine years remaining on the lease term).

Code—the ability to reject burdensome leases for the benefit of the Debtors’ creditors and estates.<sup>11</sup>

15. Accordingly, the City is not entitled to injunctive relief in the form of specific performance.

**C. All Claims for Damages Resulting from Rejection of the Lease are Capped Under Bankruptcy Code § 502(b)(6)**

16. The City has stated that the Debtors’ rejection of the Lease “would give rise to a monstrously large claim” that would be “something in the magnitude of 500 [million dollars].”<sup>12</sup> As explained in Section IV of the Memorandum (pp. 26-39), rejection of the Lease under Bankruptcy Code § 365(a) would result in an unsecured claim, in favor of the City, that is capped under Bankruptcy Code § 502(b)(6).<sup>13</sup>

17. Moreover, the cap applies, *inter alia*, to any liquidated damages that allegedly result from a breach of the Team Use Covenant<sup>14</sup> in the Lease.<sup>15</sup> Furthermore, application of the

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<sup>11</sup> See, e.g., *In re Rega Properties, Ltd.*, 894 F.2d 1136, 1140 (9th Cir. 1990) (“The purpose of allowing rejection of an executory contract under section 365 is to make the debtor’s rehabilitation more likely”); *In re Tru Block Concrete Prods., Inc.*, 27 B.R. 486, 492 (Bankr. S.D. Cal. 1986) (“It is a well settled principal that an advance agreement to waive the benefits conferred by the bankruptcy laws is wholly void as against public policy.”); *In re Cole*, 226 B.R. 647, 654 (B.A.P. 9th Cir. 1998) (citing cases and holding that debtor’s prepetition agreement not to seek discharge of a debt through bankruptcy was unenforceable); *In re TWA*, 261 B.R. 103, 118 (Bankr. D. Del. 2001) (holding that debtor’s prepetition agreement to waive the right to assume or reject an executory contract was “contrary to the purpose of chapter 11 and unenforceable”).

<sup>12</sup> Transcript of May 19, 2009 hearing at 81:12-13 and 82:5-6.

<sup>13</sup> See, e.g., *In re El Toro Materials Co.*, 504 F.3d 978 (9th Cir. 2007); *In re McSheridan*, 184 B.R. 91 (B.A.P. 9th Cir. 1995).

<sup>14</sup> The Team Use Covenant is the covenant that the Team will play all of its home games at Jobing.com Arena for the entire term of the Lease. See Lease § 9.5.

<sup>15</sup> See, e.g., *In re McSheridan*, 184 B.R. at 101-102 (B.A.P. 9th Cir. 1995) (holding that rejection of a lease “results in the breach of each and every provision of the lease, *including covenants*, and § 502(b)(6) is intended to limit the lessor’s damages resulting from that rejection.”) (emphasis added); *In re Malease 14FK Corp.*, 351 B.R. 34, 43 (E.D.N.Y. 2006) (liquidated damages resulting from lease rejection are capped by § 502(b)(6)); *In re Premier Entertainment Biloxi, LLC*, 2009 Bankr. LEXIS 1222, \*7-11 (Bankr. D. Miss. 2009) (liquidated damages resulting from lease rejection are capped by § 502(b)(6) even if the lessor would otherwise be entitled to liquidated damages under state law).

cap to the City's claim is consistent with Congress' intent "to compensate the landlord for his loss while not permitting a claim so large (based on a long-term lease) as to prevent other general unsecured creditors from recovering a dividend from the estate."<sup>16</sup>

**D. Rejection of the Lease is in the Best Interests of the Debtors' Creditors and Estates**

18. With certain exceptions that do not apply here, "a trustee, subject to the court's approval, may assume or reject any executory contract or unexpired lease of the debtor."<sup>17</sup>

A debtor-in-possession has substantially all of the rights and powers of a trustee in a case under Chapter 11.<sup>18</sup>

19. The decision to reject an executory contract or unexpired lease under § 365(a) is governed by the "business judgment" rule.<sup>19</sup> Under the business judgment rule, "the bankruptcy court should presume that the debtor-in-possession acted prudently, on an informed basis, in good faith, and in the honest belief that the action was in the best interests of the bankruptcy estate."<sup>20</sup> Accordingly, "[the bankruptcy court] should approve the rejection of an executory contract under § 365(a) unless it finds that the debtor-in-possession's conclusion that rejection

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<sup>16</sup> *In re El Toro Materials Co.*, 504 F.3d at 980, quoting S. Rep. No. 95-989, 95th Cong., 2nd Sess. 63 (1978); accord *In re McSheridan*, 184 B.R. at 97 (Bankruptcy Code § 502(b)(6) "balances the interests of landlords against those of other creditors by preventing landlords from receiving a windfall as a result of the filing of the bankruptcy petition.").

<sup>17</sup> Bankruptcy Code § 365(a).

<sup>18</sup> Bankruptcy Code § 1107(a).

<sup>19</sup> See, e.g., *In re Pomona Valley Medical Group, Inc.*, 476 F.3d 665, 670 (9th Cir. 2007) ("a bankruptcy court applies the business judgment rule to evaluate a debtor-in-possession's rejection decision"); *In re G.I. Industries, Inc.*, 204 F.3d 1276, 1282 (9th Cir. 2000); ("a bankruptcy court applies the business judgment rule to evaluate a trustee's rejection decision"); *In re Chi-Feng Huang*, 23 B.R. 798, 801 (B.A.P. 9th Cir. 1982); *Richmond Leasing Co. v. Capital Bank, N.A.*, 762 F.2d 1303, 1309 (5th Cir. 1985).

<sup>20</sup> *In re Pomona Valley Medical Group, Inc.*, 476 F.3d at 670.

would be advantageous is so manifestly unreasonable that it could not be based on sound business judgment, but only on bad faith, or whim or caprice.”<sup>21</sup>

20. “The primary issue is whether rejection would benefit the general unsecured creditors.”<sup>22</sup> This issue should be decided in conjunction with the Sale Hearing. Accordingly, the Debtors will demonstrate at the appropriate time that rejection of the Lease should be approved, with such rejection taking effect as of the closing date of a Relocation Sale.

### CONCLUSION

For all the reasons set forth above and in the Memorandum, the Debtors respectfully request that the Court enter an order:

- (a) determining that the Lease can be rejected by the Debtors under Bankruptcy Code § 365(a) subject to the Court’s approval;
- (b) determining that the City is not entitled to injunctive relief in the form of specific performance for breach of the Lease;
- (c) determining that all claims for damages resulting from rejection of the Lease are capped under Bankruptcy Code § 502(b)(6);
- (d) approving rejection of the Lease under Bankruptcy Code § 365(a) effective as of the closing date of a Relocation Sale; and
- (e) granting any other relief the Court deems appropriate.

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

<sup>22</sup> *In re Chi-Feng Huang*, 23 B.R. at 801; *see also In re Federated Department Stores, Inc.*, 131 B.R. 808 (S.D. Ohio 1991) (affirming bankruptcy court’s approval of lease rejection and application of the § 502(b)(6) cap to the lessor’s claim because rejection was in the best interests of general creditors as a whole); *In re Rickel Home Centers, Inc.*, 209 F.3d 291, 298 (3rd Cir. 2000) (“Section 365 enables the trustee to maximize the value of the debtor’s estate by assuming executory contracts and unexpired leases that benefit the estate and rejecting those that do not”); *In re Exide Technologies et al.*, 340 B.R. 222, 239 (Bankr. D. Del. 2006) (Under the business judgment rule, “[a] court is required to examine whether a reasonable business person would make a similar decision under similar circumstances. This is not a difficult standard to satisfy and requires only a showing that rejection will benefit the estate.”) (citations omitted).



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