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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.

This Filing Applies to:

☒ All Debtors

☐ Specified Debtors

Chapter 11

Case No. 2:09-bk-09488-RTBP

MOTION FOR DETERMINATION THAT THE DEBTORS' INTERESTS MAY BE TRANSFERRED TO PSE NOTWITHSTANDING THE NHL'S REFUSAL TO CONSENT

Redacted Version for Public Filing

Hearing Date: September 2, 2009
Hearing Time: 9:00 a.m.

1 **I. Introduction**

2 This motion seeks a ruling on what the Court has characterized as the "ownership"
3 issue. From day one, the NHL has told the Court that it would reject PSE's bid because of
4 Mr. Balsillie's desire to relocate the team. *See*, *e.g.*, *PSE Sports and Entertainment LP's*
5 *Brief in Support of Relocation* (hereafter "PSE Relo. Br.") [DE 298] at 25-27 (quoting two
6 pages of representations from the NHL's counsel to the Court about how the PSE bid
7 would never be approved because of the relocation issue). In an effort to avoid the "briar
8 patch" of relocation, however, the NHL now claims the Board of Governors closed its
9 eyes to the relocation issue and rejected PSE's Ownership Transfer Application solely
10 because James Balsillie allegedly is the first ownership applicant in history to lack the
11 "good character and integrity" required of all NHL owners. *See Motion of NHL for a*
12 *Determination that Debtors' NHL Membership Rights May Not Be Transferred to PSE or*
13 *an Affiliate Thereof* (hereafter "NHL Denial Mot.") [DE 584] at 1-6. This claim is
14 specious, a poor disguise for the NHL's bad faith application of its rules, and a pretextual
15 rejection violating fundamental bankruptcy and non-bankruptcy law.

16 The Court has addressed this issue previously. In its June 15 Order, the Court
17 stated its "firm sense that if the only issue here was PSE purchasing the Phoenix Coyotes
18 [no relocation term] there would be no objection from the NHL." June 15, 2009 Minute
19 Entry/Order (hereafter "June 15 Order) [DE 341] at 8. Further, the Court stated that "it
20 appear[ed] to the Court that the NHL can not object or withhold its consent to PSE
21 becoming the controlling owner of the Phoenix Coyotes." *Id.* at 9. The Court was correct
22 in its preliminary conclusion. The NHL, however, continues to contend that PSE's bid
23 must be denied simply because the NHL says so.

24 This motion asks the Court to declare that the Debtors' interests in the Coyotes
25 may be sold and assigned to PSE notwithstanding the NHL's refusal to consent. The
26 motion is based on two independent grounds:

1. The NHL's consent is unnecessary. Under section 365(f) of the Bankruptcy Code, the NHL cannot prevent assignment by invoking anti-assignment or consent provisions in its constitution and by-laws. If the Court deems that section 365(f) applies, which it clearly does, then whether or not the NHL has acted reasonably and in good faith is irrelevant. The section 365(c) exception for personal service contracts is inapplicable.

2. The undisputed facts demonstrate that the NHL has, in fact, acted unreasonably and in bad faith in withholding its consent to the proposed assignment and may, therefore, be deemed to have consented. This Court has the power to make this determination pursuant to 11 U.S.C. §§ 363(f), 365(c)(1) and governing law.

For either or both of these reasons, the NHL cannot prevent an ownership transfer from the debtors to PSE. The objective of this bankruptcy proceeding is not to further the self-interests of the NHL or its desire to keep PSE and Mr. Balsillie out of Hamilton. PSE's bid is the best – and likely only – chance that creditors have of receiving a meaningful recovery in these cases, and the NHL may not destroy that opportunity out of spite or dislike of Mr. Balsillie any more than they can do so to protect the Maple Leafs' veto over competitive entry into the Southern Ontario professional hockey market.

II. The NHL's Consent to Transfer of Ownership Is Unnecessary Under Section 365(f)

A. Section 365(f)(1) Invalidates Anti-Assignment Provisions

Section 365(f)(1) authorizes the assignment and assumption of contractual rights and interests "notwithstanding a provision in an executory contract . . . or in applicable law, that prohibits, restricts or conditions the assignment of such contract." 11 U.S.C. § 365(f)(1) (emphasis added); June 15 Order at 8. Provisions that prohibit, restrict or condition assignment on the consent of the counter-party to the contract are within the scope of section 365(f)(1). *See, e.g.*, *In re Peaches Records and Tapes, Inc.*, 51 B.R. 583,

585, 590 (9th Cir. BAP 1985) (provision prohibiting assignment absent consent unenforceable under section 365(f)).

The purpose of section 365 is well-established: "The Code generally favors free assignability as a means to maximize the value of a debtor's estate and, to that end, allows the trustee to assign notwithstanding a provision in [a contract or applicable law] prohibiting, restricting, or conditioning assignment." *In re Rickel Home Centers, Inc.*, 209 F.3d 291, 299 (3d Cir. 2000) (discussing § 365(f)(1)). The Ninth Circuit has construed section 365(f) broadly to encompass even provisions that, while not restricting or conditioning assignment on their face, nevertheless significantly restrict a debtor or trustee's ability to sell or assign contractual rights and thus may be invalidated as *de facto* anti-assignment provisions. *See* June 15 Order at 8 (discussing *In re Crow Operating Partnership*, 241 F.3d 1121 (9th Cir. 2001) and stating that there "are numerous bankruptcy cases from many jurisdictions in a variety of factual settings that rely on [§ 365(f)] to not enforce contract terms effectively barring assignment"). The Court thus does not necessarily have to delve into the "good faith" of the NHL's unprecedented rejection of Mr. Balsillie. It may reject the NHL's consent requirement as a matter of law under the Bankruptcy Code.

B. Article 3.5 of the NHL Constitution Should Be Invalidated As An Anti-Assignment Provision

The NHL claims that Article 3.5 of its Constitution and NHL By-Law 35 permit it to block assignment of the Debtors' interests to Mr. Balsillie or PSE. (*See* NHL Denial Mot. at 3). Article 3.5 states: "No membership or ownership interest in a Member Club may be sold, assigned or otherwise transferred except (a) with the consent of three-fourths of the League . . . ." *Id.* By-Law 35 sets forth two objective, exclusive, and mandatory criteria for NHL members to consider when evaluating requests for assignment under Article 3.5: the potential assignee's (1) financial wherewithal and (2) character. *Id.*

However, as noted above, provisions such as Article 3.5 and By-Law 35 that bar assignment, whether categorically or whenever consent is denied, constitute anti-assignment provisions that may be disregarded under section 365(f)(1). Thus, as the Court noted in its June 15 opinion, the NHL cannot, in light of section 365(f)(1), declare a default simply based on an assignment of ownership from the debtors to PSE. June 15 Order at 8-9. Absent the applicability of a section 365(c) exception, and wholly separate from the relocation issue, the Court should rule that the Debtors may assign their franchise interests to PSE notwithstanding the provisions in the NHL Constitution and By-Laws that prohibit assignment absent the NHL's consent.

C. The Debtors' Contractual Rights with the NHL Are Not Akin to A Personal Services or Personal Trust and Confidence Relationship

Section 365(c)(1) creates an exception to section 365(f) in particular contexts where "applicable law" -- typically state law -- precludes assignment of contractual rights or delegation of contractual duties. Courts have repeatedly held that the exception created by section 365(c) is to be construed narrowly. *See, e.g., In re Health Plan of the Redwoods*, 286 B.R. 407, 409 (Bankr. N.D. Cal. 2002) (§ 365(c)(1) "exceptions to assignability are construed narrowly"); *In re Grove Rich Realty Corp.*, 200 B.R. 502, 506 (Bankr. E.D.N.Y. 1996) ("The Section 365(c)(1) exception to the general rule of the assignability of contracts was intended by Congress to be applied narrowly").

The vast majority of cases applying section 365(c)(1) involve personal services contracts or contracts in which personal trust and confidence are so important to the relationship that state law precludes delegation of performance under the contracts. The NHL cites this line of cases in arguing that section 365(c)(1) precludes the debtors' attempt to rely on section 365(f).

The NHL has set forth two primary arguments under section 365(c)(1) in multiple briefs. The first argument is that, although the NHL concedes that the contractual rights at

1 issue here are not for "personal services," this is one of those "relatively rare situations"
2 where the character and trustworthiness of a potential assignee is so "fundamental" as to
3 be exempt from assignment under state law pertaining to personal contracts. (NHL Denial
4 Mot. at 11). The NHL's second argument is that the NHL's status as a "voluntary
5 association," a "joint venture," or a "sports league" somehow permits it to withhold
6 consent notwithstanding section 365(f). This Court has already properly expressed serious
7 skepticism about both of these arguments.

8 For the following reasons, the exception set forth in section 365(c)(1) is
9 inapplicable in this case.

10 **1. The Contractual Rights at Issue Are Not "Personal"**

11 The NHL is incorrect in suggesting that "applicable law" supports its argument that
12 its contractual relationship with its owners is so personal in nature as to be exempt from
13 assignment under section 365(f). As an initial matter, the NHL cites no statutory law that
14 prohibits the debtors from assigning or delegating their rights or obligations. *Cf. In re Van*
15 *Ness Auto Plaza, Inc.*, 125 B.R. 545, 547 (Bankr. N.D. Cal. 1990) (invoking § 365(c)(1) to
16 give effect to California Vehicle Code statute permitting manufacturer to withhold consent
17 to car dealer's assignment of franchise); *In re Adelphia Commc'ns Corp.*, 359 B.R. 65, 73-
18 74 (Bankr. S.D.N.Y. 2007) (contractual prohibition is insufficient; only a statute or
19 equivalent law suffices to meet the exemption of section 365(c)(1)).

20 The primary case the NHL has relied upon in making this argument is *In re*
21 *Magness*, 972 F.2d 689 (6th Cir. 1992). In that case, a trustee attempted to sell a debtor's
22 membership in the Dayton Country Club. The court held that the contracts at issue were
23 "not in any way commercial," were "personal contracts" and that Ohio case law held that
24 such personal contracts were not assignable. *Id.* at 696. Here, by contrast, the Debtors'
25 interests in their NHL franchise cannot be fairly described as "personal contracts" or as
26 "not in any way commercial," and there is no controlling statutory or case law cited by the

NHL that would preclude assignment. The NHL is a group of 30 separately-owned and often competing businesses participating in a multi-billion dollar sports league, not individuals who regularly share their dining room and exercise facilities.

The NHL also has previously cited *In re Catapult Entertainment*, 165 F.3d 747 (9th Cir. 1999). Although that case involved the non-assignability of patent licenses in light of longstanding federal law, a passage from the case is relevant. Specifically, the Ninth Circuit explained that, even if a state law precludes assignment of certain contractual rights, that law will trump section 365(f) "[o]nly if the law prohibits assignment on the rationale that the identity of the contracting party is material to the agreement." *Id*. at 752 (emphasis added). As a threshold matter, and to reiterate, there is no state law that precludes the proposed assignment to PSE. But even if there were, the NHL's arguments as to why the "identity" of the Debtors (or Mr. Moyes) was essential to its agreement with them have no basis in law or fact.

Consistent with the proposition that section 365(c)(1) is to be construed narrowly, courts, when applying that statute, regularly reject attempts to characterize relationships as "personal" or dependent on the "identity of the contracting party." *See, e.g.*, *In re Health Plan of the Redwoods*, 286 B.R. at 409-10 (holding that physician contracts with HMO were assignable under § 365(f)); *In re Antonelli*, 148 B.R. 443, 449-50 (D. Md. 1992) (partnership interest in real estate project assignable over objections of other partners); *In re Sunrise Restaurants*, 135 B.R. 149, 153 (Bankr. M.D. Fla. 1991) (restaurant franchise assignable); *In re Tom Stimus Chrysler-Plymouth, Inc.*, 134 B.R. 676, 679 (Bankr. M.D. Fla. 1991) (franchise agreement with Chrysler not one based on special trust and confidence); *see also In re Allentown Ambassadors*, 361 B.R. 422, 456-57 & n.72 (Bankr. E.D. Pa. 2007) (suggesting that transfer of minor league baseball team would be permissible). This is not to say that the NHL should not care who its owners are, or what their financial wherewithal is and what kind of character they may have. Such

considerations are relevant in most substantial contractual relationships, yet they are subordinated under section 365(f). The unavoidable reality for the NHL is that no matter how hard it tries to cast its relationship with its owners as "personal," the relationship is purely business and does not require any specific personal attributes or social connections for the league to function. *See* Tom Wright Declaration [DE 303] ¶ ¶ 42-43.

When, after substantial briefing, the NHL's argument that section 365(f) should not be applied previously came before the Court, the Court rejected it.

> MR. SALERNO: Your Honor, if I may I'd like to move on to § 365 issues. With respect to executory contracts, the Debtor asserts that it can assume and assign executory contracts, and the NHL points out five major objections. . . .
>
> Number 1, that the NHL agreements are like personal service contracts that you cannot assume and assign without their consent.
>
> THE COURT: Well, let me, let me put that one aside pretty quickly. **I don't buy that argument.**
>
> MR. SALERNO: That saves me some time. Thank you. . . .
>
> THE COURT: It saves me some time, too.

(6-19-09 Transcript at 47). The Court's initial reaction to the NHL's argument was correct. The line of cases carving out exceptions to section 365(f) for personal service and personal trust and confidence relationships is inapplicable here.

2. The NHL's Status as a Sports League Is Immaterial

The NHL implores this Court not to exercise any legal judgment about who may serve as a sports team owner for fear of disrupting the league's operations. *See*, *e.g.*, NHL Denial Mot. at 20-22. These dire warnings are both unfounded ("[the court] struggles with the assertion that granting the Motion would 'wreak havoc' on professional sports" (June 15 Order at 18)), and legally irrelevant.

Quite simply, the NHL's status as a sports league has little to do with whether section 365(f)(1) applies in this case. As the Court reasoned, "financially challenged sports team[s] have the same rights and obligations as any business that becomes a debtor in the bankruptcy court. The rule of law will decide . . . if any league rules are unenforceable or whether the rights and powers under the Code render some of those rules unenforceable." June 15 Order at 18. Section 365 contains no "sports league" or "voluntary association" exception.

Although it has cited several authorities for general propositions such as that "voluntary associations" generally can decide who to admit as members and that courts generally do not interfere with the internal workings of sports leagues, the NHL has not cited any statute or other controlling law that would preclude assignment of NHL franchise rights even if the NHL's Constitution and By-Laws were silent on the issue. Section 365(c)(1) is, therefore, inapplicable. As discussed, the NHL's relationship with its members is primarily commercial and not personal or social in nature. As an NHL owner, PSE would be charged with operating its own team and would have a 1/30th vote on matters put to league members. The League has no requirement for unanimity of viewpoint of its owners, as illustrated by the pending antitrust action filed by the owner of the New York Rangers against the NHL. *See* pp. 14-17, *infra.* Simply put, the NHL does not have some special sports league immunity from section 365(f)(1).

III. The NHL's Rejection of PSE's Ownership Transfer Application was not in Good Faith or in Compliance with the Law.

Even if the Court were to rule that the NHL's ownership transfer restrictions are not express or *de facto* anti-assignment provisions, they still may not be lawfully applied to disqualify Mr. Balsillie and PSE as a bidder for the Coyotes in these proceedings under sections 365(c)(1) and 363(f)(1),(2) of the Bankruptcy Code.

As the Court has already held, "[t]he law implies in every contract a covenant of good faith and fair dealing. Even where one party retains, by virtue of the contract, a right

of approval or disapproval or a discretionary power over the right of the other, such powers must be exercised within the parameters of the duty of good faith." June 15 Order at 8-9 (citing *Los Angeles Mem'l Coliseum Comm'n v. National Football League*, 791 F.2d 1356, 1361 (9th Cir. 1986) ("*Raiders II*")).[1] Here, the NHL Constitution and by-Laws – contracts between the Debtors and the NHL – expressly grant the Debtors the right to transfer ownership upon the vote of the NHL Board, which, in turn, "*shall* be guided by" only two specified criteria: financial wherewithal and "good character and integrity." Daly Decl. [DE 93], Ex. B, By-Law 35.1.[2] These criteria *must* be – but have not been – applied in good faith to PSE's Ownership Transfer Application.

Similarly, when consent of a counterparty to an executory contract is required in order to transfer that contract, "such consent will be and is deemed to have been given" where consent is unreasonably withheld. *In re McCommas*, 2007 Bankr. LEXIS 4053, *31 (Bankr. N.D. Tex. 2007); *see generally* PSE Relo. Br. at 42-46. Here, there is demonstrably no reasonable basis for the NHL to refuse to consent to PSE's ownership on the purported ground that Mr. Balsillie lacks "good character and integrity."

Indeed, this Court has already recognized the "significan[ce]" of "the fact that in 2006 the NHL approved PSE to become a member of the NHL," and stated its "firm sense that if the only issue here was PSE purchasing the Phoenix Coyotes [no relocation term]

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[1] *See also*, *e.g.*, *City of Portland, Ore. v. Electric Lightwave, Inc.*, 452 F. Supp. 2d 1049, 1066 (D. Or. 2005) ("a contract term requiring a party's consent prior to assignment is construed to included the requirement that consent shall not be unreasonably withheld"); *Fitzgerald v. Cantor*, 1999 WL 182571 (Del. Ch. 1999) (finding partners' consent unreasonably withheld where partner breached fiduciary duty by favoring one partner over another and acting out of self-interest); *In re Schick*, 235 B.R. 318, 326-29 (Bankr. S.D.N.Y. 1999) (remanding for evidentiary hearing on issue of whether consent withheld based on pretextual reason where alleged real reason would have been a breach of duty).

[2] *See* Daly Decl. [DE 93] at Ex. A, NHL Constitution ¶ 3.5 (also requiring that the transferee agree to be bound by and comply with the NHL Constitution and assume or guarantee certain debts of the transferor member on the transfer date). Mr. Balsillie has agreed to be bound by and to comply with the NHL Constitution and to assume the requisite debts; the only issue here is the NHL Board of Governors' bad faith rejection of Mr. Balsillie's Ownership Transfer Application. *See* Declaration of James Balsillie ("1st Balsillie Decl.") [DE 299] ¶¶15, 19.

there would be no objection from the NHL." June 15 Order at 8. Accordingly, "[a]bsent some showing *by the NHL* that there have been material changes in PSE's circumstances since 2006, *it appears to the court that the NHL can not object or withhold its consent to PSE becoming the controlling owner of the Phoenix Coyotes*." *Id.* at 9 (emphases added). As set forth below, the NHL has not come close to meeting its burden to show that there have been any such material changes since its 2006 approval of Mr. Balsillie to become an owner in the NHL.

A. PSE And Mr. Balsillie Readily Satisfy the NHL's Two Requirements Governing Transfer of Ownership

It is undisputed that Mr. Balsillie meets the first condition of NHL By-Law 35.1 for an ownership transfer; the NHL admits that "he has sufficient financial means to ensure the financial stability of the Coyotes." NHL Executive Committee Memorandum dated July 27, 2009 (hereafter "Exec. Memo.") at 8, *found at* Declaration of Jeremy M. Jacobs, Exh. A [DE 586]. Further, the NHL has made no objection to PSE's Ownership Transfer Application on this ground. *See generally* NHL Denial Mot.

The NHL rests its *entire* (purported) basis for rejecting Mr. Balsillie as a prospective owner of the Coyotes on his asserted lack of "good character and integrity." *Id*. PSE understands that an assertion by the NHL of a lack "of good character and integrity" has *never* before been invoked, in the entire history of the NHL, to reject any applicant. It is objectively unreasonable and in bad faith for the NHL to make history here. It was not surprising that the NHL Board of Governors found Mr. Balsillie to be "of good character and integrity" when it approved his proposed ownership of the Pittsburgh Penguins in 2006. Mr. Balsillie is one of the top CEOs in the world, a self-made billionaire, an established philanthropist and an extraordinarily enthusiastic hockey fan. He has been lauded repeatedly and throughout North America as a man of honor, worth and vision. Nothing has materially changed since 2006 – except for the fact that the NHL

now wants to punish Mr. Balsillie for seeking to purchase and relocate the Coyotes out of bankruptcy.

The NHL's Denial Motion is tellingly silent about the information provided in PSE's Ownership Transfer Application, including Mr. Balsillie's letter to the NHL, resume, accolades and references. Those documents strongly confirm the depth of Mr. Balsillie's community concern and involvement, good character and integrity.[3] Mr. Balsillie's public recognition as an outstanding citizen and recipient of multiple honorary degrees further evidence his ability to satisfy the good character requirement of the NHL By-Laws.

Since 2006, Mr. Balsillie has continued to be recognized for his philanthropic contributions, leadership, and good moral character. For example, in conferring an honorary degree upon Mr. Balsillie in June 2007, Seneca College President Dr. Rick Miner described Mr. Balsillie as "a role model for our students … , not only as a successful entrepreneur, but as one who contributes to the community in which he lives."[4] Similarly, in 2008, Mr. Balsillie was awarded an honorary Doctor of Laws degree from Wilfrid Laurier University in recognition of his contributions to the community, which include a new cancer care center at the Grand River Hospital, and a children's museum in Waterloo, Ontario.[5] The NHL does not mention any of this good character evidence in its NHL Denial Motion.

The Executive Committee report, and the Jacobs and Daly declarations describing Mr. Balsillie's interview, repeatedly and expansively make out allegations against Mr.

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[3] *Notice of Filing NHL Transfer Application Under seal* [DE 228]; *NHL Relocation Application Under seal* [DE 236]; foundation declarations of Wright, Balsillie and McGee (filed with this brief).

[4] *Research In Motion co-CEO Granted Honorary Degree from Seneca*, June 27, 2007, http://www.senecac.on.ca/media/news/2007/2007-06-27.html.

[5] Laurier Canadian Excellence, *RIM's Jim Balsillie named Laurier's 21st Outstanding Business Leader Public Affairs,* Dec. 22, 2008, http://www.wlu.ca/news_detail.php?grp_id=0&nws_id=4719.

Balsillie, but for the most part, do not set forth his responses. Whether deliberately or not, the NHL Board of Governors and the Court appear to have been presented with only "one side of the story" in material respects. If necessary, full evidence of all the facts can be presented. PSE believes, however, that sufficient facts are already available in the record to support a determination that the NHL wrongfully rejected PSE's ownership transfer application as an alternative ground to approving assignment to PSE under a straightforward application of Bankruptcy Code section 363(f).

B. The NHL's Rejection of PSE's Ownership Transfer Application Is in Bad Faith and Unlawful

1. This Bankruptcy Court is Not an Illicit "Side Door"

The NHL's principal stated reason for rejecting PSE and Mr. Balsillie as a prospective NHL owner is that Mr. Balsillie (and Mr. Moyes) purportedly "schemed" to enable Mr. Balsillie to assume ownership of the Coyotes through a "side door." *E.g.*, NHL Denial Mot. at 2. The "side door" of which the NHL complains is nothing more than this wholly legitimate bankruptcy case. Even the NHL cannot deny the economic reality of the Debtors' failing business, which has never operated profitably under multiple owners and which owes, and continues to amass, enormous debts. *See*, *e.g.*, TR 8/3/09 4:23-24 [DE 571] (NHL counsel stating,"[t]he one thing that everybody agrees on is that it is appropriate to sell the team."). It is simply beyond dispute that the Debtors have lawfully invoked these bankruptcy proceedings and the auction process to maximize the value of their assets for the benefit of creditors.

This Court has already held that "financially challenged sports teams" such as the Coyotes "have the same rights and obligations as any business that becomes a debtor in the bankruptcy court." June 15 Order at 18. In other words, the Court rejected the argument that it was improper for the Debtor to file these proceedings and seek to sell the team in bankruptcy. For the NHL to attack this same conduct – *i.e.*, Debtors' filing for bankruptcy and PSE's attempt to purchase the Coyotes out of bankruptcy – as illicit and

disqualifying because it is an unconventional path instead of the "front door" of a non-bankruptcy sale – is inconsistent with basic bankruptcy law. Prospective purchasers of troubled assets frequently condition their acquisitions on a bankruptcy filing and a section 363 "free and clear" sale order or a pre-packaged reorganization plan. That may be a "side door" to ownership but it is not illegal or improper, even when third parties are adversely affected, as borne out in the recent Chrysler case.

The Coyotes accordingly have the right to use the Bankruptcy Code to maximize the value of their estate by selling assets and excising anti-assignment and *ipso facto* contractual provisions. *See*, *e.g.*, *In re Woskob*, 305 F.3d 177, 184-85 (3d Cir. 2002) ("In other words, § 365(e)(1) invalidates *ipso facto* provisions, which, in this context, are provisions of law or contract which specify that 'a bankruptcy filing *per se* will terminate or modify' an executory contract"); *In re Perry*, 25 B.R. 817, 820 (Bankr. D. Md. 1982) ("To enforce these clauses" even in non-executory contracts "would deprive the debtors of their opportunity to obtain a fresh start and would result in forfeitures contrary to the spirit of the Code, a result which courts of equity strain to avoid."). Fundamental bankruptcy principles thus prevent precisely what the NHL is seeking to do here: discriminate and punish parties for exercising their rights under the Bankruptcy Code.

2. Mr. Balsillie's Alleged Participation in the Canadian Competition Bureau's Investigation of NHL Relocation Rules is Not a Good Faith Basis for Rejecting PSE's Ownership Transfer Application

The second purported basis for the NHL's rejection of Mr. Balsillie's application is his claimed involvement with "the Canadian Competition Bureau's ("CCB") investigation of the League in 2006, and again in 2007, regarding its rules and policies relating to franchise location and relocation." Exec. Memo. at 8-9, Ex. A; *see also* Declaration of Craig Leipold (hereafter "Leipold Decl.") [DE 585], Ex. A at Part III. The NHL's purported reliance on this factor confirms its bad faith and discriminatory application of its ownership transfer rules in this case. PSE has refused to comment on its communications

with the CCB, which publicly attributed the commencement of its investigation to media reports and which has a statutory policy of secrecy and confidentiality. *See Competition Act*, R.S.C. 1985, c. C-34, § 10(3) ("All inquiries under this section shall be conducted in private."). Even if the NHL was correct that Mr. Balsillie was a catalyst for or cooperated with the CCB's investigation, however, that would not be a lawful or good faith basis for rejecting PSE's Ownership Transfer Application on moral character grounds, and thus would be irrelevant.

The undisputed facts are that sports team owners have often exercised their legal rights to file antitrust complaints against the rules of their leagues and this has never been the basis for any league – including the NHL – to reject or expel a member. For example, the NHL's preferred bidder for the Coyotes, Mr. Reinsdorf, "filed [an antitrust] lawsuit against the NBA in 1990 when the league tried to limit the number of Bulls broadcasts aired over superstation WGN[.] The suit … cost the league an estimated $10 million in legal fees." E.M. Swift, *Misunderstood?*, Sports Illustrated, June 30 1997, at 78, http://sportsillustrated.cnn.com/vault/article/magazine/MAG1010328/index.htm; *see Chicago Professional Sports, Ltd. v. Nat'l Basketball Ass'n*, 95 F.3d 593 (7th Cir. 1996). Mr. Reinsdorf's challenge of NBA rules under the antitrust laws apparently does not negate his "good character and integrity" to serve as an NHL owner, and the NHL Board of Governors has conditionally approved his ownership transfer application. This same standard for ownership approval must be applied even-handedly to Mr. Balsillie.

Similarly, the NHL has not removed Jim Dolan, the co-owner of the New York Rangers, from its ownership ranks for lacking necessary "good character and integrity." In 2007, Mr. Dolan sued the NHL on antitrust grounds challenging the legality of its rules relating to the teams' websites. *See* Evan Weiner, *Dolans Problems May Affect Prospects of New MSG*, N.Y. Sun, Oct. 11, 2007, http://www.nysun.com/sports/dolans-problems-may-affect-prospects-of-new-msg/64401/; *see also Madison Square Garden, L.P. v.*

1 *National Hockey League*, No. 07 CV 8455(LAP), 2008 WL 4547518, at *11 (S.D.N.Y.
2 Oct. 10, 2008). Yet, Mr. Dolan remains an NHL owner and his antitrust complaint has not
3 led to his expulsion or any major disruption within the League.

4 Nor have the multitude of other antitrust complaints filed by sports team owners
5 against their respective leagues ever resulted in such individuals being found unqualified
6 to serve as owners. As this Court is well aware, in the 1980s, Al Davis, owner of the
7 Oakland Raiders, sued the NFL under the Sherman Act with respect to the league's rules
8 governing franchise relocation. *See Los Angeles Mem'l Coliseum Comm'n v. National*
9 *Football League,* 726 F.2d 1381, 1385 (9th Cir. 1984). He also sued the league for fraud
10 and other alleged wrongful acts in more recent times, yet remains an owner to this day.
11 *See, e.g., Oakland Raiders v. Nat'l Football League*, 131 Cal. App. 4th 621 (6th Dist.
12 2005). Other teams, such as the Baltimore Colts in the NFL and the San Diego Clippers in
13 the NBA, have relocated their teams before receiving any league permission. *See* June 15
14 Order at 18-19. Yet such owners were never deemed morally unfit to remain in their
15 leagues. In 1995, Jerry Jones, owner of the Dallas Cowboys, sued the NFL for $750
16 million, alleging that the league's licensing and marketing arm, NFL Properties, was an
17 illegal cartel. *See* Timothy W. Smith, *Cowboy Owner Fires Back with Suit Against N.F.L.*,
18 N.Y. Times, Nov. 7, 1995, http://www.nytimes.com/1995/11/07/sports/pro-football-
19 cowboy-owner-fires-back-with-suit-against-nfl.html; *see Dallas Cowboys Football Club,*
20 *Ltd. v. National Football League Trust*, No. 95-cv-9426 1996 WL 601705 (S.D.N.Y. Oct.
21 18, 1996). Similarly, in 1997, George Steinbrenner, owner of the New York Yankees,
22 filed an antitrust lawsuit alleging that the MLB interfered with the Yankees' agreement
23 with Adidas. *See* Murray Chass, *Steinbrenner Angers Executive Council*, N.Y. Times,
24 May 8, 1997, http://www.nytimes.com/1997/05/08/sports/steinbrenner-angers-executive-
25 council.html; *see generally see generally New York Yankees P'ship v. Major League*
26 *Baseball Enters., Inc.*, No. 97-cv-1153 (M.D. Fla. 1997). None of these antitrust lawsuits

against professional sports leagues disqualified the team owners who filed them from serving as owners of their franchises, and none of these lawsuits adversely affected the stability of their respective sports leagues. The NHL's attempt to disqualify Mr. Balsillie for allegedly raising antitrust issues with the CCB – when he has never even filed a lawsuit against the League – is unreasonable and is blatantly discriminatory, given the NHL's simultaneous acceptance of Mr. Reinsdorf as a prospective NHL owner, and the continued membership of Mr. Dolan in the League.

Finally, PSE notes that it would be contrary to public policy, which strongly favors enforcement of the antitrust laws, to permit the NHL to punish potential owners for cooperating with lawful antitrust investigations on the ground that such cooperation amounts to "bad character." *See*, *e.g.*, *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth*, 473 U.S. 614, 654 n.21 (1985) (Stevens, J., dissenting) ("[T]he purposes of the antitrust laws are best served by insuring that the private action will be an ever-present threat to deter anyone contemplating business behavior in violation of the antitrust laws.") (quotation omitted); *Hammes v. Cooksey*, 33 F.3d 774, 783 (7th Cir. 1994) ("Losses inflicted by a cartel in retaliation for an attempt by one member to compete with the others are certainly compensable under the antitrust laws"); *Parnar v. Americana Hotels, Inc.*, 652 P.2d 625, 631 (Haw. 1982) ("a retaliatory discharge in apparent furtherance of antitrust violations contravenes public policy"); *Murcott v. Best Western Int'l, Inc.*, 9 P.3d 1088 (Ariz. Ct. App. 2000) (affirming finding that an employer improperly fired its employee for reporting the employer's potential antitrust violations to state authorities).[6] There is simply no good faith, reasonable basis for the NHL to find that Mr. Balsillie is of bad moral character for allegedly exercising legal rights under the antitrust laws.

[6] A similar public policy is incorporated into the CCB's administrative procedures, which deter retaliation against antitrust whistleblowers by keeping the identity of antitrust informants private and confidential. *See* Competition Bureau Canada, *Complaint Process*, Apr. 21, 2009, http://competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/h_00131.html.

3. Mr. Balsillie's Failed Attempt to Acquire the Pittsburgh Penguins is Not a Good Faith Basis for Rejecting PSE's Ownership Transfer Application on "Character" Grounds

As set forth in the Jacobs Declaration, the NHL has also attempted to justify its rejection of Mr. Balsillie as an owner of the Coyotes because of actions taken or allegedly taken in connection with his failed effort to acquire the Penguins in 2006. Jacobs Decl. [DE 586] ¶ 16. Mr. Balsillie did not, in fact, engage in any conduct during the Penguins sale negotiations or NHL approval process that would support a good faith determination of character defects and lack of integrity precluding him from being an NHL owner. Rather, he made a sensible and justifiable business decision not to go forward with the multi-million dollar purchase when faced with a last-minute NHL imposition of new and unacceptable demands.

At the time Mr. Balsillie expressed interest in purchasing the Penguins, the team used a very old arena under a lease that was to expire only six months after closing. There were only two options to replace the arena in Pittsburgh. The first (and preferred but unlikely) option was a joint venture between the then-owners of the Penguins and Isle of Capri ("IOC") whereby IOC would contribute several hundred million dollars to build a new arena on the condition that it was the winning bidder for a slots license awarded by the Pennsylvania Gaming Control Board. Exec. Memo. [DE 586-1 p. 10 of 75] at n.10. As a fall-back ("Plan B"), the city of Pittsburgh and state of Pennsylvania would contribute funding to a new, largely publicly financed arena. *Id.* Plan B was admittedly not as favorable to the team as the IOC proposal, was still negotiable, and PSE was contractually precluded from engaging in discussions or meetings to negotiate Plan B terms and conditions until after its purchase closed. *Id.*, at p. 64 of 75 n. 3. Mr. Balsillie knew that if the IOC option did not materialize and he was obliged to keep the team in Pittsburgh, he would have no leverage to negotiate acceptable arena lease terms under Plan B. The seller of the Penguins had the right to relocate the team and PSE needed the same

right to avoid being obliged to accept whatever the local government wanted to charge if the team was to play at all.

Before entering into an asset purchase agreement, Mr. Balsillie and representatives of the seller talked with Commissioner Bettman about PSE's commitment to keeping the Penguins in Pittsburgh if acceptable terms for a new arena could be worked out, and the need to have an option to leave for negotiating leverage. Mr. Balsillie thought they reached an understanding and that no non-relocation covenant would be required in the buyer's Consent Agreement, and an email received by his counsel confirmed that. [2nd Balsillie Decl. [DE 538] ¶ 12, 13, Ex. 1; 1st Balsillie Decl. [DE 299] ¶ 20. The parties' asset purchase agreement specified the terms of an acceptable Consent Agreement (without a non-relocation covenant) as a closing condition, and provided that $1 million of the $15 million deposit would be forfeited to protect the seller if Mr. Bettman "changed his mind" on this critical term. *Id.* at ¶ 14.

In accordance with the asset purchase agreement, Mr. Balsillie actively promoted the IOC proposal, respected the prohibition on developing Plan B (or any other option), and complied with the League's Rules and By-Laws regarding transfer of ownership. [DE 586-1, pp. 44-48 of 75, 58 of 75].

Following a long vetting period and after months of cooperation by Mr. Balsillie and his counsel in providing information regarding his finances, prospective ownership, deal structure and intentions with the Club, Mr. Balsillie was interviewed by the NHL Executive Committee on December 4, 2006 regarding his application. 2d Balsillie Decl. [DE 538] at ¶¶ 14-17. During this interview, Mr. Balsillie reaffirmed his commitment to keeping the Penguins in Pittsburgh as long as acceptable replacement arena arrangements could be made. He acknowledged and agreed "that he would abide and be bound by League rules, including By-Law 35, in the event a new arena is not constructed on a timely basis in Pittsburgh and the league and the Club have no choice but to consider alternative

locations for the Club and other considerations." *See Minutes of December 4-5, 2006 Meeting of the Board of Governors of the National Hockey League* (hereafter "Meeting Minutes") at 2 [DE 586-1 p. 68 of 75]. At the same meeting, outside of Mr. Balsillie's presence, Commissioner Bettman reported to the NHL Board of Governors that "the IOC proposal appeared to be the only proposal which would provide immediate certainty for the franchise and for the construction on a timely basis of a new arena in Pittsburgh, which is necessary to ensure the future economic viability and competitive success of the Club in Pittsburgh." *Id.*

The NHL Executive Committee and Board of Governors overwhelmingly approved Mr. Balsillie as a prospective NHL owner. Nothing has changed since 2006 to justify an about-face by the NHL in this determination. To justify rejecting Mr. Balsillie now, Mr. Jacobs claims to recall:

> [A]sking Mr. Balsillie … if he was committed to keeping the Penguins in Pittsburgh, and he unequivocally answered in the affirmative. I also recall discussion of a "call" provision that would have allowed the League to buy back the Penguins at the price Mr. Balsillie paid for it if the two arena deals under contemplation failed and he sought to relocate the Club. *Mr. Balsillie's agreement to such a provision played a major role in the Executive Committee's decision to recommend Mr. Balsillie for approval in 2006.*

Jacobs Decl. [DE 586] ¶ 11 (emphasis added). The Executive Committee Memorandum, prepared for the recent Board of Governors' July 29, 2009 meeting in which Mr. Balsillie was rejected as a potential owner of the Coyotes similarly states, without citing any support, that Mr. Balsillie agreed during this interview, *as a precondition to the Executive Committee's approval of his application*, to make several commitments. According to the Memorandum:

> if both proposals failed and Mr. Balsillie had to seek to relocate the franchise outside of Pittsburgh, then he would provide the League with written notice of his intent to relocate

> and give the League the option to buy back the franchise at his same purchase price.

Exec. Memo. [DE 586], at 13. The NHL then takes the position that Mr. Balsillie showed bad character for refusing to sign a side letter embodying this purported commitment. *Id*. at 16.

Notwithstanding Mr. Jacobs' declaration and the Kroll Report, the contemporaneous minutes to the Board of Governors' December 4, 2006 meeting tell a different story. The minutes describe the Executive Committee interview of Mr. Balsillie and its recommendation to the Board of Governors. It makes *no reference* to any of the purported "significant," "specific commitments" made by Mr. Balsillie with respect to a "call option" if relocation was required. Meeting Minutes [DE 586-1, p. 68 of 75]. Mr. Balsillie recalls being asked one question about whether he would sell the team to the League if a new arena was not built in Pittsburgh, and replying that he would give the NHL a "call" option if he received a comparable right to "put" the team to the League in that event, with nothing more said on the subject during the meeting. 2nd Balsillie Decl. [DE 538] ¶ 17.

Just four days before the scheduled closing, PSE finally received a form of Consent Agreement from the NHL. It included a seven-year non-relocation covenant and was accompanied by a lengthy Side Letter. *Id.* ¶¶ 20-21, Exs. 8, 9. Among other new and egregious terms, three were completely unacceptable to PSE. The Side Letter required PSE to turn negotiations for the new arena over to the NHL if PSE did not have a final agreement with the city of Pittsburgh within 45 days and PSE would be bound by the results. The NHL would thus have had the ability to negotiate PSE into losing $20 million or $50 million a year, and PSE could do nothing about it. The Side Letter also provided that if the team relocated, PSE would be obligated to pay a relocation fee to the NHL and its other member clubs to be determined in the NHL's sole discretion, a different standard

than provided for in NHL By-Law 36.6 which is applicable to every other NHL member. The Side Letter also included an option for the NHL to buy the team for the original purchase price (with no corresponding put to the NHL) if plans for a new arena on terms consistent with a very sketchy Plan B did not materialize and PSE wanted to seek permission to relocate the team. The buy-back provision allowed the NHL to assign its right to purchase the team to a third party, who would acquire the right to relocate the team with no additional compensation to PSE. *See* 2nd Balsillie Decl. [DE 538] Ex. 9. PSE's counsel marked up the Side Letter and attempted to negotiate acceptable changes, but an acceptable agreement could not be reached. *Id.* ¶¶ 22, 26, Ex. 11. At that point, Mr. Balsillie terminated his asset purchase agreement in accordance with its terms and received all of PSE's deposit back except for the "Gary changes his mind" forfeiture to the seller. *Id.* ¶¶ 26, 27.

Mr. Balsillie's decision to stand on the terms of his asset purchase agreement signed by the sellers and provided with the transfer application to the NHL, and not accede to last-minute NHL demands that substantially and adversely changed significant deal points and could have forced him into an economically crippling lease, is not a good faith basis for the NHL to find poor moral character or lack of integrity. Whether or not Executive Committee members thought Mr. Balsillie was committed to a call option during his interview, there certainly was no agreement on the specifics of any deal, and the demand to sign a multi-point Side Letter containing new demands by the League was more than a simple call option. League members may be entitled to trust each other, but they are not obliged to forego their right to make rational business decisions in accordance with negotiated contractual terms. There is nothing immoral about Mr. Balsillie deciding not to go forward with the Penguins deal.

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4. Mr. Balsillie's Failed Attempt to Acquire the Nashville Predators is Not a Good Faith Basis for Rejecting PSE's Ownership Transfer Application on "Character" Grounds

The Jacobs and Leipold Declarations further recite Mr. Balsillie's alleged conduct in connection with his attempt to purchase the Nashville Predators in 2007 as an additional purported basis for rejecting Mr. Balsillie's ownership application. Jacobs Decl. [DE 586] ¶ 15; Leipold Decl. [DE 585] ¶ 3. Mr. Leipold prepared a statement expressing his unhappiness with Mr. Balsillie in the Predators negotiations, which he read both to the NHL Executive Committee and the NHL Board of Governors in connection with their consideration of Mr. Balsillie's application. Leipold Decl. Exh. A [DE 585] (hereafter "Leipold Statement").

In point of fact, the Leipold Statement is full of demonstrably inaccurate statements. Mr. Leipold may have been mistaken, or his statement may have been designed to create a pretext for rejecting Mr. Balsillie's ownership application. In any event, it provides no objective, good faith basis for rejecting Mr. Balsillie on "character" grounds. This Court need not resolve any genuine disputes of fact to determine the falsity of the Leipold Statement. Rather, there are sufficient errors in the Leipold Statement that are proven by the undisputed record, including facts gathered by the NHL's agents themselves (*e.g.*, Kroll Associates) as part of their investigation.

a. Alleged Breach of a "Binding" Term Sheet by "Failing" to Make a "Required" $10,000,000 payment

The Leipold Statement says that Mr. Balsillie is untrustworthy because he allegedly breached his obligations under a "binding" Term Sheet for the purchase of the Nashville Predators. Leipold Statement at ¶ F. Specifically, Mr. Leipold claims that "[o]n May 24 we exercised the option to make the Term Sheet binding to force Balsillie to put $10,000,000 in escrow." *Id.* Mr. Leipold asserts that Mr. Balsillie's refusal to put the $10 million into escrow was a breach of the Term Sheet requirement, which makes him

untrustworthy. Regrettably, it is Mr. Leipold's recollection that is untrustworthy on this point.

First, contrary to the claim in the Leipold Statement that the Term Sheet became binding by the exercise of an option on May 24, 2007, Mr. Leipold's own lawyer identified this same document as a "*non-binding* Term Sheet" (emphasis added) and noted that there was a "lack of a definitive agreement between the Club and Mr. Balsillie …." Exec. Memo. [DE 586-2 p. 55 of 75]. The NHL's own investigators, Kroll, concurred, noting that by June, "Mr. Balsillie and Mr. Leipold had not agreed to a binding contract …." *Id.* at p. 52 of 75. There is no evidence that the Term Sheet ever became binding or that Messrs. Balsillie and Leopold ever agreed to any binding contract.

Second, the terms of the Term Sheet itself contradict Mr. Leipold's characterization.

In short, Mr. Leipold had no unilateral option to make the Term Sheet binding; it was never made binding; and Mr. Balsillie did not breach any obligation to deposit $10 million as he had no such obligation. It is instructive that Mr. Leipold has never sued Mr. Balsillie for an alleged breach of contract, no doubt recognizing that any such suit would be promptly dismissed by any court.

b. Alleged Surprise at Balsillie's Relocation Application

The Leipold Statement further mischaracterizes the facts by feigning surprise at Mr. Balsillie's actions to seek to relocate the Nashville Predators, complaining that "[o]n June 11, without our knowledge and without our permission, Balsillie filed an application with the NHL to relocate the franchise." Leipold Statement [DE 585, Exh. A], ¶ II.G.8. Leipold asserts that this action was taken as if "the Term Sheet meant nothing."

In fact, it cannot be seriously disputed that Mr. Balsillie was always candid about his intention to explore a relocation option for the Nashville Predators under NHL rules.

The Leipold Statement also faults Mr. Balsillie for jumping the gun before the purchase was closed, citing, in particular, season tickets for Predators games that were conditionally sold in Hamilton. Liepold Statement [DE 585, Exh. A], ¶ II.G.10-11. Understanding that the League's policy at the time was that a substantial number of season ticket deposits had to be obtained in order to demonstrate that the Hamilton community would support a franchise, PSE offered to the public and accepted sales of ticket packages on a contingent basis in order to support its relocation application. 1st Balsillie Decl. [DE 299] ¶ 21.

This was, at worst, an over-exuberant effort by PSE to demonstrate to the League the economic viability of moving the Predators from Nashville to Hamilton, and to ensure that the Predators would have a place to play in the event the Nashville lease terminated, as it in fact did. In hindsight, Mr. Balsillie has expressed regret for not discussing this with Mr. Leipold first, but this is certainly not a good faith basis for rejecting Mr. Balsillie

as an NHL owner on character grounds – especially when compared to the far more severe character issues of various other NHL owners. *See* pp. 28-30, *infra*. While Mr. Leipold charges that the conditional sale of season ticket deposits destabilized the Predators franchise, it was Mr. Leipold who gave notice to terminate the Nashville arena lease at the same time. Further, the contingent sale of ticket deposits had the positive effect of rousing the Nashville community of fans to the very real possibility that the team might actually move, and instigated ticket sales in Nashville that had previously been lackluster and action by Nashville officials to try and keep the team. *See* 1st Rodier Decl. [DE 105] ¶¶ 9, 11. None of this establishes a good faith basis for the NHL to conclude that Mr. Balsillie lacks sufficient good moral character to qualify as an NHL team owner.

c. Alleged Agreement to execute the "NHL's standard form of Consent with a 7 year non-relocation provision."

The Leipold Statement also claims (citing the Term Sheet) that Mr. Balsillie was "required to execute the NHL's standard form of Consent with a 7 year non-relocation provision" and then suggests that Balsillie cannot be trusted because he reneged on this alleged promise. Leipold Statement [DE 585, Exh. A], ¶ I.C.iii. These assertions are false.

Putting aside the fact that Mr. Leipold's own lawyer conceded that the Term Sheet was "non-binding" as reflected on the face of that document, the Term Sheet

It thus cannot be disputed, [redacted], that:

(i) Contrary to Mr. Leipold's assertion before the Executive Committee, Mr. Balsillie was not required to execute a Consent Agreement that was not satisfactory to him; rather, he had the discretion to insist on a Consent Agreement reasonably satisfactory to him; and

In short, Mr. Leipold's assertions provide no good faith basis for rejecting Mr. Balsillie as an NHL owner on integrity grounds. If anything, the lack of any discussion of facially obvious mistakes in the Leipold statement in the Executive Committee report provided to the Board of Governors when soliciting their votes demonstrates the NHL's bad faith against Mr. Balsillie and PSE.

5. Mr. Balsillie's *Alleged* Bad Moral Character Cannot be Taken as Anything But Pretext in Comparison to the Undisputed Bad Acts of Other NHL Owners

All in all, there is no good faith basis for making Mr. Balsillie the first applicant in the history of the NHL to be rejected on "good character and integrity" grounds. Even if the NHL's claims about Mr. Balsillie's attempted purchases of the Penguins and Predators were factually accurate, which they are not, reasoned disputes about pertinent business choices under the circumstances in each case cannot discredit his character to the point where he cannot serve as an NHL owner under prevailing NHL standards. Indeed, the

NHL's recent history is rife with owners who have engaged in criminal and fraudulent behavior that is vastly more severe than *any* allegation levied against Mr. Balsillie (including the references to Mr. Balsillie's recent *civil* settlement with the Ontario Securities Commission).

To begin with, the Court should consider the NHL's recent enthusiastic approval of Mr. Reinsdorf as the preferred bidder for the Coyotes. Not only did Mr. Reinsdorf, as a NBA owner, file an antitrust suit against the NBA, but as a MLB owner he was found guilty by an arbitrator of engaging in anticompetitive collusion with other MLB owners. "Reinsdorf was cited by arbitrator George Nicolau as being in the middle of baseball's collusion conspiracy of 1985 and '86[.]" E.M. Swift, *Misunderstood?*, Sports Illustrated, June 30 1997, at 76-86. The collusion in which Mr. Reinsdorf was implicated resulted in payment of *$280 million* in damages by the MLB. The fact that the NHL would approve Mr. Reinsdorf as an owner, notwithstanding his undisputed track-record for breaking CBA rules, by itself establishes the arbitrary and disingenuous nature of the NHL's rejection of PSE's Ownership Transfer Application.

Moreover, the NHL has long tolerated indicted and even convicted criminals among its own ranks. Most recently, the NHL approved William "Boots" Del Biaggio III as the owner of the Nashville Predators (after Mr. Balsillie declined to proceed with his proposed acquisition). Mr. Del Biaggio has since pleaded guilty to fraud "for using forged financial documents to obtain $110 million in loans from several banks and two NHL owners." Paul Elias, *Disgraced Financier Faces Lengthy* Prison *Sentence*, USA Today, May 15, 2009, http://www.usatoday.com/sports/hockey/nhl/2009-05-15-2263298351_x.htm; *see also United States v. William J. "Boots" Del Biaggio, III*, No. CR 08-874 (N.D. Cal. Feb. 2, 2009) (order denying motion to seal plea agreement) He was approved as an NHL owner despite the fact that two members of the Board of Governors knew that he did not have sufficient finances to complete the purchase of the team. *Id.* In

fact, Craig Leipold, who filed a declaration in support of the NHL's Denial Motion, and Phil Anschutz, owner of the Los Angeles Kings, lent Mr. Del Biaggio $17 million to complete the purchase of his share of the Predators. *Id.*

Bruce McNall, former owner of the Los Angeles Kings, and former Chairman of the NHL Board of Governors, pleaded guilty to conspiracy and defrauding six banks of $236 million, and was sentenced to 70 months in federal prison. *See United States v. Bruce P. McNall*, No. 94-cr-890 (C.D. Cal. Jan. 13, 1997) (judgment and commitment order); *Integrity? NHL Governors Live in a Glass House*, Hamilton Spectator, Aug. 13, 2009, http://www.thespec.com/printArticle/617458; Mike Downey, *For Inmate 04302-112, Team Now Costs 2 Cups of Soup*, L.A. Times, Sept. 16, 1997, http://articles.latimes.com/1997/sep/16/news/mn-33009?pg=1. Mr. McNall served as the Chairman of the Board of Governors in 1992, just shortly prior to his conviction, and only gave up his ownership of the Kings after filing for bankruptcy. *See McNall Turns Control of Assets Over to Trustee*, Ottawa Citizen, Sept. 29, 1994.

Eugene Melnyk, the owner of the Ottawa Senators, recently reached a settlement with the Ontario Securities Commission for alleged violations of the Canadian Securities Act. In the settlement agreement, Mr. Melnyk admitted that he "engaged in conduct that was contrary to the public interest when he failed to provide complete and accurate information to Biovail regarding the Trusts' and the New Trusts' holdings of Biovail securities." *In re Eugene N. Melnyk*, Ontario Securities Commission, May 18, 2007, at 4-5, *available at http://www.osc.gov.on.ca/Enforcement/Proceedings/RAD /rad_20070606_melnyk.pdf*. In approving the settlement, the Commission panel noted that Mr. Melnyk's actions were "an intentional or reckless attempt by Melnyk to mislead the [Investment Dealers Association] though his legal counsel's letter" and that "[i]n the circumstances he misled the IDA and failed to disclose to the IDA relevant information." *Id.* at 9. Among the sanctions ordered by the Commission were a one million dollar

(Canadian) fine and "an order that Melnyk cease to be a director of Biovail for a period of one year." *Id.* at 10.

Furthermore, earlier this year Mr. Melnyk also stipulated to a judgment imposing a one million dollar civil penalty arising out of charges brought by the United States Securities and Exchange Commission regarding his violations of stock accumulation disclosure provisions, and securities fraud charges are still pending. U.S. Securities and Exchange Commission, *Litigation Release No. 20880*, Feb. 4, 2009, *available at http://www.sec.gov/litigation/litreleases/2009/lr20880.htm*; *see also SEC v. Biovail Corp.*, No. 08-cv-2979 (S.D.N.Y. Feb. 2, 2009) (order entering judgment).

PSE's point is not to pass judgment on whether Mr. Reinsdorf, Mr. Del Biaggio, Mr. McNall, Mr. Melnyk and others should or should not have been deemed of sufficient "good character and integrity" to have been approved as NHL owners. Rather, these examples establish that the "standard" that the NHL seeks to apply to Mr. Balsillie is arbitrary, capricious, and in bad faith. It makes no difference in whether the individuals are prospective or actual NHL owners – the standard of good character, and its impact on the image of the league, must be the same. Indeed, the adverse effect to league image would be even greater when an existing owner engages in an immoral act. Taken at face value, the NHL's allegations against Mr. Balsillie simply do not provide a good faith basis to justify the *unprecedented* result of rejecting PSE's Ownership Transfer Application on the ground that Mr. Balsillie lacks the "good character and integrity" required of NHL owners. This is especially true in the context of these bankruptcy proceedings, where PSE represents the only credible opportunity for creditors to receive a meaningful recovery in these cases. The NHL may not "like" Mr. Balsillie, but that is not a basis for rejecting him as being morally unfit to become an NHL owner. *See Los Angeles Mem'l Coliseum Comm'n v. National Football League,* 726 F.2d 1381, 1388 (9th Cir. 1984) (upholding an injunction for team relocation over the unanimous rejection of the NFL Board of

Governors, and noting that "testimony indicated that some owners, as well as commissioner, dislike Al Davis and consider him a maverick. Their vote against the Raiders' move could have been motivated by animosity rather than business judgment.")

IV. The Other Requirements of Section 365 Are Met or Will Be Met

PSE is cognizant of the Court's prior statement that section 365 has requirements that must be met beyond those set forth in section 365(f)(1) in order for the Debtors to assume and assign their contractual interests in the NHL Constitution and By-Laws to PSE. *See* June 15 Order at 8. Section 365 "generally requires three acts to assume an executory contract: (1) curing of enforceable default(s), (2) compensation for any actual pecuniary loss resulting from such default(s), and (3) providing adequate assurance of future performance." *Id.*; *see also* 11 U.S.C. §§ 365(b)(1), 365(f)(2).

With respect to the curing of any enforceable defaults, PSE is not aware that any such defaults exist, but, if they do, they must principally be addressed by the Debtors. We note, however, that the Court has previously indicated that "the NHL can not declare a default solely due to the change in ownership terms of the [PSE] APA." June 15 Order at 8-9. Further, while the Debtors may have violated commitments in their Consent Agreement to advise the NHL before negotiating with PSE, *that Consent Agreement is not being assigned*. Each new owner of an interest in a NHL team executes its own new Consent Agreement, as the Sale Procedures Order provides. [DE 636] ¶ 18. The requirement of an executed asset purchase agreement before an NHL ownership transfer application may be considered was cited as a reason for denying PSE's application for acquiring the Nashville Predators as premature, and the NHL's transfer application procedures require that a copy of the "Purchase and Sale Agreement" be provided to the NHL with the initial application. Daly Decl. [DE 93] Ex. K ¶ VII.B. This was the reason that PSE and the Debtors sought to negotiate an APA here without delay.

1 With respect to adequate assurance issues, the Court previously instructed that a
2 relocation fee must be paid to the NHL to satisfy section 365(f)(2)'s adequate assurance
3 requirement. June 15 Order at 9. PSE has explained repeatedly that is willing to pay a
4 reasonable relocation fee consistent with NHL By-Law 36.6, which the NHL has yet to
5 propose. The NHL has not expressed any concerns about Mr. Balsillie's financial
6 wherewithal or business acumen, a non-issue here.

7 Moreover, although section 365(f)(2)'s adequate assurance requirement generally
8 pertains to ensuring that a party has adequate financial means and business competence in
9 order to perform his obligations under the contract, *see, e.g., Richmond Leasing Co. v.*
10 *Capital Bank*, 762 F.2d 1303, 1310 (5th Cir. 1985), Mr. Balsillie has also testified that PSE
11 and he will abide by all NHL rules that are not illegal or avoidable in bankruptcy. (*See* DE
12 299 ¶¶ 12, 19). During his July 29, 2009 Executive Committee interview, Mr. Balsillie
13 stated that he would be willing to abide by the NHL's rules in Hamilton from which Mr.
14 Jacobs claims to have inferred that Mr. Balsillie is unwilling to comply with the NHL
15 Constitution and By-Laws now, but must be trusted to comply in the future. Jacobs Decl.
16 [DE 586] ¶ 10. Rather, as explained in his declarations in this case, Mr. Balsillie and PSE
17 have complied fully and completely with the NHL's Constitution and By-Law provisions
18 for potential owner applicants, which are the only ones applicable to such non-NHL
19 members. They have complied with NHL application procedures in the past, and have
20 done so in this case too. *See* [DE 228, 236, 237, 442, 480, 593]. Mr. Balsillie has
21 expressed his willingness for PSE to be bound by the NHL's current Consent Agreement
22 which would apply to it as owner of a team relocated to Hamilton. 1st Balsillie Decl. [DE
23 299] ¶ 12.

24 In sum, putting aside any material, unspecified defaults of the Debtors that for some
25 reason cannot be resolved at the September 10-11 hearing, if (a) the Court applies section
26 365(f)(1) to void the NHL's anti-assignment provisions, or if it applies section 363(c)

1 deemed consent provisions, and (b) a reasonable relocation fee is determined and accepted
2 by PSE, then the Debtors' assets may be sold and its contractual rights may be assigned to
3 PSE notwithstanding the NHL's objections.
4
5 **CONCLUSION**

6 For all of the foregoing reasons, and for the reasons set forth in the Debtors' briefs
7 that PSE joins, PSE respectfully requests that this Court order that the Coyotes' assets may
8 be transferred to PSE, notwithstanding the NHL's rejection of PSE's Ownership Transfer
9 Application, if PSE is the prevailing bidder in the forthcoming auction. Specifically, the
10 Court should order either that the NHL's ownership transfer rules constitute unenforceable
11 express or *de facto* anti-assignment provisions, or that PSE's Ownership Transfer
12 Application should be deemed consented to under a good faith, non-arbitrary application
13 of those rules.

14 RESPECTFULLY SUBMITTED this 18th day of August, 2009.

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