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UNITED STATES BANKRUPTCY COURT
DISTRICT OF ARIZONA

In re DEWEY RANCH HOCKEY, LLC, COYOTES HOLDINGS, LLC, COYOTES HOCKEY, LLC, and ARENA MANAGEMENT GROUP, LLC, Debtors.	Case No. 2:09-bk-09488 (Jointly Administered) Chapter 11 **FILED WITHOUT UNDER SEAL EXHIBITS** **DEBTORS' RESPONSE TO NHL'S (A) RENEWED MOTION FOR DETERMINATION OF (I) AUTHORITY TO MANAGE THE BUSINESS AND AFFAIRS OF THE DEBTORS, AND (II) THAT WILLIAM DALY IS THE REPRESENTATIVE OF THE ESTATES, OR (B) IN THE ALTERNATIVE, MOTION FOR APPOINTMENT OF A CHAPTER 11 TRUSTEE**
This Filing Applies to: ■ All Debtors ❒ Specified Debtors	Hearing Date: September 2, 2009 Hearing Time: 9:00 a.m. Location: U.S. Bankruptcy Court 230 N. First Ave., Courtroom 703 Phoenix, AZ 85003

INTRODUCTION[1]

1. The *National Hockey League's (A) Renewed Motion for Determination of (I) Authority to Manage the Business and Affairs of the Debtors, and (II) that William Daly is the*

[1] Exhibits to this Response filed as "UNDER SEAL" are deemed highly confidential under the Court's confidentiality order. If Exhibits are not filed "UNDER SEAL," they are not deemed confidential and may be openly discussed by this Court and these parties.

Representative of the Estates, or (B) in the Alternative, Motion for Appointment of a Chapter 11 Trustee (the "**Renewed Motion**") should not have been filed, and the Debtors regret that the Court must devote time and resources to it. Instead of evidence, the Renewed Motion relies on carefully selected and grossly misleading sound bites. Instead of substance, the motion indulges in inflammatory rhetoric and innuendo. The motion ignores the procedural realities of any Chapter 11 case, arguing instead that merely opposing the NHL constitutes bad faith and violates fiduciary duties. Joined arm in arm with the City of Glendale, the NHL has chosen to repeat falsehoods in the hope that the Court will believe them, and to repeat them publicly in an attempt to embarrass and disparage the Debtors and Mr. Moyes in the media and in the public eye.

2. The Debtors and their counsel negotiated with PSE, Mr. Rodier, and Mr. Balsillie before May 5, 2009. There is nothing nefarious or unusual about such negotiations; they were, and are, normal parts of any sale process. The results of those negotiations were the Asset Purchase Agreement presented to this Court with a $10,000,000 cash deposit. To date, this is the only real bid for the Coyotes, and it is the only bid accompanied by a cash deposit.

3. As this Court well knows, it is common in Chapter 11 cases to negotiate specific protections with a "stalking horse" bidder, whose approval is always subject to court determination. The stalking horse bid process provides a benchmark against which other bidders are measured. All the Debtors did prepetition through negotiations with PSE and its principals was to procure a stalking horse bid.[2]

4. Since then, two other bidders, Glendale Hockey LLC (the "**Reinsdorf group**") and Ice Edge, have indicated an interest in the Coyotes. Neither has made a bid. Neither has made a deposit. Both have done due diligence, reviewed information in the Debtors' data room, discussed matters with the Debtors, and indicated their continuing interest in making a bid.

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[2] The Debtors, Mr. Moyes and Mr. Scudder have incurred great expense to produce 65,469 pages so far in response to document requests by Glendale and the NHL. Many hundreds of these pages consist of, and demonstrate, the difficult negotiations between the Debtors and PSE in the month before the bankruptcy filing, and easily dispel any claim of improper "collusion" between the bidder and the Debtors. The NHL and Glendale have these documents and actually know what happened in these negotiations. The NHL (2,452 pages) and Glendale (1,379 pages) have had a much lighter document production burden.

5. Debtors have managed these estates consistently with the Debtors' fiduciary obligations. The Debtors' conduct has been subject to great scrutiny; document productions include thousands of pages of post-petition emails and drafts, including communications between the Debtors and their representatives and PSE and its representatives. The NHL and Glendale, seeking to shift the focus to imaginary transgressions instead of the best interests of creditors, have cherry-picked a few pages among thousands to try to portray a false picture that would impugn the Debtors and their counsel.

6. The attacks on the Debtors, based on Mr. Moyes' counsel's inadvertent disclosure of Glendale's negotiations with a bidder and the non-existent "leak" to the Goldwater Institute, are so without merit as to call into question good faith motion standards. Counsel for Mr. Moyes—not Mr. Moyes and not the Debtors—made an isolated, inadvertent disclosure. There clearly was no "stark breach of fiduciary duty" by Mr. Scudder or anyone else on the Debtors' behalf, and the NHL knows it. Whatever innuendo the NHL evidently believes will interest the media ought not further complicate these Chapter 11 cases.

7. The fanciful accusations regarding some "leak" to Goldwater is of a piece. Most notably, the NHL does not allege that anyone ever "leaked" information to Goldwater, or that Goldwater had, used, or disclosed any "leaked" information. Had the NHL done even rudimentary diligence before putting this misrepresentation into the public record, the NHL would have seen that Goldwater had no contact with Mr. Rodier or Mr. Scudder. Either the NHL knew its innuendo was false or recklessly disregarded the truth or falsity of its statement. How unfortunate. The NHL urges a double standard in these proceedings. The NHL can say with apparent impunity whatever it wants, regardless of the facts. But if one lawyer inadvertently errs, corrects the error within an hour, and readily and loudly accepts responsibility, he is to be vilified publicly and often, along with all associated lawyers and their clients.

8. That the Debtors and the Creditors Committee seek discovery on certain matters is hardly a breach of fiduciary duty. One party does not breach its fiduciary duties because it does not simply capitulate to its adversary. The NHL's interests and the Debtors' interests

diverge. The NHL's interests and the interests of other creditors diverge. Protecting the interests of the estates and their creditors is the Debtors' obligation. Whether the NHL likes it or not, the Debtors intend to continue meeting that obligation.[3]

THE NHL'S PRELIMINARY STATEMENT

9. The NHL first, remarkably, claims that these cases "were not filed in good faith to stave off an impending financial crisis or to effect a reorganization for the good of creditors." Renewed Motion at 1. The NHL apparently believes that any Chapter 11 case not filed "to stave off an impending financial crisis" is not filed in good faith. It hardly bears noting that is not the law. It does bear noting that a business enterprise like the Coyotes that loses tens of millions of dollars a year is most assuredly in a financial crisis by any definition.

10. The NHL alleges that these cases were not filed for the good of creditors. Yet the only creditor the NHL has identified that may be harmed financially by the bankruptcy case is the City of Glendale, which has a strong self interest contrary to that of almost all other creditors. The NHL is the current senior secured creditor in an ever-increasing amount; the NHL is fully protected financially, even though each dollar of the NHL's loans put all creditors—secured and unsecured—further and further at risk. For its part, Glendale desperately wants to keep the Coyotes in Glendale at any cost except, of course, to itself.

11. What is indisputably good for creditors, and what the Debtors have been seeking since the outset, is a sale that brings actual cash into the estates and pays as much of that cash to creditors as possible. To do that, there is presently only one bid, only one proposed purchaser serious enough to make a cash deposit, only one bidder that has complied with the Court's orders: PSE. The Debtors continue to pursue a restructuring that benefits all creditors, not just

[3] The NHL believes that NHL contracts somehow supersede bankruptcy law and that it is immoral to use bankruptcy law to avoid onerous NHL agreements. *See* August 21, 2009 William Daly Deposition, relevant portions of which are attached to this Response as Exhibit 1, 176:19 - 177:22; August 20, 2009 Deposition of Gary Bettman, relevant portions of which are attached to this Response as Exhibit 2, 228:5 - 230:24. It appears that the NHL rejected Mr. Balsillie as an owner for such "moral" reasons. *See* August 19, 2009 Deposition of Jeremy Jacobs (rough draft), relevant portions of which are attached to this Response as Exhibit 3, 34:7 - 37:13.

the NHL and Glendale. It is entirely legitimate to file a bankruptcy case and invoke provisions of the Bankruptcy Code that, for example, limit damages on lease rejection claims. The Bankruptcy Code contains no exception for hockey teams. This Court has already held that "financially challenged sports teams have the same rights and obligations as any business that becomes a debtor in bankruptcy court." Docket No. 701 at 13.

12. The NHL consistently and repeatedly impugns the Debtors' integrity for supporting the PSE bid. The NHL forgets: the PSE bid is the only bid, and PSE is the only bidder, that has demonstrated its seriousness by posting a $10 million deposit. Neither the Reinsdorf group nor Ice Edge has made a firm bid, disclosed investors, disclosed financial terms, or made a deposit.[4] Despite the abuse the NHL and Glendale have heaped on PSE, it remains in the game because it wants the hockey team and is willing to pay handsomely for it. That the Debtors have not chosen to side with the NHL and Glendale and try to drive PSE away in no way shows a lack of good faith and in no way is a basis for a change in management or the appointment of a trustee. Had the Debtors acted as the NHL would have them act—had the Debtors merely capitulated to the NHL—the Debtors would have breached their fiduciary duty to creditors, since the PSE bid is still the only apparent source of funds to pay creditors.

13. Rhetoric and appeals to media aside, facts must prevail, and they are these: the Coyotes have lost money every year they have been in the Phoenix metropolitan area. The audited financial statements paint a grim picture for the Coyotes,[5] and a comparison of the

[4] The Reinsdorf group was first approached to invest in or buy the Coyotes in the late summer or early fall of 2008 and still has not made a commitment. *See* July 30, 2009 Deposition of Jeff Shumway, relevant portions of which are attached to this Response as Exhibit 4, 100:7 - 101:25, 111:14 - 113:5.

[5] The Coyotes Hockey, LLC and Arena Management audited financial statements, attached to the Declaration of Timothy Danninger ("**Danninger Dec.**"), being filed contemporaneously herewith, show consistent massive GAAP-basis losses (for fiscal years ending June 30) (000's omitted):

Coyotes' revenues with those of other NHL teams demonstrates clearly why the Coyotes are not financially viable in their present location. With limited revenues and a minimum player payroll of $40.7 million, mere tweaking of office expenses will not cure the Coyotes' financial woes.[6] The NHL has exacerbated the Coyotes' financial crisis by reducing the revenue share payable to the revenue-starved Coyotes for the past two seasons. *See* May 15, 2009 Declaration of Jeff Shumway (Docket No. 110), ¶ 9, n. 1.

14. The Coyotes have sought additional investors and potential buyers for many months. The NHL, with all of its contacts in the hockey world, and with full knowledge of the Coyotes' dire financial condition, has been unsuccessful in finding a buyer or investors. The Coyotes are on life support, even though they have not even been required to pay all its normal expenses.[7]

	Coyotes Hockey			**Arena Management**	
	Net Loss	**Loss From Operations**	**Member Deficit**	**Net Loss**	**Member Deficit**
2004	($75,352)	($49,425)	($258,830)	($5,127)	($5,643)
2005	($50,675)	($25,422)	($309,505)	($3,998)	($9,641)
2006	($75,343)	($49,933)	($384,848)	($5,777)	($15,418)
2007	($117,175)	($107,763)	($36,854)	($6,966)	($22,384)
2008	($72,131)	($54,817)	($108,985)	($7,549)	($29,933)

The labor dispute occurred in 2005, so that year is abnormal. Mr. Moyes acquired the team in September 2006, and the capital structure changed, so the 2007 financials reflected a lower member deficit. All the audited financials include "going concern" qualifications. The NHL's records show the economic realities. Copies of these records are attached to the Declaration of Sherrie Jo Young ("**Young Dec.**") being filed contemporaneously with this Response UNDER SEAL because the NHL has designated the records as "Highly Confidential – Attorneys' Eyes Only." The Coyotes' CEO from 2006 to January 2009 believes the Coyotes are not viable; he told the NHL that (and even asked the NHL for a conflicts waiver in June 2008 to hire the Skadden firm as the Coyotes' bankruptcy counsel), and he has recommended a bankruptcy filing since the summer of 2008. Shumway Depo., Ex. 4, 122:1-11; 137:23 - 140:6.

[6] The minimum team payroll is public information, available at: http://proicehockey.about.com/od/learnthegame /a/nhl_salary_cap.htm (attached as Exhibit 5).

[7] Mr. Moyes has allowed the Coyotes to borrow more than $90 million on a revolving credit line, and has not required them to pay interest. The Moyes entity that owns the office suite in which the Coyotes are housed has never collected rent from the Coyotes. *See* July 29, 2009 Deposition of Michael Nealy, relevant portions of which are attached to this Response as Exhibit 6, 209:7 - 210:12; Shumway Depo., Ex. 4, 144:9 - 145:2. During the time that Mr. Shumway was the CEO of the Coyotes, the Coyotes did not

THE NHL'S NON-FACTUAL BACKGROUND

The Prepetition Agreement

15. Invoking pejoratives such as "scheme" cannot convert normal negotiations into bad faith. Nor does the NHL's repeated fiduciary duty allegation regarding "Glendale and the other creditors" convert an effort to obtain the best price for all creditors into a breach of fiduciary duty. The NHL has chosen to align itself—for now—with Glendale, which has an interest that is contrary to most other creditors.[8] Glendale desperately wants the team to stay in Glendale, regardless of its financial condition, regardless of its repeated losses, regardless of the increasing debt, and regardless of who picks up the tab (so long as it is not Glendale). When the NHL refers to "Glendale and other creditors," the NHL is really referring only to Glendale.

The PSE Negotiations

16. The crux of the NHL's argument that Debtors are unable to adequately represent these estates is the Debtors' support for the PSE offer. Renewed Motion at 3. The NHL quotes from emails between Messrs. Scudder and Rodier that discuss Mr. Moyes' ability to obtain some payment on his significant loans to the Coyotes. That is an unremarkable goal for a team owner

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pay any of his salary. *See* Nealy Depo., Ex. 6, 196:13 - 197:7; Shumway Depo., Ex. 4, 12:18-25 - 13:2; 19:12-25; 124:21-24. The NHL's portrayal of Mr. Moyes is false and defamatory. He is a public-spirited citizen who lost a fortune supporting a hockey team in Glendale, Arizona, for the good of Glendale, his own home town where he has lived for more than four decades. The efforts by the NHL and Glendale to pillory him for his extraordinary efforts and his astronomical financial losses are shameful.

[8] Whether the NHL would maintain its alliance with Glendale in the future is doubtful. If the Court rejects the PSE bid and there are no qualified local bids, the team can play another season in Glendale only if the NHL funds it to the detriment of all other junior creditors, after which the team would be sold for relocation to another city in a year. The NHL has said so. *See* Transcript of June, 22, 2009 Hearing, relevant portions of which are attached to this Response as Exhibit 7, 31:3 - 32:8; Transcript of August 3, 2009 Hearing, relevant portions of which are attached to this Response as Exhibit 8, 19:22 - 20:24. If a local bidder acquires the team and does not receive a substantial ongoing subsidy from Glendale, the new owner will be back in this Court in a year or two seeking to move the team elsewhere. Of course, the presumptive new owner would then reap the financial rewards of moving to a more viable location, such as Hamilton. There is no realistic scenario in which Glendale keeps the Coyotes without a large public subsidy.

with outstanding loans to the Debtors.[9] Mr. Moyes is not obliged to subordinate his interest as a creditor to Glendale's interest, or to the NHL's interest as Glendale's current advocate. As it happens, his desire to obtain the best price is consistent with the interests of all other creditors.

17. When the Debtors filed these cases, the NHL had no alternative that would have paid creditors. It doesn't today. The Debtors have supported the PSE offer because it is a solid cash offer that would provide, by far, the greatest recovery seemingly available to creditors. The Reinsdorf and Ice Edge expressions of interest are not firm, are subject to contingencies, were not accompanied by cash deposits, and contain legally unacceptable creditor preferences.

18. The NHL claims that "By mid-April, Mr. Rodier made clear to Messrs. Scudder and Moyes (as well as the Debtors' bankruptcy counsel) that Mr. Balsillie was calling the shots and the time for Mr. Moyes to make a final decision had arrived." Renewed Motion at 4. The NHL knows this is not true because the NHL has reviewed the negotiation emails.

19. First, April 14 was not the "final decision" time. The NHL has seen the many hundreds of pages of emails and drafts through May 5 in which the parties continued their hard negotiations until the Petition Date of May 5. *See* April and May 2009 specimen negotiation emails attached to this Response as Exhibit 9. No final decision was made until May 5. *See* July 31, 2009 Deposition of Jerry Moyes, relevant portions of which are attached to this Response as Exhibit 10, 84:3-8. In the very same email chains, Mr. Scudder said the seller team was stopping work because of the differences between the parties. *See* Exhibit B to Renewed Motion at JM004655 ("I will inform our team to put pencils down on a possible transaction").

20. Second, the events described in Mr. Rodier's quoted April 14 email did not happen. PSE did not take over the team. PSE did not fund the transaction costs. The team did not revert to the NHL two weeks later.

21. Third, the NHL has seen the vigorous arms-length negotiations in the emails leading to May 5. *See* Specimen Negotiation Emails, Ex. 9. From the written record, it is clear

[9] Mr. Rodier can reasonably be expected, as part of normal negotiation, to have tried to persuade Mr. Scudder that PSE's proposal was the best one.

that there was no final agreement with PSE until May 5, and on that day there were numerous negotiation emails on many different open items. The NHL knows all this.

22. From the beginning, the Debtors have concerned themselves solely with maximizing creditor recoveries. The negotiations with PSE were difficult and, at times, acrimonious. The Debtors are not wed to PSE, and were not before May 5, but PSE is both the highest and the only offer. There is no good faith basis to argue that the Debtors have breached their duties to benefit PSE. If a better real offer is made, the Debtors will pursue it.

$300+ Million Invested (the Nealy Declaration)

23. The NHL (Renewed Motion at 5, 12-13) omits known facts and fails to apprise the Court of Mr. Nealy's deposition testimony explaining the removal of the $380 million reference from Mr. Nealy's declaration, and his affirmation of the substance of the information. The sentence in paragraph 41 to the effect that Mr. Moyes had provided the Coyotes $380,000,000 to fund operations was removed because Mr. Nealy could not verify the specific amount, although he knew the amount was very large.

24. Mr. Nealy testified: "I remember that reference to [the statement that Mr. Moyes had provided approximately $380 million to fund operations], and I was probably being pretty picky. I could not absolutely speak for prior to my coming. But ***if it was 380 or 350, I mean, I knew it was up there***, but I just said I don't know that specifically." *See* Nealy Depo., Ex. 6, 162:1-17. Neither his declaration nor his deposition testimony make the inferential leap the NHL alleges that the Debtors implied "he had lost it all."

25. The litany of NHL misrepresentations continues with every contrived sound bite in the same paragraph on page 5 of the Renewed Motion:

- The original statement did not imply that "it was impossible for the Coyotes to make money in Glendale," but history proves that fact. *See* n. 5 *supra*. Mr. Beasley, in conversations with Mr. Scudder, essentially acknowledged this fact ($14.6 million in annual subsidies to the Coyotes). *See* June 3, 2009 email chain with summary of communications with Glendale attached to this Response as Exhibit 11; May 7, 2009

email chain regarding Glendale's ability to provide concessions attached to this Response as Exhibit 12.

- The statement "was calculated to chill bidding in Glendale"—on the contrary, the statement was obviously intended to avoid misleading readers or the Court and to ensure that the Coyotes' true financial condition was not a secret.
- Mr. Moyes invested $94 million (not $380 million)—the NHL knows this is wrong. The NHL cites no evidence for this preposterous allegation, citing only a Glendale brief acknowledging that Mr. Moyes paid $94 million to the Coyotes *after* September 27, 2006. Docket No. 556. The NHL ignores all of Mr. Moyes' investments in the Coyotes before then. The total amount is well above $300 million. *See* UNDER SEAL Earl Scudder Declaration ("**Scudder Dec.**") filed contemporaneously herewith at ¶¶ 3-7.
- Mr. Moyes "actual return" is more than $150 million—once again, the NHL offers no evidence, but simply relies on the same Glendale brief, which is glaringly deficient. First, Glendale includes as the major part of the "return" the $85 million Mr. Moyes received from the split with the Ellman entities in 2006. As is clear from many documents and not disputed, Mr. Moyes owned a half interest in the Westgate Center real estate development, and the Ellman entities paid him $85 million for that interest. *See* Coyotes Hockey, LLC Consolidated Financial Statements for the year ended June 30, 2008, n. 3, attached as Exhibit A to Danninger Dec. That payment was in no way a return on any investment in the Coyotes. Glendale and the NHL both know this.
- In addition, Glendale's "return" calculation (a) includes office rent Glendale and the NHL know was never paid, (b) includes an inflated tenant improvement cost the Debtors never paid, (c) includes the total paid to transport the hockey team for three seasons without deducting the cost to Swift Air of providing such services, (d) presumes tax savings based on no evidence of the ability to use the net operating losses against other income, and (e) includes Gretzky payments which the Debtors

have not made and which are disputed. Docket No. 556. Shumway Depo., Ex. 4, 144:9 - 145:1; Nealy Depo., Ex. 6, 209:7 - 210:12, 151:7 - 152:1.

The Goldwater Institute

26. Again, the NHL falsely asserts that Messrs. Moyes and Balsillie, and impliedly the Debtors, have in some way surreptitiously provided confidential information to Goldwater. To the contrary, Messrs. Moyes, Scudder, Rodier, and Balsillie have never spoken with Goldwater about Glendale or the Coyotes.

27. Carrie Ann Sitren, the primary Goldwater attorney following the Coyotes bankruptcy, had no such communications, and Goldwater received its information from public sources. *See* Carrie Ann Sitren Declaration ("**Sitren Dec.**") filed contemporaneously herewith at ¶¶ 3-5. Contrary to the NHL's innuendo that in April 2009, Rodier or Scudder agreed to covertly funnel information to Goldwater regarding Glendale's anticipated concessions, Goldwater learned of Glendale's possible concessions via public bankruptcy filings, Arizona Republic articles, and other online services. *Id.* at ¶ 5. Likewise, rather than learn from Messrs. Moyes, Scudder, Rodier, Balsillie, the Debtors, or any of their representatives about possible Reinsdorf group concessions, Goldwater learned this through public sources. *Id.* To the best of his knowledge, Mr. Scudder has never spoken with anyone affiliated with Goldwater. *See* UNDER SEAL Scudder Dec. at ¶ 8. Moreover, the emails on which the NHL relies so heavily show that Mr. Scudder said that Mr. Moyes, and the Debtors would not disclose confidential information or be the source of information to anyone. *Id.* at ¶ 9. What the NHL claims to be a "stark breach of fiduciary duty" **never happened**.

The Data Room

28. The NHL would have this Court find nefarious motives amid innocuous interactions. For example, the NHL asserts that Mr. Scudder provided information about the Reinsdorf and Ice Edge groups to Mr. Rodier and that "Mr. Rodier … co-opted Mr. Scudder … to keep close tabs on … the Reinsdorf and Ice Edge groups, and their activity in the Debtors'

confidential virtual data room … and to report back to Mr. Rodier. Mr. Scudder obliged." Renewed Motion at 7-8.

29. The NHL's evidence here is Exhibits E and F to its motion. Exhibit E consists of two email exchanges on June 22 and 26, 2009, between Messrs. Scudder and Rodier. The entire substance of the first was Mr. Rodier's questions as to whether Mr. Scudder was in Phoenix for a hearing, if anyone new has been in the data room, and if the Reinsdorf group continues to access the data room. Mr. Scudder responded that he was in Phoenix, no one new had been in the data room, and the Reinsdorf group had not been in the data room since June 12, but that Mr. Scudder set up a meeting for Mr. Tavares with Messrs. Nealy and Moss. The emails then speculated whether Mr. Tavares would be the new president or CEO, and whether Mr. Reinsdorf would retain Mr. Moss if he bought the team.

30. In the second email, Mr. Rodier said the NHL had halted its numerous press releases and public comments regarding this case, and in particular Mr. Reinsdorf's anticipated offer for the Coyotes. He asked if there was any indication an offer would be submitted. Mr. Scudder responded that Mr. Reinsdorf's group had contributed increased traffic in the data room, suggesting that the Reinsdorf group would submit a bid. No secret information was divulged.

31. The Ice Edge emails, Exhibit F to the NHL's motion, are similar. Mr. Rodier inquired as to the mysterious second bidder. Mr. Scudder provided his name and said he knew nothing about him. Mr. Parker commented regarding his data room activity and eventually Messrs. Rodier, Scudder, and Parker, apparently out of sheer curiosity, discovered additional information regarding persons involved with Ice Edge.[10] There was nothing remarkable about these emails.

[10] This situation is almost identical to another inquiry, this time to the NHL. *See* UNDER SEAL August 4, 2009 Deposition of Antonio Tavares, relevant portions of which are attached to this Response as Exhibit 13, 53:4-18 (filed UNDER SEAL because another party designated the deposition as confidential).

Efforts to Market Team

32. Here the NHL contends the Debtors have "made no effort to market the team to other relocation bidders, or to market to local bidders post-petition, or to sell tickets in Glendale, and Mr. Scudder has interfered when the Club management has tried to do so." Renewed Motion at 8. Nothing could be further from the truth.

33. Since the Petition Date, Fairway Consulting, LLC has continued to market the Coyotes, and has been the primary point of contact for parties interested in investing in or purchasing the Coyotes. *See* UNDER SEAL Scudder Dec. at ¶¶ 10-11. Fairway also assisted in gathering and preparing a substantial amount of material for the data room, and assisted all bidders regardless of their plan for the team. *Id.* at ¶ 12. Confidentiality agreements were signed with no less than eighteen potential bidders. *Id.* at ¶ 11. The lack of bidders is obviously a result of the Coyotes' financial condition, not a failure of marketing. Notably, the NHL's marketing efforts have fared no better.

34. On the other hand, the NHL's actions appear aimed at chilling bidders seeking to relocate the team. Even a casual observer could attest that the NHL has fought mightily to discourage relocation bids, yet the NHL now chastises the Debtors for not trying harder to find a relocation bidder.[11] Indeed, as recently pointed out by Mr. Salerno before this Court, "under the bid procedures order that we agreed to, certainly NHL and the Debtors, we were told don't go out and solicit relocation bids until we go and have our Glendale only auction on August 5. That's exactly what happened, your Honor." Transcript of August 3, 2009 Hearing, Ex. 8 at 61:5-9.

35. The NHL's repeated press releases and public statements about the Coyotes staying in Glendale, about the Debtors' attempting to sell an asset they don't own, about how no

[11] When the Coyotes tried to retain Citibank, an experienced investment banking firm, to help market the team, the NHL vetoed the idea because of the NHL's own interests regarding Citibank. Shumway Depo., Ex. 4, 105:11 - 109:11.

relocation bids should be considered by the Court all serve to chill bidding with respect to potential relocation. It is the NHL, and not the Debtors, that has deliberately chilled bids.

36. What the Court has adopted is an open auction process. All major parties know what the bids are, who the potential interested bidders are, and what those parties' terms are likely to be. The Debtors will file with the Court, just as it has done previously, all bids received, regardless of whether the Debtors believe the bids are conforming or qualified. What is more, the Creditor Committee and its counsel have been a part of the negotiation process with both the Reinsdorf group and Ice Edge, including by participating in a call with Ice Edge's representatives on Sunday, August 23. There is no evidence (nor would there be) that the Debtors are not being cooperative in supplying documents or information to potential bidders, and the Committee's active involvement ensures there is a "watchdog" over the process if one is even needed.

Notice to Ticket Holders

37. The NHL continues (Renewed Motion at 8) to complain about the Debtors' serving season ticket holders with *Debtors' Objection to the Offer to Purchase the Assets of Coyotes Hockey and Arena Management* on July 31, 2009. Docket No. 526. Try as it may, the NHL cannot fairly argue that to serve the objection on holders of prepetition claims against the Debtors was somehow improper.

38. The NHL and Glendale previously raised this at the August 5**,** 2009 hearing no fewer than three times during argument. The Debtors' counsel repeated what it had told the NHL's counsel the day before, that service did not go to all season ticket holders but only those who were creditors that, like all other creditors, appear on the master mailing matrix. Consistent with their fiduciary duties, the Debtors listed on their schedules of liabilities a number of ticket holders as having priority claims because of ticket deposits. A number of ticket holders have also filed proofs of claim. Because the NHL and Glendale previously accused the Debtors of attempting to chill Glendale bids by failing to notice the bid procedures order and related auction dates broadly enough, the Debtors served the entire master mailing matrix with its pleading to

avoid that same accusation. *See* Declaration of Kelly Singer ("**Singer Dec.**"), filed contemporaneously herewith, at ¶ 12. That is the only reason some season ticket holders received the Debtors' objection. *Id.* at ¶ 13. The NHL's counsel acknowledged at the hearing that the Debtors' counsel was correct, yet the NHL obstinately repeated this same allegation in its Renewed Motion.[12]

The Transportation Contract

39. The NHL's gamesmanship here is transparent. The NHL not only included this issue in its Renewed Motion (at 9-10), but also filed a needless "emergency" motion to approve an unacceptable contract with US Airways. As shown below, the NHL manufactured an argument to allow it to claim self dealing by Mr. Moyes when there was none.

40. The NHL complains (Renewed Motion at 9) that Mr. Scudder "rejected the recommendation [that the team travel on US Airways] and insisted that the Club continue to use Swift Air." As described below and in attached emails, the claim is false. In addition, there was no emergency and the team, with the NHL's involvement, rejected the US Airways bid and, as of August 24, 2009 is entering into a transportation contract with another bidder. The Debtors agreed to allow the NHL and hockey management to arrange any travel plans they saw fit for the team (*See* UNDER SEAL Scudder Dec. at ¶ 19), and the NHL and hockey management just selected the carrier.

41. The NHL neglects to mention that Mr. Scudder's reluctance to change carriers had nothing to do with Swift Air being owned by Mr. Moyes. To the contrary, it was attributable entirely to US Airways' inability to carry the team as other NHL teams are carried. *Id*. at ¶¶ 18-

[12] This is similar to the NHL's prior insistence that the Debtors had somehow blocked access to the data room for potential bidders (Tony Tavares with the Reinsdorf group). The NHL and Glendale made this assertion in papers and in Court many times. The NHL finally abandoned the position (although Glendale has not), when faced with indisputable evidence that it was wrong. The Declaration of Kelly Singer, filed on August 3, 2009 at Docket No. 553, provided the facts. The several-day delay resulted from changes desired by the Reinsdorf group in the form non-disclosure agreement. Mr. Tavares' counsel radically altered the terms of the standard agreement, Mr. Singer responded within one hour, and Mr. Tavares' counsel took two days to respond, after which the parties agreed on the terms and Mr. Tavares was granted access. Docket No. 553 at ¶¶ 4-7. Mr. Tavares' deposition confirms the Debtors' cooperation. *See* UNDER SEAL Tavares Depo., Ex. 13, 20:6-11, 25:2 - 26:2.

19. In fact, Mr. Scudder supported options other than Swift Air. *Id*. at ¶ 19. The facts, as shown by the emails (attached as Exhibits E and F to his Declaration), are:

- Don Maloney, General Manager of the Coyotes, obtained bids from six carriers for the Coyotes' travel for the 2009-2010 season: Miami Air (carried eight NHL teams in 2008-09); Delta/Northwest (carried two NHL teams in 2008-09); Air Canada Jetz (carried seven NHL teams in 2008-09); Paradigm Air (carried two NHL teams in 2008-09); Swift Air (carried five NHL teams in 2008-09); and US Airways (carried zero NHL teams in 2008-2009).

- Swift Air carried the Chicago Blackhawks, Colorado Avalanche, Los Angeles Kings, and Minnesota Wild in the 2008-2009 season.

- Swift Air's quote for the 2009-2010 season was $2.2 million and was the second lowest quote of the original quotes, behind only US Airways.

- Swift Air has carried the Coyotes since 2001, before Mr. Moyes owned the Coyotes.

- Unlike all other carriers, and unlike the manner in which all other NHL teams travel, US Airways would only provide twelve first class-size seats, likely for the coaching staff, and the players would fly in coach-size seats.

Id. at ¶¶ 16-18.

42. Mr. Scudder's August 5, 2009 email to the NHL and Mr. Maloney noted that US Airways had not carried any NHL teams in the 2008-2009 season because what it offered was contrary to what the teams needed in travel arrangements: "With only a dozen first class seats (that are likely to be used by the coaches), the US Airways proposal is for coach seats for the players. All other carriers are proposing 100% first class seats in a player-friendly environment. There is a reason the other five have provided service to professional sports teams, whereas US Airways has been out of that business for the past five years…. Please do not commit to an air service provider that neither understands the professional sports market nor is equipped to offer the service that's needed." *Id*. at ¶¶ 17-18.

43. On August 10, 2009, the NHL filed its emergency motion. Docket No. 600. Since that time, Mr. Scudder's concerns were proven to be true and the NHL backed away from its rush to contract with US Airways. The Coyotes rejected US Airways because, among other things, US Airways was not flexible enough to be a viable option. *See* Scudder Dec. at ¶ 20.

44. The Debtors take no position on the carrier selected by team hockey management and the NHL. The important points here are that the use of Swift Air was not the self-dealing breach of fiduciary duty the NHL claimed, the NHL's characterization of Mr. Scudder's position was patently incorrect, the NHL's "emergency" motion was baseless, and the NHL once again launched its inflammatory barrage notwithstanding contrary facts of which it was aware.

Gretzky Contract

45. Facts matter. Mr. Gretzky has served as the Coyotes head coach since 2000, when he also became a part owner of the Coyotes. *See* May 30, 2006 Deal Memo attached to this Response as Exhibit 14, at ¶ 6. In May 2006, Mr. Moyes, who did not yet own the team, entered into a Deal Memo with Mr. Gretzky in order to continue Mr. Gretzky's retention as the Coyotes' coach. *See* Deal Memo, Ex. 14; Shumway Depo., Ex. 4, 93:15-94:3; Moyes Depo., Ex. 10, 133:18-22.

46. The plain intent of the parties at all times was for Mr. Gretzky to be employed by the Coyotes and to provide his hockey services to the Coyotes. *See* Deal Memo, Ex. 14. The parties, including the Ellman entity that owned the Coyotes until September 2006, felt that his association with the Coyotes brought great value to the team. *See* Nealy Depo, Ex. 6, 181:3 - 182:2; Moyes Depo., Ex. 10, 122:18 - 123:3.

47. The Deal Memo called for Mr. Gretzky to perform services for the Coyotes, and for Mr. Moyes to cause the Coyotes to pay him. That is what has occurred, consistent with the parties' intent, and Mr. Gretzky has been carried on the Coyotes' payroll as an employee and treated as an employee. *See* UNDER SEAL Multiple Employment Rosters attached to this Response as Exhibit 15; *See* Deal Memo, Ex. 14, at ¶¶ 2, 4.

48. The May 2006 Deal Memo was not intended to be the permanent contractual document, but rather explicitly contemplated (a) that it would be assigned to and assumed by a to-be-formed entity that would be owned by Mr. Moyes and that would acquire the Coyotes, and (b) that a detailed employment agreement would be negotiated and entered into. *See* Deal Memo, Ex. 14, at ¶ 1; Shumway Depo., Ex. 4, 93:15-94:3; Nealy Depo., Ex. 6, 181:14-182:2; Moyes

Depo., Ex. 10, 133:18-134:7. Thus, the Deal Memo provided a placeholder corporate name of "Newco" for the new company to which the Deal Memo would be assigned once Mr. Moyes purchased the Coyotes. *See* Deal Memo, Ex. 14, at ¶ 1. The documents would then reflect the reality and the intent: Mr. Gretzky's employment was with Coyotes Hockey.

49. At some point after Mr. Moyes purchased the team in September 2006, Mr. Shumway, the Coyotes CEO, began negotiating the anticipated formal employment agreement with Mr. Gretzky's attorney and other representatives. Shumway Depo., Ex. 4, 93:15-94:14. Eventually, Mr. Shumway and Mr. Gretzky's representatives completed an extensive agreement in 2008. *Id.*

50. But for reasons unrelated to whether Mr. Gretzky was employed by the Coyotes, that detailed agreement was never signed. Under the Deal Memo, Mr. Moyes could have assigned the Deal Memo to the Coyotes at any time. *See* Deal Memo, Ex. 14, at ¶ 1. Mr. Shumway testified that he never considered transferring Mr. Gretzky's contract to the Coyotes because he was "under the initial impression that we were going to get an employment agreement done and get it done pretty quickly. And I just never thought about whether or not Jerry should transfer it to the team. I just didn't." *See* Shumway Depo., Ex. 4, 101:3-17.

51. As Mr. Shumway testified that, during that time, from May 2006 through August 2008, the parties "paid [Mr. Gretzky] equitably under what [the parties] understood would be his employment agreement" when the parties were finished negotiating it. *Id.* at 95:22-96:3. During this time Mr. Gretzky was included on Debtors' employment roster (*See* UNDER SEAL Employment Rosters, Ex. 15) and was only paid by the team and never by Mr. Moyes personally. Moyes Depo., Ex. 10, 126:12-21.

52. As illustrated by documents subsequently negotiated and executed, as well as the employment agreement that was negotiated but not signed, the intent was always to have Mr. Gretzky paid by Coyotes Hockey as its employee. *See* Amendment Waiver Agreement attached to this Response as Exhibit 16; UNDER SEAL May 3, 2008 draft Employment Agreement between Wayne Gretzky and Coyotes Hockey, LLC attached to this Response as Exhibit 17.

53. Eventually, Mr. Moyes and Mr. Gretzky entered into an Amendment and Waiver Agreement (the "**Amendment**") related to the Deal Memo. *See* Amendment Agreement, Ex. 16. The Recitals in the Amendment specifically provide that "the Deal Memo governs the terms of Gretzky's present employment with Coyotes Hockey, LLC." *Id.* The Amendment then changed all references to "Newco" in the Deal Memo to "Coyotes Hockey, L.L.C." *Id.* at ¶ 1(a)(i). This reflected what the parties had intended since the Deal Memo was created in May 2006. *See* Moyes Depo., Ex. 10, 133:8-134:7.

54. On April 20, 2009, Mr. Moyes assigned his interest in the Deal Memo to Coyotes Hockey, which assumed the obligations of Mr. Moyes. *See* April 20, 2009 Assignment and Assumption Agreement, attached to this Response as Exhibit 18. The Assignment and Assumption Agreement (the "**Assignment**") conformed the paper record to the parties' intent in May 2006: "The intention was always to assign [the Deal Memo] to the hockey team." *See* Moyes Depo., Ex. 10, 129:10-13.

55. Several points are clear. First, the Debtors have not hidden anything from anyone. The Debtors produced the Deal Memo and related documents, and answered deposition questions regarding Mr. Gretzky. Second, Mr. Gretzky at all relevant times performed his services for the Coyotes and not Mr. Moyes personally, and the Coyotes received the benefit of Mr. Gretzky's services. Third, the intent at all relevant times was for Mr. Gretzky to be employed by the Coyotes. Fourth, the May 2006 Deal Memo could have been transferred to the Coyotes at any time. Finally, reasonable people can disagree regarding the rights and obligations of Mr. Gretzky, Mr. Moyes, and Coyotes Hockey.

56. The Debtors take no position on these issues now, nor do the Debtors believe these issues need to be or can be resolved now. As indicated previously, the Debtors have assigned all rights to investigate and pursue issues regarding Mr. Moyes (and all insiders) to the Committee and the Committee will make the relevant decisions. *See* Singer Dec. at ¶ 15; *Stipulated Order Regarding Assignment of Debtors' Claims Against Insiders and Affiliates*

Thereof to the Official Joint Committee of Unsecured Creditors, Docket No. 749 (lodged order). Nothing here equates to "stark" breaches of fiduciary duty or bad faith by the Debtors.

The October 2008 Transfer

57. The NHL claims the Debtors tried to hide a $2 million transfer made to Mr. Moyes on October 2, 2008. Renewed Motion at 10. The transfer was listed in the Debtors' statements and schedules as "Jerry Moyes, Owner, Paydown of interest on line of credit at the request of the owner." *See* Singer Dec. at ¶ 14. The Debtors produced documents regarding this payment. Mr. Nealy, Mr. Shumway, and Mr. Moyes all candidly described this payment in their depositions. *See* Nealy Depo., Ex. 6, 45:17-46:4; Shumway Depo. Ex. 4, 87:7-16; Moyes Depo. Ex. 10, 145:2-4. This transfer was not hidden and was no secret to anyone.

Resisting the NHL

58. The NHL actually contends that the Debtors should not be allowed to challenge the NHL in this bankruptcy proceeding and that, as a result, the NHL may terminate the Phoenix Coyotes' NHL franchise. Renewed Motion at 11-12. According to the NHL, trying to keep alive the only real cash bid for the Coyotes is a breach of the Debtors' fiduciary duties. Renewed Motion at 11. Likewise, the NHL threatens that the Debtors' continued support of the PSE offer is a "breach of the Debtors' agreements with the NHL and subjects the team to an array of disciplinary measures ranging from monetary penalties to suspension or expulsion of the owner or even termination of the franchise." Renewed Motion at 11-12.

59. Making good on those threats would violate the automatic stay. The NHL's threat that it will take punitive actions against the Debtors as a result of their pursuit of the highest and best offer for the Debtors' assets is a violation of the stay as it seeks to exert influence and control over the Debtors' assets. *See* 11 U.S.C. § 362(a)(3) (stay against "any act to obtain possession of property of the estate or of property from the estate or to exercise control over property of the estate"). Monetary penalties would violate the stay as well, to say nothing of the NHL's apparent desire to make an example of the Coyotes and intimidate NHL member clubs from filing bankruptcy petitions. In essence, the NHL says that to join its private club, the

Debtors had to waive their rights under federal law. Bankruptcy policy does not allow or enforce such waivers.

The Inadvertent Disclosure

60. Once again, the NHL (Renewed Motion at 10) prefers rhetoric to facts. Mr. Moyes' attorney admitted an unintentional mistake which, for a matter of a couple of hours, put in the public record the substance of a document Glendale designated as confidential. A filing in this Court, supported by counsel's Declaration, sets out the facts and should dispose of this issue. Neither the Debtors nor Mr. Moyes had any role in this ministerial error.

61. Yet the NHL and Glendale ask the Court to disregard the sworn declaration of counsel and find that Mr. Moyes and the Debtors somehow caused the error.[13] The evidence makes clear that this allegation is untrue. The Court can draw its own conclusions regarding the NHL's and Glendale's purposes in persisting on this issue.

62. The information contained in the inadvertent disclosure was designated "highly confidential" and, therefore, should not have been filed publicly. But despite Glendale's confidential designation, the information was not confidential and its release caused no harm to anyone. That the Reinsdorf group required substantial concessions from Glendale to support a bid for the Coyotes was hardly a secret. *See* June 3, 2009 email chain regarding Glendale concessions, Ex. 11; May 3, 2009 email chain regarding Glendale concessions, Ex. 12; May 15, 2009 Shumway Declaration (Docket No. 110), at ¶ 21; June 5, 2009 Scudder Declaration (Docket No. 290), at ¶ 10; June 4, 2009 Shumway Declaration (Docket No. 291), at ¶ 43. The exact mechanisms for any possible subsidy were not a subject of public discussion, but certainly were issues that should be debated in public by Glendale's City Council, with notice to Glendale taxpayers and full opportunity for them to be heard. How a city raises and uses public funds should never be secret. How Glendale would structure the subsidy is not the critical issue for the

[13] Glendale has even taken *four depositions*, totaling approximately three hours, of Mr. Moyes' counsel and his public relations consultant to try to find evidence that a long time Arizona attorney and officer of the Court lied to the Court and deliberately leaked the document. Needless to say, the depositions produced no such evidence and neither the NHL nor Glendale has any such evidence.

Reinsdorf group—the critical issue is the fact and amount of the subsidy. Predictably, the inadvertent disclosure of Glendale's possible vehicle did not drive away the Reinsdorf group.

ARGUMENT

63. At every juncture in these cases, the NHL and its competent attorneys have attempted to delay (or even prevent) the Court from conducting an open auction that includes relocation bids. Why? Because the NHL wants to maintain absolute control over the business of professional hockey, unchecked by this Court and the law. Two days after the Debtors filed for bankruptcy protection under Chapter 11, the NHL filed a motion that effectively asks the Court to approve a hostile takeover of the Debtors. *See* Docket No. 47, dated May 7, 2009 (the "**Control Motion**"). For what purpose did the NHL file the Control Motion? To benefit creditors, as the Renewed Motion suggests? No. The NHL has already disclosed that its takeover attempt is driven by self-interest "rather [than] to protect any creditor interest:"

> More importantly, the NHL's fundamental interest in taking control of the Coyotes is to preserve the viability, good will and success of the NHL as a major professional sports league rather to protect any creditor interest.

Memorandum of Points and Authorities in Support of National Hockey League's Motion for Determination (I) of Authority to Manage the Business and Affairs of the Debtors, and (II) that William Daly is the Representative of the Estates, dated May 13, 2009 [Docket No. 91] at 3:2-4.

64. The Control Motion was heard on May 19, 2009, when the Court urged the parties to reach a mutually agreeable solution to the control issue so that the parties and the Court could focus on what really matters — selling the Debtors' assets to generate cash for creditors:

> ***THE COURT:*** It seems like the parties and the Court are spending an awful lot of time on an issue that I know is near and dear to the parties' heart, but I don't know that it matters that much to the creditors. The only way they're going to get paid is if there's a sale.
>
> * * *
>
> ***THE COURT:*** Seems like it would be a lot better if you all could reach resolution on how to steer the car, we figure out how to get the assets sold and get some money for these creditors.

Transcript of May 19, 2009 Hearing, relevant portions of which are attached to this Response as Exhibit 19, at 78:10-14 and 104:2-5.

65. In response to the Court's directives, the NHL and the Debtors resolved the control issue through a stipulated order setting forth a management protocol, which the Court entered on May 26, 2009 (the "**Management Protocol Order**"). *See* Docket No. 203. One day later, the Court held a hearing on the Debtors' request to set June 22 as the date for an auction that would include relocation bids. At that hearing, the NHL argued that no auction involving relocation bids should be scheduled. The NHL also stated it would "fight tooth and nail …. ***for the League***" to achieve a Glendale-only sale:

> ***THE COURT:*** [T]he Debtor filed a motion to sell and have the auction, and I think at least, in fairness to the Debtor and the potential buyer, have to give them a potential date that we're to have that hearing.
>
> ***NHL's COUNSEL:*** I appreciate that, Your Honor, and we feel we're obligated to let the Court know we'll be in asking for that date to be changed if, as and when that becomes necessary.
>
> ***THE COURT:*** I assume, at least until you tell me differently, that the NHL is going to fight this tooth and nail every step of the way to and including that hearing, if we get there.
>
> ***NHL's COUNSEL:*** Your Honor, what the NHL is going to do is fight tooth and nail to see to it that the highest and best value for this franchise in this city, in Glendale, Arizona, is achieved through this process. That's what we're going to do, Your Honor. And that's what we obligate — we are obligated to do for the League, 30 owners. Not one.

Transcript of May 27, 2009 Hearing, relevant portions of which are attached to this Response at Exhibit 20, at 46:13-47:5.

66. When the NHL realized that no qualified bids for a Glendale sale had been submitted by the July 24 deadline, when faced with the possibility that the only qualified bids would be relocation bids, the NHL filed an emergency motion asking the Court to ***cancel*** the relocation auction, which the Court had already set for September 10 in accordance with the parties' stipulated order:

> ***THE COURT:*** And I probably ought to apologize for it because it might appear to be a cheap shot, but my memory is that when I signed that order setting that September date, 10th date, I did not hear the League saying to me, "Judge, don't sign that order." I don't think you stood up and cheered that I was about to sign that order, but I didn't hear the League saying, "Don't do it, Judge. We object to that." Correct or incorrect?
>
> ***NHL's COUNSEL:*** Your Honor, you've already called me out on that. I didn't jump up and down. I wish I had. I'm here jumping up and down now. And I am guilty of thinking that there would be a Glendale sale, and we wouldn't have to worry about it.
>
> * * *
>
> ***THE COURT:*** And basically you want me to vacate the date for a relocation date, and not even reset it at this time; right?
>
> ***NHL's COUNSEL***: Yes, sir.

Transcript of August 3, 2009 Hearing, relevant portions of which are attached to this Response at Exhibit 8, at 22:11-23 and 26:22-25; *see also National Hockey League's Motion for Rescheduling of 363 Auction Sale* dated July 30, 2009 [Docket No. 513].

67. The NHL has also attempted to delay consideration of relocation bids by telling the Court it would be impossible to process relocation applications before the end of 2009:

> ***NHL's COUNSEL:*** We will be arguing, if we get to it, that even if you started today there isn't enough time between now and the end of June — frankly, there's not enough time between now and the end of 2009 to go through the process of approving a relocation . . .

Transcript of May 7, 2009 Hearing, relevant portions of which are attached to this Response at Exhibit 21, at 15:16-20.

68. But three weeks after making that statement, the NHL admitted in response to the Court's questioning that it *could* process a relocation application "very quickly" if it wanted:

> ***NHL's COUNSEL***: That wasn't my point, Your Honor. My point was that the League has the power to approve persons who want to become owners of the League and to transfer teams, and if Bill [Gates] came in and said to the League, you know, I'd like to be the owner at this price and in this place, I think Mr. Bettman could get on the phone and talk to the other owners and get some . . . response very quickly.

Transcript of May 27, 2009 Hearing, Ex. 20, at 60:19-25.

69. Two months later, the NHL was before the Court arguing that the September 10 relocation auction should be cancelled. To bolster that argument, the NHL informed the Court that it decided not to consider the relocation application of PSE and Coyotes Hockey:

> ***NHL's COUNSEL:*** Well, Your Honor, the NHL is not processing the relocation cart [sic] of PSE's bid.
>
> ***THE COURT:*** I'm not surprised to hear that.
>
> ***NHL's COUNSEL:*** And we don't intend to, Your Honor.

Transcript of August 3, 2009 Hearing, Ex. 8, at 65:13-16.

70. It is not clear when the NHL actually made that decision; but what is clear is that the NHL is using its decision strategically to argue that the Court should not consider any relocation bids before the start of the 2009-2010 hockey season.

71. Although the NHL could have filed the Renewed Motion at any time during the past three months (following entry of the Management Protocol Order), the NHL filed it on August 18, three weeks before the September 10 auction. Moreover, the Renewed Motion is scheduled to be heard on September 2, eight days before the auction.

72. The timing of the Renewed Motion cannot be a coincidence. It represents the NHL's latest attempt to scuttle the auction. As explained in detail in this Response, however, the Renewed Motion has no merit. First, as to the control issue, the NHL never removed Mr. Moyes from his position of authority to act on behalf of the Debtors, and Mr. Moyes properly exercised his authority when he commenced theses cases and executed the PSE Asset Purchase Agreement on behalf of the Debtors. Furthermore, the issue of control has no relevance to the pending sale, the purpose of which is to generate cash for creditors. That the Renewed Motion is not relevant to any of the issues discussed in *In re Dewey Ranch Hockey, LLC*, 406 B.R. 30 (Bankr. D. Ariz. 2009), combined with the fact that the NHL filed the Renewed Motion essentially on the eve of the auction, supports the conclusion that the NHL filed its motion with ulterior motives.

73. Moreover, the NHL's statement that it seeks control over the sale process "for the benefit of all creditors" is not credible because the NHL has already admitted that its "fundamental interest" in taking control is to protect its own interests, not the interests of creditors as a whole. As the Court has already recognized, the NHL is wearing "multiple hats" in these proceedings, creating inherent conflicts of interests between the NHL on the one hand and the Debtors and other parties in interest on the other hand:

> ***THE COURT:*** And the League has a lot of hats on here, don't they?
>
> ***NHL's COUNSEL:*** The League, I beg your pardon, sir?
>
> ***THE COURT:*** Has a lot of hats on.
>
> ***NHL's COUNSEL:*** Has a lot.
>
> * * *
>
> ***THE COURT:*** What's the total debt owed to the League in round numbers right now?
>
> ***NHL's COUNSEL:*** I believe it's about 13 or $14 million, Your Honor.
>
> * * *
>
> ***THE COURT:*** But the League's a secured creditor in first position; right?
>
> ***NHL's COUNSEL:*** Yes, sir, that's correct.
>
> ***THE COURT:*** And the commissioner and the League have duties to the other members of the League independent of any debt relationship with the Coyotes; right?
>
> ***NHL's COUNSEL:*** Yes, sir, that's also correct.
>
> ***THE COURT:*** And then if the League succeeds, they would be in control of the Coyotes?
>
> ***NHL's COUNSEL:*** Yes, that's correct.
>
> ***THE COURT:*** So as I see it, they've got three hats on in this situation.
>
> ***NHL's COUNSEL:*** Yes, sir. And --
>
> ***THE COURT:*** So I say they got a lot of hats on here.
>
> ***NHL's COUNSEL:*** Well, yes, Your Honor, except the, as has been

> mentioned, the League does have an interest in trying to maximize the value within the bounds of what we believe the company has to sell.
>
> ***THE COURT:*** Well, didn't the League and the proxies — nobody said much about this — get a release from these debtors for anything the League does?
>
> ***NHL's COUNSEL:*** Yes, sir.
>
> ***THE COURT:*** So I guess that would be kind of a fourth hat, wouldn't it?
>
> ***NHL's COUNSEL:*** Well, sir, as you pointed out, that would amount to our releasing ourselves.

Transcript of May 19, 2009 Hearing, Ex. 19, 95:1-96:20.

74. As to the NHL's allegations that the Debtors breached their fiduciary duties, the evidence set forth in this Response demonstrates that the allegations are patently false. The NHL's attempt to spin the truth into falsehoods is shocking and can only be understood (though not excused) by recognizing that the NHL is hoping to delay or cancel the September 10 auction so that the Court never considers: (a) whether the NHL's interests are in bona fide dispute as a result of anti-competitive conduct; (b) whether the proposed sale of assets to PSE in exchange for $212.5 million of cash is the highest or best bid; (c) whether any relocation bid constitutes the highest or best bid; and (d) whether a hockey team that is losing tens of millions of dollars each year can exercise its rights under the Bankruptcy Code to reorganize over the NHL's objections.

75. The NHL's request for appointment of trustee also seeks delay of the sale. The Renewed Motion is scheduled to be heard on September 2, and the sale is scheduled to occur eight days later on September 10. Obviously, even were the Court to approve the appointment of a trustee on September 2 in open court, the sale would have to be postponed indefinitely. The U.S. Trustee would have to appoint a trustee, the trustee would have to retain legal counsel and possibly other professionals, and (notwithstanding the extensive media coverage of these cases) the trustee's counsel would need several weeks to bring itself current on the panoply of legal issues, evidentiary issues (including thousands of pages of documents, deposition transcripts, and declarations that have been filed or otherwise produced through discovery in these cases), and

the asset purchase agreements submitted by PSE, the Reinsdorf group, and Ice Edge. Suffice it to say that the NHL is acutely aware of the impossibility of conducting a sale on September 10 if a trustee is appointed, which is precisely why the NHL included this alternative form of relief in its Renewed Motion.

76. In all events, there are no grounds for appointing a trustee under Bankruptcy Code § 1104. "The appointment of a chapter 11 trustee is an extraordinary remedy." *In re The 1031 Tax Group, LLC*, 374 B.R. 78, 85 (Bankr. S.D.N.Y. 2007); *accord In re Ontario Entertainment Corp.*, 237 B.R. 460, 472 (Bankr. N.D. Ill. 1999); Collier on Bankruptcy ¶ 1104.02[3][b][i] (15th ed. rev.). Appointment of a trustee is regarded as an exception to the general rule that the debtor-in-possession is best qualified to operate its businesses and reorganize its financial affairs. *See, e.g., In re Ontario Entertainment Corp.*, 237 B.R. at 472 ("Generally, as Chapter 11 is designed to give the debtor an opportunity to rehabilitate through reorganization, the bankruptcy court favors the debtor to remain in possession and operate the business"). Accordingly, there is a strong presumption that current management should remain in control of a debtor. *In re The 1031 Tax Group, LLC*, 374 at 85; Collier on Bankruptcy ¶ 1104.02[3][b][i] (15th ed. rev.).

77. "Although § 1104 requires a bankruptcy court to appoint a trustee if the requirements of the statute are met, a court has wide discretion in considering the relevant facts." *In re The 1031 Tax Group, LLC*, 374 B.R. at 86. Decisions regarding the appointment of a trustee, therefore, must be made on a case-by-case basis. *In re Ontario Group Entertainment Corp.*, 237 B.R. at 472. Furthermore, the party requesting the appointment of trustee carries the burden of proof, and must show by clear and convincing evidence that appointment is necessary under Bankruptcy Code § 1104(a). *See, e.g., In re ATR Develoment Co.*, 1997 Bankr. LEXIS 1553, *3-4 (Bankr. E.D. Pa. 1997) (denying motion to appoint trustee because movant failed to provide clear and convincing evidence); *In re Ontario Entertainment Corp.*, 237 B.R. 460, 472 (Bankr. N.D. Ill. 1999) (same); *In re The 1031 Tax Group, LLC*, 374 B.R. at 85 (same).

78. The NHL has not carried, and cannot carry, its burden of proof under Bankruptcy Code § 1104(a).[14] First, there is no "cause" to appoint a trustee under Bankruptcy Code § 1104(a)(1). None of the NHL's allegations regarding alleged breach of fiduciary duty, mismanagement, or misconduct have any merit, as demonstrated amply in this Response.

79. Second, there are no grounds for appointing a trustee under Bankruptcy Code § 1104(a)(2). Under that section, the NHL must establish by clear and convincing evidence that appointment of a trustee "is in the interests of creditors, any equity security holders, ***and*** other interests of the estate…." Bankruptcy Code § 1104(a)(2) (emphasis added). To satisfy this test, the NHL must show by clear and convincing evidence that appointment of a trustee benefits all interested constituencies. *Id.;* Collier on Bankruptcy ¶ 1104.02[3][d][i] (15th ed. rev.). In this case, on the eve of the September 10 auction, no benefit can be derived from the appointment of a trustee because such an appointment would substantially increase administrative expenses and force the sale to be postponed indefinitely, thus all but eliminating the possibility of any distribution to creditors. Furthermore, there can be no reasonable doubt that the Debtors will continue to operate at a substantial loss if the sale does not occur until after the 2009-2010 season, unless of course the NHL or some other post-petition lender is willing to fund operations on an unsecured basis, which is exceedingly unlikely.

80. Moreover, the NHL's suggestion that a trustee is needed to protect the "integrity of the sale process" or for any other reason misrepresents the obvious and unique facts surrounding these cases. These cases are receiving an extraordinary amount of media coverage. The entire sale process, every bid, the allowance and disallowance of significant claims, the Debtors' professionals, and the Debtors' operations are the subject of constant, close scrutiny by a very active Committee, the largest secured creditor, SOF Investments, the NHL (which wears multiple "hats"), the City of Glendale, the National Hockey League Players' Association, the

[14] The NHL does not argue for appointment of a trustee under Bankruptcy Code § 1104(a)(3) and the Debtors, therefore, do not address this section of the statute.

U.S. Trustee, the Court, and several other parties in interest that have appeared and filed pleadings in these cases. The Debtors already share control of their operations and the sale procedures with the NHL under the Management Protocol Order. Under these circumstances, the appointment of a trustee cannot provide any benefit to the interested constituencies because the entire reorganization is completely open and subject to intense scrutiny. *See, e.g., In re The 1031 Tax Group, LLC,* 374 B.R. at 91 ("Where a case has an active creditors committee functioning effectively and working well with the debtors, as it does here, there is little benefit in appointing a trustee;" denying motion to appoint trustee); *In re ATR Development Co.*, 1997 Bankr. LEXIS 1553 at *4 (concluding that appointment of a trustee would not "serve any function" because the presence of a creditors' committee, a substantial creditor, the United States Trustee, and the court was more than sufficient to scrutinize the debtor's activities).

81. Accordingly, for all the reasons set forth in this Response, the Renewed Motion should be denied in its entirely.

82. The NHL provides no new argument or authority in the "Argument" section of the Renewed Motion, and simply incorporates its May 7, 2009 Control Motion (Docket No. 47) and its supporting materials. The Debtors correspondingly will not repeat their arguments in opposition to that motion, but rather incorporate their opposition and supporting materials (Docket Nos. 109-114), as if fully repeated here.

83. The NHL is not seriously asking that the Court appoint a trustee at this late date, and the only motive for such a request is to delay the auction and force the Coyotes to spend the next year in Glendale to the severe detriment of all creditors.

CONCLUSION

For the reasons stated above, the Debtors respectfully request that the Court deny the Renewed Motion (and the Control Motion).

RESPECTFULLY SUBMITTED this 25th day of August, 2009.

SQUIRE, SANDERS & DEMPSEY L.L.P.

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