

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

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

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

15 Attorneys for the National Hockey League

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

18 In re ) Case No. 2:09-bk-09488-RTBP  
19 DEWEY RANCH HOCKEY, LLC, ) (Jointly Administered)  
20 COYOTES HOLDINGS, LLC, ) Chapter 11  
21 COYOTES HOCKEY, LLC, and ) **NATIONAL HOCKEY LEAGUE'S**  
22 ARENA MANAGEMENT GROUP, LLC, ) **REPLY IN SUPPORT OF**  
23 Debtors. ) **DETERMINATION THAT DEBTORS'**  
24 ) **NHL MEMBERSHIP RIGHTS MAY**  
25 ) **NOT BE TRANSFERRED TO PSE OR**  
26 ) **AN AFFILIATE THEREOF**

27 **PUBLIC VERSION**

26 This filing applies to:  
27  All Debtors  
28  Specified Debtors

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TABLE OF CONTENTS

TABLE OF AUTHORITIES ..... iii

PRELIMINARY STATEMENT..... 1

FACTUAL BACKGROUND..... 3

    A.    Events Relating to the Pittsburgh Penguins ..... 3

        1.    The August 29, 2006 Meeting at the NHL ..... 3

        2.    Events Leading Up to the December 4, 2006 Executive  
            Committee Meeting..... 4

        3.    Mr. Balsillie's Commitments at the December 4 Executive  
            Committee Meeting..... 5

        4.    Events Following the Executive Committee Meeting ..... 6

        5.    Mr. Balsillie Refuses to Follow Through on his Commitments..... 7

    B.    Events Relating to the Nashville Predators..... 8

        1.    Negotiations Leading Up to the May 15, 2007 Side Letter..... 8

        2.    The League Was Willing to Give Mr. Balsillie Another  
            Chance ..... 9

        3.    Mr. Balsillie Backtracks From His Commitments Following  
            Announcement of the Transaction .....10

    C.    Events Relating to the Phoenix Coyotes.....15

        1.    The "Side-Door" Scheme Goes Beyond the Bankruptcy Case  
            to Side-Step NHL Rules and Consent Rights .....15

        2.    Mr. Rodier Continually Threatened Mr. Moyes' Advisors that  
            they Would Lose the Team to the NHL if they Did Not Keep  
            the Deal Secret .....16

ARGUMENT .....16

    I.    The NHL's Right To Consent to Transfer of Ownership Cannot Be  
            Abrogated By Bankruptcy Code § 365(f).....16

        A.    PSE's Arguments Prove that By-Law 35 is Not an Anti-Assignment  
            Provision. ....17

            1.    By-Law 35 is Not a *Per Se* Anti-Assignment Provision. ....17

            2.    By-Law 35 is Not a *De Facto* Anti-Assignment Provision.....17

        B.    By-Law 35 and the NHL's Consent Rights are Protected by § 365(c). ....18

1  
2  
3  
4  
5  
6  
7  
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11  
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14  
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26  
27  
28

1.	Unincorporated Association and Joint Venture Law Excuses the NHL From Accepting PSE as a Buyer. ....	19
a.	Common law regarding unincorporated associations makes clear that the identity of an NHL owner is crucial. ....	19
b.	Common law regarding joint ventures also makes clear that the identity of an NHL owner is crucial. ....	22
2.	Intellectual Property Law Also Excuses the NHL From Accepting PSE as a Buyer. ....	23
II.	THE NHL DID NOT VIOLATE ANY DUTY OF GOOD FAITH AND FAIR DEALING IN REJECTING PSE AND MR. BALSILLIE. ....	25
A.	PSE Ignores the Appropriate Standard of Review. ....	25
B.	The NHL Satisfied its Duty of Good Faith and Fair Dealing. ....	26
1.	Mr. Balsillie's About Face in Pittsburgh is Not Seriously Disputed. ....	28
2.	The Board of Governors Properly Viewed Mr. Balsillie's Admitted Conduct in Nashville as Untrustworthy Behavior. ....	29
a.	The League and owners were willing to give Mr. Balsillie a second chance. ....	29
b.	Mr. Balsillie's disturbing conduct following his commitment to give Nashville a try for one year. ....	30
3.	Mr. Balsillie's Interaction with Mr. Gillett. ....	32
4.	Mr. Balsillie Is Attempting to Evade the NHL's Most Fundamental Rules Concerning Ownership and Relocation. ....	33
5.	Mr. Balsillie's Assertion That the League is Protecting the Maple Leafs' Purported "Veto Right" is Not Supported by the Record. ....	34
6.	PSE's Allegations Regarding Other Current or Prospective NHL Owners Are Irrelevant and Incomplete. ....	36
a.	Character and trustworthiness of applicant Jerry Reinsdorf. ....	36
b.	Character and trustworthiness of existing owners. ....	37
	CONCLUSION. ....	38

1 **TABLE OF AUTHORITIES**

2 **CASES**

3 In re Adelphia Communications Corp., 359 B.R. 65 (Bankr. S.D.N.Y. 2007) .....17, 21

4 In re Allentown Ambassadors, Inc., 361 B.R. 422 (Bankr. E.D. Pa. 2007) .....19, 23

5 In re Ames Department Stores, Inc., 316 B.R. 772 (Bankr. S.D.N.Y. 2004).....17

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8 (S.D.N.Y. 1939) .....19

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Nov. 30, 2001) .....26

10 Burger King v. Agad, 941 F. Supp. 1217 (N.D. Ga. 1996).....25

11 In re Catapult Entertainment, 165 F.3d 747 (9th Cir. 1999) ..... 20, 21, 24

12 Chicago Professional Sports LP v. NBA, 95 F.3d 593 (7th Cir. 1996) .....22

13 In re Crow Winthrop Operating Partnership, 241 F.3d 1121 (9th Cir. 2001) .....18

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18 186 B.R. 977 (C.D. Cal. 1995)..... 19, 21

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1983).....20, 22

1 Miller v. Glenn Miller Products, Inc., 318 F. Supp. 2d 923 (C.D. Cal. 2004), aff'd, 454  
F.3d 975 (9th Cir. 2006) .....24

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3 230 (D. Nev. 2005).....24

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1 The National Hockey League (the "NHL") hereby submits this Reply brief in support of its  
2 motion for an order determining that the Debtors' NHL membership rights may not be transferred  
3 to PSE.<sup>1</sup>

4 **PRELIMINARY STATEMENT**

5 The NHL established in its moving papers that By-Law 35 is not an anti-assignment  
6 provision under § 365(f)(1) and that, in any event, the NHL has the right to choose its owners  
7 under § 365(c) because that right is protected by common law and NHL ownership involves  
8 relationships of trust and confidence. It also established that, under applicable law of good faith  
9 and fair dealing, the Board of Governors' rejection of Mr. Balsillie was based on events occurring  
10 since his December 2006 conditional near-approval<sup>2</sup> that have made him an untrustworthy (and  
11 therefore unacceptable) potential partner in the unanimous view of the Board.

12 PSE's response, in no less than three briefs (and soon to be four),<sup>3</sup> essentially is twofold.  
13 First, notwithstanding a history of virtually unrestricted transfers of ownership of NHL teams under  
14 By-Law 35, PSE would have this Court hold that By-Law 35 is both a per se and de facto anti-  
15 assignment provision. The fact that Mr. Balsillie is the first Board-level rejection of an ownership  
16 application confirms that By-Law 35 does not prohibit or unduly restrict transfers – here, the Board  
17 had an opportunity over time to form views concerning Mr. Balsillie upon which it rendered its

18 \_\_\_\_\_  
19 <sup>1</sup> This brief relies on and hereby incorporates by reference the following declarations: Declaration of  
20 William L. Daly, filed on May 13, 2009 (Dkt. # 93); Declaration of Gary B. Bettman, filed on June 5, 2009  
21 (Dkt. # 295); Second Declaration of William L. Daly, filed on August 3, 2009 (Dkt. # 544); Declaration of  
22 Craig Leipold, filed on August 7, 2009 (Dkt. # 585); and Declaration of Jeremy M. Jacobs, filed on August  
23 7, 2009 (Dkt. # 586). It also relies on and hereby incorporates by reference the following depositions:  
24 August 19, 2009 Deposition of Jeremy Jacobs; August 20, 2009 Deposition of Gary Bettman; August 21,  
25 2009 Deposition of William Daly; August 26, 2009 Deposition of James Balsillie; August 26, 2009  
26 Deposition of Craig Leipold; August 27, 2009 Deposition of Jerry C. Moyes; and August 28, 2009  
27 Deposition of Richard Rodier.

28 <sup>2</sup> Commissioner Bettman testified that the vote on Mr. Balsillie in 2006 was conducted by facsimile and  
was never completed. (Bettman Dep. at 142-45.)

<sup>3</sup> PSE filed an "Initial Response" to the NHL Transfer Motion on August 10, 2009. (Dkt. # 608.) In  
contravention of the Court's briefing schedule and the agreement among the parties, on August 18, PSE filed  
what amounts to an opposition to the Transfer Motion, obliquely styling it as a "Motion for Determination  
that the Debtors' Interests May Be Transferred to PSE Notwithstanding the NHL's Refusal to Consent."  
(Dkt. # 701.) This "Motion" relates to exactly the same topic as the Transfer Motion and, in fact, repeatedly  
references and criticizes the Transfer Motion. PSE then filed an Opposition to the Transfer Motion on  
August 25 (Dkt. # 779), and no doubt will file a reply on its own "Motion" today.

1 decision. Nor, if necessary to resolve, can PSE avoid § 365(c) by claiming that NHL  
2 ownership does not involve personal trustworthiness – even Mr. Balsillie admits that it does – or  
3 that the NHL has no common law right (as an unincorporated association, joint venture and  
4 intellectual property owner) to choose its members. This is the law.

5 Second, PSE would have Mr. Balsillie's laudable success at Research In Motion and  
6 generous philanthropy blind this Court both to the law of good faith and fair dealing and to the  
7 significant material facts concerning Mr. Balsillie's conduct toward the NHL and certain of its  
8 members since his conditional near-approval in December 2006. While the NHL sincerely  
9 applauds Mr. Balsillie's business achievements and charitable activities, the decision under By-Law  
10 35 is about qualification to own an NHL team, the Board's decision to reject Mr. Balsillie was  
11 based on his character and integrity to own an NHL team, that is, whether the Board trusted him as  
12 a potential partner in a business where personal trust and confidence is important. On this score,  
13 Mr. Balsillie's conduct relating to the Pittsburgh Penguins, the Nashville Predators (including with  
14 respect to Mr. Leipold personally) and the Phoenix Coyotes collectively led the Executive  
15 Committee and the Board to conclude unanimously that he is not sufficiently trustworthy in their  
16 opinions to be welcome as an NHL owner.

17 Moreover, the discovery in this matter has confirmed that the Board's decision rejecting Mr.  
18 Balsillie was based on his conduct and perceived lack of trustworthiness as a business partner, and  
19 had nothing to do either with Mr. Balsillie's desire to move the Coyotes to Hamilton, or the fact  
20 that Mr. Moyes has sought the refuge of bankruptcy. Far from it; discovery more than amply  
21 confirms that Mr. Balsillie – at least in his dealings with NHL owners – has not been a man of his  
22 word, has engaged in conduct (particularly relating to Nashville) that went well beyond the bounds  
23 of propriety, and has enlisted Mr. Moyes in a scheme to circumvent the cornerstones of the NHL  
24 Constitution and By-Laws – i.e., the Board's right to choose who its members are and where its  
25 teams will be located. Not only does PSE either ignore or attempt to obfuscate these indisputable  
26 facts, it also tries to twist the legal standard into one in which the Court would replace its judgment  
27 for that of the NHL Board of Governors. Respectfully, under the applicable legal standards, the  
28 Court should not do that.

1 **FACTUAL BACKGROUND**

2 **A. Events Relating to the Pittsburgh Penguins**

3 Mr. Balsillie began negotiating for a possible purchase of the Pittsburgh Penguins in 2006.  
4 At that time, the NHL and Lemieux Group LP (the "Lemieux Group"), which owned the Penguins,  
5 were concerned about the condition of the aging Mellon Arena, the Penguins' home arena (built in  
6 1961). (Bettman Dep. at 126.) By the fall of 2006, two proposals for a new arena in Pittsburgh  
7 had emerged: the preferred Isle of Capri ("IOC") plan, under which an arena would have been  
8 built at no cost to the public or the Penguins; and the so-called "Plan B" proposal put forward by  
9 relevant governmental entities, which would have involved both public and private funding.  
10 (Bettman Dep. at 126; Jacobs Decl. Ex. A at 9-10 & n.10.)

11 **1. The August 29, 2006 Meeting at the NHL**

12 Mr. Balsillie met with Commissioner Bettman and Deputy Commissioner Daly on August  
13 29, 2006, and stated that, under either proposal, he was committed to maintaining the Penguins in  
14 Pittsburgh. (Second Daly Decl. ¶ 5, Ex. A, Ex. B at 4; Bettman Dep. at 120-26.) Specifically, Mr.  
15 Balsillie stated:

16 [E]ven [if], despite his best efforts, he was unable to 'improve' the  
17 financial parameters of 'Plan B,' and such Plan 'materialized,' he was  
18 committed to maintaining the Pittsburgh Penguins' franchise in  
19 Pittsburgh and would not, under any circumstances, seek to relocate  
the franchise to another market. (Mr. Balsillie reiterated his position  
in this regard two additional times during the course of the meeting.)

20 (Memorandum to File from Bill Daly (Aug. 30, 2006), Second Daly Decl. Ex. A at 2; Balsillie Dep.  
21 at 14-17, 48-50, 133; Bettman Dep. at 124-25.) As Mr. Balsillie's counsel later represented by  
22 letter to the League: "At the meeting at the Commissioner's office on August 29, 2006, Jim  
23 (together with Richard [Rodier]) made a commitment, in front of numerous attendees, regarding  
24 their intention to keep the Penguins in Pittsburgh which was unequivocal." (Letter from Victoria  
25 Gilbert to NHL (Nov. 7, 2006), Jacobs Decl. Ex. A (Tab 7) at 4; Balsillie Dep. at 77-79.)<sup>4</sup>

26 <sup>4</sup> The NHL was somewhat wary of Mr. Balsillie's commitment to keeping the Penguins in Pittsburgh  
27 because he had acquired an option from the City of Hamilton to bring an NHL team to Hamilton, Ontario.  
28 When questioned about this matter publicly, Mr. Balsillie had denied involvement in this option  
transaction. Mr. Balsillie's counsel later represented to the League that this option was "formally"  
terminated upon the signing of the Penguins asset purchase agreement. (Jacobs Decl. Ex. A (Tab 5) at 3;  
Bettman Dep. at 131.) Mr. Balsillie also had a conversation with Commissioner Bettman in June of 2006

(cont'd)



1 Contrary to Mr. Balsillie's descriptions of the August 29 meeting, Commissioner Bettman  
2 did not agree to remove the seven-year non-relocation provision from the standard form consent  
3 agreement that Mr. Balsillie would have to sign to purchase the Penguins. (Second Daly Decl. ¶¶  
4 3-4; Bettman Dep. at 129-31.) In fact, the provision was never even discussed at the August 29  
5 meeting. The lone document that PSE now cites to support its position that the "'7 year' language  
6 s[h]ould be taken out" of the prospective consent agreement is an email dated September 12, 2006,  
7 yet the NHL did not provide Mr. Balsillie with a draft form consent agreement, including the  
8 standard seven-year non-relocation provision, until October 25, 2006. **REDACTED**

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14 **2. Events Leading Up to the December 4, 2006 Executive Committee**  
15 **Meeting**

16 The Lemieux Group and PSE executed the Asset Purchase Agreement ("APA") on October  
17 4, 2006. Under the terms of the APA, the transaction could not close without NHL approval. Thus,  
18 Mr. Balsillie and the NHL continued discussions regarding the proposed transaction (as well as the  
19 arena situation in Pittsburgh) and the parties began negotiating over the consent agreement.  
20 **REDACTED**

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23 On October 30, 2006, Mr. Balsillie's counsel represented to the NHL that, if neither the IOC  
24 proposal nor Plan B was adopted, Mr. Balsillie was committed to following NHL rules and  
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*(cont'd from previous page)*

27 during which the Commissioner cautioned him: "unless you're prepared for the possibility that you will own  
28 the Penguins in Pittsburgh forever, you shouldn't buy the team. And he said, that's really good advice; I  
appreciate it. And then he dropped out of the bidding." (*Id.* at 163-64.)

1 procedures with respect to any potential relocation. (Letter from Victoria A. Gilbert to National  
2 Hockey League (Oct. 30, 2006), Jacobs Decl. Ex. A (Tab 5 at 3); Balsillie Dep. at 49-50.) On  
3 November 20, 2006, Mr. Balsillie told the press, "absolutely, we are committed to the city," adding  
4 that the Penguins would only leave Pittsburgh if the team was "fundamentally kicked out." (Pens  
5 To Stay Unless "Kicked Out", Jacobs Decl. Ex. A (Tab 8).) On the basis of Mr. Balsillie's  
6 representations in person to the Commissioner, by letter through his counsel, and publicly that he  
7 was committed to keeping the Penguins' franchise in Pittsburgh under either of the two alternative  
8 arena proposals, Commissioner Bettman presented the proposed transaction to the NHL Executive  
9 Committee. (Bettman Dep. at 30; Memorandum from David Zimmerman to NHL Executive  
10 Committee (Nov. 27, 2006), Jacobs Decl. Ex. A (Tab 9).)

11 3. **Mr. Balsillie's Commitments at the December 4 Executive Committee**  
12 **Meeting**

13 **REDACTED**

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15  
16 Mr. Balsillie also made several specific commitments to the Executive  
17 Committee on which the Executive Committee relied in recommending that the full Board of  
18 Governors approve the transaction: (1) if the IOC proposal failed but Plan B came to fruition, he  
19 would nevertheless remain committed to keeping the Penguins' franchise in Pittsburgh (Balsillie  
20 Dep. at 84; Jacobs Dep. at 76-83; Leipold Dep. at 39); (2) if the IOC proposal failed, and  
21 negotiations over Plan B stalled, he would permit Commissioner Bettman to negotiate with the  
22 State of Pennsylvania and Allegheny County on behalf of the Penguins (Balsillie Dep. at 84-88;  
23 Bettman Dep. at 135-39, 167-69); and (3) if both proposals failed and Mr. Balsillie were to seek to  
24 relocate the franchise outside of Pittsburgh, he would provide the League with written notice of his  
25 intent to relocate and give the League the option to buy back the franchise at the price for which he  
26 purchased the team. (Second Daly Decl. ¶¶ 8-9; Jacobs Decl. ¶ 11; Balsillie Dep. at 88-97, 102-07,  
27 111-12, 149; Bettman Dep. at 158-59; Jacobs Dep. at 64-69, 92; Leipold Dep. at 39-40.)

28 At the NHL Board of Governors meeting immediately following the Executive Committee  
interview, Commissioner Bettman reported Mr. Balsillie's confirmation to the Executive

1 Committee of his commitment to Pittsburgh and his agreement to abide and be bound by League  
2 rules and procedures regarding franchise relocation. Commissioner Bettman also reported to the  
3 Board that, "based in part on [Mr. Balsillie's] responses to questions asked of him and on  
4 representations and agreements made by Mr. Balsillie both during his interview and before,  
5 including representations and agreements made on behalf of Mr. Balsillie through his counsel, the  
6 Executive Committee had recommended approval of the proposed transaction." (December 4-5,  
7 2006 NHL Board of Governors Meeting Minutes, Jacobs Decl. Ex. A (Tab 10).) The Board of  
8 Governors did not vote on the proposed transaction at the December 4 meeting; rather, a vote by  
9 facsimile was conducted later the same week. (*Id.*) PSE repeatedly has asserted that Mr. Balsillie  
10 was "unanimously" approved for ownership of the Penguins, but in fact the vote – which was  
11 expressly conditioned on agreement on the terms of consent – was never completed. (Bettman Dep.  
12 at 142-45.)

13 **4. Events Following the Executive Committee Meeting**

14 During negotiation of the terms of NHL consent, although Mr. Balsillie indicated that he  
15 remained committed to keeping the team in Pittsburgh, he objected to the inclusion of the standard  
16 seven-year non-relocation provision because of a purported concern that such a commitment in the  
17 consent agreement would eliminate any leverage he would have to negotiate with public officials  
18 for a new arena in Pittsburgh. (Balsillie Dep. at 134-36; Bettman Dep. at 161-62; Jacobs Dep. at  
19 113.)<sup>5</sup>

20 To address this asserted concern, the NHL proposed that the League and Mr. Balsillie  
21 instead execute a confidential side letter regarding relocation-related issues, and on December 8,  
22 2006, the NHL forwarded a draft of the proposed side letter to Mr. Balsillie's counsel. (E-mail  
23 from Thomas Gowan to Victoria Gilbert (Dec. 8, 2006), Jacobs Decl. Ex. A (Tab 11); Bettman  
24 Dep. at 164-67.) The side letter memorialized various representations Mr. Balsillie or his counsel  
25 on his behalf had made to the NHL's counsel, Commissioner Bettman and/or the NHL Executive  
26 Committee, which together formed the basis of the Executive Committee's recommended approval

27 <sup>5</sup> REDACTED

1 of the proposed transaction. (Bettman Dep. at 167-69; Daly Dep. at 124-25.) On December 12,  
2 2006, Mr. Balsillie's counsel provided the NHL a mark-up of the draft side letter that, surprisingly,  
3 struck the provisions that would have evidenced Mr. Balsillie's commitment to Pittsburgh,  
4 including the provision (specifically requested by the Executive Committee and agreed to by Mr.  
5 Balsillie) that would have provided the League an option to buy the Club if Mr. Balsillie sought to  
6 relocate it. (E-mails between David Zimmerman and Victoria Gilbert (Dec. 12-13, 2006), Jacobs  
7 Decl. Ex. A (Tab 12).)

8         The next day, the League questioned these revisions, reminding Mr. Balsillie that he had  
9 "made certain commitments to the Executive Committee that were factors in the Committee's  
10 deliberations and approval of the proposed transaction, that were a basis upon which we put the  
11 proposed transaction to a vote of the full Board, and that the Executive Committee wants  
12 memorialized." (*Id.*; Daly Dep. at 124-25.) The League also reiterated that Mr. Balsillie had  
13 agreed with Commissioner Bettman to defer resolution of his issues with the consent agreement  
14 and side letter until at least December 20, at which time the governing state commission was  
15 expected to render its determinative decision regarding the IOC application for gaming license,  
16 which might have created clarity for the arena situation in Pittsburgh. (E-mails between David  
17 Zimmerman and Victoria Gilbert (Dec. 12-13, 2006), Jacobs Decl. Ex. A (Tab 12); Bettman Dep.  
18 at 332-35.)

19                 **5. Mr. Balsillie Refuses to Follow Through on his Commitments**

20         Mr. Balsillie abruptly terminated the APA on December 15, 2006, stating that "we are not  
21 prepared to be bound by a 7-year non-relocation clause, nor does the Purchase Agreement require  
22 us to agree to such a provision. The proposed Side Letter is insulting and unnecessary." (Letter  
23 from Victoria Gilbert to Lemieux Group LP and Pepper Hamilton LLP (Dec. 15, 2006), Jacobs  
24 Decl. Ex. A (Tab 13); Balsillie Dep. at 159.) The League responded on the same date to "correct  
25 the record," reiterating that the "confidential side letter merely memorializes and confirms that Jim  
26 intends to honor his commitments to the Executive Committee." (E-mails between David  
27 Zimmerman and Victoria Gilbert (Dec. 15-16, 2006), Jacobs Decl. Ex. A (Tab 14).) The League  
28

1 summarized the history of the communications and negotiations between Mr. Balsillie and the  
2 NHL with respect to the proposed transaction:

3           Your client has been treated consistently with every other  
4 recent ownership transfer. Each has been conditioned on the  
5 execution of an Owners Consent Agreement. Here, matters that  
6 ordinarily would be addressed in the Owners Consent Agreement  
7 instead were placed in a proposed confidential side letter to alleviate  
8 certain of your client's concerns. Unfortunately, your client  
9 apparently wished to backtrack on the very representations relating to  
10 his commitment to Pittsburgh that induced his recommendation for  
11 approval. In the final analysis, you proposed a compromise which  
12 you thought might work. I asked you to check with your client to  
13 confirm his agreement before we proceeded to reiterate it to Gary,  
14 and he to the Executive Committee. Instead, your client rejected  
15 your own proposed compromise and terminated the transaction,  
16 again, despite his agreement with Gary to wait until December 20.

17           In a professional sports league, owners demand of each other  
18 that, among other things, they can rely on each other to live under a  
19 common set of rules and be governed by the will of the Board.  
20 Therefore, the Executive Committee and the Board of Governors  
21 carefully examine the qualifications of potential new club owners  
22 and, in the particular circumstances of each transaction, require  
23 assurances in the Owners Consent Agreement that give the Board of  
24 Governors comfort that the new applicant will be a constructive  
25 business partner. That your client chose not to stand behind his prior  
26 statements and terminated the transaction prior to the date he agreed  
27 upon with Gary are quite relevant in that regard.

28 (Id.; Second Daly Decl. ¶ 10; Bettman Dep. at 332-35.)

17           **B. Events Relating to the Nashville Predators**

18           A few months later, Mr. Balsillie began negotiating for a potential purchase of the  
19 Nashville Predators with then-owner Craig Leipold. Although Mr. Balsillie was now more upfront  
20 about his desire to relocate the team (emails between Gary Bettman and Craig Leipold (May 8,  
21 2007), Jacobs Decl. Ex. A (Tab 15); Balsillie Dep. at 169-170, 178-80; Rodier Dep. at 131-33), Mr.  
22 Balsillie and Mr. Rodier eventually engaged in conduct that, in the eyes of the NHL Board of  
23 Governors, would later confirm that Mr. Balsillie would not be a trustworthy partner.

24           **1. Negotiations Leading Up to the May 15, 2007 Side Letter**

25           As Mr. Balsillie and Mr. Leipold negotiated throughout the spring of 2007, it became clear  
26 that Mr. Balsillie was only interested in the Predators if the team could be relocated from Nashville.  
27 A draft letter of intent between the parties forwarded by Mr. Rodier to Mr. Leipold on March 13,  
28 2007, sought to make NHL "consent to the relocation of the franchise to Southern Ontario" a

1 condition of closing to the transaction. (Email from Richard Rodier to Craig Leipold (Mar. 13,  
2 2007), attached hereto as Exhibit 2; Rodier Dep. at 137-38.)<sup>6</sup>

3 Mr. Leipold made clear throughout these negotiations however that Mr. Balsillie would be  
4 purchasing the Predators in Nashville "where is, as is," and Mr. Balsillie ultimately agreed to that.  
5 (Leipold Decl. ¶ 5; Leipold Dep. at 77; Balsillie Dep. at 169-71, 180-81; Rodier Dep. at 131-32.)  
6 The fact that Mr. Leipold planned to exercise an option in the Club's lease that would reserve its  
7 right to cancel the lease agreement with the City if average attendance did not increase during the  
8 2007-08 season did not necessarily mean that the team was certain to be relocated.<sup>7</sup> As Mr.  
9 Leipold testified, he was selling the Club as a "franchise that could potentially be moved if the City  
10 did not cure a default provision that we planned to initiate." (Leipold Dep. at 79.) Consequently,  
11 the term sheet eventually executed between the parties on May 15, 2007, included neither of Mr.  
12 Rodier's suggestions (nor any other term) to account for the risk that Mr. Balsillie may be unable to  
13 relocate the Predators to Hamilton. Instead, it outlined nothing more than an ownership transfer of  
14 the team in Nashville under its existing lease. (Term Sheet (May 15, 2007), Leipold Decl. Ex. B;  
15 Balsillie Dep. at 166-69; Rodier Dep. at 137-41.)

16 **2. The League Was Willing to Give Mr. Balsillie Another Chance**

17 Thereafter, Mr. Leipold began discussing the proposed transaction with various members of  
18 the NHL Executive Committee and Board of Governors, as well as Commissioner Bettman. There  
19 was general support for the proposed sale with the understanding that Mr. Balsillie would commit  
20 to respecting League rules and procedures regarding franchise relocation. (See Leipold Dep. at  
21 227-28; Bettman Dep. at 192-95; Daly Dep. at 104-09.) Mr. Leipold laid out for Mr. Balsillie a  
22 "roadmap" as to how he should approach the NHL approval process, including: (1) apologizing for  
23

24 <sup>6</sup> On May 2, 2007, Mr. Rodier suggested to Mr. Leipold another draft provision for the letter of intent that  
25 would have committed the parties to enter into a side letter with an option for the League to buy back the  
26 franchise from Mr. Balsillie if he were to apply to relocate the team and not receive Board of Governors  
approval: "This would put [Mr. Balsillie] in the same position that the NHL wanted him in on the  
Pittsburgh deal . . ." (See Email from Richard Rodier to Chris Whitson (May 2, 2007), attached hereto as  
Exhibit 3; Rodier Dep. at 228-29.)

27 <sup>7</sup> Mr. Leipold never stated that either Commissioner Bettman or the NHL Executive Committee "are in full  
28 support that the market is 'hopeless' and support relocating the team out of Nashville." Leipold Dep. at 88-  
91.

1 any misunderstandings involved with the Penguins situation; (2) acknowledging that he was  
2 applying for the purchase of the Predators in Nashville; (3) observing that Mr. Leipold was  
3 exercising the default clause in the team's lease; (4) but acknowledging that that any discussion  
4 regarding relocation would come only after the Board of Governors had approved Mr. Balsillie as  
5 an owner; and (5) stating that Mr. Balsillie would again meet with the NHL Executive Committee  
6 and Board of Governors to get their support. (Email from Craig Leipold to James Balsillie (May  
7 17, 2007), attached hereto as Exhibit 4; Balsillie Dep. at 261-62; Rodier Dep. at 155; Leipold Dep.  
8 at 235-38, 241-46.) Mr. Balsillie, however, did not follow these suggestions. (See Balsillie Dep. at  
9 262; Bettman Dep. at 192-95; Rodier Dep. at 155-57; Leipold Dep. at 238.)

10 In late May, 2007, League officials spoke with Mr. Balsillie regarding his intentions with  
11 respect to the Predators. Mr. Balsillie inquired whether the League would consider the conditional  
12 approval of a relocation of the franchise. (Bettman Dep. at 200-01.) The League informed Mr.  
13 Balsillie that, given the Predators' valid, thirty-year lease in Nashville, which may have been  
14 subject to default notice (based on home game attendance over the past two seasons) and cure  
15 provision over the course of the next season, it was premature to have any discussion regarding a  
16 proposed relocation of the franchise. (Id.) The League also expressed concern that discussion of a  
17 potential relocation could undermine efforts to sell tickets and build support for the Predators in  
18 Nashville. (Id.) In response, Mr. Balsillie represented to the League that, if approved as an owner,  
19 he would attempt in good faith to make the franchise successful in Nashville, but indicated that he  
20 did not believe this would be possible in the team's current market. (Balsillie Dep. at 176-77, 197-  
21 98; Bettman Dep. at 172-75; Daly Dep. at 105-09; Rodier Dep. at 176-77.)

22 Based on Mr. Balsillie's representations to Mr. Leipold and the NHL that he was committed  
23 to purchase the Predators in Nashville on a "where is, as is" basis and attempt in good faith to make  
24 the team successful in Nashville, Mr. Leipold exercised his right to make the term sheet binding  
25 and announced the deal publicly. (Leipold Dep. at 154-55.)

26 **3. Mr. Balsillie Backtracks From His Commitments Following**  
27 **Announcement of the Transaction**

28 Mr. Balsillie refused to deposit the \$10 million fee that would have given the parties a  
binding agreement. (Leipold Decl. Ex. A at II.F & G; Leipold Dep. at 154-55.) Mr. Rodier then

1 sent Mr. Leipold a proposed asset purchase agreement on May 24 that directly contradicted the  
2 Term Sheet in material respects, including Balsillie's commitments to purchase the team "where is,  
3 as is" and to make a good faith effort in Nashville for at least the upcoming season. (Leipold Dep.  
4 at 230-31.) He also insisted that the asset purchase agreement include NHL consent to relocation  
5 as a condition to closing. (Leipold Decl. Ex. A at II.B; Balsillie Dep. at 170-71; Leipold Dep. at 65,  
6 229-30.)

7 Mr. Leipold met with Mr. Balsillie on June 4, 2007, in Waterloo, Ontario, in an attempt to  
8 work out these issues and save the transaction. (Balsillie Dep. at 181; Leipold Dep. at 173-75.) At  
9 this meeting, however, it became increasingly clear that Mr. Balsillie would be unwilling to abide  
10 by these commitments or the applicable NHL rules and procedures. (Leipold Dep. at 173-75.) Mr.  
11 Rodier (in the presence of Mr. Balsillie and Mr. Leipold's attorney) threatened that the Canadian  
12 Competition Bureau would investigate the NHL if Mr. Leipold refused to close the transaction on  
13 these terms. (Balsillie Dep. at 181-82; Leipold Decl. Ex. A at II.G; Leipold Dep. at 67, 173-75,  
14 259-61.)

15 Mr. Leipold continued to request that Mr. Balsillie put the deposit in escrow and make the  
16 term sheet binding, but Mr. Balsillie pressed for a new agreement to shift the risk with respect to  
17 any cure by Nashville under the lease and NHL consent to relocation to Mr. Leipold. (Leipold  
18 Decl. Ex. A at II.F-G; Leipold Dep. at 230.) Frustrated by Mr. Balsillie's divergence from the  
19 representations and commitments on which the transaction had been based (and which were  
20 embodied in the Term Sheet), Mr. Leipold telephoned Mr. Rodier on June 10, 2007, to inform him  
21 that the transaction would be abandoned. (Leipold Decl. Ex. A at III.C; Leipold Dep. at 175-76,  
22 231-32.) Mr. Rodier reacted by threatening Mr. Leipold with personal liability as the result of a  
23 Canadian Competition Bureau investigation into the transaction and asserting that Mr. Leipold and  
24 other NHL owners would spend the winter in Ottawa answering questions. (Leipold Decl. Ex. A at  
25 III; Leipold Dep. at 177, 232.)<sup>8</sup>

26 \_\_\_\_\_  
27 <sup>8</sup> Mr. Leipold would soon hear from the Canadian Competition Bureau on June 14, and was interviewed by  
28 it on October 18, 2007. (Leipold Decl. Ex. A at III.D-E; Leipold Dep. at 180-84.) The Competition Bureau  
ultimately found that the NHL acted reasonably and lawfully with respect to the Nashville transaction.  
(Canadian Competition Bureau Backgrounder at 4 (Mar. 31, 2008) (emphasis added), Daly Decl. Ex. I.)



1 The next day, knowing that the transaction was dead and without Mr. Leipold's prior  
2 knowledge or consent, Mr. Balsillie submitted to the League an incomplete application for transfer  
3 of ownership of the Predators that requested approval of a "conditional" relocation to an  
4 undisclosed location in Southern Ontario subject to termination of the Predators' lease in Nashville.  
5 (Balsillie Dep. at 174-76; Leipold Decl. ¶ 6 n.1; Leipold Dep. at 232, 261-62.) Mr. Balsillie did  
6 not include a specific relocation site, a formal application for transfer of franchise location or the  
7 supporting materials that would need to be considered to evaluate such an application under NHL  
8 By-Law 36, but requested that the League act on both requests in nine days at the June 20, 2007  
9 Board of Governors meeting. On June 12, 2007, the League informed Mr. Balsillie that it could  
10 not consider his application at that meeting because, among other things, the League could not  
11 commence its review process until his application was complete, League rules required ten days  
12 written notice prior to any vote on a transfer of ownership, and League rules do not provide for  
13 "conditional" consents to transfer of a franchise's location, let alone to an unspecified site. (Letter  
14 from Thomas Gowan to Victoria Gilbert (June 12, 2007), Jacobs Decl. Ex. A (Tab 16).)

15 On June 13, 2007, Mr. Balsillie informed Commissioner Bettman that on June 14 – the very  
16 next day – he would be soliciting "refundable deposits for season tix for a Hamilton team." (E-  
17 mails between Jim Balsillie and Gary Bettman (June 13-14, 2007), Jacobs Decl. Ex. A (Tab 18);  
18 Balsillie Dep. at 192-200; Rodier Dep. at 176-81.) Mr. Balsillie explained that he was doing so "to  
19 demonstrate the viability of the market in the contingent event that the Nash lease terminates  
20 before it expires and for no other reason." (*Id.*) Commissioner Bettman responded that same day  
21 and counseled against Mr. Balsillie's proposal:

22 Concern has been expressed from a number of owners with  
23 regard to your recent actions, which appear to undermine the stability  
24 of NHL hockey in Nashville. Your e-mail of earlier today, I believe,  
25 will exacerbate these concerns because your encouragement of the  
26 sale of tickets anywhere other than Nashville clearly sends another  
27 discouraging message to the fans and business partners in Nashville  
and hardly is consistent with a representation that you would try, in  
good faith, to make it work in Nashville. Your activities may have  
the effect of the Board calling into question your bona fides as a  
good business partner willing to abide by League procedures and  
rules and acting in the best interest of the League.

28 In short, my best advice to you is to focus solely on  
completing your ownership application and the process of seeking

1 approval as a qualified owner. I am surprised that this is the first I've  
2 heard from you since you cancelled the meeting we had scheduled on  
June 4. Please let me know if I can be helpful in any other way.

3 (E-mails between Jim Balsillie and Gary Bettman (June 13-14, 2007), Jacobs Decl. Ex. A (Tab 18);  
4 Balsillie Dep. at 201-03.) That same day, without Mr. Leipold's knowledge or permission, Mr.  
5 Balsillie and the City of Hamilton publicly announced that they had reached an agreement that  
6 would commit Mr. Balsillie to move the Predators to Hamilton if he purchased the franchise and  
7 decided to move the team. (Leipold Dep. at 262.)

8 Also on the same day, in response to the question from Mr. Leipold, "Is there anything else  
9 that I need to know about?," Mr. Balsillie stated that he planned to begin selling season tickets in  
10 Hamilton. (Leipold Dep. at 280.) When Mr. Leipold told him not to do it, Mr. Balsillie responded  
11 that it was "too late. It's already in the newspaper." (*Id.* at 281.) The following day, Mr. Balsillie  
12 and the City of Hamilton began soliciting refundable deposits for season tickets in Hamilton based  
13 on a possible future relocation of the Nashville Predators. (Leipold Decl. ¶ 8; Balsillie Dep. at 188;  
14 Rodier Dep. at 176; Leipold Dep. at 280-81.) Without Mr. Leipold's knowledge or permission, Mr.  
15 Balsillie utilized the Predators' trademarked logo in soliciting these ticket deposits. (Leipold Decl.  
16 ¶ 8 & Ex. A at II.G.11; Balsillie Dep. at 203-10; Rodier Dep. at 187-90; Leipold Dep. at 262.)

17 On June 15, 2007, Mr. Leipold served his notice of default and cure on the City of  
18 Nashville in the hope that it would spur interest in the City in keeping the Club but allowing Mr.  
19 Leipold the ability to terminate the lease if the City did not cure the attendance shortfalls. (Letter  
20 from Edward Lang to Kevin Lavender (June 15, 2007), attached hereto as Exhibit 5; Daly Dep. at  
21 141-46; Leipold Dep. at 233, 265-68.)

22 Upon learning of these events, the League again cautioned Mr. Balsillie that his  
23 representations and subsequent actions would be evaluated by the Member Clubs in determining  
24 whether to accept him as one of their partners, stating that:

25 [T]here can be no doubt based on your statements and Mr. Balsillie's  
26 actions to date that he has no interest in owning the Predators if they  
27 remain in Nashville and has no intention of making a good faith,  
28 bona fide effort to make the Club succeed in Nashville. Instead, Mr.  
Balsillie's actions have been inconsistent with any attempt on his part  
to make the Predators successful in Nashville and appear to be taken  
with the purpose and effect of making it highly unlikely that  
Nashville will be able to cure any alleged default under the lease.

1 Before his ownership application has been voted on by the Board and  
2 before he even has concluded a definitive agreement to buy the  
3 Predators, Mr. Balsillie (or persons on his behalf) has had discussions  
4 with other locations, has apparently signed some type of contract in  
5 Hamilton, and has even offered season tickets for sale (using NHL  
6 and Club trademarks without the NHL's permission). . . .  
7 Significantly, Mr. Balsillie has done nothing in Nashville to  
8 encourage the community to support the Club. Each of these actions  
9 and inactions are inconsistent with any effort to make the team  
10 successful in Nashville and instead appear calculated to destabilize  
11 the team's relationship with the City, its fans, its business partners,  
12 and other constituents, seemingly in an attempt to make sure the  
13 lease contingency occurs.

8 . . .

9 We believe it is fair to assume that in large measure most  
10 prospective owners apply to join the League because of their interest  
11 in NHL hockey and their commitment to the League as a whole. The  
12 Commissioner has repeatedly assured Mr. Balsillie that if the lease is  
13 terminated and it is then clear that NHL hockey will not work in  
14 Nashville he will be free to apply for relocation of the Club.  
15 Unfortunately, Mr. Balsillie appears to be impatient with the  
16 League's process and decided to unilaterally engage in a series of  
17 actions that are at odds with the interests of his prospective partners  
18 and the League's overall business interests. Mr. Balsillie appears to  
19 be doing his best to destabilize the Predators. Mr. Balsillie should  
20 keep in mind that his actions, including his failures to honor  
21 numerous commitments and representations he has made over the  
22 past year to the Commissioner and the Executive Committee, as well  
23 as his apparent unwillingness to comply with League rules and act in  
24 the interests of the League as a whole, will be evaluated by the  
25 Member Clubs in determining whether to accept Mr. Balsillie as one  
26 of their partners.

18 (Letter from Thomas Gowan to Victoria Gilbert (June 19, 2007), Jacobs Decl. Ex. A (Tab 20).)

19 The Board of Governors did not consider the proposed ownership transaction or the  
20 proposed relocation transaction at its meeting on June 20, 2007, because, among other things, Mr.  
21 Balsillie and Mr. Leipold had not agreed to a binding contract, Mr. Balsillie had not submitted a  
22 properly executed and completed ownership transfer application, and there remained an existing  
23 and valid lease in place in Nashville. (Minutes from June 20, 2007 NHL Board of Governors  
24 Meeting, Jacobs Decl. Ex. A (Tab 21).) Further, on June 22, 2007, Mr. Leipold informed the  
25 League that he had been unable to finalize an agreement with Mr. Balsillie, and requested that the  
26 League take no further action with respect to the application for ownership transfer and "simply  
27 disregard" the request for conditional approval of relocation. (Letter from Christopher Whitson to  
28 David Zimmerman (June 22, 2007), Jacobs Decl. Ex. A (Tab 22); Leipold Dep. at 232.)

1 Mr. Leipold subsequently learned that in 2005 Mr. Rodier had contacted Nashville city  
2 officials to raise an issue regarding the Predators' potential default under a specific term of its lease  
3 agreement with the city. (Leipold Decl. ¶ 3 & Ex. A at I; Leipold Dep. at 61-73; Rodier Dep. at  
4 119-20.) Around the same time in 2005, three newspaper articles (all by the same author) appeared  
5 in the Toronto Globe & Mail regarding the Predators' potential default, and Mr. Rodier contacted  
6 Mr. Leipold to inquire about his interest in selling his franchise to Mr. Balsillie. (Leipold Decl. ¶  
7 & Ex. A at I.D; Leipold Dep. at 61-73.)

8 **C. Events Relating to the Phoenix Coyotes**

9 Rather than follow League rules with respect to a purchase of the Coyotes, Mr. Balsillie  
10 engaged in secret negotiations to buy the Club and convinced Mr. Moyes to file this bankruptcy  
11 case on May 5, 2009 specifically to avoid the NHL's consent rights.

12 **1. The "Side-Door" Scheme Goes Beyond the Bankruptcy Case to Side-  
13 Step NHL Rules and Consent Rights**

14 The NHL does not deny or even disfavor a Club's right to restructure its contracts or effect  
15 a sale to a new owner through the bankruptcy process. In fact, a number of teams have  
16 successfully progressed out of financial difficulty through bankruptcy, including the Ottawa  
17 Senators, Buffalo Sabres and the current Stanley Cup Champion Pittsburgh Penguins. (Daly Dep.  
18 at 185; Jacobs Dep. at 134.) However, PSE's Asset Purchase Agreement with Mr. Moyes was  
19 expressly conditioned on a sale to Mr. Balsillie and the relocation of the Phoenix Coyotes to  
20 Southern Ontario, both of which were to be effectuated by court order if the League did not consent.  
21 And Mr. Balsillie was well aware from the above-cited documents that he might have a problem  
22 being approved by the Board of Governors as an owner. As Mr. Balsillie told the press on May 15,  
23 2009, "I spent five years looking for a front door. . . . We couldn't find a front door. I found a side  
24 door." (Balsillie Comes Out Swinging, Jacobs Decl. Ex. A (Tab 28).) Similarly, Mr. Rodier told  
25 the press on May 19, 2009, that his and Mr. Balsillie's "strategy is to buy an NHL team out of  
26 bankruptcy and then move it over the league's objections, by winning an antitrust lawsuit if  
27 necessary." (Balsillie Not Easily Dissuaded, Jacobs Decl. Ex. A (Tab 29); City's NHL Mystery  
28 Man Unveiled?, Jacobs Decl. Ex. A (Tab 30).)



1 This, of course, is not the law. Nor does the fact that Mr. Balsillie may be the first applicant to be  
2 rejected at the Board level under By-Law 35 make that provision a de facto anti-assignment clause.  
3 This does not prove that By-Law 35 "effectively bars assignment" to prospective purchasers, it  
4 merely highlights that there must be something unique with respect to Mr. Balsillie – an issue of  
5 good faith and fair dealing perhaps, that led to his rejection.

6 **A. PSE's Arguments Prove that By-Law 35 is Not an Anti-Assignment Provision.**

7 **1. By-Law 35 is Not a *Per Se* Anti-Assignment Provision.**

8 As the NHL demonstrated in its moving papers, By-Law 35 is not an anti-assignment  
9 provision on its face. Rather, it is merely a consent right, based in part on the character and  
10 integrity of the prospective buyer, that PSE and the Debtors have argued acts to restrict assignment.  
11 "In cases where the provision restricts assignment (as contrasted to cases, for example, where the  
12 provision prohibits assignment, or conditions it on payment of a price), the Court does not apply a  
13 per se test. A bankruptcy court retains discretion in determining whether a provision in an  
14 executory contract hinders the possibility of assignment to a sufficient degree to render it  
15 unenforceable." In re Adelphia Commc'ns Corp., 359 B.R. 65, 86 n.71 (Bankr. S.D.N.Y. 2007)  
16 (emphasis added).

17 **2. By-Law 35 is Not a *De Facto* Anti-Assignment Provision.**

18 The parties (and the Court) agree that § 365(f)(1) is used to "not enforce contract terms  
19 effectively barring assignment." (PSE Transfer Mot. at 4 (quoting 6/15/09 Op. at 8).) The Court  
20 has discretion to determine whether a contract provision hinders the possibility of assignment to a  
21 sufficient degree to render it unenforceable – e.g., that it prevents the bankruptcy estate from  
22 realizing the full value of the assets to be sold; however, "the modification of a contracting party's  
23 rights is not to be taken lightly." In re Ames Dep't Stores, Inc., 316 B.R. 772, 795 (Bankr. S.D.N.Y.  
24 2004) (because restriction in lease prohibited only one of the many uses to which the property  
25 could be put, it did not materially limit assignment and would not be invalidated under 365(f)); In  
26 re Fleming Cos., 499 F.3d 300, 305 (3d Cir. 2007) ("[A] bankruptcy court . . . must be sensitive to  
27 the rights of the non-debtor contracting party . . . and the policy requiring that the non-debtor  
28 receive the full benefit of his or her bargain.") (alteration in original).

1 Here, the contract term that allegedly bars assignment is By-Law 35, and specifically the  
2 discretion given to the Board of Governors to reject a proposed owner based on its assessment of  
3 his character and integrity (or lack thereof). Yet the character and integrity component of By-Law  
4 35 has never before been an impediment to an owner's ability to sell a Club. As PSE has argued at  
5 length, "a lack 'of good character and integrity' has never before been invoked, in the entire history  
6 of the NHL, to reject any applicant." (PSE Transfer Mot. at 11 (emphasis in original).)<sup>9</sup> Indeed,  
7 even with respect to the sale of the Coyotes, the Board of Governors conditionally approved a  
8 different bidding group that proposed to purchase the team (and is still considering another),  
9 finding that the principal owners passed By-Law 35's character assessment. Moreover, in just the  
10 past three years, six different NHL teams have changed hands (with each of the new owners  
11 passing the character screen of By-Law 35) for prices ranging from \$153 million to \$260 million.  
12 Thus, based on PSE's own assertions, By-Law 35 does not effectively bar assignment and cannot  
13 be excised from the NHL Constitution and By-Laws pursuant to 365(f)(1).<sup>10</sup>

14 **B. By-Law 35 and the NHL's Consent Rights are Protected by § 365(c).**

15 Even if the Court were to deem By-Law 35 an anti-assignment provision, it cannot be  
16 excised from the Constitution and By-Laws because it is protected by the exception to § 365(f)  
17 contained in § 365(c). Under § 365(c), a contract may not be assumed and assigned if applicable  
18 law excuses the acceptance of performance by an entity other than the debtor. It is hornbook law

19  
20 <sup>9</sup> See also Bettman Dep. at 40 ("[T]he League has never, in my 17 years, voted somebody down before"  
21 on the basis of character and integrity.); Jacobs Dep. at 29-31.

22 <sup>10</sup> The cases cited by PSE are not to the contrary. In each of them, the court found that the clause at issue  
23 made it essentially impossible for the contract to be assigned. See In re Crow Winthrop Operating P'ship,  
24 241 F.3d 1121, 1124 (9th Cir. 2001) (provision providing that parking and management services would  
25 terminate upon sale of property was a de facto anti-assignment clause because it would have "significantly  
26 reduced, if not altogether eliminated" the value of the property); In re Rickel Home Centers, Inc., 209 F.3d  
27 291, 295-96 (3d Cir. 2000) (restriction requiring that leased premises be operated as home improvement  
28 centers was a de facto anti-assignment clause because the market for such home improvement centers was  
"either non-existent or in dire straits," rendering it impossible to assign debtor's lease); In re Peaches  
Records and Tapes, Inc., 51 B.R. 583, 590 (9th Cir. BAP 1985) (clause providing for cancellation of  
debtor's lease if debtor were to cease doing business on leased premises would be unenforceable under §  
365(f) because it would prevent debtor from assigning its lease to another party upon debtor's sale of its  
business). As shown in the NHL's moving papers, By-Law 35 does not suppress the value of the Coyotes in  
Glendale, which is the current and only territory where the team is authorized to play. (NHL Transfer Mot.  
at 8-9.)

1 that § 365(c) applies not only to pure personal service contracts, but also to contracts based "upon  
2 personal trust or confidence." 3 Collier on Bankruptcy ¶ 365.06 (Alan N. Resnick & Henry J.  
3 Somme reds., 15th ed. Rev. 2009). Here, applicable law relating to unincorporated associations  
4 and joint ventures, as well as intellectual property, makes clear that the identity of the contracting  
5 party is crucial, thereby allowing the NHL to reject performance by PSE.

6           1.       **Unincorporated Association and Joint Venture Law Excuses the NHL**  
7                   **From Accepting PSE as a Buyer.**

8           PSE does not dispute that § 365(c) protects contracts in which personal trust and confidence  
9 are so important to the relationship that applicable law precludes delegation of performance under  
10 the contract. Rather, it makes two erroneous arguments regarding §365(c)'s scope. First, it  
11 incorrectly asserts that the "applicable law" referred to in § 365(c) must be "statutory law." (PSE  
12 Mot. at 6; PSE Opp'n at 5-6 & n.7; see also Debtors Sale Mem. at 57 (no "ordinance or statute  
13 limiting assignment").) The cases it cites, however, make clear that the "applicable law" also can  
14 be common law. See, e.g., In re Allentown Ambassadors, Inc., 361 B.R. 422, 448 n.61, 454 (Bankr.  
15 E.D. Pa. 2007) (a bankruptcy court evaluating an executory contract under § 365(c)(1) must  
16 "determine whether applicable law (be it statutory or common law) precludes the assignment of the  
17 contract without the consent of the non-debtor") (emphasis added); Ford Motor Co. v. Claremont  
18 Acquisition Corp., Inc. (In re Claremont Acquisition Corp.), 186 B.R. 977, 984 (C.D. Cal. 1995)  
19 ("[W]here federal or state statutory or common law prohibits assignment of certain types of  
20 agreements, even when these agreements are silent on the issue of assignment, it is appropriate to  
21 apply these laws in a bankruptcy proceeding.") (emphasis added). Second, PSE incorrectly asserts  
22 that the "personal trust and confidence" contracts are limited to those that are "not in any way  
23 commercial." (PSE Mot. at 6; PSE Opp'n at 5-6.) As discussed below, that assertion is just as  
24 easily discarded.

25                   a.       **Common law regarding unincorporated associations**  
26                           **makes clear that the identity of an NHL owner is crucial.**

27           There is no dispute that the NHL is a joint venture organized as an unincorporated  
28 association. Pursuant to long-standing principles of common law, unincorporated associations  
(like the NHL) have the "sole power to say who shall belong and who shall not." Arnstein v. Am.



1 Soc'y of Composers, Authors & Publishers, 29 F. Supp. 388, 393 (S.D.N.Y. 1939) (voluntary  
2 unincorporated association has right to refuse plaintiff's attempt to join association). "Membership  
3 in a voluntary unincorporated association generally is held to be a privilege which may be accorded  
4 or withheld, and not a right which can be gained independently and then enforced. Generally,  
5 courts will not compel admission to a voluntary association." 6 Am. Jur. 2d Associations and  
6 Clubs § 17 (2008) (emphasis added). More specifically, courts have repeatedly recognized that the  
7 governing bodies of sports leagues have the right to choose their fellow owners. See generally  
8 Levin v. NBA, 385 F. Supp. 149, 151-53 (S.D.N.Y. 1974) (recognizing the NBA's right to exclude  
9 potential owners who the NBA Board of Governors was "unwilling to accept"); Fishman v. Estate  
10 of Wirtz, 807 F.2d 520, 562 (7th Cir. 1986) (same); Mid-S. Grizzlies v. NFL, 550 F. Supp. 558,  
11 (E.D. Pa. 1982) (recognizing the NFL's right to deny access to membership to particular  
12 individuals or their business entities), aff'd, 720 F.2d 772, 788 (3d Cir. 1983).

13         These principles have been applied to prevent a trustee from assigning a debtor's  
14 membership in a country club, because relevant common law "does not want the courts involved in  
15 the internal workings of associations when those associations have rationally developed rules and  
16 procedures." In re Magness, 972 F.2d 689, 696 (6th Cir. 1992). PSE asserts that Magness is  
17 irrelevant because the contracts at issue were "not in any way commercial," whereas the  
18 relationship between and among the NHL and its owners allegedly is "purely business and does not  
19 require any specific personal attributes or social connections." (PSE Transfer Mot. at 6.) As an  
20 initial matter, § 365(c) clearly is not limited to contracts that are "not in any way commercial."  
21 There are innumerable cases applying § 365(c) to prevent assignment of contracts that involve  
22 commercial interests. See, e.g., In re Schick, 2235 B.R. 318, 321-24 (Bankr. S.D.N.Y. 1999)  
23 (prohibiting assignment of limited partnership in a Manhattan apartment building over the  
24 objection of the general partner because relevant partnership law recognizes the fundamental  
25 concept "that partners may choose with whom they wish to be associated," and that concept would  
26 be violated by admission of a new member over the current partners' objection); In re Catapult  
27 Entertainment, 165 F.3d 747 (9th Cir. 1999) (a nonexclusive patent license granted to a company

28



1 assigned); cf. In re Antonelli, 148 B.R. 443, 449 (D. Md. 2002) (partnership interest in "matured"  
2 real estate project was assignable over the objections of the other partners because the duties which  
3 the partners must continue to perform were not substantial).

4 **b. Common law regarding joint ventures also makes clear**  
5 **that the identity of an NHL owner is crucial.**

6 As discussed above, there is no dispute that the NHL is a joint venture of its 30 member  
7 teams in the creation and production of NHL Hockey. (Bettman Decl. ¶ 2; Chicago Prof'l Sports  
8 LP v. NBA, 95 F.3d 593, 599 (7th Cir. 1996).) It is well-established that courts will look to  
9 partnership law to determine the rights of the members of a joint venture, including specifically  
10 professional sports leagues:

11 [A] league is more like a partnership. While each club initially  
12 contributes its own capital, the various participants to a large extent  
13 share in the joint profits of the venture. This participation in profits  
14 is achieved through various arrangements, such as the pooling of  
15 television receipts . . . between home and visiting clubs. Thus, a  
16 decision on access to membership is basically a decision as to  
17 whether particular individuals (or their business entities) will be  
18 allowed to participate in the partnership venture.

19 Mid-S. Grizzlies, 550 F. Supp. at 568 (emphasis added); see also Lutheran Gen. Hosp., Inc. v.  
20 Printing Indus. of Ill./Ind. Employee Benefit Trust, 24 F. Supp. 2d 846, 851 (N.D. Ill. 1998)  
21 ("Partnership principles govern joint ventures and the rights and liabilities of the members of a  
22 joint venture are tested by the same legal principles which govern partnerships."); Gramercy  
23 Equities Corp. v. Dumont, 531 N.E.2d 629, 632 (N.Y. 1988); 46 Am. Jur. 2d Joint Ventures § 2  
24 (2009).

25 Courts have regularly cited partnership law to hold that partnership interests cannot be  
26 assigned in bankruptcy. See In re Schick, 235 B.R. 318, 323-24 (Bankr. S.D.N.Y. 1999)  
27 (upholding a state law restricting the assignability of limited partnership interests where the  
28 statute's underlying rationale was founded on personal considerations); In re Sunset Developers, 69  
B.R. 710, 713 (Bankr. D. Idaho 1987) ("A partnership agreement is a contract based on personal  
trust and confidence, which cannot be assigned or assumed without consent of the parties."); Skeen  
v. Harms (In re Harms), 10 B.R. 817, 821 (Bankr. D. Colo. 1981) ("A partnership agreement

1 creates a fiduciary relationship among the members of the partnership. It is a contract based upon  
2 personal trust and confidence.").

3 PSE relies on In re Allentown Ambassadors for the proposition that, under § 365(c), it does  
4 not matter who owns a professional sports team. That is simply incorrect. Although Allentown  
5 Ambassadors involves a sports league, its similarity to this case ends there. In Allentown  
6 Ambassadors, the applicable law on which the member teams relied for their § 365(c) argument  
7 was North Carolina LLC law, which provided that a membership interest "is assignable in whole or  
8 in part." Id. at 455 (emphasis in original). Since that law did not unequivocally excuse the LLC  
9 from accepting performance from an assignee, the court did not reach a conclusion as to whether  
10 personal trust and confidence among the members of the LLC was important to the business. See  
11 id. at 456-57. By contrast here, the relevant common law of unincorporated associations, joint  
12 ventures and partnerships, particularly as applied to professional sports leagues, makes clear that  
13 the League has the absolute right to determine who its owners are. Moreover, the evidence here is  
14 overwhelming that the other members of the League have great concern over the identity of their  
15 fellow owners. See supra pp. 14-17.

16 Accordingly, because applicable law relating to partnerships like the NHL joint venture  
17 prohibits assignment of a member's interest precisely because the identity of a partner's members is  
18 material, the Court cannot assign Mr. Moyes' interest in the Coyotes to PSE over the NHL's  
19 objection.

20 **2. Intellectual Property Law Also Excuses the NHL From Accepting PSE**  
21 **as a Buyer.**

22 Debtors claim that the NHL does not own any of the League's copyright and trademark  
23 rights – e.g., the NHL Shield and the Stanley Cup logo ("League Marks") – because it is an  
24 unincorporated association. Thus, the Debtors are taking the rather startling position that  
25 intellectual property law would not allow the League or the other twenty-nine clubs to prevent Mr.  
26 Moyes from simply assigning the NHL Shield, the Stanley Cup or the use of all the other League  
27 and club marks to a third party. (Debtors Sale Mem. at 58-65.)

28 Debtors' position is neither factually nor legally correct. As an initial matter, Debtors  
ignore the fact that the League is organized as a joint venture. See Madison Square Garden, L.P. v.

1 Nat'l Hockey League, No. 07 CV 8455(LAP), 2008 WL 4547518, at \*1 (S.D.N.Y. Oct. 10, 2008)  
2 ("The NHL is an unincorporated association of thirty Member Clubs organized as a joint venture." ).  
3 In its capacity as a joint venture, the NHL can own rights to intellectual property, including  
4 trademarks, independently of its member clubs. See In re Hercofina, 207 USPQ 777, 782 (TTAB  
5 1980) (Trademark Board recognized that a joint venture itself can act as the user, owner and  
6 registrant of a trademark).

7       Moreover, the license agreements between the NHL and NHL Enterprises ("NHLE"), and  
8 between NHLE and the thirty teams, both are premised upon and specifically confirm the League's  
9 ownership of those rights. (Daly Decl. Ex. C at 1, 9; License Agreement between Member Clubs  
10 of the NHL and NHL Enterprises, L.P., at 1, attached hereto as Exhibit 12.) Moreover, the League  
11 Marks are registered to the NHL (Daly Decl. Ex. C at 11), and NHLE pays the League royalties for  
12 use of the League Marks. (Id. at 4-5.) Thus, absent the NHL's (and other twenty-nine clubs')  
13 consent, the Debtors cannot assign the League's copyright and trademark rights that have been  
14 licensed to the Coyotes. The Ninth Circuit has clearly stated that federal law prohibits the  
15 assignment of both copyright and trademark licenses without the owner's consent. See Gardner v.  
16 Nike, Inc., 279 F.3d 774, 780 (9th Cir. 2002) (Copyright Act of 1976 bars a licensee from sub-  
17 licensing without the licensor's consent, based on strong policy reasons favoring a licensor's ability  
18 to monitor the use of its copyright); Miller v. Glenn Miller Prods., Inc., 318 F. Supp. 2d 923, 937  
19 (C.D. Cal. 2004) (applying the Gardner policy rationale to trademarks, especially in light of the  
20 Lanham Act's requirement that a trademark owner control the quality of goods sold under its mark),  
21 affd., 454 F.3d 975 (9th Cir. 2006).

22       Bankruptcy courts have consistently invoked copyright and trademark law as "applicable  
23 law" under § 365(c)(1) to restrict the transfer of intellectual property licenses. See In re Catapult,  
24 165 F.3d at 752 n.4 (preventing a trustee from assigning nonexclusive patent rights over the patent-  
25 holder's objection because "the federal law principle against the assignability of nonexclusive  
26 patent licenses is rooted in the personal nature of a nonexclusive license – the identity of a licensee  
27 may matter a great deal to the licensor."); RCI Tech. Corp. v. Sunterra Corp. (In re Sunterra Corp.),  
28 361 F.3d 257, 262 (4th Cir. 2004) (copyright law excused owner of a nonexclusive software license

1 from accepting performance from an entity other than the debtor licensee); N.C.P. Mktg. Group,  
2 Inc. v. Blanks (In re N.C.P. Mktg. Group, Inc.), 337 B.R. 230, 237 (D. Nev. 2005) (under federal  
3 common law, trademarks are personal and non-assignable without the consent of the licensor); In  
4 re Patient Educ. Media, Inc., 210 B.R. 237, 242 (Bankr. S.D.N.Y. 1997) ("The federal policy  
5 designed to protect the limited monopoly of copyright owners and restrict unauthorized use  
6 constitutes applicable nonbankruptcy law. It prevents the trustee from assigning the nonexclusive  
7 license absent the owner's consent.") (citing Everex Sys., Inc. v. Cadtrak Corp. (In re CFLC, Inc.),  
8 89 F.3d 673, 680 (9th Cir. 1996)). Accordingly, under § 365(c)(1), applicable federal intellectual  
9 property law bars assignment of the NHL's intellectual property rights without its consent.

10 **II. THE NHL DID NOT VIOLATE ANY DUTY OF GOOD FAITH AND**  
11 **FAIR DEALING IN REJECTING PSE AND MR. BALSILLIE.**

12 Because By-Law 35 may not be excised from the NHL Constitution and By-Laws under §  
13 365(f), the NHL is entitled to and did exercise its rights under By-Law 35 by considering PSE's  
14 application for transfer of ownership in good faith and determining that Mr. Balsillie does not meet  
15 the League's criteria for a prospective owner. PSE now rests its entire strategy on getting this  
16 Court to stand in the shoes of the Board of Governors and declare that, on the facts before them, no  
17 reasonable person could possibly have made the same decision. In making that assertion, however,  
18 PSE has obfuscated the law and twisted the facts beyond recognition.

19 **A. PSE Ignores the Appropriate Standard of Review.**

20 PSE argues that the NHL violated the duty of good faith and fair dealing owed to Mr.  
21 Moyes in rejecting Mr. Balsillie, asserting that the Court should substitute its judgment for that of  
22 the NHL's Board of Governors. As the NHL demonstrated in its moving papers, however, the  
23 standard of review to determine whether the NHL complied with this duty is not de novo, and the  
24 Court cannot second guess the Board's legitimate business decision. See Svela v. Union Oil Co.,  
25 807 F.2d 1494, 1501 (9th Cir. 1987);<sup>13</sup> In re Sizzler Rests. Int'l, Inc., 225 B.R. 466, 475 (Bankr.

26 <sup>13</sup> PSE claims that Svela v. Union Oil Co., 807 F.2d 1494 (9th Cir. 1987), and its admonition that courts  
27 should not second-guess a party's legitimate business decision, has no application here because it analyzes  
28 good faith under a specific statute. (PSE Opp'n at 8.) This is a distinction without a difference, as many  
other courts have applied the same standard under fundamental contract principles. See In re Sizzler, 225  
B.R. at 474 (citing Svela). Indeed, in Vasco v. Mobil Oil Corp., 698 F. Supp. 102, 104 (D. Md. 1988), the  
court recognized that the duty of good faith "has been uniformly interpreted" such that, when analyzing

(cont'd)

1 C.D. Cal. 1998); Burger King v. Agad, 941 F. Supp. 1217, 122 (N.D. Ga. 1996); Vasco v. Mobil  
2 Oil Corp., 698 F. Supp. 102, 104 (D. Md. 1988); Rivermont Inn, Inc. v. Bass Hotels & Resorts, Inc.,  
3 113 S.W.3d 636, 643 (Ky. App. 2003). This caution is particularly relevant here because, as Mr.  
4 Balsillie admits, the Board's decision involves "very complex and nuanced . . . issues." (Balsillie  
5 Dep. at 23-24.) And as the NHL repeatedly has argued, it will suffer irreparable harm if deprived  
6 of the fundamental right to decide Club ownership. (Dkt. # 293 at 12-13.)

7       Rather, courts have articulated two different standards that are applicable here. The first is  
8 that a party "cannot capriciously exercise discretion accorded it under a contract so as to thwart the  
9 contracting parties' reasonable expectations." Ernie Haire Ford, Inc. v. Ford Motor Co., 260 F.3d  
10 1285, 1291 (11th Cir. 2001). Under this line of cases, a party's decision will not violate the  
11 covenant "unless no reasonable party . . . would have made the decision." Burger King Corp. v.  
12 H&H Restaurants, LLC, No. 99-2855, 2001 WL 1850888, at \*7 (S.D. Fla. Nov. 30, 2001)  
13 (alteration in original). Alternatively, a party must have good cause or a legitimate business reason  
14 for its discretionary decision. See In re Sizzler, 225 B.R. at 475. So long as it has good cause or a  
15 legitimate business reason, allegations regarding its motive are irrelevant. See id. Notwithstanding  
16 the passion (or shrillness) with which PSE asserts its position, both standards are easily met in this  
17 case.

18       **B. The NHL Satisfied its Duty of Good Faith and Fair Dealing.**

19       As has been described to the Court in detail, Mr. Balsillie's ownership application went  
20 through a thorough investigation and review process, culminating in a report for the Executive  
21 Committee as well as a separate written statement from Mr. Leipold. (Second Daly Decl. ¶¶ 11, 14  
22 & Ex. C.) Mr. Balsillie then met with the Executive Committee, which asked him questions based  
23 both on the Report and events that took place since the Board's facsimile vote on his ownership  
24 application in relation to the Pittsburgh Penguins in 2006. (Id. ¶¶ 14-15, 20.) Mr. Balsillie was  
25 given every opportunity to explain his conduct as to those events. (Id. ¶¶ 15-19.)

26  
27 *(cont'd from previous page)*

28 whether a party has fulfilled its duty, "courts are not entitled to second-guess a franchisor's economic  
decisions." Id. at 104.

1           The Board of Governors determined, by unanimous vote (Daly Decl. ¶ 19), that  
2 notwithstanding Mr. Balsillie's philanthropic endeavors and charitable work,<sup>14</sup> Mr. Balsillie's  
3 conduct with respect to the Pittsburgh Penguins, the Nashville Predators and the Phoenix Coyotes  
4 prior to the filing of this bankruptcy made Mr. Balsillie unsuitable to be a trustworthy owner in the  
5 NHL. In thematic and chronological terms, Mr. Balsillie's trustworthiness became a serious issue  
6 when he failed to follow through on the commitments he had made to the Executive Committee in  
7 order to garner their vote in 2006 relating to a proposed acquisition of the Pittsburgh Penguins.<sup>15</sup>  
8 Then, in 2007 – when the League was willing to give Mr. Balsillie another chance – Mr. Balsillie's  
9 trustworthiness as a potential owner suffered a severe blow as a result of his (and Mr. Rodier's)  
10 egregious behavior toward Mr. Leipold and the Predators including, most notably, selling season  
11 tickets in Hamilton (with a Nashville Predators logo) when the deal had collapsed and just after  
12 committing to the League that Mr. Balsillie would in good faith try to make the team successful in  
13 Nashville. Finally, for several owners, Mr. Balsillie's lack of trustworthiness as a potential partner  
14 was reinforced by Mr. Balsillie's decision to implement a scheme to avoid the NHL's consent rights  
15 altogether, drawing into question his ability to be an owner who will follow NHL rules and  
16 procedures if they are contrary to his perceived individual interests.

17           As discussed below, viewed as a whole – as it must be – Mr. Balsillie's conduct provides  
18 every reasonable basis for the NHL Board to conclude that he would not be a trustworthy partner,  
19 and certainly falls well within the standard that a reasonable person could think so.

20

21

22 <sup>14</sup> PSE claims that the NHL has been "tellingly silent" with respect to evidence of Mr. Balsillie's "good  
23 character." (PSE Mot. at 12-13.) This assertion is false and unfair. The Memorandum summarizing  
24 historical facts and materials relevant to the applications for transfer of ownership of the Coyotes, provided  
25 to the Board of Governors on July 27, 2009, specifically mentions Mr. Balsillie's "substantial philanthropic  
26 endeavors" and "letters from several individuals, including governmental, community, and business leaders  
in Canada, recognizing him for his charitable work." (Jacobs Decl. Ex. A, at 8.) Mr. Jacobs testified that  
there were positive comments made about Mr. Balsillie during the Executive Committee meeting, but those  
considerations did not overcome the Board's experience with him and their opinion that he cannot be trusted  
to follow the NHL's rules. (Jacobs Dep. at 129-31.)

27 <sup>15</sup> Leipold Dep. at 41 ("I knew that when I was – when the discussion was initiated, which would have been  
28 February of '07, that he was interested in buying the team, that I felt it was going to be difficult for his  
approval process as an owner because there was what I would use the term 'baggage' that he had with the  
other owners because of the questions of what kind of partner would he be in the National Hockey League.")



1                   1.     Mr. Balsillie's About Face in Pittsburgh is Not Seriously Disputed.

2                   Mr. Balsillie made commitments to the Executive Committee to obtain their approval that  
3 he later did not honor. Specifically, the Executive Committee, as a condition of recommending the  
4 approval of Mr. Balsillie as an NHL owner, asked him to make the following three commitments:

- 5                   • keep the Penguins in Pittsburgh under either the IOC plan or "Plan B" (on the then-  
6 existing terms);
- 7                   • that the NHL Commissioner may step in and help with negotiations over "Plan B" if  
8 these negotiations were to stall; and
- 9                   • that if "Plan B" failed and Mr. Balsillie sought to relocate the Club, the NHL would  
have a call option to purchase the team.

10                  See supra pp. 5-6.

11                  There is little dispute that these matters were discussed and that Mr. Balsillie made these  
12 commitments. Id. The only factual dispute is whether Mr. Balsillie also asked for a "put" right  
13 during the December 4 meeting in the event that "Plan B" failed and the League did not exercise  
14 the call. From the Executive Committee's perspective, it was left for the lawyers to paper the deal  
15 in either a Consent Agreement or through a private side letter so that Mr. Balsillie could retain  
16 some desired negotiating leverage in attempting to negotiate better terms for Plan B. (Id. at 6-8.)

17                  In the face of this indisputable evidence, PSE's position that Mr. Balsillie was "surprised"  
18 by radically new terms in the side letter rings hollow. There certainly was no surprise on the  
19 commitment to Plan B; Mr. Balsillie confirmed that he agreed to this several times. Nevertheless,  
20 his lawyer crossed it out of the side letter. There also could be no surprise to the provision that  
21 granted Commissioner Bettman the right to help formalize negotiations over Plan B, as Mr.  
22 Balsillie had no problem with that concept at the Executive Committee meeting. Nor could there  
23 be any surprise about the call option. While certainly some of the details of any call option needed  
24 to be worked out, Mr. Balsillie readily agreed to the most important term – his cost to acquire the  
25 Club. Every NHL witness deposed denied that a "put" was discussed. (Bettman Dep. at 158-59;  
26 Daly Dep. at 123-24; Jacobs Dep. at 226-29, 92.) **REDACTED**

1 Finally, discovery has confirmed that PSE's assertions that the NHL had agreed prior to  
2 December 4 to exclude a seven-year non-relocation provision from its standard Consent Agreement  
3 is plainly false. Thus, PSE argues that Mr. Balsillie "thought" they had reached an understanding  
4 that no such provision would be in any NHL Consent Agreement. Yet, testimony confirmed that:  
5 (i) Mr. Balsillie (and Mr. Rodier) knew that a non-relocation provision had become "standard" by  
6 this time;<sup>16</sup> (ii) the NHL – the only contracting party that mattered for a Consent Agreement – was  
7 never asked to enter into such an agreement; and (iii) any such discussions would only have been  
8 finalized after Mr. Balsillie's meeting with the Executive Committee. **REDACTED**

9  
10  
11  
12 Ultimately, Mr. Balsillie apparently did not want to follow through with the commitments  
13 he made to the Executive Committee. **REDACTED**

14  
15 Nor can Mr. Balsillie now belatedly claim that it was the mere concept  
16 of a side letter or a call option that was so offensive to him. **REDACTED**

17  
18  
19 , which left a  
20 bitter taste in the mouths of NHL owners. (Leipold Dep. at 41.)

21 **2. The Board of Governors Properly Viewed Mr. Balsillie's Admitted**  
22 **Conduct in Nashville as Untrustworthy Behavior.**

23 **a. The League and owners were willing to give Mr.**  
24 **Balsillie a second chance.**

25 When Mr. Balsillie re-emerged as a result of his discussions with Mr. Leipold, the evidence  
26 is that the owners and the League office were willing to consider Mr. Balsillie again, including this

27 \_\_\_\_\_  
28 <sup>16</sup> The NHL produced the thirteen Consent Agreements that it has entered into since 2000 when there was a  
change in control of a team. Only three of them did not have the seven-year non-relocation provision and  
Commissioner Bettman in his recent deposition explained why assurances were not necessary in those three  
situations. (Bettman Dep. at 277-88.)

1 time for a potential relocation of the Predators' franchise if in fact (i) he owned the team, (ii)  
2 Nashville did not cure its default during the 2007-08 season, and (iii) the Nashville lease  
3 terminated. (Leipold Dep. at 112-19.)<sup>17</sup> Thus, notwithstanding PSE's mischaracterization for  
4 present purposes, there was a general willingness to entertain Mr. Balsillie as a new owner in 2007  
5 under the basic terms to which Mr. Balsillie had agreed with Mr. Leipold in the May 15, 2007  
6 Term Sheet: **REDACTED**

7 , but with an understanding – expressed by the League office  
8 and several owners – that if the lease were to terminate, Mr. Balsillie would be allowed to apply for  
9 relocation to Hamilton (or elsewhere) after the League's January 1 deadline. (Letter from Thomas  
10 Gowan to Victoria Gilbert (June 19, 2007), Jacobs Decl. Ex. A (Tab 20); Declaration of Richard  
11 Rodier, filed on May 15, 2009 (Dkt. # 105).)

12 Critically, at that time (late May), Mr. Balsillie also agreed that he would attempt in good  
13 faith to try and make the Predators succeed in Nashville for at least one more season (see supra 10-  
14 11), and that, if he ultimately sought relocation, he would abide by governing NHL rules and  
15 procedures. Given this commitment to Nashville, as well as the status of his negotiations with Mr.  
16 Leipold in late May of 2007, the League also advised Mr. Balsillie that he should not apply for a  
17 "conditional relocation." (Supra pp. 12-13.)

18 **b. Mr. Balsillie's disturbing conduct following his**  
19 **commitment to give Nashville a try for one year.**

20 Mr. Balsillie, including through Mr. Rodier, then engaged in a course of conduct that  
21 ultimately was viewed by the Board of Governors to be outrageous and evidencing a lack of  
22 trustworthiness. Specifically, discovery has confirmed that beginning in late May 2007, Mr.  
23 Balsillie (or Mr. Rodier on his behalf) did the following:

- 24 • Mr. Rodier (in Mr. Balsillie's presence) made personal threats to Mr. Leipold that if he  
25 did not proceed with the transaction, he would be subject to an investigation by the  
Canadian Competition Bureau (supra pp. 11-12);

26 \_\_\_\_\_  
27 <sup>17</sup> PSE relies on a February 27, 2007 meeting between Mr. Leipold and Mr. Balsillie at which a law student  
28 purportedly took notes. (Leipold Dep. at 74-111.) Mr. Leipold testified at length that the memo written by  
that law student was incomplete and inaccurate. In any event, it is irrelevant as it predates the signing of the  
Term Sheet on May 15, 2007.

- 1 • the day after Mr. Leipold had called off the deal, Mr. Balsillie filed for "conditional  
2 relocation" of the Predators' franchise, even though this was never contemplated by the  
3 deal with Mr. Leipold (supra pp. 12-13);
- 4 • announced a deal with the City of Hamilton and the Copps Coliseum for the "Hamilton  
5 Predators" (supra pp. 13);
- 6 • on June 14 began taking season ticket deposits for the "Hamilton Predators" (supra pp.  
7 13-14); and
- 8 • used the Nashville Predators' logo to solicit those Predators' season ticket sales in  
9 Hamilton. (Supra pp. 14.)

10 These facts speak volumes. PSE states that Mr. Balsillie understood – erroneously – that  
11 season ticket deposits "had to be" obtained in order to demonstrate the viability of the Hamilton  
12 market and that, "at worst," the conduct was "over-exuberant." PSE also repeats the startling  
13 mantra of Messrs. Balsillie and Rodier that the conduct was not so bad because it helped rouse fans  
14 in Nashville. But perhaps most conspicuously, other than a belated apology, PSE says literally  
15 nothing in its briefs (to date) about the admittedly wrongful use of the Nashville Predators' logo to  
16 sell tickets in Hamilton – conduct that particularly offended the members of the Executive  
17 Committee. (Jacobs Dep. at 56-57.)

18 All of these activities, which were set forth in a personally-written statement by Mr.  
19 Leipold, were very disturbing to the Board of Governors, and when added to all the other misdeeds  
20 or miscues of Messrs. Balsillie and Rodier, were what ultimately made the Board realize that Mr.  
21 Balsillie would not be a trustworthy owner. Mr. Jacobs testified:

22 [W]hen he took steps and actually sold tickets to – for the Predators  
23 in Hamilton, we thought that was destabilizing and undermined the  
24 value of the franchise substantially, and we feel that he affected the  
25 local market negatively by those antics of his and that it was  
26 something that we found offensive, especially because, one, it wasn't  
27 his franchise to speculate with and, two, it really interfered with the  
28 marketability of the team in its area.

I would be offended if somebody sold the Bruins in Hamilton or any  
other jurisdiction other than my own, meaning Boston, so I'm really –  
I found that his – my experience with Mr. Balsillie externally in this  
way was very controlling to me, in my opinion, in my direction that I  
went in . . . .

1 (Jacobs Dep. at 56-57.) Leipold also confirmed that he could not trust Mr. Balsillie as a business  
2 partner:

3 To deal with these guys as long as I did and for them to turn like they  
4 did on a dime is the reason that I felt compelled to share with my  
5 partners what this man is like. All right. He's untrustworthy. He's  
6 deceiving. He's arrogant. He's a person that doesn't know how to be  
7 a partner in our business. And that was the intent of my writing that  
8 letter to my partners at the Board of Governors.

9 (Leipold Dep. at 152.) Nor can Mr. Balsillie now say he had no idea that his actions may impact  
10 the Board's view of him as a trustworthy business partner. Indeed, this is precisely what  
11 Commissioner Bettman warned Mr. Balsillie about when Mr. Balsillie told Commissioner Bettman  
12 about the planned "Predators" ticket sales in Hamilton just the day before it was to take place.

13 Specifically, Commissioner Bettman wrote: "Concern has been expressed from a number  
14 of owners with regard to your recent actions, which appear to undermine the stability of NHL  
15 hockey in Nashville. Your e-mail of earlier today, I believe, will exacerbate these concerns . . . .  
16 Your activities may have the effect of the Board calling into question your bona fides as a good  
17 business partner willing to abide by League procedures and rules and acting in the best interest of  
18 the League." (E-mails between Jim Balsillie and Gary Bettman (June 13-14, 2007), Jacobs Decl.  
19 Ex. A (Tab 18).) **REDACTED**

### 20 **3. Mr. Balsillie's Interaction with Mr. Gillett.**

21 George Gillett, owner of the Montreal Canadiens and member of the NHL Executive  
22 Committee, had personal dealings with Mr. Balsillie that caused him to question Mr. Balsillie's  
23 character and integrity. During an interview with a reporter in November 2008, Mr. Balsillie  
24 (holding his Blackberry up with a Canadiens logo on the screen) remarked that the Montreal  
25 Canadiens were for sale when they were not. In Mr. Gillett's view, this damaged the performance  
26 and value of his franchise. (Second Daly Decl. ¶ 17; Jacobs Decl. ¶ 13; Leipold Dep. at 205-07.)  
27 Mr. Balsillie claimed that the comments were taken out of context and, through his representative,  
28 Mr. Rodier, offered to submit an affidavit "clarifying" that he had not intended to imply that the  
Canadiens were for sale. (Jacobs Decl. ¶ 13.) Mr. Gillett then spent several days working out the

1 details of this affidavit with Mr. Rodier, only to have Mr. Balsillie refuse to sign, claiming that he  
2 did not want to get involved in a controversial lawsuit that would be very hard for Mr. Gillett to  
3 win and/or prove damages because he is a public figure with high visibility. (Balsillie Dep. at 212-  
4 13; Second Daly Decl. ¶ 17.)

5 PSE completely misses the point as to why this behavior caused Mr. Gillett and the rest of  
6 the Board to question Mr. Balsillie's character. As with his sale of Predators' season tickets in  
7 Hamilton, Mr. Balsillie's excuse is "no harm, no foul." (PSE Opp'n at 25.) But it was not the  
8 actual damage allegedly caused to the Canadiens by his making the statement that undermines his  
9 character and integrity; rather, it was his refusal to abide by his commitment to Mr. Gillett (as  
10 made by Mr. Rodier) to clarify his comments. (Jacobs Decl. ¶ 13.)

11 **4. Mr. Balsillie Is Attempting to Evade the NHL's Most Fundamental**  
12 **Rules Concerning Ownership and Relocation.**

13 There is nothing arbitrary or unreasonable about the Board of Governors deciding that it  
14 does not want as a fellow owner someone who deliberately seeks to evade the NHL's Constitution  
15 and By-Laws. That is exactly what Mr. Balsillie has done by convincing the Coyotes to enter into  
16 bankruptcy not merely so that Mr. Moyes could take advantage of the benefits of bankruptcy, but  
17 specifically so that Mr. Balsillie can evade the NHL's lawful consent rights regarding transfer of  
18 ownership and relocation. **REDACTED**

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21  
22 PSE claims that the NHL cannot "discriminate against" Mr. Balsillie "for exercising lawful  
23 rights under the Bankruptcy Code." (PSE Opp'n at 11.) Were that all he is doing, the Board of  
24 Governors may not have had concerns regarding his character and integrity based on his conduct in  
25 attempting to purchase the Coyotes. The Board of Governors did not reject Mr. Balsillie because  
26 he is attempting to purchase the Coyotes out of bankruptcy. (Jacobs Dep. at 36.) In fact, other  
27 teams have used the bankruptcy process in cooperation with the League office and in a manner that  
28

1 comports with League rules, including Pittsburgh, Ottawa and Buffalo. (Daly Dep. at 185; Jacobs  
2 Dep. at 134, 258-59 ("selling a franchise out of the bankruptcy court is okay with the league").)

3 The problem with Mr. Balsillie's use of the bankruptcy process is that it was designed  
4 precisely to avoid application of the League's rules regarding transfer of ownership and relocation.  
5 (Jacobs Dep. at 34-37.) When Mr. Moyes suggested that he and PSE contact Commissioner  
6 Bettman to obtain the League's support for a bankruptcy sale, Mr. Balsillie's representatives  
7 rejected the idea out of hand. (Exhibit 10; Balsillie Dep. at 222-23.) As Commissioner Bettman  
8 testified: "By the way, the fact that he's trying to buy the club out of bankruptcy, that's not what  
9 I'm referring to [as improper]. What I'm referring to is his blatant disregard and attempt to  
10 circumvent our rules and procedures, both as to ownership and as to franchise relocation."  
11 (Bettman Dep. at 23; see also Daly Dep. at 174.) His answers to pointed questions on this subject  
12 in the Executive Committee interview convinced the other owners that "he is not willing to comply  
13 with the NHL Constitution now, but that he wants us to trust that in the future he will comply with  
14 them." (Jacobs Decl. ¶ 10.) But actions speak louder than words.

15 5. **Mr. Balsillie's Assertion That the League is Protecting the Maple Leafs'  
16 Purported "Veto Right" is Not Supported by the Record.**

17 Because the Board had a legitimate business reason for rejecting Mr. Balsillie, PSE's  
18 speculative claims as to the Board's motive in doing so are irrelevant. See In re Sizzler, 225 B.R. at  
19 475. Nevertheless, PSE's claim that the Board rejected him for the illegal purpose of protecting an  
20 alleged "veto right" of the Toronto Maple Leafs is false for numerous reasons.

21 First, neither the Maple Leafs nor any other NHL team has a "veto right" over another team  
22 relocating into its home territory. Each of the NHL witnesses testified that the NHL's relocation  
23 rules and procedures do not permit any one of its member clubs to exercise or possess an exclusive  
24 right to veto an application for the transfer of an existing franchise into its home territory. (Jacobs  
25 Dep. at 200 ("[A] simple majority of the board will determine whether or not a team can go into a  
26 particular location, irrespective of it being a pre-existing quote/unquote, territory."); Bettman Dep.  
27 at 23 ("There are at least of couple of occasions where I stated that the League's position would be  
28 to have any relocation, and as you're alluding to, to Southern Ontario would be by majority vote.");  
Leipold Dep. at 104 ("[I]t would take a majority vote for a team to be able to transfer into the

1 territory of an existing team. That it would take a majority vote.") Commissioner Bettman  
2 confirmed to the Canadian Competition Bureau ("CCB") that this has been the case since 1993.  
3 (Letter from Gary Bettman to William Miller (Sept. 21, 2006), attached hereto as Exhibit 14.) And  
4 in 2008, the CCB specifically found that no team has a veto right with respect to a proposed  
5 relocation to Southern Ontario:

6           The Bureau found no instance where a "veto" was exercised by an  
7 incumbent team to protect its local territory from entry by a  
8 competing franchise. Since at least 1993, no franchise has been  
9 permitted to exercise a veto to prevent a team from entering into its  
10 local territory. Further, under the NHL's rules and procedures, in  
11 respect of the proposed relocation of a franchise to Southern Ontario,  
12 the NHL would not permit any single team to exercise a veto, but  
13 would only require a majority vote.

14 (Canadian Competition Bureau Backgrounder at 4 (Mar. 31, 2008) (emphasis added), Daly Decl.  
15 Ex. I.)

16           Second, there is no evidence that the Maple Leafs have attempted to invoke such a "veto  
17 right" to prevent the Coyotes from relocating to Hamilton. Although the Maple Leafs in 2006, in  
18 response to Deputy Commissioner Daly informing the Board that relocation requires only a  
19 majority vote, reserved its right to argue that relocation of any team into the Maple Leafs' home  
20 territory would require a unanimous vote,<sup>18</sup> the team has not made any such arguments with respect  
21 to the Coyotes. Nor did the Maple Leafs reserve its rights after Commissioner Bettman informed  
22 the Board in June 2007 – with four Maple Leafs representatives in attendance – that the League  
23 had represented to the CCB that any proposed relocation into Southern Ontario would be by  
24 majority vote. (Jacobs Decl. Ex. A (Tab 21).) Commissioner Bettman testified that the Maple  
25 Leafs have neither asked for, nor received, any assurance that the League is not going to consider  
26 relocation to Hamilton. (Bettman Dep. at 306-07.) Moreover, the Maple Leafs did not vote on Mr.  
27 Balsillie's transfer application (Jacobs Dep. at 136), nor did the team explain to the other teams  
28 why it was abstaining. The Leafs did not seek to influence any other team's vote. (Bettman Dep. at

18 <sup>18</sup> While PSE attaches to its latest brief a letter from the Maple Leafs to the Commissioner reserving their rights, it fails to attach the NHL's response. (Letter from Shepard Goldfein to David Massengill (Dec. 14, 2006), attached hereto as Exhibit 14.) As stated therein, Commissioner Bettman notified the Maple Leafs on numerous occasions that the League's position is that no team has a territorial veto, and in none of those instances did the Leafs voice an objection. (Id.)



1 307-08.) In any event, as Deputy Commissioner Daly testified, whether the Maple Leafs believe  
2 they have a "veto right" is irrelevant, because "as the Commissioner has made clear repeatedly and  
3 publicly and over a long period of time, there is no single team veto on any market, much less the  
4 market in southern Ontario." (Daly Dep. at 42.)

5 Third, in determining whether to accept or reject Mr. Balsillie and the other ownership  
6 candidates, the Board was told not to consider – and the evidence reflects that it did not consider –  
7 the fact that any of the potential ownership groups may want to relocate the Coyotes. (Jacobs Decl.  
8 ¶ 6; Second Daly Decl. ¶ 13.) Thus, there was no discussion during the July 29 meetings related to  
9 Mr. Balsillie's interest in relocating the Coyotes to Hamilton, Ontario. (*Id.*)

10 Finally, when PSE was seeking discovery on this issue, the NHL offered to stipulate that, in  
11 the event it undertakes to consider and vote on PSE's application to relocate the Coyotes to  
12 Hamilton (whether by Court order or otherwise), the Board of Governors' decision would be by  
13 majority vote and no team would have a veto right. PSE rejected this offer, obtained discovery on  
14 the issue and now is using it as a red herring to create an artificial and non-existent "pretext" for the  
15 Board of Governors' decision to reject Mr. Balsillie's ownership transfer application. As shown  
16 above, this issue has no relevance to that decision.

17 **6. PSE's Allegations Regarding Other Current or Prospective NHL**  
18 **Owners Are Irrelevant and Incomplete.**

19 PSE claims that the NHL improperly applied a different character and integrity standard to  
20 Mr. Balsillie's application than the standard it applies to others. This both ignores the critical  
21 difference between someone who is applying for membership in an association and someone who  
22 is already a member, as well as objective facts relating to the League's consistent efforts to police  
23 conduct detrimental to the League engaged in by other owners.

24 **a. Character and trustworthiness of applicant Jerry**  
25 **Reinsdorf.**

26 PSE claims that the Board's rejection of Mr. Balsillie must have been a pretext because it  
27 conditionally approved Mr. Reinsdorf, who previously filed an antitrust action against the NBA  
28 while a member of that league. PSE also claims that he was somehow to blame for an arbitrator's  
finding that MLB owners "engage[ed] in anticompetitive collusion." (PSE Mot. at 28.) But Mr.

1 Reinsdorf's claims against the NBA were filed more than 20 years ago, and both the NBA and  
2 MLB "commissioners hold him in the highest regard and find that . . . anything past of that type  
3 was not relevant to his suitability and found him to be a member in very good standing and  
4 recommended him highly to the National Hockey League." (Jacobs Dep. at 145.) In addition, a  
5 number of Board members have done business with Mr. Reinsdorf and "have an experience base  
6 with [him] which differs from the experience base we've had with Mr. Balsillie." (Jacobs Dep. at  
7 146.) In comparison, PSE's express strategy here was to buy the Coyotes out of bankruptcy and  
8 relocate the Club over the NHL's objection by winning an antitrust lawsuit. (Jacobs Dep. at 38-39  
9 & Ex. 2.) Even Mr. Moyes agreed that he would not want to be a partner with someone who even  
10 threatened him with legal action or was negotiating to have lawsuits filed against him. (Moyes  
11 Dep. at 71-74.)

12 **b. Character and trustworthiness of existing owners.**

13 PSE also suggests that Mr. Balsillie is being held to a different and higher standard of  
14 character and integrity than current owners, which allegedly is further evidence that his rejection  
15 was pretextual. As this Court has recognized, however, and the testimony supports, getting into the  
16 League is different from staying in. (Tr. 6/9/09 Hr'g at 153; Jacobs Dep. at 164 ("[T]o be sure,  
17 which in varying degrees we'd say maybe some present owners we wished would be more  
18 cooperative or less argumentative or what have you, to invite a new person in, we want to know  
19 what their history has been and how their course of conduct's been over time, and most specifically  
20 in Balsillie's situation, we would not enjoy his company, and we think it would be an avoidance of  
21 having – avoidance of disagreements or issues by keeping him outside of that group."); Bettman  
22 Dep. at 44 ("Evaluating somebody's integrity, reliability, trustworthiness, truthfulness on the way  
23 in is a little different than once they're in. And once you're in, then you have to see whether or not  
24 they've done something that reflects adversely against the League, which is a little different than  
25 the standard you might want to hold a prospective partner to."). Commissioner Bettman testified,  
26 "when you're coming into the League, you would expect somebody to be on their best behavior;  
27 and if they're not, at that point, Lord knows what you're gonna get once they're in the League."  
28 (Bettman Dep. at 42.)



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STINSON MORRISON HECKER LLP

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

and

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

Attorneys for the National Hockey League

1 COPY of the foregoing sent this August 31,  
2009, to:

2 Thomas J. Salerno, Esq.  
3 Jordan A. Kroop, Esq.  
4 Kelly Singer, Esq.  
5 SQUIRE SANDERS & DEMPSEY LLP  
6 40 N Central Ave #2700  
7 Phoenix AZ 85004-4498  
8 tsalerno@ssd.com  
9 jkroop@ssd.com  
10 ksinger@ssd.com  
11 Attorneys for Debtors

12 Larry L Watson, Esq.  
13 Connie S. Hoover  
14 OFFICE OF THE U.S. TRUSTEE  
15 230 N First Ave #204  
16 Phoenix AZ 85003-1706  
17 [larry.watson@usdoj.gov](mailto:larry.watson@usdoj.gov)  
18 [connie.s.hoover@usdoj.gov](mailto:connie.s.hoover@usdoj.gov)

19 Susan M. Freeman, Esq.  
20 Stefan M. Palys, Esq.  
21 LEWIS AND ROCA LLP  
22 40 N Central Ave  
23 Phoenix AZ 85004-4429  
24 SFreeman@lrlaw.com  
25 spalys@lrlaw.com  
26 Attorneys for PSE Sports & Entertainment and  
27 for S&E Interim Facility Corporation

28 Steven M. Abramowitz, Esq.  
VINSON & ELKINS LLP  
666 Fifth Ave 26th Fl  
New York NY 10103-0040  
sabramowitz@velaw.com  
Attorneys for SOF Investments LP, White Tip  
Investments, LLC, and Donatello Investments,  
LLC

Donald L. Gaffney, Esq.  
SNELL & WILMER LLP  
One Arizona Center  
Phoenix AZ 85004-2202  
dgaffney@swlaw.com  
Attorneys for SOF Investments LP, White Tip  
Investments, LLC, and Donatello Investments,  
LLC

James E. Cross, Esq.  
Brenda K. Martin, Esq.  
Warren J. Stapleton, Esq.  
OSBORN MALEDON PA  
2929 N Central Ave #2100  
Phoenix AZ 85012-2794  
jcross@omlaw.com  
bmartin@omlaw.com  
wstapleton@omlaw.com  
Attorneys for National Hockey League Players'  
Association

Carolyn J. Johnsen, Esq.  
Peter W. Sorensen, Esq.  
JENNINGS STROUSS & SALMON PLC  
201 E Washington St  
Phoenix AZ 85004-2385  
cjjohnsen@jsslw.com  
psorensen@jsslw.com  
Attorneys for Jerry Moyes

Jeffrey Freund, Esq.  
BREDHOFF & KAISER PLLC  
805 15th St NW  
Washington DC 20005  
jfreund@bredhoff.com  
Attorneys for National Hockey League Players'  
Association

Sean P. O'Brien, Esq.  
GUST ROSENFELD PLC  
201 E Washington St #800  
Phoenix AZ 85004-2327  
spobriein@gustlaw.com  
Attorneys for Drawbridge Special opportunities  
Fund LP

Richard W. Havel, Esq.  
SIDLEY AUSTIN LLP  
555 W Fifth St 40th Fl  
Los Angeles CA 90013-1010  
rhavel@sidley.com  
Attorneys for Drawbridge Special opportunities  
Fund LP

1 Richard H. Herold, Esq.  
HINSHAW & CULBERTSON LLP  
2 3200 N Central Ave #800  
Phoenix AZ 85012  
3 rherold@hinshawlaw.com  
4 Attorneys for Aramark

5 Ivan L. Kallick, Esq.  
Ileana M. Hernandez, Esq.  
6 MANATT PHELPS & PHILLIPS  
11355 W Olympic Blvd  
7 Los Angeles CA 90064  
ikallick@manatt.com  
8 ihernandez@manatt.com  
9 Attorneys for Ticketmaster

10 Louis T.M. Conti, Esq.  
HOLLAND & KNIGHT LLP  
11 100 N Tampa St #4100  
Tampa FL 33602  
12 louis.conti@hklaw.com  
13 Attorneys for Facility Merchandising Inc.

14 Cathy L. Reece, Esq.  
Nicolas B. Hoskins, Esq.  
15 Fennemore Craig PC  
3003 n Central Ave #2600  
16 Phoenix AZ 85012-2913  
17 creece@fclaw.com  
nhoskins@fclaw.com  
18 Attorneys for City of Glendale, Arizona

19 William R. Baldiga, Esq.  
Andrew M. Sroka, Esq.  
20 BROWN RUDNICK LLP  
One Financial Center  
21 Boston MA 02111  
wbaldiga@brownrudnick.com  
22 asroka@brownrudnick.com  
23 Attorneys for City of Glendale, Arizona

24 Jonathan P. Ibsen, Esq.  
Laura A. Rogal, Esq.  
JABURG & WILK PC  
25 3200 N Central Ave #2000  
Phoenix AZ 85012-2400  
26 [jpi@jaburgwilk.com](mailto:jpi@jaburgwilk.com)  
[lar@jaburgwilk.com](mailto:lar@jaburgwilk.com)  
27 Attorneys for Wayne Gretzky  
28

Lori Lapin Jones  
LORI LAPIN JONES PLLC  
98 Cutter Mill Rd #201 N  
Great Neck NY 11021  
[ljones@jonespllc.com](mailto:ljones@jonespllc.com)  
Attorneys for BWD Group

Thomas Allen, Esq.  
Paul Sala, Esq.  
ALLEN SALA & BAYNE PLC  
1850 N Central Ave #1150  
Phoenix AZ 85004  
psala@asbazlaw.com  
tallen@asbazlaw.com  
Attorneys for the Official Joint Committee of  
Unsecured Creditors

William Novotny, Esq.  
MARISCAL WEEKS McINTYRE &  
FRIEDLANDER PA  
2901 N Central Ave #200  
Phoenix AZ 85012-2705  
William.novotny@mwmf.com  
Attorneys for Coyote Center Development LLC

Jonathan K. Bernstein, Esq.  
Andrew J. Gallo, Esq.  
BINGHAM McCUTCHEM LLP  
One Federal St  
Boston MA 02110  
Jon.bernstein@binghama.com  
[Andrew.gallo@bingham.com](mailto:Andrew.gallo@bingham.com)

Mark C. Dangerfield, Esq.  
Dean C. Short, Esq.  
GALLAGHER & KENNEDY PA  
2575 E Camelback Rd  
Phoenix AZ 85016-9225  
[mcd@gknet.com](mailto:mcd@gknet.com)  
[dcs@gknet.com](mailto:dcs@gknet.com)  
Attorneys for Arizona Cardinals Football Club

Mark A. Nadeau, Esq.  
Shane D. Gosdis, Esq.  
Allison L. Kierman, Esq.  
DLA PIPER LLP (US)  
2525 E Camelback Rd #1000  
Phoenix AZ 85016-4245  
mark.nadeau@dlapiper.com  
shane.gosdis@dlapiper.com  
allison.kierman@dlapiper.com

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2  
3  
4  
5  
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19  
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23  
24  
25  
26  
27  
28

Scott B. Cohen, Esq.  
ENGELMAN BERGER PC  
3636 N Central Ave #700  
Phoenix AZ 85012  
sbc@engelmanberger.com  
Attorneys for John Breslow

Attorneys for Lease Group Resources, Inc.  
Arthur E Rosenberg Esq  
HOLLAND & KNIGHT LLP  
195 Broadway  
New York NY 10007-3189  
arthur.rosenberg@hklaw.com  
Attorneys for Facility Merchandising Inc.

/s/ Tracy Dunham

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