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7
8 **UNITED STATES BANKRUPTCY COURT**
9 **DISTRICT OF ARIZONA**

10 In re:
11 DEWEY RANCH HOCKEY, LLC
12 COYOTES HOLDINGS, LLC
13 COYOTES HOCKEY, LLC
14 ARENA MANAGEMENT GROUP, LLC,
15
16 Debtors.

Chapter 11 Proceeding

Case No.: 2:09-bk-09488
(Jointly Administered)

**RESPONSE TO DEBTORS
AND DEBTORS IN
POSSESSION MOTION FOR
AN ORDER AUTHORIZING
THE ASSUMPTION AND
ASSIGNMENT OF
EXECUTORY CONTRACTS
AND UNEXPIRED LEASES
UNDER SECTION 365 OF
THE BANKRUPTCY CODE IN
CONNECTION WITH SALE
OF SUBSTANTIALLY ALL OF
THEIR ASSETS**

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19 This filing applies to:

- 20
21 All Debtors
 Specified Debtors

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23 RideNow Management, LLC ("RideNow"), by and through its undersigned
24 counsel, hereby responds and objects to *Debtors and Debtors in Possession Motion for*
25 *an Order Authorizing the Assumption and Assignment of Executory Contracts and*
26 *Unexpired Leases Under Section 365 of the Bankruptcy Code in Connection with the Sale*

1 of *Substantially All of Their Assets* ("Debtors' Motion"), filed herein on August 27,
2 2009 [Docket No. 821], as follows: (1) Debtors are in default of RideNow's letter
3 agreement; (2) Debtors must cure, but cannot cure, its defaults; (3) Neither the
4 Debtors nor any proposed assignee have established adequate assurance of future
5 performance to RideNow; and (4) Debtors' Motion, and the hearing date thereon
6 effectively denies Ridenow's rights to due process.

7 **I. BACKGROUND FACTS**

8 1. On July 15, 2008, Coyotes Hockey, LLC and RideNow Management,
9 LLC entered into a letter agreement pursuant to which RideNow agreed to provide
10 money and benefits to Coyotes, and the Coyotes agreed to provide tickets,
11 advertising, promotion and sponsorship rights to RideNow.¹

12 2. On May 5, 2009 (the "Petition Date"), the Debtors filed their Voluntary
13 Petitions for relief under Chapter 11 of the Bankruptcy Code in the United States
14 Bankruptcy Court for the District of Arizona (the "Court").

15 3. On August 13, 2009, the Court entered the Bid Procedure Order, which
16 sets forth the requirements and bidding procedures related to the auction of the
17 Assets, which includes, the Phoenix Coyotes National Hockey League team and
18 related assets. The Bid Procedure Order requires all parties interested in
19 submitting qualified bids for the Assets to do so by August 25, 2009 (the "Bid
20 Deadline"). The auction and sale hearing to approve the Proposed Sale of the
21 Assets are scheduled for September 10, 2009 (the "Auction and Sale Hearing").

22 4. The Bid Procedures Order required Debtors to file a Motion to assume
23 or assign executory contracts and unexpired leases to the successful purchaser of
24 the Assets on or before August 27, 2009. The identity of the successful purchaser, if
25

26 ¹ The letter agreement contains a confidentiality provision (para. V.) and is not therefore filed with the objection.

1 any, will not be known until the conclusion of the Auction and Sale Hearing,
2 currently scheduled to begin on September 10, 2009.

3 5. Of the three bidders, the only Bidder whose assumption list included
4 the RideNow Letter Agreement is Ice Edge Team, LLC and Ice Edge Arena, LLC
5 (together, "Ice Edge").

6 6. Debtors have an estimated cure amount of \$0 regarding default with
7 RideNow's Letter Agreement.

8 7. The hearing on Debtors' Motion and RideNow's Response and
9 Objection is set for September 10, 2009.

10 **II. LEGAL ARGUMENT**

11 a. **Debtors Must Cure Contractual Defaults Before Assuming Any**
12 **Executory Contract.**

13 Bankruptcy Code Section 365 generally requires three acts to assume an
14 executory contract: (1) curing of default(s); (2) compensation for any actual
15 pecuniary loss resulting from such default(s); and (3) providing adequate
16 assurance of future performance. In this case, Debtors' default is a performance
17 failure which goes to the very core purpose of the agreement. Section 365 requires
18 Debtors to cure nonmonetary defaults. *See In re Claremont Acquisition Corp., Inc.*,
19 113 F.3d 1029, 1034-35 (9th Cir. 1997)².

20 b. **Debtors Are in Default of RideNow's Letter Agreement.**

21 The law "implies in every contract a covenant of good faith and fair
22 dealing." *In re Dewey Ranch Hockey, LLC*, 406 B.R. 30, 36 (Bkrcty.D.Ariz. 2009).

23 Arizona law recognizes that a party can breach the
24 implied covenant of good faith and fair dealing both by
exercising express discretion in a way inconsistent with a
party's reasonable expectations and by acting in ways not

25 ² See David G. Epstein & Lisa Normand, "Real-World" and "Academic" Questions About "Nonmonetary
26 Obligations" Under the 2005 Version of 365(b), 13 Am. Bankr. Inst. L. Rev. 617, 640 (2005); Risa Lynn Wolf-Smith,
Bankruptcy Reform and Nonmonetary Defaults—What Have They Done Now?, 24-6 Am. Bankr. Inst. J. 6 (July/Aug.
2005).

1 expressly excluded by the contract's terms but which
2 nevertheless bear adversely on the party's reasonably
3 expected benefits of the bargain. *Bike Fashion Corp. v.*
4 *Kramer*, 202 Ariz. 420, 46 P.3d 431 (2002) citing *Rawlings v.*
5 *Apodaca*, 151 Ariz. 149, 153, 726 P.2d 565, 569 (1986).

6 Debtors have breached the implied covenant of good faith and fair dealing in
7 their Letter Agreement with RideNow because the express subject matter of the
8 contract, access to the substantial fan base of the Coyotes, has been substantially
9 impaired or destroyed by the actions of the Debtors (or the NHL, depending upon
10 whom you would believe). What is not subject to question is that the fan base of
11 the Coyotes has been dramatically reduced. The public perception of the
12 uncertainty of the Coyotes' future in Arizona, a specter initially raised by the
13 Debtor's highly publicized prosecution of a Section 363 motion before this court,
14 and its continued exclusive support for a bidder who would relocate this team, has
15 all but destroyed the team's image and its broad appeal to the local public. The
16 Debtors may not destroy RideNow's reasonably expected benefits of the Letter
17 Agreement, and thereafter succeed in enforcing the RideNow's obligations under
18 that agreement.

19 **c. RideNow Objects to Debtors' Proposed Cure Amount.**

20 In this case, RideNow objects to the estimate cure value of \$0 placed
21 on Debtors' nonmonetary default. It is Debtors' burden to prove a cure amount
22 and improper for Debtors to attempt to shift that burden to RideNow. *See* Debtors'
23 Motion, p.8, ¶17. Debtors must compensate RideNow for the reduced value of the
24 promotion and advertising that it will provide. Debtors' Motion makes no
25 compensation proposal at all, and thereby fails to meet their burden.

26 **d. Debtors' Have Not Provided RideNow With Adequate Assurance.**

Debtor cannot assume an executory contract unless it provides adequate
assurance of future performance of the Letter Agreement. Bankruptcy Code §

1 365(b)(1)(C). Similarly, Bankruptcy Code § 365(f)(2) requires adequate assurance
2 of future performance by the assignee of the executory contract or unexpired lease
3 for a debtor to assume and assign such contract or lease. Debtors have made no
4 attempt to satisfy its burden of providing adequate assurance to RideNow. In fact,
5 Debtors' Motion provides, "In this regard, each Bidder (and where applicable) the
6 Debtors, will present evidence of adequate assurance of future performance at the
7 Auction and Sale Hearing." Relative to RideNow's Letter Agreement, this will be a
8 hefty burden for the Debtor or its assignee. Even attempting to prove that
9 RideNow will receive the benefit of its bargain³ in the 2009-2010 NFL hockey
10 season is a fool's errand.

11 e. RideNow Objects to a September 10, 2009 Hearing on Debtors'
12 Motion.

13 The ordinary local rule time frames for a motion such as this have obviously
14 been dramatically shortened. Hearing on RideNow's objection and Debtors'
15 Motion is scheduled less than one (1) week from the deadline to respond to
16 Debtors' Motion. RideNow will not know until the day of hearing, September 10,
17 2009, whether the Debtor is actually seeking to have the Letter Agreement be
18 assumed and assigned.

19 In fairness, the Debtor has not filed a motion to assume and assign executory
20 contracts. It has filed a motion to *maybe* assume and assign *some* contracts,
21 *depending* upon future events. Such a conditional, contingent request for relief is
22 unfair to potential counterparties. Is RideNow then to be obligated to conduct and
23 complete discovery in advance of the hearing regarding an assumption that may
24 never occur? Inasmuch as the Debtor has offered no proposal to cure default, nor
25 any offer of assurance of future performance, is RideNow entitled to fairly assume

26 ³ The purpose of adequate assurance of future performance is to allow that debtor's contract partner would receive the benefit of its bargain under the contract. See, In re C&S Grain Co., 47 F.3d 233, 237 (7th Cir. 1995).

1 the Debtors and assignees will similarly fail to meet their burden of proof at the
2 time of hearing, or is RideNow to assume all evidence is to be concealed until the
3 time of hearing? While RideNow understands that the goal of bankruptcy is to
4 salvage the greatest value for unsecured creditors, the Court should not accept the
5 invitation to cut all corners and rush all procedures at the expense of other people's
6 property rights.

7 RideNow objects to the September 10, 2009 hearing relating to Debtors'
8 Motion and its Objection. After the September 10, 2009 hearing and after RideNow
9 is actually informed that its agreement is proposed assumed and assigned, it
10 requests sufficient time, if necessary, to conduct discovery and prepare for hearing.

11 **III. CONCLUSION**

12 For all of the foregoing reasons, RideNow objects to Debtors' Motion.
13 RideNow also respectfully requests that the Court set a hearing date at least 60
14 days after the September 10, 2009 hearing date if Bid 2 is accepted, to afford
15 RideNow sufficient time to fairly prepare to address the relief requested.

16 DATED this 4th day of September, 2009.

17 JENNINGS, HAUG & GUNNINGHAM, L.L.P.

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/s/ Chad L. Schexnayder (# 009832)

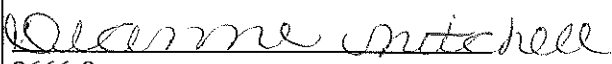
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22 Filed electronically and copies e-
23 mailed this 4th day of September,
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24 See attached service list

25 
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