

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 ) **The National Hockey League's Omnibus**  
22 ARENA MANAGEMENT GROUP, LLC, ) **Reply in Support of the Sale of Assets To**  
23 Debtors. ) **and Assumption of Liabilities By Coyotes**  
24 ) **Newco, LLC and Arena Newco, LLC**

25 Date: September 10, 2009  
26 Time: 9:00 a.m.  
27 Location: U.S. Bankruptcy Court  
28 230 N. First Ave, Courtroom 703  
Phoenix, AZ 85003

27 This filing applies to:  
28  All Debtors  
 Specified Debtors

1 The National Hockey League (the "NHL" or the "League") hereby submits this omnibus  
2 reply to (i) Debtors' Objection to the National Hockey League's Offer to Purchase the Assets of  
3 Coyotes Hockey and Arena Management, filed September 1, 2009 (Docket No. 878) (the "Debtors'  
4 Objection") and (ii) Jerry Moyes' Objection to Sale of Assets to Ice Edge Group or NHL Affiliates;  
5 and Response to NHL's Brief in Support of the Sale to Its Affiliates, filed September 1, 2009  
6 (Docket No. 881) (the "Moyes Objection"). The NHL respectfully represents as follows:<sup>1</sup>

7 **PRELIMINARY STATEMENT**

8 1. The Debtors' Objection says that "[t]he NHL's actions reek of bad faith."<sup>2</sup> Strong  
9 words, indeed. What has the NHL done in these cases to deserve such *ad hominem*?

10 2. Well, at the very first hearing, the Debtors proposed a DIP facility from PSE, the  
11 bidder they have so passionately embraced from day one to the exclusion of all others. The NHL,  
12 which had been funding the Team's operations since last year, came forward to offer a DIP  
13 financing alternative, essentially a pass-through of the NHL's lower borrowing costs with no fees.  
14 The NHL provided this financing to the Debtors at about a quarter of the cost under PSE's proposal  
15 – "a favorable interest rate", as Debtors' counsel acknowledged to the Court.<sup>3</sup>

16 3. Then, when the auction was in danger of failing for lack of any competing bids, the  
17 NHL again stepped up to the plate. The Reinsdorf Group had withdrawn from the process. The  
18 Ice Edge Group had not yet been able to submit a Qualified Bid,<sup>4</sup> which was perfectly  
19 understandable given the highly expedited schedule and the unique circumstances of these cases.  
20 And so, reluctantly, the NHL submitted its bid to provide an alternative that would cover the claims  
21 of all legitimate creditors and offer a reasonable chance for the Team to remain in Glendale and  
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23 <sup>1</sup> Capitalized terms not otherwise defined herein have the meanings ascribed to them in the NHL's  
24 Brief in Support of the Sale of Assets To and Assumption of Liabilities By Coyotes Newco, LLC and Arena Newco,  
25 LLC, filed August 27, 2009 (Docket No. 820) (the "NHL Brief").

26 <sup>2</sup> Debtors' Objection at 2.

27 <sup>3</sup> Hearing Transcript at 46:7, May 7, 2009.

28 <sup>4</sup> As such term is defined in the AMENDED Order Approving Bid Procedures for Auction/Sale of  
Phoenix Coyotes National Hockey League Team and Related Assets and the Assumption and Assignment of Certain  
Executory Contracts and Unexpired Leases, entered August 13, 2009 (Docket No. 638).

1 avoid the terrible damage to the City and the local economy that a relocation of the Team would  
2 entail. Their papers claimed that "[t]he Debtors are hopeful that another bidder will submit a bid  
3 on or before August 25, 2009",<sup>5</sup> and so, when the NHL did, one would have thought it was an  
4 answer to the Debtors' prayers. Instead, the Debtors choose to vilify the League for making the bid.

5         4.         The flawed rationale underlying the Debtors' Objection is the suggestion that the  
6 NHL has become a bidder in order to misappropriate for itself the value attributable to the Team  
7 which ought to be preserved for the benefit of the estate and creditors.<sup>6</sup> This is simply not true. As  
8 the NHL has now agreed, all Net Profit on a subsequent resale of the Team will go to the estates  
9 for distribution to creditors. And the answer to the Debtors' supposed concern that the NHL will  
10 unfairly "allocate all of the resale price to relocation and/or indemnity fees" – which this Court  
11 already has determined the League is entitled to receive if the Team does move<sup>7</sup> – "at a time when  
12 the NHL is free from this Court's supervision"<sup>8</sup> is that the Court will continue to have the power to  
13 review whether the estates have received that to which they are entitled under the NHL's Bid when  
14 the resale occurs and the Net Profit computation is made. Thus, the NHL stands to gain nothing,  
15 despite assuming all the risk of funding the Team's losses for the 2009-10 season which the League  
16 may never recoup.

17         5.         So, do these actions "reek of bad faith," as the Debtors charge? The League does  
18 not believe so. It has done everything it can to assure that the legitimate creditors here are made  
19 whole, that the City of Glendale, its citizens and the local Coyotes fans are not unnecessarily  
20 harmed by the Debtors and PSE's actions, and that the lawful interests of the League and its other  
21 members are respected and upheld. The NHL is content to have this Court determine for itself the  
22 bona fides of its conduct here and whether, as the League believes, its bid for the Debtors' assets is  
23 the highest and best and in the best interests of the Debtors and their estates.

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25         <sup>5</sup>         Debtors' Response to National Hockey League's Motion to Clarify June 15 Order, filed August 25,  
2009 (Docket No. 777), at 17 n.12.

26         <sup>6</sup>         See Debtors' Objection at 3 (emphasized language).

27         <sup>7</sup>         See In re Dewey Ranch Hockey, LLC, 406 B.R. 30, 37 (Bankr. D. Ariz. 2009).

28         <sup>8</sup>         Debtors' Objection at 9.

**ARGUMENT**

**I. The Debtors Have Repeatedly and Deliberately Mischaracterized the NHL's Interest in These Cases.**

6. In at least four pleadings, the Debtors have repeated a quote from the NHL's Memorandum of Points and Authorities in Support of National Hockey League's Motion for Determination (I) of Authority to Manage the Business and Affairs of the Debtors, and (II) that William Daly is the Representative of the Estates, filed May 13, 2009 (Docket No. 91) (the "Control Motion"), that the NHL's "fundamental interest in taking control of the Coyotes is to preserve the viability, good will and success of the NHL as a major professional sports league, rather than to protect any creditor interest."<sup>9</sup> By this quote, the Debtors have vehemently argued that the NHL's actions are inconsistent with the "seminal principal" of maximizing asset values for the benefit of all creditors.<sup>10</sup>

7. When the Control Motion is read in context, however, it is clear that the Debtors not only mischaracterized this quote, but also that they have done so deliberately. The context within which the NHL's statement was made is unambiguously clear. The comment addressed the oft-repeated accusation that the League was attempting to exercise control because it was acting with its proverbial creditor hat – that is the "creditor interest" to which the mischaracterized quote refers:

[T]he suggestion that the NHL was only acting as a "creditor" in exercising its governance rights is specious; the November 14, 2008 proxy agreements that effectuated the NHL's control of the Club predated any NHL loans. More importantly, the NHL's fundamental interest in taking control of the Coyotes is to preserve the viability, good will and success of the NHL as a major professional sports league rather to protect any creditor interest.<sup>11</sup>

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<sup>9</sup> Debtors' Memorandum of Points and Authorities in Support of Sale of Substantially All of Coyotes Hockey's Assets (NHL Issues), filed August 18, 2009 (Docket No. 703) (the "Debtors' Sale Brief"), at 2-3 (emphasis added); see also Debtors' Memorandum of Points and Authorities in Support of Motion to Sell Substantially All of Coyotes Hockey's Assets (NHL Issues), filed June 5, 2009 (Docket No. 288), at 2 n.1; Debtors' Response to NHL's (A) Renewed Motion for Determination of (I) Authority to Manage the Business and Affairs of the Debtors, and (II) that William Daly is the Representative of the Estates, or (B) in the Alternative, Motion for Appointment of a Chapter 11 Trustee, filed August 25, 2009 (Docket No. 778), at 22; Debtors' Objection at 2.

<sup>10</sup> See Debtors' Sale Brief at 2.

<sup>11</sup> See Control Motion at 2-3 (emphasis added).

1 The NHL was clarifying that it was not acting to protect its own creditor interest, not that it was not  
2 acting to protect the Debtors' creditors as a whole. In fact, as the NHL's Bid demonstrates, the  
3 League is committed to providing for the legitimate creditors in these cases by assuming liabilities,  
4 making cash payments and providing 100% of any Net Profit of a resale of the Team to the estates.  
5 No other bidder has shown more commitment to the creditor body as a whole.

6 **II. The NHL's Bid Is Not a Sub Rosa Plan.**

7 8. It is very common for a court to allow a debtor to sell most of its assets in a section  
8 363 sale, rather than under the terms of a plan of reorganization. See In re Gen. Motors Corp., 407  
9 B.R. 463, 488 (Bankr. S.D.N.Y. 2009) (citing Fla. Dept. of Revenue v. Piccadilly Cafeterias, Inc.,  
10 128 S.Ct. 2326, 2331 n.2 (2008), which "recognized the common practice in chapter 11 cases of  
11 selling the bulk of a debtor's assets in a section 363 sale, to be followed by confirmation of a  
12 liquidating plan"). The NHL's Bid proposes a clear-cut asset sale that should be approved under  
13 section 363 of the Bankruptcy Code.

14 9. This Court, in In re Work Recovery, Inc., 202 B.R. 301 (Bankr. D. Ariz. 1996),  
15 enumerated the following questions to be considered in analyzing whether a proposed sale under  
16 section 363 of the Bankruptcy Code should be recharacterized as a sub rosa plan:

- 17 (1) Has the debtor articulated a business justification for the request?  
18 (2) Is it good business judgment for the debtor to enter into the proposed transaction?  
19 (3) Will the proposed transaction further the diverse interests of the debtor, creditors  
20 and equity holders alike?  
21 (4) Is the asset increasing or decreasing in value?  
22 (5) Does the proposed transaction specify terms for adoption of the reorganization  
23 plan?  
24 (6) Will approval of the proposed transaction effectuate a de facto reorganization in  
25 such a "fundamental fashion" as to render creditors' rights under the other  
26 provisions of chapter 11 meaningless?

26 Id. at 303-04.

27 10. Considering these factors, the NHL's Bid plainly is not a sub rosa plan. First, it is  
28 good business judgment for the Debtors to sell the Team to the NHL because (i) the sale will avoid

1 costly and time-consuming litigation,<sup>12</sup> (ii) the sale will benefit the City of Glendale and its  
2 surrounding community,<sup>13</sup> and (iii) the NHL's Bid is the highest and best bid that can be  
3 consummated.<sup>14</sup> Second, a sale to the NHL will further the diverse interests of the Debtors and the  
4 creditors alike because the NHL's Bid best satisfies all legitimate parties-in-interest in the most  
5 efficient time frame.<sup>15</sup> Third, the value of the Team has unquestionably continued to decrease  
6 dramatically throughout these proceedings counseling in favor of a sale to the NHL, which has the  
7 unique business expertise to effectively manage a professional hockey team. Lastly, the NHL's Bid  
8 does not specify terms for adoption of a reorganization plan, nor does it effectuate a de facto  
9 reorganization in such a fundamental fashion as to render creditors' rights under other provisions of  
10 chapter 11 meaningless.

11 11. Specifically, the NHL's Bid does not attempt to circumvent the distribution scheme  
12 of the Bankruptcy Code. Rather, any alleged disparate treatment of creditors would simply be the  
13 result of the sale transaction itself and the inherent right of a purchaser to pick which assets and  
14 liabilities it wishes to acquire. It is clear a proposed sale to the NHL does not dictate the terms of a  
15 plan of reorganization, as its bid does not attempt to set forth or restructure the rights of creditors.

16 12. The Debtors' Objection compares the NHL's Bid to the bid approved in In re  
17 Chrysler LLC, 405 B.R. 84 (Bankr. S.D.N.Y. 2009), aff'd, --F.3d --, 2009 WL 2382766 (2d Cir.  
18 Aug. 5, 2009).<sup>16</sup> The NHL's Bid is even more legally supportable than the winning bid in Chrysler.  
19 For example, the total proceeds of the sale in Chrysler were insufficient to fully satisfy even the  
20 secured claims in that case.<sup>17</sup> Furthermore, in Chrysler, there was no other cash available to offer

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22 <sup>12</sup> See NHL Brief ¶¶ 31-38.

23 <sup>13</sup> See id. ¶¶ 32-35.

24 <sup>14</sup> See id. ¶¶ 39-49.

25 <sup>15</sup> Id. ¶ 46.

26 <sup>16</sup> See Debtors' Objection ¶¶ 25-29.

27 <sup>17</sup> Not only does the NHL's Bid assume or repay all of the Debtors' secured debt, it also provides a  
28 substantial recovery for most other creditors. The Debtors seem to argue, on the one hand, that the NHL is not  
providing enough to the estate and then, on the other, fault the NHL for attempting to satisfy most of the estate's  
creditors. The NHL simply cannot win under the Debtors' twisted logic.

1 to anyone other than the secured creditors so, of course, it was easy to distribute the sale proceeds  
2 in accordance with the Bankruptcy Code's priority scheme.<sup>18</sup> And notwithstanding the Chrysler  
3 purchaser's direct assumption of liabilities, just as is proposed in the NHL's Bid, the court found no  
4 sub rosa plan:

5 [The purchaser] has determined that, to effectively carry on its  
6 business, it should take over certain other of the Debtors' obligations.  
7 Any such assumption of liability reflects the purchaser's business  
8 judgment, the effect of which does not constitute a sub rosa plan  
9 because the obligation is negotiated directly with the counterparty.  
10 Thus, any of the obligations under those agreements are satisfied by  
11 [the purchaser] and do not constitute a distribution of proceeds from  
12 the Debtors' estates.

13 Chrysler, 405 B.R. at 99 n. 18. The same is true here.

14 13. Courts have been very clear that a section 363(b) sale transaction is not  
15 objectionable as a sub rosa plan based on the fact that the purchaser is to assume some but not all  
16 of the debtor's liabilities, or because some creditors may benefit disproportionately compared with  
17 others whose claims are not being assumed by the purchaser. As the Court in In re Trans World  
18 Airlines, Inc., No. 01-00056, 2001 WL 1820326 (Bankr. D. Del. Apr. 2, 2001) observed:

19 [N]othing in § 363 suggests that disparate treatment of creditors, such  
20 as is likely to occur here, disqualifies a transaction from court  
21 approval. . . . [W]here there is a § 363 sale of substantially all of the  
22 debtor's business as a going concern, there is bound to be disparate  
23 treatment of similarly situated creditors. . . . The treatment of  
24 creditors in a § 363(b) context is dictated by the fair market value of  
25 those assets of the debtor that the purchaser in its business judgment  
26 elects to purchase. A purchaser cannot be told to assume liabilities  
27 that do not benefit its purchase objective. Thus, the disparate  
28 treatment of creditors occurs as a consequence of the sale transaction  
itself and is not an attempt by the debtor to circumvent the  
distribution scheme of the Code.

29 Id. at \*11 (emphasis added); see also Gen. Motors, 407 B.R. at 496 ("Caselaw also makes clear that  
30 a section 363(b) sale transaction is not objectionable as a sub rosa plan based on the fact that the  
31 purchaser is to assume some, but not all, of the debtor's liabilities." (emphasis omitted)); Chrysler,  
32 405 B.R. at 111 ("The policy underlying section 363(f) is to allow a purchaser to assume only the

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33 <sup>18</sup> Presumably, the Debtors will distribute the sale proceeds from the NHL Bid in accordance with the  
34 priority scheme of the Bankruptcy Code, as the NHL has not sought, nor does it intend, to place any restrictions or  
35 qualifications on how the Debtors use the cash they receive for their assets.

1 liabilities that promote its commercial interests."). Interestingly, the Buyers here are being  
2 disparaged because they have chosen to assume a large number of liabilities to maintain the Team's  
3 goodwill, whereas the PSE bid favored by the Debtors only assumes a de minimus amount of the  
4 estates' liabilities.<sup>19</sup>

5 14. Further, nothing in the Code prohibits the NHL from buying claims at full value,  
6 which is essentially what it is doing, with full disclosure. See Fed. R. Bankr. P. 3001. The court  
7 in Figter Ltd. v. Teachers Ins. & Annuity Ass'n of Am. (In re Figter Ltd.), 118 F.3d 635, 639 (9th  
8 Cir. 1997), found that a secured creditor who bought most of the unsecured claims against a  
9 chapter 11 debtor, thereby rendering the debtors' proposed plan unconfirmable, acted in good faith  
10 and could vote each claim separately. Here, the NHL proposes to do far less than that. The NHL's  
11 Bid merely seeks to assume the vast majority of the Debtors' liabilities, as the NHL is permitted to  
12 do under section 363, except for those alleged insider liabilities that even the Creditors' Committee  
13 believes are subject to legitimate objections and defenses.

14 15. Finally, the cases to which the Debtors cite which discuss sub rosa plans can be  
15 easily distinguished on their facts because: (i) the NHL's Bid does not dictate the terms of any  
16 future reorganization plan; (ii) the NHL's Bid does not impose restrictions on creditor voting on  
17 any future reorganization plan; (iii) the NHL's Bid does not release claims against the Debtors'  
18 officers and directors; (iv) there is no "gift" or trust established for the benefit of lower-priority  
19 creditors at large in order to circumvent the priority scheme of a future plan; (v) the NHL's Bid  
20 does not deny creditors any protections that they would receive pursuant to a reorganization plan;  
21 and (vi) perhaps most importantly, there are legitimate business reasons for every provision in the  
22 NHL's Bid.

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25 <sup>19</sup> Interestingly, the Debtors object that the NHL's Bid "specifically excludes payment of tax liabilities  
26 for both Coyotes Hockey and Arena Management." (Debtors' Objection ¶ 23.) Not only is this common for purchasers  
27 of a business, but PSE's Amended APA provides for the same thing. (See Notice of Filing Exhibits A Through D to  
28 PSE Sports & Entertainment LP's Statement of Position on August 5 Sale Hearing and August 3 NHL Sale  
Rescheduling Motion, filed July 31, 2009 (Docket No. 538) Ex. B ¶ 2.5(a)(v) ("Excluded Liabilities" include "any  
Liability for Taxes, including any Taxes arising as a result of Seller's operations of the Business prior to the Closing  
Date, any Taxes that arise as a result of the sale of the Acquired Assets, and any deferred Taxes of any nature.")).



1 **III. The NHL's Bid Is the Highest and Best Bid.**

2 16. As the Creditors' Committee correctly states, the highest numerical bid is not always  
3 the highest and best bid.<sup>20</sup> See In re Bakalis, 220 B.R. 525, 532-34 (Bankr. E.D.N.Y. 1998) (sale  
4 of debtor's assets to second highest bidder approved based on court's evaluation of risks inherent in  
5 conditions attached to highest dollar bid); G-K Dev. Co. v. Broadmoor Place Invs., L.P. (In re  
6 Broadmoor Place Invs., L.P.), 994 F.2d 744, 745 (10th Cir. 1993) (sale to purchaser with lower  
7 purchase price approved because its bid contained fewer contingencies and could close  
8 immediately). Here, the NHL's Bid is the highest and best because, in addition to the reasons  
9 already set forth in the NHL's Brief, (i) it provides a full return to unsecured creditors, with limited  
10 exceptions, (ii) the entire Net Profit on a resale is for the benefit of the estates, (iii) unlike PSE's  
11 bid, which is subject to a number of contingencies, including PSE's satisfaction in its sole  
12 discretion with the relocation fee,<sup>21</sup> it is not subject to any significant conditions, and (iv) it will  
13 avoid substantial litigation.

14 **A. A Sale to the Buyers Provides a Full Return to Unsecured Creditors, with**  
15 **Limited Exceptions.**

16 17. Despite the Debtors' argument to the contrary, the Creditors' Committee recognizes  
17 the intent and, more importantly, the reality of the NHL's Bid with respect to unsecured creditors.  
18 As the Committee Statement of Position says, with limited exceptions, the NHL's Bid "provide[s]  
19 full return to unsecured creditors."<sup>22</sup> Under the NHL's Bid, the material exceptions are the insider  
20 claims of Messrs. Gretzky and Moyes.<sup>23</sup> The Debtors and, in a limited way, the Creditors'  
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23 <sup>20</sup> See The Official Joint Committee of Unsecured Creditors' Statement of Position Regarding Offers to  
24 Purchase Debtors' Assets, filed September 1, 2009 (Docket No. 880) ("Committee Statement of Position"), at 2.

25 <sup>21</sup> See PSE APA ¶ 8.1(c).

26 <sup>22</sup> See Committee Statement of Position at 3. The Committee Statement of Position provides that these  
27 limited exceptions are: (1) the contracts relating to the Jobing.com Arena; (2) the claims of Mr. Gretzky; and (3) the  
claims of Mr. Moyes and any affiliates. See id.

28 <sup>23</sup> The NHL, however, is still working through the lists of claims with the Creditors' Committee and the  
Debtors.

1 Committee, incorrectly indicate that the NHL's Bid seeks to provide less than full return to the City  
2 of Glendale with respect to the AMULA.<sup>24</sup>

3 18. With respect to the Gretzky and Moyes claims, the Debtors object that the "practical  
4 effect" of the NHL's Bid is that these claims will receive substantially less than similarly situated  
5 creditors.<sup>25</sup> The Debtors ignore the practical effect of the objections that have been and will be  
6 lodged against the claims of Messrs. Gretzky and Moyes.<sup>26</sup> As the Creditors' Committee observes,  
7 the treatment of those claims under the NHL's Bid is "somewhat ameliorated by what the Creditors'  
8 Committee sees as valid objections to those claims. Moreover, the claims asserted by Jerry Moyes  
9 and his affiliates are subject to numerous possible defenses, including, without limitation,  
10 disallowance, avoidance, equitable subordination, contractual subordination and re-  
11 characterization."<sup>27</sup>

12 19. As for the AMULA, the Debtors' Objection notes that the NHL's Bid leaves open  
13 the option of rejecting the AMULA but ignores the certainty of rejection under the PSE bid.<sup>28</sup> The  
14 NHL has made abundantly clear throughout these cases that its preference is to keep the Team in  
15 Glendale, and the NHL's proposed APA is no deviation from this. In fact, the NHL reluctantly  
16 made its bid for the Team in part to avoid the immediate rejection of the AMULA. The NHL has  
17 been and remains committed to finding a workable solution to keep the Team in Glendale. If the  
18 NHL is unsuccessful, it will deposit an additional amount that could be as much as \$13.5 million to  
19 deal with unsatisfied allowable claims against the estates, including those relating to the  
20 AMULA.<sup>29</sup>

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22 <sup>24</sup> See Debtors' Objection ¶¶ 20-21; Committee Statement of Position at 3.

23 <sup>25</sup> Debtors' Objection ¶ 55.

24 <sup>26</sup> See Objection of the City of Glendale, Arizona to Claims Asserted by Wayne Gretzky, filed August  
25 18, 2009 (Docket No. 679); The Official Joint Committee of Unsecured Creditors' Joinder in Objection of the City of  
26 Glendale, Arizona to Claims Asserted by Wayne Gretzky, filed August 24, 2009 (Docket No 761); Complaint, City of  
27 Glendale v. Moyes, No. 09-00952 (Bankr. D. Ariz. filed Aug. 18, 2009).

26 <sup>27</sup> Committee Statement of Position at 3 (citations omitted).

27 <sup>28</sup> See Debtors' Objection ¶¶ 44-48.

28 <sup>29</sup> See NHL Brief ¶ 9.

1           20.     Therefore, notwithstanding the Debtors' objections regarding non-payment of claims  
2 that are subject to legitimate objections and defenses, the NHL's Bid provides certainty of payment  
3 to the vast majority of unsecured creditors.

4           **B.     The Entire Net Profit Is for the Benefit of the Estates.**

5           21.     Despite the Debtors' non-supported assertion otherwise, the Net Profit is not  
6 "illusory," and now the full benefit of the NHL's efforts to resell the team in an orderly fashion will  
7 accrue to the true creditors in these cases.<sup>30</sup> Further, the NHL is not free to arbitrarily allocate all  
8 of the resale price to relocation and/or indemnity fees. Rather, the NHL will act in accordance with  
9 its established principles and policies to determine fair relocation and indemnity fees under the  
10 circumstances.<sup>31</sup> The insinuation that the NHL will act nefariously "free from this Court's  
11 supervision" is uncalled for and without any basis or support.<sup>32</sup>

12           **C.     A Sale to the Buyers Will Avoid Substantial Litigation.**

13           22.     The Debtors dismiss the fact that a sale to the Buyers will avoid substantial  
14 litigation. But they cannot deny the fact that the NHL has continuously, affirmatively and  
15 unequivocally stated it will appeal any approval of PSE's bid because there is nothing more  
16 fundamental to any sports league than the right to determine who should jointly produce its product  
17 and where it should be produced and sold.<sup>33</sup> Without question, this reality imposes a high level of  
18 conditionality to PSE's bid. As the Creditors' Committee says, approval of a sale to PSE is "certain  
19 to trigger years of potential appeals resulting in the diminution of the amount available to pay  
20 creditors and a delay in payment of their claims."<sup>34</sup> Accordingly, the consideration of future  
21 litigation is no red herring but, rather, a very legitimate, real concern of the Debtors' creditors.<sup>35</sup>

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23           <sup>30</sup>     See Hearing Transcript, September 2, 2009.

24           <sup>31</sup>     See NHL By-Laws Section 36.6.

25           <sup>32</sup>     See Debtors' Objection ¶ 8; see also ¶ 4 supra.

26           <sup>33</sup>     See, e.g., Hearing Transcript, September 2, 2009.

27           <sup>34</sup>     See Committee Statement of Position at 2 ("Although PSE's offer is the highest dollar offer currently  
28 available, the Committee is not yet convinced that the offer is the best offer for the Debtors' assets. As noted in the  
numerous pleadings filed in this case, PSE's ability to obtain the transfer and relocation of the Phoenix Coyotes is  
anything but certain. Moreover, an Order approving the sale of the Debtors' assets to PSE and the relocation of the

1 **IV. The NHL's Bid Is Not Improperly Conditioned on Partial Assignment of Executory**  
2 **Contracts and Unexpired Leases That Have Not Been Assumed.**

3 23. The NHL's Bid does not seek to "assign," as that term is used in section 365 of the  
4 Bankruptcy Code, the Glendale Contracts. Any assertions to the contrary in the Debtors' and Mr.  
5 Moyes' objections are inaccurate and misleading.

6 24. The NHL, recognizing the uncertainty that the City and the counterparties to the  
7 AMULA and the Glendale Contracts are facing, proposes to provide certainty for the upcoming  
8 hockey season, notwithstanding the lack of clarity inherent in the current situation. Although the  
9 League is making a bid for the Team, it is no secret that the NHL does not wish to own and operate  
10 the Team in the long term.<sup>36</sup> Should the NHL's Bid prevail, the NHL will seek to resell the Team  
11 in an orderly fashion. Therefore, the NHL's Bid is not premised on a requirement that the Debtors  
12 assume and assign the AMULA and the Glendale Contracts upon the Closing Date.

13 25. Instead, the NHL's Bid first provides that the League will take responsibility for the  
14 burden, *i.e.*, the financial obligations, of the AMULA and the Glendale Contracts for the Team's  
15 2009-10 season by making the required payments under those agreements either to the Debtors  
16 (who in turn will pay the appropriate counterparties) or to the counterparties until it can find a  
17 suitable purchaser committed to keeping the Team in Glendale to whom such agreements may then  
18 be assigned. This arrangement is not an improper condition of the NHL's Bid, and it does not  
19 result in diminished recovery for the contract counterparties. Rather, it provides assurances to the  
20 counterparties that they will at least be paid through the upcoming hockey season (in addition to  
21 receiving their pre-petition cure costs), which is more than can be said of the PSE proposal so  
22 blindly favored by the Debtors.

23 26. Second, under the Partial Lease Assignment Agreement, the Debtors will provide a  
24 partial assignment of the Debtors' rights and obligations under the AMULA to the Buyers, and the

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*(cont'd from previous page)*

26 team to Hamilton, Ontario is certain to trigger years of potential appeals resulting in the diminution of the amount  
available to pay creditors and a delay in payment of their claims.").

27 <sup>35</sup> See id.

28 <sup>36</sup> See NHL Brief ¶ 2.

1 Buyers will make the required payments under the AMULA to the Debtors or the City during the  
2 term of the partial assignment. As the NHL has previously demonstrated, such an assignment is  
3 explicitly permitted under the AMULA.<sup>37</sup>

4 **V. The NHL Submitted Its Bid in Good Faith.**

5 27. There has been no secret plot by the NHL to acquire the Team. The NHL has  
6 reluctantly stepped in as a bidder in order to instill, for the benefit of the Debtors' creditors and the  
7 Glendale community, a level of normalcy to the Team so that a fair, rational and professional sale  
8 process can be conducted.

9 **A. The Debtors Mischaracterize the NHL as an "Insider."**

10 28. Contrary to the Debtors' assertions, the NHL clearly is not an insider of the Debtors.  
11 The Debtors assert that the NHL is an insider under its arrangement for sharing of management  
12 control and through its "control" over the bidder qualification process. Despite the Debtors'  
13 repeated use of the word "control," however, it is patently evident that the NHL does not have any  
14 control over the Debtors in these cases. If the NHL were in control of the Debtors, these cases  
15 would never have been filed, nor would the NHL need to seek control in its Renewed Authority  
16 Motion. If the NHL were in control, the Debtors would not be suing the League under the antitrust  
17 laws. And any control that the NHL may have over its own internal policies and procedures does  
18 not translate into the NHL being "in control of the debtor[s]." See 11 U.S.C. § 101(31)(B)(iii). For  
19 the reasons set forth in the NHL's Renewed Authority Motion, the League believes it should be in  
20 control of the Debtors, but it plainly is not now, and has never been, in control of the Debtors  
21 during these cases. Quite simply, the Debtors have not shown, and cannot show, that the NHL is  
22 an "insider" of the Debtors under the Bankruptcy Code.

23 **B. Even if Considered by the Standards that Apply to Insiders, the NHL Has**  
24 **Acted in Good Faith.**

25 29. Judged by the standards applicable to insiders, the NHL has acted, and will continue  
26 to act, in good faith. It is not bad faith for an insider to have an interest in the purchase of a debtor.  
27 See In re Andy Frain Servs., Inc., 798 F.2d 1113, 1125 (7th Cir. 1986). A sale to an insider,

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28 <sup>37</sup> Id. ¶ 50.

1 "without more would not suffice to show a lack of good faith." Id. (citing Sulmeyer v. Karbach  
2 Enters. (In re Exennium, Inc.), 715 F.2d 1401, 1404-05 (9th Cir. 1983)). To show lack of good  
3 faith, there must be "fraud or collusion between the purchaser and the seller or other bidders, or  
4 that the purchaser's actions constituted 'an attempt to take grossly unfair advantage of other  
5 bidders.'" 255 Park Plaza Assocs. Ltd. P'ship v. Conn. Gen. Life Ins. Co. (In re 255 Park Plaza  
6 Assocs. Ltd. P'ship), 100 F.3d 1214, 1218 (6th Cir. 1996) (quoting Onouli-Kona Land Co. v. Estate  
7 of Richards (In re Onouli-Kona Land Co.), 846 F.2d 1170, 1173 (9th Cir. 1988)). Insiders "do not  
8 forfeit their good faith status unless it is shown that they colluded with the debtor or engaged in  
9 conduct that was intended to control the sale price or take unfair advantage of other bidders."  
10 Sugarloaf Indus. & Mktg. Co. v. Quaker City Castings, Inc. (In re Quaker City Castings, Inc.), No.  
11 04-8045, 2005 Bankr. LEXIS 2211, at \*20 (B.A.P. 6th Cir. Nov. 18, 2005) (citing In re Bakalis,  
12 220 B.R. at 538).

13 30. The same is true when an insider becomes a potential purchaser. See Prichard v.  
14 Sherwood & Roberts, Inc. (In re Kings Inn, Ltd.), 37 B.R. 239, 243 (B.A.P. 9th Cir. 1984)  
15 (upholding sale despite argument that good faith was lacking where purchaser controlled various  
16 entities in bankruptcy case). "The requirement that a purchaser act in good faith, of course, speaks  
17 to the integrity of his conduct in the course of the sale proceedings. Typically, the misconduct that  
18 would destroy a purchaser's good faith status at a judicial sale involves fraud, collusion between the  
19 purchaser and other bidders or the trustee, or an attempt to take grossly unfair advantage of other  
20 bidders." In re Rock Indus. Mach. Corp., 572 F.2d 1195, 1198 (7th Cir. 1978). Wearing multiple  
21 hats does not make a potential purchaser an insider, nor does it impose a presumption of bad faith.  
22 See U.S. Small Bus. Admin. v. XACT Telesolutions, Inc. (In re XACT Telesolutions, Inc.), No.  
23 DKC 2005-1230, 2006 U.S. Dist. LEXIS 621 (D. Md. Jan. 10, 2006) (member of board of directors  
24 who was also DIP lender was good faith purchaser where board had rejected all outside offers and  
25 insider made subsequent offer to purchase substantially all assets of debtors).

26 31. Here, the Debtors assert that the League's business judgment should be ignored, and  
27 that the NHL should be stripped of its right to use its internal procedures and policies, simply  
28 because it has now emerged as a potential purchaser. But the Debtors have not shown, nor can

1 they show, that the NHL has acted in bad faith. The cases cited by the Debtors are wholly  
2 inapplicable because (i) the NHL, a reluctant buyer that has forfeited any right to earn a profit from  
3 a resale of the Team, has not engaged in any self-dealing, (ii) the NHL has disclosed the  
4 information it is required to disclose, and (iii) the NHL has not illegally colluded with the Debtors  
5 or anyone else. Curiously, in one of the principal cases cited by the Debtors, the court found that  
6 Mr. Moyes himself breached his duties as an insider and fiduciary to disclose material information  
7 in the context of an asset sale where he was the buyer, and that he should not benefit from those  
8 breaches. See In re Simon Transp. Servs., Inc., 292 B.R. 207, 216-17 (Bankr. D. Utah 2003).  
9 Further, in each of the cases that the Debtors cited, the insider stood to benefit from its actions at  
10 the expense of the estate. In this case, the exact opposite is true – the NHL's Bid is in the best  
11 interests of creditors, and any profit the NHL may generate in a subsequent sale will go to the  
12 estates.

13 32. Finally, the Debtors assert that the NHL is acting in bad faith in order "to acquire for  
14 itself the Coyotes relocation opportunity right for a fraction of its value."<sup>38</sup> As already stated, the  
15 NHL has promised all of the Net Profit from a sale to the estates. Further, this Court already has  
16 acknowledged that the NHL owns the right to place a team in Hamilton, Ontario or elsewhere.<sup>39</sup>  
17 While that is not why the NHL is bidding for the Team, it is not bad faith to protect that which  
18 already belongs to the League.

19 **VI. The Debtors' and Mr. Moyes' "Red Herring" Arguments**

20 33. The Debtors have opted to recycle some of the same anomalous assertions they  
21 made in their previous objection to a Glendale sale. Each of these points is inapplicable in a  
22 section 363 sale and, moreover, do not apply to the facts at hand.

23 **A. The NHL's Bid Does Not Constitute a De Facto Subordination of Claims.**

24 34. The Debtors and Mr. Moyes allege that the NHL's Bid should not be approved  
25 because a sale to the Buyers would some how subordinate or disallow creditors claims without due

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27 <sup>38</sup> Reply in Support of PSE's Motion for Determination that the Debtors' Interests May Be Transferred  
to PSE Notwithstanding the NHL's Refusal to Consent, filed August 31, 2009 (Docket No. 852), at 2.

28 <sup>39</sup> In re Dewey Ranch Hockey, 406 B.R. at 37-39.

1 process. Approval of the NHL's Bid would have no such effect. The NHL does agree, however,  
2 that whether those claims are ultimately allowed or not is currently not an issue for decision by the  
3 Court.<sup>40</sup> In fact, to the extent that the Court determines that Mr. Moyes or Mr. Gretzky has claims  
4 (which the NHL believes is doubtful, at best), they will be paid that to which they are entitled  
5 under the Bankruptcy Code in due course through either a plan of reorganization or liquidation.  
6 The NHL does believe, however, that the questionable nature of these claims, as evidenced by the  
7 official and unofficial objections made by parties-in-interest (most notably, the Creditors'  
8 Committee), can and should weigh into the Court's determination that the NHL's Bid is the highest  
9 and best bid.

10 35. The Debtors and Mr. Moyes also misperceive what the Bankruptcy Code provides.  
11 Section 510(c) states that, after notice and a hearing, the court may "subordinate for purposes of  
12 distribution all or part of an allowed claim." 11 U.S.C. § 510(c) (emphasis added).<sup>41</sup> Here, neither  
13 Mr. Moyes nor Mr. Gretzky has an "allowed" claim. Section 502(a) states that a claim or interest is  
14 only deemed allowed if a party-in-interest does not object to that claim or interest. Here, the City  
15 and the Creditors' Committee are objecting to Mr. Gretzky's asserted claim.<sup>42</sup> Similarly, an  
16 adversary complaint<sup>43</sup> and Stipulated Order<sup>44</sup> have been filed against Mr. Moyes, and the Creditors'  
17 Committee has expressly announced its intention to object to Mr. Moyes' and his affiliates'

18 \_\_\_\_\_  
19 <sup>40</sup> Notably, the case law that the Debtors assert for support that the NHL has denied Messrs. Moyes and  
20 Gretzky due process does not address whether a court can approve a sale order that provides for distribution to only  
21 allowable claims. Instead, the case law only states that if a party seeks to equitably subordinate another party's allowed  
22 claim, then an adversary proceeding is required under Bankruptcy Rule 7001(8). Furthermore, the facts here are  
inapposite to those in GMAC Mortgage Corp. v. Salisbury (In re Loloee), 241 B.R. 655 (B.A.P. 9th Cir. 1999), also  
cited by the Debtors under its section 510(c) claim. Put simply, the NHL is not asking this Court to approve a sale  
order that affirmatively decides a lien priority dispute without giving proper notice to parties in interest.

23 <sup>41</sup> In re Mid-American Waste Systems, 274 B.R. 111, 125-26 (Bankr. D. Del. 2001) (subordination of  
24 proof of claim is only permitted if claim is allowed).

25 <sup>42</sup> See Motion to File Under Seal: Objection of the City of Glendale, Arizona to Claims Asserted by  
26 Wayne Gretzky, filed August 18, 2009 (Docket No. 679); Motion to File Under Seal: The Official Joint Committee of  
Unsecured Creditors' Joinder in Objection of the City of Glendale, Arizona to Claims Asserted by Wayne Gretzky,  
filed August 24, 2009 (Docket No. 761).

27 <sup>43</sup> Complaint, City of Glendale v. Moyes, No. 09-00952 (Bankr. D. Ariz. filed Aug. 18, 2009).

28 <sup>44</sup> See Notice of Lodging Stipulated Order Regarding Assignment of Debtors' Claims Against Insiders  
and Affiliates Thereof to the Official Joint Committee of Unsecured Creditors, filed August 24, 2009 (Docket No. 749).



1 claims.<sup>45</sup> Thus, section 510(c) is wholly inapplicable at this point, because Messrs. Moyes and  
2 Gretzky do not currently have allowed claims under the Bankruptcy Code.

3 **B. The NHL's Bid Does Not Disallow Claims Without Due Process.**

4 36. The NHL, through its bid, does not seek the disallowance of any claims. The  
5 Debtors contend that the NHL's Bid violates Bankruptcy Code section 502 because it constitutes a  
6 de facto partial disallowance of claims, but the Debtors do not cite any cases for this proposition.  
7 Furthermore, the Debtors, in making this argument, ignore the natural consequence of an asset sale  
8 in bankruptcy – that allowed claims remaining after the sale attach to the proceeds of the sale,  
9 regardless of the amount of those proceeds.<sup>46</sup>

10 37. The Moyes Objection also argues that the NHL's Bid impermissibly seeks to pay  
11 some general unsecured creditors while refusing to pay others.<sup>47</sup> Relying on Rosenberg Real  
12 Estate Equity Fund III v. Air Beds, Inc. (In re Air Beds, Inc.), 92 B.R. 419 (B.A.P. 9th Cir. 1988),  
13 Mr. Moyes argues that the NHL's Bid goes beyond choosing which executory contracts the League  
14 wants to accept and reject, which he concedes is permitted, to dictate which existing non-  
15 contingent claims could be paid in violation of the absolute priority rule.<sup>48</sup> On the contrary, the  
16 NHL's Bid contemplates providing cash to the estates and does not dictate to whom the money  
17 should be distributed thereafter.

18 **C. The NHL's Bid Does Not Seek Confirmation of a Plan of Reorganization.**

19 38. The NHL is not seeking confirmation of a plan and, therefore, any arguments by the  
20 Debtors in this vein are completely inapplicable to the NHL's Bid and unripe at this time because  
21 there is no proposed plan of reorganization or liquidation on file with the Court.  
22  
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25 <sup>45</sup> See Committee Statement of Position at 3.

26 <sup>46</sup> See, e.g., Notice of Receipt of Bids Under Sale Procedures Order and Filing of Same, filed August  
26, 2009 (Docket No. 809) Ex. 1, Sale Order ¶ K.

27 <sup>47</sup> Moyes Objection at 8.

28 <sup>48</sup> Moyes Objection at 7.

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**CONCLUSION**

For the reasons set forth herein and in the NHL's Brief, the Court should approve a sale of substantially all of the assets of the Sellers, free and clear of liens, claims, encumbrances and interests, to the Buyers.

DATED: September 4, 2009

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 September 4,  
2 2009, to:

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

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

14 Susan M. Freeman, Esq.  
15 Stefan M. Palys, Esq.  
16 LEWIS AND ROCA LLP  
17 40 N Central Ave  
18 Phoenix AZ 85004-4429  
19 SFreeman@lrlaw.com  
20 spalys@lrlaw.com  
21 Attorneys for PSE Sports & Entertainment and  
22 for S&E Interim Facility Corporation

19 Steven M. Abramowitz, Esq.  
20 VINSON & ELKINS LLP  
21 666 Fifth Ave 26th Fl  
22 New York NY 10103-0040  
23 sabramowitz@velaw.com  
24 Attorneys for SOF Investments LP, White Tip  
25 Investments, LLC, and Donatello Investments,  
26 LLC

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

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  
cjohnsen@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 LLC

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

8 Ivan L. Kallick, Esq.  
9 Ileana M. Hernandez, Esq.  
10 MANATT PHELPS & PHILLIPS  
11 11355 W Olympic Blvd  
12 Los Angeles CA 90064  
13 ikallick@manatt.com  
14 ihernandez@manatt.com  
15 Attorneys for Ticketmaster

16 Louis T.M. Conti, Esq.  
17 HOLLAND & KNIGHT LLP  
18 100 N Tampa St #4100  
19 Tampa FL 33602  
20 louis.conti@hklaw.com  
21 Attorneys for Facility Merchandising Inc.

22 Cathy L. Reece, Esq.  
23 Nicolas B. Hoskins, Esq.  
24 Fennemore Craig PC  
25 3003 n Central Ave #2600  
26 Phoenix AZ 85012-2913  
27 creece@fclaw.com  
28 nhoskins@fclaw.com  
Attorneys for City of Glendale, Arizona

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

Jonathan P. Ibsen, Esq.  
Laura A. Rogal, Esq.  
JABURG & WILK PC  
3200 N Central Ave #2000  
Phoenix AZ 85012-2400  
[jpi@jaburgwilk.com](mailto:jpi@jaburgwilk.com)  
[lar@jaburgwilk.com](mailto:lar@jaburgwilk.com)

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 McCUTCHEN LLP  
One Federal St  
Boston MA 02110  
Jon.bernstein@binghma.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

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2  
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4  
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23  
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25  
26  
27  
28

Attorneys for Wayne Gretzky

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

shane.gosdis@dlapiper.com  
allison.kierman@dlapiper.com  
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

---