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UNITED STATES BANKRUPTCY COURT

FOR THE DISTRICT OF ARIZONA

In re DEWEY RANCH HOCKEY, LLC, COYOTES HOLDINGS, LLC, COYOTES HOCKEY, LLC, and ARENA MANAGEMENT GROUP, LLC, Debtors.	Case No. 2:09-bk-09488-RTBP (Jointly Administered) **PUBLIC VERSION** Chapter 11 **The National Hockey League's Omnibus Brief Objecting to Relocation of the Coyotes and Responding to PSE's and Debtors' Briefs Regarding Relocation and Relocation Fees** Date: September 10, 2009 Time: 9:00 a.m. Location: U.S. Bankruptcy Court 230 N. First Ave, Courtroom 703 Phoenix, AZ 85003
This filing applies to: ▪ All Debtors □ Specified Debtors	

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The National Hockey League (the "NHL" or "League") hereby respectfully submits this memorandum objecting and responding to (i) Motion of Debtors and Debtors in Possession 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 [Dkt. no. 817]; (ii) Debtors' Memorandum of Points and Authorities in Support of Sale of Substantially All of Coyotes Hockey's Assets [Dkt. no. 703] ("Debtors Sale Brief"); (iii) PSE's Motion for Determination that the Coyotes May Be Relocated to Hamilton without NHL Consent [Dkt. no. 824] ("PSE Relocation Brief"); and (iv) PSE's Motion to Determine Relocation Fee Issues in Connection with the Relocation of the Coyotes to Hamilton [Dkt. no. 825] ("PSE Relocation Fee Brief").

PRELIMINARY STATEMENT

As we await the Court's decision concerning the NHL's rejection of Mr. Balsillie as an NHL owner, it is time once again to address one of the more extraordinary requests for relief ever asked of a bankruptcy court: to order, in the form of mandatory injunctive relief, the relocation of a professional sports franchise over the objection of its league. While the Debtors and PSE have again confirmed their ability to bombard the Court with mounds of paper, nowhere in them is one case in which a bankruptcy court ordered the relocation of a business, let alone a professional sports franchise that is part of a multinational thirty-member league. So, as PSE and the Debtors continue their rhetoric about anti-assignment provisions, "asserted" veto rights or consent "deemed given," we respectfully ask the Court to keep in mind that no court has provided the relief that the Debtors and PSE now seek. Indeed, in open court earlier this week, we heard the equally extraordinary proposition (quickly retracted, but quite revealing) that the Court can bend the law (in reference to good faith and fair dealing) depending on how much extra money may be available to creditors. And that is all that is happening here: the Debtors and PSE want this Court to create revolutionary new legal and equitable principles in order to get more money in the hands of Mr. Moyes and an NHL franchise in the hands of Mr. Balsillie in Hamilton, Ontario.

More technically, this Court must now decide three dispositive issues. First, under § 365(f) of the Bankruptcy Code, can the Debtors provide adequate assurance of future performance by PSE

of the Coyotes' contractual obligation to play its home games in Phoenix, Arizona? And, within this contractual context, can and should the Court order the forced relocation of the Coyotes to Hamilton based on the notion that the NHL has breached a duty of good faith and fair dealing owed to Mr. Moyes? Again, there is no relevant authority cited for this extraordinary proposition. Second, under § 363, is the NHL's right to determine the location of its Clubs an "interest" covered by § 363 (it is not) and, if so, have the Debtors proved that they meet the § 363 requirements, including that they can provide adequate protection of the NHL's interest under § 363(e)? Third, if somehow PSE's bid can survive these § 365 and § 363 inquiries, is its bid the highest and best compared to the NHL or Ice Edge bids, including when considering the critical question of execution risk?

In making these assessments, it is particularly important to keep in mind the different purposes and requirements of §§ 365 and 363. Section 365 deals with the rejection or acceptance of executory contracts – in this case, the Coyotes' obligation to play their home games in Phoenix, both under the NHL Constitution and By-Laws and the Coyotes' Consent Agreement. By contrast, § 363 deals with the sale of assets of the Club – i.e., the sticks, pucks, and other tangible assets of the Coyotes, as well as contracts that are properly assumed and assigned under § 365. The underlying policies of §§ 365 and 363 confirm this clear and important distinction. With respect to § 365, the Code's purpose is to make sure that any assumed contract is assigned cum onere, and that it will be performed by the assignee (here, PSE). The only way an assignee can avoid performing an assigned executory contract is to prove, on the full merits, that the provision is illegal or voidable on some other public policy grounds. In contrast, § 363, which deals with financial or possessory interests in physical assets or real property, may allow for the sale of assets free and clear of these interests, but there must at least be a bona fide dispute concerning the validity of that interest and the Debtors must prove that it can provide an "indubitable equivalent" of that interest in case the affected party later prevails in that dispute. Critically, however, § 363 cannot be used to modify any executory contracts that the Debtors wish to (or must) assume and assign under § 365.

This brings us to the NHL's response, set forth below, to the various § 365 contract and § 363 property issues raised by the Debtors' and PSE's several briefs. Many of these issues have been briefed before, in which case we will briefly summarize the NHL's position (and provide the appropriate reference).

With respect to § 365 and the assumption and assignment of the Coyotes' right to play in Phoenix, as well as any contractual rights between the NHL and the Coyotes, the NHL will focus on the following points:

- the NHL Constitution's territorial designation is not an anti-assignment provision (as this Court has observed);

- the territorial designation is not illegal or otherwise unenforceable (again, as this Court has found);

- under the NHL's Constitution and By-Laws, <u>the Debtors cannot prove that</u>:
  - Mr. Moyes was illegally denied an opportunity to have PSE's relocation application considered;
  - had the Board considered the relocation application objectively under the League's rules and procedures, it would have been compelled to approve the relocation;
  - the Debtors or PSE would be entitled to a mandatory injunction requiring relocation of the Club to Hamilton; and
  - any Court-ordered relocation fee for the hypothetical approval of a relocation would be as meager as PSE suggests.

Importantly, with respect to all of these issues, PSE cannot prevail merely by asserting (or even showing) that there are "bona fide disputes" over the Debtors' assertions – that is a § 363 bankruptcy standard applicable to the sale of assets, and is inapplicable to attempts to excise parts of executory contracts under § 365 or to any contract dispute between the NHL and Mr. Moyes.

As for § 363 relating to the sale of the Coyotes' assets, it is now clearer than ever that PSE is not particularly interested in the Coyotes' tangible assets (e.g., puck and sticks); rather, it wants the Coyotes' NHL <u>membership</u>, which is defined and governed by the Coyotes' executory contracts

with the NHL – including the Coyotes' home territory designation – contained in both the NHL Constitution and By-Laws and the Coyotes' Consent Agreement. And, of course, it includes the Coyotes' (through Mr. Moyes) agreement to follow NHL rules and procedures relating to a contemplated relocation. Yet, in an attempt to avoid the impact of these executory contracts, the Debtors and PSE continue to invoke § 363(f)(4) as a strawman standard by which they ask this Court essentially to modify these membership contracts as if the NHL merely had a financial interest at stake here that could be resolved at a later time. As we explain briefly below:

- the NHL's territorial designations and related consent rights are provisions within executory contracts, which are not the type of "interests" that can be sold "free and clear" with adequate protection;

- in any event, there is no nonbankruptcy law under § 363(f)(1) that allows the Court to ignore the NHL's executory contracts and related consent rights;

- further, even if § 363 somehow changes the analysis, there is no bona fide dispute, under relevant authority, as to the NHL's legitimate interest in determining the location of its Clubs; <u>and</u>

- it is indisputable that <u>if</u> the NHL "interests" include its territorial designations and related consent rights, the Debtors and PSE have not proven that the Court <u>can</u> fashion any relief that would protect such an interest, including by:

  – replacing its judgment for that of the NHL Board in assessing the relocation factors under By-Law 36; or

  – attempting to determine a "reasonable" relocation fee, which certainly cannot compensate for these fundamental NHL interests and, in any event, would be massively higher than PSE has suggested through its expert.

We respectfully request that this Court exercise its discretion under § 363 to reject the Debtors' and PSE's attempted novel use of the Code.

Finally, independent of all of these considerations, the Court must assess whether PSE's bid is the highest <u>and</u> <u>best</u> in light of the enormous execution risk of the PSE bid (both contingencies and relocation fee) when compared with the NHL and Ice Edge bids. On this question there can be no dispute that both the NHL and Ice Edge bids clearly are the best bids for the estate. In contrast

to those bids, PSE's bid is fraught with execution risk at every turn, including both the massive litigation risk (on numerous issues) that could keep that transaction from ever closing and PSE's right literally to walk from the deal if any Court-approved relocation fee is not to its liking.

DISCUSSION

I. SECTION 365 OF THE CODE PROVIDES NO BASIS TO FORCE A RELOCATION OF THE COYOTES.

A. The Debtors Must Assure PSE's Performance of the NHL Constitution and By-Laws and the Coyotes' Consent Agreement.

In its June 15, 2009 opinion, the Court rejected the argument that the "geographic restriction [that] is part of the executory contract sought to be assumed by the Debtors" violates the antitrust laws. In re Dewey Ranch Hockey, LLC, 406 B.R. 30, 37 (Bankr. D. Az. 2009). The Court also rejected the argument that the "Debtors' location obligation [is] a term prohibiting, restricting or conditioning the assignment of the agreement as those terms are used in Section 365[f]." (Id.)[1] The Debtors and PSE offer no good or new reasons why the Court should change its view regarding the Coyotes' obligation under the NHL Constitution and By-Laws to play in the home territory attached to its membership.

The Debtors and PSE also continue to give the back of the hand to the Coyotes' Consent Agreement,[2] arguing again this past week that they can "reject" the Consent Agreement and negotiate a new one with the NHL after the Court orders a relocation. Apparently, PSE is under the impression that it can divide what it calls the bundle of membership rights it is purchasing into those that it wishes to assume and those it wishes to "negotiate." PSE misses the import of § 365 of the Code. The Coyotes' Consent Agreement (and NHL Constitution and By-Laws) is an unseverable part of what makes the Coyotes a member of the NHL and, therefore, must be assumed

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[1] The NHL hereby incorporates the various briefs it has filed on the issue of whether the NHL's territorial designations and related consent rights can be viewed as per se or de facto anti-assignment provisions, which they cannot. (See NHL's Objection to the Debtors' Request to Sell the Phoenix Coyotes Under Sections 365 and 363 of the Bankruptcy Code [Dkt. no. 293] ("NHL Relocation Objection").)

[2] Both the Coyotes' entities, including the Debtors, and Mr. Moyes personally, are parties to the Consent Agreement with the NHL.

by the Debtors. This is clear from the Constitution and By-Laws (which contemplates requiring a Consent Agreement of new members),[3] which in Mr. Moyes' case resulted in a Consent Agreement, which was a condition to Mr. Moyes acquiring his ownership interest in the Club. (See Sept. 27, 2006 Consent Agreement at Background(b), attached as Exhibit E to First Daly Decl. [Dkt. no. 93].)

Nor can PSE and the Debtors simply assert that they can walk away from the location provisions of the Consent Agreement, including Mr. Moyes' obligation not to relocate or discuss or negotiate a relocation without seeking League approval. (Id. § 4(c).) Indeed, when PSE was contemplating how to avoid Mr. Moyes' and the Coyotes' executory contract embodied in the Consent Agreement, it knew that the contract had to be assumed and assigned, but "changed." In an April 24, 2009 e-mail from Richard Rodier to Tom Salerno, Mr. Rodier writes:

> [W]hen [you] break it down, all we are asking the Court(s) to do is force an assignment of the NHL Consent Agreement, but with a change to Exhibit A [the home territory].

(Email from Richard Rodier to Tom Salerno (Apr. 24, 2009), attached hereto as Exhibit 1.) This, of course, is precisely what the Code does not allow the Debtors to do: assign the Consent Agreement – which, again, must be done because that is what makes the Coyotes a member of the League – but change the Coyotes' home territory. Thus, absent the facial illegality of the NHL's territorial designations – a proposition this Court has already rejected – there is no NHL membership to assume and assign without the Consent Agreement's home territory. (Id.) Therefore, PSE and the Debtors cannot possibly provide adequate assurance of future performance because the transaction is conditioned upon a relocation to Hamilton. (See NHL Relocation Objection [Dkt. no. 293].)

B. The Debtors and PSE Cannot Create an "As Applied" Relocation Case Out of Thin Air.

Knowing that they have to assume and assign executory contracts that would require the Coyotes to play their home games in Phoenix, the Debtors continue to assert in various iterations that the current state of affairs somehow involves an antitrust violation such that the territorial

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[3] (See NHL By-Law 35.2(h), attached as Exhibit B to First Daly Decl. [Dkt. no.93].)

designation and consent rights in the Coyotes' executory contracts can be ignored. The Debtors must engage in this fiction because of the framework adopted by the Court in its June 15 ruling, in which it found:

> First, that for purposes of antitrust claims, professional sports league franchise movement restrictions are not invalid as a matter of law. Second, the question of what restraints are reasonable is one of fact. Third, the mere existence of terms and conditions for franchise relocations cannot violate antitrust law.

In re Dewey Ranch Hockey, LLC, 406 B.R. at 39 (citation omitted). In light of these unassailable principles, PSE and the Debtors are now left to argue that the NHL has "applied" its relocation rules and procedures in an unlawful way. Yet, in its June 15, 2009 opinion, the Court observed that "[t]he fundamental problem with [an as applied challenge] is that the NHL has never made any decision about the relocation of the Phoenix Coyotes to any site, be it Ontario, Canada or anywhere else, i.e., the NHL has not yet applied its relocation requirements to this request." (Id. at 40.)

That is still true today. Because the NHL Board of Governors rejected Mr. Balsillie's ownership application, it had no reason to process Mr. Balsillie's relocation application. (The League also had no reason to process the application because it was premised on an immediate relocation for the 2009-10 season, and as early as May the League reasonably concluded that it was too late for the Club to relocate for this season.) That leaves PSE to argue that the NHL's denial of Mr. Balsillie's ownership application should be "deemed" a denial of his relocation application. Specifically, PSE argues that (i) the Board denied Mr. Balsillie's ownership application because of his desire to relocate to Hamilton; and (ii) any denial based on a desire to prevent a relocation to Hamilton would violate the antitrust laws. PSE cannot prove either proposition.

C. The Debtors and PSE Cannot Prove That NHL Consent to the Relocation of the Coyotes Should Be "Deemed Given."

1. The Standard Is Full Merits, Not "Bona Fide Dispute," Under Contract or Antitrust Law.

At various points in their briefs, the Debtors, and to a lesser extent PSE, suggest that the Court can order a relocation of the Coyotes under § 365 as long as there is a "bona fide" dispute under § 363(f)(4) about whether the NHL's consent should be "deemed given" as a matter of contract law or that the Coyotes' territorial designation should be "excised" from the Coyotes'

executory contracts that constitute part of their NHL membership. (See Debtors Sale Brief at 7; PSE Relocation Brief at 25.) This simply is not the law. By its terms, Section 365 contains no lower standard of proof for assessing whether an executory contract obligation may be excised as a matter of public policy. Indeed, as a matter of fundamental Bankruptcy Code policy, if executory contracts could be split apart merely by finding a bona fide dispute over a specific provision's legality, it would violate the rule that an executory contract must be assumed and assigned cum onere. Instead, such a standard is reserved for the sale of assets under § 363 – which may include executory contracts in compliance with § 365 – where there is a dispute as to whether a third party has an "interest" in the assets. Critically, then § 363 only comes into play after all § 365 executory contracts are properly rejected or assumed and assigned. See In re Qintex Entm't, Inc., 950 F.2d 1492, 1495 (9th Cir. 1991); In re Res. Tech. Corp., 254 B.R. 215, 220-21 (Bankr. N.D. Ill. 2000) ("Instead of being subject to sale under § 363 of the Code, an estate's rights under executory contracts can only be transferred, by assignment, after the contract is 'assumed.'") (citing § 365(f)(2)(A)). Accordingly, if this Court were to "deem consent given" under either contract law or antitrust principles, as a threshold matter it could only do so based on a full merits trial in which the Debtors would bear the burden of proof.

It also is important to emphasize that while PSE has contended that "[u]nder applicable nonbankruptcy law, the NHL may be deemed to consent to the relocation request, or its right to withhold consent may be deemed forfeited, if the Court concludes that the NHL's refusal to consent is commercially unreasonable, not in good faith, arbitrary or illegal,"[4] no court has entertained or ordered consent "deemed given" in any context remotely like this one, let alone ordered mandatory injunctive relief. The cases on which PSE relies for this dubious proposition are inapposite for a variety of reasons, but most notably because they do not concern provisions related to the transfer of membership rights or requests of the court to relocate a business. See DB Structured Prods., Inc. v. Am. Home Mortgage Holdings, Inc. (In re Am. Home Mortgage Holdings, Inc.), 402 B.R. 87

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[4] (PSE Sports and Entertainment LP's Response to the NHL's Motion to Clarify and Finalize the Court's June 15th Order Regarding Relocation at 3 [Dkt. no. 776].)

(Bankr. D. Del. 2009) (allowing assignment of non-executory contract, where party withholding consent could be compelled to accept money damages under New York law and § 363(f)(5)); In re McCommas LFG Processing Partners, LP, No. 07-32222-HDH-11, 2007 WL 4234139 (Bankr. N.D. Tex. Nov. 29, 2007) (where no party withheld consent to debtors' chapter 11 sale); Clancy v. King, 954 A.2d 1092, 1109 (Md. 2008) (if author withdrew consent to use his name from limited partnership in order to decrease its profitability out of spite, action for breach of contract and fiduciary duty could be maintained against him).[5]

Likewise, the only case to which the Debtors point for the proposition that the NHL's location designation and related consent rights may be excised from the Coyotes' executory contracts with the League, including the Constitution and By-Laws, actually offers no support for that proposition.[6] Moreover, there remains no case in which a bankruptcy court has ordered the

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[5] Cases that PSE cites as purported authority for this Court to override the NHL's consent in the event it is deemed unreasonably withheld are so far afield they have no relevance to this case whatsoever. See Guntert v. City of Stockton, 43 Cal. App. 3d 203 (Cal. App. 1974) (voiding a city's arbitrary and unreasonable termination of an existing contract); Am. Book Co. v. Yeshiva Univ. Dev. Found., Inc., 297 N.Y.S.2d 156 (Sup. Ct. 1969) (ordering landlord to approve sublease, but recognizing that landlord would have been entitled to refuse consent for any reason absent a rider to the lease imposing a duty not to unreasonably withhold consent). PSE also relies upon several decisions, including freedom of association cases, where federal or state laws trumped the right to withhold consent. See Board of Dirs. of Rotary Int'l v. Rotary Club of Duarte, 481 U.S. 537 (1987) (upholding a state law that had the effect of requiring rotary clubs to admit women); T.J. King v. Employers Nat'l Ins. Co., 928 F.2d 1438, 1443 (5th Cir. 1991) (interpreting a state statute to require that if employer's consent to employee's insurance settlement was unreasonably withheld, the settlement would be deemed approved and employee would be entitled to share litigation costs with employer); Schellenberg v. Elks Lodge, 577 N.W.2d 163 (Mich. App. 1998) (ordering admission of a female candidate to membership in a fraternal lodge after determining that rejection of her application constituted a violation of the Civil Rights Act); Thorman v. Int'l Alliance of Theatrical Stage Employees, 49 Cal. 2d 629 (1958) (ordering union to admit plaintiff where membership was wrongfully denied under state law).

[6] See In re Boogaart of Fla., Inc., 17 B.R. 480 (Bankr. S.D. Fla. 1981). Contrary to the Debtors' assertions, the court in Boogaart did not rely upon antitrust law to excise a contractual provision. In that case, a sublessor of certain real property leases objected to the assumption and assignment of one of its subleases, arguing that the terms of its lease required a sublessee to utilize various consulting services the sublessor offered. Id. at 484-85. The court ruled that these contractual provisions could be stricken from the lease because they had never been enforced and, therefore, were waived. Id. at 485. While the debtors also argued that these waived provisions constituted an illegal tying arrangement, the court refused to address the merits of this claim and only cited the possibility that such antitrust violation could be a factor that "militates against the Court's giving effect to the provisions." Id. at 486. To the extent the Boogaart Court gave any weight to the alleged antitrust violation in striking contractual provisions, it is important to recognize that the alleged tying arrangement would have constituted a per se violation of § 1 of the Sherman Act. In contrast, this Court has recognized that the NHL's location restriction is not illegal on its face. See

(cont'd)

relocation of a franchise under the proposition that a league is not entitled to follow its internal processes related to a request for relocation.[7]

Applying these principles here, the Debtors have no basis to claim – let alone prevail on the merits – that the NHL violated any duty to the Coyotes or Mr. Moyes or violated the antitrust laws in deciding not to process the Coyotes' and PSE's joint relocation request.

2. The NHL Denied Mr. Balsillie's Ownership Application Based on Character and Integrity Grounds.

There is no evidence whatsoever supporting PSE's argument that the NHL Board of Governors denied Mr. Balsillie's ownership application in order to prevent the Coyotes from relocating to Hamilton. It is undisputed that the League has some history with Mr. Balsillie. As the NHL demonstrated in its Motion for a Determination that Debtors' NHL Membership Rights May Not be Transferred to PSE or an Affiliate Thereof [Dkt. no. 584] ("NHL Transfer Motion"), the League considered his application in good faith, applied its standard procedures, and performed its customary due diligence. At the end of the process, the Executive Committee and Board of Governors reasonably concluded that Mr. Balsillie did not satisfy the character and integrity requirements of Article 3.5 of the NHL Constitution and NHL By-Law 35. While Mr. Balsillie may quibble with some of the facts underlying the Board's decision, he cannot reasonably dispute that those are the facts relied upon by the Board in making its decision. There is no evidence that the Executive Committee or the Board considered his relocation request in making its decision; all

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In re Dewey Ranch Hockey, LLC, 406 B.R. at 39 (stating that "professional sports league franchise movement restrictions are not invalid as a matter of law").

[7] PSE has cited cases where a court determined that a right to consent to relocation was unreasonably withheld, but none concluded that consent was "deemed given." See Dunfee v. Baskin Robbins, Inc., 720 P.2d 1148 (Mont. 1986) (remedy for franchisor's unreasonably withheld consent to franchisee's relocation was monetary damages). PSE has claimed to offer an "on point" example where a court determined that consent to relocation was unreasonably withheld because the denial was not based on the application of proper "objective and legal criteria." (PSE Sports & Entertainment LP's Brief in Support of Relocation at 43 [Dkt no. 298] ("PSE Preliminary Relocation Brief") (citing Benson & Gold Chevrolet, Inc. v. La. Motor Vehicle Comm'n, 403 So.2d 13 (La. 1981) (where the court ruled that the Louisiana Motor Vehicle Commission wrongfully denied the license application of an automobile dealership that was relocating)).) But the case involved governmental approval using criteria arising under a state statute, as opposed to a private contract. The decision turned on the fact that the statute in question did not entitle the Motor Vehicle Commission to regulate the relocation of an existing automobile dealership. Id. at 20-21.

of the evidence is to the contrary. (See Jacobs Decl. ¶ 6 [Dkt. no. 586]; Second Daly Decl. ¶ 13 [Dkt. no. 544].)

Indeed, Mr. Leipold had no problem dealing with Mr. Balsillie in 2007 when Mr. Balsillie was admittedly upfront and transparent about his desire to move the Predators to Hamilton. (See Balsillie Dep. at 176-79; Leipold Dep. at 79.) Mr. Leipold's opinion regarding Mr. Balsillie changed not because of his desire to relocate a team to Hamilton but, rather, because Mr. Balsillie failed to follow through on the "where is, as is" deal he believed they had struck, and more disturbingly perhaps, that he used the Predators' name and logo without Mr. Leipold's consent to sell season tickets in Hamilton when he had committed to giving Nashville a good faith effort to succeed. (See Leipold Dep. at 175-76, 262-69; Leipold Decl. Ex. A [Dkt. no. 585].)[8]

Finally, the fact that the NHL has decided to put in its own bid in no way comprises the Board's decision to reject Mr. Balsillie. The Board has a duty to all Member Clubs, and the venture as a whole, to ensure that new owners possess the character and integrity to become an NHL owner, including on the critical character issue of a prospective owner's trustworthiness. See NHL Transfer Motion. In making such a decision, the Board's primary obligation is not to maximize the value received by an individual Club owner or his creditors, but rather to protect the best interests of the League as a whole. By executing a Consent Agreement and agreeing to abide by the Constitution and By-Laws, each owner acknowledges this fact. Moreover, as explained in other NHL briefing,[9] the NHL decided to put in its own bid in order to provide an alternative that would deal with most claims of legitimate creditors immediately and provide a reasonable chance for the Coyotes to remain in Glendale thus mitigating the significant damage that might be done to the City of Glendale and its citizens. That perfectly legitimate objective is completely distinct from the

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[8] Commissioner Bettman contemporaneously advised Mr. Balsillie – well before he expressed any desire to purchase the Coyotes and relocate them to Hamilton – that his actions relating to the Predators could "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." (Emails between Jim Balsillie and Gary Bettman (June 13-14, 2007), Jacobs Decl. Ex. A (Tab 18) [Dkt. no. 586].)

[9] (See NHL's Omnibus Reply in Support of the Sale of Assets to and Assumption of Liabilities by Coyotes Newco, LLC and Arena Newco, LLC [Dkt. no. 911]; NHL's Supplemental Submission in Support of NHL Transfer Motion [Dkt. no. 879].)

Board's consideration of Mr. Balsillie's character and integrity under By-Law 35, and the Debtors' and PSE's baseless and speculative assertions to the contrary should have no impact on the Court's resolution of this matter.

3. The Debtors and PSE Cannot Show That the NHL's Decision Not to Consider the Joint Relocation Application Was in Bad Faith.

The Debtors and PSE assert that because the NHL has not processed their Joint Relocation Application, the NHL somehow has acted in bad faith in violation of its covenant of good faith and fair dealing to Mr. Moyes. However, as discussed in more detail in the NHL's Reply Brief in Support of Motion for a Determination That the Coyotes Cannot Relocate for the 2009-10 Season [Dkt. no. 849], the League had no reason to process the application. First, the Debtors and PSE did not even submit the application until June 1, 2009, and did not request a waiver of the January 1 deadline for such application until June 17, 2009. At that point, the League was working to finish its schedule for the 2009-10 season, and it was no longer feasible to consider a relocation for this season. Because the Joint Application was conditioned on a relocation for the 2009-10 season, there was nothing left to consider. (Significantly, PSE has now conceded that the League's refusal to schedule the Coyotes in Hamilton for the 2009-10 season does not raise any antitrust issues.)

Second, as discussed above, on July 29, 2009, Mr. Balsillie was rejected as a potential owner by the NHL Board of Governors. At that point, PSE, which has no contractual relationship with the NHL, had no factual or legal basis to make any demands of the NHL whatsoever, much less that the League expend substantial time and money processing a relocation application for someone who was not qualified to be an NHL owner and who was premising his application on conditions that the League could not satisfy.[10]

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[10] PSE argues the fact that the NHL has not considered the Joint Relocation Application illustrates bad faith and cites cases for the proposition that bad faith "may consist of inaction." (PSE Relocation Brief at 16); see Parr v. Triple L & J Corp., 107 P.3d 1104, 1107 (Colo. Ct. App. 2004); German v. Ford, No. W2007-02768-COA-R3-CV, 2009 WL 604951, at *13-14 (Tenn. Ct. App. Mar. 10, 2009). These cases are inapplicable to the current facts because, unlike the defendants in the cited cases, the NHL is not contractually obligated to consider a relocation proposal from a bidder that the NHL Board of Governors has unanimously rejected. Furthermore, it should be noted that the remedy available in each of the cited decisions was damages, not an order for the defendant to consent or otherwise perform. Therefore, neither

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4. The Debtors and PSE Have Not Shown That the NHL Decided Not to Consider PSE's Relocation Application for Anticompetitive Reasons.

Despite undisputed evidence demonstrating that Mr. Balsillie's ownership application was denied based on character and integrity grounds and that the Board has not considered PSE's relocation application, PSE argues that the real reason motivating the Board is a secret veto right claimed by the Toronto Maple Leafs. But PSE has no evidence that the League still allows individual teams to veto relocations, much less that the purported existence of such a veto right is what motivated the NHL Executive Committee and Board to deny Mr. Balsillie's ownership application.

On the issue of whether a veto right exists, the Commissioner is charged with the application, enforcement and interpretation of the Constitution and By-Laws and his interpretations are binding upon League members and not subject to any review. (See NHL Constitution, Article 6.3(d), attached as Exhibit A to First Daly Decl. [Dkt. no. 93].)[11] The Commissioner has made clear, both before and during this matter, that he interprets the NHL Constitution as requiring only a majority vote for all relocations, including any potential relocation to Southern Ontario. (See Bettman Dep. at 23 ("There are at least of couple of occasions where I stated that the League's position would be to have any relocation, and as you're alluding to, to Southern Ontario would be by majority vote.").) The Commissioner's interpretation has been repeatedly communicated to all NHL Member Clubs and was communicated to the Canadian Competition Bureau in 2006 and 2007. (Letter from Gary Bettman to William Miller (Sept. 21, 2006), attached as Exhibit 13 to NHL's Reply in Support of Determination That Debtors' NHL Membership May Not Be

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of these cases provides authority for this Court to order the relocation of the Coyotes to Hamilton based on the NHL's alleged bad faith.

[11] The NHL By-Laws expressly authorize relocation votes to be governed by majority vote based on the advice of counsel. (See By-Law 36.4(c), attached as Exhibit D to First Daly Decl. [Dkt. no. 93].) Yet, PSE is essentially arguing that the League must interpret its own Constitution and By-Laws in a manner that PSE contends would violate the law (and potentially impede it from relocating) and that the League's refusal to interpret its Constitution in that manner should be held against it. With all due respect, PSE's position is absurd and demonstrates the manufactured nature of its antitrust claim – PSE actually wants the League to have as restrictive a relocation policy as possible to aid it in its antitrust argument.

Transferred to PSE or an Affiliate Thereof [Dkt. no. 863] ("NHL Transfer Reply"); June 20, 2007 NHL Board of Governors Meeting Minutes, attached as Exhibit A (Tab 21) to Jacobs Decl. [Dkt. no. 586].) Based on the evidence before it – including any material provided by Mr. Balsillie, who admits he was contacted by the CCB – the Bureau specifically found that no team has a veto right with respect to a proposed relocation to Southern Ontario:

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

(Canadian Competition Bureau Backgrounder at 4 (Mar. 31, 2008) (emphasis added), attached as Exhibit I to First Daly Decl. [Dkt. no. 93].) Every NHL witness has confirmed that they understand that the NHL's relocation rules and procedures do <u>not</u> permit any one of its member clubs to veto an application for the transfer of an existing franchise into its home territory. (Jacobs Dep. at 200 ("[A] simple majority of the board will determine whether or not a team can go into a particular location, irrespective of it being a pre-existing quote/unquote, territory."); Leipold Dep. at 104 ("[I]t would take a majority vote for a team to be able to transfer into the territory of an existing team. That it would take a majority vote.").)

PSE does not – and cannot – dispute any of this evidence. All that PSE offers in support of its theory, other than conjecture and speculation, is that in November 2006 the Toronto Maple Leafs took the position that they possess a veto right, and that the NHL Constitution has never been formally amended to eliminate the text that purports to stand for a veto right. PSE has also suggested that the NHL and its counsel obtained the favorable ruling from the Competition Bureau by misrepresenting the relevant facts. The accusation is as untrue as it is unprofessional. The NHL made clear to the Competition Bureau that the League was communicating its position, which would govern any potential relocation:

> [W]hile the NHL cannot purport to speak for all 30 Member Clubs, in this instance, I can confirm that the above-referenced policies and practices have been reflected in numerous communications from the League to the Member Clubs. Accordingly, such policies and practices should be known to them. For greater certainty, the

> NHL re-communicated its position as set out herein to the Board of Governors at its meeting on September 14, 2006.

(Letter from Gary B. Bettman to William Miller (Sept. 21, 2006), attached as Exhibit 13 to NHL Transfer Reply [Dkt. no. 863].) The Maple Leafs sent its reservation of rights letter later in November 2006. While PSE submitted the Maple Leafs' letter to the Court, it failed to submit the NHL's response. (See Letter from Shepard Goldfein to David Massengill (Dec. 14, 2006), attached as Exhibit 14 to NHL Transfer Reply [Dkt. no. 863].) 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. (See Bettman Dep. at 307-08.) Further, with four Maple Leafs representatives in attendance, Commissioner Bettman once again informed the Board in June 2007 that the League had represented to the CCB that any proposed relocation into Southern Ontario would be subject to a majority vote. (Jacobs Decl. Ex. A (Tab 21) [Dkt. no. 586].) There is no evidence that the Maple Leafs disagreed, much less that they reserved their rights at that time or any later time.

Most importantly, neither of the facts relied upon by PSE are material to the ultimate question: whether any individual team will be allowed veto rights in connection with a potential relocation to Southern Ontario. Again, the League's position – which has been clearly articulated for several years now and which will actually control the consideration of any relocation vote – is that any application will be considered by a majority vote of the Board. (See Daly Dep. at 42.) The League has even offered to stipulate that any relocation application in this matter will be considered by a majority vote, and at the September 2 hearing affirmatively made this representation to the Court once again.

On the issue of whether the purported existence of a veto right is what motivated the NHL Executive Committee and Board to deny Mr. Balsillie's ownership application, PSE offers no evidence at all. There is no evidence that the Executive Committee or Board considered Mr. Balsillie's relocation request, or that the Maple Leafs have attempted to invoke any purported "veto right" to prevent the Coyotes from relocating to Hamilton. The Maple Leafs are not represented on the Executive Committee, and did not make any statements at the Board of Governors meeting on

July 29, 2009, at which Mr. Balsillie's ownership application was denied. (See Jacobs Dep. at 136.) The Maple Leafs did not even participate in the vote. (Id.) Finally, Commissioner Bettman testified that the Maple Leafs have neither asked for, nor received, any assurance that the League is not going to consider relocation to Hamilton. (See Bettman Dep. at 306-07.)

D. The Debtors and PSE Have Not Proven That an Actual Vote Rejecting a Proposed Relocation to Hamilton Would Be in Bad Faith or Violate the Antitrust Laws.

Even if the NHL had before it a proper application for relocation of the Coyotes from Glendale to Hamilton – timely made by the current owner (or in conjunction with an approved prospective owner) far enough in advance of a future season that such relocation may be reasonably accomplished – to set aside a rejection of such application, the Debtors and PSE would need to prove that the NHL's decision was made in bad faith or was unlawful under the antitrust laws. The Debtors and PSE have not satisfied that burden such that the NHL's consent to this hypothetical relocation application should be "deemed given." Indeed, while as noted above such a showing would require a full plenary trial on the merits, the objective evidence – including an application of the relocation factors under NHL By-Law 36 – demonstrates that (i) a reasonable person easily could vote to disapprove of a move of the Club to Hamilton, and (ii) maintaining the Coyotes in Glendale would not be anticompetitive.

1. The Debtors and PSE have not demonstrated that an objective application of the League's relocation rules would compel a relocation from Glendale to Hamilton.

As explained more fully in the NHL's briefs regarding the League's rejection of Mr. Balsillie as an owner,[12] an application of the League's consent rights under the NHL Constitution and By-Laws would not violate any duty of good faith and fair dealing owed to Mr. Moyes unless "no reasonable party" would have made the same decision. Burger King Corp. v. H&H Rests., LLC, No. 99-2855, 2001 WL 1850888, at *7 (S.D. Fla. Nov. 30, 2001) (citation omitted). In circumstances similar to those here, this standard has been applied to uphold the rejection of a

[12] (See NHL Transfer Motion and Reply [Dkt. nos. 584, 863].)

proposed sale and relocation of a franchise in the face of a challenge that the franchisor's decision was made in bad faith and in contravention of its own relocation factors. See Ernie Haire Ford, Inc. v. Ford Motor Co., 260 F.3d 1285 (11th Cir. 2001).

In Ford, the franchisee proposed to sell his franchise through a transaction that was conditioned on the franchise being relocated to the purchaser's "superstore." Id. at 1289. The Dealership Agreement between the franchisee and Ford provided that the franchisee could not move the dealership "without the prior written consent of [Ford]" and that Ford could determine "in its best judgment, the . . . locations . . . of authorized dealers." Id. at 1288-89. After Ford rejected the proposed sale and relocation, the franchisee filed suit claiming that Ford had violated the duty of good faith and fair dealing. Ford proffered several reasons for its rejection, including that the proposed relocation conflicted with its market plan and that the relocation to the proposed purchaser's used car lot would have upset other franchisees and devalued the brand. See id. The court held that Ford's decision was made in good faith despite evidence presented by the franchisee that "[p]rior to rejecting the transaction, [Ford] performed a limited amount of due diligence," and that "had [Ford] adhered to its own relocation manual, nine of the ten factors listed therein favored the [relocation]." Id. The court concluded that the district court appropriately granted summary judgment for the franchisor on the franchisee's claim for breach of the covenant of good faith and fair dealing. Id. at 1292.

Similarly, here, the Debtors and PSE claim that a hypothetical application of the NHL's own relocation factors under By-Law 36 to a proposed relocation of the Coyotes from Glendale to Hamilton mandates a finding that a rejection of that proposed relocation necessarily would be in bad faith. (See PSE Relocation Brief at 9.) They assert not only that the NHL's factors favor relocation to Hamilton, but that the "undisputed evidence" shows that there can be no good faith basis for the NHL to withhold consent to such a relocation. (Id.) The Debtors and PSE, however, have failed to prove that "no reasonable person" applying the NHL's rules and factors would vote against a relocation of the Club out of Glendale. Indeed, as evidenced by the Declaration of Professor Franklin M. Fisher, the NHL would have a number of reasonable bases on which to reject in good faith such a hypothetical relocation application.

Professor Fisher analyzed the factors in By-Law 36 as applied to a hypothetical proposed relocation of the Coyotes to Hamilton, and concluded that it would be reasonable and procompetitive for a club or the NHL Board of Governors as a whole to find that the value of the League would be maximized by keeping the Coyotes franchise in Phoenix. (See Fisher Decl. ¶¶ 190-229.) Specifically, Professor Fisher opined that it would be reasonable to conclude that relocating the Coyotes to Hamilton would likely materially impair the League's efforts to promote geographic diversity, franchise stability, competitive balance, and community commitment, and would present significant operational problems, particularly if the move were made effective for the 2009-10 season. He pointed to record evidence showing, among other things, that:

- the Club can be viable in Phoenix, particularly with a more experienced and engaged ownership group;
- local government is prepared to provide financial assistance to the Club with respect to the use agreement for its state-of-the art arena, which was built only six years ago;
- the evidence is mixed as to whether the Club would be viable in Hamilton – e.g., there is significant fan support, but the proposed arena needs extensive renovation, the funding of which is not certain, the city lacks a corporate base, and there is some evidence that the population is declining; and
- abandoning Phoenix after all of the investments it has made would damage the goodwill of the League and leave a major U.S. city without a Club.

2. The Debtors and PSE have not demonstrated that rejection of a proposed relocation from Glendale to Hamilton would be anticompetitive.

The Debtors and PSE also appear to argue that any application of the NHL's rules and procedures to reject a proposed relocation of the Coyotes to Hamilton would be made solely to prevent competition with the Toronto Maple Leafs and thus would violate the antitrust laws. However, to succeed in setting aside as unlawful a denial of an application to relocate the Club, the Debtors and PSE would need to prove (again, after a full trial on the merits) that such a denial was anticompetitive. Of course, as this Court has already acknowledged, there are a number of legitimate justifications for a professional sports league's territorial designations and relocation rules and procedures. See In re Dewey Ranch Hockey, LLC, 406 B.R. at 38-40; see also NBA v.

SDC Basketball Club, Inc., 815 F.2d 562, 568 (9th Cir. 1987) (concluding that professional sports league franchise movement restrictions are not invalid as matter of law and that mere existence of terms and conditions for franchise relocations cannot violate antitrust law); L.A. Mem'l Coliseum Comm'n v. NFL, 791 F.2d 1356, 1373 (9th Cir. 1986) ("Raiders II") ("[T]he nature of NFL football requires some territorial restrictions in order both to encourage participation in the venture and to secure each venturer the legitimate fruits of that participation.") (emphasis in original and citation omitted).

Indeed, an objective application of the NHL's relocation factors demonstrates that there would be numerous legitimate procompetitive reasons for denying an application to relocate the Coyotes from Glendale to Hamilton. (See Fisher Decl. ¶¶ 27, 228-29.) As a result, the Debtors' antitrust claims face several insurmountable obstacles, including that:

- It is now well recognized that professional sports leagues (and teams) compete in the broader sports and entertainment market and hence do not have "market power" in an antitrust sense.
- The League competes for consumer (fan) interest and loyalty by promoting (a) geographic diversity, (b) franchise stability, (c) competitive balance, and (d) community commitment.
- Without market power, the NHL cannot restrain trade and must instead act in the best interests of consumers. Only by pursuing consumers' best interests can the League succeed in maximizing its own economic value.
- Sports leagues, like many joint ventures, are susceptible to "externalities" created by conflicts between the interests of individual Clubs and those of the League as a whole. Externalities can arise with (a) reassignment of ownership and/or (b) relocation of a Club.
- Unless appropriately regulated by the League, franchise relocations would harm consumers. Unilateral relocation by a Club would impair the League's ability to build fan support and loyalty in other NHL communities; undermine incentives for cities, businesses, and arena owners to commit resources to the success of their home Club; reduce incentives to invest in developing a high-quality entertainment for fans; and impose significant operational costs that ultimately are borne by consumers.
- Therefore, the League has a procompetitive interest in regulating the location of its Clubs, and the conditions and terms under which Clubs may be relocated. The NHL's relocation rules are intended to minimize inefficient outcomes associated with free riding and other externalities.

- The potential relocation of the Phoenix Coyotes presents the type of economic circumstances where the League's franchise relocation rules would have particular relevance to safeguard the quality of NHL Hockey and promote the League's competitive success.

- A complete economic analysis of the NHL's relocation rules supports the conclusion that it would be reasonable for Member Clubs to decide that relocating the Coyotes to Hamilton would likely materially injure the League and consumers.

In contrast, the report submitted by Prof. Zimbalist ignores or misstates both the facts relating to the Coyotes and/or basic economic principles:

- Prof. Zimbalist proposes an artificially and inappropriately narrow antitrust market limited to NHL Hockey. His proposed definition is contradicted by the relevant economics literature, evidence cited in his own expert declaration, and the NHL's clear recognition of the significant competition that it faces from other sports and forms of entertainment.

- Because he defines an inappropriately narrow antitrust market, Prof. Zimbalist is led incorrectly to conclude that the NHL has market power. This conclusion is falsified by the NHL's extremely small market share in a properly defined antitrust market.

- Prof. Zimbalist asserts that "the NHL acts like a cartel." As a matter of economic analysis, this assertion is incorrect. A correct economic analysis finds that the NHL is properly considered a single economic entity engaged in the production of the NHL Hockey product.

- Prof. Zimbalist acknowledges that the economic structure of a sports league, in which the incentives of individual clubs may become misaligned with the interests of the league as a whole, exposes the league to the risk of externalities imposed by its member clubs.

- Notwithstanding his recognition of this externality problem, and notwithstanding his acknowledgment that the evaluation criteria specified in NHL By-Law 36 "appear to respond to fan interests and, hence, to be reasonable,"[13] Prof. Zimbalist incorrectly concludes that relocation of the Coyotes would be unlikely to injure the League and consumers.

- Prof. Zimbalist reaches this incorrect conclusion because he conducted an inappropriately narrow analysis that overlooks numerous ways in which Club relocations in general — and relocation of the Coyotes *in particular* — would adversely impact the League's ability to promote a high quality entertainment product.

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[13] (Zimbalist Decl. ¶13 [Dkt. no. 292].)

- In particular, Prof. Zimbalist considers only one factor (namely, Hamilton's economic viability to support an NHL franchise) among the numerous economically relevant factors that NHL rules require the Board of Governors to consider when evaluating proposed franchise relocations. Prof. Zimbalist fails to analyze whether or how relocation of the Coyotes (absent NHL approval) would impair the League and consumers by, *inter alia*, (a) eroding the value of the option to locate a new NHL Club in Phoenix at some future date; (b) reducing the League's geographic diversity; (c) damaging the NHL's ability to foster community commitment to its Clubs on a League-wide basis; and (d) imposing significant operational costs on the League and its other Member Clubs.

- Finally, in situations where the League decides to authorize a Club's relocation, it is procompetitive for the League to have the authority to levy fees on the relocating Club to (a) compensate the NHL for the potential economic value that the League has created in the new location, and (b) compensate other Clubs for any harm caused to them by the relocation.

Thus, even if the NHL were to consider and reject an application for relocation of the Club, that denial would not be unlawful under the antitrust laws. Accordingly, there is no basis for this Court to find that consent of the NHL should be "deemed given" and permit the sale and relocation of the Coyotes without the NHL's consent.

E. Mr. Moyes' Breach of His Contractual Obligations to the League Precludes any Claim Based on the Implied Covenant of Good Faith and Fair Dealing.

At the September 2, 2009 hearing, PSE's counsel acknowledged that the only duty of good faith owed by the NHL is to Mr. Moyes, who is the current owner of the Coyotes, rather than to Mr. Balsillie.[14] PSE attempts to rely upon the Ninth Circuit's holding in Raiders II, recognizing that sports leagues have a duty to consider relocation requests of current owners in good faith. But the Ninth Circuit actually rejected the Raiders' implied covenant claim for reasons that are instructive here. The Ninth Circuit first observed that "[m]ost important for the present case, this implied promise of good faith and fair dealing is 'reciprocal,' a 'two-way street' which demands mutual compliance from the contracting parties." Raiders II, 791 F.2d at 1361. In light of the reciprocal

[14] Again, the law is unequivocal that the NHL owes no duty of good faith and fair dealing to Mr. Balsillie or PSE, as they are not parties to any contract with the NHL. See, e.g., Leal v. Allstate Ins. Co., 17 P.3d 95, 99 (Ariz. Ct. App. 2000) ("[I]t is well established that a third-party claimant, a stranger to the contract, cannot sue . . . for . . . breach of the duty of good faith."). Thus, Debtors' and PSE's repeated reliance on Raiders II is misplaced as Al Davis was an owner when he sought to relocate the Raiders. Here, Mr. Balsillie is not a current owner and Mr. Moyes is not seeking to relocate the Club for his own account.

obligations, the Ninth Circuit held that the Raiders, who were attempting to force their way into Los Angeles regardless of whether the league consented, could not recover under the implied covenant of good faith and fair dealing:

> The evidence presented in this case, taken as a whole, permits only one of two conclusions: either (1) neither the Raiders nor the NFL breached the duty of good faith with respect to the contemplated franchise move from Oakland to Los Angeles, or (2) both parties so breached. Either way, the Raiders may not recover under the implied covenant. The jury's implicit conclusion, that the NFL failed to act in good faith when it refused to authorize the Raider's relocation but that the Raiders did act in good faith with respect to this issue, is not a reasonable one to be drawn from the evidence, and we find it to be untenable as a matter of law. The Raiders and their managing general partner Al Davis expressed, on various occasions prior to the vote of the NFL team owners withholding League authorization for the Raiders proposed relocation, their refusal to forego these relocation plans regardless of the wishes of the NFL. They in essence denied any contractual obligation to submit their relocation plans to the League for approval, and deliberately sought to avoid or circumvent the prescribed procedure for obtaining a vote of the other teams . . . . It cannot reasonably be maintained that the NFL's subsequent withholding of authorization, but not these actions of the Raiders, constituted a breach of the implied promise of good faith and fair dealing.

Id. at 1361-62 (emphasis added).

The Ninth Circuit's reasoning applies with even greater force in this case. While the NHL vigorously disputes that it has acted in anything other than good faith, there can be no reasonable dispute that Mr. Moyes has knowingly violated his duties to the NHL in connection with any potential relocation of the Coyotes. He agreed with Mr. Balsillie to negotiate terms of a potential relocation behind the League's back despite knowing that doing so violated both League rules and his Consent Agreement; he included as an express provision of the APA negotiated with Mr. Balsillie that the League's consent be "deemed given" if the NHL did not consent; and he agreed to file (and has filed) antitrust litigation against the League in direct contravention of his contractual obligations in both the Constitution and By-Laws and his Consent Agreement with the NHL. (See Emails to and from Richard Rodier (Apr. 2009), attached as Exhibits 6-8, 10 to NHL Transfer Reply [Dkt. no. 863]; Coyotes Hockey–PSE Asset Purchase Agreement (amended as of July 31, 2009) ¶¶ 6.2, 6.3 [Dkt. no. 538].) Mr. Moyes' undisputed breaches of his contractual obligations to the League relating to any potential relocation of the Coyotes preclude him from maintaining

any claim against the League based on purported breaches of the implied covenant of good faith and fair dealing in those same contracts.

II. PSE HAS NOT PROVEN THAT, IF THE COURT WERE TO REACH THE ISSUE, ITS PROPOSED RELOCATION FEE WOULD MEET THE RAIDERS II TEST.

A. PSE Is Backtracking on the Raiders II Methodology.

PSE's motion relating to the determination of a relocation fee is "déjà vu all over again." Thus, notwithstanding its reluctant acknowledgement that this Court has decided to adopt the Raiders II "franchise opportunity" methodology for any relocation fee in this matter,[15] PSE again trots out arguments that any such fee should be limited to specific "goodwill investments" made in the "Hamilton market." (See PSE Relocation Fee Brief at 9.) PSE's rationale for this position is that the NHL Constitution and By-Laws restrict any fee to such investments and that there is no economic basis for the franchise opportunity methodology – again propositions already considered and rejected by the Court. In re Dewey Ranch Hockey, LLC, 406 B.R. at 37.

In any event, PSE's position is factually, economically and legally flawed. Factually, the Constitution and By-Laws says nothing that limits a relocation fee to an "investment" amount; on the contrary, the specific words are that the fee is to "reflect the goodwill developed by the League in the new location." (See By-Law 36.6, attached as Exhibit B to First Daly Decl. [Dkt. no.93].) In this respect, there is no dispute that the claimed rabid popularity of NHL hockey in Hamilton is the product of the NHL's overall development of goodwill for the product of NHL hockey throughout North America, including in Hamilton. Otherwise, under PSE's theory, in the absence of any investment specifically in Hamilton, there should be no interest in NHL Hockey. Obviously, there is the ninety-year investment by the League in NHL Hockey as the national sport of Canada that has engendered rapid fan interest throughout Canada, including Hamilton.

Likewise as a matter of economic theory, the franchise opportunity methodology is the most sound and robust approach for attempting to capture the goodwill developed by the League

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[15] (See PSE Relocation Fee Brief at 4; PSE Sports & Entertainment LP's Position on August 5 Sale Hearing and August 3 NHL Rescheduling Motion at 11 [Dkt. no. 533].)

over the years in a given area. (See Fisher Decl. ¶¶ 241-59.) This is because the expansion opportunity reflects the future income streams based on the popularity of NHL hockey in that area. (Id.)[16]

Nor can PSE be heard to complain that certain negotiated relocation fees in the past may have been lower than an expansion opportunity methodology may dictate. It was PSE's choice to ask the Court to force a relocation of the Coyotes to Hamilton, and there is nothing inappropriate (just the opposite) about the Court assessing the full value of that fee should it decide to force a relocation of the Club. Thus, PSE's argument is wrong as a matter of law. In Raiders II, the Ninth Circuit held that the NFL was entitled to the net lost franchise opportunity fee when the NFL was ordered by the court to allow the Raiders to relocate. The court found that the damages offset was necessary to prevent the unjust enrichment of the Raiders at the expense of the entire league. Subsequently, on remand, the NHL moved to amend its answer to add cross-claims seeking the full excess value of the net lost franchise opportunity value, arguing that the league's damages exceeded the amount of the damages offset. The NFL asserted claims under both tort and contract theories (i.e., usurpation of joint venture opportunity, breach of fiduciary duty, and breach of contract). (See NFL's Notice of Motion and Motion for Leave to File an Amended Answer and Cross-Claims and Memorandum of Points and Authorities in Support Thereof, L.A. Mem'l Coliseum Comm'n v. NFL, No. 78-3523-HP, attached hereto as Exhibit 2.) Over the Raiders' objection, the trial court granted the NFL's motion. (See Order Granting National Football League's Motion to Amend Answer, L.A. Mem'l Coliseum Comm'n v. NFL, No. 78-3523-TJH

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[16] Moreover, PSE is simply incorrect to assert that a relocation fee and indemnity fees are the same thing and cannot be separately assessed as mandated by By-Law 36.6 of the NHL's Constitution and By-Laws. They are not. As Dr. Fisher explains, the relocation fee accounts for the goodwill of the NHL that would otherwise be taken for free by the relocating team. By contrast, an indemnity fee accounts for the direct financial impact – for example, in terms of gate receipts and television revenues – that a relocation may have on a particular team or teams. (See Fisher Decl. ¶¶ 250, 254-59; Barrett Rep. at 99-102; Rapkoch Rep. at 107-09.) While PSE obviously wishes to carry out its forced relocation agenda with as little cost as possible, separate relocation and indemnity fees are appropriate. (Again, without accepting for a moment that such fees can in any way "pay" for assurance of adequate performance under § 365(f) or in any way provide protection of the NHL's interests – which are not compensable – in retaining the right to determine the location of its Clubs.) (See NHL's Motion to Clarify and Finalize the Court's June 15th Order Regarding Relocation [Dkt. no.684].)

(GHKx), attached hereto as Exhibit 3.) Accordingly, in the context of the court-ordered relocation that PSE seeks, under Raiders II the NHL is entitled to the full net lost expansion opportunity fee.

B. An Economically Reasonable Relocation Fee Would Be in the Range of $101 Million to $195 Million.

As explained in detail in the expert declaration and reports submitted herewith by Dr. Franklin Fisher, Barrett Sports Group, LLC ("BSG" or "Barrett Rep.") and Sports Value Consulting, LLC ("SVC" or "Rapkoch Rep."), the methodology used by PSE's expert, Dr. Andrew Zimbalist, in calculating a relocation fee range of $11.2 million to $12.9 million does not pass muster. Prof. Zimbalist uses methodologies that are not commonly used in the valuation community and were clearly selected to minimize the amount of a potential relocation fee. Indeed, given the Debtors' and PSE's assertions that a team in Hamilton would be one of the more valuable franchises in the League, and the Coyotes have been losing large sums of money in Phoenix, the notion that a team in Hamilton would be worth only $11.2 million to $12.9 million more than a team in Phoenix is patently absurd. Specific problems with Prof. Zimbalist's analysis include:

- Prof. Zimbalist understates the value of the Hamilton franchise option taken from the League by basing his estimate of that option on simple historical averages for NHL franchise expansions. This approach is inconsistent with his own view that Hamilton is an above-average site in terms of local interest in NHL Hockey.
- Prof. Zimbalist overstates the value of the Phoenix franchise option returned to the League by overlooking the fact that relocation by the Club would substantially impair the value of that option on a going-forward basis.
- By undervaluing the option taken in Hamilton and overvaluing the option returned in Phoenix, Prof. Zimbalist's underestimates the appropriate relocation fee owed to the League.
- Prof. Zimbalist also concludes that Clubs neighboring to Hamilton should not be entitled to any indemnification fee in the eventuality that the Coyotes franchise relocates. This unwarranted conclusion rests on the incorrect view that neighboring Clubs have monopoly power — an assumption that is falsified by evidence cited in Prof. Zimbalist's own report.
- Prof. Zimbalist also errs in concluding that any indemnification payment should be made out of whatever relocation fee is determined in this dispute. If the relocation fee is insufficient to offset the externalities that a Club's relocation imposes on other Member Clubs, then payment of a supplemental indemnification fee is economically appropriate and procompetitive. Failure to levy a supplemental indemnification fee

> would depress those Clubs' investment incentives and therefore would injure consumers.

(See Fisher Decl. ¶¶ 260-75.)

BSG and SVC, working independently, applied basic valuation methodologies to the formula set forth in Raiders II and the provisions set forth in the NHL Constitution and By-Laws to determine an appropriate relocation fee if the Coyotes were to relocate from Glendale to Hamilton. Their analyses took account of NHL League and Club economics, as well as today's economic conditions. BSG and SVC both set out to calculate and compare the fair market value of a team in Hamilton and the fair market value of a team in Glendale. They also considered payments that have been made to the NHL in connection with prior relocations.

In calculating the fair market value for a Hamilton team, they considered the size of the territory; the fan avidity of Canadian residents; the presence of competition from the Maple Leafs as well as, to a lesser degree, the Sabres (and other sports and entertainment providers); and operating and financial performance of comparable teams. This allowed the experts to estimate the likely revenues for a team in Hamilton under various assumptions. Based on those estimates and in accordance with standard valuation methods, the experts were able to extrapolate the fair market value of a team in Hamilton by applying a multiple of revenues. BSG estimated the value of a team in Hamilton as between $261.8 million and $279.8 million. SVC estimated the value of a team in Hamilton as approximately $315 million. Aided by the actual results that the Coyotes have achieved in Glendale, the experts employed the same methodology to calculate the likely revenues for a team in Glendale and the ultimate value of a team in Glendale. BSG estimated the value of a team in Glendale as between $163.4 million and $176 million. SVC estimated the value of a team in Glendale as approximately $120 million.

Based on the principles adopted in Raiders II, the experts calculated an appropriate relocation fee as the difference between the value of a team in Hamilton (opportunity lost) and the value of a team in Glendale (opportunity gained). BSG calculated that an appropriate relocation fee would be approximately $101 million. SVC calculated that an appropriate relocation fee would

be approximately $195 million. Both BSG and SVC corroborated their estimates by using other standard valuation methodologies and reached similar results.

III. FASHIONING THE PROPOSED PURCHASE AS A SECTION 363 SALE OF ASSETS DOES NOT CHANGE THE APPLICABLE SECTION 365 LEGAL STANDARDS, NOR CAN THE DEBTORS AND PSE COMPLY WITH SECTION 363 IN ANY EVENT.

Notwithstanding the Debtors' and PSE's sleight of hand, there can be no doubt that the Debtors seek to assume and assign to PSE the Coyotes' executory contract rights under the NHL Constitution and By-Laws, as well as the Coyotes' Consent Agreement. (See, e.g., Debtors Sale Brief at 1 ("Coyotes Hockey's membership in the NHL is an asset that it both owns outright and an executory contract right.").) As Richard Rodier testified: **REDACTED**

In truth, PSE is not particularly interested in purchasing the Coyotes' sticks, pucks, and other physical assets, but instead seeks franchise membership in the NHL (and relocation of that franchise to Hamilton). Such a membership right, as well as the ability to seek relocation, however, requires assumption and assignment of the Coyotes' contracts with the NHL – there is no separate membership "asset," tangible or intangible, apart from the NHL Constitution and By-Laws and the Coyotes' Consent Agreement.

That the Debtors and PSE attempt to structure the proposed purchase as a sale of the Coyotes' "Assets" does not change the analysis discussed above with respect to the Debtors' ability to assume and assign the NHL Constitution and By-Laws to PSE under § 365. Indeed, the § 363 "bona fide" dispute standard touted by the Debtors and PSE throughout this case is a red herring; and, in any event, the Debtors and PSE cannot comply with § 363(e) as necessary to effect a sale under § 363.

A. The Mandates of Section 365 Apply with Full Force to the Assumption and Assignment of Executory Contracts As Part of a Proposed Section 363 Sale.

Significantly, "Section 363 of the Code allows a debtor to sell assets of the estate, after notice and a hearing, including substantially all the assets of the estate. An executory contract does not become an asset of the estate until it is assumed pursuant to § 365. Therefore, the sale of

[debtor's] assets will not include any contract that is executory unless [debtor] first assumes the contract." In re Qintex Entm't, Inc., 950 F.2d 1492, 1495 (9th Cir. 1991) (citing In re Tleel, 876 F.2d 769, 770 (9th Cir. 1989)). Indeed, a "debtor cannot avoid the requirements of section 365 by saying it is 'selling' a lease or executory contract, rather than assuming and assigning it." In re Access Beyond Techs., Inc., 237 B.R. 32, 47-48 (Bankr. D. Del. 1999); see Gray v. W. Envtl. Servs. & Testing, Inc. (In re Dehon, Inc.), 352 B.R. 546, 562-63 (Bankr. D. Mass. 2006) ("Without an assumption of the contracts, which is the mechanism for a trustee or debtor to secure enforceable rights against the non-debtor contracting party, they could not assign any enforceable rights to a third party." (emphasis in original)).

Further, while "executory contract rights are a form of 'property' that is salable 'free and clear' of interests under section 363(f). . . . [i]n addition to complying with section 363, . . . sales of executory contracts and leases also have to comply with the protections afforded the contract party under section 365 of the Bankruptcy Code." Shaw Group, Inc. v. Bechtel Jacobs Co. (In re IT Group), 350 B.R. 166, 171 (Bankr. D. Del. 2006) (emphasis in original) (citing Cinicola v. Scharffenberger, 248 F.3d 110, 123-24 (3d Cir. 2001) ("[T]he sale of an executory contract triggers the protections afforded sales of bankruptcy estate property but also requires satisfaction of the requirements for assuming and/or assigning the same executory contract.") (citation omitted)); see also In re Res. Tech. Corp., 254 B.R. 215, 220-21 (Bankr. N.D. Ill. 2000); Chira v. Saal (In re Chira), 367 B.R. 888, 900-01 (Bankr. S.D. Fla. 2007) (noting that "[i]n the context of executory contracts, courts have recognized section 365 as the exclusive remedy available to parties wishing to sell property or other assets of the estate"); In re Taylor, 198 B.R. 142, 167 (Bankr. D.S.C. 1996) ("The Court in [Qintex], in denying the sale of an executory contract as part of a sale of assets under § 363 implied that § 365 is either an exclusive remedy or a necessary intermediate step before such a sale is available.").

A proposed § 363 sale that contemplates the assumption and assignment of a debtor's contracts must, therefore, first comply with § 365. Accordingly, structuring the proposed sale to PSE under § 363 does not change the legal analysis under § 365 discussed above with respect to

the Coyotes' contractual rights, and for those same reasons the proposed sale to PSE should be denied.[17]

B. The Purported Section 363 "Bona Fide" Dispute Standard Is Specious in This Case.

Throughout this bankruptcy case, the Debtors and PSE have beseeched the Court that it need find only a "bona fide" dispute under § 363(f)(4) to excise the NHL's consent rights from the NHL Constitution and By-Laws. (See, e.g., PSE Relocation Brief at 25 ("Rather than requiring a definitive ruling on the merits of a challenge to the NHL's interest based on nonbankruptcy law, subsection (f)(4) allows a free and clear sale notwithstanding the NHL's interest in the property (i.e., its relocation consent rights) if 'such interest is in bona fide dispute.'").) To the extent § 363 even applies separate and apart from § 365 to the question of whether the Coyotes' contractual rights under the NHL Constitution and By-Laws can be conveyed without NHL consent, this argument is, at best, disingenuous.

Section 363(f) permits a debtor to sell property of the estate "free and clear" of any third party's interest only if one of five distinct and independent predicates are satisfied. See, e.g., In re Wolverine Radio Co., 930 F.2d 1132, 1147 n.24 (6th Cir. 1991) (noting that § 363(f) is constructed disjunctively and disallowing free and clear sale because "not one of the conditions is met in this case"); Reiter v. Sonotone Corp., 442 U.S. 330, 339 (1979) ("Canons of construction ordinarily suggest that terms connected by a disjunctive be given separate meanings, unless the context dictates otherwise.").[18] The Debtors and PSE point out two of these pre-conditions: "applicable

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[17] For the reasons discussed above, the Debtors here cannot properly assume and assign the Coyotes' contractual rights under the NHL Constitution and By-Laws and the Coyotes' Consent Agreement because the contemplated transaction is improperly premised on rewriting material terms of those agreements, i.e., changing the Coyotes' designated home territory from Phoenix to Hamilton. As a result, the Debtors cannot provide adequate assurance of future performance, and they have not identified any basis to force the League to renegotiate the Coyotes' executory contracts to change the Club's home territory. They have not proven that the League has acted in bad faith, and they have not proven that the League has violated the antitrust laws. (See NHL Relocation Objection [Dkt. no. 293].)

[18] The Debtors, as they must, admit this legal requirement: "Coyotes Hockey is seeking to sell its Assets under Bankruptcy Code § 363(b) . . . , which can be approved [under § 363(f)] if one of the following conditions is satisfied . . . ." (Debtors Sale Brief at 2 (emphasis added).)

nonbankruptcy law permits sale of such property free and clear of such interests," § 363(f)(1); and/or "such interest is in bona fide dispute," § 363(f)(4).

Significantly, the Debtors and PSE seek to conflate these principles into a single standard to better suit their needs. Fully aware that the record would not bear out a successful, full-merits challenge to the NHL's consent rights based on either antitrust law or the duty of good faith and fair dealing (purported "nonbankruptcy law" under § 363(f)(1)), the Debtors and PSE blithely maintain that a "bona fide" dispute (under § 363(f)(4)) regarding whether "nonbankruptcy law" (under § 363(f)(1)) would invalidate the NHL's consent rights suffices. (See, e.g., Debtors Sale Brief at 17 (alleging that the NHL consent rights "are in bona fide dispute because they violate federal and state antitrust law").) Section 363(f) does not provide for any such blurring of the applicable lines. See, e.g., In re Wolverine, 930 F.2d at 1147 n.24 (noting that § 363(f) is constructed disjunctively and disallowing free and clear sale because "not one of the conditions is met in this case").

1. Section 363(f)(1) requires a definitive ruling.

Again, to the extent § 363 has any power here independent of § 365, if the Debtors were to convey the Coyotes' membership right (embodied in the NHL Constitution and By-Laws) to PSE under § 363(f)(1), the Court would have to make a definite ruling, on the full merits, that nonbankruptcy law (either antitrust law or the duty of good faith and fair dealing) allows the Court to essentially override the NHL's lack of consent. See 3 Collier on Bankruptcy ¶ 363.06[2], at 363-44 to -45 (15th ed. rev. 2009) ("A court may authorize sale free and clear under paragraph (1) when the nonbankruptcy law by its terms relieves a successor from ongoing obligations associated with the property, the court thereby effectively making a determination, binding on future claimants, that the relief provision of the other law applies."). As discussed above and in the NHL's Relocation Objection [Dkt. no. 293], the Debtors and PSE cannot prove that any nonbankruptcy law compels a forced relocation of the Coyotes. See section I.C.1, supra.

2. The NHL consent rights are not "interests" in the property; they are the property.

The Debtors' and PSE's position with respect to § 363(f)(4) again bespeaks the incongruity of their attempt to shoehorn a § 365 assumption and assignment of the NHL Constitution and By-Laws into a § 363 sale of "Assets." The Debtors and PSE argue that the NHL consent rights – the purported "interests" – "are set forth in Articles 3.5, 4.1, 4.2, and 4.3 of the NHL Constitution, and Sections 35 and 36 of the NHL By-Laws." (Debtors Sale Brief at 5.) Of course, these are provisions of the very contracts the Debtors seek to convey to PSE, and not "interests" separate and apart from the bankruptcy estate property (tangible or intangible).

Indeed, every case cited by the Debtors and PSE deals with a purported claim against the estate or financial or possessory interest in physical or real property of the estate, including litigation claims, liens, tax interests, intellectual property grants, commissions, and statutory rights of recovery. (See Debtors Sale Brief at 3-5; PSE Relocation Brief at 26); see, e.g., Clear Channel Outdoor, Inc. v. Knupfer (In re PW, LLC), 391 B.R. 25 (B.A.P. 9th Cir. 2008) (lien on debtor's assets); In re Trans World Airlines, Inc., 322 F.3d 283 (3d Cir. 2003) (employment discrimination claims and rights under travel voucher program established in settlement of sex discrimination action); In re Leckie Smokeless Coal Co., 99 F.3d 573 (4th Cir. 1996) (financial obligations under employee benefit fund and plan); Folger Adam Security, Inc. v. DeMatteis/MacGregor, JV, 209 F.3d 252 (3d Cir. 2000) (recoupment and set-off defenses not interests under 363(f)); Ninth Avenue Remedial Group v. Allis-Chalmers Corp., 195 B.R. 716 (Bankr. N.D. Ind. 1996) (environmental cleanup claims). There is no authority that a provision of an executory contract a debtor seeks to assume and assign can be excised from the contract under § 363(f)(4), and instead PSE relies only on cases related to various interests in real property. (See PSE Relocation Brief at 25); In re Bedford Square Assocs., L.P., 247 B.R. 140 (Bankr. E.D. Pa. 2000) (tenant's leasehold interest extinguished by debtor's rejection of lease); In re Clark, 266 B.R. 163, 171-72 (B.A.P. 9th Cir. 2001) (rejecting argument that real property could be sold free and clear of exemption claim under § 363(f)(4)); In re Downour, No. 06-30854, 2007 WL 963258 (Bankr. N.D. Ohio Mar. 28,

2007) (lien on real property); In re Downtown Athletic Club of N.Y. City, Inc., No. M-47 (JSM), 2000 WL 744126 (S.D.N.Y. Jun. 9, 2000) (right to obtain leases under rent stabilization law).

Nor, as discussed above, can the Debtors or PSE point to any case that applies § 363(f)(1) nonbankruptcy law under the § 363(f)(4) bona fide dispute standard.[19] Absent a definitive ruling from this Court that these provisions violate the antitrust laws or the duty of good faith and fair dealing, the Debtors must assume and assign to PSE the NHL Constitution and By-Laws cum onere – i.e., including these purported "interests," the NHL consent rights.

C. In Any Event, the Debtors Cannot Provide Adequate Protection of the NHL's "Interests" in the NHL Constitution and By-Laws As Required by Section 363(e).

Assuming arguendo that § 363(f) has any effect whatsoever on the legal requirements for the Debtors to assume and assign the NHL Constitution and By-Laws to PSE, and that the Court either has the authority to excise the NHL consent rights from these executory contracts under § 363(f)(1) or were to characterize the NHL's consent rights (even though part of these very contracts) as "interests" subject to a bona fide dispute under § 363(f)(4), the Debtors nevertheless cannot provide adequate protection of the NHL's "interests" as required by § 363(e) of the Bankruptcy Code. Section 363(e) requires the Court to adequately protect the NHL's interest:

> Notwithstanding any other provision of this section, at any time, on request of an entity that has an interest in property used, sold, or leased, or proposed to be used, sold, or leased, by the trustee, the court, with or without a hearing, shall prohibit or condition such use, sale, or lease as is necessary to provide adequate protection of such interest.

11 U.S.C. § 363(e). Debtors' attempt to assume and assign to PSE the NHL Constitution and By-Laws without those provisions PSE seeks to avoid (the territorial designation of the Phoenix Coyotes and the NHL's consent rights), highlights the very "interests" that this Court cannot protect under § 363(e). Under § 361, when adequate protection is required to be provided to an interest holder under § 363, such adequate protection may be provided by, among other things, cash

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[19] Further, for the reasons discussed in section I.D, supra, there can be no bona fide dispute over the NHL's contractual right to determine the location of its Clubs.

payments, a replacement lien or such other relief "as will result in the realization by such entity of the indubitable equivalent of such entity's interest in such property." 11 U.S.C. § 361. See generally In re Kellstrom Indus., Inc., 282 B.R. 787, 794 (Bankr. D. Del. 2002) (discussing interplay between §§ 363(f), 363(e) and 361). Here, the NHL's interest is in having an NHL team in the greater Phoenix area.

In a typical sale scenario, cash payments and liens would protect the non-debtor party's interests in property of the estate. Here, however, the NHL cannot be financially compensated for deprivation of the fundamental right to decide Club ownership and location. Nor can the NHL be adequately protected by attachment of its interests to sale proceeds or by any other monetary compensation, and there is no alternative remedy to realize the "indubitable equivalent" of its interests.[20] Indeed, no relocation fee or indemnity payment (regardless of amount) could compensate the NHL if the Court were to deprive the NHL Board of Governors of its ability to consent to who its prospective partner would be and where one of the League's Member Clubs would play (the NHL is entitled to a relocation fee even when its consents to a relocation). Even if the Court has the authority under § 363(f) to eliminate the NHL's consent rights from the NHL Constitution and By-Laws, which as discussed above the NHL maintains it does not, § 363(e) requires the Court to prohibit the proposed sale to an unapproved partner and relocation to an unconsented to site because the destruction of the NHL's rights would leave the League without adequate protection. In other words, the League would be irreparably injured, and there is no adequate monetary remedy.

IV. PSE'S BID CANNOT BE "HIGHEST AND BEST."

It is against this backdrop of the unprecedented relief sought that the Court also must assess whether the PSE's bid is the highest and best for the estate. For several reasons, it is not.

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[20] The Debtors' framing of the adequate protection issue admits that Debtors and PSE are attempting to circumvent the § 365 requirement that executory contracts must be assumed and assigned in their entirety under the auspices of § 363: "The proposed sale to PSE Sports preserves the benefit of such bargain to the NHL by complying with all lawful applicable provisions of Sections 35 and 36 of the NHL By-Laws . . . , which do not otherwise violate federal or state antitrust law." (Debtors Sale Brief at 51 (emphasis added).)

A. The Highest Bid Is Not Always the Best.

In the circumstances of this matter, this Court (again, if it is to compare the Glendale-only and PSE bids) has been presented with one of the more extreme examples of a bid (PSE's) where the highest is by no means the best for the estate. Indeed, as this Court has already observed (and preliminarily found), the PSE bid amount is based on an assurance of future performance (as to the Coyotes' contractual obligation to play in its "home territory" of Glendale, Arizona) that neither the Debtors nor PSE intends to keep. See In re Dewey Ranch Hockey, LLC, 406 B.R. at 36-37. Under these circumstances, PSE's bid is so speculative as to render it meaningless. See In re Morande Enters., Inc., 335 B.R. 188 (M.D. Fla. 2005) (rejecting § 363 sale where buyer planned to move franchise location over franchisor's objection and could not assure future performance of location provision). And this is just one of the hurdles PSE would have to overcome.

To set the stage properly, it is useful to recount the law relating to "highest and best." Section 363(b)(1) of the Bankruptcy Code provides that "[t]he trustee, after notice and hearing, may . . . sell . . . other than in the ordinary course of business, property of the estate . . . ." Here, the parties, including the Debtors, have agreed that a sale of the Coyotes pursuant to § 363(b)(1) is in the best interests of the estate. However, it is well established that a bankruptcy court may reject a proposed bid recommended by the debtor-in-possession "if it has an awareness there is another proposal in fact which, from the estate's point of view, is better or more acceptable." In re Broadmoor Place Investments, L.P., 994 F.2d 744, 745-46 (10th Cir. 1993) (emphasis added) (affirming dismissal of appeal where bankruptcy court approved lower non-contingent bid and rejected larger contingent bid).

Moreover, the law is well-settled that the best offer for the estate often can be the one with the least execution risk, especially where the higher bid is essentially "hostile" and involves the prospect of protracted litigation. For example, in In re Bakalis, 220 B.R. 525 (E.D.N.Y. 1998), the debtor was a bank and there were two competing bids in the § 363 sale. The lower bid (from "Holdings") had only one significant contingency – regulatory approval – and had a contingency plan that would protect creditors in terms of accrued interest if there were an unanticipated delay in closing. By contrast, the higher competing bid (from "Atlantic") was essentially a "hostile

takeover" with various contingencies and outs, including a "material adverse change provision" and a provision allowing Atlantic to terminate the transaction if the target did not approve the merger within ninety days of court approval of the sale. In the trustee's view, the Atlantic bid involved the real prospect of litigation between the boards of directors of Atlantic and debtor that, combined with Atlantic's walk-away rights, would be a substantial "gamble" for the estate.

Agreeing with the trustee, the court held that the best offer for the estate was the lower bid, which did not carry the same risk of litigation and higher risk of not closing. Id. at 538. While observing that when all else is equal, the highest bid is the preferred bid, the court recognized that the principle does not apply where the conditions of closing, including the prospect of protracted litigation, suggest that the closing of the higher offer "may never transpire" or may be delayed for a substantial period of time. Id. at 535-38. Specifically, the court found that it was nearly impossible to predict the outcome of the hostile takeover attempt or how long the related litigation would last. Coupled with the "various contingency clauses and walk-away provisions," the trustee was "understandably unwilling to run the risk that after the dust settles in a merger battle, he is left with a devalued asset to remarket." Id. at 536.

As described below, there is no question that the relative execution risk of the PSE bid is enormously high.

B. The PSE "Offer" Is Fraught with Execution Risk.

As described in the NHL's reply brief – also filed today – supporting the NHL bid,[21] the NHL's bid has little to no execution risk, takes care of all secured creditors and also takes care of all legitimate unsecured creditors in accordance with the Code. In stark contrast, the execution risks that come with PSE's proposed sale and relocation are overwhelming, including the certainty of protracted litigation with the City of Glendale and the NHL. Further, PSE's bid itself remains, as a practical matter, much more conditional than either of the Glendale bids – e.g., PSE can walk away if the Court does not order a relocation of the Coyotes to Hamilton by September 14, 2009 or

[21] (See NHL's Omnibus Reply in Support of the Sale of Assets to and Assumption of Liabilities by Coyotes Newco, LLC and Arena Newco, LLC [Dkt. no. 911].)

if the Court disagrees with PSE's proffered a $11.2-12.9 million dollar relocation fee under Raiders II.

1. Litigation over the City of Glendale's claim.

Glendale has argued throughout these proceedings that it will suffer harm amounting to hundreds of millions of dollars if PSE's bid to purchase the Coyotes – which would reject the Arena Agreement with Glendale – were to prevail. The Debtors, who have conceded that a sale of the Club to PSE would cause this substantial harm to Glendale, have responded that virtually all of Glendale's claim would be statutorily capped or otherwise limited. In its June 15, 2009 Opinion, the Court, while reserving final decision on Glendale's objection, recognized the merits of each party's arguments on these issues. See In re Dewey Ranch Hockey, LLC, 406 B.R. at 40-42. And Glendale has made it clear that it intends to fight this issue to the fullest extent possible. This real prospect of litigation over Glendale's claim may substantially delay or even ultimately preclude the closing of PSE's offer. By contrast, similar litigation risk will not accompany the NHL or Ice Edge bids, as both are aimed at keeping the Club in Glendale, and each either has an agreement with the City or is working toward one.

2. Litigation over the NHL's right to choose its owners.

PSE's bid comes with the additional execution risk of litigation over whether the Bankruptcy Code, or any other law, would permit this Court to order the transfer of the Coyotes to PSE without NHL consent. While the Debtors and PSE somehow believe that the NHL's vote rejecting Mr. Balsillie as a trustworthy owner helps their case, the NHL respectfully disagrees. The facts are that the Board's analysis, deliberation and vote on Mr. Balsillie: (i) are not covered by the anti-assignment provisions of § 365(f); (ii) are protected under common law relating to partnerships, joint ventures and voluntary associations under § 365(c); (iii) in no way violated any applicable duty of good faith and fair dealing; and (iv) do not even implicate the antitrust laws, as it has long been established that a League's decision on who may be an owner has nothing to do with the underlying policies of the Sherman Act, which protects competition, not individual competitors. (See NHL Relocation Objection [Dkt. no. 293].)

Indeed, counsel for both the Debtors and PSE recently acknowledged to this Court once again that they have no precedent under any law that would permit this Court to override the NHL Board of Governors' decision rejecting Mr. Balsillie and ordering the transfer of the Club to PSE. Suffice to say that should the Court order adversely to the NHL, the NHL will litigate this fundamental issue to the fullest, including seeking any necessary stays, before this Court and any appellate court.

3. Litigation over the NHL's right to choose franchise location.

This Court has already ruled, preliminarily, that the NHL's consent rights concerning relocation are not anti-assignment provisions under § 365(f) and, in turn, that PSE's bid (conditioned on a move to Hamilton) cannot assure future performance of the Coyotes' contractual obligation to play in its Phoenix "home territory." And, again, the only way for the Debtors and PSE could overcome this obstacle would be for the Court to make unprecedented rulings that would force a relocation of a professional sports franchise over the League's objection and in contravention of the rules and processes to which the Coyotes and Mr. Moyes agreed regarding any potential relocation of the Club.

If this Court were to order the relocation of the Coyotes to Hamilton, irrespective of the novel theories it would have to adopt to do so, the NHL would of course fully litigate all of these issues (e.g., sale without NHL consent, relocation without NHL consent, authority to put the Club into bankruptcy, relocation for the 2009-10 season, amount of any relocation fee) up through the highest court that would hear the matter. Indeed, given the Ninth Circuit's Raiders and SDC decisions, we believe the Ninth Circuit would be very interested in reviewing any decision that compels a professional sports league essentially to grant a Club the right to relocate and usurp an expansion opportunity that the Ninth Circuit has held belongs to the League. At a minimum, these issues could take several months or more to work their way through the courts,[22] and there

---

[22] Moreover, the antitrust principle applicable to this case very well may be affected by the anticipated decision of the United States Supreme Court in the upcoming term on the issue of whether the member teams of a professional sports league should be treated as a "single entity" incapable of conspiring in violation of § 1 of the Sherman Act. See Am. Needle, Inc. v. NFL, 538 F.3d 736, 744 (7th Cir. 2008), cert. granted (No. 08-661); (Fisher Decl. ¶¶ 75-79).

certainly is no assurance that at the end of the day PSE's bid would survive. Hence, any relocation of the Coyotes can only occur if the NHL consents.

4. PSE's "bid" remains highly speculative in and of itself.

Finally, even in the absence of the significant execution risks discussed above, PSE's "bid" is highly speculative and conditional on its face. PSE has the right to walk away from the deal under two scenarios: (i) if certain significant conditions are not satisfied by September 14, 2009; or (ii) if, hypothetically PSE were admitted as an NHL owner and allowed to relocate the Coyotes to Hamilton, the NHL was to assess any relocation or indemnity fees.

(a) Too many absolute conditions must be met prior to the "drop dead date" in the APA.

The Debtors and PSE had been promising for weeks that they would execute a modified Asset Purchase Agreement that deals with many of the issues raised by the Court over the course of these proceedings. (Tr. of 6/22/09 Hr'g at 15.) Having done so by amendment on July 31, nothing really has changed. Thus, the current APA remains subject to several considerable conditions that must be met no later than September 14, 2009: the Court must issue an order approving the sale of the Coyotes to PSE that allows the team to relocate to Hamilton, and PSE in its sole discretion must agree to pay any relocation or indemnity fees. (See APA (as amended on July 31, 2009) ¶¶ 6.2(b), 7.1(g).) It is a foregone conclusion that these conditions could not be met by September 14, 2009, because as discussed above the NHL will fully litigate – including up to and beyond the Ninth Circuit, if necessary – the numerous legal issues that must be resolved in PSE's favor if these conditions are to be met.

(b) PSE also continues to have the right to walk away based on any relocation or indemnity fee it dislikes.

Further, PSE's "bid" remains conditioned on its acceptance – "in its sole discretion" – of any relocation or indemnity fee determined by the NHL or the Court. (APA ¶ 7.1(g).) Again, this Court already has ruled that the NHL has a right "to compensation for the expansion opportunity for the proposed move." In re Dewey Ranch Hockey, LLC, 406 B.R. at 37 (citing Raiders II, 791 F.2d at 1371 ("[T]he NFL as a whole owned the right to expand into the Los Angeles area.")).

While PSE has conceded that the League has such a right, it has argued at length that any relocation or indemnification fees "must be minimal." (PSE Preliminary Relocation Brief at 18-24.) In fact, under its APA, PSE may walk away from the deal if Mr. Balsillie does not see fit to pay any such NHL-determined or Court-ordered fees. (See APA ¶ 7.1(g); see also PSE Relocation Fee Brief; PSE Preliminary Relocation Brief.) It is no wonder, then, that PSE has proposed an insultingly low relocation fee and had earlier indicated that if the NHL assessed relocation and indemnity fees in the range of $100 million or more, it would either reduce its offer by that amount or walk away from the deal. (See PSE Preliminary Relocation Brief at 20.) This creates a real possibility (if not near certainty) that, if the Court were to approve the sale to PSE and allow the team to relocate to Hamilton – again, issues themselves that would be appealed – and the NHL assessed or the Court itself ordered relocation and indemnity fees that are anything but "minimal" (whatever that means), then PSE's "bid" would simply vanish.

CONCLUSION

WHEREFORE, for the reasons set forth above, the NHL respectfully requests that the Court should deny the proposed transfer of Coyotes Hockey's assets as contemplated by that certain APA submitted by PSE, including a relocation of the Phoenix Coyotes professional hockey team.

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 Milmoe
Shepard Goldfein
Anthony W. Clark

Attorneys for the National Hockey League

Exhibit 1

From: rrodier@richardrodierlaw.com
Sent: Friday, April 24, 2009 08:29 PM
To: Tom Salerno
CC: Daniel R. Dowdall; Susan Freeman; Steven Golick; Earl Scudder
Subject: Re: Yotes

Tom,
I'm very tired and going to sleep. But I took another read of your email below. I sure we can simply get rid of 4.14.
7.1(b)(iv) is a trickier issue because, absent NHL Consent, the Court order(s) that we need are the key to the whole transaction. On the other hand, when u break it down, all we are asking the Court(s) to do is force an assignment of the NHL Consent Agreement, but with a change to Exhibit A that is contemplated by the NHL By-Laws.
Anyway.....I hope this email gives you some comfort. Let's tackle the rest starting tomorrow and forward.
A. Richard Rodier
-----Original Message-----
From: rrodier@richardrodierlaw.com
Date: Sat, 25 Apr 2009 02:45:24
To: Tom Salerno<TSalerno@ssd.com>
Cc: Daniel R. Dowdall<dan.dowdall@fmc-law.com>; Susan Freeman<SFreeman@LRLaw.com>; Steven Golick<SGolick@osler.com>; Earl Scudder<escudder@scudderlaw.com>
Subject: Re: Yotes

Hi tom.....just got in. Still at airport.
I will look over rhis stuff and should be in touch noonish PHO time.
Et's all stay calm, and work thru the problems.
A. Richard Rodier
-----Original Message-----
From: "Salerno, Thomas J." <TSalerno@ssd.com>
Date: Fri, 24 Apr 2009 15:34:43
To: <rrodier@richardrodierlaw.com>
Cc: Daniel R. Dowdall<dan.dowdall@fmc-law.com>; Susan Freeman<SFreeman@LRLaw.com>; Steven Golick<SGolick@osler.com>; Earl Scudder<escudder@scudderlaw.com>; Golick, Steven<SGolick@osler.com>
Subject: Yotes

Notwithstanding your April 16 e mail exchange with Earl Scudder, this APA has, in no uncertain terms, a condition to closing that you get a final order from both a Canadian and US Bankruptcy Court that you own the franchise and can move it to Ontario and any restrictions in the bylaws and constitutions are deemed unenforceable. As we discussed numerous times, there's no way a US Bankruptcy Court is going to adjudicate to finality (or anywhere even close to finality) that the NHL restrictions on transfer are invalid or unlawful. We intended to raise it to create a bona fide dispute and the basis under which the US Court could approve a sale of the assets free and clear of liens. The APA makes this a specific rep and warranty (section 4/14), and it must be true in order for Buyer to be obligated to close (Section 7.1a). The rep and warranty assumes a full and final adjudication of very tricky and complex antitrust law issues in the time frame of 40-60 days (including the enforceability of the 50 mile exclusive territorial limits and exclusive broadcast rights)--that just won't happen in the US Bankruptcy Court. I would be willing to bet Susan Freeman would concur with that. I'll let Steve Golick opine as to whether that would happen in the Canadian system.
The language of Section 4.14, under Representations And Warranties, is as follows:

NHL. The NHL consists of 30 current members, each person or entity who may hereafter acquire the membership rights in the NHL which are now owned by any of the 30 current members of the NHL. By the way of explanation, but not in limitation, Seller is an existing member and, when the Closing occurs and Buyer acquires the Acquired Assets including

the Seller's Membership Interest pursuant to this Agreement, Buyer will become and be an existing member. The term "Existing Franchises" means and includes each and all of the 30 franchises owned and held by the existing members on the data hereof regardless of whether or not any of such franchises may hereafter be relocated or transferred to a different geographic location; by way of explanation, and not of limitation, when the Closing occurs and Buyer acquires the Franchise pursuant to the provisions of this Agreement and thereafter transfers the Franchise from the City of Glendale, Arizona, to another city, the Franchise will continue to be an "Existing Franchise" with restrictions based upon Franchise location (including both operations and broadcasting rights) held unenforceable and/or deemed excised from the Franchise, as shall be determined by Final Orders of the Bankruptcy Court and CCAA Court in the Sale Approval Orders.

Under section 7.1(a), express conditions to closing are as follows:

The obligation of Buyer to pay the Purchase Price and consummate the transaction contemplated by this Agreement is subject to satisfaction, or waiver by the Buyer, of the following conditions at or before Closing. which shall take place on or before June 30, 2009:

(a) the representations and warranties made by the Seller in this Agreement were accurate as of the date of this Agreement and will be accurate on the Closing Date;

(b) the Bankruptcy Court and [Canadian] Court enter Sale Approval Orders satisfactory to Buyer in its sole and absolute discretion, which become Final Orders [i.e. no appeals], including....

(iv) authorizing Buyer to carry on the Business at a location satisfactory to Buyer in Southern Ontario, Canada on terms and conditions satisfactory to Buyer in its sole and absolute discretion.

Also of interest, in the event that Buyer breaches and walks away, the sole recourse against Buyer is forfeiture of the earnest money deposit ($20 million). Section 8.2. That's a little over the amount needed to do this process thru the DIP loan.

In sum, we cannot make this rep and warranty because we won't get a US Court, by June 30, to make these final adjudications/determinations. I'll let Steve Golick talk to the Canadian Court issues. We will not have a US Bankruptcy Court ruling on the invalidity of transfer restrictions by way of adjudication on the merits in 45-60 days, and there will most certainly never be a final order to that effect should the NHL appeal in that time (assuming the US Court did make this adjudication on the merits, which is unlikely).

-----Original Message-----
From: rrodier@richardrodierlaw.com [mailto:rrodier@richardrodierlaw.com]
Sent: Friday, April 24, 2009 3:28 PM
To: Salerno, Thomas J.; Richard Rodier
Cc: Daniel R. Dowdall; Susan Freeman; Steven Golick; Earl Scudder
Subject: Re: Yotes
I can't remember what"s in 4.14?

------Original Message------
From: Tom Salerno
To: Richard Rodier
Cc: Daniel R. Dowdall
Cc: Susan Freeman
Cc: Steven Golick
Cc: Earl Scudder
Subject: Yotes
Sent: Apr 24, 2009 3:25 PM

Richard

I've done a brief review of the APA. Frankly, there are items in there that are simply non starters from a legal and practical perspective (in the US or Canada). The rep and warranty in section 4.14, and requirements for a final order making the determinations you require in section 7.1(b)(iv), are simply not achievable by June 30, and certainly you know that (especially true in Canada, where an NHL appeal can happen without the posting of a bond).

This APA goes well beyond what was in the e mail of April 16 you agreed to with Earl Scudder.

We will need to determine whether it makes to move forward at

this point. I need to get input from Earl and Jerry on these points.
-----Original Message-----
From: rrodier@richardrodierlaw.com [mailto:rrodier@richardrodierlaw.com]
Sent: Friday, April 24, 2009 3:21 PM
To: Salerno, Thomas J.
Cc: Daniel R. Dowdall; Susan Freeman
Subject: Yotes

Has Golick started work on the CCAA filing?
Sent from my BlackBerry device on the Rogers Wireless Network

Sent from my BlackBerry device on the Rogers Wireless Network

Exhibit 2

FRANK ROTHMAN
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Attorneys for Cross-Defendant
National Football League

FILED
DEC 3 1987
CLERK, U.S. DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
BY DEPUTY

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

LOS ANGELES MEMORIAL COLISEUM COMMISSION, Plaintiff, vs. NATIONAL FOOTBALL LEAGUE, an unincorporated association, et al., Defendants.	Case No. 78-3523-HP (1) NOTICE OF MOTION AND MOTION FOR LEAVE TO FILE AN AMENDED ANSWER AND CROSS-CLAIMS; (2) MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT THEREOF;
OAKLAND RAIDERS, LTD., Cross-claimant, vs. NATIONAL FOOTBALL LEAGUE, an unincorporated association, et al., Cross-defendants.	(3) [PROPOSED] SECOND AMENDED ANSWER AND CROSS-CLAIMS OF THE NFL (lodged under separate cover); AND (4) [PROPOSED] ORDER (lodged under separate cover) Date: January 19, 1988 Time: 10:00 a.m. Ctrm: Honorable Harry Pregerson

COPY

TO DEFENDANT AND CROSS-CLAIMANT OAKLAND RAIDERS LTD. AND ITS ATTORNEYS OF RECORD:

NOTICE IS HEREBY GIVEN that on January 19, 1988 at 10:00 A.M. or as soon thereafter as the matter can be heard, in the courtroom of the Honorable Harry Pregerson, Defendant and Cross-Defendant National Football League (the "NFL") or (the "League") will move, pursuant to Rules 13(g) and 15(a) and (c) of the Federal Rules of Civil Procedure, for leave to amend the Amended Answer of the NFL and Related Cross-Defendants to Cross-Claim filed in this action on August 2, 1980 by means of a Second Amended Answer and Cross-Claims of the NFL (the "Proposed Answer and Cross-Claims") against the Oakland Raiders Ltd. (the "Raiders") in the form lodged concurrently herewith.

The NFL's Proposed Answer and Cross-Claims realleges and reasserts all denials, admissions and affirmative defenses contained in the original answer and supplements the original answer as follows:

CROSS-CLAIMS OF THE NFL

Cross-Defendant NFL, for its Cross-Claims against Cross-Claimant Raiders, alleges, upon knowledge with respect to itself and its own acts and upon information and belief as to all other matters, as follows:

Jurisdiction and Venue

1. These Cross-Claims arise out of the conduct, transactions and occurrences that were set forth, or attempted to be set forth, in the Second Amended and Supplemental Complaint, the Answer and Cross-Claim of the Raiders, and the Amended Answer of the NFL and Related Cross-Defendants To Cross-Claims. They are asserted pursuant to Fed. R. Civ. P. 13(g), 15(a) and 15(c).

2. This Court has jurisdiction over these Cross-Claims under principles of pendent jurisdiction.

3. The Raiders transact business within the Central District of California. The alleged unlawful acts have been and were in part conceived, carried out and made effective within the Central District of California.

Parties

4. The NFL is a Defendant and Cross-Defendant in this action. It has presented and promoted professional football in the United States for approximately 65 years.

5. The Raiders are a Defendant and Cross-Claimant in this action, a member club of the NFL, and a limited partnership of which Allen Davis is the managing general partner. Until March 4, 1980, the Raiders operated as an NFL member club in Oakland, California.

Count One Against the Raiders

[Damages for Usurpation of Joint Venture Opportunity]

6. The NFL repeats and realleges paragraphs 1 through 5 with the same force and effect as if here set forth at length.

7. The NFL is a joint business venture that presents professional football in accord with the NFL Constitution and Bylaws. As a member of this joint business operation, the Raiders are obligated to act for the benefit of the League, not for the Raiders' own benefit.

8. The right to establish NFL member clubs in metropolitan areas throughout the United States is a valuable right and opportunity of the NFL as a league. The right to establish an NFL member club in Los Angeles, California is and always has been a valuable asset of the NFL. Among other things, the NFL has presented professional football in the greater Los Angeles area for more than 40 years, thereby establishing goodwill and public acceptance of the NFL's professional sports product. Los Angeles has also been a highly desirable location for the establishment of an NFL franchise because of, among other things, the size and prosperity of its population.

9. On or about March 4, 1980, the Raiders transferred their NFL operations from Oakland to Los Angeles without obtaining permission from the NFL.

10. Prior to March 4, 1980, several NFL member clubs had expressed interest in relocating to Los Angeles. Individuals unrelated to the NFL also had inquired about and sought the right to operate an NFL member club in Los Angeles. The Raiders knew of some of the member teams' and other individuals' interest in acquiring the rights to establish or relocate a franchise in Los Angeles prior to March 4, 1980.

11. The right to sell an NFL franchise is a significant business opportunity that belongs to the NFL. On informa-

tion and belief, if the NFL had authorized an NFL member club to operate in Los Angeles prior to the Raiders' move (through either the relocation of an existing NFL franchise into Los Angeles or the granting of a Los Angeles expansion franchise), the NFL would have realized at least $11,554,382 more than what the NFL would have realized if, instead, the Raiders had been located in Los Angeles and the NFL had authorized an NFL member club to operate in Oakland at that time.

12. By relocating to Los Angeles without League approval, the Raiders appropriated the Los Angeles franchise opportunity from the NFL. In so doing, the Raiders acted for their own benefit and to the detriment of their fellow League members and the NFL.

13. By moving to Los Angeles, the Raiders damaged the joint venture by usurping the franchise opportunity that existed there. The Raiders' relocation to Los Angeles substantially diminished or destroyed what the NFL could have obtained by selling the right to operate an NFL franchise in Los Angeles.

14. The Raiders have not offered and, upon information and belief, do not intend to pay the fair value of the business opportunity that they appropriated from the NFL.

15. In sum, the Raiders have usurped and appropriated the valuable franchise opportunity that belonged to the League and all the NFL member clubs.

16. As a direct and proximate result of the foregoing, the NFL has sustained damages, in an amount to be determined at trial, to the extent that the value of the NFL expansion opportunity in Los Angeles that the Raiders usurped from the NFL exceeds

the value of the NFL expansion opportunity in Oakland that the Raiders returned to the NFL.

Count Two Against the Raiders

[Damages for Breach of Fiduciary Duty]

17. The NFL repeats and realleges paragraphs 1 through 15 with the same force and effect as if here set forth at length.

18. In engaging in the foregoing conduct, the Raiders acted in their own self interest, thereby damaging the NFL. The Raiders' conduct therefore constituted a breach of the Raiders' fiduciary duties owed to the NFL.

19. As a direct and proximate result of the foregoing, the NFL has sustained damages, in an amount to be determined at trial, to the extent that the value of the NFL expansion opportunity in Los Angeles that the Raiders usurped from the NFL exceeds the value of the NFL expansion opportunity in Oakland that the Raiders returned to the NFL.

Count Three Against the Raiders

[Damages for Breach of Contract]

20. The NFL repeats and realleges paragraphs 1 through 18 with the same force and effect as if here set forth at length.

21. The NFL Constitution operates as a contract among the member clubs of the NFL. Each and every member club of the NFL has agreed to be bound by all of the terms and provisions of the NFL Constitution and Bylaws pursuant to Article 3.11(g) of the NFL Constitution. In addition, pursuant to Paragraph 1 of the National Football League-American Football League Agreement, all member clubs of the expanded single league, including the

Raiders, agreed to conduct their business pursuant to and in accordance with the Constitution and Bylaws of the NFL.

22. A contractual relationship among the member clubs of the NFL exists not only by reason of the NFL Constitution and Bylaws, but also by reason of other agreements between and among the League's member clubs. Accordingly, each NFL member club's management of its own affairs is subject to the provisions of the NFL Constitution and Bylaws, and customs and policies thereunder.

23. The Raiders agreed, pursuant to the NFL Constitution and other commitments, to maintain an NFL franchise in Oakland, California and to seek and obtain NFL approval prior to relocating the franchise.

24. The Raiders knowingly and wilfully breached their contractual obligations under the NFL Constitution and other agreements by unilaterally moving to Los Angeles, thereby failing to maintain the Raiders' franchise in Oakland and failing to seek and obtain NFL approval prior to relocating.

25. As a direct and proximate result of the foregoing, the NFL has sustained damages, in an amount to be determined at trial, to the extent that the value of the NFL expansion opportunity in Los Angeles that the Raiders unilaterally took from the NFL exceeds the value of the NFL expansion opportunity in Oakland that the Raiders returned to the NFL.

WHEREFORE, the NFL prays for the following relief:

A. Under Count One, for damages according to proof at trial;

B. Under Count Two, for damages according to proof at trial;

C. Under Count Three, for damages according to proof at trial; and

D. For such other and further relief as the Court may deem to be just and proper.

This motion is based on this notice, the attached memorandum of points and authorities, the pleadings and documents on file herein, and such further and additional matters as may be presented at the hearing on this motion.

DATED: December 2, 1987

SKADDEN, ARPS, SLATE, MEAGHER & FLOM

By: _____
FRANK ROTHMAN
Attorneys for Cross-Defendant
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6 B. Witkin, Summary of California Law § 19 (8th ed. 1974). 11

MEMORANDUM OF POINTS AND AUTHORITIES

INTRODUCTION

In light of the Ninth Circuit's opinion in Los Angeles Memorial Coliseum Comm'n v. NFL, 791 F.2d 1356 (9th Cir. 1986), cert. denied, ____ U.S. _____, 108 S. Ct. 92, 98 L. Ed. 2d 53 (1987)("Raiders II"), the NFL seeks leave to amend the Amended Answer of the NFL and Related Cross-Defendants To Cross-Claim to assert tort and contract claims against the Raiders. Specifically, the NFL seeks to recover from the Raiders the amount by which the Los Angeles expansion opportunity that the Raiders usurped from the NFL in March 1980 exceeds the Oakland expansion opportunity that the Raiders returned to the NFL at the same time. See Raiders II, 791 F.2d at 1371, 1373.

The NFL's tort claim is premised on the fact that, as the Ninth Circuit pointed out, the Raiders appropriated for their own benefit the franchise expansion opportunity in Los Angeles that belonged to the League as a whole. Raiders II, 791 F.2d at 1371. The NFL's breach of fiduciary duty claim is based on the Raiders' breach of their duty not to act in their own self interest when the League will thereby be harmed. The NFL's contract claim is predicated on the NFL Constitution and other commitments, and policies and customs followed thereunder, which the Raiders breached by failing to maintain an NFL franchise in Oakland and by unilaterally moving to Los Angeles.

As demonstrated below, the NFL should be granted leave to amend its answer. Leave to amend pleadings is "freely" grant-

ed, Fed. R. Civ. P. 15(a), and is denied only where -- unlike here -- there are compelling reasons to do so.

It would do violence to the Ninth Circuit's opinion in Raiders II if this Court were to refuse to permit the NFL to assert its Cross-Claims against the Raiders. In holding that the NFL is entitled to assert an "offset" against the Raiders, the Ninth Circuit has already determined that the League may charge the Raiders for moving to Los Angeles, and that Los Angeles was a "significantly more lucrative franchise opportunity" than Oakland:

> "the value of the league's expansion opportunities belonged to the league as a whole, or in other words, was owned in part by each franchise owner. Unquestionably, when the Raiders moved to Los Angeles, they appropriated for themselves the expansion value that had accumulated in Los Angeles. Although by moving out of Oakland the Raiders 'gave back' an expansion opportunity to the NFL, the uncontradicted testimony at trial showed the Los Angeles market to be a significantly more lucrative franchise opportunity. Indeed, the Raiders' managing general partner, Al Davis, testified that the Raiders increased their value by some $25 million by moving to Los Angeles."

Raiders II, 791 F.2d at 1371 (citations omitted).

Since the Ninth Circuit has determined that "the uncontradicted testimony at trial showed the Los Angeles market to be a significantly more lucrative franchise opportunity than Oakland," id., there is only one issue to be tried on remand as to

both the offset and the Cross-Claims: how much more the Los Angeles expansion opportunity was worth than Oakland. To the extent that this amount exceeds $11,554,382 (the amount of the Raiders' damages as found by the jury), the NFL is entitled to judgment in its favor.

ARGUMENT

I.

THE NFL IS ENTITLED TO LEAVE TO AMEND ITS ANSWER

A. Leave to Amend Is Freely Granted

The Federal Rules of Civil Procedure provide that leave to amend should be freely granted. Fed. R. Civ. P. 15(a); see Foman v. Davis, 371 U.S. 178, 182, 83 S. Ct. 227, 230, 9 L. Ed. 2d 222 (1962) (leave to amend "should, as the rules require, be freely given"); United States v. Webb, 655 F.2d 977 (9th Cir. 1981) (Rule 15's policy of favoring amendments to pleadings should be applied with "extreme liberality"); Waits v. Weller, 653 F.2d 1288 (9th Cir. 1981) (lower court abused its discretion in denying defendants leave to file a supplemental answer and counterclaim).

In Foman v. Davis, the Supreme Court mandated that leave to amend should be granted absent "undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of the allowance of the amendment, [or] futility of the amendment . . . ." 371 U.S. at 182, 83 S. Ct. at 230. Undue prejudice to the other party is the

"crucial factor": "unless undue prejudice to the opposing party will result, the trial judge should permit a party to amend its complaint." Howey v. United States, 481 F.2d 1187, 1190 (9th Cir. 1973), citing United States v. Hougham, 364 U.S. 310, 81 S. Ct. 13, 5 L. Ed. 2d 8 (1960).

The Raiders will not suffer "undue prejudice" if the NFL is granted leave to amend its answer. For example, the NFL consistently maintained in its answer that the Raiders had breached a provision of the NFL Constitution, see Amended Answer of the NFL and Related Cross-Defendants to Cross-Claim (the "Answer") ¶¶ 28-31, and had conducted an "opportunistic scheme . . . to exact a business advantage for Oakland Raiders Ltd." See Answer ¶¶ 34-35. Simply stated, there is no "surprise" here.

In any event, the Raiders must be prepared to litigate the "offset issue" (see Raiders II), which will implicate the same facts and issues as those implicated by the Cross-Claims. The retrial ordered by the Ninth Circuit requires that the relative values of the Oakland and Los Angeles expansion opportunities be determined. The NFL's Cross-Claims simply seek to recover any amount by which the difference between the value of the two expansion opportunities exceeds the single damage judgment. The Cross-Claims will therefore require little or no additional discovery and will neither prolong nor complicate the trial. Finally, there is no basis for asserting that the amendment is offered in "bad faith."

This case presents a more compelling circumstance for the allowance of an amended pleading than Howey v. United States, 481 F.2d 1187 (9th Cir. 1973). In Howey, the Ninth Circuit re-

versed the district court's denial of a motion to amend a third party complaint, even though the motion was made five years after the third-party complaint had been filed and on the second day of trial. The Court of Appeals reasoned that the amendment should be permitted because the third-party defendant (RCA) would not be prejudiced. Specifically, RCA had the opportunity to conduct discovery with respect to the issues raised by the amendment, and had notice that the third party plaintiff might seek recovery on the theories alleged in the amended complaint because of language in the original pleading.

Similarly here, the Raiders would not be unduly prejudiced by the NFL's assertion of its Cross-Claims. The Raiders have had and will have the opportunity to conduct discovery on the issues raised by the Cross-Claims. In addition, the Raiders had notice that the NFL might seek recovery from the Raiders for the tort and contract claims because of language in the NFL's original pleading.

This case stands in stark contrast to cases in which courts have refused leave to amend pleadings. In Komie v. Buehler Corp., 449 F.2d 644 (9th Cir. 1971), for example, the defendant sought to amend his original answer to deny the existence of an agency relationship which he had admitted in his original answer and in his "Uncontested Facts Deemed Material." As the Howey Court stated, in Komie "[c]learly the party opposing the amendment would have been prejudiced by permitting the [defendant] now to litigate an issue he had expressly conceded years ago." Howey, 481 F.2d at 1190 n.2; see Komie, 449 F.2d at 648. Similarly, in Wood v. Santa Barbara Chamber of Commerce, Inc.,

705 F.2d 1515 (9th Cir. 1983), the Court of Appeals rejected an amendment that inverted the legal theory charging defendants with liability because it was unduly prejudicial and was asserted in bad faith. The instant action bears no resemblance to Komie or Wood. No undue prejudice or bad faith exists here.

B. This Motion Is Timely

The NFL's assertion of Cross-Claims should not be denied simply because they were not asserted at an earlier point in this action. "Neither the federal rules nor the rules of this court impose any limitation on the time when cross-claims may be filed." Fogel v. United Gas Improvement Co., 32 F.R.D. 202, 203 (E.D. Pa. 1963) (permitting cross-claims to be asserted by amendment two years after the original pleading had been filed because the cross-claims would not unduly complicate the trial).

As the Ninth Circuit stated in Howey: "we know of no case where delay alone was deemed sufficient grounds to deny a Rule 15(a) motion to amend . . . . We agree with the Second and Eighth Circuits that the mere fact that the [moving party] could have moved at an earlier time to amend does not by itself constitute an adequate basis for denying leave to amend." Howey, 481 F.2d at 1190-91, citing Hanson v. Hunt Oil Co., 398 F.2d 578 (8th Cir. 1968); Middle Atlantic Utilities Co. v. S.M.W. Development Corp., 392 F.2d 380 (2d Cir. 1968); Hurn v. Retirement Trust Fund of Plumbing, Heating and Piping Indus., 648 F.2d 1252, 1254 (9th Cir. 1981) ("Delay alone does not provide sufficient grounds for denying leave to amend").

Further, "amendments may be offered at the trial, or even after reversal and remand" (emphasis added). Howey, 481 F.2d at 1191 n.3, citing 3 J. Moore, Moore's Federal Practice, § 15.08, 0.835 (2d ed. 1986). "The mandate [of the Appellate Court] would not prevent the District Court [on remand] in the exercise of a sound discretion from allowing plaintiff, were adequate showing made, to file additional pleadings, vary or expand the issues, and take other proceedings . . .." Rogers v. Hill, 289 U.S. 582, 587-88, 53 S. Ct. 731, 734, 77 L. Ed. 1385 (1933). Accord R.E.B., Inc. v. Ralston Purina Co., 525 F.2d 749, 751 (10th Cir. 1975); Nucor Corp. v. Tennessee Forging Steel Service, Inc., 513 F.2d 151 (8th Cir. 1975).

In R.E.B., the plaintiff sought to amend its complaint only five and one-half weeks before trial to assert additional claims that had not been addressed on a prior appeal or prior to the appellate court's remand of the case for retrial of damages only. The Tenth Circuit found that it was error not to allow the amendments because they did not (1) involve substantially different issues from those to be tried on remand, (2) complicate the proceedings unduly or (3) add a new party. The Tenth Circuit reasoned that "[l]ateness does not of itself justify the denial of the amendment . . . And the fact that [the amendment] is offered following remand does not suffice of itself to require denial. . . . Unless the granting of the amendment after remand caused grave prejudice, the action is not an abuse of discretion." R.E.B., 525 F.2d at 751-52.

Consistent with R.E.B., the NFL should be allowed to assert its Cross-Claims on remand. The NFL's claims do not pre-

sent substantially different issues from those remaining to be tried. The claims will not excessively complicate the proceedings; indeed, the issues presented by the Cross-Claims are the same issues presented to the Court on remand. Further, the claims do not add new parties to the proceedings. Finally, as discussed above, there is no "grave prejudice" here.

II.

THE STATUTE OF LIMITATIONS IS NO BAR TO THE NFL'S CLAIMS

The NFL is asserting claims that arose in 1980, when the Raiders breached the NFL Constitution and took from its NFL joint venturers the Los Angeles expansion opportunity. These claims are not time-barred because this amendment "relates back" to the NFL's timely filed answer.

Rule 15(c) of the Federal Rules of Civil Procedure provides:

> "Whenever the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading, the amendment relates back to the date of the original pleading."

In this instance, there can be no dispute but that the Cross-Claims the NFL seeks to assert "arose out of the conduct, transaction or occurrence set forth, or attempted to be set forth, in [the NFL's original Answer]." Accordingly, the NFL's

proposed amendment "relates back to the date of the original [Answer]."

Like amended pleadings generally, the relation-back doctrine should be "liberally applied." Clipper Express v. Rocky Mountain Motor Tariff Inc., 690 F.2d 1240, 1259-60 n.2 (9th Cir. 1982) ("this liberality is particularly persuasive in antitrust suits where there is ample opportunity for discovery and other pre-trial procedures"); see, e.g., U.S. Dominator, Inc. v. Factory Ship Robert E. Resoff, 768 F.2d 1099 (9th Cir. 1985) (allowing salvage claim for powered fish processing vessel to relate back to date of original pleading for salvage of unpowered fish processing vessel where claims arose out of the same salvage effort).

The Ninth Circuit's liberal view of the relation-back doctrine has resulted in its application in a wide variety of circumstances. In Clipper Express, for example, the Court found that numerous antitrust protests made to the ICC by various defendants involved a single transaction or occurrence. The plaintiff's amended claim for fraud based on later protests was found to relate back to the plaintiff's original antitrust claims based on earlier protests and therefore was not time-barred.

The NFL's Cross-Claims similarly relate back to the original pleading. These claims are based on only one factual transaction: the Raiders' move from Oakland to Los Angeles. The Raiders' move does not involve numerous actions, but one interlocking set of facts forming one single transaction. The NFL set forth this move and the surrounding facts and circumstances in its Answer to the Raiders' antitrust claims.

Moreover, the Ninth Circuit has found that the mere existence of prior notice, to the party defending the claims, of the factual basis of the claims to be asserted is sufficient to permit "relation-back." In Santana v. Holiday Inns, Inc., 686 F.2d 736, 739 (9th Cir. 1982), for example, the plaintiff was fired from his job because a hotel manager reported to plaintiff's boss that he had made sexual advances toward a hotel employee. The plaintiff filed a slander claim against the hotel and the hotel moved for summary judgment on the basis of the statute of limitations. Plaintiff then filed an amended complaint asserting a claim for interference with employer relations; between the original filing and the amendment, however, the statute of limitations had run on the interference claim. Nevertheless, the Ninth Circuit found that the interference claim related back to the filing of the original claim because "the factual situation out of which the action [arose remained] the same and [had] been brought to the defendant's attention by the original pleading." Id. at 739.

Like the employer in Santana, the Raiders had notice of the factual basis of the NFL's Cross-Claims from the beginning of the action. Prior to commencement of the action, the Raiders knew of the expansion opportunity and knew that it belonged to the NFL under the NFL Constitution. Indeed, the NFL's Answer (¶¶ 34-35) alleged that the Raiders had conducted an opportunistic scheme to gain the franchise expansion opportunity. Where, as here, the party has notice of the factual situation supporting the claims, the claims relate back.

III.

THE NFL IS ENTITLED TO RECOVER DAMAGES FROM THE RAIDERS

The NFL is entitled to recover damages from the Raiders on three independent grounds: (a) usurpation of joint venture opportunity; (b) breach of fiduciary duty; and (c) breach of contract.

Like usurpation of a corporate opportunity, usurpation of a joint venture opportunity provides for tort liability when a joint venturer takes an opportunity for himself that is owned by the joint venture as a whole. 6 B. Witkin, Summary of California Law § 19 (8th ed. 1974).

In MacIsaac v. Pozzo, 81 Cal. App. 2d 278, 183 P.2d 910 (1947), plaintiffs and defendants were separate partnerships engaged in construction as a joint venture. While working on one job, plaintiffs procured another job based on the reputation of the joint venture. The plaintiffs (cross-defendants) attempted to take the second job opportunity for their own benefit, and prevent the joint venture from sharing in this opportunity. The MacIsaac court found that the plaintiffs were obligated to share the opportunity equally with the defendants, reasoning that the doctrine of corporate opportunity was fully applicable to a joint venture: "[I]f there is presented to a corporate officer or director a business opportunity which the corporation is [ready, willing and able to undertake], . . . the law will not permit [the corporate officer or director] to seize the opportunity for himself." 81 Cal. App. 2d at 284. See, e.g., MacIsaac v. Pozzo, 26 Cal. 2d 809, 813, 161 P. 2d 449, 451 (1945) (joint venturers

are "charged not to take any unfair advantage or secret profit"); Rosen v. E.C. Losch Co., 234 Cal. App. 2d 324, 335, 44 Cal. Rptr. 377 (1965) (a joint venturer is "required to refrain from taking any unfair advantage of his coadventurer"); Jaffe v. Heffner, 173 Cal. App. 2d 512, 516-17, 343 P.2d 374 (1959) (a joint adventurer holding or acquiring title to property for a joint venture is a trustee for his coadventurers.)

The Raiders are a member of the NFL, which is a joint venture. Los Angeles Memorial Coliseum Comm'n v. NFL, 726 F.2d 1381, 1396 (9th Cir. 1984), cert. denied, 469 U.S. 990, 105 S. Ct. 397, 83 L. Ed. 2d 331 (1986) ("Raiders I"). In addition, the Ninth Circuit has determined that the Raiders took something of value from the NFL, finding that the NFL was entitled to the "excess value" of the Los Angeles expansion opportunity. Raiders II, 791 F.2d at 1373. The Court of Appeals recognized that the NFL owns the right to place existing or expansion teams into particular cities. Id. "[T]he value of the league's expansion opportunities belonged to the league as a whole, or in other words [is] owned in part by each franchise owner." Id. at 1371.

Under California law, the Raiders were obligated to share the franchise opportunity with the Raiders' fellow joint venture members, or the League as a whole. See MacIsaac, 81 Cal. App. 2d at 284. "Unquestionably, when the Raiders moved to Los Angeles, they appropriated for themselves the expansion value that had accumulated in Los Angeles." Raiders II, 791 F.2d at 1371. Therefore, the NFL has a right to assert the claim for the Raiders' usurpation of the joint venture franchise expansion opportunity.

The NFL also has the right to assert the claim for the Raiders' breach of fiduciary duty. By unilaterally relocating to Los Angeles, the Raiders acted in their own self interest, thereby damaging the NFL. In so doing, the Raiders breached their fiduciary duty owed to the NFL. See, e.g., Professional Hockey Corp. v. World Hockey Ass'n, 143 Cal. App. 3d 410, 414-16, 191 Cal. Rptr. 773, 776-77 (1983) (member club that acts in own self interest when the interest of the league will thereby be harmed breaches fiduciary duty owed to the league).

With respect to the NFL's breach of contract claim, the Raiders' assent to the terms and provisions of the NFL Constitution and Bylaws constitutes a contract. See NFL Constitution Article 3.11(g). Key provisions of this contract govern team placement. As the Ninth Circuit has stated: "the League must be allowed to have some control over the placement of teams to ensure NFL football is popular in a diverse group of markets." Raiders I, 726 F.2d at 1396.

The Ninth Circuit's opinion in Raiders II and the terms of the NFL Constitution make clear that the member clubs of the NFL have contractually agreed that the League as a whole has the right to select franchise expansion opportunities and award new franchises within the League. Moreover, the Raiders agreed to maintain their franchise in Oakland, and to seek and obtain approval from the League before moving the franchise out of Oakland. The Raiders breached this agreement with the League by moving to Los Angeles. This breach caused damage to the League in that it lost the ability to sell the Los Angeles expansion opportunity. Therefore, the League is entitled to recover the

excess value of the Los Angeles expansion opportunity over the Oakland expansion opportunity.

CONCLUSION

For the foregoing reasons, the NFL's motion for leave to amend its answer should be granted in all respects.

DATED: December 2, 1987

SKADDEN, ARPS, SLATE, MEAGHER & FLOM

BY: _____
Frank Rothman
Attorneys for Cross-Defendant
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PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

I am employed in the county of L. A., State of California. I am over the age of 18 and not a party to the within action; my business address is 300 SOUTH GRAND AVENUE, LOS ANGELES, CA 90071-3144.

On DECEMBER 3, 1987 I served the foregoing document(s) described as

NOTICE OF MOTION AND MOTION FOR LEAVE TO FILE AN AMENDED ANSWER AND CROSS-CLAIMS; MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT THEREOF

on the interested parties in this action by placing a true copy thereof enclosed in a sealed envelope addressed as follows:

Joseph L. Alioto, Esq. Alioto & Alioto 650 California Street 23d Floor San Francisco, CA 94108	Moses Lasky, Esq. Lasky, Haas, Cohler & Munter 505 Sansome St. Suite 1200 San Francisco, CA 94111

STATE

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☐ I delivered such envelope by hand to the offices of the addressee pursuant to CCP § 1011.

☐ I declare under penalty of perjury under the laws of the State of California that the above is true and correct.
Executed on _____, 19__ at _____, California.

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☒ (BY MAIL) I caused such envelope with postage thereon fully prepaid to be placed in the United States mail at a facility regularly maintained by the United States Postal Service at Los Angeles, California.

☐ (BY PERSONAL SERVICE) I caused such envelope to be delivered by hand to the offices of the addressee.

☒ I declare that I am employed in the office of a member of the bar of this Court at whose direction the service was made.
Executed on December 3, 1987 at Los Angeles, California.

Edward N. McCarthy
Type or Print Name

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Signature

Exhibit 3

Aigner/Stuart F Cooper Co Toll Free 1-800-421-9703 Call 213-747-7141

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FILED
JUN 22 1988
CLERK, U.S. DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
BY DEPUTY

IN THE UNITED STATES DISTRICT COURT

FOR THE CENTRAL DISTRICT OF CALIFORNIA

LOS ANGELES MEMORIAL COLISEUM COMMISSION, Plaintiff, v. NATIONAL FOOTBALL LEAGUE, an unincorporated association, et al., Defendants.	No. CV 78-3523-TJH (GHKx) [~~PROPOSED~~] ORDER GRANTING NATIONAL FOOTBALL LEAGUE'S MOTION TO AMEND ANSWER
OAKLAND RAIDERS, Cross-Claimant, v. NATIONAL FOOTBALL LEAGUE, an unincorporated association, et al., Cross-Defendants.	

ENTERED
CLERK, U.S. DISTRICT COURT
JUN 24 1988
CENTRAL DISTRICT OF CALIFORNIA
BY DEPUTY

THIS CONSTITUTES NOTICE OF ENTRY AS REQUIRED BY FRCP, RULE 77(d).

This matter having come regularly before the Court; and the Court having read and considered the papers

Case 2:09-bk-09488-RTBP Doc 917 Filed 09/04/09 Entered 09/04/09 22:22:40 Desc
Main Document Page 78 of 78

filed in support of and in opposition to the Motion of the National Football League for Leave to File an Amended Answer and Cross-Claims and the files and records in this matter; and having heard the oral arguments of counsel; and good cause appearing therefor:

IT IS HEREBY ORDERED that

1. The National Football League's Motion is granted.

2. The Court is of the opinion that this order involves a controlling question of law as to which there is a substantial ground for difference of opinion, and that an immediate appeal from the order may materially advance the ultimate termination of the litigation.

3. If Los Angeles Raiders timely apply to the Court of Appeals for permission to appeal from this order pursuant to 28 U.S.C. § 1292(b), its time to respond to the Cross-Claims shall not begin to run until the Court of Appeals either shall have refused leave to appeal or disposed of the appeal after permitting it.

DATED: June 22, 1988

TERRY J. HATTER, JR.

UNITED STATES DISTRICT JUDGE

Approved as to form:

SKADDEN, ARPS, SLATE, MEAGHER & FLOM

By

Douglas B. Adler
Attorneys for National Football League

PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

I am employed in the county of Los Angeles, State of California. I am over the age of 18 and not a party to the within action; my business address is 300 S. Grand Avenue, 34th floor, Los Angeles 90071.

On June 21, 1988, I served the foregoing document(s) described as

[PROPOSED] ORDER GRANTING NATIONAL FOOTBALL LEAGUE'S MOTION TO AMEND ANSWER

on the interested parties in this action by placing a true copy thereof enclosed in a sealed envelope addressed as follows:

See attached Service List

STATE

☐ (BY MAIL) I deposited such envelope with postage thereon fully prepaid in the United States mail at a facility regularly maintained by the United States Postal Service at Los Angeles, California.

☐ (BY PERSONAL SERVICE) ☐ By personally delivering copies to the person served.

☐ I delivered such envelope by hand to the offices of the addressee pursuant to CCP § 1011.

☐ I declare under penalty of perjury under the laws of the State of California that the above is true and correct.
Executed on _____, 19__ at _____, California.

FEDERAL

☒ (BY MAIL) I caused such envelope with postage thereon fully prepaid to be placed in the United States mail at a facility regularly maintained by the United States Postal Service at Los Angeles, California.

☐ (BY PERSONAL SERVICE) I caused such envelope to be delivered by hand to the offices of the addressee by FEDERAL EXPRESS.

☒ I declare that I am employed in the office of a member of the bar of this Court at whose direction the service was made.
Executed on June 21, 1988 at Los Angeles, California.

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