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15 Attorneys for the National Hockey League

16 UNITED STATES BANKRUPTCY COURT

17 FOR THE DISTRICT OF ARIZONA

18 In re) Case No. 2:09-bk-09488-RTBP
19 DEWEY RANCH HOCKEY, LLC,) (Jointly Administered)
20 COYOTES HOLDINGS, LLC,) Chapter 11
21 COYOTES HOCKEY, LLC, and) **National Hockey League's Opposition to**
22 ARENA MANAGEMENT GROUP, LLC,) **PSE's Motion to Exclude the Expert**
23 Debtors.) **Declarations of Daniel S. Barrett,**
24) **Michael Rapkoch, and Franklin M.**
25) **Fisher**

24) Date: September 10, 2009
25) Time: 8:30 a.m.
26) Location: U.S. Bankruptcy Court
27) 230 N. First Ave, Courtroom 703
28) Phoenix, AZ 85003

26 This filing applies to:

- 27 ☐ All Debtors
28 ☐ Specified Debtors

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In support of its request for such extraordinary relief, PSE makes sweeping and vague allegations of purported discovery misconduct. None of PSE's accusations is true, and certainly none warrants excluding the expert declarations proffered by the NHL. Since the NHL denied Mr. Balsillie's ownership application on July 29, 2009, it has been upfront with the Court and PSE that the League would not process PSE's relocation application under the NHL's rules and procedures. The NHL also expressly objected to any relocation-related discovery on those same grounds. However, given the threat that the NHL would be required to make a decision on a relocation fee in a very short timeframe in the event the Court overruled the NHL's decision on Mr. Balsillie's ownership application, the submission of the Wright and Zimbalist Declarations in early June 2000, and the NHL's representation that it could and would complete the necessary work in a short time frame if it became necessary, the NHL's counsel prepared for such a contingency by allowing its consultants to continue their analysis of a potential relocation fee and response to PSE's experts

On August 12, 2009, the Court ordered the parties to "meet and confer" regarding some limited discovery on relocation issues (again, recognizing that the parties were dealing with a short time period in which to complete discovery and were fully engaged in document discovery on ownership transfer issues and numerous depositions on a wide range of issues). Contrary to the insinuations that the NHL has engaged in some sort of improper gamesmanship, the NHL based its proposed discovery "compromise" to PSE on the discrete set of documents it had

1 gathered (or was in the process of gathering) for its own experts. The NHL did not object to
2 discovery of any material it had already gathered as "unduly burdensome." The discovery that
3 PSE was seeking at that time (and which was the subject of the NHL's objections) went well
4 beyond what the NHL had gathered for its consultants and would, indeed, have been unduly
5 burdensome to gather and produce.

6 Finally, PSE does not even attempt to demonstrate any prejudice from the timing of the
7 NHL's production; nor could it, especially at the end of a bankruptcy case in which significant
8 issues have been routinely briefed and considered in a matter of days (and sometimes hours). PSE
9 does not identify any documents material to the analysis of any of the NHL's experts that the NHL
10 failed to produce in August. Nor does PSE claim that the purported late production has impeded
11 the work of its own expert, Prof. Zimbalist, who has already prepared a rebuttal report to the
12 NHL's expert reports and has concluded that the reports do not change his opinions.

13 ARGUMENT

14 A brief recap of the relevant history relating to PSE's demands for relocation-related
15 discovery is instructive. From the outset of this proceeding, the NHL has resisted being forced to
16 apply its relocation rules in a truncated time frame and from having to calculate a relocation fee
17 for (i) a relocation it has not approved, and (ii) a potential owner who has not been approved (and
18 who has since been rejected). The Coyotes did not begin its relocation application process until
19 June 1, 2009, and did not request a waiver of the January 1 deadline until June 17, 2009 (and
20 made additional supplements to its relocation application on July 15, July 24, August 7 and
21 August 24). The NHL rejected Mr. Balsillie as a potential owner on July 29, 2009, at which time
22 he had still failed to produce much of the material that the League requested to evaluate his
23 relocation application, including particularly the pro forma financials projected for the Coyotes in
24 Hamilton, which were not provided until August 7. At that point, the NHL took the unambiguous
25 position that it was not going to continue its relocation processes with respect to an application
26 filed by someone who was not an owner and who was not qualified to become an owner.

27 Of course, the denial of Mr. Balsillie's ownership application did not stop PSE and the
28 Debtors from demanding relocation-related discovery in the event that the Court were to overrule

1 the NHL's decision regarding Mr. Balsillie's qualification to be an owner and reverse its decision
2 that a successful bid would need to take into account the "geographic restriction [that] is part of
3 the executory contract sought to be assumed by the Debtors." (6/15/09 Order at 10 [Dkt. no. 341].)
4 On August 7, 2009, PSE and the Debtors jointly moved to obtain discovery related to both the
5 ownership transfer and relocation-related issues, including the calculation of a potential relocation
6 fee. The Motion, which included twenty requests, many of which asked for "all" documents
7 relating to a subject, including email, were overbroad, unduly burdensome, and went well beyond
8 both what the NHL had collected and provided to its experts and what the NHL could reasonably
9 have pulled together in the limited time remaining before the September 10, 2009 Auction
10 Hearing. Indeed, some of the requests related to transactions dating back to the 1930s. The NHL
11 filed objections on August 10, 2009, arguing that there was no basis for any relocation-related
12 discovery because Mr. Balsillie had been disapproved as an owner and "no other Qualified
13 Bidders have come forward to bid for the purchase and relocation of the Phoenix Coyotes."
14 (Objection at 2 [Dkt. no. 595].) The NHL also noted that the discovery sought was "exceedingly
15 broad, seeking decades of materials," including "confidential information from NHL member
16 franchises that are not before this Court." (Id. at 3.) Contrary to PSE's insinuations, there is
17 nothing in anyway inaccurate in what the NHL stated in its objections.

18 At the August 11, 2009 scheduling hearing, the Court informed PSE that "you're going to
19 have to probably figure out with a lot more precision what it is you ought to get. I don't even see
20 how you're going to do five depositions and meet this schedule." (8/12 Hr'g Tr. at 24.) The NHL
21 repeated its position that relocation-related discovery was inappropriate because the NHL does not
22 process applications for those who are not qualified to be owners. (Id. at 36.) In response to a
23 question from the Court regarding whether that would leave enough time for relocation-related
24 discovery if it became necessary, the NHL also suggested that the determination of the relocation
25 fee could occur after the auction. (Id. at 37.) The Court confirmed its understanding of the
26 League's position: "[W]hat you're representing to the Court is if you lose and PSE's the bidder,
27 then what I'm going to call the jet lagging issues, relocation fee, whatever else it is – we're going
28 to have to confront those quickly. The league is prepared to do that – and will do that." (Id. at 39.)

1 The Court ultimately held that any discovery was necessarily going to need to be limited and
2 instructed the parties to meet and confer:

3
4 I think you all need to meet and confer about what limited discovery
5 you ought to get to do. And I'm going to tell all of you, it's going to
6 be limited. So you better pick your, you know, your golden
opportunities carefully, because there's just not enough time left to
just kind of open the floodgates up.

7 (Id. at 41.)

8 The parties engaged in a "meet and confer" immediately after the hearing. (As a
9 contingency, the NHL's outside counsel had retained consultants to advise them on a potential
10 relocation fee in the event it ever became necessary to provide such a calculation to the Court.)
11 The NHL also had gathered a discrete set of material potentially relevant to the calculation of such
12 a fee to provide to its consultants – a tiny fraction of the documents sought by PSE in its
13 blunderbuss document requests.¹ It was those documents that it had already gathered or was in
14 the process of gathering that formed the basis for the compromise that the NHL proposed to PSE
15 and the Court regarding relocation-related discovery. The NHL volunteered to produce and did
16 produce the primary financial documents relied by the NHL's experts, including gate receipts for
17 2006-2009 and Hockey Related Revenue ("HRR") reports for the same time period. Therefore,
18 the repeated suggestion that the NHL objected to requested discovery as "unduly burdensome"
19 when it had already gathered the requested information and provided it to its experts is patently
20 false – the NHL was objecting to documents it had not collected and still has not collected
21 because they are either irrelevant and/or their collection would be unduly burdensome.

22 Sweeping away the bravado and rhetoric, PSE identifies only four categories of documents
23 that it claims the NHL wrongfully withheld. (PSE Motion at 8-9 [Dkt. no. 922].) Again, an
24 analysis of the actual facts relating to each request belies PSE's allegations.

25 1. Other Franchise Sales. PSE had requested summaries regarding every team sale
26 dating back to 2000. (PSE 8/12/09 Position Statement at Req. No. 4 [Dkt. no. 620].) The NHL
27 did not specifically address this request in its written response, but generally objected to financial

28 ¹ By reporting the number of "pages" the NHL produced, rather than the number of documents, PSE
exaggerates the amount of documents the NHL gathered for its experts.

1 documents prior to the new Collective Bargaining Agreement in 2006 as being irrelevant. In
2 response, the Court ordered that "[i]n lieu of category number 4, the NHL shall disclose all
3 expansion fees and relocation fees charged by the NHL since 1999." The NHL complied with the
4 Court's order. Consistent with its position regarding what transactions are relevant, the NHL also
5 collected and provided to its own potential experts summaries regarding transactions since 2006,
6 which the NHL has also now provided to PSE.

7 2. Indemnification Fees. PSE claims that "the Barrett Declaration calculates an
8 indemnity fee based in part on the 1982 relocation of the New Jersey Devils from Colorado."
9 (Motion at 8.) This is simply not true. None of the NHL's experts has calculated what an
10 appropriate indemnification fee would be if the Coyotes are allowed to move to Hamilton over the
11 League's objection, and none relied on the Devils' move in calculating a potential relocation fee.²
12 Moreover, at the August 11 meet and confer, counsel for the NHL offered to produce this
13 information, but PSE subsequently limited its request to materials dating back only to 1990,
14 specifically excluding this transaction.

15 3. Efforts to Bring a Team to Hamilton. PSE claims that the "Barrett Declaration
16 relies on 'historical documents related to efforts to bring an NHL team to Hamilton.'" (Motion at
17 9.) This again is simply not true. None of the NHL's experts relied on expansion materials from
18 the early 1990s, including the material relating to Hamilton. Moreover, during the meet and
19 confer following the August 11, 2009 hearing, the NHL's counsel informed PSE that the report
20 was irrelevant, and PSE did not even request this document in the discovery paper it filed the next
21 day.

22 4. Ticket Sales. PSE notes that the Fisher Declaration contains data regarding ticket
23 sales in 2009. But the NHL gave PSE this same data in August. In response to PSE's overbroad
24 request for data dating back to 1996, the NHL offered to produce – and did produce – gate
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27 ² The page-long discussion of how minutes from a 1982 board meeting purportedly
28 demonstrate the League's bad faith in denying Mr. Balsillie's ownership application in 2009 is
indicative of PSE's modus operandi in this case of trying to manufacture issues out of whole cloth
where there are none. (See Motion at 4.)

1 receipts for seasons since the new CBA went into effect in 2006, which is exactly what it provided
2 to its own experts.

3 Finally, for all its complaining, PSE does not identify any prejudice; certainly none that
4 would justify striking the NHL's expert reports. See King v. Nat'l Human Res. Comm., Inc., 218
5 F.3d 719, 724-25 (7th Cir. 2000) (affirming as not arbitrary or capricious district court ruling that
6 refused to strike expert report which relied on documents that had not been produced). Prof.
7 Zimbalist does not claim that he has been prejudiced, and in fact has already submitted a detailed,
8 eighteen-page critique of the reports by the NHL's experts. Moreover, while PSE acts shocked to
9 learn that the NHL's counsel retained experts in July 2009 to analyze relocation issues, PSE has
10 known since at least August 21, 2009, when Deputy Commissioner Daly testified that – in
11 addition to whatever the League itself had done prior to July 29, 2009 to consider PSE's relocation
12 application – the League's outside counsel had retained outside consultants to conduct their own
13 analysis in anticipation of responding to the June declarations filed by Mr. Wright and Prof.

14 Zimbalist:

15
16 Q: What I'm interested in is not what work counsel may have done
17 in connection with this litigation -- or legal advice. What I'm
18 interested in is what did the League do to work on the application
19 for relocation before it was stopped.

20 A: Well, I have a problem, because, again, I think we're into a
21 compound type question. I'm not sure I can separate necessarily
22 what we directed in terms of processing a relocation application
23 versus what our outside counsel may be doing vis-a-vis a
24 litigation. Some of the processes, I believe, were related to both our
25 processing the relocation application pursuant to bylaw 36 and
26 whatever they might be doing with respect to a relocation.

27 Q: Let me ask you specifically. Did you do any studies of the
28 Hamilton market?

A: I believe we retained outside consultants and experts to look at
the Hamilton market, yes.

Q: And did they provide any reports to you?

A: No.

Q: What date did you retain them?

A: I don't know.

1 Q: Was it just before July 29th when they stopped? Approximately
2 how long were your experts working on this matter? Was it a week?
Was it two days?

3 A: No. It was – would've been probably sometime in June.

4 (8/21 Daly Tr. at 24-26.)

5 Likewise, PSE's counsel did not express any shock or surprise when it informed the Court
6 at the September 2, 2009 hearing that the NHL had informed PSE the NHL would be submitting
7 expert declarations with its papers on September 4, 2009. (9/2 Hr'g Tr. at 254.) And contrary to
8 PSE's suggestion that the NHL's papers were somehow tardy, it was expressly discussed and
9 agreed to at the September 2, 2009 hearing that the NHL would be submitting its papers on
10 September 4, 2009 and there were no objections from any party. (Id. at 251-53.)

11 Put simply, there has never been any attempt by the NHL to deny PSE or anyone else
12 adequate time to perform all the work necessary to have a proper auction; the exigency and tight
13 timeframes have all been of PSE's own creation by its insistence that the Court hold a single
14 auction for both local and relocation bidders prior to the start of the 2009-10 season and prior to
15 the Court even determining whether Mr. Balsillie is a Qualified Bidder. The NHL's position has
16 been (and remains) that it is premature to consider relocation issues, including a potential
17 relocation fee. In any event, PSE offers no legitimate basis to exclude the NHL's expert reports.

18 **CONCLUSION**

19 WHEREFORE, for the reasons set forth above, the NHL respectfully requests that PSE's
20 motion to strike the declarations submitted by the NHL's experts be denied.

21 DATED: September 9, 2009
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