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IN THE 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) Chapter 11 **REPLY TO GLENDALE SALE OBJECTIONS AND SUMMARY OF NEWLY DISCOVERED EVIDENCE (FILED UNDER SEAL)** **Hearing Date:** August 3 and 5, 2009 **Hearing Time:** 1:30 p.m. and 9:00 a.m. **Hearing Location:** 230 N. First Ave. Courtroom 703 Phoenix, Arizona
This filing applies to: ■ All Debtors □ Specified Debtors	

The City of Glendale, Arizona ("Glendale") respectfully submits this reply ("Reply") to the several objections and other oppositions filed to the sale of certain assets of these estates in the manner styled in these cases as the "Glendale Sale," and further provides this Court with a summary of certain highly relevant evidence learned through

the discovery recently conducted in these cases. This Reply is based upon the following points and authorities, the accompanying Declaration of Edward Beasley, the pleadings, papers and other records on file in these cases, and such argument and further evidence presented to the Court at the time of the hearing.

I.

INTRODUCTION

As this Court knows, these cases have been dominated by heated litigation from literally their first day as to the proper manner for selling the operating assets of these Debtors. The National Hockey League ("NHL"), Glendale, other creditors, and indeed the integrity of the conduct of these cases, are in desperate need of relief from the litigation onslaught and misconduct brought on by Mr. Moyes and his representatives, and in place thereof for this Court to impose a transparent and fair sale process carried out without the continued oppression by Mr. Moyes.

The Debtors commenced these cases with laser-like focus on the urgent sale of the operating assets (the "Operating Assets") to PSE Sports & Entertainment, L.P. ("PSE"), an entity formed by Mr. James Balsillie for the purpose of moving the Phoenix Coyotes NHL franchise (the "Team") to Hamilton, Ontario. Virtually every deadline imposed in these cases has been in an effort to accommodate that stated purpose under PSE's threats to withdraw its bid, notwithstanding the repeated caution of the NHL that Mr. Balsillie's prior conduct made his eligibility for ownership anything but certain, and that the Team could not be moved from Glendale for the upcoming 2009-2010 season in any event. Glendale has also strenuously objected to the Debtors' threatened rejection of its Use Agreement with Glendale for the benefit of the Debtors' primary owner, Mr. Jerry Moyes, knowing the tremendous damage that would be caused to the taxpayers of Glendale by such rejection.

On the severely constrained schedule dictated by PSE, the NHL and Glendale have

scrambled to identify, qualify and finalize tremendously complex arrangements for the acquisition of the Operating Assets. These efforts have been under the most trying of circumstances: timeframes compressed beyond anything previously attempted (to Glendale's knowledge) for the sale of an NHL franchise; no support from the Debtors of any type; the threat, and then the reality, of litigation by other parties seeking to derail the ability of Glendale to finalize arrangements with potential buyers; the constant (and extremely public and well-financed) drum-beat by Mr. Balsillie that he will spare no expense to move the Team to Ontario, designed to cast doubt on the Glendale Sale that the NHL has tried to conduct; the threat of interrogation of anyone who ventured to make a bid, and then the carrying out of those threats under the gussied-up pretense of "collusion" among bidders that still today has no demonstrated basis in fact; and, most recently, the exceptionally harmful and inexcusable public disclosure of the most delicate and confidential negotiation details by Mr. Moyes, with the effect of chilling or completely derailing the very Glendale Sale that he has made every effort to prevent.

The NHL has now determined, in accordance with its Constitution, that Mr. Balsillie lacks the integrity to become an NHL owner of this franchise (wherever located). There are no more false deadlines imposed by PSE.

The most recent misconduct by Mr. Moyes, which has at least severely chilled the competitive Glendale Sale process that he opposes, is set forth in more detail in the Application for Issuance of an Order to Show Cause filed herewith by Glendale. However, and as unfortunate as that conduct is in and of itself, it is even more egregious in the context of the pattern of inappropriate conduct by Mr. Moyes. That pattern started the very day he purchased the controlling interest in the Team on September 27, 2006. It continued through the days just prior to the commencement of these cases with the [redacted] and is continuing further in connection with Mr. Moyes's attempted administration of these

cases for his personal benefit and at the expense of creditors holding legitimate claims against these estates. The actual facts as to this pattern of conduct, while still being revealed through on-going discovery, are inconsistent with the facts and stories previously provided to this Court, and the summary of what has been discovered to date under the compunction of legal process is necessary to understand the context of this most recent misconduct.

II.

STATEMENT OF RECENTLY DISCOVERED FACTS REGARDING MR. MOYES'S RELATIONSHIPS WITH THE DEBTORS AND THE CONDUCT OF THESE CASES

[redacted]

[1] The relevant pages of the transcript of Mr. Shumway's July 30, 2009 examination ("Shumway Tr.") are attached hereto as Exhibit A.

[redacted]

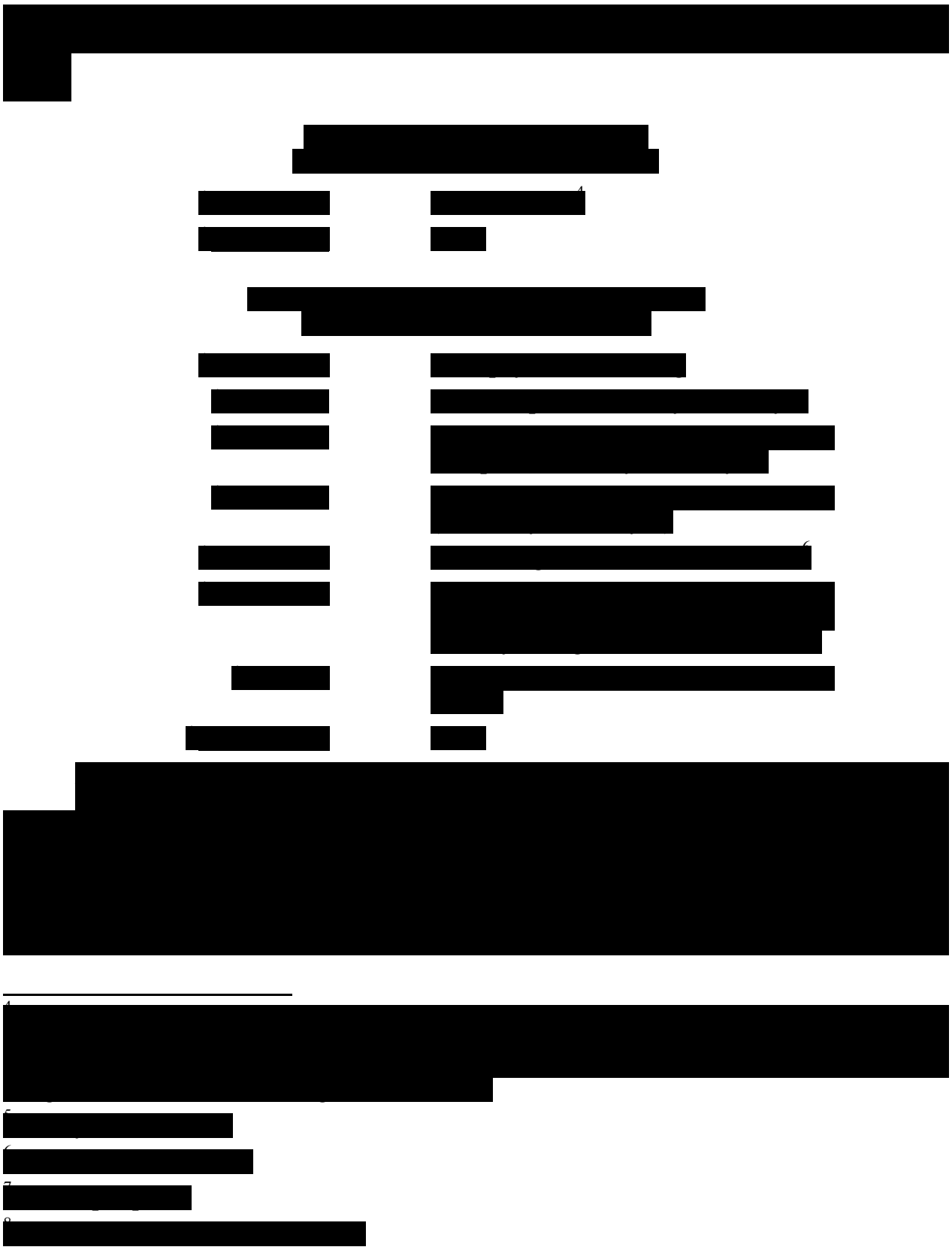
[2] The relevant pages of the transcript of Mr. Moyes's July 31, 2009 examination ("Moyes Tr.") are attached hereto as Exhibit B.

[redacted]

[3] The relevant pages of the transcript of Mr. Nealy's July 29, 2009 examination ("Nealy Tr.") are attached hereto as Exhibit C.

[redacted]

[redacted]



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Second, and while Glendale is not privy to the details of allegations that have been communicated to it informally (as Glendale is not intimately involved with the day-to-day aspects of any bidders' due diligence or the administration of the sale process), Glendale has been informed that the potential bidder most disfavored by Mr. Moyes, the Reinsdorf Group, has been especially frustrated in obtaining access to the sale data room, timely access to senior management and delays in obtaining the Debtors' comment on draft sale

documents.

Third, for several weeks the Debtors threatened discovery against all potential bidders (other than of PSE, of course), a threat made immediately after (specifically, within a matter of 20 hours) the filing of discovery requests by Glendale against Mr. Moyes. The Debtors and Mr. Moyes jointly then carried out the threatened discovery under the banner of suspected "collusion," and even now have not provided a hint of proof as to a single supposed collusive act. That discovery has, however, taken its intended toll by distracting all parties and adding additional cost and public scrutiny to what should be an orderly sale process. It is extraordinary for the supposed fiduciary debtor-in-possession to seek discovery as to a potential bidder at all; it is incredible that that supposed fiduciary presently intends to take the examination of a potential bidder literally the day before the scheduled auction date in Reno, Nevada.

Mr. Moyes has also failed to comply with this Court's discovery orders. Despite the fact that Glendale's discovery requests were filed on July 1, 2009, and were so ordered by this Court on July 16, 2009, to this day Mr. Moyes has failed to produce virtually any of Mr. Moyes's e-mails, and has failed to even conduct a good faith effort to comply. The limited search for Mr. Moyes's e-mails was done by using search terms that would have failed to pick up, for example, e-mails that would have referenced words such as "hockey," "Scudder," "Glendale," "NHL," or "Coyotes." Glendale is mindful that the Court has little patience for discovery disputes and the proper remedy for this failure can be addressed in due time. Glendale feels compelled, however, to bring this further misconduct to the Court's attention given that Mr. Moyes's failures have greatly impaired Glendale's ability to effectively prepare for hearings occurring on almost a daily basis. Glendale is also mindful that such failures may contribute to its inability to be more precise as to some of the allegations made herein. Glendale must therefore reserve its opportunity to more fully address these issues and correct any misimpressions that could

have been addressed earlier if only Mr. Moyes had made any genuine effort to comply with this Court's discovery orders. These failures are, unfortunately, consistent with Mr. Moyes's other conduct in these cases.

Next, the Debtors failed to notice out the Glendale Sale. Glendale is prepared to chalk up that failure to the admitted inadvertence of counsel.

What cannot be inadvertence, no matter how charitably interpreted, is the intentional violation by Mr. Moyes of the confidentiality order that has occupied hour upon hour of courtroom time and difficult negotiation. Indeed, the confidential information that was disclosed were exactly those facts which were specifically known to Mr. Moyes and his counsel to be most damaging to the integrity of this process and the ability of Glendale to fashion one or more agreements that would enable it to have a fair opportunity to keep the Team in Glendale. If there were any integrity in the Moyes-directed process before that misconduct, there certainly cannot be now.

III.

ARGUMENT

These cases involve significant sums of money; important taxpayer and commercial interests; complex legal relationships; and tremendous public attention. In that context, the integrity of the process is first and foremost.

Here, in the context of a section 363 sale of valuable assets, "the interests of creditors is said to be of 'paramount' importance and entitled to deference." In re Lahijani, 325 B.R. 282, 290 (B.A.P. 9th Cir. 2005); In re Huang, 23 B.R. 798, 801 (B.A.P. 9th Cir. 1982).

Integrity of the process, in the first instance, is the primary responsibility of the debtors-in-possession. "The doctrine that a chapter 11 debtor in possession owes a fiduciary duty to all creditors of the estate is presumably universal." In re Battinelli, 169 B.R. 522, 524-25 (Bankr. E.D.N.Y. 1994) (citing In re Devers, 759 F.2d 751, 754 (9th

Cir.1985)). See also In re Hampton Hotel Investors, L.P., 270 B.R. 346, 361-62 (Bankr. S.D.N.Y. 2001) ("The United States Supreme Court has made clear that a debtor in possession, like a chapter 11 trustee, owes the estate and its creditors a general duty of loyalty." (citing Wolf v. Weinstein, 372 U.S. 633, 649 (1963)).

"By virtue of section 1107(a), a chapter 11 debtor in possession stands in the shoes of a trustee and is a fiduciary for the estate and its creditors." In re Count Liberty, LLC, 370 B.R. 259, 275 (Bankr. C.D. Cal. 2007) (citing Thompson v. Margen (In re McConville), 110 F.3d 47, 50 (9th Cir. 1997) (stating that chapter 11 debtors in possession "were fiduciaries of their own estate owing a duty of care and loyalty to the estate's creditors"). As a fiduciary, a corporate officer is not free to manage chapter 11 process in his or her own self interest, but rather must administer in trust for the benefit of creditors. See In re Anchorage Nautical Tours, Inc., 145 B.R. 637, 643 (B.A.P. 9th Cir.1992) (citing In re Woodson, 839 F.2d 610, 614 (9th Cir. 1988)).

Glendale respectfully submits that Mr. Moyes does not appreciate these principles. But appreciation is required, not elective. "One of the painful facts of bankruptcy is that the interests of shareholders become subordinated to the interests of creditors." Commodity Futures Trading Commission v. Weintraub, 471 U.S. 343, 355 (1985). "It is true that a debtor in possession owes a fiduciary duty to both creditors and equity holders. … This does not allow a debtor in possession to favor equity holders over creditors, however, or to engage in conduct that essentially amounts to concealing assets and self-dealing. To the contrary, the hierarchy of the Bankruptcy Code provides that the interests of creditors are paramount to the interests of the equity holders, and a trustee must act in accordance with this hierarchy." Tenn-Fla Partners v. First Union Nat. Bank of Fla., 229 B.R. 720, 736 (W.D. Tenn. 1999) (citations omitted).

Here, these Debtors have been insolvent from the moment Mr. Moyes took control of the Team in 2006, and Mr. Moyes seems to have rarely missed an opportunity to look

out for himself at the expense of third party creditors. The privilege of having the tiller of the chapter 11 ship, especially in a conceded sale case, is not without bounds. "[T]he willingness of courts to leave debtors in possession is premised upon an assurance that the officers and managing employees can be depended upon to carry out the fiduciary responsibilities of a trustee." Commodity Futures Trading, 471 U.S. at 355. Bankruptcy courts have routinely revoked the privilege of principals who put their own interests before those of creditors in much less egregious situations, and where the pattern of conduct has been much less pervasive. See e.g., In re Embrace Sys. Corp., 178 B.R. 112 (Bankr. W.D. Mich. 1995) (a bidder's offer was found unfair and the sale was not in the best interests of creditors because the sale had been arranged by the debtor's president, who had a financial interest in the bidder); In re Wingspread Corp., 92 B.R. 87 (Bankr. S.D.N.Y. 1988) (chairman failed to list certain information on the schedules in an effort to personally capitalize on the section 363 sale of debtors' assets through a corporate vehicle that was purchasing the debtors' assets; accordingly, the court granted an injunction to preserve the status quo and allow the court the opportunity to consider whether the sale process was permeated by insider misconduct); In re Plabell Rubber Products, Inc., 149 B.R. 475, 479-80 (Bankr. N.D. Ohio 1992) (debtor's vice president, involved in soliciting and running the sale, testified that he would not discuss his employment with the debtor, which caused the court concern because such discussions would bear upon the integrity of the proposed sale).

IV.

CONCLUSION

In its Application for Order to Show Cause filed herewith, the City of Glendale has suggested forms of relief that, while not sufficient to compensate Glendale and other creditors for the harm caused by Mr. Moyes and those reporting to him, would mitigate harm going forward and restore some sense of integrity to the sale process proposed to be

conducted in this Court. The City of Glendale respectfully requests that such relief be entered without delay, and that the taxpayers of the City of Glendale be afforded a fair opportunity to retain an important civic asset, and to avoid material and irreparable harm, on something approaching a level playing field with due process of law.

Dated: August 3, 2009

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This document was filed under seal with the U.S. Bankruptcy Court on this 3rd day of August, 2009.

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