

1 **Scharf-Norton Center for Constitutional Litigation at the**
2 **GOLDWATER INSTITUTE**

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6 **UNITED STATES BANKRUPTCY COURT**
7 **DISTRICT OF ARIZONA**

8 In re:) No. 2-09-bk-09488-RTB
9)
10 DEWEY RANCH HOCKEY, LLC, COYOTES) Chapter 11
11 HOLDINGS, LLC, COYOTES HOCKEY, LLL,)
12 and ARENA MANAGEMENT GROUP, LLC,) (Jointly Administered)
13)
14 Debtors.) **MEMORANDUM IN SUPPORT OF**
15) **GLENDALE TAXPAYERS' MOTION**
16 This filing applies to all debtors.) **FOR LEAVE TO FILE AMICUS**
17 **BRIEF**

14 **Introduction**

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16 On July 31, 2009, the Goldwater Institute, representing Glendale taxpayers, filed a
17 Motion to File Amicus Brief/Conditional Bid Objection to question the constitutionality of
18 potential taxpayer subsidies tied to the new ownership of the Coyotes hockey team (BK Docket
19 No. 531). Later, the Court indicated that the taxpayers may lack standing and/or a right to be
20 heard under Section 1109(b) of the Bankruptcy Code and invited taxpayers and others to set
21 forth their reasons for being heard by August 31, 2009 (BK Doc 634). As the taxpayers
22 indicated in their July Motion, they still remain unable to determine whether it is desirable or
23 appropriate for them to intervene and/or object to any particular bid or term because no relevant
24 terms or potential terms have ever been publicly revealed.¹ However, it is clear the Court has

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28 ¹ On June 26, 2009, the Goldwater Institute filed a public records lawsuit against the City of Glendale for the release of the City's negotiations with potential Coyotes owners (*Goldwater Institute v. City of*

1 the inherent power to allow them to file an amicus brief as a “friend of the court” because they
2 offer a unique and highly relevant legal perspective—a perspective that may call into question
3 any deal that is currently under negotiation as a matter of state constitutional law.²

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5 **Argument: Glendale Taxpayers Should be Allowed to File an Amicus Brief**

6 It is within the inherent authority of the Bankruptcy Court to allow the filing of an
7 amicus brief where it will provide a unique perspective relevant to contested issues. As held in
8 *In re Heath*,

9 An amicus brief should normally be allowed when a party is not represented
10 competently or is not represented at all, when the amicus has an interest in some
11 other case that may be affected by the decision in the present case (though not
12 enough affected to entitle the amicus to intervene and become a party in the present
13 case), or when the amicus has unique information or perspective that can help the
14 court beyond the help that the lawyers for the parties are able to provide.

15 *Id.*, 331 B.R. 424, 430 (B.A.P. 9th Cir. 2005) (quoting *Ryan v. Commodity Futures Trading*
16 *Comm’n*, 125 F.3d 1062, 1063 (7th Cir. 1997)). “No matter who a would-be amicus curiae is,
17 therefore, the criterion for deciding whether to permit the filing of an amicus brief should be the

18 *Glendale*, Maricopa County Superior Court CV2009-020757), but no public records of substantive
19 negotiations, terms, or potential terms have been released as of August 28, 2009.

20 ² Although the taxpayers do not request it, they are arguably “enough affected” to entitle them to
21 intervene. *See In re Heath*, 331 B.R. at 430; see also Bankruptcy Code § 1109(b) (intervention for
22 interested parties) and § 2018(a) (permissive intervention for cause). This is because their interest is
23 similar to that of potential future asbestos claimants, who may not know the extent or even existence of
24 their interest at the time of the bankruptcy proceeding. In asbestos cases, the “failure to provide for
25 future claimants in a reorganization plan might fatally undermine any such plan as well as prejudice the
26 position of future claimants.” *In re Amatex Corp.*, 755 F.2d 1034, 1042 (3rd Cir. 1985). In other types
27 of cases, intervention under § 1109 is precisely the method by which potentially interested individuals
28 may be heard while negotiations are pending, as they apparently are here. For example, in *In re Agway, Inc.*, 297 B.R. 371, 373 (N.D.N.Y. 2003), retired employees were concerned that their benefits plan could potentially be modified in the bankruptcy proceedings, and their interests would not be represented by current employees. The court held that until the modifications were officially proposed or filed with the Court and a committee was appointed to represent them, the retirees were “certainly entitled to express their ‘unofficial’ views . . . pursuant to Code § 1109.” *Id.* at 375. The taxpayers here nevertheless do not seek so much at this stage; instead, they request merely to express their views to the Court as amici. For all these reasons, the taxpayers request that the Court grant their motion. However, intervention may be sought once the terms of any tentative, potential, or final agreements became public, so that the taxpayers might argue for intervention in the specific context of particular bids and particular terms. *E.g., In re Public Serv. Co. of N.H.*, 88 B.R. 546, 554 (U.S. Bk. Ct. D. N.H. 1988).

1 same: whether the brief will assist the judges by presenting ideas, arguments, theories, insights,
2 facts, or data that are not to be found in the parties' briefs." *Voices for Choices v. Illinois Bell*
3 *Tel. Co.*, 339 F.3d 542, 545 (7th Cir. 2003). The taxpayers meet all of the factors for amici.

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5 **A. The Interests of Glendale Taxpayers are Not Represented by the Parties.**

6 Glendale Taxpayers should be allowed to file an amicus brief because their interests are
7 not represented by the parties. Of course, the City of Glendale may broadly represent the
8 interests of its residents in matters of local politics, but the City does not represent the interests
9 of the named taxpayers in these proceedings. Similar findings have been previously recognized
10 in bankruptcy proceedings. For example, in a public utility bankruptcy proceeding, the court
11 held that the interests of a citizen group were not represented by any of the parties, which
12 included a state Office of the Consumer Advocate and a state agency formed "to protect the
13 interests of Connecticut utility ratepayers." *See In re Public Serv. Co. of N.H.*, 88 B.R. 546,
14 548-49 (U.S. Bk. Ct. D. N.H. 1988).

16 In this case, the taxpayers may even file litigation *against* their City should it enter into
17 an unlawful subsidy agreement with the new Coyotes owners. Indeed, the outcome in this
18 Court will determine whether the taxpayers will need to take legal action against the City. To
19 avoid the necessity of such litigation, the taxpayers seek to make their interests and legal
20 positions known here.

22 **B. Glendale Taxpayers Offer a Unique Perspective that Will Aid the Court.**

23 Glendale Taxpayers should be allowed to file an amicus brief because the taxpayers will
24 not duplicate arguments made by the parties. No other party has raised the troubling legal and
25 prudential implications of the fact that taxpayer dollars appear to be a critical component of any
26 ultimate agreement resolving the disputes between the debtor and its creditors. According to a
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1 confidential record that leaked from these proceedings, at least one bidder demanded a special
2 district to transfer to the team \$23 million next year and up to \$15 million annually after that in
3 taxpayer funds (BK Doc 525, Appendix A). Although that bidder has since withdrawn his
4 interest in the Coyotes, public dollars are still at risk with other potential owners. As the debtors
5 stated, “Any party interested in owning the Club in Glendale requires a substantial subsidy from
6 the City to offset losses from managing the arena and payments to the City for rent,
7 maintenance, and parking” (BK Doc 236, Main Document Page 18).³

9 These facts raise an important constitutional issue that none of the parties have brought
10 before this Court: This Court may be presented with the question of whether to approve a sale
11 whose terms involve or rely on negotiating for public assistance. But public assistance,
12 whether it takes the form of a direct subsidy, special tax district, bond issue from Glendale or
13 another city, or another form, would violate Article IX, § 7 of the Arizona Constitution. Under
14 this provision, known as the Gift Clause, a city may not “give or loan its credit in the aid of, or
15 make any donation or grant, by subsidy or otherwise, to any individual, association, or
16 corporation.” Likewise, a city may not “become a subscriber to, or a shareholder in, any
17 company or corporation, or become a joint owner with any person, company, or corporation.”
18 The taxpayers believe it is important for the Court to understand these constitutional issues so
19 that it may reject a sale or certify the question to the Arizona Supreme Court, or, alternatively,
20 perhaps suggest an alternative means of more securely structuring any ultimate agreement—one
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24 ³ The record also reveals that City Manager Ed Beasley discussed annual subsidies of \$20 million (BK
25 Doc 290, ¶¶ 6, 10, & 13), and late last year, the Commissioner of the NHL “convinced Mr. Beasley to
26 agree to provide future concessions in the range of \$12-15 million to a new group of investors or a new
27 purchaser of the Phoenix Coyotes hockey team” (BK Doc 291, ¶ 43). *See also* BK Doc 291, ¶23
28 (“Glendale understood that the lease would need to be restructured in order to keep Coyotes Hockey and
Arena Management viable.”); BK Doc 478-5, Desc Exhibit B Page 2 (“Ice Edge has been in extensive
discussions with Glendale and has developed specific plans that will . . . enable the Team to remain in
the Arena for the long term.”)

1 that does not involve taxpayer money. *See generally In re Krohn*, 203 Ariz. 205, 206, 52 P.3d
2 774, 775 (2002). The fact that Glendale’s taxpayers offer a unique perspective on this
3 foundational legal issue fully justifies allowing them to file their proposed Amicus Brief.

4 **Conclusion**

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6 The Gift Clause raises serious questions about the security of any agreement that may be
7 reached between the parties, which involves taxpayer money. Accordingly, it is particularly
8 appropriate for the taxpayers to offer their perspective as a “friend of the court” to raise the Gift
9 Clause issue. The taxpayers are in a unique position to offer this perspective because the clause
10 was intended for their protection, not for the protection of city officials, professional hockey
11 owners, or other parties in these proceedings. It is the taxpayers who will ultimately pay for any
12 public subsidy in connection with the sale. Therefore, their perspective should be helpful for
13 this Court to identify who the successful bidder should be. Each of these reasons is
14 independently sufficient for the Court to accept the amicus brief. Combined, they offer a
15 compelling justification.
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18 **RESPECTFULLY SUBMITTED** on this 31st day of August, 2009 by:

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CERTIFICATE OF SERVICE

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