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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) **Reply in Support of National Hockey**
22 ARENA MANAGEMENT GROUP, LLC,) **League's Motion to Clarify and Finalize**
Debtors.) **the Court's June 15th Order Regarding**
23) **Relocation**
24) Date: September 2, 2009
25) Time: 9:00 am
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

1 The National Hockey League (the "NHL" or "League") hereby submits this reply to the
2 responses filed by the Debtors [dkt. no. 777] ("Debtors' Response") and PSE [dkt. no. 776] ("PSE's
3 Response") to the NHL's Motion to Clarify and Finalize the Court's June 15th Order Regarding
4 Relocation [dkt. no. 684] (the "Motion").

5 **ARGUMENT**

6 With its Motion, the NHL presented a discreet and very narrow legal issue: whether, as a
7 matter of law, mere payment of a relocation fee could constitute adequate assurance of future
8 performance under § 365 of lawful and enforceable location restrictions in an executory contract.
9 The NHL felt the need to bring this motion in light of ambiguous statements made by PSE that
10 appeared to suggest that such a fee may be sufficient in and of itself to provide "adequate
11 assurances of future performance" or "damages as a matter of adequate protection" in relation to
12 the Coyotes' executory contract obligation to play all of its home games in Glendale, Arizona. (See
13 PSE Sports & Entertainment LP's Position on August 5 Sale Hearing and August 3 NHL Sale
14 Rescheduling Motion [dkt. no. 533] at 11.) As it has now made clear, though, "PSE's position is
15 not, and has never been, that it can avoid the NHL's consent rights merely by paying a relocation
16 fee." (PSE Response at 2; see also id. at 3-4.) Nor do the Debtors dispute that a relocation fee, in
17 and of itself, cannot constitute adequate assurance of future performance under § 365(f). Thus, it is
18 now apparent that the parties are in agreement on this issue. If the NHL's territorial franchise
19 restrictions are not excised from the NHL Constitution and By-Laws – as the NHL maintains they
20 should not and cannot be – then PSE cannot pay its way around those provisions with a relocation
21 fee. Accordingly, the Court should grant the NHL's Motion and order that payment of a relocation
22 fee alone cannot suffice to provide adequate assurance of future performance of the NHL
23 Constitution and By-Laws under § 365 of the Bankruptcy Code.

24 Although the parties are in agreement that the Court may not "order relocation merely
25 because PSE is willing to pay a reasonable relocation fee," (PSE Response at 4), PSE's Response
26 and the Debtors' Response nevertheless rehash arguments (irrelevant to the NHL's Motion) that
27 either have been decided by this Court or, if necessary, may be considered at the September 10
28

1 Sale Hearing, and that are not on the schedule for the September 2 hearing on preliminary issues.
2 While the NHL does not request any relief as to these issues now and will more fully brief the
3 applicable issues for the Sale Hearing at the appropriate time, a few points regarding PSE's and the
4 Debtors' arguments are worth briefly addressing.

5 First, PSE and the Debtors attempt in their Responses to reargue that the territorial
6 franchise restrictions and related consent rights in the NHL Constitution and By-Laws are
7 unenforceable under § 365(f) and thus may be excised from the contract because they (i) constitute
8 de facto anti-assignment clauses, or (ii) violate the antitrust laws. Both of these arguments already
9 have been considered and rejected by the Court:

10 Simply put, this court disagrees with the assertions by the Debtors
11 and PSE that the relocation requirement can be excised from the
12 "contract" because it violates some portion of Section 365 [anti-
assignment or other term] or is unlawful under the anti-trust claims
alleged by the Debtors and also advocated by PSE.

13 (6/15/09 Order [dkt. no. 341] at 10 (emphasis added) (footnote omitted); see also id. at 10 ("The
14 court does not consider the provision establishing the Debtors' location obligation as a term
15 prohibiting, restricting or conditioning the assignment of the agreement"); id. at 15 ("[I]t is not an
16 antitrust violation for professional sports leagues to have terms and conditions on relocations of
17 member teams.")) Such arguments thus should not even be addressed at the September 10 Sale
18 Hearing, and to the extent they are, may be summarily dismissed. See also In re Morande Enters.,
19 Inc., 335 B.R. 188, 192 (M.D. Fla. 2005) (holding that location provision was not anti-assignment
20 provision under § 365(f)); NBA v. SDC Basketball Club, Inc., 815 F.2d 562 (9th Cir. 1987)
21 (concluding that professional sports league franchise movement restrictions are not invalid as
22 matter of law and that mere existence of terms and conditions for franchise relocations cannot
23 violate antitrust law); L.A. Mem'l Coliseum Comm'n v. NFL, 791 F.2d 1356, 1373 (9th Cir. 1986)
24 ("[T]he nature of NFL football requires some territorial restrictions in order both to encourage
25 participation in the venture and to secure each venturer the legitimate fruits of that participation.").

26 Second, throughout their Responses to a Motion addressing adequate assurance of future
27 performance of an executory contract under § 365 of the Bankruptcy Code, the Debtors and PSE
28

1 repeatedly invoke § 363 (which addresses only the sale of assets and is irrelevant to the adequate
2 assurance of performance of executory contracts), attempting to borrow principles from § 363 –
3 such as a "bona fide dispute" test – and graft them onto the § 365 requirement that a debtor must
4 assume and assign the entirety of an executory contract – both benefits and burdens – and provide
5 adequate assurance of performance of the material and economically significant contract terms.¹ It
6 is unclear whether the Debtors and PSE are simply confused or whether they continue to conflate
7 these issues intentionally in the hope of salvaging PSE's bid to purchase what the Debtors plainly
8 do not own – i.e., an NHL team located anywhere other than in the Glendale, Arizona home
9 territory. In any event, this much is clear: § 363 of the Code and the provisions therein apply only
10 to the sale of assets (e.g., the hockey equipment), while § 365 applies to the assumption and
11 assignment of executory contracts (e.g., the agreement between the NHL and the Debtors as to the
12 sole home territory of the Coyotes). Here, even if it were to complete a purchase of the Debtors'
13 assets under § 363, PSE simply cannot be a member of the NHL unless and until the executory
14 contract subsumed in the NHL Constitution and By-Laws – including the home territory restriction
15 – is assumed by the Debtors and assigned to PSE. See In re Morande, 335 B.R. at 192. And
16 because an executory contract must be assumed and assigned in its entirety, the territorial
17 restrictions and related consent right provisions in the NHL Constitution and By-Laws cannot be
18 set aside unless the Court were to conclude either that they are de facto anti-assignment clauses or
19 are otherwise unenforceable under § 365 – a proposition that, as noted above, this Court already
20 has rejected.

21 Accordingly, the Debtors' and PSE's repeated arguments that there is a "bona fide dispute"
22 under § 363(f)(4) regarding the NHL's relocation consent right are fruitless and irrelevant to the §
23 365 analysis of whether the NHL Constitution and By-Laws can be assumed and assigned by the

25 ¹ A contract term is material if it was "integral to the bargain struck between the parties" and
26 is economically significant if "performance of that term gives a party the full benefit of his
27 bargain." In re Fleming Cos., 499 F.3d 300, 306 (3d Cir. 2007); see also In re Morande, 335 B.R.
28 at 191-192. There can be no doubt that the location provisions of the NHL Constitution and By-
Laws satisfy this standard.

1 Debtors. Nothing in the Bankruptcy Code permits the excision of a material and economically
2 significant provision of an executory contract under § 365 merely by alleging a bona fide dispute
3 (which is only relevant to § 363) regarding the lawfulness of that provision, and neither the Debtors
4 nor PSE has pointed to any such provision of the Code. Therefore, to the extent the Debtors and
5 PSE are asking this Court to reconsider whether the territorial and relocation provisions of the
6 NHL Constitution and By-Laws may be excised as unlawful and thus unenforceable under the
7 Debtors' antitrust claims, the Court would only have the power to do so after a full-blown litigation
8 – including a full plenary trial – culminating in the finding on the merits that those provisions
9 actually violated the antitrust laws.

10 Finally, both PSE and Debtors turn to the subject of "good faith" contractual principles and
11 argue that the NHL's relocation consent rights have not been (and cannot be) applied in good faith,
12 and the NHL therefore should be "deemed" to have consented to a relocation of the Coyotes to
13 Hamilton, Ontario. As the NHL noted in its moving brief, this Motion does not address whether
14 the NHL has any contractual obligation to the Debtors to consider the relocation application of a
15 potential owner whose ownership transfer application has been rejected. Suffice it to say that the
16 Court is well aware of the NHL's position that because the NHL Board of Governors unanimously
17 voted that Mr. Balsillie is not qualified as a matter of character and integrity to be the owner of an
18 NHL team, PSE's relocation application is moot, and the NHL will not consider his relocation
19 application unless and until the Board's determination on ownership is invalidated in this Court
20 (and all available appeals have been exhausted). (See Tr. 8/11/09 Hr'g at 36-39, 72.) Accordingly,
21 any arguments concerning whether the NHL's relocation consent rights have been or can be applied
22 in a good faith manner are entirely premature, and the NHL will address such arguments if it
23 becomes appropriate to do so.²

24
25 ² The parties briefed these hypothetical issues months ago and on June 15 the Court deferred
26 ruling on them because "there is no factual or legal history for the court to analyze." (6/15/09
27 Order at 14.) As was the case then, the NHL still has not "made any decision about the relocation
28 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.)

1 In sum, should the Court hold after the September 2 hearing that PSE may proceed as a
2 Qualified Bidder and make a bid to purchase the Coyotes at the September 10 Sale Hearing, the
3 NHL will more fully address the § 365 issues raised in the Debtors' and PSE's Responses, as well
4 as any other applicable issues, in advance of the Sale Hearing. In the meantime, the NHL requests
5 that the Court rule on the narrow Motion before it now and order that payment of a relocation fee,
6 in and of itself, cannot provide adequate assurance of future performance under § 365(f) of the
7 territorial restrictions on the Phoenix Coyotes in the NHL Constitution and By-Laws.

8 **CONCLUSION**

9 WHEREFORE, for the reasons set forth above, the NHL respectfully requests that the
10 Court enter an Order that with respect to any purported sale of the Phoenix Coyotes premised on a
11 relocation outside of Glendale, Arizona, payment of a relocation fee cannot constitute adequate
12 assurance of future performance of the territorial restrictions on the Coyotes in the NHL
13 Constitution and By-Laws under § 365 of the Bankruptcy Code.

14 DATED: August 31, 2009

15
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