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UNITED STATES BANKRUPTCY COURT

DISTRICT OF ARIZONA

In re: DEWEY RANCH HOCKEY, LLC, COYOTES HOLDINGS, LLC, COYOTES HOCKEY, LLC, and ARENA MANAGEMENT GROUP, LLC, Debtors.	Chapter 11 Case No. 2:09-bk-09488-RTBP **REPLY IN SUPPORT OF PSE'S MOTION FOR DETERMINATION THAT THE DEBTORS' INTERESTS MAY BE TRANSFERRED TO PSE NOTWITHSTANDING THE NHL'S REFUSAL TO CONSENT** **Hearing Date: September 2, 2009** **Hearing Time: 9:00 a.m.** **Redacted Version for Public Filing**
This Filing Applies to: ☒ All Debtors ☐ Specified Debtors	

I. INTRODUCTION

The NHL has failed to file a response to this motion, in an obvious attempt to deny PSE an opportunity to present the significant additional evidence that has been adduced in

discovery since PSE's opening brief. This evidence – most of it undisputed and out of the mouths of the NHL witnesses – further demonstrates that the NHL acted in manifest bad faith when it rejected Mr. Balsillie as a prospective owner of the Coyotes. As detailed below, this new evidence confirms that Mr. Balsillie never had a chance to be approved as an NHL owner – not in light of his desire to relocate the team to Hamilton. Instead, Mr. Balsillie went from unanimously being approved as an owner in 2006 to unanimously being deemed morally unfit in 2009 for pretextual reasons, to avoid a Maple Leafs' territorial veto.

- At the very same time that the NHL was rejecting Mr. Balsillie as a potential owner on alleged "character" grounds, the sworn testimony of Mr. Leipold reveals that the NHL was already formulating its own bid for the Coyotes, which it has now submitted. Blocking Mr. Balisille's bid, which is some $ 75 million higher than the NHL's bid, is thus a bad faith act designed to prevent creditors from receiving the full value of the Debtors' assets, and to enable the NHL, as an insider asserting control over bidder qualifications, to acquire for itself the Coyotes relocation opportunity right for a fraction of its value. This conflict of interest is clear evidence of bad faith. Moreover, by assuming the role of competing bidder, the NHL has forfeited any claim to serve as the gatekeeper as to who may participate in the upcoming auction. It is the responsibility of the Court to ensure that the auction process is open and fair and maximizes the value of the Debtors' assets for their creditors. The only way it can do so is to make a *de novo* determination as to whether PSE may become an NHL owner, notwithstanding the NHL's bad faith rejection of Mr. Balsillie's ownership transfer application.

- We now have stunning new evidence of the bad faith nature of Mr. Balsillie's rejection as a prospective owner from the NHL's belated production of the proverbial "smoking gun" – a previously secret communication from the Toronto Maple Leafs detailing its position that the unlawful territorial veto in the NHL Constitution is still

in effect. The Emperor no longer has any clothes. After denying repeatedly to this Court that any territorial veto existed in the NHL, and insinuating that PSE's claim to the contrary was akin to a wild conspiracy theory, the truth is now revealed to this Court. The repeated efforts of the NHL to mislead the Court on these facts makes it abundantly clear that, as this Court suspected all along, Mr. Balsillie would have been approved if not for the relocation issue. *See* June 15 Order [DE 341] at 8. Indeed, while the NHL continues to deny to this Court that any veto provision still exists, the NHL admits that the veto provision in Article 4 of the NHL Constitution has never been amended in a unanimous writing, as is required by Article 12 of the Constitution for any amendments to Article 4 to be effective.

- Craig Leipold has now been deposed, and he is clearly angry over losing the high purchase price that Mr. Balsillie offered for his Nashville Predators in 2007. When confronted with the evidence, however, he acknowledged the errors in his strong statements to the NHL Executive Committee and Board of Governors about the facts of the unconsummated sale of the Predators. Messrs. Bettman and Daly knew of these errors but did nothing to correct them, thus misleading the NHL Board of Governors to believe that Mr. Balsillie reneged on binding commitments.
    - Contrary to Mr. Leipold's representation to the Board that Mr. Balsillie reneged on a binding term sheet to pay a $10 million deposit for the team, even Mr. Daly now concedes that this is not the truth. Most remarkably, Mr. Leipold admits that his lawyer made these same false statements to the Canadian Competition Bureau ("CCB") to persuade it that Mr. Balsillie's failure to obtain the team had nothing to do with the territorial veto, when Mr. Leipold himself believed that such a veto was still in effect. The failure of the NHL to do anything to correct the false statements made

by Mr. Leipold about Mr. Balsillie further confirms its bad faith reasons for rejecting the Balsillie application.

- The Court previously cautioned the NHL that, given its approval of Mr. Balsillie as an owner of the Pittsburgh Penguins in 2006, the NHL would need to establish "material" changes in his "character" since then in order to justify what is the first NHL rejection of an owner on purported "character" grounds in its entire history. However, Mr. Leipold has now testified that he "had no reservations" about PSE in 2007, well after the proposed Pittsburgh transaction failed, and even suggested the possibility of becoming a partner of Mr. Balsillie's in the Nashville Predators team. This new evidence further confirms that there was no good faith basis for the NHL to rely on the failed 2006 Penguins negotiations as a purported basis to reject Mr. Balsillie's ownership application on character grounds.

- With respect to the 2007 Nashville Predators negotiations, new evidence confirms that Mr. Leipold misrepresented to the NHL Executive Committee and the Board of Governors that Mr. Balsillie was untrustworthy because he failed to keep his purported promise to purchase the Predators "as is, where is," and to keep the team in Nashville for seven years "in accordance with the standard form NHL consent agreement." At his recent deposition, Mr. Leipold admitted that he was explicitly offering to sell the Predators as a "*mobile franchise*" – and that he was also negotiating with other parties, including "Boots" Del Biaggio, for the sale and relocation of the franchise to Kansas City. During the negotiations, Commissioner Bettman made it clear that he was hostile to Mr. Balsillie's candid statements that it was his intent to move the franchise to Hamilton, Ontario if the Nashville lease terminated. Yet, he exhibited no such hostility to the

competing bidder, Mr. Del Biaggio, who wanted to move the Predators to Kansas City. The only explanation for this difference in treatment is not Mr. Balsillie's purported bad character, but the fact that only Mr. Balsillie wanted to move a team that would run head-on into Toronto's stated intention to veto any effort to relocate a club to Southern Ontario. Indeed, an email by a Predators executive candidly admitted that "Craig [Leipold] *doesn't have to get NHL consent to allow the team to move to KC [Kansas City]*." By contrast, the NHL refused to give any consideration to moving the team to Hamilton, which it claimed was premature. *See also* PSE's Opposition to the NHL's Motion for a Determination that Debtors' NHL Membership Rights May Not be Transferred to PSE or an Affiliate Thereof ("PSE's Opp'n to NHL Denial Mot.") [DE 779] at 24.

- Finally, the NHL has repeatedly admitted in discovery that it has nothing but contempt for Mr. Balsillie's participation in these perfectly legal and appropriate bankruptcy proceedings, which were initiated to save a failing team. Moreover, the NHL acknowledges that this was "a contributing factor" to its rejection of his ownership application. Under well-established principles of bankruptcy law, such an animus towards the bankruptcy process itself is not a good faith basis to reject Mr. Balsillie as an NHL owner.

For all of the reasons set forth herein, and in PSE's Ownership Motion[1] and Opposition to the NHL Denial Motion, the Court should apply a high level of scrutiny to the NHL's rejection of PSE's bid to acquire the Coyotes, find that the NHL acted in bad faith, and deem its consent granted or unnecessary pursuant to Bankruptcy Code sections 365(c)(1) and 363(f)(1)-(2). Moreover, as the NHL has assumed the conflicting role of a competing bidder, the Court should make the determination of whether Mr. Balsillie

[1] PSE's Motion for Determination that the Debtors' Interests May Be Transferred to PSE Notwithstanding the NHL's Refusal to Consent [DE 701] ("PSE's Ownership Motion").

objectively satisfies the character criteria of the NHL By-Laws without any deference to the position of the NHL.

II. AS A COMPETING BIDDER, THE NHL MAY NOT DECIDE THE OWNERSHIP TRANSFER APPLICATION

As a threshold matter, the NHL acted with a significant conflict of interest when it considered Mr. Balsillie's ownership transfer application and has thus forfeited any conceivable claim to deference for its decision rejecting the application.

A. Bidders Seeking to Exercise Control Over the Sale Process to Impair Other Bids Violate Duties to the Court and the Estates.

Asset sales in bankruptcy cases must be fair and free of collusion in order to maximize the value of assets for the bankruptcy estates. *See In re Hampton Hotel Investors, L.P.*, 270 B.R. 346, 355 (Bankr. S.D.N.Y. 2001). Thus, courts have repeatedly held that an insider with even "some" degree of control of the sale process cannot be allowed to further its own bid over other bids. *See, e.g., In re Brook Valley VII*, 496 F.3d 892 (8th Cir. 2007); *In re Tenn-Fla Partners*, 229 B.R. 720 (W.D. Tenn. 1999); *In re Simon Transp. Servs.*, 292 B.R. 207 (Bankr. D. Utah 2003). In each of these cases, insiders of the debtors acquired property from their bankruptcy estates at less than the assets' fair value by manipulating the sale process at the expense of the creditors.

The Eighth Circuit in *Brook Valley* held that the debtors' partners who bid considerably less than fair value, looking out for themselves rather than the estates, failed to prove that the transaction was fair and reasonable. *Brook Valley*, 496 F.3d at 901. The District Court in *Tenn-Fla* found that the debtor's management refused to follow up on indicia of interest from potential buyers, kept the company's assets for themselves under a plan paying creditors 75% of their claims, then sold the business after confirmation for a substantial profit that would have paid the creditors in full, if it had been received by the estate. The court upheld a finding that the debtor's management "knew of willing and able buyers but temporarily spurned their offers and 'parked' their interests, all for the purpose

of preventing the secured bondholders from realizing or capturing the true value of their collateral. *Tenn-Fla*, 229 B.R. at 725, 734. The court held that this not only breached a duty of disclosure, but also breached a duty to maximize the estate's value "by not obtaining the known highest available price for the property prior to confirmation." *Id.* at 734, 736.

In *Simon Transportation*, a person in control of the debtor and a bidder gained a "significant advantage in the bidding process" at a section 363 sale by causing the perceived value of the assets to be less than the actual value. The court held that whether this "occurred because of fraud, accident or mistake, [it] caused a fundamental defect in the bidding process that resulted in a winning bid submitted by [the prevailing bidder] that paid nothing for" valuable contract rights. *Simon Transp.*, 292 B.R. at 218. The court refused to approve the assignment of those contract rights, quoting the Supreme Court:

> In a bankruptcy setting, a dominant or controlling shareholder "cannot use his power for his personal advantage and to the detriment of the stockholders and creditors no matter how absolute in terms that power may be and no matter how meticulous he is to satisfy technical requirements."

Id. at 216-17 (quoting *Pepper v. Litton*, 308 U.S. 295, 311(1939)).

These cases establish the principle that the bankruptcy estate and its creditors should receive the full value of estate assets, and not allow an entity with a degree of control over the bidding process to seize that value for itself by impairing other bidders. Here, there can be no question that the NHL has asserted control over the sales process, to the detriment of creditors. It rejected PSE, the bidder with the highest and best offer, on the pretextual ground of "bad character" knowing that it would likely be submitting its own bid to purchase the same assets at below market prices. This is clearly improper and the NHL's overwhelming conflict of interest can only lead to the conclusion that this Court must determine for itself whether PSE can fairly meet the criteria in the NHL By-Laws for becoming an owner of a team.

The NHL has simply forfeited any claim to be able to exercise control, when it also wishes to stifle the PSE bid so that its own below market offer can prevail. Indeed, the NHL's plans specifically provide for it to be able to resell the team to another owner and have it relocated in just one year – depriving creditors of the true value of the assets of the Debtors' estate. While, as discussed below, Mr. Bettman concealed the fact at his deposition that the NHL was actively considering putting in a bid, Mr. Leipold was forced to testify, since the bid had already been submitted at that time, that the NHL had been considering becoming a competing bidder at the same time as when the Board of Governors rejected Mr. Balsillie's ownership application. Leipold Depo. Tr. at 212:19-215:19, attached hereto as Exhibit 1.

The NHL has not denied that it is putting its interests first above those of the creditors.[2] That is fine for the NHL as a bidder, creditor, and party in interest, but it deprives the NHL of any standing to argue that this Court, which must make the interests of creditors paramount, should defer to the NHL in screening out other bidder competitors.

B. The NHL Has Tried to Hide Its Conflict

Given the seriousness of the conflict position that the NHL now finds itself in – as both bidder and supposedly neutral referee – it is perhaps no surprise that it has attempted to keep its role as competing bidder under wraps. Commissioner Bettman testified on August 20, 2009, that the NHL's plan in the event that PSE is unable to purchase the Coyotes and no other viable bidders emerge was to continue DIP financing of the Coyotes:

> Q. [Mr. Kessler] Have you made any preparations or steps to consider what to do with the team this season if there is no bidder other than Mr. Balsillie?
>
> A. [Mr. Bettman] Well, there are a host of things that may or may not happen that appear to be beyond all of our control other than the fact that if the team's going to play, its gotta

[2] *See* June 9, 2009 Hearing Tr. at 108-109.

> play in Phoenix. If ultimately Mr. Balsillie chooses to buy the club and is approved by the court over our objection, he'll be operating the club in Phoenix.
>
> Q. That's not my question.
>
> A. And if there's no other bidder, we will continue the DIP financing that we've been doing.
>
> Q. That's what I wanted to know.
>
> A. Well, why didn't you ask me that question?
>
> Q. Well, I'm trying to, okay?
>
> A. It's the compounding questions. If you just ask simple questions, I'll answer.
>
> Q. Again, just to confirm. So if the court does not overturn your rejection to Mr. Balsillie, which you've rejected him, and if there's no other bidder that emerges for the team, then your current plan would be to continue DIP financing in the bankruptcy to fund the operations of the team?
>
> A. And at the same time try to sell it in a calm, sensible, professional, rational process.

Bettman Depo. Tr. at 213:9-214:16, attached hereto as Exhibit 2.

Contrary to Mr. Bettman's testimony, the evidence adduced from Mr. Leipold proves that the NHL had begun planning to submit its own insider bid since at least the end of July – at the very *same time* that that the NHL used its control over the sale process to reject Mr. Balsillie's ownership application. Ex. 1, Leipold Depo. Tr. at 212:19-215:19. Indeed, Mr. Leipold testified that it was Commissioner Bettman *himself* who called members of the Executive Committee and the Board of Governors at the end of July to discuss the NHL's planned bid. *Id.*

The NHL's secret plan to thwart PSE's bid for its own benefit thus was in effect by the time that the NHL evaluated Mr. Balsillie's ownership application. While the NHL will apparently stop at nothing to prevent PSE from purchasing the insolvent Coyotes, the

bankruptcy law requires the Court to conduct a fair and open auction for the Debtors' assets. Allowing an insider bidder arbitrarily to reject the qualifications of another bidder would subvert the auction process and deprive the creditors of the only bidder that is prepared to offer full value for the Debtors' assets.

C. The Insider Bidder Cases Apply to the NHL.

Here, the NHL itself has effectively admitted that it is an insider. It has exercised a shared-control arrangement of the Debtors in connection with its DIP financing. Courts have held that a person with substantial influence over the DIP's decision-making generally, but not necessarily in an official capacity, holds fiduciary duties to the bankruptcy estates and creditors. *Commodity Futures Trading Comm'n v. Weintraub*, 471 U.S. 343, 355 (1985) (debtor's directors owe fiduciary duties); *Pepper*, 308 U.S. at 289 (dominant or controlling stockholder); *In re Chief Executive Officers Clubs, Inc.*, 359 B.R. 527, 540 n.6 (Bankr. S.D.N.Y. 2007) (officers, directors and managing agents owe fiduciary duties to the estate); *In re York Int'l Bldg., Inc.*, 527 F.2d 1061, 1068 (9th Cir. 1975) ("We start with the well established principle that those performing duties in the administration of a bankrupt's estate are not acting as private persons, but as officers of the court.").

Indeed, the NHL has recently filed yet another motion asking this Court to give it exclusive control over the Debtors. *See* NHL's (A) Renewed Motion for Determination of (I) Authority to Manage the Business and Affairs of the Debtors, and (II) that William Daly is the Representative of the Estates, or (B) in the Alternative, Motion for Appointment of a Chapter 11 Trustee [DE 682]. Whatever the fate of that motion, the facts set forth therein by the NHL demonstrate, at a minimum, that it has a level of control and influence over the bidding process that subject the NHL to the *Brook Valley* and *Tenn-Fla* principles: it cannot take steps to favor its own, lower, bid over PSE's higher one. The greater the degree of control the NHL exerts over the process, the greater its fiduciary

duty to the bankruptcy estates and all creditors. *See Pepper*, 308 U.S. at 307 n.14 (corporate director/lender to corporation: "if he becomes a party to a contract with the company, [his duty of] candor and fair dealing, is increased in the precise degree that his representative character has given him power and control. . . . If he should be a sole director, or one of a smaller number vested with certain powers, this obligation would be still stronger, and his acts subject to more severe scrutiny, and their validity determined by more rigid principles of morality, and freedom from motives of selfishness.").

The fiduciary duties applicable to the NHL here as an insider exercising a degree of control over the sale process include maximizing the value of the estates and creditors' recoveries. *See In re Rigden*, 795 F.2d 727, 730 (9th Cir. 1986). There is also a duty to avoid self-dealing and putting one's own self-interest ahead of the estate's interest. *Pepper*, 308 U.S. at 289 ("[Dominant stockholder/fiduciary's] dealings with the corporation are subjected to rigorous scrutiny and ... the burden is on the director or stockholder not only to prove the good faith of the transaction but also to show its inherent fairness from the viewpoint of the corporation and those interested therein."). As noted above, that precludes buying estate assets with the intention to re-sell them and keep most of the profit, rather than allowing the full amount of the assets' market value to be available to the bankruptcy estate and creditors. *See Tenn-Fla*, 229 B.R. at 732.

It is apparent that the NHL has not been striving to maximize the value of the Debtors' estates or the recovery for creditors, and instead has been pressing its own bad faith agenda to keep PSE out of the bid process, to punish it for using the bankruptcy laws and to protect the unlawful territorial veto of the Toronto team. The NHL's latest step of presenting its own competing bid for the Coyotes, adding the "hat" of competing bidder to

the multiple "hats" it already wears in this case,[3] makes it clear that it may not reject PSE as a bidder for pretextual reasons, when it is actually furthering it own bad faith objectives.

D. An Insider Bidder Must Surrender Control and Influence Over the Sale Process.

When an insider wants to participate in bidding for assets fairly and openly and have its bid approved by the Bankruptcy Court, it should be excluded from the sale evaluation process to avoid issues of improperly influencing or deterring other bidders. *See In re Performance Nutrition, Inc.*, 239 B.R. 93, 102 (Bankr. N.D. Tex. 1999) ("When [person in control of company] began negotiating for himself with [bidder for a role in the company] and/or when he reached an agreement with [that bidder] regarding himself, [control person] should have stepped aside, due to the conflict of interest he faced, and allowed another of [debtor's] directors to evaluate the [bidder's] purchase deal and attempt to market the assets to others."); *In re Medical Software*, 286 B.R. at 437 (examiner role in asset sale to prepetition/DIP lenders with representatives on debtor's board); *Simon Transp.*, 292 B.R. at 218 ("It is a basic principle that a debtor in possession must never give an insider a competitive advantage over others with regard to matters affecting the administration of its bankruptcy estate.").

For example, the insider bidder is generally screened from contact with persons conducting due diligence of other bidders, which is put in the hands of others at the debtor's business or an investment banker. *Performance Nutrition*, 239 B.R. at 106. The person is excluded from the group assessing competing bids and making recommendations to the Court, a role that is exercised instead by other management personnel, the Creditors Committee, and DIP and Committee counsel. Outside the context of a bankruptcy case, the legal principles are the same. Officers and directors interested in acquiring company

[3] *See* May 19, 2009 Hearing Tr. at 95:1-96:20. PSE notes that the NHL is asking for a finding of good faith under Bankruptcy Code section 363(m), which it cannot earn while exercising its control over any portion of the sale process to block PSE's bid.

assets are not allowed to vote on the transaction.[4] And the importance of having disinterested decision makers controlling the sale process is especially important where, as here, a company is distressed and "in play."[5] Accordingly, in those cases, the courts significantly increased their level of scrutiny over the fairness of the transaction to ensure that stakeholders received the best price.

Competing bidders cannot exercise influence, let alone any material degree of control, over a sale process if that process is to be considered fair and in good faith. Whether or not the NHL had a role in encouraging and discouraging and "coalescing" various bids in the past, now that it is officially a bidder, its role must be limited. It cannot be permitted to act as a blocking mechanism for disliked bids when the League itself has a competing bid in the auction.[6]

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[4] *See, e.g.*, 3 William Meade Fletcher, Fletcher Cyclopedia of the Law of Private Corporations § 915.10 (perm. ed., rev. vol. 2002).

[5] *Paramount Comm'ns v. QVC Network, Inc.*, 637 A.2d 34, 42 & n.9 (Del. 1994) (change of control sale where defensive measures are adopted is one of "rare situations which mandate that a court take a more direct and active role in overseeing the decisions made and actions taken by directors. In these situations, a court subjects the directors' conduct to enhanced scrutiny to ensure that it is reasonable. [footnote: Where actual self-interest is present and affects a majority of the directors approving a transaction, a court will apply even more exacting scrutiny to determine whether the transaction is entirely fair to the stockholders"]); *Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc.*, 506 A.2d 173, 182, 184 (1986) (enhanced judicial scrutiny of corporate break-up; "[t]he directors' role changed from defenders of the corporate bastion to auctioneers charged with getting the best price for the stockholders at a sale of the company.").

[6] In analogous situations, courts have not hesitated to assume control over sports league decision-making when league actions violate rights of due process and unbiased treatment of third parties. *See Morris v. New York Football Giants, Inc.*, 150 Misc. 2d 271, 277-278 (N.Y. Sup. Ct. 1991) (holding that the NFL Commissioner lacked the "necessary neutrality" to arbitrate a dispute because as former counsel to the NFL he had given legal advice on the very action being challenged); *Erving v. Virginia Squires Basketball Club*, 349 F. Supp. 716, 719 (E.D.N.Y. 1972) (disqualifying the commissioner from arbitrating a dispute because he was partner in the law firm representing the league). The fact that the NHL's By-Laws and contract provisions grant it authority to make decisions do not alter the limited role it can play in a sale where it is a bidder. *See Hampton Hotel Investors*, 270 B.R. at 362 ("To the extent any provisions in the Partnership Agreement have the purpose or effect of authorizing any dealings by Beeler here that would otherwise be a breach of the fiduciary duties he has while acting as the general partner of the debtor in possession, they will not be enforced, and will not be regarded as a defense to a motion to convert based on such breaches of fiduciary duty.").

Conflicts of interest are serious matters in bankruptcy cases, including conflicts on the part of non-attorneys who have some degree of control over DIP decisions. *See In re Coram Healthcare Corp.*, 271 B.R. 228, 238-40 (Bankr. D. Del. 2001) (turnaround manager's connections to secured creditor mandated his disqualification from decision-making, even if fully disclosed). When persons involved in DIP management have substantial, inherent conflicts of interest that interfere with carrying out the fiduciary obligations of a DIP, the Court may displace that management with a Chapter 11 trustee or examiner without finding fraud, dishonesty, incompetence or gross mismanagement. Here, there is co-management, but the NHL is asserting a gatekeeper role to screen out bidders. This Court – not the NHL – should be the one objectively to determine whether Mr. Balsillie meets the NHL By-Laws' fitness standards of good character and integrity.

III. NEW EVIDENCE FURTHER ESTABLISHES THAT THE NHL'S REJECTION OF PSE'S OWNERSHIP APPLICATION WAS IN BAD FAITH[7]

The Court has held, and the NHL concedes,[8] that the NHL was obligated to consider PSE's ownership transfer application in accordance with the standard of good faith and fair dealing.[9] As set forth above, the NHL's irredeemable conflict of interest renders its rejection of PSE's application to be a bidder before this Court invalid as a

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[7] PSE has fully briefed the reasons why the NHL's consent to transfer of ownership is unnecessary under section 365(f)(1) of the Bankruptcy Code, because Article 3.5 of the NHL Constitution and NHL By-Law 35 operate as an invalid anti-assignment provisions. *See* PSE Ownership Mot. [DE 701] at 3-13; PSE Opp'n to NHL Denial Mot. [DE 779] at 5-6.

[8] *See* NHL's Motion for a Determination that Debtors' NHL Membership Rights May Not Be Transferred to PSE or an Affiliate Thereof [DE 584] ("NHL Denial Motion") at 17-22.

[9] *See* June 15 Order [DE 341] at 8-9 ("The court has a firm sense that if the only issue here were PSE purchasing the Phoenix Coyotes [no relocation term] there would be no objection from the NHL. The law implies into every contract a covenant of good faith and fair dealing. Even where one party retains, by virtue of the contract, a right of approval or disapproval or a discretionary power over the right of the other, such powers must be exercised in good faith."); *see also* PSE's Ownership Mot. [DE 701] at 9-11; PSE's Opp'n to NHL Denial Mot. [DE 779] at 6-8.

matter of law. The nature and timing of the NHL's bid, disclosed at the last minute, is also evidence of its bad faith approach. The NHL desperately seeks to avoid at any cost the Toronto Maple Leafs' territorial veto – which, as discussed below, still exists – even though it means rejecting the only bid that provides funds for all creditors for distribution in accordance with the Bankruptcy Code and that gives the creditors the value of the objectively determined relocation opportunity that is the Debtors' contract right under the NHL Constitution. The NHL has purported to reject PSE's ownership application on the most threadbare of pretenses for a number of bad faith reasons, including its desire to protect the Toronto veto and to ensure that its own inferior bid succeeds.

For the reasons set forth in this motion and in PSE's Opposition to the NHL Denial Motion, the NHL has failed to meet its burden to "show[] . . . that there have been material changes in PSE's circumstances since 2006" to justify their rejection of PSE as an owner. *See* June 15 Order [DE 341] at 9. Rather, the evidence establishes that the NHL rejected Mr. Balsillie's application on defamatory, baseless, and wholly pretextual grounds. *See* PSE's Ownership Mot. [DE 701] at 9-30; PSE's Opp'n to NHL Denial Mot. [DE 779] at 6-26. Evidence uncovered since PSE submitted its Opposition further supports the conclusion that the NHL acted in bad faith in rejecting PSE's application. As set forth *infra*, Point III.B., the evidence shows that NHL's bases for rejecting Mr. Balsillie for purportedly lacking "good character and integrity" have no grounding in fact. Instead, the NHL's own witnesses have admitted that Mr. Balsillie's decision not to accept the proposed terms of the previous Pittsburgh and Predators transactions represents nothing more than a business judgment and certainly is not evidence of immoral character. *See also* Daly Depo. Tr. at 127:10-21, attached hereto as Exhibit 3.

The new evidence also shows *why* the NHL went to such great lengths to shade the facts and deny Mr. Balsillie's ownership application on the most baseless of pretexts – to protect the unlawful territorial veto of the Toronto Maple Leafs.

A. The Territorial Veto in the NHL Constitution Has Not Been Amended and the Toronto Maple Leafs Claim the Right to Exercise That Unlawful Veto to Block Any Move to Hamilton

The NHL has treated Mr. Balsillie differently from other potential owners for one specific reason – and it has nothing to do with his character. Mr. Balsillie, as the Court knows, is the only bidder who has made clear his intention to move the Coyotes to Southern Ontario. Discovery has confirmed that the NHL has done everything in its power to try to protect the Toronto territory from a relocated team and the reason is now apparent: Toronto has told the NHL that it will enforce its territorial veto rights if the NHL tries to permit a team to relocate to Hamilton. *See* Letter from David E. Massengil to Gary Bettman, Nov. 29, 2006 ("Toronto Veto Letter"), attached hereto as Exhibit 4. As this Court surmised without the benefit of this confirming evidence: "The court has the firm sense that if the only issue here was PSE purchasing the Phoenix Coyotes [no relocation term] there would be no objection from the NHL." June 15 Order [DE 341] at 8. Since the Court made this observation early in these proceedings, the NHL has done everything it can think of to try to block PSE's bid. It is now obvious why it has taken this bad faith course of action.

Knowing that the territorial veto is unlawful, the NHL has denied its continued presence to both this Court and the Canadian Competition Bureau. [redacted]; First Daly Decl. [DE 93] ¶ 14; Second Bettman Decl. [DE 295] ¶ 24; Limited Objection of the NHL [DE 92] at 11 n.3. All the while, however, the League has known that its denials were, at the very least, incomplete. The NHL Constitution does not permit amendment of Article 4 without a unanimous written consent (Ex. 3, Daly Depo. Tr. at 42:19-43:9), and Toronto

has made it very clear that it has not and will not give that consent. *See* Ex. 4, Toronto Veto Letter. It is worth repeating the full text of the recently disclosed letter from counsel for Toronto here, as it leaves no doubt as to the position of the Maple Leafs and of the misleading nature of the NHL's statements to the Court:

> Dear Commissioner Bettman,
>
> I am writing on behalf of the Toronto Maple Leafs with respect to the Minutes of the Board of Governors meeting of September 14, 2006, which were received by the Maple Leafs with a cover memo dated November 9, 2006. Those Minutes refer to a statement made to the Competition Bureau by the National Hockey League. According to the Minutes, the National Hockey League intended to confirm in writing to the Competition Bureau that a transfer of a team into the home territory of an existing member would require only a majority vote, despite the specific provisions of Article 4 of the National Hockey League constitution. The Minutes state that the Board did not object to this action.
>
> The Toronto Maple Leafs do *not* agree that a relocation of another club into their home territory would be subject to a majority vote. They continue to believe that a unanimous vote would be required before a team could be relocated into their home territory.
>
> The statement in the Minutes that none of the Board members objected to statement about relocation into home territories does *not* represent the Maple Leafs' position, as there were no representatives of the Toronto Maple Leafs present during that portion of the September 14, 2006 meeting. The Minutes make it clear that no resolution was proposed or adopted with respect to this issue and no vote was taken on this issue. Accordingly, it continues to be the position of the Maple Leafs that, no matter what may have happened at the September 14 Board meeting, the relocation of any team into the Maple Leafs exclusive home territory would require a unanimous vote. The Maple Leafs they reserve all rights to take whatever actions are necessary to protect their exclusive rights to their home territory.[10]

[10] There is other evidence that the unilateral veto explicitly provided by the NHL Constitution does indeed exist. At a February 26, 2007 meeting attended by Mr. Leipold, Mr. Balsillie, and others, Mr. Leipold expressed surprise when he learned that the NHL had represented that a move to southern Ontario would be subject only to a majority vote, because he had always believed that the "Home Territory" veto existed. Memorandum re Meeting in Racine, Wisconsin, Loren Greenspoon ("Greenspoon Memorandum"), Feb. 27, 2007, attached hereto as Exhibit 6. Moreover, Mr. Leipold stated in a January 2007 newspaper article discussing the possibility of a Nashville Predators move to Milwaukee, that "Milwaukee is in Chicago's media area. The Blackhawks would never let us move

Ex. 4, Toronto Veto Letter at 1 (emphases in original).

Counsel for the NHL cannot cure this problem by offering to stipulate away the veto – it remains in the Constitution, subject to Toronto's exercise, unless and until a unanimous consent is secured or the provision is struck down in a court of law. In a desperate effort to protect Toronto's veto and avoid legal exposure on this issue, the NHL has stubbornly refused to rule on PSE's relocation application and has invented the pretext of rejecting Mr. Balsillie's application on character grounds. No neutral observer could reach any other rational conclusion from the facts as they have now been revealed in discovery.

The NHL Constitution explicitly provides that "[n]o franchise shall be granted for a home territory within the home territory of a member, *without the written consent of such member*." First Daly Decl. [DE 93] Ex. A (NHL Const. § 4.3) (emphasis added). And, the NHL does not dispute that this veto would be illegal under both United States and Canadian law. Indeed, [redacted] But denying its existence no longer can serve as a cover for the NHL's motivations in rejecting the Balsillie ownership application. It is nothing more than a pretext to keep a team out of Hamilton, so that the Maple Leafs will not take action against the league, as they have threatened to do. *See* Ex. 4, Toronto Veto Letter.

Craig Leipold, the current owner of the Minnesota Wild and former owner of the Nashville Predators, was one of the most vocal opponents of Mr. Balsillie's ownership application at the July 29, 2009 Board of Governors meeting. Mr. Leipold prepared a written statement that he read to the NHL Executive Committee and Board of Governors,

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there." Ex. 1, Leipold Depo. Tr. at 219:18-221:8; Mark McGee, *Predators Owner Leipold Looks to Sell 40 Percent*, Nashville City Paper, Jan. 12, 2007, attached hereto as Exhibit 7; *see also* Ex. 1, Leipold Depo. Tr. at 110:5-6 ("Would I object to a team moving into my market? You bet your ass I would.").

urging them to vote against Mr. Balsillie's ownership. *See* Leipold Decl. [DE 585] ¶ 3. This statement was an important factor in the Board of Governors' decision to vote against Mr. Balsillie's ownership application and the NHL has relied on it as evidence that the vote was legitimate. *See* NHL Denial Mot. [DE 584] at 4-6; Jacobs Depo. Tr. at 52:18-22, attached hereto as Exhibit 8. A significant portion of Mr. Leipold's statement to the NHL Executive Committee and Board of Governors, urging them to vote against Mr. Balsillie's ownership, was an insinuation that Mr. Balsillie had instigated a Canadian Competition Bureau investigation of the League's practices relating to their illegal territorial veto and how that veto was being exercised by the Toronto Maple Leafs to keep a team out of southern Ontario. *See* Leipold Decl. [DE 585] Ex. A.

Mr. Leipold, however, recently admitted at his deposition that he has no proof that either Mr. Balsillie or anyone else from PSE actually prompted that investigation. Ex. 1, Leipold Depo. Tr. at 67:21-23, 172:7-12. In any event, even if the Court were to assume, for the sake of argument, that it was someone from PSE who prompted the investigation, the NHL does not explain how it would be a reflection of bad moral character for someone seeking to ensure that Canadian competition laws are followed. There is no dispute that the NHL has not disciplined one of its other owners, Jim Dolan, when he sought to enforce the antitrust laws of the United States against NHL rules on behalf of the New York Rangers. Ex. 3, Daly Depo. Tr. 130:10-23; Ex. 8, Jacobs Depo. Tr. at 160:12-161:7. A similar action by a prospective owner to seek to enforce Canadian law would hardly seem to be reflective of a poor moral character.

In fact, the discovery evidence now reveals that the CCB was apparently misled by the NHL in several respects. Most importantly, as the Toronto letter indicates, there was never any repeal of the territorial veto and it remains in effect. The entire premise of the NHL's representation to the CCB was thus false – hardly a poor reflection on *Mr. Balsillie's* character. Further, discovery has revealed that Mr. Leipold's counsel

apparently misled the CCB with respect to the reasons why the Nashville Predators sale to Mr. Balsillie collapsed. Mr. Leipold testified that his attorney submitted to a formal interview in front of the CCB, and told it that the deal "did not fail because of any policies of the NHL, rather it failed because of Balsillie's conduct and complete refusal to abide by the terms of the documents." Leipold Decl. [DE 585] Ex. A, Part III.G; *see also* Ex. 1, Leipold Depo. Tr. at 176:16-180:12. Given the fact that we now know that the NHL was requiring a seven-year covenant not to relocate to prevent a move to Hamilton, and that Mr. Leipold's attorney himself recognized, in writing, that the parties "have not finalized a binding, definitive Purchase Agreement" and described the term sheet as "that certain non-binding Term Sheet, dated May 15, 2007," it would seem that the CCB was not told the correct facts about the Predators transaction. *See* Jacobs Decl. [DE 586] Ex. A, Tab 22 (Letter from Christopher Whitson to David Zimmerman, June 22, 2007). In fact, Mr. Leipold himself referred to the Predators "agreement" with Mr. Balsillie as non-binding,[11] contrary to what his attorney apparently told the CCB and what Mr. Leipold told the Executive Committee and Board of Governors when he accused Mr. Balsillie of going back on his deal.

The newly revealed Toronto letter is powerful evidence of the NHL's bad faith in rejecting Mr. Balsillie's ownership application. In light of this, the NHL's motivations are transparent: either it was protecting the Toronto Maple Leaf's illegal territorial veto, or it was protecting itself from a legal battle resulting from the Maple Leafs invoking its unamended NHL Constitutional right. Neither of these reflects adversely on Mr.

[11] *See* Jacobs Decl. [DE 586] Ex. A, Tab 21 (Minutes of the June 20, 2007 Meeting of the NHL Board of Governors), at 2 ("Craig Leipold, the owner of the Predators, had entered into a non-binding (according to Mr. Leipold) term sheet to sell the Predators to Jim Balsillie.").

Balsillie's character or provides any good faith basis to rejection PSE's ownership application.[12]

B. New Evidence Further Establishes that the NHL's Rejection of PSE's Ownership Application on "Good Character and Integrity" Grounds Has No Basis in Fact

The NHL Constitution and By-Laws require that an NHL Board of Governors vote on ownership transfer "*shall* be guided by" two specific criteria: financial wherewithal and "good character and integrity." *See* First Daly Decl. [DE 93] Ex. B (NHL By-Law 35.1) (emphasis added); *see* PSE's Ownership Mot. [DE 701] at 10. As PSE has demonstrated, the NHL's claim that it rejected Mr. Balsillie's ownership application on the basis of alleged defects in "character and integrity" was entirely pretextual. *See* PSE's Ownership Mot. [DE 701] at 9-31; PSE's Opp'n to NHL Denial Mot. [DE 779] at 10-26. In particular, PSE showed that the NHL applied a different standard of "good character" to Mr. Balsillie than any other applicant in history,[13] and that no conduct by Mr. Balsillie after the NHL approved him as an owner of the Pittsburgh Penguins in 2006 justified the NHL's rejection of his Coyotes ownership application. Now, new evidence underscores

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[12] Nor does Mr. Balsillie's statement to a newspaper reporter allegedly suggesting that the Montreal Canadiens were for sale provide a good faith basis for rejecting his ownership application. *See* PSE's Opp'n to NHL Denial Mot. [DE 779] at 25-26. Indeed, Mr. Leipold confirmed that what Mr. Balsillie actually said was something like "all [teams] are for sale." *See* Ex. 1, Leipold Depo. Tr. at 205:12-206:24. Mr. Balsillie believed that the statement was taken "massively out of context," objected to the article, and "sent a very stern . . . letter to the editor setting the record straight." *See* Balsillie Depo. Tr. at 211:22-212:1; 212:15-213:4, attached hereto as Exhibit 9. Mr. Gillett's plan to pursue legal action against the reporter, rather than Mr. Balsillie, is further evidence that the reporter took the statement out of context. *See* Ex. 9, Balsillie Depo. Tr. at 212:2-10. Further, there is no evidence that the statement was false, given that Mr. Gillett actually did agree to sell the Montreal Canadiens shortly after the statement. *See* Ex. 1, Leipold Depo. Tr. at 207:28-209:8. Nor was any damage caused, given that the team is scheduled to be sold for the highest sale amount in the NHL's history. *See* PSE's Opp'n to NHL Denial Mot. [DE 779] at 25. In sum, the Montreal Canadiens situation was blown wildly out of proportion, and even Mr. Gillett does not hold it against Mr. Balsillie. *See* Ex. 9, Balsillie Depo. Tr. at 213:8-16.

[13] Mr. Balsillie is the *first* person the NHL Board of Governors has ever rejected on an ownership transfer application on the grounds of "good character and integrity." *See* PSE's Opp'n to NHL Denial Mot. [DE 779] at 10-11.

the fact that the NHL acted in flagrant disregard of the criteria set forth in its own Constitution and By-Laws, and utterly failed to consider Mr. Balsillie's ownership application in good faith because of the NHL's own bad faith objectives.

Despite the allegations against Mr. Balsillie that Mr. Leipold made in his statement to the NHL Executive Committee and Board of Governors – which the NHL relies upon to prove that the rejection of Mr. Balsillie's application was legitimate – Mr. Leipold's recent deposition testimony confirms that his statement was based on fiction, not fact. The NHL did nothing to prevent this knowingly false information from being used as a pretense by the Board to reject the PSE application.

1. PSE's Actions in Connection with the 2006 Acquisition of the Penguins and Prior Activities Did Not Dissuade Mr. Leipold from Seeking a Business Partnership with Mr. Balsillie.

The NHL has failed to show that there have been any material changes in Mr. Balsillie's good character since he was approved to acquire the Pittsburgh Penguins. *See* PSE's Ownership Mot. [DE 701] at 4-31; PSE's Opp'n to NHL Denial Mot. [DE 779] at 10-26. This point has now been confirmed by the deposition testimony of Mr. Leipold who attested that, in June of 2007, when he was attempting to sell Mr. Balsillie the Predators, he "had no reservations" about Mr. Balsillie, and held him in such high regard that *he* suggested that they become partners in the venture, with Mr. Balsillie owning 80 percent of the team and Mr. Leipold owning the remaining 20 percent. Ex. 1, Leipold Depo. Tr. at 120:12-121:12. Similarly, Mr. Bettman has conceded that the NHL was open to considering Mr. Balsillie as an owner in June of 2007, despite the failed negotiations for the Penguins the prior year. Ex. 2, Bettman Depo. Tr. at 192:25-193:8. The pretextual nature of the NHL's use of the failed Penguins transaction for rejecting Mr. Balsillie on purported character grounds is thus self-evident."[14] This affirmative evidence underscores

[14] Under this Court's direction, pre-2006 events relating to Mr. Balsillie are not relevant. *See* June 15 Order [DE 341] at 8-9. Nonetheless it bears noting that Mr. Leipold's deposition testimony also undercuts his accusations regarding a 2005 incident regarding

the conclusion that PSE's conduct in the negotiation for the Penguins should have no negative impact on Mr. Balsillie's ownership application for the Coyotes. *See* PSE's Opp'n to NHL Denial Mot. [DE 779] at 15-22.[15]

2. Mr. Leipold Now Concedes That He Was Always Open About His Intent to Sell the Predators as a Mobile Franchise That Could Be Moved out of Nashville, Thus Negating the NHL's Claims About Balsillie's Bad Character in Seeking to Move The Team.

It is now undisputed by Mr. Leipold that in 2007 he *explicitly marketed* the Predators as a team which could be moved out of Nashville.[16] For instance, Mr. Leipold testified that he "was selling Nashville Predators as a *mobile franchise*, one – a franchise that could potentially be moved if the City did not cure a default provision that we had planned to initiate that . . . this team could be a mobile team." Ex. 1, Leipold Depo. Tr. at

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Mr. Richard Rodier, Mr. Balsillie's counsel. While Mr. Leipold suggested to both the Executive Committee and Board of Governors that, in 2005, Mr. Rodier caused the City of Nashville to investigate whether the Predators were in default of a net worth provision in their lease, Mr. Leipold's statements were not grounded in facts. *See* Leipold Decl. [DE 585] Ex. A. [redacted]

[15] While Mr. Balsillie was fully committed to keeping the Penguins in Pittsburgh if a new arena deal materialized on reasonable economic terms, he recalls making no special commitments at the December 4, 2006 NHL Executive Committee meeting during the Pittsburgh negotiations. *See* Ex. 9, Balsillie Depo. Tr. at 12:5-12:22; 14:18-14:24; 81:9-82:13 ("And I came out of this meeting with a very clear sense that all systems go, everything straight ahead, there were no additional commitments in that meeting."); *see also* Ex. 1, Leipold Depo. Tr. at 50:25-53:2 (no recollection of a discussion of a side letter). Indeed, Mr. Balsillie's contemporaneous emails to Mr. Rodier say the same thing. *See* Emails between Mr. Balsillie and Mr. Rodier, December 6, 2006 (PSE03115-20), attached hereto as Exhibit 11. The notion that Mr. Balsillie agreed during that meeting to give the NHL the right to repurchase the Team should the IOC Plan and Plan B fail to materialize is a complete fabrication. *E.g.*, Ex. 9, Balsillie Depo. Tr. at 153:11-153:13 ("I didn't have even a synapse of thought that there was going to be a put or call in our deal.").

[16] In fact, Mr. Leipold admits that was going to "assist in the efforts to try to get the team out of Nashville" if he and Mr. Balsillie became co-owners of the Predators in the 80/20 ownership plan discussed above. Ex. 1, Leipold Depo. Tr. at 122:14-18.

78:16-79:23 (emphasis added). Mr. Leipold also testified that he discussed the default lease provision "in every negotiation that I had because the value of the team was greater outside of Nashville than it was in Nashville. . . . [I]t was fairly well known that this provision was in the – in our lease and so it was an important part of the value of the Nashville Predators." Ex. 1, Leipold Depo. Tr. at 82:7-83:10. Mr. Balsillie understood Mr. Leipold's representations to be that the team could be moved as the lease termination was unlikely to be cured. *See* Ex. 9, Balsillie Depo. Tr. at 169:21-170:7. In accordance with this strategy to maximize the value of the team, Mr. Leipold decided to, and did, notify the City of Nashville that it was in default of its lease provisions (because of dismal attendance) and that the lease would be terminated if this default was not remedied within the next season. *See* Letter re License and Use Agreement, June 15, 2007, attached hereto as Exhibit 12.

Just as Mr. Leipold repeatedly emphasized the mobile nature of the Nashville team, so too was Mr. Balsillie quite candid about his intentions to move the team to Hamilton, Ontario if the Nashville lease terminated, as everyone expected would be the case. Ex. 1, Leipold Depo. Tr. at 140:7-17. Mr. Leipold recognized Mr. Balsillie's candor. For instance, in an email to Commissioner Bettman, dated May 7, 2007, Mr. Leipold stated "[t]hey are very up front that they would like to move the team to the Hamilton area." Jacobs Decl. [DE 586] Ex. A, Tab 15 (Email from Mr. Leipold to Mr. Bettman, May 7, 2009). And Mr. Leipold encouraged Mr. Balsillie's plans to purchase the team with the intent to move it to Hamilton. *See* Ex. 6, Greenspoon Memorandum; *see also* Ex. 1, Leipold Depo. Tr. at 98:19-101:14, 102:25-103:20. According to the Greenspoon Memorandum, which was a contemporary account of the meeting (*See* Rodier Depo. Tr. at 128:23-130:18, 310:24-311:20, attached hereto as Exhibit 13), Mr. Leipold stated that Mr. Bettman and the NHL Executive Committee supported relocating the Predators out of

Nashville. Ex. 6, Greenspoon Memorandum at 1-2.[17] The Greenspoon Memorandum also establishes that Mr. Leipold and Mr. Balsillie explicitly discussed the possibility of moving the team to Hamilton from the very beginning of their negotiations. *Id.*

Given that both Messrs. Leipold and Balsillie understood that the team was likely to leave Nashville, and that Mr. Balsillie wanted to move it to Hamilton, it boggles the mind for Mr. Leipold and the NHL to suggest that Mr. Balsillie showed bad character because he was not willing to "execute the NHL's standard form of Consent with a seven-year non-relocation provision." Leipold Decl. [DE 585] Ex. A, at Part I.C.iii. PSE's opening brief demonstrated the that no such promise was ever made – as it would have run counter to everyone's understanding of the deal. *See* PSE's Opp'n to NHL Denial Mot. [DE 701] at 26-27. Beyond that, however, new evidence confirms that the NHL's insistence on a seven-year non-relocation consent provision from Mr. Balsillie reflected a markedly different and bad faith treatment of him as compared to other bidders for the Predators.[18]

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[17] Although Mr. Leipold now asserts that the Greenspoon Memorandum was incomplete and inaccurate, he has no contrary contemporaneous notes from the meeting. Ex. 1, Leipold Depo. Tr. at 90:8-18. While he claims to have a better memory of this meeting than what is reflected in the memorandum, this assertion is called into serious question by the fact that he could not even remember if Loren Greenspoon, one of the five attendees, was a man or a woman. Ex. 1, Leipold Depo. Tr. at 75:6-10, 76:4-14, 90:8-10. When pressed, he testified that he believed Loren Greenspoon was a woman. Ex. 1, Leipold Depo. Tr. at 76:3-14. In fact, Loren Greenspan is a man. Ex. 13, Rodier Depo. Tr. at 311:17-312:2. Mr. Rodier testified that he read the Greenspoon memorandum shortly after the meeting and that he found it to be true and accurate as to what transpired. *Id.* at 312:7-22

[18] This is not the first time that the NHL would insist that such a covenant be applied to Mr. Balsillie, in derogation of earlier understandings. With respect to the Pittsburgh Penguins negotiations, Mr. Balsillie had made clear that the seven-year non-relocation provision was a "deal breaker" from the start, a sentiment he shared with Commissioner Bettman at least as early as the August 29, 2006, and memorialized in the parties' asset purchase agreement. Ex. 9, Balsillie Depo. Tr. at 58:8-58:19; 59:9-61:8. Despite this understanding, the buyers were "shocked" and "floored" by the NHL's last-minute proposal of a side letter with 24 terms, *and* inclusion of a non-relocation covenant. *Id.* at 113:7-113:16; 113:23-11:24 ("Shock and surprise is an understatement for that to happen."). In the end, Mr. Balsillie had little choice but to withdraw from the deal, else risk the very significant $15 million deposit. *See id.* at 70:21-71:3, 147:15-148:13, 157:18-158:9, 159:15-16.

At this same time, in 2007, while Mr. Leipold was negotiating with Mr. Balsillie, he was also having parallel negotiations with William "Boots" Del Biaggio, who wanted to move the team to Kansas City. Ex. 1, Leipold Depo. Tr. at 135:2-7. Kansas City, unlike Hamilton, is not in the territorial market of any other NHL team, and thus no other team could invoke the veto provided by the NHL Constitution to prevent that move.[19] In light of this, the NHL applied a drastically different standard to Mr. Del Biaggio's proposal to purchase the Predators than it was applying to Mr. Balsillie.

Ed Lang, the Chief Financial Officer of the Predators, acknowledged the NHL's disparate treatment of a move to Kansas City as opposed to Southern Ontario. In an email to Mr. Rodier dated March 30, 2007, Mr. Lang stated "Craig [Leipold] *doesn't have to get NHL consent to allow the team to move to KC* or pay relo fees so we'll continue our dialog with KC . . . ." Email from Mr. Lang to Mr. Rodier, March 30, 2007, attached hereto as Exhibit 14 (emphasis added); Ex. 13, Rodier Depo. Tr. at 313:24-317:12. In contrast to the ease with which a relocation to Kansas City could occur, Mr. Lang stated that Leipold "would have to go to the NHL and try and convince them to move the team to Southern Ontario, which by the way will be a lot harder than you make it out to be." *Id.*

The double-standard that the NHL applied to Mr. Balsillie is also shown by the NHL's reaction to Mr. Del Biaggio's sale of suites in Kansas City for NHL games before Mr. Del Biaggio owned the Predators team. While Mr. Leipold testified that Mr. Del Biaggio pre-selling suites in Kansas City did not reflect negatively upon his good character,[20] the NHL Executive Committee took a very different tack with Mr. Balsillie, claiming that they were "incredulous" that Mr. Balsillie took deposits on season tickets in

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[19] *See supra*, Point III.A., for discussion of the illegal territorial veto provided by the NHL Constitution. *See also* PSE's Mot. for Determination that the Coyotes May Be Relocated to Hamilton Notwithstanding the NHL Refusal to Consent [DE 824].

[20] Ex. 1, Leipold Depo. Tr. at 280:24-281:13.

Hamilton for the Predators. Ex. 1, Leipold Depo. Tr. at 263:23-264:2, 280:24-281:13.[21] PSE's acceptance of deposits for Predators season tickets was completely in line with Mr. Leipold's marketing of the team as a "mobile franchise." As testified by Mr. Balsillie, he told Mr. Bettman about the sale in advance and did not understand how the sale could cause damage to the Predators in Nashville as he knew that Mr. Leipold was about to give public notice of his early lease termination, as he did the very next day. *See* Ex. 9, Balsillie Depo. Tr. at 196:20-197:22; Ex. 1, Leipold Depo. Tr. 263:3-264:2; *see also* Ex. 11, Letter re License and End Use Agreement; Ex. 9, Balsillie Depo. Tr. at 177:23-179:14. Indeed, Mr. Leipold admitted that he was "educating the ... market going back a couple months" before the lease default notice, so that the press knew for at least a couple of months before that notice that one very real possibility was for the team to move out of Nashville. Ex. 1, Leipold Depo. Tr. at 233:9-234:14. Mr. Rodier confirmed that he saw such references in the Nashville press. Ex. 13, Rodier Depo. Tr. at 180:9-182:2.

In any event, both Messrs. Balsillie and Rodier have testified that PSE only sold the seat deposits in a good faith attempt to demonstrate the viability of the Hamilton market, which in their minds was competing with a possible move to Kansas City, where Mr. Del Biaggio was taking suite deposits on the same basis. *See* Ex. 9, Balsillie Depo. Tr. at 188:8-190:8, 191:15-23, 196:19-197:5; Ex. 13, Rodier Depo. Tr. at 176:7-178:21, 186:20-187:5. As for the use of the Predators logo, Mr. Rodier explained that such use was *de minimis* (in a very small advertisement in a newspaper for a couple of days) and Mr.

[21] The double-standard that the NHL applied to PSE's bid for the Predators is also shown by Commissioner Bettman's reaction to learning about the negotiations. When Mr. Bettman found out that Mr. Balsillie was negotiating to purchase the Predators, and that those negotiations might soon become public, he called Mr. Leipold and told him he was placing a "cease and desist order" on the negotiations. Ex. 1, Leipold Depo. Tr. at 123:3-125:20; Email from Mr. Leipold to Mr. Rodier, May 4, 2007, attached hereto as Exhibit 15 ("I would say the cease and desist order is still in play."). In contrast, Mr. Bettman knew of Mr. Del Biaggio's intention to move the team to Kansas City, but never ordered Mr. Leipold to cease or slow down negotiations with him. Ex. 1, Leipold Depo. Tr. at 135:2-136:5.

Leipold admitted that the use of the logo alone would not have been a major issue for him. Ex. 1, Leipold Depo Tr. at 281:25-282:5; Ex. 13, Rodier Depo. Tr. at 188:16-190:6; *compare* Ex. 1, Leipld Depo. Tr. at 185:2-189:23, 200:9-203:18 (questionable acts by other NHL owners).

In short, the history of the Nashville Predators negotiations demonstrates that both sides of the table – Mr. Balsillie and Mr. Leipold – understood that the team was likely to move from Nashville and that Mr. Balsillie wanted to move the team to Hamilton. The NHL's pretextual claim today that Mr. Balsillie demonstrated bad character in that transaction by his refusal to sign a seven-year non-relocation covenant or by applying for a relocation to Hamilton should be rejected by this Court out of hand.

Indeed, it appears that Mr. Leipold has a personal animus towards Mr. Balsillie because when Mr. Balsillie learned of the obstacles the NHL was putting in front of him, he refused to make a $10 million non-refundable deposit which Mr. Leipold requested under their non-binding Term Sheet. *See* Ex. 1, Leipold Depo. Tr. at 148:11-20 ("It gets to the entire issue of -- of do I trust Jim Balsillie. . . . he cannot be trusted. He says he'll put $10 million down and he doesn't."). But, contrary to his statements to the Executive Committee and Board of Governors, Mr. Leipold was finally forced to admit at his deposition that this so-called "agreement" to deposit the $10 million was non-binding. Mr. Balsillie "always ha[d] the right not to make the $10 million payment." *See* Ex. 1, Leipold Depo. Tr. 147:23-148:10, 155:24-156:4; *see also* Ex. 1, Leipold Depo. Tr. at 141:22-144:20, 161:14-24; PSE's Ownership Mot. [DE 701] at 23-24; Jacobs Decl. [DE 586] Ex. A, Tab 21 (Minutes of the June 20, 2007 Meeting of the NHL Board of Governors), Ex. A, Tab 22 (Letter from Mr. Leipold's Counsel to Mr. Zimmerman, June 22, 2007). Regrettably, Mr. Leipold misrepresented this Term Sheet as binding in his statement to the Executive Committee and Board of Governors on July 29, and Mr. Daly knew the statement was false in this regard, but the NHL did nothing to correct this. Ex. 3,

Daly Depo. Tr. at 135:18-136:23; *see also* PSE's Opp'n to NHL Denial Mot. [DE 779] at 22-25.[22]

CONCLUSION

For all of the foregoing reasons, and for the reasons set forth in PSE's Ownership Motion and its Opposition to the NHL Denial Motion, PSE respectfully requests that this Court order that the Coyotes' assets may be transferred to PSE, notwithstanding the NHL's rejection of PSE's Ownership Transfer Application.

RESPECTFULLY SUBMITTED this 31st day of August, 2009.

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[22] Mr. Leipold also alleged a series of threats, including that Mr. Rodier threatened to cause the Canadian Competition Bureau to investigate Mr. Leipold and the NHL, and that the team should be moved "in the dead of night using the litigation as a cover." See Leipold Decl. [DE 585] Ex. A, at 4; Ex. 1, Leipold Depo. Tr. at 67:8-20, 173:13-19, 273:23-277:15. However, Mr. Leipold was unable to produce any documentary evidence that such threats were made. Ex. 1, Leipold Depo. Tr. at 172:19-173:10, 178:5-10, 275:1-3. Mr. Rodier testified that he did not make the alleged threats. Ex. 13, Rodier Depo. Tr. at 174:3-175:16.

COPY of the foregoing
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