Thomas J. Salerno (AZ Bar No. 007492) tsalerno@ssd.com
Jordan A. Kroop (AZ Bar No. 018825) jkroop@ssd.com
Kelly Singer (AZ Bar No. 022024) ksinger@ssd.com
SQUIRE, SANDERS & DEMPSEY L.L.P.
Two Renaissance Squire, Suite 2700
40 North Central Avenue
Phoenix, Arizona 85004-4498
(602) 528-4000

Counsel to the Debtors-In-Possession

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.	Case No. 2:09-bk-09488 (Jointly Administered) Chapter 11 **DEBTORS' OBJECTION TO THE NATIONAL HOCKEY LEAGUE'S OFFER TO PURCHASE THE ASSETS OF COYOTES HOCKEY AND ARENA MANAGEMENT**
This Filing Applies to: ■ All Debtors ❐ Specified Debtors	**Hearing Date: September 10, 2009** **Hearing Time: 9:00 a.m. (PDT)**

DEWEY RANCH HOCKEY, LLC ("**Dewey**"), COYOTES HOLDINGS, LLC ("**Coyotes Holdings**"), COYOTES HOCKEY, LLC ("**Coyotes Hockey**"), and ARENA MANAGEMENT GROUP, LLC ("**Arena Management**", and together with Dewey, Coyotes Holdings, and Coyotes Hockey, the "**Debtors**"), debtors-in-possession in the above-captioned Chapter 11 cases (these "**Cases**"), file this Objection to the "NHL's Brief In Support Of The Sale Of Assets To And Assumption Of Liabilities By Coyotes Newco, LLC and Arena Newco, LLC" dated August 27, 2009 [Docket No. 820] (the "**NHL Brief**"), filed in support of the "Asset Purchase Agreement Among Coyotes Hockey, LLC, Arena Management Group, LLC, Coyotes

Newco, LLC And Arena Newco, LLC" (the "**NHL Bid**"), submitted by the National Hockey League (the "**NHL**") and affiliated entities (together with the NHL, the "**Buyers**") to purchase substantially all of Coyotes Hockey's and Arena Management's assets (the "**Assets**").

The Debtors have been vilified by the NHL and the City of Glendale in these Cases for doing its job -- *i.e.*, seeking the highest value for its assets in submitting a bid by PSE Sports & Entertainment, L.P. ("**PSE Sports**") to buy the assets of the Debtors for $212.5 million, in cash. Extraordinarily, the next highest bid for the assets is the contingent Ice Edge Offer at approximately $150 million, or approximately $62.5 million less. It is axiomatic that the Debtors have a fiduciary duty, and are obligated to maximize the value of their assets for the benefit of their estates and creditors and must therefore determine which of the foregoing bids represents the highest and best offer for the assets. *See Commodities Futures Trading Commission v. Weintraub*, 471 U.S. 343, 352 (1985); *U.S. v. Aldrich (In re Rigden)*, 795 F.2d 727, 737 (9th Cir. 1986). The NHL, however, feels no such fiduciary duty. Why? The NHL has told the Court -- the NHL's "***fundamental interest in taking control of the Coyotes is to preserve the viability, good will and success of the NHL as a major professional sports league rather than to protect any creditor interest***." *See* "Memorandum Of Points And Authorities In Support Of National Hockey League's Motion For Determination (I) Of Authority To Manage The Business And Affairs Of The Debtors, And (II) That William Daly Is The Representative Of The Estates" filed on May 13, 2009, at 3:3-4 [Docket No. 92] (the "**Control Motion**").

The NHL has certainly lived up to its word, and its conduct in these Cases has come full circle. The NHL's actions reek of bad faith. Indeed, on July 29, 2009 (approximately one month ago), the NHL's Board of Governors rejected the $212.5 million bid submitted by PSE Sports. *See* "Notice To Debtors, Bidders, And Notice Parties Pursuant To Paragraph 19 Of The July 6, 2009 Bid Procedures Order" filed July 30, 2009 (Docket No. 510). Less than 30 days later (August 25, 2009), the NHL submits its own bid that is $72.5 million less than PSE Sports' bid. The NHL has been kept informed of the entire sale process; it knew the details of each bid. The NHL even drafted the confidentiality agreement that governed bidders' access to the on-line data room established by the Debtors. Moreover, the NHL has unabashedly claimed that is controls the Debtors and that is sole decision-maker with respect to the Debtors' assets and their business operations throughout this entire process.[1]

When asked two weeks ago at a deposition about the NHL's plans regarding the Debtors' assets, the NHL's Commissioner concealed the NHL's plans to submit a competing bid. Other deposition testimony reveals that the NHL was planning to submit a competing bid as early as four weeks ago around the time it outright rejected PSE Sports. *See* discussion at paragraphs 65 *et seq.*, *infra*.

The NHL Bid is particularly troubling. ***The NHL Bid contemplates a possible relocation sale of the Phoenix Coyotes after the NHL purchases it, despite demonizing the Debtors for attempting the same thing pre- and post-petition. The difference, however, is that the structure of the NHL Bid allows the NHL -- and not creditors -- to reap the benefits of a future relocation sale***. To put it another way: Insider, which has claimed to be in sole control of Debtor, and has purported consent rights to approve a sale of Debtor, rejects Bidder's substantial all cash offer to purchase Debtor's assets. At the same time, Insider was preparing a competing bid to purchase Debtor when it rejected Purchaser. Days later, Insider submits a bid to purchase

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[1] *See* "Memorandum Of Points And Authorities In Support Of National Hockey League's Motion For Determination (1) Of Authority To Manage The Business And Affairs Of The Debtors, and (II) That William Daly Is The Representative Of The Estates" dated May 13, 2009 [Docket No. 91], supporting declarations [Docket Nos. 93, 125, and 295], reply [Docket No. 124], and renewed motion [Docket No. 682] (collectively, the "**Control Motion**").

Debtor that is millions of dollars less than Bidder's offer, and has the opportunity to resell Debtor for a substantial profit without benefiting Debtor's creditors. This is simply wrong.

The Debtors and Official Committee of Unsecured Creditors are currently undertaking a claims analysis (the "**Claims Analysis**"), which details the various claims that would be paid under the NHL Bid and those claims that would not be paid under the NHL Bid.[2] As will be demonstrated by the Claims Analysis, the NHL Bid would fail to fully pay millions of dollars in administrative, selected priority unsecured, and general unsecured claims. At the same time, however, the NHL Bid would pay similarly situated claims 100%. The NHL Bid, therefore, blatantly discriminates among similarly situated creditors.

In addition to being submitted in bad faith, the NHL Bid thus contains the same legal deficiencies that plagued the now-withdrawn Reinsdorf Group offer. The NHL Bid could not be approved under a Chapter 11 Plan if it were contained in one. It unfairly discriminates among similarly situated creditors and violates Bankruptcy Code § 1129, the absolute priority rule, and Bankruptcy Code § 365. Because it cannot be approved through a plan, the NHL Bid cannot be effectuated in a sale under Bankruptcy Code § 363.

Put simply, from both a legal and economic perspective, the NHL Bid pales in comparison to the asset purchase agreement submitted by PSE Sports (the "**PSE Bid**").[3] For these reasons, and for the reasons set forth below, the NHL Bid is not the highest and best bid

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[2] At the time of this Objection, the Claims Analysis was not fully complete, and the Debtors will supplement this Objection with information contained in the Claims Analysis.

[3] In this regard, the Debtors incorporate here by this reference all briefs filed in support of the PSE Bid, including, without limitation, the "<u>Debtors' Memorandum Of Points And Authorities In Support Of Sale Of Substantially All Of Coyotes Hockey's Assets (NHL Issues)</u>" filed on August 18, 2009 [Docket No. 703] (the "**Debtors' Memorandum**"), and all briefs and pleadings filed by PSE Sports.

and cannot be accepted by the Debtors or approved by this Court. This Objection is supported by the entire record before the Court and the following points and authorities.

OBJECTION

I. The NHL Bid Contains Insurmountable Legal Obstacles

1. It is indisputable that the PSE Bid provides approximately $72.5 million more than the guaranteed consideration under the NHL Bid. Aside from that indisputable fact, which alone defeats the NHL Bid, the NHL Bid presents profound legal obstacles that render the NHL Bid unacceptable by the Debtors.

A. Pertinent Provision Of The NHL Bid

2. As set forth in Sections 2.1 and 2.3 of the NHL Bid, the Buyers propose to purchase certain "Purchased Team Assets" and "Purchased Arena Assets" from Coyotes Hockey and Arena Management, respectively. These assets comprise substantially all of the business operations and assets of the Debtors, including the Phoenix Coyotes professional hockey team owned by Coyotes Hockey.

3. Under Sections 2.2 and 2.4, certain assets are excluded from the contemplated sale. The NHL Bid also assumes certain liabilities of both Debtors (collectively, the "**Assumed Liabilities**"). With respect to Coyotes Hockey, the following Assumed Liabilities are being assumed:

> (i) Liabilities to the extent arising out of or relating to the ownership of the Purchased Team Assets, or the operation of the Team, by the Team Buyer that accrue following the Closing;
>
> (ii) Liabilities under any of the Assumed Contracts arising out of or relating to performance by the Team Buyer thereunder that accrue after the Closing;
>
> (iii) Liabilities accruing after the Closing with respect to Claims arising out of the employment by Team Buyer of any of the Transferred Employees;

(iv) all unpaid amounts or unsatisfied obligations that must be paid or satisfied to effectuate, according to the Sale Order, the assumption by the Team Seller and assignment to the Team Buyer of the Assumed Contracts of the Team Seller ("Team Cure Costs"); and

(v) obligations to pay unpaid amounts under the Allowable Unsecured Claims of the Team Seller set forth on Schedule 2.5(a)(v).

Section 2.5(a), page 20. With respect to Arena Management, the following Assumed Liabilities are being assumed:

(i) Liabilities to the extent arising out of or relating to the ownership of the Purchased Arena Assets, or the operation of the Arena, by the Arena Buyer that accrue following the Closing;

(ii) Liabilities under any of the Assumed Contracts arising out of or relating to performance by the Arena Buyer thereunder that accrue after the Closing;

(iii) Liabilities accruing after the Closing with respect to Claims arising out of the employment by Arena Buyer of any of the Transferred Employees;

(iv) all unpaid amounts or unsatisfied obligations that must be paid or satisfied to effectuate, according to the Sale Order, the assumption by the Arena Seller and assignment to the Arena Buyer of the Assumed Contracts of the Arena Seller ("Arena Cure Costs"); and

(v) obligations to pay unpaid amounts under the Allowable Unsecured Claims of the Arena Seller set forth in Schedule 2.7(a)(v).

Section 2.7(a), page 21.

4. Schedules 2.5(a)(v) and 2.7(a)(v) set forth the Allowable Unsecured Claims referred to in Sections 2.5(a)(v) and 2.7(a)(v) above, which constitute pre-petition, general unsecured claims. Of particular note, approximately $2,059,274.70 of Allowable Unsecured Claims are general unsecured claims asserted by the NHL. *See* Schedule 2.5(a)(v) at numbers 70, 72-74.

5. The aggregate consideration to be provided for the Assets and business operations of Coyotes Hockey and Arena Management consists of the following:

> Consideration. The aggregate consideration for the Purchased Assets shall be:
>
> (a) the assumption of the Assumed Liabilities, including but not limited to:
>
> (i) Payment or other satisfaction of the SOF Indebtedness;
> (ii) Assumption of all NHL Obligations;
> (iii) Payment of Cure Costs relating to the Assumed Contracts (including the AMULA and the Glendale Contracts to the extent they become Assumed Contracts in accordance with Sections 2.12 and 2.14, respectively), to the extent not paid in accordance with Section 3.1.(a)(iv) below; and
> (iv) Payment of the Allowable Unsecured Claims set forth on Schedules 2.5(a)(v) and 2.7(a)(v); and
>
> (b) Cash in an amount equal to the sum of:
>
> (i) $2,000,000; plus
> (ii) An amount equal to the lesser of:
> (1) the difference between $140,000,000 and the sum of the payments referred to in Sections 3.1(a)(i), (ii), (iii) and (iv) and 3.1(b)(i); and
> (2) the aggregate amount of unsatisfied Allowable Unsecured Claims (after taking into account payments made in accordance with Section 3.1(a)(iii) and (iv) above), administrative claims and Contract rejection claims, excluding in each case any claims payable to Jerry Moyes, Vickie Moyes, The Jerry and Vickie Moyes Family Trust and their respective Affiliates; and
>
> (c) in the event a Team Sale is consummated prior to the second anniversary of the Closing Date, an additional amount of cash, payable by the Buyers to the Sellers within ten (1) Business Days following consummation of such Team Sale, in an amount equal to 20% of the Net Profit received in connection with such Team Sale; provided, however, that any amount paid pursuant to this Section 3.1(c) shall not exceed $20,000,000 in the aggregate.

Section 3.1, page 25-6. Sections 4.3(a), (b), and (c) provide that the following shall be delivered to the Debtors on the closing date:

(a) the Cure Costs required to be paid at Closing pursuant to Sections 2.5, 2.7 and 2.10;

(b) the portion of the other Allowable Unsecured Claims set forth on Schedules 2.5(a)(v) and 2.7(a)(v) payable at Closing;

(c) the cash payable pursuant to Section 3.1(b)(i);

Sections 4.3(a), (b), and (c), page 28. Under Section 4.4, the cash consideration set forth in Section 3.1(b)(ii), if there is any, is deferred until five business days after June 15, 2010 (the "**Deferred Compensation**").

6. Accordingly, the only guaranteed consideration being provided under the NHL Bid comprises payment of $2,000,000, assumption of certain "Assumed Liabilities," the "Cure Amounts" to be paid on account of the "Assumed Contracts," which are specifically identified in Schedule 1.1(a) of the NHL Bid, and the specified Allowable Unsecured Claims.

7. As will be set forth in the Claims Analysis, the "Cure Costs" set forth on account of contracts to be assumed under the NHL Bid are significant. The Assumed Liabilities contained on Schedules 2.5(a)(v) and 2.7(a)(v), which represent regular, non-executory contract, general unsecured claims the NHL Bid will satisfy, total approximately $4.5 million.

8. ***Other than the $2,000,000 to be provided to the Debtors at closing, there is no guaranteed cash consideration provided to the estates under the NHL Bid***. The Deferred Compensation is a mathematical formula that may equal zero dollars. Although Section 3.1(c) of the NHL Bid provides that the Buyers pay 20% of the "Net Profit" earned on the resale of the Assets that occurs within two years of closing, this additional compensation is entirely illusory. First, there will likely be no Net Profit if there is a sale that keeps the Phoenix Coyotes in Glendale, Arizona. *See* Letter dated August 25, 2009, from William Daly to Coyotes Hockey,

LLC, page 3.[4] Second, Net Profit is defined as the aggregate consideration received from the resale of the Assets ***less*** the following:

> (i) [T]he aggregate consideration paid by the Buyers pursuant to Sections 3.1(a) - (b) of this Agreement; (ii) any additional amounts invested in, or loaned to or paid on behalf of, the Buyers by the NHL or any NHL entity or any Affiliates hereof, including any interest charged thereon, during the period between the Closing Date and the consummation of such Team Sale; (iii) any Indebtedness of the Buyers not included in clause (ii) above that is outstanding at the time of consummation of such Team Sale and is not assumed by the purchaser in such Team Sale; (iv) all fees and expenses (including attorneys' fees and accountants' fees and expenses) incurred by the NHL or the Buyers in connection with such Team Sale.

Section 1.1, page 9. Accordingly, any amounts received from the resale will be deducted by, among other things, any additional money loaned by the NHL to operate the team and the businesses. To date, the NHL has already loaned approximately $40 million to run the Debtors' operations, and this subsidy will likely increase for the upcoming 2009-2010 year before a sale of the Assets. Most important is that "***any relocation fees or other payments made directly to the NHL or to the Member Clubs in connection with any Team Sale shall not be included in the calculation of Net Profit***." *Id.* The NHL is free to allocate all of the resale price to relocation and/or indemnity fees especially at a time when the NHL is free from this Court's supervision. For all intents and purposes, therefore, Net Profit is illusory in terms of consideration.

9. As noted in Section 3.1(a)(iii) above, not all executory contracts are being assumed under the NHL Bid. For example, the contracts related to the operation of Jobing.com Arena, including the "Amended And Restated Management, Use And Lease Agreement" (the

[4] A copy of this letter is attached to the "Notice Of Receipt Of Bids Under Sales Procedure Order And Filing Of Same" dated August 26, 2009 [Docket No. 809].

"**AMULA**"), are specifically excluded. With respect to the AMULA, Section 2.12 of the NHL Bid provides that the parties will enter into a "Partial Lease Assignment Agreement" on terms satisfactory to the Buyers and the Debtors. The Partial Lease Assignment Agreement proposes to assign -- without assumption under Bankruptcy Code § 365 -- the AMULA to the Buyers for a period no longer than June 15, 2010 (the end of the 2009-2010 hockey season). The Buyers will comply with the terms and obligations of the AMULA during this time, unless the Buyers direct the Debtors to reject the AMULA on or before June 15, 2010 (which would occur when the NHL relocates the Phoenix Coyotes).

10. The same is true for the other executory contracts related to the operation of Jobing.com Arena that are referred to as the "Glendale Contracts" under the NHL Bid. Under Section 2.14, the NHL Bid proposes that the parties enter into a "Transition Services Agreement," under which the Debtors will effectively assign all of their rights to the Glendale Contracts -- again, without assumption under Bankruptcy Code § 365. The Buyers will comply with the terms and obligations of the Glendale Contract unless the Buyers direct the Debtors to reject the Glendale Contracts on or before June 15, 2010 in connection with a relocation of the Phoenix Coyotes.

11. Section 8.1(a) provides that the Debtors will be liable for all taxes. The Buyers will have no liability for employees that are not to be employed by the Buyers. Under Sections 2.6(iii) and 2.8(iii), the Buyers also do not assume liability for the tax claims against the Debtors. Even if a governmental entity seeks the payment of taxes from the Buyers, Section 8.1(b) provides that such obligation will fall on the Debtors.

12. Under Section 8.2(a), employees whose employment contracts are not an Assumed Contract will be terminated. The Buyers propose to offer these terminated employees

at will employment on terms and conditions in the sole discretion of the Buyers. This employment will also be conditioned on the employees executing releases in favor of the Buyers. Absent an agreement for continued employment, the Buyers will have no liabilities for any of the terminated employees.

13. ***The NHL Bid, therefore, does not include full payment of millions of dollars in claims of creditors, who are, or may become, either higher in priority or pari passu with the creditors that are paid under the NHL Bid***. This disturbing amount of unpaid creditors includes the following:

(a) Over $2 million in administrative claims;

(b) employee-related claims on account of terminated employees.

(c) millions of dollars in general unsecured claims comprising the claim of Mr. Wayne Gretzky (the "**Gretzky Claim**") and the claims of Jerry and Vickie Moyes and their respective affiliates (the "**Moyes Claims**");

(d) Prospective damages -- in the millions -- arising from the contemplated possible rejection of the AMULA and the Glendale Contracts.[5]

B. The NHL Bid Could Not Be Approved In A Chapter 11 Plan.

14. Under Bankruptcy Code § 363(b), a debtor, after notice and a hearing, may sell its assets outside the ordinary course of business. 11 U.S.C. § 363(b). It is axiomatic that a Bankruptcy Code § 363(b) sale cannot be approved if the sale attempts to achieve what cannot be achieved through a Chapter 11 plan of reorganization. *See, e.g.*, *In re On-Site Sourcing, Inc.*, 2009 Bankr. LEXIS 1698 (Bankr. E.D. Va. 2009) (holding that § 363(b) sale that pays a

[5] The Transition Services Agreement and the Partial Lease Assignment Agreement may mitigate some of these damages, but there will undoubtedly be substantial damages incurred on behalf of the estates if the AMULA and the Glendale Contracts are rejected as contemplated by the NHL Bid.

distribution to general unsecured creditors before paying all administrative expenses and priority unsecured claims cannot be approved); *see also In re Gulf Coast Oil Corp.*, 2009 Bankr. LEXIS 313 (Bankr. S.D. Tex. 2009) (denying motion to sell substantially all debtor's assets under § 363(b) because transaction violated §§ 1122 and 1129(a)(1) by paying some unsecured creditors in full and others not at all, and because transaction violated § 1129(a)(9) by paying some administrative expenses in full and others not at all); *In re Braniff Airlines, Inc.*, 700 F.2d 935 (5th Cir. 1983) (reversing bankruptcy court's approval of § 363(b) sale that purported to allocate the sale proceeds to only a select group of unsecured creditors and shareholders); *In re Continental Air Lines, Inc.*, 780 F.2d 1223 (5th Cir. 1986) (holding that bankruptcy court lacked authority to approve § 363(b) lease transaction if a plan of reorganization containing the same transaction could not be confirmed); *In re Allison*, 39 B.R. 300, 304 (Bankr. D.N.M. 1984) (stating that a proper balance between § 363(b) and Chapter 11 "prohibits the debtor from doing under Section 363(b) what it could not do in a plan of reorganization").

15. In *In re On-Site Sourcing, Inc.*, 2009 Bankr. LEXIS 1698 (Bankr. E.D. Va. 2009), a Chapter 11 debtor filed a motion to sell substantially all its assets under Bankruptcy Code § 363(b). The consideration for the assets included $132,500 of cash to be deposited into a trust for the benefit of general unsecured creditors. The total sale proceeds, however, would be insufficient to pay all administrative expenses and priority claims in full. Accordingly, earmarking $132,500 for distribution to the general unsecured creditors before paying priority claims in full violated the "best interests of creditors" test under § 1129(a)(7), and also violated the requirement of § 1129(a)(9) that all administrative expenses be paid in full:

> The general unsecured creditors trust provision is contrary to the scheme of distribution in both a chapter 7 and chapter 11 liquidation. It would assure that the general unsecured creditors are paid in advance of the administrative and priority claims. At

> oral argument, the Committee's counsel candidly admitted that the purpose was to assure that the general unsecured creditors received a distribution. He admitted that if there were insufficient funds to pay all administrative expenses and priority claims, some administrative or priority claimants would go unpaid while the unsecured creditors would receive a distribution. . . .
>
> In the ordinary course of a chapter 11 case, the $132,000 and other consideration proposed to be earmarked for the general unsecured creditors trust would be part of the fund to be distributed to creditors of the estate. That distribution would be determined in a confirmed chapter 11 plan. A chapter 11 plan cannot be confirmed unless it complies with § 1129(a), or if all of the provisions of § 1129(a) are satisfied other than § 1129(a)(8) then also with § 1129(b). Two provisions, other than § 1129(a)(8) would most likely be violated by the proposed general unsecured creditors trust. Priority claimants are adversely affected. Section 1129(a)(7) required than an impaired class of claims accept the plan or receive as much as they would receive under a distribution under chapter 7. Absent consent, this is not satisfied if the general unsecured creditors receive a distribution before the priority claims are paid in full. In addition, § 1129(a)(9) requires that all administrative claims be paid in full unless the holder of a particular claim has agreed to a different treatment. The consideration earmarked for the general unsecured creditors trust effectively evades this requirement by redirecting part of the purchase price from the administrative expense claimants to general unsecured creditors without the consent of the holders of the administrative claims

In re On-Site Sourcing, Inc., 2009 Bankr. LEXIS 1698, *24-*27.

16. The Bankruptcy Court thus refused to permit the general unsecured trust to exist as a component of the transaction because the trust would have made a Chapter 11 plan unconfirmable. *Id.* at *35. Exactly like the *On-Site Sourcing* case and other authority cited above, the sale contemplated by the NHL Bid cannot be consummated through Bankruptcy Code § 363(b) -- the transaction could not be incorporated into a confirmable Chapter 11 plan.

(i) The NHL Bid Discriminates Among Similarly Situated Creditors.

17. The NHL Bid could not be incorporated into a Chapter 11 plan, because such plan would unfairly discriminate among creditors in violation of Bankruptcy Code § 1123(a)(4). As a prerequisite to confirmation, a Chapter 11 plan of reorganization must comply with all applicable provisions of the Bankruptcy Code. *See* Bankruptcy Code § 1129(a)(1) ("The court shall confirm a plan only if all of the following requirements are met: (1) The plan complies with applicable provisions of this title"). One such provision is Bankruptcy Code § 1123(a)(4), which requires that a plan "provide the same treatment for each claim or interest of a particular class, unless the holder of a particular claim or interest agrees to a less favorable treatment of such particular claim or interest." "This section [1123(a)(4)] restates the cardinal principle of bankruptcy practice that claims within a class should all be treated equally." *In re Hickabee Auto Co.*, 33 B.R. 132, 138 (Bankr. M.D. Ga. 1981); *accord In re Computer Task Group, Inc. v. Brotby (In re Brotby)*, 303 B.R. 177, 185 (B.A.P. 9th Cir. 2003) ("the text of § 1123(a)(4) mandates that a confirmable plan provide the 'same treatment' for class members").

18. Here, the NHL Bid violates § 1123(a)(4) by treating the administrative, priority, and certain general unsecured creditors differently. Certain administrative claims will be satisfied by the NHL Bid, but no less than $2 million of administrative claims of the same priority would not receive full payment. Certain priority claims would be satisfied in full, while the NHL Bid would fail to pay in full any pre-closing tax claims of the Debtors that would be in the same class. The list of Assumed Liabilities includes only a portion of the general unsecured creditor pool having pre-petition claims against the Debtors. Millions in unsecured creditor claims would not be satisfied in full. To the extent the AMULA and the Glendale Contracts are

rejected when the NHL relocates the Phoenix Coyotes, their resulting general unsecured rejection claims will not be paid in full.

19. The NHL Bid provides only $2,000,000 in guaranteed cash and post-sale the Debtors would have literally no business operations or assets to generate an income stream. The holders of the claims left out of the NHL Bid -- whether administrative, priority, general unsecured, or future rejection claims -- will receive minimal compensation on account of their claims. But the NHL proposes a 100% payout to the designated creditors set forth in the NHL Bid.

20. This disparate treatment among the creditors in the same classes would violate Bankruptcy Code § 1123. *See In re AOV Industries, Inc.*, 792 F.2d 1140, 1152 (D.C. Cir. 1986) ("Even though neither the Code nor the legislative history precisely defines the standards of equal treatment, the most conspicuous inequality that § 1123(a) prohibits is payment of different percentage settlements to co-class members"). Moreover, the Buyers could not separately classify the claims of similarly situated creditors and attempt to discriminate among the separate classes -- such discrimination would be unfair. Under Bankruptcy Code § 1129(b), a confirmable plan must not discriminate unfairly, and it must be fair and equitable, with respect to each impaired class that has not voted to accept the plan. 11 U.S.C. § 1129(b). The Ninth Circuit has adopted a four-part test to determine whether a plan unfairly discriminates against dissenting impaired classes. Under that test:

> Discrimination between classes must satisfy four criteria to be considered fair under 11 U.S.C. § 1129(b): (1) the discrimination must be supported by a reasonable basis; (2) the debtor could not confirm or consummate the Plan without the discrimination; (3) the discrimination is proposed in good faith; and (4) the degree of the discrimination is directly related to the basis or rationale for the discrimination.

In re Ambanc La Mesa Limited Partnership, 115 F.3d 650, 656 (9th Cir. 1997).

21. Here, any plan that incorporated the terms of the NHL Bid would unfairly discriminate against creditor classes who are left out of the sale. The NHL Bid does not, and cannot, justify the discrimination, and therefore, factors (1), (3), and (4) of the Ninth Circuit's test are not met. Even if those factors were met, factor (2) could not be satisfied. For example, it is possible that a plan could be confirmed without discriminating against general unsecured creditors if the plan simply paid all allowed unsecured claims on a *pro rata* basis. *See also In re Snyder's Drug Stores, Inc.*, 307 B.R. 889, 895-96 (Bankr. S.D. Ohio 2004). This Court should not allow the NHL to unilaterally allocate purchase proceeds.

(ii) The NHL Bid Violates § 1129(a)(9) And The Absolute Priority Rule.

22. In addition to unfairly discriminating among similarly situated creditors, the NHL Bid violates Bankruptcy Code § 1129(a)(9), which provides that all administrative claims against a debtor must be paid in full on the effective date of a plan. 11 U.S.C. § 1129(a)(9)(A). Because the NHL Bid provides only $2,000,000 in guaranteed cash and usurps all of the Debtors' operations and revenue stream, there is no way to satisfy the administrative claims, which the Debtors believe exceeds that amount. A plan that fails to pay administrative creditors in full cannot be confirmed under Bankruptcy Code § 1129(a)(9)(A). *See also, In re On-Site Sourcing, Inc.*, 2009 Bankr. LEXIS 1698 at *24-*27; *In re Gulf Coast Oil Corp.*, 2009 Bankr. LEXIS 313; *In re Braniff Airlines, Inc.*, 700 F.2d 935.

23. The NHL Bid also specifically excludes payment of tax liabilities for both Coyotes Hockey and Arena Management. Tax obligations fall on these Debtors even if government entities pursue the Buyers for the tax liabilities. *See* Sections 2.6(iv), 2.8(iv), and

8.1(b).[6] Such claims (to the extent there are tax liabilities) would likely qualify as priority claims under Bankruptcy Code § 507(a), which would be entitled to 100% payment under Bankruptcy Code §§ 1129(a)(9)(B) and (a)(9)(C). This defect would result in denial of confirmation. *See also In re On-Site Sourcing, Inc.*, 2009 Bankr. LEXIS 1698 at *24-*27; *In re Gulf Coast Oil Corp.*, 2009 Bankr. LEXIS 313; *In re Braniff Airlines, Inc.*, 700 F.2d 935.

24. By virtue of this nonpayment, the NHL Bid violates the primary tenet of the Bankruptcy Code -- the absolute priority rule. As codified in Bankruptcy Code § 1129(b)(2), the absolute priority rule provides that a junior class of creditors or interest holders may not receive or retain any property on account of their claims or interests unless the claims or interests of an objecting senior class are satisfied in full. *See, e.g.*, *Case v. Los Angeles Lumber Products Co.*, 308 U.S. 106 (1939); *In re Davis*, 262 B.R. 791 (Bankr. D. Ariz. 2007). Here, certain general unsecured creditors would receive 100% payment under the NHL Bid, while tax liabilities -- claims entitled to higher priority than general unsecured claims -- would receive no payment whatsoever.

25. *In re Chrysler LLC*, 2009 U.S. App. LEXIS 17441 (2nd Cir. 2009) is also informative because (unlike the NHL Bid) the sale proceeds in that case were distributed in accordance with the priority scheme of the Bankruptcy Code; and, therefore, the sale was not a *sub rosa* plan. In *Chrysler*, the Court of Appeals for the Second Circuit affirmed the bankruptcy court's approval of the sale of substantially all the operating assets of Chrysler LLC ("**Old Chrysler**") to New CarCo Acquisition LLC ("**New Chrysler**") under Bankruptcy Code § 363.

[6] There will not be sufficient funds to pay any tax liabilities if a governmental entity pursued either the Debtors or the Buyers for such obligations. The administrative claims incurred in these cases will be significantly higher than the $2,000,000 in guaranteed cash the Buyers propose to pay under the NHL Bid. The Debtors simply cannot comply with this provision of the NHL Bid.

In exchange for the assets, New Chrysler paid $2 billion into the bankruptcy estate and assumed various liabilities in the form of cure payments for executory contracts that were assumed and assigned to New Chrysler.

26. The debtor, Old Chrysler, paid the full amount of the $2 billion sale proceeds to its first lien lenders, whose liens attached to the sale proceeds. The total amount of the secured debt to the first lien lenders was $6.9 billion; and, therefore, after receiving the $2 billion of sale proceeds, the first lien lenders had an unsecured deficiency claim in the amount of $4.9 billion for which they received nothing. Other than the $2 billion paid to the first lien lenders from the sale proceeds, no creditors received any distribution on their prepetition claims.

27. Certain entities received membership interests in New Chrysler in exchange for new value that they contributed to New Chrysler: Fiat (20%); an employee benefit trust created by the United Auto Workers union (55%), the United States Treasury (8%), and Export Development Canada, which is wholly owned by the Canadian government (2%).

28. The Indiana Pensioners and other entities objected to the sale on the grounds that the sale constituted a *sub rosa* plan, because the plan gave value to unsecured creditors (in the form of equity interests in New Chrysler) without paying off secured creditors in full. Both the bankruptcy court and the Second Circuit, however, held that the sale did not constitute a *sub rosa* plan because the sale did not violate the priority distribution system of the Bankruptcy Code. In particular, all of the sale proceeds were distributed to the (undersecured) first lien lenders whose security interests attached to the sale proceeds. No other creditors received any distribution on account of their prepetition claims. Furthermore, the equity interests in New Chrysler were not assets of the bankruptcy estates, and they were not distributed to Fiat, the employee benefit trust, or the government entities on account of prepetition claims. Instead, the equity interests were

distributed in exchange for new value that those entities provided to New Chrysler in the form of governmental loans to finance the sale, new technology, and new management:

> The Indiana Pensioners argue that the Sale is a *sub rosa* plan chiefly because it gives value to unsecured creditors (*i.e.*, in the form of the ownership interest in New Chrysler provided to the union benefit funds) without paying off secured debt in full, and without complying with the procedural requirements of Chapter 11. However, ***Bankruptcy Judge Gonzalez demonstrated proper solicitude for the priority between creditors and deemed it essential that <u>the Sale in no way upset that priority</u>.*** The lien holders' security interests would attach to all proceeds of the Sale: "Not one penny of value of the Debtors' assets is going to anyone other than the First-Lien Lenders." Opinion Granting Debtor's Motion Seeking Authority to Sell, May 31, 2009, ("Sale Opinion") at 18. As Bankruptcy Judge Gonzalez found, ***<u>all the equity stakes in New Chrysler were entirely attributable to new value</u> -- including governmental loans, new technology, and new management -- which were <u>not</u> assets of the debtor's estates***. *See, e.g.*, id. at 22-23.

In re Chrysler LLC, 2009 U.S. App. LEXIS 17441, *23-24 (2nd Cir. 2009) (emphasis added).

29. Thus, the Chrysler sale was not thwarted by any of the insurmountable deficiencies contained within the NHL Bid. The NHL Bid unfairly discriminates among similarly situated creditors and violates Bankruptcy Code § 1129, the absolute priority rule, and Bankruptcy Code § 365. In contrast, the sale proceeds that Old Chrysler received in exchange for its assets were paid into the bankruptcy estate and properly distributed to creditors in accordance with the Bankruptcy Code; and, moreover, to the extent that any prepetition creditors received equity in New Chrysler, they received the equity in exchange for new value (not in exchange for, or satisfaction of, their prepetition claims).

(iii) The NHL Bid Purports To Assign Contracts Without Assuming Them

30. A debtor must assume a contract in order to assign that contract under Bankruptcy Code § 365. *See* Bankruptcy Code § 365(f)(2)(A). This Court explained that "[i]t is basic bankruptcy law regarding the assumption and assignment of executory contracts that the

assuming party can not assume only the benefits of a contract; rather assumption is the entire agreement, benefits and burdens." *In re Dewey Ranch Hockey, LLC*, 406 B.R. 30, 37 (Bankr. D. Ariz. 2009).

31. The NHL Bid, however, provides that the parties' execution of the Partial Lease Assignment Agreement with respect to the AMULA. Although the Debtors have not seen a copy of the Partial Lease Assignment Agreement and do not know exactly what it entails, the NHL Bid indicates that the Debtors will be assigning all of their rights under the AMULA to the Buyers at least until June 15, 2010. *See* Section 2.12. The same is true with respect to the Glendale Contracts. The NHL Bid provides that the Debtors must assign to the Buyers the "goods, services, rights and benefits" the Debtors receive under the Glendale Contracts in accordance with the Transition Services Agreement until no later than June 15, 2010. The Debtors also have not seen this agreement. Despite assigning all of their rights under these agreements, and despite that the Buyers -- not the Debtors -- will be enjoying these rights, the NHL Bid does not provide for the assumption of the AMULA or the Glendale Contracts. In other words, the Buyers receive all of the benefits these agreements, but not all of the burdens. Under the authority above, this violates Bankruptcy Code § 365(f).

32. This violation is further amplified by the fact that the NHL Bid contemplates the rejection of the AMULA and the Glendale Contracts after assignment of these agreements. Does this mean that the City of Glendale ("**Glendale**") agrees to the possible rejection of the AMULA and the relocation of the Phoenix Coyotes? Is Glendale a party to the Partial Lease Assignment Agreement, and if so, does Glendale concede all of the Debtors' arguments with respect to rejection of the AMULA and their ability to move the team? If Glendale does not concede and the Buyers successfully move the Phoenix Coyotes, it will be the Debtors -- not the Buyers --

liable for any damages flowing from the rejection of the AMULA and the Glendale Contracts. The NHL Bid will not provide sufficient money to satisfy these rejection damages, but it will have already paid other general unsecured creditors 100%.

33. The NHL Bid, therefore, violates Bankruptcy Code § 1129(a)(9), the absolute priority rule, and Bankruptcy Code § 365. For these reasons, the NHL Bid could not be approved in the context of a Chapter 11 plan and thus cannot be approved under Bankruptcy Code § 363(b). The Debtors cannot accept, and this Court should not approve, the NHL Bid as a matter of law.

C. The NHL Bid Disallows Claims Without Due Process.

34. The NHL Bid also violates Bankruptcy Code § 502 because it constitutes a *de facto* partial disallowance of all claims that are not paid from the sale proceeds. Under Bankruptcy Code § 502(a), a claim is deemed allowed unless a party in interest objects to the claim. Bankruptcy Code § 502(b) provides that if a party in interest does object, then the Court is required to determine the amount of the claim after notice and a hearing. 11 U.S.C. §§ 502(a) and (b); *see also Lundell v. Anchor Constr. Specialists, Inc. (In re Lundell)*, 223 F.3d 1035, 1039 (9th Cir. 2000).

35. Sufficient cash will not be available to pay any of the administrative, priority, and general unsecured creditors that are not paid under the NHL Bid. The NHL Bid, if accepted by the Debtors and approved by the Court, would effectively treat millions of dollars in claims against the Debtors as effectively partially disallowed even though no objections to those claims have been filed, and even though this Court has not adjudicated such objections.[7] This result

[7] While the general unsecured claims on account of the Gretzky and Moyes Claims are currently subject to an objection and adversary proceeding, this Court has not made any adjudication with respect to such claims. Allowing the instant sale contemplated by the NHL Bid effectively

would violate the spirit and intent Bankruptcy Code § 502, which requires a claims-objection process.

E. **<u>The NHL Bid Constitutes A *De Facto* Subordination Of Claims.</u>**

36. The NHL Bid carves out claims for full payment, while providing little payment to any other claims, including priority and administrative claims. The NHL Bid, therefore, constitutes a *de facto* equitable subordination of the excluded claims without the required due process. Claims and interests may be equitably subordinated under Bankruptcy Code § 510(c):

> (c) Notwithstanding subsections (a) and (b) of this section, after notice and a hearing, the court may—
>
> (1) under principles of equitable subordination, subordinate for purposes of distribution all or part of an allowed claim to all or part of another allowed claim or all or part of an allowed interest to all or part of another allowed interest; or
>
> (2) order that any lien securing such a subordinated claim be transferred to the estate.

Bankruptcy Code § 510(c). In this regard, an adversary proceeding is required to equitably subordinate any claim. *See* Bankruptcy Rule 7001 ("The following are adversary proceedings: . . . (8) a proceeding to subordinate any allowed claim or interest, except when a . . . plan provides for subordination."); *see also In re USA Commercial Mortgage Co.*, 377 B.R. 608, 620 n.13 (B.A.P. 9th Cir). (stating that "all types of subordination fall under" Rule 7001(8)); *In re J.S. II, L.L.C.,* 389 B.R. 570, 587 (Bankr. N.D. Ill. 2008) ("Fed.R.Bank.P. 7001(8) requires that claims for equitable subordination be pursued via an adversary proceeding."); *In re Protarga, Inc.*, 2004 Bankr. LEXIS 1255, *11 (Bankr. D. Del. 2004) ("Claims for equitable subordination must be

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places the cart before the horse -- the lack of funds flowing to the Debtors effectively disallows almost entirely those claims even if they are ultimately allowed.

brought as a separate adversary proceeding pursuant to Rule 7001(8) of the Federal Rules of Bankruptcy Procedure").

37. In an equitable subordination adversary proceeding, the plaintiff must prove three elements before subordination will be granted: (1) that the claimant who is to be subordinated engaged in inequitable conduct; (2) that the misconduct injured creditors or gave the claimant an unfair advantage; and (3) that subordination would not be inconsistent with the Bankruptcy Code. *In re Filtercorp, Inc.*, 163 F.3d 570, 583 (9th Cir. 1998) (affirming bankruptcy court's refusal to equitably subordinate claim because creditor did not engage in misconduct). Moreover, "blanket" subordination based simply on the type of claim (or holder of the claim) is not permissible as a matter of law. *See U.S. v. Noland*, 517 U.S. 535 (1966) (unlawful to simply subordinate tax penalty claims, based on nature of the claims, without showing of inequitable conduct).

38. In order to justify equitable subordination, a Bankruptcy Court is required to make specific findings and conclusions with respect to each of the three elements. *In re Lazar*, 83 F.3d 306, 309 (9th Cir. 1996) (holding that district court abused its discretion when it equitably subordinated claims without making any findings of facts to support the subordination).

39. The terms of the NHL Bid would result in full payment only to certain creditors. No other creditors -- even similarly situated creditors -- would receive full payment under the NHL Bid or from the estates post closing. The NHL Bid, therefore, violates the due process rights of creditors by effectively subordinating their claims under § 510(c) without the protections and procedures provided by an adversary proceeding.

40. The Bankruptcy Appellate Panel for the Ninth Circuit addressed an analogous situation in *In re Loloee*, 241 B.R. 655 (B.A.P. 9th Cir. 1999). In *Loloee*, two secured creditors ("**GCC**" and "**GMAC**") each claimed to hold a first-priority lien in the debtor's real property. Under Bankruptcy Rule 7001(2), such disputes must be resolved by an adversary proceeding. *See* Bankruptcy Rule 7001 ("The following are adversary proceedings: . . . (2) a proceeding to determine the validity, priority, or extent of a lien or other interest in property"). The debtor's Chapter 7 trustee filed a motion to sell the property free and clear of all liens under Bankruptcy Code § 363(f), with all valid liens attaching to the sale proceeds. After GCC objected to the sale, the trustee made a deal with GCC to withdraw its objection on the condition that the sale order expressly provide that GCC would be paid in full from the sale proceeds. The Bankruptcy Court entered such order and approved the sale without a hearing and without making an independent determination regarding the lien-priority dispute. In other words, the sale order effectively determined that GCC held a first-priority lien on the property by expressly stating that GCC would be paid in full from the sale proceeds. On appeal to the BAP, GMAC argued that the sale order was void for lack of due process and that Bankruptcy Rule 7001(2) was circumvented through a motion to sell property. *In re Loloee*, 241 B.R. at 659.

41. On appeal, the BAP considered "[w]hether the resolution of a lien priority dispute through a motion to sell property free and clear of liens without an adversary proceeding is consistent with due process." *Id.* The BAP agreed with GMAC, and held that it had been denied its due process rights because it was not provided an adequate opportunity to defend the priority of its lien.

42. The result here is no different. Accepting the NHL Bid and approving the sale contemplated under that offer would effectively determine the relative priority of claimants. For

example, the NHL Bid would subordinate certain outstanding administrative claims, priority tax claims (to the extent any are due), and general unsecured claims, to those general unsecured creditors paid 100% through the NHL Bid. Such subordination, just like the determination of lien priority through a sale in *Loloee*, would contravene the need for an adversary proceeding under Bankruptcy Rule 7001(8).[8]

II. Responses To Arguments Raised In The NHL Brief

43. Most of the arguments raised in the NHL Brief in support of the NHL Bid are simply incorrect or misplaced because the NHL Bid cannot be accepted by the Debtors or allowed by the Court as a matter of law. The PSE Bid on the other hand provides an instant influx of $72.5 million more than the NHL Bid. Courts apply four factors to determine whether a party properly exercised its business judgment: (1) whether a sound business reason exists for the transaction; (2) whether the transaction is in the best interests of the estate; (3) whether the transaction has been proposed and negotiated in good faith; and (4) whether the transaction is arms' length. *See In re Wilde Horse Enters, Inc.*, 136 B.R. 830, 841 (Bankr. C.D. Cal. 1991). As set forth below, it would be an exercise of poor business judgment to accept the NHL Bid over the PSE Bid.

A. The City Of Glendale Is Just One Creditor Among Many

44. The NHL suggests that acceptance of the NHL Bid would constitute proper business judgment because the proposed sale to the Buyers benefits the City of Glendale ("**Glendale**") and its surrounding community. But this cannot be true, and that is clear from the NHL Bid itself. The NHL Bid contemplates a resale of the Phoenix Coyotes to another

[8] While the Moyes Claims are currently subject to an adversary proceeding for equitable subordination, this Court has not adjudicated that cause of action. The defendant has not even filed an answer. The lack of funds flowing to the estates effectively subordinates almost entirely these claims even if Mr. Moyes prevails.

purchaser that may want to relocate the team. *See, e.g.*, Section 3.1(c). As provided in Sections 2.12 and 2.14 of the NHL Bid, this resale would result in the rejection of the AMULA and the Glendale Contracts. If Glendale and its surrounding community were a concern to the NHL, then relocation would not be an option for the NHL.[9]

45. Although the NHL purports a desire to keep the Phoenix Coyotes in Glendale, Arizona, history demonstrates that that is highly unlikely even with the additional time allowed under the NHL Bid to effectuate such transaction prior to the rejection of the AMULA and the Glendale Contracts (which is to occur on or before June 15, 2010). No one except the NHL and Glendale know exactly why the Reinsdorf Group withdrew its offer to purchase the Assets. But this Court can be relatively certain that its withdrawal was due in part to the inability to negotiate a deal with Glendale that made sense from an economic perspective and that could be consummated from a practical perspective. In this regard, the Debtors incorporate here by this reference Section II.B of the "<u>[Unredacted] Debtors' Objection To The Offer To Purchase The Assets Of Coyotes Hockey And Arena Management</u>" filed on July 31, 2009 [Docket No. 526].[10]

46. The Debtors submit that the IceEdge Group bid will likely run up against the same obstacle; that bid was modeled after the Reinsdorf Group's bid structurally and economically, and it contemplates the execution of a "<u>Memorandum Of Understanding</u>" dated August 21, 2009 with Glendale. *See* IceEdge Asset Purchase Agreement, Section 8.2(i), page 57 [Docket No. 809]. Put simply, the Phoenix Coyotes just do not make economic sense in Glendale, Arizona. Setting aside the dismal attendance at Phoenix Coyotes hockey games, the

[9] While not entirely clear, it is presumed that Glendale will be a party to the Partial Lease Assignment Agreement and may even agree with the NHL's ability to relocate the Phoenix Coyotes after the 2009-2010 season.
[10] This portion of the Reinsdorf bid objection was filed under seal.

Debtors submit that the inability to negotiate and consummate a deal with Glendale will result in the Phoenix Coyotes being relocated as contemplated by the NHL Bid.

47. This problem is exactly what the Debtors faced pre-petition. After all of the pre-petition marketing detailed in the "Declaration Of Earl Scudder In Support Of Sale Motion" dated May 5, 2009,[11] the Debtors could not negotiate nor consummate a transaction that made sense for the estates' creditors. It is nothing short of ironic that the NHL and Glendale publicly lynch the Debtors and Moyes for attempting to do exactly what the NHL Bid proposes to do -- relocate the team after attempts to find a Glendale bidder fail.

48. Moreover, as set forth in the "Memorandum of Points and Authorities In Support Of Debtors Motion For An Order Approving Rejection Of The Arena Lease Under Bankruptcy Code § 365(A) Effective As Of The Closing Date Of A Relocation Sale," dated August 18, 2009, and corresponding reply [Docket Nos. 685 and 853], Glendale is just one creditor that holds a capped claim against the estate under Bankruptcy Code § 502(b)(6). It is not the only creditor of these estates, and certainly not the creditor with the largest general unsecured claim. Its capped claims should not drive the outcome of these Cases at the expense of other creditors.

B. The Litigation Surrounding The PSE Bid Is Not Determinative

49. The NHL further argues that the NHL Bid is better than the PSE Bid because approving the NHL Bid avoids substantial litigation. The NHL has made clear that any approval of Mr. James Balsillie's attempt to purchase the Phoenix Coyotes will be appealed. *See* NHL Brief, 14:5-7.[12] This argument is a red herring. This Court already recognized that any party is free to appeal any of its decision. *See* Transcript of August 11 Hearing, 8:17-18.

[11] This declaration was filed under seal.
[12] Of course the fallacy of the NHL's argument here is that it assumes that no party would appeal a decision in favor of the NHL, which would also involve substantial litigation.

50. Whether the NHL (or any other party for that matter) decides to appeal this Court's decision(s) should not determine the outcome. The prospect of appeals should not even be a factor here where one bid is $72.5 million higher than the next highest bid. Besides, any party wishing to appeal would have to seek a stay of the pending sale process and post a bond to protect the estates.

51. With respect to posting a bond, Bankruptcy Courts look "to whether the bond would be necessary to protect against diminution in the value of property pending appeal and to secure the prevailing party against any loss that might be sustained as a result of an ineffectual appeal." *In re Adelphia Commc'n Corp.*, 361 B.R. 337, 350 (Bankr. S.D.N.Y. 2007) (internal quotations omitted). "If a stay pending appeal is likely to cause harm by diminishing the value of an estate or endanger the non-moving parties' interest in the ultimate recovery, and there is no good reason not to require posting of a bond, then the court should set a bond at or near the full amount of the potential harm to the non-moving parties." *Id.* (internal quotations and alterations omitted). Bankruptcy Courts generally support a bond requirement because a bond "secures the prevailing party against any loss sustained as a result of being forced to forego execution on a judgment during the course of an ineffectual appeal." *In re Texas Equip. Co., Inc.*, 283 B.R. 222, 229 (Bankr. N.D. Tex. 2002) (*citing Poplar Grove Planting and Ref. Co. Inc.*, 600 F.2d 1189, 1191 (5th Cir. 1979)); *In re Adelphia Commc'n Corp.*, 361 B.R. at 350 ("posting of a bond guarantees the costs of delay incident to the appeal").

52. If the NHL appeals a decision in favor of the Debtors and Mr. Balsillie, the NHL will need to post a bond that is sufficient to cover the potential loss of at least $72.5 million (and interest) plus the operating losses for the 2009-2010 season, plus attorneys' fees and costs. All of this are what the estates would suffer if the appeal precludes the PSE Bid. Therefore, the

Debtors' business judgment is entirely justified in rejecting the NHL Bid and accepting the PSE Bid.

C. <u>The NHL's Arguments Regarding Gretzky And Moyes Are Flawed</u>

53. The NHL further argues that the Assets can be sold free and clear of the Gretzky and Moyes Claims in accordance with Bankruptcy Code § 363(f). Specifically, the NHL asserts that such claims constitute interests that are in *bona fide* dispute under § 363(f)(4), or that such interests may be compelled to accept a money satisfaction of such interest under § 363(f)(5). The Debtors are not certain that such unsecured claims constitute "interests" under Bankruptcy Code § 363(f). It does not matter for these purposes, because even if these claims are not "interests," the NHL Bid effects a blatant discrimination and a *de facto* subordination of the claims that precludes approval of the NHL Bid as a matter of law.

54. If the Gretzky and Moyes Claims are "interests" under Bankruptcy Code § 363(f), the NHL Bid fails to provide any adequate protection of such "interests" in accordance with Bankruptcy Code § 363(e). The Court may condition a sale free and clear of the Gretzky and Moyes "interests" on providing such parties "adequate protection." Bankruptcy Code § 361, in turn, supplies three non-exclusive means for providing adequate protection in the form of either: (a) cash payments; (b) additional or replacement liens; or (c) other relief that will result in the realization by such entity of the "indubitable equivalent" of such entity's interest in the property to be sold. Both the NHL and the NHL Bid completely ignore this.

55. Indeed, the NHL offers no adequate protection on account of the Gretzky and Moyes Claims. Regardless of the outcome of the objection to the Gretzky Claim or the adversary proceeding asserted against Mr. Moyes, the practical effect of the NHL Bid is that these claims will receive substantially less money than the similarly-situated creditors being paid

100%. Even if the Gretzky Claim is found to be an estate obligation and even if Mr. Moyes prevails in the adversary proceeding, they are not adequately protected. The NHL Bid leaves them with, at best, pennies on account of their claims.

D. The NHL Bid Was Submitted In Bad Faith

56. The NHL Bid requires a finding that it is a good faith purchase under Bankruptcy Code § 363(m). *See, e.g.*, NHL Bid, Sections 1.1, page 12 (definition of "Sale Order"), and 7.7(d), page 41. The NHL cannot be a good faith purchaser. As the Court has already recognized, the NHL is wearing "multiple hats" in these proceedings, creating inherent conflicts of interests between the NHL on the one hand and the Debtors and other parties in interest on the other hand. *See* Transcript of May 19, 2009 Hearing, Ex. 19, 95:1-96:20. ***The NHL is a pre-petition secured and unsecured creditor, the debtor-in-possession lender, a party that shares control of the Debtors (and believes it should be in complete control), and a party with fiduciary obligations to members of its league independent of any debt relationship with the Phoenix Coyotes. The NHL just donned another hat when it became a bidder***. With all of these hats, the circumstances surrounding the NHL Bid are astonishing.

57. To this Court and the media following these Cases, the NHL Bid appears to have come out of nowhere. The NHL Bid, however, was secretly planned nearly a month ago at a critical time during this sale process, and not disclosed to the Court when the NHL reported its rejection of PSE Sports.

58. Under the "Stipulated Order Among The Debtors And National Hockey League Authorizing Interim Management Of The Debtors' Business Affairs" dated May 26, 2009 [Docket No. 203], Mr. Moyes and the NHL share control of the Debtors. The NHL also asserts in the recently-renewed Control Motion that it alone has all of the decision-making authority

over the businesses and operations of the Debtors. It is clear, therefore, that the NHL is a self-proclaimed insider of the Debtors, because it is a "person in control" of the Debtors. *See* 11 U.S.C. § 101(31)(B).

59. As an insider, the NHL cannot self deal and put its own self-interest ahead of the estate's interests and creditors. *See Pepper v. Litton*, 308 U.S. 295, 289, 311 (1939) (insiders are subject to rigorous scrutiny). Insiders should not be allowed to frustrate one of the paramount goals of bankruptcy -- maximization of asset value for the benefit of creditors. *See In re Hampton Hotel Investors, L.P.*, 270 B.R. 346, 355 (Bankr. S.D.N.Y. 2001) (principal of debtor joined bidder for main asset of the estate, acquiring for less than fair value and keeping market value for himself). Moreover, the NHL cannot use its insider control of the Debtors, and its control over the sale process, to advance its own bid and defeat the PSE Bid. *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 Transportation Services*, 292 B.R. 207 (Bankr. D. Utah 2003). An insider cannot seize from competing bidders the assets for itself capitalizing on the true value of the assets at the expense of the creditors.

60. Despite its duties to the estate as an insider -- and that it believes it is the sole decision-maker with respect to the Debtors -- the NHL has actively seized the Assets to defeat the PSE Bid for itself and its own interests at the expense of the estates' creditors. As indicated by the "Notice Of Filing NHL Transfer Application Under Seal" dated May 29, 2009, as supplemented, [Docket Nos. 228, 237, 309, and 480], PSE Sports submitted its "NHL Transfer Application Of PSE Sports & Entertainment, L.P.," on May 22, 2009, and supplemented it at the

NHL's request on May 29, 2009, June 1, 2009, June 5, 2009, and July 24, 2009 (the "**Transfer Application**").[13]

61. Likewise, Coyotes Hockey and PSE Sports submitted to the NHL their "NHL Relocation Application Of The Phoenix Coyotes," and supplemented such Application at the request of the NHL on July 15, 2009, July 24, 2009, and August 7, 2009 (the "**Relocation Application**" and together with the Transfer Application, the "**Applications**"). *See* "Notice Of Filing NHL Relocation Application Under Seal" dated June 1, 2009, as supplemented [Docket Nos. 236, 442, 480, and 593].[14] The NHL Board of Governors unanimously rejected the Transfer Application. The NHL also stated in open Court on August 3, 2009 that it would not even entertain the Relocation Application.[15]

62. Three weeks later, the NHL submits the NHL Bid, which in addition to the patent discrimination and other legal deficiencies, allows the NHL full benefit of a potential relocation sale of the Phoenix Coyotes. The Net Profit, a percentage of which the Buyers propose to pay the Debtors after a resale (not exceed $20,000,000), does not include any relocation or indemnification fee. The NHL will ensure that the Net Profit in this regard equals zero dollars, and that the relocation or indemnification fee will be in the hundreds of millions of dollars. Without this Court's supervision, no parties will know how the NHL calculated the Net Profit or the relocation and indemnification fee.

[13] The Transfer Application and portions of the Relocation Application were filed under seal in accordance with the "Order Authorizing The Debtors To File NHL Transfer And Relocation Applications Under Seal" entered by the Court on May 27, 2009 [Docket No. 211].

[14] The Applications were submitted without prejudice to the allegations in the adversary proceeding against the NHL.

[15] *See* "Notice To Debtors, Bidders And Notice Parties Pursuant To Paragraph 19 Of The July 6, 2009 Bid Procedures Order" dated July 30, 2009 [Docket No. 510]; *See* Transcript of August 3, 2009 Hearing, 65:16-25, 66:1-3.

63. *In re Performance Nutrition, Inc.*, 239 B.R. 93 (Bankr. N.D. Tex. 1999), is especially instructive. In that case, the debtor ("**PNI**"), was in the business of selling vitamins and health-related supplements. PNI had a significant business relationship with General Nutrition ("**GNC**"), that Naturade (one of PNI's competitors) valued. In this regard, to effect a purchase of PNI through bankruptcy proceedings, Naturade and a PNI secretly negotiated a deal under which Naturade would purchase substantially all of PNI's businesses and assets. The insider negotiated a general compensation package for post-sale employment with Naturade. The parties attempted to effect the transaction through a Bankruptcy Code § 363 sale, which was denied. The evidence illustrated that PNI and its creditors were significantly damaged by the attempt to sell the assets to Naturade.

64. The Chapter 11 trustee brought suit against, among others, the insider. The Bankruptcy Court found that the insider "should have stepped aside, due to the conflict of interest he faced, and allowed another of PNI's directors to evaluate the Naturade purchase deal and attempt to market the assets to others." *Id.* at 102. The Bankruptcy Court further found that the insider's conflict of interest -- that is, his personal compensation package -- influenced his decision not to explore other offers or market the PNI assets. *Id.* at 102-03. The Bankruptcy Court ultimately found that the insider breached his duty of loyalty and care to PNI. "As officers of the court, officers of a debtor in possession owe the Court a duty to act in the best interests of the estate." *Id.* at 112. It also found that the insider breached his debtor-in-possession fiduciary duties by, among other things, failing to appropriately market the business and failing to disclose his personal interest in the transaction. *Id.* at 112.

65. It is clear here that the NHL cannot serve the interests of the estates. Despite donning a fifth hat in these Cases, the NHL concealed the existence of the NHL Bid fewer than two weeks ago:

> **PSE COUNSEL:** Have you made any preparations or steps to consider what to do with the team this season if there is not bidder other than Mr. Balsillie?
>
> **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 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.
>
> **PSE COUNSEL:** That's not my question.
>
> **MR. BETTMAN:** Well, why didn't you ask me the question?
>
> **PSE COUNSEL:** Well, I'm trying to, okay?
>
> **MR. BETTMAN:** It's the compounding questions. If you just ask simple questions, I'll answer.
>
> **PSE COUNSEL:** 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?
>
> **MR. BETTMAN:** And at the same time try to sell it in a calm, sensible, professional, rational process.

Bettman Deposition Transcript at 213:9-214:16.[16] Craig Leipold -- former Nashville Predators owner and current owner of the Minnesota Wild -- testified that ***Commissioner Bettman contemplated becoming a competing bidder as early as four weeks ago***. That was right around the time the NHL Board of Governors unanimously rejected the Transfer Application, and certainly before NHL's counsel announced that the NHL would not be considering the

[16] A copy of the Bettman Transcript is attached as Exhibit "1" to the "Motion For Determination That The Coyotes May Be Relocated To Hamilton Notwithstanding The NHL's Refusal To Consent" dated August 28, 2009 [Docket No. 824].

Relocation Application. True to Mr. Leipold's testimony, the NHL submitted the NHL Bid, and that offer contemplates the potential relocation of the Phoenix Coyotes even after the sale to the Buyers.

66. The NHL has placed itself in the exact same position as the insider in PNI and has compromised its duties to the creditors in these Cases. It has opted to pay only certain creditors' claims 100% under the NHL Bid (including its own claims both secured and over $2 million in unsecured claims),[17] and left out millions of dollars of other claims that are similarly situated. The definition of Net Profit under the NHL Bid illustrates that the NHL will be the only party that benefits from any resale (including a relocation sale) of the Phoenix Coyotes much like the insider in PNI benefitted under the transaction with Naturade at the expense of the estate. At the same time, the NHL has done everything possible to preclude this Court's consideration of the PSE Bid. Mr. Bettman also failed to reveal the NHL's plans in this regard when asked under oath at his deposition. Under these circumstances, the NHL should "step aside" due to its inherent conflicts of interest. *In re Performance Nutrition, Inc.*, 239 B.R. at 102.

67. Bankruptcy Code § 363(m) provides that a purchaser of property of the estate is protected from the effects of a reversal on appeal so long as the purchaser acted in "good faith." Section 363(m) is intended to maximize the purchase price by providing bidders assurance that their purchase of estate assets will not be undone absent bad faith. Though the Bankruptcy Code does not provide a definition of good faith, "courts generally have followed the traditional equitable principals in holding that a good faith purchaser is one who buys 'in good faith' and 'for value.'" *In re Ewell*, 958 F.2d 276, 281 (9th Cir. 1992); *see also In re Abbotts Diaries of Pa., Inc.*, 788 F.2d 143, 147 (3d. Cir. 1986); *In re Rock Indus. Mach. Corp.*, 572 F.2d 1195,

[17] *See* NHL Bid, Schedules 2.5(a)(v) at claim nos. 70, 72, 73, and 74.

1197-98 (7th Cir. 1978). In analyzing the standard for good faith in the context of Bankruptcy Code § 363(m), Courts note that the "requirement that a purchaser act in good faith speaks to the integrity of his conduct in the course of the sale proceedings." *See, e.g.*, *In re Abbotts Diaries*, 788 F.2d at 147; *In re Rock Indus. Mach. Corp.*, 572 F.2d at 1198. Not surprisingly then, "lack of good faith is shown by fraud, collusion between the purchaser and other bidders or the trustee, or an attempt to take grossly unfair advantage of other bidders." *Id.*; *see also In re Ewell*, 958 F.2d at 281.

68. It is clear that the NHL has acted in bad faith. It outright rejected the Transfer Application, while at the same time it was planning its own bid to purchase the Assets. The NHL has further refused to consider the Relocation Application. By actively seeking to derail the PSE Bid, the NHL devalues the estates' assets. The NHL Bid discriminates among creditors and attempts to usurp the relocation value of the Assets at the expense of creditors. "Although full disclosure to the bankruptcy court may not always neutralize conduct that would otherwise constitute bad faith, disclosure should certainly weigh heavily in a bankruptcy court's decision on that issue." *Kabro Assocs., LLC v. Colony Hill Assocs. (In re Colony Hill Assocs.)*, 111 F.3d 269 (2d Cir. 1997); *see also G-K Dev. Co. v. Broadmoor Place Invs., L.P. (In re Broadmoor Place Invs., L.P.)*, 994 F.2d 744 (10th Cir. 1993) (negating any claim of concealment or collusion because existence of contract was disclosed even though details of the contract were not specified). Fewer than two weeks ago at his deposition, Mr. Bettman knowingly concealed the NHL's plans to submit a bid for the Assets.

69. For these reasons, the Buyers cannot have the protections afforded under Bankruptcy Code § 363(m). The NHL Bid was submitted in bad faith.[18]

[18] The Debtors respectfully reserve their rights to supplement this Objection.

JUDICIAL NOTICE

70. The Debtors submit that this Court may take judicial notice of the documents and pleadings referred to in this Objection in accordance with Federal Rule of Evidence 201(d). *See also United States v. Author Services, Inc.*, 804 F.2d 1520, 1523 (9th Cir. 1986) (court may take judicial notice of its own files), as amended by, 811 F.2d 1264 (9th Cir. 1987); *In re Arden Props., Inc.*, 248 B.R. 164, 169 (Bankr. D. Ariz. 2000) (same); *In re Haye v. United States*, 461 F. Supp. 1168, 1174 (C.D. Cal. 1978) (finding that judicial notice of certain deeds and a federal tax lien was proper, because they were recorded in a general index, were not subject to "reasonable dispute", and were capable of "accurate and ready determination").

CONCLUSION

For the reasons set forth above, the Debtors have determined that the NHL Bid is not the highest and best offer and cannot be accepted. Accordingly, the Debtors respectfully request that the Court enter an order sustaining this Objection, prohibiting the NHL Bid from being considered during the auction, determining that the NHL Bid is not the highest and best offer for the Assets, and granting such other and further relief as may be just and proper. The Debtors respectfully submit that the Court should approve the PSE Bid.

Dated this 1st day of September, 2009.

SQUIRE, SANDERS & DEMPSEY L.L.P.

By: */s/ Thomas J. Salerno*
Thomas J. Salerno
Jordan A. Kroop
Kelly Singer
Two Renaissance Square
40 North Central Avenue, Suite 2700
Phoenix, Arizona 85004-4498
(602) 528-4000

Counsel to the Debtors-In-Possession