Carolyn J. Johnsen – 011894
cjjohnsen@jsslaw.com
Peter W. Sorensen – 007506
psorensen@jsslaw.com
JENNINGS, STROUSS & SALMON, P.L.C.
A Professional Limited Liability Company
The Collier Center, 11th Floor
201 East Washington Street
Phoenix, Arizona 85004-2385
Telephone: (602) 262-5911
Facsimile: (602) 495-2696

Attorneys for Jerry Moyes

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 Proceedings Case No. 2:09-bk-09488-RTBP (Jointly Administered) **OBJECTION TO SALE OF ASSETS TO ICE EDGE GROUP OR NHL AFFILIATES; AND RESPONSE TO NHL'S BRIEF IN SUPPORT OF THE SALE TO ITS AFFILIATES** **Hearing Date: September 10, 2009** **Hearing Time: 9:00 a.m.**

After the dust has cleared, three bids to purchase the Coyotes Hockey Team[1] ("Team") have surfaced: PSE Sports & Entertainment ("PSE"), Ice Edge Group ("Ice Edge") and affiliates of the National Hockey League ("NHL"). The bids will be considered by the Court at an auction to be conducted on September 10, 2009, after which time the Court will determine which bid is the higher and better bid, which is in the best interests of all creditors, and whether a sale to such bidder may be approved. For the reasons set forth below, Jerry and Vickie Moyes ("Moyes") object to any sale to Ice Edge or the NHL.

[1] More specifically, substantially all the assets of Coyotes Hockey, LLC and Arena Management Group, LLC.

In a nutshell, neither the Ice Edge nor the NHL bid can be accepted. The Ice Edge bid is easily disregarded. Because of the numerous contingencies contained in this bid, it is doubtful that Ice Edge has even met the requirements to be a "Qualified Bidder,"[2] much less able to consummate a purchase of the Team in a reasonable period of time, if ever. With respect to the NHL bid, and putting aside the gratuitous vitriolic brutalization of Mr. Moyes, the NHL's bid is clearly inferior to the PSE bid (it provides some $80 million less to the creditors than does PSE's bid). Moreover, it is a disguised plan of reorganization or a *de facto* subordination which attempts to orchestrate discriminatory payments to select creditors.

I. The Ice Edge Bid

As indicated above, Ice Edge has not met the requirements set forth in the Amended Bid Procedures Order to be a Qualified Bidder at the Auction. Principally, a bid must include a "fully negotiated" Purchase Agreement. The Ice Edge bid has numerous unresolved conditions including: (1) an amended AMULA[3] that, among other things, would allow the Team to play 5 regular-season games per season elsewhere; (2) negotiated and executed Successor Contracts; and (3) the arrangement of satisfactory financing. These conditions are premised on the existence of ongoing rather than completed negotiations. Thus, the Purchase Agreement cannot be considered "fully negotiated," meaning Ice Edge's bid cannot be considered a Qualified Bid.

More importantly, even if Ice Edge was deemed to be a Qualified Bidder, its proposed purchase contains contingencies that would require significant time to resolve. As a result, the bid is so inferior to the two other competing bids that it should not be

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[2] See Amended Bid Procedures Order dated August 13, 2009.

[3] City of Glendale Arena Management Use and Lease Agreement dated November 29, 2001.

considered.[4]

II. Focus of the Sale and Standard

In essence, the Court will be considering two bids, PSE's and the NHL's. Amidst all of the rhetoric and name-calling, the purpose of the sale has been diverted. The NHL has briefed the legal standard to be applied in order for a sale to be approved, i.e., the highest and best offer that is in the best interest of all creditors. But then, it ignores this same standard when urging approval of its bid. The focus must be on which bid/sale provides the maximum value to the creditors—all creditors—of these estates. That is a pure question of economics. It is not a question of picking and choosing which select creditors will receive the proceeds of the sale; it is a matter of providing the largest pool to be distributed to creditors in accordance with the bankruptcy priorities set forth in the Bankruptcy Code and Rules. It is not up to the bidders to make these choices.

III. Brief Comparison of Bids

PSE's proposed purchase is simple: an all cash deal at $212,500,000 paid to the Debtors with a Closing no later than September 14, 2009. The pertinent condition precedent is the necessary consent by the NHL to authorize the assignment of the Team franchise and the relocation to Ontario, Canada. The sale contemplates that the amounts due to SOF

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[4] The Debtors have set forth in their objection to a sale to Ice Edge (dkt. 877) more extensive reasons why the bid cannot be approved and those arguments are adopted and incorporated herein. In addition, Moyes agrees with the NHL in its assessment that the Ice Edge bid is deficient, though it chooses to describe it as un-ripened: "As of the date of this brief, it appears that the Ice Edge Group may mature into a Qualified Bid. The principal concern, however, relating to the Ice Edge Group's bid is that it requires significant additional time to consummate with respect to issues including financing and the implementation of its memorandum of understanding with the City." NHL's Brief in Support of the Sale of Assets To and Assumption of Liabilities By Coyotes Newco., LLC and Arena Newco, LLC, ("NHL Brief") at page 9 (emphasis added); *see also* NHL Brief, page 6 n.5 ("The Ice Edge Group's bid is also subject to contingencies which the NHL believes prevents it from closing immediately." [emphasis added]).

Investments, LP ("SOF") and the NHL[5] will be paid at Closing. Presumably, the remainder will be distributed by the Debtors in accordance with normal bankruptcy priorities and after consideration of any claim objections.

The NHL's bid is for a total of $140,000,000 of which $126.5 million is paid at Closing to SOF, the NHL, $2 million to the Debtors and an estimated $7.5 million (which could be more) to select vendors (specifically excluding Moyes and Wayne Gretsky). If the team is moved after the 2009-2010 season, the balance up to the $140 million cap will be paid based on a calculation of any unsatisfied claims, Glendale-related rejection damages and Gretsky's claim (specifically excluding Moyes' claim from that calculation). This so-called remainder ranges from $0 to $13.5 million. Finally, if the Team is sold within two years, the NHL will pay the Debtors 20 percent of the Net Profits, although none are expected if the Team remains in Glendale.[6]

IV. A Sale as Proposed by the NHL Cannot be Approved As A Matter of Law[7]

A. The NHL's Purchase is a Disguised Plan of Reorganization or at Least a de facto Subordination.

Despite the NHL's claim to the contrary, the NHL's bid improperly dictates how the proceeds of the sale are to be used. It does so under the guise of "assumption" of liabilities—presumably under Section 365 of the Code. However, what is really happening is an improper and discriminatory allocation of the proceeds to a select few creditors.

Except for certain "Excluded Assets," the NHL's bid proposes to acquire all of the Debtor's assets, including (but not limited to) "Assumed Contracts."[8] In addition, it "will

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[5] Estimated at $80 million and $37 million, respectively.

[6] Query why the Debtors only receive 20 percent when there is a current offer of $212.5 million by PSE.

[7] Many of the following arguments pertain to the Ice Edge bid. To the extent, the Court considers the Ice Edge bid, such arguments defeat a sale to Ice Edge.

[8] NHL Brief, ¶ 4(a).

assume those liabilities of the Sellers expressly specified as 'Assumed Liabilities' in the APA, including (i) liabilities arising after the closing of the transaction (the 'Closing') under the Assumed Contracts, (ii) cure costs required to be paid under a sale order in connection with the assumption by the Buyers [sic] and assignment to the Sellers [sic] of the Assumed Contracts, and (iii) payment obligations for allowable unsecured claims of the Buyers designated on schedules to the APA., which schedules include most of such unsecured claim, with notable exceptions". . . namely excluding obligations owed to Moyes and Wayne Gretsky ("Moyes").[9] While the NHL appears to be attempting to justify this blatant discrimination among general unsecured creditors by casting the payment of some, but not all, general unsecured claims as a proper "assumption" of liabilities under section 365 of the Code, the liabilities contained in the third category of "Assumed Liabilities" are not directly related to, and are more extensive than, the "Assumed Contracts"—meaning at least some of the Assumed Liabilities are not related to executory contracts and thus do not qualify for assumption and cure under Section 365 of the Code.

For example, the allowable unsecured claims included in the third category of Assumed Liabilities are all listed either in Schedule 2.5(a)(v) or Schedule 2.7(a)(v). A cursory review of these claims reveals that the vast majority of them are not related in any way whatsoever to Assumed Contracts (which are listed in Schedule 1.1) or any other possible executory contract.[10] Under no conceivable interpretation of § 365 of the Code can

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[9] NHL Brief, ¶ 4(b).

[10] The only Assumed Contracts under the NHL Bid (Schedule 1.1) are the NHL Agreements (excluding the Existing Consent Agreement and the September 27, 2006, Guaranty in favor of the NHL); NHL Collective Bargaining Agreement; Standard Player's Contracts; Select Employment Agreements, Letter Agreements with individuals (presumably service agreements), and independent contractor agreements; Affiliation Agreement with San Antonio Hockey; and NHL credit agreements and D-I-P financing obligations.

payment of these claims qualify as cure costs. Quite to the contrary, the NHL, by way of its bid, is simply trying to dictate which select prepetition unsecured claims get paid and which do not. This sounds suspiciously like a plan of reorganization and certainly a de facto subordination without any of the Bankruptcy Code requirements or procedural safeguards.

The NHL tries to defend this discriminatory treatment by implying that Moyes and Gretzky will be able to participate in the potential distribution (which may be -0-) the NHL will supposedly pay in the future. This argument misses the point. All general unsecured creditors listed on Schedules 2.5(a)(v) or Schedule 2.7(a)(v) are guaranteed payment in full upon closing. Moyes, Gretzky and the un-favored few have no such guarantee. At most, they can hope to receive pennies on their claims, a year or two after most other general unsecured creditors have been paid full. Thus, despite the NHL's boast that "the APA does not place any restrictions on how, or to whom the back-end payment will be distributed," the damage will have already been done. Regardless of how the NHL tries to spin its payment in full of some, but not all, of the unsecured claims, its Bid patently discriminates between similarly situated unsecured creditors. The Code forbids this.

B. The NHL's Attempt To Prefer Some Pre-Petition Unsecured Creditors Over Others Is Prohibited By The Code.

While the Bankruptcy Code allows an asset purchaser in a § 363 sale to choose the assets it wishes to purchase and the executory contracts it wishes to assume—it does not allow the purchaser to decide which claims can be paid and which cannot. In this respect, the NHL cites several cases outlining the business judgment aspect of § 363 sales, but it fails to cite the relevant Ninth Circuit authority prohibiting the conditions of a §363 sale from dictating the allocation of sale proceeds. *See Rosenberger Real Estate Equity Fund III v. Air Beds, Inc.* (*In re Air Beds*), 92 B.R. 419 (B.A.P. 9th Cir. 1988) (rejecting a 363 sale where the debtor proposed to distribute the proceeds of the sale to pay lower priority claims before

paying high priority claims); *see also In re General Motors Corp.*, 407 B.R. 463 (S.D.N.Y. 2009) ("A 363 sale may also may be objectionable as a sub rosa plan if the sale itself seeks to allocate or dictate the distribution of sale proceeds among different classes of creditors.").

In *Air Beds*, for example, the Ninth Circuit B.A.P. started with the presumption that it is "[t]he general rule that a distribution on pre-petition debt in a Chapter 11 case should not take place except pursuant to a confirmed plan of reorganization, absent extraordinary circumstances." *Id.* at 422 (citations omitted). When a § 363 sale appears to dictate allocation of the proceeds of the sale, the *Air Beds* court recognized "the potential for circumventing the requirements attendant to the confirmation of a Chapter 11 plan." In this sense, *Air Beds* acknowledges that assessing the propriety of the sale and determining distribution of the proceeds are two distinct issues. *Id.* at 423. Ultimately, the B.A.P. found the trial court abused its discretion in allowing distribution of the proceeds to be re-ordered outside the context of a Chapter 11 plan. *Id.* at 424. Thus, the rule in the Ninth Circuit is clear—the terms of a § 363 sale cannot alter a creditor's claim distribution and priority rights under the Code. The NHL's bid contemplates exactly this.

Even the recent *Chrysler* and *GM* cases do not go as far as the NHL proposes here. For example, in *GM*, the court found the conditions of sale did not seek to reorder priority, but merely brought in value and "[c]reditors will thereafter share in that value pursuant to a chapter 11 plan subject to confirmation by the Court." *In re General Motors*, 407 B.R. 463, 496-97 (Bank. S.D.N.Y 2009). While the court in *GM* recognized the Debtor's ability to pick and choose which executory contracts it wants to accept and reject, (i.e., the Debtor can choose to assume some liabilities, and reject others), the *GM* court did not go as far as to allow the terms of the § 363 sale to dictate which existing non-contingent claims could be paid. *Id.*

Unlike *GM*, the NHL is purposefully attempting to pay some general unsecured creditors while refusing to pay others. The NHL has not cited, nor can it cite, any legal authority authorizing this blatant discrimination between similarly situated unsecured creditors. While the NHL may be able to treat some creditors favorably through Code-authorized assumption and cure of executory contracts, that is not what is happening here. The claim discrimination here has nothing to do with proper assumption and rejection of executory contracts. The NHL is simply trying to pick and choose which general unsecured creditors get paid and which do not. *Compare GM*, 407 B.R. at 497. This it cannot do.

C. The NHL's Bid Is Improperly Conditioned On The Partial Assignment Of Executory Contracts And Unexpired Leases That Have Not Been Assumed

As explained in *In Re Access Beyond Technologies, Inc.*, 237 B.R. 32, 47 (D. Del. 1999), "[a]n executory contract does not become an asset of the estate until it is assumed pursuant to § 365(a) of the Code." Thus, before the Debtor can assign or sell an executory contract or lease under § 363 it must first assume it. This concept flows from the general rule that, "[i]f the debtor does not assume an executory contract, it is deemed rejected. Thus, if a debtor does not assume an executory contract before he sells it . . ., the buyer may be purchasing an illusion: the executory contract will disappear on conclusion of the bankruptcy case." *Id.* at 47-48. It is also well settled that assumption or rejection of an executory contract is an all or nothing proposition. *In re CellNet Data Systems, Inc.*, 327 F.3d 242, 249 (3d Cir. 2003) (holding that the Section 365 "election is an all-or-nothing proposition—either the whole contract is assumed or the entire contract is rejected"); *see also In re Larson*, 128 B.R. 257, 262 (Bankr. D. N.D. 1990) ("A lessee, if assuming an unexpired lease, must adhere to the lease terms in all respects . . . ."). It follows that the NHL cannot direct the Debtor to only assume one year of the AMULA and Glendale Contracts prior to assigning them over to the new owners—they must be assumed in full prior to their

assignment.

No one has seen the NHL's proposed assignment or its terms. But, clearly the notion creates a purgatory for the Debtors and creditors. The benefit of the contract is assigned but if eventually rejected, the liability for rejection damages are borne by the Debtors and all of the remaining unsecured creditors who were not paid at Closing. There simply is no legal authority or factual justification for such a bizarre result.

V. The Assertion Regarding A Sale Free And Clear Of Moyes' Claim Is Inappropriate

In its Brief in Support of the Sale of Assets, the NHL asserts that somehow Sections 363(f)(4) and (5) are applicable to a sale free and clear of Moyes'[11] claim even though he does not assert an interest in the assets being sold. Moyes has an unsecured claim in the approximate amount of $104 million based on a fully documented Revolving Line of Credit and Revolving Promissory Note dated as of September 1, 2006, and last amended on April 16, 2008.[12] The NHL cannot affect Moyes' claim through a Section 363 sale process. This argument is clearly an effort by the NHL to cast aspersions toward Moyes and persuade the Court to somehow disregard his claim for purposes of approving a sale.

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[11] And also Gretzky's claim.

[12] Moyes proof of claim was filed on June 22, 2009 based on the Revolver, the purpose of which was to essentially fund payroll and the shortfall for various operating expenses. It provided that Moyes would loan up to $5,000,000 to Coyotes Hockey. Team revenues did not increase as projected and Coyotes Hockey's need for cash quickly exceeded the $5,000,000 cap on the Revolver. Consequently, Moyes agreed to loan Coyotes Hockey additional amounts and the Revolver was amended accordingly to increase the amount of the cap. Ultimately, the cap was increased to $95,000,000 as evidenced by the Sixth Amended and Restated Revolving Loan Agreement, dated April 16, 2008. The loans made by Moyes have been treated as such in the books and records of both Coyotes Hockey and Moyes. Unquestionably, the parties intended that Moyes' funding would be treated as a loan to accrue interest and be repaid. The parties carefully documented each and every increase in the cap on the funding as evidenced by the six amendments to the original Revolver.

To date, Moyes' claim remains unaffected. Although the City of Glendale has filed an adversary complaint attempting to recharacterize Moyes' claim as equity or otherwise subordinate it, there has been no resolution. In fact, the answer deadline is three weeks away. This Court has already determined that the issues regarding Moyes' claim will not be considered in conjunction with the sale hearings.[13] The NHL's allegations, which mirror the City's, have no place in the consideration of the bids presented to the Court. The issues regarding Moyes' claim are what they are and will be resolved appropriately by the parties that have standing to raise such issues[14]—not the City or the NHL, and not at this time. Again, the focus of the sale is the maximization of proceeds, not the concerted effort to punish Moyes.

VI. Conclusion

Based on the foregoing, the Court cannot approve a sale of the Debtors' assets to Ice Edge or to the NHL.

Dated: September 1, 2009.

JENNINGS, STROUSS & SALMON, P.L.C.

By */s/ Carolyn J. Johnsen*
Carolyn J. Johnsen
Peter W. Sorensen
Attorneys for Jerry Moyes

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[13] On August 11, 2009, the Court conducted a hearing regarding scheduling for the auction sale set for September 10, 2009 (see Minute Entry dated August 11, 2009, docket #650). At the hearing, the Court was presented with a document entitled "Issues for Scheduling" (attached to the Minute Entry) which set forth 14 topics on which the parties in the case had conferred. The parties sought a determination by the Court as to which issues would be considered at a pre-auction hearing to be held on September 2, 2009. Item 12 was "Should Moyes' claims be equitably subordinated or otherwise restricted?" With respect to this Item 12, the Court held, "IT IS FURTHER ORDERED that for the September 2nd hearing, issues 12, 13, and 14 are out."

[14] Importantly, in that regard, Moyes and the Debtors have stipulated that any claims the estate might have against Moyes have been assigned to the Official Unsecured Creditors' Committee. Neither the City nor the NHL has standing to assert these claims.

COPY of the foregoing mailed and/or e-mailed on September 1, 2009, to the following parties:

Thomas J. Salerno
Squire, Sanders & Dempsey
40 N. Central, #2700
Phoenix, AZ 85004
Attorneys for Debtor
tsalerno@ssd.com

Edward M Zachary
Bryan Cave
2 N. Central Ave #2200
Phoenix, AZ 85004
Attorneys for Debtor
edward.zachary@bryancave.com

Larry L. Watson
U.S. Trustee
Office of the U.S. Trustee
230 North First Ave., Suite 204
Phoenix, AZ 85003
larry.watson@usdoj.gov

C. Taylor Ashworth
Stinson Morrison Hecker
1850 N Central Ave #2100
Phoenix, AZ 85004
Attorneys for National Hockey League
tashworth@stinson.com

James E. Cross
Osborn Maledon
2929 N. Central Ave. #2100
Phoenix, AZ 85012
Attorneys for National Hockey League Players' Assoc.
jcross@omlaw.com

Susan M. Freeman
Lewis And Roca
40 N. Central Ave.
Phoenix, AZ 85004-4429
smf@lrlaw.com

Donald L. Gaffney
Snell & Wilmer L.L.P.
One Arizona Center
Phoenix, AZ 85004-2202
Attorneys for Donatello Investments
dgaffney@swlaw.com

Shane D. Gosdis
Allison L. Kierman
DLA Piper
2525 E Camelback Rd #100
Phoenix, AZ 85016
Attorneys for Lease Group Resources, Inc.
shane.gosdis@dlapiper.com
allison.kierman@dlapiper.com

Richard Henry Herold, Jr
Hinshaw & Culbertson
3200 N Central Ave #800
Phoenix, AZ 85012-2428
Aramark Sports and Entertainment Services
rherold@hinshawlaw.com

Alan A. Meda
Stinson Morrison Hecker
1850 N Central Ave #2100
Phoenix, AZ 85004
Attorneys for National Hockey League
ameda@stinson.com

Sean P. O'Brien
Gust Rosenfeld
201 E. Washington, #800
Phoenix, AZ 85004-2327
Attorneys for Drawbridge Special Opportunities Fund
spobrien@gustlaw.com

Cathy L. Reece
Fennemore Craig
3003 N. Central Ave., #2600
Phoenix, AZ 85012-2913
Attorneys for City of Glendale, Arizona
creece@fclaw.com

Dale C. Schian
Schian Walker
3550 N. Central Ave. #1700
Phoenix, AZ 85012-2115
ecfdocket@swazlaw.com

Scott B. Cohen
Engelman Berger
3636 N. Central Ave., #700
Phoenix, AZ 85012
Attorneys for John Breslow
sbc@engelmanberger.com

Lori Lapin Jones
98 Cutter Mill Road, #201 North
Great Neck, NY 11021
Attorney for BWD Group
ljones@jonespllc.com

William Novotny
Mariscal, Weeks, McIntyre & Friedlander
2901 N. Central Avenue, Suite 200
Phoenix, AZ 85012-2705
Attorneys for Coyote Center Development, LLC
William.novotny@mwmf.com

Ivan L. Kallick
Carl L. Grumer
Ileana M. Hernandez
Manatt, Phelps & Phillips
11355 W. Olympic Blvd.
Los Angeles, CA 90064
Attorneys for Ticketmaster
ikallick@manatt.com
cgrumer@manatt.com
ihernandez@manatt.com

Facility Merchandising, Inc.
c/o Arthur E. Rosenberg
Holland & Knight
195 Broadway
New York, NY 10007-3189
Arthur.rosenberg@hklaw.com

Facility Merchandising, Inc.
c/o Louis T.M. Conti
Holland & Knight
100 North Tampa Street, Suite 4100
Tampa, FL 33602
Louis.conti@hklaw.com

Thomas H. Allen
Paul Sala
Allen, Sala & Bayne, PLC
1850 N. Central Avenue, Suite 1150
Phoenix, AZ 85004
Attorneys for Official Joint Committee
Of Unsecured Creditors
tallen@asbazlaw.com
psala@asbazlaw.com

Jonathan K. Bernstein
Andrew J. Gallo
Bingham McCutchen LLP
One Federal Street
Boston, MA 02110
jon.bernstein@bingham.com

andrew.gallo@bingham.com

William R. Baldiga
Andrew M. Sroka
Brown Rudnick LLP
One Financial Center
Boston, MA 02111
Attorneys for City of Glendale, AZ
wbaldiga@brownrudnick.com
asroka@brownrudnick.com

J. Gregory Milmoe
Shepard Goldfein
Skadden, Arps, Slate, Meagher & Flom
4 Times Square
New York, NY 10036
Attorneys for National Hockey League
gregory.milmoe@skadden.com
shepard.goldfein@skadden.com

Anthony W. Clark
Skadden, Arps, Slate, Meagher & Flom
One Rodney Square
Wilmington, DE 19899
Attorneys for National Hockey League
anthony.clark@skadden.com

Steven M. Ambramowitz
Vinson & Elkins
666 Fifth Ave., 26th Floor
New York, NY 10103-0040
Attorneys for SOF Investments/Donatello Investments
sabramowitz@velaw.com

Jeffrey A. Krieger
Greenberg Glusker Fields Claman & Machtinger
1990 Avenue of the Stars, #2100
Los Angeles, CA 90067
Attorneys for Wayne Gretzky
jkrieger@greenbergglusker.com

Jonathan P. Ibsen
Laura A. Rogal
Jaburg & Wilk, PC
3200 N. Central Avenue, #2000
Phoenix, AZ 85012-2440
Attorneys for Wayne Gretzky
jpi@jaburgwilk.com
lar@jaburgwilk.com

Albert Turi
BWD Group, LLC
BWD Plaza
P. O. Box 9050
Jericho, NY 11753-8950

Jeffrey Freund
Bredhoff & Kaiser, PLLC
805 15th St. NW
Washington, D.C. 20005
jfreund@bredhoff.com
Attorneys for the National Hockey League Players' Association

Scott Greenberg
John J. Rapisardi
Cadwalader, Wickersham & Taft, LLP
One World Financial Center
New York, NY 10281

Richard Havel
Sidley Austin LLP
555 W. Fifth Street, 40th Floor
Los Angeles, CA 90013-1010

Joseph Lubertarri, Jr. Esq.
McCarter & English, LLP
Four Gateway Center
100 Mulberry Street
Newark, NJ 07102

Adam Klein
Katten Muchin Rosenman LLP
525 W. Monroe Street
Chicago, IL 60661

Susan Boswell
Quarles & Brady, LLP
One S. Church Avenue, Suite 1700
Tucson, Arizona 85701-1621

Geoffrey Khotim
Ridenour, Hienston & Lewis, PLLC
201 N. Central Avenue, Suite 3300
Phoenix, AZ 85004

Mark Dangerfield
Dean Short
Gallager & Kennedy
2575 E. Camelback Road
Phoenix, Arizona 85016

/s/ Todd M. Adkins