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### In re Dewey Ranch Hockey, LLC: The Bankruptcy of the Phoenix Coyotes

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# In re Dewey Ranch Hockey, LLC

The Bankruptcy of the Phoenix Coyotes

By: Chris Rowe and Jeff Upshaw

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## **I. Introduction**

While only a small percentage of Chapter 11 bankruptcy filings garner the attention of the American public, a bankruptcy petition involving a “big four” professional sports franchise (NFL, MLB, NBA, NHL) is big news to the American sports world. Perhaps the reason is that few, if any, commercial entities make such a passionate connection with its customers as professional sports teams.

In comparison to the other members of the “big four”, the NHL simply does not have the same level of financial success. Almost half of the 30 NHL franchises lost money in the 2011-2012 season.<sup>1</sup> Of the nine “big four” franchises to file for bankruptcy in the past forty years, six are in the NHL (67%)<sup>2</sup>. The Phoenix Coyotes hold the inglorious distinction of being one of the six NHL franchises that has lost money every season dating back to the previous lockout of 2005.<sup>3</sup>

## **II. History of the Phoenix Coyotes**

The franchise that would eventually become the Phoenix Coyotes was initially formed as the Winnipeg Jets in 1972, as a member of World Hockey Association (WHA). In 1979, the Jets joined the NHL as an expansion franchise due to the WHA going out of business.<sup>4</sup> In October of 1995, the Jets were purchased by two American businessmen, who subsequently moved the team to Phoenix, Arizona, and changed the name to the “Phoenix Coyotes.”<sup>5</sup> Throughout its time in Phoenix, the Coyotes played its home games in the American West Arena in downtown Phoenix.<sup>6</sup> The arena was ill-fitted for a hockey team and ticket sales suffered as a result.<sup>7</sup>

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<sup>1</sup> Tom Van Riper, The NHL's Best Hope: Contraction, Forbes, <http://www.forbes.com/sites/tomvanriper/2012/12/13/the-nhls-best-hope-contraction>.

<sup>2</sup> Darren Rovell, 10 Sports Franchises That Have Gone Bankrupt, CNBC, [http://www.cnbc.com/id/39915632/10\\_Sports\\_Franchises\\_That\\_Have\\_Gone\\_Bankrupt](http://www.cnbc.com/id/39915632/10_Sports_Franchises_That_Have_Gone_Bankrupt).

<sup>3</sup> Tom Van Riper, The NHL's Best Hope: Contraction, Forbes, <http://www.forbes.com/sites/tomvanriper/2012/12/13/the-nhls-best-hope-contraction>.

<sup>4</sup> Statement of Facts at 2, In re Dewey Ranch Hockey, LLC, No. 2:09-bk-09488, 2009.

<sup>5</sup> Statement of Facts at 2, In re Dewey Ranch Hockey, LLC, No. 2:09-bk-09488, 2009.

<sup>6</sup> Gretzky's Coyotes Open New Home in Suburbs, USA Today, [http://usatoday30.usatoday.com/sports/hockey/nhl/coyotes/2003-12-28-arena\\_x.htm](http://usatoday30.usatoday.com/sports/hockey/nhl/coyotes/2003-12-28-arena_x.htm).

<sup>7</sup> Gretzky's Coyotes Open New Home in Suburbs, USA Today, [http://usatoday30.usatoday.com/sports/hockey/nhl/coyotes/2003-12-28-arena\\_x.htm](http://usatoday30.usatoday.com/sports/hockey/nhl/coyotes/2003-12-28-arena_x.htm).

The franchise's financial troubles precipitated the sale of the team in 2001 to a group of Phoenix-area investors, including trucking executive Jerry Moyes, real estate developer Steve Ellman, and former hockey great Wayne Gretzky.<sup>8</sup> In 2003, the Coyotes moved its home games from the city of Phoenix to one of its suburbs, Glendale.<sup>9</sup> The City of Glendale publicly financed the construction of a new arena for the Coyotes, Jobing.com arena.<sup>10</sup> The City and the Coyotes executed a lease agreement, whereby the franchise pays the city only about \$2.2 million per year in annual rent, ticket surcharges, and other fees.<sup>11</sup> In exchange, the Coyotes committed to play home games in the newly-built arena for the next 30 years, subject to an early termination fee of over \$700 Million.<sup>12</sup> In September of 2006, Moyes purchased most of the shares of his co-owners, resulting in Moyes and his wife Vickie owning slightly over 91% of the Coyotes franchise.<sup>13</sup>

### III. Lead-Up to Bankruptcy Filing

Since its move from Winnipeg in 1995, the Coyotes franchise has struggled to be profitable. Even after remedying the aforementioned arena issues in Phoenix by moving to the publicly funded Jobing.com arena in nearby Glendale, the franchise still could not turn a profit. In the 2006 fiscal year, during which Moyes purchased a super-majority interest in the Coyotes, the franchise produced \$54,078,000 in revenues against \$75,947,000 in expenses, resulting in a loss of \$21,870,000.<sup>14</sup> Similarly, over the course of the next two years, the franchise had losses of \$29,511,000 and \$21,727,000.<sup>15</sup> In order to cover the Coyotes' financial losses and keep the team operating, Moyes personally advanced the team over \$300 Million.<sup>16</sup>

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<sup>8</sup> Statement of Facts at 3, In re Dewey Ranch Hockey, LLC, No. 2:09-bk-09488, 2009.

<sup>9</sup> Statement of Facts at 3, In re Dewey Ranch Hockey, LLC, No. 2:09-bk-09488, 2009.

<sup>10</sup> The City of Glendale provided \$324 Million of the costs to build the stadium. Pat Garofalo and Travis Waldron, *The Atlantic*, <http://www.theatlantic.com/business/archive/2012/09/ifyou-build-it-they-might-not-come-the-risky-economics-of-sports-stadiums/260900/>.

<sup>11</sup> Pat Garofalo and Travis Waldron, *The Atlantic*, <http://www.theatlantic.com/business/archive/2012/09/if-you-build-it-they-might-not-come-the-riskyeconomics-of-sports-stadiums/260900/>.

<sup>12</sup> Ryan Gauthier, In re Dewey Ranch Hockey, 1 Harv. J. Sports & Ent. L. 181, 184 (2010).

<sup>13</sup> Statement of Facts at 4, In re Dewey Ranch Hockey, LLC, No. 2:09-bk-09488, 2009.

<sup>14</sup> Statement of Facts at 8, In re Dewey Ranch Hockey, LLC, No. 2:09-bk-09488, 2009.

<sup>15</sup> Statement of Facts at 8, In re Dewey Ranch Hockey, LLC, No. 2:09-bk-09488, 2009.

Moyes became disillusioned with the financial failures of the Coyotes, and notified the NHL in November of 2008 that he would no longer provide the team with financing to cover its losses.<sup>17</sup>

The NHL was determined to keep the Coyotes in business and located in Arizona. The NHL views the non-traditional markets of the southern United States as vital areas of expansion.<sup>18</sup> This is a continuing trend, as prior to 1990, only four teams were located south of the 40th parallel.<sup>19</sup> Today, half of the NHL teams are located south of the 40th parallel (15 teams).<sup>20</sup> If the Coyotes moved to Canada, which is already saturated with professional hockey teams, the NHL fears it might lose an entire segment of fans in that region of the American southwest.

After Moyes refused to loan the team any more money, the NHL stepped in to offer help to the franchise. Specifically, the NHL gave the Coyotes \$31.4 million in cash advances against its share of league shared revenues in the 2008-2009 season.<sup>21</sup> Furthermore, the NHL also extended the Coyotes a line of credit, \$13.4 million of which the Coyotes had used.<sup>22</sup>

In 2009, the Moyes group prepared confidential investor materials for potential purchasers of the Phoenix Coyotes and began actively searching for viable purchasers.<sup>23</sup> In April of 2009, a prospective buyer from Canada emerged that wanted to move the franchise to Southern Ontario.<sup>24</sup> This purchaser was Jim Balsillie, the co-CEO of Research in Motion, represented through PSE Sports and Entertainment LP (“PSE”).<sup>25</sup>

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<sup>16</sup> *In re Dewey Ranch Hockey, LLC*, 406 B.R. 30, 33 (Bankr. D. Ariz. 2009).

<sup>17</sup> Statement of Facts at 11, *In re Dewey Ranch Hockey, LLC*, No. 2:09-bk-09488, 2009.

<sup>18</sup> Tom Van Riper, The NHL's Best Hope: Contraction, *Forbes*, <http://www.forbes.com/sites/tomvanriper/2012/12/13/the-nhls-best-hope-contraction>.

<sup>19</sup> Tom Van Riper, The NHL's Best Hope: Contraction, *Forbes*, <http://www.forbes.com/sites/tomvanriper/2012/12/13/the-nhls-best-hope-contraction>.

<sup>20</sup> Tom Van Riper, The NHL's Best Hope: Contraction, *Forbes*, <http://www.forbes.com/sites/tomvanriper/2012/12/13/the-nhls-best-hope-contraction>.

<sup>21</sup> Statement of Facts at 9, *In re Dewey Ranch Hockey, LLC*, No. 2:09-bk-09488, 2009.

<sup>22</sup> Statement of Facts at 9, *In re Dewey Ranch Hockey, LLC*, No. 2:09-bk-09488, 2009.

<sup>23</sup> *In re Dewey Ranch Hockey, LLC*, 406 B.R. 30, 34 (Bankr. D. Ariz. 2009).

<sup>24</sup> *Id.*

<sup>25</sup> *Id.*

It was PSE's third attempt to purchase an NHL team.<sup>26</sup> PSE first attempted to purchase the Pittsburgh Penguins in 2006. While PSE was approved as a buyer by the NHL, the parties could not agree on the final terms of the transaction in writing.<sup>27</sup> Specifically, PSE was interested in potentially moving the Penguins, and the NHL virulently opposed such a provision in the agreement.<sup>28</sup> Subsequently, in 2007, PSE entered into a non-binding agreement to purchase the Nashville Predators.<sup>29</sup> This deal, however, also did not pan out.<sup>30</sup>

PSE demanded, among other things, that the sale of the Coyotes would be free and clear of any NHL objections to relocation and also of any lease obligations with the arena in Glendale, Arizona.<sup>31</sup> Unfortunately for Moyes, any transfer of ownership or relocation of an NHL franchise can only be made with the consent and approval of the NHL.<sup>32</sup> As previously mentioned, the NHL did not want to relocate the Coyotes, because it viewed Arizona as a vital market to expand the NHL brand, compared to the oversaturated market of Canada.<sup>33</sup> The NHL Commissioner, Gary Bettman, vehemently opposed this sale and relocation of the Coyotes. When it became clear that the sale would not go through, the Coyotes filed for Chapter 11 bankruptcy protection on May 5, 2009.<sup>34</sup>

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<sup>26</sup> Ryan Gauthier, *In re Dewey Ranch Hockey*, 1 Harv. J. Sports & Ent. L. 181, 184 (2010). Balsillie's previously attempted (and failed) to purchase the Pittsburgh Penguins and the Nashville Predators. The failed purchase of the Predators was particularly embarrassing, as he caused an uproar among Predators fans by season tickets to the "Hamilton Predators" prior to a consummated sale of the team.

<sup>27</sup> Hearing on the Sale of the Phoenix Coyotes at 6, *In re Dewey Ranch Hockey, LLC*, No. 2:09-bk-09488, 2009.

<sup>28</sup> Hearing on the Sale of the Phoenix Coyotes at 6, *In re Dewey Ranch Hockey, LLC*, No. 2:09-bk-09488, 2009.

<sup>29</sup> Ryan Gauthier, *In re Dewey Ranch Hockey*, 1 Harv. J. Sports & Ent. L. 181, 184 (2010).

<sup>30</sup> Ryan Gauthier, *In re Dewey Ranch Hockey*, 1 Harv. J. Sports & Ent. L. 181, 184 (2010).

<sup>31</sup> Motion of the Debtors for an Order Under Sections 105(a), 363, and 365 of the Bankruptcy Code at 18-19, *In re Dewey Ranch Hockey, LLC*, No. 2:09-bk-09488, 2009.

<sup>32</sup> Motion of the Debtors for an Order Under Sections 105(a), 363, and 365 of the Bankruptcy Code at 19, *In re Dewey Ranch Hockey, LLC*, No. 2:09-bk-09488, 2009.

<sup>33</sup> Motion of the Debtors for an Order Under Sections 105(a), 363, and 365 of the Bankruptcy Code at 19, *In re Dewey Ranch Hockey, LLC*, No. 2:09-bk-09488, 2009.

<sup>34</sup> Voluntary Petition, *In re Dewey Ranch Hockey, LLC*, No. 2:09-bk-09488, 2009.



This bankruptcy case was expected to have wide-ranging consequences for the professional sports industry as a whole. Never before in the history of a United States professional sports league had a team filed bankruptcy in an attempt to get the bankruptcy court to force a sale and relocation of the franchise, in derogation of the league's rules and procedures.<sup>35</sup>

#### **IV. Players in the Case**

##### **Judge Redfield T. Baum**

Judge Baum was appointed to the United States Bankruptcy Court, District of Arizona in 1990 and served until he was succeeded by Edward Philip Ballinger, Jr. in 2013. He received his Juris Doctorate from Arizona State University College of Law in 1973 and practiced privately for 20 years before taking the bench.<sup>36</sup> He was a partner at O'Connor, Cavanagh, Anderson, Westover, Killingsworth & Beshears law which was one of the largest firms in Arizona at the time Judge Baum worked there. In 2000, Judge Baum was chosen as one of the "10 outstanding bankruptcy judges" by the bankruptcy publication, *Turnarounds & Workouts*.

##### **Thomas J. Solerno**

At the time of this present litigation and still to present day, Mr. Solerno is a partner at the firm of Squire Sanders<sup>37</sup> He is currently the co-chair of the firm's international restructuring practice. He has been listed as one of the twelve Outstanding Bankruptcy Attorneys in 1998 and 2000 by *Turnarounds & Workouts*. He has represented parties in insolvency proceedings in 30 states and five countries and lists his work as counsel for the Phoenix Coyotes among his proudest legal achievements.<sup>38</sup>

##### **Anthony W. Clark**

Mr. Clark is a partner at Skadden, Arps, Slate, Meagher & Flom and represented the NHL in this case. He works in the corporate restructuring and corporate securities areas. He has

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<sup>35</sup> *In re Dewey Ranch Hockey*, 406 B.R. 30, 35 (Bankr. D. Ariz. 2009).

<sup>36</sup> See Redfield T. Baum, Judgepedia, [http://judgepedia.org/index.php/Redfield\\_T.\\_Baum](http://judgepedia.org/index.php/Redfield_T._Baum) (last visited Mar. 19, 2013.)

<sup>37</sup> At the time of this litigation the firm operated under the name Squires, Sander & Dempsey. In 2012, after merging with the U.K. based Hammonds, Squire, Sanders & Dempsey decided to drop Dempsey from the firm name. See *Squire Sanders Bids Farewell to Dempsey*, The AM Law Daily, <http://amlawdaily.typepad.com/amlawdaily/2012/01/squire-sanders-shortens-name.html> (Jan 12, 2012).

<sup>38</sup> See Thomas J. Solerno, Squire Sanders, <http://www.squiresanders.com/tsalerno/>, (last visited Mar. 19, 2013).

represented many creditors in chapter 11 cases.<sup>39</sup> Prior to entering private practice, Mr. Clark was a clerk at the Delaware Superior Court level and also clerked for Judge John McNeilly of the Delaware Supreme Court from 1980-1981.

### **William R. Baldiga**

Mr. Baldiga represented the City of the Glendale in the case at bar. Mr. Baldiga is a partner at Brown Rudnick and practices primarily out of the New York office. He is the managing partner of the Litigation & Restructuring division. He often represents middle market companies in chapter 11 proceedings and has expertise in bankruptcy litigation, especially in the area of plan confirmation contests.<sup>40</sup>

## **V. First Day Orders**

A hearing to take up the first day motions was held on May 5, 2009 in the United States Bankruptcy Court District of Arizona before Judge Redfield T. Baum.<sup>41</sup> The elephant in the room and a pervasive theme throughout the hearing was what the parties deemed the “control issue.”<sup>42</sup> In short, the NHL claimed that Mr. Moyes, his wife, and Mr. Shumway executed proxies in favor of the Commissioner of the National Hockey League. According to the NHL, these proxies gave the Commissioner right to exercise control over the debtor entities. Attorneys for the Debtors claimed that the proxies in question only ceded voting rights to the Commissioner, not managing rights, and that even if the proxies were interpreted as the NHL contended, the NHL did not act as if it had the power it now claims to have had. However, Judge Baum refused to address this issue during the May 5th hearing because briefs had yet to be filed on the issue.<sup>43</sup>

On the first day, Debtor’s attorneys filed 10 motions: a “Motion to Consolidate the Docket”, a “Motion to Change Hearing Location,” a “Motion to Extend Time to File Statements and Schedules,” a “Motion to Prepare a Consolidated List of Creditors,” a “Motion to Maintain

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<sup>39</sup> Anthony W. Clark, Skadden, <http://www.skadden.com/professionals/anthony-w-clark>, (last visited Mar. 19, 2013).

<sup>40</sup> William R. Baldiga, Brown Rudnick, <http://www.brownrudnick.com/people-detail/baldiga-william-r>, (last visited Mar. 19, 2013).

<sup>41</sup> Transcript of May 7, 2009 Hearing at 2, 406 B.R. 30 (Bankr. D. Ariz. 2009) (No. 2:09-bk-09488-RTBP).

<sup>42</sup> Transcript of May 19, 2009 Hearing at 18, 406 B.R. 30 (Bankr. D. Ariz. 2009) (No. 2:09-bk-09488-RTBP).

<sup>43</sup> See Transcript of May 7, 2009 Hearing at 6, 406 B.R. 30 (Bankr. D. Ariz. 2009) (No. 2:09-bk-09488-RTBP).

Existing Bank Accounts and Business Forms,” a “Motion to Establish Adequate Assurance Procedures For Utilities,” a “Motion to Employ Ordinary Course Professionals,” a “Motion to Pay Prepetition Amounts Owed to Employees,” a “Motion for Payment of Prepetition Taxes,” and a “Motion to Retain Squire, Sanders & Dempsey as Counsel.”

### **Motion to Consolidate the Docket**

After setting the schedule for the next hearing, the attorneys then moved on to more of the traditional first day motions that you see in a bankruptcy case of this type. First, the events leading up to the instant litigation involved four separate Debtors, all of which filed independent bankruptcy actions. These Debtors included Dewey Ranch Hockey, LLC, Coyotes Holdings, LLC, Coyotes Hockey, LLC, and Arena Management Group LLC.<sup>44</sup> All the aforementioned entities were under the control of the Moyes group. A motion was granted to consolidate the docket into the earliest filed docket, *Dewey Ranch, LLC*.<sup>45</sup> This would make administration of the case easier and eliminate duplicative filings. Second, Debtor’s counsel brought a motion to confirm the Debtors ordinary course of business in imposition of the automatic stay.<sup>46</sup> Debtors reasoned that an order that the debtors can hand to vendors stating that an automatic stay is in place and that the debtors are authorized to operate in the ordinary course of business would alleviate the need to file show cause orders with respect to stay violations. Judge Baum granted a stipulated order between the debtor and the United States Trustee with respect to this motion.

### **Motion to Change Hearing Location**

Third, Debtor’s counsel moved to change the hearing location for the case. The case was supposed to be heard in Prescott, Arizona because Dewey Ranch Hockey, LLC was located in Yavapai County and it was the first case filed into which the other three cases were consolidated. The local rules of court provided that “[u]nless otherwise directed by the court . . . [c]ases originating in Coconino, Mohave, and Yavapai Counties shall be heard in Prescott, Flagstaff, or Bullhead city as the court may direct.”<sup>47</sup> That being said, the other three Debtor entities were located in Phoenix and the attorneys for all parties resided in Phoenix. Judge Baum granted an

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<sup>44</sup> See Motion for Joint Administration Motion for an Order Authorizing and Directing Joint Administration and Use of Consolidated Caption at 1, 406 B.R. 30 (Bankr. D. Ariz. 2009) (No. 2:09-bk-09488-RTBP).

<sup>45</sup> Transcript of May 7, 2009 Hearing at 18, 406 B.R. 30 (Bankr. D. Ariz. 2009) (No. 2:09-bk-09488-RTBP).

<sup>46</sup> Transcript of May 7, 2009 Hearing at 18, 406 B.R. 30 (Bankr. D. Ariz. 2009) (No. 2:09-bk-09488-RTBP).

<sup>47</sup> Proposed Agenda for First Day Hearing and Related Matters at 3, 406 B.R. 30 (Bankr. D. Ariz. 2009) (No. 2:09-bk-09488-RTBP).

order moving the hearing locations to Phoenix for the mutual convenience of the parties involved.<sup>48</sup> Judge Baum himself was located primarily in Phoenix but was also at the time the presiding judge over the Prescott calendar meaning that he periodically traveled to Prescott to hold court.

### **Motion to Extend Time to File Statements and Schedules**

Fourth, was a motion to extend the time to file statements and schedules.<sup>49</sup> Interestingly, Mr. Baldiga, representing the City of Glendale, objected to this motion on the grounds that it was premature. Mr. Baldiga argued that if the debtor requested a sale hearing, which the city would oppose, he wanted there to be schedules on file already. Mr. Singer for the Debtors withdrew his motion and agreed to comply with the 15 day schedule mandated by the Bankruptcy Code.

### **Motion to Prepare a Consolidated List of Creditors**

The fifth motion heard was Debtor's motion seeking an order to prepare a consolidated list of creditors in lieu of having to file a separate list for each of the jointly administered cases.<sup>50</sup> Piggy backing on the earlier motion to consolidate the docket, this motion sought to make it easier on debtors by not requiring each debtor entity to list its 40 largest unsecured creditors. Debtors instead sought to file a consolidated list of the top 40 largest unsecured creditors for all debtor entities. The U.S. Trustee interjected here to clear up some confusion on what he was requesting in regards to unsecured creditors. At this point, the U.S. Trustee sought each debtor entity to provide a list of the 20 largest unsecured creditors but would not be opposed to creation of a consolidated list should it become beneficial. The principle purpose of these lists were to allow the U.S. Trustee to solicit creditors to serve on the creditor's committee. Judge Baum granted a stipulated order with the U.S. Trustee to that effect.

### **Motion to Maintain Existing Bank Accounts and Business Forms**

The sixth of these first day motions to be taken up by the court was a motion to maintain the existing bank accounts and existing business forms as used in the ordinary course of business.<sup>51</sup> This is a common motion where the debtor entity seeks to avoid the expense of having to print or modify existing forms and accounts. Debtor's counsel argued that the pervasive media coverage would be sufficient to put anyone doing business with the coyotes on

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<sup>48</sup> Transcript of May 7, 2009 Hearing at 21, 406 B.R. 30 (Bankr. D. Ariz. 2009) (No. 2:09-bk-09488-RTBP).

<sup>49</sup> Transcript of May 7, 2009 Hearing at 22, 406 B.R. 30 (Bankr. D. Ariz. 2009) (No. 2:09-bk-09488-RTBP).

<sup>50</sup> Transcript of May 7, 2009 Hearing at 24, 406 B.R. 30 (Bankr. D. Ariz. 2009) (No. 2:09-bk-09488-RTBP).

<sup>51</sup> See Transcript of May 7, 2009 Hearing at 26, 406 B.R. 30 (Bankr. D. Ariz. 2009) (No. 2:09-bk-09488-RTBP).

notice that they were in Chapter 11. Again, the U.S. Trustee took up this motion arguing that the accounts in question be internally labeled as DIP accounts. Mr. Baldiga, for the City of Glendale, raised an issue relating to the contract between the City and Debtors in which \$2.60 per ticket sold was to be set aside for the city in a trust account. Debtor's counsel agreed to, without admitting that the funds in question were segregated trust funds or trust funds in general, set the requested ticket proceeds aside until the issue was properly before the court. Judge Baum issued two stipulated orders, the first was a general order between the U.S. Trustee and Debtor and the second was specifically regarding the ticket sales trust between the Debtor and City of Glendale.

### **Motion to Establish Adequate Assurance Procedures for Utilities**

The seventh motion of the day was a motion to establish adequate assurance procedures for utilities.<sup>52</sup> The Debtors were concerned that they would not be able to maintain utilities services for their various facilities. The court held that this motion was premature because at this point it was still within the statutory period before a utility provider could take action. Consequently, this motion was to be continued until the May 18th hearing.

### **Motion to Employ Ordinary Course Professionals**

The eighth motion was a motion to employ ordinary course professionals.<sup>53</sup> In this case, there were only "five outfits", as Judge Baum put it, that the Debtor was seeking to employ. Judge Baum found no pressing need to grant a motion to employ these professionals and allow them to skip the ordinary fee application and formal application process. Debtor's counsel consequently withdrew the motion.

### **Motion to Pay Prepetition Amounts Owed to Employees**

The ninth motion was what many deem to be the most important of any set of first day motions, a motion to pay prepetition amounts owed to employees. Not only does a debtor want to pay its employees out of a sense of fairness and loyalty but it also wants the employee to keep working. A Reuters survey recently concluded that more than two-thirds of Americans live paycheck to paycheck.<sup>54</sup> If the debtor cannot keep paying the employees they simply cannot keep working and will have to find other jobs quickly due to a lack of savings. Debtors in this case had approximately 524 employees with prepetition claims and a little over three hundred

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<sup>52</sup> Transcript of May 7, 2009 Hearing at 32, 406 B.R. 30 (Bankr. D. Ariz. 2009) (No. 2:09-bk-09488-RTBP).

<sup>53</sup> Transcript of May 7, 2009 Hearing at 34, 406 B.R. 30 (Bankr. D. Ariz. 2009) (No. 2:09-bk-09488-RTBP).

<sup>54</sup> See Jim Forsyth, *More than two-thirds in U.S. live paycheck to paycheck: survey*, REUTERS, <http://www.reuters.com/article/2012/09/19/us-usa-survey-paycheck-idUSBRE88I1BE20120919> (Sept. 19, 2012).

thousand dollars in payroll expenses that they sought to pay. This number broke down into \$195,000 owed in hourly and salary wages,<sup>55</sup> \$100,000 owed in possible commissions, \$6,000 owed in dental and health plan premiums, and \$6,600 in matching 401k contributions. Debtors made it clear that they did not intend to pay any individual over the \$10,950 priority amount. Judge Baum issued an interim order, stipulated between the U.S. Trustee and Debtor but the Debtor was to provide a list of the amounts and names for all payments seeking to be made to both the U.S. Trustee's office and to be filed with the court.

### **Motion for Payment of Prepetition Taxes**

The tenth first day motion was a motion for payment of prepetition taxes. At the time of this hearing, Debtors owed approximately \$100,000 in sales taxes and \$500 in franchise taxes. Debtors sought permission to pay these taxes to avoid non-debtor parties being held liable for the failure to do so. This motion was unopposed and granted.

### **Motion to Retain Squire, Sanders & Dempsey as Counsel**

Finally, the last of the first day motions was the one that was probably most important to Debtor's counsel. This was the motion for Squire, Sanders & Dempsey to be retained by the Debtors as counsel which was granted.<sup>56</sup>

## **VI. The "Control Issue"**

The court dealt with the much anticipated "control issue" at the March 19, 2009 hearing. This issue rested largely on the interpretation of a proxy statement issued by Mr. Moyes to the NHL Commissioner. The debate regarding this proxy was to a large degree the result of imprecise drafting and a failure to clearly define what rights the Moyes Group was giving up in the November 14, 2008 proxy statement.<sup>57</sup> If the Moyes Group merely gave the NHL Commissioner a proxy granting the Commissioner the *shareholder* rights that Moyes possessed, then the Moyes Group would not have given up control of the Coyotes. Generally speaking, a shareholder has the right to vote on the election of directors and management as opposed to directly controlling the enterprise. However, if the proxy was concerning Moyes' rights as a

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<sup>55</sup> Player salaries were not included in this figure. See Transcript of May 7, 2009 Hearing at 37, 406 B.R. 30 (Bankr. D. Ariz. 2009) (No. 2:09-bk-09488-RTBP).

<sup>56</sup> Of interest for later developments in the case is the dialogue related to this motion in which Mr. Singer of Squire, Sanders & Dempsey acknowledges that should the NHL prevail on the control issue it will likely decide to appoint other counsel to run the bankruptcy case.

<sup>57</sup> See Motion to Determine 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 at 7, 406 B.R. 30 (Bankr. D. Ariz. 2009) (No. 2:09-bk-09488-RTBP).

director, then the NHL could have a legitimate claim to control over the Coyotes from the date the proxy was executed. Unfortunately, the proxy statement was ambiguous on this point and did not clearly indicate one way or the other.<sup>58</sup>

Mr. Clark, representing the NHL, argued first. According to Mr. Clark, the NHL's position was a straightforward application of the facts. First and foremost, Mr. Moyes, Mr. Shumway, and Mr. Moyes' wife executed proxies in favor of the Commissioner of the NHL on November 14, 2008.<sup>59</sup> Moreover, those proxies stated "in clear and unambiguous language on their face" that they were to have "immediate effect" giving the NHL control of the debtor entities.<sup>60</sup> However, the NHL's position became slightly less clear when Mr. Clark was questioned by Judge Baum. Judge Baum had Mr. Clark read through the operative provisions of the proxy statement in question and pointed out that in fact the proxy was anything but clear and unambiguous. Specifically the Judge pointed to the second paragraph of the proxy statement which contained one very long sentence that made it unclear whether the rights being granted to the NHL Commissioner were management rights or merely voting rights.<sup>61</sup>

However, Judge Baum was able to clarify the NHL's core position regarding when the proxy came into effect. The NHL argued not that anything that the Moyes group did after November 14, 2008 was without authority but rather that anything the Moyes Group did after that date without the NHL's consent and permission was void.<sup>62</sup> Judge Baum then sought to take Mr. Clark through the actions taken by the Moyes group after November 14, 2008 and asked Mr. Clark to point out where the NHL consented to these actions. The only document which had any NHL consent was a February 2009 loan document.<sup>63</sup> Moreover, as Judge Baum pointed out, in all the materials filed with the court for this case there was no document where the NHL listed

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<sup>58</sup> See Motion to Determine 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 at 7, 406 B.R. 30 (Bankr. D. Ariz. 2009) (No. 2:09-bk-09488-RTBP).

<sup>59</sup> See Transcript of May 19, 2009 Hearing at 18, 406 B.R. 30 (Bankr. D. Ariz. 2009) (No. 2:09-bk-09488-RTBP).

<sup>60</sup> Transcript of May 19, 2009 Hearing at 19, 406 B.R. 30 (Bankr. D. Ariz. 2009) (No. 2:09-bk-09488-RTBP).

<sup>61</sup> See Motion to Determine 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 at 7, 406 B.R. 30 (Bankr. D. Ariz. 2009) (No. 2:09-bk-09488-RTBP).

<sup>62</sup> Transcript of May 19, 2009 Hearing at 18, 406 B.R. 30 (Bankr. D. Ariz. 2009) (No. 2:09-bk-09488-RTBP).

<sup>63</sup> Transcript of May 19, 2009 Hearing at 25, 406 B.R. 30 (Bankr. D. Ariz. 2009) (No. 2:09-bk-09488-RTBP).

what actions the Moyes group could and could not take after to the November 14, 2008 proxy signings.<sup>64</sup> Mr. Clark argued that though it may have not been reduced to writing, the NHL had officials in place who were advising the Moyes Group on what actions they could or could not take. That said, as Judge Baum pointed out, there was also no record of the NHL Commissioner designating anyone to execute the proxy on his behalf. Therefore, that authority rested solely with him.

Mr. Clark next argued that the most important point was that the proxy gave “sole and exclusive” power to the commissioner.<sup>65</sup> When questioned on where this language appeared in the proxy statement, Mr. Clark admitted that the document never used that exact quotation. He went on to state that the implication of the entire document was to give the Commissioner that power. Judge Baum took issue with this argument due to the fact that Mr. Clark began his argument by emphatically stating that the document was clear and unambiguous on its face.<sup>66</sup> Why would one need to interpret the document that is clear and unambiguous on its face?

Judge Baum then returned to the issue of when the NHL thought these proxies removed the Moyes Group from power over the management decisions for the Coyotes. Mr. Clark stated that Mr. Moyes was allowed to retain his position within the organization to avoid public embarrassment but that it was understood internally that he no longer had management authority.<sup>67</sup> That said, it was not until May 5, 2009 that the commissioner exercised a document removing Mr. Moyes from all officer and director authoritative positions.<sup>68</sup> Assuming Moyes was actually not removed from his managerial positions until May 5, 2009, which was after the bankruptcy proceeding was filed and the automatic stay imposed, the question became whether the NHL’s action of removing Moyes was a violation of the automatic stay. The NHL argued that this was not a violation of the automatic stay, citing the case of *Marvel Entertainment* as

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<sup>64</sup> Transcript of May 19, 2009 Hearing at 25, 406 B.R. 30 (Bankr. D. Ariz. 2009) (No. 2:09-bk-09488-RTBP).

<sup>65</sup> Transcript of May 19, 2009 Hearing at 27, 406 B.R. 30 (Bankr. D. Ariz. 2009) (No. 2:09-bk-09488-RTBP).

<sup>66</sup> Transcript of May 19, 2009 Hearing at 27-29, 406 B.R. 30 (Bankr. D. Ariz. 2009) (No. 2:09-bk-09488-RTBP).

<sup>67</sup> Transcript of May 19, 2009 Hearing at 25-26, 406 B.R. 30 (Bankr. D. Ariz. 2009) (No. 2:09-bk-09488-RTBP).

<sup>68</sup> Transcript of May 19, 2009 Hearing at 32, 406 B.R. 30 (Bankr. D. Ariz. 2009) (No. 2:09-bk-09488-RTBP).



authority for this proposition. Judge Baum, believing this issue tangential to the main control issue, told Mr. Clark to hold off on making that portion of his argument.<sup>69</sup>

Judge Baum continued hammering away at the execution of the proxies issue. He next questioned Mr. Clark about the November 21, 2009 loan agreement that was executed between the NHL and Moyes entities. Judge Baum told Mr. Clark that this loan between the NHL and the Coyotes was signed on behalf of the Coyotes by Mr. Shumway, Mr. Moyes, and Mrs. Moyes. The Judge then asked Mr. Clark who gave the Clarks and Mr. Shumway the authority to sign that loan. If the NHL truly was in control of the Moyes Group at that point, it would stand to reason that the Moyes Group would need to get permission to enter into a multi-million dollar loan. In the first of many times, Mr. Clark defaulted to the response of “if it was done, the NHL allowed it.”<sup>70</sup> Unable to find specific justification for various actions taken after the November 14, 2008 proxy signing, Mr. Clark took the position that all actions taken after that point that the NHL did not stop, in effect granted permission for said actions to occur. Judge Baum seemed skeptical of this line of reasoning and brought up the fact that the NHL did not act as if they had full control over the Coyotes in their dealings with the Coyotes after November 14, 2008.<sup>71</sup> Finally, Judge Baum asked Mr. Clark what legal standard should be applied to the control motion. Mr. Clark responded that the court should apply a summary judgment standard.

Mr. Solerno, on behalf of the Debtors, began his argument by bringing up the aforementioned ambiguous proxy statement.<sup>72</sup> According to Mr. Solerno the NHL wanted to cut off the sentence in the middle and not give the entire sentence its full effect. When the entire language of the November 14, 2008 proxy was read, it merely gave the NHL control over voting rights and not managing rights of the Coyotes.<sup>73</sup> Mr. Solerno continued by arguing that a proxy in and of itself was a document that was concerned solely with voting rights. He provided a definition from Black’s Law Dictionary which he interpreted to that effect. Judge Baum disagreed to some degree with this characterization of a proxy. Mr. Solerno sought to drive the point home by pointing out the places where the rights being relinquished are associated with

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<sup>69</sup> Transcript of May 19, 2009 Hearing at 35, 406 B.R. 30 (Bankr. D. Ariz. 2009) (No. 2:09-bk-09488-RTBP).

<sup>70</sup> Transcript of May 19, 2009 Hearing at 38, 406 B.R. 30 (Bankr. D. Ariz. 2009) (No. 2:09-bk-09488-RTBP).

<sup>71</sup> Transcript of May 19, 2009 Hearing at 38, 406 B.R. 30 (Bankr. D. Ariz. 2009) (No. 2:09-bk-09488-RTBP).

<sup>72</sup> Transcript of May 19, 2009 Hearing at 54, 406 B.R. 30 (Bankr. D. Ariz. 2009) (No. 2:09-bk-09488-RTBP).

<sup>73</sup> Transcript of May 19, 2009 Hearing at 60, 406 B.R. 30 (Bankr. D. Ariz. 2009) (No. 2:09-bk-09488-RTBP).

voting rights.<sup>74</sup> Mr. Solerno next argued that the proxy document and subsequent documents failed to name any new managing members. He also argued that the NHL did not act as if they owned the Debtor between November of 2008 and May 5th of 2009 when Moyes was removed. He then argued that the NHL ruled with such a light touch that they were the only ones that thought they were in control prior to May 5, 2009. In this vein, Mr. Solerno pointed to the lack of any written delegations of authority to various NHL employees. Instead, by all outward appearances, Mr. Moyes was still in control until May 5, 2009. Finally, Mr. Solerno briefly stated his position on the automatic stay issue and that he believed the NHL's actions of removing Moyes after the imposition of the automatic stay to be a violation of the automatic stay.

After questioning my Solerno on the proxy issue, Judge asked for the legal standard that should apply to this motion and Mr. Solerno agreed that it was a summary judgment standard.<sup>75</sup> He next asked if this entire issue might be moot. As he saw it, there was going to be a sale of the team sometime between May and July of 2009 and who was running the team until then seemed somewhat irrelevant. Mr. Solerno responded that the issue became what sale procedures were to be used.<sup>76</sup> This brought up the tension between Mr. Moyes' desire to sell to the stalking horse bidder from Canada without the NHL's approval of this bidder and the NHL's desire to have control over who the buyer of the Coyotes was in order to preserve the integrity of the league.

At the close of this hearing Judge Baum took the matter under advisement and ordered the parties to undergo a quick mediation on the control issue. Mr. Baldiga, representing the City of Glendale, sought to have the city involved as a party to this mediation. Judge Baum was reluctant because he thought the City was not in the position to be in "control" of the Coyotes and that adding the City to a mediation where the parties already have so little common ground could doom the process.<sup>77</sup> Moreover, the City would get an opportunity to object to the mediated agreement if one was reached before it was approved.<sup>78</sup> In the end, the court ordered the parties

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<sup>74</sup> Transcript of May 19, 2009 Hearing at 62, 406 B.R. 30 (Bankr. D. Ariz. 2009) (No. 2:09-bk-09488-RTBP).

<sup>75</sup> Transcript of May 19, 2009 Hearing at 64, 406 B.R. 30 (Bankr. D. Ariz. 2009) (No. 2:09-bk-09488-RTBP).

<sup>76</sup> Transcript of May 19, 2009 Hearing at 64, 406 B.R. 30 (Bankr. D. Ariz. 2009) (No. 2:09-bk-09488-RTBP).

<sup>77</sup> Transcript of May 19, 2009 Hearing at 105-08, 406 B.R. 30 (Bankr. D. Ariz. 2009) (No. 2:09-bk-09488-RTBP).

<sup>78</sup> Transcript of May 19, 2009 Hearing at 105-08, 406 B.R. 30 (Bankr. D. Ariz. 2009) (No. 2:09-bk-09488-RTBP).

to quickly mediate the matter and set another hearing for May 27, 2009 at which the results of the mediation attempt would be discussed.

Before we get to the results of this mediated agreement, it is prudent to first take a step back and try to determine the answer to Judge Baum's question of why does it matter? Clearly this issue was one of the most important issues and a key point of contention early in the bankruptcy litigation. Moreover, the ruling in this case would have implications reaching farther than the immediate litigation as evidenced by the amicus briefs filed by the NFL, NBA, and MLB. The Statement of Position of the National Football League exemplifies these other professional sports leagues' positions on the matter. It emphasizes the NFL's concern over retaining the power to determine "its members and where its teams play."<sup>79</sup> Implicit in this right is the ability for these professional sports leagues to take struggling franchises and make them league owned until a more stable financial situation can be achieved.<sup>80</sup> The NFL argues that "any franchise sales procedure prescribed by the Court in this case should respect the National Hockey League's rules and procedures regarding ownership transfer and relocation and not set precedent that has the potential to undermine or disrupt the business of professional hockey, football and other major league sports."<sup>81</sup> This is at the heart of the control issue. If the Moyes group is in control of the bankruptcy sale they can try and circumvent the NHL's rules on franchise sale and relocation by using chapter 11 as a sale mechanism.

Despite only a short time to mediate, the parties were able to come to a mutually agreeable interim solution to the control issue.<sup>82</sup> As such, a stipulated order among the Debtors and NHL authorizing interim management was entered the day before the May 27th hearing. The parties agreed that day-to-day ordinary course business decisions would continue to be made by existing senior management.<sup>83</sup> However, two point persons, one from the NHL and one from the Debtors' organization, would be appointed to discuss business-type decisions with senior

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<sup>79</sup> Statement of Position of the National Football League at 1, 406 B.R. 30 (Bankr. D. Ariz. 2009) (No. 2:09-bk-09488-RTBP).

<sup>80</sup> The Los Angeles Dodgers bankruptcy situation provides a prime example of this behavior.

<sup>81</sup> Statement of Position of the National Football League at 1, 406 B.R. 30 (Bankr. D. Ariz. 2009) (No. 2:09-bk-09488-RTBP).

<sup>82</sup> Transcript of May 27, 2009 Hearing at 5, 406 B.R. 30 (Bankr. D. Ariz. 2009) (No. 2:09-bk-09488-RTBP).

<sup>83</sup> Transcript of May 27, 2009 Hearing at 5, 406 B.R. 30 (Bankr. D. Ariz. 2009) (No. 2:09-bk-09488-RTBP).

management.<sup>84</sup> These point persons would be expected to have, at minimum, weekly communications with senior management on ordinary course business decisions.<sup>85</sup> The intent here was to provide oversight for both sides and make sure that the current senior management was kept on a tight leash with plenty of oversight.

With respect to non-ordinary course business and operational matters, senior officers and managers of the organization would make recommendations to the point persons for both the NHL and Debtor.<sup>86</sup> If the point persons agree, then the action will go forward. However, if there was a disagreement on the non-ordinary course business action either party had the right to come into court and seek resolution of the disputed issue.<sup>87</sup>

Additional issues discussed in this mediated agreement included an agreement that the normal attorney - client protections would remain in place despite this co-party control. Debtors would not waive the attorney - client privilege related to the communications between counsel and senior officers in the Coyotes organization.<sup>88</sup>

As a final issue, the parties agreed that the motion on the control issue itself should be allowed to “ride the calendar” and that either party could ask the court to rule on the motion at a later date.<sup>89</sup> The hope of this mediated agreement was to allow the parties to focus on other issues in the bankruptcy case aside from who was in charge.

## **VII. The “Relocation Issue”**

Another central issue to the proposed 363 sale was whether or not the NHL could require the Phoenix Coyotes to remain located in Glendale Arizona. Judge Baum heard oral arguments on this issue in a June 12, 2009 hearing. The parties extensively briefed this issue — even making motions to exceed the court mandated page limits. Judge Baum granted these motions as

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<sup>84</sup> Transcript of May 27, 2009 Hearing at 5, 406 B.R. 30 (Bankr. D. Ariz. 2009) (No. 2:09-bk-09488-RTBP).

<sup>85</sup> Transcript of May 27, 2009 Hearing at 5, 406 B.R. 30 (Bankr. D. Ariz. 2009) (No. 2:09-bk-09488-RTBP).

<sup>86</sup> Transcript of May 27, 2009 Hearing at 6, 406 B.R. 30 (Bankr. D. Ariz. 2009) (No. 2:09-bk-09488-RTBP).

<sup>87</sup> Transcript of May 27, 2009 Hearing at 6, 406 B.R. 30 (Bankr. D. Ariz. 2009) (No. 2:09-bk-09488-RTBP).

<sup>88</sup> Transcript of May 27, 2009 Hearing at 6, 406 B.R. 30 (Bankr. D. Ariz. 2009) (No. 2:09-bk-09488-RTBP).

<sup>89</sup> Transcript of May 27, 2009 Hearing at 6, 406 B.R. 30 (Bankr. D. Ariz. 2009) (No. 2:09-bk-09488-RTBP).

this issue was central to any potential sale. The bidders would be completely different pending the outcome of this issue.

The debtor argued in its briefs and before the court that Bankruptcy Code section 363 authorizes a sale free and clear of adverse interests.<sup>90</sup> Moreover, an “interest” under the bankruptcy code, while not defined, has been interpreted by case law to “include all types of adverse claims as well as encumbrances.”<sup>91</sup> Therefore, the Coyotes’ membership in the NHL, which puts restrictions<sup>92</sup> on the actions NHL member teams can take, is merely an “interest” that can be disregarded in a section 363 sale. The NHL Constitution and Bylaws mention the relocation of a team numerous times; however, the Debtors argued that the sum total of the rights created by these documents still only amounted to an interest in the Coyotes.<sup>93</sup> Debtors next argue that the NHL interests as applied to the proposed sale of the assets in this case violate federal and state antitrust law.<sup>94</sup> Essentially the Debtors’ argument here was that the provisions of the NHL Constitution and Bylaws amounted to an unreasonable restraint on trade.<sup>95</sup>

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<sup>90</sup> See Debtors’ Memorandum of Points and Authorities in Support of Motion to Sell Substantially All of Coyotes Hockey’s Assets at 4, 406 B.R. 30 (Bankr. D. Ariz. 2009) (No. 2:09-bk-09488-RTBP).

<sup>91</sup> Debtors’ Memorandum of Points and Authorities in Support of Motion to Sell Substantially All of Coyotes Hockey’s Assets at 5, 406 B.R. 30 (Bankr. D. Ariz. 2009) (No. 2:09-bk-09488-RTBP).

<sup>92</sup> Article 3.5 of the NHL Constitution provides in pertinent part:

No membership or ownership interest in a Member Club may be sold, assigned or otherwise transferred except (a) with the consent of three-fourths of the members of the League, and (b) upon the condition that the transferee will at all times be bound by and comply with the terms, provisions and conditions of this Constitution, and (c) upon the further condition that the transferee shall assume or guarantee all debts, liabilities and obligations of the transferor member existing at the date of transfer.

Debtors’ Memorandum of Points and Authorities in Support of Motion to Sell Substantially All of Coyotes Hockey’s Assets at 7-8, 406 B.R. 30 (Bankr. D. Ariz. 2009) (No. 2:09-bk-09488-RTBP).

<sup>93</sup> See Debtors’ Memorandum of Points and Authorities in Support of Motion to Sell Substantially All of Coyotes Hockey’s Assets at 7-11, 406 B.R. 30 (Bankr. D. Ariz. 2009) (No. 2:09-bk-09488-RTBP).

<sup>94</sup> Debtors’ Memorandum of Points and Authorities in Support of Motion to Sell Substantially All of Coyotes Hockey’s Assets at 13, 406 B.R. 30 (Bankr. D. Ariz. 2009) (No. 2:09-bk-09488-RTBP).

Debtors continued by arguing that the NHL's contention that it could not relocate the team in time for the 2009-2010 season is without merit. Debtors cite the *In re Pacific Northwest Sports, Inc.*, Case No. 66822 (Bankr. W.D. Wash. 1970) as evidence of a distressed professional sports franchise that was quickly relocated.<sup>96</sup> Moreover, Debtors argued that in the *Pacific Northwest* case, the timetable for moving the team was even smaller than the proposed time table in the case at bar. In that case, the Judge approved the sale and relocation of a baseball team a mere twelve days after the commencement of the bankruptcy and only seven days before the start of the upcoming baseball season.<sup>97</sup> Debtors reason that compared to *Pacific Northwest*, the NHL in this case has plenty of time to fix scheduling and ministerial issues with the upcoming season.<sup>98</sup>

Debtors next argued that the NHL would still be adequately protected under section 363(e) of the Bankruptcy Code. Section 361 of the code supplies three different means for providing adequate protection to a non-consenting creditor in a bankruptcy sale: "(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."<sup>99</sup> Debtors sought to travel under the "indubitable equivalent" prong of section 361 which is essentially the catch all provision and allows the court to determine that the creditor in question is adequately protected. The Debtors argued that the stalking horse bidder, PSE Sports, would honor the NHL Constitution and Bylaws so this was the adequate protection to which the NHL was entitled to protect its interest. Moreover, the Debtors argued that they had the right to assume and assign executory contracts under Bankruptcy Code Section 365.

Finally the Debtors argue that withholding consent to an ownership on location transfer constitutes bad faith. The Debtors argued that NHL may not withhold "consent arbitrarily, or capriciously and...any decision to withhold its consent [must] be made in good faith."<sup>100</sup> Debtors

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<sup>95</sup> As authority for this assertion, Debtors argue that the "NHL's application of Articles 4.2 and 4.3 of the NHL Constitution and Sections 35 and 36 of the NHL By-Laws violate Sections 1 and 2 of the Sherman Act." *Id.* at 22.

<sup>96</sup> *Id.* at 34.

<sup>97</sup> *Id.* at 37-38.

<sup>98</sup> Debtors point out that "[d]espite a 162-game season, the American League managed to change its schedule to accommodate the sale of the Pilots to the Brewers, which occurred only six days before the beginning of the 1970 baseball season on April 7, 1970." *Id.* at 38.

<sup>99</sup> *Id.* at 42; see also 11 U.S.C. §361.

<sup>100</sup> *Id.* at 70.

argued that the only reason the NHL has refused to allow the team to relocate to Hamilton, Ontario was that Hamilton was a “league opportunity.”<sup>101</sup>

In responding to the Debtors’ arguments, the NHL began with the premise that the Debtors were attempting to sell rights that they did not own and that were not part of the estate.<sup>102</sup> The NHL first brought up the Debtors Sale Approval Motion. In that motion, the NHL believed the Debtors were seeking the right not to transfer their contractual rights as they presently existed but rather to transfer these rights with the following modifications: “(i) the right to transfer the Club without the consent of the League, (ii) the right to a ‘home territory’ in Hamilton, Ontario, and (iii) the extinguishment of the contractual requirement to compensate the League for the value of the Hamilton, Ontario ‘home territory.’”<sup>103</sup> However, under section 541 of the bankruptcy code, the debtor’s estate only acquires interest in property that the debtor itself had at the time of the filing.<sup>104</sup> Moreover, “[b]ecause the estate may take no greater interest than that held by the debtor, the estate takes the license subject to the restrictions imposed on the debtors by its transfer.”<sup>105</sup> The NHL argued that under its contracts with the Coyotes, the Debtors owned the right to “operate a hockey club in the Phoenix, Arizona ‘home territory’— nothing more.”<sup>106</sup>

The NHL next argued that the Debtors were seeking to transfer the team without transferring its membership in the NHL because of the Debtors refusal to honor NHL bylaws. Consequently, the buyer of the Coyotes would not have the ability to play as an NHL team or take advantage of any of the other membership benefits. The NHL’s reasoning behind this was that the Debtor, by trying to circumvent the sale approval procedures in the NHL membership contract, must not be trying to transfer the NHL membership contract. Thus, Debtors would

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<sup>101</sup> *Id.* at 73.

<sup>102</sup> Brief of National Hockey League’s Objection to Debtors’ Request to Sell the Phoenix Coyotes Under Sections 365 and 363 of the Bankruptcy Code, 406 B.R. 30 (Bankr. D. Ariz. 2009) (No. 2:09-bk-09488-RTBP).

<sup>103</sup> Brief of National Hockey League’s Objection to Debtors’ Request to Sell the Phoenix Coyotes Under Sections 365 and 363 of the Bankruptcy Code at 4-5, 406 B.R. 30 (Bankr. D. Ariz. 2009) (No. 2:09-bk-09488-RTBP).

<sup>104</sup> *See* 11 U.S.C. § 541(a)(1).

<sup>105</sup> *See* Brief of National Hockey League’s Objection to Debtors’ Request to Sell the Phoenix Coyotes Under Sections 365 and 363 of the Bankruptcy Code at 5, 406 B.R. 30 (Bankr. D. Ariz. 2009) (No. 2:09-bk-09488-RTBP) (citing *California v. Farmers Mkts., Inc.*, 792 F.2d 1400, 1403 (9th Cir. 1986)).

<sup>106</sup> *See* Brief of National Hockey League’s Objection to Debtors’ Request to Sell the Phoenix Coyotes Under Sections 365 and 363 of the Bankruptcy Code at 6, 406 B.R. 30 (Bankr. D. Ariz. 2009) (No. 2:09-bk-09488-RTBP).

merely be transferring the other assets of the Coyotes to the new buyer and would not assume that the new team would be an NHL member.<sup>107</sup>

The NHL next addressed the executory contract argument made by the Debtors. According to Bankruptcy Code section 365(f), in order to assume an executory contract and assign it the debtor must be able to cure all defaults and compensate for any pecuniary loss caused by said defaults.<sup>108</sup> According to the NHL, the Debtors could not cure the default. The Debtors did not plan to pay relocation and indemnity payments provided for in the NHL contracts with the Coyotes and they also would not be able to provide proof of adequate assurance of future performance. According to the NHL, this adequate assurance would have to come in the form of proof of non-monetary performance.<sup>109</sup> This performance would be the very thing that the Debtors had been saying they would not do—comply with the NHL’s Constitution and Bylaws regarding the sale practices.

The NHL further argued that the relocation could not proceed due to limitations imposed on it through partnership law. According to the NHL, the NHL is considered a joint venture among its thirty member clubs which collectively produce the product of NHL Hockey.”<sup>110</sup> Under partnership law, “a partner may not assign its partnership interests absent the consent of its partners.”<sup>111</sup> Therefore, the relocation cannot proceed unless the other partners agree. Consequently, this argument mirrors the approval procedures in the NHL Constitution which would require a vote of the other teams in the league.

Finally, the NHL claimed that there was no bona fide dispute over the NHL’s interests. This again was building on the argument that the Debtors were seeking to sell something they did not own. Section 363(f)(4) of the Bankruptcy Code allows a sale where there is an interest that is in “bona fide dispute” and the non-debtor is claiming a disputed interest in the property of the debtor. Here, the NHL argued that it was not trying to claim an interest in the property of the debtor. Rather it was merely trying to enforce rights associated with an interest it already had in

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<sup>107</sup> See Brief of National Hockey League’s Objection to Debtors’ Request to Sell the Phoenix Coyotes Under Sections 365 and 363 of the Bankruptcy Code at 7-8, 406 B.R. 30 (Bankr. D. Ariz. 2009) (No.2: 09-bk-09488-RTBP).

<sup>108</sup> See 11 U.S.C. § 365(b)(1).

<sup>109</sup> Docket # 296 at 12. Brief of National Hockey League’s Objection to Debtors’ Request to Sell the Phoenix Coyotes Under Sections 365 and 363 of the Bankruptcy Code at 12, 406 B.R. 30 (Bankr. D. Ariz. 2009) (No. 2:09-bk-09488-RTBP).

<sup>110</sup> *Id.* at 15.

<sup>111</sup> *Id.*



the Coyotes. The NHL was not seeking some type of lien on Debtors' property, instead it was seeking to enforce its contractual rights.

After hearing arguments from both parties in the June 12, 2009 hearing,<sup>112</sup> Judge Baum took the matter under advisement. In the end, the Debtors' would not have presented a compelling enough argument to allow them to disregard the NHL sale procedures and bylaws contained in the NHL Constitution. Judge Baum would order that a sale go forward but it would be a sale that complied with the NHL Constitution and that had NHL approval of the potential bidders and any possible relocations. While this would not preclude a relocation, it certainly would make it more difficult. The time sensitive PSE Sports stalking horse bid would also have to be heavily modified or else taken off the table.

### **VIII. Executory Contracts**

The Bankruptcy Code allows debtors to either assume, assign, or reject executory contracts.<sup>113</sup> An executory contract is a "contract under which the obligation of both the bankrupt and the other party to the contract is so far clearly unperformed that failure of either to complete performance would constitute a material breach excusing the performance of the other."<sup>114</sup>

In accordance with the originally proposed sale to PSE, on June 9, 2009, the debtor submitted a motion to assume and assign all player contracts and various agreements with the NHL.<sup>115</sup> The debtor made it clear that in order to have any chance at a successful sale of the Coyotes, the debtor would have to assume player and employment contracts.<sup>116</sup> After all, a hockey team "cannot play without hockey players."<sup>117</sup> In assuming these contracts, the Coyotes

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<sup>112</sup> See generally Transcript of June 12, 2009 Hearing, 406 B.R. 30 (Bankr. D. Ariz. 2009) (No. 2:09-bk-09488-RTBP).

<sup>113</sup> 11 U.S.C. § 365(a) (1994).

<sup>114</sup> JONATHAN P. FRIEDLAND, MICHAEL L. BERNSTEIN, GEORGE W. KUNEY, JOHN D. AYER, CHAPTER 11-101 at 198 (American Bankruptcy Institute, 1st ed. 2007).

<sup>115</sup> Emergency Motion of the Debtors for an Order Under Sections 105(a) and 365 of the Bankruptcy Code and Bankruptcy Rule 6006 (A) Approving the Assumption and Assignment of Certain Executory Contracts and (B) Granting Certain Related Relief, In re Dewey Ranch Hockey, LLC, No. 2:09-bk-09488, 2009.

<sup>116</sup> Emergency Motion of the Debtors for an Order Under Sections 105(a) and 365 of the Bankruptcy Code and Bankruptcy Rule 6006 (A) Approving the Assumption and Assignment of Certain Executory Contracts and (B) Granting Certain Related Relief, In re Dewey Ranch Hockey, LLC, No. 2:09-bk-09488, 2009.

would be required to cure any monetary defaults,<sup>118</sup> compensate the aggrieved party for any actual, pecuniary loss,<sup>119</sup> and provide adequate assurance of future performance.<sup>120</sup>

In addition to the player contracts, the Debtor also proposed to assume its affiliation agreement with San Antonio Hockey, LLC (the Coyotes' farm team), as well as the NHL Collective Bargaining Agreement, the NHL Constitution, and the NHL Bylaws.<sup>121</sup> The Jobing.com Arena lease with the City of Glendale was noticeably absent from the list of proposed contracts the Debtor intended to assume.<sup>122</sup> Obviously, this was due to the fact that the relocation of the Coyotes was a necessary part of the sale to PSE.

This motion was subsequently revoked by the Debtors on June 18, 2009.<sup>123</sup> After the Court's ruling on June 12, 2009, holding that the Debtors could not sell the Coyotes free and clear of the NHL's sale procedures, pursuant to the NHL Constitution and bylaws,<sup>124</sup> the Debtor was forced to reconsider which contracts it would assume. It quickly became clear that the executory contract issue would not be remedied until the Debtor could find a viable buyer for the team.

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<sup>117</sup> Emergency Motion of the Debtors for an Order Under Sections 105(a) and 365 of the Bankruptcy Code and Bankruptcy Rule 6006 (A) Approving the Assumption and Assignment of Certain Executory Contracts and (B) Granting Certain Related Relief, In re Dewey Ranch Hockey, LLC, No. 2:09-bk-09488, 2009.

<sup>118</sup> 11 U.S.C. § 365(b)(1)(A) (1994).

<sup>119</sup> 11 U.S.C. § 365(b)(1)(B) (1994).

<sup>120</sup> 11 U.S.C. § 365(b)(1)(C) (1994).

<sup>121</sup> Emergency Motion of the Debtors for an Order Under Sections 105(a) and 365 of the Bankruptcy Code and Bankruptcy Rule 6006 (A) Approving the Assumption and Assignment of Certain Executory Contracts and (B) Granting Certain Related Relief, In re Dewey Ranch Hockey, LLC, No. 2:09-bk-09488, 2009.

<sup>122</sup> Emergency Motion of the Debtors for an Order Under Sections 105(a) and 365 of the Bankruptcy Code and Bankruptcy Rule 6006 (A) Approving the Assumption and Assignment of Certain Executory Contracts and (B) Granting Certain Related Relief, In re Dewey Ranch Hockey, LLC, No. 2:09-bk-09488, 2009.

<sup>123</sup> Oral Argument in re: Location, §363 & §365 Issues, In re Dewey Ranch Hockey, LLC, No. 2:09-bk-09488, 2009.

<sup>124</sup> Oral Argument in re: Location, §363 & §365 Issues, In re Dewey Ranch Hockey, LLC, No. 2:09-bk-09488, 2009.

When the Coyotes were finally sold to the NHL on November 2, 2009, the NHL assumed all of the contracts that were to be assumed by PSE under its original proposed sale: all Coyote players' contracts, farm team affiliate contracts, the NHL collective bargaining agreement, the NHL bylaws, and the NHL Constitution.<sup>125</sup> Additionally, the NHL assumed various agreements the Coyotes originally made with the NHL related to trademarks, previously made loans, the lease agreement with Jobing.com Arena and the City of Glendale, and employment contracts with Coyotes management.<sup>126</sup>

## **IX. §363 Sale**

### **Alternate Auctions**

After the Court rejected the Debtor's attempted sale to PSE, under which Moyes and PSE attempted to circumvent league rules regarding the transfer of ownership,<sup>127</sup> the Debtor and the NHL scrambled to find other potential purchasers of the Coyotes. After a hearing on June 22, 2009, the Court authorized two separate auction procedures.<sup>128</sup> The first auction, scheduled for August 5, 2009, was open solely to bidders that were committed to keeping the Coyotes in Glendale,<sup>129</sup> pursuant to the procedural framework of the NHL Constitution.<sup>130</sup> The second auction, set for September 10, would be open to all bidders.<sup>131</sup> The second schedule would only

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<sup>125</sup> Stipulated Order Approving Amended and Clarified Bid at 165-173, In re Dewey Ranch Hockey, LLC, No. 2:09-bk-09488, 2009.

<sup>126</sup> Stipulated Order Approving Amended and Clarified Bid at 165-173, In re Dewey Ranch Hockey, LLC, No. 2:09-bk-09488, 2009.

<sup>127</sup> Stipulated Order Approving Amended and Clarified Bid at 165-173, In re Dewey Ranch Hockey, LLC, No. 2:09-bk-09488, 2009.

<sup>128</sup> *In re Dewey Ranch Hockey, LLC*, 414 B.R. 577, 582 (Bankr. D. Ariz. 2009).

<sup>129</sup> *Id.*

<sup>130</sup> Declaration of William L. Daly at 29, In re Dewey Ranch Hockey, LLC, No. 2:09-bk-09488, 2009. Article 3.5 of the NHL Constitution says “[n]o membership or ownership interest in a [team] may be sold, assigned or otherwise transferred except (a) with the consent of three-fourths of the members of the League, and (b) upon the condition that the transferee will at all times be bound by and comply with the terms, provisions, and conditions of this Constitution, and (c) upon the further condition that the transferee shall assume or guarantee all debts, liabilities and obligations of the transferor member existing at the date of transfer.”

<sup>131</sup> *In re Dewey Ranch Hockey, LLC*, 414 B.R. 577, 582 (Bankr. D. Ariz. 2009).

become necessary if none of the bids from the first auction “adequately satisfie[d] [the Debtor’s] creditors.”<sup>132</sup>

In accordance with NHL guidelines, the Court required any potential bidders to submit an application to the NHL that contained a myriad of background information about the bidder, as well as information about the proposed purchase of the Coyotes, including post-auction operations of the team.<sup>133</sup> The bidders also had to be approved by the NHL as an owner prior to purchasing the team.<sup>134</sup>

### **New Bidders Join the Party**

Two serious bidders in addition to PSE emerged: A group headlined by Jerry Reinsdorf (the Chair of the MLB’s Chicago White Sox and the NBA’s Chicago Bulls), and a business consortium named “Ice Edge Holdings.”<sup>135</sup>

Reinsdorf had a few reasons for pursuing the Coyotes. He was perhaps driven by a desire to become the first owner in history win championships in the NBA (Chicago Bulls), MLB (Chicago White Sox), and NHL (Phoenix Coyotes).<sup>136</sup> Reinsdorf’s also had a number of connections to the state of Arizona, and the city of Glendale, specifically.<sup>137</sup> Reinsdorf had a home in Paradise Valley, AZ, only fifteen miles away from Glendale.<sup>138</sup> Reinsdorf had also previously brokered the relocation of a minor league baseball team from Tucson to Glendale.<sup>139</sup>

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<sup>132</sup> Deadline Passes with One Bid, Letter of Intent to Buy Coyotes, Sports Business Daily, <http://www.sportsbusinessdaily.com/Daily/Issues/2009/07/Issue-214/Franchises/Deadline-Passes-With-One-Bid-Letter-Of-Intent-To-Buy-Coyotes.aspx>.

<sup>133</sup> Exhibit 1 of Order Approving Alternative Bid Procedures Proposed by the National Hockey League for Auction/Sale of Phoenix Coyotes, In re Dewey Ranch Hockey, LLC, No. 2:09-bk-09488, 2009.

<sup>134</sup> Order Approving Bid Procedures for Auction/Sale of Phoenix Coyotes National Hockey Team and Related Assets and the Assumption and Assignment of Certain Executory Contracts and Unexpired Leases at 9, In re Dewey Ranch Hockey, LLC, No. 2:09-bk-09488, 2009.

<sup>135</sup> Deadline Passes with One Bid, Letter of Intent to Buy Coyotes, Sports Business Daily, <http://www.sportsbusinessdaily.com/Daily/Issues/2009/07/Issue-214/Franchises/Deadline-Passes-With-One-Bid-Letter-Of-Intent-To-Buy-Coyotes.aspx>.

<sup>136</sup> Dan Bickley, Bickley: Reinsdorf to Rescue Cash-Strapped Coyotes?, The Arizona Reputlic, [http://www.azcentral.com/sports/articles/2009/05/05/20090505reinsdorf.html?nclick\\_check=1](http://www.azcentral.com/sports/articles/2009/05/05/20090505reinsdorf.html?nclick_check=1).

<sup>137</sup> Dan Bickley, Bickley: Reinsdorf to Rescue Cash-Strapped Coyotes?, The Arizona Reputlic, [http://www.azcentral.com/sports/articles/2009/05/05/20090505reinsdorf.html?nclick\\_check=1](http://www.azcentral.com/sports/articles/2009/05/05/20090505reinsdorf.html?nclick_check=1).

<sup>138</sup> Dan Bickley, Bickley: Reinsdorf to Rescue Cash-Strapped Coyotes?, The Arizona Reputlic, [http://www.azcentral.com/sports/articles/2009/05/05/20090505reinsdorf.html?nclick\\_check=1](http://www.azcentral.com/sports/articles/2009/05/05/20090505reinsdorf.html?nclick_check=1).

Finally, his business partner in the proposed bid for the Coyotes, Arizona lawyer John Kaites, was a lobbyist that had past business dealings with the Glendale City Manager.<sup>140</sup> It was believed that Reinsdorf would keep the team in Glendale, as he was engaged in discussions with the city about the Coyotes.<sup>141</sup>

Ice Edge Holdings had a more unorthodox plan for the Coyotes. Its plan was to have the Coyotes primarily play its home games in Glendale, but also play a portion of its home schedule at an alternate home site in Saskatoon, Canada.<sup>142</sup> Specifically, the Coyotes would play five home games at Saskatoon's 11,300-seat arena for home games against the Calgary Flames, Montreal Canadiens, Edmonton Oilers, New Jersey Devils, and Vancouver Canucks.<sup>143</sup> Ice Edge also wanted to make hockey great Wayne Gretzky the centerpiece of the franchise moving forward, including a long-term coaching contract and a major ownership interest in the team.<sup>144</sup>

Moyes clearly preferred PSE's bid of \$212.5 million over Reinsdorf's bid of \$148 million. If PSE's bid was approved, Moyes would receive about \$100 million back as an unsecured creditor. However, under Reinsdorf's bid, Moyes would get very little, if anything.<sup>145</sup>

### **Application Consternation**

All three parties filed applications with the NHL for approval as NHL owners.<sup>146</sup> At a July 29 meeting, the NHL Board of Governors convened to consider the three applications.<sup>147</sup>

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<sup>139</sup> Dan Bickley, Bickley: Reinsdorf to Rescue Cash-Strapped Coyotes?, The Arizona Republic, [http://www.azcentral.com/sports/articles/2009/05/05/20090505reinsdorf.html?nclick\\_check=1](http://www.azcentral.com/sports/articles/2009/05/05/20090505reinsdorf.html?nclick_check=1).

<sup>140</sup> Dan Bickley, Bickley: Reinsdorf to Rescue Cash-Strapped Coyotes?, The Arizona Republic, [http://www.azcentral.com/sports/articles/2009/05/05/20090505reinsdorf.html?nclick\\_check=1](http://www.azcentral.com/sports/articles/2009/05/05/20090505reinsdorf.html?nclick_check=1).

<sup>141</sup> *In re Dewey Ranch Hockey, LLC*, 414 B.R. 577, 585 (Bankr. D. Ariz. 2009).

<sup>142</sup> Deadline Passes with One Bid, Letter of Intent to Buy Coyotes, Sports Business Daily, <http://www.sportsbusinessdaily.com/Daily/Issues/2009/07/Issue-214/Franchises/Deadline-Passes-With-One-Bid-Letter-Of-Intent-To-Buy-Coyotes.aspx>.

<sup>143</sup> Deadline Passes with One Bid, Letter of Intent to Buy Coyotes, Sports Business Daily, <http://www.sportsbusinessdaily.com/Daily/Issues/2009/07/Issue-214/Franchises/Deadline-Passes-With-One-Bid-Letter-Of-Intent-To-Buy-Coyotes.aspx>.

<sup>144</sup> Deadline Passes with One Bid, Letter of Intent to Buy Coyotes, Sports Business Daily, <http://www.sportsbusinessdaily.com/Daily/Issues/2009/07/Issue-214/Franchises/Deadline-Passes-With-One-Bid-Letter-Of-Intent-To-Buy-Coyotes.aspx>.

<sup>145</sup> Coyotes Owner Challenges Reinsdorf Bid, CBC Sports, <http://www.cbc.ca/sports/hockey/story/2009/07/30/sp-moyes-reinsdorf.html>.

<sup>146</sup> *In re Dewey Ranch Hockey, LLC*, 414 B.R. 577, 582 (Bankr. D. Ariz. 2009).

The Board approved Reinsdorf as an owner, as well as his bid of \$148 million,<sup>148</sup> made no decision on Ice Edge Holdings, and unanimously rejected PSE's application.<sup>149</sup>

In rejecting PSE's application, the Board stated that Balsillie did not have the "character and integrity" required of NHL owners under rule 35 of the NHL Bylaws.<sup>150</sup> The Board specifically cited Balsillie's conduct during his failed attempts to purchase an NHL team in the past (both the Pittsburgh Penguins and Nashville Predators), his spurring of an antitrust investigation of the NHL by Canadian authorities, misconduct related to the backdating of options during his time at Research in Motion, and his conduct in his attempt to purchase the Coyotes.<sup>151</sup>

### **Bids Under The First and Second Auction**

While the auction was originally scheduled for August 5, 2009, the NHL asked the court to grant a continuance until September 10, 2009.<sup>152</sup> The court granted this continuance, but rejected a subsequent motion by the NHL to continue the auction until the end of the NHL season.<sup>153</sup> The court was not moved by the NHL's argument that there was simply not enough time for bona fide bidders to comply with the enumerated requirements by the auction date.<sup>154</sup>

As a result, Reinsdorf was not able to finalize a new lease agreement with Glendale and Jobing.com Arena, and subsequently retracted his bid.<sup>155</sup> A few weeks later, Ice Edge followed suit and bowed out of the bidding, as well.<sup>156</sup>

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<sup>147</sup> *Id.*

<sup>148</sup> Coyotes Owner Challenges Reinsdorf Bid, CBC Sports, <http://www.cbc.ca/sports/hockey/story/2009/07/30/sp-moyes-reinsdorf.html>.

<sup>149</sup> *In re Dewey Ranch Hockey, LLC*, 414 B.R. 577, 582 (Bankr. D. Ariz. 2009).

<sup>150</sup> *Id.*

<sup>151</sup> *Id.* at 583.

<sup>152</sup> *Id.*

<sup>153</sup> *Id.* at 585.

<sup>154</sup> *Id.*

<sup>155</sup> Carrie Watters, Reinsdorf Drops Coyotes Bid as NHL Seeks to Buy Team, The Arizona Republic, <http://www.azcentral.com/sports/coyotes/articles/2009/08/25/20090825nhlcoyotes.html>.

<sup>156</sup> Carrie Watters, Ice Edge Bows Out of Coyotes Auction, The Arizona Republic, <http://www.azcentral.com/sports/coyotes/articles/2009/09/08/20090908spt-coyotes.html>.

When it became obvious that no one was going to bid in the first auction, the NHL submitted a bid to purchase the team on the last day allowed under the court's bid procedures.<sup>157</sup> The NHL's bid, which reeked of desperation, was for \$140,000,000,<sup>158</sup> far below the \$212,500,000 bid originally submitted by Balsillie at the beginning of the bankruptcy case.<sup>159</sup>

In its asset purchase proposal submitted to the court, the NHL explained that under the terms of the proposed bid, the team would remain in Glendale, and all unsecured creditors would be paid in full.<sup>160</sup> However, the proceeds would explicitly not go to pay any claims against the estate held by Moyes or Wayne Gretzky.<sup>161</sup>

PSE, however, refused to give up. Pursuant to the court's procedures, PSE submitted a revised bid of \$242,500,000, which included a \$50,000,000 payment to the City of Glendale if the City withdrew its objection of the sale of the Coyotes to PSE.<sup>162</sup>

### **PSE's Bid Rejected**

The debtor and PSE continued to argue that under the Code, the court could authorize the sale of the team free and clear of the NHL's right to object to the sale and relocation of the team under sections 363 and 365 of the code.<sup>163</sup> Furthermore, PSE argued that because the NHL bid on the team, the NHL now has an inherent conflict of interest, and its rejection of Balsillie as an owner should be disregarded.<sup>164</sup> Lastly, due to the numerous debates between the debtor and the NHL about its ability to sell the team free and clear of any interests, and the NHL's purported bad faith throughout the process, the debtor asserted that there is a "bona fide dispute" regarding the NHL's collective rights, and therefore, under section 364(f) of the Bankruptcy Code, that

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<sup>157</sup> *In re Dewey Ranch Hockey, LLC*, 414 B.R. 577, 585 (Bankr. D. Ariz. 2009).

<sup>158</sup> *Id.*

<sup>159</sup> Balsillie Offers to Buy, Move Coyotes, ESPN, <http://sports.espn.go.com/nhl/news/story?id=4143432>.

<sup>160</sup> *In re Dewey Ranch Hockey, LLC*, 414 B.R. 577, 585 (Bankr. D. Ariz. 2009).

<sup>161</sup> *Id.*

<sup>162</sup> *Id.* at 587

<sup>163</sup> *Id.*

<sup>164</sup> *Id.*

bona fide dispute allows the court to authorize a sale of the team free and clear of the NHL's interests.<sup>165</sup>

In weighing the merits of both bids, Judge Baum considered “which of the two bids was the highest and best bid for the Coyotes and whether either of those bids satisfied the requirements of the [Bankruptcy] Code.”<sup>166</sup> The Court rejected PSE's bid on the grounds that it does not adequately protect the NHL's interests, as required in §363(e) of the Bankruptcy Code.<sup>167</sup> Under §363(e), the debtor must provide adequate protection to any interest in the property being sold free and clear of that interest.<sup>168</sup> In this situation, the three “interests” of the NHL that must be adequately protected are: the right to admit new members pursuant to its own procedures, the right to control where its members play home games, and the right to any relocation fees when one of its members moves to a new home site.<sup>169</sup>

The court concluded that the first two interests of the NHL could not be adequately protected if the Coyotes were sold to PSE and moved to Hamilton, Canada.<sup>170</sup> Because these interests are non-economic, economic redress would not constitute adequate protection to the NHL.<sup>171</sup> As a result of the fact that the NHL's interests would not be protected under §363(e) under the sale to PSE, the court rejected PSE's bid with prejudice.<sup>172</sup> Because PSE's bid was rejected, the court did not have to consider whether to overrule the NHL's rejection of Balsillie as an owner.

### **NHL's Bid Rejected**

The court was much more amenable to the NHL's bid, rather than PSE's. The court pointed out that the NHL's bid would pay most unsecured creditors in full, secured creditors in full, and has significant support from the City of Glendale, and other creditors.<sup>173</sup> The court,

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<sup>165</sup> *Id.* at 589

<sup>166</sup> *Id.* at 588

<sup>167</sup> *Id.* at 590

<sup>168</sup> 11 U.S.C. § 363(e) (2010).

<sup>169</sup> *In re Dewey Ranch Hockey, LLC*, 414 B.R. 577, 591 (Bankr. D. Ariz. 2009).

<sup>170</sup> *Id.*

<sup>171</sup> *Id.*

<sup>172</sup> *Id.* at 592.

<sup>173</sup> *Id.* at 592.



however, took issue with the fact that the NHL's bid would allow the NHL to discretionarily choose which secured creditors would be paid in full.<sup>174</sup> Not coincidentally, under the NHL's bid, all unsecured creditors would be paid in full, except for Moyes and Wayne Gretzky (current ownership and management of the Coyotes).<sup>175</sup>

The court pointed out that while a § 363 sale has the practical effect of deciding issues that would usually be resolved by the confirmation of a plan, it may deprive certain parties of rights it would have pursuant to the plan process.<sup>176</sup> A contested § 363 sale can only be approved by the court if it does not discriminate unfairly among the creditors, and is fair and equitable with respect to each claim of creditors that is impaired by the sale.<sup>177</sup>

The court determined that the proposed sale to the NHL was not "fair and equitable" to Moyes and Gretzky, as creditors of the debtor.<sup>178</sup> The practical effect of the NHL's bid was to pay all creditors in full except Moyes and Gretzky.<sup>179</sup> This was a violation of one of the underlying principles of bankruptcy, which is "equality of distribution among the the creditors."<sup>180</sup> The court, therefore, rejected the NHL's bid, holding that it would be unjust for the court to deprive Moyes and Gretzky of its rightful share of the proceeds of a sale.<sup>181</sup> This rejection, however, was without prejudice, as the court believed that the NHL could cure this defect in its bid simply by providing an equitable distribution of the proceeds to Moyes and Gretzky.<sup>182</sup> This decision gave the NHL a clear blueprint for how to amend its bid in a way that would satisfy the court.

### **The Coyotes are Sold to the NHL**

With no other bidders showing interest in the Coyotes, the NHL appeared to be the only viable purchaser. Following the court's guidance from its rejection of the NHL's first bid, the

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<sup>174</sup> *Id.*

<sup>175</sup> *Id.*

<sup>176</sup> *Id.*

<sup>177</sup> 11 U.S.C. § 1129(b)(1) (2010).

<sup>178</sup> *In re Dewey Ranch Hockey, LLC*, 414 B.R. 577, 593 (Bankr. D. Ariz. 2009).

<sup>179</sup> *Id.*

<sup>180</sup> *Id.*

<sup>181</sup> *Id.*

<sup>182</sup> *Id.*

NHL submitted an amended bid of \$140,000,000 that included a more equitable distribution to Moyes and Gretzky. Moyes agreed to the sale on October 26, 2009,<sup>183</sup> and the sale was approved by the court on November 2, 2009.<sup>184</sup>

## **X. Coyotes Since the Sale**

The NHL's purchase of the Coyotes was fully intended as a temporary move that would ensure the NHL had complete control over the next owner of the team.<sup>185</sup> The NHL remains committed to finding an owner that will keep the Coyotes in Glendale.<sup>186</sup> Serious doubts have arisen from all sides that this is possible.<sup>187</sup>

Over the course of the past three and a half years, the NHL has been unable to find a viable owner that will keep the team in Glendale.<sup>188</sup> The last serious bidder was former San Jose Sharks CEO, Greg Jamison.<sup>189</sup> Jamison publicly expressed a desire to keep the Coyotes in Glendale, even going so far as to negotiate an amended lease with the City of Glendale and Jobing.com Arena that would pay Jamison \$15 million annually over 20 years to run the arena.<sup>190</sup> Jamison, however, recently missed a deadline set for January 31, 2013 to purchase the

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<sup>183</sup> Joel Rosenblatt, Phoenix Coyotes Owner Moyes Will Sell Bankrupt Team to NHL, Bloomberg, <http://www.bloomberg.com/apps/news?pid=newsarchive&sid=acyvdjqY1dWI>.

<sup>184</sup> Stipulated Order Approving Amended and Clarified Bid, In re Dewey Ranch Hockey LLC, No. 2:09-bk-09488, 2009.

<sup>185</sup> Carrie Watters, Ice Edge Bows Out of Coyotes Auction, The Arizona Republic, <http://www.azcentral.com/sports/coyotes/articles/2009/09/08/20090908spt-coyotes.html>.

<sup>186</sup> Mike Sunnucks, As Greg Jamison's Bid Fades, Coyotes 'Left Reeling,' Source Says, Phoenix Business Journal Sporting News, <http://aol.sportingnews.com/nhl/story/2013-01-31/greg-jamison-phoenix-coyotes-sale-shane-doan-contract-jerry-reinsdorf>.

<sup>187</sup> Mike Sunnucks, As Greg Jamison's Bid Fades, Coyotes 'Left Reeling,' Source Says, Phoenix Business Journal Sporting News, <http://aol.sportingnews.com/nhl/story/2013-01-31/greg-jamison-phoenix-coyotes-sale-shane-doan-contract-jerry-reinsdorf>.

<sup>188</sup> Mike Sunnucks, As Greg Jamison's Bid Fades, Coyotes 'Left Reeling,' Source Says, Phoenix Business Journal Sporting News, <http://aol.sportingnews.com/nhl/story/2013-01-31/greg-jamison-phoenix-coyotes-sale-shane-doan-contract-jerry-reinsdorf>.

<sup>189</sup> Paul Giblin, Coyotes Deal Falls Through; Potential Buyer Jamison Misses Deadline, The Arizona Republic, <http://www.azcentral.com/community/glendale/articles/20130131glendale-mayor-jamison-asks-for-extension-on-coyotes-deal.html>.

team. While Jamison ardently pursued the purchase of the team, he was unable to organize a team of investors that shared his vision.<sup>191</sup>

Jamison is still considered to be a possible purchaser at some point in the future, but the bidding has reopened to other interested parties; even some that are interested in relocation.<sup>192</sup> As the NHL continues to look for a purchaser that will keep the team in Glendale, there are a number of cities that have been sitting on the sidelines, quietly tracking the pulse of the situation, in case relocation once again becomes a possibility.<sup>193</sup> Specifically, Seattle, Quebec City, and Oklahoma City have at least preliminary interest as a landing spot for the Coyotes.<sup>194</sup>

While rumors continue to surface that there are potential serious bidders that want to keep the Coyotes in Glendale, it appears as though at some point, the NHL is going to have to swallow its pride and sell the team to an owner that is intent on relocating the franchise. With the lowest fan attendance figures in the NHL (and it is lowest by a fair margin), and continued financial losses,<sup>195</sup> the Coyotes time in Glendale appears to be coming to a slow and painful end.

## **XI. Precedent of *Dewey* Going Forward**

The Phoenix Coyotes bankruptcy litigation created waves throughout the professional sports community. The hotly contested relocation issue presented in *Dewey* garnered the attention of all the major United States professional sports leagues and turned a relatively routine section 363 sale into something more. The Moyes group sought to circumvent NHL Bylaws and

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<sup>190</sup> Joe DeLessio, Location, Location, Location, Sports on Earth, <http://www.sportsonearth.com/article/41384338/>.

<sup>191</sup> Paul Giblin, Coyotes Deal Falls Through; Potential Buyer Jamison Misses Deadline, The Arizona Republic, <http://www.azcentral.com/community/glendale/articles/20130131glendale-mayor-jamison-asks-for-extension-on-coyotes-deal.html>.

<sup>192</sup> Paul Giblin, Coyotes Deal Falls Through; Potential Buyer Jamison Misses Deadline, The Arizona Republic, <http://www.azcentral.com/community/glendale/articles/20130131glendale-mayor-jamison-asks-for-extension-on-coyotes-deal.html>.

<sup>193</sup> Paul Giblin, Coyotes Deal Falls Through; Potential Buyer Jamison Misses Deadline, The Arizona Republic, <http://www.azcentral.com/community/glendale/articles/20130131glendale-mayor-jamison-asks-for-extension-on-coyotes-deal.html>.

<sup>194</sup> Paul Giblin, Coyotes Deal Falls Through; Potential Buyer Jamison Misses Deadline, The Arizona Republic, <http://www.azcentral.com/community/glendale/articles/20130131glendale-mayor-jamison-asks-for-extension-on-coyotes-deal.html>.

<sup>195</sup> Joe DeLessio, Location, Location, Location, Sports on Earth, <http://www.sportsonearth.com/article/41384338/>.

the NHL Constitution regarding the sale of a member franchise and sought to do so by taking refuge in the Bankruptcy Code. The court was inundated with amicus briefs by the National Basketball Association, National Football League, and Major League Baseball containing adamant oppositions to this proposed course of action. All of these professional sports leagues have similar constitutions and restrictions in place regarding the sale or relocation of member teams.

The ultimate outcome in this case proved to be a victory for the professional sports leagues. The court walked the thin line between allowing the Debtors to seek the protection of the Bankruptcy code while not freeing them to completely disregard their obligations as an NHL franchise. Had the court allowed the 363 sale to PSE Sports to proceed, a drastic change in the landscape of professional sports franchises would have occurred. The power to control league membership and franchise locations, which currently rests largely with the league administrative bodies, would be transferred to franchise owners. This would change many aspects of the business because a franchise owner would know that should she wish to get out of the league contract and sell the team, she can do so without limitation through the Bankruptcy Code.

Overall, the ruling in *Dewey* makes it easier for professional sports league commissioners to ensure that the right people are running member franchises. In the NHL and other such leagues, this means that no one rogue franchise can take independent action that will hurt the league as a whole. Instead, potential buyers have to go through the proper channels and league policy has to be followed.

# In re Dewey Ranch Hockey

Chris Rowe and Jeff Upshaw  
April 16, 2013

## Introduction

- "Big Four" professional sports teams seldom file for bankruptcy protection
- NHL teams, however, file bankruptcy most often
- NHL franchises have the lowest attendance, revenue, and ratings of the "Big Four"

## Overview of the NHL

- Premier professional hockey league globally
- 30 member teams
  - 23 located in the US, 7 in Canada
- Smallest member of the "Big Four"
- Almost half of its 30 member franchises lost money in the 2011-2012 season

## Expansion

- 9 new member teams added since 1991
- Prior to 1990, only 4 teams were located south of the 40th parallel.
- Today, half of the NHL teams are located south of this line.



## History of the Coyotes

- Initially organized as the Winnipeg Jets, a member of the World Hockey Association, in 1972
- Joined the NHL in 1979 after the WHA went out of business
- With ownership change in 1995, the team name was changed to the Coyotes and moved to Phoenix, Arizona

## History of the Coyotes

- Coyotes were once again sold in 2001 to a group of investors headlined by Jerry Moyes
- In 2003, the Coyotes moved into a new arena in Glendale, Arizona
- In 2006, Moyes bought out most of the other investors, and ended up with 91% ownership of the team

# Corporate Structure



# Lead-Up to Bankruptcy Filing

- Coyotes were losing tens of millions of dollars annually
- Moyes was constantly dipping into his own pocket to cover expenses
- In late 2008, Moyes notified the NHL that he would no longer cover the Coyotes' losses, and he began searching for potential purchasers



## A Potential Purchaser Emerges

- Jim Balsillie, the Co-CEO of RIM, wanted to purchase the Coyotes and move the team to Southern Ontario
- Balsillie had unsuccessfully attempted to buy 2 NHL teams in the past (Penguins and Predators)



## Balsillie's Bargain

- Balsillie was willing to purchase the team for an aggressive price (\$212.5 million), but only if he could move the team to Canada
- NHL Commissioner Gary Bettman was completely opposed to moving the team from Arizona.

# Bankruptcy Filing

- When it became clear that Balsillie would not garner the requisite approval to move the team, the Coyotes filed chapter 11 bankruptcy on May 5, 2009

# First Day Motions

## Debtors Filed 10 First Day Motions:

(1) a "Motion to Consolidate the Docket", (2) a "Motion to Change Hearing Location," (3) a "Motion to Extend Time to File Statements and Schedules," (4) a "Motion to Prepare a Consolidated List of Creditors," (5) a "Motion to Maintain Existing Bank Accounts and Business Forms," (6) a "Motion to Establish Adequate Assurance Procedures For Utilities," (7) a "Motion to Employ Ordinary Course Professionals," (8) a "Motion to Pay Prepetition Amounts Owed to Employees," (9) a "Motion for Payment of Prepetition Taxes," and (10) a "Motion to Retain Squire, Sanders & Dempsey as Counsel."

## Motion to Change Hearing Location

- Case was originally to be held in Prescott, Arizona because Dewey Ranch Hockey, LLC was located in Yavapai County.
- Local rules of court provided that "[u]nless otherwise directed by the court . . . [c]ases originating in Coconino, Mohave, and Yavapai Counties shall be heard in Prescott, Flagstaff, or Bullhead city as the court may direct."
- Judge Baum granted an order moving the hearing locations to Phoenix, AZ for the convenience of the parties.
- At the Time Judge Baum sat in Phoenix primarily but was in charge of the Prescott calendar as well.

## The "Control Issue"

- This issue would prove to be central to the outcome of the bankruptcy proceedings.
- In question was a proxy statement issued by Mr. Moyes to the NHL Commissioner.
- The NHL argued that this proxy, issued on November 14, 2008, granted the Commissioner complete control over the Coyotes.
- The Debtors argued that this proxy merely granted the NHL Commissioner the voting rights that Moyes possessed.

# The Clause at Issue

"The undersigned hereby irrevocably appoints, with immediate effect, the Commissioner of the NHL (whoever he or she is now or from time to time hereafter may be) (the "Commissioner"), as its true and lawful attorney and proxy in respect of all of the undersigned's interest and rights in the Club, including without limitation a 91.79% ownership interest in, and all rights as managing member of, the Club (collectively, referred to herein as the "Coyotes Interests"; the term "Coyotes Interests" shall be deemed to include, without limitation, all of the limited liability company interests, shares, membership interests or units issued by the Club or any successor that, in the future, may be registered in the name of the undersigned, whether voting or non-voting), with all powers the undersigned possesses, and with full power of substitution and resubstitution, to vote or express consent or dissent in the sole discretion of such proxy in respect of all of the Coyotes Interests to the extent they are entitled to vote or express consent or dissent (whether by operation of law or otherwise) in each case for any and all purposes and upon any and all subjects, matters and issues (collectively, the "Voting Rights"), including, without limitation, the following: ..."

## NHL's Argument

- The NHL argued that the proxy gave the Commissioner complete control over the management of the Coyotes effective November 14, 2008.
- Despite the fact that this control was to a large degree unexercised and the current management was allowed to stay in place, the NHL took the position that any actions taken by management after that date that were not objected to were implicitly authorized.

## Debtors' Argument

- The Debtors' primary argument was that the proxy merely transferred to the NHL Commissioner Moyes' shareholder rights and consequently his rights to control the corporation as a director were unaffected.
- They also made a lot out of the fact that the NHL did not act as if it were in complete control over the Coyotes between the time of the proxy execution and the time of the bankruptcy filing.

## Resolution

- Judge Baum ordered the parties to mediate the issue.
- The parties came to an interim agreement where the ordinary course business decisions would continue to be made by existing senior management but two point persons, one from the NHL and one from the Debtors, would be appointed to discuss any other business type decisions with senior management and act in an advisory capacity.

## The "Relocation Issue"

- The second key issue in this proceeding was whether the team would be allowed to relocate and leave Phoenix.
- The Debtors' sought to use the language of Section 363 which authorizes a sale free and clear of adverse interests to sell the Coyotes to PSE Sports a stalking horse bidder from Canada.

## Relocation Cont'd

- If the court allowed the Debtors to proceed with the sale, the Debtors would be able to sidestep the NHL Constitution and Bylaws which have restrictions regarding the sale of a franchise member team.
- Any potential bidders are required to meet NHL approval standards and the relocation of a team to a new city has to be approved by the other NHL member franchises.

## Relocation Cont'd

- The NHL argued that under Section 541 of the Bankruptcy Code the debtor's estate only acquires interest in property that the debtor itself had at the time of the filing
- The NHL contended that the Debtors never had the right to freely relocate their franchise absent NHL consent.
- Therefore, the Debtors could not transfer the right to operate the franchise in another city since they themselves never had this right.

## Policy Concerns

- This issue garnered the attention of the other major professional sports leagues.
- The Debtors were asking Judge Baum to create a large loophole in the current franchiser/franchisee relationship that could seriously shake up management of professional sports franchises in many different sports leagues.
- Amicus briefs were filed on behalf of the NBA, MLB, and NFL in support of the NHL's position.

## Resolution

- Ultimately the Court sided with the NHL.
- The bankruptcy sale was allowed to continue forward but the sale would have to be one that complied with the NHL Constitution and that had NHL approval of the potential bidders and any possible relocation.

## §363 Sale

- After Judge Baum's ruling, the proposed sale to PSE/Balsillie seemed dead
- However, Baum instituted a process of two separate auctions.
  - The first was for bidders that wanted to keep the team in Glendale
  - The second was for all bidders (including those that wanted to relocate the Coyotes)



## The First Auction

- It appeared that the Coyotes would be sold during the first auction as three serious purchasers emerged
- At the first auction, the NHL was the only bidder. Its bid of \$140 million was rejected as inadequate by Judge Baum

## The Second Auction

- Prior to the second auction, Balsillie raised his bid to \$242.5 million
  - Judge Baum once again found Balsillie's bid inadequate, as it did not adequately protect the NHL's interest under §363(e) of the Bankruptcy Code
- The NHL then amended its bid to include a more equitable distribution to Moyes and Gretzky

## Sale to the NHL

- After Balsillie's bid was rejected, the NHL was the only viable purchaser.
- The Court approved the NHL's amended bid of \$140 million

## Coyotes Since the Sale

- The Coyotes are still currently owned by the NHL, and have still been hemorrhaging money each season
- The NHL is still courting potential buyers.
  - Former San Jose Sharks CEO Greg Jamison is the last unsuccessful buyer
- It appears inevitable that the NHL is going to have to move the team eventually

## Precedent of *Dewey*

- *Dewey* provided a victory for professional sports leagues on an issue that could have caused upheaval in franchise negotiations between owners and league personnel.
- The court's disposition of the "relocation issue" set the precedent that franchise owners can not circumvent league rules regarding the sale of a franchise by affecting a sale through bankruptcy proceedings.