

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25

UNITED STATES BANKRUPTCY COURT  
DISTRICT OF ARIZONA

\_\_\_\_\_)  
In re: )  
DEWEY RANCH HOCKEY, LLC CH: 11 ) 2:09-bk-09488-RTBP  
ORAL ARGUMENT IN RE: RELOCATION, §363 & )  
§365 ISSUES )

U.S. Bankruptcy Court  
230 N. First Avenue, Suite 101  
Phoenix, AZ 85003-1706

June 9, 2009  
9:01 a.m.

BEFORE THE HONORABLE REDFIELD T. BAUM, Judge

APPEARANCES:

For Debtors: Jordan S. Kroop  
Thomas J. Salerno  
George I. Brandon  
SQUIRE SANDERS & DEMPSEY, L.L.P.  
40 N. Central Ave., Ste. 2700  
Phoenix, AZ 85004

-and-  
Edward M. Zachary  
BRYAN CAVE, L.L.P.  
Two N. Central Ave., Ste. 2200  
Phoenix, AZ 85004

For National Hockey League: Alan A. Meda  
C. Taylor Ashworth  
STINSON MORRISON HECKLER, L.L.P.  
1850 N. Central Ave., Ste. 2100  
Phoenix, AZ 85004

-and-  
Gregory Milmoe  
Shepard Goldfein  
Anthony W. Clark  
SKADDEN, ARPS, SLATE, MEAGHER  
& FLOM, L.L.P.  
4 Times Square  
New York, NY 10036

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25

APPEARANCES: (Continued)

For SOF investments, L.P.; White Tip Investments, L.L.C.: Donatello Investments, L.L.C.:	Steven M. Abramowitz VINSON & ELKINS, L.L.P. 666 Fifth Ave., 26th Floor New York, NY 10103-0040
For City of Glendale, Arizona:	William R. Baldiga BROWN & RUDNICK, L.L.P. One Financial Center Boston, MA 02111
For Jerry Moyes:	Carolyn J. Johnsen Peter W. Sorensen JENNINGS, STROUSS & SALMON, P.L.C. The Collier Center, 11th Floor 201 E. Washington Street Phoenix, AZ 85004-2385
For National Basketball Association; National Football League; Office of the Commissioner of Baseball:	Dale C. Schian SCHIAN WALKER, P.L.C. 3550 N. Central Ave., Ste. 1700 Phoenix, AZ 85012-2115
For PSE Sports & Entertainment LP and S&E Interim Facility Corporation:	Susan M. Freeman David D. Weinzweig Stefan M. Palys LEWIS AND ROCA 40 N. Central Ave. Phoenix, AZ 85004-4429
For National Hockey League Players' Association:	James E. Cross OSBORN MALEDON, P.A. 2929 N. Central Ave., Ste, 2100 Phoenix, AZ 85012
For City of Glendale, Arizona:	Cathy L. Reece FENNEMORE CRAIG 3003 N. Central Ave., Ste. 2600 Phoenix, AZ 85012-2913

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25

APPEARANCES: (Continued)

For the Creditors Committee: Paul Sala  
ALLEN, SALA & BAYNE, PLC  
Viad Corporate Center  
1850 N. Central Ave., Ste. 1150  
Phoenix, AZ 85004

Proceedings recorded by electronic sound technician, Juanita Pierson-Williams; transcript produced by AVTranz, Inc.

1 (Audio begins - Gavel pounds)

2 MR. CLARK: Good Morning, Your Honor. Tony Clark for  
3 the National Hockey League. I spoke with Mr. Salerno briefly  
4 before Your Honor came on the bench to ask for permission to  
5 get up first just to make a very quick introduction to the  
6 Court.

7 Your Honor's already met Mr. William Daly, the deputy  
8 commissioner of the National Hockey League, but today I wanted  
9 to introduce to you the commissioner, Mr. Gary Bettman, who is  
10 here today joining before heading out to Pittsburgh.

11 THE COURT: I was going to say. Isn't he supposed to  
12 be in Detroit tonight?

13 MR. CLARK: Pittsburgh, I think.

14 THE COURT: Pittsburgh, that's right.

15 MR. CLARK: For game 6 of the Stanley Cup, the  
16 Stanley Cup final, I am told. It is not the finals.

17 THE COURT: Game 6.

18 MR. CLARK: Game 6. Thank you, Your Honor.

19 THE COURT: Thank you.

20 MR. SALERNO: Good morning, Your Honor. Thomas  
21 Salerno of Squire Sanders & Dempsey on behalf of the Debtors.  
22 Also present is Jerry Moyes, a principal of the Debtor's.

23 Your Honor, on behalf of everyone we sincerely want  
24 to thank the Court and the Court's staff and people for all the  
25 hard work they've done over the last few days. We recognize

1 the extraordinary amount of paper that has been filed with this  
2 Court, and the effort that the Court and the staff has made,  
3 and we truly appreciate it. We know that it's, that it was a  
4 burden on everyone, and I think the only person that I felt,  
5 the only people I felt more sorry for this weekend than myself  
6 were perhaps the Court and the staff for having to digest all  
7 the various reams of paper.

8 THE COURT: That's very thoughtful of you.

9 MR. SALERNO: Thank you, Your Honor.

10 (Laughter)

11 MR. SALERNO: Your Honor, we had spoken, the Debtor's  
12 counsel and NHL's counsel have spoken about kind of a division  
13 of responsibilities if this is acceptable to the Court. I may  
14 have referenced it on one of the last times we were here.

15 There's two primary, quote dating issues, if you  
16 will, one of the NHL issues involving relocation, transfer, and  
17 things of that nature, and the other are the City of Glendale  
18 issues that have been briefed separately.

19 With respect to the NHL issues, what we had talked  
20 about at the counsel for the NHL is that we would ask the  
21 Court's indulgence to allow two lawyers from each side to  
22 address different, very different aspects of those,  
23 specifically I will be --

24 THE COURT: Somehow I was afraid you all were going  
25 to do that to me. You know, I find it interesting that you all

1 can say, okay, I'm going to do the bankruptcy issues and my  
2 partner's going to do the anti-trust issues, and my third  
3 partner is going to do the lease issues.

4 I just want you to remember as you look up here.  
5 There's only one guy sitting up here.

6 MR. SALERNO: Understood, Your Honor.

7 (Laughter)

8 THE COURT: And so --

9 MR. SALERNO: I fully understand that.

10 THE COURT: -- if this is an endurance contest I'll  
11 concede at the moment.

12 MR. SALERNO: Thank you, Your Honor.

13 (Laughter)

14 MR. SALERNO: Your Honor, with the Court's  
15 permission, do you want to address the NHL issues first, the  
16 City of Glendale issues?

17 THE COURT: Well, it's your motion. You get to lead.

18 Let me tell you and tell everybody who's here, the  
19 attorneys who want to argue, I've read everything, and I think  
20 I've read everything more than once, and I have not read every  
21 case you all provided me, but to be blunt, I picked all the  
22 materials up at about 11:00 Saturday morning and pretty much  
23 have been reading them since then, and have read a lot of the  
24 cases but not all of them.

25 And I do thank all of you for getting the materials

1 delivered the way you did, and perhaps it's worth saying, I had  
2 them delivered to my friend's business at 44th and Camelback  
3 because I figured it'd save me about two and a half to three  
4 hours Saturday from coming down here, having Security open the  
5 courthouse, sweep an eight storey courthouse, and then wait for  
6 everything to be delivered before I could start reading it, so  
7 I'm probably as prepared as I can be.

8 MR. SALERNO: We appreciate that, Your Honor.

9 Your Honor, with respect to the issues before the  
10 Court, at its core the NHL argues essentially as follows. We  
11 are an exclusive club, and as such, we have sole, absolute, and  
12 unfettered discretion as to who gets in, and where they play.

13 We have rules and regulations that this Court has to  
14 give total deference to.

15 The Debtor only owns the right to play as a  
16 professional hockey team in Glendale, Arizona, it's Phoenix,  
17 Arizona, but Glendale, Arizona.

18 THE COURT: That's what the contract says.

19 MR. SALERNO: I'm sorry, Your Honor?

20 THE COURT: That's what the contract says.

21 MR. SALERNO: That's what the contract says, Your  
22 Honor. But it says more than that, Your Honor, and we'll get  
23 to that.

24 And that's all that it can sell and assign. The NHL  
25 will decide on its own timetable for approval of ownership or

1 location transfers.

2 And Your Honor, the NHL, which has been joined by  
3 other professional sports league, tells the Court that chaos is  
4 going to erupt if this delicate schedule or balance is undone.  
5 The NHL essentially argues, Your Honor, that it is above  
6 concepts of bankruptcy law, anti-trust law, applicable law on  
7 good faith and fair dealing, and fiduciary duty law.

8 In fact, Your Honor, the NHL tells this Court it has  
9 in some respects this quasi-sacred mission, and very  
10 specifically, Your Honor, they say the NHL's fundamental  
11 interest in taking control of the Coyotes, is to preserve the  
12 viability, goodwill, and success of the NHL as a major  
13 professional sports league, rather than to protect any creditor  
14 interest.

15 And that's from the memorandum of points and  
16 authorities, docket 91, page 3.

17 NHL ultimately of course concedes that it is in fact  
18 a big business, but it is a very special creature. And herein,  
19 Your Honor, lies the clash, because in dealing with the NHL and  
20 its special position, its avowed special position in the world,  
21 it finds itself coming in some respects fact to face and  
22 running headlong into bankruptcy policy.

23 Bankruptcy policy, Your Honor, and I certainly don't  
24 need to tell this Court, has a couple of basic tenets that  
25 are true in every bankruptcy case, be it Chrysler, be it a



1 single asset case, I mean the basic premise, the basic tenets  
2 go through.

3 Number 1, Your Honor, to maximize value of assets for  
4 all creditors, and not to just protect special interests.

5 Number 2, bankruptcy courts deal with real economic  
6 emergencies on an expedited timeline. When there's a real  
7 emergency, if there's a contrived emergency the Courts have  
8 said no, but when there's a real emergency, Courts deal with  
9 them on an expedited timeline.

10 I mean, the Chrysler case that we've all watched in  
11 New York, the Supreme Court has apparently just issued a stay  
12 saying --

13 THE COURT: A one sentence stay.

14 MR. SALERNO: I'm sorry, Your Honor?

15 THE COURT: A once sentence stay.

16 MR. SALERNO: Exactly. And --

17 THE COURT: It must be nice to be on the Supreme  
18 Court.

19 (Laughter)

20 MR. SALERNO: It's -- it's good to be the king as --  
21 or the queen in that case, Your Honor, as they say.

22 Number 3, Your Honor, preserve asset values.  
23 Preserving and preservation of asset values are key.

24 Number 4, balancing competing rights and interests,  
25 and be able to deal with emergency situations.

1           Your Honor, in the Chrysler case they rejected almost  
2 800 franchise contracts on three weeks' notice.

3           It's difficult. That was a difficult decision I'm  
4 sure for Judge Gonzales, but it needed to be done and he did  
5 it.

6           Number 5, Your Honor, facilitating an open and  
7 transparent sale process. And lastly but not least, Your  
8 Honor, a fair treatment of all creditor constituencies. That's  
9 bankruptcy policy.

10           Your Honor, the Debtor asserts that it can sell its  
11 assets and assume and assign executory contracts that are  
12 associated with those assets under bankruptcy code §§ 363 and  
13 365.

14           This sale by definition involves not only a change of  
15 the owner, but also a change of the location. The economic  
16 reality on which we all are faced, Your Honor, is that this  
17 team has been in Arizona since 1996, and unfortunately it has  
18 never made an operational profit in the 13 years it's been  
19 here.

20           THE COURT: Well, it's lost a lot of money.

21           MR. SALERNO: It's lost a lot of money.

22           THE COURT: And again, bear in mind, I've read the  
23 briefs.

24           MR. SALERNO: Understood, Your Honor.

25           Your Honor, the Debtor has attempted to the best of

1 its ability to get the NHL to consent to both the ownership  
2 transfer and the relocation transfer. On May 27th of this, of  
3 2009 PSE submitted an extensive ownership transfer application,  
4 that I believe the Court has. It was filed under seal.

5 THE COURT: If I remember correctly, they  
6 supplemented that I think yesterday.

7 MR. SALERNO: Yes, correct, Your Honor, they're  
8 supplementing it as new information comes in, and if, I think  
9 that's the second supplement. There was another one on June 1.

10 And then June 1 the potential buyer and the Coyotes  
11 submitted a location transfer application, what I will call a  
12 location transfer application to the NHL that was also filed  
13 with the Court under seal.

14 The NHL has told us the following. Number 1, there  
15 is no way the location transfer application could be considered  
16 for the 2009 or 2010 season. It's a logistical nightmare.

17 When the Debtors sought discovery on this very issue,  
18 Your Honor, last week I think it was, NHL resisted. We wanted  
19 to know, for example, how in the Quebec Nordiques case you  
20 could have a sale of the franchise announced on May 25th of  
21 1995, approved for not only an ownership change but a location  
22 change, which changed time zones and divisions, on June 21 of  
23 1995 to start a season which started I think October 6th or 7th  
24 of 1995. The NHL raises those issues yet again, but of course  
25 denies discovery on that very point.

1           In addition, Your Honor, the NHL in their objection  
2 in their brief that was filed said something that I thought was  
3 interesting. They said that this, these Debtors and PSE, the  
4 buyer, when they filed their relocation transfer, never  
5 formally requested a waiver of the January 1 deadline.

6           I suppose, Your Honor, mea culpa, we did not check  
7 the appropriate box to the extent that there was one. I  
8 suppose the filing of the sale motion on May 5th seeking this  
9 was not enough notice to the NHL that perhaps we needed them to  
10 deal with this on somewhat of an expedited timeline.

11           On the ownership application the NHL says we need  
12 more time to review it. It's noteworthy, Your Honor, that the  
13 NL doesn't say when it's going to call a meeting of the Board  
14 of Governors. It just needs more time.

15           In court on May 27th NHL's counsel was very candid  
16 with the Court, said Mr. Bettman could get on the phone with  
17 the owners and get a response very quickly from Mr. Bill Gates,  
18 the mythical Bill Gates bidder that we have here.

19           And the Court said, "I want you to make sure you tell  
20 this to your client. I expect that there be some movement  
21 here, not simply, 'I'll get to it when I get to it, Judge, and  
22 I'll call you when I've made a decision.'"

23           What we have here, Your Honor, is a classic pocket  
24 veto. It's kind of the legal equivalent of a passive-  
25 aggressive behavior. "I haven't said no, but I haven't said

1 yes."

2 THE COURT: Well, you know, I know that's the  
3 Debtor's view, but, you know, as one of my colleagues likes to  
4 say, "We're not selling a used car here."

5 MR. SALERNO: No doubt.

6 THE COURT: It's a pretty significant asset. There's  
7 a lot at stake for a lot of people, a lot of interests, and so  
8 under all the circumstances it seems like to consider that, and  
9 for the group to consider that that are in the NHL, they're  
10 entitled to some reasonable period of time to do it.

11 Now I'm not a great hockey fan. I'll admit that up  
12 front, but to my knowledge this is the first time anybody's  
13 ever tried to move a hockey team from this country to Canada  
14 and not vice versa, and that probably raises some unique issues  
15 on its own.

16 MR. SALERNO: That's probably true, Your Honor.  
17 There's no doubt that it does.

18 But it is, this much is transparent, Your Honor. If  
19 the NHL delays the process, they know very well that the  
20 stalking horse bid goes away. They know that, and --

21 THE COURT: Well, you know, you're really talking two  
22 different processes. You --

23 MR. SALERNO: Absolutely correct.

24 THE COURT: You're talking the process with the  
25 league. You've asked for, you've got your hearing, and, you

1 know, to be candid with all of you, you all are going to ask  
2 this Court to make a ruling on a very difficult issue, and I  
3 will do that, and I will promise all of you that at least some  
4 of you, at a minimum, will be very unhappy after I rule. And  
5 it's quite possible that all of you may be very unhappy after I  
6 rule.

7 MR. SALERNO: That's fair enough, Your Honor.

8 Your Honor, but they do know that if they delay the  
9 process, what they've done is the stalking horse bidder goes  
10 away, and at that juncture what we have by definition, if you  
11 look at their proposed sale procedures that were filed last  
12 night, the Court may or may not have seen them, but effectively  
13 what we're going to have is just a bid for the sale to remain  
14 in Glendale, and that's the universe of bidders that we're  
15 going to have. And they know that, because they do need to  
16 keep, and this has been, the NHL's been candid about this, they  
17 need to keep Southern Ontario as a league opportunity, and  
18 that's what, that's -- so be delaying the process they know  
19 that what they will do is accomplish effectively their goals.

20 And the NHL tells us, Your Honor, that there's no  
21 harm here, and the reason there's no harm here is because the  
22 NHL will continue to finance the operational losses of the  
23 Coyotes through next season and possibly beyond in order to  
24 find an appropriate buyer, appropriate by the NHL standards.

25 They're even going to, out of the goodness of their

1 hearts I suppose finance their own interest carry on their  
2 secured debt.

3 THE COURT: Well, let's be a little careful here with  
4 the comments. I mean, you know, they have now said that  
5 they're going to, if they have the opportunity to do so,  
6 they'll fund the league, the Coyotes, for next year, next  
7 season.

8 MR. SALERNO: They did.

9 THE COURT: The 2009-2010 season. That's, to me, not  
10 an insignificant statement.

11 MR. SALERNO: It's not, Your Honor, but I think it's  
12 more interesting to see what wasn't said. For example, if you  
13 look at Mr. Bettman's declaration on paragraph 35 he says, "The  
14 financing will be, 'Under appropriate conditions.'"

15 I don't know what that means. Maybe the Court does.  
16 What are those exactly? Because here's why it's important,  
17 Your Honor. The dirty secret here, and it's not really a  
18 secret, is that for every dollar that is lent, if it's lent on  
19 a secured basis, a senior secured basis, is one dollar less  
20 that's going to go to creditors in this matter, other creditors  
21 other than the NHL.

22 And Your Honor, one thing is pretty certain.  
23 Notwithstanding some fanciful projections by the City of  
24 Glendale that, "Oh, no, you can really turn this thing around,"  
25 this thing hasn't made money in 13 years. It's not going to

1 make money next year. It's not going to make money next year,  
2 Your Honor.

3 And so we are going to have an operational loss, and  
4 every dollar that is spent to fund it, now if it were funded  
5 either in the nature of either an unsecured claim, or even just  
6 funded without being entitled to repayment, that's different.

7 THE COURT: Well, I mean, in candor and in fairness,  
8 I think it's pretty rare when in any bankruptcy Chapter 11  
9 reorganization case there's DIP financing that doesn't have  
10 first claim on the all the proceeds when it comes time to make  
11 payments, so whether the NHL does it in this case or Bank One  
12 does it in some other case, it's always on those conditions.

13 MR. SALERNO: That's exactly correct, Your Honor,  
14 except the NH --

15 THE COURT: And I understand that the economic effect  
16 of that is that if they stay there an run through the next  
17 season, that probably means there is going to be less money for  
18 people with a lower priority.

19 MR. SALERNO: Yeah, exactly, Your Honor. We're  
20 cannibalizing the asset, we're just cannibalizing it like the  
21 famous line out of Catch-22 that I lose a nickel on every sale  
22 but I make it up in volume, that's precisely what's going to  
23 happen here. We're simply cannibalizing the asset. We're just  
24 cannibalizing it like the famous line out of Catch-22 that I  
25 lose a nickel on every sale but I make it up in volume; that's



1 precisely what's going to happen here. We're simply  
2 cannibalizing this asset, and every dollar that's lent to fund  
3 operations, first lien or otherwise, is going to reduce it.

4 Absent NHL consent or NHL inaction here, which is the  
5 equivalent of de factor disapproval, the Debtors believe that  
6 this Court can approve a sale and a relocation under both  
7 sections, 363 and 365.

8 With respect to § 363, what we have, Your Honor, and  
9 it's kind of an interesting mix, and I think one of the reasons  
10 why this --

11 THE COURT: Well that may be a gentle statement. I,  
12 in all the cases I've read, I don't think I've seen any  
13 scenario where somebody's tried to use §§ 365 and 363 as the  
14 Debtors are trying to do here.

15 MR. SALERNO: Well Your Honor, I'm not sure what  
16 other sections of the bankruptcy code we would use?

17 THE COURT: Well, I think you're right; those are the  
18 sections you'd use, but is there any case where a debtor has  
19 done anything factually similar to this where they've bought an  
20 existing business that's committed to a location and said, "Oh,  
21 but in the process, Judge, by the way, we're going to move it  
22 to another country."

23 MR. SALERNO: Well Your Honor --

24 THE COURT: Or let's make it even to another state.

25 MR. SALERNO: Sure.

1 Well, Your Honor, there are no other cases that have  
2 done it. This is clearly a case of first  
3 impression. That having been said there are numerous examples  
4 of where bankruptcy courts have used both §§ 363, and in some  
5 instances § 36t --

6 THE COURT: No question about that.

7 MR. SALERNO: -- to say, "I know the contract says X.  
8 I know that's what it says, but we're not going to enforce that  
9 provision in order to allow this sale to happen." And that,  
10 Your Honor, is what bankruptcy courts are uniquely qualified to  
11 do under these circumstances.

12 Your Honor, no one has raised it so I will not spend  
13 any time on it about the business justification for a sale  
14 outside of a plan of reorganization. The Court's familiar with  
15 the standards. If that gets raised as ultimately as part of a  
16 sale objection, the parties will deal with it, but we did brief  
17 it.

18 The real issue becomes, and the Court just raised  
19 it, okay --

20 THE COURT: Let me ask you this question. Let me cut  
21 to what I consider one of the challenging issues from the  
22 Debtor here. 365 says, let me find my notes, "Provides  
23 adequate assurance of future performance under such contract.

24 MR. SALERNO: Uh-huh.

25 THE COURT: Right?

1 MR. SALERNO: Yes, sir.

2 THE COURT: All right.

3 And so the contract says games in Glendale, Arizona,  
4 so to prevail you've got to prove that you're going to provide  
5 adequate assurance of future performance of that contract.

6 MR. SALERNO: Your Honor, the contract says games in  
7 Phoenix, Arizona, Glendale, Arizona, unless --

8 THE COURT: There is a difference.

9 MR. SALERNO: -- unless there is a transfer, a  
10 relocation transfer. That's what it is, Your Honor. It's not  
11 simply this is the only place you may ever play. It is unless  
12 there is a transfer location --

13 THE COURT: Well, but the contract doesn't say that  
14 the coyotes, and I'll just call them that to make it easy --

15 MR. SALERNO: Sure.

16 THE COURT: -- can unilaterally move anywhere they  
17 want, any time they want, does it?

18 MR. SALERNO: That's exactly correct, Your Honor.

19 THE COURT: Okay.

20 MR. SALERNO: What the contract says, and I'm  
21 looking, when we talk about the contract, what we really have,  
22 Your Honor, we have the constitution of the NHL. We have the  
23 bylaws of the NHL. And then there's a consent agreement. That  
24 consent agreement was when Mr. Ellman and Mr. Moyes essentially  
25 split --

1 THE COURT: Right.

2 MR. SALERNO: -- if you will, in 2006.

3 Well, let's look at the NHL constitution and bylaws,  
4 Your Honor. There are specific provisions which allow for and  
5 in fact contemplate changes of ownership and location. They  
6 get very specific in the bylaws, the bylaws here being Article  
7 35 and Article 36. There's a very detailed analysis of what  
8 the league will consider when it's determining whether to  
9 approve an ownership change, which is one issue, and a location  
10 transfer, which is the second issue.

11 Your Honor, it is the Debtor's position, and we'll  
12 focus on 363 first, and I promise you I'll get to 365. On 363  
13 the prohibition, the blanket prohibition, to the extent that  
14 the NHL is claiming a blanket provision, which is we just  
15 can't look at it, is violative of applicable non-bankruptcy  
16 law.

17 What law is that? Well, Your Honor, the anti-trust  
18 law, which we have people here to address, the concepts of good  
19 faith and fair dealing, the concepts of fiduciary duty. It is  
20 violative of those provisions. As a result, Your Honor, it is  
21 our belief that the restrictions in the contract from a 363  
22 standpoint are in bona-fide dispute. The bankruptcy code  
23 allows a sale free and clear of those interests -- and again  
24 we're talking 363. I will get to 365 -- if it's in bona-fide  
25 dispute.

1           Interests are intended to be read very broadly, not  
2 as the NHL says, all they really mean is sale free and clear of  
3 a lien. No. Interests --

4           THE COURT: Now let me review a statement from the  
5 Ninth Circuit in Vortex Fishing. "It is true that the mere  
6 existence of pending litigation with the filing of an answer is  
7 insufficient to establish the existence of a bona-fide  
8 dispute." So.

9           MR. SALERNO: We have more than that here, Your  
10 Honor. We have more than that here.

11          THE COURT: What do you have?

12          MR. SALERNO: Well, Your Honor, we have declarations  
13 of an expert which were filed, very specifically Mr. Andrew  
14 Zimbalist. We have more than simply an allegation, and, Your  
15 Honor, and we don't have an answer yet but the answer -- but we  
16 do have a complaint. We have the declaration of an expert on  
17 this point.

18          And Your Honor, we also have, we have briefed  
19 extensively, we have briefed extensively --

20          THE COURT: Well I'll agree with that. You have  
21 briefed it extensively.

22          (Laughter)

23          MR. SALERNO: There you go.

24          Your Honor, the NHL says that you could never sell  
25 free and clear of its interests to a proven owner or to

1 relocate to the extent it's a property interest as opposed to  
2 an executory contract interest. We have very specific rules,  
3 and those rules are sacrosanct and must be followed. And  
4 again, Your Honor, the Debtor is doing its best under the  
5 circumstances with the relocations and transfer applications to  
6 do that.

7 But the important question that we have as we sit  
8 here today, Your Honor, what are the real rules that the NHL is  
9 insisting we follow? It is apparently, it is very clear, Your  
10 Honor, that the NHL itself apparently feels free to disregard  
11 its own constitution when it wants to.

12 I'll give you an example, Your Honor. Mr. Daly filed  
13 a declaration on May 13th --

14 THE COURT: I'm familiar with this point.

15 MR. SALERNO: Exactly, Your Honor.

16 And he attaches to his declaration the NHL  
17 constitution, and Article 4.3 on page 11 of that constitution  
18 very specifically refutes what he says in his sworn  
19 declaration.

20 But what are the rules here, Your Honor? What are  
21 the rules? Well I suspect, Your Honor, that the rules are what  
22 the NHL say they are when they say they are.

23 THE COURT: Well I mean to some extent they are  
24 because the NHL makes their rules.

25 MR. SALERNO: Well, Your Honor, the NHL makes the

1 rules with its other owners I suppose, but that having been  
2 said, the constitution of the NHL, which is being held up as  
3 being carved in stone tablets and cannot be messed with,  
4 requires a very specific protocol for amending that  
5 constitution. That constitution has not been amended but we  
6 have the NHL saying --

7 THE COURT: Well, but --

8 MR. SALERNO: -- we don't, we don't follow it.

9 THE COURT: But haven't you already established  
10 through your Nordique's discussion about the move from Quebec  
11 to Denver that they don't follow that constitution at times?

12 MR. SALERNO: That's correct, Your Honor, yeah.

13 THE COURT: Okay.

14 MR. SALERNO: We have established that.

15 And that's the problem here, Your Honor. They  
16 themselves say you must follow the provisions of the bylaws and  
17 constitution that we tell you to follow and we'll ignore it  
18 when we want to ignore it.

19 Your Honor, we can't have that sort of process  
20 because it becomes arbitrary and capricious.

21 THE COURT: Well this probably gets into your anti-  
22 trust issue, but I'm going to ask the question, and if you want  
23 to bring in the leftie you can.

24 (Laughter)

25 THE COURT: You know, the entire argument you make is

1 an-applied argument for anti-trust violation, and to some  
2 extent that hasn't happened here because the application was  
3 only submitted a couple of weeks ago.

4 MR. SALERNO: And that is in fact an anti-trust  
5 issue, and if the Court wants to address that right now we can  
6 do that, or whatever --

7 THE COURT: Well we're going to address it sooner or  
8 later, so I'll let you make the decision.

9 MR. SALERNO: Okay. Well, you want to do it now?

10 THE COURT: Sure.

11 MR. SALERNO: Okay.

12 I yield the podium.

13 MR. BRANDON: Your Honor, George Brandon from Squire  
14 Sanders in Phoenix, and I am in fact a leftie.

15 I think Your Honor, if I understood the question  
16 correctly, has asked about whether rejection has occurred, and  
17 it seems pretty plain under the Sullivan case in the First  
18 Circuit, a 1994 decision after the Raiders decisions, that de  
19 facto rejection is more than enough.

20 THE COURT: Well let me ask you something about  
21 Sullivan, because my memory of that case is that the circuit  
22 court ultimately vacated the decision by the lower court in  
23 part because the Sullivan Group never actually insisted upon a  
24 vote to reject their public financing proposal.

25 MR. BRANDON: Well Your Honor, the problem with that



1 comparison is that of course there's a full record at trial  
2 there. There's motions for summary judgment heard, and there's  
3 a much fuller record before the Court.

4 Here, we're asking the Court essentially to look  
5 through 363 and 365 --

6 THE COURT: Well let's stay on the, just the anti-  
7 trust issue for a second because the one thing I'm not going to  
8 let any of you do, if you want to argue the anti-trust issues  
9 you can, but we'll let Mr. Salerno handle the bankruptcy  
10 issues.

11 MR. BRANDON: Sure. He's happy with that, Your  
12 Honor.

13 THE COURT: So the question is, if it's an as-applied  
14 argument, the NHL really hasn't applied anything yet, have  
15 they?

16 MR. BRANDON: Well I can answer that question this  
17 way, Your Honor. Only half of our claimed anti-trust injury is  
18 an as-supplied analysis. With respect to the as-applied  
19 analysis, it becomes almost an irrelevancy in the context of a  
20 provision of the NHL constitution that provides for a veto of  
21 any member in the home territory, and as a result, as-applied,  
22 you know, their defense to that is well we haven't applied it,  
23 and if we do apply it we have these objective factors set forth  
24 in Raiders II, well our response to that is that doesn't matter  
25 because when we get to the end of this proceeding we still have

1 somebody out there in the person of the Toronto Maple Leafs who  
2 can stop the show. That is unlawful.

3 THE COURT: Well, you know, if those are the ultimate  
4 facts, maybe you've got a case, but I think the Ninth Circuit  
5 in the San Diego Clippers case talked about that professional  
6 leagues can't deviate from their constitution and rules and  
7 there depends upon the facts of the case, and vacated summary  
8 judgment that the Clippers had obtained against the NBA and  
9 sent it back for trial, and then the case just disappeared from  
10 reported decisions so we have no idea what happened.

11 MR. BRANDON: Well a couple things about that, Your  
12 Honor. One, the Clippers case says the existence of these  
13 objective factors might justify them on pro competitive terms,  
14 but it doesn't say they do in all circumstances.

15 And here, Your Honor, I can answer that question with  
16 another question. Where's the declaration from the owner of  
17 the Toronto Maple Leafs saying I will not veto a move into my  
18 home territory? Without that, I think their argument is  
19 baseless, and Your Honor has said, we might have a case; we do  
20 have a case.

21 Beyond that let me get to the other half of the anti-  
22 trust claim because it's relevant to Your Honor's analysis on  
23 this point. The exercise of anticompetitive behavior and  
24 monopoly power in the context of a trans, the market for a  
25 transfer of ownership interests here has already been made.

1 There's no issue of as-applied. The NHL has said repeatedly,  
2 including last night in their bid procedures, this is a sale  
3 only for an owner willing to keep the team in Phoenix.

4 And that, Your Honor, if Your Honor, it's under --

5 THE COURT: Well, now in fairness, both sides got  
6 orders scheduling their bid procedures, and so, you know, at  
7 the moment one of those is going to go forward.

8 MR. BRANDON: Well, yes, Your Honor, and I'm --

9 THE COURT: You have to put those two orders  
10 together, and you can't say that the league has said that's the  
11 only way it's going to go.

12 MR. BRANDON: Well I'm arguing I guess ultimately,  
13 Your Honor, for the proposition that only a sale that  
14 contemplates a purchase of this ownership interest in the  
15 market for NHL ownership interests beyond the limited market of  
16 owning such an interest in Phoenix is lawful under these  
17 circumstances.

18 And that we have alleged in the complaint and I  
19 believe we can prove and I don't believe that any substantive  
20 argument exists to suggest that somehow this, you know,  
21 essentially conceded constriction in that market is pro  
22 competitive. It's not; it's anti-competitive. It takes out  
23 Mr. Balsillie. It probably takes out --

24 THE COURT: Well, now --

25 MR. BRANDON: -- others who wish to move the team to

1 Toronto.

2 THE COURT: Hasn't the Ninth Circuit said in Raiders  
3 in the Clippers' decision that all these issues are factual  
4 questions. They're not, per se, violations.

5 MR. BRANDON: Absolutely, Your Honor. The rule of  
6 reason applies. For the NHL to prevail on those issues in this  
7 context, however, where Your Honor need only find a bona-fide  
8 dispute or under 365 the mere specter of an anti-trust  
9 violation as in the Boogart case in Florida, they must  
10 effectively show that all their procedures, as applied, and  
11 their actions with respect to the ownership as per se legal,  
12 and they cannot do that today, Your Honor.

13 THE COURT: Well, tell me how they've applied their  
14 procedures and decision making in the context of the Coyotes?

15 MR. BRANDON: Well, Your Honor, with respect to the  
16 transfer, the market for ownership interests, I just discussed  
17 that. That's not an application issue. They've said it's only  
18 limited to persons willing to own in Phoenix.

19 With respect to their interests in controlling the  
20 transfer of the team, they've essentially not, unlike every  
21 other sports league represented by Mr. Schian, they haven't  
22 removed from their constitution the veto right of a home  
23 territory member.

24 THE COURT: Well of course --

25 MR. BRANDON: And so the objective factors they put

1 in --

2 THE COURT: -- if they don't apply those, then it  
3 really doesn't matter.

4 MR. BRANDON: But Your Honor, you're counting on the  
5 good faith of persons whose agenda is clear to do something in  
6 conformity with the law, which we say they've already stated  
7 they won't do.

8 THE COURT: Well --

9 MR. BRANDON: I mean, Your Honor, they, it's,  
10 there's no question that Mr. Goldfein's going to get up here  
11 and say, you know, after Raiders II --

12 THE COURT: Well let me go back to my basic question.  
13 Tell me how the NHL has applied their relocation and transfer  
14 processes to the Coyotes?

15 MR. BRANDON: They haven't amended their constitution  
16 to take away veto power of the Toronto Maple Leafs.

17 THE COURT: Well --

18 MR. BRANDON: The only professional sports league  
19 that permits that after Raiders II, all they've done is add a  
20 bunch of window dressing objective factors, but at the end of  
21 the day when we all leave this courtroom with Your Honor's  
22 order, whenever that may be, there still remains the right of  
23 the Maple Leafs to veto under this constitution and stop the  
24 show or file a lawsuit to do that.

25 THE COURT: Of course at least as far as the record

1 is that hasn't happened; right?

2 MR. BRANDON: Doesn't have to happen yet, Your Honor,  
3 No one's permitted a sale to their or a relocation to their  
4 home territory. It could not have happened yet, I don't think,  
5 under the constitution and by-laws.

6 In any event, what's plain is they're not foreclosed  
7 from it under the constitution and by-laws. Indeed, it is  
8 permitted them expressly, no matter what Mr. Daly swears or Mr.  
9 Bettman swears or, you know, Mark Messier swears. It doesn't  
10 matter, Your Honor. It's in the constitution. It hasn't  
11 changed. It's unlawful.

12 THE COURT: Well, I think the Clippers talks about,  
13 the Clippers decision talks about that there are situations  
14 where your agreements as written in the context of anti-trust  
15 and pro sports leagues, it's much more important how they apply  
16 them. And that's something the jury's going to have to decide  
17 that can't be decided as a matter of law; right?

18 MR. BRANDON: Well I would think that might be true  
19 in cases other --

20 THE COURT: Isn't that what the Clippers case says?

21 MR. BRANDON: Yes, Your Honor, but the Clippers case  
22 doesn't go that far, with all due respect. It says that these,  
23 use of these objective factors in the context Your Honor's  
24 talking about might be sufficiently pro competitive.

25 And I suppose that is for the jury at the end of the

1 day, but here those, the existence of the veto power renders  
2 those factors a nullity, and so I don't know how the jury could  
3 override the constitution by finding that, you know, the jury  
4 can't find an amendment, de facto amend to the constitution I  
5 don't think, Your Honor.

6 Your Honor's scaring me so I'm going to pull out my  
7 copy of the Clippers while Your Honor does the same.

8 THE COURT: Well, I mean, page 586,  
9 "The mere existence of Article 9 and  
10 Article 9A and various provisions for  
11 franchise movement evaluation cannot  
12 violate anti-trust law."

13 I think what that court said was that, you know, your  
14 documents may say something but I think what that court was  
15 telling the trial court when they remanded it is, you're going  
16 to have to put all the facts on the table and let a jury decide  
17 whether there was an anti-trust violation.

18 MR. BRANDON: Absolutely, Your Honor. That is the  
19 rule of reason, and we're not asking Your Honor to find that  
20 these things are --

21 THE COURT: Okay. So let me go back to Mr. Salerno  
22 because now you're going to tell me about bona-fide dispute and  
23 that's the right-hander.

24 MR. BRANDON: Well I was, Your Honor, and you're  
25 correct. Thank you.

1 MR. SALERNO: Like tag team legal arguments.

2 Your Honor, on a bona-fide dispute the case law talks  
3 about an objective standard under the law, the objective  
4 standard. If all you had was a complaint filed and an answer,  
5 well, that's probably not it. There's more than that here,  
6 Your Honor. There's more than that here.

7 And in fact, Your Honor, to the extent that this  
8 Court says, "You know what? Maybe after discovery happens and  
9 there is a trial, yeah, I understand where that, where we  
10 could get to that."

11 That is the objective standard, Your Honor. I would  
12 liken it to a motion to dismiss, the standard being a motion to  
13 dismiss, or a motion for summary judgment. Will the NHL be  
14 able to come in here and get a motion to dismiss for failure to  
15 state a claim or a motion for summary judgment, because if they  
16 could, say, okay, then there's not an objective basis.

17 But Your Honor, there are factual issues here, and  
18 again, we've not had any opportunity to do any discovery with  
19 respect to the NHL --

20 THE COURT: Well, that's because you only filed your  
21 amended complaint about ten days ago, didn't you?

22 MR. SALERNO: That's true, Your Honor. That's  
23 absolutely true.

24 Your Honor, we're all working under very tight  
25 timelines, including the Court. We recognize that.



1 THE COURT: I've noticed that.

2 MR. SALERNO: I recognize that.

3 And Your Honor, again, NHL speaks out of both sides  
4 of its mouth here. They're telling you that anyone who takes  
5 this team must agree to be bound in its entirety the NHL  
6 constitution. That includes the provision in § 4.3 that gives  
7 any team a veto right. They say, "Yeah, you have to take it  
8 subject to that, but we're telling you as a matter of practice  
9 or policy we don't give it."

10 THE COURT: Well --

11 MR. SALERNO: Well, Your Honor, then why do they  
12 insist upon it being assumed in its entirety? It seems to me,  
13 Your Honor --

14 THE COURT: Isn't that the law? If you want to  
15 assume a contract you have to assume the entire contract,  
16 right?

17 MR. SALERNO: You have to assume all lawful  
18 provisions of a contract, Your Honor; that is exactly right.

19 Your Honor, let me give you an example. There is a  
20 provision in the NHL, I believe it's the constitution, which  
21 says filing of a bankruptcy is automatic termination of a  
22 member.

23 Of course --

24 THE COURT: That's a give-me (sic).

25 MR. SALERNO: That's a give-me. That's exactly

1 right, Your Honor. But when you look at the cases under § 365  
2 that we cited, say it does not require literal compliance. You  
3 take a look at it and there are some that are not strictly  
4 enforced, Your Honor, and to simply come in here.

5 Your Honor, let me give you an example. If I walked  
6 in and said, "Your Honor, the Debtor owns a piece of property,  
7 and pursuant to the deed that I got this piece of property  
8 from, it's a great piece of property. I've got a buyer, but  
9 I've got an issue, and the issue is the deed has a restriction  
10 in it that says you may not sell this property to an African-  
11 American, right in the deed. I took it with that. Yeah, I got  
12 a great deal on it. I understand that."

13 THE COURT: Unenforceable.

14 MR. SALERNO: And I come in, Your Honor, and I --

15 THE COURT: Unenforceable as a matter of law.

16 MR. SALERNO: I'm sorry, Your Honor?

17 THE COURT: Unenforceable as a matter of law.

18 MR. SALERNO: Exactly, Your Honor.

19 And so that's what we have here, Your Honor. There  
20 are, there is an overlay here that you can't simply say if it's  
21 in that contract I'm simply going to say you have to take it  
22 subject to that.

23 That's why you have the long laundry list of cases  
24 where they say, "I know that there's a use restriction in the  
25 lease; I'm selling free and clear of that." The tying

1 arrangements in Boogart --

2 THE COURT: Well let me ask you the same question I'm  
3 going to try and ask the main counsel.

4 MR. SALERNO: I'm sorry, Your Honor?

5 THE COURT: Let me ask you the question I'm going to  
6 try to ask, and other counsel make a little note and remind me  
7 to ask you this question.

8 MR. SALERNO: I'll remind you if they don't.

9 THE COURT: Good. What's the Debtor's best case on  
10 this one, that this transfer and relocation restriction can be  
11 cut out? What case should I read, or, even if you've got two  
12 or three give me the two best?

13 And if you want to reserve your comment and tell me  
14 later, you can.

15 MR. SALERNO: Sure. And Your Honor, I mean, I'm  
16 happy to do that. We have cited a number of cases. I can --

17 THE COURT: Oh, you've cited a number of cases.

18 MR. SALERNO: Exactly, Your Honor.

19 (Laughter)

20 MR. SALERNO: Your Honor, I'll tell you a couple  
21 though that I think would be particularly -- I find them  
22 interesting. I hope you do.

23 I found particularly interesting, Your Honor, the  
24 Rickel's, I think it was the Rickel's case, and in that  
25 particular instance, Your Honor, what the court allowed -- it's

1 on paragraph 124, page 66 of our brief.

2 THE COURT: Paragraph 124?

3 MR. SALERNO: One two four; yes, Your Honor. It's --

4 THE COURT: Thank you.

5 MR. SALERNO: It's -- luckily we kept it to one  
6 volume, so. The mini-series is going to be the thing that  
7 you're going to watch for.

8 And Your Honor, this is a fascinating case because in  
9 Rickel's there were lease restrictions, and they were use  
10 restrictions, and the debtor wanted to assume and assign, but  
11 the assignee was going to --

12 THE COURT: But --

13 MR. SALERNO: -- that that assumption assignment was  
14 going to violate it. They temporarily suspended it and said,  
15 "But you, as assignee, are bound furthermore after this."

16 THE COURT: You know, I'm familiar -- I can't quote  
17 you the facts in that specific case. I know there's a number  
18 of bankruptcy decisions on use restrictions. Again, I suppose  
19 this is the reality of the facts here, which is reported  
20 decisions. That seems to me factually fairly different than  
21 what's going on here.

22 MR. SALERNO: Well, Your Honor, you're not going to  
23 find a case on all fours. If there was a case on all fours,  
24 and all of these lawyers in this room missed it, shame on us.  
25 This is factually unique.

1           That having been said, Your Honor, bankruptcy courts  
2           have to deal with cases that are factually unique.  
3           Unfortunately that is the nature of the beast, Your Honor, so  
4           do I wish I could have shown you three cases involving NHL  
5           teams? Yes, of course, Your Honor, but the truth is there have  
6           been very, very few. There's only, this is the third hockey  
7           team in the 31 years of the Bankruptcy Code that's filed, and  
8           only the fourth professional sports team that's filed since the  
9           Bankruptcy Code; the Kings, Penguins, Sabers, and the Coyotes.

10           Your Honor, on adequate protection, on the issue of  
11           adequate protection, because that's required. If it's a  
12           disputed interest that is certainly required.

13           Your Honor, what we will do, and assuming, and all  
14           this assumes, Your Honor, that our existing stalking horse  
15           bidder is the highest or best. I don't say highest and best  
16           because it's conceivable someone could come in at less money  
17           but the economic impact say maybe that's a better bid. That's  
18           entirely possible.

19           But if they're the highest or best bid at the sale  
20           hearing, Your Honor, it is our burden, the Debtor's burden, in  
21           order to put on a case of adequate protection.

22           What is that? Because this doesn't happen now. It  
23           doesn't happen, you're not stripping anything from the NHL now.  
24           What happens is going to be at the sale hearing, and Your  
25           Honor, what we would do is have to show by an evidentiary

1 presentation to the satisfaction of this Court that this  
2 ownership transfer meets the objective criteria of Article 35  
3 of the NHL consitu -- by-laws, and that the location transfer  
4 meets the objective criteria of Article 36. If we don't do  
5 that, we lose.

6 THE COURT: But, well let me as you the question  
7 about adequate protection of the NHL.

8 MR. SALERNO: Uh-huh.

9 THE COURT: And it's got a little anti-trust in it,  
10 but you're going to have to handle it solo, so stay there.

11 MR. SALERNO: I'll do my best.

12 THE COURT: In the Raiders decision the Ninth Circuit  
13 said that the league owned the Los Angeles location until the  
14 Raiders I think in 1980 or 1982 decided they wanted to go  
15 there, and so that value was a league right, and the Raiders  
16 took it. And so in analyzing the damages that the Raiders were  
17 seeking, they offset the league's right by that reduced by the  
18 value of the Oakland location that the Raiders were giving up.

19 MR. SALERNO: Uh-huh.

20 THE COURT: Now it seems like to me, everybody agrees  
21 that a NHL team in Hamilton, Ontario is worth more than an NHL  
22 team in Glendale, Arizona. And I haven't seen anything from  
23 Debtors or PSE about how that plays in the equation in terms of  
24 adequate assurance and the economic analysis that I've asked  
25 about.

1 MR. SALERNO: Absolutely. I'll deal with that right  
2 now. How is that, Judge?

3 The fee that you're talking about, the so-called  
4 Raiders II fee, that is found in Article 36.6 of the NHL by-  
5 laws. The NHL has stated --

6 THE COURT: Well, I've read the by-law --

7 MR. SALERNO: Understand.

8 THE COURT: -- and I know what it says.

9 MR. SALERNO: I understand.

10 THE COURT: Okay.

11 MR. SALERNO: I'm not going to go into any great  
12 length about it.

13 The NHL believes that this asset purchase agreement  
14 is reduced dollar for dollar by any relocation fee. That's in  
15 fact not true, Your Honor. That's not true.

16 If you look at § 6.2(b)(iv) of that, it says that it  
17 is required, Your Honor, that the Court determine what that  
18 relocation fee is. They want it to be zero. Of course they  
19 want it to be zero. If that fee is more than zero, Your Honor,  
20 they have the ability to walk away. They do have the ability  
21 to walk away.

22 But it does not, if this Court says it's a \$100  
23 million fee, this \$212 million offer doesn't go to 112. It's  
24 not like they take it off of the purchase price. That's in  
25 addition, Your Honor.

1 THE COURT: Well, well help me out a little bit.  
2 Under this deal, let's assume for the moment that there is a  
3 relocation cost --

4 MR. SALERNO: Uh-huh.

5 THE COURT: -- and that somebody has to pay it.  
6 Under this deal who pays it?

7 MR. SALERNO: The buyer.

8 THE COURT: All right. So --

9 MR. SALERNO: Under this deal the buyer, the, PSE  
10 Sports pays that.

11 THE COURT: Now is, unless I missed it in some of the  
12 amendments, my reading of the asset purchase agreement was that  
13 the buyer is not going to pay that.

14 MR. SALERNO: Your Honor, the buyer has the ability  
15 to walk away, but it does not, the APA does not say that it  
16 comes out of the purchase proceeds. The buyer has the ability  
17 to walk away, but this does not come out of it.

18 THE COURT: Well help me out a little bit. Again,  
19 let's assume that there is a fee to be charged for relocating.

20 MR. SALERNO: Uh-huh.

21 THE COURT: And I come back, everybody has  
22 acknowledged either expressly or by implication that a NHL  
23 franchise in Hamilton is worth more than a NHL franchise in  
24 Glendale, Arizona, so let's assume there's a relocation cost.  
25 How is the Debtor, who's obligated to prove adequate



1 protection, how's that going to be dealt with?

2 MR. SALERNO: Well, Your Honor, what we'll do is that  
3 would have to be dealt with as part of the sale hearing.

4 It's interesting. The Court says for example that  
5 the franchise in Ontario, in Hamilton, is worth more than the  
6 franchise in Arizona.

7 THE COURT: Well, I -- in all my reading I think,  
8 like I said, I think you all have either expressly, i.e. the  
9 NHL, or others impliedly, acknowledged that fact.

10 MR. SALERNO: Your Honor, we do, except that's not  
11 how the relocation fee under the NHL's own by-laws is  
12 calculated. The relocation fee and the indemnity is to  
13 reimburse the NHL and the neighboring team for goodwill --

14 THE COURT: All right.

15 MR. SALERNO: -- that they expended to develop this  
16 market.

17 THE COURT: We're --

18 MR. SALERNO: That's what it is, Your Honor. It's  
19 not simply --

20 THE COURT: That's, you're correct; that's what the  
21 constitution says.

22 MR. SALERNO: That's what the contract says, Your  
23 Honor, so again, maybe we'll get a declaration that says, "I  
24 know that's what it says, but let me tell you what we really  
25 mean." But Your Honor, that's what the contract says.

1           What is the goodwill? And let me give you an  
2 example, Your Honor. You compare it to what happened when the  
3 Coyotes came to Arizona. When the Coyotes came to Arizona,  
4 there was, in 1996, there was this effort, by the NHL I  
5 suspect, to make some hockey consciousness, if you will, in a  
6 market that was not a traditional hockey market. They would  
7 put on clinics for kids. This is a, you know, this is how you  
8 play hockey, et cetera, et cetera, to build up the excitement.

9           That is in fact building goodwill in the Arizona  
10 market, and there's a cost to that. There's an absolute cost  
11 to that. Of course there is, Your Honor.

12           THE COURT: Well, I --

13           MR. SALERNO: And the question becomes what is the  
14 goodwill that the NHL, or the Maple Leafs for that matter, have  
15 actually expended to put a team in Hamilton? Your Honor, the  
16 truth is they don't need to put any goodwill into that. That  
17 market would support two more teams.

18           THE COURT: Well, that's a clever argument, but I  
19 think it dodges the question. As I read Raiders, they own  
20 Hamilton, at least as of May 5, 2009. That was a league  
21 opportunity, and under the Raiders they're entitled to that  
22 value.

23           And so as I perceive as I sit here the thing that the  
24 Debtor's trying to do under 363 and 365 is in part you've got  
25 to prove that you can adequately protect the league's interest

1 there.

2 MR. SALERNO: Absolutely.

3 THE COURT: Whatever that number is.

4 MR. SALERNO: Your Honor, you're absolutely correct.  
5 You're absolutely right.

6 THE COURT: Thank you.

7 MR. SALERNO: And Your Honor, again, we would put on  
8 a factual showing. This is under Article 36.6 of the by-laws,  
9 this is what it is, Your Honor, and the NHL comes in, "No, no,  
10 no, you're wrong. It's not X; it's Y. It's 100 million. It's  
11 200, it's three trillion, whatever it is the NHL says."

12 And Your Honor, that becomes a factual dispute which  
13 we clearly, this Court is going to have to resolve. There's no  
14 doubt about that.

15 THE COURT: So hypothetically speaking, it's very  
16 important that we acknowledge that hypothetically speaking, if  
17 the Debtor wins today, there's still unresolved issues under  
18 363 and 365; right?

19 MR. SALERNO: Right.

20 THE COURT: And we're going to resolve those on the  
21 22nd by some kind of trial?

22 MR. SALERNO: Yes, Your Honor. There's factual  
23 issues. There are factual unresolved issues.

24 THE COURT: And you're going to parade in all your  
25 economists and sports specialists and --

1 MR. SALERNO: Yes, Your Honor.

2 THE COURT: How long do you think that'll take?

3 MR. SALERNO: A couple of days. A couple of day,  
4 Your Honor.

5 Your Honor, on this very issue, we have made a  
6 proposal to the NHL. The proposal was why don't we get  
7 together and try and mediate this issue of the --

8 THE COURT: Well, wouldn't that be a lovely idea?

9 (Laughter)

10 THE COURT: Why don't you guys just go mediate the  
11 whole thing?

12 MR. SALERNO: Well, Your Honor, the truth is I  
13 suspect if you mediated the relocation fee, maybe it would  
14 resolve everything, but that, who knows? But we, what we have  
15 suggested, Your Honor, is that the Court order the parties to  
16 mediate between now and next week, see what we can agree to.  
17 This will allow us to determine how far off we are on this  
18 issue, how far off are we on this issue?

19 We would ask, Your Honor, that the NHL make its  
20 proposed fee, what it believes the fee, be available to us no  
21 later than say June 17th so that we can say, because again,  
22 we're working on a June 22nd hearing date, Your Honor, and  
23 that's, that's what the Debtor has. I mean, that's what we  
24 have in the sense of we have a purchase that has certain  
25 deadlines under it, not unlike what Chrysler was faced with

1 Fiat, et cetera, the Debtors have what they have, and they can  
2 only work with what they have.

3 And Your Honor, we want a basis for this Court to  
4 review it, because what we don't have to have happen, Your  
5 Honor, is that notwithstanding what's in the by-laws, what we  
6 hear is, "No, no, no. I know that's what the by-law says, but  
7 we actually do this."

8 It's really difficult to deal with those sorts of  
9 unwritten practices, Your Honor, because it simply creates  
10 chaos for anyone trying to buy this, and it ultimately simply  
11 says whatever the NHL says, you do.

12 THE COURT: Well, it seems like the courts have said  
13 in the Ninth Circuit that professional leagues have some  
14 latitude to deviate from what their contracts and constitution  
15 say.

16 MR. SALERNO: Your Honor, let's assume, okay, if  
17 there's a case, there's cases that say that, that latitude,  
18 that deviation has to be good faith, and has to be done in good  
19 faith.

20 THE COURT: Well --

21 MR. SALERNO: I can't simply be whatever the league  
22 says it is.

23 THE COURT: I think also clear, and I think it's,  
24 it's either Raiders I or Raiders II, it talks about in context  
25 of professional sports franchises the covenant of good faith

1 and fair dealing, and that applies both ways.

2 MR. SALERNO: And in this case, Your Honor, under New  
3 York law, because we think that's the applicable law vis-a-vis  
4 the NHL, it does apply. It does apply.

5 THE COURT: All right.

6 MR. SALERNO: And --

7 THE COURT: I think it applies both ways under New  
8 York law, Arizona law, and Ninth Circuit law. My guess is  
9 there's no law in this country that doesn't apply to contracts.

10 MR. SALERNO: I think you're right, Your Honor. I  
11 think you're right.

12 And that means that you cannot simply act arbitrarily  
13 and capriciously to say, "Here is what I've decided is the  
14 fee." You can't do it.

15 THE COURT: I think we can all agree on that  
16 standard. I suspect it much like art, we're probably not going  
17 to agree on which painting meets that standard and which  
18 doesn't.

19 MR. SALERNO: That's fair. That's fair enough, Your  
20 Honor.

21 But in any event, Your Honor, it is the Debtor's  
22 position that the adequate protection of the disputed interests  
23 would be the showing, and which would include a resolution of  
24 this issue. Hopefully we can mediate it. If we can't, we  
25 can't. But that would, that's what it would be required.

1 THE COURT: You know, what's the absolute deadline  
2 for the Debtor to close this sale assuming it wins hands down  
3 on everything?

4 MR. SALERNO: Under the contract, Your Honor?

5 THE COURT: Uh-huh.

6 MR. SALERNO: The sale order I, and I could be off on  
7 this, it has to be entered sometime June 30th or something like  
8 that. The primary thing that we have is there's a draft which  
9 is coming up in June 26th, 27th, around that date, I don't  
10 know. And that's, under the contract that's what it is, Your  
11 Honor. It's an expedited timeline there's no doubt. There's  
12 no doubt, Your Honor.

13 Your Honor, if I may, I'd like to move on to § 365  
14 issues. With respect to executory contracts, the Debtor  
15 asserts that it can assume and assign executory contracts, and  
16 the NHL points out five major objections. There may be sub  
17 objections or whatever.

18 Number 1, that the NHL agreements are like personal  
19 services contracts that you cannot assume and assign without  
20 their consent.

21 THE COURT: Well, let me, let me put that one aside  
22 pretty quickly. I don't buy that argument.

23 MR. SALERNO: That saves me some time. Thank you.

24 Number 2 --

25 THE COURT: It saves me some time, too.

1 MR. SALERNO: No, although I'm sure this is  
2 fascinating for you as it is for us.

3 Number 2, Your Honor, there's intellectual property  
4 contracts that cannot be assumed or assigned, citing Catapult.

5 Number 3, the Debtor has to cure defaults, and  
6 there's a pre-bankruptcy non-monitored default, because we had  
7 the temerity to actually negotiate, subject to Court approval,  
8 a document, and that of course can't be --

9 THE COURT: Well let's cut to the heart. You want to  
10 transfer and relocate without the consent of the league and  
11 assume the contract; right?

12 MR. SALERNO: Correct.

13 THE COURT: Talk about those.

14 MR. SALERNO: The Debtors cannot cherry pick what  
15 parts they want and what they don't want, and then finally the  
16 Debtors cannot show adequate assurance of future performance.

17 Your Honor, one of the things that is raised is that  
18 the NHL says, "Oh, by the way, contract, that they're not  
19 trying to assume and assign, that they have to, is the consent  
20 agreement."

21 I don't understand that because a consent agreement  
22 is a specific agreement between the NHL and whoever owns it at  
23 the time. The consent agreement that exists is the one when  
24 again there was the split between Mr. Ellman and Mr. Moyes, so  
25 that's specific to them. You don't assume and assign that.



1           But let's take the constitution and the by-laws as  
2 these contracts. With respect to the intellectual property  
3 contracts, Your Honor, candidly, the NHL is being disingenuous  
4 with this Court.

5           THE COURT: Well let's talk about the transfer and  
6 relocation --

7           MR. SALERNO: Okay.

8           THE COURT: -- under 365, because I think that goes  
9 to the heart of what this case is about.

10          MR. SALERNO: Uh-huh.

11          THE COURT: You -- I assume the Debtor, if it is  
12 successful and the buyer if they're successful, don't want  
13 those provisions taken out and declared invalid on the  
14 constitution and by-laws, do they?

15          MR. SALERNO: No, Your Honor. I think what they want  
16 is like what was done in Rickel's Home Center, which is allow  
17 this to happen, and then keep them in. Allow them to happen.  
18 That's exactly what the court did in the Rickel's Home Center  
19 case.

20          THE COURT: Of course Rickel's stayed in the same  
21 location --

22          MR. SALERNO: Sure, Your Honor.

23          THE COURT: -- and continued to perform under the  
24 agreement, other than it used the property differently than  
25 previously.

1 MR. SALERNO: Of course, Your Honor, of course.

2 And you know what, Your Honor? To the landlord in  
3 Rickel's or the first party that was objecting to the  
4 assumption and assignment, I'm sure that lease restriction, use  
5 restriction, was incredibly important to them. I understand  
6 that, Your Honor. I understand that.

7 But the courts did it. Under the adequate assurance  
8 of future performance they specifically said, "You do not have  
9 to enforce for purposes of allowing the assumption and  
10 assignment every single provision of the contract."

11 And Your Honor, if we, here's what I think  
12 ultimately, Your Honor, it comes down to. The NHL, good  
13 reasons or bad reasons, whatever, says, "We are just not going  
14 to make a decision. We don't have time." Whatever their  
15 reasons are.

16 What we're saying is, that's fine. We're going to  
17 put on the same showing that we've put on to the NHL, and if  
18 the NHL will not formally hold a meeting and decide what it  
19 wants to do on this thing, I'm going to ask the Court to do  
20 that, Your Honor. If --

21 THE COURT: Well you've done that.

22 MR. SALERNO: If Mohammad will not come to the  
23 mountain, the mountain will in fact move to Mohammad under  
24 those circumstances, Your Honor.

25 And Your Honor, Judge Volinn in the Seattle Pacifics,

1 or, yeah, the --

2 THE COURT: The Seattle Pilots.

3 MR. SALERNO: I'm sorry?

4 THE COURT: The Seattle Pilots.

5 MR. SALERNO: That, too. I'm not a baseball fan much  
6 either, Your Honor, but under those circumstances, as we've  
7 said, we said to, at the time in the American League, "Show up  
8 in front of me." They gave them two weeks. "Tell me why  
9 you're going to approve or disapprove this? Tell me. In order  
10 to show cause."

11 And they said, "Okay, we approve it," made it easy.  
12 Made it much easier. We forced their hand, Your Honor. And  
13 that's fine, because these things happen sometimes in  
14 bankruptcy cases.

15 THE COURT: Well, that one's very interesting for  
16 some reason, but it's also quite different for a couple of very  
17 fundamental reasons. Different law; right?

18 MR. SALERNO: No doubt. It was a bankruptcy act, Your  
19 Honor. No doubt about that.

20 THE COURT: And in everything I read there seemed to  
21 be an indication that nobody was going to pay for the Seattle  
22 Pilots to play for the season that was weeks away in Seattle,  
23 and so basically you either did the sale, or you kind of went,  
24 I don't remember the number of teams then, but you went one  
25 team less that year.

1 MR. SALERNO: Right.

2 Well, Your Honor, interestingly with respect to the  
3 Pilots' situation, there was that analysis to say no one wanted  
4 to buy it. What Judge Vollin focused on was the economic  
5 distress of the debtor, which was undeniable.

6 But Your Honor, here we have asked, we have sought to  
7 get some indication. We know what the market is, Mr. Scudder's  
8 declaration, we've asked to do discovery of the NHL to say,  
9 "Tell me what other expressions of interest you have?"  
10 According to Mr. Bettman's declaration, Your Honor, there's  
11 four other potential parties that are all expressing interest  
12 with the NHL.

13 Your Honor, NHL says, "We're not going to tell you  
14 these things. We're not going to do that yet, expose those to  
15 the Court."

16 But what's going to wind up happening, Your Honor, is  
17 that if the NHL is successful so PSE goes away, and there's  
18 going to be an audible gasp, an audible gasp when these offers  
19 come before this Court, because we know what the market, we  
20 know what the market is out there, Your Honor. And you said,  
21 the Court said this isn't like selling a used car.

22 You're exactly right. It's not like selling a used  
23 car. We know what the market is, and we know where the numbers  
24 shake down. There is going to be an audible gasp if and when  
25 these offers are ever exposed.

1                   But what the NHL needs to do is make sure Mr.  
2 Balsillie's driven away, after he's gone, and then that's going  
3 to come in because, guess what? We're the only game in town  
4 now.

5                   I know you don't like it, but that is what it is.  
6                   And I understand the Court has to do the economic  
7 analysis. Okay. Well, it's less money, but you don't have the  
8 City of Glendale issues to deal with, et cetera.

9                   Well I understand that. I understand that, Your  
10 Honor. But there's going to be an economic, a real economic  
11 impact. NHL doesn't want to tell us who they're dealing with,  
12 or, or --

13                   THE COURT: Well presumably nobody knows right now  
14 because at least from everything I've read there's been no  
15 other offer for the Coyotes.

16                   MR. SALERNO: That's correct, Your Honor, including,  
17 Your Honor, in the efforts that Coyotes made prior to  
18 bankruptcy, the only one that ever came forward and said,  
19 "Here's a signed asset purchase agreement" was PSE Sports.

20                   So you're exactly right, Your Honor. No one does  
21 know.

22                   But you know, generally speaking, some of these  
23 expressions of interest, some of these expressions of interest  
24 are certainly going to give us a parameter.

25                   And Your Honor, let's pretend for a moment that

1 professional hockey is not some sort of sacred icon but it's a  
2 business. And Your Honor --

3 THE COURT: Well it is a business.

4 MR. SALERNO: It is a business, exactly right, Your  
5 Honor.

6 And as a practical matter, Your Honor, a business  
7 that loses the kind of money this business loses is not worth a  
8 lot of money. It's just not worth a lot of money. That's the  
9 economic reality of it.

10 THE COURT: Well, you know, I probably shouldn't tell  
11 a story but I will. It's kind of the old suit story when I was  
12 a young lawyer. I went up to San Francisco on a case that, as  
13 far as I could tell, it was an absolute loser and we were not  
14 going to get a dime out of it, but my client insisted that we  
15 go up there, and he assured me we were not only going to get  
16 our trip paid for; we were going to get some money.

17 And he was right. Got quite a bit of money.

18 But he took me out to a nice dinner in San Francisco  
19 and he said, "It's the suit rule, stupid."

20 I said, "What's the suit rule?"

21 He says, "When there's this many suits around this  
22 kind of a claim, it's worth something, and somebody will pay  
23 you something for your interest."

24 And you know, there are a lot more suits here today  
25 than there were up there.

1 (Laughter)

2 MR. SALERNO: Your Honor, from your lips to God's  
3 ears. We would want nothing more --

4 (Laughter)

5 MR. SALERNO: -- nothing more than that. We really  
6 would. We can hope. Hope does spring eternal.

7 Your Honor, again on this cherry picking argument  
8 that was made, that the NHL made, what again we're saying is  
9 the provisions that are lawful will be assumed and assigned.  
10 Provisions that in their application or otherwise are not  
11 lawful, the Court, we're not asking the Court to require  
12 literal compliance with that for purposes of doing this  
13 transaction.

14 That is again, UL Radio, Rickel's Homes; different?  
15 Of course they were different factual circumstance, Your Honor,  
16 absolutely because this is treading new ground. We recognize  
17 that, Your Honor.

18 Your Honor, I did want to go back to this  
19 intellectual properties contract issue because the NHL says  
20 that it licenses intellectual property to the Coyotes, and  
21 under federal property law, or not proper right but federal  
22 intellectual property law they have an absolute veto to that.

23 And Your Honor, again, I don't quite understand that.  
24 The Daly declaration attached as Exhibit C, the license  
25 agreement that he's talking about. The licensee is not the

1 debtor. The licensee is NHL Enterprises, either LP or Inc, I  
2 forget which is owned one-thirtieth by the Coyotes and one-  
3 thirtieth by the other member of the league. That's the  
4 licensee, not the Debtors. This is not an intellectual  
5 properties contract. That's what they get. They get the  
6 license by virtue of the ownership of the entity, not because  
7 they get an assignment of the license.

8 Your Honor, on the adequate assurance of future  
9 performance, again the evidentiary showing, the evidentiary  
10 showing that we're talking about, Your Honor, would be an  
11 article, what I call an article 35 and 36 hearing. Sounds  
12 slightly militaristic. But we would make that -- and that  
13 would also involve, Your Honor, a resolution, if necessary, of  
14 this, I'll call it the Raiders II fee for lack of a better  
15 word.

16 But we do want judicial oversight, Your Honor, and  
17 the reason we do? Because we believe that that is the way,  
18 keeps it transparent, keeps it open, and that is the way that  
19 makes sense.

20 Your Honor, the sale process is in place. Let it  
21 proceed.

22 THE COURT: Let me ask you to make a note because as  
23 I listen, I'm very concerned about if the Debtor prevails how  
24 the relocation fee is going to be resolved in enough time to  
25 conduct an auction and close the sale, so make a note about



1 that --

2 MR. SALERNO: Understood, Your Honor.

3 THE COURT: -- and don't leave today until we talk  
4 about that.

5 MR. SALERNO: Understood, Your Honor.

6 Any other questions for me, Your Honor?

7 THE COURT: Not at the moment.

8 MR. SALERNO: Thank you.

9 MR. CLARK: Good morning, Your Honor.

10 Our team as well has designated a tag team here.

11 I'll talk about the bankruptcy issues until you ask me  
12 something I don't know, and then I'll turn to somebody else on  
13 that, but on the anti-trust stuff I definitely don't know it,  
14 and my partner, Mr. Shep Goldfein, who is the in-house expert  
15 on that, will address those issues to the extent Your Honor  
16 wants to hear about them.

17 Your Honor, Mr. Salerno said he wanted to talk about  
18 basic principles, so let's do that. Let's start with what I  
19 think of as a very first principle here. Let's talk about the  
20 you can't sell what you don't own argument.

21 Now, that requires that we determine what, vis-a-vis,  
22 this team, what constitutes property of the Debtor's estate  
23 here. And it --

24 THE COURT: Well doesn't the league constitution and  
25 by-laws provide for transfers of ownership and relocation?

1 MR. CLARK: It certainly does, Your Honor, subject to  
2 the league's rules and procedures. There are, there is the  
3 possibility of a transfer of ownership.

4 THE COURT: Well, apparently the league doesn't  
5 always follow its constitution and by-laws, does it?

6 MR. CLARK: We're talking about § 4.3 and the so-  
7 called veto?

8 THE COURT: Well let's just talk in general. I mean,  
9 it's a general question. I don't think they do, do they?

10 MR. CLARK: With respect to the constitution and by-  
11 laws, Your Honor, I think what's important to observe here is  
12 that they contemplate that there will be situations in which  
13 the commissioner will interpret and make determinations with  
14 respect to how those things are going to be applied, or whether  
15 they're going to applied in particular circumstances.

16 THE COURT: Well, but don't those rules say that if  
17 you don't make an application to move before the 1st of the  
18 year you've got to wait a year?

19 MR. CLARK: Subject to the ability to get a waiver of  
20 that rule, that's correct, Your Honor.

21 THE COURT: Okay.

22 MR. CLARK: That is correct.

23 THE COURT: And in the Quebec Nordiques to Denver  
24 Avalanche, that wasn't complied with, was it?

25 MR. CLARK: I believe that it was complied with in

1 the sense that the league made a determination that they would  
2 make an exception to the January 1st deadline under the unique  
3 circumstances of that particular situation, Your Honor.

4 THE COURT: Educate me; what were the unique  
5 circumstances there?

6 MR. CLARK: I candidly don't know, but perhaps Mr.  
7 Goldfein knows?

8 THE COURT: Well --

9 MR. GOLDFEIN: Your Honor, there -- it was known for  
10 a long period prior to the commencement of the season in which  
11 they knew for the prior year or so that it was not working in  
12 Quebec. There was no buyer in Quebec after efforts had been  
13 undertaken to find a buyer in Quebec. There was no public  
14 support or willingness to participate in an attempt to keep the  
15 club in Quebec, and as a result for a long period of time there  
16 was a focus on the necessity of having to move the club, and  
17 the league, the board, executive committee all were well aware  
18 of it. The requirements of the by-laws were in fact applied.

19 THE COURT: Well they were waived; right?

20 MR. GOLDFEIN: Well they were -- well --

21 THE COURT: They were complied with by leaving.

22 MR. GOLDFEIN: The deadline, the deadline was waived.

23 The --

24 THE COURT: And that deal happened in about 40 days  
25 in May; right?

1 MR. GOLDFEIN: It happened, but there were clear,  
2 because of the year that had been spent understanding the  
3 situation in Quebec, the elements that are set forth in by-law  
4 36 were essentially evaluated on an ongoing basis because of  
5 the realities of the circumstances that occurred.

6 So when it came before the board for approval, the  
7 board knew that half of the by-laws, of the standards that  
8 applied to the effort to stay in the home existing territory  
9 could not be satisfied, and they also understood, because of  
10 the description of the transaction and where the club would be  
11 relocated to, that the circumstances on the other half, if you  
12 will, of the standards were arguably met. So there was a board  
13 decision to move the club based upon the analysis of the  
14 standards, albeit it was on a more expedited basis.

15 Keep in mind one thing, Your Honor. There is a  
16 concern, and there was a concern in that circumstance that the  
17 Nordiques not be undercut in their existing community while  
18 they were playing essentially their last year there. The NHL  
19 was trying to preserve a franchise, the goodwill of the league  
20 under those circumstance -- under very difficult circumstances  
21 in terms of the future of the club, and worked very hard to  
22 manage a very difficult situation.

23 THE COURT: It's an extraordinary problem; right?

24 MR. GOLDFEIN: Yes.

25 THE COURT: Okay.

1 MR. CLARK: Your Honor, what I was going to point out  
2 is that under § 6.3(d) of the constitution it does provide  
3 expressly that the commissioner has plenary authority to  
4 interpret and establish policies and procedures regarding  
5 provisions of the constitution and the by-laws, and that his  
6 determinations in that respect are final, binding, and shall  
7 not be subject to any review.

8 And the commissioner has provided a sworn declaration  
9 to this Court, as he did earlier to the Canadian Commission  
10 Competition Bureau, indicating that with respect to the  
11 relocation rules, that the approval that will be required, it  
12 is not going to be subject to a single team veto, but rather it  
13 is subject to a approval by a simple majority vote of the Board  
14 of Governors, 16 out of 30.

15 THE COURT: Well, but since you mentioned, let me ask  
16 you. You quoted in your brief, and the Canadian Competition  
17 Bureau concluded in part, that the league's policies and  
18 procedures appropriately reflect the league's legitimate  
19 concern that franchises could only be relocated in  
20 extraordinary circumstances; right?

21 MR. CLARK: Correct.

22 THE COURT: Is this an extraordinary circumstance?

23 MR. CLARK: Maybe. We'll find out.

24 Your Honor, if the Court allows --

25 THE COURT: Well, you say that like you're going to

1 find out when I rule, but it seems to me to some extent the  
2 league ought to be looking at that.

3 MR. CLARK: That was actually what I did mean, Your  
4 Honor.

5 THE COURT: Okay.

6 MR. CLARK: If the Court allows the league to  
7 exercise its contractual right to conduct its procedures here,  
8 what'll happen is that we've now got an application for  
9 ownership transfer from Mr. Balsillie. We actually have four  
10 others, or the preliminary applications under our procedures  
11 that have been submitted. And then there is an application for  
12 relocation by Mr. Basillie.

13 If we get to the relocation issue, that application  
14 is going to be considered by the Board of Governors, first by a  
15 committee of the Board of Governors. And by the way, there was  
16 some question or allusion to what the league has or hasn't done  
17 in this context specific to the Coyotes with respect to these  
18 issues.

19 What they have done, Your Honor, is we got the very  
20 first ownership transfer application from Mr. Balsillie all of  
21 two and a half weeks ago, supplemented, by the way, just four  
22 days ago. That application --

23 THE COURT: I have tracked that.

24 MR. CLARK: And we have four other applications now  
25 from other individuals who are interested in possibly bidding

1 for the team here in Arizona. And all of those applications  
2 the league has now retained Kroll, the well known investigative  
3 firm, to do background checks and investigations of those  
4 applicants, and that process is going on right now.

5 With respect to the one relocation application that  
6 has been submitted, that was all of one week ago. Yesterday  
7 there was a meeting of the executive committee of the Board of  
8 Governors. They were given a status report on that. It was  
9 determined at that time that the executive committee, under the  
10 rules there is a committee that the commissioner will appoint  
11 to do the investigation of the relocation in the first instance  
12 and then report back to the full Board of Governors.

13 It was determined at the meeting yesterday that the  
14 executive committee will in fact act as the investigating  
15 committee on that particular application, as well as it will  
16 act as the committee to interview a potential ownership  
17 transferee applicants during that process, so we aren't sitting  
18 on our hands. The process is going forward.

19 And if the Court permits that to happen, what I  
20 believe will happen is that all relevant information with  
21 respect to ownership transfer will be submitted to the league.

22 If it's determined to the league after the auction  
23 procedures that we have proposed to Your Honor, and if Your  
24 Honor allows us to go through with those procedures, if we  
25 can't find a suitable buyer for the team here in Arizona, then

1 we'll go back to the drawing board and see if we need to  
2 conduct an auction procedure subject to a relocation anywhere  
3 in the world, not just Hamilton, Ontario. There may be your  
4 hypothetical Bill Gates may want to have the team up there in  
5 Redmond, Washington. Who knows? And pay a lot more money than  
6 Mr. Balsillie.

7 But we will go through those procedures according to  
8 the objective criteria set forth in the by-laws and come to  
9 some conclusion. That conclusion though, Your Honor, will of  
10 course be subject to the Court's oversight and ultimate  
11 decision.

12 THE COURT: Why doesn't, in terms of this offer the  
13 league accelerate those procedures and make a decision quickly?

14 MR. CLARK: How quickly, Your Honor?

15 THE COURT: Well, you know, the advantage in being a  
16 judge is I don't have to answer your questions.

17 (Laughter)

18 MR. CLARK: That's true.

19 THE COURT: You don't have to answer mine, but I  
20 might hold it against you.

21 MR. CLARK: I'll answer, I will answer the question  
22 by giving you the answer that we've been given by Mr.  
23 Balsillie. He says it's got to be decide -- he decided that  
24 all of this has to be done --

25 THE COURT: He has set the schedule, and I'm going to



1 ask Ms. Freeman about that when we get her to the podium.

2 MR. CLARK: Right, by the end of June.

3 THE COURT: I have you right now.

4 MR. CLARK: And you'll have Ms. Freeman shortly.

5 MR. GOLDFEIN: Your Honor, may I? Because I may know  
6 a little bit more about the dynamics of the relocation process.

7 First of all let me just say in response to your  
8 question about the Nordiques, one thing I neglected to say.  
9 They were working on parallel tracks for a year, and with  
10 regard to scheduling, they were working on parallel schedules  
11 in the event that their --

12 THE COURT: Well, but, you know, just in terms of  
13 scheduling, when you look at what happened with the Seattle  
14 Pilots in the American League --

15 MR. GOLDFEIN: Yes.

16 THE COURT: -- and the time that was done, and  
17 recognizing there were no computers in those days --

18 MR. GOLDFEIN: Right.

19 THE COURT: -- so some poor guy with a green eyeshade  
20 and a pencil drawing all these papers to make the schedule  
21 work.

22 MR. GOLDFEIN: We still have that poor guy.

23 THE COURT: Well --

24 MR. GOLDFEIN: And I will --

25 THE COURT: -- I guess that's your decision how you

1 handle that.

2 MR. GOLDFEIN: Right.

3 I will say, Your Honor, that what's not reflected in  
4 the record there, and I don't know myself, we'd have to get  
5 into discovery on it, is whether they also knew the situation  
6 in Seattle was a desperate one, that there was no buyer, and it  
7 was unlikely they were going to get a buyer.

8 THE COURT: Well remember, in round 1 they turned  
9 down the buy -- the American League said no to the buyer of the  
10 pilots.

11 MR. GOLDFEIN: They did. They did. The turned down  
12 the buyer, and they may have regretted doing that, but they may  
13 have known at that point --

14 THE COURT: Well, let's go to the basic question. I  
15 mean, here we have a gentleman who says I'll pay \$212 million  
16 for this team, and according to the record everybody here has  
17 been looking for a buyer since last, sometime last year.

18 MR. GOLDFEIN: We don't, Your Honor, with all  
19 respect, we do not subscribe to the good faith efforts that  
20 have been supposedly been made by Mr. Scudder and others to  
21 sell the club. The commissioner has --

22 THE COURT: Well, you may not, but I don't think it's  
23 any secret that the club was available, if somebody wanted to  
24 buy it. That's been known for months, hasn't it?

25 MR. GOLDFEIN: It has been known for a time, and

1 there was a buyer that was found. As Your Honor knows, the  
2 commissioner was here on May 5th or 4th or something like that  
3 and presented --

4 THE COURT: You know, that said, but I didn't see any  
5 offer.

6 MR. GOLDFEIN: Well, Your Honor --

7 THE COURT: And you know it's hearsay I believe under  
8 Rule 101 of Evidence that when Witness A says B will buy this  
9 asset, that's hearsay.

10 MR. GOLDFEIN: Well, there was document, and there  
11 still is a document --

12 THE COURT: There may be, but it's not part of the  
13 record that I've seen.

14 MR. GOLDFEIN: Correct, because that buyer upon the  
15 filing of the bankruptcy, prematurely in our view, decided and  
16 told us that he wanted to rethink his position and not have it  
17 submitted --

18 THE COURT: Well, that doesn't mean he didn't make an  
19 offer to the league.

20 MR. GOLDFEIN: And, well he has indicated now an  
21 expression of interest --

22 THE COURT: Well let me just cut to the heart. Did  
23 he make a specific definitive offer to buy the club?

24 MR. GOLDFEIN: He made a specific offer. It did have  
25 some conditions on it, but it was a specific offer that was

1 made to buy the club, yes.

2 THE COURT: Was it in writing?

3 MR. GOLDFEIN: Yes, it was. It was a letter of, it  
4 was a letter of intent.

5 THE COURT: And you know, since you all have filed so  
6 much, you all have probably filed more stuff under seal in this  
7 case than has been filed in my 20 years on the bench in all my  
8 cases.

9 MR. GOLDFEIN: Well we've -- because, well --

10 THE COURT: And I don't think that's been filed.

11 MR. GOLDFEIN: Well, that has not.

12 THE COURT: Let's leave it at that.

13 MR. GOLDFEIN: You're right, Your Honor, it has not,  
14 because there's a confidentiality provision in that letter of  
15 offer. We don't have the right to put the letter in without  
16 permission of the party that signed that letter, and it so, it  
17 just so happens that that party is now a party who has  
18 continued to express interest. He has, by the way, requested  
19 access to the data room and has not been granted access to the  
20 data room by the Debtors because Debtors as the last I  
21 understood, and maybe the facts have changed --

22 THE COURT: Well, but we're getting off track here,  
23 so.

24 MR. GOLDFEIN: That's getting off track.

25 THE COURT: Yeah.

1 MR. GOLDFEIN: But the fact of the matter is there  
2 are four expressions of interest. No one, as we pointed out --

3 THE COURT: Well let me cut to the heart of that.

4 MR. GOLDFEIN: Yeah.

5 THE COURT: You know, expressions of interest I guess  
6 in the eyes of an old bankruptcy judge aren't particularly  
7 helpful. You either make offers or you don't. We've got  
8 parallel auction procedures, so if some guy comes in, let's say  
9 we get to September, and says, "Gee, Judge, if I had another 90  
10 days I might be interested in buying this asset." You probably  
11 can guess what my answer is going to be.

12 MR. GOLDFEIN: Yeah, and sure, because, Your Honor,  
13 we proposed procedures that were premised on the idea that  
14 people would want to invest in the due diligence and take the  
15 time to make an offer.

16 THE COURT: Well, but, but --

17 MR. GOLDFEIN: The most --

18 THE COURT: But let's just leave it at least this old  
19 judge isn't too excited about expressions of interest.

20 MR. GOLDFEIN: Well, I understand that, and --

21 THE COURT: And let's move on from there.

22 MR. GOLDFEIN: And we would like to see them matured  
23 into offers, and we believe they will mature into offers --

24 THE COURT: Okay.

25 MR. GOLDFEIN: -- Your Honor, and the reason we

1 believe that --

2 THE COURT: Well, I think we're off topic.

3 MR. GOLDFEIN: But, look, the point here, the point  
4 here is that this is not an extraordinary circumstance right  
5 now.

6 THE COURT: Whoa, whoa, whoa, whoa.

7 MR. GOLDFEIN: We are funding --

8 THE COURT: Whoa. Now you know Mr. Clark just said  
9 it was, so let's, undisputed facts. I believe the Coyotes have  
10 lost \$380 million since the Moyes group acquired them; right?  
11 Other people have been making a lot of money. The league has  
12 been funding the Coyotes since what, last November?

13 MR. GOLDFEIN: Yes.

14 THE COURT: How extraordinary does it have to get?

15 MR. GOLDFEIN: Your Honor --

16 THE COURT: I mean, if your partner's losing that  
17 kind of a money, don't the other 29 partners have some  
18 obligation to try and say we ought to do something about this?

19 MR. GOLDFEIN: And they are. They are doing -- it is  
20 the 29 other partners that are funding this club and are saying  
21 they will continue to fund this --

22 THE COURT: Well, that's --

23 MR. GOLDFEIN: -- club through and including the  
24 upcoming season if necessary until a suitable --

25 THE COURT: Well, all this goes back to that basic

1 question; why doesn't the league move more quickly on this  
2 application?

3 MR. GOLDFEIN: Because to move more quickly in the  
4 space of the schedule they have proposed is essentially to deny  
5 us the opportunity to do the review that we can do.

6 THE COURT: Well --

7 MR. GOLDFEIN: Doing a review of a relocation --

8 THE COURT: -- in fairness, hasn't the league  
9 previously approved this buyer to buy a franchise?

10 MR. GOLDFEIN: No, Your Honor. In fairness, what the  
11 league --

12 THE COURT: Conditionally approved?

13 MR. GOLDFEIN: -- did was approve this buyer. They  
14 got to, they took a vote by phone. Twenty-seven of the clubs  
15 had voted. Not all of the clubs had voted, and --

16 THE COURT: Well let's cut to the heart; did the  
17 league approve this buyer or not?

18 MR. GOLDFEIN: No, they --

19 THE COURT: Okay. They didn't --

20 MR. GOLDFEIN: They approved him sub --

21 THE COURT: -- didn't tender a document for him to  
22 sign to join the NHL?

23 MR. GOLDFEIN: They tendered him a consent agreement  
24 which he refused to sign. The approval, as any approval --

25 THE COURT: And if he signed the consent agreement,

1 what would have happened?

2 MR. GOLDFEIN: If he had signed the consent agreement  
3 with the terms that were discussed with him at the executive  
4 committee meeting, then he would have been admitted to the  
5 league.

6 He refused. He was the one that refused to sign  
7 the --

8 THE COURT: Well, you know, you and I probably differ  
9 on this. It sounds to me like they made him some kind of an  
10 offer to join the club?

11 MR. GOLDFEIN: Yes, they did.

12 THE COURT: Okay.

13 MR. GOLDFEIN: And --

14 THE COURT: That was the question.

15 MR. GOLDFEIN: And -- they did. And he chose not to  
16 sign them.

17 THE COURT: Okay.

18 MR. GOLDFEIN: He now says there was a  
19 misunderstanding about that.

20 THE COURT: Well, but to cut to the heart, you're  
21 telling me the league can't decide this in the time set forth  
22 by the proposed buyer?

23 MR. GOLDFEIN: No, cannot decide relocation within  
24 that time frame.

25 THE COURT: Okay. That was the question.



1 MR. GOLDFEIN: Yes.

2 THE COURT: Thank you.

3 MR. CLARK: Your Honor, going back to the question of  
4 what it is that these Debtors can sell, there's, under 541 it  
5 says, "Property of the estate as all legal and equitable  
6 interests of the Debtor, and property as of the commencement of  
7 the case." Now there's no dispute that as of May the 5th when  
8 this case got filed Debtors owned the right to ice a team here  
9 on the home ice in Glendale, Arizona.

10 With respect to possibly having a home ice somewhere  
11 else in the world including Hamilton, Ontario, they didn't own  
12 the right to have a home team in Hamilton, Ontario. What they  
13 had --

14 THE COURT: I think I agree with that, but that begs  
15 the question a little bit. The question becomes what were  
16 their rights to change of ownership and what were their rights  
17 to transfer?

18 MR. CLARK: Exactly. They owned the right to apply  
19 to the league to relocate the team elsewhere subject to the  
20 league's rules, right?

21 Now what they're doing here is they are trying at the  
22 behest of Mr. Balsillie to end run, obviate, abrogate those  
23 rules. He doesn't want to be subject to review by the league  
24 pursuant to the by-laws --

25 THE COURT: Well, you know, the league, as you just

1 heard, is offering him an opportunity to join what I call the  
2 club or the league; right?

3 MR. CLARK: I won't disagree with what Mr. Goldfein  
4 just said to you, Your Honor.

5 THE COURT: Okay.

6 MR. CLARK: He was offered the opportunity to sign a  
7 consent agreement some years ago and he declined to do so. He  
8 declined to be bound by the league's rules and procedures.

9 And he still declines to be bound by those rules and  
10 procedures here today.

11 THE COURT: Well, and then you get into the question  
12 of are those restrictions enforceable or not in the context of  
13 this bankruptcy case; right?

14 MR. CLARK: Absolutely, Your Honor, they are.

15 Now they argue that there's all this, and I'm not  
16 going to argue the anti-trust stuff, but that's what they put  
17 out there as a shibboleth. It's there to persuade Your Honor  
18 as to two things under the Bankruptcy Code, right? Under § 363  
19 out of my --

20 THE COURT: And 4.

21 MR. CLARK: Right, 2 and 4, sub 2 and 4, one, that  
22 because of these so-called anti-trust violations Your Honor can  
23 deem the league to have consented to the relocation and the  
24 application and the ownership transfer.

25 And number 2, that because of these allegations of

1 anti-trust violations there's a bona-fide dispute as to our  
2 interest in the property that can be overridden and the  
3 property can be sold free and clear.

4 Your Honor I think hit the nail on the head about  
5 that. There is no -- the case law in the Ninth Circuit is very  
6 clear that there is no per se violation with respect to the  
7 league's rules and procedures.

8 And so you got to go to an as-applied analysis, which  
9 Mr. Goldfein can explain better than I can, but --

10 THE COURT: Right.

11 MR. CLARK: -- but we, you and I both know it hasn't  
12 been applied.

13 THE COURT: Well doesn't the Ninth Circuit decision  
14 in Crow-Winthrop undercut the restriction on change in an  
15 ownership requirement?

16 MR. CLARK: Anti-trust?

17 THE COURT: No, that's a bankruptcy case.

18 MR. CLARK: Oh, I'm sorry.

19 THE COURT: Congratulations.

20 (Laughter)

21 MR. CLARK: Oh, I'm sorry. There you go.

22 THE COURT: Let me read you what the court said. It,  
23 the Court, concluded that it was proper to invalidate,

24 "The change in ownership provision as  
25 an unenforceable anti-assignment clause

1 under § 365(f). Courts look beyond the  
2 literal wording of a contractual  
3 provision to see whether it operates as  
4 a de facto anti-assignment clause, in  
5 violation of 365(f)."

6 MR. CLARK: Precisely. That's the law. There's  
7 nothing new about that, Your Honor.

8 If there is an anti, an anti-assignment provision  
9 that's tied to the bankruptcy, that's not enforceable. Of  
10 course not.

11 But that's not what you have here. You've got  
12 procedures that apply in or out of bankruptcy regardless of the  
13 financial condition of the team involved.

14 THE COURT: Well it seems to me that case was a  
15 stronger case than the situation here because that case said  
16 you can't do it. You can't assign it. And it didn't say it  
17 literally. It said it through the back door, that if you  
18 change, you have a change in ownership. That's a default, and  
19 we can call it, and we can enforce it.

20 And the bankruptcy court, I believe it went to the  
21 district court and the BAP -- I'm sorry. It went to the  
22 bankruptcy court and district court, and then the Ninth  
23 Circuit, and they said that's effectively an anti-assignment  
24 provision, not enforceable.

25 MR. CLARK: Right. And it was effectively an anti-

1 assignment provision that wasn't enforceable.

2 But you asked Mr. Salerno for a favorite case. Let  
3 me give you a favorite case, Your Honor --

4 THE COURT: Okay.

5 MR. CLARK: -- for us. And I'm very grateful to Ms.  
6 Freeman for actually having pointed it out to us, because it  
7 wasn't in my brief. It was in hers.

8 It's a case called In Re Morande Enterprises, 335  
9 B.R. 188 by Chief Judge Paskay in 2005 in the Bankruptcy Court  
10 in the Middle District of Florida, the Mazda Dealership case,  
11 Your Honor.

12 There you had a fellow who owned a Mazda dealership,  
13 and there was a dealership agreement that controlled that  
14 relationship. And under that agreement it said that he was  
15 authorized to operate this dealership at a specific location,  
16 some street address in Naples, Florida, and that he couldn't  
17 change the location unless Mazda consented.

18 The poor fellow didn't make a go of it, ended up in  
19 Chapter 11, and the debtors conducted a 363 auction. Judge  
20 Paskay keep looking at this transfer, this location  
21 restriction, and he was concerned about it, but he allowed the  
22 363 sale process to go forward.

23 A highest and best bidder came in, Germain Motor  
24 Company, offered more money than anybody else for this  
25 dealership, but made it clear that it would not operate the

1 dealership in the contractually required location, and Mazda  
2 wasn't consenting to have the thing moved.

3 And the court upheld that location restriction, held  
4 that the debtor could only assume and assign what it owned,  
5 which was a dealership agreement in toto including the  
6 restriction on changing the location absent the consent of the  
7 other party.

8 That's exactly what we have here. They have a  
9 contract that says that they can apply, they can apply to  
10 relocate.

11 And Your Honor has pointed out, and we don't disagree  
12 one little bit, that when the league is asked to consider a  
13 relocation application, whether it's by these debtors or by any  
14 of the other 29 teams in the league, that there's an obligation  
15 by the league, by the Board of Governors, to consider that in  
16 good faith and not to act in bad faith.

17 Well that's what, if Your Honor allows it to happen,  
18 will happen here.

19 THE COURT: Well --

20 MR. CLARK: They'll consider --

21 THE COURT: Well, of course I'm -- you all have got  
22 me in what I'll call the box that I have to resolve these  
23 matters by the end of the month or the \$212 million offer as  
24 written is no good.

25 MR. CLARK: All due respect, Your Honor, I didn't put

1 you in that box. Mr. Balsillie put you in that box. And he  
2 put you in that box --

3 THE COURT: Well, you kind of assisted because you've  
4 objected on behalf of your client. If you hadn't objected it  
5 would be a lot easier, wouldn't it?

6 MR. CLARK: If we had waived --

7 (Laughter)

8 MR. CLARK: If we had waived our rights, if the  
9 league had just said to hell with our rules, they can go out  
10 the window, and Mr. Balsillie can tell the world how we're  
11 going to run the league, yeah, you're right. You wouldn't be  
12 in that box.

13 But we're not going to do that. We have a fiduciary  
14 obligation to all of our members to run this league in a  
15 responsible way. And what they're suggesting is the height of  
16 irresponsibility. What they say, Your Honor, they say that the  
17 league doesn't own the right to determine where a team's going  
18 to play.

19 What they literally say is that that decision is  
20 ultimately to be made by a purchaser. So think about what that  
21 means. There is a theoretically, well I suppose infinite is  
22 the wrong word because I think there are only something like  
23 seven or eight billion human beings wandering around on the  
24 face of the earth. But there is a theoretical infinite  
25 universe of potential buyers for professional sports league

1 teams, whether it's the NHL or the MBA or the NFL or some other  
2 league, right?

3 And according to them, those potential buyers are the  
4 ones who own the right to determine where the team they're  
5 going to buy in a league is going to play.

6 THE COURT: Well, in fairness, I think you have to  
7 acknowledge that what's happened here is you've kind of got a  
8 confluence of bankruptcy law, commercial law, contract law,  
9 anti-trust law, and I'm probably missing a few topics that have  
10 collided here in this courtroom on a very unique situation.

11 MR. CLARK: I agree that you've got a confluence of a  
12 lot of things colliding in this courtroom. I think it's been  
13 done because a particular determined fellow, Mr. Balsillie,  
14 decided having tried twice before to buy a team in this league  
15 and have it moved up to Canada, and having failed at doing  
16 that, decided tactically that perhaps he could use the good  
17 offices of this Court to achieve what he couldn't achieve by  
18 playing by the rules that bind everyone else.

19 THE COURT: Well, of course you know, and the courts  
20 say, one of the considerations in all this is what does it do  
21 for the creditors?

22 MR. CLARK: Right. Let me, if I may approach, Your  
23 Honor. I have a little piece of paper that talks a little bit  
24 about what this --

25 THE COURT: Another piece of paper?



1 (Laughter)

2 MR. CLARK: Just one page.

3 THE COURT: Oh.

4 MR. CLARK: And not a whole lot of words on it  
5 either, Your Honor.

6 THE COURT: That would be unusual.

7 Thank you.

8 MR. CLARK: Because Your Honor asked, has asked that  
9 question more than once in these proceedings. What does this  
10 all mean for the creditors?

11 THE COURT: Well it's just a small consideration in  
12 bankruptcy courts.

13 MR. CLARK: Now I ask the Court to keep in mind that,  
14 number 1, the league was, and it is in the record here, pre-  
15 petition, we didn't even know the petition was coming, so, but  
16 we were acting to try and find a buyer, and we did have  
17 somebody who had expressed interest in buying this club.

18 And Mr. Bettman was in a car on his way over to Mr.  
19 Moyes' office with that --

20 THE COURT: I know the story. I know the story.

21 MR. CLARK: And then they sprung this on us, okay?

22 So we have now come in and said this case didn't need  
23 to be here, but it's here. And in the context of a case before  
24 Your Honor, we have proposed a set of auction procedures that  
25 we think will maximize value for these, for this, for these

1 assets. And that'll take us through, on an as-is, in-place  
2 sale, that'll take us into I believe it's late August and  
3 September to conduct the sale, and we'll be able to determine  
4 what the level of interest is.

5 There's no harm, there is no harm whatsoever to the  
6 creditors of this estate, Your Honor, in allowing that process  
7 to take place, because he NHL is going to fund the team through  
8 that process.

9 THE COURT: Well, but in fairness, I think there's  
10 some validity to what Mr. Salerno says, that I'll certainly  
11 acknowledge the league is putting the cash up that nobody else  
12 is willing to do today to pay the ongoing expenses.

13 But, whenever the asset's sold and the monies are  
14 distributed, they get their money back.

15 MR. CLARK: That's correct.

16 THE COURT: And so those folks who are farther down  
17 the priority line that as each new dollar's advanced their  
18 chance of getting paid is diminished, potentially, and --

19 MR. CLARK: Potentially, Your Honor.

20 THE COURT: Well, with some degree of I think  
21 probability.

22 MR. CLARK: I would respectfully disagree with that,  
23 Your Honor.

24 THE COURT: Well --

25 MR. CLARK: I don't think that we can know for sure--

1 THE COURT: You're right. You're right. You can't  
2 know for sure, but as we sit here today and look at the history  
3 of where we are in the context of this case --

4 MR. CLARK: You've got one offer.

5 THE COURT: Well, you've got one offer, but it  
6 doesn't seem like that the value of this franchise is  
7 increasing. It's not an appreciating asset, in other words.  
8 Now we don't know.

9 MR. CLARK: Actually, Your Honor, it might be.  
10 What, because look at the record that we do have. These are  
11 facts, and, you know, I don't think anybody's going to dispute  
12 it, right?

13 What we had was as of May the 5th at, I don't know  
14 what time they filed this case, but five minutes before they  
15 did what we had --

16 THE COURT: Late in the day as everything gets filed  
17 in this case.

18 MR. CLARK: What we had, we didn't know everything,  
19 but what the league knew it had was one bird in the hand in the  
20 person of Mr. Reinsdorf, and they were on the way over to talk  
21 to Mr. Moyes and tell him, you know, what they had worked out  
22 with Mr. Reinsdorf.

23 What we didn't know was that they also had Mr.  
24 Balsillie there.

25 So what you had on May the 5th were two, two people

1 interested in buying this team, one who wants to move it, not  
2 according to the league's rules or processes but unilaterally  
3 with Your Honor's help up to Canada, and one who wants to keep  
4 it right here.

5 Now Mr. Reinsdorf, we also know, public record, you  
6 can take judicial notice, Mr. Reinsdorf is the Mr. Reinsdorf of  
7 Chicago White Sox/Chicago Bulls fame. The man isn't known for  
8 throwing money down a hole just because he's got a lot of  
9 money. He's got two successful major league sports enterprises  
10 going on right now.

11 THE COURT: Well, but let's cut to the heart of it.  
12 I'll just be blunt. I'm very worried whether if we end up  
13 going the NHL's route will there be an equivalent amount of  
14 economic value to the same group of creditors, or will it be  
15 diminished? I think the Court has to consider that --

16 MR. CLARK: Well the --

17 THE COURT: -- in weighing all this.

18 MR. CLARK: -- the piece of paper that I handed Your  
19 Honor, what it shows you at the top is what Mr. Balsillie's  
20 actual bid is vis-a-vis the creditors that I think Your Honor  
21 is asking about. We keep hearing a \$212.5 million purchase  
22 price, but there are some deducts, two main deducts from that.

23 One is a credit for the advances on the revenue  
24 sharing that the NHL has already made. That's a \$25 deduction  
25 from the 212.

1 THE COURT: Twenty-five million dollar.

2 MR. CLARK: Twenty-five million. I'm sorry. Twenty-  
3 five million, 25 hundred, 25 million.

4 THE COURT: You know, although when I look at them,  
5 it seems to me that that number kind of zeroes out. The  
6 Debtors and the NHL view it differently, but I think ultimately  
7 the NHL gets paid \$30 some million either way.

8 MR. CLARK: Absolutely not, Your Honor. That is a  
9 revenue sharing advance. It is not a loan. It is not owed by  
10 the Debtors to the league.

11 THE COURT: It may be, you may be correct, but the  
12 Debtors' numbers put 34 million in there I think for that  
13 number. You've got 13, and then the 25 on the advances.

14 So all I'm saying is I think on your respective  
15 accountings, if you'd make my life easier and do them on equal  
16 footing, that essentially comes out roughly the same in my  
17 view.

18 MR. CLARK: What they've done is they've said that  
19 there's an obligation to the NHL of \$36.9 million. Of that, 23  
20 point -- and this is the footnote, Your Honor.

21 THE COURT: Right.

22 MR. CLARK: Twenty-three point six million represents  
23 the revenue sharing advances that were advanced by the league  
24 to the Debtors and that the Debtors don't pay back.

25 And then there's another 13.3 million which is a

1 secured loan that does get paid back.

2 THE COURT: But in their numbers, when they did their  
3 economic analysis, they show the NHL getting 37 million out of  
4 212 million. You take it right off the top and say, well, as  
5 you read the offer, the \$212 million offer is less \$25 million.

6 MR. CLARK: Oh, I'm sorry. Certainly.

7 THE COURT: And so all I'm saying is I think those  
8 numbers under your respective analysis kind of wash out.

9 MR. CLARK: Maybe they do, maybe they don't, but the  
10 one thing I do know, Your Honor, is that the NHL doesn't get  
11 that \$25 million. They gave the \$25 million to the team as an  
12 advance on obligations that they would have in the future.

13 So it's not going to get paid back, but it does come  
14 off the top of Mr. Balsillie's proposal, and then if, assuming  
15 Mr. Wayne Gretsky stays with the team if Mr. Balsillie acquires  
16 it, and if it goes up to Canada, he will directly pay certain  
17 obligations to Mr. Gretsky in the amount of \$22.5 million.

18 THE COURT: Right.

19 MR. CLARK: And that comes off the purchase price,  
20 too.

21 THE COURT: Right.

22 MR. CLARK: So the net, the creditor group that I  
23 think Your Honor is concerned about is 165 million.

24 THE COURT: Well, let me stop for just a second.

25 I'm assuming that Mr. Gretsky's a creditor in some

1 capacity, and so I have to consider that interest as well.

2 Now the fact that he's getting paid and takes him out  
3 of that equation, fine.

4 MR. CLARK: We look at him the same way, and we think  
5 he's going to get paid one way or the other, Your Honor.

6 THE COURT: All right.

7 MR. CLARK: And when you look at the other, the  
8 creditor group, that's the second half of this piece of paper,  
9 you'll see that, number 1, there is the DIP lender. That's the  
10 National Hockey League, and as of yesterday that amount  
11 outstanding was \$7.3 million.

12 By the way, with respect to the DIP, there was some  
13 discussion with Mr. Salerno about what the terms are on which  
14 the league would be prepared to fund this team through the  
15 following season, and that's --

16 THE COURT: Save that for another day.

17 MR. CLARK: All I want to say is it's in terms of the  
18 DIP that have been agreed to, Your Honor. And it's basically a  
19 pass-through --

20 THE COURT: Well, I --

21 MR. CLARK: -- of the league's borrowing of that.

22 THE COURT: I will note, and I appreciate the  
23 league's statement that if they prevail today they intend to  
24 fund the cash requirements of the Coyotes through the coming  
25 season. I don't think that's an insignificant statement in this

1 Court's view.

2 MR. CLARK: Thank you, Your Honor.

3 Then secondly you have the NHL as the prepetition  
4 lender. That's what we were talking about a minute ago. And  
5 that amount as of the, as of yesterday was \$13.3 million.

6 You have the other secured lender. It's Mr. Dale's  
7 group, SOF/MSD, roughly 80 million, 79.7 million, and then as  
8 best as we can tell from the Debtor's own schedules, and there  
9 may be some double counting in there so the number may be  
10 actually less, but the unsecured claims as of today, excluding  
11 Mr. Moyes, who we don't think of as a creditor in any way --

12 THE COURT: Well, you know, I think several people  
13 have made that assertion. I'm not going to decide --

14 MR. CLARK: I appreciate that.

15 THE COURT: -- as part of this process what his  
16 status is.

17 MR. CLARK: I appreciate that, Your Honor.

18 THE COURT: And so if he says he's a creditor, I  
19 think, like every other creditor, at the moment I have to take  
20 that at face value.

21 MR. CLARK: That's fine.

22 I just wanted by way of explanation for presentation,  
23 what we had done is we excluded his \$104 million claim from  
24 there.

25 THE COURT: Right. Got it.



1 MR. CLARK: And we excluded Mr. Gretskey, because  
2 under this scenario he's paid directly by Mr. Balsillie.

3 And then because you've got to have some number  
4 there, our administrative claims, we put in an estimated \$5  
5 million. I think that the City of Glendale has used that  
6 number. Others have maybe used that as an estimate, but that  
7 all --

8 THE COURT: They're somewhere between seven million  
9 and 550 million depending on who you want to credit.

10 MR. CLARK: Well this is, this is the claims, this is  
11 the claims that exist today plus the reasonably anticipated  
12 administrative claims for the people, the professionals, if you  
13 will, and not for Glendale. That all comes out to, round  
14 numbers, \$120 million, so there's a difference between the net  
15 proceeds and the current creditor claims of approximately \$45  
16 million, which it's fair to say Mr. Moyes probably looks at as  
17 his money under this scenario; right?

18 Now, if you have a sale of the team subject to it  
19 being relocated up to Canada, that \$120 million number, that  
20 bogey that you're trying to satisfy out of the proceeds of this  
21 sale, goes up dramatically, right? Now you got to talk about  
22 the Glendale claims, you got to talk about the league's  
23 relocation and indemnity claims, and those are not  
24 insubstantial, Your Honor. They are tens of millions of  
25 dollars.

1           If you talk about a sale of the team here, you don't  
2 have to talk about those claims at all because they don't  
3 arise.

4           So what you have to get in a sale here today, right,  
5 to take care of the creditors -- from Mr. Moyes, and I know  
6 Your Honor's keeping him in, but for my presentation that's  
7 \$120 million. That's \$45 million less than what's here.

8           And after you run an auction process, Your Honor,  
9 subject to the diligence and the review, and a fair auction  
10 process, too, where everybody gets access to diligence, and  
11 everybody gets to talk to the league, too, maybe it'll be 165.  
12 Maybe it'll be 265. We don't know until it's done.

13           And the question for the Court, Your Honor, is can  
14 you, can this Court order that that process be done, and be  
15 run, without any regard to the league's contractual rights and  
16 rules? That's the question that I understood was being teed up  
17 here today.

18           Our answer to that question is, with all due respect,  
19 no. The Court does have a role; there's no question about it.  
20 And that's why under the procedures that we have proposed there  
21 would be an auction run. It would be bids solicited, qualified  
22 bidders, and then when we got to the end of the road they would  
23 come here and Your Honor, this Court, would be the final  
24 auctioneer.

25           And if we were lucky enough to have more than one

1 qualified bidder, you'd have a real auction here in the  
2 courtroom where, you know, people would be bidding against each  
3 other.

4           And then we'd come to a number as to what somebody  
5 will pay for this team in this city right here right now.

6           And that's when you're going to be able to make a  
7 determination, Your Honor, of what does this mean for the  
8 creditors. And if the league determines that what it means to  
9 the creditors in the league isn't what they want, or even if  
10 the League determines that it is, and they come in and say,  
11 "Approve this sale, Your Honor."

12           But Your Honor, after hearing evidence and argument  
13 from all interested parties, says, "No, I'm not going to  
14 approve that," then what the league has said is it will  
15 conduct, while it funds this team, it will conduct a second  
16 auction of this franchise based on a relocation to wherever  
17 anybody who wants to bid wants to take it.

18           Now that doesn't mean they get to take it there. It  
19 just means that we'll listen to them. And if they offer enough  
20 money to take care of the creditors, and to otherwise honor the  
21 league's rules and procedures, and to advance the interests of  
22 the league, the 30 teams, not one fellow, Mr. Balsillie, then  
23 we're going to bring the gavel -- we're going to bring him back  
24 into Your Honor's courtroom. Your Honor's going to bring the  
25 gavel down, and the team's going to be sold to whoever that is.

1           Now, I said before, you can't know, and I can't know  
2 what those numbers are going to end up being because we can't  
3 predict the future, but I'll give you a real good bet here,  
4 Your Honor. I'll bet a month's draw. If we get to that second  
5 auction, and it's an anyplace-in-the-world relocation auction,  
6 Mr. Basillie, he'll be here. He'll be here with his checkbook.

7           THE COURT: Well, regrettably the Court can't wager  
8 that, although I suspect your draw is significantly more than  
9 the monthly draw of federal bankruptcy judge --

10          (Laughter)

11          THE COURT: -- but --

12          MR. CLARK: I'll give you those long odds, Your  
13 Honor.

14                My point is that there is no harm to the creditors in  
15 running through the processes that we have proposed and that I  
16 just described, because at the end of the day, if the creditors  
17 aren't taken care of to Your Honor's satisfaction with a sale  
18 here in Arizona, then there'll be a sale subject to relocation.

19                THE COURT: Well, there is a risk with that one, and  
20 that if kind of what I call the appreciating asset risk, that's  
21 kind of one on one in bankruptcy that a dollar today is worth  
22 more than a dollar next month, next year.

23                MR. CLARK: And that was what I was sort of getting  
24 at, Your Honor, when I was talking about where we were on May  
25 the 5th. What we had, even though we didn't know it until late

1 in the day on May the 5th is we had two guys --

2 THE COURT: Well, you knew -- hadn't the commissioner  
3 been told by Mr. Scudder at some point in April that they were  
4 talking with a buyer who wanted to relocate?

5 MR. CLARK: What the commissioner was told on the  
6 Friday before the bankruptcy filing, the commissioner told Mr.  
7 Scudder, the commissioner's office told Mr. Scudder that they  
8 had a potential buyer.

9 I'm not even sure. Did we tell them who it was?

10 Told them who it was, and that we were coming, he was  
11 coming out to make a presentation, and this --

12 THE COURT: Well, but prior, but prior to that wasn't  
13 there a discussion, I think it was between Mr. Scudder and  
14 either the commissioner or Mr. Daly, or somebody --

15 MR. CLARK: Right.

16 THE COURT: -- that they were talking with somebody  
17 who was very interested but they wanted to relocate, and they  
18 were told, "You can't do that. I'm not authorizing you to have  
19 those kind of discussions."

20 MR. GOLDFEIN: Your Honor, the record, affidavits  
21 reflect, the commissioner's affidavit was that you should have  
22 that purchaser talk to the commissioner.

23 THE COURT: But all I'm saying is that --

24 MR. GOLDFEIN: We didn't tell him that --

25 THE COURT: -- that information was communicated to

1 the NHL --

2 MR. GOLDFEIN: Was communicated.

3 THE COURT: -- so they knew in April that that was  
4 being discussed?

5 MR. GOLDFEIN: Yes, but the important point that --

6 THE COURT: Okay. Let him argue his case. I'm not  
7 letting you do through the Bobsey twins on me.

8 MR. CLARK: Well that's what happens. His lips won't  
9 even move, Your Honor.

10 What the commissioner, commissioner's office, I  
11 believe it was Mr. Daly, on the Friday before the bankruptcy  
12 filing told Mr. Scudder is, "We got somebody interested in  
13 buying the team here in, here in Arizona," and it was Mr.  
14 Reinsdorf, and Mr. Scudder in words or substance said, "We  
15 don't have anything better. Full speed ahead. God bless."  
16 That's what he was told.

17 And so we didn't know that there was a Mr. Balsillie  
18 there on Friday afternoon, or over the weekend, or on Monday.  
19 It was only after -- and we didn't even know when the  
20 bankruptcy case got filed and we were told about the bankruptcy  
21 case that they had Mr. Balsillie. As I recollect, we learned  
22 that subsequent to the phone call saying there was a bankruptcy  
23 filing and the meeting got called.

24 THE COURT: Well, although the motion I think was  
25 filed contemporaneously with the petition to the extent the

1 computer system allows you to do that.

2 MR. CLARK: My point was Mr. Bettman was in a car  
3 driving over to Mr. Moyes' office --

4 THE COURT: I understand.

5 MR. CLARK: -- and didn't have that, and wasn't given  
6 that information.

7 But what do we have -- that's what we had on May the  
8 5th; what do we have today? Well the record shows you that you  
9 got Mr. Balsillie here with his, quote, offer. It isn't an  
10 offer because he's not offering to buy what these people have  
11 to sell, but you've got his offer.

12 THE COURT: Well, you're right if the collision  
13 between the bankruptcy law and these other laws don't allow a  
14 transfer and relocation.

15 MR. CLARK: And I thin if --

16 THE COURT: And that appears to be a case that in I  
17 think now volume 403 of the Bankruptcy Reporters and all the  
18 other reporters that has never been confronted by any court  
19 before.

20 MR. CLARK: I'd ask Your Honor to look at the, as I  
21 said, the In Re Morande case, Enterprises case, and two other  
22 cases just as we -- well three -- that we cited in our brief.  
23 The Farmers Markets case --

24 THE COURT: Can you give me the names again of the  
25 cites?

1 MR. CLARK: Can I have our brief?

2 THE COURT: Just give me the names.

3 MR. CLARK: In Re Morande Enterprises, that's 335  
4 B.R. 188, Your Honor.

5 THE COURT: Got it.

6 MR. CLARK: The second case I would urge Your Honor  
7 to take a look at is the Dean case, Rice v. Shoney's. That's  
8 174 B.R. 787 out of the Bankruptcy Court in the District of  
9 Arkansas. The Farmers Market case, Your Honor, California v.  
10 Farmers Markets, 797 F.2d 1400. That's the Ninth Circuit 1986.  
11 And one other, because I always like to rely on what my law  
12 professors used to call hoary authority. The Chicago Board of  
13 Trade case, authored by Chief Justice Taft, in 1924. That's  
14 264 United States Reports I, all of those cases stand for the  
15 same fundamental proposition, that while a debtor's estate  
16 receives at the commencement of the case all of the Debtor's  
17 property and interests, it receives them with all of the  
18 restrictions in place on those property interests.

19 THE COURT: Well, not all.

20 MR. CLARK: Not an anti-assignment clause, and not an  
21 ipso facto clause.

22 THE COURT: Well, or a disguised one of those.

23 MR. CLARK: And you don't have that here, and I think  
24 if you compare what we have here to what the courts were  
25 dealing with in those four cases, you will see a striking,



1 striking similarity, Your Honor.

2 THE COURT: Although again in the Crow-Winthrop  
3 decision by the Ninth Circuit, you weren't dealing with a  
4 change in ownership.

5 MR. CLARK: Right. But under the circumstances of  
6 that case, it was a change of ownership provision that was  
7 being used as a flat out anti-assignment provision.

8 Here, the league has approved changes of ownership  
9 many, many times with teams in financial difficulty and teams  
10 not in financial difficulty, and so.

11 And what I was going to say, Your Honor, is what we  
12 had on May the 5th is two potential bidders. What we have  
13 today are five. And what we may have --

14 THE COURT: Well -- I'll just leave it this way. I  
15 have an extremely lengthy record here. It's now computerized,  
16 but I'm going to guess you all have given me in excess, I  
17 stacked it up and measured, in excess of ten feet of documents,  
18 and the only offer I've seen is by PSE.

19 MR. CLARK: And that's because PSE has engineered and  
20 manipulated the process.

21 THE COURT: Well, but --

22 MR. CLARK: We don't even know what's being sold,  
23 Your Honor.

24 THE COURT: Well --

25 MR. CLARK: What's being sold? Is it a team in

1 Arizona? Is it a team in Hamilton, Ontario? Is it a team  
2 anywhere in the world that somebody wants to pay for?

3 THE COURT: It's -- at the moment the only offer is  
4 to move the transfer ownership, and do it and locate it in  
5 Hamilton, Ontario; right?

6 MR. CLARK: Just because they used the word offer  
7 doesn't make it so. It's the analogy I drew for Your Honor, I  
8 don't know, a couple of hearings ago. If I'm a debtor in  
9 bankruptcy, and I've got 100 shares of IBM stock, and I offer  
10 to sell it to the world and say, "And if you buy it, you get to  
11 control IBM," well that doesn't make it so.

12 THE COURT: That's true.

13 MR. CLARK: The same here.

14 THE COURT: Well, no --

15 MR. CLARK: It doesn't make it so because he says and  
16 they say that they've got the right to sell this team without  
17 regard to the league's relocation rules. That doesn't make it  
18 so. It does not make it so. And the four cases that we've  
19 just cited to Your Honor tell you that it is not so.

20 THE COURT: Well I know in one of those cases, I  
21 believe that was either three or four bankruptcy laws ago, and  
22 so the law has changed a little bit.

23 MR. CLARK: The Taft case, yes, but the basic  
24 principle --

25 THE COURT: You happen to have a history major, and I

1 remember when Justice Taft was on the Supreme Court, and I  
2 don't think you and I were around in those days.

3 MR. CLARK: I'm sure Your Honor wasn't, and I don't  
4 think I was --

5 THE COURT: I'm sure you weren't either.

6 MR. CLARK: -- I don't think I was either.

7 THE COURT: Yeah.

8 MR. CLARK: What I will say about the Chicago Board  
9 of Trade case, though, Your Honor, like I said it's hoary  
10 authority. When you read the other three cases that are of an  
11 era when you and I were, oh, maybe out on the golf course from  
12 time to time --

13 THE COURT: If only.

14 MR. CLARK: -- that case, that case gets cited. It's  
15 still good law, even though it was under the Bankruptcy Act,  
16 it's still good law for the basic property right principle.

17 Your Honor, I'm happy to address any other questions  
18 you might have.

19 THE COURT: Well I do have one, and I don't know if  
20 Mr. Schian's here but I want him to make some notes about this  
21 one, too, the argument that the NHL and the other leagues make  
22 that this would ruin professional sports if this happens.

23 MR. CLARK: I'll let others speak to that, but I'll  
24 say this.

25 THE COURT: Well, no, you're pretty glib; you can

1 handle this. Come on.

2 (Laughter)

3 MR. CLARK: Thank you, Your Honor.

4 THE COURT: You know, I got to find my notes.

5 MR. CLARK: Others have used a different phrase to  
6 describe me in that same trait but --

7 THE COURT: Well, everybody's entitled to their view.  
8 Let me find my notes here.

9 MR. CLARK: It's, Your Honor, it's what I alluded to  
10 a little while ago.

11 THE COURT: Let's talk about the San Diego Clippers  
12 and the Baltimore Colts.

13 MR. CLARK: Yes?

14 THE COURT: You're about my age. Remember Johnny  
15 Unitas and Frank Robinson and --

16 MR. CLARK: High tops?

17 THE COURT: -- Butch Robinson --

18 MR. CLARK: Yes.

19 THE COURT: -- and the Baltimore Orioles and the  
20 Baltimore Colts?

21 MR. CLARK: Yes, I do.

22 THE COURT: Do you remember when the Baltimore Colts  
23 left Baltimore?

24 MR. CLARK: I do.

25 THE COURT: March 28th, 1984?

1 MR. CLARK: Yeah, and just ahead of an effort by the  
2 State of Maryland to condemn the team by eminent domain. Yes,  
3 I do recall --

4 THE COURT: No public announcement; right?

5 MR. CLARK: No, I don't think so.

6 THE COURT: And in fact, if I understand the factual  
7 scenario correctly, the mayor of Indianapolis arranged for the  
8 moving vans. This is not an anti-trust type question so sit  
9 down.

10 (Laughter)

11 MR. CLARK: Actually I was deferring -- I was only  
12 deferring to Mr. Goldfein because he is not just an anti-trust  
13 lawyer; he's a sports lawyer.

14 THE COURT: All right. Well then the two of you get  
15 up.

16 (Laughter)

17 THE COURT: All right. So you tag team him. But  
18 anyway, in kind of the midnight departure, the moving vans  
19 from Indianapolis rolled in, the owner of the moving company  
20 being a friend of the major of Indianapolis, and took the Colts  
21 and moved them to Indianapolis in the middle of the night.

22 MR. GOLDFEIN: Correct.

23 THE COURT: No dispute about those facts; right?

24 MR. GOLDFEIN: None.

25 THE COURT: And no dispute that the NFL filed no

1 lawsuit about that, did they?

2 MR. GOLDFEIN: Yes, but for one reason, Your Honor,  
3 which is quite pertinent, and because I've been involved in so  
4 many relocation cases for the NFL I know the history here.

5 The Raiders opinion had just come down, and the  
6 Raiders, and based on the Raiders opinion, NFL felt it could  
7 not, it was helpless to do anything.

8 THE COURT: It couldn't stop it right?

9 MR. GOLDFEIN: It couldn't stop it.

10 THE COURT: That's what it concluded?

11 MR. GOLDFEIN: That's correct.

12 THE COURT: Okay.

13 MR. GOLDFEIN: It could not stop it because of the  
14 Raiders --

15 THE COURT: Now, well let me, let me then, are you a  
16 sports fan, too? Okay. A Baltimore Colt fan by any chance,  
17 the Baltimore Colts?

18 MR. GOLDFEIN: No, Your Honor.

19 THE COURT: All right. NFL, in the season, in the  
20 '84-'85 season was just fine; right?

21 MR. GOLDFEIN: Your Honor, the NFL was fine, but  
22 there's a real question about how fine the NFL is today because  
23 there's no team in Los Angeles.

24 THE COURT: Well --

25 MR. GOLDFEIN: And they don't have a franchise in Los

1 Angeles, and --

2 THE COURT: Well, let's stay on the Colts for a  
3 moment.

4 MR. GOLDFEIN: Yes, Your Honor.

5 THE COURT: The midnight departure from Baltimore  
6 didn't ruin the National Football League, didn't create havoc.  
7 They played their season the next year. The Colts were now the  
8 Indianapolis Colts.

9 MR. GOLDFEIN: Yes.

10 THE COURT: And ultimately Baltimore got the Raiders.

11 MR. GOLDFEIN: Right.

12 THE COURT: So the NFL was fine on that.

13 MR. GOLDFEIN: Well, there's a lot of water that went  
14 under that bridge, Your Honor.

15 THE COURT: Oh, I'm sure there is --

16 MR. GOLDFEIN: Including --

17 THE COURT: -- but the bottom line is it didn't wreck  
18 (sic) havoc in the National Football League.

19 MR. GOLDFEIN: Well, it did -- I would beg to differ,  
20 Your Honor. It wrecked (sic) a lot of havoc and threatened a  
21 lot of havoc, but fortunately --

22 THE COURT: Well --

23 MR. GOLDFEIN: -- the Ninth Circuit came back in  
24 Raiders II --

25 THE COURT: Well.

1 MR. GOLDFEIN: -- and significantly clarified the  
2 law.

3 THE COURT: Well that's the law, but let's talk about  
4 what happened out on the real, you know --

5 MR. GOLDFEIN: Well, but the law had --

6 THE COURT: The law is great. Courtrooms are great.  
7 But you have the real world, the economy that goes on. The  
8 markets will open tomorrow no matter what I do.

9 MR. GOLDFEIN: Your Honor --

10 THE COURT: But I know the puck's going to get  
11 dropped in Pittsburgh tonight no matter what happens here  
12 today.

13 MR. GOLDFEIN: But the difference is that because of  
14 the change in the law, the real, the willy-nilly relocation of  
15 teams, the San Diego Clippers moved also because of Raiders I.

16 THE COURT: Well we'll get to the Clippers in a  
17 moment. Let's --

18 MR. GOLDFEIN: All right.

19 THE COURT: -- just stay on the Colts.

20 MR. GOLDFEIN: So --

21 THE COURT: The NFL was fine. They've continued to  
22 grow. They're now worth billions of dollars more than they  
23 were in 1984.

24 MR. GOLDFEIN: But Your Honor.

25 THE COURT: Everybody's making a lot of money. The



1 marketplace is fine; right?

2 MR. GOLDFEIN: With all due respect, there are so  
3 many factors that lead to those conclusions having absolutely  
4 nothing to do --

5 THE COURT: Well, all I'm saying is you all have said  
6 to this Court, "Judge, this would wreak havoc in all of the  
7 professional sports."

8 MR. GOLDFEIN: Well, yes.

9 THE COURT: And at least history doesn't support  
10 that.

11 MR. GOLDFEIN: No, I beg to differ, Your Honor. It--  
12 history, we don't know whether history will support it, but I  
13 do know --

14 THE COURT: Well sure we know.

15 MR. GOLDFEIN: No, we don't.

16 THE COURT: The NFL was fine. The league played.  
17 The games got played. The Indianapolis Colts have now won a  
18 Super Bowl and the Baltimore Ravens have won a Super Bowl.

19 MR. GOLDFEIN: Your Honor, and there's no -- and  
20 because of the, and because of some of the relocation  
21 restrictions or the law, we've been able in the various leagues  
22 to keep teams in places like Minnesota. The Timberwolves were  
23 not allowed to move. There were other places and a myriad of  
24 locations where teams have been prevented to move because the  
25 law changed after Raiders I, and --

1 THE COURT: Well, but, but the argument is not so  
2 much a legal one but a factual one. This would create havoc  
3 for professional sports league everywhere.

4 MR. GOLDFEIN: But these are factual matters. The  
5 factual matter is about the teams that have, that the leagues  
6 have been able to keep in place.

7 THE COURT: Well, I don't know anything about those.

8 MR. GOLDFEIN: That's the factual matter.

9 THE COURT: I only know the ones that you all have  
10 put on the record I'm aware of.

11 MR. GOLDFEIN: Well, but that's what the issue is,  
12 denying consent of the league and allowing the floodgates to  
13 open to let teams file in bankruptcy and move without the  
14 consent of the leagues is the issue.

15 THE COURT: Well --

16 MR. GOLDFEIN: We do know that the law was --

17 THE COURT: Well, the argument was, not the a legal  
18 argument one, this, and I believe these are your words, "Would  
19 wreck (sic) havoc in professional sports leagues."

20 MR. GOLDFEIN: Yes, and --

21 THE COURT: And all I'm saying is the facts don't  
22 seem to bear that out.

23 MR. GOLDFEIN: And what I'm suggesting --

24 THE COURT: How about the Clip, let's talk about the  
25 Clippers for a second.

1 MR. GOLDFEIN: Sure.

2 THE COURT: Do you remember how they departed?

3 MR. GOLDFEIN: The Clippers moved, and the MBA let  
4 the Clippers move, and then filed an action for declaratory  
5 judgment.

6 THE COURT: Well, the MBA didn't let the Clippers  
7 move. The Clippers made a public announcement and said, "We're  
8 moving," got the consent of the Lakers and moved to Los  
9 Angeles, and played there every since, and did that in a matter  
10 of days; right?

11 MR. GOLDFEIN: But the league decided that they would  
12 not seek a preliminary injunction because of the Raiders I  
13 opinion.

14 THE COURT: Well.

15 MR. GOLDFEIN: And then, and then what occurred was  
16 they filed a declaratory judgment action.

17 THE COURT: I guess you and I will just disagree on  
18 this point. It didn't seem to wreck (sic) havoc on those  
19 professional sports leagues when that happened. The MBA's been  
20 fine, and some might argue the Clippers haven't been so fine.  
21 The MBA has been fine and they're still making a lot of money.  
22 The NFL's been fine, they're making a lot of money, and major  
23 league baseball survived the Seattle Pirates.

24 MR. GOLDFEIN: Your Honor, it's not the issue of the  
25 teams that have moved; it's the teams that have not moved

1 because of the consents that are required, and because of the  
2 standards that --

3 THE COURT: Well --

4 MR. GOLDFEIN: -- apply that favor teams staying in-

5 THE COURT: -- that's a different argument than  
6 wrecking havoc in pro sports, in my opinion. You and I are  
7 just going to disagree on that one.

8 MR. CLARK: Respectfully so, Your Honor.

9 THE COURT: All right.

10 MR. CLARK: And I don't think that the other three  
11 leagues frankly would have filed amicus if they didn't feel  
12 that the significant of the issue before Your Honor was a very,  
13 very important one.

14 THE COURT: I'm sure you're right on that point. You  
15 and I agree on that one.

16 MR. CLARK: Your Honor, the one point I would make on  
17 that is that this Court has the power granted to it under the  
18 law, and Your Honor, Your Honor is obviously a knowledgeable  
19 sports fan, no question about it, but when it comes to making a  
20 business determination about what's in the best interest of 30  
21 hockey teams or 32 NFL football teams or 30-some baseball  
22 teams, with all due respect, I think that that business  
23 judgment decision is best put in the hands of sophisticated  
24 knowledgeable men and women of integrity who have put their own  
25 money, their own reputations on the line to be owners in

1 leagues, to make a determination based on a myriad of facts and  
2 circumstances that are put before them in accordance with  
3 objective procedures and criteria like we have in this case.

4 THE COURT: I don't think and I disagree on that one.  
5 Unfortunately that's not the issue that confronts the Court.

6 MR. CLARK: Well my only point was that if it's the  
7 ruling of the courts that by the mechanic of filing a  
8 bankruptcy petition a professional sports team is allowed to  
9 circumvent and avoid the league rules on consents for  
10 relocations, you're going to have a lot more cases in courts.  
11 The teams are going to try and do that, and judges are going to  
12 have to make those judgments, and with all due respect to the  
13 Courts, I think like I said, the league owners --

14 THE COURT: This is probably not the best place,  
15 place, for those kind of decisions to be sorted out.

16 MR. CLARK: You and I agree on that, Your Honor.

17 THE COURT: But that's the hand that's been dealt  
18 here.

19 I think you have to acknowledge one thing, that you  
20 all seem to think that a lot of franchises will run to the  
21 bankruptcy court. It seems like the league recognizes this is  
22 an extraordinary situation given the losses that the Coyotes  
23 have suffered, given their circumstances; this is a very  
24 difficult situation.

25 MR. CLARK: The league's been working very hard to

1 remedy the situation, Your Honor. And as we've said many,  
2 many, many times, it didn't have to be in this courtroom.

3 Thank you, Your Honor.

4 Anything else I can --

5 THE COURT: I don't see anything in my notes  
6 immediately, but --

7 MR. CLARK: I'm right over here if you need me.

8 THE COURT: -- I'm not releasing you permanently.

9 MR. CLARK: I'm right over here if you need me, Your  
10 Honor.

11 THE COURT: All right.

12 MR. GOLDFEIN: Your Honor?

13 THE COURT: Yes.

14 MR. GOLDFEIN: One point on the anti-trust law that I  
15 wanted, or was made earlier that I would like to address if I  
16 could in response to a point that Mr. Salerno made.

17 THE COURT: The non-anti-trust lawyer?

18 MR. GOLDFEIN: Well, he made it about, he made an  
19 assertion that --

20 THE COURT: He's good at that.

21 MR. GOLDFEIN: -- that we believe that we're above  
22 the law, and that if there's been a violation --

23 THE COURT: Well, you know, for all of your benefit,  
24 and there's probably no diplomatic way to say this, you all are  
25 advocates. You have to advance the position as you think is in

1 the best interest of your client.

2 And you probably say some things that may come across  
3 harsh or pejorative, and I guess you'll have to trust me; that  
4 doesn't carry a whole lot of weight with me. I'm not some  
5 juror who's never been in a courtroom before. I've sat here  
6 for 20 years and I've tried a lot of cases all over this  
7 country.

8 MR. GOLDFEIN: Your Honor, I appreciate that very  
9 much. And the one thing I wanted to say was, and I know you  
10 have this point down but I want to call your attention to a  
11 couple of other case cites that are in our papers.

12 The circuit has already ruled, the Ninth Circuit, and  
13 you quoted the language, that the relocation rules and  
14 procedures are not, cannot be a violation of the anti-trust  
15 laws. They're not unlawful on their face. The question is the  
16 application of the law.

17 THE COURT: Right. That's Raiders and Clippers.

18 MR. GOLDFEIN: Yes. And that's the Raiders' and the  
19 Clippers' case combined sort of, and the Clippers ultimately  
20 says if you have those choice, those objective factors, as we  
21 do, then they may be lawful in all cases. They may ensure the  
22 lawfulness of those rules as long as they are applied in good  
23 faith.

24 And while the other side has made this long  
25 presentation and put in, you know, affidavits and whatever

1 about the supposed application of those rules, the truth is  
2 they have not yet been applied, and whatever is said about the  
3 rules and the application, there may or may not be an agreement  
4 between the NHL board as they evaluate each of the standards  
5 and Mr. Balsillie or the Debtor's position.

6 And I don't want to burden the Court with examples  
7 unless you would like to hear a couple.

8 THE COURT: You know, I've read Clippers and Raiders  
9 very carefully.

10 MR. GOLDFEIN: Right.

11 THE COURT: As you might have noticed, I can almost  
12 quote them off the top of my head.

13 MR. GOLDFEIN: So the point that I want to make to  
14 Your Honor is there's a second line of cases under the anti-  
15 trust laws that I think are important for Your Honor to  
16 consider. The Supreme Court decision is Kelly v. Kosuga.  
17 There's a number we cite in our brief, two Viacom opinions that  
18 are the progeny of Kelly v. Kosuga, and basically what the law,  
19 the Court has said, it frowns upon the use of an anti-trust  
20 defense to avoid the benefit, the burdens of a contract when  
21 you have already enjoyed the benefits of that contract.  
22 And the benefits of being a member of the National Hockey  
23 League I will not -- it's set forth in our papers, and the  
24 dynamics of being a club, and the interdependence of the  
25 club --



1 THE COURT: We wouldn't be here if there wasn't a  
2 perceived benefit in being in the League.

3 MR. GOLDFEIN: That's right.

4 And so what Kelly says is the burden cannot be  
5 avoided by an antitrust defense, unless the court would be  
6 involved in the enforcement of an antitrust violation. And  
7 those cases are rare and far and few between where you find  
8 that to be the case.

9 So I wanted to call the Court's attention -- they're  
10 cited in our brief. There's two other Viacom opinions where  
11 courts have made the same point. There's one in particular out  
12 of Delaware State Court where Viacom wanted to basically  
13 compete with a -- in violation of a non-compete clause.

14 THE COURT: I got it.

15 MR. GOLDFEIN: You've seen the cases I'm sure.

16 And the point here is that while they can make a  
17 claim, and they want to make a claim, they can --

18 THE COURT: They have made a claim. They sued you.

19 MR. GOLDFEIN: They sued us. They can do and did  
20 what Al Davis did or can do. Al Davis made an application.  
21 The NFL chose to reject it. He filed a lawsuit. They have the  
22 same right.

23 There is no -- and this is the last point I wanted to  
24 make. There's no antitrust causation here when they talk about  
25 the antitrust issues. Mr. Balsillie and the debtor agreed to a

1 schedule. Whatever implications that schedule has upon the  
2 antitrust issues, that's of their own doing. That's of their  
3 own making. Their schedule is what's causing them to have a  
4 purported antitrust problem.

5 Because it's not the NHL that is not going to fulfill  
6 its obligation pursuant to the constitution and bylaws.  
7 They've argued in their latest filing they want the rights of  
8 the NHL constitution, but they don't want its obligations.  
9 They literally say that now.

10 Because in their filing last night they say they'll  
11 accept the rights and obligations under the collective  
12 bargaining agreement, but only the rights under the  
13 constitution and bylaws. That's a very significant and damning  
14 admission from an antitrust point of view.

15 Because from an antitrust point of view, it only  
16 strengthens the fact that we should have the right, because  
17 it's not illegal, not a violation of any law to consent to the  
18 transfer of ownership, and to consent to the relocation of the  
19 club, if it comes properly before the board, and the board has  
20 an opportunity to do the kind of detailed study it routinely  
21 does which was described in our papers.

22 All of the objective standards and the procedural  
23 safeguards are provided to these parties under NHL  
24 constitutional procedures and rules. And there's from an  
25 antitrust point of view no reason to depart at all from those

1 procedures and those rules.

2 I'll leave it to the bankruptcy court and to my  
3 partner arguing the bankruptcy law to argue whether the  
4 bankruptcy laws in any way affect those rights. But certainly  
5 the antitrust laws don't interfere at all with the processes of  
6 the National Hockey League. Thank you, Your Honor.

7 MR. WEINZWEIG: May I be heard on one point, the as  
8 applied. I'll be fairly quick and discrete. I have one case  
9 for you --

10 THE COURT: Are you -- you have to tell me who you  
11 are and who you represent.

12 MS. FREEMAN: This is my partner, David Weinzweig.  
13 He's the antitrust part of the PSE team.

14 THE COURT: You know I love it that you all get to  
15 parade up multiple participants, and then it's just me.

16 Go ahead.

17 MR. WEINZWEIG: Your Honor, I don't want to waste  
18 time here. I just want to call your attention to an opinion  
19 that I think --

20 THE COURT: Well, don't give them both copies. Give  
21 me a copy. They're both on the same team.

22 MR. WEINZWEIG: May I approach?

23 THE COURT: You may.

24 MR. WEINZWEIG: It answers a question and an issue  
25 that has been raised. And you had asked what our favorite

1 cases are. I would tell you my favorite case is the Raiders  
2 case.

3 And one of the reasons is because in this district  
4 court opinion the NHL -- sorry -- the NFL raised what is the  
5 identical position that we hear today from the NHL, which is  
6 that there have been no votes -- as of now no votes, either  
7 affirmative or negative, have taken place. In a nutshell, the  
8 defendants say that nothing actually has happened, and that the  
9 coliseum is merely seeking an advisory opinion from this Court.

10 Well, this is the distinction between Sections 4 and  
11 16 of the Clayton Act. Section 16 is an injunctive relief  
12 provision that is prophylactic in nature, and it's forward  
13 looking.

14 THE COURT: Well, let me ask you this question. It  
15 seems to me one of the challenges the Court is going to have to  
16 confront, in the context of the Raiders litigation, the Raiders  
17 went to the NFL and ultimately insisted upon a vote. They were  
18 told they couldn't move.

19 And my sense is that ultimately that was one of the  
20 fundamental reasons why the NFL lost that litigation.

21 Here the League has yet to apply a decision to the  
22 recent applications to transfer and relocate. And so that's a  
23 pretty significant factual distinction between those two  
24 situations in my mind.

25 MR. WEINZWEIG: Well, and I understand that, and at

1 least in this instance the NFL raised the identical point. And  
2 the court said that the NFL's argument is quote, clearly at  
3 odds with the language of Section 16 of the Clayton Act.

4 And then the court moves on to talk about why the  
5 coliseum in this instance could file a claim under Section 16  
6 of the Clayton Act to assess the legality of the particular  
7 provisions in the NFL constitution.

8 So I mean I could go on and address some of the other  
9 antitrust issues, but --

10 THE COURT: Let's hold them for the moment.

11 MR. WEINZWEIG: I just wanted to give you this one  
12 case.

13 MS. FREEMAN: Susan Freeman for PSE.

14 So as I'm hearing about this case, and I hadn't  
15 focused on that district court opinion before, initially there  
16 was no decision by the NFL, and the court said they still could  
17 be found in violation --

18 THE COURT: No, no. The Raiders made the NFL vote,  
19 and they voted, "No, you can't move."

20 MS. FREEMAN: I know. But the initial decision by  
21 the district court was when there had been no decision. That's  
22 the one that was just handed up. And the court still ruled on  
23 it. Then there was a vote, and the court overruled that vote.

24 THE COURT: Well, let me back up, because I think you  
25 deserve an award for the filings on Friday. And I guess in

1 your case shortly after midnight Friday night.

2 MS. FREEMAN: I know. You wouldn't believe the  
3 problems we had.

4 THE COURT: The good is the Seinfeld quote. That was  
5 the most hilarious part of all the briefs. The bad news is  
6 that 210 footnotes in your brief is a record. And in fact I  
7 think it's a record for any brief I've ever read in 20 years on  
8 the bench.

9 MS. FREEMAN: We tried to put them down in the  
10 bottom, instead in the midst of it so that it would be a little  
11 more readable.

12 THE COURT: Well, I guess, you know, the question is,  
13 like my days in law school, do I have to read the footnotes? I  
14 assume you put them there for me to read.

15 MS. FREEMAN: Yes, yes, we did.

16 But the Seinfeld quote I think gets to the heart of  
17 one of the points that's been raised here, which is whether or  
18 not this has really been prejudged. I mean from our  
19 standpoint --

20 THE COURT: You know, I hear you all, but I struggle  
21 with kind of the basic you don't know until you've been asked.  
22 It's kind of like when I was a youngster in college, and I  
23 wanted to ask some young lady to dance. The only way you found  
24 out was to ask.

25 And you guys have now asked --

1 MS. FREEMAN: We have asked.

2 THE COURT: -- and they're entitled to, under the  
3 rules and regulations, time to respond. At a minimum in the  
4 eyes of the law they're entitled to a reasonable time to  
5 respond.

6 MS. FREEMAN: And I guess the question is in part  
7 what's a reasonable time to respond under the exigencies of the  
8 circumstances? When they need to respond quickly, as in the  
9 case of the Nordiques, and they can respond very quickly.

10 THE COURT: Well, yes, but --

11 MS. FREEMAN: And here they've known for a long time  
12 too that yes --

13 THE COURT: This isn't a question.

14 MS. FREEMAN: -- this is a problem situation.

15 THE COURT: This is just a statement. You could have  
16 made that application on May 5th or 6th --

17 MS. FREEMAN: You know, it took --

18 THE COURT: -- and made them have more time to  
19 confront the decision. That hasn't happened. So here we are.

20 MS. FREEMAN: I wish we had. It really did take an  
21 awful lot of work, as the Court can see. I mean there were  
22 surveys. There was a real effort to pull together all of the  
23 information that would be needed to show exactly what the  
24 circumstances were here, and what they would be there. There  
25 were surveys of the people in Glendale, you know. There were

1 extensive interviews and information, so --

2 THE COURT: It's not a short process. I understand  
3 that.

4 MS. FREEMAN: Yeah. But at this point in time they  
5 have the information. The updates --

6 THE COURT: Well, but I guess just on the -- that  
7 there's somehow ill will, bad faith, spite, whatever here. I  
8 really struggle with that for this reason.

9 It's pretty hard to say that if you don't give  
10 somebody time to respond, because maybe that girl would have  
11 danced with me if I'd asked her.

12 MS. FREEMAN: Well, here we do have in this record,  
13 we have not only the venom dripping from the voice of he's  
14 manipulating this process, but --

15 THE COURT: Well, but again you all are advocates.

16 MS. FREEMAN: Yeah, wholly apart from that --

17 THE COURT: That's what you do.

18 MS. FREEMAN: Wholly apart from that --

19 THE COURT: I did it when I was out there with you.

20 MS. FREEMAN: You do have the statements on the  
21 record, "We will not allow a team to relocate. We will fight  
22 tooth and nail to keep a team in Glendale." You have those on  
23 the record before this Court.

24 THE COURT: Well, and you know, they are now paying  
25 the cost of doing that. So it's not some idle statement or



1 threat. I mean that's what they decided is in their best  
2 interests, just like PSE and Mr. Balsillie have decided what's  
3 in their best interests to make this offer.

4 MS. FREEMAN: Right.

5 THE COURT: And so I don't know that you can  
6 attribute to either one somehow there's ill will, or spite, or  
7 bad faith.

8 MS. FREEMAN: No. I think you can here. I really  
9 do. Because I think that you have --

10 THE COURT: Well, I know you do.

11 MS. FREEMAN: Okay. But I think you have a  
12 sufficient record that we have given you to show that it is  
13 manifestly unreasonable not to agree to this transfer.

14 If you look at all the information that's in the  
15 relocation application, if you look at the Wright expert  
16 declaration, if you look at the Baziliauskas expert  
17 declaration, if the look at the Zimbalist expert declaration, I  
18 mean you have the information here that shows that they have  
19 repeatedly blocked any effort to move to Hamilton. They've  
20 said repeatedly, "We will not allow any team to go to  
21 Hamilton."

22 They have information that shows the --

23 THE COURT: Has anybody in all of this record -- I  
24 don't think there's anything in there where somebody has  
25 actually asked and said, "I want to go to Hamilton" until your

1 client filed his application, have they?

2 MS. FREEMAN: No. I think frankly that there had  
3 been a number of discussions with the NHL about going to  
4 Hamilton in connection with Predators and Penguins situations.  
5 So this was not something that was new by any means. This  
6 one --

7 THE COURT: But a la the Sullivan decision and the  
8 Raiders decision, they didn't actually say, "I'm going to  
9 submit the paperwork, and you're going to have to tell me  
10 officially no."

11 MS. FREEMAN: And maybe, Your Honor, given the  
12 exigencies of the bankruptcy case what you need to do is to do  
13 what was done in the Pacific Northwest case, and just give an  
14 order to show cause that under the circumstances of this case  
15 you need to decide by X date. You have all of the information.  
16 It's there.

17 THE COURT: Well, I think there's one -- in that  
18 regard one fundamental difference between that case and this  
19 case. Here the League is now said something that they didn't  
20 say the first few days of this case. "Judge, we're going to  
21 keep them there for this season if you let us, and we'll pay  
22 for that privilege." And we all know it's going to cost  
23 millions of dollars to do that.

24 And so that's a fundamentally different position than  
25 the American League took with the Seattle Pilots. I don't

1 think the American League said to Judge Volinn, "Judge, we're  
2 going to keep them there for the next season, and we'll pay  
3 whatever it costs to do that." It's a very different situation  
4 in that regard.

5 MS. FREEMAN: I do appreciate the difference. We do  
6 have the -- we'll put on terms and conditions which are not  
7 really disclosed, really spelled it out. They've always put  
8 little caveats in there, so --

9 THE COURT: But now in fairness --

10 MS. FREEMAN: In fairness.

11 THE COURT: -- and you want to talk about spite and  
12 bad faith. Let's talk about good faith. They stood up, and I  
13 forget the day, but it was roughly May 12th. They stood up and  
14 said, "Judge, we're going to fund this debtor."

15 MS. FREEMAN: I stood up and said the same thing. We  
16 offered to fund it, too.

17 THE COURT: You did. But here is the difference.

18 They said right out of the box they'd do it. And  
19 they didn't say, "Judge, we'll only do it on terms and  
20 conditions that work for us." They said, "We'll work it out  
21 with the debtor and the other lenders, and we'll fund." That's  
22 pretty significant.

23 I mean they're in a sense -- they've said basically  
24 for the next year, if they get what they want, whatever those  
25 operating losses are, which I guess the last three years

1 average about \$30 million, they're going to pay that.

2 That's radically different than what the American  
3 League was saying to the judge for the Seattle Pilots.

4 MS. FREEMAN: I do appreciate that. There's a huge  
5 consequence for all of the creditors here, particularly  
6 Mr. Moyes, as the one at the bottom. But there certainly is a  
7 huge consequence to all the creditors here.

8 It's been operating at a loss of 30 million a year.  
9 We can't really expect it to be less, and it's probably going  
10 to be a lot more, since we really expect a lot of people to be  
11 rushing out for sponsorships and season tickets on this record,  
12 and seeing that it's probably a lame-duck franchise. It's  
13 not --

14 THE COURT: Well, you know, if the NHL gets their  
15 way, the fans and the community are going to have to make the  
16 decision. Because if you're right and they walk away, the  
17 probable reality is that they NHL franchise in Arizona probably  
18 won't be there in two seasons.

19 MS. FREEMAN: Right.

20 THE COURT: If there's no fans, you know, well, I  
21 hate to say this on the record, but the last year the St. Louis  
22 Cardinals played in St. Louis before they moved to Arizona,  
23 they pretty much played in an empty stadium.

24 So if the NHL gets their way, the fans, those people  
25 who have written all their letters, the save the Coyotes'

1 group, well, they're going to get an opportunity to stand up  
2 and vote with your pocketbooks and your presence.

3 MS. FREEMAN: And one of the things that's in our  
4 relocation application is the survey of Glendale residents  
5 where 72 percent of those surveyed said that they would rather  
6 have the team leave than have the city subsidizing them three  
7 to fifteen million.

8 THE COURT: I saw all that.

9 MS. FREEMAN: Yeah. I mean every municipality in the  
10 Phoenix metropolitan area is hurting, and Glendale is hurting  
11 substantially, and --

12 THE COURT: I don't think that's limited to the  
13 valley.

14 MS. FREEMAN: -- these are taxpayer dollars. I'm  
15 sorry?

16 THE COURT: I don't think it's limited to the Valley  
17 of the Sun.

18 MS. FREEMAN: No. That's true. But we are one of  
19 the worst hit certainly. And the notion that Glendale --

20 THE COURT: I think Miami might argue with you --

21 MS. FREEMAN: -- is going to subsidize --

22 THE COURT: -- but we're a contender.

23 MS. FREEMAN: You also have gift clause issues.  
24 There's a pending -- there's a case pending before the Arizona  
25 Supreme Court now with respect to the gift clause in the City

1 North case. They may have some additional constraints there.

2 So any of these in store or other offers are  
3 contingent upon Glendale making a significant subsidy, which  
4 frankly looks pretty unlikely under the circumstances. So we  
5 need to take that in account too as you're weighing -- or well,  
6 yes. The NHL might continue to fund. Certainly if it's  
7 continuing to --

8 THE COURT: Well, not might. I mean they've now  
9 said, Mr. Bettman said in I think this last declaration, "We  
10 will." It's not that we might.

11 MS. FREEMAN: This is on terms -- on acceptable terms  
12 and conditions. That's the only question --

13 THE COURT: Well, you don't expect them --

14 MS. FREEMAN: -- is the little caveat there.

15 THE COURT: -- to commit to spend \$30 million that  
16 they might lose and not have some kind of terms and conditions  
17 on it.

18 MS. FREEMAN: Whatever the terms and conditions are,  
19 we can be pretty sure that they are going to be first-priority  
20 repayment; right?

21 THE COURT: Well, that's kind of the same deal --

22 MS. FREEMAN: Any DIP financing is going to be --

23 THE COURT: -- your client wanted, isn't it?

24 MS. FREEMAN: Right. You would expect that.

25 THE COURT: Pretty standard.

1 MS. FREEMAN: Pretty standard.

2 THE COURT: I'll be the DIP lender --

3 MS. FREEMAN: Yeah.

4 THE COURT: -- as long as I get first dibs on the  
5 money.

6 MS. FREEMAN: But by virtue of doing that, we also  
7 know that as it's likely that the team will --

8 THE COURT: It's the depreciating asset concern.

9 MS. FREEMAN: It is a depreciating asset.

10 THE COURT: If it's a constant dollar, then the  
11 effect of that is that somebody at the end of the line either  
12 isn't going to get paid, or they're going to get paid less. I  
13 understand that.

14 MS. FREEMAN: Right, right, or significantly less.

15 And the other big thing I think is that it's not just  
16 getting paid less, but you'll lose effectively the value of the  
17 ability to relocate. I mean if in fact what we have is  
18 Reinsdorf or someone else coming in, certainly the others are  
19 Toronto businessmen, like they're going to keep it in Phoenix  
20 forever. They're coming in because they want to have the  
21 opportunity at least and understanding with the NHL that  
22 they're going to be able to move the team as it does poorly,  
23 which it inevitably will.

24 Even under the rosiest projections you've got, you  
25 know, five years of ongoing deficits, and it's likely to be

1 worse given the bankruptcy. So it will do poorly.

2 And as a result, then they will be all right. We  
3 bought the team. We funded it in Phoenix. And darn it, it  
4 didn't go well. So now we need to relocate.

5 And what happens then is that these creditors lose  
6 out on the difference between the 212 million and whatever it's  
7 being bought for now.

8 THE COURT: Well, doesn't -- and here's where you all  
9 kind of, I'll be blunt and I'll apologize for it, let me down a  
10 little bit on the economic analysis. Nobody did any kind of  
11 numbers on what's the NHL's claim if PSE and the debtor went.

12 I think under Raiders II they've got a claim that has  
13 to go in there.

14 The City of Glendale, even I think the debtors and  
15 PSE concede are in there for \$7 million if you all prevail, but  
16 wouldn't be there if there's a sale to somebody in place.

17 And then I may mispronounce it, but Aramark has filed  
18 a pleading that says, "If these motions are granted, Judge,  
19 we're going to be owed in round numbers 5.5 million," that  
20 wouldn't be owed if they stay there.

21 And so my own phrase as a lawyer, I'm trying to do an  
22 economic analysis on moving numbers.

23 MS. FREEMAN: I don't see any basis for the NHL to  
24 have a claim against this bankruptcy estate. What it has --

25 THE COURT: Well, I think they have to be --



1 MS. FREEMAN: -- is the claims for the loans.

2 THE COURT: For the debtor and PSE to prevail, they  
3 have to convince me NHL is going to be adequately protected,  
4 both currently and in the future. And as I probably indicated,  
5 I think the NHL has a claim, if I grant the motions that you  
6 all are asking me to grant, that I have no idea what the number  
7 is. But I don't think it's an insignificant number.

8 And now I've got to factor that into the equation.  
9 And that test really is probably the ultimate test that has to  
10 be resolved to grant or deny the motions. I mean if it turns  
11 out the creditors are worse off by granting this, it's a pretty  
12 easy ruling. I deny it; right?

13 MS. FREEMAN: Uh-huh.

14 THE COURT: And if it turns out the creditors are  
15 better off, then I've got to look really hard at these issues  
16 that apparently no other court's ever confronted before. So  
17 lucky me. I get to be the guy.

18 MS. FREEMAN: Well, each case is a little bit unique.  
19 We do have we think a number of cases that the Court can look  
20 to.

21 But let me address the relocation point. Yes, in  
22 Raiders II there was a discussion of the offset, the damages'  
23 offset with respect to this franchise value.

24 And then we go to the SDC case, the Clippers case  
25 where there was a specific request to pay this relocation

1 value. And but the court said, what the Ninth Circuit said is,  
2 "You don't have just some free-floating right to get that  
3 money. It has to be based" -- the whole last paragraph. "It  
4 has to be based in some specific contract or other provision."

5 What we have here is the express contract in the form  
6 of the bylaws. And the Court saw that we laid this out in our  
7 brief.

8 THE COURT: I've read the argument bylaws and the  
9 constitution on that. I'm not sure that answers the question  
10 as definitively as you assert.

11 Notwithstanding what the Ninth Circuit said in  
12 Clippers, in Raiders they said the NFL owns the Los Angeles  
13 location.

14 MS. FREEMAN: Right.

15 THE COURT: That's their value. And when the Raiders  
16 took it, their damages had to be offset by the debt the Raiders  
17 owed for the League.

18 MS. FREEMAN: And there is no damages' claim here.  
19 Nobody's asserting -- nobody's asking for damages. You don't  
20 have issues of offset. And so you get to Clippers which is  
21 taking --

22 THE COURT: You, you, you --

23 MS. FREEMAN: -- exactly that logical step from  
24 Raiders II.

25 THE COURT: You're correct in this sense. That the

1 NHL has not said as of 11:30 on June 9th, 2009, "Judge, that  
2 right is blank-million dollars." But they've said they've had  
3 the right in their brief.

4 MS. FREEMAN: And they have -- for the right that  
5 they are seeking, a relocation, a taking of that expansion  
6 opportunity value, it is that claim that was precisely at issue  
7 in SDC in Clippers. They said, "Raiders I says this;  
8 Raiders II says that." And so you then have the precise  
9 request, "Well, can we get this expansion opportunity value?  
10 We have a claim to get that expansion opportunity value."

11 And the Circuit said, "There's no free-floating right  
12 for that. You have to find it in your contract."

13 THE COURT: Well, unfortunately for you I happen to  
14 have the Clippers last page sitting right here in front of me.

15 MS. FREEMAN: Okay, I do, too.

16 THE COURT: And what they said was, quote:

17 "The existence of a recovery or expansion  
18 opportunity must find its source somewhere  
19 other than antitrust law, i.e., the express  
20 or implied provisions of the NBA  
21 constitution."

22 And they sent the court -- the case back to the trial  
23 court. As far as I know, the case then disappeared.

24 MS. FREEMAN: Settled.

25 THE COURT: But it's hard not to read Raiders II, and

1 for this judge not to conclude that the League has some dollar  
2 right. If you're right, then you can take this franchise and  
3 move it to Hamilton, Ontario.

4 MS. FREEMAN: But what is it? How do you define it?  
5 And what it says is you look --

6 THE COURT: Well, I would assume --

7 MS. FREEMAN: -- at the express or implied provisions  
8 of the NBA constitution.

9 THE COURT: Well, that's one place you can find it.  
10 But it seems to me that the Ninth Circuit has said the League  
11 owns that, and they have the right to charge for that, whatever  
12 that number is.

13 MS. FREEMAN: They have the right to, but they have  
14 to spell it out. This is not -- you know -- the NHL is -- it's  
15 a group of member -- it's a group of individual team owners.  
16 It's not a corporation. It's not a partnership. It's a group  
17 of individual team owners. And they have agreed --

18 THE COURT: Well, let me say this.

19 MS. FREEMAN: -- under this constitution to what  
20 they're going to get.

21 THE COURT: I'm not sure it's a fair analogy. But  
22 take any country club in America.

23 MS. FREEMAN: Right.

24 THE COURT: And let's say today to join the country  
25 club it costs \$10,000. I think those members have the absolute

1 right -- you have the meeting tonight. And say, "You know,  
2 that's too cheap. If you want to belong here it's not  
3 \$50,000."

4 And I'll be very candid about this. As I sit here  
5 right now I'm not so sure -- as long as they do it reasonably  
6 and not arbitrarily, and not aimed at spite at Mr. Balsillie,  
7 they have the right to say, "Okay, if you want to take Hamilton  
8 location, in our view that's the most valuable location for an  
9 NHL franchise, and the price is 10X." I'm not going to even  
10 allude to an actual number.

11 I'm not so sure they don't have the right to do that  
12 as long as it's done reasonably and fairly.

13 MS. FREEMAN: Your Honor, I think that it has to be  
14 under the documents that they have. I don't think that they  
15 can turn around now and say, "You know, now we're going to  
16 start charging a whole lot more than we ever said before."

17 THE COURT: Well, now --

18 MS. FREEMAN: I also would ask the Court to look to  
19 the bankruptcy law, the bankruptcy cases like Jamesway that say  
20 you can't impose a fee as a condition of assignment as a matter  
21 of bankruptcy law, because that is in effect an anti-assignment  
22 provision.

23 The anti-assignment 365(f) is dealing with conditions  
24 of assignment, too, and this is a condition of assignment --

25 THE COURT: Well, here's where you have that

1 bankruptcy law, and antitrust law --

2 MS. FREEMAN: That's correct.

3 THE COURT: -- and contract, and commercial law  
4 butting heads. It seems to me the Ninth Circuit has said the  
5 NHL owns the Hamilton opportunity. That's theirs.

6 And if you want to force yourself upon them, you may  
7 have to pay that value to them. You have to under 363 and 365  
8 adequately protect that interest in the NHL. At least the  
9 debtors do to get their motions read.

10 MS. FREEMAN: And the question is how you define it.  
11 A, it has to be reasonable. The courts recognize that.

12 THE COURT: I think that's --

13 MS. FREEMAN: Certainly we would say that the way  
14 they've spelled it out in their bylaws as to what it is would  
15 be the one. I hear what the Court is saying that you think  
16 that there may be something more.

17 THE COURT: Well, this is an area you all trip over  
18 consistently.

19 MS. FREEMAN: Sure.

20 THE COURT: When you like their bylaws and they help  
21 your case, i.e., the veto power of any one franchise, you wave  
22 that one about. When you don't like their bylaws, then you  
23 don't wave it about.

24 I remember something about that old line about you  
25 can't have it both ways. You either got to live with them or

1 reject them.

2 Okay, go ahead.

3 MS. FREEMAN: The other thing would be, Your Honor,  
4 that in this last -- in their filings on Friday they suggested  
5 that the fee would be maybe a hundred million. There's never  
6 been -- I mean to the extent you have an expansion --

7 THE COURT: Is that in the record?

8 MS. FREEMAN: Yes.

9 THE COURT: Where?

10 MS. FREEMAN: Page -- paragraph 44 I believe.

11 THE COURT: Of?

12 MS. FREEMAN: Of their brief.

13 THE COURT: Oh.

14 MS. FREEMAN: There has never been an expansion fee  
15 of any close to that magnitude ever sought before.

16 The other points we would note, Your Honor, are that  
17 effectively what's happening as a result is that the value is  
18 ending up not going to a debtor's estate where it otherwise  
19 would.

20 THE COURT: If the NHL has this right, you're  
21 absolutely correct. It doesn't go to the creditors. But I'm  
22 happy to have you tell me that I'm missing something, but it  
23 seems to me the Ninth Circuit in Raiders said -- uh oh.

24 MR. SALERNO: I'm just going to whisper something.

25 MS. FREEMAN: Okay.

1 (Counsel confer)

2 THE COURT: You guys doing okay?

3 MS. FREEMAN: Mr. Salerno is reminding me that if in  
4 fact there is a relocation fee that is charged, it is not paid  
5 by the debtors, but is instead paid by PSE. That is accurate.

6 If the fee is too large, we have the right to walk  
7 away. Something other than zero, we have the right to walk  
8 away. If it is a minimal fee, then, you know, the likelihood  
9 is we'd go right for it. We read the bylaws. We think that it  
10 would be a very minimal fee.

11 If in fact it's going to be a huge fee, then, you  
12 know, there's a limit to the market value of this. And if in  
13 fact you're going to double the cost, and it is way outside of  
14 the market value --

15 THE COURT: I assume you're not going to write a  
16 blank check on this one.

17 MS. FREEMAN: Right.

18 THE COURT: All right. Let me ask a question that I  
19 think you'll answer now, but I think the debtor, the League,  
20 and maybe the City ought to think about the answer to this one.

21 You know, this is a -- these motions raise a lot of  
22 very interesting but unique issues. If it turns out that fee  
23 is determined by the Court or the League -- I guess by the  
24 League first and ultimately by the Court -- is the amount that  
25 your client isn't willing to pay, I'm kind of asking myself why



1 we shouldn't pluck that issue out and get that decided now.

2 MS. FREEMAN: Well, and that was Mr. Salerno's  
3 suggestion. I heard it of us having this mediated. We want to  
4 have it heard. I mean we're happy to try and mediate it, see  
5 if we can reach an agreement. And if we can't, have it heard  
6 by the Court.

7 THE COURT: I think that's great. My only concern is  
8 this, that you know, we're running out of June 9th.

9 MS. FREEMAN: Correct.

10 THE COURT: We'll call that day gone. You want to  
11 have an auction on the 22nd. So when exactly am I going to  
12 listen to this plethora of experts you all want to parade in  
13 here, and read all this material, and make a decision --

14 MS. FREEMAN: Sure.

15 THE COURT: -- in time to have an auction on  
16 June 22nd?

17 MS. FREEMAN: Sure, of course.

18 THE COURT: Oh, it's easy.

19 MS. FREEMAN: Yeah, it's easy. I mean you've shown  
20 how much you can do right now. I'm enormously impressed with  
21 all the work you're doing.

22 THE COURT: Well, do you ever feel like you've kind  
23 of gone beyond your ability?

24 MS. FREEMAN: Yeah, I'm sure you're not there.

25 THE COURT: You know, the gas tank is now empty and

1 I --

2 MS. FREEMAN: I'm sure you're not there.

3 THE COURT: My son ran the marathon two Sundays ago,  
4 and I rode the bike with him the last four miles because he was  
5 dying. And he said it was the only time in his life -- and  
6 he's a pretty good athlete -- that when he wanted to go a  
7 little faster and a little farther he wasn't sure that he  
8 could.

9 The old man is starting to feel that way a little  
10 bit.

11 MS. FREEMAN: Well, Your Honor, looking at the  
12 calendar before me, I see that I believe we have some things  
13 that are due on the 17th, which is a week and a day away. You  
14 could direct us to mediate between now and then. And if we  
15 need a hearing on the 17th, 18th, or 19th, then we could have a  
16 hearing then with respect to an appropriate relocation fee if  
17 we're not able to reach an agreement.

18 THE COURT: Well --

19 MS. FREEMAN: I do also note, Your Honor, that I have  
20 all of the information I believe with respect to Hamilton, and  
21 to making a determination on Hamilton. You do have a couple of  
22 other bidders here.

23 If the Court says today, as we hope it will, that the  
24 Court does have power to find that consent is unreasonably  
25 withheld under the circumstances, and therefore it opens it to

1 other bidders, you do have as I see a couple of Toronto  
2 businessmen who are looking at this. If in fact they want to  
3 move the team to Toronto, Toronto has a lot more value than  
4 Hamilton. You know, that's where the Leafs really make money.

5 On the other hand, in Toronto they would actually be  
6 moving in and sharing a stadium with the Leafs, because there  
7 isn't another facility big enough at least right now. And so  
8 there would likely be a significant indemnity fee to the lease.  
9 You could decide with respect to us.

10 THE COURT: I think we're running into that old  
11 calendar crunch that is being dictated by you and your client I  
12 might note.

13 MS. FREEMAN: And I'm sorry about that. I wish we  
14 had had the opportunity to come in earlier. We didn't get this  
15 opportunity until late in the spring. Believe me I was working  
16 round the clock to get this contract negotiated, and --

17 THE COURT: I did notice --

18 MS. FREEMAN: -- so were they. So --

19 THE COURT: -- when I was checking the time of  
20 everybody's filings Friday night that yours were actually one  
21 minute into Saturday morning. So I understand what you're  
22 saying.

23 MS. FREEMAN: I know. My computer crashed.

24 THE COURT: I think, you know, we're probably going  
25 to take a recess here fairly soon. That at least the four

1 major parties: the buyer, the debtor, the League, and the City  
2 need to think about that issue, and whether, A, we should  
3 decide it first, and then ask the buyer to say, "Okay, I'll pay  
4 it," or, "No, that's too much. I'm not going to pay it."

5 Because then the rest of these very difficult and  
6 very unique issues may not have to be confronted.

7 Now, if we go that route I'm going to tell all of you  
8 this right now. We're going to try it a lot sooner than the  
9 19th of June. But we'll hold that for the moment.

10 Okay, go ahead. I diverted you.

11 MS. FREEMAN: That's fine.

12 We would still I think want to be able to come back  
13 to the Court with respect to the amount of any relocation fee  
14 if they're saying, "It has to be a hundred million dollars or  
15 more than that."

16 THE COURT: Well, I think if we're going to go down  
17 that path --

18 MS. FREEMAN: So then it really would be  
19 unreasonable, so --

20 THE COURT: -- I would hope the League could tell the  
21 debtor, the buyer as quickly as reasonably possible, "We think  
22 it's X." And then if you all say, "No, that's way too high,"  
23 I'm not some Pollyanna that thinks that that's not going to  
24 happen, that we're probably going to have to have some kind of  
25 a hearing about it.

1 I like the idea of you all mediating. I love being  
2 optimistic about those things, but I'll just leave it this way.  
3 I'm not sure I'm going to hold my breath on this one.

4 MS. FREEMAN: Realistic as well as optimistic.

5 THE COURT: Anything else from the buyer?

6 MS. FREEMAN: Yes, actually there is. With respect  
7 to what rights are held by the team owner, and what rights we  
8 are buying, we do intend to buy the rights of membership what  
9 is needed to operate a team that's --

10 THE COURT: Well, let me ask a question that's just  
11 for my own mind. Let's assume I grant the motion, and PSE is  
12 the high bidder. And okay, they've moved to Hamilton, and  
13 they're now playing in Hamilton. There's no litigation between  
14 the League and the City -- or the League and PSE about that.

15 Doesn't PSE then have to say, "We subscribe to the  
16 rights and the obligations of the National Hockey League"?

17 MS. FREEMAN: Yes, yes. And there was no intent to  
18 take obligations out --

19 THE COURT: All right.

20 MS. FREEMAN: -- when we've written up the rights and  
21 obligations with the --

22 THE COURT: So if it says that or implies that,  
23 that's not correct.

24 MS. FREEMAN: Your Honor, we have declaration -- a  
25 sworn declaration from Mr. Balsillie in the record here, and it

1 says that if approved he would in fact execute all the standard  
2 forms with the home territory defined for the Hamilton area.

3 So you've got the home territory and the sphere of  
4 influence based upon there --

5 THE COURT: So he would just be like the other 29  
6 owners. He'd have his franchise in Hamilton, and he'd have --

7 MS. FREEMAN: Correct.

8 THE COURT: -- the same rights and obligations as the  
9 other 29.

10 MS. FREEMAN: Correct. And I believe that that's  
11 very clear from the sworn testimony of Mr. Balsillie.

12 THE COURT: All right.

13 MS. FREEMAN: With respect to the going through the  
14 NHL's review process, and whether the Court has the power to  
15 overrule it, we look back to the fact that the rules have to be  
16 fairly and objectively applied. And as the Court did in  
17 Raiders I, it can determine that no, they are not being applied  
18 in that way.

19 In Raiders I the court did say, "An owner need only  
20 muster seven friendly votes to prevent a three-fourths'  
21 approval from entering the franchise." And also said:

22 "Testimony indicated some owners, as well  
23 as the commissioner dislike Al Davis and  
24 consider him a maverick. Their vote  
25 against the Raiders' move could have been

1 motivated by animosity rather than business  
2 judgment."

3 And that the NFL made no showing that a transfer of  
4 the Raiders to Los Angeles would have a harmful effect on the  
5 League, because Los Angeles is a market large enough for  
6 successful operation of two teams with scheduling difficulties,  
7 at least something that you could deal with, as they did, and  
8 the facilities of the coliseum are more than accurate.

9 All of those --

10 THE COURT: I think one of the things that's  
11 fundamentally different from Raiders and most of the other  
12 antitrust cases in this situation is there the League member or  
13 the seeking party actually said, "Here's what I want to do;  
14 approve it," and it was rejected.

15 Here we have a, "Here's what I want to do.  
16 Application has been submitted." But no decision has been  
17 made; i.e., there's been no application of the NHL's processes  
18 on this request.

19 MS. FREEMAN: What we can't have is an NHL process  
20 that intentionally drags out to the point that this sale goes  
21 away. There is a reason this -- you know -- June 30th was not  
22 pulled out of the air. On July 1 the team's people become free  
23 agents.

24 If you don't have us buying it, if you don't have  
25 somebody buying it then, who's going to decide on these? You

1 may keep the restricted free agents, but for the unrestricted  
2 ones, oh, so nobody --

3 THE COURT: Well, hasn't the League said that --

4 MS. FREEMAN: It says it's going to fund it. But  
5 who's going to make decisions on who's going to be acquired --

6 THE COURT: I think at the moment --

7 MS. FREEMAN: -- and whether they're going to put in  
8 the money to buy anybody.

9 THE COURT: I think at the moment the League has  
10 said, "We're going to fund it." And we've got this mediated  
11 operating mechanism. But I don't know whether that includes  
12 what to do about players or not.

13 But I assume that the League and the debtor, if we  
14 get to that point, are going to have to figure out how to deal  
15 with that, and not let the players just become free agents and  
16 leave. I mean the League has said if they win it's staying in  
17 Phoenix -- or Glendale -- excuse me. It's staying in Glendale,  
18 and the 2009-2010 season is going to be in Glendale.

19 So at least in the League's view those players are  
20 still Phoenix Coyotes through next season. I understand your  
21 assertions, but it seems to me --

22 MS. FREEMAN: If we're going to buy them we need to  
23 be the ones in order to make -- making those decisions. We  
24 need to be the ones who are in the position to invest in the  
25 team. We need to be the ones to go ahead and start doing the



1 renovations with respect to --

2 THE COURT: If you buy them --

3 MS. FREEMAN: -- coliseum and so forth.

4 THE COURT: -- then that's certainly your right.

5 MS. FREEMAN: So that's the reason for the date.

6 It's not just arbitrary and pulled out of thin air. And as I  
7 said, I wish -- if we'd been able to start this in the summer  
8 it would have been very nice, but we didn't have that  
9 opportunity. I'm sorry, in the winter as opposed to in the  
10 spring, it would have been very nice.

11 But my point is that under the Raiders' decisions,  
12 and I think even the Clippers too, but especially under the  
13 Raiders' decisions, the Court does have the right to look and  
14 see what they did, and to determine whether on its face it is  
15 reasonable for a move to take place.

16 THE COURT: But to do that you need to let them do  
17 whatever it is they're going to do, whatever process and  
18 decision they're going to reach.

19 MS. FREEMAN: But they can't just drag it on to the  
20 point that it is now a moot point.

21 THE COURT: Well, I think generally you're right.  
22 But here we are May 5 bankruptcy.

23 MS. FREEMAN: Right.

24 THE COURT: Additional application material I believe  
25 submitted yesterday.

1 MS. FREEMAN: Let me clarify. The additional  
2 application material is with respect to the transfer  
3 application, not the relocation. Nothing more than the  
4 relocation.

5 The transfer is with respect to whether Mr. Balsillie  
6 has the financial wherewithal to buy. We were asked for  
7 financial applications with all the detail with respect to the  
8 trustees of his family trust. You know, frankly --

9 THE COURT: But --

10 MS. FREEMAN: -- that doesn't alter the fact he's got  
11 \$3 billion, and he can fund this. They're asking for more  
12 follow up. We give it to them. We've given it to them each  
13 time, but --

14 THE COURT: Well, but then, you know, you've got the  
15 problem that you said -- I'm not sure what the date is, but at  
16 some point before the end of June if we're not approved, our  
17 offer is dead.

18 MS. FREEMAN: Right. Because we need to be able to  
19 be the ones to decide on operating the team going forward.

20 THE COURT: Well, I think in a cryptic sense that's  
21 your offer. That's the deadline.

22 MS. FREEMAN: Right.

23 THE COURT: And then the question becomes is it  
24 reasonable to say to the League you've got to accelerate your  
25 process and make your decision prior to the auction on

1 June 22nd.

2 MS. FREEMAN: And there --

3 THE COURT: I'm sure you're going to tell me it is.

4 MS. FREEMAN: Yeah.

5 THE COURT: I'm not sure I agree with you as I sit  
6 here.

7 MS. FREEMAN: Okay. It is, because with respect to  
8 the transfer application, whether Mr. Balsillie has the  
9 financial wherewithal, you know, it's pretty straightforward.  
10 He's first cousin --

11 THE COURT: But it's a two-step dance. It's transfer  
12 and relocate.

13 MS. FREEMAN: That's right. With respect --

14 THE COURT: You know, I suspect you all know the  
15 answer to this question. Has there been any hockey team  
16 relocated from the United States to Canada? Am I missing  
17 anything?

18 MS. FREEMAN: To my knowledge, the answer is no. On  
19 the other hand, nobody, not the NFL, NHL, no one has raised the  
20 question as to whether or not there are any constraints in that  
21 regard. This is U.S. largest trading partner.

22 THE COURT: Well, but my only point is --

23 MS. FREEMAN: You know, same basic law.

24 THE COURT: it's one thing to say, you know, "We want  
25 to move from city A to city B in the United States."

1 MS. FREEMAN: Right.

2 THE COURT: I think it probably raises more issues  
3 when you say, "We want to move from a city in the United States  
4 to a city in Canada."

5 MS. FREEMAN: But why more than moving from a city in  
6 Canada to a city in the United States? Frankly --

7 THE COURT: Well, I suppose because you've got  
8 different countries.

9 MS. FREEMAN: But I mean when the Nordiques moved to  
10 Denver, why is that any different than when Phoenix moves to  
11 Hamilton? You're still crossing countries.

12 THE COURT: Well, I hate to be corrected --

13 MS. FREEMAN: It didn't cause any problems.

14 THE COURT: -- because you're going south on one and  
15 north on the other.

16 MS. FREEMAN: What difference does it make if you're  
17 going south or north, you know? As a practical matter, this is  
18 not -- it's not like we're moving to Nicaragua. You know, this  
19 is an Anglo-American country that has virtually the same laws.

20 THE COURT: Well, but I mean --

21 MS. FREEMAN: You can call them on the phone without  
22 even --

23 THE COURT: I'm highly confident that in some  
24 respects there are differences in laws and other things --

25 MS. FREEMAN: Sure.

1 THE COURT: -- that have to be factored in.

2 All I'm saying is, you know, it's one thing to say,  
3 "You've done this ten times. I'll just ask you to do this  
4 quickly the eleventh time." It seems like not that big of a  
5 deal.

6 It's another thing to say, "You've never done this  
7 before. Now accelerate the process, and do it far quicker than  
8 you've ever done anything before."

9 MS. FREEMAN: Right. It's just that no one has ever  
10 raised the fact that there are different laws. The fact that  
11 there are some differences, this is really one league, and it  
12 operates across all of North America. And this is not a  
13 situation where there have never been any cross-country  
14 transfers before. And it has not caused a problem. I mean  
15 we've certainly --

16 THE COURT: Yeah, you could be right.

17 MS. FREEMAN: I can tell the Court that I know the  
18 debtors looked into at length, and certainly when we came into  
19 it we looked into it at length with our Canadian co-counsel,  
20 whether there needed to be a companion CCAA proceeding in order  
21 to have this go forward because of that.

22 And after a lot of looking and a lot of money spent  
23 by attorneys across both sides, the answer was no, that --

24 THE COURT: So let's say --

25 MS. FREEMAN: -- there was the conclusion that you

1 didn't need that.

2 THE COURT: -- you decided to stay in Phoenix in the  
3 summer and not go to Canada in the winter.

4 MS. FREEMAN: Question here. But the  
5 determination -- there was a serious look at whether that  
6 needed to be done in order to allow a team to move from here to  
7 there. And as far as we could tell the answer was no, and  
8 nobody on their side has ever said, "Oh, this is a big problem.  
9 You know, you've got a move to Canada." This is --

10 THE COURT: All right.

11 MS. FREEMAN: Okay. So I do not see that as being a  
12 problem.

13 With respect to the fact that courts can and do step  
14 in regarding league decisions, we not only have the Raiders  
15 case -- I did -- as I was looking at their cases, I went a  
16 little further. Yesterday looked at a sports' law textbook,  
17 and this Court probably knows it since you're the sports' fan  
18 much more than me.

19 But in the Pete Rose case, certainly the commissioner  
20 was -- his ability to even decide on Pete Rose was taken away  
21 from him by the court, because the determination was made that  
22 the commissioner was biased, based upon what he had said in  
23 another proceeding --

24 THE COURT: I think there was some ruling about that  
25 just yesterday, wasn't there?

1 MS. FREEMAN: That I do not know.

2 THE COURT: I think the supreme court made a little  
3 decision about that one yesterday about judges.

4 MS. FREEMAN: Oh, yes, yes, with respect to judges  
5 and bias. But it was applied in that case with respect to a  
6 lead commissioner. So to the extent that you have issues here  
7 with respect to bias against Mr. Balsillie, with respect --

8 THE COURT: Well, you keep saying that -- but how --

9 MS. FREEMAN: -- to bias against moving to Hamilton,  
10 you can take away --

11 THE COURT: What do I look at in the record before me  
12 to conclude that the NHL is biased against him --

13 MS. FREEMAN: But you have --

14 THE COURT: -- particularly where, as I understand  
15 it, they said, "You know, you can have" -- I think it's  
16 Nashville. Sign up.

17 MS. FREEMAN: They did that once, yes. And that to  
18 us means the --

19 THE COURT: Doesn't sound like you're biased though,  
20 does it?

21 MS. FREEMAN: Well, right. But it's since then  
22 that's the problem. At that point in time it seemed to be, you  
23 know, pretty clear. And that's why we think the transfer  
24 application should just be a snap right now. It should go  
25 right through. There's not really a basis to come back and

1 say, "Oh, no. You know, his net worth has somehow changed  
2 dramatically." That part should be easy.

3 So all you should be talking about is the relocation  
4 application. But instead we are talking about the transfer  
5 application as well.

6 I do note that in the last filing that there was a --  
7 that there were statements made about not only the secret  
8 negotiations, which we are somehow nefarious for having  
9 undertaken --

10 THE COURT: Well, as I said --

11 MS. FREEMAN: -- for perceiving it would be in open  
12 court --

13 THE COURT: -- I'm not going to make much of a  
14 finding out of lawyer rhetoric --

15 MS. FREEMAN: Right.

16 THE COURT: -- that somebody's got ill will or bad  
17 faith towards somebody.

18 MS. FREEMAN: You do have statements made, questions  
19 about his character that were raised because of the civil  
20 complaint with respect to the SEC back dating.

21 THE COURT: Lawyer statements; right?

22 MS. FREEMAN: Well, I don't frankly remember whether  
23 that was partly in Bettman's declaration or only in --

24 THE COURT: It's definitely in the brief. I can't  
25 remember whether it's in the declaration or not.



1 MS. FREEMAN: It is in the brief.

2 Our point with respect to that is that there are two  
3 current NHL owners -- no. I guess three. One of whom was  
4 Mr. Samueli was convicted of 2.2 billion of back dating. He  
5 was suspended from participating in the Board of Governors but  
6 still continues to own his team, and was not taken away from  
7 that.

8 THE COURT: Course I think it's always harder to kick  
9 somebody out of the club than decide whether they ought to be  
10 let in or not.

11 MS. FREEMAN: Mr. Melnyk stipulated to a district  
12 court civil judgment against him for securities' law  
13 violations, and securities' fraud charges are still pending.  
14 He's still an active member of the Board of Governors.

15 Maple Leafs' owner Harold Ballard was convicted of  
16 fraud and theft involving the Maple Leafs' garden. He was  
17 allowed to retain his stake.

18 Predators' owner, Mr. Del Diaggio, has pleaded guilty  
19 to fraud, and is awaiting sentencing. And in fact they even --  
20 that one is where they did know about it before they let him  
21 in. He was the one who was the competitor to us buying the  
22 team. And yet he was allowed to buy.

23 There was not an actual proceeding, but there was a  
24 lot of information about him that was certainly available at  
25 the time, and he was allowed to buy.

1           And then a lot of the articles in the sports' law  
2 textbook I was looking at discussed Mr. Reinsdorf, the NHL  
3 alternative, who was the subject of the collusion findings with  
4 respect to free agency in the eighties, and a \$280-million  
5 fine. And certainly the sports' law textbooks all talk about  
6 him being one of the ring leaders.

7           So to the extent that -- no. Mr. Balsillie's  
8 character, I mean he was just put in again as one of the top  
9 CEO's in the world. This should not be something that they  
10 would say, "No, no. Now you have to keep him out."

11           THE COURT: But you --

12           MS. FREEMAN: He's just buying a team. This is  
13 not --

14           THE COURT: -- kind of get back to the as-applied  
15 question that until they make a decision it's hard to say,  
16 based on all that, that this Court ought to find that there's  
17 some bias towards him.

18           I mean the very fact that they offered him a  
19 franchise in national, the very fact that they keep asking for  
20 information implies that they're looking at it, and they're  
21 thinking about it, which is what they're supposed to do.

22           MS. FREEMAN: That's with respect to him in  
23 particular.

24           With respect to relocation, they have made it very  
25 clear that they are not going to allow it to move to Hamilton

1 unless this Court tells them to. With respect to that part,  
2 having a relocation application with all of the information  
3 there is not going to help.

4 THE COURT: My guess is, from what I've read, that  
5 all the sports' leagues are going to say, "Judge, the only way  
6 that this is going to happen is if you force us to relocate  
7 this team. We're not going to do it voluntarily."

8 MS. FREEMAN: You know, and part of it may be -- one  
9 of the statements that was made in the League's brief was, "We  
10 may be liable for tortious interference with the Glendale lease  
11 contract if we approve it." Frankly I think that's pretty far  
12 fetched. But in part they may be saying, "You've got to tell  
13 us to do it, and then we'll be okay."

14 And maybe it's just you need to say enough things on  
15 the record like you did at the control hearing that kind of  
16 lead people to say we understand where you're going so that  
17 they can then reach an agreement.

18 And that's pretty much what happened as I read it in  
19 the Pacific Northwest case, that there was an order to show  
20 cause why you aren't going to approve this and let it go  
21 forward. And I'm going to look at it, and I'm going to look at  
22 it really seriously. And then they did go ahead and approve  
23 it.

24 But until this Court gives some indication that yes,  
25 you are going to be likely to -- I'll at least look at all of

1 the facts, and I will determine --

2 THE COURT: I'm going to do that.

3 MS. FREEMAN: -- them at a hearing. And if the facts  
4 support relocation, I will approve relocation. But without  
5 some kind of an indication like that, I don't think they're  
6 going to approve it, given all of the statements that they've  
7 made over and over.

8 Plus, Your Honor, we do have --

9 THE COURT: That's certainly their current position.

10 MS. FREEMAN: And we have also part of the record  
11 here includes the expert opinion of Mr. Baziliauskas, and the  
12 one from Mr. Rodier that set forth the repeated efforts to  
13 bring a team into Hamilton and being repeatedly blocked from  
14 moving into Hamilton. Other teams, not this one, trying to do  
15 it.

16 And statements made by the Maple Leafs that, "You  
17 know, we'll sue everybody if you allow it to happen," and that  
18 they charge for anybody trying to move into Hamilton, or use  
19 the Hamilton facility.

20 So you do have enough of a record here frankly, Your  
21 Honor, to be able to see that this is something where they are  
22 going to block it unless told, "Yes, you darn well better  
23 consider it, and consider it seriously on the merits." Because  
24 otherwise it's not going to happen.

25 You have asked for favorite cases.

1 THE COURT: Well, and you know, what I'm trying to  
2 find is cases that will give the Court some guidance on what  
3 I've always called the "relocation issue," whether this Court  
4 has that kind of power or not.

5 MS. FREEMAN: Right. And there are our favorite case  
6 with respect to the actual relocation is the Baskin Robbins  
7 case where the court said, "Yeah, you have a contractual right  
8 to refuse relocation, that the law imposes a duty to be  
9 reasonable in the exercise of that right, and you weren't  
10 reasonable here. And therefore, I'm assessing damages."

11 That was not in a bankruptcy context. But to the  
12 extent 363(f)(1) is looking to outside non-bankruptcy law. And  
13 to the extent that 363(f)(4) is looking to whether consent is  
14 reasonably withheld, and you do have the cases with respect to  
15 those.

16 This case is an important one for saying, "Yes, you  
17 need to be allowed to relocate, too." Certainly most franchise  
18 cases are dealing with a franchise in a specific location, and  
19 are not dealing with moving from one spot to another. But this  
20 is one where it was.

21 Another is the Benson & Gold Chevrolet where the  
22 dealership met stated guidelines for relocation. The court  
23 said that a commission acted unreasonably in relying on public  
24 interest to deny a relocation request. And said, "No. You do  
25 have to consider it on the merit." And when the facts support

1 that, just saying, "No. I think it's in the public interest to  
2 keep the particular business in this place as opposed to  
3 another."

4 THE COURT: Well, I think the Ninth Circuit said  
5 pretty clearly in I believe it was Raiders II that when you're  
6 exercising that kind of discretion you've got to do it  
7 appropriately, and not arbitrarily or for spite.

8 MS. FREEMAN: Right.

9 THE COURT: And those are not -- they said it much  
10 more eloquently than I did, but that's the essence of it.

11 MS. FREEMAN: You have that with respect to  
12 Raiders II. But then you also have in the bankruptcy context  
13 the one case that you had mentioned before, which I had  
14 actually had written down as well, Crow Winthrop, with respect  
15 to a change in ownership.

16 We would also point the Court in particular to Tom  
17 Stimus and Coors, U.L. Radio, and Antonelli as ones where the  
18 court is determining that you can deem consent, or you're  
19 acting illegally by refusing to consent. And therefore, the  
20 bankruptcy court can override it in a 363-365 context, and  
21 determine that in fact the transaction can go forward.

22 I also have a note to Macumis (phonetic) as one in  
23 that regard, but I frankly can't recall that one now off the  
24 top of my head. And Sunrise.

25 With respect to the incurable default from secret

1 negotiations, the consent agreement is what prohibits secret  
2 negotiations, and there's not -- we would be entering into a  
3 new consent agreement. It's the rights to belong to this  
4 group. You buy a team and participate in the group that we  
5 would be buying. And those are rights under the bylaws and the  
6 constitution.

7 We would execute our own consent agreement, as has  
8 happened repeatedly with each of the owners even in Phoenix.  
9 When it's transferred from the Ellman group to the Moyes group,  
10 then you have a new consent agreement. And the Balsillie  
11 declaration spells out that yes, you would execute a standard  
12 consent agreement with the home territory defined in the sphere  
13 of influence defined based up there.

14 There is also an injunction against secret  
15 negotiations and saying that you have to bring in the NHL --

16 THE COURT: I'm not --

17 MS. FREEMAN: -- in a memorandum, but that's not --

18 THE COURT: I don't think this case has been decided  
19 on the claim that somebody did something in secret.

20 MS. FREEMAN: Okay, thank you. We appreciate that.

21 With respect to I guess the bona fide dispute issues,  
22 and we have spelled out why we think that the Court can find  
23 that consent would be unreasonably withheld, it's withheld, and  
24 that in fact you can't just kind of have a pocket veto by not  
25 ruling. And they need to rule expeditiously under the

1 circumstances, as they have with respect to Nordiques.

2 We also would point out that given what exists by way  
3 of evidence in this record, and expert declarations to support  
4 the antitrust claims, it's not just a complaint. You have not  
5 only the declaration of Mr. Zimbalist that was brought in, but  
6 in this record you also have the declaration of  
7 Mr. Baziliauskas, Mr. Wright. And I hope the Court read the  
8 Wright one because it was really very thorough with respect to  
9 it's a reasonable analysis and why. And the Rodier --

10 THE COURT: But you know, when you look at the Ninth  
11 Circuit decision of 2007 by Judge Kazinski I think it was --  
12 no. That's the Cab case. They really looked at what happened  
13 between the parties to find a bona fide dispute.

14 And again I think one of the challenges I see here  
15 for the debt of the movants on this issue that are the buyer,  
16 is that there really hasn't been much communication between the  
17 League, and the debtor, and PSE about any of this. And that's  
18 a fundamental difference from it was the Vortex Fishing case  
19 that adopted a lot of the BAP opinion, and then talked about  
20 bona fide dispute itself.

21 MS. FREEMAN: We do have in the record, Your Honor,  
22 the Gowan letter saying that, "We will not consider it." We do  
23 have the record -- I mean as the Court's noted, we do have  
24 repeated statements here, and we have statements going back  
25 over time --



1 THE COURT: But certainly --

2 MS. FREEMAN: -- where they say, "We will not  
3 consider a move to Hamilton."

4 THE COURT: The Ninth Circuit decisions focused on  
5 what happened outside of the courtroom.

6 MS. FREEMAN: Right.

7 THE COURT: Once you file a motion, the other side  
8 has either got to say, "Well, we're going to object to it or  
9 we're not." And I don't remember the courts using proceedings  
10 before that court as a basis for finding a bona fide dispute.  
11 They looked at what went on pre-filing and pending cases.

12 MS. FREEMAN: Right.

13 THE COURT: And so --

14 MS. FREEMAN: And there you do have though a record  
15 with respect to previous efforts to move the team to Hamilton,  
16 and you do have Mr. Scudder raising with pre-bankruptcy, pre-  
17 filing here, "We've got somebody who's willing to pay money to  
18 move it to Hamilton." "No, we're not going to agree to move it  
19 to Hamilton."

20 And you have the record here with the Baziliauskas  
21 report showing repeated efforts to move teams to Hamilton and  
22 no --

23 THE COURT: But that -- I don't know if that helps  
24 you much of showing a bona fide dispute between the debtor,  
25 PSE, and the NHL.

1 MS. FREEMAN: It does, because the dispute is whether  
2 the debtor will be allowed to move its team in conjunction with  
3 a sale. The bylaws certainly provide for relocation in  
4 conjunction with a sale. Both 36 and 37 do -- or 35 and 36.

5 And I mean basically what's happening here is you  
6 have a debtor whose business is going under. He's put \$380  
7 million into the thing. It's been going down. It hasn't made  
8 a profit in 12 years.

9 And he's being told, "You can't make money off of it,  
10 you know. We're not going to allow you to move to where it  
11 makes money. Instead, we're going to force you to stay  
12 here" --

13 THE COURT: Well, I think you have to agree that  
14 outside of bankruptcy no league member has a unilateral right  
15 to relocate.

16 MS. FREEMAN: But it does have the right to have its  
17 relocation application considered reasonably and fairly. And  
18 if that doesn't happen, then just like with Raiders, the court  
19 can step in and say, "No" --

20 THE COURT: Well, the difference in Raiders is --

21 MS. FREEMAN: -- "this wasn't considered reasonably  
22 and fairly."

23 THE COURT: -- there the process went the whole nine  
24 yards. The league voted, "No, you can't move."

25 MS. FREEMAN: And in some -- right.

1 THE COURT: Let me --

2 MS. FREEMAN: In some instances like the Colts and  
3 others it happened really fast. So yes.

4 THE COURT: Let me take a little pause here.

5 MS. FREEMAN: Sure.

6 THE COURT: How much more time do you need?

7 MS. FREEMAN: I think I only have a few more moments.  
8 If you wanted to take a break and come back, that's fine. I  
9 do --

10 THE COURT: Well, we have some court at 1:30? Okay.

11 Let me just ask everybody else who wants to be heard  
12 today that hasn't been heard to stand up so I know who else  
13 wants to --

14 MR. GOLDFEIN: I would like to respond to some of the  
15 things that have been said.

16 THE COURT: Now, one, two, three, four, five, six,  
17 seven.

18 MR. SALERNO: Your Honor, recall there's also the  
19 City of Glendale is why I think some of these people is  
20 standing up, which is a dispute.

21 THE COURT: I would have forgotten all about that if  
22 you hadn't mentioned it. I have one matter --

23 MS. FREEMAN: Let me be quick in trying to wrap it up  
24 on my end.

25 THE COURT: Well, I don't want to cut you off, but we

1 haven't taken a break this morning. It's the lunch hour. I've  
2 got a matter at 1:30. So let me just kind of ask all of  
3 you -- let me think out loud for a second.

4 I think we'll go to 12:40 by the courtroom clock, and  
5 then we'll break for an hour and come back at 1:40, and  
6 hopefully I will have finished one matter I have here at 1:30.

7 I want all of you to think about this. You all want  
8 me to rule as quickly as possible on these motions. And so if  
9 you eat up the rest of today, then I get to start working on it  
10 tonight or tomorrow. And so I want to emphasize to everybody I  
11 have read all the briefs, everybody's brief at least twice, and  
12 I've read a lot of the cases.

13 And so what I really want to hear from you are the  
14 critical points, the high points, and I have some questions for  
15 some of you.

16 Ms. Freeman, go ahead.

17 MS. FREEMAN: Let me try and wrap it up. One other  
18 point that I want --

19 THE COURT: Well, I want to be clear. I'm not trying  
20 to cut you off.

21 MS. FREEMAN: I appreciate that.

22 THE CLERK: Can I interrupt just -- let me interrupt  
23 just a moment, please. For the parties that are on the phone,  
24 when we do return this afternoon there will be a different  
25 meeting ID number. That number is 69092.

1 MR. GOLDFEIN: Your Honor, while they are consulting,  
2 the commissioner has to leave in order to make it to  
3 Pittsburgh --

4 THE COURT: The commissioner should leave whenever he  
5 has to leave. He has to be in Pittsburgh in case the Stanley  
6 Cup gets delivered tonight.

7 MR. GOLDFEIN: Right. And so we would --

8 THE COURT: I understand that. I am not going to  
9 take any implications at all when he stands up to leave. He  
10 should go get on his plane when it's time to go, and good luck  
11 tonight.

12 MR. GOLDFEIN: Thank you, Your Honor.

13 MS. FREEMAN: This is not in terms of the  
14 implications of this, in order to relocate a team you need to  
15 have somebody who has the financial wherewithal, and  
16 fortunately there are a few of those in the country who is  
17 passionate about hockey, and a smaller number. But you also  
18 have to have a place that has an arena, a facility that will  
19 work.

20 It's my understanding that at the present time of all  
21 of the potential places, and you're really looking only at  
22 Kansas City and Hamilton, if you're not going to be sharing  
23 somebody else's arena. You could move to Toronto --

24 THE COURT: Well, I think the easy answer --

25 MS. FREEMAN: -- and share somebody else's arena.

1 So --

2 THE COURT: -- until we have a second bidder, we  
3 don't have to worry about other locations. It's either  
4 Glendale or Hamilton.

5 MS. FREEMAN: Yeah, I think that's true.

6 And in terms of -- but what that also means, Your  
7 Honor, is that to the extent that you have people from outside  
8 who are saying that they have an interest in just coming in and  
9 keeping it in Phoenix, the likelihood is that there probably  
10 aren't.

11 THE COURT: Well, as I've said before --

12 MS. FREEMAN: They're looking at moving it  
13 thereafter, and --

14 THE COURT: -- in the bankruptcy court, the Court is  
15 very concerned and interested in bidders, people who may have  
16 an interest in the bidding or another category.

17 MS. FREEMAN: Okay. I do still have some concerns  
18 with respect to my understanding of the Court with respect to  
19 the relocation fee and exactly what would be encompassed by  
20 that in the Court's view, given the fact that what we have are  
21 bylaws that do spell it out.

22 THE COURT: Well, I think to make the economic  
23 analysis that this Court has to make to decide whether it can  
24 grant the motions or not, because I mean hypothetically if that  
25 fee is -- I'm just going to make a number up -- is so large

1 that because of the adequate protection requirements, there  
2 would be nothing left for a lot of the creditors, then the  
3 Court probably should just deny the motion.

4 That's why I tend to think it might make sense to  
5 confront that issue first before you get into these more  
6 difficult of can the Court force relocation over the objections  
7 apparently of the City and the League.

8 MS. FREEMAN: And there, Your Honor, I think we would  
9 want to perhaps brief further the adequate protection point,  
10 because we don't believe that there are the significant  
11 damages' claims that are now being bandied about, and that's --

12 THE COURT: Let me make you the keeper of the Court's  
13 conscience.

14 MS. FREEMAN: Sure.

15 THE COURT: And we won't recess today until we decide  
16 how we're going to sort that one out.

17 MS. FREEMAN: All right, thank you, Your Honor.

18 MR. GOLDFEIN: Your Honor?

19 MR. SALERNO: Your Honor, if I may, if I may. The  
20 court asked a question. And through the magic of hand-held  
21 Internet, has there ever been a NHL team that's gone from the  
22 U.S. to Canada.

23 And Atlanta Flames played in Atlanta from 1972 to  
24 1980. In 1980 they moved to Calgary, Canada. It's gone both  
25 ways on the border.

1 THE COURT: Thank you.

2 Let me make a suggestion. Let me ask you to hold  
3 your thoughts. Because what I think I ought to do is give  
4 those who haven't had a chance at the podium yet their  
5 opportunity, and then we'll hear from you before we conclude.

6 So who wants to go next?

7 MR. SALA: Good afternoon, Your Honor. Paul Sala on  
8 behalf of the Creditors Committee.

9 As you know, Your Honor, we joined in the debtor's  
10 request that this Court move forward with an auction sale of  
11 this property, and that the Court move forward with the  
12 opportunity to place this team wherever else it goes. I did it  
13 for a couple of practical reasons.

14 One, we believe that the highest-and-best offer is  
15 going to be had by whoever comes into this court. And we think  
16 there may be other bidders out there if Your Honor decides that  
17 this team can move.

18 More importantly, Your Honor, we believe that a  
19 prompt sale is the best sale here. As Your Honor alluded, a  
20 dollar today is much better than a dollar later on. We  
21 appreciate the NHL's position that the NHL will fund operations  
22 going forward.

23 The problem, Your Honor, is this could be a very,  
24 very skinny deal right now. We have a \$212-million offer. It  
25 looks like there would be money to unsecured creditors,



1 particularly if it's the buyer's obligation to pick up relo.  
2 fee.

3 THE COURT: Let me ask you a blunt question. Let's  
4 assume on further analysis and determination of the numbers  
5 that are owed to the people that would have significant claims  
6 if a move if authorized, and that effectively would eliminate  
7 or wipe out the unsecured creditors and leave them with a very  
8 minimal or no recovery.

9 MR. SALA: It might, Your Honor. And that's why we  
10 don't necessarily support this APA and this motion to sell, and  
11 we'll deal with that with a response next week when it's due.

12 What we believe though is the Court needs to get the  
13 process moving so that we can get to a sale.

14 And here's the real worry, Your Honor. There may be  
15 money on the sale from -- on the table for unsecured creditors  
16 with this offer. The league has said, "We don't want to sell  
17 it till some time in September, and we'll fund the operations."

18 Well, if those operations are going to take  
19 \$30 million to fund, and we're going to find an Arizona buyer  
20 or a Glendale buyer in September, and you do the math. Take  
21 out the secured debt. Take out the 30 million the League may  
22 have to advance to operate. Take out the other debts that are  
23 in there. There may not be anything at that point for  
24 unsecured creditors. We don't know. And we won't know till  
25 September unless we move this process along quicker.

1 I understand there are huge issues regarding the City  
2 of Glendale's claim, and that that may really impact the net  
3 return to creditors. I understand that the NHL asserts a relo.  
4 fee and an indemnity fee. I believe we're talking all about  
5 the same thing, and they're both in there together, and that  
6 that's something the buyer has to say yes or no they're going  
7 to pick up or take the risk of.

8 Those all need to be fleshed out, and they will.

9 But the question for today seems to me, and to the  
10 committee is how do we move the process so that we get bidders  
11 in here, and we get bidders at a point in time where there  
12 could be a meaningful return to creditors?

13 And I suspect, and the committee suspects that if  
14 that doesn't occur until some time in September, and if that is  
15 limited only to the people who want to keep the team in  
16 Glendale, given all the marketing that's been done, given all  
17 of the declarations, all of the information of all the people  
18 who have looked at this, people know the Phoenix Coyotes have  
19 been in play.

20 It seems to me if we wait till September and we're  
21 \$30 million behind in funding, there's a real likelihood there  
22 won't be anything for unsecured creditors. We move this thing  
23 on an accelerated path, maybe we can't do it as accelerated as  
24 PSE wants, but if we move this on an accelerated path, and if  
25 we ask the NHL to consider the prospective bidders and the

1 transfer applications on an accelerated path, we can get to an  
2 auction at a point in time where there's going to be something  
3 here for creditors.

4 The fear is, like in most bankruptcy cases, the  
5 longer we wait, the more DIP financing, the more priority debt,  
6 the less likelihood there's anything for the current unsecured  
7 creditors. We fear that's going to happen if you don't move on  
8 a more expedited basis to get these assets sold.

9 THE COURT: Thank you.

10 MS. JOHNSEN: Carolyn Johnsen and Peter Sorensen on  
11 behalf of Jerry Moyes.

12 It's probably good that I follow what Mr. Sala has  
13 said, because of course we echo his comments on the problems of  
14 slowing down this process, and the fact that any DIP financing  
15 is simply going to harm the unsecured creditors of which  
16 Mr. Moyes is the largest unsecured creditor.

17 We take to heart what the Court had commented on  
18 earlier that the challenges that have been put in some of the  
19 pleadings before the Court about recharacterizing or  
20 challenging Mr. Moyes' claim are not going to be considered by  
21 this Court today, because they have not been put in any kind of  
22 formal pleading or any kind of formal challenge. And we take  
23 that to heart.

24 However, we do want to make sure that the Court is  
25 aware of our statement of position that Mr. Moyes' claim should

1 not be recharacterized. And we would simply emphasize that  
2 fact on the record today.

3           Aside from that we would again echo what Mr. Sala has  
4 said about the fact that unsecured creditors need to be  
5 protected. Mr. Moyes has the largest claim in this estate as  
6 an unsecured creditor, and that claim should be protected.

7           THE COURT: Thank you.

8           MR. SCHIAN: Good morning, Your Honor. Dale Schian  
9 appearing --

10          THE COURT: Actually it's good afternoon.

11          MR. SCHIAN: It is afternoon now. Started off as  
12 morning. Dale Schian appearing on behalf of the Office of the  
13 Commissioner of Baseball, the National Football League, and the  
14 National Basketball Association.

15                I was present when you asked to be -- you said you  
16 had questions for me. And so I wanted to rise briefly both to  
17 answer the questions, and to thank you for the opportunity to  
18 allow us to file the amicus curiae brief and elaborate on that  
19 briefly.

20                Having listened to the arguments this morning and  
21 thinking about how it affects my clients, each of the Leagues,  
22 like the NHL, have a set of rules and procedures that they have  
23 implemented and abide by. And it's necessary where you have  
24 what are competitors on the court or on the field that they  
25 have to abide by a common set of rules to produce a collective

1 product.

2 THE COURT: I understand that it seemed to me that  
3 all of the Leagues were asserting that if you allow the Coyotes  
4 to move it would wreck havoc in all professional sports  
5 leagues. And for good or bad, you all drew a sports' fan. And  
6 I thought about all the things that have happened, some of  
7 which I wasn't -- hadn't recalled until I read the briefs.

8 And it occurred to me that in light of those events,  
9 I'm not sure that argument stood up to the test.

10 MR. SCHIAN: And that was frankly not the point of  
11 our brief. Whether the Coyotes are allowed to move or not is a  
12 matter that's important to the NHL. That -- if the Coyotes  
13 move doesn't necessarily wreak havoc on any of my clients,  
14 leagues.

15 But the fundamental thing that could wreak havoc on  
16 all professional sports and professional sports' teams was a  
17 comment that you made to Ms. Freeman about 30 minutes ago now.  
18 And I think what you said was that we would all have to agree  
19 that outside of bankruptcy no league member has a unilateral  
20 right to relocate. And I believe that is true with respect to  
21 each of the four leagues.

22 THE COURT: Although I guess that was perhaps an  
23 overstatement, because certainly the Clippers and the Raiders  
24 moved unilaterally and got away with it.

25 MR. SCHIAN: Well, whether you -- whether that was

1 moving unilaterally, or as a result of a process, because --

2 THE COURT: Oh, and the Baltimore Colts. I forgot  
3 them.

4 MR. SCHIAN: That's correct.

5 Teams are placed in locations for a variety of  
6 reasons.

7 THE COURT: I understand that.

8 MR. SCHIAN: And those reasons are important to the  
9 League.

10 THE COURT: Well, I mean to cut through all this,  
11 professional sports' leagues only work if everybody has their  
12 geographic territory and has some place to play their home  
13 games, and cultivate their home fans.

14 MR. SCHIAN: That's correct. And there are other  
15 factors that are important. I mean if -- I will assume for  
16 sake of argument that Ontario, Canada is the premier place to  
17 have a hockey franchise in the entire world. I would  
18 respectfully submit that having every team in NHL relocate to  
19 Ontario, Canada would not be good for any of them.

20 And so there has to be geographic diversity. With  
21 respect to many or most of the Leagues, there are some teams  
22 located in Canada and some in the U.S. And it's important for  
23 TV contracts, fan base, a number of things, both the geography  
24 and the location of the teams for a variety of reasons.

25 Sometimes a location doesn't work, or an owner will

1 conclude that a location doesn't work. And under any of the  
2 procedures of my clients and under the NHL's procedures, an  
3 owner has a right to seek to relocate his team to a different  
4 location.

5 Sometimes that is approved, and that's the end of it.  
6 Sometimes it is disapproved, and that is the end of it, but  
7 some --

8 THE COURT: Sometimes it's disapproved, and there's a  
9 lawsuit.

10 MR. SCHIAN: That's correct. And that has happened  
11 in those cases -- I know those cases probably not as a lawyer  
12 but as a sports' fan who's followed these teams over a number  
13 of years. I remember the cases, also not as a lawyer, just as  
14 a sports' fan.

15 But in those instances there is a lawsuit and a  
16 process, and perhaps the team wins and it's allowed to  
17 relocate, and perhaps the team prevails. But whatever the  
18 rules are, whether they be antitrust law, or whether they be  
19 the rules of the League, or matters based in contract, that  
20 process works itself through, and a decision is made. The team  
21 relocates and it doesn't (sic). And realis- -- in reality,  
22 although we remember the times that that has happened, it's  
23 relatively infrequent that that process actually proceeds. And  
24 so the disruption is relatively minor, because it is a  
25 franchise that moves at a particular time.

1           The concern of my clients is that -- is not whether  
2 the Coyotes prevail in that process or not, whether the League  
3 is correct that they will apply the process, and the League  
4 rules will determine whether or not this team should be located  
5 (sic), or whether the Coyotes are correct, and for whatever  
6 reason something trumps the League's decision.

7           The concern of my clients is that that process needs  
8 to work its way through. And at the end of the day the process  
9 ought to be the same before this Court as if the Coyotes were  
10 not before this Court.

11           THE COURT: Well, that kind of ducks the question,  
12 because the Coyotes are here. It is the bankruptcy court.  
13 Apparently this is the first time anybody has gone to a  
14 bankruptcy court and said, "Judge, from the powers of the  
15 bankruptcy law let me relocate notwithstanding what my contract  
16 says."

17           MR. SCHIAN: And that is the concern of my clients is  
18 that if this Court were to find that there is an overriding  
19 principle of bankruptcy law that permits teams upon the filing  
20 of a bankruptcy petition to disregard what the normal rules are  
21 for relocation or for lawsuits if there's a disagreement on a  
22 relocation, but that a fundamental principle of bankruptcy law  
23 permits teams to simply relocate, that it is some type of a  
24 get-out-of-jail card -- get-out-of-jail-free card.

25           That I file bankruptcy, so I can relocate anywhere in



1 the world I want to, because I filed bankruptcy. That is what  
2 would be highly disruptive not only to the National Hockey  
3 League but also to all professional sports' leagues.

4 And that is the concern of my clients is that this  
5 case should be decided on the specific facts of this case. It  
6 should be adjudicated similar to what the other cases have been  
7 adjudicated over the years, whether it be the regulars or other  
8 cases.

9 THE COURT: Well, but the difficulty with that is  
10 that most of the other cases were antitrust cases tried in  
11 United States District Courts, and reviewed by circuit courts.

12 Again I think this is the first time that I'm aware  
13 of where a Chapter-11 debtor sports' franchise has said,  
14 "Judge, I can pay a lot of my creditors if you approve this  
15 transaction, but that requires me to relocate. And you can do  
16 that under the powers under § 363 and 365 of the Bankruptcy  
17 Code."

18 MR. SCHIAN: And I have been analogizing it to my  
19 house. I mean it's a house located in Phoenix, and we've heard  
20 how lousy the Phoenix economy is. I guess if I could sell my  
21 house for a lot more if you would order that it could be  
22 relocated it to beach-front property some place. And if I get  
23 to select the particular property that's great. The house is  
24 worth a lot of money.

25 The question is --

1 THE COURT: I'm not sure I buy your analogy. But go  
2 ahead.

3 MR. SCHIAN: But the question becomes what is there  
4 to be sold? And in the pressures of trying to maximize this  
5 asset for the benefit of all creditors, hopefully this process  
6 of bringing additional buyers to the table will maximize what's  
7 available for all creditors, and will result in a sale to a  
8 qualified and viable buyer that the NHL will be able to  
9 approve.

10 But the concern of my clients is that as this process  
11 works it way through, that the rules attributable to a  
12 relocation in bankruptcy should be the same rules that apply to  
13 a relocation of a team that has not filed for bankruptcy  
14 protection.

15 THE COURT: I understand, although I think the  
16 Leagues I sense want to beg the question, because the question  
17 is under the powers under the Bankruptcy Code can somebody in  
18 the Coyotes' situation relocate without the consent of the  
19 National Hockey League?

20 MR. SCHIAN: And it is our position that the  
21 Bankruptcy Code does not authorize a team to --

22 THE COURT: I'm shocked to hear that position.

23 MR. SCHIAN: As I assumed you would be. Like I said,  
24 I apprec- --

25 THE COURT: You probably don't have any great case

1 authority for me to read that hasn't already been provided that  
2 would help in that decision.

3 MR. SCHIAN: Your Honor, I think we agreed to keep  
4 our brief to ten pages, and we limited it to about seven, and I  
5 was quite --

6 THE COURT: And you win the record.

7 MR. SCHIAN: I was quite confident that the other  
8 filings that would be made would cite every case out there that  
9 there is to be considered in this matter.

10 THE COURT: Thank you.

11 MR. SCHIAN: Thank you.

12 MR. BALDIGA: Good afternoon, Your Honor. William  
13 Baldiga for the City of Glendale.

14 Your Honor, we obviously have some comment on -- for  
15 today. We thought that as to the City of Glendale issues,  
16 which really haven't been started yet for today, and even  
17 though some of them overlap, economics for example, that it  
18 would be more appropriate if the debtor makes its case for a  
19 sale or rejection, whichever one it chooses, and then we'll  
20 respond. And that would be appropriate for this afternoon.

21 But we can do that in any way the Court wishes.

22 THE COURT: Who's arguing that?

23 MR. KROOP: It is I, Your Honor, and that's fine. I  
24 mean I certainly don't think we ought to start it in the next  
25 eight minutes.

1 MR. BALDIGA: So we'll make all of our comments at  
2 one time at that point.

3 THE COURT: All right.

4 MR. BALDIGA: Thank you.

5 MR. GOLDFEIN: May I, Your Honor, just --

6 THE COURT: I'll give you five minutes, and then  
7 we're going to take the hour break.

8 MR. GOLDFEIN: Then I'll do it in --

9 THE COURT: Give me your best shot.

10 MR. GOLDFEIN: I'm going to speak as quickly as I  
11 can.

12 It is certainly not the case that the NHL has said  
13 this team could never move. We have said it can't move --

14 THE COURT: I've read it.

15 MR. GOLDFEIN: -- for the 9/10 season, that we have  
16 said -- in fact what we have said is if there's not a viable  
17 purchaser in Glendale, there is not a viable participation from  
18 the City to make this team profitable or look like it's  
19 potentially profitable, and we will have no choice but to  
20 sponsor a supervised auction by the court for another location.  
21 And we will continue to fund during that process.

22 We -- Ms. Freeman way over states the other ownership  
23 issues in the League. Some owners are under suspension  
24 currently because of their legal problems. Your Honor exactly  
25 pointed it out correctly.

1 THE COURT: Well, I don't think that's going to  
2 affect the decision on today's motions.

3 MR. GOLDFEIN: I appreciate that, Your Honor.

4 Also, on the relocation fee, let me just very briefly  
5 say we filed -- and I hope the Court saw it -- a redacted copy  
6 of our affidavit and brief and an unredacted one. I hope the  
7 Court got the unredacted one. That was our intent.

8 THE COURT: Well, I was just going to say I didn't  
9 bother reading the redacted version.

10 MR. GOLDFEIN: Well, I --

11 THE COURT: I think you guys call them, the "clean  
12 version."

13 MR. GOLDFEIN: Yeah.

14 THE COURT: I read them.

15 MR. GOLDFEIN: And the reason for it was in their  
16 confidential information memo attached to the Scudder  
17 affidavit, which was under seal, there is an estimate in that  
18 of what the value of an expansion franchise is --

19 THE COURT: Right.

20 MR. GOLDFEIN: -- in the National Hockey League. And  
21 that led us after our analysis of the value of the club, to  
22 come up with the number that's in the affidavit that  
23 Ms. Freeman referred to in open court, which I don't have a  
24 problem with, but I'm not going to refer to it again.

25 In their filing as well they say -- and let me first

1 say the NHL has not had the opportunity at all to calculate the  
2 relocation fee, and study it, and do the work that would be  
3 necessary to do it. But they say --

4 THE COURT: Well, let me say something about that.  
5 Unless you all win today, I'm not ruling from the bench. You  
6 may be forced to do that on a very expedited basis.

7 MR. GOLDFEIN: Well, Your --

8 THE COURT: So you should make sure that your client  
9 does whatever it has to do that if we're going to go down that  
10 path towards June 22nd we're going to have to, whoops, move  
11 quickly.

12 MR. GOLDFEIN: Well, that -- Your Honor, that raises  
13 the whole timing issue. I mean they say -- Ms. Freeman said it  
14 took them well near a month or over a month to prepare the  
15 relo. application. Now we don't take it for gospel that  
16 everything that in there (sic) -- that's in there we should  
17 take as fact.

18 In fact I'll give you just one brief example.

19 THE COURT: Well, move off that one. Don't worry  
20 about that.

21 MR. GOLDFEIN: All right. And we have to do our job.  
22 It took them a month I'm sure of working very hard. It's going  
23 to take several months that we normally employ. And I  
24 understand there's a deadline and there's an emergency, in the  
25 Court's view emergent circumstances here.

1           But we have -- you know -- a cram-down here is when  
2 we have we believe under the bankruptcy law a right to the  
3 consent that we have spelled out. We don't really think that  
4 it's appropriate, with all due respect, for us to have to  
5 suffer not doing the proper study and making the proper  
6 decision.

7           But having gone beyond that, I want to say to the  
8 Court that even their numbers -- because I have a thought for  
9 the Court. Even their numbers just in their latest filing  
10 suggest a relocation fee that is far in excess of \$100 million.

11           They first say that the Toronto Maple Leafs first --  
12           THE COURT: Well, let's not argue the amount right  
13 now. And again I think the easy answer in part is that if  
14 we're going forward on the debtor's schedule, then the League,  
15 the debtor --

16           MR. GOLDFEIN: Right.

17           THE COURT: -- and the Court is going to have to  
18 confront that issue and get it decided in some fashion.

19           MR. GOLDFEIN: And let me also point out that  
20 Mr. Balsillie knows what he's prepared to pay. He knows where  
21 the breakpoint is. What's material is that he tell the Court  
22 that number, because that is what may well tell the Court  
23 whether this is a waste of time. And --

24           THE COURT: Well, but I can't deal with that in a  
25 vacuum.

1 MR. GOLDFEIN: Well, he's already said they won't pay  
2 \$100 million. I mean --

3 THE COURT: Well, you know, it's kind of like my old  
4 analogy about asking the lady to dance. You never know until  
5 you ask.

6 MR. GOLDFEIN: Well, I know. And the point here is  
7 and that was why I was getting into the other numbers. Because  
8 by their own admission -- and I wanted -- because you had asked  
9 the question what impact did this have on the creditors. They  
10 have a number of 448 million for Toronto. They're asking for  
11 the exact same territory as Toronto.

12 And if you don't even take the \$165-million number --

13 THE COURT: I'm not -- isn't that 448 what that  
14 franchise is worth in today's dollars in the estimation of  
15 Forbes or somebody?

16 MR. GOLDFEIN: Yes.

17 THE COURT: Yeah.

18 MR. GOLDFEIN: And that's what they -- they've  
19 adopted that number. We have not.

20 THE COURT: Yeah.

21 MR. GOLDFEIN: But I'm just giving you their math and  
22 their -- you know -- the number based on their math. They've  
23 also given you numbers -- we don't know where they got the  
24 numbers.

25 THE COURT: Well, let me make it easy. Let's hold



1 the relocation argument for a different time.

2 MR. GOLDFEIN: All right. And --

3 THE COURT: And the clock is rapidly running out on  
4 you. So you got about 60 seconds to make your best shot.

5 MR. GOLDFEIN: All right. The other point I wanted  
6 to make is this is not necessarily a depreciating asset while  
7 we're funding the club. If you look at the Sheehan affidavit  
8 that the City put in, which was very interesting, it proposes  
9 \$15 million in cost savings for the club that could be achieved  
10 right away if the City participates in further --

11 THE COURT: Well, you have to bear with me. I'm just  
12 an old bankruptcy judge. But if you're losing 30 million a  
13 year, and someone gives you 15 million, I think you're still  
14 going to come up short.

15 MR. GOLDFEIN: Yes. And yes, absolutely.

16 And what I was about to say is if the City  
17 participates further in alleviating some of the expenses or  
18 supplementing the revenues of the club, this club could very  
19 well be profitable if the fans come back while the club is  
20 operating here, and this asset value does not necessarily  
21 depreciate.

22 THE COURT: I like an optimist. I hope you're right,  
23 but history calls it into question.

24 MR. GOLDFEIN: Well, Your Honor --

25 THE COURT: And I think with that maybe we ought to

1 break for lunch.

2 MR. GOLDFEIN: All right. History --

3 THE COURT: All right. We'll resume at 1:40 by the  
4 courtroom clock.

5 MR. SALERNO: Your Honor, is it okay if we keep our  
6 materials here, or do you want us --

7 THE COURT: You can leave all of your materials here,  
8 but I do have another hearing at 1:30 that's not voluminous.

9 (Recess from 12:40 p.m. to 2:02 p.m.)

10 MR. SALERNO: Back on the record?

11 THE COURT: We are.

12 MR. SALERNO: Thank you. Your Honor, I think at this  
13 point we're going to address the City of Glendale issues. I  
14 think that's where we --

15 THE COURT: I think that's correct.

16 MR. KROOP: Afternoon, Your Honor. Jordan Kroop for  
17 the Debtors. I think everybody appreciated the lunch break,  
18 none more than I because I was able to use it to compose myself  
19 about all the references to the Baltimore Colts. Whose moving  
20 vans, the Mayflower Moving vans, actually rolled by my house in  
21 Owings Mills, Maryland, as they left town. So that had some  
22 resonance with me.

23 What we're talking about with respect to Glendale is  
24 nowhere near as thorny and complicated, at least in my  
25 estimation, as some of the issues that were discussed this

1 morning. And really what it boils down to, more than anything  
2 else, is that Glendale is essentially trying to convince this  
3 Court that by virtue of its role in this case and in this  
4 situation, that it would never make sense, it would never be a  
5 valid exercise of the Debtor's business judgment, to enter into  
6 a transaction that would occasion a relocation of this team and  
7 occasion a rejection of the lease that the team has with the  
8 City of Glendale.

9 Now, there's some pieces of all of that that are  
10 obviously more complicated, but what it really does boil down  
11 to, in essentially 40 pages of our brief, has largely to do  
12 with getting --

13 THE COURT: Yeah, yours was the short one, I think,  
14 wasn't it?

15 MR. KROOP: It was the short one, and I did my best.  
16 The -- what it really does is help us keep narrowing down and  
17 narrowing down until we get to the real kernel of what the  
18 issue is, and that is what is better for the creditors of this  
19 estate? Because clearly, based on some of the previous  
20 statements from the City's counsel, if they've got a claim that  
21 is in the hundreds of millions of dollars, and that claim  
22 doesn't exist if the purchaser of this team stays in Glendale,  
23 that's a pretty important question we need to answer. And  
24 that, I think, is really where the rubber meets the road in  
25 terms of what we're going to be discussing.

1           Unfortunately for the City, however, in order to get  
2 themselves into a position to be able to substantiate, at least  
3 temporarily for purposes of this hearing, to substantiate a  
4 claim that numbers in the hundreds of millions of dollars, they  
5 basically have to ignore everything about the agreement that  
6 they have with Coyotes Hockey, LLC, they have to ignore the  
7 clear thrust of bankruptcy law, they have to ignore the clear  
8 thrust of applicable state law, and they have to ignore the  
9 clear thrust of public policy that pertains to all of these  
10 issues.

11           In order to do all of that -- in other words, it's  
12 very easy for them to do that, but it's also necessary for them  
13 to do that. Because if they simply agree with the Coyotes that  
14 what this is is a lease that is subject to exactly the types of  
15 things that happen to nonresidential real property leases under  
16 the Bankruptcy Code, then it's very difficult for them to say  
17 we are the 800 pound gorilla. In fact, they become a sizable  
18 and not insignificant creditor, but not one whose number on the  
19 economic analysis would sway things enough where the perhaps  
20 hundred million dollar difference between the proposed bid now  
21 and what one might imagine a Glendale-based bid would be, how  
22 that could tip the balance.

23           And so we have to trudge our way through some of  
24 these issues in order to get ourselves back to the place where  
25 everybody needs to be, and that is to recognize that this is a

1 lease. It is a lease that is subject to rejection. And it is  
2 a lease whose damages that arise from that rejection are  
3 subject to the cap under 502(b)(6).

4 THE COURT: Well, some of the damages are. Not all  
5 damages are capped.

6 MR. KROOP: Surely not all damages are capped for a  
7 creditor. But it is clear, under Ninth Circuit precedent, that  
8 all damages that arise from the termination of the lease fall  
9 within the claim that is subject to the cap.

10 THE COURT: Right.

11 MR. KROOP: And that is, I think, at bottom the most  
12 important area for us all to ensure that we are clear on.  
13 Because if I can be so presumptuous, it's one of those things  
14 that even very experienced bankruptcy lawyers can sometimes  
15 stumble on. Abandonment is another. Not -- you know, people  
16 stumble over 554 and what it really means.

17 Well, the interplay between 365(g) and 502(b)(6) is  
18 sometimes something -- sometimes the kind of thing that even  
19 experienced bankruptcy lawyers trip over. And with all respect  
20 to the City of Glendale's fine counsel, I think that they may  
21 be tripping over that interplay in a way that benefits their  
22 argument. If I may explain.

23 By conflating the computation of 502(b)(6), which is  
24 based on rent reserve, with what the claim is or is not by  
25 virtue of the rejection of a lease, and what the cap applies

1 to, we get an inaccurate picture of what happens when a lease  
2 is rejected vis-a-vis the claim that is created. And the  
3 McSheridan case and others in this circuit and beyond this  
4 circuit make it very clear that when we're talking about a  
5 claim that arises from the rejection of a nonresidential real  
6 property lease, we're talking about all claims that arise  
7 before the breach of every obligation in that lease. Every  
8 single one of them. And all covenants.

9 The McSheridan case actually even says, and I can,  
10 you know -- the sentence is clear, reading these provisions as  
11 a whole therefore, rejection of a lease results in a breach of  
12 each and every provision of the lease, including covenants, and  
13 502(b)(6) is intended to limit the lessor's damages resulting  
14 from that rejection. The damages are those resulting from  
15 nonperformance of the debtor's obligations under the lease.

16 It kind of creates what may be regarded as sort of a  
17 but for analysis of what the claim is. If you have this claim  
18 because of the rejection of the lease -- in other words, if you  
19 wouldn't have the claim but for the rejection of this lease,  
20 then that claim goes into the pot and the lid that gets put on  
21 to that pot is the one that's calculated by 502(b)(6). But we  
22 haven't gotten to 502(b)(6) yet, to define the claim. That  
23 claim can be broad because a commercial lease particularly --  
24 and this one is a good example of one -- a commercial lease can  
25 have a lot of obligations in it; it can have a lot of different

1 components of it, but it is a lease.

2 Now, much is made in the Glendale brief -- and  
3 frankly, were I in their position, I would argue the same case.  
4 The El Toro case out of the Ninth Circuit kind of leaves the  
5 door ajar a little bit insofar as there's the possibility that  
6 the same creditor, the landlord, could have other claims that  
7 are not subject to 502(b)(6). I readily acknowledge it.

8 El Toro is a fine example of one such claim. In that  
9 case, the tenant had trespassed on the landlord's other  
10 property and left a multi-ton pile of dirt and filth and  
11 schmutz. That was a tort that had nothing whatsoever to do  
12 with the obligations that were being rejected under the lease.

13 The Court said, That claim would have existed no  
14 matter what. Whether the lease had been rejected, assumed;  
15 whether there had been a bankruptcy or not. That would have  
16 been something that the landlord would have had an affirmative  
17 claim against the tenant for having committed a tort against  
18 the landlord.

19 We have nothing of the sort here. Whatever damages,  
20 whatever they are -- liquidated damages or unpaid rent or all  
21 of the other types of components of compensation and/or damages  
22 that arise from the putative rejection of this lease with the  
23 City -- and again, we're talking about putative because  
24 obviously it -- we just want to make clear, if the sale as  
25 proposed to Mr. Balsillie's entity closes then obviously the

1 Debtor would then be in a position to reject the Glendale lease  
2 because the team would no longer be playing games there.

3 If that lease were rejected, all of what Glendale  
4 says it would be owed -- and I acknowledge the -- how  
5 compelling their declaration was on this point. Look at all of  
6 the hundreds of millions of dollars of damages that we can  
7 count on what would happen as a result of the rejection of this  
8 lease. I have no qualms with that. The implication, however,  
9 is that -- and therefore, because we're owed \$565 million or  
10 \$700 million or \$400 trillion, it never makes sense as an  
11 economic matter in this case to reject this lease. It would  
12 never make sense to do it.

13 But they forget that all of those damages, by virtue  
14 of McSheridan and all of the other cases all over the country  
15 that make it very clear that all of those resulting claims all  
16 go into the pot that then gets capped by 502(b)(6) --

17 THE COURT: Well, let's assume you're right. They  
18 claim that their right to specific performance survives.

19 MR. KROOP: Let's talk about specific performance,  
20 because that really is their first, I think, and best shot at  
21 avoiding this entire discussion. Because, again, if they're  
22 entitled to specific performance, all of the numbers don't  
23 matter at that point. But at bottom, what they're attempting  
24 to do is basically say, "Well, look, this entity entered into  
25 an agreement with us that prohibits them from doing anything



1 other than what they promised they would do under this lease."  
2 They're not the first landlord to try that.

3 Lots of clever lawyers can write a lease that  
4 basically tells the tenant, By the way, if you ever had any  
5 idea about doing something other than what you're going to do  
6 in this lease for the next 30 years, forget it because we're  
7 going to make you agree that if you breach the lease our remedy  
8 is specific performance; we're going to force you to do this.

9 It's also not the first time the Bankruptcy Courts  
10 have dealt with that issue, and they uniformly and always say  
11 no. For a lot of reasons.

12 THE COURT: Well, isn't the law on this somewhat  
13 muddled in some of the cases?

14 MR. KROOP: Isn't the law somewhat -- I'm sorry?

15 THE COURT: Muddled?

16 MR. KROOP: Muddled? I think it may be muddled only  
17 insofar as that there is this outlier decision pertaining to  
18 the Pittsburgh Penguins. A decision that --

19 THE COURT: Well, what about the decision -- is it  
20 Udell or however it's pronounced? I think out of the Third  
21 Circuit?

22 MR. KROOP: I may need a little bit more help with  
23 that, Your Honor.

24 THE COURT: Oh, keep talking. I'll track it down.

25 MR. KROOP: All right.

1 THE COURT: Matter of Udell, 18 F.3d, 403, Seventh  
2 Circuit, 1994. Covenant not to compete case.

3 MR. KROOP: Covenants not to compete are perhaps the  
4 only line of cases -- and there are several of those. That's  
5 not the only one. I'll acknowledge that.

6 Covenants not to compete are the types of things that  
7 are, under applicable state law, readily noticeable -- readily  
8 -- in other words, it's very easy to understand those to be not  
9 susceptible to monetary damages.

10 THE COURT: Well, except the Courts seem to kind of,  
11 in a cryptic sense, flip-flop. You've got some that say  
12 specific performance survives, and you've got some that say it  
13 doesn't.

14 MR. KROOP: I --

15 THE COURT: So it seems to me they're kind of muddled  
16 in some sense.

17 MR. KROOP: They may be muddled insofar as there is  
18 no identity among all of the various agreements that were at  
19 stake in those cases. I mean, again, every case in some sense  
20 is unique. So every agreement is unique. Some covenants not  
21 to compete are the kinds that no one could ever ascertain and  
22 -- at a -- a way to say that there is an alternative right to  
23 payment. And you know, we -- we're kind of skipping over  
24 points here that are important. Under the Bankruptcy Code --

25 THE COURT: Well, you were the one who said the cases

1 were uniform. That's the only thing I was questioning.

2 MR. KROOP: Well, when --

3 THE COURT: Seems to me they're not.

4 MR. KROOP: When we're talking about specific  
5 performance with respect to a real property lease, they are  
6 uniform. I recognize that there are executory contract cases  
7 that deal with whether or not an injunctive relief pertaining  
8 to a covenant not to compete are enforceable. Those are  
9 markedly different, for a couple of reasons.

10 And the -- one of them is because applicable state  
11 law will often say the covenants not to compete, to the extent  
12 that they're enforceable at all -- and Arizona's a tough state  
13 for that, as the Court probably knows -- but with covenants not  
14 to compete they are the kind of thing where, under the  
15 Bankruptcy Code, it is impossible for the Bankruptcy Code's  
16 definition to be applied adequately to that particular covenant  
17 not to compete.

18 And when I -- when I'm speaking of the -- what I'm  
19 speaking of is the definition of claim. Where 1015 says a  
20 claim includes the -- any equitable remedy if there is an  
21 alternative right to payment. In some of those cases where, as  
22 the Court mentioned, there's some that go one way, some that go  
23 the other, the ones that say, you know what, this covenant not  
24 to compete is not going to be enforced as an equitable remedy,  
25 it's because either under applicable law or the very covenant

1 that was written by those parties and in the way they wrote it,  
2 the Court was able to identify an alternative right to payment.  
3 They were able to identify a claim.

4 And then the Court said -- and then it becomes easy.  
5 If it's a claim under the Bankruptcy Code, then it's a claim  
6 that arises from the rejection of this executory contract.

7 In other cases, the Court looked in vain for that  
8 type of drafting. They said there was no alternative right to  
9 payment. And so under the Bankruptcy Code definition of what a  
10 claim is, they couldn't find a claim insofar as that particular  
11 covenant was involved. The cases are muddled because the  
12 agreements themselves, and the applicable state law from state  
13 to state, were somewhat muddled.

14 But when we come back to what we're dealing with  
15 here, clearly it's not a covenant not to compete. This is a  
16 specific performance remedy that purports to bind this entity,  
17 Coyotes Hockey, LLC, from playing home game -- for -- to  
18 playing home games for 30 years under this lease.

19 And the same analysis is going to be incumbent upon  
20 this Court as it was in all of the other muddled courts, and  
21 that is going to be the following: Is there an alternative  
22 right to payment? And the answer is clearly yes.

23 And you don't have to look very hard, because there's  
24 a numbered section of this lease, Section 147.2, that gives  
25 exactly that, an alternative right to payment. And the cases

1 also make very clear that it matters not whether the landlord  
2 wants to have the alternative right to payment or seeks it or  
3 prefers it, or not. The fact that it exists, under these --  
4 under the parties' own document, is enough to put that claim,  
5 unquoted (sic), into the quote, claim definition under the  
6 Bankruptcy Code.

7 And what Glendale's going to tell you is, Well, that  
8 right to payment is only a right to payment if specific  
9 performance is not available.

10 Well, there's two reasons why specific performance is  
11 simply not available here: state law says it isn't, and  
12 bankruptcy law says it isn't. Because when you strip this all  
13 away, what is the practical effect of a specific performance  
14 remedy in a commercial lease? The practical effect of it is  
15 what this Court and many, many others have seen over and over  
16 again. In this and any other context, it's an attempt to  
17 prohibit a future debtor-in-possession from making the kinds of  
18 decisions it has a fiduciary duty and a right under the  
19 Bankruptcy Code to make.

20 A debtor has to have the ability to maximize its  
21 assets for the benefit of creditors. And if it gives up that  
22 right in a fundamental way, if it gives up one of the  
23 cornerstones of the Bankruptcy Code in some pre-petition  
24 agreement, Bankruptcy Courts do not enforce it. And they're  
25 particularly comfortable about not enforcing an equitable

1 remedy when there is already an alternative right to payment.  
2 It's not a hard leap for the Court to make. It's not really a  
3 leap at all.

4           What you're dealing with is a situation where of  
5 course Glendale would love to be able to force this Debtor to  
6 continue to play hockey for 30 years. And they have  
7 declarations in page after page of their brief describing how  
8 the economic and cultural and intangible benefits are being  
9 mounted upon Glendale and all of its citizens. Again --

10           THE COURT: Well, they --

11           MR. KROOP: -- we don't quibble with that.

12           THE COURT: They spent \$180 million for this deal.

13           MR. KROOP: They did, on the expectation that there  
14 would be returns of multiples of that value in every way  
15 possible. Commercial returns, economic returns, cultural  
16 returns, reputational returns. Don't quibble with any of it.  
17 Clearly, Glendale made a decision that municipalities all over  
18 this country make every day and have made for decades and  
19 decades, we really, really want a major league franchise here,  
20 playing on our turf, because there is just so much good things  
21 that happen from it.

22           Again, there is no quibbling with that assertion.  
23 But you can't take that and then simply say, And because it's  
24 so valuable to the City of Glendale that if we lose it, that  
25 somehow falls outside of the effect of the 502(b)(6) cap, or it

1 somehow gives rise to an injunction to prevent that from  
2 happening.

3           The cultural benefits to the City of Glendale trump  
4 one of the very touchstones of what the American bankruptcy  
5 regime is all about. You, Mr. Debtor, are not going to be  
6 allowed to maximize the value of your assets for the benefit of  
7 all your creditors, because we want to be able to continue to  
8 enjoy the tangible and intangible benefits of the deal that we  
9 cut with you a couple of years ago.

10           How is that, in any real way, different from a real  
11 estate developer that built a shopping mall on the expectation  
12 that Nordstrom and Macy's and Bloomingdale's are going to be  
13 there as anchor tenants. If this sounds familiar, it should,  
14 because this is what's happening around the corner from my  
15 house.

16           THE COURT: Well, there is one difference, that a  
17 shopping mall is fairly fungible and other than at the current  
18 moment when Department Store A moves out, usually Department  
19 Store B will move in.

20           MR. KROOP: I would suggest that the state of the  
21 retail economy right now probably makes that a lot less true  
22 than it may have been at one point.

23           THE COURT: You may be right, but I think you and I  
24 can agree that a hockey arena in Glendale is radically  
25 different than a shopping mall, the freeway in 202.

1 MR. KROOP: I acknowledge freely that a sports arena  
2 is different from a shopping mall. I do, however, think that  
3 the analogy is compelling when you consider that you have  
4 developers that build shopping malls on the expectation of a  
5 particular type and level and reputation of an anchor tenant.  
6 And when that does not come to fruition or that anchor tenant  
7 is lost, that the benefit of that bargain in many ways,  
8 intangible and tangible, are destroyed. There's no doubt about  
9 it. All the externalities that attend that happening are real.

10 But Congress has, for a very long time, made a very  
11 clear assessment of what is supposed to happen in that regard.  
12 Irrespective of the economic value of all of those bad results  
13 for the landlord, irrespective of those, we've got to find a  
14 way to fairly treat all creditors who are similarly situated as  
15 unsecured creditors. And if we were to allow a landlord such  
16 as Glendale or such as this mythical shopping center developer  
17 to essentially completely swamp the rest of the unsecured  
18 creditors, that's a judgment that Congress has made a long time  
19 ago and says, We're not going to let that happen. We have a  
20 very longstanding policy to prevent that from happening, and  
21 we've incorporated that into § 502(b)(6).

22 Again, all of those declarations are well argued,  
23 they're well calculated -- they are what they are. And I'm not  
24 going to stand up here and presumed -- and presume to say that  
25 they're not valid. But I am going to remind the Court that



1 Congress has already told us what we do about a landlord who  
2 may have an enormous rejection damages claim. We cap it.

3 THE COURT: Well, you're certainly entitled to your  
4 opinion on that, although I will -- may ask Mr. Baldiga whether  
5 it's realistic to think that Arizona State University and  
6 college hockey is going to come to Glendale.

7 MR. KROOP: Your Honor, I am only -- I can only  
8 imagine as well as anybody else can, and I'm sure there's  
9 others that have broader and more creative imaginations than I,  
10 about what that arena might be used for tomorrow, next year, or  
11 15 years from now if the Coyotes were to vacate it. I would  
12 like to believe, because there's nothing punitive here, that  
13 Glendale will find a very lucrative use for that arena. I  
14 certainly hope it does. Everybody here hopes that it does.  
15 But at the end of the day that's going to be their  
16 responsibility.

17 It's also not something that they -- you know, that's  
18 been foisted upon them that they could never have imagined.  
19 Every landlord enters into a lease with at least the implicit  
20 understanding that the tenant may disappear one day. And I'm  
21 not just talking about what we're trying to accomplish here. A  
22 couple of years ago --

23 THE COURT: Well --

24 MR. KROOP: -- major league baseball was bandying  
25 about this idea of contracting franchises away. Rather than

1 allowing teams that were losing money and that were  
2 unsuccessful in their home markets in many respects, rather  
3 than let them move to what might be a more successful market --

4 THE COURT: Well, let's, let's --

5 MR. KROOP: -- they were going to remove them.

6 THE COURT: Let's leave that one alone, because I  
7 think the clock is going to run out on all of you at some point  
8 today.

9 MR. KROOP: Well, I -- and you're right, Your Honor.  
10 I won't belabor the point, except to say that we keep coming  
11 back to the same issue. No one's going to quibble with how  
12 astronomical the damages to Glendale may be in the short term  
13 or even the long term, and we hope that it isn't.

14 But we are constrained, as we were this morning, as  
15 we are today, as we are this afternoon and in the future, we  
16 are constrained by what the Bankruptcy Code tells us we must do  
17 in this case and in any other case. And that is, we cannot  
18 allow an astronomical claim by a landlord to completely swamp  
19 and essentially eliminate any recovery for any other unsecured  
20 creditor. That's something that we are constrained by.

21 And Glendale --

22 THE COURT: The cap is what the cap is; El Toro is  
23 what it says.

24 MR. KROOP: Precisely. And again, El Toro is not  
25 surprising and shouldn't be surprising to anyone, but there

1 also is no allegation here that what the Coyotes are doing is  
2 creating a huge pile of dirt as a tort or any other affirmative  
3 separate tort that has nothing to do with this lease agreement.

4 THE COURT: Have you been out to the Arena recently?

5 MR. KROOP: I was there early in the season. And I  
6 saw a game --

7 THE COURT: That would have been last year?

8 MR. KROOP: -- against the Capitals. Sorry?

9 THE COURT: That would have been last year?

10 MR. KROOP: The season that just ended, or may end  
11 tonight, I was -- I went to early in the season and I saw a  
12 game against the Capitals, and I had a very good time. The  
13 Coyotes did not prevail, and there was a very disappointing  
14 small number of people watching that game with me. And it was  
15 disappointing to me as a hockey fan and as a resident of this  
16 neighborhood. But it's -- it is reality.

17 And we did make a footnote mention in our brief that  
18 I won't repeat about whether there really is a huge loss to the  
19 cultural integrity of Glendale if the Coyotes were to leave.  
20 We can quibble about that but, again, for purposes of what I'm  
21 talking about, I'm going to assume --

22 THE COURT: I think we can agree --

23 MR. KROOP: -- there will be.

24 THE COURT: -- there's a huge loss to the City of  
25 Glendale if the Debtors are right on this request.

1 MR. KROOP: There is a huge economic loss. And we  
2 don't even have to talk about the psychic losses. Which may be  
3 real; I acknowledge that they are.

4 Back for one moment to the issue of specific  
5 performance. Because I mentioned before that what we're really  
6 talking about are two impediments to them being able to get  
7 specific performance.

8 I admire the drafting, because if -- were I drafting  
9 on behalf of the landlord, I would love to be able to try to  
10 button this thing down as tight as possible. And every day I  
11 get a call from one of my partners in our real estate group  
12 that says, Jordan, can you come up with a great way for me to  
13 put something in a lease so that this tenant can't file  
14 bankruptcy and bail out on us?

15 THE COURT: Do you do it?

16 MR. KROOP: I can't.

17 THE COURT: Oh.

18 MR. KROOP: I'm good, but I'm not that good.

19 THE COURT: You're --

20 MR. KROOP: I'm not a congressman.

21 THE COURT: You're entitled to your opinion.

22 MR. KROOP: You know, it --

23 THE COURT: Humble as it may be.

24 MR. KROOP: -- is a long time before there was a  
25 comment at my expense. I was wondering if you were on your

1 game today. I've been giving you some softballs, too.

2 With respect to specific performance under state law,  
3 the inquiry is not controversial. The legal issue is not  
4 controversial. Is there an adequate remedy at law. In this  
5 respect, I will mention that the Bankruptcy Code is very  
6 similar in this regard when it defines what a claim is. It  
7 looks to a long, long history of what state law is on this  
8 point. We're not going to treat equitable remedies as a claim  
9 unless there's an alternative right to payment.

10 Well, that's another way of saying what state law has  
11 said for a long, long, long time, long before the Bankruptcy  
12 Code of 1978. And that is, if there is an alternative right to  
13 payment, or, in the state jargon, if there is an alternative  
14 remedy at law -- damages -- then you're not entitled to  
15 specific performance.

16 And in this regard, the City unfortunately is forced  
17 into a position where it has to speak out of both sides of its  
18 mouth. In order to enforce its rights to specific performance  
19 it has to say, Well, look, we have a right to specific  
20 performance not only because our contract says so, but because  
21 there's just no earthly way to quantify what our damages would  
22 be if this breach -- if this lease were breached.

23 Okay. Well, then what of the many pages of very good  
24 analysis by economists and their other witnesses that detail  
25 specifically what the damages are going to be. If you can't

1 quantify these, there was an awful lot of crooked numbers on  
2 those pages. Both in their brief and in their -- in two of  
3 their declarations.

4           Again, no one's quibbling with the accuracy of that.  
5 They very well might be right. Maybe they've even under-  
6 estimated it. I don't know. But what I do know is they did a  
7 terrific job quantifying their damages right after they said  
8 that they were unquantifiable.

9           They also quantified their damages in the agreement  
10 itself, before they ever hired the witnesses that filled out  
11 these declarations, because the lease itself says if specific  
12 performance is not available, then -- turn the page. 14.7.2.  
13 At that point you have a liquidated damages provision which,  
14 again, is not just some round number, but it's a formula that  
15 is sensitive to a lot of things, including actual dollars that  
16 were paid over time by the tenant to the landlord. There is a  
17 formula there. Again, if that is not capable of -- if that's  
18 not susceptible to calculation, then what are all those numbers  
19 for? What's the formula for?

20           State law has long had a very easy time with that  
21 issue. When parties are able to quantify their damages, state  
22 law simply says you cannot have specific performance or any  
23 other kind of equitable remedy because we know, as a matter of  
24 law, that there are damages that can be awarded to you that can  
25 compensate you for the loss.

1           Glendale has told us, by virtue of this agreement  
2           itself and their filings in this case, what their damages are.  
3           Right down to the cent. And we -- and again, there's no reason  
4           to quibble with it. It is what it is.

5           There's another reason that Courts do not -- I'm  
6           sorry? Oh, I'm sorry -- I thought I heard --

7           THE COURT: I haven't said anything yet, but --

8           MR. KROOP: Okay.

9           THE COURT: I think the clock's running out on you,  
10          so you better wrap up.

11          MR. KROOP: All right. I will wrap this up because I  
12          will skip ahead to simply reminding this Court that not so long  
13          ago Your Honor had before you a case where there was something  
14          very similar going on --

15          THE COURT: I remember it --

16          MR. KROOP: -- with an agreement pre-petition.

17          THE COURT: I read it.

18          MR. KROOP: I'm sorry?

19          THE COURT: I remember it, and I read about it.

20          MR. KROOP: Yes. And you wrote a decision that  
21          really, in many ways, followed the TWA decision from Delaware.  
22          This was the second TWA bankruptcy that resulted in TWA  
23          becoming a page in history, where the Bankruptcy Court in  
24          Delaware did exactly what Your Honor did in the Three-Five  
25          case. And looked at the pre-petition agreement and said, You

1 know what? If I were to enforce this pre-petition waiver of a  
2 cornerstone right of the Bankruptcy Code, what am I doing here?  
3 I can't do that. I can't enforce that, because that then  
4 places these parties in the ability to essentially have primacy  
5 over an entire legal regime that has evolved over decades and  
6 even centuries to address financial distress in this country  
7 and in this economy.

8 Courts don't do that. And they can't do it, for the  
9 simple reason that you could never force a debtor-in-possession  
10 to have its hands tied behind its back and unable to perform  
11 its fiduciary duties because of something that it might have  
12 done pre-petition when it was trying to get a deal done with a  
13 landlord or with somebody else.

14 This case is of a piece to Three-Five and TWA. The  
15 specific performance remedy in this lease is the same type of  
16 waiver of a basic bankruptcy right that this and all debtors  
17 must have if they are to dispatch their fiduciary duty for the  
18 benefit of creditors.

19 If this -- if specific performance were upheld  
20 notwithstanding that it essentially writes 365 completely out  
21 of the Bankruptcy Code were it enforced, if that were to happen  
22 then this Debtor has essentially two choices: dismiss this case  
23 and muddle along and God only knows how, in what way,  
24 continuing to lose tens of millions of dollars a year, or  
25 simply say can't, can't do it, can't do it, can't do it



1 anymore. What are you going to do? What are you going to -- I  
2 can't do it.

3 Because, again, let's keep in mind what this lease  
4 says. This lease says that the Team, Capital T, which is  
5 defined as Coyotes Hockey, LLC, is the one that is obligated  
6 under the specific performance obligation to continue to  
7 operate in the Arena.

8 As I was beginning to mention before, if Coyotes  
9 Hockey LLC were to simply cease existence, either because the  
10 NHL said, You know what, we've got too many teams, 30 is too  
11 many, we're going to contract the way that baseball almost did  
12 with the Twins and the Expos a couple years ago.

13 Well, if that were to happen, where does that leave  
14 Glendale? In exactly the same spot. There are no home games  
15 to be played at the Arena any more, because the team doesn't  
16 exist.

17 THE COURT: You addressed that adequately in your  
18 brief, so wrap it up.

19 MR. KROOP: Okay. Finally, I want to spend two  
20 sentences, and then I think you've probably heard enough --  
21 although I'm sure you'll let me know -- on a very substantial  
22 portion of Glendale's brief that we didn't touch upon at all in  
23 our Glendale-related brief. And that is, the notion that the  
24 specific performance remedy was somehow in interest in the  
25 assets that are proposed to be sold under § 363 of the

1 Bankruptcy Code.

2           And I got to tell you, I don't know that I have a  
3 very eloquent way of addressing that issue, because it was just  
4 so puzzling to me. It seemed like the proverbial square peg in  
5 the round hole. All of us, I thought, knew what an interest in  
6 property is, that can or cannot be sold free and clear of under  
7 363(f). But Glendale devotes a considerable amount of its  
8 brief on trying to argue that the specific performance remedy  
9 is somehow an interest in the assets to be sold. It just  
10 doesn't work that way, and it sort of betrays common sense to  
11 even try to view it that way.

12           THE COURT: You were going to do this in a couple of  
13 sentences, right?

14           MR. KROOP: Okay, one more sentence. If these assets  
15 are sold tomorrow, Coyotes Hockey, LLC is the one that's  
16 obligated to continue to specifically perform. The hockey  
17 sticks and pucks and pads are not subject to the specific  
18 performance obligation. Coyotes Hockey, LLC is.

19           We're left to wonder what would happen the next day,  
20 if the assets are sold. And that is why the specific  
21 performance remedy is not in interest for purposes of 363. We  
22 can engage them on the 365 issue; I believe I have; I believe  
23 our brief obviously does, but I'm left --

24           THE COURT: This is that last sentence you were going  
25 to give me.

1 MR. KROOP: Well, I break promises frequently with  
2 you, I think.

3 THE COURT: Noted.

4 MR. KROOP: I will stop. But obviously answer any  
5 questions you have.

6 THE COURT: No questions at the moment.

7 MR. KROOP: Thank you.

8 MR. BALDIGA: Thank you, Your Honor. William Baldiga  
9 for the City of Glendale.

10 Your Honor, I think that argument was helpful in  
11 pinpointing the specific request that's been made to the Court,  
12 which perhaps you've been involved in cases like that; I have  
13 not. Where the Debtor's request now is -- can be seen as  
14 simple as it is. That they come here asking this Court to make  
15 a decision of first impression to allow these Debtors to  
16 possibly -- possibly, and I'll address that -- pay something  
17 more to unsecured creditors by admittedly an act that would  
18 create hundreds of millions of dollars of harm.

19 These Debtors are here to do, under 363 or under 365,  
20 admittedly in their papers, they cite to the cases, what is in  
21 the best interest of their creditors. And they are asking you  
22 to create harm to accomplish that. And that is the request of  
23 this Court.

24 It is no coincidence that there is no precedent that  
25 would allow this type of thing. There is nothing here that is

1 value creative, except through the damage caused to the City of  
2 Glendale. And to some extent, to Aramark and to the NHL.

3 THE COURT: Isn't that true any time a large  
4 commercial lease is rejected, though?

5 MR. BALDIGA: No, Your Honor. And if you -- I can  
6 jump right to that point, because I think the -- when you get  
7 right to the heart of the cases, they're very instructive.

8 The -- whether it's El Toro, and the other cases cite  
9 to the -- or that at least make reference to the Supreme  
10 Court's decision. McSheridan refers to it. The Kuehner v.  
11 Irving Trust case. This is out of McSheridan, which El Toro  
12 reversed, to some extent.

13 So here's the basis for this line of cases. The  
14 Supreme Court has indicated in dicta that rent reserved has  
15 some relationship to the value of property and the value of the  
16 lease thereon.

17 So that's the genesis of this whole line of thought,  
18 where we're here.

19 Now, El Toro struggled with this 80 years later,  
20 reversing McSheridan to some extent, and in El Toro the Court  
21 went at pains to say that 502(b)(6) is not a limit on claims  
22 for other than lost rent, rent-like payments, or, quote, other  
23 damages directly arising from a tenant's failure to complete a  
24 lease term. In contrast, collateral damages bear only a weak  
25 correlation to the amount of rent.

1           Here, the damage that the Debtors now admit will be  
2 caused to Glendale have no correlation whatsoever, and no one  
3 is making any pretense that they have anything to do with the  
4 payment of rent.

5           THE COURT: Well, you know, I -- if I understand that  
6 assertion, I think El Toro addressed that in -- refuted in  
7 Lawrence Park, because the Court there said there was a simple  
8 test. That if the landlord -- would the landlord have the same  
9 claim if the lease was assumed and not rejected.

10          MR. BALDIGA: And --

11          THE COURT: If he wouldn't, then the claim is capped.  
12 It's part of the cap.

13          MR. BALDIGA: Well, the Court -- that was dicta  
14 because that issue was not before the Court. The issue in El  
15 Toro specifically was a tort claim for leaving --

16          THE COURT: It may be dicta, but it seems like a  
17 pretty good comment.

18          MR. BALDIGA: And then the El Toro Court immediately  
19 went on to say, Landlords in future cases -- and here we are --  
20 may have significant claims for both loss rental income and for  
21 breach of other provisions of the lease --

22          THE COURT: Well, but --

23          MR. BALDIGA: -- unquote.

24          THE COURT: But. I mean, whatever claim the City's  
25 got, arguably you're going to tell me they've got two claims:

1 they got their cap claim and they got their collateral damage  
2 claim.

3 MR. BALDIGA: Yes.

4 THE COURT: And you've asserted that the latter takes  
5 it into the hundreds of millions of dollars, right?

6 MR. BALDIGA: The Debtors have said that, and we  
7 agree.

8 THE COURT: Okay. So you're one of the larger  
9 creditors here.

10 MR. BALDIGA: Yes. The harm caused to Glendale, by  
11 all accounts in this courtroom, is immense. Huge.

12 Now, in El Toro the Court didn't need to get to the  
13 issue that we are here on. And it would -- the Court there  
14 found that a tort claim outside of lost rent was outside the  
15 claims cap. Here, that -- you know, El Toro did not need to  
16 get to this, but they did make specific reference again, in  
17 that language which I quoted, that landlords in future cases  
18 may have significant claims for both lost rental income and for  
19 breach of other provisions of the lease.

20 We're right on point. That is the --

21 THE COURT: Well, I think you got to be a little  
22 careful, because I think you inserted the word rent there, and  
23 I think they said damages resulting from the rejection. It's  
24 not just rent. So you have to look at the damages resulting  
25 from rejection; they're subject to the cap. And your other

1 damage claims, whatever they may be, are not subject to the  
2 cap.

3 MR. BALDIGA: But El Toro left open the possibility  
4 of other breaches -- of breaches of other provisions of the  
5 lease. And it's hard to say that El Toro is binding here, when  
6 they dealt with a situation that was not there before the  
7 Court.

8 THE COURT: Well, it's easy. We can argue about  
9 what's holding and what's dicta, but El Toro is binding here.

10 MR. BALDIGA: It is binding and in the language that  
11 dealt with tort claims it is -- there's no way around it. A  
12 separate tort claim is outside the claims cap.

13 So -- but I - going back again to the Supreme Court,  
14 to McSheridan, to El Toro, they all start from the basic sense  
15 that when you're dealing with a claims cap -- and Your Honor, I  
16 don't think we need to get to the claims cap here, and you push  
17 me there now, so I --

18 THE COURT: Well, you kind of wanted me to do that --

19 MR. BALDIGA: -- want to deal with it, but --

20 THE COURT: -- so I did it.

21 MR. BALDIGA: I -- and that's something that you have  
22 the right to do. But I think left open to -- the door to this  
23 type of claim being outside the tort claim that was dealt with  
24 in McSheridan and El Toro.

25 THE COURT: Okay.

1 MR. BALDIGA: Could I -- Your Honor, I could stay  
2 with that point or go further, but --

3 THE COURT: You've got the podium. You go anywhere  
4 you want till I stop you.

5 MR. BALDIGA: Okay. Well, thank you.

6 There -- going back, then, no one has come in and  
7 cited to a case where, again, harm has been created in order to  
8 possibly generate money for other creditors. It's not a  
9 debtor's fiduciary duty to harm one constituent before the  
10 Court, admittedly in the hundreds of millions of dollars, in  
11 the hope but not the demonstrated proof that some number of  
12 dollars may fall to other unsecured creditors when there's not  
13 even an attempted showing that the dollars that may fall to  
14 other creditors are even a small fraction of the harm that  
15 would be admittedly caused here to the City of Glendale.

16 THE COURT: Well, in terms of just the status of the  
17 City of Glendale and the other unsecureds, isn't Glendale an  
18 unsecured creditor just like the other unsecureds?

19 MR. BALDIGA: Yes. But the --

20 THE COURT: Yeah.

21 MR. BALDIGA: But, Your Honor, the cases, including  
22 the cases cited by the Debtors, do not say that the debtors  
23 have to run a 363 sale, as they do here, or to decide whether  
24 to reject claim -- or, to reject a contract based on the amount  
25 of claim. They say what's in the best interest of creditors.



1 And --

2 THE COURT: Well, don't you kind of evaluate that on  
3 what the economic effect is on the various creditor classes?  
4 Unless some creditor says, Judge, I don't care about that,  
5 which --

6 MR. BALDIGA: There's not a single case that says  
7 that best interest of creditors is limited to a capped claim.  
8 Or an uncapped claim, for that matter. Best interest of  
9 creditors -- and we cite to a half a dozen cases or so where  
10 the best interest of creditors were seen as having something to  
11 do with the amount of claims, but we've cited to many cases in  
12 our papers having to do with retention of employment, with the  
13 minimizing of creating of other claims.

14 There are decided cases, Your Honor, from all over  
15 the country where the best interest of creditors is not limited  
16 to the allowable claim of the particular creditor. And there  
17 are no cases cited to the contrary. That was an absolute  
18 necessity for this Debtor to see, that if they could come in  
19 and prove that best interest of creditors was equated legally  
20 in even one case in this country --

21 THE COURT: How does the Court evaluate that, versus  
22 just focusing on the other unsecured creditors, vis-a-vis the  
23 interests of the City?

24 MR. BALDIGA: Well, it would in some cases perhaps be  
25 difficult. But here the City has put in facts that are

1 undisputed that the damage to the City well exceeds \$500  
2 million. Facts which these Debtors say they have --

3 THE COURT: Well, let me ask you just something about  
4 that. Some of that number is money that the City believes it  
5 will get in, what, 2035?

6 MR. BALDIGA: Discounted to present value. And --

7 THE COURT: It is discounted, then?

8 MR. BALDIGA: Absolutely.

9 THE COURT: Okay.

10 MR. BALDIGA: And the Debtors have just told you they  
11 have no qualms and no quibbles with that harm. There is not a  
12 single -- in your 10 feet of paper --

13 THE COURT: Okay, so they accept it, but how -- go  
14 back to how does the Court, in your view, balance the interests  
15 of the City versus the interests of the other creditors.

16 MR. BALDIGA: The -- well. Here you have damage that  
17 would be caused to Aramark of \$5.1 million by their papers,  
18 damage that the NHL has said would be caused to their league of  
19 \$100 million or so, damage to the City in the 5 to 7 hundred  
20 million dollar range.

21 Now. If you -- if they're not going to contest those  
22 numbers, and they're certainly not contesting here the City's  
23 numbers, in a hypothetical case where there was a trial to be  
24 held as to the amount of the City's damage, maybe the Court has  
25 a tough time. But here, where there's admitted harm to be

1 caused to the City exceeding the gross price offered by the  
2 buyer, it can't be in the interest of these creditors. It  
3 can't be. By definition. And there's not been a single case  
4 advanced to show that.

5 THE COURT: Well, it might not be in the interest of  
6 the League, the City, and Aramark, but let's assume that the  
7 payout is 20 percent. The other creditors would get their 20  
8 percent under this deal.

9 MR. BALDIGA: Okay, and so we can add up all the  
10 dollars that would go to the other creditors --

11 THE COURT: Well, is it gross dollars or is it the  
12 interest of the creditors? In other words, it seems they talk  
13 about, you know, the interest to creditors. So even the guy  
14 with a small claim gets some consideration.

15 MR. BALDIGA: Absolutely. And here we could -- and  
16 I'm going to come to the economics because the Court has been  
17 asking, I think in vain for the most part, as to what the  
18 economics here, and I think the economics are truly compelling  
19 that even regardless of the amount of the City's claim the harm  
20 to the City exceeds whatever would go to the unsecured  
21 creditors.

22 Here there's an argument being made that there may be  
23 an incremental value -- possibly, because this Court hasn't put  
24 that to the test. It may be zero incremental value, but let's  
25 assume that the Debtors are right, that there's 50 million,

1 maybe even a hundred million dollars incremental value to the  
2 Team if the Team didn't have to obey the NHL Constitution and  
3 can move anywhere in the world. The Cit -- the Debtors have  
4 admitted that the harm to the City is 500 million or up. Well,  
5 there's the math right there. How much more -- it's at least  
6 five times, by the Debtor's own numbers, harm caused to the  
7 City than would benefit other creditors.

8 THE COURT: Well --

9 MR. BALDIGA: By definition.

10 THE COURT: But I come back -- my sense when I read  
11 that statement, the interest of the creditors, they seem to be  
12 talking about you have to focus on them kind of collectively  
13 and individually. So the City would be harmed -- everybody  
14 seems to acknowledge that -- in a very significant way.

15 But for example, you heard counsel for the Unsecured  
16 Creditors Committee, they like this deal because they think  
17 they're going to get some money out of it. So their interest  
18 is contrary to the City's. And so somehow --

19 MR. BALDIGA: Well, I actually -- I thought Mr. Sala  
20 ended by saying he's not ready to support this sale. He wants  
21 to get to a date --

22 THE COURT: He's ready to support a deal.

23 MR. BALDIGA: -- in the future. A deal.

24 THE COURT: Right now I think, far as I know, this is  
25 the only deal on the table.

1 MR. BALDIGA: Well, Your Honor, and you know, you've  
2 said that several times today and at prior hearings, but these  
3 Debtors have decided not to bring any other ones to this Court.  
4 There is an exclusive period and no one else has the right to  
5 promote a 363 sale here. If you do open up exclusivity, then  
6 it wouldn't take us long to bring other buyers. If you just  
7 let us do that, we'll do it in a heartbeat.

8 THE COURT: I thought --

9 MR. BALDIGA: But it's a little un --

10 THE COURT: I thought I signed an order for the  
11 Debtor conditionally that said here's the auction procedures  
12 and anybody who wants can come in and make an offer. So that  
13 the door is open. If there's somebody out there who wants to  
14 come in and say, Judge, I'll pay \$250 million for you if you  
15 let it -- let me move it to -- pick a site. But.

16 MR. BALDIGA: Well, we are here today on a sale  
17 hearing. And so let me get pushed to 363. There's two  
18 provisions of 363 that pertain to this sale. I mean, a 363  
19 motion is the only one that's been filed by this Court. There  
20 has been no 365 motion, so when the Debtors say why are we  
21 arguing 363? It's their motion. And you instructed us on the  
22 first day of the case, let's argue about motions that are filed  
23 and not the ones that are not.

24 I can go through 363(f)(1)(2)(3)(4) and (5), and I  
25 think in our papers we showed pretty conclusively that our

1 interests here are not something that 363(f) would be -- would  
2 permit to be sold free and clear of. But let's assume that  
3 we're wrong on that and just go right to 363(e). Which, for  
4 good reason, these Debtors avoid like the third rail.

5 The - 363(e) requires that any sale here --

6 THE COURT: It's the adequate protection section.

7 MR. BALDIGA: -- be conditioned on adequate  
8 protection.

9 THE COURT: What's the interest of the City, in your  
10 view, in this bundle of rights?

11 MR. BALDIGA: We built an arena at the cost exceeding  
12 \$180 million. We then put a lot of infrastructure around it,  
13 at a cost of a lot more millions of dollars. And we've helped  
14 construct a retail entertainment center around all of that, at  
15 a cost of several hundred million dollars even more.

16 We have an interest as a landlord, the Debtors would  
17 say. We have an interest in the right to specific performance.

18 THE COURT: But are those interests in property of  
19 the Estate?

20 MR. BALDIGA: Well, certainly a landlord's right is.  
21 It's an interest in property. One of the assets to be -- we  
22 have that interest. And -- and yes. The right to specific  
23 performance is an interest in this team. This team has made us  
24 a promise to play here for the next 26 years. We have an  
25 interest in that team.

1 THE COURT: Well, you know, that's an interesting  
2 question, and it might be outside today's parameters -- maybe.  
3 But as we sit here right now, the Debtors can't pay for the  
4 team to stay open, right?

5 MR. BALDIGA: No. And let's --

6 THE COURT: And the NHL is, right now, footing that  
7 bill, right?

8 MR. BALDIGA: Well, Your Honor, I think we've had to  
9 get to the facts here at some point, so I think now's as good  
10 of a time to do it. Be -- and I want to come back to adequate  
11 protection, because adequate protection is --

12 THE COURT: Well --

13 MR. BALDIGA: -- required as a matter of law.

14 THE COURT: Well, but hold that thought. But what  
15 I'm driving at is the City seems to be saying, Judge, we have  
16 the absolute legal right to have the Coyotes stay and play in  
17 our arena until the year 2035, right?

18 MR. BALDIGA: Yes. Unless we're adequately protected  
19 otherwise.

20 THE COURT: Well, what happens hypothetically if the  
21 League says, in November, We're done. We're not going to fund  
22 it anymore.

23 So there's nobody to pay for any of the expenses of  
24 the Debtor. And so there's going to be no Coyotes hockey.

25 MR. BALDIGA: Your Honor, I think that you have

1 before you today enough hard questions that it's not necessary  
2 to get to questions that may or may not ever be before the  
3 Court in November, but what we have here today is unrefuted  
4 proof that there is a DIP lender prepared to get this Court  
5 through a sale.

6 Now, let's talk about the numbers. Because I think  
7 it's critical to talk about the numbers, and you've heard  
8 virtually nothing about that. First, all of the Debtor's  
9 allegations -- and you, as a bankruptcy judge, see numbers all  
10 the time. All -- the bank -- the Debtors have stayed away  
11 religiously from cash losses. They talk about accounting  
12 losses. And professional sports teams are notoriously heavy on  
13 depreciation. But if you look back through the numbers, you  
14 see everything about losses.

15 Now, Mr. Moyes talks about how much he puts into the  
16 team, but you've heard nothing about how much he's taken out of  
17 the team.

18 THE COURT: Do you think they're profitable? You  
19 think they're making money out there?

20 MR. BALDIGA: I'm saying that he's taken a lot of  
21 money out of this, but this Court has no record in that regard  
22 and no basis for concluding --

23 THE COURT: Well, I think you're the first one who  
24 has implied that they're not losing a lot of money out there.  
25 Is that --



1 MR. BALDIGA: I'm not saying that. I'm still -- I'm  
2 talking about, first, let's talk about what the proof is and  
3 not talk about what lawyers are saying.

4 THE COURT: Well --

5 MR. BALDIGA: And when we look at Mr. Moyes'  
6 declaration, he talks about accounting losses. There is no --  
7 it's the easiest thing in the world to do, to come in before  
8 this Court and say, Here, month after month, year after year,  
9 here's how many dollars I put in, here's how many dollars I've  
10 taken out.

11 You don't have that in your record. You don't.

12 THE COURT: Well, I have a number of declarations  
13 from people on behalf of the Debtor who say they've lost  
14 hundreds of millions of dollars, correct?

15 MR. BALDIGA: Accounting losses, yes.

16 THE COURT: I have the NHL, who's been paying, I  
17 believe, since November for the Debtor to remain there, pay  
18 rent to the City and have the League -- or, the Coyotes play  
19 their League games, right?

20 MR. BALDIGA: That's right. And the NHL is proposing  
21 to conduct a sale which we support, and --

22 THE COURT: Well, let me finish.

23 MR. BALDIGA: Okay.

24 THE COURT: The point -- I mean, with all that,  
25 doesn't it seem like you can argue about the amount, but

1 they're losing a lot of money out there, right?

2 MR. BALDIGA: No.

3 THE COURT: No?

4 MR. BALDIGA: I'm going to disagree again. The --

5 THE COURT: Okay. What would I look at in the record  
6 before me, to reach the conclusion that that was wrong?

7 MR. BALDIGA: The Debtors are proposing a sale that  
8 this Court would conclude sometime about the end of June. The  
9 NHL is proposing a sale which doesn't -- is not a creation of  
10 harm sale, that doesn't create hundreds of millions of dollars  
11 of harm to creditors, that closes in early September. I think  
12 they're prepared to do it in late August, but we all sort of  
13 agreed to stay out of Labor Day.

14 So the question before this Court is, during those  
15 two months -- because that's all they're talking about -- no  
16 one is suggesting for a minute, I don't think anybody in this  
17 courtroom, that Mr. Moyes is going to continue to own this team  
18 and manage it like he has in Glendale. That's not an option.

19 So the only question is, over the next two months if  
20 a sale in three weeks causes hundreds of millions of dollars of  
21 admitted harm, versus a sale that in -- two months later, that  
22 does not cause hundreds of millions of dollars of admitted  
23 harm, what is the incremental loss during those two months that  
24 the NHL will fund?

25 That, I think -- the Court doesn't have to say, you

1 know, like Carl Sagan, billions and billions of stars. It's  
2 what are the losses during the two months that the team is not  
3 playing and not paying payroll?

4 THE COURT: Well, the one thing that assertion avoids  
5 is, what's the sales price in September if there's a sale. And  
6 will it be sufficient to be approved by the Court?

7 MR. BALDIGA: Okay. So -- well, let's talk --

8 THE COURT: I mean, in a simple sense, it's the  
9 classic -- you got the bird in the hand with the PSE offer, and  
10 the, I guess what I'll call the expectation that, come  
11 September, the City of Glendale and the League think there'll  
12 be a better deal there.

13 MR. BALDIGA: Well, I'd like to use the -- well, if  
14 -- Your Honor, can I -- I have a chart that I'd like to use.

15 THE COURT: You've got the podium. You can do  
16 anything you want till I stop you.

17 MR. BALDIGA: Is this microphone working?

18 THE COURT: It should be.

19 MS. REECE: May I approach the bench?

20 THE COURT: You may. Thank you.

21 MR. BALDIGA: Well, Your Honor, I did this once in a  
22 poor way, so I thought I'd do it better here, hopefully.

23 This is the PSE deal and the effect on pre-petition  
24 creditors. I think there's no doubt that we get the 165, I  
25 think everybody's numbers are the same. I'm off on some of the

1 NHL numbers in terms of what is the pre-petition loan and what  
2 is their DIP loan, but I'm using their 13 million that the  
3 Debtors used. And I'm trying to use the Debtors' numbers here  
4 throughout.

5 So the net purchase price is 165. And then we have  
6 some reductions. I don't know, maybe after today the 5 million  
7 is way too conservative for administrative costs, if we're  
8 going down the path --

9 THE COURT: Well --

10 MR. BALDIGA: -- that the Debtors used.

11 THE COURT: Well, actually the Debtor thought it was  
12 a million in their projections, and you've raised it five times  
13 that, so.

14 MR. BALDIGA: I think we're well beyond a million  
15 where -- as we already said, Your Honor. But the NHL --

16 THE COURT: It's a frightening thought, isn't it?

17 MR. BALDIGA: I'm sorry?

18 THE COURT: It's a frightening thought, isn't it?

19 MR. BALDIGA: It is. The course of this case that  
20 the Debtor suggests, Your Honor, that's the perfect word for  
21 it. Not just for Glendale, but I think as to the process going  
22 forward. It is truly frightening.

23 This would leave -- if the NHL cure claim -- we don't  
24 know what that would be. It could be a hundred, it could be  
25 less. Could be more.

1           What's available for pre-petition claims is \$47  
2 million. SOF gets first dibs on that. They get paid 59 cents  
3 on the dollar. There would be nothing left for unsecured  
4 creditors. The unsecured creditor pool would be \$564 million,  
5 using the Debtor's numbers, obviously except for the City  
6 claim.

7           THE COURT: You're assuming there's no cap effect on  
8 the City's claim, right?

9           MR. BALDIGA: I am, Your Honor. But Your Honor, if  
10 you crossed a line through the City claim here, okay, you  
11 divide by zero by a smaller number.

12           THE COURT: I was going to say, I understand that  
13 under this -- these assumptions, in a sense it almost doesn't  
14 matter whether it's a half a billion dollars or a hundred  
15 million or 50 million.

16           MR. BALDIGA: Or ten cents. Because there's nothing  
17 left for unsecured creditors and, in fact, even SOF gets, you  
18 know, 50 cents or so on the dollar. So that's the deal  
19 that's --

20           Now. This is the deal that's before the Court today,  
21 admittedly creating hundreds of millions of dollars of harm to  
22 other parties before the Court.

23           All right. The second --

24           THE COURT: Can I make a suggestion to you for the  
25 future?

1 MR. BALDIGA: Yes.

2 THE COURT: You should make those words and numbers a  
3 lot bigger.

4 MR. BALDIGA: I can see it just fine.

5 THE COURT: Yeah, you're standing next to it.

6 MR. BALDIGA: That's why I'm handing these out.

7 THE COURT: You're a young guy. See these glasses?

8 MR. BALDIGA: I understand. Well, let me ask Your  
9 Honor. I could have a copy of the chart in front of me and  
10 return to the table.

11 THE COURT: I've got it right here. I'm fine.

12 MR. BALDIGA: All right. Now, Your Honor, where did  
13 the 140 million come? Top line. Came from the Debtor's chart  
14 of indicative prices, right out of their exhibit to their  
15 brief. The Glendale brief, where they compared the PSE deal  
16 and said, in their footnote 2, as the Court is aware, for  
17 purposes of comparison here's a series of hypothetical bids  
18 based on other offers.

19 First one to admit, an offer is not a commitment but  
20 it's a little unfair to blame people for not making a  
21 commitment when the Debtors have told them don't make any  
22 commitments, we have something else here. So -- but that's  
23 where we are today.

24 So using 140 million, we have the same NHL pre-  
25 payment, brings it down to a net purchase price of 115. We

1 have the DIP, the NHL cure goes away, admin costs are, I would  
2 say, 40 percent on a consensual basis than the litigation  
3 bloodbath that we're otherwise in. Miscellaneous priority  
4 claims have to be paid. So available for pre-petition  
5 creditors is 97.7, is -- SOF has first dibs on that. There's  
6 17.7 left. City rejection claim goes away. Aramark  
7 termination claim goes away.

8 THE COURT: Well, let me ask you a question about  
9 this.

10 MR. BALDIGA: Yeah.

11 THE COURT: If you're right or probably right,  
12 shouldn't you be able to convince Mr. Sala and the Committee to  
13 support the City's position and not the Debtor's?

14 MR. BALDIGA: Your Honor, I represent a lot of  
15 committees. There is a standard operating procedure for  
16 representing committees, which is I don't care about all the  
17 legal stuff, I don't actually care about any of this 10 feet,  
18 first want --

19 THE COURT: How much do I get?

20 MR. BALDIGA: I'm sorry?

21 THE COURT: How much do I get. Isn't it the --

22 MR. BALDIGA: How much do I get? First one to  
23 promise us that we get paid, I support them.

24 He's doing a great job, he's going to keep the big  
25 straddle going. First one to promise them that they're paid,

1 wins. And you know what? That's what I'd do if I represented  
2 this committee. It's not a --

3 THE COURT: If these are reasonable assumptions, it  
4 seems to me you would be able to go to them and say, Look, you  
5 get nothing under the PSE deal. You're going to get \$17  
6 million to divide up under a probable deal.

7 MR. BALDIGA: That's right. And so since the City is  
8 not in a position -- because our claim goes to zero. So we  
9 don't have anything sort of to give here. We can't make our  
10 claim less than zero. He can't come to me and say, Hey, this  
11 is pretty easy. See that 8.9 million? Give it a guarantee.

12 He needs a little time to go to other people to get  
13 that done. And you know what? That's his job. Over the next  
14 -- whether it's a week or a month or two months; that's his  
15 job, respect him for it, and he doesn't need to be too  
16 concerned about all these other things. That's the same thing  
17 I'd do.

18 So, and there's available to equity, whether that's  
19 Mr. Moyes or whoever, at the end of the case. That's the deal.  
20 That -- using the Debtor's, you know, within their range of  
21 suggested other numbers to use.

22 I have one more chart, if I could go through that?

23 THE COURT: Sure.

24 MR. BALDIGA: Number 3. I'll put it up on the board,  
25 just to get it up.



1 THE COURT: Put it up so you can see it.

2 MR. BALDIGA: Yeah. Thank you.

3 Anticipating the Court's concern earlier this morning  
4 that, Boy, I really don't know what the NHL cure claim is --

5 THE COURT: That's kind of a big wild card, isn't it?

6 MR. BALDIGA: That's right. So what I've done here,  
7 Your Honor, if you look, is let's take it to zero. Okay? So  
8 here's the PSE deal with that being zero. Not even the Debtors  
9 think it's zero, but let's make it zero.

10 So what happens is that there is more money left for  
11 general unsecured creditors, but the City -- City rejection  
12 claim swamps it. That does, Your Honor, this -- the math at  
13 the bottom of the page does provide for the claims cap not to  
14 apply to the loss of tax revenue.

15 But, however, Your Honor, again going back to the  
16 first things that I said, this math, however, is still an  
17 accurate measure of the harm to be caused by creditors that  
18 these Debtors are asking you to sanction. The claims cap does  
19 not at all limit the harm to the City. That harm will exist.  
20 And I'm going right back to where I started, that the -- all of  
21 the case law under 363 and 365 says what is in the best  
22 interest of creditors.

23 You yourself challenged me a few minutes ago and say,  
24 Oh, boy, do you have an interest -- interest is such a big wide  
25 word, that --

1 THE COURT: No, what I was getting at is, is 363  
2 talks about interest in property that's -- to be sold, and I'm  
3 trying to figure out what the City's interest is --

4 MR. BALDIGA: I understand, but it's no coincidence,  
5 I think, that the courts uniformly use the same term that  
6 debtors that come before this Court, especially those  
7 requesting extraordinary relief for which there is no  
8 precedent, all of the cases, whether we're here under 363 or  
9 365 or under some hybrid of the two -- that seems to be the  
10 present request -- requires that the relief provided by this  
11 Court is in the best interest of creditors.

12 THE COURT: But those words, interest, have different  
13 meanings in -- depending on which side of the --

14 MR. BALDIGA: I agree, but there's not a single case,  
15 or the Debtors would have been in here for sure citing to it,  
16 because it would have been on page 1 of their brief, that  
17 interests in that regard are limited to some claims cap,  
18 whether under 502(b)(6) or something else.

19 There's not a single case that says that, and it  
20 defies common sense that it would because these courts of  
21 equity are to do what makes it -- again, what is in the best  
22 interest of creditors.

23 And it doesn't say, and if you capped or whatever --  
24 and the reason I went to the Supreme Court case is because the  
25 whole genesis of 502(b)(6) in the first place is because it was

1 seen by Congress and by the courts as fair compensation to a  
2 landlord in the usual commercial case where, hey, maybe it  
3 takes one year or three years or something in between there, to  
4 find another commercial tenant. Where no one has suggested  
5 that there's another commercial tenant that we'll be able to  
6 bring back in here. There's been no pretense, even, that a  
7 fraction of that 5 to 7 hundred million dollars in harm can be  
8 compensated in any way. That train, once it leaves, is gone.  
9 And we will --

10 THE COURT: Well --

11 MR. BALDIGA: We will --

12 THE COURT: Hang on for just a second. I think what  
13 you're saying is the City is going to assume that the Arena  
14 will not be used to generate any revenue over the remaining  
15 term of the lease to 2035, right?

16 MR. BALDIGA: No. We -- our papers were very careful  
17 to assume that all of the non-hockey events that are now in  
18 there will continue to be run, and in fact we will replace some  
19 of the Coyotes revenue with other substitute revenues. Our  
20 papers -- I mean, these took some real work. We gave them the  
21 benefit of the doubt that we would put in replacement revenue  
22 of some type, based on what we think this market would bear.  
23 And these are experts who are pretty good at understanding what  
24 happens in these situations.

25 THE COURT: Well, although I --

1 MR. BALDIGA: This number is a net number.

2 THE COURT: I am going to -- and I forget his name,  
3 but the gentleman from Massachusetts who thought --

4 MR. BALDIGA: Mr. Sheehan.

5 THE COURT: -- there'd be some ASU games, some  
6 college hockey and some basketball games at the Arena, and I  
7 have to admit I struggled with that assumption.

8 MR. BALDIGA: Well, I'm critical of that, too. Just  
9 one more example how conservative we would be. We were pushing  
10 as much revenue into the Arena as we could. That's the best we  
11 could do. We're going to be hurt really bad or really, really  
12 bad. Those are the two choices. But there is no good ending  
13 here in the interests of creditors.

14 Now, I do want to go through the Sheehan declaration  
15 because there's been a lot of allegation, but all lawyers talk.  
16 But let's stick, again, with the evidence, because there's not  
17 a single piece of evidence -- I mean, there's been all sorts of  
18 comment by -- again, just by lawyers -- that, Oh, no one could  
19 ever make money here. No one could ever make money here.

20 Well, we do have, by all accounts, a number of people  
21 who are lining up to pay \$100 million, maybe a little bit more,  
22 maybe a little bit less, maybe a lot more, for the right to do  
23 what Mr. Moyes is now doing, to play hockey in this Arena.

24 THE COURT: Well, let me come back to what I said  
25 earlier. I think it's inappropriate, until somebody makes an

1 offer, for the Court to really weigh somebody who's expressed  
2 interest.

3 MR. BALDIGA: It would be inappropriate if this Court  
4 had invited them to do that. But the motion before the Court  
5 is to compete with an offer that moves this team to alienate  
6 the NHL and to move them to Toronto. It's no wonder that  
7 anyone who wants to be part of the NHL would stay away from  
8 that like crazy. No one who is a serious business person, who  
9 wants to be admitted to the Board of Governors of the NHL, is  
10 going to come in here and do what Mr. Balsillie has proposed to  
11 do. And I think it's un --

12 THE COURT: Well, I'll have to go back and look at  
13 it, but I'm not so sure that the order I signed conditionally  
14 for the Coyotes auction on the 22nd, doesn't allow somebody to  
15 come in and say, Judge, I'll bid X and keep it in Glendale, and  
16 that's a better deal for all the reasons you just have been  
17 asserting.

18 MR. BALDIGA: Well, but Your Honor, it -- all we're  
19 asking and all the NHL has asked from the first moment, is to  
20 not do an illegal sale that tramples on the rights of the NHL  
21 and the City of Glendale, but do this consensual sale and let's  
22 see what that produces.

23 It, it's unrefuted that the NHL was on the literal  
24 verge, that day, of producing someone and even at those  
25 numbers, creditors here --

1 THE COURT: Well --

2 MR. BALDIGA: -- are not harmed.

3 THE COURT: There's an assertion to that. Again,  
4 it's hearsay. Right?

5 MR. BALDIGA: Hearsay both ways. Yes. That --

6 THE COURT: Well --

7 MR. BALDIGA: -- there's no one who is out there, and  
8 that there is --

9 THE COURT: Well --

10 MR. BALDIGA: -- someone out there.

11 THE COURT: I think we can agree that as of 3:20 on  
12 June 9th, there's only been one offer that's been presented to  
13 this Court to buy these assets, right?

14 (Counsel Confer)

15 MR. BALDIGA: I'm being told that that's not correct.

16 THE COURT: Well, I'll ask somebody to point out to  
17 me in the record where the second offer is, because to share  
18 with all of you, I've pretty much been reading continuously  
19 since about 11:30 Saturday all this stuff. And before that.  
20 And I haven't seen it.

21 And any time somebody says, Judge, so-and-so told me  
22 they have made an offer, that's hearsay. Yeah.

23 MR. BALDIGA: I agree.

24 THE COURT: Okay.

25 MR. BALDIGA: And Your Honor, it's never the case

1 that offers are presented to this Court until there's a process  
2 where people are told, Make your offers, there's going to be an  
3 auction on such-and-such a date, come in, and the winner will  
4 take the cake.

5 But here, the rules have to be established, and when  
6 people are thinking that they're competing with a rogue offer  
7 that is illegal in any event, that the NHL itself is  
8 challenging --

9 THE COURT: I -- be careful with the pejorative  
10 terms. I mean, I've tried to let you all argue your case, but  
11 rogue offer is pretty harsh. You know, he's made an offer. It  
12 is what it is.

13 And at least as of submissions on Monday, the League  
14 hadn't said no way, no how, we're not going to consider it.  
15 They're asking for more documents. So I think rogue offer is  
16 probably too harsh for me.

17 MR. BALDIGA: Okay.

18 THE COURT: Okay.

19 MR. BALDIGA: Well, Your Honor, it's -- and perhaps I  
20 am a little carried away because nothing about this is funny to  
21 the City.

22 THE COURT: You're an advocate; that's your job.

23 MR. BALDIGA: No, it's not an advocate so much as  
24 that there's been a lot of joking and everything else with  
25 other parties, but to the City of Glendale who everybody in

1 this courtroom, Debtors included, are saying that they will be  
2 caused hundreds of millions of dollars of harm, it's least  
3 funny to them. And for these Debtors to get up and say we're  
4 going to strip rights that will cost you hundreds of millions  
5 of dollars, okay, without legal precedent, to maybe allow some  
6 money to go back into the owner's pocket, is not amusing in the  
7 least. And I'm sorry if that came out.

8 THE COURT: All right.

9 MR. BALDIGA: Let's go back to Mr. Sheehan. There's  
10 a specific allegation, unrefuted, that Mr. Moyes moved his  
11 offices, moved the Team's offices, out of the Arena, put those  
12 offices into a building so he pays rent to himself of \$2.3  
13 million. And he's done that for a while. Now, that's one of  
14 nine -- seven -- cost savings.

15 Now. Just that \$2.3 million going right into the  
16 owner's pocket, for no good business reason because that space  
17 is now empty in the Arena, and no coming in here to explaining,  
18 well, it's not that simple, whatever -- silence. Does that  
19 more than compensate the Estate for the two months in carrying  
20 costs to get to a consensual sale that's only in the first week  
21 of September instead of the last week of June? We think it  
22 probably does. But if these Debtors find it didn't -- and  
23 that's one of seven cost savings that Mr. Sheehan has pointed  
24 out.

25 These cost savings have all been available to Mr.



1 Moyes. I can't blame him in the least if he gets to write the  
2 checks to himself. Why he hasn't done these.

3 Then we get to the revenue enhancements. This team,  
4 as Mr. Sheehan has said, is at the lowest end of every single  
5 creation of revenue. And so Mr. Moyes would say, Boy, it's a  
6 horrible situation. No one can make money here. But Mr.  
7 Scudder's affidavit belies that. Where he -- where there's --  
8 again, we can leave aside how much people are willing to pay,  
9 but Mr. Scudder -- it wasn't like his phone was just quiet.  
10 There were a lot of people who wanted to come in and play in  
11 Glendale.

12 Then you question -- and I think it came up a little  
13 bit earlier -- well, you know, Mr. Scudder in his second  
14 declaration says, Huh, the economic malaise in Phoenix is just  
15 too great, and Phoenix and the desert is a really tough place  
16 to play hockey, and so we're now in such a place economically  
17 that there's simply no rebound here. And it's not my  
18 mismanagement.

19 Well, the NHL, Mr. Bettman's declaration, I think, is  
20 incredibly poignant. The Buffalo Sabres. That situation was  
21 worse. Involved in the criminal aspects of the Rigas matter,  
22 the Adelphia bankruptcy. It was a horrible situation. The  
23 Ottawa Senators was a very difficult situation, insolvent by a  
24 large margin. Pittsburgh Penguins, where we do happen to have a  
25 case right on point and squarely for us on this 365 issue.

1           THE COURT: Aren't those Penguin decisions kind of  
2 hard to sort out?

3           MR. BALDIGA: Not the -- well -- well, the vacated  
4 one should have been vacated because it looks like it's a -- it  
5 doesn't make much sense. But the first one? Makes all the  
6 sense in the world. And it's not actually -- the first one  
7 says, Listen. NHL teams, there's not that many of them to go  
8 around.

9           And as this Court now knows, more than most people,  
10 it's not that hard -- it's not that easy to find new ones and  
11 to move them into a city. And so when a NHL team promises to  
12 play in a particular city, the city has the right to enforce  
13 that when they've invested hundreds of millions of dollars in  
14 that.

15           Now. The Court in Pittsburgh found that is the worst  
16 arena deal in the NHL. It's right in the decision. And that's  
17 the reason for, on the second one, they said could they reject  
18 that because there is no other choice? But they didn't get to  
19 -- first of all, it was vacated and that was in dicta anyway,  
20 but they said if they want to leave and make their deal some --  
21 it wasn't about leaving the City of Pittsburgh, though. It was  
22 about could they find someplace else in Pittsburgh to play.

23           And the City of Pittsburgh was keeping its team in  
24 the second decision, which was then vacated.

25           So having too much weight on a vacated decision --

1 THE COURT: I'll just show you. I mean, I've read  
2 those decisions, and I kind of struggle with them collectively.

3 MR. BALDIGA: I'm glad you have, because I think  
4 everybody who reads them does as well. And again, I'm not sure  
5 how much we should take away from a pretty thoughtful first  
6 decision, which is as close to being on point as you're ever  
7 going to get in a case in this courtroom, to a vacated  
8 decision. And decisions get vacated for a reason.

9 In any event, Sabres, Penguins, Senators, each dogged  
10 by bankruptcy, with owners saying we're hopeless, we can't make  
11 it here. Horrible arena deals. We can't possibly make it in  
12 this arena.

13 Every one is now a success on the ice in that city.  
14 And those -- in every one of those, especially it comes loud  
15 and clear in the Penguins case, is all about how horrible the  
16 arena deal is.

17 Let me use the Debtor's words here as to this arena  
18 deal. The details of the arena leases and the arena management  
19 agreements that the predators in the wild operate under are not  
20 publicly available, but the company's management believes --  
21 this company's management believes -- that the terms of the use  
22 agreement are as favorable, if not more favorable, than any  
23 agreements under which the predators or wild may operate. This  
24 use agreement affords the Coyotes to retain every type of  
25 revenue stream that an NHL franchise could hope to retain.

1           Going on with the Debtor's words. Even assuming that  
2 the predators in the wild have been equally successful in  
3 negotiating their arena leases and arena management agreements,  
4 this company's management believes that the Phoenix use  
5 agreement -- I mean, the Phoenix MSA, geographical area -- with  
6 its booming economy, rapidly expanding population, including an  
7 increasingly large number of Northern expatriates, and the  
8 available capacity within the jobbing dot-com arena,  
9 distinguishes the Coyotes from both the predators and the wild  
10 in terms of revenue growth potential.

11           As much as these Debtors would have you believe that  
12 what we are asking you to do is to doom this team, all we're  
13 asking is don't cause tremendous harm to the City by taking the  
14 opportunity here that these Debtors themselves, in their words,  
15 see as a tremendous opportunity, and allow people to come in,  
16 not cause harm to the NHL, not cause harm to the City of  
17 Glendale, and make this team a success.

18           And hypothetically, if it doesn't work, that's what  
19 judges are for, to deal with situations as they come before the  
20 Court, but not thinking about what happens if the NHL decides,  
21 after one season, they're not going to fund it anymore. Again,  
22 we have enough hard legal and factual problems here to not make  
23 a decision today based on what may or may not happen a year  
24 from now, and certainly not based on a complete lack of facts  
25 from these Debtors as to what actually is the cash drain to go

1 two months.

2 How much is -- where is -- I mean, this Court sees it  
3 every day. Where is the 13-week cash flow? Where is any of  
4 the things that courts always demand to show a lack of  
5 protection or a declining situation? You don't have any of  
6 that. You have first day affidavits --

7 THE COURT: Well, but --

8 MR. BALDIGA: -- that are general in the extreme.

9 THE COURT: You sound like you've been around  
10 bankruptcies a lot, so I'm going to assume you have.

11 It seems like if the NHL is funding the Debtor, as  
12 they have for months, and existing secured creditors have  
13 consented to that, that the loss may not be as bad as you are  
14 asserting there is. But it's still a loss.

15 I mean, they wouldn't be doing that otherwise, right?

16 MR. BALDIGA: That's right.

17 THE COURT: I mean, come on.

18 MR. BALDIGA: Your Honor, we have -- you and we all  
19 have cases where management is tired, has run out of money, is  
20 not maximizing revenue, and is taking money out in their own  
21 rent and things like that. This won't be the first case and --  
22 or the last case here where the value of this enterprise is not  
23 being maximized. It's not our fault and it's not the fault of  
24 creditors.

25 This management team put it here, and it's not the

1 job of this Court to bail him out by eviscerating the rights of  
2 other creditors when the unrefuted evidence is that there is  
3 substantial revenue gains to be made and substantial cost  
4 savings including immediately to be had. And a willing lender  
5 to bridge to when those take effect.

6 I wish every case had those economics and those  
7 compelling situations. It's not often that there's someone who  
8 comes in and is willing to bridge until the things that should  
9 have been done one year, two years, three years ago, if only  
10 management had been more capable to do. But it doesn't mean  
11 that Mr. Balsillie has the right to come in and scoop this  
12 thing and cause gain for himself and maybe some pennies to  
13 creditors by causing harm to other creditors who are here  
14 involuntarily. And that is, again, the request that's before  
15 this Court.

16 And this can't be justified under 363, and the  
17 Debtors don't even -- the Debtors have filed a 363 motion and  
18 then come before this Court and say, We're not going to even  
19 try to justify this under 363. They do try to justify it under  
20 365, but the standard, again --

21 THE COURT: Well. Well, they have to link them to  
22 get where they want to go. And they've got a -- if they're --  
23 to get their motions granted, they've got to prove that they've  
24 met the requirements of both § 365 and § 363.

25 MR. BALDIGA: Well, 363 requires adequate protection.

1 There is no --

2 THE COURT: Of those who have an interest --

3 MR. BALDIGA: -- adequate protection to be had.

4 THE COURT: -- in the property.

5 MR. BALDIGA: That's right. And we have a tremen- --

6 and the NHL, likewise, has a tremendous interest in this team.

7 Your Honor, I can --

8 THE COURT: Well --

9 MR. BALDIGA: I think I'm --

10 THE COURT: I think you got to be very careful with  
11 those terms, they have a tremendous interest in this team. The  
12 question is, what is their interest in the assets of the Debtor  
13 that's entitled to adequate protection. And it's the same  
14 question asked in the City of Glendale. And that is difficult  
15 to analyze.

16 MR. BALDIGA: Well, but, Your Honor -- I mean, that  
17 -- that's ignoring several pages from our brief where we go  
18 into, in the 365 context, which is what the Debtor's current  
19 choice is of what they do want to argue, about what does it  
20 mean to be in the best interest of creditors. And --

21 THE COURT: Yeah, well, that's different from  
22 interests in the property that has to be adequately protected.

23 MR. BALDIGA: Okay. But again, if the Debtors are  
24 going to say today that, We want to proceed under 365, we cite  
25 to several cases where, again, the best interest of creditors

1 is simply not a matter of how big the claim is. The best  
2 interests are, again, job creation, revenue loss, and all of  
3 the other things that the cases hold --

4 THE COURT: You know, I'll acknowledge a lot of  
5 courts have talked about those. I'm going to be blunt here. I  
6 struggle a little bit whether those really are legitimate  
7 interests under 363 and 365. I know job preservation,  
8 creation, is an extremely laudable thing, but whether it fits  
9 under those confines of those sections when you talk about  
10 interest in the property, I'm not sure.

11 MR. BALDIGA: But let's just talk about the best  
12 interest of creditors.

13 THE COURT: All right.

14 MR. BALDIGA: Because that is the test. So we'll  
15 move away from property, to just is there anybody in this  
16 court, with all the arguments you've heard, who have even  
17 hinted that this sale is in the best interest of Glendale? And  
18 --

19 THE COURT: I think the Debtors and PSE concede that  
20 it isn't --

21 MR. BALDIGA: Okay.

22 THE COURT: -- in the best interest.

23 MR. BALDIGA: And the harm to Glendale is  
24 concededly --

25 THE COURT: Significant.



1 MR. BALDIGA: Not just significant, but is in an  
2 amount that dwarfs every other claim in the case. That's what  
3 the admission was during the first half. It's -- maybe the  
4 500 million is low, maybe the \$700 million is low. That is  
5 our evidence that we will suffer harm in that amount. You can  
6 argue about claims cap. If I were the Debtors, I'd argue about  
7 claims cap because I have nothing else to argue.

8 But the harm caused is in the hundreds of millions of  
9 dollars. It exceeds the benefit created altogether by everyone  
10 else. And there's just simply no way to find that 365(a) can  
11 be satisfied when there's more harm created than good  
12 conferred. Especially where it's a hypothetical decision,  
13 because we don't even know yet whether there's a better result  
14 that doesn't cause any harm.

15 THE COURT: Well, as you said, we have to play with  
16 the hand that's been dealt here, the motions that are before  
17 the Court. It is difficult for everybody, including the Court,  
18 because you don't know what the other options might be. So  
19 you're kind of, to some extent, trying to evaluate it against  
20 an unknown.

21 MR. BALDIGA: But the unknowns do not include the  
22 requirement that the sale be, again, in the best interest of  
23 creditors, and when the --

24 THE COURT: The --

25 MR. BALDIGA: -- admitted harm caused exceeds the

1 gross purchase price of the proposed buyer, that should be the  
2 end of the inquiry. There's not a single case --

3 THE COURT: Well, if you're right that means the City  
4 would have a veto over any deal, correct?

5 MR. BALDIGA: No, because we're not vetoing any deal.  
6 That's again hypothetical.

7 THE COURT: I didn't say you would veto. I said you  
8 would have a veto over any deal.

9 MR. BALDIGA: Any deal that moves this team out of  
10 Glendale.

11 No, I guess -- and even that's too strong, Your  
12 Honor. It's --

13 THE COURT: Let me put it this way. You're not  
14 asserting that the City should have a veto over any sale, are  
15 you?

16 MR. BALDIGA: What -- we're only -- no. We're only  
17 asserting that this sale does not comport with 365.

18 THE COURT: All right.

19 MR. BALDIGA: Because this is the sale that's before  
20 you. We don't need to prove more than that. All we need to  
21 prove is this sale admittedly causes harm to the tune of  
22 hundreds of millions of dollars more than the purchase price,  
23 period. I think this Court could conclude the hearing on that  
24 basis and not struggle otherwise, because that itself --  
25 there's not a single case that these Debtors have found, or

1 frankly that any of us will ever find, that the purpose of the  
2 Bankruptcy Court is to create harm if it sprinkles some dollars  
3 on others. And the harm caused exceeds the value of whatever  
4 was created in this courtroom.

5 If this Court is ever a court of equity, that can  
6 never be the decision of the Court.

7 And I do think, Your Honor, you have 10 feet of  
8 briefs, but I think that one point should and can be the end  
9 all of that decision.

10 THE COURT: All right.

11 MR. BALDIGA: Thank you.

12 MR. SALA: Your Honor, Paul Sala on behalf of the  
13 Committee.

14 Just trying to focus on the economics, which is what  
15 I think you asked everyone to do. And using the chalks put out  
16 by the City. If you look at Number 2, it shows \$16.7 million  
17 available if a sale happened today, for unsecured creditors.  
18 They have it split 89 -- 8.9 to vendors and 8.8 to equity that  
19 presupposes the Moyes claim we don't need to do that. If you  
20 add the Moyes claim back in, that's about 12 and a half percent  
21 return.

22 If you go to chalk number 3, you see there's \$64  
23 million available today for unsecured creditors, but a  
24 potential whole lot of other claims, and roughly a return of  
25 12.2 percent to unsecured creditors.

1           Here's what I know, looking at all this. If we don't  
2 have a sale fairly soon, the numbers that are available in  
3 chalk number 2 aren't going to be there. Because if we have a  
4 sale in September and the NHL has to advance \$15 million  
5 between now and then, we've got \$1.7 million to divide. That's  
6 not where we should be, Your Honor.

7           The economics of this are everybody seems to agree  
8 this -- these assets should be sold. Nobody has asked you to  
9 waive exclusivity to file a plan. Maybe they should. But  
10 nobody's protecting the unsecured creditors here by saying  
11 let's wait. At least we have an offer.

12           I don't know that that's going to be an offer that  
13 the Committee is going to support or not, but at least you have  
14 a process. And if there are these other bidders, these bidders  
15 that may or may not have made offers, these other interested  
16 parties who want to buy the team and keep it here, that's  
17 something we need to get to. And we can get to the analysis of  
18 what's the best and the highest offer and where the best return  
19 is.

20           THE COURT: Well, that sounds like you're saying go  
21 for the auction on June 22nd, let's see what happens.

22           MR. SALA: I think that's exactly where the Committee  
23 is. I mean, maybe a few extra days if we could get to it.  
24 Maybe that would be necessary to resolve some of the claims.  
25 But if the Balsillie -- or, the PSE offer is assuming the

1 relocation and the indemnity fees, okay, we know what that  
2 means. We probably need to figure out what Glendale's claim  
3 is, whether it's capped or not. If it is, the return on chalk  
4 number 3 to unsecured creditors, based on their cap claim, is  
5 well over 100 percent. You're looking at interest.

6 THE COURT: Well, I think you got to be careful  
7 because on all three of those, there's a number of assumptions  
8 made and it may be that those assumptions aren't going to be  
9 correct.

10 MR. SALA: Understood, Your Honor. But it seems to  
11 me what has to happen here is we have to sell the assets sooner  
12 rather than later, whether that means --

13 THE COURT: So, but --

14 MR. SALA: -- the 22nd or something --

15 THE COURT: To jump to the bottom line, the Committee  
16 is saying today we support the auction on June 22nd, Judge; the  
17 City has not convinced us that that's not in our best interest.

18 MR. SALA: Correct, Your Honor. But we fully  
19 understand and would hope local bidders are there. So that  
20 there's --

21 THE COURT: Well, I understand that the Committee's  
22 position might change when we get to the 22nd. Today that's  
23 the Committee's position. The interest of that creditor  
24 constituency is, go for the auction.

25 MR. SALA: It's -- that's correct, Your Honor,

1 because it seems like if we wait there may not be any money  
2 here at all.

3 THE COURT: Got it.

4 MR. CLARK: Your Honor, very briefly. Go for the  
5 auction on the 22nd. Question for the Court is, what's for  
6 sale? That's the issue before the Court today.

7 I do want to take one minute to comment on the City's  
8 position here, and the Debtor's position with respect to the  
9 City's position.

10 The Debtors have -- their argument is that on a  
11 fairly straightforward reading of the code, that's going to  
12 produce a terrible loss and damage to one creditor, the City of  
13 Glendale. They acknowledge it's going to be a terrible loss.  
14 They're going to lose taxes, they're going to lose an anchor  
15 tenant, lose jobs and the rest.

16 The NHL consent rights, Your Honor, with respect to  
17 relocation, as part of its 24 point analysis, takes into  
18 account the damages that would actually be inflicted on  
19 communities and municipalities where their teams are located,  
20 and tries, in the first instance, to alleviate that harm. And  
21 so the NHL is looking to what's best in the interests of all  
22 creditors, not some special subset of creditors.

23 And if there is a buyer for this team in Glendale --  
24 and we believe there is once the process is made clear that  
25 that's what's being sold in the first instance, because that's

1 what is available to be sold, then we think the municipality --  
2 if we find that buyer, the municipality isn't going to be  
3 harmed, nor are any of the legitimate creditors of this Estate.

4 Thank you. Unless Your Honor has questions for me?

5 THE COURT: You know, I don't think I have any  
6 questions for you at the moment. But I could change my mind.

7 MR. CLARK: Thank you, Your Honor.

8 THE COURT: Anybody else want to be heard?

9 Let me ask you a question, Ms. Freeman. How much  
10 time do you need versus some afternoon break?

11 MS. FREEMAN: We could have an afternoon break right  
12 now, is fine.

13 THE COURT: Well, but if you tell me you're going to  
14 take 10 minutes or less, we might as well press on. So you  
15 tell me how much time you think you need. Just --

16 MS. FREEMAN: You know, hopefully, 10 minutes, but I  
17 can't tell for sure.

18 THE COURT: You guys okay? All right. Let's press  
19 on for the moment.

20 MS. FREEMAN: All right. The chawks that have been  
21 presented talk about a hundred million dollars of damages and  
22 of cure costs. And I think that goes, in part, to the damages  
23 and the relocation fee issue.

24 Over our lunch break I went back and looked again at  
25 365 of the Bankruptcy Code, and 365(b)(1)(B) is, I think, the

1 portion that deals with this issue. And it says that the  
2 Debtor must compensate or provide adequate assurance that  
3 Trustee will compensate a party other than the debtor to such  
4 contract release for --

5 THE COURT: For any actual pecuniary loss.

6 MS. FREEMAN: For any actual pecuniary loss to such  
7 party resulting from such default.

8 There are no defaults.

9 THE COURT: Well.

10 MS. FREEMAN: That's the point, Your Honor. If you  
11 look --

12 THE COURT: Well, let me ask you this question.

13 MS. FREEMAN: Uh-huh?

14 THE COURT: If you prevail and you force a move to  
15 Hamilton over the objection of the NHL, seems like it's a  
16 default because their contract says that the Coyotes will be in  
17 Glendale, not Hamilton.

18 MS. FREEMAN: The Bylaws do not say that it must be  
19 there. And the Constitution does not say it must be there. It  
20 is their consent agreement which provides their particular  
21 location and gives them, as members of the NHL, the right to  
22 apply for a relocation in conjunction with a sale, and that's  
23 precisely what they're doing.

24 What is being asked of this Court is to find that any  
25 consent is deemed consent, because it's wrongfully withheld, or



1 that the relocation -- the territorial veto that's in the  
2 constitution needs to be excised out or treated as illegal,  
3 under the Raiders cases, so that it is not there, it's not  
4 something that is to be enforced, and there is no other --  
5 there's no monetary default. There's nothing that is a default  
6 under the constitution or bylaws being assigned.

7 THE COURT: Well let me ask it this way.

8 MS. FREEMAN: Uh-huh.

9 THE COURT: I don't think the Phoenix Coyotes are  
10 entitled to call up the NHL tomorrow and say, you know, we've  
11 decided to play all of our games in El Paso next year, and  
12 we're moving there. That would be a violation of the  
13 agreements collectively. The constitutions, the bylaws, the  
14 consent agreement. It's the Phoenix Coyotes, not the El Paso  
15 Coyotes. Just like it's the Denver Avalanche and the San Jose  
16 Sharks, et cetera. They all have their territory that they've  
17 agreed that's where they play their home games.

18 And so if you're right and you can force a relocation  
19 over their objection, it sounds to me like that's a default  
20 that triggers a § 365 -- 365(b)(1)(b) issue.

21 MS. FREEMAN: And respectfully, Your Honor, I  
22 disagree. Because what's being done here is asking this Court  
23 to look at the facts and determine that if they're refusing to  
24 consent it is wrongfully withheld, they're doing it on anti-  
25 trust -- on grounds that violate the anti-trust laws.

1           There is -- there certainly is an issue to be  
2 addressed that takes time --

3           THE COURT: Let me it very simply.

4           MS. FREEMAN: Sure.

5           THE COURT: Your position is that under the law --

6           MS. FREEMAN: Uh-huh.

7           THE COURT: -- your client can buy the Phoenix  
8 franchise and move it to Hamilton, right?

9           MS. FREEMAN: And have the opportunity to move to  
10 Hamilton be fairly considered and on its facts it will justify  
11 itself. It does justify itself.

12           THE COURT: Well let me finish the question.

13           MS. FREEMAN: Sure. I thought you had stopped,  
14 sorry, I wouldn't have interrupted.

15           THE COURT: As I read the anti-trust cases you all  
16 have cited, and particularly Raiders II --

17           MS. FREEMAN: Uh-huh.

18           THE COURT: -- and The Clippers, Hamilton, as least  
19 as of May 4<sup>th</sup>, 2009 was a league opportunity; it belonged to the  
20 NHL. And if you want to take that, they're entitled to be  
21 compensated for that. And it seems to me as I read the Code  
22 that's where 365(b)(1)(b) comes into play.

23           MS. FREEMAN: You know, and respectfully, Your Honor,  
24 I would say that there is no default when the Court orders that  
25 consent is wrongfully withheld. If you deem consent given --

1 if in fact you have a Maple Leafs, we're entitled to, you know,  
2 50 miles of territory and nobody else can play in that  
3 territory. If that is in fact an anti-trust violation, as we  
4 submit it is, then to play in that territory is not a default  
5 under the contract.

6 All of the provisions with respect to cures and with  
7 respect to adequate assurance, you carve out those provisions  
8 that are unlawful. You carve out those provisions --

9 THE COURT: Well you keep saying they're unlawful,  
10 but I think the Ninth Circuit anti-trust cases have said that's  
11 a factual issue --

12 MS. FREEMAN: Uh-huh.

13 THE COURT: -- and a business that doesn't fit  
14 particularly well into the anti-trust analysis. And you have  
15 to carefully evaluate all of the factors to determine whether  
16 some position by the League, vis-à-vis one of its members is or  
17 is not unlawful under the anti-trust laws. I know you say it  
18 is, but I don't think it's as easy as that.

19 MS. FREEMAN: Your Honor, if we were talking about --  
20 if we were talking about the Jets moving to Phoenix in the  
21 first place where it's a territory that nobody's ever been in  
22 before, it's not a traditional hockey territory, you don't know  
23 whether it's ever going to make money here, that takes a lot of  
24 thought and care and evaluation.

25 There seems to be no question at all that Hamilton is

1 hockey territory, that it has value up there. Certainly  
2 everything --

3 THE COURT: Well as I've said, my reading of all of  
4 this is it seems like everybody either asserts or grudgingly  
5 acknowledges that an NHL franchise in Hamilton has greater  
6 value than an NHL franchise in Glendale, Arizona.

7 MS. FREEMAN: That's right, it makes sense. It makes  
8 sense to be there.

9 And then you have on the other hand in Glendale,  
10 Arizona where it has lost money for 12 years, and lost money to  
11 the tune of \$30 million a year, and is likely to keep losing  
12 money, and their -- does it make sense to move from there, a  
13 failing place to a place where it in fact will gain money for  
14 the League? Will gain revenue for all of the League to share.

15 On its face it is reasonable. And so this Court can  
16 look in the same way that Raiders I did and say a decision by  
17 the Board of Governors to turn this down is not reasonable.  
18 We'll get -- then we get to timing in a minute. But first in  
19 terms of the reasonableness of a decision, if it is reasonable  
20 to do this, if it would be unreasonable and an abuse of the  
21 fiduciary duties that are owed to the Coyotes as one of the  
22 joint ventures in here to turn them down and to say you're  
23 forced to keep with this lousy franchise that is not making  
24 money and you will have to keep suffering and throwing out  
25 millions of dollars more or lose everything that you have in a

1 bankruptcy, if those are the alternatives, if that's the way  
2 the NHL is treating its partners, you know, you have to keep  
3 loaning money, and we're going to treat it all as equity. I  
4 mean, that is --

5 THE COURT: Well but I come back --

6 MS. FREEMAN: Okay.

7 THE COURT: -- I mean, if you're right Hamilton's a  
8 valuable location --

9 MS. FREEMAN: Right.

10 THE COURT: -- at least as of May 4<sup>th</sup> it was the  
11 League's opportunity, and under the adequate protection  
12 requirements and the actual pecuniary loss or any default  
13 requirements it seems like one way or the other somebody has  
14 got to protect that league right; whatever that is.

15 MS. FREEMAN: That's if there is a default. And Your  
16 Honor, that comes after the --

17 THE COURT: Now adequate protection -- adequate  
18 protection doesn't require a default. And I don't think this  
19 opportunity in Hamilton, whatever you want to call it, a  
20 relocation fee, an indemnity fee, an expansion opportunity,  
21 doesn't fit easily in the Bankruptcy Code either. It's kind of  
22 like the anti-trust laws on sports franchises. But it is an  
23 interest the League has. The Ninth Circuit has said so. And  
24 so somewhere within that rubric of those two sections that's  
25 got to be protected.

1 MS. FREEMAN: It certainly doesn't fall within a  
2 default within the adequate point, Your Honor, which is --

3 THE COURT: Well but I'll tell you. Where your  
4 contracts say you have to operate in location A --

5 MS. FREEMAN: Right.

6 THE COURT: -- and you say, well Judge, we'll buy it,  
7 we'll assume and assign, and we'll use our 363 powers, we'll  
8 take it. Well we want to move it a couple thousand mile to  
9 Hamilton, Ontario, because that's a great location, Judge.

10 MS. FREEMAN: Uh-huh.

11 THE COURT: I have to tell you as I sit here right  
12 now that sounds like that's a default that you'd have to --  
13 somebody's got to pay the League the actual pecuniary loss  
14 they've suffered as a result of that.

15 MS. FREEMAN: It the Court finds that is it  
16 unreasonable refuse a partner in this situation the right to  
17 move his team --

18 THE COURT: Of course bear in mind, they haven't  
19 refused anything yet.

20 MS. FREEMAN: Which gets to the timing in just a  
21 moment. But to the extent that they are refusing and treating  
22 a partner in the way that Mr. Moyes and his Coyotes are being  
23 treated, and say look, you have to keep --

24 THE COURT: Well, you know, I have to struggle with  
25 that a little bit. I mean, they've been paying the bills out

1 there since November. That seems like kind of a good partner  
2 to make. I wish my partners when I was practicing law paid my  
3 bills.

4 MS. FREEMAN: Of course they've refused to allow him  
5 to make money on his franchise for a long time too by refusing  
6 to let him sell -- refusing to let him sell to a person who  
7 would pay him money for it.

8 THE COURT: At least according to everything I've  
9 read until now there's been no application to transfer, no  
10 application to relocate.

11 MS. FREEMAN: There was not an application because  
12 there were repeated statements, may I sell it? And the answer  
13 is, no, we are not going to allow this team to move to southern  
14 Ontario. You know, so you end up with, all right, a completely  
15 sensible decision by the Coyotes to say let's see if having a  
16 judge oversee what is being done will allow -- will allow  
17 someone else, an independent view to determine whether this  
18 makes sense and should be done. And give that there is not a  
19 default.

20 With respect to -- let's see -- with respect to a  
21 determination -- another part that bears in -- that bears on  
22 this in terms of this league opportunity, that a league  
23 opportunity in terms of what an expansion franchise would be.  
24 And in a bankruptcy case -- I mean, in the Raiders case there  
25 was a reduction for what the value was in --

1 THE COURT: L.A. minus Oakland.

2 MS. FREEMAN: Oakland, right. In a bankruptcy  
3 context we're dealing with something I believe that's a little  
4 bit different. Because what you have is the value of this  
5 underlying franchise, the franchise itself, the entertainment  
6 product. That is something that was paid for by the  
7 predecessor of the Coyotes, and the Coyotes own that -- that  
8 value, and that is something that is paid to the Coyotes. It's  
9 not paid back to the League. To the extent the League has some  
10 additional amount, it's going to be the demographics of  
11 Hamilton as opposed to the underlying value of the product  
12 itself -- the base value so to speak of having a franchise.  
13 And to the extent that there is good will and actual  
14 expenditure of good will, you know, that's what the bylaws  
15 provide. The bylaws say, all right, we're going to take all of  
16 these components, and this is the amount that you are to pay.  
17 It does not say that we are to pay the League for this. If we  
18 pay the League for this then we can't be paying the Coyotes for  
19 this underlying fundamental value of the franchise itself.  
20 That's what the Coyotes have, and that's what they have to  
21 sell, and that's what they're trying to sell, and we need to  
22 have that money go to the estate and the creditors under the  
23 Bankruptcy Code. Well --

24 THE COURT: You have to decide --

25 MS. FREEMAN: Uh-huh.



1 THE COURT: -- whether the League has any economic  
2 rights in the Hamilton location, what those are, and then you  
3 have to reduce those by whatever the economic rights and value  
4 are of the Glendale operation. And Raiders seem to say awfully  
5 clearly, that's the League's, they own that.

6 MS. FREEMAN: But that is in the context of an anti-  
7 trust damages claim. And I would submit, Your Honor, that when  
8 you're talking about a valuation and what needs to be paid to a  
9 debtor's estate, it's a little bit different analysis than an  
10 anti-trust damages claim. Because the -- what is owned --

11 THE COURT: I hear you --

12 MS. FREEMAN: Uh-huh.

13 THE COURT: -- but I have to tell you, I haven't seen  
14 any law that has persuaded me otherwise. You know, what they  
15 did in the Raiders was they said this is basically -- a basic  
16 offset issue. The Raiders have damages because they were  
17 precluded from moving, and I think the jury calculated those.  
18 And then the Ninth Circuit said the trial court made a mistake  
19 because they didn't allow the League to prove and put on  
20 evidence and the jury decide what the offset was for the value  
21 of Los Angeles, which is a more valuable site than Oakland, and  
22 that should have been offset against those damages.

23 MS. FREEMAN: And then you get into the Clippers  
24 where the court's saying, we didn't say in Raiders that a  
25 league is entitled to something.

1 THE COURT: That -- you know, I'll certainly  
2 acknowledge that the language in Clippers almost makes you  
3 question what the decision was in Raiders II. But you've got  
4 to remember that the ultimate decision there was Clippers won  
5 summary judgment at the trial court, and the Ninth Circuit  
6 basically said that was wrong for a lot of reasons, and one of  
7 which is in their view this nebulous location valuation, and  
8 that you can't prove that solely under anti-trust law, you've  
9 got to prove it under some other factual predicate.

10 MS. FREEMAN: And the factual predicate is spelled  
11 out in the League's constitution.

12 THE COURT: Understood.

13 MS. FREEMAN: And it narrows it to the goodwill that  
14 is created in that location.

15 THE COURT: Understood.

16 MS. FREEMAN: Okay. With respect to the timing, Your  
17 Honor, you -- one other point. You were saying that we picked  
18 the bylaws we want, and we're not doing that. We're taking all  
19 of the bylaws and -- except for those that are carved out.  
20 We're not adding anything in. You can't add language in --

21 THE COURT: Except for those little ones about  
22 transferred relocation.

23 MS. FREEMAN: No. But that's not it either. I mean,  
24 we're just saying they need to -- they need to decide. And we  
25 think based upon what they have said repeatedly that they're

1 going to just say nope, we're keeping Hamilton.

2 THE COURT: Well, but the position today really the  
3 Debtor's position that you're standing hand and hand with then  
4 is that those ought to be not allowed judge and excised out  
5 under the powers of the Bankruptcy Code, and arguably under  
6 anti-trust law.

7 MS. FREEMAN: And with respect to the anti-trust law  
8 my partner has a few additional points on that.

9 THE COURT: Well, you know, you exceeded your ten  
10 minutes.

11 MS. FREEMAN: I said it may be a little more than  
12 that. With respect to timing, Your Honor, over the break I was  
13 handed one case and I would like to hand it up to the Court.  
14 I'm sorry I was only handed one copy, so let me tell everyone  
15 in the room it is Parr versus Triple L and J, and the citation  
16 is 107 P. 3d 1104. This is a lease withholding consent -- or a  
17 lessor withholding consent to an assignment of the lease. And  
18 what the court said is that a decision to delay consent amounts  
19 to withholding of consent. And that the court's not really  
20 going to distinguish between withholding consent and refusing  
21 consent; they're really one in the same when you're just  
22 holding back and delaying consent.

23 And that, Your Honor, gets to the point -- I will  
24 hand this to the Court at the end -- but that gets to the point  
25 of this is not one where it's going to take a lot of work to

1 figure out whether Hamilton is acceptable hockey market. You  
2 know, it is. Everybody said it has value, that's a good place  
3 to have a hockey team.

4 THE COURT: But --

5 MS. FREEMAN: It's not like moving to Phoenix.

6 THE COURT: But I think even the Ninth Circuit says  
7 that's not the only factor that one ought to be looking at in  
8 these situation.

9 MS. FREEMAN: Well frankly, the factors that the  
10 Ninth Circuit said you should be looking at are factors that  
11 relate to pro-competition. Looking at the factors that are --  
12 for moving into a particular location. And what the League has  
13 drafted by way of factors are mostly, how can we stay put? How  
14 can we force them to stay here as opposed to moving to another  
15 location. I frankly don't think that they need all of those  
16 factors, but given what they are they have their factors  
17 written down and we've shown how they are met.

18 If in fact you have an auction on the 22<sup>nd</sup> and  
19 somebody comes in and really does offer 150 million or 175  
20 million and you're able to see that yes, they don't have  
21 conditions and contingencies, and Glendale really does persuade  
22 its tax payer base that it can contribute \$20 million a year  
23 toward that and it's going to work out, then I can see that the  
24 Court's going to say well, I really have to look at that  
25 compared to the 212 million that is coming in.

1           But you'll find that out -- you'll find out on the  
2 22<sup>nd</sup> when these people come and bid whether or not there are any  
3 real offerors out there, somebody without contingencies who's  
4 really willing to put the money in, whether Glendale really is  
5 going to put up the money in the form of subsidies that will  
6 make something work. And if there is not then it's a really  
7 clear choice. It's got to be moved somewhere else. There's no  
8 sense in delaying it --

9           THE COURT: Well, except the League says --

10          MS. FREEMAN: -- for another year and causing that  
11 much loss to the unsecured creditors.

12          THE COURT: -- they'll pay to keep it where it is for  
13 a year and see what they can find in terms of another buyer.

14          MS. FREEMAN: And if you do that --

15          THE COURT: So there is another choice.

16          MS. FREEMAN: If you do that the unsecured creditors  
17 are the ones that lose, and lose big, including the largest  
18 unsecured creditor, Mr. Moyes. And as I said, the members of  
19 the National Hockey League I think would be aghast if they  
20 thought that every dollar that is loaned by their member owners  
21 is going to be equitably subordinated and just treated as  
22 equity. I doubt that that's the way that they perceive their  
23 membership interest and the loans that they make to their own  
24 clubs.

25          THE COURT: Well as I said, that's an issue for some

1 other day.

2 MS. FREEMAN: That is, but it does have an important  
3 point here. Because if this operates for another years, with  
4 another year of losses that are all secured loans by the NHL  
5 off the top, there's nothing for Mr. Sala's little unsecured  
6 creditors, and there's nothing for Mr. Moyes with his huge  
7 unsecured claim, and in the long run, in the end, Glendale has,  
8 you know, maybe one more year of rent and that's it.

9 THE COURT: Well in a way that begs the question.

10 MS. FREEMAN: Uh-huh.

11 THE COURT: Because to succeed on these motions, the  
12 Debtor, and to some extent PCE, have to say and convince the  
13 Court you've met the requirements under 365 and 363 to obtain  
14 the results you're seeking.

15 MS. FREEMAN: Right. I know. And we're trying  
16 desperately to do that and I think that we have.

17 THE COURT: Yes, you are.

18 MS. FREEMAN: With respect to -- with respect to the  
19 timing. Again, we think that this could be -- you know, there  
20 are admissions -- recognition that the Hamilton market makes  
21 sense. You've got a determination as to whether it is  
22 appropriate to leave Glendale at this point in time. The  
23 Court's seen all of the -- seen from the Scudder declaration  
24 and so forth, all of the efforts that have been made for a long  
25 time to try and market it and bring in buyers and nobody has

1 actually come in with hard money that isn't subject to  
2 contingencies and maybe this and maybe that, and then not  
3 nearly enough to make the dent in unsecured creditor claims  
4 that ours would make.

5           So in terms of figuring out what a relocation fee  
6 should be, it should not take that long. We would ask the  
7 Court to direct that -- you know, we're willing to do the  
8 mediation that Mr. Salerno has proposed. We're willing to do  
9 that. And we would ask the Court to say -- to tell the League,  
10 give us your determination, your estimation, your proposal as  
11 to what a relocation fee should be and tell us how you derive  
12 that. Not just, you know, pull a number out of the air, oh you  
13 know, \$100 million, I'm going to pull it out of the air. Tell  
14 us how you derived that, what actual money has been spent on  
15 developing goodwill in Hamilton -- we think it's none -- but  
16 you know, tell us what it is, show us that.

17           There have been -- there were relocation fees that  
18 were paid when the Jets moved down here to Phoenix and became  
19 the Coyotes, and there were relocation fees paid when the  
20 Nordiques moved to Colorado and became the Avalanche. What  
21 were those amounts? What were they? How did you determine  
22 them? You know, we've got a record within a relatively short  
23 period of time back here that we can compare, and let's see  
24 what those are, let's get that -- those facts, and let us sit  
25 down and determine and see whether we can reach a determination

1 as to what is a reasonable fee.

2 We think it's going to be far less than numbers that  
3 have been band aid about here, but let us see if a  
4 determination can be made, and then you will have the facts too  
5 that you can look at it and say, this really is a condition  
6 being imposed on assignment that is a violation of the anti-  
7 assignment provisions of the Bankruptcy Code, because it is so  
8 large that it is outside the scope of what is reasonable and  
9 what is appropriate, and therefore is a wrongful amount. But  
10 we'll have that evidence, we can present it.

11 I mean, as I said, Hamilton is not that hard. You  
12 know, yes, Hamilton is a place that has value. Coyotes in  
13 Phoenix no. So relocation per se to this particular area, this  
14 is not really a hard decision to make. It should not take that  
15 long to review the information. We'd like to know what they've  
16 done other than have an executive meeting yesterday saying oh,  
17 we'll have the executive committee look at this. I don't know  
18 whether they've done anything since we submitted it on June 1<sup>st</sup>,  
19 but you know, let's get going --

20 THE COURT: Well, I think they've done something,  
21 because they've asked for more information.

22 MS. FREEMAN: That was with respect again to the  
23 transfer application, and Mr. Balsillie's economic wherewithal,  
24 and we have provided that. Frankly again, I don't know what  
25 the financial background of the trustee's of his family trust



1 needs to be done, but we did provide that information.

2 THE COURT: All right.

3 MS. FREEMAN: I guess finally the -- we can get to  
4 this after the break, but the bona fide dispute issue, and that  
5 gets back to the anti-trust points that my partner had a few  
6 points to make. We're really talking about not a complaint or  
7 an answer, but whether it reaches the threshold that it could  
8 survive a motion for summary judgment. That's how I read  
9 Vortex.

10 So if you don't have such a slam dunk case that you  
11 could get a motion for summary judgment immediately --  
12 effectively a motion to dismiss standard, then you have bona  
13 fide dispute under Vortex, and I think we have enough to meet  
14 that.

15 THE COURT: Well, you know, that's (a) a bankruptcy  
16 issue, and I think it was the Vortex Fishing case --

17 MS. FREEMAN: Uh-huh.

18 THE COURT: -- seemed to lay out a pretty direct  
19 statement about how you analyze that and look at it.

20 MS. FREEMAN: Uh-huh.

21 THE COURT: And it seemed to me a little different  
22 than what you're asserting. It's not really a summary judgment  
23 statute, it's what went on between the parties, when they then  
24 came here and said we want to make a 363 sale judge, and we can  
25 do it free and clear because it's in bona fide dispute.

1 MS. FREEMAN: I don't know that we're -- I'll look  
2 at it over our break and see if I'm crossing, but I think we're  
3 saying effectively the same thing. You're looking at these  
4 facts --

5 THE COURT: Well you may think that, I'm not sure  
6 that I agree with that.

7 MS. FREEMAN: Okay. I will give this to Lori.

8 THE COURT: All right. Thank you.

9 MS. FREEMAN: Thank you.

10 MR. WEINZWEIG: Your Honor, in the interest of time  
11 and your wellbeing I'll pass.

12 THE COURT: You're very kind. I think Mr. Kroop and  
13 Mr. Clark are going to join you, right? Not a chance.

14 MR. CLARK: Not a change, that's right. Your Honor,  
15 I can wait until after we have a little break that I don't have  
16 to --

17 THE COURT: Well, how much time do you want? See  
18 here's my concern.

19 MR. CLARK: Ninety seconds?

20 THE COURT: Go.

21 MR. CLARK: There's been a lot of talk about there  
22 being one offer here and gee, where are the other offers, there  
23 aren't any other offers. Well that is an evidentiary matter,  
24 it wasn't what we understood today's hearing was all about.  
25 But one reason there aren't any other offers is because the

1 Debtors have been blocking access to the data room to bona fide  
2 bidders; Mr. Reinsdorf. And we'll put the proof on when Your  
3 Honor wants to hear that.

4 The gating issue --

5 THE COURT: I'm going to make it easy. If somebody  
6 wants access they ought to get access.

7 MR. CLARK: That's what we would have thought too,  
8 Your Honor.

9 THE COURT: Well the advantage of being the judge,  
10 that's what I'm telling everybody.

11 MR. CLARK: The gating issue that we understood we  
12 were here for, Your Honor, was as I've said before, what's for  
13 sale? Are the League's consent rights to be honored and a part  
14 of this process or are they not? And I think Your Honor  
15 acknowledged two hearings ago when we set this hearing up that  
16 until that gets clarified very difficult, it not impossible, to  
17 get others to come forward, spend the money and the time to  
18 develop a bid not knowing if they're bidding on a team in place  
19 or a team in Hamilton or a team in Hong Kong.

20 Last point, Your Honor. Ms. Freeman, she talked  
21 about the National Hockey League forcing Mr. Moyes to stay here  
22 in Glendale. She talked about how bleak the team's prospects  
23 have been here for many, many years. Losing money hand over  
24 fist. In fact there's a quote, this is what she called it.  
25 I'm from Delaware and I wouldn't have called this place what

1 she did, but she said here -- she called it "a losing place,"  
2 this is "a losing place." Well --

3 THE COURT: You remember my comment about lawyer  
4 rhetoric, right?

5 MR. CLARK: Right. it was her rhetoric about her  
6 place.

7 THE COURT: Okay.

8 MR. CLARK: Until Mr. Balsillie came along and told  
9 them to do so, Your Honor, Mr. Moyes never once went to the  
10 League and said let me move this team to someplace else. That  
11 should tell you something, Your Honor. There are other  
12 Mr. Moyes out here who want the team and want it here and now.  
13 Thank you, Your Honor.

14 MR. BALDIGA: I want 43 seconds, but I'll take much  
15 less.

16 THE COURT: Well you take 43 and then you tell me how  
17 much you want after he's done.

18 MR. KROOP: Twenty-five seconds, Your Honor.

19 THE COURT: I'm going to bet against it, but go  
20 ahead. The clock is starting.

21 MR. KROOP: All this has -- all the talk about the  
22 relocation fee has circled around one issue, and it was an  
23 assumption that the City is making. It is incorrect and I  
24 wanted to rise to simply point that out.

25 The relocation fee, to the extent it's payable in

1 whatever amount is not a claim against this estate. So  
2 deducting from purchases prices that amount -- whatever that  
3 amount is -- is not right. That's a -- relocation fees would  
4 have to be paid by the buyer separately, and that would go  
5 directly from the buyer to the League.

6 THE COURT: Okay.

7 MR. KROOP: Thank you.

8 MR. BALDIGA: I have an answer to the Court's  
9 question as to examples of interest and property under 363.  
10 And since you asked the direct question, direct answer. An  
11 employee's right to travel vouchers. Much more femoral than  
12 what is here.

13 TWA 322 F.3d 283. Employee discrimination claims,  
14 same decisions. Premiums under the Coal Act, Leckie Smokeless  
15 Coal, 99 F.3d 573, that's the Fourth Circuit. Estates interest  
16 in recapturing depreciation. PKR Convalescent, Bankruptcy  
17 Court Eastern District of Virginia, 189 BR 90. A statutory  
18 right to recapture depreciation in a case, same court, 189 BR  
19 90. And sales commissions, that's the Sixth Circuit at the Al  
20 Perry case, 503 F.3d 538.

21 So there's three circuit courts all with 363 cases  
22 dealing with interest that I would say are easily more femoral  
23 than what the City has here. Thank you.

24 THE COURT: All right, ladies and gentlemen I think  
25 we're done, but -- nope.

1 MR. SALERNO: Your Honor, you had asked us to bring  
2 to your attention -- I think you had delegated this to  
3 Ms. Freeman to be the conscience of the Court -- this issue of  
4 the timing on this relocation fee. That's what you'd said in  
5 the morning session.

6 THE COURT: I did. I wonder -- and I'll have to  
7 confess to all of you that I think maybe I should think about  
8 that one over night, and then if I decide that I want pull that  
9 one out and deal with it first I'll probably let everybody know  
10 some time tomorrow and --

11 MR. GOLDFEIN: Your Honor, we'd prefer to wait to  
12 hear what you have to say before we express any reaction. Or  
13 we may have a reaction and I don't want to say what it might  
14 be. In the event that we have to have a determination of a  
15 relocation fee which would be out of order in our normal  
16 consent process --

17 THE COURT: Well as I thought about it it may be  
18 somewhat out of order, on the other hand as I perceive the  
19 magnitude of the issues, if that means this is over then it  
20 might be better for everybody. But perhaps all of you ought to  
21 think about that over night too.

22 MR. GOLDFEIN: Your Honor, I understand what you're  
23 saying, but the problem is that the Board of Governors decides  
24 the relo fee issue in the context of a relocation application.  
25 And the decision is made as part and parcel of the relocation

1 decision. There has to be an approval of the relocation before  
2 it ever gets to a fee.

3 THE COURT: Well --

4 MR. GOLDFEIN: And so it involves the very consent  
5 right that's before the Court under bankruptcy laws.

6 THE COURT: -- you have to confront the possibility  
7 that I may conditionally grant these motions and require the  
8 League to confront that ASAP before the 22<sup>nd</sup>. And if it goes  
9 down that path then the League's going to have to do that.

10 MR. GOLDFEIN: Well as I said earlier, we can decide  
11 the transfer of ownership issue in a much quicker basis than we  
12 can relocation. For us to decide -- or be ordered to decide  
13 relocation by the 22<sup>nd</sup> would basically either effectively deny  
14 us our consent or lead to a decision that would not, we don't  
15 believe, be based on a proper consideration on the merits.

16 THE COURT: Well, I am not making a ruling, but one  
17 possibility is I'm going to grant the motions subject to  
18 resolving the relocation issue and cost, and the League's going  
19 to have to them move whatever the powers are quickly to  
20 confront that.

21 MR. GOLDFEIN: I understand what you're saying, Your  
22 Honor.

23 THE COURT: Anything else?

24 MR. CLARK: No, Your Honor.

25 THE COURT: All right.

1 MR. SALERNO: Your Honor, on behalf of everyone, we  
2 truly appreciate the Court and your staff's time. We know --

3 THE COURT: You should really thank the staff.

4 MR. SALERNO: They're the real power anyway. Thank  
5 you very much, Judge.

6 THE COURT: We adjourned. Thank you.

7 (Proceedings Concluded)

8  
9  
10  
11  
12 I certify that the foregoing is a correct transcript from  
13 the record of proceedings in the above-entitled matter.  
14

15 Dated: June 12, 2009

*Harold Ferguson*

16 AVTranz  
17 365 E. Coronado Road  
18 Suite #100  
19 Phoenix, AZ 85004-1525  
20  
21  
22  
23  
24  
25