

Nick Dranias (168528)
Scharf-Norton Center for Constitutional Litigation at the
GOLDWATER INSTITUTE
500 E. Coronado Rd.
Phoenix, AZ 85004
(602) 462-5000
csitren@goldwaterinstitute.org
Attorney for Amici/Interested Persons Glendale Taxpayers

**UNITED STATES BANKRUPTCY COURT
DISTRICT OF ARIZONA**

In re:) No. 2-09-bk-09488-RTB
)
DEWEY RANCH HOCKEY, LLC, COYOTES) Chapter 11
HOLDINGS, LLC, COYOTES HOCKEY, LLL,)
and ARENA MANAGEMENT GROUP, LLC,) (Jointly Administered)
)
Debtors.) MOTION TO FILE AMICUS
) BRIEF/CONDITIONAL BID
This filing applies to all debtors.) OBJECTION ON BEHALF OF
) GLENDAL TAXPAYERS

The Goldwater Institute represents the following City of Glendale taxpayers who oppose illegal City subsidies and concessions to new owners of the Phoenix Coyotes hockey team: Gary Livingston, Joe Cobb, Patrick McHugh, Kimberly Ruff, Adam Marsh, Susan Goyette Stevens, Tim Weaver, and Sarah Raybon. Despite a public records request and a lawsuit whose outcome was to require the City to produce documents pertaining to proposed deals, the Institute has been unable to access any public records of subsidy negotiations or possible deals involving City funds, though it is clear that such discussions are taking place. Because the possible terms are entirely unknown, taxpayers are not in a position to “object” to the approval of a particular Glendale sale in this Court as permitted in the July 6, 2009 Order Approving Bid Procedures. However, taxpayers have a significant interest in the use of any public funds for a bidder, as they will ultimately be accountable for them. They request leave to file

this amicus brief/conditional bid objection regarding the constitutionality of a subsidy and request that this Court consider it when determining whether a buyer is an “acceptable” potential bidder.

Material Facts

At least a year ago, the current owners of the Coyotes began requesting annual concessions of \$12-15 million from the City of Glendale (BK Docket No. 291 at ¶¶ 19, 24, 26, 33, & 43). Several months ago, that request increased to at least \$20 million annually (BK Docket No. 290 at ¶¶ 6, 10, 13). To date, the City has been heavily involved in negotiating some sort of “deal” with new potential Coyotes buyer Glendale Hockey, LLC and Glendale Arena, LLC led by Jerry Reinsdorf. *See, e.g.*, July 7, 2009 email from attorney for Reinsdorf to City Manager Ed Beasley, City Attorney Craig Tindall, and others (regarding a conference call on July 7, 2009 “to see if our group has a deal with the City”) (Exh. 1); similar email on July 21, 2009 (Exh. 2); (*see also* BK Docket No. 425 at ¶ 2 (City admitting to ongoing negotiations with potential buyers)).

It appears that a deal may take the form of renegotiating the terms of the team’s 30-year arena lease agreement with the City (*see* BK Docket No. 373 at Exh. A, p. 2) (Reinsdorf conditioning application for bid on “enter[ing] into a new Arena Management, Use and Lease Agreement (and related agreements) with the City of Glendale”). However, because taxpayers are unable to access any public records of the negotiations, a City deal might take other forms as well, and may occur with Reinsdorf or the alternative Glendale bidder, Ice Edge Holdings, LLC. Regardless, it could involve taxpayer resources.

This Court's approval or rejection of a potential bidder might be the sole protection against a deal for Glendale taxpayers. Although the City is presumed to represent the taxpayers' interest in this Court, the City has refused to disclose any public records of substantive negotiations with potential bidders, despite a court order in a public records request lawsuit filed by the Goldwater Institute in Maricopa County Superior Court (Case No. CV 2009-020757). This makes it impossible for taxpayers to advise their elected officials what paths to pursue and avoid, and it forecloses the opportunity for them to object in this Court to a particular sale or term by today's deadline.

Although the City presumably must approve any new deal at a public hearing, such a hearing may prove meaningless to taxpayers who want to offer input on the fate of the City's arena and now bankrupt tenant. The City stated on July 29, 2009 in a hearing in the Goldwater Institute's public records lawsuit that the team's lease agreement is a very "complex" document amounting to hundreds of pages, and that its negotiations take many "twists and turns." The City is well aware of the pressure to develop and approve an agreement in a very compressed period of time. By the time such a complex and lengthy proposal finally reaches the Council for approval, it may be unlikely that the taxpayers will have any meaningful input. Additionally, as the court in the public records lawsuit stated in its order filed this morning, the City's code may not require it to issue public notice of a hearing in sufficient time for taxpayers to "digest, analyze, and prepare to comment on any proposed agreement and/or concessions."

Furthermore, should the City approve a deal by an emergency measure, which the City may believe is appropriate given the tight deadlines involved in this case, and if such

action is proper, the act takes effect immediately and thus precludes taxpayers from referring it to the ballot (*see* Glendale City Charter Art. VII, § 7). Therefore, taxpayers have an important interest in ensuring that this Court does not approve as an “acceptable” bidder anyone whose bid or whose success with the team demands or otherwise relies on an illegal subsidy or City assistance. Should this Court have any concern over the potential legality, it may certify the question to the Arizona Supreme Court, as it has done before. *In re Krohn*, 203 Ariz. 205, 206, 52 P.3d 774, 775 (2002).

Discussion

The Arizona Constitution categorically prohibits municipalities from “giv[ing] or loan[ing] its credit in the aid of, or mak[ing] any donation or grant, by subsidy or otherwise, to any individual, association, or corporation.” Ariz. Const. Art. IX, § 7 (“Gift Clause”).¹ The “operative word” is “assist,” meaning “to give support or aid to, especially in some undertaking or effort.” *City of Tempe v. Pilot Properties, Inc.*, 22 Ariz. App. 356, 362, 527 P.2d 515, 521 (1974) (involving assistance to facilitate the presence of spring training in Tempe). In the context of the Gift Clause, “assist” “has connotations of the city receiving less than the fair market value . . . thus resulting in aid or support.” *Id.*, 22 Ariz. App. at 362, 527 P.2d at 521-22. For example, forgiving debts owed to government violates the Gift Clause. *Puterbaugh v. Gila County*, 45 Ariz. 557, 564-66, 46 P.2d 1064, 1067 (1935). This is particularly relevant to Glendale’s potential negotiations with the Coyotes team, which owes payments the City.

¹ Some other state constitutions make explicit exceptions for promotion of economic development through grants, loans, or investments in private enterprises, *see, e.g.*, Okla. Const. Art. 10, § 15(B), but ours does not.

Arizona's Gift Clause "represents the reaction of public opinion to the orgies of extravagant dissipation of public funds by counties, townships, cities, and towns in aid of the construction of railways, canals, and other like undertakings," and "was designed primarily to prevent the use of public funds raised by general taxation in aid of enterprises apparently devoted to *quasi* public purposes, but actually engaged in private business'." *State v. Northwestern Mutual Ins. Co.*, 86 Ariz. 50, 53, 340 P.2d 200, 201 (1959) (citation omitted). Hence the Gift Clause "was intended to prevent governmental bodies from depleting the public treasury by giving advantages to special interests . . . or by engaging in non-public enterprises'." *Wistuber v. Paradise Valley Unified Sch. Dist.*, 141 Ariz. 346, 349, 687 P.2d 354, 357 (1984) (citations omitted).

A challenged subsidy must satisfy several factors, taking a "panoptic" view of the transaction in question. *Id.* For example, an agreement violates the Gift Clause if it is not for a public purpose or if "the value of the public money or property is not so much greater than the value of the benefit received by the public that the exchange of the one for the other is disproportionate." *Maricopa County v. State*, 187 Ariz. 275, 279-80, 928 P.2d 699, 703-04 (App. 1996). Beyond any "surface indicia of public purpose . . . [t]he reality of the transaction both in terms of purpose and consideration must be considered." *Wistuber*, 141 Ariz. at 349, 687 P.2d at 357.

The private or personal interest served is also a factor. *Turken v. Gordon*, 220 Ariz. 456, ¶ 31, 207 P.3d 709, 720 (App. 2008) (review pending in the Arizona Supreme Court, CV09-0042PR). A court further asks:

Is money paid or property transferred to a private enterprise? What is the direct object of the public payment, not just its indirect effects? Are the claimed benefits merely the result of private activities, or do they directly result from the government's actions? Does the public expenditure

purchase property that will be owned or controlled by the government?
Do the funds provide a public service, or employ staff or agents who
provide such a service? Do the payments pay a private party to engage in
private business?

Id. at ¶ 33, 207 P.3d at 720-21. As the court observed in *Pilot Properties*, 22 Ariz. App. at 362, 527 P.2d at 521, “A donation of public property to a private corporation for a purpose that is deemed by the city fathers to be for the public good, in our opinion falls squarely within the prohibition of our constitution and the purpose of such a provision as determined by our Supreme Court.”

In *Turken*, the Court of Appeals rejected finding a public purpose for a city’s \$97.4 million sales tax rebate for a multi-use retail, dining, and residential development that would produce jobs, stimulate economic development, generate sales tax revenues, reduce traffic, provide free public parking, and develop an “urban core.” *Turken*, 220 Ariz. at ¶ 34, 207 P.3d at 721. The court found these benefits to be only indirect and “filtered through the operation and success of those private activities.” *Id.* at ¶ 45, 207 P.3d at 723. “Even if the potential benefits are great, they are not sufficient to overcome the prohibition in the Gift Clause against donations or subsidies to private persons.” *Id.* at ¶ 47, 207 P.3d at 724.

Therefore, under *Turken*, it is irrelevant that the public benefits may allegedly outweigh a potential subsidy or concession to incent new Coyotes owners to keep the team in Glendale. As a threshold matter, the City’s expected public benefits from the team were drastically overstated by perhaps as much as 50% (*compare* annual revenue projections from the arena and surrounding commercial center in the current Arena Management, Use and Lease Agreement, Exhibit A, *with* actual revenues received over the past six lease years, which measure approximately half the projected amounts). Thus,

Glendale's actual losses if the team relocates are significantly less than the City has asserted, and the City has not subtracted from anticipated losses the potential revenues and benefits of using the arena for other purposes. Regardless of these facts, the Court of Appeals has foreclosed any argument that a subsidy passes the Gift Clause test as long as the City comes out ahead in public benefits. When a city structures an agreement as a 50% sales tax rebate so that it *necessarily* reaps revenues greater than zero, that cannot satisfy the prohibition on gifts. *See Turken*, 220 Ariz. at ¶ 50, 207 P.3d at 724-25. Therefore, any subsidies or concessions by the City of Glendale that may be necessary to keep the team in the City's arena will not satisfy the Gift Clause by virtue of any projected or actual losses the City may experience if the team relocates.

In addition to public purpose, which would not be present if the beneficiary is a private for-profit entity, a court must also find adequate consideration. Arizona courts have expressly rejected the argument "that what constitutes a 'substantial consideration' is within the discretionary powers of the city council" *Pilot Properties*, 22 Ariz. App. at 362, 527 P.2d at 521; *accord*, *Wistuber*, 141 Ariz. at 349, 687 P.2d at 357. Rather, a court will evaluate the exchange and "if the consideration . . . is 'so inequitable and unreasonable that it amounts to an abuse of discretion,' a gift or donation by way of a subsidy has been bestowed . . . which is prohibited by the Arizona Constitution." *Pilot Properties*, 22 Ariz. App. at 363, 527 P.2d at 522 (citation omitted).

As a threshold matter, the City must engage in due diligence to measure the adequacy of consideration. It must act with "particularized information" to estimate the values exchanged in any agreement. *Ariz. Center for Law in the Public Interest v. Hassell*, 172 Ariz. 356, 369, 837 P.2d 158, 171 (App. 1991). Of course, the consideration

received by the City must be real and not illusory. “A promise to do something which a party is already legally obliged to do is no consideration for a contract.” *J.D. Halstead Lumber Co. v. Hartford Accident & Indemnity Co.*, 38 Ariz. 228, 235, 298 P. 925, 927 (1931); *accord*, Ariz. Op. Att’y Gen. No. I80-027, 1980 WL 28003, at *3 (Feb. 29, 1980). Likewise, it cannot be adequate consideration to satisfy the Gift Clause. Because a lease agreement already exists between Glendale and the Coyotes team, it is important to scrutinize any new provisions to determine whether the team is not doing anything it was not already required to do.

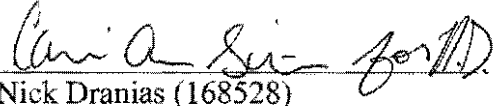
The *Turken* decision by the Court of Appeals is presently on appeal to the Arizona Supreme Court. Should any deal before this Court present a question of public subsidy, we believe the Court should certify the question to the Arizona Supreme Court. The last thing any party to this transaction—especially the taxpayers, who are responsible for picking up the tab but whose interests plainly are not represented by the City—should want is to have a deal approved that will be the subject of extensive litigation. The fact that the City has insisted on negotiating under cover of darkness suggests that it wants an agreement rammed through this Court without airing the important legal issues such an agreement may raise. A bid that is legally questionable cannot be an acceptable bid.

Conclusion

Because Glendale refuses to release any public records, taxpayers are unable to put a bid objection in context, or even determine whether an objection is warranted. However, it is clear that the City is in negotiations with potential buyers, and those negotiations almost certainly involve giving up some public benefits, whether or not in exchange for something of equal value. Glendale taxpayers request that this Court take

note of Arizona's Gift Clause and consider its potential implications when deciding on an acceptable bidder, and certify the question of constitutionality of any subsidy or lease agreement or potential subsidy or agreement to the Arizona Supreme Court before placing its imprimatur upon a new owner, or alternatively proceed with bids from potential owners that do not raise such questions.

RESPECTFULLY SUBMITTED this 31st day of July, 2009 by:


Nick Dranias (168528)
**Scharf-Norton Center for
Constitutional Litigation at the
GOLDWATER INSTITUTE**
500 E. Coronado Rd.
Phoenix, AZ 85004
(602) 462-5000
csitren@goldwaterinstitute.org
*Attorney for Amici/Interested Persons
Glendale Taxpayers*

ORIGINAL of the foregoing E-FILED and E-MAILED and MAILED this 31st day of July, 2009, to:

Thomas J. Salerno, Esq.
Jordan A. Kroop, Esq.
Kelly Singer, Esq.
SQUIRE SANDERS & DEMPSEY LLP
40 N Central Ave #2700
Phoenix, AZ 85004-4498
tsalerno@ssd.com
jkroop@ssd.com
ksinger@ssd.com
Attorneys for Debtors

Larry L. Watson, Esq.
Connie S. Hoover
OFFICE OF THE U.S. TRUSTEE
230 N First Ave #204
Phoenix, AZ 85003-1706
larry.watson@usdoj.gov
connie.s.hoover@usdoj.gov

Susan M. Freeman, Esq.
Stefan M. Palys, Esq.
LEWIS AND ROCA LLP
40 N Central Ave
Phoenix, AZ 85004-4429
sfreeman@lrlaw.com
spalys@lrlaw.com
Attorneys for PSE Sports & Entertainment and for S&E Interim Facility Corporation

Steven M. Abramowitz, Esq.
VINSON & ELKINS LLP
666 Fifth Ave 26th Fl
New York, NY 10103-0040
ssabramowitz@velaw.com
Attorneys for SOF Investments LP, White Tip Investments, LLC, and Donatello Investments, LLC

Donald L. Gaffney, Esq.
SNELL & WILMER LLP
One Arizona Center
Phoenix, AZ 85004-2202
dgaffney@swlaw.com
Attorneys for SOF Investments LP, White Tip Investments, LLC, and Donatello Investments, LLC

Richard H. Herold, Esq.
HINSHAW & CULBERTSON LLP
3200 N Central Ave #800
Phoenix, AZ 85012
rherold@hinshawlaw.com
Attorneys for Aramark

Lori Lapin Jones
LORI LAPIN JONES PLLC
98 Cutter Mill Rd #201 N
Great Neck, NY 11021
ljones@jonespllc.com
Attorneys for BWD Group

Albert Turi
BWD GROUP LLC
BWD Plaza
PO Box 9050
Jericho, NY 11753-8950

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

William R. Baldiga, Esq.
Andrew M. Sroka, Esq.
BROWN RUDNICK LLP
One Financial Center
Boston, MA 02111
wbaldiga@brownrudnick.com
asroka@brownrudnick.com
Attorneys for City of Glendale, Arizona

Scott B. Cohen, Esq.
ENGELMAN BERGER PC
3636 N Central Ave #700
Phoenix, AZ 85012
sbc@engelmanberger.com
Attorneys for John Breslow

Mark A. Nadeau, Esq.
Shane D. Gosdis, Esq.
DLA PIPER LLP (US)
2525 E Camelback Rd #1000
Phoenix, AZ 85016-4245
mark.nadeau@dlapiper.com
shane.gosdis@dlapiper.com
Attorneys for Lease Group Resources, Inc.

Arthur E Rosenberg Esq
HOLLAND & KNIGHT LLP
195 Broadway
New York, NY 10007-3189
arthur.rosenberg@hkllaw.com
Attorneys for Facility Merchandising Inc.

Louis T.M. Conti, Esq.
HOLLAND & KNIGHT LLP
100 N Tampa St #4100
Tampa, FL 33602
louis.conti@hkllaw.com
Attorneys for Facility Merchandising Inc.

Carolyn J. Johnsen, Esq.
Peter W. Sorensen, Esq.
JENNINGS STROUSS & SALMON PLC
201 E Washington St
Phoenix, AZ 85004-2385
cjjohnsen@jsslaw.com
psorensen@jsslaw.com
Attorneys for Jerry Moyes

James E. Cross, Esq.
Brenda K. Martin, Esq.
Warren J. Stapleton, Esq.
OSBORN MALEDON PA
2929 N Central Ave #2100
Phoenix, AZ 85012-2794
jcross@omlaw.com
bmartin@omlaw.com
wstapleton@omlaw.com
Attorneys for National Hockey League Player's Association

Jeffrey Freund, Esq.
BREDHOFF & KAISER PLLC
805 15th St NW
Washington, DC 20005
jfreund@bredhoff.com
Attorneys for National Hockey League Player's Association

Sean P. O'Brien, Esq.
GUST ROSENFELD PLC
201 E Washington St #800
Phoenix, AZ 85004-2327
spobriein@gustlaw.com
Attorneys for Drawbridge Special Opportunities Fund LP

Richard W. Havel, Esq.
SIDLEY AUSTIN LLP
555 W Fifth St 40th Fl
Los Angeles, CA 90013-1010
rhavel@sidley.com
Attorneys for Drawbridge Special Opportunities Fund LP

Ivan L. Kallick, Esq.
Ileana M. Hernandez, Esq.
MANATT PHELPS & PHILLIPS
11355 W Olympic Blvd
Los Angeles, CA 90064
ikallick@manatt.com
ihernandez@manatt.com
Attorneys for Ticketmaster

Thomas Allen, Esq.
Paul Sala, Esq.
ALLEN SALA & BAYNE PLC
1850 N Central Ave #1150
Phoenix, AZ 85004
psala@asbazlaw.com
tallen@asbazlaw.com
Attorneys for the Official Joint Committee of Unsecured Creditors

William Novotny, Esq.
MARISCAL WEEKS McINTYRE &
FRIEDLANDER PA
2901 N Central Ave #200
Phoenix, AZ 85012-2705
William.novotny@mwmf.com
Attorneys for Coyote Center Development LLC

Jonathan K. Bernstein, Esq.
Andrew J. Gallo, Esq.
BINGHAM McCUTCHEN LLP
One Federal St
Boston, MA 02110
Jon.bernstein@binghama.com
Andrew.gallo@bingham.com

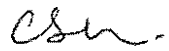


Exhibit 1

Conf call re teamarena
From: Klein, Adam R. [adam.klein@kattenlaw.com]
Sent: Tuesday, July 07, 2009 8:31 AM
To: Lynch, Art; Beasley, Ed; Tindall, Craig; tlhocking@msn.com
Cc: flatbush@chisox.com; [REDACTED]; [REDACTED]; Padmanabhan,
Ram
Subject: Conf call re team/arena

We would like to have a conf call today at 4:00 AZ time (6:00 Chicago time) to see if our group has a deal with the City such as to be able to move forward with a bid for the team. The dial in info is as follows:

888-232-0366
Code: 908315
Adam R. Klein
Katten Muchin Rosenman LLP
312-902-5469

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Exhibit 2

From: Klein, Adam R. [adam.klein@kattenlaw.com]
Sent: Tuesday, July 21, 2009 9:52 AM
To: Lynch, Art; Beasley, Ed; Tindall, Craig; Flatbush; John Kaites; Tduckt@yahoo.com
Cc: Padmanabhan, Ram
Subject: Coyotes

My understanding is that we will be having a noon AZ time (2:00 Chicago time) conference call to discuss outstanding issues on the term sheet that need to be resolved by Thursday so our buyer group can feel comfortable making a bid on Friday. The dial in is as follows:

888-232-0366
code: 908315

ADAM R. KLEIN
Partner
Katten Muchin Rosenman LLP
525 W. Monroe Street / Chicago, IL 60661-3693
[REDACTED] (312) 577-8739
adam.klein@kattenlaw.com / www.kattenlaw.com

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