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BREAD AND CIRCUSES: FINANCING SPORT ARENAS, AND PROACTIVELY MANAGING THE RISKS OF DEFAULT AS TO COVENANTS TO PLAY

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A. The Economist's Viewpoint

The competition between cities to host major sporting events and professional sports franchises can often be as fierce at the sporting contests themselves. Cities can market themselves to league and event officials in a number of ways in order to make themselves attractive as a host site. While economic and demographic factors such as population, income, and the presence of major potential corporate partners play an important role in franchise[1] location, often the single largest factor in luring a new franchise, or preventing the relocation of an existing team, is a city's decision to expend significant public funds on a new stadium or arena.

Since 1990, 125 of the 140 teams in the in the five largest professional sports leagues in the U.S. and Canada[2] have begun play in new or significantly refurbished facilities. Construction costs alone for major league professional sports facilities have totaled in excess of $30 billion in nominal terms over the past two decades with over half of the cost being paid by the public.[3] And the subsidies provided to spectator sports by municipal and state authorities do not stop there. Sports teams often receive tax breaks on retail and food sales within an arena, below market rental rates on municipally owned stadiums, preferential property tax rates, generous revenue sharing from non-sporting events, and even occasionally direct cash payments. In addition, such subsidies are not limited to the big leagues but often extend to minor league teams in smaller venues and less populous towns. For this level of public investment, it is reasonable to ask the extent to which municipalities are getting a reasonable return on their investment.

Sports leagues will frequently claim that franchises bring significant economic rewards to the communities "lucky" enough to attract them, and it is easy enough to find a consultant for hire who will produce an economic impact analysis that demonstrates the magnitude of these benefits. There are three major reasons to be highly skeptical of any economic study purporting to find large benefits from sports franchises, however.

First, economic impact reports and cost benefit analyses are often paid for by sports boosters themselves in an attempt to justify elicit taxpayer subsidies. Since the entities paying for the studies have a vested interest in the outcome of the

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[1] The economics of hosting one-off sporting events ranging from "mega-events" such as league All-Star Games, the Olympics, or World Cup down to smaller events such as marathons or golf and soccer tournaments are similar to the economics of hosting sports franchises. The remainder of this section will generally refer specifically to the economics of sports franchise location, but the ideas can be generalized to sporting events as well.

[2] The these five leagues, in the order of average attendance, are the National Football League (NFL), Major League Baseball (MLB), Major League Soccer (MLS), National Basketball Association (NBA), and National Hockey League (NHL).

[3] See "Financing Professional Sports Facilities," (with Robert Baade) in Financing for Local Economic Development, 2nd ed., Zenia Kotval and Sammis White, eds., (NewYork: M.E. Sharpe Publishers, 2012).

investigation, there is ample reason to question to veracity of any numbers that are reported. Even those impact analyses not directly sponsored by leagues, teams, or event organizers, tend to emphasize the potential benefits rather than the potential costs. In fact, it is not unusual for an economic impact analysis to completely omit the incremental direct costs of hosting a sporting event such as security, sanitation, transportation, or event organization. It goes without saying that it is fairly easy to produce a rosy cost benefit analysis when costs are not counted.

Second, even aside from the exaggerated revenue and underestimated costs that can accompany any commissioned study, there are significant theoretical problems associated with the methodology used in most economic impact studies. Economic studies produced by consulting firms typically estimate the impact of a sports team by measuring consumer expenditures on sports and related items and then applying a multiplier to account for money spent on sports being spent and re-spent in the local economy. While this technique may do a reasonable job of estimating gross spending associated with a sports team, it typically does a very poor job of estimating net spending associated with sports for several reasons.

The first theoretical problem with most impact reports is the substitution effect. Most fans at a regular season sporting event are local residents who would have spent money elsewhere in the metropolitan economy in the absence of a local franchise. While an NHL team, for example, clearly generates consumer spending, a significant portion of that spending is not new to the municipality but instead comes at the expense of other local entertainment or spending options. In other words, the presence of team simply shifts around spending patterns without necessarily increasing total spending in the economy.

In many cases, the same concept also applies to spending by out-of-town visitors. Unless the tourist has come to town specifically for an athletic event, the casual visitor would almost certainly have spent money in elsewhere in the economy in the absence of a local game. For example, a lawyer who travels to a conference in another state may decide to attend an NBA game while in town. Although any expenditures by the lawyer at the game would normally be considered new spending to the area and serve to increase the economy, it is unrealistic to believe that if the local NBA team had been on the road during the lawyer's visit, the traveling attorney would have barricaded him or herself in his room, engaging in no other expenditures of any type. Again, the NBA game serves to as a substitute for other potential spending in the local economy.

Another issue with sporting events is that the large crowds and congestion they generate can serve to dissuade other economic activity from occurring. Other than eating and drinking establishments, businesses in the vicinity of major league sports stadiums tend to see a reduction in business on game days as parking and traffic difficulties make non-sports fans reluctant to brave the crowds in the neighborhood.

Finally, spending at sports venues tends to be less likely to stay in the local economy than spending on many other entertainment options. The athletes themselves tend to earn roughly 50 percent of all revenues generated by a top-level professional sports franchise; however, professional athletes are much like likely to live in the same metropolitan area in which they work compared to most workers. For example, only about 29% NBA players live in the same city as their team.[4] Thus, a large portion of the money fans pay for tickets as well as hot dogs or beer at the game, finds its way into the players' pockets and leaves town with the athletes instead of recirculating in the local economy. Overall, even when economic impact statements are done well, they are still prone to significantly overestimate the net benefits of an event.

The third major reason to discount the accuracy of industry-generated economic impact statements is the massive amount of scholarly literature written by independent economists not associated with sports teams that clearly debunks the claim that sports franchises, new stadiums, and mega-events generally lead to significant economic gains. The academic studies typically examine economic conditions in a city, including factors such as employment, tax collections, personal income, GDP, or visitor arrivals, before, during, and after a change a city's sports environment. These studies, which look at actual data rather than consultants' projections, uniformly find economic effects that are fraction of those claimed by sports boosters.[5] As a general rule of thumb, academic economists suggest taking any economic impact number advertised by a promoter and simply moving the decimal point one place to the left for a more realistic estimate of the true impact of a sporting event.

Of course, direct economic impact is not the only reason used by sports teams to justify sports subsidies. Sports teams and events can serve as advertising for a metropolitan area and as a way to "put a city on the map." Undoubtedly, there is some truth to this claim. Placing a value on this publicity is difficult, however, and simply hosting a professional team or mega-event doesn't suddenly turn any other city into New York City. Similarly, while Green Bay, Wisconsin obviously has higher name recognition than its otherwise similar neighbors, Duluth or Osh Kosh, there is little evidence that the fame of the Green Bay Packers brings the city much additional tourism or economic activity.

Sports stadiums are also often used as an anchor to promote local economic development in otherwise blighted areas or encourage the redevelopment of downtown or inner city areas. Numerous cities have followed the model of Camden Yards in Baltimore to varying degrees of success, but cities should use

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[4] Seigfried, John and Andrew Zimbalist, (2002), "A Note on the Local Economic Impact of Sports Expenditures," Journal of Sports Economics, 3:4, 361-366.

[5] See, among others, Dennis Coates and Brad Humphreys, "Do Economists Reach a Conclusion on Sports Franchises, Stadiums, and Mega-Events?" Econ Journal Watch, vol. 5(3), pages 294-315, September, 2008.

this technique with caution. First, stadiums tend to not be very good at or very interested in generating neighborhood activity. The stadium tenant doesn't earn revenues from fans frequenting nearby restaurants or retailers, and thus modern stadiums are designed to drive traffic inside the stadium. In fact, many facilities resemble medieval castles with fortress-like walls surrounded by a moat of parking lots. While such a design is effective at earning money for team owners, it is not conducive to neighborhood economic development. Furthermore, even in cases where a stadium leads to buildup in other nearby entertainment and dining establishments, as previously mentioned, the rise of these entertainment districts often comes at the expense of restaurants and activities elsewhere in the city.

Finally, it is often suggested that sports teams serve as a cultural amenity that serves to improve the quality of life for a city's residents. It is here that academic economists find the most agreement with sports boosters. There is no doubt that spectator sports are a popular pastime for many fans around the country, and there is clear evidence that both professional sports and mega-events can improve citizens' self-reported levels of happiness. Making local residents happy is without question a reasonable goal of government. However, while sports may make people happy, they are unlikely to make people rich, so it is important that government officials are making decisions for the right reasons.

So, what actions should municipal leaders take in response to sports teams looking for handouts? First and foremost, cities should take any economic impact statement with a grain, and preferable a whole shaker, of salt. The data clearly indicate that sports infrastructure, franchises, and mega-events have somewhere between little and no real impact on host cities' economies. Second, to the extent possible, cities should present a united front to counter the monopoly power of the big sports leagues. Leagues are more than willing to pit cities against one another for a limited number of franchises, and teams have extracted billions of dollars of stadium and arena subsidies from cities on the threat of relocation. The same reasoning applies for multiple jurisdictions within a metropolitan area. There is no credible threat that the Yankees would abandon the New York City area, but the team can still play various wards or suburbs against each other in order to extract the largest subsidies. Next, subsidies should be structured so that the costs fall as much as possible on those who benefit from sports. Thus, designating taxes from event parking, ticket sales, concessions, or nearby restaurants, or tax increment financing agreements with nearby properties is preferred to subsidies financed through general funds. Finally, before any subsidies are granted, cities should negotiate long-term binding agreements with teams that ensure that franchises are only able to exert their monopoly power over cities on an infrequent basis. Without long-term contracts that can withstand bankruptcy or similar challenges, what was planned as a one-time initial subsidy can turn into an ongoing practice of a team squeezing a local government for ever-increasing concessions.

B. Managing the Risks of Financing Premised on Exclusive Covenants to Play; The Lessons Learned in the Course of Keeping the Coyotes

- **Background and City of Glendale's role in the bankruptcy case of the National Hockey League's Phoenix Coyotes**
  - In 2001, the City negotiated a deal with the Coyotes to bring the team from downtown Phoenix to Glendale by building a state of the art hockey arena.
  - The $180 million investment was premised on a 25 year commitment by the Team to play its hockey games at the Glendale arena and no other location. The City's investment was part of its sponsorship of the $750 million private development of the Westgate City Center (shopping mall, hotel, entertainment, etc.).
  - The Team's covenant not to relocate the Team was included in the Arena lease and use agreement, and was enforceable by specific performance.
  - Under the Agreement, if specific performance was not available, then the City was entitled to liquidated damages in excess of $700 million (with the exact amount calculated based on expected tax revenue from the Westgate development).
  - In May 2009, the Coyotes' filed a chapter 11 case in Phoenix and immediately moved to sell the Team to Jim Balsillie, the co-founder of Blackberry / RIM. The premise of the sale was Mr. Balsillie's intention to move the Team to Hamilton, Ontario in violation of the Team's covenant to play all games only in Glendale, the City was then faced with the risk of losing the Team within 5 years of building the arena
  - The City immediately filed a complaint seeking injunction to prevent the Team from breaching the non-relocation covenant.
- **Does the City's right to specific performance survive bankruptcy?**
  - Outside of bankruptcy, state law permits specific performance if certain conditions are met:
    - the parties have a legal contract;
    - the terms are certain and fair;
    - hardship of specific performance does not outweigh benefit to the party seeking specific performance; and

- no adequate remedy at law.

- Bankruptcy Code §365 – a debtor may reject contracts based on its business judgment - rejection power is used as an opportunity to shed burdensome contracts and allow fresh start. Rejection is deemed a breach and gives rise to damages, but the damage claim is subject to discharge.

- City's Argument 1: Right to specific performance (an equitable remedy) is not impacted by the bankruptcy proceedings because it is not a dischargeable claim:

  - "Claim" – broadly defined but must ultimately be something that gives rise to a right to payment;

  - Line of cases that say the right to specific performance of non-compete agreements is not a "claim" because it cannot be reduced to a right to payment. Another case in 3rd circuit involving clean-up of environmental damages (Torwico) also held that such equitable remedy was not a claim;

  - The Pittsburg Penguins bankruptcy case in 1998 was on almost identical facts, judge held that the right to specific performance of non-relocation provision was not a claim and would not be discharged in bankruptcy;

  - The Coyotes focused on another line of cases that held that violations of non-competes can be reduced to a monetary figure; and

  - The was very little guiding case law, but the City of Glendale felt it had the more compelling argument because of non-economic aspects of having a professional sports team ("community asset," supports local economy, jobs).

- City's Argument 2: Even if it is considered a claim, rejection of the contract should not be allowed because rejection would cause disproportionate harm to the City as compared to the marginal benefit to the debtors

  - We found unique 9th Circuit law that analyzes harm versus benefit; other courts generally defer to business judgment.

  - Harm = $500+ million in lost revenue, loss of community asset, jobs, goodwill

- Benefit: higher sale price paid by buyers wanting to relocate (versus local bidder)
- The City argued that even if you could get a higher price for a relocation sale, the City's claims from rejection (based on the liquidated damages calculation) would dilute recoveries to all creditors and thus there would actually be no benefit to creditors.
- Stay sale: $140 million cash and $175 million in claims
- Relocation sale: $220 million in cash and $750 million in claims
- Ultimate test is what is in the best interest of creditors

- The City believed that these arguments provided sufficient basis to prevent a relocation of the Team

- **Curve-ball: What if the City's damages claims were "capped?"**
  - The arena contract was a multi-part agreement providing for a license to use the arena for games, rights to manage the facility for a fee and a lease of locker rooms and office space. The Team argued that because the agreement also contained a fairly customary "lease" provision, the Bankruptcy Code section which caps claims of landlords to 3 years of rent (§502(b)(6) was applicable.
  - If it applies, then the City's claim is reduced to $6 million (from $750 million) and so in the "best interest of all creditors."
  - The difficulty of having multiple agreements packed into one; limited applicable case law given the unique nature of the contract.
  - It remains an unresolved issue in the case.

- **The Interim Result**
  - Following briefing as part of subsequent auction process, the court initially avoided ruling on the "numerous issues regarding Glendale and the [arena contract]" and ruled that a relocation sale could not be approved over the NHL's rights under its constitution to choose owners and the location of teams (subject to anti-trust rules).
  - As part of the sale of the Team to NHL, the debtors agreed that they would not seek rejection of the Arena contract until June 30,

2010. The debtors would not agree to an extension and have rejected the contract. The City then reached a deal with the NHL to keep the Team in Glendale for the 2010-2011 NHL season. That deal with the NHL has been since extended to cover the 2011-2012 season.

- At present, the Team continues to play in Glendale, and Glendale remains subject to the risk of losing the Team leaving after the 2011-2012 NHL season.

- **2012 Legal Ruling**

  - In December 2011, the City reached an agreement with the independent trustee appointed in the Coyotes bankruptcy case to require the Coyotes estate to pay to the City a large portion of the bankruptcy estate on account of the City's claims arising from the Team's violation of the exclusive covenant to play. The former owner of the Coyotes, Jerry Moyes, objected to that agreement, and continued to make the argument that the City's claims were subject to the cap on rejection damages imposed by Section 502(b)(6) of the Bankruptcy Code.

  - In January 2012, the Bankruptcy Court issued a decision approving the agreement, and finding that the City had a stronger argument on that critical legal issue. That decision is attached as Exhibit A.

  - At present, this decision of the Bankruptcy Court in the Coyotes case is the most clear ruling to date on the issue of whether a city's claims on account of the breach of an exclusive covenant to stay are capped under the Bankruptcy Code. If this decision had gone the other way, cities would be under increased risk that owners of professional sports team subject to similar covenants would be able to use the Bankruptcy Code to try to breach these covenants with essential impunity, even if the teams were solvent.

- **Lessons Learned**

1. The Agreements for the long-term exclusive use of a municipal-owned stadium, arena or other significant facility should be split into 3 separate agreements: (i) a management agreement, (ii) a lease and (iii) an agreement related to the exclusive use covenant. Each agreement should expressly state that it is independent from the other agreements and separately enforceable. Each agreement should describe the consideration provided/received. As there seems to be little gained by having them (as a practical matter), consider having no cross-default provisions (to minimize risk of the 3 agreements being deemed as one in substance).

2. The exclusive use covenant should contain an acknowledgment by the parties that it is not a "lease" under state law.

3. The exclusive use covenant should make clear that it is binding on subsequent owners of the actual user (such as the Coyotes NHL franchise) (in addition to the standard language that it is binding on successors and assigns).

4. The "lease" document should clearly pertain only to the "exclusive spaces" and expressly provide that it is not a lease of the entire facility.

5. Where applicable, the agreement should also recite that the "rent" payable under the separate "lease" is merely compensation for the use of the rental space, and does not constitute consideration for the many other benefits provided by the municipality to the user (especially the use of the facility's other spaces for games and other events).

6. In an ideal world, the municipality would get a separate promise (even some sort of limited covenant) from the user's sponsor itself to not move the franchise except under very specific conditions (e.g., gross financial failure of the Coyotes in Glendale, NHL consolidation, etc.).

7. It is important to obtain a "bad boy" guaranty if at all possible from the ultimate owner or other financially capable party, kicking in only if the exclusive use covenant is violated.

8. If at all possible, take a pledge of the ownership interests in the user (such as from the owner of the NHL's Coyotes) to secure (even if on a non-recourse basis) the exclusive use covenant. This pledge, in the case of a professional sports league, would require league approval (as, for example, the NHL Constitution prohibits the pledge of an owner's stock).

EXHIBIT A

FILED

JAN 30 2012

UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF ARIZONA

UNITED STATES BANKRUPTCY COURT

DISTRICT OF ARIZONA

MINUTE ENTRY/ORDER

FOR MATTER TAKEN UNDER ADVISEMENT

Bankruptcy Judge:	Hon. Redfield T. Baum
Case Name:	Dewey Ranch Hockey, LLC, Chapter 7
Case No.:	2:09-bk-09488-RTBP
Subject of Hearing:	Motion To Approve Settlement Between CH Liquidation Trust and The City of Glendale
Date Matter Taken Under Advisement:	January 18, 2012
Date Ruled Upon:	January 30, 2012

Pending before the court is the motion to approve CH Liquidation Trust's ("Trust") settlement stipulation between the Trust and the City of Glendale ("Glendale"). The settlement is opposed by Jerry Moyes, Vickie Moyes and The Jerry and Vickie Moyes Family Trust ("Moyes Group"). Creditors, the National Hockey League ("NHL") and Aramark Sports and Entertainment Services, Inc. ("Aramark") have filed statements and appeared in support of the settlement between the Trust and Glendale. There is a long history here between these parties, which history goes back far beyond this 2009 Chapter 11 case.[1] As Yogi Berra is

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[1] See: In re Dewey Ranch Hockey, LLC, 414 B.R. 577 (Bankr. D. Az. 2009); In re Dewey Ranch Hockey, LLC, 406 B.R. 30 (Bankr. D. Az. 2009).

supposed to have said, 'It is deja vu, all over again" for these parties and this court.

On February 24, 2011, this court entered its order confirming the debtors' Second Amended Chapter 11 Plan of Reorganization ("Plan"). The Plan, which is a liquidating plan, i.e., there are no ongoing business operations of any kind, created the Trust to liquidate and collect the assets of the debtors, resolve the remaining disputed claims, and distribute the funds of the estate to its creditors. The bankruptcy estates and now the Trust are insolvent. Glendale has filed claims against the estates for more than $500 million and the Moyes Group have filed claims against the estates for more than $104 million; both have objected to the other's claims. These two sets of claims represent, by far, the largest claims against the former bankruptcy estates and now the Trust. The Trust currently has about $10 million to pay all remaining claims.

The proposed settlement, in its essence, is straightforward; the Trust pays Glendale $4,750,000.00 by January 31, 2012 in full settlement of all claims against the Trust and the estates. If the payment is not made timely, Glendale may terminate the settlement. The Moyes Group objects to the settlement because, in its view, the settlement is not sufficiently supported to be approved, it does not satisfy the four requirements to approve a settlement, and they assert that all of the other creditors' claims could be easily resolved for a small portion of the remaining funds leaving Glendale and them to fight over the division of most of the remaining funds, the bulk of which should, in their view, go to them.

As referenced above, this is not the first time that the validity of Glendale's claims have been extensively briefed and argued to this court [See, for example and not by way of limitation, dockets #281, 282, 283, 287 and 288 (which collectively total 742 pages) and this court's decision at docket #341]. Based upon the massive and extensive record here, the court concludes that there is a sufficient record to determine on the merits whether or not the proposed

settlement should be approved.

The case is now fundamentally different than before because the Plan has been confirmed. The terms of the Plan establish two significant points. First, that the plan trustee has greater powers to resolve claims than a debtor in possession or chapter trustee and, second, that the plan trustee must expeditiously wind up the Trust. These conclusions are based upon the Plan's express terms. For example, Article 4.02(a)(iv) & (v) which direct that the trustee "must use his reasonable best efforts to maximize the value of, and liquidate into Cash, all the Liquidation Trust's non-Cash assets, ..., and not unduly prolong the existence of (sic) Liquidation Trust"; "must control and manage the Liquidation Trust's assets, including, as necessary or appropriate: (A) ...; (B) filing, prosecuting, and settling objections to Claims. Article 4.02(b) "Purposes. The Liquidation Trust will operate, and its assets may be used, soely for the purposes of: (I) ... resovling (by litigation, settlement, or otherwise) the Avoidance Actions, the Litigation Claims, and all Disputed Claims". Article 7.02 "Prosecution. .... . The Liquidation Trust will have sole discretion to determine in its business judgment which Avoidance Actions and Litigation Claims to pursue, which to settle, and the terms and conditions of those settlements". Article 6.01 of the that Plan does provide that nothing in the confirmed plan "impairs or otherwise affects any party in interest's right to object to the allowance of any Claims". Finally, Article 10.01 provides that this court retain's jurisdiction to allow or not, determine, establish the amount of any claim and resolve any objection to any claim.

The parties have asserted and the court will apply the four prongs of the well established test to determine whether or not a settlement should be approved. See: Martin v. Kane (In re A & C Properties), 784 F.2d 1377 (9th Cir. 1986), cert. denied, Martin v. Robinson, 479 U. S. 854, 107 S. Ct. 189, 93 L.Ed. 2d 122 (1986). One of those requirements, risk of collection, is not an

issue here, so it is effectively a three part analysis.

I. THE PROBABILITY OF SUCCESS FACTOR

The Court reminds the parties that it has previously noted that the issues raised by these cases, including the claims of Glendale, present "novel and unique issues" and "that no cases have been found that precisely or even closely fit this scenario". 406 B.R. at 35. It appears that one of the key components of the objection to Glendale's claims is the statutory cap on a landlord's claim for "damages resulting from the termination of a lease of real property" set forth in Section 502(b)(6) of the Bankruptcy Code. That point has been hotly debated before this court multiple times; and unneeded to be decided to date. The Moyes Group now asserts that issue and its effect on Glendale's claims could be quickly and inexpensively resolved on summary judgment.

The record does not support the Moyes Group's view. It appears that the most applicable decision to this dispute is In re El Toro Materials Co., Inc., 504 F.3d 978 (9th Cir. 2007). There the Ninth Circuit reversed a summary judgment and remanded for further proceedings concluding that a damage claim in tort is not subject to the Section 502(b)(6) cap on claims for "lost rent, rent-like payments or other damages directly arising from a tenant's failure to complete a lease term". In reaching that conclusion, that court stated:

> The structure of the cap – measured as a fraction of the remaining term – suggests that damages other than those based on a loss of future rental income are not subject to the cap. It makes sense to cap damages for lost rental income based on the amount of expected rent : Landlords may have the ability to mitigate their damages by re-leasing or selling the premises, but will suffer injury in proportion to the value of their lost rent in the meantime. In contrast, collateral damages are likely to bear only a weak correlation to the amount of rent: A tenant may cause a lot of damage to a premises leased cheaply, or cause little damage to premises underlying an expensive leasehold
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> . . .

Metering these collateral damages by the amount of the rent would be inconsistent with the goal of providing compensation to each creditor in proportion with what it is owed. Landlords in future cases may have significant claims for both lost rental income and for breach of other provisions of the lease. To limit their recovery for collateral damages only to a portion of their lost rent would leave landlords in a materially worse position than other creditors. In contrast, capping rent claims but allowing uncapped claims for collateral damage to the rented premises will follow congressional intent by preventing a potentially overwhelming claim for lost rent from draining the estate, while putting landlords on equal footing with other creditors for their collateral claims.

504 F.3d @ 980. Glendale has cited El Toro to support its assertion that all or almost all of its half a billion dollar breach of covenant claim is not capped by Section 502(b)(6). A compelling argument could be advanced that the quoted statements from El Toro, if not the entire opinion, were made in anticipation of this case.

On a motion to approve a settlement, this court need not decide if Glendale or the Moyes Group is correct on the cap issue. However, the court does conclude that the holding and analysis of El Toro supports approving the proposed settlement. At a minimum, (1) Glendale has an argument that under El Toro most of its damage claim is collateral damages not capped by the Code and (2) given the history here and the significant amounts at risk here, Glendale would probably appeal any adverse ruling on the merits to the Ninth Circuit based upon El Toro.

As noted above and in the prior decisions by this court, the facts and agreements here are unusual and apparently are not the subject of any reported decisions. All of which simply confirms that it is far from clear that the Moyes Group, contrary to their assertions, would probably be successful, if at all, if these issues were actually litigated as the Moyes Group asserts should be done. Rather and for the reasons set forth above, it appears to the court that Glendale has the stronger argument regarding which side has the greater probability of prevailing if the matter were tried on the merits. Accordingly, this court concludes that the probability of success factor favors approval of this settlement.

II. THE COMPLEXITY OF THE LITIGATION INVOLVED, AND THE EXPENSE, INCONVENIENCE AND DELAY IF LITIGATED

Contrary to the assertions of the Moyes Group and given all that this court has confronted in these cases, it seems beyond dispute to this court that further litigation will be a complex matter without any clear and controlling case authority to guide this court. Similarly and again based upon the history here, it also seems beyond dispute to this court that such litigation would be expensive, inconvenient and time consuming. The record here supports that; in a few months most of the issues here will have been pending for three years.

As noted above, in the court's view for the Moyes Group to ultimately prevail, as it asserts it will, it appears the Ninth Circuit will have to decide whether the El Toro collateral damage view applies to the massive covenant damage claim of Glendale. That alone will be costly and probably take a minimum of three years to resolve; if not a significantly longer period of time. The remaining creditors have now waited almost three years for their pro rata payment on their claims. To accept the positions asserted by the Moyes Group would make it highly probably that these creditors would have to wait even much longer than that because until Glendale's massive claim is resolved it appears that any distribution to these other creditors is not practical. The Moyes Group asserts that is not so but the record shows that almost three years have elapsed and, absent the approval of this settlement, the payment to all the creditors seems no closer that it was three years ago. The court concludes that the complexity, cost, inconvenience and time factor supports approval of the settlement.

III. THE PARAMOUNT INTEREST OF THE CREDITORS AND A PROPER DEFERENCE TO THEIR REASONABLE VIEWS

It is beyond dispute that the creditors support this settlement; three (Glendale, NHL and Aramark) to one (Moyes Group). Even if the standard was the dollar amount of claims, which

the court does not think it is, the creditors still favor the settlement. Giving proper deference to their views, again supports approving the settlement.

Further and because this is a case with a confirmed plan of reorganization, the court considers that factor to further and strongly support approval of this settlement. The Trust has been directed to promptly resolve and pay the creditors here. Even with the payment to Glendale, there is still a comparatively large amount of money for the Moyes Group and the other creditors to receive a roughly similar pro rata payment on their claims to the payment being received by Glendale. That reality only changes if the claims of Glendale can be massively reduced which, at best from the Moyes Group view, seems to the court to be a risky and speculative endeavor; which the creditors clearly don't wish to engage in such an endeavor. Considering the paramount interests of the creditors and giving proper deference to their views, once again favors approval of the settlement.

For the reasons set forth above, the court concludes that the proposed settlement clearly meets, and probably exceeds, the three requirements for the court to approve, as the court does, the settlement. The motion is granted and counsel for the trustee shall serve and lodge an appropriate order.

Copy of the foregoing
mailed this 30th day of
January, 2012 to:

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BIOS

Bio for Victor Matheson

Victor Matheson is an associate professor of economics at the College of the Holy Cross in Worcester, Massachusetts. He earned his Ph.D. in economics from the University of Minnesota in 2001 and has previously taught at Williams College in Williamstown, Massachusetts, Lake Forest College in Illinois, and Monash University in Melbourne, Australia.

Victor is among the nation's leading experts on the economic impact of sporting events, stadiums, and franchises on local, regional, and national economies. He is the author of over 50 journal articles or book chapters on various issues relating to sports economics including studies of the economic impact of the Summer and Winter Olympics Games, the World Cup, and the Super Bowl. He has served in a consulting capacity for numerous sports projects including the Staples Center in Los Angeles.

He is an editorial board member of the *International Journal of Sport Finance* and the *Eastern Economic Journal* and serves on the executive board of the North American Association of Sports Economists. He is frequently sought after as a public speaker and a media expert. He has appeared on National Public Radio's *Marketplace* and *All Things Considered*, *Bloomberg News*, and *Fox News*. Among the many magazines and newspapers in which he has been quoted are Newsweek, USA Today, the New York Times, and the Wall Street Journal.

He is delighted to hang out with a bunch of lawyers instead of a bunch of economists for a change.

Bio of Craig Tindall

Craig Tindall is the City Attorney of Glendale, Arizona. During his tenure, Craig has been involved with more than $2.5 billion of public construction projects. These projects were financed with federal, state, and local funds and through public-private partnerships. With private sector developers, Craig negotiated development agreements for over 1.5 million acres of mixed use development.

Beginning in 2001, Craig was a member of the team that recreated Glendale into a center for sports and entertainment. During this time, the City completed construction of the Jobing.com Arena, a state-of-the-art arena seating 17-19,000 and currently home of the NHL Phoenix Coyotes. Additionally, in 2004 the City began its participation with the Arizona Sports and Tourism Authority in the construction of the University of Phoenix Stadium, an 83-85,000 seat stadium that is home of the NHL Arizona Cardinals and the NCAA Fiesta Bowl. The City and the stadium also hosts college football's Bowl Championship Series every four years. In 2008, Glendale worked with Arizona Sports and Tourism Authority and the Cactus League Association, an organization of 15 Major League Baseball teams that conduct spring training games on the west coast, to construct the new, 13,500 seat Spring Training home of the Los Angeles Dodgers and Chicago White Sox. In conjunction with the development of these major sporting and entertainment venues, Craig lead the legal teams that constructed a 30,000-square foot state-of-the-art media facility that serves the requirements of national and international media broadcasts at the highest level. As part of the intensive interesting in the area, the City has added a 120,000-square foot conference center and exposition hall, a regional public safety training center, and a nationally-recognized Emergency Operations Center.

In addition to this development, Craig assisted in the formation of Valley Metro Rail in 2001. Valley Metro Rail is the joint powers corporation formed by several Valley cities that constructed and now operates the Phoenix area light rail line, a $1.4 billion federally and locally funded project. Since inception of this organization, Craig has served as the City's representative on its Board of Directors. In December 2009, the line opened on-time and on-budget. Since opening, ridership on the line has far exceeded projections.

In 2009, Craig directed the City's legal team handling the NHL Phoenix Coyote's bankruptcy and has been instrumental in the negotiations searching for a new ownership group that will assure the team remains in Glendale. He also managed the legal, intergovernmental, and media affairs related to the proposed creation of an Indian reservation and construction of a gaming facility within the City's jurisdictional boundaries.

Craig has an undergraduate degree in corporate finance from Arizona State University and earned his law degree at Southern Methodist University in Dallas, Texas. He has published articles on various topics in several legal publications and is a frequent speaker on municipal land use and development issues.

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Practice Areas

Bankruptcy and Corporate Restructuring

Commercial Litigation

Education

Boston College – J.D., *magna cum laude,* 1983

Williams College – B.A., *cum laude*, 1980

William R. Baldiga

Bill Baldiga is the Managing Director of Brown Rudnick's Litigation & Restructuring Department, which includes its worldwide bankruptcy and finance practice. He often represents middle market public and private companies in chapter 11 proceedings, official and *ad hoc* equity and creditor committees and strategic investors in complex reorganization proceedings. He has particular experience in bankruptcy litigation, especially as trial counsel in valuation and plan confirmation contests.

Bill is recognized by Woodward/White's *The Best Lawyers in America* in the area of Bankruptcy and Creditor-Debtor Rights Law, and by *Chambers USA: America's Leading Lawyers for Business* as a leading bankruptcy lawyer.

REPRESENTATIVE MATTERS

- Representation of Beacon Power Corporation, a publicly traded green technology company in its chapter 11 proceedings in Delaware, including as to the resolution of its financing and other relationships with the U.S. Department of Energy.
- Representation of the City of St. Petersburg, Florida regarding its interests in Tropicana Field and the Tampa Bay Rays major league baseball team's commitment to play at Tropicana Field.
- Representation of GSI Corp., a publicly traded semi-conductor and components manufacturer, in its chapter 11 proceedings and companion CCAA, culminating in its successful reorganization and $100 million section 1145 exempt rights offering.
- Representation of the City of Glendale, Arizona as the largest creditor and owner of the arena in the chapter 11 proceedings of the NHL's Phoenix Coyotes hockey franchise.

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- Representation of official equity committee and plan sponsor in Riverstone Networks, a publicly traded technology company, achieving distributions to stockholders exceeding stock trading value within nine months of filing.
- Representation of official equity committee in chapter 11 proceedings of worldwide leveraged leasing company in one of the country's largest reorganization proceedings.
- Representation of several hundred homeowners and club members to obtain recognition as an official committee in chapter 11 proceedings of New Seabury, Massachusetts, a major East Coast resort community, and then confirmation of a highly contested plan of reorganization favorable to homeowners/club member clients.

PUBLICATIONS

- Contributing Editor, *The Bankruptcy Strategist*; publisher of several articles in law reviews, journals and newsletters on issues including chapter 11 practice, asset-based leasing and plan confirmation litigation.

SPEAKING ENGAGEMENTS

- Regular speaker at national and regional seminars as to developments in bankruptcy litigation, fiduciary duties in insolvency matters, lender liability and precious metals finance.

BAR ADMISSIONS & MEMBERSHIPS

- Admitted, New York and Massachusetts Bars
- Member, First Circuit Court of Appeals; specially admitted in federal courts in more than twenty Districts

COMMUNITY INVOLVEMENT

- Director, Carol DiMaiti Foundation
- Director, Hopkinton Educational Foundation