From WDPa Website: "Notable Cases"

Air Crash Near Pittsburgh on September 8, 1994 (Misc. No. 94-1014)
Judge William Standish

On the evening of September 8, 1994, USAir Flight 427 crashed near Pittsburgh, Pennsylvania. All 134 passengers and crew members aboard the Boeing 737-300 aircraft died. As a result of the accident, forty-seven cases against USAir, The Boeing Company and Parker-Hannifin Corporation were filed in the Western District of Pennsylvania and consolidated for pretrial proceedings. In addition, nineteen cases were transferred to the Western District of Pennsylvania for pretrial proceedings pursuant to an order of the Judicial Panel on Multidistrict Litigation ("MDL litigation"). The majority of the cases arising out of the crash of USAir Flight 427 not included in the MDL litigation were filed in the Circuit Court of Cook County, Illinois ("Cook County litigation").

The first case management order established a Plaintiffs' Steering Committee ("PSC") consisting of nine members and appointed an attorney to serve as a liaison between the plaintiffs and the PSC. Difficult issues arose in the early stages of the MDL litigation concerning the coordination of procedures in the MDL litigation and the Cook County litigation, the avoidance of duplicate expenses by the PSC in the MDL litigation and the PSC established in the Cook County litigation, and the manner in which fees were to be assessed among the plaintiffs in the MDL litigation and the Cook County litigation. The Court worked closely with the judge in charge of the Cook County litigation to resolve these and other issues.

With respect to claims and defenses, the plaintiffs alleged that a component of the rudder control system on the Boeing 737-300 aircraft, which had been manufactured by Parker-Hannifin Corporation, had failed during the flight, causing the plane to crash. On the other hand, USAir maintained that the crash had been caused by an airplane-related failure, and The Boeing Company maintained that the crash had been caused by a crew-related mishap. The completion of liability discovery was hampered by the ongoing investigation into the cause of the accident by the National Transportation Safety Board ("NTSB"), which conducted "wake vortex" tests to determine whether the wake created by another plane that was landing in front of USAir Flight 427 at the Greater Pittsburgh International Airport on the evening of September 8, 1994, could have caused the Boeing 737-300 to suddenly veer to the left and nosedive to the ground. Ultimately, all of the cases filed in the Western District of Pennsylvania settled and, upon the completion of pretrial proceedings, the four remaining cases were remanded to the district courts from which they had been transferred by order of the Judicial Panel on Multidistrict Litigation.

Issues requiring resolution by the Court included (1) whether the attorney who had been appointed as liaison counsel in the first case management order needed to be replaced due to a serious dispute with the PSC regarding his role as liaison counsel; (2) whether the plaintiffs were entitled to a copy of the cockpit voice recorder tape which had recorded the radio communications, pilots' voices and ambient sounds in the cockpit during the final thirty minutes and fifty-six seconds of flight, including the entire accident sequence up to impact, for analysis by their experts; (3) whether six plaintiffs could recover punitive damages from The Boeing Company and Parker-Hannifin Corporation, requiring application of the choice of law rules of Pennsylvania, New York and Florida; (4) whether the parents of a decedent could challenge the reasonableness of the settlement reached by the widow of the decedent, who had been appointed as the administratrix of his estate, with the defendants; and (5) whether the same parents were entitled to share in the settlement proceeds under Pennsylvania law.

USAirways, Inc. v. Parker-Hannifin Corp. (CV 99-917)
Judge Alan Bloch

This was a product liability action arising out of the USAir Flight 427 crash occurring on September 8, 1994, which killed the captain, the first officer, three flight attendants and 127 passengers. Plaintiff USAirways, Inc., had settled the claims of 117 passengers, and the Boeing Company, the manufacturer of the aircraft, had settled claims arising out of the deaths of the crew members. USAirways had also settled claims for property damage and the costs of emergency services and equipment. In addition, USAirways and Boeing had entered into a settlement of any claims possessed by USAirways against Boeing arising out of claims made on behalf of the crash victims. As a part of that settlement, Boeing irrevocably assigned any and all contribution and indemnity rights that it may have had to USAirways.

USAirways, Boeing and Parker-Hannifin Corp., the manufacturer of the aircraft's rudder power control unit, had entered into a claims handling agreement permitting USAirways to investigate, analyze, and settle claims and lawsuits related to the crash while reserving its rights to indemnity and contribution from Parker-Hannifin. USAirways brought this suit against Parker-Hannifin for reimbursement for all or part of the payments which had been provided by USAirways to settle the claims arising out of the deaths of the passengers and crew members, claiming that Parker-Hannifin was primarily liable for the crash of Flight 427.

In this regard, USAirways argued that post-accident investigation and testing had revealed problems with the rudder power control unit in the plane, and that these problems had caused the crash. USAirways contended that because Parker-Hannifin had designed and manufactured the rudder power control unit, it was liable under various theories of product liability. Parker-Hannifin denied liability, claiming that the crash had been caused by the negligence of USAirways or, in the alternative, that any defects existing in the aircraft's flight control system had been caused by Boeing, the manufacturer of the aircraft. Parker-Hannifin had brought Boeing into the case as a third-party defendant.

A jury trial commenced on June 3, 2002. By that time, Parker-Hannifin had already settled its claims against Boeing. On June 28, 2002, the jury rendered a verdict in favor of USAirways. The parties subsequently settled the case.

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

IN RE:

PITTSBURGH SPORTS ASSOCIATES HOLDING COMPANY,	Bankruptcy No. 98-28174-BM
PITTSBURGH HOCKEY ASSOCIATES, and HBRM LLC,	Bankruptcy No. 98-28175-BM Bankruptcy No. 98-28176-BM
	Jointly Administered At Bankruptcy No. 98-28174-BM
Debtors	
***	Chapter 11
PUBLIC AUDITORIUM AUTHORITY OF PITTSBURGH AND ALLEGHENY COUNTY, a body corporate and politic, and SMG PITTSBURGH, INC., d/b/a PITTSBURGH ARENA, INC., a Delaware corporation, General Partner, trading as SMG PITTSBURGH, L.P., d/b/a PITTSBURGH ARENA, L.P., a Delaware limited partnership,	
Plaintiffs	
v.	Adversary No. 98-2475-BM
HBRM, LLC, a Pennsylvania limited liability company, General Partner of PITTSBURGH HOCKEY ASSOCIATES, a Pennsylvania limited partnership, and ROGER M. MARINO, an individual,	
Defendants	

PREFACE

Two matters are before us at this time.

After receiving evidence in court that Roger Marino and his representatives had egregiously breached non-relocation covenants contained in agreements Pittsburgh Hockey Associates ("PHA") had with Public Auditorium Authority of Pittsburgh ("PAA") and SMG Pittsburgh, Inc. (SMG"), we issued orders in November of 1998 preliminarily enjoining PHA, HBRM, and Marino from taking further actions in breach of the covenants. Marino is a principal of PHA and HBRM. The breaches occurred so soon after execution of the agreements that one is left to wonder whether Marino intended to abide by the covenants when the agreements containing them were executed.

Seeking to require debtors and Marino to abide by their promise to keep the Pittsburgh Penguins hockey team playing at the Pittsburgh Civic Arena, PAA and SMG have brought a motion to make permanent the injunction we issued in November of 1998.

Claiming that the value of the Penguins franchise can be accurately determined only if we permit them to solicit offers from potential purchasers who might relocate the team elsewhere, PHA and HBRM have brought a motion to dissolve the preliminary injunction.

We will deny the motion of PHA and HBRM to dissolve the temporary injunction and instead will grant the motion of PAA and SMG for a permanent injunction.

MEMORANDUM OPINION

- FACTS -

PAA is a corporation created under the Public Auditorium Authorities Law (53 P.S. § 2384 *et seq.*). Among other things in April of 1958, it leased from Urban Redevelopment Authority tracts of land on which the Civic Arena was constructed.

SMG is in the business of managing and operating various sports, entertainment, and convention complexes throughout the nation. It presently manages and operates the Civic Arena.

Debtor PHA is a limited partnership which owns and operates the Penguins franchise. It plays its home games at the Civic Arena.

Debtor HBRM is a limited liability company and is the sole general partner of PHA.

Defendant Roger Marino is co-chair of HBRM and co-managing director of PHA. He holds himself out as co-owner of the Penguins and has assumed and asserted *de facto* control and ultimate authority over the team.

Pursuant to a sublease dated July 1, 1981, PAA subleased the Civic Arena to Civic Arena Corporation ("CAC"), which managed and operated the facility.

On October 31, 1991, CAC assigned its sublease to SMG. In addition to managing and operating the Civic Arena, SMG coordinates and promotes all events held at the facility.

In accordance with an amended and restated lease agreement with PHA, SMG subleased the Civic Arena to PHA on October 31, 1991. The term of the lease will not expire until September 1, 2012.

Paragraph 304 of the amended and restated lease between SMG and PHA dated July 14, 1993, contained a "non-relocation covenant", whereby PHA covenanted and agreed:

> (1) to play and cause to be played in the Arena, all Penguins Regular Scheduled Games, all Penguins Playoff Series Games in which the Penguins are designated to play in their home rink, and at least two Exhibition Games per Season;
>
> (2) not to cause or permit the Penguins' status as a Member Club of the National Hockey League for the City of Pittsburgh, Commonwealth of Pennsylvania, to be transferred outside the City of Pittsburgh, Commonwealth of Pennsylvania, unless mutually agreed upon by Tenant and Landlord; and
>
> (3) not to assign, transfer, let or sublet, mortgage or pledge this Lease without the prior written consent of Landlord.

Among other things, PHA agreed in paragraph 305 of the amended and restated lease agreement dated July 14, 1993, not to "assign, transfer, pledge, or otherwise dispose of the Penguins" and not to "sell, assign, sublet, or otherwise transfer" its rights under the lease without the prior, written consent of SMG.

Paragraph 704 of the amended and restated lease between SMG and PHA further provides as follows:

> Tenant acknowledges that its obligation hereunder not to relocate during the term of this Lease is necessary to protect the business and goodwill of Landlord and that a breach of such covenant will irreparably and continually damage Landlord, for which money

damages may not be adequate or determinable, and that Landlord shall, in addition to any other remedies available at law or in equity, have the right to injunctive relief to enforce the aforesaid covenant and to protect and preserve the rights of Landlord. Tenant agrees that in the event it breaches any of the non-relocation covenant, Landlord shall be entitled to a temporary, preliminary or permanent injunction in order to prevent the continuation of such harm... .

Paragraph 705 of the lease provided that, in addition to the rights and remedies given to it in the agreement, SMG would have all rights and remedies available to it at law or in equity. All such available rights and remedies are "cumulative and concurrent".

Paragraphs 304 and 704 of the amended and restated lease dated July 14, 1993, were amended in June of 1997, in a third amendment to the amended and restated lease.

Paragraph 304(2) was amended to provide that PHA could not cause the Penguins to be transferred out of Pittsburgh unless mutually agreed upon by SMG **and PAA**.

Paragraph 704 was amended to add paragraphs (B)(1) through (5).

PHA made various "acknowledgments" in paragraph (B)(1). For instance, PHA "acknowledged" that PAA, the City of Pittsburgh, and the County of Allegheny would suffer irreparable harm if PHA relocated the Penguins or entered into an agreement to sell the Penguins that contemplated relocating the team. Such action, PHA acknowledged, would constitute a material breach for which PAA would have no adequate remedy at law. PHA further acknowledged that PAA would be entitled to injunctive relief to prevent continuation of such harm. Lastly, PHA agreed that PAA had the right to recover specified liquidated damages, "[i]f the Authority is unable to obtain an injunction".

Paragraphs 704(B)(2) through (4) provide that, in the event PHA receives a bona fide offer to relocate the Penguins to another venue or to purchase and then relocate the team to another venue, which offer PHA intends to accept, PHA shall promptly notify PAA, the City, and the County and shall wait sixty days before accepting the offer. PAA has the option during this sixty-day period to match the offer.

Paragraph 704(B)(5) specifies the liquidated damages to which PAA is entitled. It provides in relevant part that:

> If the Authority is unable to (x) obtain an injunction in accordance with subsection 704(B)(1) above or (y) to find a buyer who exercises the option granted under subsection 704(B)(4) above, or if the Authority, in its sole discretion, chooses not to seek such a buyer, then the Authority shall have the right to recover liquidated damages from PHA in a cumulative amount....

The specified damages identified in paragraph 704(B)(5) include: the outstanding amount borrowed by PAA to renovate the Civic Arena in 1997; the outstanding amount of a bond PAA issued in 1994 to make earlier renovations to the Civic Arena; tax revenues lost in connection with Penguins games played at the Civic Arena; and $5,000,000 for additional damages and/or to offset costs incurred to attract another NHL franchise to Pittsburgh.

Beginning late in 1996, PHA approached PAA and SMG and requested certain improvements to the Civic Arena. Its request was in addition to improvements

PAA had made to the Civic Arena in 1994 and 1995 with public funds. Among other things, PHA requested installation of luxury boxes and reconfiguration of the seating bowl.

PAA and SMG ultimately agreed to undertake the requested improvements. PAA financed the improvements by borrowing the sum of $10,500,000, which was to be repaid from public funds through allocations of tax revenue from Allegheny Regional Asset District ("RAD") and from a RAD grant in the approximate amount of $2,300,000.

Marino purchased an ownership interest in the Penguins through PHA in May of 1997, thereby becoming an equal partner and co-managing director of the Penguins.

On June 23, 1997, approximately one month after Marino acquired an interest in the Penguins, PHA, SMG, and PAA executed a document entitled "Development and Repayment Agreement". Paragraph (f) of the Recital portion of this agreement made reference to another agreement executed that same day. It states as follows:

> (f) Pursuant to the PHA Agreement, and as consideration in part for the improvement, PHA has agreed that the Pittsburgh Penguins will not be relocated from the Arena during the term of this Agreement... .

The term of this agreement expires on June 30, 2007.

That same day -- i.e., June 23, 1997 --, PAA and PHA executed a document entitled "PHA Agreement", the term of which also expires on June 30, 2007.

PAA agreed in paragraph 1 to provide up to $10,500,000 to PHA to make improvements to the Civic Arena in accordance with the Development Agreement.

Paragraph 2.A of this agreement provides in part as follows:

> A. Covenant. Effective immediately, PHA affirmatively covenants to (I) occupy the Civic Arena in accordance with the Penguins Lease; (ii) have its NHL franchise continue to play the home portion of its regular and playoff schedule at the Civic Arena in accordance with the Penguins lease; (iii) not to relocate or attempt to relocate its NHL franchise; and (iv) not to initiate discussions for the sale and relocation of PHA's NHL franchise with any third party.

Paragraph 2.C of the PHA Agreement is identical to paragraph 704(B)(1) of the third amendment to the amended and restated lease agreement between PHA and SMG. It provides as follows:

> C. Injunctive Relief. PHA acknowledges that the Authority, the City, and the County would suffer irreparable harm if PHA's NHL franchise would, during the term of this Agreement, relocate or enter into any agreement for the sale or assignment of its rights and privileges under its NHL franchise that would constitute a material breach of this Agreement, that damages incurred as a result of such material breach would not be readily ascertainable, and that money damages would not adequately compensate the Authority, the City, or the County for resulting injuries. PHA acknowledges that its obligations as set forth in this Agreement are unique and that the Authority would not have an adequate remedy at law if PHA's NHL franchise were to relocate. Therefore, PHA agrees that this Agreement may be specifically or mandatorily enforced by the Authority. PHA agrees that, if it breaches this covenant not to relocate, then in addition to any other remedies available at law or in equity (including specific performance), the Authority shall be entitled to a temporary, preliminary, or permanent injunction in order to prevent the continuation of such breach or harm....If the Authority is unable to obtain an injunction, the Authority shall have the right to recover liquidated damages as set forth below.

Paragraph 2.G of the PHA Agreement is virtually identical to paragraph 704(B)(5) of the third amendment to the amended and restated lease agreement. It sets forth the same liquidated damages which PAA would be entitled to recover in the event PAA was unable to obtain an injunction in accordance with paragraph 1.C.

Starting in May of 1998, less than a full year after PHA had persuaded PAA to make further improvements to the Civic Arena and PHA had executed the so-called "PHA Agreement", Roger Marino, principal of debtors PHA and HBRM, undertook discussions with representatives of various cities concerning relocation of the Penguins. If he ever intended to abide by the non-relocation covenants set forth in the third amendment to the amended and restated lease agreement and the PHA Agreement, we are left to wonder whether the ink on the agreements had fully dried before Marino decided to investigate the possibility of relocating the Penguins to another city. Conduct in violation of the covenants almost certainly occurred well before one year had elapsed. Marino and his representatives did not wake up one morning and decide on the spur of the moment to make overtures to other cities and to travel there that same day to meet with appropriate individuals and to tour their arenas. Arranging such visits requires considerable time and planning before they take place.

Marino secretly traveled to Houston, Texas, in May of 1998 to meet with its representatives to discuss possible relocation of the Penguins to Houston and to tour the Summit to see whether it was a suitable venue for playing hockey.

He secretly traveled to Kansas City, Missouri, in August of 1998 and met with its representatives, including its Mayor, to discuss moving the Penguins to Kansas City.

Marino also toured the Kemper Arena to evaluate it as a potential venue for hockey games.

At some unspecified time after August of 1998, Marino or his representatives also secretly traveled to Las Vegas, Nevada, and met with representatives of these cities to discuss the possibility of relocating the Penguins there.

Neither PAA, SMG, nor the other co-principal and co-owner of the Penguins was aware of any of these visits and discussions concerning possible relocation of the Penguins until after they had taken place.

On October 7, 1998, after learning about these visits and discussions, PAA and SMG brought a complaint in equity in the Court of Common Pleas of Allegheny County, Pennsylvania, against PHA, HBRM, and Roger Marino seeking to enforce the non-relocation covenants contained in the third amendment to the amended and restated lease with SMG and the PHA Agreement with PAA. Along with their complaint, PAA and SMG filed a motion requesting a preliminary injunction prohibiting PHA, HBRM, and Marino from violating the aforementioned non-relocation covenants.

Debtors PHA and HBRM responded to the complaint by filing voluntary chapter 11 petitions on October 13, 1998, thereby staying the state court action against them brought only six days before. Roger Marino himself did not file a bankruptcy petition. Three days later, on October 16, 1998, debtors PHA and HBRM had the state court action removed to this court, where it was docketed at Adversary No. 98-2475-BM.

PHA and HBRM brought motions to dismiss or to stay the adversary action against them. PAA and SMG responded by bringing a motion for remand or for relief from the automatic stay. Marino brought his own motion to dismiss shortly thereafter.

A hearing on these motions was conducted on November 13, 1998, at which time we invited all interested parties to provide whatever support for their motions they deemed appropriate. We issued an oral order at the conclusion of the hearing which, among other things, prohibited PHA, HBRM, and Marino from engaging in discussions with third parties pertaining to relocation of the Penguins and effectively requiring them to comply with the above non-relocation covenants. The order was entered after the parties had an opportunity to offer evidence on the matter. This order was primarily intended to maintain the status quo until the dust generated by debtors' bankruptcy filings had settled and we could decide upon a permanent course of action.

On November 17, 1998, PHA, HBRM, and Marino brought motions for reconsideration of our oral order of November 16, 1998. PHA and SMG stated their opposition to the motions.

We issued a written order on November 25, 1998, which was intended to codify our previous oral order. Among other things, the order enjoined debtors, their managing directors, partners, affiliates, agents, officers, servants, employees, experts, and attorneys from: (1) initiating or engaging in discussions with third parties concerning the sale or relocation of the Penguins hockey team; (2) relocating or attempting to relocate the Penguins hockey team to a venue other than the Civic Arena; and (3) causing or permitting the Penguins hockey team to play any portion of its regular season and playoff season scheduled for the Civic Arena to be played at any other venue.

On January 9, 1999, PHA, HBRM, and Marino withdrew their earlier motions for reconsideration and did not appeal the written order of November 25, 1998. As a consequence, said order remains in force to this date.

After experiencing an apparent change of heart concerning the above injunction, PHA brought a motion on February 12, 1999, to dissolve the temporary injunction arising from our orders of November 13, 1998, and November 25, 1998, respectively.

PHA and SMG responded by bringing a motion of their own on February 23, 1999, to make permanent the injunction we had issued.

A hearing on the motion to dissolve the temporary injunction and the motion to make it permanent was held on March 19, 1999, at which time all interested parties were given an opportunity to offer evidence on the issues raised by the motions.

- DISCUSSION -

Debtors PHA and HBRM and non-debtor Marino previously had requested reconsideration of the orders of November 13, 1998, and November 25, 1998, which enjoined them from taking action in violation of the above non-relocation covenants.

We issued these orders because we were convinced at the time that they were necessary to preserve the status quo until the furor created by debtors' petitions subsided.

For reasons that are known only to debtors and Marino, they subsequently withdrew their motions for reconsideration and agreed to let the order stand. The orders became binding when they took no appeal of them.

PAA and SMG have responded to debtors' motion by bringing a motion of their own to make the above injunction permanent.

We first will address the motion of PAA and SMG for a permanent injunction. A determination that a permanent injunction is warranted would largely obviate the need to address debtors' motion to dissolve the temporary injunction.

A.) Motion For Permanent Injunction.

> A party seeking a permanent injunction must:
>
> (1) demonstrate that exercise of the court's equity jurisdiction is warranted:
>
> (2) actually succeed on the merits of its claim; and
>
> (3) establish that the balance of the equities tips in favor of injunctive relief.

Roe v. Operation Rescue, 919 F.2d 857, 868 n.8 (3d Cir. 1990).

The first of these requirements itself consists of three subparts. The moving party must establish that:

> (1) it has no adequate remedy at law;

(2) the threatened injury is real, not imagined; and

(3) no equitable defense exists.

Roe, 919 F.2d at 868 n.8.

One has no "adequate remedy at law" if the injury in question is of a repeated or continuing nature or if monetary damages are difficult to ascertain or inadequate. Glasco v. Hills, 558 F.2d 179, 181 (3d Cir. 1977).

We are convinced that PAA and SMG would have no adequate remedy at law if debtors PHA, HBRM, and Marino were to continue violating the non-relocation covenants and took steps that resulted in moving the Penguins to another city. PAA is an instrumentality of the City of Pittsburgh and Allegheny County and was created to further the public interest of this community.

Were debtors to violate the non-relocation covenants and the Penguins ultimately moved as a consequence, the resultant injury to this community would be continual in that the community and surrounding areas would be without a professional NHL franchise. The injury most likely would be permanent in that it would be exceedingly difficult, if not impossible, to attract another NHL franchise to relocate here.

Moreover, any award of monetary damages would be difficult, if not impossible, to determine and would not be adequate. The Penguins are as much a part of the warp and woof of this community as are its other professional sports teams, museums, parks, theaters, and ethnic neighborhoods. Because the team is known as the **Pittsburgh** Penguins, it brings invaluable recognition to this region and greatly

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enhances its cachet in ways that confer economic benefit in the form of increased business, employment, and tax revenues. All of these would suffer if the Penguins relocated. Having an NHL franchise, we are convinced, can help to entice other individuals and businesses considering moving into this region to do so. Major League franchises contribute greatly to the making of major league cities.

We do not believe that the resultant injury to the self-image, pride, and prestige of this community, could be adequately compensated for solely by an award of money damages. To the extent that money damages would be adequate, they would be virtually impossible to calculate in a meaningful way.

The second and third subparts of the first of the above requirements for a permanent injunction also are satisfied in this case.

Evidence that the threat is real, not imagined, is found in the actions of Roger Marino and his minions occurring shortly after execution of the PHA Agreement. He made overtures to officials in Houston, Kansas City and Las Vegas, concerning relocation of the Penguins to these cities and even toured some of their arenas to find out whether they would provide a suitable venue for playing hockey. We have little or no doubt that Marino, as debtors' controlling principal, would once again violate the non-relocation covenants in the absence of an injunction prohibiting him and his subordinates from so doing.

Finally, debtors PHA and HBRM have not raised any equitable defenses to the request for a permanent injunction. Although they seek to have the temporary injunction dissolved because the required elements for a temporary injunction purportedly are not satisfied, debtors have not asserted any credible equity-based arguments in opposition to the injunction.

Based on the foregoing, we conclude that the first of the above requirements for a permanent injunction is satisfied in this instance.

PHA and SMG also have satisfied the second requirement for a permanent injunction. In other words, they have prevailed on the merits of their claim that debtors and Marino breached the non-relocation covenants.

We previously determined that debtors and Marino, their dominant principal, breached these covenants by making secret overtures to various other cities about relocating the Penguins there and by traveling to those cities to discuss the matter in person with various officials and to tour their facilities to see if they would provide an acceptable venue for hockey.[1]

Finally, PAA and SMG have shown that the balance of the equities in this case favors issuance of a permanent injunction.

We already have determined that PAA, SMG, and the community at large, whose interest PAA is charged with furthering, would suffer substantial, noncompensable injury if PHA, HBRM, and Roger Marino were not enjoined from taking

1. We will undertake later on in this memorandum opinion a more complete discussion of the contention of debtors PHA and HBRM that SMG and PHA **cannot** prevail on the merits in light of the fact that PHA and HBRM are in bankruptcy.

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actions in violation of the non-relocation covenants and the Penguins ultimately moved elsewhere.

It is not clear what injury, if any, debtors PHA and HBRM themselves would suffer as debtors-in-possession if we permanently enjoined them from taking action which violates the non-relocation covenants and which resulted in the Penguins moving to another city. Any confirmed plan or reorganization apparently will be funded by a sale of the Penguins to a third party. We anticipate that the net sale proceeds will be applied as far as they go toward paying creditors' claims and will in no way inure to the benefit of PHA and HBRM. In addition, it is questionable at present whether such a sale would result in any funds that make their way to Roger Marino and other interest holders as equity owners.

It is conceivable, however, that claim holders may be harmed by a permanent injunction. A sale of the hockey franchise to a purchaser who would relocate the Penguins to another city might fetch more than would a sale to a purchaser who is not able to relocate the team. We have no way of knowing at the present time whether any distribution would be made to general unsecured creditors even in the event the team is sold and moved elsewhere. Even if we assume, however, that claim holders and equity interest holders would fare less well if a permanent injunction is issued, the irreparable harm suffered by PAA, SMG, and the community at large in the absence of a permanent injunction outweighs that experienced by claim holders and interest holders in the presence of one.

We reach this conclusion without intending to derogate the importance of the interests of claim holders in a bankruptcy case. As important as their interests are, they may have to give way when the interest of the community at large so dictates. In this case it so dictates.

Based on the foregoing, we conclude that we should grant the motion by PAA and SMG for a permanent injunction.

B.) Motion To Dissolve Temporary Inunction.

It is not necessary in light of the determination that PAA and SMG are entitled to a permanent injunction to address in detail the arguments offered by PHA and HBRM in support of their motion to dissolve the temporary injunction. We nonetheless shall address two arguments offered in support of their motion because of their importance not only to the decision to issue a permanent injunction but also to the eventual fate of the non-relocation covenants if and when debtors receive a discharge.

We have concluded that PAA and SMG were successful on the merits of their claim that PHA, HBRM, and Marino had breached the above non-relocation covenants. PHA and HBRM apparently concede that PAA and SMG may be entitled to permanent injunctive relief in another forum, but strenuously deny that such injunctive relief is appropriate in the context of a bankruptcy case. They offer two arguments in support of this proposition.

According to PHA and HBRM, any obligation owed to PAA and SMG as a result of the non-relocation covenants qualifies as a "claim" for purposes of § 101(5)(B) of the Bankruptcy Code and therefore is dischargeable. They also assert that, as a hypothetical judicial lien creditor, PHA may invoke the "strong-arm" power accorded by § 544(a)(1) of the Bankruptcy Code to avoid under state law the obligations owed to PAA and SMG under the non-relocation covenants. As a result, they argue, they could not be prohibited from selling the Penguins to a party who may wish to relocate the team to another city. Neither of these arguments has merit in this case.

"Claim" is defined in the Bankruptcy Code in relevant part as a:

> (B) right to an equitable remedy for breach of performance if such breach gives rise to a right to payment.

The term "claim" is to be construed broadly to permit a debtor to meet all of its legal obligations in bankruptcy and to enable holders of allowed claims to participate in the bankruptcy proceedings. Ohio v. Kovacs, 469 U.S. 274, 279, 105 S.Ct. 705, 708, 83 L.Ed.2d 649 (1985).

The purpose of this provision is to cause the liquidation or estimation of contingent claims for which there may be an alternative equitable remedy with the result that the equitable remedy will be discharged in bankruptcy. For instance, if a judgment for specific performance may be satisfied by an alternative right to payment, the creditor entitled to specific performance has a "claim" in the bankruptcy case. Kovacs, 469 U.S. at 280, 105 S.Ct. at 7-8.

The United States Court of Appeals for the Third Circuit, whose decisions bind us, recently has spoken to the proper application of § 101(5)(B) in light of Kovacs. *See* Torwico Electronics, Inc. v. State of New Jersey, Department of Environmental

Protection (In re Torwico Electronics, Inc.), 8 F.3d 146 (3d Cir. 1993), *cert. denied*, 511 U.S. 1046, 114 S.Ct. 1576, 128 L.Ed.2d 219 (1994); *also* Air Line Pilots Ass'n v. Continental Airlines (In re Continental Airlines), 125 F.3d 120 (3d Cir. 1997), *cert denied*, 118 S.Ct. 1049, 140 L.Ed.2d 113 (1998).[2]

When determining whether equitable relief such as an injunction qualifies as a "claim" for purposes of § 101(5)(B), we must examine the nature of the remedy sought and determine whether it can give rise to a right to payment. Continental Airlines, 125 F.3d at 134. Even if it does not facially require payment of money, it still may constitute a "claim". Torwico, 8 F.3d at 150.

In particular, we must determine whether monetary payment is an **alternative** for the requested equitable relief. If it is such an alternative, the equitable relief constitutes a "claim". Continental Airlines, 125 F.3d at 133 (*citing* Matter of Udell, 18 F.3d 403, 407 (7th Cir. 1998)).

The Third Circuit has analyzed requests for injunctive relief in either of two way to determine whether such relief qualifies as a "claim". These variant formulations, we are told, are "persuasive and consistent". Torwico, 8 F.3d at 150.

2. We are aware of a well-reasoned case which would have us follow a different approach for determining whether a right to equitable relief is a "claim" for purposes of § 101(B)(5). *See* Maids International, Inc. v. Ward (In re Ward), 194 B.R. 703 (Bankr. D. Mass. 1997). Were we to follow its approach, the outcome of this case might well be different. We are, however, precluded from so doing because the United States Court of Appeals for the Third Circuit, which interpretation of the law binds us, has spoken to the issue.

Under the one formulation, we must determine whether the requested equitable relief is but a "repackage[d] ....claim for damages". Torwico, 8 F.3d at 149 (*citing* In re CMC Heartland Partners, 966 F.2d 1143, 1147 (7th Cir. 1992)). If the requested equitable relief is so "repackage[d]", it qualifies as a "claim" for purposes of § 101(5)(B).

Under the other formulation, a request for equitable relief constitutes a "claim" if the party seeking the injunction has the option of taking action on its own and then suing to recover damages. If, however, the other party has no option to accept damages in lieu of equitable relief and instead seeks to end or ameliorate harm, it does not have a "claim". Torwico, 8 F.3d at 149 (*citing* In re Chateauguay, 944 F.2d 997, 1008 (2d Cir. 1991)).

The fact that compliance with an order granting equitable relief will require a debtor to expend money, without more, is not sufficient reason for concluding that the equitable remedy sought is a claim. What matters is whether a party seeks to force a debtor to pay money to it, in which case that party has a "claim". Torwico, 8 F.3d at 150.

Applying the above legal standard to the facts of this case, we conclude that the injunctive relief sought by PAA and SMG is **not** a "claim" for purposed of § 101(5)(B) and therefore survives debtors' anticipated discharges.

We do not view the permanent injunction PAA and SMG seek as a "repackaged claim for damages" arising out of the breach of the non-relocation covenants by PHA, HBRM, and Marino. PAA and SMG instead seek to prevent PHA, HBRM, and Marino from continuing to engage in conduct that violates the covenants. In short, they want the Penguins to remain where they are and want to avoid having to recover for losses resulting from the breaching of the covenants.[3]

We also do not view PAA and SMG as having the option **in the requisite sense** of seeking monetary damages as an "alternative" to an injunction prohibiting PHA, HBRM, and Marino from breaching the covenants.

Paragraph 704(B)(1) of the third amendment to the restated and amended lease between PHA and SMG is identical to paragraph 2.C of the agreement between PHA and PAA executed during that same month. They provide, among other things, that PAA is entitled to an injunction in the event PHA breaches the non-relocation covenants. Only if PAA is unable to obtain an injunction, however, is it entitled to liquidated damages.

Also, paragraph 704(B)(5) of the third amendment to the restated and amended lease between PHA and SMG is identical to paragraph 2.G of the agreement between PHA and PAA. If PHA is unable to obtain an injunction **or** is unable to find a buyer for the Penguins, **or** chooses not to find such a buyer, it has the right to recover certain specified liquidated monetary damages.

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3. Media accounts and statements in court proceedings made public the secret attempts at shopping the Penguins. Immediately thereafter, public support at the box office dipped, all of which inured to the economic detriment of PAA and SMG. In spite thereof, no claim is advanced for money damages.

As we read paragraphs 704(B)(1) and 2.C, PAA does not have the option in the requisite sense of seeking monetary damages for a breach of the non-relocation covenants as an alternative to injunctive relief. That is to say, PAA does not enjoy the luxury of deciding whether to seek injunctive or monetary relief. It may seek monetary relief **only in the event injunctive relief is not available**. Accordingly, these paragraphs do not justify the conclusion that PAA's right to injunctive relief is a "claim" for purposes of § 101(5)(B).

PHA, HBRM, and Marino do not seriously contest this conclusion but instead assert that paragraphs 704(B)(5) and 2.G provide that a breach of the non-relocation covenants triggers a right to injunctive relief as well as a right, under certain conditions, to payment of monetary damages. It is this disjunctive provision, they argue, which qualifies PHA's right to injunctive relief as a dischargeable "claim".

We disagree both with their construal of paragraphs 704(B)(5) and 2.G and with the conclusion they reach.

We have just concluded that the first of the disjuncts set forth in paragraphs 704(B)(5) and 2.G -- i.e., the right to liquidated damages if PHA is unable to obtain an injunction -- does not provide on its own that PHA has the option of pursuing monetary damages in lieu of injunctive relief. It may recover damages only in the event an injunction is not available.

The remaining disjuncts of paragraphs 704(B)(5) and 2.G, we conclude, do not constitute "alternatives" to equitable relief in the sense required for a right to injunctive relief to qualify as a "claim" for purposes of § 101(5)(B). Not just any alternative right to monetary damages will qualify under the rubric set forth in Torwico and Continental Airlines as an "alternative" remedy in the requisite sense.

A right to injunctive or other equitable relief qualifies as a "claim" for purposes of § 101(5)(B) if the breach that gives rise to equitable relief also gives rise to a **corollary** right to payment of liquidated damages -- i.e., **to a right to payment with respect to the equitable remedy**. Continental Airlines, 125 F.2d at 133 (*citing approvingly to* Matter of Udell, 18 F.3d 403, 408 (7th Cir. 1994)).

We understand this cryptic language to mean that the right to monetary relief must be "derivative of" or a "corollary to" the right to injunctive relief. It is not sufficient for purposes of § 101(5)(B) that the equitable remedy and the right to money damages are related only to the extent that both happen to be disjunctively available in the event of a breach.

Applying this analysis to our case, we see that the disjunctive remedies available to PAA under paragraphs 704(B)(5) and 2.G in the event of a breach of the non-relocation covenants do not make PHA's right to injunctive relief a "claim" in the requisite manner. The other remedies set forth in these contractual provisions, while unquestionably alternatives in a generic way, are not "derivative of" PAA's right to injunctive relief.

One final matter remains for our consideration.

Section 544 of the Bankruptcy Code (11 U.S.C. § 544), the so-called "strong arm" clause, provides in relevant part as follows:

> (a) The trustee....may avoid....any obligation incurred by the debtor that is voidable by--
>
> > (1) a creditor that extends credit to the debtor at the time of commencement of the case, and that obtains at such time and with respect to such credit, a judicial lien on all property on which a creditor on a simple contract could have obtained such a judicial lien, whether or not such creditor exists.

PHA and HBRM argue, as an apparent afterthought and half-heartedly, that we should not enjoin them and Roger Marino from violating the non-relocation covenants because, under § 544(a)(1), a hypothetical judicial lien holder would be able to sell the Penguins to a third party without regard to the non-relocation covenants.

This argument is unpersuasive and merits the same cursory treatment from us that PHA and HBRM gave it.

Although these strong arm powers arise under federal bankruptcy law, their scope vis-a-vis third parties is governed entirely by the substantive law of the state in which the property is located as of the bankruptcy filing date. Midatlantic National Bank v. Bridge (In re Bridge), 18 F.3d 195, 200 (3d Cir. 1994). We conclude from this that Pennsylvania law controls the determination whether a judicial lien creditor could, as PHA and HBRM contend, avoid debtors' obligations arising under the non-relocation covenants. Their contention is not persuasive.

To begin with, we question whether § 544(a) even applies here. The purpose of § 544(a) is to enable the trustee (or debtor-in-possession) to set aside preferential or fraudulent transfers and to preserve estate assets against unrecorded or "secret" liens. In re Teerlink Ranch, Ltd., 886 F.2d 1233, 1235 (9th Cir. 1989). There is no indication that fraud or a secret lien of any kind is at issue here. To the contrary, what is at issue is a non-relocation covenant contained in a lease which was duly filed with the appropriate authorities.

Also, PHA and HBRM have not offered any case law in support of what they consider to be the "obviously true" premise that, under Pennsylvania law, a judicial lien creditor could sell the Penguins without regard to the non-relocation covenants. The correctness of this proposition is far from obvious.

According to Pennsylvania law, the purchaser of property sold at a sheriff's sale assume all risk under the rule of *caveat emptor* and receives only what right, title, and interest the judgment debtor had. CSS Corporation v. Sheriff of Chester County, 352 Pa.Super. 256, 259, 507 A.2d 870, 872 (1986), *appeal denied*, 514 Pa. 630, 522 A.2d 559 (1987). The same would appear to apply by parity of reasoning with respect to limitations on the debtors' interest, such as non-relocation covenants.

An appropriate order shall issue.

3-25-99

BERNARD MARKOVITZ
Chief Judge
U.S. Bankruptcy Court

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

IN RE:

PITTSBURGH SPORTS ASSOCIATES HOLDING COMPANY, PITTSBURGH HOCKEY ASSOCIATES, and HBRM LLC,	:	Bankruptcy No. 98-28174-BM Bankruptcy No. 98-28175-BM Bankruptcy No. 98-28176-BM
	:	Jointly Administered At Bankruptcy No. 98-28174-BM
Debtors	:	
**	:	Chapter 11
PUBLIC AUDITORIUM AUTHORITY OF PITTSBURGH AND ALLEGHENY COUNTY, a body corporate and politic, and SMG PITTSBURGH, INC., d/b/a PITTSBURGH ARENA, INC., a Delaware corporation, General Partner, trading as SMG PITTSBURGH, L.P., d/b/a PITTSBURGH ARENA, L.P., a Delaware limited partnership,	:	
Plaintiffs	:	
v.	:	Adversary No. 98-2475-BM
HBRM, LLC, a Pennsylvania limited liability company, General Partner of PITTSBURGH HOCKEY ASSOCIATES, a Pennsylvania limited partnership, and ROGER M. MARINO, an individual,	:	
Defendants	:	

AO 72A
(Rev.8/82)

ORDER OF COURT

AND NOW at Pittsburgh this 25th day of **March**, 1999, in accordance with the accompanying memorandum opinion, it hereby is **ORDERED**, **ADJUDGED**, and **DECREED** that:

> (1) the motion for a permanent injunction filed by Public Auditorium Authority of Pittsburgh and by SMG Pittsburgh, Inc. is **GRANTED**. Debtors Pittsburgh Hockey Associates and HBRM, LLC, their managing directors, partners, affiliates, agents, officers, servants, employees, experts and attorneys are **PERMANENTLY ENJOINED** from:
>
> > (A) initiating or engaging in discussions with third parties concerning the sale or relocation of the Pittsburgh Penguins hockey team; and
> >
> > (B) relocating or attempting to relocate the Penguins hockey team to a venue other than the Pittsburgh Civic Arena: and
> >
> > (C) causing or permitting the Penguins hockey team to play any portion of its regular season and playoff season scheduled for the Civic Arena to be played at any other venue.
>
> (2) the motion by Pittsburgh Hockey Associates and HBRM, LLC to dissolve the preliminary injunction issued on November 23, 1998, and again on November 25, 1998, is **DENIED**.
>
> It is **SO ORDERED**.

BERNARD MARKOVITZ
Chief Judge
U.S. Bankruptcy Court

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In Re PITTSBURGH SPORTS ASSOCIATES HOLDING COMPANY, Pittsburgh Hockey Associates, HBRM, LLC, Debtors

Pennsylvania Western Bankruptcy Court, Case No. 19-20825

239 B.R. 75 1999 Bankr. LEXIS 1198 1999 WL 741849

Filed: June 18, 1999 | Bernard Markovitz | Author: BERNARD MARKOVITZ, Bankruptcy Judge.

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MEMORANDUM OPINION

FINDINGS OF FACT

Debtor Pittsburgh Hockey Associates ("PHA") owns and operates a National Hockey League ("NHL") franchise known as the Pittsburgh Penguins, which since its inception has played all of its home games in the Civic Arena in Pittsburgh, Pennsylvania.

Respondent Public Auditorium Authority ("PAA") constructed the Civic Arena and is the ultimate Lessor of the land on which it is located and of adjacent land.

Respondent SMG Pittsburgh presently leases the Civic Arena and adjacent land from PAA and has entered into an agreement with PHA whereby the Penguins play all home games at the Civic Arena.

All the assets of the Penguins, including the lease for the Civic Arena and adjacent land, were owned and controlled prior to 1991 by Edward J. DeBartolo Corporation ("DeBartolo") or by corporations it owned or controlled. Civic Arena Corporation ("CAC") had entered into a sublease with PAA whereby CAC subleased the Civic Arena and land on which it was situated. DeBartolo Century Corporation ("DCC") had entered into a sublease with PAA whereby DCC subleased the land adjacent to the Civic Arena.

Under these leases, CAC and DCC paid annual rents to PAA in the amount of $350,000 plus another $250,000 for use of the ice rink for practices. The total rent they paid to PAA on an annual basis was $600,000.

DeBartolo decided in 1991 to divest itself of some of its assets and put the Penguins up for sale. Its asking price for the assets of the franchise was $65,000,000.

DeBartolo engaged one Howard Baldwin to act as its agent and to find prospective buyers of the franchise and its assets. Although Baldwin had located several prospective purchasers, none was able to consummate a sale. At that point Baldwin informed DeBartolo that a group of investors he led wanted to purchase the Penguins and related assets.

Baldwin, however, was not able to meet the $65,000,000 asking price established by DeBartolo. He still needed to come up with approximately $29,000,000 in additional funds.

In an attempt to obtain additional capital, Baldwin approached one Edward Snider, who already was a principal owner of another NHL franchise. He also approached Spectacor Management, in which Snider had a substantial interest.

NHL rules prohibited Snider from purchasing more than a five percent interest in the Penguins because of his substantial ownership interest in another NHL franchise. Its rules also prevented Snider from lending enough money to Baldwin to

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enable Baldwin to consummate a purchase of the Penguins.

As a way of masking Snider's participation in the transaction and making it palatable to the NHL, Snider and others created respondent SMG Pittsburgh, which in turn provided Baldwin with $24,-000,000 so that Baldwin could purchase the Penguins. The remaining $5,000,000 needed to purchase the Penguins was taken care of when DeBartolo agreed to accept deferred payments in this amount from future advertising and playoff revenues and expansion fees.

Baldwin and his group of investors purchased the Penguins from DeBartolo on October 31, 1991 through a complex series of transactions. The assets of the franchise were contributed by the DeBartolo corporations to a partnership known as PBT Business Trust ("PBT"), another De-Bartolo entity. PBT then transferred its interest in the NHL franchise known as the Penguins to the group of investors led by Baldwin who were known as PHA.

Among the documents executed in connection with the sale of the Penguins was an agreement between CAC and SMG, whereby SMG acquired CAC's rights to the Civic Arena under CAC's sublease with PAA. SMG then purported to sublease the Civic Arena to PBT, which in turn transferred its interest in the Penguins and in this purported sublease to PHA.

Among other things, the agreement between PBT and SMG specified that the agreement would expire on September 1, 2012, "unless terminated earlier".

The agreement between SMG and PBT also provided that, under certain conditions, SMG had the right to relocate the Penguins to a venue other than the Civic Arena. If SMG elected not to renew the CAC lease with PAA and did not itself select a new venue for the Penguins, the Penguins had the option of relocating to another venue, but only if the Penguins maintained SMG's position vis-a-vis the Penguins until the year 2012. Should this occur, the Penguins had an obligation to require the landlord of the alternative venue to enter into an agreement with SMG, who then would enter into an agreement with PHA on terms substantially similar to those providing for PHA's occupancy of the Civic Arena.

Yet another document prepared in connection with Baldwin's acquisition of the Penguins was a security agreement between PBT, the predecessor of PHA, and SMG, whereby the obligations of PBT/ PHA to SMG were protected by a security interest in basically all the assets of the Penguins. Despite repeated demands by SMG that it do so, PBT/PHA never executed the agreement.

The agreement between SMG and PHA, as amended and restated, provides for' payment of a base rent in accordance with a specified formula. It also obligates PHA to pay SMG all event costs for staging hockey games at the Civic Arena and to pay an adjusted base rent for regularly-scheduled home games that are televised within a fifty-mile radius of the Civic Arena.

The amended and restated agreement also entitles SMG to a specified dollar amount of gross revenues derived from suites in existence prior to the 1993-94 hockey season and to specified percentages of gross revenues derived from various seats and suites constructed in 1993-94. SMG also retains 92.5% of revenues derived from sales of programs and novelties and retains 100% of parking revenues through October 31, 2001, after which it will retain only 60%. It also receives a specified percentage of advertising revenues.

With the exception of those NHL franchises which play their home games in a arena under an agreement with an entity affiliated with the franchise, the cost to PHA of playing its home games is the highest in the NHL and exceeds its nearest competitor by more than twenty-five

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percent. If player salaries are excluded, PHA's costs are the highest in the NHL as a percentage of costs other than player salaries.

PHA derives no income from non-hockey events staged at the Civic Arena. Moreover, it is required to compensate SMG for revenues SMG loses at non-hockey events due to reduced seating capacity as a result of improvements to the Civic Arena made in 1997.

PHA presently pays SMG between six million and seven million dollar annually for playing its home games at the Civic Arena, an increase of one thousand percent over the annual rents previously paid by CAC and DCC to PHA. It also is obligated to pay for recent improvements made to the

Civic Arena. SMG, which purports to lease the facility to PHA, is 'not required to pay anything for the improvements. The total annual amount PHA pays for using the Civic Arena and for recent improvements made thereto exceeds ten million dollars.

PHA has suffered losses exceeding $50,-000,000 over the past three hockey seasons. During this same period, payments made by PHA to SMG and for improvements to the Civic Arena exceed $30,000,-000. Payments to SMG alone during this period approximate $20,000,000.

PHA filed a voluntary chapter 11 petition on October 13, 1998. It indicated in its schedules that it had an unexpired lease with SMG for use of the Civic. Arena.

Three different plans of reorganization, none of which has yet been confirmed, were filed in this bankruptcy case. After PHA indicated that it would not file a plan of its own, a group led by former Penguins player Mario Lemieux submitted a plan in March of 1999. The NHL submitted a plan in April of 1999. SMG and Fox Sports Net Pittsburgh, which has local television rights to Penguins games, submitted yet a third plan. Hearing on possible confirmation of one of these plans is scheduled for Thursday, June 24, 1999.

On May 26, 1999, PHA brought the present motion to reject in accordance with 11 U.S.C. § 365 (a) the above agreement for use of the Civic Arena or, in the alternative, to determine that the agreement is not a "true" lease.

An evidentiary hearing on PHA's motion to reject the agreement was conducted on June 4, 1999. We issued an oral order at the conclusion of said hearing granting its motion to reject the agreement. A written codification of that oral order was subsequently transmitted to the parties in interest bound by the oral order.

An evidentiary hearing on PHA's motion to determine that its agreement with SMG for use of the Civic Arena is not a "true" lease but a disguised financing agreement instead was conducted on June 7, 1999.

The purpose of this memorandum opinion is to more fully explain the basis for our oral order issued on June 4, 1999, and to determine whether the amended and restated agreement between PHA and SMG constitutes a "true" lease.

PREAMBLE

Initially it must be said that we do not wish to encourage a litigant to characterize a transaction in one manner one day and thereafter revise diametrically the legal description. If such conduct merits a judicial response, it can be provided at an appropriate time. That being said, we find that PHA has not made a judicial admission that its agreement with SMG qualifies as a "true" lease, nor do we find that debtor's actions merit invoking the doctrine of judicial estoppel. Court documents, exhibits, and testimony evidence an intent to camouflage a financing agreement into a lease structure. To the extent that the agreement is a "true" lease, we alternatively conclude that PHA may reject it.

DISCUSSION

I. Is PHA Estopped From Seeking A Determination That Its Agreement With SMG Is Not A True Lease?

PHA identified its agreement with SMG as an unexpired lease of real property in

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its bankruptcy schedules. It did the same in various motions brought previously in this bankruptcy case and in Adversary No. 98-2053-BM, wherein we enforced certain non-relocation covenants contained in agreements between PHA and SMG and between PHA and PAA.

According to SMG, these representations by PHA estop PHA from now asserting that its agreement with SMG is not a "true" lease. Such representations, SMG contends, qualify as binding judicial admissions and are conclusive with regard to the "true" nature of the agreement. SMG further maintains that PHA's earlier assertions concerning its lease with SMG are inconsistent with PHA's present position and that PHA therefore is judicially es-topped from denying that its agreement with SMG is a "true" lease.

A.

Judicial Admissions.

A judicial admission is an admission made by a party in pleadings, stipulations, and the like, and do not have to be proven in the litigation in which they are made.

Giannone v. United States Steel Corp.,

238 F.2d 544, 547 (3rd Cir.1956). It is binding upon the party making the admission for purposes of the case in which made, provided that said admission is unequivocal.

Glide v. White Motor Co.,

458 F.2d 1287, 1291 (3d Cir.1972).

Judicial admissions are restricted in scope to matters of fact which otherwise would require evidentiary proof.

Id.

A legal conclusion�"e.g., that a party was negligent or caused an injury�"does not quality's a judicial admission.

Giannone,

238 F.2d at 547 ;

MacDonald v. General Motors Corp.,

110 F.3d 337, 341 (6th Cir.1997)

(citations

omitted).

PHA's numerous previous representations during this bankruptcy case that its agreement with SMG is a lease is not a binding judicial admission for at least two reasons.

For purposes of the present motion. the proposition that the agreement between PHA and SMG is (or is not) a "true" lease is a conclusion of law no less than the proposition that, say, an individual was negligent or committed perjury. In the present context it does not constitute a statement of fact. Conclusions of law, we have seen, do not lie within the scope of the doctrine of judicial admission. They must be proven in a contested matter.

The contention that PHA's previous assertions constitute binding judicial admissions fails also because they were not made "in the same litigation" as is now before us.

Giannone,

238 F.2d at 547 .

Many of the representations by PHA that it had a lease with SMG were made to banks, on its tax returns, in audited financial statements, and to members of the press and electronic media. They were not made in a judicial context and therefore do not qualify as admissions.

As for those statements PHA made in various other motions brought in this bankruptcy case or in adversary actions brought under it, they were not made in the requisite sense "in the same litigation".

Giannone

was a personal injury tort action brought under state law in federal court. It did not involve a bankruptcy case, which is vastly different from a garden-variety personal injury case. What qualifies as the "same litigation" for purposes of a garden-variety personal injury action is not the same as what constitutes such in a bankruptcy case. A motion for relief from the automatic stay, for instance, is not the "same litigation" as a motion for approval of counsel fees or an adversary action objecting to discharge even though all are brought within the confines of a single bankruptcy case.

B.

Judicial Estoppel.

SMG alternatively argues that PHA is judicially estopped from now maintaining that the above agreement with SMG is not a "true" lease because of previous statements by PHA in the above bank

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ruptcy case that it was a "lease". This argument fares no better than does SMG's previous argument concerning judicial admissions. Debtor is not judicially estopped from asserting in its present motion that its agreement with SMG really is not a lease and from seeking a determination to that effect.

Judicial estoppel is a judge-made doctrine which prevents a litigant from asserting a position that is inconsistent with a position that litigant had asserted in the same or in a previous proceeding.

Ryan Operations v. Santiam-Midwest Lumber Co.,

81 F.3d 355, 358 (3d Cir.1996). It was created to prevent' a litigant from playing "fast and loose" with the court.

McCarron v. F.D.I.C.,

111 F.3d 1089, 1097 (3d Cir.1997).

It involves the relationships between a given litigant and the judicial system as a whole.

Delgrosso v. Spang & Co.,

903 F.2d 234, 241 (3d Cir.1990). Its primary purpose is to protect the integrity of the judicial system, not to protect other parties to the litigation.

Fleck v. KDI Sylvan Pools, Inc.,

981 F.2d 107, 121-22 (3d Cir.1992).

There is no bright-line test for determining whether the doctrine applies in a particular instance. Its application requires consideration of facts and circumstances specific to that particular case.

Scarano v. Central Railroad Co. of New Jersey,

203 F.2d 510, 513 (3d Cir.1953).

Judicial estoppel is an appropriate remedy when: (1) the litigants' present position is inconsistent with a position it previously had asserted; and (2) the litigant asserted either (or both) of the inconsistent positions in bad faith �" i.e., with intention to play "fast and loose" with the court.

Ryan Operations,

81 F.3d at 361 .

The person invoking the doctrine of judicial estoppel need not be the same adversary as the one against whom the previous inconsistent position was asserted.

Ryan Operations,

81 F.3d at 359 . Furthermore, the litigant whom they seek to estop need not have benefitted from its previous inconsistent position.

Id.

Judicial estoppel is not intended to eliminate all inconsistencies, however slight or inadvertent; it is concerned only with deterring inconsistencies which are of such a magnitude as to lead one to conclude that a litigant is playing "fast and loose" with the court.

Ryan Operations,

81 F.3d at 358 .

Although PHA unquestionably represented on numerous occasions in previous proceedings occurring within the perimeters of this bankruptcy case that its agreement with SMG was a lease, we are not willing to conclude that these representations are "inconsistent", for purposes of judicial estoppel, with its present position that said agreement really is not a lease after all.

When PHA made these previous representations, the question whether the agreement "truly" was a lease or a lease in name only was not at issue. That questions was not "on the table", as it now is. PHA, in other words, did not previously assert the position that the agreement with SMG "truly" was a lease, as opposed to a lease in name only, when it previously so characterized the agreement with SMG.

To the extent that these previous representations are inconsistent with PHA's present assertion, they would have to qualify as a "position" which PHA "urged upon" or "argued before" the court for judicial estoppel to apply.

Cheripka v. Republic Insurance Co. (In re Cheripka),

1991 WL 276289 (3rd Cir.1991). When it previously represented in this bankruptcy case that it had a lease with SMG, PHA was not asserting a "position" which it was "urging upon" or "arguing before" the court.

The matter does not end there. Judicial estoppel also does not apply because we see nothing that would justify the inference that PHA's present position that its

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agreement with SMG is not truly a lease is asserted in bad faith �" i.e., for the purpose of playing "fast and loose" with the court.

PHA brought the motion presently under consideration on May 26, 1999, shortly after SMG and Fox Sports had submitted their own plan of reorganization. It was approximately one month before a hearing on which of the competing plans of reorganization were scheduled to be heard. SMG's argument, as we understand it, maintains that PHA now seeks a determination that its agreement with SMG is really not a lease for the purpose of preventing confirmation of SMG's proposed plan. Such an outcome, SMG continues, will increase the likelihood that the Lem-ieux plan will be accepted by voting creditors and then confirmed. This result, it insists, would inure to the benefit of PHA's present principals. We reject SMG's argument for at least two reasons.

We are not persuaded that PHA brought the present motion when it did because it intended to scuttle the plan proposed by SMG and Fox Sports. It is just as likely, based on the evidence presented, that PHA brought the present motion when it did �" i.e., shortly after the Penguins were eliminated from contention for the Stanley Cup �" because it wanted to avoid an anticipated reduction in the sale of playoff tickets. Filing the motion while the playoffs were still in contention, PHA reasoned, would erode fan support for the Penguins.

Even if SMG is correct in asserting that PHA brought the present motion when it did for the purpose of having the Lemieux. plan confirmed over the plan submitted by SMG and Fox Sports, this does not constitute the sort of bad faith required for judicial estoppel to apply. Judicial estoppel, we previously noted, was created to protect the integrity of the judicial system and was not meant to protect the litigants. Any harm to SMG that may (or may not) occur to SMG as a result of PHA's present motion does not trigger application in this instance of the doctrine of judicial estoppel.

Having determined that PHA is not es-topped from seeking a determination that its agreement with SMG is not a "true" lease, we next shall address the merits of PHA's position.

C.

Is The Agreement Between PHA And SMG A "True" Lease?

To make this determination we must consult Pennsylvania law.

The caption of a document does not determine its legal effect.

Kowatch v. Atlantic Richfield Co.,

480 Pa. 388, 391 , 390 A.2d 747, 749 (1978). For instance, a caption indicating creation of a landlord-tenant relationship is not necessarily dispositive in that regard.

Nath v. National Equipment Leasing Corp.,

282 Pa.Super. 142, 153-54 , 422 A.2d 868, 873-75 (1980),

aff'd,

497 Pa. 126 , 439 A.2d 633 (1981). On the other hand, it is not necessary that the agreement contain the word "lease" for it to be one, provided that the requisites for a lease are present.

Morrisville Shopping Center v. Sun Ray Drug Co.,

381 Pa. 576, 582-83 , 112 A.2d 183, 186-87 (1955).

It is difficult, if not impossible, to formulate an all-encompassing definition of "lease". It may, however, be accurately defined as:

> ... a conveyance or grant or demise of certain described land or tenement (usually in consideration of rent or other recompense) for a prescribed period .... but for a less time than the lessor hath in the premises.

Morrisville Shopping Center,

381 Pa. at 582 , 112 A.2d at 186 .

No particular words are required to constitute a lease. Any writing will suffice if it establishes the intention of one party to voluntarily dispossess itself of the premises in return for consideration and of the other party to assume possession thereof for a prescribed period.

Schweit

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zer v. Evans,

360 Pa. 552, 555 , 63 A.2d 39, 40 (1949).

In a bona fide lease, the interest of the lessee is equivalent to that of a purchaser of the premises for the term of the lease.

Commonwealth v. Monumental Properties, Inc.,

459 Pa. 450, 470-72 , 329 A.2d 812, 822-23 (1974). As one court stated long ago:

> A lease is a sale and conveyance of the property leased, which only differs from what is called a deed, in being limited to a term certain, and leaving a reversion-ary interest in the grantor.... From the moment of letting, the land becomes the tenant's and remains such until the lease terminates; the house, if there be one, is his castle.

Wien v. Simpson,

2 Phila. 158 , 158 (Pa.Dist.Ct.1856).

Determining whether an agreement is a "true" lease or a financing device requires examination of the particular facts and circumstances of each case. What at first glance looks to be a lease may upon further scrutiny reveal itself to be a disguised financing device.

Nath,

282 Pa.Super. at 148 , 422 A.2d at 871 .

Our review of the circumstances surrounding the agreement between PHA and SMG which is at issue here leads us to conclude that it was not a "true" (or bona fide) lease whereby SMG conveyed to PHA the right to use the Civic Arena so the Penguins could play their home games there. Rather, it was a financing device masquerading as a lease, so as to allow Howard Baldwin to purchase the team while providing a stream of money to SMG to reimburse it for the cash infusion and for its efforts in running the facility.

A complex series of agreements and transactions occurred on October 31, 1991, which culminated in PHA becoming the owner of the NHL franchise known as the Pittsburgh Penguins.

Among other things, CAC and SMG executed, with PHA's consent, an agreement whereby CAC assigned to SMG all of CAC's rights to the Civic Arena arising out of its sublease with PAA. Contemporaneously therewith, SMG purportedly subleased the Civic Arena to PBT, which in turn transferred to PHA its interest in the Penguins along with the purported sublease it had just entered into with SMG. The term of the purported sublease was to expire on September 1, 2012, "unless terminated earlier hereunder".

According to Article III, § 315(2) of their agreement, SMG has the right under certain conditions to relocate the Penguins to an "alternative facility" of SMG's choosing. No geographical limitations were set upon the locus of the alternative facility. Nothing would seem to prohibit SMG from relocating the Penguins to an alternative facility located, say, two thousand miles from the Civic Arena. If PHA did not timely reject the alternative facility chosen by SMG, PHA and SMG were required to execute an amendment to their agreement reflecting the fact of relocation to the alternative facility. Such amendment could not, however, affect any of the terms of their agreement unless a particular term was "inapposite" relative to the alternative facility.

According to Article III, § 315(3) of their agreement, PHA has the right under certain conditions to relocate to an "alternative facility" acceptable to SMG. Should it relocate the Penguins, however, PHA must require the owner of the alternative facility to enter into a lease agreement with SMG, which then shall amend its agreement with PHA to reflect the relocation and which shall not affect any terms of the previous agreement unless a particular term was "inapposite" relative to the alternative facility. Among other things, the agreement requires PHA to guarantee SMG the stream of income it would have enjoyed at the Civic Arena had relocation not taken place.

These provisions lead us to conclude that the agreement between PHA and SMG whereby the Penguins were to play

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all of their home games at the Civic Arena is not a "true" �" i.e., bona fide �" lease, as the concept was defined previously.

The agreement did not convey, grant, or demise the Civic Arena to PHA during the term of the lease. We have just seen how the above provisions of their agreement gave SMG the right (under certain conditions) to relocate the Penguins to another facility, which could be virtually anywhere. If it did so, the terms of their agreement had to be amended only to reflect the fact of relocation and to change any terms that were "inapposite" relative to the alternative facility. All other terms of the agreement, including those which provided the basis on which PHA paid SMG for permitting the Penguins to pay at the Civic Arena remained in effect.

Also, the agreement provided that PHA itself could under certain conditions relocate the Penguins to another facility. It could do so, however, only if the owner of the alternative facility first entered into a lease with SMG, which in turn would sublease the alternative facility to PHA under terms which would guarantee the stream of income SMG would have enjoyed had the Penguins remained at the Civic Arena.

In our estimation, these requirements negate the proposition that PHA in effect had purchased the Civic Arena for a specified term, one of the requirements for a lease, so that the Penguins could play there.

The matter does not end there. The requirement that a lease be for a prescribed period of time also is lacking in this instance. The term of their agreement was to expire on September 1, 2012, "unless terminated earlier". Such an indefinite term is inconsistent with the requirement that a lease be for a "prescribed period".

The agreement between SMG and PHA for use of the Civic Arena was in reality a financing device masquerading as a lease.

When Howard Baldwin came up short in his quest to purchase the Penguins from DeBartolo, he approached an individual about providing the necessary funds to enable the sale to go through. Due to this individual's ownership of a substantial portion of another NHL franchise, NHL rules prohibited this individual from contributing the needed funds in exchange for an equity interest in the Penguins or from lending the money to Baldwin. To make his participation palatable to the NHL, this individual (and others) created SMG, which then contributed $24,000,000 ostensibly in return for acquiring CAC's rights to the Civic Arena under its sublease with PAA. Its contribution in reality was a loan to Baldwin's group to enable them to complete their purchase of the Penguins.

The above-cited provisions of the above agreement between SMG and PHA (as successor to PBT), were inserted to provide a steady stream of payments to SMG. Even if the Penguins ceased playing in the Civic Arena and moved to another facility it ensured that PHA would fully repay SMG the funds it had loaned to Baldwin and his co-investors. We would expect to find such provisions in a financing transaction, not in a bona fide lease.

A compelling piece of extrinsic evidence in support of this conclusion is the security agreement SMG drafted which granted SMG a security interest in basically all of the Penguins assets. Despite repeated demands by SMG that it do so, neither PBT nor PHA executed the agreement. SMG would not have so acted unless it had loaned $24,000,000 to PHA and intended the so-called lease to be a financing device rather than a bona fide lease.

Both PHA and SMG urge us to take the following factors into consideration in determining whether or not the above agreement between them is a bona fide lease:

(1) whether the amount of the rent was calculated to compensate for use of the property or was based on some other purpose, such as ensuring a particular return on an investment;

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(2) whether the property was purchased by the lessor specifically for the lessee's use;

(3) whether the transaction was denominated a lease to gain certain tax advantages;

(4) whether the lessee assumed obligations normally assumed by the lessor; and

(5) whether the agreement permits the lessee to purchase the property for a nominal sum at the end of the lease.

City of Olathe, Kansas v. KAR Development Associates (In

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KAR Development Associates),

180 B.R. 629, 639 (D.Kan.1995)

(citing to In re Hotel Syracuse, Inc.,

155 B.R. 824, 838-39 (Bankr.N.D.N.Y.1993)).

We are not convinced that these factors are relevant to determining in this instance whether or not the agreement between SMG and PHA is a bona fide lease. These factors were articulated for determining whether an agreement between SMG and PHA is a bona fide lease for purposes of 11 U.S.C. §§ 365 (d)(4) and 502(b)(6). We are not here concerned with these provisions of the Bankruptcy Code but instead with whether the agreement is a bona fide lease at all under state law. In addition, these cases were concerned with rejection of equipment leases. The purported lease at issue here does not concern equipment.

To the extent these cases are relevant, they indicate on balance that the above agreement is not a lease for purposes of 11 U.S.C. §§ 365 (d)(4) and 502(b)(6).

We already have determined that the agreement between SMG and PHA was structured as a covert financing device to ensure that SMG would receive a return on the loan it had made to enable the Baldwin-led group of investors to purchase the Penguins from DeBartolo.

SMG acquired CAC's rights under its sublease with PAA for the purpose of providing a vehicle whereby the loan it made to the Baldwin group could be disguised as a lease. It acquired the ostensible sublease so the Penguins could play in the Civic Arena and generate revenues to repay the loan.

Although calling the transaction a lease apparently did not provide any tax advantages, it was so denominated to make it palatable to the NHL. The record does not indicate whether the NHL was aware of this subterfuge.

Finally, as the purported lessee, PHA assumed the obligation of paying for certain improvements to the Civic Arena. SMG, whose purported interest in the Civic Arena was greatly enhanced by such improvements, paid nothing for them.

Based on all the foregoing, we conclude that the agreement between SMG and PHA concerning use of the Civic Arena for staging Penguins hockey games was not a "true" lease but was instead a financing device to ensure that PHA repaid a loan SMG had made to enable the group led by Howard Baldwin to purchase the Penguins.

II. Rejection Of The Lease

It is not necessary in light of the determination that the agreement between SMG and PHA is not a bona fide lease to determine whether PHA can reject it. To the extent that said agreement is a true lease, we shall consider out of an abundance of caution whether PHA may reject it in accordance with the Bankruptcy Code.

With the bankruptcy court's approval, a chapter 11 debtor-in-possession may reject an unexpired lease to which it is a party. 11 U.S.C. §§ 365 (a) and 1107(a).

Rejection cuts off any right of the other party to the lease to require debtor to perform and limits their claim to one for breach of contract.

University Medical Center v. Sullivan (In re University Medical Center),

973 F.2d 1065, 1075 (3rd Cir.1992).

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If the unexpired lease was not previously assumed during the bankruptcy case, the resultant breach is deemed to have occurred immediately before the filing of the bankruptcy petition. 11 U.S.C. § 365 (g)(1). Any allowed claim arising therefrom is treated as a prepetition claim for damages.

In re Klein Sleep Products, Inc., Nostas Associates v. Costich (In re Klein Sleep Products, Inc.),

78 F.3d 18, 26 (2d Cir.1996). The measure of the resultant damages is set at 11 U.S.C. § 502 (b)(6).

The appropriate standard we must apply in determining whether or not to approve rejection under § 365(a) of the Bankruptcy Code is the so-called "business judgment" test.

N.L.R.B. v. Bildisco and Bildisco (In re Bildisco),

682 F.2d 72, 79 (3d Cir.1982),

aff'd,

465 U.S. 513 , 104 S.Ct. 1188 , 79 L.Ed.2d 482 (1984).

To prevail on its motion to reject. debtor must establish that rejection is in the best interest of the estate and of unsecured creditors.

In re Klein Sleep Products,

78 F.3d at 25 .

We should not substitute our own judgment for that of debtors but should instead allow rejection to take place if the motion is not manifestly unreasonable and not in bad faith and would seem to enhance debtors' estate.

Four B Corp. v. Food Barn Stores, Inc. (In re Food Barn Stores, Inc.),

107 F.3d 558 , 567 n. 16 (8th Cir.1997).

SMG has objected to debtors' motion to reject its sublease with SMG. According to SMG, rejection of the agreement does not pass muster under the business judgment rule. Rejection of the sublease, it insists, is not a reasonable business judgment in that it will leave the Penguins without a place to play its home hockey games next season and will result in "immediate and total devastation of fan support". We disagree.

To begin with, SMG's unarticulated premiss that the Penguins will not have a venue in which to play its home games if PHA rejects its present sublease with SMG is not necessarily true. The possibility remains that the plan proposed by SMG and Fox Sports Pittsburgh will carry the day and be confirmed over competing plans. If this occurs, we would expect that SMG will quickly negotiate a new agreement with the reorganized debtor which will have the Penguins playing in the Civic Arena next hockey season. Even if their plan is not confirmed and the Lemieux-led plan is confirmed instead, there still will remain time for the reorganized debtor and SMG to arrive at a mutually acceptable new agreement. Both sides would have powerful economic incentives to do so. The Penguins will need a facility in which to play home games. SMG will need to come to terms with the reorganized debtor or else be in material default of its lease with PAA and risk having PAA terminate the lease and deal directly with the reorganized debtor.

The matter does not end there. We also are persuaded that PHA's rejection of the present sublease is in the best interest of its bankruptcy estate and comports with the requirements of the business judgment rule. If the present agreement is not the most onerous in the NHL, it is near the top of the list.

PHA presently pays SMG between $6,000,000 and $7,000,000 per year, a tenfold increase over the rent paid to PAA by CAC and DCC, and also pays several million dollars more per year for improvements made to the Civic Arena which are included in SMG's leasehold interest. SMG pays nothing for these improvements. In addition to receiving a substantial base rent, SMG presently retains 92.5% of revenues derived from sales of programs and novelties, 100% of parking revenues, and 80% of revenues from sales of food and beverages. It also receives a substantial percentage of ticket sales for various seats and suites at the Civic Arena, of income derived from the Igloo Club, and of advertising revenues.

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Not only does PHA not derive any revenue from non-hockey events staged at the Civic Arena, it also is required to compensate SMG for revenues lost by SMG as a result of decreased seating capacity due to construction of Igloo Club seats in 1997.

PHA has lost approximately $50,000,000 during the past three hockey seasons. The cost to PHA of operating, under the provisions of the agreement with SMG during that same period is approximately $30,000,000, which equals some 60% of its operating losses. Rejection of the current agreement with SMG and negotiation of a new one will go a long way towards rectifying this problem.

Neither PHA nor any reorganized debtor could continue to operate for very long under the provisions of the present agreement with SMG. No feasible plan of reorganization is likely as long as the agreement remains in effect.

Even the plan of reorganization proposed by SMG and Fox Sports Pittsburgh supports this conclusion. While their plan does not propose altering any of the terms of the sublease with SMG, they do propose that PAA assume the cost of paying for improvements made to the Civic Arena and propose that the City of Pittsburgh and County of Allegheny effectively subsidize payment of amusement taxes for events held at the Civic Arena. Their proposed plan would merely shift to other creditors the burden of defraying other costs of doing business at the Civic Arena while leaving the onerous provisions of the agreement unchanged.

While SMG's contention that rejection of the sublease is not- in the best interest of PHA's bankruptcy estate at first blush may appear plausible, further reflection convinces us that rejection of the sublease is the only remaining reasonable course of action available and is in the best interest of PHA's bankruptcy estate.

Rejection of the sublease will leave PHA (at least for the time being) in the admittedly perilous position of not having a place to play its home games. So doing, however, also will maximize the probability that a reorganized debtor will succeed in negotiating an agreement containing more favorable terms which will enable it to continue operating at the Civic Arena and to remain viable. When viewed from this perspective, it becomes apparent that PHA's request to reject the present sublease is in the best interest of its bankruptcy estate.

We are optimistic that the reorganized debtor and SMG will successfully arrive at a new agreement that is mutually acceptable to both parties while relieving the reorganized debtor of some of the intolerable provisions of the present agreement and enabling it to survive as a viable entity. While it unquestionably could happen that SMG and a reorganized debtor might not succeed in negotiating a new agreement on terms which would enable the latter to survive, SMG in that event would be in default of its agreement with PAA and would risk having its agreement with PAA terminated. It is precisely this "Sword of Damocles" hanging over the heads of both parties that makes reasonable PHA's request to reject its sublease with SMG.

PHA's rejection of its sublease with SMG may or may not result in SMG receiving rejection damages as a result of the breach that will occur. While agreeing that SMG in principle is entitled to rejection damages, the parties disagree concerning whether or not such damages are appropriate in this instance. We need not address this issue now and will riot do so unless SMG submits a claim for rejection damages and an interested party objects.

An appropriate order shall issue.

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Opinion Details

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Stadium & Arena Financing

September 7, 1998

SECTION: Vol. 2; No. 17; Pg. 1

LENGTH: 203 words

HEADLINE: PENGUINS CONSIDER FLYING

BODY:

Pittsburgh's a small market, but that doesn't mean everybody needs to try to leave town at once. No sooner had "Plan B," the solution for replacing Three Rivers Stadium, been hashed out for the Pirates and Steelers than Penguins co-owner **Roger Marino** showed up in Kansas City, Missouri.

The visit was by the invitation of Kansas City's mayor Emmanuel Cleaver. "When we found out the Penguins were having problems in Pittsburgh, we invited Mr. Marino to come see the (Kemper) Arena," said Laurie Spoon-Potter, the mayor's press secretary. In mid-August, Marino met with the mayor and officials at the arena, which is currently home to the IHL Blades.

Marino has since said he's not looking for a replacement to the 37-year-old Civic Arena, where the Penguins' lease runs through 2011. Still, there are reasons to skip out. The Penguins are currently near the bottom of the NHL in attendance, a fact that stems from losing star Mario Lemieux to retirement, as well as playing in a small (16,958-seat) arena. In addition, the lawsuits are flying in Pittsburgh, with Lemieux suing the team for $33 million of deferredsalary payments and Arena executives suing the Penguins' owners for a missed loan payment.

LANGUAGE: ENGLISH

LOAD-DATE: September 8, 1998

MEMORANDUM

FROM: The Honorable Jeffery A. Deller
United States Bankruptcy Judge

RE: The Honorable Bernard Markovitz

DATE: December 17, 2022

It is with great sadness that I inform you that retired United States Bankruptcy Judge Bernard Markovitz has passed away at the age of 83 after a courageous battle against pancreatic cancer.

Judge Markovitz was sworn in as the Western District of Pennsylvania's 6^{th} bankruptcy judge on November 25, 1985. For 26 years, Judge Markovitz served the District with distinction as he presided over consumer and commercial bankruptcy cases filed by the citizens residing in each of the 25 counties which comprise the Western District of Pennsylvania.

His service included being Chief Judge of the Court from 1997-2000, and during that time the Court became known as the "highest court in the land" when he spearheaded the Court's move from the antiquated William S. Moorhead Federal Building to the 54^{th} floor of the U.S. Steel Building.

A true lover of Western Pennsylvania's great sports teams, Judge Markovitz was a graduate of Westminster College where he played football for the Titan's. Westminster College was also the place where Bernie met the love of his life– Anne Catherine ("Cathy") Dalae– whom he would wed in 1966 and later have two children (son, Bill, and daughter, Susan).

After graduation Bernie earned his law degree from Duquesne University. Thereafter, he dabbled in politics and was a candidate for many elective offices, including state representative of the 23^{rd} Legislative District where he advocated for a "complete overhaul of the tax structure." He was also the Republican candidate for the Allegheny County District Attorney position, ultimately coming up short to legendary Democrat Robert E. Colville (who himself later became a well respected jurist in Pennsylvania). Commenting on his victory, Mr. Colville said: "Bernie had the disadvantage of being in the minority party in terms of registration." Reports of the time were that Democrat's outnumbered Republican registrations on the voter rolls of Allegheny County by a margin

Bernie's public service was constant and varied, including a stint as an officer in the United States Army Reserves and service as a Lieutenant Commander in the United States Navy.

Bernie's work as an attorney included service as an assistant district attorney, where he tried many cases including murder cases on behalf of the Commonwealth of Pennsylvania. Judge Markovitz was also an assistant solicitor for the City of Pittsburgh Schools under the late Superior Court Judge Justin Johnson. Prior to his appointment to the bench, Judge Markovitz was also in private practice for nearly 20 years handling a variety of cases such as personal injury, criminal defense, mortgage foreclosure, and bankruptcy.

A real "judges judge," Bernie Markovitz looked the part, gray beard and all, and acted the part as well.

When he was appointed in 1985, Judge Markovitz (along with Judges Cosetti and Bentz) was tasked with the unpleasant task of changing the culture of bankruptcy in the Western District. According to Judge Markovitz, the Circuit Court and District Court were of the view that the local bankruptcy practice was "too chummy" and "insular."

Judge Markovitz was also tasked with raising the bar in terms of the quality of the practice of law within the United States Bankruptcy Court for the Western District of Pennsylvania. "After all," Judge Markovitz once told me, "we are a unit of the United States District Court."

While operating a no-nonsense courtroom, sports journalist Stan Savran wrote this about Judge Markovitz:

> Actually I suppose I wouldn't mind being an attorney. I just wouldn't want to be one standing in front of Judge Markovitz. He reminded me of the principal at school. You're standing before him, blathering a mealy-mouthed explanation of why you threw a spitball at the French teacher, and he won't even let you commit disciplinary suicide. He'd interrupt you, point out how ridiculous your story was even before you got to the ridiculous part. So it was for many in the horde of barristers. It made you squirm in your seat. Any they, of course, had to take it. "Yes, Your Honor. Thank you, Your Honor: May I have another tongue lashing, Your Honor?"

While he presided over thousands of bankruptcy cases during his tenure, the most visible was the bankruptcy case of the Pittsburgh Penguins.

During this case, Judge Markovitz single handedly prevented the Penguins from leaving Pittsburgh when he granted an injunction barring the team's relocation. In his decision, he wrote: "The Penguins are as much a part of the warp and woof of this community as are its other professional sports teams, museums, parks, theaters and ethnic neighborhoods." Judge Markovitz further wrote: "As important as [the creditors'] interests are, they may have to give way when the interest of the community at large so dictates."

For almost a year, Judge Markovitz navigated the legal red tape and public legal haggling over the fate of Pittsburgh's only NHL franchise. At one point during the proceedings, when it appeared to be at a stalemate which could potentially doom the fate of the team, Judge Markovitz implored the parties to "not miss the opportunity to save an asset of the community."

Judge Markovitz recognized early on that saving the team from a move to a distant city (or at worst extinction) could only be accomplished through consensus between the team's owners, players, the NHL, team vendors, the Civic Arena landlord, and Pittsburgh's Sports & Exhibition Authority.

Bernie remarked, that if a consensus was not reached, "It would be all of our failings." He further reminded the NHL that: "The last thing the NHL wants to have is this franchise terminated, and we sell off this hockey team's pots and pans." With respect to television and radio rights to broadcast Penguins' games, Judge Markovitz said to the networks: "You need a hockey game on TV. You surely don't want to fill it up with mud wrestling."

Bernie's formal rulings and not so subtle courtroom nudgings resulted in what he had hoped (and what all Pittsburgh sports enthusiasts had hoped)– a deal that would keep the Penguins in Pittsburgh. The deal included Mario Lemieux converting his debt for equity, and Mario leading an investor group that acquired the team.

That day (June 27, 1999), Pittsburgh Post-Gazette columnist Brian O'Neill described Judge Markovitz as "a man whose robe ought to hang in the Civic Arena's rafters alongside the championship banners, because he is the man who saved hockey in Pittsburgh."

In an article aptly titled *No 1 Star: Markovitz*, O'Neill wrote that "This umpire [i.e., Judge Bernie Markovitz] knew the game better than the players." O'Neill observed: "Always, Markovitz kept his perspective, even as the high-priced lawyers before him lost all of theirs."

According to O'Neill:

> Markovitz was the right guy in the right place at the right time. When this hearing ended, the media hordes shoved microphones in front of Lemieux. All attention was on the glamorous athlete-turned-tycoon.

> Markovitz, meanwhile got what he wanted too. Lunch. It was past 3:15 p.m., and he'd been on the bench since 9:00 a.m., saving a franchise . . .

Judge Markovitz was certainly the right man in the right place, not only in the Penguins case but in life. I know that first hand. Despite a busy professional life, Bernie never missed a sporting event where his children Bill and Susan were participants. He even found time to attend sporting events for my children, and kept me company on many long drives to them.

Bernie loved his wife Cathy more than words can describe. In retirement in Florida, he loved joining Cathy in spending time with their children and grandchildren, hosting friends for a game of bridge, having a piece of his favorite strawberry pie, going for his daily bike ride to the library, saying his prayers, playing the clarinet, and watching Penn State football games and otherwise cheering on the Steelers, Pirates, and Penguins.

From time to time, he'd also check in on the work of the Court to "see what we are up to." Every time I would have a call with Bernie, he would always end it by saying: "Thank you for the call. You be safe, and watch yourself."

Bernie, thank you for the good memories. You be safe in Heaven, and watch yourself.

Judge Markovitz is survived by his wife Cathy, daughter Susan, son Bill and daughter-in-law Cathy, and four grandchildren. Arrangements are not known yet and will be shared once they become known.

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PITTSBURGH POST-GAZETTE

THURSDAY, OCTOBER 8, 1998 VOL. 72, NO. 69 10/8/98 **FINAL**

Hockey team's co-owner denies that he has been holding secret talks in four other cities about moving the franchise.

City, county sue Pens' Marino

Penguins co-owner Roger Marino
"We are committed to Pittsburgh"

By Jon Schmitz and Mark Belko
Post-Gazette Staff Writers

The city and county yesterday sued Penguins co-owner Roger Marino, accusing him of holding secret talks about moving the franchise with officials in four other cities.

Marino quickly denied it, saying the Penguins, whose season opens Saturday, "aren't going anywhere. We are committed to Pittsburgh."

The Public Auditorium Authority, the city-county agency that owns the Civic Arena, filed suit yesterday, seeking an order barring any discussions about relocating the team before its lease commitments expire in 2007.

The lawsuit, filed in Allegheny County Common Pleas Court, accuses Marino and other unidentified Penguins officials of having contacts with officials in Houston, Kansas City, Oklahoma City and Las Vegas about moving the Penguins.

It says Marino "secretly received an offer sheet or term sheet from Las Vegas outlining the basic economic terms of the Penguins' potential relocation," even after Marino had assured Mayor Murphy in August that he was not trying to move the team.

The suit says the discussions violated contractual commitments by the Penguins against initiating or engaging in discussions about moving the team before June 30, 2007.

SMG Pittsburgh Inc., the private firm that operates the arena under a lease with the city and county, and subleases the facility to the Penguins, joined in the lawsuit.

Steve Leeper, executive director of the Public Auditorium Authority, said the agency filed suit because "we have had reason to believe they are shopping this team to other jurisdictions in the country."

Such overtures were in "direct conflict" with an agreement that the Penguins, city and county reached last year for $12.9 million in publicly funded improvements to the Civic Arena, Leeper said.

Principals in the dispute, including Marino, National Hockey League Commissioner Gary Bettman, SMG President Wes Westley, Murphy and representatives of the Allegheny County commissioners met for about an hour yesterday in the mayor's office — a meeting that was scheduled before the lawsuit was filed.

They discussed the team's deep financial problems and the possibility the team could be forced into bankruptcy.

SEE **PENGUINS,** PAGE A-2

City, county sue Penguins' Marino

PENGUINS FROM PAGE A-1

Participants described the meeting as spirited and contentious, and said there was little agreement about anything, except to talk more.

"Our interest is in keeping the Penguins here," Murphy said later, in a statement. "We will work with the current ownership. I'm not certain that their interests and our interests are the same at this time, but we will continue to talk with them."

Marino, in his statement, said he didn't understand why the city, county and SMG went to court. He said the team underscored its commitment to Pittsburgh last week in reaching a partial settlement with retired superstar Mario Lemieux in a dispute over money it owes him.

The Penguins are believed to be in severe financial straits. Last year, they won a commitment from the Allegheny County Regional Asset District for a $12.9 million infusion aimed at upgrading the arena and increasing the Penguins' revenues.

Marino, a Boston businessman who is a co-owner of the Penguins, has asked the city and county to consider building a new arena for the team as part of "Plan B," the funding method for proposed new football and baseball stadiums.

Murphy has said it was too late to rewrite Plan B, and pointed to the Penguins' commitment last year to stay at the arena until 2007 in exchange for the asset district funding.

Marino created a stir in August when he went to Kansas City, met with Mayor Emanuel Cleaver and toured the Kemper Arena, currently home to a minor-league hockey team. It was revealed then that he had also visited Houston, which has aggressively sought an NHL franchise.

Marino later apologized to Murphy, saying he had no intention of moving the team.

Despite that assurance, Marino subsequently went to Las Vegas "for the purpose of soliciting offers . . . for relocation of the Penguins," the lawsuit says.

It says he also visited Oklahoma City for the same reason, and said the mayor of Oklahoma City had advised Murphy that such discussions occurred.

Attempts to reach Oklahoma City Mayor Kirk Humphreys and Las Vegas Mayor Jan Laverty Jones yesterday were unsuccessful.

The Public Auditorium Authority and SMG are seeking an emergency court order barring the Penguins from relocating, attempting to relocate or "initiating or engaging in discussions . . . concerning a sale or relocation" of the team.

Judge Paul F. Lutty Jr. has scheduled a conference Wednesday on the case. A hearing on the request for an emergency order was tentatively set for Nov. 19.

The Penguins, who are scheduled to begin the 1998-99 regular season against the New York Islanders in Long Island Saturday, are mired in other contractual disputes.

The team has sought to renegotiate long-term deals with SMG regarding arena revenues and Fox Sports Network on payments for broadcast rights.

In both cases, the Penguins signed long-term deals to cure short-term financial crises, taking upfront cash but sacrificing future income streams. Now, Marino wants those deals reworked.

Fox Sports and SMG have sued the Penguins for failing to make required payments under the contracts. Marino last week reached a partial agreement with Lemieux, who sued the team for $33 million for failing to make payments on a contract he signed in 1992.

Penguins officials, including Marino, were scheduled to meet with Fox Sports executives in New York City today to tackle that part of the Penguins' woes.

Marino has said the team lost $37.5 million in the past two seasons, and there has been talk that the team could be forced into bankruptcy.

At yesterday's meeting in Murphy's office, "they were looking for a way to see if there was any way we could work with them to avoid it coming to that," said Art Victor, top aide to county Commissioner Bob Cranmer.

Staff writer Cindi Lash contributed to this report.