

**UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF WISCONSIN**

In re:

Fox Valley Pro Basketball, Inc.

Case No. 19-28025-bhl
Chapter 11

Debtor-in-Possession.

**NOTICE OF CITY OF OSHKOSH'S MOTION TO REQUIRE DEBTOR TO
REJECT OR ASSUME CONTRACT AND FOR ADEQUATE PROTECTION**

PLEASE TAKE NOTICE:

The City of Oshkosh (the "Movant") has filed a *Motion to Require Debtor to Reject or Assume Contract and for Adequate Protection* (the "Motion").

YOUR RIGHTS MAY BE AFFECTED. You should read these papers carefully and discuss them with your attorney, if you have one in this Bankruptcy case. (If you do not have an attorney, you may wish to consult one.)

If you do not want the Court to approve the Motion or if you want the Court to consider your views on the Motion, then on or before **14 days from the date of this notice**, you or your attorney must file a written objection with the Court at:

Clerk, U.S. Bankruptcy Court
Room 126, Federal Courthouse
517 East Wisconsin Avenue
Milwaukee, WI 53202

You **must** also mail a copy to:

Office of the U.S. Trustee
517 East Wisconsin Ave, Room 430
Milwaukee, WI 53202

Attorney Nicholas Hahn
Godfrey & Kahn, S.C.
200 S. Washington Street, Suite 100
Green Bay, WI 54301

Any objection not timely filed may be deemed waived and the Court may enter an Order approving the Motion as filed without a hearing.

Dated: September 6, 2019.

GODFREY & KAHN, S.C.

By: /s/ Nicholas L. Hahn
Nicholas L. Hahn (State Bar No. 1085675)
*Attorneys for the City of Oshkosh and the Redevelopment
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In re:

Fox Valley Pro Basketball, Inc.

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**CITY OF OSHKOSH'S MOTION TO REQUIRE DEBTOR TO REJECT OR
ASSUME CONTRACT AND FOR ADEQUATE PROTECTION**

The City of Oshkosh ("City") is committed to the Menominee Nation Arena's ("Arena") success, but the Arena's success should not come at the taxpayer's expense. Despite defaulting on its agreement with the City and presenting no proposals to address millions of dollars of secured debt, the Fox Valley Pro Basketball, Inc. ("Debtor") is eyeing tax increment financing funds to execute a Hail Mary attempt to avoid liquidation. Unless the Debtor demonstrates a credible ability to satisfy the requirements for assuming its agreement with the City, the Court should not require the City give the Debtor hundreds of thousands of dollars that would otherwise be available to a successor-in-interest that will operate the Arena as a financially viable property.

Background

1. The Debtor operates the Arena on Main Street on Oshkosh's south side, an area that was blighted due to the closure of the Buckstaff factory. The Arena is located on land owned by the City's Redevelopment Authority.

2. In 2016, the Debtor's principal, Greg Pierce, began negotiations with the City and the Milwaukee Bucks to construct and operate the Arena to host the Bucks' new developmental league team now known as the Wisconsin Herd.

3. Because the Arena's proposed location was blighted, the City was able to use tax increment financing ("TIF")¹ to assist in financing the Arena's construction.

4. In February 2017, the Bucks announced that it chose the Debtor's bid to host the Herd.

Development Agreement and Ground Lease

5. On March 17, 2017, the City's Redevelopment Authority and the Debtor entered into the Tax Incremental District No. 31 Development Agreement (Fox Valley Pro Basketball, Inc. Project) ("Development Agreement"). The City and the Debtor amended the Development Agreement three times because of cost overruns and the Debtor's inability to adequately finance its operations. A copy of the Development Agreement, as amended, is attached as **Exhibit A**.

6. In the Development Agreement, the Debtor represented that it had "sufficient funds through equity and debt financing sources to continuously operate, maintain, and fulfill the Project." Development Agreement, Art. VII, ¶ A.4.

7. The Debtor also agreed to pay "all costs related to the Project" including "all City fees" Development Agreement, Art. III, ¶ C. The Development Agreement defines the Project as the Debtor's "acquisition, development and use of the Property as a 3,500 seat sports arena" Development Agreement, Art I, ¶ O.

¹ For an in depth explanation of TIF in Wisconsin, see <https://www.revenue.wi.gov/Pages/SLF/tif.aspx>; *see also* Wis. Stat. § 66.1105.

8. For its part, the City agreed to pay to the Debtor \$5,549,450.00 plus interest from future property tax revenues and issue the Debtor a Municipal Revenue Obligation (“MRO”) documenting that promise. Third Amendment to Development Agreement, ¶ 6.

9. Under the Development Agreement, an Event of Default occurs when the Debtor “breaches any provision of [the Development Agreement] or its obligations under [the Development Agreement].” Development Agreement, Art. X, ¶ A. 4.

10. Upon an Event of Default, the City may “suspend or terminate the performance of any and all of its” duties under the Development Agreement and take any action to enforce performance of the Development Agreement. Development Agreement, Art. X, ¶ B.

11. Whenever there is an Event of Default by the Debtor and the City employs attorneys or incurs other expenses for the collection of payment due or to enforce any obligation or agreement by the Debtor, the Debtor “shall, on demand thereof, pay to the City the reasonable fees of such attorneys and such other reasonable expenses incurred by the City.” Development Agreement, Art. X, ¶ E.

12. On the same day the Debtor signed the Development Agreement, it entered into a Ground Lease Agreement (“Ground Lease”) with the City. A copy of the Ground Lease is attached as **Exhibit B**.

13. Under the Ground Lease, the Debtor agreed to “not allow any encumbrance to be filed on or against the Leased Premises, including mortgages, easements, or similar restrictions except” as allowed in Section 6 of the Ground Lease.

14. Section 6 allows a lender of the Debtor to take a leasehold mortgage contingent upon it being

accompanied by a simultaneous written assumption by [the lender] of [the Debtor's] obligations under that the [sic] Development Agreement, and must be more fully described in separate documents reasonably agreeable to the Lessor.

Ground Lease, Section 6.

Prepetition Defaults

15. Before bankruptcy, the Debtor failed to pay the following obligations to the City:

- a. Police and Fire – Special Events Invoices - \$12,658.64
- b. Utilities - \$4,419.87 (currently at \$7,608.58)
- c. Miscellaneous Current Charges - \$172.71

16. Moreover, the Debtor allowed a construction lien in the amount of \$9,010.00 to be recorded against the property and voluntarily recorded two leasehold mortgages totaling \$14,435,307.33 against the Property without complying with Section 6 of the Ground Lease. *See Northern Metal & Roofing, Co., Inc. v. Fox Valley Pro Basketball, Inc.*, Winnebago County Circuit Court, case no. 18-CL-27. Copies of the mortgages are attached as **Exhibit C**.

17. The City has also incurred \$24,293.75 in prepetition attorney's fees because of the Debtor's defaults under the Development Agreement and Ground Lease. These fees included fees incurred in amending the Development Agreement three times to accommodate the Debtor's efforts to obtain financing. The City continues to incur fees post-petition to enforce its rights under the Ground Lease and Development Agreement.

18. The Debtor paid its 2018 real estate taxes late.

19. Contrary to the Debtor's representation in the Development Agreement, it does not have adequate financing to operate the Arena.

20. The City has \$429,891.01 earmarked for use as the first payment on the MRO, nominally due on November 1, 2019 ("MRO Payment").

21. Despite being in default under the Development Agreement and Ground Lease, the Debtor has represented that it intends to use the MRO Payment as collateral to finance this case.

Applicable Bankruptcy Law

22. In a Chapter 11 case, the debtor-in-possession (“DIP”) may assume an executory contract or unexpired lease at any time until confirmation of a plan. Until assumption or rejection, an executory contract “generally remains in effect pending assumption or rejection by the [DIP].” *In re Nat’l Steel Corp.*, 316 B.R. 287, 305 (Bankr. N.D. Ill. 2004). Regardless of a pre-petition default, the non-debtor must continue to perform under the contract, even though the DIP is not bound by the contract unless it subsequently assumes it. *Id.* (collecting cases). However, on request of any party to the executory contract or unexpired lease, the Court may order the DIP “to determine within a specified period of time whether to assume or reject such contract or lease.” 11 U.S.C. § 365(d)(2).

23. If there has been a default under an executory contract or lease, the DIP may not assume the contract unless (a) the debtor cures the default, or provides adequate assurance that the debtor will promptly cure the default and (b) provides adequate assurance of future performance. 11 U.S.C. § 365(b)(1). The DIP “must either assume the entire contract, *cum onere*, or reject the entire contract, shedding obligations as well as benefits.” 3 Collier on Bankruptcy, ¶ 365.03[3] (Richard Levin & Henry J. Sommer eds., 16th ed.) (citing *N.L.R.B. v. Bildisco & Bildisco*, 465 U.S. 513, 531, 104 S. Ct. 1188, 79 L. Ed. 2d 482 (1984); *In re National Gypsum Co.*, 208 F.3d 498, 506 (5th Cir. 2000)).

Request for Relief

24. The City requests that the Court order the Debtor to move to assume or reject the Development Agreement and Ground Lease by October 31, 2019.

25. Alternatively, if the Court is inclined to compel the City to comply with the Development Agreement and pay this year's MRO, the City requests the Debtor provide the City adequate protection for this year's MRO payment. The City has a possessory security interest in the MRO Payment to secure payment of outstanding fees and the Debtor's performance under the Development Agreement and the Ground Lease.

26. Alternatively, this case's timing, to the extent that payment may be required, the City also requests that the Court temporarily relieve the City of its obligation to make the MRO Payment pending resolution of this matter.

I. The Court should require the Debtor to decide on or before October 31, 2019 whether it will assume or reject the Development Agreement and Ground Lease.

27. Agreements executed at the same time as part of the same transaction must be construed as one contract. *Seaman v. McNamara*, 180 Wis. 609, 193 N.W. 377, 379 (1923) (quoting *Norton v. Kearney*, 10 Wis. 443, 448 (1860)) ("There is no rule better established than that all contemporaneous agreements between the same parties, and in relation to the same subject-matter, are to be taken together and construed as one instrument for the purpose of determining the character of the transaction and the intention of the makers."); *see also In the Matter of Tak Broadcasting Corp.*, 137 B.R. 728, 734 (W.D. Wis. 1992) ("Thus, although the lease agreement is a separate document, it makes no economic sense unless it is considered with the sale of the tower and land.")

28. The Development Agreement and Ground Lease are an executory contract because significant unperformed obligations remain for the Debtor and the City. *Dick ex rel. Amended Hilbert Residence Maintenance Trust v. Conseco, Inc.*, 458 F.3d 573, 578-79 (7th Cir. 2006).

- a. The City's duties include terminating the Ground Lease, transferring title to the Debtor, and continuing to pay the MRO. Development Agreement, Art. IV, ¶ C., Art. V, ¶ D.
- b. The Debtor's duties, on the other hand, include keeping the Property free of liens, paying all costs and fees related to the Property, maintaining appropriate insurance, and refraining from seeking a lower property value assessment for six more years. The Debtor also has a duty to terminate the Ground Lease and accept a warranty deed from the City. Ground Lease, §§ 18, 19, 20; Development Agreement, Art. III.C., IX.

29. In order to assume the Ground Lease and Development Agreement, the Debtor must cure all defaults, including paying all past-due fees to the City, removing all the liens recorded against the Property, and compensating the City for the attorney's fees and other costs it has incurred due to the Debtor's breaches under the Development Agreement and Ground Lease.

30. Further, it must provide adequate assurance of future performance. There are substantial questions about whether the Debtor can do so:

- a. The Debtor has testified that "on an EBITDA basis, the Debtor is breaking even." Dkt. 10 at 2. In other words, it apparently only has just enough money to operate before accounting for its millions of dollars of debt and special assessments.

- b. The two financing offers the Debtor has received—neither from a traditional lender—do not reflect a healthy going concern.
- c. The Debtor’s current DIP lender, Windward Wealth Strategies, shares the Debtor’s managing member. Dkt. 10-4 at 6. Greg Pierce is quoted in the Oshkosh Northwestern newspaper as saying that “[t]he willingness of Windward to make a \$200,000 line of credit facility available in the bankruptcy demonstrates our belief in the company and our commitment to do everything we can to enable a successful organization”² Yet the terms Windward offered suggest the opposite: a 9% interest rate, a \$6,000 loan origination fee, and monthly \$2,000 loan servicing fees. Given that the Debtor had virtually no cash at filing, we can only presume that Windward intends to charge interest on the origination fee. As security, Windward has demanded a security interest in all of the Debtor’s post-petition property, including the MRO, which alone should provide an equity cushion of over 50%.
- d. Two Willows’ offer is even less comforting. It appears to be related to an equity interest holder, Tim Schoessow. It requires a 9% interest rate, a \$9,000 facility fee, payment of a \$3,000 servicing fee, and payment of all of Two Willows’ attorney’s fees. Further, the offer is contingent on Two Willows receiving a first-position lien on substantially all post-petition receivables and confirmation that the Debtor will receive this year’s MRO payment.

² Lydia Slattery and Nathaniel Shuda, “Menominee Nation Arena owner may borrow up to \$200,000 from sister company to stay open,” *Oshkosh Northwestern*, August 23, 2019, available at <https://www.thenorthwestern.com/story/news/2019/08/23/oshkosh-arena-bankruptcy-fox-valley-pro-basketball-may-borrow-up-200-k/2089011001/>

- e. There are serious questions about how the Debtor spent the \$19,731,000 it reported it raised to the Securities and Exchange Commission. *See* SEC Regulation D Filing attached as **Exhibit D**.

II. Alternatively, the Court should require the Debtor to provide the City adequate protection.

31. If the Court provides the Debtor additional time past November 1, 2019 to accept or reject its executory contract with the City, the City, by operation of law, and requires the City to make the MRO Payment, the Court should require the Debtor to provide the City adequate protection.

32. Under the Development Agreement, if the Debtor defaults, the City may “[s]uspend or terminate the performance of any and all of its undertakings and obligations” under the Development Agreement.” Development Agreement, Art. X, § B.1.

33. On request of an entity with an interest in property proposed to be used by the DIP, the Court, “with or without a hearing, shall prohibit or condition the use” of the property “as is necessary to provide adequate protection of such interest.” 11 U.S.C. § 363(e).

34. The City has an interest in the amount earmarked for the MRO payment.

- a. It is in possession of the money. But for the bankruptcy filing, the City would be free to use the money for other purposes related to the TIF district.
- b. It has setoff or recoupment rights in the money. Except as provided in sections 362 and 363, the bankruptcy code does not affect those rights. § 553.
- c. It has a perfected possessory security interest in the MRO Payment to secure payment of its attorney’s and other fees and to secure the Debtor’s performance under the Development Agreement and Ground Lease. Wis. Stat. §§ 409.102, 409.3203(2)(b)2., 409.313(1).

35. The City requests that, if the City is required to pay this year's MRO Payment to the Debtor, the Court also require the Debtor to post a bond or provide other adequate protection for the City's interest in the MRO payment.

36. The Arena's ultimate success is of paramount importance to the City. Legal limbo and dissipation of resources earmarked for that purpose does not further that goal.

WHEREFORE, the City of Oshkosh requests that the Court order that:

- A. The Debtor is required to determine whether it will accept or reject the executory contract with the City by October 31, 2019 and file a motion accordingly; and
- B. If the Court requires the City to make the first MRO Payment, that the Debtor is required to provide adequate assurance for the City's interest.

Dated: September 6, 2019.

GODFREY & KAHN, S.C.

By: /s/ Nicholas L. Hahn
Nicholas L. Hahn (State Bar No. 1085675)
*Attorneys for the City of Oshkosh and the Redevelopment
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**UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF WISCONSIN**

In re:

Fox Valley Pro Basketball, Inc.

Case No. 19-28025-bhl
Chapter 11

Debtor-in-Possession.

**CERTIFICATE OF SERVICE OF CITY OF OSHKOSH'S
NOTICE OF MOTION AND MOTION TO REQUIRE DEBTOR TO
REJECT OR ASSUME CONTRACT AND FOR ADEQUATE PROTECTION**

Dori Betts certifies that she is a legal executive assistant with Godfrey & Kahn, S.C., and that on September 6, 2019 she mailed a true copy of the following documents:

- Notice of City of Oshkosh's Motion to Require Debtor to Reject or Assume Contract and for Adequate Protection;
- City of Oshkosh's Motion to Require Debtor to Reject or Assume Contract and for Adequate Protection; and
- Supporting Exhibits

in the above matter, by regular mail, securely enclosed in an envelope with postage paid thereon, and addressed to the 20 largest creditors, as attached, and to the following:

Fox Valley Pro Basketball, Inc.
2370 State Road 44, Suite A
Oshkosh, WI 54904

Fox Valley Pro Basketball, Inc.
c/o Jerome R. Kerman
Kerkman & Dunn
839 N. Jefferson Street
Milwaukee, WI 53202-3744

I certify under penalty of perjury that the foregoing is true and correct. Executed on September 6, 2019.

/s/ Dori Betts

Blue Door Consulting
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Through Eric Heiting
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Madison, WI 53717

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