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OUR FILE NO.: 20030-1

June 7, 2012

PRIVILEGED AND CONFIDENTIAL

Mayor and City Council
City of Glendale, Arizona
c/o Craig Tindall, Glendale City Attorney
Office Of The City Attorney
City Of Glendale
5850 West Glendale Ave., Suite 450
Glendale, AZ 85301

Re: Transactions (the "Transactions") between and among the City of Glendale, an Arizona municipal corporation (the "City"), Arizona Hockey Partners LLC, a Delaware limited liability company (the "Team"); and Arizona Hockey Arena Partners LLC, a Delaware limited liability company, (the "Arena Manager")

Ladies and Gentlemen:

We have acted as special counsel to the City in connection with a review of certain aspects of the Transactions evidenced by, or discussed in, the Documents (as defined below). Specifically, we have been engaged by the City to review certain draft agreements and to comment upon the effect, if any, upon those agreements (considered collectively) of the provisions of Article 9, Section 7 of the Arizona

Constitution (hereinafter, the "Gift Clause").

As used in this analysis, the phrase "to our knowledge," or words of similar import, mean, as to matters of fact, that, to the actual knowledge of the attorneys within our Firm principally responsible for analyzing the Transactions and after examination of the Documents, but without any independent factual investigation or verification of any kind other than inquiry of certain representatives of the City, such matters are factually correct.

For purposes of this analysis, we have examined such questions of law and fact as we have deemed necessary or appropriate. However, we have examined only the following documents received from the City (collectively, the "Documents"), and we have made no other investigation or inquiry:

I. DOCUMENTS EXAMINED

We have received and reviewed drafts of the following Documents. Each of the Documents is to be executed by each of the signatory parties thereto.

- An undated "Substantial Final Draft" of an Arena Lease and Management Agreement by and among the City of Glendale, an Arizona municipal corporation, Arizona Hockey Arena Partners LLC, a Delaware limited liability company (the "Arena Manager") and Arizona Hockey Partners LLC, a Delaware limited liability company (the "Team"); and

- An undated "Substantial Final Draft" of a Noncompetition and Non-Relocation Agreement by and between [sic] the City of Glendale, an Arizona municipal corporation, and Arizona Hockey Partners, LLC, a Delaware Limited Liability Company (the "Team") and Arizona Hockey Arena Partners LLC, a Delaware Limited Liability Company, (the "Arena Manager").

In addition, we have reviewed the following report which we understand has been prepared at the request of the City in connection with the Transactions.

- Report of Elliott D. Pollack & Company dated May 31, 2012 (the "Pollack Study").

II. ASSUMPTIONS

In preparing this analysis, we have made the following assumptions:

a. The Documents will be completed, executed and approved in form and content substantially identical to the draft versions provided to

us and the Transactions will be undertaken and performed consistent with the terms of the Documents until expiration, of the Documents. Each of the parties to the Documents has approved the execution and delivery of the Documents in accordance with all applicable laws; the person or persons executing the Documents on behalf of each party is authorized to execute the Documents; each party has all requisite entity power and authority to execute, deliver, and carry out the terms of the Documents and, except with respect to the Gift Clause addressed below, the Documents constitute the legal, valid, and binding obligations of the respective parties thereto, enforceable upon such parties in accordance with their respective terms;

b. The Gift Clause applies to the Transactions and there is no constitutional exemption from application of the Gift Clause to the Transactions (such as the exemptions found in Ariz. Const. art. 13, § 7);

c. The City of Glendale is a city of the state of Arizona within the meaning of the Gift Clause;

d. The recipient of benefits from the City under the Documents is an individual, association, or corporation (or more than one individual, association or corporation), within the meaning of the Gift Clause;

e. The City Council will expressly identify (by resolution, ordinance, or otherwise) the public purposes served by the Documents and the Transactions;

f. The Pollack Study is complete, accurate and not misleading, and properly projects the costs to be incurred and the benefits to be received (or expenses avoided) by the City, in connection with the Documents and the Transactions;

g. The requirements of all other relevant laws, rules, regulations, policies, and constitutional provisions (other than the Gift Clause) have been satisfied;

h. The avoidance of the need to use public funds to recoup losses that would otherwise be incurred in the absence of the Transactions is a benefit appropriate for consideration in evaluating, for purposes of Gift Clause analysis, the bargained-for contractual consideration to be received by the City, under the decision in Kromko v. Arizona Board of Regents, 149 Ariz. 319, 322, 718 P.2d 478, 481 (1986) or otherwise; and

i. The Pollack Study properly considers and accurately quantifies all direct benefits to be received or conferred by the City under the Documents. We have also assumed that various indirect and/or non-monetary benefits associated with operation of the Arena and/or the Team (e.g., with respect to the Arena Manager and the Team, anticipated ticket or parking revenues and the City's non-competition covenant; and with respect to the City, taxes to be generated by Westgate area businesses, from player salaries and from ticket sales) are either outside the scope of an appropriate Gift Clause analysis or that such benefits, when viewed together with the monetary benefits described in Section III of this analysis, do not alter the conclusions set forth in Section IV of this analysis.

III. DISCUSSION

Subject to the foregoing, we have evaluated the Documents and the Pollack Study and analyzed the application of the Gift Clause to the Documents and the Transactions contemplated by the Documents. The following analysis consists first of a discussion of the Gift Clause, and the most significant cases that have interpreted the Gift Clause and that have established standards for evaluating compliance with the Gift Clause. Next, we comment briefly upon the presence (or absence) of legal, bargained-for, contractual consideration. Finally, we analyze the principal elements required for Gift Clause compliance ("public purpose" and "adequacy of consideration") and the potential application of those requirements to the Transactions.

A. The Gift Clause in Arizona

The Gift Clause provides:

> Neither the state, nor any county, city, town, municipality, or other subdivision of the state shall ever give or loan its credit in the aid of, or make any donation or grant, by subsidy or otherwise, to any individual, association, or corporation, or become a subscriber to, or a shareholder in, any company or corporation, or become a joint owner with any person, company, or corporation, except as to such ownerships as may accrue to the state by operation or provision of law or as authorized by law solely for investment of the monies in the various funds of the state.

Ariz. Const. art. 9, § 7.

As the Arizona Supreme Court has recognized, the Gift Clause, as written, does not offer specific guidance as to what constitutes an impermissible "subsidy." Furthermore, the records of Arizona's constitutional convention offer no substantial guidance in interpreting the Gift Clause. See John S. Goff, The Records of the Arizona Constitutional Convention of 1910, at 483 (1990) (only mention of Gift Clause reflects a

minor grammatical correction). The Gift Clause was taken nearly verbatim from Montana's Constitution, and early Arizona decisions looked to Montana decisions for guidance:

> [The Gift Clause] represents the reaction of public opinion to the orgies of extravagant dissipation of public funds by counties, townships, cities, and towns in aid of the construction of railways, canals, and other like undertakings during the half century preceding 1880, and it was designed primarily to prevent the use of public funds raised by general taxation in aid of enterprises apparently devoted to quasi-public purposes, but actually engaged in private business.

Day v. Buckeye Water Conservation & Drainage Dist., 28 Ariz. 466, 473, 237 P. 636, 638 (1925) (quoting Thaanum v. Bynum Irrigation Dist., 72 Mont. 221, 232 P. 528, 530 (1925)).[1]

Historically, early Gift Clause challenges were often coupled with an attack on public expenditures under art. 9, § 1 of the Arizona Constitution (the "Tax Clause"). That constitutional provision requires that "all taxes . . . shall be levied and collected for public purposes only." Eventually, the case law evolved to recognize that an expenditure must serve a public purpose to withstand scrutiny under the Gift Clause as well. While the Gift Clause does not itself expressly mention a "public purpose requirement," such a requirement has long been a fixture of Gift Clause jurisprudence.

The cases interpreting the Gift Clause and the Tax Clause have nevertheless struggled to define "public purpose." See, e.g., Turken v. Gordon, 223 Ariz. 342, 346, 224 P.3d 158, 162 (2010). The courts have noted that "public purpose" is a phrase perhaps incapable of precise definition, and better elucidated by examples. See City of Tombstone v. Macia, 30 Ariz. 218, 222, 245 P.2d 677, 679 (1926); City of Glendale v. White, 67 Ariz. 231, 236, 194 P.2d 435, 438-39 (1948); Maricopa County v. State, 187 Ariz. 275, 280, 928 P.2d 699, 704 (App. 1996). Generally, an expansive view of what constitutes a public purpose has been adopted. See, e.g., Humphrey v. City of Phoenix, 55 Ariz. 374, 102 P.2d 82 (1940) (slum clearance program found to serve interest of the general public even though effect is felt by a given class more than the community at large); Industrial Dev. Auth. of Pinal County v. Nelson, 109 Ariz. 368, 509 P.2d 705 (1973) (issuance of industrial development bonds by public agency served public purpose); Town of Gila Bend v. Walled Lake Door Co., 107 Ariz. 545, 490 P.2d 551 (1971) (construction of water line serving only one factory served public purpose).

In addition to "public purpose," the case law has also examined the consideration received by the municipality or other subdivision of the state in a contract with a private party to assess whether "the consideration received by the city . . . is so inequitable and

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[1] Montana subsequently removed its gift clause from the State Constitution as unnecessary in light of the other constitutional provisions. Montana Constitutional Convention, 1971-1972, at 583 (1979), available at *http://archive/org/details/montanaconstitut02mont*.

unreasonable that it amounts to an abuse of discretion," thus constituting a forbidden "gift or donation by way of a subsidy." City of Tempe v. Pilot Properties, Inc., 222 Ariz. App. 356, 363, 527 P.2d 515, 522 (1974).

In 1984, in Wistuber v. Paradise Valley Unified School Dist., 141 Ariz. 346, 687 P.2d 354 (1984) ("Wistuber"), the Arizona Supreme Court synthesized the Gift Clause jurisprudence. The Court adopted a two-prong test for determination of compliance with the Gift Clause. Wistuber provided that a governmental expenditure does not violate the Gift Clause if: (1) it has a public purpose; and (2) in return for its expenditure, the governmental entity receives consideration that "is not so inequitable and unreasonable that it amounts to an abuse of discretion, thus providing a subsidy to the private entity." Id. at 349, 687 P.2d at 357 (internal quotations and citations omitted). Wistuber did not clearly resolve what constitutes "inequitable and unreasonable consideration" or whether "indirect" benefits can be considered in evaluating the existence or adequacy of consideration. Subsequent case law has provided some, albeit limited, guidance with respect to these questions.

The law applicable to Gift Clause compliance was most recently clarified by the Arizona Supreme Court in Turken v. Gordon, 223 Ariz. 342, 224 P.3d 158 (2010) ("Turken"), decided twenty-six years after Wistuber. Turken dealt with the development of the CityNorth project, the proposed commercial core of Desert Ridge, a master-planned community in Phoenix, Arizona. The City of Phoenix ("Phoenix") was apparently approached by the developer which indicated that it could not complete the project as planned without financial assistance. Phoenix was apparently concerned that, without aid, the development might not incorporate the full purposed retail component and that potential sales tax revenues would be lost, perhaps to the City of Scottsdale.

Phoenix subsequently entered into a Parking Space Development and Use Agreement with the developer (the "CityNorth Agreement"). The CityNorth Agreement required the developer to set aside, for 45 years, 2,980 parking garage spaces for the non-exclusive use of the general public and 200 spaces for the exclusive use of drivers participating in commuting programs. The payments by Phoenix to the developer were conditioned on the construction of both the garage spaces and at least 1.02 million square feet of retail space. Upon compliance with these requirements by the developer, Phoenix would be obligated to make annual payments to the developer equal to one-half of certain transaction privilege taxes projected to be generated by the development, for a period of up to eleven years and three months, and not to exceed $97.4 million in the aggregate.

The CityNorth Agreement withstood a Gift Clause challenge in the Superior Court. The trial court (Hon. Robert Miles) found that the payments to the developer would serve a public purpose and counted the anticipated increase in tax revenues from the CityNorth development as part of the relevant consideration.

The Court of Appeals reversed and found that the CityNorth Agreement violated

the Gift Clause. Turken v. Gordon, 220 Ariz. 456, 207 P.3d 709 (App. 2008), vacated, 223 Ariz. 342, 224 P.3d 158 (2010). In finding the CityNorth Agreement to be violative of the Gift Clause, the Court of Appeals engrafted a third requirement onto the Wistuber test for Gift Clause compliance. Specifically, the Court of Appeals found that under "the realities of the transaction" the challenged governmental expenditure must not "unduly promot[e] private interests." Turken, 220 Ariz. at 467, 207 P.3d at 720. The Court identified various questions pertinent to that inquiry and concluded that the payments associated with the 2,980 parking spaces not reserved for commuters violated the Gift Clause. 220 Ariz. at 467-472, 207 P.3d at 720-725. The Court of Appeals introduced this third requirement based on its reading of the Arizona Supreme Court's decision in Kromko v. Arizona Board of Regents, 149 Ariz. 319, 718 P.2d 478 (1986).

On review, the Arizona Supreme Court vacated the opinion of the Court of Appeals, rejected the "third" Gift Clause compliance requirement adopted by the Court of Appeals, and effectively reaffirmed the two-prong test of Wistuber. In applying the "public purpose" prong of the Wistuber test, the Court noted that substantial deference is to be given to the judgment of elected officials in the determination of public purpose:

> In taking a broad view of permissible public purposes under the Gift Clause, we have repeatedly emphasized that the primary determination of whether a specific purpose constitutes a "public purpose" is assigned to the political branches of government, which are directly accountable to the public. We find a public purpose absent only in those rare cases in which the governmental bodies' discretion has been "unquestionably abused."

223 Ariz. at 349, 224 P.3d at 165 (internal citations omitted).

In evaluating compliance with the second prong of the Wistuber test, the Court considered the existence and adequacy of consideration. With respect to the existence of legal, bargained-for, contractual consideration, the Turken Court adopted the commonplace meaning of consideration in the law of contracts:

> The term "consideration" has a settled meaning in contract law. It is a "performance or return promise" that is "bargained for . . . in exchange for the promise of the other party." Schade v. Diethrich, 158 Ariz. 1, 8, 760 P.2d 1050, 1057 (1988) (citing Restatement (Second) of Contracts § 71 (1981)). In other words, consideration is what one party to a contract obligates itself to do (or to forbear from doing) in return for the promise of the other contracting party. Id.

Turken, 223 Ariz. at 349, 224 P.3d at 165. With respect to the value of the benefits to be received by the government, the Court observed:

> When a public entity purchases something from a private entity, the

> most objective and reliable way to determine whether the private party has received a forbidden subsidy is to compare the public expenditure to what the government receives under the contract. When government payment is grossly disproportionate to what is received in return, the payment violates the Gift Clause.

Turken, 223 Ariz. at 348, 224 P.3d at 164 (emphasis added).

In Turken, the Supreme Court found that the trial court had erred in considering "indirect benefits" -- such as the projected increase in transaction privilege (sales) tax revenues -- as part of the required, bargained-for consideration. The Court recognized that such anticipated indirect benefits may well be relevant in evaluating whether a government expenditure serves a "public purpose," but when the indirect benefits are not bargained-for as part of the contracting parties' promised performance, such benefits are not consideration under contract law. 223 Ariz. at 350, 224 P.3d at 166. Rather, the Court determined that "analysis of adequacy of consideration for Gift Clause purposes focuses on the objective fair market value of what the private party has promised to provide in return for the public entity's payment." Id.

Ultimately, the Supreme Court expressed skepticism that the $97.4 million that the City promised to pay was in any sense proportionate to the value of the parking spaces promised in return: "We find it difficult to believe that the 3,180 parking spaces have a value anywhere near the payment potentially required under the Agreement." 223 Ariz. at 351, 224 P.3d at 167.[2] In finding that the CityNorth Agreement "quite likely violates the Gift Clause," the Court noted that it was not a finder of fact and normally would remand the case to the Superior Court for further proceedings with respect to the "consideration" issue. However, because the Court determined that its opinion would apply only on a prospective basis, it found remand for this purpose to be unnecessary. Id.

Thus, the required "consideration" inquiry appears to involve both: (i) an initial determination of whether the consideration provided to the City is legal, bargained-for, contractual consideration; and (ii) a subsequent or related analysis of whether the value of the consideration to be received by the City is "grossly disproportionate" to the value of the benefits/incentives to be provided by the City. This framework (public purpose, bargained-for consideration, adequacy of consideration) may be applied to evaluate the Transactions.

B. Application of the Gift Clause to the Transactions

The Documents state that the Transactions will achieve the following public purposes, among others: they will provide a multi-purpose sports and entertainment

[2]It appears that the Court was considering the provision in the CityNorth Agreement that provided for non-exclusive use of the majority of the parking spaces, as it noted that the parties asserting the Gift Clause challenge had conceded that "$97.4 million might well be a fair payment for exclusive use of 3,180 spaces over the next 45 years." 223 Ariz. at 351, 224 P.2d at 167 (emphasis added).

facility to be used by the general public; they will provide additional employment opportunities within the City; they will increase the City's tax base and stimulate additional development on properties in the vicinity of the Arena; and they will mitigate the more than $500 million in future damages (costs) to the City caused by the prior owner's termination of the prior Arena management agreement. Those objectives will, in turn, be accomplished, in part, by eliminating or substantially limiting, the Team's right/ability to relocate to a facility outside the City.

Assuming that the City Council confirms (by ordinance, resolution, or otherwise) the public purposes that underlie the Documents and the Transactions, a valid public purpose (or purposes) will have properly been identified and adopted to the satisfaction of the relevant legislative body; and it may reasonably be anticipated that a reviewing court will grant substantial deference to this determination. The stated purposes are, the City can assert, within the expansive view of "public purpose" recognized in the relevant case law, and this case would not appear to represent one of the "rare cases" where the governmental body's discretion in determining public purpose has been unquestionably abused.

With respect to the existence of legal, bargained-for, contractual consideration, the consideration provided to the City should reasonably be viewed by a reviewing court as direct, legal, bargained-for consideration of a type traditionally recognized as valid, contractual consideration. Here, the City is paying money (e.g., management fees) to one or more private parties. In return, the Documents provide that those parties are going to provide valuable services to the City including, but not limited to: managing the Arena in compliance with certain Management Performance Standards; collection of operating revenues and payment of operating expenses; payment and training of personnel; maintenance and operation of the Arena; scheduling of Arena events (including professional hockey games); management and operation of the Arena parking areas; management of Arena advertising; preparation of proposed annual budgets, etc. In addition, subject to the terms of the Noncompetition and Non-Relocation Agreement, to our knowledge, the Team is effectively relinquishing its legal right to relocate elsewhere, and is agreeing to utilize the City-owned Arena as a venue for professional hockey for approximately 20 years.

For the purposes of determining whether or not the consideration to be paid by the City is grossly disproportionate to the aggregate consideration to be received by the City, we have accepted and relied upon the analysis and conclusions of the Pollack Study which include, among other observations, that:

a. The aggregate payments to be made directly by the City to the private parties (Arena management fee, capital repairs/enhancements) are projected to be approximately $324,000,000 over twenty (20) years. Utilizing a discount rate of 6.5%, the present value of such payments as computed in the Pollack Study, is estimated to be

$203,708,341.[3]

b. In contrast, the City anticipates receiving direct benefits (fees, rents, ticket surcharges, naming rights revenues) totaling $79,452,352 during the twenty (20) year term. The present value of the City's anticipated revenues (utilizing the same 6.5% discount rate), as computed in the Pollack Study, is $44,911,739.[4]

c. In addition, the City projects that the Transactions will protect the City against $315,171,271 ($176,561,515 present value) in aggregate projected operating losses (net negative expenditures, without consideration of debt service payments, but after consideration of revenues anticipated from non-hockey events) projected to be incurred during the next 20 years in the absence of the Transactions.[5]

Except as noted, the foregoing summary of anticipated revenues/benefits does not include fiscal benefits (e.g., transaction privilege taxes, state-shared revenues) or general economic benefits (e.g., job creation, revenue growth of area businesses) projected as a result of the Transactions.[6] The City believes that the value of all such general economic and fiscal benefits (plus benefits described above) is likely to substantially exceed the City's payments to the private parties (¶(a), above).

IV. CONCLUSION

Based upon the foregoing (including the assumptions derived from the Pollack Study), a court of last resort, with the issues fully briefed and argued and faced with the question of Gift Clause compliance of the Documents, should reasonably conclude that: (i) the Transactions serve a public purpose; and (ii) the Documents provide for the receipt of legal, bargained-for, contractual consideration by the City. With respect to the adequacy of the consideration to be received by the City, and in reliance upon the Pollack Study, a court of last resort, with the issues fully briefed and argued and faced with the question, should reasonably conclude that the aggregate benefits (consideration) to be received by the City from the Transactions ($394,623,623; present value $221,473,254) are not grossly disproportionate to (and, in fact, exceed) the payments to be made by the City ($324,000,000; present value $203,708,341). This is

[3] The figures do not reflect any naming rights revenues, ticket revenues, or other revenue streams retained by the private parties and derived from operation and/or management of the Arena or the Coyotes Hockey Team.

[4] The Pollack Study reflects that the City will receive a share of naming rights revenues under the terms of the Documents. Note that transaction privilege (sales) tax revenues are not included in these figures.

[5] In the absence of Team operations at the Arena, no naming rights revenues are projected. Again, transaction privilege (sales) tax revenues have apparently also not been considered in projecting future losses in the absence of the Transactions.

[6] In other words, the summary reflects only those benefits that may be considered to flow directly from, and as a result of, the Documents and the Transactions.

the case if – but only if – both monetary benefits to be received and expenses/liabilities to be avoided through the Transactions are considered.[7] Support for inclusion of loss avoidance benefits may be found in Kromko v. Arizona Board of Regents, 149 Ariz. 319, 718 P.2d 478 (1986) (which did involve a special statute, A.R.S. § 15-1637(A), applicable to hospital transfers only), where the Court noted that the elimination of the need to use public funds for loss recoupment was a substantial monetary benefit to the Board of Regents and thus to the State of Arizona. Accordingly, in a properly presented and argued case, a court of last resort and of competent jurisdiction, with the issues fully briefed and argued, should find the Transactions to not be violative of the Gift Clause.

The conclusions and analysis set forth in this letter must be considered in light of the broad statutory and equitable powers of the relevant court to decide issues such as public purpose and adequacy of consideration. In this evolving area of constitutional and municipal law in Arizona, it is difficult to discern a consistent factual pattern upon which legal precedent of general applicability may be based. This letter, therefore, necessarily is based on a reasoned analysis of many cases. We note also that, notwithstanding our analysis and conclusions, a court's decision in determining issues such as public purpose and adequacy of consideration is necessarily based upon its own analysis and interpretation of the factual evidence before it and the applicable legal principles. Accordingly, a different conclusion might be reached by a reviewing court.

This letter is further expressly subject to: (A) there being no material change in the law subsequent to the date of this analysis; and (B) there being no additional (or different) facts of which we are currently unaware which would materially affect the validity of the assumptions upon which this analysis is based.

Without limiting the foregoing, this analysis is not a guaranty of what any particular court would hold in any particular circumstances, but rather only an informed judgment as to the specific question of law presented.

Finally, this analysis is being furnished to the City solely for its consideration. This correspondence and the analysis set forth herein may not be: (i) used or relied

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[7] If consideration is also given to so-called "indirect benefits" (e.g., anticipated tax revenues, general economic benefits) then the value of all benefits received by the City (direct monetary benefits, covered potential expenses/liabilities, direct and indirect fiscal benefits, and general economic benefits) is likely to substantially exceed the total of all payments/costs to the City. We recognize, however, that language in Turken suggests that, at least in certain circumstances and for certain purposes, consideration of indirect benefits may not be appropriate. Specifically, in Turken, the indirect benefits were found to be inadequate to establish the existence of legal, bargained-for, contractual consideration. Here, the bargained-for consideration consists of contractual undertakings such as assumption of Arena operational responsibility (for a City-owned facility) and a commitment to use that facility for hockey operations for approximately 20 years. Once appropriate contractual consideration is found, how is the value of such consideration to be determined for evaluating whether it is "not grossly disproportionate to the benefits conferred by the government on private parties"? May indirect benefits be considered solely for the purpose of determining the value of otherwise valid, legal, bargained-for, contractual consideration? The Supreme Court has not yet answered these precise questions.

upon by, or quoted or delivered in whole or in part to, any other person or entity; or (ii) used, quoted, cited, or relied upon by any person, for any purpose, without, in each instance, our prior written consent.

This letter incorporates by reference, and is to be interpreted in accordance with, the First Amended and Restated Report of the State Bar of Arizona Business Law Section Committee on Rendering Legal Opinions in Business Transactions, dated October 20, 2004.

Yours truly,

Mariscal, Weeks, McIntyre & Friedlander, P.A.

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