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Phoenix Rising: Inside the Owner's Box with Counsel to Jerry Colangelo

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In late spring of 1987, I received a telephone call that changed my law practice. Jerry Colangelo, General Manager of the Suns since its arrival in Phoenix as an expansion NBA franchise in 1969, called me to discuss representing a group of investors he was putting together for the purchase of the franchise. At the time, the Suns franchise was the only major professional sports team in Arizona and had been very successful. Unfortunately, the reputation of the team, carefully nurtured from its arrival, recently had been tarnished by allegations and investigations concerning drugs. Jerry explained that the Tucson and California owners of the Suns were considering selling the franchise or moving it from Phoenix. True to an unwritten understanding with the owners, Jerry was being given an opportunity to buy the franchise if he could meet the price the owners had set. Jerry recounted that he had begun contacting investors by meeting with John W. Teets, Chairman of the Board and CEO of The Greyhound Corporation, and Greyhound's General Counsel, L. Gene Lemon. He proposed that Greyhound consider becoming a lead investor. During the discussions with Greyhound, I had been recommended to assist in putting together the investment group. Having just received the call from John Teets that he was waiting for—confirming that the Board of Directors of Greyhound had voted to put up \$6 million for a 25 percent interest in the team—Jerry thought it was time for me to get involved.

I had moved my family to Phoenix in 1972 after obtaining an L.L.M. from the Graduate Tax Program at New York University. By 1987, I was primarily a transactional lawyer and it was as a result of several large projects for Greyhound that I became involved with the Suns. Except for a few areas (such as the organization and structure of the professional

BY JAY S. RUFFNER

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phoenix rising

leagues and associations, player contracting and certain aspects of arena and stadium development matters), "sports law" differs very little from any other business practice. Needless to say, with its increasing popularity, the markets for related merchandise and business interest in seeking sponsorship and promotion opportunities, professional sports has become big business. This article covers my involvement in Phoenix during what has been a period of unprecedented growth.

My wife and I already knew Jerry and Joan Colangelo socially. They were very active in the community and, under Jerry's leadership, the Phoenix Suns seemed to support every worthwhile cause in town.¹ In Phoenix, Jerry *was* the Phoenix Suns. He had committed 17 years of his life to the franchise and had earned a reputation for hard work and marketing genius. His integrity and business ethics were above reproach. Nonetheless, with the drug controversy and the team suffering through one of its most disappointing years on the court, the question was whether his ambition was realistic. While Jerry had been very successful with the Suns and in real estate, he was of limited personal means (certainly in comparison with the controlling interests of other professional sports franchises), and I was soon to learn that he had agreed to pay the highest price ever for an NBA franchise.

CLOSING THE DEAL

When we met, Jerry explained the Greyhound investment and the commitment of the Arizona Bank for a substantial loan if the balance of the \$44.5 million purchase price could be raised. The meeting went well and we discussed the various steps that would have to be taken in order to purchase the franchise. I had the

distinct impression that he would prefer to do the deal on a handshake, but was resigned to the need for lawyers to become involved. A deadline for early October had been set in order to close the deal and afford new ownership sufficient time to prepare for the 1987-88 NBA season. We quickly began work forming an Arizona corporation (to be the general partner) and a Delaware limited partnership (to be the owner and operator of the franchise); began the preparation of subscription information for investors; and started negotiations with the Arizona Bank. At the same time, work was underway to prepare the agreement for purchasing the assets comprising the franchise; to obtain NBA approvals² of the newly formed limited partnership, its general partner and investors as they signed up; and to draft the host of other agreements and documents necessary to complete the project. The principal assets of the team consisted of player contracts, trademarks and trade names, participation rights in the NBA and affiliated organizations, season ticket deposits, local broadcast and telecast contracts, advertising and sponsorship agreements, merchandise, and an office and facility lease (the Veterans Memorial Coliseum).

With the commitments of Greyhound and the Bank, Jerry had early success in generating interest among other investors. Pinnacle West, through its investment subsidiary, committed to \$3 million and Ross Farnsworth, a successful Mesa, Arizona real estate developer, committed to \$4 million. Other smaller investors came on board and, for a while, it looked like smooth sailing. As the deadline approached, signs began to appear that certain early and substantial expressions of interest by two prominent Phoenix-based companies might be unraveling.

Things came to a head one afternoon in our offices, shortly before the scheduled closing. What we hoped would be a wrap-up meeting with executives of these investors was not going well. After covering where he stood with the Bank and other investors and after sharing his expectations for the franchise, Jerry asked for their commitment in order to help close the deal. The executives asked for time to discuss the matter privately and adjourned to separate conference rooms. About a half hour later they returned and announced that they were sorry but had to pull out of the deal. As they got up to leave, Jerry remained seated and crumpled up in a ball several pieces of paper that were in front of him. In a single movement, he swiveled in his chair and tossed the crumpled paper the length of the large conference room toward a small waste basket. I will never know how he made that shot. No one said a word.

We stayed at the office for hours discussing how to fill the gap. We ran through our list of existing investors, we considered additions to the list—though time was very short—and we considered options with the ownership of the franchise (which was insisting on being bought out entirely). Late in the evening, I rejoined Jerry in our conference room. He had wanted to be alone. With no options readily apparent, I struggled for words. This was more than a business deal gone bad—I had become infected with Jerry's passion and he deserved to succeed. When he left our offices late that night, he said it was not over—but for the life of me, I did not see a solution.

The next morning, the sun was shining and the clouds had lifted. Jerry called and said "It's a go." In early morning conversations, he had convinced the owners of the franchise to stay on as limited partners in the

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new partnership and carry back some debt. The rest, Jerry made up by borrowing to purchase the two remaining limited partnership units. The elation of the moment quickly gave way to around-the-clock work to restructure the deal.

In addition to Jerry's waste basket "hoop," several unusual things occurred during the acquisition of the franchise. We expected that some investors might insist on burdensome constraints on management and in the course of resisting these efforts, Teets and Greyhound became a staunch ally. They pointed out, matter-of-factly, that none of the investors, including Greyhound, knew the first thing about running a professional basketball franchise. Teets made it clear that Greyhound was investing in Jerry and Jerry must have the authority to make it work.³ The other unusual occurrence was a matter of timing. There had to be a lot of last-minute legal work to effectuate the restructuring of the deal. As a result, there was considerable sentiment (especially among some of the lawyers) for postponing the scheduled closing. As if there was some urgency only he perceived, Jerry insisted that we meet the deadline. We closed the purchase, as scheduled, on October 14, 1987. Days later, Black Monday hit—had we delayed, all might yet have been lost as uncertainty set in throughout the business community.

Jerry's deal with his new investors was pretty straightforward. He would operate the franchise and make all management decisions. Limited partner approvals would only be required for major events, such as borrowing in excess of a liberal cap, a move of the franchise from Phoenix, the sale of the franchise, or

dissolution of the partnership. An advisory committee of limited partners was established to meet with Jerry once or twice a year to discuss the affairs of the business. When the limited partnership repaid investors their capital, plus a stated annual return on their investment, the General Partner's interest would increase from one to 25 percent.⁴

THE GREAT TURNAROUND

With the team coming off one of its worst seasons, an uncertain local and national economy, and new investors watching (a few nervously), it seemed reasonable to expect that Jerry would move cautiously. Instead, he and Cotton Fitzsimmons (who was brought back to the Suns shortly after closing the purchase of the franchise) worked feverishly to remake the team. At the beginning of the 1987-88 season, only two players would remain from the 1986-87 roster. Trade rumors swirled and it seemed that announcements were being made almost weekly. The key decisions involved trading Phoenix's best player, Larry Nance, to Cleveland for three relatively obscure players, Kevin Johnson (in his second year in the NBA and a relatively inexperienced back-up point guard), Ty Corbin, and Mark West. None seemed to offer the potential of a Larry Nance, regarded widely as one of the premier forwards in professional basketball. The other controversial move was to acquire Tom

Chambers, one of the NBA's first free agents. There was a great deal of speculation by the fans and the sports writers about Chambers. While recognized as a player with tremendous talent, he had a reputation in some quarters for inconsistency.

The 1987-88 team produced 55 victories. Coming off a 28-54 season, it was one of the greatest turnarounds in NBA history. The team reached the Western Conference Finals and Jerry could do no wrong. After the 1987-88 season, Jerry was recognized an unprecedented third time as NBA Executive of the Year. The 1987-88 season would turn out to be the start of ten consecutive seasons during which the team made the NBA playoffs. Kevin Johnson emerged as one of the best point guards in the NBA and Tom Chambers proved to be a great addition at forward, making people forget the Nance trade except for the fact that it brought us Kevin Johnson. While there were many naysayers when the franchise was purchased for \$44.5 million (too much to pay for any basketball team), those voices soon became muffled by the success of the new team.⁵ The franchise moved quickly to take marketing advantage of its on-the-court success. No matter how opinions about Jerry may differ, I have never heard anyone doubt that he is at the head of the line when it comes to marketing professional sports.⁶

The Suns were one of the few positive stories as Phoenix suffered through difficult economic and political times. The franchise seemed to be on a steady course when Jerry decided the time was right to make a move that would insure its future. When information was being prepared for prospective investors in the

franchise, Jerry insisted that there be included his commitment to a new arena. At the time, it sounded like long, long-range planning, but Jerry soon began giving voice to the idea at speaking engagements. Denny Moss, Director of Economic Development for the City of Phoenix, heard Jerry speak and called to discuss the idea of a downtown arena.

“LET’S GET TO WORK”

When I moved to Phoenix in 1972, downtown was a wasteland. Commercial and retail was dying out. Government buildings, bank headquarters and the courts were the only notable presences. Soon after 5:00 p.m., the streets were deserted. Vagrancy, crime, and the blight that accompanies them seemed to be all that was flourishing, despite the efforts of city councils, mayors, and vested downtown interests.

By 1989, there were a few signs of an awakening in downtown. The city had invested heavily in a much under-utilized convention center. A Hyatt hotel was constructed and the “old Adams Hotel” was gutted and rebuilt. Pinnacle West was under construction on the Arizona Center, a gamble to reintroduce retail and restaurants to the downtown area. A hard-fought battle over taxes to develop a freeway system with much better access to downtown finally had been won. While some pieces were coming together, there still was no spark to ignite the imagination and spur activity.

Over a several-month period, Jerry engaged in meetings with the Mayor, Terry Goddard, and City staff (“City”). A rough outline was developed for a public/private partnership to construct a downtown multi-purpose sports and entertainment facility that would serve as the home of the Phoenix Suns. I was sitting in my office one afternoon when Jerry

called to say that he and the City were ready to move forward. In almost the same breath, he told me that one of his investment partners had asked him to meet with another law firm about representing the Suns on the project. Jerry said he owed it to his investment partner to have the meeting and he did not want me to hear about it through the grapevine. It was an anxious and nervous several days. Our next conversation began, in typical Colangelo fashion, with “Let’s get to work.” Warning me about rumors that I, in fact, had heard concerning his meeting with another law firm was a decent thing to do that, in my experience, would not have been considered by many clients.

LAYING THE ARENA’S LEGAL FOUNDATION

The arena negotiating team began meeting in early 1989. The City was represented by Denny Moss, outside counsel and a representative from the City Attorney’s office. Bob Machen, whom Jerry had selected to be in charge of development and operation of the new arena, Rich Dozer, then Chief Financial Officer of the Suns and now president of the Diamondbacks, and I all represented the Suns. For several months, we put together the key points to the deal and on March 24, 1989, the Mayor and City Council were presented for approval the Downtown Sports Arena Memorandum of Understanding (“MOU”).

The MOU described a multi-purpose arena having a seating capacity of approximately 18,000, an attached parking garage, and other improvements. The arena would be owned by the City but would be developed and operated, under long-term agreements with the City, by Phoenix Arena Development Limited Partnership (the developer/operator), a Colangelo-controlled Delaware lim-

ited partnership, of which the franchise is the 99 percent limited partner. Three possible downtown sites were identified for the City to purchase and prepare for development, all of which complied with environmental and historic preservation laws. The developer/operator would select the architects, design the arena and related facilities, and supervise construction. A construction manager would be jointly selected and construction contracts would comply with the City’s public bidding requirements. In addition to the cost of the site and site preparation, the City agreed to provide a maximum of \$35 million towards the construction costs of the arena, the parking garage, and related infrastructure.

The developer/operator was required to obtain debt financing for all additional funds, then estimated to be \$35 million, and would be solely responsible for repaying the debt from arena revenues and other sources. Cost overruns would be the responsibility of the developer/operator. No lien or encumbrance of any kind would be permitted on the arena improvements or the site.

The developer/operator also agreed to enter into a long-term arrangement with the City to manage and operate the arena. After operating expenses, the funding of a repair and replacement reserve, and debt service, the City would receive a priority payment during the first 30 years of \$500,000 per year (increasing by 3 percent each year) and 70 percent of net cash flow. Remaining net cash flow represented the developer/operator’s profit. After the initial 30 years (assuming the arena had not become obsolete), the developer/operator would continue to operate the project for ten years with no priority payment to the City and with the City receiving 60 percent of net cash flow. The City, subject to

The cornerstone has been solid organization and management—not only in the selection of the product and its marketing, but in the sustainable development of the franchise by attracting top coaches and athletes.

legal requirements and with certain exceptions, agreed not to participate financially in the development of any other arena or arena-like facility that could compete for events.

The Suns would enter into a long-term, iron-clad agreement with the developer/operator to play all of their NBA home games at the arena and would maintain practice and work-out facilities, a store for the sale of team merchandise, and their business offices at the arena. The Suns also agreed to market the private suites in the arena (88 in number) and all permanent arena advertising during the first 30 years of the arrangements for 60 percent of all gross revenues derived from licensing of the suites and arena advertising sales. The right of the Suns to these payments was subordinate only to operating expenses, funding the repair and replacement account, debt service, and the City's priority payment. The agreement granted to the City the right to use the arena, at cost, for conventions, civic events, and other activities. These rights included 50 priority reserve dates and the right to use the arena on any other day that it was not committed to another event. Two sets of projections were submitted with the MOU, one based on a mix of events averaging 220 per year and the other based on an average of 185 per year. An opinion of Public Financial Management, Inc. (financial and investment advisors to the project) accompanied the projections.⁷

After approval of the MOU by the City Council, work began immediately on definitive documents. While public reaction to the deal was largely positive (with the help of the team, which was working its way towards another 55-win season), dissident

voices began to be heard. There were objections to the City's investment in the project through an increase in the hotel-motel tax and the car-rental tax; groups with various social concerns spoke out about the City's spending priorities; and those fundamentally opposed to spending public money to benefit professional sports teams became quite vocal. Petitions began circulating to limit the City's participation in arenas and stadiums—placing a great deal of pressure on the arena negotiating team to quickly present definitive documents for City Council approval.⁸ Under Arizona law, a city ordinance, even if enacted by referendum, may not be applied retroactively to undo a transaction lawfully entered into where the parties rely upon their agreements and substantially perform. A referendum vote could not take place before the fall of 1989—the definitive documents would have to be completed by the early summer and substantial work would have to begin on site acquisition, preparation, and planning in order to render the project safe from challenge.⁹

Early during what became protracted negotiating and drafting sessions, the parties set a deadline of June for completion of all document preparation. While that date slipped, all necessary approvals were received (including the vote of the City Council) and the documents

were signed on July 19, 1989. During negotiations with the City, the financial management consultants worked on a financing proposal and began shopping it. To my knowledge, this was the first project of its kind proposing substantial private financing secured solely by revenues, with no rights in the physical assets comprising the proj-

ect. The concept was unacceptable to a number of institutions that early had expressed interest. In the end, The Fuji Bank, through its San Francisco Agency, offered its commitment if certain other pieces could be put in place. Fuji's commitment left approximately \$5 million of construction costs unpaid. In addition, the financial plan assumed the concessionaire would pay the costs of build-out and equipment for concession space and a proposed bar and restaurant. Finally, the financial plan contained no provision for construction cost overruns. These loose ends came together through a public bid process which identified The Dial Corp (formerly Greyhound), through its subsidiary, Restaura, Inc., as a \$5 million lender to the project, the exclusive food and beverage concessionaire at the arena (responsible for building out and equipping all food and beverage space) and the guarantor of up to \$6 million in construction cost overruns.

A TANGLE OF PRIORITIES

Where the arena money came from is fairly easy to explain. How construction funds would be disbursed, however, and how arena revenues would be paid were the subject of difficult negotiations and complex arrangements. The concerns of the City included protecting its priority payment and making sure that its

bond funds were not disbursed or used for purposes that would contravene applicable requirements. Fuji was agreeable to the priorities for operating expenses (including the overhead of the operator) and funding for repair and replacement, but wanted first call on every other dollar of revenue. The Dial Corp and Restaura, with respect to their \$5 million loan and cost overrun advances, investment in concession area build out and equipment and interest in concession revenues, wanted to share arena revenues (after operating expense and funding for capital improvements) pro rata with Fuji. The franchise was protective of the priority established for its fees for the marketing of advertising and suite licenses while at the same time sought to maintain maximum flexibility in the control of the facility through its affiliate, the developer/operator.

Negotiations to put the financing for the arena (with naming rights successfully marketed, the America West Arena) in place were protracted and difficult due to the number of parties involved and their competing interests.¹⁰ Most of the private financing came from the sale of taxable variable-rate bonds issued by the Industrial Development Authority of Maricopa County. The bonds were backed by Fuji's direct draw letter of credit in the initial stated amount of approximately \$45,000,000. Fuji would make liquidity advances to bond holders pursuant to the letter of credit with repayment by the Arena on the same date. Several reserve accounts were established and funded, primarily with advance deposits from the early marketing of suites. In addition, the Arena was required to fund a working capital reserve to pay operating expenses in the event cash flow proved inadequate. The Arena, with

City approval, granted Fuji a security interest in all contracts relating to the financing, construction, development, use and operation of the facility—including its agreements with the City, its agreements with Dial/Restaura, its agreements with the Suns, the naming agreement, major advertising contracts, and suite license agreements. In the event of a default, the developer/operator could be removed; however, all of the rights and obligations of the developer/operator of the Arena, including the Arena's obligations to the Suns, were required to be assumed by the interim operator and, ultimately, a replacement operator to be selected by the parties.

The Dial/Restaura loan agreement set forth procedures for obtaining advances against the \$5 million loan commitment as well as advances against the \$6 million cost overrun facility. Under a related concession agreement, Restaura would collect all food and beverage gross revenues. Against these collections, Restaura was permitted to withhold from the Arena's share 10 percent of gross receipts plus an additional amount for each \$1 million advanced pursuant to the cost overrun guaranty. Provision was also made in the loan and concession agreements for repayment of the depreciated costs of concessionaire build out and equipment in the event of termination of the concession agreement. In the event of a payment default with respect to Fuji, Restaura was subject to a limited pay back obligation. Notwithstanding a default in the obligations to Dial/Restaura, no acceleration of Arena obligations was permitted without Fuji's consent.

All of the rights and obligations of the various parties involved in the Arena's financing and operation were pulled together in the Interparty Agreement by and between the

developer/operator, the Suns, the City, Fuji, Dial/Restaura, the various banks holding reserve accounts and the entity formed by the City of Phoenix to act as interim operator. The principal purpose of the Interparty Agreement was to set forth the various priorities for application and payment of facility revenues in the absence of default as well as in the event of defaults under any or all of the financing arrangements or other key agreements for the operation of the Arena and the playing of Suns home games at the Arena. What was, as between the City and the developer/operator, a fairly simple outline for disbursing Arena revenues became excruciatingly complex arrangements to address the payment of competing obligations, with variations in priorities to take into account the various defaults that might occur. Special provisions applied during construction to take into account untoward events and failures to maintain the schedule for development and construction.¹¹

The Arena site was acquired by the City by late summer 1989, and work was begun immediately (using proceeds from the sale of the City's bonds) for infrastructure and site preparation. Groundbreaking for the Arena occurred in 1990. It was an ideal time to be building an arena—the local economy was in the doldrums and major construction was at a near standstill. Every major contractor in Arizona bid on the project at substantially below the most optimistic estimates of the construction manager. This permitted adding additional seating and many aesthetic features to the Arena not included in the original design. The Arena officially opened on June 5, 1992, several months ahead of schedule. Approximately 25 new restaurants and retail outlets opened in downtown Phoenix within 12 months, and

existing downtown businesses expanded. The City finally had an attraction that would bring people back to the downtown area, and, with streetscapes and other improvements, downtown began to take on the attributes of a popular destination.

THE PLAY-BY-PLAY OF ARENA DEVELOPMENT

1. Jerry instructed the arena negotiating team at the outset of negotiations with the City that he had committed the Suns to the Arena and that we should not resist any recourse the City might seek if the Suns threatened to leave or left the Arena prior to the end of its commitment.

2. Although it was not at all clear that we would be successful, our instructions were also to safeguard the franchise from Arena failures. By pre-selling naming rights, long-term advertising and suite licenses, we were able to assure revenue streams which, together with the City's commitment of funds to Arena development and construction, allowed us to achieve that objective by limiting recourse on financing obligations to Arena revenues and the developer/operator. In addition, the franchise's principal revenue streams were tied to gross revenues from advertising and suite licenses. Not only was the franchise well-equipped (in the person of Harvey Shank, Vice President of Marketing) to do this, but the revenue expectations of the franchise were not dependent on the bottom line performance of the Arena and the obligations to the Suns would be assumed by any successor to the developer/operator, if removed due to Arena defaults.

3. In structuring arrangements between the City and the developer/operator for the Arena, a great deal of attention was paid to property taxes. In 1989, Arizona taxed pos-

sessory interests in publicly owned property. The "Operating Agreement" structure, rather than a ground lease arrangement, was selected to avoid characterizing the developer/operator's interest in the Arena as a possessory interest, even though several exemptions from the tax on possessory interests were applicable. Subsequently, provisions of the favorable property tax applicable to government-owned arenas and stadiums were held violative of Arizona's Uniformity Clause (ARIZ. CONST. art. 9, §1 provides "all taxes shall be uniform upon the same class of property") and Exemptions Clause (ARIZ. CONST. art. 9, §2 provides "[p]roperty in the State not exempt under the laws of the United States or under the Constitution ... shall be subject to taxation").¹² The Legislature moved quickly and Arizona no longer imposes property taxes on possessory interests in publicly owned property; rather, a Government Property Lease Excise Tax ("GPLe"), which applies favorably to publicly owned arenas and stadiums, has been enacted (ARIZ. REV. STAT. §42.6201 et seq.). Arizona's Uniformity Clause and Exemption Clause do not apply to excise taxes.¹³

4. As on several other occasions previously referred to, Dial once again played an important role by agreeing to provide the construction cost overrun guaranty. No concessionaire bidding for exclusive arrangements at the Arena (other than Restaura) was willing to assume that risk.

5. We were not able to find any model or structure similar to the arrangements negotiated and entered into with respect to the America West Arena. Since completing the America West Arena, I have run into more clones of our documents than I can keep track of (most

of our documents are public record). I was hired in the spring of 1996 by the Miami Heat to prepare the initial documentation for a new arena to be developed for by the NBA Miami Heat and the NHL Florida Panthers. Shortly after my arrival in Miami, the tentative agreement between the teams fell apart. Eric Woolworth, General Counsel of the Heat, Bruce J. Colan, a partner at Holland & Knight, and I began drafting documents for the development of a downtown Miami basketball arena, while the Panthers and their lawyers were working on a new hockey arena in Broward County. Those involved with each of the facilities kept a close eye on the progress of both projects. In one of the final drafts of the hockey arena operating agreement, someone failed to catch the provision that "Jerry Colangelo" was to maintain control of the operator at all times. While it was obvious to everyone familiar with either project that the America West Arena documents were being used for both projects, this oversight in drafting provided a much-needed lighter moment.

6. When the Arena was under design, a great deal of consideration was given to the playing and performance areas for the wide array of anticipated events. After Jerry confirmed with the National Hockey League that the sport was not destined for Phoenix in the near term, it was decided to place the basketball court in the center of the bowl. This provided for removable seats in order to expand playing and performance areas to one end of the Arena for sporting events and exhibitions requiring added space (such as arena football, arena soccer, ice events, large family shows, and hockey). A great deal of consideration was also given to advertising by hiring a highly regarded consultant to make sure

NHL meets NBA

negotiating shared use of the america west arena

that the maximum amount of appropriate prime advertising space was incorporated in the design of the Arena.

7. From virtually the outset, the America West Arena outperformed revenue projections; unfortunately, it also proved more costly to operate than estimated. While the Arena operated at a level sufficient to satisfy the priority payment to the City, participation in net cash flow would be deferred beyond the City's expectations. Discussions began immediately with the City and, while underway, newspaper headlines trumpeted that the America West Arena was underperforming for the City. Even though the economic projections had been carefully qualified and reviewed by consultants, Jerry moved quickly by agreeing that the City could temporarily share in payments going to the franchise (its fees from advertising and suites) until

performance of the Arena was improved, at which time the sharing arrangement would terminate and the City would repay the Suns. This is a good example of Jerry's philosophy about doing what has to be done to make business arrangements work out to everyone's reasonable expectations.

8. Throughout negotiations with the City, including the financing of the Arena, relationships were cordial and one could sense a great deal of trust between the City (both elected and appointed officials) and the Suns organization. As was the case with the investors in the purchase of the Suns franchise, the City clearly relied on Jerry and his leadership and credibility that was being counted on to make the Arena a success. Accordingly, the various agreements with the City included certain restrictions on Jerry's transferring control of or selling the franchise or

the developer/operator. The America West Arena is and, I believe, will continue to be an outstanding example of public/private sector cooperation in providing the community a much-needed and much-utilized facility.¹⁴

9. The agreements between the Suns and the City were unique at the time. The NBA had no experience with these kinds of arrangements. Accordingly, the City of Phoenix required our legal opinion that no rule, regulation, or policy of the NBA was violated by the arrangements. NBA rules and regulations were easy to verify; policy, on the other hand, existed only in minutes of the meetings of the Board of Governors of the NBA, available for inspection only in the Association's New York offices. It took me three days to get through the minute books. To be able to follow the major events in the history of the NBA from inside the boardroom

To pave the way for the Phoenix Coyotes, a binding letter of intent was entered into between the hockey team, the developer/operator of the Arena, and the Phoenix Suns. This letter of intent obligated the parties to use their best efforts to enter into definitive agreements and obtain all necessary approvals, consents and modifications to existing agreements in order to implement certain understandings.

1 The Arena and the hockey team, as a prime licensee of the Arena, would enter into a license agreement for the play of all home, exhibition, preseason, regular season and play-off games at the Arena. The license agreement would be for an initial term of five seasons, with two five-year renewal terms, if elected by the NHL team. License fees were established for the initial and renewal terms, together with reimbursement for certain game day and related costs incurred by the Arena, not to exceed a cap.

2 The hockey team retained the exclusive rights to sell and control the sale of tickets for hockey events, subject to a ticket distribution agreement entered into by

the Arena. The hockey team also was given the exclusive right to establish prices and control the sale of tickets for the suites and to receive all revenues therefrom. The team was given the right to one private suite for its use for all Arena events and the exclusive use of another suite for hockey games. If suite licensees chose not to purchase tickets for hockey games, the hockey team and the developer/operator were to cooperate in obtaining the permission of such suite licensees to permit the use of the suites by third parties.

3 The Arena agreed, at its sole cost and expense, to make certain improvements in order to provide a venue complying with NHL standards and consistent in quality with the material and workmanship provided to the Suns (in areas such as locker rooms, coaches' rooms, etc.). The developer/operator would be entitled to reimbursement of these expenses if the hockey team left the Arena before the improvements were fully amortized.

4 The hockey team was provided access to all existing facilities necessary for NHL hockey game use, including the box office, media lounge, wives and family lounge, training facilities, medical room and officials room. Access and use of all other facilities at the Arena would be made available to the hockey team on the same basis as available to the Suns, with office space to be offered when available in the Arena or ancillary buildings controlled by the Arena.

was fascinating. As Jerry had assured me, no policies of the NBA were contravened by our deal with Phoenix.

SPORTS EXPANSION

While the basketball franchise was a great anchor tenant for the Arena and while Bob Machen was immediately successful in attracting commitments for family shows, ice events, concert bookings, and other events, Jerry began investigating other indoor sports that might add reliable events at the venue. An affiliate of the Suns bought into World Team Tennis, indoor soccer, and arena football. Tennis and soccer did not work out in Phoenix, notwithstanding three years of effort and substantial investment. Arena football, on the other hand, almost immediately became and continues to be wildly popular with a very loyal cadre of fans. At a nominal cost, the

Arizona Rattlers franchise has become a great investment. The success of the Rattlers is illustrative of Jerry's approach to professional sports. One of his first moves was to hire Danny White as the first and only General Manager and Head Coach. Danny is a product of Arizona and Arizona State University and was the successor to Roger Staubach in leading the Dallas Cowboys to many successful seasons. Jerry's second move was to delegate responsibility for developing the franchise to his son, Bryan. Bryan and Danny White have been honored by the Arena Football League as Executive of the Year and Coach of the Year respectively. As a result of a coordinated marketing strategy,¹⁵ virtually every game has been a sellout and the franchise has received the AFL Commissioner's Award on two occasions as the best indoor football

organization in the League. Bryan's emergence from the long shadow of his father began with the success of the Rattlers. Bryan now also heads up the Suns organization. He still remembers with more than just a little satisfaction that he presented Jerry with his first professional sports championship ring.

In late 1995, Jerry was approached on the subject of bringing the National Hockey League to Phoenix. Several businessmen were in negotiations to purchase the Winnipeg Jets franchise and move it to a more promising market. In meetings between Jerry and the new owners, arranged by Gary Bettman, Commissioner of the NHL, a rough outline was prepared to bring the hockey team to Phoenix and the America West Arena. The success of NHL hockey in the Sun Belt since has catapulted Phoenix and the

5 The Arena parking garage was available to the hockey team on hockey game days at rates specified by the hockey team. All parking revenues (net of direct operating costs) were to be paid to the hockey team.

6 With respect to signage and sponsorship, base advertising revenues (including scheduled increases) would be determined with respect to all existing advertising in the Arena. The Suns would continue to negotiate new advertising agreements and replacement advertising agreements for such space, with the hockey team receiving any increase. Exclusive arrangements were protected and advertising in new space (or based on new technologies) would be shared on an equitable basis to be agreed upon. Advertising space on the upper fascia within the bowl of the Arena (between the two levels of suites) was assigned to the hockey team for the sale of fixed and permanent advertising. Temporary advertising at hockey games also would go to the hockey team.

7 The hockey team was given the right to elect to participate in sales of merchandise, novelties and publications, together with the Suns and the Arizona Diamondbacks through a limited liability company to be formed with stores at the Arena, the Bank One Ballpark (under construction) and other locations.

8 The developer/operator agreed to use its best efforts to assist the hockey team in negotiating a separate concession agreement with Restaura. The cost of carving out a direct inter-

est in concessions for the hockey team was split between Restaura and the developer/operator.

9 The Suns and the developer/operator agreed to make available their marketing, advertising, ticket sales and promotional staffs to the hockey team on a fee basis in order to save the hockey team overhead costs with respect to its staffing of these functions. Where the Suns and the developer/operator benefited from exclusive relationships with service providers, best efforts would be made to extend similar arrangements to the hockey team.

10 The hockey team retained exclusive rights to control all broadcasts and telecasts of its games and all existing transmission and production facilities at the Arena were available for its use.

11 Scheduling of NBA and NHL games would share the same priority, both subject to long-term arrangements for other events entered into by the Arena.

12 All Arena revenues to be paid to or retained by the hockey team were deemed revenues of the hockey team and not revenues of the Arena or subject to any distribution formula under any agreement to which the Arena, the Suns, the City, Fuji Bank, etc., were parties.

America West Arena to the fore as a promising market and venue.

Several factors brought the NHL to Phoenix. The NHL team wanted to be more than a mere licensee at the America West Arena. In future marketing, the Arena would be referred to and identified as the home of the Phoenix Suns and the NHL team. In addition, the new hockey team owners required certain interests in Arena revenues; however, unlike the Suns and the developer/operator, those revenues were not at risk by being subordinated to operating expense, debt service, the City's priority payments, payments to the Suns for advertising and suites, or any of the other priorities established for the disbursement of Arena revenues. The shortcomings of the America West Arena as a venue for hockey were well known at the outset of negotiations. The Arena had hosted a number of NHL exhibition games which established the capacity of the Arena for NHL hockey at approximately 16,500 due to the problems of impaired sight-lines at the expanded end of the playing surface.

On December 12, 1995, the parties entered into two binding letters of intent. An abbreviated letter of intent obligated Jerry to negotiate definitive agreements to bring the NHL hockey team to the America West Arena and obtain all necessary consents and approvals. Jerry agreed to assist the hockey team in obtaining sponsors, advertisers, local radio and television stations, and service providers. The agreement also recited Jerry's right to purchase a 5 percent limited partnership interest in the NHL team on terms and conditions to be agreed upon—failure to reach agreement in this respect would not relieve the hockey team or the America West Arena of their agreements. We insisted on adding

to the letter of intent a statement concerning Jerry's positions as the controlling shareholder of each of the general partners of the Suns and its affiliates and of the Diamondbacks and its affiliates; consistent therewith, Jerry's obligations to the hockey team were to be subject to and to be performed consistent with his fiduciary duties owed to the entities he controlled and their investors.

RELATIONS COOL WITH THE NHL

Negotiation of the definitive documents with the hockey team (to become the Phoenix Coyotes) were protracted and, at times, very difficult.¹⁶ Relationships between the parties became somewhat strained. Definitive documents were signed in June of 1995. No agreement was reached with respect to Jerry becoming a limited partner in the Phoenix Coyotes. The relationships between the Coyotes and the Arena have continued to decline. While the Coyotes franchise has been successful in generating very good fan support in Phoenix, it has experienced operating losses. Among the causes it has publicly identified are the reduced capacity of the Arena for hockey events, obstructed view seating, problems with suite licensees (this season, approximately 7 suites at the Arena do not participate in the Coyotes season and do not permit the Coyotes to license others for the use of the suites), and limited participation in Arena revenues.

Dissatisfied with its venue, the hockey franchise has entered into an agreement with Scottsdale (which borders Phoenix on the east) and developers for a new hockey arena there. The project goes before the voters of Scottsdale in May of this year. The City and the Arena have recently announced plans to expand the Arena's capacity for hockey and

similar events and to alleviate, to a significant extent, the problems with obstructed seating. The cost of this project is estimated to be \$12 million.¹⁷ With respect to participation in Arena revenues, there is obviously a point beyond which the developer/operator, its lenders, the City and the Suns cannot go, especially if the Coyotes franchise continues to insist that its Arena revenues not be at risk to costs of operations and other commitments.¹⁸ In the end analysis, the Phoenix Coyotes suffers from increasing player contract demands (as does all of professional sports) and inadequate revenues at the National Hockey League level—one need only compare the NHL to professional football, basketball, and baseball with respect to shared league revenues in order to appreciate the problem.

THE MERCURY TAKE THE COURT

While the Arena has had a difficult relationship with the Phoenix Coyotes, the Women's National Basketball Association, as would be expected, has been a different story. When NBA Commissioner David Stern first discussed establishing a professional women's basketball league, with Jerry, Jerry was immediately supportive, feeling that the time was right. The WNBA is not organized in the same manner as the NBA. The NBA owns the WNBA and enters into long term operating and revenue sharing arrangements with NBA teams and their venues to organize WNBA teams and operate them. Players contract directly with the WNBA and are subject to a team selection process that seeks to assure competitiveness throughout the League. The WNBA kicked off its initial season with eight teams, including the Phoenix Mercury. Jerry prepared to enter women's professional sports by signing up Cheryl

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Miller as Head Coach. Cheryl had been an All American at University of Southern California, a national College Player of the Year and a leader on the U.S. Women's Basketball Team that won America's first Gold Medal in the sport at the 1984 Olympics. At the same time, the marketing departments of the Suns and the Arena focused on preparing Phoenix, and its fans, advertisers, and sponsors for women's professional basketball. Despite predictions and projections of a slow start

and serious losses for the first several years of operation, the Phoenix Mercury took to the basketball court in 1997 and was an immediate financial and performance success story. Like the Rattlers, the Mercury appear to have a very bright future in the Phoenix marketplace. Again, the cornerstone has been solid organization and management—not only in the selection of the product and its marketing, but in the sustainable development of the franchise by attracting top coaches and athletes.

“PLAY BALL!”

In the summer of 1993, Jerry received a visit from Jim Bruner, a member of the Maricopa County Board of Supervisors, and Joe Garagiola, Jr., an attorney in Phoenix with a deep and abiding interest in baseball. Both had been involved with baseball in Arizona over the years, and wanted Jerry to lead an effort to solicit an expansion franchise of Major League Baseball in Phoenix. Jerry knew if he became involved, everything would have to be in place. In the previous round of Major League Baseball expansion in

1990, Phoenix had been embarrassingly unprepared. Jerry's visitors expressed the opinion, which they said was shared by many others in the community, that Jerry was the person who could make it happen.

Jerry was a very successful baseball player in high school, receiving a number of offers from major league franchises. Though he accepted a college scholarship at Kansas to play basketball, his love of baseball always remained strong. Nonetheless, the challenge of bringing Major League Baseball to Phoenix was formidable. It was to be expected that an expansion team would cost no less than \$100 million, and Phoenix had no ballpark. In addition, early proposals to deal with the Phoenix summer heat (such as erecting evaporative cooling towers at Phoenix Municipal Stadium, the home of the Triple A Phoenix Firebirds) had proven totally unsuccessful. Jerry's visitors had some positive information concerning a stadium. In connection with previous attempts to bring Major League Baseball to Arizona, the Arizona Legislature had enacted legislation in 1990 that per-

mitted Maricopa County, through a Stadium District, to impose a quarter-cent sales tax for funds to develop a baseball-only stadium, if a Major League Baseball team were first secured.¹⁹

As Jerry considered the opportunity, it was clear that there would be little room for foot faults. For the Stadium District to be formed and the vote on ballpark funding to take place, a Major League Baseball franchise would have to be committed to Phoenix. The seed money for

efforts to attract Major League Baseball and pursue a ballpark would have to come from the Phoenix Suns organization. In addition, Jerry was concerned that Major League Baseball, for historical and other reasons, faced serious problems in relationships with its players, in the competitiveness with other professional sports, and with its fan support. On the other hand, there was also reason to believe success could be achieved and would be welcomed by Arizonians. After all, Arizona had repeatedly demonstrated its infatuation with baseball. At every level, including the outstanding programs at Arizona State University and the University of Arizona, baseball was popular and successful. In addition, the state and various communities throughout the state had worked hard and at no small expense to develop the Cactus League as the premier Major League Baseball spring training program. More than \$160 million of public funds has been spent on Cactus League facilities for ten teams that conduct spring training in Arizona. Further expansion of the Cactus

League by two additional teams appears likely.²⁰ The popularity of the Cactus League has been impressive from the beginning, not only in terms of local support, but in drawing winter visitors and capturing significant tourism dollars. In addition to these encouraging developments, one was tempted to look to our neighbor, Colorado, and Denver's success as a 1990 Major League Baseball expansion franchise.

With these thoughts in mind and, Jerry made the decision to proceed. Legal work for the project was split. My assignments were to organize the Delaware limited partnership and related entities to acquire the expansion franchise; to prepare materials for a private offering; and to negotiate and document the Membership Agreement between Major League Baseball and the expansion franchise. Another firm would be responsible for negotiations with the Maricopa County Stadium District and the development of the ballpark and related facilities.

In February of 1994, I organized AZPB Limited Partnership, a Delaware limited partnership, for the purpose of owning and operating a Major League Baseball team to be awarded to Maricopa County and to operate a ballpark and related facilities. Jerry already had begun and we were to follow through on discussions with investors. The objective was to raise \$145 million. The minimum investment was set at \$250,000, with early efforts targeted at commitments of \$5 million and above. In addition to Jerry's efforts, primarily in the business community, a number of friends and associates worked nonstop to put together groups of smaller qualified investors to participate through limited liability companies.²¹ At the same time, ballpark design and planning was proceeding, as were negotiations

with the Maricopa County Stadium District to develop a memorandum of understanding and planning for the enactment of the County-wide sales tax for the development of the ballpark. Amid wildly churning controversy over the imposition of the tax for the ballpark which required no public vote and several tumultuous public hearings, the members of the Maricopa County Board of Supervisors (sitting as the governing board of the Maricopa County Stadium District), authorized the tax on February 17, 1994, subject to the prior award of a Major League Baseball expansion franchise for Maricopa County and subject further to a \$238 million maximum amount of tax levy receipts. At the time the vote was taken, the development budget for the ballpark was approximately \$278 million.

With the passage of the ballpark tax provision, the legal work moved forward on all fronts. After numerous delays, on March 9, 1995, the Major League Baseball owners approved expansion franchises for Phoenix and Tampa. What had been collected in the way of commitments by investors now had to be turned into binding subscriptions and escrowed funds. On March 24, 1995, a several-inch-thick Confidential Private Offering Memorandum for AZPB Limited Partnership was released. It covered Major League Baseball, the expansion franchise process, the Maricopa County market, the ballpark, and other details of the offering. Distribution of the Memorandum was limited to known accredited investors who had expressed an interest in the opportunity that was being offered. A detailed subscription agreement and investor questionnaire were included with the materials, as was an extensive background information-new ownership application to be

filed with and acted upon by Major League Baseball.

While we were moving quickly to review, verify, and complete subscription documents, investment questionnaires and Major League Baseball's ownership information and applications, we were involved at the same time in detailed discussions and due diligence with Major League Baseball over the Membership Agreement. The Membership Agreement established the basis on which the expansion franchise had been awarded and set forth all of the rights, duties, and obligations of the various parties. Over the preceding months, I had made several trips to New York to meet with Major League Baseball staff members and in-house counsel so that we would be prepared to sign the Agreement. In addition, we had reviewed a massive number of documents and agreements affecting the franchise. Notwithstanding this preparation and the detailed information that for months had been shared back and forth, the first draft of the Membership Agreement submitted by Major League Baseball had a host of problems. In the weeks leading up to the deadline for signing the Agreement, changes were coming from and going to New York virtually nonstop. In addition to dealing with in-house counsel at Major League Baseball, we were just being introduced to outside counsel for the National League and outside counsel for the American League, each of whom had previously unanticipated concerns with the Agreement.

The Membership Agreement was entered into as of March 24, 1995, and established, in accordance with the franchise award vote, a fee of \$130 million payable in four installments between July 1, 1995, and November 1, 1997.²² The Agreement also required equity capital of \$32

million by April 18, 1995; \$60 million by July 1, 1996; and \$90 million by the closing date (tied to the expansion draft scheduled for November of 1997 or such other date as agreed upon by the Commissioner and the expansion club). The process of preparing and issuing offering materials; assisting investors and their counsel with the subscription documents and Major League Baseball's background information form and ownership application; keeping track of commitments and escrow account deposits; and supplementing the offering materials as significant events occurred affecting Major League Baseball, the franchise, and the ballpark made most of 1995 a blur in my memory.

IN RETROSPECT

In 1993, I left the law firm of Lewis and Roca, where I had practiced for 21 years, and joined the firm of Meyer, Hendricks, Victor, Osborne & Maledon. In the spring of 1995, several of the senior partners in the firm precipitated a power struggle which resulted in the dissolution of the firm. When these events began to unfold at the law firm, I immediately met with Jerry. It was a difficult meeting and the timing could not have been worse. While I was prepared to withdraw from the project and assist in an orderly transition of the work, I also was prepared to see the project through and meet the critical deadlines which lay ahead. If ever the loyalty of a client was tested, this was certainly one of those moments. While Jerry was sympathetic, he was obviously concerned for the project. I assured him that nothing would interfere with getting the job done. With his support and encouragement, I went back to work. Before meeting with Jerry, I had called a meeting of the key attorneys who were working on the

project and obtained their commitment to continue their work. As a result of the distraction of law firm internal politics and rumors, I ended up moving our group, together with secretaries and several paralegals, to an unoccupied floor of the building. We had agreed to "play ball" and only become involved in firm politics to the extent necessary to protect careers. One career that did not need protection was that of Jane Birge, a very bright and capable young lawyer. Jane stayed with me for three years and only left to take a job with Jerry as the first in-house lawyer for the basketball and baseball organizations, as well as the Arena and the Ballpark. Jerry also lured away Melissa Santello, my legal assistant for eight years.

Dealing with Major League Baseball was nothing like dealing with the National Basketball Association. The NBA, under the leadership of David Stern, is an extremely efficient and well-run organization. While there are disagreements among NBA owners from time to time, I have not been aware of any issue which publicly divided the organization or impaired the Commissioner's office. If a self-destructive tendency was near the surface in the NBA, one surely would have expected to see evidence of it during the course of the recently concluded lockout. Major League Baseball, on the other hand, had no Commissioner in 1995 and the Major League Baseball Players Association was on strike. The Major League Baseball owners seemed to be much less cohesive than the NBA owners. I am sure among those who know Major League Baseball well—and I am not one of those—there are historical, structural, and other reasons that explain why the organization was difficult to deal with. When I was in almost daily contact with

Major League Baseball staff, there was never a dull moment.²³

Because no decision on league assignment was made at the time the expansion franchises were awarded, we had to comply not only with the Major League Baseball Agreement, rules and regulations, but also with the Constitutions, Bylaws, rules and regulations of both the National and American Leagues. This presented some interesting problems at times, since consistency was often lacking. Within the structure of professional baseball, certain matters are governed by each league whereas other matters are governed by Major League Baseball (all of the owners in both leagues, meeting as the governing body of Major League Baseball). The Office of Commissioner (vacant in 1995 but with its powers vested in the Executive Committee of Major League Baseball) was kind of a "wild card."

The structure of Major League Baseball made due diligence especially difficult. Not only were there a large number of complex Major League Baseball documents and agreements to review, but there were also the material documents and agreements of the National League and American League, as well.²⁴

With the America West Arena located downtown and Jerry to be in control of both teams, the location of the ballpark was designed to be in close proximity to the Arena. The impact of the Diamondbacks and the ballpark (now, pursuant to a long-term naming agreement, the Bank One Ballpark) on downtown Phoenix has been and will continue to be remarkable.²⁵

The Bank One Ballpark used the tried and true legal structure developed for the America West Arena. As with the Arena, a separate entity was formed for the development and operation of the Ballpark. Due to the size of the project, uncertainties associated with being a start-up ven-

ture in a new facility and difficulties encountered in dealing with Maricopa County (a more challenging task than dealing with the City of Phoenix), the Diamondbacks franchise was required to take on greater risk than the Suns franchise had undertaken with the Arena.

The Ballpark itself presented well-publicized architectural and design challenges. The facility would have to be enclosed and air conditioned during the hot Phoenix summers, while at the same time meet Jerry's commitment to a natural playing surface. The result is a facility with a natural surface and a retractable roof which can open and close in approximately six minutes. In every respect, the Ballpark is state-of-the-art for fans and game participants. Every detail from sight lines and seating, concessions and restaurants, public amenities and aesthetics was carefully considered. In addition, the Ballpark was designed to accommodate advertising and other revenue-generating opportunities.²⁶ The Ballpark has immediately established itself as one of Phoenix's landmarks. While modern and innovative in many of its design and construction concepts, it retains a traditional feel.

Major League Baseball, the National and American Leagues, the expansion franchise, the expansion franchise process, and the Ballpark would have been difficult enough to explain in private placement offering materials under normal circumstances. Unfortunately, the situation in 1995 was anything but normal and predictable. We were constantly assessing new developments with Major League Baseball as a result of the player strike and the vacant Commissioner's office. Development of the team and the increasing costs of the Ballpark had to be carefully tracked, as well. On several occasions, the offering mate-

rials were supplemented to keep investors and prospective investors fully informed.²⁷

Major League Baseball, the National League, and the American League prohibit any owner of an interest in a franchise from lending money to any other franchise or the owners, players, and personnel of any other franchise. Four investors in the Diamondbacks franchise were large lending institutions with major offices in the Greater Metropolitan Phoenix area. They represented commitments to the capital of the limited partnership of \$20 million. The problems posed by the rules concerning their participation as investors (presumably a credit card issued to a player on another team could trigger a violation) was raised with Major League Baseball in 1994. In what has to be one of my most frustrating experiences, it took until June of 1995, for Major League Baseball, the National League, and the American League to approve an exception we suggested for small noncontrolling ownership interests held by banking and banking-related businesses with respect to transactions entered into in the ordinary course of business. Given past scandals, it is understandable that baseball would have strict rules regarding the lending of money and gambling, but the delay in getting the owners to adopt what appeared to be an easy "fix" was maddening.²⁸ While our lending institutions contributed their funds to the escrow account, they would not approve unconditional release of their funds until the rules were changed. The April 18, 1995, deadline for equity capital established in the Membership Agreement had to be extended three times until July 1, 1995.

Beginning in early 1995, we were reporting investment commitments on a regular basis to the staff at

Major League Baseball. At the outset, Jerry had established \$250,000 as the minimum investment. While most of our committed capital was attributable to investors of \$5 million or more, a substantial amount of money was raised from among wealthy individuals who formed limited liability companies for the purpose of purchasing one or more limited partnership units for \$5 million per unit. After the award of the franchise and signing of the Membership Agreement, the Major League Baseball owners determined that the minimum investment could be no less than \$500,000 by each individual and business investor. A business entity formed for the purpose of investing in the franchise would not be approved unless each member or shareholder contributed the minimum \$500,000 amount. Having accepted investments in the amount of \$250,000 (subject to Major League Baseball approval) at the last minute, we had to offer each small investor the opportunity to withdraw their commitment or increase it to the newly-established minimum contribution amount. In addition, we had to notify all investors of the change in the rules and apprise them of the effect of the change on capital contributions.

The NBA requires various levels of background investigation, depending on the size of the ownership interest and participation in management. This always seemed like a reasonable policy to me, since it was unlikely that a franchise or the sport would be tarnished by something in the background of a small passive investor. Major League Baseball's requirements were far more burdensome and restrictive. The expense and delay occasioned by the Major League Baseball procedures were substantial.

On March 31, 1998, as scheduled, Bank One Ballpark opened and the Arizona Diamondbacks took the

field. The inaugural season is history. The Diamondbacks got off to a miserable start, but played the last part of the season at better than 500. Attendance was at the top of Major League Baseball. The Bank One Ballpark ended up costing approximately \$350 million (with some costs still in arbitration); and that amount, together with the franchise fee and the costs of establishing a farm system and the team, account for, give or take a few million, a half-a-billion-dollar enterprise. As the Diamondbacks prepare for their second Major League Baseball season, the excitement of being a contender has replaced the excitement of being the new kid on the block.

BUILDING THE FAN BASE

Greater Metropolitan Phoenix is now one of a handful of communities

across the country which hosts franchises of the four major professional sports organizations, and Jerry has been instrumental in bringing and keeping three of them here. It has been an exciting 12 years since he telephoned me about buying the Suns franchise. It has been an unforgettable experience with a truly remarkable man. Jerry started out in Chicago and made his way into high school and college basketball and baseball as a "jock." An early failure in business led him to follow up on a suggestion to contact Dick Klein. Dick Klein hired Jerry to help put together the Chicago Bulls, after previous failures of professional basketball to take hold in the Windy City. When Jerry hit the ground in Phoenix with the Phoenix Suns in 1969, who would have guessed what was to follow.

While he has turned opportunity into tremendous success, his most enduring qualities are revealed in the sentiments he has expressed on a number of important occasions. The message is simple. I have heard it delivered to more than 350,000 fans in front of the America West Arena after the Suns came so close to beating the Bulls in 1993;²⁹ to the fans crowding Bank One Ballpark on opening day for the Diamondbacks; and, most recently, to the sell-out crowd at the Suns first home game of this lockout-shortened season: "I want to thank you for your support. You owe us nothing. It is up to us to earn your support, and we'll do everything we can to do just that." When Jerry expresses these sentiments, they sound sincere—because they are sincerely spoken. ♦

¹ In the early years of the franchise, Jerry hired Tom Ambrose as Vice President of Public Relations. Tom's duties included organizing the Suns in support of the community and community efforts. Today, Tom's duties include staffing Suns Charities, which donates several million dollars a year to worthwhile community causes, as well as for community involvement by the Diamondbacks.

² It was evident from my first contacts with the NBA that Gary Bettman (now Commissioner of the National Hockey League), Jeff Mishkin (now Chief Legal Officer of the NBA), Joel Litvin (now General Counsel of the NBA) and their staff attorneys would be helpful beyond my expectations. The same is true whenever I have had to deal with outside counsel for the NBA at the Proskauer Rose LLP law firm.

³ John Teets pointed out that Jerry had always been given great latitude in running the team. Donald Pitt, the Suns Managing Partner, stated in 1982 on the occasion of Jerry's selection for the second time as NBA Executive of the Year: "We look forward to Jerry Colangelo being the general manager of the Phoenix Suns as long as he's in professional basketball. The key to the success of the Suns, we feel, is stability. The Phoenix Suns is one of the few sports franchises that has not changed ownership, has not changed cities, and has not changed general managers. The top-to-bottom stability of the Suns organization is remarkable in light of the transient nature of pro sports management. We consider Jerry to be the premier executive in basketball, if not all of professional athletics. He exemplifies as a leader what every business organization, particularly sports organizations, desires to have at its helm."

⁴ In July of 1993, the franchise entered into a favorable

restructuring of its long-term debt. Through the restructuring and the utilization of net cash from operations, the Partnership distributed to all partners their adjusted capital accounts and the guaranteed return on investment. The General Partner's interest increased from 1 to 25 percent. In 1996, the Partnership redeemed the interests of Viad Corp, successor to the 25 percent interest in the Suns of The Dial Corp. (formerly Greyhound), and the General Partner's interest increased to approximately 36 percent.

⁵ The Phoenix Suns franchise is estimated by those in the industry to be worth \$200 million.

⁶ The Greater Metropolitan Phoenix area ranks 19th in size within the NBA. According to NBA statistics, over the past ten years the Suns have averaged 11th in attendance. In four of those ten years, the franchise ranked in the top five in the NBA in merchandise sales.

⁷ For the period 1993-1998, the America West Arena averaged in excess of 190 events per year.

⁸ On October 3, 1989, the voters of Phoenix approved a limit of \$3 million in public fund expenditures to construct or aid in the construction of any arena, without approval of the electorate. Phoenix, AZ CODE Ch. XXVII (1969).

⁹ In Point Resorts, Inc. v. Culbertson, 158 Ariz. 137, 761 P.2d 1041 (1988), the Arizona Supreme Court held that a trade of publicly owned land in the Phoenix Mountain Preserve for 34 acres of privately held land was sufficiently completed prior to the effective date of a measure adopted by special election prohibiting the selling or trading of Mountain Preserve property.

¹⁰ Harry Pfeifer, a partner at Lillick and Charles in San Francisco, represented The Fuji Bank. Harry not only represented his client in outstanding fashion, but at times lent assistance to the other parties in resolving their differences. Stuart Meislik with the legal department at The Dial Corp represented Restaura, Inc., and was also of great assistance. Bob Matia, with the Phoenix office of Squire Sanders & Dempsey, represented the City with respect to its financing of the project.

¹¹ On March 1, 1998, the Arena was refinanced on very favorable terms through the issuance of Phoenix Industrial Development Authority bonds insured by Ambac. Jim Pitman, Chief Financial Officer of the Suns, and Paige Peterson, Chief Financial Officer for the Arena, were in charge of the project and, while there were a few anxious moments as interest rates fluctuated, their timing was excellent.

¹² In an unpublished and unappealed ruling in January 1993, the Arizona Tax Court invalidated exemptions from the property tax applicable to possessory interests. ARIZ. REV. STAT. §42-684 (1998).

¹³ In order to appreciate the impact property taxes can have on arenas and stadiums, one need only look to the consternation and concern in the wake of a recent Florida decision, Sebring Airport Auth. v. McIntyre, 718 So.2d 296 (Fla. Dist. Ct. App. 1998). That decision, which is being appealed, would subject stadiums and arenas owned by cities and sports authorities to property taxes. The decision is on appeal. See Arena Taxes Give Florida Fits, STREET AND SMITH'S SPORTS BUSINESS JOURNAL, Feb. 1-7, 1999, at 7.

¹⁴ In 1996, Bob Machen was named Manager of the Year by FACILITIES MAGAZINE, which also conferred its Prime Site award on the Arena in 1995, 1996, 1997, and 1998. The Arena was named Best New Concert Venue by POLLSTER MAGAZINE in 1992. In 1996, the Arena was named the Foremost Sports Facility at Sports Summit, a convention of sports industry professionals.

¹⁵ In 1991, Ray Artigue joined the Suns to coordinate the marketing function. Within the Suns organization, Ray has established "Standing Room Only" which not only markets the Suns, the Arena, the Diamondbacks and Bank One Ballpark, but an impressive number of unrelated businesses.

¹⁶ Fortunately, Jac Sperling, a partner with Hogan and Hartson in Denver, represented the Coyotes and helped to work through the tough issues.

¹⁷ See §12 Mil. Upgrade for AWA, ARIZONA REPUBLIC, Mar. 12, 1999.

¹⁸ A group of California investors headed up by Barry Kemp, an investor in the Suns, has offered to purchase the Phoenix Coyotes and keep them at the America West Arena. See Group Bids for Coyotes, ARIZONA REPUBLIC, Mar. 18, 1999.

¹⁹ ARIZ. REV. STAT. §48-420, et seq. (1998). The legislation was news to Jerry, who, in 1990, was consumed by the Phoenix Suns and the America West Arena.

²⁰ See A Big Spring Pitch, ARIZONA REPUBLIC, Mar. 13, 1999.

²¹ Jerry's partners in the Suns and in real estate investments, Mel Shultz and David Eaton, provided invaluable assistance, as did Eddie Lynch of Westcor Partners. Dale Jensen, a transplant from Nebraska who had been very successful creating banking software, not only became a substantial investor, but worked to bring others on board.

²² Investors subscribing to Units were permitted to contribute in installments timed to meet the payment obligations to Major League Baseball for the expansion franchise.

²³ I never received less than cordial and helpful assistance from the staff at Major League Baseball. In particular, Tom Ostertag, General Counsel, and Chris Tully, a staff attorney, were a pleasure to deal with. The difficulty and the frustration would occur when, what I would consider to be staff decisions, could not be made without first obtaining the vote of one or more committees of owners.

²⁴ The material documents and agreements identified in exhibits to the Membership Agreement numbered in excess of 50, all of which required detailed examination.

²⁵ Shortly before the opening of the Ballpark, we formed a limited liability company to provide facility personnel to both the Arena and the Ballpark. By combining the staffing for both facilities, we were able to increase the number of full time positions for the facilities, avoid duplication of personnel and put in place a better trained and more cost effective work force.

²⁶ As opportune as the timing was for the construction of the Arena, the Ballpark came along when the construction industry in Arizona was booming. As a result, competition for the project, while active, did not present the same cost saving opportunities as were enjoyed by the Arena.

²⁷ The private placement offering closed when \$145 million in capital was achieved. The Phoenix Suns acquired one unit for \$5 million and one-half unit for the risks assumed in funding the early efforts to sign up investors to attract an expansion franchise and to deal with the Maricopa County Stadium District. The Suns also were repaid the funds which had been advanced, plus interest. In excess of 50 business and individual investors were approved by Major League Baseball.

²⁸ As we became increasingly concerned that our lending institutions might be disqualified, inquiry began into the ownership of other franchises. In Toronto (with the Blue Jays) and Pittsburgh (with the Pirates), several large banks were substantial investors.

²⁹ Jerry was honored for the fourth time as NBA Executive of the Year in 1993. No other executive has won the award more than twice.