

**UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF KENTUCKY
COVINGTON DIVISION**

IN RE:

	:	Chapter 11, Judge Howard
NORTHERN KENTUCKY	:	
PROFESSIONAL BASEBALL, LLC	:	Case No. 04-22256
Debtor	:	

**MOTION FOR ORDERS AUTHORIZING AND APPROVING (I) THE SALE OF
CERTAIN OF THE DEBTOR’S ASSETS FREE AND CLEAR OF LIENS, CLAIMS AND
INTERESTS, (II) THE ASSUMPTION AND ASSIGNMENT OF CERTAIN
EXECUTORY CONTRACTS AND UNEXPIRED LEASES**

The above captioned Debtor hereby moves this Court for the entry of orders, pursuant to sections 105(a), 363 and 365 of Title 11 of the United States Code (“Bankruptcy Code”) and Rules 2002, 6004, 6006 and 9014 of the Federal Rules of Bankruptcy Procedure (“Bankruptcy Rules”) authorizing and approving (i) the sale of certain of the Debtor’s assets (the “Acquired Assets”) pursuant to that certain Asset Purchase Agreement dated October 28, 2004 (the “Agreement”) by and among the Debtor and Canterbury Baseball, LLC (“Proposed Purchaser”) and attached hereto as Exhibit A and (ii) the assumption and assignment of certain executory contracts and unexpired leases as set forth in the Agreement (the “Assumed Contracts”) to the Proposed Purchaser

I. INTRODUCTION

On September 3, 2004 the Debtor filed a voluntary petition for relief under chapter 11 of the Bankruptcy Code. Pursuant to sections 1107(a) and 1108 of the Bankruptcy Code.

On September 13, 2004, an official committee of unsecured creditors was appointed. The committee is represented by counsel.

The Court has jurisdiction over this Motion under 28 U.S.C. sec. 1334. This is a core

proceeding within the meaning of 28 U.S.C. sec. 157(b)(2) (A) and (O). Venue of this Chapter 11 case in this district is proper under 28 U.S.C. sec. 1408 and 1409.

The statutory predicates for the relief requested herein are sections 105(a), 363(b), 365, 1107(a), and 1108 of the Bankruptcy Code and Bankruptcy Rules 2002, 6004, 6006 and 9014.

II. BACKGROUND

The Debtor, League Agreement and Stadium Lease

Northern Kentucky Professional Baseball, LLC ("NKPB") was organized on 12/3/2001 as a Kentucky Limited Liability Company. It was organized for the purpose of bringing a professional baseball team to the City of Florence. The members of NKPB are:

Chuck Hildebrant, 20%
Tripleplay, LLC (Rodger Kessler, Officer), 17.78%
More Hits, LLC (Robert Klensch, Officer), 35.555%
Thomas J. Niehaus Family Limited Partnership (Thomas J. Niehaus, Officer), 26.665%

NKPB is a member of Frontier Professional Baseball, Inc. (the "League"). The Debtor became a member of the League by purchasing the member interest of Johnston Professional Baseball, Inc. with the consent of the League given in March, 2003. \$520,000.00 was paid for the interest. The team name is the Florence Freedom.

The League is governed by a Code of Regulations and By-Laws ("Franchise Agreement") that requires, among other things, that members be parties to a lease of a stadium facility in which the team will play its home games. The Franchise Agreement contains territorial rights of NKPB which may be capable of being waived providing an enhanced value to the Franchise Agreement. The Franchise Agreement is an executory contract within the meaning of 11 U.S.C. sec. 365. A copy of the Franchise Agreement has been filed with Court [Doc. 79].

NKPB entered into a Baseball Stadium Ground Lease Agreement ("Stadium Lease") with the City of Florence ("City"). A copy of the Stadium Lease has been filed with the Court [Doc. 78]. The City acquired 3 separate parcels aggregating approximately 35 acres and committed under the lease to contribute money for the development of the infrastructure and public parking. \$375,000.00 still remains in the public funds of the City for the completion of the infrastructure and public parking .

NKPB was obligated under the Stadium Lease, among other things, to construct an open air minor league baseball stadium conforming to agreed specifications. The costs of the construction were treated under the lease as pre-paid rent. In addition basic rent was to be paid by NKPB to the City. The basic rent schedule declines in accordance with a schedule delineated in the lease:

<u>Date</u>	<u>Amount</u>
8/10/2004	\$197,617.34
2/8/20005	\$ 83,106.60
8/10/2005	\$197,394.60
2/8/2004	\$ 81,860.15
etc. until	
2/8/2033	\$ 4,921.25
8/10/2033	\$182,421.25

In the 6th year additional rent is payable based upon gross revenues. The initial term of the lease is 30-years and there are 2 subsequent 30-year renewal periods. This summary is certainly not all-inclusive of the 60-page lease agreement. NKPB defaulted on the basic rent payment due 8/10/2004, failed to complete construction of the stadium facility, and failed to pay all contractors furnishing labor, materials and/or supplies to the job, all in violation of the Stadium Lease.

Events leading to bankruptcy

Although it was intended that the stadium would be built in time for the team to play the 2003 season in Florence, Kentucky, there were delays and by agreement of the interested parties the team played the 2003 season under their name, Florence Freedom, in a facility leased from the City of Hamilton, Ohio. The 2003 season was not successful for the obvious reason that the Florence Freedom were not playing in the city that would be their permanent home.

Although Chuck Hildebrant is a 20% member of NKPB, by contract he was the Managing Member in control of NKPB's finances. Giordano Construction Company was engaged to manage the stadium construction but all decisions with respect to the stadium construction were vested in Chuck Hildebrant as the Managing Member. His wife, Connie Hildebrant, was named the general manager of the team. Her duties included promoting the stadium, soliciting sponsors, advertising, etc. The member entities represented by Thomas J. Niehaus, Rodger Kessler, and Bob Klensch were investors to whom periodic reports were to be given by Chuck Hildebrant. As the stadium construction progressed it developed that there were problems which were either underestimated or underreported by Chuck Hildebrant to the other members. The magnitude of the problems and cost-overruns was reported to the investors by Chuck Hildebrant to range from \$300,000.00 to \$500,000.00. Some contingency plans were developed to either seek additional investors or short-term loans to fund the anticipated shortfall. As matters developed, however, the problems were grossly underestimated or underreported.

Although construction of the stadium had not been fully completed, it had been completed enough for games to be played at the facility, the first of which was played approximately 6/18/2004. Shortly thereafter the magnitude of the problems and cost over-runs began to surface and cascaded to the date of filing of the bankruptcy. On 6/23/2004 NKPB's largest creditor, Provident

Bank, demanded that Chuck and Connie Hildebrant be removed from all management positions with NKPB. At a meeting conducted on 7/6/2004, Chuck Hildebrant resigned as the Managing Member. On 7/29/04, by mutual agreement, Connie Hildebrant resigned as the general manager of NKPB.

In mid-July, 2004 the first notices of the filing of mechanic's liens from unpaid contractors were received and they have continued through September, 2004. Although the mechanic's liens aggregate in excess of \$4,700,000 there are duplicates, for example, from a general contractor including a subcontractor's debt in its lien claim followed by the filing of a separate claim by the same subcontractor. As best as can be determined at the present, there are mechanic's lien claims of unpaid contractors approximating \$3.9 million (the "Mechanic's Lien Claimants"¹). Non-bankruptcy claims are being asserted against the City of Florence as mechanic's liens against the City's fee simple interest upon which the stadium and Rainbow Building (discussed hereafter) are constructed, mechanic's liens against the public funds, or under state law. Claims of contractors are asserted against the Debtor as mechanic's liens attaching to the leasehold interest of the Debtor under the Stadium Lease. The City has taken the legal position in state court proceedings that the liens cannot attach to the municipal property and are limited to the public funds allocated to the project (\$375,000 remains in the fund) and that the City is otherwise protected from all other state court claims by sovereign immunity. The contractors take opposing views.

The stadium facility has not been entirely completed. Estimates to complete the stadium appear to be in the range of \$800,000.00, including completion of a large sign visible from I-75.

¹ Included as a "Mechanic's Lien Claimant" are claims of contractors for labor, materials and/or supplies who have not yet filed a mechanic's lien under state law but who may still hold the right to do so under state law and the operation of 11 U.S.C. sec. 362(b) and 546(b). Mechanic's Lien Claimants also include contractors who assert their claim of mechanic's lien against one or more of the Debtor's leasehold interest, the City's fee simple interest, or the City's public fund, provided that they are timely filed.

In addition to the claimed mechanic's liens the following situations with Heritage Bank, Huntington Bank, and Provident Bank moved the Debtor to file the Ch. 11 case.

Heritage Bank

On the real estate leased from the City there was additional land upon which a building was constructed. NKPB refers to this as the Rainbow Building. NKPB borrowed \$403,075.00 from Heritage Bank to finance the interior leasehold improvements to the building and subsequently subleased the Rainbow Building to St. Elizabeth Medical Center, Inc. Heritage Bank is secured by an Assignment of Rents under the Sub-Lease with St. Elizabeth. In late August, 2004 Heritage Bank exercised its state court rights against the Sub-Lease under the Assignment of Rents.

Provident Bank

On 5/5/2004 two loans were closed between NKPB and Provident Bank upon which there is due an aggregate amount approximating \$2,950,000.00. On 6/8/2004 Provident Bank filed a UCC Financing Statement with the Kentucky Secretary of State purportedly perfecting a security interest in all of the personal property of the Debtor, including equipment, accounts receivable, general intangibles, and most importantly, the Debtor's Franchise Agreement with the Frontier League. Provident's claimed lien may be invalid because Article II(C), Section 3 of the Code of Regulations of the League prohibits League members from encumbering their membership in the League. Additionally the Debtor believes that the 6/8/2004 filing of the UCC Financing Statement constitutes a voidable preference under 11 U.S.C. sec. 547(b), the bankruptcy having been filed within the 90 day period following the 6/8/2004 transfer.

Huntington Bank

NKPB financed the purchase of a bus through Huntington Bank for the purpose of

transporting the team to and from its away games. In addition to that loan relationship, NKPB maintained its operating bank account at Huntington. In late August, 2004 Huntington Bank placed a freeze on NKPB's operating account.

III. RELIEF REQUESTED

The Debtor has contemporaneously filed a "Motion for Orders Approving (I) the Form and Manner of Sale Notice and (II) Certain Sale Procedures, Including the Payment of a Break Up Fee" (hereinafter the "Procedures Motion"). That Procedures Motion requests, inter alia, that the Court set a Sale Hearing (as defined therein) at which approval of this Motion is sought. The Procedures Motion and the order sought thereunder is intended to market test the Proposed Purchaser's Agreement to purchase the Acquired Assets.

The Debtor requests the entry of an order (the "Sale Order") in the form attached hereto authorizing: (i) the Debtor to sell the Acquired Assets and (ii) the Debtor to assume and assign the Assumed Contracts to the Proposed Purchaser or the Successful Bidder (as defined in the Procedures Motion), as the case may be.

At the Sale Hearing Debtor will articulate the business justification for the sale of the assets out of the ordinary course of business. The League consists of numerous other minor league baseball teams. Schedules of games among League members, brochures, booking of attractions related to scheduled games, and other matters must be completed within certain time frames mandated by the League. The League is required to know with certainty whether or not the Florence Freedom will field a team in the spring, 2005 within these time frames. If the proposed sale is not approved within these time frames, the League will be required to exclude the Florence Freedom from its 2005 schedule. If not approved there will be many undesirable

results, including the stadium facility sitting vacant and unfinished until the spring, 2006.

Debtor anticipates the presentation of evidence from a League representative on this subject at the hearing to approve the proposed sale.

IV. PROPOSED SALE OF ASSETS

The Agreement

Pursuant to the Agreement, upon the approval by this Court, Debtor will (i) sell the Acquired Assets free and clear of all liens, security interests, claims, encumbrances or other interests (collectively, the "Interests") and (ii) assume and assign the Assumed Contracts to the Proposed Purchaser.

Before proceeding to describe the Agreement it is helpful to understand one of the more unique aspects of this case as it pertains to the City of Florence and the Mechanic's Lien Claimants. As previously discussed the Mechanic's Lien Claimants assert certain non-bankruptcy claims against the City of Florence in the form of mechanic's liens against the City's fee simple interest upon which the improvements are constructed, liens against the City's public funds, and various claims of negligence, unjust enrichment, or other claims under state law. There is pending state court litigation in which some or all of these issues have been joined. Under the Stadium Lease NKPB was prohibited from permitting any of these claims to exist.

In order for the Debtor to be able to assume and assign the Debtor's leasehold interest in the Stadium Lease, the Debtor must promptly cure the defaults under the Stadium Lease. Monetarily the defaults aggregate approximately \$4.1 million (the "Maximum Cure Amount") i.e. the \$197,617.34 rent payment missed on 8/10/2004 plus the approximate \$3.9 million of claims held by Mechanic's Lien Claimants asserting lien claims against the Debtor's leasehold interest

under the Stadium Lease, which claims are also asserted against the City of Florence under state law in the pending state court litigation. The Debtor's leasehold interest in the Stadium Lease is believed to be worth significantly less than the Maximum Cure Amount, to wit: \$1.3 million or such higher sum as a competitive bidder may pay for it.

The City of Florence has a substantial public interest in having the stadium completed by the Proposed Purchaser or other Successful Bidder within the time frame set by the Frontier League so that the stadium facility will be in use in the spring, 2005. It also has a substantial public interest in resolving the state court claims of Mechanic's Lien Claimants asserted against the City. As a result the City of Florence is conditionally willing to modify the Stadium Lease and accept less than the Maximum Cure Amount in conjunction with the assumption and assignment of the Stadium Lease and is further willing to conditionally commit the sum of \$600,000.00 (or such other sum as they may hereafter agree) to a Lien Restitution Fund (as defined in the Agreement) to induce the Mechanic's Lien Claimants to release their state court claims against the City in conjunction with the sale, provided that at least 100% in amount of such claimants have, prior to the Sale Hearing (as hereafter defined), agreed in writing to release or assign their state court claims against the City and release all of their claims of any kind against the Debtor. In this manner a fund of \$1.9 million, the "Lien Restitution Fund", will be created for payment of Mechanic's Lien Claimants under the proposed sale. The terms of the Lien Restitution Fund will be detailed in a filing with the Court which may be filed contemporaneous herewith or soon thereafter. If 100% in amount of the Mechanic's Lien Claimants release or assign their non-bankruptcy state court claims against the City and release all of their claims of any kind against the Debtor, the City will permit the Debtor's assumption and assignment of the Stadium Lease.

If this is accomplished then the Debtor will be able to realize substantial value for the Franchise Agreement with the Frontier League. Although Provident Bank asserts a lien against the Franchise Agreement with the League, the claimed lien may be invalid because Article II(C), Section 3 of the Code of Regulation of the League prohibits League members from encumbering their membership in the League. Additionally the Debtor believes that the 6/8/2004 filing of the UCC Financing Statement constitutes a voidable preference under 11 U.S.C. sec. 547(b), the bankruptcy having been filed within the 90 day period following the 6/8/2004 transfer.

By being able to assume and assign the Stadium Lease, the Debtor will thus obtain substantial value for the Franchise Agreement resulting in potential recovery for unsecured creditors.

The significant terms of the Agreement are as follows:

GENERAL TERMS: The Proposed Purchaser will purchase all of the Acquired Assets as defined in the Agreement needed for or used in connection with the operation of a minor league baseball team as a member of the League.

PURCHASE PRICE: The purchase price to be paid by Proposed Purchaser is expressed by both the money allocated to the Debtor's assets as well as the financial commitments given to the City to provide the City with adequate assurance of the Proposed Purchaser's ability to provide future performance under the Stadium Lease, including the completion of construction of the stadium. This is summarized as follows:

\$ 640,000	Allocated to the Baseball Assets (this sum will be paid to the Debtor to which valid liens asserted against the Debtor's Baseball Assets will attach) Plus the components of the cure of existing defaults under the Stadium Lease and adequate assurance of future performance under the Stadium Lease
\$1,300,000	For the cure of the Debtor's leasehold interest in the Stadium Lease as conditionally modified by the City of Florence (this sum will be paid to the Lien Restitution Fund) to which valid liens asserted against the Debtor's leasehold interest in the Stadium Lease will attach.
\$ 400,000	Cost to complete the stadium, excluding completion of the sign
\$ 400,000	Cost to complete the sign
\$ 250,000	Demonstrable minimum net worth in cash or readily marketable securities to adequately assure the City and the League of the ability of the Proposed Purchaser to perform under sec. 7.1(d) of the Agreement
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\$2,990,000	Total financial commitments of the Proposed Purchaser (Note additionally however that in addition to this sum the Proposed Purchaser will be required to purchase a team bus to transport players to and from away games, the team bus formerly owned by the Debtor having been repossessed by Huntington Bank under an agreed order for relief from stay)

CURE AMOUNTS: Proposed Purchaser will assume the Assumed Contracts in accordance with the following summary of terms.

City of Florence, Ky. Cure Tender

In conjunction with the proposed sale of the leasehold interest held by the Debtor under the Stadium Lease, the Debtor proposes that the Stadium Lease be modified and thereafter assumed and assigned to the Successful Bidder (as that term is defined in the Procedures Motion) as follows:

1. As the first component of an agreed upon cure of existing defaults under the Stadium Lease, as provided under the Agreement at Sec. 2.1(b)(i), the Successful Bidder will pay to the Lien Restitution Fund at closing \$1,300,000 (or such larger amount as may be competitively bid under the Sale Procedures approved by the Court) for the Stadium Lease to which lien claims of Mechanic's Lien Claimants validly asserted against the leasehold interest of the Debtor will attach under sec. 363.

2. As the second component of an agreed upon cure of existing defaults under the Stadium Lease, the Successful Bidder will pay \$400,000.00 into a segregated account specifically designated to fund the completion of the Stadium as provided under the Agreement at Sec. 2.1(b)(ii).

3. As the third component of an agreed upon cure of existing defaults under the

Stadium Lease, the Successful Bidder will erect a sign at the Stadium at a cost not to exceed \$400,000.00 as provided under the Agreement at Sec. 2.1(d).

4. As additional components of the agreed upon cure of existing defaults under the Agreement at Sec. 7.1(d) and adequate assurance of future performance by the Successful Bidder, the Successful Bidder will execute the Amended and Restated Baseball Stadium Ground Lease which, among other things, requires the Successful Bidder to have minimum net worth of \$250,000.00.

The obligations undertaken by the Successful Bidder as modified by the proposed lease modifications shall hereafter be referred to as the “City Cure Tender”.

As detailed in the Procedures Motion, the City shall file with the Court, a position statement accepting or rejecting the City Cure Tender as being in agreed compliance with the provisions of 11 U.S.C. sec. 365(b), provided however that the City’s claims against Chuck Hildebrant on his personal guarantee of the Stadium Lease obligations shall be preserved to the City.

In the event that the City’s Cure Position causes the Court to approve the rejection of the Stadium Lease at the Sale Hearing (as defined in the Procedures Motion), the bid of the Successful Bidder allocated for the Baseball Assets and the obligation to close the Sale contemplated by the Agreement shall be contingent upon the Successful Bidder reaching agreement within 21 days of the Sale Hearing with the City of Florence on terms of a new lease agreement made between the Successful Bidder and the City without regard to the Debtor’s leasehold estate. If agreement with respect to a new lease is not obtained within said 21 days, the bid amount allocated to the Baseball Assets shall no longer be binding on the Successful Bidder and the Successful Bidder shall have no obligation to close.

Frontier League Cure Tender

In conjunction with the proposed sale of the Baseball Assets and the related assumption and assignment of the Debtor’s Franchise Agreement in the Frontier League, the Successful Bidder shall promptly pay to the League the pre-closing liabilities or defaults of the Debtor under the Franchise Agreement, including the payment of cure amounts necessary for such contract to be assumed by the Debtor and assigned to the Proposed Purchaser or Successful Bidder if other than the Proposed Purchaser and shall otherwise agree to the Code of Regulations and By-Laws of the League in form satisfactory to the League. The League shall promptly notify the Proposed Purchaser and any other Qualified Bidder of the monetary or other defaults that it believes must be cured under the Franchise Agreement or otherwise required to approve the Successful Bidder as the substituted member in the League. The obligations undertaken by the Successful Purchaser under the Franchise Agreement including the payment or promise of payment of all monetary defaults shall hereafter be referred to as the “League Cure Tender”.

As detailed in the Procedures Motion, the League shall file with the Court, a position statement accepting or rejecting the League Cure Tender as being in agreed compliance with the provisions of 11 U.S.C. sec. 365(b)

If the Stadium Lease is rejected and terminated by operation of the City's demand for the Maximum Cure Amount under the Stadium Ground Lease, the bid of the Successful Bidder allocated for the Baseball Assets and the obligation to close the Sale contemplated by the Agreement shall be contingent upon the Successful Bidder delivering to the League evidence, satisfactory to the League, of a contractually binding lease for a stadium facility at which the Successful Bidder would play its home games within 21 days following the Sale Hearing. If agreement with respect to a new lease is not obtained within said 21 days, the bid amount allocated to the Baseball Assets shall no longer be binding on the Successful Bidder and the Successful Bidder shall have no obligation to close.

Cure of Other Designated Contracts

Paragraph 3.2 of the Agreement contemplates that the Proposed Purchaser may subsequently determine to assume certain other sponsorship, marketing, or other contracts. The cure of any existing defaults under any of such contracts will be paid by Proposed Purchaser. The Procedure Motion describes mechanisms to propose cure amounts and to give notice to the parties to such contracts of the proposed cure.

AS IS SALE: The Sale is "AS IS", "WHERE IS" and "WITH ALL FAULTS"

BREAK-UP FEE: Subject to Bankruptcy Court approval, the Debtor will be obligated to pay to Proposed Purchaser \$70,000, which payment is to be paid in cash upon the Closing of a sale of the Acquired Assets to the Successful Bidder if other than Proposed Purchaser. The Break-Up Fee is discussed in the Procedures Motion.

DISCLOSURE: By way of disclosure Thomas J. Niehaus, Rodger Kessler and Bob Klensch each are principals of affiliated entities which will hold minority positions in the Proposed Purchaser and thus are "insiders" of the Debtor, as that term is defined in 11 U.S.C. sec. 101. The 4th member of the Proposed Purchaser, and majority interest holder, is an entity affiliated with Clint Brown, who is not an insider of the Debtor.

WHEREFORE, based on the foregoing, the Debtor requests that the court enter an order (I) authorizing and approving sale of the Acquired Assets free and clear of liens, claims and interests and (II) the assumption and assignment of the Assumed Contracts.

Respectfully submitted,

/s/ John A. Schuh

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CERTIFICATE OF SERVICE

Please see the Master Certificate of Service filed contemporaneous herewith for details of the persons served with this document and the methods employed to do so.

/s/ John A. Schuh

John A. Schuh
Attorney at Law