

The Honorable Marsha J. Pechman

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

CITY OF SEATTLE, a first-class charter
city,

Plaintiff,

v.

PROFESSIONAL BASKETBALL CLUB
LLC, an Oklahoma limited liability company,

Defendant.

No. C07-1620 MJP

JOINT EXPEDITED CR 37
SUBMISSION REGARDING SEARCH
TERM REVIEW OF PBC MEMBERS'
EMAIL

Note for Consideration:

February 13, 2008

JOINT CR 37 SUBMISSION - 1
Case No. C07-1620 MJP

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I. Moving Party The City of Seattle's Opening Statement.

The Professional Basketball Club, LLC ("PBC") unreasonably refuses to search for and produce responsive emails of six of its eight members.¹ *See* Declaration of Michelle Jensen ("Jensen Decl."), ¶¶ 2-4, Exs. A-C; *see, in particular*, Ex. C ("[W]e are not willing to search for email of individual members other than Msrs. Bennet and McClendon. That would increase the email universe exponentially with little or no likelihood of generating new or different relevant material."). PBC's claim that there is "little or no" likelihood that these emails will contain responsive, relevant, and non-duplicative documents is implausible. Indeed, unless each of three unlikely propositions is true – that Bennett and McClendon never delete or otherwise fail to retain emails sent among PBC members; that PBC members never email one another without including Bennett or McClendon; and that PBC members never email third parties without including Bennett or McClendon – it is very likely that the other members' emails will contain responsive, non-duplicative documents.

It is undisputed that PBC's members have substantial interests in the LLC and the Sonics, and those interests will be reflected in the existence of responsive emails in their files. The members of PBC collectively paid \$350 million to purchase the Sonics. *See* Jensen Decl., ¶ 5, Ex. D. Each member invested at least \$10 million, with two of the members whose email PBC refuses to search investing \$50 million apiece. *Id.* All owners are Oklahoma residents. In terms of involvement, Clay Bennett has described the ownership structure as "We're just all partners." *Id.* As each member has millions or tens of millions at dollars at stake, each has a direct, personal interest in:

¹ PBC has agreed to search the emails of Clay Bennett and Aubrey McClendon, who each own a 20 percent share of PBC. The current shareholders whose emails PBC has refused to search and produce are Tom Ward and Jeffrey Records (the latter in association with family members), each of whom owns a 20 percent share; and minority shareholders William and Lynda Cameron (8%); Everett Dobson (4%); Bob Howard (4%); and Domer and Janis Scaramucci (4%). *See* Jensen Decl., ¶ 5, Ex. D. PBC appears to treat family groups as single members; the City does likewise here.

- 1 • The formation of PBC (RFP No. 9);
- 2 • PBC's purchase of the Sonics (RFP No. 1);
- 3 • The finances and attendance of the Sonics, as PBC would be operating the Sonics in
- 4 Seattle for at least one year, and potentially up to three (or more) – which would have
- 5 a direct financial impact on the PBC and its members (RFP Nos. 4, 5, 6);
- 6 • Where the Sonics would be playing in 2008 and beyond, which would include the
- 7 implications of the Lease that PBC assumed from the Sonics' former owners; the
- 8 possibility of building a new arena in the Seattle area; and the possible relocation of
- 9 the Sonics to Oklahoma City (RFP Nos. 2, 7, 8);
- 10 • What financial and non-financial impact the Sonics' potential relocation would have,
- 11 and what impact the Hornets' temporary relocation did have, on Oklahoma City (RFP
- 12 Nos. 12, 10); and
- 13 • Any tax benefits they individually received from ownership of the Sonics (RFP. No.
- 14 14).

15 Additionally, any members who were directly involved in the purchase of the Sonics would

16 have direct involvement in communications with the Sonics' former owners (RFP No. 3). It

17 is implausible to suggest that members of a relatively small LLC, each with tens of millions of

18 dollars at stake – as well as home town pride – would not have emails related to the topics

19 described above.

20 It is equally unrealistic for PBC to assert that all or almost all emails on these topics

21 will be found in the email files of Clay Bennett, PBC's Chairman, or Aubrey McClendon, a

22 PBC member. *See* Jensen Decl., ¶ 4, Ex. C. PBC asks this Court to believe that other

23 members of PBC never communicated with each other without including Bennett or

24 McClendon; that other members of the PBC never communicated with third parties without

25 including Bennett or McClendon; and that Bennett and/or McClendon never deleted or

26 otherwise failed to retain responsive emails among PBC members, which other PBC members

did keep. Without investigating, PBC cannot simply assume that each of these propositions is

true. With respect to important communications made by the “partners” who make up

1 defendant PBC, a flat refusal to search important custodian files is unacceptable.

2 Further, the City has a specific justification for seeking emails from all PBC members,
3 not just Bennett and McClendon – in fact, in particular not just from McClendon. PBC is
4 producing McClendon’s emails because McClendon publicly announced that “we” – i.e., PBC
5 as an entity, or the members of PBC collectively – always intended to move the Sonics to
6 Oklahoma City. *See* Jensen Decl., ¶ 6, Ex. E (“We didn’t buy the team to keep it in Seattle;
7 we hoped to come here.”). If it is true that PBC entered into the Lease with the existing
8 intention of breaking it, that is an additional reason to order specific enforcement of the City’s
9 rights under the Lease. *See Dean v. Gregg*, 663 P.2d 502, 686 (Wn. App. 1983) (justice
10 requires enforcement of plaintiff’s right to specific performance where defendant’s breach of
11 contract is flagrant and its excuse for nonperformance – e.g., the assertion that it had entered
12 into a bad bargain – is “woefully deficient”). In its Answer, PBC expressly denied that
13 McClendon was speaking for anyone but himself. *See* PBC’s Answer (Dkt. No. 7), ¶ 23 (“...
14 Aubrey McClendon made [the] statement in his individual capacity, and not as a
15 representative of PBC”). The first place to look for evidence on this point is in the email files
16 of the other PBC members, to see if they shared what McClendon said “we” intended. PBC
17 cannot deny that the City’s allegation is true, and simultaneously deny the City access to the
18 evidence that would prove whether it is true or not.

19 PBC offers no evidence that production of emails from the files of other current
20 members, and one former member, would be unduly burdensome. Indeed, its discovery
21 responses do not even assert, much less substantiate, an objection based on undue burden.
22 PBC in fact appears to have no idea what the burden would be, as it has not even bothered to
23 collect or count how many emails the other current or former members have. *See* Jensen
24 Decl., ¶ 2, Ex. A. PBC cannot refuse to produce documents on the supposed grounds of
25 undue burden, when it has not taken even the most basic steps to determine what that burden
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1 would be.

2 Moreover, identification and production of responsive documents would in fact not be
3 unduly burdensome. PBC asserts that it has collected approximately 150,000 emails from
4 Bennett and McClendon. *Id.* To the extent these emails have been collected from accounts
5 associated with PBC, presumably the majority are from Bennett (as Chairman). This
6 significantly undercuts PBC's suggestion that producing emails from other members would
7 "exponentially" increase the number of emails at issue. Moreover, PBC has already agreed to
8 run a restricted set of search terms against Bennett and McClendon's emails to identify
9 responsive documents. *See* Jensen Decl., ¶¶ 2-4, Exs. A-C. PBC could easily run the exact
10 same search against the emails of the other members, which is all that the City is asking it to
11 do. If the other members actually do possess a large number of emails that contain the terms
12 being searched for, this is itself strong evidence that they possess responsive emails (including
13 ones that Bennett and McClendon would not possess). And if the search terms match very
14 few emails, any production would be easy.

15 Collecting and searching email is a common practice in complex commercial
16 litigation. Both parties agree significant issues affecting the Seattle community are at stake.
17 The subject of the dispute – the Sonics – is worth \$350,000,000 by PBC's own valuation.
18 The City's discovery requests go to issues at the heart of the case: the effects of a sports
19 team's presence on a city; what hardship, if any, would be involved if PBC played out the
20 term of the Lease at KeyArena; and, in particular, whether equity requires specific
21 enforcement of the City's rights under the Lease. The City should be allowed full and fair
22 discovery of the responsive, relevant, and non-duplicative documents at issue here, which
23 PBC could produce with relative ease.

1 II. PBC's Position – Overview

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3 As a threshold and dispositive legal matter, the email of the PBC's members is not
4 within the PBC's "care, custody and control." The PBC – an LLC – is an independent, stand-
5 alone, legal entity. It does not itself maintain or operate its members' email accounts.
6 Instead, some members of the LLC operate their email account through their particular
7 business. That email is owned by the business. The business, in turn, has nothing to do with
8 the PBC or the Sonics. Other "members" are themselves LLC's, and the members of those
9 LLC's, in turn, typically operate their email account through their businesses. The test in the
10 Ninth Circuit (not addressed in the City's motion) is whether the PBC has the legal right to
11 compel its members to give the PBC their email. The PBC has no such right – statutorily,
12 contractually, by common law, or otherwise.
13

14 Although not required, but as a compromise, the PBC earlier agreed to request and
15 review email from its Chair, Clay Bennett, and one other member, Aubrey McClendon. Mr.
16 Bennett was directly involved in the PBC's acquisition of the Sonics, efforts to obtain a new
17 arena in the Seattle area, and the lease dispute with the City. Mr. McClendon, although a
18 minority owner, is an individual who the City says may be a witness. Thus, to try to avoid
19 this particular discovery dispute, the PBC agreed to request and produce responsive emails
20 from these two individuals. To this end, the PBC obtained a universe of approximately
21 150,000 electronic documents from these two individuals to review for responsive material.²
22 Based on the operations of the PBC, it was believed that this production would capture the
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26 ² Approximately 100,000 of the electronic documents are from Mr. McClendon, and the
remainder from Mr. Bennett.

1 overwhelming majority of responsive email generated by the PBC's members. It would also
2 enable the City to scrutinize Mr. McClendon's emails for evidence of the supposed Secret
3 Plan by which, says the City, the PBC purchased the Sonics with the intent of moving the
4 team to Oklahoma City. (More about the supposed Secret Plan below). It should also be
5 remembered that this email production is in addition to thousands of documents the PBC is
6 producing.
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8 Even if Fed. R. Civ. P. 34 enabled the City to obtain the email (it does not), there are
9 significant relevance versus burden and reward hurdles. This is a landlord tenant dispute
10 where the issue is whether the Sonics can be forced to play in KeyArena in addition to paying
11 all of the rent required under the lease. Nevertheless, the City says it needs emails from all
12 members of the PBC on a wide range of issues. For example, the City claims it needs
13 information from the emails about the Sonics' financial performance. But the PBC is already
14 producing reams of financial material relating to the Sonics, including audited financial
15 statements. Thus, the email adds nothing to the case except mountains of work for no return.
16 Likewise, the City claims it needs email about the formation of the PBC. To the extent
17 relevant, scores of hard copy "formation" documents are being produced. Altogether, the
18 PBC is producing many boxes of hard copy documents, a significant volume of electronic
19 documents and, as indicated, responsive emails culled from the universe of 150,000 electronic
20 documents.
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23 In short, just as the City did not need 25 depositions, and did not need to depose all of
24 the members of the PBC, the City does not need the email of all of the PBC's members.
25 Regardless, as a matter of law, it is not entitled to it. The City's motion should be denied.
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1 **A. There Is No “PBC” Email**

2 The PBC is composed of individuals and LLC’s. Unlike some LLC’s, the PBC does
3 not maintain an email system for its members.³ Instead, each member (or member of an LLC
4 which is a member of the PBC) maintains his or her own email.⁴

5 The PBC has four members who each hold approximately a 20 percent share.⁵ Two of
6 those four members are not individuals, but separate LLC’s.⁶ One of the LLC’s is owned by
7 Mr. Bennett. The other LLC consists of numerous trusts and individuals.⁷ The third 20
8 percent owner is Aubrey McClendon.⁸ The final 20 percent owner, Mr. Ward, uses his
9 company’s email system exclusively.⁹ That company, SandRidge Energy, Inc., is a publicly-
10 traded company with which the PBC has no legal or business relationship, and the PBC has
11 no right to access that company’s IT system.¹⁰ Turning to the smaller owners, Everett
12 Dobson’s email resides within the server of his former employer, AT&T.¹¹ Again, the PBC
13 has no legal relationship with AT&T. Likewise, the majority member of PBC member
14 Cameron Hoops, LLC, is a revocable trust of which Bill Cameron is the beneficiary. Mr.
15 Cameron’s email is owned by his company, American Fidelity. Other smaller owners are also
16 themselves LLC’s.¹²

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21 ³ Ex. G (Webb Declaration).

22 ⁴ Id.

23 ⁵ Id.

24 ⁶ Id.

25 ⁷ Id.

26 ⁸ Mr. McClendon’s email is being produced.

⁹ Ex. G (Webb Declaration).

¹⁰ Id.

¹¹ Id.

¹² Id.

1 The PBC does not maintain or possess any of the emails of any of its members, and
 2 has no legal right to force the custodians of the emails (be they members, members'
 3 employers, members of member LLC's, etc.) to provide those emails.

4 **B. As a Matter of Law, the Email of PBC Members Is Not Within the PBC's**
 5 **Care and Custody or Control**

6 Fed. R. Civ. P. 34(a) is limited to documents "in the possession, custody or control of
 7 the party upon whom the request is served." The party seeking production – the City – bears
 8 the burden of proving that the opposing party has such control. *United States v. Int'l Union of*
 9 *Petroleum & Indus. Workers*, 870 F.2d 1450, 1452 (9th Cir. 1989).

10 In the Ninth Circuit, "[c]ontrol is defined as the legal right to obtain documents upon
 11 demand." *Int'l Union*, 870 F.2d at 1452. Importantly, whether a party has the practical
 12 ability to obtain the requested documents from a non-party is irrelevant. Thus, this Court
 13 must focus exclusively on the PBC's legal right to demand emails from its members. *See In*
 14 *re Citric Acid Litig.*, 191 F.3d 1090, 1107-08 (9th Cir. 1999) (rejecting the proposed
 15 "practical ability to obtain documents" test, reiterating that the legal control test is the proper
 16 standard, and holding that a court cannot order production of documents held by a separate
 17 legal entity, where the requested party is not in actual possession or custody of the
 18 documents).¹³ As one district court within the Ninth Circuit further clarified:

19 The relationship between the party and the person or entity
 20 having actual possession of the document is central in each
 21 case. The party must be able to command release of the
 22 documents by the person or entity in actual possession. This
 position of control is usually the result of statute, affiliation or
 employment.

23 *Estate of Young v. Holmes*, 134 F.R.D. 291, 294 (D. Nev. 1991) (emphasis added).

24 Applying the "legal control" test, the Ninth Circuit held that an international labor

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 26 ¹³ The City's briefing does not address, or even mention, the controlling Ninth Circuit

1 union did not have a duty to produce documents and records of its affiliated local unions. *See*
 2 *Int'l Union*, 870 F.2d at 1453-54. In that case, the government subpoenaed the International
 3 Union of Petroleum and Industrial Workers ("IUPIW"), seeking records from local unions
 4 affiliated with IUPIW. The court concluded that IUPIW lacked legal control over documents
 5 in the possession of local unions because (1) IUPIW and each local union were separate
 6 entities under the law and (2) the contract governing the union relationship did not expressly
 7 give IUPIW the right to obtain the records of local unions upon demand. *See id.* at 1452-53.
 8 The Ninth Circuit rejected the DOL's argument that IUPIW had "control" of the local unions'
 9 records "by virtue of its 'inherent relationship' to the locals." *Id.* at 1453. As the court
 10 explained, "[c]ontrol must be firmly placed in reality, not in an esoteric concept as 'inherent
 11 relationship.'" *Id.* at 1453-54 (citation omitted). *See also Thomas v. Hickman*, No. 106-CV-
 12 00215, 2007 WL 4302974 (E.D. Cal. Dec. 6, 2007) (citing *International Union* and reiterating
 13 that contract means "the legal right to obtain documents upon demand"); *Gen. Metals of*
 14 *Tacoma, Inc. v. Bean Envtl. LLC*, No. C05-5306, 2006 WL 2927730 (W.D. Wash. Oct. 11,
 15 2006) (applying "legal right" test).

18 In arguing that the PBC must demand, obtain and search its member's email merely
 19 because those members have substantial investments in the PBC, the City apparently relies on
 20 the "inherent relationship" test expressly rejected by the Ninth Circuit. The City has not
 21 shown – as it must – that the PBC has a legal right to obtain upon demand the records of its
 22 members. In fact, just like the contract governing the inter-union relationship in *International*
 23 *Union*, neither the LLC agreement nor any other corporate document of the PBC confers upon
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 26 standard.

1 it the right to inspect or obtain any personal documents and records of its members.¹⁴

2 It is also worth emphasizing that the PBC is a distinct legal entity that exists
3 independently from its members. For that reason, and unlike general partnerships, individual
4 members are not personally liable for the debts, torts or contractual obligations of an LLC.
5 There is no evidence that those members are merely the “alter egos” of the PBC. Moreover,
6 none of them are parties to this lawsuit. Under similar circumstances, the court in *American*
7 *Maplan Corp. v. Heilmayr* denied a Rule 34 request for documents and records of a non-
8 party. *See* 203 F.R.D. 499, 502 (D. Kan. 2001). In *Heilmayr*, an action for violation of a
9 covenant not to compete, the plaintiff corporation (AMC) requested that its former president
10 produce corporate books, records, and other documents of a non-party corporation (VET) of
11 which he was the president and a shareholder. Reversing the magistrate judge’s order
12 compelling production, the Court explained:

13 [The magistrate judge’s] order disregards VET’s corporate form
14 and its existence as a distinct legal entity. As defendant
15 correctly highlights, the order effectively ignores the distinction
16 between a corporation, on the one hand, and its officers and
17 shareholders, on the other hand. . . . VET is not a sole
18 proprietorship and AMC has not alleged that defendant is the
19 “alter ego” of VET. There is simply no evidence or allegation
20 that defendant and VET are essentially one and the same.
21 AMC’s response to defendant’s motion does not address this
22 argument in any way whatsoever. In sum, then, AMC cannot
23 properly seek to obtain from one entity or individual what
24 belongs to another.

25 *Id.* (emphasis added).

26 Here, the City’s Rule 34 request essentially mirrors the plaintiff’s request in *Heilmayr*
with the only difference that the City wants an entity to demand, obtain and search records of
its independent members, and in some cases the independent companies of its independent

¹⁴ See Ex. H (LLC Agreement of PBC).

1 members. None of those members are parties to this case. None of them have a legal duty to
2 give the PBC access to their email. None of them are the alter egos of the PBC.

3 The legal control test is disposition of the City's motion. Even if it were not, the
4 motion should still be denied. As detailed below, the PBC is voluntarily producing the
5 Bennett/McClendon email even though the City's relevance theories are thin at best.

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7 **C. The Assembling of the Bennett/McClendon Emails – Why and How**

8 Clay Bennett is the Chair of the PBC. Aubrey McClendon is a member of the PBC,
9 holding a 20 percent interest. In an effort at a reasonable compromise in discovery, the PBC
10 agreed to review the email of these two people and produce responsive documents generated
11 after filtering the overall universe (150,000 electronic documents) pursuant to an agreed set of
12 search terms.

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14 Bennett's email was selected because he is the Chair of the PBC, and was intimately
15 involved in all of the factual matters at issue in the case. McClendon's email was offered
16 because the City claims that he is the source of the proof of the supposed Secret Plan by the
17 PBC, from the outset, to move the Sonics to Oklahoma City. The sole basis for the theory is a
18 press report of a remark made by Mr. McClendon. Despite urging the Secret Plan to the
19 media, in pleadings and anyone who will listen, the City has never squared its theory with the
20 fact that the PBC spent millions of dollars and months of effort trying to structure an
21 economically viable arrangement to keep the Sonics in the greater Seattle area. The City's
22 lawyers know of these efforts. In fact, the City's lead counsel – Senator Gorton – assisted the
23 PBC in trying to remain in Seattle. Apparently the City contends that this was all an elaborate
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1 ruse to cover up the Secret Plan. Regardless, to put this nonsense to bed, Mr. McClendon
 2 agreed to give his email to the PBC for review for production to the City.

3 Messrs. Bennett and McClendon each use an email account from their respective
 4 companies (not the PBC) for their email. They do not maintain or use separate personal email
 5 accounts.¹⁵ Both of their company's systems are such that when they send or receive an
 6 email, it is automatically "trapped" or stored in the company's server before it arrives at their
 7 desktop.¹⁶ As a result, even if it is deleted or double-deleted at the desktop, a copy of the
 8 email remains in the respective server.¹⁷ Thus, the City is wrong when it speculates that some
 9 portion of the Bennett/McClendon email has been deleted.
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11 **D. Even If the PBC Had the Right to Obtain the Email, the Relevance Is**
 12 **Tenuous Relative to the Burden and Reward.**

13 As detailed below, the asserted relevance of the email is tenuous at best. In this
 14 regard, the City says this is a \$350 million dispute. That figure represents the price the PBC
 15 paid for the Sonics. That is not the issue here. This case is about whether there should be
 16 specific performance of a lease.

17 **1. PBC Formation**

18 The City first claims it needs email relating to "the formation of PBC." There is
 19 nothing in the case that turns on this issue. PBC is an Oklahoma LLC. The LLC Agreement
 20 is attached as an exhibit. There is no apparent link between specific performance of the lease
 21 and the formation of the PBC. Moreover, reams of hard copy documents regarding the
 22 formation of the PBC are being produced.
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25 ¹⁵ Ex. G.

26 ¹⁶ Id.

¹⁷ Id.

1 **2. The Purchase of the Sonics**

2 The City next claims it needs information regarding “PBC’s purchase of the Sonics.”
 3 Here again, to the extent even relevant, the details of the purchase are set forth in the Purchase
 4 and Sale Agreement, due diligence materials, communications between the PBC and the prior
 5 owners, and the Bennett/McClendon email, all of which are being produced.
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7 **3. Financial Impacts on Oklahoma City**

8 The City next claims it needs email to ascertain “what financial and non-financial
 9 impact the Sonics’ potential relocation would have, and what impact the Hornets’ temporary
 10 relocation did have, on Oklahoma City.”¹⁸ At the outset, the economic impact, or lack
 11 thereof, of the Sonics or the Hornets on Oklahoma City is not the issue. The question is
 12 whether the Sonics’ departure will have any net negative economic impact on Seattle. The
 13 City implies that the Sonics’ departure will have a huge impact. In fact, the City Council’s
 14 staff has already studied this issue in connection with KeyArena and the Sonics, and
 15 concluded there would be no impact:
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17 **Bottom Line:** There is no empirical evidence showing that
 18 major league teams and their stadiums/arenas are effective
 19 drivers of local and regional economies. There is abundant
 20 evidence that they are not. To quote two authorities in the field,
 21 “Few fields of empirical economic research offer virtual
 22 unanimity of finding. Yet, independent work on the economic
 23 impact of stadiums and arenas has uniformly found that there is
 24 no statistically significant positive correlation between sports
 25 facility construction and economic development.”¹⁹

26 Moreover, the economic impact question is a subject for expert testimony from
 economists, and both sides have retained experts on the issue. These experts will base their

¹⁸ The Hornets are an NBA team that played briefly in Oklahoma City because of the
 disruption in their home town (New Orleans) resulting from Hurricane Katrina.

¹⁹ See Ex. I (emphasis in original).

1 opinion on economic and statistical data, and similar studies that have been done over the
 2 years. What lay people say, or more likely do not say, about the issue in emails is of no
 3 relevance.

4 **4. The Sonics' Finances**

5 The City next argues that it needs information about the Sonics' finances. The Sonics
 6 are producing their financial records, including audited financial statements, profit and loss
 7 statements, etc. Those materials – detailing millions of dollars of losses – are not in dispute.
 8 These losses are no surprise to the City's lawyers. Those lawyers represented the Sonics'
 9 prior owner in attempting to obtain a new arena. In that capacity, they studied the Sonics'
 10 finances, and concluded that the team was "losing money," could not be "competitive," and
 11 that the lease with the City for KeyArena was the "worst lease in the NBA."²⁰ Even then,
 12 they recognized that the financial condition was such that there was a "real possibility" the
 13 Sonics would leave Seattle.²¹

14 There will be no dispute at trial about whether the Sonics are losing money.
 15 Mountains of emails will not create profits where only losses – huge and ever-mounting
 16 losses – exist.

17 **5. Tax Impacts**

18 The City says it needs email to analyze "any tax benefits individual members receive
 19 from ownership of the Sonics." It is not clear how tax benefits, if any, derived by non-parties
 20 have anything to do with the KeyArena lease. Regardless, given the ownership structure,
 21 such a tax analysis would be complicated at best. Moreover, it assumes that the City

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 25 ²⁰ See Ex. J, written by K&L Gates.
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1 somehow knows all the other financial information about the PBC's members so that it can
2 put the tax benefits in context. Stated simply, unless the City knows each member's personal
3 financial details, theoretical tax benefits are just that – theoretical. Moreover, looking ahead,
4 it seems unlikely that the City will spend trial time speculating about complex potential tax
5 ramifications of non-parties based on hypothetical assumptions.
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7 **E. Conclusion**

8 The City's motion fails as a matter of law. Even if it did not, there are sound reasons
9 to deny the motion. The parties have much to do already without adding a huge additional
10 layer of discovery. The City's motion should be denied.
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26 ²¹ Id.

1 **III. Discovery Requests at Issue in this Dispute**

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3 **REQUEST FOR PRODUCTION NO. 1.** Please produce a true, correct, accurate and
4 complete copy of all documents that relate to the Professional Basketball Club's ("PBC's")
5 purchase of the Seattle SuperSonics (the "Sonics"), including but not limited to the following:

- 6 (a) the purchase agreement;
- 7 (b) all documents generated during the due diligence process leading to the
8 purchase of the Sonics, including but not limited to any reports prepared by third-parties that
9 were provided to PBC; and
- 10 (c) all documents that refer or relate to the valuation and financial performance of
11 the Sonics, including operating expenses, operating revenue and operating losses.

12 **RESPONSE:** Defendant restates its general objections. Without waiving said objections and
13 subject to them, responsive documents will be produced.

14
15 **REQUEST FOR PRODUCTION NO. 2.** Please produce a true, correct, accurate and
16 complete copy of all documents that relate to the Premises Use and Occupancy Agreement
17 (the "Lease") entered into between the City of Seattle and SSI Sports, Inc., and subsequently
18 assumed by The Basketball Club of Seattle and PBC, including but not limited to the
19 following:

- 20 (a) documents that refer or relate to PBC's obligations under the Lease;
- 21 (b) documents that constitute or reflect communications between PBC, including
22 its attorneys, agents, employees and representatives, and any official, employee or
23 representative of Oklahoma City concerning the Lease;
- 24 (c) documents that constitute or reflect communications between PBC, including
25 its attorneys, agents, employees and representatives, and any employee or representative of
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1 the Ford Center in Oklahoma City, including but not limited to employees or representatives
2 of SMG, the property management group that manages the Ford Center, concerning the
3 Lease; and

4 (d) documents that constitute or reflect communications between PBC, including
5 its attorneys, agents, employees and representatives, and any employee or representative of
6 the National Basketball Association ("NBA") concerning the Lease.

7 **RESPONSE:** Defendant restates its general objections. Without waiving said objections and
8 subject to them, responsive documents will be produced.

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10 **REQUEST FOR PRODUCTION NO. 3.** Please produce a true, correct, accurate and
11 complete copy of all documents that reflect or constitute communications between PBC,
12 including its attorneys, agents, employees and representatives, and any former owner(s) of the
13 Sonics, including attorneys, agents, employees and representatives of any former owner(s).

14 **RESPONSE:** Defendant restates its general objections. Without waiving said objections and
15 subject to them, responsive documents will be produced.

16
17 **REQUEST FOR PRODUCTION NO. 4.** Please produce a true, correct, accurate and
18 complete copy of all documents that relate to the financial performance of the Sonics, under
19 both past and current ownership, including but not limited to profit and loss statements,
20 financial projections and pro formas.

21 **RESPONSE:** Defendant restates its general objections. Without waiving said objections and
22 subject to them, responsive documents will be produced.

23
24 **REQUEST FOR PRODUCTION NO. 5.** Please produce a true, correct, accurate and
25 complete copy of all documents submitted to the NBA by the owners or representatives of the
26

1 Sonics, including under both past and current ownership, that reflect the financial
2 performance of the Sonics.

3 **RESPONSE:** Defendant restates its general objections. Without waiving said objections and
4 subject to them, responsive documents will be produced.

5
6 **REQUEST FOR PRODUCTION NO. 6.** Please produce a true, correct, accurate and
7 complete copy of all documents that relate to projected attendance at Sonics home games
8 during the 2007-08 season, including but not limited to the following:

9 (a) documents that relate to the effect that the departure of Ray Allen and/or
10 Rashard Lewis from the Sonics would have on attendance;

11 (b) documents that relate to marketing campaigns to promote the Sonics and/or
12 ticket sales; and

13 (c) documents that relate to the impact that a possible relocation of the team would
14 have on attendance and/or ticket sales.

15 **RESPONSE:** Defendant restates its general objections and objects further that the request is
16 vague. Without waiving said objections and subject to them, defendant will produce
17 documents projecting, or discussing projected, attendance for games during the 2007-2008
18 season.

19
20 **REQUEST FOR PRODUCTION NO. 7.** Please produce a true, correct, accurate and
21 complete copy of all documents that relate to efforts to secure financing for a new arena in
22 Washington State, including but not limited to:

23 (a) documents that reflect or constitute communications between PBC, including
24 its attorneys, agents, employees, representatives and lobbyists, and any representative of the
25 Washington Legislature, including elected representatives, legislative staff (including
26

1 committee staff, employees of the Legislature, and employees of elected representatives); and

2 (b) documents that reflect or constitute communications between PBC, including
3 its attorneys, agents, employees, representatives and lobbyists, and the office of Governor
4 Christine Gregoire, including Governor Gregoire personally and members of her staff.

5 **RESPONSE:** Defendant restates its general objections. Without waiving said objections and
6 subject to them, responsive documents will be produced.

7
8 **REQUEST FOR PRODUCTION NO. 8.** Please produce a true, correct, accurate and
9 complete copy of all documents that relate to the possible relocation of the Sonics from
10 KeyArena and/or the City of Seattle, including but not limited to the following:

11 (a) documents constituting, regarding or relating to the assessment of potential
12 alternative venues for Sonics home games, including Renton, Washington; Bellevue,
13 Washington; and Oklahoma City, Oklahoma;

14 (b) documents that constitute or reflect communications between PBC, including
15 its attorneys, agents, employees and representatives, and any official, employee or
16 representative of Oklahoma City concerning the possible relocation of the Sonics to
17 Oklahoma City;

18 (c) documents that constitute or reflect communications between PBC, including
19 its attorneys, agents, employees and representatives, and any employee or representative of
20 the Ford Center in Oklahoma City, including but not limited to employees or representatives
21 of SMG, the property management group that manages the Ford Center, concerning the
22 possible relocation of the Sonics to Oklahoma City; and

23 (d) documents that constitute or reflect communications between PBC, including
24 its attorneys, agents, employees and representatives, and any employee or representative of
25 the NBA concerning the possible relocation of the Sonics to Oklahoma City.

1 **RESPONSE:** Defendant restates its general objections and objects further to the production
2 of documents post-dating November 1, 2007, which is the time when the PBC began
3 relocation discussions with Oklahoma City. Notwithstanding such objection, documents
4 following that date will be produced to the extent they are responsive to other requests.
5

6 **REQUEST FOR PRODUCTION NO. 9.** Please produce a true, correct, accurate and
7 complete copy of all documents that relate to the formation of PBC, including any prospectus,
8 incorporation documents, and communications with actual and possible investors.

9 **RESPONSE:** Defendant restates its general objections. Without waiving said objections and
10 subject to them, responsive documents will be produced.
11

12 **REQUEST FOR PRODUCTION NO. 10.** Please produce a true, correct, accurate and
13 complete copy of all documents that relate to the benefits, both financial and non-economic,
14 derived by the City of Oklahoma City as a result of the New Orleans Hornets playing home
15 games in Oklahoma City.

16 **RESPONSE:** Defendant restates its general objections. Without waiving said objections and
17 subject to them, responsive documents will be produced.
18

19 **REQUEST FOR PRODUCTION NO. 12.** Please produce a true, correct, accurate and
20 complete copy of all documents that relate to the projected or expected benefits, both financial
21 and non-economic, to be derived by Oklahoma City as a result of the possible relocation of
22 the Sonics to Oklahoma City.

23 **RESPONSE:** Defendant restates its general objections and objects further that the request is
24 vague. Without waiving said objections and subject to them, responsive documents will be
25 produced.
26

1
2 **REQUEST FOR PRODUCTION NO. 13.** Please produce a true, correct, accurate and
3 complete copy of all tax returns and related work papers prepared by or on behalf of PBC
4 regarding or relating to PBC's ownership of the Sonics.

5 **RESPONSE:** Defendant restates its general objections. Without waiving said objections and
6 subject to them, responsive documents will be produced.

7
8 **REQUEST FOR PRODUCTION NO. 14.** Please produce a true, correct, accurate and
9 complete copy of all documents reflecting any tax benefits accruing to the principals of PBC
10 as a result of their ownership interest in the Sonics.

11 **RESPONSE:** Defendant restates its general objections. Without waiving said objections and
12 subject to them, responsive documents will be produced.

1 **IV. The City of Seattle's Statement of the Issue and Authority**

2 **A. All Members' Emails Should Be Searched for Responsive Documents**

3 PBC refuses to review the emails of six of its eight current members (indeed, it refuses
4 even to collect any of their emails in the first place).²² PBC's refusal to collect and search
5 these emails violates its discovery obligations; defies common sense; rests upon an
6 implausible factual contention; and is unsupported by the evidence. The City is entitled to the
7 production it requests because:

8 (1) The City's discovery requests seek relevant documents;

9 (2) The mutually agreed upon keyword search of the PBC members' emails would
10 produce responsive documents;

11 (3) There is strong evidence that Bennett and McClendon's emails will not contain all
12 or almost all responsive and relevant documents; and

13 (4) Searching the other PBC members' emails would not be unduly burdensome and,
14 regardless, PBC fails to establish the existence of undue burden.

15 "[W]ide access to relevant facts serves the integrity and fairness of the judicial
16 process by promoting the search for the truth." *Shoen v. Shoen*, 5 F.3d 1289, 1292 (9th Cir.
17 1993). Thus, a "court must be careful not to deprive a party of discovery that is reasonably
18 necessary to afford a fair opportunity to develop and prepare the case." *Harper v. U.S.*
19 *Seafoods, L.P.*, 2003 WL 25674101, *4 (W.D. Wash. April 8, 2003) (J. Pechman, citing
20 Notes of Advisory Committee, 1983 Amendment). Accordingly, the City respectfully
21

22 ²² PBC does not dispute that it has "possession, custody, or control" of its members' emails
23 sufficient to give it the power to search those emails for responsive documents. Fed. R. Civ.
24 P. 34(a); *Export-Import Bank of U.S. v. Asia Pulp & Paper Co.*, 233 F.R.D. 338, 341 (courts
25 construe "control" requirement of Fed. R. Civ. P. 34(a) liberally; a party controls documents
26 that it has the "right, authority, or ability" to obtain upon demand). Indeed, the fact that PBC
has already agreed to produce responsive documents located in McClendon's emails proves
that it has the ability to obtain such documents if it so chooses.

1 requests that this Court order PBC to promptly collect the email files of all PBC members,
 2 promptly run the mutually agreed upon search terms against them, and promptly produce all
 3 responsive documents.

4 **B. The City's Document Requests Seek Relevant Documents.**

5 PBC does not dispute that the documents the City requests are relevant. The City's
 6 document requests focus on issues that are central to this case: the Lease (RFP No. 2); PBC's
 7 formation, its purchase of the Sonics, its intentions in doing so, and whether it made good
 8 faith efforts to keep them in the Seattle area (RFP Nos. 1, 3, 4, 5, 6, 9); the potential relocation
 9 of the Sonics, including the effects of relocation on a city's finances and urban fabric (RFP
 10 Nos. 7, 8, 10, 12); and the alleged hardship PBC claims is caused by playing Sonics games in
 11 KeyArena (which include mitigating tax consequences) (RFP Nos. 4, 5, 6, 13, 14).

12 **C. All Members of the PBC Are Likely to Have Responsive Documents in Their**
 13 **Emails.**

14 The City has made the reasonable request that PBC use agreed upon search terms to
 15 search the emails of a limited number of additional custodians: to the City's knowledge, six
 16 current PBC members (including family groups). As discussed in the City's Opening
 17 Statement, all of these members have substantial financial stakes in PBC as well as substantial
 18 interest in having an NBA team in Oklahoma City. The latter is evidenced by Mr.
 19 McClendon's public statements regarding what "we" [i.e., PBC's members] intended. Even if
 20 the members do not serve in a management position for the LLC, they are nothing like
 21 shareholders in a public corporation. With so many millions of dollars and substantial non-
 22 financial interests at stake, it is hard to believe that the members, if they use email at all,
 23 would not possess responsive emails about: the formation of the LLC; the finances of its
 24 principal (if not only) asset, the Sonics; where the Sonics will be playing; and how the Sonics'
 25 potential relocation would affect Oklahoma City.
 26

1 Moreover, emails from the other PBC members are the best evidence on one of the
2 central points of this dispute: whether PBC entered into a Lease that required it to keep the
3 Sonics in Seattle through 2010, but intended all along to move the Sonics to Oklahoma City
4 for the start of the 2008-09 season. Mr. McClendon has publicly said that this is what “we”
5 intended (i.e., what PBC as a whole intended, or its members collectively intended). PBC
6 repeatedly denies that Mr. McClendon spoke for anyone but himself, including in its Answer.
7 PBC cannot, now, raise the corporate form to hide what will be among the best evidence on
8 this point – the emails of the other PBC members.

9 **D. If PBC Searches Only Bennett and McClendon’s Emails, It Is Very Likely to**
10 **Miss Multiple, Significant Groups of Responsive Documents.**

11 It is hard to believe that PBC is arguing that Bennett and McClendon’s emails are
12 “representative” of PBC, and that searching only those emails will produce all or almost all
13 relevant emails that any member of PBC ever wrote or received. To the contrary, PBC’s
14 proposed search will, by definition, miss at three broad categories of emails that the City’s
15 proposed search would produce:

- 16 (1) Emails between PBC members, to which Bennett and McClendon were not parties;
- 17 (2) Emails between a PBC member or members and third parties, to which Bennett and
18 McClendon (or other custodians searched by PBC) were not parties; and
- 19 (3) Emails that included Bennett or McClendon, and were kept by another member of
20 PBC, but that Bennett and/or McClendon deleted or otherwise failed to retain.

21 PBC offers no evidence establishing that Bennett and McClendon keep all their emails.

22 Absent such evidence, it is only reasonable to assume that there will be responsive emails
23 among the members of PBC that other PBC members kept, but Bennett and/or McClendon
24 deleted. Moreover, it appears that PBC has no idea whether its other members included
25 Bennett or McClendon on all their emails. How can PBC claim to know this, when it never
26 bothered to collect or examine the other members’ emails in the first place? Furthermore, at

1 least some of PBC's members likely had divergent interests. Thus, it seems highly likely that
 2 Bennett and McClendon were intentionally excluded from at least some important and
 3 relevant emails. It is also likely that at least some relevant communications occurred that,
 4 even if on subjects of common interest, were exchanged only between some members of the
 5 PBC, and did not always include Bennett or McClendon.

6 It is not enough for PBC to argue that the discovery is duplicative. The rule is that
 7 discovery may not be "*unreasonably* cumulative or duplicative." Fed. R. Civ. P.
 8 26(b)(2)(C)(i) (emphasis added). While some of the emails will undoubtedly be identical to
 9 those produced from Bennett and McClendon's emails, PBC has made no showing that the
 10 other PBC members' emails are necessarily substantially duplicative. Particularly in light of
 11 the fact that PBC has no real idea what emails exist in other PBC members' files, PBC
 12 "cannot rely on a mere probability or assertion that the documents are unreasonably
 13 cumulative." *Wilkinson v. Fed. Bureau of Investigation, et al.*, 111 F.R.D. 432, 444 (C.D.
 14 Cal. 1986).

15 Furthermore, PBC has neither the factual basis nor the right to argue that non-
 16 duplicative emails in other PBC members' files are unimportant – i.e., that PBC is entitled to
 17 stop searching if there is "little" likelihood that emails it refuses to search contain responsive,
 18 relevant, and non-duplicative documents. PBC cannot "arrogate to [itself] the power to
 19 determine what constitutes a relevant document[.]" and unilaterally conclude that the emails it
 20 will not produce – and has never seen – are not 'really' relevant. *Alexander v. Fed. Bureau of*
 21 *Investigation*, 186 F.R.D. 54, 59 (D.D.C. 1998).

22 **E. Searching the Emails of the Additional PBC Members Entails Little Burden,**
 23 **Particularly in Light of the Amount in Controversy.**

24 The City sued PBC to keep PBC from taking the Sonics out of the City in violation of
 25 PBC's contractual obligations. The Sonics have been part of Seattle for over 40 years. Even
 26

1 this year, after PBC stripped the team of its two best players from the 1997-98 season, tens of
2 thousands of Seattle fans watch their games in person, and tens of thousands more on
3 television. Along with Sonics games, Seattle's name is broadcast across the country and the
4 world. PBC's planned breach would cause substantial intangible losses to the City's urban
5 makeup – its civic pride and sense of self. The monetary damages to the City would be
6 incalculable, but similarly significant.

7 After buying the Sonics for \$350 million, and claiming that fulfilling its obligations
8 under the lease is costing it tens of millions of dollars a year, PBC argues that the costs of
9 searching the emails of approximately six more custodians would be unduly burdensome.
10 This seems unlikely. The other custodians will in all likelihood have substantially fewer
11 emails than Bennett, who presumably generated the bulk of the approximately 150,000 emails
12 taken from Bennett and McClendon's files together. The universe of emails will thus likely
13 be at most a few times greater, not "exponentially" larger. PBC can search the new emails
14 using the same limited group of agreed-upon search terms it is using to search Bennett and
15 McClendon's emails.

16 PBC's claim that the discovery would be unduly burdensome, without more, fails to
17 meet its obligations under the Federal Rules. "When a party objects to discovery requests, the
18 court must be able to ascertain precisely what is being objected to. As such, unless it is
19 obvious from the wording of the request itself that it is overbroad, vague, ambiguous or
20 unduly burdensome, an objection simply stating so is not sufficiently specific." *Boeing Co. v.*
21 *Agric. Ins. Co.*, 2007 WL 4358332, *2 (W.D. Wash. Dec. 11, 2007). PBC bears the burden
22 of providing specific detail about the time, money, and procedure that would be involved in
23 the collection and search. *See Super Film, Inc. v. UCB Films, Inc.*, 219 F.R.D. 649, 651 (D.
24 Kan. 2004); *Wachtel v. Guardian Life Ins. Co.*, 239 F.R.D. 376, 387 (D.N.J. 2006). It has not
25 done so. Indeed, it has not even asserted an undue burden in its objections. Moreover, it
26

1 apparently has not even investigated to determine how many emails are at issue. PBC's claim
2 of undue burden is unsupported. Production should be required.

3 **F. PBC Is Legally Required to Search for All Responsive Documents in Its**
4 **Possession, Custody or Control, Including Emails of PBC and Sonics Officers or**
5 **Employees.**

6 PBC worked with the City to develop search terms to use in identifying responsive
7 emails of PBC members Bennett and McClendon, which included terms like "Sonics,"
8 "Seattle," and "Basketball." *See* Jensen Decl., ¶¶ 2-4, Exs. A-C. PBC has not, however,
9 identified the search terms it intends to use to identify and produce responsive email written
10 by officers or employees of PBC or the Sonics. Such emails would be within PBC's
11 possession, custody, or control, and thus must be searched and produced if PBC has not done
12 so. PBC presumably does not intend to use the same search terms (which, for non-members,
13 could be over-inclusive); but it has not identified which search terms it does intend to use.
14 The City focuses this motion on the production of emails from members of PBC (as those are
15 the only custodians whose records PBC has asserted will not be searched); but if PBC has
16 confined its search to Bennett and McClendon (and not included PBC/Sonics executives and
17 employees), it should be ordered to search and produce responsive emails from those
18 custodians as well.

19 **G. Conclusion.**

20 The City is asking PBC to search the email files of all of its members. This request
21 involves only a limited number of custodians – 8 in total, as opposed to the 2 offered by PBC.
22 It involves a limited number of emails – substantially less than the "exponential" number
23 pulled out of the air by PBC, which has not even bothered to determine how many emails are
24 actually at issue. The search is expressly limited to the use of agreed-upon search terms, a
25 standard practice for electronic discovery in complex commercial litigation. PBC offers no
26 evidence that locating and searching the email files would be unduly burdensome. By

1 contrast, the City has offered substantial evidence that the other members' email files will
2 contain responsive, relevant, important, and non-duplicative documents. PBC cannot in
3 fairness or compliance with the Rules deny the City the discovery it is owed. The City
4 respectfully requests that this Court order PBC to produce responsive documents from the
5 emails of all of its members.

V. The PBC's Statement of the Issue and Authority

[To avoid confusion, the City notes that PBC's submission is contained in its entirety in Section II, above. The City's reply is in Section VI, below.]

1 **VI. City's Reply**

2 In the CR 37 conference, PBC never disputed it controls its members' emails, nor did
3 it state some members have no management role. The City clarifies it seeks only PBC-related
4 emails of members who are PBC managers or committee members. Ex. H, § VI. PBC
5 managers and committee members have intrinsic and/or delegated authority. Ex. H, §§ 6.3,
6 6.4, 6.6(b), 6.7, 6.8. Thus, PBC controls their PBC-related emails. Control is the legal right
7 to obtain documents on demand. *In re Citric Acid Litigation*, 191 F.3d 1090, 1107-08 (9th
8 Cir. 1992). This legal right exists if a principal-agent relationship exists. *McKesson Corp. v.*
9 *Islamic Republic of Iran*, 185 F.R.D. 70, 78 (D.D.C. 1999); *see also Riddell Sports, Inc. v.*
10 *Brooks*, 158 F.R.D. 555, 559 (S.D.N.Y. 1994). A manager is an agent of an LLC for the
11 purposes of its business. Okla. Stat. tit. 18, § 2019; Okla. Stat. tit. 18, § 2016. PBC relies on
12 inapposite cases involving control of third party documents, not managers or active owners of
13 a party and certainly not managers and active members of an LLC.

14 Moreover, PBC's discovery responses did not identify or preserve the objections
15 (relevance and burden) asserted now. Jensen Decl., Ex. F. They are waived.

16 The City seeks PBC-related emails. PBC has a right to get them, but PBC never even
17 tried. PBC is playing an unfair game. On the one hand, it demands an expedited trial. On the
18 other, it delays and resists legitimate discovery on bases never raised in the parties' CR 37
19 conference and not asserted formally in a discovery response.

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DATED this 13th day of February, 2008.

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CERTIFICATION

The City, as the moving party, has complied with the requirements of Local Rule CR 37(a)(2)(B)(viii) in filing this CR 37 Joint Submission.

/s/ Michelle Jensen
Michelle Jensen, WSBA # 36611

CERTIFICATE OF SERVICE

I hereby certify that on February 13, 2008, I electronically filed the foregoing with the Clerk of the Court using CM/ECF system, which will send notification of such filing to all counsel of record.

By: /s Michelle D. Jensen
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