

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

CITY OF SEATTLE,) Cause No. 07-01620-MJP
Plaintiff,)
vs.) Seattle, Washington
PROFESSIONAL BASKETBALL CLUB,) June 26, 2008
LLC,) Volume VI
Defendant.)

BENCH TRIAL
VERBATIM REPORT OF PROCEEDINGS
BEFORE THE HONORABLE MARSHA J. PECHMAN
UNITED STATES DISTRICT JUDGE

APPEARANCES:

For the Plaintiff: Paul Lawrence
Jeffrey Charles Johnson
Gregory Narver

For the Defendant: Bradley S. Keller
Paul Taylor
James Webb

Reported by: Barry L. Fanning, CCR, RMR, CRR
Nichole Rhynard, CCR, RMR, CRR

Proceedings recorded by mechanical stenography, transcript
produced by Reporter on computer.

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

EXAMINATION INDEX

EXAMINATION OF:	PAGE
NICHOLAS LICATA	
DIRECT EXAMINATION	1020
CROSS-EXAMINATION	1041

EXHIBIT INDEX

EXHIBITS ADMITTED:	PAGE
553	1029
532	1044
582	1052
630	1053
42	1053
Stipulated list of exhibits admitted	1055
54	1056
197	1057
343	1057
568, 569	1058

P R O C E E D I N G S

1
2
3 THE COURT: Good morning. It is not a good morning
4 for everybody? All right. Okay. Counsel, we have some
5 things that we need to accomplish today. And before I do
6 that, and I know that you should have received a phone call
7 about this, but let me for the record indicate that last
8 Friday the plaintiffs used 96 minutes, the defense used 204,
9 that leaves a balance for the City of 139, and for the
10 defense 153.

11 I would like to have us put Mr. Licata on, finish up with
12 his testimony so that he can be excused, and then we will
13 move into the other issues concerning whether or not there is
14 rebuttal and what the limitations on rebuttal are.

15 MR. KELLER: Very well.

16 THE COURT: Mr. Licata, please. Mr. Licata, you have
17 previously been sworn, you are still under oath. Take a
18 seat.

19 NICHOLAS LICATA

20 CONTINUED DIRECT EXAMINATION

21 BY MR. KELLER:

22 Q Good morning, sir. I believe where we left off, I guess
23 it was last Friday, I was asking you some questions about
24 I-91. And we were talking about Exhibit 518. And I would
25 like to pull that up on the screen and ask that you take a

1 look at it again with me.

2 A All right.

3 Q Mr. Licata, do you recall that one of the issues that was
4 being publicly debated in connection with I-91 was the extent
5 to which having a professional sports team would or would not
6 have an economic impact on our City?

7 A Yes, that was part of the debate.

8 Q And as part of the statement in favor of initiative 91 did
9 you tell us that you had reviewed that as part of your
10 activities?

11 A I have reviewed it.

12 Q Take a look on the third page of 518. I think it is the
13 third yes on 91 up from the bottom.

14 A All right.

15 Q Next one down. I think the way this thing is structured,
16 help me out if I'm wrong, is you're answering things that
17 opponents might say against I-91?

18 A That's correct.

19 Q So if somebody is saying yes you should vote -- making the
20 argument that a yes on I-91 would help economic development,
21 this is the answer to that?

22 A That's correct.

23 Q And the point that you were trying to make in this piece
24 was that the studies shows that the Sonics have a limited
25 economic impact on Seattle, that most money that is spent on

1 pro sports games is discretionary and would otherwise be
2 spent elsewhere in our region, right?

3 A That's correct.

4 Q And that was your belief then, right?

5 A Yes.

6 Q And that remains your belief to this day?

7 A Yes.

8 Q Do you agree, sir -- as I understand I-91, and I am going
9 to try to paraphrase it, and tell me if I am doing it
10 correctly, it was a notion that if you're going to use public
11 money on a sports facility the government body, the City of
12 Seattle, providing the money has got to get a fair return on
13 any public investment in the sports arena?

14 A That was what I-91 was based on, in consideration of what
15 we had seen both around the country and city after city.

16 Q So the concept was if the City of Seattle is going to use
17 public money on the sports arena it has got to get a fair
18 return for the dollars it puts in, right?

19 A That's what we were asking for.

20 Q As I understand it, a fair return was being defined in the
21 initiative as on a cash-on-cash basis, a return equivalent to
22 what a 30-year treasury bond would yield?

23 A In a rough sense. There was actually a little more detail
24 than that which involved lease arrangements and things of
25 that sort and offsets. That would be a rough interpretation,

1 but there were modifications available.

2 Q I will show you a few of the details in it in a minute.

3 But generally was that the gist of it?

4 A As I said, subject to the other conditions, yes.

5 Q Do you know of a single publicly owned and publicly
6 financed arena in the last ten years here in our state where
7 the government body in fact did earn a 30 year T-bill return
8 on its investment?

9 A Well, the information collected from other -- the two
10 professional sports team buildings that have been built with
11 public subsidies, those books are not available to the public
12 so we don't know.

13 Q My question was, are you aware of a single other arena --

14 A No, I'm not.

15 Q -- in this state in the last ten years that would have met
16 the criteria that was being laid down in I-91 for a return in
17 public investment?

18 A I was not personally aware.

19 Q This ordinance, in terms of defining what would be deemed
20 fair value, that is the return that the public owner and the
21 public -- giving the public money, in terms of defining what
22 would be fair value, didn't I-91 make it crystal clear that
23 no consideration would be given to anything other than a
24 cash-on-cash return?

25 A Are you reading from somewhere on that "crystal clear"?

1 Q Take a look at Exhibit 518 in front of you. And I want
2 you to look at the description of I-91 that is provided by
3 the City Attorney's Office. Do you see there is a section,
4 "City Attorney's explanatory statement"? It starts at the
5 bottom of the first page.

6 A Okay. I see it on the screen.

7 Q We are going to look at a section of this thing that was
8 actually written by the City's law department?

9 A If it says City attorney that would be true.

10 Q Let's look at the next page. Do you see next number 2?

11 A Yes.

12 Q "The effect of the initiative if approved." And go down
13 to the paragraph that starts "according to the initiative."

14 A Yes, I see that paragraph.

15 Q Take a moment to read it to yourself, sir. I will ask you
16 some questions.

17 A All right.

18 Q You see it quite clearly says there "the fair value
19 requirement will be computed as the net cash-on-cash return"?

20 A I do see that.

21 Q And do you see it goes on, "and makes it crystal clear
22 that in computing fair value intangible benefits, such as
23 goodwill, cultural and general economic benefits would not be
24 considered fair value under the ordinance"?

25 A That's true. But in the paragraph -- the sentence above,

1 as I said, the other conditions that would apply would be
2 such things as goods, services and also depreciation. It is
3 not as simple as just cash on cash.

4 Q Am I missing something? Doesn't that last sentence say
5 "the computation of return to the City would specifically
6 exclude all intangible, indirect, non-cash items, such as
7 goodwill, cultural or general economic benefits to the City,
8 as well as unsecured future cash returns"?

9 A Well, that is true.

10 Q Mr. Licata, it is crystal clear, isn't it, as written by
11 the City law department in this initiative, when it comes to
12 computing whether the City is getting fair value for public
13 investment on the I-91, goodwill, cultural and general
14 economic benefits are not to be counted, right?

15 A There is no dollar assigned to those values.

16 Q Thank you. This initiative passed, didn't it, sir?

17 A Yes, it did.

18 Q This became the law of this City, didn't it?

19 A Yes, it did.

20 Q It passed overwhelmingly, didn't it?

21 A Yes, it did.

22 Q What was the percentage?

23 A I do not know, but I think it was over 70 percent.

24 Q So the law in this City, sitting here today, is that when
25 it comes to the investment of public monies in a sports arena

1 intangibles like civic pride, cultural, goodwill are not
2 ascribed any economic value for financing purposes?

3 A And the reason we included that is because in the past,
4 not only in Seattle but other cities, those values are often
5 given inflated economic value. That is the reason we wrote
6 it in the first paragraph, that we would include
7 depreciation, financing costs to make it fair.

8 Q That is helpful information. Now, see if you wouldn't
9 mind answering my question, please. So the law in this City,
10 sitting here now, is that when it comes to the investment of
11 public monies in a sports arena intangibles like civic pride,
12 cultural value and indirect economic benefits are not
13 ascribed any economic value for purposes of a fair return,
14 correct?

15 A That's correct.

16 Q Thank you, sir. I-91 was a pretty powerful statement by
17 the public about its views on spending public monies on
18 professional sports facilities, wasn't it?

19 A I believe it was.

20 Q And you championed it, right?

21 A I did.

22 Q Is it fair to say you were a tenacious opponent of efforts
23 to get a new arena or a remodeled arena built here in Seattle
24 for the Sonics?

25 A Only in the context of excessive public subsidies.

1 Q And when people were talking about \$200 million remodels,
2 that is an excessive public subsidy from your standpoint,
3 right?

4 A That is correct.

5 Q This overwhelming 70 plus percent vote in favor of I-91,
6 is it true that you viewed it as being consistent with the
7 survey results and data that you were keeping tabs on?

8 A It was roughly consistent.

9 Q Could you turn to Exhibit 539?

10 A Is that in the book or should I be looking at the screen?

11 Q Either one. It will not be in the small book that have
12 you, sir. Do you recognize Exhibit 539, sir?

13 A Not directly, but I am familiar with Elway Polls.

14 Q This is actually a poll that you yourself did your best to
15 make sure that it was an unbiased survey, didn't you?

16 A I have used Elway in the past. I try to make sure
17 whenever we use Elway it is unbiased. I actually don't
18 exactly remember this exact poll.

19 Q You don't? I will move on then. Do you recall after
20 Mr. Bennett and his fellow investors acquired the Sonics he
21 came to visit you at your office?

22 A Yes, he did.

23 Q Was that sometime in the second half of 2006?

24 A It may have been. I don't recollect the exact date.

25 Q And he wanted to talk to you about the efforts that he was

1 going to make to try and do a new arena in Renton?

2 A We talked about retaining the Sonics. I am not sure if we
3 talked specifically about Renton or -- actually I think we
4 talked about in general retaining the Sonics for this region.

5 Q Did you talk about the prospects of a new arena?

6 A We did talk about the prospects of both remodeling the
7 KeyArena and a new facility.

8 Q Did you make your views about the use of public monies for
9 those purposes known to Mr. Bennett?

10 A I told him that a reasonable amount of public subsidies
11 would be -- I would personally be in favor of, but something
12 to the tune of what had been proposed in the past I would
13 not.

14 Q By "something that had been proposed in the past" that you
15 would be opposed to, you were talking about what had
16 previously been a two to \$300 million remodel?

17 A That's correct.

18 Q You were aware I think in the 2007 legislative session in
19 Olympia the Sonics were down there trying to get some public
20 funding toward a new arena in Renton, right?

21 A Yes.

22 Q While the Sonics were lobbying Olympia for funding, is
23 that when you appeared to testify before a congressional
24 committee looking into the area of public financing for
25 sports arenas?

1 A It may have been. Again, I am not exactly sure on the
2 dates.

3 Q Take a look at Exhibit 553 and see if that helps refresh
4 your recollection, that while the Sonics were in Olympia you
5 were testifying in Washington, DC on these issues?

6 A Right. I think it would have been towards the end of the
7 session.

8 Q Okay. And do you remember testifying in front of congress
9 about what you perceived to be the benefits of sports
10 facilities and sports teams?

11 A Yes, I did.

12 Q And if you look at Page 2 of your testimony here, about
13 two-thirds of the way down there is a paragraph that you
14 begin, "what are the benefits from these facilities",
15 question mark?

16 THE COURT: Hold on, Mr. Keller. I can't track with
17 you here.

18 MR. KELLER: 553 on Page 2. I will move for the
19 admission of 553.

20 MR. NARVER: No objection.

21 THE COURT: Go ahead, Mr. Keller. 553, you moved for
22 admission. No objection?

23 MR. NARVER: No objection.

24 THE COURT: 553 will be admitted.

25 (Exhibit 553 admitted)

1 MR. KELLER: Thank you, your Honor. I apologize for
2 any confusion.

3 THE COURT: That's okay. I am having a hard time
4 managing books here. Go ahead.

5 BY MR. KELLER:

6 Q Can we pull up that paragraph that begins "what about the
7 benefits for these facilities"? It is on the second page of
8 the exhibit.

9 This is your testimony before congress, right?

10 A That's correct.

11 Q And this is the paragraph talking about "what about the
12 benefits from these facilities", right?

13 A Correct.

14 Q You expressed the view that there was no lasting benefit,
15 right?

16 A I expressed, as you read there, there is meager evidence.

17 Q "While some retail businesses in the area might do more
18 business on a game night that the evidence that it improves
19 urban living or increases retail shopping was", your words,
20 "meager"?

21 A That's correct.

22 Q And then you went on to point out that actually crime
23 increases in the area?

24 A Certain kinds of crime, that's true.

25 Q At the time you testified you were a council member?

1 A Indeed I was.

2 Q Were you president at the time of the council?

3 A I believe I was at that time.

4 Q Let's stay in this spring of 2007 while the Sonics were
5 trying to get state authorized funding from Olympia for
6 Renton. Did you speak with state legislators down in Olympia
7 about your concerns about large public subsidies for sports
8 arenas and that you were against that?

9 A Yes, I did.

10 Q Did you make your views against public subsidies for
11 sports arenas known at the state legislature in Olympia
12 during 2007 while the PBC was down there trying to get a new
13 arena for Renton?

14 A I made my views that excessive public subsidies in sports
15 arenas was contrary to the public interest.

16 Q And were you doing that in the spring of '07 while you
17 knew PBC was there trying to get funding for a Renton arena,
18 correct?

19 A I knew they were down there as well as I believe other
20 City and county officials were down there taking the opposite
21 position that I was.

22 Q You thought there were City officials in the spring of '07
23 that were down in Olympia supporting the Sonics efforts to
24 get an arena in Renton?

25 A I didn't know that.

1 Q You don't know that at all, do you?

2 A That's correct.

3 Q You were just guessing a moment ago?

4 A I was under that impression.

5 Q So did you make your views against public subsidies for
6 sports arenas known in Olympia while PBC was down there
7 trying to get funding for a Renton arena, yes?

8 A Yes.

9 Q Did you encourage Olympia to not make a large public
10 investment in a new arena that was being requested by PBC at
11 that time?

12 A Yes.

13 Q I will go to something else now. Was one of your visions
14 for KeyArena to change its use from being sports and concerts
15 to a different, more culturally diverse venue?

16 A As an option if the Sonics were to leave. The first
17 preference would be to have the Sonics remain in the KeyArena
18 given that KeyArena was a very usable facility.

19 Q You think it is just fine the way it is, right?

20 A I think that with a minimal investment it could remain a
21 facility that was rated I guess in 2004 as the best facility
22 in the NBA.

23 Q Well, back in 2006 you were actively studying is there a
24 future for KeyArena without the Sonics? Yes?

25 A As an option, that's true.

1 Q And as part of that study you drew on consultants that the
2 City hired to help you evaluate that, right?

3 A That's correct.

4 Q And you drew upon people in the community and brought them
5 forward to present to City government their views about
6 options without the Sonics, right?

7 A As a responsible elected official I needed to take a look
8 at all options.

9 Q And you presented as one of the options a building that
10 would both be a better concert venue and a building that
11 would support music, film, technology and possibly even
12 Seattle's burgeoning gaming industry, didn't you?

13 A As one of the alternatives, that's true.

14 Q And you presented testimony and evidence from consultants
15 to the committees in 2006 that were studying the arena to
16 show that that was a viable option and with a relatively
17 modest investment KeyArena could be converted to those uses,
18 right?

19 A In the context that in the worst case scenario if the
20 Sonics were to leave there could be an alternative economic
21 model that would work for the KeyArena.

22 Q You didn't call it a worst case scenario back then when
23 you were in front of the PEL committee, the Parks and --
24 What does PEL stand for?

25 A I'm not sure.

1 Q It is called the PEL committee, right?

2 A Which committee are you referring to?

3 Q Parks and --

4 A Are you talking about the City Council or are you talking
5 about the State?

6 Q The City?

7 A The City. The City committee -- the City Council
8 committees changes their names about every two years so it is
9 not consistent. It is the Parks committee.

10 Q My point is, when you were presenting all these options
11 back in 2006 you were not talking about them as a worst case
12 options, you were putting them forth as potentially viable
13 options for KeyArena without the Sonics, weren't you?

14 A Within the context I had publicly stated a number of times
15 that given my druthers I would prefer the Sonics stay in the
16 KeyArena with modest improvements. If they did not we could
17 present a usable, sustainable economic model based on a
18 description of using other sources, other activities in the
19 KeyArena.

20 Q And you believed that a usable and sustainable model for
21 KeyArena without the Sonics would include this more diverse
22 user group for concerts, music, film, technology and possibly
23 even gaming, right?

24 A That's true.

25 Q And do you remember characterizing those uses, things like

1 music, film, technology and promoting concerts and music as
2 being more reflective of the values of Seattle?

3 A I don't recollect that statement. It may be there.

4 Q Let's look at you -- Let me see if I can help you here.
5 Can we have Exhibit 598 from the March 29th, 2006 PEL
6 committee meeting. This is Mr. Licata. It is the second
7 one.

8 MR. NARVER: Are you offering it?

9 MR. KELLER: I am just going to show it to him to see
10 if it refreshes his recollection as to how he characterized
11 it.

12 (Video played)

13 BY MR. KELLER:

14 Q Does that refresh your memory, sir?

15 A Oh, yeah. Great speech.

16 Q Sounded good to me too. Certainly not somebody with his
17 head down talking about worst case scenarios, is it?

18 A No. Again, the context is important.

19 Q Thank you. That was in March of 2006, right?

20 A If the date says that, that's correct.

21 Q Was this also around the time you were interviewed by
22 Sports Illustrated about your views about the Sonics efforts
23 to use tax revenues to renovate KeyArena?

24 A It could have been. I don't remember the date.

25 Q Do you want --

1 A I am not contesting the date. I just don't remember the
2 exact date.

3 Q Let me help you out here. Take a look at Exhibit 615, and
4 see if that helps refresh your recollection time wise where
5 we are.

6 A Is there something up here on the screen?

7 Q No, it won't, sir. It is the Sports Illustrated.

8 A Given all the publicity I am surprised we are not on the
9 front cover.

10 THE COURT: That might be reserved for me.

11 MR. KELLER: I'm not going to say anything.

12 BY MR. KELLER:

13 Q Does it refresh your memory, sir, that the spring of 2006
14 is the same time you were being interviewed by --

15 A Yes.

16 Q -- Sports Illustrated?

17 A That's true.

18 Q Now, at the time you were interviewed by Sports
19 Illustrated you were pretty active in these issues out here
20 in Washington about financing?

21 A Yes.

22 Q You were very very involved in a task force that was
23 reviewing KeyArena and the whole situation, right?

24 A I presented information before the task force. I wasn't
25 on it, though.

1 Q You were closely following these things, right?

2 A I was.

3 Q You had been involved in opposing the Schultz group's
4 efforts to get financing?

5 A I was opposed, again, to excessive public financing of the
6 arena. Whoever the owners were, I didn't particularly pay
7 attention to the personalities.

8 Q And you testified in front of congress, as we said, right?

9 A I did, not just on the effort in KeyArena but past efforts
10 as well.

11 Q And at the time you were interviewed by Sports Illustrated
12 had you recently been appointed as the president of the
13 King -- excuse me, Seattle City Council?

14 A It would have been the beginning of the two-year term, so
15 that's true.

16 Q And you told the reporter that you were the president of
17 the Seattle City Council?

18 A He asked for my title and I gave it to him.

19 Q Did you tell the reporter from Sports Illustrated during
20 this interview that the Sonics departure on an economic basis
21 would have near zero impact? Is that what you told the
22 reporter?

23 A I told the reporter given that I just read a report that
24 arts and culture had contributed close to a billion dollars
25 in the King County overall economy, and I was thinking to

1 myself at that moment, well, I am not sure it is going to be
2 that big of a plunk. So I used that statement.

3 Q Let's go back to my question. Did you tell the reporter
4 that the Sonics departure on an economic basis would have
5 near zero impact?

6 A Yes, I did.

7 Q Thank you, sir. From the standpoint of culture affairs of
8 our community did you tell the Sports Illustrated reporter
9 that it was your view at the time that the team's departure
10 would have close to zero cultural impact?

11 A As I have stated before, it was a flippant remark made
12 off-the-cuff. And I did make that statement. I don't deny
13 it.

14 Q Mr. Licata, did you tell the reporter in that interview
15 that from the standpoint of the cultural affairs of our
16 community it was your view at the time that the team's
17 departure would have close to zero cultural impact?

18 A Yes, I did.

19 Q Was part of your thought process at the time that even if
20 the Sonics left Seattle would still have two professional
21 sports teams and plenty of cities our size don't have three?

22 A That's correct.

23 Q And when you said at the time that there would be a
24 cultural impact of close to zero, were you also thinking
25 about not only the two other professional sports teams that

1 were here, but also the wide and diverse variety of cultural
2 and civic activities that are available in our community?

3 A Yes.

4 Q And when you said a cultural impact of the team leaving
5 would be near zero, was that comment probably influenced a
6 bit by the polling data that you were aware of and that we
7 looked at earlier showing that the public was against using
8 public monies to renovate KeyArena for the Sonics?

9 A Actually it was more influenced by a study that had just
10 come out by The Arts Fund pointing out the wide variety of
11 cultural and arts activities going on in the region. It was
12 more influenced by that than the polls.

13 Q I understand it was more influenced by the fact that we
14 have a huge amount of cultural activities available to us
15 here, but was it also influenced in part by your awareness of
16 the polling data that we were looking at earlier that talks
17 about how the public was against using public money to
18 renovate sports facilities?

19 A No, I don't think so.

20 Q Would you look at Page 40 of your deposition?

21 MR. KELLER: Did I publish that last Friday? I can't
22 remember.

23 THE COURT: Yes, you did.

24 BY MR. KELLER:

25 Q Can we have 40 Lines 18 through 24, please? Question:

1 "Were you also being informed by the poll results that you
2 had looked at over the years as far as public interest and
3 public interest in using public money to renovate?" Answer:
4 "They probably influenced me but I am not sure that they
5 would be an appropriate tool to measure cultural value."

6 A Yeah.

7 Q That was your answer?

8 A That's correct.

9 Q Now, when you gave the answer -- not the deposition
10 answer, but when you told the Sports Illustrated reporter
11 that in your review the culture impact of the team leaving
12 would be near zero, I think you characterized that as a
13 reflexive response, right?

14 A I think I characterized it as a flippant response.

15 Q But was it reflexive also?

16 A I have gone through a lot of definitions on this one word,
17 reflexive, flippant, non-thinking, whatever.

18 Q Was it reflexive also?

19 A I think that would probably be adequate.

20 Q In your own way, whether it was flippant, reflexive,
21 whatever it was, in your own way you were trying to make the
22 point that Seattle is a world class City when it comes to
23 cultural events and opportunities?

24 A Yes.

25 Q And if the Sonics leave Seattle will still be a world

1 class cultural City?

2 A That's correct.

3 Q And it will still be a world class cultural City for many
4 reasons, even without the Sonics, right?

5 A Yes.

6 MR. KELLER: Thank you, sir.

7 THE COURT: Cross-examination.

8 MR. NARVER: Yes, your Honor.

9 CROSS-EXAMINATION

10 BY MR. NARVER:

11 Q Good morning, Mr. Licata.

12 A Good morning.

13 Q For the record, Greg Narver for the City of Seattle.
14 Mr. Licata, from the testimony you gave both on Friday and
15 this morning, is it fair to say you have some strong opinions
16 on whether or not public funds should be used to pay for
17 sports stadiums?

18 A That's correct.

19 Q If I can characterize it, just to move past it, you are
20 opposed to excessive public subsidies to stadiums?

21 A So I make that clear, I am not opposed to public subsidies
22 point blank, but within the context of return to the public.

23 Q You think there should be a significant contribution from
24 the owner of the team, too?

25 A That's correct.

1 Q You have held that opinion both as an elected official and
2 also as a citizen activist before you were elected?

3 A Yes.

4 Q And your opinion about that hasn't changed over the years;
5 is that right?

6 A No.

7 Q I-91 was about that subject, wasn't it --

8 MR. KELLER: Your Honor, I think we should not be
9 leading this witness.

10 MR. NARVER: Your Honor, this is cross-examination.
11 Counsel has elicited a lot of opinions which he clearly
12 viewed were favorable to his case. I am trying to move
13 through -- When I get to the gist of this it won't be
14 leading. I think we need to establish that Mr. Licata's
15 opinions -- these opinions have not been viewed as favorable
16 to the City. I think some cross-examination just to
17 summarize the opinions that leading is appropriate here.

18 THE COURT: The objection is overruled.

19 MR. NARVER: Thank you.

20 BY MR. NARVER:

21 Q I-91 was about that subject, whether or not there should
22 be public subsidies to stadiums?

23 A Correct.

24 Q And the congressional testimony you were shown, when you
25 testified to congress, that was also about that subject,

1 whether or not there should be public subsidies of stadiums?

2 A That's right.

3 Q You have also expressed opinions about whether or not
4 there would be financial impact on the broader region through
5 the loss of the sports team, too?

6 A That's right.

7 Q You have had those opinions both as a citizen activist and
8 also as an elected official?

9 A Going back a number of years.

10 Q I want to ask you now some questions about a different
11 topic, and that is what has been called the cultural value of
12 the Sonics to Seattle.

13 First I want to go back to the Sports Illustrated article,
14 Mr. Keller asked you about, in early 2006. This was just
15 introduced. Could that page be brought up again that
16 Mr. Licata was being shown? I'm sorry. Maybe it wasn't
17 brought up on the screen. Do you have that in front of you,
18 the Sports Illustrated article?

19 A Yes, I do.

20 THE COURT: Number again, please?

21 MR. NARVER: It was just used. 615.

22 BY MR. NARVER:

23 Q Do you have the page in front of you that has your
24 comments?

25 A You know, they are not highlighted so I have to find them.

1 Q Well, the Sports Illustrated looks to be page -- I believe
2 it is the third page of the exhibit, which I think was
3 Page 110 of this issue of Sports Illustrated.

4 A Yes.

5 Q You have that, sir?

6 A Um-hum.

7 Q Going down about eight lines, there is a sentence that
8 begins, "a vocal opponent of the baseball and football
9 stadium deals, Licata, who does admit that his views are more
10 hard line than those of many of his colleagues --" Do you
11 see that part?

12 A Yes, I do.

13 Q Do you agree with that characterization, your views are
14 more hard line?

15 A Yes, I do.

16 Q Now, Mr. Keller asked you about the part of this interview
17 where you said, on a cultural basis close to zero.

18 MR. NARVER: The City offers Exhibit 532 into
19 evidence.

20 MR. KELLER: No objection, your Honor.

21 THE COURT: 532 will be admitted.

22 (Exhibit 532 admitted)

23 BY MR. KELLER:

24 Q Mr. Licata, I will show you a highlighted portion of
25 Exhibit 532. Do you see that on the screen there?

1 A Yes, I do.

2 Q And the first part of that paragraph says, "you have been
3 saying for months you would like to see the Sonics stay in
4 Seattle"?

5 A That's correct.

6 Q I want to ask you about the second part of this that is
7 highlighted. You say, "there is no doubt that my glib,
8 foolish remarks several months ago --" Were you referring to
9 the Sports Illustrated --

10 A Yes, I was.

11 Q "-- on the relative unimportance of professional
12 basketball in Seattle was smug and wrong. In my clumsy way I
13 was trying to point out that Seattle is a world class
14 cultural City for a variety of reasons, not just because of
15 the Sonics." What is Exhibit 532?

16 A This is a personal e-mail newsletter that I sent out to
17 the citizens in Seattle.

18 Q To express your views on issues?

19 A Yes. At the beginning I think it is designed to provide
20 an opportunity for citizens to understand my votes, what my
21 thinking is behind the votes.

22 Q So glib, foolish, smug, wrong, clumsy, why did you write
23 this in your newsletter?

24 A Well, because I, first of all, believed it. Moments after
25 I had said that quote I realized it wasn't probably accurate.

1 I had let it pass without correcting it. I felt bad about
2 that.

3 Q Had you heard anything from constituents when this quote
4 appeared?

5 A Yes, I did.

6 Q Did you ever hear anything about a reaction at KeyArena to
7 your comments?

8 A Oh, I was told by someone --

9 MR. KELLER: Objection. Hearsay, your Honor.

10 THE COURT: Sustained.

11 BY MR. NARVER:

12 Q You heard from constituents who disagreed?

13 A I heard from constituents. I received e-mails, a number
14 of them, and a fair amount of derision in the newspapers as
15 well from columnists.

16 Q Sitting here today do you believe that the cultural value
17 of the Sonics is close to zero?

18 A No, I don't.

19 Q More than zero?

20 A Well, I don't think you can put a cultural -- I mean, I
21 don't think you can put a scale on cultural appreciation.
22 The fix I got myself in was that, as I pointed out earlier, I
23 had just read a report about cultural economic impact to King
24 County and Seattle on the multitude of opportunities that
25 people have. In this conversation, which apparently was

1 about a 45-minute conversation, one quick statement that I
2 made about the economy he followed up and asked, how about
3 culture. Trying to be amusing I said, oh, close to zero. It
4 literally was an offhanded remark that did not have a basis
5 of anything other than a half fleeting thought.

6 Q I want to ask you some questions about 525 that has
7 already been admitted into evidence. Mr. Keller was asking
8 you about this document on Friday. And I want to direct your
9 attention to the last page of this. And this is a memo that
10 was prepared by Council's central staff; is that right?

11 A Yes.

12 Q The quote here that is highlighted is -- it is under a
13 question posed: "Does this mean it is not worth \$200 million
14 or so to keep the Sonics/Storm in the region?" The response:
15 "It does not mean that." The highlighted portion reads:
16 "There are benefits associated with sports teams that are not
17 easily quantifiable or captured in the economic studies.
18 People get excited about sports and that's worth something.
19 But precisely how much, we can't tell you." Do you agree
20 with that statement?

21 A Yes, I do.

22 Q Do you believe that the benefit that the Council staff is
23 discussing here is similar to what you were talking about as
24 a cultural value -- the cultural value of the team a minute
25 ago?

1 A I'm sorry. Say that again.

2 Q You just gave an answer about the cultural value of the
3 team to the City. Is this benefit that the Council staff --
4 in your mind is that what we are talking about here, that you
5 can't put a dollar figure on it, that there is a value to the
6 City?

7 A Yes.

8 Q I will show you also Exhibit 31 which is already in
9 evidence. This is ordinance 122492. Just to be clear, what
10 is an ordinance?

11 A An ordinance is legislation that gets passed by the
12 council that becomes law.

13 Q How many votes are required to pass?

14 A A majority, five. Five votes.

15 Q This is the Council acting as a legislative body passes
16 this thing?

17 A Yes.

18 Q We are going to look on the second page of Exhibit 31.
19 And I just want you to look at the final portion here that is
20 going to be highlighted. Right there. What was the Council
21 ordaining here?

22 A Well, we were ordaining that the Council would not -- the
23 Council's intent was not to allow the City to amend the
24 contract that we have with, in this instance, the
25 Professional Basketball Club, to use the KeyArena to the

1 effect that it would be -- allow the owners to remove the
2 team before the end of their lease, which would have been
3 September 30th, 2010.

4 Q This is the Council saying we think they ought to stay
5 through the end of the lease?

6 A Yes.

7 Q Is that your signature as the president?

8 A Yes, it is.

9 Q And this was passed on September 10th, 2007?

10 A Yes.

11 Q To your knowledge did anyone on the Council vote against
12 this?

13 A No, not as far as I know. I may have even been one of the
14 sponsors of the legislation.

15 Q Sitting here today is it your opinion that the Sonics
16 should stay at KeyArena through the term of the lease?

17 MR. KELLER: Your Honor, I will object under
18 relevance grounds.

19 MR. NARVER: Your Honor, the PBC has put a lot of
20 Mr. Licata's opinions about the value of the team, whether or
21 not it should be subsidized into evidence. I think he should
22 be able to state clearly as he sits here what his opinion is
23 about the issue here, whether or not they should stay through
24 the term of the lease.

25 THE COURT: And what element of the contract action

1 does his opinion go to?

2 MR. NARVER: Well, PBC has elicited testimony from
3 him which they view as unfavorable obviously to the City's
4 contract action, that the City doesn't care, that its elected
5 officials don't care about this team. He, as president of
6 the City Council, stated a strong opinion about that. I
7 think it is fair for him to be able, in response to the
8 opinions that were elicited about the value of the team, to
9 state what his view is, whether the team ought to stay
10 through the end of the lease.

11 THE COURT: Do you want to answer the question now?
12 What elements of the contract does his opinion goes to?

13 MR. NARVER: It goes to the intangible value of the
14 team, that there is a value to the team contrary to his
15 earlier statement about arena subsidies that were elicited by
16 PBC to try and show the City doesn't care. PBC has made that
17 argument repeatedly, including using Mr. Licata's statements
18 to suggest the City doesn't care about this team. I am just
19 asking what Mr. Licata's view is of whether the team ought to
20 stay through the end of the lease.

21 THE COURT: The objection is overruled. You can
22 answer the question?

23 THE WITNESS: Yes. Could you repeat that question?

24 BY MR. NARVER:

25 Q Yes. Do you believe that the Sonics should stay at

1 KeyArena through the end of the lease term?

2 A Yes, very strongly.

3 Q Why do you hold that opinion?

4 A Because from my experience, both as a citizen activist and
5 as someone who has seen sports teams come and go in other
6 cities, and looking at their track records, I was concerned
7 that when a sports team is purchased before the end of the
8 contract the pattern appeared to be that in many instances
9 the team would be pulled from the City. I did not want to
10 see that happen in Seattle. I felt very strongly that we
11 have a contract. And I would feel the same about any team
12 with the City, that the contract should be completed.

13 Q A deal is a deal, is that your view?

14 MR. KELLER: Your Honor, this is argument.

15 THE COURT: Sustained.

16 MR. NARVER: I withdraw the question. Thank you,
17 sir.

18 MR. KELLER: No further questions, your Honor.

19 THE COURT: Thank you. You may step down. Next
20 witness, please.

21 MR. KELLER: We have no more witnesses. We have a
22 few exhibits we need to offer into evidence. Subject to that
23 we will rest, your Honor. Mr. Taylor will offer those if
24 that's all right.

25 MR. TAYLOR: Your Honor, we would first offer

1 Exhibit 582.

2 THE COURT: You need to tell me what it is and what
3 witness it is connected to.

4 MR. TAYLOR: Exhibit 582 is a press conference
5 conducted by the Mayor and Senator Gorton on March 6th of
6 2008. They were announcing the Ballmer group's offer to
7 contribute \$150 million. It is relevant because at Page 8 --

8 THE COURT: 582 is a press conference?

9 MR. TAYLOR: Yes, by the Mayor and Senator Gordon.

10 THE COURT: Go ahead.

11 MR. TAYLOR: It is offered as a statement of party
12 opponent. It is relevant because at Page 8 Senator Gorton,
13 speaking as lead counsel for the City, says that the City has
14 been working hand in glove with the Ballmer group -- that
15 includes, you remember, Wally Walker -- hand in glove from
16 the very start of the process of the Walker group. We would
17 offer it on that basis.

18 MR. LAWRENCE: There is no objection, your Honor.

19 THE COURT: 582 will be admitted.

20 (Exhibit 582 admitted)

21 MR. TAYLOR: Next, your Honor, is Exhibit 630. That
22 is the retention letter between the City and K&L Gates in
23 this case.

24 MR. LAWRENCE: No objection, your Honor.

25 THE COURT: 630 will be admitted.

1 (Exhibit 630 admitted)

2 MR. TAYLOR: Finally, your Honor, we offer
3 Plaintiff's 42.

4 MR. LAWRENCE: No objection, your Honor.

5 THE COURT: What is Plaintiff's 42?

6 MR. TAYLOR: Plaintiff's 42 is a report to the
7 Seattle City Council by the Seattle Center staff as to the
8 goals of the remodeled KeyArena and the proposed agreement
9 between the Sonics and the City that ultimately became the
10 lease.

11 THE COURT: All right. Counsel, it appears to be a
12 series of numbers so small as to almost be unintelligible.
13 What part of it is it you want me to take note of?

14 MR. TAYLOR: The second page only, your Honor, the
15 goals of the project.

16 THE COURT: The second page is what you are asking
17 for?

18 MR. TAYLOR: Yes.

19 THE COURT: Are you asking for the whole exhibit or
20 just the second page?

21 MR. TAYLOR: We can go with just the cover page and
22 Bates number 1489, the second page.

23 THE COURT: All right. Thank you.

24 (Exhibit 42 admitted)

25 MR. TAYLOR: Thank you.

1 MR. KELLER: Thank you, your Honor. With that PBC
2 rests.

3 THE COURT: The defense has rested. Is there any
4 rebuttal?

5 MR. LAWRENCE: Your Honor, a couple of clean up
6 issues. We had submitted jointly to the Court yesterday a
7 list of trial exhibits that were referred to in the various
8 depositions that have been provided to your Honor for
9 admission without objection. I don't know if we need to put
10 that on the record here. There was a document that was
11 provided to the Court, but I would be happy to read those
12 into the record at this point.

13 THE COURT: Here is the problem, Mr. Lawrence. These
14 are the exhibits that were to be part of the depositions that
15 I read. Are you giving them different numbers now?

16 MR. LAWRENCE: We thought the proper procedure, both
17 parties agreed, that the references should be to the trial
18 exhibit version of those rather than the deposition exhibit.
19 But we can provide a list to the Court, and I think we have,
20 that shows what the relative deposition exhibit was for each
21 of these exhibits.

22 THE COURT: Is there an agreement on this?

23 MR. TAYLOR: Yes, your Honor. We have prepared a
24 stipulated list of exhibits that should come in.

25 THE COURT: All right. We will admit that list.

1 (Stipulated list of exhibits admitted)

2 MR. LAWRENCE: Your Honor, there were additional
3 exhibits that we stipulated to beyond the materials and
4 deposition, particularly Exhibit 54. And I don't know if
5 this is within the stipulation as well.

6 THE COURT: What is 54?

7 MR. LAWRENCE: Exhibit 54 relates to community
8 activities undertaken by the Sonics.

9 THE COURT: And what witness was the testimony
10 elicited from?

11 MR. LAWRENCE: It is generally related to the civic
12 and charitable contributions that Mr. Barth and Mr. Wade
13 testified to. That is agreed.

14 THE COURT: Counsel, I can't put my hands on it. Is
15 this something that you gave Ms. Scollard to pull?

16 MR. LAWRENCE: We did not give it to her today. We
17 gave the list of exhibits to Ms. Scollard yesterday. I don't
18 know if she pulled them or not because they were agreed
19 exhibits, not related to today's testimony.

20 THE COURT: Here it is. Exhibit 54.

21 MR. LAWRENCE: Yes. It is a document relating to the
22 civic and charitable activities of the team.

23 THE COURT: When you say "it is a document related",
24 what is it about that document? It is how many pages? I
25 don't have it here. What is it about that document that you

1 want me to consider? Can somebody give me a copy of it,
2 please? Can somebody hand me a copy, please?

3 MR. TAYLOR: Your Honor, I have one.

4 THE COURT: Counsel, this doesn't say where it comes
5 from, who authored it. What is it you want me to get from
6 this document?

7 MR. LAWRENCE: Simply it is additional evidence of
8 the type of community and charity activities that the Sonics
9 bring to the City.

10 THE COURT: And who wrote it? Who documented it?

11 MR. LAWRENCE: Your Honor, because there was no
12 objection to it -- It is from the Sonics, from PBC. If you
13 look at it, it is from PBC. It was written, we understand,
14 in conjunction with their efforts in Olympia.

15 THE COURT: 54 will be admitted.

16 (Exhibit 54 admitted)

17 MR. LAWRENCE: The next document is category
18 Exhibit 197, which is their responses to our request for
19 admission.

20 THE COURT: It isn't here.

21 THE CLERK: I don't have it either.

22 THE COURT: Can I have a copy, please? All right.
23 Mr. Lawrence, it is the answers to the request for admission.
24 Which admission is it you are asking me to take a look at?

25 MR. LAWRENCE: Your Honor, since you have taken our

1 copy I don't have that handy. We have cited in our proposed
2 Findings about five of those admitted facts that we would ask
3 you to rely on. So they are reflected entirely in our
4 proposed Findings of Fact.

5 THE COURT: Can these also be found in the pretrial
6 order?

7 MR. LAWRENCE: Some of them are in the pretrial
8 order, yes, your Honor.

9 THE COURT: Mr. Taylor, any objection to 197?

10 MR. TAYLOR: No objection.

11 THE COURT: 197 is admitted. What else,
12 Mr. Lawrence?

13 (Exhibit 197 admitted)

14 MR. LAWRENCE: Exhibit 343.

15 THE COURT: All right. Any objection to 343.

16 MR. TAYLOR: No, your Honor.

17 THE COURT: 343 will be admitted.

18 (Exhibit 343 admitted)

19 MR. LAWRENCE: I think there were two defense
20 exhibits they offered as part of this stipulation, which I
21 guess they can speak to, 568 and 569.

22 THE COURT: Mr. Taylor, what is this?

23 MR. TAYLOR: Your Honor, Exhibit 568 is an agreement
24 that was entered into between the PBC, the City of Seattle
25 and the NBA relating to a meeting that occurred in

1 New York City last fall. The parties agreed in that
2 agreement that neither the fact of the meeting, nor the
3 contents of the meeting would be disclosed to anybody under
4 any circumstances. The agreement was signed by the City and
5 in particular by the City's lead counsel, Mr. Slade Gorton.

6 The two exhibits are interrelated. If we look to
7 Exhibit 569 we see that Senator Gorton within 24 hours of
8 signing an agreement pledging to the NBA and the PBC that he
9 would not disclose the contents of the meeting, 24 hours
10 later he wrote a lengthy e-mail to Wally Walker and the
11 Ballmer group detailing everything that happened at the
12 meeting.

13 THE COURT: Any objection?

14 MR. LAWRENCE: There is no objection to either
15 exhibit, your Honor.

16 THE COURT: 568 and 569 will be admitted.

17 (Exhibits 568 and 569 admitted)

18 THE COURT: Anything else, Mr. Taylor?

19 MR. TAYLOR: No, your Honor.

20 MR. LAWRENCE: Mr. Taylor was going to offer 583. Is
21 that now withdrawn or has that already been discussed?

22 MR. TAYLOR: Your Honor, we don't need to offer 583
23 at this point.

24 MR. LAWRENCE: The one other exhibit that was the
25 subject of the filing to the Court that we offered that was

1 objected to is Exhibit 355.

2 THE COURT: Exhibit 355?

3 MR. LAWRENCE: 355, yes, your Honor.

4 THE COURT: What is it?

5 MR. LAWRENCE: It is an e-mail from Mr. Walker to
6 Mr. Ballmer dated March 9th -- sorry, March 7th, 2008, in
7 which Mr. Walker is indicating the results of a discussion he
8 had with Joel Litvin of the NBA, that talks about the
9 willingness to work -- in which Mr. Litvin asked Mr. Walker
10 whether people here, being Seattle, expected the NBA to force
11 Mr. Bennett to sell the team. And Mr. Walker indicated, I
12 said that I had not heard that but that Seattle has to come
13 up with a competitive arena solution first and then deal with
14 the rest of the equation next.

15 MR. TAYLOR: Your Honor, it is double hearsay. First
16 of all, it is Wally Walker talking to Mr. Ballmer.
17 Mr. Walker is reporting to Mr. Ballmer what he said to
18 Mr. Litvin. None of those people are parties to this action.
19 It is hearsay.

20 MR. LAWRENCE: Your Honor, we are offering it under
21 two bases if would you like a response after you have had a
22 chance to review.

23 THE COURT: Something has been blocked out on the
24 copy have.

25 MR. LAWRENCE: That is an e-mail address which the

1 people asked to keep confidential.

2 THE COURT: All right. Your response.

3 MR. LAWRENCE: Twofold. First of all, now having
4 more closely read the hearsay rules, under 801(d)(1),
5 defining what statement is not hearsay, subsection (b) allows
6 the admission of a statement consistent with the declarant's
7 testimony offered to rebut an expressed or replied charge
8 against the declarant of fabrication or improper influence or
9 motive.

10 Certainly PBC has presented the case that Mr. Walker was
11 acting to force the team to sell -- force Mr. Bennett to sell
12 the team rather than acting consistent with his testimony on
13 our examination to simply try to find an NBA approved arena
14 in Seattle. This was a consistent statement with what
15 Mr. Walker testified on cross, and rebuts the suggestion by
16 PBC of fabrication or improper influence or motive.

17 Secondly, it is offered to show Mr. Walker's state of mind
18 at the time rather than the truth of his statement to
19 Mr. Litvin.

20 THE COURT: Mr. Taylor, you have been at some point
21 trying to argue to me that Mr. Walker is an agent of the
22 City. Why doesn't it come in as an admission of a party
23 opponent? I'm sorry. Because they are not the agent. Got
24 it. Okay.

25 MR. TAYLOR: It doesn't qualify under 801(d)(2).

1 801(d)(1), I'm not sure Mr. Lawrence read the rule close
2 enough. 801(d)(1) allows a document to be in to rebut a
3 recent allegation of a fabrication. There has been no
4 allegation that Mr. Walker lied in his testimony. In fact,
5 he truthfully disclosed his role in preparation of the power
6 point and how he attended the meeting. So there has been no
7 allegation of fabrication.

8 The latter clause there under (b), improper influence or
9 motive, that refers to the notion that maybe somebody got to
10 a witness, and this is an attempt to show, no, that didn't
11 happen. So, for example, if we claimed somebody had bribed
12 Mr. Walker then this might come in to say, no, he didn't --
13 he wasn't the subject of a bribe. But it is not designed for
14 this kind of document.

15 THE COURT: The document won't be admitted under
16 Rule 801(d)(1). The declarant, Mr. Walker, has testified at
17 trial and he was subject to cross-examination concerning his
18 statement. And it doesn't fit, A, because it wasn't given
19 under oath. B, there isn't an allegation that he was
20 untruthful in his testimony. And so the document is hearsay.

21 MR. LAWRENCE: The only other clean up we have is the
22 depositions that were submitted to you. I think we formally
23 need to publish those. The ones that the plaintiffs
24 submitted were from Mr. James Couch, Mr. Brent Gooden,
25 Mr. Joel Litvin, Mr. Aubrey McClendon and Mr. Roy Williams,

1 so we would formally move to publish those depositions.

2 MR. TAYLOR: No objection, your Honor.

3 THE COURT: Those are the depositions the Court
4 indicated on the record previously that I have read your
5 designations?

6 MR. LAWRENCE: Yes, your Honor. I think that's all
7 the clean up we would have. And we would offer, as your
8 Honor knows, Mr. Ceis as a rebuttal witness at this point.

9 THE COURT: First, Mr. Lawrence, your offer of proof
10 as to what Mr. Ceis would be called to testify to.

11 MR. LAWRENCE: A couple of items, your Honor. First
12 of all, he would be offered to testify about the engagement
13 letter, which was just admitted at the defendant's request,
14 to explain the scope of the engagement of K&L Gates by the
15 City, and also the disclosure by K&L Gates of the prior and
16 ongoing work by Senator Gorton and Gerry Johnson to find
17 prospective owners for the Sonics, which was outside the
18 engagement of the City. So he will talk to the letter which
19 your Honor just admitted.

20 Second, he was asked -- These are all subjects that we
21 were talking about that he was asked about at his deposition.
22 He will be asked whether or not he saw or approved in any
23 form the power point presentation which PBC has offered,
24 whether that was something he saw either in final or draft
25 form, and whether that was something he knew about and

1 authorized. It was asked about and answered fully at
2 Mr. Ceis's deposition.

3 He will also testify about essentially what the City did
4 in response to Mr. Bennett's July 19th telephone conference
5 with the mayor of Seattle, which there has been testimony
6 about. And the call to action, which is a document that has
7 been admitted in this case previously, whereby the mayor in
8 response to Mr. Bennett's determination not to talk about the
9 City about a renovated KeyArena, and calling on action, what
10 the City did in response which would essentially relate to
11 the instruction to have staff meet with Wally Walker on
12 July 24th, which Mr. Walker testified about, and what the
13 instructions to staff were, and the continuing efforts
14 thereafter by the City to work on a renovated KeyArena
15 solution for Seattle with Mr. Walker, with the NBA, including
16 meetings with the NBA that PBC attended, and continuing on
17 until the time that the City became aware of Mr. Griffin's
18 representation of a prospective ownership group, and when he
19 learned of the Griffin group in the first instance.

20 And then finally he would testify -- There has been
21 testimony brought out about the fact that he commented on
22 the, quote, dysfunctional nature of the relationship between
23 the Sonics and the mayor's office. And he would testify his
24 explanation as to that statement.

25 None of these are matters that were either asked about and

1 answered at his deposition, or were not asked about and were
2 not subject to any issue of attorney-client privilege.

3 I would also add, with respect to the claims in the motion
4 to exclude, that the record is clear that after the break in
5 his deposition Mr. Taylor was allowed to ask anything that he
6 wanted with respect to Mr. Walker, etcetera, about the
7 efforts with the prospective ownership group.

8 THE COURT: Mr. Lawrence, nobody has given me the
9 page. I am assuming therefore it does not exist. And I
10 understand from Mr. Narver's statement that there was nothing
11 on the record about withdrawing privilege.

12 MR. LAWRENCE: What Mr. Narver's declaration
13 indicates, as the record in the deposition indicates, there
14 was an agreement to have a discussion at the break about this
15 issue. There was a discussion at the break about the issue
16 in which what Mr. Narver said was communicated and agreed to
17 by Mr. Taylor. Mr. Taylor then came back immediately after
18 the break and asked questions on the subjects related to
19 Mr. Walker, reflecting the fact that the City was not going
20 to assert any privilege with respect to discussions with
21 Mr. Walker, Mr. McGavick, etcetera.

22 I understand that Mr. Narver did not put that formally on
23 the record, but it has not been disputed that he made that
24 statement to Mr. Taylor, nor that Mr. Taylor was able to ask
25 questions about that subject for the remaining several hours

1 of the deposition without any assertion of privilege by the
2 City.

3 THE COURT: Well, Mr. Lawrence, it is disputed.
4 Mr. Taylor filed an affidavit basically saying that no such
5 discussion exists. If I am looking at one lawyer that says
6 there is a discussion, the other lawyer says there isn't one,
7 there is nothing in the record. What does the Court look to
8 as objective evidence as to whether or not there was a
9 waiver.

10 MR. LAWRENCE: I would suggest, your Honor, that
11 Mr. Taylor did not deny what Mr. Narver stated in his
12 declaration. The point of dispute from Mr. Taylor in his
13 argument in his reply was that the City did not waive
14 privilege with respect to its discussion with counsel related
15 to this litigation. That is the only statement that
16 Mr. Taylor made in his declaration. And that is actually
17 consistent with the discussion that Mr. Narver talked about,
18 because there was not a waiver with respect to this
19 litigation and the engagement by K&L Gates with respect to
20 that litigation. I assure you that Mr. Taylor can confirm
21 that that's what he was talking about, not that it was not a
22 withdrawal of the assertion of privilege with respect to the
23 discussions with Mr. Walker, et al.

24 Again, if you look at the actual transcript, as we have
25 pointed out, there were no questions in which Tim Ceis was

1 instructed not to answer that relate to any of the subjects
2 that we are asking -- we would purport to ask him about. So
3 I actually don't think that there is disagreement of counsel.
4 All that Mr. Taylor stated in his declaration was there
5 wasn't a waiver of privilege on every issue, which Mr. Narver
6 did not purport to state in his declaration.

7 I think Mr. Taylor could clarify this. I don't believe he
8 is disputing what Mr. Narver said. What he is saying in his
9 declaration, and in their reply, is that there wasn't a
10 complete waiver with respect to this litigation, which we
11 agree with.

12 THE COURT: All right. Mr. Taylor.

13 MR. TAYLOR: Thank you, your Honor. There are
14 apparently four subjects for rebuttal, the engagement letter
15 and what K&L Gates knew and what it told the City. Second,
16 the power point. Third, the July 19th meeting. Fourth,
17 dysfunctional motive.

18 Rebuttal is designed to address new matters not previously
19 anticipated by these plaintiffs that were first raised in the
20 defendant's case-in-chief. All of these matters were
21 addressed in opening statement by the defense. We addressed
22 the power point. We addressed clean hands, the dysfunctional
23 nature -- the comment by Mr. Ceis as to dysfunctionality is
24 in the deposition excerpts that we submitted at the beginning
25 of the case. The July 19th meeting has been discussed

1 extensively by both sides throughout the case.

2 So, number one, it is not proper rebuttal. Number two, we
3 have to address the issues of probative value.

4 What is really happening here, your Honor, is that on the
5 last day of trial the City is waiving the attorney-client
6 privilege. They are going to have Mr. Ceis come up and
7 testify about discussions he apparently had with Slade Gorton
8 and Gerry Johnson about things they were doing, what they
9 were going to supposedly be doing when they were wearing the
10 City hat, what they were doing we will call it the Griffin
11 hat. That necessarily raises issues about the
12 attorney-client privilege.

13 Had we been advised of this waiver in a timely fashion we
14 would have deposed Senator Gorton and Mr. Johnson. And it is
15 entirely possible that what they have to say about these
16 discussions is different than Mr. Ceis. But because they
17 delayed the privilege waiver we have not had the opportunity
18 to use the discovery that we are entitled to on this issue.

19 Next, your Honor, there is a question of probative value.
20 And this goes in particular to the question of Mr. Ceis'
21 knowledge of the power point and what he was told by Senator
22 Gorton or Mr. Johnson or perhaps the litigation team about
23 the power point.

24 What Mr. Ceis knows or doesn't know or was told or was not
25 told really proves nothing. Mr. Ceis is not the only person

1 who works for the City. There is the mayor, the mayor's
2 staff, Mr. Ceis' counterpart Mr. Nakatsu, and then City
3 Attorney Tom Carr.

4 The fact that Mr. Ceis wants to come in and say, I didn't
5 know anything about it proves nothing, because we know that
6 Senator Gorton was dealing with the mayor, the City attorney.
7 The fact that if -- as Mr. Ceis says, he was not told of it
8 by Senator Gorton does not tell us what Senator Gorton
9 disclosed to the mayor or to the City attorney. So it is not
10 probative.

11 And, again, as to this issue we have been denied basic
12 discovery. Had we known that this was the testimony, and had
13 they given us notice of an election of privilege waiver, as
14 they are required to do, then we could have deposed these
15 people on this issue. We haven't had a chance to. Instead
16 we get only testimony that we can't explore or use the
17 typical discovery tools for.

18 THE COURT: Mr. Taylor in the deposition of Mr. Ceis
19 you asked the City to provide you with their designations of
20 waiver.

21 MR. TAYLOR: Yes.

22 THE COURT: Did that ever happen, whether on the
23 record or off the record?

24 MR. TAYLOR: No waiver was ever communicated to us.

25 THE COURT: You went on in the deposition and asked

1 several questions about various meetings in the fall of 2007.

2 MR. TAYLOR: That is true.

3 THE COURT: Was there something that you were told
4 that changed your tactic that you went into those issues?

5 MR. TAYLOR: No, your Honor. I simply tried to see
6 what I could get. We had been struggling, and it is apparent
7 in the deposition, for sometime to figure out what lines they
8 were drawing. I asked repeatedly. I asked on the record.
9 Mr. Narver said he did not know because he did not know the
10 relationship between K&L Gates and the Griffin group. No
11 waiver was communicated. We asked, give us the boundaries of
12 what we can go into and what we can't.

13 As a practical matter, your Honor, think of the
14 circumstances. If I, as a trial lawyer, am told by my
15 opponent that they are waiving privilege, the very first
16 thing I am going to do is subpoena the law firm for all of
17 its records, and I am going to go back to the City for
18 everything that has been withheld as privileged. We didn't
19 do that because no waiver was ever communicated to us.

20 Throughout this case we have been unable to understand
21 what lines have been drawn. Sometimes the witnesses are
22 allowed to answer questions about these meetings, at other
23 times they are not allowed to answer questions about these
24 meetings. That has been their decision. We don't know why.
25 We don't know how they made that decision. But they never

1 communicated to us a waiver of the privilege.

2 Had they done so, as I indicate, we would have immediately
3 subpoenaed all of the records so that we wouldn't be in this
4 situation today.

5 THE COURT: For the first hour of the deposition
6 Mr. Narver was making objections and blocking the witness'
7 answers under privilege.

8 MR. TAYLOR: Yes.

9 THE COURT: After the break did you ever go back and
10 ask questions about those same topics?

11 MR. TAYLOR: Some of those topics were addressed
12 again, yes, your Honor. Why he decided to allow them to
13 answer and why he didn't none of us at the deposition could
14 figure out what was happening or why in the world it was
15 happening. We didn't know. We don't know today what their
16 position has been on privilege, other than we do know now on
17 the last day of trial they are waiving it. It is too late to
18 make such an election.

19 THE COURT: All right. Let's go through this. Have
20 you finished what it is you wanted to argue to me?

21 MR. TAYLOR: Yes, your Honor.

22 THE COURT: Let's go through the four topics that
23 have been outlined. Is there any problem with the engagement
24 letter? The engagement letter was entered into on September
25 the 21st prior to the poison well power point.

1 MR. TAYLOR: Actually the power point was -- Yes, it
2 was finalized after the engagement letter. That's correct.

3 THE COURT: So are you objecting to Mr. Ceis
4 basically getting on the stand and saying this is our
5 engagement letter, given that the power point wasn't made
6 until afterwards?

7 MR. TAYLOR: We are objecting to any testimony from
8 him about what he was told about what K&L Gates was doing.
9 It is hearsay. It is a waiver of the privilege. We haven't
10 had an opportunity to depose Mr. Gorton and Mr. Johnson. It
11 is also, of course, hearsay, and it is being offered for the
12 truth.

13 THE COURT: What if the issue is he wasn't told? In
14 other words, the lack of a statement versus a statement?

15 MR. TAYLOR: It is still a waiver, your Honor,
16 because it goes into a communication between a lawyer and a
17 client. Did the lawyer tell you this? No. You can't get to
18 the answer without waiving the privilege. And it raises the
19 same issue. Mr. Ceis is going to say, well, Mr. Gorton
20 didn't tell me X. Had an election been timely made we would
21 have deposed Mr. Gorton to get his version of that same
22 conversation. We have been deprived of that opportunity.

23 THE COURT: All right. Thank you. Mr. Lawrence.
24 Aren't you in the position of attempting to argue that
25 Mr. Gorton exceeded the scope of his engagement and didn't

1 tell the City what it is that he was doing with the Griffin
2 matter, or you didn't tell the City what the Griffin --

3 MR. LAWRENCE: I didn't tell the City anything with
4 respect to that personally in terms of K&L Gates. What our
5 position has been -- the City's position has been
6 consistently, despite what Mr. Taylor has stated, is that
7 K&L Gates was retained with respect to this litigation. And
8 all the work that we did with respect to this litigation we
9 have consistently asserted privilege on.

10 We have also taken the position that Mr. Johnson and
11 Senator Gorton prior to the engagement were engaged in a
12 process, which we have heard something about from Mr. Walker,
13 to discuss a Bellevue plan, to discuss new prospective
14 ownership of the Sonics in Seattle --

15 THE COURT: And the engagement letter doesn't include
16 the Bellevue arena, it merely speaks about the Seattle area.

17 MR. LAWRENCE: The engagement letter does two things.
18 I am reading from an admitted exhibit so I think that is
19 fair. It, first of all, sets forth the scope of the
20 engagement very clearly, which as we understand it we have
21 been retained to provide legal services in connection with
22 the enforcement of the lease between the City and the Sonics
23 on the KeyArena matter. That is the scope of the
24 arrangement -- sorry, that is the scope of the engagement
25 that is clearly set forth.

1 The letter goes on, City policy is that KeyArena lease
2 should be respected and specifically performed through its
3 current term, and the City will oppose, in litigation if
4 necessary, any efforts by the Sonics to continue playing
5 professional basketball at KeyArena before the expiration of
6 the lease. We will support, "we" being K&L Gates, the law
7 department working under your direction as well as at the
8 direction of Mr. Narver in efforts to enforce the City lease.

9 THE COURT: All right. That is in evidence.

10 MR. LAWRENCE: In addition to that it goes on to say
11 that, "we have disclosed to you that both Mr. Gorton and
12 Mr. Johnson also are engaged in other efforts to retain
13 professional basketball in the Seattle area."

14 Reading from Page 2, the top paragraph. "These efforts
15 are consistent with retaining the Sonics as KeyArena tenants
16 through the expiration of the City's KeyArena lease, and in
17 fact could lead to short and/or long-term extensions of the
18 Sonics use of the facility."

19 Now, admittedly when we offered Mr. Ceis the defendants
20 had not yet offered this as an exhibit. That occurred this
21 morning. We did not know they were going to offer this until
22 this morning. And the testimony we are going to elicit is
23 indeed testimony consistent with this exhibit. But when we
24 offered Mr. Ceis up, this had not been offered --

25 THE COURT: Now the exhibit is in. What do you need

1 Mr. Ceis to testify to?

2 MR. TAYLOR: The main points I think, because the
3 engagement letter is in, and I think it speaks very clearly
4 as to what went on, and I think Mr. Ceis could confirm that,
5 but most importantly we would speak to the questions of the
6 power point and the alleged Machiavellian plan, which as your
7 Honor knows from reading the depositions Mr. Taylor fully
8 asked several questions to Mr. Ceis about whether or not he
9 saw the power point or reviewed any drafts of it --

10 THE COURT: What difference does it make whether he
11 saw it or not?

12 MR. LAWRENCE: Well, I don't think their unclean
13 hands defense stands up. Their unclean hands defense was
14 that the City and the prospective ownership group were
15 engaged in an inappropriate effort to use this litigation.
16 And Mr. Ceis can confirm that was not the case, that he never
17 saw or approved any of the language in the power point that
18 Mr. McGavick and Senator Gorton and Gerry Johnson worked on.

19 THE COURT: You realize, don't you, that you are
20 basically arguing that your law firm did this outside the
21 scope of the engagement and on their own without permission
22 of the City?

23 MR. LAWRENCE: Our position is that the carve out in
24 the engagement letter for the work that Mr. Johnson and
25 Mr. Gorton were doing is encompassed -- that encompasses the

1 work they were doing on the power point.

2 We also did provide a month ago to the defendants all the
3 e-mails. We showed them for review, and offered recently to
4 provide -- we provided them to them last night, though they
5 never asked for them, the e-mails that were done in
6 conjunction with that meeting on the power point with respect
7 to Mr. Johnson and Senator Gorton.

8 The point is that there is a consistency between the carve
9 out and the engagement letter that says this was ongoing work
10 at the time you retained us, you agree that we can continue
11 to do that work and it doesn't conflict with what you are
12 engaging us to do, which is limited to the litigation.

13 THE COURT: But the power point and the outside
14 owners hadn't been identified yet when you signed the
15 engagement letter in September. So how can it be included in
16 the scope if it didn't exist?

17 MR. LAWRENCE: I guess I am not quite sure I follow
18 the gist of your question. As Mr. Walker testified there
19 were discussions involving a Bellevue plan with Mr. Ballmer
20 and Mr. McGavick. And then when the Bellevue plan fell by
21 the wayside there were continuing efforts to talk to
22 Mr. Ballmer which culminated in the October 7th meeting
23 which, again, there has been testimony about. Obviously that
24 October 7th meeting couldn't have been identified in advance,
25 but it was --

1 THE COURT: You are saying that Mr. Gorton's
2 activities and Mr. Walker's activities with the Ballmer group
3 were inside the scope of the engagement letter?

4 MR. LAWRENCE: No. They were inside the scope of the
5 carve out that was provided to the City.

6 THE COURT: And so that was all carved out and you
7 didn't have any obligation to tell your client what you were
8 doing?

9 MR. LAWRENCE: Senator Gorton and Gerry Johnson did
10 not tell the client that -- did not tell the City of Seattle
11 that they were meeting with Mr. Ballmer presenting with the
12 power point. That's what happened.

13 THE COURT: And they also didn't tell the City that
14 although the City signed a confidentiality agreement with the
15 NBA not to discuss their meeting in New York, Mr. Gorton
16 immediately came back and told Mr. Griffin about it?

17 MR. LAWRENCE: That's correct. Senator Gorton did
18 not ask the City for permission and, as you see, were not
19 copied what he sent to Mr. Griffin.

20 THE COURT: Well, don't you suppose that is something
21 if there was a waiver of attorney-client privilege that the
22 defense would have wanted to explore rather than having this
23 document produced to them on the last day of trial?

24 MR. LAWRENCE: That document was not produced to them
25 on the last day of trial.

1 THE COURT: Well, it was admitted on the last day of
2 trial.

3 MR. LAWRENCE: Right. They have had that document
4 for a while from third-party production of Mr. Stanton and
5 Mr. Walker. And they specifically asked us to provide to
6 them any communications with the City where Mr. Walker and --
7 I'm sorry, Mr. Johnson and Senator Gorton were acting outside
8 the engagement for litigation, which we searched and found
9 there were no communications with the City. So we are not
10 holding back on privilege things -- communication with the
11 City in which Mr. Johnson and Senator Gorton did with respect
12 to the prospective ownership issue.

13 THE COURT: Let me see if I understand correctly.
14 You think it is okay for Mr. Gorton to go with the City to
15 meet with the NBA, sign an agreement saying that meeting was
16 confidential, and then the next day turn around and give it
17 to another client?

18 MR. LAWRENCE: I am not going to make an ethical
19 judgment one way or another about Senator Gorton's actions.
20 The question is whether or not --

21 THE COURT: I didn't ask you whether it was ethical.
22 You are trying to say it is okay in the context of this
23 litigation. In other words, the defense wants to know what
24 the City has done. Mr. Gorton is their lawyer.

25 MR. LAWRENCE: I understand that.

1 THE COURT: So you are trying to shield Mr. Gorton's
2 activities on the one hand, but at the same time offering up
3 statements by Mr. Ceis that he didn't know what Mr. Gorton
4 was doing.

5 MR. LAWRENCE: I don't believe it is accurate to say
6 that we are trying to shield Senator Gorton's activities with
7 respect to, for example, disclosing the materials that he did
8 about the NBA -- I'm sorry, disclosing the results of the NBA
9 meeting to Mr. -- I'm sorry, I don't know if it went to
10 Griffin. I can't remember who he sent the e-mail to. But
11 that was never the subject of an attorney -- that is not an
12 attorney-client document because he was not acting as an
13 attorney on behalf of the City when he did that. And we have
14 never asserted any privilege with respect to communications
15 between Senator Gorton and the Ballmer group or Mr. Griffin
16 or Mr. McGavick, etcetera. All of that is not privileged.
17 We don't assert a privilege with respect to those
18 communications. We never have.

19 THE COURT: So are you going to put Mr. Ceis on to
20 testify that he is the only one who had the decision making
21 power, in other words, he was the client? Because the
22 engagement letter goes to Mr. Carr.

23 MR. LAWRENCE: The mayor's office was the client.
24 And the mayor has testified already that he was not part of
25 any plan to lead Mr. Bennett or force a sale of the team.

1 Mr. Ceis, who is the deputy mayor, the other spokesperson for
2 the mayor's office, has been more actively involved in
3 directing the litigation. He will also basically confirm the
4 testimony that the City -- the mayor's office, who is our
5 client, did not see that power point in any form at any point
6 before it was provided to Mr. McGavick. In fact, he
7 testified he did not see it. He had not seen it at all until
8 the day of his deposition.

9 THE COURT: Okay. So the purpose of putting Mr. Ceis
10 on is to separate him from counsel, saying Mr. Gorton,
11 Mr. Johnson and the City's consultant for this litigation,
12 Mr. Walker, were off on their own doing their own thing?

13 MR. LAWRENCE: As is consistent with the engagement
14 letter, yes.

15 THE COURT: All right. Mr. Taylor, do you have
16 anything else you want to say?

17 MR. TAYLOR: It would be fundamentally unfair and
18 prejudicial to the PBC to allow Mr. Ceis to testify when we
19 have not been given the opportunity to depose Senator Gorton,
20 Mr. Johnson and others at the K&L Gates law firm about all of
21 the communications with their client, the City, including
22 communications about the power point.

23 MR. LAWRENCE: Your Honor, one other point I forgot
24 to mention. We disclosed in the pretrial order that if
25 Mr. Ceis was identified as a witness for PBC -- we disclosed

1 in the trial order if they were not going to call him live
2 that we would reserve the right to recall him as a rebuttal
3 witness. Both parties went through the process also of
4 designating deposition testimony from him, which I guess if
5 had been offered would have addressed all these issues
6 because all these issues were designated. But they
7 determined not to call him live or offer his deposition
8 testimony. So consistent with our reservation in the
9 pretrial order to recall him as a rebuttal witness, that's
10 what we are doing.

11 In that sense I wanted your Honor to know that we had
12 reserved the right if they didn't intend to call Mr. Ceis,
13 although he was originally identified as a witness for PBC,
14 that we did intend to call him for rebuttal. I should say we
15 reserved that right, your Honor.

16 THE COURT: Mr. Taylor, do you acknowledge that
17 Mr. Ceis in his deposition indicated he never saw the power
18 point before?

19 MR. TAYLOR: Yes, that is in his deposition
20 testimony.

21 THE COURT: And that is not of contention?

22 MR. TAYLOR: No. Well, for argument purposes it is,
23 your Honor. There is some inferences that can be drawn from
24 some events, but that will come up in closing argument.
25 There are competing facts that suggest perhaps he did see it.

1 For example, he is named. Mr. Ceis, once again, went to the
2 NBA meeting. The power point details the fact that Mr. Ceis
3 and Senator Gorton are going to the NBA meeting the following
4 week. So somebody knew about Mr. Ceis in connection with the
5 power point. If Mr. Ceis says he doesn't know, that is his
6 testimony. There are competing inferences that can be drawn
7 from other documents.

8 THE COURT: All right. Let's talk about some
9 fundamental principles that are at play when we do discovery.
10 One of those principles is that each side has an opportunity
11 to explore and gather facts and circumstances and statements
12 that would assist in the presentation of their case.

13 One of the exceptions that we allow to that exploration is
14 the attorney-client privilege and that when the privilege is
15 asserted. And we value the confidences of the lawyers with
16 their client to keep those secret, and the privilege belongs
17 to the client to assert. That blocks the other side from
18 getting behind those advices and the scope of the engagement
19 and the activities that the client has asked for, that the
20 client has approved, that the client shares with others at
21 the behest of their lawyers.

22 We started the deposition with Mr. Ceis and Mr. Narver was
23 objecting to a very large number of questions posed by
24 Mr. Taylor indicating that he was asserting the privilege.
25 There is a break in the testimony. I don't have any

1 knowledge of what was said during that break. The bottom
2 line is that the record, which all lawyers know is what we
3 use -- The court reporter is sitting there for the purpose
4 of recording what the agreements are between the parties.
5 There is nothing in this record about the City waiving the
6 attorney-client privilege. There is no writing that has been
7 offered up when Mr. Taylor on the record asks for the City to
8 outline what their attorney-client privilege is.

9 Mr. Taylor does go on to ask many questions. He asks
10 questions about meetings and conduct, mostly about meetings
11 that the privilege could not surround anyway because there
12 were other people at the meetings. And once you have someone
13 else at the meeting it breaks the privilege.

14 I wonder whether Mr. Walker's cloaking with his letter
15 nunc pro tunc can shield any meeting that Mr. Walker was at.
16 The case law is debatable as to whether that type of an
17 expert comes within the privilege or outside the privilege.

18 You cannot use the privilege as a shield and then turn
19 around and use it as a sword. You have to decide early on
20 whether you are going to keep matters privileged or whether
21 you are going to offer them up.

22 In this instance the City never designated the scope of
23 the privilege that they wished to waive or to decline. There
24 is nothing on paper, there is nothing on the record.

25 I therefore find it would be fundamentally unfair to allow

1 the City at this point to offer up testimony that the defense
2 didn't have an opportunity to explore, didn't have an
3 opportunity to depose Mr. Gorton, Mr. Johnson concerning
4 these statements, to ask Mr. Gorton about his dual
5 representation and the confidences that he may have been
6 passing from one group to the other.

7 Now, we already have in the record the engagement letter.
8 We already have in the record the fact that Mr. Ceis says
9 that he did not see these documents. So that's part of the
10 record already.

11 MR. LAWRENCE: That notion, the fact that Mr. Ceis
12 testified that he did not see the power point in any form,
13 that is something that comes in as a stipulation, your Honor?

14 THE COURT: Well, Mr. Taylor basically says that he
15 answered that question in the deposition. He is not
16 contesting that information be put before the Court now. It
17 is one of the things I read in your memorandums. I asked him
18 if he was willing to accept the fact that Mr. Ceis said he
19 hadn't seen the poison well Power Point.

20 MR. LAWRENCE: Again, so the record is clear, if that
21 is a stipulated fact that is accepted then Mr. Ceis doesn't
22 have to testify about that. And that's fine with us.

23 THE COURT: Okay. That's what I am trying to tell
24 you, is that those two facts, the engagement letter and the
25 fact that Mr. Ceis says he didn't see the Power Point that

1 was presented to him at the deposition, those are facts.

2 As to the other issues, I think they clearly implicate the
3 attorney-client privilege. The City didn't waive it before
4 and didn't give clear notice that somebody else could --
5 didn't give clear notice to the defense that those matters
6 could be examined on, and so we are not going to go into
7 them.

8 MR. LAWRENCE: May I ask a point of clarification,
9 your Honor?

10 THE COURT: Yes.

11 MR. LAWRENCE: One of the subjects that we offered on
12 for Mr. Ceis was the July 24th meeting, and meetings and
13 efforts that took place before K&L Gates was retained. I was
14 not sure whether or not your Honor would preclude things
15 before September -- I'm sorry, he 19th or the 21st, I can't
16 remember when the engagement letter was, that did not involve
17 K&L Gates attorneys.

18 THE COURT: The mayor testified extensively as to
19 what it is he did. Is Mr. Ceis going to say there is -- Is
20 there something in that testimony that we haven't gone
21 through or that you didn't have an opportunity to put on in
22 your original case as to what the City was doing -- I am
23 assuming you are talking about July and August. The mayor
24 testified about it, Mr. Bennett testified about it.

25 MR. LAWRENCE: The only specific meeting that was not

1 testified about -- the mayor -- was the July 24th meeting
2 that Mr. Walker testified about. It would be confirming of
3 what Mr. Walker testified with respect to that meeting, but
4 it would also clarify that there was no discussion of
5 litigation at that meeting.

6 THE COURT: Well, then it is duplicative.

7 MR. LAWRENCE: As long as your Honor is consistent
8 then we don't need to bring that point. We made the two
9 points we wanted to bring, the engagement letter and the
10 power point. I think those have been covered.

11 THE COURT: All right. Mr. Lawrence, are there any
12 other witnesses that you intend to call at this time in
13 rebuttal?

14 MR. LAWRENCE: No. We just wanted to make those two
15 points about Mr. Ceis, and they are in the record.

16 THE COURT: All right. Any surrebuttal to those two
17 points?

18 MR. KELLER: Absolutely not.

19 THE COURT: All right. Counsel, I think that we
20 should take a break, and then we will come back and we
21 will -- I am sorry to the audience. I blasted right through
22 a break I have always told you that you could have. I wasn't
23 paying attention to the clock.

24 MR. KELLER: I say no surrebuttal, but on the two
25 points I want to be clear what Mr. Taylor has stipulated to

1 regarding the second one is just that the testimony of
2 Mr. Ceis is that he didn't see it. It is not a stipulation
3 that he didn't see it.

4 THE COURT: That was my understanding.

5 MR. KELLER: Okay.

6 THE COURT: He has testified under oath in his
7 deposition that he did not see it. Let's take our break, and
8 then we will come back and we will go forward with the
9 closing arguments.

10 MR. LAWRENCE: Thank you, your Honor.

11

12 (Short recess taken.)

13

14 THE COURT: Please be seated.

15 Are we ready for closing argument?

16 MR. LAWRENCE: We are, Your Honor.

17 THE COURT: Go ahead, Mr. Lawrence.

18 MR. LAWRENCE: Thank you, Your Honor.

19 We thank, first of all, the Court for your attention over
20 these past six days. We're pleased to take the opportunity
21 here to discuss how the evidence presented fits into the
22 applicable law. Looking at the evidence and applying the
23 law, we believe the City has made its case that it's entitled
24 to specific performance of the KeyArena lease.

25 There are a couple of themes that we are going to go

1 through in closing. First, the City is not a developer. The
2 City is not like a standard landlord. KeyArena is not like a
3 strip-mall or a shopping mall. Finally, the Sonics are not
4 like a Wal-Mart store.

5 So we ask that in assessing the lease at issue here and
6 the benefits bargained for under that lease, we should start
7 in recognizing that the City of Seattle is spending taxpayer
8 money, pledging taxpayer debt, and leasing public property is
9 not the same as a developer/owner of a strip-mall leasing
10 property. The mall developer has a simple goal: To earn a
11 profit on its investment. The rent is typically set at a
12 rate that attempts not only to cover expenses like debt
13 service and operating expenses, but to return a profit to the
14 developer.

15 The City, however, has different motivation. Rather than
16 earn a profit, the City seeks to provide benefits to its
17 citizens, public, police services, roads, social services,
18 economic development, cultural services, community services.

19 The motivation of public entities that provide support for
20 constructions of public sports arenas simply is to provide
21 benefits to its citizens. This was recognized here in the
22 State of Washington in case of CLEAN v. State, where the
23 Washington Supreme Court recognized that the public provision
24 of a venue for professional sports franchises serves a public
25 purpose by providing jobs, recreation for citizens and

1 promoting economic development and tourism.

2 This concept is not found alone in the State of
3 Washington. In other cases, in other states dealing with
4 sports arenas, we see that in Minnesota the Minnesota Supreme
5 Court noted that the construction of a stadium for use by
6 professional sports teams constitutes a public purpose for
7 which public expenditures may legally be undertaken.

8 In Pennsylvania, the Court noted that public projects are
9 not confined to providing only the bare bones of municipal
10 life. It may provide gardens, parks, monuments, fountains,
11 libraries, museums, and generally speaking anything
12 calculated to promote the education, creation or the pleasure
13 of the public.

14 These decisions to support sports stadiums and allow
15 public money to be spent on sports stadiums reflect that the
16 City of Seattle and other public entities make public-policy
17 decisions to pursue public purposes for perceived public
18 benefit.

19 While the value to the public of sports stadiums may be
20 subject to the debate, the policy decision rests squarely in
21 the elected representatives of the people. This also was
22 emphasized by the Washington Supreme Court in the CLEAN
23 decision where they stated, We are aware that an argument can
24 be and has been made that opportunities for recreation and
25 little positive economic impact flow to the community from

1 the presence of a major league baseball team. This agreement
2 that underlies that debate, however, is best resolved by the
3 people's elected representatives.

4 That there is debate about the benefits, the economic, the
5 intangible benefits of a sports stadium misses the point.
6 The point is that if the City, in entering into the KeyArena
7 lease, was entitled to make public-policy decisions to obtain
8 certain benefits, and the City in deciding to enforce the
9 lease also is making a public-policy decision to obtain the
10 benefits, tangible and intangible, that flow from having a
11 sports stadium here in Seattle.

12 There was some decision about I-91. Maybe the policy of
13 the City has changed in the last two years. But that was not
14 the policy in effect in 1994, 1993, when the City of Seattle
15 negotiated the KeyArena lease.

16 With that navigation starting point, let's turn to the
17 lease at issue here. Here the benefit that was bargained for
18 by the City was not profit. As you heard Virginia Anderson
19 testify, the proposed revenue streams from the lease were
20 never envisioned to provide a reasonable return to the City
21 and its citizens as it might be required to under I-91. This
22 was a shared-risk public-private partnership that perhaps
23 would break even. But simply spending City money to break
24 even after 15 years and have out of date basketball only --
25 state-of-the-art basketball -- what was a state-of-the-art

1 basketball facility was not the benefit bargained for by the
2 City.

3 The benefit bargained for by the City was something much
4 more and the benefits that every City or state or county
5 looks for in having a sports team in a public building. That
6 is, the very type of intangible and economic development
7 benefits that courts have recognized are appropriate.

8 That conclusion applies here, and it's clear from a couple
9 of things. The testimony of Virginia Anderson which you see
10 here, where she was asked about how does this fit into the
11 Seattle Center concept? And she testified that if you bring
12 together a rich and diverse community that means everybody.
13 There are a lot of people who find their way coming together
14 around opera, there are many others who find it around
15 sports.

16 It's also clear from the structure of the lease. We
17 talked a little bit about that in the sense that the lease
18 was not intended to provide a reasonable rate of return to
19 the City on its investment in KeyArena.

20 It was intended to do something more than that. And then
21 the lease itself. This is the memorandum of understanding.
22 If you recall the testimony, this was a two-part agreement
23 with the Sonics' ownership and the Ackerley group.
24 Initially, in order to allow the City to fund the initial
25 construction activities related to the renovation proposal,

1 the parties entered into a memorandum of understanding, in
2 which the City said the City acknowledges a long-standing
3 commitment of the Sonics and Seattle community. The Sonics
4 will continue to provide certain public services and benefits
5 as part of their long-term tenancy.

6 Subsequently, the parties signed the lease. In that lease
7 this understanding of what the City hoped is reflected. The
8 City desires to construct the state-of-the-art basketball
9 facility in order to enhance the City, without means of a
10 long-term user to do so. In order to keep SSI, which is the
11 Ackerley group, in Seattle the City will construct a new
12 facility.

13 Consistent with those goals, the City sought to lock in
14 the benefits that they were trying to achieve in getting a
15 Sonics team in Seattle for the long term by requiring that
16 they stay in the lease and use the premises through September
17 30, 2010. And all home games of the Sonics were to be played
18 in KeyArena through that date.

19 That locked the Sonics in to playing here for the full
20 term of the lease, so that the City could get the full
21 benefits of the Sonics playing here. And then the key to
22 that lock was thrown away when the parties agreed that the
23 obligations to this contract are unique and agreement may be
24 specifically enforced by either party.

25 This was a lock-down agreement that gave the City the

1 right to specifically enforce the lease to make sure that it
2 was paying the full benefits of having the Sonics play in
3 Seattle through the 2010 season. And as we know, the
4 defendants admit that the lease says what it says.

5 When Mr. Bennett was asked about the lease and whether
6 there was any out for him at all in the lease that allowed
7 him to leave early, he acknowledged no, there is nothing in
8 the lease that allows him to leave early. And there is no
9 provision of the lease that allows the Sonics to leave early
10 because of failing attendance, because of the facility not
11 living up to current NBA standards, because of low revenues.
12 None of those provisions are found in the lease.

13 THE COURT: Mr. Lawrence, doesn't the lease also have
14 a reciprocal agreement? In other words, there were two sides
15 negotiating. And it was Mr. Ackerley who needed a viable
16 venue.

17 Wasn't that part of what was bargained for; that the City
18 had to maintain its property as a viable venue?

19 MR. LAWRENCE: The maintenance obligation under the
20 lease is clear. There is no requirement that the City
21 upgrade on a continual basis the facility in order for it to
22 meet at every year whatever the then-current NBA standards
23 were.

24 The maintenance requirements which were set out in the
25 lease had the City keep the facility in good repair, and then

1 the further specified that about halfway through the lease
2 there would be a freshening up of the arena paid for by the
3 City, and certain specific maintenance items were set forth
4 in the lease as to what the City would do and originally it
5 was 2002-2003 season of what the City would do.

6 The City -- actually the third amendment to the lease,
7 which is an Exhibit No. 600, then sat down with the owners of
8 the Sonics and said here is what we're going to do to fulfill
9 this renovation requirement that is in the lease.

10 So in terms of what requirements are in the lease for the
11 City to maintain the facility and provide the one agreed-upon
12 upgrade that was complied with by the City. There was
13 nothing in the lease -- you can look at the lease back and
14 fourth -- that required the City to keep the facility as a
15 state-of-the-art building for the entire 15 years of the
16 lease which is their suggestion. It's not found there.

17 And in their proposed findings they cite pages 161 and 162
18 of Virginia Anderson's testimony. But there is nothing in
19 her testimony that suggests that what the City was going to
20 was to provide to the Sonics a state-of-the-art facility
21 throughout the entire term of the lease. We know that the
22 KeyArena remains fully functional. Mr. Bennett said that to
23 the state legislature. Anyone who goes to a basketball game
24 at KeyArena, as we showed in the pictures, it works just fine
25 to do professional basketball.

1 What has changed in those 15 years are new ideas that are
2 a revenue enhances outside of the basketball court itself.
3 But there is nothing in the lease, there is no testimony
4 about the intent of the lease that suggests the City was
5 committing itself to continually renovating the arena. The
6 maintenance obligations were set forth in the lease.
7 Freshening up halfway through the lease of set forth in the
8 lease. Sonics' ownership and the City agreed what that would
9 entail in the third amendment to the lease.

10 So I think until we heard the argument from Mr. Keller
11 here, there has been no suggestion by any prior owner that
12 the City was not living up to its agreement to maintain the
13 facility in the manner in which it agreed to when it signed
14 the lease. So the notion that this was to be kept renovated
15 into some greater, bigger arena over the course of 15 years
16 is simply not supported by anything in the record.

17 In terms of the revenue issues, as Virginia Anderson
18 testified, this was a novel approach. It was one that had
19 shared risk and shared benefit for both parties. Actually,
20 when the Sonics were doing well in the '90s, as Mr. Barth --
21 you can look at Mr. Barth's chart about what money was being
22 paid out to the City, it was a large amount of money, and
23 presumably Sonics were also getting a large amount of money
24 because there was a sharing of revenue from the games.

25 But, again, there is risk that both sides took with

1 respect to this novel arrangement. But there is nothing in
2 the arrangement that allows the Sonics to unilaterally say
3 sorry, we need to leave here because this is not working to
4 us, even though there are other NBA leases that have those
5 types of provisions. There is nothing in this lease.

6 And, again, the revenue to the City was not intended to
7 give the City a profit. It was intended to try to make this
8 as close to a break-even type of deal as possible. But not
9 to give a profit. And the reason the City wasn't interested
10 in profit is because it's the other benefits of having a
11 basketball team that the City was interested in obtaining.

12 Now, we'll talk a little bit more about all the things
13 that Mr. Bennett and PBC knew when they assumed the lease.
14 One thing that they knew is -- I'm going the wrong way,
15 sorry. Shortly after they purchased the Sonics Mayor Nickles
16 told the City without equivocation the City will enforce the
17 lease. The City had made a policy decision that it wanted to
18 elect the specific performance remedy that was bargained for
19 in the lease to obtain the benefits of the Sonics in the city
20 for the full term of that lease. Mr. Bennett testified he
21 understood that in July of 2006. And in October of 2006,
22 several months later, he signed an assumption of that lease
23 with no changes. He didn't come to the City and say this
24 lease doesn't work; can you give us a break? He didn't come
25 to the City and say look, I'm going to spend 12 months

1 looking for a new arena, and then I need to get out of here
2 if I don't because this doesn't work; so can we cut a deal to
3 allow me to leave if I do a 12-month good-faith effort
4 search? He didn't come to the City and say we'll extend the
5 lease for a few years if you can change the way the revenue
6 structures works. He didn't come to the City at any point
7 and say let's work on a renovation plan to make this a
8 state-of-the-art facility.

9 Instead, on October 23rd he signed the assumption
10 instrument agreeing to assume all obligations under the
11 lease, including the obligation to play Sonics games through
12 the 2010 NBA season without any requests for change, without
13 any efforts to negotiate with the City for change. Signed on
14 to a deal and then less than a year later he was telling
15 everyone he was moving.

16 So the benefit of the bargain of this deal, as I said, for
17 the City was getting the Sonics to play in Seattle for 15
18 years and all the tangible/intangible benefits that go along
19 with the team playing in the city.

20 So what was the benefit of the bargain for the Sonics?
21 They got a then-state-of-the-art basketball facility per
22 their specifications. They got scheduling priority for use
23 of the KeyArena and status as the principal prime user. They
24 got the City's agreement to provide staff at games at City
25 expense, and they got the City's agreement to maintain the

1 facility as set forth in the agreement, on some version of
2 keeping the arena in a state-of-the-art facility process for
3 15 years.

4 I think, as I said, I think it's instructive that neither
5 the Ackerley group nor the Schultz group ever approached the
6 City to argue that the lease should be written -- rewritten
7 because it's not working. The only person who has suggested
8 the lease should be rewritten -- that is, we should be able
9 to leave the lease earlier -- was Mr. Bennett's group.

10 THE COURT: Mr. Lawrence, is that really quite true?
11 I mean basically Mr. Schultz was down at the legislature
12 trying to get to a different spot. And isn't that inherently
13 saying to the City we want out; we wanting to elsewhere; we
14 want improvement?

15 MR. LAWRENCE: No one in court has testified that the
16 KeyArena for the next 10 to 15 years as-is is a suitable
17 facility. That's not I think part of case and no one is
18 suggesting that.

19 As is typical of sports arenas, you build it
20 state-of-the-art at the time; at the end of the lease it
21 needs to be renovated. That is what happened here. The
22 Schultz group was working with the City on a renovation plan
23 so that after the end of the lease, they could have what
24 would be then a 2010 state-of-the-art facility.

25 We're not suggesting that the Schultz group didn't want an

1 improved facility, if they were going to stay beyond 2010.
2 But the issue is no one has the complained that the City
3 wasn't meeting its obligations with respect to the facility
4 through 2010. And I don't think anyone is asserting here
5 that if the Sonics were to play, although they could
6 certainly continue to play, that KeyArena would not need to
7 be renovated on a going-forward basis. The question is: Do
8 the Sonics have to stay as they originally agreed to through
9 the end of their lease?

10 I digress slightly from my argument to make the point that
11 they have the same problem in Oklahoma City. You heard from
12 Mr. Bennett is that Oklahoma City, the Ford Center, is not
13 currently a state-of-the-art arena. There is going to be
14 100-some-odd-million-dollars spent by the City to renovate
15 the Ford Center so that it will in the future be a
16 state-of-the-art arena. It's not as if Mr. Bennett is
17 seeking to move from one non-state-of-the-art arena to a
18 state-of-the-art arena. He's seeking to move from a
19 non-state-of-the-art arena to another non-state-of-the-art
20 arena because in a couple years from now it will be a
21 state-of-the-art arena.

22 It's a very parallel situation to what the Schultz group
23 is trying to do; that is, recognizing that you might be in an
24 arena that doesn't have the revenue-enhancing capabilities
25 through the end of your lease term, but then you get to move

1 into something that is current state-of-the-art, which is
2 what happened back in 1994. That facility, you know, at the
3 time was current state-of-the-art. It was done to Sonics'
4 specifications. As Joel Litvin testified -- we read in the
5 deposition -- the NBA had to approve the move of the team
6 into the renovated KeyArena because it met existing NBA
7 standards at the time.

8 So the City promised to deliver. That's what they did
9 deliver to the Sonics. And the fact that at the end of the
10 lease it's not the state-of-the-art is neither surprising or
11 unexpected in the standard. There is nothing in the lease
12 that says you get to leave because time ages a facility.

13 One of the questions that has been raised in briefing here
14 is whether the specific performance clause is ambiguous, what
15 are the "unique obligations" under that clause.

16 I think there are a couple that stand out. One is the
17 City's obligation to give scheduling priority to the Sonics
18 which is Article VI of the lease. It's a very specific
19 obligation with respect to meeting NBA requirements for
20 scheduling games there. This is a unique obligation that
21 parties have.

22 Secondly, the Sonics use rights for KeyArena under Article
23 VII and Article X.B which cement their principal user status
24 for KeyArena, which make clear that the Sonics have rights to
25 use this public facility over and above any other tenant of

1 the facility.

2 And finally and foremost, in terms of this case, the other
3 unique obligation in this agreement is the Sonics' commitment
4 to play their home games here through 2009-2010 NBA season.
5 That is Article II.

6 Now, those particular obligations are clear, they're
7 unequivocal, they're easy to enforce. This is nothing
8 ambiguous about them. As we talk about in terms of the
9 requirements to show specific performance, you have to show
10 that what you're trying to enforce is a clear and definitive
11 contractual provision.

12 We posit, Your Honor, we leave absolutely nothing unclear,
13 it's entirely clear, the Sonics' commitment to play in
14 KeyArena for the 2009-2010 season. That is a unique
15 provision and it's a clear provision. There is nothing
16 ambiguous about it. It can be specifically enforced.

17 THE COURT: So if it's not ambiguous, do I throw out
18 the Virginia Anderson testimony about it? Because you only
19 let in extrinsic evidence if the provisions of the term are
20 ambiguous.

21 MR. LAWRENCE: As you approach a contract, you look
22 at it to determine whether or not ambiguous, terms are clear.
23 If there is a question about it, yes, you look to other
24 evidence. The only other evidence in this Court that has
25 been presented about what the terms of the contract meant

1 would be that Virginia Anderson testimony, the memorandum of
2 understanding, that was trial Exhibit No. 41, I believe. And
3 also you would look at the subsequent performance under the
4 lease, ranging from the fact that all of the owners of the
5 Sonics up until Mr. Bennett performed by playing other home
6 games there, despite the problems that were identified over
7 the past few years with the lease. None of them sought to
8 avoid that clear obligation.

9 So you would look, yes, at Virginia Anderson testimony,
10 contemporaneous documents, and also course of performance to
11 the determine, clarify any ambiguity if Your Honor found some
12 in the contract.

13 I believe all that testimony is consistent that the City
14 was trying to obtain whatever benefits -- you can argue about
15 them, whether they're real or perceived. The City thought
16 they were real enough to commit its dollars and debt, commit
17 everything involved with it in order to keep the Sonics here
18 without any return on its investment.

19 So I'm going to turn now to the elements of specific
20 performance. Fortunately, there is a very recent Washington
21 Supreme Court case that talks about specific performance
22 Crafts v. Pitts case, 2007. The Washington Supreme Court
23 recognized that this is a contract-specific remedy that can
24 be done by a court. It's a valid, binding contract; a party
25 has committed or is threatening to commit a breach; the

1 contract has definite and certain terms; and the contract is
2 free from unfairness, fraud and overreaching.

3 There can be no dispute in terms of the evidence of this
4 case that all these starting elements were met. It's an
5 admission of fact that we have a valid, binding contract. No
6 one has suggested otherwise.

7 It's very clear Mr. Bennett and the PBC are threatening to
8 commit a breach of the agreement by wanting to leave early,
9 not fulfill the 15-year term of the lease. The terms to play
10 all home games through 2009-2010 are certainly definite and
11 certain as this is a specific performance clause. And there
12 has never been any suggestion that the contract was somehow
13 procured through unfairness, fraud or overreaching. As
14 Virginia Anderson testified, this was a negotiated contract
15 with both sides being represented by counsel back in 1993 and
16 1994. That's not an issue in this case.

17 So the basic premises, basic elements upon which a party
18 can claim specific performance are met here. And so the
19 question is: Is there some reason not then to allow specific
20 performance? There are a couple of reasons we think that you
21 don't have to go very much further in your analysis.

22 First of all, we cited these cases in our finding and
23 trial brief, Keystone and Mahoney cases. The parties have a
24 freedom of contract as they choose absent a contrary public
25 policy, the fundamental principle recognized in law. Two

1 sophisticated parties -- the City and the Ackerley group and
2 then the City and PBC -- when they signed the assumption had
3 the freedom to contract as they choose. And this includes
4 the freedom to choose the remedy of specific performance.

5 And the courts will allow that choice of remedy to be
6 enforced because people have the ability. And here parties
7 recognize that because of the unique nature of the
8 obligations that the parties ran into, the specific
9 performance was an appropriate remedy.

10 And I will note, if I can make rest for a second, there
11 are provisions in the contract that have alternative remedies
12 in them. For example, the staffing provision requires the
13 City to provide staffing says that if the City doesn't
14 provide staffing, there are remedies specified for that.
15 There is no alternative remedies specified for failure to
16 play home games at KeyArena other than the general specific
17 performance clause. The parties here freely contracted to
18 that remedy, and the courts routinely enforce the remedy to
19 which the parties agree.

20 Now, the one exception to that that you heard about that
21 might apply in this case is whether or not specific
22 performance would require extensive court supervision. So
23 let's talk about that at issue for a second. There is a very
24 simple straightforward answer to that. The lease has a
25 mandatory arbitration clause in it. With very little

1 exception, any dispute under the lease is subject to
2 mandatory arbitration and would never come before this Court.

3 Article 11 is an exception, hazardous waste is an
4 exception. But operational issues like you heard about in
5 terms of the suite marketing, concession issues, none of
6 those could even be before this Court because they're all
7 subject to mandatory arbitration. The only thing that is not
8 that is relevant is the lease term, which if Your Honor
9 ordered specific performance on and there is any dispute
10 about suites or concessions whatever, Your Honor would never
11 see either party here again. We would be before some AAA
12 arbitrator resolving that dispute. So there can't be a
13 burden on this Court.

14 THE COURT: Mr. Lawrence, one of the underlying
15 things in this case is each side telling the other how badly
16 they've been treated and lots of accusations about who the
17 City wants as a tenant.

18 If both sides have an obligation to carry out the contract
19 in good faith, am I going to be embroiled with this same type
20 of proceeding that we've been going through for six days
21 where each side makes accusations against the other and the
22 accusation against the City, of course, is that it's
23 undermined its own tenant.

24 MR. LAWRENCE: I can't imagine that to be the case,
25 Your Honor.

1 First of all, if you heard the testimony of the
2 operational people that deal with each other day to day,
3 there are no recriminations, no disputes that can't be
4 resolved as they would in any normal course in terms of
5 day-to-day operations of the Sonics and day-to-day operations
6 of the KeyArena --

7 THE COURT: I'm not worried about people who change
8 out the arena or sweep the floors or take the tickets.

9 What I'm worried about is are we going to have an ongoing
10 allegation about the City undermining its tenant by plotting
11 to have someone else buy them out, forcing them to increase
12 loss, going to the NBA and undermining their business
13 position or leaking their secrets?

14 I would like to know how I can be assured that we're not
15 going to be back here with those kinds of problems.

16 MR. LAWRENCE: I think there are couple of responses
17 to that. I just don't see that happening. I don't see any
18 of this would have happened in the first instance if
19 Mr. Bennett had simply played out his term at the lease
20 instead of announcing the year after he signed -- but it
21 doesn't really matter whose fault or who fired the first
22 shot. I think Your Honor has a legitimate concern. I think
23 that Mr. Bennett and the mayor are responsible people that
24 have both testified that if Your Honor enforces the lease and
25 allows the City to have the Sonics as a tenant for the next

1 two years, people will behave just fine.

2 I think if Your Honor is concerned about certain actions
3 that were taken by individuals, I think that can be addressed
4 by Your Honor so that those types of actions wouldn't be
5 continuing in the future. But you've heard no testimony at
6 all from the mayor, who is the spokesperson for the City,
7 that he intended to bleed Mr. Bennett or call Mr. Bennett
8 names or anything like that. Mr. Bennett was equally clear
9 that he has no particular beef with the mayor. These are
10 sophisticated people who can get along once they understand
11 what the rights and obligations are.

12 THE COURT: Well, let's talk about how sophisticated
13 they are. Mr. Bennett calls the mayor wanting to meet in
14 July, and the mayor doesn't call him back.

15 MR. LAWRENCE: I don't believe that was the testimony
16 at all.

17 THE COURT: Well, Mr. Bennett called for a meeting
18 with the mayor. These two gentlemen really haven't sat down
19 and talked about anything since the failure with the last
20 legislative session.

21 MR. LAWRENCE: I misunderstood. You're talking about
22 July 2007?

23 THE COURT: Correct.

24 MR. LAWRENCE: There was also a conversation July
25 2006 where they talked, and Mr. Bennett was told the City

1 wanted to enforce the lease. They had dinner together where
2 again, the City expressed its preference for renovating
3 KeyArena.

4 Then what happened in July of 2007 was a conversation
5 between each side did converse and communicate. Mr. Bennett
6 was saying I will work with you to get out of the lease early
7 and the mayor was saying, no, I want you to stay for the
8 lease.

9 THE COURT: That's not real sophisticated when they
10 both go to their own corners and refuse to talk with one
11 another, is it?

12 MR. LAWRENCE: As we get through in a later slide,
13 that is actually not what the City did in response to that.
14 What the City did in order to protect its future interest is
15 said, look, let's try to revisit the notation of a renovated
16 KeyArena. That's what the City can provide. We can provide
17 more money to that effort than was offered to the Schultz
18 group, and we want to engage in the process of presenting
19 this to the NBA. You've heard about the NBA meeting. This
20 was not an NBA meeting at which Bennett wasn't invited to.
21 He was there, he heard the pitch that the City made to the
22 NBA as to why a renovated KeyArena works --

23 THE COURT: Mr. Lawrence, answer my question.

24 MR. LAWRENCE: I'm trying to.

25 THE COURT: Did the mayor ever call Mr. Bennett back

1 and say let's sit down, let's talk about this, and see what
2 we can do?

3 MR. LAWRENCE: The mayor --

4 THE COURT: I didn't hear it.

5 MR. LAWRENCE: The mayor's position has been
6 consistent that he's willing to talk about -- the only thing
7 he's willing to talk about is something that would allow the
8 Sonics to stay through the end of the lease and hopefully
9 something future going forward. Since that was not a
10 discussion that Mr. Bennett was willing to have there was no
11 discussion.

12 THE COURT: So answer to my question is no?

13 MR. LAWRENCE: Not -- the mayor was not willing to
14 sit down and discuss an early exit, correct.

15 THE COURT: Let's move on.

16 MR. LAWRENCE: I think once Your Honor clarifies what
17 the rights are with respect to that issue -- that is, whether
18 or not the City has a right to specifically enforce the lease
19 or Mr. Bennett has a right to leave early -- that clarifies
20 the principal point of dispute between the parties.

21 I don't think there is any evidence to suggest based on
22 the clarification there that the City would not treat
23 Mr. Bennett well over the next two years, or that Mr. Bennett
24 would treat the City poorly over the next two years. The
25 main dispute has been what does the lease provide? Does the

1 lease require them to stay? Or is there some, as Mr. Bennett
2 testified, some out that allows him a remedy of leaving?
3 That's the fundamental dispute. That will end based on what
4 Your Honor decides. And then I think the parties will move
5 forward in a rational basis based on Your Honor's decision.

6 I don't know what they could be coming into court to fight
7 about. All the cases that they rely upon -- that is, PBC
8 relies upon -- where the courts have said we're not going to
9 specifically enforce because of the potential for continuing
10 disputes have to do with clauses in leases relating to
11 operations of the business.

12 There are no issues that you've heard about in terms of
13 operational issues that will require this Court's attention
14 over the next two years. That's the sole businesses of which
15 any court has said I'm not going to specifically enforce.
16 It's only because there are operational-type issues. There
17 has never been a case where a court has said I am not going
18 to specifically enforce because the owner of the development
19 and the owner of Wal-Mart don't get along.

20 It's always been because there is something operationally
21 day to day that would require the Court's attention. That's
22 why I started with that as my answer to Your Honor's
23 question. There is no evidence here of those types of
24 day-to-day issues that could come back before the Court.

25 One other thing to consider is all the cases that deal

1 with this notion of we don't want the courts to get involved
2 in the middle -- all the cases that they cite, include
3 Calahan case, which is the principal case they cite for
4 proposition that the Court shouldn't get involved in specific
5 enforcement when there is an issue of supervision, state that
6 it's a discretionary rule that is frequently ignored and is
7 always given significantly less weight where the public
8 interest is involved. We believe that the public interest is
9 involved here. So again, the case law supports limited court
10 supervision for the sake of the public, even if you are
11 concerned principals can't get along. It's supported by all
12 case law, the including principal case they cite in
13 Washington.

14 So we think the contract is clear. Specific performance
15 is appropriate and been agreed to by the parties in terms of
16 their freedom of contract. But if you were to go on to the
17 next step in the analysis, you would need to look at the
18 couple of issues. This is also set forth in the Crafts v.
19 Pitts case. The difficulty of proving damages which
20 reasonable certainty and the difficulty of procuring a
21 suitable substitute. I would like to turn to these two
22 issues next.

23 In terms of where courts have ordered specific performance
24 related to the uniqueness of the subject of a contract or the
25 difficulties in procuring a suitable substitute, the courts

1 have looked at several things. And I think this is actually
2 very critical. If you look at the findings and conclusions
3 that the PBC has submitted to this Court, they completely
4 ignore the issue of uniqueness. They don't recognize that
5 it's an issue for this Court; they don't argue that it
6 doesn't exist; they don't think they have done anything in
7 this courtroom to demonstrate that the Sonics are anything
8 other than a unique tenant to KeyArena.

9 And on that basis alone, on the uniqueness of the tenant
10 of the Sonics to KeyArena, that's sufficient evidence for
11 this Court to issue an order of specific performance. If we
12 look at the case law, the areas where the courts have granted
13 specific performance on uniqueness including several. One is
14 where the substitute for the object of the contract is not
15 available on the open market. That's McLeod case out of
16 Washington which we cite in our brief.

17 Another type of uniqueness is where strong sentimental
18 attachments developed through long-time association with the
19 subject contract. That is from the Restatement (Second) of
20 the Contract, Section 360, which is cited in our brief, in
21 the Burr v. Bloomsburg case out of New Jersey, which is cited
22 in our brief, as well as the Wehend case out of California.

23 "Furthermore, where the subject of a contract although not
24 literally unique has features which lead the buyer to give it
25 special value to specific performance will be enforced."

1 That is again out of the Restatement of Contracts, Section
2 360. All these types of issues apply here.

3 Let me talk about why Sonics unique in terms of evidence
4 and then what the courts have done with respect to the
5 uniqueness of sports franchises. We know there is no market
6 the City can go to to obtain a substitute NBA team. This is
7 not like a gas station where one gas station owner leaves and
8 there are dozen other franchises you can go to to get a
9 replacement tenant, or a jeans store leaves and there are
10 hundreds of other stores that can replace them. There is no
11 market for an alternative NBA tenant for KeyArena.
12 Undisputed.

13 There is no substitute team of any kind that is available
14 with the 41-year history that the Sonics have with Seattle.
15 The Sonics fan and the City have a strong sentimental
16 connection with the Sonics. You heard that in testimony and
17 whatever happens when you have a bad team, whatever effect
18 that has, there is a strong core of people that retain that
19 connection to the Sonics. That is a significant number of
20 people in this community.

21 Sherman Alexie testified the Sonics have been here 41
22 years. "I have been a season ticket holder for 12 years. I
23 love this team. I love what it represents. I live its
24 history. If they leave I haven't been given -- the fellow
25 fans have not been given the proper way to say good-bye."

1 This is an object to its lease to which there is
2 sentimental value, a long-term history and uniqueness that
3 can't be replaced by an alternative tenant. A case that is
4 on point with this is Triple-A Baseball Association v.
5 Northeastern Baseball, Inc. out of the first circuit, 1987
6 case. There the question was whether or not --

7 THE COURT: You don't need to tell me about that
8 case. I told you about it.

9 MR. LAWRENCE: I appreciate that. I wasn't sure if
10 Your Honor wanted to reveal that was the case that you were
11 asking about.

12 THE COURT: It obviously is the case. It's actually
13 the highest authority of anything that I have been cited,
14 although it's a federal and out-of-state case. And so I
15 understand it. I'm throwing it out mostly to say to
16 Mr. Keller why shouldn't I look to this. So I understand how
17 it applies to you.

18 MR. LAWRENCE: I would only just emphasize the quote
19 that we had which is the Court looked at the uniqueness of
20 the Triple-A franchise as a basis for specific performance.

21 THE COURT: Can I back up a little bit on the issue
22 of the sentimentality. The City is a corporation. And I
23 don't know that I have ever seen any case law that basically
24 talks about does the City shed tears or does the City cry?
25 In other words, can a corporate entity have sentiment? I

1 understand that the fans do. We have spent a lot of time and
2 the fans obviously feel they have a stake in this. But in
3 fact, the fans aren't parties to the lease. And I don't
4 think you're going to find anything in there about the fans.

5 So if you want me to stick to the lease, is that really
6 something that I should be looking at? I don't know that
7 there is such a thing as corporate tears.

8 MR. LAWRENCE: I think that the City and any public
9 entity is uniquely different than a corporation, who is
10 created for the purposes of making money. The City, you're
11 right, is a municipal corporation. It's not a corporation
12 under the business laws of the State of Washington. It's a
13 corporation that is set up through the municipal laws of the
14 State of Washington. Yes, they call it a municipal
15 corporation. We're back to the RCW. It's a totally
16 different set of provisions dealing with municipalities
17 than corporations. The structure in the state law is that
18 they are different entities. The structure of the state law
19 allows a City to act on behalf of the public.

20 Now, a business corporation were to go out and spend a
21 whole bunch of money for the benefit of somebody in the
22 public that was unrelated to the corporation, you would have
23 shareholder issue suits about that. Here in some sense the
24 analogy would be the citizens of Seattle are the people that
25 the corporation, municipal corporation, represents.

1 So when the City acts, whether it's building a road,
2 providing lease services, providing a park, supporting the
3 Opera House, which they did, supporting the Symphony Hall,
4 which the City did, supporting theater, supporting social
5 services for the homeless, social services for alcoholics,
6 the City is all doing for the benefits of its citizens, so it
7 is unique, it is different. It is fundamentally different.
8 That is why you get to those cases we looked at in the first
9 set of slides as to whether or not it's a valid public
10 purpose for a municipality, municipal corporation -- I think
11 actually the City is a Class A Charter, not a corporation at
12 all. They're a separate entity called a Class A Charter.
13 But they're acting on behalf of their citizens. And that is
14 what they are structured under the state law to do. And if
15 they don't, they get sued, and they get slapped down. That
16 is why it was important that the State of Washington Supreme
17 Court addressed can King County support a public baseball
18 stadium? The supreme court said, yes, that's a valid public
19 purpose because of the benefits that flow to the citizens.

20 So I think with respect to cities, they act on behalf of
21 their citizens. And the Sonics fans and basketball fans or
22 the opera fans or the theater fans or the people who believe
23 that homelessness is an important issue to be addressed,
24 they're all served and have a stake in what the City does.
25 And when the City decides to spend its money for those

1 purposes is doing so on behalf of the citizens.

2 And the fact, I'm sorry, I'm moving up to 12:00 hour. I
3 will cite you a case that we've cited in our brief that
4 indicates that where the public interest is effective is in a
5 case of specific performance is entirely appropriate to look
6 to that public interest in deciding whether to grant specific
7 enforcement. This is -- it is 12:00. This might be an
8 appropriate time to take a break.

9 THE COURT: I understand the position that you take
10 with the City, and obviously that's what city and governments
11 do -- act on behalf of the citizens. But is the
12 sentimentality what they use? Obviously, one of the points
13 you're going to make, and you've done in your briefing, is
14 that you take public-opinion polls and you can say two-thirds
15 of the people in the city don't care if the Sonics leave, but
16 there is a third who do. You probably wouldn't get any
17 unanimity on any of those questions, whether it be
18 homelessness, opera; everybody would have a different
19 situation. And obviously the City has to act for its
20 citizens.

21 But you put on testimony about essentially sentimentality
22 and, Mr. Alexie is being a representative of the fans; he's
23 disappointed he doesn't get his cucumber sandwiches, and he's
24 disappointed nobody knows his name in the locker room anyway.

25 But is that really something that we're here to value as

1 opposed to the City acting in the best interest of the public
2 at large? Those emotions go to individuals; they don't go to
3 entities. That is what I'm trying to get you to engage me
4 on.

5 MR. LAWRENCE: I understand what you're suggesting.
6 And I think to a certain degree, the degree of emotional
7 connection of an individual fan is way at the margins of
8 relevance. But I would say the City in going about its
9 business, deciding to build roads, support homeless people is
10 consistently making public-policy decisions, as to what the
11 benefits will be to its citizens. It's consistently making
12 public-policy decisions that probably don't have majority
13 public support, leadership. I don't know that you could get
14 a majority of the people of Seattle to support spending
15 however many million dollars of went into the Opera House or
16 however many million dollars go to serving alcoholics,
17 provide a place for alcoholics to rehabilitate in the City of
18 Seattle. It's not a majority rule. The City makes a
19 public-policy choice to serve its citizens.

20 There has been a suggestion by PBC that citizens don't
21 care and that that public-policy choice should be dismissed
22 because the citizens don't care.

23 Well, Mr. Alexie makes clear that citizens do care, and
24 there is a reality to the public-policy choice that the City
25 makes to provide these differences to a segment of its

1 citizens. This was affirmed by the defendant's own expert,
2 Mr. Humphreys; that there are real intangible benefits,
3 whether you call them sentiment or not, civic pride, sense of
4 community, all the things that Mr. Alexie testified about
5 Mr. Humphreys acknowledged. These are part of the public
6 benefits that the City made a public-policy decision to
7 invest in back in 1994 and has made a public-policy decision
8 to support by seeking to specifically enforce the lease here
9 today.

10 Maybe the degree of sentimentality you see on the stand is
11 not as important. But the fact that there is a connection,
12 the fact that that informs public-policy decisions of the
13 City, the fact it's a valid public purpose, all of those
14 things do weigh in the decision that the City has to make.
15 And the City based on those issues, which are real, which
16 were evidenced by the testimony, admitted by the expert,
17 validates the City's decision to enforce this lease rather
18 than to elect the damages remedy.

19 THE COURT: Thank you. We need to stop for lunch.
20 So we'll be back at 1:30.

21 (Short recess taken.)
22

23 THE COURT: Mr. Lawrence, my accountants tell me that
24 you have 30 minutes remaining.

25 MR. LAWRENCE: Very good. I will endeavor to save a

1 few minutes for rebuttal.

2 Good afternoon, your Honor. Just a couple more brief
3 comments on uniqueness. We talked about the Triple-A case,
4 the Minnesota Twins case, 38 Northwest 2nd at 223, 225, also
5 talks about the unique connection between a team and its
6 citizens as a basis for granting relief to require the Twin
7 to stay in that case as well.

8 A couple of other observations. All of the shopping mall
9 cases that the PBC cites in their findings, the Facts and
10 Conclusions of Law, they list a number of cases, in none of
11 those cases did the court find the tenant unique. It was in
12 all cases where they were replaceable commercial tenants.

13 In fact, in every one of those cases as well the court
14 found in whole or in part there were supervision issues as
15 well in finding those specific performance.

16 But in all those commercial cases, those leasing cases,
17 that they cite, in none of them was there an issue about
18 uniqueness like there is in this case.

19 In fact, in a couple cases we cited, particularly the
20 Massachusetts Mutual case, there the tenant was the anchor
21 tenant of the mall, and the court -- in the reported decision
22 that we have the court required anchor tenant to stay at the
23 mall, at least pending trial. We don't know what happened
24 after that. But that was a example where you had a unique
25 tenant in the shopping mall and the court said we will

1 require you to stay through the lease, at least through the
2 end of trial. We don't know what happened after that.

3 THE COURT: Doesn't that make sense? You wouldn't
4 basically disrupt the status quo, after they move out make
5 them move back in?

6 MR. LAWRENCE: They had already closed in that case.
7 The court forced them to reopen during the pendency of the
8 trial.

9 Finally I wanted to mention the land cases. If there is
10 one thing that all the courts seem to agree on when it comes
11 to specific performance and the conveying of a piece of land,
12 that is something you can get specifically performed.

13 I think this goes to the question of where does the
14 adequacy of damages play into this. Well, land is easily
15 valued. Anyone can go out and get a fair market appraisal of
16 a piece of land.

17 For example, in the Carpenter case, which we cite at 627
18 P.2d 555 out of Washington, there was an option purchase with
19 respect to a piece of land. The purchase price under the
20 option I think was \$95,000. There was an unequivocal
21 testimony at trial that the fair market value due to
22 appreciation of the land was \$179,000. Well, one would think
23 that, well, then the damages can be easily calculated, you
24 just take \$179,000 and subtract \$95,000. But the court says,
25 no, despite the fact that you could do that valuation,

1 because land is unique, will allow a specific performance.
2 The notion that there is something special about that piece
3 of land to the contractor that can't simply be replaced with
4 money, it can't simply be replaced with another piece of
5 land, just like here there is something special about the
6 Sonics that cannot be replaced with another tenant, can't be
7 replaced with Ice Capades or any other events. There is
8 something unique about the Sonics in relationship to the City
9 that can not be replaced. It is very close, in our view, to
10 a land case where the court, despite the ability to look at
11 fair market value, despite the ability of a jury to get fair
12 market value, always allow specific performance.

13 And the case we have been talking about, *Crafts v. Pitts*,
14 in the Washington Supreme Court also came to that very same
15 conclusion, again, about land, noting that the particular
16 land at issue had a special relationship to the purported
17 purchaser, just like the Sonics have a special relationship
18 to the City of Seattle.

19 I would like to turn to sort of the other side of the
20 equation from uniqueness. And that has to do with whether or
21 not damages can be measured with reasonable certainty.

22 We think that uniqueness in and of itself should end the
23 Court's inquiry because they are a unique tenant and we are
24 entitled to specific performance. But you can also look to
25 the question of whether the damages -- whether what the City

1 bargained for can be measured with reasonable certainty.

2 You have heard a lot of testimony about both the tangible
3 and intangible benefit benefits of having an NBA team in the
4 City. I will just kind of briefly go through them.

5 Mr. Bennett testified that every NBA team has an economic
6 impact on the City in which it is located. You heard the
7 testimony of Lon Hatamiya who talked about the economic
8 impact of the team on the community, the jobs associated with
9 the team, the game day spending associated with the team.
10 Those type of jobs and game day spending were acknowledged by
11 Mr. Bennett.

12 And even Mr. Humphreys, the expert who thinks that teams I
13 guess are an economic negative on a community, testified that
14 he looked only at this broad, three-county region, and he
15 can't really say what the economic impact on the City of
16 Seattle will be from the Sonics leaving. He talked only
17 about what the economic impact on the King, Snohomish and
18 Pierce County region. So even if you buy his concept of
19 transferability, he didn't say anything that was relevant to
20 the economic impact on the City of Seattle, especially in
21 light of the fact that he could have done that analysis, and
22 he knows that over 60 percent of the season ticket holders
23 live outside the City of Seattle, and that is reason to
24 believe they would spend their discretionary dollars outside
25 the City of Seattle, which would have a real economic impact

1 on the City.

2 So going on to the intangible benefits. You heard about
3 the substantial community and charitable activities that the
4 Sonics engage in. It is not simply a matter of volunteerism,
5 it is a matter of the NBA mission you heard. The NBA mission
6 involves community and charitable involvement, which requires
7 players making appearances in the community at hospitals and
8 charities, etcetera. This is part of the package you get
9 when you get an NBA team in your City.

10 In the general category of intangibles, their own expert,
11 Mr. Humphreys, testified clearly that intangibles do exist
12 with respect to a basketball team.

13 THE COURT: What do I do with your expert who
14 basically says, yes, these things can be valued, and any
15 economic entity can have a dollar value put on it? I asked
16 him specifically, as you know, are the Sonics any different
17 from a store, from a Walmart. He says, Judge, we can put a
18 value on it.

19 MR. LAWRENCE: When you asked Mr. Hatamiya that,
20 there is clearly an ability to put a value on the economic
21 activity that is generated with respect to the Sonics. With
22 respect to a store, it would be different.

23 But putting that down, it doesn't work for two reasons.
24 First of all, the Sonics are not a Walmart. And the
25 Sonics -- you can't replace the Sonics level of intangible

1 benefits and the uniqueness of them with any other entity in
2 terms of the economic --

3 THE COURT: What am I supposed to glean from his
4 testimony?

5 MR. LAWRENCE: The point of his testimony was that
6 there is a lot of economic activity generated from the
7 Sonics. Economists can put numbers on things. I remember my
8 first day at the University of Chicago where the economics
9 professor said I can put a value on whether or not you decide
10 to go save somebody who is being mugged based on the utility
11 value to you of making that save. We know economists are
12 good at doing that.

13 The question is, can the court or fact finder to a degree
14 of reasonable certainty put a value on the benefits of that
15 kind of economic activity to the City, the benefits of that
16 kind of job creation to the City, the benefits of the
17 vitality of the Seattle Center to the City. Those types of
18 benefits which are the consequences of the economic activity
19 are not easily ascertainable.

20 The standard for economic damages in the State of
21 Washington is you have to find with reasonable certainty and
22 there has to be data. We don't know how to translate that
23 job creation, we don't know how to translate that economic
24 activity into a damages number. Is it \$187 million that
25 would be paid to the City? We don't know. We just know that

1 there is value to the City. Again, part of the public
2 purpose in having sports stadiums, whether you believe it or
3 not, is the perception of the City that it gets a lot of
4 economic activity, that it gets jobs, that it helps immediate
5 neighborhoods. How do you translate that into a dollar
6 value? I don't think you can do that with reasonable
7 certainty under the standards in Washington for contract
8 damages.

9 And that distinguishes, for example, the damage award for
10 pain and suffering. For pain and suffering under Washington
11 law there is no standards that guide a jury with respect to a
12 pain and suffering award. It is simply left up to the
13 discretion of the jury. It is a very different type of
14 analysis than you have with respect to economic damages.

15 There is another reason why that analogy doesn't make
16 sense. In the case of a tort, the harm has been done, the
17 person has been injured, the person has lost a loved one.
18 You can't -- you don't have the choice to go back and say,
19 would I rather have damages in the form of pain and suffering
20 or would I rather have not had that accident and not been
21 injured.

22 In the case of a contract the courts say, look, there are
23 two ways that you could be made whole. One, maybe can you
24 get damages that will make you whole. But alternatively in
25 certain cases it is a matter of specific performance that

1 will make you whole. And this was the point that was
2 emphasized in the Crafts case by the Washington Supreme
3 Court.

4 The question is not whether or not there is some ability
5 to measure, the question is whether or not a remedy at law
6 will provide an equal making whole. "Equal" is the word the
7 Court terms, in terms of making an award.

8 In the Crafts v. Pitts case the court said, look, it is
9 not going to be equal if you get something related to the
10 fair market value to land because this land is special. In
11 the same way here simply being awarded a dollar amount is not
12 going to make the City equal to whatever benefits it
13 perceives are associated with the team. You can't put a
14 number to it. You can't put the City in the same position as
15 if they got the Sonics for the last two years of the lease.

16 In contract damages you are entitled to be made whole.
17 And if the only way you can be made whole is by specific
18 performance, and the damages award would be something but not
19 equal, it might undercompensate, it might overcompensate, but
20 not equal, then you are entitled to relief in the form of
21 specific damages.

22 You can't in this case go to a jury and try to value
23 intangible benefits. I don't know what the LA study was
24 based on, I don't know what the Jacksonville study was based
25 on, but there is no data out there that is going to tell you

1 what the value is on a reasonably certain basis for those
2 intangible benefits.

3 And that is exactly why in all the sports cases that we
4 cited the courts have said these benefits are not easily
5 calculable and therefore we will award specific damages.

6 This is the quote from Crafts that I was talking about.
7 "The question is always whether money damages would equally
8 compensate the injured party, not whether they are merely
9 available." So the fact that an economist can come up with a
10 theory doesn't mean that the City would be equally
11 compensated for the loss of the Sonics by having some money
12 damages award.

13 This was brought home in the King County case when the
14 Seahawks tried to leave King County. The Court noted that
15 King County and its citizens -- again, they are looking at
16 the citizens the same way as the other sports cases -- would
17 be injured. And through the loss of intangible benefits
18 flowing from the presence of a professional football team in
19 Seattle. And of course in that case the court in sitting in
20 equity decided to keep the team in Seattle. Again, because,
21 as the court went on, these injuries would be irreparable
22 because the amount of damages will not be subject to
23 reasonable calculation.

24 So, in summary, we believe that we have shown -- we have a
25 lease with clear and certain terms, a lease that provides a

1 remedy of specific performance that the parties agreed to,
2 that this Court should honor the choice that the parties made
3 in entering into the contract. It should further think that
4 the Sonics are a unique tenant, and on that basis alone
5 specific performance is warranted.

6 There is no possibility of this Court having to be
7 involved in supervision because of the arbitration clause,
8 and because if there are ongoing disputes I believe that they
9 can be addressed in a business-like manner between the City
10 Attorney's office and -- if it gets to that level. But most
11 likely it would just be done between Mr. Barth and Mr. Singh,
12 who seem to be able to get along just fine.

13 The damages from the intangible benefits, every court that
14 has looked at a case involving sports teams has held that it
15 is impossible to ascertain with reasonable certainty.

16 There are a couple of other cases I mentioned. I
17 mentioned the Massachusetts Mutual case. We also cited a
18 case, Dover out of Delaware, which was another case where a
19 tenant in a mall was required to continue its lease.

20 And then there are cases where a landlord has made
21 substantial improvements in a facility to meet the
22 specifications with a tenant. And in those cases as well
23 courts have ordered specific performance where you have put
24 substantial improvements into a facility like Seattle did
25 with KeyArena, and the tenant has been there for a long time.

1 That case is Loughlin v. Cook, 38 P.2d at 224.

2 So I would like to turn to the defenses that PBC has
3 raised, if I might briefly address those. With respect to
4 unclean hands, I think the starting point in the Court's
5 analysis should be the law on unclean hands, and whether or
6 not any of the cases that have applied the unclean hands
7 doctrine are analogous to this case.

8 We went through the case law and we found several
9 circumstances where the misconduct at issue rose to the level
10 of unclean hands. A contract formed under inequitable
11 circumstances, the Nelson case. The Washington v. Rhodes
12 case out of Michigan. Not the case here. Broad or
13 misrepresentation prior to formation or materially breaching.
14 Again, not the case here. That is the Walsh case out of
15 Washington. Unfair delays before asserting rights. Not the
16 case here. That is the Hallauer case out of Washington Court
17 of Appeals. If a party commits a fraud upon the court. Not
18 the case here. That is the income investors case out of
19 Washington. The relief sought was contrary to public policy.
20 Again, not the case here. The Cascade Timber case out of
21 Washington. And the US Jaycees case out of the Eighth
22 Circuit. None of these circumstances apply to the type of
23 misconduct alleged here. We also don't believe that the
24 facts and circumstances show that the City itself was
25 involved in the misconduct claim.

1 If you look at the actual evidence in the case you will
2 see that -- as we have noted, as soon as PBC purchased the
3 team Mayor Nickels told Mr. Bennett that the City intends to
4 enforce the lease. This is July of 2006, long before any of
5 the other issues raised by PBC occurs.

6 We see that again in May 2007, before anything occurs
7 Mayor Nickels again rejects the notion of a buyout by PBC.
8 So at least twice before, even the hint that PBC is creating,
9 Mayor Nickels had made the decision -- and testified on his
10 own made the decision as a matter of public policy the City
11 was going to enforce the lease.

12 The steps that took place that involved the City either
13 involved, as Mr. Walker testified, efforts to think about a
14 KeyArena remodel or the hiring of K&L Gates and Mr. Walker in
15 connection with the litigation.

16 The City continued in those two veins meeting with the NBA
17 and PBC to discuss a KeyArena solution in mid October 2007.
18 Again, not there to tell the NBA to force a sale but simply
19 to try to convince both parties that a renovated Key was in
20 fact a better solution.

21 On the other side of the equation, what we have seen
22 evidence of is Mr. Gordon, Mr. McGavick, Mr. Walker,
23 Mr. Ballmer meeting at various points through the period July
24 through September. We heard the testimony that the meeting
25 was all about a Bellevue plan, which the City of Seattle

1 obviously would have no interest in at all. That plan is
2 rejected by Mr. Ballmer. Then the effort turns to these
3 individuals meeting with Mr. Ballmer in October 2007 to talk
4 about him being available potentially to purchase the team.

5 But, again, other than Senator Gorton and Gerry Johnson
6 who, as we talked about earlier, were disclosed to be doing
7 this work before they were engaged in litigation, there is no
8 evidence from Mayor Nickels or Mr. Ceis that the mayor's
9 office directed any efforts with respect to a prospective
10 owner, that the mayor's office knew at all in any way about
11 this power point.

12 And the power point itself, when you read through it,
13 anticipates the mayor's future participation in working with
14 the prospective owner group not present. The only reference
15 there, as Mr. Walker testified, that in August 2007 he and
16 Mr. Ceis met to talk about the fact that the City is willing
17 to put more money into a KeyArena model. And that's what,
18 quote, the offer was all about. It was not an offer to
19 anyone. It was an offer to everyone, anyone who wanted to be
20 in KeyArena, whether it be Mr. Bennett or somebody else that
21 the City was willing to put up \$100 million towards a
22 renovated KeyArena effort.

23 The rest of those slides clearly contemplate a future with
24 the City, getting the mayor involved, getting the mayor on
25 board, but not a concerted plan.

1 The two do come together in early 2008 when the City first
2 meets with the Griffin group, and then they together go
3 forward with the idea of going to the State legislature to
4 try to get a KeyArena renovation funding plan.

5 THE COURT: Mr. Lawrence, you are leaving out one
6 stop here.

7 MR. LAWRENCE: Go right ahead.

8 THE COURT: Mr. Gorton goes with Mr. Ceis to the NBA
9 to lay out their arena plan, Mr. Bennett is invited to that
10 meeting, they sign a document where they agree that they are
11 not going to tell anyone anything, because that might
12 actually be the best moment for all the parties involved to
13 cut a deal or to talk about what they can do to come to a
14 solution. And Mr. Gorton, less than 24 hours later, sends an
15 e-mail to the Ballmer group, where they are talking -- and he
16 lays out name, rank and serial number, and they all talk
17 about going out and getting a beer.

18 MR. LAWRENCE: I cannot explain Mr. Gorton's action.

19 THE COURT: That is the City's actions because that
20 is Mr. Gorton.

21 MR. LAWRENCE: I respectfully would disagree with
22 that for two reasons. One, there is no evidence that
23 Mr. Gorton was directed by the City to provide that
24 information. And indeed the e-mail was not copied to the
25 City, which if it was something done at the City's request

1 that you might expect.

2 THE COURT: He signs on behalf of the City. He signs
3 the NBA agreement not to talk about it. He represents the
4 City there, Mr. Lawrence. What is he doing turning around
5 the next day and violating the City's promise?

6 MR. LAWRENCE: As I said, your Honor, I wish I could
7 explain what Mr. Gorton's thinking was. I am not suggesting
8 that he did not violate the NBA confidentiality agreement.
9 All I am telling you is that there is no evidence that links
10 Mr. Gorton's actions to the City. He was not acting within
11 the scope of his engagement with the City, which is set forth
12 in Exhibit 630, that was limited to the litigation. What he
13 was acting -- Whether or not it would have been appropriate
14 for him to disclose to the City that the carve out that they
15 had discussed with the City to engage in other efforts to
16 retain professional basketball I would have included -- Should
17 Mr. Gorton have requested the City's permission and should
18 the City have said no? I would agree with that. I am not
19 going to deny that he did what he did. All I am saying is
20 that --

21 THE COURT: Is one of the ways -- If I give you your
22 specific performance -- I asked this question before. If I
23 give you specific performance there is one way to ameliorate
24 the harm here to the Sonics, is to sever your ties with the
25 City.

1 MR. LAWRENCE: That would be entirely within your
2 discretion. We would be happy to withdraw and happy to let
3 the City Attorney's office, which would happen in the normal
4 course, take over any ongoing issues between the City and the
5 Sonics. We have no vested interest in this. The City has a
6 vested interest. The citizens have a vested interest.
7 K&L Gates has no vested interest continuing to represent the
8 City if it would be to the advantage of the goal of keeping
9 the Sonics here for the next two years.

10 THE COURT: What else would you like to argue to me.
11 You have a few moments left.

12 MR. LAWRENCE: Just on the hardship. You heard the
13 testimony that Mr. Bennett knew of all the issues that were
14 before him that he now complains about before he purchased
15 the team, the lease was the most unfavorable, the losses were
16 expected to be high. The NBA warned him. He knew about the
17 competing fields of the Mariners and the Seahawks. He knows
18 that attendance is a factor in performance. As Exhibit 343
19 shows, there is a pretty direct correlation between how the
20 team does and what the attendance is. If he is losing money
21 and the team has the worst season in history I don't think
22 that is a hardship because of the lease relationship.

23 If you look at his claimed losses of 61 to \$65 million you
24 can break that down into two easy elements. One, he expected
25 losses based on the prior performance of the Sonics of 46 to

1 \$48 million in the two years prior to which he purchased the
2 team. Second, his expert testimony was that the lame duck
3 losses were 14 to \$16 million. That approximates exactly the
4 losses that he has created.

5 But he did not have to be a lame duck owner. He could
6 have played out his lease here and then moved to Oklahoma
7 City or Las Vegas or Kansas City or any place he wanted to
8 move. But he chose to impose a lame duck status on himself
9 by announcing three years before the lease expiration, before
10 this past season, when he didn't have to, that he was going
11 to move. No one is forcing him to move. No one forced him
12 to apply to the NBA early. He could have played out his
13 lease and, as you heard the testimony, could have waited
14 until the very end of the 2010 season to apply to move to
15 wherever it is he wants to move, and he would have avoided
16 the lame-duck status and the lame duck losses he claims are
17 due to this dispute.

18 This is more than just about money. As the court in the
19 New York Jets case said, "every home game not played at Shea
20 causes more than loss of rental. That is only money. It
21 results in injury to the welfare, recreation, prestige,
22 prosperity and trade and commerce of the people of the City."

23 And, your Honor, as much as we have got great and
24 wonderful cultural artistic values as a world class City, I
25 don't think anyone can question whether New York City would

1 still be a world class City without the New York Jets, but
2 still the court found that injuries associated, to even
3 New York, from the loss of a sports team, would have two
4 football teams, two baseball teams, a basketball team and a
5 hockey team, was still sufficiently important and
6 sufficiently unique and sufficiently hard to quantify that
7 the court ordered the team not to play two home games away
8 from New York.

9 Your Honor, the Sonics and the Storm are synonymous with
10 Seattle. It is a unique relationship that can be protected
11 by the remedy of specific performance. We ask you to defer
12 to the City's decision to elect that remedy to obtain the
13 benefits they bargained for in 1994. Thank you.

14 THE COURT: Thank you, Mr. Lawrence. Mr. Keller.

15 MR. LAWRENCE: Do I have any time left for rebuttal?

16 THE COURT: I think you have about three minutes.
17 You started at 1:28. When you came out you had 30.

18 MR. LAWRENCE: Great. Thank you.

19 MR. KELLER: Your Honor, Brad Keller on behalf of the
20 PBC. This case has absolutely nothing to do with deference
21 to the City of Seattle or any ordinance that the City of
22 Seattle created knowing this lawsuit was in the wings so they
23 could create a piece of evidence to come here and say there
24 are all these things important for the City because somebody
25 realized that these aren't in any of the old ordinances that

1 we put into place.

2 You do not tell a court sitting in equity or a chancellor
3 from old England that they should defer to the mayor of the
4 City of Seattle. You sit here as a court of equity to decide
5 from the ground up whether or not the remedy of specific
6 performance is available under the facts of this case as we
7 stand here now in 2008 given all we learned.

8 And talking about a TRO from a King County Superior Court
9 that had a 14-day TRO in the context of a TRO hearing, or a
10 New York trial court on a TRO hearing, when we have had six
11 days of trial with a fully developed record for you to decide
12 these issues, it tells you nothing in terms of what you need
13 to know.

14 The threshold issue in this case is, and in every case
15 involving somebody's effort to specifically perform a lease,
16 is there an adequate remedy at law. What are the economic
17 benefits that were actually bargained for in the expressed
18 written terms of this lease and are they quantifiable.

19 The economic benefits that are specified in the lease are
20 the base rent, percentage of club suite and seat sales and a
21 handful of other financial items. There is no question that
22 that payment stream is quantifiable. Mr. Barth established
23 that.

24 THE COURT: Mr. Keller, one of the components is in
25 that is the City obviously uses credit, and it still has

1 \$35 million owing on the arena. Do the Sonics basically owe
2 any obligation to the City to pay that off?

3 MR. KELLER: The obligation is to continue to pay the
4 rent and meet its financial and other obligations for the
5 balance of the two years. If that doesn't cover their
6 remaining obligation on the bonds, the answer is no. If it
7 does cover it, the answer is yes. And I can tell your Honor
8 it probably won't, because we heard from the testimony that
9 the projection of financial payments under the life of the
10 lease were nine to \$10 million, less any mitigation revenue.
11 I am not sure if there was actually evidence to this effect
12 in the case but I believe the current projection is at the
13 end of the two years the remaining balance on what is the
14 original debt, which has been moved over to other places on
15 the City balance sheets, will be about 20 to \$25 million.

16 So instead of talking about things that are expressed
17 written provisions in the lease the City spent much effort
18 endeavoring to show that it would lose indirect benefits,
19 things that are nowhere in this lease itself. And because of
20 that we see things that are really not protectable interest
21 in a specific performance case.

22 But here I realize you are not going to decide that in
23 this case, because you don't need to. The evidence showed
24 that everything that was indirect that they talked about is
25 quantifiable. One item was City tax revenue. That was a

1 math exercise that was also done by Mr. Barth. Another
2 indirect item was the alleged indirect benefit to our local
3 economy.

4 It doesn't make a difference if you use the gross economic
5 benefit, \$180 million approach that Mr. Hatamiya used, where
6 nobody spends any of their leisure dollars on anything else,
7 or you use zero net economic approach of Mr. Humphreys, the
8 amount is quantifiable if it is compensable.

9 Your Honor's questioning of Mr. Hatamiya sums it up best.
10 Can you use this RIMS thing, is it the same thing for a
11 sports team as it is for a box store. Yeah.

12 Then there was the analysis of the City staff itself, an
13 admission by the City that professional sports really are not
14 drivers of the local economy. And that was the bottom line
15 from Mr. Alves' memo to the City council, Exhibit 525.

16 To quote two authorities in the field, there are few
17 fields of empirical research that offer virtual unanimity of
18 the finding. That is, they are not drivers of the local
19 economy.

20 The disparity between these experts, it doesn't show that
21 the amount is difficult to quantify. It just shows that if a
22 trier of fact later is permitted to consider indirect
23 economic benefits, the trier of fact, or maybe even the court
24 on a Daubert type motion, is going to decide what is
25 appropriate, gross benefit approach or net benefit approach.

1 Regardless it is quantifiable.

2 And then there was this debate over intangible economic
3 benefits, things like civic pride, sense of community, and a
4 supposed elevating of Seattle's visibility. I think
5 Seattle's visibility has been elevated by what came out of
6 this courtroom in the last few days.

7 Let's talk about the more positive things now. One thing
8 was clear from the evidence, and that is that unlike in the
9 case involving the Minnesota Twins, where there was a virtual
10 zero rent deal, and the intangibles were spelled out in the
11 enabling legislation and the leases as to what was the
12 exchange, this lease doesn't have any such expressed
13 provisions. This lease was a construction financing
14 mechanism, where the revenue sharing feature was going to pay
15 off the bonds. That was the hope.

16 And it is very very telling, I thought, that the original
17 ordinance back in 1994 that authorized Ms. Anderson to sign
18 this lease, Exhibit 32, makes absolutely no mention of such
19 intangibles as an expected benefit or reason for entering
20 into the lease.

21 Now, it is true that Ms. Anderson comes in now and she
22 says, well, you know, that was kind of an assumption that
23 there would be these kinds of things. In Washington, with
24 Bird versus Huttesman and the Hearst case, subjective
25 assumptions really don't count in contract cases. We deal

1 with the objective manifestations of the parties intent. So
2 that doesn't really help them trying to establish an
3 expressed term, and certainly not a written term, about these
4 intangibles.

5 I think it was also very telling that since the enactment
6 of Initiative 91 it is the law here in Seattle that these
7 general intangibles that you are being told now are the be
8 all and everything, it is the law in this City and has been
9 for two years now, they count for nothing, zero, when it
10 comes to determining whether the City of Seattle is receiving
11 fair value for public dollars.

12 And it was telling when Mayor Nickels conceded that any
13 sense of civic pride would be, I think his words were, muted
14 if the only reason the team is here is because of a court
15 order.

16 Look, we need to be straightforward here. What is at
17 issue here? Not the glory days of the past. What is at
18 issue is two years of lame-duck status. What is the civic
19 pride and sense of community from a team that rightly or
20 wrongly has decided to go elsewhere? Not much.

21 What civic pride is there from a team that in poll after
22 poll our citizens say they don't want to spend money on a
23 facility, and they say we would be better off without them?
24 Not much.

25 What civic pride is there when attendance is dwindling,

1 the arena is increasingly empty and local sponsors don't even
2 want their products tainted by the branding of a team that is
3 leaving? Not much.

4 What civic pride is there when four times over four years
5 with three separate ownership groups Olympia in so uncertain
6 terms has said no to an arena? Very little.

7 And what civic pride is there when 30 percent of the
8 people who pay for a ticket don't even bother to go to a
9 game? And out of a million households less than 20,000, two
10 percent, even bother to turn on their TV set to watch a game?
11 Very little.

12 We also had testimony, and I think I will characterize it
13 as interesting testimony, from Professor Zimbalist about how
14 there are intangible benefits from just everything, talking
15 about the weather on the elevator, going to a house of
16 worship, talking about the Huskies, the Mariners, the
17 Seahawks.

18 Here again, we can debate in the next phase, if we have
19 to, whether that is compensable, and how much intangible
20 benefits there really is or isn't from a lame-duck status
21 team. The issue now is can you quantify it if it is
22 compensable. And the evidence was you can.

23 The evidence was there is this thing called this
24 contingent valuation methodology, and it has been used to
25 measure exactly these intangibles for an NHL franchise, the

1 Penguins and for an NFL franchise the Jaguars. Professor
2 Zimbalist himself did it for the Anaheim Angels. He computed
3 the value of such intangibles in the middle \$7 million range.
4 That was Anaheim, a very popular Major League Baseball
5 franchise. Even Mr. Humphreys testified that the intangible
6 benefits can and have been quantified.

7 So if, and I underscore if, intangible benefits over the
8 next two years is something that is part of the benefit of
9 the bargain here, it is quantifiable if they are compensable.

10 But what is clear, though, is it is not an expressed
11 written term of this lease.

12 And whether the Sonics leave now versus two years from
13 now, it makes no difference as to whether this is a
14 professional sports town in a world class City. Mayor
15 Nickels said that right here in this courtroom from the
16 witness stand. This was his testimony in the trial. "If
17 they leave two years earlier is it still going to be a
18 professional sports town?" "Yes." "Still be a world
19 class City?" "Yes."

20 The question of whether there is an adequate remedy of law
21 is the threshold issue. It is an issue as to which the City
22 has the burden of proof. The City has the burden of proving
23 that the things it claims it is entitled to receive under the
24 lease and that it would lose cannot be quantified.

25 We submit the evidence here, where we have had a full

1 blown trial, unlike the TR0 orders from some other trial
2 courts, has shown that they can be quantified. If the answer
3 is the evidence shows they can be quantified, it should be
4 the beginning and the end of the case.

5 In the world of contracts there are times when
6 nonperformance and the payment of the financial consequences
7 of nonperformance is the most efficient way for a party to
8 proceed.

9 THE COURT: Mr. Keller, let's assume that payment
10 would be the most efficient way to proceed. In other words,
11 we know in the testimony that Mr. Bennett made the City a
12 \$26 million offer, which of course could pay off their debt
13 at the arena if they chose to. Is it up to me to tell the
14 City leadership you're asking for a bad bargain? That is not
15 my role, is it?

16 MR. KELLER: No. Your role is to determine whether
17 under the facts of this case specific performance is an
18 available remedy. And if the answer is no, well, they are
19 going to have to revisit what their approach was to that
20 buyout offer.

21 I will tell your Honor, since you raised that offer, that
22 offer was put together designed based on exactly how much the
23 financial payments would be under the lease to the City, and
24 what the remaining construction debt obligation would be at
25 the end of it.

1 THE COURT: That wasn't lost on me, Mr. Keller.

2 MR. KELLER: That was the PBC's effort to approach
3 this the way one would approach any lease termination, what
4 does the other guy need, what is fair. That is different
5 than what the setting will be if we have a contested
6 proceeding later and we are talking about what are they
7 actually entitled to.

8 This is one of those situations where nonperformance and
9 payment of the financial obligations is the most efficient
10 way.

11 PBC is going to have to pay at least nine to \$10 million
12 over the next few years, less any mitigation revenue, no
13 matter what. That is a lot of money to pay for a facility
14 that if it has its way it is not even going to be using it.

15 Why would it do that? Because it is a lot less than the
16 \$60 million loss that the team faces here. It is a lot
17 better than trying to make a go of it for two years when you
18 have a landlord whose sole objective is to force you to sell
19 your team to someone else.

20 And when it comes to the direct financial payments
21 specified in the lease, to borrow a phrase from Mr. Lawrence,
22 listen, a deal is a deal. The lease obligates it to pay
23 those amounts and it will.

24 So why is the home game provision any different? This
25 lease says, play your home games at KeyArena, and there is a

1 generic specific performance clause. Why isn't that, no pun
2 intended, game over?

3 There are two reasons. The first is that the generic,
4 specific performance clause is just that. It is a general,
5 free-floating clause, and it is because of that it is
6 ambiguous as applied to this dispute.

7 That specific performance clause, was it meant to apply to
8 the extensive process that is laid out in I think the first
9 20 pages of the lease about -- for the design and
10 construction of the remodel? Was it meant to apply to the
11 home game provision? Well, one thing is for sure it couldn't
12 have been meant to apply to everything. There is a lot of
13 provisions in that lease that say we will pay X dollars for
14 this, we will pay Y dollars for that. Those are things that
15 are never specifically enforced. We are left to really guess
16 were these parties intended that the home game provision
17 would or would not be one of those provisions that would be
18 subject to specific performance.

19 And this is where the very heavy burden that the City
20 bears comes into play. Because the burden of proof in a
21 specific performance case is a heightened one. It is not a
22 mere preponderance. Under Washington law the City has the
23 heightened burden of showing by, quote, clear and
24 unequivocal, close quote, evidence. That is evidence that
25 leaves no doubt as to what the parties intended to be their

1 agreement.

2 Here again, Ms. Anderson's testimony as to what she
3 believed or what she assumed really is irrelevant under
4 Washington law. In any event, she said nothing other than 13
5 years ago the City hoped to secure having a team for 15
6 years. But she also said an equally fundamental assumption
7 of premise was that this arena was going to enable the team
8 to continue to be profitable over the 15 years, and that
9 KeyArena would remain a competitive NBA arena.

10 The second reason that this home game is at the beginning
11 and the end of this case, is when it comes to specific
12 performance what the lease says is just the starting point.
13 We wouldn't even be here if there wasn't a home game
14 provision. The reason we are here is whether it should be
15 specifically enforced for the last two years given all of the
16 facts and circumstances related to what brings us here today,
17 13 years later, in what is now an utterly and completely
18 economically and relationship wise dysfunctional
19 relationship.

20 So to stand here and say that because of 13 years ago a
21 deal is a deal, that really tells you very little about what
22 a court in equity sitting here 13 years later, whether or not
23 it is equitable to specifically enforce the home game
24 provision.

25 You know, in every specific performance case there is

1 going to be an expressed provision that required somebody to
2 do something. That is a given. But what we need to decide
3 is whether it should be specifically enforced. The threshold
4 issue, is there an adequate remedy at law. And that is
5 whether the consequences of nonperformance are reasonably
6 quantifiable. Here they are. And we submit that is really
7 not much more needed to decide this case.

8 What's the rule in Washington on leases? Can we see the
9 slide on Washington Trust? This is a Washington Appellate
10 decision. It makes it quite clear that a suit for specific
11 performance will not lie if there is an adequate remedy at
12 law. "It has long been held in Washington that there is an
13 adequate remedy at law in damages for the breach of a lease
14 agreement." That is the rule here.

15 Now, I just want to comment on the Sonics. Counsel talked
16 a lot about Crafts versus Pitts. Crafts versus Pitts is your
17 typical, one-shot sale of real estate case. And in that case
18 there was something very unique about the parcel of land that
19 the buyer needed to have it to fill out a complement. It is
20 your typical one-shot ownership of real estate case. It is
21 not a lease case. Lease cases are different. A lease
22 holder's interest is different and the problems that they
23 raise on the continuous operation are very different. I will
24 talk about that in more detail later.

25 Now, counsel talked about the fact that, you know, these

1 Sonics, they have been really good corporate citizens. They
2 give back a lot to our community. And somehow that should
3 change the outcome in this case. Nothing in this lease
4 requires the team to do what it has done. It is interesting
5 that there is nothing in the enabling ordinance that recited
6 such considerations. And there is really nothing unique
7 about what the Sonics do as compared to the Storm, the
8 Mariners, the Seahawks, Boeing or Microsoft or any other good
9 corporate citizen in our community.

10 Trying to use a team's good communities work to justify
11 making it lose another \$60 million reminds me of a saying, no
12 good deed goes unpunished. And what message does it send to
13 companies who give back to the community? Do so at your
14 peril because your good works may be the ball and chain by
15 which we make you continue to lose money here? I don't think
16 that is the message to send.

17 These claimed losses are quantifiable. The law is clear
18 when it comes to a lease the extraordinary remedy of specific
19 performance is not available if they are quantifiable.

20 Stop and think for a minute, why is it that specific
21 performance is considered so extraordinary. It is because
22 money compensation is the currency of our judicial system.
23 You don't get to elect remedies. It is money compensation.
24 That is our currency that we deal with here in this
25 courthouse. Not court orders forcing you to try and operate

1 a business in a very public and openly hostile relationship,
2 in a facility that is no longer viable and with a landlord
3 who has for over a year now engaged in conduct designed to
4 try and force you to sell.

5 Last week I said the evidence would show that the marriage
6 was broken and that equity would not be served by enforcing
7 the estranged parties to continue under the same roof. I am
8 sad that the evidence showed more than that. It showed
9 scheming to undermine and take away the tenant's business.

10 I took no delight in exposing in this courtroom the
11 plotting to use this lawsuit to try and force PBC to sell.
12 This is my town too. But I felt shame for those among us who
13 live in a world of power and privilege and who have not
14 learned from history's lessons that the end does not and
15 never will justify the means, and that using proper means is
16 the difference between doing the right thing and doing the
17 wrong thing.

18 The evidence presented showed that there was a plan to use
19 specific performance to lock PBC into tens of millions of
20 dollars to force it to sell the team.

21 Now, I want to quickly review with you what that evidence
22 was and why it can and should be laid at the feet of the
23 City. It starts in July, but not with the first entry I have
24 in this chart. Because remember you have to set the stage.

25 What had happened in July? Mr. Bennett -- excuse me, PBC

1 had sort of been told by Olympia a few months earlier, no
2 financing. And he had issued a very public statement. He
3 had talked to the media, he had met with the mayor, he was
4 reaching out publicly. This was referred to I think as the
5 call to action. We didn't get anything done in Olympia. We
6 are looking for some solutions. Time is running out. It is
7 time to do something.

8 Everything we are about to see that unfolded was going on
9 against the background of that public request for assistance.

10 We know that in mid July there was the e-mail from
11 Mr. McGavick characterizing what was about to unfold as very
12 Machiavellian stuff.

13 I thought it was amazing in the opening statement counsel
14 mockingly referred to our contention that there was a
15 Machiavellian scheme here. Lo and behold the evidence shows
16 up with an e-mail in mid July characterizing what was about
17 to unfold as very Machiavellian. And in Mr. Walker's comment
18 in that e-mail, which is trial Exhibit 876 -- excuse me, the
19 trial transcript, Mr. Gorton refers to the plan as complex
20 and ambitious.

21 Next was on July 24th. That was the meeting that occurred
22 between Mr. Walker and Mr. Nakatsu, I believe it was, right
23 below the mayor. And Mr. Walker described his desire to make
24 it too expensive and too litigious for PBC, and his takeaway
25 from the meeting was that the City was in total agreement.

1 This is also the e-mail, by the way, that Mr. Stanton
2 responded by saying it should be excruciating.

3 Then in mid October we have Mr. Walker's e-mail that gets
4 forwarded to Mr. Griffin that talks about continuing to drive
5 the wedge. We have the entry in Mr. Walker's calendar.

6 And then we have the meeting on October 7th at
7 Mr. Walker's house where Mr. Gorton brings over the poison
8 well power point slide. They all flip through it, go over
9 it. Everybody was dancing around whether they spent any time
10 on those pages. It is like they didn't want to touch them
11 because of what they said, because they talked about
12 increasing the prospect of locking them into losses,
13 increasing their costs in an unpleasant environment and how
14 Mr. Gorton would increase the pain of staying.

15 One thing that hasn't been exercised that I would like to
16 point out is what happened two days after that October 7th
17 meeting. You will find it in Exhibit 601. It is not on my
18 chart here, but it is Mr. Walker's calendar. Two days later
19 Mr. Walker's calendar reflects a meeting at K&L Gates and
20 Ellis attended by himself, attorneys from the firm and
21 Mr. Ceis. It says it right there in his calendar. So one
22 thing you will have to decide is what is the likelihood that
23 two days later after the finalization of the whole poison
24 well power point presentation, after having spent two days
25 before going through it with Mr. Ballmer, whether they

1 weren't doing the exact same thing two days later with the
2 City's Assistant Deputy Mayor sitting there in the office of
3 K&L Gates with Mr. Gorton.

4 Next we have the Bennett isn't in a box e-mail from
5 Mr. Griffin in his report to Mr. Ballmer. And we had another
6 thing from Mr. Griffin in December talking about Mr. Bennett
7 feeling the bleeding. And we had Mr. Griffin's December
8 e-mail talking about how they need to get Mr. Bennett to sell
9 at a reasonable price, litigation-forced bleeding will help.
10 And also in mid December Mr. Gorton's e-mail that Bennett
11 will only sell if he faces an expensive and unpleasant legal
12 future.

13 So why is the City accountable for what we just looked at?
14 Well, the first reason is that the factual inference that the
15 City became complicit in the scheme is more than warranted.
16 It is somewhat compelling. Think of that. The July 24
17 meeting between Walker and the mayor's office. They were
18 sitting there. The takeaway is they are in total agreement
19 with the fact that we have to make this too expensive and
20 litigious for them.

21 Then you have Mr. Ceis two days after the October 7
22 meeting with Walker, with Mr. Gorton and the other people
23 from K&L Gates, right after the poison well is finalized.

24 In August you have Mr. Ceis publicly stating in the
25 newspapers that everything has become so dysfunctional, we

1 are all going down the drain. The worse we make it for him,
2 the worse he makes it for us.

3 And then you have the mayor's admission that was in his
4 deposition that was played during his testimony here. And I
5 am going to play it for you now. His admission. And he is
6 trying to effectuate a sale. And that is one of the reasons
7 why we are here.

8 Can we see the mayor's testimony?

9 (Video played)

10 I think, as your Honor just pointed out in questioning
11 Mr. Lawrence, what did the mayor do when Mr. Bennett tried to
12 reach out to him during this period of time in July and
13 August? He didn't respond.

14 And then we have the mayor's press conference in March,
15 where standing there with Mr. Griffin, Mr. Gorton and the
16 mayor, Mr. Gorton says, and this is in Exhibit 582, Page 8,
17 that they have been working hand in glove -- that the buyers
18 have been working hand in glove with the City from the
19 beginning to the end of this process. If you look at the
20 poison well document itself it actually indicates that the
21 mayor himself already was on board for certain things.

22 Can we see Exhibit 567? This is at page Bates 522. "The
23 path forward. Let the public guys lead. With the offer the
24 mayor has made to us and the planned trip to New York City
25 the mayor wants to make this happen. Let him." Is that

1 talking about let's enlist him down the road? It says not
2 only is he on board, they have already got the plan to go to
3 the NBA to drive the wedge.

4 In the poison well path forward, your Honor, it didn't
5 just lay out a potential strategy. In the ensuing months the
6 two groups, each in a coordinated manner, implemented the
7 precise pincer strategy that is laid out in this document.
8 Each one doing what the other needed and publicly joining
9 hands when it came time to come out of the closet, so to
10 speak. And there is K&L Gates smack dab in the middle
11 coordinating all of this.

12 Here is Slade Gorton, the right side of his brain is
13 working for the Griffin group's lawyers, the left side is
14 working for the City's litigation lawyers. We are supposed
15 to think the left side of the brain isn't talk to the right,
16 and vice versa.

17 You are being asked to accept that the City's attorney
18 wasn't telling his client what he was cooking up when the two
19 had the exact same objective, to keep the team here, and
20 forcing the sale would have accomplished that objective for
21 both. That is contrary to logic. That is contrary to common
22 sense. And if there was even some fleck of plausible
23 deniability to this we didn't know, the law doesn't permit a
24 principal to act like a horse with blinders ignoring what its
25 agent is doing.

1 The legal standard is one of inquiry notice. I don't
2 think this was in the briefing. It was American Insurance
3 Company versus Lucus, 38 F.Supp. 896. And the pertinent
4 discussion is at pages 922 through 924. It is inquiry
5 notice.

6 If a person of ordinary prudence and diligence would have
7 inquired what K&L Gates and Walker were doing the law imputes
8 to the City all of the knowledge that a reasonably diligent
9 inquiry would have disclosed.

10 And as the case points out, there is good reason for it.
11 Because if you hold otherwise this basic maxim of equity that
12 he who seeks equity must do equity could be defeated by the
13 principal, the very person for the benefit it is being done,
14 by just closing their eyes.

15 THE COURT: Mr. Keller, let's back up here.
16 Litigation we all know can often be unpleasant and
17 embarrassing, but it is also used to get people what they
18 want or to enforce people's rights. On its most basic tenant
19 you don't disagree the City had the right to bring the suit?

20 MR. KELLER: Absolutely.

21 THE COURT: And you don't disagree that the City had
22 the right to do discovery?

23 MR. KELLER: Absolutely.

24 THE COURT: Or carry on discussions as to what they
25 are going to do with the arena if Mr. Bennett leaves. So

1 what about the quality and nature of this violates the spirit
2 of the litigation here?

3 MR. KELLER: I think it is different than the spirit
4 of litigation, because what we are dealing with is what did
5 the City have the legal right to seek. And if it started out
6 having the legal right to insist on the team performing for
7 the last two years, it stops there. I wouldn't be able to
8 talk about what I am talking about.

9 But when it goes beyond that, and it does it for the
10 purpose of trying to get something to which it has no right
11 under the contract, it is then using it for an improper
12 purpose. It is then seeking to get something it has no right
13 to seek.

14 THE COURT: So it has no right to sale?

15 MR. KELLER: It has no right to force its tenants to
16 sell. Does it have the right to try and work with the tenant
17 to get the tenant to stay longer? Of course it does. But if
18 the tenant doesn't want to because it believes, and in its
19 discretion it is entitled to believe, the arena is inadequate
20 both existing and renovated, it has no right to force its
21 tenant to sell or engage in any course of conduct that is
22 designed to try and accomplish that end. And when you do
23 that you go over the line from a proper purpose to an
24 improper purpose. And when you join hands and actively
25 become complicit with others to engage in acts to effectuate

1 that improper end you go from what is just a lawful exercise
2 of a legal right and cross over into the world of unclean
3 hands and improper behavior.

4 What I wanted to finish was why is it that the City is
5 accountable here? What is it that gives them, if nothing
6 else, inquiry notice if they weren't complicit expressly? It
7 is the very K&L Gates retention letter. It is spelled out
8 that the firm was working to retain the Sonics as tenants,
9 and that those efforts could lead to a long-term extension.
10 That disclosure itself imposed on the City inquiry notice
11 about what it is that these lawyers that I am now going to
12 hire and are going to be my advocates and press my case, what
13 is it they are doing that could lead to this team staying
14 beyond the lease.

15 In fact, your Honor, go to the other side of the equation,
16 K&L Gates. K&L Gates had a duty to disclose to the City not
17 just that it was generally doing some work for a buyer group
18 but in sufficient detail so that the City could give its
19 informed consent to the contemporaneous representation.

20 One can argue, and I am arguing that the Code of
21 Professional Responsibility, and particularly RP 7 1.7
22 subpart (b)(4) required K&L Gates fully disclose its
23 activities for the Griffin group in sufficient detail to get
24 the City's informed consent to the contemporaneous
25 representation. And I ask you to infer that that law firm

1 was aware of and complied with its ethical obligations in
2 that regard. And if it did so it had to disclose what it was
3 doing in working with the buyers trying to force a sale.

4 Now, to get back to what I think you were asking me
5 before, what is the line between what is okay and what
6 crosses over to what a court can deem unclean hands? There
7 is no fixed standard.

8 Professor Dobbs in his treatise on remedies makes the
9 point that the conduct itself need not be unlawful. But
10 really, your Honor, the case law is not very helpful in
11 fleshing out an objective standard against which to gauge
12 what happened here.

13 What is clear, though, is that a court sitting in equity
14 has very wide discretion to consider all the facts and judge
15 each case on its own.

16 I would submit, your Honor, the fact that I can't stand
17 here and cite a case to you where a landlord actively worked
18 to undermine its tenant, and to force its tenant to sell and
19 divest itself of an asset that belonged to the tenant, the
20 reason I can't cite a case to you just shows in certain
21 respects how unprecedented and inappropriate the conduct was
22 that occurred here.

23 Now, what Professor Dobbs does point out in this treatise
24 is that the unclean hands must be related to the equitable
25 relief that is being sought. In other words, how close is

1 the nexus between what is inappropriate conduct and the
2 effort to obtain specific performance. And that nexus issue
3 is at Section 2.4(2) at Page 95.

4 And here in this case the two go hand in hand. When PBC
5 paid \$350 million for this team, yes, it legally assumed a
6 lease that had what is now a two-year tail. But what it
7 didn't legally assume was having a landlord who was trying to
8 use those two years as a bludgeon to try and force it to
9 sell. Yet that is what has occurred, that is what happening
10 here. And the conducts and acts that constitutes unclean
11 hands, they were like this when it comes to the relief of
12 specific performance. The City and the buyers were working
13 hand in hand. And they can only enjoy the fruits of their
14 scheme if specific performance is granted.

15 Your Honor, I submit that these issues really have a life
16 of their own that goes beyond and separate from the issue of
17 unclean hands. What it really goes to is whether this Court
18 is willing to be used. It goes to whether this Court is
19 going to permit itself to become the tool by which the forced
20 bleeding, forced sale strategy gets implemented.

21 Just like Mr. Griffin conceded on the stand, he had no
22 ability to impose the bleeding. Only Mr. Gorton and the City
23 could do that. Well, so too the only way the City can now
24 continue to try to force its tenant to sell is if you force
25 the bleeding. We submit that a court in equity should not

1 countenance such attempts at misuse of its powers.

2 Whatever legitimate interest they had in those last two
3 years they lost the ability to come here claiming that they
4 were just trying to enforce their rights when it sought to
5 leverage the hardship to force the sale. And however
6 laudable it may be that City government would like to retain
7 the team, the City doesn't have the right to enlist a court
8 of equity's aid in trying to get something it is not entitled
9 to under the lease, a tenancy that goes beyond two years and
10 a forced sale.

11 So what case law supports what I am saying? I must admit
12 even after you asked your questions it has been difficult to
13 go out and find a lot in this area. We did cite the US
14 Jaycees case, which I think does stand for the proposition,
15 look, it doesn't make a difference how strong you are when it
16 comes to your legal right, a court of equity is not going to
17 grant equitable relief if you seek to do it for an improper
18 or unconscionable purpose. And trying to bleed your tenant
19 to force them to sell is an improper purpose.

20 I know your Honor is familiar with the US Jaycees case,
21 because you cited it in your First Global Communications
22 decision. I acknowledge that was a very different factual
23 setting. But First Global and US Jaycees they both stand for
24 the proposition you may have a very strong legal right to
25 something, but if the purpose for which you seek to enforce

1 it is improper then a court in equity is not going to assist
2 you.

3 I think Washington law recognizes this as well. Can we
4 have the slide from the Arnold case. This is from Arnold
5 versus Melani. This was a case involving an encroachment.
6 The issue was whether there was going to be a forced removal
7 of the things. And the Washington Supreme Court said, the
8 "doctrine is rather the judicial recognition of the
9 circumstance in which one party uses a legal right to gain
10 purchase of an equitable club to be used as a weapon of
11 oppression rather than in defense of a right." We submit
12 that is what the evidence shows is happening here. The City
13 wants to use specific performance as a club to inflict
14 financial harm on PBC to force it to sell.

15 Now, I want to spend a few moments talking about what the
16 evidence showed the other ways this marriage is broken,
17 besides the land grab that is going on for an asset that
18 belongs to PBC and only belongs to PBC.

19 I think it is more difficult to imagine a more
20 economically dysfunctional lease than what this one has
21 turned into. The evidence shows this lease doesn't work for
22 either party anymore. It hasn't worked for either party for
23 going on eight years now and through three different
24 ownership groups.

25 The mayor's 2006 task force report concluded the lease,

1 the facility, they are both dysfunctional and it has only
2 gotten worse since then.

3 Look, it is undisputed KeyArena is no longer a competitive
4 NBA arena, and it hasn't been one for years. An NBA
5 franchise cannot operate profitably there. It has been that
6 way for years. That was conceded. And the very economic
7 model that was underpinning this argument got turned upside
8 down 180 degrees when two new stadiums with fancier suites
9 and better amenities got built. That was conceded.

10 Mayor Nickels himself admitted the changes in the
11 marketplace have had a profound impact on the lease
12 economics. This was his testimony in the trial. The
13 marketplace just fundamentally changed since the 13 years
14 that this lease was entered into, right? Yes. And it
15 changed and it had a profound impact? Yes.

16 Now, counsel says, look, there are no substitutes. We
17 can't get another NBA franchise. Well, why is that? Because
18 they don't have a competitive NBA facility, and haven't for
19 years.

20 You know, Mr. Walker and Mr. Griffin, they got on the
21 stand and they tried to sell you this, well, you know, it
22 wasn't just about forcing the sale. That was just one of the
23 options. Another option was to get another NBA team. Well,
24 they can't get their stories straight. Can they get another
25 NBA team or not? The answer is they can't until they get a

1 competitive arena. That is why there is no substitute. And
2 there never will be in this town until there is a competitive
3 arena.

4 The City comes in and they say, hey, you know, we know
5 this facility doesn't work, we know you are losing tons of
6 money, we know it doesn't work. But they say, you knew all
7 that. You knew that when you bought this place, this team.

8 I've got three responses to that, your Honor. The first
9 is, this isn't a misrepresentation case or a case of
10 nondisclosure. It is a contract case. What we knew, when we
11 knew it has nothing to do with whether now, given the toxic
12 relationship between these parties, given the extremely
13 difficult operating environment, where the equity is now
14 going to force one of these parties to struggle on and incur
15 \$60 million in losses.

16 The second thing is, the assumption agreement that counsel
17 keeps talking about, it didn't just assume the liabilities,
18 it also assumed the rights, including the prior owners'
19 rights, and including my right to ask your Honor to consider
20 and take into account that just not my client couldn't fix
21 this arena solution here, but the prior ownership couldn't
22 with their 50 or \$60 million of losses as well.

23 The third reason is PBC tried to fix the problem with a
24 newer arena, and a solution that its contract with the seller
25 gave it ultimate and absolute discretion over.

1 When that plan didn't work the losses that were
2 experienced far exceeded anything that had been projected
3 based on what were the inadequacies of the facility.

4 And I think the numbers here were very telling. I put
5 together an exhibit to summarize them.

6 THE COURT: Mr. Keller, can we come back to these
7 numbers after we take a break?

8 MR. KELLER: Absolutely.

9 THE COURT: Ladies and gentlemen, we will be at
10 recess for 15 minutes.

11

12 (Short recess taken.)

13

14 THE COURT: Please be seated.

15 All right. Mr. Keller, I think we're going to look at
16 some numbers here.

17 MR. KELLER: We are, but I'm going to doing it very
18 quickly because these exhibits are in evidence. What I
19 wanted to point out to Your Honor is Goldman Sachs'
20 projections and the MZ Sports' projections, both of which
21 were done at the time PBC acquired the franchise, they were
22 done with the expectation that there would be a new arena
23 solution in the area. And both of them projected -- yes,
24 they projected losses, but nothing even remotely to what in
25 fact has occurred. The delta between the two is in the range

1 of \$30 million. Those exhibits are in evidence.

2 The point I want to make now is the losses are going to
3 get worse because of the lame-duck status. The rhetorical
4 question I want to pose is: To what end? Because Mayor
5 Nickles says he's an optimist? An optimist about what? The
6 fact that PBC will drown in red ink and be forced to sell to
7 the Griffin gang? An optimist that somehow Olympia, which in
8 four separate legislative sessions in working with three
9 different owner groups has said no is suddenly going to do an
10 about-face? The evidence was the City had five years of
11 chances to fix the problem. And we're here today because it
12 couldn't.

13 Your Honor inquired whether KeyArena being an economically
14 viable NBA venue was an express term of the lease. The
15 evidence clearly showed that the parties very clearly
16 intended that it would be a competitive NBA facility, and it
17 would be a facility where the teams' operations could be
18 profitable. The whereas clause reflects that and
19 Ms. Anderson testified.

20 Is it an express written term? No. But that doesn't make
21 it a non-issue. Just the opposite. For purposes of specific
22 performance, it very much makes it the issue because it
23 becomes part of the equation of undue hardship. When we're
24 dealing with equities extraordinary powers, the question is:
25 Should those extraordinary powers be brought to bear with a

1 facility that no longer works; where the original intent was
2 that it would be competitive and it isn't; where the original
3 intent is that the team could be profitable playing here
4 because it would be in a competitive facility and it can't.

5 This facility hasn't worked for NBA basketball for years
6 when it comes to the economics of the sport. The landlord
7 knows it; hasn't been able to fix it. This team has been in
8 a downward spiral for five years, in part because of an
9 inadequate arena and a dysfunctional lease. The dysfunction
10 developed long before PBC bought the team. And it has just
11 gotten worse and it will continue to get worse.

12 A team is a business. A business is a living and
13 breathing organization, not just an Excel spreadsheet. This
14 business faces enormous obstacles here if forced to stay at
15 KeyArena the next two years, obstacles just trying to
16 preserve what it has left.

17 20 percent loss of employees the past few months will be
18 dwarfed by employee retention problems that it will face
19 going forward. How do you provide leadership and instill
20 your culture into an organization when the owner can't come
21 to town without a personal security and can't, let alone sit
22 court side at a home game? You can't.

23 How do you maintain employee morale when your team and the
24 whole organization is just trying to stem the bleeding until
25 they can leave in two years? You can't.

1 How do you sell sponsorships and sell signage to area
2 businesses when your brand has become synonymous with
3 abandonment? You can't.

4 How do you expect fans to support your product -- I'll say
5 it candidly -- when in their eyes you're nothing but a bunch
6 of carpetbaggers from Oklahoma City who came here to take
7 your team away? You can't.

8 How do you convince your potential customers to spend
9 \$5,000 to \$7,000 for a single season ticket, let alone
10 \$60,000 to \$130,000 for a suite when the loyalty bond has
11 been broken, attendance is declining, and the community is by
12 all outward appearances apathetic? You can't.

13 How do you attract coaches and professional staff to come
14 work in what is now a very public and openly hostile
15 environment in a dwindling fan base? You can't.

16 How do you attract free agents or resign free agents in an
17 unstable setting like this? It's going to be extremely
18 difficult.

19 This team and this business desperately needs to regroup
20 and rebuild. They need to establish roots in a new home and
21 team pride. They need the boost of an enthusiastic
22 supportive community and local leadership that through action
23 has spoken about how it values having a team not the
24 demoralizing bad blood setting we have here, where the
25 landlord and City leadership trying to make you bleed until

1 you will sell. Getting rid of the City's lawyers doesn't get
2 rid of the problem. Just like Mayor Nickles testified in
3 that admission I played for you earlier, his goal is to have
4 a local sale.

5 The undue hardship, Your Honor, goes beyond the \$60
6 million in losses the team faces. It's the struggle and the
7 obstacles of trying to run a business that depends on
8 community and fan support where the bond of the community and
9 the fans are in the process of being severed.

10 Professor Dobbs, again, in his treatise provides some
11 guidelines about undue hardship. The "undue" in undue
12 hardship isn't whether you have deep pockets and can continue
13 funding capital calls, that you have some affluent investors.
14 There is no silk stocking exception to Section 364 of the
15 Restatement of Contracts.

16 Undue hardship is how does the hardship to PBC compare to
17 any nonquantifiable loss to the City? We submit the balance
18 here is decidedly lopsided with a very significant hardship
19 on PBC.

20 Why is it that there is not a single Washington court that
21 in a reported decision has ever specifically enforced a
22 lease? Why is it that courts generally refuse to force a
23 marriage and don't force the parties to have an ongoing
24 interactive relationship for any extended period of time?

25 And I want to respond to Your Honor's inquiry about the

1 Triple-A baseball club matter, because it is the difference
2 between a sale and a lease. Triple-A involved a one-shot
3 sale. That's all the Court was dealing with: Are we going
4 to specifically enforce a sale of a franchise? It was not
5 dealing with a lease.

6 So the protectable interest that the buyer had there was
7 the right to own the franchise with all that comes with
8 ownership of a franchise. And the Court didn't have to deal
9 at all with how is an owner's interest from a bundle of
10 rights that come with ownership, they are very, very
11 different from a lessor's interest in the last two years of
12 the lease. That is one very important difference. Two,
13 because it's a sale, you don't have any of the ongoing issues
14 that you face in a lease situation.

15 I submit there is a difference. If you look at page 225
16 of the decision, the Court pointed out that one of the
17 reasons why there was deemed to be no adequate remedy of law
18 was that there had been a failure of proof. There had been
19 no evidence submitted regarding what the lost profits would
20 be and that they could be calculated. We have just the
21 opposite in this case. Every claimed loss that the City
22 claims has been shown to be reasonably quantifiable.

23 So those are the three reasons why I think the Triple-A
24 case provides very limited guidance from what we have here.
25 It's a lease, ongoing relationship, and we have shown an

1 adequate remedy of law.

2 Besides the operational challenges that the club faces,
3 there is one thing that this trial did show. That is that
4 there is an enormous level of distrust and dysfunction
5 between City leadership and the principals of PBC. One of
6 life's lessons, at least for me, has been when the generals
7 can't deal with each other, that pretty much always permeates
8 down to how the troops end up dealing with each other.

9 But you did ask me to be specific as to what kinds of
10 disputes were likely such that the prospects of repeated
11 court intervention is a concern. Well, I think Your Honor
12 pointed out one already. Mayor Nickles wants to see this
13 team sold to local ownership. You can get rid of the
14 lawyers, but you can't get rid of the mayor. That is what
15 their goal is, and they have been work to go make it happen
16 behind the scenes and publicly. And there has been not one
17 indication of remorse or any intent of stopping their plan.

18 What about more specifically? You heard about suites and
19 how those -- by the way, suite marketing agreement is not in
20 the lease. That is that separate agreement that is part of
21 Exhibit No. 600. It's called the Concession and Suite
22 Marketing Agreement. That's important because when counsel
23 stands up and says there is an arbitration clause, you won't
24 be bothered with all this, well, I would urge you to look in
25 the Concession and Marketing Agreement because guess what?

1 It doesn't have an arbitration clause. Section XXII.D
2 provides for some mediation. If it doesn't work you get the
3 right to come to court.

4 Well, the lease does have -- Section XX.R has one. And
5 then the two kind of incorporate each other. We're going to
6 be fighting in lawsuits over where the forum is. Sound
7 familiar? We already did that once already before we got
8 here.

9 Back to the suite marketing thing. Traditionally they've
10 been sold on three-, five-, and seven-year leases. Team
11 wanted to be able to sell them with a termination provision.
12 City said no. Why? Because that would make relocation
13 easier. Translated, deprive PBC of the ability to try and
14 stem the bleeding by selling short-term leases consistent
15 with the strategy.

16 There are many other areas that are fertile ground for
17 these parties to bicker. There is scheduling provisions that
18 counsel talked about. That is in the lease section XI.A
19 they have to work together regarding scheduling of home
20 games. The City could drive up the team's losses by giving
21 it less attractive dates and giving the more attractive dates
22 to other users generating disputes.

23 There is repair and maintenance obligation that they each
24 had. This is one thing I have never liked about long-term
25 leases. In the waning years of the lease, there is an

1 economic disincentive to put money into repairs and
2 maintenance. And the Repairs and Maintenance provisions in
3 the lease, section X and XII, and in the Concession
4 Agreement, section XII and XVII. In the Lease and Concession
5 Agreement they have certain standards for repairs and
6 maintenance. The parties will disagree. The team doesn't
7 have an incentive to put money in the facility. Frankly, the
8 City doesn't either. Two more years, short horizon for this
9 kind of financing.

10 The City is required to individual game day support. That
11 is in Section XIII.E of the lease. Ushers, securities,
12 staging, engineers. The standard is to operate in a
13 "efficient and orderly manner." Both are going to be losing
14 money. Natural tendency for the City to cut corners and
15 reduce staff. And there is a potential for disputes there.

16 There is this process over concession prices and menu.
17 I'm not going to sit here and tell you that we're going to
18 fight over 20-ounce Pepsi's or whether nachos should have
19 more cheese. The point is there is no economic incentive of
20 two years left to put out the best product and service and to
21 spend money experimenting on making it a better experience.
22 What you have is natural economic disincentives at work that
23 can be suffice.

24 Then you have the obligations regarding marketing of club
25 seats, which is in the concessions agreement in XXI.C. PBC

1 is required to use its best efforts. There is a reason for
2 that: Because the City gets 40 percent of the revenue. But
3 the club has an economic incentive to move potential club
4 seat folks to other seating where there is no economic
5 sharing.

6 And the standard isn't are we in fact going to mud wrestle
7 overall these things. And there are two cases that were not
8 cited in any briefing but one is from Illinois and one is
9 from Maryland. And they both recognize that look, it's
10 possible that there may never even be any disputes. But the
11 judicial concern is if they arise. If they arise courts just
12 don't want to be in the business of telling the operator how
13 to run his business. Those two cases, the one from Illinois
14 is the New Park Forest Assocs. case at 552 N.E.2d 1215 at
15 page 1220 and the Maryland case is M. Leo Storch, S-T-O-R-C-H
16 at 620 A.2d 408. A lot of these things I talked about were
17 in the concession agreement. There is no arbitration clause
18 there.

19 Your Honor, there is no right to specific performance.
20 All of these equitable maxims about hardship, not wanting to
21 force continuous relationships that required oversight, these
22 are very specific examples of what I think is an overarching
23 principle that the court exercise its discretion as to what,
24 standing here today, is fair and would be an equitable
25 result.

1 At some point you just need to stand back and say to
2 yourself: Based on what I heard in this courtroom, sitting
3 here today, knowing what has happened and what got us here,
4 is it fair? The intent here was an economically viable
5 arena. It isn't and it won't be over the next two years.

6 You have a landlord that has been undermining its tenant
7 by forcing it to sell and it's just going to continue to do
8 that over the two years. The parties don't get along, and
9 they're not going to get along. The tenant faces enormous
10 operational hardships, things that will just continue over
11 the next two years. Why exercise your equitable discretion
12 to force these parties to struggle and co-exist for two more
13 years in such a difficult environment, an environment that
14 was never contemplated when this lease was signed, and when
15 any claimed loss is quantifiable? Enough is enough. The
16 marriage is broken. Please stop the bleeding. Thank you.

17 THE COURT: Thank you, Mr. Keller.

18 MR. LAWRENCE: May I have a second, Your Honor?

19 I have a lot of ground to cover in three minutes. Let me
20 try to do my best.

21 First of all, Mr. Keller is wrong about the law. Let me
22 give you a good example. We didn't hear very much cited.
23 It's probably because there is not very much in his favor.
24 But he said no court in Washington has ever specifically
25 enforced a lease. Washington Supreme Court in Rowland v.

1 Cook, 638 P.2d 224, specifically enforced the lease against
2 the tenant where the landlord had done improvements at the
3 tenant's request. We cited this in our brief. It's a case
4 very similar to this case in that the City did lots of
5 renovations, built KeyArena to the specifications of the
6 Sonics. In that circumstance the Washington Supreme Court
7 did specifically enforce a lease against a tenant.

8 It's not totally within this Court's discretion. As the
9 Washington Supreme Court said in Crafts, "While a decree of
10 specific performance rests within the sound discretion of the
11 trial court, this does not permit a court to deny specific
12 performance where otherwise appropriate." 162 P.3d at 389.

13 That is what we believe the case is. You heard a litany
14 of scheduling priorities, maintenance, game day support,
15 etcetera, etcetera, etcetera. All issues on which there has
16 been no evidence of any disagreement at all. And Mr. Barth
17 and Mr. Singh were very clear that they will work together to
18 do the best interest that they can.

19 Again, we saw some pages of this poisoned well plan. Let
20 me talk about that. I think that what the important pages
21 are, are the end of the plan, the path forward part of the
22 plan. If you look at the path forward part of the plan, you
23 will see that the plan, rightfully or wrongfully participated
24 in by Mr. Gorton, clearly anticipated getting the City on
25 board. It could not by the terms of the PowerPoint have been

1 a City plan because it contemplated getting the City on
2 board. If the City were a participant why would it say that?

3 With respect to unclean hands, the one case they cite, the
4 Arnold case, does not support the proposition for which they
5 assert. I invite Your Honor to read it. The cases we cited
6 to you in the PowerPoint are the cases on unclean hands in
7 Washington and elsewhere. And none of them involve the
8 situation here.

9 There is no injury regardless. As Your Honor pointed out,
10 the only thing that has happened to Mr. Bennett is he's been
11 subjected to litigation and been subjected to litigation to
12 enforce a right which the City is entitled to enforce, is not
13 an injury. He has not been forced to sell the team. The
14 losses that he faces over the next two years are not a result
15 of unclean hands. Simply a result of him having to stay here
16 which is a natural consequence of the specific enforcement of
17 the right that the City has.

18 With respect to undue hardship, what he knew is relevant
19 under the case law. "The Court will not deny specific
20 performance for undue hardship where the alleged hardship was
21 foreseeable." That's the Carpenter case, 627 P.2d, 555.
22 There is a case out of Delaware, Craft Builders. These are
23 all cited in our findings. Mohrlang out of Nebraska, Oregon
24 case, cases galore.

25 Hardship that should have been foreseen but is not

1 likewise an undue hardship. Again, findings. We have case
2 Blanck out of Washington, Mohrlang and Public Utilities,
3 which is out of Washington.

4 Of course, an equity will not save a party from a bad
5 bargain. Dean v. Gregg, Washington Court of Appeals, 653
6 P.2d 502.

7 So what did we not hear from Mr. Keller? We did not hear
8 a lot of case law about specific performance or about unique
9 objects of a contract, about the other sports teams cases,
10 about the -- there is no case support for the notion that
11 damages are the currency of the courts, Crafts v. Pitts and
12 Mahoney, which we cite, make clear a party is entitled to
13 elect between remedies, including specific performance.

14 But mostly, let's see what is really going on here. What
15 they're asking this Court to do basically in argument about a
16 misstep, and a major misstep, by Mr. Gorton, trying to hold
17 the City responsible.

18 Municipalities routinely build sports stadiums for
19 professional sports teams with public dollars, public
20 support. In this case \$10 million in cash, additional
21 millions dollars in improvements, tax support of the pledge
22 of the City's debt.

23 According to PBC, what they're asking this Court is that
24 in any case, in every case, a team is allowed to break its
25 lease whenever there is a better offer coming from another

1 City that is going to allow them to do better economically.
2 They're asking this Court to allow the Sonics to leave the
3 City with a KeyArena empty of their prime tenant. They're
4 asking this Court to leave the City with \$35 million in debt.
5 They're asking this Court to leave the City without the full
6 benefits of what the City bargained for in 1994. They're
7 asking this Court to leave the City without the ability to
8 follow a team that likely is going to do much better, got a
9 number four draft pick coming up this evening, they have the
10 rookie of the year, they can follow the Boston Celtics from
11 being the worst team in the league to possibly a world
12 champion. They are denying the City that.

13 And all of it, why? For profits. For their profits.
14 What he said is we are entitled under the law to take more
15 money elsewhere and run away from our lease, despite knowing
16 exactly what they got into a year before they decided to
17 breach, knowing exactly what they got into in entering into a
18 lease that required them to stay the term and had a specific
19 performance clause in it.

20 They should not come into this court and ask for your help
21 in allowing the them to break their lease in order to gain
22 money to make profits all at the expense of the City of
23 Seattle and its citizens.

24 We respectfully ask you to accept the City's election of
25 its remedies to gain the benefits that it thinks it will gain

1 over the next two years of the lease and specifically enforce
2 the lease to require the Sonics to stay and play out its full
3 term. Thank you.

4 THE COURT: Thank you. All right I promised you that
5 I would let you know when a decision would be made. I am not
6 going to open my mouth and decide this case today. You've
7 given me much to think about and much to review. I also
8 understand that time is significant for everybody involved.

9 So what I am planning on doing is telling you when a
10 decision will be posted, so that everyone will have an equal
11 opportunity to find it and all of the press will have an
12 equal opportunity to see it. I will be posting a decision
13 next Wednesday afternoon at 4:00. That's when you can expect
14 to see it. So stay tuned.

15 Thank you, Counsel. I would ask for both sets of
16 PowerPoint slides. Mr. Lawrence, can you supply me with a
17 set of your slides?

18 MR. LAWRENCE: Yes. A color copy is being brought
19 over today.

20 THE COURT: Is there any other issue we need to take
21 care of?

22 MR. LAWRENCE: I don't think so.

23 THE COURT: Okay. Thank you, very much.

24

25 (Court adjourned.)

C E R T I F I C A T E

We certify that the foregoing is a correct transcript
from the record of proceedings in the above-entitled matter.

/S/ Barry L. Fanning, CCR, RMR, CRR

/S/ Nichol e Rhynard, CCR, RMR, CRR