

The Honorable Marsha J. Pechman

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UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON

CITY OF SEATTLE, a first-class charter city,)	
)	
Plaintiff,	)	No. C07-1620MJP
)	
v.	)	DEFENDANT'S MOTION TO AMEND
	)	ANSWER
THE PROFESSIONAL BASKETBALL CLUB,)	
LLC, an Oklahoma limited liability company,	)	NOTE ON MOTION CALENDAR:
	)	MAY 5, 2008
Defendant.)	

I. INTRODUCTION

Pursuant to Fed. R. Civ. P. 15(a), and LR 7(d)(2)(B), defendant PBC moves for leave to file an amended answer to include a counterclaim for declaratory relief against the City of Seattle.

The PBC has a lease with the City by which the Sonics play at KeyArena. There are two seasons remaining under the lease. Subject to this Court's ruling, the Sonics intend to relocate to Oklahoma City, either after this trial or at the end of the lease. On the current pleadings, the only express claim is the City's claim for specific performance requiring the Sonics to continue playing at KeyArena through the end of the lease.

Implicit in this claim is whether the City's damages – the rent for the remaining term of the lease – can be calculated with reasonable certainty. At trial, the PBC will demonstrate that

1 the City's damages may be so calculated and that the City is otherwise barred from equitable
2 relief. Therefore, PBC hereby requests leave to amend to assert a counterclaim for declaratory
3 relief, asking that the Court declare the quantum of the City's damages should the Sonics not
4 play the remaining two seasons at the KeyArena. This will avoid the need for a follow-up trial
5 on this issue.

6 **II. STATEMENT OF FACTS**

7 On September 21, 2007, the PBC filed an arbitration demand seeking a declaration that
8 the City would not be entitled to an order of specific performance if PBC did not play in
9 KeyArena for the final two seasons of the lease, but was prepared to pay the rent for those two
10 seasons. The City then sued the PBC, asking that the Sonics be enjoined to play in KeyArena for
11 the last two seasons. The Arbitration was then stayed. On February 8, 2008, this court entered a
12 scheduling order providing for expedited discovery and setting trial in this matter to begin on
13 June 16.

14 **III. ARGUMENT**

15 **The PBC Should Be Given Leave to Amend to Assert Its Counterclaim**

16 **1. Leave to Amend Is Freely Given**

17 Leave to amend shall be "freely give[n] . . . when justice so requires." Fed. R. Civ. P.
18 15(a). Furthermore, Rule 15's policies favoring amendments must be applied with "extreme
19 liberality."¹ Chodos v. W. Pub. Co., 929 F.3d 992, 1003 (9th Cir. 2002). When considering a
20 motion for leave to amend, the district court must consider whether the proposed amendment
21 results from "undue delay, is made in bad faith, will cause prejudice to the opposing party, or as
22 a dilatory tactic." Chodos, 292 F.3d at 1003. And this determination should be made with all
23 inferences in favor of granting the motion. Griggs v. Pace Am. Group, Inc., 170 F.3d 877, 890
24 (9th Cir. 1999).

25 _____
26 ¹ The "extreme liberality" favoring amendments to pleadings applies to counterclaims.
Rosenberg Bros. & Co. v. Arnold, 283 F.2d 406 (9th Cir. 1960); Cooper Dev. Co. v. Employers
Ins. of Wausau, 765 F. Supp. 1429 (N.D.Cal.1991)(same); 6 Wright & Miller Fed. Prac. & Proc.
Civ.2d § 1430 (same).

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2 **2. The Availability of Specific Performance Necessarily Requires a Determination of Whether the City's Damages Would Be Reasonably Ascertainable.**

3 The extraordinary remedy of specific performance is only available if the legal remedy of
4 damages is inadequate. The factors bearing on the adequacy of the legal remedy include "the
5 difficulty of proving damages with reasonable certainty." Crafts v. Pitts, 161 Wn.2d 16, 162
6 P.3d 382 (2007). The City, as landlord, says the Sonics provide it with both "tangible" and
7 "intangible" benefits. Cmpl. at ¶ 6. The City claims that if the Sonics were to leave early, the
8 City's damages would include "intangible" losses. Cmpl. at ¶ 24. Thus, the City says that
9 damages are an inadequate remedy and that it is therefore entitled to specific performance.
10 Washington law provides no support for such a claim. Indeed, it "has long been held in
11 Washington that there is an adequate remedy at law in damages for the breach of a lease
12 agreement." Wash. Trust Bank v. Circle K Corp. 15 Wn. App. 89, 546 P.2d 1249 (1976)
13 (denying landlord's specific performance claim).

14 The factual and legal merits of the City's claims regarding "intangible" damages need not
15 be addressed here. Instead, whether the City's damages – i.e., the rent owing – can be calculated
16 with reasonable certainty will *necessarily* be an issue for trial. If the PBC proves the City's
17 compensable damages can be so calculated and that damages are an otherwise proper remedy,
18 specific performance must be denied and the Court should enter a declaratory judgment
19 regarding the amount of damages the City would incur from an early departure.

20 Alternatively, the Court can deny specific performance for reasons other than the
21 certainty with which damages may be calculated. Here, for example, the City has unclean hands:
22 The just-obtained Griffin documents show that the City is using the lawsuit to try to force the
23 PBC to sell the team to the City's preferred group of owners. But equity requires the Court to
24 ensure that specific performance "will not be oppressive, unconscionable, or result in undue
25 hardship to any party involved."² If the Court concludes that the City is not entitled to the
26

² Crafts v. Pitts, 161 Wn.2d 16 at 24.

1 equitable relief it purports to seek, it should nevertheless declare the damages it finds would
2 result from an early departure so that the matter need not be tried again.

3 **IV. CONCLUSION**

4 Amendment allowing PBC to assert its counterclaim for declaratory relief will not
5 prejudice the City. Because the evidence presented at trial will, by necessity, require
6 determination of the rent owed should PBC leave two years early, such an amendment would
7 simply make express what is already being tried implicitly between the parties. If specific
8 performance is not ordered, it would be a waste of judicial resources to have a second proceeding
9 to determine the rent. Accordingly, leave should be granted. A proposed amended answer,
10 revised only to add a counterclaim for declaratory relief, is attached as Exhibit A.

11 DATED this 24th day of April, 2008.

12 BYRNES & KELLER LLP

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The Professional Basketball Club

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CERTIFICATE OF SERVICE

I hereby certify that on the 24th day of April, 2008, I electronically filed the foregoing document with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the following:

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EXHIBIT A

The Honorable Marsha J. Pechman

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UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON

CITY OF SEATTLE, a first-class charter city,)	
)	
Plaintiff,	)	No. C07-1620RSM
)	
v.	)	[PROPOSED] AMENDED ANSWER,
	)	AFFIRMATIVE DEFENSES, AND
THE PROFESSIONAL BASKETBALL CLUB,	)	COUNTERCLAIM FOR DECLARATORY
LLC, an Oklahoma limited liability company,	)	RELIEF
)	
Defendant.)	

Defendant The Professional Basketball Club, LLC, by and through its counsel, answers plaintiff's complaint as follows:

PRELIMINARY STATEMENT

Answering paragraph 1 of the Preliminary Statement, defendant admits that the Lease says what it says, and denies each and every other or different characterization thereof. Except as so admitted, defendant denies the remainder of paragraph 1.

Answering paragraph 2 of the Preliminary Statement, defendant admits that the referenced documents say what they say, and denies each and every other or different characterization thereof. Except as so admitted, defendant denies the remainder of paragraph 2.

1 **PARTIES**

2 1. Answering paragraph 1, defendant admits same.

3 2. Answering paragraph 2, defendant admits same.

4 **JURISDICTION AND VENUE**

5 3. Answering paragraph 3, defendant admits same and further admits that the action
6 has been properly removed to the United States District Court for the Western District of
7 Washington.

8 **FACTS**

9 4. Answering paragraph 4, defendant admits the first sentence and denies the
10 second.¹

11 5. Answering paragraph 5, defendant admits all but the last sentence, which is too
12 vague to permit a response, and is therefore denied.

13 6. Answering paragraph 6, defendant admits that it pays rent under the Lease and
14 pays various taxes. Defendant further admits that although there is other spending associated
15 with the operation of defendant's business, that spending does not generate any net increase in
16 economic benefits for the City and/or local businesses. Defendant admits that the team has
17 participated in charitable events and that local businesses have the opportunity to advertise with
18 defendant. Except as so admitted, defendant denies each and every other or different allegation.

19 7. Answering paragraph 7, defendant denies the first sentence, admits the second
20 sentence, and denies the third sentence.

21 8. Answering paragraph 8, defendant admits that the win-loss records are accurate.
22 Except as so admitted, defendant denies the remainder of paragraph 8.

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¹ Seattle's first professional franchise was the Metropolitans, who won the Stanley Cup in 1917.

1 9. Answering paragraph 9, defendant admits the win-loss records and the fact that
2 attendance has declined. Except as so admitted, defendant denies the remainder of paragraph 9.

3 10. Answering paragraph 10, defendant admits same.

4 11. Answering paragraph 11, defendant admits that a 15-year lease was approved.
5 Defendant lacks sufficient information upon which to formulate a response to the remainder of
6 paragraph 11, and therefore denies same.
7

8 12. Answering paragraph 12, defendant admits that the Coliseum was renovated with
9 new seats and luxury suites, and renamed. Except as so admitted, defendant denies each and
10 every other allegation of paragraph 12.

11 13-17. Answering paragraphs 13, 14, 15, 16 and 17, defendant admits that the Ordinance
12 passed and that the Lease says what it says, and denies each and every other or different
13 characterization thereof. Defendant further denies the remainder of these paragraphs.
14

15 18. Answering paragraph 18, defendant lacks sufficient information upon which to
16 formulate an answer and therefore denies same.

17 19. Answering paragraph 19, defendant admits that it purchased certain assets from
18 BCOS in 2006, that it became a party to the Lease through the Instrument of Assumption, and
19 that it was familiar with the Lease and with KeyArena. Defendant further admits that the
20 Instrument of Assumption says what it says, and denies each and every other or different
21 characterization thereof. Defendant denies the remainder of paragraph 19.
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23 20. Answering paragraph 20, defendant denies same.

24 21. Answering paragraph 21, defendant lacks sufficient information upon which to
25 formulate an answer, and therefore denies same.
26

1 22. Answering paragraph 22, defendant denies same.

2 23. Answering paragraph 23, defendant admits that it is an Oklahoma Limited
3 Liability Company formed for the purpose of acquiring the franchise. Defendant further admits
4 that Aubrey McClendon made a statement in his individual capacity, and not as a representative
5 of TPBC, which has been taken out of context by the City and others. Except as so admitted,
6 defendant denies the remainder of paragraph 23.
7

8 24. Answering paragraph 24, defendant denies same.

9 25. Answering paragraph 25, defendant admits that the arbitration demand says what
10 it says, and denies each and every other or different characterization thereof. Defendant further
11 admits that the Lease says what it says, and denies each and every other or different
12 characterization thereof. Except as so admitted, defendant denies the remainder of paragraph 25.
13

14 **FIRST CAUSE OF ACTION**

15 26. Answering paragraph 26, defendant restates its answers to paragraphs 1-25.

16 27. Answering paragraph 27, defendant admits that the Lease says what it says, and
17 denies each and every other or different characterization thereof. Except as so admitted,
18 defendant denies the remainder of paragraph 27.

19 28. Answering paragraph 28, defendant admits that the Lease says what it says, and
20 denies each and every other or different characterization thereof.
21

22 29. Answering paragraph 29, defendant admits that it filed an arbitration demand.
23 Except as so admitted, defendant denies the remainder of paragraph 29.

24 30. Answering paragraph 30, defendant denies same.
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SECOND CAUSE OF ACTION

31. Answering paragraph 31, defendant restates its answers to paragraphs 1-30.

32. Answering paragraph 32, defendant admits that the Lease says what it says, and denies each and every other or different characterization thereof.

33. Answering paragraph 33, defendant denies same.

34. Answering paragraph 34, defendant denies same.

AFFIRMATIVE DEFENSES

BY WAY OF FURTHER ANSWER, and as AFFIRMATIVE DEFENSES, the defendant alleges as follows:

35. Plaintiff does not have clean hands and is not entitled to specific performance;

36. Plaintiff has failed to state a claim upon which relief can be granted;

37. Plaintiff is equitably estopped from seeking specific performance;

38. The requirements of Article II of the Lease are in the nature of a personal services contract, and not subject to specific performance; and

39. Plaintiff's claims are subject to mandatory arbitration.

COUNTERCLAIM FOR DECLARATORY RELIEF

1. The PBC is attempting to relocate the Sonics to Oklahoma City before the 2008-2009 season, and a dispute over the Sonics' right to relocate exists.

2. If the PBC is permitted by the Court to relocate, the City's damages resulting from such a departure consist of the rent owed for the remainder of the term of the lease. There is a real and justiciable controversy between the City and the PBC over the amount of rent owing.

3. The PBC seeks a declaration from this Court establishing the quantum of the City's damages if the PBC were to relocate to Oklahoma City beginning in the fall of 2008.

PRAYER FOR RELIEF

WHEREFORE, having fully answered the Complaint, the defendant requests that the Court grant it the following relief:

- a. A declaration determining the quantum of the City's damages if the PBC were to relocate to Oklahoma City before the beginning of the 2008-2009 season;
- b. Dismissal of plaintiff's claims with prejudice;
- c. An award of defendant's costs and attorney's fees; and
- d. Such other relief as the Court deems just and proper.

DATED this 24th day of April, 2008.

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