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7 UNITED STATES DISTRICT COURT
8 WESTERN DISTRICT OF WASHINGTON
9 AT SEATTLE

10 CITY OF SEATTLE,

11 Plaintiff,

12 v.

13 THE PROFESSIONAL BASKETBALL
14 CLUB, LLC,

15 Defendant.

CASE NO. C07-1620RSM

ORDER DENYING DEFENDANT'S
MOTION TO STAY AND
GRANTING PLAINTIFF'S CROSS-
MOTION FOR STAY OF
ARBITRATION

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17 **I. INTRODUCTION**

18 This matter comes before the Court on defendant's Motion to Stay, (Dkt. #2,
19 Exhibit B) and plaintiff's Cross-Motion for Stay of Arbitration. (Dkt. #2, Exhibit D).
20 Defendant argues that this Court should stay this litigation on the grounds that an agreement
21 signed between plaintiff and defendant's predecessor-in-interest compels the underlying
22 dispute to be resolved through arbitration. Plaintiff responds that the agreement specifically
23 excludes the underlying dispute from arbitration, thereby subjecting the dispute to
24 adjudication before this Court.

25 For the reasons set forth below, the Court finds that the language of the agreement
26 supports plaintiff's position. Therefore the Court DENIES defendant's motion to stay, and
27 GRANTS plaintiff's cross-motion for stay of arbitration.

II. DISCUSSION

A. Background Facts

On July 18, 2006, the Professional Basketball Club, LLC (“PBC”), purchased the Seattle SuperSonics (“Sonics”) and the Seattle Storm from the Basketball Club of Seattle, LLC (“BCOS”). PBC is an Oklahoma City based investment group, and is led by Clay Bennett (“Bennett”), the current chairman of PBC. Pursuant to the sale, PBC agreed to assume all obligations and responsibilities associated with a Premises Use & Occupancy Agreement (“Lease”) that was entered into in 1994 by the City of Seattle (“City”) and PBC’s predecessor-in-interest, SSI, Sports, Inc. (“SSI”). Under the terms of the Lease, the City agreed to appropriate approximately \$74 million to renovate KeyArena (formerly known as the Seattle Coliseum). In exchange, SSI signed a 15-year lease in which it agreed to play all home games in KeyArena through the 2009-2010 National Basketball Association (“NBA”) season. PBC’s intention to assume its obligations under the Lease was formalized on October 23, 2006, when PBC signed an Instrument of Assumption. (Dkt. #2, Exhibit F at p. 81). The document provides in pertinent part:

PBC acknowledges having been provided with a copy of the [Lease] and agrees that, from and after the Closing date, it shall assume, and hereby agrees to satisfy or perform (as applicable), all liabilities and obligations of BCOS under the [Lease].

Id.

In addition, the Lease contained three relevant provisions that are at issue in the instant case. The first provision is under Article II¹ of the Lease and is titled “Term; Use Period.” Article II provides:

The Term of this Agreement shall commence on the date it is executed by an authorized representative of each of the parties hereto. [PBC’s] use and occupancy rights to the premises shall commence on the “Use Commencement Date.” [PBC’s] use and occupancy rights with respect to the Premises and the Term of this Agreement shall end on September 30, 2010, unless terminated earlier pursuant to the provisions hereof.

¹ Defendant PBC characterizes the provisions of the Lease as “Sections.” However, the Court shall adhere to the precise terms of the Lease, which characterizes the provisions as “Articles.”

1 Subject to the provisions of this Agreement, [PBC] shall schedule and ensure that
2 the SuperSonics play all Home Games other than pre-season games exclusively in
3 [KeyArena] after the Use Commencement Date.

4 (Dkt. #2, Exhibit B at p. 25).

5 The next important provision is found in subsection A of Article XXV ("subsection
6 A"). Article XXV is titled "Arbitration" and indicates which matters under the Lease may
7 or may not be resolved through binding arbitration. Subsection A specifically provides in
8 pertinent part:

9 All claims, disputes and other matters in question between the parties arising out of, or
10 relating to provisions of this Agreement shall be decided by binding arbitration . . .
11 unless the parties mutually agree otherwise *or unless the claim, dispute, or matter in*
12 *question relates to the provisions of Article II* ("Term; Use Period"), Article III
13 ("Termination of Current Agreement Providing Seattle Center Space for SuperSonics
14 Home Game Use"); Article IV ("Coliseum Design and Construction"), Article V
15 ("Coliseum Planning & Construction Schedule; [PBC] Opportunities to Void
16 Agreement"), Subsection XVI.F ("Hazardous Substances") or Article XIX
17 ("Subcontracting and Transfer of Ownership").

18 (*Id.* at p. 73) (emphasis added).

19 Also found within Article XXV is subsection D ("subsection D"), which contains a
20 limitation on which party can seek judicial relief. That section provides:

21 No proceedings based upon any claim arising out of or related to this Agreement
22 shall be instituted in any court by any party hereto against any other party hereto
23 except (i) an action to compel arbitration pursuant to this Section, (ii) an action to
24 enforce the award of arbitration panel rendered in accordance with this Section, (iii)
25 to file arbitration award as a judgment, and (iv) proceedings brought by [PBC] for
26 injunctive relief or any other interim remedy to protect [PBC's] rights under this
27 Agreement.

28 (*Id.* at p. 74).

The last important provision of the Lease is found in Article XXVI, titled "Default
and Remedies Therefor." This provision indicates the rights of the respective parties should
the other be in default under the terms of the Lease. Subsection C of Article XXVI
provides:

1. City Rights upon [PBC's] Default & Breach: In the event [PBC] fails to correct,
remedy, or cease such failure or violation within the time specified in the City's
notice, the City may thereafter terminate this Agreement without any further
proceedings, re-enter the Premises, lease and license others to use said Premises and
receive rent and license fees therefor as if this Agreement had not been made;

1 provided, that [PBC] shall remain liable for the full amount due to the City pursuant
2 to Article VIII, hereof, as when due, but may offset against such liability the amount
3 received by the City as a consequence of such lease or license. The City shall also
have such other remedies as may be available to it, which shall include, without
limitation, injunctive relief and damages.

4 (*Id.* at p. 75).

5 According to the City's complaint, when the sale by BCOS to PBC was announced,
6 Bennett promised to assume and honor PBC's obligations under the Lease, and put forth his
7 "good faith best efforts" to find a venue in the Greater Seattle area for the Sonics after the
8 expiration of the KeyArena Lease term. However, the complaint states that the actions and
9 statements of PBC were inconsistent with their Lease obligations. The City alleges that
10 Bennett made an attempt to submit an arena plan to the 2007 Washington State Legislature,
11 but that it was guaranteed to fail because it was filed too late in the session and relied on
12 public subsidies of \$400 million compared to a private investment of \$100 million. The City
13 also states that PBC rejected efforts by the City to put together a viable financial package to
14 renovate KeyArena with equal commitments of investment from the new owners and the
15 City. The City's complaint goes on to state that the new owners rejected requests from
16 local selling owners and other local partners to join the Sonics ownership. Further, the City
17 alleges that the new owner's intent to move the team was acknowledged by Aubrey
18 McClendon, a minority owner of PBC, who stated that "[w]e didn't buy the team to keep it
19 in Seattle, we hoped to come [to Oklahoma City]."

20 As a result of PBC's failed attempts to build an arena for the Sonics in the Greater
21 Seattle area, PBC filed a Demand for Arbitration with the American Arbitration Association
22 on September 21, 2007 (Dkt. #2, Exhibit B at p. 91). In its demand, PBC indicated that
23 KeyArena was no longer a financially viable option for PBC, citing losses of \$17 million
24 from 2006 to 2007. *Id.* PBC also argued that they had the right to leave KeyArena after
25 the 2007-2008 season so long as they honored their financial commitment to the City. *Id.*

26 Three days later, on September 24, 2007, the City filed this lawsuit in King County
27 Superior Court. The City's complaint seeks: (1) a declaratory judgment that Article II is
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1 enforceable through a specific performance clause of the Lease; and (2) an order from the
2 Court directing that disputes relating to Article II of the lease are not subject to arbitration.
3 PBC subsequently filed a motion to stay the litigation, arguing that the Lease compelled the
4 parties to enter into arbitration. The City filed a cross-motion opposing PBC's motion to
5 stay, reiterating its argument that the Court should issue an order preventing the dispute
6 from entering arbitration. After the motions were fully briefed, PBC removed the case to
7 this Court on October 9, 2007. The City did not oppose removal.

8 **B. Washington Law Governing Arbitrability**

9 In applying Washington law to determine whether two parties agreed to arbitrate a
10 particular dispute, courts consider four guiding principles: (1) the duty to arbitrate arises
11 from the contract; (2) a question of arbitrability is a judicial question unless the parties
12 clearly provide otherwise; (3) a court should not reach the underlying merits of the
13 controversy when determining arbitrability; and (4) as a matter of policy, courts favor
14 arbitration of disputes. *See Stein v. Geonerco, Inc.*, 105 Wash. App. 41, 45-46, 17 P.3d
15 1266 (2001) (citations omitted). It is well-established that a strong public policy favoring
16 arbitration exists under Washington law in order "to avoid the formalities, the expense, and
17 the delays of the court system." *Perez v. Mid-Century Ins. Co.*, 85 Wash. App. 760, 765,
18 934 P.2d 731 (1997) (citing *Barnett v. Hicks*, 119 Wash. 2d 151, 160, 829 P.2d 1087
19 (1992)). Relatedly, Washington law also favors arbitration when the contract is ambiguous.
20 *See, e.g., Kamaya Co. v. American Prop. Consultants, Ltd.*, 91 Wash. App. 703, 714, 959
21 P.2d 1140 (1998) (holding that a contractual dispute is arbitrable "unless it can be said with
22 positive assurance that the arbitration clause is not susceptible of an interpretation that
23 covers the asserted dispute").

24 Notwithstanding the public policy referenced above, arbitration "should not be
25 invoked to resolve disputes that the *parties have not agreed to arbitrate*." *King County v.*
26 *Boeing Co.*, 18 Wash. App. 595, 603, 570 P.2d 713 (1977) (emphasis added). Whether an
27 arbitrator has the authority to address a dispute is wholly dependent upon the express terms
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1 of the agreement. *See Sullivan v. Great American Ins. Co.*, 23 Wash. App. 242, 246, 594
2 P.2d 454 (1979). Arbitration is a “matter of contract and a party cannot be required to
3 submit to arbitration any dispute which he has not agreed so to submit.” *United Steel*
4 *Workers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 582, 80 S.Ct. 1347 (1960); *see*
5 *also Teamsters Local 315 v. Union Oil Co. of California*, 856 F.2d 1307, 1314 (9th Cir.
6 1988) (finding that evidence of a purpose to exclude a claim from arbitration rebuts the
7 presumption of arbitrability); *see also Building Materials and Constrs. Teamsters Local No.*
8 *216 v. Granite Rock Co.*, 851 F.2d 1190, 1195 (9th Cir. 1988) (holding that “[t]he parties . .
9 . decide whether and to what extent their disputes will be subject to binding arbitration”).
10 Ultimately, the “first task of a court asked to compel arbitration of a dispute is to determine
11 whether parties agreed to arbitrate that dispute.” *Mitsubishi Motors Corp. v. Soler*
12 *Chrysler-Plymouth, Inc.*, 473 U.S. 614, 626, 105 S.Ct. 3346 (1985).

13 **1. The Underlying Dispute Relates to Article II**

14 In the instant case, the primary issue is whether Article II or Article XXVI under the
15 Lease controls the underlying dispute between the parties. If Article II controls, then it is
16 clear that the City is not compelled to proceed with arbitration under subsection A because
17 that provision expressly excludes any “claim, dispute, or matter in question [that] relates to
18 the provisions of Article II.” The City argues that Article II is at the very “heart” of the
19 underlying dispute. Consequently, the City contends that the unambiguous language of
20 subsection A clearly excludes the underlying dispute from arbitration. On the other hand,
21 PBC argues that Article II does not control because there is no dispute over the language of
22 Article II. PBC concedes that the Lease requires the Sonics to play home games at
23 KeyArena through the 2009-2010 NBA season. Instead, PBC claims that by not playing in
24 KeyArena for the final two seasons pursuant to the Lease, they are in default and therefore
25 the “Default and Remedies Therefor” provisions of Article XXVI controls this dispute. As
26 a result, PBC argues that arbitration is mandatory because Article XXVI is not listed as a
27 specific carve-out that is to be excluded from arbitration under subsection A. PBC also
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1 argues that this Court should construe the exception clause in subsection A narrowly as
2 required by contract law. Failing to do so, PBC suggests, would exclude almost all disputes
3 from arbitration because the entire agreement relates to the Sonics playing their home games
4 at KeyArena.

5 PBC's attempt to side-step Article II and shoot for Article XXVI is as errant as a
6 typical Shaquille O'Neal free throw. PBC's arguments ignore the clear language of Article
7 II which states that PBC's "use and occupancy rights with respect to the Premises and the
8 Term of this Agreement *shall end on September 30, 2010*["] (Dkt. #2, Exhibit B at p. 25)
9 (emphasis added). Article II goes on to state that PBC "shall schedule and ensure that the
10 SuperSonics play all Home Games other than pre-season games exclusively in [KeyArena]
11 after the Use Commencement Date." *Id.* Based on this language, it cannot be any clearer
12 that the underlying dispute squarely revolves around the language of Article II. Despite
13 PBC's claims to the contrary, PBC is the party who filed the initial arbitration demand and is
14 also the party seeking to break the terms of the Lease; terms that specifically compel PBC
15 under Article II to ensure the Sonics play in KeyArena through September 30, 2010. The
16 City has subsequently initiated the instant litigation against PBC in an effort to enforce this
17 specific obligation under the Lease. Indeed, Article II is titled "Term; Use Period," and the
18 underlying dispute fundamentally relates to whether the Sonics will fulfill the 15-year use
19 period the parties negotiated when the Lease was entered into.

20 This Court also finds no merit in PBC's contention that Article II "swallows"
21 subsection A. PBC argues that under the City's interpretation, almost all disputes would
22 relate to Article II's requirement that the Sonics play their home games at KeyArena. PBC
23 points to Articles VI, VII, and VIII to support this argument. These Articles do not,
24 however, essentially relate to the Sonics' obligation to play in KeyArena through 2010 as
25 Article II does. For example, Article VI, titled "Scheduling of Home Games Into Seattle
26 Center Coliseum," establishes the procedure for how the Sonics will schedule its home
27 games at KeyArena. Article VII, titled "Premises Licensed For Use and Occupancy by SSI"
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1 grants PBC the exclusive right and license to full and unrestricted use and enjoyment of
2 KeyArena. Lastly, Article VIII, titled “SSI Payments to the City” fixes the amount to which
3 the City is entitled to under the Lease and the procedures by which payments are to be
4 made. None of these Articles expressly governs the length of the Lease, which Article II
5 clearly does both in terms of its title and the language contained therein. Contrary to PBC’s
6 arguments, Article II controls the underlying dispute.

7 Moreover, it is well established that words in a contract are to be given their
8 ordinary, usual, and popular meaning unless the entirety of the agreement clearly
9 demonstrates contrary intent. *Hearst Communications, Inc. v. Seattle Times Co.*, 154
10 Wash. 2d 493, 504, 115 P.3d 262 (2005) (citing *Universal/Land Constr. Co. v. City of*
11 *Spokane*, 49 Wash. App. 634, 637, 745 P.2d 53 (1987)). Here, there is no indication in the
12 Lease that the words “relate to” under Article II should be given anything short of their
13 ordinary meaning. The current dispute between the parties arises out of PBC’s intention to
14 leave KeyArena before September 30, 2010. Thus, it is undeniably clear that this dispute is
15 not only “related” to Article II, but it goes to the very “heart” of why the City has brought
16 its complaint against PBC.

17 In addition, the declarations attached to both parties’ moving papers also clearly
18 indicate that both parties intended to exclude from arbitration any disputes relating to
19 Article II. The declaration of Eric M. Rubin (“Rubin”) submitted by PBC states:
20 “[Subsection] A of the arbitration clause provides that ‘all claims and disputes’ between the
21 parties shall be decided by binding arbitration. However, given the Sonics’ concerns, certain
22 ‘carve-outs’ were added [such as] Article II, Term; Use Period.” (Dkt. #2, Exhibit G at p.
23 23). The declaration of Gordon B. Davidson submitted by the City also states: “Sometime
24 between January 30, 1994 and February 2, 1994, the Lease’s arbitration clause was
25 rewritten to provide that disputes relating to *Article II*, III, IV, V and XIX are not subject to
26 arbitration.” (Dkt. #2, Exhibit E at p.5) (emphasis added). Thus, compelling arbitration in
27 this case would be contrary to the parties’ intent. A party cannot be required to submit to
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1 arbitration if it has not agreed to do so. *See United Steel Workers*, 363 U.S. at 582. This
2 Court finds that the underlying dispute relates to Article II and that this dispute is not
3 subject to arbitration pursuant to the specific agreement of the parties.

4 **2. Subsection D of Article XXV**

5 PBC argues that regardless of whether the Court were to find that the express terms
6 of Article II were to control this dispute, the City is still not entitled to seek judicial relief
7 given the plain language of subsection D. That specific provision, PBC contends, only
8 allows PBC to institute an action in court. Alternatively, PBC argues that when subsection
9 A is read in conjunction with subsection D, an ambiguity is created, thereby compelling
10 arbitration pursuant to Washington law's strong public policy in favor of arbitration.

11 In interpreting a contract, "[t]he role of the court is to determine the mutual
12 intentions of the parties according to the reasonable meaning of their words and acts."
13 *Fisher Props. Inc. v. Arden-Mayfair, Inc.*, 106 Wash. 2d 826, 837, 726 P.2d 8 (1986)
14 (citing *Dwelley v. Chesterfield*, 88 Wash.2d 331, 560 P.2d 353 (1977)); *see also Berg v.*
15 *Hudesman*, 115 Wash.2d 657, 663, 801 P.2d 222 (1990) (finding that the cardinal rule with
16 which all interpretation begins is to ascertain the intention of the parties). The intent of the
17 parties to a contract "may be discovered not only from the actual language of the
18 agreement, but also from 'viewing the contract as a whole, the subject matter and objective
19 of the contract, all circumstances surrounding the making of the contract, the subsequent
20 acts and conduct of the parties to the contract, and the reasonableness of respective
21 interpretations advocated by the parties.'" *Bort v. Parker*, 110 Wash. App. 561, 573, 42
22 P.2d 980 (2002) (citations omitted). A court shall "not give effect to interpretations that
23 would render contract obligations illusory." *Taylor v. Shigaki*, 84 Wash. App. 723, 730,
24 930 P.2d 340 (1997) (citing *Kennewick Irrigation Dist. v. United States*, 880 F.2d 1018,
25 1032 (9th Cir. 1989)).

26 In the instant case, the only reasonable interpretation of subsection D, when viewing
27 the contract as a whole, is that its scope is limited to the arbitration clause of Article XXV.
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1 The drafting history of the Lease, which is not in dispute by either party, establishes that
2 subsection D was present in the initial draft of the Lease, and the specific carve-outs were
3 subsequently added in later drafts. Therefore the clear intent of the parties with regard to
4 subsection D was that it was intended to apply only to matters which subsection A required
5 the parties to arbitrate. It does not, as PBC suggests, apply to matters that were
6 subsequently carved-out of subsection A. Furthermore, the purpose of subsection D was to
7 allow for PBC's predecessor-in-interest, SSI, to protect its interests when the Lease was
8 entered into. The moving papers provided by PBC through Rubin's declaration support this
9 interpretation. Rubin states that "the Sonics were concerned about the risks of entering into
10 a long-term lease for a facility that had not yet been designed, much less built. Therefore,
11 the Sonics wanted to be able to seek prompt relief for certain issues, primarily those relating
12 to design and construction, and when occupancy would begin." (Dkt. #2, Exhibit G at pp.
13 23-24).

14 Moreover, accepting PBC's interpretation of the Lease would provide the City with
15 no method in which to seek relief for any disputes relating to Article II, or any other matter
16 that was carved out from arbitration under subsection A. This is an unreasonable
17 interpretation of the Lease given the placement of subsection D, which is embedded within
18 Article XXV. While counsel for PBC stipulated in oral argument that the City can make its
19 demands for specific performance in arbitration, this Court cannot overlook the parties'
20 clear intention on the face of the contract. The parties *unequivocally* excluded from
21 arbitration disputes relating to Article II. Had the parties clearly intended that only PBC be
22 able to seek judicial relief for any disputes regarding the Lease, the parties would not have
23 placed such prominent language within the arbitration clause of their agreement.

24 In any event, there is no doubt that subsection A is unambiguous, even when read in
25 conjunction with subsection D. As *Kamaya* indicates, a contractual dispute is arbitrable
26 unless it can be said with "positive assurance that the arbitration clause is not susceptible of
27 an interpretation that covers the asserted dispute." 91 Wash. App. at 714 (citations
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omitted). Here, subsection D is silent on which disputes under the Lease are excluded from arbitration, whereas subsection A is not. The Supreme Court has clearly mandated that courts should “not override the clear intent of the parties, or reach a result inconsistent with the plain text of the contract, simply because the policy favoring arbitration is implicated.” *E.E.O.C. v. Waffle House, Inc.*, 534 U.S. 279, 294, 122 S.Ct. 754 (2002). Subsection D has no relevance to the fact that disputes relating to Article II were specifically intended by the parties to be excluded from arbitration.

III. CONCLUSION

The Court, having reviewed the parties’ motions, the exhibits and declarations attached thereto, and the remainder of the record, hereby finds and ORDERS:

(1) Defendant’s Motion to Stay (Dkt. #2, Exhibit B) is DENIED.

(2) Plaintiff’s Cross-Motion for Stay of Arbitration (Dkt. #2, Exhibit D) is GRANTED. The Court finds that the underlying dispute between the parties relates to whether the Sonics are compelled to play all regular seasons home games in KeyArena until September 30, 2010. This dispute therefore relates to Article II of the Premises Use & Occupancy Agreement. The Court additionally finds that disputes relating to Article II are excluded from arbitration.

(3) The Clerk shall forward a copy of this Order to all counsel of record.

DATED this 29 day of October, 2007.



RICARDO S. MARTINEZ
UNITED STATES DISTRICT JUDGE