

The Honorable Marsha J. Pechman

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

CITY OF SEATTLE, a first-class charter
city,

Plaintiff,

v.

THE PROFESSIONAL BASKETBALL
CLUB, LLC, an Oklahoma limited liability
company,

Defendant.

No. 07-1620 MJP

THE CITY OF SEATTLE'S
OPPOSITION TO DEFENDANT'S
MOTION IN LIMINE TO EXCLUDE
SHERMAN ALEXIE AND MITCH
LEVY

Note on Motion Calendar:

June 6, 2008

I. SUMMARY OF ARGUMENT

The City of Seattle respectfully requests that the Court deny PBC's motion in limine to exclude the testimony of Mitch Levy and Sherman Alexie. Sherman Alexie is an award-winning poet, novelist, screenwriter, director, and 10-year holder of season tickets to the Sonics. Mr. Alexie, if allowed, will offer a unique and important perspective on the intangible benefits the Sonics bring to the City of Seattle, including athletic excellence and a racially diverse entertainment opportunity. Mitch Levy hosts a popular sports talk radio show which frequently covers the Sonics. In fact, during the first year of his ownership, Clay

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1 Bennett appeared at least twice on Mr. Levy's show. Mr. Levy, if allowed, will explain the
2 symbiotic relationship between Seattle's professional sports teams and KJR (Seattle's only all
3 sports station), and how KJR historically has provided the Sonics with free marketing and
4 publicity through live interviews of Sonics players, coaches and management. Mr. Levy will
5 explain that despite KJR listeners' significant interest in the Sonics, PBC unilaterally decided
6 to discontinue the team's historical practice of making players, coaches and management
7 available for live interviews during the recently completed 2007-08 season. This refusal to
8 promote and market the team to an enthusiastic audience, at no cost to PBC, further illustrates
9 the self-inflicted nature of PBC's claimed losses.

10 II. ARGUMENT

11 A. Sherman Alexie Will Explain that the Sonics Provide Intangible and 12 Unquantifiable Benefits to Seattle.

13 Whether specific performance is an appropriate remedy for breach of contract depends
14 on whether money damages will be an adequate remedy for PBC's threatened breach. *Crafts*
15 *v. Pitts*, 162 P.3d 382, 386 (Wash. 2007). Mr. Alexie, an award-winning writer and Sonic
16 season ticket holder for the past 10 years, will support the City's contention that the presence
17 of the Sonics provides the City intangible benefits that cannot be compensated through money
18 damages. Mr. Alexie will offer insights ranging from the Sonics' role in bringing together
19 diverse communities in support of a common civic interest, to the beauty of the game itself –
20 especially when played by the greatest players in the world.

21 PBC attacks Mr. Alexie's qualifications by summarizing his entire career in one
22 sentence ("a writer known for his profanity-laced columns about the Sonics in *The Stranger*")
23 and casting him as really no different than any other angry Sonics season ticket holder.
24 Defendant's Motion in Limine Re Mitch Levy and Sherman Alexie ("Defendant's MIL")

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1 (Dkt. No. 57), p. 1, 3. PBC's exposure to Mr. Alexie is apparently limited to its review of *The*
2 *Stranger*,¹ but even a brief review of his background shows he is one of the country's most-
3 acclaimed writers in recent decades – most recently receiving the National Book Award for
4 Young People's Literature. *See* Declaration of Jeffrey Johnson in Support of the City's
5 Opposition ("Johnson Decl."), Ex. A.² In addition to his literary achievements, Mr. Alexie
6 has spoken to nationwide audiences on the importance of racial and ethnic heritage and
7 diversity.³

8 As a Sonics season ticket holder for ten years and a keen observer of race, culture, and
9 community, Mr. Alexie is eminently qualified to provide relevant testimony about the
10 intangible benefits the Sonics bring to Seattle, such as the beauty of witnessing the greatest
11 athletes in the world compete at the highest level of their game, and the cultural impact
12 created by an entertainment alternative whose participants (the players) are predominantly
13

14 ¹ By pointing out Mr. Alexie's other accomplishments, the City in no way wishes to minimize
15 the importance of *The Stranger* or the fabulous work of *The Stranger*'s witty writers.

16 ² Mr. Alexie's first collection of short stories received the PEN/Hemingway Award for Best
17 First Book of Fiction and the Lila-Wallace-Reader's Digest Writers' Award. *Id.* His first
18 novel, *Reservation Blues*, received numerous awards. *See* Johnson Decl., Ex. A. His second
19 novel, *Indian Killer*, was named one of *People's* Best of Pages and a *New York Times* Notable
20 Book. *Id.* Mr. Alexie wrote the screenplay for *Smoke Signals*, a film that debuted at the
21 Sundance Film Festival, winning two festival awards and several other awards after its release
22 by Miramax. *Id.* Mr. Alexie's literary career was aptly summed up in a recent *New York*
23 *Times* review of his first young adult novel, *The Absolutely True Diary of a Part-Time Indian*,
24 which won the 2007 National Book Award in Young People's Literature: "For 15 years now,
25 Sherman Alexie has explored the struggle to survive between the grinding plates of the Indian
26 and white worlds." Bruce Barcott, *Off the Rez*, *The New York Times*, Nov. 11, 2007, at Sec.
7.

³ In 1998, Mr. Alexie participated with seven others in the PBS Lehrer News Hour Dialogue
on Race with President Bill Clinton. *See* Johnson Decl., Ex. A. In 2003, Mr. Alexie was
featured in the Museum of Tolerance's project, "Finding Our Families, Finding Ourselves,"
which included an appearance on the Oprah Winfrey Show to discuss the exhibit's focus on
the diverse personal histories of several noted Americans. *Id.*

1 people of color. Sonics games, unlike some other entertainment options in the City, regularly
2 attract ethnically, culturally and racially diverse crowds.

3 In an effort to avoid its Lease obligations, PBC has cited Seattle City Council Member
4 Nick Licata's once-held belief that the Sonics offer "close to zero" cultural value to the City of
5 Seattle. *See* Declaration of Jonathan Harrison in Support of the City of Seattle's Motions in
6 Limine ("Harrison Decl.") (Dkt. No. 68), Ex. R, ¶¶ 22-23.⁴ In its responses to the City's
7 Requests for Admission, PBC similarly denied that the Sonics produce non-financial benefits
8 for the City of Seattle. *See* Johnson Decl., Ex. C (PBC's Response to the City's Request for
9 Admission No. 17). PBC cannot argue the team offers no cultural value and then exclude
10 testimony offered to contradict that argument. The City's response could take many forms,
11 including contradictory testimony from a host of citizens who disagree. Given the brief time
12 allotted for a trial (due to PBC's expedited needs), however, Mr. Alexie is an ideal spokesman
13 for the season ticket holders who would otherwise not have a voice in a case directly
14 impacting their interests.

15 In addition to being a renowned writer and season ticket-holder, Mr. Alexie is a
16 recreational basketball player and passionate basketball fan. As a result, he is perhaps
17 uniquely qualified among Sonics season ticket holders to explain why the team does add
18 cultural value to the City. Mr. Alexie regularly incorporates basketball into his work, where
19 the game functions as a metaphor and setting through which he explores themes of family,
20

21 _____
22 ⁴ In its Demand for Arbitration – the document that effectively initiated this litigation – PBC
23 recognized that specific performance would be justified by a showing of non-monetary injury,
24 with particular focus on the extent to which the team is an essential part of the “fabric of the
25 community.” Harrison Decl., Ex. R, ¶ 22. Not surprisingly, PBC is now endeavoring to
26 exclude the testimony of two witnesses who are particularly well-qualified to speak to that
precise subject.

1 tribal identity, social mobility and race relations.⁵ Through basketball, Mr. Alexie's characters
2 express their aspirations, wrestle with social inequity and resolve personal conflicts.

3 In addition to testifying about his background, Mr. Alexie will testify:

- 4 1. As a season ticket holder for the last 10 years he has first-hand knowledge of
5 the unique community building experience of rooting for a team with fellow
6 (largely anonymous) fans, and the irreplaceable opportunity to witness the
7 greatest athletes in the world compete in a beautiful sport at the highest level.
- 8 2. How Sonics games provide a community gathering place for a diverse group of
9 citizens.
- 10 3. How the Sonics provide fans an opportunity to step beyond the boundaries of
11 their neighborhoods and ethnic communities and come together in support of a
12 mutual civic interest.
- 13 4. How sports in general, and basketball specifically, provide a unique vehicle for
14 fathers and their children to communicate, using examples from his own life.⁶

15
16 ⁵ See, e.g., *The Absolutely True Diary of a Part-Time Indian*, 142-42 (Little, Brown & Co.
17 2007), in which Mr. Alexie uses a basketball game to illustrate the cross-cultural challenges
18 he faced when he elected to attend an off-reservation school (“The morning of the game, I’d
19 woken up in my rez house, so my dad could drive me the twenty-two miles to Reardan, so I
20 could get on the team bus for the ride back to the reservation. Crazy. ... The rez basketball
21 fans were chanting, ‘Ar-nold sucks! Ar-nold! Sucks! Ar-nold sucks!’ They weren’t calling
22 me by my rez name, Junior. Nope, they were calling me by my Reardan name.”). See also,
23 Mr. Alexie’s film *Smoke Signals* (Miramax 1998), in which the retelling of a basketball game
between “the Indians” and “the Christians” links a deceased father with his surviving son and
provides a mechanism for reimagining cultural history (“Victor took it to the hoop, and he
flew man – he flew right over that Jesuit. Twelve years old, and he was like some kind of
indigenous angel or something ... He was the man that day. He took the shot, and he won
that game. It was Indians versus Christians that day, and for at least that one day, the Indians
won.”).

24 ⁶ See, e.g., Mr. Alexie’s November 7, 2006 “Sonics Death Watch” column:

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1 5. How the loss of the Sonics cannot be adequately replaced by college or high
2 school basketball.⁷

3 6. Why the Sonics are an important part of what makes Seattle a great city.⁸

4 PBC also seeks to attack Mr. Alexie citing quotes from two of Mr. Alexie's "Sonics
5 Death Watch" columns for *The Stranger* to demonstrate that he is biased against PBC. *See*
6 Defendant's MIL at 3 & Taylor Decl. Exs. 4, 5. PBC wants to avoid its lease and move the
7 team to Oklahoma City as soon as possible. The City would like to keep the team for the term
8 of the lease and beyond. The fact that Mr. Alexie, as a Sonics fan, shares the City's goal is no

10 While my father was dying, he and I talked basketball. Three days before he died, my
11 father still had enough will and character left to deride Kobe Bryant for being a rotten
12 smallpox wound on the game of basketball.

13 "I know," I said. "I can't stand him."

14 That meant *I love you, Dad*.

15 "I still can't believe they traded Shaq instead of Kobe."

16 That meant *I love you, too, Son*.

17 Of course, no matter how much I hate Kobe, I still love to watch him play. He's a
18 ferocious poet on the court. And I most especially love to watch him lose.

19 Declaration of Paul Taylor ("Taylor Decl.") (Dkt. No. 58), Ex. 5.

20 ⁷ *See, e.g.,* Mr. Alexie's April 30, 2008 "Sonics Death Watch" column: "What will I do if the
21 Sonics leave town? Some compassionate folks have suggested that I buy Huskies season
22 tickets, or adopt Seattle U, or go rabid for Garfield High. Those options are inadequate
23 because I want to watch the best basketball players in the world." Johnson Decl., Ex. B

24 ⁸ *See, e.g.,* Mr. Alexie's November 7, 2006 "Sonics Death Watch" Column:

25 "But, Sherman," you might say. "It's just basketball. It's not as important as feeding the poor
26 or educating our children or providing affordable housing."

 And, of course, basketball is not as important as those other social issues. But the health and
pride of a city depends on more than its politics. It also needs art and, yes, it needs athletics.

 A great city needs to work on its soul, mind, and body.

 A great city needs to embrace as much greatness as it possibly can.

 Taylor Decl., Ex. 5.

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1 basis for disqualification. Instead, his testimony will buttress the community interest in
2 retaining this unique asset, at least through the 15-year commitment the City secured when it
3 agreed to contribute many millions of dollars to rebuild KeyArena to the Sonics'
4 specifications.

5 Ultimately, PBC's attacks on Mr. Alexie's biases have no bearing on the admissibility
6 of the above-outlined testimony. If PBC wants to raise the content of Mr. Alexie's column in
7 *The Stranger*⁹ in order to attack his credibility, it can do so on cross-examination at trial
8 (subject, of course, to any objections from the City's attorneys).

9
10 **B. Mitch Levy Will Offer Relevant Testimony to Explain How PBC Has**
11 **Intentionally Declined Key Sources of Free Advertising for the Sonics, Thereby**
12 **Adding to Its Self-Inflicted Financial Wounds.**

13 The City anticipates that PBC will argue at trial that specific performance of the Lease
14 is inappropriate because specific performance will be "oppressive, unconscionable, or result
15 in undue hardship" to PBC. *Crafts v. Pitts*, 162 P.3d 382, 386 (Wash. 2007); *see also Egbert*
16 *v. Way*, 546 P.2d 1246, 1248-49 (Wash. Ct. App. 1976). Mr. Levy's testimony will support
17 the City's contention that any hardship, beyond what PBC knew it would suffer when it
18 bought the team in October of 2006, is self-inflicted.

19 Self-inflicted hardships are not grounds for denying specific performance. *Mohrlang*
20 *v. Draper*, 365 N.W.2d 443, 447 (Neb. 1985) (circumstances "unforeseeable at entry into the
21 contract" may "equitably excus[e] specific performance"; however, "[h]ardship of such nature
22 ... cannot be self-inflicted or caused through inexcusable neglect on the part of the person

23 ⁹ The style of Mr. Alexie's columns in *The Stranger* must be viewed in the context in which
24 they are presented: "an in-your-face alternative weekly." Frank Sennett, *Inside Spokane's*
25 *Indie-Media Boomlet*, The Spokesman-Review, Sept. 7, 2007, at 13W (comparing Spokane's
26 alternative newspaper to *The Stranger*).

1 seeking to be excused or exonerated from specific performance. Were the rule otherwise, one
2 would derive a benefit from his or her own inexcusable neglect.” (citations omitted));
3 *Carpenter v. Folkerts*, 627 P.2d 559, 562 (Wash. App. 1981) (specific performance ordered
4 where defendants’ financial inability to fulfill the contract resulted from their own decisions
5 to encumber the land subject to a lease-option; specific performance is appropriate where a
6 defendant has “voluntarily assumed [] self-induced obligations and performance [i]s not
7 prevented by an Act of God or through any fault of the [plaintiffs]”).

8 Contrary to PBC’s assertion that “[w]hat a radio personality does (or does not) know
9 about the Sonics has no bearing on this case[,]”¹⁰ Mr. Levy’s testimony will demonstrate
10 PBC’s apparently intentional efforts to minimize public interest in the Sonics. This is a
11 particularly troubling issue, as there appears to be no other plausible explanation for PBC’s
12 deliberate effort to avoid marketing the team other than for purposes of this litigation. For
13 example, the Sonics’ best player is the 2007-08 NBA rookie of the year, Kevin Durant. He
14 was described by the Sonics’ CEO as a potentially transcendent player and potential super
15 star. *See Johnson Decl.*, Ex. D (30(b)(6) Deposition of Daniel Barth), 82:5-83:2. These
16 terms are generally reserved for NBA legends, past and present, such as Magic Johnson, Larry
17 Bird, Michael Jordan, Kobe Bryant and LeBron James. The fact that PBC made only minimal
18 efforts to market the 19 year-old Mr. Durant – allowing him to appear only once on sports
19 radio, and otherwise failing to attempt to create a bond between Mr. Durant and the Seattle
20 community¹¹ – suggests an intent by PBC to distance itself from its core audience for the sole

21 _____
22 ¹⁰ *See* Defendant’s MIL at 2.

23 ¹¹ Mr. Levy can also testify regarding the difference between the way the Mariners
24 organization promoted Ken Griffey Jr. when he was a 18 year-old rookie, and the Sonics’
25 complete failure to promote and introduce Kevin Durant adequately to the local community –
despite very similar situations (i.e. struggling teams with young stars that needed to sell
tickets).

1 purpose of easing its intended departure for Oklahoma City. Mr. Levy will shed light on this
2 by testifying as follows:

- 3 1. In addition to being a Sonics season ticket holder for many years, he has
4 covered the NBA, in his capacity as a sports reporter and commentator, since
5 1992, and served as the pre- and post-game sideline reporter for Sonics
6 television broadcasts in 1995 and 1996. At trial, Mr. Levy will authenticate a
7 City trial exhibit, consisting of one of his sideline reports at a 1995 Sonics
8 game.
- 9 2. He for many years hosted "Mitch in the Morning" on KJR AM Sports Radio,
10 which is one of the most popular sports radio shows in Seattle, and throughout
11 that time has spent significant time on his show covering the NBA and
12 specifically the Sonics' basketball team.
- 13 3. The Sonics know that KJR's listener demographic is a very important market
14 for the team in terms of maintaining and increasing fan interest.
- 15 4. Prior to PBC's purchase and even during their first year of ownership, the
16 Sonics used KJR to sell tickets by making players and coaches available on a
17 regular basis to the station.
- 18 5. The Sonics get free advertising by providing access to their players and
19 coaches for interviews with KJR radio personalities.
- 20 6. Despite the prospects of a dismal record and disinterest among fans caused by
21 the Sonics' ownership announcing its intent before the start of the 2007-08
22 season to move the team to Oklahoma City, the team's management did not
23 avail itself of the free publicity available from KJR. It first severely limited –

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1 and then shortly after filing for arbitration altogether refused to allow –Sonics’
2 players, coaches or management to appear on KJR. For example, even though
3 Mr. Levy has a top-rated show, he was only able to get one interview with the
4 Sonics’ best player, Kevin Durant.

5 PBC’s efforts to impugn Mr. Levy’s integrity with references to the non-sports
6 elements of his morning talk show (Defendant’s MIL at 2 n.2 & Taylor Decl., Ex. 2) have no
7 bearing on the admissibility of the above-outlined testimony.

8 III. CONCLUSION

9 For the foregoing reasons, the City requests the Court deny PBC’s motion in limine to
10 exclude the testimony of Sherman Alexie and Mitch Levy.

11
12 DATED this 3rd day of June, 2008.

13
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15 PRESTON GATES & ELLIS, LLP

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26 THE CITY OF SEATTLE'S
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1 CERTIFICATE OF SERVICE

2

3 I hereby certify that on June 3, 2008, I electronically filed the foregoing with the Clerk

4 of the Court using the CM/ECF system which will send notification of such filing to the

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