

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 REPLY IN
SUPPORT OF ITS MOTION IN
LIMINE TO EXCLUDE EVIDENCE
OF ALLEGED "DYSFUNCTION"

Note on Motion Calendar:

June 6, 2008

I. SUMMARY OF REPLY

The Professional Basketball Club ("PBC") admits the KeyArena Premises Use & Occupancy Agreement (the "Lease") is a fully assignable commercial lease. PBC presents no evidence to suggest the Lease is non-delegable or otherwise personal in nature, such that evidence of alleged "dysfunction" in the parties' relationship would be relevant.¹ PBC's only

¹ PBC is grasping when it suggests that its separate agreements with Sonics players (which may or may not be personal services contracts) somehow convert the City's commercial lease with PBC into a contract for personal services. Player contracts are not at issue in this lease dispute, nor is the City a party to those contracts. PBC alone is responsible for any burden it has placed on its players by announcing its intent to breach the Lease and move the team to Oklahoma City. Indeed, Sonics players have expressed a desire not to move to Oklahoma City – to which Clayton Bennett responded: "Boo Hoo." Declaration of Michelle Jensen in Support of the City of Seattle's Replies to Motions in Limine ("Jensen Decl."), Ex. D.

THE CITY OF SEATTLE'S
REPLY IN SUPPORT OF ITS MOTION IN
LIMINE TO EXCLUDE EVIDENCE OF
ALLEGED "DYSFUNCTION" - 1

Case No. 07-1620 MJP

K:\2065932\00001\20516_HAH\20516P227C

KIRKPATRICK & LOCKHART
PRESTON GATES ELLIS LLP
925 FOURTH AVENUE
SUITE 2900
SEATTLE, WASHINGTON 98104-1158
TELEPHONE: (206) 623-7580
FACSIMILE: (206) 623-7022

1 argument for the relevance of this evidence is its unfounded prediction that performance
2 under the Lease will require ongoing supervision from this Court. In fact, the productive,
3 thirteen-year relationship between Sonics and Seattle Center staff combined with the desire
4 PBC will have to perform as well as possible during the remaining term of the Lease virtually
5 ensure that performance under the Lease will continue without need of Court supervision.
6 Any evidence of alleged “dysfunction” between the litigants (who do not directly handle the
7 daily operations of KeyArena) is therefore irrelevant and should be excluded.²

8 II. ARGUMENT

9 Commercial leases for sports arenas are fully enforceable.³ PBC’s citations to cases
10 involving shopping mall leases are inapposite and misleading due to the unique features of
11 shopping mall leases – which often contain a “continuous operation” clause in conjunction
12 with detailed operational requirements.⁴ Thus, some courts have declined to specifically
13

14 ² PBC cites a statement Deputy Mayor Tim Ceis made to the press in August 2007 (“The
15 situation is really dysfunctional”) to support its claim that enforcement of the Lease will
16 require Court supervision. *See* PBC's Opposition, p. 1. As he clarified in his deposition,
17 however, Deputy Mayor Ceis was referring specifically to negotiations between the City and
18 Clay Bennett to find a long-term solution for KeyArena. *See* Declaration of Paul Taylor in
Support of Defendant’s Oppositions to Plaintiff’s Motions in Limine, Ex. 1 (Ceis Dep. at
171:5-24). Irrespective of Deputy Mayor Ceis’ belief about the state of negotiations,
however, the Sonics’ ability to play at KeyArena was in no way impaired, and the team
played through the end of the 2007 season without incident.

19 ³ *See, e.g., Metro. Sports Facilities Comm’n v. Minn. Twins P’ship* (“Minnesota Twins”), 638
20 N.W.2d 214, 228 (Minn. Ct. App. 2002); *Fla. Panthers Hockey Club, Ltd. v. Miami Sports &*
21 *Exhibition Auth.*, 939 F. Supp. 855, 858 (S.D. Fla. 1996). The City provided this authority in
its opening motion and PBC makes no attempt to answer, distinguish or otherwise refute it.

22 ⁴ *See, e.g., M. Leo Storch Ltd. P’ship v. Erol’s, Inc.*, 620 A.2d 408, 410 (Md. Ct. App. 1993)
23 (mall lease contained a clause requiring tenant to operate “during the entire term of this Lease
24 with due diligence and efficiency” and to “carry at all times in said premises a stock of
25 merchandise of such size, character and quality as shall be reasonably designed to produce the
maximum return to Landlord and Tenant”); *Mayor’s Jeweler’s, Inc. v. State of Cal. Pub.*
Employees’ Ret. Sys., 685 So.2d. 904, 904 (Fla. Dist. Ct. App. 1996) (mall lease contained a
provision requiring tenant “to occupy and open the PREMISES for business, fully fixtured,

26 THE CITY OF SEATTLE’S
REPLY IN SUPPORT OF ITS MOTION IN
LIMINE TO EXCLUDE EVIDENCE OF
ALLEGED “DYSFUNCTION” - 2

Case No. 07-1620 MJP

K:\2065932\00001\20516_HAH\20516P227C

KIRKPATRICK & LOCKHART
PRESTON GATES ELLIS LLP
925 FOURTH AVENUE
SUITE 2900
SEATTLE, WASHINGTON 98104-1158
TELEPHONE: (206) 623-7580
FACSIMILE: (206) 623-7022

1 enforce shopping center leases, finding the court lacks the expertise to determine and
2 supervise whether a tenant is “operating with due diligence and efficiency and what mix of
3 products is reasonably designed to produce maximum gross sales.” *CBL & Assoc., Inc. v.*
4 *McCrory Corp.*, 761 F. Supp. 807, 809 (M.D. Ga. 1991).⁵ The shopping mall rule is not
5 appropriately applied to arena leases, however, because arena leases do not contain these
6 unique and extensive operational requirements; i.e., arena leases typically do not give
7 landlords any control or input regarding the operation of the team itself. *See, e.g., Minnesota*
8 *Twins*, 638 N.W.2d at 222-23 (rejecting the application of the shopping mall rule to a sports
9 team lease and upholding a temporary injunction enforcing the arena lease).

10 In fact, the KeyArena Lease gives the City no operational control over the Sonics, nor
11 does the City seek it. *See* Declaration of Jonathan Harrison in Support of the City’s Motions
12 in Limine (“Harrison Decl.”) (Dkt. No. 68), Ex. D (Lease). The City’s interest in this
13 litigation is to enforce where the Sonics play for the next two years, not how. There is no
14 basis for PBC’s suggestion that the Court will have to supervise the Lease’s revenue
15 provisions or PBC’s player decisions. *See* PBC’s Opposition, pp. 5-6.

16 The City is not asking the Court to require PBC to perform new or different
17 obligations pursuant to the Lease. The City is asking the Court to enforce the status quo by
18 requiring PBC to continue playing Sonics home games in KeyArena through 2010, as the
19 team has done since 1995, and as PBC agreed to do when it assumed the Lease in 2006. If

20 stocked and staffed, and thereafter to continuously conduct its business ... in order that
21 TENANT might produce the maximum gross sales possible from the PREMISES during the
22 lease term and the continued operation of a full service regional retail development be
assured”).

23 ⁵ *But see, Hamilton W. Dev., Ltd. v. Hills Stores Co.*, 959 F. Supp. 434, 439-40 (N.D. Ohio
24 1997) (stating that Ohio courts would likely reject any “hard and fast rule” that shopping mall
continuous operation leases cannot be specifically enforced).

25 THE CITY OF SEATTLE'S
26 REPLY IN SUPPORT OF ITS MOTION IN
LIMINE TO EXCLUDE EVIDENCE OF
ALLEGED “DYSFUNCTION” - 3

Case No. 07-1620 MJP

K:\2065932\00001\20516_HAH\20516P227C

KIRKPATRICK & LOCKHART
PRESTON GATES ELLIS LLP
925 FOURTH AVENUE
SUITE 2900
SEATTLE, WASHINGTON 98104-1158
TELEPHONE: (206) 623-7580
FACSIMILE: (206) 623-7022

1 PBC is required to honor its obligation, PBC will have a natural incentive to protect its
2 financial investment in the team by operating it in a financially reasonable manner, and
3 selecting and promoting the best players. The President and CEO of the Sonics, Danny Barth,
4 admitted as much during his deposition. Harrison Decl., Ex. L (Barth Dep. at 119:10-17).
5 Moreover, given the thirteen-year working relationship between Seattle Center and Sonics
6 staff, and PBC's explicit agreement to abide by the Court's decision (Harrison Decl., Ex. K
7 (Response to Request For Admission No. 7), an order of specific performance should impose
8 no significant administrative burdens at all.

9 III. CONCLUSION

10 For the foregoing reasons, the City requests the Court grant its motion to exclude any
11 evidence of alleged "dysfunction" between the City and PBC.

12 DATED this 4th day of June, 2008.

13
14 KIRKPATRICK & LOCKHART
15 PRESTON GATES & ELLIS, LLP

THOMAS A. CARR
Seattle City Attorney

16 By: : /s/ Paul J. Lawrence
17 Slade Gorton, WSBA No. 20
18 Paul J. Lawrence, WSBA No. 13557
19 Jeffrey Johnson, WSBA No. 23066
Jonathan Harrison, WSBA No. 31390
Michelle Jensen, WSBA No. 36611

Gregory C. Narver, WSBA No. 18127
Assistant City Attorney

Attorneys for Plaintiff City of Seattle

20 Attorneys for Plaintiff City of Seattle
21
22
23
24
25

26 THE CITY OF SEATTLE'S
REPLY IN SUPPORT OF ITS MOTION IN
LIMINE TO EXCLUDE EVIDENCE OF
ALLEGED "DYSFUNCTION" - 4

Case No. 07-1620 MJP


K:\2065932\00001\20516_HAH\20516P227C

KIRKPATRICK & LOCKHART
PRESTON GATES ELLIS LLP
925 FOURTH AVENUE
SUITE 2900
SEATTLE, WASHINGTON 98104-1158
TELEPHONE: (206) 623-7580
FACSIMILE: (206) 623-7022

1
2
3 CERTIFICATE OF SERVICE
4

5 I hereby certify that on June 4, 2008, I electronically filed the foregoing with the Clerk
6 of the Court using the CM/ECF system which will send notification of such filing to the
7 following:

8 Mr. Bradley S. Keller
9 Mr. Paul R. Taylor
10 Byrnes & Keller LLP
11 1000 2nd Avenue
12 38th Floor
13 Seattle, WA 98104-1094

14
15
16
17
18
19
20
21
22
23
24
25
26

Dawn M. Taylor, Legal Assistant