REDACTED

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.

PROFESSIONAL BASKETBALL CLUB LLC, an Oklahoma limited liability company,

Defendant.

No. C07-1620 MJP

CITY OF SEATTLE'S REPLY IN SUPPORT OF ITS MOTION IN LIMINE TO EXCLUDE EVIDENCE RELATED TO LOCAL INVESTORS

I. INTRODUCTION

The only relief the City seeks from this Court is specific enforcement of the 1994 Premises Use & Occupancy Agreement ("the Lease") and the 2006 Instrument of Assumption. In response, PBC has asserted an unclean hands defense based entirely on the City's efforts to enforce its contractual rights. But, as a matter of law, the City's efforts to enforce its rights cannot constitute bad faith. Moreover, PBC argues the City's interactions with the Griffin Group caused it harm. But the only harm PBC posits are the operating losses it may incur by performing under the Lease. PBC not only assumed those losses, but anticipated them at the time of purchase; the losses were not caused by the interactions between the City and the Griffin Group.

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II. STATEMENT OF ADDITIONAL RELEVANT FACTS

From the first day PBC purchased the Sonics, the City stated it intended to enforce its rights and require the Sonics to play at KeyArena through the entire term of the Lease. Declaration of Michelle Jensen in Support of the City of Seattle's Replies to Motions in Limine ("Jensen Decl."), [redacted] Long before the first events identified by PBC as steps in the City's alleged conspiracy, PBC's Clay Bennett met with its Seattle litigation counsel, Brad Keller. *Id*., Ex. G. [redacted] PBC subsequently asked to breach the Lease in its Arbitration Demand on September 19, 2007. *Id*., Ex. A. PBC's actions caused the City to sue, not the other way around.

PBC argues the alleged City plan pre-dates the litigation.[1] The theory has no support. Initially, PBC cites documents that post-date the litigation. Then, PBC cites to calendar entries that show the City met with Wally Walker before PBC filed its Arbitration Demand. PBC deposed both Mr. Walker and Mr. Ceis but says nothing about the substance of those meetings. [redacted]

[1] PBC's opposition repeatedly and falsely implies "the City" did things that were done by others. [redacted] Even if PBC's allegations were true, however, they would be irrelevant for the reasons addressed below.

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[redacted] PBC also fails to cite any deposition testimony to support its claim that Mr. Walker was acting as a representative for the City at those times. This is because PBC knows that the City did not retain Mr. Walker as a consultant until September 21, 2007 – after PBC filed its arbitration demand, not before.

The City had no knowledge of the efforts of Slade Gorton and Gerry Johnson to secure a potential local owner other than the disclosure and waiver contained in the City's letter retaining K&L Gates. *Id*., Ex. L (Ceis Dep., 77:21-78:15). Although PBC cries absurdity, it points to no evidence to the contrary.

PBC refers to a meeting between the City and the NBA. PBC was at that meeting because the City's hope – then and now – was that PBC would honor the Lease and keep the team in Seattle. PBC egregiously misrepresents the record by claiming that the City, through Mr. Ceis, improperly disclosed the substance of this meeting with a third-party. Mr. Ceis' deposition testimony, and the very document cited by PBC, show Mr. Ceis revealed nothing.[2]

PBC implies that if this Court grants specific performance, it is equivalent to forcing PBC to sell the Sonics to the Griffin Group. But PBC offers no evidence to prove that, because there is none.

III. ARGUMENT

A. The City's Suit to Enforce Its Rights Under the Lease Cannot Be Unclean Hands as a Matter of Law.

PBC does not dispute controlling Washington law that "[a]s a matter of law, there

[2] Specifically, PBC asserts that "Ceis later disclosed the meeting to the head of a fan group working to keep the team in Seattle." PBC's Opposition at 9. In fact, the document PBC cites (Taylor Decl., Ex. 15 at KALD_02000737) shows it was the head of the fan group Save Our Sonics that wrote to Mr. Ceis to describe a meeting that occurred between several representatives of Save Our Sonics and the NBA. Mr. Ceis was the recipient of this communication, not its author. Ceis Dep., 13:11-14:6. There is not a shred of evidence that Mr. Ceis disclosed the substance of this meeting to any outside party.

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cannot be a breach of the duty of good faith when a party simply stands on its rights to require performance of a contract according to its terms." *Badgett v. Sec. State Bank,* 807 P.2d 356, 360 (Wash. 1991); *see also, Baird v. Knutzen* 301 P.2d 375, 376 (Wash. 1956). Similarly, "the duty of good faith does not extend to obligate a party to accept a material change in the terms of its contract." *Badgett*, 807 P.2d at 360. The cases on which PBC relies, in turn, make clear that a party who acts in "good faith" does not have unclean hands. *Precision Instrument Mfg. Co. v. Auto. Maint. Mach. Co.*, 324 U.S. 806, 814 (1945); *Income Investors, Inc. v. Shelton*, 101 P.2d 973, 974 (Wash. 1940); *Port of Walla Walla v. Sun-Glo Producers, Inc.*, 504 P.2d 324, 328 (Wash. Ct. App. 1972). As a matter of law, the City did not act with "unclean" hands when it sued to enforce its express rights under the Lease.

The main case upon which PBC relies, *Portion Pack, Inc. v. Bond*, 265 P.2d 1045 (1954), supports the City's position. In *Portion Pack*, the court agreed the plaintiffs had the right to enforce the parties' original contract, including by stopping its check when the defendant failed to perform. 265 P.2d at 1050-51. This was true even though the defendant, having paid his hotel with the check, was locked out of his hotel room, his clothes and personal effects seized, and told to make the check good 'or else[.]' *Id*. at 1048. What the plaintiffs could not do was then extract a second contract – a non-compete – from the defendant under duress, and have the second contract enforced in equity. *Id. Portion Pack* is a standard application of the doctrine, where a court denies specific performance because the party seeking specific performance unfairly induced the other party to enter into the contract at issue. *Cascade Timber Co. v. N. Pac. Ry. Co.*, 184 P.2d 90, 104-05 (Wash. 1947); *Hudesman v. Foley,* 480 P.2d 534, 537 (Wash. Ct. App. 1971). PBC's reliance on *Nelson v. Nelson* fails for the same reason. 356 P.2d 730 (Wash. 1960). In *Nelson*, an experienced real estate investor engineered a manifestly unfair deal under circumstances strongly suggesting impropriety. 356 P.2d at 732. As in *Portion Pack*, the court refused to order specific

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performance because the plaintiff improperly induced the defendant to enter into the contract.[3]

Here, the City asks this Court to enforce the Lease and the Instrument of Assumption. The City had nothing to do with PBC's decision to assume the Lease – the City did not even know PBC had agreed to buy the Sonics until the deal was done. More importantly, even according to PBC's timeline, PBC assumed the Lease long before the City had any communications with the Griffin Group. Accordingly, no evidence related to the Griffin Group can relate to PBC's entry into the Lease or execution of the Instrument of Assumption.

B. By PBC's Admission, the City's Interactions with the Griffin Group Caused No Injury.

PBC fails to address the requirement that alleged unclean hands cause injury. *McKelvie v. Hackney,* 360 P.2d 746, 752 (Wash. 1961). That is because there is no injury. PBC argues the City tried to force it to sell the Sonics to the Griffin Group. Yet as PBC previously represented to this Court, the team is not for sale. Defendant's Reply in Support of Motion to (i) Eliminate AEO Designations; (ii) Seal Documents; and (iii) Eliminate Ten-Day Waiting Period (Dkt. # 42), p. 3 [Redacted Version]. PBC's investors can without difficulty fund any forecast operating losses incurred by PBC during the 2008-09 and 2009-10 NBA

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[3] PBC cites *Port of Walla Walla v. Sun-Glo Producers, Inc.*, 504 P.2d 324 (Wash. App. 1972), but in that case motive was arguably relevant (if at all) because the Court found compliance with the plaintiff's demand for performance would have been futile. 504 P.2d at 327-28. That is not the case here: if PBC agrees to comply with Article II, this case is over.

In other cases cited by PBC, the court denied equitable relief on multiple grounds and did not rely on a finding of improper motive. *Ingram v. Kasey's Assocs.*, 531 S.E.2d 287, 292 (S.C. 2000) (equitable estoppel); *City of Duluth v. Riverbrooke Props., Inc.*, 502 S.E.2d 806, 813 (Ga. Ct. App. 1998) (plaintiff's undue delay in asserting rights). PBC withdrew the affirmative defense of equitable estoppel and laches is obviously not at issue.

The remaining two cases cited by PBC involve improper conduct in litigation not at issue here. In *Hall v. Wright*, 240 F.2d 787 (9th Cir. 1957), both parties filed a multiplicity of meritless suits to serve as "sales propaganda to the trade" in conjunction with a patent dispute. 240 F.2d at 794-95. In *Income Investors, Inc. v. Shelton*, 101 P.2d 973 (Wash. 1940), the party seeking equitable relief willfully falsified evidence.

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seasons. Pretrial Order (Dkt. # 81), Admitted Fact No. 31 (p. 6). The injury PBC alleges – a "forced sale"– did not, and according to PBC will not, occur. If PBC were to change its mind for any reason and sell the Sonics, that sale would still not be in any way "forced."

PBC also argues the City tried to persuade the NBA not to allow the Sonics to relocate the team. Given that PBC's threatened relocation breached the Lease, the City's request that the NBA hold PBC to its obligations under the Lease was not in any way wrongful. *Badgett*, 807 P.2d at 360. Regardless, the NBA approved PBC's relocation of the Sonics to Oklahoma City for the 2008-09 NBA season, contingent on PBC being allowed to relocate the team under the Lease. Pretrial Order, Admitted Fact 15 (p. 4); [redacted] Nothing the City did prevents PBC from relocating the Sonics to Oklahoma City in 2008. The only thing that bars PBC from relocating the Sonics is its promise not to do so, which the NBA explicitly acknowledged in its limited approval of PBC's relocation application.

IV. CONCLUSION

PBC assumed the Lease, knowing its term ran through 2010. PBC assumed the Lease knowing it would incur substantial loses during its remaining term. In fact, the NBA cautioned that PBC's expected losses would be even greater than PBC anticipated given the uncertainty surrounding the Lease. PBC now seeks the Court's assistance to avoid the obligations it willing assumed and the losses it expected. The City is simply asking the Court to enforce its Lease rights. In doing so the City hopes to obtain the full range of tangible and intangible benefits the City gets from the team for the next two years and hopefully for other years. Yes, the City hopes a way can be found to keep an NBA franchise in Seattle. Yes, the City hopes that the NBA will not approve a move if the City's lawsuit is successful and the PBC is required to reapply for permission. Yes, the City hopes that Mr. Bennett's Sonics, or Mr. Ballmer's Sonics, or some other NBA team plays in Seattle for years. None of that is even remotely relevant. That the City has acted legally to try to achieve these hopes does not deprive it of its right to seek specific performance.

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DATED this 4th day of June, 2008.

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CERTIFICATE OF SERVICE

I hereby certify that on June 4, 2008, I electronically filed the foregoing 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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