

**UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK**

**CITY OF SEATTLE, a first-class charter  
city,**

**Plaintiff,**

**v.**

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

**Defendant.**

**CATEGORY NO. M-8-85**

**Case No. C07-1620 MJP**

**The Honorable Marsha J. Pechman  
United States District Court for the  
Western District of Washington**

**THE CITY OF SEATTLE'S REPLY MEMORANDUM OF LAW IN FURTHER  
SUPPORT OF ITS MOTION TO COMPEL DOCUMENT PRODUCTION AND IN  
OPPOSITION TO THE NBA'S CROSS-MOTION TO QUASH OR ALTERNATIVELY  
TO MODIFY THE CITY OF SEATTLE'S RULE 30(B)(6) DEPOSITION SUBPOENA  
AND THE DEPOSITION OF DAVID J. STERN**

**TABLE OF CONTENTS**

	<u>Page</u>
TABLE OF AUTHORITIES .....	ii
INTRODUCTION .....	1
ARGUMENT .....	2
I. The City’s Specific Performance Claim and PBC’s Undue Hardship Defense Involve Issues on Which the NBA Has Centrally Relevant and Unique Evidence.....	2
II. Document Production. ....	2
A. The NBA Failed to Produce Documents It Agreed to Provide.....	2
B. Request No. 5: Relocation of the Sonics. ....	3
C. Request No. 6: Purchase of the Sonics. ....	4
D. Request Nos. 17, 19, 20 (and Topics 16, 18, 19): Early Termination, Early Relocation, and Specific Performance Clauses. ....	5
E. Requests Nos. 8, 9, 13: Financial Issues Affecting NBA Franchises in General.....	5
F. Request No. 10: Policies Regarding Revenue Reporting. ....	6
III. 30(b)(6) Testimony. ....	6
A. Mr. Litvin’s Individual Testimony Is No Substitute for 30(b)(6) Testimony. ....	6
B. Topics 2, 15, 17: The NBA Must Prove Its Claim of Lack of Knowledge (Knowledge It In Fact Has).....	7
C. Topics 3, 4, and 5: Opinions, Comments, or Recommendations Regarding the Lease, Relocation, and Key Arena and Its Potential Renovation. ....	8
D. Topic 14: How NBA Teams Generally Affect Their Communities.....	8
E. Topic No. 7: NBA Funding of the Sonics.....	8
F. Topics 8, 9, 10, 13: Factors Affecting NBA Team Finances.....	9
G. Topics 12 and 14: Expansion Plans and the Sonics’ Name and History. ....	9
IV. The City Is Entitled to Depose Commissioner David Stern Individually, As He Possesses Unique Knowledge.....	10

**TABLE OF AUTHORITIES**

**FEDERAL CASES**

**Page**

*Alexander v. Federal Bureau of Investigation*, 186 F.R.D. 148 (D.D.C. 1999).....6  
*Amherst Leasing Corp. v. Emhart Corp.*, 65 F.R.D. 121 (D. Conn. 1974) .....7, 10  
*CBS, Inc. v. Ahern*, 102 F.R.D. 820 (S.D.N.Y. 1984) .....10  
*Marriott v. Montgomery*, 426 F. Supp. 2d 1 (W.D.N.Y. 2006).....7  
*Overseas Exchange Corp. v. Inwood Motors, Inc.*, 20 F.R.D. 228 (S.D.N.Y. 1956).....7

**STATE CASES**

*Crafts v. Pitts*, 162 P.3d 382 (Wash. 2007) .....2

**FEDERAL STATUTES**

Fed. R. Civ. P. 30(b)(6).....7

**MISCELLANEOUS**

Premises, Use and Occupancy Agreement (“Lease”), Section XX.A.3 .....7, 9

## INTRODUCTION

The NBA was involved in whether the Sonics' owners keep the team in Seattle even before PBC bought the team. The original 1994 KeyArena lease specifically required NBA approval. At the time the renovations to KeyArena were completed, NBA Commissioner David Stern stated that Seattle got a "beautiful building" and that "Seattle should be very proud." As part of its approval of PBC's purchase of the Sonics, the NBA investigated the financial capability of PBC principals to handle the economics of owning the Sonics; it also received, and presumably analyzed, information about the Sonics' projected financial performance. The NBA even required PBC to make "good faith best efforts" to keep the team in the Seattle area as an express condition of its approval of the purchase. Since PBC's purchase, the NBA has monitored and commented upon PBC's efforts to obtain a new arena in the Seattle area and their options to relocate. David Stern, NBA commissioner, was the principal spokesperson for the NBA and had unique contacts with PBC. Joel Litvin, NBA President of League and Basketball Operations, was also consistently involved in the status of the Sonics franchise. In reviewing PBC's relocation request, the NBA conducted an evaluation of the projected economic performance of the Sonics in the Seattle and Oklahoma City markets. The NBA thus is uniquely involved and has relevant information about many issues related to the dispute between the City and PBC.

Indeed, the NBA acknowledges it has relevant information. Its objections to the City's documents and deposition subpoenas are inconsistent. It acknowledges the relevance of a subject by agreeing either to produce or testify, but refusing to do both.

Accordingly, the City requests that the Court require the NBA immediately to produce documents, no later than 3:00 p.m. on April 29, and allow the 30(b)(6) deposition of the NBA, the individual depositions of Mr. Litvin and of Mr. Stern to proceed on April 30.

## ARGUMENT

### **I. The City's Specific Performance Claim and PBC's Undue Hardship Defense Involve Issues on Which the NBA Has Centrally Relevant and Unique Evidence.**

The City is entitled to enforcement of its contractual bargain with PBC: specific performance of the Sonics' obligation to play their home games at KeyArena. The court could enforce the contract, or potentially consider four major issues: (1) whether the Sonics are unique /irreplaceable tenants; (2) whether the Sonics bring economic and non-economic benefits to a city in addition to rent due; (3) whether the burden to PBC is "undue" (e.g., relative to financial capabilities, pre-purchase understanding of the lease, what expenses other NBA teams readily bear, and the cost to the City of breach), and / or whether any alleged losses are the result of a bad bargain, factors other than the lease, or PBC's own actions; and (4) the relative equities of the case, including PBC's claim of clean hands and the fairness of the KeyArena Lease. *Crafts v. Pitts*, 162 P.3d 382, 386 (Wash. 2007). As discussed below, the documents and testimony the City seeks from the NBA bear on these four issues.

### **II. Document Production.**

#### **A. The NBA Failed to Produce Documents It Agreed to Provide.**

The NBA agreed to produce: (1) documents regarding the Lease and the NBA's approval of it; (2) the NBA's fine of any PBC principal, including for violation of the "good faith" promise; and (3) the impact of the Sonics on Seattle, the Seattle Center (KeyArena), and the Seattle public. Exs. 2, 5, 8 & 9. Aside from its governing documents, and a copy of the Lease and associated contracts, however, the NBA produced only approximately 30 pages of documents (virtually all authored by third parties). *See* Declaration of Jeffrey C. Johnson in Support of the City of Seattle's Reply and Opposition ("Johnson Decl."), ¶ 2. The NBA does not accurately represent its production to date.

**B. Request No. 5: Relocation of the Sonics.**

The City requests the NBA's internal documents on relocation. The NBA refuses, but its position is inconsistent. It agreed to provide a deponent but refuses to produce documents. NBA's Opposition, p. 10; *cf.* pp. 16-19. Without documents, the City cannot depose the NBA.

Near-term relocation of the Sonics necessarily involves breach of PBC's Lease. Also, the NBA's internal documents on relocation will reflect the NBA's evaluation of the Sonics' financial viability in Seattle vs. Oklahoma City. A recent article reveals that NBA consultants concluded Seattle is a superior market to Oklahoma City in terms of population, income, and the like (information the NBA's Relocation Committee apparently disregarded). Johnson Decl., ¶ 25, Ex. 69.<sup>1</sup> The NBA approved relocation anyway, despite the City proposal to renovate KeyArena and offer new lease terms. If PBC can succeed in the Seattle area by working together with local government, that would disprove a hardship defense. Exs. 58 & 59. This calls into question PBC's defense that it is moving to Oklahoma City because playing in Seattle is burdensome, rather than – for instance – to simply promote and boost its members' hometown.

PBC was asking the NBA to allow it to relocate by at least April 2007 – six months *before* the end date of its good faith best efforts promise. PBC Chairman Clay Bennett claims his April 17, 2007 email assertion that he was a “man possessed” refers to attempts to obtain an arena deal in the Seattle area. Ex. 70. But two days prior, he wrote the NBA's Maureen Coyle – who had suggested, among other things, that PBC consider various strategies in moving to Oklahoma City – that his then “combination of messaging and strategic thinking” included: (1) “We can now speak candidly and openly about our intentions out of the political context;” and (2) “We will work to negotiate out of the lease with KeyArena . . . .” Ex. 54. Soon after, Mr. Bennett wrote the NBA's Mr. Litvin describing four reasons why the NBA should consider

---

<sup>1</sup> All Exhibit (“Ex.”) cites refer to the sequentially numbered exhibits attached to either the Johnson Declaration, submitted herewith, or the previously filed Lawrence Declaration.

expedited relocation to Oklahoma City. Ex. 55; *cf.* Exs. 56 & 57. Despite Mr. Bennett's recent disclaimers, his intent was clear. PBC's documents reveal little; mostly that calls or meetings happened. Exs. 24, 25, 58, 62 & 64. Internal NBA documents will provide evidence of what PBC was asking of the NBA. This impeaches PBC's claims that it tried in good faith, but failed, to solve any financial problems it faced in the Seattle area. Hardship resulting from PBC's own decisions is no defense. These emails and other documents also show NBA was involved in each step of PBC's actions regarding the Lease and relocation. Exs. 67, 68 & 69.

**C. Request No. 6: Purchase of the Sonics.**

The City requested documents regarding PBC's purchase of the Sonics (Request No. 6). The NBA refuses to produce them but agreed to testify regarding PBC's purchase of the Sonics, and the good faith requirement (Topics 1 and 22). NBA's Opposition, p. 10; *cf.* 16-19. Again, the City needs these documents to depose the NBA.

Internal NBA documents regarding PBC's purchase will reflect the NBA's assessment of PBC's ability to bear operating losses and its analysis of PBC's financial forecast for the Sonics. PBC submitted these materials to the NBA. Exs. 50 & 51. The NBA knew PBC was assuming a KeyArena lease that extended through the 2009-10 seasons and included a specific performance clause (Ex. 12), so presumably it took extra care to ensure that PBC's members had the capacity to fund the team's obligations under the lease. Exs. 19 & 63. In addition, there is no dispute that the NBA insisted PBC make good faith efforts to keep the team in Seattle. PBC's good faith obligation likely relates to the Sonics' economic/community impact on Seattle, and is the presumptive reason the NBA originally supported keeping the Sonics and their 41-year history in the Seattle area. The NBA produced no documents on the Sonics' purchase, and less than 30 pages – created by third parties – related to the Sonics' impact on Seattle. Johnson Decl., ¶ 2.

**D. Request Nos. 17, 19, 20 (and Topics 16, 18, 19): Early Termination, Early Relocation, and Specific Performance Clauses.**

Only the NBA can produce documents and testimony that address, generally (rather than specific to the Sonics), early termination of arena leases, the proposed or actual early relocation of teams, and specific performance clauses in arena leases.

First, this information bears on whether PBC knew it could be required *by the NBA* to abide by the Lease. If the NBA has such policies, PBC would be bound. Foreseeable losses are not a defense to specific performance, but are even less so if the NBA also has policies that reinforce the lease obligations. Second, the NBA's position on these topics will reflect when the NBA considers specific performance "fair." Third, these documents show the NBA recognizes the unique contribution an NBA franchise brings a city. They show an NBA franchise is a unique tenant that brings tangible and intangible benefits to a City over and above the rent.

The NBA claims specific team leases are confidential. The City, however, is not seeking specific leases, but rather the NBA's documents on these issues generally. Moreover, leases between a team and a public entity (as many NBA leases are) are in fact public documents. The NBA argues that since 2000 only the Hornets "actually" relocated during the term of a Lease. The City's request, however, encompasses "proposed" early relocations, not just "actual."

**E. Requests No. 8, 9, 13: Financial Issues Affecting NBA Franchises in General.**

PBC's asserted defense is that it cannot make money, due to the KeyArena's lease and size. The NBA has unique knowledge regarding the factors that affect NBA teams' profits and losses, which it either took into account or disregarded in approving relocation. In either case, this evidence will help the City rebut PBC's asserted defense of undue hardship.

If other NBA teams are financially viable with losses equal to or greater than the Sonics', this disproves PBC's claim of undue burden. With regard to profit and loss statements, the City asks for approximately 300 discrete documents (profit and loss statements, or their equivalent,

for 30 teams over 10 years). The NBA asserts these documents are highly confidential, and the City will treat them as such under the agreed Protective Order (indeed, it previously stipulated to the NBA's request to seal a document obtained outside discovery the NBA felt was confidential).

With regard to the effects of the 1998-99 lockout and the recent Collective Bargaining Agreement on NBA team profits, the City limits its request to documents sufficient to show these effects. These are topics the NBA likely analyzed in discrete documents it can easily find.

**F. Request No. 10: Policies Regarding Revenue Reporting.**

The NBA concedes it has policies regarding how NBA franchises report their revenues to the NBA. To understand PBC's revenue reports, the City needs to understand what the NBA is asking for. The NBA is the best source (and only certain source) for these documents.

The City will limit this request to documents sufficient to show the NBA's formal or informal policies governing or addressing the way in which franchises report their revenues.

**III. 30(b)(6) Testimony.**

**A. Mr. Litvin's Individual Testimony Is No Substitute for 30(b)(6) Testimony.**

The NBA argues the 30(b)(6) deposition notice should be quashed because Mr. Litvin has some individual knowledge. NBA Opposition, p. 15. While Mr. Litvin is likely a speaking agent for the NBA on most of the 30(b)(6) topics, offering him in only his individual capacity (and not as a 30(b)(6) witness) is less than the City is entitled to. A 30(b)(6) deponent is required to obtain knowledge regarding subpoena topics; an individual has no such obligation. *Alexander v. Fed. Bureau of Investigation*, 186 F.R.D. 148, 151 (D.D.C. 1999). Mr. Litvin should not be allowed to testify in his individual capacity and thereby potentially hide behind a wave of non-responsive answers to, or assertions that he lacks knowledge regarding, questions central to this litigation.

**B. Topics 2, 15, 17: The NBA Must Prove Its Claim of Lack of Knowledge (Knowledge It In Fact Has)**

The NBA argues it has no knowledge regarding certain topics of 30(b)(6) testimony. NBA's Opposition, p. 16. But Rule 30(b)(6) requires the NBA testify regarding "information known or reasonably available." Fed. R. Civ. P. 30(b)(6); *Marriott v. Montgomery*, 426 F. Supp. 2d 1, 8 n.8 (W.D.N.Y. 2006). Also, a party claiming lack of knowledge must testify to that fact at a 30(b)(6) deposition; i.e., the City is entitled to "test" any claimed lack. *See Overseas Exchange Corp. v. Inwood Motors, Inc.*, 20 F.R.D. 228, 229 (S.D.N.Y. 1956); *Amherst Leasing Corp. v. Emhart Corp.*, 65 F.R.D. 121, 122-23 (D. Conn. 1974).

Further, the NBA's claim is implausible. It says it has no knowledge of approval of the Lease in 1994. NBA Opposition, p. 16. Section XX.A.3 of the Lease, however, states the NBA Commissioner approved it. Ex. 12. The NBA says nothing about 2006, when the NBA approved PBC's purchase of the Sonics and assumption of the Lease obligations (Topic 2). PBC's documents show the NBA received materials from PBC regarding the Sonics' financial forecasts under the Lease as part of approving the purchase. Exs. 50 & 51.

The NBA says it has no knowledge of the Sonics' impact on Seattle, the Seattle Center, or the citizens of Seattle (except for one document someone else created) (Topic 15). NBA Opposition, p. 16. Before taking sides against the City of Seattle, however, the NBA repeatedly emphasized the connection between the City, its people, and their team. Exs. 47 ("Seattle should be very proud" of its "beautiful building"), 49, 52 & 53. The NBA cannot hide these admissions now that they are no longer convenient.

Finally, the NBA says it has no knowledge regarding impacts the Sonics would have on Oklahoma City if they moved (Topic 17). NBA Opposition, p. 16. A parade of Oklahoma politicians and civic leaders just represented to the NBA that the Sonics would be perfect for Oklahoma. Exs. 39, 45 & 69. Again, the NBA cannot hide its knowledge of this issue.

**C. Topics 3, 4, and 5: Opinions, Comments, or Recommendations Regarding the Lease, Relocation, and KeyArena and Its Potential Renovation.**

The Lease, relocation, and the suitability for NBA games of KeyArena or a renovated KeyArena are all relevant topics. Ex. 60. The NBA agreed to produce documents and/or testify about these general topics (Request Nos. 3, 5, 19; Topics 6, 20). The NBA cannot concede their general relevance, but refuse to testify about what it has recommended, communicated, said, or opined. If the issues are relevant, then so are discussions of them.

The City is willing to limit Request No. 4 to communications between PBC and the NBA and internal NBA discussions and analysis regarding the Lease, relocation, the suitability of KeyArena as a basketball facility, and the suitability of a renovated KeyArena.

**D. Topic 14: How NBA Teams Generally Affect Their Communities.**

The NBA falsely claims it has no knowledge of the impact of the Sonics on Seattle or Oklahoma City. NBA Opposition, p. 16. It obviously has knowledge of the impact of NBA teams generally on their communities. The City claims NBA teams provide significant benefits to their cities, and the City will suffer a significant loss – both economically and to its cultural fabric – if PBC breaks the KeyArena Lease and relocates the Sonics two years early. PBC argues relocation of the Sonics will be great for Oklahoma City (Ex. 66), but will not significantly harm Seattle (Ex. 15, ¶¶ 12-35). The NBA is a very important source of evidence regarding how NBA teams generally affect communities. This evidence will allow the City to test – and prove false – PBC’s claim that the loss of the Sonics will not hurt Seattle.

The City is willing to limit this deposition topic to testimony regarding the effects of NBA teams on their cities over the past three years.

**E. Topic No. 7: NBA Funding of the Sonics.**

Much of a team’s revenues come from the NBA. Ex. 48. This has a major effect on the Sonics’ profits or losses, and PBC’s claim it is losing tens of millions of dollars. The City has

PBC documents and will depose it, but is entitled to verify the accuracy of PBC's claims by seeking discovery from the NBA including what, if any, routine and/or special revenues PBC might reasonably expect from the NBA during the remaining two years of their lease.

**F. Topics 8, 9, 10, 13: Factors Affecting NBA Team Finances.**

The City asks the NBA to provide testimony about “[t]he reasons NBA franchises suffer operating profits or losses” (Topic 9). PBC's asserted defense is that it is losing money because KeyArena is supposedly too small. Ex. 15, ¶¶ 15-21. To counter this defense, the City will produce evidence that PBC's losses are due to foreseeable causes (e.g., predictable increases in NBA contracts); have nothing to do with the Lease (e.g., the Sonics' win-loss record); or stem from PBC's own actions (e.g., its reduction in the team's marketing budget). Only the NBA has comprehensive knowledge about the factors that affect teams' operating profits and losses generally. PBC knows what the Sonics' revenues are, but has only a narrow (and biased) understanding of the causes of its alleged losses. The NBA is obviously an expert on this topic already; it needs only to supply an employee with knowledge, which involves no real burden.

The NBA argues it would be too burdensome to testify about the financial impact of the 1998-99 NBA lockout, the most recent Collective Bargaining Agreement, or how teams report revenues. NBA Opposition, p. 18. The NBA has employees who know about these topics. The City seeks general testimony; the NBA will not have to research details. These topics do not require the NBA to provide information about any specific team's finances.

**G. Topics 12 and 14: Expansion Plans and the Sonics' Name and History.**

The City claims the Sonics, an NBA team with a 41-year local history, are essentially irreplaceable. Ex. 11, ¶ 17; Ex. 65. PBC denies it. If the NBA is not going to expand, it will be hard for Seattle to ever obtain another NBA team. *Id.* If Seattle cannot keep the Sonics' name, the City loses that history. The City has a right to know, and give evidence, on these issues.

**IV. The City Is Entitled to Depose Commissioner David Stern Individually, As He Possesses Unique Knowledge.**

The NBA's motion to quash Commissioner Stern's testimony ignores established law. Individual depositions are allowed where an executive possesses unique knowledge. *CBS, Inc. v. Ahern*, 102 F.R.D. 820, 822 n.2 (S.D.N.Y. 1984); *Amherst Leasing*, 65 F.R.D. at 122-23. PBC's documents, although scanty, show Commissioner Stern had private conversations with PBC Chairman Clay Bennett regarding relocation and related topics. Exs. 24, 25, 36, 48, 61, 62 & 64. Further, Commissioner Stern is the spokesperson of the NBA year in and year out. He has been Commissioner of the NBA for over 20 years. The NBA has uniformly expressed its position on the KeyArena Lease and the Sonics' relocation through Commissioner Stern. His individual deposition is necessary.

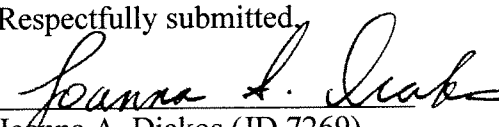
**V. Conclusion.**

For the reasons set forth above, the City requests that the Court require the NBA to produce documents immediately, and no later than 3:00 p.m. on April 29, and to allow the 30(b)(6) deposition of the NBA, as well as the individual depositions of Mr. Litvin and Mr. Stern, to proceed on April 30.

Dated: New York, New York  
April 24, 2008

Of Counsel:  
Paul Lawrence (*pro hac vice pending*)  
WSBA No. 13557  
Jeffrey Johnson (*pro hac vice pending*)  
WSBA No. 23066  
**KIRKPATRICK & LOCKHART**  
**PRESTON GATES ELLIS LLP**  
925 FOURTH AVENUE SUITE 2900  
SEATTLE, WA 98104-1158  
Telephone: 206.623.7580  
Facsimile: 206.623.7022

Respectfully submitted,

  
Joanna A. Diakos (JD 7269)  
**KIRKPATRICK & LOCKHART**  
**PRESTON GATES ELLIS LLP**

599 Lexington Avenue  
New York, New York 10022  
Telephone: 212.536.4807  
Facsimile: 212.536.3900  
[joanna.diakos@klgates.com](mailto:joanna.diakos@klgates.com)

*Attorneys for Plaintiff City of Seattle*

