UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

CITY OF SEATTLE, a first-class charter city Plaintiff, - against - 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

NON-PARTY THE NATIONAL BASKETBALL ASSOCIATION'S MEMORANDUM OF LAW IN OPPOSITION TO THE CITY OF SEATTLE'S MOTION TO COMPEL DOCUMENT PRODUCTION AND IN SUPPORT OF ITS OWN 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

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Non-party the National Basketball Association (the "NBA") respectfully submits this memorandum of law (i) in opposition to the motion of the City of Seattle (the "City") to compel the production of documents in connection with its document subpoena to the NBA dated January 31, 2008 ("Document Subpoena"), and (ii) in support of the NBA's cross-motion to quash or, alternatively, to modify the City's Rule 30(b)(6) subpoena of the NBA, dated March 27, 2008 (the "Rule 30(b)(6) Subpoena"), and to quash the deposition subpoena served on the Commissioner of the NBA on April 14, 2008 (the "Commissioner Subpoena").

PRELIMINARY STATEMENT

The City served the NBA with the Document, Rule 30(b)(6) and Commissioner Subpoenas in connection with its action (the "Lawsuit") against the owner of the Seattle Super-Sonics (the "Sonics"), one of the thirty professional basketball teams that are members of the NBA. As the NBA understands it, the sole issue in the Lawsuit is whether the City is entitled to specific performance of its lease with the Sonics, which states that the team is to play all regular season home games at KeyArena in Seattle through September 30, 2010 (the "Lease"). The owner of the Sonics, The Professional Basketball Club, LLC ("PBC"), contends that it may lawfully terminate the Lease now upon payment of all remaining financial obligations under the Lease, while the City asserts that the Sonics should be compelled to play their home games at KeyArena for the next two seasons.

Neither the NBA nor any of the other twenty-nine NBA teams are parties to the Lease or to the Lawsuit. The City has asserted that the NBA is "interested" in the outcome of the Lawsuit and, indeed, because the Lawsuit will likely determine where the Sonics play basketball for the next two seasons, the NBA is of course interested in the outcome in the general sense of the word. But the NBA has not taken a legal position on the merits of the Lawsuit, has not inter-

vened or participated in the Lawsuit in any way, and has no intention of doing so. The NBA is truly a non-party to the Lawsuit and the scope of discovery to which it may properly be subjected is only that required of any non-party under Rule 45 of the Federal Rules of Civil Procedure.[1]

The Document Subpoena originally sought documents from the NBA in twenty separate categories. The NBA served its responses, including its objections, to the Document Subpoena on February 13, 2008; thereafter – on February 22 and March 19, 2008 – the NBA and the City conferred and resolved the NBA's objections with respect to a number of categories of requested documents. (Dreyer Dec. ¶¶ 6-8.) The NBA has produced documents pursuant to the subpoena, but has continued to object to – and has declined to produce documents in response to – requests for documents relating to the financial performance and arena lease obligations of the NBA teams other than the Sonics, for documents relating to the actual or possible relocation of NBA teams other than the Sonics, for documents relating to the internal operations of the NBA, and for documents relating to the sale of the Sonics to PBC in 2006, on the grounds that those requests are overly broad and unduly burdensome and seek disclosure of highly sensitive, confidential information that is wholly irrelevant to the issue in the Lawsuit – whether PBC's anticipatory breach of its Lease is compensable in damages or by specific performance.

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[1] The NBA Board's recent approval of PBC's application to relocate the Sonics does not make the NBA a party to the Lawsuit, or align it with either side in the action. On November 2, 2007, PBC requested approval of the NBA's Board of Governors under the NBA Constitution and By-Laws to relocate the Sonics to Oklahoma City. (Pujals Dec. ¶ 9.) PBC explicitly requested that the Board of Governors approve relocation for the first season following the earlier of (i) a legal determination or settlement agreement providing that the Sonics are not required to play home games at KeyArena during the remaining term of the Lease, or (ii) the expiration of the Lease on September 30, 2010. (*Id.*) On April 18, 2008, the NBA Board of Governors voted to approve PBC's request to relocate the Sonics to Oklahoma City for the 2008-09 NBA Season only, expressly conditioning that approval on a settlement or other resolution of the Lawsuit that would permit such a relocation. (*Id.*) Accordingly, PBC may move the team from Seattle *only* if permitted to do so following the resolution of the Lawsuit.

Although the NBA understands that the Washington court has imposed an April 30, 2008 discovery deadline in the Lawsuit, the City did not immediately move to compel production of the documents to which the NBA had interposed unresolved objections. Rather, on March 27, 2008, the City simply served the Rule 30(b)(6) Subpoena, seeking an NBA representative to testify about some twenty-two different subjects, many of which had been withdrawn from the Document Subpoena or were subject to the NBA's outstanding and unresolved objections in connection with the Document Subpoena. (Dreyer Dec. ¶ 9.) Three weeks later, on April 14, 2008, the City served deposition subpoenas for the testimony of David Stern, Commissioner of the NBA, and Joel Litvin, President of League and Basketball Operations. (*Id.* ¶ 11.)

On April 9, 2008, the City moved this Court to compel the NBA to produce additional documents under the Document Subpoena. Specifically, the City moves to compel the production of:

- "All documents regarding or relating to any request or plan to relocate the Sonics outside Seattle, Washington, or to the possibility of such a relocation." (Request No. 5.)
- "All documents regarding or relating to the possible or actual purchase of the Sonics, by PBC or by any other potential purchaser, from the date the NBA became aware that the former team owner The Basketball Club of Seattle, chaired by Howard Schultz, was seeking to sell the Sonics." (Request No. 6.)
- "All documents reflecting or relating to the NBA's position (including any actions taken or contemplated by the NBA, and all communications) related to the termination (actual or contemplated) by any NBA team of its arena lease prior to the expiration of its term, including but not limited to any lease entered into by the New Orleans Hornets." (Request No. 17.)
- "All documents regarding or relating to proposed or actual efforts to relocate NBA teams during the term of an existing lease." (Request No. 19.)
- "All documents regarding or related to specific performance clauses in NBA arena leases." (Request No. 20.)
- "All documents analyzing or assessing the financial impact of the 1998-1999

NBA lockout on NBA teams, including but not limited to the financial impact of the lockout on the Sonics." (Request No. 8.)

- "All profit and loss statements submitted to the NBA by each NBA franchise for the last 10 years." (Request No. 9.)
- "All documents reflecting formal or informal NBA policies governing or addressing the way in which franchises account for and report their revenues." (Request No. 10.)
- "All documents regarding or relating to the impact on NBA team profits of the most recent collective bargaining agreement between the NBA and the NBA Players' Association." (Request No. 13.)

The NBA has already produced those documents sought by the City that are arguably relevant to the issue in the Lawsuit. In addition, the NBA will comply with the deposition subpoena for Mr. Litvin. But compliance with the remaining document requests concerning the possible relocation of the Sonics to Oklahoma City, the internal operations of the NBA (presumably since its inception in 1946), the financial performance for the past ten years and arena obligations for several decades of the other twenty-nine NBA teams, and the sale of the Sonics in 2006 to PBC, would be unduly burdensome and would require the NBA to disclose highly sensitive, commercial information that is entirely irrelevant to the underlying issue in the Lawsuit. Accordingly, the City's motion to compel production of documents should be denied.

Moreover, the NBA cross-moves for an Order quashing or modifying the Rule 30(b)(6) Subpoena to strike from it many of the categories of information for which the City has demanded the NBA designate a witness to testify. Given the overbreadth of the Rule 30(b)(6) Subpoena and the fact that Mr. Litvin is being produced to testify, the City cannot sustain its burden of showing the relevance and necessity of requiring the NBA to designate multiple witnesses to testify on nearly two dozen subject areas during the month of April. For these reasons, the NBA's cross-motion to quash or modify the Rule 30(b)(6) Subpoena should be granted.

Finally, the Commissioner Subpoena is simply a device to harass the NBA. There

is no showing of need for the deposition of Commissioner Stern, and the NBA's cross-motion to quash the Commissioner Subpoena should be granted.

ARGUMENT

I. THE CITY IS NOT ENTITLED TO THE DOCUMENTS IT SEEKS FROM THE NBA, AND ITS MOTION TO COMPEL SHOULD BE DENIED.

The City bears the burden of proving that the documents and information it seeks are relevant and material to the allegations and claims at issue in the Lawsuit. *See Night Hawk Ltd. v. Briarpatch Ltd., L.P.*, 03 Civ. 1382, 2003 WL 23018833, at *8 (S.D.N.Y. Dec. 23, 2003) (granting motion to quash a non-party subpoena because party issuing subpoena failed to demonstrate relevance of documents). The City must also demonstrate that the information cannot otherwise be obtained from PBC or public sources. *See* Fed. R. Civ. P. 26(b)(2)(C); *WM High Yield v. O'Hanlon*, 460 F. Supp. 2d 891, 895 (S.D. Ind. 2006) (non-party status is a significant factor when assessing undue burden and quashing subpoena based in part on party's failure to establish that the documents being sought were unavailable from parties to the litigation); *Schaaf v. Smithkline Beecham Corp.*, 233 F.R.D. 451, 453 (E.D.N.C. 2005) (same).

Here, as explained above, the sole issue in the Lawsuit is whether PBC's anticipated breach of the Lease is compensable in damages or by specific performance. Yet most of the documents the City seeks relate to other teams or the NBA generally. In determining whether a landlord is entitled to specific performance of a lease, the relevant inquiry focuses on the specific terms of the specific lease, the specific circumstances of the particular landlord and tenant, and the specific harm that would allegedly befall each should specific performance be granted or denied. *See, e.g.*, 71 Am. Jur. 2d Specific Performance § 7 (2008) ("The remedy of specific performance will be granted or withheld by the court according to the equities of the situation as disclosed by a consideration of all the circumstances of the particular case"); *Nelson*

v. Nelson, 356 P.2d 730, 733 (Wash. 1960) (stating that "the decision of [specific performance cases] must of necessity depend largely upon the circumstances surrounding each particular case") (quoting *Voight v. Fidelity Inv. Co.*, 49 Wash. 612, 614 (Wash. 1908)). Accordingly, third-party discovery that bears no relationship to the parties or their agreement is simply irrelevant to the question of whether specific performance is appropriate.[2]

Even where the information sought is arguably relevant, a court should quash or modify a subpoena if it "subjects a person to undue burden." Fed. R. Civ. P. 45 (c)(3)(A). Whether a subpoena imposes "undue burden" requires an assessment of: (i) the relevance of the requested documents to the lawsuit; (ii) the breadth of the request; (iii) the time period covered by the request; (iv) the particularity with which the request describes the documents sought; (v) the party's need for the requested documents; and (vi) the burden imposed upon the entity or individual who has been requested to produce the documents. *See Concord Boat Corp. v. Brunswick Corp.*, 169 F.R.D. 44, 51 (S.D.N.Y. 1996) (quashing overly broad subpoena that sought discovery of virtually every document relating to defendant that was generated or maintained by non-party witness during the past ten years).

Moreover, Rule 45 makes clear that courts are permitted to quash or modify a subpoena if it requires disclosure of "a trade secret or other confidential research, development, or commercial information." Fed. R. Civ. P. 45(c)(3)(B). Courts have recognized that this rule

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[2] The City relies on *Payne v. Still*, 38 P. 994 (Wash. 1894), for the unremarkable proposition that consideration of a request for specific performance is influenced by the class of contract to which the specific contract at issue belongs. *Payne* holds that a real estate lease belongs to a class of contracts as to which specific performance may be appropriate. But Payne does not even address discovery, let alone the broad, sweeping non-party discovery sought here. And while no one disputes that certain types of contracts may be more susceptible to specific performance than others (*see* 71 Am. Jur. 2d Specific Performance § 7), the mere fact that a contract is of a certain type hardly means that looking at other contracts of that type will assist a court in determining whether the disputed contract should be specifically enforced.

applies with greater force where the subpoenaed party is not a party to the litigation. *Slater Steel, Inc. v. Vac-Air Alloys Corp.*, 107 F.R.D. 246, 248 (W.D.N.Y. 1985) (recognizing that "[t]here appear to be quite strong considerations indicating that . . . discovery would be more limited to protect third parties from harassment, inconvenience, or disclosure of confidential documents") (quoting *Dart Indus. v. Westwood Chem. Co.*, 649 F.2d 646, 649 (9th Cir. 1980)).[3]

Finally, a party seeking discovery from a non-party must meet a higher standard in order to compel discovery, as non-parties are accorded greater deference and heightened consideration of the factors used to determine undue burden. *See e.g.*, *Fears v. Wilhelmina Model Agency, Inc.*, No. 02 Civ. 4911, 2004 WL 719185 (S.D.N.Y. Apr. 1, 2004); *Schaaf*, 233 F.R.D. at 453 (a court will give extra consideration to the objections of a non-party witness in weighing burdensomeness and relevance); *Night Hawk*, 2003 WL 23018833, at *8. Where a subpoena seeks discovery that is facially overbroad, or at best tangential to the case, the court should not impose upon a non-party the burden of compliance with the subpoena. *See Eisemann v. Greene*, 97 Civ. 6094, 1998 WL 164821, at *2 (S.D.N.Y. Apr. 8, 1998) (granting motion to quash deposi-

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[3] Without a doubt, compliance with the vast majority of the City's requests would require disclosure of proprietary and highly sensitive commercial and competitive information. Although the City contends that these concerns can be alleviated by the Protective Order entered into by the City and PBC, the City's own past conduct refutes that contention. The NBA told the City as early as February 14, 2008, that the NBA's Operations Manual and its Constitution and By-Laws are highly confidential and would only be produced subject to the Protective Order. These documents were subsequently produced by the NBA under the confidentiality designation "Attorneys Only." Nevertheless, in connection with its motion to compel, the City *publicly* filed a portion of the 2006-07 NBA Operations Manual containing an excerpt of the NBA Constitution. In addition, the City leaked its motion to compel (including the contents of documents it knew to be covered by the Protective Order) to the press before those documents were even publicly available via the PACER Service Center. The City's defense to its actions – that it independently obtained the document from the files of a former client affiliated with the Sonics' prior ownership (who would have no authority in any event to waive the confidentiality of documents that the NBA has repeatedly and explicitly designated highly confidential) – does not excuse the City's conduct. (Dreyer Dec. ¶¶ 12-15.)

tion of non-party on the ground that requested information was of "doubtful and tangential relevance"); *Concord Boat Corp.*, 169 F.R.D. at 49-50 (noting that where a subpoena sweepingly pursues materials that have no apparent or likely relevance to the subject matter, it runs a great risk "of being found overbroad and unreasonable," and thus quashed).

The City argues that the protections traditionally accorded non-parties should not apply to the NBA because of its presumed financial resources and because it has an "interest" in the outcome of the Lawsuit. It is simply not the case, as the City suggests, that the "undue burden" standard of Rule 45 is to be ignored where the non-party is a large, corporate entity; indeed, courts do not hesitate to quash overbroad subpoenas against well-financed corporate non-parties. *See, e.g.*, *Concord Boat Corp.*, 169 F.R.D. at 51 (quashing a document subpoena issued against non-party Merrill Lynch because compliance would impose an undue burden). Moreover, as noted above, while the NBA is of course "interested" (in the ordinary sense of the word) in the decision of the court in Seattle, since it will determine where one of the NBA's member teams will play basketball for the next two seasons, the NBA is not a party to the Lease, is not a party to the Lawsuit and takes no position on the merits of the Lawsuit, and has made it abundantly clear that it will not permit the Sonics to relocate unless and until the team is permitted to do so following the resolution of the Lawsuit.[4] Hence the NBA does not have an "interest" in the legal sense of the word in the Lawsuit and clearly remains a non-party to that proceeding.

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[4] The cases on which the City relies (City Br. at 12) for the proposition that broad discovery is appropriate because the NBA is an "interested" party are inapposite. While each stands for the common proposition that third-party discovery is available from persons with an interest in the outcome of the litigation, they do not convert such persons into parties to the litigation. Indeed, the most recent of the City's authorities, *Behrend v. Comcast Corp.*, 07-mc-10224-PBS, 2008 WL 250373, at *3 (D. Mass. Jan. 16, 2008), expressly held that "concern for the unwanted burden thrust upon non-parties is a factor entitled to special weight in evaluating the balance of competing needs."

With these principles in mind, it is readily apparent that the City's motion to compel production of documents for each of the document requests at issue should be denied.

A. "All documents regarding or relating to any request or plan to relocate the Sonics outside Seattle, Washington, or to the possibility of such a relocation." (Request No. 5.)

During the meet-and-confer process, the City agreed to narrow this request to documents regarding any request or plan to relocate the Sonics made by the teams' former owner and the NBA informed the City that the Sonics former owner had never made a request to the NBA to relocate the team. (Dreyer Dec. ¶ 8.) Now the City seeks documents created by the NBA (and excluding any documents created by PBC) regarding any request or plan to relocate the Sonics by PBC. (City Br. at 15-16.)

The City argues that documents related to the Sonics' proposed relocation are relevant to the Lawsuit for two reasons. First, the City contends that the documents about relocation may support the City's contention that PBC intends to breach the Lease and that it has deceived the NBA about its intentions. Second, the City appears to assert that the relocation documents may bear on the Sonics' economic impact on the City of Seattle. (City Br. at 16-17.)

As to the City's first argument, there is no dispute that the team's relocation prior to 2010 would constitute a breach of the Lease; the sole issue is whether the breach is compensable in monetary damages or must be remedied by an order of specific performance. The City seems to think PBC told the NBA it did not intend to relocate when, in fact, it always intended to move to Oklahoma. But whatever PBC told the NBA about its relocation intentions is totally irrelevant to whether PBC's threatened breach of the Lease now is remediable by specific performance. And in all events, the City has withdrawn its request for documents prepared by PBC, which would presumably include what PBC told the NBA about its intentions.

As to the City's second argument, it has served a separate document request relat-

ing to the Sonics' economic impact on the City of Seattle (Request No. 16), and the NBA has already produced documents in response to that request. (Dreyer Dec. ¶ 6.) Accordingly, the discovery the City seeks with respect to relocation documents created by the NBA is unnecessary and irrelevant, and its motion to compel compliance with Request No. 5 should be denied.

B. "All documents regarding or relating to the possible or actual purchase of the Sonics, by PBC or by any other potential purchaser, from the date the NBA became aware that the former team owner The Basketball Club of Seattle, chaired by Howard Schultz, was seeking to sell the Sonics." (Request No. 6.)

The City seeks broad discovery on PBC's purchase of the Sonics, regardless of whether those documents relate in any way to the issue in the Lawsuit. Documents generated by the NBA in connection with PBC's purchase of the Sonics cover a wide range of topics – including confidential investigative reports concerning the backgrounds and financial resources of PBC's members – none of which relates in any way to the Lease or to the City's claimed entitlement to specific performance of that Lease. (Pujals Dec. ¶ 7.)

The City argues that documents responsive to this request might be relevant to the Lawsuit because they might contain information relating to (i) the Sonics' economic impact on the City, or (ii) the financial considerations that the NBA might consider legitimate for the relocation of the team. (City Br. at 18.) As for the former argument, the NBA has already produced all non-privileged documents regarding the Sonics' impact on the City of Seattle and KeyArena. (Dreyer Dec. ¶ 6.) As for the latter argument, the considerations – financial and otherwise – that the NBA might considered legitimate for the relocation of the team to Oklahoma City are entirely irrelevant to the issue in the Lawsuit, which, as previously explained, is whether PBC's threatened breach of the Lease should be compensable in monetary damages or remedied by specific performance. Moreover, the City already has Article 7 of the NBA Constitution and By-Laws, which sets forth the factors to be considered in connection with the relocation of a team.

C. "All documents reflecting or relating to the NBA's position (including any actions taken or contemplated by the NBA, and all communications) related to the termination (actual or contemplated) by any NBA team of its arena lease prior to the expiration of its term, including but not limited to any lease entered into by the New Orleans Hornets." (Request No. 17.)

The City argues, with no legal authority, that documents relating to other member teams' arena leases will provide "context" for its analysis of whether monetary damages are an adequate remedy for PBC's anticipated breach. (City Br. at 19-20.) But what the NBA thinks about the termination of an arena lease before it expires is not relevant to whether the City is entitled to specific performance. As previously noted, the propriety of specific performance depends entirely on the particular facts and circumstances of the particular case and the particular contract. The arena leases of the other twenty-nine teams were individually negotiated by the teams and their arena landlords at different times, were executed under different circumstances, and are governed by different state laws, so the NBA's position, if any, about the termination of any other team's arena lease prior to its expiration is entirely irrelevant to the question of whether PBC's Lease is susceptible to the equitable remedy of specific performance.

Moreover, the terms of arena leases are highly sensitive, competitive information, the disclosure of which should not be compelled except where absolutely necessary. Because the City has not satisfied its burden of demonstrating the relevance of what the NBA thinks about pre-expiration termination of arena leases other than the Lease at issue in this case, the City's motion to compel production of the requested documents should be denied.

D. "All documents regarding or relating to proposed or actual efforts to relocate NBA teams during the term of an existing lease." (Request No. 19.)

For the same reasons, efforts to relocate other teams during the term of an existing arena lease are wholly irrelevant to the issue in the Lawsuit about the availability of specific performance under the Lease in question. The NBA is aware of only one team that was relocated

during the term of an existing lease since 2000 – the New Orleans Hornets, who were compelled by Hurricane Katrina to secure a playing facility outside New Orleans. A search for all documents relating to the Hornets' relocation and any prior team relocation efforts (presumably from the inception of the league in 1946) would be enormously time-consuming and burdensome, with little, if any, benefit given the total irrelevance of the information. The City's motion to compel the production of such documents should be denied.

E. "All documents regarding or related to specific performance clauses in NBA arena leases." (Request No. 20.)

Again, the arena leases into which other teams have entered contain different provisions negotiated by different parties at different times under different circumstances and are governed by the laws of different states. They are irrelevant, yet highly competitively sensitive, and their production should not be compelled in this matter.

F. "All documents analyzing or assessing the financial impact of the 1998-1999 NBA lockout on NBA teams, including but not limited to the financial impact of the lockout on the Sonics." (Request No. 8.)

With no meaningful explanation – let alone legal support – the City argues that documents reflecting the historical financial health of each of the other twenty-nine member teams are somehow relevant to PBC's claim of undue hardship (City Br. at 21) and, on that thin basis, asks for all documents analyzing the financial impact on each of the thirty member teams of a player lockout that occurred nearly ten years ago. Even if any such documents exist – and searching for such documents would be extremely burdensome, given their likely age – they would be very little help in assessing why the Sonics are not profitable in 2008. The utter lack of probity and the undue burden of searching for and producing such documents mandates that the City's motion to compel compliance with this request be denied.

G. "All profit and loss statements submitted to the NBA by each NBA franchise for the last 10 years." (Request No. 9.)

There is probably no more highly sensitive commercial information than each member team's profit and loss statements. Nothing of any use to the court in Seattle would result from compelling twenty-nine individual teams to disclose their confidential and sensitive financial records.

The City asserts (without authority) that it wants those statements for each team for each of the last ten years to try to understand why the Sonics are not currently profitable. But the City already has the Sonics' own audited financial statements for the past five years. If the Sonics' own audited financial statements are insufficient to enable the City to draw any conclusions as to the reasons for the team's recent financial difficulties, ten years' worth of profit and loss statements from the New York Knicks or the Houston Rockets will certainly not illuminate that issue. The reasons for any particular team's profitability (or lack of it) are highly individualized, and depend entirely on the specific circumstances applicable to each particular team and each particular city. The notion that an explanation of the Sonics' current financial condition could be divined by plugging into an economic "model" the reported profit or loss of every other NBA team without a thorough qualitative evaluation of the reasons for each of the other teams' profit or loss is utter fantasy.

H. "All documents reflecting formal or informal NBA policies governing or addressing the way in which franchises account for and report their revenues." (Request No. 10.)

The NBA has no policies, formal or informal, as to how teams report revenue for purposes of their own financial statements. (Pujals Dec. ¶ 16.)[5] The City is of course free to de-

[5] The City appears to be confused about the financial information the NBA requests from the teams under the collective bargaining agreement. That reporting protocol is intended solely *(cont'd)*

pose PBC on the methodologies and assumptions used to prepare its financials. Accordingly, the City's motion to compel compliance with this request should therefore be denied.

I. "All documents regarding or relating to the impact on NBA team profits of the most recent collective bargaining agreement between the NBA and the NBA Players' Association." (Request No. 13.)

Finally, the City's request for all documents relating to the financial impact of the most recent collective bargaining agreement (the "CBA") on the profits of each of the twenty-nine other NBA teams is wholly irrelevant to the issue of whether PBC's Lease should be specifically enforced. As noted above, the City has the Sonics' audited financial statements for the period immediately before the most recent CBA – which was negotiated in 2005 – and for the period thereafter. Accordingly, to the extent the financial impact of the 2005 CBA on *the Sonics'* profitability has any relevance to the availability of equitable relief in the Lawsuit, the City already has the information on which to make that assessment. The impact of the CBA on other teams is meaningless in the context of the Lawsuit, constitutes highly sensitive commercial information, and would be unduly burdensome for the NBA to search for and produce. The City's motion to compel compliance with this request should likewise therefore be denied.

II. THE NBA'S MOTION TO QUASH OR, ALTERNATIVELY, TO MODIFY THE RULE 30(B)(6) SUBPOENA SHOULD BE GRANTED.

In addition to its Document Subpoena, which was narrowed in the course of the meet-and-confer process, the City has served the NBA with three deposition subpoenas: (i) the Rule 30(b)(6) Subpoena requiring the NBA to designate and produce testifying witnesses with respect to twenty-two separate categories of information; (ii) the deposition subpoena for Joel Litvin, President of League and Basketball Operations; and (iii) the deposition subpoena for

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for internal NBA purposes to promote uniformity among the teams, and is irrelevant to the issue in the Lawsuit. (Pujals Dec. ¶ 16.)

Commissioner David Stern. As noted above, the NBA has agreed to produce Mr. Litvin, who is responsible for overseeing collective bargaining, basketball operations, franchise transactions and legal matters. (Pujals Dec. ¶ 15.) Because it is producing Mr. Litvin for a deposition, the NBA moves to quash or, alternatively, to modify the Rule 30(b)(6) Subpoena and to quash the subpoena directed at Commissioner Stern.

As with a Rule 45 document subpoena, courts quash third-party deposition subpoenas where they subject the subpoenaed party to an undue burden. *See, e.g., Night Hawk*, 2003 WL 23018833, at *8. In this case, compliance with the Rule 30(b)(6) Subpoena – which contains twenty-two categories, including various subparts – would require the NBA to designate multiple witnesses to review materials and testify on issues wholly irrelevant to the Lawsuit, including: (i) information on other teams and cities besides the Sonics and Seattle, spanning time periods of up to ten years; (ii) information relating to categories for which the NBA has no documents; and (iii) information readily available from PBC. Requiring such an onerous undertaking would entail significant effort by – and impose substantial expense on – the NBA, which could not in any event complete the task without a substantial extension of the return date of the Rule 30(b)(6) Subpoena. (Pujals Dec. ¶ 14.)

As President of League and Basketball Operations, Mr. Litvin is qualified to testify about a number of subject areas identified on the Rule 30(b)(6) Subpoena and, without conceding the relevance of any of them, is prepared to testify about them. But there are a number of wholly irrelevant categories about which Mr. Litvin is either unqualified to testify (and in many of these cases, the NBA has no employee or witness whom it can designate to testify) or should not be required to testify because of the highly sensitive, yet totally irrelevant, nature of the category. For these reasons, the NBA moves to quash or modify the Rule 30(b)(6) Subpoena.

A. Categories Where the NBA Has No Responsive Witness with Knowledge (Category Nos. 2, 15 and 17.)

Category No. 2 (the NBA Commissioner's approval of the Lease). Neither the NBA nor its Commissioner approved the Lease because, in 1994, when the Lease was entered into, the NBA had no policy requiring the Commissioner or the NBA to approve arena leases. (Pujals Dec. ¶ 6.) Accordingly, the NBA does not have a witness with knowledge regarding this category, and this subject area should be struck from the Rule 30(b)(6) Subpoena.

Category No. 15 (impact on the City of Seattle, the Seattle Center, or the public that result from the Sonics playing home games in Seattle). Although the NBA has agreed to produce in response to Document Request No. 16 a single document it has located in its files relating to this subject, that document was not prepared by or for the NBA, and the NBA does not have a witness with knowledge regarding this category. (Pujals Dec. ¶ 17.) This subject area should be struck from the Rule 30(b)(6) Subpoena.

Category No. 17 (financial and/or other impacts on Oklahoma City that would result from the Sonics' potential move to Oklahoma City). The NBA does not have a witness with knowledge regarding this category. (Pujals Dec. ¶ 17.) This subject area should be struck from the Rule 30(b)(6) Subpoena.

B. Categories Wholly Irrelevant to The Issue in the Lawsuit (Category Nos. 3, 4, 5, 7, 8, 9, 10, 12, 13, 14, 16, 18, 19 and 21.)

Category No. 3 (why the NBA Commissioner would recommend that the Sonics should relocate). Whether the Commissioner of the NBA made a recommendation about the possible relocation of the Sonics to Oklahoma City, and, if he were to do so, what that recommendation might be, is wholly irrelevant to the issue in the Lawsuit: Is the City entitled to specific performance of the Lease or would monetary damages for PBC's threatened breach suffice? This subject area should be struck from the Rule 30(b)(6) Subpoena.

Category No. 4 (the substance of all communications of *any* kind between the NBA and PBC regarding *any* matter related to the NBA or the Sonics). This category of information is hugely overbroad and would include communications relating to basketball operations (for example, player discipline, playing rules, and equipment requirements), marketing, team travel, and other matters having nothing to do with whether PBC's threatened breach of the Lease should be remedied with an order of specific performance. (Pujals Dec. ¶ 18.) Furthermore, PBC has agreed to produce documents reflecting its communications with the NBA, and has been noticed for a Rule 30(b)(6) deposition with respect to this category of information. (Dreyer Dec. ¶ 4.) While communications between PBC and the NBA are not in dispute in the Lawsuit (and therefore this deposition category calls for information not relevant to the Lawsuit), at the very least, the City should be required to depose PBC about any communications prior to seeking examination of the NBA. *See* Fed. R. Civ. P. 26(b)(2)(C) (requiring courts to limit the extent of discovery otherwise allowed where the discovery sought is "unreasonably cumulative or duplicative, or can be obtained from some other source that is more convenient, less burdensome, or less expensive"); *WM High Yield,* 460 F. Supp. 2d at 896 (quashing non-party subpoena where party seeking information failed to demonstrate that it had been unable to obtain the desired information from actual parties to the underlying litigation). In short, this subject area should be struck from the Rule 30(b)(6) Subpoena.

Category No. 5 (comments made by the NBA Commissioner regarding the Lease, KeyArena, the relocation of the Sonics). Like Category No. 3, any comments made by the Commissioner regarding the Lease, KeyArena, or the relocation of the Sonics are entirely irrelevant to the question of whether monetary damages are inadequate to compensate the City for PBC's threatened breach of the Lease. This subject area, too, should be struck from the Rule

30(b)(6) Subpoena.

Category No. 7 (monies received by the Sonics from the NBA, from 2003 to the present, including but not limited to revenue from luxury taxes). This category calls for information related to issues not in dispute in the Lawsuit and otherwise obtainable from PBC. PBC has produced its audited financial statements for the last five years, and so the City already has the requested information. Further, PBC has been noticed for a Rule 30(b)(6) deposition regarding the Sonics' financial condition. (Dreyer Dec. ¶ 4.) While monies received by the Sonics from the NBA are not in dispute in the Lawsuit (and therefore this deposition category calls for information not relevant to the Lawsuit), here again, the City should be required to depose the PBC about this topic prior to seeking examination of the NBA. *See* Fed. R. Civ. P. 26(b)(2)(C); *WM High Yield,* 460 F. Supp. 2d at 896. Accordingly, this subject area should be struck from the Rule 30(b)(6) Subpoena.

Categories Nos. 8, 9, 10, and 13 (other teams' financials). These subject areas are irrelevant and highly sensitive for the reasons set forth above in connection with the NBA's opposition to the City's motion to compel compliance with Document Requests Nos. 8, 9, 10, and 13. (*See* Point IF-I above.) They should be struck from the Rule 30(b)(6) Subpoena.

Categories 12 and 14 (any NBA expansion plans in North America and the impact of NBA teams on cities other than Seattle or Oklahoma City). These categories are hugely burdensome insofar as they would require witnesses with knowledge of information dating back to the inception of the NBA in 1946. Each geographic area is different from the others, and such information has absolutely no relevance whatsoever to the issues in the Lawsuit. These subject areas should be struck from the Rule 30(b)(6) Subpoena.

Categories Nos. 16, 18, and 19 (other teams' arena lease obligations). Other

teams' arena lease obligations are irrelevant for the reasons set forth above in connection with the City's motion to compel compliance with Document Requests Nos. 17, 19, and 20. (*See* Point IC-E above.) This subject area should be struck from the Rule 30(b)(6) Subpoena.

Category No. 21 (whether or not the NBA would approve the assignment of all intellectual property rights related to the Sonics). This category calls for rank speculation, since no such approval by the NBA has been sought. Moreover, whether the NBA would approve such an assignment if it were sought is irrelevant to the issue in the Lawsuit as to whether the Lease is enforceable by specific performance. This subject area should be struck from the Rule 30(b)(6) Subpoena.

In conclusion, while the NBA is prepared to produce Mr. Litvin to testify about certain categories listed in the Rule 30(b)(6) Subpoena, the NBA moves this Court to quash or modify the Rule 30(b)(6) Subpoena to limit the subject areas on which Mr. Litvin may be deposed and to limit the requirement that the NBA designate multiple witness on nearly two dozen subject areas.

III. THE COMMISSIONER SUBPOENA IS UNDULY BURDENSOME, UNNECESSARY AND DESIGNED SOLELY TO HARASS THE NBA; THE NBA'S MOTION TO QUASH IT SHOULD BE GRANTED.

In addition to its extensive Rule 30(b)(6) deposition subpoena, on April 14, 2008, the City subpoenaed the deposition of NBA Commissioner David Stern. There can be no doubt that the sole purpose of the deposition is to harass the NBA and its Commissioner, and the Commissioner Subpoena accordingly should be quashed. *See, e.g., Consol. Rail Corp. v. Primary Indus. Corp.*, 92 Civ. 4927, 92 Civ. 6313, 1993 WL 364471, at *1 (S.D.N.Y. Sept. 10, 1993) (noting that "permitting unfettered discovery of corporate executives would threaten disruption of their business and could serve as a potent tool for harassment in litigation").

The NBA has already agreed to produce Mr. Litvin, who possesses the same

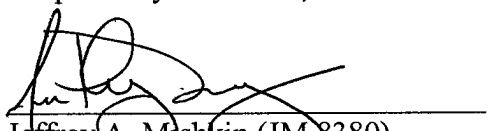
knowledge and has access to the same information as the Commissioner on any issue about which the City's counsel may inquire. It is therefore inappropriate to require the additional deposition of Commissioner Stern. *See Filetech, S.A. v. France Telecom, S.A.*, 95 Civ. 1848, 1999 WL 92517, at *2 (S.D.N.Y. Feb. 17, 1999) (staying deposition of chairman of defendant corporation where other employees were available to furnish information necessary to resolve the inquiry at issue); *Consol. Rail Corp.*, 1993 WL 364471, at *1 (deferring depositions of corporate executives where defendant could not demonstrate that the executives had unique knowledge pertinent to the issues in the case). Consequently, the deposition of Commissioner Stern is improper and the Commissioner Subpoena should be quashed.

CONCLUSION

For the foregoing reasons, the NBA respectfully requests that this Court deny the City's motion to compel, and grant the NBA's motion (i) to quash or modify the Rule 30(b)(6) Subpoena and (ii) to quash the Commissioner Subpoena.

Dated: April 19, 2008
New York, New York

Respectfully submitted,



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