

The Honorable Marsha J. Pechman

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UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON

CITY OF SEATTLE, a first-class charter city,)	
)	
Plaintiff,)	No. C07-1620MJP
)	
v.)	
)	
THE PROFESSIONAL BASKETBALL CLUB,)	
LLC, an Oklahoma limited liability company,)	
)	
Defendant.)	

**DEFENDANT’S PROPOSED FINDINGS OF FACT
AND CONCLUSIONS OF LAW**

I. **FINDINGS OF FACT**¹

A. **The Parties and the Lease**

The Professional Basketball Club (“PBC”) is a limited liability corporation and a resident of the State of Oklahoma. The City of Seattle is a resident of the State of Washington. The City and the PBC are parties to a lease. Ex. 600. The City is the landlord; the PBC is the tenant. By its terms, the lease expires on September 30, 2010.

B. **The Threshold Issue: All of the City’s Claimed Losses Are Quantifiable and Can Be Calculated with Reasonable Certainty.**

The threshold question under specific performance is whether a party has an adequate remedy at law—i.e., whether a party’s claimed losses from nonperformance are quantifiable and can be calculated with reasonable certainty. Here, the City claims injuries consisting of: (i) base rent and other payments due under the lease; and (ii) items not provided for in the express provisions of the lease consisting of (a) “economic benefit” to the community at large generated by the Sonics, and (b) claimed “intangible benefits” to the community resulting from the Sonics’ presence in the community. The Court is not deciding in this case whether the “economic” and “intangible” benefits are compensable or legally cognizable damages for nonperformance of the home game provision of the lease. However, to the extent they are cognizable, all of these amounts are quantifiable and can be calculated with reasonable certainty.

The amounts owed under the lease by the PBC for the two remaining seasons can be calculated with reasonable certainty. The payments due under the lease are broken into two categories. Ex. 600. The first consists of fixed pre-season and quarterly rental payments. Id. at 0223. These are fixed amounts which are subject to annual set increases. Id. The second is a variable component consisting of a percentage of various revenue streams, including suite leases, club seat sales, and concessions. Id. at 0225-227.

¹ All Findings of Fact that are more appropriately characterized as Conclusions of Law are so deemed, and vice versa.

1 The evidence showed at least two ways to calculate the amounts due for the remainder of
2 the lease term. The first is based on the average of the rental payments for the 05/06 and 06/07
3 seasons, reduced by the percentage decline in revenues in the 07/08 season. Verbatim Report of
4 Proceedings (“Tr.”) 585-86. The second is based on comparable attendance declines for “lame-
5 duck” sports franchises, i.e., those publicly known to be leaving for a different city. That
6 percentage decline is applied against the PBC’s performance in a base year of 2005-2006. The
7 rent is calculated based on the resulting projected performance figures. Tr. 586.

8 The parties’ expert economists disagreed about whether the Sonics generate a net tangible
9 economic benefit for the community at large. Compare Tr. 618 (Sonics generate average
10 economic activity of approximately \$187 million per year) versus Tr. 723-26 (Sonics’ departure
11 from Seattle would have no net economic impact). The City presented testimony that the
12 economic impact of the Sonics can be measured using the so-called “RIMS-II” analysis. Tr. 617,
13 657.

14 Because the Court is sitting in equity, and there is no claim for damages, the Court need
15 not make a finding as to the amount, if any, of the tangible economic benefit the Sonics provide to
16 the community at large. The Court also need not decide if such amounts are legally cognizable as
17 damages. The Court does, however, find that if and to the extent there is a tangible economic
18 benefit, it can be determined with reasonable certainty. With regard to the potential intangible
19 economic benefits the Sonics provide to the community, it is also possible to calculate a dollar
20 value with reasonable certainty. For example, “Contingent Valuation Methodology” (“CVM”) is
21 an economic methodology by which citizens are surveyed about how much they would be willing
22 to pay to keep a particular team in their city. Tr. 387-88. Such valuations have been done in
23 connection with the Pittsburgh Penguins (hockey), the Jacksonville Jaguars (football), and the
24 Anaheim Angels (baseball). Tr. 387-88, 417; see also Tr. 755-56. Again, because there is no
25 damages claim in this action, the Court need not determine whether such damages are legally
26 cognizable. Nor does it need to make a finding as to the dollar amount, if any, of the intangible

1 economic benefit the Sonics provide to the community. The Court does, however, find that such
2 an amount could, if necessary, be calculated with reasonable certainty.

3 **C. KeyArena and the Lease.**

4 KeyArena was built almost 50 years ago for the 1962 Seattle World’s Fair. Ex. 500 at 1.
5 After the Fair, the City purchased the building from the State of Washington for \$2.9 million. Id.
6 The City converted it into the Seattle Coliseum—a multipurpose venue for sports, concerts, trade
7 shows, family events (e.g., the circus), etc. Id. In 1967, the Coliseum began being used by the
8 Seattle SuperSonics, then a new franchise in the NBA. Id.

9 Fifteen years ago, in 1993, the PBC’s predecessor in interest and the City began
10 discussing a private/public partnership for a \$100 million remodel of the aging and deteriorating
11 Coliseum. Ex. 500 at 1-2. The funding mechanism envisioned—using a percentage of the team’s
12 revenues to pay off bonds issued to fund the renovation—with no dedicated tax dollars was
13 unprecedented. Id.

14 The financial terms of the arrangement were as follows. First, the Sonics contributed
15 approximately \$21 million cash. Ex. 500 at 2. Second, they agreed to pay an annual base rent—
16 initially \$800,000—with a yearly escalator. Ex. 600 at 0223. Third, the Sonics committed to pay,
17 as additional rent, a percentage of the team’s revenues from suite sales and rentals, club seats and
18 other income streams to satisfy the debt service. Id. at 0226. For its part, the City pledged its
19 credit to support the issuance of bonds to pay for the project. Ex. 500 at 2. The arrangement was
20 designed so that no tax dollars would be used. Id. The parties predicated the agreement on two
21 interrelated assumptions: (i) that KeyArena would be a competitive NBA arena for the life of the
22 lease (Tr. 161-162) and (ii) the revenue sharing payments would be adequate to cover the first
23 fifteen years of debt service on the bonds.

24 From 1995 to 2007, the Sonics paid approximately \$110,000,000 in base rent and revenue
25 sharing. Ex. 500 at 26; Ex. 504. The Sonics also made capital improvements of approximately
26 \$21,000,000. Ex. 500 at 26.

1 **D. The Intent of the Parties in Negotiating the Lease.**

2 In negotiating the lease, the parties intended to create a financial structure that would
3 enable the Sonics to remain competitive within the NBA for the duration of the lease. Tr. 161-62.
4 This is why the Sonics' revenue sharing obligation was structured to decline over time. Ex. 600
5 at 0226. For example, in the first year of the lease (1995) the Sonics were obligated to pay the
6 City 60 percent of club seat revenues. That figure declined by two percent per year until 2005,
7 when it would be fixed at 40 percent for the balance of the lease. Likewise, for suite receipts, in
8 1995 the Sonics were obligated to give the City 80 percent of such revenues. Id. The revenue
9 sharing obligation dropped by two percent per year until 2005, when it would be fixed at 60
10 percent. In short, as the Sonics' future costs increased, so too would the Sonics' share of the
11 revenues.

12 The lease itself is actually a series of interrelated agreements and amendments, which
13 totals over 100 pages and covers many issues beyond the Sonics' playing games at KeyArena.
14 Thus, it included provisions governing the design and construction of the facility (Ex. 600 at
15 0211-18), delineation of the portion of the premises available to the Sonics (id. at 0220-222), rent
16 (id. at 0223-24), audit rights (id. at 0227-229), personnel and staffing obligations (id. at 0229-
17 233), first aid facilities (id. at 0230), maintenance obligations of the parties (id. at 0233), the
18 Sonics' rights and obligations regarding concession sales, suite leases and rentals (id. at 0236),
19 video production, broadcast, and cablecast transmission rights (id. at 0241), ticket administration
20 (id.), the relationship with the NBA (id. at 0252), and many other operational issues.

21 The lease does not have any provision requiring the PBC to have Sonics players engage in
22 charitable or community works. Ex. 600; Tr. 116. Likewise, the ordinance authorizing the lease
23 said nothing about charitable or community activities. Ex. 32. The City may have assumed the
24 Sonics would provide such activities (Tr. 143-44), but there is no evidence that they were the
25 subject of any negotiation between the parties.

26 The lease contains a specific performance clause:

1 The obligations of the parties to this Agreement are unique in nature; this
2 Agreement may be specifically enforced by either party.

3 Ex. 600 at 0263, ¶ L. The clause does not delineate which portions of the lease and the other
4 incorporated agreements are, or are not, specifically enforceable. There was no evidence offered
5 about the negotiations that led to the specific performance clause or about which provisions of the
6 lease are, or are not, specifically enforceable.

7 **E. The Economics of the Lease No Longer Work for the City**

8 After several years, and due to circumstances beyond the parties' control, the agreement
9 began failing for both parties. From the City's perspective, beginning in around 2001, the
10 financial component of the arrangement began failing because of several events. Ex. 500 at 2.
11 First, when the remodeled KeyArena opened, it was the only professional sports facility in the
12 region with modern suites and so-called premium seating arrangements. But with the addition of
13 taxpayer-subsidized Safeco and Qwest Fields, and the Everett Events Center, the available suite
14 and premium seating inventory in the area nearly tripled, as did the competition for high net-
15 worth customers. Tr. 166; Ex. 500 at 2. The increased competition, combined with regional
16 economic downturns, had a "profound" impact on sales of suite and premium seating at
17 KeyArena. Ex. 516; Tr. 84-85, 167-168. It created, in the words of the director of the Seattle
18 Center, a "perfect storm." Nellams Dep. at 50:8-16. As a result, the revenue sharing stream was
19 no longer sufficient to cover debt service on the bonds. Ex. 500 at 2; Tr. 169.

20 **F. KeyArena Has Not Been a Competitive NBA Facility for Many Years.**

21 The Mayor acknowledged that KeyArena has "significant shortcomings that affect the
22 financial health of the Sonics," Tr. 68-69, and that an NBA team cannot be viable in KeyArena
23 given the lease and the facility. Tr. 76-77. The PBC and its predecessors have been economically
24 hampered by (i) the revenue sharing obligations under the lease, and (ii) the revenue generating
25 limitations of KeyArena. The City has known of these problems for several years. Tr. 76, 81.

26 Looking first at the lease, the terms are not competitive with other NBA leases. Tr. 836.
Its revenue sharing provisions make it "onerous" relative to other NBA leases (Tr. 837), and make

1 it “one of the worst in the league.” Id. The City acknowledges that the Sonics cannot be
2 financially successful given the limitations of the facility and the terms of the lease. Tr. 77.

3 As to the facility, the parties agree that KeyArena has not been economically viable for
4 men’s professional basketball for several years. Of the 29 NBA arenas, KeyArena is the smallest,
5 barely one-half the average size of other NBA facilities. Ex. 500 at 3, 35. The small size limits
6 point of sale opportunities for food, beverages, and merchandise. Ex. 500 at 35. The size and
7 configuration also make it impossible to offer enough premium seating alternatives. Ex. 500 at 3,
8 35; Tr. 354-355. As a result, the Sonics’ premium seating revenues are among the lowest in the
9 NBA. Ex. 500 at 3, 35.

10 At least in part because of these shortcomings, the PBC’s operating losses for the 07/08
11 season are projected to be approximately \$24 million. Tr. 568.² For the remaining two seasons
12 (08/09 and 09/10), the projected total operating loss for the PBC is between approximately \$61
13 and \$65 million. Tr. 781.

14 By contrast, if the Sonics are permitted to move to Oklahoma City beginning with the
15 08/09 season, they are projected to earn \$7 million in 08/09 and \$10 million in 09/10. Tr. 436-
16 437.

17 **G. The City Has Been Unable to Find a Solution for KeyArena.**

18 Although the parties agree about KeyArena’s deficiencies, the parties disagree about
19 whether KeyArena could, at considerable expense, be made economically viable for men’s
20 professional basketball. The City believes that it can be made into an economically viable NBA
21 facility through a renovation. Tr. 93. The PBC does not believe that KeyArena can be made into
22 an economically viable NBA facility. Tr. 354-355. Regardless, there is no reasonable prospect
23 that KeyArena could be made into an economically viable facility before the end of the current
24 lease.

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² The PBC’s fiscal year does not end until September 30, 2008.

H. The Public’s Attitude About the Sonics.

The results of a survey by Field Research, taken in November 2007, show that 66 percent of Seattleites either believe it would make no difference to them if the Sonics left Seattle, or they would be “better off.” Ex. 333 at 22; Tr. 812-814. Of the remainder, 13 percent said they would be only “slightly worse off if the Sonics left,” 8 percent said they would be “somewhat worse off” and only 12 percent said they would be “much worse off” if the Sonics left Seattle. Ex. 333 at 24. The Field Research poll results are consistent with earlier polls. Tr. 999-1000; Ex. 522.

The poll results are consistent with the election results on Seattle Initiative 91 in November 2006. That initiative provided that City funds could not be used on professional sports facilities unless the City was guaranteed a minimum rate of return on the funds it contributed to building the facility. Ex. 518. The “Statement for” Initiative 91 in the official Voting Guide explained that in terms of City priorities, there were more important things than new sports facilities, “such as keeping schools open, affordable housing, healthcare, lower taxes, roads and transit, and real economic development.” Ex. 518. Initiative 91 passed by approximately 75 percent.

The polling results are also consistent with the television ratings for team broadcasts. For example, Nielsen ratings have declined by more than 50 percent since 2004³:

2004	3.12
2005-2006	1.67
2006-2007	1.60
2007-2008	1.24

The 1.24 rating for the 07/08 season means that, on average, out of over 1,000,000 potential households, approximately 20,000 were watching the Sonics. Tr. 546-47.

The drop in television ratings tracks the drop in attendance. For example, there has been a season ticket attrition rate of fifty-five percent from the 03/04 season to the 07/08 season. Ex. 507. Average attendance per game has dropped from 13,798 in 00/01 to 9,146 for the 07/08 season. Ex. 510. Seattle’s attendance ranks 27th out of 29 NBA teams. Id. Similarly, since the

³ Ex. 505.

1 03/04 season, there has been a 50 percent increase in “no shows,” i.e., people who paid for a
2 ticket but did not attend. Ex. 508. “No shows,” i.e., tickets purchased but not used, went from 19
3 percent in the 03/04 season to 28 percent in the 07/08 season. Id.

4 It may be that at some time in the past, the Sonics were an important part of Seattle’s
5 community fabric. For whatever reasons, that is no longer true. Even if it were true, an order of
6 specific performance can, at most, only require the team to play in Seattle for two additional
7 seasons. A team performing pursuant to a court order will, given the open hostilities between the
8 PBC and City leadership, generate “muted” enthusiasm. Tr. 104.

9 **I. The PBC Purchased the Team with the Intention of Securing a New Facility in**
10 **Which to Play.**

11 When the PBC purchased the Sonics, it was aware that the prior owner had incurred
12 significant losses over the past several years. Tr. 340. The PBC was also aware of the
13 shortcomings of KeyArena. In acquiring the team, the PBC intended to work toward obtaining a
14 new facility in the Seattle area in which to play. Tr. 339-341. The PBC believed that if it could
15 obtain a new facility, it could operate profitably in the Seattle area. Id.

16 **J. The Principal Asset of the PBC Will Be Seriously Harmed by Specific Performance.**

17 If the Sonics remain in Seattle by court order for the last two years of the lease, the team
18 and organization will be substantially injured. The PBC is projected to lose upwards of \$65
19 million in the last two years of the lease. Tr. 781. In the past six months alone, the Sonics have
20 lost approximately 20 percent of its employees, including key executives, as a result of the
21 uncertainty arising out of the litigation. Tr. 559. Morale is declining, and it is difficult for the
22 owners to provide visible leadership given the animosity they encounter in Seattle and in
23 KeyArena. Specific performance will also have an impact on the team’s ability to attract players
24 and coaches. Tr. 442. This, in turn, would impact the quality of the team that would play in
25 Seattle for two years under a court order. Similarly, sponsors no longer desire to be associated
26 with the team, further depressing the team’s already dismal economic performance. Tr. 445-46.
The team cannot successfully market suites. Potential subtenants want “opt out” clauses allowing

1 them to terminate their lease when the Sonics leave. The City has, however, declined to allow
2 such clauses. Thus, there is an economic stalemate on suites. Given these and other problems, an
3 order of specific performance would trigger a steep economic and performance decline. It would
4 also be extremely difficult to operate the business in a viable, competitive fashion during the last
5 two years.

6 **K. The City's Lawsuit Is Being Used to Force the PBC to Sell Its Principal Asset.**

7 “Winning” this lawsuit cannot, by itself, produce a long-term benefit to the City:

8 Bennett owns the team, wants it in Oklahoma City, and sees relatively
9 clear sailing to NBA approval except for our lawsuit which, at best, can delay his
move and make it more costly.⁴

10 The evidence shows that because winning the lawsuit would not accomplish its goal, the
11 City became involved in a plan to use this lawsuit, and the threat of specific performance, to try to
12 force the PBC to sell its principal asset—the Sonics—to a group of local owners.

13 On July 24, 2007, there was a meeting between a representative of the Mayor's office and
14 Mr. Walter Walker. Mr. Walker was the former CEO of the Sonics and was interested in keeping
15 the Sonics in Seattle and “fighting [Mr. Bennett's] attempt to leave.” Ex. 618. Mr. Walker told
16 the City that he wanted to make it “too expensive and too litigious for [Bennett to leave].” At the
17 meeting, the City gave the impression that “they were in total agreement,” and that “they
18 (administration) understand the value of buying more time.” Id.

19 Soon thereafter, the City instructed K&L Gates to hire Walker as an “expert consultant”
20 beginning on September 21, 2007. Ex. 625. His role was to assist “K&L Gates and the City with
21 respect to efforts to retain the Sonics and the Storm in the City of Seattle beyond the term of the
22 existing KeyArena lease.” Id.

23 The strategy to use this lawsuit to force the PBC to sell the Sonics was set forth in a
24 document prepared and/or at least approved by the City's law firm (K&L Gates) and consultant
25 Walker. Exs. 567, 575, 620; Tr. 857-858. The document was distributed, reviewed and discussed
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⁴ Ex. 576 at 1.

1 at an October 7, 2007, meeting. Tr. 857-58. Present were the City's lead litigation counsel,
2 potential buyer Steve Ballmer, Mike McGavick, and Walker. Tr. 856. The purpose of the
3 meeting was to discuss how to keep the Sonics in Seattle. Tr. 857. The document detailed a
4 strategy to force the PBC to sell the team to Seattle-based owners, and to persuade the NBA to not
5 allow the PBC to relocate the team to Oklahoma City. The strategy included the following:

6 The critical path is to separate the NBA from the Oklahomans, while increasing
7 the exposure for each.⁵

8 So it is a pincer movement: increasing the Oklahomans [sic] costs in an
9 unpleasant environment while increasing the league's belief that an alternative
solution gains it a good new owner and keeps it in a desirable market.⁶

10 Gorton, et. al, increase pain of staying (financial and reputation).⁷

11 With respect to persuading the NBA not to permit relocation in particular, Walker was
12 tasked to "drive [a] wedge" between the PBC and the NBA. Ex. 570 at 00243; Ex 601 (Oct. 17,
13 2007, entry).

14 Soon after this meeting, prominent local developer Matt Griffin joined the buyer's group,
15 becoming its manager and public spokesman. As Griffin explained, the goal of the lawsuit was to
16 make the PBC sell through "forced bleeding of about \$20 [million] per year."⁸

17 Thereafter, the City pursued a two prong strategy: (i) persuade the NBA not to approve
18 relocation of the Sonics to Oklahoma City by persuading Olympia to approve funding to remodel
19 KeyArena into a viable NBA facility and showing that there were qualified owners; and
20 (ii) induce the PBC to sell to these local owners through the threat of specific performance and
21 huge losses. The effort to persuade the NBA not to approve relocation and to persuade Olympia
22 to approve funding failed.

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25 ⁵ Ex. 567 at WW00227.

26 ⁶ Id. at WW00229.

⁷ Id. at WW00236.

⁸ Ex. 575 at Griff_00001052.

1 **II. CONCLUSIONS OF LAW**

2 This court has jurisdiction pursuant to 28 U.S.C. § 1332.

3 Specific performance is an extraordinary remedy. There is no right to specific
4 performance, and it is not available where there is an adequate remedy at law. Wash. Trust Bank
5 v. Circle K Corp., 15 Wn. App. 89, 546 P.2d 1249 (1976).

6 The general rule is that landlords may not obtain specific performance compelling tenants
7 to operate businesses. See 8600 Assocs., Ltd. v. Wearguard Corp., 737 F. Supp. 44, 46 (E.D.
8 Mich. 1990) (decisions denying injunctive relief to landlords reflect “the modern trend and the
9 majority rule”); Mayor’s Jewelers, Inc. v. State of Cal. Pub. Employees’ Retirement Sys., 685
10 So.2d 904 (Fla. App. 4th Dist. 1996) (“[A]lmost every other court confronted with this issue has
11 denied injunctive relief requiring a tenant to specifically perform a lease.”). Additionally, specific
12 performance is typically denied even where the landlord and tenant have agreed that the landlord
13 is entitled to mandatory injunctive relief if the tenant failed to keep the store open as required.
14 See 8600 Assocs. Ltd. v. Wearguard Corp., 737 F. Supp. 44, 46 (E.D. Mich. 1990).

15 Landlords are generally denied specific performance for either of two reasons. First, a
16 landlord’s legal remedy—money damages for compensable losses—is typically an adequate
17 remedy. Second, specific performance of a lease cannot be accomplished with a single act, such
18 as conveying a piece of property, but requires continuous, protracted interaction between parties
19 and court supervision of that relationship. Both reasons apply here and require that the City be
20 left to its legal remedy.

21 **A. Monetary Compensation Is an Adequate Remedy for Nonperformance of the Home**
22 **Games Lease Provision.**

23 Where a landlord can be compensated with money, the rule against specific performance
24 of continuous operations clauses is almost universal. See, e.g., CBL & Assocs., Inc. v. McCrory
25 Corp., 761 F. Supp. 807, 809-10 (M.D. Ga. 1991); New Park Forest Assocs. II v. Rogers Enters.,
26 Inc., 552 N.E.2d 1215 (Ill. Ct. App. 1 Dist. 1990); Sizeler Prop. Investors, Inc. v. Gordon Jewelry
Corp., 544 So.2d 53 (La. Ct. App. 4th Cir. 1989); Lorch, Inc. v. Bessemer Mall Shopping Ctr.,

1 Inc., 310 So.2d 872, 876 (Ala. 1975); Madison Plaza, Inc. v. Shapira Corp., 387 N.E.2d 483, 486-
 2 87 (Ind. Ct. App. 1 Dist. 1979); Price v. Herman, 81 N.Y.S.2d 361 (N.Y. Sup. Ct. 1948), aff'd, 87
 3 N.Y.S.2d 221 (N.Y. App. 1949); Bradlees Tidewater, Inc. v. Walnut Hill Inv., Inc., 391 S.E.2d
 4 304 (Va. 1990); Grossman v. Wegman's Food Markets, Inc., 350 N.Y.S.2d 484 (N.Y. App.
 5 1973).

6 Here, the compensable monetary damages to the City—rent for the balance of the lease—
 7 can be calculated with reasonable certainty. To the extent legally cognizable—an issue the Court
 8 need not address—the additional claimed tangible and intangible economic benefits, if any, are
 9 quantifiable and can be calculated with reasonable certainty.

10 **B. Specific Performance Is Denied Where Ongoing Supervision Is Necessary.**

11 Specific performance is also denied where the contract calls for a succession of acts whose
 12 performance cannot be consummated by one transaction, and which requires ongoing supervision.
 13 This has long been the rule in Washington. In Cahalan Investment Co. v. Yakima Central
 14 Heating Co., 113 Wash. 70, 193 P. 210 (1920), for example, plaintiff sought an order requiring
 15 defendant to provide its apartment building with steam heat for the remaining three years of a
 16 commercial services contract. As the Court explained:

17 A court of equity is always loath to specifically enforce a contract the
 18 enforcement of which requires the subsequent supervision and direction of the
 19 court, especially so where the contract extends over a considerable period of
 20 time. . . . Many differences can arise, and most certainly will arise, between the
 21 parties during this time over the question whether the contract is being properly
 22 performed, to settle which will require investigations and orders on the part of the
 23 court. . . .

24 113 Wash. at 74-75. Accordingly, specific performance was denied, and plaintiff was left to its
 25 legal remedy. Id. at 75 (“To conduct a private business is not the function of a court of equity.”).

26 Given the burdens of requiring parties to run a business, this rule applies when landlords
 seek to enforce “continuous operations” clauses. In M. Leo Storch Ltd. v. Erol's, Inc., 620 A.2d
 408 (Md. Ct. App. 1993), the Court recognized that knowledge and judgment were required in
 “innumerable” day-to-day business decisions. Hoping to persuade the Court that the burdens of

1 ordering specific performance would be minimal, the landlord argued that the Court could issue
 2 “a simple order that says, you may not continue to breach the continuous operations clause.” 620
 3 A.2d at 412. This was rejected. As the Court explained, “if a dispute arises in the future, the
 4 court will become a referee.” Id.

5 Here, the lease is more than one hundred pages long and controls many detailed and
 6 minute aspects of the parties’ relationship, including revenue sharing, signage, concessions
 7 (including items and pricing), marketing, and other issues. The lease is, in this respect, similar to
 8 a shopping center lease between a landlord and tenant. Specific performance would require the
 9 Court to monitor and supervise the detailed and complex relationship between the parties. This is
 10 another reason to deny specific performance.

11 **C. Specific Performance Is Not Available with an Ambiguous Clause.**

12 The specific performance clause of the lease is ambiguous. It does not detail which of the
 13 many provisions of the lease are, and are not, specifically enforceable. Specific performance
 14 requires clear and unequivocal evidence that leaves no doubt as to the terms, character and
 15 existence of the contract. Russell v. Cook, 78 Wn. App. 427, 896 P.2d 1317 (1995). It likewise
 16 requires a level of certainty and definiteness of terms that leaves no reasonable doubt as to what
 17 the parties intended, and no reasonable doubt of the specific thing that equity compels a party to
 18 do. Haire v. Patterson, 63 Wn.2d 282, 386 P.2d 953 (1963). Here, there is not clear and
 19 unequivocal evidence of what portions of the lease were intended to be specifically enforceable.
 20 The City put on no proof as to which terms of the lease fell within the specific performance
 21 clause. Because it is ambiguous, it is not subject to specific performance.

22 **D. In Balancing the Equities, the City Will Gain Little From Specific Performance, and**
 23 **the Hardships on the PBC Would Be Great.**

24 Even if the City did not have an adequate remedy at law, specific performance is not
 25 warranted. A court must ensure that specific enforcement will not be oppressive, unconscionable,
 26 or result in undue hardship to any party involved. Crafts v. Pitts, 161 Wn.2d 16, 162 P.3d 382
 (2007). “The relative burden imposed upon the defendant as compared with the benefit the

1 plaintiff will derive from the performance of a contract may be a ground for a court's refusal to
 2 direct specific performance." 71 Am.Jur.2d § 94 (2008). Restatement (Second) of Contracts
 3 § 364(1)(b) (1981); 25 David K. DeWolf & Keller W. Allen, Washington Practice: Contract Law
 4 & Practice § 15:1 (2007).

5 Here, the balance of hardships weighs against specific performance. The "hardship" on
 6 the City will be modest if the Sonics depart two years earlier than would otherwise be the case.
 7 The City will lose only the remaining "muted" benefit of a team for which public interest has
 8 steadily declined over the past several years. Seattle will still be a world-class city with a wide
 9 variety of sports, cultural and entertainment options. By contrast, the PBC will lose upwards of
 10 \$65 million if forced to stay in Seattle these two years. Likewise, the business will degrade as
 11 employees leave, morale plummets and performance suffers.

12 **E. Even If Specific Performance Were Otherwise Proper, the City's Claim Is Barred**
 13 **by Its Inequitable Conduct.**

14 The City has certain rights as a landlord. Those rights do not include forcing its tenant—
 15 the PBC—to sell its principal asset—the Sonics—to the City's preferred owner. Equity does not
 16 allow a plaintiff to use specific performance to extract more than it bargained for in the contract at
 17 issue. Portion Pack, Inc. v. Bond, 44 Wn.2d 161, 265 P.2d 1045 (1954). Whatever right the City
 18 may have had to try and enforce the last two years of the lease, it did not have the additional right
 19 to use specific performance as a means to undermine the PBC's business to try to force it to sell
 20 the team.

21 Equity also requires clean hands. Income Investors, Inc. v. Shelton, 3 Wn.2d 599, 602,
 22 101 P.2d 973 (1940). Stated somewhat differently:

23 any willful act in regard to the matter in litigation, which would be condemned
 24 and pronounced wrongful by honest and fair-minded men, will be sufficient to
 25 make the hands of the applicant unclean.

26 Rose v. Nat'l Auction Group, Inc., 646 N.W.2d 455, 463 (Mich. 2002) (quoting 2 Pomeroy's
Equity Jurisprudence, § 404, p. 143 (1941)).

1 The clean hands doctrine protects the Court’s integrity, rather than the opposing party’s
2 interests. It ensures that the judicial system does not become a party to impropriety:

3 That doctrine is rooted in the historical concept of court of equity as a vehicle for
4 affirmatively enforcing the requirements of conscience and good faith. This
presupposes a refusal on its part to be ‘the abetter of iniquity.’

5 Precision Instrument Mfg. Co. v. Auto. Maint. Mach. Co., 324 U.S. 806, 814 (1945).

6 The City has unclean hands. This lawsuit seeks specific performance as a further way of
7 “locking” the PBC into huge losses and thereby forcing it to sell its principal asset—the Sonics.
8 The City argues that it was not involved in the conduct, even though it was carried out by its lead
9 counsel and its expert consultant. More fundamentally, Seattle’s Deputy Mayor participated in
10 discussions about the subject of the PBC’s only selling the team “if pressured by the NBA or if
11 [it] faces an expensive or unpleasant legal future.” Tim Ceis Dep. at 99-100. Even assuming that
12 the City was not a direct participant in the unclean hands conduct, the City is responsible for the
13 actions of its agents, K&L Gates and Walker. The standard for whether a principal is responsible
14 for the unclean hands acts of its agents is inquiry notice. Am. Ins. Co. v. Lucas, 38 F. Supp. 896,
15 923-924 (W.D. Mo. 1940). “To hold otherwise, would mean that this beneficent maxim of equity
16 could be defeated merely by the principal (for whose benefit an agent grossly abused the powers
17 of the court of equity) closing his eyes.” Id. at 923-24. Here, the City had actual notice by not
18 later than September 21, 2007, that K&L Gates was involved in efforts to keep the Sonics in
19 Seattle beyond the term of the lease. This information was communicated to the Seattle City
20 Attorney in connection with his retention of K&L Gates. The City, through the City Attorney,
21 consented to K&L Gates’ efforts. Likewise, Mr. Walker was retained as a consultant by K&L
22 Gates at the direction of the Deputy Mayor of Seattle. Accordingly, the City is responsible for the
23 acts of its agents, and its inequitable conduct bars it from the relief it seeks.

24 DATED this 24th day of June, 2008.

25 BYRNES & KELLER LLP

26 By: /s/ Paul R. Taylor, WSBA #14851

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CERTIFICATE OF SERVICE

I hereby certify that on the 24th day of June, 2008, I electronically filed the foregoing document 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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