

1 **Arbitration Demand**

2 **I. Introduction and Overview**

3 1. The Agreement between Seattle and the Sonics<sup>1</sup> by which the Sonics are  
4 permitted to use and occupy KeyArena expires in 2010.<sup>2</sup> There are three remaining NBA  
5 seasons covered by the Agreement (2007-2008, 2008-2009, and 2009-2010). Unfortunately,  
6 KeyArena is no longer an economically viable NBA venue. Recognizing this, the Sonics  
7 have worked diligently with elected officials to obtain a suitable multipurpose facility for the  
8 future beyond 2010. Despite these efforts, no viable option is on the horizon. Meanwhile, the  
9 Sonics' losses tied to playing in KeyArena are staggering -- \$17,000,000 in just this past year.  
10 Accordingly, and in an effort to stem the losses, the Sonics have no alternative but to play the  
11 2007-2008 season in KeyArena, and satisfy all remaining obligations by paying the rent for  
12 the balance of the term of the Agreement. Under the guise of "specific performance," the  
13 City has publicly stated it intends to try to force the Sonics to play in KeyArena, against their  
14 will, for the final two seasons.

15 2. The issue is whether it makes equitable sense to force the Sonics to play the  
16 final two seasons in KeyArena. The answer is "no," for many good reasons. First, for many  
17 years KeyArena has not been economically viable for men's professional basketball. As the  
18 City admits, KeyArena lacks the necessary physical infrastructure and amenities and is an  
19 economically obsolete venue for men's professional basketball. Thus, specific performance  
20 guarantees huge losses for the Sonics and a declining revenue stream for the City. Second,  
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25 <sup>1</sup> "Sonics" refers to the current owners of the Sonics, The Professional Basketball Club, LLC,  
26 an Oklahoma limited liability company ("PBC").

<sup>2</sup> "Premises Use and Occupancy Agreement" (Ex. 1).

1 City officials have repeatedly acknowledged that there will be little or no cultural or economic  
2 impact on the City if the Sonics leave. Third, the relationship between the Sonics and the  
3 City's elected leaders is all but gone. Likewise, a majority of the public has accepted the  
4 team's imminent departure. The sentiment among many is "who cares"? Fourth, the  
5 complex, ongoing nature of the parties' relationship under the Agreement is not the type of  
6 business relationship that can be meaningfully or effectively "forced" and supervised on a  
7 going-forward basis. Finally, the Sonics have the right to leave KeyArena so long as they  
8 honor their financial commitment. Given the many negatives of a forced and dysfunctional  
9 relationship, the lack of corresponding benefits, and the resulting financial losses for both  
10 sides, it makes no sense to unnecessarily prolong the relationship.  
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13 3. From a legal perspective, specific performance also is not warranted. Like any  
14 landlord, the City's damages are readily measurable under the rental formula established by  
15 the Agreement. That is why specific performance is routinely denied to landlords. The  
16 landlord is made whole by the payment of the rent owed for the remaining term of the lease.

17 4. Were this a traditional business relationship, it is unlikely that the parties  
18 would be at this point. Any rational landlord/businessperson in the City's position would  
19 realize that the City is better off by not seeking specific performance but instead embracing  
20 the traditional legal remedy: to be made financially whole under the Agreement. Those funds  
21 could be used by the City to strategically position KeyArena for its future without the Sonics.  
22 The City can begin now to make KeyArena a premier facility for those events for which it is  
23 suitable. There is, unfortunately, a political overlay that has apparently impeded the City's  
24 ability or willingness to address the issues in a way that benefits the taxpayers.  
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1            5.     Even though it is financially best for both parties to end the relationship, it is  
2     clear that certain elected officials do not want to be known as “the ones that let the Sonics  
3     leave.” Thus, for non-economic, non-legal reasons, City leadership has taken an increasingly  
4     adversarial approach with the Sonics, culminating in a September 12, 2007, announcement  
5     from the Mayor’s office that the City was “lawyering up,” and setting aside a million dollars  
6     to fight the Sonics.<sup>3</sup> Perhaps those leaders believe that bellicose, truculent and economically  
7     irresponsible rhetoric can change the ultimate outcome. The reality is that even if the City  
8     were right – even if it could force specific performance – it simply delays the Sonics’  
9     departure by two years and hurts the City. No amount of grandstanding can change these  
10    essential facts.

11           6.     The Sonics seek a declaratory judgment that under §§ XXVI and XXVII of the  
12    Agreement, specific performance is not available to force the Sonics to play the final two  
13    seasons at KeyArena. The City is instead entitled to the traditional damages remedy: the  
14    payment due under the Agreement for the final two seasons. Once the specific performance  
15    issue is resolved, the parties should be able to agree on the amount owed for the remaining  
16    term of the Agreement pursuant to the rental formula in the Agreement. If not, a short follow-  
17    up proceeding may be necessary to determine that amount.

## 18                                      **II. The KeyArena Agreement**

19           7.     The Sonics’ use of KeyArena is governed by the Agreement. The Agreement  
20    began in 1995 and runs through September 30, 2010. The rent is set forth in § VIII of the  
21    Agreement:

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26     \_\_\_\_\_  
<sup>3</sup> Seattle Times, September 12, 2007 (Ex. 2).

- 1 • **Base rent:** The base rent is \$1,170,300.32 for the 2007-  
2 2008 season. Per a CPI adjustment formula, it will be  
increased for the 2008-2009 and 2009-2010 seasons.
- 3 • **Additional rent:**
  - 4 • **Ticket sales revenue sharing:** 8-1/2 percent of  
preseason and playoff ticket sales;<sup>4</sup>
  - 5 • **Other revenue sharing:** Fixed percentages of  
6 gross receipts from concessions, suites and other  
sources;<sup>5</sup> and
  - 7 • **Expense Reimbursement:** Reimbursement of  
certain out-of-pocket expenses incurred by the  
8 City related to KeyArena.<sup>6</sup>

9 **III. The Sonics Worked Diligently, But Unsuccessfully,**  
10 **to Reach a Solution Short of Leaving**

11 8. When PBC purchased the Sonics, it was widely recognized that KeyArena was  
12 no longer economically viable for men's professional basketball. Building on the efforts of  
13 prior ownership, PBC was optimistic that it could reach an agreement with the City, County  
14 and/or the State of Washington for a new multipurpose arena financed by a combination of  
15 PBC and public funding, similar to the Qwest and Safeco field models. PBC believed that  
16 elected decision makers would be willing to assist financially to ensure the Sonics' long-term  
17 presence in the area.

18 9. To that end, PBC began an exhaustive exploration of alternatives by which the  
19 Sonics could stay in Seattle or the greater Puget Sound area on a long-term basis. Working  
20 with a national real estate consulting firm, PBC reviewed nearly 100 potential sites for a new  
21 multipurpose arena. It conducted feasibility and economic studies on the sites that looked  
22 most viable. Those studies consistently showed, however, that there was no site that made  
23 economic sense without a public financing component.

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25 <sup>4</sup> Ex. 1 at 20, § VIII.2.a, b and c.

26 <sup>5</sup> Ex. 1. at 20, § VIII.3.g, h, i, and j.

<sup>6</sup> Ex. 1 at 20, § VIII.3.a, b, c and k.

1           10.     At the same time, PBC began working with the state legislature to craft  
2 legislation to fund a new multipurpose arena. PBC Chair Clay Bennett and others spent  
3 hundreds of hours meeting with state officials, local business leaders, and other interested  
4 parties. Ultimately, PBC's efforts were unsuccessful. In fact, PBC encountered considerable  
5 resistance. For example, in the state House of Representatives, the matter was not even  
6 brought to a vote.  
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8           11.     The City was likewise unwilling to assist in a way that made it economically  
9 viable to build a new multipurpose arena in the City. Moreover, the voters of Seattle  
10 overwhelmingly passed a Referendum – aimed squarely at the Sonics – that made a new  
11 facility in Seattle all but impossible.<sup>7</sup>  
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13           12.     After spending several million dollars exploring alternatives, it ultimately  
14 became clear that a new multipurpose arena would not happen in Seattle or elsewhere in the  
15 Puget Sound region. The Sonics' only remaining viable business option is to play the 2007-  
16 2008 season in Seattle, pay off the remaining lease obligation under the Agreement, and  
17 leave. The alternative – playing out the remainder of the lease at KeyArena – is simply  
18 untenable for the Sonics, and guarantees declining revenue for the City.  
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#### 20                   **IV. The City Is Not Entitled to Specific Performance**

21           13.     Specific performance is an extraordinary remedy, available only in very  
22 limited circumstances. It is not available where, as here, there is a readily available formula –  
23 spelled out in the Agreement – for calculating any amounts owing.

24           14.     Even if specific performance were theoretically available, it is nevertheless not  
25 warranted. Specific performance is a discretionary remedy, taking into account all of the facts  
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<sup>7</sup> See ¶ 31.

1 and circumstances. The facts and circumstances here show that by any measure, specific  
2 performance does not make sense. KeyArena is economically obsolete and both sides will  
3 suffer. By contrast, and as the City has acknowledged, there will be no negative economic or  
4 cultural impact on the City if the Sonics leave. Finally, KeyArena will be fine without the  
5 Sonics. It will thrive if the City exercises fiscal prudence and uses the money available from  
6 the Sonics to make improvements to KeyArena to attract and retain the types of events for  
7 which it is suitable.

9 **A. KeyArena Is No Longer Economically Viable for Professional Men's Basketball**

10 15. Key Arena is no longer an economically viable facility for men's professional  
11 basketball. It is the smallest NBA arena, barely one-half the average size of other NBA  
12 facilities.<sup>8</sup> The limited square footage is economically crippling.

13 16. The size and configuration make it impossible to offer enough premium  
14 seating alternatives.<sup>9</sup> As a result, the Sonics' premium seating revenues are among the lowest  
15 in the NBA.

16 17. The small size also limits point of sale opportunities for food, beverages, and  
17 merchandise.<sup>10</sup> For example, a number of NBA venues offer (and profit from) a variety of  
18 restaurant-type dining alternatives. As a comparison, Toyota Center (Houston) has 13,500  
19 square feet of restaurant/club space.<sup>11</sup> AT&T Center (San Antonio) has 11,400.<sup>12</sup> Fed Ex  
20 Forum (Memphis) has 6,000 square feet.<sup>13</sup> KeyArena has only 1,300 square feet of  
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23  
24 <sup>8</sup> Ex. 3 (KeyArena Subcommittee Report) at 35.

25 <sup>9</sup> Id.

26 <sup>10</sup> Id.

<sup>11</sup> Ex. 4 at 3.

<sup>12</sup> Id.

<sup>13</sup> Id. at 3.

1 restaurant/club space. Likewise limited are the opportunities for a large "team store" like the  
2 Mariners Team Store at Safeco Field. In fact, the Sonics Team Store is not even in KeyArena  
3 but housed in a separate building, out of the patron traffic flow.

4 18. Given the shortcomings of KeyArena, it is not surprising that the Sonics have  
5 incurred losses every year since 1999. In the past five years, the Sonics have lost over  
6 \$55,000,000. The loss for the fiscal year ending September 30, 2007, will be over  
7 \$17,000,000. These losses continued to mount even as the Sonics' share of suite revenues  
8 increased from 20 to 40 percent, club revenues went from 40 to 60 percent, and non-Sonic  
9 event concessions increased from 60 to 70 percent.

10 19. These numbers will, of course, only worsen given the inevitable decline in  
11 attendance with what the fan base views as a lame duck franchise. Likewise, the City's  
12 revenue sharing income, which has already been declining, will decline further.

13 20. The problems with KeyArena were aptly summarized in The Seattle Times:

14  
15  
16 When the City Council and the Sonics agreed in 1994 to build  
17 the KeyArena, the plan was celebrated as a win-win: The City  
18 floated construction bonds and got a cut of luxury-suite sales to  
19 pay off the debt. No public subsidy required.

20 But soon, KeyArena was dwarfed by larger, more lucrative  
21 NBA arenas. Today, KeyArena is the NBA's smallest venue  
22 and a money loser.<sup>14</sup>

23 21. These are the facts. Forcing an unwanted two additional years on the Sonics  
24 will not change the facts, or make KeyArena profitable.

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<sup>14</sup> Seattle Times, November 14, 2006 (Ex. 11).

1 **B. There Is No Non-Monetary Injury to the City If the Sonics Leave – Few Care**

2 22. The City cannot establish the type or level of irreparable, non-monetary injury  
3 required to justify specific performance. In cases addressing whether equity is available to  
4 force a professional sports franchise to play in a given venue, the non-monetary inquiry  
5 examines the extent to which the team is an essential part of the “fabric of the community.”<sup>15</sup>  
6 Here, there is a considerable record showing, at best, profound community indifference about  
7 whether the Sonics stay or leave. Politicians, the press, and much of the public have  
8 consistently displayed a “who cares?” attitude.

9  
10 23. For example, the President of the Seattle City Council, Nick Licata, gave the  
11 following answer when asked if the City would suffer any injury if the Sonics left:

12 On an economic basis near zero. On a cultural basis, close to  
13 zero. We would still have two sports, and plenty of cities our  
14 size don't have three.

15 24. Underscoring the lack of impact on Seattle, Council President Licata has also  
16 made clear that, in his view, the Sonics are free to leave:

17 The City and the public will now have to wait to see if the new  
18 owners are willing to keep the team in Seattle without expecting  
19 a huge public subsidy. **I hope they do, but that is their  
decision to make.**<sup>16</sup>

20 25. The Mayor's Office agrees:

21 In terms of our image as a city, I don't think (the Sonics' effect)  
22 matters – maybe it did 40 years ago when they first came here.<sup>17</sup>

23  
24 <sup>15</sup> See, e.g., City of New York v. New York Yankees, 458 NYS.2d 486 (N.Y. Sup. Ct. 1983)  
25 (granting an injunction requiring the Yankees to play games in Yankee Stadium because  
26 “Yankee Pinstripes” help make New York “the Big Apple.” No one will make a similar claim  
about the Sonics in this case.

<sup>16</sup> N. Licata, Urban Politics, Issue No. 217 (July 28, 2006) (emphasis added) (Ex. 5).

<sup>17</sup> May 28, 2007, Seattle Post Intelligencer, quoting Deputy Mayor Tim Ceis (Ex. 6).



1           26.    The view from the leadership of the Washington Legislature is the same.  
2 House Speaker Frank Chopp refused to bring the proposed arena legislation to a vote.  
3 According to an editorial in a leading daily paper, Chopp acted "as though naming the Walla  
4 Walla onion the state vegetable was a higher legislative priority than the Sonics arena."<sup>18</sup>  
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6           27.    A prominent Seattle sportscaster echoed the view that it does not matter if the  
7 Sonics leave:

8                   **Right now, in Seattle, nobody cares about whether the**  
9                   **Sonics stay here or not. You know, the Legislature just**  
10                   **kicked Clay Bennett and the rest of that group down in**  
11                   **Oklahoma to the curb.**

12                   .....

13                   **Really, nobody cares up here. I am being really honest with**  
14                   **you guys.**

15                   Interviewer: Well, do you as a journalist, you got to cover the  
16                   hottest things going up there, what do you cover?

17                   Swanson: Well, of course, we have the Seahawks who went to  
18                   the Super Bowl a couple of years ago. They went to the  
19                   playoffs. And then we have the Mariners, who are really having  
20                   just an up and down season, but they've won 5 of 6, including  
21                   today against Kansas City where they get a sweep. We got the  
22                   Huskies; we got the World Series, where if Oklahoma would  
23                   have won today, it would have been the Huskies taking on the  
24                   Sooners down in the College World Series, but that is not going  
25                   to happen. It is going to be DePaul, so, **there is a lot to cover**  
26                   **up here, but, really guys, no one thinks about the NBA**  
27                   **anymore. You got the Blazers, two and one-half hours by**  
28                   **car, so if you are a real NBA fan, you just hightail it south a**  
29                   **little bit. So, it ain't that big a deal.**<sup>19</sup>

30           28.    The Tacoma News Tribune, a leading daily newspaper in the region, shared  
31 these sentiments. After the Washington Legislature declined to vote on funding a new arena,  
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33 <sup>18</sup> Tacoma News Tribune Editorial, April 18, 2007 (Ex. 7).

34 <sup>19</sup> Gaard Swanson, KIRO TV, May 27, 2007.

1       Sonics' Chair Clay Bennett said there was "little hope of remaining in the Puget Sound  
2       region." Here is the Tacoma News Tribune's response:

3                       [I]t seems obvious that the region's love affair with the Sonics  
4                       is all but over.

5                       . . . .

6                       We didn't notice a sense of general crisis in the Puget Sound  
7                       region following [Bennett's] pronouncement. The sky turned  
8                       dark, but that was just the rain. Life goes on.

9                       . . . .

10                      If the city of Seattle is in a panic about the prospect of losing  
11                      the Sonics, we haven't noticed. . . .

12                      The Sonics' biggest problem is that Seattle and the rest of the  
13                      metropolitan region doesn't need the Sonics to feel big-league  
14                      anymore.

14                      . . . .

15                      This region isn't infatuated with the Sonics anymore. The  
16                      taxpayers have had their fill subsidizing new playpens for the  
17                      Mariners and the Seahawks. If the Sonics head for Oklahoma,  
18                      we'll get by.<sup>20</sup>

18       29.   The public feels the same way:

19                      An overwhelming majority of Seattle residents would rather  
20                      watch the Sonics leave the City than use tax money to renovate  
21                      KeyArena, according to a telephone survey of registered voters.

22                      Some 78 percent of those polled said they were "more inclined  
23                      (to) let the Sonics leave Seattle" than to pay for renovation with  
24                      "use taxes," according to the survey conducted June 1-5 by  
25                      independent pollster Stuart Elway.<sup>21</sup>

26       <sup>20</sup> Tacoma News Tribune, April 17, 2007, editorial (Ex. 7).

<sup>21</sup> Seattle Post Intelligencer, June 13, 2006 (Ex 8).

1           30.    The comments and polls are consistent with the election results on Seattle  
2 Referendum 91 in November 2006. That Referendum provided that City funds could not be  
3 used on professional sports facilities unless the City was guaranteed a minimum rate of return  
4 on the funds it contributed to building the facility. The Official Voters Pamphlet urged voters  
5 to approve the Referendum:  
6

7                       Studies show that the Sonics have a limited economic impact on  
8                       Seattle, and that most money spent at pro-sports games is  
9                       discretionary and would otherwise be spent elsewhere in our  
10                      region.

11           Referendum 91 passed overwhelmingly – by 75 percent.

12           31.    The lack of interest is borne out by the television ratings for Sonics' games.  
13 They have declined from an already low 3.12 rating in 2004-2005 to a 1.6 rating in 2006-2007  
14 – a drop of nearly 50 percent. A 1.6 rating means that out of 1,500,000 potential households,  
15 only 24,000 are watching the Sonics.

16           32.    In short, there will be minimal or no impact on Seattle when the Sonics leave.  
17 Unfortunately, most people seem not to care. Other than the dwindling core fan base, the only  
18 people pushing to force the Sonics to stay are those with a self-advancing political agenda.

19    **C.    KeyArena Will Continue Without the Sonics**

20           33.    The future viability of KeyArena without the Sonics was studied by the  
21 KeyArena Subcommittee. The Subcommittee consisted of several of Seattle's community  
22 leaders, and was assisted by the staff of the Seattle Center (where KeyArena is located), and a  
23 number of consultants. Following several months of study, the committee concluded that  
24 under certain conditions, KeyArena could remain the "premier" arena in the region even if the  
25  
26

1     Sonics leave.<sup>22</sup> Ironically, the first condition is that the Sonics “relocate to a city **outside the**  
2     **state.**”<sup>23</sup> Competition from a new multipurpose arena in the region, the committee concluded,  
3     would “spell disaster” for KeyArena.<sup>24</sup> The second two conditions relate to new capital  
4     investment, and ongoing funding for maintenance and improvements. An obvious source of  
5     such funds would be the rental payments under the Agreement.  
6

7             34.     Following up on the KeyArena Subcommittee Report, Council President  
8     Licata issued a report concluding that the City was much better off financially by letting the  
9     Sonics leave rather than investing in a new arena or renovating KeyArena:

10                    So here is our dilemma: taxpayers pay \$200 million to upgrade  
11                    Key Arena to keep the Sonics, and in return the city gets \$1  
12                    million in rent per year; or, taxpayers pay between zero and \$20  
13                    million to upgrade Key Arena, the Sonics leave, and the city  
14                    earns between \$1.903 million and \$3.076 million per year in  
15                    operating profits from Key Arena. Debt outstanding on which  
16                    taxpayers will pay, in the former instance, will total some \$250  
17                    million, and in the latter, about \$30 million. Without regard to  
18                    the cultural contribution of the Sonics to Seattle, **the financial**  
19                    **decision is clear.**<sup>25</sup>

20             35.     As the Licata report makes clear, the City, Seattle Center, and KeyArena will  
21     be better served by accepting and addressing the reality that the Sonics will be leaving.

#### 22                    **V. Conclusion and Demand for Relief**

23             36.     The Deputy Mayor of Seattle, Tim Ceis, recently summed up the relationship  
24     between the Sonics and the City of Seattle:

25                    “The situation is **really dysfunctional,**” Deputy Mayor Tim  
26                    Ceis said by phone . . . . “**We are all going to go down the**

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27             <sup>22</sup> Ex. 3 at 65.

28             <sup>23</sup> Ex. 3 at 65 (emphasis added).

29             <sup>24</sup> *Id.* at 67.

30             <sup>25</sup> Ex. 9.

1 **drain together.** The worse we make it for [the Sonics], the  
2 worse [the Sonics] make it for us."<sup>26</sup>

3 37. Sadly, Mr. Ceis was right. But in the guise of "not giving in," the City's  
4 leaders are on a path intended to benefit certain political images at the expense of the City, the  
5 taxpayers, and the Sonics. Fortunately, the law of specific performance is such that the City  
6 cannot block the Sonics from leaving, and the City will instead benefit from realizing the  
7 financial benefits that it bargained for under its agreement.

8 38. The Sonics seek a declaratory judgment that under §§ XXVI and XXVII of the  
9 Agreement, specific performance is not available to force the Sonics to play the 2008-2009  
10 and 2009-2010 NBA seasons in KeyArena. The City is instead entitled to the traditional  
11 remedy: the monetary consideration it bargained for under the Agreement. If the parties  
12 thereafter are unable to reach agreement on the remaining amount owing under the  
13 Agreement, the Sonics also seek to have that matter resolved in a follow-on proceeding.

14 DATED this 19th day of September, 2007.

15  
16 BYRNES & KELLER LLP

17  
18  
19 By Paul R. Taylor  
20 Bradley S. Keller, WSBA #10665  
21 Paul R. Taylor, WSBA #14851  
22 Attorneys for The Professional Basketball Club,  
23 LLC

24  
25  
26 <sup>26</sup> Remarks of Tim Ceis as quoted in August 23, 2007, Seattle Post Intelligencer (emphases added) (Ex. 10).