

**Office of
The City Attorney
City of San Diego**

**MEMORANDUM
MS 59**

(619) 533-5800

DATE: November 1, 2010

TO: Honorable Mayor and City Council

FROM: City Attorney

SUBJECT: Remedies For Potential Breach of Contract as Result of City Council's Decision to Use Golden Hall as Fiscal Year 2011 Emergency Winter Shelter

INTRODUCTION

On October 22, 2010, during a special meeting of the City Council, the Council voted to designate Golden Hall as the Fiscal Year 2011 Emergency Winter Shelter. Golden Hall would be used for the Winter Shelter from sometime in November or December 2010 to the end of March 2011, with approximately one month's time needed afterward for repairs and refurbishing before it can be used for events.

Golden Hall is reserved for 31 events between November 1, 2010 and April 30, 2011, including holiday parties, fundraising events for charities and nonprofit organizations, conventions, conferences, expositions, cheerleading and martial arts competitions, and monthly naturalization ceremonies by the United States District Court, pursuant to San Diego Concourse License & Service Agreements (License Agreements). Many of these events have been scheduled many months in advance. To confirm a reservation for an event, a person or entity wishing to use Golden Hall (Licensee) signs two copies of the License Agreement and deposits a license fee and charges for ancillary services provided by the City for the event, such as the rental of tables, chairs, audiovisual equipment, and telecommunications. Once the City receives the signed License Agreements and the license fee and ancillary service charges, the Director of Real Estate Assets and the City Attorney sign the License Agreements, which then become legally binding on both the Licensee and the City.

As of the date of this memorandum, License Agreements have been signed and payment made for twelve events. Fifteen other scheduled events are listed as "definite" by the Real Estate Assets Department (READ), for which the Licensees have requested a reservation for a particular date and in some cases have placed deposits to secure the dates, although no License Agreements have been signed by either the licensees or the City. In addition, there are also four License Agreements for use of Golden Hall during the time that Golden Hall would be used as the Winter Shelter, that have been signed by the licensees but that the City has not yet signed. READ has calculated the City's total estimated event revenue from license fees and ancillary service charges as \$289,102 for all events scheduled for the period of November 1, 2010 to April 30, 2011, including those events listed as "definite." Of the \$289,102 in total estimated event revenue, \$126,902 has been paid for the sixteen events that have signed License Agreements (whether signed by the Licensee and City, or just by the Licensee).

You have asked what the City's potential exposure to litigation for alleged breach of contract would be. This Office cannot opine as to the likelihood of litigation. However, at present, the total maximum amount of license fees and ancillary service charges that would be refunded to the Licensees would be \$126,902 for events where the Licensees have signed the License Agreements and paid the license fees and ancillary service charges. Also, the Licensees may have incurred additional costs for the events upon the reservation of an event date or the signing of a License Agreement, such as the rental of equipment, the hiring of caterers, photographers, announcers, and the like, and advertising and promotions expenses. All of these additional costs may be sought as damages in litigation.

DISCUSSION

I. IF LICENSE AGREEMENTS FOR GOLDEN HALL ARE NOT SIGNED BY THE CITY, THOSE PROSPECTIVE LICENSEES WOULD NOT PREVAIL IN A BREACH OF CONTRACT CLAIM AGAINST THE CITY

Four License Agreements for use of Golden Hall have been signed by the Licensees. However, the City has not signed those License Agreements. The terms of the License Agreements signed by the licensees state that the License Agreements shall "be effective as of the date of execution by CITY . . . when signed by the parties and approved by the San Diego City Attorney."

California law specifies that "[i]f a proposal prescribes any conditions concerning the communication of its acceptance, the proposer is not bound unless they are conformed to." Cal. Civ. Code § 1582. When the understanding and agreement between two parties is that the proposed contract is to be written and signed by both parties, the signing by only one party will not create a binding contract. *Spinney v. Downing*, 108 Cal. 666, 668 (1895). The License Agreement, as noted above, states that it shall take effect "when signed by the parties." Therefore, if the prospective Licensee signs the License

Agreement but the City does not, the City is not legally bound by it, and the prospective Licensee would not prevail in a claim against the City for breach of contract.¹

II. A LICENSEE MAY BE ENTITLED TO COMPENSATORY DAMAGES IF THE CITY BREACHES A LICENSE AGREEMENT

There are two forms of remedies available for the breach of a contract: monetary damages, to compensate the innocent party for money lost because of the other party's breach; and specific performance, which is to compel the breaching party to perform its obligations under the contract. The primary remedy for breach of contract is the payment of monetary damages, to compensate for the losses suffered by a party. Cal. Civ. Code § 3300. The remedy of specific performance is available only if the payment of money is inadequate to remedy the harm suffered. *Morrison v. Land*, 169 Cal. 580, 586 (1915); *Palo Alto-Menlo Park Yellow Cab Co. v. Santa Clara County Transit Dist.*, 65 Cal. App. 3d 121, 132-33 (1976).

Specific performance is available in cases involving the breach of a contract for the *sale* or *lease* of real estate, as the traditional doctrine is that each parcel of land and each interest in land are unique and that monetary damages are an inadequate remedy for the inability to acquire a particular lot or parcel. Cal. Civ. Code § 3387; *Pike v. Hayden*, 97 Cal. App. 2d 606, 612 (1950) (specific performance available in breach of contract to lease service station and café). Specific performance is a remedy for breach of a license, but only when the license is granted orally and the licensee has made improvements upon the land under license. *Flickinger v. Shaw*, 87 Cal. 126 (1890).

The License Agreements for the use of Golden Hall are *licenses*, not leases. A license is mere permission to enter onto one's land for a specific purpose and time, whereas a lease gives the lessee or tenant "the exclusive possession of the premises against all the world, including the owner" *Howard v. County of Amador*, 220 Cal. App. 3d 962, 972 (1990). Unlike a sale or a lease, the License Agreement transfers no interest in Golden Hall from the City to the Licensee, because on the date that Golden Hall is used for the licensee's event, the Licensee's activities are limited to what is specified in the License Agreement and the City controls all other functions. See *Golden West Baseball Co. v. City of Anaheim*, 25 Cal. App. 4th 11, 34 (1994) (agreement between city and owners of Angels baseball team for use of Anaheim Stadium was a license and not a lease, because baseball team occupied stadium on sporadic basis and its activities were limited to "exhibiting baseball games"). Since the License Agreements are in writing and do not involve the Licensees making improvements to Golden Hall, specific performance will likely not be available as a remedy for breach of contract, and monetary damages would be the only remedy, unless some extraordinary circumstances are shown that we are not currently aware of.

¹ The same reasoning would apply to licensees whose events are listed as "definite," since those events do not have License Agreements signed by the licensees.

Monetary damage awards are of three kinds: compensatory damages to compensate for loss; punitive damages to punish for especially willful and malicious behavior; and nominal damages which are a symbolic award of a tiny amount where there is no appreciable detriment to the plaintiff. Cal. Civ. Code §§ 3274, 3294, 3360. Punitive damages are not allowed as a remedy for breach of contract, even if the breach was willful or fraudulent. Cal. Civ. Code § 3294; *Chelini v. Nieri*, 32 Cal. 2d 480 (1948). Therefore, any recovery for breach of the License Agreements would be limited to compensatory or nominal damages. Since nominal damages are merely symbolic (albeit symbolic of a judgment that the contract was breached), this memorandum will focus on compensatory damages.

For damages to be recovered for a breach of contract, they must be “clearly ascertainable in both their nature and origin.” Cal. Civ. Code § 3301. If an injured party can establish with reasonable certainty the amount of profit or benefits it would have obtained from performing its obligations under the contract, then the lost profits or benefits can be recovered as damages. *Noble v. Tweedy*, 90 Cal. App. 2d 738 (1949). Difficulty in determining the amount of damages does not relieve the breaching party from liability for breach of contract. *Sobelman v. Maier*, 203 Cal. 1, 11-12 (1927). The lost profits, in the case of the licensees of Golden Hall, could include lost revenue from unsold tickets and cancelled reservations, minus expenditures incurred by the licensees.

In the alternative, a party can seek recovery of its own expenditures made in anticipation of, or preparation for, performance under the contract. This type of compensatory damages can be sought if a claim for lost profits cannot be established with reasonable certainty as to the amount. *Cederberg v. Robison*, 100 Cal. 93, 97 (1893); *Walpole v. Prefab Mfg. Co.*, 103 Cal. App. 2d 472, 489 (1951). One cannot recover for both lost profits and expenditures, as that would produce a windfall from a breach of contract that would not be available if the contract had not been breached. *Cederberg*, 100 Cal. at 98. The lost expenditures for an event at Golden Hall could include the license fee and ancillary services, costs of hiring guest speakers and announcers, advertising and promotions costs, and nonrefundable fees paid to vendors for supplying the event (i.e., caterers, musicians, disc jockeys, photographers, florists, and the like). Compensatory damages awards for many of the events would be calculated on a lost-expenditures basis since many of the Licensees are nonprofit organizations and government agencies, which are limited to recovering their costs and barred from trying to operate at a profit.

A Licensee has an obligation to mitigate its loss and avoid foreseeable loss. The party who is injured by a breach of contract must do everything reasonably possible to mitigate its loss and reduce the damages caused by the other party, and not sit by and let the damages pile up; otherwise, no money can be awarded as damages. *Spurgeon v. Drumheller*, 174 Cal. App. 3d 659, 665 (1985) (would-be buyer cancelled real estate sale contract, after which owners removed property from the market and sued for breach of contract; verdict for owners reversed because owners failed to mitigate damages). However, if reasonable efforts at mitigation were made but proved to be unsuccessful, then compensatory damages can be recovered. *Dutra v. Cabral*, 80 Cal. App. 2d 114,

Honorable Mayor and City Council

November 1, 2010

Page 5

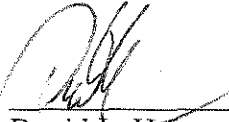
122 (1947). If the party could have foreseen the harm and avoided the harm by using reasonable effort and without undue expense, compensatory damages are not available for that harm. *Henrici v. S. Feather Land & Water Co.*, 177 Cal. 442, 449 (1918) (farmer's lawsuit against irrigation company for failure to provide water under contract, resulting in damage to crops; judgment for farmer reversed on grounds that farmer could have avoided loss by paying irrigation company's slightly-increased water rates instead of letting his crops die). However, the issue of avoidance of harm does not exist in this case, because the Licensees could not have foreseen the City Council's decision to designate Golden Hall as the Winter Shelter.

CONCLUSION

In the event that the City does not sign the License Agreements for events that are to be held at Golden Hall during the time that Golden Hall is to serve as the Winter Shelter, those prospective Licensees would not prevail in a claim against the City for breach of contract. As for those License Agreements that have been signed by both the Licensees and the City, the available remedy that could be awarded in a breach of contract lawsuit would likely be compensatory monetary damages, either for lost profits or expenditures. As of the date of this memorandum, there are \$126,902 in already-paid license fees and ancillary service charges that might have to be refunded. There may also be additional costs that may have already been incurred by the Licensees for third-party services associated with the event, including food, entertainment, and promotional costs, that may also be sought as damages.

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