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U.S. DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

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10 UNITED STATES DISTRICT COURT
11 NORTHERN DISTRICT OF CALIFORNIA

12 CV 09 1457

SC

13 ERIC BANNER,

CASE NO.

14 Plaintiff,

**COMPLAINT FOR DECLARATORY
RELIEF, BREACH OF CONTRACT,
BREACH OF THE COVENANT OF GOOD
FAITH AND FAIR DEALING AND
ACCOUNTING**

15 v.

16 PENTACORP, INC., a Texas corporation, and
17 TIM F. JOHNSON, an individual,

DEMAND FOR JURY TRIAL

18 Defendants.

19 Plaintiff ERIC BANNER alleges as follows:

20 **THE PARTIES**

21 1. Plaintiff Eric Banner is now, and was at all times mentioned herein, an individual
22 domiciled in San Francisco, California.

23 2. Plaintiff is informed and believes that Defendant Pentacorp Inc. ("Pentacorp") is
24 now, and was at all times mentioned herein, a Texas Corporation with its principal business in El
25 Paso, Texas.

26 3. Plaintiff is informed and believes that Defendant Tim F. Johnson ("Johnson") is
27 now, and was at all times mentioned herein, the President and sole Director of Pentacorp. Upon
28 information and belief, Mr. Johnson is now, and was at all times mentioned herein, domiciled in the
State of Texas.

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JURISDICTION

4. This Court has jurisdiction over the subject matter of this action pursuant to 28 U.S.C. §1332(a) as this action is between citizens of different states and the amount in controversy exceeds \$75,000.00, exclusive of interests and costs.

VENUE

5. This Court is the proper place for trial under 28 U.S.C. §1391 as a substantial part of the claims asserted herein arose in San Francisco, California and because Pentacorp and Johnson (collectively “Defendants”) are subject to personal jurisdiction in this District.

INTRADISTRICT ASSIGNMENT

6. Pursuant to Civil L.R. 3-2(c) and 3-5(b), the San Francisco Division of this Court is the proper division for trial because San Francisco is where a substantial part of the events or omissions which give rise to the claims averred herein occurred.

THE CONTRACTS

7. On November 10, 2003, Johnson sent Plaintiff an email soliciting an investment in an NBA preseason basketball game which was being promoted and/or produced by Pentacorp and Johnson. Attached to this email was a contract which required Plaintiff make a ten thousand dollar (\$10,000.00) investment in “an NBA Pre-season Basketball game to be held and played in El Paso, Texas. [sic] At the Don Haskins Special Events Center on the campus of the University of Texas at El Paso (UTEP) in October of 2004.” (A true and correct copy of this contract is attached hereto as Exhibit “A.”) On or about November 11, 2003, Plaintiff executed this contract in California and remitted to Johnson a draft in the amount of ten thousand dollars (\$10,000.00) made payable to Pentacorp.

8. This contract and the four subsequent contracts described below (collectively the “Contracts”) into which Plaintiff and Defendants would enter provide, *inter alia*, that, “[Pentacorp] will pay to [Plaintiff a specific percentage] of the gross revenues after expenses received by [Pentacorp] from the promoting and production of NBA Pre-season basketball game as provided herein.” (See Paragraph 1 of Exhibits “A,” “B,” “C,” “D,” and “E”.) The Contracts provide that “[w]ithin Forty-Five (45) days after the completion of said NBA pre-season Basketball game as

1 provided herein, [Pentacorp] will give [Plaintiff] and [sic] Itemized accounting of all income,
2 revenue and expenses concerning the event. In addition, within such Forty-Five, (45) day period,
3 [Pentacorp] will pay to [Plaintiff] [the principle investment amount] plus [the agreed upon shared
4 percentage] of the gross revenues as provided in this Agreement.” (See Paragraph 4 of Exhibits
5 “A,” “B,” “C,” “D,” and “E”.) The Contracts also provide that “[Pentacorp] does hereby guarantee
6 that [Plaintiff’s] original investment will be paid upon occurrence of the NBA pre-season basketball
7 game promoted and/or produced by [Pentacorp] as provided in this Agreement. (Unless [Plaintiff]
8 wants to rollover his/her principle investment in future games).” (See. Paragraph 6 of Exhibits “A,”
9 “B,” “C,” “D,” and “E”.)

10 9. Within a month or two after the conclusion of the 2004 El Paso preseason game,
11 Johnson orally advised Plaintiff during a telephone call that Plaintiff’s share of the gross profits
12 from that game was five thousand dollars (\$5,000.00). Pursuant to the express terms of the
13 contract, Plaintiff elected to rollover his ten thousand dollar (\$10,000.00) principle and five
14 thousand dollar (\$5,000.00) profit into the investment of future NBA preseason basketball games
15 promoted and/or produced by Pentacorp and Johnson.

16 10. On or about November 15, 2004, Johnson sent Plaintiff four (4) more contracts
17 regarding an additional four (4) preseason NBA basketball games which Pentacorp and Johnson
18 were promoting and/or producing in various cities which did not have NBA basketball teams.

19 11. The first of these contracts pertained to “an NBA basketball game to be held and
20 played in Albuquerque, New Mexico. [sic] At the University Arena on the campus of the
21 University of New Mexico (UNM) in October of 2005.” (A true and correct copy of this contract is
22 attached hereto as Exhibit “B.”) This contract called for an additional investment from Plaintiff in
23 the amount of twenty-five thousand dollars (\$25,000.00) in exchange for a twenty five percent
24 (25%) share the gross revenues after expenses received by [Pentacorp].

25 12. The second of these contracts pertained to “an NBA Pre-season Basketball game to
26 be held and played in Biloxi, Mississippi (Gulfport). [sic] At the Mississippi Coast Coliseum and
27 Convention Center in October of 2005.” (A true and correct copy of this contract is attached hereto
28 as Exhibit “C.”) This contract called for an additional investment from Plaintiff in the amount of

1 thirty-one thousand two hundred and fifty dollars (\$31,250.00) in exchange for a twenty five
2 percent (25%) share the gross revenues after expenses received by [Pentacorp].

3 13. The third of these contracts pertained to “an NBA basketball game to be held and
4 played in Cincinnati, Ohio. [sic] At the University Arena on the campus of the University of
5 Cincinnati in October of 2005.” (A true and correct copy of this contract is attached hereto as
6 Exhibit “D.”) This contract called for an additional investment from Plaintiff in the amount of
7 thirty-one thousand two hundred and fifty dollars (\$31,250.00) in exchange for a twenty five
8 percent (25%) share the gross revenues after expenses received by [Pentacorp].

9 14. The fourth of these contracts pertained to “an NBA basketball game to be held and
10 played in Knoxville, TN. or Jacksonville, FL. [sic] At the Thompson-Boling Arena in Knoxville or
11 Veterans Memorial Coliseum in Jacksonville in October 2005.” (A true and correct copy of this
12 contract is attached hereto as Exhibit “E.”) This contract called for an additional investment from
13 Plaintiff in the amount of thirty-one thousand two hundred and fifty dollars (\$31,250.00) in
14 exchange for a twenty five percent (25%) share the gross revenues after expenses received by
15 [Pentacorp].

16 15. On or about November 22, 2004, Plaintiff executed each of these four additional
17 contracts and remitted to Johnson four drafts made payable to Pentacorp totaling one hundred
18 eighteen thousand seven hundred fifty dollars (\$118,750.00).

19 16. Each of these four additional preseason basketball games was played and Defendants
20 collected the revenues generated by those games. However, despite Plaintiff’s repeated demands
21 and Johnson’s repeated promises to remit those proceeds, Defendants have breached their
22 contractual obligations by failing to remit Plaintiff’s share of the gross proceeds of all of the
23 aforementioned NBA preseason basketball games to Plaintiff.

24 17. On March 17, 2008, Johnson sent Plaintiff a spreadsheet entitled “Event History
25 Payout Summary Statement” dated “12/31/2007” wherein Defendants admit they owe Plaintiff one
26 hundred twenty three thousand six hundred ninety six thousand dollars and twenty eight cents
27 \$123,696.28, excluding interest. (A true and correct copy of the statement is attached hereto as
28 Exhibit “F.”)

1 18. In December 2008 and January 2009, Johnson left several voicemails for Plaintiff
2 admitting that he owes Plaintiff at least \$123,696.28, excluding interest.

3 19. There is such a unity of interest and ownership between Pentacorp and Johnson that
4 the separate personalities of the corporation and Johnson do not in reality exist and recognizing
5 Pentacorp and Johnson as separate entities would result in fraud and/or injustice. During all phases
6 of the negotiation, execution and performance of these Contracts, Pentacorp acted through its sole
7 Director and Officer Johnson. Plaintiff sent all drafts required by the Contracts directly to Johnson
8 at Johnson's place of employment, Meticorp. Plaintiff is informed and believes that Johnson treated
9 the assets of Pentacorp, including the money Plaintiff paid Pentacorp, as his own. Plaintiff is
10 informed and believes that Johnson, as the sole Officer and Director of Pentacorp, controlled and
11 continues to control the finances of Pentacorp. Plaintiff is informed and believes that Johnson has
12 commingled his money with that of Pentacorp and that Pentacorp is undercapitalized. Plaintiff is
13 informed and believes that, during the relevant time period, the separateness of Pentacorp had
14 ceased and that Pentacorp was the alter ego of Johnson. Plaintiff is informed and believes that the
15 corporation and the individual acted as one with respect to all of the facts averred in this Complaint.

16 **FIRST CLAIM FOR RELIEF: DECLARATORY JUDGMENT ON PENTACORP'S**
17 **OBLIGATIONS TO PLAINTIFF UNDER THE CONTRACTS**

18 20. Plaintiff incorporates herein the averments of Paragraphs 1 through 19, inclusive, as
19 if the same were fully set forth herein.

20 21. Pentacorp is obligated under the Contracts to pay in full Plaintiff's share of the gross
21 proceeds generated by all of the aforementioned NBA preseason basketball games.

22 22. Pentacorp has failed to honor and refused to pay Plaintiff any of Plaintiff's share of
23 the gross proceeds generated by all of the aforementioned NBA preseason basketball games.

24 23. By reason of the foregoing, an actual and justiciable controversy presently exists
25 between Plaintiff and Pentacorp concerning Pentacorp's obligations to pay in full Plaintiff's share
26 of the gross proceeds generated by all of the aforementioned NBA preseason basketball games.
27 Accordingly, Plaintiff seeks a declaration that Pentacorp's refusal to pay in full Plaintiff's share of
28 the gross proceeds generated by all of the aforementioned NBA preseason basketball games is

1 wrongful under terms of the Contracts and that Pentacorp has an obligation under the Contracts to
2 pay in full Plaintiff's share of the gross proceeds generated by all of the aforementioned NBA
3 preseason basketball games.

4 **SECOND CLAIM FOR RELIEF: DECLARATORY JUDGMENT ON JOHNSON'S**
5 **OBLIGATIONS TO PLAINTIFF UNDER THE CONTRACTS**

6 24. Plaintiff incorporates herein the averments of Paragraphs 1 through 23, inclusive, as
7 if the same were fully set forth herein.

8 25. Johnson is obligated under the Contracts to pay in full Plaintiff's share of the gross
9 proceeds generated by all of the aforementioned NBA preseason basketball games.

10 26. Johnson has failed to honor and refused to pay Plaintiff any of Plaintiff's share of the
11 gross proceeds generated by all of the aforementioned NBA preseason basketball games.

12 27. By reason of the foregoing, an actual and justiciable controversy presently exists
13 between Plaintiffs and Johnson concerning Johnson's obligations to pay in full Plaintiff's share of
14 the gross proceeds generated by all of the aforementioned NBA preseason basketball games.
15 Accordingly, Plaintiff seeks a declaration that Johnson's refusal to pay in full Plaintiff's share of the
16 gross proceeds generated by all of the aforementioned NBA preseason basketball games is wrongful
17 under terms of the Contracts and that Johnson has an obligation under the Contracts to pay in full
18 Plaintiff's share of the gross proceeds generated by all of the aforementioned NBA preseason
19 basketball games.

20 **THIRD CLAIM FOR RELIEF: PENTACORP'S BREACH OF CONTRACT**

21 28. Plaintiff incorporates herein the averments of Paragraphs 1 through 27, inclusive, as
22 if the same were fully set forth herein.

23 29. Plaintiff satisfied each and every one of his obligations to be performed under the
24 Contracts.

25 30. Plaintiff has demanded, and by the filing of this complaint hereby makes demand of
26 Pentacorp for payment of Plaintiff's share of the gross proceeds generated by all of the
27 aforementioned NBA preseason basketball games. Pentacorp has breached its obligations to
28 Plaintiff under the Contracts by failing to pay in full Plaintiff's share of the gross proceeds

1 generated by all of the aforementioned NBA preseason basketball games.

2 31. As a direct and proximate result of Pentacorp breaches of the Contracts, which are
3 continuing to at least the date of this Complaint, Pentacorp has deprived Plaintiff of the benefit of
4 the Contracts for which Plaintiff paid full consideration. As a direct and proximate result of
5 Pentacorp's acts, Plaintiff has been damaged in an amount to be proved at trial and in excess of the
6 jurisdictional requirements of this Court.

7 **FOURTH CLAIM FOR RELIEF: JOHNSON'S BREACH OF CONTRACT**

8 32. Plaintiff incorporates herein the averments of Paragraphs 1 through 31, inclusive, as
9 if the same were fully set forth herein.

10 33. Plaintiff satisfied each and every one of his obligations to be performed under the
11 Contracts.

12 34. Plaintiff has demanded, and by the filing of this complaint hereby makes demand of
13 Johnson for payment of Plaintiff's share of the gross proceeds generated by all of the
14 aforementioned NBA preseason basketball games. Johnson has breached its obligations to Plaintiff
15 under the Contracts by failing to pay in full Plaintiff's share of the gross proceeds generated by all
16 of the aforementioned NBA preseason basketball games.

17 35. As a direct and proximate result of Johnson's breaches of the Contracts, which are
18 continuing to at least the date of this Complaint, Johnson has deprived Plaintiff of the benefit of the
19 Contracts for which Plaintiff paid full consideration. As a direct and proximate result of Johnson's
20 acts, Plaintiff has been damaged in an amount to be proved at trial and in excess of the jurisdictional
21 requirements of this Court.

22 **FIFTH CLAIM FOR RELIEF: PENTACORP'S BREACH OF THE COVENANT OF**
23 **GOOD FAITH AND FAIR DEALING**

24 36. Plaintiffs incorporate herein the averments of Paragraphs 1 through 35, inclusive, as
25 if the same were fully set forth herein.

26 37. Pentacorp has breached the covenant of good faith and fair dealing owed Plaintiff
27 under the Contracts by failing to pay in full Plaintiff's share of the gross proceeds generated by all
28 of the aforementioned NBA preseason basketball games.

1 basketball games.

2 **PRAYER**

3 WHEREFORE, Plaintiff requests this Court to enter judgment as follows with respect to the

4 Bonds:

5 1. With respect to the First and Second Claims, a declaration that Pentacorp and
6 Johnson are obligated under the terms and conditions of the Contracts to pay in full Plaintiff's share
7 of the gross proceeds generated by all of the aforementioned NBA preseason basketball games.

8 2. With respect to the Third and Fourth Claims, for damages according to proof at the
9 time of trial, plus interest;

10 4. With respect to the Fifth and Sixth Claims, for damages according to proof at the
11 time of trial, plus interest;

12 5. With respect to the Seventh Claim, for a full accounting of the gross revenues and
13 expenses of each of the aforementioned NBA preseason basketball games.

14 6. With respect to all claims:

15 a. Plaintiff's attorneys' fees and costs of suit incurred herein;

16 b. Interest on such fees and costs; and,

17 c. For such other, further relief and/or different relief as the Court may deem

18 just and proper.

19
20 DATED: April 2, 2009

BLAXTER LAW, a professional corporation

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23 By: J.T. Wells Blaxter
J.T. WELLS BLAXTER
24 Attorneys for Plaintiff
ERIC BANNER
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