

COMMONWEALTH OF KENTUCKY
FRANKLIN CIRCUIT COURT
DIVISION NO. I
CIVIL ACTION NO. 07-CI-1765

FILED
FEB 14 2008
FRANKLIN CIRCUIT COURT
SALLY JUMP, CLERK

UNIVERSITY OF LOUISVILLE

PLAINTIFF

VS.

DEFENDANT'S MEMORANDUM IN SUPPORT
OF MOTION FOR JUDGMENT
ON THE PLEADINGS

DUKE UNIVERSITY

DEFENDANT

Comes now the Defendant, Duke University ("Duke"), by and through counsel, and in support of its Motion for Judgment on the Pleadings, states as follows:

INTRODUCTION

This is a contract action arising out of a June 23, 1999 agreement between Duke and the University of Louisville to have their football teams compete against each other in a series of games to be played in the years 2002, 2007, 2008 and 2009 (the "Agreement" (*Exhibit 1*)). Pursuant to the plain and unambiguous terms of the Agreement, if either of the parties withdrew from any of these games, the withdrawing party would pay the other party liquidated damages in the amount of \$150,000 per game only *if* the other party was unable to schedule a replacement game against an opponent of "similar stature" to the withdrawing party. (*Id.* at ¶ 13) (emphasis added).

Specifically, paragraph 13 of the Agreement provides:

- A. If this agreement is breached by the Visiting Team, and no contest occurs between the Home Team and the Visiting Team, and *if no contest with a team of similar stature is scheduled by the Home Team to replace the one canceled because of the breach*, then the Visiting Team shall pay the Home Team a liquidated sum of \$150,000.

B. If this agreement is breached by the Home Team, and no contest occurs between the Home Team and the Visiting Team, and *if no contest with a team of similar stature is scheduled by the Visiting Team to replace the one canceled because of the breach*, then the Home Team shall pay the Visiting Team a liquidated sum of \$150,000.

(*Id.* at ¶ 13 (emphasis added).) The Agreement also provided that Duke and Louisville would play football games at the following locations and on the following dates:

DATE	PLACE
October 5, 2002	Durham, NC
October 6, 2007	Louisville, KY
October 4, 2008	Durham, NC
October 3, 2009	Louisville, KY

(Agreement at ¶ 2).

The October 5, 2002 game between Louisville and Duke was rescheduled for September 7, 2002 and was played on that date. (Complaint (*Exhibit 2*) at ¶ 8). On March 24, 2003 -- four years before the next scheduled game in the series -- Duke informed Louisville that its football team would not play the games scheduled in 2007, 2008 and 2009. (Complaint at ¶ 9).¹ Contrary to the plain and unambiguous terms of the Agreement, however, and rather than wait to see if it could replace Duke on its schedule with teams of "similar stature" to Duke, Louisville *immediately* demanded that Duke pay it \$150,000 in liquidated damages for each of the games that were scheduled to have taken place in 2007, 2008 and 2009. (Complaint at ¶ 10). Since the earliest scheduled game was over four years away, giving Louisville sufficient opportunity to replace Duke on its schedule, and since Duke's obligation to pay the \$150,000 did not arise until such time that it was finally determined that Louisville could not schedule a replacement game with a team of "similar stature", Duke rejected

¹ For purposes of this Motion, Duke admits the factual allegations set forth in Louisville's Complaint. Duke does not admit those allegations, except as otherwise indicated in Duke's Answer, for any purpose beyond this motion, and Duke does not waive its right to deny and/or contravene these same allegations if this motion is denied and the litigation continues. See 6 Kurt A. Philipps, Jr., et al., *Ky. Practice R. Civ. Proc. Ann.*, Rule 12.03 (6th ed. 2007).

Louisville's premature demand. (Complaint at ¶ 11). Despite further communications between the parties, their positions remained essentially unchanged. (Complaint at ¶ 12).

Louisville filled its 2007 schedule and on October 5, 2007, Louisville's football team played the University of Utah's ("Utah") football team in Louisville, Kentucky. (Complaint at ¶ 14.) Louisville's process to complete its football schedule for the 2008 and 2009 seasons is ongoing at this point. (Complaint at ¶¶ 17-25.) At the time of the filing of the Complaint, Louisville still had one open date on its 2008 schedule and two open dates on its 2009 schedule. (Complaint at ¶¶ 17, 18.)

Louisville alleges that it has been unable to schedule a game "with a team of similar stature" to Duke and that it is therefore futile for it to continue to attempt to do so. (Complaint at ¶¶ 22, 24.) Despite the fact that it was able to play Utah during the same week that it was to play Duke pursuant to the Agreement, and that the 2008 and 2009 seasons have yet to be played, Louisville prematurely commenced this action on November 1, 2007.

As set forth below, even if this Court accepts the allegations in Louisville's Complaint as true, Louisville's claims against Duke fail as a matter of law. First, in 2007, Louisville scheduled and played a replacement game with a team of "similar stature" to Duke when it played Utah on the same weekend that it was scheduled to play Duke under the Agreement. Second, since the 2008 and 2009 seasons have yet to be played, and Louisville's ability to schedule a team of "similar stature" to Duke in those years is therefore uncertain, the two claims Louisville has made against Duke for breach of contract (Counts II and III) pertaining to those time periods are unripe and should be dismissed.

The futility of Louisville's claims is proven by its own admissions and its own version of the facts. The Court need not look outside the pleadings² to determine that Louisville's claims against Duke fail under any interpretation of Kentucky law. For purposes of this Motion, the facts are not in dispute and the parties need not undertake the process of pursuing discovery on them. Accordingly, Duke respectfully requests that the Court enter judgment on the pleadings in its favor.

ARGUMENT

I. A MOTION FOR JUDGMENT ON THE PLEADINGS IS THE PROPER VEHICLE TO FULLY DISPOSE OF LOUISVILLE'S CLAIMS.

Pursuant to CR 12.03, after the pleadings are closed, any party may move for a judgment on the pleadings. A judgment on the pleadings should be entered if, on the admitted material facts, the movant clearly is entitled to a judgment. CR 12.03. The rule's purpose is to expedite the termination of a lawsuit where the ultimate and controlling facts are undisputed, and is appropriate when allegations of a pleading are admitted and only a question of law must be decided. *City of Pioneer Village v. Bullitt County ex rel. Bullitt Fiscal Court*, 104 S.W.3d 757, 759 (Ky. 2003).

For purposes of this motion only, Duke admits all of the factual allegations in Louisville's Complaint. Yet the factual allegations therein, if proven true, do not entitle Louisville to any relief. Thus, a judgment on the pleadings should be entered in Duke's favor.

II. LOUISVILLE CANNOT RECOVER ON COUNT I BECAUSE IT WAS ABLE TO REPLACE DUKE WITH AN OPPONENT OF "SIMILAR STATURE."

In Count I of its Complaint, Louisville alleges that Duke's refusal to have its football team play Louisville's team in 2007 is a breach of contract because Louisville was "unable to find a 'team of similar stature' to replace the 2007 contest cancelled by Duke." (Complaint at ¶¶ 27, 28.) To recover in any action based on breach of a contract, a plaintiff must show the existence and the

²The Agreement is a pleading for purposes of a motion for judgment on the pleadings. See CR 12.03; CR 10.03 ("A copy of any written instrument which is an exhibit to a pleading is a part thereof for all purposes.")

breach of a contractually imposed duty. *Lenning v. Commercial Union Ins. Co.*, 260 F.3d 574, 581 (6th Cir. 2001) (citing *Strong v. Louisville & Nashville R. Co.*, 43 S.W.2d 11, 13 (Ky. 1931)). It is axiomatic, however, that a plaintiff basing his action on a contract requiring the fulfillment of certain conditions must show that the conditions were indeed fulfilled before the plaintiff has a right to recover. *Cawthon v. Jones*, 42 S.W.2d 498, 499 (Ky. 1931).³ Since Duke's obligation to pay Louisville pursuant to Paragraph 13 of the Agreement was expressly conditioned on Louisville's failure to schedule a football team of "similar stature" to compete against in 2007, and Louisville scheduled and played just such a team, Louisville cannot prove that it is entitled to relief on Count I, and judgment should be entered in favor of Duke.

"[T]he construction and interpretation of a contract, including questions regarding ambiguity, are questions of law for the court to decide." *Island Creek Coal Co. v. Wells*, 113 S.W.3d 100, 103 (Ky. 2003) (quoting *First Commonwealth Bank of Prestonsburg v. West*, 55 S.W.3d 829, 835 (Ky. Ct. App. 2000)). Further, "in the absence of ambiguity a written instrument will be enforced strictly according to its terms, and a court will interpret the contract's terms by assigning language its ordinary meaning and without resort to extrinsic evidence." *Frear v. P.T.A. Indus., Inc.*, 103 S.W.3d 99, 106 (Ky. 2003); *see also 3D Enter. Contracting Corp. v. Louisville and Jefferson County Metro. Sewer Dist.*, 174 S.W.3d 440, 448 (Ky. 2005). "The fact that one party may have intended different results . . . is insufficient to construe a contract at variance with its plain and unambiguous terms." *3D Enter.*, 174 S.W.3d at 448; *see also Frear*, 103 S.W.3d at 107 ("[A]n otherwise unambiguous contract does not become ambiguous when a party asserts -- especially post hoc, and after

³ *See also 13 Williston on Contracts* § 38:7 (4th ed.) ("A condition precedent in a contract . . . must be performed or happen before a duty of immediate performance arises on the promise which the condition qualifies. A condition precedent is either an act of a party that must be performed or a certain event that must happen before a contractual right accrues or contractual duty arises." (citations omitted)).

detrimental reliance by another party -- that the terms of the agreement fail to state what it intended.").

In this case, Paragraph 13 of the Agreement requires Duke to pay Louisville \$150,000 in liquidated damages resulting from its cancellation of the 2007 game only in the event that "no contest with a team of similar stature is scheduled by [Louisville] to replace the one canceled" by Duke. This language is not susceptible of more than one reasonable interpretation. According to Webster's Seventh New Collegiate Dictionary 856 (1967), the word stature means "quality or status gained by growth, development, or achievement." Thus, Duke does not have to compensate Louisville if Louisville was able to replace the game it was to play against Duke with a game against a team similar in "quality or status" to that of Duke's football team.

It is undisputed that Louisville was to play Duke in Louisville on October 6, 2007, the sixth week of Louisville's football season. (Complaint at ¶ 7.) It is equally undisputed that Louisville eventually played Utah in Louisville during the sixth week of that season, on October 5, 2007. (*Id.* at ¶ 14.) Thus, based on inarguable facts and the plain meaning of the words used in the Agreement, Louisville's game against Utah represents "the one canceled" because of Duke's termination of the Agreement.

The deciding question then becomes whether Utah's football team is one of similar "quality or status" to that of Duke. This question can only be answered in the affirmative. In 2007, the year in which it played Louisville, Utah finished with a record of nine wins and four losses, played in a bowl game and played two games against opponents ranked in the Top 25 -- exactly the same number of games that Duke played against ranked teams.⁴ Further, the game against Utah was televised nationally by ESPN, which gave Louisville broad exposure on a national level.

⁴ See ESPN.com, Utah Utes Schedule - 2007, <http://sports.espn.go.com/ncf/teams/schedule?teamId=254> (last visited

Pursuant to the plain and unambiguous language of the Agreement, by scheduling and playing Utah in 2007 on the same weekend that Louisville was to have played Duke, Louisville replaced Duke on its schedule with a team of "similar stature." As a matter of law, therefore, the express condition that would give rise to liability on Duke's part for the liquidated damages was not fulfilled, and Louisville therefore cannot recover from Duke on Count I of its Complaint.

II. COUNTS II AND III OF PLAINTIFF'S COMPLAINT ARE NOT YET RIPE FOR ADJUDICATION AND SHOULD THEREFORE BE DISMISSED.

In Counts II and III of its Complaint against Duke, Louisville asserts that it "has been unable" to find a team to replace Duke in its 2008 and 2009 football schedules and that Duke must therefore compensate it for the loss of those games as well. (Complaint, at ¶¶ 31-33, 35-37.) However, as previously noted, Duke's obligation to pay Louisville pursuant to the Agreement only arises if Louisville is unable to find an opponent of "similar stature" to replace Duke in the 2008 and 2009 seasons. *See* pp. 5-6, *supra*. Since these seasons have yet to begin, Counts II and III should be dismissed as unripe and therefore nonjusticiable.

Ripeness is an element of a justiciable claim. *Doe v. Golden & Walters, PLLC*, 173 S.W.3d 260, 270 (Ky. App. 2005). Because an unripe claim is not justiciable, a circuit court lacks subject-matter jurisdiction over it. *Id.* (citing Ky. Const. § 112(5)). Importantly, the subsequent accrual of a justiciable cause of action during the pendency of a case is ineffective to cure the defect of a prematurely filed claim. *See Doe*, 173 S.W.3d at 275 ("[T]he nonexistence of a cause of action when the suit was started is a fatal defect.") (quoting *Lilly v. O'Brien*, 6 S.W.2d 715, 719 (Ky. 1928)).

When it filed this case on November 1, 2007, Louisville still had nearly one year in which to schedule a team to replace Duke in 2008 and nearly two years to schedule such a team in 2009. Thus, no one could have known, at the time the Complaint was filed, if Louisville would be unable to schedule teams to replace Duke in those years, thereby triggering Duke's duty under Paragraph 13 of the Agreement. It is still not known today whether Louisville will find such a team. Indeed, Louisville may yet find such a team, but this simply cannot be determined until the 2008 and 2009 seasons conclude. Since Duke's liability under the Agreement as it relates to the 2008 and 2009 games was, and still is, completely speculative, the Court is without jurisdiction to decide it. *See Doe*, 173 S.W.3d at 270 ("Questions that may never arise or are purely advisory or hypothetical do not establish a justiciable controversy."). Pursuant to the teachings of *Doe* and *Lilly*, Duke requests that the Court dismiss Counts II and III of Louisville's Complaint, without prejudice, for lack of subject-matter jurisdiction. *See Doe*, 173 S.W.3d at 276; *Lilly*, 6 S.W.2d at 719.

CONCLUSION

For the foregoing reasons, Duke respectfully requests that the Court grant its Motion for Judgment on the Pleadings and dismiss Louisville's claims against it.

Respectfully submitted,



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Counsel for Defendant

CERTIFICATE OF SERVICE

This is to certify that a true and accurate copy of the foregoing was served on this the 13th day of February, 2008, on the following by facsimile and regular mail:

Holland N. McTyeire, V
Melissa Norman Bork
Jesse A. Mudd
Greenebaum, Doll & McDonald, PLLC
3500 National City Tower
101 South Fifth Street
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Barbara Paelman
Counsel for Defendant

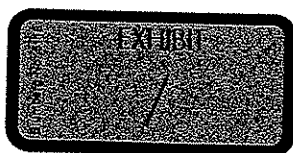
ATHLETIC COMPETITION AGREEMENT

This is a record of the agreement made June 23, 1999, between Duke University ("Duke") and the University of Louisville ("Louisville").

1. **PURPOSE:** The purpose of this agreement is to confirm the arrangements made for holding an athletic contest between Duke and Louisville.
2. **EVENTS:** Each party shall cause its varsity team to play the other in a game of Football in accordance with the terms of this agreement. The game shall be held as set forth below:

DATE	PLACE	TIME
October 5, 2002	Durham, NC	TBA
October 6, 2007	Louisville, KY	TBA
October 4, 2008	Durham, NC	TBA
October 3, 2009	Louisville, KY	TBA

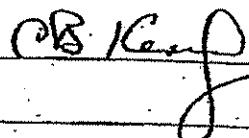
3. **RULES FOR THE CONTEST:** The contest shall be governed by the rules of the National Collegiate Athletic Association ("NCAA") as in effect at the time of the contest.
4. **ELIGIBILITY OF TEAM MEMBERS:** The eligibility of each team member to participate in a contest shall be governed by the rules and regulations of his institution and the rules of the athletic conference, if any, of which his institution is a member.
5. **OFFICIALS:** The officials for the contest shall be an Atlantic Coast Conference crew for games at Louisville and a Conference USA crew for games at Duke.
6. **COMPENSATION TO VISITING TEAM:**
 - A. The Home Team for the game shall compensate the Visiting Team as set forth below, and no other compensation shall be due or payable. Such compensation shall be:
 - A flat fee of \$150,000 for each game.
 - The rate may be renegotiated with mutual agreement of both parties.
 - B. The Home Team shall pay the Visiting Team the amount due hereunder not later than February 15, following the contest.
 - C. Revenue from radio and television shall be handled as set forth in succeeding paragraphs and shall be in addition to any compensation payable under this paragraph.
7. **ALLOCATION AND PRICING OF TICKETS:**
 - A. The Home Team shall set ticket prices.
 - B. Band members, cheerleaders and mascots for each institution shall be admitted without charge, when in uniform.




- C. The visiting team shall be allowed 400 complimentary tickets.
 - D. The Visiting Team shall be allotted tickets for sale. It is understood and agreed that the visiting institution shall return to the home institution ninety percent (90%) of the unused or unsold tickets held by said visiting institution not later than Monday preceding said game. If the game is not sold out, the Visiting Party may return tickets, not to exceed One Hundred (100) upon arrival.
8. **SIDELINE AND PRESS BOX PASSES:**
- A. The Home Team shall be allowed 40 sideline passes and the Visiting Party shall be allowed 40 sideline passes.
 - B. The Visiting Team shall be allowed 10 press box passes for the use of visiting university personnel at no charge. A reasonable number of press box passes will be provided at no charge for visiting news media and sports information personnel.
9. **RADIO AND FILM RIGHTS:**
- A. The Home Team shall retain the revenue from and have full control of all radio rights to broadcast the game as well as all film rights.
 - B. The Visiting Team shall be allowed one free outlet for live or delayed radio broadcast and shall retain the revenue from such broadcast.
10. **TELEVISION:** Louisville recognizes that Duke has assigned its live, over-the-air broadcast and cable television rights to their home football games to the Atlantic Coast Conference, Inc. which in turn has contracted with certain television networks and cable broadcasters ("Conference Contracts"). Duke recognizes that Louisville has assigned its live, over-the-air broadcast and cable television rights to their home football games to Conference USA, which also has contracted with certain television networks and cable broadcasters ("Conference Contracts"). Any discussion regarding the conditions of the Conference Contracts shall be directed to the conference offices for the Atlantic Coast Conference and Conference USA.
- All rights fees from over-the-air broadcast and cable television rights shall be distributed based upon respective conference crossover agreements in force at that time.
- In the event the game is not selected for an over-the-air or cable broadcast, the Home Team and Visiting Team shall have the game televised in its local market. The rights fee for such a broadcast shall be waived.
11. **CONCESSIONS, PARKING AND PROGRAM INCOME:** The Home Team shall have the exclusive right to sell programs and run concessions and parking. All income from program sales, concessions and parking shall be the sole property of the Home Team. The Visiting Team will be supplied with 75 game programs at no charge.

12. **IMPOSSIBILITY:** If an unforeseen catastrophe or disaster makes impossible the playing of any contest by either party, that contest shall be cancelled and neither party shall be responsible to the other for any loss or damage. Notwithstanding the preceding sentence, any financial obligations incurred by either party for promotion of the contest shall be shared equally. Cancellation of a contest under this paragraph shall not be deemed a breach of the contract. Notice of such a catastrophe or disaster shall be given as soon as possible. No such cancellation shall affect the parties' obligations as to subsequent contests covered by this agreement.
13. **DAMAGES:**
- A. If this agreement is breached by the Visiting Team, and no contest occurs between the Home Team and the Visiting Team, and if no contest with a team of similar stature is scheduled by the Home Team to replace the one canceled because of the breach, then the Visiting Team shall pay the Home Team a liquidated sum of \$150,000.
 - B. If this agreement is breached by the Home Team, and no contest occurs between the Home Team and the Visiting Team, and if no contest with a team of similar stature is scheduled by the Visiting Team to replace the one canceled because of the breach, then the Home Team shall pay the Visiting Team a liquidated sum of \$150,000.
14. **INTEGRATION:** This contract is the total agreement between the two parties. Any conditions or modifications must be in writing, signed by both parties.
15. **ACCEPTANCE:**

DUKE UNIVERSITY:

By: 
Title: _____
Date: _____

UNIVERSITY OF LOUISVILLE:

By: 
Title: Director of Athletics
Date: November 29, 1999

COMMONWEALTH OF KENTUCKY
FRANKLIN CIRCUIT COURT
DIVISION I
CIVIL ACTION NO. 07-CI-1765

FILED
NOV 01 2007
FRANKLIN CIRCUIT COURT
SALLY JUMP, CLERK

UNIVERSITY OF LOUISVILLE
University of Louisville
Louisville, Kentucky 40292

PLAINTIFF

v.

COMPLAINT

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DEFENDANT

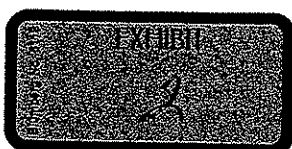
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Durham, North Carolina 27710
and
Secretary of State
Commonwealth of Kentucky
152 State Capitol
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Frankfort, Kentucky 40601-3493

* * * * *

Plaintiff, the University of Louisville (the "University"), through counsel, for its
Complaint against Defendant, Duke University ("Duke"), states as follows:

PARTIES

1. The University is an agency of the Commonwealth providing post-secondary
education primarily in Louisville, Kentucky and is governed by KRS Chapter 164, in particular
KRS 164.810 through 164.870.



2. Duke is a private institution providing post-secondary education primarily in Durham, North Carolina.

JURISDICTION AND VENUE

3. The Court has personal jurisdiction over Duke pursuant to KRS 454.210 because it has transacted business with the University in the Commonwealth.

4. Venue is proper in this Court because the University is an agency of the Commonwealth and actions for breach of contract involving agencies of the Commonwealth must be brought in Franklin Circuit Court pursuant to KRS Chapter 45A.

BACKGROUND FACTS

5. The University and Duke entered into a bilateral Athletic Competition Agreement (the "Agreement") on June 23, 1999, a copy of which is attached hereto as Exhibit A.

6. The purpose of the Agreement "is to confirm the arrangements made for holding an athletic contest" between the University and Duke. Agreement, p. 1, ¶ 2.

7. The four football games to be played pursuant to the Agreement are as follows:

DATE	PLACE	TIME
October 5, 2002	Durham, NC	TBA
October 6, 2007	Louisville, KY	TBA
October 4, 2008	Durham, NC	TBA
October 3, 2009	Louisville, KY	TBA

Id.

8. The 2002 game was eventually scheduled for September 7, 2002 at Duke and was played that date, pursuant to a December 17, 2001 letter between the University and Duke, a copy of which is attached as Exhibit B.

9. On March 24, 2003, Duke wrote to the University, a copy of which is attached as Exhibit C, to advise that Duke was cancelling the remainder of the Agreement pursuant to

Section 13, despite the fact that both parties still had obligations remaining under the terms of the Agreement.

10. On March 28, 2003, the University wrote to Duke, a copy of which is attached as Exhibit D, and requested the liquidated damages of \$150,000 per contest as set forth in Section 13 of the Agreement. In the alternative, the University indicated it would accept a suitable replacement from the Atlantic Coast Conference ("ACC") for the games cancelled by Duke.

11. On April 7, 2003 Duke responded to the University, a copy of which is attached as Exhibit E, contending that the liquidated damages would only be due if the University could not find a replacement of "similar stature" after a good faith effort to do so.

12. Counsel for the University and Duke exchanged additional correspondence regarding the matter in which the parties' positions remained essentially unchanged.

13. The University has continued its efforts to complete its football schedules for 2007, 2008, 2009 and other years both before and after it received Duke's letter cancelling the Agreement.

14. The schedule for the University's 2007 football season, which is now past its midpoint, is as follows:

August 30, 2007	Murray State University	Home
September 6, 2007	Middle Tennessee State University ("MTSU")	Home
September 15, 2007	University of Kentucky ("UK")	Away
September 22, 2007	Syracuse University	Home
September 29, 2007	North Carolina State University	Away
October 5, 2007	University of Utah ("Utah")	Home
October 13, 2007	University of Cincinnati	Away
October 19, 2007	University of Connecticut	Away
October 27, 2007	University of Pittsburgh	Home
November 8, 2007	West Virginia University	Away
November 17, 2007	University of South Florida	Away
November 29, 2007	Rutgers University	Home

15. Because Duke refused to honor its obligation under the Agreement to play the University during the 2007 football season, the University was unable to complete its schedule with teams of "similar stature" to Duke.

16. In both 2008 and 2009, the University's schedule will include seven Big East conference games.

17. Currently, the University's out-of-conference football schedule for 2008 includes games with UK, Tennessee Tech University, Kansas State University and MTSU, but the University needs at least one more out-of-conference football game for 2008 which it has been unable to schedule.

18. For 2009, the University's out-of-conference schedule includes a home game with Indiana State University ("Indiana State") and away games with UK and Utah. The University needs two additional out-of-conference games to complete its football schedule for 2009. Because Duke has refused to honor its obligation under the Agreement to play the University during the 2009 football season, the University was forced to replace Duke with a contest against Indiana State, which is not a member of the Football Bowl Subdivision and thus, is not a replacement of "similar stature."

19. The University has worked diligently and for a long period of time to find a replacement of "similar stature" to Duke. In fact, the University has solicited help from both Duke and ACC representatives in an effort to find a replacement of "similar stature" to Duke in order to complete its football schedules for 2007, 2008 and 2009. The University received little, if any, help from either Duke or the ACC in finding a replacement of "similar stature" to Duke.

20. Since Duke advised the University that it was terminating the Agreement, representatives of the University's Athletic Department have communicated by e-mail, telephone

or letter with the Athletic Departments of every member of the Football Bowl Subdivision in an effort to find a replacement of "similar stature" to Duke for the games cancelled by Duke. The University has also communicated with ESPN officials who schedule the college football games televised by ESPN, but such communications have been to no avail.

21. In fact, the University's Athletic Department currently spends up to one hour per day attempting to find a suitable replacement for Duke and complete its football schedule for 2008 and 2009, as well as other years.

22. However, the University has been unable to schedule a "contest with a team of similar stature" to replace the football games cancelled by Duke. Agreement, p. 3, ¶ 13.

23. There are two primary reasons why the University has been unable to complete its football schedules "with a team of similar stature" to Duke. No team of "similar stature" to Duke is willing to play two games at Louisville in return for only one home game. In addition, there is no dispute that the schedule for 2007 is complete, and the schedules for 2008 and 2009 for teams of "similar stature" to Duke have also been completed. Moreover, there is no dispute that Indiana State, which is scheduled to play a contest against the University in 2009 as a replacement for Duke, is not a team of "similar stature" to Duke.

24. Therefore, it is futile for the University to continue its efforts to find a replacement of "similar stature" to Duke for the football game it needs for 2008 and 2009.

25. The University has continuously tried to resolve this issue with Duke, including through correspondence within the past few weeks, but has been unable to do so and now brings this Complaint.

COUNT I

BREACH OF CONTRACT

26. The University restates and realleges the allegations contained in Numerical Paragraphs 1 through 25 of this Complaint.

27. The University was unable to find a "team of similar stature" to replace the 2007 contest cancelled by Duke.

28. Duke has breached the Agreement by refusing to play the contest with the University scheduled for 2007 and by unequivocally repudiating its contractual obligation to play the remaining "contests" set forth in the Agreement for 2008 and 2009.

29. As set forth in the Agreement, Duke owes the University liquidated damages in the sum of \$150,000 for the game that was scheduled to be played in 2007 which it cancelled.

COUNT II

BREACH OF CONTRACT

30. The University restates and realleges the allegations contained in Numerical Paragraphs 1 through 29 of this Complaint.

31. The University has been unable to find a "team of similar stature" to replace the 2008 contest cancelled by Duke.

32. Duke has breached the Agreement by refusing to play the contest with the University scheduled for 2007 and by unequivocally repudiating its contractual obligation to play the remaining "contests" set forth in the Agreement for 2008 and 2009.

33. As set forth in the Agreement, Duke owes the University liquidated damages in the sum of \$150,000 for the game scheduled to be played in 2008 which it cancelled.

COUNT III

BREACH OF CONTRACT

34. The University restates and realleges the allegations contained in Numerical Paragraphs 1 through 33 of this Complaint.

35. The University has been unable to find a "team of similar stature" to replace the 2009 contest cancelled by Duke.

36. Duke has breached the Agreement by refusing to play the contest with the University scheduled for 2007 and by unequivocally repudiating its contractual obligation to play the remaining "contests" set forth in the Agreement for 2008 and 2009.

37. As set forth in the Agreement, Duke owes the University liquidated damages in the sum of \$150,000 for the game scheduled to be played in 2009 which it cancelled.

WHEREFORE, the University requests that this Court:

A. Award the University liquidated damages against Duke in the amount of \$150,000 for Count I.

B. Award the University liquidated damages against Duke in the amount of \$150,000 for Count II.


C. Award the University liquidated damages against Duke in the amount of \$150,000 for Count III.

D. Award the University its costs against Duke.

E. Award the University any and all prejudgment and post-judgment interest to which it is entitled.

F. Grant the University such further and additional relief as this Court deems appropriate.

Respectfully submitted,



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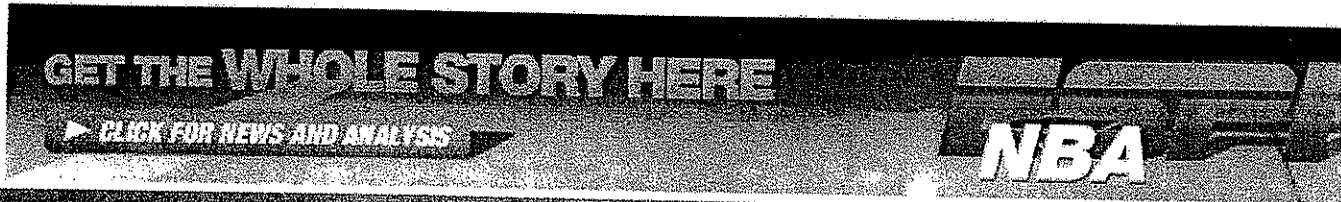
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UTAH UTES

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Utah Utes Schedule - 2007

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2007 Football Schedule and Results

DATE	OPPONENT	RESULT/TIME	RECORD/TICKETS
August 30	at Oregon State	L 24-7	0-1 (0-0)
September 8	Air Force	L 20-12	0-2 (0-1)
September 15	No. 11 UCLA	W 44-6	1-2 (0-1)
September 22	at UNLV	L 27-0	1-3 (0-2)
September 29	Utah State	W 34-18	2-3 (0-2)
October 5	at Louisville	W 44-35	3-3 (0-2)
October 13	San Diego State	W 23-7	4-3 (1-2)
October 18	at TCU	W 27-20	5-3 (2-2)
October 27	at Colorado State	W 27-3	6-3 (3-2)
November 10	Wyoming	W 50-0	7-3 (4-2)
November 17	New Mexico	W 28-10	8-3 (5-2)
November 24	at No. 25 Brigham Young	L 17-10	8-4 (5-3)
December 20	vs Navy	W 35-32	9-4 (5-3)

Inside College Football



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DUKE BLUE DEVILS

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Duke Blue Devils Schedule - 2007

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Duke

2007 Football Schedule and Results

DATE	OPPONENT	RESULT/TIME	RECORD/TICKET
September 1	<u>Connecticut</u>	<u>L 45-14</u>	0-1 (0-0)
September 8	at <u>Virginia</u>	<u>L 24-13</u>	0-2 (0-1)
September 15	at <u>Northwestern</u>	<u>W 20-14</u>	1-2 (0-1)
September 22	at <u>Navy</u>	<u>L 46-43</u>	1-3 (0-1)
September 29	at <u>Miami (FL)</u>	<u>L 24-14</u>	1-4 (0-2)
October 6	<u>Wake Forest</u>	<u>L 41-36</u>	1-5 (0-3)
October 13	No. 12 <u>Virginia Tech</u>	<u>L 43-14</u>	1-6 (0-4)
October 27	at <u>Florida State</u>	<u>L 25-6</u>	1-7 (0-5)
November 3	No. 25 <u>Clemson</u>	<u>L 47-10</u>	1-8 (0-6)
November 10	<u>Georgia Tech</u>	<u>L 41-24</u>	1-9 (0-7)
November 17	at <u>Notre Dame</u>	<u>L 28-7</u>	1-10 (0-7)
November 24	at <u>North Carolina</u>	<u>L 20-14</u>	1-11 (0-8)

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