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

UNIVERSITY OF LOUISVILLE PLAINTIFF

VS.

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

DUKE UNIVERSITY DEFENDANT

* * * * * * * *

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

INTRODUCTION

The University of Louisville's ("Louisville") response to Duke's Motion for Judgment on the Pleadings reflects an incorrect and overly narrow view of Kentucky procedural and contract law, and does not support the denial of Duke's motion. Although Louisville argues that Duke's inclusion of documentary material -- namely, college football schedules -- to its motion requires the Court to consider it as a motion for summary judgment, neither the Kentucky Rules of Civil Procedure nor common sense mandate that result because Louisville cannot dispute the accuracy of the information Duke submitted and, therefore, conversion of the motion would serve no useful purpose. Further, Louisville's argument that this Court must accept its unsupported allegations that Count II and III of its Complaint are ripe is patently erroneous, since a Court need not defer to Louisville's attempts to forecast future events. Finally, despite Louisville's continual attempts to get this Court to read

language into the parties' Agreement that is simply not there, the plain and unambiguous language of the Agreement, as well as the facts admitted by Louisville, require the dismissal of Count I.

Distilled to its essence, Louisville's response is simply a boilerplate plea for the Court to refrain from dismissing its case so that it can force Duke to engage in lengthy and protracted discovery on issues that can, and should, be resolved as a matter of law, all in the hopes of extorting a favorable settlement. Notably, however, Louisville offers the Court no assurance or even possibility that discovery will bear any fruit as Counts II and III of its Complaint will still be unripe, and pursuit of the allegations in Count I will still be futile based on the plain language of the Agreement into which Louisville willingly entered.

The proper time for disposal of this action is now, before the parties and the Court expend needless time and energy in discovery, only to find themselves in this exact same position at trial. Accordingly, Duke requests the entry of judgment in its favor.

ARGUMENT

I. DUKE'S MOTION FOR JUDGMENT ON THE PLEADINGS AS TO COUNT I OF LOUISVILLE'S COMPLAINT IS PROPERLY SUPPORTED AND SHOULD BE GRANTED

A. The Court May Consider Matters that are Subject to Judicial Notice on a Motion for Judgment on the Pleadings.

Rather than actually address the merits of Duke's arguments, Louisville's principal response to Duke's motion for judgment on the pleadings is to ask this Court to delay resolution of the case by suggesting that the motion should be treated as one for summary judgment because it is supported with matters outside the pleadings. What Louisville fails to recognize, however, is that it is entirely proper for a Court to consider matters outside the pleadings "if such materials are public records or are otherwise appropriate for the taking of judicial notice." *New England Health Care Employees Pension Fund v. Ernst & Young, LLP*, 336 F.3d 495, 501 (6th Cir. 2003); *see also* Ky. R. Evid. 201

(stating that judicially noticed fact "must be one not subject to reasonable dispute"... "[and must be taken] if requested by a party and supplied with the necessary information."). This exception to the general rule against considering matters outside the pleadings is entirely consistent with the purpose of a motion for judgment on the pleadings, i.e. the disposal of cases "where the allegations of the pleadings are admitted and only a question of law is to be decided." *City of Pioneer Vill. v. Bullit County ex rel. Bullitt Fiscal Court*, 104 S.W.3d 757, 759 (Ky. 2003).

The only documents Duke attached to its motion, other than Louisville's Complaint and the parties' contract (which *Louisville* attached to its Complaint), are copies of Duke and the University of Utah's ("Utah") 2007 football schedules and results. These schedules and results are facts that are subject to judicial notice because Louisville cannot -- and, notably, *does not* -- dispute their truth. Indeed, it is quite telling that, although Louisville's whole argument is focused on delaying resolution of this case because it believes that Duke has improperly included matters outside the pleadings in its motion, it fails to dispute the accuracy of the matters submitted.

Since football scores and schedules are properly noticed, Louisville's attempt to prolong this litigation and extort a settlement from Duke with expensive and time-consuming discovery on issues that can, and should, be resolved as a matter of law, should be rejected. Based on sound precedent, Duke's motion for judgment on the pleadings should not be converted to one for summary judgment.

Therefore, Louisville's argument that this Court should treat Duke's motion as one for summary judgment and then deny it as premature because Louisville has not had a chance to take discovery, is without merit. Moreover, as detailed in the following section, undisputed facts show that Count I of Louisville's Complaint cannot succeed. Since a motion for judgment on the pleadings may be filed "[a]fter the pleadings are closed but within such time as to not delay the trial," under CR 12.03, Duke's motion is neither premature nor unfounded.

B. The Unambiguous Terms of the Agreement and Undisputed Facts Prove the Futility of Count I of Louisville's Complaint.

In a further attempt to postpone the inevitable conclusion of this matter, Louisville argues that the language of the Agreement is ambiguous and that the Court must consider extrinsic evidence in order to interpret the meaning of "similar stature." As set forth below, however, Louisville's argument fails because it is based on the fallacy that it can manufacture an ambiguity in a contract by simply arguing that the term should be interpreted the way it wants it to be interpreted.

Throughout its response, Louisville argues that a team of similar stature must be one from a conference whose champion receives an automatic berth to a Bowl Championship Series ("BCS") bowl game. *See* Response, at 4, 8-10. It is undisputed, however, that the terms "BCS", "automatic berth" or "bowl game" do not appear *anywhere* in the Agreement. Moreover, when looking at the plain language of the Agreement (which is all this Court need do to rule on this matter), there is nothing that would even remotely suggest that the parties intended that Duke would be liable for damages if Louisville did not replace Duke on its schedule with a "team from a conference with an automatic berth to a BCS bowl game."[1] For Louisville to suggest that this Court read those exact terms into the Agreement is comical. Indeed, why stop there? Why not read into the Agreement that Duke must pay Louisville liquidated damages unless Louisville chooses to play a replacement game with a school that is from North Carolina whose colors are blue and white and whose football team has finished at or near the bottom of the Division I rankings in each of the last ten years?

Clearly, Louisville wants this Court to interpret the Agreement in a way that provides it with what it perceives to be a guaranteed win or money. Unfortunately for Louisville, however, its argument that the Agreement is ambiguous because it does not say what Louisville wants it to say is contrary to Kentucky law and is routinely rejected by Kentucky courts. *See Frear v. P.T.A. Indus.,*

[1] It should be noted that Louisville was not even part of the BCS when the Agreement was executed.

Inc., 103 S.W.3d 99, 107 (Ky. 2003) ("[A]n otherwise unambiguous contract does not become ambiguous when a party asserts -- especially post hoc, and after detrimental reliance by another party -- that the terms of the agreement fail to state what it intended."); *Grimes v. Smith*, 2005 WL 3442938 *2 (Ky. App. 2005) ("The mere fact that the appellants attempt to muddy the water and create some question of interpretation does not necessarily create an ambiguity.") (unpublished opinion); *Sawyer v. Sawyer*, 2004 WL 221328 *3 (Ky. App. 2004) ("[W]e are mindful that we are not permitted to create an ambiguity where none exists even if doing so would result in a more palatable outcome.") (unpublished opinion); *Russell v. Cincinnati Insurance Co.*, 2004 WL 2633618 *2 (Ky. App. 2004) ("a party cannot create an ambiguity by merely injecting his 'fanciful' expectations where none exists") (unpublished opinion).

Contrary to Louisville's claims, the pertinent language of the Agreement is clear and straightforward and Louisville's attempt to have this Court read the terms "BCS", "automatic berth" and "bowl game" into the Agreement is nothing more than Louisville's wish to "inject its fanciful expectations" into the Agreement where none exist. *See Russell*, 2004 WL 2633618 *2. As was set forth more fully in Duke's original brief, "similar stature" simply means similar "quality or status." And Louisville has not, nor could it, set forth any reasonable argument that Utah's football team was not of similar "quality or status" to Duke.

Moreover, although Louisville disputes (without support) that its 2007 game with Utah was the game scheduled to replace the 2007 game Duke cancelled, it cannot dispute that Louisville played Utah the exact same weekend that it was to have played Duke under the Agreement.[2] Thus, the only reasonable construction of the Agreement is that Utah was scheduled to replace Duke; any

[2] Curiously, although Louisville argues that Utah was not the replacement game, it does not identify what it believes was the replacement game. This is gamesmanship and simply another attempt by Louisville to delay this matter and run up legal costs during discovery in an attempt to extort money from Duke.

other interpretation would permit Louisville to simply select the team which provides it the best chance of prevailing in this case and then assert that it was the team that replaced Duke.

The plain and unambiguous language of the Agreement provides that Duke does not have to pay Louisville if Louisville schedules a team of similar stature to Duke, and Louisville did exactly that. Requiring the parties to engage in protracted discovery would tell this Court and the parties nothing that they do not already know about this case. As such, Duke is entitled to judgment on Count I of Louisville's Complaint.

II. LOUISVILLE CANNOT RELY ON ITS PREDICTIONS TO AVOID DISMISSAL OF COUNTS II AND III.

In its brief in support of its motion for judgment on the pleadings, Duke demonstrated that Counts II and III of Louisville's complaint must be dismissed as unripe and therefore lacking subject-matter jurisdiction. *See id.*, at 7-8; *Doe v. Golden & Walters, PLLC*, 173 S.W.3d 260, 270 (Ky. App. 2005). The only response Louisville can muster to the arguments presented or authority cited by Duke is that it alleged in its Complaint that its 2008 and 2009 football schedules are complete, and, therefore, the Court must accept these assertions as true on a motion for judgment on the pleadings. *See* Response, at 11. Because the law is to the contrary, Louisville's sole effort to avoid the dismissal of Counts II and III fails as a matter of law.

Although Louisville is correct that the Court, in resolving Duke's motion for judgment on the pleadings, must deem the well-pleaded *factual* allegations of a complaint to be true, the Court "does not have to accept each and every allegation in the complaint as true in considering its sufficiency." 5B Fed. Prac. & Proc. Civ.3d § 1357 (2008). Under Kentucky law, "[w]hen considering the merits of a demurrer to a pleading the facts contained in that pleading must be accepted as true, but it has long been settled that a demurrer admits as true only averments of fact and *not legal conclusions*." *Potter v. Trivette*, 197 S.W.2d 245, 246 (Ky. 1946) (emphasis added). The Sixth Circuit Court of

Appeals is in accord with this principle, *see Gean v. Hattaway*, 330 F.3d 758, 765 (6th Cir. 2003) (citation omitted) (stating that a court must "accept as true only the factual allegations of the non-moving parties, and need not accept as true legal conclusions or unwarranted factual inferences set forth in the complaints."), and even recent authority cited by Louisville indicates implicit concurrence with it. *See, e.g., City of Pioneer Vill. v. Bullitt County ex rel. Bullitt Fiscal Court*, 104 S.W.3d 757, 759 (Ky. 2003) (holding that party moving for judgment on the pleadings admits "all his adversary's *well-pleaded allegations of fact* and fair inferences therefrom") (emphasis added). Thus, while the Court must accept the truth of Louisville's factual contentions, it is free to and should reject Louisville's unsupported opinions and legal conclusions.

In responding to Duke's motion, however, Louisville relies *only* on such conclusions and assertions in its attempt to save Counts II and III of its Complaint. Although Louisville states that its 2008 and 2009 schedules are "complete" and that further attempts to schedule teams similar in stature to Duke would be "futile," these allegations are nothing more than Louisville's attempt to predict the future. Louisville may have believed their schedules to be complete when it filed its Complaint,[3] but it cannot know what might transpire between now and the fall of 2008 and 2009. One of its scheduled opponents could easily drop out, and may still do so. Moreover, there is no way that Louisville can state as a matter of law, more than a year in advance, that continuing its search for a team of similar stature to Duke is futile.

Upon examination, it is apparent that Louisville's allegations are precisely the kind of "legal conclusions" and "unwarranted factual inferences" that should be ignored when a party attempts to rebut a well grounded motion for judgment on the pleadings. Were the Court to accept Louisville's argument, the ripeness doctrine would be a dead letter because any plaintiff could allege what it

[3] Louisville might make that claim, but they know the 2008 scheduling was not "completed" until months after the Complaint was filed.

believed would happen in the future and then shield its claim from dismissal by demanding that a trial court accept its allegations. Indeed, the litigation of this case in its current posture could result in the absurdity of requiring Duke to try this case *before* the 2008 or 2009 seasons even *begin*.[4] Finally, Louisville could also reap an unexpected windfall if it eventually *did* change its 2008 or 2009 schedule and add an opponent of similar stature to Duke. Such a state of affairs would unfairly prejudice Duke, and is exactly the situation that the ripeness doctrine was meant to prevent. In fact, this exact scenario has already happened once as Louisville announced on its website in 2006 that it had entered into a multi-year agreement for home and away games with Vanderbilt University, only to have those games cancelled by Vanderbilt before the season began. (*See* Article: "Cards' Finalize Non-conference Schedule Through 2008" at pg. 3, a copy of which is attached hereto at Tab 1). Moreover, in 2006, Louisville even represented to Duke that it had found and scheduled replacement games for the games Duke cancelled in 2008 and 2009 only to then turn around the next year and say that those replacement games had been cancelled.[5] (*See* September 6, 2006 e-mail from Mark Ament to Kate Hendrix, attached at Tab 2) (stating that "Louisville was able to fill the games in 2008 and 2009 with a home and home contract. It is 2007 that is the problem.").

In sum, Louisville argues that because it allegedly has completely scheduled its next two football seasons, its agenda will inevitably come to pass. This is akin to saying that, because an attorney has scheduled a trial for a future date, the trial is certain to occur then. In athletics, as in

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[4] Even aside from its senselessness, such a situation would place needless difficulties on the parties. Since it is entirely possible that Louisville's 2008 and 2009 schedules could change at any time, any witnesses deposed by Duke before such an alteration would need to be re-deposed if a change occurred. Further, Duke cannot even take the deposition of the person at Louisville who is in charge of scheduling games for the 2009 season because there is no way for Duke to know who that will be without a crystal ball. Duke will have to litigate this case in its current state and then be forced to take new depositions every year to discover what steps were taken to find replacement games in each of those years. Duke also expects that, in such a situation, either it or Louisville would need to amend its pleadings to account for the change. The lack of ripeness of Counts II and III of Louisville's complaint therefore places unnecessary stresses on the conduct of this action.

[5] Of course, under the Agreement, once Louisville finds a replacement for Duke, Duke's obligations thereunder cease. Duke does not remain liable for games that Louisville finds to replace Duke and then are subsequently cancelled.

law, future events are subject to change. Because it is impossible to know whether Louisville will schedule a team of similar stature to Duke in 2008 and 2009, Counts II and III of Louisville's complaint are unripe and must be dismissed without prejudice.

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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CERTIFICATE OF SERVICE

This is to certify that a true and accurate copy of the foregoing was served on this the 9th day of April, 2008, on the following by facsimile and regular mail:

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Cards' Finalize Non-Conference Schedule Through 2008

Kentucky and Miami Highlight 2006 Home Schedule

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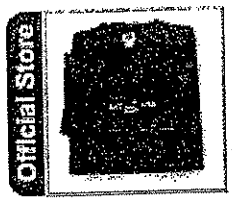

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CSTV

Jan. 26, 2006

LOUISVILLE, Ky. - - The University of Louisville football program has finalized its 2006 non-conference schedule and has also finished its out of league opponents through the 2008 season.

The Cardinals open their fourth season under head coach Bobby Petrino in 2006 when intra-state rival Kentucky comes to Papa John's Cardinal Stadium on Saturday, September 2. The Cardinals and Wildcats will meet for the 19th time in what has become one of the nation's top rivalries. Kentucky leads the overall series, 10-8, but the Cardinals have won the last three meetings and six of the last seven.

Louisville hits the road for the first time on Saturday, September 9 with a visit to Temple to face the Owls in a return game from the 2003 season. The Cardinals and Owls last played in 2003 with Louisville winning, 21-12, at Papa John's Cardinal Stadium. Temple still holds a 3-1 series advantage.

The second home game of the season will be one of the biggest when national power Miami invades PJCS on Saturday, September 16 for the first time and makes its first appearance in Louisville since 1984. In 2004, the two teams played one of the most exciting games of the season, with Miami coming out ahead 41-38 at the Orange Bowl. Louisville has never beaten Miami, trailing 0-9-1 in the series.

Louisville will hit the road again on Saturday, September 23 to face Kansas State in Manhattan, Kan. This wil be the first meeting between these schools.

The Cardinals will not play on Saturday, September 30, their first off week of the season, but returns to action on Friday, October 6 when the Cardinals play Middle Tennessee State in Nashville, Tenn. at The Coliseum, the home of the Tennessee Titans.

"This schedule will be a tremendous challenge for our football team," said Louisville head coach Bobby Petrino. "But it's a great home schedule for our fans with games against Kentucky, Miami, South Florida and West Virginia coming to Papa John's Cardinal Stadium in 2006. Our non-conference schedule is intriguing with games at Temple, and our first-ever appearance at Kansas State and a trip to Nashville to play Middle Tennessee State. I'm excited for the upcoming season because of the quality of competition we'll be playing next year."

Louisville has also finalized its non-conference opponents for the following two seasons, but the dates will be released at a later time.

In 2007, the Cardinals will host Middle Tennessee State, Vanderbilt and Utah with road games at Kentucky and North Carolina State.

The 2008 slate features the home opener against Kentucky with additional home games with Kansas State and Middle Tennessee State. Louisville will also face Georgia Tech and Vanderbilt away from home in '08.

"Ament, Mark"
<MSA@gdm.com>

09/06/2006 10:46 AM

To: <kate.hendricks@duke.edu>
cc: "Kevin Miller" <kevin.miller@louisville.edu>, <tmjuri01@gwise.louisville.edu>, <adkosh01@louisville.edu>
Subject: University of Louisville Football - Duke Football

Kate,
I know it's been a long time since we last communicated and I hope you are doing well. I don't know if this is still your responsibility but since you have been the one with whom I have been in contact, I thought I would start with you. As a new season kicks off, we are almost upon the 2007 season in which Louisville and Duke were to play the first of the games Duke took it upon itself to cancel. To date, Louisville has been unable to replace that game and has a hole in its home schedule.

As you well know, football schedules are made many years in advance and the scrambling for the addition of a home game against a quality opponent from a quality conference like the ACC is difficult, if not impossible when there is no return game to offer. Since Duke saw fit to cancel the three remaining games on the contract, Louisville is in the position of not being able to offer a return game to an opponent in 2007. Louisville was able to fill the games in 2008 and 2009 with a home and home contract. It is 2007 that is the problem.

The University of Louisville has been very patient and accommodating in this matter since Duke chose to arbitrarily breach and cancel this contract. Louisville has attempted to replace Duke on its football schedule in accordance with the contract and has been unable to do so for 2007. Louisville expects to receive the $150,00 agreed upon cancellation fee as stated in the contract. Please let me know as soon as possible when we can expect to receive the check. Thanks for your assistance.
Mark

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