

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

Billy Clyde Gillispie,

Plaintiff,

vs.

University of Kentucky Athletic
Association, Inc.,

Defendant.

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Civil Action No. 3:09-cv-970
(Jury)

ORIGINAL COMPLAINT

Plaintiff, Billy Clyde Gillispie (“Plaintiff” or “Coach Gillispie”), files this Original Complaint against Defendant, University of Kentucky Athletic Association, Inc. (“Defendant” or “UKAA”), and would respectfully show the Court as follows:

SUMMARY OF THE CASE

1. When he signed and accepted Defendant’s written agreement to act as the head coach of the University of Kentucky’s men’s basketball team, Coach Gillispie was at the pinnacle of a meteoric rise through the collegiate coaching ranks. Coach Gillispie had just completed his third season as the head coach at Texas A&M, and his basketball team had finished the season with the highest national ranking ever achieved by the program. Texas A&M’s impressive success led to discussions between the school and Coach Gillispie concerning a new, seven-year contract which, among other provisions and monetary incentives, would increase his annual salary to \$1.75 million. Coach Gillispie nevertheless made the difficult decision to leave Texas A&M for the unique opportunity to coach one of the most storied programs in college basketball: the University of Kentucky. No program in the history of Division I men’s college basketball has won more games than the University of Kentucky.

2. Coach Gillispie was hired away from his post at Texas A&M for a seven-year term at Kentucky, with an option for a two-year extension. Despite his signed, written, contractual agreement to serve as the head basketball coach for seven years at Kentucky, Defendant terminated Coach Gillispie's employment on March 27, 2009, after only two years as Kentucky's head coach. In his two years as the program's head coach, Coach Gillispie amassed a winning record of 40-27, including a mark of 22-14 in his second season; after his first season, Coach Gillispie was named the Southeastern Conference's ("SEC") co-coach of the year. Since the date of his termination, Defendant has refused to honor the very signed, written agreement with Coach Gillispie which the General Counsel for the University of Kentucky described in November of 2007 as "contain[ing] all the basic terms needed for an Employment Agreement, and *can itself serve as the employment contract for the Coach.*" Coach Gillispie performed the signed, written contract, and honored his word to UKAA. Unfortunately, because Defendant refuses to do likewise, Coach Gillispie files this Original Complaint in a final effort to require UKAA to honor its signed, written contract with him.

THE PARTIES

3. Plaintiff is a Texas native and a resident of the Graford, Texas. Coach Gillispie has been a Division I men's basketball head coach since 2002 and, among other head coaching positions, served as the head coach of the University of Kentucky men's basketball team from April 6, 2007 through March 27, 2009.

4. UKAA is a Kentucky corporation with its principal place of business in Lexington, Kentucky. UKAA was the entity that employed Coach Gillispie, much in the same way that UKAA employed Plaintiff's predecessor, Orlando "Tubby" Smith. Defendant can be served with process by serving its registered agent as follows:

Barbara W. Jones, Esq.
The Main Building
Suite 300
University of Kentucky
Lexington, Kentucky 40506-0032.

JURISDICTION AND VENUE

5. Pursuant to 28 U.S.C. § 1332(a), this Court has diversity jurisdiction over this dispute because it involves a controversy between parties of diverse citizenship and the amount in controversy greatly exceeds \$75,000.

6. Defendant is also subject to the personal jurisdiction of this Court because it has established well more than minimum contacts with the State of Texas and these contacts are such that Defendant can reasonably anticipate being haled into this Court. This Court has specific jurisdiction over Defendant because Plaintiff's causes of action arise from or are directly related to Defendant's contacts with the State of Texas. For instance, Defendant committed numerous acts in the State of Texas that are substantially related to this lawsuit. *See, e.g., Moncrief Oil Int'l v. OAO Gazprom*, 481 F.3d 309, 311 (5th Cir. 2007) (even a single act directed at forum state can support specific jurisdiction if it gave rise to claim). Moreover, this Court has general jurisdiction over Defendant because it has engaged in continuous and systematic activities in the State of Texas. As a result, this Court's exercise of general jurisdiction over Defendant will not offend traditional notions of fair play or substantial justice.

7. Because Coach Gillispie was recruited in Texas and hired by his employer, UKAA, the University of Kentucky itself is not a necessary party to this action and, accordingly, no issues or allegations of sovereign immunity are presented by this dispute. *See, e.g., Memorandum Opinion and Order on Motions to Dismiss* (May 3, 2005); Civil Action No. 5:04-425-JMH; *Bassett v. NCAA*, etc.; in the United States District Court for the Eastern District of

Kentucky, Lexington Division (denying UKAA's motion to dismiss and holding that University of Kentucky was not a necessary party in suit filed by former assistant football coach).

8. Venue is proper in this Court and in this Judicial District pursuant to 28 U.S.C. § 1391(a)(2) because a substantial part of the events or omissions giving rise to the claims occurred in this District and in Dallas, Texas. Defendant also engaged in tortious conduct in this District as well as in Dallas, Texas.

FACTUAL BACKGROUND

A. Plaintiff Becomes One Of The Nation's Premier College Head Basketball Coaches.

9. Through a career of hard work and dedication, Coach Gillispie has become of the country's premier men's head basketball coaches. Coach Gillispie's experience as Division I college basketball coach began as an assistant coach and recruiting coordinator at Baylor University under then-head coach Harry Miller. Coach Gillispie was a strong success at Baylor, delivering a recruiting class in 1996 that was considered by many to be in the top ten classes in the nation.

10. After three years at Baylor, Coach Gillispie moved to the University of Tulsa to work as an assistant coach under Bill Self. Just as he was at Baylor, Coach Gillispie was a success in Tulsa, and during the 1999-2000 season, the school won its conference title and advanced to the Elite Eight in the National Collegiate Athletic Association ("NCAA") Tournament, ending the season ranked as a top ten team in the country according to the final coaches' poll.

11. When Bill Self accepted the head coaching position with the University of Illinois, Coach Gillispie followed, working as an assistant coach on that staff for the next two years. During those two seasons, Illinois won back-to-back Big Ten Conference titles for the

first time in 50 years, advancing to the Elite Eight in the 2001 NCAA Tournament and to the Sweet 16 in the 2002 NCAA Tournament. With Coach Gillispie's assistance, the University of Illinois landed a recruiting class in 2002 that was among the top ten in the country. Including his tenure with Illinois, as an assistant coach, Coach Gillispie was a member of coaching staffs that won five conference championships in six years. As part of Bill Self's staff, he was a member of the only coaching staff in NCAA history to lead two different schools to the Elite Eight in successive seasons.

12. Coach Gillispie's first job as a Division I head basketball coach was at the University of Texas at El Paso ("UTEP"). Coach Gillispie was hired in 2002 as part of an effort to help rebuild the once-remarkable program. The task was not an easy one, and his first season as the head coach of UTEP was, predictably, difficult. Despite the difficulties, by the end of the next season, Coach Gillispie had orchestrated an astonishing improvement in the UTEP program. At the start of his second season as the program's head coach, UTEP was predicted to finish at or near the bottom of the Western Athletic Conference ("WAC"), but the program instead earned its first conference title in twelve years; as such, UTEP became only the third WAC team in history, and the first in 35 years, to win the conference title after finishing last the previous year. Under Coach Gillispie's direction, the team finished 24-8, some eighteen wins better than the previous season, and received a bid to the NCAA Tournament. The 18-win improvement was the best in Division I basketball that season, and still ranks among the top in the history of Division I men's basketball. The success of UTEP's program led to increased support from its fans, and the program ranked first in the NCAA in increased attendance. After his remarkable second year with the Miners, Coach Gillispie received various well-deserved accolades, including being

named Texas coach of the year and being included among the finalists for national coach of the year.

13. After his 2003-2004 season at UTEP, Coach Gillispie was recruited by Texas A&M to become head coach of the men's basketball team. When he accepted the position, Texas A&M's program had just completed a very disappointing season during which the team had finished with a record of 7-21, and had failed to win a single game in the Big 12 Conference. Almost immediately, Coach Gillispie led a resurgence in men's basketball at Texas A&M. Coach Gillispie's team finished the season 21-10, a fourteen-win improvement over the previous season. The team received its first postseason bid in eleven years, and won two games in the postseason National Invitation Tournament. Coach Gillispie's Aggies were named the country's most improved team, making Coach Gillispie the only coach in history to lead the most improved team in consecutive seasons. Coach Gillispie again received various honors, including being a consensus selection for Big 12 Coach of the Year and, again, a finalist for national coach of the year.

14. Although Texas A&M was widely predicted to stumble during Coach Gillispie's second season due to the departure of first-round draft pick Antoine Wright, the predictions were mistaken. Coach Gillispie's team finished the regular season with a record of 21-8, and the Aggies received their first bid to the NCAA Tournament in nearly twenty years (since 1987). In the NCAA Tournament, Coach Gillispie and Texas A&M stunned Big East champion Syracuse in the first round. In the second round, Texas A&M lost to Louisiana State University ("LSU") by a single point, and LSU went on to reach the Final Four. Following yet another successful season, Coach Gillispie was named by several publications the Big 12 Coach of the Year, and was again honored as Texas college coach of the year.

15. Coach Gillispie's third, and final, year as head coach of Texas A&M was even more remarkable. The team finished with an overall record of 27-7, and a 13-3 record in the Big 12. The team again received a bid to the NCAA Tournament, during which it advanced to the Sweet Sixteen, losing in that round by a single point. The Aggies ended the regular season ranked seventh in the country by the Associated Press and sixth in the nation by the ESPN/USA Today Coaches' poll. These national rankings were the highest ever achieved by Texas A&M. The school's third straight twenty-win season was also a record for the program.

16. By the end of his third year at Texas A&M, Coach Gillispie had become one of the nation's premier basketball coaches. Texas A&M began discussions with Coach Gillispie concerning a new, seven-year contract with the school which, among other provisions and monetary incentives, would increase his annual salary to \$1.75 million. Texas A&M was not the only program interested in retaining Coach Gillispie, however, and other programs, including the University of Arkansas and the University of Kentucky, were widely reported to be considering him as a head coach for their basketball teams.

B. Coach Gillispie Accepts The Job As The Head Coach For The University of Kentucky.

17. While Coach Gillispie was negotiating his new contract with Texas A&M, on or about April 5, 2007, Texas A&M gave permission to Mitch Barnhart, University of Kentucky's Athletic Director, to discuss the program's head coaching position, which was open following the departure of Orlando "Tubby" Smith, with Coach Gillispie.¹ On April 5, 2007, while Coach Gillispie was recruiting in Dallas, Texas on behalf of Texas A&M, he was contacted by Kentucky's Athletic Director. After a series of phone calls and discussions with Coach Gillispie in Dallas, the Athletic Director stated that, on behalf of UKAA, he wanted to offer Coach

¹ Mr. Barnhart is the authorized agent of Defendant and, at all relevant times, acted as the authorized agent of UKAA in Defendant's communications and negotiations with Coach Gillispie.

Gillispie the job as head coach of the men's basketball program, undoubtedly one of the most storied programs in the country; Coach Gillispie was offered the job while he was still in Dallas. The Athletic Director discussed with Coach Gillispie in Dallas the proposed salary, duration, and other material terms of his proposed coaching contract. During these discussions, the Athletic Director told Coach Gillispie that he wanted him to travel to Kentucky the following day in order to announce his hiring by UKAA. Due to a previous commitment scheduled for April 6, 2007 in Los Angeles, California honoring Acie Law, one of Coach Gillispie's players on the Texas A&M team, Coach Gillispie would not agree to travel to Kentucky unless and until he had been formally offered the job as the head coach by UKAA.

18. On behalf of UKAA, the Athletic Director offered him the job on the telephone during their discussions in Dallas, assuring Plaintiff that the job was his. He even arranged for a private jet to be sent immediately to Dallas to pick up Coach Gillispie, bring him to the University of Kentucky to sign a codification of their agreement, and then to fly him to Los Angeles so that he could satisfy his prior commitment.

19. Coach Gillispie arrived in Lexington, Kentucky shortly after midnight on April 6, 2007. When he arrived, he was given a copy of a Memorandum of Understanding ("MOU") dated the same day. The MOU was drafted by Defendant UKAA, and it memorialized the material terms of the agreement that had earlier been reached in Dallas between Coach Gillispie and UKAA to serve as Kentucky's head basketball coach; indeed, the MOU openly stated that it "presents the material terms of our offer . . ." Because the MOU merely codified the agreement Coach Gillispie had previously reached, no further negotiations occurred, and the agreement was signed at approximately 2:30 a.m. on April 6, 2007 by both Coach Gillispie and, on behalf of

Defendant, by Kentucky's Athletic Director.² Among its various provisions, the MOU specifies that "it will be expanded and incorporated into an employment contract with the University of Kentucky for execution at the earliest possible date." Exhibit A at p.1.

20. Within hours of the MOU being signed, UKAA called a special meeting of the UKAA Board of Directors at 2:00 p.m. to discuss and approve Coach Gillispie's MOU. The meeting was called by the President, Lee Todd, and was attended by a quorum of the Board as well as by the Athletic Director.³ President Todd "reviewed highlights of the contract, including the incentive clause and retention plan." Exhibit B at p.1. Some of the members of the Board "preferred contracts for no more than four years." *Id.* Others were "supportive of the contract." *Id.* As the Board's deliberations ended, Coach Gillispie's deal to serve as the head basketball coach was approved unanimously by the UKAA Board.

21. Defendant wasted no time announcing Coach Gillispie as the new head coach for the University of Kentucky during a press conference held immediately after conclusion of the special meeting. During the press conference, Kentucky's Athletic Director emphasized that Coach Gillispie "brings the things that we want to bring to our athletic program. He's a tireless worker. He has a great passion for the game and he's not afraid of the pressure. His attitude is, 'Bring it on.'" Coach Gillispie openly acknowledged that he was very "grateful and honored" to have been selected as the new head basketball coach, but that he had "a lot of work to do" to improve the program.

22. Coach Gillispie began this work immediately, including by commencing recruiting and hiring assistants; for example, by May 16, 2007, Coach Gillispie had successfully

² A true and correct copy of the MOU is attached as Exhibit A to this Original Complaint and is incorporated by reference.

³ A true and correct copy of the minutes from the meeting is attached as Exhibit B to this Original Complaint and is incorporated by reference.

recruited Patrick Patterson, then a McDonald's All-American and one of the country's top young prospects. Fully consumed with his duties as the University of Kentucky's head basketball coach, Coach Gillispie left it to his legal counsel and Defendant to document any further employment contract specified in the MOU.

C. Defendant Insists That The MOU Is The Signed, Written Contract With Coach Gillispie.

23. Coach Gillispie's legal counsel and Defendant's legal counsel discussed the possibility of such a further or revised employment contract, including in June, July, and August of 2007, and exchanged proposed drafts as part of these discussions. While the parties' legal counsel were able to agree on many matters, disagreements arose between them concerning, among other matters, how to document and handle Coach Gillispie's deferred compensation plan and how to define terminations of employment "with cause" and those "without cause."

24. Throughout these discussions, Defendant consistently recognized the MOU as a legally binding contract with Coach Gillispie. For instance, on July 12, 2007, Barbara W. Jones, the General Counsel for the University of Kentucky and the University's highest-ranking lawyer (the "Kentucky General Counsel"), wrote Mr. Gillispie's legal counsel.⁴ In her correspondence, the Kentucky General Counsel rejected certain proposals, calling them "inconsistent with the Memorandum of Understanding and Offer signed by the Director of Athletics and accepted by Coach Gillispie . . ." Simply put, the Kentucky General Counsel repeatedly emphasized in her correspondence that the MOU had been a contractual offer to Coach Gillispie which, when he accepted, formed a legally binding, written contract between the parties.

⁴ Just as was the case with Mr. Barnhart, Ms. Jones is also an authorized agent of Defendant and, at all relevant times, acted as the authorized agent of UKAA in Defendant's communications and negotiations with Coach Gillispie. She is also the Secretary of the UKAA Board of Directors and attended the special meeting to approve the hiring of Coach Gillispie and the MOU. See Exhibit B at p.3.

25. Not only did the UKAA recognize the MOU as a contract, but also it affirmatively invoked provisions of the MOU. For instance, on July 24, 2007, the Kentucky General Counsel wrote to Coach Gillispie's lawyer to inquire whether Coach Gillispie had entered into an endorsement agreement in Houston, Texas; if so, the Kentucky General Counsel claimed that such an agreement would violate the MOU and would create a significant problem requiring immediate attention:

Stuart, Billy delivered to Mitch Barnhart an unsigned copy of a Personality Endorsement Agreement with Select Asset Management in Houston, Texas. While the effective date of the contract is not completed, the terms of the agreement indicate the agreement is for services beginning July 1, 2007 and continuing through June 20, 2012. *I trust this agreement has not been signed. Such an agreement would place Billy in violation of the terms of the April 6, 2007 Memorandum of Understanding, the current broadcasting and endorsement provisions in our proposed contract and would place the University of Kentucky in breach of its exclusive [sic] multi-million dollar broadcast and endorsement contract with Host Communications. Please advise as to the status of this agreement and any other agreements Billy has signed since April 6, 2007.* I am certain you understand that Billy does not have the authority to enter into such an agreement as the University owns those endorsements. In addition the website for Select Asset Management features Billy's image and identifies him as the Head Basketball Coach for the University of Kentucky. We ask that this image be removed immediately until this matter is resolved.

(emphasis added).⁵ Hence, UKAA invoked provisions under the MOU to protect its interests and to restrict Coach Gillispie's marketing activities.

26. That Defendant insisted that the MOU was a binding, written contact between the parties became clearer still as discussions between the legal counsel stalled. On October 10, 2007, the Kentucky General Counsel wrote in correspondence to Plaintiff's legal counsel that "I have advised you in each responsive letter that *the terms of the MOU, to which your client is*

⁵ The email from the Kentucky General Counsel proved to be much to do about nothing, as there was no agreement between Plaintiff and Select Asset Management and, therefore, no issue or problem with the MOU.

bound, are the substantive terms of the contract and that the University will not create an exception to the rules currently applicable to all staff solely for the benefit of the Coach.” (emphasis added). The Kentucky General Counsel recognized that the MOU was not only binding on Coach Gillispie, but also on Defendant: “Until then the University considers the MOU of April 2007 as the agreement which binds Coach and the University.”

27. By November of 2007, Defendant decided that the MOU would, itself, serve as the employment contract for Coach Gillispie and that no further documentation or negotiation would be required. The Kentucky General Counsel made this point crystal clear to Coach Gillispie’s legal counsel in a letter dated November 1, 2007:

The University is satisfied that the executed Memorandum of Understanding contains all of the basic terms needed for an employment agreement, and can itself serve as the employment contract for the Coach. Any additional provisions not contained in the Memorandum of Understanding that your client wishes to address will need to be separately resolved by Coach with the Director of Athletics.

(emphasis added). Driving home the point again and again, the Kentucky General Counsel further explained that Defendant’s public position would now be that the MOU was the contract with Coach Gillispie:

Finally, you should be aware the University, pursuant to the Open Records Act, has been asked on a weekly basis by individuals for a copy of Coach’s contract. To date we have advised them the contract is not yet finalized. Effective November 5, 2007 at 9:00 a.m. EST the University will provide the executed Memorandum of Understanding to requesting parties, as we consider the matter finally resolved.

(emphasis added).

28. Indeed, Defendant rapidly shut down any further discussions or negotiations, adamantly refusing to negotiate any further documents related to the MOU. In an email to

Plaintiff's legal counsel from the Kentucky General Counsel dated November 7, 2007, the Kentucky General Counsel echoed Defendant's now-familiar mantra:

The Athletics Board approved the MOU with Coach at a special meeting in April 2007. The Board of Trustees does not have to approve the hiring of the Coach nor the contract. The hiring of the coach is reported to the Board which was done verbally by the President who is Chair of the Athletics Board in April and it will be reported in writing to the Board at the December 2007 meeting.

We are not willing to attempt to negotiate any further documents related to the MOU.

(emphasis added).

29. Eight days later, Defendant yet again reiterated that the MOU was the contract with Coach Gillispie. On November 15, 2007, Kentucky's General Counsel sent an email to Plaintiff's legal counsel informing him that the *Lexington Herald Leader* had requested a copy of Coach Gillispie's contract and that, in response to this request, Defendant would be producing a copy of the MOU:

Mitch Barnhart wanted me to advise you that on Monday, November 12th we received a request from Jerry Tipton with the Lexington Herald Leader for Billy's contract. We will be providing the MOU tomorrow.

(emphasis added).

D. During Plaintiff's Employment, The Parties Perform Their Obligations Under The MOU.

30. Throughout all of the discussions between the lawyers, Coach Gillispie diligently went about his job as the head basketball coach. By the end of his first year at Kentucky, Coach Gillispie was honored as the SEC's co-coach of the year. By the end of his second season at Kentucky, Coach Gillispie had directed his team to a twenty-two win season.

31. Throughout his tenure as the head men's basketball coach for the University of Kentucky, Coach Gillispie honored and performed his obligations under the MOU. Defendant

also performed under the MOU while Coach Gillispie was head coach; for instance, the salary specified by the MOU was paid to Plaintiff. The annual escalator in base salary was also implemented and performed by Defendant. The athletic incentives specified in the MOU were also performed. Similarly, Defendant paid the sums specified in the MOU to a deferred compensation plan. Coach Gillispie received the standard benefits provided in the MOU. Plaintiff was reimbursed for his household moving expenses, again as required by the MOU. Coach Gillispie had the use of a vehicle and of a club membership, also as stated in the MOU.

E. Defendant Terminates Coach Gillispie And Breaches The MOU.

32. Throughout the entirety of Coach Gillispie's tenure, he treated it, correctly, as the binding, written contract between him and Defendant. But when Defendant decided to terminate Coach Gillispie in March of 2009, it did a startling about-face that has continued ever since. On March 27, 2009, Defendant terminated Coach Gillispie's employment without cause. In a letter addressed to Plaintiff that same day, the Athletic Director explained that "it is our belief that the relationship between you and the University is simply not a good fit in many ways." But the Athletic Director also took the remarkable position that, somehow, the parties had never reached an employment contract: "The inability to come to an agreement on critical terms of an employment contract after two years of negotiation is just one indication of this incompatibility."

33. Of course, the baseless assertion of the Athletic Director was completely at odds with the position Defendant, through its highest-ranking lawyer, had repeatedly advanced for nearly two years. Sixteen months earlier, for instance, the Kentucky General Counsel had insisted that "*The University is satisfied that the executed Memorandum of Understanding contains all of the basic terms needed for an employment agreement, and can itself serve as the employment contract for the Coach.*"

34. Unfortunately, Defendant's abrupt about-face is motivated, apparently, by Defendant's bad-faith desire no longer to honor the terms of the MOU, including its seven-year term. Rather than honor its written, signed deal with Coach Gillispie, Defendant prefers instead to pretend as though no deal was ever reached. Unfortunately for Defendant, its make-believe world is just that, and the terms of the MOU, the numerous statements of the University's own General Counsel, the University's public statements and positions, and the pre-termination conduct and performance of the parties all demonstrate that, in reality, the MOU was the written, signed, and enforceable deal between the parties. Under that contractual agreement, Coach Gillispie is entitled to specified payments upon his termination without cause: "A termination without cause by the University provision that will require payment of \$1,500,000 per year for the remainder of the term of the contract, provided the payment for termination without cause shall not exceed 48 months." Exhibit A at p.2. Coach Gillispie has asked Defendant to honor its deal with him. Because Defendant has stubbornly refused to do so, this lawsuit followed.

CAUSES OF ACTION

A. Breach of Written Contract.

35. Plaintiff incorporates all allegations made in this Original Complaint as if repeated fully here.

36. Under Texas law, the elements of an action for breach of contract are the following: (a) there is a valid, enforceable contract; (b) the Plaintiff is a proper party to sue for breach of contract; (c) the Plaintiff performed, tendered performance or, or was excused from performing his contractual obligations; (d) the Defendant breached the contract; and (e) the Defendant's breach caused the Plaintiff injury. *See, e.g., Case Corp. v. Hi-Class Bus.*, 184 S.W.3d 760, 769 (Tex. App.—Dallas 2005, pet. denied) (elements a, c-e); *Zuniga v. Wooster*

Ladder Co., 119 S.W.3d 856, 862 (Tex. App.—San Antonio 2003, no pet.) (element b). Coach Gillispie easily satisfies each of these elements.

37. The MOU is a valid and legally enforceable, written contract between Plaintiff and Defendant. Plaintiff has performed his contractual obligations under this contract, but Defendant has not. Accordingly, Defendant has breached its signed, written contract with Coach Gillispie. All conditions precedent, if any, to this suit have either been satisfied, performed, excused, or waived, including through Defendant's repeated assertions through the Kentucky General Counsel that the MOU is the written contract between the parties.

38. Defendant has breached its written contract with Coach Gillispie by failing, without legal excuse, to perform its contractual obligations under the contract after his termination without cause, including, but not limited to Defendant's obligation to pay "\$1,500,000 per year for the remainder of the term of the contract, provided the payment for termination without cause shall not exceed 48 months." Exhibit A at p.2. Coach Gillispie has requested that Defendant perform its obligations under the contract, but his requests have been refused or ignored by Defendant. Accordingly, Defendant has materially breached its contract with Coach Gillispie without any legal excuse to do so.

39. Defendant's breach of its written contract has caused injury to Plaintiff. Plaintiff's injury is a natural, probable, and foreseeable consequence of Defendant's breach. Plaintiff's injuries include, but are not limited to, the monetary losses he has sustained as a result of Defendant's breach and as a result of Defendant's failure to pay "\$1,500,000 per year for the remainder of the term of the contract, provided the payment for termination without cause shall not exceed 48 months." Exhibit A at p.2.

40. Plaintiff seeks to recover his actual damages from Defendant, as well as all recoverable consequential damages, attorneys' fees, costs of Court, and pre- as well as post-judgment interest at the highest legal rate on all of his damages.

B. Fraud (No Intent to Perform the MOU).

41. Plaintiff incorporates all allegations made in this Original Complaint as if repeated fully here.

42. Texas law provides that when a party enters into a contract with no intention of performing it, that misrepresentation may give rise to a cause of action for fraud. *See, e.g., Crim Truck & Tractor Co. v. Navistar Int'l Transp.*, 823 S.W.2d 591, 597 (Tex. 1992).

43. When Defendant negotiated and entered into its contract with Coach Gillispie in Texas, it had no intention of performing that portion of the MOU that obligated it, upon termination of Coach Gillispie without cause, to pay "\$1,500,000 per year for the remainder of the term of the contract, provided the payment for termination without cause shall not exceed 48 months." Exhibit A at p.2. Specifically, Defendant, through its agent the Athletic Director, committed fraud by non-disclosure during its negotiations and discussions with Coach Gillispie in Dallas because it concealed from Plaintiff its intent not to perform the contract in the event of a termination without cause as well as its intent not to document in a further employment contract such an obligation on Defendant. Defendant did not inform Coach Gillispie that it intended all along to treat the MOU not as a contract, but rather as a unilateral, discretionary option, on Coach Gillispie's employment. Hence, direct as well as circumstantial evidence, together with Defendant's breach of its promise to perform, supports a finding of fraudulent intent by Defendant. Put simply, Defendant was deliberately silent about its true intent when it had a duty to speak during its discussions and negotiations with Plaintiff in Texas.

44. Plaintiff reasonably relied on the omission or concealment by Defendant, just as Defendant had intended that he do so. Coach Gillispie performed his obligations under the MOU, entirely unaware that Defendant did not intend to pay, upon termination of Coach Gillispie without cause, "\$1,500,000 per year for the remainder of the term of the contract, provided the payment for termination without cause shall not exceed 48 months." Exhibit A at p.2.

45. As a result of Defendant's intent not to perform its contract with Plaintiff, Plaintiff has suffered injury. Plaintiff's injuries include, but are not limited to, the monetary loss he has sustained as a result of Defendant's tortious conduct, his lost income and profits, all other consequential damages, costs of Court, and pre- as well as post-judgment interest at the highest legal rate on all of his damages.

C. Fraudulent Misrepresentation And Inducement.

46. Plaintiff incorporates all allegations made in this Original Complaint as if repeated fully here.

47. Under Texas law, Coach Gillispie states a common-law claim for fraud when: (a) the Defendant made a representation to the Plaintiff; (b) the representation was material; (c) the representation was false; (d) when the Defendant made the representation, the Defendant (1) knew the representation was false, or (2) made the representation recklessly, as a positive assertion, and without knowledge of its truth; (e) the Defendant made the representation with the intent that the Plaintiff act on it; (f) the Plaintiff relied on the representation; and (g) the representation caused the plaintiff injury. *See, e.g., In re FirstMerit Bank*, 52 S.W.3d 749, 758 (Tex. 2001). Each of these elements is satisfied here.

48. During its discussions and negotiations with Coach Gillispie in Dallas, Defendant made material misrepresentations to Plaintiff, and Defendant did so recklessly or with knowledge that the material misrepresentations were false. For example, Defendant knowingly misrepresented to Plaintiff during the negotiations in Texas that his employment with Defendant would be for a minimum period of seven years. Defendant also knowingly or recklessly misrepresented to Plaintiff that, in the event he was terminated without cause prior to the expiration of the minimum, seven-year term, Defendant would pay him “\$1,500,000 per year for the remainder of the term of the contract, provided the payment for termination without cause shall not exceed 48 months.” Exhibit A at p.2. Defendant further knowingly or recklessly misrepresented to Plaintiff during these negotiations in Texas that a further contract would include a standard termination for cause provision mutually agreed upon by the parties when, in fact, Defendant had no intention to propose, much less agree to such a provision. Defendant further misrepresented that all University coaches had identical, consistent definitions of cause in each of their contractual agreements.

49. Defendant made these materially false misrepresentations to Plaintiff with the intent that Plaintiff rely on these representations. After all, during the negotiations in Texas, Defendant intended or had reason to expect that the Plaintiff would act in reliance on the representation. For instance, the Athletic Director informed Coach Gillispie in Texas that Plaintiff had the job of head coach under the agreement reached between them and that he need not delay a public announcement the very next day. Furthermore, Coach Gillispie incurred pecuniary loss as a result of this transaction in which Defendant intended or had reason to expect that Plaintiff’s conduct would be influenced.

50. Coach Gillispie actually and justifiably relied on Defendant's representations and acted on them. He resigned a promising, successful position as head-coach with a rapidly ascending program at Texas A&M. He did so because he believed Defendant's false representations to him during his negotiations with Defendant in Texas.

51. Defendant's representations injured Plaintiff. Defendant's fraud resulted in direct damages foreseen by Defendant as a result of its wrongful conduct, but also proximately resulted in consequential damages to Plaintiff. Plaintiff therefore seeks all of his damages, including, but not limited to out-of-pocket damages, benefit-of-the-bargain damages, and all other actual or consequential damages.

D. Tortious Interference With Prospective Contract.

52. Plaintiff incorporates all allegations made in this Original Complaint as if repeated fully here.

53. To establish a claim for tortious interference with prospective contractual relations, Plaintiff need only establish that (a) he had a business relationship that had not been reduced to contract or a business relationship that was not formalized by written contract; (b) that Defendant intentionally interfered with the formation of the relationship; (c) that Defendant's conduct was independently tortious or unlawful; (d) that Defendant's interference proximately caused Plaintiff's injury; and (e) that Plaintiff suffered actual injury or loss. Again, each of those elements is evident in the instant dispute. *See, e.g., Wal-Mart Stores v. Sturges*, 52 S.W.3d 711, 726 (Tex. 2001).

54. When Coach Gillispie was first contacted by Defendant in Texas, he was in the process of negotiating a new, seven-year contract with the school which, among other provisions, would increase his annual salary to \$1.75 million. The proposed deal was to run through 2015

and, if Coach Gillispie stayed through the 2012 season, he would receive an additional \$1 million; if he stayed through 2015, he would receive yet an additional \$750,000. This new contract had not yet been formalized between the parties at the time Defendant contacted Plaintiff in Texas.

55. Defendant intentionally interfered with Coach Gillispie's contract negotiations with Texas A&M through its fraud as well as fraudulent misrepresentation and inducement described earlier. Thus, Defendant's conduct was independently tortious and unlawful. Moreover, Defendant intentionally interfered because it had actual knowledge of the prospective contract or business relations between Texas A&M and Plaintiff, and Defendant's interference with this contract was more than merely an incidental result.

56. Defendant's interference proximately caused Plaintiff actual damage and loss. Had Defendant not interfered with his prospective contract with Texas A&M, he would have reached this contract with Texas A&M and would have gladly remained the head coach of the men's basketball team. Indeed, the Texas A&M Board of Regents had already approved the offer of this prospective contract to Coach Gillispie. Defendant's tortious activity intentionally interfered with the completion of this prospective contract.

E. Punitive Damages (For Causes of Action B-D).

57. Plaintiff incorporates all allegations made in this Original Complaint as if repeated fully here.

58. Plaintiff also seeks exemplary or punitive damages as allowed by common law or by statutory provisions. For each example of Defendant's tortious conduct described above, Defendant's acts and omissions involved, when viewed objectively from the standpoint of Defendant, an extreme degree of risk, considering the probability and magnitude of the potential

harm to others. Also, Defendant had actual subjective awareness of the risk involved, but nevertheless proceeded in conscious indifference to the rights, safety, or welfare of others. These acts and omissions were committed knowingly, intentionally, willfully, wantonly, and maliciously and were committed in such a manner by partners, managerial employees, agents, and/or officers of Defendant. Plaintiff seeks recovery of exemplary and punitive damages in the maximum possible amount under Texas law.

F. Attorneys' Fees.

59. Plaintiff incorporates all allegations made in this Original Complaint as if repeated fully here.

60. Plaintiff is entitled to recover from Defendant his reasonable and necessary attorneys' fees incurred to prosecute this action, and any and all appeals of this action, on an hourly basis. Because this suit is, among other claims, a claim for suit on a written contract, Plaintiff is entitled to seek recovery of his reasonable attorneys' fees from Defendant pursuant to Section 38.001(8) of the Texas Civil Practice & Remedies Code. Plaintiff will and hereby does present his claim to Defendant pursuant to Section 38.002(2) of the Texas Civil Practice & Remedies Code. Since Defendant has not or will not pay or tender the just amount owed Plaintiff before the expiration of the thirtieth day after the claim is presented, Plaintiff has satisfied the procedure for recovery of attorneys' fees specified in Section 38.002 of the Texas Civil Practice & Remedies Code.

CONDITIONS PRECEDENT

61. Plaintiff incorporates all allegations made in this Original Complaint as if repeated fully here.

62. All conditions precedent to Plaintiff's claims have occurred or have been waived by Defendant.

DEMAND FOR A JURY TRIAL

63. Plaintiff incorporates all allegations made in this Original Complaint as if repeated fully here.

64. Plaintiff respectfully demands a trial by jury on all of its claims and on all claims triable to a jury. The necessary filing and jury fees have been paid.

PRAYER FOR RELIEF

65. Plaintiff incorporates all allegations made in this Original Complaint as if repeated fully here.

66. Plaintiff respectfully requests:

- a. trial by jury, for which Plaintiff has paid the appropriate jury fee;
- b. all actual, consequential, pecuniary, benefit-of-the-bargain, out-of-pocket and other damages allowed by contract, by law, or in equity, as well as pre-judgment and post-judgment interest at the maximum rate allowed by law, and all costs of Court and expenses to bring this action;
- c. punitive damages in the maximum amount allowed by law;
- d. all of Plaintiff's attorneys' fees incurred in this action and any and all appeals of this action, on an hourly basis; and
- e. all such other and further relief, both at law and in equity, to which Plaintiff may be entitled.

