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Attorneys for Plaintiff  
UNIVERSITY OF HAWAI'I

IN THE CIRCUIT COURT OF THE FIRST CIRCUIT

STATE OF HAWAI'I

UNIVERSITY OF HAWAI'I, ) Civil No. \_\_\_\_\_  
 ) (Other Civil Action)  
Plaintiff, )  
 )  
vs. ) COMPLAINT FOR DECLARATORY,  
 ) INJUNCTIVE, AND EQUITABLE  
 ) RELIEF; DEMAND FOR JURY TRIAL;  
GIBSON ARNOLD; HAWAII ) SUMMONS  
GOVERNMENT EMPLOYEES )  
ASSOCIATION, AFSCME LOCAL 152, )  
AFL-CIO; JOHN DOES 1-10; JANE DOES )  
1-10; DOE CORPORATIONS 1-10; and DOE )  
ENTITIES 1-10, )  
 )  
Defendants. )  
\_\_\_\_\_ )

COMPLAINT FOR DECLARATORY, INJUNCTIVE, AND EQUITABLE RELIEF

Plaintiff University of Hawai'i ("UH"), by and through its attorneys, McCorrison Miller Mukai MacKinnon LLP, hereby alleges its Complaint against Defendant Gibson Arnold

(“Arnold”) and interested party Hawaii Government Employees Association, AFSCME Local 152, AFL-CIO (“HGEA”) as follows:

PARTIES

1. UH is authorized as a State of Hawai‘i body corporate pursuant to Chapter 304A of the Hawaii Revised Statutes.

2. Upon information and belief, at all times relevant, Arnold was a resident of the State of Hawai‘i. Arnold served as the head coach of the UH men’s basketball team (“Basketball Team”) from July 1, 2011 until October 28, 2014.

3. HGEA has an interest in this dispute because it is the exclusive bargaining representative for Unit 8 employees at UH and is a signatory to Arnold’s employment contract discussed below.

4. UH is unaware of the true names and capacities of the defendants sued herein as additional Defendants John Does 1-10, Jane Does 1-10, Doe Corporations 1-10, and Doe Entities 1-10 (hereinafter collectively referred to as the “Doe Defendants”), inclusive, and for that reason, sues such defendants under fictitious names. On information and belief, the Doe Defendants are responsible in some manner for the occurrences alleged herein, and the Doe Defendants’ acts and omissions proximately caused UH’s damages as alleged herein. UH prays for leave to amend this Complaint when the true names, capacities, and/or responsibilities of such Doe Defendants are ascertained. As alleged herein, “Defendants” shall mean all named defendants and all fictitiously named Doe Defendants.

FACTUAL BACKGROUND

5. This action seeks, among other things, a declaration that a liquidated damages provision in Arnold’s employment contract with UH is unenforceable as a penalty.

6. On or about November 3, 2011, Arnold entered into a Head Coach Employment Agreement with UH and HGEA to serve as Head Coach of the Basketball Team for a term of three years, terminating on June 30, 2014 (“Agreement”).

7. Under the Agreement, Arnold would be entitled to an automatic one-year extension if he accomplished any one of certain benchmarks, including winning at least twenty games in the 2013-2014 season with the Basketball Team.

8. The Basketball Team achieved twenty victories in the 2013-2014 season, and therefore, Arnold received an automatic one-year contract extension under the Agreement.

KEY PROVISIONS IN ARNOLD’S AGREEMENT

9. The Agreement includes a liquidated damages payment in the event of a without cause termination (“Liquidated Damages Provision”).

10. As set forth in Section 8 of the Agreement, the stated liquidated damages are a lump sum equal to the total compensation Arnold earned up until the point of the termination:

This Agreement may be terminated by the University at any time without cause upon ninety (90) days written notice to Coach. In such event, University will pay Coach as liquidated damages, a lump sum amount equal to the total amount of compensation earned under the terms of this Agreement as of the date of the termination (incentives and extensions are not included in liquidated damages).

11. The Agreement also contains a number of terms governing Arnold’s role as head coach, including, but not limited to provisions stating that:

- Arnold will provide leadership in building and maintaining a competitive, quality program with student-athlete academic performance which will reflect the values and high standards of UH.
- Arnold will provide leadership and oversight for the academic progress and success of student-athletes including promoting and maintaining an environment that encourages academic

achievement as measured by academic eligibility, retention, and graduation.

- Arnold will comply with all applicable governing constitutions, by-laws, rules, policies, interpretations and regulations of the NCAA, UH, and any intercollegiate athletic conference or organization of which UH is or becomes a member of.

12. The Agreement also required Arnold to immediately report any NCAA violations of which he became aware:

Coach shall immediately advise the Athletics Director or his designee and the University's Athletics Compliance Office if Coach has reason to believe that NCAA violations have occurred or will occur and shall cooperate fully in any investigation of possible NCAA violations conducted or authorized by the University or the NCAA at any time.

THE NCAA INVESTIGATION AND NOTICE OF VIOLATION

13. In or around March 2014, the National Collegiate Athletic Association (“NCAA”) initiated an inquiry into the Basketball Team following allegations of an alteration made by a coach of the Basketball Team to a certified document required for a recruit to be admitted to UH.

14. On October 28, 2014, UH notified Arnold that it was terminating him without cause.

15. On January 31, 2015, the NCAA issued its “Notice of Allegations,” charging the Basketball Team with three Level I and four Level II violations, the two most severe level of charges that may be imposed by the NCAA.

16. The Notice of Allegations specifically alleged charges against Arnold.

17. For example, the Notice of Allegations alleged that Arnold:

- a. “obstruct[ed] an investigation or attempt[ed] to conceal the violations”;

b. “knowingly influenced the then directors of operation to conceal their participation in coaching, instructional and/or recruiting activities from the media and the institution in order to conceal the violations”;

c. “knowingly influenced then men’s basketball staff members to fabricate a story to report to the institution that the on-campus evaluation conducted between April 19 and 20, 2013, was neither arranged nor observed by the men’s basketball staff”;

d. “knowingly influenced at least four then men’s basketball student-athletes to refrain from reporting the issue of a then men’s basketball student-athlete having impermissible use of a vehicle with anyone outside the men’s basketball program in order to conceal the violation”; and

e. participated in unethical conduct by “knowingly influenc[ing] others to furnish to the institution false or misleading information, or to conceal information. . . .”

18. The NCAA further alleged that Arnold, as the Head Coach of the Basketball Team, condoned, participated in, or negligently disregarded the violation or related wrongful conduct.

19. The NCAA also alleged that Arnold intentionally, willfully, or blatantly disregarded the NCAA’s constitution and bylaws.

20. The NCAA did not find any mitigating factors applicable to Arnold.

21. Based on these charges, the NCAA referred the matter to a hearing panel of the NCAA Division I Committee on Infractions “pursuant to procedures applicable to a severe breach of conduct (Level I violation).”

ARNOLD FAILED TO USE A UH TRAVEL ADVANCE TO PAY FOR TRAVEL EXPENSES

22. The Men's Basketball Team traveled to Las Vegas, Nevada in late November 2012, to play a basketball game against the University of Nevada Las Vegas.

23. The Men's Basketball Team and staff stayed at The Palms Casino Resort ("Palms") during the trip.

24. Prior to the trip, in August 2012, UH and the Palms reached an agreement reserving a block of rooms for the Men's Basketball Team.

25. UH and the Palms estimated \$2,300.48 for the reservation.

26. On November 16, 2012, the University provided Arnold with University check #3031123 for \$2,435.48 to be used for the trip.

27. On November 23, 2012, Arnold deposited the check.

28. The Men's Basketball Team stayed at the Palms from November 30 through December 2, 2012.

29. On December 4, 2012, Arnold provided UH with a settlement statement in which he certified that he paid the \$2,123.52 Palms bill: "I certify that although hotel bill is in Benjy's Taylor's name, payment of \$2,123.52 for the hotel was made by me on 12/2/12."

30. Arnold also submitted a Travel Completion Form in which he represented that all expenses in his report were submitted in accordance with applicable state and federal law:

I, as traveler, certify that all expenses claimed in this report have been incurred and expended for the purpose of the above-mentioned travel, in accordance with applicable policies and procedures, federal rules and regulations, and applicable State laws.

31. Subsequently, the Palms advised UH that it never received payment.

32. The Palms has since turned the matter over to a collection agency.

33. As of the filing of this Complaint, the Palms maintains that the debt is outstanding.

34. UH has twice asked Arnold, through his counsel, for proof of payment to the Palms. Arnold has not responded.

UH TERMINATES ARNOLD;  
ARNOLD INITIATES GRIEVANCE PROCESS

35. On October 28, 2014, UH issued Arnold a termination letter, advising him that he was being terminated without cause, and that his position as Head Coach of the Basketball Team would officially end on January 26, 2015 (“Termination Letter”).

36. The Termination Letter advised Arnold that a “lump sum amount equal to the total amount remaining under your Employment Agreement will be provided to you within thirty (30) days after your last day of employment, January 26, 2015.”

37. UH timely paid Arnold \$148,545.48.

38. The day after the termination date of the Agreement, Arnold’s attorney sent UH two letters (collectively, “Demand Letters”) purportedly to “give [UH] notice of the contract provisions and tort duties breached by [UH]” related to Arnold.

39. Inasmuch as Arnold was an HGEA member, on February 3, 2015, Arnold filed a grievance against UH, claiming a violation of Section 8 of his Agreement and seeking \$1.4 million in damages.

40. The grievance process consists of four steps:

- Steps One, Two, and Three are internal to UH where the decision-makers will be the Athletic Director, Chancellor, and President of UH, respectively; and
- Step Four is an arbitration where the Arbitrator is “limited to deciding whether the Employer has violated any terms of” the collective bargaining agreement.

41. Arnold has completed Step Three of the grievance process. Arnold and HGEA have provided UH with notice of their intent to proceed to arbitration.

42. During the arbitration, the arbitrator will be confined to looking at the four corners of the Agreement.

43. However, the arbitrator should not be issuing decisions based on provisions of the Agreement that are unenforceable.

ARNOLD ALLEGES NEW VIOLATIONS POST-EMPLOYMENT

44. Arnold's Agreement required that he immediately report any NCAA violations of which he became aware.

45. In his Response and Supplemental Response to the Notice of Allegations, Arnold has alleged new NCAA violations that he failed to report during his coaching tenure.

COUNT I  
(Declaratory Relief)

46. UH re-alleges and hereby incorporates by reference, Paragraphs 1 through 45, inclusive, as if fully set forth here.

47. Under well-established Hawai'i case law, a liquidated damages clause that constitutes a penalty will not be enforced.

48. Arnold claims he is entitled to \$1.4 million dollars due under the Liquidated Damages Provision.

49. However, \$1.4 million is well in excess of any actual or anticipated damages incurred by Arnold as a result of the termination.

50. The Liquidated Damages Provision acts like a penalty and is therefore unenforceable as a matter of law.



51. If UH terminated Arnold without cause at the beginning of the Agreement, the clause would penalize Arnold inasmuch as, instead of being paid what “remains” on the Agreement, he would only be paid what he has earned.

52. In comparison, if UH terminated Arnold without cause on the back end of the Agreement, the clause wrongly penalizes UH by requiring it to pay Arnold twice for a job he did once.

53. Accordingly, the Liquidated Damages Provision functions as a penalty and cannot be enforceable.

54. As a result of the above-described events and circumstances, there is an actual and continuing controversy regarding the enforceability of the Liquidated Damages Provision.

55. A declaratory judgment will terminate the controversy with respect to whether the Liquidated Damages Provision is enforceable.

56. UH prays for a binding declaration that the Liquidated Damages Provision is unenforceable as a penalty.

COUNT II  
(Injunctive Relief)

57. UH re-alleges and hereby incorporates by reference, Paragraphs 1 through 56, inclusive, as if fully set forth here.

58. If the arbitration is allowed to proceed without first resolving the actual and continuing controversy regarding the enforceability of the Liquidated Damages Provision, then UH will be irreparably harmed for which there will be no adequate remedy at law.

59. UH is entitled to an order enjoining Defendants from proceeding forward with the arbitration unless and until this Court resolves the actual and continuing controversy regarding the enforceability of the Liquidated Damages Provision.

COUNT III

(Breach of Employee's Duty of Loyalty/Fiduciary Duty to Employer)

60. UH re-alleges and hereby incorporates by reference, Paragraphs 1 through 59, inclusive, as if fully set forth here.

61. Under Hawai'i law, an employee owes a fiduciary duty to his employer and is prohibited from acting in any manner inconsistent with the agency relationship during his employment.

62. As an employee of UH, Defendant owed this fiduciary duty to UH, separate and apart from his express contractual duties owed to UH.

63. By the actions described above, Defendant breached his duty of loyalty and/or fiduciary duty to UH.

64. As a direct and legal result of Arnold's breach of his duty of loyalty and fiduciary duty to UH, UH has been damaged in an amount to be proven at trial.

COUNT IV

(Fraud by Concealment)

65. UH re-alleges and hereby incorporates by reference, Paragraphs 1 through 64, inclusive, as if fully set forth here.

66. Arnold repeatedly and intentionally deceived UH into believing that Arnold and his Basketball Team complied with all NCAA constitutions, by-laws, rules, policies, interpretations, and regulations.

67. Separate and apart from his express contractual duties owed to UH, Arnold was duty-bound, pursuant to the fiduciary duty he owed to UH, to disclose, truthfully and accurately, to UH that he failed to comply with all NCAA constitutions, by-laws, rules, policies, interpretations, and regulations.

68. By neglecting to disclose to UH that he failed to comply with all NCAA constitutions, by-laws, rules, policies, interpretations, and regulations, Arnold intentionally misled UH to believe that he was in full compliance with all NCAA constitutions, by-laws, rules, policies, interpretations, and regulations.

69. Arnold knowingly used his silence about his failure to comply with all NCAA constitutions, by-laws, rules, policies, interpretations, and regulations with the intention that UH would rely on his silence to UH's detriment.

70. Arnold's concealment of his failure to comply with all NCAA constitutions, by-laws, rules, policies, interpretations, and regulations was material.

71. UH did in fact rely on Arnold's silence about his compliance with all NCAA constitutions, by-laws, rules, policies, interpretations, and regulations in continuing to employ and pay Arnold his full-time salary and benefits and otherwise support the Basketball Team.

72. UH's reliance upon Arnold's omissions of fact were reasonable and justified.

73. As a direct and legal result of Arnold's concealment, UH has been damaged in an amount to be proven at trial.

74. Arnold's conduct described above was willful, malicious, fraudulent, and performed in conscious disregard of UH's rights. Accordingly, punitive damages against Arnold are warranted.

COUNT V  
(Negligent Failure to Disclose)

75. UH re-alleges and hereby incorporates by reference, Paragraphs 1 through 74, inclusive, as if fully set forth here.

76. Arnold had a duty to exercise reasonable care in obtaining and communicating information to UH about the Basketball Team.

77. Arnold failed to disclose material information to UH, including but not limited to his failure to comply with all NCAA constitutions, by-laws, rules, policies, interpretations, and regulations, or his failure to pay for the hotel room block at the Palms.

78. Arnold's material omissions were misleading or false, which he knew or should have known in the exercise of reasonable care.

79. Arnold's material omissions were made to UH for the benefit of Arnold.

80. UH did in fact rely on Arnold's omissions regarding his lack of compliance with all NCAA constitutions, by-laws, rules, policies, interpretations, and regulations in continuing to employ and pay Arnold his full-time salary and benefits and otherwise support the Basketball Team, along with his omission in refusing to pay the hotel room block at the Palms.

81. UH's reliance upon Arnold's omissions of fact were reasonable and justified.

82. As a direct and legal result of Arnold's concealment, UH has been damaged in an amount to be proven at trial.

COUNT VI  
(Hawai'i False Claims Act)

83. UH re-alleges and hereby incorporates by reference, Paragraphs 1 through 82, inclusive, as if fully set forth here.

84. Arnold has knowingly caused to be presented to an officer or employee of the State a false or fraudulent claim for payment, and/or caused to be made or used a false record or statement and/or conspired to defraud the State by getting a false or fraudulent claim paid in violation of the Hawai'i False Claims Act, Hawaii Revised Statutes §§ 661-21 et. seq.

85. As a direct and legal result of Arnold's violation of the Hawai'i False Claims Act, UH is entitled to treble damages and civil penalties as provided by law.

COUNT VII  
(Conversion)

86. UH re-alleges and hereby incorporates by reference, Paragraphs 1 through 85, inclusive, as if fully set forth here.

87. Arnold has wrongfully and intentionally exercised control over the monies that UH provided him as reimbursement for payment of the hotel room block at the Palms.

88. Arnold's continued refusal to pay the monies to the Palms, despite having been reimbursed by UH, is an act of conversion.

89. As a direct and legal result of Arnold's conversion, UH has been damaged in an amount to be proven at trial.

COUNT VIII  
(Unjust Enrichment)

90. UH re-alleges and hereby incorporates by reference, Paragraphs 1 through 89, inclusive, as if fully set forth here.

91. Arnold has wrongfully and unjustly received monies from UH for repayment of the block of rooms at the Palms.

92. If Arnold is allowed to retain the monies received from UH to pay the Palms, he will have been unjustly enriched at UH's expense.

93. The conduct of Arnold is contrary to the fundamental principles of equity and good conscience. Arnold should be ordered to make restitution to UH in an amount to be proven at trial, and be ordered to compensate UH for the fair and reasonable value of its unjust retention and use of these benefits, in addition to the monetary damages addressed elsewhere in this Complaint.

COUNT IX  
(Constructive Trust)

94. UH re-alleges and hereby incorporates by reference, Paragraphs 1 through 93, inclusive, as if fully set forth here.

95. Due to Arnold's breach of his fiduciary duties owed to UH, UH is entitled to reimbursement of all the monies UH paid him under the Agreement.

96. UH is also entitled to reimbursement of the monies Arnold wrongfully obtained when he failed to pay the Palms.

97. Arnold holds these monies in a constructive trust, and he is obligated to return those monies to UH.

WHEREFORE, UH prays for judgment as follows:

A. That this Court issue a binding declaration that the Liquidated Damages Provision is unenforceable as a penalty;

B. That this Court award UH special, compensatory, treble and consequential damages against Arnold, as may be appropriate, in an amount to be determined at trial;

C. That this Court award UH punitive and/or exemplary damages against Arnold in an amount to be determined at trial;

D. That this Court impose a constructive trust and/or other appropriate remedy to the extent necessary to secure payment for amounts owed by Arnold to UH;

E. That this Court award UH its attorneys' fees and costs and prejudgment and postjudgment interest against Arnold as allowed by law; and

F. That this Court award UH such further and other equitable legal relief as it deems just and proper.

DATED: Honolulu, Hawai'i, June 10, 2015.

A handwritten signature in black ink, appearing to read 'William C. McCorrison', written over a horizontal line.

WILLIAM C. McCORRISTON  
KENNETH J. MANSFIELD  
JORDON J. KIMURA  
JESSICA M. WAN

Attorneys for Plaintiff  
UNIVERSITY OF HAWAI'I

IN THE CIRCUIT COURT OF THE FIRST CIRCUIT

STATE OF HAWAI'I

UNIVERSITY OF HAWAI'I,	)	Civil No. _____
	)	(Other Civil Action)
Plaintiff,	)	
	)	DEMAND FOR JURY TRIAL
vs.	)	
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GIBSON ARNOLD; HAWAII	)	
GOVERNMENT EMPLOYEES	)	
ASSOCIATION, AFSCME LOCAL 152,	)	
AFL-CIO; JOHN DOES 1-10; JANE DOES	)	
1-10; DOE CORPORATIONS 1-10; and DOE	)	
ENTITIES 1-10,	)	
	)	
Defendants.	)	
_____	)	

DEMAND FOR JURY TRIAL

Plaintiff UNIVERSITY OF HAWAI'I, by and through its attorneys, McCorrison Miller Mukai MacKinnon LLP, hereby demand trial by jury on all issues triable herein.

DATED: Honolulu, Hawai'i, June 10, 2015.



WILLIAM C. MCCORRISTON  
KENNETH J. MANSFIELD  
JORDON J. KIMURA  
JESSICA M. WAN

Attorneys for Plaintiff  
UNIVERSITY OF HAWAI'I



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AFL-CIO; JOHN DOES 1-10; JANE DOES	)	
1-10; DOE CORPORATIONS 1-10; and DOE	)	
ENTITIES 1-10,	)	
	)	
Defendants.	)	
_____	)	

SUMMONS

STATE OF HAWAI'I

TO THE ABOVE-NAMED DEFENDANTS

YOU ARE HEREBY SUMMONED and required to file with the court and serve upon McCorrison Miller Mukai MacKinnon LLP, Plaintiff's attorneys, whose address is Five Waterfront Plaza, 4th Floor, 500 Ala Moana Boulevard, Honolulu, Hawai'i 96813, an answer to the Complaint which is herewith served upon you, within twenty (20) days after service of this summons upon you, exclusive of the day of service.

If you fail to make your answer within the twenty day time limit, judgment by default will be taken against you for the relief demanded in the Complaint.

Pursuant to Rule 4(b) of the Hawai'i Rules of Civil Procedure, this summons shall not be personally delivered between 10:00 p.m. and 6:00 a.m. on premises not open to the general

public, unless a judge of the above-entitled court permits, in writing on this summons, personal delivery during those hours.

A failure to obey this summons may result in an entry of default and default judgment against the disobeying person or party.

DATED: Honolulu, Hawai'i, \_\_\_\_\_.

\_\_\_\_\_  
CLERK OF THE ABOVE ENTITLED COURT