

EXHIBIT 17
TO DECLARATION OF O'CONNOR



July 31, 2008

VIA EMAIL AND U.S. MAIL

**Re: Nelson, Don vs. Dallas Basketball Limited d/b/a Dallas Mavericks
JAMS Ref. No.: 1310016794**

Dear Counsel:

Enclosed please find the **INTERIM AWARD** executed by Hon. Glen M. Ashworth (Ret.).

Please contact me if you have any questions.

Sincerely,

Megan Moyer
Case Manager
mmoyer@jamsadr.com
Fax# 214-720-6010

Encl.

DON NELSON,	§	
	§	
Claimant,	§	Matter in Arbitration
v.	§	
	§	JAMS Reference No. 1310016794
DALLAS BASKETBALL LIMITED	§	
d/b/a DALLAS MAVERICKS,	§	
	§	
Respondent.	§	

INTERIM AWARD

Parties and Counsel: The parties are identified in the caption and are represented as follows:

Mark Talbot Davenport
Donald Colleluori
Ryan K. McComber
Figari & Davenport LLP
3400 Bank of America Plaza
901 Main Street, LB 125
Dallas, TX 75202-3796
(Ph.) 214-939-2000; (Fax) 214-939-2090

and

John D. O'Connor
O'Connor & Associates
One Embarcadero Center, Suite 1020
San Francisco, CA 94111
(Ph.) 415-693-9960; (Fax) 415-981-0222
Counsel for Claimant / Counter-Respondent

Geoffrey S. Harper
Steven H. Stodghill
Thomas M. Melsheimer
Natalie Arbaugh
Fish & Richardson P.C.
1717 Main Street, Suite 5000
Dallas, TX 75201
(Ph.) 214-747-5070; (Fax) 214-747-2091
Counsel for Respondent / Counter-Claimant

Arbitrator:

Hon. Glen M. Ashworth (Ret.)
JAMS – The Resolution Experts
8401 N. Central Expressway, Suite 610-LB32
Dallas, TX 75225
(Ph.) 214-744-5267; (Fax) 214-720-6010

Case Manager:

Megan F. Moyer
JAMS – The Resolution Experts
8401 N. Central Expressway, Suite 610-LB32
Dallas, TX 75225
(Ph.) 214-891-4525; (Fax) 214-720-6010
Email: MMoyer@jamsadr.com

In accordance with the parties' agreement and pursuant to Section 8(b) of the Fifth Amendment to the Employment Agreement, all matters in controversy were submitted to binding arbitration before Hon. Glen M. Ashworth, serving as the parties' sole Arbitrator. The arbitration was convened in Dallas, Texas, over two days beginning June 23, 2008. The parties proceeded to present their offers of proof, including statements of counsel, testimony of witnesses, depositions and documentary evidence. Thereafter, the parties submitted post-arbitration briefing for consideration.

By agreement of the parties, the issue of attorney's fees and costs was bifurcated and deferred pending this Interim Award.

All issues have been determined by the evidence presented during the Arbitration. The standard of proof is based on a preponderance of the evidence, unless otherwise stated.

BACKGROUND

On February 7, 1997, Claimant, Don Nelson ("Nelson"), executed an Employment Agreement ("Agreement") to become General Manager of the Respondent, Dallas Basketball Limited d/b/a Dallas Mavericks ("Mavericks"). Thereafter, the Agreement was amended five (5) times, beginning with a December 4, 1997 First Amendment to reflect Nelson's assumption of duties as Head Coach through the remainder of the 1997-1998 NBA season. A Second Amendment became effective July 1, 1998 to retain Nelson as Head Coach through June 30, 2000, as well as General Manager through June 30, 2003. The Third Amendment was executed to employ Nelson as Head Coach through June 30, 2003; General Manager through June 30, 2006; and, as a Consultant from July 1, 2006 through June 30, 2011. Effective August 1, 2003, a Fourth Amendment was executed to address scheduled deferred compensation payments in the event of Nelson's death. Finally, the Fifth Amendment became effective July 1, 2003 and extended Nelson's head coaching responsibilities through June 30, 2006. The Fifth Amendment was in effect during the time period of this dispute.

While the Agreement was amended several times, it was an integrated contract which remained in effect, subject to control or modification by a provision of a more recent conflicting Amendment. It is the Fifth Amendment which essentially contains all the operative terms regarding Nelson's employment duties and compensation, including deferred compensation. Under its terms, Nelson was to receive annually \$3.5 million for serving as Head Coach; \$1.6 million for serving as General Manager; and, \$900,000 in deferred compensation, through June 30, 2006. Thereafter, he was to receive \$200,000

per year as a Consultant through June 30, 2011.

In January, 2000, the Mavericks were purchased by its current majority owner, Mark Cuban ("Cuban"). By all accounts, initially a good relationship existed between Cuban and Nelson; however, by the time of the Fifth Amendment, it had deteriorated. On March 19, 2005, Nelson stepped down from his duties as Head Coach, but pursuant to an agreement with Cuban, his Fifth Amendment to the Agreement remained in effect and there was no evidence it was ever terminated in accordance with Section 8.A or B of the Agreement. The remainder of the season was completed under a new head coaching regime.

On July 1, 2006, Nelson was to begin the consulting portion of his employment, in accordance with the terms of the Fifth Amendment. The first consulting payment (approximately \$8,000) was due on July 15, 2006, along with the larger deferred compensation payment (approximately \$40,000). While the deferred compensation payment was made, the consulting payment was not. The testimony reflects that Nelson and Maverick's CFO, Floyd Jahner, discussed the non-payment, as well as either a lump sum payment (according to Jahner) or a buy-out (according to Nelson). Regardless, no consulting payment was made, nor again on July 31, 2006. Nelson's personal attorney, John O'Connor, sent a notice of breach letter to the Mavericks on August 4, 2006, and yet, the third consulting payment was not made on August 15, 2006.

On August 30, 2006, Nelson accepted a head coaching position with the NBA Golden State Warriors. On August 31, 2006, Nelson did not receive either his consulting salary or his scheduled payment for deferred compensation. The Mavericks did, however, send Nelson a notice of breach letter for taking the Golden State position and

gave him 30 days to cure the breach.

The evidence supports that since that time, no further consulting or deferred compensation payments have been paid by the Mavericks and Nelson continues to serve as Head Coach of the Warriors.

FINDINGS AND CONCLUSIONS

The Agreement and its five subsequent Amendments constitute one valid integrated contract and the threshold issue is to determine whether an ambiguity exists which would require the consideration of parol evidence. This determination is a question of law and must be decided by looking at the contract as a whole in light of the circumstances surrounding its formulation. The primary concern is to ascertain the parties' intentions from the "four corners" of the agreement and to give the contractual language its plain grammatical meaning. *Reilly v. Rangers Mgt., Inc.*, 727 S.W.2d 525 (Tex. 1987). From a review of the entire Agreement, and in concurrence with the parties' acknowledgment, the Agreement is found to be unambiguous.

Significant parol evidence was offered during the arbitration hearing, and while anecdotal, such extrinsic testimony was irrelevant to any interpretation of the Agreement. *Nat'l Union Fire Ins. Co. v. CBI Indus., Inc.*, 907 S.W.2d 517 (Tex. 1995).

A. Nelson's Deferred Compensation

The terms of Nelson's compensation, including deferred compensation, are principally found in Section 4 and Exhibit A of the Fifth Amendment. The clear and plain reading of the entire Agreement, including the aforementioned Section 4 and

Exhibit A, reflect that while the deferred compensation was to be "payable" in future years, it was both "earned" and "accrued" by Nelson during his tenure as Head Coach/General Manager, ending on June 30, 2006. All relevant language in the Agreement supports this conclusion.

Section 4(a) provides that the deferred compensation earned in the Fifth Amendment term (July 1, 2003 – June 30, 2006) was "in addition to the deferred compensation already earned and accrued by Employee during the period beginning July 1, 1998 through June 30, 2003." Likewise, Section 4(c) provides that "The deferred compensation earned by Employee for each 12-month period as referenced in Paragraph 4(a) above shall be earned pro-rata over such 12 month period." Indeed, Exhibit A also clearly reflects the periods in which the deferred compensation was "earned." When harmonizing this language with the entire Agreement, there is simply no contractual support that Nelson had not fully earned his entire deferred compensation amount by June 30, 2006, nor was there any clear language which tied it to any contractual performance after it had accrued.

Pursuant to the terms of the Agreement and according to the undisputed testimony, including that of Floyd Jahner, Nelson had fully earned \$6.6 million in deferred compensation that remained unpaid as of June 30, 2006. Although scheduled to be payable in future years, Nelson had fully performed all of his contractual obligations as Head Coach/General Manager and had the vested right to receive the balance of his fully earned and accrued deferred compensation following the termination of the Agreement.

Finally, the testimony supports and the parties concur that the Agreement was not terminated pursuant to either Section 8.A (cause) or 8.B (without cause). Inasmuch as the provisions of Section 9 of the Agreement contemplate possible offset following an 8.B termination (which did not occur) and furthermore since there was no "remaining" and unearned deferred compensation due at the time of the termination, any offset from the Golden State employment is inapplicable under the Agreement.

B. First Breach

The parties are in agreement and the evidence supports that Nelson's Employment Agreement did not terminate pursuant to Section 8, but rather ceased to operate pursuant to breach. Each party has correctly cited *Mustang Pipeline Co. v. Driver Pipeline Co.*, 134 S.W.3d 195 (Tex. 2004) for the fundamental principle of contract law that when one party commits a material breach of contract, the other party is discharged or excused from further performance. Additionally, materiality is a question of fact and is subject to an analysis such as found in *Hernandez v. Gulf Group Lloyds*, 875 S.W.2d 691 (Tex. 1994).

The evidence reveals that the Mavericks failed to pay Nelson his consulting salary beginning on July 1, 2006. While there were discussions within the Mavericks' organization, as well as some negotiations between Jahner and Nelson, the salary was not paid. Likewise, the consulting salary was again not paid on July 31, 2006. Even following an August 4, 2006 letter from Nelson's attorney, John O'Connor, the August 15, 2006 consulting salary was not paid.

Certainly the approximately \$8,000 consulting payments were small in comparison to the previously earned Head Coach/General Manager salaries in former

years, but at the time of non-payment, they represented Nelson's salary and benefit of the bargain going forward. Additionally, there is no evidence that the Mavericks ever cured this breach with payment. Using a *Mustang Pipeline/Hernandez* analysis, the non-payment was a material breach and was the operative basis for the termination of the Agreement.

While Nelson's deferred compensation was previously earned, regardless, the Agreement ceased to operate pursuant to the Mavericks' initial breach. Nelson was therefore relieved contractually from his ongoing consulting position, as well as the non-competition provision of Section 7, which was only applicable "during the term" of the Agreement." Consequently, inasmuch as he was no longer contractually committed to the Mavericks pursuant to the Agreement, there were no legal impediments to prevent Nelson from taking the head coaching job with the Warriors on August 30, 2006.

C. Mavericks' Counter Claims

By way of counterclaim, the Mavericks aver that Nelson breached his fiduciary duty by taking the Warrior's head coaching position and should be subjected to an equitable disgorgement of his Golden State compensation. At the outset, to prevail on a breach of fiduciary claim, the Mavericks must establish (1) that the parties had a fiduciary relationship; (2) Nelson breached a fiduciary duty; and, (3) Nelson's breach resulted in either injury to the Mavericks or benefit to Nelson. *Kelly v. Gaines*, 181 S.W.3d 394 (Tex. App. – Waco 2005).

The determination of a fiduciary duty must be decided on a case by case basis. *Johnson v. Brewer & Prichard, P.C.*, 73 S.W.3d 193 (Tex. 2002). Beginning July 1, 2006, Nelson served only as a Consultant to the Mavericks with no specific duties or

responsibilities under the Agreement and he was without any authority to bind the organization. In fact, the testimony reflects that his services were not utilized in this position at all. Based on the evidence presented, the Mavericks have failed to establish that they reposed any trust in Nelson as a Consultant or that a fiduciary relationship existed. Certainly no fiduciary relationship existed after the Agreement terminated by the Mavericks' own breach.

Additionally, the second prong is likewise found factually insufficient. Although Section 10 of the Agreement did contain a Proprietary and Confidential Information clause, there was insufficient evidence to support that Nelson violated its terms upon leaving the Mavericks' organization. To the contrary, the greater weight of the evidence supports that upon termination, Nelson did not use or disclose any of the Mavericks' proprietary or confidential information, but rather left with only his over 40 years of NBA experience.

Finally, any claim for an equitable disgorgement under the evidence is legally and factually inapplicable. Therefore, the Mavericks' counter claims against Nelson are DENIED.

D. Nelson's Damages

The Mavericks materially breached the Agreement initially by non-payment of Nelson's consulting salary beginning July 15, 2006 and further they failed to pay Nelson's deferred compensation payment on August 31, 2006, and thereafter. The evidence also supports that due to the Mavericks' repudiation of the Agreement, Nelson is entitled to recover immediately the total amount of deferred compensation that would otherwise have been paid to him over several years.

The parties have agreed and stipulated that through June 30, 2008, \$1,875,000 deferred compensation has not been paid. Additionally, future deferred compensation that has not been paid, discounted to present value as of June 30, 2008, is \$4,242,575.53. The total of which is \$6,117,575.53. The interest on the past due amounts through June 30, 2008 is \$132,534.25 at 5% per annum and carries a per diem of \$256.85. (Hearing Tr. pp. 584-585.) These stipulated amounts were used to calculate Nelson's damages under the Agreement as of the date of this Interim Award.

INTERIM AWARD

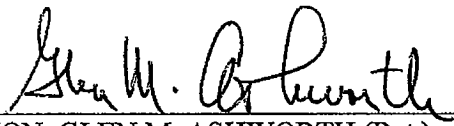
For the foregoing reasons, it is ORDERED that:

1. Nelson's breach of contract claim against the Mavericks is GRANTED;
2. Nelson is AWARDED damages as follows:
 - (a) \$1,958,333.00 in past due deferred compensation through July 31, 2008;
 - (b) \$146,740.84 interest on past due payments through July 31, 2008 (accruing at \$268.26/day); and,
 - (c) \$4,171,564.62 as the present day value of future deferred compensation payments.
 - (d) TOTAL AWARD is therefore \$6,276,638.46;
3. All awarded amounts shall bear post-judgment interest at the prevailing statutory rate;
4. Mavericks' counter claims are DENIED;

5. With the exception of the bifurcated issue of attorney's fees and costs, all other relief not expressly granted is DENIED. (In the event the parties are unable to reach an agreement on the attorney's fees and costs issue within 7 days of this Interim Award, they are instructed to contact the Case Manager to set up a conference with the Arbitrator to establish a hearing procedure.)

This Interim Award is interlocutory and the Arbitrator shall continue to retain jurisdiction pending entry of a Final Award herein.

DATED: July 31, 2008.


HON. GLEN M. ASHWORTH (Ret.),
Arbitrator

PROOF OF SERVICE BY EMAIL & U.S. MAIL

Re: Nelson, Don vs. Dallas Basketball Limited d/b/a Dallas Mavericks
Reference No. 1310016794

I, Cynthia Cleaveland, not a party to the within action, hereby declare that on July 31, 2008 I served the attached Interim Award on the parties in the within action by Email and by depositing true copies thereof enclosed in sealed envelopes with postage thereon fully prepaid, in the United States Mail, at Dallas, TEXAS, addressed as follows:

John D. O'Connor Esq.
O'Connor & Associates
One Embarcadero Center
#1020
San Francisco, CA 94111 USA
Tel: 415-693-9960
Email: lisa.oconnorlaw@sbcglobal.net

Geoffrey S. Harper Esq.
Fish & Richardson P.C.
1717 Main Street
Suite 5000
Dallas, TX 75201
Tel: 214-292-4004
Email: harper@fr.com
Fax: 214-747-2091

Mark Talbot Davenport Esq.
Figari & Davenport LLP
3400 Bank of America Plaza
901 Main Street, LB 125
Dallas, TX 75202-3796
Tel: 214-939-2002
Email: mdavenport@figdav.com

Donald Colleluori Esq.
Figari & Davenport LLP
3400 Bank of America Plaza
901 Main Street, LB 125
Dallas, TX 75202-3796
Tel: 214-939-2007
Email: don.colleluori@figdav.com
Fax: 214-939-2090

Ryan K. McComber Esq.
Figari & Davenport LLP
3400 Bank of America Plaza
901 Main Street, LB 125
Dallas, TX 75202-3796
Tel: 214-939-2014
Email: rmccomber@figdav.com

Thomas Melsheimer Esq.
Fish & Richardson P.C.
5000 Bank One Center
1717 Main St.
Dallas, TX 75201
Tel: 214-292-4001
Email: melsheimer@fr.com
Fax: 214-747-2091

Michael Hilgers Esq.
Fish & Richardson P.C.
5000 Bank One Center
1717 Main St.
Dallas, TX 75201
Tel: 214-760-6124
Email: hilgers@fr.com

Natalie L. Arbaugh Esq.
Fish & Richardson P.C.
5000 Bank One Center
1717 Main St.
Dallas, TX 75201
Tel: 214-292-4076
Email: arbaugh@fr.com
Fax: 214-747-2091

I declare under penalty of perjury the foregoing to be true and correct. Executed at

Dallas, TEXAS on July 31, 2008.

A handwritten signature in cursive script, reading "Cynthia Cleaveland". The signature is written in dark ink and is positioned above a horizontal line.

Cynthia Cleaveland

ckcleaveland@jamsadr.com