STATE OF NORTH CAROLINA
COUNTY OF MECKLENBURG

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
23CV040918-590

ATLANTIC COAST CONFERENCE,

Plaintiff,

v.

BOARD OF TRUSTEES OF FLORIDA STATE UNIVERSITY,

Defendant.

FLORIDA STATE UNIVERSITY BOARD OF TRUSTEES' BRIEF IN SUPPORT OF MOTION TO DISMISS OR, IN THE ALTERNATIVE, STAY THE ACTION

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Other Authorities

Pursuant to BCR 7, Defendant Florida State University Board of Trustees ("FSU Board") submits this brief in support of its motion to dismiss the First Amended Complaint ("Amended Complaint") filed by Plaintiff Atlantic Coast Conference ("ACC") pursuant to Rules 12(b)(1), 12(b)(2), 12(b)(6), and 12(b)(7); or, in the alternative, to stay the ACC's anticipatorily-filed action, in favor of the FSU Board's more comprehensive action currently pending in the Circuit Court of the Second Judicial Circuit in and for Leon County, Florida (the "Florida Action"), pursuant to N.C.G.S. § 1-75.12.

INTRODUCTION

The ACC admits in both its Complaint for Declaratory Judgment ("Original Complaint") and its Amended Complaint that it initiated this action on December 21, 2023 because it speculated that the FSU Board might vote to authorize the filing of the Florida Action in a meeting scheduled for the very next morning. (ECF No. 5 ¶ 114; ECF No. 11 ¶ 149.)[1] This type of improper "procedural fencing" has been rejected time and again by North Carolina courts.

But irrespective of the ACC's undisputed race to the courthouse to secure what the ACC presumably believes to be a more favorable venue – necessitating, at a minimum, a stay of this action – the ACC's lawsuit should be dismissed under Rule 12(b) for a host of reasons.

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[1] Notably, the summons was issued six minutes before the Court's close of business on December 21, 2023 (*see* ECF No. 3), but the ACC did not electronically file its Original Complaint with this Court until 5:18 p.m. (*see* ECF No. 5). The ACC then served the General Counsel for FSU via process server the following morning in Tallahassee, Florida as she exited the FSU Board's publicly-noticed and scheduled meeting. (ECF No. 7 ¶ 4.)

First, the ACC prematurely filed suit before an actual or justiciable controversy arose, and the lack of such controversy either renders (a) this action a nullity due to the lack of subject matter jurisdiction at that time, or (b) its true filing date January 17, 2024 – the date the ACC filed its Amended Complaint.

Second, in its race to the courthouse, the ACC made no attempt to provide member notice or to obtain the two-thirds member vote required by its Constitution to initiate its lawsuit, and it also failed to properly plead (generally or specifically) compliance with this mandatory condition precedent.

Third, the ACC is not permitted to sue the FSU Board in North Carolina, as the FSU Board is not registered in North Carolina and has not waived its sovereign immunity anywhere except within the boundaries of the State of Florida.

Fourth, the Amended Complaint fails to plead that the FSU Board approved the Grants of Rights as required by Florida law.

Fifth, North Carolina law for unincorporated nonprofit associations does not support the ACC's attempt to impose broad, extra-contractual, fiduciary duties on its members to act in the best interest of the ACC, especially when doing so would be detrimental to the member.

Thus, as further stated below, the ACC's anticipatorily-filed action should be dismissed pursuant to Rule 12(b) or, in the alternative, stayed until final completion of the Florida Action – which will resolve all the issues in the Amended Complaint – pursuant to N.C.G.S. § 1-75.12.

FACTUAL BACKGROUND

The relevant background facts of the parties' dispute and respective claims in both this action and the pending Florida Action are as follows:

A. Background of The Dispute.

The dispute raised by the ACC's Original Complaint was limited to the parties' rights and obligations under the 2013 Grant of Rights and the 2016 Amended Grant of Rights agreements (collectively, the "Grants of Rights"). In its Amended Complaint (filed after the Florida Action), the ACC raised, for the first time, claims of alleged breaches of purported confidentiality obligations and other extra-contractual obligations, all of which allegedly arise out of the parties' dispute regarding the Grants of Rights.

As background, the Grants of Rights are purported contracts whereby the members allegedly provided their media rights for "home games" to the ACC so that it could aggregate those rights and negotiate long-term media deals with third party broadcasters, like ESPN, on their behalf and for their benefit. (ECF No. 11 ¶¶ 57-59.) In truth, the ACC actually "entered into its first Multi-Media Agreement with ESPN . . . grant[ing] ESPN" these aggregated media rights in 2010 (three years before the first "Grant of Rights" was even executed). (*See* ECF No. 11 ¶ 42.)

In contrast, the Florida Action encompasses all issues pertaining to the Grants of Rights, and spans much more including, but not limited to, the allegation that the ACC – as fiduciary on behalf of each of its members – abjectly failed to manage the conference including by not maximizing the media rights of its members (years before the ACC first conceived the Grant of Rights), misrepresented the terms of those media

agreements, and cloaked in secrecy not just its dealings with ESPN but the actual monetary terms of those agreements struck with ESPN. (*See generally*, ECF No. 19.1 ¶¶ 105-47.)[2]

In particular, the FSU Board contends the Grants of Rights were never supported by adequate consideration and were obtained by the ACC through representations and assurances that never came to fruition. *Id.* Moreover, the Florida Action challenges the entire penalty structure of the ACC (not just the Grants of Rights) and reaches into matters of restraint of trade, public policy, breach of contract, and whether the ACC has fulfilled its contractual duties to its members expressly set forth in the ACC Constitution and Bylaws.

Although the ACC has tried to expand this action with its Amended Complaint, the dispute it raises focuses almost exclusively on whether the Grants of Rights are enforceable against all of its members and alleging (in the Amended Complaint only) that the FSU Board improperly disclosed certain financial and other terms of the ESPN media agreements in its Complaint in the Florida Action and breached its purported duty to act in the best interest of the ACC, to the detriment of itself, just by filing the Florida Action.

[2] This Court is permitted to take judicial notice of the pleadings in the Florida Action for purposes of this motion. *See Zloop, Inc. v. Parker Poe Adams & Bernstein LLP*, 2018 NCBC LEXIS 16, at *13-15 (N.C. Super. Ct. Feb. 16, 2018) (citing North Carolina authorities permitting judicial notice for Rule 12 motions to dismiss/on the pleadings).

B. Relevant Portions of the ACC Constitution.

The ACC's ability to act and operate on its members' behalf is governed by the ACC's Constitution, which specifies the procedures necessary to initiate material litigation. Pursuant to the ACC Constitution, "the initiation of any material litigation involving the Conference" requires a two-thirds vote of its member directors after due notice of a meeting at which a quorum is present. (ECF No. 11.1 §§ 1.5.4.3 and 1.6.2.) (emphasis added).

C. Prior Litigation Involving the ACC and a Former Member Seeking to Leave the Conference.

This current lawsuit is not the first time the ACC has sued an existing member. The ACC also filed suit against the University of Maryland ("Maryland") and the Maryland Board of Regents in the North Carolina Business Court (Case No. 12-CVS-10736) ("ACC-Maryland Case") when Maryland withdrew from the Conference.[3] The ACC specifically alleged in the ACC-Maryland Case that:

> 39. The ACC, as an unincorporated nonprofit association, is duly authorized by each member of the ACC to pursue legal action to enforce the rights of members against one or more other members related to duties and obligations owed to the ACC. Each member other than defendant Maryland has specifically authorized the ACC to act in that capacity in this Action.

See ACC-Maryland Case Complaint (ECF No. 19.2 ¶ 39) (emphasis added).[4]

[3] In 2013, the Grant of Rights was originally proposed to the conference members, in part, because of Maryland's withdrawal in 2012 and that corresponding lawsuit. (*See* ECF No. 11 ¶¶ 54-57; ECF No. 19.1 ¶¶ 66-99.)

[4] This Court can similarly take judicial notice of the ACC-Maryland Case.

D. The December 21, 2023 Board Meeting Announcement and the ACC's Filing of This Lawsuit Just Hours Later.

On the morning of December 21, 2023, the FSU Board noticed a special emergency meeting for 10:00 am on December 22, 2023. Just hours after this announcement, the ACC e-filed this 33-page lawsuit at 5:18 p.m. and then personally served FSU's general counsel in Tallahassee, Florida as she left the FSU Board's meeting the following morning. (*See* ECF No. 3; ECF No. 5; ECF No. 7 ¶ 4.)

The ACC's Original Complaint raised only two causes of action, both of which sought only declaratory relief regarding the enforceability of the Grants of Rights.

E. The Florida Action.

At its scheduled meeting on the morning of December 22, 2023, the FSU Board voted to authorize the initiation of litigation against the ACC to obtain a declaration from the Florida Courts addressing the ACC's misconduct and mishandling of conference member media rights and revenue generation/sharing over a period of the prior 13 years dating back to 2010, preceding the Grant of Rights by three years, including a claim under Fla. Stat. § 542.18 seeking a declaration that the ACC's withdrawal penalties are an unenforceable restraint on trade. Following that meeting, the FSU Board filed the Florida Action at 11:26 a.m. on December 22, 2023.

F. The ACC's Amended Complaint.

On January 17, 2024, less than a month after its initial filing, the ACC served its Amended Complaint, in which it asserted four new claims derived entirely from the previously-filed Florida Action, and (for the first time) sought money damages

from the FSU Board for purported conduct that preceded, in part, the ACC's original declaratory Complaint.

Neither of the ACC's Complaints allege that any of the mandatory conditions precedent necessary to bring this North Carolina action on December 21, 2023 were (or have ever been) satisfied, nor do they specifically allege that the ACC complied or even attempted to comply with § 1.5.4.3 or § 1.6.2 of the ACC Constitution by attaining the requisite member votes necessary to initiate litigation upon due notice and proper quorum.

Notably, both of the ACC's Complaints reference the ACC's notice of the December 22, 2023 Board meeting and the ACC's corresponding decision to initiate this action on December 21, 2023, before that meeting:

> 114. ***Upon information and belief***, the "emergency" Board meeting presently scheduled for 10:00 am on December 22, 2023 is for the purpose of initiating litigation against the Conference and challenging the validity and enforceability of the Grant of Rights and amended Grant of Rights.

(ECF No. 5 ¶ 114.) (emphasis added).

> 149. With the knowledge of Florida State's clear intention to breach the Grant of Rights and Amended Grant of Rights, and being under an obligation to take all commercially reasonable measures to protect those rights, ***the Conference filed its Complaint on December 21, 2023, after notice of the alleged "emergency" meeting***.

(ECF No. 11 ¶ 149) (emphasis added).[5]

[5] Although it is not entirely clear, the ACC apparently claims that the FSU Board failed to comply with its own internal procedures for scheduling the emergency meeting on December 22, 2023. (ECF No. 11 ¶¶ 143-47.) Even if this were true and the ACC had standing to make such a claim (both of which the FSU Board denies), this allegation is a red herring and has no bearing on, nor does it excuse, the ACC's admitted race to the courthouse immediately upon learning of the meeting scheduled for the following day.

Based on both (1) the fatal defects associated with the ACC's claims, and (2) the ACC's improper attempt to initiate this action in Mecklenburg County solely for purposes of attaining what it hopes will be a more favorable venue, the FSU Board now seeks either dismissal pursuant to Rule 12, or alternatively, a stay of this action pending final resolution of the Florida Action.

ARGUMENT

I. The ACC's Amended Complaint Should be Dismissed Pursuant to Rule 12 Because It Was Filed Prematurely, Without Proper Approval, and Is Fatally Flawed.

In its admitted race to the courthouse, the ACC sidestepped well-established North Carolina law regarding the existence of an actual and justiciable controversy and its own affirmative requirements under the ACC Constitution to seek the necessary approval from its members as a precondition to file this lawsuit. Furthermore, the ACC was required to file its suit in Florida because the FSU Board has not waived sovereign immunity outside the borders of the State of Florida, and the remainder of the ACC's claims are erroneously premised on purported extra-contractual obligations that are unsupported by North Carolina law.

As stated further below, the ACC's premature, noncompliant, and facially deficient filing thereby warrants dismissal under Rule 12.

A. The ACC Filed Its Complaint for Declaratory Judgment Before There Was an Actual and Justiciable Controversy.

As a threshold matter, "in order for a court to have subject matter jurisdiction to render a declaratory judgment, an actual controversy must exist between the parties at the time the pleading requesting declaratory relief is filed." *Sharpe v. Park*

Newspapers of Lumberton, Inc., 317 N.C. 579, 584, 347 S.E.2d 25, 29 (1986). And "[w]hen the record shows that there is no basis for declaratory relief, as when the complaint does not allege an actual, genuine controversy, this may be taken advantage of by a Rule 12(b)(6) motion to dismiss." *Kirkman v. Kirkman*, 42 N.C. App. 173, 176, 256 S.E.2d 264, 266 (1979).

Under the NC Declaratory Judgment Act, "[a]ny person interested under a … written contract … or whose rights, status, or other legal relations are affected by a … contract…, may have determined any question of construction or validity arising under the … contract…, and obtain a declaration of rights, status, or other legal relations thereunder. A contract may be construed either before or after there has been a breach thereof." N.C.G.S. § 1-254.

Notwithstanding the NC Declaratory Judgment Act, however, "[t]he controversy must exist at the time the complaint is filed." *Town of Ayden v. Town of Winterville*, 143 N.C. App. 136, 141, 544 S.E.2d 821, 824 (2001). "[F]uture or anticipated action of a litigant does not give subject matter jurisdiction to our courts under the Declaratory Judgment Act." *Id.* (quoting *Bueltel v. Lumber Mut. Ins. Co.*, 134 N.C. App. 626, 628, 518 S.E.2d 205, 207 (1999)).

Said differently, "it is necessary that litigation appear unavoidable. Mere apprehension or the mere threat of an action or a suit is not enough." *Am. C.L. Union of N. Carolina, Inc. v. State*, 181 N.C. App. 430, 433-34, 639 S.E.2d 136, 138-39 (2007) (emphasis added). While "unavoidable" has not been explicitly defined, the Supreme Court of North Carolina in one case "analyzed existing case law and determined, '[i]n

the three cases … in which we said that litigation did not appear to be unavoidable, there was an impediment to be removed before court action could be started.'" *Id.* at 433, 639 S.E.2d at 138 (quoting *City of New Bern v. New Bern-Craven Cnty. Bd. of Educ.*, 328 N.C. 557, 561, 402 S.E.2d 623, 626 (1991)).

Moreover, "[North Carolina] courts have determined other cases to be non-justiciable due to other impediments, such as cases where the action in controversy has not been performed but is merely speculative." *Id.* at 434. "Thus, an impediment to litigation could arise in the form of one party's lack of intent to avail himself of his rights, one party's lack of intent to litigate, or the speculative nature of the conflict." *Id*.

Here, when the ACC filed its Original Complaint on the evening of December 21, 2023, the FSU Board had not yet met, much less voted to initiate litigation, and it was entirely possible that the FSU Board could have voted not to authorize the Florida Action at that time, or not actually filed the Florida Action even if authorized. Indeed, when reduced to its essence, the ACC claimed that by harboring a "specific intent" to consider bringing a lawsuit that might challenge the legality of the Grants of Rights, the FSU Board "violate[d] the terms of the Grant of Rights." (ECF No. 5 ¶ 124.)

Accordingly, when the ACC filed its Original Complaint, litigation was still speculative and not unavoidable, and there was not an actual and justiciable controversy. Indeed, had the meeting been called off, or if the FSU Board vote had gone the other way, or if for any reason the Florida Action was never filed, this action

was already pending.

Under these circumstances, dismissal pursuant to Rule 12(b)(1) is required because the ACC's Original Complaint was a nullity that cannot subsequently be corrected via amendment. *See Coderre v. Futrell*, 224 N.C. App. 454, 457-58, 736 S.E.2d 784, 787 (2012) ("A universal principle as old as the law is that the proceedings of a court without jurisdiction of the subject matter are a nullity") (quoting *Burgess v. Gibbs*, 262 N.C. 462, 465, 137 S.E.2d 806, 808 (1964)). Or, at a minimum, the filing date for this action should be deemed January 17, 2024, the date on which the Amended Complaint was filed. *Id.*

B. The ACC Failed to Satisfy a Necessary Condition Precedent and Improperly Initiated this Litigation Without Obtaining the Affirmative Two-Thirds Vote of Its Members Upon a Proper Notice and Meeting Having a Quorum as Mandated by Its Constitution.

In its race to the courthouse, the ACC disregarded its obligations under the ACC Constitution to provide notice of a meeting and a meeting with a quorum as required by § 1.5.4.3, or secure the approval of the requisite number of the ACC members necessary to file this action. Section 1.6.2 of the ACC Constitution expressly states that two-thirds of ACC member Directors are required to affirmatively vote in favor of the "initiation of any material litigation involving the Conference." (ECF No. 11.1 § 1.6.2.) Yet, despite expressly recognizing and pleading this affirmative condition precedent in the ACC-Maryland Case,[6] the ACC here does not (1) plead specifically that this required notice, quorum meeting, and member vote ever took

[6] *See* ECF No. 19.2 ¶ 39.

place or (2) plead generally that all conditions precedent to filing this action have occurred.[7]

The ACC's apparent attempt to act beyond the bounds of its authority and failure to satisfy this required condition precedent (or to even plead the same) warrants dismissal pursuant to Rule 12(b)(1) and/or 12(b)(6). *See Lunsford v. ViaOne Servs., LLC*, 2020 NCBC LEXIS 127, at *17 (N.C. Super. Ct. Oct. 28, 2020) (dismissing breach of contract claim due to failure to plead satisfaction of condition precedent – "Our appellate courts require – and our Rules of Civil Procedure envisage – that a plaintiff must plead performance of any condition precedent to a defendant's liability, even though particularity isn't required."); *see also Hometown Servs., Inc. v. Equitylock Sols., Inc.*, 2014 U.S. Dist. LEXIS 125207, at *3-4 (W.D.N.C. September 5, 2014) (dismissal of lawsuit due to failure to satisfy condition precedent to filing action); *Sohmer v. Hwang*, 2021 U.S. Dist. LEXIS 116787, at *4 (W.D.N.C. June 23, 2021) ("Plaintiff's failure to pursue mandatory mediation prior to filing a lawsuit, in breach of his contractual duty to do so according to the express language of the

[7] To the extent the ACC later contends that it did in fact comply with this threshold provision, it must allege how and when it complied. The timing of the required vote is of course important because it may further confirm the Florida Action is the first-filed lawsuit. *See* further discussion below, and *Town of Midland v. Harrell*, 385 N.C. 365, 371, 892 S.E.2d 845, 850 (2023) ("a plaintiff must have standing at the time of the filing to have standing at all. Subsequent events cannot confer standing retroactively."); *see also Phoenix Light SF Ltd. v. Deutsche Bank Nat'l Tr. Co.*, 585 F. Supp.3d 540, 568 (S.D.N.Y. 2022) ("subsequent satisfaction of the condition precedent 'cannot relate back' because the inherent nature of a condition precedent to bringing suit is that it actually precedes the action.") (quoting *U.S. Nat'l Ass'n v. Greenpoint Mortg. Funding, Inc.*, 147 A.D.3d 79, 45 N.Y.S.3d 11, 17 (2016)).

Agreement, requires dismissal of this case pursuant to Rule 12(b)(6).").[8]

C. The ACC Failed To Sue the FSU Board in the Only Jurisdiction Where the FSU Board Has Waived Sovereign Immunity – the State of Florida.

In order to support its decision to file suit prematurely in North Carolina, the ACC claims the FSU Board is subject to suit here because it purportedly waived sovereign immunity in all jurisdictions pursuant to Fla. Stat. § 1001.72(1) and based on "its membership and leadership in the ACC" under North Carolina's Uniform Unincorporated Nonprofit Association Act ("UUNAA") (*See* ECF No. 11 ¶¶ 19-23.) Both arguments fail.

While Fla. Stat. § 1001.72(1) does provide that the FSU Board has authority "to contract and be contracted with, to sue and be sued, to plead and be impleaded in all courts of law and equity," the phrase "all courts" necessarily refers only to all courts in the State of Florida. This is because any waiver that extends beyond the State of Florida would have to be expressly stated in the statute, and such a global waiver is nowhere to be found. *See Austin v. Glynn Cnty., Ga.*, 80 F.4th 1342, 1350-51 (11th Cir. 2023) (courts will not expand waiver of sovereign immunity outside jurisdiction unless waiver specifically "employ[s] language that is either explicit or else admits of no other reasonable interpretation.") (quoting *Schopler v. Bliss*, 903

[8] "The North Carolina Rules are modeled after the Federal Rules of Civil Procedure…Decisions under the Federal Rules are pertinent guidance in interpreting North Carolina Rules, and it is customary for North Carolina courts to look to such decisions in interpreting the North Carolina Rules." *Recurrent Energy Dev. Holdings, LLC v. SunEnergy1, LLC*, 2017 NCBC LEXIS 18, at *36 (N.C. Super. Ct. Mar. 7, 2017).

F.2d 1373, 1379 (11th Cir. 1990)); *see also Ashworth v. Glades Cnty. Bd. of Cnty Comm'rs*, 2017 U.S. Dist. LEXIS 204000, at *3 (M.D. Fla. Dec. 12, 2017) ("[a]ny waiver of sovereign immunity must be 'clear and unequivocal.'").

To adopt the ACC's argument that the FSU Board can be sued in North Carolina, this Court would have to remarkably conclude that the Florida legislature intended that all courts outside of its state boundaries are vested with the full authority and ability to confer jurisdiction and determine the scope of the waiver of governmental sovereign immunity as to a state entity of Florida like the FSU Board. This is nonsensical because the Florida legislature's authority, like that of the North Carolina legislature, extends only to each respective state's borders. And with respect to any tort claims (such as the ACC's claim for breach of fiduciary duty), Fla. Stat. § 768.28(1) further provides that the FSU Board can only be sued in the county where the main campus is located – *i.e.*, where the Florida Action is currently pending (Leon County).

Furthermore, the case on which the ACC relies in its attempt to haul the FSU Board to North Carolina based on its membership in an unincorporated non-profit association is inapposite because it pertains to a different statutory scheme – the North Carolina Nonprofit Corporation Act. In *Farmer v. Troy University*, the defendant university in that case registered as a non-profit corporation in North Carolina. 382 N.C. 366, 370-71, 879 S.E.2d 124, 127-28 (2022). The FSU Board never registered as a nonprofit corporation, nor has it been issued a certificate of authority to operate in this state, both of which are creatures of non-profit corporation law.

These requirements simply do not apply to members of unincorporated associations, which, by definition, are not corporations conducting business in North Carolina. The FSU Board, therefore, is not (and never has been) subject to jurisdiction in North Carolina under this statutory scheme (N.C.G.S. § 59B-1 *et seq*.) or *Farmer*.

Again, the ACC filed its action in this Court in an apparent attempt to attain a perceived litigation advantage, and without any basis to establish jurisdiction over the FSU Board. Accordingly, dismissal pursuant to Rule 12(b)(1), (2), and/or (6) is required.

D. The Amended Complaint Fails to Plead the FSU Board Either Signed the Grants of Rights or Approved Them Upon Proper Notice and A Vote.

As the ACC correctly acknowledges in its Amended Complaint, the FSU Board (and not the FSU President) is the only entity that has the statutory authority to "contract and be contracted with" on behalf of FSU. (*See* ECF No. 11 ¶ 6 (citing Fla. Stat. § 1001.72(1).) According to the face of the Grants of Rights, however, the FSU Board was neither a signatory nor a party to the Grants of Rights. (ECF Nos. 12.2 and 12.7.) Rather, both documents named only FSU as a party and were signed by FSU's then-president (an officer of FSU but not the Chairman of the FSU Board). (*See id.*)

The ACC has never alleged the FSU Board approved either Grant of Rights at any FSU Board meeting, including after appropriate notice, as required by Florida law. Instead, the ACC makes the conclusory and vague allegation that the FSU President "was authorized to agree to and execute the Grant[s] of Rights." (ECF No.

11 ¶¶ 67, 100.) In truth, the FSU Board never cast any vote to approve the Grants of Rights.

As such, the Declaratory Judgment claims should also be dismissed pursuant to Rule 12(b)(7) because the ACC did not name the actual party to the Grants of Rights – FSU.[9] Moreover, the claims are subject to dismissal because the Amended Complaint fails to allege that the Grants of Rights were ever approved by the FSU Board as required under Florida law.

E. The ACC's Remaining Claims Are Based on Purported Extra-Contractual Obligations that Are Not Supported by North Carolina Law.

The ACC correctly alleges that it is "an unincorporated nonprofit association under North Carolina law and is governed by its Constitution and Bylaws, i.e., a "contract by and between the ACC and [its] Member[s]." (*See, e.g.*, ECF No. 11 ¶ 233.) But then, in its Fourth, Fifth, and Sixth Claims for Relief, the ACC seeks to unilaterally impose an array of duties on the FSU Board (and the other ACC members) that cannot be found anywhere in the ACC's Constitution and By-Laws or in the UUNAA (N.C.G.S. § 59B-1 *et seq.*).

These purported duties include: (i) a duty to keep the terms of the ACC's agreements with ESPN confidential, despite the fact that neither FSU nor the FSU Board was ever a party to those agreements or entered into any confidentiality

[9] Like FSU, the allegations made by the ACC in its Amended Complaint affect all other ACC members, and the allegations concerning a blanket waiver of sovereign immunity for any public institution by virtue of its membership in any North Carolina unincorporated nonprofit association (*see* ECF No. 11 ¶¶ 21-23) has an especially profound impact on eight of the remaining 13 full members.

agreement with the ACC, much less with respect to the ESPN agreements (*see* ECF No. 11 ¶¶ 214-31); (ii) a "fiduciary duty" to refrain from acting in the best interests of the member whenever doing so would not be in the "best interests of the [ACC]" or could "undermine . . . the stability" of the ACC (see *id.* ¶¶ 232-65); and (iii) a vague duty of good faith and fair dealing arising out of, presumably, the ACC Constitution and By-Laws (*see id.* ¶¶ 266-73.)

According to the ACC, the source of these duties is that by joining the ACC, all members have unwittingly entered into a "common and joint venture" subject to "common law of North Carolina" for such ventures. (*See id.* ¶¶ 240-41.) But the ACC is not an implied "common and joint venture" under North Carolina law; rather, an express "unincorporated nonprofit association," (*id.* ¶ 1), a creature of statute governed by the UUNAA, which imposes no fiduciary duties on its members. Nonetheless, the ACC claims that it is improper for a member to take "actions . . . for its own benefit, with no regard for the best interest of the [ACC]." (*Id.* ¶ 252.) The FSU Board disagrees with this self-serving interpretation – the Presidents of each of the 15 ACC members owe a primary and overarching duty to act in the best interests of their respective institutions, even if (and perhaps especially if) that may conflict with the ACC's agenda.

Of course, had the ACC members wished to subject themselves to the fiduciary duties the ACC now seeks to impose, they could have either (a) included them anywhere in the 159 pages of the ACC Manual that includes the ACC Constitution and Bylaws, or (b) organized themselves as a nonprofit corporation under the North

Carolina Nonprofit Corporation Act, which expressly provides for such fiduciary duties, rather than as an unincorporated association, which does not. *Compare* N.C.G.S. § 55A-8-30 ("A director shall discharge his duties . . . (1) [i]n good faith; (2) [w]ith the care an ordinarily prudent person in a like position would exercise under similar circumstances; and (3) [i]n a manner the director reasonably believes to be in the best interests of the corporation") *with* N.C.G.S. § 59B-1 *et seq.* (containing no similar provision).

In sum, there is no basis in North Carolina law for the ACC's allegation that the FSU Board (or any other ACC member) owes any duties to the ACC beyond those reflected in the ACC's Constitution and By-Laws. Therefore, Claims Four, Five, and Six should also be dismissed for this independent reason.

II. Alternatively, the ACC's Anticipatorily-Filed Action Should Be Stayed in Favor of the Florida Action Which Is Before the Proper Court.

In the event the Court finds that dismissal is not warranted under Rule 12 as provided above, then this Court should alternatively stay this action pending the final adjudication of the parties' claims in the Florida Action (which subsumes those claims alleged by the ACC here),[10] because Florida is the true proper forum for this case under N.C.G.S. § 1-75.12.[11]

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[10] Of course, the ACC could assert whatever claims it thinks are not already encompassed by the more comprehensive Florida Action by way of counterclaims in the Florida Action.

[11] Additionally, N.C.G.S. § 1-257 (Discretion of Court) further vests the court with the full discretion to "refuse to render or enter a declaratory judgment or decree where such judgment or decree, if rendered or entered, would not terminate the uncertainty or controversy giving rise to the proceeding…" N.C.G.S. § 1-257. "[W]hen the record shows that there is no basis for declaratory relief [under § 1-257], the Court may

N.C.G.S. § 1-75.12(a) provides that "[i]f, in any action pending in any court of this State, the judge shall find that it would work substantial injustice for the action to be tried in a court of this State, the judge on motion of any party may enter an order to stay further proceedings in the action in this State." N.C.G.S. § 1-75.12(a). The Court's decision to grant or deny a stay is a matter within its reasonable discretion. *Home Indem. Co. v. Hoechst-Celanese Corp.*, 99 N.C. App. 322, 325, 393 S.E.2d 118, 120 (1990).

North Carolina courts have held that "[i]n determining whether to grant a stay under G.S. § 1-75.12, the trial court may consider the following factors:

> (1) The nature of the case, (2) the convenience of the witnesses, (3) the availability of compulsory process to produce witnesses, (4) the relative ease of access to sources of proof, (5) the applicable law, (6) the burden of litigating matters not of local concern, (7) the desirability of litigating matters of local concern in local courts, (8) convenience and access to another forum, (9) choice of forum by plaintiff, and (10) all other practical considerations.

Lawyers Mut. Liab. Ins. Co. v. Nexsen Pruet Jacobs & Pollard, 112 N.C. App. 353, 356, 435 S.E.2d 571, 573 (1993).

"[In determining whether to grant a stay,] [t]he Court is not required to consider each enumerated factor, but must consider all factors that are relevant to the case in deciding whether a stay is warranted." *La Mack v. Obeid*, 2015 NCBC LEXIS 24, at *16 (N.C. Super. Ct. Mar. 5, 2015). Further, "it is not necessary [for] all factors [to] positively support a stay, as long as [the Court] is able to conclude that (1)

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dismiss a declaratory judgment action through a Rule 12(b)(6) motion." *Harris Teeter Supermarkets, Inc. v. ACE Am. Ins. Co.*, 2023 NCBC LEXIS 125, at *48 (N.C. Super. Ct. Oct. 10, 2023).

a substantial injustice would result if the [stay was denied], (2) the stay is warranted by those factors present, and (3) the alternative forum is convenient, reasonable, and fair." *Lawyers Mut. Liab. Ins. Co.*, 112 N.C. App. at 356.

As provided below, consideration of these § 1-75.12 factors warrants a stay of this action in favor of the pending and broader Florida Action.

A. The ACC's Choice of Forum Should Be Disregarded In Favor of the FSU Board's (i.e., the True Plaintiff's) Choice of Forum (i.e., the Florida Action).

The ACC's fervent rush to the courthouse on December 21, 2023 for the admitted (and sole) purpose of trying to dictate a supposed friendly forum for the parties' dispute necessitates "[b]eginning with the ninth factor first [under § 1-75.12]." *See Obeid*, 2015 NCBC LEXIS 24, at *16. And when applying North Carolina law to the ACC's actions here, the ACC is not entitled to any advantage for purposely filing its narrow lawsuit just a few hours before the Florida Action in order to gain a perceived tactical advantage.

While courts ordinarily give priority to the party that filed its action first, *see Learning Network, Inc. v. Discovery Commc'ns, Inc.*, 11 Fed. App'x. 297, 300-01 (4th Cir. 2001) (citations omitted), such deference is disregarded when the plaintiff has notice of an imminent or pending lawsuit and the initial action is only (or primarily) asserted as a means of "procedural fencing" in order to ensure a more favorable venue and/or so as to deny the true plaintiff the forum of his choice. *See Centennial Life Ins. Co. v. Poston*, 88 F.3d 255, 258 (4th Cir. 1996) ("declin[ing] to place undue significance on the race to the courthouse door, particularly where [plaintiff] had constructive

notice of [defendant's] intent to sue and differing issues were present in both cases, and affirming trial court's dismissal of first filed case in favor of later-filed state court case on these grounds).[12]

North Carolina courts have similarly adopted and applied the "anticipatory filing" exception under both N.C.G.S. §§ 1-75.12 and 1-257 in a number of factual contexts similar to those presented in this case.

1. North Carolina Courts Have Adopted the "Anticipatory Filing" Exception and Rejected Similar Attempts to Improperly Control Venue.

North Carolina first adopted and applied the "anticipatory filing" exception in *Coca-Cola Bottling Co. Consolidated v. Durham Coca-Cola Bottling Co.*, 141 N.C. App. 569, 541 S.E.2d 157 (2000). In *Coca-Cola*, the Court of Appeals succinctly held that the initial lawsuit should not necessarily be given priority when it is apparent that the first filer plaintiff has constructive notice that the defendant (the "natural" or "real" plaintiff) intends to initiate its own action in a separate jurisdiction pertaining to the same issues/subject matter. *Id*. at 578-79.

Accordingly, the Court of Appeals reversed the trial court's order denying the motion to dismiss and held that the first-filed Mecklenburg County lawsuit was not dispositive because "[w]e cannot condone using the Declaratory Judgment Act to

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[12] *See also Nautilus Inc. Co. v. Winchester Homes, Inc.*, 15 F.3d 371, 377 (4th Cir. 1994) (finding that initial declaratory action could proceed when determined that it was not initiated for the purpose of "procedural fencing"); *Learning Network, Inc.*, 11 Fed. App'x at 3 ("It has long been established that courts look with disfavor upon races to the courthouse and forum shopping. Such procedural fencing is a factor that counsels against exercising jurisdiction over a declaratory judgment action.").

obtain a more preferable venue in which to litigate a controversy. Such 'procedural fencing' deprives the natural plaintiff of the right to choose the time and forum for suit.…To hold otherwise would be to encourage a race to the courthouse in situations in which a potential defendant anticipates litigation by the natural plaintiff in a controversy." *Id.* at 581 (emphasis added).

North Carolina state courts have subsequently repeatedly applied *Coca-Cola* to deny attempts by a plaintiff to preemptively (and improperly) control the forum for strategic purposes when it is aware that the defendant's filing of a lawsuit is imminent. *See Harleysville Mut. Ins. Co. v. Narron*, 155 N.C. App. 362, 574 S.E.2d 490, 494-95 (2002) (affirming summary judgment in favor of the defendants, in part, due to the declaratory judgment action "appear[ing] to be little more than a case of 'procedural fencing'."); *Poole v. Bahamas Sales Assoc., LLC*, 209 N.C. App. 136, 143, 705 S.E.2d 13, 18-19 (2011) (relying heavily on the standard articulated in *Coca-Cola*, the trial court's denial of the plaintiffs' request for declaratory relief affirmed, because their "decision to file the present action in this jurisdiction is 'merely a strategic maneuver to achieve a preferable forum'…") (quoting *Coca-Cola*, 141 N.C. App. at 579, 705 S.E.2d at 164); *Obeid*, 2015 NCBC LEXIS 24, at *18-20 (denying first-filed priority to due to plaintiff's improper use of a "hip-pocket" complaint as means to control venue); *Wachovia Bank, Nat'l Ass'n v. Harbinger Cap. Partners Master Fund I, Ltd.*, 2008 NCBC LEXIS 6 at *20 (N.C. Super. Ct. Mar. 13, 2008), *aff'd* 201 N.C. 507, 687 S.E.2d 487 (2009) (concluding that stay of North Carolina action in favor of later-filed New York case appropriate, because plaintiffs "filed what is primarily a

preemptive declaratory judgment action in North Carolina, thus guaranteeing the very fight they profess to have wanted to avoid, but in a forum more to their liking….[a]gainst this backdrop, Plaintiff's choice of forum is not entitled to substantial weight."); *Harris Teeter Supermarkets, Inc.,* 2023 NCBC LEXIS 125, at *52 (motion to dismiss claim for declaratory judgment granted "because the Court will not reward attempted forum shopping").[13]

2. Application of the "Anticipatory Filing" Exception to the ACC's Conduct Warrants a Stay of This Lawsuit.

When applying the above precedent to the facts presented here, the Florida Action venue should control the ultimate resolution of this dispute rather than Mecklenburg County for a number of reasons.

First, there is no need to ascertain whether the ACC had constructive notice of the FSU Board's intent to authorize a suit under *Coca-Cola*, because the ACC has already admitted (twice, in separate filings) that it had notice of the imminent filing of the Florida Action given the mere notice of an emergency Board of Trustees meeting called for December 22, 2023, and that such notice was the de facto reason for initiating this lawsuit. In response to that "actual notice", the ACC pre-emptively raced to file this action late in the day on December 21 in order to attain what it presumes to be a more favorable forum. (ECF No. 5 ¶ 114; ECF No. 11 ¶ 149.)

[13] North Carolina federal district courts have followed suit. *See Nutrition & Fitness, Inc. v. Blue Stuff, Inc.*, 264 F. Supp. 2d 357, 361 (W.D.N.C. 2003); *Klingspor Abrasives, Inc. v. Woolsey*, 2009 U.S. Dist. LEXIS 66747, at *11 (W.D.N.C. July 31, 2009); *N. Am. Roofing Servs., Inc. v. BPP Retail Props., LLC*, 2014 U.S. Dist. LEXIS 35193, at *9-10 (W.D.N.C. 2014).

The ACC's conduct here is precisely the type of improper "procedural fencing" that North Carolina law expressly disfavors and has been repeatedly rejected, and the *de minimis* 18-hour difference between the filing of this case and the Florida Action thereby does not justify any first-filer advantage. *See N. Am. Roofing Servs.,* 2014 U.S. Dist. LEXIS 35193, at **9-10 (declaratory judgment action filed **one day before** the defendant deemed an improper race to the courthouse).

Second (and as discussed further above), the ACC apparently cut procedural corners in its race to file first when it failed to follow the requisite conditions precedent under §§ 1.5.4.3 and 1.6.2 of the ACC Constitution necessary to initiate "material litigation" against the FSU Board. *See Hometown Servs.*, 2014 U.S. Dist. LEXIS 125207, at *3-4 (accepting magistrate's dismissal of lawsuit due to plaintiff's failure to satisfy condition precedent); *Tattoo Art, Inc. v. Tat Int'l, LLC*, 711 F. Supp. 2d 645, 651 (E.D. Va. 2010) ("[a] number of courts have found that when parties have not elected to be subject to a court's jurisdiction until some condition precedent is satisfied, such as mediation, the appropriate remedy is to dismiss the action."); *Alchemist Jet Air, LLC v. Century Jets Aviation*, LLC, 2009 U.S. Dist. LEXIS 49472, at *13-17 (N.D. Ill. 2009) (rejecting "first to file" rule and finding failure to follow contractual notice to cure requirement can be used to determine if a party raced to the courthouse in order to avoid a lawsuit in another venue); *Stone & Webster, Inc. v. U.S. Dep't of Labor*, 968 F. Supp. 2d 1, 10-11 (D.D.C. 2013) (dismissal without prejudice of first filer's lawsuit due to failure to comply with contractual condition precedent for mediation was appropriate remedy under Rule 12(b)(6)).

Accordingly, the ACC's anticipatory filing of this action in an admitted effort to beat the FSU Board to the courthouse warrants disregarding any "first filer" deference under § 1-75.12, and the remainder of the applicable factors likewise favor a stay of this case in favor of the Florida Action.

B. The Nature of the Case, Applicable Law, and the Burden of Litigating Matters Not of Local Concern (e.g., Sovereign Immunity of the State of Florida, Restraint of Trade Under Florida Law, Confidentiality Under Florida Law, and Capacity to Contract on Behalf of Agencies of the State of Florida) All Favor a Stay.

When applying factors (1), (5), (6), and (7) under § 1-75.12, it is also readily apparent that Florida is the more appropriate forum, because (as noted above) this case involves important jurisdictional issues of sovereign immunity waiver under Fla. Stat. §§ 1001.72 and 768.28 that should be interpreted and decided by a Florida court more familiar with the intent and application of these statutes.

Both parties also premise their claims, in part, on conduct that occurred or is actionable under Florida law. For example, the ACC alleges (and the FSU Board denies) disclosures of confidential information pursuant to Florida law by the FSU Board at several Board meetings in Florida and to unauthorized third parties in Florida, as well as attempts by the FSU Board to circumvent Florida's Public Meetings Act. Indeed, almost all the predicate acts upon which the Amended Complaint rests occurred entirely in Florida and are determinable only under Florida law.

The FSU Board asserts that the ACC's misconduct and dealings with third parties associated with the Grants of Rights constitute direct violations of both

restraint of trade under Fla. Stat. § 542.18 as well as Florida public policy and amounts to an unenforceable penalty under Florida law.[14] These issues should properly be decided by a Florida court.

Furthermore, while North Carolina contract law may apply to some of the claims pertaining to the Grants of Rights at issue, the general principles of contract interpretation and breach associated with this case are not fundamentally different from those in Florida, and a Florida court's governance of this dispute will therefore have no substantive bearing on those claims. *See Press v. AGC Aviation, LLC*, 260 N.C. App. 556, 562, 818 S.E.2d 365, 370 (2018) ("Florida's rules of contract interpretation are essentially the same as North Carolina's…").[15] Indeed, according to the allegations of the Amended Complaint, the ACC Commissioner and his media consultant traveled to personally lobby individual FSU Board members with respect to the Grant of Rights. (ECF No. 19.1 ¶ 89.) Florida courts are similarly experienced in dealing with implied duties of good faith and fair dealing arising from contracts as alleged by the ACC. *See Ins. Concepts & Design, Inc. v. Healthplan Servs., Inc.*, 785 So. 2d 1232, 1234 (Fla. Dist. Ct. App. 2001).

Simply put (and as noted above), the Florida Action is broader in scope than the ACC's anticipatorily-filed action. For these reasons, the Florida Action is the proper proceeding for purposes of judicial efficiency and determinatively resolving

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[14] *See* ECF No. 19.1 pp. 47-51, and 57-58.

[15] *Jim Crockett Promotions, Inc. v. Action Media Grp., Inc.*, 751 F. Supp. 93, 98 (W.D.N.C. 1990) (court in either of two competing jurisdictions "would have little difficulty in applying the applicable law" in a straightforward contract dispute).

the entire matter. *See Bryant & Assocs., LLC v. ARC Fin. Servs., LLC*, 238 N.C. App. 1, 6-8, 767 S.E.2d 87, 91-92 (2014) (affirming grant of stay under § 1-75.12 of first-filed action after concluding that the second-filed action was broader in scope).

CONCLUSION

For the reasons discussed above, the ACC's anticipatorily-filed action against the FSU Board should be dismissed pursuant to Rule 12 or, in the alternative, stayed pending final resolution of the Florida Action under § 1-75.12.

This the 7th day of February, 2024.

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CERTIFICATE OF COMPLIANCE WITH BUSINESS COURT RULE 7.8

The undersigned, in accordance with Business Court Rule 7.8, certifies the foregoing brief (exclusive of case caption, any index, table of contents, table of authorities, signature blocks, and any required certificates) contains fewer than 7,500 words, as reported by word processing software.

This the 7th day of February, 2024.

/s/ C. Bailey King, Jr.
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CERTIFICATE OF SERVICE

The undersigned hereby certifies that the foregoing brief has been served by filing with the Court's electronic-filing system, which will send electronic notice to all counsel of record.

This the 7th day of February, 2024

/s/ C. Bailey King, Jr.
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