No. 124P24

No. _____ TWENTY-SIXTH DISTRICT

NORTH CAROLINA SUPREME COURT

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ATLANTIC COAST CONFERENCE, Plaintiff, v. BOARD OF TRUSTEES OF FLORIDA STATE UNIVERSITY, Defendant.	)	From Mecklenburg County Business Court No. 23-CV-040918-590

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PETITION FOR WRIT OF CERTIORARI

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PETITION FOR WRIT OF CERTIORARI

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TO THE HONORABLE SUPREME COURT OF NORTH CAROLINA:

Defendant Board of Trustees of Florida State University ("FSU Board") respectfully petitions this Court to issue a writ of certiorari pursuant to N.C.G.S. § 1-75.12(c) and Rule 21 of the North Carolina Rules of Appellate Procedure to review the Order and Opinion on Defendant's Motion to Dismiss Or, In the Alternative, Stay the Action ("Order") of the Honorable Louis A. Bledsoe, III, Presiding, North Carolina Business Court (Mecklenburg County), dated 4 April 2024. The FSU Board specifically seeks review of the trial court's erroneous denial

of the FSU Board's request for a stay of this action in favor of the action currently pending in the Circuit Court of the Second Judicial Circuit for Leon County, Florida (Case Number 2023-CA-2860) ("Florida Action") involving the same parties, the FSU Board and the Plaintiff Atlantic Coast Conference ("ACC").[1]

In summary, judicial economy and significant concerns surrounding the trial court's misapplication of N.C.G.S. § 1-75.12 in this nearly $700 million-dollar dispute warrant immediate review concurrent with the FSU Board's separate appeal as of right on personal jurisdiction and sovereign immunity grounds pursuant to N.C.G.S. § 1-277(b).[2]

STATEMENT OF THE FACTS

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

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[1] For clarification and ease of reference, the FSU Board will refer herein to the ECF document number cite for the various filings in the proceedings below, with the exception of the Order.

[2] On 9 May 2024, the trial court entered an order staying the proceedings in their entirety pursuant to N.C.G.S. § 1-294 until "the final resolution of [the FSU Board's] appeal of the Court's Rule 12(b)(2) ruling in the April 4 Order or until otherwise ordered by the Court." (ECF No. 69 ¶ 19.) This petition is being filed without unreasonable delay, as the FSU Board is the process of preparing the proposed record for the appeal as of right, and while this matter is stayed at the trial court level.

A. Background of the Dispute.

Florida State University ("FSU") is a member of the ACC and first joined the conference in 1991. The ACC is an unincorporated nonprofit association that became subject to the North Carolina Uniform Unincorporated Nonprofit Association Act ("UUNAA") when that statute was first enacted in 2007. This underlying dispute involves competing actions in separate states concerning the rights and obligations of FSU and the ACC under the 2013 Grant of Rights and the 2016 Amended Grant of Rights agreements (collectively, the "Grants of Rights"), though the Florida Action also encompasses causes of action involving the ACC Constitution and Bylaws, and other laws, with hundreds of millions of dollars at issue. The ACC's operative pleading in this action in no way seeks to construe and/or enforce the "liquidated damages" withdrawal payment described in Article 1.4.5 of the ACC Constitution.

The Grants of Rights are purported contracts whereby the ACC members allegedly aggregated their media rights for their respective "home games" to the ACC so that it could allegedly market those rights and negotiate long-term media deals with third-party broadcasters, like ESPN, on the members' behalf and for their benefit. (ECF No. 11 ¶¶ 57–59.) But the ACC had been doing much the same thing under its Constitution and Bylaws for decades. Indeed, 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) and then established the template for the still-controlling media rights agreements and payments in a 2012 amendment thereof (one year before the first "Grant of Rights" was even executed). (*See* ECF No. 12 ¶¶ 42, 57.) FSU contends the Grants of Rights add nothing to this pre-existing mechanism and were unnecessary for the ACC to negotiate and enter contracts with ESPN.

B. Prior Litigation Involving the ACC and Its Former Member Seeking to Leave the ACC, and the Relevant Portions of the ACC Constitution.

This current lawsuit is neither the first nor the last time the ACC has sued an existing conference member. The ACC previously 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 ACC in 2012.[3]

The "ACC is organized by and operates pursuant to the Constitution and Bylaws." (ECF 19.2 ¶ 9.)[4] "The Constitution of the ACC (the 'Constitution') is a

[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.) Unlike Maryland, FSU has not withdrawn from the conference.

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

contract by and among the member institutions, pursuant to which the members have agreed to conduct the business affairs of the ACC." (*Id*. at ¶ 8.) 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 ("Absolute Two-Thirds Matters"). (ECF No. 12.1 Articles 1.5.4.3 and 1.6.2) (emphasis added).

With respect to these Absolute Two-Thirds Matters, under Article 1.5.1.5.6 (Agenda), the Commissioner must distribute an agenda to the Directors within two calendar days of such meeting. (ECF No. 12.1, Article 1.5.1.5.6.) Draft minutes and copies of all reports submitted at the meeting then must be distributed to the Directors within thirty (30) days of the meeting. *Id*. The meeting minutes for the Two-Thirds Matters meeting are then required to be placed on the agenda for the next Conference meeting for approval. *Id*.

In the ACC-Maryland Case, the ACC specifically alleged 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). And when the ACC subsequently sued ACC member Clemson University in

Mecklenburg County Business Court (Case No. 24-CV-013688-590) on 20 March 2024, subsequent to filing this Action, the ACC similarly alleged:

> 3. On March 20, 2024, the ACC held a special meeting in which three-fourths of the ACC's member institutions waived the three-days' notice requirement under Section 1.5.1.5.1 of the ACC Constitution, and in which more than two-thirds of the ACC's member institutions voted to approve the filing of this Complaint.

(ECF No. 4 ¶ 3.) No similar allegations appear in the ACC's pleadings here.

C. The 21 December 2023 FSU Board Meeting Announcement and the ACC's Admitted Filing of This Preemptive Lawsuit Without Member Approval Just Hours Later.

On the morning of 21 December 2023, the FSU Board noticed a special emergency meeting for 10:00 am on 22 December 2023. Just a few hours after this announcement, the ACC initiated the underlying litigation by e-filing its 33-page, 146-paragraph Complaint for Declaratory Judgment ("Initial Complaint") at 5:18 p.m. in Superior Court, Mecklenburg County[5] without providing any notice to its members or taking the "**Required Vote**" mandated by its Constitution. The Initial Complaint also contained eight exhibits, including the ACC Constitution and a copy of a 23 August 2023 FSU Board meeting transcript.[6] The ACC personally served FSU's general counsel in Tallahassee, Florida via process server as she left

[5] The ACC shortly thereafter filed its Notice of Designation to the North Carolina Business Court.

[6] It still remains unclear at this point in the case how, why, and when the transcript of this meeting was obtained by the ACC.

the FSU Board's meeting the following morning. (*See* ECF No. 3; ECF No. 5; ECF No. 7 ¶ 4.)

Unlike the ACC-Maryland and ACC-Clemson cases, the ACC neither pleaded that it complied with the ACC Constitution, nor that it had sought and obtained member approval prior to initiating the action against the FSU Board. The ACC did confirm that it had notice of the 22 December 2023 FSU Board meeting and then swiftly initiated this action (previously drafted) in the late afternoon of 21 December 2023 before that meeting occurred:

> 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).

D. The Florida Action.

At its scheduled meeting on the morning of 22 December 2023, the FSU Board voted to authorize the initiation of litigation against the ACC. Following that meeting, the FSU Board filed the Florida Action at 11:26 a.m. on 22 December 2023 and perfected service on the ACC six days later, on 28 December 28 2023. In the Florida Action, the FSU Board seeks a declaration from the Florida Courts addressing among other things (i) whether the Grant of Rights transferred to the ACC media rights that are not necessary for the ACC to fulfill its obligations under

the ESPN Agreements, (ii) whether the withdrawal payment called for by Article 1.4.5 is an unenforceable penalty, (iii) whether the ACC has committed mutlitple material breaches of the ACC Constitution and Bylaws just with respect to FSU, and (iv) whether under Fla. Stat. § 542.18, the ACC's penalty apparatus amounts to an unenforceable restraint on trade under Florida law.

The Florida Action encompasses all issues pertaining to the Grants of Rights at issue here, but also spans much more including, but not limited to, the "liquidated damages" withdrawal penalty set forth in Article 1.4.5 of the ACC Constitution; almost a dozen alleged breaches of contract by the ACC under the ACC Constitution and Bylaws with respect to FSU; as well as several claims that the ACC – as fiduciary of FSU – abjectly failed to manage the conference, including by not exploiting and maximizing the media rights of its members (years before the ACC first conceived the Grant of Rights), misrepresenting the terms of those media agreements as well as the scope of the Grant of Rights, and cloaking in secrecy and distorting not just its dealings with ESPN but the actual legal and monetary terms of the ACC agreements with ESPN ("ESPN Agreements"). (*See* g*enerally*, ECF No. 19.1 ¶¶ 105–47.)

In particular, the FSU Board contends the Grants of Rights transfer no media rights to home games played after FSU withdraws from the ACC (leaves the Conference), were never signed and/or approved by the named defendant (the FSU

Board), add nothing to the ACC Constitution and Bylaws and the ESPN Agreements, were never supported by adequate consideration, and were obtained by the ACC from FSU through misrepresentations 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), a multitude of ACC breaches of the ACC Bylaws and Constitution with respect to FSU, and reaches into matters of restraint of trade, public policy, breach of contract, and whether the ACC has fulfilled its contractual duties to FSU expressly set forth in the ACC Constitution and Bylaws. Further, by the express terms of the ESPN Agreements, all issues of confidentiality as applicable to FSU must be decided strictly and only under Florida law. (Order ¶ 89.)

Although the ACC later tried to expand this action filed in Mecklenburg County with its First Amended Complaint (more on this below), the dispute it raises focuses almost exclusively on whether the Grants of Rights are enforceable against all of its members and alleges (in the First Amended Complaint only) that the FSU Board, in violation of its supposed duties of confidentiality under the ESPN Agreements (to which neither FSU nor the FSU Board are parties or signatories), 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, merely by filing the Florida Action.

The ACC moved to stay the Florida Action, which the Florida trial court denied in the 6 May 2024 Order Denying ACC's Motion to Stay ("Florida Order"). In particular, the trial court in the Florida Action reached the exact opposite conclusions from the trial court in this action on nearly every issue, and specifically found in part that:

- Applying the law of several jurisdictions, including North Carolina, the ACC had engaged in blatant forum shopping when it anticipatorily filed this North Carolina action on 21 December 2023 without the proper member vote (Florida Order at pp. 2–5);
- "[T]here are significant questions about whether a sovereign Florida entity can be sued for breach of contract and damages in another state, and whether the sovereign immunity can be deemed waived under that state's law…" (*Id*. at 7); and
- "Similarly, there are significant state interests as to whether that subject matter [ownership of FSU's media rights to its home games after FSU leaves the ACC] constitutes property of the State of Florida…. [T]hese issues directly affect Florida more than North Carolina because potential Florida, not North Carolina, property and

monies are at issue. FSU is a Florida state entity, and is directly funded by the State of Florida." (*Id*.)

The Florida Action remains pending, and the parties have been ordered to complete mediation in that case on or before 20 August 2024.[7]

E. The ACC's Subsequent 12 January 2024 Member Vote for the Now Alleged "Material" First Amended Complaint.

On 10 January 2024, the Commissioner of the ACC (James Phillips) sent an email to the conference Directors (except FSU) seeking to hold a "special meeting of the ACC Board of Directors" on 12 January 2024 to "continue the discussions we started on Tuesday [9 January 2024] regarding a Conference legal matter." (ECF No. 46.1.) Phillips also acknowledged that three days' notice was required for such a special meeting and requested that three-fourths of the Directors waive this requirement. There was no agenda attached to Phillips' email as required by the ACC Constitution Article 1.5.1.5.6, and the ACC deprived FSU of any notice even though FSU was (and is) a full ACC member. (*Id*.)

A Conference meeting purportedly took place on 12 January 2024, where "the voting Directors in attendance unanimously approved the filing of the [First]

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[7] It is worth noting that the Florida Attorney General has also recently initiated a separate lawsuit in the same county as the Florida Action (Leon County, Florida) against the ACC, arising from the ACC's refusal to disclose information (namely, the ESPN Agreements at the center of the ACC's Grant of Rights claims in this dispute) subject to Florida's public records laws. The ACC has been ordered to produce those Agreements to Clemson University in South Carolina state court.

Amended Complaint in this matter, inclusive of the original claims in the Complaint filed on December 21, 2023." (ECF 31.2 ¶ 5; ECF 46.3 ¶ 10.) This Director vote was purportedly "reflected in Minutes of the Board of Directors, which [were] scheduled to be approved at the ACC's March 19, 2024 meeting of the Board of Directors." (ECF 31.2 ¶ 6.) The ACC has never provided the 12 January 2024 agenda or meeting minutes to FSU, nor are they part of the record or considered by the trial court in the proceedings below or as part of the Order.[8] Under ACC Constitution Article 1.5.1.5.6, the ACC had 30 days, or until 12 February 2024, to provide "the Directors" (including FSU's President) with these minutes. (ECF No. 12.1, Article 1.5.1.5.6.)

On 17 January 2024, and less than a month after initiating this litigation, the ACC filed its First Amended Complaint, in which it asserted four new claims derived entirely from the previously-filed Florida Action (but still nothing with respect to the withdrawal payment under Article 1.4.5 of the ACC Constitution), and (for the first time) sought money damages from the FSU Board for purported conduct that preceded, in part, the ACC's Initial Complaint. The ACC again (1) failed to allege it had complied with the ACC Constitution, i.e., that a member vote had taken place or that it had any member approval of any kind to initiate the

[8] Investigative journalists have similarly been unable to locate the agenda and minutes for this meeting, with some schools apparently unsure that they even exist. https://twitter.com/MBakerTBTimes/status/1782940359992995967.

litigation against FSU, and (2) confirmed that it originally initiated this litigation in order to beat the FSU Board to the courthouse:

> 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).

The ACC has contended that, unlike its Initial Complaint, a member vote was required under its Constitution to file its First Amended Complaint because once the ACC asserted claims for monetary damages, the litigation became for the first time "material litigation" that needed member approval, while the "initiation" of the litigation through the Initial Complaint never required member approval because it was not "material." Hence, through today, the ACC has never obtained the "**Required Vote**" mandated by Article 1.4.5 of the ACC Constitution to authorize "the initiation" of this litigation.

F. The FSU Board's Motion to Dismiss, or in the Alternative, Stay the Action, and Related Briefing.

On 7 February 2024, the FSU Board filed its Motion to Dismiss, or in the Alternative, Stay the Action ("FSU Board Motion") seeking to dismiss the ACC's

First Amended Complaint for a host of reasons pursuant to Rule 12(b) of the North Carolina Rules of Civil Procedure:

- The ACC prematurely filed suit before an actual or justiciable controversy arose, warranting dismissal pursuant to Rules 12(b)(1) and/or 12(b)(6);
- In its race to the courthouse, the ACC made no attempt to provide member notice or to obtain the mandatory two-thirds member "**Required Vote**" mandated by its Constitution to initiate this lawsuit, warranting dismissal pursuant to Rules 12(b)(1) and/or 12(b)(6);
- The ACC is not permitted to sue the FSU Board in North Carolina, as the FSU Board (a Florida sovereign entity) has not waived its sovereign immunity anywhere except within the boundaries of the State of Florida pursuant to Fla. Stats. §§ 1001.72(1) and 768.28(1), warranting dismissal under Rules 12(b)(1), 12(b)(2) and/or 12(b)(6);
- The First Amended Complaint fails to plead that the FSU Board approved the Grants of Rights as required by Florida law or signed it; and
- North Carolina law on unincorporated nonprofit associations does not support the ACC's attempt to impose broad, extra-contractual, fiduciary duties on each of its members to act in the best interest of

the ACC, warranting dismissal under Rule 12(b)(6).

In the alternative, FSU moved for a stay in favor of the Florida Action under N.C.G.S. § 1-75.12 because the Florida Action is the broader and more comprehensive action involving many issues of Florida law, and it would work "substantial injustice" if the ACC was awarded any first-filing deference as a result of its improper forum-shopping.

In support of its argument that the trial court lacked standing and subject matter jurisdiction, the FSU Board noted that neither of the ACC's complaints specifically allege that the ACC complied (or even attempted to comply) with Articles 1.5.4.3 or 1.6.2 of the ACC Constitution by obtaining the requisite member votes necessary to initiate material litigation upon due notice and proper quorum (as the ACC previously did in the ACC-Maryland case and subsequently did in the ACC-Clemson case).

The ACC responded to the FSU Board Motion on 27 February 2024 and submitted evidence for the first time that definitively confirmed that the ACC did not provide notice of a meeting and then conduct such a meeting with a quorum as required by Article 1.5.4.3 of the ACC Constitution, nor did the ACC secure the requisite "**Required Vote**" of an "Absolute Two-Thirds" of the ACC member directors as mandated by Article 1.6.2, before prematurely initiating material litigation on the evening of 21 December 2023. (ECF No. 30 at pp. 7–9.) In its

response, the ACC also attempted to sidestep the "**Required Vote**" by, for the first time, claiming that initiating litigation against one of its own members for ownership of twelve years of that members' media rights (worth hundreds of millions of dollars) was "immaterial" and exempt from that Article 1.6.2, but, even if the ACC was wrong, the ACC had ratified the Initial Complaint via the 12 January 2024 meeting and approval of the filing of only the First Amended Complaint (even though the ACC on that day believed no ratification was necessary). In support of its Response, the ACC tendered the Affidavit of Brad Hostetter ("Hostetter Affidavit"), the ACC's Secretary and Deputy Commissioner, to introduce the declarant's statements on the truth of the matter asserted entirely outside the four corners of the complaint and immune from cross-examination (*i.e.*, hearsay). (ECF No. 31.2.) The ACC also readily acknowledged that it raced to the courthouse to file suit first and attain a more favorable venue upon learning of the FSU Board meeting the following morning. (ECF No. 30 at pp. 7–9.)

The FSU Board submitted its Reply on 8 March 2024 and noted that "(1) the ACC unabashedly defied its own Constitution and members when it filed suit on the evening of 21 December 2023 without first seeking member approval; and (2) the ACC prematurely initiated this action for the sole and improper purpose of attempting to control venue." (ECF No. 41 at p. 1.) And because the ACC lacked standing to sue the FSU Board under North Carolina case law (and the Initial

Complaint thereby remained a legal nullity), the trial court correspondingly had no subject matter jurisdiction – warranting dismissal, or at a minimum, a stay of the action under N.C.G.S. § 1-75.12.[9] (*Id*.)

After reviewing the FSU Boad's Reply, on 11 March 2024, the trial court determined *sua sponte* "that permitting [the ACC] to file a sur-reply brief would be of benefit to the court." (ECF No. 42.) The ACC submitted its Sur-Reply on 18 March 2024, submitting even more out-of-court statements outside of the four corners of the complaint offered for the truth of the matter asserted and immune from cross examination (*i.e.*, hearsay) via the Declaration of James E. Ryan ("Ryan Declaration"). (ECF No. 46.3.) Neither hearsay statement of Hostetter or Ryan anywhere include the words "ratify" or "ratification," and the purported minutes of the meeting remain undisclosed by the ACC. *Id*.[10] Yet, none of this stopped the

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[9] Both the ACC and the trial court claimed that the FSU Board's position had "shifted over time" as to the ACC's lack of a member vote prior to originally filing suit on 21 December 2023 and the pleading requirements regarding the same. (Order ¶ 31.) However, the ACC's own Response shifted the analysis from a 12(b)(6) pleading standard to the sworn admission of the seminal fact at issue that confirmed the ACC lacked standing under 12(b)(1). In other words, there was no more guessing as to whether a pre-suit vote took place because the ACC introduced sworn admissions outside the pleading to remove all doubt and confirmed that operative (and dispositive) fact that none had.

[10] Taking the assertions of the Ryan Declaration as true, because Ryan and ACC Management believed in January 2024 that they had not committed any unauthorized act in connection with the initiation of the litigation, then they could not possibly have advised their principal (the ACC Directors) that they as agents

trial court from declaring these hearsay statements to be "uncontroverted evidence" the "ACC Board of Directors ratified the initiation of this litigation" on 12 January 2024 which was "unrebutted and dispositive" (Order ¶¶ 44, 50-51).[11]

G. The 22 March 2024 Hearing and the Court Order at Issue.

The hearing on the FSU Board's Motion took place on 22 March 2024 ("Hearing"). The trial court issued its 76-page Order thirteen days later on 4 April 2024, so that (as the court advised the parties during the hearing) its ruling would issue in advance of the previously scheduled 9 April 2024 hearing in the Florida Action on the ACC's motion to stay or dismiss that proceeding.

While the Order did dismiss the ACC's fifth claim for relief (breach of fiduciary duty) *with prejudice*, the trial court concluded the ACC had standing for its Initial Complaint despite its admitted failure to comply with the ACC Constitution and that the trial court thereby had subject matter jurisdiction over the parties' dispute. Without the opportunity for any discovery (or the production of the ESPN Agreements), the trial court also made a number of factual and legal findings with significant implications on the jurisprudence of this State, including the scope of a foreign state entity's waiver of sovereign immunity in North

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had committed an unauthorized act in December that required later "ratification" by their principal.

[11] At paragraph 4 of its Order, the trial court stated it would "not make findings of fact on the Motions."

Carolina,[12] the consistent application of the first to file rule following a plaintiff's admitted forum shopping, and the related weighing of the various factors for a stay under N.C.G.S. § 1-75.12.

1. The Order found that the FSU Board (though not an ACC member) had explicitly waived sovereign immunity in the State of North Carolina based on FSU's (not the FSU Board's) participation in the ACC and a North Carolina statutory scheme that was enacted fifteen years *after* FSU joined the ACC (Order ¶¶ 52-69.)

Relying on this Court's recent decision in *Farmer v. Troy University*, 382 N.C. 366 (2022), the trial court concluded that the FSU Board waived Florida's sovereign immunity in the State of North Carolina. Instead of recognizing any relevant distinctions between the North Carolina Nonprofit Corporation Act ("NCNCA") and the UUNAA, the Order relied extensively on *Farmer* for the proposition that "*Farmer* sets out the general framework for determining what constitutes 'consent' to suit of a foreign State in North Carolina post-*Hyatt III*." (Order ¶ 54). While first noting that the FSU Board "is entitled to sovereign immunity from suit without its consent in the state courts of every state in the country" (*id.* ¶ 62 (quoting *Farmer*, 382 N.C. at 371)), the trial court's next step was to determine if the FSU Board had waived this sovereign immunity to suit in

[12] The trial court's broad ruling on the FSU Board's purported waiver of sovereign immunity has raised significant alarm: https://www.tampabay.com/news/florida-politics/2024/04/23/florida-state-acc-lawsuit-conference-realignment-fsu-clemson-ashley-moody.

North Carolina based on *Farmer* and the UUNAA, neither of which emanate from Florida.

The trial court first found that the UUNAA contains a sue and be sued clause (though neither the word "sue" nor "sued" appears anywhere within the UUNAA), and the ACC and the FSU Board are permitted to bring suit against one another – though the FSU Board is nowehere in prvivity of contract and has never been an ACC Member Institution.[13] (Order ¶ 63.) The UUNAA's purported "sue or be sued" clause, Section 59B-7(e), in truth allows the actual ACC member, FSU, only the right to "assert a claim against or on behalf of the non-profit association," and only allows for suit "against" FSU by the "non-profit association", meaning the statute is far more circumscribed than the NCNCA at issue in *Farmer*. Indeed, the Official Commentary to Section 59B-7 states:

> This Act does not deal with the liability of members or other persons acting for a nonprofit association for their own conduct. With respect to contract and tort Section 6 leaves that to the other law of the jurisdiction enacting this Act.

N.C.G.S. § 59B-7 (2021).

Nonetheless, based on language in *Farmer* stating that "a sue and be sued clause can act as a waiver of sovereign immunity when a state entity's

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[13] "Florida State [FSU] is an ACC Member Institution. The [FSU] Board of Trustees ratified and approved of Florida State becoming a Member Institution of the ACC." (ECF No. 12 ¶ 5.)

nongovernmental activity is being challenged[,]" the trial court determined that its next inquiry was whether the FSU Board's activities in North Carolina were commercial or governmental in nature. (Order ¶ 63 (quoting *Farmer*, 382 N.C. at 372)).

Looking first to the ACC's activities, the trial court noted that the ACC's activities like "the sponsorship of athletic events and the marketing of media rights for those events" were commercial activities. (Order ¶ 67.) Therefore, "as a member of the ACC, FSU's Conference-related activities in [North Carolina] are also commercial, rather than governmental, in nature." (*Id.*). Accordingly, because of these commercial activities of ***FSU*** (not the FSU Board), and "[b]ecause the FSU Board knew ***it*** was subject to the UUNAA and its sue and be sued clause when ***it*** chose to be a member of a North Carolina unincorporated nonprofit association," the trial court held that the FSU Board had "explicitly" waived its sovereign immunity. (*Id.* ¶ 67) (emphasis added). Again, the FSU Board has never been an ACC member and thus has never chosen to be a member of any North Carolina entity.

While acknowledging earlier in the Order that FSU first joined the ACC in 1991 (Order ¶ 5), the trial court failed to appreciate or acknowledge that the UUNAA was not effective until **1 January 2007**. Thus, at the time when the FSU Board approved FSU joining the ACC in 1991, the FSU Board could not possibly

have "known" that either FSU or the FSU Board would be "subject to" the law of a foreign State that would not be enacted until over 15 years later.

2. The Order disregarded well-established North Carolina law in finding that an actual and justiciable controversy existed, the ACC had standing to originally file suit, and the trial court had subject matter jurisdiction despite the lack of the Required Two-Thirds Member vote required by the ACC Constitution (Order ¶¶ 18-51.)

The trial court further held that an actual and justiciable controversy existed even though at the time that the ACC filed suit, the FSU Board had not yet voted on whether to initiate litigation. To support this holding, the trial court found persuasive certain language in the Grant of Rights, whereby "the FSU Board agreed that 'it will not take any action, or permit any action to be taken by others subject to its control, … or fail to take any action, that would affect the validity and enforcement of the Rights granted to the Conference under this Agreement'" though the Grant of Rights is not signed by the FSU Board. (Order ¶ 25 (quoting Grant of Rights ¶ 6)). Therefore, as held by the trial court, the ACC did not have to wait until there was any "action" – it was enough that the FSU Board was thinking about taking action, which allowed the ACC to opine such action (a breach) was imminent.

Moreover, the ACC purportedly had discretion to protect ESPN's rights by initiating litigation as well.[14] (Order ¶ 25.) Finally, given purported allegations that the FSU Board had entertained the option of possibly withdrawing from the ACC as early as February 2023, a draft complaint allegedly had been circulated to FSU Board members, and the FSU Board did in fact initiate litigation shortly after the meeting, the trial court held that litigation was inevitable, such that an actual and justiciable controversy existed when the ACC filed suit in North Carolina. (*Id.* ¶¶ 26–30.)

Additionally, as to the ACC's standing to bring suit, the trial court held that as of 21 December 2023, the ACC had standing because "the ACC has demonstrated that it has 'a legally protected interest that has been invaded' by the FSU Board's pursuit of a declaratory judgment with respect to the validity and enforceability of the Grant of Rights Agreements." (*Id.* ¶¶ 39, 41.) Moreover, as to the ACC's authorization to initiate litigation, the trial court held that even if the ACC's complaint against the FSU Board constituted "material litigation," there

[14] The trial court found that per the ESPN Agreements, the ACC was "obligated" to take "Commercially Reasonable Efforts" to protect ESPN's rights. (Order ¶ 25). "Commercially Reasonable Efforts" is a defined term in the ESPN Agreements, but notably, the definition states, "Commercially Reasonable Efforts shall not require any party to incur or become obligated to incur any expense not otherwise specifically provided for in this Agreement, **including fees and expenses of counsel**…." (*Id.* ¶ 25 n.53) (emphasis added).

was "uncontroverted evidence" of subsequent ratification of the Initial Complaint which was "unrebutted and dispositive." (*Id.* ¶¶ 44, 50.)

The trial court looked to the Hostetter Affidavit and an email from ACC Commissioner Phillips as evidence of the purported "ratification," though neither mentioned the concept. (*Id.* ¶ 49.) Accordingly, the trial court held that the motion to dismiss should be denied, to the extent the FSU Board challenged the ACC's failure to comply with any condition precedent to initiate litigation, because "the ACC had standing to bring this lawsuit at the time it filed its original Complaint" notwithstanding its failure to get member approval, and "the ACC Board of Directors ratified the initiation of this litigation three weeks later." (*Id.* ¶ 51.)

However, the words "ratification" or "ratify" are found nowhere in the factual record, and the trial court's holding as to ratification contradicts the sworn testimony of Ryan that the ACC submitted that no member approval was ever required before initiating its lawsuit against the FSU Board. (*Id.* ¶ 44.)

3. Similarly, the Order disregarded well-established North Carolina law in holding that the ACC was entitled to deference as a first-filer even though the ACC admittedly raced to the courthouse in contravention of North Carolina law (Order ¶¶ 117–25.)

Even though the ACC readily admits that it preemptively initiated this action in North Carolina in a clandestine race to the courthouse, the trial court held that "the ACC's choice of forum is entitled to deference as the party first to file." (*Id.* ¶

121.) To arrive at this conclusion, the trial court stated that "the FSU Board's alleged breach of [the Grants of Rights] was a practical certainty that threatened the ACC with imminent and unavoidable injury as a result," so the ACC was a "'natural' plaintiff." (*Id.* ¶¶ 122–23.) And even if the FSU Board could also be considered a "natural plaintiff," "the fact that the ACC is also a 'natural' plaintiff is sufficient for the ACC to maintain its first-filer advantage." (*Id.* ¶ 123.) This was the extent of the trial court's analysis on this issue.

4. With respect to the other N.C.G.S. § 75-1.12 factors, the Order held that North Carolina is the proper forum even though there were significant issues of Florida law associated with the full resolution of the case and the other factors weigh against North Carolina (Order ¶¶ 111-131.)

The trial court further concluded that additional facts supported resolving this matter in North Carolina. For example, the trial court concluded that the Grant of Rights, Amended Grant of Rights, and the ACC's Constitution and Bylaws are all governed by North Carolina law. (*Id.* ¶ 126.)

The Order acknowledged the possible introduction of Florida law and conduct in Florida but noted that "the core issue presented in the two actions—i.e., the enforceability of the two Grants of Rights Agreements—favors resolution before a North Carolina court." (*Id.* ¶ 126.) The Order makes no mention that this action is narrowly tailored primarily to the interpretation and enforceability of the Grants of Rights, while pending only in the Florida Action are the dispute over the

nine-figure withdrawal penalty, Article 1.4.5 of the ACC Constitution, Florida anti-trust law, and serial breaches of the ACC Constitution and Bylaws damaging FSU.

Moreover, the trial court concluded that "the burden of litigating matters not of local concern and the desirability of litigating matters of local concern in local courts strongly favor the litigation of this matter in North Carolina" (*id.* ¶ 127), the North Carolina court has a greater local interest than the Florida court (*id.* ¶ 128), the convenience of witnesses and ease of access to proof favors North Carolina (*id.* ¶ 129), and the scope of the two actions will likely eventually be of similar scopes once the Florida Action progresses (*id.* ¶ 130.) As such, the trial court declined to stay the matter. (*Id.* ¶ 131.)

Further (and while not directly addressed in the context of the N.C.G.S. § 1-75.12 analysis), the trial court held that the ACC had properly alleged a claim for breach of implied contract of confidentiality under *North Carolina* law that could move forward against the FSU Board (a non-party to the ESPN Agreements and the Grant of Rights) (*id.* ¶¶ 87–93), even though the plain language of the ESPN Agreements requires the application of *Florida* law to determine any and all issues of such confidentiality with respect to FSU.[15]

[15] In *National Collegiate Athtletic Association ("NCAA") v. Associated Press*, the court ruled that even a written confidentiality agreement signed by an FSU

H. The FSU Board's Pending Appeal as of Right to This Court on Personal Jurisdiction/Sovereign Immunity Grounds, and This Related Request for Certiorari Review Pursuant to N.C.G.S. § 1-75.12(c).

Because the denial of a motion to dismiss premised on personal jurisdiction and/or sovereign immunity grounds is an immediately appealable interlocutory order that affects a substantial right, the FSU Board appealed that portion of the trial court's ruling to this Court on 9 April 2024.[16] The parties are currently in the process of settling the record on appeal with respect to the FSU Board's separate appeal as of right.

For the reasons stated below, the FSU Board now seeks separate review of the trial court's denial of the FSU Board's motion for a stay pursuant to N.C.G.S. § 1-75.12(c) so that these significant and inextricably intertwined issues of

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attorney was void in the face of Florida law with respect to all matters NCAA. 18 So. 3d 1201 (Fla. Dist. Ct. App. 2009), *rev. den.*, 37 So. 3d 848 (Fla. 2010),

[16] *See State ex. rel. Stein v. Kinston Charter Acad.*, 379 N.C. 560, 571 (2021) ("Although an order denying a dismissal motion predicated upon the doctrine of sovereign immunity is interlocutory in nature, such an order is immediately appealable because it represents a substantial right.") (quoting *Craig v. New Hanover Bd. of Educ.*, 363 N.C. 334, 338 (2009)) (cleaned up); *see also Can Am South, LLC v. State*, 234 N.C. App. 119, 124 (2014) ("As has been consistently held by this Court, denial of a Rule 12(b)(2) motion to dismiss premised on sovereign immunity constitutes an adverse ruling on personal jurisdiction and is therefore immediately appealable under section 1-277(b)."); *Woodard v. N.C. Local Governmental Emps. Ret. Sys.*, 110 N.C. App. 83, 85–86 (1993) (same).

jurisdiction and venue can be decided concurrently in the interests of judicial economy.

REASONS WHY THE WRIT SHOULD ISSUE

The trial court's erroneous endorsement of the ACC's improper race to the courthouse without the prior, "**Required**" Absolute Two-Thirds Matters member vote has – to quote the ACC – created "chaos."[17] From personal jurisdiction to sovereign immunity, corporate governance to standing and subject matter jurisdiction, and the anticipatory filing exception to consideration of issues of local concern/law, the trial court circumvented or disregarded large swaths of North Carolina jurisprudence in order to find that Florida waived its sovereign immunity, that the ACC had standing to initiate this lawsuit (the trial court thus had subject matter jurisdiction), and that a stay in favor of the Florida Action is not warranted under N.C.G.S. § 1-75.12.[18]

Review by writ of certiorari is appropriate in cases that present important legal questions "where the administration of justice will best be served by granting

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[17] https://www.tampabay.com/sports/seminoles/2024/04/09/florida-state-acc-lawsuit-fsu-football-conference-realignment/

[18] Section 1-75.12(c) of the North Carolina General Statutes expressly provides that the denial of a motion for stay entitles the defendant "seek review by means of writ of certiorari and failure to do so shall constitute a waiver of any error the judge may have committed in denying the motion." Accordingly, this petition is the FSU Board's only avenue to seek review of the significant errors in the proceedings below at a crucial juncture in this larger dispute.

[the] petition," and this is certainly one of those instances. *Reid v. Cole*, 187 N.C. App. 261, 263–64 (2007). While the FSU Board's appeal on *personal* jurisdiction/sovereign immunity grounds is currently on deck for consideration by this Court in the coming months, the similar threshold issue of *subject matter* jurisdiction and its close relation to N.C.G.S. § 1-75.12 is of equal importance and necessitates parallel and immediate review at this critical juncture of the case. *Daedalus, LLC v. City of Charlotte*, 282 N.C. App. 452, 459 (2022) (certiorari proper when "central issue presented in this appeal is a vital threshold issue upon which the remaining and extensive litigation to follow hinges").

This Court recently reaffirmed the two-factor test applicable to whether certiorari review is appropriate: (1) the likelihood that the case has merit or that an error was committed below, and (2) whether there are extraordinary circumstances that justify issuing the writ. *Cryan v. Nat'l Council of Young Men's Christian Ass'ns of U.S.*, 384 N.C. 569, 572 (2023).

The first factor "weighs the likelihood that there was some error of law in the case." *Id*. And while there is no definitive list of "extraordinary circumstances" warranting appellate review under the second factor, "this factor generally requires a showing of substantial harm, considerable waste of judicial resources, or wide-reaching issues of justice and liberty at stake." *Id*. (quoting *Doe v. City of Charlotte*, 273 N.C. App. 10, 23 (2020)) (cleaned up); *Stanback v. Stanback*, 287

N.C. 448, 453 (1975) (issuance of a writ appropriate where review will serve the "expeditious administration of justice or some other exigent purpose").

In *Cryan*, this Court affirmed the issuance of a writ by the trial court because of "extraordinary circumstances" that included the interests of "judicial economy," a statutory scheme with scarce jurisprudence interpreting that scheme, and significant questions involving the trial court's *subject matter* jurisdiction – which would "potentially deprive[] the trial court of any power to rule in the case" and correspondingly "could lead to a considerable waste of judicial resources if a trial court works through a complicated, novel constitutional issue only for that work to later be declared a nullity." 384 N.C. at 573.

In addition to the trial court's multiple errors of fact and substantive law in the Order explained in further detail below, the "extraordinary circumstances" identified in *Cryan* are presented here, warranting certiorari review of the trial court's denial of the FSU Board's request for stay under N.C.G.S. § 1-75.12 in tandem with the FSU Board's pending separate appeal as of right on personal jurisdiction/sovereign immunity grounds.

I. The Writ Should Issue Because the Order Misapplies North Carolina Law in Ruling Against a Stay Under N.C.G.S. § 1-75.12.

As stated in N.C.G.S. § 1-75.12(a), "[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).

North Carolina courts have held that "[i]n determining whether to grant a stay under N.C.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 (1993). Further, "it is not necessary [for] all factors [to] positively support a stay, as long as [the Court] is able to conclude that (1) 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." *Id.*; *see also Home Indem. Co. v. Hoechst-Celanese Corp.*, 99 N.C. App. 322, 325 (1990) (standard of review under N.C.G.S. § 1-75.12 is abuse of discretion).

Here, the trial court abused its discretion in misapplying the factors under N.C.G.S. § 1-75.12 and ruling against a stay in spite of the substantial case law and the factual record warranting such a stay in favor of the FSU Board.

A. The Trial Court Misapplied North Carolina Law on Threshold Issues of Standing and Subject Matter Jurisdiction in Order to Grant the ACC First-Filed Status.

Any analysis under N.C.G.S. § 1-75.12 is moot without the existence of the plaintiff's standing and the court's corresponding subject matter jurisdiction. *Town of Midland v. Harrell*, 385 N.C. 365, 371 (2023) ("If a plaintiff does not have standing to assert a claim for relief, the trial court lacks subject matter jurisdiction over the claim.") (citing *Willowmere Cmty. Ass'n, Inc. v. City of Charlotte*, 370 N.C. 553, 561 (2018)); *Burgess v. Gibbs*, 262 N.C. 462, 465 (1964) (the failure to establish standing at any point divests the trial court of subject matter jurisdiction, and "it is the duty [of the court] to take notice of the defect and stay, quash or dismiss the suit.").

Standing is determined at the time the ACC filed the Initial Complaint – or 21 December 2023. *Town of Midland*, 385 N.C. at 371 ("[A] plaintiff must have standing at the time of filing to have standing at all."); *Quesinberry v. Quesinberry*, 196 N.C. App. 118, 123 (2009) ("The Supreme Court has explained that when standing is questioned, the proper inquiry is whether an actual controversy existed when the party filed the relevant pleading.") (quoting *Simeon v. Hardin*, 339 N.C. 358, 369 (1994)) (cleaned up).

Most importantly as it applies to the threshold question and the facts at issue, bylaws and other internal governance documents are contractual in nature, and

entities may expressly prescribe *subject matter* jurisdiction for their own organizations via these documents. *Peninsula Prop. Owners Ass'n, Inc. v. Crescent Res., LLC,* 171 N.C. App. 89, 93 (2005); *Homestead at Mills Prop. Owners Ass'n, Inc. v. Hyder*, No. COA17-606, 2018 WL 3029008 (N.C. Ct. App. June 19, 2018) (unpublished). As such, "[j]udicial enforcement of a covenant will occur as it would in an action for enforcement of any other valid contractual relationship." *Homestead at Mills River Prop. Owners Ass'n, Inc.*, 2018 WL 3029008, at *8 (quoting *Page v. Bald Head Ass'n*, 170 N.C. App. 151, 155 (2005)).[19]

Applying this standard to the factual record, the ACC did not have standing when it initiated this action on 21 December 2023 because it failed to comply with its own mandatory Constitutional prerequisites. The trial court instead performed significant jurisprudential gymnastics to conclude otherwise, causing considerable confusion in the application of this Court's precedent on standing and related compliance with corporate governance, in order to anoint the ACC with first-filed status.

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[19] On governance matters, the UUNAA completely defers to the ACC's Constitution and Bylaws. For example, N.C.G.S. § 59B-3 provides that "Principles of law and equity supplement this Chapter unless displaced by a particular provision of it." Official Comment ¶ 2 further states: "This Act contains *no rules concerning governance*…. [A] court must resort to *the rules of the nonprofit association* or, if there are none applicable or none at all, to the common law or other statutory law of the jurisdiction." (emphasis added).

1. The trial court looked the other way on the ACC's admitted noncompliance with the plain mandatory preconditions of its own Constitution before filing suit.

For purposes of standing and the trial court's corresponding subject matter jurisdiction, there are only two operative facts at issue, and they are not in dispute: (1) the ACC was "***Required"*** to take an Absolute Two-Thirds member vote before initiating material litigation pursuant to the unambiguous language in its Constitution, and (2) the ACC did not take this member vote before racing to the courthouse to file suit on the evening of 21 December 2023. (ECF No. 31.2; Order ¶ 43.)

The trial court dispatched the ACC's (initial) nonsensical argument that suing a member institution regarding the validity and enforceability of the agreements that provide the overwhelming majority of the revenue from the Conference did not constitute "material litigation" under Article 1.6.2.[20] But the trial court otherwise mishandled the threshold analysis under N.C.G.S. § 1-75.12 by refusing to abide by several North Carolina decisions directly on point

[20] The ACC generally cited to this Court's decision in *Willowmere Community Association, Inc. v. City of Charlotte*, 370 N.C. 553 (2018) and claimed that the ACC had established standing under the UUNAA via bare bones allegations. But as noted above and further discussed herein, pleading requirements are irrelevant to this analysis as the ACC has already admitted the operative fact in question for purposes of Rule 12(b)(1). *See also Tubiolo v. Abundant Life Church, Inc.*, 167 N.C. App. 324, 326–27 (2004) (court permitted to consider and weigh matters outside of pleadings for Rule 12(b)(1) motion).

dismissing complaints by an organization against one of its organizational *members* on lack of standing/subject matter jurisdiction grounds due to the organization's undisputed failure to first seek the requisite prior approval mandated by its operative governance procedures. *See Peninsula Prop. Owners Ass'n, Inc.,* 171 N.C. App. at 96–97; *Homestead at Mills River Prop. Owners Ass'n, Inc.*, 2018 WL 3029008, at *14–16.

In *Peninsula* for example, the association's declaration required a two-thirds vote of all members prior to initiating legal action. 171 N.C. App. at 90. The Court of Appeals first specifically noted that "contractual provisions agreed to by members of the [association] may provide procedural prerequisites or contractually limit the time, place, or manner for asserting claims," before affirming the trial court's dismissal on lack of standing/subject matter jurisdiction grounds due to the organization's failure to first conduct the requisite member vote. *Id.* at 96–97 (internal citations omitted).

Subsequent courts have recognized this crucial distinction pertaining to a *member* defendant and dismissed on standing/lack of subject matter jurisdiction grounds due to the lack of a member vote before filing suit against another member. *See Homestead at Mills River Prop. Owners Ass'n, Inc.*, 2018 WL 3029008, at *6–10 (distinguishing *Peninsula* and this Court's decision in *Willowmere* on basis of presence of member defendant); *Atkinson v. Lexington*

Cmty. Ass'n, Inc., No. 22-CVS-11238, 2023 WL 5274331, at *3 (N.C. Super. Ct. Aug. 16, 2023) (unpublished) (dismissal warranted because provision requiring 75% of member vote prior to initiating lawsuit "unambiguous, making its interpretation a question of law. Likewise, the Association's admission that it did not ask for or get member approval before suing [defendant] has 'conclusively established' its failure to comply with the declaration.").

The trial court sidestepped the holdings in *Peninsula* and *Homestead* by trying to make a distinction between authority and standing. But the cases are clear that the lack of authority at the time of filing means the party correspondingly lacks standing to bring the claims. The two concepts are interrelated. In other words, authority is a necessary element of standing. *See Peninsula Prop. Owners Ass'n, Inc.*, 171 N.C. App. at 97 ("Without the required vote, the [plaintiff association] ***lacked the authority*** to commence legal proceedings against [the defendant member] and ***does not possess standing***.") (emphasis added); *Homestead at Mills River Prop. Owners Ass'n*, 2018 WL 3029008, at *16 ("The ***record does not indicate this action was properly authorized*** under the plain

language of Plaintiff's bylaws. Consequently, Plaintiff has ***failed to demonstrate standing*** to maintain its suit") (emphasis added).[21]

Accordingly, the record confirms that the ACC indisputably failed to follow the mandatory prerequisites of its own Constitution prior to initiating this suit. As such, the ACC lacked standing to sue the FSU Board on 21 December 2023, and the trial court therefore erred in holding that it had subject matter jurisdiction to even consider the N.C.G.S. § 1-75.12 factors, much less find the ACC had first-filed status without subject matter jurisdiction.[22]

2. The trial court further erred in assuming facts not in evidence to reach a conclusion that directly conflicts with this Court's precedent regarding standing and the effectiveness of subsequent ratification.

Just a few short months ago, this Court held that "**[*s*]*ubsequent events cannot confer standing retroactively***." *Town of Midland*, 385 N.C. at 371

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[21] The trial court erroneously claims that the required "authority" was later given to the ACC via ratification, but this is also false and without legal basis for the reasons explained in the following section.

[22] Not only is review required here in order to correct the trial court's threshold error as to standing and subject matter jurisdiction, but this Court should closely scrutinize the trial court's insinuation that this Court's decision in *Willowmere* stands for the proposition that a party can definitively establish standing by showing "a legal injury; the traceability of the injury to a defendant's actions; and the probability that the injury can be redressed by a favorable decision," even if the plaintiff (as here) refuses to comply with its own corporate documents before filing suit. (Order ¶¶ 36–38.) This is not, cannot – and should not – be the standard in North Carolina.

(emphasis added) (citing *Simeon*, 339 N.C at 369).[23] Despite this Court's bright-line enunciation that a subsequent action cannot bestow the ACC with standing as of 21 December 2023, the trial court still held that the lack of an Absolute Two-Thirds vote was irrelevant because "the ACC's evidence of ratification [via the 12 January 2024 ACC meeting] is unrebutted and dipositive." (Order ¶ 44.)[24]

But the record says nothing of the sort. For example, the words "ratify" or "ratification" appear nowhere in either the Ryan Declaration, the Hostetter Affidavit, or the preceding Phillips email relied upon by the trial court in reaching its "dispositive" factual conclusion. (ECF No. 31.2; ECF No. 46.3.)[25] The Ryan Declaration and Hostetter Affidavit merely state that the members voted "to

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[23] Despite citing to fifty-plus cases in its initial Response to the FSU Board's Motion, the ACC curiously ignored this Court's recent decision in *Town of Midland* altogether. Only after the FSU Board highlighted this glaring omission (and then subsequently being thrown a lifeline by the *sua sponte* order of the trial court requesting a sur-reply) did the ACC even attempt to address this Court's precedent.

[24] This purportedly conclusive finding of fact was preceded by the trial court's initial assurance it would be make no findings of fact in the Order. (Order ¶ 4.)

[25] The FSU Board noted in the proceeding below that accepting the ACC's position would turn the law of internal governance on its head and allow organizations to sidestep compliance with their own constitutions and bylaws for practically any reason in their "discretion" (here, purportedly to protect a third-party under the ESPN Agreements, even at the direct expense of its own members). This concern remains important, and organizations cannot be permitted to intentionally ignore and disregard their own governance documents when convenient for strategic litigation purposes.

approve the filing of the Amended Complaint, inclusive of the original claims for relief filed on December 21, 2023." (ECF No. 31.2 ¶ 5; ECF No. 46.3 ¶ 10.) They do not state that the agent's 21 December 2023 unauthorized act was later contemplated and ratified with full knowledge by the principal, such that the approval would be deemed effective as of 21 December 2023. This would have been required for a legitimate, after-the-fact ratification by a principal of an agent's prior unauthorized act. Instead, the Ryan Declaration and Hostetter Affidavit state only that the members approved the filing of the First Amended Complaint which "included" the three claims that were contained in the Initial Complaint. These are two entirely different concepts and do not establish that any ratification of the previous unauthorized agent action.

The trial court's similar sidestep on the ACC's complete disregard for its own internal governance documents as an inadvertent "mistake" is equally unavailing, as the ACC's conduct here was not innocently done to "approve defective actions which the entities failed to originally authorize," nor was this some sort of overlooked procedural stumble that required mere clean-up correction. (Order ¶¶ 46–48.) To be clear, the Ryan Declaration and Hostetter Affidavit definitively confirm that the ACC had long planned behind the back of FSU to sue FSU, and been laying-in-wait for the opportune time to spring its hip

pocket complaint on the FSU Board in Mecklenburg County, all for strategic advantage (more on this in the next section).

This is evidenced by the ACC's own statements in the affidavits/declarations before the trial court, the 33-page, 146-paragraph Initial Complaint (with eight exhibits including a FSU Board meeting transcript) that was filed within a few hours after first learning the FSU Board was convening an emergency meeting on undisclosed subjects, and its own Response to the FSU Board's Motion in which the ACC boasted that it won "the race to the courthouse." In other words, the ACC made the deliberate decision to circumvent any member vote initiating its material litigation to surprise FSU and gain a favorable forum.[26]

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[26] The trial court also erred in suggesting the "ratification" should be given effect as though originally authorized, i.e. relate back. (Order ¶ 46.) Ratification of an unauthorized act of an agent is legally ineffective if the relation back impacts a third party's intervening rights. *See* Restatement (Third) of Agency § 4.05 ("A ratification of a transaction is not effective unless it precedes the occurrence of circumstances that would cause the ratification to have adverse and inequitable effects on the rights of third parties. These circumstances include: … (2) any material change in circumstances that would make it unequitable to bind the third party, unless the third party chooses to be bound[.]"); *First Telebanc Corp. v. First Union Corp.*, No. 02-80715-CIV-GOLD/TURNOFF, 2007 WL 9702557, at *10 (S.D. Fla. Aug. 6, 2007) (unpublished) ("While ratification of an unauthorized act may relate back to the original act, such ratification will only relate back if the rights of third parties have not been affected in the interim[.]"); *Matter of Rice v. Novello*, 808 N.Y.S.2d 486, 488 (N.Y. App. Div. 2006) ("[T]he ratification could have no retroactive effect" given a third party's rights); *Hernandez v. IndyMac Bank*, No. 212CV00369MMDCWH, 2014 WL 12644259, at *5 (D. Nev. Sept. 19, 2014) (unpublished) (no ratification given "it would have an adverse and inequitable effect on Plaintiff's rights for this Court to permit ratification");

Legal failings aside, the ACC's position on ratification simply does not pass the commonsense test. If Ryan proclaims in March 2024 that he always and still believed that the Initial Complaint was "immaterial" when he authorized it (thus needing no prior member vote), then why would he insist on 12 January 2024 that the ACC Board treat his act as unauthorized, needing a subsequent ratification by his principal armed with full knowledge of all material facts? Indeed, the FSU Board first pointed out the fact that "the ACC materially breached its agreements with" FSU by "[i]nitiating a lawsuit against the [FSU Board] without obtaining authority for such action from its members, as required by the ACC Constitution" on 29 January 2024, seventeen days after the clandestine 12 January 2024 meeting. (ECF No. 19.1 ¶ 248.) Also (again), where are the 12 January 2024 meeting minutes that would clarify what "knowledge" was supplied to the principal before

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Alabama Mun. Ins. Corp. v. Alliant Ins. Servs., Inc., No. 2:09-CV-928-WKW, 2012 WL 39950, at *10 (M.D. Ala. Jan. 9, 2012) (unpublished), *aff'd*, 521 F. App'x 873 (11th Cir. 2013) (citing Restatement (Third) of Agency § 4.05 and holding it would be "inequitable to bind Alliant to AMIC's attempted ratification"); *Pinal Cnty. v. U.S.*, No. CV-09-00917-PHX-NVW, 2010 WL 3523071 (D. Ariz. Sept. 3, 2010) (unpublished); *Boyce v. Chem. Plastics*, 175 F.2d 839 (8th Cir. 1949). Here, because the FSU Board (the third party) filed and served its Complaint in December of 2023, the purported 12 January 2024 "ratification" was legally ineffective as to the FSU Board. *See Wagner v. City of Globe*, 722 P.2d 250, 255 (Ariz. 1986) (where the third party (a police officer) filed suit challenging his unauthorized termination by the agent of the principal (a municipality) before the municipality had ratified the agent's unauthorized termination, the ratification did not relate back against the officer).

the vote, and what vote was actually taken? How could conclusive findings of fact about such a vote be made without such information based solely on hearsay?

Simply put, the trial court gave the ACC a legal pass at the expense of the FSU Board (and the State of Florida) and this Court's own precedent, and the ACC's *intentional* disregard of its own Constitution mandates review and correction on appeal.

B. The Trial Court Similarly Disregarded Long-Standing Case Law on the Anticipatory Filing Exception Despite the ACC's Admissions as to Its Preemptory Forum Shopping.

Not only did the trial court look the other way on the ACC's refusal to comply with its own mandatory Constitutional prerequisites, it did so in order to support its finding that the ACC should be given deference as the first-filer "plaintiff" under N.C.G.S. § 1-75.12, even though the ACC readily admits it had been preparing for its last-second race to the courthouse for months. When applying North Carolina law to the ACC's actions here, this was in further error as the ACC is not entitled to any advantage for purposely filing its limited lawsuit just a few hours before the more fulsome Florida Action in order to gain a perceived tactical advantage.

While not initially considered in the context of N.C.G.S. § 1-75.12, 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

(2000).[27] 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 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

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[27] The *Coca-Cola* decision is rooted in federal jurisprudence that denies the first filing party any deference when that plaintiff has notice of an imminent or pending lawsuit and the initial action is only (or primarily) asserted as a means of "procedural fencing" to secure 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); *see also Nautilus Inc. Co. v. Winchester Homes, Inc.*, 15 F.3d 371, 377 (4th Cir. 1994) (holding that initial declaratory action could proceed when determined that it was not initiated for the purpose of "procedural fencing"); *Learning Network, Inc. v. Discovery Commc'ns, Inc.*, 11 Fed. App'x 297, 301 (4th Cir. 2001) (unpublished) ("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.").

> 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 repeatedly applied the "anticipatory filing" exception developed in *Coca-Cola* under both N.C.G.S. §§ 1-75.12 and 1-257 in several factual contexts similar to those presented in this case to deny attempts by a litigant to preemptively (and improperly) control the forum for strategic purposes when it is aware that its opponent's filing of a lawsuit is imminent. *See Harleysville Mut. Ins. Co. v. Narron*, 155 N.C. App. 362, 369 (2002) (affirming summary judgment against the first-filer, 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 (2011) (relying heavily on the standard articulated in *Coca-Cola*, the trial court's denial of the plaintiffs' request for declaratory relief was 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); *La Mack v. Obeid*, No. 14-CVS-12010, 2015 WL 966239, at *6–7 (N.C. Super. Ct. March 5,

2015) (unpublished) (denying first-filed priority to due to plaintiff's improper use of a "hip-pocket" complaint as means to manipulate venue).[28]

Here, the ACC readily admits that it had "actual notice" of the FSU Board's meeting the following day and then preemptively raced to file this action late in the day on 21 December 2023 on a hunch to attain what it presumed to be a more favorable forum. (ECF No. 5 ¶ 114; ECF No. 11 ¶ 149.) 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* eighteen-hour difference between the filing of this case and the Florida Action thereby did not justify any first-filer advantage for the ACC.[29]

Again, the trial court improperly provided the ACC an escape hatch from the unambiguous case law by declaring the ACC as the "true plaintiff" in the dispute. (Order ¶ 123.) But the trial court's erroneous conclusion is premised on a one-sided assessment of the parties' dispute, as the FSU Board has alleged misconduct

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[28] 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*, 5:08CV-152, 2009 WL 2397088, at *3–4 (W.D.N.C. July 31, 2009) (unpublished); *N. Am. Roofing Servs., Inc. v. BPP Retail Props., LLC*, No. 1:13-cv-000119-MR-DLH, 2014 WL 1092319, at *3–4 (W.D.N.C. 2014) (unpublished).

[29] *See N. Am. Roofing Servs.,* 2014 WL 1092319, at *3–4 for nearly identical facts to what took place here (declaratory judgment action filed **one day before** the defendant deemed an improper race to the courthouse).

in the Florida Action towards FSU by the ACC going back several years and transgressing multiple different articles or sections of the ACC Constitution and Bylaws as well as implicating exclusively Florida law on the issues of sovereign immunity, restraint of trade, and public policy, as well as confidentiality under Florida's robust open records laws. (*See generally* ECF No. 19.1 ¶¶ 105–47.)[30] In contrast, the ACC's limited action here only involves the narrow Grants of Rights and touches on nothing else.

And if the ACC is really the true plaintiff, then why did it wait until the evening before the FSU Board meeting, when it already had a 133-paragraph lawsuit (with a FSU Board meeting transcript as an exhibit) in the can and ready to go? More importantly (and as the FSU Board noted repeatedly in the trial court), if the Florida Action was not filed on 22 December 2023, then what would happen to the ACC's claims here? The answer is the ACC's claims would all be unripe and moot, with this action exposed as having been filed solely as a litigation tactic. The FSU Board was and is the true plaintiff.

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[30] By its express terms, with respect to FSU, ***all issues of confidentiality*** pertaining to any ESPN Agreement are "subject to the law applicable" to FSU. And that law is carefully explained in the case of *NCAA v. Associated Press*, 18 So. 3d 1201, 1207 (Fla. 1st DCA 2009) which is directly on point. As noted above, and based on the holding in *NCAA*, the trial court further erred both in (1) applying North Carolina law instead of the governing Florida law, and (2) concluding the ACC's breach of implied contract count stated a claim against the FSU Board, a non-party to the ESPN Agreements. (Order ¶¶ 87–93.)

Accordingly, the ACC's anticipatory filing of this action in an admitted effort to beat the FSU Board to the courthouse warrants no deference under N.C.G.S. § 1-75.12, and the trial court erred in wholly disregarding the ACC's misconduct associated with the filing of the Initial Complaint and weighing this factor in favor of the ACC.

C. The Trial Court Did Not Properly Consider and Weigh the Significant Florida-Specific Issues and Matters of Foreign Concern That Envelop This Dispute.

The remainder of the applicable factors likewise favor a stay of this case in favor of the Florida Action, yet the trial court (like its first to file analysis) nevertheless drew every possible inference across the board in favor of the ACC. When applying the relevant remaining N.C.G.S. § 1-75.12 factors under *Lawyers Mutual* (1 – nature of the case), (5 – applicable law), (6 – burden of litigating matters of local concern), and (7 – the desirability of litigating matters of local concern in local courts), it is also readily apparent that Florida is the more appropriate forum.

This is primarily because this case involves important jurisdictional issues of sovereign immunity waiver under Fla. Stat. §§ 1001.72 and 768.28. Such a waiver is clearly a matter of "foreign concern" for the State of Florida, and the trial court unnecessarily decided Florida had waived sovereign immunity under North Carolina law when it could have just stayed the matter and not addressed this issue.

In addition, the trial court ignored the reality that the subject matter of the ACC's Grant of Rights lawsuit here concerns only Florida intellectual property, namely, the media rights to FSU's home games played almost exclusively in Tallahassee, Florida after FSU leaves the ACC. In its Amended Complaint, the ACC admits "[t]his matter involves a dispute over whether the Grant of Rights . . . granted Florida State's Media Rights to the ACC" defining those "Media Rights as a form of intellectual property." (ECF No. 63, ¶ 25.)[31]

Moreover, the ACC admitted in its Amended Complaint that "Florida State's Media Rights, a form of intellectual property, are worth in excess of $5 Million." (*Id.* at ¶ 178.) And the ACC further admitted that the FSU Media Rights "are for 'home' games. A 'home' game is any game which is either played at [FSU's] home or in which [FSU] is designated as the 'home' team." (*Id.* at ¶ 58 n.5.) Thus, the ACC wants a North Carolina court to declare the ACC "the owner" of all Florida State's home games through 2036 *regardless of whether FSU remains in the ACC* (*i.e.*, an ACC "Member Institution"). (*Id.* at ¶ 184.) In other words, the only subject matter of this dispute (according to the ACC) is FSU's intellectual property rights (FSU Media Rights) to all of FSU's home games played in

[31] Though the Amended Complaint was originally filed at ECF No. 11 (sealed) and ECF No. 12 (public, redacted version), the FSU Board has attached hereto the most recently filed version of the Amended Complaint, ECF No. 63. This version was filed per the trial court's request following its Order and Opinion on Motions to Seal. (ECF No. 58 at pp. 16–17.)

Tallahassee and broadcast from Tallahassee using FSU facilities in Tallahassee for the next twelve years after FSU leaves the ACC. What could possibly be more Florida-centric?

In the Florida Action, the FSU Board also asserts that the ACC's misconduct and dealings with third parties constitute direct violations of both restraint of trade under Fla. Stat. § 542.18, Florida open records laws, and Florida public policy and that its nine-figure withdrawal penalty amounts to an unenforceable penalty under Florida law.[32] These are issues (as well as property and Florida state taxpayer money) that should properly be interpreted and decided by a Florida court – i.e., by the state whose treasury is at risk and the state far more familiar with the intent and application of these state-specific statutes.

Furthermore, both parties 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 under 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. And the FSU Board has alleged that the ACC Commissioner and his media consultant traveled to Florida to personally lobby individual FSU Board members with respect to the Grant of Rights directly at issue. (ECF No. 28 ¶

[32] *See* ECF No. 19.1 pp. 47–51, 57–58.

89.) As such, almost all the predicate acts upon which the ACC's First Amended Complaint rest occurred entirely in Florida and are determinable only under Florida law.

Entirely ignoring the lone subject matter of the suit (FSU's media rights), the trial court focused predominantly on the governing law and the location of potential witnesses, which still relies upon an incomplete analysis that does not take into account the N.C.G.S. § 1-75.12 factors in the aggregate. While North Carolina contract law may apply to some of the contract 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 (2018) ("Florida's rules of contract interpretation are essentially the same as North Carolina's…").[33] As to the available witnesses and their respective locations, the trial court simply took the ACC at its word (without supporting affidavits or any other evidence) as to the location of purported witnesses, while

[33] 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).

simultaneously disregarding that the ACC has alleged misconduct against individual FSU Board members whom are located *in Florida*.

When conducting a true and thorough analysis of the parties' claims and issues, it is readily apparent that Florida is the true proper forum for this case under N.C.G.S. § 1-75.12 and the trial court erred in refusing to stay this action pending the final adjudication of the parties' claims in the Florida Action (which subsumes all claims alleged by the ACC here).[34] As such, (1) a substantial injustice has resulted to the FSU Board arising from the trial court's erroneous denial of the stay, (2) the stay of this action is warranted by the factors at issue, and (3) the alternative forum of Florida is more than convenient, reasonable, and fair. *Lawyers Mut. Liab. Ins. Co.*, 112 N.C. App. at 356.

For these reasons, immediate review by this Court is necessary to correct the trial court's misapplication of the N.C.G.S. § 1-75.12 factors and its denial of a stay in favor of the true plaintiff – the FSU Board.

II. The Writ Should Issue Because Extraordinary Circumstances Exist, and Judicial Efficiency Will be Served By Addressing These Issues Concurrently With the FSU Board's Appeal as of Right on Personal Jurisdiction/Sovereign Immunity Grounds.

[34] Of course, the ACC can assert whatever claims it thinks are not already encompassed by the more comprehensive Florida Action by way of counterclaims in that case, which remains pending.

In addition to the above-referenced errors by the trial court necessitating immediate review and correction, certiorari is further appropriate in the interest of justice where the impact of the lawsuit is significant, the issues involved are important, and the case either presents a need for a writ in the interest of the efficient administration of justice or the granting of the writ would promote judicial economy. *Hundley v. Automoney, Inc.*, 284 N.C. App. 378, 381 (2022) (quoting *Stetser v. TAP Pharm. Prods, Inc.*, 165 N.C. App. 1, 12 (2004)) (internal quotations omitted) (granting certiorari due to effect of order on parties and substantial amount of potential liability at issue).

"The interests of judicial economy are implicated and may well be served by certiorari review of interlocutory orders ***when they are interrelated in nature to other issues on appeal as a matter of right***." *Town of Apex v. Rubin*, 277 N.C. App. 357, 363 (2021) (emphasis added and cleaned up) (citing *Jessee v. Jessee*, 212 N.C. App. 426, 431 (2011)). Certiorari review of a non-appealable interlocutory order is also appropriate "when interlocutory review of a dispositive question of law would be more efficient than deferring the issue until final judgment at the trial level." *Morris v. Rodeberg*, 285 N.C. App. 143, 148 (2022) (quoting *Reid*, 187 N.C. App. at 264); *see also Lamb v. Wedgewood S. Corp.*, 308 N.C. 419, 425 (1983) (affirming lower court's grant of *certiorari* review of denial of motion for summary judgment because where "[t]he issue is strictly a legal one

and its resolution is not dependent on further factual development…[and] the issue of the applicability and interpretation of th[e] statute is squarely presented…"); *see Pelican Watch v. U.S. Fire Ins. Co.*, 323 N.C. 700, 702 (1989) (certiorari allowed in the interest of judicial economy so as to avoid fragmentary appeals).

The FSU Board's petition before this Court is on all fours with the precedent previously granting certiorari, inextricably intertwined with the other personal jurisdiction/sovereign immunity issues before this Court as of right, and replete with the "extraordinary circumstances" that justify such review. For example, the failure to review the threshold issues of standing and subject matter jurisdiction at this critical juncture along with personal jurisdiction would lead to a "considerable waste of judicial resources" if this Court later holds at the end of the case that the "trial court [was deprived] of any power to rule in this case" and the proceedings below were a "nullity." *Cryan*, 384 N.C. at 573 (noting importance of threshold issue of subject matter jurisdiction as basis for immediate interlocutory review).

Hearing all of these issues now in conjunction with the FSU Board's appeal as of right will also avoid the potential for fragmentary appeals on parallel threshold issues (*i.e.*, personal and subject matter jurisdiction) in a case that entails rights and obligations valued at approximately $700 million dollars. Furthermore, the statutory scheme at issue (N.C.G.S. § 1-75.12) and the posture of this particular case present the crucial intersection of standing/subject matter jurisdiction, the

anticipatory filing doctrine, and the consideration of claims arising in foreign jurisdiction that will provide importance guidance to the courts below on a host of issues related to the consideration of a stay under this statute. *Cryan*, 384 N.C. at 573 ("extraordinary circumstances" include "wide-reaching issues of justice and liberty at stake") (quoting *Doe*, 273 N.C. App. at 23).

All of these issues warrant immediate review by this Court, and the FSU Board therefore respectfully requests the issuance of a writ of certiorari.

ATTACHMENTS

Attached to this petition for consideration by the Court is a certified copy of the 4 April 2024 Order and Opinion on Defendant's Motion to Dismiss Or, In the Alternative, Stay the Action sought to be reviewed, and the following items from the trial court record:

Exhibit A – Plaintiff's Complaint for Declaratory Judgment (ECF No. 62);

Exhibit B – Plaintiff's First Amended Complaint (ECF No. 63);

Exhibit C – FSU Board's Motion to Dismiss Or, In the Alternative, Stay the Action and Accompanying Brief (ECF Nos. 19 and 20) (under seal exhibit 19.1 omitted);

Exhibit D –Affidavit of Brad Hostetter (ECF No. 31.2);

Exhibit E –Declaration of James E. Ryan, J.D. (ECF No. 46.3);

Exhibit F – Verbatim Transcript of the March 22, 2024 Hearing;

Exhibit G - 4 April 2024 Order and Opinion on Defendant's Motion to Dismiss Or, In the Alternative, Stay the Action (ECF No. 56); and

Exhibit H – 9 April 2024 Notice of Appeal to the North Carolina Supreme Court (ECF No. 60).

Exhibit I – ACC Constitution (ECF No. 12.1), ACC Grant of Rights (ECF No. 12.2), ACC Bylaws (ECF No. 12.4), and Amendment to ACC Grant of Rights (ECF No. 12.7).

CONCLUSION

For all of these reasons, the FSU Board respectfully requests that this Court issue a writ of certiorari to the North Carolina Business Court (Mecklenburg County) so that it may review the Order and Opinion on Defendant's Motion to Dismiss Or, In the Alternative, Stay the Action, upon the issues stated as follows:

1. Whether the trial court lacked subject matter jurisdiction due to the ACC's lack of standing when it filed the Initial Complaint.

2. Whether the trial court abused its discretion in denying the FSU Board's request to stay this action under N.C.G.S. § 1-75.12.

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Respectfully submitted, this the 17th day of May 2024.

BRADLEY ARANT BOULT CUMMINGS LLP

Electronically Submitted

/s/ C. Bailey King, Jr.
C. Bailey King, Jr.
N.C. State Bar No. 34043
214 North Tryon Street, Suite 3700
BRADLEY ARANT BOULT CUMMINGS, LLP
Charlotte, NC 28202
Telephone: (704) 338-6000
Facsimile: (704) 332-8858
bking@bradley.com

N.C. R. App. P. 33(b) Certification: I certify that all of the attorneys listed below have authorized me to list their name on this document as if they had personally signed it.

Christopher C. Lam
N.C. State Bar No. 28627
Brian M. Rowlson
N.C. State Bar No. 37755
Hanna E. Eickmeier
N.C. State Bar No. 54927
BRADLEY ARANT BOULT CUMMINGS, LLP
214 North Tryon Street, Suite 3700
Charlotte, NC 28202
Telephone: (704) 338-6000
Facsimile: (704) 332-8858
clam@bradley.com
browlson@bradley.com
heickmeier@bradley.com

David C. Ashburn (*pro hac vice forthcoming*)
Florida Bar No. 708046
Peter G. Rush (*pro hac vice forthcoming)*
Florida Bar No. 1050902
John K. Londot (*pro hac vice forthcoming*)
Florida Bar No. 579521
GREENBERG TRAURIG, P.A.
101 East College Avenue
Tallahassee, FL 32302
Telephone: (850) 222-6891
Facsimile: (850) 681-0207
ashburnd@gtlaw.com
peter.rush@gtlaw.com
londotj@gtlaw.com
Attorneys for Defendant Board of Trustees of Florida State University

VERIFICATION

The undersigned counsel for petitioner, after being duly sworn, says:

The material allegations of the foregoing petition are true to my personal knowledge, except those matters stated on information and belief, and as to those matters, I believe them to be true.

Additionally, pursuant to Rule 21 of the North Carolina Rules of Appellate Procedure, counsel for petitioner was unable to attain certified copies of Attachments A, B, C, D, E, and I from the Mecklenburg County Clerk of Superior Court, but further verifies that these documents are true and accurate copies of those documents either received or filed by counsel for petitioner through the Business Court filing system.

BBK

C. Bailey King, Jr.

Mecklenburg County
State of North Carolina

Sworn to (or affirmed) and subscribed before me by C. Bailey King, Jr. this the 17th day of May, 2024.

Karrie E. Kelley
Notary Signature

{Notary Seal}

KARRIE E. KELLEY
Notary Public
North Carolina
Iredell County

Karrie E. Kelley
Print Notary Name

My Commission expires: April 1, 2027

CERTIFICATE OF SERVICE

The undersigned hereby certifies that the foregoing **PETITION FOR WRIT OF CERTIORARI** has been served upon all counsel of record this day by electronic mail and by depositing a copy hereof to each said party, postage pre-paid in the United States Mail, properly addressed as follows:

James P. Cooney
Sarah Motley Stone
Patrick Grayson Spaugh
Womble Bond Dickinson (US) LLP
301 South College Street, Suite 3500
Charlotte, North Carolina 28202-6037
Jim.Cooney@wbd-us.com
Sarah.Stone@wbd-us.com
Patrick.Spaugh@wbd-us.com

Charles Alan Lawson
Lawson Huck Gonzalez, PLLC
215 South Monroe Street, Suite 320
Tallahassee, Florida 32301
alan@lawsonhuckgonzalez.com

Attorneys for Plaintiff Atlantic Coast Conference

This the 17th day of May 2024.

/s/ C. Bailey King, Jr.
C. Bailey King, Jr.

EXHIBIT A

STATE OF NORTH CAROLINA COUNTY OF MECKLENBURG	IN THE GENERAL COURT OF JUSTICE SUPERIOR COURT DIVISION 23-CVS-
ATLANTIC COAST CONFERENCE, Plaintiff, v. BOARD OF TRUSTEES OF FLORIDA STATE UNIVERSITY. Defendants.	**COMPLAINT FOR DECLARATORY JUDGMENT**

NOW COMES the Plaintiff in the above-captioned matter, the ATLANTIC COAST CONFERENCE ("the ACC" or "the Conference"), pursuant to N.C. Gen. Stat. § 1-253 et seq. and, complaining of Defendant Board of Trustees of Florida State University ("Florida State"), states that:

Summary of Claims

At its core, this case involves the legal promises of Florida State and its obligations to the Conference to which it has belonged and from which it has profited from for more than 30 years. In 2013 and 2016, Florida State, along with the other Members of the ACC, agreed to and executed a "Grant of Rights" through which it transferred the exclusive media rights to all its "home" games contests to the Conference (the "Media Rights"). Florida State and the other Members of the ACC made these grants so that the Conference could negotiate a long-term contract and agreements with ESPN. By aggregating these collective Media Rights in the Conference, the Members were able to realize more value from those Media Rights than if they had each attempted to market them separately. These aggregated Media Rights, in turn, led to the negotiations of agreements and contracts that provided a predictable source of income to the Members and ultimately resulted in

the creation of the ACC Network. By the end of the contracts and agreements with ESPN, the Conference will have received and distributed to its Members [redacted] including specific "Grant of Rights" payments. Under these agreements, Florida State has received more than [redacted] to date, and will receive [redacted] more through 2036.

In signing the Grant of Rights, Florida State explicitly agreed that it would not "take any action, or permit any action to be taken by others subject to its control . . . that would affect the validity and enforcement" of the Grant of Rights. Florida State further promised that its Grant was "irrevocable" and "exclusive" through its term. Moreover, Florida State, the Conference, and the other Member Institutions, guaranteed in [redacted]

[redacted]

[redacted]"

Florida State now intends to breach its contractual obligations not to challenge the validity or enforceability of the Grant of Rights, to breach its promise that its Grant was "irrevocable" and "exclusive," to intentionally violate the warranties of the ESPN agreements, and to challenge the Grant of Rights under which it has accepted hundreds of millions of dollars over the last decade. Despite its commitment for nearly a decade, and in multiple agreements. that it "irrevocably and exclusively" granted its Media Rights to the Conference, Florida State now intends to take the position that its grant was neither irrevocable nor exclusive.

Consequently, the ACC seeks a declaration that the Grant of Rights signed by Florida State in 2013 and 2016 is valid and enforceable and that Florida State is equitably estopped from challenging the validity or enforceability of the Grant of Rights validity or has waived the right to do so, by knowingly executing the Grant of Rights and then accepting hundreds millions of dollars in benefits under the Grant of Rights for more than a decade.

I. Parties, Jurisdiction, and Venue

A. The Parties

The Atlantic Coast Conference

1. The ACC is an unincorporated nonprofit association under North Carolina law. The ACC currently has 15 Member Institutions: Boston College, Clemson University, Duke University, Florida State University, Georgia Institute of Technology, University of Louisville, University of Miami, University of North Carolina at Chapel Hill, North Carolina State University, University of Notre Dame (except for Football), University of Pittsburgh, Syracuse University, University of Virginia, Virginia Polytechnic Institute & State University, and Wake Forest University. [1] The ACC's Board of Directors has 15 voting members, including the President of Florida State University. Its headquarters and principal place of business is in Charlotte, Mecklenburg County, North Carolina. Since its inception over 70 years ago, the ACC's principal place of business and headquarters have been located in North Carolina.

2. As an unincorporated nonprofit association under North Carolina law, the ACC has the ability to sue in its own name and enter into contracts. N.C. Gen. Stat. § 59B-8. As an unincorporated nonprofit association, the ACC is a legal entity "separate from its members for the purpose of determining and enforcing rights, duties, and liabilities." N.C. Gen. Stat. § 59B-7(a). Consequently, the Conference may, acting on its own behalf, enforce its contractual obligations with one or more of its Member Institutions. N.C. Gen. Stat. § 59B-7(e).

[1] The ACC refers to its members as "Member Institutions," while its agreements with ESPN refer to the members as "Conference Institutions." "Member," "Member Institution," and "Conference Institution" will be used interchangeably in this Complaint.

3. The Conference is a party to the written contracts that form the subject-matter of this Complaint and is therefore entitled to seek a declaration of its rights and other legal relations under these written contracts within the meaning of N.C. Gen. Stat. § 1-254.

Florida State University Board of Trustees

4. The Florida State University Board of Trustees is governed by the laws of the State of Florida. The Board of Trustees oversees and manages the operations and affairs of Florida State University. According to its Mission Statement, Florida State University is an institution of higher education which aims to "preserve, expand, and disseminate knowledge in the sciences, technology, arts, humanities, and professions, while embracing a philosophy of learning strongly rooted in the traditions of the liberal arts and critical thinking."

5. Florida State is an ACC Member Institution. The Board of Trustees ratified and approved of Florida State as a Member Institution of the ACC.

6. In accordance with the laws of the State of Florida, the Board of Trustees has the authority "to contract and be contracted with, to sue and be sued, to plead and be impleaded **in all courts of law or equity**." Fla. Stat. § 1001.72(1) (emphasis added). Accordingly, Florida State waives its sovereign immunity when it enters into express contracts and consents to suits in all courts and therefore sovereign immunity does not protect Florida State from suit in North Carolina on North Carolina contracts that to which Florida State is a party.

B. Personal Jurisdiction

7. In matters involving the ACC, Florida State is subject to the jurisdiction of the State of North Carolina as a result of its continuous and systematic membership and governance activities within the ACC. Consequently, this Court may exercise personal jurisdiction over Florida State pursuant to N.C. Gen. Stat. § 1-75.4(1)(d), (4), and (5).

8. Since 1991, Florida State has been an ACC Member Institution. Throughout this time, Florida State has regularly attended ACC meetings held in the State of North Carolina.

9. Due to the fact that the ACC is a North Carolina unincorporated non-profit association, each of its Member Institutions is responsible for managing and overseeing its operations. Florida State has played an active role in the administration of ACC affairs. The President of Florida State is a Member of the Board of Directors, while Florida State's Athletic Director, like the Athletic Directors of all Member Institutions, attends Athletic Director meetings and serves on the Football and Basketball Committees. Each of Florida State's Head Coaches serves on the committee for his or her respective sport. Currently, Florida State officers or representatives serve on at least 11 committees governing and advancing the mission of the ACC. In the past decade. Florida State officers and employees have served on the following notable committees and in the following positions:

a. Florida State's current President served on the Finance Committee (2022-2023), and its previous president served as chair of the Council of Presidents (2018-2019) and as a member of the Executive Committee (2018-2019);

b. A Florida State faculty member served on the Executive Committee (2013-2017), as the president of the ACC (2015-2016), and its current President is currently on the Finance Committee (and participated as recently as December 12, 2023);

c. The Florida State Athletic Director served on the Television or Media Committees from 2013 to 2023; and,

d. A member of the Athletic Department served on the Finance Committee (2012-2013 and 2016-2020), as well as the Constitution and Bylaws Committee (2012-2014 and 2016-2018).

10. The Conference generally holds two meetings of the Board of Directors per month, with three of these meetings held in person annually, often in North Carolina. Three of the four most recent in-person Board of Directors meetings were held in North Carolina: Durham, North

Carolina (September 2022), and Charlotte, North Carolina (February 2023 and May 2023); Florida State's President attended either via Zoom or in person.

11. The ACC's Board of Directors is responsible for selecting the ACC's headquarters. In 2022, the Board, including Florida State's President, voted unanimously to relocate the ACC's headquarters and principal place of business from Greensboro to Charlotte, North Carolina. In doing so, the ACC, through its Board of Directors, accepted a financial incentive of $15 Million created by the State of North Carolina, paid for by North Carolina taxpayers, and made available to an athletic conference that established or maintained its headquarters in North Carolina and held at least four men's and four women's basketball tournaments in North Carolina over the next ten years, and twenty other Championship events in North Carolina over the next twenty years. Session Law 2022-74, HB 103, Section 11.8(a). Thus, Florida State voted to accept benefits from North Carolina taxpayers through its role as a Member Institution of the Conference.

12. The contracts that Florida State is contesting, the Grant of Rights and amended Grant of Rights, are North Carolina contracts. Florida State executed the Grant of Rights and transmitted its signature pages to the ACC in North Carolina. As set forth in this Complaint and its exhibits, the Commissioner of the ACC did not execute the Grant of Rights or amended Grant of Rights until after each of the Member Institutions had signed. This final execution in North Carolina was the last act necessary for the formation of this contract and means that the Grant of Rights and amended Grant of Rights is a North Carolina contract governed by North Carolina law.

13. Between 2014 and 2016, the ACC entered into multiple agreements with ESPN[2] for the Media Rights ceded by the Grant of Rights. These agreements were not possible without the Media Rights ceded by the Grant of Rights.

[2] "ESPN" refers to ESPN, Inc. and ESPN Enterprises, Inc.

14. These agreements included an Amended Multimedia Agreement in 2014 (which was superseded by a Restated and Amended Multimedia Agreement in 2016), and an agreement establishing the ACC Network as a joint venture. Under these agreements, ESPN has paid and continues to pay the Conference a Rights Fee, a Royalty, and a Grant of Rights Fee. The Conference then allocates these fees and royalties to its Member Institutions, including Florida State. Since signing the Grant of Rights agreement, Florida State has accepted more than $[redacted] in distributions under these agreements.

15. Four ACC Member Institutions are located in North Carolina, and Florida State frequently travels to North Carolina to compete in ACC-sponsored and administered athletic events and athletic competitions against these four North Carolina Member Institutions. Additionally, many of the ACC's championships are conducted, held, and administered in North Carolina. For reference, the ACC Football Championship Game has been held in Charlotte 13 times since its inception in 2005, and Florida State has competed in this Championship five times, the last time occurring on December 2, 2023. Since 1991, the ACC's Men's and Women's Basketball Tournaments, in which Florida State regularly competes, have been held 25 times in North Carolina, including most recently in March 2023.

16. To the extent relevant, the Conference adopts by reference and incorporates the remaining paragraphs and attached Exhibits of this Complaint as evidence of Florida State's consistent and systematic contacts with North Carolina.

C. Subject-Matter Jurisdiction

17. This Court has subject matter jurisdiction under N.C. Gen. Stat. §§ 7A-240 and 1-253 et seq.

18. This Court is authorized to declare the ACC's rights and legal obligations and interpret the terms of the various contracts that are the subject of this Complaint. The Court further has the authority to issue such a declaration before there has been a breach of these contracts.

19. Under the laws of the State of Florida, Florida State has waived sovereign immunity and consented to be sued when entering into contracts: the Florida State Board of Trustees has the authority "to contract and be contracted with, to sue and be sued, to plead and be impleaded **in all courts of law or equity**." Fla. Stat. § 1001.72(1) (emphasis added).

20. Florida State further consented to be sued in the State of North Carolina through its membership and leadership in the ACC, an unincorporated nonprofit association under North Carolina law, and under the plain language of Fla. Stat. § 1001.72(1), which permits Florida State to be sued in "all courts" regardless of the location of such courts.

21. Under the Uniform Unincorporated Nonprofit Association Act, N.C. Gen. Stat. § 59B-1, et seq., each Member Institution of the Conference is responsible for oversight and administration of the Conference. N.C. Gen. Stat. § 59B-7(e) further provides that each Member Institution has standing to assert a claim by the Conference in its own name. Under these statutory provisions, and as specifically noted in the Official Comment to N.C. Gen. Stat. § 59B-8, each member of an unincorporated nonprofit association has the right to "sue and be sued." Consequently, as provided by these statutory provisions, because any Member Institution has standing to bring a claim involving the Conference, each Member Institution also consents to sue and be sued in North Carolina. *See Farmer v. Troy University,* 382 N.C. 366, 370–71 (2022) *petition for certiorari denied* (No. 22-787 May 30, 2023) (state university consented to sue and be sued by registering as a nonprofit corporation where the North Carolina Act provided that nonprofit corporations could sue and be sued).

D. Venue

22. As of August 1, 2023, the ACC's headquarters and principal place of business are located in Charlotte, North Carolina. According to N.C. Gen. Stat. § 59B-13, for purposes of venue, the ACC is a resident of Mecklenburg County, North Carolina.

23. This matter involves a dispute over whether the Grant of Rights and amended Grant of Rights entered into by Florida State and the Conference in 2013 and amended in 2016 is a valid contract which granted Florida State's Media Rights to the ACC. Media rights are a form of intellectual property. N.C. Gen. Stat. § 7A-45.4(a)(5).

24. This matter further involves a dispute that will necessitate reference to and interpretation of the law governing corporations (including unincorporated nonprofit associations) under N.C. Gen. Stat. § 7A-45.4(a)(1).

25. The amount in dispute that is the subject of this request for declaratory exceeds $5,000,000, as the total Media Rights subject to the ESPN contracts and agreements that Florida State breached amount to [redacted]

II. Factual Background

A. The Formation, Purpose, and Structure of the ACC

26. The ACC is the country's most successful collegiate academic and athletic conference.

27. The ACC has led the Football Bowl Subdivision conferences in the best average rank in the *U.S. News and World Report* rankings for the past 17 years.[3] It has a graduation success

[3] In the most recent survey, 6 of the soon-to-be 18 Members of the Conference were ranked among the top 25 Universities in the country. No other FBS Conference had more than 3 universities in the top 25.

rate of 96% for all of its sports, and 147 of the teams in the ACC had a 100% graduation success rate. Seven of its 15 present Members have graduation rates of more than 91% for Football.

28. In the past two years and across all sports, ACC athletic teams have won 20 NCAA championships (including 14 championships in 2023), more than any other conference. The Conference has placed the second highest number of teams in the College Football Playoff and won the second most national championships in football over the past decade. In Men's Basketball, ACC teams appear in the Final Four on a consistent basis, and its programs have won more national championships than any other Conference over the past 30 years. In 2023, 24 ACC teams advanced to the finals or semi-finals of NCAA championships, and both the Men's Lacrosse and Women's Tennis Championships featured all-ACC finals. Eighteen ACC teams finished 2023 ranked No.1 or No. 2 in the final polls, the most of any other conference. The ACC sponsors 15 women's sports, the highest number among major conferences, and 28 sports overall.

29. There are approximately 10,000 student-athletes participating in ACC-sponsored sports.[4] More than 100 current or former ACC athletes from 15 sports are currently training on U.S. National Teams in an effort to qualify for the 2024 Olympics. At the 2023 FINA World Championships, 11 different ACC swimmers participated. Twenty-nine current and former ACC athletes represented nine countries at the 2023 Women's World Cup, five of whom played for the United States.

30. The ACC was founded on May 8, 1953, at the Sedgefield Inn near Greensboro, North Carolina. It consisted of seven Member Institutions: Clemson University, Duke University,

[4] Beginning August 2, 2024, and with the addition of Stanford University, the University of California Berkley, and Southern Methodist University, the ACC will have more than 12,000 student athletes.

the University of Maryland, the University of North Carolina, North Carolina State University, the University of South Carolina, and Wake Forest University.

31. On June 14, 1953, the charter members adopted the first set of bylaws and a constitution. The current ACC Constitution is attached as **Exhibit 1** to this Complaint.

32. On December 4, 1953, the University of Virginia became the eighth Member Institution of the ACC. On May 28, 1954, the ACC elected its first commissioner and on July 1, 1954, the Office of Commissioner was established in Greensboro, North Carolina.

33. The ACC operated with eight Member Institutions until June 30, 1971, when the University of South Carolina withdrew.

34. Subsequently, the ACC expanded, adding the Georgia Institute of Technology in 1978, Florida State University in 1991, the University of Miami and Virginia Polytechnic Institute and State University in 2004, Boston College in 2005, the University of Notre Dame (except for Football), the University of Pittsburgh, and Syracuse University in 2013, and the University of Louisville in 2014.

35. Since August 1, 2023, the ACC's headquarters and principal place of business have been located in Charlotte, North Carolina.

36. The General Purpose for the ACC is set forth in its Constitution:

> It is the purpose and function of this Conference to enrich and balance the athletic and educational experiences of student-athletes at its member institutions to enhance athletic and academic integrity among its member, to provide leadership, and to do this in a spirit of fairness to all.

ACC Constitution § 1.2.1 (**Exhibit 1** at p. 10).

37. One of the ACC's governing principles is the concept of "Institutional Control." Through its governing body, each Member Institution must conduct its athletic programs in

accordance with ACC and NCAA rules and regulations. ACC Constitution § 1.3 (**Exhibit 1** at p. 10). Therefore, each Member Institution is subject to the ACC's rules and regulations.

38. The ACC is governed by a Board of Directors comprised of the Presidents or Chancellors of each Member Institution. A Chair and Vice-Chair are elected for two-year terms from among the Board of Directors' members. The Conference also has non-Board officers, including the Commissioner (who serves as President), a Secretary, a Treasurer, and such additional officers as the Board of Directors may designate from time to time. ACC Constitution §§ 1.51, 1.5.2 (**Exhibit 1** at pp. 12-15).

39. The ACC Constitution addresses the withdrawal or resignation of Member Institutions. ACC Constitution § 1.4.5 (**Exhibit 1** at p. 12). Withdrawal or resignation is permitted with notice by August 15th for an effective withdrawal date of June 30th of the following year. Upon receiving notice of withdrawal, the Member Institution is immediately removed from the Board of Directors and all committees. In addition, the withdrawing Member Institution must make a payment equal to three times the total operating budget of the Conference as of the date of the official withdrawal notice. The withdrawal payment may be deducted from distributions received by the withdrawing institution, but any remainder is due in full within 30 days of the withdrawal's effective date.

B. The ACC's 2010 Multi-Media Agreement with ESPN and the 2012 Amendment to the 2010 Multi-Media Agreement

40. On July 8, 2010, the ACC entered into its first Multi-Media Agreement with ESPN ("2010 Multi-Media Agreement") with the unanimous approval of its Member Institutions (including Florida State). Under the 2010 Multi-Media Agreement, the ACC granted ESPN the exclusive distribution rights to home or Conference-controlled Football Games, Men's Basketball Games, Women's Basketball Games, and Olympic Sports.

41. In exchange, ESPN agreed to pay the Conference a "Rights Fee" beginning in [redacted], which would [redacted] the 2010 Multi-Media Agreement.

42. In 2012, through an Amendment and Extension Agreement, the ACC and ESPN agreed to extend the term of the 2010 Multi-Media Agreement until 2027, increasing the Rights Fees to be paid such that, by the end of the term, ESPN would pay the ACC (for distribution to its Member Institutions) [redacted] annually.

43. Florida State's President was authorized to vote for and approve the 2010 Multi-Media Agreement on behalf of Florida State.

44. Florida State authorized, ratified, and otherwise approved the 2010 Multi-Media Agreement and Amendment.

C. The 2013 Grant of Rights

45. In 2012, the University of Maryland announced its withdrawal from the ACC. In the same year, the ACC elected to add the University of Notre Dame (except for Football), the University of Pittsburgh, Syracuse University, and the University of Louisville as Member Institutions. Concurrently with these membership modifications, the ACC and ESPN began negotiations to amend the 2010 Multi-Media Agreement.

46. During this time period, other collegiate athletic conferences began to experience significant instability and realignment, which continues to this day. At this time, the SEC added the University of Missouri and Texas A&M University (from the Big 12 Conference), while the Big Ten Conference added the University of Maryland (from the ACC), Rutgers University (from the Big East Conference) and the University of Nebraska (from the Big 12 Conference). The PAC-12 Conference and the Big 12 Conference were undergoing a similar realignment.

47. The instability and realignments in other college athletic conferences necessitated that, in order to secure a long-term media rights agreement and thus ensure the payment of predictable sums over time, the media rights granted had to be stable and constant over the same period of time. This stability provides ESPN with certainty regarding the games (and their participants) it is permitted to broadcast, and it provides each of the Conference's Member Institutions with certainty regarding the annual revenue that it can anticipate throughout the term of the agreement.

48. To facilitate this stability and certainty, each Member Institution, including Florida State, that remained in or intended to join the ACC, including Florida State, entered into a written Grant of Rights agreement. Florida State did so on April 19, 2013. This Grant of Rights agreement is attached as **Exhibit 2** to this Complaint.

49. The Grant of Rights agreement is a written contract between the Member Institutions and the Conference in which each Member Institutions each granted the Conference its Media Rights[5] and, in exchange, on behalf of the collective Member Institutions, the Conference negotiated revisions to the 2010 Multi-Media Agreement to increase the [redacted] paid. The Conference then distributed the funds to the Member Institutions.

50. The Grant of Rights was intended to provide the necessary commitments for long-term agreements with ESPN by stipulating that the collection of Media Rights ceded to ESPN would remain unchanged if a Member Institution left the Conference. This thus bound the Member Institutions to one another, to the Conference, and ultimately to ESPN in a partnership.

[5] These rights are for "home" games. A "home" game is any game which is either played at a Member's home location or in which the Member is designated as the "home" team.

51. By aggregating the Media Rights from each Member Institution, the Conference was able to increase the value of those rights for all Member Institutions over a situation in which each Member, individually, was forced to negotiate and enter into agreements to broadcast those rights.

52. As set forth in the Grant of Rights agreement, in order to negotiate for increased payments for the media rights to be granted to ESPN in any revision of the 2010 Multi-Media Agreement, "each of the Member Institutions [including Florida State] is required to, and desires to, irrevocably grant to the Conference, and the Conference desires to accept from each of the Member Institutions, those rights granted herein." **Exhibit 2** at p. 1.

53. The Grant of Rights further stipulated that it was irrevocable and exclusive for the duration of the ESPN agreement, regardless of whether a Member Institution withdrew from the Conference:

> Grant of Rights. Each of the Member Institutions hereby (a) irrevocably and exclusively grants to the Conference during the Term . . . all rights (the "Rights") necessary for the Conference to perform the contractual obligations of the Conference expressly set forth in the ESPN Agreement, ***regardless of whether such Member Institution remains a member of the Conference during the entirety of the Term*** . . . .

Exhibit 2 at p. 2 ¶ 1 (emphasis added). This was repeated in ¶ 6:

> Acknowledgements, Representations, Warranties, and Covenants. Each of the Member Institutions acknowledges that the grant of Rights during the entire Term is irrevocable and effective until the end of the Term ***regardless of whether the Member Institution withdraws from the Conference during the Term or otherwise ceases to participate as a member of the Conference*** in accordance with the Conference's Constitution and Bylaws.

Exhibit 2 at p. 3 ¶ 6 (emphasis added).

54. The rights granted under the Grant of Rights by each Member Institution of the ACC included "the right to produce and distribute all events of such Member Institution that are subject to the ESPN Agreement," with each Member Institution acknowledging that the Conference "owns or will own the copyrights" associated with the rights granted to the Conference. **Exhibit 2** at p. 2 ¶¶ 1, 2.

55. The Grant of Rights further provided that each Member Institution "covenants and agrees that . . . it will not take any action, or permit any action to be taken by others subject to its control, . . . or fail to take any action, that would affect the validity and enforcement of the Rights granted to the Conference under this Agreement." **Exhibit 2** at p.3 ¶ 6.

56. In short, each Member Institution agreed (1) to grant its athletic Media Rights to the Conference, (2) to make this make this grant in irrevocable for the duration of the term of Grant of Rights, and (3) not to take any action that would affect the validity of the Grant of Rights or contest its validity.

57. Florida State agreed to and executed the Grant of Rights on April 19, 2013.

58. Florida State's President was authorized to agree to and execute the Grant of Rights on April 19, 2013 on behalf of Florida State.

59. The Grant of Rights contains a specific acknowledgement and warranty that the President of Florida State was authorized to agree to and execute the Grant of Rights:

> [E]ach Member Institution represents and warrants to the Conference (a) that such Member Institution either alone, or in concert with an affiliated entity . . . has the right, power and capacity to execute, deliver and perform this Agreement . . . (b) that execution, delivery and performance of this Agreement . . . have been duly and validly authorized by all necessary action on the part of such Member Institution.

Exhibit 2 at p.3 ¶ 6.

60. On April 22, 2013, following the execution of the Grant of Rights by all Member Institutions, the ACC accepted and executed the Grant of Rights in Greensboro, North Carolina, with the signature of its Commissioner.

D. The 2014 Second Amendment to the Multi-Media Agreement

61. Relying on the irrevocable and exclusive Grant of Rights, the Conference negotiated the Second Amendment to the 2010 Multi-Media Agreement, which went into effect on June 24, 2014. In addition to incorporating the changes in the ACC's membership, this amendment also increased the Rights Fee. By the end of the term, 2026-2027, the total fees paid to the Conference under this agreement would have been in the hundreds of millions of dollars.

62. The increase in the fees paid to the Conference, which were then distributed by the Conference to the Member Institutions (including Florida State), is good and valuable consideration in support of the Grant of Rights.

63. The Second Amendment to the 2010 Multi-Media Agreement contained a specific representation and warranty from the Conference to ESPN, [redacted]:

[redacted] Attached as **Exhibit 3** to this Complaint is the relevant portion of the Second Amendment to the Multi-Media Agreement [redacted]

64. Following the ACC's acceptance of Florida State's Grant of Rights in 2013 and the implementation of the Second Amendment to the 2010 Multi-Media Agreement in 2014, Florida State received its pro rata share of the Rights Fee payments from ESPN, totaling millions of dollars. At no point did Florida State reject the distributions it received or contest the legality of the Grant of Rights which it executed, and which made the Second Amendment to the 2010 Multi-Media Agreement possible.

65. Indeed, at this time, one member of the Board of Trustees of Florida State commented, "I was in concert with President Barron that this was the best thing that could happen. . . . It ensures that we don't lose any members. Nobody can afford to leave now."[6]

66. Another member of the Board of Trustees of Florida State commented,

> What is on the minds of a lot of people is, is the ACC the conference that gives us the best opportunity to compete over the long term? . . . At the end of the day, I think the ACC negotiated a good deal with ESPN and levels the playing field with the rest of the conferences.[7]

Florida State's President also commented,

> The added resources coming to the ACC schools will have a significant impact on the success of our athletic programs. . . . We are also very pleased that we will be moving forward on the next phase of developing an ACC network. The vote of the ACC presidents will ensure that the conferences will strengthen its position of leadership among Division I Athletics.[8]

67. In addition to entering into the Grant of Rights, the ACC's Member Institutions voted unanimously to amend the ACC's Bylaws to confirm that, pursuant to the Grant of Rights, the Member Institutions granted the ACC the right to market the Member Institutions media and

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[6] "Anatomy of One School's Role in ACC Media Rights Deal," *USA Today,* April 25, 2013.

[7] *Id.*

[8] "ACC Schools Agree to Grant TV Rights to League," *The AP News,* April 22, 2013.

related rights. **Exhibit 4**, ACC Bylaws § 2.10.1

E. The 2016 Agreements

68. In 2016, the ACC sought to generate additional revenue through its partnership with ESPN on behalf of its Member Institutions. Due to the fact that the Conference had already granted ESPN its media rights, the Conference sought a partnership with ESPN to establish the ACC Network, broadcast more ACC events, and share in the revenues from this new network.

69. ESPN agreed to extend and increase the Grant of Rights Fee until the establishment and launch of the ACC Network, which ultimately took place in 2019. On July 21, 2016, the parties executed an Amended and Restated ACC-ESPN Multi-Media Agreement ("Media Rights Agreement") and an ACC-ESPN Network Agreement ("ACC Network Agreement".) Throughout the duration of these two agreements, the ACC will receive [redacted] to distribute to its Members.

70. Similar to the Second Amendment to the 2010 Multi-Media Agreement, the Media Rights Agreement contained a warranty by the Conference [redacted]:

> WARRANTIES
>
> 20.1 By Conference. [redacted]

71. The Conference further warranted that [redacted] A copy of the Media Rights Agreement warranties provision is attached to this Complaint as **Exhibit 5.**

72. The ACC Network Agreement included a similar warranty:

WARRANTIES

12.1 By Conference. [redacted]

73. In addition, under the ACC Network Agreement, the Conference warranted that [redacted] A copy of the ACC Network Agreement warranties provision is attached to this Complaint as **Exhibit 6.**

74. In preparation for entry into these new agreements, on July 18, 2016, each Member Institution executed an "Amendment to Atlantic Coast Conference Grant of Rights Agreement." ("Amended Grant of Rights"). A copy of the Amended Grant of Rights is attached to this Complaint as **Exhibit 7**.

75. As a condition for the entering into the Media Rights Agreement and the agreement establishing the ACC Network, the Amended Grant of Rights states, "ESPN has informed the Conference that it will enter into the Prospective Agreements only if each of the Member Institutions agrees to amend the Original Grant Agreement to extend the term thereof." **Exhibit 7** at p. 1.

76. The Amended Grant of Rights stipulates that the terms and conditions of the Grant of Rights "remain in full force and effect" unless "specifically modified by this Amendment."

77. The Amended Grant of Rights did not modify the Grant of Rights provisions in which each Member Institution irrevocably assigned its Media Rights to the Conference, regardless of whether it remained a Member of the Conference, and each Member Institution agreed not to take any action that would affect the validity of the Grant of Rights.

78. The Amended Grant of Rights did alter the "Term" of the Grant of Rights, changing that Term from June 30, 2027 to June 30, 2036.

79. On June 28, 2016, Florida State accepted and executed the Amended Grant of Rights, extending the term of the Grant of Rights until June 30, 2036.

80. Florida State's President was authorized to enter into and accept the Amended Grant of Rights on behalf of Florida State.

81. After each Member Institution agreed to and executed the Amended Grant of Rights, the ACC accepted the amendment on July 18, 2016, in Greensboro, North Carolina, through the signature of its Commissioner.

82. Subsequently, each Member Institution, including Florida State, ratified the Media Rights Agreement and the ACC Network Agreement.

83. Florida State's President was authorized to ratify and otherwise enter into and approve the Media Rights Agreement and the ACC Network Agreement on behalf of Florida State.

84. The terms and conditions of the Media Rights Agreement and the ACC Network Agreement are confidential and constitute a trade secret. Both agreements stipulate that their terms and conditions cannot be disclosed to the public and impose a confidentiality obligation on the Conference. Media Rights Agreement ¶ 25.11; ACC Network Agreement ¶ 18.11. This portion of these agreements is attached to this Complaint as **Exhibits 5 and 6.**

85. These agreements are accessible to Florida State as a Member Institution.

86. The increased fees paid received by the Conference in connection with the ACC Network Agreement and the Media Rights Agreement, including [redacted] which have been and will continue to be distributed by the Conference to its Members, is good and valuable consideration in support of the amended Grant of Rights.

F. Under the Grant of Rights, Amended Grant of Rights, and ESPN Agreements, Florida State Athletics Experiences Unprecedented Success

87. Since the execution of the Amended Grant of Rights, the entry into the Media Rights Agreement, the establishment of the ACC Network, and the payment of a Grant of Rights Fee by ESPN, Florida State has received more than [redacted] and the ACC as a whole has received more than [redacted]

88. Florida State's distributions from the ACC more than doubled over the 9 year period between its agreement to enter into the Grant of Rights and June 30, 2023. Over the past year, Florida State's distributions increased by nearly 20% over the prior year.

89. Since the 2013 execution of the Grant of Rights, and as a direct result of the stability provided by the ESPN agreements under the Grant of Rights and Amended Grant of Rights, Florida State has prospered both financially and on the field. Florida State currently has twenty athletic

teams with 530 student-athletes. Since 2013, Florida State (1) won a national championship in Football, (2) won four national championships in Women's Soccer, (3) won a national championship in Softball, (4) participated in the College Football Playoff, (5) made three "Sweet Sixteens" and one "Elite Eight" appearances in Men's Basketball, (6) made three "Sweet Sixteens" and two "Elite Eight" appearances in Women's Basketball, (7) finished as the national runner-up in Softball, (8) finished as the national runner-up two times and made the national quarterfinals six other times in Women's Soccer, (9) made two College World Series appearances in baseball, and (10) made three "Sweet Sixteen" appearances in Women's Volleyball. According to information and belief, Florida State's athletic department ranked 15th in the nation among public universities in total revenue in 2022, with $161,141,884 in revenue. *NCAA Finances: Revenue and Expenses by School, https://sports.usatoday.com/ncaa/finances*

G. Florida State Seeks Unequal Revenue Distribution

90. In July 2021, both the University of Texas and the University of Oklahoma announced their plans to withdraw from the "Big 12" Conference to join the SEC beginning in 2025.[9] The date of their noticed withdrawal coincided with the termination of the Grant of Rights agreement for the Big 12, leaving the University of Texas and the University of Oklahoma free to market those rights.

91. Neither of these schools sued the Big 12 or sought to breach their legal obligations or their grant of rights.

92. In July 2022, both the University of California at Los Angeles ("UCLA") and the University of Southern California ("USC") announced that their plans to withdraw from the Pac 12 Conference to join the Big Ten Conference effective August 2024. The date of their withdrawal

[9] Each subsequently negotiated an earlier withdrawal date from the Conference.

coincided with the termination of the Pac 12's rights agreements, leaving UCLA and USC free to market those rights.

93. In August 2022, Florida State's President, "comment[ing] on where the Seminoles stand in conference realignment," said: "It's something I'm spending a lot of time on and we're getting a lot of help. . . . We're trying to do anything we can to think about how we remain competitive. Florida State is expected to win. We're going to be very aggressive."[10]

94. At a meeting of the Board of Trustees on February 24, 2023, Florida State's Board openly discussed withdrawing from the Conference and the cost of the withdrawal payment in order to facilitate a move to another conference in order to receive more money.

95. During that meeting, Florida State's Athletic Director expressed concern about the "revenue gap" that would develop between Florida State and members of the SEC and Big Ten. He stated: "At the end of the day for Florida State to compete nationally, something has to change moving forward."[11]

96. In response, one member of the Board of Trustees inquired about withdrawing from the ACC, which resulted in the following reported exchange:

> One trustee questioned whether or not a buyout to leave the ACC was "even feasible."
>
> "That is an excellent question," Carolyn Egan, FSU's vice president for legal affairs and general counsel, responded.
>
> According to Egan, the ACC's exit fee is three times its annual operating budget. That equals $120 million.

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[10] "FSU President says Seminoles Will Be "Very Aggressive" in Conference Realignment," *NoleGameDay*, August 21, 2022 (https://www.si.com/college/fsu/football/fsu-president-says-seminoles-will-be-very-aggressive-in-conference-realignment).

[11] "FSU Fires Warning Shot to ACC: 'Something Has to Change.'" *Tampa Bay Times,* February 24, 2023.

> If FSU could make up $30 million per year, a trustee asked, does that mean the Seminoles would break even in about four years?
>
> "Hypothetically," Alford replied.[12]

97. As a result of this meeting, Florida State's Athletic Director began to advocate for more money for the university through unequal sharing of revenue. "We have to do something," he said, after previously claiming that Florida State's "brand" entitled it to more revenue.[13]

98. At the same time, Florida State advocated for unequal payments for it as a consequence of its "brand."

99. In response, on May 17, 2023, the Conference endorsed the concept of distributing a larger share of post-season revenues to the Members that generated those revenues, rather than equally among all members. This was the first time in the Conference's 70-year history that it had agreed to any form of unequal revenue distribution among Members.

100. Following this change, Florida State's Athletic Director stated: "I'm thrilled with the work and the direction that it's going. . . . Step in the right direction. We're not going to ever cover the entire gap, but it will allow you to be competitive."[14] He then claimed: "We're thrilled about being in this league, and we want to stay in it."[15]

101. However, shortly after its Athletic Director's public remarks, Florida State began to demand more, advocating for an unequal share of *all Conference revenue*, not just post-season

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[12] *Id.*

[13] "FSU, Clemson, Pushing for New ACC Revenue Model," *The Stuart News,* May 16, 2023.

[14] "ACC Leadership Touts Progress in Trying to Address Financial Gap with the Big Ten and the SEC," *The Associated Press,* May 17, 2023.

[15] "After Exploring Situation, UM, FSU, Others Expected to Stay in ACC with New Revenue Deal," *The Miami Herald,* May 17, 2023.

revenue: "If you have success, you are rewarded for it. At the same time, I believe the media value should also be changed and divided differently, and right now, that's not being looked at."[16]

102. Despite the Conference's willingness to explore new revenue distribution models to reward success, Florida State sought to claim the largest share of revenue, asserting that "We're one of the best media value teams in the United States. We in many ways . . . help to carry the value of the media rights in the ACC."

103. As a result, by August 2, 2023, the President of Florida State informed the Board of Trustees that the university would "consider very seriously leaving the ACC unless there is a radical change to the revenue distribution."[17]

104. During this same meeting, another Trustee claimed that "[u]nless something drastic changes on the revenue side at the ACC, it's not a matter of if we leave. In my opinion, it's a matter of how and when we leave." For Florida State "[s]ports is no longer an extracurricular activity at the university level. It's big business. So if you want to participate in big business, you need to invest accordingly. ***So we need to do whatever is necessary.***" (emphasis supplied).

105. A copy of a transcript of this Board of Trustees Meeting is attached as **Exhibit 8** to the Complaint.

106. By this time, it appears that Florida State had either already created or was in the process of creating a plan to challenge the Grant of Rights agreements.

107. The day before the Board of Trustees meeting on August 2, the Chair of the Board stated in an interview that with regard to the Grant of Rights "we have a very good handle on what are risks are under that document, what our opportunities are under that document. And that's the

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[16] "AD Alford Cautiously Optimistic on ACC Plan for Revenue," *Orlando Sentinel,* May 27, 2023.

[17] Remarks of President McCullough to Board of Trustees, August 2, 2023.

least of my worries. . . . We have gotten a lot of counsel on that document and that will not be the document that keeps us from taking action." A copy of a transcript of this interview is attached as **Exhibit 9** to the Complaint.

108. In short, by at least early August 2023, Florida State had determined that it would not be bound by its promises and obligations in the Grant of Rights or Amended Grant of Rights, or the promises and obligations in any agreement based on the Grant of Rights or Amended Grant of Rights, including the ESPN agreements.

109. In preparation for the actions set forth in this Complaint, Florida State, through counsel, reviewed the Media Rights Agreement and the ACC Network Agreement at the ACC's Headquarters in North Carolina on October 7, 2022, January 4, 2023, July 22, 2023, and August 2, 2023.

110. On December 21, 2023, the Florida State Board of Trustees notified the public of a Board meeting that would occur on December 22, 2023.

111. Under Florida State University Policy 1-1 "BOT Operating Procedures," the Board is required to provide the public with one (1) week notice of Board meetings. Policy 1-1, § 202 (b).

112. However, the Policy also provides that a notice of an "emergency meeting" need only be posted "as early as practicable prior to the meeting." Policy 1-1, § 202(b).

113. Policy 1-1 further provides that "[m]eetings of the Board may be held for the purpose of acting on emergency matters affecting the university." Policy 1-1, § 201(e).

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.

115. These statements and Florida State's actions reveal that a real, live, actionable, and justiceable dispute between the Conference and Florida State exists over the validity of the Grant of Rights and amended Grant of Rights. This Court has subject-matter jurisdiction over this dispute.

III. Claims for Relief

First Claim for Relief: Request for Declaratory Judgment that the Grant of Rights and amended Grant of Rights are Valid and Enforceable Contracts

116. The ACC adopts by reference and incorporates the allegations of paragraphs 1 through 115 of the Complaint.

117. In the Grant of Rights and the amended Grant of Rights (together the "Grants of Rights"), Florida State agreed to grant its athletic Media Rights "irrevocably" and "exclusively" to the Conference for the term.

118. In the Grants of Rights, Florida State transferred its Media Rights to the Conference "regardless" of whether it remained a Member Institution during the term of the Grant of Rights and amended Grant of Rights.

119. In the Grants of Right and amended Grant of Rights, Florida State transferred its Media Rights to the Conference through 2036 and specifically acknowledged that the transfer was valid even if it withdrew from the Conference as a Member Institution.

120. In exchange for the Grant of Rights and amended Grant of Rights, the ACC negotiated new contracts and agreements with ESPN, contracts and agreements which significantly increased the revenues paid to the Conference and distributed to its Member Institutions, including Florida State. The increase in revenues included specific payments for the Grant of Rights held by the ACC.

121. Florida State's Media Rights, a form of intellectual property, are worth in excess of $5 Million. Florida State has received more than [redacted] under the Grant of Rights since 2013.

122. The Grants of Right and amended Grant of Rights between Florida State on the one hand, and the ACC on the other, was and is supported by good and valuable consideration.

123. The ACC has not breached the Grant of Rights or amended Grant of Rights. To the contrary, at all times relevant to the Complaint, the ACC has abided by the terms of the Grant of Rights and amended Grant of Rights.

124. Florida State has indicated a specific intent to breach, ignore, or otherwise violate the terms of the Grant of Rights and amended Grant of Rights, notwithstanding the ACC's ownership of those rights through June 30, 2036.

125. Florida State's intent to challenge the Grant of Rights and amended Grant of Rights would further breach its warranties to ESPN arising out of the ESPN contracts. The ACC was an intended beneficiary of those warranties and will be damaged if Florida State challenges the validity of the Grant of Rights and amended Grant of Rights.

126. Under the ESPN contracts, the Conference is obligated to take all commercially reasonable actions to defend the Grant of Rights and amended Grant of Rights and the rights granted to ESPN under those contracts.

127. The Conference is entitled to a declaration by this Court that the Grants of Right and amended Grant of Rights are valid and binding contracts, supported by good and adequate consideration, and that the Conference is and will remain the owner of the rights transferred by Florida State under the Grants of Rights through June 30, 2036.

Second Claim for Relief: Florida State is Estopped by Its Acceptance of Benefits (Quasi-Estoppel) or Has Waived by Its Conduct Any Challenge to the Grant of Rights and Amended Grant of Rights

128. The ACC adopts by reference and incorporates the allegations set forth in paragraphs 1 through 127 of the Complaint.

129. The purpose of the Grant of Rights and Amended Grant of Rights was to permit the ACC to negotiate various agreements with ESPN and provide ESPN the Media Rights for its Member Institutions, including Florida State, in exchange for Rights Fees and other good and valuable consideration.

130. Since 2013, Florida State has received more than [redacted] in distributions from revenue generated by the Grant of Rights and Amended Grant of Rights, [redacted] as a result of entering into the Grant of Rights and Amended Grant of Rights and transferring its Media Rights exclusively and irrevocably to the ACC for the term of these agreements.

131. Florida State had the option accepting or rejecting the benefits resulting from the Grant of Rights and amended Grant of Rights.

132. Florida State had the right not to enter into and execute the Grant of Rights or Amended Grant of Rights.

133. By accepting and retaining the benefits of the Grant of Rights and Amended Grant of Rights, Florida State ratified the validity and enforceability of the Grant of Rights and Amended Grant of Rights.

134. Florida State substantially and materially benefitted from the Grant of Rights and Amended Grant of Rights.

135. Florida State never objected to its share of the distributions generated by the Grant of Rights and Amended Grant of Rights, including payments specifically for the Grant of Rights and Amended Grant of Rights. It accepted all benefits derived from and made possible by the ACC Constitution and the Grant of Rights and Amended Grant of Rights.

136. By accepting the substantial benefits made possible by the Grants of Right and Amended Grant of Rights over a ten-year period, Florida State is equitably estopped from challenging the validity or enforceability of the Grants of Right and Amended Grant of Rights.

137. Having entered into the Grant of Rights and Amended Grant of Rights, accepted the benefits generated by the Grant of Rights and Amended Grant of Rights, and retained the benefits generated by the Grant of Rights and Amended Grant of Rights, Florida State is now estopped from contesting the validity or enforceability of the Grant of Rights and Amended Grant of Rights.

138. Florida State made a deliberate choice to transfer its media rights to the ACC for a specific term in order to negotiate different and increasingly lucrative multi-media agreements with ESPN, knowing that the transfer of these rights for a specific term would continue even if it ceased to be a Member Institution or chose to withdraw from the Conference.

139. In the Grant of Rights and Amended Grant of Rights, Florida State expressly and voluntarily relinquished its Media Rights to the ACC, with the understanding that the transfer of rights to the ACC would continue through June 30, 2036, regardless of whether it remained a Member Institution.

140. Florida State knowingly and voluntarily agreed in the Grant of Rights and Amended Grant of Rights to transfer ownership of its Media Rights to the ACC through June 30, 2036,

knowing that the transfer and ownership would continue regardless of whether it remained a Member Institution of the Conference.

141. Florida State had full knowledge, actual or constructive, of the rights it transferred to the Conference in the Grant of Rights and Amended Grant of Rights, as well as the benefits that it would receive as a result.

142. Florida State intended to transfer the rights covered by these agreements to the Conference when it executed the Grant of Rights and Amended Grant of Rights, with the expectation of receiving the benefits of different and enhanced agreements between the Conference and ESPN.

143. Florida State intended for the Grant of Rights and Amended Grant of Rights to be enforceable and valid for the purpose of receiving the benefits generated by these contracts.

144. Florida State, through its conduct in accepting the benefits under the Grant of Rights and Amended Grant of Rights for more than a decade, led the ACC to reasonably understand that Florida State did not contest the validity or enforceability of the Grant of Rights or Amended Grant of Rights.

145. By accepting the substantial benefits made possible by the Grant of Rights or Amended Grant of Rights over a ten-year period, Florida State has waived its right to contest the validity or enforceability of these contracts.

146. The ACC is entitled to a declaration that Florida State is estopped from challenging the validity or enforceability of the Grant of Rights or Amended Grant of Rights, or has waived its right to contest the validity or enforceability of the terms and conditions of these contracts as a result of its conduct, including its acceptance of benefits under these agreements, over nearly a decade.

WHEREFORE, the Plaintiff prays that this Court issue its Declaratory Judgment declaring:

1. The Grant of Rights and amended Grant of Rights is a valid and enforceable contract between Florida State and the ACC;

2. Florida State is estopped from challenging the validity of the Grant of Rights and amended Grant of Rights under the doctrine of equitable estoppel or estoppel by acceptance of benefits;

3. Florida State is barred from challenging the validity of the Grant of Rights and amended Grant of Rights and has waived its right to do so.

4. This Court order such further relief as it deems just and appropriate.

This 21st day of December 2023.

WOMBLE BOND DICKINSON (US) LLP

/s/ *James P. Cooney III*
James P. Cooney III (N.C. Bar No. 12140)
Sarah Motley Stone (N.C. Bar No. 34117)
Patrick Grayson Spaugh (N.C. Bar No. 49532)
301 South College Street, Suite 3500
Charlotte, North Carolina 28202-6037
Telephone: 704-331-4980
Jim.Cooney@wbd-us.com
Sarah.Stone@wbd-us.com
Patrick.Spaugh@wbd-us.com

Attorneys for Plaintiff Atlantic Coast Conference

EXHIBIT B

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. Defendants.	**FIRST AMENDED COMPLAINT**

NOW COMES the Plaintiff, the ATLANTIC COAST CONFERENCE ("the ACC" or "the Conference"), pursuant to N.C. Gen. Stat. § 1A-1, Rule 15(a) and, prior to a responsive pleading being served, amends its Complaint for Declaratory Judgment and files this First Amended Complaint against the Board of Trustees of Florida State University ("Florida State"):

Summary of Claims

This case involves Florida State's serial breaches of critical legal promises and obligations which it made over the last 13 years to the ACC. In 2013 and 2016, Florida State, along with every other Member of the ACC, agreed to and executed a "Grant of Rights" in which it transferred the exclusive media rights to all its "home" games to the Conference (the "Media Rights") through 2036. By aggregating their collective Media Rights in the Conference, the Members realized more value from those collective Media Rights than if they had each attempted to market them separately, and the media partners of the Conference were assured that they would have access to all home games of the Members throughout the length of the agreements. These aggregated Media Rights resulted in agreements and contracts between the ACC and ESPN that provided a predictable source of revenue to the ACC's Members and which led to the creation of the ACC

Network. By the time these contracts end, the Conference will have distributed to its Members [redacted] including specific "Grant of Rights" payments. Under these agreements, Florida State has received more than [redacted] to date, and will receive [redacted] more through 2036.

In signing the Grant of Rights and its amendment, Florida State promised that its Grant was "irrevocable" and "exclusive" through 2036. It further explicitly agreed that it would not "take any action, or permit any action to be taken by others subject to its control . . . that would affect the validity and enforcement" of the Grant of Rights. Moreover, Florida State, the Conference, and the other Member Institutions, guaranteed in [redacted]

[redacted]

[redacted]

[redacted]"

Now, nearly 13 years after entering into the Grant of Rights, and after receiving more than [redacted] in distributions from media contracts, Florida State has chosen to breach its contractual obligations. It has violated its contractual promise not to challenge the validity or enforceability of the Grant of Rights. It has breached its promise that its Grant was "irrevocable" and "exclusive." And it has deliberately released confidential information to the public from those agreements, something which it also agreed not to do. Put simply, Florida State takes the position that it is bound by a contract only so long as it chooses.

Despite its actions and clear, direct, and material conflict of interest, Florida State continued and continues to participate in the management of the Conference. Thus, Florida State participates in deciding fundamental policy questions for the Conference, even as it breaches its contracts and seeks to undermine the Conference's objectives and purpose. Florida State's actions,

and its continued participation in the governance of the Conference, violate its fiduciary obligations to the Conference.

Consequently, the ACC seeks a declaration that its Grant of Rights, which Florida State agreed to on two separate occasions, is valid and enforceable. It also seeks a declaration that Florida State is equitably estopped from challenging the validity or enforceability of the Grant of Rights or, alternatively, has waived the right to do so by knowingly executing the Grant of Rights and then accepting hundreds of millions of dollars in benefits for more than a decade. The Conference further seeks damages for the multiple breaches of contract that Florida State has committed and all necessary injunctive relief to prevent future breaches. Finally, the Conference seeks permanent injunctive relief to prevent Florida State from continuing to disclose confidential information and to prevent Florida State from continuing to breach its fiduciary obligations to the Conference under the ACC Constitution and Bylaws and North Carolina law.

I. Parties, Jurisdiction, and Venue

A. The Parties

The Atlantic Coast Conference

1. The ACC is an unincorporated nonprofit association under North Carolina law. The ACC currently has 15 Member Institutions: Boston College, Clemson University, Duke University, Florida State University, Georgia Institute of Technology, University of Louisville, University of Miami, University of North Carolina at Chapel Hill, North Carolina State University, University of Notre Dame (except for Football), University of Pittsburgh, Syracuse University, University of Virginia, Virginia Polytechnic Institute & State University, and Wake Forest

University. [1] The ACC's Board of Directors has 15 voting members, including the President of Florida State University. Its headquarters and principal place of business is in Charlotte, Mecklenburg County, North Carolina. Since its inception over 70 years ago, the ACC's principal place of business and headquarters have been located in North Carolina.

2. As an unincorporated nonprofit association under North Carolina law, the ACC can to sue in its own name and enter into contracts. N.C. Gen. Stat. § 59B-8. As an unincorporated nonprofit association, the ACC is a legal entity "separate from its members for the purpose of determining and enforcing rights, duties, and liabilities." N.C. Gen. Stat. § 59B-7(a). Consequently, the Conference may, acting on its own behalf, enforce its contractual obligations with one or more of its Member Institutions. N.C. Gen. Stat. § 59B-7(e).

3. The Conference is a party to the written contracts that form the subject-matter of this Complaint and is therefore entitled to seek a declaration of its rights and other legal relations under these written contracts under N.C. Gen. Stat. § 1-254.

Florida State University Board of Trustees

4. The Florida State University Board of Trustees is governed by the laws of the State of Florida. The Board of Trustees of Florida State ("Board of Trustees") oversees and manages the operations and affairs of Florida State University. According to its Mission Statement, Florida State University is an institution of higher education which aims to "preserve, expand, and disseminate knowledge in the sciences, technology, arts, humanities, and professions, while

[1] The ACC refers to its members as "Member Institutions," while its agreements with ESPN refer to the members as "Conference Institutions." "Member," "Member Institution," and "Conference Institution" will be used interchangeably in this Complaint.

embracing a philosophy of learning strongly rooted in the traditions of the liberal arts and critical thinking."

5. Florida State is an ACC Member Institution. The Board of Trustees ratified and approved of Florida State becoming a Member Institution of the ACC.

6. In accordance with the laws of the State of Florida, the Board of Trustees has the authority "to contract and be contracted with, to sue and be sued, to plead and be impleaded **in all courts of law or equity**." Fla. Stat. § 1001.72(1) (emphasis added). Moreover, by choosing to be a member of the ACC, a North Carolina unincorporated nonprofit association, Florida State consented and agreed that the ACC could sue it for its claims. N.C. Gen. Stat. § 59B-7(e) explicitly provides that an unincorporated association "may assert a claim against a member or a person referred to as a 'member.'"

B. Personal Jurisdiction

7. Florida State is subject to the jurisdiction of the State of North Carolina in matters involving the ACC as a result of its continuous and systematic membership and governance activities within the ACC. These specific continuous and systematic actions in North Carolina arise out of its membership in and management of the Conference, and are the subject of this Amended Complaint. Consequently, this Court may exercise personal jurisdiction over Florida State pursuant to N.C. Gen. Stat. § 1-75.4(1)(d), (4), and (5).

8. Since 1991, Florida State has been an ACC Member Institution. Throughout this time, Florida State has regularly attended ACC meetings held in the State of North Carolina.

9. Because the ACC is a North Carolina unincorporated nonprofit association, each of its Member Institutions is responsible for managing and overseeing its operations. Florida State has played an active role in the administration of ACC affairs. The President of Florida State is a

Member of the Board of Directors, while Florida State's Athletic Director, like the Athletic Directors of all Member Institutions, attends Athletic Director meetings and serves on the Football and Basketball Committees. Each of Florida State's Head Coaches serves on the committee for his or her respective sport. Currently, Florida State officers or representatives serve on at least 11 committees governing and advancing the mission of the ACC. In the past decade. Florida State officers and employees have served on the following notable committees and in the following positions:

a. Florida State's current president served on the Finance Committee (2022-2023), and its previous president served as chair of the Council of Presidents (2018-2019) and as a member of the Executive Committee (2018-2019);

b. A Florida State faculty member served on the Executive Committee (2013-2017), as the president of the ACC (2015-2016), and its current president is currently on the Finance Committee (and participated as recently as December 12, 2023);

c. The Florida State Athletic Director served on the Television or Media Committees from 2013 to 2023; and,

d. A member of the Athletic Department served on the Finance Committee (2012-2013 and 2016-2020), as well as the Constitution and Bylaws Committee (2012-2014 and 2016-2018).

10. The Conference generally holds two meetings of the Board of Directors per month, with three of these meetings held in person annually, often in North Carolina. Three of the four most recent in-person Board of Directors meetings were held in North Carolina: Durham, North Carolina (September 2022), and Charlotte, North Carolina (February 2023 and May 2023); Florida State's President attended each of these meetings either via Zoom or in person.

11. The ACC's Board of Directors is responsible for selecting the ACC's headquarters. In 2022, the Board, including Florida State's President, voted unanimously to relocate the ACC's headquarters and principal place of business from Greensboro to Charlotte, North Carolina. In

doing so, the ACC, through its Board of Directors, accepted a financial incentive of $15 Million created by the State of North Carolina, paid for by North Carolina taxpayers, and made available to an athletic conference that established or maintained its headquarters in North Carolina and held at least four men's and four women's basketball tournaments in North Carolina over the next ten years, and twenty other Championship events in North Carolina over the next twenty years. Session Law 2022-74, HB 103, Section 11.8(a). Thus, Florida State voted to accept benefits from North Carolina taxpayers through its role as a Member Institution of the Conference.

12. The contracts that Florida State is contesting, the Grant of Rights and amended Grant of Rights, are North Carolina contracts that arose out of Florida State's membership in the Conference. Florida State executed the Grant of Rights and transmitted its signature pages to the ACC in North Carolina. As set forth in this Amended Complaint and its exhibits, the Commissioner of the ACC did not execute the Grant of Rights or amended Grant of Rights until after each of the Member Institutions had signed. This final execution in North Carolina was the last act necessary for the formation of this contract and means that the Grant of Rights and amended Grant of Rights is a North Carolina contract governed by North Carolina law.

13. Between 2014 and 2016, the ACC entered into multiple agreements with ESPN[2] for the Media Rights ceded by the Grant of Rights. These agreements were not possible without the Media Rights ceded by the Grant of Rights.

14. These agreements included an Amended Multimedia Agreement in 2014 (which was superseded by a Restated and Amended Multimedia Agreement in 2016), and an agreement establishing the ACC Network as a joint venture. Under these agreements, ESPN has paid and continues to pay the Conference a Rights Fee, a Royalty, and a Grant of Rights Fee. The

[2] "ESPN" refers to ESPN, Inc. and ESPN Enterprises, Inc.

Conference then allocates these fees and royalties to its Member Institutions, including Florida State. Since signing the Grant of Rights agreement, Florida State has accepted more than [redacted] in distributions under these agreements.

15. The Member Institutions of the Conference, including Florida State, specifically authorized the ESPN Agreements.

16. Four ACC Member Institutions are located in North Carolina, and Florida State frequently travels to North Carolina to compete in ACC-sponsored and administered athletic events and athletic competitions against these four North Carolina Member Institutions. Additionally, many of the ACC's championships are conducted, held, and administered in North Carolina. For reference, the ACC Football Championship Game has been held in Charlotte, North Carolina, 13 times since its inception in 2005, and Florida State has competed in this Championship five times, the last time occurring on December 2, 2023. Since 1991, the ACC's Men's and Women's Basketball Tournaments, in which Florida State regularly competes, have been held 25 times in North Carolina, including most recently in March 2023.

17. North Carolina law specifically authorizes an unincorporated association to "assert a claim against a member or a person referred to as a 'member.'" N.C. Gen. Stat. § 59B-7(e). By being a Member Institution in the Conference and engaging in the activities of participating as a Member Institution and managing the Conference, Florida State consented to jurisdiction in the North Carolina courts for claims that the Conference had against it.

18. To the extent relevant, the Conference further adopts by reference and incorporates the remaining paragraphs and attached Exhibits of this Amended Complaint as evidence of Florida State's specific consistent and systematic contacts with North Carolina arising out of its membership in the Conference.

C. Subject-Matter Jurisdiction

19. This Court has subject matter jurisdiction under N.C. Gen. Stat. §§ 7A-240 and 1-253 et seq.

20. This Court is authorized to declare the parties' rights and legal obligations and interpret the terms of the various contracts that are the subject of this Complaint.

21. Under the laws of the State of Florida, Florida State has waived sovereign immunity and consented to be sued when entering into contracts: the Florida State Board of Trustees has the authority "to contract and be contracted with, to sue and be sued, to plead and be impleaded **in all courts of law or equity**." Fla. Stat. § 1001.72(1) (emphasis added). Florida State has thus waived sovereign immunity for the claims set forth in this Amended Complaint.

22. Florida State further consented to be sued in the State of North Carolina through its membership and leadership in the ACC, an unincorporated nonprofit association under North Carolina law, and under the plain language of Florida Statute § 1001.72(1), which permits Florida State to be sued in "all courts" regardless of the location of such courts.

23. Under the Uniform Unincorporated Nonprofit Association Act, each Member Institution of the Conference is responsible for oversight and administration of the Conference. N.C. Gen. Stat. § 59B-1, et seq. Section 59B-7(e) further provides that each Member Institution has standing to assert a claim by the Conference in its own name and sue on the Conference's behalf. In addition, the Conference is given the statutory right to make claims against any of its Members. Consequently, a member of an unincorporated association in North Carolina consents to be sued by the unincorporated association for any claims against it by the unincorporated nonprofit association. Florida State, in exchange for its Membership in the Conference, was granted the right to sue in North Carolina courts on behalf of the Conference. The Conference was

also given the explicit right to sue Florida State for any claims which it had arising out of Florida State's membership. Thus, the Conference has the right to make claims against Florida State in the courts of North Carolina. *See Farmer v. Troy University,* 382 N.C. 366, 370–71 (2022) *cert. denied* (No. 22-787 May 30, 2023) (state university consented to sue and be sued in the courts of North Carolina by registering as a nonprofit corporation where the North Carolina Act provided that nonprofit corporations could sue and be sued).

D. Venue

24. As of August 1, 2023, the ACC's headquarters and principal place of business are located in Charlotte, North Carolina. According to N.C. Gen. Stat. § 59B-13, for purposes of venue, the ACC is a resident of Mecklenburg County, North Carolina.

25. This matter involves a dispute over whether the Grant of Rights and amended Grant of Rights entered into by Florida State and the Conference in 2013 and amended in 2016 is a valid contract which granted Florida State's Media Rights to the ACC. Media rights are a form of intellectual property. N.C. Gen. Stat. § 7A-45.4(a)(5).

26. This matter further involves a dispute that will necessitate reference to and interpretation of the law governing corporations (including unincorporated nonprofit associations) under N.C. Gen. Stat. § 7A-45.4(a)(1).

27. The amount in dispute that is the subject of this request for declaratory exceeds $5,000,000, as the total Media Rights subject to the ESPN contracts and agreements that Florida State breached amount to [redacted].

II. Factual Background

A. The Formation, Purpose, and Structure of the ACC

28. The ACC is the country's most successful collegiate academic and athletic conference.

29. The ACC has led the Football Bowl Subdivision conferences in the best average rank in the *U.S. News and World Report* rankings for the past 17 years.[3] It has a graduation success rate of 96% for all of its sports, and 147 of the teams in the ACC had a 100% graduation success rate. Seven of its 15 present Members have graduation rates of more than 91% for Football.

30. In the past two years and across all sports, ACC athletic teams have won 20 NCAA championships (including 14 championships in 2023), more than any other conference. The Conference has placed the second highest number of teams in the College Football Playoff and won the second most national championships in Football over the past decade. In Men's Basketball, ACC teams appear in the Final Four on a consistent basis, and its programs have won more national championships than any other Conference over the past 30 years. In 2023, 24 ACC teams advanced to the finals or semi-finals of NCAA championships, and both the Men's Lacrosse and Women's Tennis Championships featured all-ACC finals. Eighteen ACC teams finished 2023 ranked first or second in the final 2023 polls, more than any other conference. The ACC sponsors 15 women's sports, the highest number among major conferences, and 28 sports overall.

[3] In the most recent survey, 6 of the soon-to-be 18 Members of the Conference were ranked among the top 25 Universities in the country. No other FBS Conference had more than 3 universities in the top 25.

31. There are approximately 10,000 student-athletes participating in ACC-sponsored sports.[4] More than 100 current or former ACC athletes from 15 sports are currently training on U.S. National Teams in an effort to qualify for the 2024 Olympics. At the 2023 FINA World Championships, 11 different ACC swimmers participated. Twenty-nine current and former ACC athletes represented nine countries at the 2023 Women's World Cup, five of whom played for the United States.

32. The ACC was founded on May 8, 1953, at the Sedgefield Inn near Greensboro, North Carolina. It consisted of seven Member Institutions: Clemson University, Duke University, the University of Maryland, the University of North Carolina, North Carolina State University, the University of South Carolina, and Wake Forest University.

33. On June 14, 1953, the charter members adopted the first set of bylaws and a constitution. The current ACC Constitution is attached as **Exhibit 1** to this Amended Complaint.

34. On December 4, 1953, the University of Virginia became the eighth Member Institution of the ACC. On May 28, 1954, the ACC elected its first commissioner and on July 1, 1954, the Office of Commissioner was established in Greensboro, North Carolina.

35. The ACC operated with eight Member Institutions until June 30, 1971, when the University of South Carolina withdrew.

36. Subsequently, the ACC expanded, adding the Georgia Institute of Technology in 1978, Florida State University in 1991, the University of Miami and Virginia Polytechnic Institute and State University in 2004, Boston College in 2005, the University of Notre Dame (except for

[4] Beginning August 2, 2024, and with the addition of Stanford University, the University of California Berkeley, and Southern Methodist University, the ACC will have more than 12,000 student athletes.

Football), the University of Pittsburgh, and Syracuse University in 2013, and the University of Louisville in 2014.

37. Since August 1, 2023, the ACC's headquarters and principal place of business have been located in Charlotte, North Carolina.

38. The General Purpose for the ACC is set forth in its Constitution:

> It is the purpose and function of this Conference to enrich and balance the athletic and educational experiences of student-athletes at its member institutions to enhance athletic and academic integrity among its members, to provide leadership, and to do this in a spirit of fairness to all.

ACC Constitution § 1.2.1. **Exhibit 1** at p. 10.

39. One of the ACC's governing principles is the concept of "Institutional Control." Through its governing body, each Member Institution must conduct its athletic programs in accordance with ACC and NCAA rules and regulations. ACC Constitution § 1.3. **Exhibit 1** at p. 10. Therefore, each Member Institution is subject to the ACC's rules and regulations.

40. The ACC is governed by a Board of Directors comprised of the presidents or chancellors of each Member Institution. A Chair and Vice-Chair are elected for two-year terms from among the Board of Directors' members. The Conference also has non-Board officers, including the Commissioner (who serves as President), a Secretary, a Treasurer, and such additional officers as the Board of Directors may designate from time to time. ACC Constitution §§ 1.51, 1.5.2. **Exhibit 1** at pp. 12-15.

41. The ACC Constitution addresses the withdrawal or resignation of Member Institutions. ACC Constitution § 1.4.5. **Exhibit 1** at p. 12. Withdrawal or resignation is permitted with notice by August 15th for an effective withdrawal date of June 30th of the following year. Upon receiving notice of withdrawal, the Member Institution may be removed from the Board of

Directors and all committees if the Conference determines that a conflict of interest exists. In addition, the withdrawing Member Institution must make a payment equal to three times the total operating budget of the Conference as of the date of the official withdrawal notice. The withdrawal payment may be deducted from distributions received by the withdrawing institution, but any remainder is due in full within 30 days of the withdrawal's effective date.

B. The ACC's 2010 Multi-Media Agreement with ESPN and the 2012 Amendment to the 2010 Multi-Media Agreement

42. On July 8, 2010, the ACC entered into its first Multi-Media Agreement with ESPN ("2010 Multi-Media Agreement") with the unanimous approval of its Member Institutions (including Florida State). Under the 2010 Multi-Media Agreement, the ACC granted ESPN the exclusive distribution rights to home or Conference-controlled Football Games, Men's Basketball Games, Women's Basketball Games, and Olympic Sports.

43. In exchange, ESPN agreed to pay the Conference a "Rights Fee" beginning in [redacted] which would [redacted] the 2010 Multi-Media Agreement.

44. In 2012, through an Amendment and Extension Agreement, the ACC and ESPN agreed to extend the term of the 2010 Multi-Media Agreement until 2027, increasing the Rights Fees to be paid such that, by the end of the term, ESPN would pay the ACC (for distribution to its Member Institutions) [redacted] annually.

45. Florida State's President was authorized to vote for and approve the 2010 Multi-Media Agreement on behalf of Florida State.

46. Florida State authorized, ratified, and otherwise approved the 2010 Multi-Media Agreement and Amendment.

C. The Withdrawal Payment and Alternative Performance

47. Following the approval of the 2010 Multi-Media Agreement, the Conference revised the withdrawal payment and alternative performance that a withdrawing Member must make if it chose to leave the Conference.

48. During a meeting of the Council of Presidents (now Board of Directors) on September 11-12, 2012, there was extensive discussion concerning whether the withdrawal payment and alternative performance should be increased to better protect the Conference from the potential negative impact that a withdrawal of a Member could cause, as well as to more appropriately compensate the Conference for some of the potential losses.

49. During this meeting, a media consultant provided information concerning the potential lost revenue to the Conference in the event a Member withdrew. That assessment indicated that the lost revenue in 2012 could range from $6 Million to $18 Million per year depending on the identity of the withdrawing Member - - and that these losses would occur over then 12-year life of the Media agreement, for a total of $72 Million to over $200 Million. These projected losses only reflected the loss of certain Media Rights payments.

50. The Council of Presidents further discussed the fact that other losses would also occur if a Member withdrew, ranging from NCAA Men's Basketball Tournament revenues (which are distributed over time on a unit basis), the potential inability to honor bowl agreements, lost revenues on individual campuses from ticket sales, and the harm to the Conference's reputation, image, and national brand.

51. Given the extent of potential loss if a Member withdrew, and while a recommendation was made to increase the amount of the withdrawal payment from 1 ¼ to 3

times the Conference's annual operating budget, this increase was still insufficient to address the potential losses caused by withdrawal.

52. As a result of these discussions, the Council of Presidents voted to increase the withdrawal payment to 3 times the Conference's annual operating budget.

53. Thus, the withdrawal payment is simply a vehicle through which a Member may choose to terminate its membership in the Conference by meeting the payment obligations rather than continuing to meet the obligations of a Member. It thus constitutes a form of alternate performance under the ACC Constitution and Bylaws and represents a fraction of the losses that would be caused to the Conference by the withdrawal of a Member.

D. The 2013 Grant of Rights

54. In 2012, the University of Maryland announced its withdrawal from the ACC. In the same year, the ACC elected to add the University of Notre Dame (except for Football), the University of Pittsburgh, Syracuse University, and the University of Louisville as Member Institutions. Concurrently with these membership modifications, the ACC and ESPN began negotiations to amend the 2010 Multi-Media Agreement.

55. During this time period, other collegiate athletic conferences began to experience significant instability and realignment, which continues to this day. At this time, the Southeastern Conference ("SEC") added the University of Missouri and Texas A&M University (from the Big 12 Conference), while the Big Ten Conference added the University of Maryland (from the ACC), Rutgers University (from the Big East Conference) and the University of Nebraska (from the Big 12 Conference). The Pac-12 Conference and the Big 12 Conference were undergoing a similar realignment.

56. The instability and realignments in other college athletic conferences necessitated that, in order to secure a long-term media rights agreement and thus ensure the payment of predictable sums over time, the media rights granted had to be stable and constant over the same period of time. This stability provides ESPN with certainty regarding the games (and their participants) it has a right to broadcast, and it provides each of the Conference's Member Institutions with certainty regarding the annual revenue that it can anticipate throughout the term of the agreement.

57. To facilitate this stability and certainty, each Member Institution that remained in or intended to join the ACC, including Florida State, entered into a written Grant of Rights agreement. Florida State did so on April 19, 2013. This Grant of Rights agreement is attached as **Exhibit 2** to this Amended Complaint.

58. The Grant of Rights agreement is a written contract between the Member Institutions and the Conference in which each Member Institution granted the Conference its Media Rights[5] and, in exchange, on behalf of the collective Member Institutions, the Conference negotiated revisions to the 2010 Multi-Media Agreement to increase the [redacted] paid. The Conference then distributed the funds to the Member Institutions.

59. The Grant of Rights was intended to provide the necessary commitments for long-term agreements with ESPN by providing an assurance that the collection of Media Rights ceded to ESPN would remain unchanged if a Member Institution left the Conference. This thus bound the Member Institutions to one another, to the Conference, and ultimately to ESPN in a partnership.

[5] These rights are for "home" games. A "home" game is any game which is either played at a Member's home location or in which the Member is designated as the "home" team.

60. By aggregating the Media Rights from each Member Institution, the Conference was able to increase the total value of those rights as opposed to the situation in which each Member, individually, was forced to negotiate and enter into individual agreements to broadcast those rights.

61. As set forth in the Grant of Rights agreement, in order to negotiate for increased payments for the Media Rights to be granted to ESPN, "each of the Member Institutions [including Florida State] is required to, and desires to, irrevocably grant to the Conference, and the Conference desires to accept from each of the Member Institutions, those rights granted herein." **Exhibit 2** at p. 1.

62. The Grant of Rights further stipulated that it was irrevocable and exclusive for the duration of the ESPN agreement, regardless of whether a Member Institution withdrew from the Conference:

> Grant of Rights. Each of the Member Institutions hereby (a) irrevocably and exclusively grants to the Conference during the Term . . . all rights (the "Rights") necessary for the Conference to perform the contractual obligations of the Conference expressly set forth in the ESPN Agreement, ***regardless of whether such Member Institution remains a member of the Conference during the entirety of the Term*** . . . .

Exhibit 2 at p. 2 ¶ 1 (emphasis added). This was repeated in ¶ 6:

> Acknowledgements, Representations, Warranties, and Covenants. Each of the Member Institutions acknowledges that the grant of Rights during the entire Term is irrevocable and effective until the end of the Term ***regardless of whether the Member Institution withdraws from the Conference during the Term or otherwise ceases to participate as a member of the Conference*** in accordance with the Conference's Constitution and Bylaws.

Exhibit 2 at p. 3 ¶ 6 (emphasis added).

63. The rights granted under the Grant of Rights by each Member Institution of the ACC included "the right to produce and distribute all events of such Member Institution that are subject to the ESPN Agreement," with each Member Institution acknowledging that the Conference "owns or will own the copyrights" associated with the rights granted to the Conference. **Exhibit 2** at p. 2 ¶¶ 1, 2.

64. The Grant of Rights further provided that each Member Institution "covenants and agrees that . . . it will not take any action, or permit any action to be taken by others subject to its control, . . . or fail to take any action, that would affect the validity and enforcement of the Rights granted to the Conference under this Agreement." **Exhibit 2** at p.3 ¶ 6.

65. In short, each Member Institution agreed (1) to grant its athletic Media Rights to the Conference, (2) to make this grant irrevocable for the duration of the term of Grant of Rights, and (3) not to take any action that would affect the validity of the Grant of Rights or otherwise contest its validity.

66. Florida State agreed to and executed the Grant of Rights on April 19, 2013.

67. Florida State's President was authorized to agree to and execute the Grant of Rights on April 19, 2013 on behalf of Florida State.

68. The Grant of Rights contains a specific acknowledgement and warranty that the President of Florida State was authorized to agree to and execute the Grant of Rights:

> [E]ach Member Institution represents and warrants to the Conference (a) that such Member Institution either alone, or in concert with an affiliated entity . . . has the right, power and capacity to execute, deliver and perform this Agreement . . . (b) that execution, delivery and performance of this Agreement . . . have been duly and validly authorized by all necessary action on the part of such Member Institution.

Exhibit 2 at p.3 ¶ 6.

69. On April 22, 2013, following the execution of the Grant of Rights by all Member Institutions, the ACC accepted and executed the Grant of Rights in Greensboro, North Carolina, with the signature of its Commissioner.

E. The 2014 Second Amendment to the Multi-Media Agreement

70. Relying on the irrevocable and exclusive Grant of Rights, the Conference negotiated the Second Amendment to the 2010 Multi-Media Agreement, which went into effect on June 24, 2014. In addition to incorporating the changes in the ACC's membership, this amendment also increased the Rights Fee. By the end of the term, 2026-2027, the total fees paid to the Conference under this agreement would have been in the hundreds of millions of dollars.

71. The increase in the fees paid to the Conference, which were then distributed by the Conference to the Member Institutions (including Florida State), is good and valuable consideration in support of the Grant of Rights.

72. The Second Amendment to the 2010 Multi-Media Agreement contained a specific representation and warranty from the Conference to ESPN, [redacted]:

[redacted] Attached as **Exhibit 3** to this Amended Complaint is the relevant portion of the Second Amendment to the 2010 Multi-Media Agreement [redacted]

73. Following the ACC's acceptance of Florida State's Grant of Rights in 2013 and the implementation of the Second Amendment to the 2010 Multi-Media Agreement in 2014, Florida State received its pro rata share of the Rights Fee payments from ESPN, totaling millions of dollars. At no point did Florida State reject the distributions it received or contest the legality of the Grant of Rights it executed that made the Second Amendment to the 2010 Multi-Media Agreement possible.

74. Indeed, at this time, one member of the Board of Trustees of Florida State commented, "I was in concert with [Florida State] President Barron that this was the best thing that could happen. . . . It ensures that we don't lose any members. Nobody can afford to leave now."[6]

75. Another member of the Board of Trustees of Florida State commented,

> What is on the minds of a lot of people is, is the ACC the conference that gives us the best opportunity to compete over the long term? . . . At the end of the day, I think the ACC negotiated a good deal with ESPN and levels the playing field with the rest of the conferences.[7]

Florida State's President also commented,

> The added resources coming to the ACC schools will have a significant impact on the success of our athletic programs. . . . We are also very pleased that we will be moving forward on the next phase of developing an ACC network. The vote of the ACC presidents will ensure that the conferences will strengthen its position of leadership among Division I Athletics.[8]

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[6] "Anatomy of One School's Role in ACC Media Rights Deal," *USA Today* (April 25, 2013), *available at* https://www.usatoday.com/story/sports/college/2013/04/25/acc-commissioner-john-swofford-lobbies-florida-state-grant-of-rights/2113527/.

[7] *Id.*

[8] "ACC Schools Agree to Grant TV Rights to League," *AP News* (April 22, 2013)), *available at* https://apnews.com/acc-schools-agree-to-grant-tv-rights-to-league-fd6dae3c385d4b2bbe2dce53757a6971.

76. In addition to entering into the Grant of Rights, the ACC's Member Institutions voted unanimously to amend the ACC's Bylaws to confirm that, pursuant to the Grant of Rights, the Member Institutions granted the ACC the right to market the Member Institutions' media and related rights. The ACC Bylaws as amended are attached to this Amended Complaint as **Exhibit 4.** ACC Bylaws § 2.10.1

F. The 2016 Agreements

77. In the years following, and into 2016, the ACC sought to generate additional revenue for its Members through a network partnership with ESPN. Because the Conference had already granted ESPN its Media Rights, the Conference sought a partnership with ESPN to establish the ACC Network, broadcast more ACC events, and share in the revenues from this new network.

78. As part of these agreements, ESPN agreed to extend and increase the Grant of Rights Fee until the establishment and launch of the ACC Network, which ultimately took place in 2019. On July 21, 2016, the parties executed an Amended and Restated ACC-ESPN Multi-Media Agreement ("2016 Multi-Media Agreement") and an ACC-ESPN Network Agreement ("ACC Network Agreement") (together "the ESPN Agreements"). Throughout the duration of these agreements, the ACC will receive [redacted] to distribute to its Members in the form of Grant of Rights payments, Media Rights payments, and revenues from the ACC Network.

79. Similar to the Second Amendment to the 2010 Multi-Media Agreement, the 2016 Multi-Media Agreement contained a warranty by the Conference [redacted]

WARRANTIES

20.1 By Conference. [redacted]

80. The Conference further warranted that [redacted] A copy of the Multi-Media Agreement warranties provision is attached to this Amended Complaint as **Exhibit 5.**

81. The ACC Network Agreement included a similar warranty:

WARRANTIES

12.1 By Conference. [redacted]

82. In addition, under the ACC Network Agreement, the Conference warranted that [redacted]

[redacted] A copy of the ACC Network Agreement warranties provision is attached to this Amended Complaint as **Exhibit 6.**

83. In preparation for entry into the ESPN Agreements, on July 18, 2016, each Member Institution executed an "Amendment to Atlantic Coast Conference Grant of Rights Agreement" ("Amended Grant of Rights"). A copy of the Amended Grant of Rights is attached to this Amended Complaint as **Exhibit 7**.

84. As a condition for entering into the 2016 Multi-Media Agreement and the agreement establishing the ACC Network, the Amended Grant of Rights states, "ESPN has informed the Conference that it will enter into the Prospective Agreements only if each of the Member Institutions agrees to amend the Original Grant Agreement to extend the term thereof." **Exhibit 7** at p. 1.

85. The Amended Grant of Rights stipulates that the terms and conditions of the Grant of Rights "remain in full force and effect" unless "specifically modified by this Amendment."

86. The Amended Grant of Rights did not modify the Grant of Rights provisions in which each Member Institution irrevocably assigned its Media Rights to the Conference, regardless of whether it remained a Member of the Conference, and agreed not to take any action that would affect the validity of the Grant of Rights.

87. The Amended Grant of Rights did extend the "Term" of the Grant of Rights from June 30, 2027 to June 30, 2036.

88. This extension was necessary in order to establish and operate the ACC Network through 2036. [redacted]

[redacted].

89. The Grant of Rights was further necessary to provide content to the ACC Network for as long as that Network operated. Absent certainty as to the duration of the Grant of Rights, the ACC and ESPN could not establish the ACC Network, nor market it to cable providers. Consequently, the term of the Grant of Rights was extended to be coterminous with the life of the ACC Network under the Network Agreement.

90. As part of the extension of the Grant of Rights necessary to implement the 2016 Multi-Media Agreement and the ACC Network Agreement, ESPN agreed to [redacted] providing a predictable and substantial source of revenue.

91. Before the execution of the Amended Grant of Rights and the ESPN Agreements, the Conference held a number of meetings with legal counsel for its Members, with the Presidents, with the Athletic Directors, and with the Faculty Athletics Representatives ("FAR").

92. These meetings were in addition to on-campus meetings with various Presidents, campus stakeholders, and conference calls with attorneys for the Members.

93. For example, on June 22, 2016, the Conference held a meeting of the FARs including the FAR for Florida State, who chaired the meeting. After being briefed on the provisions of the ESPN Agreements, the FARs (including Florida State's FAR) voted unanimously to move forward with the Agreements. The FARs were further advised that counsel for the ACC would be leading a call on June 24, 2016, with counsel for each Member to review the Amended Grant of Rights.

94. On June 23, 2016, the Council of Presidents met to discuss the Amendment to the Grant of Rights and the ESPN Agreements. Florida State's then-President attended that meeting.

95. The then-President of ESPN also attended the June 23 meeting and described ESPN's perspective on and the necessity for the new agreements.

96. The Conference's media consultant also gave the Presidents a review of the terms and conditions of the ESPN Agreements.

97. During the same meeting, the Presidents were advised that their attorneys would be holding a conference call with the counsel for the Conference to discuss the Amended Grant of Rights the next day, June 24, 2016.

98. On June 24, 2016, counsel for the Conference held conference calls with the attorneys for the Members to discuss the Amended Grant of Rights.

99. On June 28, 2016, Florida State accepted and executed the Amended Grant of Rights, extending the term of the Grant of Rights until June 30, 2036.

100. Florida State's President was authorized to enter into and accept the Amended Grant of Rights on behalf of Florida State.

101. On July 11 and 12, 2016, and before the Conference accepted the Amended Grant of Rights, a series of additional meetings were held to discuss the details of the ESPN Agreements. These included a meeting of the Council of Presidents that was attended by Florida State's then-President, and a meeting of the Conference's Television Committee attended by Florida State's Athletic Director, and its FAR.

102. At these meetings, the general terms of the agreements were reviewed with each Member Institution through its representatives, including Florida State.

103. Subsequently, each Member Institution, including Florida State, ratified the 2016 Multi-Media Agreement and the ACC Network Agreement.

104. Florida State's then-President was authorized to ratify and otherwise enter into and approve the 2016 Multi-Media Agreement and the ACC Network Agreement on behalf of Florida State.

105. After each Member Institution agreed to and executed the Amended Grant of Rights, the ACC accepted the amendment on July 18, 2016, in Greensboro, North Carolina, through the signature of its Commissioner.

106. The terms and conditions of the 2016 Multi-Media Agreement and the ACC Network Agreement are confidential. Both agreements stipulate that their terms and conditions cannot be disclosed to the public and impose a confidentiality obligation on the Conference.

107. Thus, the 2016 Multi-Media Agreement and ACC Network Agreement provide that "each party shall maintain the confidentiality of this Agreement and its terms." 2016 Multi-Media Agreement ¶ 25.11; ACC Network Agreement ¶ 18.11. This portion of these agreements is attached to this Amended Complaint as **Exhibits 8 and 9.**

108. The ESPN Agreements further permit disclosure of the Agreements to each "Conference Institution, provided that each Conference Institution shall agree to maintain the confidentiality" of the Agreements. **Exhibits 8 and 9.**

109. The increased fees received by the Conference in connection with the ACC Network Agreement and the 2016 Multi-Media Agreement, including [redacted] which have been and will continue to be distributed by the Conference to its Members, is good and valuable consideration in support of the Amended Grant of Rights.

G. Under the Grant of Rights, Amended Grant of Rights, and ESPN Agreements, Florida State Athletics Experiences Unprecedented Success

110. Since the execution of the Amended Grant of Rights, the entry into the 2016 Multi-Media Agreement (and extension of the option), the establishment of the ACC Network, and the payment of a Grant of Rights Fee by ESPN, Florida State has received more than [redacted] and the ACC as a whole has received more than [redacted]

111. Florida State's distributions from the ACC more than doubled over the 9-year period between its agreement to enter into the Grant of Rights and June 30, 2023. Over the past year alone, Florida State's distributions increased by nearly 20% over the prior year.

112. Since the 2013 execution of the Grant of Rights, and as a direct result of the stability provided by the ESPN Agreements under the Grant of Rights and Amended Grant of Rights, Florida State has prospered both financially and on the field. Florida State currently has 20 athletic teams with 530 student-athletes. Since 2013, Florida State (1) won a national championship in Football, (2) won four national championships in Women's Soccer, (3) won a national championship in Softball, (4) participated in the College Football Playoff, (5) made three "Sweet Sixteens" and one "Elite Eight" appearances in Men's Basketball, (6) made three "Sweet Sixteens" and two "Elite Eight" appearances in Women's Basketball, (7) finished as the national runner-up in Softball, (8) finished as the national runner-up two times and made the national quarterfinals six other times in Women's Soccer, (9) made two College World Series appearances in baseball, and (10) made three "Sweet Sixteen" appearances in Women's Volleyball. Upon information and belief, in 2022, Florida State's athletic department ranked 15th in the nation among public universities in total revenue, with $161,141,884.[9]

[9] *NCAA Finances: Revenue and Expenses by School,* https://sports.usatoday.com/ncaa/finances

H. Florida State Seeks Unequal Revenue Distribution

113. In July 2021, both the University of Texas and the University of Oklahoma announced their plans to withdraw from the Big 12 Conference to join the SEC beginning in 2025.[10] The date of their noticed withdrawal coincided with the termination of the Grant of Rights agreement for the Big 12, leaving the University of Texas and the University of Oklahoma free to market those rights.

114. Neither of these schools sued the Big 12 nor sought to breach their legal obligations or their grant of rights.

115. In July 2022, both the University of California at Los Angeles ("UCLA") and the University of Southern California ("USC") announced their plans to withdraw from the Pac 12 Conference to join the Big Ten Conference effective August 2024. The date of their withdrawal coincided with the termination of the Pac-12's rights agreements, leaving UCLA and USC free to market those rights.

116. In August 2022, Florida State's President, "comment[ing] on where the Seminoles stand in conference realignment," said: "It's something I'm spending a lot of time on and we're getting a lot of help. . . . We're trying to do anything we can to think about how we remain competitive. Florida State is expected to win. We're going to be very aggressive."[11]

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[10] Each subsequently negotiated an earlier withdrawal date from the Conference.

[11] *FSU President says Seminoles will be "very aggressive" in conference realignment*," NOLEGAMEDAY (Aug. 21, 2022), *available at* https://www.si.com/college/fsu/football/fsu-president-says-seminoles-will-be-very-aggressive-in-conference-realignment.

117. At a meeting of the Board of Trustees on February 24, 2023, Florida State's Board openly discussed withdrawing from the Conference and the cost of the withdrawal payment in order to facilitate a move to another conference in order to receive more money.

118. During that meeting, Florida State's Athletic Director expressed concern about the "revenue gap" that would develop between Florida State and members of the SEC and Big Ten. He stated: "At the end of the day for Florida State to compete nationally, something has to change moving forward."[12]

119. In response, one member of the Board of Trustees inquired about withdrawing from the ACC, which resulted in the following reported exchange:

> One trustee questioned whether or not a buyout to leave the ACC was "even feasible."
>
> "That is an excellent question," Carolyn Egan, FSU's vice president for legal affairs and general counsel, responded.
>
> According to Egan, the ACC's exit fee is three times its annual operating budget. That equals $120 million.
>
> If FSU could make up $30 million per year," a trustee asked, "does that mean the Seminoles would break even in about four years?
>
> "Hypothetically," Alford replied.[13]

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[12] *FSU fires warning shot to ACC: "Something has to change"*, TAMPA BAY TIMES (Feb. 24, 2023), *available at* https://www.tampabay.com/sports/seminoles/2023/02/24/fsu-football-florida-state-acc-conference-realignment/#:~:text=A%20trustee%20asked%20whether%20a,wasn't%20%E2%80%9Cno.%E2%80%9D&text=Florida%20State's%20board%20of%20trustees,and%20Big%20Ten%2C%20or%20else.

[13] *Id.*

120. As a result of this meeting, Florida State's Athletic Director began to advocate for more money for the university through unequal sharing of revenue. "We have to do something," he said, after previously claiming that Florida State's "brand" entitled it to more revenue.[14]

121. At the same time, Florida State advocated for unequal payments for it as a consequence of its "brand."

122. In response, on May 17, 2023, the Conference endorsed the concept of distributing a larger share of post-season revenues to the Members that generated those revenues, rather than equally among all Members. This was the first time in the Conference's 70-year history that it had agreed to any form of unequal revenue distribution among Members.

123. Following this change, Florida State's Athletic Director stated: "I'm thrilled with the work and the direction that it's going. . . . Step in the right direction. We're not going to ever cover the entire gap, but it will allow you to be competitive."[15] He then claimed: "We're thrilled about being in this league, and we want to stay in it."[16]

124. However, shortly after its Athletic Director's public remarks, Florida State began to demand more, advocating for an unequal share of *all Conference revenue*, not just revenue generated by athletic success: "If you have success, you are rewarded for it. At the same time, I

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[14] *FSU, Clemson, Pushing for New ACC Revenue Model*, THE STUART NEWS (May 16, 2023).

[15] *ACC leadership touts progress in trying to address financial gap with the Big Ten and the SEC*, AP NEWS (May 17, 2023), *available at* https://apnews.com/article/acc-revenue-sec-big-ten-0801204ef4a928cc89348af081b2d1d7.

[16] After exploring situation, UM, FSU, others expected to stay in ACC, with new revenue deal, MIAMI HERALD (May 17, 2023), *available at* https://www.aol.com/exploring-situation-um-fsu-others-210328299.html.

believe the media value should also be changed and divided differently, and right now, that's not being looked at."[17]

125. Despite the Conference's willingness to explore new revenue distribution models to reward success, Florida State sought to claim the largest share of revenue, asserting that "We're one of the best media value teams in the United States. We in many ways . . . help to carry the value of the media rights in the ACC."

I. Florida State Creates a Plan to Breach its Agreements and Disclose Confidential Information

126. Upon information and belief, and before the filing of a Complaint in Florida, Board of Trustees had decided on a course of action in which Florida State would leave the Conference.

127. Florida State has a right to withdraw from the Conference under the ACC Constitution provided that it meets certain obligations. The ACC Constitution requires that a withdrawing Member notify the Conference on or before August 15 to make a withdrawal effective as of June 30 the following year.

128. One of the purposes of this notice period is to permit scheduling changes among the remaining Members and address other logistical issues.

129. The Board of Trustees held a regularly scheduled meeting on August 2, 2023.

130. The last hour of this meeting was dominated by a discussion on Florida State's membership in the Conference.

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[17] *AD Alford Cautiously Optimistic on ACC Plan for Revenue*, ORLANDO SENTINEL (May 27, 2023).

131. At this meeting, the President of Florida State informed the Board of Trustees that the university would "consider very seriously leaving the ACC unless there is a radical change to the revenue distribution."[18]

132. During this same meeting, another trustee claimed that "[u]nless something drastic changes on the revenue side at the ACC, it's not a matter of if we leave. In my opinion, it's a matter of how and when we leave." For Florida State, "[s]ports is no longer an extracurricular activity at the university level. It's big business. So if you want to participate in big business, you need to invest accordingly. ***So we need to do whatever is necessary.***" (emphasis supplied).

133. A copy of a transcript of this Board of Trustees Meeting is attached as **Exhibit 10** to the Amended Complaint.

134. By this time, Florida State had either already created or was in the process of creating a plan to challenge the Grant of Rights agreements.

135. The day before the Board of Trustees meeting on August 2, the Chair of the Board stated in an interview that with regard to the Grant of Rights, "[W]e have a very good handle on what our risks are under that document, what our opportunities are under that document. And that's the least of my worries. . . . We have gotten a lot of counsel on that document and that will not be the document that keeps us from taking action." A copy of a transcript of this interview is attached as **Exhibit 11** to the Amended Complaint.

136. In short, before filing its Complaint in Florida, Florida State had determined that it would not be bound by its promises and obligations in the Grant of Rights or Amended Grant of Rights, or the promises and obligations in any agreement based on the Grant of Rights or Amended Grant of Rights, including the ESPN Agreements.

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[18] Remarks of President McCullough to Board of Trustees, August 2, 2023.

137. Upon information and belief, as part of this plan, Florida State further determined that it would not be bound by the withdrawal provisions of the ACC Constitution, and in particular, the alternative performance specified by the withdrawal payment.

138. In preparation for the actions set forth in this Complaint, Florida State, through counsel, reviewed the Multi-Media Agreement and the ACC Network Agreement at the ACC's headquarters in North Carolina on October 7, 2022, January 4, 2023, and August 1 and 2, 2023.

139. On each of these occasions, Florida State was provided access to the ESPN agreements. But before being provided access, and as a condition for such access, Florida State was advised that the information in the ESPN Agreements was confidential.

140. For example, on August 2, 2023, the General Counsel for the ACC informed a member of Florida State's legal team, that the documents provided for review "must be kept confidential according to the terms of those agreements, particularly the ESPN agreements." A copy of this email is attached as **Exhibit 12** to the Amended Complaint.

141. Florida State did not provide any notice of withdrawal from the Conference for the academic year 2023-2024 by August 15, 2023.

142. Notwithstanding its plan to breach its agreements, during this time Florida State certified through a vote of its Board of Trustees that it had the mandate and support of the Board of Trustees "to operate a program of integrity in full compliance with NCAA, Conference and all other relevant rules and regulations." A copy of this is attached as **Exhibit 13** to this Amended Complaint.

J. Florida State Carries Out Its Plan to Breach Its Agreements, Interfere with the Conference's ESPN Agreements, and Reveal Confidential Information that is a Trade Secret.

143. On December 21, 2023, the Board of Trustees notified the public of a Board meeting that would occur the next day.

144. Under Florida State University Policy 1-1 "BOT Operating Procedures," the Board is required to provide the public with one week notice of Board meetings. Policy 1-1, § 202 (b).

145. However, the Policy also provides that a notice of an "emergency meeting" need only be posted "as early as practicable prior to the meeting." Policy 1-1, § 202(b).

146. Policy 1-1 further provides that "[m]eetings of the Board may be held for the purpose of acting on emergency matters affecting the university." Policy 1-1, § 201(e).

147. In violation of its legal obligations, the Board of Trustees did not specify the "emergency matter[ ] affecting the university" that necessitated a meeting on the last business day before the Christmas Holiday on one-day's notice.

148. In fact, there was no "emergency," but only Florida State's desire to file a preemptive lawsuit against the ACC in Leon County, Florida, Florida State's home county.

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.

150. The "emergency" Board meeting took place at 10:00 am on December 22, 2023.

151. During the course of the "emergency" Board meeting, neither the Board of Trustees, the officers of Florida State, nor its counsel informed the public of the nature of the "emergency" that had necessitated giving less than the statutorily required notice.

152. Remarks made at the meeting by Members revealed that Florida State had already decided it would breach its agreements and reveal confidential information from the ESPN Agreements.

153. For example, the Board Chairman revealed that a Complaint to be filed by Florida State had been transmitted to all Members several days before.

154. The Board Chairman further revealed that each of the Board Members had been privy to "individual briefings" over the course of several months.

155. The Board Chairman also revealed that he had spoken individually with all Board Members for the purpose of securing the necessary votes to proceed to litigation.

156. Upon information and belief, these actions were intended for the purpose of avoiding the applicability of Florida's Public Meetings Act.

157. A private attorney representing Florida State also revealed that a member of his firm was prepared to electronically file the Complaint once the Board formally voted to execute its scheme.

158. In furtherance of its litigation, Florida State misrepresented basic facts during the course of the Board meeting.

159. For example, multiple members of the Board claimed that the Conference treated the Grant of Rights and Amended Grant of Rights as a confidential document and would not allow Florida State to have a copy of the agreements.

160. Florida State retained an executed copy of the Grant of Rights after its execution and, in fact, provided it to the public. In 2016, the Associate Director of Athletics for Florida State, informed the Conference that the General Counsel for Florida State had provided a fully executed

copy of the Grant of Rights to a blogger named "AllNoles" who had posted it on the website "Warchant."A copy of this email is attached as **Exhibit 14** to the Amended Complaint.

161. Throughout 2022 and 2023, Florida State was repeatedly informed that the ESPN Agreements were confidential, that the ESPN Agreements required the Conference to maintain their confidentiality, and that a condition for disclosure of the ESPN Agreements to Florida State was that Florida State was required to "maintain the confidentiality."

162. Each time Florida State reviewed the ESPN Agreements, it had access to the portions of those Agreements requiring confidentiality.

163. Notwithstanding these repeated warnings, and the language of the ESPN Agreements, Florida State chose to deliberately and publicly disclosed or authorize the disclosure of confidential information from the ESPN Agreements.

164. For example, during the December 22, 2023, meeting, counsel for Florida State discussed at length the future media rights to be paid under the ESPN Agreements.

165. While counsel "cherry picked" the numbers to make it appear that Florida State would receive less than was actually projected, counsel did disclose various confidential terms and provisions of the ESPN Agreements.

166. These terms included:

[redacted]

c. Other provisions of the Multimedia Agreement and ACC Network Agreement.

167. The Board of Trustees authorized the disclosure of this confidential information.

168. At the conclusion of the "emergency" Meeting, the Board of Trustees authorized the filing of a Complaint containing confidential information without any protections.

169. Before a Complaint was filed, however, Florida State disclosed or authorized others to disclose the allegations of the Complaint, including the allegations disclosing confidential information in the ESPN Agreements. An unfiled copy of the cover-page of Complaint that circulated on the internet is attached to this Amended Complaint as **Exhibit 15.**

170. Counsel for Florida State, and at the direction of the Board, filed a Complaint in the Circuit Court of Leon County at approximately 11:26 AM ("the Florida Action").

171. The Complaint filed by Florida State in the Florida Action did not seek to protect this confidential information in the ESPN Agreements. Instead, the Complaint disclosed this confidential information. A copy of those portions of the Complaint referring to confidential information is attached as **Exhibit 16** to the Amended Complaint.

172. Shortly after the release of the unfiled copy of the Complaint in the Florida Action, on December 22, 2023, ESPN notified Florida State that it had disclosed confidential information. Subsequently, on January 9, 2024, the Conference notified Florida State that it had disclosed confidential information.

III. Claims for Relief

First Claim for Relief: Request for Declaratory Judgment that the Grant of Rights and Amended Grant of Rights are Valid and Enforceable Contracts

173. The ACC adopts by reference and incorporates the allegations of paragraphs 1 through 172 of the Amended Complaint.

174. In the Grant of Rights and the Amended Grant of Rights, Florida State agreed to grant its athletic Media Rights "irrevocably" and "exclusively" to the Conference for the term.

175. In the Grant of Rights and Amended Grant of Rights, Florida State transferred its Media Rights to the Conference "regardless" of whether it remained a Member Institution during the term of the Grant of Rights and Amended Grant of Rights.

176. In the Grant of Rights and Amended Grant of Rights, Florida State transferred its Media Rights to the Conference through 2036 and specifically acknowledged that the transfer was valid even if it withdrew from the Conference as a Member Institution.

177. In exchange for the Grant of Rights and Amended Grant of Rights, the ACC entered into contracts and agreements with ESPN which significantly increased the revenues paid to the Conference and distributed to its Member Institutions, including Florida State. The increase in revenues included [redacted] held by the ACC.

178. Florida State's Media Rights, a form of intellectual property, are worth in excess of $5 Million. Florida State has received more than [redacted] under the Grant of Rights since 2013.

179. The Grant of Rights and amended Grant of Rights between Florida State on the one hand, and the ACC on the other, was and is supported by good and valuable consideration.

180. The ACC has not breached the Grant of Rights or Amended Grant of Rights. To the contrary, at all times relevant to the Complaint, the ACC has abided by the terms of the Grant of Rights and Amended Grant of Rights.

181. Florida State has breached, ignored, or otherwise violated terms of the Grant of Rights and Amended Grant of Rights, and further indicated an intent to violate these agreements in their entirety notwithstanding the ACC's ownership of the rights through June 30, 2036.

182. Florida State's challenge to the Grant of Rights and Amended Grant of Rights further constituted a breach of its warranties to ESPN arising out of the ESPN Agreements. The ACC was an intended beneficiary of those warranties and has been damaged by these breaches.

183. Under the ESPN Agreements, the Conference is obligated to take all commercially reasonable actions to defend the Grant of Rights and Amended Grant of Rights and the rights granted to ESPN under those contracts.

184. The Conference is entitled to a declaration by this Court that the Grant of Rights and Amended Grant of Rights are valid and binding contracts, supported by good and adequate consideration, and that the Conference is and will remain the owner of the rights transferred by Florida State under the Grants of Rights through June 30, 2036.

Second Claim for Relief: Florida State is Estopped by Its Acceptance of Benefits (Quasi-Estoppel) or Has Waived by Its Conduct Any Challenge to the Grant of Rights and Amended Grant of Rights

185. The ACC adopts by reference and incorporates the allegations set forth in paragraphs 1 through 184 of the Amended Complaint.

186. The purpose of the Grant of Rights and Amended Grant of Rights was to permit the ACC to negotiate various agreements with ESPN and provide ESPN the Media Rights for its Member Institutions, including Florida State, in exchange for Rights Fees and other good and valuable consideration.

187. Since 2013, Florida State has received more than [redacted] in distributions from revenue generated by the Grant of Rights and Amended Grant of Rights, [redacted] as a result of entering into the Grant of Rights and Amended Grant of Rights and transferring its Media Rights exclusively and irrevocably to the ACC for the term of these agreements.

188. Florida State had the option of accepting or rejecting the benefits resulting from the Grant of Rights and Amended Grant of Rights.

189. Florida State had the right not to enter into and execute the Grant of Rights or Amended Grant of Rights.

190. By accepting and retaining the benefits of the Grant of Rights and Amended Grant of Rights, Florida State ratified the validity and enforceability of the Grant of Rights and Amended Grant of Rights.

191. Florida State substantially and materially benefitted from the Grant of Rights and Amended Grant of Rights.

192. Florida State never objected to its share of the distributions generated by the Grant of Rights and Amended Grant of Rights, including payments specifically for the Grant of Rights and Amended Grant of Rights. It accepted all benefits derived from and made possible by the ACC Constitution and the Grant of Rights and Amended Grant of Rights.

193. By accepting the substantial benefits made possible by the Grants of Right and Amended Grant of Rights over a ten-year period, Florida State is equitably estopped from challenging the validity or enforceability of the Grants of Right and Amended Grant of Rights.

194. Having entered into the Grant of Rights and Amended Grant of Rights, accepted the benefits generated by the Grant of Rights and Amended Grant of Rights, and retained the benefits generated by the Grant of Rights and Amended Grant of Rights, Florida State is now estopped from contesting the validity or enforceability of the Grant of Rights and Amended Grant of Rights.

195. Florida State made a deliberate choice to transfer its Media Rights to the ACC for a specific term in order to negotiate different and increasingly lucrative multi-media agreements

with ESPN, knowing that the transfer of these rights for a specific term would continue even if it ceased to be a Member Institution or chose to withdraw from the Conference.

196. In the Grant of Rights and Amended Grant of Rights, Florida State expressly and voluntarily relinquished its Media Rights to the ACC, with the understanding that the transfer of rights to the ACC would continue through June 30, 2036, regardless of whether it remained a Member Institution.

197. Florida State knowingly and voluntarily agreed in the Grant of Rights and Amended Grant of Rights to transfer ownership of its Media Rights to the ACC through June 30, 2036, knowing that the transfer and ownership would continue regardless of whether it remained a Member Institution of the Conference.

198. Florida State had full knowledge, actual or constructive, of the rights it transferred to the Conference in the Grant of Rights and Amended Grant of Rights, as well as the benefits that it would receive as a result.

199. Florida State intended to transfer the rights covered by these agreements to the Conference when it executed the Grant of Rights and Amended Grant of Rights, with the expectation of receiving the benefits of different and enhanced agreements between the Conference and ESPN.

200. Florida State intended for the Grant of Rights and Amended Grant of Rights to be enforceable and valid for the purpose of receiving the benefits generated by these contracts.

201. Florida State, through its conduct in accepting the benefits under the Grant of Rights and Amended Grant of Rights for more than a decade, led the ACC to reasonably understand that Florida State did not contest the validity or enforceability of the Grant of Rights or Amended Grant of Rights.

202. By accepting the substantial benefits made possible by the Grant of Rights and Amended Grant of Rights over a ten-year period, Florida State has waived its right to contest the validity or enforceability of these contracts.

203. The ACC is entitled to a declaration that Florida State is estopped from challenging the validity or enforceability of the Grant of Rights or Amended Grant of Rights, or has waived its right to contest the validity or enforceability of the terms and conditions of these contracts as a result of its conduct, including its acceptance of benefits under these agreements, over nearly a decade.

Third Claim for Relief: Florida State Has Breached Its Promises in the Grant of Rights and Amended Grant of Rights Agreements

204. The ACC adopts by reference and incorporates the allegations of paragraphs 1 through 203 of the Complaint.

205. The Grant of Rights and the Amended Grant of Rights are a valid, enforceable contract between the ACC and Florida State.

206. In the Grant of Rights and Amended Grant of Rights, Florida State "covenants and agrees that . . . it will not take any action, or permit any action to be taken by others subject to its control, . . . or fail to take any action, that would affect the validity and enforcement of the Rights granted to the Conference under this Agreement."

207. In the Grant of Rights and Amended Grant of Rights, Florida State also "irrevocably and exclusively grant[ed] [its Media Rights] to the Conference during the Term" of the ESPN Agreements.

208. Under North Carolina law, each contract has an implied duty of good faith and fair dealing. Thus, the Grant of Rights and Amended Grant of Rights require Florida State to act in good faith and on principles of fair dealing to accomplish the purpose of the contracts.

209. By instituting the Florida Action, Florida State took direct action that affects the validity and enforcement of the Grant of Rights and Amended Grant of Rights, and breached its contract with the Conference.

210. By instituting the Florida Action, Florida State has taken direct action that affects the irrevocability and exclusivity of the Grant of Rights and Amended Grant of Rights, and has breached its contract with the Conference.

211. By filing the Florida Action, and taking the other actions set forth in this Amended Complaint, Florida State breached its obligation of good faith and fair dealing under the Grant of Rights and Amended Grant of Rights. In particular, rather than act in good faith and deal fairly with the Conference to accomplish the ends of the Grant of Rights and Amended Grant of Rights, Florida State has actively breached and sought to prevent the goals of those contracts.

212. The Conference has been damaged by these breaches in an amount yet to be determined but which the Conference reasonably believes will be substantial.

Fourth Claim for Relief: Florida State Has Breached Its Obligation to Protect Confidential Information

213. The ACC adopts by reference and incorporates the allegations set forth in paragraphs 1 through 212 of the Amended Complaint.

214. In the 2016 Multi-Media Agreement, ESPN and the ACC agreed that "[e]ach party shall maintain the confidentiality of this Agreement and its terms, and any other Confidential Information." 2016 Multi-Media Agreement § 25.11; **Exhibit 8.**

215. Disclosure of the confidentiality of the 2016 Multi-Media Agreement and all Confidential Information under the 2016 Multi-Media Agreement was permitted "to each Conference Institution, provided that each Conference Institution shall agree to maintain the

confidentiality of this Agreement, subject to the law applicable to each such Conference Institution." 2016 Multi-Media Agreement § 25.11(c); **Exhibit 8.**

216. As of December 22, 2023, Florida State was aware and had been aware of the confidentiality provisions of the 2016 Multi-Media Agreement.

217. In the ACC Network Agreement, ESPN and the ACC agreed that "[e]ach party shall maintain the confidentiality of this Agreement and its terms, and any other Confidential Information." ACC Network Agreement § 18.11; **Exhibit 9.**

218. Disclosure of the confidentiality of the ACC Network Agreement and all Confidential Information under the ACC Network Agreement was permitted "to each Conference Institution, provided that each Conference Institution shall agree to maintain the confidentiality of this Agreement, subject to the law applicable to each such Conference Institution." ACC Network Agreement § 18.11(c); **Exhibit 9.**

219. As of December 22, 2023, Florida State was aware and had been aware of the confidentiality provisions of the ACC Network Agreement.

220. In an effort to preserve the confidentiality of the ESPN Agreements, the Conference limits access to the Agreements. They are maintained at its Headquarters in North Carolina. Access is limited amongst Conference staff. Prior to voting to approve the Agreements in 2016, and at other meetings where the Agreements are discussed, the Members are verbally briefed on the provisions of the ESPN Agreements, each time reminded of the confidential nature of the Agreements. The ESPN Agreements are not shared electronically with Members.

221. In an effort to preserve the confidentiality of the ESPN Agreements, the Conference permits its Members to inspect and review the ESPN Agreements on request at its Headquarters

but only on agreement that the Member would not copy or reproduce the provisions of the ESPN Agreements and would treat the information as confidential.

222. In preparation for the actions set forth in this Amended Complaint, Florida State, through counsel, reviewed the 2016 Multi-Media Agreement and the ACC Network Agreement at the ACC's Headquarters in North Carolina on October 7, 2022, January 4, 2023, and August 1 and 2, 2023.

223. Before each inspection of the ESPN Agreements, the ACC informed Florida State of the confidentiality requirements and that its review was conditioned upon protecting the confidential information contained in the ESPN Agreements and not disclosing that information to the public.

224. As a result of these reviews, Florida State was provided with and learned the confidential information in the ESPN Agreements.

225. Florida State violated these conditions of confidentiality when it authorized and permitted disclosure of confidential information from the ESPN Agreements during the course of the Board of Trustees Meeting on December 22, 2023.

226. Florida State violated these conditions of confidentiality when it authorized and permitted disclosure of confidential information from the ESPN Agreements in the release of an unfiled version of the Complaint in the Florida Action.

227. Florida State violated these conditions of confidentiality when it authorized and permitted the disclosure of confidential information from the ESPN Agreements in the Complaint that it filed on December 22, 2023.

228. The material outlined in the Complaint constitutes confidential information under the terms of the 2016 Multi-Media Agreement and ACC Network Agreement.

229. Florida State has breached its obligation to treat the information in the 2016 Multi-Media Agreement and the ACC Network Agreement as confidential and, instead, has disclosed this information to the public.

230. The Conference has been damaged by Florida State's breach of its obligation in an amount to be determined but which the Conference reasonably believes will be substantial.

231. The Conference is further entitled to permanent injunctive relief barring Florida State from disclosing the confidential information in the ESPN Agreements that was disclosed to it by the Conference.

Fifth Claim for Relief: Florida State Has Breached and Continues to Breach Its Fiduciary Obligations to the Conference Under the ACC Constitution and Bylaws and North Carolina Law

232. The ACC adopts by reference and incorporates the allegations set forth in paragraphs 1 through 231 of the Amended Complaint.

233. The ACC is an unincorporated nonprofit association under North Carolina law and is governed by its Constitution and Bylaws. The Constitution and Bylaws are a contract by and between the ACC and a Member, including Florida State.

234. In 1991, Florida State requested to be permitted to join the Conference as a Member Institution. Each year, Florida State certifies that it has the mandate and support of the Board of Trustees "to operate a program of integrity in full compliance with NCAA, Conference and all other relevant rules and regulations."

235. The ACC Constitution and Bylaws give Florida State the right to participate in the management of the affairs of the Conference and, since joining the Conference in 1991, Florida

State, its employees, and its Presidents have actively participated in the management of the affairs of the Conference.

236. As a Member of an unincorporated nonprofit association under North Carolina law, Florida State had the right to participate in the management of the affairs of the Conference. N.C. Gen. Stat. § 59B-2(1).

237. As a Member Institution, Florida State has the right to participate in and select individuals authorized to manage the Conference's affairs and develop policies. N.C. Gen. Stat. § 59B-2(1).

238. As a Member Institution, Florida State has the authority to assert claims on behalf of the Conference. N.C. Gen. Stat. § 59B-7(e).

239. The rights and obligations of Members of an unincorporated nonprofit association under North Carolina law are further supplemented by principles of law and equity. N.C. Gen. Stat. § 59B-3.

240. Upon joining the ACC as a Member Institution, Florida State entered into a common and joint venture with the other Member Institutions, as expressed in the ACC's Constitution. As a member of a common and joint venture, Florida State has a fiduciary obligation to the other members of the common and joint venture, as well as to the Conference, to act in ways that advance the common and joint venture's goals and not act in ways that undermine or frustrate those goals.

241. The ACC Constitution and Bylaws, as well as the statutory and common law of North Carolina, impose a duty on Florida State to act in good faith, with due care, and in a manner that is in the best interests of the Conference while it is a Member of the Conference and charged with managing the Conference's affairs.

242. Under North Carolina law, when a member of a common and joint venture can no longer support the goals of the joint venture, it has an obligation to withdraw from the joint venture and not act in ways the frustrate the goals of the joint venture.

243. The Conference has adopted the method and form of governance of an incorporated body.

244. As a Member Institution, Florida State designated its President as a Member of the Board of Directors.

245. At all times relevant to this Amended Complaint, the President of Florida State was acting under the direction and pursuant to the authority of Florida State. His actions are the actions of Florida State.

246. Members of the Board of Directors of the Conference owe a fiduciary duty under the ACC Constitution and Bylaws, as well as principles of statutory and common law in North Carolina, to the Conference and its Member Institutions to act for the benefit of the Conference in matters involving the Conference.

247. Members of the Board of Directors of the Conference owe a fiduciary duty to the Conference and its Member Institutions under the ACC Constitution and Bylaws, as well as principles of statutory and common law in North Carolina, not to undermine or frustrate the goals and viability of the Conference.

248. Under the ACC Constitution and Bylaws, as well as principles of statutory and common law in North Carolina, when a Member of the Board of Directors of a joint venture contemplates and then authorizes actions that undermine or are designed to frustrate the stability of the joint venture or its goals, he has an obligation to resign from the Board of Directors.

249. One of the Conference's common goals, and part of the joint and common venture into which Florida State has entered as a Member Institution, is to create a viable collegiate athletic conference that, through its activities, enhances and funds college athletics for its Members.

250. By challenging the validity of the Grant of Rights and Amended Grant of Rights through the Florida Action, Florida State seeks to undermine or destroy the contracts and agreements that enable the Conference to create a viable collegiate athletic conference that, through its activities, enhances and funds college athletics for its Members.

251. By challenging the validity of the Grant of Rights and Amended Grant of Rights through the Florida Action, Florida State has further challenged the right of the Conference established under the Bylaws to market the Media Rights of the Member Institutions collectively, undermining the organization and management of the Conference.

252. Florida State's actions as set forth in this Amended Complaint and in filing the Florida Action have been for its own benefit, with no regard for the best interests of the Conference.

253. Florida State's actions as set forth in this Amended Complaint and in filing the Florida Action were taken without due care and in breach of its obligation of good faith.

254. None of the actions taken by Florida State as set forth in this Amended Complaint and in filing the Florida Action were for the benefit of or in the best interest of the Conference.

255. Florida State actions set forth in this Amended Complaint and in filing the Florida Action breached its fiduciary obligations to the Conference.

256. The actions of Florida State have caused actual damage to the Conference and will continue to cause damage in the future to the Conference.

257. Among the requests for relief sought by Florida State in the Florida Action is a request by Florida State that it be deemed to have retroactively withdrawn from the Conference as of August 15, 2023.

258. To be clear, a decision by Florida State to withdraw from the Conference does not constitute a breach of its President's fiduciary obligations as a member of the Board of Directors if appropriate notice is given under the ACC Constitution and Bylaws so that the Conference can address the resulting conflict of interest.

259. Under the ACC Constitution and Bylaws, in order to withdraw, a Member is required to provide notice of withdrawal by August 15 for a withdrawal to be effective on the following June 30.

260. Once a Member has indicated an intention to withdraw, the ACC Constitution and Bylaws further provide that as a consequence of a conflict of interest, the Conference may withhold proprietary or confidential information or bar attendance, voting, or attendance at Conference meetings for the Member and its Chief Executive or other representative(s):

> During the period between delivery of a notice of . . . withdrawal and the effective date . . . the Board, the Executive Committee and any other Committee may withhold any information from, and exclude from any meeting (or portion thereof) any/or any vote, the Director . . . of the . . . withdrawing member, if the Board determines that (i) the relevant matter relates primarily to any period after the effective date . . . (ii) such information is proprietary or confidential or (iii) such attendance, access to information or voting could present a conflict of interest . . . .

Exhibit 1 at 13, ¶ 1.5.1.3.

261. As of the date of this Amended Complaint, Florida State claims that it has not withdrawn from the Conference.

262. By this claim, Florida State seeks to avoid exclusion from meetings or a bar on access to information or voting as a consequence of its conflict of interest.

263. By seeking retroactive withdrawal in the Florida Action, Florida State has a clear, direct, and material conflict of interest with the management of the Conference.

264. By continuing to act in disregard of this clear, direct, and material conflict of interest, Florida State breaches their obligations under the ACC Constitution and Bylaws, and the statutory and common law of North Carolina.

265. The ACC requests that this Court grant permanent injunctive relief barring Florida State from acting in breach of its fiduciary obligations under the ACC Constitution and Bylaws, as well as principles of statutory and common law in North Carolina, by barring it and its President and other representatives from participating in the management of the affairs of the Conference while it has a direct and material conflict with the purposes and objectives of the Conference.

Sixth Claim for Relief: Florida State Has Breached Its Obligation of Good Faith and Fair Dealing Under the ACC Constitution and Bylaws

266. The ACC adopts by reference and incorporates the allegations set forth in paragraphs 1 through 265 of the Amended Complaint.

267. The ACC Constitution and Bylaws is a valid and enforceable contract between the Conference and its Members.

268. Under North Carolina law, it is a basic principle of contract law that a party to a contract must act in good faith and on principles of fair dealing to accomplish the purpose of the contract.

269. Thus, in North Carolina, each contract has an implied duty of good faith and fair dealing.

270. Under the ACC Constitution and Bylaws, the Commissioner is charged with the duty to negotiate Media Rights agreements on behalf of the Conference. **Exhibit 1** at p. 13 §2.3.1.q and p. 39 §2.10.3. Florida State further agreed under the Bylaws that it had "granted to the

Conference the right to exploit certain media and related rights" under the Grant of Rights. *Id.* §2.10.1. Florida State further agreed under the Bylaws that it had "granted to the Conference the right to exploit certain media and related rights" under the Grant of Rights. *Id.* §2.10.1.

271. Florida State's actions as detailed in this Amended Complaint violate its duty to act in good faith and fairly deal with the Conference.

272. To the contrary, and in violation of its obligations of good faith and fair dealing, Florida State has not acted in good faith and has not dealt fairly with the Conference.

273. The Conference has been damaged by Florida State's violation of is contractual obligations of good faith and fair dealing in an amount to be determined, but which the Conference reasonably believes will be substantial.

IV. Prayer for Relief

WHEREFORE, the Plaintiff prays that::

1. The Court issue a Declaration that the Grant of Rights and amended Grant of Rights is a valid and enforceable contract between Florida State and the ACC and issue all necessary injunctive decrees or relief to enforce this Declaration;

2. The Court issue a Declaration that Florida State is estopped from challenging the validity of the Grant of Rights and amended Grant of Rights under the doctrine of equitable estoppel or estoppel by acceptance of benefits;

3. The Court issue a Declaration that Florida State is barred from challenging the validity of the Grant of Rights and amended Grant of Rights and has waived its right to do so.

4. The Conference have and recover of Florida State damages for its breaches of the Grant of Rights and Amended Grant of Rights in an amount to be proven at trial but which the Conference reasonably believes will be substantial;

5. The Conference have and recover of Florida State damages for the breach of its obligation to maintain the confidentiality of the ESPN Agreements in an amount to be determined but which the Conference reasonably believes will be substantial;

6. This Court issue a permanent injunction barring Florida State from disclosing confidential information from the ESPN Agreements;

7. This Court issue a permanent injunction barring Florida State from participating in the management of the affairs of the Conference while it has a direct and material conflict of interest with the purposes and objectives of the Conference;

8. The Conference have and recover of Florida State damages for its breach of the ACC Constitution and Bylaws in an amount to be proven at trial but which the Conference believes will be substantial;

9. This Court order such further relief as it deems just and appropriate.

This ___ day of January 2024.

WOMBLE BOND DICKINSON (US) LLP

/s/ *James P. Cooney III*
James P. Cooney III (N.C. Bar No. 12140)
Sarah Motley Stone (N.C. Bar No. 34117)
Patrick Grayson Spaugh (N.C. Bar No. 49532)
301 South College Street, Suite 3500
Charlotte, North Carolina 28202-6037
Telephone: 704-331-4980
Jim.Cooney@wbd-us.com
Sarah.Stone@wbd-us.com
Patrick.Spaugh@wbd-us.com

Attorneys for Plaintiff Atlantic Coast Conference

CERTIFICATE OF SERVICE

I hereby certify that the foregoing was electronically filed using the N.C. Business Court's electronic filing system, which will automatically and electronically notify all counsel of record as follows:

Christopher C. Lam
C. Bailey King, Jr.
BRADLEY ARANT BOULT CUMMINGS, LLP
214 North Tryon Street, Suite 3700
Charlotte, NC 28202
Telephone: (704) 338-6000
Facsimile: (704) 332-8858
clam@bradley.com
bking@bradley.com
Counsel for Defendant

/s/ James P. Cooney III
James P. Cooney III

EXHIBIT C

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.

DEFENDANT'S MOTION TO DISMISS OR, IN THE ALTERNATIVE, STAY THE ACTION

Pursuant to Rules 12(b)(1), 12(b)(2), 12(b)(6), and 12(b)(7) of the North Carolina Rules of Civil Procedure, Defendant Florida State University Board of Trustees (the "FSU Board")[1] hereby moves to dismiss the claims in Plaintiff Atlantic Coast Conference's (the "ACC's") First Amended Complaint ("Amended Complaint"). In the alternative, the FSU Board requests a stay of the ACC's anticipatorily-filed lawsuit 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. Gen. Stat. § 1-75.12. In support of this Motion, the FSU Board shows the Court as follows:

1. The ACC filed a Complaint for Declaratory Judgment against the FSU Board after-hours on December 21, 2023, in an admitted "race to the courthouse" to secure what it hoped would prove to be a more favorable forum because it speculated

[1] The defendant's proper name is Florida State University Board of Trustees.

that the FSU Board might vote to authorize the filing of a lawsuit in Florida the very next day.

2. Notwithstanding the ACC's improper attempt at "procedural fencing," the ACC's lawsuit against the FSU Board is fundamentally flawed and subject to dismissal under Rule 12(b) for a host of reasons:

a. *First*, the ACC prematurely filed suit before an actual or justiciable controversy arose, warranting dismissal pursuant to Rules 12(b)(1) and/or 12(b)(6).

b. *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 this lawsuit, warranting dismissal pursuant to Rules 12(b)(1) and/or 12(b)(6).

c. *Third*, the ACC is not permitted to sue the FSU Board in North Carolina, as the FSU Board has not waived its sovereign immunity anywhere except within the boundaries of the State of Florida pursuant to Fla. Stats. §§ 1001.72(1) and 768.28(1), warranting dismissal under Rules 12(b)(1), 12(b)(2) and/or 12(b)(6).

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

e. *Fifth,* North Carolina law for unincorporated nonprofit associations does not support the ACC's attempt to impose broad, extra-contractual,

fiduciary duties on each of its members to act in the best interest of the ACC, warranting dismissal under Rule 12(b)(6).

3. In the alternative, if the Court does not dismiss this action, the Court should stay it in favor of the Florida Action under N.C. Gen. Stat. § 1-75.12. The Florida Action is the broader and more comprehensive action, and the ACC should not be entitled to any first-filing deference as a result of its improper forum-shopping.

4. Pursuant to BCR 7.2, this Motion is accompanied by a brief, which is incorporated by reference herein.

5. This Motion is further supported by the following exhibits, attached hereto:

a. Exhibit 1 is a copy of the Amended Complaint for Declaratory Judgment filed on January 29, 2024, in the Florida Action, Case No. 23-CA-002860.

b. Exhibit 2 is a copy of the Complaint filed on November 26, 2012, in the North Carolina Superior Court Division, Guilford County (and subsequently designated as mandatory complex business) in the lawsuit captioned *Atlantic Coast Conference v. University of Maryland, College Park; Board of Regents, University System of Maryland*, Case No. 2012CVS10736.

WHEREFORE, the FSU Board respectfully requests that the Court dismiss the ACC's anticipatorily-filed action against the FSU Board pursuant to Rule 12(b) or, in the alternative, stay this case pending final resolution of the Florida Action pursuant to N.C. Gen. Stat. § 1-75.12.

This the 7th day of February, 2024.

BRADLEY ARANT BOULT CUMMINGS LLP

/s/ C. Bailey King, Jr.
Christopher C. Lam
N.C. State Bar No. 28627
C. Bailey King Jr.
N.C. Bar No. 34043
Brian M. Rowlson
N.C. Bar No. 37755
214 North Tryon Street, Suite 3700
Charlotte, North Carolina 28202
Telephone: (704) 338-6000
Facsimile: (704) 3328858
clam@bradley.com
bking@bradley.com
browlson@bradley.com

David C. Ashburn (*pro hac vice* motion forthcoming)
Florida Bar No. 708046
Peter G. Rush (*pro hac vice* motion forthcoming)
Florida Bar No. 1050902
John K. Londot (*pro hac vice* motion forthcoming)
Florida Bar No. 579521
GREENBERG TRAURIG, P.A.
101 East College Avenue
Post Office Drawer 1838
Tallahassee, FL 32302
Telephone: (850) 222-6891
Facsimile: (850) 681-0207
ashburnd@gtlaw.com
peter.rush@gtlaw.com
londotj@gtlaw.com

Attorneys for Defendant Florida State University Board of Trustees

CERTIFICATE OF SERVICE

The undersigned hereby certifies that the foregoing **DEFENDANT'S MOTION TO DISMISS OR, IN THE ALTERNATIVE, STAY THE ACTION** was filed with the clerk using the CM/ECF system, which will send electronic notification to all following counsel of record.

This the 7th day of February, 2024.

/s/ C. Bailey King, Jr.
C. Bailey King, Jr.
Attorney for Defendant Florida State University Board of Trustees

EXHIBIT
2

STATE OF NORTH CAROLINA

GUILFORD COUNTY

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
12 CVS 10736

ATLANTIC COAST CONFERENCE,

Plaintiff,

vs.

UNIVERSITY OF MARYLAND, COLLEGE PARK; BOARD OF REGENTS, UNIVERSITY SYSTEM OF MARYLAND,

Defendants.

COMPLAINT
(Jury Trial Requested)

Plaintiff Atlantic Coast Conference ("ACC" or "Conference"), complaining of defendants University of Maryland, College Park ("Maryland") and the Board of Regents, University System of Maryland ("Board of Regents"), alleges and says:

THE PARTIES

1. Plaintiff ACC is an unincorporated nonprofit association organized and existing under the laws of North Carolina, and with its principal place of business in Greensboro, North Carolina.

2. The ACC is comprised of twelve members that are institutions of higher education. In addition to defendant Maryland, the members are Boston College, Clemson University, Duke University, Florida State University, Georgia Institute of Technology, University of Miami, The University of North Carolina, North Carolina State University, University of Virginia, Virginia Polytechnic Institute and State University, and Wake Forest University.

3. As an unincorporated nonprofit association, the ACC is its own legal entity duly authorized by statute to assert claims in its name on behalf of its members. One or more of its members have standing to assert in their own right the claim or claims asserted herein. The interests the ACC seeks to protect herein are germane to its purposes, and neither the claim or claims asserted herein nor the relief requested requires the participation of any particular member of the ACC as a party other than defendant Maryland.

4. Defendant Maryland is a university with its principal place of business in College Park, Maryland, organized and existing under the laws of the State of Maryland. Defendant Maryland is a member of the North Carolina unincorporated nonprofit association that is the ACC, and has been a member at all times since the founding of the ACC in 1953 in Guilford County, North Carolina.

5. The Board of Regents governs the University System of Maryland, of which defendant Maryland is a constituent institution. The Board of Regents takes certain official actions on behalf of defendant Maryland, including the actions described herein.

JURISDICTION

6. This court has the authority to grant the relief requested in this Complaint pursuant to N.C. Gen. Stat. § 1-253 et seq. and Rule 57 of the North Carolina Rules of Civil Procedure.

7. Defendants are subject to the jurisdiction of this Court pursuant to, *inter alia*, N.C. Gen. Stat. § 1-75.4 and the Constitution of the United States.

BACKGROUND

8. The Constitution of the ACC (the "Constitution") is a contract by and among the member institutions, pursuant to which the members have agreed to conduct the business affairs of the ACC.

9. Plaintiff ACC is organized by and operates pursuant to the Constitution and Bylaws.

10. The Constitution and Bylaws are governed by North Carolina law.

11. Article VII of the Constitution grants the complete responsibility for and authority over the ACC to the Council of Presidents, comprised of the chief executive officer from each member institution.

12. Each member has agreed, and each member has relied on the agreements of the other members, to be bound by votes of the Council of Presidents.

13. Specifically, defendant Maryland has agreed to be bound by votes taken by the Council of Presidents.

14. The Constitution of the ACC provides that upon notice of withdrawal from the association of members, a withdrawing member shall be subject to a withdrawal payment in an amount "equal to three (3) times the total operating budget of the Conference (including any contingency included therein), approved in accordance with Section V-1 of the Conference Bylaws, which is in effect as of the date of the official notice of withdrawal."

15. This provision of the Constitution requiring payment of the withdrawal amount and its immediate effective date were adopted by the duly authorized, binding, sufficient and effective vote of the Council of Presidents of the ACC member institutions

in North Carolina during the September 11-12, 2012 meeting of the Council of Presidents.

16. The members of the ACC are bound by the vote of the Council of Presidents during the September 11-12, 2012 meeting of the Council of Presidents.

17. The foregoing vote of the Council of Presidents in North Carolina followed discussion and consideration by the Council of Presidents, including the President of defendant Maryland, Dr. Wallace D. Loh. Over the course of more than a year, Dr. Loh freely participated in discussions and votes among members of the Council of Presidents regarding the withdrawal payment due to the ACC if any member were to withdraw from the Conference.

18. Dr. Loh, acting as the agent and representative of defendant Maryland, voluntarily consented to and participated, without objection, in the discussion and vote by and among the Council of Presidents during their September 11-12 meeting concerning the immediate establishment of the withdrawal payment at three times the annual operating budget of the ACC (although defendant Maryland did not vote in favor).

19. The Council of Presidents incorporated the withdrawal payment provision into the Constitution because it provides some measure of financial protection against potential damages and losses for members of the ACC that remain after withdrawal by one or more other members.

20. As the governing body of the common enterprise that generates substantial revenue on which the member institutions rely each year, and in light of the revenue of each member based on its involvement and activities with the other members of the ACC,

the Council of Presidents deemed it reasonable and necessary to provide some relief for the prospective and substantial harm caused by withdrawal.

21. The Council of Presidents, following consideration of the types and amounts of financial and other harm that would potentially occur in the event of a member's withdrawal, concluded that the sum of three times the annual operating budget of the ACC was a fair and reasonable approximation of the potential financial and other harm resulting from withdrawal.

22. The Council of Presidents previously had addressed the issue of a withdrawal payment on September 13-14, 2011. Following discussion at that meeting of potential harm resulting from withdrawal, the Council of Presidents adopted a proposal by Dr. Loh at that meeting to establish the withdrawal payment at one and one-quarter times the total operating budget of the ACC. The Council of Presidents unanimously voted on September 13, 2011 to amend the Constitution to establish the withdrawal payment at the amount proposed in discussion by Dr. Loh.

23. Following the September 2011 vote, the potential harm to ACC member institutions in the event of the withdrawal of one or more members of the Conference substantially increased. The September 11, 2012 amendment to the Constitution increasing the withdrawal payment to three times the annual operating budget of the ACC resulted from further assessment of the potential harm for Conference members in the event of withdrawal and from additional changes related to the structure of collegiate athletics.

24. The annual operating budget of the ACC for the 2012-2013 year is $17,422,114. The withdrawal payment to which a member is subject upon withdrawal between July 1, 2012 and June 30, 2013 is $52,266,342.

25. On or about November 19, 2012, following a vote, the Board of Regents endorsed, approved and authorized defendant Maryland's withdrawal from the ACC and, further, to join the Big Ten Conference, which was described by Dr. Loh as "a watershed moment for the University of Maryland."

26. On November 19, 2012, defendant Maryland conducted a public press conference, led by Dr. Loh, announcing and discussing its decision to withdraw from the ACC.

27. Dr. Loh, on behalf of and as the authorized agent of defendant Maryland, officially provided notice of Maryland's withdrawal to the Commissioner of the ACC on November 19, 2012.

28. The Big Ten Conference on or about November 19, 2012 published statements welcoming defendant Maryland to the Big Ten Conference.

29. In apparent reliance on the withdrawal of defendant Maryland from the ACC, and the decision of defendant Maryland to join the Big Ten Conference, the Big Ten Conference immediately agreed thereafter to accept as a new member Rutgers, The State University of New Jersey.

30. Following defendant Maryland's public announcement and Dr. Loh officially providing notice to the ACC of its withdrawal, defendant Maryland has become subject to the withdrawal payment of $52,266,342.

31. Despite having participated in the vote to amend the Constitution two months earlier, Dr. Loh has distanced Maryland publicly from any commitment to pay the withdrawal payment as set forth in the Constitution.

32. In public statements, Dr. Loh, on behalf of defendant Maryland, has referred to the withdrawal payment as "illegal" and indicated his contention that it is unenforceable.

33. Dr. Loh, on behalf of defendant Maryland, has also stated publicly regarding the withdrawal payment that it raises issues "for a court to decide" and is "illegal."

34. When asked directly whether defendant Maryland intends to pay the withdrawal payment, Dr. Loh, on behalf of defendant Maryland, has refused to provide assurance that defendant Maryland will do so and has made it clear that defendant Maryland does not intend to pay the amount provided by the ACC's Constitution.

35. Upon information and belief, Dr. Loh has asserted on other occasions that defendant Maryland will not pay the full amount of the withdrawal payment as provided by the ACC's Constitution.

CLAIM FOR DECLARATORY RELIEF

36. The ACC re-alleges and incorporates by reference the allegations set forth in the preceding paragraphs.

37. An actual controversy has arisen between the ACC and Defendants over the validity and enforceability of the provisions of the Constitution that make defendant Maryland subject to the withdrawal payment.

38. This is an action seeking a declaratory judgment pursuant to N.C. Gen. Stat. § 1-253 et seq., determining the relative rights, liabilities and obligations of the ACC and defendant Maryland pursuant to Section IV-5 of the ACC's Constitution.

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.

40. A genuine controversy exists between the parties. Defendant Maryland has indicated its belief that Section IV-5 of the ACC's Constitution, as amended on or about September 11, 2012, is invalid and unenforceable. A declaratory judgment from this Court will clarify and settle the validity and enforceability of the withdrawal payment at issue and will afford relief from the controversy and dispute created by defendant Maryland's assertion that the withdrawal payment is invalid and unenforceable.

41. Additionally, through public and private statements, defendant Maryland has indicated that it does not intend to pay the amount provided by the ACC's Constitution.

42. The ACC is entitled to a declaratory judgment by the Court determining and declaring that the Section IV-5 of the ACC's Constitution, requiring payment by any withdrawing member of the withdrawal payment, is a valid and enforceable contractual term and that defendant Maryland is subject to the withdrawal payment of $52,266,342.

WHEREFORE, Plaintiff ACC respectfully prays unto the Court as follows:

1. That the Court declare that the provision of Section IV-5 of plaintiff ACC's Constitution regarding the withdrawal payment owed by any member institution of the ACC that gives notice of withdrawal from the Conference is valid and enforceable;

2. That the Court declare that, pursuant to Section IV-5 of plaintiff ACC's Constitution, the University of Maryland is subject to a withdrawal payment in the amount of $52,266,342, in light of the actions taken by the defendants;

3. That plaintiff ACC recover its costs, including reasonable attorneys' fees, as may be provided by law;

4. That any and all issues so triable be tried by a jury; and

5. That plaintiff ACC have such other and further relief as the Court may deem just and proper.

This the 26th day of November, 2012.

SMITH MOORE LEATHERWOOD LLP

D. Clark Smith, Jr.
N.C. State Bar No. 6853
Alan W. Duncan
N.C. State Bar No. 8736
Alexander L. Maultsby
N.C. State Bar No. 18317
SMITH MOORE LEATHERWOOD LLP
300 North Greene Street, Suite 1400
Post Office Box 21927
Greensboro, North Carolina 27420
Telephone: (336) 378-5200
Facsimile: (336) 378-5400

Attorneys for Plaintiff Atlantic Coast Conference

OF COUNSEL:

James D. Smeallie
Elizabeth M. Mitchell
Benjamin M. McGovern
Holland & Knight LLP
10 St. James Avenue, 11th Floor
Boston, Massachusetts 02116
Telephone: (617) 523-2700
Facsimile: (617) 523-6850

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

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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.

/s/C. Bailey King, Jr.
Christopher C. Lam
N.C. State Bar No. 28627
C. Bailey King, Jr.
N.C. State Bar No. 34043
Brian M. Rowlson
N.C. State Bar No. 37755
BRADLEY ARANT BOULT CUMMINGS, LLP
214 North Tryon Street, Suite 3700
Charlotte, NC 28202
Telephone: (704) 338-6000
Facsimile: (704) 332-8858
clam@bradley.com
bking@bradley.com
browlson@bradley.com

David C. Ashburn (*pro hac vice* motion forthcoming)
Florida Bar No. 708046
Peter G. Rush (*pro hac vice* motion forthcoming)
Florida Bar No. 1050902
John K. Londot (*pro hac vice* motion forthcoming)
Florida Bar No. 579521

GREENBERG TRAURIG, P.A.
101 East College Avenue
Tallahassee, FL 32302
Telephone: (850) 222-6891
Facsimile: (850) 681-0207
ashburnd@gtlaw.com
peter.rush@gtlaw.com
londotj@gtlaw.com

Attorneys for Defendant Florida State University Board of Trustees

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.
C. Bailey King, Jr.

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.
C. Bailey King, Jr.

EXHIBIT D

STATE OF NORTH CAROLINA

COUNTY OF MECKLENBURG

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

ATLANTIC COAST CONFERENCE, a North Carolina Nonprofit Unincorporated Association,

Plaintiff,

v.

BOARD OF TRUSTEES OF FLORIDA STATE UNIVERSITY.

Defendant.

AFFIDAVIT OF BRAD HOSTETTER

I, Brad Hostetter, being first duly sworn, depose and say:

1. I am over the age of 18 and have personal knowledge of the statements contained herein.

2. I am the Secretary and Deputy Commissioner – Policy & Institutional Services for the Atlantic Coast Conference ("ACC").

3. On January 12, 2024, the ACC held a special meeting of the Board of Directors, attended by a quorum of Directors from the current Member Institutions, along with two representatives from non-voting future Member Institutions.

4. The required three days' notice of the meeting was waived by the required three-fourths of the Directors.

5. At this meeting, the voting Directors in attendance unanimously approved the filing of the Amended Complaint in this matter, inclusive of the original claims in the Complaint filed on December 21, 2023. This constituted the affirmative vote of more than two-thirds of all voting Directors.

6. This act by the ACC's Board of Directors has been reflected in Minutes of the Board of Directors, which are scheduled to be approved at the ACC's March 19, 2024 meeting of the Board of Directors.

FURTHER THE AFFIANT SAY NOT.

This the 27th day of February, 2024.

Brad Hostetter

STATE OF NORTH CAROLINA
MECKLENBURG COUNTY
Sworn to and subscribed to me
this the 27th day of February, 2024.

TRACEY HAITH Notary Public Alamance County My Comm. Exp. NORTH CAROLINA

Notary Public
My Commission Expires: 8/31/2025

EXHIBIT E

STATE OF NORTH CAROLINA COUNTY OF MECKLENBURG	IN THE GENERAL COURT OF JUSTICE SUPERIOR COURT DIVISION 23CV040918-590
ATLANTIC COAST CONFERENCE, a North Carolina Nonprofit Unincorporated Association, Plaintiff, v. BOARD OF TRUSTEES OF FLORIDA STATE UNIVERSITY. Defendants.	**DECLARATION OF JAMES E. RYAN, J.D.**

The undersigned, under the penalty of perjury, states that:

1. I am James E. Ryan, the President of the University of Virginia. I have been the President of the University of Virginia since 2018. From 2013 to 2018 I was the Dean of the Faculty of Education at the Harvard Graduate School of Education. From 1998 to 2013, I was an Associate Professor and Professor at the University of Virginia School of Law. From 1992 to 1993, I served as a Clerk to the Hon. William H. Rehnquist, Chief Justice of the United States Supreme Court. I received my law degree from the University of Virginia School of Law in 1992, and my undergraduate degree from Yale University in 1988.

2. I am presently the Chair of the Board of Directors of the Atlantic Coast Conference. I became the Chair on July 1, 2023. From July 1, 2022 to June 30, 2023, I served as the Vice-Chair of the ACC (President Vincent Price of Duke University served as Chair during that time).

3. Beginning in August 2023, and continuing into December 2023, I was aware that Florida State University ("FSU") appeared to be either considering a withdrawal from the ACC, a challenge to the Grant of Rights agreements, or both.

4. In conferring with the ACC's Management, a decision was made that the Conference would not bring any litigation against FSU until and only if breach of an agreement with the Conference was believed to be imminent. Discussions with the ACC's Management also occurred on whether the Conference should bring an

action for declaratory relief, or make affirmative claims for relief, such as for damages or for injunctive relief, if breach by FSU was imminent.

5. On December 21, 2023, I was notified that the Board of Trustees of FSU had scheduled an emergency meeting on 24 hours' notice for December 22, 2023.

6. After conferring with ACC Management and counsel, I authorized the filing of a lawsuit that sought only declaratory relief concerning the validity of the Grant of Rights agreements.

7. It was my opinion, and the opinion of ACC Management, that authorization by the Board was not required for this lawsuit because it did not constitute the "initiation of material litigation." The lawsuit sought only to defend and preserve the agreements under which the Conference and FSU had operated and did not seek to change any existing agreements or alter the relationship between the Conference and FSU. In addition, under the ESPN Agreements unanimously approved by the Conference in 2016, the Conference was obligated to take all commercially reasonable actions necessary to protect the media rights that were provided to ESPN under those agreements. This contractual obligation and preexisting authorization, in combination with the limited nature of the lawsuit to be filed, led me to conclude along with ACC Management that the lawsuit did not require the approval of an absolute two-thirds of the voting members of the Conference.

8. During the course of December 21, while the lawsuit was being prepared and at my request, ACC Management consulted with President Vincent Price of Duke University, the former Chair of the Board, Chancellor Kent Syverud of Syracuse University, President Susan Wente of Wake Forest University (the present Vice-Chair of the Board), President Timothy Sands of Virginia Polytechnic Institute and State University, and Fr. William P. Leahy, of Boston College. I was informed that these Members agreed with this interpretation of the Conference Bylaws and the decision to proceed forward with the lawsuit without a full meeting of the Board of Directors.

9. On December 21, 2023, as the President of the Board of Directors of the ACC (and in conjunction with ACC Management), I was of the opinion and still hold the opinion that the lawsuit that was authorized to be filed on December 21 did not constitute the initiation of material litigation within the meaning of the ACC's bylaws and thus did not require a vote of the Board of Directors.

10. On January 12, 2024, I presided over a meeting of the Board of Directors. During that meeting the voting Members of the Board that were present

voted unanimously to approve the filing of the Amended Complaint, inclusive of the original claims for relief filed on December 21, 2023. This unanimous vote was more than the two-thirds required for the initiation of material litigation under the bylaws.

11. A vote of the Members was conducted for the filing of the Amended Complaint because the Amended Complaint had several claims for affirmative relief, including claims for substantial damages and injunctive relief relating to various breaches by FSU. By seeking affirmative relief in the form of substantial damages and injunctive relief against a Member, the Amended Complaint constituted the initiation of material litigation which required a vote of the Membership.

This 18th day of March 2024.

James E. Ryan
(Signature)

Name (Printed): James E. Ryan
Title: President, University of Virginia

COMMONWEALTH OF VIRGINIA:

COUNTY OF Albemarle

Acknowledged before me this 18th day of March, 2024, by James E. Ryan, President, University of Virginia.

Maria Jones
Notary Public
Commonwealth of Virginia
Commission Expires December 31, 20[illegible]
Commission ID# 7858013

Maria Jones

Notary: Maria Jones

Registration No.: 7858013

My Commission Expires: 12/31/24

EXHIBIT F

STATE OF NORTH CAROLINA
COUNTY OF MECKLENBURG

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
2023CVS40918

Atlantic Coast Conference,

Plaintiff,

v.

Board of Trustees of Florida State University,

Defendant.

(Pages 1 to 148)

Friday,
March 22, 2024

Transcript of Proceedings

Courtroom 6370 - 9:30 a.m.

Business Court Rule 9.3 Case Management Conference

(i) Plaintiff Atlantic Coast Conference's Amended Motion to Seal, (ECF No. 9);

(ii) Defendant Board of Trustees of Florida State University's Motion to Dismiss or, in the Alternative, Stay the Action, (ECF No. 19); and

(iii) Plaintiff Atlantic Coast Conference's Motion to Seal Summary Exhibit ECF No. 24.2, (ECF No. 25).

The Honorable Lewis A. Bledsoe, III, Judge Presiding

Joyce K. Huseby, CRR-RMR
Official Court Reporter
832 East Fourth Street, Suite 6013
Charlotte, North Carolina 28202
joyce.k.huseby@nccourts.org

A P P E A R A N C E S:

For the Plaintiff:

JAMES P. COONEY, III, ESQ.
SARAH MOTLEY STONE, ESQ.
PATRICK GRAYSON SPAUGH, ESQ.
Womble Bond Dickinson LLP
301 South College Street, Suite 3500
Charlotte, North Carolina 28202

CHARLES ALAN LAWSON, ESQ.
Lawson Huck Gonzalez, PLLC
215 South Monroe Street, Suite 320
Tallahassee, Florida 32301

For the Defendant:

C. BAILEY KING, JR., ESQ.
CHRISTOPHER C. LAM, ESQ.
HANNA EICKMEIER, ESQ.
BRIAN M. ROWLSON, ESQ.
Bradley Arant Boult Cummings LLP
Truist Center
214 North Tryon Street, Suite 3700
Charlotte, North Carolina 28202

DAVID C. ASHBURN, ESQ.
PETER RUSH, ESQ.
Greenberg Traurig, PA
101 East College Avenue
Tallahassee, Florida 32301

For ESPN, Inc.:

JAMES PATRICK MCLOUGHLIN, ESQ.
WILLIAM M. BUTLER, ESQ.
Moore & Van Allen PLLC
100 North Tryon Street, Suite 4700
Charlotte, North Carolina 28202

DAVID H. KORN, ESQ.
J. WESLEY EARNHARDT, ESQ.
Cravath, Swaine & Moore LLP
Worldwide Plaza
825 Eighth Avenue
New York, New York 10019-7475

I N D E X

P R O C E E D I N G S

THE COURT: Good morning.

MR. COONEY: Good morning.

MR. KING: Good morning.

09:29:47 THE COURT: All right. We are here today for a hearing in Mecklenburg County Superior Court, Case Number 2023CVS40918, which is captioned the Atlantic Coast Conference versus the Board of Trustees of Florida State University.

09:30:02 We're here on three motions, on the Defendant Board of Trustees of Florida State University's Motion to Dismiss or, in the Alternative, Stay the Action, which is ECF Number 19 on the Business Court Docket; the Plaintiff Atlantic Coast Conference's Amended Motion to Seal, which is 09:30:24 ECF Number 9 on the Business Court Docket; and the Plaintiff Atlantic Coast Conference's Motion to Seal Summary Exhibit, ECF Number 24.2, which is ECF Number 25 on the Business Court Docket. We're also here for a Business Court Rule 9.3 Case Management Conference.

09:30:41 The court personnel joining me today include our bailiffs, Deputy Flores in the back, Deputy Robeson over to my right, your left; my career clerk, Lauren Schantz, here in the witness box; our courtroom clerk from the Mecklenburg County clerk's office, Sade Johnson; and we have our court 09:31:07 reporter, Joyce Huseby.

Before we begin our arguments and so that our record is clear, I would appreciate you all announcing your appearances, plaintiff first, defendant next, and then ESPN.

MR. COONEY: Good morning, your Honor. My name is Jim Cooney. I'm a member of the Mecklenburg County Bar, with Womble Bond Dickinson. I represent the plaintiff, the Atlantic Coast Conference. I'm joined at counsel table by Pearl Houck, who is general counsel for the Atlantic Coast Conference; Alan Lawson of the Bar of Florida, who you've admitted pro hac vice; Mr. Lawson is with the law firm of Lawson Huck Gonzalez in Tallahassee; and Sarah Stone Motley of our firm; Patrick Spaugh of our firm; and Caroline Cooney, who is my paralegal, but also moonlights as my daughter.

THE COURT: All right. Thank you, Mr. Cooney. Mr. King?

MR. KING: Your Honor, Bailey King from the law firm of Bradley here on behalf of Atlantic -- no -- Florida State University Board of Trustees.

MR. COONEY: You can join us; that's fine.

MR. KING: I'm glad I got that one out of the way. With me is my partner, Chris Lam, and Carolyn Egan from the Florida State University General Counsel. Also with us from Greenberg Traurig are David Ashburn and Pete Rush; and then from our firm, Hanna Eickmeier and Brian Rowlson.

THE COURT: All right. Thank you, Mr. King.

MR. MCLOUGHLIN: Good morning, your Honor. James McLoughlin from Moore & Van Allen for ESPN. With me is my partner, Bill Butler, from Moore & Van Allen, and David Korn from Cravath, Swaine & Moore, who will be arguing for ESPN.

09:32:53

THE COURT: Thank you, Mr. McLoughlin.

All right. A few housekeeping details before we begin.

First, we are going to follow the proposed hearing schedule that the parties and the Court worked out and finalized by email on March 14th.

09:33:07

That means we will hear first Florida State's Motion to Dismiss or, in the Alternative, to Stay the Action; and in connection with that motion, the ACC and FSU will each be permitted one hour to present their arguments.

09:33:25

We'll then hear the ACC's Amended Motion to Seal, which is ECF Number 9, the Motion to Seal the Summary Exhibit. The summary exhibit is ECF Number 24.2. And the ACC and FSU will each have 20 minutes on that motion, and ESPN will have 10 minutes on those motions. So the sealing motions are 20 each for ACC and FSU and 10 minutes for ESPN.

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After the sealing motions have been heard, we will then have our Business Court Rule 9.3 Case Management Conference. The parties have estimated about 15 to 30 minutes, and we'll see where that goes.

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The parties will be expected to observe the time limits for each motion reflected on the schedule as outlined. Ms. Schantz will be the official timekeeper for the hearing. She will notify the parties when a party has five minutes of argument time left on a particular motion. She will give notice again two minutes, one minute, and then when the time period is up.

I will plan to take a ten- to fifteen-minute break at a convenient time about halfway through the proceeding. Otherwise, I would like for us to plow ahead and hopefully be finished no later than 1:00 o'clock or 1:15 at the latest.

Based on the parties' representations upon my inquiry that no party expects to present material that has been designated as confidential during today's presentations, as well as the parties' agreement that the courtroom does not need to be closed for any portion of today's proceedings, I do not intend to close the courtroom today.

I have received and approved an application by WSOC-TV to make a video recording of the proceeding today pursuant to Rule 15 of the general rules for practice in the Superior District Courts and also consistent with the 26th Judicial District's local rules governing photography, filming, and audio recording within the Mecklenburg County

Courthouse.

I have not received any other applications to film or otherwise record today's proceedings, so please be advised that taking photographs, filming, or recording of audio by means of camera, cell phone, smartphones, tablets, or any other electronic or mechanical device is prohibited, and violators of this rule are subject to the contempt powers of the Court.

Are there any questions or comments from the parties before we begin the arguments on the first motion on which we're hearing today?

MR. COONEY: One quick question, your Honor. On the time limits, do you want us to tell Ms. Schantz how we want to allocate it, or can we just kind of go and then kind of pick it up?

THE COURT: Well, I mean, the reality is that whatever you leave for rebuttal will be what you've got left for rebuttal, even if you declare at the outset that you're going to reserve X for rebuttal, so I will let you manage that how you wish.

MR. COONEY: Thank you, your Honor.

THE COURT: Each side will be in charge of arranging their own arguments such that Ms. Schantz isn't going to tell you when you've run into your rebuttal time. You need to keep track of that yourself.

Any other questions or comments before we start?

All right. Let me say at the outset that I have spent several days now reading and studying your briefs, your supporting material in which you're citing cases; and as I anticipated from the outstanding lawyers that are representing the parties in this case -- I'm not just saying that, the folks in the gallery know these are very, very fine lawyers representing all three sides -- as I expected, they have done a very good job, excellent job in setting forth their respective positions.

I've also reserved -- not reserved. I've reviewed the demonstratives that both sides have submitted, or at least Florida State and the ACC have submitted.

But despite all of that education that I've received from the parties, I do have a number of questions, and those who have appeared before me know that we often engage in a lot of back-and-forth discussion, and I anticipate we may do some of that today.

So I encourage you to get to the heart of the matter in your arguments this morning, make effective use of your available time. In particular it will be helpful for me and may serve to limit my questions, which would be a good thing since these are time-limited arguments, if you not only advance your affirmative arguments when you present your side but also directly and squarely engage with the

other side's arguments that they have made in opposition to your position.

All right. With that, I look forward to your arguments and will turn to Florida State's Motion to Dismiss or, in the Alternative, to Stay the Action.

09:38:25

Mr. King, it looks like you're perched to argue for Florida State.

MR. KING: Yes, your Honor. Bailey King here on behalf of the Florida State University Board of Trustees.

09:38:36

THE COURT: Okay, Mr. King, I will hear from you.

MR. KING: With your comments, taking those in mind, your Honor, I'd like to really start by cutting to the chase and acknowledging exactly what this motion is and the reason we are here today on it. I don't think it is lost on

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anyone that this is a forum fight.

As you know, the FSU Board filed a competing lawsuit in Florida. That lawsuit was filed approximately 18 hours after the ACC initiated this lawsuit by filing its original Complaint for Declaratory Judgment.

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Now, both sides, certainly the FSU Board, and also the ACC, they want to litigate the dispute on their home field, and I would like to start by acknowledging there's nothing wrong with that.

True plaintiffs, it's a longstanding principle,

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get to choose the forum. But in order to do so, your Honor,

you have to play by the rules of the game, and those rules include, in this case, two sources, really, where we look at the rule book. First is the ACC's own rules that govern how their members are to operate vis-à-vis each other, that's
09:39:40 the ACC constitution and the bylaws, and then, as your Honor is well familiar, the rules governing civil litigation and how that operates, and that includes the United States Constitution and the case law interpreting it.

And in that source of rules, I think I would point
09:39:58 out just from the outset that the first-filed rule is a rule, but it's not the only rule. The rules also include standing, sovereign immunity, ripeness, and the anticipatory filing doctrine. And in its attempt to try to secure a home-field advantage, the ACC didn't follow those rules.

09:40:16 Instead, the ACC raced to the courthouse to file a preemptive and premature lawsuit against the FSU Board, one of its members, and it did so before it had standing to sue under its own constitution by not taking a vote, and it did so before the dispute was ripe under Article 3 of the US
09:40:35 Constitution, and, finally, it did so in a court that lacks personal jurisdiction over Florida State University, a sovereign agency in the state of Florida.

So with that said, apologies for the pun, we believe the ACC jumped offsides. That is a penalty. It
09:40:52 certainly does not entitle the ACC to its home field. And

we think according to the well-established rules it warrants dismissal or, at a minimum, a stay of this action.

Because your Honor said you read the briefs, I don't feel like -- again, this is a forum fight -- that we need to delve too deeply into the underlying facts of this dispute, but I do think it's helpful to put some context around those facts, especially given some of the arguments that the ACC has made.

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And so in doing so, I'm going to focus on the original Complaint, ECF Number 3. This is the filing that the ACC raced to the courthouse to file, admittedly, in order to secure this forum. And it did so on December 21st, only after it heard that the Florida State University Board was going to be meeting the next day, and it did so before taking a vote of its members, and it did that in order to race to the courthouse and be first to file.

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As you know, in the original Complaint and in the Amended Complaint, the ACC is seeking a declaration regarding the enforceability of two documents, the 2013 Grant of Rights and the 2016 Grant of Rights.

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And I think we need to talk about the importance of these agreements, especially to the ACC. These are the agreements under which the ACC contends that Florida State and the other members of the ACC gave away their exclusive media rights to the ACC through 2036, a period of 20 years,

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and they did that so that the ACC, according to allegations in the Complaint, could negotiate a long-term deal on their behalf with ESPN. These are referred to in the briefing as the ESPN agreements, and ESPN has argued that they are among its most vital third-party contracts. They make up the vast majority of their revenue, under which the ACC received hundreds of millions of dollars.

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I think you also should look at the timing of -- the broader timing of when this lawsuit was filed. The ACC filed this lawsuit and is seeking this declaration during a time period in which it acknowledges that athletic conferences like the ACC and others are experiencing, quote, significant instability and realignment. The ACC alleges that in this environment the Grant of Rights were, quote, necessary to secure the ESPN agreements and to secure the ACC's ongoing stability and certainty.

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And then they filed it on December 21st, as I said, racing to the courthouse, because -- expressly because Florida State had threatened to leave the conference during this period of realignment and instability.

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And finally, the stated goal of the ACC in this lawsuit is to prevent Florida State from leaving. Paragraph 127 of the complaint declaration -- Complaint for Declaratory Judgment states that they are seeking a declaration that if Florida State leaves, the ACC keeps

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FSU's media rights for the next twelve years.

So I think, with that backdrop, it is fair to say that this dispute is going to impact the future of both Florida State and the ACC. I think it's fair to say that it
09:44:19 involves hundreds of millions of dollars, and I think it is safe to say that from the outset, when the ACC filed this lawsuit, it was material litigation.

For Florida State, at least, it's been widely reported that this is existential. According to the ACC,
09:44:35 suing one of its members -- it's a member institution, and suing one of those members in an attempt to hold that member hostage is immaterial.

We will talk about more of that as we get into the arguments, but I would just say now that I think the ACC's
09:44:51 watching -- we learned from the declaration of President Ryan the other day -- watching Florida State for a period of months and then racing to the courthouse and filing this lawsuit immediately upon receiving notice that the FSU Board was going to meet suggests otherwise.

09:45:08 THE COURT: It sounds like you're arguing the Motion to Stay and the first-filed rule out of the blocks as opposed to your Motion to Dismiss. Do we want to talk about that argument now?

MR. KING: Your Honor, I was going to address them
09:45:25 all largely together because I do think that they largely

overlap, at least what I want to focus on today.

What I want to focus on today -- we've made several arguments in our Motion to Dismiss -- but are primarily the arguments about whether this Court is the 09:45:38 proper forum to hear this dispute, and I think those -- the way I would say it is they're jurisdictional, they're threshold issues, and we believe we win them, we feel strongly we win them, and that's what I would begin to argue. But if we lose them, if they're close calls and your 09:45:55 Honor goes the other way, certainly they all would factor in favor of a stay, so I think you can address them together.

I will answer, obviously, any questions your Honor has, but there is three I plan to focus on. That's the standing issue, which, as your Honor knows, is the matter of 09:46:10 subject-matter jurisdiction, sovereign immunity, and then ripeness.

And again, like I said, I'll try to -- I am going to plan to address both the Motion to Dismiss and the stay at the same time because I think they're really -- they're 09:46:26 really -- they overlap, and I think the standing, which is where I would like to start, is the one where that's the most obvious.

THE COURT: All right.

MR. KING: So the first things I would say about, 09:46:40 and to clarify a few things in the briefing, I think, is

that the place we are at now on this standing issue, again, the ACC did not conduct a vote to get the approval of its members before filing the lawsuit against one of its comembers, Florida State. We know that. We did not know
09:46:55 that at the time we filed our initial Motion to Dismiss. It was a pleading issue.

But because this is a subject-matter jurisdiction issue, the Court can and should look outside of the pleadings. And we now have two affidavits from the ACC in
09:47:11 which they seek to establish the authority to sue under their constitutional documents, and so -- but that was based on a vote that was taken on January 12th, three weeks after this lawsuit was filed, approximately three weeks after Florida State filed its lawsuit.

09:47:28 And so if standing exists based on that vote, it does not exist until January 12th; they are not the first to file. And so this is why this actually does relate to the Motion to Stay.

THE COURT: Let me ask you about that. You've
09:47:41 indicated in a brief just what you've said, that is, that there was not standing at the initiation of the lawsuit but that if there was standing by virtue of anything the ACC did, it was as of January 17 when they filed their First Amended Complaint.

09:48:00 North Carolina law does say that if there is a

lack of subject-matter jurisdiction, if there's no standing to bring a lawsuit, then the lawsuit that is filed is a legal nullity.

How is it, then, that it could be revived -- recognizing the ACC has got an argument about retroactive application, but I'm asking about your position that, potentially, January 17, 2024 is the date when standing attached -- does it work that way, or would they have to refile a lawsuit?

09:48:36 MR. KING: No, I don't think it works that way.

THE COURT: Why do y'all say that?

MR. KING: Say again.

THE COURT: Why do y'all say that?

MR. KING: Well, I think under the Cudar case, the 09:48:45 original Complaint is a nullity. The correct thing to do was dismiss it, and then the ACC, if it wanted to, it could try to refile based on its subsequent, what it believes is authority that it now has.

THE COURT: I mean, under your standing theory, 09:48:57 they would simply need to have a vote and then refile if I were to dismiss based on lack of standing.

MR. KING: Yes. So I think the -- if -- if there were questions as to whether or not that standing -- whether or not they had standing as of the original Complaint, if 09:49:16 that had been raised, I think you can't make an argument

that standing attaches any time before that vote.

And so -- and maybe this is why, there's no case law that says the court subject-matter jurisdiction -- that a Court can obtain subject-matter jurisdiction retroactively. So we do think --

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THE COURT: Mr. Cooney cites my colleague Judge Robinson's case, and I believe it's pronounced Gao, G-A-O, as being on all fours with this situation. What is your response?

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MR. KING: We absolutely disagree. Your Honor, Gao does not so hold that subject-matter jurisdiction can be conferred retroactively.

Gao was a case in which a shareholder in a corporation sued the corporation. There was no question

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that the Court had subject-matter jurisdiction over that dispute. The corporation then asserted counterclaims back and before -- it asserted those counterclaims before taking a vote. It then later took the vote and filed a Second Amended Counterclaim, and the -- Mr. Gao, if that's

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pronounced correctly, moved to dismiss the First Amended Complaint on the grounds that it lacked -- that it didn't have standing at the time that he filed the First Amended Complaint.

The Court found that that was immaterial because

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it, in fact, was a nullity, it was no longer that operative

pleading, it didn't have a matter of whether the Court had jurisdiction to hear the dispute because Mr. Gao actually brought the dispute.

I think the difference here that is made clear is that there is a competing action here. You know, if -- I'm trying to think if you can analogize -- if you think of the same situation, if Florida State University would have brought this lawsuit in North Carolina, the ACC would have counterclaimed before it took a vote. Maybe that doesn't -- you know, it didn't have any authority to do that, but then it later gets the authority and files new counterclaims. Well, we're still in the same courtroom, and it is, as the Court found, immaterial.

Mr. Cooney's going to point you to Paragraph 34 of that case which says that following in compliance with the bylaws is immaterial. Clearly that was about the facts and situations of that case. Following compliance with your bylaws is not immaterial.

But if you look down to 35, the Court goes on to say, "The Court concludes that despite the failure of the Board to comply with Sinova US's bylaws prior to filing its counterclaims, Gao's first argument against standing fails as to Second Amended Counterclaim.

So if we were arguing that the Second Amended Counterclaim didn't have standing, maybe that would fail if

the ratification was appropriate, but it does not relate back to a prior pleading.

Does that answer your question, your Honor?

THE COURT: Okay.

09:52:15 MR. KING: So we think, and that's the first big point, that we don't believe subject-matter jurisdiction relates back, and this goes to kind of the way our argument works, it should be dismissed. At a minimum this Court should not proceed based on an Amended Counterclaim that has 09:52:32 not been, you know -- that -- that was not -- that was not the initiation of litigation which actually falls into the second argument about whether or not the ACC ever complied with its constitutional obligation to take a vote for the initiation of material litigation.

09:52:58 And I think the declaration of James Ryan, President Ryan, from Virginia, ECF 46.3 makes clear that that is not what the January 12th post-filing meeting, where they claim it was ratified -- that's not actually what was voted on.

09:53:14 He states in Paragraph -- sorry, I've lost it, but -- I can't get the numbered paragraph, but basically the vote was that we approve the filing of the Amended Complaint inclusive of the claims that were in the original Complaint. But approving an Amended Complaint is not the same thing as 09:53:36 approving the initiation of litigation. The laws and the

constitution are very specific; you have to have a vote to approve initiation.

And so the attempted ratification did not do that. All it approved was the next steps in already-initiated litigation.

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And it's Paragraph 10, I apologize, your Honor, that says that it's approving the Amended Complaint, which then gets you to, I think, what the ACC's -- sort of what their next argument is, the next logical one they have to make, is that they didn't have to take a vote. And I think --

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THE COURT: Before you get there, I thought your primary argument was based on Town of Midland, which has a statement which Mr. Cooney says shouldn't control me but that that statement that -- I'm lacking on the phrase, but it's subsequent events cannot confer standing retroactively --

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MR. KING: Yes.

THE COURT: -- is that what that case says, is Mr. Cooney right, that I shouldn't consider as binding or at least directional for me?

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MR. KING: Mr. Cooney is correct that statement was not -- well, it was not essential to the holding of that case because it failed standing on other grounds. I would say it was direction from the North Carolina Supreme Court

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as to how this doctrine would apply in this exact situation. Less than six months ago the Court went out of its way to say it, and it really is just an application of the Cudar case, the original Complaint is a nullity, and it cites to other cases. I think that that's just a -- I mean, I think that your Honor hit it right on the head, standing is measured at the time pleadings are filed and subsequent events cannot confer standing retroactively. That -- I think that's a statement of the law. It was not essential to a holding in that case.

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THE COURT: All right.

MR. KING: So as to whether or not the -- a vote was even required -- and I think first, let's just -- it's a remarkable, I think, proposition that a member association can sue one of its members without getting the approval of its members.

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But assuming that that is the position the ACC is taking, they have two bases for that. First, according to the affidavit of President Ryan, the ESPN agreements allow for -- or, as he said, imposed a contractual obligation and constituted preexisting authorization of the members to file a lawsuit against Florida State to stop them from challenging the Grant of Rights.

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Your Honor, I'm happy to answer your questions, but that is not what that provision says. I know it's not

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in the -- Mr. Cooney represents it's -- it no longer remains confidential. I would say what that provision says is you've got to take commercially reasonable actions. Those actions do not include any obligation that you spend money on counsels, and so I think that's an overstatement of what that provision says. And it certainly was not authorization of the members that were there go, you know, thereby means you didn't need to take their vote that was specifically required by the authorization.

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THE COURT: All right. So your contention is that the obligation to engage in commercially reasonable efforts as a defined term under the relevant agreements does not require the ACC to initiate litigation to protect ESPN's rights under those agreements and therefore there would need to be another step and that other step is provided by the constitution which provides, at 6.12 or -- maybe I've got the numbers conflated -- but that there is the requirement that there be a two-thirds vote in favor of material litigation?

MR. KING: That's exactly correct. I would -- correct. I misspoke. The term is "commercially reasonable efforts," as defined, and its actions in the affidavit. But, yes.

So then that leaves the last leg; they can say, the ACC can say it didn't need -- or that it has standing as

of December 21st, when it filed a lawsuit, and that that is that this case is not material because if it was they had to get a two-thirds approval vote.

I would note they took the vote before -- the ACC took that vote before it sued Maryland back in, I believe, 2012, in that case. It took a vote before suing Clemson earlier this week or last week. It did not do that with Florida State University.

THE COURT: It was the day before yesterday.

MR. KING: Day before yesterday, yes.

You know, I would say material, yet in this position -- in this case they take the position that this case is not material. Material is, first, not an ambiguous term. It has a clear and ordinary meaning. The Oxford dictionary defines it as significant, influential, or relevant, especially to the extent of a judgment, such as whether they filed a lawsuit.

THE COURT: Well, as I understand the ACC's argument on material, the argument there is, Look, all our lawsuit did was to seek to maintain the status quo. The parties have been operating under these Grant of Rights agreements, the first one from 2013, the amended one from 2016, nobody has made any challenge to them, everybody has received lots of money under them, there hasn't been any dispute about them, and our lawsuit, as originally filed,

simply sought to have a Court recognize what everybody has always understood these agreements to mean, and then they posit that we got approval from the board, the two-thirds majority of the board, to initiate the First Amended
10:00:12 Complaint because that Complaint contained allegations against Florida State, in particular along the damages claims, that is, claims for relief allowing for damages. And I imagine what Mr. Cooney will tell me is that because the lawsuit that was filed the other day against Clemson
10:00:29 also includes damages claims against Clemson, that that's why the ACC elected to get approval from the Board to file that lawsuit.

What do you say about the status quo argument?

MR. KING: So status quo does not mean material.
10:00:43 I think you have to look at the context. Just think of the context of a preliminary junction. The purpose of a preliminary injunction is to preserve the status quo, but, your Honor, Courts don't impose preliminary injunctions unless irreparable harm will be caused to them. Irreparable
10:01:03 harm, in our opinion, means it must be significant, it must be influential, it must be material; otherwise, this Court would not issue a preliminary injunction.

So I just think the status quo argument is just -- it's just -- there's no correlation between maintaining the
10:01:16 status quo and whether something is material. Certainly,

maintaining the status quo is material for the ACC, and upsetting the status quo is material for Florida State.

THE COURT: All right.

MR. KING: The other thing I will say, on the same -- in the same argument, the ACC points to the definition of material for material media rights agreements, and I think following the textualist approach that the ACC uses on a sovereign immunity argument, you would say, Well, the ACC knew how to define material in that context, and it actually gave the commissioner and the president of the board's discretion to determine whether an agreement was material -- was a material media right. The provision of litigation certainly didn't give the president or the commissioner that discretion to make that determination on its own.

It's a clear contractual term that I think it's a question of law for this Court to interpret. They have said it's a question of fact, and all I would say about that is to the extent the Court believes it is a question of fact, it's a question of fact it will go to this Court's subject-matter jurisdiction, and we believe we would need the right to take jurisdictional discovery on that so that we can find out about the conversations that president Ryan says ACC management had with other members about whether this was actually material litigation and that the Court

should have that information before deciding whether it would have subject-matter jurisdiction.

THE COURT: Well, let me ask you this: As I understand it, the ACC makes an argument along these lines, that is, that, Look, we're an incorporated association under Chapter 59B of the North Carolina General Statutes; as an unincorporated association, we are a voluntary association.

Under North Carolina law and the law of a lot of places, Courts are not to interfere with the internal affairs, internal governance, of a voluntary association. That includes, according to the ACC, interpretation of the bylaws. And here we have a bylaw provision which the ACC has determined, in this context, whether something is material litigation or not, they made the determination that it's not material litigation and therefore they don't need to bring -- they don't need to have two-thirds approval of the Board to bring it and that -- they argue that their judgment in that respect is only upset unless the Court were to conclude that their judgment in that regard was unreasonable or that it perpetuated -- it was derived pursuant to fraud or collusion or duress or other equitable concerns of that nature.

As a result, as I understand the argument, it's that, Judge, we put forward evidence from our decision-maker who says this was not material litigation; that's a

reasonable position given our argument about status quo; therefore, your opportunity to review that decision is limited, and you ought not upset our voluntary association's internal governance determination.

10:05:00 Taking that argument on its own terms, I mean, is that right? I mean, does that argument naturally flow the way they posit it?

MR. KING: No, your Honor, it does not. The ACC has a constitution. That constitution is a contract between

10:05:13 the members, and if it is unambiguous it is for the Court to determine the -- using the plain language to determine the meaning of the constitution.

The cases cited by the ACC include McAdoo, Board of Gaston County Realtors. Those relate to due process type

10:05:32 questions, whether the association has applied their procedures in a way that is reasonable, and the Court should not second-guess the internal affairs and operations.

THE COURT: Is that what those cases say, or do those cases say that the Court is to determine whether or

10:05:47 not the internal procedures have been followed, and if the internal procedures have been followed, then the Court is not to provide exacting scrutiny or is otherwise to defer to the decision that the entity -- that the voluntary association made pursuant to those -- pursuant to those

10:06:12 procedures?

MR. KING: Yeah, I think maybe we're saying the same thing. I mean, that's right; you've got to follow the internal procedures and the Court should not second-guess those.

10:06:21 Here, though, we're talking about the contract, the ACC constitution, so we think it's a lot more similar to the Atkinson case from this Court, where the Court defined what -- I think that was in the bylaw -- but defined what the term "proceeding" -- I think in the context of legal

10:06:34 proceeding -- meant, and it said it was for this Court to determine that because it is a plain and unambiguous term used in a contract and that's a question of law, so that's what we believe, in looking at the ACC contract, what the ACC contract means what they should do. It's not about the

10:06:51 internal affairs and this Court second-guessing sort of their procedures. It's whether or not --

THE COURT: So the deference that the ACC would receive as a voluntary association would be in its decision to initiate the litigation, which was the end result of

10:07:14 their adherence to their internal procedures? I could evaluate whether they followed their internal procedures. I would have to give deference to the decision that they made --

MR. KING: Yes.

10:07:25 THE COURT: -- ultimately, which is to create a

lawsuit? Is that right?

MR. KING: I think if there were procedures for the initiation of a lawsuit that were followed, a vote, to do that, and there was some good faith -- not good faith -- but they made an interpretation of how this vote is required, what they should do, then I don't think that a Court should second-guess those sorts of procedural decisions.

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But in the first instance of whether to take a vote, that is a requirement of the constitution, and they can't say, We don't think it was a requirement here. I think it's contract that all the members certainly understood that in order to initiate material litigation there would need to be a two-thirds vote. There was not a two-thirds vote.

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THE COURT: All right.

MR. KING: With that, I would like to move on to the sovereign immunity argument.

THE COURT: Okay.

MR. KING: And I think these will be relatively quicker. First, the waiver of sovereign immunity requires a clear and unequivocal declaration by the state legislature, in this case Florida.

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The ACC has offered two sort of acts that it contends could be these declarations. The first is the

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Florida State 1001.72 that gives the Florida State Board the authority to contract and act on behalf of the Florida State University, and it says it can sue and be sued in all courts of law or equity.

10:09:03 The ACC points to it and says Florida follows the textualist approach. All courts of law or equity doesn't exclude courts in other states, and so that's what -- this includes the courts in North Carolina law.

The textualist approach, when you're dealing with 10:09:21 sovereign immunity, the Eleventh Amendment right, is not what the law requires. The law requires the most restrictive interpretation possible. The Maynard decision stands for that proposition from the Eleventh Circuit.

THE COURT: The Eleventh Amendment from sovereign 10:09:34 immunity is a different animal from state sovereign immunity, right? The Eleventh Amendment from sovereign immunity is about whether or not there's sovereign immunity from suit in federal court, and you have judgment law in North Carolina that deals with sovereign immunity that has 10:09:51 to do with the sovereign of the state courts of North Carolina?

MR. KING: Yes. But I think that the rationale from the Maynard Court would apply in this context as well, where it says the State does not consent to suit in Federal 10:10:04 Court, it's not a clear and unequivocal declaration merely

by consenting to service in courts of its own creation, and, again, it is then used in the context of Federal Court, but not does it consent to suit in Federal Court by stating its intention to sue and be sued. And I think that logic applies here. This Court should follow, from Florida, in deciding whether Florida has waived its sovereign immunity, should follow the most restrictive interpretation of that statute.

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THE COURT: Let me ask you: Is it even -- is the state statute from Florida even relevant in light of the Farmer versus Troy University's decision from the North Carolina Supreme Court? Because in that case the Supreme Court of North Carolina decided that where there was a sue-and-be-sued clause, and we have that here under -- I will let you talk about that, but at least Mr. Cooney and the ACC argues that we have that here in the unincorporated association statute under Chapter 59B, and so long as you have a sue-and-be-sued provision in the statute, and you have commercial rather than -- or as opposed to governmental activity, you have business activity in the state, then that's enough to constitute an express waiver of sovereign immunity. And they decided that, that is, the Supreme Court of North Carolina decided that despite the fact that the constitution of Alabama provided that the State of Alabama, or the state agency, would never be a defendant in any court

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of law or equity, which is a stronger statement of sovereignty, or sovereign immunity, than what we have from the Florida statute, which has this definitional issue that you all are fighting about, whether courts of law or equity mean only in Florida, as Florida State says, or means anywhere in the country, as the ACC says.

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But our Supreme Court said as long as you've got sue and be sued, as long as you've got business activity, it doesn't -- apparently, it doesn't matter what the state -- what Alabama or what Florida may say about their exposure to sue in foreign jurisdictions; North Carolina says you've expressly consented to suit here. Respond to that.

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MR. KING: I think the first thing I would say about it is if Florida State University had registered as a nonprofit organization in the state of North Carolina as a distinct legal North Carolina that was agreeing it could sue and be sued here, then Farmer versus Troy University would be directly on point, you're right, your Honor.

10:12:42

THE COURT: Does Farmer say that -- Farmer brought two overt acts that it talked about. One was to register with the North Carolina Secretary of State as a nonprofit corporation. The other was to have a Certificate of Authority, or to obtain a Certificate of Authority.

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But did the Supreme Court talk about those as these are the requirements that a sovereign must take in

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order to have waived sovereign immunity, or was it simply that this is evidence of consent? Because we're talking about a case that follows the Hyatt case, which had determined that, as a constitutional matter, all states have
10:13:38 sovereign immunity except when they consent, and the United States Supreme Court declared what constituted consent, and then the North Carolina Supreme Court in Farmer decided, Well, we're going to talk about what it means to consent, and in this case those were the facts involving Troy
10:13:59 University from Alabama.

Mr. Cooney's argument, the ACC's argument, is, Well, if those kinds of actions were sufficient to connote consent in the Farmer case, certainly Florida State's activities, business activities in North Carolina pursuant
10:14:20 to Chapter 59B, which contains a provision that allows for suit to be brought by the association and suit be brought by the member where they could earn millions of dollars, where they've competed in countless athletic contests, where they've attended innumerable meetings and engaged in the
10:14:40 leadership of the conference in North Carolina, all of that would certainly satisfy a Court examination of whether there was consent to be sued in North Carolina, again, under Farmer.

MR. KING: I don't believe it does because if you
10:14:56 look at the difference between the Nonprofit Corporation Act

and the Uniform Unincorporated Nonprofit Association Act, the differences in what those two entities are, first, Florida State did not register as an entity in North Carolina. It did not get a certificate of good standing or
10:15:11 whatever the document was. All it did was join as a member -- it joined as a member an association.

And as a member what the statute that the ACC relies on that they claim to be a sue-or-be-sued statute, it makes clear that the ACC is a legally distinct entity from
10:15:31 its members, and so in a nonprofit corporation -- for a nonprofit corporation, that's the exact opposite. The corporation is the entity that is governed by that Act. It provides -- it actually provides the members of associations with some protections that say you're not liable for the
10:15:50 conference or for the organization.

And so what that clause is saying is the ACC is a legally distinct entity with the ability to sue and be sued. It doesn't use the words "sue and be sued." It says a member can sue on behalf of the association, and it says the
10:16:06 association can sue a member. It does not say where. And certainly it would come as a surprise to Florida and possibly many of the other members of the ACC if that was found to be a clear waiver of sovereign -- clear consent to suits in the courts of North Carolina.

10:16:23 THE COURT: Well, of course, this is all recent

law. The Hyatt case was, I believe, 2019, and then the Farmer case was from, I believe it was, November or December of 2022. And there is a rescrambling of the eggs here a bit because there had been a rule or comity that had given
10:16:51 discretion to a state as to whether they would afford sovereign immunity to a sister state. And that was the argument the University of Maryland had made back in 2012, and the North Carolina Court elected not to afford a comity so that the suit -- so that the sovereign immunity was not
10:17:12 extended to Maryland and the case proceeded in North Carolina. That whole regime is gone --

MR. KING: Right.

THE COURT: -- now based on Hyatt.

MR. KING: Yes. And I think that if you look at
10:17:20 that, you have to find consent from the state now, and I think the distinctions between the Nonprofit Corporation Act and the Uniform Unincorporated Nonprofit Association Act show that this is not the same thing. There is not the same level of subjecting yourself to the courts in North
10:17:38 Carolina. You are not registering. You are not -- I think even Troy had an office there, Troy University had an office and were recruiting folks there. They were subject to jurisdiction there. That is not the case if you are a member of an association.

10:17:51 THE COURT: All right.

MR. KING: The last point on sovereign immunity, I will touch on quickly. The FSU Board -- the ACC claims that the FSU Board waived any personal jurisdiction defenses, including sovereign immunity, by opposing the ACC's Motion to Seal. They claim that that opposition was a general appearance. But our -- we believe our jurisdictional defenses were preserved in our stipulation of service where we preserved all jurisdictional -- where FSU preserved all jurisdictional defenses it may have under Ryles. This put the ACC on notice. That should be sufficient.

In fact, here the ACC spent several paragraphs explaining why they did not believe the doctrine of sovereign immunity applied, so they were certainly on notice and it was preserved. None of the cases cited by ACC included a preexisting preservation.

I would also say that sovereign immunity is a little bit different than the typical minimum context type waiver, and that is because you have to have a clear and unequivocal declaration, and I would point the Court to the Mullis versus Sechrest decision, 126 N.C. App. 91, where the defendant was allowed to amend an answer, amend an answer to raise an affirmative defense of sovereign immunity even. And that case was reversed on other grounds, but that principle was then approved by the Supreme Court in the News and Observer versus McCrory case, 251 N.C. 211, where this

Court actually found that sovereign immunity in that case was waived, but in that case it wasn't raised until an argument, oral argument, on judgment on the pleadings.

And so you have -- I think it is -- there is a more exacting standard than there is for minimum contacts, and that's because it requires a clear and unequivocal declaration.

The last point is that makes sense. I said that it could be asserted as an affirmative defense. The Courts in North Carolina also look at sovereign immunity under a 12(b)(6) standard. The Green versus Kearney case did that. And so we don't believe it was -- it was waived.

THE COURT: All right.

MR. KING: The last argument I want to touch on is ripeness, whether there was an actual and justiciable controversy. You know, the North Carolina Declaratory Judgment Act does say that you can ask for a declaration before a breach. We do not disagree with that.

There is also the doctrine, though, of actual -- there has to be an actual and justiciable controversy in order for the dispute to be ripe. The cases cited by the ACC, Board of Gaston County Realtors, McAdoo, and others recognize distinction and in many instances dismissed cases because they were premature.

This is, we will acknowledge, an issue of sort of

line drawing. It can be difficult to know when something springs into an actual and justiciable controversy pre breach, but I think everyone knows and would recognize that the ACC could have gone to the Court in 2013 and said, Please just give us your blessing of this Grant of Rights and let us know it's enforceable when nobody has challenged it.

I think the Gaston County Board of Realtors said it best when they said you can't get a judicial decision to put on ice in case a dispute ever arises.

So here there was clearly -- you know, there was, obviously, negotiations, but the case law has said -- or statements -- the case law has said that litigation has to be unavoidable and there should be no impediments, and we believe a required Board of the -- vote of the Florida State University Board, before it could initiate litigation, is just such an impediment. You can't preordain what the vote of a public body will be.

THE COURT: The ACC argues that, or alleges that, Florida State's president had individual meetings with each of the Board of Trustee members to secure -- their language -- to secure their affirmative vote for the filing of the lawsuit and that promptly upon retaining that, all those approvals, then, you know, had the vote on the 22nd.

They also point to a filed or a -- I guess an

issued copy of the Complaint that was put out by, I think it was, Florida State press office, I'm not exactly sure who put it out, but there was a copy of the Complaint that was distributed that was issued in the morning before the
10:22:40 Florida State meeting. And they also point to comments the president made, comments that the members of the board of trustees made, comments that were made in a board meeting in August, comments that were made in a board meeting in February, all of which, the ACC argues, showed that Florida
10:23:01 State intended to bring litigation, that they were not going to sit idly by, and when they learned, because of the notice of this meeting, it was imminent, that the actual case in controversy was crystalized.

MR. KING: A couple of things. First, the leaked
10:23:17 copy of the Complaint was the next morning after the ACC had filed suit, and I don't believe it was the FSU press office. I don't think we know who it was.

THE COURT: And I'm sorry, I don't mean to --

MR. KING: It was just a leaked copy. I don't
10:23:30 think it matches up perfectly with the Complaint that was actually filed there.

But the bigger point is that happened the next morning.

The other thing is if the FSU president had those
10:23:41 meetings, I believe under the public records law there would

have to be minutes of those individual meetings and -- to secure a vote.

THE COURT: They said they had the meetings to avoid the public records --

10:23:50 MR. KING: But the bigger point is the board of directors, the whole point of the board of directors is they exercise independent judgment, and so we are really just saying you should not preordain what that vote is going to be.

10:24:05 We acknowledge it's a close call on this one, when the litigation springs into existence, but I would say preordaining a vote is on the other side of that.

THE COURT: Was it a unanimous vote when it actually happened? Is that in the record?

10:24:19 MR. KING: I don't know if it's in the record, and I don't know the answer to that question.

THE COURT: All right.

MR. KING: The ACC -- Florida State cannot move forward, though, until they have that vote, and so that's --

10:24:33 Florida State can't move forward until it has the vote to authorize the initiation. It's certainly an impediment.

THE COURT: What I knew about the -- I've got the ACC's allegations that they made, and really what Florida State has posed is theoretical, that is, theoretically,

10:24:51 until we know the vote, it wasn't a done deal and we might

have changed our mind, but I don't have anything from Florida State that indicates that the president was uncertain or that any of the voting members of the board were uncertain. I don't have any evidence on which I can
10:25:10 rely that suggests that it wasn't, as the ACC argues, a done deal.

MR. KING: I think you're right --

THE COURT: Help me with that.

MR. KING: There's nothing in the record other
10:25:23 than the theoretical what would have happened. I would say that theoretical question is important. Obviously every board member of every Board exercises independent judgment. And what if the vote had not passed? I think the question is what would the ACC have done.

10:25:37 They had a process server sitting outside the meeting waiting. They didn't send a courtesy copy of the Complaint after they filed it. They waited to see the outcome of that vote. They had the Complaint in their hip pocket waiting for them to come out and then served it
10:25:52 immediately once Florida State initiated litigation, which actually dovetails us right into the Motion to Stay.

We believe this was a hip-pocket complaint. We believe that's evidenced by the fact they didn't serve it -- I mean, that they didn't send a courtesy copy it; they
10:26:04 didn't serve it; they didn't serve it by overnight mail.

They waited to see the outcome of that vote because they knew that was the only way there would be -- their lawsuit would be moot.

It challenged the -- it said you can't challenge the enforceability of the Grant of Rights provision. If Florida State hadn't challenged the enforceability of the Grant of Rights, there is no lawsuit. So we think it -- that proves that it could not have been an actual and justiciable controversy before Florida State even made its decision to do that.

Lastly, on the stay motion -- that moves into the Motion to Stay -- you know, the Court's well aware of the statute that allows the Court to stay any litigation in favor of the competing action if it warrants a substantial injustice -- go ahead.

THE COURT: Let me just try to sort of jump into that because both parties spent a lot of time, understandably spent a lot of time arguing about whether the ACC should have first-filer status and that under North Carolina law, even though we're guided by the Lawyers Mutual case, which has ten factors that the Courts are advised to consider, at least in some combination of the -- consider some combination of those factors, deference is afforded to the first-filed Complaint. But it's not automatic. It's not an ipso facto whoever files first, or whoever is

accorded first-file status, therefore their case gets to go forward.

Let me ask you, you made a statement sort of early on in your argument about why you think that Florida -- I mean, you forecasted you were going to talk about why Florida ought to be placed where these issues get litigated.

I think summarizing the ACC's position would be along these lines: Why should a Florida court where two members of the ACC reside, two of the fifteen current members reside, decide issues involving the interpretation of the North Carolina -- excuse me -- of the ACC's constitution and bylaws, which by the internal affairs doctrine that I am guided by would be controlled by North Carolina law, and why should a Florida court interpret the Grant of Rights agreements, which the ACC argues were entered into the last half -- causing those contracts to become effective in North Carolina and therefore those contracts are governed by North Carolina law. So you've got four potential documents that need interpretation, all of which, according to the ACC, are governed by North Carolina law. You've got the ACC, who has been headquartered in North Carolina for 70 years. You've got four member institutions, the most institutions of any state represented in the ACC, that are North Carolina based. You've got -- the ACC argues this is where all the sources of proof are

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because the ACC servers are here. The ACC argues this is where the decisions were made about which Florida State is upset.

Why, in light of all that, should the case, even if I were to determine the ACC is not entitled to first-filed status, why should this case go forward before a Florida judge rather than here in North Carolina?

I imagine I might hear from Mr. Cooney that -- well, I won't go into that. I will let Mr. Cooney speak for himself.

Help me address that. Even if you win on first filed, why should this case be in Florida rather than North Carolina?

MR. KING: There's, I believe, about eleven factors in Lawyers Mutual. The Court knows you -- it's not a matter of -- you don't have to find every single factor. It's a weighing and a balance. So there are several factors that go in favor of Florida. Obviously whether Florida has waived sovereign immunity is an important question to Florida, the Florida --

THE COURT: How does that question get raised in Florida? Because sovereign immunity won't be an issue in the Florida case. The ACC has sued Florida -- excuse me, Florida State has sued the ACC in Florida. Florida State has accepted jurisdiction in Florida. The only place the

sovereign immunity issue is going to get decided is here.

MR. KING: I would say that it requires a clear and unequivocal declaration. It's obviously a matter of -- and this goes really to the factor of local concern. It's a huge concern to the State of Florida. And so if there's no reason for this Court to issue that decision, we would say it shouldn't.

They are also arguing Florida questions of law. You know, the unreasonable restraint of trade is brought under Florida statute. There's an argument that we made in our Motion to Dismiss that I didn't touch on much because it's 12(b)(6) argument, not jurisdictional, but who has the capacity to bind a Florida state agency? That is certainly a very important question to the State of Florida. So those are important questions.

We cited a case that I'm blanking on the name, but to the extent, and I don't know if we've agreed to this yet, but to the extent these contracts are governed by North Carolina law, North Carolina law -- or contract law is largely the same across jurisdictions, and I think there's a case that says in Florida specifically they are very similar. So when you look at the issues of local concern, certainly I understand why the ACC wants to be in North Carolina. They understand why Florida State wants to be in Florida. There are important issues on both sides.

And I do think this gets then the first-filed status. The first-filed doctrine is because we give deference to the true plaintiff. And so I think you have to look at who is the true plaintiff, and that factor gets a lot of weight.

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THE COURT: Well, let's talk about that. Who is the true plaintiff in this case? Florida State says it's the true plaintiff. Usually when you see, you know, you see an examination of who is the true plaintiff in a litigation, you've got somebody who's suffered damages, and usually the true plaintiff is the person who suffered the damages and the true defendant is the one who's caused the alleged damages.

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Here, both Florida State and the ACC are seeking to go to judicial declaration about the very same contracts. Florida State wants to define these contracts -- all of the remedies that Florida State seeks in its Complaint in Florida are a judicial declaration, they're a declaratory judgment, that the contract is not binding, that is, the Grant of Rights agreements are not binding or -- are not enforceable -- that are not binding and enforceable against Florida State. What the ACC is seeking is that those very same contracts are enforceable.

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So how is it that Florida State is the true plaintiff and the ACC is not? Aren't they both -- don't

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both parties actually stand in relation to this dispute as true plaintiffs? And then you do have a race to the courthouse.

MR. KING: I don't think so because they are Florida State's media rights, and so Florida State is the one that is harmed by the contract. So we are challenging the contract. They are asking, as they say, for the status quo to stand. And there could certainly be damages that arise out of that.

10:33:09 But Florida State is the party who is challenging the enforceability of the agreements. They are the ones who are going to court asking for affirmative relief, and I think -- I take your point that they are both declaratory judgments, but I think --

10:33:21 THE COURT: Seeking -- I mean, the remedies are just the mirror opposite of each other, right? Florida State wants a judicial declaration that these agreements are unenforceable and the ACC wants a judicial declaration that these agreements are enforceable. And then you have the

10:33:38 added piece that there are damages claims that the ACC has brought. Florida State has not elected to bring damages claims.

MR. KING: I think I would just say that I think the party challenging the enforceability of a contract is

10:33:51 true plaintiff here. There are -- and so I think --

THE COURT: Do you have a case to point me to on that?

MR. KING: I will look, but I don't have one, off the top of my head. I will say -- the last thing I would say is we do think it would be -- they focused on substantial injustice. Obviously, that's defined by the factors. We do think it would be a substantial injustice to allow the ACC to watch Florida State's conduct for months, lay in wait, and then when Florida State announces it's going to have a meeting, to race to the courthouse, file the Complaint, wait to serve it, leave it in their hip pocket, and then serve it after Florida State decides to move forward. I actually think that proves the point that they are the true plaintiff.

With that, that's all I have, your Honor.

THE COURT: All right. Thank you, Mr. King.

Mr. Cooney?

MR. COONEY: Thank you, your Honor, if I could get the system on.

THE COURT: Let me ask out of the blocks: Mr. King had submitted a PowerPoint with his Motion to Dismiss but did not reference it. Is there any objection from the ACC about my reviewing it? I haven't reviewed it.

MR. COONEY: No, your Honor.

THE COURT: Go ahead.

MR. COONEY: As long as you don't give it any credence.

THE COURT: I'm sorry?

MR. COONEY: As long as you don't give it any credence, we have no objection.

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THE COURT: Always the advocate.

MR. COONEY: And with the Court's permission, I've kind of reorganized this to focus in on the issues that Mr. King addressed, and so I may skip through some of the slides and move them around. It won't be exactly the way the presentation was that I gave to you, and hopefully I've shortened it, which I know the Court would --

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THE COURT: Short is good.

MR. COONEY: So what I'd like to do is talk a little bit about one of the things that Mr. King mentioned in the end, which was that there are issues about who even signed the Grant of Rights, whether it was authorized and that.

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And when you take a step back and you look at this lawsuit, this lawsuit ultimately is about the integrity of agreements, the integrity of promises, the integrity of the way parties deal with each other over a period of years, and part of integrity is accountability, and it's an important part: Is a party going to be accountable for its promises? Is it going to be accountable for what it says? Is it going

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to be accountable for representations it makes?

And the issue I've run into, and one of the issues they raise in their Motion to Dismiss itself is, when they say, "In truth, the Florida State University Board never
10:36:32 cast any vote to approve the Grant of Rights," which got my attention because I immediately began wondering why we sent them all that money over the years if they never entered into the contract.

And so I went back to, as most lawyers do, to the
10:36:50 source document, to the Grant of Rights. There's the Grant of Rights. It's signed by the member institution. So far as I know, Florida State doesn't deny it's a member institution. It's signed by the president, and it says Florida State University.

10:37:05 And then when you look at the warranties provision, you see one of the warranties is, "Each member institution," that would be Florida State, "represents and warrants to the conference that the member institution either loaned or in concert with an affiliate entity has the
10:37:25 right, power, and capacity to execute, deliver, and perform this agreement and to discharge the duties set forth herein."

And then it goes on to say, "The execution, delivery, and performance of this agreement and the
10:37:42 discharge of the duties have been duly and validly

authorized by all necessary action on the part of such member institution." That's what they said in 2013; we've authorized this. And then now in 2023, or 2024, when this was filed, they claim they never authorized it. Both things
10:38:07 can't be true. And that's one of the things we've been struggling with, is the arguments keep shifting on us a little bit.

And then they submitted their First Amended Complaint to the Court, and in that Complaint, Paragraph
10:38:26 234, they said, "The ACC Grant of Rights and Grant of Rights extension had ensnared the media rights of Florida State."

Well, how do we ensnare the media rights of Florida State in agreements they say they never signed or authorized? It's like Whac-A-Mole, your Honor, and that's
10:38:47 part of some of what we're dealing with here which led to the lawsuit to begin with on the part of the ACC.

Now, what's not in dispute, as the Court pointed out, is that the ACC is a nonprofit of North Carolina incorporated association, it's been here for 70 years.
10:39:08 Florida State is a member institution. It's routinely participated in and exercised control over the ACC for 30 years. The Grant of Rights is a North Carolina contract. The Grant of Rights will be governed by North Carolina law.

So what your Honor has here is a North Carolina
10:39:27 organization suing one of its members over the

interpretation of a contract governed by North Carolina law in North Carolina, just as it's permitted to do under 59B-7, where it says a nonprofit association may assert a claim against a member. That is the right that this juridical
10:39:51 organization was given, to sue a member.

Now, working my way backwards through Mr. King's argument, I want to deal with ripeness, and I'll not be long on it. First of all, Mr. King suggested that this related to Article 3 ripeness, that you had to have a case or
10:40:12 controversy, it doesn't. Article 3 doesn't apply in the North Carolina courts for -- because the federal courts are courts of limited jurisdiction. That's why we have case or controversy requirements in the Constitution.

In North Carolina the only issue is is there
10:40:28 enough of a concrete controversy so that it makes sense for a Court to weigh into it? Do the parties have enough of a stake? Is there enough of an argument? And that's very different from case or controversy.

But here what we know, and this is the initial
10:40:46 Complaint that was filed, is that one of the promises in the Grant of Rights that Florida State made in 2013 was they would not take any action or permit any action to be taken by others subject to their control that would affect the validity and enforcement of the rights granted under this
10:41:10 agreement, so, effectively, a covenant not to sue. It's a

covenant not to challenge. It's actually broader than a covenant not to sue.

And so one -- and then Paragraph 114 of the initial Complaint alleges specifically the Board's going to meet tomorrow, it's going -- and the purpose is to initiate litigation, and they're going to challenge the validity and enforceability of the Grant of Rights and Amended Grant of Rights. In other words, the Board's going to breach this contract tomorrow.

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And what Florida State doesn't recognize is that their lawsuit by itself is a breach under that non-dispute provision of the Grant of Rights.

And the ACC doesn't have to wait until they actually breach in order to bring a claim, and that's precisely what it did. The case law is clear about that.

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We knew they were going to breach the agreement. We knew they were going to breach the agreement tomorrow. And, in fact, they did breach the agreement tomorrow.

Now, Mr. King somehow suggested we held this in our hip pocket. I mean, first of all, you can't just send it certified mail. It wouldn't have gotten there on the 22nd anyway if we had sent it out on the night of the 21st.

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But Florida's fairly particular and North Carolina law is a little bit opaque on how you serve a sovereign institution in another state, and so we decided that, at

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least looking at Florida law and interpreting it under Rule 4 of North Carolina law, we need to personally serve the chairman of the board of trustees or the president or their authorized representative. And guess where they all were on the morning of the 22nd? They were in that board meeting. We served them literally as soon as the meeting broke up. We served them within hours of filing the lawsuit. That's hardly the kind of hip-pocket complaint that the Court dealt with in Lamac where they walked around with a summons, I think was for six weeks. You couldn't have served them any faster than we served them.

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And they say, Well, we should have sent a courtesy copy. We didn't even know who was representing them in this litigation. We knew lawyers had been in our offices. We didn't know who the lawyers were going to be for the litigation. Who would we send a courtesy copy to, other than Florida State? And guess what, they would have sued us immediately upon receiving it anyway.

So the other thing is this lawsuit copy that we located on the Internet, and this is a copy of the lawsuit, and it was posted by fsu.edu, it's the news service for Florida State using the fsu.edu web address, it was posted actually on the 21st, but it was modified the morning of the 22nd at 8:12 a.m.

And it actually contains an allegation at 8:12

a.m. on the 22nd that the Florida State University Board of Trustees in a publicly noticed meeting on December 22nd, 2023 authorized initiation of this action. It alleges the board had already approved it before the board had even met. I don't know how you can get more imminent than what we had here. And clearly this was ripe when the conference filed.

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THE COURT: Mr. King makes a point of saying that, Well, it was the next day, it was after the ACC filed the lawsuit, it really isn't relevant to the ACC's state of mind at the time that they filed their lawsuit on December 21st, it wasn't part of what they knew about the existence of the controversy so it really shouldn't have much bearing on the -- or any bearing on my decision on that particular issue. What do you say to that?

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MR. COONEY: Well, respectfully for Mr. King, ripeness doesn't turn on a subjective state of mind. I can believe somebody is going to do something and there's no objective evidence for it and the Court could find it's not ripe.

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Ripeness is a judicial determination that you make based on the facts and circumstances, and they're the facts and circumstances in this case around whether or not breach was imminent. And we cited case law to you where the Court of Appeals has specifically said, Well, they filed a declaratory judgment because they were afraid a lawsuit was

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10:46:02

going to be filed. And guess what? A lawsuit was filed. And we can consider that to say it was ripe when they filed it. It proves it was imminent.

So you have the advantage, both taking an objective look at what the facts and circumstances are and being able to look at all the facts and circumstances that we know existed around that time before you make a determination on whether breach was imminent.

And so what we didn't know at the time doesn't mean that the Court can't consider it, and the Court of Appeals has specifically authorized that.

What we did know at the time is they were getting ready to sue us, and we were right, and the Court's entitled to consider that.

And we've now given you -- and the main reason we gave you that lawsuit on the morning of the 22nd was to meet this argument they keep making that, Well, we could have changed our mind. It's a funny thing to say you could have changed your mind when your own news service is putting a copy of a Complaint out on the Internet that says you've already made up your mind.

And, you know, they're right in one sense because we've all got freewill, and everyone can always change their mind. But the standard isn't, Well, can you change your mind before you actually breach? In that case you'd always

have to wait for a breach.

The question is as a reasonable person, as a practical matter, was breach imminent? Breach was imminent as a practical matter.

10:47:51 Now, let me talk about authority, which occupied a lot of Mr. King's argument. First of all, the way this initially came up was it was a 12(b)(6) that we didn't allege specifically there was authority, and of course we're not required to do that under North Carolina law. So it's

10:48:17 not a 12(b)(6) issue.

But then they dropped a footnote that seemed to suggest standing in a 12(b)(1) basis, and we were, frankly, left with a quandary because they really hadn't argued it other than dropping this footnote, but we know 12(b)(1)

10:48:36 standing does go to subject-matter jurisdiction. And so rather than just say, no, we're not allowed to -- or we're not required to allege authority, go pound sand, we said we need to address this in a way to let the Court know there's more to it than meets the eye, and that's what we did. And

10:48:56 then this has morphed into this kind of 12(b)(1) standard.

THE COURT: Which allows me to go beyond the pleading.

MR. COONEY: That's correct. And that's why we submitted the additional materials, knowing that, I mean,

10:49:10 you can go beyond the pleadings, and frankly, we've got to

show you subject-matter jurisdiction.

THE COURT: You've got a burden?

MR. COONEY: Yes. I hate that word, but I do. Now, your Honor, and I'll get to this now, but to anticipate -- I don't want to anticipate where you're going, but to respond to some of your questions, you were talking about the broad language in Town of Midland and some of the other cases, and I respectfully submit to the Court "standing" is a very broad term. And standing encompasses different kinds of things. And I would use the Lamac case that your Honor did as one example. So there's what I think you can refer to as injuring the facts standing. In other words, is this a party who's actually been injured, who has a cognizable legal claim? If you don't have a cognizable legal claim, you've obviously got no standing.

And in Lamac what you were trying to figure out is, all right, do these people have a direct claim under Delaware law for having been deprived of the ability to weigh in and vote? And you concluded, in fact, they did have that injury. But if they hadn't had that injury, if you concluded, no, that's not a cognizable claim, then they can never have standing. And that's what that case law is directed to.

Cottrell is similar to it because, as I recall, that was the bankruptcy case where the corporation's in

bankruptcy and, you know, some shareholder just decided, well, I will bring it on behalf of the corporation because, you know, they're not doing anything and I don't have any business doing it but I'm going to do it anyway. That person can never -- doesn't have an injuring fact. That person can never have standing.

But that's different than this case because in this case there's no question the ACC has an injuring fact. It's got a claim. It's got several claims. The issue is whether it must -- the issue is whether it complied with its internal documents in order to have the authority to actually file the claim, and that's a very different thing than whether you have -- whether you don't have a cognizable claim at all.

THE COURT: The ACC acknowledges that it had to follow its constitution in initiating the lawsuit, right?

MR. COONEY: That's correct, which is what it did.

THE COURT: All right. Okay. Go ahead.

MR. COONEY: Right. Because the ACC --

THE COURT: I mean, this argument is not fought on a contention that, you know, the ACC was excused from the constitutional requirement, the ACC's argument is we complied with the constitution in determining this was not material litigation?

MR. COONEY: Correct.

THE COURT: All right.

MR. COONEY: Or there was ratification on January 12th, which, under Gao, makes immaterial what happened earlier.

10:52:22 THE COURT: Let me -- I mean, let me ask you the same question that I asked Mr. King.

MR. COONEY: Okay.

THE COURT: Gao is a decision from the Business Court from Judge Robinson. It was decided in 2018. The

10:52:33 Town of Midland is just six months ago from the North Carolina Supreme Court, and it's got that language that says subsequent events cannot confer standing retroactively. Now, they grade my papers. They're the Supreme Court.

Can I -- can I -- I mean, your argument asking me

10:52:56 to consider that dicta and decide to follow my colleague's decision from five years ago --

MR. COONEY: No, it does not, your Honor.

THE COURT: Okay.

MR. COONEY: I mean, first of all, it is dicta.

10:53:08 They concede it's dicta, but --

THE COURT: It's pretty directional dicta.

MR. COONEY: Right. But it deals with the injuring facts standing, and I direct the Court, for example, the footnote in Willowmere from the Court of

10:53:24 Appeals' opinion where the Court of Appeals said, all right,

here's an association who didn't follow its bylaws so we don't think it has standing, and then it dropped a footnote saying we've not been given any evidence that there was ratification. And across the country courts have ruled repeatedly, yes, you can ratify the decision to file a lawsuit.

Even Robinson on corporations talks about the fact that a corporation's standing is not defeated by its failure to follow the internal bylaws so long as ratification occurs.

THE COURT: How does that gel with North Carolina cases that say that subject-matter jurisdiction standing is determined at the time the initial Complaint is filed?

MR. COONEY: Because, again, we -- it's how you define the standard. North Carolina law and Town of Midland are absolutely right. If you're looking at standing in the injury in fact, the cognizable legal claim, you've either got a cognizable legal claim or you don't. You know, it's like --

THE COURT: The subsequent events that the Town of Midland cases are talking about, you're positing that those are not the procedural requirements that must be followed, they are -- they relate solely to the underlying injury that gave rise to the claim?

MR. COONEY: If there is even an injury or if it

is even a legally cognizable claim. And that's the distinction that allows you to -- you don't have to, you know, overrule Town of Midland, which I wouldn't ask you to do.

10:55:07 THE COURT: Thank you for that.

MR. COONEY: You don't have to overrule Judge Robinson, and you'll really thank me for that. But those two things are consistent with each other because when you take a look at the standing cases, Burgess and Cottrell and

10:55:26 Lamont, where you were looking at them, those all dealt with is there even a cognizable claim? Is this a claim that you can bring ever? And if you can't bring the claim, you can never bring the claim.

It's a little bit like if I'm getting ready to go

10:55:46 in for surgery and I filed a lawsuit against my surgeon for malpractice that's going to happen during the surgery, you know, and I go into surgery and the surgeon commits malpractice, I didn't have a standing to file that first Complaint. I had no injury. I had no legally cognizable

10:56:06 claim.

But this isn't that case. There is a legally cognizable claim, particularly once you find it's ripe. Then it's absolutely a legally cognizable claim. And if it's a legally cognizable claim and it's simply a question

10:56:23 of following your internal procedures, then ratification is

a valid -- is consistent not only with the Court of Appeals' forecast but also what other courts across the country have done.

And I don't -- you know, Town of Midland, 10:56:43 obviously we have to respect the Supreme Court's language, but the fact of the matter is Town of Midland wasn't dealing with the situation we have where we have a cognizable injury in fact, cognizable claims, a ripe dispute, and the issue is whether or not you can ratify an alleged failure to follow 10:57:05 your internal procedures as an organization.

THE COURT: So essentially your legal proposition is that ratification is available if the injury, in fact, occurred at the time of the initial suit?

MR. COONEY: Correct, your Honor. If --

10:57:23 THE COURT: Why didn't you argue it that way in your brief?

MR. COONEY: I believe I did. I apparently didn't argue it that clearly.

THE COURT: Okay.

10:57:32 MR. COONEY: And part of it, too, is taking a look at Gao, when I saw Gao, and trying to say, all right, I've got Gao here and I've got broad language in Town of Midland and I've got, you know, broad language. But when I look at those cases, they're all dealing with this is a cognizable 10:57:56 legal injury. They're not dealing with internal procedures

the way our case is.

And then I see the footnote from the Court of Appeals' decision in Willowmere, which we did cite to the Court, to indicate that, you know, ratification would have made that case differently.

10:58:11

And then we looked at the case law across the country that all said ratification can authorize a previously filed lawsuit, and, you know, and we look at Robinson on corporations and so we see these things, and how do we marry these things up in a way that's consistent? Well, again, looking at the case law, standing includes both you have a cognizable legal claim at all, does this person have a cognizable legal claim? And also encompasses did you comply with your internal procedures to bring the claim that you have? And it's the internal procedures to bring the claim that you have that Gao addresses that the Court of Appeals forecast and that none of the other cases that talk about one standing isn't there can never be there, none of those cases deal with those kinds of facts where you've got an internal authorization process of an admittedly cognizable claim. And that's what Judge Robinson was dealing with in Gao.

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Now, respectfully, Judge Robinson's decision didn't go off on, well, I had jurisdiction over Gao's claim. The sole thrust of that was whether you've got jurisdiction

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on the counterclaims and whether he was going to dismiss the counterclaims for lack of subject-matter jurisdiction. And this is a basic corporate law principle that when you ratify something, it is effective as of the time the act was taken as if the act was validly authorized to begin with, which is probably why we're here in Business Court talking about this because I don't think the Town of Midland was intended to overrule that basic principle of ratification. That principle of ratification applies not only to organizations but to private corporations and municipal corporations.

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And so you've got to read that ratification language in the context of what those cases with the broad standing language actually deal with as opposed to simply apply a dictum to something that's different than those cases.

11:00:41

And I apologize if we hadn't articulated this as clearly as I hoped I've articulated it now.

THE COURT: All right.

MR. COONEY: But the standing is just a very broad concept that encompasses a lot of different things. And all that language about once you don't have it, you can never have it deals with cognizable legal injury and cognizable legal claims and not with people with claims who maybe don't follow their internal procedures.

11:00:54

Now, your Honor, I've kind of skipped ahead a

11:01:16

little bit, but I do want to talk about, since we've talked about that -- what I do want to talk about is the question of initiation of any material litigation, because obviously -- because you don't need to wrestle with any of this if you find the initial Complaint was both ripe and fell within the power of the conference to file without a vote of its members.

11:01:45

THE COURT: Let me sort of -- I know you've got your argument ready, but -- when I'm looking at that, let me ask about the standard that I'm applying to determine this argument about material litigation.

11:02:06

What I have discerned from your briefing is that, as I said in my question to Mr. King, that there is some deference that I should afford to the ACC in making its determination as to materiality and that so long as that determination of materiality is reasonable, or not arbitrary, capricious, and that line of words, then I will not exert judicial review and impose my own determination of materiality. Is that a fair assessment of your argument?

11:02:31

MR. COONEY: Yeah, if I could -- if I could play around with it just a little bit.

11:02:55

So I think our argument is, in the first instance, the ACC has the right to interpret its bylaws to determine what procedures would follow from that. And in this case what we have is a required absolute two-thirds majority for

11:03:13

the initiation of any material litigation. It's not any litigation. It's any material litigation. "Material" is not otherwise defined.

So the ACC, in the first instance, has the right to say, all right, what does that mean and how does it apply to this situation? And we believe that if they do that and present you reasons for it, which we've done, that you can only set that aside if you find that was an arbitrary and capricious determination.

11:03:54 THE COURT: Now, Mr. King's argument in response to that is, Look, this is a constitution of the conference and that is a contract between the conference and all of its members and that that provision is there for the benefit of the members, including Florida State, and that in the event 11:04:14 that the ACC does not follow its own internal procedures, then relying on cases like Peninsula and Homestead and Atkinson, we have a right to challenge that and if we establish that the predicate for bringing the lawsuit was not properly established, then there's no standing and the 11:04:44 claim must be dismissed, albeit without prejudice.

MR. COONEY: So the problem with that is if this said the initiation of any litigation, they would absolutely be right.

THE COURT: But then -- so the question then 11:05:00 becomes, all right, so it says material litigation?

MR. COONEY: It does.

THE COURT: Does the fact that it says material litigation remove from the Court the ability to determine that as a matter of contract interpretation and instead vest that in the ACC to decide for itself whether litigation is material?

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MR. COONEY: In between, your Honor. The ACC gets to decide in the first instance. I think we'd all have to agree with that, I mean, because it's their bylaws, it's their organization, but --

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THE COURT: Subject to review and --

MR. COONEY: The question is what is the standard.

THE COURT: Right.

MR. COONEY: So what they're asking you to do is substitute your judgment.

11:05:46

THE COURT: Well, they're asking me to decide as a matter of contract interpretation whether or not the constitution has been followed.

MR. COONEY: Well, they're asking you to decide as a matter of contract interpretation whether this was material.

11:05:57

THE COURT: Right, because the constitution --

MR. COONEY: Right.

THE COURT: -- embraces the concept of materiality?

11:06:08

MR. COONEY: Right, but had we concluded with materiality, as we did when we brought affirmative claims, we are required to take a vote. So it's not a question about what the procedures are. It's a question about whether the procedures were even triggered.

11:06:20

THE COURT: Well, but, I mean, but to your point, though, if you had decided -- if the ACC leadership had decided that the filing of the Amended Complaint was not material, your argument would be the same, that is, that I would need to defer and to determine whether or not that's reasonable or not. And if you could make an argument that that was reasonable, then there would not be really judicial review of anything beyond an abuse of discretion-type review.

11:06:39

MR. COONEY: Well, and that's the way it is with any bylaw inter -- if this wasn't in the constitution, but these are governing documents, and that's why the courts stay out of these issues because, you know, they may interpret -- a governing organization may interpret these words to mean one thing --

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11:07:14

THE COURT: But don't these cases, McAdoo and Wilson and -- Master versus Landfall is another -- don't they talk about that so long as the association -- so long as the voluntary association complies with its internal procedures, then there is going to be deferential review but

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it leaves to the Court to determine what -- whether or not there was compliance with the bylaws.

MR. COONEY: Right. But here the compliance with the bylaws turns on an interpretive term that's necessary for the governance of the conference, do you have to convene the board or not, do you have to take a vote or not. And in the cases they cite, it clearly did. If you're going to sue Crescent, you have to take a vote. If you're going to sue another homeowner, there has to be a vote. And if there's not a --

THE COURT: And here if there's going to be material litigation, you've got to take a vote.

MR. COONEY: Right.

THE COURT: Their argument is, well, it's up to the judge to decide whether this is material or not, and that's not a deferential standard of review.

MR. COONEY: And our -- we're not taking you out of the process, your Honor. We're just saying --

THE COURT: You're just saying I'm limited to an abuse-of-discretion- --

MR. COONEY: Right.

THE COURT: -- type review, whether it was reasonable or not?

MR. COONEY: Correct. Correct.

THE COURT: Okay.

MR. COONEY: And that's the only thing that makes sense when you're looking at -- because they're trying to figure out, in good faith, and that's why president Ryan's affidavit -- or declaration was given to you, trying to
11:08:52 figure out in good faith what does this mean and does it apply to us, does it apply to this situation?

And they took -- they've taken a very nuanced approach, which is, look, if we're just preserving the status quo, we're just saying to the Court, we've been
11:09:10 operating this way for a while, we think we need to continue to operate this way. That's different than suing a member for damages.

If the ACC wins every claim that was set forth in that first Complaint, nothing changes.

11:09:29 THE COURT: But, see, the flip side of that is if the ACC loses, then the most valuable contracts that the ACC has would be found unenforceable. How is that not material?

MR. COONEY: Well, because the issue isn't, you know, well, gee, what happens if you lose? If we had sat
11:09:49 back and done nothing, the same thing could have happened. The issue is what are we initiating? We're initiating something to preserve what's been going on --

THE COURT: Well, you're initiating a lawsuit with a hoped-for result, which is it would be a result to
11:10:10 maintain the status quo, but you're opening up the

possibility --

MR. COONEY: Sure.

THE COURT: -- that your contract would be found unenforceable.

11:10:18 MR. COONEY: But that's inherent in any litigation. Now we're getting back to in all litigation.

THE COURT: That's why, I mean, I guess -- it's an odd -- it's an odd provision --

MR. COONEY: It is --

11:10:28 THE COURT: -- in a constitution.

MR. COONEY: -- which is all the more reason why you should defer to it, because it's not -- it's not an unambiguous provision, and it calls for an interpretation, and --

11:10:42 THE COURT: Typically when I've seen material litigation, it would be in the context of a corporate transaction and there would be a schedule that lists material litigation and there would be a definition, much like there's a material Media Rights Agreement or --

11:10:56 MR. COONEY: Definition of material Media Rights Agreement.

THE COURT: Yeah, that clause in the same -- I think that's Clause 3, and this clause we're talking about is Clause 5.

11:11:08 But you have a definition, and usually that

definition would be tethered to a noncontroversy or an expected expense or some kind of marker like that.

MR. COONEY: And that one, to give you an idea of the interpretive, you know, gloss over this, is 5 percent of the gross revenues or the discretion of the chair and the commissioner.

11:11:27

THE COURT: What is your argument -- you've advanced the material Media Rights Agreement in the -- in your briefing and in your PowerPoint. What am I to draw from that reference from the ACC's perspective? Because Mr. King's made the argument, well, all that the ACC has done by referencing that is to show you they knew how to define what materiality is in the context of a Media Rights Agreement, they could have done that here with respect to litigation and just chose not to do it.

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11:12:05

MR. COONEY: The list of things anyone could do is obviously fairly long, but what it does show us is the ACC membership was comfortable in assigning the definition of materiality in everything but -- but the most obvious case, to the chair and the commissioner, that they made that decision about money, and having made that decision about money, is it unreasonable to believe that there shouldn't be some discretion in terms of trying to determine whether anything is material. Now, I'm not arguing that that definition applies.

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THE COURT: It's not --

MR. COONEY: It's not a defined term.

THE COURT: No. I mean, it seems --

MR. COONEY: But it's a modifying term, is the point.

THE COURT: But Florida State's argument is that if they intended to leave it to the discretion of the chair and the president, they know how to do that, they did that in the material media rights provision, they did not do that when it came to material litigation.

MR. COONEY: Right. But we're not arguing this is totally left to the discretion, because if it was totally left to the discretion, you might not have a role at all.

But what we're saying is this is a modifier that's not defined elsewhere, that, you know, there was a -- there was a process to try to figure out what it meant in the context of this skinny Complaint that was filed, with only two claims for relief, both of which were declaratory, and whether it would apply.

And in the first instance the -- and this is a -- this is more than merely a contract term. It is a governing procedural term because if they determined we think it's material, it triggers some procedures. If they determine it's not material, it doesn't trigger those procedures.

And so this is no different than, you know, a --

the conference deciding let's say they're going to have a meeting on whether to expel a member on -- how much time are they going to give the member to be expelled, you know, what are kind of the implications of the process around it. Because it's not spelled out, you have to make some decisions, but there are some basics spelled out.

So if -- and I understand, you know, the Court's focus on this, but at the end of the day, the association has got to have the discretion to interpret this and not have a Court come in and decide that there's another interpretation that's more reasonable. I mean, if it's arbitrary and capricious, then that's one thing, but that deference is critical to the way, particularly the way in which an unincorporated nonprofit membership operates.

And so, you know -- and I don't want to repeat myself, but they were presented with a quandary and they made some decisions. The decisions were we're not going to seek affirmative relief. They could have sought affirmative relief. They could have sought an injunction. They could have sent me down to the Business Court and sought an antisuit TRO and tried to restrain Florida State from filing its lawsuit. That was a bridge too far for them in terms of that provision, and so what they did is they asked the Court simply to find the status quo, that the agreements we operate under for more than a decade mean what they say.

And more importantly that Florida State's estopped from challenging them as a result of the acceptance of benefits. Nothing material about either of those in the sense of changing the relationship between the conference and Florida
11:16:16 State, no damages, no injunctive relief, not changing the way the conference is going to be governed or what Florida State's rights are.

THE COURT: Mr. King made an additional argument that it would be material anytime the conference would
11:16:37 choose to sue a member. How do you respond to that?

MR. COONEY: I have a hard time accepting that unless I know what they're being sued for and what the relief is.

You know, if a member's not coming to meetings on
11:16:54 a regular basis and we sue the Court saying -- and we sue them saying, you know, you need to issue a declaration saying the member really needs to come to meetings or you can take some action or something like that. You know, it's hard for me to equate that with suing a member for damages
11:17:13 or suing to expel the member or suspending the member. There are plenty of actions we can take that change the relationship between the conference and the member, and that ultimately is kind of what this turned on, how is the relationship changing, you know, what are we asking for that
11:17:37 would alter Florida State's rights or alter Florida State's

pocketbook through damages or alter the way this conference is governed, and none of that was there in that initial lawsuit.

THE COURT: Is it a reasonable expectation for Florida State to believe that under the ACC constitution this provision will ensure that any litigation against us by the conference would have to be approved by a two-thirds majority?

MR. COONEY: I don't think so. And if I can flip it around, we've seen those provisions in some of the other -- in the home -- in the property owners cases. If you sue a property owner, there needs to be a vote. If you sue Crescent, there needs to be a vote.

THE COURT: Right.

MR. COONEY: That wasn't anywhere in here. Quite frankly, I'm willing to bet when they drafted this clause, they never thought for a second that litigation would be erupting between the ACC and its own members, so...

THE COURT: But here we sit.

MR. COONEY: Yeah, but here we sit, which, again, it gets back to you've got to interpret -- you've got to give this organization the opportunity to interpret this and some discretion to do so.

Now, the second piece of this, and I don't want to ignore it... and I do want to get to jurisdiction, too --

is the commercially reasonable.

So as president Ryan pointed out in his affidavit, the ACC was required to take commercially reasonable efforts to prevent what they were about to do.

11:19:35 Now, they argue, well, commercially reasonable efforts don't include hiring attorneys because, look, it says you don't have to become obligated to --

THE COURT: You can but you don't have to.

MR. COONEY: Yeah, you can but you don't have to.

11:19:51 And on top of it, it says "not otherwise specifically provided for in this agreement."

And when you look at the warranty provisions, the warranty provisions -- and I'm not going to quote them verbatim because those are under seal -- but the general

11:20:06 import of the warranty provisions is that the conference has to take action to protect or prevent an infringement or violation of the rights that it has given under the ESPN agreements.

Now, there's no way you can protect or prevent

11:20:25 infringement of these kind of intellectual property rights without lawyers and courts ultimately. I suppose you could, you know, send a harshly worded letter. But the point is --

THE COURT: Then why have this provision if it doesn't obligate them?

11:20:43 MR. COONEY: Because there are hundreds,

literally, of other provisions in this agreement that also require commercially reasonable efforts that wouldn't require consulting lawyers. For example, if a game gets canceled, they've got to operate in a commercially reasonable fashion to consult with ESPN and figure out when and if the game can be scheduled. You know, if there are other issues, you know, involving, you know, a dispute over, you know, facilities, for example, again, commercially reasonable efforts. You're not required to hire a consultant to design your broadcast facilities in stadiums. So this is a broad provision that's intended to apply to a lot of things, and it says except as otherwise specifically provided for, and that warranty provision is one of those exceptions. Plus, your Honor, your Honor pointed out, it doesn't require you to but you can.

The other thing is, as of December 21, the ACC was incurring attorneys' fees because they were going to sue us. So, you know, to say that, well, you're not required to incur fees when we're about to make you incur attorneys' fees gets back to the fact that this is a commercially reasonable action that was, you know, previously authorized.

Now, we're not saying it's solely the unanimous approval of the membership for this that -- because we could probably all think of something in which it would also constitute material litigation. But this was one of the

bases on which the ACC was looking at this thing saying we've got a contractual obligation to protect or prevent infringement of these rights and we're only filing something that is narrowly targeted to preserve that status quo.

11:22:54 THE COURT: Your argument is that this -- that the warranty, in the definition of commercially reasonable efforts, combine to effectively preapprove this lawsuit, is that right?

MR. COONEY: Not by itself, but it provides the 11:23:14 added authorization, the added, all right -- because you asked the question about would Florida State have anticipated that there would be a vote before we sued. Well, in the context of this -- there's not -- you don't need to have a vote to take the actions necessary to protect 11:23:31 or prevent an infringement of rights.

THE COURT: Even if that involved the initiation of material litigation?

MR. COONEY: Right, because that is --

THE COURT: I mean, is that right? Is that the 11:23:41 argument?

MR. COONEY: Well, yes, I mean, on one level it certainly is, but it doesn't need to be the only argument on that. That can inform the reasonableness of the interpretation of the clause as well, because, arguably, if 11:23:55 the ACC hadn't done what it did, it was placing itself in

breach of ESPN agreements, and breach of the ESPN agreements --

THE COURT: Arguably not since it's not a mandatory requirement to incur costs.

11:24:09 MR. COONEY: But it is a mandatory requirement to protect or prevent the infringement of the rights, and that's an exception to that clause, because that's otherwise specifically provided for in this agreement.

So, you know, you're on the precipice, if you do 11:24:27 nothing, of being declared in breach of the most important contract you have, more important than the Grant of Rights, and so that helps inform the decision.

Now, is that by itself preauthorization? If the Court wanted to find that, we wouldn't argue with it, but it 11:24:51 certainly makes the determination of material litigation more reasonable under these circumstances.

THE COURT: As president Ryan said in an affidavit?

MR. COONEY: Yes.

11:25:04 THE COURT: All right. I understand that argument.

MR. COONEY: All right. So on jurisdiction, I don't have that much time left, but I do want to address it.

First of all, there are no issues of due process 11:25:18 jurisdiction. They've got plenty of contacts. They don't

deny they can't be sued in the State of North Carolina but for what I'll call sovereign jurisdiction issues. So this is not a due process jurisdiction argument.

So on sovereign jurisdiction, Farmer, I think, 11:25:36 guides this case, because Farmer's not about getting a certificate of authority. What Farmer did is it you said the United States Supreme Court precedent, the Hyatt case, does not support the Court of Appeals' conclusion that a sue-and-be-sued clause cannot constitute an explicit waiver 11:25:55 of sovereign immunity. Then they gone on to say when Troy University registered as a nonprofit and engaged in North Carolina business --

THE COURT: This is evidence of consent?

MR. COONEY: Precisely. It accepts the 11:26:07 sue-and-be-sued clause.

THE COURT: Do we have a sue-and-be-sued clause here? Mr. King suggested we don't, but you argued in your brief we do. Tell me about that.

MR. COONEY: We do. So we don't -- it's not a 11:26:18 broad sue-and-be-sued clause. In fact, it's far narrower. Remember, the nonprofit sue-and-be-sued clause says you can be sued on everything, everywhere, by anyone.

And what the General Assembly did is they tailored this much more narrowly. They said, well, a member can sue 11:26:33 on behalf of the nonprofit association. And then they

provided the non -- a member can be sued by the nonprofit association for its claims. So this is a narrowly tailored consent that I think reflects the participation of a member in a nonprofit organization who doesn't -- and it's
11:26:58 certainly not the broad way that happened in Troy. It's solely limited to claims of the association. And by continuing to be a member of the ACC, they accepted that, under the same reasoning.

THE COURT: Does the fact that it's narrower
11:27:17 sue-or-be-sued clause give Florida State more of -- I mean, are they able to avoid the application of Farmer?

MR. COONEY: I would say it's to the opposite because -- and maybe I'll use a term that might be inappropriate -- it's a more humble waiver here than it is
11:27:38 in Farmer. I mean, Farmer was quite broad, once you come in Alabama, we don't care what your law is, you know, it -- you're stuck, whereas here all we're saying is they are liable for the claims of the association.

And again, this is a nonprofit association. It's
11:27:57 run by its members, and it would be -- you know, if the ACC had to run to several different states to make a claim against one of its own members arising out of North Carolina law, that would defeat the purpose of having a North Carolina incorporated association.

11:28:16 The North Carolina incorporated association has to

have the ability to sue its members for its claims, and the members are not engaged in a broad waiver that should concern the Court from an equitable standpoint. I mean, it's not like I can sue Florida State. Only the ACC can.

11:28:33 And what I'd love to do is to take a couple of minutes and let Mr. Lawson talk to you about the textural approach of Florida law.

Your Honor's right, obviously if Farmer governs the case, it doesn't make any difference what Florida law

11:28:51 says. You pointed out the distinction between Maynard and this case because Maynard is an Eleventh Amendment case and this is not an Eleventh Amendment case, so I wanted to let Mr. Lawson talk to you very briefly about the way Florida courts read their own statutes.

11:29:05 THE COURT: All right. Before we do that, what's the time allocation, Lauren?

MS. SCHANTZ: Six minutes, roughly, remaining.

THE COURT: All right. And how much time does Mr. King have?

11:29:18 MS. SCHANTZ: Four minutes and four seconds.

THE COURT: Let's take a break now. We'll take a ten-minute break. Actually, let's take a fifteen-minute break, be sure everybody has an opportunity to take advantage of the break. We'll be back in fifteen minutes.

11:29:36 (Recess 11:29 a.m. to 11:44 a.m.)

THE COURT: All right. Mr. Lawson, I will hear from you.

MR. LAWSON: Okay. In Austin v. Clayton County, Georgia, which FSU relies upon on Page 13 of its brief, the 11:45:01 Court explained that the standard for waiver of Eleventh Amendment immunity is an exacting one and went on to explain that the State must specify that it tends to subject itself to suit in a Federal Court. That standard, a US Supreme Court precedent, in interpreting the Eleventh Amendment 11:45:22 obviously does not apply to your consideration of Florida Statute 1001.72(1). And when it comes to interpreting Florida statutes, the Florida Supreme Court has been very, very clear in saying that we are a supremacy-of-text state and that the words of the governing text are of paramount 11:45:41 concern to us and what they convey in their context is what the text means.

And so looking at 1001.72 (1), it provides that Florida State, its Board of Trustees, is authorized to contract and be contracted with, to sue and be sued, and 11:46:03 plead and be impleaded in all courts of law or equity. You would have to add words to that statute to conclude that this Court does not come within the plain meaning of that statute. That's the text.

And when you look at the context, it's even more 11:46:28 clear. The preexisting Florida law is that a state entity

waives sovereign immunity by entering into a contract. There is a separate provision in Florida law that gives a limited waiver, and we cite it in our brief, of tort immunity. With that limited waiver of tort immunity, the -- with respect to universities, the provision provides that they have a home venue privilege and must be sued in the -- where they have their main campus or in a location where they do business, but it's clear that it's in Florida.

11:46:50

But with this the context is that by authorizing Florida State to enter into a contract, it's authorizing it to waive sovereign immunity by the act of entering into a contract. Then it goes on to explain that then it can sue and be sued and plead and be impleaded in all courts of law and equity. So that's the plain meaning of the statute, and that's the supremacy-of-text principle that would govern with respect to the text and the context.

11:47:12

11:47:34

There's also another statute in Florida, 6.2.07, that provides incorporated associations with the power to sue and be sued in this state. So the legislature -- it's just another -- rounding out the analysis that the legislature knew how to specify they would be sued -- subject to suit in Florida if that's what they had wanted to say. They didn't say that. Thank you.

11:47:59

THE COURT: Thank you, Mr. Lawson.

MR. COONEY: Your Honor, I'm going to touch on two

11:48:14

more points very quickly. On the breach of fiduciary duty argument under 12(b)(6), Florida State posits that because they cannot on their own bind the ACC therefore there cannot be a joint venture and no fiduciary obligation. When you
11:48:33 read the case law, the case law doesn't say it's got to be exclusive control. It says you just have to have some measure of control. And Florida State's president has been a chair of the board of directors, Florida State sits on the board of directors, Florida State's on a lot of the
11:48:49 governing committees. As a member, Florida State has some measure of control over the ACC. And that's the necessary bridge to have this be not only a joint venture but to establish a basic fiduciary duty. And when we're talking about basic, I mean, you can't -- the fiduciary duty is you
11:49:08 cannot undermine the conference. You know, we're not talking about the range of fiduciary duties that corporate directors have. We're simply talking about a basic fiduciary duty not to defeat the purposes of the joint venture.

11:49:22 THE COURT: Let me ask you, I mean, Chapter 59B, which deals with nonprofit unincorporated associations does not contain any provisions within it that create fiduciary duties. When you look at the other corporate governance statutes in North Carolina, and Florida State points this
11:49:42 out, if you look at Chapter 55 for corporations, 55A for

nonprofit corporations, 57D for LLCs, 59 for partnerships -- well, case law interpreting Chapter 59 partnerships, they all embrace the concept of fiduciary duties in some way, shape, or form, whether it's directors and officers owing a 11:50:10 fiduciary duty to the corporation or managers owing a fiduciary duty to the LLC, partners owing a fiduciary duties between themselves, yet here we don't have any creation of fiduciary duties. So recognition of fiduciary duties in Chapter 59B, your argument posits that, well, what we've 11:50:27 really got with this organization is we've created a joint venture and through that device we back into the partnership law which creates the fiduciary duties among and between the members of the association. Am I understanding that correctly?

11:50:44 MR. COONEY: Yeah, that was mostly correct. There's a nuance. If I can answer the question, because I'm probably out of time.

THE COURT: You may answer the question.

MR. COONEY: The nuisance is 59B expressly 11:50:56 contemplates that common law will continue to apply and that it uses a definition of unincorporated association, which is the common law definition for joint venture. So it's not that I back into it by virtue of something unique about this particular organization. I think the General Assembly 11:51:14 expressed an intent that we're going to set these statutory

provisions, that's going to overlay, to the extent it conflicts, override the common law, but then the common law is still going to apply, and, in fact, we use a common law definition for unincorporated association. So it's not so much there's something unique about the ACC. It's that you go to the common law, you determine whether or not this is a joint venture. We believe it's a joint venture because the profits are equally shared and each member exercises some measure of control. And under those circumstances, the members owe a basic fiduciary obligation to the common enterprise not to defeat the common enterprise.

THE COURT: In your research have you uncovered any cases in North Carolina in which an unincorporated association has fiduciary duties owed to it by members of the unincorporated association?

MR. COONEY: There is some --

THE COURT: I remember --

MR. COONEY: There's not a specific North Carolina case. There was a case dealing with the NAACP that we cited to the Court where they talked about the fact that the members of an association would owe fiduciary obligations to the association and not vice versa when it's an unincorporated member association.

The problem, as the Court knows, a lot of this law came up in the age of unions, and, you know, how do you get

an injunction against a union and do those other things? So, no, I have not found a case that specifically says what you have posited. But since the common law defines a joint venture effectively as a general partnership, then the general partners certainly owe a fiduciary obligation to each other not to blow up the general partnership, and that's the fiduciary obligation to the general partnership.

THE COURT: What about -- I mean, there's been litigation around the country between conferences and members over the years. Has any Court anywhere ever recognized that a member of a conference, an athletic conference, owes a fiduciary duty to the conference?

MR. COONEY: I've not seen any case, but I've also not seen litigation in which that claim has been raised or there's been litigation over it.

THE COURT: So no cases either way?

MR. COONEY: Correct, your Honor. And certainly Florida State doesn't cite any cases to the contrary. So...

THE COURT: All right. You said you had one other thing you wanted to --

MR. COONEY: I was just -- all I was going to touch on, on the stay issue.

THE COURT: I will let you do that. We're keeping count. You'll get a fair share.

MR. COONEY: And I don't need to say much because

I think the Court laid out, you know, rather well what our argument is. The point is whether a case is first filed or not really is not one of the factors. I mean, the factors is is this a North Carolina case about North Carolina issues with North Carolina evidence involving a North Carolina entity, and every case they cite involves an entity that's seeking to dodge their home jurisdictions law or is bringing claims that aren't even governed by their law. You know, they claim, well, we've got some defenses under Florida law, but the point is those defenses under Florida law still need to be applied in the context of the contract that is governed by North Carolina, and whether those defenses would even be valid under North Carolina contract law. And that is uniquely a determination that a North Carolina judge should make.

The only other thing I wanted to add is that --

THE COURT: You would argue that there also are going to be counterclaims in this case if this case goes forward?

MR. COONEY: Correct. And they can bring all of those claims before the Court.

You know, they keep suggesting somehow that North Carolina is the more favorable jurisdiction. It's not that North Carolina is more favorable. It's that North Carolina is the right place where this needs to be hashed out. I

mean, Lord knows I've brought plenty of claims before your Honor and you've decided them and it hadn't gone my way, but I know you've got the grounding in North Carolina law that, like it or not, that was a fair decision. I would never admit that in my appellate brief, but that's the reality. We're not here not because this is more favorable. We are here because this is the right place to decide North Carolina issues.

11:55:43

THE COURT: All right. Thank you, Mr. Cooney. I think I've overruled Mr. King before, too. Mr. King, go ahead. I want you to --

11:56:00

How much time will Mr. King have?

MS. SCHANTZ: He has four minutes plus an additional -- an additional four minutes, so eight minutes total.

11:56:15

THE COURT: Eight minutes. Let me ask you: I want you to address this materiality point that Mr. Cooney -- excuse me, not materiality point -- the ratification point that he was making. You may have anticipated I was going to ask you that. I'm not sure -- Mr. Cooney said was in his brief. I missed it if it was in there. I didn't understand it quite the way I understood it as he articulated it now. You may be in the same boat. So I would like for you to have an opportunity to respond to the idea that so long as -- as I understand the argument, so

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11:56:47

long as -- or Mr. Cooney's contention that these cases hold so that so long as there is an injury in fact at the time of the initiation of the law, that is, that there is standing at the time of the initiation of the lawsuit, any failure to comply with the requirements for bringing the suit that occurred thereafter that are subsequent -- that are attendant to the filing of the suit but which are ratified to remove those impediments thereafter, that that's permissible and that there's not a standing problem, there's not a sovereign jurisdiction problem, that you can ratify a failure to comply with bylaws if you had standing at the time you brought the claim by virtue of having an injury in fact. So I want you to address that. You don't have to address it first, but I do want you to address it among the points that you make.

MR. KING: I will try to address it first before I forget the question. I was processing it as I got the argument.

I think the standing here is the authority to sue. It is not about whether there was an injury. It is the authority to sue. They do not have the authority to sue until they have a vote under the constitution. That is -- that is required by the ACC constitution, Provision 1.6.42, or something, I believe, that says you have to have a vote to have approval to sue a member.

THE COURT: His argument would be that, well, even before you have authority to sue, you've got to have an injury and that that's really what standing is about, is the fact that you've been injured, you actually have to prove a claim.

11:58:28

MR. KING: I don't think that that is what -- certainly not the standing argued. They have to have -- in addition to an injury, you have to have authority to sue. And the Peninsula case, the Homestead case, was talking about the authority to sue. That requires a vote. They admit they didn't take the vote in time. The Midland case says if you don't take the vote, it doesn't really factor. We're not suggesting that corporations can't ratify X. What we're saying is the corporation can't retroactively bring on your Honor subject-matter jurisdiction and, while they make the argument, they haven't cited a single case that will stand for that proposition.

11:58:42

11:59:00

THE COURT: What about the Gao case? We didn't really -- you and I didn't really talk very much about it. Mr. Cooney and I did. Let me have your take on Gao.

11:59:09

MR. KING: I think the Gao --

THE COURT: We did talk about it.

MR. KING: Yeah, the Gao case finds that the -- it only related to second amended counterclaims. The first amended counterclaims, it was immaterial because there was

11:59:19

no competing action, because there was already a lawsuit pending in the court, and so the Court didn't find any retroactive standing. It didn't even address the issue.

THE COURT: All right.

11:59:37 MR. KING: Basically, the ratification only went one way. The ratification went -- they had a vote to approve the second Amended Complaint. That ratified that. There was no discussion about whether that would relate back.

11:59:48 THE COURT: I think -- as I understand Mr. Cooney's point on that is that, well, in that case there was an injury in fact as of the time of the initiation of the litigation, as of the filing of the first counterclaim, as of the filing of the second counterclaim, and all the 12:00:05 second counterclaim did was to fix the procedural error that occurred and that that doesn't really get into standing in the way we think about it when we think in terms of injury in fact.

MR. KING: I would say it doesn't get into 12:00:22 standing at all. It certainly doesn't go on retroactively with standing. It says you didn't comply with the bylaws, you then didn't comply with the bylaws, you filed a new claim. As of the date of that new claim, you have -- it has been ratified. You've complied with the bylaws. It doesn't 12:00:38 say that that goes back to the first -- to the first

original Complaint. It just doesn't say that.

THE COURT: All right.

MR. KING: The other big point on this, I think, is there was no ratification here. You can read through president Ryan's affidavit. There is the word -- for ratification of the initiation of the litigation. The word "initiation" does not appear in his affidavit. The word "ratification" does not appear in his affidavit. That is not what they did. They approved the filing of an Amended Complaint that was inclusive of the claim, but it did not ratify the ACC's decision in the first instance to sue Florida State.

For the rebuttal points -- I'll move on if the Court's --

THE COURT: Sure.

MR. KING: I think the most important thing that was said was Mr. Cooney said that the ESPN agreements are the most important contracts to the ACC. They've also alleged the Grant of Rights were necessary to those ESPN agreements under their -- under -- that's the whole premise of their case. And they say that, in Paragraph 127, what they're asking this Court to do in the original Complaint is enter a declaration by this Court that the Grant of Rights and amended Grant of Rights are valid and binding contracts supported by good and adequate consideration and that the

conference is and will remain the owner of those rights transferred by Florida State under the Grant of Rights through June 30, 2036. That's 20 years. They're worth hundreds of millions of dollars, their most important contracts. And you have to look, as their argument suggested, to the ESPN agreements in order to analyze this case and to make a decision. And those ESPN agreements are, by definition, material media rights agreements. And so I think the idea this lawsuit is somehow not material is not well founded, and I don't believe the Court should give any deference to the ACC's determination, or interpretation, of its constitution. The constitution was for the benefit of the members, and I think they've got it turned backwards.

So the only issue in the case is -- about that is what -- who -- Florida State's media rights. They're Florida State's media rights. The ACC is claiming they're theirs.

I think I would just touch briefly again, he said that we made a lot of reference to the ACC, this being their preferred forum. Obviously, your Honor, I've been in front of you a lot, we know we'll get a fairly officiated game here, but litigants do prefer to have suits in their home field.

THE COURT: I haven't taken offense by anybody wanting -- preferring Florida --

MR. KING: Yeah. And I think the race to the courthouse shows that the ACC wants to be in North Carolina, and -- for whatever strategic benefit they believe that may be. You know, I think what it comes down to, the last thing
12:03:49 is, you know, this Court, you can't get over the question of subject-matter jurisdiction. No vote was taken. This litigation was clearly material. It concerns material media rights that belong to Florida State. And so if you don't have subject-matter jurisdiction, obviously the original
12:04:05 Complaint is a nullity. It should be dismissed. If you're going to accept the ratification that did not the occur, at a minimum they wouldn't have standing until that vote on January 12th, until the filing of their Amended Complaint on January 17th.

12:04:19 THE COURT: Thank you, Mr. King. Did Mr. Cooney have any time left?

MS. SCHANTZ: He had one minute and twenty-eight seconds.

MR. COONEY: I apologize, I know I went over my
12:04:31 time. I thought you had given me extra time.

THE COURT: I think I did. And you have a minute and twenty-eight.

MS. SCHANTZ: Sorry, that was Mr. King that had a minute and twenty-eight.

12:04:40 THE COURT: Oh, Mr. King had a minute and

twenty-eight. I'm sorry. Mr. Cooney had used all of his time.

I'm going to ask Mr. Cooney, and I will give you a chance to respond to what he says, one of the arguments that Mr. King just made was the argument that what happened on January 17th, or whatever the day in January when the ACC board authorized the initiation of the -- or the filing of the First Amended Complaint, that that was not a ratification because it did not ratify the filing of the Complaint rather what it did was to approve the filing of a Complaint that contained the same claims that were in the initial Complaint. If you would comment on that.

MR. COONEY: Yeah. That's just not correct. You don't need to have -- I mean, he wants the magic words that somehow they've got to find that, well, you know, to the extent it was material litigation, we ratified the action.

What they did is, and very specifically, and I think the declaration is probably the best evidence of that, but what they -- what they ratified was the filing of the claims in the Amended Complaint, inclusive of the claims in the original Complaint. In other words, they're aware of the original Complaint, they considered those claims, they wanted those claims to continue as part of the filing of the Amended Complaint, they approved the filing of those claims as they had been expressed in the original Complaint, and

that's ratification. You don't need to use the magic word "ratification." It was an approval of those initial claims. And the only way you can approve those initial claims is by -- I mean, why are you approving them other than to say they can be filed and they were appropriate to be filed on behalf of the organization and we're filing them again. And I do have to say on that related matter, I guess, and perhaps I'm the one that caused this when I, you know, articulated a little more clearly with the differences along the spectrum of standing, so I get that, but Gao seems to me to be fairly clear, you know, because in Gao they not only authorize the filing of the Second Amended Counterclaims, the First Amended Counterclaims, and the Counterclaims themselves, I mean, they wrapped them all together, as he says in that second.

12:06:30 12:06:54 12:07:17

And what Judge Robinson said fairly clearly is, you know, once you ratify, it really doesn't make any difference what happened at the beginning. And, again, that's consistent with what the North Carolina Court of Appeals forecast in Willowmere when they said there's no standing, and we've not been presented with any evidence of ratification.

12:07:33

THE COURT: Thank you, Mr. Cooney. Mr. King, any response to that?

MR. KING: Yeah. I would just say, your Honor,

12:07:45

it's not magic words. The constitution requires a vote for the initiation of litigation. And so if you want to ratify that, you would have to have the vote as to whether the initiation of the litigation was proper.

12:07:59 If you look at Paragraph 10 of his affidavit, the word "initiation" is not in there. He says he presides over the meeting of the board of directors where they unanimously approved to file the Amended Complaint inclusive of the original claims for relief filed on December 1, 2023.

12:08:17 I would say the vote was we're in this mess now and we're okay with the next step, filing the Amended Complaint at best.

On Gao, I think Gao does not say that the standing relates back. It says the First Amended Counterclaims don't

12:08:34 matter anymore because we're here on the second, and so it doesn't even address it. It says I'm only going to find -- the argument against standing fails as to, quote, Sinova US's Second Amended Counterclaims. It doesn't mention any others.

12:08:50 Thank you, your Honor.

THE COURT: Thank you, Mr. King. Thank you to counsel for your arguments on that motion. I'm not going to rule from the bench on that motion. I don't know that anybody thought that I was. I'm not. I'll take that under

12:09:05 advisement and will endeavor to decide it as promptly as I

can, recognizing all of the circumstances surrounding this matter.

All right. I will turn now to hearing the ACC's two Motions to Seal. Who will be arguing those motions?

12:09:27 MR. COONEY: Ms. Stone.

THE COURT: All right. Mr. Cooney, I will hear from you. If there needs to be some rearranging of counsel --

MR. COONEY: Ms. Stone is going to be arguing it.

12:09:32 MS. STONE: I'm going to be arguing it, your Honor.

THE COURT: Oh, I'm sorry.

MR. COONEY: We're going to give you a break from me.

12:09:42 THE COURT: If we need to do any rearranging, let's do it now and get settled.

MS. STONE: Sarah Stone here on behalf of the Atlantic Coast Conference.

Ms. Schantz, I do have a brief deck, if you don't

12:10:27 mind.

We're here today on behalf of the conference's Amended Motion to Seal, as well as our Motion to Seal the Summary Exhibit. The parties, including the nonparty, ESPN, have also submitted extensive briefing regarding sealing in

12:10:45 this matter. This motion pertains to -- I'm going to

quickly walk the Court through the material subject to our Motion to Seal, but I want to start off by framing it as it is all narrowly related to information coming from the media agreements between the conference and ESPN.

12:11:06 We heard a lot in the prior motion about the Grant of Rights. The Grant of Rights is not under seal. It has been publicly filed.

There is also a claim in the ACC's Amended Complaint for breach of confidentiality. The

12:11:20 confidentiality provision, we obtained permission with ESPN, and that has been also publicly filed from the agreement. However, in our Complaint, in an effort to present the Court with a well-pleaded Complaint, to give the defendant, Florida State, notice of the information that we claim is

12:11:39 important to support our various claims, we have attempted to judiciously redact either in the Complaint itself or place under seal very narrow portions of the 2012 amendment to the ACC's 2010 agreement related to the Grant of Rights as well as the warranty provision from the 2016 amended and

12:12:05 restated multimedia agreement and the 2016 network agreement. So those are the key items at issue.

Again, just to run them through very quickly, because I always appreciate a checklist, it is ECF 2 and 2.35 and 6, which is the original Complaint, and the three

12:12:26 excerpts from the agreements between the ACC and ESPN, and

ECF 11, which is our Amended Complaint.

THE COURT: I was just going to say, I've got the PowerPoint up --

MS. STONE: Perfect. We will just walk through it and --

12:12:42

THE COURT: -- if you want to just scroll all those things, I will read them and --

MS. STONE: We will do it. And the nice thing is, is in ECF 11 and 2, those three are the same, so we -- these are not additional exhibits that we're looking for, as well as our summary chart that we submitted in connection with our reply in support of this Motion to Seal to attempt to make this request easier for the Court.

12:12:48

I want to just take a moment to talk about what we are not arguing about right now in our Motion to Seal. In the briefing in this Motion to Seal there has been a number of claims that have been raised by Florida State about the confidentiality provision, about whether or not these are public records, about whether or not these are trade secrets, and we posit that for purposes of the Motion to Seal under well-established precedent by the Business Court here, those are actually not the right questions before the Court now. Obviously the merits of our breach of confidentiality claim will be vetted out through the process of this Court. They have alleged that they believe these

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are public records in the state of Florida. We do not need to get into a detailed analysis of whether or not these are public records. I think it's significant to point that Florida State points to not a single occasion in which any of the media agreements that apply to the over -- I did a quick count -- 230 public universities in the NCAA Division I have ever been treated as a public record and released. We have done a similar -- we have looked. We have not been able to find a single occasion.

12:14:19 Looking specifically at the law in Florida -- Florida is home to three universities in what we refer to as the Power Five conferences, obviously Florida State of the ACC, University of Florida in the SEC, and University of Central Florida in the Big twelve -- we have not been able 12:14:36 to find a single instance, nor has Florida State been able to point to one, where their media agreements have ever been released as public records requests. The ACC has never been treated as a public institution in Florida.

Indeed, turning to the North Carolina law, 12:14:51 likewise there are no situations we've been able to find in which one of the member universities of the ACC has ever received and produced these media agreements.

Simply put, when you walk through the analysis, there are multiple universities subject to very similar 12:15:12 agreements between their athletic conference and their media

partner, and those simply are just not viewed as public records. And even if they were public records, we contend you would then have to jump through the analysis of whether or not they are trade secrets under either Florida or North Carolina law.

12:15:28

We have submitted, and ESPN will also present to you information regarding how these items are viewed by the parties, how they are protected, limited in scope, and, more significantly, the competitive harm that would be caused should these agreements be released, which we contend would meet the definition of trade secrets; however, we don't have to cross that bridge today.

12:15:44

THE COURT: And you're going to tell me -- because Florida State wants me to make those decisions.

MS. STONE: Yes.

12:15:55

THE COURT: Florida State says that they're subject to the public records laws, that the trade secrets exemption does not apply under either of those state statutes that we're operating under, and I think, you know, they feel like I do have an obligation to make a decision about whether or not the public records laws of these two states apply and whether or not the exemption applies.

12:16:08

You're telling me I don't need to decide, but you're not telling me yet why I don't have to decide, so I want you to go ahead and tell me that.

12:16:25

MS. STONE: Correct, correct. It's because the question before the Court here at this stage in this litigation where we're looking at the materials the ACC is seeking to seal is would the harm from disclosure be greater than the public interest. We are unable to find a situation in which simply because a party could argue in a context where a record is not found -- has not been subjected to a public records request, where a Court has refused to seal such information. The analysis is whether or not harm from releasing this information is greater than the public interest, and we contend we've submitted evidence, and ESPN, our media partner, and consignee of these agreements has also submitted similar information showing that the release of these provisions, which are limited to the historical financials, prospective financials, and some very limited provisions, material terms in the agreements, that release of those would cause competitive harm to both the conference as well as to ESPN as media partner.

THE COURT: All right. Well, as I understand Florida State's argument, it's -- they don't really engage with the idea of disclosure causing competitive harm, and ACC spends a lot of time briefing about -- as well as ESPN -- about how valuable these contracts are, how important their confidentiality is, why it would be devastating to each as the -- a broad disclosure was made as

far as State seeking -- that would be made here.

Florida State's argument, as I understand it, is more directed to the public records law, and it's, gosh, there may be some bad consequences if this happens, but that's not really our concern because we have an obligation under the Florida public records law, the North Carolina public records law, if those laws apply, we don't think the trade secret exceptions apply to prevent disclosure of this information, the chips will fall where they will, but that's beyond our control. Can you respond to that?

MS. STONE: Happily, your Honor. If in a hypothetical world we were sitting in Leon County, Florida, and if Florida State had received a public records request from a constituent of the State of Florida and had filed motions and somehow brought the ACC into the claim to argue that these contracts that Florida State complains of very loudly they do not have copies of, and they do not have copies of the contracts for the very reason that the ACC and ESPN take great efforts to protect the confidentiality of them, if we were in that world and if the ACC were brought into the litigation and if a judge found that somehow Florida State's membership in the ACC reached through and cast a potential shadow over the ACC making these records in its possession a public record, then perhaps we would be in that. But that's not the position we're in right now.

To put it simply, your Honor, Florida State is raising these objections because during their meeting on December 22nd, they willingly and knowingly disclosed material terms of the provisions. They also did so again in the Complaint they filed down in Florida. They are asserting this as a potential preemptive defense to our breach of confidentiality claim, and I would posit at this stage in the litigation a plaintiff should not have to go through the -- the analysis that would be appropriate for a preliminary injunction or appropriate at the stage of a motion for summary judgment to prove up why there is confidentiality or prove up why the ACC as a North Carolina unincorporated association does not take on the public mantle that Florida State University has at this stage.

12:20:33 THE COURT: All right.

MS. STONE: Again, I want to just -- there is no dispute these are obviously subject to confidentiality. Here's the confidentiality provision that we have filed, ECF 11, Exhibit 8, and it does say that we are permitted, ESPN and the ACC negotiated that the agreements could be released or could be provided to the conference institution provided that the conference institution shall agree to maintain the confidentiality of the agreement subject to the law applicable to such conference institution.

12:21:05 THE COURT: And that last phrase is the phrase

that Florida State sees as well?

MS. STONE: Correct. When Florida State came to Charlotte to review the contracts, they understood they needed to be maintained as confidential. If Florida State interpreted Florida law such that simply by laying eyes on the information meant it could no longer be confidential, they had an obligation to raise that at its time so the ACC would understand and could speak with its media partner, ESPN, and understand the potential consequences from having Florida State review the information. That is not what occurred.

In fact, in the email communication we submitted as Exhibit twelve to our Amended Complaint, when our general counsel was conversing with retained counsel for Florida State about viewing these agreements, Florida State's counsel acknowledged in discussing having access to copies of the Grant of Rights, since these are not the ESPN documents, contrasting the Grant of Rights from the ESPN documents and subject to the ESPN confidentiality provisions, she asked could she get a copy of the Grant of Rights documents.

And so if Florida State came to North Carolina, came to view these agreements with an understanding that they were confidential and they'd be able to keep them confidential, they should not now be able to take a contrary

position here in this court and say that, well, we think they're public records under the Florida law even though there's no public records request at issue and therefore they shouldn't be sealed.

12:22:41 Similar, during the board meeting on December 22nd, president McCullough again referenced that the contracts are hard to see, we have to go to the conference office when we view them, we can't make copies of them, yet nevertheless they then -- and, again, I don't want to argue 12:22:58 the merits of our breach of confidentiality claim, but they then disclosed the information.

So again, under the case law as the parties have set forth in its extensive briefing, we look here at what the harm is to the ACC and ESPN of releasing this 12:23:14 information at this time as compared to the public rights interest under the constitution.

We've presented to you the declaration from a former associate commissioner, Jeff Elliott, from 2012, right at the time these contracts were beginning, the 12:23:30 earlier versions of them were being executed, they have consistently been held to be confidential and proprietary business information that could harm the ACC's relationships with its television partners.

We see the same thing happening in the extensive 12:23:46 antitrust litigation involving the NCAA in which the

conferences as well as the various media partners across the country have been asked to produce their media agreements subject to various terms.

We see situations in which other conferences and other media partners -- here we have Pac-twelve, Big Ten, CBS, Fox, in addition to ABC and ESPN, are saying these are our commercially sensitive documents, they need to be protected. And in those cases the Courts entered into very unique, very stringent protective orders in which these network strictly confidential agreements were carved out.

Simply put, not agreeing to seal this information today based on our review would be the first time that these contracts or any similar contract had ever been treated as not confidential and proprietary business information.

We see it again in -- as they were heading into trial how the case was being handled. Furthermore, ESPN has submitted a detailed declaration from Nick Dawson reiterating this information, why they view this as their nonpublic information, with significant financial terms, looking at rights provisions, looking at termination provisions, distribution obligations.

Now, those aren't in the materials we're seeking to seal today, but they are evidence of why this information is viewed as so highly competitive.

And then what we're looking at today, again, is

really focused on, and as we submitted in our chart, which is also subject to be sealed, historic financial data, the prospective data, the material terms.

I anticipate you may hear some argument regarding the media interest in these agreements, and I think what's important to highlight is that in all of the media articles that talk about these agreements from any network, they're all speculative, it's "said" to be worth, "if" those figures are correct, "speaks on condition of anonymity," because the ACC and ESPN and every other conference and every other media provider recognize the proprietary nature.

And I would like to reserve the rest of my time.

THE COURT: All right. Thank you, Ms. Stone.

How much time does the ACC have left?

MS. SCHANTZ: Four minutes and eleven seconds, your Honor.

THE COURT: All right. ESPN?

MR. KORN: Thank you, your Honor. David Korn from Cravath, Swaine & Moore on behalf of ESPN, a nonparty to this action.

I've learned one thing this morning, and that is that your Honor has a lot of complicated questions before him and a lot of things to decide.

I will submit that this is not a hard question to decide and this is not one that should trouble you. This is

an easy question. This is a question of sealing.

The standard, as ACC has articulated, is is there going to be harm if your Honor enters an order regarding the unsealing of these documents. There's no dispute, I think, in this case that the answer is yes. If your Honor enters that order that says these documents have to come off the seal and the information becomes public, harm will be suffered as a result. That is the standard here.

Everything that you're going to hear going to the merits of the case, going to the substance, going to is it public record, is it trade secret, these are all fine, complicated questions that I'm happy to get into with your Honor. They're not for today, because I agree with the ACC, the question today is is there harm if tomorrow these go on the docket. The answer is yes. That is the inquiry.

I will take a few moments to just underscore how critical the business interests are of ESPN that are at stake.

ESPN's business is obtaining these types of agreements. That's what we do. We have a television network. We have employees. It's all built primarily on live sports. Live sports is built on these rights agreements. These rights agreements are negotiated on an ongoing basis. Every year, every couple of years, every rights folder, we are constantly renegotiating this deal and

that deal and this other deal.

The substance of those agreements, the terms of those agreements, are critical to every renegotiation. It's the monetary component, but there's lots of nonmonetary components, what the warranties are, what the representation are, what the promises are, what the agreements are. Every last piece of that long, complicated contract can potentially be important to the next negotiation. It matters to the people we're negotiating with, the other college conferences, professional sports leagues. They want to know what's in these contracts because it's going to impact what they're going to be able to get in their negotiations.

Likewise, our competitors, who we're all familiar with, who would be more than happy to take these rights away and take them for themselves. They would love to know the specific, precise financial terms of our contracts, and the nonfinancial terms, that they can then use to bargain to get better deals than what we might have offered in the past.

This is the reality of commerce as we know it. This is the industry. That's what we're all talking about here. The briefing is full of discussions about this is big money, this is a big business, this is all, you know, big boys and big girls playing hard in business. Well, that's what this is. These are commercially sensitive agreements

that if they go out there in the world help others compete against us and take our core business, and that's a real significant concern for my client.

And I think your Honor is right, so I won't dwell on it, I don't think we've heard from FSU any dispute that in the upstream market where you're going to have discussions between the other television networks, we're going to be harmed. In the downstream market where there's negotiations with the other rights holders, not the ACC, we're going to be harmed. No real dispute in the record that I've seen here, and I think that is dispositive.

As counsel for the ACC underscored, these are agreements that have been protected previously and significantly in litigation throughout this country. I would submit that your Honor would be an outlier if you ruled otherwise. Sometimes it's okay to be an outlier. This is not that case.

If the answer were these are public records, these are all publicly available, they should be out there for the world to see, a lot of lawyers and a lot of judges have been wasting their time on discovery disputes and sealing disputes in litigations and NDLs in California and all over the country.

These aren't public records. We know that because these are things that are sought tooth and nail in

discovery. If it were so easy to just go ahead and say, let me serve a public records request and get these, that would have been done a long time ago.

THE COURT: Have ESPN's agreements with any conferences ever been ordered to be disclosed in their entirety?

12:30:36

MR. KORN: Disclosed in discovery? Yes. But subject to protective orders that don't allow for public publication, my understanding is no. Certainly this agreement has not.

12:30:53

THE COURT: And have ESPN's agreements ever been determined to be public records by any state?

MR. KORN: Not to my knowledge, your Honor. And I haven't seen anything cited to the contrary by FSU.

12:31:06

THE COURT: All right. Anything else, Mr. Korn?

MR. KORN: Very briefly, I would just say these agreements are trade secrets. I think FSU's briefing talks about, well, these aren't trade secrets because there's some special sauce, you have to use magic words, you have to say,

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you know, this is -- I denote you a trade secret. That's not what the standard is. It's is this commercially reasonable, is it going to be commercial harm, and are there reasonable efforts that are taken to protect the information.

12:31:36

Here we've done that in spades. We've required

the ACC to ensure that these documents are kept confidential. We -- and the ACC then goes to great lengths to ensure this material is safeguarded. I think we've passed both of those tests with flying colors.

12:31:51 And I would just underscore, it really is a one-way ratchet here. If this were to be a disclosure, there's no, you know, unringing of the bell, which leads me to my last point, if you'll indulge me.

I think FSU's main point that I've heard them make

12:32:09 is that because we put this stuff out there to the world, we rang the bell and so everybody must ring it from here to eternity, and that is just -- frankly, puts us in an impossible position. That can't be right. It can't be the case that a bad act by someone else has then made it

12:32:29 impossible for us to protect the terms of our agreements.

THE COURT: Well, Florida State argues that's not their argument. What they do say is that by ESPN entering into a contract with the ACC which has a number of public institution members, including Florida State, they've

12:32:51 exposed themselves to the risk that they may have to disclose their confidential agreements pursuant to a public records request or a public records law. Respond to that.

MR. KORN: I think of this as the you shouldn't have trusted us argument because there are ample provisions

12:33:08 in the ESPN agreements that say this be kept confidential by

the ACC and the member institutions. If we weren't able to trust that, then what could we really do here?

And it's not just that was signed and then the agreement went out into the world and nobody's done anything to protect it. We've heard all day today about how lawyers for FSU had to go to the ACC's offices and abide by very strict confidentiality rules in doing so. And so it is not the case that we somehow, you know -- this is our risk of dealing with the FSUs of the world, you know that this is going to be out there in the world. That is absolutely not the case. And we know that's not the case because for years and years and years every other court to considered this issue has made sure this information has stayed safeguarded.

THE COURT: Thank you, Mr. Korn.

All right, Mr. Lam, it looks like you're up.

MR. LAM: It's my turn, your Honor.

Ms. Schantz, I have a presentation, too, please.

THE COURT: Mr. Lam, let me ask you a question out of the blocks on this. If I were to agree with Florida State's position and determine that these documents should be disclosed publicly because they're public records under either North Carolina or Florida law and do not qualify under the trade secret exemptions of those two statutes, would that moot the ACC's claim against Florida State for breach of confidentiality, their confidentiality obligation?

MR. LAM: I don't think so, your Honor. I was going to address -- we're not seeking a dispositive -- this is not a dispositive motion. Just by opposing this, we're not asking for dispositive relief.

12:35:06 If the ACC wishes to still maintain its claim that we breached some confidentiality agreement for some contract we weren't a party to and can prove damages, fine. We believe we've got defenses to that that we'll prevail on, but it does --

12:35:19 THE COURT: Part of those defenses would include that you were subject to the public records law --

MR. LAM: If you ruled the way you just forecasted, we think we would have a pretty good head start on our defense, but that's -- but we're not asking for --

12:35:32 we're not asking for a ruling on that claim here.

THE COURT: Then help me understand the line you're drawing, because, as I understood your arguments, it was that -- it was that these are public records that -- and that there's no protection for these documents because

12:35:53 they're public records. Wouldn't that be a necessary component of your defense to the ACC's claim for breach of confidentiality agreement?

MR. LAM: There is clearly overlap, your Honor. If you listen to the ACC and you -- I mean, they want you to

12:36:06 put blinders on and ignore the public records laws of seven

states in which nine public ACC institutions are located.

THE COURT: Well, I don't think they're telling me to ignore it. I think they're telling me that I need to reserve ruling on that until we have an adjudication on the merits concerning their breach of contract claim that's based on confidentiality.

12:36:26

MR. LAM: We're saying you have to consider that, though, because the only way to evaluate this, as Ms. Stone characterized it, the very limited and very narrow information that has been provided to the Court, we believe, our position is, it would be improper for the Court to seal something that would constitute or that does constitute a public record. And so we believe the Court has to evaluate that and has to look at that question in order to reach a determination on their relief.

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Now, the ACC -- I think they're trying to downplay this motion, this is -- your Honor, it's a formality, they do this all the time, they do this everywhere.

Well, they've got a burden to carry, and the burden requires them to show with specificity what, if any, information warrants to be sealed and kept secret from the public when our laws say that generally our courts are open and this is the property of the people, and so we submit you have to look at that.

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And if I might, then, just address -- because I'm

going to go into all that. But they talked a lot about harm. We didn't talk about harm. We heard about 30 minutes and we've seen four briefs about how these are textbook trade secrets, the public disclosure of which would cripple ESPN, essentially.

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Your Honor, to be clear, the agreements we're talking about are fourteen years and eight years old respectively. And in the today's media rights environment --

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THE COURT: The parties are still operating under those agreements.

MR. LAM: They are, but in --

THE COURT: I mean, the Coke formula was developed over a hundred years ago and it still retains its trade secret characteristic, right?

12:38:20

MR. LAM: We would submit Coke has done a better job with their reasonable efforts. In today's media rights environment, which even the ACC says is ever changing, we would say these agreements are not trade secrets. They are relics because in October 2022 ESPN reported on its own deal with the Big twelve that they were signing a six-year $2.28 billion extension increasing the value to $380 million starting in 2025.

12:38:35

And even in Clemson's lawsuit against the ACC filed on Tuesday, they note that in 2020 the SEC entered

12:39:02

into a ten-year deal that starts this year until 2034 worth 3 billion, the Big Ten has a seven-year deal reported to be $7 billion. And the point there is that these much more recent and current terms of media rights agreements, including one involving ESPN, not only dwarf the amounts that have already been publicly reported about the ESPN agreements with ACC, but they undermine, we would say, the arguments that we've just heard that declining to seal these would somehow put ESPN and the ACC at a competitive disadvantage.

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THE COURT: The ACC point is that these are unconfirmed numbers. You can look at what you've gone up on the screen now from the Clemson Complaint, and it's a reported estimated value of $3 billion and then the Big Ten's deal is reportedly worth more.

But what they are saying is that people in the press may report what they think they have determined through their investigative efforts as the value of the ACC's deals, the terms of their agreements, but by requiring that they be publicly disclosed, then there becomes confirmation of that information and that would be what would be harmful.

MR. LAM: To that point, we would disagree that an anonymity equals speculation. I think we all know how this works. Those reporters are not going down to the 7-Eleven

and asking, hey, Joe, what do you think that deal is worth? They are talking to a source who has provided the information on background or whatever it is. There's also never been anything refuting these reports.

12:40:44 The point is, though, the numbers are out there. The financial terms are out there. And so I think that goes into the calculus of, again, has the request to seal, and when you look at the First Amended Complaint that the ACC filed -- and, you know, the public can only see the redacted

12:41:04 version; your Honor can look at what they filed -- those words are generic, they are inconsistently applied at best, and so --

THE COURT: There are numbers.

MR. LAM: But in addition to numbers, there are

12:41:20 descriptions of amounts that even in other places in the Amended Complaint they are not sealed.

And so our point, among the points in opposing this, is it's -- the brush has been too -- it's been overbroad, it's been arbitrary, and it's been inconsistently

12:41:37 applied. And because of the burden, and I know Mr. Cooney, he didn't -- he doesn't like his burden, but they've got one here, and they've got a burden to specify what information -- and why that should be kept from the public, and we don't think that has been satisfied.

12:41:54 If I can move to the public record point, though,

because we finally, even though it wasn't mentioned in any of the four briefs that the ACC and ESPN filed, we finally got to talk about the magic ten words, and they're the ones highlighted up here, your Honor, and you keyed in on them, and we cannot ignore these because it is these words that make and lead to the conclusion that the agreements are public records. And it's not just -- and this is in both of the ESPN agreements. It's the same language. And the reason it matters is because that -- those ten words apply to these seven states that house nine public institutions that are members of the ACC. And so you have to give those words meaning, and the fact that that -- any attempt to explain why those words don't mean what they must mean in the four briefs is even more remarkable given the ACC's burden.

And so instead it seems they have just defaulted to a, you know: Just trust us, we were judicious in our redaction. We have only given you, your Honor, 13 out of 160 total pages of the ESPN agreements, but just take our word, those are the only ones that are relevant, the only ones you need to look at. And that was presented as almost, you know, we should get a pat on the back, we did the work for you.

But we have a very recent example of why that just-trust-us approach doesn't work because -- and why the

Court is unable to do the job you are required to do without the entire ESPN agreements and with the agreements under seal.

And we'll walk through this real quickly, because I think it -- it illustrates this very importantly. So in Paragraph 126 of their original Complaint, the ACC alleged the following as the reason that it had to file this lawsuit: It said, "Under the ESPN contracts, the conference is obligated to take all commercially reasonable actions to defend the Grant of Rights and the rights granted to ESPN under those contracts."

Then in its amended Complaint a few weeks later, after it took the alleged vote, the ACC said, "Being under an obligation to take all commercially reasonable measures," so it changes from actions to measures this time, "to protect those rights, the conference filed its Complaint."

But then in its sur-reply, just filed on Monday in response to our Motion to Dismiss, as purported justification for why it didn't get the two-thirds vote required by the constitution, which we already talked about, we got the declaration of James Ryan, the president of the University of Virginia, and he stated the following: Of course it's under the penalty of perjury because it's a declaration -- but he stated, "In addition, under the ESPN agreements unanimously approved by the conference in 2016,

the conference was obligated to take all commercially reasonable actions" -- back to actions -- "necessary to protect the media rights that were provided to ESPN. This contractual obligation and preexisting authorization, in combination with the limited nature of the lawsuit, led me to conclude we didn't need a vote."

12:45:20

Now, two days ago your Honor noticed, hey, the definition for commercially reasonable efforts from the ESPN agreements, it's not in the record, and so how do I know what that means? And the reason it wasn't in the record is because the ACC chose not to give it to you because that was part of the judicious decision about what to redact or seal.

12:45:37

And -- but when you read that definition -- and Mr. Cooney put it up earlier, I don't have a slide for it -- it is a far cry from the obligation for a preauthorization to file this lawsuit that the ACC has alleged and that Dr. Ryan has now declared.

12:45:55

And, first of all, the term in the ESPN agreements is "commercially reasonable efforts." So why did the ACC call them commercially reasonable actions in the first Complaint, or commercially reasonable measures in the Amended Complaint? Why did Dr. Ryan call it commercially reasonable actions in his declaration?

12:46:13

And if you look at Paragraphs 71 and 73 of the original Complaints -- that's ECF 2 and Exhibits 5 and 6

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thereto -- the phrase "commercially reasonable efforts," when used in the ESPN agreements, has nothing to do with the Grant of Rights as has been alleged in the Complaint and has been represented today.

12:46:51 Now, this also -- I would like to say more about what that warranty provision is, but, again, that has been placed under seal. But Mr. Cooney did allude to it, and he said -- he gave a general characterization that basically said we are obligated to use commercially reasonable efforts

12:47:09 to protect the infringement of the rights from the media agreements.

All I can say to you, your Honor, is please go read those provisions in the Exhibits 5 and 6 because without saying -- I will just say one word, and it was one

12:47:28 word that was omitted by Mr. Cooney, and it's exclusivity, okay? That is not what the case is about. It's not what the claims are that the ACC is seeking.

Now, the ACC obviously knew exactly what the ESPN agreement said, commercially reasonable efforts. So why

12:47:46 would it use, intentionally use, different words in its Complaints, Amended Complaint, declaration, to try to justify its -- the litigation to the Court? And why would the ACC have Dr. Ryan declare under penalty of perjury and then file with the court something that I believe we now

12:48:08 know by looking at it is not true? Because not only did the

ESPN agreements contain no obligation to sue about the Grant of Rights, let alone constitute a preauthorization to sue, but the definition explicitly says "Commercially reasonable efforts shall not require any party to incur any expense, including attorneys' fees."

12:48:30

And if the efforts -- if the efforts to do something under the ESPN agreements would require the ACC to even spend a dime, then that doesn't even trigger the provision.

12:48:44

THE COURT: How does that tie -- how does that tie to sealing?

MR. LAM: This is why it ties, because we wouldn't have known that if you hadn't of asked them for it two days ago. We had no idea. To how to evaluate -- how are we

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supposed to depend the case -- if we stay here, how do we defend the case when the allegations that are in the Complaint about this purported obligation don't exist? How can you --

THE COURT: I thought the ACC said that you would

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get access to those documents pursuant to an appropriate protective order if the case goes forward here in the course of litigation. I mean, that was in -- I think you had that in a note foot in your brief, but I know they had that in a footnote of their brief.

12:49:29

MR. LAM: But we need it now, and that was

illustrated by this point, because the Court --

THE COURT: But I mean, have you sought it other than through the public disclosure to the world, as opposed to, it would help us in doing X, Y, and Z, we would like to have access now, let's enter into a protective order? Has there been any kind of conversation along those lines?

MR. LAM: There was -- we had some dialogue, Mr. Cooney and I did earlier, but that did not advance any further, and -- but --

THE COURT: I guess my question is: You're going to -- the ACC has committed, assuming ESPN is along for the ride on this, that you're going to have access to these agreements in their entirety, so you're arguing about being subject to the ACC's interpretation of what a document says without the ability to see what that document actually says is maybe a current problem but it's not a problem that will persist as soon as you and the ACC work out a protective order. Am I missing something on that?

MR. LAM: Well, the only other part of that might be we can't waive the public records laws and -- and now I'm already running out of time here.

THE COURT: I mean, I'm not following why your problem in not being able to trust what the ACC says a document says translates into we need to have public disclosure of this document for the world as opposed to just

you and the ACC working out an agreement as to a protective order that would allow you to see the entirety of the document --

MR. LAM: Well, the point is the ACC --

12:51:13 THE COURT: -- according to the public records law.

MR. LAM: The ACC only gave your Honor 13 out of 160 pages, and part of our motion is that there is no subject-matter jurisdiction because it wasn't -- you only

12:51:28 asked for one definition out of 160 pages. What else is there that might allow you to consider the arguments that the parties have just made in the two hours earlier this morning?

So the point is that is -- it doesn't comply with

12:51:44 their burden to specify what in those -- they just said we're only going to give you -- give you part of it.

So I'm mindful of my time. Let me just try to address some of the other points. One is whether the Court were to believe that Florida State was a party to the ESPN

12:52:12 agreements or not, the conclusion is the same. ESPN says we and the other members are bound by this agreement, okay? Well, to be bound by a contract, you have to be a party to the contract. And so if we are deemed a party to the contract, then under case law such as Volume Services,

12:52:30 Wilmington Star-News, then the contract is a public record

because that's a cost of doing business with the government. The conclusion is the same even if we're not a party, and the relevant authority there is the NCAA versus Associated Press case because --

12:52:47 THE COURT: We're definitely going to be arguing about that one, on the breach of confidentiality contract, right? I mean, that's squarely in the argument that's -- the merits argument on that claim that the ACC has brought.

MR. LAM: Well, then that's a spoiler alert, but 12:53:03 we've got -- that case is remarkably on point because what it says is even if you -- and in that case it was Florida State lawyers -- even if you sign a confidentiality agreement, you cannot agree to make private what is public, and that is precisely the situation here, which then leads 12:53:21 to the only other question of whether do they somehow qualify for the trade secrets exemption.

In addition to whether it's generally known, we talked about that a little bit. But then you look at the reasonable efforts to maintain secrecy. We heard a lot 12:53:36 about you've got to come to the headquarters and, you know, peek behind the curtain and do all this stuff. We would submit those are not reasonable efforts to maintain secrecy. They are perhaps efforts to avoid a public records request. And the fact that nobody's found one or that -- they've also 12:53:53 not found an example one where one was denied on the basis

of that.

So maybe this is a case of first impression. It's the first time that these agreements have been litigated over between a conference and a member, and so that's why some of these issues have not yet come to a head.

THE COURT: I guess that raises a starting point that Ms. Stone has, which this really isn't the proper procedural posture for the Court to be deciding an issue of first impression concerning the public records law of either Florida or North Carolina. We're in the context of a Motion to Seal. She articulated that if we're going to really tee this issue up, it needs to be one that flows from the public records law, a public records request is made, you know, resistance is based on X, and then the parties litigate that.

What do you say about the procedural argument she makes?

MR. LAM: One, this is not a public records request. The point is if the documents --

THE COURT: That's the point, she says that the proper forum for a decision on public records --

MR. LAM: If that was the answer and we just ignored that and parked it because there hadn't been a public records request, then arguably there is something being sealed, which we would submit shouldn't be sealed, and

so --

THE COURT: They argue -- they argue -- the ACC argues that Florida State is -- this is only a recently found position that Florida State has, you know -- they've been aware of these agreements, they've reviewed these agreements, but they never have made any effort trying to raise the flag and say this is a public record and we need to -- you know, they need to be disclosed, it's only in the context of this litigation.

12:55:36 MR. LAM: We don't go around sua sponte just throwing you, you know, you have a public record, you have a public record. This is the first time it's come to a head. This is the first time it's come to a head, and so we think that's why the posture is different.

12:55:48 It's also different from those other cases in California and North Carolina that were cited. Those were third-party subpoenas where nobody was contesting whether they were trade secrets. Here we are obviously challenging that.

12:56:02 And let me just make one point on the reasonable efforts. It is -- today, 90 days have passed since Florida State publicly filed a Complaint in Florida that is supposedly, if you listen to them, littered with trade secrets, and they've done nothing, no single step by either 12:56:18 the ACC or ESPN who says we monitor litigation around the

country and we intervene when we need to, and nobody has done a thing to try to do that.

So whether it's the toothpaste out of the tube or the cat out of the bag or the bell having been rung, the Linx Legal case from this court tells us that courts do not make private what has thus become public. And so we think that also must be factored into the lack of reasonable efforts.

If the Court were to say, you know, what? I'm going to seal these now at this stage of the litigation, then we just ask that you order the ACC give you the entire documents so that then the proper analysis can be done to walk provision by provision to make sure that, in fact, the sealing is narrowly tailored, which we would submit it is not, and particularly in the First Amended Complaint it is not.

To discharge that duty requires that level of analysis. Even the courts in California have taken that provision-by-provision analysis. They don't just accept we're just going to throw a blanket over this entire thing. And that -- obviously it would be, we think, improper to seal the excerpts from the Florida Amended Complaint that remain publicly filed.

Thank you, your Honor.

12:56:36 12:56:52 12:57:11 12:57:25 12:57:41

THE COURT: All right. And, Mr. Lam, also in your

brief you said that you think that I should defer a ruling on this Motion to Seal, or the Motions to Seal, pending my decision on the Motion to Dismiss?

MR. LAM: I would like to thank you for reminding me that I wanted to put that placeholder in there. Yes, because we contend the Court lacks subject-matter jurisdiction for all the reasons discussed this morning, we think it would be appropriate to defer a ruling on this pending a decision on that.

12:57:56

12:58:08

THE COURT: Thank you, Mr. Lam.

All right. Ms. Stone, I think you have four minutes and eleven seconds.

MS. STONE: Four minutes and eleven seconds, your Honor, a fair amount of ground to cover, but I will try to do so quickly.

12:58:16

THE COURT: Why don't you address first Mr. Lam's last point, which is that the Florida -- the Florida lawsuit has got a lot of the same information on file and the ACC and ESPN have not done anything to try to seal it.

12:58:35

MS. STONE: This feels a bit like the arsonist who's complaining that we took too long to call the fire department.

Florida State made a determination to disclose confidential information during their public meeting in their original Complaint after we put them on notice through

12:58:50

our breach of confidentiality allegation in this case in our Amended Complaint, and then they double downed on it in their Amended Complaint.

Frankly, your Honor, we have -- in trying to --

12:59:06 THE COURT: But you're seeking to seal allegations -- descriptions -- allegations of descriptions of documents in your Complaint here.

MS. STONE: Correct.

THE COURT: There apparently is actual disclosure

12:59:16 of information there. Why have you not moved to seal it?

MS. STONE: Frankly, your Honor, like I said, we cannot unring the bell in Florida. We believe that going into the Florida court and highlighting for everyone the allegations in their Complaint that we contend are the

12:59:33 proprietary information, and that could be harmful, would likely, on balance, do more harm than good for the conference.

THE COURT: It would provide confirmation?

MS. STONE: A confirmation and really highlight.

12:59:46 As you said, most of what we see the media is speculation, it's allegations. And so we believe that trying to go down there and to really kind of highlight it and submit to the Court, that could potentially cause more harm.

We have an obligation to protect the

13:00:01 confidentiality of these agreements. We are taking every

appropriate step in this court to do so.

THE COURT: Why would I seal the allegations in the Florida -- that is, the twelve pages of allegations in the Florida litigation that are public there but you want sealed here? Is really the goal there to make the effort so that you can resist any kind of contention that you haven't taken reasonable efforts but that -- what would be the reason for me to seal material that's going to be public, or is public and has been public, since December?

13:00:20

13:00:37

MS. STONE: Certainly. Well, so the specific pages that we have filed with this court as evidence to support our breach of confidentiality claim, those specific pages are not broadly known, right? So the public knows that there are certain pages within the Florida State's Florida Complaint that we contend contain our confidential information. We have not highlighted what those are. However, we are seeking to seal those because we filed them as support of allegations for our Complaint. And so we believe it's appropriate --

13:00:52

13:01:05

THE COURT: So it would be in the same vein of if you move down there, to seal those twelve pages you would be confirming to the world that those would be the twelve pages that contain accurate information, if you move to seal them here and you -- all that's under seal so the twelve pages are not disclosed to the public?

13:01:20

MS. STONE: Correct.

THE COURT: All right.

MS. STONE: And so we're just making an attempt -- you know, we are trying to plead a well-pled Amended Complaint highlighting the breach of confidentiality that Florida State undertook during their December 22nd Board meeting and subsequent Florida court filing, in order to support that claim, we excerpted out some of the most significant violations there.

13:01:39 And I'm sorry, Ms. Schantz, that was --

MS. SCHANTZ: One minute.

MS. STONE: Thank you.

Just to hit on a couple of points, this Court all the time in breach of employment agreement and trade secret 13:01:51 cases at this stage is dealing with a situation in which the plaintiff believes its information is confidential; the defendant does not.

In those contexts it is appropriate to seal because, again, we're looking at the balancing test of harm 13:02:04 versus the public interest.

Regarding the information you have before you in this court, we have read numerous opinions from this Court that ask us not to submit an entire contract if we don't need to submit an entire contract, and those are what our 13:02:18 efforts were, your Honor, is to simply submit the provisions

as they relate directly to our allegations in the Amended Complaint.

A lot of effort is spent looking at sort of the totality of the dollars. We say it's more than the totality of the dollars. It's how those dollars are calculated. That's the information contained in the Complaint, are the specific generators of the dollars, not so much this aggregated big picture number.

13:02:28

And I believe I'm out of time, your Honor. Thank you.

13:02:43

THE COURT: Thank you, Ms. Stone.

Mr. Korn?

MR. KORN: Thank you, your Honor. I don't have much to add, maybe just to address the last point, which is why hasn't ESPN gone down to Leon County and done something down there.

13:02:49

I will tell you what we did do, which is my partner and I emailed Mr. Ashburn the day the Complaint was filed. We said, hold on, now we've got some real problems here. I frankly thought it was a mistake. Mistakes happen. We wanted to correct it. This is the first time I had ever heard from Mr. Ashburn before until today. We never got a response to that. We never heard anything. We never heard, nope, this isn't going to be a public record. Radio silence.

13:03:02

13:03:14

So the question we're put to is are we going to go have a hearing in Tallahassee with cameras in the courtroom, big public presentations of all the nonsealed Complaints and have a big fight about something where their own PR, 13:03:32 apparently -- I've learned today -- their own PR office put up the Complaint in full form the day the Complaint was filed, and it's been out there on the Internet ever since.

So there's -- if you're talking about what's commercially reasonable effort for us to do to protect our 13:03:41 trade secrets, which these are, it's not going down there and having a big spectacle in a public court with these documents already in the public. It's doing the best we can to preserve what we already have, and that's making sure that we make the arguments here and everywhere else we can 13:03:57 to protect this information.

Happy to address any other questions your Honor has.

THE COURT: Thank you, Mr. Korn.

Mr. Lam? How much time does Mr. Lam have?

13:04:05 MS. SCHANTZ: He has used his time.

THE COURT: Mr. Lam, I'm going to give you 90 seconds, but you don't have to take them. You would be the first lawyer I know that hasn't taken time --

MR. LAM: I'm going to exercise my only 13:04:22 commercially reasonable discretion and yield the time back

to the Court.

THE COURT: Thank you, Mr. Lam. That will conclude the argument on the two ACC motions for sealing. I will not render a decision on those either. I will take those under advisement.

13:04:39

And we will now move straight on in to our Case Management Conference. You all have asked it to be transcribed, so we will continue to be on the record, which is fine.

13:04:57

Essentially what you all have said is, Judge, let's really defer the Case Management Conference process until you have decided the Motion to Dismiss or, in the alternative, to stay. And I'm fine with that. I think that makes good sense. Obviously when the subject-matter

13:05:20

jurisdiction is challenged, it would potentially be wasted effort for us to wrangle over a case management schedule when I may not have jurisdiction to enter the order. So I'm fine with that.

Is there -- I've got a few questions. Well, I've

13:05:45

got a lot of questions. I do think I'm going to enter an order that's sort of -- if you've seen one of my prior case management orders, it provides some information about ground rules, who's who, that kind of thing. It's not going to set up any kind of schedule. It's not going to be a binding

13:06:06

thing, more of an advisory-type thing. I think I will issue

an interim case management order.

That order will reflect a few things. One will be whether or not you all will have a filing deadline under our rules, which is 5:00 o'clock p.m. on the day when something is due, or would you rather have that be 11:59 p.m., which lawyers often like to their staff's dismay. But if you want to have an 11:59 p.m. filing deadline, I don't know what may be filed before I enter a decision, there may be nothing, there may be something, but is there -- is there any view about that?

13:06:21

13:06:46

MR. COONEY: I believe we talked about that when we did the initial case management report. I do not like 11:59. Mistakes get made.

THE COURT: The older you get.

13:06:58

MR. COONEY: Yes. And Lord knows I started from a really high base anyway. So we are content with 5:00 p.m.

THE COURT: Is that okay with you?

MR. KING: Yes, your Honor.

THE COURT: Early mornings, then. Anything that any of the parties want to raise with me now? You all estimated 15 to 30 minutes. I thought I would give you the benefit of the doubt and listen to you. So anything from the plaintiff?

13:07:18

MR. COONEY: Nothing, your Honor. We estimated 15 to 30 minutes because we also know how active your Honor can

13:07:35

be on these conferences, and we wanted to make sure there was plenty of time in case you had things you wanted to tell us.

THE COURT: All right. Mr. Lam?

13:07:59 MR. LAM: I think we're in agreement we can dispense with the estimate of time.

THE COURT: All right. I guess -- do any parties anticipate making any motions before I decide the Motion to Dismiss?

13:08:19 MR. COONEY: We don't anticipate any motions, but -- I never say never, but it's certainly not on our radar at this point.

THE COURT: All right. Just trying to get a handle on whether I needed to be aware that something might 13:08:32 be in my inbox and if we need to set a briefing schedule or something of that nature.

Okay. Well, I think -- I don't think there really is -- well, let me ask this, I suppose: I assume y'all have not engaged in discovery to date, is that correct?

13:08:54 MR. KING: Correct.

MR. COONEY: Correct.

THE COURT: Do you want me to enter a stay of discovery pending my ruling, or are you all comfortable on a handshake that you're not going to engage in any discovery?

13:09:06 MR. COONEY: I'm comfortable with a handshake. I

don't know if they trust me after today.

MR. KING: That's fine with us, your Honor.

THE COURT: All right. Then I won't enter an order. It's my expectation, then, that you all will honor your handshake and you won't engage in discovery.

13:09:18

It is my intention to issue a written order deciding the Motion to Dismiss as promptly as I can. I anticipate that that will be before April 9th, which is when I know the Florida hearing is set. I will endeavor to do that. I believe I will be able to do that. So that's my intention, is to enter a written ruling prior to April 9. I will not commit to having the Motion to Seal filed by then, although I may. I think the Motion to Dismiss or Motion to Stay is of a more immediate import.

13:09:46

13:10:13

Anything else we need to discuss? I will go with the defendants first.

MR. KING: Nothing from the defendant, your Honor. Thank you.

THE COURT: From the ACC?

13:10:24

MR. COONEY: Nothing from the plaintiff, your Honor.

THE COURT: What about ESPN?

MR. KORN: No, your Honor.

THE COURT: Thank you very much. I appreciate everybody's good work today. These were enlightening

13:10:29

arguments. I feel like you've all given me much to think about, very well presented.

Deputy Robeson, we will be adjourning sine die.

(Court adjourned sine die at 1:11 p.m.)

CERTIFICATE

STATE OF NORTH CAROLINA

COUNTY OF MECKLENBURG

I, Joyce K. Huseby, the officer before whom the foregoing proceeding was taken, do hereby certify that said hearing, pages 1 through 148 inclusive, is a true, correct, and verbatim transcript of said proceedings.

I further certify that I am neither counsel for, related to, nor employed by any of the parties to the action in which this proceeding was heard; and further, that I am not a relative or employee of any attorney or counsel employed by the parties thereto, and am not financially or otherwise interested in the outcome of the action.

This 25th of March, 2024.

_____
Joyce K. Huseby, CRR-RMR
Official Court Reporter
26th Judicial District

EXHIBIT G

STATE OF NORTH CAROLINA
In The General Court Of Justice
Mecklenburg County

CERTIFICATE OF TRUE COPY

OFFICE OF THE CLERK OF THE SUPERIOR COURT

As a Clerk of the Superior Court of this County, State of North Carolina, I certify that the attached copies of the documents described below are true and accurate copies of the originals now on file in this office.

Number And Description Of Attached Documents:

ATLANTIC COAST CONFERENCE,

V.

BOARD OF TRUSTEES OF FLORIDA STATE UNIVERSITY,

23CV040918-590

ORDER AND OPINION ON DEFENDANT'S MOTION TO DISMISS OR, IN THE ALTERNATIVE, STAY THE ACTION

Witness my hand and the seal of the Superior Court

Date
05/06/2024

Clerk Of Superior Court
ELISA CHINN-GARY

Name Of Undersigned Clerk (type or print)
Jamie Hawkins

Signature
Jamie Hawkins

☒ *Deputy CSC* ☐ *Assistant CSC* ☐ *Clerk Of Superior Court*

AOC-G-101, Rev. 3/19

STATE OF NORTH CAROLINA

MECKLENBURG COUNTY

ATLANTIC COAST CONFERENCE,

Plaintiff,

v.

BOARD OF TRUSTEES OF FLORIDA STATE UNIVERSITY,

Defendant.

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

ORDER AND OPINION ON DEFENDANT'S MOTION TO DISMISS OR, IN THE ALTERNATIVE, STAY THE ACTION

1. Plaintiff Atlantic Coast Conference (the "ACC" or the "Conference") initiated this litigation late on the afternoon of 21 December 2023 seeking a judicial determination that two media rights agreements between the ACC and its members are valid and enforceable. The ACC argues that it did so only when it became a practical certainty that Defendant Board of Trustees of Florida State University ("FSU" or the "FSU Board") would file a lawsuit the following day to challenge the enforceability of those agreements, which, by their terms, prohibited the FSU Board from seeking such relief. As the ACC expected, the FSU Board filed suit against the ACC in Florida the next day, allegedly breaching the agreements.

2. This matter is now before the Court upon the FSU Board's Motion to Dismiss (the "Motion to Dismiss") or, in the Alternative, Stay the Action (the "Motion to Stay"; together, the "Motions"), filed on 7 February 2024 in the above-captioned case.[1]

[1] (Def.'s Mot. Dismiss or, in the Alt., Stay Action [hereinafter "Def.'s Mots."], ECF No. 19.)

STATE OF NORTH CAROLINA

MECKLENBURG COUNTY

ATLANTIC COAST CONFERENCE,

Plaintiff,

v.

BOARD OF TRUSTEES OF FLORIDA STATE UNIVERSITY,

Defendant.

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

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[1] (Def.'s Mot. Dismiss or, in the Alt., Stay Action [hereinafter "Def.'s Mots."], ECF No. 19.)

3. Having considered the Motions, the parties' briefs in support of and in opposition to the Motions, the Complaint for Declaratory Judgment (the "Complaint")[2] and the First Amended Complaint (the "FAC"),[3] the appropriate evidence of record on the FSU Board's Motion to Dismiss pursuant to Rules 12(b)(1) and 12(b)(2) of the North Carolina Rules of Civil Procedure (the "Rule(s)"), and the arguments of counsel at the hearing on the Motions, the Court, in the exercise of its discretion and for the reasons set forth below, hereby **GRANTS in part** and **DENIES in part** the Motion to Dismiss and **DENIES** the Motion to Stay.

Womble Bond Dickinson (US) LLP, by James P. Cooney, III, Sarah Motley Stone, and Patrick Grayson Spaugh, and Lawson Huck Gonzalez, PLLC, by Charles Alan Lawson, for Plaintiff Atlantic Coast Conference.

Bradley Arant Boult Cummings LLP, by Christopher C. Lam, C. Bailey King, Jr., Hanna E. Eickmeier, and Brian M. Rowlson, and Greenberg Traurig, P.A., by David C. Ashburn, John K. Londot, and Peter G. Rush, for Defendant Board of Trustees of Florida State University.

Bledsoe, Chief Judge.

I.

FACTUAL AND PROCEDURAL BACKGROUND

4. The Court does not make findings of fact on the Motions. Rather, the Court recites the allegations asserted and documents referenced in the Complaint and FAC that are relevant to the Court's determination of the Motions.

5. The ACC is a North Carolina unincorporated nonprofit association created under Chapter 59B of the North Carolina General Statutes to "enrich and balance

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[2] (Compl. Declaratory J. [hereinafter "Compl."], ECF Nos. 2 (sealed), 3 (public redacted).)

[3] (First Am. Compl. [hereinafter "FAC"], ECF Nos. 11 (sealed), 12 (public redacted).)

the athletic and educational experiences of student-athletes at its member institutions[,] to enhance athletic and academic integrity among its members, to provide leadership, and to do this in a spirit of fairness to all."[4] The ACC currently has fifteen members (each a "Member" or "Member Institution"; collectively, the "Members" or "Member Institutions")[5] and is governed by a Board of Directors. The "most senior executive officer of [each] Member[ ]" serves as a Director on the ACC Board,[6] and "each Director shall have the right to take any action or any vote on behalf of the Member it represents[.]"[7] FSU has been a Member of the ACC since 1991.[8]

6. On 8 July 2010, the ACC entered into a Multi-Media Agreement (the "2010 Multi-Media Agreement") with ESPN, Inc. and ESPN Enterprises, Inc. (together, "ESPN"), granting ESPN exclusive distribution rights to certain ACC Member

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[4] (FAC ¶¶ 1, 38 (quoting FAC Ex. 1 § 1.2.1 [hereinafter "ACC Const."], ECF Nos. 11 (sealed), 12.1 (public unredacted)).) Exhibits 1–9 to the Complaint were refiled as Exhibits 1–11 to the FAC. (Exhibit 5 to the Complaint was split between Exhibits 5 and 8 to the FAC; Exhibit 6 to the Complaint was split between Exhibits 6 and 9 to the FAC.) For ease of reference, all citations in this opinion will be to the exhibits to the FAC.

[5] (*See* FAC ¶ 1.) The current ACC Members, with their year of admission to the Conference, are: Clemson University (1953), Duke University (1953), the University of North Carolina at Chapel Hill (1953), North Carolina State University (1953), the University of Virginia (1953), Wake Forest University (1953), the Georgia Institute of Technology (1978), Florida State University (1991), the University of Miami (2004), Virginia Polytechnic Institute and State University (2004), Boston College (2005), the University of Notre Dame (excluding football and ice hockey) (2013), the University of Pittsburgh (2013), Syracuse University (2013), and the University of Louisville (2014). (*See* FAC ¶¶ 32–36.)

[6] (ACC Const. § 1.5.1.2; *see* FAC ¶¶ 1, 40.)

[7] (ACC Const. § 1.5.1.1; *see* FAC ¶¶ 1, 40.)

[8] (*See* FAC ¶¶ 8, 36.)

Institution sporting events in exchange for specified payments.[9] The ACC Board of Directors unanimously approved this agreement.[10]

7. In 2012, "collegiate athletic conferences began to experience significant instability and realignment[.]"[11] The ACC was no exception. Late that year, the University of Maryland announced its withdrawal from the ACC. Shortly thereafter, the ACC elected to add four new Member Institutions.[12] During this same period, the ACC Board voted to significantly increase the amount a Member must pay if it chose to leave the Conference "to more appropriately compensate the Conference for some of the potential losses[ ]" associated with the Member's withdrawal.[13] It was against this backdrop in 2013 that the ACC and ESPN agreed to an extension of the 2010 Multi-Media Agreement through 2027.[14]

8. "[I]n order to secure a long-term media rights agreement and thus ensure the payment of predictable sums over time," the current and incoming ACC Member Institutions, including FSU, entered into an Atlantic Coast Conference Grant of

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[9] (*See* FAC ¶¶ 13 n.2, 42–43.)

[10] (*See* FAC ¶ 42.)

[11] (FAC ¶ 55.)

[12] (*See* FAC ¶ 54.) The four new Members were the University of Notre Dame (excluding football and ice hockey), the University of Pittsburgh, Syracuse University, and the University of Louisville.

[13] (FAC ¶ 48; *see* FAC ¶¶ 47, 49–52.)

[14] (*See* FAC ¶¶ 44, 54.)

Rights Agreement (the "Grant of Rights") with the ACC in April 2013.[15] Under the Grant of Rights,

> each of the Member Institutions is required to, and desires to, irrevocably grant to the Conference, and the Conference desires to accept from each of the Member Institutions, those rights granted herein[:]
>
> . . . .
>
> Grant of Rights. Each of the Member Institutions hereby (a) irrevocably and exclusively grants to the Conference during the Term . . . all rights (the "Rights") necessary for the Conference to perform the contractual obligations of the Conference expressly set forth in the ESPN Agreement, regardless of whether such Member Institution remains a member of the Conference during the entirety of the Term[.]
>
> . . . .
>
> Acknowledgements, Representations, Warranties, and Covenants. Each of the Member Institutions acknowledges that the grant of Rights during the entire Term is irrevocable and effective until the end of the Term regardless of whether the Member Institution withdraws from the Conference during the Term or otherwise ceases to participate as a member of the Conference in accordance with the Conference's Constitution and Bylaws. . . . Each of the Member Institutions covenants and agrees that . . . it will not take any action, or permit any action to be taken by others subject to its control, including licensees, or fail to take any action, that would affect the validity and enforcement of the Rights granted to the Conference under this Agreement.[16]

9. The ACC negotiated a Second Amendment to the 2010 Multi-Media Agreement in 2014, incorporating the ACC's new Members and increasing the fees paid to the Conference, which were then distributed to the Member Institutions,

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[15] (FAC ¶ 56; *see* FAC ¶¶ 57, 66–67, 69; FAC Ex. 2 [hereinafter "Grant of Rights"], ECF Nos. 11 (sealed), 12.2 (public unredacted).)

[16] (Grant of Rights 1, ¶¶ 1, 6; *see* FAC ¶¶ 61–64.)

including FSU.[17] In 2016, the ACC "sought to generate additional revenue for its Members through a network partnership with ESPN[ ]" that would "establish the ACC Network, broadcast more ACC events, and share in the revenues of this new network."[18] To this end, the ACC and ESPN negotiated two new agreements in 2016: an Amended and Restated ACC-ESPN Multi-Media Agreement and an ACC-ESPN Network Agreement (together, the "ESPN Agreements").[19]

10. ESPN, however, conditioned its participation in the ESPN Agreements on each Member Institution's agreeing to extend the term of the Grant of Rights.[20] After numerous Board and other meetings, the ACC Members, including FSU, executed a 2016 Amendment to ACC Grant of Rights Agreement with the ACC (the "Amended Grant of Rights"; together with the Grant of Rights, the "Grant of Rights Agreements") on 18 July 2016 that, according to the ACC, extended the term from 30 June 2027 to 30 June 2036.[21] The ESPN Agreements were executed a few days later.[22] Both ESPN Agreements "stipulate that their terms and conditions cannot be

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[17] (*See* FAC ¶¶ 70–73; FAC Ex. 3, ECF Nos. 11 (sealed), 12.3 (sealed).)

[18] (FAC ¶ 77.)

[19] (FAC ¶¶ 78–82; *see* FAC Ex. 5 [hereinafter "2016 Multi-Media Agreement"], ECF Nos. 11 (sealed), 12.5 (sealed); FAC Ex. 6 [hereinafter "ACC Network Agreement"], ECF Nos. 11 (sealed), 12.6 (sealed).)

[20] (*See* FAC ¶ 84; FAC Ex. 7 at 1 [hereinafter "Am. Grant of Rights"], ECF Nos. 11 (sealed), 12.7 (public unredacted).)

[21] (*See* FAC ¶¶ 83, 87, 91–105; Am. Grant of Rights ¶ 2.)

[22] (FAC ¶ 78; *see* 2016 Multi-Media Agreement 1; ACC Network Agreement 1.)

disclosed to the public and impose a confidentiality obligation on the Conference."[23] The ACC was permitted to disclose the ESPN Agreements to its Member Institutions, "provided that each [Member] Institution shall agree to maintain the confidentiality" of the agreements.[24] To maintain the confidentiality of the ESPN Agreements, the ACC allowed its Members to view the agreements only at the Conference's North Carolina headquarters and conditioned access on the Member's promise to maintain the confidentiality of the agreements.[25]

11. Although FSU's "distributions from the ACC more than doubled" since it entered into the Grant of Rights,[26] in early 2023, the FSU Board "began to advocate for more money for the university through unequal sharing of revenue[,]" contending that FSU's " 'brand' entitled it to more revenue."[27] In response, in May 2023, the ACC "endorsed the concept of distributing a larger share of post-season revenues to the Members that generated those revenues[.]"[28] But FSU continued to push for "an

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[23] (FAC ¶ 106; *see* FAC Ex. 8 ¶ 25.11 [hereinafter "2016 Multi-Media Agreement Confidentiality Provision"], ECF Nos. 11 (sealed), 12.8 (public unredacted); FAC Ex. 9 ¶ 18.11 [hereinafter "ACC Network Agreement Confidentiality Provision"], ECF Nos. 11 (sealed), 12.9 (public unredacted).)

[24] (FAC ¶ 108 (quoting 2016 Multi-Media Agreement Confidentiality Provision ¶ 25.11; ACC Network Agreement Confidentiality Provision ¶ 18.11).)

[25] (*See* FAC ¶¶ 138–40, 161–62.)

[26] (FAC ¶ 111.)

[27] (FAC ¶ 120; *see* FAC ¶¶ 117–19, 120–21.)

[28] (FAC ¶ 122.)

unequal share of all Conference revenue,"[29] and the FSU Board discussed withdrawing from the ACC at a 2 August 2023 Board meeting.[30]

12. Events came to a head on 21 December 2023, when the FSU Board notified the public that it would hold an emergency meeting the following day.[31] The ACC alleges that, "[w]ith the knowledge of [the FSU Board]'s clear intention to breach the Grant of Rights and Amended Grant of Rights[ ]" by filing "a preemptive lawsuit against the ACC in Leon County, Florida,"[32] the ACC filed its original Complaint under seal in Mecklenburg County Superior Court later that day, seeking a declaration that the Grant of Rights Agreements are valid and enforceable contracts and a declaration that the FSU Board is estopped from challenging or has waived any right to challenge the Grant of Rights Agreements by accepting the benefits thereunder.[33]

13. According to the ACC, the FSU Board Chair indicated at the 22 December 2023 Board meeting that (i) "each of the [FSU] Board Members had been privy to 'individual briefings' over the course of several months[,]"[34] (ii) "he had spoken individually with all [FSU] Board Members for the purpose of securing the necessary

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[29] (FAC ¶ 124 (emphasis omitted).)

[30] (*See* FAC ¶¶ 129–32.)

[31] (*See* FAC ¶ 143.)

[32] (FAC ¶¶ 148–49.)

[33] (Compl. ¶¶ 116–46.)

[34] (FAC ¶ 154.)

votes to proceed to litigation[,]"[35] and (iii) "a Complaint to be filed by [the FSU Board] had been transmitted to all [FSU Board] Members several days before."[36] At the end of the meeting, the FSU Board authorized the filing of the Florida complaint, and it was filed publicly in the Circuit Court of the Second Judicial Circuit in and for Leon County, Florida later that same day (the "Florida Action").[37]

14. On 17 January 2024, the ACC filed its FAC, alleging damages and asserting claims for monetary relief against the FSU Board for breach of the Grant of Rights Agreements, breach of a contractual obligation to protect confidential information, breach of fiduciary duty, and breach of the implied duty of good faith and fair dealing under the ACC's Constitution and Bylaws, in addition to the same two declaratory judgment claims asserted in the original Complaint.[38]

15. The FSU Board subsequently filed an Amended Complaint for Declaratory Judgment in the Florida Action on 29 January 2024, asserting claims against the ACC for unreasonable restraint of trade under Fla. Stat. § 542.18; unenforceable penalties under the Grant of Rights Agreements and the ACC Constitution; breach of various contracts; breach of fiduciary duty; fundamental failure or frustration of contractual purpose; unenforceable contracts as to the Grant of Rights Agreements;

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[35] (FAC ¶ 155.)

[36] (FAC ¶ 153.)

[37] (*See* FAC ¶¶ 168, 170; FAC Ex. 16 at 1 [hereinafter "Fla. Compl."], ECF Nos. 11 (sealed), 12.16 (sealed).)

[38] (*See* FAC ¶¶ 173–273.)

and unconscionable penalty provisions in violation of Florida public policy in the Grant of Rights Agreements and the ACC Constitution.[39] For each of its claims, the FSU Board sought a judicial determination that the Grant of Rights Agreements were unenforceable against FSU or that FSU was relieved and excused from performance under those agreements.[40] The FSU Board also sought as relief for each claim a judicial decree that FSU "be deemed to have issued its formal notice of withdrawal from the ACC under section 1.4.5 of the ACC Constitution effective August 14, 2023."[41] The FSU Board has not alleged damages or sought monetary relief on any claims it has asserted against the ACC in the Florida Action.[42]

16. On 7 February 2024, the FSU Board timely filed the Motions, seeking to dismiss the FAC under Rules 12(b)(1), 12(b)(2), 12(b)(6), and 12(b)(7) or, in the alternative, seeking to stay this action in favor of the pending Florida Action.[43]

17. After full briefing, the Court held a hearing on the Motions on 22 March 2024 at which all parties were represented by counsel (the "Hearing"). The Motions are now ripe for resolution.[44]

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[39] (FSU Bd.'s Br. Supp. Def.'s Mots. Ex. 1 ¶¶ 227–74 [hereinafter "Fla. Am. Compl."], ECF Nos. 19.1 (sealed), 28 (public redacted).)

[40] (*See* Fla. Am. Compl. ¶¶ 241, 246, 250, 256, 261, 270, 274.)

[41] (Fla. Am. Compl. ¶¶ 241, 246, 250, 256, 261, 270, 274.)

[42] (*See* Fla. Am. Compl. ¶¶ 241, 246, 250, 256, 261, 270, 274.)

[43] (Def.'s Mots. ¶¶ 2–3.)

[44] The Court also heard arguments at the Hearing on the ACC's Amended Motion to Seal, (ECF No. 9), and Motion to Seal Summary Exhibit ECF No. 24.2, (ECF No. 25). The Court will resolve these sealing motions by separate order.

II.

MOTION TO DISMISS PURSUANT TO RULES 12(b)(1) AND 12(b)(2)

18. Moving under Rule 12(b)(1), the FSU Board challenges the ACC's standing to bring suit in North Carolina on two grounds: (i) the ACC filed suit before an actual or justiciable controversy arose; and (ii) the ACC failed to satisfy a necessary condition precedent prior to initiating this action.[45] The FSU Board additionally argues that, under Rules 12(b)(1) and/or 12(b)(2), it cannot be sued in North Carolina because the FSU Board has not waived its sovereign immunity except within the boundaries of the State of Florida pursuant to Fla. Stat. §§ 768.28(1) and 1001.72.[46]

A. Legal Standard

19. "Standing is a necessary prerequisite to a court's proper exercise of subject matter jurisdiction[,]" *In re Z.G.J.*, 378 N.C. 500, 504 (2021) (citation omitted), and "must be addressed, and found to exist, before the merits of the case are judicially resolved[,]" *In re T.B.*, 200 N.C. App. 739, 742 (2009) (cleaned up). "Rule 12(b)(1) requires the dismissal of any action 'based upon a trial court's lack of jurisdiction over the subject matter of the claim.' " *Watson v. Joyner-Watson*, 263 N.C. App. 393, 394 (2018) (quoting *Catawba Cnty. v. Loggins*, 370 N.C. 83, 87 (2017)). The plaintiff bears the burden of establishing subject matter jurisdiction. *See Harper v. City of Asheville*, 160 N.C. App. 209, 217 (2003). In ruling on a motion to dismiss for lack of standing pursuant to Rule 12(b)(1), the Court "may consider matters outside the pleadings" in

[45] (Def.'s Mots. ¶¶ 2(a), (b).)

[46] (Def.'s Mots. ¶ 2(c).)

determining whether subject matter jurisdiction exists, *Harris v. Matthews*, 361 N.C. 265, 271 (2007), and must "view the allegations [of the pleading] as true and the supporting record in the light most favorable to the non-moving party[,]" *Mangum v. Raleigh Bd. of Adjustment*, 362 N.C. 640, 644 (2008).

20. In North Carolina, the appropriate rule for consideration of a motion to dismiss on the grounds of sovereign immunity has been somewhat unsettled. *See, e.g.*, *Battle Ridge Cos. v. N.C. Dep't of Transp.*, 161 N.C. App. 156, 157 (2003) ("Our courts have held that the defense of sovereign immunity is a Rule 12(b)(1) defense. Our courts have also held that the defense of sovereign immunity is a matter of personal jurisdiction that would fall under Rule 12(b)(2)." (cleaned up)); *Farmer v. Troy Univ.*, 382 N.C. 366, 369–70 (2022) (reviewing a motion to dismiss on the grounds of sovereign immunity under Rules 12(b)(2) and 12(b)(6)). Our Court of Appeals, however, recently clarified that an assertion of "[sovereign] immunity should be classified as an issue of personal jurisdiction under Rule 12(b)(2)." *Torres v. City of Raleigh*, 288 N.C. App. 617, 620 (2023). Accordingly, the Court will construe the Motion to Dismiss on sovereign immunity grounds as an issue of personal jurisdiction under Rule 12(b)(2) and apply the appropriate standard of review for motions under that Rule.

21. "The standard of review to be applied by a trial court in deciding a motion under Rule 12(b)(2) depends upon the procedural context confronting the court." *Id.* (quoting *Banc of Am. Sec. LLC v. Evergreen Int'l Aviation, Inc.*, 169 N.C. App. 690, 693 (2005)). Where, as here,

> neither party submits evidence [on personal jurisdiction], the allegations of the complaint must disclose jurisdiction although the particulars of jurisdiction need not be alleged. The trial judge must decide whether the complaint contains allegations that, if taken as true, set forth a sufficient basis for the court's exercise of personal jurisdiction.

Parker v. Town of Erwin, 243 N.C. App. 84, 96 (2015) (cleaned up). "[A] trial court [may] consider matters outside the pleadings[ ]" when ruling on a motion to dismiss under Rule 12(b)(2). *Id.* at 97.

B. Analysis

1. Actual and Justiciable Controversy

22. Under the Declaratory Judgment Act (the "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." N.C.G.S. § 1-254. Because the "Act recognizes the need of society 'for officially stabilizing legal relations by adjudicating disputes before they have ripened into . . . destruction of the status quo[,]' " *Gray Media Grp., Inc. v. City of Charlotte*, 290 N.C. App. 384, 391 (2023) (quoting *Lide v. Mears*, 231 N.C. 111, 117–18 (1949)), "[a] contract may be construed either before or after there has been a breach thereof[,]" N.C.G.S. § 1-254.

23. In order for a court to have subject matter jurisdiction to render a declaratory judgment, "the pleadings and evidence [must] disclose the existence of an actual controversy between the parties having adverse interests in the matter in dispute[ ] . . . at the time the pleading requesting declaratory relief was filed." *Button*

v. Level Four Orthotics & Prosthetics, Inc., 380 N.C. 459, 466 (2022) (cleaned up). Although "[a]bsolute certainty of litigation is not required," *id.*, "it is necessary that litigation appear unavoidable," *Sharpe v. Park Newspapers of Lumberton, Inc.*, 317 N.C. 579, 589 (1986) (quoting *Gaston Bd. of Realtors, Inc. v. Harrison*, 311 N.C. 230, 234 (1984)). "Mere apprehension or the mere threat of an action or a suit is not enough." *Gaston Bd. of Realtors, Inc.*, 311 N.C. at 234 (cleaned up). Instead, it is

> [t]he imminence and practical certainty of the act or event in issue, or the intent, capacity, and power to perform, [that] create[s] justiciability as clearly as the completed act or event, and is generally easily distinguishable from remote, contingent, and uncertain events that may never happen and upon which it would be improper to pass as operative facts.

Reese v. Brooklyn Vill., LLC, 209 N.C. App. 636, 652 (2011) (quoting *Sharpe*, 317 N.C. at 590 (emphasis omitted)).

24. The FSU Board argues that, at the time the ACC filed its Complaint, "litigation was still speculative and not unavoidable[.]"[47] Because the "FSU Board had not yet met, much less voted to initiate litigation," the FSU Board contends that it "could have voted not to authorize the Florida Action at that time, or not actually filed the Florida Action even if authorized."[48] As a result, the FSU Board asserts that no actual and justiciable controversy existed when the ACC filed its Complaint late in the afternoon on 21 December 2023.[49]

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[47] (FSU Bd.'s Br. Supp. Def.'s Mots. 10 [hereinafter "Br. Supp. Def.'s Mots."], ECF No. 20; *see* FSU Bd.'s Reply Supp. Def.'s Mots. 7–8 [hereinafter "Reply Supp. Def.'s Mots."], ECF No. 41.)

[48] (Br. Supp. Def.'s Mots. 10; *see* Reply Supp. Def.'s Mots. 7–8.)

[49] (*See* Br. Supp. Def.'s Mots. 10; Reply Supp. Def.'s Mots. 8.)

25. The Court finds this argument without merit. Under the Grant of Rights, the FSU Board agreed that "it will not take any action, or permit any action to be taken by others subject to its control, . . . or fail to take any action, that would affect the validity and enforcement of the Rights granted to the Conference under this Agreement."[50] As the ACC correctly notes, "[t]o protect its rights [under the Grant of Rights], the Conference was not required to wait until FSU sued, breaching that covenant[,]" but "was entitled to enforce that covenant when breach was imminent."[51] *See, e.g.*, *Lee Ray Bergman Real Est. Rentals v. N.C. Fair Hous. Ctr.*, 153 N.C. App. 176, 179 (2002) ("To satisfy standing requirements, a plaintiff must show . . . injury that is concrete and particularized and actual or imminent[.]"); *River Birch Assocs. v. City of Raleigh*, 326 N.C. 100, 129 (1990) ("To have standing the complaining association or one of its members must suffer some immediate or threatened injury."). Moreover, under the ESPN Agreements, the ACC was obligated to "take all [Commercially Reasonable Efforts] to protect the rights provided to ESPN[ ]" through the Grant of Rights and Amended Grant of Rights.[52] While the ESPN Agreements did not require the ACC to initiate litigation to protect ESPN's rights, the ACC had

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[50] (Grant of Rights ¶ 6.)

[51] (Pl.'s Br. Opp'n Def.'s Mots. 3–4 [hereinafter "Br. Opp'n Def.'s Mots."], ECF No. 30; *see also* Br. Opp'n Def.'s Mots. 6 n.3 ("FSU ignores that the filing of its lawsuit challenging the Grant of Rights was itself the breach, not just an effort to invoke judicial interpretation of a contract's terms." (emphasis omitted)).)

[52] (Br. Opp'n Def.'s Mots. 8; *see also* Sur-Reply Pl. ACC 11 [hereinafter "Sur-Reply Def.'s Mots."], ECF No. 46.)

the right to initiate litigation to protect ESPN's rights in the ACC's discretion if those rights were threatened.[53]

26. The ACC alleges that, as early as 24 February 2023, the FSU Board "openly discussed withdrawing from the Conference and the cost of the withdrawal payment in order to facilitate a move to another conference in order to receive more money."[54] The ACC further alleges that FSU "began to advocate for more money for the university through unequal sharing of revenue[,]"[55] and, on 17 May 2023, the ACC "endorsed the concept of distributing a larger share of post-season revenues to the Members that generated those revenues[.]"[56] Nevertheless, the ACC alleges that FSU continued to "advocat[e] for an unequal share of all Conference revenue,"[57] once again discussing the possibility of leaving the ACC at the 2 August 2023 meeting of

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[53] "Commercially Reasonable Efforts" is a defined term in the ESPN Agreements. The portions of the ESPN Agreements initially in the record did not include the definition of this term. At the Court's request, the ACC supplied the Court and the FSU Board with the following definition from the ESPN Agreements, which it made part of the public record, prior to the Hearing:

> 1.24 "Commercially Reasonable Efforts": With respect to a given goal or objective, the efforts that a reasonable commercial person or entity in the position of the party undertaking to pursue such goal or objective would use so as to achieve such a goal or objective expeditiously; provided, however, that Commercially Reasonable Efforts shall not require any party to incur or become obligated to incur any expense not otherwise specifically provided for in this Agreement, including fees and expenses of counsel and consultants, or to incur any liability or waive or concede any right or claim that such party may have.

[54] (Compl. ¶ 94; FAC ¶ 117; *see also* Compl. ¶¶ 95–96; FAC ¶¶ 118–19.)

[55] (Compl. ¶ 97; FAC ¶ 120.)

[56] (Compl. ¶ 99; FAC ¶ 122.)

[57] (Compl. ¶ 101 (emphasis omitted); FAC ¶ 124 (emphasis omitted).)

the FSU Board.[58] The day before this meeting, the Chair of the FSU Board stated in a public interview that the Grant of Rights "will not be the document that keeps us from taking action."[59]

27. On 21 December 2023, the FSU Board notified the public that an emergency meeting would occur the following day.[60] Leading up to that meeting, the ACC alleges that "each of the [FSU] Board Members had been privy to 'individual briefings' over the course of several months[ ]" and that the Chair "had spoken individually with all [FSU] Board Members for the purpose of securing the necessary votes to proceed to litigation."[61] In addition, the ACC alleges that a draft complaint "had been transmitted to all [FSU Board] Members several days before[ ]" the meeting[62] and that a copy of the original complaint in the Florida Action appeared on FSU's news service prior to the FSU Board meeting on 22 December 2023.[63] And, of course, the FSU Board initiated litigation against the ACC within hours after the FSU Board meeting concluded.[64]

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[58] (*See* Compl. ¶¶ 102–04; FAC ¶¶ 125, 129–32; *see generally* FAC Ex. 10, ECF Nos. 11 (sealed), 12.10 (public unredacted).)

[59] (Compl. ¶ 107; FAC ¶ 135; *see* FAC Ex. 11 at 8, ECF Nos. 11 (sealed), 12.11 (public unredacted).) Citations to the page numbers in Exhibit 11 refer to the electronic PDF page numbers as the document itself contains no page numbers.

[60] (*See* Compl. ¶¶ 110, 114; FAC ¶ 143.)

[61] (FAC ¶¶ 154–55.)

[62] (FAC ¶ 153.)

[63] (FAC ¶ 169; *see also* FAC Ex. 15, ECF Nos. 11 (sealed), 12.15 (public unredacted).)

[64] (*See* FAC ¶ 170; Fla. Compl. 1.)

28. Viewing these allegations as true and in the light most favorable to the ACC as it must under Rule 12(b)(1), the Court concludes that, as of the filing of this action, the FSU Board's initiation of litigation over the Grant of Rights Agreements was unavoidable and a practical certainty. While it was theoretically possible that the FSU Board would decide not to file suit at its 22 December Board meeting, it has not offered any evidence to rebut the ACC's allegations and proof showing that the FSU Board had decided to file suit as of the filing of the ACC's Complaint and that the FSU Board's approval of that action on 22 December was a mere formality to its institution of the Florida Action. *See, e.g.*, *Ferrell v. Dep't of Transp.*, 334 N.C. 650, 656 (1993) (concluding that where "it is conceivable that litigation [might] not arise[,]" such "contingencies and possibilities[ ] . . . do not make the case nonjusticiable"); *City of New Bern v. New Bern-Craven Cnty. Bd. of Educ.*, 328 N.C. 557, 559 (1991) (concluding a justiciable controversy existed when plaintiff challenged a statute that removed "[a] right which previously belonged to the plaintiff"); *Bueltel v. Lumber Mut. Ins. Co.*, 134 N.C. App. 626, 629 (1999) (determining a justiciable controversy existed where plaintiff sought a judgment as to whether or not his past and present actions violated a contract); *Stephenson v. Parsons*, 96 N.C. App. 93, 96 (1988) (concluding that defendant's subsequent litigation against plaintiff "shows an actual controversy between [the] parties").

29. Because the ACC has demonstrated that, as of the filing of the ACC's Complaint, there existed "a practical certainty that litigation would arise" with the FSU Board, *Button*, 380 N.C. at 466 (quoting *Ferrell*, 334 N.C. at 656), there existed

an "actual controversy between the parties having adverse interests in the matter in dispute[ ] . . . at the time the pleading requesting declaratory relief was filed." *Id.*

30. The Court therefore will deny the FSU Board's Motion to Dismiss to the extent the FSU Board contends that an actual and justiciable controversy did not exist when the ACC filed this litigation.[65]

2. Condition Precedent to Initiating Suit

31. As the ACC notes in its sur-reply, the FSU Board's position for dismissal based on the ACC's failure to comply with a condition precedent "has shifted over time."[66] The first argument advanced by the FSU Board in its supporting brief appears to be focused on the sufficiency of the allegations in the pleading and, thus, is more properly considered as a motion to dismiss under Rule 12(b)(6).[67] Specifically, the FSU Board argues that because the ACC failed to either "plead generally that all conditions precedent to filing this action have occurred" or "plead specifically that [the] . . . notice, quorum meeting, and member vote" required by the ACC Constitution to initiate litigation occurred, dismissal is warranted.[68]

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[65] Because the Court concludes that an actual and justiciable controversy existed at the time the ACC filed its Complaint, the Court will also deny the FSU Board's Motion to Dismiss under Rule 12(b)(6) on this ground. *See Poole v. Bahamas Sales Assoc., LLC*, 209 N.C. App. 136, 141–42 (2011) ("Although a motion to dismiss under Rule 12(b)(6) is seldom an appropriate pleading in actions for declaratory judgments, it is allowed when the record clearly shows that there is no basis for declaratory relief as when the complaint does not allege an actual, genuine existing controversy." (cleaned up)).

[66] (Sur-Reply Def.'s Mots. 3.)

[67] (*See* Br. Supp. Def.'s Mots. 11–12.)

[68] (Br. Supp. Def.'s Mots. 11–12; *see* ACC Const. §§ 1.5.1.5, 1.6.2.) The Court notes that, although the FSU Board refers to section 1.5.4.3 of the ACC Constitution in its briefing, (*see* Br. Supp. Def.'s Mots. 11; Reply Supp. Def.'s Mots. 3), this section refers to notice and meeting

32. The Court disagrees. Although North Carolina permits notice pleading, *see* N.C. R. Civ. P. 8(a), certain matters have specific pleading requirements, *see* N.C. R. Civ. P. 9. "In pleading the performance or occurrence of conditions precedent, it is sufficient to *aver generally* that all conditions precedent have been performed or have occurred." N.C. R. Civ. P. 9(c) (emphasis added). And, when the condition precedent relates to a party's ability to bring suit, Rule 9(a) only requires that "[a]ny party not a natural person shall make an affirmative averment showing its legal existence and capacity to sue." N.C. R. Civ. P. 9(a).

33. In both its Complaint and FAC, the ACC alleges that it is "an unincorporated nonprofit association under North Carolina law."[69] The ACC further alleges that "[a]s an unincorporated nonprofit association under North Carolina law, the ACC has the ability to sue in its own name and enter into contracts[,]" and "may, acting on its own behalf, enforce its contractual obligations with one or more of its Member Institutions."[70]

34. At this stage, the Court must "construe the pleading liberally and in the light most favorable to the plaintiff, taking as true and admitted all well-pleaded factual allegations contained within the complaint." *Donovan v. Fiumara*, 114 N.C. App. 524, 526 (1994) (cleaned up). Because the ACC was required only to "make an

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requirements for committees, (*see* ACC Const. § 1.5.4.3). Section 1.5.1.5 of the ACC Constitution sets out the notice and meeting requirements for the ACC's Board of Directors. (*See* ACC Const. § 1.5.1.5.)

[69] (Compl. ¶ 1; FAC ¶ 1.)

[70] (Compl. ¶ 2; FAC ¶ 2.)

affirmative averment showing its legal existence and capacity to sue[,]" N.C. R. Civ. P. 9(a), the FSU Board's contention that the ACC failed to plead that it had taken all necessary steps prior to bringing suit, either generally or specifically, is without merit.

35. Turning to the parties' remaining arguments, the Court observes that the parties appear to "conflate[ ] . . . *standing*-related arguments with . . . arguments regarding the legally and conceptually distinct issue of whether the [ACC]'s actions were *authorized*" under the ACC Constitution. *United Daughters of the Confederacy v. City of Winston-Salem*, 383 N.C. 612, 626 (2022) (emphasis added). The Court will therefore first determine whether the Conference "has made the necessary showing of standing[ ]" prior to addressing the parties' arguments about whether the ACC was authorized to bring suit. *Id.* at 627.

36. "Standing refers to whether a party has a sufficient stake in an otherwise justiciable controversy such that [the party] may properly seek adjudication of the matter." *Edwards v. Town of Louisburg*, 290 N.C. App. 136, 140 (2023) (citation omitted). "The North Carolina Constitution confers standing to sue in our courts on those who suffer the infringement of a legal right, because 'every person for an injury done him in his lands, goods, person, or reputation shall have remedy by due course of law.' " *Comm. to Elect Dan Forest v. Emps. Pol. Action Comm.*, 376 N.C. 558, 610 (2021) (quoting N.C. Const. art. I, § 18, cl. 2). To establish standing in North Carolina, "a plaintiff must demonstrate the following: a legal injury; the traceability of the injury to a defendant's actions; and the probability that the injury can be

redressed by a favorable decision." *Soc'y for the Hist. Pres. of the Twentysixth N.C. Troops, Inc. v. City of Asheville*, 282 N.C. App. 701, 704 (2022). Thus, "[w]hen a person alleges the infringement of a legal right directly under a cause of action at common law, a statute, or the North Carolina Constitution, . . . the legal injury itself gives rise to standing." *Comm. to Elect Dan Forest*, 376 N.C. at 608.

37. Under the Declaratory Judgment Act, "an action is maintainable only in so far as it affects the civil rights, status and other relations in the present actual controversy between the parties." *Edwards*, 290 N.C. App. at 140. Nevertheless, a "plaintiff is still required to demonstrate that it has sustained a legal or factual injury arising from defendant['s] actions as a prerequisite for maintaining [a] . . . declaratory judgment action[,]" because "[t]he mere filing of a declaratory judgment is not sufficient, on its own, to grant a plaintiff standing." *United Daughters of the Confederacy*, 383 N.C. at 629 (third alteration in original) (quotation marks and citation omitted).

38. In *Willowmere Community Association v. City of Charlotte*, the Supreme Court of North Carolina previously determined that "[n]othing in our jurisprudence on *standing* requires a corporate litigant to affirmatively plead or prove its compliance with corporation bylaws and internal rules relating to its decision to bring suit." 370 N.C. 553, 560–61 (2018) (emphasis added). Even where, as here, the defendant, who is a member of the plaintiff corporate litigant, raises the plaintiff's failure to comply with its internal governance procedures as a bar to plaintiff's suit, *Willowmere* implies that defendant's relief lies in contract, through a motion to

dismiss, a motion to stay, or the initiation of a separate suit. *See id.* at 561. As long as a corporate litigant meets the three-pronged test to establish standing set out above, it "possess[es] a sufficient stake in an otherwise justiciable controversy to confer jurisdiction on the trial court to adjudicate [a] legal dispute[,]" despite the corporate litigant's "failure to strictly comply with [its] . . . bylaws and internal governance procedures in [its] decision to initiate . . . suit[.]" *Id.* at 562 (quotation marks and citation omitted); *see also* Robinson on N.C. Corp. Law § 3.03[1] ("A plaintiff corporation's failure to comply strictly with its bylaws and internal governance procedures in determining whether to commence litigation does not in itself deprive the corporation of standing to bring its claim.").

39. Here, and as discussed in connection with the FSU Board's first argument above, the Court concludes that the ACC has established that it had standing when it initiated this litigation on 21 December 2023. Under the Grant of Rights Agreements, FSU "irrevocably and exclusively" granted its media rights to the ACC for the term of those agreements.[71] FSU additionally agreed that "it [would] not take any action, or permit any action to be taken by others subject to its control, . . . or fail to take any action, that would affect the validity and enforcement of the Rights granted to the Conference under this Agreement."[72] Based on these representations,

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[71] (*See* Compl. ¶¶ 52–53, 56–59, 76–80, 117; FAC ¶¶ 61–62, 65–68, 83–86; Grant of Rights ¶¶ 1, 6; Am. Grant of Rights ¶ 3 ("Except as specifically modified by this Amendment, the terms of the [Grant of Rights] will remain in full force and effect.").)

[72] (Compl. ¶ 55 (quoting Grant of Rights ¶ 6); FAC ¶ 64 (same).)

the ACC entered into the ESPN Agreements on behalf of its Members,[73] "which significantly increased the revenues paid to the Conference and distributed to its Member Institutions, including [FSU]."[74]

40. The ACC alleges that the FSU Board has "breached, ignored, or otherwise violated the terms of the Grant of Rights and Amended Grant of Rights[.]"[75] In support, the Conference alleges that FSU began seeking a greater share of Conference revenue in early 2023;[76] openly discussed leaving the Conference at meetings of the FSU Board in February and August 2023;[77] provided "individual briefings" for, and circulated a draft complaint to, each of the FSU Board Members to "secur[e] the necessary votes to proceed to litigation[ ]";[78] and held an "emergency" meeting of the FSU Board on 22 December 2023 to authorize the filing of "a preemptive lawsuit against the ACC in Leon County, Florida[.]"[79] "By challenging the validity of the Grant of Rights and Amended Grant of Rights through the Florida Action," the ACC alleges that the FSU Board "seeks to undermine or destroy the contracts and agreements that enable the Conference to create a viable collegiate

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[73] (*See* Compl. ¶¶ 69–75; FAC ¶¶ 78–84.)

[74] (Compl. ¶ 120; FAC ¶ 177; *see* FAC ¶¶ 109, 111.)

[75] (FAC ¶ 181; *see* Compl. ¶ 124.)

[76] (*See* Compl. ¶¶ 97–102; FAC ¶¶ 120–25.)

[77] (*See* Compl. ¶¶ 94–96, 103–08; FAC ¶¶ 117–19, 129–32.)

[78] (FAC ¶¶ 153–55.)

[79] (FAC ¶ 148; *see* Compl. ¶ 114; FAC ¶¶ 148–57, 168.)

athletic conference that, through its activities, enhances and funds college athletics for its Members."[80]

41. As such, the ACC has demonstrated that it has "a legally protected interest" that has been "invaded" by the FSU Board's pursuit of a declaratory judgment with respect to the validity and enforceability of the Grant of Rights Agreements. *Soc'y for the Hist. Pres. of the Twentysixth N.C. Troops, Inc.*, 282 N.C. App. at 704 (citation omitted). Because the ACC's "injury can be redressed by a favorable decision[,]" *id.*; namely, through a "Declaration that the Grant of Rights and [A]mended Grant of Rights is [sic] a valid and enforceable contract [sic] between [FSU] and the ACC[,]"[81] the Court concludes that the ACC had standing to bring suit when it filed its original Complaint on 21 December 2023 under the threat of the FSU Board's imminent breach. *See id.* (requiring "a legal injury; the traceability of the injury to a defendant's actions; and the probability that the injury can be redressed by a favorable decision" for standing to obtain).

42. Although argued in the context of "standing," the parties' remaining arguments actually focus on whether the ACC was *authorized* to initiate litigation against FSU. The FSU Board argues that, because the Conference did not comply with a provision of the ACC Constitution that requires the Conference to obtain the approval of an "Absolute Two-Thirds" majority of the ACC Member Institutions prior

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[80] (FAC ¶ 249.)

[81] (FAC Prayer for Relief ¶ 1.)

to "the initiation of any material litigation involving the Conference[,]"[82] dismissal is warranted.[83]

43. The ACC does not dispute that it did not obtain an "Absolute Two-Thirds" majority approval of its Members prior to filing the Complaint; rather, the Conference contends that such approval was unnecessary because the relief requested in the Complaint did not amount to "material litigation" and, moreover, had been previously authorized by the Members based on the ACC's obligation to protect ESPN's rights under the ESPN Agreements.[84] And, "[w]hile not required because the original Complaint was valid,"[85] the ACC further contends that an "Absolute Two-Thirds" majority of the Member Institutions approved the filing of the FAC, which included the original claims as they were asserted in the Complaint, at a duly called meeting of the ACC Board on 12 January 2024, thus retroactively ratifying the filing of the Complaint.[86]

44. Although the parties direct much of their focus on the ACC's first two contentions, even if the Court were to assume, as the FSU Board argues, that the relief requested in the Complaint constituted "material litigation" and that the

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[82] (ACC Const. § 1.6.2.)

[83] (*See* Reply Supp. Def.'s Mots. 3–6.)

[84] (*See* Br. Opp'n Def.'s Mots. 8–9; Sur-Reply Def.'s Mots. 11.)

[85] (Br. Opp'n Def.'s Mots. 9.)

[86] (*See* Br. Opp'n Def.'s Mots. 9; Br. Opp'n Def.'s Mots. Ex. 2 at ¶¶ 3–5 [hereinafter "Hostetter Aff."], ECF No. 31.2; Sur-Reply Def.'s Mots. 5–8.)

institution of litigation was not contemplated in "the already-approved obligation [of the ACC] to take commercially reasonable action[ ]" to protect the Grant of Rights Agreements under the terms of the ESPN Agreements,[87] the Court concludes that the FSU Board's Motion to Dismiss for failure of a condition precedent must be denied because the ACC's evidence of ratification is unrebutted and dispositive.

45. Our Court of Appeals has defined "ratification" as "the affirmance by a person of a prior act which did not bind him but which was done or professedly done on his account, whereby the act, as to some or all persons, is given effect as if originally authorized by him." *King Fa, LLC v. Chen*, 248 N.C. App. 221, 226 (2016) (citation omitted). "To establish ratification, a plaintiff must show that the principal had full knowledge of all material facts and that the principal intended to ratify the act." *Hilco Transp., Inc. v. Atkins*, 2016 NCBC LEXIS 5, at *29 (N.C. Super. Ct. Jan. 15, 2016).

46. Far from "turn[ing] the law of internal governance on its head" as the FSU Board contends,[88] ratification is a practice frequently employed by corporate entities to approve defective actions which the entities failed to originally authorize. *See, e.g.*, N.C.G.S. §§ 55-1-61 to -65 (permitting ratification of defective corporate actions under the North Carolina Business Corporation Act); *Holland v. Warren*, 2020 NCBC LEXIS 146, at *20 (N.C. Super. Ct. Dec. 15, 2020) (noting that courts have interpreted N.C.G.S. § 55A-8-31(a)(1) to permit a nonprofit board to cure an improper act or

[87] (Br. Opp'n Def.'s Mots. 9.)

[88] (Reply Supp. Def.'s Br. 6 n.4.)

transaction through ratification). Just like any other corporate action, a failure to comply with procedural prerequisites prior to initiating litigation can be ratified by a corporate entity, such that the prior act "is given effect as if originally authorized by [that corporate entity]." *King Fa, LLC*, 248 N.C. App. at 226; *see Gao v. Sinova Specialties, Inc.*, 2018 NCBC LEXIS 70, at *14–15 (N.C. Super. Ct. July 16, 2018) ("[I]t is immaterial whether the board complied with the bylaws prior to asserting its original and first amended counterclaims" because "the board subsequently complied with its bylaws and ratified Sinova US's engagement of counsel and the counterclaims" and "filed its second amended counterclaims after the board approved filing the counterclaims[.]").

47. The four cases the FSU Board relies on in opposition do not compel a different result. Two of the cases are silent as to whether the corporate litigants attempted to later authorize the improperly initiated litigation by ratification. *See Peninsula Prop. Owners Ass'n v. Crescent Res., LLC*, 171 N.C. App. 89, 97 (2005); *Atkinson v. Lexington Cmty. Ass'n*, 2023 NCBC LEXIS 101, at *9 (N.C. Super. Ct. Aug. 16, 2023) (dismissing claims without prejudice because the association "could obtain member approval in the future and file a new lawsuit[ ]"). Moreover, the courts in the other two cases expressly emphasized the plaintiff associations' post-suit actions. *See Willowmere*, 370 N.C. at 561 (noting that "[t]here is no evidence in this case suggesting that any member of the [plaintiff associations] opposed plaintiffs' prosecution of this suit[ ]");[89] *Homestead at Mills River Prop. Owners Ass'n v. Hyder*,

[89] Although the issue was not before the Supreme Court, the Court of Appeals noted in its decision in *Willowmere* that "plaintiffs have not presented any evidence that the boards took

No. COA17-606, 2018 N.C. App. LEXIS 622, at *9 (N.C. Ct. App. June 19, 2018) (unpublished) (noting that, in contrast to *Willowmere*, "there was ample evidence indicating that a number of Plaintiff's members opposed this lawsuit[ ]").[90]

48. Courts in other jurisdictions have also held that a corporate entity may later ratify the initiation of litigation that was unauthorized at the time of filing. *See, e.g.*, *First Telebanc Corp. v. First Union Corp.*, No. 02-80715-CIV-GOLD/TURNOFF, 2007 U.S. Dist. LEXIS 114903, at *26 (S.D. Fla. Aug. 6, 2007) ("In accordance with Florida law, . . . the board may subsequently ratify the filing of the lawsuit."); *In re Council of Unit Owners of the 100 Harborview Drive Condo.*, 552 B.R. 84, 89 (Bankr. Md. 2016) ("[W]hen an officer has acted without authority in bringing a suit, the corporation may ratify the action, which is the equivalent of the officer's having had original authority to bring the lawsuit." (citation and quotation marks omitted)); *Cmty. Collaborative of Bridgeport, Inc. v. Ganim*, 698 A.2d 245, 254–55 (Conn. 1997) (affirming trial court's finding that board did not ratify officer's unilateral initiation of litigation); *City of McCall v. Buxton*, 201 P.3d 629, 640 (Idaho 2009) ("[T]he fact that the city manager did not have the authority to authorize the commencement of

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action in accord with their bylaws to ratify the filing of the lawsuit after the issue of standing was raised," 250 N.C. App. 292, 304 (2016), suggesting that the plaintiff boards of directors could have retroactively ratified their earlier decision to file litigation by subsequent board action.

[90] In opposing ratification, the FSU Board also relies on *Town of Midland v. Harrell*, in which the Supreme Court of North Carolina stated that "[s]ubsequent events cannot confer standing retroactively." 385 N.C. 365, 371 (2023). But as the Court has noted above, the concepts of standing and authorization to act are "legally and conceptually distinct issue[s,]" *United Daughters of the Confederacy*, 383 N.C. at 626, and ratification implicates issues of authorization, not standing. Thus, *Town of Midland* is inapposite.

this lawsuit does not require dismissal where the city council later ratified that action in a meeting that complied with the open meeting laws."); *City of Topeka v. Imming*, 344 P.3d 957, 964 (Kan. Ct. App. 2015) ("[T]he City Council could not ratify the City Manager's decision to file this lawsuit without an open, affirmative vote on the matter or by taking some action consistent with ratification."); *McGuire Performance Sols., Inc. v. Massengill*, 904 A.2d 971, 978 (Pa. Super. Ct. 2006) (determining that corporation ratified the litigation by passive acquiescence).

49. The ACC has submitted a 27 February 2024 Affidavit of ACC Secretary and Deputy Commissioner Brad Hostetter ("Hostetter")[91] and a 10 January 2024 e-mail from ACC Commissioner James J. Phillips ("Phillips")[92] in support of its argument that the Conference ratified the initiation of this litigation. In his 10 January 2024 e-mail, Phillips provided notice of a special meeting of the ACC Board of Directors for 12 January 2024.[93] Although special meetings of the Board usually require three

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[91] (Hostetter Aff.)

[92] (Sur-Reply Def.'s Mots. Ex. A [hereinafter "Jan. 10 E-mail"], ECF No. 46.1.)

[93] (*See* Jan. 10 E-mail.) The FSU Board alleges that this notice was ineffective because FSU did not receive notice of this special meeting. (*See* Reply Supp. Def.'s Mots. 1.) This argument is without merit. As the Conference notes in its sur-reply, the complaint in the Florida Action requests that FSU "be deemed to have issued its formal notice of withdrawal from the ACC under Section 1.4.5 of the ACC Constitution effective August 14, 2023." (Sur-Reply Def.'s Mots. 4 n.1 (quoting Fla. Compl. 33).) Section 1.5.1.3 of the ACC Constitution provides that "[t]he CEO of any Member that . . . withdraws from the Conference pursuant to Section 1.4.5 shall automatically cease to be a Director . . . , and shall cease to have the right to vote on any matter as of the effective date of the . . . withdrawal." In addition,

> [d]uring the period between the delivery of a notice of . . . withdrawal and the effective date of the . . . withdrawal, the Board . . . may withhold any information from, and exclude from any meeting . . . and/or any vote, the Director . . . of the . . . withdrawing member, if the Board determines that . . . such attendance, access to information or voting could present a

days' notice,[94] Hostetter avers that the required three-fourths of all Directors waived this notice requirement.[95] Furthermore, Hostetter avers that a quorum of Directors attended the special meeting and "unanimously approved the filing of the [FAC] in this matter, inclusive of the original claims in the Complaint filed on December 21, 2023."[96] In his affidavit, Hostetter confirms that the 12 January 2024 vote met the "Absolute Two-Thirds" majority vote required by Section 1.6.2 of the ACC Constitution to initiate "material litigation involving the Conference[.]"[97]

50. Thus, the record clearly demonstrates that, by approving the filing of the FAC, which includes the original declaratory judgment claims as they were asserted in the original Complaint, the ACC Board of Directors "had full knowledge of all material facts" and "intended to ratify" the filing of the Complaint on 21 December 2023. *Hilco Transp., Inc.*, 2016 NCBC LEXIS 5, at *29. In light of this uncontroverted evidence, the Court concludes that the ACC was properly authorized to bring this litigation.

> conflict of interest for the . . . withdrawing member or is otherwise not in the best interests of the Conference, as determined by the Board.

(ACC Const. § 1.5.1.3.) The Court agrees with the ACC that "[a] meeting to decide whether affirmative claims should be made against FSU . . . presented just such a conflict of interest[,]" (Sur-Reply Def.'s Mots. 4 n.1), such that the ACC was not required to provide the FSU Board with notice of the 12 January 2024 special meeting.

[94] (ACC Const. § 1.5.1.5.1.)

[95] (*See* Hostetter Aff. ¶ 3 (referencing ACC Const. § 1.5.1.5.2).)

[96] (Hostetter Aff. ¶¶ 3, 5.)

[97] (*See* Hostetter Aff. ¶ 5.)

51. Because the Court concludes both that the ACC had standing to bring this lawsuit at the time it filed its original Complaint and that the ACC Board of Directors ratified the initiation of this litigation three weeks later, the Court will deny the FSU Board's Motion to Dismiss to the extent the FSU Board contends this action should be dismissed for failure to comply with any conditions precedent.

3. Sovereign Immunity

52. Prior to 2019, sovereign "immunity [was] available only if the forum State 'voluntar[ily]' decide[d] 'to respect the dignity of the [defendant State] as a matter of comity.' " *Franchise Tax Bd. of Cal. v. Hyatt* (*Hyatt III*), 587 U.S. 230, 236 (2019) (second and fourth alterations in original) (quoting *Nevada v. Hall*, 440 U.S. 410, 416 (1979)). But the United States Supreme Court expressly overruled *Nevada v. Hall* in *Hyatt III*, holding that the United States Constitution does not "permit[ ] a State to be sued by a private party without its consent in the courts of a different State." *Id.* at 233. The Supreme Court, however, did not explain what form this "consent" must take in *Hyatt III*. Three years later, the Supreme Court of North Carolina took up this unanswered question in *Farmer v. Troy University*, 382 N.C. 366 (2022). The ACC contends that *Farmer* controls and establishes that FSU has expressly consented to suit in the courts of the State of North Carolina.[98]

53. The FSU Board, however, argues that the ACC's reliance on *Farmer* is inapposite because "it pertains to a different statutory scheme—the North Carolina

[98] (*See* Br. Opp'n Def.'s Mots. 10–12; Sur-Reply Def.'s Mots. 12–14.)

Nonprofit Corporation Act [the 'NCNCA']"[99]—rather than to the Uniform Unincorporated Nonprofit Association Act (the "UUNAA"), N.C.G.S. §§ 59B-1 to -15, under which the ACC is organized. The FSU Board contends that, unlike the defendant state university in *Farmer*, it neither "registered as a nonprofit corporation[ ]" nor "has it been issued a certificate of authority to operate in this state[.]"[100] The FSU Board argues that because "[t]hese requirements simply do not apply to members of unincorporated associations," the courts of North Carolina cannot exercise jurisdiction over it under either the UUNAA or *Farmer*.[101]

54. But the FSU Board's focus on the NCNCA is misplaced. As the ACC demonstrates in its opposition brief,[102] *Farmer* sets out the general framework for determining what constitutes "consent" to suit in North Carolina post-*Hyatt III*. This Court must therefore look to *Farmer* to determine whether the FSU Board has waived its sovereign immunity based on the allegations in the FAC.

55. In *Farmer*, Troy University, an Alabama state institution, registered as a nonprofit corporation with the North Carolina Secretary of State, leased an office building in North Carolina, and employed Farmer to recruit military personnel in North Carolina to take its online educational courses. *See Farmer*, 382 N.C. at 367. After his employment was terminated, Farmer brought suit against Troy University

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[99] (Br. Supp. Def.'s Mots. 14.)

[100] (Br. Supp. Def.'s Mots. 14; *see also* Reply Supp. Def.'s Mots. 8–9.)

[101] (Br. Supp. Def.'s Mots. 15; *see also* Reply Supp. Def.'s Mots. 8–9.)

[102] (*See* Br. Opp'n Def.'s Mots. 9–12.)

for various tort claims. *Id.* Shortly after the United States Supreme Court decided *Hyatt III*, Troy University moved for dismissal based on sovereign immunity. *Id.* at 369.

56. The Alabama Constitution provides that "the State of Alabama shall never be made a defendant in any court of law or equity." Ala. Const. art. I, § 14. The Supreme Court of North Carolina observed in *Farmer* that this immunity "extend[ed] to [the State of Alabama's] institutions of higher learning." *Farmer*, 382 N.C. at 370 (second alteration in original) (quoting *Ala. State Univ. v. Danley*, 212 So. 3d 112, 122 (Ala. 2016)). Having then concluded that, "[u]nder *Hyatt III* and the United States Constitution, as a general matter, Troy University is entitled to sovereign immunity from suit without its consent in the state courts of every state in the country[,]" *id.* at 271, our Supreme Court then set about determining whether Troy University had consented to waive its sovereign immunity in North Carolina state court.

57. The Supreme Court began its analysis in *Farmer* by reiterating that "any waiver of sovereign immunity must be explicit." *Id.* As a registered nonprofit corporation, Troy University was subject to the NCNCA, which contains the following sue and be sued clause:

> (a) Unless its articles of incorporation or this Chapter provides otherwise, every corporation . . . has the same powers as an individual to do all things necessary or convenient to carry out its affairs, including without limitation, power:
>
> (1) To sue and be sued, complain and defend in its corporate name[.]

N.C.G.S. § 55A-3-02(a)(1). Stressing that it was "crucial" to its "analysis that *Hyatt III* did not involve a sue and be sued clause[,]" the *Farmer* Court instead looked to

Thacker v. Tennessee Valley Authority, another recent case in which the United States Supreme Court addressed the effect of a sue and be sued clause on sovereign immunity. *Farmer*, 382 N.C. at 372.

58. In *Thacker*, the United States Supreme Court explained that "[s]ue-and-be-sued clauses . . . should be liberally construed[,]" noting that "[t]hose words in their usual and ordinary sense . . . embrace all civil process incident to the commencement or continuance of legal proceedings." *Thacker*, 139 S. Ct. 1435, 1441 (2019) (citations and quotation marks omitted). But, according to our Supreme Court in *Farmer*, *Thacker* placed a limit on these types of clauses: "[A]lthough a sue and be sued clause allows suits to proceed against a public corporation's *commercial* activity, just as these actions would proceed against a private company, suits challenging an entity's *governmental* activity may be limited." *Farmer*, 382 N.C. at 372 (emphasis added) (citing *Thacker*, 139 S. Ct. at 1443). Our Supreme Court therefore concluded that, "while *Hyatt III* . . . requires a State to acknowledge a sister State's sovereign immunity, *Thacker* recognizes that a sue and be sued clause can act as a waiver of sovereign immunity when a state entity's *nongovernmental* activity is being challenged." *Id.* (emphasis added).

59. Applying these principles to the facts in *Farmer*, our Supreme Court determined that Troy University was engaged in commercial activity in North Carolina, specifically the marketing and selling of online educational programs, rather than governmental activity. *Id.* at 373. Because Troy University knew that it

was subject to the NCNCA and its sue and be sued clause when it chose to do business in North Carolina, "it explicitly waived its sovereign immunity." *Id.*

60. *Farmer* found additional support for Troy University's waiver of sovereign immunity in article 15 of the NCNCA, which requires a foreign corporation operating in North Carolina to obtain a certificate of authority. *Id.* at 374. "A certificate of authority authorizes the foreign corporation . . . to conduct affairs in this State[,]" N.C.G.S. § 55A-15-05(a), and gives the foreign corporation "the same but no greater rights and . . . the same but no greater privileges as, and is subject to the same duties, restrictions, penalties, and liabilities . . . imposed on, a domestic corporation of like character[,]" *id.* § 55A-15-05(b). Our Supreme Court separately concluded that, "[b]y requesting and receiving a certificate of authority to do business in North Carolina, renting a building here, and hiring local staff, Troy University, as an arm of the State of Alabama, consented to be treated like 'a domestic corporation of like character,' and to be sued in North Carolina." *Farmer*, 382 N.C. at 374–75 (quoting N.C.G.S. § 55-15-05(b)).

61. The Court shall now apply the framework created by our Supreme Court in *Farmer* to determine whether, based on the allegations in the FAC and the current record, the FSU Board has consented to suit in North Carolina and thereby waived its sovereign immunity for purposes of this action.

62. The Court begins with the presumption that the State of Florida may not "be sued by a private party without its consent in the courts of [this] State." *Hyatt III*, 587 U.S. at 233. Florida has extended its sovereign immunity to include its public

universities because "[u]niversity boards of trustees are a part of the executive branch of state government." Fla. Stat. Ann. § 1001.71(3). The Court therefore concludes that, "as a general matter, [the FSU Board] is entitled to sovereign immunity from suit without its consent in the state courts of every state in the country." *Farmer*, 382 N.C. at 371. The Court must now determine whether the FSU Board explicitly waived its sovereign immunity to suit in North Carolina.

63. The UUNAA contains the following sue and be sued clause: "A nonprofit association, in its name, may institute, defend, intervene, or participate in a judicial, administrative, or other governmental proceeding or in an arbitration, mediation, or any other form of alternative dispute resolution."[103] N.C.G.S. § 59B-8(1). In addition, the UUNAA expressly permits the ACC, as a North Carolina unincorporated nonprofit association, and the FSU Board, as a Member of the ACC,[104] to bring suit against each other: "A member of, or a person referred to as a 'member' by, a nonprofit association may assert a claim against or on behalf of the nonprofit association. A nonprofit association may assert a claim against a member or a person referred to as a 'member' by the nonprofit association." N.C.G.S. § 59B-7(e). Because "a sue and be sued clause can act as a waiver of sovereign immunity when a state entity's nongovernmental activity is being challenged[,]" *Farmer*, 382 N.C. at 372 (citing *Thacker*, 139 S. Ct. at 1441), the Court must next analyze the FSU Board's activities

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[103] Although the language of the statute itself does not include the phrase "sue and be sued," the Official Comment affirmatively states that an unincorporated nonprofit association "may sue and be sued." N.C.G.S. § 59B-8 off. cmt. ¶ 1.

[104] (*See* FAC ¶¶ 1–2.)

in this State and decide if they are of a commercial or governmental nature. In doing so, the Court views the allegations in the FAC as true and, if appropriate, may also consider matters outside the FAC. *See Parker*, 243 N.C. App. at 96–97 (under Rule 12(b)(2), "[w]hen neither party submits evidence, . . . [t]he trial judge must decide whether the complaint contains allegations that, if taken as true, set forth a sufficient basis for the court's exercise of personal jurisdiction" (cleaned up)).

64. Since it joined the ACC in 1991, FSU has engaged in "continuous and systematic membership and governance activities" that "arise out of its membership in and management of the Conference[.]"[105] For example, the President of FSU is a member of the ACC's Board of Directors and "regularly attend[s] ACC meetings held in the State of North Carolina."[106] "Three of the four most recent in-person [ACC] Board of Directors meetings were held in North Carolina[,]" and FSU's President "attended each of these meetings either via Zoom or in person."[107] In addition, the ACC alleges that FSU's Presidents, Athletic Directors, and Head Coaches have "played an active role in the administration of ACC affairs[ ]" and in "advancing the mission of the ACC[,]" and lists in the FAC the numerous Conference leadership and committee positions held by these individuals over the past decade.[108] Moreover, the

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[105] (FAC ¶ 7; *see* FAC ¶¶ 8, 36.)

[106] (FAC ¶ 8.)

[107] (FAC ¶ 10 (stating that the "Conference generally holds two meetings of the Board of Directors per month, with three of these meetings held in person annually, often in North Carolina[ ]").)

[108] (FAC ¶ 9; *see also* FAC ¶¶ 11 (indicating that the ACC Board of Directors, including the FSU President, voted to relocate the Conference's headquarters to Charlotte to secure a $15

FSU President has approved the ACC's execution of several media rights agreements entered into on behalf of all of the ACC's Member Institutions.[109] The FSU Board has not sought to refute any of these allegations.

65. As a "collegiate academic and athletic conference[,]"[110] the ACC's purpose is to "enrich and balance the athletic and educational experiences of student-athletes at its member institutions[,] to enhance athletic and academic integrity among its members, to provide leadership, and to do this in a spirit of fairness to all."[111] More specifically, the ACC seeks to provide "quality competitive opportunities for student-athletes in a broad spectrum of amateur sports and championships[,]" and ensure "responsible fiscal management and further financial stability[ ]" by "[a]ddress[ing] the future needs of athletics" for the "mutual benefit of the Members[.]"[112]

66. Historically, the ACC's main source of income has consisted of the payments it receives in exchange for granting exclusive media rights to broadcast athletic

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million financial incentive derived from North Carolina taxpayer dollars), 16 (describing FSU's participation in various ACC championship events held in North Carolina), 57–67 (explaining the benefits of the Grant of Rights and the FSU President's execution thereof), 83–104 (discussing the same with respect to the Amended Grant of Rights), 120–22 (discussing how FSU convinced the ACC to distribute "a larger share of post-season revenues to the Members that generated those revenues, rather than equally among all Members[ ]").)

[109] (*See, e.g.*, FAC ¶¶ 45 (alleging approval of the 2010 Multi-Media Agreement), 104 (alleging approval of the ESPN Agreements).)

[110] (FAC ¶ 28.)

[111] (FAC ¶ 38 (quoting ACC Const. § 1.2.1).)

[112] (ACC Const. §§ 1.2.1(c), (g), (i).)

events and competitions involving athletes from ACC Member Institutions.[113] "By aggregating the Media Rights from each Member Institution, the Conference was able to increase the total value of those rights[.]"[114] The Conference then distributes the payments it receives under these media rights agreements, totaling hundreds of millions of dollars, to its Members, including FSU.[115]

67. Based on this record, the Court first concludes that the ACC's activities, specifically the sponsorship of athletic events and the marketing of media rights for those events, are commercial in nature. The Court further concludes that, as a Member of the ACC, FSU's Conference-related activities in this State are also commercial, rather than governmental, in nature. *See Thacker*, 139 S. Ct. at 1443 (describing "governmental activities" as the "the kinds of functions private parties typically do not perform[ ]"). Because the FSU Board knew that it was subject to the UUNAA and its sue and be sued clause when it chose to be a member of a North Carolina unincorporated nonprofit association, and because FSU engaged in extensive commercial activity in North Carolina as described above, *Farmer* instructs that FSU "explicitly waived its sovereign immunity" to suit in this State. *Farmer*, 382 N.C. at 373.

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[113] (*See* FAC ¶¶ 12–14, 48–51 (estimating potential losses of "$72 Million to over $200 Million[ ]" in media rights payments alone should a Member Institution withdraw from the ACC).)

[114] (FAC ¶ 60.)

[115] (*See* FAC Summary of Claims, ¶¶ 14, 44, 58, 70–71, 73, 78, 109–11.)

68. In its supporting and reply briefs, the FSU Board argues that the statutory waiver of sovereign immunity found in Fla. Stat. Ann. § 1001.72(1), which states that "[e]ach board of trustees shall be a public body corporate . . . , with all the powers of a body corporate, including the power to . . . contract and be contracted with, to sue and be sued, [and] to plead and be impleaded in all courts of law or equity," does not extend beyond the State of Florida.[116] The FSU Board contends that, unless "expressly stated in the statute," "the phrase 'all courts' necessarily refers only to all courts in the State of Florida."[117] Although the Court questions the FSU Board's narrow reading of this statute, *see Storey Mt., LLC v. George*, 357 So. 3d 709, 715 (Fla. 4th Dist. Ct. App. 2023) ("The use by the Legislature of [a] comprehensive term indicates an intent to include everything embraced within the term." (alteration in original) (citation omitted)), the Court is not required to engage in statutory interpretation under *Farmer*, where our Supreme Court held that, despite the fact that "[s]overeign immunity [was] enshrined in Alabama's Constitution," Troy University had waived its sovereign immunity by engaging in commercial, rather than governmental, activities within this State under a sue and be sued clause, *Farmer* 382 N.C. at 370, 373.[118]

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[116] (*See* Br. Supp. Def.'s Mots. 13; Reply Supp. Def.'s Mots. 9.)

[117] (Br. Supp. Def.'s Mots. 13.)

[118] The Court notes that the United States Supreme Court denied Troy University's petition for *writ of certiorari*. *See Troy Univ. v. Farmer*, 143 S. Ct. 2561 (2023), *cert denied.*

69. Accordingly, the Court concludes that, under *Farmer*, the FSU Board has waived its sovereign immunity and is subject to this suit in North Carolina. The Court will therefore deny the FSU Board's Motion to Dismiss to the extent it seeks dismissal on grounds of sovereign immunity.[119]

III.

MOTION TO DISMISS PURSUANT TO RULE 12(b)(7)

A. Legal Standard

70. Under Rule 12(b)(7), a necessary party must be joined to an action. *See Strickland v. Hughes*, 273 N.C. 481, 485 (1968). A necessary party is any person or entity with a material interest in the subject matter of the controversy, and whose interests will be directly affected by an adjudication thereof. *See Equitable Life Assurance Soc'y of the U.S. v. Basnight*, 234 N.C. 347, 352 (1951). Dismissal for failure to join a necessary party is proper only if the defect cannot be cured, and any such dismissal must be without prejudice. *See Lambert v. Town of Sylva*, 259 N.C. App. 294, 307 (2018).

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[119] The ACC also argues that the FSU Board made a general appearance in this matter when it opposed the ACC's 17 January 2024 Amended Motion to Seal and therefore waived its sovereign immunity because it did not specifically reserve its right to challenge personal jurisdiction in its sealing opposition. (*See* Br. Opp'n Def.'s Mots. 14; *see generally* Def.'s Br. Opp'n Pl.'s Am. Mot. Seal, ECF No. 15.) In the parties' joint Stipulation of Service, however, the first filing the FSU Board made in this action, the FSU Board represented that "it does not waive and preserves all jurisdictional defenses it may have." (Stipulation Service, ECF No. 8.) Our Court of Appeals has held that "[w]hen a defendant promptly alleges a jurisdictional defense as his *initial step* in an action, he fulfills his obligation to inform the court and his opponent of possible jurisdictional defects." *Ryals v. Hall-Lane Moving & Storage Co.*, 122 N.C. App. 242, 247–48 (1996) (emphasis added). The Court therefore concludes that, under *Ryals*, the ACC's argument is without merit.

B. Analysis

71. The FSU Board argues in conclusory fashion that the ACC's declaratory judgment claims in the FAC should be dismissed because "the ACC did not name the actual party to the Grants of Rights—FSU."[120]

72. This argument is a non-starter. Although the signature blocks for both the Grant of Rights and Amended Grant of Rights list "FLORIDA STATE UNIVERSITY" as the "Member Institution" and bear the signature of the individual serving as President of FSU at the time of execution,[121] the FSU Board concedes that it, rather than the university, is "the contracting agent of the university[ ]" and has "all the powers of a body corporate, including the power to . . . contract and be contracted with, to sue and be sued, [and] to plead and be impleaded in all courts of law or equity[.]" Fla. Stat. Ann. §§ 1001.72(1), (3).[122] Consequently, Florida courts have held that "it is improper to sue 'Florida State University' since the Florida Legislature has designated university boards of trustees as the proper entities with the power to sue and be sued." *Broer v. Fla. State Univ.*, No. 2021 CA 000859, 2022 WL 2289143, at *2 (Fla. Circ. Ct. June 17, 2022) (dismissing defendant "Florida State University" with prejudice); *see Doe v. New Coll. of Fla.*, No. 8:21-cv-1245-CEH-CPT, 2023 U.S.

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[120] (Br. Supp. Def.'s Mots. 16.)

[121] (*See* Grant of Rights 9; Am. Grant of Rights 7.) Citations to the page numbers in these exhibits refer to the electronic PDF page numbers as the signature pages do not contain page numbers.

[122] (*See* Br. Supp. Def.'s Mots. 15.)

Dist. LEXIS 173689, at *21 (M.D. Fla. Sept. 28, 2023) (dismissing defendant "New College of Florida" as an improperly named defendant).

73. Indeed, FSU has acknowledged in litigation that "Florida State University is not endowed with an independent corporate existence and so lacks the capacity to sue or be sued in its own name[.]"[123] Given that the FSU Board acknowledges that "Florida State University" has no independent corporate existence and that the Florida courts have held that the FSU Board is the proper party to answer claims against "Florida State University," the Court will deny the FSU Board's Motion to Dismiss the ACC's first and second claims for failure to join "Florida State University" as a necessary party pursuant to Rule 12(b)(7).

IV.

MOTION TO DISMISS PURSUANT TO RULE 12(b)(6)

A. Legal Standard

74. When deciding whether to dismiss for failure to state a claim under Rule 12(b)(6), the Court considers "whether the allegations of the complaint, if treated as true, are sufficient to state a claim upon which relief can be granted under some legal theory." *Corwin v. Brit. Am. Tobacco, PLC*, 371 N.C. 605, 615 (2018) (quoting *CommScope Credit Union v. Butler & Burke, LLP*, 369 N.C. 48, 51 (2016)). "[T]he trial court is to construe the pleading liberally and in the light most favorable to the plaintiff, taking as true and admitted all well-pleaded factual allegations contained

[123] (Br. Opp'n Def.'s Mots. Ex. 4 *Pompura v. Fla. State Univ.*, No. 20 CA 1080, Florida State University's Limited Appearance to Quash Attempted Service and Dismiss ¶ 4 (Fla. Cir. Ct. July 22, 2020), ECF No. 31.4.)

within the complaint." *Donovan*, 114 N.C. App. at 526 (cleaned up); *see also, e.g.*, *Sykes v. Health Network Sols., Inc.*, 372 N.C. 326, 332 (2019) (recognizing that, under Rule 12(b)(6), the allegations of the complaint should be "view[ed] as true and in the light most favorable to the non-moving party" (cleaned up)).

75. When considering a motion to dismiss under Rule 12(b)(6), the Court may "also consider any exhibits attached to the complaint because '[a] copy of any written instrument which is an exhibit to a pleading is a part thereof for all purposes.' " *Krawiec v. Manly*, 370 N.C. 602, 606 (2018) (quoting N.C. R. Civ. P. 10(c)). Moreover, the Court "can reject allegations that are contradicted by the documents attached [to], specifically referred to, or incorporated by reference in the complaint." *Moch v. A.M. Pappas & Assocs., LLC*, 251 N.C. App. 198, 206 (2016) (quoting *Laster v. Francis*, 199 N.C. App. 572, 577 (2009)).

76. "[D]ismissal pursuant to Rule 12(b)(6) is proper when '(1) the complaint on its face reveals that no law supports the plaintiff's claim; (2) the complaint on its face reveals the absence of facts sufficient to make a good claim; or (3) the complaint discloses some fact that necessarily defeats the plaintiff's claim.' " *Corwin*, 371 N.C. at 615 (quoting *Wood v. Guilford Cnty.*, 355 N.C. 161, 166 (2002)).

B. Analysis

1. Breach of Grant of Rights and Amended Grant of Rights

77. The ACC alleges that, by initiating the Florida Action, the FSU Board has breached its obligation under the Grant of Rights Agreements not to take any actions that affect the validity, enforcement, irrevocability, and/or exclusivity of those

agreements, as well as the FSU Board's obligation of good faith and fair dealing that is attendant to all contracts.[124] In response, the FSU Board does not challenge that it breached the agreements (assuming those agreements are valid) but instead contends that, despite having received hundreds of millions of dollars under the Grant of Rights Agreements, it never entered into those agreements in the first place. The FSU Board argues that because it is the only entity that has statutory authority to enter into contracts on behalf of FSU, the ACC's failure to allege that "the FSU Board approved either Grant of Rights at any FSU Board meeting, including after appropriate notice," warrants dismissal of the ACC's contract claim.[125]

78. "The elements of a claim for breach of contract are (1) [the] existence of a valid contract and (2) breach of the terms of that contract." *Poor v. Hill*, 138 N.C. App. 19, 26 (2000). As our Court of Appeals has noted, "[o]ur system of notice pleading means the bar to plead a valid contract is low." *Lannan v. Bd. of Governors of Univ. of N.C.*, 285 N.C. App. 574, 596 (2022) (citation omitted). Consequently, the ACC need only plead "offer, acceptance, [and] consideration[ ]" to establish the existence of a valid contract. *Id.*

79. The ACC adequately alleges each element of its breach of contract claim in the FAC. The ACC alleges that, "in order to secure a long-term media rights agreement and thus ensure the payment of predictable sums over time," the Member

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[124] (FAC ¶¶ 209–11.)

[125] (Br. Supp. Def.'s Mots. 15–16.)

Institutions entered into the Grant of Rights in April 2013.[126] As pleaded in the FAC, "each Member Institution granted the Conference its Media Rights and, in exchange, . . . the Conference negotiated revisions to the 2010 Multi-Media Agreement, to increase the [amounts] paid[ ]" and subsequently "distributed the funds to the Member Institutions."[127]

80. With respect to the Grant of Rights, the ACC alleges that (i) the FSU Board "agreed to and executed the Grant of Rights on April 19, 2013[ ]";[128] (ii) FSU's President "was authorized to agree to and execute the Grant of Rights on April 19, 2013 on behalf of [the FSU Board]";[129] and (iii) FSU received its pro rata share of the fees paid by ESPN to the ACC pursuant to the Second Amendment to the 2010 Multi-Media Agreement and the Grant of Rights.[130] The ACC then alleges that, by filing suit in Florida, the FSU Board breached various obligations under the Grant of Rights.[131]

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[126] (FAC ¶¶ 56–57, 69.)

[127] (FAC ¶ 58.)

[128] (FAC ¶ 66; *see also* Grant of Rights ¶ 6 ("[E]ach Member Institution represents and warrants to the Conference (a) that such Member Institution . . . has the right, power and capacity to execute, deliver and perform this Agreement and to discharge the duties set forth herein[.]").)

[129] (FAC ¶ 67; *see also* Grant of Rights ¶ 6 ("[E]ach Member Institution represents and warrants to the Conference . . . (b) that execution, delivery and performance of this Agreement and the discharge of all duties contemplated hereby, *have been duly and validly authorized by all necessary action on the part of such Member Institution*[.]" (emphasis added)); ACC Const. § 1.5.1.1 ("[E]ach Director shall have the right to take any action or any vote on behalf of the Member it represents[.]").)

[130] (FAC ¶¶ 68, 71, 73, 111.)

[131] (*See* FAC ¶¶ 205–11.)

81. With respect to the Amended Grant of Rights, the ACC alleges that the Member Institutions agreed to extend the term in the original Grant of Rights in exchange for receiving increased fees under the ESPN Agreements.[132] The ACC alleges that (i) the FSU Board "accepted and executed the Amended Grant of Rights[ ]";[133] (ii) FSU's President "was authorized to enter into and accept the Amended Grant of Rights on behalf of [the FSU Board]";[134] and (iii) FSU received a portion of the fees paid by ESPN to the ACC under the ESPN Agreements and the Amended Grant of Rights.[135] The ACC then alleges that the FSU Board breached various obligations under the Amended Grant of Rights by initiating the Florida Action.[136]

82. The ACC also contends that it has adequately pleaded waiver and equitable estoppel to preclude the FSU Board from denying that it is legally bound by the Grant of Rights Agreements.[137] The affirmative defenses of waiver and equitable estoppel "concern whether a valid and enforceable agreement may be the subject of a legal action based on conduct that occurs after the parties enter into a contract[.]" *Window*

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[132] (*See* FAC ¶¶ 84, 87–90, 109.)

[133] (FAC ¶ 99.)

[134] (FAC ¶ 100.)

[135] (FAC ¶¶ 110–11; *see also* Amended Grant of Rights ¶ 3 ("Except as specifically modified by this Amendment, the terms of the [Grant of Rights] will remain in full force and effect.").)

[136] (*See* FAC ¶¶ 205–11.)

[137] (*See* Br. Opp'n Def.'s Mots. 16.)

World of N. Atlanta, Inc. v. Window World, Inc., 2021 NCBC LEXIS 82, at *18 (N.C. Super. Ct. Sept. 22, 2021).

83. "The essential elements of waiver are (1) the existence, at the time of the alleged waiver, of a right, advantage, or benefit; (2) the knowledge, actual or constructive, of the existence thereof; and (3) an intention to relinquish such right, advantage or benefit." *Fetner v. Rocky Mount Marble & Granite Works*, 251 N.C. 296, 302 (1959). The doctrine of equitable estoppel "arises when an individual, by his acts, representations, admissions, or by his silence when he has a duty to speak, intentionally or through culpable negligence induces another to believe that certain facts exist, and such other person rightfully relies and acts upon that belief to his detriment." *Thompson v. Soles*, 299 N.C. 484, 487 (1980). Under this doctrine, "the party whose words or conduct induced another's detrimental reliance may be estopped to deny the truth of his earlier representations in the interests of fairness to the other party." *Whitacre P'ship v. Biosignia, Inc.*, 358 N.C. 1, 17 (2004).

84. The ACC alleges in the FAC that the "purpose of the Grant of Rights and Amended Grant of Rights was to permit the ACC to negotiate various agreements with ESPN and provide ESPN the Media Rights for its Member Institutions, including [FSU], in exchange for . . . [f]ees[.]"[138] The ACC further alleges that the FSU Board "knowingly and voluntarily agreed . . . to transfer ownership of its Media Rights to the ACC through June 30, 2036[ ]"[139] "for the purpose of receiving the

[138] (FAC ¶ 186.)

[139] (FAC ¶ 197.)

benefits generated by these contracts[,]"[140] "regardless of whether [FSU] remained a Member Institution of the Conference."[141] The allegations in the FAC also state that, since 2013, the FSU Board "substantially and materially benefitted from the Grant of Rights and Amended Grant of Rights[ ]"[142] by receiving its share of the "distributions from [the] revenue generated by the Grant of Rights and Amended Grant of Rights[.]"[143] Based on these allegations, the ACC argues that, even if the FSU Board "did not vote on these agreements despite accepting their benefits[,]"[144] the FSU Board is "estopped from challenging the validity or enforceability of the Grant of Rights or Amended Grant of Rights, or has waived its right to contest [their] validity or enforceability . . . as a result of its conduct[.]"[145]

85. At this stage, the Court concludes that the ACC has sufficiently pleaded that the FSU Board approved the execution of both the Grant of Rights and Amended Grant of Rights. The Court further concludes that the ACC has also sufficiently pleaded that, regardless of whether the FSU Board approved the Grant of Rights Agreements, the FSU Board should be estopped from challenging or has waived its right to challenge these agreements by its conduct in accepting the benefits of these

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[140] (FAC ¶ 200.)

[141] (FAC ¶ 197.)

[142] (FAC ¶ 191.)

[143] (FAC ¶ 187.)

[144] (Br. Opp'n Def.'s Mots. 16.)

[145] (FAC ¶ 203.)

agreements for many years without protest. Accordingly, the Court will deny the FSU Board's Motion to Dismiss the ACC's claim for breach of the Grant of Rights and Amended Grant of Rights.

2. Declaratory Judgment Claims

86. The ACC seeks a judicial declaration that (i) the Grant of Rights Agreements are valid and enforceable contracts; and (ii) the FSU Board is estopped from making or has waived by its conduct any challenge to the Grant of Rights Agreements.[146] The FSU Board seeks dismissal of these claims on the same basis that it seeks dismissal of the ACC's breach of contract claim.[147] Because the Court has concluded that the ACC's claim for breach of the Grant of Rights Agreements should survive the FSU Board's Motion to Dismiss, the Court will likewise permit the ACC's declaratory judgment claims based on those agreements to proceed.

3. Breach of Obligation to Protect Confidential Information

87. The FSU Board next seeks to dismiss the ACC's claim that the FSU Board breached its obligation to keep confidential the terms of the ESPN Agreements by disclosing some of those terms at its 22 December 2023 meeting and by publicly filing the complaint containing some of those terms in the Florida Action.[148] The FSU Board argues that "neither FSU nor the FSU Board was ever a party to [the ESPN

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[146] (FAC ¶¶ 173–203.)

[147] (*See* Br. Supp. Def.'s Mots. 15–16.)

[148] (*See* Br. Supp. Def.'s Mots. 16–18.)

Agreements] or entered into any confidentiality agreement with the ACC,"[149] and, furthermore, that the FSU Board does not owe "any duties to the ACC beyond those reflected in the ACC's Constitution and [Bylaws]."[150]

88. "[A]n implied-in-fact contract 'is valid and enforceable as if it were express or written.' " *Lannan*, 285 N.C. App. at 596 (quoting *Snyder v. Freeman*, 300 N.C. 204, 217 (1980)). "A valid contract may be implied in light of the conduct of the parties and under circumstances that make it reasonable to presume the parties intended to contract with each other." *Se. Caissons, LLC v. Choate Constr. Co.*, 247 N.C. App. 104, 113 (2016) (citation omitted). Thus, the ACC need only "plead offer, acceptance, and consideration[ ]" to plead a valid implied-in-fact contract. *Lannan*, 285 N.C. App. at 597.

89. The ACC alleges that, on behalf of its Member Institutions, it entered into the ESPN Agreements with ESPN on 21 July 2016.[151] The ESPN Agreements contain the following terms:

> Each party shall maintain the confidentiality of this Agreement and its terms, and any other Confidential Information, except when disclosure is[ ] . . . to each [Member] Institution, provided that each [Member] Institution shall agree to maintain the confidentiality of this Agreement, subject to the law applicable to each such [Member] Institution[.][152]

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[149] (Br. Supp. Def.'s Mots. 16–17.)

[150] (Br. Supp. Def.'s Mots. 18; Reply Supp. Def.'s Mots. 11.)

[151] (*See* FAC ¶ 78.)

[152] (2016 Multi-Media Agreement Confidentiality Provision ¶ 21.11; ACC Network Agreement Confidentiality Provision ¶ 18.11; *see also* FAC ¶¶ 106–08, 214–18 (discussing these terms).)

The ACC alleges that "[i]n an effort to preserve the confidentiality of the ESPN Agreements, the Conference limits access to the [a]greements[ ]"[153] by only "permit[ting] its Members to inspect and review the ESPN Agreements on request at its Headquarters" and "only on agreement that the Member would not copy or reproduce the provisions of the ESPN Agreements and would treat the information as confidential."[154]

90. The ACC alleges that counsel for the FSU Board reviewed the ESPN Agreements at the ACC's headquarters on 7 October 2022, 4 January 2023, and 1 and 2 August 2023.[155] The ACC further alleges that, on each occasion, "before being provided access, and as a condition for such access, [the FSU Board] was advised that the information in the ESPN Agreements was confidential."[156] The ACC then avers that, after being advised of this confidentiality obligation, FSU's counsel reviewed the ESPN Agreements.[157] The ACC finally alleges that, despite FSU's counsel reviewing the ESPN Agreements after receiving these warnings, the FSU Board publicly disclosed confidential information from the ESPN Agreements at its 22 December 2023 meeting and in the publicly filed complaint in the Florida Action.[158]

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[153] (FAC ¶ 220.)

[154] (FAC ¶ 221.)

[155] (*See* FAC ¶¶ 138, 222.)

[156] (FAC ¶ 139; *see also* FAC ¶¶ 140, 161, 223; FAC Ex. 12, ECF Nos. 11 (sealed), 12.12 (public redacted) (reproducing an e-mail from the ACC's general counsel informing counsel for the FSU Board that the terms of the ESPN Agreements must be kept confidential).)

[157] (*See* FAC ¶¶ 139, 162, 224.)

[158] (*See* FAC ¶¶ 163–72, 225–29.)

91. Although the FSU Board focuses on the ACC's failure to allege that FSU signed a written agreement with the ACC or ESPN to maintain the confidentiality of the ESPN Agreements,[159] the ACC has alleged that it expressly advised counsel for the FSU Board that counsel could review the ESPN Agreements at the ACC's headquarters only if FSU maintained the confidentiality of those agreements. As such, the ACC has alleged that it made a legally binding, conditional offer to the FSU Board, *see, e.g.*, *Fed. Reserve Bank of Richmond v. Neuse Mfg. Co.*, 213 N.C. 489, 493 (1938) ("In negotiating a contract the parties may impose any condition precedent, a performance of which condition is essential before the parties become bound by the agreement."), which the FSU Board accepted by its counsel's reviewing the agreements, *Snyder*, 300 N.C. at 218 ("Acceptance by conduct is a valid acceptance.").

92. Thus, although the FSU Board was not a party to the ESPN Agreements, the Court concludes that the ACC has sufficiently pleaded at least an implied-in-fact contract between the ACC and the FSU Board to maintain the confidentiality of the terms of the ESPN Agreements as well as the FSU Board's breach. *Id.* ("With regard to a contract implied in fact, one looks not to some express agreement, but to the actions of the parties showing an implied offer and acceptance.").

93. The Court therefore will deny the FSU Board's Motion to Dismiss the ACC's fourth cause of action for breach of contract concerning confidentiality.

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[159] (*See* Br. Supp. Def.'s Mots. 16–17.)

4. Breach of Fiduciary Duties Owed by the FSU Board to the ACC

94. The FSU Board next seeks to dismiss the ACC's claim that FSU has breached, and continues to breach, its fiduciary obligations to the Conference under the ACC's Constitution and Bylaws as well as under North Carolina law.[160] The FSU Board first argues that the ACC is a creature of statute governed by the UUNAA, N.C.G.S. §§ 59B-1 to -15, which imposes no fiduciary duties on members of unincorporated nonprofit associations.[161] The FSU Board additionally contends that neither the ACC's Constitution or Bylaws impose fiduciary duties on the Member Institutions.[162]

95. The ACC argues in opposition that, by joining the Conference as a Member Institution, FSU entered into a "common and joint venture with the other Member Institutions,"[163] and thereby has a fiduciary duty to "act in good faith, with due care, and in a manner in the best interests of the Conference"[164] under the ACC's Constitution and Bylaws "as well as [under] principles of statutory and common law in North Carolina[.]"[165] The ACC further contends that, "[b]y seeking retroactive

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[160] (*See* Br. Supp. Def.'s Mots. 16–18; Reply Supp. Def.'s Mots. 10–11.)

[161] (*See* Br. Supp. Def.'s Mots. 17.)

[162] (*See* Br. Supp. Def.'s Mots. 17; Reply Supp. Def.'s Mots. 10.)

[163] (FAC ¶ 240.)

[164] (FAC ¶ 241.)

[165] (FAC ¶¶ 246–48; *see* Br. Opp'n Def.'s Mots. 19–20.)

withdrawal [from the ACC] in the Florida Action, [FSU] has a clear, direct, and material conflict of interest with the management of the Conference."[166]

96. To state a claim for breach of fiduciary duty, a plaintiff must plead that "(1) defendant[ ] owed the plaintiff a fiduciary duty; (2) the defendant breached that fiduciary duty; and (3) the breach of fiduciary duty was a proximate cause of injury to the plaintiff." *Chisum v. Campagna*, 376 N.C. 680, 706 (2021). "For a breach of fiduciary duty to exist, there must first be a fiduciary relationship between the parties." *King v. Bryant*, 369 N.C. 451, 464 (2017) (quoting *Dalton v. Camp*, 353 N.C. 647, 651 (2001)). "[A] fiduciary relationship is generally described as arising when 'there has been a special confidence reposed in one who in equity and good conscience is bound to act in good faith and with due regard to the interests of the one reposing confidence.' " *Dallaire v. Bank of Am., N.A.*, 367 N.C. 363, 367 (2014) (quoting *Green v. Freeman*, 367 N.C. 136, 141 (2013)). "North Carolina recognizes two types of fiduciary relationships: *de jure*, or those imposed by operation of law, and *de facto*, or those arising from the particular facts and circumstances constituting and surrounding the relationship." *Hager v. Smithfield E. Health Holdings, LLC*, 264 N.C. App. 350, 355 (2019).

97. Under North Carolina law, "[a] joint venture exists when there is: '(1) an agreement, express or implied, to carry out a single business venture with joint sharing of profits, and (2) an equal right of control of the means employed to carry out the venture.' " *Sykes*, 372 N.C. at 340–41 (quoting *Rifenburg Constr., Inc. v. Brier*

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[166] (FAC ¶ 263; *see* Br. Opp'n Def.'s Mots. 20.)

Creek Assocs. Ltd. P'ship, 160 N.C. App. 626, 632 (2003), *aff'd per curiam*, 358 N.C. 218 (2004)). "[E]ach party to the joint venture [has] a right in some measure to direct the conduct of the other '*through a necessary fiduciary relationship.*' " *Se. Shelter Corp. v. BTU, Inc.*, 154 N.C. App. 321, 327 (2002) (quoting *Cheape v. Town of Chapel Hill*, 320 N.C. 549, 562 (1987)).

98. Prior to North Carolina's adoption of the UUNAA in 2006, the legal status of unincorporated associations at common law was uncertain. *See, e.g.*, *Venus Lodge No. 62, F. & A. M. v. Acme Benevolent Ass'n*, 231 N.C. 522, 526 (1950) ("At common law . . . an [unincorporated] association is not an entity, and has no existence independent of its members. This being true, an unincorporated association has no capacity at common law to contract; or to take, hold, or transfer property; or to sue or be sued." (cleaned up)); *Goard v. Branscom*, 15 N.C. App. 34, 38 (1972) ("The general rule deducible from the cases which have passed on the question is that the members of an unincorporated association are engaged in a joint enterprise[.]" (quoting 6 Am. Jur. 2d, Associations and Clubs, § 31)). In light of this ambiguity, the legislature adopted a modified version of the UUNAA for the "limited purpose of treating a group that acts together in nonprofit matters as a . . . legal entity" that is "separate and apart from its members for purposes of owning property and determining and enforcing third-party rights, duties and procedures." Robinson on N.C. Corp. Law § 35.03[1]; *see* N.C.G.S. § 59B-2 off. cmt. ¶¶ 1, 3; *id.* § 59B-5 off. cmt. ¶¶ 1–2.

99. Unlike North Carolina's statutes governing corporations, N.C.G.S. §§ 55-8-30, 31, nonprofit corporations, *id.* §§ 55A-8-30, 31, limited liability companies, *id.*

§§ 57D-2-21, 30, and partnerships, *id.* §§ 59-51, however, the UUNAA does not contain provisions imposing fiduciary duties on members of an unincorporated nonprofit association. Because the General Assembly has repeatedly shown that it knows how to impose fiduciary duties on various corporate actors by statute in similar contexts, the legislature should be presumed to have purposely chosen to exclude imposing fiduciary duties on members of an unincorporated nonprofit association under the UUNAA. *See, e.g., N.C. Dep't of Revenue v. Hudson*, 196 N.C. App. 765, 768 (2009) ("When a legislative body includes particular language in one section of a statute but omits it in another section of the same [statute], it is generally presumed that the legislative body acts intentionally and purposely in the disparate inclusion or exclusion." (cleaned up)); *see also In re D.L.H.*, 364 N.C. 214, 221 (2010) (recognizing that "the absence of a similar provision in [a related statute] seems to indicate a legislative intent not to [reach the same result as under the related statute]"); *State v. Campbell*, 285 N.C. App. 480, 491 (2022) (applying similar reasoning when comparing two similar statutes).

100. Moreover, the Official Comment to the UUNAA explains that, "[b]ecause a nonprofit association is made a separate legal entity, *its members are not co-principals.*" N.C.G.S. § 59B-7 off. cmt. ¶ 3 (emphasis added); *see also id.* § 59B-7 off. cmt. ¶ 1 ("At common law a nonprofit association was not a legal entity separate from its members. Borrowing from the law of partnership, the common law viewed a nonprofit association as an aggregate of its members. The members are co-principals. *Subsection (a) changes that.*" (emphasis added)). A joint venture, however, "requires

that the parties to the agreement stand in the relation of principal, as well as agent, as to one another." *Se. Shelter Corp.*, 154 N.C. App. at 327. As the FSU Board notes, the ACC has not alleged that "the FSU Board (or any other individual [M]ember) on its own can bind the ACC or other members through its conduct."[167] Because "[o]ur Supreme Court has . . . held that a joint venture *does not exist* where each party to an agreement cannot direct the conduct of the other[,]" *Rifenburg Constr., Inc.*, 160 N.C. App. at 632 (citing *Pike v. Wachovia Bank & Tr. Co.*, 274 N.C. 1, 10 (1968)), an unincorporated nonprofit association does not qualify as a joint venture and, thus, the ACC cannot establish that a *de jure* fiduciary relationship existed between itself and FSU.[168]

101. In the absence of a *de jure* fiduciary relationship, the Court must determine whether the allegations in the FAC are sufficient to demonstrate that the relationship between the parties is one in which "there has been a special confidence reposed in one who in equity and good conscience is bound to act in good faith and with due regard to the interests of the one reposing confidence." *Dallaire*, 367 N.C. at 367 (quoting *Green*, 367 N.C. at 141). "The standard for finding a *de facto* fiduciary relationship is a demanding one: 'Only when one party figuratively holds all the cards—all the financial power or technical information, for example—have North

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[167] (Reply Def.'s Mots. 11.)

[168] Although not yet adopted in North Carolina and thus not controlling, the Court notes that the revised UUNAA expressly states that "[a] member does not have any fiduciary duty to an unincorporated nonprofit association or to another member solely by reason of being a member." Rev. Unif. Unincorp. Nonprofit Ass'n Act § 17(a) (Nat'l Conf. Comm'rs on Unif. State Laws 2011).

Carolina courts found that the special circumstance of a fiduciary relationship has arisen.'" *Lockerman v. S. River Elec. Membership Corp.*, 250 N.C. App. 631, 636 (2016) (quoting *S.N.R. Mgmt. Corp. v. Danube Partners 141, LLC*, 189 N.C. App. 601, 613 (2008)). The ACC has failed to plead such a *de facto* fiduciary relationship here.

102. Under the ACC's Constitution, "all of the powers of the Conference shall be exercised by or under the authority of the Board, and all of the activities and affairs of the Conference shall be managed by or under the direction, and subject to the oversight, of the Board[.]"[169] The ACC Constitution further provides that "[t]he Board shall be composed of a representative of each Member (each a 'Director')"[170] and "[e]ach Director shall be entitled to one vote each."[171] FSU is but one of fifteen ACC Member Institutions[172] and has the power to cast just one of the votes necessary to approve any action taken by the ACC requiring Board approval. Conversely, the ACC cannot take any action requiring Board approval without the approval of its Board of Directors. As neither party can be said to "hold all the cards," a *de facto* fiduciary relationship between the ACC and the FSU Board does not exist on the pleaded facts.

103. The FSU Board makes one additional, albeit brief, argument in opposition to the ACC's breach of fiduciary duty claim, contending that "had the ACC [M]embers

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[169] (ACC Const. § 1.5.1.1; *see id.* § 1.6 (Board voting requirements); FAC ¶ 243.)

[170] (ACC Const. § 1.5.1.2; *see* FAC ¶ 244 ("As a Member Institution, [FSU] designated its President as a Member of the [ACC] Board of Directors.").)

[171] (ACC Const. § 1.6.2.)

[172] (FAC ¶ 1.)

wished to subject themselves to the fiduciary duties the ACC seeks to impose, they could have . . . included them in the . . . ACC Constitution and Bylaws[.]"[173] Although the UUNAA "contains no rules concerning governance[,]" N.C.G.S. § 59B-3 off. cmt. ¶ 2, "the [constitution] and bylaws of an association may constitute a contract between the organization and its members wherein the members are deemed to have consented to all reasonable regulations and rules of the organization,"[174] *Master v. Country Club of Landfall*, 263 N.C. App. 181, 187 (2018) (quoting *Gaston Bd. of Realtors, Inc.*, 311 N.C. at 237).

104. The ACC argues that the "provisions of the ACC Constitution that address conflicts of interest of withdrawing [M]embers[ ]" support its assertion that Member Institutions owe a fiduciary obligation "to the [Conference] not to defeat or destroy its common purpose."[175] The Court disagrees. The provision on which the ACC relies allows the ACC Board, *in its discretion*, to withhold information from or to exclude from a meeting or vote an expelled or withdrawing Member *if* the Board determines that a conflict of interest exists.[176] Whether such a conflict of interest exists is therefore discretionary; whether fiduciary duties exist, however, is not. The ACC does not point to any provision of the ACC's Constitution or Bylaws that affirmatively

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[173] (Br. Supp. Def.'s Mots. 17.)

[174] The parties do not dispute that the ACC's Constitution and Bylaws are a contract between the ACC and its Member Institutions. (FAC ¶¶ 233, 267; *see* Br. Supp. Def.'s Mots. 16; Br. Opp'n Def.'s Mots. 8, 18.)

[175] (Br. Opp'n Def.'s Mots. 20; *see* FAC ¶¶ 257–64.)

[176] (*See* ACC Const. § 1.5.1.3.)

imposes fiduciary duties on current Members, nor is the Court able to find one. The ACC's breach of fiduciary duty claim therefore fails on this additional basis.

105. Because the FAC alleges that the ACC is an unincorporated nonprofit association under the UUNAA,[177] the ACC cannot establish the existence of a *de jure* fiduciary relationship with FSU under a joint venture theory. Nor has the ACC alleged sufficient facts to establish either the existence of a *de facto* fiduciary relationship or a contractual imposition of fiduciary duties under the ACC's Constitution and Bylaws. Thus, dismissal of this claim pursuant to Rule 12(b)(6) is proper both because "the complaint discloses some fact that necessarily defeats the plaintiff's claim[ ]" and "the complaint on its face reveals the absence of facts sufficient to make a good claim[.]" *Corwin*, 371 N.C. at 615 (citation omitted).

106. The Court will therefore grant the FSU Board's Motion to Dismiss the ACC's fifth claim for relief for breach of fiduciary duty and dismiss this claim with prejudice.

5. Breach of Implied Duty of Good Faith and Fair Dealing Under the ACC's Constitution and Bylaws

107. Finally, the FSU Board seeks to dismiss the ACC's claim for breach of the implied duty of good faith and fair dealing under the ACC's Constitution and Bylaws.[178] The FSU Board argues in conclusory fashion that "there is no basis in North Carolina law for the ACC's allegation that the FSU Board (or any other ACC

[177] (FAC ¶¶ 1–2, 6, 9, 17, 22–23, 233, 236.)

[178] (*See* Br. Supp. Def.'s Mots. 16–18; Reply Supp. Def.'s Mots. 10–11.)

[M]ember) owes any duties to the ACC beyond those reflected in the ACC's Constitution and [Bylaws]."[179] The Court disagrees.

108. North Carolina law has long recognized that a covenant of good faith and fair dealing is implied in every contract and requires the contracting parties not to "do anything which injures the rights of the other to receive the benefits of the agreement." *Bicycle Transit Auth. v. Bell*, 314 N.C. 219, 228 (1985) (citation omitted).[180]

109. As discussed above, to sustain a claim for breach of contract, the ACC need only plead "(1) [the] existence of a valid contract and (2) breach of the terms of that contract[,]" *Poor*, 138 N.C. App. at 26, to satisfy its burden under Rule 12(b)(6). The ACC alleges, and the FSU Board concedes, that the "ACC Constitution and Bylaws [are] . . . valid and enforceable contract[s] between the Conference and its Members[,]" including FSU.[181] The Conference further alleges that the FSU Board's "actions as detailed in this Amended Complaint violate its duty to act in good faith and fairly deal with the Conference."[182] Under our notice pleading standard, these

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[179] (Br. Supp. Def.'s Mots. 18; Reply Supp. Def.'s Mots. 11.)

[180] The revised UUNAA expressly adopts this concept, providing that "[a] member shall discharge the duties to the unincorporated nonprofit association and the other members and exercise any rights under this [act] consistent with the governing principles and contractual obligation of good faith and fair dealing." Rev. Unif. Unincorp. Nonprofit Ass'n Act § 17(b) (second alteration in original).

[181] (FAC ¶ 267; *see* FAC ¶ 233; Br. Supp. Def.'s Mots. 16; Br. Opp'n Def.'s Mots. 8, 18.)

[182] (FAC ¶ 271.)

allegations are sufficient to state a claim for breach of the duty of good faith and fair dealing under the ACC's Constitution and Bylaws.

110. The Court will therefore deny the FSU Board's Motion to Dismiss the ACC's claim against FSU for breach of its obligation of good faith and fair dealing under these governing documents.

V.

MOTION TO STAY

111. The FSU Board moves in the alternative to stay this first-filed action under N.C.G.S. § 1-75.12 in favor of its second-filed Florida Action.[183] The FSU Board argues that the Florida Action should take priority because it is "broader in scope,"[184] "more comprehensive,"[185] and in "the true proper forum for this case,"[186] and also because the ACC deserves no first-filing deference as a result of its improper forum shopping.[187]

112. The ACC argues in opposition that a North Carolina court, not a Florida court, should determine the claims of a North Carolina organization concerning the validity and breach of contracts governed by North Carolina law and further that the

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[183] (*See* Def.'s Mots. ¶ 3.)

[184] (Br. Supp. Def.'s Mots. 26.)

[185] (Br. Supp. Def.'s Mots. 1.)

[186] (Br. Supp. Def.'s Mots. 18.)

[187] (*See* Br. Supp. Def.'s Mots. 21–25; Reply Supp. Def.'s Mots. 11–13.)

FSU Board has failed to offer any evidence that FSU would suffer "substantial injustice" should this litigation proceed in North Carolina.[188]

113. Section 1-75.12 provides, in relevant part, as follows:

> (a) When Stay May Be Granted. – If, 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. A moving party under this subsection must stipulate his consent to suit in another jurisdiction found by the judge to provide a convenient, reasonable and fair place of trial.

N.C.G.S. § 1-75.12(a). "The essential question for the trial court is whether allowing the matter to continue in North Carolina would work a 'substantial injustice' on the moving party." *Muter v. Muter*, 203 N.C. App. 129, 131–32 (2010).

114. Our appellate courts have held that

> [i]n determining whether to grant a stay under [N.C.]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.

Laws. Mut. Liab. Ins. Co. of N.C. v. Nexsen Pruet Jacobs & Pollard, 112 N.C. App. 353, 356 (1993).

115. "[I]t is not necessary that the trial court find that *all* factors positively support a stay, as long as it is able to conclude that (1) a substantial injustice would result if the trial court denied the stay, (2) the stay is warranted by those factors present, and (3) the alternative forum is convenient, reasonable, and fair." *Id.* at 357.

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[188] (*See* Br. Opp'n Def.'s Mots. 21–27.)

And while "the trial court need not consider every factor," *Muter*, 203 N.C. App. at 132, the court will abuse its discretion when it "abandons any consideration of these factors[,]" *Laws. Mut. Liab. Ins. Co.*, 112 N.C. App. at 357.

116. After careful consideration and review, the Court concludes, in the exercise of its discretion and based on an evaluation of each of the factors set forth in *Lawyers Mutual*, that "allowing th[is] matter to continue in North Carolina would [not] work a 'substantial injustice' on [the FSU Board]," *Muter*, 203 N.C. App. at 131–32, and therefore that the FSU Board's Motion to Stay should be denied.

117. Much of the parties' focus in their briefing and at the Hearing is on *Lawyers Mutual*'s ninth factor—whether the ACC's choice of its North Carolina home forum is entitled to deference. North Carolina "[c]ourts generally give great deference to a plaintiff's choice of forum, and a defendant must satisfy a heavy burden to alter that choice by . . . staying the case." *Wachovia Bank v. Deutsche Bank Tr. Co. Ams.*, 2006 NCBC LEXIS 10, at *18 (N.C. Super. Ct. June 2, 2006). This is particularly true when the plaintiff chooses to file suit in its home forum. *See, e.g.*, *La Mack v. Obeid*, 2015 NCBC LEXIS 24, at *16–17 (N.C. Super. Ct. Mar. 5, 2015) ("[A] plaintiffs' choice of forum ordinarily is given great deference, especially when plaintiffs select their home forum to bring suit.").

118. This Court has recognized, however, that "[t]he amount of deference due . . . varies with the circumstances," *Cardiorentis AG v. IQVIA Ltd.*, 2018 NCBC LEXIS 243, at *8 (N.C. Super. Ct. Dec. 31, 2018), *aff'd*, 373 N.C. 309, 314 (2020), and that "when plaintiffs file a complaint merely as a strategic maneuver to choose a

favorable forum, 'first-filed' priority may be denied." *La Mack*, 2015 NCBC LEXIS 24, at *17. As our Court of Appeals has explained:

> [I]n situations in which two suits involving overlapping issues are pending in separate jurisdictions, priority should not necessarily be given to a declaratory suit simply because it was filed earlier. Rather, if the plaintiff in the declaratory suit was on notice at the time of filing that the defendant was planning to file suit, a court should look beyond the filing dates to determine whether the declaratory suit is merely a strategic maneuver to achieve a preferable forum.

Coca-Cola Bottling Co. Consol. v. Durham Coca-Cola Bottling Co., 141 N.C. App. 569, 579 (2000).

119. The FSU Board argues that the ACC's choice of forum is not entitled to deference because the ACC engaged in improper "procedural fencing"[189] by pre-emptively filing this action against the FSU Board, the "true" or "natural" plaintiff, without required ACC Board approval, "to attain what it presumes to be a more favorable forum[ ]" after learning that the FSU Board had scheduled an emergency board meeting for the following day.[190] The FSU Board cites to numerous cases that have denied first-filer advantage when a natural defendant files a declaratory judgment action in what it perceives to be a more favorable forum when it is aware that the natural plaintiff's lawsuit is imminent.[191]

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[189] *See Coca-Cola Bottling Co. Consol.*, 141 N.C. App. at 579 ("[A] declaratory suit should not be used as a device for 'procedural fencing.' ").

[190] (Br. Supp. Def.'s Mots. 23–24; *see* Reply Supp. Def.'s Mots. 12.)

[191] *See Coca-Cola Bottling Co. Consol.*, 141 N.C. App. at 579 ("A defendant in a pending lawsuit should not be permitted to bring a declaratory suit involving overlapping issues in a different jurisdiction as a strategic means of obtaining a more preferable forum. Otherwise, the natural plaintiff in the underlying controversy would be deprived of its right to choose the forum and time of suit."); *see also Poole*, 209 N.C. App. at 143; *Harleysville Mut. Ins. Co. v. Narron*, 155 N.C. App. 362 (2002); *Harris Teeter Supermarkets, Inc. v. Ace Am. Ins. Co.*,

120. The ACC contends in opposition that the FSU Board started any "race to the courthouse" and that its "grievance is . . . that it lost."[192] The ACC argues that "since before August 2023 FSU intended to breach the Grant of Rights through litigation[ ]" and that "when the [FSU] Board convened a meeting on the last business day before the Christmas Holiday for an 'emergency' matter, it did so to try to be the first to file a lawsuit, a lawsuit which it had already publicly released, and which its counsel was poised to file immediately."[193] As such, the ACC argues that "once it became apparent that FSU intended to breach its obligations by filing a lawsuit, the ACC had the right to sue to settle the validity of the Grant of Rights, and to do so in the state whose law applied and where the ACC is headquartered, North Carolina."[194]

121. After careful review, the Court concludes on the allegations and facts of record here that the ACC's choice of forum is entitled to deference as the party first to file. To begin, it is clear, as the FSU Board argues and the ACC acknowledges, that the ACC filed its action on 21 December 2023 because it correctly anticipated that the FSU Board intended to file the Florida Action the following day soon after

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2023 NCBC LEXIS 125, at *52 (N.C. Super. Ct. Oct. 10, 2023); *La Mack*, 2015 NCBC LEXIS 24, at *18–20; *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 (2009); *N. Am. Roofing Servs., Inc. v. BPP Retail Props., LLC*, No. 1:13-cv-000119-MR-DLH, 2014 U.S. Dist. LEXIS 35193, at *9–10 (W.D.N.C. 2014); *Klingspor Abrasives, Inc. v. Woolsey*, No. 5:08CV-152, 2009 U.S. Dist. LEXIS 66747, at *11 (W.D.N.C. July 31, 2009); *Nutrition & Fitness, Inc. v. Blue Stuff, Inc.*, 264 F. Supp. 2d 357, 361 (W.D.N.C. 2003).

[192] (Br. Opp'n Def.'s Mots. 21–22.)

[193] (Br. Opp'n Def.'s Mots. 21–22.)

[194] (Br. Opp'n Def.'s Mots. 24.)

the FSU Board was scheduled to vote to approve the filing of the Florida Action. The FSU Board argues that the ACC's litigation conduct is paradigmatic "procedural fencing" that should cause the Court to reject any first-filer advantage for the ACC.[195] *See, e.g.*, *Coca-Cola Bottling Co. Consol.*, 141 N.C. App. at 579 (finding "procedural fencing" when a "potential defendant [which] anticipates litigation by the natural plaintiff in a controversy" is the first to file); *Poole*, 209 N.C. App. at 141–42 (applying *Coca-Cola Bottling Co. Consol.* to dismiss claim where "natural defendant" denied "natural plaintiff" its forum of choice).

122. But the FSU Board's argument hinges on its erroneous view that it is the only "natural" plaintiff in this dispute. The "natural" or "real" plaintiff in a civil suit is the party that has allegedly suffered damages at the hands of its opponent. *Coca-Cola Bottling Co. Consol.*, 141 N.C. App. at 579–80. Here, that is the ACC, which alleges that the FSU Board intended to breach the covenants not to sue in the Grant of Rights Agreements.[196] The parties did not simply race to the courthouse to resolve their dispute over the agreements' terms; to the contrary, the ACC sued because the FSU Board's alleged breach of those agreements was a practical certainty that threatened the ACC with imminent and unavoidable injury as a result. *See, e.g.*, *River Birch Assocs.*, 326 N.C. at 129 (finding standing where an association member suffers "immediate or threatened injury"). In other words, it is the ACC, as the non-breaching party, rather than the FSU Board, as the alleged breaching party, that is

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[195] (Br. Supp. Def.'s Mots. 24.)

[196] (*See* FAC ¶¶ 134, 136, 142, 149, 181, 206, 209–11.)

the injured party in this dispute, *see Coca-Cola Bottling Co. Consol.*, 141 N.C. App. at 579, and "the one who wishes to present a grievance for resolution by a court," *Cree, Inc. v. Watchfire Signs, LLC*, No. 1:20CV198, 2020 U.S. Dist. LEXIS 223801, at *15 (M.D.N.C. Dec. 1, 2020) (quoting *Piedmont Hawthorne Aviation, Inc. v. TriTech Env't Health and Safety, Inc.*, 402 F. Supp. 2d 609, 616 (2005)).

123. As such, the Court concludes that the ACC is a "natural" plaintiff in its dispute with the FSU Board. Thus, even assuming the FSU Board is a "natural" plaintiff because it is the one challenging the enforceability of the Grant of Rights Agreements as the FSU Board contends, the fact that the ACC is also a "natural" plaintiff is sufficient for the ACC to maintain its first-filer advantage. *See, e.g.*, *Wachovia Bank*, 2006 NCBC LEXIS 10, at *18 (recognizing the "heavy burden" a defendant must satisfy "to alter [a plaintiff's choice of forum] by . . . staying the case").

124. The Court's rejection of the FSU Board's attack on the ACC's choice of forum finds further support from numerous courts within and without North Carolina that have refused to stay a first-filed declaratory judgment action where, as here, both the first- and second-filed actions involve the same agreements and seek the same relief. *See, e.g.*, *IQVIA, Inc. v. Cir. Clinical Sols.*, 2022 NCBC LEXIS 105, *4–5 (N.C. Super. Ct. Sept. 14, 2022) (staying second-filed action where both the first- and second-filed actions involved the same declaratory and injunctive relief); *Baldelli v. Baldelli*, 249 N.C. App. 603, 608 (2016) (remanding with instructions to hold second-filed action in abeyance and noting that when there is a "clear interrelationship of the issues,"

allowing "both actions to proceed concurrently would be to invite conflict between the resolution of interrelated issues in the two actions[ ]"); *see also, e.g.*, *Sorena v. Gerald J. Tobin, P.A.*, 47 So. 3d 875, 878–89 (Fla. 3d Dist. Ct. App. 2010) (staying second-filed action involving "substantially similar" parties and claims "stem[ming] from the same set of facts"); *Caspian Inv., Ltd. v. Vicom Holdings, Ltd.*, 770 F. Supp. 880, 884 (S.D.N.Y. 1991) (staying second-filed action where "both actions involve[d] interpretation of the same loan agreements" and "[sought] the same relief"); *Fuller v. Abercrombie & Fitch Stores, Inc.*, 370 F. Supp. 2d 686, 690 (E.D. Tenn. 2005) (staying second-filed action, even though the second-filed case brought an additional claim, because both actions contested the same issue).

125. Based on the above, the Court cannot conclude, as the FSU Board contends, that the ACC's filing was "nothing more than an attempt to deny the FSU Board (i.e., the true plaintiff) from prosecuting its claims in its chosen venue."[197] Rather than seek to avoid unfavorable law, *see, e.g.*, *Harris Teeter Supermarkets, Inc.*, 2023 NCBC LEXIS 125, at *51 n.16, or deny a party who has suffered actual damages its choice of forum, *see, e.g.*, *Coca-Cola Bottling Co. Consol.*, 141 N.C. App. at 578—circumstances typically found to constitute improper forum shopping—the ACC chose to put its interpretation of its North Carolina contracts and their covenants not to sue before a North Carolina court once the FSU Board's breach of those contracts was imminent. *See, e.g.*, *Pilot Title Ins. Co. v. Nw. Bank*, 11 N.C. App. 444, 449 (1971) ("[J]urisdiction lies where the court is convinced that litigation, sooner or later,

[197] (Reply Supp. Def.'s Mots. 12.)

appears to be unavoidable[.]"). As such, the ACC did not engage in improper conduct or "procedural fencing" in filing this action in North Carolina. Accordingly, considering all of the facts and circumstances surrounding the filing of this action and the Florida Action, the Court concludes, in the exercise of its discretion, that the ACC's choice of forum is entitled to deference on this record.

126. The Court further concludes that the nature of the case and the applicable law strongly favor allowing this matter to proceed in North Carolina. The key contracts in this case—the Grant of Rights and the Amended Grant of Rights—were made in North Carolina and are governed by North Carolina law. *See, e.g.*, *Tom Togs, Inc. v. Ben Elias Indus. Corp.*, 318 N.C. 361, 365 (1986) ("Under North Carolina law, a contract is made in the place where the last act necessary to make it binding occurred."). The ACC's Constitution and Bylaws are also at issue, and as the ACC's governing documents, they too are governed by North Carolina law. *See, e.g.*, *Futures Grp., Inc. v. Brosnan*, 2023 NCBC LEXIS 7, at *6 (N.C. Super. Ct. Jan. 19, 2023) ("North Carolina courts apply the substantive law of the incorporating state when deciding matters of internal governance."). In addition, the FSU Board's claims in the Florida Action and its anticipated defenses and compulsory counterclaims in this action are based on the ACC's decisions and conduct in North Carolina. And while the Court recognizes that certain of the FSU Board's anticipated defenses and anticipated counterclaims may be governed by Florida law, and that the ACC's damages claims challenge, at least in part, the FSU Board's conduct in Florida, the

core issue presented in the two actions—i.e., the enforceability of the two Grant of Rights Agreements—favors resolution before a North Carolina court.[198]

127. The Court also finds that the burden of litigating matters not of local concern and the desirability of litigating matters of local concern in local courts strongly favor the litigation of this matter in North Carolina. The ACC has been based in North Carolina for over seventy years and recently received a tax incentive from the State of North Carolina to locate its headquarters in Charlotte.[199] Four of its Member Institutions are located in North Carolina—more Members than from any other State—and only two Members of the ACC's fifteen current Members are in Florida.[200] FSU has attended numerous meetings, served in Conference leadership positions, and participated in hundreds of athletic contests in North Carolina since it joined the ACC in 1991,[201] and, as noted, many of the decisions about which the FSU Board

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[198] While the FSU Board has raised certain defenses that likely implicate Florida law, the FSU Board's contention that "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[,]" (Br. Supp. Def.'s Mots. 25), is without merit. The FSU Board initiated the Florida Action and thereby consented to suit in Florida; thus, there are no issues of sovereignty immunity waiver to be determined in Florida. Sovereign immunity waiver is only at issue in this litigation and therefore is only before this Court for determination.

[199] (*See* FAC ¶¶ 1, 11, 32.)

[200] (*See* FAC ¶¶ 1, 16.)

[201] (*See* FAC ¶¶ 8–10, 16, 94–97, 112.)

complains occurred at the ACC's headquarters in North Carolina.[202] The FSU Board has also previously participated in litigation in North Carolina without complaint.[203]

128. Moreover, while FSU is the only ACC Member Institution involved in this lawsuit, the determination of whether the ACC's Grant of Rights Agreements are legally enforceable is critically important to all Members of the Conference, and the resolution of that issue is of tremendous consequence to the North Carolina-based ACC since it may directly bear on the Conference's ability to meet its contractual commitments to ESPN as well the Conference's future revenues, stability, and long-term viability. For these reasons, the Court concludes that a North Carolina court has "a local interest in resolving the controversy" that exceeds the local interest of the Florida courts. *See Cardiorentis AG*, 2018 NCBC LEXIS 243, at *23 (observing that North Carolina courts generally have an interest in providing a forum to hear disputes involving injuries related to citizens of the state).

129. The Court also concludes that the convenience of witnesses and the ease of access to proof favor proceeding in North Carolina. While the FSU Board did not specifically address these factors in its briefing or at the Hearing, the ACC has identified by name several material witnesses who reside in North Carolina and other

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[202] (*See* FAC ¶¶ 11–15, 52–53, 69, 105.)

[203] Indeed, the FSU Board voted to approve the ACC's initiation of litigation in North Carolina against the University of Maryland in 2012, (*see* Br. Supp. Def.'s Mots. Ex. 2 ¶ 39, ECF No. 19.2), and FSU's General Counsel submitted an affidavit in that litigation seeking the disqualification of the University of Maryland's counsel for a conflict of interest, (*see* Br. Opp'n Def.'s Mots. Ex. 5, ECF No. 31.5.)

material witnesses who do not reside in Florida.[204] The ACC has also represented that its servers, records, Board minutes, and agreements with ESPN are located in North Carolina.[205] Without opposing argument or evidence from the FSU Board, the Court concludes these factors weigh against the FSU Board's requested stay.

130. In addition to its arguments on the ACC's choice of forum, the FSU Board argues that this Court should defer to the Florida Action because it is broader in scope than this action. *See, e.g.*, *Coca-Cola Bottling Co. Consol.*, 141 N.C. App. at 578 (recognizing that "the interests of judicial economy and efficiency weigh in favor of suits that will settle all of the issues in the underlying controversy"). While the Florida Action may be broader in scope at this pre-answer stage of the litigation, the FSU Board ignores that its defenses and compulsory counterclaims will likely broaden the scope of this action to the same extent as the Florida Action once they are asserted. As a result, the Court does not give substantial weight to this factor in its analysis.

131. Considering the *Lawyers Mutual* factors as discussed above, both independently and in combination, and balancing the equities present in these circumstances, the Court concludes, in the exercise of its discretion, that the stay that the FSU Board requests is not warranted under *Lawyers Mutual* and that proceeding with this action in North Carolina would not work a "substantial injustice" on the FSU Board. The Court concludes, as discussed above, that (1) the nature of the case,

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[204] (*See* Br. Opp'n Def.'s Mots. 26 n.16, 17.)

[205] (*See* Br. Opp'n Def.'s Mots. 27.)

(2) the convenience of the 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, and (9) the ACC's choice of the North Carolina forum, when considered in combination, decisively outweigh the FSU Board's choice of the Florida forum for the determination of the enforceability of the Grant of Rights Agreements and the resolution of the ACC's damages claims against the FSU Board for breach of those agreements. Accordingly, the Court, in the exercise of its discretion, will deny the FSU Board's alternative Motion to Stay under section 1-75.12(a).

VI.

CONCLUSION

132. **WHEREFORE**, the Court **GRANTS in part** and **DENIES in part** the Motions and hereby **ORDERS** as follows:

a. The Court **GRANTS** the FSU Board's Motion to Dismiss as to the ACC's fifth claim for relief for breach of fiduciary duty, and that claim is hereby **DISMISSED with prejudice**;

b. The Court otherwise **DENIES** the FSU Board's Motion to Dismiss; and

c. The Court, in the exercise of its discretion, **DENIES** the FSU Board's alternative Motion to Stay.

SO ORDERED, this the 4th day of April, 2024.

/s/ Louis A. Bledsoe
Louis A. Bledsoe, III
Chief Business Court Judge

EXHIBIT H

STATE OF NORTH CAROLINA
In The General Court Of Justice
Mecklenburg County

CERTIFICATE OF TRUE COPY

OFFICE OF THE CLERK OF THE SUPERIOR COURT

As a Clerk of the Superior Court of this County, State of North Carolina, I certify that the attached copies of the documents described below are true and accurate copies of the originals now on file in this office.

Number And Description Of Attached Documents:

ATLANTIC COAST CONFERENCE,

V.

BOARD OF TRUSTEES OF FLORIDA STATE UNIVERSITY,

23CV040918-590

NOTICE OF APPEAL

Witness my hand and the seal of the Superior Court

Date
05/06/2024

Clerk Of Superior Court
ELISA CHINN-GARY

Name Of Undersigned Clerk (type or print)
Jamie Hawkins

Signature
Jamie Hawkins

☒ *Deputy CSC* ☐ *Assistant CSC* ☐ *Clerk Of Superior Court*

AOC-G-101, Rev. 3/19

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.	**NOTICE OF APPEAL**

TO THE HONORABLE SUPREME COURT OF THE STATE OF NORTH CAROLINA

Defendant Florida State University Board of Trustees of Florida State University (the "FSU Board") hereby gives notice of appeal to the Supreme Court of North Carolina of the findings and ruling by Chief Business Court Judge Louis A. Bledsoe, III in the April 4, 2024 Order and Opinion on Defendant's Motion to Dismiss Or, In the Alternative, Stay the Action (the "Order") that the FSU Board has waived sovereign immunity and is therefore subject to personal jurisdiction in the State of North Carolina.

This appeal is taken pursuant to North Carolina General Statutes § 1-277, which permits the immediate appeal of any interlocutory order that affects a substantial right and/or includes "an adverse ruling as to the jurisdiction of the

court over the person or property of the defendant." Pursuant to N.C. Gen. Stat. § 7A-27(a)(3)a), this "[a]ppeal lies of right directly to the Supreme Court" because the Order is an "interlocutory order of a Business Court Judge [that] [a]ffects a substantial right."

The FSU Board further intends to seek review of the trial court's denial in the Order of the FSU Board's request for stay of the trial court proceedings by means of a writ of certiorari to this Court as expressly provided by North Carolina General Statute § 1-75.12(c) and Rule 21 of the North Carolina Rules of Appellate Procedure.

The FSU Board expressly reserves all rights and avenues of future appeal with respect to all remaining issues and findings in the Order that are not immediately appealable under North Carolina law as of the date of this notice.

This the 9th day of April 2024.

/s/ C. Bailey King, Jr.
Christopher C. Lam
N.C. State Bar No. 28627
C. Bailey King, Jr.
N.C. State Bar No. 34043
Brian M. Rowlson
N.C. State Bar No. 37755
Hanna E. Eickmeier
N.C. State Bar No. 54927
BRADLEY ARANT BOULT CUMMINGS, LLP
214 North Tryon Street, Suite 3700
Charlotte, NC 28202
Telephone: (704) 338-6000
Facsimile: (704) 332-8858
clam@bradley.com
bking@bradley.com
browlson@bradley.com
heickmeier@bradley.com

David C. Ashburn (admitted *pro hac vice*)
Florida Bar No. 708046
Peter G. Rush (admitted *pro hac vice motion*)
Florida Bar No. 1050902
John K. Londot (admitted *pro hac vice*)
Florida Bar No. 579521
GREENBERG TRAURIG, P.A.
101 East College Avenue
Tallahassee, FL 32302
Telephone: (850) 222-6891
Facsimile: (850) 681-0207
ashburnd@gtlaw.com
peter.rush@gtlaw.com
londotj@gtlaw.com

Attorneys for Board of Trustees of Florida State University

CERTIFICATE OF SERVICE

The undersigned hereby certifies that this Notice of Appeal has been served upon all counsel of record through filing with the North Carolina Business Court, which will send electronic notice to all counsel of record and by depositing a copy hereof to each said party, postage pre-paid in the United States Mail, properly addressed to:

James P. Cooney
Sarah Motley Stone
Patrick Grayson Spaugh
Womble Bond Dickinson (US) LLP
301 South College Street, Suite 3500
Charlotte, North Carolina 28202-6037

Charles Alan Lawson
Lawson Huck Gonzalez, PLLC
215 South Monroe Street, Suite 320
Tallahassee, Florida 32301

James P. McLoughlin, Jr.
William M. Butler
Moore & Van Allen
100 North Tryon Street, Suite 4700
Charlotte, North Carolina 28202

J. Wesley Earnhardt
David H. Korn
Cravath, Swain & Moore LLP
Worldwide Plaza
825 Eighth Avenue
New York, New York 10019

This the 9th day of April 2024.

/s/ C. Bailey King, Jr.
C. Bailey King, Jr.

EXHIBIT

I

Exhibit 1

CONSTITUTION

ACC MANUAL

2023 | 2024

CONSTITUTION

1.1 NAME

The name of this association shall be the Atlantic Coast Conference, hereinafter referred to as the "Conference".

1.2 PURPOSE

1.2.1 General Purpose.
It is the purpose and function of this Conference to enrich and balance the athletic and educational experiences of student-athletes at its member institutions (collectively, the "Members"), to enhance athletic and academic integrity among its members, to provide leadership, and to do this in a spirit of fairness to all. The Conference aims to:

a. Enhance the academic and athletic achievement of student-athletes;
b. Increase educational opportunities for young people;
c. Foster quality competitive opportunities for student-athletes in a broad spectrum of amateur sports and championships;
d. Promote amateurism in intercollegiate athletics;
e. Coordinate and foster compliance with Conference and NCAA rules;
f. Stimulate fair play and sportsmanship;
g. Encourage responsible fiscal management and further fiscal stability;
h. Provide leadership and a voice in the development of public attitudes toward intercollegiate sports;
i. Address the future needs of athletics in a spirit of cooperation and mutual benefit of the Members; and
j. Promote mutual trust and friendly intercollegiate athletic relations between the Members.

1.2.2 Principle of Diversity, Inclusion and Equity.
The Conference and its Members are committed to diversity, inclusion, and equity among our student-athletes, staff, coaches, administrators, and leaders. The promotion of diversity, inclusion, and equity are integral to the structure, programs, legislation, and policies of the Conference and its Members.

1.3 INSTITUTIONAL CONTROL

There shall be institutional responsibility and control of intercollegiate athletics at the Member level. Each Member is responsible for conducting its intercollegiate athletics program in compliance with rules and regulations of the NCAA and the Conference. The Member's CEO (as defined below) is ultimately responsible for the administration of all aspects of the athletics program, including approval of the budget and audit of all expenditures.

The Member's responsibility for the conduct of its intercollegiate athletics program includes responsibility for the actions of its staff members and for the actions of any other individual or organization engaged in activities promoting the athletics interests of the Member.

1.4 MEMBERSHIP

1.4.1 Current Membership.
The Conference is composed of the following Members:

Boston College
Clemson University
Duke University
Florida State University
Georgia Institute of Technology
University of Louisville
University of Miami
University of North Carolina
North Carolina State University
University of Notre Dame
University of Pittsburgh
Syracuse University
University of Virginia
Virginia Polytechnic Institute & State University
Wake Forest University

1.4.2 Required Teams.
Each member shall meet NCAA Division I Football Bowl Subdivision membership requirements regarding the minimum number of teams. Further, each Member shall have a men's and women's basketball team, a football team, and either a women's soccer team or a women's volleyball team.

1.4.3 Admission of New Members.

a. Prior to considering admission of new Members, the Board (as defined in Section 1.5.1.1) shall consider the desirability of expansion generally and the ramifications of any potential expansion on Conference revenues, scheduling, student-athlete welfare, and the pool of prospective Members, among other issues.

b. Prospective Members must be proposed for admission by three Directors (as defined in Section 1.5.1.2).

c. Upon proper nomination for admission as outlined in Section 1.4.3(b), a prospective Member shall submit to the Conference office (Attention: Commissioner) an expression of interest for admission and all information the Conference has requested be included with such initial submission, including but not limited to, information regarding the institution's academic and athletic cultures, the most recent report of the accrediting agency for colleges and universities, the Equity in Athletics Disclosure Act (EADA) report, and the NCAA Committee on Institutional Performance report. The information will be distributed to the Board, and if authorized by the Board, the faculty athletics representatives, and athletics directors of all Members.

d. Thereafter, the prospective Member shall promptly submit to the Conference such additional information as may be requested by the Conference.

e. A favorable vote of three-fourths of the Directors is required to extend an invitation for membership to the Conference.

f. Participation by the new Member in Conference revenues and all other terms and conditions under which the new Member will join the Conference, including the amount, payment schedule and other terms for any fee payable to the Conference by the new Member, will be determined by a three-fourths (¾) vote of the Board at the time of admission.

1.4.4 Expulsion/Suspension/Probation of Members.
A Member may be expelled, suspended, or placed on probation by the Conference only upon the favorable vote of three-fourths of the Directors (excluding the Director appointed by the Member under consideration). To expel means a complete severance from the Conference in all sports. To suspend means a temporary severance under stated conditions from the Conference in one or more sports.

Among the reasons a Member may be expelled, suspended, or placed on probation for good cause is if it no longer participates in one or more sports which are required for membership in the Conference, if the Member is required by the NCAA to discontinue such required sport because of violations of NCAA regulations, or such Member or one or more of its sports programs becomes incompatible with the objectives of the Conference.

The effective date of any expulsion shall be June 30. In the event of expulsion, the Conference must provide the Member with the specific reasons for expulsion and a notice of expulsion on or before August 15 of the year preceding the June 30 expulsion date. The expelled Member will receive a proportionate share of the distribution made to Members with respect to the fiscal year ending on the June 30 expulsion date, unless its share has previously been reduced due to a suspension or probation, in which case it shall receive such reduced share.

In the event of suspension or probation, the Conference may enforce penalties immediately.

In any sport in which a Member is ineligible for postseason play because of violations of NCAA or Conference regulations, the Member may be suspended in that sport. If suspended, the Member shall not be eligible for the Conference championship in that sport and may be required to forfeit its share of any or all Conference revenues generated by that sport.

1.4.5 Withdrawal of Members.
To withdraw from the Conference, a Member must file an official notice of withdrawal with each of the Members and the Commissioner on or before August 15 for the withdrawal to be effective June 30 of the following year.

Upon official notice of withdrawal, the Member will be subject to a withdrawal payment, as liquidated damages, in an amount equal to three times the total operating budget of the Conference (including any contingency included therein), approved in accordance with Section 2.5.1 of the Bylaws of the Conference (the "Bylaws"), which is in effect as of the date of the official notice of withdrawal. The Conference may offset the amount of such payment against any distributions otherwise due such Member for any Conference year. Any remaining amount due shall be paid by the withdrawing Member within 30 days after the effective date of withdrawal. The withdrawing Member shall have no claim on the assets, accounts, or income of the Conference.

1.5 GOVERNANCE STRUCTURE

1.5.1 Board of Directors.

1.5.1.1 Authority. Except as otherwise provided in this Constitution, the Bylaws, or resolutions of the board of directors of the Conference (the "Board"), all of the powers of the Conference shall be exercised by or under the authority of the Board, and all of the activities and affairs of the Conference shall be managed by or under the direction, and subject to the oversight, of the Board

in accordance with this Constitution and the Bylaws. Notwithstanding anything to the contrary in the Constitution, Bylaws or such resolutions, or in the Sports Operations Code, General Policies and Procedures or otherwise in the Manual, the Board shall have the right to take any action or any vote on behalf of the Conference, and each Director shall have the right to take any action or any vote on behalf of the Member it represents, even if such right could be taken or exercised by another committee or person if the Board or such Director did not choose to exercise such right.

1.5.1.2 Composition, Terms and Vacancies. The Board shall be composed of a representative of each Member (each a "Director"), provided that each Director must be the most senior executive officer of such Member, whether such position is characterized as president, chancellor, chief executive officer or otherwise. In these capacities, these persons are occasionally referred to in this Constitution or the Bylaws as the "CEOs" of the Members they represent. The Commissioner shall also serve on the Board as an ex-officio, non-voting member and shall not be counted towards any quorum requirements. No election or appointment of any other Director shall be required or permitted. The term of each Director shall continue for so long as the Director is serving as the CEO of the Member it represents. If a vacancy occurs on the Board, other than due to the termination or withdrawal of a Member, the Member with a vacancy on the Board shall designate an individual to fill the vacancy on an interim basis until such time as a new CEO of such Member is appointed. Such interim appointee shall either be the acting or interim CEO of such Member or a person discharging a substantial portion of the duties of the CEO on an acting or interim basis. The remaining Directors shall have the authority, by majority vote, to remove from, or to refuse to recognize or seat on, the Board, any designee who fails to meet the criteria set forth in this Section 1.5.1.2.

1.5.1.3 Expelled and Withdrawing Member. The CEO of any Member that is expelled pursuant to Section 1.4.4 or withdraws from the Conference pursuant to Section 1.4.5 shall automatically cease to be a Director and such CEO and any other representative of such expelled or withdrawing Member that is then serving on any other Committee of the Conference shall automatically cease to be a member of such Committee, and shall cease to have the right to vote on any matter as of the effective date of the expulsion or withdrawal. During the period between delivery of a notice of expulsion or withdrawal and the effective date of the expulsion or withdrawal, the Board, the Executive Committee and any other Committee may withhold any information from, and exclude from any meeting (or portion thereof) and/or any vote, the Director and any other representatives of the expelled or withdrawing member, if the Board determines that (i) the relevant matter relates primarily to any period after the effective date of expulsion or withdrawal, (ii) such information is proprietary or confidential or (iii) such attendance, access to information or voting could present a conflict of interest for the expelled or withdrawing member or is otherwise not in the best interests of the Conference, as determined by the Board.

1.5.1.4 Chair and Vice Chair. The Board shall elect a chairperson of the Board (the "Chair") and a vice chairperson of the Board (the "Vice Chair") from among the Directors, each of whom shall serve for a term of two (2) years beginning on July 1 and ending on June 30, unless the Board determines a shorter term is appropriate. No Director shall be eligible to serve in the same position as Chair or Vice Chair for more than one (1) two (2)-year term unless a period of 6 years has passed since such Director last served in such position. For clarity, the foregoing sentence does not prevent a Director from serving one term as Chair and one term as Vice Chair within such six-year time period. In the event of any vacancy in the position of Chair or Vice Chair, any successor selected by the Board who serves out the remaining term of his or her predecessor shall remain eligible to serve an additional full two-year term unless the unexpired term filled by

such successor is 18 months or longer. The Chair shall preside at all meetings of the Board at which he or she is present, and the Vice Chair shall preside at all meetings of the Board at which the Chair is not present. The Board shall have the right to remove the Chair and/or the Vice Chair from such offices (but not the position of Director) at any time that the Board determines that such removal is in the best interests of the Conference.

1.5.1.5 Meetings of the Board.

1.5.1.5.1 Frequency; Notice and Participation. Unless the Board shall otherwise decide, the Board shall meet at least three (3) times each year, which generally shall include one meeting in the fall (the second Tuesday and Wednesday in September), one meeting during the Men's or Women's Basketball Conference Championship (alternating annually) and one meeting in May ("Regular Meetings"). The times and places of each Regular Meeting will be arranged by the Chair, who shall provide at least ninety (90) days' notice of each Regular Meeting to the Directors; provided that at the beginning of each one (1) year period beginning with the Annual Meeting (as defined below), the Chair may provide a single notice of all Regular Meetings for that year, or for a lesser period, without having to give notice of each meeting individually. Special meetings of the Board may be called at any time by the Chair, the Commissioner or at least two-thirds (2/3) of the Board. Special meetings also may be called by any three (3) Directors who serve on the Executive Committee pursuant to Section 1.5.3.1(iv) or by any three (3) Directors who do not also serve on the Executive Committee if they believe any item that is to be taken up by the Executive Committee (but has not yet been voted on by the Executive Committee) should instead be addressed by the full Board. Any special meetings shall be called upon at least three (3) days' notice (which notice shall state the purpose of the special meeting), unless notice is waived by three-fourths (3/4) of the Directors. Voting by proxy is not permitted. Any or all of the Directors may participate in and vote at any meeting of the Board by any means of communication by which all participants may simultaneously hear each other during the meeting and any Member attending by such means shall be deemed "present" for all quorum and voting purposes. Participation in a meeting by substitute representation is not permitted, unless determined otherwise in the specific case by the Chair, but in no event shall voting by a substitute representative be permitted.

1.5.1.5.2 Waiver of Notice. Before or after the date and time stated in the notice of any meeting of the Board, any Director may waive on such Director's own behalf any required notice of that meeting or any other required process with respect to any business to be conducted at that meeting by delivering to the Conference a written waiver of such notice or process by mail or by electronic transmission, which shall be filed with the corporate records of the Conference. Any Director who attends or participates in a meeting shall be deemed to have waived any required notice or process, unless the Director attends for the express purpose of objecting, at the beginning of the meeting, to the transaction of any business at the meeting on the ground that the meeting is not permitted to be called or convened or the required process for any business to be conducted has not been followed. Any waiver of notice or process with respect to a Board meeting shall only be effective if waived (or deemed waived) by three-fourths (3/4) of all the Directors.

1.5.1.5.3 Method of Notice. Any notice, request, consent, or other communication to any Director shall be deemed given effectively on the date delivered if given in person or by e-mail, one (1) business day after being transmitted by a nationally recognized overnight

delivery service, or five (5) business days after being sent by U.S. certified mail, return receipt requested, addressed to such Director at such Director's mail or e-mail address as it appears on the records of the Conference. Unless otherwise set forth in this Constitution or the Bylaws, any writing required or permitted hereunder may be in electronic form.

1.5.1.5.4 Action without Meeting. Any action of the Board required or permitted to be taken at any meeting of the Board may be taken without a meeting if each Director consents in writing or by electronic transmission and such writing or electronic transmission is filed with the corporate records of the Conference.

1.5.1.5.5 Annual Meetings. Unless the Board shall otherwise decide, a Regular Meeting occurring at any time between May 1 and May 31 of the calendar year shall constitute the annual meeting of the Board (the "Annual Meeting") and shall be deemed to constitute, unless the Chair shall designate otherwise, the annual meeting of the Members, which shall be held at a time and place fixed by the Chair.

1.5.1.5.6 Agenda. The agenda for each Board meeting shall be prepared by the Commissioner in consultation with the Chair and shall include all items submitted to the Commissioner by at least three (3) Directors no later than fifteen (15) business days before such meeting. The Commissioner shall be responsible for distributing the agenda to the Directors at least ten (10) business days before each Regular Meeting and at least two (2) calendar days prior to each special meeting of the Board. Except for Absolute Two-Thirds Matters (as defined below) and Absolute Three-Fourths Matters (as defined below), additional items may be added to the agenda at the meeting with the approval of the Board in accordance with Section 1.6.2. The Secretary (as defined below) shall cause draft minutes of each meeting of the Board and copies of all reports submitted at such meetings to be distributed to the Directors within thirty (30) days after the conclusion of each meeting. Any Director wishing to propose modifications to such draft minutes shall do so in a writing to the Secretary within the succeeding thirty (30) day period. The agenda for the next meeting shall include the adoption of such minutes, with such amendments as the Board may approve.

1.5.1.5.7 Attendees at Board Meetings; Executive Sessions. The Chair may invite persons other than Directors and the Commissioner to attend meetings of the Board, including, without limitation, the chairs of the Advisory Committees (as defined below), the officers of the Conference and any outside advisors or consultants to the Conference; provided that no such persons shall count toward a quorum nor be entitled to vote on any matter. The Board, at the request of the Chair or at least three (3) Directors, may meet in executive session in which one or more of such invited persons or the Commissioner may not be invited to attend. The Chair may, however, invite to such executive session internal or external counsel or any outside expert whose advice the Chair reasonably believes to be necessary or advisable to assist the Board in such executive session.

1.5.2. Officers.

1.5.2.1 Commissioner.

1.5.2.1.1 Appointment and Employment Terms. The Board shall appoint one person to serve as the chief executive officer and president of the Conference, who shall have the

title of "Commissioner" (the "Commissioner"). A vote of at least two-thirds (2/3) of the Directors shall be necessary (a) to authorize the appointment, extension of the term, or removal of the Commissioner, and (b) in connection with any appointment or extension, to determine the Commissioner's salary, other compensation and benefits, length of term in office, and other terms and conditions of employment; provided, that by a vote of at least two-thirds (2/3) of the Directors, the Board may delegate, within such parameters as it shall establish, final authority over the negotiation or modification of one or more of such employment matters and any related employment agreement to the Executive Committee or another committee formed for such purpose. Any terms and conditions of the Commissioner's employment (including upon a removal) shall be subject to any contractual rights the Commissioner may have.

1.5.2.1.2 Authority and Duties. The Commissioner shall have general supervision and direction of the day-to-day activities and affairs of the Conference and shall have such other authority as the Board may determine from time to time. The Commissioner shall report to, and be subject to the direction and supervision of, the Board. The Commissioner shall perform such duties as are prescribed in Sections 2.2.1 and 2.3.1 of the Bylaws and such other duties and responsibilities as may be established by the Board from time to time.

1.5.2.2 Other Officers.

1.5.2.2.1 President. The Commissioner shall also serve as the President of the Conference and will have such duties as may be established by the Board or as are generally incident to the office of President.

1.5.2.2.2 Secretary. The Board shall appoint one person (who shall not be the Commissioner) to serve as the secretary of the Conference (the "Secretary") under the supervision of the Board and the Commissioner. The Secretary shall attend all meetings of the Board and record all votes of the Board, prepare and retain in the Conference's records the minutes of all meetings of the Board, and perform similar duties for all Committees if requested by such Committees, it being understood that each Committee shall have the authority to appoint a Committee designee to perform any or all of such tasks. The Secretary shall give, or cause to be given, notice of all meetings of the Board, and shall have charge of the books, records and papers of the Conference and shall see that the reports, statements, and other documents required by law to be kept and filed are properly kept and filed. The Secretary shall perform such other duties as may be established by the Board or the Commissioner or as are generally incident to the office of Secretary.

1.5.2.2.3 Treasurer. The Board shall appoint one person (who shall not be the Commissioner) to serve as the treasurer of the Conference (the "Treasurer") under the supervision of the Board and the Commissioner. Subject to any applicable policies of the Board, the Treasurer shall have custody of the Conference funds and securities and shall keep full and accurate accounts of receipts and disbursements in books belonging to the Conference, and shall keep the moneys of the Conference in one or more separate accounts to the credit of the Conference. The Treasurer shall have the authority to take all actions and to sign all agreements necessary or advisable to open and administer the Conference's bank accounts and shall disburse the funds of the Conference as may be

ordered by the Board or the Commissioner, taking proper vouchers for such disbursements, and shall render to the Chair, the Vice Chair and the Board, at Regular Meetings, or whenever they may require it, an account of all transactions as Treasurer and of the financial condition of the Conference. The Treasurer shall perform such other duties as may be established by the Board or, subject to any applicable policies of the Board, the Commissioner or as are generally incident to the office of Treasurer.

1.5.2.2.4 Additional Officers. The Conference shall have such other officers (e.g., Vice President(s)) as may from time to time be appointed or elected by the Board or by the Commissioner (but only to the extent such authority has been granted to the Commissioner by the Board). Each officer shall have the authority to perform the duties set forth in this Constitution or the Bylaws or, to the extent consistent with this Constitution and the Bylaws, established by the Board, subject to any applicable policies of the Board, by the Commissioner. Except as set forth in this Section 1.5.2, one person may simultaneously hold any two or more offices.

1.5.2.2.5 Appointment and Removal of Officers. Officers of the Conference (other than the Commissioner) shall be appointed by the Board at the Annual Meeting and shall continue in office from July 1 through June 30; provided, that in the event the Board shall fail to appoint a new officer to any office prior to June 30, the person holding such office shall continue to hold such office until the earlier of appointment of such person's successor or such person's removal, resignation, death, or incapacity. The Board shall have the right to remove any Officer of the Conference at any time that the Board determines that such removal is in the best interests of the Conference, subject to any contractual rights the individual may have with the Conference and, in the case of the removal of the Commissioner, the two-thirds (2/3) voting requirement under Section 1.5.2.1.1.

1.5.3. Executive Committee.
Unless otherwise determined by the Board, there shall be an executive committee (the "Executive Committee") consisting of the Chair, the Vice Chair and four (4) other Directors, who shall rotate among the Members in accordance with a rotation order determined by three-fourths (3/4) of the Board, provided that service as Chair or Vice Chair shall count as a rotation opportunity. If the election of a Chair or Vice Chair requires a change in the Executive Committee rotation, such change shall be determined by a majority of the Board. The Chair shall serve as chairperson and the Vice Chair as the vice chairperson of the Executive Committee. The Commissioner and the chairs of the AD Committee, FAR Committee and SWA Committee shall serve as ex-officio, non-voting members of the Executive Committee and shall not be counted towards any quorum requirements.

1.5.3.1 Duties. Between Board meetings, the Executive Committee shall serve as a forum for the Chair or the Commissioner to seek advice on strategic, operating, and other matters relating to the Conference. In addition, if requested by the Chair or requested by the Commissioner and approved by the Chair between Board meetings, the Executive Committee shall have the authority to take any action on behalf of the full Board that could have been taken by the affirmative vote of a simple majority of the Directors at a meeting at which a quorum is present, excluding (i) the approval of the budget, (ii) the approval of any change in the rotation order of the Executive Committee, (iii) the approval of any matter that under applicable law must be approved by the Board (and may not be delegated to a committee) and (iv) the approval of any matter that at least three Directors serving on the Executive Committee request be submitted to the full Board

(provided such request is made prior to any vote by the Executive Committee on such matter). For the avoidance of doubt, (a) except as provided in clause (iv) of the foregoing sentence, the Chair shall determine whether the Executive Committee may act on behalf of the Board between meetings or whether to call a special meeting of the Board and (b) the Executive Committee shall not have the authority to take any action that under this Constitution or the Bylaws would require the affirmative vote of more than a majority of the Directors who are present for such vote, including the Absolute Two-Thirds Matters and the Absolute Three-Fourth Matters. If an agenda for an Executive Committee meeting is prepared in advance of the meeting, the Commissioner shall, if practicable, distribute such agenda to the full Board prior to the Executive Committee meeting.

1.5.3.2 Term of Executive Committee Members. The Chair and Vice Chair shall each serve on the Executive Committee for the duration of their terms in such offices; any removal of a Director as Chair or Vice Chair also shall automatically be a removal from the Executive Committee unless the Board otherwise decides. The remaining members of the Executive Committee shall be Directors selected in accordance with the rotation described in Section 1.5.3 and each shall serve a two (2) year term; provided that the Board shall have the right to create initial one-year terms for one or more members of the Executive Committee to create staggered terms and such initial one (1) year term shall not count against the aggregate two (2) year term limit described in the following sentence. Any Member whose Director has served one (1) two (2)-year term on the Executive Committee (including any Director completing a term as Chair or Vice Chair) shall not be eligible for reappointment on the Executive Committee until such Member is next in the rotation described in Section 1.5.3, unless such Director has been elected Chair or Vice Chair in accordance with Section 1.5.1.4.

1.5.3.3 Meetings of the Executive Committee; Executive Sessions. The Executive Committee may invite persons not on the Executive Committee to attend its meetings if such attendance is approved by the Chair (unless disapproved by a majority of the Executive Committee members), but such person shall not count toward a quorum nor be entitled to vote on any matter. The Executive Committee at the request of the Chair or at least three (3) Directors on the Executive Committee may meet in executive session in which one or more of such invited persons or the ex-officio members may not be invited to attend.

1.5.3.4 Vacancies. If a vacancy occurs in the positions of Chair or Vice Chair, the individual designated by the Board under Section 1.5.1.4 to serve as his or her successor in such position shall serve on the Executive Committee for the remaining term that such person serves as Chair or Vice Chair. If a vacancy occurs in any other seat on the Executive Committee, other than due to the expulsion or withdrawal of a Member, then the individual designated by the Member to fill its vacancy on the Board in accordance with Section 1.5.1.2 shall serve out the remaining term of the departing member of the Executive Committee. If a vacancy occurs on the Executive Committee (other than the Chair or Vice Chair) as a result of the expulsion or withdrawal of a Member, then such vacancy shall be filled in accordance with the rotation described in Section 1.5.3 and service of the remaining term of the departing member of the Executive Committee shall not count against the aggregate two (2) year term limit.

1.5.3.5 Notice and Conduct of Meetings; Quorum and Required Vote; Action without Meeting. Meetings of the Executive Committee may be called by the Chair, the Commissioner or at three least Directors serving on the Executive Committee. Unless waived by all Directors on the Executive Committee, notice of any meeting of the Executive Committee shall be given at least

three (3) days prior to such meeting. If all members of the Executive Committee are present at a meeting and no objection is made as to notice or the absence of any other required process, no notice or other process shall be required and any business authorized under this Constitution or the Bylaws may be transacted at the meeting. Except as otherwise provided by applicable law, this Constitution or the Bylaws, two-thirds (2/3) of all the Directors on the Executive Committee shall constitute a quorum and, if a quorum is present when a vote is taken, the affirmative vote of a majority of the Directors present and eligible to vote shall be the act of the Executive Committee. Voting by proxy is not permitted. Any or all members of the Executive Committee may participate in any meeting by any means of communication by which all participants may simultaneously hear each other during the meeting and any member attending by such means shall be deemed "present" for quorum purposes. Participation in a meeting by substitute representation is not permitted, unless determined otherwise in the specific case by the Chair, but in no event shall voting by a substitute representative be permitted. Any action of the Executive Committee required or permitted to be taken at any meeting of the Executive Committee may be taken without a meeting if all Directors on the Executive Committee eligible to vote consent thereto in writing or by electronic transmission and such writing(s) or electronic transmission(s) are filed with the records of the proceedings of the Executive Committee.

1.5.3.6 Notice of Executive Committee Decisions. The Chair will periodically provide the full Board with notice of all Executive Committee decisions that constitute action on behalf of the Board within a reasonable period of time after such decisions have been made, but in no event later than the date of the next Regular Meeting or special meeting of the Board.

1.5.4 Committees.

1.5.4.1 Establishment of Committees. The Board may from time to time establish committees of the Board (in addition to the Executive Committee, which has been established under Section 1.5.3) ("Committees"), on a standing or ad hoc basis, including but not limited to those expressly provided for in Section 2.4 of the Bylaws. At or about the time of the Annual Meeting, the Board shall elect the Directors to serve in any positions to be open on the following July 1 on any Committee comprised entirely of Directors. With respect to any Committee that is not comprised entirely of Directors and does not by its nature have a specified number of representatives per Member (e.g., FAR Committee, SWA Committee, AD Committee, Student-Athlete Advisory Committee), (a) the Members or their representatives may nominate individuals to serve on such Committees by submitting such nomination to the Commissioner and the Chair at least six weeks prior to the Annual Meeting, (b) the Commissioner and the Chair shall recommend to the Executive Committee the individuals to serve on each Committee by proposing a slate of nominees for the positions expected to be open on such Committee on the following July 1 at least two weeks prior to the Annual Meeting, and (c) each such Committee slate shall be subject to approval as a slate by the Executive Committee at or about the time of the Annual Meeting, with appointed persons to begin serving on the immediately following July 1. Each Committee shall have such authority as the Board may determine; provided, that, except as expressly provided in the Constitution or the Bylaws or by the Board, no Committee (including any Committee described in Section 2.4 of the Bylaws) shall (i) be authorized to act on behalf of the Board, (ii) have the power to bind the Conference or (iii) have any power which is specifically required by law, this Constitution, the Bylaws or any resolution of the Board to be exercised by the full Board or the Executive Committee. Subject to the foregoing sentence, the establishment or disbanding of any Committee, other than those explicitly provided for in the Bylaws, shall not require an amendment of this Constitution or the Bylaws, and shall instead be accomplished by

a vote of the Board in accordance with Section 1.6.2.

1.5.4.2 Terms and Vacancies. All Committee terms shall begin on July 1 and end on June 30. Directors serving on the Audit Committee, Finance Committee or Autonomy Committee shall serve for a two-year term and shall not be eligible to serve more than one such two-year term unless otherwise determined by a majority of the Directors. Members of Advisory Committees shall serve for so long as they remain the AD, FAR or SWA, as applicable, of the Member they represent. Persons who serve on a Committee by virtue of holding another position (e.g., Commissioner, chair of FAR Committee, etc.) shall serve on such Committee for so long as they remain in such position. All members of Committees not described in the foregoing sentences of this Section 1.5.4.2 shall each serve terms of three (3) years and shall not be eligible to serve more than two consecutive three-year terms; provided, that the Board shall have the right to create initial one (1) or two (2) year terms for one or more members of each Committee to create staggered terms and such initial one (1) or two (2) year terms shall not count against the aggregate six (6) year term limit. If a vacancy occurs on any Committee comprised entirely of Directors, the Board shall appoint a Director to fill the vacancy and such individual shall serve out the remaining term of the vacating member. If a vacancy occurs on any Advisory Committee, the relevant Member may designate an individual to fill the vacancy on an interim basis until such time as a new FAR, AD or SWA (as applicable) of such Member is appointed. If a vacancy occurs on any other Committee, the Executive Committee shall appoint an individual to fill the vacancy from nominations proposed by the Chair and the Commissioner and, where applicable, such individual shall serve out the remaining term of the vacating member. Such individual shall be selected from the same group of individuals (whether Directors, athletic directors, faculty athletic representatives, senior woman administrators, student-athletes or otherwise) as the vacating member, if applicable. In the case of a Committee established during the course of the year, members may be appointed to the Committee effective upon its formation and any period of service prior to the next July 1 shall not affect their ability to serve a term of up to three (3) years beginning on July 1 and shall not count against the aggregate six (6) year term limit.

1.5.4.3 Notice and Conduct of Meetings; Quorum and Required Vote; Action without Meeting. Meetings of a Committee may be called by the Chair, the chairperson of such Committee, the Commissioner, or a majority of the voting members of such Committee. Unless waived by three-fourths (3/4) of the voting members of a Committee, notice of any meeting of such Committee shall be given at least ten (10) days prior to such meeting. If all members of a Committee are present at a meeting and no objection is made as to notice or the absence of any other required process, no notice or other process shall be required and any business authorized under this Constitution or the Bylaws may be transacted at the meeting. Except as otherwise provided by applicable law, this Constitution or the Bylaws, two-thirds (2/3) of all the members of a Committee shall constitute a quorum and, if a quorum is present when a vote is taken, the affirmative vote of a majority of the members present and eligible to vote shall be the act of such Committee; provided that, with respect to any vote on a matter pertaining to a given sport, any Committee member who represents a Member that does not participate in such sport shall not count towards a quorum and shall not be entitled to vote on such matter. Voting by proxy is not permitted for any Committee (except as provided below by a substitute representative for Advisory Committee meetings). Any or all members of a Committee may participate in any meeting by any means of communication by which all participants may simultaneously hear each other during the meeting and any member attending by such means shall be deemed "present" for quorum and voting purposes. Advisory Committee members are expected to participate in all meetings of such Advisory Committee; however, a substitute representative of a Member may participate in and

vote at an Advisory Committee meeting if an illness or other exigent circumstance affects the ability of a Member's representative to participate. Participation in a Committee meeting (other than Advisory Committee meetings) by substitute representation is not permitted, unless determined otherwise in the specific case by the Chair, but in no event shall voting by a substitute representative be permitted (except as provided above for Advisory Committee meetings). Any action of a Committee required or permitted to be taken at any meeting of such Committee may be taken without a meeting if all members of such Committee eligible to vote consent thereto in writing or by electronic transmission and such writing(s) or electronic transmission(s) are filed with the records of the proceedings of such Committee.

1.5.4.4 Rule and Procedures. Each Committee shall keep regular minutes of its meetings and report to the Board when required or requested to do so. The Board may adopt other rules and regulations for the conduct of any Committee business or meetings not inconsistent with this Constitution or the Bylaws, and each Committee may adopt such other rules and regulations not inconsistent with applicable law, this Constitution, or the Bylaws for the conduct of its business or meetings as such Committee may deem proper.

1.6 BOARD VOTING REQUIREMENTS

1.6.1 Quorum.
Except as provided under applicable law, this Constitution or the Bylaws, two-thirds (2/3) of all Directors present at a meeting of the Board shall constitute a quorum of the Board; provided that, in the case of any matter requiring the affirmative vote of more than two-thirds (2/3) of all Directors present, a quorum shall only exist if at least that number of Directors equal to such required vote is present.

1.6.2 Required Vote.
Each Director shall be entitled to one vote each. Except as otherwise provided herein or in the Bylaws, if a quorum is present when a vote of the Directors is taken, the affirmative vote of a majority of all Directors present for such vote shall be an act of the Board.

For the avoidance of doubt, all references in this Constitution or the Bylaws to the affirmative vote of:

a. a majority or two-thirds (2/3) of all "Directors present", shall mean a majority or two-thirds (2/3) of all the Directors who are present at a Board meeting at which a quorum exists;

b. two-thirds (2/3) of all the Directors, shall mean two-thirds (2/3) of all the Directors of the Board, even if one or more of such Directors is not present for such vote ("Absolute Two-Thirds Matters"); and

c. three-fourths (3/4) of all the Directors, shall mean three-fourths (3/4) of all the Directors of the Board, even if one or more of such Directors is not present for such vote ("Absolute Three-Fourths Matters").

The Absolute Two-Thirds Matters are as follows: (i) any amendment to Article 2.5 of the Bylaws (Finances), (ii) selecting or changing the location of the Conference office, (iii) entering into or amending any Material Media Rights Agreement (as defined in Section 2.3.1(q)), (iv) the appointment, extension of the term, or removal of the Commissioner or the other matters set forth in Section 1.5.2.1.1, and (v) the initiation of any material litigation involving the Conference (but not, for clarity, the settlement of any

litigation involving the Conference, which requires the affirmative vote of a majority of all Directors present for such vote).

The Absolute Three-Fourths Matters are as follows: (i) the admission of new Members to the Conference pursuant to Section 1.4.3, (ii) the expulsion, suspension, or probation of a Member pursuant to Section 1.4.4, (iii) any amendment of this Constitution, (iv) any amendment of the Bylaws (except amendments to Article 2.5), and (v) waiver of notice or other required process for a Board meeting pursuant to Section 1.5.1.5.2.

1.6.3 Constitution and Bylaws Amendments.
The initial draft of any proposed amendment to this Constitution or the Bylaws shall be submitted in writing to the Directors or their designees at least four weeks before the Board meeting at which such amendment shall be considered. Revised drafts reflecting material comments received within 14 days shall be sent to the Directors at least 10 days before the meeting; provided that motions for further amendments may be considered and adopted by the requisite vote at the meeting.

1.6.4 Waivers of Eligibility Rules.
An approved waiver of the ACC initial-eligibility rule requires an affirmative vote of two-thirds of the members of the FAR Committee present at a FAR Committee meeting and voting on the request and not less than a majority of the total members on the FAR Committee. All FAR Committee members, including the FAR representing the Member requesting the waiver, are eligible to vote. The FAR Committee may invite persons other than FARs to attend any such meetings of the FAR Committee, including any compliance expert or other advisor; provided that no such persons shall count toward a quorum nor be entitled to vote on any matter.

1.6.5 Sports Operation Code Amendments.
The Commissioner, after consultation with the ADs and SWAs, shall submit proposed amendments to the Sports Operation Code to the FAR Committee, which may adopt any such amendment by a majority vote of the FARs present and voting on the issue.

1.6.6 General Policies and Procedures Amendments.
Unless the Board decides it will vote on any such proposed amendments, the Commissioner, after consultation with the ADs and SWAs, shall submit proposed amendments to the General Policies and Procedures to the FAR Committee, which may adopt any such amendment by a majority vote of the FARs present and voting on the issue.

1.6.7 Effective Date of Amendments.
All amendments to the ACC Manual shall become effective July 1 following adoption unless otherwise noted in the proposed amendment or the resolution(s) adopting the proposed amendment.

Exhibit 2

ATLANTIC COAST CONFERENCE GRANT OF RIGHTS AGREEMENT

THIS ATLANTIC COAST CONFERENCE GRANT OF RIGHTS AGREEMENT (the "Agreement") is executed on _____, 2013, by and among the Atlantic Coast Conference, an unincorporated nonprofit association (the "Conference"), and each of the following entities: (i) Boston College, Clemson University, Duke University, Florida State University, Georgia Institute of Technology, University of Miami, University of North Carolina, North Carolina State University, University of Virginia, Virginia Polytechnic Institute and State University, and Wake Forest University (collectively, the "Current Members"), (ii) University of Pittsburgh, Syracuse University, University of Notre Dame du Lac, and University of Louisville (collectively, the "Accepted Members"), and (iii) any entities that are admitted as new members of the Conference hereafter and which become bound by this Agreement by executing a signature page or joinder agreement hereto as a condition to such admission (the "Additional Members" and, together with the Current Members and Accepted Members, each a "Member Institution" and collectively, the "Member Institutions").

RECITALS:

WHEREAS, the execution and delivery of this Agreement enhances the stability of Conference membership, confirms the commitment by each Member Institution to the other Member Institutions of the Conference, and thereby provides valuable benefits to each Member Institution of the Conference;

WHEREAS, the Conference has previously entered into the Multi-Media Agreement with ESPN, Inc. and ESPN Enterprises, Inc. dated as of July 8, 2010, as amended by the Amendment and Extension Agreement dated as of May 9, 2012 (as amended, collectively referred to as the "Amended ESPN Agreement");

WHEREAS, each of the Accepted Members has been accepted for membership in the Conference by the Current Members and each Accepted Member has agreed that its membership shall be effective on the date specified on its signature page to this Agreement;

WHEREAS, as a condition to the agreement of ESPN to offer additional consideration to the Conference as part of a further amendment to the Amended ESPN Agreement (the "Additional Amendment"; the Additional Amendment, together with the Amended ESPN Agreement, collectively, the "ESPN Agreement"), each of the Member Institutions is required to, and desires to, irrevocably grant to the Conference, and the Conference desires to accept from each of the Member Institutions, those rights granted herein; and

WHEREAS, the Conference and the Member Institutions desire to have this Agreement memorialize their understandings with respect to the matters set forth herein.

NOW, THEREFORE, for and in consideration of the foregoing, the covenants set forth herein and in the ESPN Agreement, and other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged and agreed, and intending to be legally bound hereby, the undersigned each hereby agree with the Conference and with each other as follows:

1. Grant of Rights. Each of the Member Institutions hereby (a) irrevocably and exclusively grants to the Conference during the Term (as defined below) all rights (the "Rights") necessary for the Conference to perform the contractual obligations of the Conference expressly set forth in the ESPN Agreement, regardless of whether such Member Institution remains a member of the Conference during the entirety of the Term and (b) agrees to satisfy and perform all contractual obligations of a Member Institution during the Term that are expressly set forth in the ESPN Agreement. The grant of Rights pursuant to this paragraph 1 includes, without limitation, (A) the right to produce and distribute all events of such Member Institution that are subject to the ESPN Agreement; (B) subject to paragraph 7 hereof, the right to authorize access to such Member Institution's facilities for the purposes set forth in and pursuant to the ESPN Agreement; (C) the right of the Conference or its designee to create and to own a copyright of the audiovisual work of the ESPN Games (as defined in the ESPN Agreement) of or involving such Member Institution (the "Works") with such rights being, at least, coextensive with 17 U.S.C. 411(c); and (D) the present assignment of the entire right, title and interest in the Works that are created under the ESPN Agreement. Notwithstanding any other provisions of this paragraph, the grant of Rights pursuant to this paragraph 1 shall not include any rights of a particular Member Institution to sports as to which the Conference and such Member Institution have agreed, as of the date of such Member Institution's execution of this Agreement or a joinder thereto, that such Member Institution will not participate as a member of the Conference. The grant of Rights pursuant to this paragraph 1 shall remain subject to the right to produce and distribute, by means of specified media, those events of such Member Institution during the Term which are reserved to the Conference and the Member Institution under the ESPN Agreement and which may be exercised as permitted by the ESPN Agreement and in accordance with Conference policy. Each Member Institution will cause any affiliated entity which has previously been granted any interest in the Rights, to grant such interest to the Conference to the extent necessary to allow the Member Institution to fully perform all of its obligations under this Agreement and provide the Conference with the Rights contemplated hereby.

2. Copyright Assignment and License. The Conference and each of the Member Institutions acknowledge that the Conference owns or will own the copyrights to the Works. Each Member Institution hereby grants to the Conference or its designee the right to create a copyright Work and, for the entire duration of the applicable event, the copyright in such Works. The Conference shall have the right to seek relief under 17 U.S.C. 411(c) for any interference with the Conference's federal copyright ownership interest in the Works created and/or Works to be created under the ESPN Agreement. Each Member Institution agrees to cooperate with the Conference in any such action, but at the Conference's sole expense. The rights assigned in the Works include, but are not limited to, all rights under the United States and/or foreign copyright laws; all reproduction, performance, display, distribution, and other intellectual property rights; the right to modify, distort, or alter the Works and future Works; and all so-called moral rights. To the extent moral rights may not be assigned, each Member Institution hereby waives the benefit or protection of same.

3. Execution of Additional Documents. If requested by the Conference, each Member Institution hereby agrees to execute and deliver all documents reasonably requested by the Conference to effectuate the intent of this Agreement, at the Conference's expense.

4. Additional Members. The Conference shall not admit a new member to the Conference unless and until (a) such new member agrees to become bound by this Agreement with respect to all sports in which it participates as a member of the Conference by executing a signature page or joinder agreement hereto as a condition to such admission and (b) grants to the Conference pursuant to this Agreement all Rights of such Member Institution with respect to such sports.

5. Term. The "Term" of this Agreement shall begin on the Effective Date and shall continue until June 30, 2027. The "Effective Date" means (a) for the Current Members, the date first set forth above, and (b) for Accepted Members and Additional Members, the date on which the Conference and a particular Accepted Member or Additional Member have agreed that the membership in the Conference shall become effective in accordance with the Conference's Constitution and Bylaws, which date is set forth on the respective signature page hereof for each Accepted Member and shall be set forth on the signature page of this Agreement for each Additional Member. For clarity, all Accepted Members and Additional Members agree to be bound as of their signature hereon even though the term of their membership in the Conference has not yet begun.

6. Acknowledgements, Representations, Warranties, and Covenants. Each of the Member Institutions acknowledges that the grant of Rights during the entire Term is irrevocable and effective until the end of the Term regardless of whether the Member Institution withdraws from the Conference during the Term or otherwise ceases to participate as a member of the Conference in accordance with the Conference's Constitution and Bylaws. Furthermore, each Member Institution represents and warrants to the Conference (a) that such Member Institution either alone, or in concert with an affiliated entity that has executed an agreement to be bound by the provisions of this Agreement, has the right, power and capacity to execute, deliver and perform this Agreement and to discharge the duties set forth herein; (b) that execution, delivery and performance of this Agreement and the discharge of all duties contemplated hereby, have been duly and validly authorized by all necessary action on the part of such Member Institution; (c) that execution and delivery of this Agreement by Member Institution and the discharge of duties contemplated herein by Member Institution will not, with or without the giving of notice or the lapse of time, or both: (i) violate or conflict with any of the provisions of the charter document, bylaws or other governing documents of such Member Institution; (ii) violate, conflict with or result in breach or default under, or cause termination of any contract, license, permit or other agreement, document or instrument to which Member Institution is a party or by which Member Institution may be bound; or (iii) violate any provision of any law, statute, rule, regulation, court order, judgment, or decree, or ruling of any governmental authority, by which Member Institution is a party or to which Member Institution may be bound; and (d) that Member Institution, either alone, or in concert with an affiliated entity that has executed an agreement to be bound by the provisions of this Agreement, owns all Rights granted to the Conference in paragraph 1 above. Each of the Member Institutions covenants and agrees that (x) it will not enter into any agreement that is inconsistent with the provisions of this Agreement, and (y) it will not take any action, or permit any action to be taken by others subject to its control, including licensees, or fail to take any action, that would affect the validity and enforcement of the Rights granted to the Conference under this Agreement.

7. Reasonable Access. Without any additional consideration or compensation to the Member Institutions, each of the Member Institutions agrees throughout the Term to provide ESPN and its sublicensees with reasonable access to its property and facilities, with appropriate ingress and egress, parking, facilities, utilities and lighting, and other support and assistance reasonably required by ESPN and its sublicensees to exercise the Rights as and to the extent provided in the ESPN Agreement.

8. Miscellaneous. This Agreement may not be modified or amended other than by an agreement in writing signed by duly authorized representatives of the Conference and each of the Member Institutions that are then members of the Conference. This Agreement may be executed in multiple counterparts and delivered by electronic or facsimile transmission. This Agreement, together with any substantially contemporaneous agreement between the Conference and an affiliated entity of a Member Institution relating to the Rights, sets forth the entire understanding of the parties hereto relating to the grant of Rights and related subject matter provided for herein and, effective as of the date first set forth above, supersedes all prior agreements and understandings among or between any of the parties relating to the grant of Rights and related subject matter provided for herein. The Recitals set forth above shall be deemed incorporated by this reference into and specifically made part of this Agreement. Should any provision of this Agreement be determined to be invalid or unenforceable, such shall not invalidate this Agreement, but such provision shall be deemed amended to the extent necessary to make such provision valid and enforceable and which as closely as possible reflects the original intent of the parties.

[The remainder of this page is intentionally left blank.]

IN WITNESS WHEREOF, the Conference and each of the Member Institutions have duly executed this Agreement as of the date set forth opposite their respective signatures below intending to be bound as of the date first set forth above.

THE CONFERENCE:

ATLANTIC COAST CONFERENCE

Dated: April 22, 2013

By: _____
John D. Swofford
Commissioner

SIGNATURE PAGE TO
ATLANTIC COAST CONFERENCE
GRANT OF RIGHTS AGREEMENT
DATED 4/19, 2013

IN WITNESS WHEREOF, the Conference and each of the Member Institutions have duly executed this Agreement as of the date set forth opposite their respective signatures below intending to be bound as of the date first set forth above.

MEMBER INSTITUTION:

BOSTON COLLEGE

Dated: April 19, 2013

By: William P. Leahy, S.J.
Name: William P. Leahy, S.J.
Title: President

SIGNATURE PAGE TO
ATLANTIC COAST CONFERENCE
GRANT OF RIGHTS AGREEMENT
DATED 4-19, 2013

IN WITNESS WHEREOF, the Conference and each of the Member Institutions have duly executed this Agreement as of the date set forth opposite their respective signatures below intending to be bound as of the date first set forth above.

MEMBER INSTITUTION:

CLEMSON UNIVERSITY

Dated: 4 / 19, 2013

By: _____
Name: James F. Barker
Title: President

SIGNATURE PAGE TO
ATLANTIC COAST CONFERENCE
GRANT OF RIGHTS AGREEMENT
DATED 4/19, 2013

IN WITNESS WHEREOF, the Conference and each of the Member Institutions have duly executed this Agreement as of the date set forth opposite their respective signatures below intending to be bound as of the date first set forth above.

MEMBER INSTITUTION:

DUKE UNIVERSITY

Dated: April 19, 2013

By: Richard H Brodhead
Name: RICHARD H. BRODHEAD
Title: PRESIDENT,
DUKE UNIVERSITY

IN WITNESS WHEREOF, the Conference and each of the Member Institutions have duly executed this Agreement as of the date set forth opposite their respective signatures below intending to be bound as of the date first set forth above.

MEMBER INSTITUTION:

FLORIDA STATE UNIVERSITY

Dated: April 19, 2013

By: Eric J Barron
Name: Eric J Barron
Title: President

SIGNATURE PAGE TO
ATLANTIC COAST CONFERENCE
GRANT OF RIGHTS AGREEMENT
DATED April 19 2013

IN WITNESS WHEREOF, the Conference and each of the Member Institutions have duly executed this Agreement as of the date set forth opposite their respective signatures below intending to be bound as of the date first set forth above.

MEMBER INSTITUTION:

GEORGIA INSTITUTE OF TECHNOLOGY

Dated: April 19, 2013

By: _____

Name: G.P. Peterson

Title: President

SIGNATURE PAGE TO
ATLANTIC COAST CONFERENCE
GRANT OF RIGHTS AGREEMENT
DATED April 19, 2013

IN WITNESS WHEREOF, the Conference and each of the Member Institutions have duly executed this Agreement as of the date set forth opposite their respective signatures below intending to be bound as of the date first set forth above.

MEMBER INSTITUTION:

UNIVERSITY OF LOUISVILLE

Dated: April 19, 2013

By: James R Ramsey
Name: James R Ramsey
Title: President

Date that Conference membership becomes effective:

Expected July 1, 2014, pending withdrawal negotiations with the Big East Conference

IN WITNESS WHEREOF, the Conference and each of the Member Institutions have duly executed this Agreement as of the date set forth opposite their respective signatures below intending to be bound as of the date first set forth above.

MEMBER INSTITUTION:

UNIVERSITY OF MIAMI

Dated: April 19, 2013

By: _____
Name: DONNA E SHALALA
Title: PRESIDENT

IN WITNESS WHEREOF, the Conference and each of the Member Institutions have duly executed this Agreement as of the date set forth opposite their respective signatures below intending to be bound as of the date first set forth above.

MEMBER INSTITUTION:

UNIVERSITY OF NORTH CAROLINA

Dated: April 19, 2013

By: H. Holden Thorp
Name: H. Holden Thorp
Title: Chancellor

IN WITNESS WHEREOF, the Conference and each of the Member Institutions have duly executed this Agreement as of the date set forth opposite their respective signatures below intending to be bound as of the date first set forth above.

MEMBER INSTITUTION:

NORTH CAROLINA STATE UNIVERSITY

Dated: April 19, 2013

By: Randy Woodson
Name: W. Randolph Woodson
Title: Chancellor

IN WITNESS WHEREOF, the Conference and each of the Member Institutions have duly executed this Agreement as of the date set forth opposite their respective signatures below intending to be bound as of the date first set forth above.

MEMBER INSTITUTION:

UNIVERSITY OF NOTRE DAME DU LAC

Dated: April 19, 2013

By: _____
Name: Rev. John I. Jenkins, C.S.C.
Title: President

Date that Conference membership becomes effective: July 1, 2013

SIGNATURE PAGE TO
ATLANTIC COAST CONFERENCE
GRANT OF RIGHTS AGREEMENT
DATED 4-19, 2013

IN WITNESS WHEREOF, the Conference and each of the Member Institutions have duly executed this Agreement as of the date set forth opposite their respective signatures below intending to be bound as of the date first set forth above.

MEMBER INSTITUTION:

UNIVERSITY OF PITTSBURGH

Dated: April 19, 2013

By: [signature]
Name: Mark A. Nordenberg
Title: Chancellor

Date that Conference membership becomes effective: July 1, 2013

IN WITNESS WHEREOF, the Conference and each of the Member Institutions have duly executed this Agreement as of the date set forth opposite their respective signatures below intending to be bound as of the date first set forth above.

MEMBER INSTITUTION:

SYRACUSE UNIVERSITY

Dated: April 19, 2013

By: _____
Name: Nancy Cantor
Title: Chancellor

Date that Conference membership becomes effective: July 1, 2013

IN WITNESS WHEREOF, the Conference and each of the Member Institutions have duly executed this Agreement as of the date set forth opposite their respective signatures below intending to be bound as of the date first set forth above.

MEMBER INSTITUTION:

UNIVERSITY OF VIRGINIA

Dated: April 19, 2013

By: Teresa A. Sullivan
Name: Teresa A. Sullivan
Title: President, University of Virginia

SIGNATURE PAGE TO
ATLANTIC COAST CONFERENCE
GRANT OF RIGHTS AGREEMENT
DATED April 19, 2013

IN WITNESS WHEREOF, the Conference and each of the Member Institutions have duly executed this Agreement as of the date set forth opposite their respective signatures below intending to be bound as of the date first set forth above.

MEMBER INSTITUTION:

VIRGINIA POLYTECHNIC INSTITUTE AND STATE UNIVERSITY

Dated: 4 19, 2013

By: _____
Name: Charles W. Steger
Title: President

SIGNATURE PAGE TO
ATLANTIC COAST CONFERENCE
GRANT OF RIGHTS AGREEMENT
DATED April 19, 2013

IN WITNESS WHEREOF, the Conference and each of the Member Institutions have duly executed this Agreement as of the date set forth opposite their respective signatures below intending to be bound as of the date first set forth above.

MEMBER INSTITUTION:

WAKE FOREST UNIVERSITY

Dated: April 19, 2013

By: _____
Name: Nathan O. Hatch
Title: President

SIGNATURE PAGE TO
ATLANTIC COAST CONFERENCE
GRANT OF RIGHTS AGREEMENT
DATED April 19 2013

Exhibit 4

BYLAWS

ACC MANUAL

2023 | 2024

2.10 MEDIA RIGHTS POLICY

[Note: See Section 2.12 of these Bylaws for provisions regarding the University of Notre Dame.]

2.10.1 Grant of Rights. The Members have granted to the Conference the right to exploit certain media and related rights of the Members (such rights, the "Media Rights"; and the agreement pursuant to which the Members granted such rights, the "Grant of Rights").

2.10.2 Revenues from Media Rights.
Unless otherwise determined by the Board, all revenues from the sale, licensing, distribution, and other exploitation of the Media Rights shall be deposited with the Conference.

2.10.3 Conference Media Rights Agreements.
The Commissioner shall negotiate all contracts and agreements for the sale, licensing, distribution, and other exploitation of the Media Rights on behalf of the Conference as provided in Section 2.3.1(q); provided that any Material Media Rights Agreement shall require the approval of two-thirds (2/3) of the Directors and all other Media Rights agreements shall be subject to approval by the Executive Committee. The Media Committee established pursuant to Section 2.4.2 shall assist the Commissioner in the negotiation and evaluation of the Conference's Media Rights agreements and shall make a recommendation to the Board with respect to any Media Rights agreement requiring Board approval.

2.10.4 Conflict Games.
Subject to the terms of this Section 2.10.4, no Member shall participate in any game that will conflict with the terms of any Conference Media Rights agreement or any of the Conference's rights or obligations thereunder. To the extent any Member is invited to participate in a football or men's basketball game that will be distributed or otherwise exploited in conflict with any football or men's basketball game that is or may be subject to any Conference Media Rights agreement ("Conflict Game"), and such Member wishes to participate in such Conflict Game, the Member shall promptly refer the matter to the Commissioner for his or her prior written approval. Unless the Commissioner grants such approval, the Member shall be prohibited from participating in such Conflict Game.

2.10.5 Member Rights.
Notwithstanding Section 2.10.3, but only to the extent permitted by the Conference's Media Rights agreements, each Member shall retain such rights that are expressly retained by the Members under the Grant of Rights and any other rights that the Board may from time to time determine may be exploited by the Members.

2.10.6 Revenues from Non-Package Games.
Unless otherwise determined by the Board, all revenues derived from the exploitation by any Member of its football games and basketball games that are not included in or selected for distribution as part of any Conference Media Rights agreement ("Non-Package Games") shall be deposited with the Conference.

2.10.7 Conference Non-Package Contracts.
In appropriate circumstances determined by the Board, the Commissioner's office may negotiate television contracts for events that are not part of any Conference Media Rights agreement. However, any such contracts shall be subject to the approval of the Board.

Exhibit 7

AMENDMENT TO
ATLANTIC COAST CONFERENCE
GRANT OF RIGHTS AGREEMENT

This Amendment is entered into as of this ____ day of June, 2016, by and among the Atlantic Coast Conference, an unincorporated nonprofit association (the "Conference"), and each of the following entities: Boston College, Clemson University, Duke University, Florida State University, Georgia Institute of Technology, University of Miami, University of North Carolina, North Carolina State University, University of Virginia, Virginia Polytechnic Institute and State University, Wake Forest University, University of Pittsburgh, Syracuse University, University of Notre Dame du Lac, and University of Louisville (collectively, the "Member Institutions"), who are parties to that certain Atlantic Coast Conference Grant of Rights Agreement, dated as of April 19, 2013 (the "Original Grant Agreement)."

WHEREAS, the Conference is a party to a Multi-Media Agreement with ESPN, Inc. and ESPN Enterprises, Inc. (collectively, "ESPN"), dated as of July 8, 2010, as amended by the Amendment and Extension Agreement dated as of May 9, 2012, and by a Second Amendment to Multi-Media Agreement," dated as of June 24, 2014 (collectively, the "Original ESPN Agreement"); and

WHEREAS, the Conference has negotiated an Amended and Restated Multi-Media Agreement with ESPN (the "Restated Multi-Media Agreement") and a Network Agreement with ESPN. (collectively, the "Prospective Agreements"), which offer certain additional consideration to the Conference; and

WHEREAS, ESPN has informed the Conference that it will enter into the Prospective Agreements only if each of the Member Institutions agrees to amend the Original Grant Agreement to extend the term thereof, as provided herein;

NOW, THEREFORE, in consideration of the mutual promises set forth in this Amendment and other good and valuable consideration, the receipt and sufficiency of which are acknowledged, the parties agree as follows:

1. The term "ESPN Agreement" in the fourth "Whereas" clause of the Original Grant Agreement is hereby amended to refer collectively to the Original ESPN Agreement and the Prospective Agreements.

2. Section 5 of the Original Grant Agreement is hereby amended by deleting the first sentence of the existing Section 5 in its entirety and substituting the following therefor:

> *"Term. The "Term" of this Agreement shall begin on the Effective Date and shall continue until June 30, 2036.*

3. Except as specifically modified by this Amendment, the terms of the Original Grant Agreement will remain in full force and effect.

4. This Amendment is effective as of June 27, 2016.

[The remainder of this page is intentionally left blank.]

IN WITNESS WHEREOF, the Conference and each of the Member Institutions have duly executed this Amendment as of the date set forth opposite their respective signatures below intending to be bound as of the date first set forth above.

THE CONFERENCE:

ATLANTIC COAST CONFERENCE

Dated: July 18, 2016

By: _____
John D. Swofford
Commissioner

IN WITNESS WHEREOF, the Conference and each of the Member Institutions have duly executed this Agreement as of the date set forth opposite their respective signatures below intending to be bound as of the date first set forth above.

MEMBER INSTITUTION:

BOSTON COLLEGE

Dated: June 27, 2016

By: William P. Leahy, S.J.
Name: William P. Leahy, S.J.
Title: President

IN WITNESS WHEREOF, the Conference and each of the Member Institutions have duly executed this Agreement as of the date set forth opposite their respective signatures below intending to be bound as of the date first set forth above.

MEMBER INSTITUTION:

CLEMSON UNIVERSITY

Dated: June 29, 2016

By: James P. Clements
Name: James P. Clements, Ph.D.
Title: President

IN WITNESS WHEREOF, the Conference and each of the Member Institutions have duly executed this Agreement as of the date set forth opposite their respective signatures below intending to be bound as of the date first set forth above.

MEMBER INSTITUTION:

DUKE UNIVERSITY

Dated: June 27, 2016

By: Richard Brodhead

Name: Richard H. Brodhead

Title: President

IN WITNESS WHEREOF, the Conference and each of the Member Institutions have duly executed this Agreement as of the date set forth opposite their respective signatures below intending to be bound as of the date first set forth above.

MEMBER INSTITUTION:

FLORIDA STATE UNIVERSITY

Dated: June 28, 2016

By: _____
Name: JOHN THRASHER
Title: PRESIDENT

IN WITNESS WHEREOF, the Conference and each of the Member Institutions have duly executed this Agreement as of the date set forth opposite their respective signatures below intending to be bound as of the date first set forth above.

MEMBER INSTITUTION:

GEORGIA INSTITUTE OF TECHNOLOGY

Dated: June 27, 2016

By: _____
Name: G. P. Peterson
Title: President

IN WITNESS WHEREOF, the Conference and each of the Member Institutions have duly executed this Agreement as of the date set forth opposite their respective signatures below intending to be bound as of the date first set forth above.

MEMBER INSTITUTION:

UNIVERSITY OF LOUISVILLE

Dated: June 27, 2016

By: _____
Name: _____
Title: _____

IN WITNESS WHEREOF, the Conference and each of the Member Institutions have duly executed this Agreement as of the date set forth opposite their respective signatures below intending to be bound as of the date first set forth above.

MEMBER INSTITUTION:

UNIVERSITY OF MIAMI

Dated: June 30, 2016

By: _____
Name: Julio Frenk
Title: President

IN WITNESS WHEREOF, the Conference and each of the Member Institutions have duly executed this Agreement as of the date set forth opposite their respective signatures below intending to be bound as of the date first set forth above.

MEMBER INSTITUTION:

NORTH CAROLINA STATE UNIVERSITY

Dated: June 29, 2016

By: Scott R Dgl
Name: Scott R. Douglass
Title: Vice Chancellor

IN WITNESS WHEREOF, the Conference and each of the Member Institutions have duly executed this Agreement as of the date set forth opposite their respective signatures below intending to be bound as of the date first set forth above.

MEMBER INSTITUTION:

UNIVERSITY OF NORTH CAROLINA
AT CHAPEL HILL

Dated: June 27, 2016

By: Carol L. Folt
Carol L. Folt
Chancellor

IN WITNESS WHEREOF, the Conference and each of the Member Institutions have duly executed this Agreement as of the date set forth opposite their respective signatures below intending to be bound as of the date first set forth above.

MEMBER INSTITUTION:

UNIVERSITY OF NOTRE DAME DU LAC

Dated: July 12, 2016

By: _____
Name: John I. Jenkins, C.S.C.
Title: President

IN WITNESS WHEREOF, the Conference and each of the Member Institutions have duly executed this Agreement as of the date set forth opposite their respective signatures below intending to be bound as of the date first set forth above.

MEMBER INSTITUTION:

UNIVERSITY OF PITTSBURGH

Dated: June 27, 2016

By: _____
Name: Patrick Gallagher
Title: Chancellor

IN WITNESS WHEREOF, the Conference and each of the Member Institutions have duly executed this Agreement as of the date set forth opposite their respective signatures below intending to be bound as of the date first set forth above.

MEMBER INSTITUTION:

SYRACUSE UNIVERSITY

Dated: June 27, 2016

By: Kent Syverud
Name: Kent Syverud
Title: Chancellor & President

IN WITNESS WHEREOF, the Conference and each of the Member Institutions have duly executed this Agreement as of the date set forth opposite their respective signatures below intending to be bound as of the date first set forth above.

MEMBER INSTITUTION:

UNIVERSITY OF VIRGINIA

Dated: June 27, 2016

By: Teresa A. Sullivan
Name: Teresa A. Sullivan
Title: President

IN WITNESS WHEREOF, the Conference and each of the Member Institutions have duly executed this Agreement as of the date set forth opposite their respective signatures below intending to be bound as of the date first set forth above.

MEMBER INSTITUTION:

VIRGINIA POLYTECHNIC INSTITUTE
& STATE UNIVERSITY

Dated: June 24, 2016

By: M. Dwight Shelton, Jr.
Name: M. Dwight Shelton, Jr.
Title: VP for Finance & CFO

IN WITNESS WHEREOF, the Conference and each of the Member Institutions have duly executed this Agreement as of the date set forth opposite their respective signatures below intending to be bound as of the date first set forth above.

MEMBER INSTITUTION:

WAKE FOREST UNIVERSITY

Dated: June 27, 2016

By: _____
Nathan O. Hatch
President

ADDENDUM – UNPUBLISHED CASES:

2012 WL 39950
Only the Westlaw citation is currently available.
United States District Court,
M.D. Alabama,
Northern Division.

ALABAMA MUNICIPAL INSURANCE CORPORATION, Plaintiff,
v.
ALLIANT INSURANCE SERVICES, INC., formerly known as Driver Alliant Insurance Services, formerly known as Robert F. Driver Associates, Defendant.

No. 2:09–CV–928–WKW.
|
Jan. 9, 2012.

Attorneys and Law Firms

Scott Michael Speagle, William Houston Webster, Dennis Mitchell Henry, Thomas Michael McCarthy, Webster, Henry, Lyons, White, Bradwell & Black, P.C., Montgomery, AL, for Plaintiff.

John Winston Scott, Kimberly Wood Geisler, Michael G. Green, II, Scott Dukes & Geisler PC, Birmingham, AL, for Defendant.

MEMORANDUM OPINION AND ORDER

W. KEITH WATKINS, Chief Judge.

I. INTRODUCTION

***1** Not much is simple about this jury case, but these facts are undisputed. Plaintiff Alabama Municipal Insurance Corporation ("AMIC") was formed as a nonprofit corporation by the Alabama League of Municipalities to provide insurance for Alabama municipalities and other public entities. In 2000, AMIC was in the market for reinsurance. Defendant Alliant Insurance Services, Inc. ("Alliant") had for sale to public entity insurers like AMIC a reinsurance program ("PEPIP"), underwritten by various underwriters, including Lloyd's of London ("Lloyd's"). In April and May, 2000, Alliant and AMIC got together (through AMIC's now-President, Steve Wells, and Alliant's then-Vice President, Gerry Lillis, who were golfing buddies), and AMIC joined the PEPIP program by purchasing a reinsurance policy through the program to reinsure Alabama public entities (cities, towns and the like) with total insured values of roughly $650 million. (Pl.'s Ex. 3, Property Binder; Abella Trial Test., Mar. 16, 2011.[1]) AMIC and Alliant had no preexisting business relationship.

Alliant issued a PEPIP binder on "various underwriters" (Lloyd's was not identified as the reinsurance carrier initially) to AMIC, and AMIC transmitted a $494,500 premium to Alliant (not Lloyd's). (Pl.'s Ex. 3; Trial Tr. vol. 1, 50 (Doc. # 120).) The binder required AMIC to report its losses to Alliant, and Alliant promised a written policy to follow. (Pl.'s Ex. 3, Attach. 3 (stating that coverage is "[a]s per PEPIP USA Manuscript form"); Def.'s Ex. 6, PEPIP USA Manuscript 38 (stating that notice of loss is to be reported to Alliant).) In fact, no policy was received by AMIC until June 2001, more than a year after its purchase, when the Lloyd's policy (Def.'s Ex. 6) was delivered. According to AMIC, it also entered into a contractual relationship with Alliant whereby AMIC's duties were to transmit the reinsurance premiums to Alliant, as well as to transmit *timely* its notices of loss to Alliant. (Am. Compl. ¶ 6 (Doc. # 17)[2]; Trial Tr. vol. 1, 18, 22–23.) In turn, Alliant's alleged contractual duties were to forward *timely* those notices of loss and premiums upstream to the reinsurer(s). (Am. Compl. ¶ 5; Trial Tr. vol. 1, 49–50.) This alleged contract is at the center of this controversy.

Because the 2000–01 premium and aggregate deductible quoted to AMIC were so "aggressive," "competitive" and "low"—in other words, quite favorable and quite cheap—AMIC thrived and grew fatter than a pig with a thyroid condition during the 2000–01 term of the Lloyd's policy. (Trial Tr. vol. 1, 21–22; Abella Trial Test.) During a round of golf in August 2001, Mr. Wells told Mr. Lillis and Mr. Wozniak (also a Vice President at Alliant) that AMIC would not submit reinsurance claims for the 2000–01 "treaty" year.[3] Both parties and their principals referred to this statement as the "Gentlemen's Agreement." Whether it was a legally binding agreement or not, it was never reduced to writing.

***2** In accordance with the Gentlemen's Agreement, AMIC did not submit its 2000–01 claims for more than five years after the end of the Lloyd's policy term. That was in November, 2006,[4] when Mr. Wells unilaterally decided that AMIC was not being treated fairly by Alliant in its dealings for treaty years subsequent to 2000–01 (years which did not involve Lloyd's—AMIC was insured by other reinsurers during those years). The 2000–01 claims were eventually

submitted through Alliant to Lloyd's, whose laywer indicated in correspondence in 2009 that Lloyd's would not pay, not because the claims were untimely, but because AMIC's insured values had doubled during the treaty year and no corresponding premium was paid. Lloyd's is not a party, and its position has never been tested by AMIC.

Contract questions come to the surface like so many boulders. Was there a meeting of the minds between AMIC and Alliant in the first relevant instance, that back in 2000, Alliant agreed to timely transmit notices of loss to Lloyd's? If so, did AMIC subsequently agree not to pursue notices of loss with Lloyd's through Alliant, ostensibly under the Gentlemen's Agreement? And if the Gentlemen's Agreement was in fact no legal agreement at all (owing to lack of consideration and mutuality) or unenforceable (due to the statute of frauds), did the parties' conduct (particularly AMIC's delay of more than five years in bringing claims under the Lloyd's policy) create an equitable bar to enforcement of the alleged contract as a matter of law?

As is apparently customary in the insurance business, AMIC and Alliant did not bother their lawyers with requests for pre- or post-nuptial agreements defining their roles and obligations in this marriage. In fact, it turns out there might not even be a marriage at all between AMIC and Alliant. Alliant says it brokered a marriage between AMIC and Lloyd's, and that it was merely the priest who performed the ceremony. AMIC says it thought it was marrying Alliant *and* Lloyd's. To paraphrase Shakespeare, one must here admit impediments to the marriage (meeting) of true corporate minds. [5] It has fallen to unfortunate lawyers, a judge and jury to sort it out, and here we are.

A jury trial ensued, and Alliant now seeks post-trial relief from a jury verdict in favor of AMIC for $392,429.00 on AMIC's breach of contract claim. Before the court is Alliant's fully-briefed Renewal of Motion for Judgment as a Matter of Law, or Alternatively that Judgment be Vacated, filed pursuant to Federal Rule of Civil Procedure 50(b). (*See* Docs. # 118, 123, 126.) For the reasons set forth below, Alliant's motion is due to be granted, and judgment will be entered in favor of Alliant as a matter of law.

II. STANDARD OF REVIEW

Rule 50(b) of the Federal Rules of Civil Procedure allows a party to "renew its motion for judgment as a matter of law after the jury has returned its verdict, if there is no legally sufficient evidentiary basis for a reasonable jury to find for the nonmoving party." *Optimum Techs., Inc. v. Henkel Consumer Adhesives, Inc.,* 496 F.3d 1231, 1251 (11th Cir.2007); Fed.R.Civ.P. 50(b). "In ruling on the renewed motion, the court may: (1) allow judgment on the verdict ...; (2) order a new trial; or (3) direct the entry of judgment as a matter of law." *Id.*

***3** "The standard for judgment as a matter of law mirrors that of summary judgment...." *Thorne v. All Restoration Servs., Inc.,* 448 F.3d 1264, 1266 (11th Cir.2006) (citing *Matsushita Elec. Ind. Co. v. Zenith Radio Corp.,* 475 U.S. 574, 586 (1986)). Construing the evidence submitted to the jury in the light most favorable to the non-moving party, *see Lee v. Ferraro,* 284 F.3d 1188, 1190 (11th Cir.2002) (summary judgment context), the court "consider[s] whether such sufficient conflicts exist[ ] in the evidence to necessitate submitting the matter to the jury or whether the evidence is so weighted in favor of one side that that party is entitled to succeed in his or her position as a matter of law." *Abel v. Dubberly,* 210 F.3d 1334, 1337 (11th Cir.2000) (citing *Mendoza v. Borden, Inc.,* 195 F.3d 1238, 1244 (11th Cir.1999) (*en banc*)). As with summary judgment, "the non-movant must put forth more than a mere scintilla of evidence suggesting that reasonable minds could reach differing verdicts." *Id.*

"A motion for judgment as a matter of law will be denied only if 'reasonable and fair-minded persons in the exercise of impartial judgment might reach different conclusions.' " *Mendoza,* 195 F.3d at 1244 (quoting *Walker v. NationsBank of Fla., N.A.,* 53 F.3d 1548, 1555 (11th Cir.1995)). At the same time, " '[i]f the facts and inferences point overwhelmingly in favor of one party, such that reasonable people could not arrive at a contrary verdict, then the motion [is due to be] granted.' " *Id.* (quoting *Combs v. Plantation Patterns,* 106 F.3d 1519, 1526 (11th Cir.1997)); *see also Proctor v. Fluor Enters., Inc.,* 494 F.3d 1337, 1347 n. 5 (11th Cir.2007) ("Judgment as a matter of law 'is appropriate when a plaintiff presents no legally sufficient evidentiary basis for a reasonable jury to find for him on a material element of his cause of action.' " (quoting *Christopher v. Fla.,* 449 F.3d 1360, 1364 (11th Cir.2006)). In sum, the jury's commission is to dutifully apply the law to the evidence adduced at trial, and if that application is determined unreasonable, as defined above, then the court may direct the entry of judgment as a matter of law.

III. PROCEDURAL BACKGROUND

AMIC filed an Amended Complaint against Alliant alleging one breach of contract count for Alliant's alleged failure to perform contractual obligations relating to one reinsurance policy that Alliant obtained for AMIC in 2000. There is much confusion surrounding the nature of the relationship between AMIC and Alliant. In the Amended Complaint, AMIC uses the term "Managing General Agent" ("MGA") fifteen times to describe Alliant. The Amended Complaint alleges eight times that Alliant was an MGA "for" AMIC, and fourteen times refers to an "MGA contract" or to Alliant's alleged "contractual duties as MGA." (Am. Compl. ¶¶ 4–40 (Doc. # 17).) Although capitalized upon its first appearance, the term is nowhere defined in the Amended Complaint, and nowhere is there reference to the Alabama Managing General Agents Act, Ala.Code § 27–6A–1, *et seq.* Alliant has taken the position in its briefing that it "served as a broker to procure reinsurance policies for AMIC[.]" (Def.'s Br. in Supp. of Rule 50(b) Mot. 7 (Doc. # 118).)

***4** A jury trial was held from March 14 through March 17, 2011. The jury found that AMIC and Alliant entered into a contract, that it was an MGA contract, and that Alliant breached the contract. The jury then rejected Alliant's defenses of equitable estoppel, laches and statute of frauds. The jury awarded AMIC $392,429.00. (Verdict Form (Doc. # 104).)

Alliant has renewed its motion for judgment as a matter of law made at the close of AMIC's case and at the close of evidence, arguing that the jury's verdict is unsupported factually and legally. Specifically, Alliant argues: (1) that the jury's finding of an MGA contract was unreasonable and that AMIC failed to meet its burden of proving the elements of its breach of contract claim; (2) that AMIC's breach of contract claim is barred by Alabama's Statute of Frauds, Ala.Code § 8–9–2; and (3) that AMIC's breach of contract claim is barred by Alliant's defenses of laches and equitable estoppel. (Def.'s Br. in Supp. of Rule 50(b) Mot. 4.) Alliant seeks entry of judgment as a matter of law pursuant to Fed.R.Civ.P. 50(b).

IV. DISCUSSION

Several grounds exist for granting Alliant's Rule 50(b) renewed motion for judgment as a matter of law. First, there is no legally sufficient evidentiary basis to support the jury's finding that the parties entered into an MGA contract, and that alone perhaps would warrant relief. Second, however, exclusive of the MGA contract claim, the court also finds that AMIC failed to prove any breach of contract claim. Third, and finally, even if AMIC proved a binding contract with Alliant, the court further finds that Alliant would be entitled to judgment as a matter of law on its statute of frauds and equitable estoppel defenses.

A. *AMIC's Burden of Proof on the Alleged Contract*

In response to Questions 1, 2 and 3 of the Verdict Form, the jury found "by a preponderance of the evidence that AMIC and Alliant entered into a contract to procure reinsurance and transmit reinsurance claims[,]" that the contract was an "[MGA] contract[,]" and that "Alliant breached the [MGA] contract [.]" Alliant contends that the jury's finding of any contract at all, and in particular an "MGA contract," was unreasonable and contrary to the evidence. Alliant further argues that AMIC failed to prove the elements of its breach of contract claim.

"The elements of a breach-of-contract claim under Alabama law are (1) a valid contract binding the parties; (2) the plaintiff['s] performance under the contract; (3) the defendant's nonperformance; and (4) resulting damages." *Shaffer v. Regions Fin. Corp.*, 29 So.3d 872, 880 (Ala.2009). "The requisite elements of a valid contract include: an offer and an acceptance, consideration, and mutual assent to terms essential to the formation of the contract." *Avis Rent A Car Sys., Inc. v. Heilman,* 876 So.2d 1111, 1118 (Ala.2003) (citations, brackets and internal quotation marks omitted); *see also Macon Cnty. Greyhound Park, Inc. v. Knowles,* 39 So.3d 100, 107 (Ala.2009).

***5** AMIC contends that, pursuant to the alleged MGA contract, Alliant owed AMIC *duties* [6] to bind coverage and to timely transmit claims and premiums to the reinsurer. [7] (Am. Compl. ¶ 5 (Doc. # 17); Pl.'s Resp. to Def.'s Rule 50(b) Mot. 5–6 (Doc. # 123); Trial Tr. vol. 1, 18 (Wells's testimony that Alliant's contractual obligations were to "[p]rovide the reinsurance through their PEPIP program and to do whatever it takes to get our claims paid")).) According to AMIC, its own contractual obligations were to timely submit the reinsurance premiums to Alliant for transmission to the reinsurer and to timely notify Alliant of any losses suffered that were covered by the reinsurance policies. (Am. Compl. ¶ 6; Trial Tr. vol. 1, 18 (testifying that AMIC's contractual obligations were to "submit quarterly reports, whether it was

claims or values, and submit those in a—you know, straight to them so they could do their job, basically").)

1. No MGA Contract Between Alliant and AMIC

The first problem with the verdict is the jury's finding that Alliant and AMIC entered into an MGA contract. The Amended Complaint states a multitude of times that Alliant "act[ed] as a[n][MGA] *for* AMIC...." (*See, e.g.,* Am. Compl. ¶¶ 4, 7, 10, 13, 16, 22, 28, 34 (emphasis added).) Count I of the Amended Complaint unambiguously avers that "Alliant and AMIC entered into an MGA contract" and that "Alliant is in breach of the MGA contract...." (Am.Compl.¶¶ 38, 40.)

However, at trial, AMIC largely changed its tune. Alliant was no longer an MGA for AMIC, but was an MGA for the reinsurers. Contradicting the allegations of the Amended Complaint, Steve Wells, President and CEO of AMIC, testified with emphasis numerous times that Alliant was an MGA for the reinsurers—*not for AMIC.* In response to Alliant's counsel's question, "But I thought you said [Alliant] was the MGA for AMIC[,]" Mr. Wells responded: "Never said that." (Trial Tr. vol. 1, 46.) A few moments later, Mr. Wells testified that "because [Alliant] was the MGA on the PEPIP program for [Lloyd's], they had the pen." (Trial Tr. vol. 1, 51.) Mr. Wells continued: "Again, Alliant was the MGA for the Lloyd's of London policies." (Trial Tr. vol. 1, 56.) "[T]here's [sic] various reinsurance companies that they have underwritten through *their MGA agreement with those companies,* yes." (Trial Tr. vol. 1, 59 (emphasis added).) And finally, this exchange took place in the context of a discussion regarding payment of Alliant's commission:

> Q: All right. Who determined what that commission was going to be?
>
> A: I believe Alliant did.
>
> Q: With who?
>
> A: With the reinsurers.
>
> Q: And they never came to you and sat down and y'all dickered over what the commission was going to be, did they?
>
> A: No, *which sort of proves my point that they were the MGA for the reinsurers, not us.* So—
>
> Q: All right. They were the MGA for the reinsurers but not you. Is that what you're saying?
>
> ***6** A: That's correct.
>
> Q: They were not an MGA for—I just want to make sure I got this right. They were not an MGA for AMIC.
>
> A: That is correct.

(Trial Tr. vol. 1, 63–64 (emphasis added).)

Mr. Gary Martin, AMIC's expert, testified similarly, albeit less directly. After testifying that Alliant was an MGA (but not for whom) and describing the role of the MGA, Mr. Martin defined an MGA as "a wholesaler that's *representing a carrier* in the marketplace and producing retail customers to have the carrier's capacity purchased." (Trial Tr. vol. 3, 44 (Doc. # 122) (emphasis added).) In the context of this case, AMIC is the "retail customer" and Alliant is the "wholesaler." Based on his definition, Mr. Martin clearly envisioned an MGA relationship between Alliant and the reinsurer, not AMIC. This is further buttressed by his earlier testimony in which he presupposes an MGA relationship prior to a reinsured (*i.e.,* AMIC) entering the picture. (Trial Tr. vol. 3, 10 ("Often an MGA will establish a program that makes it more conducive for [it] to go out and attract retail placements to basically place business into the carrier's risk—risk bank, if you will.").)

Finally, Tony Abella, Jr., AMIC's retained broker from Arthur J. Gallagher & Co. ("Gallagher"), testified consistently with Mr. Wells and Mr. Martin. Mr. Abella testified on direct examination that Alliant was a general agent or MGA (using the terms interchangeably), but not for anyone in particular. However, he clarified his position on cross-examination, testifying that the managing general agency contract would be the agreement between the underwriters and the managing general agent. This testimony wholly excludes AMIC from the MGA contract. Though Mr. Abella's testimony on direct examination might have provided an inadequate scintilla of evidence that the contract pled was an MGA contract, the sum of his testimony is that Alliant was not an MGA for AMIC.

Thus, in contradiction to the Amended Complaint and to the jury's response to Question 2 of the Verdict Form, there was no testimony or other evidence to support an MGA contract between Alliant and AMIC. Recognizing its changed theory of the case and the lack of evidence supporting an MGA contract between AMIC and Alliant, AMIC filed a Motion to Amend the Pleadings to Conform to the Evidence after it rested on March 16, 2011. (Doc. # 96.) In that motion, AMIC unveiled its new theory of the case: "AMIC's theory

[is] that a contract other than the written MGA contract was breached by Alliant." (Mot. to Amend 2.) That motion was later denied as moot (Doc. # 107) in light of the jury's response to Question 2 of the Verdict Form, in which the jury found that the contract at issue between Alliant and AMIC was an MGA contract. [8] The complete lack of evidence from either party in support of an MGA contract between Alliant and AMIC renders the jury's response to Question 2 of the Verdict Form unreasonable and contrary to the evidence. Based upon this result, the court would be inclined to grant Alliant relief, but there are more serious problems with the verdict.

2. The Contract AMIC Sought to Prove at Trial Is Indefinite

***7** A more consequential hindrance to sustaining the jury's verdict is the necessary conclusion that AMIC's evidence is hopelessly indefinite and fails to establish a valid contract as a matter of law. In its Response to Alliant's Motion for Judgment as a Matter of Law, AMIC now argues that Defendant's Exhibit 6—the PEPIP Manuscript that is part of the reinsurance policy itself—is the contract between AMIC and Alliant. (Pl.'s Resp. to Def.'s Rule 50(b) Mot. 4–5 (section titled "A. A Valid Binding Contract Existed: The PEPIP Manuscript" and multiple citations to Defendant's Exhibit 6).) In fact, the testimony of Mr. Wells was that Alliant agreed to "do whatever it takes to get our claims paid ." (Trial Tr. vol. 1, 18.) That language appears nowhere in writing in the evidence —specifically not in the manuscript AMIC now claims as the contract. Under cross examination, Mr. Wells was asked: "Q. My question is, do you have any piece of paper or contract that you can point to that says that Alliant had to timely submit claims on behalf of AMIC? A. No, I do not." (Trial Tr. vol. 2, 10.) Nor did Mr. Wells attribute the promise to any particular statement by a person binding Alliant.

"Any contract must express all terms essential to the transaction with definiteness sufficient to enable a court to enforce the parties' agreement." *Macon Cnty. Greyhound Park, Inc .*, 39 So.3d at 108 (citing *White Sands Grp., L.L. C. v. PRS II, LLC,* 998 So.2d 1042, 1051 (Ala.2008)). "[A] contract that 'leav[es] material portions open for future agreement is nugatory and void for indefiniteness.' " *Id.* (quoting *White Sands Group,* 998 So.2d at 1051). A reservation by either party " 'of a future unbridled *right to determine the nature of the performance* ... has often caused a promise to be too indefinite for enforcement.' " *White Sands Group,* 998 So.2d at 1051 (quoting 1 Richard A. Lord, Williston on Contracts § 4:21, at 644–48 (4th ed.2007)). Moreover, indefiniteness "may render a contract void for lack of mutuality of obligation," *id.* at 1051 (internal alterations and quotation marks omitted), and whether a contract fails for indefiniteness is properly a question of law for the court to decide, *id.* at 1052–53.

AMIC has argued that the written PEPIP manuscript is the contact between AMIC and Alliant, or that the contract was implied based upon the written PEPIP manuscript, as well as industry standards and the course of dealing between the parties, and on occasion that the binder (Pl.'s Ex. 3) was part of the contract. Based on the evidence before the court, however, there is no legally sufficient basis to find the existence of a clear and definite contract or a breach thereof. There is no "everfixed mark," leaving the court now, as it was at trial, a "wandering bark" in search of the elusive contract. [9] AMIC failed to prove the contract with Alliant.

3. AMIC Failed to Prove Its Own Performance Under the Contract

***8** Assuming for purposes of argument that the PEPIP manuscript was the contract between AMIC and Alliant, one of the elements a plaintiff must prove on a breach of contract claim is its own performance under the contract. *Shaffer,* 29 So.3d at 880. According to AMIC's alleged contract with Alliant, its contractual obligation regarding transmission of claims was to *timely* notify Alliant of any losses suffered that were covered by the 2000–01 Lloyd's reinsurance policy. (Am. Compl. ¶ 6; Trial Tr. vol. 1, 18 .) The Claims Control Clause plainly states: "[I]t is a condition precedent to any liability under this Certificate that a) The Reinsured shall, upon knowledge of any loss or losses which may give rise to a claim against this Certificate, advise the Reinsuring Underwriters thereof *as soon as possible.*" (Def.'s Ex. 6, Proportional Reinsurance Certificate 3 (emphasis added).) Moreover, the Notice of Loss Clause says: "In the event of loss or damage insured against under this Policy, *the Insured shall give immediate notice* ...." (Def.'s Ex. 6, PEPIP USA Manuscript 38 (emphasis added).) Finally, the Proof of Loss paragraph states: "The Insured shall render a signed and sworn proof of loss *as soon as practical* after the occurrence of a loss, ..." (Def.'s Ex. 6, PEPIP USA Manuscript 40 (emphasis added).) AMIC's submission of claims, under all the circumstances, was not timely as a matter of law.

a. Under Agency Principles, the Claims Were Not Submitted by AMIC in February 2005 as a Matter of Law

Mr. Abella testified that he, as AMIC's broker and agent, first submitted AMIC's claims on the Lloyd's 2000–01 policy on February 2, 2005, when he sent to Doug Wozniak by email a spreadsheet with AMIC's final aggregate loss reports. (Abella Trial Test. (testifying that "the first numbers ... that got the clock ticking on the 2000–2001 [policy] ... were submitted in February of ' 05"); (Trial Tr. vol. 1, 32–33 (Mr. Wells affirming that in February, 2005, Mr. Abella submitted loss reports to Alliant.) However, Mr. Wells had proposed to and entered into a Gentlemen's Agreement with Alliant in August 2001, whereby AMIC agreed that it never would submit claims under the Lloyd's policy so long as Alliant treated AMIC fairly. [10] (Trial Tr. vol. 2, 22.) Regarding the Gentlemen's Agreement, Mr. Wells testified that he did not call off the Gentlemen's Agreement until November 2006, about twenty months after Mr. Abella first submitted the claims. (Trial Tr. vol. 1, 37; Trial Tr. vol. 2, 24.) Indeed, AMIC admits in briefing that the Gentlemen's Agreement "was cancelled by the parties to the agreement in November 2006." (Pl.'s Resp. to Def.'s Mot. for J. As a Matter of Law 9 (Doc. # 98).) Accordingly, as of February 2005, it is undisputed that Alliant was getting mixed signals from AMIC itself and from AMIC's agent, Mr. Abella. On the one hand, Mr. Abella prepared claims under the Lloyd's policy in the form of a final loss report to Alliant. On the other hand, Mr. Wells had told Alliant that he likely never would submit claims under the Lloyd's policy, and that agreement was still in effect in February 2005, when Mr. Abella first attempted to submit those claims. [11]

***9** Several agency issues arise, and ultimately lead the court to conclude that *AMIC* did not submit to Alliant its claims on February 2, 2005, as a matter of law. [12] The first issue is whether Mr. Abella was acting within the scope of his agency authority on February 2, 2005, when he first attempted to submit AMIC's final loss report and claims to Alliant. Mr. Abella testified that, at the time, he was aware that AMIC and Alliant had a Gentlemen's Agreement in force whereby AMIC would not submit claims, and that he submitted them anyway. (Abella Trial Test. ("Well, in the insurance world, the only thing I can go by is the actual written contract.... [W]hen I called Doug [Wozniak at Alliant] to tell him that we were going to be filing aggregate claims before that February filing, that's when he commented, hey there's that agreement in place. And I said, Doug, I'm sorry.... I've got no choice [other] than to file an entire aggregate recovery.").) Mr. Abella also testified that his actions in submitting the claims were self-serving to a degree. (Abella Trial Test. ("Q: And you said one of the reasons you didn't rely on the Gentlemen's Agreement and Mr. Wells's representations [was] because that would have put Arthur J. Gallagher at risk; is that correct? ... A: If we were a party to it, it certainly might have.").)

The Restatement (Third) of Agency recognizes two forms of agency authority: actual and apparent. The inquiry here is simply whether the agent, Mr. Abella, was acting within the scope of his actual authority. "An agent acts with actual authority when, at the time of taking action that has legal consequences for the principal, the agent reasonably believes, in accordance with the principal's manifestations to the agent, that the principal wishes the agent so to act." Restatement (Third) of Agency § 2.01 (2006); *see also G .UB.MK Constructors v. Garner,* 44 So.3d 479, 486 (Ala.2010) (citing the Restatement (Third) of Agency with approval). Based upon Mr. Abella's prior knowledge of the Gentlemen's Agreement, AMIC's outward manifestations concerning the agreement, and Mr. Abella's knowledge that the Gentlemen's Agreement was still in effect on February 2, 2005, Mr. Abella's submission of the 2000–01 Lloyd's claims was outside his actual authority.

In a March 9, 2004 email sent by Mr. Abella to Mr. Wozniak and Mr. Wells, among others, Mr. Abella referenced the Gentlemen's Agreement: "I believe there was a gentleman's agreement between Steve Wells and Gerry Lillis that AMIC would not pursue an aggregate recovery for this [2000–01 Lloyd's policy] year. (If Gerry and Steve [c]ould please confirm their recollection of this I would be most appreciative)." (Def.'s Ex. 16, 3/9/2004 Email from Abella to Wozniak, *et al.*) Thus, at least as of March 9, 2004, this email reveals that AMIC's manifestations to Mr. Abella were that there was a Gentlemen's Agreement in effect and that, pursuant to the agreement, AMIC would not submit claims under the 2000–01 Lloyd's policy. [13] Accordingly, as of March 9, 2004, Mr. Abella could not have reasonably believed that AMIC wished him to submit AMIC's 2000–01 Lloyd's claims for payment based upon the Gentlemen's Agreement. And nothing up to February 2, 2005, appears to have changed this understanding of the Gentlemen's Agreement. Mr. Wells testified that the Gentlemen's Agreement was still in effect as of February 2, 2005 (in fact, that it was still in effect until twenty months later). (Trial Tr. vol. 1, 36–37; Trial Tr. vol. 2, 24.) Furthermore, Mr. Abella testified that when he attempted to submit the February 2, 2005 claims, he deliberately chose not to rely on the Gentlemen's Agreement, which he understood to be in force, and that he even acted according to his own interests in submitting the claims. (Abella Trial Test.) As of February 2, 2005, Mr. Abella could

not have "reasonably believe[d] ... that the principal [AMIC] wishe[d][him] so to act" in submitting the 2000–01 Lloyd's policy claims. Restatement (Third) of Agency § 2.01.

***10** Nevertheless, by adopting the February 2, 2005 date in litigation as the date AMIC first submitted its claims, AMIC seeks to ratify Mr. Abella's actions. "A ratification of a transaction is not effective unless it precedes the occurrence of circumstances that would cause the ratification to have adverse and inequitable effects on the rights of third parties." Restatement (Third) of Agency § 4.05. One such situation where a ratification is not effective involves "any material change in circumstances that would make it inequitable to bind the third party...." Restatement (Third) of Agency § 4.05(2). Rescinding the Gentlemen's Agreement almost twenty months after the claims were known and filing a lawsuit claiming breach of contract for the alleged *untimely* submission of claims based upon the February 2, 2005 date is a material change that would make it inequitable to bind Alliant to AMIC's attempted ratification of the February 2, 2005 date. Thus, AMIC cannot be said to have submitted its claims to Alliant on February 2, 2005, as a matter of law.

b. AMIC's October/November 2006 Submission Was Untimely

Mr. Abella testified that the second time he submitted AMIC's claims to Alliant was on October 30, 2006, just before or around the time that AMIC called off the Gentlemen's Agreement. (Abella Trial Test. ("Q: And we next go in our timeline—and that's the 10/30/2006 e-mail. This is your formal request. A: Oh, yes sir. Q: And again, Tony, don't let me misquote you, but your formal request really isn't different [from] the request you made 18 months earlier [on February 2, 2005]. A: No. It was just an attempt to try and get more attention to it.").) Accordingly, it is from this date, six years after the binder was issued, five years after the policy term ended, and twenty months after Mr. Abella first attempted to submit AMIC's claims, that the jury was to assess whether AMIC's own performance under the alleged contract was timely.

Although there was a significant amount of testimony that the 2000–01 Lloyd's policy was an indemnity contract and that the final settlement of a claim subject to the public procurement process could take years (*see e.g.,* Abella Trial Test.), the court concludes that the October 30, 2006 submission was untimely as a matter of law and that AMIC failed to prove its own performance under the contract. The court reaches this conclusion *not only* because five years elapsed between the end of the policy term and the submission of the claims by AMIC, but also because AMIC had claims ready to be submitted as of February 2, 2005. Despite having claims ready to be submitted, AMIC waited another twenty months, until Mr. Wells decided unilaterally to rescind the Gentlemen's Agreement, to finally submit them.

To draw from the related context of submitting notice of losses to an insurer under an insurance policy, the Alabama Supreme Court has held that delays of submitting claims of one year, eight months, and six months are unreasonable as a matter of law. *See Fire Ins. Exch. v. McCoy,* 637 F.Supp.2d 991, 993–94 (M.D.Ala.2009) (collecting Alabama Supreme Court cases). There is no material difference between untimely submission of claims by an insured to an insurer and by a reinsured to a reinsurance intermediary to be submitted to a reinsurer. [14] Accordingly, the court concludes that AMIC's delay of more than five years in submitting the claims, including its twenty-month delay after the claims were ready, is unreasonable and untimely as a matter of law. No reasonable juror could have found that AMIC proved its own performance under the alleged contract.

4. The Statute of Frauds Bars Recovery

***11** Section 8–9–2 of the Code of Alabama states that "[e]very agreement, which by its terms, is not to be performed within one year from the making thereof" is "void unless such agreement or some note or memorandum thereof expressing the consideration is in writing and subscribed by the party to be charged therewith." There must be a "valid oral contract ... of which the memorandum is an accurate statement." *Fausak's Tire Ctr., Inc. v. Blanchard,* 959 So.2d 1132, 1139 (Ala.Civ.App.2006) (citing 10 R. Lord, Williston on Contracts §§ 29:6 at 434 (4th ed.1999)). For reasons noted elsewhere in this Opinion, AMIC has not established a writing binding Alliant in any respect to "do whatever it takes to get our claims paid." (Trial Tr. vol. 1, 18.) Nor has AMIC established such a promise by oral agreement. The proof of a binding, enforceable contract is therefore doubly lacking. [15]

5. AMIC Failed to Prove Damages

As an element of AMIC's breach of contract claim, AMIC had the burden of proving that it suffered damages as a result of Alliant's alleged breach regarding the timely submission of AMIC's claims. Alliant contends that AMIC failed to meet this burden because it did not prove that late notice was the reason Lloyd's did not pay the claim.

"[D] amages recoverable for breach of contract are those which result naturally and proximately from the breach." *Marshall Durbin Farms, Inc. v. Landers,* 470 So.2d 1098, 1102 (Ala.1985). "The finding of a causal relation [between the breach and the damages] must be based on more than surmise or conjecture." *Cooley v. Gulf Bank, Inc.,* 773 So.2d 1039, 1047 (Ala.Civ.App.1999); *see also* Restatement (Second) of Contracts § 352 ("A party cannot recover damages for breach of a contract for loss beyond the amount that the evidence permits to be established with *reasonable certainty.*" (emphasis added)). Rather, "[t]he causal relation must be established by a 'but for' link between the defendant's conduct and the plaintiff's loss." *Cooley,* 773 So.2d at 1047 (citing *Corson v. Universal Door Sys., Inc.,* 596 So.2d 565, 570 (Ala.1991)).

AMIC had the burden of proving that Alliant's alleged breach of failing to timely submit AMIC's claims proximately caused Lloyd's refusal to pay AMIC's claims. *Marshall Durbin Farms,* 470 So.2d at 1102. The only evidence submitted to the jury regarding Lloyd's position is a letter from Lloyd's counsel to AMIC's counsel dated September 28, 2009. (Def.'s Ex. 86, 9/28/2009 Letter from Lock to Speagle.) In that letter, counsel for Lloyd's sets forth Lloyd's position in response to AMIC's claims. During the 2000–01 policy term, AMIC's total insured values doubled from approximately $623 million to approximately $1.3 billion. Citing AMIC's growth during the policy term, Lloyd's referred to AMIC's obligations under the Automatic Acquisition clause of the Lloyd's policy. According to Lloyd's reading of the clause, AMIC was required to report "new named insured members" whose total insured values did not exceed $50 million. (Def.'s Ex. 86, at 3–4; Def.'s Ex. 6, PEPIP USA Manuscript 87–88.) For "new named insured members with total insured values exceeding [$50 million][,]" AMIC was to "report[ ] [those members] immediately to [Lloyd's] for acceptance and additional ... premium agreement." (Def.'s Ex. 86, at 3; Def.'s Ex. 6, PEPIP USA Manuscript 87.)

***12** Based upon these provisions, Lloyd's position was that "[t]o the degree that any new member had total insured values of less than [$50 million], automatic coverage would exist but a premium would be due. If any new member had total insured values exceeding [$50 million], AMIC was to report these new members to [Lloyd's] immediately for acceptance and an additional premium." (Def.'s Ex. 86, at 3–4.) Having taken the position that it was entitled to additional premiums, Lloyd's calculated, based upon the available information, that its additional premium would "more than offset[ ] the amount to which you believe [AMIC] is due." (Def.'s Ex. 86, at 4.)

Although the correctness of Lloyd's position is disputed, AMIC does not dispute that this, in fact, is Lloyd's position. (Trial Tr. vol. 1, 46 ("That's [Lloyd's] incorrect position, yes.").) AMIC's concession that this letter sums up Lloyd's position is important because nowhere in this letter does Lloyd's set forth or even implicate a position that AMIC's claims would be denied for untimeliness. Other than calling the position "incorrect," AMIC has failed to test Lloyd's position. If AMIC had filed a lawsuit against Lloyd's, Lloyd's may have asserted a defense of untimeliness of the claims. However, speculation as to whether Lloyd's would have asserted a particular defense is insufficient to create a triable issue of fact. *Cordoba v. Dillard's, Inc.,* 419 F.3d 1169, 1181 (11th Cir.2005) (stating in summary judgment context that "[s]peculation does not create a *genuine* issue of fact ...."); *see also Thorne,* 448 F.3d at 1266 (stating that the standard for a judgment as a matter of law motion mirrors that of summary judgment); *Cooley,* 773 So.2d at 1047 ("The finding of a causal relation [between the breach and the damages] must be based on more than surmise or conjecture.").

In sum, the evidence before the jury regarding AMIC's damages was legally insufficient to establish with reasonable certainty a causal relationship between Alliant's alleged breach and Lloyd's refusal to pay AMIC's claims. *See* Fed.R.Civ.P. 50; Restatement (Second) of Contracts § 352. No reasonable juror, based upon the evidence AMIC produced regarding damages, would have been able to conclude that, but for Alliant's alleged failure to timely transmit claims, Lloyd's would have paid AMIC's claims. *Cooley,* 773 So.2d at 1047 (citing *Corson,* 596 So.2d at 570). Nor would a reasonable juror, on this evidence, have been able to conclude that Lloyd's conjectured refusal to pay AMIC's claims was a proximate result of Alliant's alleged failure to timely transmit AMIC's claims. *Marshall Durbin Farms,* 470 So.2d at 1102. AMIC thus failed in its burden of showing a causal connection between untimeliness of submission of the claims and the failure to pay the claims.

B. *Alliant's Equitable Estoppel and Laches Defenses*

Alliant's final argument is that no reasonable juror could have found that Alliant did not prove its equitable estoppel and laches defenses by a preponderance of the evidence. The jury rejected this defense in its response to Question 4 of the Verdict Form. At issue is the Gentlemen's Agreement the

parties discussed during a golf outing in August 2001, during the Lloyd's policy term. (Wozniak Trial Test., Mar. 15, 2011.)

***13** The elements of the defense of equitable estoppel are: (1) The person against whom estoppel is asserted, who usually must have knowledge of the facts, communicates something in a misleading way, either by words, conduct, or silence, with the intention that the communication will be acted on; (2) the person seeking to assert estoppel relies upon that communication; and (3) the person relying would be harmed materially if the actor is later permitted to assert a claim inconsistent with his earlier conduct.[16] *Gen. Elec. Credit Corp. v. Strickland Div. of Rebel Lumber Co., Inc.,* 437 So.2d 1240, 1243 (Ala.1983) (citing *Mazer v. Jackson Ins. Agency,* 340 So.2d 770, 773 (Ala.1976)); *see also Hughes v. Mitchell Co., Inc.,* 49 So.3d 192, 200 (Ala.2010). "The purpose of equitable estoppel ... is to promote equity and justice in an individual case by preventing a party from asserting rights ... when his own conduct renders the assertion of such rights contrary to equity and good conscience." Mazer, 340 So.2d at 772 (citing *First Nat'l Bank of Opp v. Boles,* 165 So. 586, 592 (Ala.1936)). In other words, the "far reaching" doctrine of equitable estoppel can act to "deny[ ] to a person the right to repudiate his ... representations, when they have been relied upon by persons to whom they were directed and whose conduct they were intended to and did influence." *Id.* (quoting *Boles,* 165 So. at 592).

1. Misleading Communication

The first element of Alliant's equitable estoppel defense requires AMIC to have made a misleading communication to Alliant with the intention that Alliant rely upon it. The parties do not dispute the existence of the Gentlemen's Agreement nor do they dispute that the Gentlemen's Agreement was Mr. Wells's idea during a golf outing in August 2001.[17] (Trial Tr. vol. 2,22–23 ("Q: And the [G]entlemen's [A]greement was your idea, wasn't it? A: That is correct."); Wozniak Trial Test. ("Q: Okay. And he proposed [the Gentlemen's Agreement]? A: Yeah. It came from Steve [Wells].").)

Mr. Wells testified that the communication he made to Alliant was that AMIC "would not make claims [on the Lloyd's policy], period, as long as [Alliant] continued to treat us fairly."[18] (Trial Tr. vol. 2, 22.) The communication is inherently misleading because Mr. Wells began his Gentlemen's Agreement proposal by making an unequivocal promise of seemingly infinite duration: not making claims "period[.]" (Trial Tr. vol. 2, 22.) However, he then retreated from that promise by attaching his own wholly subjective requirement that AMIC be treated "fairly." (Trial Tr. vol. 2, 22.) In response to Alliant's counsel's question that "ultimately, ... what you decided treated fairly was was your decision[,]" Mr. Wells evasively responded that "when you shake somebody's hand and then they hit you in the jaw, you realize pretty quickly that the agreement is over with." (Trial Tr. vol. 2, 24.) With this response, Mr. Wells did not dispute the subjectivity of his determination of being treated "fairly."[19] Ultimately, Mr. Wells's promise was that AMIC would not submit claims unless AMIC decided to submit claims. Such a contradictory communication is inherently misleading.

2. Reliance by Alliant and Material Harm

***14** The second and third requirements of Alliant's equitable estoppel defense are reliance upon AMIC's misleading communication and material harm. *Hankins v. Crane,* 979 So.2d 801, 811 (Ala.Civ.App.2007) (quoting *Tubbs v. Brandon,* 374 So.2d 1358, 1361 (Ala.1979) (stating that "the defendant must have acted in reliance upon plaintiff's conduct so as to make it inequitable for the plaintiff to assert his rights.")); *see also Mazer,* 340 So.2d at 773.

First, it is undisputed that the Gentlemen's Agreement for the 2000–01 Lloyd's policy extended at least through November 2006, five years after the end of the policy and at least twenty months after AMIC had claims ready to be submitted.[20] (Trial Tr. vol. 2, 30 ("Obviously, it was around November of 2006."); Trial Tr. vol. 1, 37 ("Q: Is that the conversation around this same time frame, which is November the 20th, 2006, where you told Alliant that the gentlemen's agreement was off? A: Yes, it is.").)

The first clear occasion of reliance was on February 2, 2005, when Alliant received AMIC's losses on the 2000–01 Lloyd's policy from Mr. Abella, but did not transmit them to be adjusted or paid. Mr. Wozniak testified that "we [were] only concerned with these years [after November, 2001], because the [G]entlemen's [A]greement handle[d] the 2000–2001 term." (Wozniak Trial Test., Mar. 15, 2011.) On account of the Gentlemen's Agreement, the 2000–01 Lloyd's claims were "[n]ot even being talked about or adjusted at this point." (Wozniak Trial Test., Mar. 15, 2011.)

The second clear occasion of reliance was in response to Mr. Abella's October 30, 2006 re-submission of the 2000–01 claims. On October 30, 2006, Mr. Abella again emailed

a spreadsheet with AMIC's claims to Alliant. (Def.'s Ex. 30; Abella Trial Test.) Mr. Wozniak responded on November 1, 2006: "Hi [Mr. Abella], ... [r]egarding the [2000–01 Lloyd's] policy term (18 months), [Mr. Wells] had a[G]entlemen's [A]greement ... that he would not be submitting the aggregate losses for that term...." (Def.'s Ex. 30.) After that response to Mr. Abella, on which Mr. Wells was copied, Mr. Wozniak sent an internal email to Mr. Frey and Ms. Heidi Newell directing them to forward the latest spreadsheet to McLarens Young and to inform McLarens Young that it "should only consider the policy terms from 11/01/2001 to 11/1/2004." (Def.'s Ex. 31, 11/1/2006 Email from Wozniak to Newell, *et al.*) Although Mr. Wells and AMIC rescinded the Gentlemen's Agreement shortly thereafter, Alliant relied on the Gentlemen's Agreement by not submitting the claims to the reinsurer.

As discussed above, AMIC abided by its promise in the Gentlemen's Agreement for more than five years, and for at least twenty months after it had claims ready to be submitted, and then unilaterally decided that it was not being treated fairly. In those five years, from August 2001 until November 2006, Alliant relied upon the Gentlemen's Agreement by not submitting AMIC's claims. The heart of AMIC's claim is that Alliant's submission of AMIC's claims was *untimely.* Thus, Alliant's reliance on the communication in not submitting the claims when first received materially harmed Alliant.

***15** Finally, Alliant relied upon the Gentlemen's Agreement by not informing Lloyd's of AMIC's growth during the policy period. (Wozniak Trial Test., Mar. 16, 2011 ("Q: Did you ever tell Lloyd's about AMIC's growth in the 2000–01 time period? A: No.").) For whatever reason, AMIC has not sued Lloyd's or otherwise tested Lloyd's position that AMIC owes a more than off-setting premium, and Alliant now is in the position of holding Lloyd's bag, arguably becoming responsible for indemnifying AMIC for its losses under the Lloyd's policy. The risk that Alliant has involuntarily assumed on account of Lloyd's refusal to pay AMIC's claims is also Alliant's material harm.

Even if equitable estoppel fails as a defense, laches is a bar to recovery when it is inequitable or unfair to permit a claim to be enforced when some change of condition has taken place that would make the enforcement of a claim unjust. *Gwaltney v. Russell,* 984 So.2d 1125, 1130 (Ala.2007). The Gentlemen's Agreement, in effect from August 2001 until November 2006, and its late, unilateral cancellation, is just such a change in condition. By 2006, Lloyd's was long out of the picture; Alliant was no longer providing a reinsurance program for AMIC; memories and records were stale; and there was confusion in the ranks of the parties as to which entity, initially Lloyd's and eventually Alliant, should pay the claims, if at all. AMIC's attempt to hold Alliant liable for its losses under all the circumstances is inequitable and unjust, and is barred by laches. After careful review of all the circumstances, the court concludes that the jury's finding to the contrary is unreasonable as a matter of law.

V. CONCLUSION

Construing the evidence in the light most favorable to AMIC, the court concludes that the evidence is so weighted in favor of Alliant that reasonable jurors could not arrive at a contrary verdict. Further, as a matter of law, AMIC failed to prove a legally enforceable contract. Finally, equity bars recovery by AMIC—any recovery under all the facts and circumstances would be unjust. Accordingly, it is ORDERED that Alliant's Renewal of Motion for Judgment as a Matter of Law (Doc. # 118) is GRANTED.

It is further ORDERED that the Final Judgment (Doc. # 108) is VACATED. An appropriate final judgment will be entered.

All Citations

Not Reported in F.Supp.2d, 2012 WL 39950

Footnotes

1 The court does not have the benefit of a transcript of all testimony. The testimony of Mr. Wells and Mr. Martin is transcribed and will be referred to as Trial Transcript, volumes 1, 2 and 3, which have been filed. All other citations to trial testimony, including Mr. Abella's and Mr. Wozniak's testimony, will be from the court's notes.

2 The amended complaint was offered into evidence at trial as Defendant's Exhibit 2.

3 Mr. Wells also adds, “as long as [Alliant] continued to treat us fairly,” but that particular fact is disputed. (Trial Tr. vol. 2, 22 (Doc. # 121); Wozniak Trial Test., Mar. 15, 2011 (stating that “you treating me fairly never came up once”).)

4 This date is also disputed.

5 William Shakespeare, *Sonnet 116.*

6 The court suspected throughout the trial, and after reflection is convinced, that this case is really about Alliant's duty of care sounding in tort. The fact that Alliant's alleged contractual duty happens to be identical to its duty of care as, say, a broker, is perhaps not coincidence. Alabama's statute of limitations for tort actions is two years. *See* Ala.Code § 6–2–38(l). On the other hand, Alabama's statute of limitations for breach of contract is a more generous six years. *See* Ala.Code § 6–2–34(4). In this case, a breach of duty cause of action sounding in tort likely would have been barred by the two-year statute of limitations.

7 AMIC alleged breaches with respect to multiple policies from multiple policy years in the Amended Complaint. At trial, AMIC pursued only Alliant's alleged breach with regard to the 2000–01 reinsurance policy with Those Various Underwriters of Lloyd's of London (“Lloyd's”). AMIC abandoned the other alleged breaches and now concedes that Alliant “performed” its alleged contractual duties for those policy years. (Pl.'s Resp. to Def.'s Rule 50(b) Mot. 5–6.) Thus, at issue is only one breach regarding one reinsurance policy.

8 On account of the absence of testimony to support an MGA contract between AMIC and Alliant, the court's initial set of charges would have instructed the jury not to concern itself with whether the alleged contract was an MGA contract, and there would have been no Question 2 on the Verdict Form. Alliant objected, arguing that the jury should decide whether the contract was an MGA contract because that was what AMIC pleaded in the Amended Complaint. The objection of Alliant resulted in changed Jury Instructions and Verdict Form. Neither party objected to the court's final set of Jury Instructions and Verdict Form, which charged the jury to determine whether there was a contract, and if so, whether it was an MGA contract. Reasonable and fair-minded persons could not conclude that the contract was an MGA contract between these parties.

9 Shakespeare, *supra* note 4.

10 To be clear, the arrangement referred to as the “Gentlemen's Agreement” is not deemed an agreement at all. The court uses the lexicon of the parties' throughout their decade of dealing, including this trial, as shorthand for the explanation why AMIC waited so long to submit its claims under the 2000–01 Lloyd's policy. At bottom, the Gentlemen's Agreement is construed as AMIC's unilateral waiver of rights it possessed under a reinsurance policy underwritten by Lloyd's. AMIC attempts to make that waiver conditional on “so long as Alliant treated AMIC fairly.”

11 For a discussion of Alliant's reliance on the representations of AMIC regarding the Gentlemen's Agreement, see Section IV.B.2 *infra.*

12 Waiting until February, 2005, to submit claims on a 2000–01 policy is untimely, but is not the primary factual support for finding a failure of performance by AMIC.

13 In fact, Mr. Abella testified that he was present at the time the Gentleman's Agreement was made in August 2001. (Abella Trial Test. (“Well, I was certainly there.”).)

14 If anything, a reasonable time to submit claims to a reinsurance intermediary is more time-restrictive because the intermediary must also have time to submit the claims upstream to the reinsurer.

15 Assuming for argument only the existence of a binding, enforceable contract, AMIC has not shown that the contract could have been performed within one year of its making.

16 Although Alliant properly refers to its defense as "equitable estoppel," it recites the elements of the claim of promissory estoppel. (Def.'s Br. in Supp. of Rule 50(b) Mot. 45–46.) A claim of promissory estoppel differs from the defense of equitable estoppel in one respect. Equitable estoppel requires the person against whom the estoppel is asserted to have made a *misleading* communication, while promissory estoppel only requires a communication in the form of a promise. *See Mazer,* 340 So.2d at 772 ("Except for the nature of the conduct on which the estoppel is based, the elements of equitable and promissory estoppel are essentially the same."). Alliant was not alone, however, in overlooking this difference. *See Penick v. Most Worshipful Prince Hall Grand Lodge F & A M of Al., Inc.,* 46 So.3d 416, 430–31 (Ala.2010) (employing the heading "Promissory Estoppel" but reciting the elements of equitable estoppel). Furthermore, AMIC did not object to Alliant's proposed equitable estoppel jury charge, which erroneously listed the elements of promissory estoppel, and the court itself failed to recognize the problem when it delivered the instruction to the jury. (Doc. # 101, at 10.) Despite the erroneous charge, it can be presumed that the jury would have rejected Alliant's equitable estoppel defense even if charged properly, because the promissory estoppel elements are similar to those of equitable estoppel except for the extra proof in equitable estoppel that the communication be misleading.

17 However, the parties do dispute AMIC's reason for proposing the Gentlemen's Agreement. Mr. Wells testified that he proposed the Gentlemen's Agreement for marketing purposes. (Trial Tr. vol. 2, 22–23; Trial Tr. vol. 1, 29 ("[W]e basically decided to not ask [sic] for the recovery primarily as a marketing tool.").) In other words, Mr. Wells thought that by not submitting claims in his first year, AMIC would present a good loss history and this would result in lower premium rates in the future. (Trial Tr. vol. 2, 23.) Mr. Wozniak saw a different reason for not submitting the claims under the Lloyd's policy. Between May 2000 and November 2001 (the duration of the Lloyd's policy), AMIC's total insured values doubled from roughly $600–650 million to roughly $1.3 billion. (Abella Trial Test.; Trial Tr. vol. 1, 43 ("Absolutely. We—we nearly doubled in size [in 2000], property value wise, yes."); Wozniak Trial Test., Mar. 15, 2011 ("The underwriting that took place on day one when that policy was originally placed on May 1 st of 2000 was based on a risk set of $650 million in values. And then the program doubled [to $1.3 billion] over the course of 18 months.").) Alliant's and Mr. Wozniak's position is that, because of AMIC's substantial growth and the fact that they were not charged additional premiums for that growth, Mr. Wells decided he would not submit claims. (Wozniak Trial Test., Mar. 16, 2011; Def.'s Ex. 30, 11/1/2006 Email from Wozniak to Abella, *et al.* ("Steve had a gentlemen's agreement ... that he would not be submitting the aggregate losses for that term due to the substantial growth in the AMIC program that period.").) The reason for the existence of the Gentlemen's Agreement was disputed at trial, but the motive for the arrangement is largely irrelevant to Alliant's equitable estoppel defense.

18 Mr. Wozniak's version of the Gentlemen's Agreement did not include a requirement that Alliant treat AMIC fairly. (Wozniak Trial Test., Mar. 16, 2011 ("Q: [D]id Mr. Wells ever say that this [G]entlemen's [A]greement was in place only so long as he was treated fairly? A: No.").) However, because AMIC is the non-moving party, AMIC's version of the Gentlemen's Agreement is credited for purposes of this analysis.

19 It is noteworthy that the series of events that caused Mr. Wells to decide that he was not being treated fairly had nothing to do with the 2000–01 Lloyd's policy. Rather, Mr. Wells was upset with the length of time it was taking AMIC to get paid on policies from later years that did not involve Lloyd's at all. Those claims, which were eventually paid, were initially part of this lawsuit, but were dropped by AMIC at trial.

20 Alliant's position is that AMIC did not rescind the Gentlemen's Agreement until March 2008. (Wozniak Trial Test., Mar. 16, 2011.) However, AMIC's November 2006 position must be credited.

2012 WL 39950

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2023 WL 5274331
Superior Court of North Carolina,
Mecklenburg County.
Business Court.

Henry ATKINSON and Jane Atkinson, Plaintiffs,
v.
LEXINGTON COMMUNITY ASSOCIATION, INC., Defendant/Third-Party Plaintiff,
v.
Darrin L. Rankin; Horace Bryan; and Bryan and Associates Real Estate, LLC, Third-Party Defendants.

22 CVS 11238
|
August 16, 2023

Attorneys and Law Firms

Law Firm Carolinas, by Harmony W. Taylor, and Clawson and Staubes, LLC, by Jeremy S. Foster, for Third-Party Plaintiff Lexington Community Association, Inc.

Villmer Caudill, PLLC, by Bo Caudill, for Third-Party Defendant Darrin L. Rankin.

Dickie, McCamey & Chilcote, P.C., by Garry Davis, Michele Eagle, and Bridget Baranyai, for Third-Party Defendants Horace Bryan and Bryan and Associates Real Estate, LLC.

ORDER AND OPINION ON THIRD-PARTY DEFENDANT DARRIN L. RANKIN'S MOTION FOR PARTIAL JUDGMENT ON THE PLEADINGS

Conrad, Judge.

***1** 1. In February 2022, Henry and Jane Atkinson signed a contract to buy a home owned by Lexington Community Association, Inc. ("Association"). When the sale fell through, the Atkinsons sued the Association to recover their earnest money and diligence costs. This simple claim for breach of contract had a cascade effect. The Association blamed the failed sale on its president, Darrin Rankin, and asserted third-party claims against him and the real estate agents that he hired to list the home. Rankin, in turn, blamed the Association's lawyers for failing to clear title to the property and asserted a so-called "fourth-party claim" for malpractice against them. He also counterclaimed against the Association.

2. Much of this free-for-all has sorted itself out. The Atkinsons are no longer in the case, having settled with the Association. (*See* ECF No. 71.) Rankin, too, has settled his claim against the Association's lawyers. (*See* ECF No. 66.) But the litigation between the Association and Rankin goes on, and their claims and counterclaims are the subject of this dispute.

3. The Association tells a story of a board member gone rogue. As alleged, the home that the Atkinsons tried to buy was a rental property, which the Association leased to tenants and had no plans to sell. Without board approval, Rankin canceled the lease and put the home up for sale. The Association believes that he did so for personal gain. Rankin, who works as a real estate agent, hired his employer and a colleague to handle the listing and supposedly arranged to take part of the commission for himself. Later, when the Atkinsons backed out because the Association could not convey clear title, Rankin refused to return their earnest money. Based on these allegations, the Association claims that Rankin engaged in self-dealing and breached his fiduciary duties. (*See* Ass'n Third-Party Compl. ¶¶ 11–14, 16–18, 23–26, 40, 42, 46, ECF No. 4.)

4. Rankin insists that the Association never should have sued him, both because its allegations are false and because it had no authority to do so under its governing declaration. The Association's accusations, he alleges, have ruined his reputation. He asserts counterclaims for defamation, breach of contract, and declaratory judgment. (*See* Rankin Countercl. ¶¶ 14, 15, 18, 23, 24, ECF No. 13.)

5. After the Association replied to the counterclaims, Rankin moved for partial judgment on the pleadings under Rule 12(c) of the North Carolina Rules of Civil Procedure. (*See* ECF No. 54.) His motion, which is fully briefed, is limited to the Association's third-party claims and his counterclaim for declaratory judgment. The Court held a hearing on 15 May 2023. The motion is ripe for disposition.

6. "A motion for judgment on the pleadings is the proper procedure when all the material allegations of fact are admitted in the pleadings and only questions of law remain." *Ragsdale v. Kennedy*, 286 N.C. 130, 137, 209 S.E.2d 494 (1974). The Court may "consider documents which are the subject of a plaintiff's complaint and to which the complaint specifically refers even though they are presented by the defendant." *Weaver v. Saint Joseph of the Pines, Inc.*, 187

N.C. App. 198, 204, 652 S.E.2d 701 (2007) (citation and quotation marks omitted).

***2** 7. The premise of Rankin's motion is that the Association lacked authority to sue him. He points to a provision in the declaration that gives the Association's members a say in deciding whether to sue. The provision states broadly that "[n]o judicial or administrative proceeding shall be commenced or prosecuted by the Association unless approved by" 75% of its members, but it goes on to exempt a few types of proceedings, including "actions brought by the Association to enforce the provisions of [the] Declaration" and "counterclaims brought by the Association in proceedings instituted against it." (Decl. Art. XII § 17, ECF No. 13.1.) Because the Association admits that it did not ask for or get member approval before filing its third-party complaint, (*see* Ans. to Countercl. ¶ 14, ECF No. 43), Rankin contends that it failed to comply with the declaration.

8. If Rankin is right that the Association needed to get member approval, then its failure to do so is a complete bar to its claims against him. Our Supreme Court has held that "a defendant who is a stranger to" a homeowners' association may not "invoke the association's own internal governance procedures as an absolute defense to" claims asserted "by the association against that defendant." *Willowmere Cmty. Ass'n v. City of Charlotte*, 370 N.C. 553, 561, 809 S.E.2d 558 (2018). But a *member* of the association (such as Rankin) *is* "entitled to raise the association's failure to comply with" a provision requiring presuit membership approval "as a bar to the plaintiff's suit." *Id.*, 370 N.C. 553, 561, 809 S.E.2d at 560; *see also Homestead at Mills River Prop. Owners Ass'n v. Hyder*, 2018 N.C. App. LEXIS 622, at *24 (N.C. Ct. App. June 19, 2018) (unpublished) ("[A] member of an association being sued by that association may assert a lack of standing based on the association's alleged violation of provisions in its own articles of incorporation specifically governing the association's ability to sue."); *Peninsula Prop. Owner Ass'n v. Crescent Res., LLC*, 171 N.C. App. 89, 97, 614 S.E.2d 351 (2005) ("Without the required vote, the [plaintiff association] lacked the authority to commence legal proceedings against [the defendant member] and does not possess standing.").

9. The Association maintains that it had the authority to assert claims against Rankin without a member vote. It reads the declaration to require member approval only when it intends to start a new lawsuit from scratch. Because the Atkinsons started this action, it contends, the declaration's presuit requirements simply don't apply.

10. This is a misreading of the declaration. Member approval is required in any "proceeding ... commenced or prosecuted" by the Association. (Decl. Art. XII § 17.) Yes, this includes starting a brand-new lawsuit. But it is also broad enough to cover claims asserted and pursued by the Association in lawsuits in which it is a defendant. Why else would the declaration exempt "counterclaims brought by the Association in proceedings instituted against it"? (Decl. Art. XII § 17.)

11. Moreover, the word "proceeding" is a well-defined legal term that means "[a]n act or step that is part of a larger action." *Proceeding*, Black's Law Dictionary (10th ed. 2014). Naturally, that includes a third-party proceeding in which a defendant (the Association) serves a summons and complaint on someone (Rankin) who is "not a party to the action" as originally filed. N.C. R. Civ. P. 14(a). Before the Association filed its third-party complaint, Rankin was not a party, and no proceeding against him existed. The Atkinsons may have started this action, but it was the Association that "commenced" the "proceeding" against Rankin.

12. The Association objects that it would be impractical to get member approval before filing a third-party complaint due to the time constraints set by the Rules of Civil Procedure. Even if that were true, practical difficulties could not override the plain, unambiguous language of the declaration. *See Atl. & E. Carolina Ry. Co. v. Wheatly Oil Co.*, 163 N.C. App. 748, 752, 594 S.E.2d 425 (2004) ("When the language of a written contract is plain and unambiguous, the contract must be interpreted as written and the parties are bound by its terms." (citation and quotation marks omitted)). In any event, the concern is overblown. A defendant has 30 days to answer a complaint and another 45 days to file a third-party complaint after its answer, plus the ability to ask for an extension if needed. *See* N.C. R. Civ. P. 12(a)(1), 14(a). There is plenty of time to seek member approval.

***3** 13. As a fallback, the Association contends that its claims against Rankin are exempt from the membership-approval requirement. No exemption applies, though. The only candidate is the exemption for claims "to enforce the provisions of [the] Declaration." (Decl. Art. XII § 17.) But the claims against Rankin, which are for breach of fiduciary duty, do not fit. Although the Association's *bylaws* have provisions dealing with duties owed by officers and directors, the *declaration* does not. Without citation, the Association argues that the bylaws are part of the declaration so that

a claim to enforce the bylaws is a claim to enforce the declaration. That interpretation finds no support in the text. When the declaration means to refer to the bylaws, it does so expressly. (*See, e.g.*, Decl. Art. IV § 6; Art. XII §§ 1, 11, 16, 18, 19.) Reading "Declaration" to mean "Declaration and Bylaws" would render the express references to the bylaws superfluous and, worse yet, could introduce conflicts where none exist. (*Compare* Decl. Art. XII § 4 (establishing rules for amending "this Declaration"), *with* Bylaws Art. VI § 4 (establishing distinct rules for amending "these Bylaws").)

14. None of the Association's other arguments has merit. It points to a statute that authorizes it to "[i]nstitute ... litigation ... on matters affecting the planned community" and argues that the statute trumps the declaration. N.C.G.S. § 47F-3-102(4). This gets things backward: the declaration trumps the statute, not the other way around. *See id.* § 47F-3-102 (stating that the statute controls "[u]nless the articles of incorporation or the declaration expressly provides to the contrary"). The declaration's limitation on the Association's ability to sue is a valid and enforceable departure from the statutory default. *See Peninsula Prop. Owner Ass'n*, 171 N.C. App. at 97, 614 S.E.2d 351.

15. Next, the Association's reliance on the doctrine of judicial estoppel is far off base. It has not come close to showing that Rankin has taken "clearly inconsistent" positions on a question of fact. Nor has it shown that this Court or any other court has accepted a position that Rankin took at an earlier time such that accepting his current position would threaten "judicial integrity" or lead to "inconsistent court determinations." *Whitacre P'ship v. BioSignia, Inc.*, 358 N.C. 1, 29, 591 S.E.2d 870 (2004) (citation and quotation marks omitted).

16. And finally, no issues of fact stand in the way of a decision. The declaration is unambiguous, making its interpretation a question of law. *See, e.g.*, *Schenkel & Shultz, Inc. v. Hermon F. Fox & Assocs. P.C.*, 362 N.C. 269, 273, 658 S.E.2d 918 (2008). Likewise, the Association's admission that it did not ask for or get member approval before suing Rankin has "conclusively established" its failure to comply with the declaration. *Champion v. Waller*, 268 N.C. 426, 428, 150 S.E.2d 783 (1966). Whether fact disputes exist as to the merits of the Association's claims is beside the point.

17. In sum, the declaration required the Association to obtain membership approval before asserting third-party claims against Rankin. The Association did not; its claims are therefore barred. The Court grants Rankin's motion for judgment on the pleadings with respect to all claims asserted against him. Because the Association could obtain member approval in the future and file a new lawsuit, the Court dismisses its claims against Rankin without prejudice.

18. Having dismissed the Association's claims, the Court concludes that Rankin's claim for declaratory judgment is moot. He asks the Court to "enter a judgment declaring the filing and prosecution of the Association's Third-Party Complaint to be in breach of the Declaration and *ultra vires*" and to issue an injunction requiring the Association to dismiss its claims. (Rankin Countercl. ¶ 15.) Because Rankin has received complete relief through the dismissal of the third-party claims, there is no longer any genuine controversy, and a declaratory judgment would serve no "useful purpose in clarifying and settling the legal relations at issue." *Calabria v. N.C. State Bd. of Elections*, 198 N.C. App. 550, 554, 680 S.E.2d 738 (2009) (citation and quotation marks omitted).

***4** 19. For these reasons, the Court **GRANTS in part** and **DENIES in part** the motion for judgment on the pleadings as follows:

a. The Court **DISMISSES** without prejudice the Association's claims against Rankin.

b. The Court **DENIES** Rankin's motion as to his counterclaim for declaratory judgment and **DISMISSES** that counterclaim without prejudice as moot.

20. In addition, the Court dissolves the stay of discovery entered in May 2023. (*See* ECF No. 70.) Within fourteen days from the date of this Order, the parties shall jointly file a revised case management report and an amended proposed case management order.

SO ORDERED, this the 16th day of August, 2023.

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United States District Court, S.D. Florida.

FIRST TELEBANC CORP., a/k/a Net First Financial Corporation, Plaintiff,

v.

FIRST UNION CORPORATION, Defendant.

CASE NO: 02-80715-CIV-GOLD/TURNOFF

|

Signed 08/06/2007

Attorneys and Law Firms

Atlee W. Wampler, III, Wampler Buchanan Walker Chabrow Banciella & Stanley PA, Pinecrest, FL, Barry Steven Mittelberg, Barry S. Mittelberg, P.A., Coral Springs, FL, J. Stephen Walker, J. Stephen Walker PC, Michael J. Rovell, Rovell & Associates, Chicago, IL, for Plaintiff.

Karen Jessica Jerome Smith, Groelle & Salmon, Wellington, FL, Padmavathi Ghanta Hinrichs, Padma Hinrichs, P.A., Palm Beach, FL, Susan Fleischner Kornspan, Boca Raton, FL, for Defendant.

ORDER GRANTING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT: CLOSING CASE

THE HONORABLE ALAN S. GOLD, UNITED STATES DISTRICT JUDGE

***1** This cause comes before the Court on Defendant First Union's Motion for Summary Judgment **[DE 35]** and its Supplemental Motion for Summary Judgment **[DE 79]**. I have reviewed the Motions, the Plaintiff's Responses, and the Defendant's Replies, and I have heard argument from the parties. In addition, I have reviewed all exhibits and supplemental filings of the parties. Upon consideration of the record in this case, in light of the relevant legal standards and case law, I grant summary judgment in favor of First Union.

I. Factual Background

The early background of this case was set forth by Florida's Fourth District Court of Appeals in *Net First Nat'l Bank v. First Telebanc Corp.*, 834 So. 2d 944 (Fla. 4th DCA 2003). The parties do not dispute the facts as set forth by that court:

> This complex case involves two groups of investors battling for control of Net First National Bank ("the Bank") and the Bank's sole shareholder, First Telebanc Corporation ("the holding company"). The events leading to the present rift in leadership began in January 1999, when the directors of the Bank appointed Keith Duffy to fill a vacant director position. Sometime prior to May 2000, the Bank was designated a "troubled institution" under the Financial Institutions Reform, Recovery, and Enforcement Act of 1989 ("FIRREA").
>
> In June 2000, Duffy began acting as president and chief executive officer of the Bank. Throughout this time, the Bank experienced increasing financial difficulties, resulting in a Consent Order and Stipulation between the Office of the Comptroller of Currency ("OCC") and the Bank. The order gave the OCC increased oversight of the Bank's business dealings, most importantly a veto power over any proposed senior executive officer.
>
> Pursuant to FIRREA requirements, Duffy submitted a form 914 Notice to the OCC detailing his qualifications for his senior executive and director positions with the Bank. Duffy was later interviewed, and the OCC declined to grant him authority to act as a senior executive of the Bank, stating that he did not have sufficient experience to hold a leadership position in a "problem bank." The OCC did not object at that time to Duffy's continuing as a director.
>
> In February 2001, however, the OCC nullified its non-objection to Duffy serving as director. In a five-page letter, the OCC detailed material misrepresentations and omissions Duffy made in the biographical portion of his 914 application and his interview. The OCC found that Duffy gave a false answer and omitted material information regarding his past involvement with a state-chartered bank, then continued to misrepresent facts and give inconsistent explanations in subsequent documents and his interview.
>
> At the center of Duffy's misrepresentations to the OCC was his past involvement with a state-chartered bank. Duffy failed to disclose that his application to serve as president of the state bank was disapproved by Florida's Department of Banking and Finance, Duffy also failed to disclose that after disapproval, he continued to serve as president of the state bank, in violation of the Department's numerous demands that he step down. The state bank was in poor financial condition and under a cease and desist order

from the State Comptroller when Duffy arrived, and it deteriorated further during his tenure, with criticism of his performance including "inappropriate insider transactions involving Duffy-related companies, a number of violations of laws, and continued noncompliance with the cease and desist order." As a result, the OCC withdrew its approval for Duffy to have any connection with Bank leadership.

***2** In September 2000, the Federal Reserve Bank notified the board of the holding company that the OCC decision not only precluded Duffy from serving as a director of the Bank, but governed his actions as a director of the holding company as well. The Federal Reserve warned that "holding company board of directors' minutes should clearly note Mr. Duffy's abstention from all policymaking decisions regarding the bank." Several months later, in May 2001, the holding company elected six directors of the Bank. They included Duffy, Randall Rossilli, and Laura Pugliese, with Duffy's directorship subject to the outcome of a pending appeal of the OCC nullification. The OCC responded by advising the Bank's directors that "Mr. Duffy may not participate in the affairs of the bank or otherwise act as an 'institution affiliated party' in board meetings or under any other circumstances," and that such participation subjected other directors to civil penalties. Duffy's appeal of the OCC nullification was resolved against him.

Id. at 946-47. The controversy continued. As of September, 2001, the holding company board consisted of Duffy, Rosselli, and Bradley Groves. *Id.* at 947. Over the next several months, numerous board meetings and shareholder meetings were held; new board members were appointed, and ultimately the shareholders voted to remove Duffy and Groves from the board, and elect a new slate of board members. *Id.* Duffy led a group of Plaintiffs who filed suit against both the bank and the holding company, seeking temporary injunctions to stop the shareholders from removing him from the board. After several unsuccessful attempts, Duffy succeeded in gaining the injunction. *Id.* at 948. The trial court ordered as follows:

1. Defendants, and anyone acting in concert with Defendants, are enjoined in any way from acting in any official capacity on behalf of [the holding company], as director or otherwise.

2. Defendants, and anyone acting in concert with Defendants, are enjoined from interfering with Duffy and Groves' performing their duties as the lawful Board of Directors of [the holding company].

3. Defendants, and anyone acting in concert with Defendants, are enjoined from interfering in any way with the access of Duffy or Groves to the corporate funds, records, or offices of [the holding company].

4. [The holding company], Duffy and Groves shall, within 60 days, call an annual meeting, at which meeting the shareholders of [the holding company] shall elect directors as required by the Articles of Incorporation and Bylaws of [the holding company].

5. L. Pugliese, Rossilli, Connors, and Pasley are hereby enjoined from acting as directors of Net First National Bank.

6. Plaintiffs shall file an injunction bond in the amount of $ 250,000.00 within 72 hours of the entry of this Order or the injunction set forth herein shall be immediately dissolved.

Id. at 948-49. Less than one month after the trial court issued the injunction, the OCC closed the Bank and named the Federal Deposit Insurance Corporation ("FDIC") receiver. *Id.* at 949.

The case was appealed, and came before Florida's Fourth District Court of Appeals. The court reversed the trial court, and lifted the injunction. In its decision, the court made various findings of fact. Notable among those findings was the fact that Duffy did not have the legal right to act as he did regarding the makeup of the board:

Duffy was precluded from any leadership role in the Bank because of material misrepresentations and omissions made to the OCC, but at the injunction hearing he described himself as the Bank president. The picture that emerges from these facts is not that the Plaintiffs had a substantial likelihood of success on the merits or a clear legal right to injunctive relief.

* * *

Not only does Pugliese's potential status as a director of the holding company cast doubt on Duffy and Groves's actions at the November 20 meeting, Duffy acted beyond his legal capacity in voting on policy decisions affecting the Bank.

Id. at 949-50.

While the state court case between Duffy, the bank, and the holding company was ongoing, the Plaintiff in this case, First Telebanc, filed suit against First Union Bank in

state court. First Union removed the case to the Southern District of Florida based on diversity jurisdiction on July 30, 2002. [DE 1]. First Telebanc had three claims against First Union: breach of contract, negligent misrepresentation, and fraudulent inducement. The case was at the time assigned to the Honorable Wilkie Ferguson; he adopted the Report and Recommendation of Magistrate Judge Snow, and dismissed Counts II and III of the Complaint. [DE 32]. Only the breach of contract claim remained.

***3** On February 27, 2003, First Union filed a motion to stay the case, on the grounds that it had learned of the decision entered by the Fourth District Court of Appeals cited above. [DE 24]. In its motion, First Union requested that the case be stayed until it was able to file a motion for summary judgment against First Telebanc. First Union attached to its motion a letter from counsel for the board of directors of First Telebanc. The letter states, in relevant part, as follows:

> As you are aware, we represent the Appellants in the appeal in which the 4th DCA has recently issued an opinion and Mandate. (See copies enclosed). In summary, the opinion overturns Judge Wessel's preliminary injunction in its entirety, and contains significant findings regarding your clients (Mr. Duffy in particular) and their position vis a vis First Telebanc. While we understand that the Appellees are trying to obtain rehearing in this matter, the Mandate is in effect and as a result, our clients are the ones who have authority to undertake actions on behalf of Net First Financial ("former bank holding company), including the commencement of prosecution of litigation. We are aware of at least two legal actions filed by your firm on behalf of former bank holding company. These include a legal action against First Union (now "Wachovia") related to the sale of Boca Raton National Bank.
>
> Our clients believe that any such action is baseless, frivolous and without merit and is designed to cover the negligence of Mr. Duffy and his various counsel in failing to properly operate/represent the bank after its acquisition, failing to initially structure the transaction and closing documents properly, failure to complete a proper due diligence and understand the regulatory "status" of the bank during the period of ownership by First Union as opposed to it operating as a stand along entity post-closing, and other matters which would preclude any claim against this entity. Regardless, it is my client's belief that no claim exists or should be pursued against First Union/ Wachovia and that any pending action in this regard should be dismissed.
>
> We are therefore demanding that the pending action be dismissed. We further demand that you provide this office with a list of any and all action of which you are aware which are being prosecuted or defended by First Telebanc, and that you take no further action in those lawsuits without first consulting with this office.

One month later, on April 9, 2003, First Union filed a motion for summary judgment against First Telebanc. [DE 35]. The basis of the motion was that the lawsuit had been initiated by Duffy on behalf of the bank, and that Duffy had no legal authority to act on behalf of the bank. At about the same time, the board of directors of First Telebanc moved to intervene in the action between Duffy and First Union, claiming that Duffy lacked authority to pursue the action on the bank's behalf.

On May 22, 2003, the case was reassigned to me. [DE 45], Shortly thereafter, Magistrate Judge Snow issued a report and recommendation that First Union's motion for stay be granted. I adopted the report and recommendation, and set oral argument on First Union's motion for summary judgment. [DE 55, 60]. On August 15, 2003, I heard oral argument on the motion for summary judgment. At that argument, the parties argued that the case should be stayed pending the outcome of the state case still ongoing in the Fifteenth Judicial Circuit, Palm Beach County. That case involved decisions required by the Fourth District Court of Appeals' remand to the state court to determine who legally comprised the board of directors of First Telebanc. I decided that the most prudent course of action was to stay the case pending a decision by the state court, to avoid the possibility of conflicting findings between the two courts. [DE 66], First Union moved for reconsideration of the order, which I denied, finding that First Union would suffer no prejudice from the stay. The case was therefore stayed pending the outcome of the state court case. [DE 68].

***4** On December 4, 2006, First Telebanc moved to reopen the case, as the state court case was closed. [DE 69]. First Telebanc informed this Court that the parties to the state court case had settled the matter, and in the settlement had agreed that

> With respect to the past business affairs of the Company (i.e. First Telebanc), the Board of Directors of First Telebanc were Duffy, Groves, and Rosselli. Further, the Company

> and specifically Duffy, on behalf of the Company, had the authority to file and pursue the lawsuit filed by the Company against Wachovia Bank f/k/a First Union National Bank ... All parties acknowledge that from this point forward, Duffy and Groves are the only Directors of the Company.

First Telebanc argued that the

> [d]isposition of state court proceedings in Palm Beach County Circuit Court as outlined above establishes unequivocally that at all times material to this case, Keith Duffy had the authority to act on behalf of First Telebanc in regard to the filing and prosecution of First Telebanc's complaint against First Union Corp.

[DE 69].

First Union responded, arguing that the case should not be reopened, because no judicial determination had been made regarding the makeup of the board of directors, which was a condition precedent to reopening the case. Alternatively, First Union argued that its motion for summary judgment should be granted for the same reasons earlier argued: that Duffy did not have the authority to litigate the case on behalf of First Telebanc. [DE 70]. On January 16, 2007, I granted First Telebanc's motion to reopen the case, and set a briefing schedule for First Union's renewed motion for summary judgment. [DE 78]. In its supplemental motion for summary judgment, First Union argues that summary should be granted on the grounds that Duffy did not have the authority to pursue claims against it on behalf of First Telebanc. First Union points to the decision by the Fourth District Court of Appeals in *Net First Nat'l Bank v. First Telebanc Corp.,* 834 So. 2d 944 (Fla. 4th DCA 2003), and the findings of fact contained therein, as described above. First Union also points to the January 10, 2002 affidavit of Randall R. Rossilli, in which he states that on December 18, 2001, a special shareholder's meeting was held, in which Duffy and Groves were unanimously removed from First Telebanc's Board of Directors.

In its response, First Telebanc does not dispute the existence of the *Net First Nat'l Bank v. First Telebanc Corp.* case, nor the existence of the Rossilli affidavit. First Telebanc relies upon the settlement agreement in the state court case, in which the parties agreed that Duffy and Groves, and Rossilli were the only members of Telebanc's board of directors at times material to this litigation. First Union does not dispute the existence of the settlement agreement: only its legal effect.

II. LEGAL STANDARD FOR SUMMARY JUDGMENT

Rule 56(c) of the Federal Rules of Civil Procedure authorizes summary judgment when the pleadings and supporting materials show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. *See Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 248, 106 S.Ct. 2505, 2510 (1986). The court's focus in reviewing a motion for summary judgment is "whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law." *Anderson,* 477 U.S. at 252, 106 S.Ct. at 2512; *Bishop v. Birmingham Police Dep't,* 361 F.3d 607, 609 (11th Cir. 2004).

***5** The moving party bears the initial burden under Rule 56(c) of demonstrating the absence of a genuine issue of material fact. *Allen v. Tyson Foods, Inc.,* 121 F.3d 642, 646 (11th Cir. 1997). Once the moving party satisfies this burden, the burden shifts to the party opposing the motion to go beyond the pleadings and designate "specific facts showing that there is a genuine issue for trial." *Celotex v. Catrett,* 477 U.S. 317, 324, 106 S.Ct. 2548, 2553 (1986). A factual dispute is genuine only if the evidence is such that a reasonable fact finder could return a verdict for the non-moving party. *Anderson,* 477 U.S. at 248; *Denney v. City of Albany,* 247 F.3d 1172, 1181 (11th Cir. 2001).

In assessing whether the movant has met its burden, the court should view the evidence in the light most favorable to the party opposing the motion and should resolve all reasonable doubts about the facts in favor of the non-moving party. *Denney,* 247 F.3d at 1181. In determining whether to grant summary judgment, the court must remember that "[c]redibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are

jury functions, not those of a judge." *Anderson,* 477 U.S. at 255.

Upon review of the record and the parties' arguments, I grant First Union's motion for summary judgment.

III. Analysis

Several issues must be addressed to determine whether summary judgment should be granted in favor of First Union: (1) whether Duffy had the authority to act on behalf of First Telebanc when he initiated this lawsuit; (2) whether the settlement agreement regarding Duffy's authority creates retroactive authority for Duffy; (3) whether the subsequent ratification by the Board of Directors of Duffy's authority creates retroactive authority for Duffy; (4) whether the second ratification by the Board creates retroactive authority for Duffy; (5) whether First Union has standing to assert Duffy's lack of authority. I will address each issue in turn.

A. Whether Duffy had the authority to act on behalf of First Telebanc when he initiated this lawsuit

1. Duffy lacked authority as President and CEO

First Union argues that Duffy did not have the authority to file this lawsuit on behalf of the bank. In support of this position, First Union cites to Florida statutes and case law which hold that only the directors of a corporation have the power to manage the business affairs of a corporation-including the power to bring a lawsuit-unless the articles of incorporation or bylaws provide otherwise. *See* Fla. Stat. § 607.0801(2)("AII corporate powers shall be exercised by or under the authority of, and the business and affairs of the corporation managed under the direction of, its board of directors, subject to any limitation set forth in the articles of incorporation or in an agreement authorized under s. 607.0732"); Fla. Stat. § 607.0206(2) ("The bylaws of a corporation may contain any provision for managing the business and regulating the affairs of the corporation that is not inconsistent with law or the articles of incorporation"); *Citizens National Bank of St. Petersberg v. Peters,* 175 So. 2d 54, 56 (Fla. 2d DCA 1965)("The corporation law of this State vests in directors the management of the corporate business").

In this action, Duffy has stated by way of affidavit that he initiated this lawsuit in his capacity as President of First Telebanc Corporation: not as a director of the corporation. (Duffy Affidavit, DE 35, p. 187). [1] He also provided no evidence that the Board of Directors authorized the initial filing of the lawsuit. Under Florida law, therefore, Duffy did not have authority to initiate the lawsuit unless the articles of incorporation or the bylaws of the corporation conferred such authority upon him. However, neither the company's articles of incorporation nor its bylaws confer such authority upon the President or CEO. Pursuant to First Telebanc's Articles of Incorporation, *all* corporate powers are vested in the Board of Directors:

> ***6** The business and affairs of the Corporation shall be managed by or under the direction of the Board of Directors. In addition to the powers and authority expressly conferred upon them by the Florida Statutes or by these Articles of Incorporation or the Bylaws of the Corporation, the directors are hereby empowered to exercise all such powers and do all such acts as may be exercised or done by the corporation.

Similarly, the Bylaws vest all power with the Board of Directors:

> All corporation powers shall be exercised by or under the authority of the Board of Directors, and the business and affairs of this Corporation shall be managed under the direction of the Board of Directors.

As noted above, First Telebanc has provided no evidence that the Board of Directors ever approved the filing of this lawsuit against First Union. In fact, the only evidence as to whether the Board approved the action shows the opposite; the letter from the Board's counsel expressly directs Duffy to dismiss the action, because the Board had determined that the case was "baseless, frivolous, and without merit." (DE 81-2). In accordance with Florida law and First Telebanc's Articles of Incorporation and its Bylaws, Duffy acted without authority in his initiation of this lawsuit against First Union.

2. Duffy lacked authority due to the mandate of the OCC

Notably, First Telebanc fails to address, *in any fashion,* the determination by the Office of the Comptroller of Currency ("OCC") that Duffy was prohibited from participating in the affairs of the bank. As discussed above, the OCC expressly held that "Mr. Duffy may not participate in the affairs of the bank or otherwise act as an 'institution affiliated party' in board meetings or under any other circumstances." As the Fourth District Court of Appeals held, this decision by the OCC precluded Duffy from having any legal right to seek relief on behalf of the bank.

During oral argument, First Telebanc argued that Duffy was not acting on behalf of the bank itself, but only on behalf of the holding company. The OCC, argues First Telebanc, could not forbid Duffy to act on behalf of the holding company. This argument is disingenuous. The holding company had only one asset: the bank. The affairs of the holding company are therefore necessarily the affairs of the bank itself. Moreover, this argument is ineffective for the reasons stated above; *i.e.,* that Duffy, as President and CEO, had no authority to initiate the lawsuit in any event.

The OCC is a federal agency charged with regulating banking throughout the nation. 12 U.S.C. § 1. "The National Bank Act establishes the primacy of the federal government, through the Office of the Comptroller of the Currency, as the regulatory authority over national banks." *Bank of Am., N.A. v. McCann,* 444 F. Supp. 2d 1227, 1231 (N.D. Fla. 2006). The decision of the OCC was clear that Duffy was precluded from participating in any fashion with the affairs of First Telebanc. He therefore had no authority to initiate the instant lawsuit against First Union.

3. Duffy's authority to act is barred by the Fourth District Court of Appeals' Decision

First Telebanc also fails to acknowledge the effect of the Fourth District Court of Appeals' opinion. First Telebanc claims that the Fourth District Court of Appeals merely reversed the preliminary injunction because it found that Duffy did not have a substantial likelihood of success on the merits, and made no factual findings as to whether or not Duffy had the authority to file suit against the board of directors. First Telebanc is mistaken. The Fourth District Court of Appeals did, indeed, make factual findings concerning Duffy's authority: "Duffy was precluded from any leadership role in the Bank because of material misrepresentations and omissions made to the OCC ... Duffy acted beyond his legal capacity in voting on policy decisions affecting the Bank." *Net First Nat'l Bank v. First Telebanc Corp.,* 834 So. 2d 944, 949-950. (Fla. 4th DCA 2003). The court further found that "The ultimate effect of the injunction was to wrest physical control of the Bank and its assets from Defendants and hand it to Duffy, when Duffy was precluded by federal authority from participating in running the Bank, at the Bank level and the holding company level." *Id.* at 949.

***7** Neither of the parties have raised the issue of whether collateral estoppel or the doctrine of the law of the case prevents this Court from considering the issue of Duffy's legal authority to act on behalf of First Telebanc in the wake of the Fourth District's opinion. However, I need not raise that issue *sua sponte,* because summary judgment is appropriate for First Union for other reasons. [2]

4. Duffy was without authority to initiate the lawsuit

Viewing all of the undisputed facts in the record before me, I must conclude that at the outset of the litigation in this case, Duffy had no authority to act on behalf of first Telebanc. Duffy was therefore without authority to bring suit on behalf of Telebanc against First Union. First Telebanc has failed to raise any genuine issue of fact to refute the fact that the lawsuit was improperly filed. This case must therefore be dismissed unless some future actions conferred retroactive authority upon Duffy such that he could properly file the lawsuit.

B. Whether the settlement agreement provided retroactive authority for Duffy to initiate this lawsuit

First Telebanc argues that the settlement agreement between Duffy, Groves, and Rossilli confirms that Duffy had authority to act on behalf of Telebanc when he originally initiated this lawsuit. In particular, First Telebanc focuses on the portion of the settlement agreement that reads:

> With respect to the past business affairs of the Company (i.e. First Telebanc), the Board of Directors of First Telebanc were Duffy, Groves, and Rosselli. Further, the Company and specifically Duffy, on behalf of the Company, had the authority to file and pursue the lawsuit filed by the

Company against Wachovia Bank f/k/
a First Union National Bank.

First Union argues that the settlement agreement reached between the various parties to the state court lawsuit has no legal effect relevant to a decision in this case. I concur with First Union. [3]

When I originally stayed this case pending the outcome of the decision in the state court as to who comprised the board of directors, I was concerned that some holdings in this case might conflict with determinations of the state court case. That court, however, never made any judicial determination as to who comprised the board. The parties to that case entered into a negotiated settlement, which is not binding upon this Court, nor binding upon the Defendant in this case, First Union, who was not a party to the state court action. Upon review of the record, it is clear that the issue of who were the members of the board of directors of First Telebanc at the time of the lawsuit is irrelevant to the question of whether Duffy had the authority to initiated the lawsuit. In his affidavit, Duffy acknowledged that he, alone, initiated the lawsuit, and there is no dispute between the parties that Duffy, alone, initiated the lawsuit in this case. Duffy states in his affidavit that he initiated the lawsuit in his capacity and President and CEO of First Telebanc. As discussed above, under Florida law Duffy had no authority to act in that capacity. Additionally, given the undisputed fact that the OCC-a federal body governing national banks-had prohibited Duffy from acting in connection with First Telebanc in any fashion, the makeup of the board at the time of the lawsuit is irrelevant.

***8** The self-serving, negotiated settlement agreement cannot retroactively confer authority upon Duffy to file suit when he was precluded from doing so by virtue of Florida law and the OCC. First Telebanc has failed to raise any issue of material fact as to whether Duffy had authority to initiate the lawsuit in this case. The undisputed facts show that he clearly did not.

C. Whether the Board's ratification of Duffy's action creates retroactive authority for Duffy to initiate this lawsuit

First Telebanc takes the position that, assuming *arguendo* Duffy did not have the authority to initiate this lawsuit, the subsequent ratification of the lawsuit by the Board of Directors endows him with such authority. Attached to its opposition to First Union's motion for summary judgment are two Resolutions by the Board of Directors of First Telebanc: one grants permission to Michael J. Rovell, Esq., to re-open this case and pursue it on behalf of First Telebanc; the other expressly ratifies Duffy's earlier actions in initiating the lawsuit on behalf of First Telebanc. These documents were executed by Duffy and Groves in October, 2006 and January, 2007.

There is no question that, under Florida law, a board of directors may ratify the previously unauthorized actions of a board member, director, or other office-holder of a corporation. *See Gentry-Futch Co. v. Gentry,* 90 Fla. 595, 612 (Fla. 1925)("While a corporation cannot ratify absolutely void and ultra vires acts, it may, like an individual, ratify any act done on its behalf which it had the power to do or to authorize to be done in the first instance"); *Wimbledon Townhouse Condominium I, Asso. v. Wolfson,* 510 So. 2d 1106, 1108 (Fla. 4th DCA 1987)("We also find merit in appellant's argument that the board of directors of a condominium association may ratify its prior acts"), citing *Hillsboro Light Towers, Inc. v. Sherrill,* 474 So.2d 1219 (Fla. 4th DCA 1985); *Zinger v. Gattis,* 382 So.2d 379 (Fla. 5th DCA 1980).

First Union argues that Florida law also holds that a board of directors may not ratify unlawful acts. First Union is correct in its statement of Florida law, but this alone does not resolve the issue. Florida courts have held that a board of directors may not ratify unlawful acts. *See, e.g., Flight Equip. & Eng'g Corp. v. Shelton,* 103 So. 2d 615, 621 (Fla. 1958) ("It cannot be disputed that a board of directors of a corporation is without power to ratify that which it cannot do directly or that which it could not authorize be done initially. It has no power to ratify a void or illegal act."); *Gentry-Futch Co. v. Gentry,* 1925, 90 Fla. 595,106 So. 473 ("a corporation cannot ratify absolutely void and ultra vires acts"). Other courts, examining basic corporate law principles have similarly held: *Wolf v. Frank,* 477 F.2d 467, 477 (5th Cir. 1973); 2A William M. Fletcher, Encyclopedia of the Law of Private Corporations, § 752 (2000) (noting that, like other cases of agency, a corporation cannot ratify "acts done in violation of law or in contravention of public policy").

Applying these principles, First Union argues that under Florida corporations law, Duffy had no power to initiate the lawsuit against First Union on behalf of First Telebanc; therefore, it argues, the board of directors cannot subsequently ratify Duffy's unlawful act. First Union's position has some

merit. Duffy was proscribed by the OCC from participating in any actions on behalf of the bank. His initiation of the lawsuit, therefore, could be seen as unlawful, in the sense that he lacked lawful authority to initiate the suit. [4]

***9** However, the law is clear that a board may ratify any act which it could have originally authorized. As the Florida Supreme Court stated in *Gentry-Futch*, "While a corporation cannot ratify absolutely void and ultra vires acts, it may, like an individual, ratify any act done on its behalf which it had the power to do or to authorize to be done in the first instance." *Gentry-Futch,* 90 Fla. at 612. In this case, while the board of directors may not have been able to authorize Duffy to initiate the lawsuit, the board could have initiated the lawsuit itself. In accordance with Florida law, therefore, the board may subsequently ratify the filing of the lawsuit.

Notwithstanding the board's theoretical ability to ratify the initiation of the lawsuit, problems remain given the facts of this case. First Union points out that the attempted ratification fails as a matter of law under First Telebanc's Articles of Incorporation. The Articles mandate that the "Board of Directors of the Corporation shall be comprised of not less than three (3) nor more than fifteen (15) directors." [DE 35, Exhibit B to Exhibit 4]. The Resolution by the Board, attached in support of First Telebanc's opposition to First Union's motion for summary judgment, is signed by only two Board members, and indeed makes clear that the Board consists of only two members. Without three members, the Board does not comply with First Telebanc's Articles of Incorporation, and therefore cannot take any authorized action.

Moreover, of the two board members ratifying Duffy's action, one is Duffy himself, who was proscribed by the OCC from acting as a director. In *Wolf v. Frank,* 477 F.2d 467, 477 (5th Cir. 1973), the Fifth Circuit, applying Florida corporations law, stated that "We also recognize the general rule that 'ratification can never be made on the part of the corporation by the same persons who wrongfully assume the power to make the contract,' " citing *Flight Equipment & Engineering Corp. v. Shelton,* 103 So.2d 615, 621 (1958).

Viewing all evidence in the record in the light most favorable to First Telebanc, I can only conclude that First Telebanc has not raised a genuine issue of material fact to demonstrate that ratification in this case has any effect.

First Union further argues that the ratification of January 24, 2007 is ineffective because the cause of action is barred by the statute of limitations. [5] The original Complaint was filed on June 5, 2002, alleging a breach of contract. The allegations in the Complaint make clear that the alleged breach occurred on September 9, 1997, when First Union allegedly failed to make certain disclosures to First Telebanc regarding the financial soundness of the bank sought to be acquired by First Telebanc.

Under Florida law, the statute of limitations on a breach of contract action is five years. Fla. Stat. § 95.11(1)(b). If the cause of action accrued on September 9, 1997, the statute of limitations to bring that cause of action expired on September 9, 2002. *See Medical Jet, S.A. v. Signature Flight Support-Palm Beach, Inc.,* 941 So. 2d 576, 578 (Fla. 4th DCA 2006)("For a breach of contract action, it is well established that a statute of limitations runs from the time of the breach, although no damage occurs until later").

***10** While ratification of an unauthorized act may relate back to the original act, such ratification will only relate back if the rights of third parties have not been affected in the interim:

> A corporation, like an individual, may ratify and thereby render binding upon it the originally unauthorized acts of its officers or other agents. [T]he ratification of an act done by a previously unauthorized officer or agent is, unless rights of third persons have intervened, equivalent to a prior authority and relates back and supplies the authority to do such an act.

Boyce v. Chemical Plastics, Inc., 175 F.2d 839, 842 (8th Cir. 1949)(citations and ellipses omitted). In this case, the rights First Union have been affected: specifically, its right to be free from suit under the statute of limitations.

The United States Supreme Court explained the limitations of a party's ability to ratify the acts of its agent:

> If an act to be effective in creating a right against another or to deprive him of a right must be performed before a specific time, an affirmance is not effective against the other unless made before such time.... "The bringing of an action, or of an appeal, by a purported agent can not be ratified after the cause of action or right to appeal has

> been terminated by lapse of time". Though in a different context, we have recognized the rationale behind this rule: "The intervening rights of third persons cannot be defeated by the ratification. In other words, it is essential that the party ratifying should be able not merely to do the act ratified at the time the act was done, *but also at the time the ratification was made*"

FEC v. NRA Political Victory Fund, 513 U.S. 88, 98 (U.S. 1994)(emphasis in original). Thus, ratification attempted after the statute of limitations has run on a cause of action is ineffective. *See Town of Nasewaupee bay v. City of Sturgeon Bay,* 251 N.W.2d 845 (Wis. 1977)(dismissing complaint where boards' attempted ratification of unauthorized but timely commencement of lawsuit came after statute of limitations had run); *Miernicki v. Duluth Curling Club,* 699 N.W.2d 787 (Minn. App. 2005)(granting summary judgment where attempted ratification occurred after expiration of statute of limitations).

To permit ratification after a statute of limitations has expired would be to render the limitations periods meaningless. As First Union argues, were a party to have the unilateral power to retroactively ratify its agent's actions years after their occurrence, a defendant could be exposed to liability for an indefinite period of time. Limitations are designed to prevent precisely that type of prolonged exposure to suit.

In this case, while the Board of Directors could have initiated the lawsuit in 2002, it could not now initiate the lawsuit because the statute of limitations is long since passed. The ratification is therefore ineffective, and fails to create an issue of material fact in this case. Duffy did not originally have the authority to file suit against First Union, and the Board's belated attempts to ratify that action fail as a matter of law.

D. Whether the second ratification by the Board of Duffy's actions creates retroactive authority for Duffy to initiate this lawsuit

***11** Following oral argument on First Union's Motion for Summary Judgment, First Telebanc filed with this Court Duffy's resignation from the board, along with a Resolution of the board of First Telebanc. In this Resolution, the Board consists of three members, and does not include Duffy. This new Board ratified Duffy's action in filing the initial lawsuit on June 5, 2002. First Telebanc appears to concede that its earlier attempt at ratification failed on several bases, and attempts to cure those deficiencies with this new ratification. However, as First Union correctly argues, this new ratification attempt is also legally invalid.

As First Union points out, First Telebanc's new filings are both unsworn and untimely. The Eleventh Circuit has stated that "only 'pleadings, depositions, answers to interrogatories, and admissions of file, together with affidavits, can be considered by the district court in reviewing a summary judgment motion." *Carr v. Tatangelo*, 338 F.3d 1259, 1273 (11th Cir. 2003). First Telebanc's newly filed Resolution of the Board fits into none of these categories. Instead, it is an unsworn document filed *after* the motion for summary judgment was fully briefed, and *after* oral argument was held. Fed. R. Civ. P. 56(c) provides that" [t]he adverse party prior to the day of hearing may serve opposing affidavits." Clearly, this latest Resolution is not an affidavit, nor was it filed prior to the day of the hearing.

It appears that First Telebanc is attempting to cure its earlier papers, whose deficiencies were made clear during oral argument. For First Telebanc to attempt to change the record at this late stage appears to be merely a last ditch effort to avoid summary judgment. Such a filing is not in accordance with the Rules of Federal Procedure, and need not be considered by this Court.

However, even if I were to consider the effect of this latest attempt at ratification, I would find that it fails as a matter of law. This new ratification is ineffective on the grounds that the statute of limitations has expired on this breach of contract action. As discussed above, the January, 2007 ratification was invalid as time-barred; this new June, 2007 ratification is similarly barred.

First Telebanc has failed to create any genuine issue of material fact to defeat First Union's assertion that this lawsuit was, and continues to be, unauthorized. Duffy has never had the authority to file this suit, and as a matter of law, the Board may not now-ten years after the alleged breach of contract-ratify the action.

E. Whether First Union has standing to assert Duffy's lack of authority

First Telebanc claims that First Union's motion for summary judgment must fail because First Union does not have standing to assert Duffy's lack of authority. First Telebanc cites no legal authority in support of its position; it merely makes the statement that "[a]lthough First Union clearly had a parochial interest in which faction ultimately was held

to be in control of First Telebanc's Board of Directors and therefore this action, at no time did First Union have standing to participate in the resolution of that dispute." First Telebanc misses the point here. First Union did not participate in the state court case in which the identity of the board of directors was at issue, and had no reason to. As First Union has agreed, its position as to the lack of authority for *this* case to go forward has no bearing on who was, or is, a member of the board of directors of First Telebanc. Because the undisputed evidence shows that Duffy initiated the lawsuit on his own, and because he lacked the authority to act, the makeup of the board at any time is simply irrelevant to First Union's position in its motion for summary judgment.

***12** As to whether First Union has standing to question whether this lawsuit against it is proper, it is ludicrous to suggest it does not, A party has standing where it "has a sufficient stake in the controversy, with a legally cognizable interest which would be affected by the outcome of the litigation." *Accela, Inc. v. Sarasota Cty.,* 901 So. 2d 237, 238 (Fla. 2d DCA 2005). First Union clearly has an interest in whether Duffy had the authority to file the lawsuit against it, just as any defendant has an interest in whether the suit against it is properly brought. For the rule to be otherwise, a plaintiff with no connection to another entity could file lawsuits on its behalf, and the defendant would be forced to defend a suit brought by an improper party. For example, should a stranger to the corporation file suit against First Union, alleging that First Union had harmed the corporation, First Union would undeniably have standing to assert that the suit was improperly brought. *See Bend v. Basham*, 471 F.3d 1199 (11th Cir. 2006)(noting that among the prudential requirements for standing, a plaintiff cannot raise the rights of third parties). Given the OCC's decision that Duffy was prohibited from acting on behalf of the bank, a stranger to the corporation would have the same authority to file suit against First Union in this case as did Duffy.

First Telebanc misapprehends the standing issue. It is the plaintiff who must demonstrate its standing to bring the subject action. The United States Constitution limits the jurisdiction of the Federal Courts by permitting them to consider only disputes that rise to the level of being "cases" or "controversies." *Hugh Johnson Enterprises, Inc. v. City of Winter Park, Florida,* 2007 WL 1047071 at *2 (Slip Copy)(11th Cir. 2007). In order for there to be a real case or controversy, the plaintiff must have legal authority to initiate the action. Without such legal authority, the case is not ripe for consideration. "The ripeness doctrine protects federal courts from engaging in speculation or wasting their resources through the review of potential or abstract disputes." *Id.* Independently, this Court may examine whether a plaintiff has standing, and whether, as a result, this Court has jurisdiction to hear a matter. It is the responsibility of the claimant to substantiate, when the issue is raised, that it is a proper party to invoke judicial resolution of the dispute and the exercise of the court's remedial powers. *Elend v. Basham,* 471 F.3d 1199 (11th Cir. 2006).

In this case, Duffy had no corporate authority to file the lawsuit on behalf of the bank; he therefore had no standing to bring the action. Without standing, there is no case or controversy as to the plaintiff. Upon independent review, therefore, I conclude that this case is not properly before this court, and cannot proceed.

IV. Conclusion

In light of all of the foregoing, summary judgment must be granted in favor of First Union. Viewing the all of the undisputed facts in the light most favorable to First Telebanc, summary judgment must be entered for First Union as a matter of law.

It is hereby **ORDERED and ADJUDGED** that:

1. First Union's Motion for Summary Judgment **[DE 35, 79] is GRANTED.**
2. First Telebanc's Complaint is DISMISSED.
3. This case is CLOSED.
4. All pending motions are DENIED as moot.

DONE AND ORDERED in chambers at Miami, Florida, this 6th day of August, 2007.

All Citations

Not Reported in Fed. Supp., 2007 WL 9702557

Footnotes

1 Florida's Fourth District Court of Appeals also found that Duffy was not a director at the time he initiated the lawsuit, as he had been removed from the board.

2 Notably, under the doctrine of the law of the case, while the trial court on remand from the Fourth District Court of Appeals could have made a determination as to the makeup of the board of directors, it could not determine that Duffy had authority to file the lawsuit, as the Fourth District Court of Appeals had definitively determined that Duffy had no authority to act on behalf of the bank. *Engle v. Liggett Group, Inc.,* 945 So. 2d 1246, 1266 (Fla. 2006)("Law of the case 'requires that questions of law actually decided on appeal must govern the case in the same court and the trial court, through all subsequent stages of the proceedings' "). Moreover, under that same doctrine, I could make a finding contrary to that of the Fourth District Court of Appeals only if the decision was "clearly erroneous and would work a manifest injustice." *Christianson v. Colt Indus. Operating Corp.,* 486 U.S. 800, 817 (U.S. 1988). Because I do not find that the Fourth District Court of Appeals' decision was clearly erroneous, under the law of the case I conclude that Duffy had no authority to act on behalf of the bank.

3 It is also worth note that while First Telebanc attempts to discard any findings made by the Fourth Circuit Court of Appeals as irrelevant, it attempts to rely upon a settlement agreement in a trial court case as legally binding.

4 This interpretation of "unlawful" is, however, a stretch. This is not a situation in which, for example, a director entered into a contract to purchase cocaine when he had no authority to act for the corporation. No board could ratify that action, as it is clearly an illegal act. In any event, the attempted ratification fails for the reasons discussed below.

5 Notably, the Resolution ratifying Duffy's actions was executed on January 24, 2007, and was attached as an exhibit to First Telebanc's Response in Opposition to First Union's Supplemental Motion for Summary Judgment. In its Reply, First Union raised the argument that the attempted ratification was barred by the statute of limitations. First Telebanc did not request leave to file a sur-reply to address the statute of limitations argument, nor did it address the statute of limitations issue at oral argument.

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United States District Court, D. Nevada.

Jose HERNANDEZ, Plaintiff,
v.
INDYMAC BANK, et al., Defendants.

Case No. 2:12–cv–00369–MMD–CWH
|
Signed 09/19/2014

Attorneys and Law Firms

Jose Hernandez, North Las Vegas, NV, pro se.

Jacob S. Smith, Houser & Allison, APC, Shawn L. Walkenshaw, Takos Law, Ltd., Kristin A. Schuler-Hintz, Christopher M. Hunter, McCarthy & Holthus, Las Vegas, NV, for Defendants.

ORDER

MIRANDA M. DU, UNITED STATES DISTRICT JUDGE

I. SUMMARY

***1** Before the Court is Defendants OneWest Bank, FSB and Deutsche Bank National Trust Company's Motion for Summary Judgment ("Motion"). (Dkt. no. 73.) Defendant Quality Loan Service Corporation joins in the Motion. (Dkt. no. 75.) The Court directed supplemental briefings (dkt. no. 86) and has reviewed the parties' supplemental briefs (dkt. nos. 87, 88, 92). Plaintiff's supplemental brief included a new argument under RESTATEMENT (THIRD) OF AGENCY § 4.05 (2006). The Court allowed Defendants an opportunity to respond, but Defendants have failed to do so. (Dkt. no. 93.) For the reasons discussed below, the Motion is denied.

II. BACKGROUND

A. Factual Background

The following facts are undisputed. Plaintiff Jose Hernandez purchased real property located at 3276 Costa Smeralda Circle, Las Vegas, Nevada 89117 ("the Property") on or about August 6, 1997. (Dkt. no. 1 at 5–6.) Hernandez obtained a loan of $780,000 ("the Loan") from Defendant IndyMac Bank, FSB ("IndyMac") and executed a promissory note ("Note"), which was secured by a deed of trust on the property ("the Deed of Trust"). (*Id.* at 6; dkt. no. 73–1.) The Deed of Trust names IndyMac as lender and designates Old Republic Title Company as trustee. (Dkt. no. 73, Exh. A.) The Deed of Trust was recorded on September 3, 2003, in the official records of Clark County, Nevada. (*Id.*) In October 2008, Hernandez defaulted on the Note, and attempted to negotiate a loan modification in December 2008, without success. (Dkt. no. 1 at 7.) Hernandez does not claim that he was current on his payments.

On May 4, 2007, Defendant IndyMac assigned the beneficial interest under both the Note and Deed of Trust to Defendant Deutsche Bank National Trust Company as Trustee of IndyMac INDX Mortgage Loan Trust 2005–AR9 Mortgage Pass–Through Certificates Series 2005–AR ("Deutsche Bank"). (Dkt. no. 73–3.) The assignment was recorded on July 2, 2007. (*Id.*)

IndyMac's assets were later transferred to Defendant IndyMac Federal Bank, FSB ("IndyMac Federal") in July 2008 under the direction of the FDIC. (Dkt. no. 1 at 6.)[1] Subsequently, on March 19, 2009, all of IndyMac Federal's assets were transferred to Defendant OneWest Bank, FSB ("OneWest"). (Dkt. no. 1 at 7.)[2] On December 2, 2009, OneWest also executed an assignment, purportedly transferring the Note and Deed of Trust to Deutsche Bank effective March 7, 2009.[3] (Dkt. no. 40–2.) This assignment was recorded on December 8, 2009. (*Id.*)

Despite IndyMac's assignment of the Note and Deed of Trust to Deutsche Bank, IndyMac Federal purportedly substituted Defendant Quality Loan Service Corporation ("Quality Loan") as the Trustee under the Deed of Trust instead of Old Republic Title Company on March 9, 2009. (Dkt. no. 73–5.) The substitution was recorded on March 19, 2009. (*Id.*) The Substitution of Trustee identifies IndyMac Federal as "the present Beneficiary under said Deed of Trust." (*Id.*) Deutsche Bank also executed a substitution naming Quality Loan as trustee on March 19, 2012, which was recorded on March 26, 2012. (Dkt. no. 49–3.) This substitution occurred after the Complaint was filed.[4]

***2** On March 10, 2009, Quality Loan recorded a Notice of Breach and Default and Election to Sell ("Notice of Default"). (Dkt. no. 73–4.) The Notice of Default stated that Quality Loan "is either the original trustee, the duly appointed substituted trustee, or acting as agent for the trustee or beneficiary" without specifying precisely who the beneficiary

was at the time. (*Id.*) On July 11, 2009, Quality Loan sent a Notice of Trustee's Sale setting a sale date of July 6, 2009. After a series of postponements for various reasons (dkt. nos. 13–9, 40–5, 73–7), Deutsche Bank purchased the Property at the trustee's sale in February 28, 2013, for $692,806.40. (Dkt. no. 73–8.)

B. Procedural History

Hernandez filed this suit on February 28, 2012, for wrongful foreclosure, in state court seeking only declaratory and injunctive relief. (Dkt. no. 1.) On March 1, 2012, the state court issued a Temporary Restraining Order ("TRO") enjoining a March 2, 2012, scheduled sale. (Dkt. no. 1–2.) Before the state court preliminary injunction hearing was held, Defendants removed to this Court on March 7, 2012. (Dkt. no. 1.) Hernandez filed a motion for a TRO on March 29, 2012 (dkt. no. 11), which was denied (dkt. no. 27). Hernandez subsequently filed a second motion for TRO and preliminary injunction on August 22, 2012, seeking to enjoin a September 7, 2012, scheduled foreclosure sale of the Property on the grounds that the Court's prior order denying Plaintiffs motion for a TRO incorrectly applied the "tender rule."[5] (Dkt. no. 39.) The Court issued the TRO (dkt. no. 46), but ultimately denied Plaintiff's Motion for a Preliminary Injunction, reasoning that Plaintiff had not established a likelihood of success on the merits. (Dkt. no. 56.) Plaintiff appealed this denial to the Ninth Circuit, which ultimately affirmed the Court's decision. (Dkt. no. 69.)

Plaintiff also filed a second suit in state court against Deutsche Bank National Trust Company and Quality Loan. *Hernandez v. Deutsche Bank Nat'l Trust Co.*, No. 2:13–cv–01431–MMD–CWH. That case was removed and Judge Dorsey found "[t]he arguments raised by Plaintiff ... [were] materially the same as those raised" in this matter. (Dkt. no. 73–2.) Plaintiff's separate lawsuit was ultimately consolidated with this case. (*Id.*)

Defendants OneWest and Deutsche Bank now move for summary judgment, arguing that the law of the case dictates judgment in their favor and that Plaintiff's allegations do not support any claim for relief. The law of the case argument fails and questions of material fact remain as to whether Quality Loan was authorized to initiate foreclosure proceedings. Consequently, summary judgment is inappropriate.

III. DISCUSSION

A. Legal Standard

The purpose of summary judgment is to avoid unnecessary trials when there is no dispute as to the facts before the court. *Nw. Motorcycle Ass'n v. U.S. Dep't of Agric*, 18 F.3d 1468, 1471 (9th Cir. 1994). Summary judgment is appropriate when "the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a); *see Celotex Corp. v. Catrett*, 477 U.S. 317, 322–23 (1986). An issue is "genuine" if there is a sufficient evidentiary basis on which a reasonable fact-finder could find for the nonmoving party and a dispute is "material" if it could affect the outcome of the suit under the governing law. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248–49 (1986). Where reasonable minds could differ on the material facts at issue, however, summary judgment is not appropriate. *Warren v. City of Carlsbad*, 58 F.3d 439, 441 (9th Cir. 1995). "The amount of evidence necessary to raise a genuine issue of material fact is enough 'to require a jury or judge to resolve the parties' differing versions of the truth at trial.' " *Aydin Corp. v. Loral Corp.*, 718 F.2d 897, 902 (9th Cir. 1983) (*quoting First Nat'l Bank of Ariz. v. Cities Serv. Co.*, 391 U.S. 253, 288–89 (1968)). In evaluating a summary judgment motion, a court views all facts and draws all inferences in the light most favorable to the nonmoving party. *Kaiser Cement Corp. v. Fishbach & Moore, Inc.*, 793 F.2d 1100, 1103 (9th Cir. 1986).

***3** The moving party bears the burden of showing that there are no genuine issues of material fact. *Zoslaw v. MCA Distrib. Corp.*, 693 F.2d 870, 883 (9th Cir. 1982). "In order to carry its burden of production, the moving party must either produce evidence negating an essential element of the nonmoving party's claim or defense or show that the nonmoving party does not have enough evidence of an essential element to carry its ultimate burden of persuasion at trial." *Nissan Fire & Marine Ins. Co. v. Fritz Cos.*, 210 F.3d 1099, 1102 (9th Cir. 2000). Once the moving party satisfies Rule 56's requirements, the burden shifts to the party resisting the motion to "set forth specific facts showing that there is a genuine issue for trial." *Anderson*, 477 U.S. at 256. The nonmoving party "may not rely on denials in the pleadings but must produce specific evidence, through affidavits or admissible discovery material, to show that the dispute exists," *Bhan v. NME Hosps., Inc.*, 929 F.2d 1404, 1409 (9th Cir. 1991), and "must do more than simply show that there is some metaphysical doubt as to the material facts." *Orr v. Bank of Am.*, 285 F.3d 764, 783 (9th Cir. 2002) (internal quotation marks omitted). "The mere existence of a

scintilla of evidence in support of the plaintiff's position will be insufficient." *Anderson*, 477 U.S. at 252.

B. Analysis

Initially, the Court notes that Defendants' law of the case argument fails. Defendants' argument is based on the Court's previous determination, as well as Judge Dorsey's determination in the consolidated action, that Plaintiff was unlikely to prevail on the merits in denying Plaintiff's request for preliminary injunctive relief. However, a determination that a plaintiff is *unlikely* to prevail on the merits is not an explicit determination as to the merits such that the law of the case doctrine is implicated. *See Milgard Tempering, Inc. v. Seals Corp. of Am.*, 902 F.2d 703, 715–16 (9th Cir. 1990) (finding that under the law of the case doctrine, "a court is generally precluded from reconsidering an issue previously decided by the same court, or a higher court in the identical case"). The standard for determining preliminary injunctive relief is different than for determining summary judgment. The former requires the Court to review the likelihood of success on the merits whereas the latter compels the Court to decide the issue on the merits. To hold otherwise would essentially transform a motion for preliminary injunction into one for summary judgment. Thus, the law of the case is not implicated by the Court's prior preliminary injunction orders and Defendants bear the burden of demonstrating through admissible evidence that no issues of material fact prevent a determination that they are entitled to judgment as a matter of law.

Defendants fail to do so here. The crux of Plaintiff's wrongful foreclosure claim is that IndyMac Federal's March 2009 substitution of trustee was ineffective such that Quality Loan lacked authority to file the Notice of Default. [6] Defendants argue that Quality Loan had authority to file the Notice of Default as the agent of Deutsche Bank. However, viewing the facts and drawing all inferences in the light most favorable to Plaintiff, Deutsche Bank's attempt to ratify Quality Loan's filing of the Notice of Default was untimely, and questions of material fact remain as to whether an agency relationship existed between Deutsche Bank and Quality Loan at the time of the filing.

***4** First, Quality Loan was not the Trustee at the time it filed the Notice of Default because it was not properly substituted in as trustee. IndyMac Federal's March 9, 2009, purported substitution of Quality Loan as trustee was ineffective because IndyMac Federal was not the beneficiary of the Deed of Trust at the time it executed the substitution. Indeed, IndyMac had already transferred the Note and Deed of Trust to Deutsche Bank on May 4, 2007, and lacked any legal status under the Deed of Trust at the time it purported to substitute Quality Loan as trustee. Thus, Quality Loan was not the trustee under the Deed of Trust at the time it filed the Notice of Default.

Nonetheless, the Notice of Default states that Quality was acting as "either the original trustee, the duly appointed substituted trustee, or acting as agent for the trustee or beneficiary under a Deed of Trust." (Dkt. no. 40–4.) Thus, although not properly substituted as trustee, Quality Loan may have had the authority to file the Notice of Default if it was acting on behalf of Deutsche Bank, the beneficiary. Defendants argue that Deutsche Bank's March 26, 2012, Substitution of Trustee ratified Quality Loan's actions, thus giving Quality Loan the authority to file the Notice of Default.

Under Nevada law, a principal may ratify the act of another if it was purportedly done on the principal's behalf. *See, e.g., Harrah v. Specialty Shops*, 221 P.2d 398, 399 (Nev. 1950); *Edwards v. Carson Water Co.*, 34 P. 381, 389 (Nev. 1893); *see also* RESTATEMENT (THIRD) OF AGENCY § 4.03 (2006). In the context of mortgage foreclosures, "[a] later-executed substitution of trustee making the notice of default filer the new trustee before proceeding to sale is practically insurmountable evidence of ratification." *Nevada ex rel. Bates v. MERS*, No. 3:10–407, 2011 WL 1582945, at *5 (D. Nev. Apr. 25, 2011). *But see Dyer v. Am. Mortg. Network, Inc.*, No. 11–172, 2012 WL 1684571, at *1 (D. Nev. May 14, 2012) (holding that beneficiary did not ratify prior act of trustee because trustee did not purport to act on behalf of beneficiary at the time it filed its notice of default).

Here, Deutsche Bank's March 26, 2012, Substitution of Trustee would be sufficient to ratify Quality Loan's filing of the Notice of Default. The Notice of Default stated that Quality Loan was purporting to act on behalf of the beneficiary. Although the document did not name Deutsche Bank specifically, Quality Loan's holding itself out as a possible agent for an unnamed beneficiary is sufficient for ratification. *See Clews v. Jamieson*, 182 U.S. 461, 483 (1901) ("A principal can adopt and ratify an unauthorized act of his agent who in fact is assuming to act in his behalf, *although not disclosing his agency to others*, and when it is so ratified it is as if the principal has given an original authority to that effect and the ratification relates back to the time of the act which is ratified.") (emphasis added); RESTATEMENT

(SECOND) OF AGENCY § 85 cmt. c. (1958) ("It is not necessary that the purported principal be identified; it is sufficient that the person acting should purport to act as agent for another. But if he describes the other by name or otherwise, only a person coming within the description so given, if any, can ratify."); RESTATEMENT (THIRD) OF AGENCY § 4.03 cmt. b (2006) ("The formulation in this section does not distinguish among disclosed principals, unidentified principals, and undisclosed principals.").

Plaintiff, however, presents two arguments that Deutsche Bank's ability to ratify the actions of Quality Loan was cut off by the time Deutsche Bank filed its Substitution of Trustee on March 26, 2012. First, Plaintiff argues that NRS § 107.028(4) eliminated the ability to retroactively appoint a trustee, and consequently, any action taken by Quality Loan before the March 26, 2012, Substitution of Trustee was void. Second, Plaintiff argues that Deutsche Bank's ratification was untimely as intervening changes in the laws governing foreclosure constituted a material change in circumstance rendering ratification inequitable.

***5** Plaintiff's first argument misconstrues the application of N RS § 107.028(4). NRS § 107.028(4) states that no party becomes a substitute-trustee until the substitution is properly recorded. Although Plaintiff is correct in asserting that Quality Loan was not made Trustee until March 26, 2012, and no action undertaken *as trustee* prior to that date would be effective, this misses the point. Defendants do not argue that Quality Loan filed the Notice of Default as trustee, but rather as agent of Deutsche Bank, the beneficiary. Indeed, the March 26, 2012, Substitution of Trustee does not purport to have retroactive effect to March 9, 2009. Thus, there is no question about Quality Loan's status as trustee at the time it recorded the Notice of Default [7] —it was not. Rather, the issue presented is whether Quality Loan's actions as agent of the beneficiary were properly authorized. [8]

Plaintiff's second argument, however, has more merit. For ratification to be effective, it must "precede[ ] the occurrence of circumstances that would cause the ratification to have adverse and inequitable effects on the rights of third parties." R RESTATEMENT (THIRD) OF AGENCY § 4.05 (2006). Such circumstances include "(2) any material change in circumstances that would make it inequitable to bind the third party, unless the third party chooses to be bound; and (3) a specific time that determines whether a third party is deprived of a right or subjected to a liability." *Id.*

Plaintiff argues that, after the filing of the Notice of Default but before ratification, the Nevada legislature enacted several additional requirements to the foreclosure process to protect owners of real property and ensure more transparency. These statutory requirements include: NRS § 107.086, which gives grantors of deeds of trust the right to request mediation and requires notice and contact information of the beneficiary to be provided; and amendments to NRS § 107.080, which requires those filing a notice of default to attach an affidavit outlining their authority to do so. Plaintiff argues that Deutsche Bank would be allowed to circumvent these additional statutory requirements if Deutsche Bank can ratify Quality Loan's Notice of Default over two years later.

The Court finds that ratification would be inequitable under the circumstances here. First, allowing Deutsche Bank's March 26, 2012, Substitution of Trustee to ratify Quality Loan's March 9, 2009, filing of the Notice of Default would allow Deutsche Bank to circumvent its adherence to the additional requirements and protections imposed by the Nevada legislature. The intervening legislative changes altered the foreclosure sale landscape and rendered the foreclosure process more consumer-friendly. Second, and more importantly, equity counsels against permitting ratification given after the filing of a lawsuit that challenges the actions of the agent as unauthorized. *See Wagner v. City of Globe*, 722 P.2d 250, 255 (Ariz. 1986), *overruled on other grounds by Demasse v. ITT Corp.*, 984 P.2d 1138 (Ariz. 1999) (rejecting argument that a principal can retroactively ratify the agent's decision to terminate plaintiff's employment when the ratification was made after plaintiff filed the employment action). Substantive rights vest upon the filing of a lawsuit, and allowing ratification to disrupt those rights would be inequitable. *See id.* At the time this action was filed on February 28, 2012, Quality Loan's actions in initiating the foreclosure were yet unauthorized and consequently, constituted a violation of Nevada's foreclosure statute. Deutsche Bank's attempt to ratify Quality Loan's actions after the filing of the lawsuit would deprive Plaintiff of the rights that vested as of the filing of this lawsuit. Taken together, it would have an adverse and inequitable effect on Plaintiff's rights for this Court to permit ratification after the changes to the foreclosure process by the Nevada legislature and after Plaintiff filed the lawsuit challenging the acts of Quality Loan as unauthorized.

***6** Defendants additionally argue that the agency relationship between Quality Loan and Deutsche Bank existed at the time of Quality Loan's filing of the Notice

of Default. This would eliminate the need for ratification and establish Quality Loan's authority to file the Notice of Default. However, the evidence submitted is insufficient for purposes of summary judgment. Defendants proffer a Foreclosure Transmittal Package instructing Quality Loan to vest title in the name of Deutsche Bank. (Dkt. no. 73–9.) Defendants argue that this instruction is sufficient to show an agency relationship between Deutsche Bank and Quality Loan. However, the Foreclosure Transmittal Package is from an entity apparently affiliated with IndyMac Fed and identifies IndyMac Fed as the mortgage holder. This is insufficient to establish an agency relationship between Deutsche Bank and Quality Loan.

IV. CONCLUSION

The Court notes that the parties made several arguments and cited to several cases not discussed above. The Court has reviewed these arguments and cases and determines that they do not warrant discussion as they do not affect the outcome of the Motion.

It is therefore ordered that Defendants OneWest Bank, FSB and Deutsche Bank National Trust Company's Motion for Summary Judgment (dkt. no. 73) is denied.

All Citations

Not Reported in Fed. Supp., 2014 WL 12644259

Footnotes

1 *See also* Press Release, FDIC, FDIC Establishes IndyMac Federal Bank, FSB as Successor to IndyMac Bank, F.S.B., Pasadena, California (July 11, 2008) (https://www.fdic.gov/news/news/press/2008/pr08056.html) (last visited 8/11/14).

2 *See also* Press Release, FDIC, FDIC Closes Sale of Indymac Federal Bank, Pasadena, California (March 19, 2009) (https://www.fdic.gov/news/news/press/2009/ pr09042.html) (last visited 8/11/14).

3 The Court notes that the effective date of this transfer pre-dates OneWest's acquisition of IndyMac Federal's assets.

4 The Complaint was filed on February 28, 2012, and Quality Loan removed the action on March 7, 2012. (Dkt. no. 1.)

5 Hernandez filed his Motion as an ex parte emergency motion on August 21, 2012. The Court denied the Motion on the ground that good cause did not appear for ex parte relief, and directed Hernandez to re-file his motion as an emergency motion and serve Defendants. (Dkt. no. 38.)

6 Plaintiff also argues that IndyMac's 2007 assignment of the Deed of Trust to Deutsche Bank under the PSA was void and Quality Loan failed to comply with the notice provisions of NRS 107.080(4)(c) (2011). However, these arguments fail because Plaintiff, as neither a party nor a third party beneficiary under the PSA, lacks standing to raise a challenge under the PSA. *See, e.g., Bleavins v. Demarest*, 196 Cal.App.4th 1533, 1542 (2011). Moreover, the record supports Defendants' substantial compliance with the statutory notice requirements as evidenced by Plaintiff's own actions in moving for TROs to prevent the foreclosure sale. Plaintiff's action demonstrates actual notice. Plaintiff also failed to allege that he could have redeemed the Property if properly noticed or that he was prejudiced in any other way by the alleged defective notice. *See Schleining v. Cap One, Inc.*, 326 P.3d 4, 8 (Nev. 2014).

7 Defendants argue that IndyMac Fed, as agent of Deutsche Bank, filed the March 2009 Substitution of Trustee. However, this argument is unavailing because the March 9, 2009, Substitution of Trustee clearly identifies IndyMac Fed as the beneficiary and not the agent of the beneficiary.

8 The Court also rejects Plaintiff's arguments that NRS § 107.028(5) eliminates Deutsche Bank's ability to ratify the acts of Quality Loan by disallowing any fiduciary relationship between the trustee and beneficiary. Plaintiff misunderstands the statute. NRS § 107.028(5) reiterates that the trustee to a deed of trust does not owe fiduciary duties to the *grantor.* The beneficiary-trustee relationship, conversely, is by definition fiduciary in nature. *See, e.g., Bank of Nev. v. Speirs*, 603 P. 2d 1074, 1076 (Nev. 1979).

260 N.C.App. 126
Unpublished Disposition
NOTE: THIS OPINION WILL NOT APPEAR IN A PRINTED VOLUME. THE DISPOSITION WILL APPEAR IN THE REPORTER.
An unpublished opinion of the North Carolina Court of Appeals does not constitute controlling legal authority. Citation is disfavored, but may be permitted in accordance with the provisions of Rule 30(e)(3) of the North Carolina Rules of Appellate Procedure.
Court of Appeals of North Carolina.

HOMESTEAD AT MILLS RIVER PROPERTY OWNERS ASSOCIATION, INC., Plaintiff,

v.

Boyd L. HYDER, Homestead at Mills River, LLC, River Oaks Joint Venture, LLC, Biltmore Farms Homes, LLC, Darrin B. Ball, Dana B. Ball, William R. Gibson, Joan M. Gibson, Thomas G. Gibson, Rita R. Gibson, James H. Martin, III, Kasandra R. Martin, Carl Jerry Ball, Launa B. Ball, James E. Ellis, Sr., Mary J. Ellis, Palladium Builders, Inc., William P. Ewald, Deborah A. Ewald, William R. Hutchisson, Jr., Co Trustee of the William R. Hutchisson, Jr. and Rene L. Hutchisson Revocable Trust Dated June 9, 2005, Rene L. Hutchisson, Co-Trustee of the William R. Hutchisson, Jr. and Rene L. Hutchisson-Revocable Trust Dated June 9, 2005, Marcus L. Horne, Jr., Laura L. Horne, Easystreet Properties, LLC, Moore & Son Site Contractors, Inc., William F. Stanfield, Sr., Peter Deblieux, Karen Deblieux, Edward H. McElrath, James R. Moore, Vaun R. Moore, John E. Cuttino, Sarah R. Cuttion, Benjamin D. McCoy, Natalie W. McCoy, Bradford D. Welch, Susan M. Welch, Robert H. Medley, Lisa M. Medley, Scott E. McElrath, Timothy C. Heffner, Deborah H. Heffner, John L. Johnson, Jr., Louise P. Johnson, Penelope P. Wallquist, Trustee of the Penelope P. Wallquist Amended & Restated Revocable Trust U/A/D August 23, 2000, Harry N. Gousis, Kristie K. Finch, Darlene Harzog, William L. Coward, Peter Nilsen, Tamara Nilsen, David A. Harris, Lesa Hinson McAbee Harris, The Miriam N. Forrest Living Trust, Dated March 23, 2005, Florian L. Wilson-Mullis, Charles F. West, Debra J. West, 3 M's LLC , Timothy A. Highley, Lisa A. Tapp, Julie A. Lapkoff, Keith T. McElrath, Russell H. Nixon, Johnsie B. Nixon, John E. Mansen, Ingrid R. Mansen, Richard L. Tatum, Catherine M. Tatum, Seraphim M. Rine, Cynthia D. Rine, Jeffrey G.J. Chittenden, Rebecca P.K. Chitenden, Dan Rooker, Renee Rooker, Marion Delorenzo, Steve Hedden a/k/a Stephen M. Hedden, Barbara Hedden, John C. Stadler, Carlos D. Owen, Kimberly A. Owen, Cynthia G. Hirschey, Charles Kevin White, Ashleigh B. White, Terry L. Gahagan, Whistlestop International, LLC, David J. Israel, David K. Ballard, April B. Ballard, Thomas W. Moore, Beulah S. Moore, Annette Cloos, Gregory Cloos, Fre Deric L. Wightman, Doris J. Kistler, David R. Charlton, Kathleen F. Charlton, John A. Horton, III, Linda B. Horton, Linda F. Pierce, Co-Trustee of the Linda F. Pierce Revocable Trust U/A/D June 14, 2005, Robert W. Pierc E, Co-Trustee of the Linda F. Pierce Revocable Trust U/A/D June 14, 2005, Carolina Mountain Land Company, LLC , Lynn P. Williams, Trustee of the Lynn P. Williams Living Trust U/A/D September 9, 2008, Mike Elder, Ann Maria Elder, Homestead at Mills River Property Owners Association, Inc., Wells Fargo Bank, N.A., Carolina First Bank, Arthur State Bank, TD Bank, N.A., South Carolina Bank & Trust, N.A., BBB Funding, LLC, Charles Schwab Bank, United Community Bank, National Bank of South Carolina, Asheville Savings Bank, Hometrust Bank, Steven M. Rosenbloom Et Ux, Laura S. Howell, Suntrust Mortgage, Inc., and Mountain 1 St Bank & Trust, Defendants.

No. COA17-606
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Filed: June 19, 2018

***925** Appeal by Plaintiff from order and judgment entered 13 December 2016; and cross-appeal by Defendant from order entered 8 September 2016 and order entered 13 December 2016 by Judge Mark E. Powell in Superior Court, Henderson County. Heard in the Court of Appeals 8 January 2018. Henderson County, No. 11 CVS 784

Attorneys and Law Firms

James W. Lee III, Attorney at Law, by James W. Lee III, for Plaintiff-Appellant and Cross-Appellee.

Fisher Stark, P.A., Asheville, by Brad A. Stark and W. Perry Fisher, II, for Defendant-Appellee and Cross-Appellant Boyd L. Hyder.

Opinion

McGEE, Chief Judge.

****1** Homestead at Mills River Property Owners Association, Inc. ("Plaintiff" or "the Association") appeals from the trial court's 13 December 2016 order granting a directed verdict in this matter for Boyd L. Hyder ("Defendant Hyder"). Defendant Hyder appeals the trial court's 8 September 2016 order denying his motion for summary judgment and the trial court's 13 December 2016 order denying his motion for reconsideration. For the reasons discussed below, we dismiss Plaintiff's appeal.

I. Background

Plaintiff is the homeowners' association for The Homestead at Mills River, a planned residential community ("the community" or "the development") located in Henderson County, North Carolina. The community was developed by Homestead at Mills River, LLC, and River Oaks Joint Venture, LLC, (collectively, "Developer-Declarant") beginning in or around 2003. Developer-Declarant recorded a three-slide plat of the development with the Henderson County Register of Deeds. One of the plat slides showed a tract of land near the entrance to the development labeled "Common Area" ("the Common Area"). The Common Area was initially platted as 6.2 acres, but was later re-platted as 5.88 acres. Developer-Declarant used a pre-existing structure in the Common Area as a business office and sales center. The Common Area also included a parking lot.

Scott McElrath ("McElrath"), a developer affiliated with Homestead at Mills River, LLC, testified that Developer-Declarant recorded numerous revised plats over the course of several years, but each subsequently-recorded plat showed the Common Area as part of the development. Developer-Declarant also recorded restrictive covenants for the development. As early as April 2005, Developer-Declarant began selling lots within the development and granting deeds by reference to the recorded plat and subject to the restrictive covenants. On or about 8 July 2005, Developer-Declarant recorded an amendment to the restrictive covenants that reserved to Developer-Declarant "the right to modify the boundaries of The Homestead at Mills River to remove [ ] unsold properties from [t]he ... planned community." The amendment provided, however, that Developer-Declarant's "right to move [sic] properties from the general plan of development ... does not apply to Common Elements." Developer-Declarant recorded an "Amended and Restated Declaration of Restrictive Covenants Governing The Homestead at Mills River" ("the Declaration") on 8 December 2006. Among other things, the Declaration defined "Common Elements" as "any real estate or other property within [The] Homestead [at Mills River development] owned or leased by the Association, including any improvements thereon, other than a Lot."

Developer-Declarant encountered financial difficulties beginning in 2008. In an effort to mitigate outstanding debt, Developer-Declarant sold the Common Area to Defendant Hyder for $250,000.00 by general warranty deed recorded on 16 July 2009. Developer-Declarant also entered into an agreement with Defendant Hyder to lease back the Common Area with an option to purchase. McElrath continued doing business in the sales center located in the Common Area.

****2** Plaintiff filed a complaint on 25 April 2011 against Developer-Declarant and Defendant Hyder seeking a declaratory judgment determining "that the 5.88 acre [Common Area] tract is the sole property of [ ] Plaintiff or that [ ] Plaintiff and [ ] Defendant [Hyder] ... own the [Common Area] tract as tenants in common and said tract may only be used by the lot owners of [the development]." Plaintiff contended Developer-Declarant's "act of recording plats showing common areas [within the development] was a dedication of the common areas for the exclusive use of the purchasers of the various lots[,]" and that every "owner deeded a lot ... prior to [16 July] 2009[ ] was assured use of all common areas within the community and agreed to be a member of the homeowners' association and subject to the restrictive covenants of [the development] and therefore had a vested interest in [the Common Area]." Plaintiff further asserted that Defendant Hyder's

> contention that he is the sole owner of the [Common Area] property constitutes a cloud on the property and ... [the deed conveying the Common Area to Defendant Hyder] does not indicate that the homeowners within the [development] have a

> vested interest in the [Common Area] property and purports to convey the entire property.

Defendant Hyder filed a motion to dismiss Plaintiff's complaint on 24 June 2011 for failure to state a claim upon which relief could be granted. *See* N.C. Gen. Stat. § 1A-1, Rule 12(b)(6) (2017). The matter was set for hearing, but Defendant Hyder subsequently withdrew the motion to dismiss, and filed an answer and counterclaim on 20 June 2012. Following a 22 January 2013 hearing on Defendant Hyder's first and second defenses, the trial court entered an order on 11 July 2013 directing Plaintiff to file an amended complaint adding as necessary parties to the action all owners of lots within the development, including lien holders. [1] Plaintiff filed its amended complaint on 7 August 2013.

Defendant Hyder filed a motion for summary judgment on 23 August 2016 "on the grounds that Plaintiff [did] not have a deed to [the Common Area] as a matter of public record, no violation of any [restrictive] covenants [were] alleged against Defendant [Hyder] ..., and Plaintiff [did] not have standing to make the claims asserted against Defendant [Hyder][.]" Following a hearing, the trial court denied Defendant Hyder's motion for summary judgment on 8 September 2016 based on the court's conclusion that Defendant Hyder was "not entitled to judgment as a matter of law as to whether [ ] Plaintiff ha[d] standing to make the claims asserted against Defendant Hyder in this action as a matter of law." Defendant Hyder filed a motion for reconsideration of his motion for summary judgment on 29 November 2016, based on this Court's intervening decision in *Willowmere Community Association, Inc. v. City of Charlotte*, —— N.C. App. ——, 792 S.E.2d 805 (2016), as well as Defendant Hyder's assertion that Plaintiff violated a provision of its corporate bylaws pertaining to suits against Developer-Declarant. The trial court entered an order on 13 December 2016 finding Defendant Hyder's motion for reconsideration was proper with respect to Developer-Declarant but not as to Defendant Hyder. Plaintiff's claims against Developer-Declarant were dismissed with prejudice.

****3** The trial court heard all remaining issues at a trial on 28 November 2016. At the conclusion of Plaintiff's evidence, Defendant Hyder moved for a directed verdict. After hearing arguments of counsel, the trial court indicated it would dismiss Plaintiff's claims. Defendant Hyder dismissed his counterclaims without prejudice. The trial court entered an order on 13 December 2016 directing judgment for Defendant Hyder. Plaintiff appeals. Defendant Hyder cross-appeals from the trial court's 8 September 2016 order denying his motion for summary judgment and the trial court's 13 December 2016 order denying his motion for reconsideration as to Defendant Hyder only.

II. Defendant's Cross-Appeal

We first address Defendant Hyder's cross-appeal from the order denying his motion for summary judgment, entered 8 September 2016, and the order denying his motion for reconsideration, entered 13 December 2016.

"Once a decision on the merits is reached through a trial, review of the denial of summary judgment is improper." *Reliance Ins. Co. v. Lexington Ins. Co.*, 87 N.C. App. 428, 432, 361 S.E.2d 403, 405-06 (1987) (citing *Harris v. Walden*, 314 N.C. 284, 333 S.E.2d 254 (1985)). Our Supreme Court explained in *Harris*:

> The purpose of summary judgment is to bring litigation to an early decision on the merits without the delay and expense of a trial when no material facts are at issue. After there has been a trial, this purpose cannot be served. Improper denial of a motion for summary judgment is not reversible error when the case has proceeded to trial and has been determined on the merits by the trier of the facts, either judge or jury. The denial of a motion for summary judgment is an interlocutory order and is not appealable. An aggrieved party may, however, petition for review by way of certiorari. To grant a review of the denial of the summary judgment motion after a final judgment on the merits ... would allow a verdict reached after the presentation of all the evidence to be overcome by a limited forecast of the evidence. In order to avoid such an anomalous result, we hold that the denial of a motion for summary judgment is not reviewable

> during appeal from a final judgment rendered in a trial on the merits.

314 N.C. at 286, 333 S.E.2d at 256 (citations omitted); *see also Zairy v. VKO, Inc.*, 212 N.C. App. 687, 689, 712 S.E.2d 392, 394 (2011) (noting "[o]rders denying ... a motion to reconsider are interlocutory[ ]" and generally not immediately appealable).

In discussing this principle, however, this Court has "distinguish[ed] cases in which the trial court denie[d] motions *based on jurisdictional or similar grounds*, and there [wa]s no right of immediate appeal." *Concrete Service Corp. v. Investors Group, Inc.*, 79 N.C. App. 678, 682, 340 S.E.2d 755, 758 (1986) (emphasis added). "In those cases the adverse party must, absent a successful petition for certiorari, submit to [a] trial on the merits. Only then will that party have a chance to appeal [the] denial of the original motion." *Id.* (citations omitted).

> The question of subject matter jurisdiction may be raised at any time, and while the denial of a motion to dismiss pursuant to [N.C. Gen. Stat. § 1A-1,] Rule 12(b)(1) [for lack of subject matter jurisdiction] is interlocutory, an appeal of the denial is no longer interlocutory once there has been a final judgment on the merits of the case.

In re Will of McFayden, 179 N.C. App. 595, 599-600, 635 S.E.2d 65, 68 (2006).

In the present case, Defendant Hyder moved for summary judgment pursuant to N.C. Gen. Stat. § 1A-1, Rule 56, rather than seeking dismissal for lack of subject matter jurisdiction under Rule 12(b)(1). *See Fuller v. Easley*, 145 N.C. App. 391, 395, 553 S.E.2d 43, 46 (2001) ("Standing concerns the trial court's subject matter jurisdiction and is therefore properly challenged by a Rule 12(b)(1) motion to dismiss." (citations omitted)). However, among other arguments, Defendant Hyder asserted in his motion for summary judgment that "Plaintiff [did] not have standing to make the claims asserted against Defendant Hyder in this action as a matter of law." [2]

**4 "Standing is treated differently than most other issues because it is an aspect of subject matter jurisdiction." *Transcontinental Gas Pipe Line Corp. v. Calco Enter.*, 132 N.C. App. 237, 241, 511 S.E.2d 671, 675 (1999) (citation omitted). "Without standing, the courts of this State lack subject matter jurisdiction to hear a party's claims." *Am. Oil Co., Inc. v. AAN Real Estate, LLC*, 232 N.C. App. 524, 526, 754 S.E.2d 844, 846 (2014) (citation omitted); *see also Peacock v. Shinn*, 139 N.C. App. 487, 491, 533 S.E.2d 842, 845 (2000) ("[S]ubject matter jurisdiction exists only if a plaintiff has standing."). "[I]t is well-established that an issue of subject matter jurisdiction may be raised at any stage of a case and may be raised by a court on its own motion." *Sanford v. Williams*, 221 N.C. App. 107, 116, 727 S.E.2d 362, 368 (2012) (citation and quotation marks omitted). In *Sanford*, although the defendants did not file a motion to dismiss for lack of subject matter jurisdiction prior to the hearing on their motion for summary judgment, this Court addressed the issue of subject matter jurisdiction as a threshold question. *See id.*

In the present case, the *sole* reason cited by the trial court in its order denying Defendant Hyder's motion for summary judgment was the court's determination that "Defendant [Hyder] [was] not entitled to judgment as a matter of law *as to whether [ ] Plaintiff ha[d] standing to make the claims asserted against Defendant Hyder* in this action[.]" (emphasis added). Defendant Hyder's motion for reconsideration was based exclusively on his assertion that "subsequent authority and the uncontroverted testimony of Plaintiff establish[ed] Plaintiff's lack of standing." In its order denying Defendant Hyder's motion for reconsideration, the trial court did not explicitly refer to standing, but stated it "[was] of the opinion that the [m]otion for [r]econsideration [was] ... not [just and proper] as to Defendant [ ] Hyder." Because Defendant Hyder's only argument in support of his motion for reconsideration concerned Plaintiff's standing, we can reasonably infer that the trial court denied that motion on jurisdictional grounds. As discussed above, Defendant Hyder's appeal from the interlocutory orders denying his motion for summary judgment and motion for reconsideration would ordinarily be mooted by a final judgment on the merits. However, the record makes clear that the trial court denied both motions on jurisdictional grounds, and our precedent suggests Defendant Hyder's appeal is therefore not improper. Moreover, "issues pertaining to standing may be raised for the first time on appeal, including *sua sponte* by [this] Court." *Aubin v. Susi*, 149 N.C. App. 320, 324, 560 S.E.2d 875,

879 (2002) (citation omitted). We therefore address Plaintiff's standing to maintain this action.

III. Standing

A. *Standard of Review*

"Standing is a necessary prerequisite to a court's proper exercise of subject matter jurisdiction. If a party does not have standing to bring a claim, a court has no subject matter jurisdiction to hear the claim." *Fairfield Harbour Prop. Owners Ass'n, Inc. v. Midsouth Golf, LLC*, 215 N.C. App. 66, 72, 715 S.E.2d 273, 280 (2011) (citations and quotation marks omitted).

> Whether a trial court has subject-matter jurisdiction is a question of law, reviewed *de novo* on appeal. Subject-matter jurisdiction involves the authority of a court to adjudicate the type of controversy presented by the action before it. Subject-matter jurisdiction derives from the law that organizes a court and cannot be conferred on a court by action of the parties or assumed by a court except as provided by that law. When a court decides a matter without the court's having jurisdiction, then the whole proceeding is null and void, *i.e.*, as if it had never happened.

****5** *Rodriguez v. Rodriguez*, 211 N.C. App. 267, 270, 710 S.E.2d 235, 238 (2011) (citation and quotation marks omitted) (first emphasis added). "A *de novo* standard of review requires the appellate court to examine the case anew as if there had never been a trial court ruling." *Watson v. Brinkley*, 211 N.C. App. 190, 192, 712 S.E.2d 186, 188 (2011) (citation omitted).

B. *Analysis*

"Standing refers to whether a party has a sufficient stake in an otherwise justiciable controversy such that he or she may properly seek adjudication of the matter." *Street v. Smart Corp.*, 157 N.C. App. 303, 305, 578 S.E.2d 695, 698 (2003) (citation and quotation marks omitted). Plaintiff bears the burden of demonstrating that standing exists. *See Myers v. Baldwin*, 205 N.C. App. 696, 698, 698 S.E.2d 108, 109 (2010).

Defendant Hyder has asserted throughout this litigation that Plaintiff lacked standing to initiate this action against him. Plaintiff contends it has standing to sue Defendant Hyder in a representative capacity on behalf of its individual members. According to Plaintiff, it satisfies the three prerequisites for association standing articulated by the United States Supreme Court in *Hunt v. Washington State Apple Advertising Commission*, 432 U.S. 333, 53 L.Ed. 2d 383 (1977), and restated by this Court in *Creek Pointe Homeowner's Ass'n v. Happ*, 146 N.C. App. 159, 552 S.E.2d 220 (2001):

> [A]n association has standing to bring suit on behalf of its members when: (a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization's purpose; and (c) neither the claim asserted, nor the relief requested, requires the participation of individual members in the lawsuit.

Creek Pointe, 146 N.C. App. at 165, 552 S.E.2d at 225 (quoting *Hunt*, 432 U.S. at 343, 53 L.Ed. 2d at 394) (alteration in original). Plaintiff argues it meets all three prongs of the *Hunt* test because (1) each member of the Association "has an interest in and cognizable claim to the 5.88 acre [C]ommon [A]rea and [thus] has standing to sue in the member's individual capacity[;]" (2) the interests Plaintiff seeks to protect—"[t]he defense of title to and maintenance of [the] [C]ommon [A]rea"—are "germane to the purpose of a subdivision homeowners' association[;]" and (3) Plaintiff's suit does not require the participation of its individual members, as it seeks only "declaratory relief on behalf of all its members[,]" and "[n]o monetary relief is sought and the relief which is sought is common to all members of the [A]ssociation." Plaintiff also contends it was authorized to bring this action pursuant to N.C. Gen. Stat. § 47F-3-102(4) (2017), which provides that "[u]nless the articles of incorporation or the declaration [of

an owners' association] expressly provides to the contrary, the association may ... [i]nstitute, defend, or intervene in litigation ... on matters affecting the planned community[.]"

Defendant Hyder argues Plaintiff lacked standing to bring this action against him because (1) Plaintiff's Board of Directors ("the Board") violated a provision in the Association's bylaws ("the bylaws") "requir[ing] an affirmative vote of two-thirds [ ] of all qualified voting members as a pre-condition to any lawsuit being filed by Plaintiff 'on account of an act or omission of [Developer-]Declarant[;]' " and (2) Plaintiff did not suffer any injury in fact. Defendant Hyder submits this case "is similar to many cases in which [this Court found] a non-profit association ... to lack standing because it failed to follow a governance provision in its own bylaws."

****6** In support of this argument, Defendant cites this Court's holdings in *Willowmere Community Association, Inc. v. City of Charlotte*, —— N.C. App. ——, 792 S.E.2d 805 (2016), and *Peninsula Prop. Owners Ass'n v. Crescent Res., LLC*, 171 N.C. App. 89, 614 S.E.2d 351 (2005). In both *Willowmere* and *Peninsula*, this Court held the plaintiff-associations lacked standing to sue, because the associations' directorship failed to comply with explicit bylaw provisions governing the directors' ability to act on behalf of the associations. In *Peninsula*, the plaintiff's bylaws and declaration of restrictive covenants contained a provision that required an affirmative vote of two-thirds of its members to "(1) file a complaint, on account of an act or omission of [the d]eclarant, ... or (2) assert a claim against or sue [the d]eclarant." *Peninsula*, 171 N.C. App. at 90, 614 S.E.2d at 352. The plaintiff-association filed suit against the developer-declarant without obtaining the required two-thirds vote, and asserted the claims in its complaint "on behalf of the [association] itself, rather than individual homeowners." *Id.* at 91, 614 S.E.2d at 353. This Court concluded the *Peninsula* plaintiff's complaint was properly dismissed for lack of subject matter jurisdiction. We noted the two-thirds provision at issue in that case was "limited to situations where the [association] desire[d] to commence legal action against [the developer-declarant] directly or complain to a governmental agency about [the developer-declarant's] acts or omissions." *Id.* at 94, 614 S.E.2d at 354.

In *Willowmere*, the plaintiffs, two homeowners' associations, had bylaws that "permit[ted] their directors to sue regarding matters affecting their [respective] planned communities, [but provided that] the directors [could] only act through a meeting or a consent action without a meeting." *Willowmere*, —— N.C. App. at ——, 792 S.E.2d at 808. This Court concluded the associations lacked standing because their directors "failed to hold a meeting or take other action in accordance with their bylaws to authorize the filing of [the] lawsuit[,]" and further, the associations "presented [no] evidence that the boards took action in accord with their bylaws to ratify the filing of the lawsuit after the issue of standing was raised." *Id.* at ——, 792 S.E.2d at 812-13. Notably, unlike in *Peninsula*, the *Willowmere* defendants were neither members nor developers of the planned communities represented by the plaintiffs.

While the present appeal was pending before this Court, our Supreme Court reversed this Court's holding in *Willowmere*. *See Willowmere Community Association, Inc. v. City of Charlotte*, —— N.C. ——, 809 S.E.2d 558 (2018). The Court held that "despite [the *Willowmere*] plaintiffs' failure to strictly comply with their respective bylaws and internal governance procedures in their decision to initiate [the] suit, they nonetheless possess[ed] a sufficient stake in an otherwise justiciable controversy to confer jurisdiction on the trial court to adjudicate [the] legal dispute." —— N.C. at ——, 809 S.E.2d at 565 (citation and internal quotation marks omitted). The Court distinguished precedent of this Court "deal[ing] entirely with the plaintiff associations' capacity to enforce restrictive covenants against the defendant property owners," *id.* at ——, 809 S.E.2d at 562, and noted that, prior to this Court's decision in *Willowmere*, our appellate courts had "[never] held ... that a defendant who is *a stranger to the plaintiff association* may assert that the plaintiff's failure to abide by its own bylaws necessitates dismissal of the plaintiff's complaint for lack of standing[.]" —— N.C. at ——, 809 S.E.2d at 563 (emphasis in original). The Court further noted that, "in *Peninsula*, the failure of the plaintiff[-association] to comply with [its] bylaws was raised by [the defendant-developer], *which was a member of the plaintiff association*." *Id.* (emphasis added). The Court observed that

> [o]ne of the underlying issues ... in *Peninsula* was the very fact that [the defendant-developer] ... had drafted the association's bylaws and explicitly included the two-thirds approval provision, which, in the plaintiff's view, contravened [the defendant-developer's] fiduciary duties as the controlling member of the association when the bylaws were created. *As a member of the plaintiff association*

> *and as the party that was clearly intended to benefit from the two-thirds approval requirement in the bylaws, [the defendant-developer] was entitled to raise the association's failure to comply with this provision of its bylaws as a bar to the plaintiff's suit*.

****7** *Id.* (internal citation omitted) (emphasis added). After observing "[t]here [was] no evidence ... suggesting that any member of the [*Willowmere* plaintiffs'] communities ... opposed [the] plaintiffs' prosecution of [the] suit[,]" the Court "decline[d] to permit a defendant *who is a stranger to an association* to invoke the association's own internal governance procedures as an absolute defense to subject matter jurisdiction in a suit filed by the association against that defendant." *Id.* at ——, 809 S.E.2d at 564 (emphasis added). Although our Supreme Court stated that "[n]othing in our jurisprudence on standing requires a corporate litigant to affirmatively plead or prove its compliance with corporation bylaws and internal rules relating to its decision to bring suit[,]" *see id.* at ——, 809 S.E.2d at 563, the Court repeatedly emphasized the third-party, non-member status of the party asserting a lack of standing in that case.

We find the present case factually distinguishable from *Willowmere* in several important respects. Here, although Defendant Hyder was not Plaintiff's Developer-Declarant, he was also not a "stranger" to the Association. Article XXVI of Plaintiff's Declaration provides that "[e]very person (or entity) who/which is a record owner of a fee or undivided fee interest in any lot that is subject to this Declaration shall be deemed to have a membership in The Homestead at Mills River Property Owners Association, Inc." Defendant Hyder thus became a member of the Association when he purchased the Common Area property in 2009. Article XXVI further provides that each lot owner "shall, by the acceptance of a deed or other conveyance for such lot, be deemed obligated to pay to the Association an annual assessment or charge ... established by the Association[.]" Article XXXII of the Declaration provides in part that

> [e]ach grantee or purchase[r] of any lot or parcel shall, by acceptance of a deed conveying title thereto, ... accept such deed or contract upon and subject to each and all of the provisions of this Declaration and all amendments thereto, and to *the jurisdiction, rights, powers, privileges and immunities* of Developer *and the Association* herein provided for.

(emphases added). Under the Declaration, the "rights" and "powers" of the Association include "the right to collect the amount [of past-due assessments] by an action at law against the [property] owner as for a debt, and [the Association] may bring and maintain such other suits and proceedings at law or at equity as may be available." Thus, when Plaintiff filed this action in 2011, Defendant Hyder was (1) a member of the Association, with attendant voting rights; (2) obligated to pay annual membership fees to the Association; and (3) subject to legal action by the Association for unpaid or past-due annual fees. Plaintiff's Declaration and bylaws permit the Association to use the funds collected from the annual assessments for a number of specific purposes, including "legal ... fees" and "doing any other things necessary or desirable in the opinion of the Association to maintain the [d]evelopment." Jeffrey Buchanan ("Buchanan"), who was president of the Board at the time of trial, testified that lot owners paid annual dues of $700.00 each, and that, to Buchanan's knowledge, Defendant Hyder had paid annual dues to the Association since purchasing the Common Area property in 2009. Buchanan acknowledged the Association "accepted and cashed [Defendant Hyder's] check[s]." Buchanan agreed at trial that Defendant Hyder's membership dues had helped fund the Association's annual budget.

Defendant Hyder was a party to Plaintiff's governing articles. *See* N.C. Gen. Stat. § 55A-6-20 (2017) (providing in part that "[i]f a corporation has members, the designations, qualifications, rights, and obligations of members shall be set forth in or authorized by the articles of incorporation or bylaws[.]"). Article XXXII of the Declaration provides in part that

> ****8** [e]ach grantee or purchaser of any lot or parcel shall, by acceptance of a deed conveying title thereto, or the execution of a contract for the purchase thereof, ... consent and agree ... to keep, observe, comply with[,] and

> perform the covenants, conditions[,] and restrictions contained in this Declaration, and all amendments and supplemental declarations thereto.

The Declaration authorizes both Plaintiff and Defendant Hyder to "proceed at law or in equity against any person or other legal entity *violating or attempting to violate any provisions of [the Declaration]*, either to restrain violation, to recover damages, or both." (emphasis added). Thus, when Defendant purchased the Common Area, he became both subject to the Declaration and authorized to enforce its terms.

In other contexts, our appellate courts have recognized that members of a corporation have the right to challenge the corporation's alleged failure to comply with corporate bylaws. *See*, *e.g.*, *Roberts v. Madison County Realtors Assn.*, 344 N.C. 394, 402-03, 474 S.E.2d 783, 789 (1996) (holding summary judgment was improper where plaintiff "presented to the trial court genuine issues of material fact about whether [defendant association] violated [plaintiff's] rights as a member of ... defendant [a]ssociation by following merger procedures that violated ... the [association's] articles of incorporation, and the bylaws[.]"); *Davis v. New Zion Baptist Church*, —— N.C. App. ——, ——, 811 S.E.2d 725, 728 (2018) (holding that plaintiffs who were "voting members of [a c]hurch in good standing at the time of the alleged violations of the [c]hurch bylaws, and at the time [plaintiffs] filed [their] lawsuit[,]" had standing to challenge church's alleged failure to comply with provisions of its bylaws). This Court has also held that corporate bylaws, like restrictive covenants, are contractual in nature. *See Cape Hatteras Electric v. Stevenson*, —— N.C. App. ——, ——, 790 S.E.2d 675, 676 (2016); *Property Owners Assoc. v. Curran*, 55 N.C. App. 199, 205, 284 S.E.2d 752, 756 (1981); *see also Virmani v. Presbyterian Health Services Corp.*, 127 N.C. App. 71, 77, 488 S.E.2d 284, 288, *disc. review denied*, 347 N.C. 141, 492 S.E.2d 38 (1997) (concluding employer's corporate bylaws were "an integral part" of employment contract, and employee had a contractual right to enforce the bylaws against employer). "Judicial enforcement of a covenant will occur as it would in an action for enforcement of any other valid contractual relationship." *Page v. Bald Head Ass'n*, 170 N.C. App. 151, 155, 611 S.E.2d 463, 466 (2005) (citation and internal quotation marks omitted).

Applying the foregoing principles to the present case, we conclude Defendant Hyder had the right to allege Plaintiff failed to comply with its bylaws in filing this action against Defendant Hyder. Defendant Hyder was required by the Declaration to join and pay annual fees to the Association. As a member of the Association, Defendant Hyder had certain voting rights. Fees paid by Defendant Hyder were used to finance the Association's budget—including, presumably, costs associated with this litigation. Defendant Hyder was also authorized by the Declaration to enforce its provisions. We do not find our Supreme Court's holding in *Willowmere* inconsistent with the conclusion that a member of an association being sued by that association may assert a lack of standing based on the association's alleged violation of provisions in its own articles of incorporation specifically governing the association's ability to sue. In a footnote, the *Willowmere* Court found it "sufficient to say that, *while a member of either plaintiff association could permissibly challenge the association's failure to comply with its bylaws in instituting this suit*[,] ... [the non-member] defendants [in *Willowmere*] [could] not." *See* —— N.C. at —— n.7, 809 S.E.2d at 564 n.7 (emphasis added).

****9** We also observe that, in *Willowmere*, our Supreme Court emphasized there was "no evidence ... suggesting that any member of the [plaintiff-associations] opposed [the] plaintiffs' prosecution of [the] suit." *Id.* at ——, 809 S.E.2d at 564. By contrast, in the present case, there was ample evidence indicating a number of Plaintiff's members opposed this lawsuit. At trial, Defendant Hyder introduced twenty-one letters from owners of property within the development, dated 14 October 2013 and filed with the Henderson County clerk of superior court on various dates in October and November 2013, stating the owners "object[ed] to [his or her] Property Owners Association dues being used to pursue this lawsuit over [the Common Area][,]" and "ask[ing] that the [trial] court dismiss this lawsuit." Buchanan testified the Board had received the letters in evidence as well as "other letters along the way." Buchanan stated the Board received a letter about a month before trial "from someone who owned a property and just said 'this has gone on long enough,' you know. ... [The property owner] asked how much money had been spent on the suit and then said that [the Board] should drop it." McElrath also testified that numerous members of the Association opposed the lawsuit, and that there was an effort at some point to remove the directors of the Board as a result. McElrath testified:

> [I]n speaking with these [owners] who were very upset and continued

> to be upset, they wanted to know how we might end this [litigation]. And the only way I [knew] to do it was to overthrow the [B]oard and drop the suit. And to do that you have to announce a special meeting, call a special meeting and [specify] what the meeting is going to be about and then get [sixty-seven] percent of the [members] to show up and take the action. And I had about [sixty-four] percent of those people, which represented [eighty-four] property owners, to sign such a letter requesting a special meeting to overthrow the [B]oard and drop the suit. And some of the folks that participated in bringing the suit ... basically lobbied against that, and I couldn't achieve [the sixty-seven percent vote]. But most of the [owners] ... [live] all over the country. And ... it's difficult to understand ... what's going on. And [the owners] just want [the litigation] to [ ] end. And they are very happy with their community and what we have there. ... But that was why they wanted me to put forth that effort [to remove the directors] because they are tired of this continuing saga.

The uncontroverted evidence shows that Defendant was a dues-paying member of the Association when Plaintiff filed this lawsuit in 2011, and other members of the Association thereafter opposed the litigation. Under these circumstances, we find it consistent with the reasoning of our Supreme Court in *Willowmere* to conclude Defendant Hyder was entitled to challenge Plaintiff's standing to sue based on an alleged "fail[ure] to comply with explicit prerequisites to filing suit imposed by [the Association's] bylaws[.]" *See* —— N.C. at ——, 809 S.E.2d at 562.

Our Supreme Court stated in *Willowmere* that if "a member of [a] plaintiff association disagrees with the [association's] decision to file suit, the proper vehicle to challenge the association's failure to comply with its respective bylaws in making that decision is a suit against the nonprofit corporation brought by the aggrieved member or members of the association[.]" —— N.C. at ——, 809 S.E.2d at 564. In the present case, where Defendant Hyder was both a member of the Association *and* a named defendant in Plaintiff's suit, it would frustrate principles of judicial economy to require Defendant Hyder to file a separate action challenging Plaintiff's failure to comply with its bylaws rather than permitting him to raise that argument as a defense to Plaintiff's suit. *See*, *e.g.*, *Baldelli v. Baldelli*, —— N.C. App. ——, ——, 791 S.E.2d 687, 690 (2016) (holding that where "there is a clear interrelationship between the issues [and parties] in [two separate] actions, we do not believe it is in the interest of judicial economy or clarity for both of these actions to proceed simultaneously.").

The Supreme Court in *Willowmere* also cited N.C. Gen. Stat. § 55A-3-04(b) (2017), a statutory provision that applies to *ultra vires* action by a corporation and provides in part that "[a] corporation's *power to act* may be challenged ... [i]n a proceeding by a member or a director against the corporation to enjoin the act[.]" (emphasis added). "An act by a ... corporation is *ultra vires* if it is *beyond the purposes or powers expressly or impliedly conferred upon the corporation* by its charter and relevant statutes and ordinances." *Miesch v. Ocean Dunes Homeowners Assn.*, 120 N.C. App. 559, 563, 464 S.E.2d 64, 67 (1995) (citation and quotation marks omitted) (second emphasis added). Our Supreme Court has held that

> ****10** [i]f a corporation has *authority* under statute and charter to enter into a particular kind of contract, the fact that an agent of the corporation purports to bind the corporation without permission of the corporation does not make this act *ultra vires*. It merely makes this particular act one that the corporation *has not authorized*, even though other such acts by proper corporate agents would be binding on the corporation.

Rowe v. Franklin County, 318 N.C. 344, 349, 349 S.E.2d 65, 69 (1986) (emphases added). We find this distinction instructive in the present case. Assuming Plaintiff had *authority* to sue Defendant Hyder, as conferred by statute and/or its governing articles, the filing of this lawsuit did

not constitute an *ultra vires* act. Instead, the issue before us is whether Plaintiff's suit was *properly authorized* by the Association. We conclude Defendant Hyder was entitled to assert, as a defense to further prosecution of this action, that Plaintiff lacked *proper authorization* to sue him.

We next address Defendant Hyder's argument that Plaintiff violated a provision of its bylaws governing Plaintiff's ability to sue. Specifically, Defendant Hyder cites the following provision in Plaintiff's bylaws:

> 3.14 Pre-condition to Suits Against Declarant. The affirmative vote of no less than two-thirds (2/3) of all votes by Qualified Voting Members entitled to be cast by the Association shall be required in order for the Association to (1) file a complaint, on account of an act or omission of Declarant, with any governmental agency which has regulatory or judicial authority over the Homestead at Mills River development or any part thereof; or (2) assert a claim against or sue Declarant.

According to Defendant Hyder, "[i]t is undisputed and all evidence presented at trial confirmed [that] this action was both originally against [ ] Developer[-]Declarant and the basis for the lawsuit against Defendant Hyder was 'on account of an act or omission of [Developer-]Declarant.' " Thus, Defendant Hyder argues, bylaw provision 3.14 applied, and "Plaintiff's Board of Directors acted in contravention of its [b]ylaws [when it] did not obtain the appropriate member voted approval to file this action, [and] the Board ... never obtained authority to act on Plaintiff's behalf."

As Defendant Hyder notes, bylaw provision 3.14 requires an affirmative vote by two-thirds of Plaintiff's members "in order for the Association to [ ] file a complaint, on account of an act or omission of Declarant[.]" Defendant Hyder does not dispute that bylaw provision 3.14 explicitly applies to "Suits Against Declarant," or that he is not the "Declarant" [3] referenced throughout Plaintiff's bylaws, but argues bylaw provision 3.14 nevertheless applied to him because "this action was [ ] originally against [ ] Developer[-]Declarant and the basis for the lawsuit against Defendant Hyder was 'on account of an act or omission of [Developer-]Declarant.' "

We find this argument unpersuasive. Reading bylaw provision 3.14 as a whole—including its title, "Pre-condition to Suits *Against Declarant*"—we conclude this provision governs Plaintiff's ability to "file a complaint [*against Declarant*], on account of an act or omission of Declarant[.]" *See*, *e.g.*, *Biggers v. Evangelist*, 71 N.C. App. 35, 41, 321 S.E.2d 524, 528 (1984) (noting that, in construing a contract provision, "[t]he intention of the parties is to be collected from the entire instrument and not from detached portions." (citation and quotation marks omitted)). Moreover, Plaintiff asserted a distinct cause of action against Defendant Hyder based on Defendant Hyder's "contention that he is the sole owner of the [Common Area] property[,]" which Plaintiff alleged "constitutes a cloud on the property[.]" Plaintiff asked the trial court to "determine that the 5.88 acre [Common Area] tract is the sole property of [ ] Plaintiff or that [ ] Plaintiff and [ ] Defendant [ ] Hyder[ ] own the said tract as tenants in common and said tract may only be used by the lot owners of The Homestead at Mills River, LLC." At trial, when asked to clarify Plaintiff's request for relief, Plaintiff's counsel "move[d] to amend [its] complaint to conform to the evidence presented[,]" and told the trial court:

> ****11** Specifically, ... in our prayer for relief, [Plaintiff was] asking as tenants in common, I don't think that's what [Plaintiff is] asking for exactly. [Plaintiff is] asking for *the right to use the property* which is in the complaint already. But I don't think that necessarily means tenants in common. ... Just to make sure that we're clear that [Plaintiff is] not only asking [for the homeowners] to be named tenants in common [with Defendant Hyder] but *[to declare] that [they] have an interest ... in the property*. That is [Plaintiff's] prayer for relief. If that is to quiet title, that would be fine. ... I don't know that it would be tenants in common though. But otherwise, [Plaintiff is] still asking that judgment be entered that ... the homeowners have an interest in the Common Area.

(emphases added). Because bylaw provision 3.14 applies only to suits against the "Declarant" specifically identified in the bylaws, and Defendant Hyder is not the Declarant, bylaw provision 3.14 did not apply to Defendant Hyder. Nevertheless, as discussed below, we conclude Plaintiff's lawsuit was not properly authorized under other provisions of the bylaws.

The North Carolina Planned Community Act ("PCA") provides in part that

> [t]o the extent not inconsistent with the provisions of this Chapter, the declaration, bylaws, and articles of incorporation *form the basis for the legal authority for [a] planned community to act as provided in the declaration, bylaws, and articles of incorporation*, and the declaration, bylaws, and articles of incorporation are enforceable by their terms.

N.C. Gen. Stat. § 47F-2-103(a) (2017) (emphasis added). The PCA also confers certain statutory powers upon a property owners' association, including the authority to "[i]nstitute, defend, or intervene in litigation or administrative proceedings on matters affecting the planned community[,]" "[u]nless the [association's] articles of incorporation or the declaration expressly provides to the contrary[.]" *See* N.C.G.S. § 47F-3-102(4). Under an earlier version of the statute, an association's ability to exercise the statutory powers enumerated therein was made "*[s]ubject to* the provisions of the [association's] articles of incorporation or the declaration[.]" *See Wise v. Harrington Grove Cmty. Ass'n*, 357 N.C. 396, 402, 584 S.E.2d 731, 736 (2003) (emphasis added). In *Wise*, the organizational documents of the defendant-association "[did] not expressly empower [the association]" to impose the fines at issue in that case, although such fines were authorized under N.C.G.S. § 47F-3-102. *Id.* at 407, 584 S.E.2d at 739. Our Supreme Court held that, in using the phrase "subject to," our General Assembly "explicitly acknowledged that the powers described in N.C.G.S. § 47F-3-102 were contingent on, subordinate to, and governed by the legal instruments creating a homeowners['] association." *Id.* at 403, 584 S.E.2d at 737. The Court concluded the powers enumerated in the statute could not be "create[d] ... by implication" with respect to associations formed prior to the enactment of the PCA. *Id.* at 407, 584 S.E.2d at 740.

After *Wise*, the General Assembly amended N.C.G.S. § 47F-3-102 by

> remov[ing] the permissive words "subject to" and replac[ing] them with explicit language stating that a homeowners' association may exercise the listed powers unless its articles of incorporation or declaration expressly provides to the contrary. It appears that the [L]egislature's intent was to ... clarify that homeowners' associations have the enumerated powers unless their documents expressly provide to the contrary.

**12 *RiverPointe Homeowners Ass'n v. Mallory*, 188 N.C. App. 837, 841, 656 S.E.2d 659, 661 (2008). This Court has subsequently interpreted N.C.G.S. § 47F-3-102 "to provide powers to an [owners'] association *in addition* to those already provided to [the association] by its declaration, provided that the declaration is silent regarding said powers." *Conleys Creek Limited Partnership v. Smoky Mountain Country Club Property Owners Association, Inc.*, ––– N.C. App. ––––, ––––, 805 S.E.2d 147, 154 (2017) (emphasis in original).

In the present case, Plaintiff's governing articles expressly empower the Association to take legal action for certain purposes. As noted above, the Declaration gives the Association the authority to collect from its members, *i.e.*, "[e]very person (or entity) who/which is a record owner of a fee or undivided fee interest in any lot that is subject to [the] Declaration[,]" "an annual assessment or charge for the purposes stated within this article to be fixed, established by the Association and pursuant to reasonable advance notice given in writing to all lot owners." Under Article XXVI, the Association has "the right to collect the amount of [past-due assessments or charges] by an action at law against [an] owner as for a debt, and may bring and maintain such other suits and proceedings at law or [in] equity as may be available [to

collect assessments due].” Article XXXIV of the Declaration, entitled “Enforcement,” also provides that

> each person to whose benefit these restrictions inure, *including The Homestead at Mills River Property Owners Association, Inc.*, and other lot owners in the [d]evelopment, may proceed at law or in equity against any person or other legal entity violating or attempting to violate any provisions of these restrictions, either to restrain violation, to recover damages, or both.

(emphasis added). Thus, under the Declaration, Plaintiff is explicitly authorized to take legal action in order to (1) enforce annual assessments against property owners within the development; and (2) enforce the restrictive covenants.

Plaintiff's bylaws provide that “*[a]ll of the powers and duties of the Association* shall be exercised by the Board [of Directors], including those existing under the common law, applicable statutes, the [North Carolina] Corporation Act, the Declaration, the Articles, and these [b]ylaws[.]” *See also* N.C. Gen. Stat. § 55A-8-01(b) (2017). Under provision 4.13 of the bylaws, the Board's “powers and duties” include the ability to (1) enforce the bylaws and the Declaration “by all legal means, including injunction and recovery of monetary penalties[,]” and (2) “institute, defend, intervene in, or settle any litigation ... in its own name on behalf of itself on matters affecting the Common Elements or enforcement of the Declaration, the [b]ylaws[,] or the rules and regulations of the Association.”

We observe that while N.C.G.S. § 47F-3-102(4) permits an owners' association to institute litigation “on matters affecting the planned community,” Plaintiff's bylaws give the Association, by and through the Board, express authority to “institute ... litigation ... on *matters affecting the Common Elements*[.]” (emphasis added). The bylaws provide that “terms specifically defined either in the ... Declaration ... or the North Carolina Nonprofit Corporation Act ... shall have the same meaning [in the bylaws].” The Declaration explicitly defines the term “Common Elements” as “any real estate or other property within [the development] *owned or leased by the Association*, including any improvements thereon, other than a [l]ot.” It is undisputed in this case that the Common Area property was never “owned or leased by the Association.” Thus, the provision of the bylaws permitting the Association to sue regarding “matters affecting the Common Elements” did not apply here. However, bylaw provision 4.13 also states that the “powers and duties” of the Board “shall include, *but not be limited to*,” the powers and duties enumerated in the bylaws. Additionally, the Declaration and bylaws do not expressly provide that the Association *may not* initiate litigation “on matters affecting the planned community[,]” which it is otherwise authorized to do under N.C.G.S. § 47F-3-102(4). *See RiverPointe*, 188 N.C. App. at 841, 656 S.E.2d at 661.

****13** Assuming *arguendo* this lawsuit concerns a “matter[ ] affecting [Plaintiff's] planned community,” the PCA “reiterat[es] the common law rule that, *when otherwise proper*, a homeowners' association may participate in a lawsuit.” *Creek Pointe*, 146 N.C. App. at 164, 552 S.E.2d at 224 (emphasis added). This Court held in *Creek Pointe* that the statute “does not *automatically* confer standing upon homeowners' associations in every case, and [ ] questions of standing should be resolved by our courts in the context of the specific factual circumstances presented[.]” *Id.* (emphasis in original). We concluded that

> although the [PCA] clearly authorizes homeowners' associations as a general class to institute, defend, or intervene in litigation, this statute does not diminish our judicial responsibility to evaluate whether the association has standing to bring [the] suit under the specific fact situation presented.

Id.

As this Court observed in *Peninsula*, “*contractual provisions agreed to by members of [a property owners' association] may provide procedural prerequisites or contractually limit the time, place, or manner for asserting claims*.” *Peninsula*, 171 N.C. App. at 96, 614 S.E.2d at 355 (emphasis added). In the present case, we conclude the Board failed to comply with certain “procedural prerequisites” set forth in the bylaws that apply to action taken by the Association. As a result, Plaintiff was not properly authorized to file this lawsuit according to the terms of its own governing articles, and it cannot establish standing. *See*, *e.g.*, *Anderson v. SeaScape at Holden*

Plantation, LLC, 241 N.C. App. 191, 203, 773 S.E.2d 78, 87 (2015) ("*Having determined that the [plaintiff-property owners' association] was properly authorized by a quorum of disinterested directors to file the intervenor complaint*, we must now turn to the issue of standing." (emphasis added)).

Plaintiff's bylaws provide that "*[a]ll of the powers and duties of the Association* shall be exercised by the Board[.]" In turn, the bylaws impose specific procedural requirements on the Board's ability to act on behalf of the Association. Bylaw provision 4.9 requires the presence of a majority of the directors "for the transaction of business at any meeting of the Board. If a [majority] is not present, the meeting shall be adjourned from time to time until a [majority] is present." Bylaw provision 4.10 prescribes the Board's "Manner of Acting": "Each Director shall be entitled to one (1) vote. The act of a majority of the Directors *present at a meeting* shall constitute the act of the Board unless the act of a greater number is required by the provisions of applicable law, the Declaration[,] or these [b]ylaws." (emphasis added). The bylaws plainly contemplate that most action taken by the Board, which has the sole authority to act in Plaintiff's name, will occur by majority vote of the directors, at regular or special meetings, which are subject to notice requirements stipulated elsewhere in the bylaws.[4] Provision 4.11 of the bylaws provides the singular exception: "Any action that may be taken at a meeting of the Board may be taken without a meeting *if such action is authorized in writing, setting forth the action taken, signed by all Directors*." (emphasis added). Thus, under Plaintiff's bylaws, all powers of the Association are exercised by the Board, and the Board may exercise those powers either (1) by a majority vote of directors present at a meeting, or (2) without a meeting, "if such action is authorized in writing, setting forth the action taken, signed by all Directors."

****14** There is no evidence tending to show the present action was ever authorized either (1) by a majority vote of Plaintiff's directors present at a meeting, or (2) in a writing signed by all directors. The record discloses little detail about the Board's decision-making process prior to filing the complaint in this case. At trial, Robert Pierce ("Pierce"), a former member of the Board, testified:

> I was on the [B]oard when we were in the process of filing the lawsuit. I am not sure if we had actually filed it or not when I rolled off [the Board]. I do know we had a meeting at ... [an] attorney's office, at which time [Defendant] Hyder and [ ] McElrath and their attorneys and another board member and I were there. I just am not sure if we [had already] filed [the lawsuit] or if we had seen the purchase [of the Common Area by Defendant Hyder] had been done, ... or whether the purchase had been made and we were trying to figure out what to do going forward. So I am not real certain.

When Buchanan testified that "the homeowners in total did not agree to approve the lawsuit[,]" counsel for Defendant asked: "But the lawsuit was filed because the directors decided on their own to file a lawsuit; right?" Buchanan replied: "*I assume there was a vote taken* where that group—yes, that group decided to bring the lawsuit."

Dennis Mankin ("Mankin"), who did not testify at trial, was president of the Board when this action was filed and the only signatory of Plaintiff's complaint. The record includes an undated "Letter from the President," on letterhead of the Homestead at Mills River Property Owners Association, addressed to property owners and signed by Mankin. Although the letter is undated, its contents indicate it was written "seven months" after Developer-Declarant transferred control of the Association to the property owners. It is unclear exactly when that transfer of control occurred, but the record suggests it happened sometime in 2009 or 2010.[5] McElrath testified he received the undated letter from Mankin in February 2011. The letter introduced the "new Board of Directors[,]" comprising a president, vice president, treasurer, secretary, and one member-at-large. It informed property owners that the Board had been "working on a variety of projects and issues on [their] behalf including ... overseeing deed restrictions to protect the value of the community assets[.]" It also indicated the Board had "taken a number of steps to ensure all common properties that were in the hands of the developers have now been transferred over to the [Association][.]"[6] The letter did not reference the Common Area property, which was never "transferred over to the [Association][,]" nor did it indicate the Board was considering legal action related to the sale of the Common Area to Defendant Hyder.

**15 The record also includes a notice of annual meeting and meeting agenda allegedly mailed to Plaintiff's members prior to Plaintiff's 2011 annual meeting. That annual meeting was held on or about 31 March 2011, less than a month before Plaintiff filed this lawsuit; however, the notice of annual meeting and the meeting agenda do not indicate whether there was any discussion, by the directors and/or the members, about potential legal action related to the sale of the Common Area.[7] No minutes from the 2011 annual meeting —or any other meeting of the Board – appear in the record on appeal.[8] Additionally, although the bylaws require the Board to "prepare and provide to members annually, a budget summary report ... containing ... [a] statement of the status of any pending suits or judgments in which the Association is a party[,]" there are no budget summary reports in the record before us.

The above evidence is insufficient to show the Board complied, or attempted to comply, with the explicit procedural prerequisites set forth in Plaintiff's bylaws that prescribe the Association's "manner of acting." *See Bilodeau v. Hickory Bluffs Cmty. Servs. Ass'n. Inc.*, 244 N.C. App. 1, 9-10, 780 S.E.2d 205, 211-12 (2015). Even assuming Plaintiff had statutory authority to file this lawsuit, Plaintiff's governing articles impose procedural constraints on action by the Board, which has exclusive authority to act on Plaintiff's behalf. *See*, *e.g.*, *Laurel Park Villas Homeowners Assoc. v. Hodges*, 82 N.C. App. 141, 143-44, 345 S.E.2d 464, 466 (1986) (finding that, while plaintiff's corporate bylaws contained a provision giving corporation the power to bring the action, "*a [different] provision of the bylaws* indicate[d] that all powers of the corporation [must] be exercised by the board of directors, and ... nothing in the record suggest[ed] that any of [the persons explicitly empowered to take action on behalf of the corporation] authorized [the] action." (emphasis added)). While Plaintiff's bylaws may not require a vote by the Association's members before Plaintiff may sue someone other than the Declarant identified in the bylaws, they do require that any action of the Association be authorized by a majority vote of directors at a meeting or in a writing signed by all directors.

In *Willowmere*, our Supreme Court held "that a showing of *strict* compliance [with an association's bylaws and internal governance procedures] is not necessary to satisfy the requirements of our standing jurisprudence." —— N.C. at ——, 809 S.E.2d at 565 (emphasis added). In that case, in addition to the third-party status of the defendants, there was evidence suggesting the plaintiff-associations' directors had taken some informal steps to authorize the lawsuit. One of the association's directors discussed initiating the lawsuit by phone, and the other association contended its board of directors unanimously authorized the litigation through a chain of emails. By contrast, in this case, there is no record of internal discussions among Plaintiff's directors about the lawsuit, other than Pierce's testimony that he and one other unidentified Board member attended a meeting with Defendant Hyder and some attorneys that, by Pierce's own account, may have occurred before or after the lawsuit was filed. Only one Board member, Mankin, signed Plaintiff's complaint. There are no minutes of any Board meeting in the record. Because the evidence does not show Plaintiff's Board approved this action, either by a majority vote of directors at a meeting or in a writing signed by all directors, we conclude the action was not properly authorized as required by Plaintiff's bylaws, and Plaintiff therefore lacked standing to prosecute the action. *See Beech Mountain Property Owners' Assoc. v. Current*, 35 N.C. App. 135, 136, 240 S.E.2d 503, 505 (1978) (noting that "substantive issues cannot be considered unless the party raising them has the capacity to do so."). Since "our holding that the [trial] court lacked subject matter jurisdiction is dispositive," it is unnecessary to address Plaintiff's arguments challenging the trial court's entry of a directed verdict for Defendant. *See Reynolds v. Motley*, 96 N.C. App. 299, 306 n.2, 385 S.E.2d 548, 552 n.2 (1989).

IV. Conclusion

**16 The record does not indicate this action was properly authorized under the plain language of Plaintiff's bylaws. Consequently, Plaintiff has failed to demonstrate standing to maintain its suit against Defendant Hyder. The trial court therefore improperly denied Defendant Hyder's motion for summary judgment. We dismiss Plaintiff's appeal.

DISMISSED.

Report per Rule 30(e).

Judge DAVIS concurs.

Judge TYSON concurs in the result to dismiss for lack of jurisdiction.

All Citations

260 N.C.App. 126, 814 S.E.2d 924 (Table), 2018 WL 3029008

Footnotes

1 In the first defense in his 20 June 2012 response to Plaintiff's complaint, Defendant Hyder asked the trial court

> to dismiss this action for failure to join a necessary party on the ground that all of the individual lot owners in the subdivision are the necessary parties together with each recorded lien holder on any lot in the subdivision. [ ] Plaintiff property owners['] association is not a proper party, and none of the homeowners or mortgagees have been joined as parties [by] Plaintiff."

No transcript of the 22 January 2013 hearing appears in the record on appeal. In the order entered 11 July 2013, the trial court stated it was

> of the opinion that the owners of the lots in the subdivision known as [T]he Homestead at Mills River together with each recorded lien holder on any and all of the lots in [T]he Homestead at Mills River are necessary parties and a complete determination of the rights of the parties cannot be made without the presence of each of those.

2 In a memorandum filed in support of his motion for summary judgment, Defendant Hyder argued more specifically on the issue of standing that Plaintiff "ha[d] no authority under [its] restrictive covenants to bring this action where no violation [of the restrictive covenants] [was] alleged and none [had] occurred."

3 The bylaws identify "Declarant" as "[the] developer, The Homestead at Mills River, LLC[.]" In ruling on Defendant's motion for reconsideration, the trial court concluded dismissal was proper with respect to The Homestead at Mills River, LLC, as well as its co-developer, River Oaks Joint Venture, LLC, which was also named as a defendant in this action.

4 The bylaws permit meetings of the directors to occur "by means of a conference telephone or similar communication device ... *as long as the required notice is given*." (emphasis added).

5 Buchanan testified Developer-Declarant transferred control of the Association to the property owners "sometime in [the] 2010 timeframe, ... 2009-2010." Pierce, who was vice president of the original Board, testified the Board was "formed after the declarant turned it over to the people of the property ... [in] [20]09 perhaps." Another property owner testified it was "hard to say" when Developer-Declarant handed over control of the Association to the property owners, but testified it was in "[20]09, maybe, at some point in time. ... [20]08, [20]09, somewhere in there."

6 The only deed that appears in the record showing a transfer of property from Developer-Declarant to the Association involved a 10.62 acre tract known as the River Reserve property. That deed was recorded on or about 8 November 2010.

7 Plaintiff's bylaws provide that "[t]he Association may vote or transact business on any matter at an annual meeting whether or not specific notice of said item had been given in the notice of the annual meeting." By contrast, "for special meetings, only items which were included in the meeting's notice to members can be voted on." The record in this case does not disclose evidence of any special meetings.

8 Provision 5.6(c) of the bylaws provides in part that the secretary of the Board "shall keep the minutes of *all meetings and actions of the Board* and of the members[.]" (emphasis added).

2009 WL 2397088
Only the Westlaw citation is currently available.

This decision was reviewed by West editorial staff and not assigned editorial enhancements.

United States District Court, W.D. North Carolina, Statesville Division.

KLINGSPOR ABRASIVES, INC., Plaintiff,
v.
James D. WOOLSEY, Defendant.

No. 5:08CV-152.
|
July 31, 2009.

Attorneys and Law Firms

Stephen Mason Thomas, Patrick, Harper & Dixon, Hickory, NC, for Plaintiff.

Geraldine Sumter, Ferguson, Stein, Chambers, Gresham & Sumter, P.A., Charlottte, NC, Hal K. Gillespie, Gillespie, Rozen, Watsky & Motley, PC, Tiffany Chantee Alvoid, Gillespie, Rozen, Watsky & Jones, P.C., Dallas, TX, for Defendant.

ORDER

RICHARD VOORHEES, District Judge.

***1 THIS MATTER** is before the court on Defendant's Motion to Dismiss and Brief in Support, both filed December 30, 2008. On February 27, 2009, Plaintiff filed its Brief in Opposition to Defendant's Motion to Dismiss, to which Defendant filed a Reply on March 12, 2009. Defendant's Motion is now ripe for disposition.

I. FACTUAL AND PROCEDURAL HISTORY

This is a claim for declaratory judgment brought by Plaintiff Klingspor Abrasives, Inc. ("Klingspor") against Defendant James D. Woolsey ("Woolsey"). Klingspor is a North Carolina corporation with its registered and principal office in Catawba County. Woolsey is a citizen and resident of Texas, and he was employed by Klingspor beginning on October 14, 1985. From July 21, 2003 until his termination on August 27, 2008, Woolsey was employed as the National Sales Manager.

The parties dispute the reasons for Woolsey's termination. Klingspor contends that Woolsey was fired for insubordination, poor management of employees, and taking actions that gave rise to EEO claims against Klingspor. Woolsey, however, denies this and claims he was terminated because of his age and his opposition to discrimination against older workers and females.

On November 4, 2008, Woolsey's counsel sent a letter to Klingspor, stating that he had been retained by Woolsey "to pursue his rights in connection with his legal claims against Klingspor," and alleging Woolsey was terminated as a result of discrimination. The letter also stated that "Mr. Woolsey would like to resolve his disputes with Klingspor on the basis of a good faith compromise, without litigation if possible," and suggested a "serious exploration of settlement" before beginning litigation.

On or about November 21, 2008, Klingspor filed a Complaint for Declaratory Judgment in the Superior Court of Catawba County, North Carolina, asking the court to declare that Klingspor had not unlawfully discriminated against Woolsey in any fashion and that Woolsey has no valid claim as to any such discrimination. On December 3, 2008, Woolsey filed a charge of discrimination against Klingspor with the Equal Employment Opportunity Commission ("EEOC") and the Texas Workforce Commission ("TWC"). On December 22, 2008, Woolsey filed a notice of removal to this court. On December 30, 2008, Woolsey filed a Motion to Dismiss Plaintiff's Complaint for Declaratory Judgment.

II. DISCUSSION OF CLAIM

Woolsey argues that he is entitled to the dismissal of Klingspor's Complaint for Declaratory Judgment. Woolsey asserts that Klingspor's claim lacks subject matter jurisdiction and fails to state a claim upon which relief can be granted.

A. Standard of Review

"The purpose of a Rule 12(b)(6) motion is to test the legal sufficiency of a complaint." *Edwards v. City of Goldsboro,*

178 F.3d 231, 243 (4th Cir.1999). In considering a 12(b)(6) motion, the court must assume the facts alleged in the complaint to be true and construe the facts in the light most favorable to the plaintiff. *Eastern Shore Mkts., Inc. v. J.D. Assocs. Ltd. P'ship,* 213 F.3d 175, 180 (4th Cir.2000). However, the court does not "need to accept the legal conclusions drawn from the facts." *Id.* In order to survive a Rule 12(b)(6) motion, the facts alleged in the complaint "must be enough to raise a right of relief above the speculative level" and must provide "enough facts to state a claim to relief that is plausible on its face." *Bell Atl. Corp. v. Twombly,* 550 U.S. 544, 570 (2007).

***2** When a court considers a Rule 12(b)(1) motion to dismiss where it is contended that the complaint simply fails to allege facts upon which subject matter jurisdiction can be based, all facts alleged in the complaint should be assumed to be true. *Adams v. Bain,* 697 F.2d 1213, 1219 (4th Cir.1982). The plaintiff is then given, in effect, "the same procedural protection as he would receive under a Rule 12(b)(6) consideration." *Id.*

B. No Significant Controversy Exists, as Required for Declaratory Judgment

North Carolina's Declaratory Judgment Act states, "Any person interested under a deed, will, written contract or other writings constituting a contract, or whose rights, status or other legal relations are affected by a statute, municipal ordinance, contract or franchise, may have determined any question of construction or validity arising under the instrument, statute, ordinance, contract, or franchise, and obtain a declaration of rights, status, or other legal relations thereunder." N.C. Gen.Stat. § 1-254 (2009). The purpose of the Act is "to settle and afford relief from uncertainty and insecurity, with respect to rights, status, and other legal relations." *Walker v. Phelps,* 202 N.C. 344, 349 (1932). While the Act should "be liberally construed, its provisions are not without limitation." *North Carolina Consumers Power, Inc. v. Duke Power Co.,* 285 N.C. 434, 446 (1974). A court "may refuse to render or enter a declaratory judgment or decree where such a judgment or decree, if rendered or entered, would not terminate the uncertainty or controversy giving rise to the proceeding." N.C. Gen.Stat. § 1-257 (2009).

In order for a court to have jurisdiction over claims for declaratory judgment, the complaint must demonstrate "the existence of an actual controversy." *Wendell v. Long,* 107 N.C.App. 80, 82 (Ct.App.1992). In fact, an actual controversy has been described as a "jurisdictional prerequisite" for proceeding under the Declaratory Judgment Act. *Lide v. Mears,* 231 N.C. 111, 118 (1949). A party must show that the controversy arises "out of [the parties'] opposing contentions as to their respective legal rights and liabilities ... under a statute, municipal ordinance, contract or franchise ... and that the relief prayed for will make certain that which is uncertain and secure that which is insecure." *Light Co. v. Iseley,* 203 N.C. 811, 820 (1933). The North Carolina Supreme Court requires that "an actual controversy exist both at the time of the filing of the pleading and at the time of hearing." *Sharpe v. Park Newspapers of Lumberton, Inc.,* 317 N.C. 579, 585 (1986).

To satisfy the jurisdictional requirement of an actual controversy, "it is not necessary that one party have an actual right of action against another." *Nat'l Travel Servs. v. State ex rel. Cooper,* 153 N.C.App. 289, 292 (Ct.App.2002). However, "more than anticipation of future action" is required. *Id.* A party must show in the complaint "that litigation appears unavoidable." *Wendell,* 107 N.C.App. at 82-83 A mere threat to sue or apprehension of a suit is not sufficient to establish an actual controversy. *Nat'l Travel Servs.,* 153 N.C.App. at 292. When the facts alleged do not contain an actual controversy, a motion to dismiss under Rule 12(b)(6) will be granted. *Gaston Bd. of Realtors, Inc. v. Harrison,* 311 N.C. 230, 234-35(1984).

***3** Letters threatening suit are generally not found to establish an actual controversy. In *Nat'l Travel Services,* the North Carolina Court of Appeals held that a letter from the Attorney General's office stating it would "take whatever action necessary" did not establish an actual controversy sufficient to establish jurisdiction under the Declaratory Judgment Act. 153 N.C.App. at 292. Similarly, in *Gaston,* a defendant wrote a letter to plaintiff stating that he would "take such actions as are necessary to protect myself ... from harm by the actions of individuals involved in the matter." 311 N.C. at 235. The North Carolina Supreme Court held this letter did not establish an actual controversy and that litigation was not unavoidable. Although the defendant did not specifically threaten to file a lawsuit, the court found that even if he had, a threat would not have been sufficient to establish an actual controversy.

Declaratory judgment can "serve a useful purpose where the plaintiff seeks to clarify its legal rights in order to prevent the accrual of damages, or seeks to litigate a controversy where the real plaintiff in the controversy has either failed to file

suit, or has delayed in filing." *Coca-Cola Bottling Co. Consol. v. Durham Coca-Cola Bottling Co.,* 141 N.C.App. 569, 578 (2000). However, the Declaratory Judgment Act "does not license litigants to fish in judicial ponds for legal advice." *Lide,* 231 N.C. at 117. The Act does not exist to "convert judicial tribunals into counselors and impose upon them the duty of giving advisory opinions to any parties who may come into court and ask for either academic enlightenment or practical guidance concerning their legal affairs." *Sharpe,* 317 N.C. at 583-84. The court is not required to "give a purely advisory opinion which the parties might, so to speak, put on ice to be used if and when occasion might arise." *Duke Power,* 222 N.C. at 204. "Thus, the principle which protects the jurisdiction of the Court from the suggested invasions and keeps its decisions within the traditional judicial functions is the presence of a genuine controversy as a jurisdictional necessity." *Id.*

Additionally, declaratory judgment "should not be invoked 'to try a controversy by piecemeal, or to try particular issues without settling the entire controversy.' " *Coca-Cola,* 141 N.C.App. at 578 *(quoting Aetna Cas. & Sur. Co. v. Quarles,* 92 F.2d 321, 325 (4th Cir.1937). "This is especially so where a separate suit has been filed, or is likely to be filed, that will more fully encompass the scope of the entire controversy." *Coca-Cola,* 141 N.C.App. at 578.

Klingspor's complaint contains no actual controversy for the purposes of the Declaratory Judgment Act. While "the actual controversy rule may be difficult to apply in some cases and the definition of 'controversy' must depend on the facts of each case," *Gaston,* 311 N.C. at 234, declaratory judgment is not appropriate for the facts here. Woolsey's letter to Klingspor only stated that Woolsey retained counsel "to pursue his rights in connection with his legal claims against Klingspor." Nothing in the letter indicated that litigation was unavoidable; in fact, the letter stated that Woolsey wanted to resolve the issue without litigation, if possible. Similar to *Gaston* and *Nat'l Travel Services,* the letter can be seen, at best, as nothing more than a threat of suit. The North Carolina Supreme Court has held mere threats of suit are not sufficient to establish an actual controversy. Thus, the letter does not show a controversy sufficient to provide the court with subject matter jurisdiction.

***4** The Declaratory Judgment Act can be useful for clarifying legal rights to prevent further accrual of damages or to address a stalemate where the natural plaintiff has delayed filing. Here, Klingspor has already acted by terminating Woolsey and wants a declaration as to the lawfulness of its decision. Since Woolsey has already been terminated, Klingspor is not accruing further damages by waiting for Woolsey to file suit. Klingspor is simply trying to determine if its decision to terminate was lawful. Declaratory judgment would not serve to protect any rights of Klingspor or help Klingspor avoid liability. Klingspor will not accrue further damages by waiting for Woolsey to take action, and Woolsey has not delayed in attempting to settle the controversy.

C. Plaintiff Cannot Choose Time and Place if Defendant is Already Planning on Initiating Claim

Requests for declaratory judgment cannot be used to allow a traditional defendant to choose the time and place of litigation. *Coca-Cola,* 141 N.C.App. at 579 ("It is inappropriate for a potential tortfeasor to bring a declaratory suit against an injured party for the sole purpose of compelling the injured party 'to litigate [its] claims at a time and in a forum chosen by the alleged tortfeasor.' " *(quoting Cunningham Bros., Inc. v. Bail,* 407 F.2d 1165, 1167 (7th Cir.1969))). Declaratory suits should not be used as "device[s] for 'procedural fencing.' " *Id. (quoting Nautilus Ins. Co. v. Winchester Homes, Inc.,* 15 F.3d 371, 377 (4th Cir.1994)). Such declaratory suits cannot be condoned, as "such 'procedural fencing' deprives the natural plaintiff of the right to choose the time and forum for suit." *Id.*

Klingspor cannot successfully argue that the declaratory suit is useful on the grounds that the natural plaintiff in the controversy had failed to initiate litigation or delayed in initiating litigation. By filing this request for declaratory judgment, Klingspor has essentially filed a discrimination suit against itself, before Woolsey filed a claim. A declaratory suit such as this cannot be used to deprive Woolsey, the natural plaintiff in this controversy, the right to choose the time and forum to settle the matter. Such suits will not be condoned.

D. Exhaustion of Administrative Remedies

This Court need not address the exhaustion of administrative remedies, as no actual controversy was found. However, the Court notes that before bringing suit, a plaintiff must exhaust administrative remedies for the court to have subject matter jurisdiction over the issue. *Wake Cares, Inc. v. Wake County Bd. of Educ.,* 190 N.C.App. 1,12 (Ct.App.2008). Administrative remedies are available under Texas and North Carolina law for resolution of employment discrimination claims, and Klingspor would be expected

to exhaust such prerequisite remedies as may exist before requesting declaratory judgment.

E. Attorney's Fees

In his motion, Woolsey asks this court to award attorney's fees and costs pursuant to Rule 11 of the North Carolina Rules of Civil Procedure as a sanction against Klingspor for filing a frivolous suit. However, since this case is in federal court, it is governed by the Federal Rules of Civil Procedure. FED.R.CIV.P. 1. Under FED.R.CIV.P. 11(c)(2), a motion for sanctions must be filed separately from all other motions. Furthermore, such a motion must first be presented to the opposing party. Then, if the opposing party has not taken ameliorative action within twenty-one days of being served, the motion may be presented to the court for adjudication. *Id.* In the present case, Woolsey's motion for sanctions was not filed separately from his motion to dismiss, and there is no evidence that this motion was presented to Klingspor before being filed. For these reasons, Woolsey's motion for Rule 11 sanctions will be denied. *

III. CONCLUSION

***5 IT IS THEREFORE ORDERED,** for the foregoing reasons, that Defendant's Motion to Dismiss is **GRANTED.**

IT IS FURTHER ORDERED that Defendant's request for attorney's fees and costs is **DENIED.**

All Citations

Not Reported in F.Supp.2d, 2009 WL 2397088

Footnotes

* To the extent Woolsey seeks attorney's fees on a discrete claim of unlawful retaliation, this issue is not properly before the court. *See* (Def.'s Reply Br. at 5-6.) Woolsey has not filed any counterclaims in this court against Klingspor, and Woolsey did not raise this argument until his reply.

2015 WL 966239
Superior Court of North Carolina,
Mecklenburg County,
Business Court.

Christopher LA MACK, Dante A. Massaro, and Gemini Real Estate Advisors, LLC, Plaintiffs,
v.
William T. OBEID, Defendant.

No. 14 CVS 12010.
|
March 5, 2015.

{1} THIS MATTER is before the Court upon Defendant William T. Obeid's ("Obeid" or "Defendant") Motion to Dismiss Plaintiffs Christopher La Mack ("La Mack"), Dante A. Massaro ("Massaro"), and Gemini Real Estate Advisors, LLC's ("Gemini") (collectively "Plaintiffs") First Amended Complaint ("Motion to Dismiss") or Alternatively to Stay the Action ("Motion to Stay") (collectively, the "Motions") in the above-captioned case.
{2} After considering the parties' pleadings, written motions and submissions, and arguments at the October 28, 2014 hearing, the Court hereby DENIES Defendant's Motion to Dismiss and GRANTS Defendant's Motion to Stay.

Attorneys and Law Firms

McGuire Woods LLP by Robert A. Muckenfuss, Elizabeth Zwickert Timmermans, and Justin T. Yedor, for Plaintiffs Christopher La Mack, Dante A. Massaro, and Gemini Real Estate Advisors, LLC.

Smith Moore Leatherwood LLP by Robert R. Marcus and C. Bailey King, Jr., for Defendant William T. Obeid.

BLEDSOE, Judge.

I.

BACKGROUND

***1** {3} The Court recites the allegations set forth in the parties' papers that are relevant for purposes of resolving the present Motions. [1]

{4} Gemini is a closely held Delaware limited-liability company with its principal place of business in New York, New York and an office in Mecklenburg County, North Carolina. (First Am. Compl. ¶ 3.)

{5} Gemini was formed in 2003 to "acquire, own, operate, improve, manage and dispose of commercial real estate." (First Am. Compl. ¶ 20; Amended and Restated Operating Agreement of Gemini Real Estate Advisors, LLC dated February 19, 2009 ("Amended Operating Agreement"), [2] Ex. D.)

{6} La Mack, Massaro, and Obeid are Gemini's only members, with each owning a one-third membership interest in the company. (Am. Oper. Agrmt., p. 39, Ex. A; *see also* First Am. Compl. ¶¶ 17–18.)

{7} Each Plaintiff is also a manager of Gemini. (Am.Oper.Agrmt., p. 45, Ex. C.)

{8} Under the Amended Operating Agreement, Obeid was appointed Gemini's initial Operating Manager. (*See* First Am. Compl. ¶¶ 22–23; Am. Oper. Agrmt. § 5.16.) As Operating Manager, Obeid was "empowered to carry out the management and operational policies of the Company as set forth and determined by the Managers." (Am.Oper.Agrmt. § 5.16.) The Agreement provided that Obeid could "act on behalf of the Company and [ ] execute any and all documents, instruments and agreements ..." with La Mack and Massaro's approval. (*See* Am. Oper. Agrmt. § 5.16; First Am. Compl. ¶ 24.)

{9} Over time, each of the managers began to pursue different types of projects based on his particular skillset and interests. In particular, Obeid focused on hospitality projects, with an emphasis on independent and boutique hotels, while La Mack and Massaro focused on Gemini's retail projects, including grocery, fitness, and department stores. Obeid alleges that over time, his projects "performed significantly better" than La Mack and Massaro's projects, and that his greater relative contribution to Gemini became even more pronounced over the last five years. (Def.'s Br. Supp. Mot., p. 4.)

{10} In mid–2013, Obeid proposed restructuring Gemini to mitigate the risks between its retail and hospitality sectors and to allow each members' economic interest in Gemini to more accurately reflect his respective contribution. (Def.'s Br. Supp. Mot., p. 5.) La Mack, Massaro, and Obeid agreed to discuss Obeid's proposal at a March 28, 2014 meeting. (Def.'s

Br. Supp. Mot., p. 5.) At the meeting, Gemini's members allegedly agreed in principle to create two new LLC's—one dedicated to Gemini's retail business and the types of projects La Mack and Massaro had been pursuing (the "Retail LLC") and the other dedicated to Gemini's hospitality business and the types of projects Obeid had developed (the "Hospitality LLC"). (Def.'s Br. Supp. Mot., p. 5.) Under the alleged agreement, Gemini would wholly own the Retail LLC but only retain a 30% interest in the Hospitality LLC, with Obeid owning the remaining 70% interest. (Def.'s Br. Supp. Mot., p. 5.)

***2** {11} After allegedly agreeing to this new business model, however, Obeid contends that La Mack and Massaro advised him that they wanted a "business divorce" and to negotiate his separation from Gemini. (Def.'s Br. Supp. Mot., p. 6.) Obeid asserts that thereafter he called a special meeting of the managers to discuss the "business divorce" on July 1, 2014, but that at that meeting, La Mack and Massaro, without prior notice to Obeid, voted to remove Obeid as Operating Manager and replace him with Massaro. (Def.'s Br. Supp. Mot., p. 6; *see also* Pls.' Resp. Opp. Def.'s Mot., p. 4.)

{12} That same day, La Mack and Massaro, "individually and as members of and on behalf of Gemini," filed this action against Gemini and Obeid ("individually and as a manager of Gemini") in Mecklenburg County, North Carolina Superior Court (the "North Carolina Action") (Compl., pp. 1, 4; *see* Def.'s Br. Supp. Mot., pp. 1, 6), purporting to allege direct and derivative claims against Obeid to recover damages arising out of Obeid's alleged breach of the Amended Operating Agreement, breach of fiduciary duty, conversion, negligent misrepresentation, and unjust enrichment (Compl.¶ 1).

{13} Contemporaneously with the filing of the Complaint, La Mack and Massaro filed a notice of designation of this case to the North Carolina Business Court. The case was thereafter designated a mandatory complex business case and assigned to the undersigned on July 7, 2014.

{14} La Mack and Massaro did not attempt service of the North Carolina Action on Obeid until approximately six weeks after filing. (Def.'s Br. Supp. Mot., p. 2.)

{15} On August 1, 2014, Obeid filed an action in the United States District Court for the Southern District of New York (the "New York Court"), bringing claims against La Mack and Massaro "directly and derivatively on behalf of Gemini Real Estate Advisors LLC [and various entities created by Obeid, La Mack, and Massaro to develop Gemini's real estate projects]" (the "New York Action"). (Def.'s Br. Opp. Mot. for TRO, Ex. A titled *Obeid v. La Mack, et al.,* Case No. 14–cv–06498–LTS (S.D.N.Y., Aug. 1, 2014).)

{16} Obeid served the New York Action on La Mack and Massaro on August 14, 2014. (Def.'s Mot. Dismiss ¶ 3.) Immediately thereafter, on August 15, 2014, La Mack and Massaro began efforts to serve the North Carolina Action on Obeid. (Def.'s Br. Supp. Mot., pp. 2, 7.)[3]

{17} Obeid subsequently filed an Amended Verified Complaint in the New York Action on August 22, 2014. (Def.'s Br. Supp. Mot., Ex. A titled *Obeid v. La Mack, et al.,* Case No. 14–cv–06498–LTS (S.D.N.Y. Aug. 22, 2014).) La Mack and Massaro thereafter moved the New York Court to dismiss or, alternatively, to stay the New York Action in favor of the North Carolina Action. On October 31, 2014, the New York Court denied La Mack and Massaro's motion.[4] (*See* Pls.' Resp. to Def.'s Notice of Issuance of Order, Ex. A, p. 5.)

***3** {18} On August 28, 2014, Obeid filed a Motion to Dismiss or Alternatively to Stay the [North Carolina] Action pursuant to Rules 12(b)(1) and (12)(b)(6) of the North Carolina Rules of Civil Procedure, arguing that La Mack and Massaro lacked standing to bring derivative claims on behalf of Gemini, necessitating the dismissal of the North Carolina Action and, alternatively, seeking a stay in favor of the New York Action. (Def.'s Mot. Dismiss ¶ 2.)[5] In particular, Obeid contended that because La Mack and Massaro owned a combined 66.66% ownership interest in Gemini (Am.Oper.Agrmt., Ex. A, p. 39), they could have authorized Gemini to bring the North Carolina Action as a direct action; as such, La Mack and Massaro's admitted failure to make demand on Gemini (and their claim of alleged demand futility) required dismissal of the Complaint. (Def.'s Mot. Dismiss ¶ 2.)

{19} Soon thereafter, on September 2, 2014, La Mack and Massaro filed a First Amended Complaint adding Gemini as a Plaintiff, removing Gemini as a nominal Defendant, and abandoning the individual Plaintiffs' derivative claims, this time asserting only direct claims against Obeid.[6] (Pls.' Resp. Opp. Def.'s Mot ., p. 11, fn. 5.) Plaintiffs also discarded their claim for unjust enrichment and added a claim for tortious interference with prospective economic advantage. (Pls.' Resp. Opp. Def.'s Mot., p. 11, fn. 5.) Obeid responded by

filing the Motion to Dismiss and Motion to Stay on September 16, 2014. The Motions are now ripe for resolution.

II.

ANALYSIS

A. Motion to Dismiss

{20} Obeid contends that because La Mack and Massaro lacked standing to bring their initial Complaint, the Court lacks subject matter jurisdiction over the action, thereby making the Complaint a legal nullity which could not be amended. As a result, Obeid argues that the First Amended Complaint must be dismissed, and if the claims therein are to be advanced at all, they must be asserted in a new action. (Def.'s Mot. Dismiss ¶¶ 4–5.)

{21} As an initial matter, the Court notes that "[a] universal principle as old as the law is that the proceedings of a court without jurisdiction of the subject matter are a nullity." *Burgess v. Gibbs,* 262 N.C. 462, 465, 137 S.E.2d 806, 808 (1964). Relying on this principle, our courts have held that if a plaintiff was "[w]ithout standing to bring [an] initial complaint, there was no valid complaint to which the amended complaint could relate back." *Coderre v. Futrell,* 736 S.E.2d 784, 787 (N.C.Ct.App.2012). As applied here, if the individual Plaintiffs did not have standing to assert any of the claims in the initial Complaint, the initial Complaint is a legal nullity to which amendment is impossible, and dismissal of the First Amended Complaint is required.

{22} Turning then to an examination of the individual Plaintiffs' claims in the initial Complaint, the Court first notes that La Mack and Massaro purported to assert both direct and derivative claims. As a result, even if Obeid is correct that Plaintiffs did not have standing to assert derivative claims in the initial Complaint, the Court would still retain subject matter jurisdiction over any claims Plaintiffs have properly brought in their direct or individual capacity. Accordingly, the Court first determines whether the individual Plaintiffs alleged valid direct claims in their initial Complaint.

***4** {23} La Mack and Massaro purport to allege three direct claims against Obeid in their initial Complaint—Breach of the Amended Operating Agreement, Breach of Fiduciary Duty, and Negligent Misrepresentation (collectively, "Individual Claims"). Obeid argues that these claims should be dismissed for lack of standing, because La Mack and Massaro have "fail[ed] to allege any 'direct injury' they have suffered 'independent' of the alleged injuries to [Gemini]." (Def.'s Br. Supp. Mot., p. 8, fn. 5) (citation omitted). In response, La Mack and Massaro contend their injury is "based not solely on their membership interest in Gemini, but also on their rights to participate in the management of Gemini." (Pls.' Resp. Opp. Def.'s Mot., p. 8.)

{24} North Carolina courts "look to the laws of the state in which the company is incorporated to determine the procedural prerequisites and whether the claim [s are] derivative or individual." *Technik v. WinWholesale, Inc.,* 2012 NCBC 5 ¶ 25 (N.C.Super.Ct. Jan. 13, 2012), http://www.ncbusinesscourt.net/opinions/2012_NCBC_5.pdf; *see also Scott v. Lackey,* 2012 NCBC 58 ¶ 32 (N.C.Super.Ct. Dec. 3, 2012), http:// www.ncbusinesscourt.net/opinions/2012_NCBC_58.pdf ("[T]he law of corporate derivative suits should [ ] apply to limited liability companies to determine the governing law for assessing whether claims may be brought individually or derivatively.").

{25} Gemini is a limited liability company formed in Delaware. (First Am. Compl. ¶ 3.) Thus, the Court will look to Delaware law to determine whether Plaintiffs' claims may be brought as direct or derivative.

{26} "Under Delaware law, whether [La Mack and Massaro] properly assert [ ] direct or derivative claims 'must turn solely on the following questions: (1) who suffered the alleged harm ([Gemini] or [La Mack and Massaro], individually); and (2) who would receive the benefit of any recovery or other remedy ([Gemini] or [La Mack and Massaro], individually)?' " *Scott,* 2012 NCBC 58 ¶ 36 (quoting *Tooley v. Donaldson, Lufkin, & Jenrette, Inc.,* 845 A.2d 1031, 1033 (Del.2004)). "To make this determination, the Court will not be bound by [La Mack and Massaro]'s classification of the claim as direct or derivative, but will look to the complaint as a whole to determine if the injury alleged falls directly on [Gemini] or the individual." *Id.* (citing *In re Syncor Int'l Corp. S'holders Litig.,* 857 A.2d 994, 997 (Del.Ch.2004)).

{27} "Delaware courts typically refuse to extend standing for direct claims to plaintiffs alleging an injury arising solely from an ownership interest in [a] company, because their harm would be felt only secondarily to the direct harm to the company." *Id.* ¶ 37 (citing *Feldman v. Cutaia,* 951 A.2d 727, 733 (Del.2008)). Thus, in order to be properly classified as an

individual claim, " '[t]he stockholder's claimed direct injury must be independent of any alleged injury to the corporation.' " *Id.* ¶ 36 (quoting *Tooley,* 845 A.2d at 1039). *See Feldman,* 951 A.2d at 733 ("Where all of a corporation's stockholders are harmed and would recover pro rata in proportion with their ownership of the corporation's stock solely because they are stockholders, then the claim is derivative in nature.").

***5** {28} Of particular relevance here, the denial of a shareholder's right to vote on important company matters is nearly always, under Delaware law, a direct harm that is unique to the individual. *See In re Ebix, Inc.,* 2014 Del. Ch. LEXIS 132, at *48, 2014 WL 3696655 (Del. Ch. July 24, 2014) ("Where a shareholder has been denied one of the most critical rights he or she possesses—the right to a fully informed vote—the harm suffered is almost always an individual, not corporate, harm.") (quoting *In re Tyson Foods, Inc. Consol. S'holder Litig.,* 919 A.2d 563, 601 (Del.Ch. Feb.6, 2007)). This principle applies with equal force when a manager of an LLC is denied the manager's contractual right to vote on matters impacting the LLC. *See Bakerman v. Sidney Frank Importing Co.,* 2006 Del. Ch. LEXIS 180 *69–70 (Del. Ch. Oct. 16, 2006) ("[Plaintiff]'s contract and good faith and fair dealing claims are direct claims because they allege that defendants deprived [plaintiff] of his voting rights under the LLC's Operating Agreement, and because [plaintiff] would receive the benefit of any recovery.").

{29} Here, the individual Plaintiffs allege that they have been injured by Obeid's denial of their right to vote as managers of Gemini.

{30} For example, in their claim for breach of the Amended Operating Agreement, La Mack and Massaro allege in the initial Complaint (i) that the Amended Operating Agreement was a "valid and enforceable contract" they entered with Obeid (Compl.¶¶ 22, 40); (ii) Obeid breached the Amended Operating Agreement by unilaterally acting on behalf of the company by, *inter alia,* executing a hotel deal in Miami, Florida (the "Miami Hotel Deal"), without allowing La Mack and Massaro to first vote on the deal (Compl.¶¶ 26–31, 43); and (iii) Obeid's actions harmed La Mack and Massaro as parties to the Amended Operating Agreement (Compl.¶ 48). Most notably, the individual Plaintiffs allege that Obeid usurped La Mack and Massaro's right to vote on critical company decisions by unilaterally acting without their approval. (Compl.¶¶ 26, 33, 36.) Obeid also allegedly "induced La Mack and Massaro into signing a line of credit for which [they] are now personally liable." (Compl. ¶¶ 26–31; Pls.' Br. Opp. Def.'s Mot., p. 9.)

{31} Similarly, as support for their negligent misrepresentation claim, La Mack and Massaro allege in the initial Complaint that Obeid "concealed the Miami Hotel Deal from [them] until substantial Company funds had already been expended," (Compl.¶ 63), thereby preventing them from exercising their "right to approve or disapprove substantial expenditures for such projects," (Compl.¶ 67), and thereby denying them the right to vote on important company matters.

{32} Accordingly, the Court finds that La Mack and Massaro's claims for breach of the Amended Operating Agreement and for negligent misrepresentation in the initial Complaint are properly characterized as direct claims, not derivative claims. As such, the Court concludes that the individual Plaintiffs had standing under Delaware law to assert these direct claims in the initial Complaint. Thus, even if Obeid is correct that La Mack and Massaro did not have standing to assert the derivative claims set forth in the initial Complaint, [7] due to the presence of the direct claims against Obeid, the initial Complaint is not a legal nullity, and the Court had subject matter jurisdiction over the initial Complaint.

***6** {33} Therefore, because the Court had subject matter jurisdiction over the initial Complaint, Obeid's Motion to Dismiss the Amended Complaint under Rules 12(b)(1) and 12(b)(6) for lack of subject matter jurisdiction should be denied.

B. Motion to Stay

{34} N.C. Gen.Stat. § 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." 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).

{35} The 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) (citing *Motor Inn Mgmt., Inc. v. Irvin–Fuller Dev. Co., Inc.,* 46 N.C.App. 707, 713, 266 S.E.2d 368, 371, *appeal dismissed and disc. review denied,* 301 N.C. 93, 273 S.E.2d 299 (1980)).

{36} The 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. *Id.* at 357, 435 S.E.2d 571, 435 S.E.2d at 574. "[I]t is not necessary [for] all factors [to] positively support a stay, as long as [the Court] is able to conclude that (1) 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." *Id.*

{37} Beginning with the ninth factor first, the Court notes that plaintiffs' choice of forum ordinarily is given great deference, especially when plaintiffs select their home forum to bring suit. *Wachovia Bank v. Harbinger Capital Partners Master Fund I, Ltd.,* 2008 NCBC 6 ¶ 62 (N.C.Super.Ct. Mar. 13, 2008), http://www.ncbusinesscourt.net/opinions/2008% 20NCBC% 206.pdf (citation omitted); *Wachovia Bank v. Deutsche Bank Trust Co. Ams.,* 2006 NCBC 8 ¶ 51 (N.C.Super. Ct. June 2, 2006), http://www.ncbusinesscourt.net/opinions/2006% 20NCBC% 208.htm ("The weight accorded to [ ] plaintiff[s'] choice of forum [may be] particularly appropriate where, as in this case, [ ] plaintiff[s] selected [their] home forum to bring suit.") (citing *Long Haymes Carr, Inc. v. VueCom, Inc.,* 1997 U.S. Dist. LEXIS 21939 at *11 (M.D.N.C. Dec. 12, 1997)); *see also Bates v. J.C. Penney Co.,* 624 F.Supp. 226, 227 (W.D.N.C.1985) ("Plaintiffs' choice of forum should be given especially strong consideration since the forum they chose is in the district in which they reside.").

***7** {38} Obeid must satisfy a heavy burden to alter Plaintiffs' choice of forum by staying the case in favor of the New York Action. *See Firstar Bank, N.A. v. Interlease 757 Aircraft Investors, LLC,* 2002 U.S. Dist. LEXIS 20974 at *10, 2002 WL 31399146 (M.D.N.C. Aug. 23, 2002) (citation omitted) ("[U]nless the balance is strongly in favor of the defendant, the plaintiff's choice of forum should rarely be disturbed."). However, when plaintiffs file a complaint merely as a strategic maneuver to choose a favorable forum, "first-filed" priority may be denied. *See Nutrition & Fitness, Inc. v. Blue Stuff, Inc.,* 264 F.Supp.2d 357, 361 (W.D.N.C.2003).

{39} Obeid contends that La Mack and Massaro's initial Complaint was a "hip pocket" complaint, filed only to secure leverage in the "business divorce" negotiations between the parties and to guarantee La Mack and Massaro a local forum in which to litigate this dispute should a business agreement not be reached. (Def.'s Br. Supp. Mot., pp. 6, 12.) A "hip pocket" complaint is one in which a plaintiff files suit in a favorable forum, but does not serve the complaint on defendant until after defendant files suit in a foreign forum and serves his complaint upon plaintiff. *Nutrition & Fitness, Inc.,* 264 F.Supp.2d at 360. The plaintiff then pulls out his "hip pocket" complaint if a dispute results in litigation to contest defendant's motion to transfer or stay by claiming "first-filed" status. *Id.* at 360–62.

{40} Our Court of Appeals has addressed "hip pocket" complaints and stated that "[i]n situations in which two suits involving overlapping issues are pending in separate jurisdictions, priority should not necessarily be given to [the earlier filed suit.] Rather, if the plaintiff [ ] was on notice at the time of filing that the defendant was planning to file suit, a court should look beyond the filing dates to determine whether the [plaintiff's] suit is merely a strategic maneuver to achieve a preferable forum." *Coca–Cola Bottling Co. Consol. v. Durham Coca–Cola Bottling Co.,* 141 N.C.App. 569, 579, 541 S.E.2d 157, 164 (2000).

{41} Here, Obeid alleges that he put La Mack and Massaro on notice on June 25, 2014 that he may file suit against them. (Def.'s Br. Supp. Mot., p. 17.) The Court cannot ignore the fact that La Mack and Massaro thereafter filed their action on July 1, 2014, but did not attempt service until six weeks later —waiting until the day after they were served with Obeid's

competing New York Action on August 15, 2014. (Def.'s Br. Supp. Mot., p. 7, fn. 4.)[8] Furthermore, instead of causing Gemini to bring a direct action against Obeid—which they could have done based on their combined 66 .66% ownership in Gemini, but which would have required notifying Obeid of the planned litigation—La Mack and Massaro chose to file a derivative action on behalf of Gemini, without prior notice to Obeid, before then dropping all derivative claims in favor of a direct action in their later filed First Amended Complaint. Because the Court finds that "[s]uch behavior screams of forum shopping," *see Nutrition & Fitness, Inc.,* 264 F.Supp.2d at 362, the Court concludes that La Mack and Massaro's initial Complaint should not enjoy priority under the "first-filed" rule. *See id.* at 361 ("It is well-settled law that a court has broad discretion in applying and construing the first-filed rule.") (citing *Plating Resources, Inc. v. UTI Corp.,* 47 F.Supp.2d 899, 903 (N.D.Ohio 1999)). Thus, the ninth factor weighs in favor of staying the North Carolina Action.[9]

***8** {42} With regard to the first (nature of the case), fifth (applicable law), sixth (burden of litigating matters not of local concern), and seventh (desirability of litigating matters of local concern in local courts) factors, the Court does not believe any of these factors weigh in favor of litigating this matter in North Carolina. First, the majority of the parties' claims are governed by federal law or a state's law other than North Carolina's. In particular, Plaintiffs' claims in this action focus on the duties owed under Gemini's Operating Agreement, which will likely be governed under Delaware law pursuant to the Agreement's Delaware choice of law provision. (Am.Oper.Agrmt. § 11.7.) Furthermore, much of the offending conduct alleged in this action occurred outside of North Carolina, including in South Carolina, Tennessee, and Florida, and was directed against Gemini, a Delaware limited liability company with its principal place of business in New York. The Court therefore concludes that North Carolina law has little, if any, application to this dispute. Moreover, Obeid's New York Action not only asserts claims under the Amended Operating Agreement, which will likely be governed by Delaware law, but also New York common law claims as well as a federal trademark claim under the Lanham Act. In sum, the Court concludes that Plaintiffs' claims do not present substantial matters of local concern that would weigh in favor of their resolution in a North Carolina venue.

{43} The Court also concludes that the second (convenience of the witnesses), third (availability of compulsory process to produce witnesses), fourth (relative ease of sources of proof), and eighth (convenience and access to another forum) factors also weigh in favor of staying the North Carolina Action.

{44} The New York Action is currently pending in the United States District Court for the Southern District of New York. The parties have New York counsel, Plaintiffs' Motion to Dismiss the New York Action has been denied, and the parties are engaged in discovery. All parties transact substantial business in New York, and the Court finds the Southern District of New York is a convenient forum where all parties are equipped to litigate.

{45} Moreover, most of Gemini's officers are based in New York, the majority of Obeid's "family and personal friends" that allegedly received inflated salaries are not North Carolina residents, the individuals that work for Gemini's principal lenders are primarily located in New York and Connecticut, and Gemini's current and potential investors by and large are located outside of North Carolina. (Def.'s Br. Supp. Mot., p. 19.) Further, Obeid does not regularly travel to or conduct business in North Carolina, whereas La Mack and Massaro regularly travel to New York. (Def.'s Br. Supp. Mot., p. 17.) Based on the above, the Court finds that the New York Court provides a more convenient forum for the witnesses in this case than North Carolina.

***9** {46} The Court also finds that the availability of compulsory process is at least as effective in the Southern District of New York as it is in North Carolina in light of the federal court's ability to compel the appearance of witnesses under Rule 45 of the Federal Rules of Civil Procedure.

{47} Similarly, most of the Electronically Stored Information in this case is likely held on Gemini's servers in New York. The Court concludes that the relative ease of access to sources of proof is no more difficult in New York than it would be in North Carolina and, in light of the location of Gemini's data, very likely less difficult.

{48} The tenth factor requires this Court to consider any "practical considerations which would make the trial easy, expeditious, and inexpensive." *Home Indem., Co. v. Hoechst Celanese Corp.,* 128 N.C.App. 113, 119, 493 S.E.2d 806, 810 (1997). The Court finds it significant that Obeid's claims in the New York Action, while overlapping those in the North Carolina Action, are broader in scope, including a federal claim under the Lanham Act, and are brought against a more comprehensive set of defendants. As Obeid notes in his

papers, this Court has before it "only a subset of the issues pending in New York." [10]

{49} The Court finds that the interests of justice and judicial economy are best served by litigation of this matter in the forum where all claims and all parties are joined and complete relief may be provided among the parties. *See Harbinger Capital Partners,* 2008 NCBC 6 ¶¶ 69–70 ("To grant a stay, it is not required that the parties and issues in both actions be identical. Substantial or functional identity is sufficient.") (citing *12 AT & T Corp. v. Prime Sec. Distribs., Inc.,* 1996 Del. Ch. LEXIS 134 at * 6, 1996 WL 633300 (Del. Ch. Oct. 24, 1996)). *See generally, Coca–Cola Bottling Co.,* 141 N.C.App. at 578, 541 S.E.2d at 163 ("The declaratory remedy should not be invoked to try a controversy by piecemeal, or to try particular issues without settling the entire controversy. This is especially so where a separate suit has been filed, or is likely to be filed, that will more fully encompass the scope of the entire controversy.") (internal citation and quotation marks omitted). Here that forum is New York.

{50} Furthermore, it appears to the Court that while certain discovery potentially could be used in both actions, permitting the North Carolina Action to proceed will likely result in additional time and expense for the parties, wasted judicial resources, and potentially separate trials that will require witnesses to testify twice. The Court thus concludes that "practical considerations" weigh in favor of staying the North Carolina Action in deference to the New York Action and finds Judge Diaz's conclusion in *Harbinger Capital Partners,* 2008 NCBC 6 ¶ 87, equally applicable here:

> ... whatever I do in North Carolina, the New York Action will proceed. Accordingly, I find no good reason for expending precious judicial resources by insisting on the presentation of overlapping (if not identical) testimony and evidence in two jurisdictions.

***10** {51} Accordingly, based on the Court's weighing and balancing of the various factors discussed above, the Court concludes that (1) a stay of the North Carolina Action is warranted by the factors present as discussed above, (2) the United States District Court for the Southern District of New York is a convenient, reasonable, and fair forum for the litigation of this matter, and (3) substantial injustice would result if the Court were to deny the stay and order the North Carolina Action to proceed.

III.

CONCLUSION

{52} In light of the foregoing, the Court hereby (i) **DENIES** Obeid's Motion to Dismiss Plaintiffs' First Amended Complaint and (ii) **GRANTS** Obeid's alternative Motion to Stay this action while the New York Action proceeds.

{53} Accordingly, this civil action is hereby **STAYED** pending the outcome of the New York Action.

SO ORDERED.

All Citations

Not Reported in S.E.2d, 2015 WL 966239, 2015 NCBC 21

Footnotes

1 "When reviewing a motion to dismiss for lack of subject matter jurisdiction pursuant to Rule 12(b)(1), a trial court may consider and weigh matters outside the pleadings." *Dare County v. N.C. Dep't of Ins.,* 207 N.C.App. 600, 610, 701 S.E.2d 368, 375 (2010) (alteration in original) (quoting *Dep't of Trans. v. Blue,* 147 N.C.App. 596, 603, 556 S.E.2d 609, 617 (2001), *disc. review denied,* 356 N.C. 434, 572 S.E.2d 429 (2002)). Similarly, when deciding a motion to dismiss under Rule 12(b)(6), the Court "may properly consider documents which are the subject of a plaintiff's complaint and to which the complaint specifically refers," even

if those documents are not attached thereto. *Oberlin Capital, L.P. v. Slavin,* 147 N.C.App. 52, 60, 554 S.E.2d 840, 847 (2001) (citing *Robertson v. Boyd,* 88 N.C.App. 437, 441, 363 S.E.2d 672, 675 (1988)).

2 Gemini's Amended Operating Agreement is attached to Plaintiff's Complaint and First Amended Complaint as Exhibit A.

3 According to an Affidavit of Attempted Service filed in the New York Action, La Mack and Massaro first attempted to serve Obeid in the North Carolina Action the day after they were served with the Complaint in the New York Action. A copy of the Affidavit of Attempted Service is attached as Exhibit B to Defendant's Brief in Support of the Motion to Dismiss.

4 The New York Court's Order is attached as Exhibit A to Defendant's Notice of Issuance of Order, filed November 3, 2014.

5 Obeid's original Motion to Dismiss or Alternatively Stay Action lists paragraphs two and three as “2.”

6 Plaintiffs assert direct claims against Obeid in the First Amended Complaint for breach of the Amended Operating Agreement, breach of fiduciary duty, conversion, negligent misrepresentation, and tortious interference with prospective economic advantage. (*see generally* First Am. Compl.)

7 In light of the Court's determination that Plaintiffs have asserted direct claims in the initial Complaint, the Court declines to address whether Plaintiffs asserted valid derivative claims in the initial Complaint.

8 *See also* Def.'s Br. Supp. Mot., Ex. B, Affidavit of Attempted Service.

9 N.C.R.C.P. 15(c) provides that “[a] claim asserted in an amended pleading is deemed to have been interposed at the time the claim in the original pleading was interposed, unless the original pleading does not give notice of the transactions, occurrences, or series of transactions or occurrences, to be proved pursuant to the amended pleading.” Even if the Court were to give the initial Complaint first filed status, only La Mack and Massaro's direct claims in their First Amended Complaint would be deemed to relate back to the earlier filed Complaint under Rule 15(c), first because Obeid had ample notice from the initial Complaint of the series of transactions or events that gave rise to the Individual Claims in the First Amended Complaint, and second because Gemini was not a named Plaintiff in the initial Complaint. *Bailey v. Handee Hugo's, Inc.,* 173 N.C.App. 723, 726–27, 620 S.E.2d 312, 315 (2005) (“While Rule 15 of the North Carolina Rules of Civil Procedure permits the relation-back doctrine to extend periods for pursuing claims, it does not apply to parties.”).

10 Obeid has included in the New York Action an additional 24 parties—Gemini Fund 5, LLC, 36 West 38th Street Holding, LLC, 33 Peck Slip Holding, LLC, Gemini Centerville Galleria, LLC, Gemini College Plaza H, LLC, Gemini Dubois Mall, LLC, Gemini Indian Creek, LLC, Gemini Opportunity Fund I, LLC, Gemini Opportunity Fund IV, LLC, Gemini Parkway Plaza, LLC, Gemini Real Estate Partners, LP, Gemini Real Estate Indian Creek Member, LLC, Gemini Rio Norte H, LP, Gemini River Ridge, LLC, Gemini Tamiami, LLC, Gemini Youngsville Crossing M, LLC, Gemini 300 West 22nd Street, LLC, Gemini Rowlett Partners, LLC, Gemini Rowlett Crossing, LP, Gemini 449 West 36th Street MT, LLC, Gemini 442 West 36th Street MT, LLC, Gemini 305 West 39th Street MT, LLC, Gemini 135 East Houston MT, LLC, and Gemini Equity Partners.

KeyCite Yellow Flag - Negative Treatment
Declined to Extend by Francis v. Transunion Rental Screening Solutions, LLC, E.D.Va., January 22, 2020

11 Fed.Appx. 297
This case was not selected for publication in the Federal Reporter.
Not for Publication in West's Federal Reporter.
See Fed. Rule of Appellate Procedure 32.1 generally governing citation of judicial decisions issued on or after Jan. 1, 2007. See also Fourth Circuit Rule 32.1 (Find CTA4 Rule 32.1)
United States Court of Appeals, Fourth Circuit.

The LEARNING NETWORK, INCORPORATED; Headland Digital Media, Incorporated; Pearson Incorporated; Pearson, PLC; Phillip Hoffman, Plaintiffs–Appellees,
v.
DISCOVERY COMMUNICATIONS, INCORPORATED, Defendant–Appellant.

No. 01–1202.
|
Argued May 9, 2001.
|
Decided June 7, 2001.

Synopsis
The United States District Court for the District of Maryland, Marvin J. Garbis, J., granted preliminary injunction enjoining plaintiff in a New York trademark infringement and dilution suit from proceeding in that action, and party enjoined appealed. The Court of Appeals held that the district court did not abuse its discretion in applying the first-filed rule in favor of the Maryland action, and in finding no exception to that rule.

Affirmed.

West Headnotes (3)

[1] Federal Courts Dismissal or nonsuit in general

Orders denying motions to dismiss are not final, and thus, not immediately reviewable.

1 Case that cites this headnote

[2] Declaratory Judgment Concurrent and conflicting jurisdiction

Federal Courts Particular cases, contexts, and questions

New York lawsuit alleging trademark infringement and dilution was not imminent so as to merit an exception to the first filed rule and thus preclude district court in Maryland, in which opposing party had filed a declaratory judgment action concerning the marks, from enjoining the New York plaintiff from proceeding, where New York plaintiff's letter to defendant was sent nearly six weeks after latter's press release concerning use of name and neither overtly threatened litigation nor threatened to take particular action if defendant failed to respond to the letter by a certain date, and there was a total of at least eight to ten weeks after plaintiff had notice of the Maryland action and was not bound by a standstill agreement in which it failed to file the allegedly "imminent" New York action.

62 Cases that cite this headnote

[3] Declaratory Judgment Anticipation of other action

Declaratory judgment actions are proper when there is a potential lawsuit, but in some cases, there may come a point after which the potential lawsuit that may otherwise have given rise to a proper declaratory judgment action has become so certain or imminent that the declaratory judgment action is merely an improper act of forum shopping, or a race to the courthouse.

34 Cases that cite this headnote

***298** Appeal from the United States District Court for the District of Maryland, at Greenbelt. Marvin J. Garbis, District Judge. (CA–00–2565–MJG).

Attorneys and Law Firms

Robert Lloyd Raskopf, White & Case, L.L.P., New York, NY, for appellant. Peter Buscemi, Morgan, Lewis & Bockius, L.L.P., Washington, DC, for appellees. ON BRIEF: John P. Reiner, White & Case, L.L.P., New York, NY, for appellant. Halley F. Sexter, Morgan, Lewis & Bockius, L.L.P., Washington, DC; Stephen W. Feingold, David Leichtman, Morgan, Lewis & Bockius, L.L.P., New York, NY, for appellees.

Before WIDENER, Circuit Judge, HAMILTON, Senior Circuit Judge, and MICHAEL, Senior United States District Judge for the Western District of Virginia, sitting by designation.

OPINION

PER CURIAM.

****1** Discovery Communications, Inc. ("Discovery") appeals an order of the United States District Court for the District of Maryland enjoining Discovery from proceeding in a trademark infringement and dilution suit Discovery filed against Learning Network, Inc. ("Network") in the United States District Court for the Southern District of New York. For the reasons stated herein, we shall affirm the order of the court below.

I.

Appellee Network, a subsidiary of Pearson, Inc. ("Pearson"), distributes textbooks and other educational materials world-wide. Network's principal place of business is in San Francisco, California. Pearson's ***299** principal place of business is in New York, New York. The public has access to Network's services on the Internet through a dedicated America Online ("AOL") link, and through the domain "learningnetwork.com," which is owned by Headland Digital Media ("Headland"), an affiliate of Network.

Appellant Discovery, a Delaware corporation, has its principal place of business in Bethesda, Maryland. Discovery provides entertainment and information services using multiple media platforms.

Discovery's flagship product is the Discovery Channel, a cable network launched in 1985. In or about 1991, Discovery acquired The Learning Channel, which had been broadcasting educational and information programming since 1982. Discovery provides education-based programming and content to teachers and students under The Learning Channel brand. Discovery owns numerous federal trademark registrations and pending applications for "THE LEARNING CHANNEL" and "TLC THE LEARNING CHANNEL" marks. Discovery also operates a web-site, located at "discovery.com," which contains a section reflecting the attributes of The Learning Channel's on-air brand. This section is located at "www.tlc.discovery.com." Discovery also owns the domain name "learningchannel.com," although it apparently has not used it.

On June 29, 2000, Network issued a press release announcing that it would become an anchor tenant on the main screen of AOL's Research and Learn Channel, providing online educational content for all stages of a person's life. The press release also announced Network's intention to launch its own educational website. On August 11, 2000, counsel for Discovery sent a cease and desist letter to Phillip Hoffman, Chief Executive Officer of Network, and President of Pearson ("August 11 Letter"). In the August 11 Letter, Discovery alleged violations of its trademark rights in "THE LEARNING CHANNEL" and "TLC THE LEARNING CHANNEL" by Network's use of the name "Learning Network;" reserved all rights and remedies; expressed desire "to reach a quick and amicable resolution to this matter;" and requested Network's "urgent attention" to the matter.

On August 18, 2000, Network's counsel responded with a letter stating that Network was "looking into" Discovery's allegations and would contact Discovery with a response "promptly." However, on August 23, 2000, Network and Headland filed a declaratory judgment action in the District Court of Maryland, seeking a declaration that Network's use of the designation "LEARNING NETWORK" did not infringe or dilute the distinctive quality of Discovery's marks ("Maryland Action").

****2** On or about August 30, 2000, Network provided Discovery with a courtesy copy of the complaint filed in the Maryland Action. A series of correspondence and meetings followed, which lead to an agreement on September 29, 2000, wherein the parties agreed not to "file or serve further pleadings," pending the outcome of the settlement

negotiations ("Standstill Agreement"). Sometime between December 6 and 12, 2000, settlement negotiations broke off.

On or about December 20, 2000, Discovery's counsel accepted formal service of the summons and complaint in the Maryland Action. Discovery was required to respond to the complaint by January 9, 2001. As this date approached, counsel for Discovery called Network to request an extension of the time to respond, on the basis that Discovery had not yet determined how it would proceed. Network agreed to the extension of time, but apparently did so on the strength of assurances from counsel for Discovery that it was not ***300** intending to "sandbag" Network. Accordingly, on or about January 9, 2001, the parties filed a stipulation requesting an extension of the time for Discovery to respond to the complaint until February 8, 2001. The court in the Maryland Action granted the extension.

Despite Discovery's apparent assurances that it would not "sand-bag" Network, on or about January 22, 2001, Network's counsel was advised that Discovery had filed an action in the Southern District of New York ("New York Action"). In the New York Action, Discovery alleged trademark infringement and dilution as well as state law claims against Network, Headland, Pearson, and Hoffman. Counsel for Discovery also advised counsel for Network that Discovery planned to file an application for a temporary restraining order and preliminary injunction in the New York Action. The apparent purpose of this motion was to enjoin Network from proceeding in the Maryland Action.

On January 23, 2001, the presiding judge in the New York Action denied Discovery's application for a temporary restraining order, but ordered expedited discovery and set a trial date of February 27, 2001. On January 25, 2001, Network filed, in the Maryland Action, a motion for a preliminary injunction enjoining Discovery from proceeding in the New York Action, and from instituting any action in any other court involving substantially the same issues. Discovery filed a cross motion to dismiss the Maryland Action.

[1] On February 6, 2001, the presiding judge in the Maryland Action granted Network's motion for preliminary injunction and denied Discovery's motion to dismiss. Discovery herein appeals the order of preliminary injunction. [1]

II.

We review the grant or denial of a preliminary injunction for an abuse of discretion, recognizing that preliminary injunctions are extraordinary remedies to be granted in limited circumstances. *See* *Direx Israel, Ltd. v. Breakthrough Med. Corp.,* 952 F.2d 802, 814 (4th Cir.1991). We also review decisions of the district courts to grant, or to refrain from granting, declaratory relief for an abuse of discretion. *See* *Wilton v. Seven Falls Co.,* 515 U.S. 277, 289, 115 S.Ct. 2137, 132 L.Ed.2d 214 (1995). Thus, "a district court's decision to stay or dismiss a declaratory judgment action is reviewed for abuse of discretion." *Centennial Life Ins. Co. v. Poston,* 88 F.3d 255, 258 (4th Cir.1996). District courts are "vested with discretion in the first instance, because facts bearing on the usefulness of the declaratory judgment remedy, and the fitness of the case for resolution, are peculiarly within their grasp." *Wilton,* 515 U.S. at 289; *Centennial Life,* 88 F.3d at 258.

III.

****3** The court below relied on the "first-filed" rule to enjoin Discovery from proceeding in the New York Action. The Fourth Circuit has recognized the "first to file" rule of the Second Circuit, giving priority to the first suit absent showing of a balance of convenience in favor of the second. *See* *Ellicott Mach. Corp. v. Modern* ***301** *Welding Co., Inc.,* 502 F.2d 178, 180 n. 2 (4th Cir.1974), citing and quoting *Mattel, Inc. v. Louis Marx & Co.,* 353 F.2d 421, 423 (2d Cir.1965). Discovery challenges the district court's decision to enjoin the New York Action, arguing that the district court improperly applied the first-filed rule to Network's benefit. Discovery argues that the first-filed rule was inapplicable because of special circumstances [2] or a balance of convenience in favor of New York.

A.

[2] In support of Discovery's argument for a special circumstances exception to the first-filed rule, Discovery asserts that Network's filing of the Maryland Action was an improper anticipatory filing because it was made under the threat of imminent litigation. Accordingly, Discovery argues, the impropriety of Network's filing of the Maryland Action warrants a departure from the first-filed rule, and the

court below abused its discretion by giving preference to the Maryland Action and enjoining the later-filed New York Action.

[3] Declaratory judgment actions are proper when there is a potential lawsuit. *See e.g. United Capitol Ins. Co. v. Kapiloff,* 155 F.3d 488, 494 (4th Cir.1998) ("The declaratory judgment action allows the uncertain party to gain relief from the insecurity caused by a potential suit waiting in the wings."). Here, a case or controversy existed between the parties because Discovery's assertion of rights in the August 11 letter was contrary to Network's immediate business plan.

In some cases, there may come a point after which the potential lawsuit that may otherwise have given rise to a proper declaratory judgment action has become so certain or imminent, that the declaratory judgment action is merely an improper act of forum shopping, or a race to the courthouse. *See e.g., Aetna Cas. & Sur. Co. v. Quarles,* 92 F.2d 321, 324 (4th Cir.1937) (Courts should decline jurisdiction over declaratory judgment actions filed "for the purpose of anticipating the trial of an issue in a court of coordinate jurisdiction."); *Citigroup Inc. v. City Holding Co.,* 97 F.Supp.2d 549, 557 (S.D.N.Y.2000) ("An improper anticipatory filing is one made under the apparent threat of a presumed adversary filing the mirror image of that suit in another court." (citations and quotations omitted)). Discovery argues that the imminence of its lawsuit against Network made Network's filing in Maryland improper, thereby not entitling the Maryland Action to the presumptive benefits of the first-filed rule.

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. *See Myles Lumber Co. v. CNA Financial Corp.,* 233 F.3d 821, 824 (4th Cir.2000); *Centennial Life Ins. v. Poston,* 88 F.3d 255, 257 (4th Cir.1996); *Nautilus Ins. Co. v. Winchester Homes, Inc.,* 15 F.3d 371, 377 (4th Cir.1994).

****4** However, there can be no race to the courthouse when only one party is running. Discovery's own actions belie its argument that its potential suit against Network was imminent at the time of the filing of the Maryland Action. Discovery's August 11 letter to Network was sent nearly six weeks after Network's June 29 press release, and neither overtly threatened ***302** litigation nor threatened to take particular action if Network failed to respond to the letter by a certain date. After Discovery received notice on August 30, 2000 of the Maryland Action, it did not file the New York action until January 22, 2001. The court recognizes that the Standstill Agreement was in place for approximately eight to ten weeks, during which time Discovery could not have filed the New York Action. However, even after the negotiations broke off in December and Discovery formally was served in the Maryland Action, Discovery waited an additional four to six weeks before filing the New York Action. Thus, not including the period of time between Network's press release and Discovery's August 11 cease and desist letter, there was a total of at least eight to ten weeks after which Discovery had notice of the Maryland Action and was not bound by a Standstill Agreement, but failed to file the allegedly "imminent" New York Action. In fact, as of January 9, 2001, counsel for Discovery indicated to counsel for Network that Discovery was uncertain as to the course of action it intended to undertake. Such representations, combined with a relatively mild cease and desist letter and several months of inaction, counsel against a finding that the potential lawsuit that gave rise to the Maryland Action was imminent. Accordingly, the district court did not abuse its discretion in finding that the Maryland Action was not an act of procedural fencing, so as to merit an exception to the first-filed rule.

B.

This court also recognizes an exception to the first-filed rule when the balance of convenience favors the second action. *See Ellicott,* 502 F.2d at 180 n. 2. Discovery did not argue this point in its briefs to this court; however, balance of convenience briefly was argued by Network. As is often the case, there are factors counseling in favor of both fora. However, the district court's well-reasoned finding that the balance of convenience did not favor New York was not an abuse of discretion. Accordingly, the balance of convenience exception to the first-filed rule is inapplicable in this case.

IV.

Because the court below did not abuse its discretion in applying the first-filed rule in favor of the Maryland Action, and in finding no exception to the first-filed rule applicable to this case, the Maryland Action deserves priority over the New York Action. Consequently, the injunction issued by the court below was not an abuse of discretion, and hereby is

AFFIRMED.

All Citations

11 Fed.Appx. 297, 2001 WL 627618

Footnotes

1 Discovery's outstanding motion to stay the District Court of Maryland's order enjoining proceedings in the New York Action is rendered moot by this opinion. The motion to expedite the briefing schedule also is now moot. Furthermore, contrary to Appellant's assertion at oral argument, this court does not have jurisdiction to consider the denial of Discovery's motion to dismiss in the Maryland Action. Orders denying motions to dismiss are not final, and thus, not immediately reviewable. *See* *Catlin v. United States,* 324 U.S. 229, 236, 65 S.Ct. 631, 89 L.Ed. 911 (1945).

2 The Fourth Circuit has not stated explicitly that special circumstances may warrant an exception to the first-filed rule. Because we find that the court below did not abuse its discretion in finding no special circumstances in this case, we do not herein undertake to determine whether the presence of special circumstances would, in fact, merit a departure from the first-filed rule.

2014 WL 1092319
Only the Westlaw citation is currently available.
United States District Court, W.D. North Carolina, Asheville Division.

NORTH AMERICAN ROOFING SERVICES, INC. and Carlisle Construction Materials Incorporated, Plaintiffs,
v.
BPP RETAIL PROPERTIES, LLC, Defendant.

Civil No. 1:13–cv–000119–MR–DLH.
|
Signed March 18, 2014.

Attorneys and Law Firms

John L. Kubis, Jr., William Andrew Bulfer, Teague Campbell Dennis & Gorham, LLP, Asheville, NC, Lawrence T. Bowman, Kane Russell Coleman & Logan, P.C., Dallas, TX, for Plaintiffs.

Avery Ann Simmons, David Hill Bashford, Bradley Arant Boult Cummings LLP, Charlotte, NC, for Defendant.

ORDER

MARTIN REIDINGER, District Judge.

***1 THIS MATTER** is before the Court for resolution of the Defendant's Motions to Dismiss [Docs. 5, 7]; the Magistrate Judge's Memorandum and Recommendation regarding the disposition of such Motions [Doc. 34]; the Plaintiffs' Objections to the Findings of Fact, Conclusions of Law, and Recommendation [Doc. 35]; and the Defendant's Response in Opposition to Plaintiff's Objections to the Memorandum and Recommendation [Doc. 36].

I. PROCEDURAL BACKGROUND

The Plaintiffs North American Roofing Services, Inc. ("North American") and Carlisle Construction Materials Incorporated ("Carlisle") (collectively "Plaintiffs") brought this action on March 27, 2013 in Buncombe County Superior Court against the Defendant BPP Retail Properties, LLC ("BPP"), seeking a declaratory judgment that they are not obligated to replace the roofs of six properties located in Puerto Rico and are not subject to consequential damages stemming from roof leaks caused by a failure in the membrane covering the roofs of the six buildings. [Doc. 1–1]. The Plaintiffs further contend that six warranty agreements entered into between BPP and North American limit the damages that BPP may seek as a result of any leaks in the roof and constitute as BPP's sole legal remedy against North American. [*Id* .]. On April 25, 2013, BPP removed this action to this Court based on diversity jurisdiction. [Doc. 1].

BPP filed suit against the Plaintiffs and third party Carlisle Syntec Incorporated ("Carlisle Syntec") in the United States District Court for the District of Puerto Rico the day after the Plaintiffs brought their state court action. BPP asserted claims for negligence and breach of contract against North American and a products liability claim against the Plaintiffs and Carlisle Syntec. On May 6, 2013, BPP moved to dismiss Carlisle as a Plaintiff in this action and to either dismiss this action in its entirety or transfer it to the United States District Court for the District of Puerto Rico. [Docs. 5–8].

Pursuant to 28 U.S.C. § 636(b) and the Standing Orders of Designation of this Court, the Honorable Dennis L. Howell, United States Magistrate Judge, was designated to consider the Defendant's motions and to submit a recommendation regarding their disposition. On October 29, 2013, the Magistrate Judge entered a Memorandum and Recommendation in which he recommended that the Court should exercise its discretion and decline to issue a declaratory judgment in this case. [Doc. 34]. The Plaintiffs timely filed objections [Doc. 35], to which BPP has responded [Doc. 36].

Having been fully briefed, this matter is ripe for disposition.

II. STANDARD OF REVIEW

The Federal Magistrate Act requires a district court to "make a *de novo* determination of those portions of the report or specific proposed findings or recommendations to which objection is made." 28 U.S.C. § 636(b)(1). In order "to preserve for appeal an issue in a magistrate judge's report, a party must object to the finding or recommendation on that issue with sufficient specificity so as reasonably to alert the district court of the true ground for the objection." *United States v. Midgette,* 478 F.3d 616, 622 (4th Cir.2007). The Court is not required to review, under a *de novo* or any other standard, the factual or legal conclusions of the magistrate judge to which no objections have been raised. *Thomas v. Arn,* 474 U.S. 140, 150 (1985). Additionally, the Court need not conduct a *de novo* review where a party makes only "general and conclusory objections that do not direct the court to a specific error in the magistrate's proposed findings and

recommendations." *Orpiano v. Johnson,* 687 F.2d 44, 47 (4th Cir.1982).

III. DISCUSSION

***2** The Plaintiffs commenced this action relying on the North Carolina Declaratory Judgment Act, which gives courts discretion in granting declaratory relief. N.C. Gen.Stat. § 1–257. The Court may deny declaratory relief where: "(1) the requested declaration will serve no useful purpose in clarifying or settling the legal relations at issue; or (2) the requested declaration will not terminate or afford relief from the uncertainty, insecurity, or controversy giving rise to the proceeding." *Augur v. Augur,* 356 N.C. 582, 588–89, 573 S.E.2d 125, 130 (2002).

As the Magistrate Judge aptly noted, judicial economy and efficiency favor proceedings that will settle all of the issues in an underlying controversy. *Coca–Cola Bottling Co. Consol. v. Durham Coca–Cola Bottling Co.,* 141 N.C.App. 569, 577, 541 S.E.2d 157, 163 (2000). Declaratory relief is particularly disfavored where "a separate suit has been filed, or is likely to be filed, that will more fully encompass the scope of the entire controversy." *Id.,* 541 S.E.2d at 163.

First, the Plaintiffs argue that the Magistrate Judge erred in determining that the entire case and controversy between the parties will not be settled by this declaratory judgment action. [Doc. 35 at 4]. The Plaintiffs claim that the "piecemeal" litigation in this dispute springs from BPP's failure to abide by the forum selection clause, BPP's "attempt to improperly ignore the NARCO Warranties," and BPP's filing of "unsubstantiated and untenable tort and contract claims." [*Id.* at 4]. Further, the Plaintiffs give numerous arguments regarding why they believe that BPP's claims will fail as a matter of law. [Doc. 35 at 4–7].

Contrary to the Plaintiffs' argument, the issuance of a declaratory judgment in this action would not completely resolve the entire underlying controversy between the parties. As the Magistrate Judge correctly opined:

> Defendant asserts product liability claims against the manufacturer of the TPO Membrane installed on the six buildings in the Puerto Rico action. A declaratory judgment issued by this Court addressing the rights and legal obligations of Defendant and Plaintiff North American Roofing under the terms of the warranties would not address these product liability claims. In fact, one of the defendants in the Puerto Rico action, Carlisle Syntec Incorporated, is not even a party to this action ...

[Doc. 34 at 8]. Thus, regardless of the validity of the claims asserted in the Puerto Rico case, or the consideration of whether Carlisle Syntec is a proper party in the Puerto Rico case, this Court exercises its discretion to deny rendering a declaratory judgment. The United States District Court for the District of Puerto Rico will be able to competently determine whether the warranties limit the legal remedies sought by BPP, whether the warranties require that the entire case be transferred to this Court, and whether the parties and legal claims are valid in the Puerto Rico case. This objection, therefore, is overruled.

***3** Second, the Plaintiffs assert that the Magistrate failed to consider the valid and enforceable forum selection clause within the warranties entered into between North American and BPP. [Doc. 35 at 7]. This clause stated that any litigation concerning the warranties would be litigated in either the Superior Court of Buncombe County or the United States District Court for the Western District of North Carolina. [Doc. 34 at 3]. The Plaintiffs maintain that the forum selection clause within the warranties "address[es] all disputes concerning conditions and required repairs, if any, to the roofs at issue." [Doc. 35 at 7–8].

Indeed, the Magistrate Judge specifically addressed and considered the forum selection clause within the warranties at issue in this case. [Doc. 34 at 3, 7]. Having done so he then stated:

> the United States District Court for the District of Puerto Rico is more than capable of determining for itself whether the warranties limit the legal remedies sought by Defendant and/or whether the warranties require that the entire case be transferred to this Court. The United States District Court for the District of Puerto Rico is also in the

> best situation to determine whether the breach of contract claim and tort claim asserted by Defendant against Plaintiff North American Roofing are subject to the limitations in the warranties and to determine the appropriate course of action.

[Doc. 34 at 7–8]. Additionally, the Magistrate Judge properly noted that the "timing of the lawsuit should generally be left to the injured party, not the potential tortfeasor." [Doc. 34 at 7 (citing *Coca–Cola Bottling,* 141 N.C.App. at 579, 541 S.E.2d at 164)]. The Court concurs with the Magistrate Judge's assessment, and accordingly this objection is also overruled.

Third, the Plaintiffs claim that the Magistrate improperly concluded that the Plaintiffs raced to the courthouse. [Doc. 35 at 10]. Although the Fourth Circuit has "recognized the 'first to file' rule of the Second Circuit, giving priority to the first suit absent showing of a balance of convenience in favor of the second," *Learning Network, Inc. v. Discovery Commc'ns, Inc.,* 11 F. App'x 297, 300–01 (4th Cir.2001) (citations omitted), "[i]n some cases, there may come a point after which the potential lawsuit that may otherwise have given rise to a proper declaratory judgment action has become so certain or imminent, that the declaratory judgment action is merely an improper act of forum shopping, or a race to the courthouse." *Id.* at 301.

In recommending that this Court exercise its discretion regarding the granting of a declaratory judgment, the Magistrate Judge properly noted: "Plaintiffs *may not use* the North Carolina Declaratory Judgment Act as a means of racing Defendant to the courthouse of Plaintiffs' choosing." [Doc. 34 at 7 (emphasis added)]; *see Coca–Cola Bottling,* 141 N.C.App. at 579, 541 S.E.2d at 164; *Poole v. Bahamas Sales Accoc. LLC,* 209 N.C.App. 136, 142, 705 S.E.2d 13, 18 (2011); *Klingspor Abrasives, Inc. v. Woolsey,* No. 5:08CV–152, 2009 WL 2397088, *4 (W.D.N.C. Jul. 29, 2009) ("A declaratory suit ... cannot be used to deprive ... the natural plaintiff ... the right to choose the time and forum to settle ... [and][s]uch suits will not be condoned."). Particularly, BPP did not fail to start litigation or delay the litigation process, as it filed suit the very day after the Plaintiffs filed this case. [*Id.*]. [1]

***4** The Plaintiffs claim that "the record is devoid of any evidence to suggest that the Puerto Rico action was imminent *before* it was actually filed. Though Plaintiffs acknowledge that Defendant had threatened a lawsuit for recovery of damages from full roof replacement in the unknown future, Plaintiffs were not required to sit on their hands and wait to be sued [Doc. 35 at 11]. This case is distinguishable, however, from *Learning Network, Inc.,* 11 F. App'x at 300, upon which the Plaintiffs rely, in which "only one party [was] running [in the race]." [2] Thus, the Magistrate Judge correctly recommended the exercise of this Court's discretion, since "[s]uch procedural fencing [as races to the courthouse] counsels against exercising jurisdiction over a declaratory judgment action." *Id.* at 301 (citing *Myles Lumber Co. v. CAN Financial Corp.,* 233 F.3d 821, 824 (4th Cir.2000); *Centennial Life Ins. v. Poston,* 88 F.3d 255, 257 (4th Cir.1996); *Nautilus Ins. Co. v. Winchester Homes, Inc.,* 15 F.3d 371, 377 (4th Cir.1994)). The Plaintiffs' objection on this point is overruled.

Finally, the Plaintiffs contend that Carlisle is a beneficiary of the forum selection clause. [Doc. 35 at 11]. The Magistrate Judge noted that the warranties "may limit the legal remedies against Plaintiff North American Roofing," but "the same cannot be said as to Plaintiff Carlisle ..." [Doc. 34 at 8]. The Court agrees. Carlisle is not a party to the warranties. While the Plaintiffs rely on cases to claim that forum selection clauses apply to nonparties if their conduct is "closely related" to the contract [Doc. 35 at 11], such cases are of no precedential value in this Court. In any event, this Court need not determine whether Carlisle is a third party beneficiary of the warranties because the United States District Court for the District of Puerto Rico can make an appropriate judicial determination regarding this issue and regarding whether the case needs to be transferred.

IV. CONCLUSION

Having conducted a *de novo* review of those portions of the Memorandum and Recommendation to which objections were filed, the Court concludes that the Magistrate Judge's proposed conclusions of law are supported by and are consistent with current case law. Thus, the Plaintiffs' Objections to the Memorandum and Recommendation are therefore overruled.

ORDER

IT IS, THEREFORE ORDERED that the Plaintiffs' Objections [Doc. 35] are **OVERRULED;** the Magistrate

Judge's Memorandum and Recommendation [Doc. 34] is **ACCEPTED;** and the Defendant's Motions to Dismiss [Docs. 5, 7] are **DENIED AS MOOT.**

IT IS FURTHER ORDERED that, in the exercise of the Court's discretion, this case is **DISMISSED WITHOUT PREJUDICE.**

IT IS SO ORDERED.

MEMORANDUM AND RECOMMENDATION

DENNIS L. HOWELL, United States Magistrate Judge.

Pending before the Court are Defendant's Motions to Dismiss [# 5 & # 7]. Plaintiffs brought this action in Buncombe County Superior Court for a declaratory judgment pursuant to the North Carolina Declaratory Judgment Act. Specifically, Plaintiffs seek a judgment that they are not obligated to replace the entire roof for six properties located in Puerto Rico and are not subject to consequential damages stemming from roof leaks caused by a failure in the membrane covering the roofs of the six buildings. Defendant removed the action to this Court on the basis of diversity jurisdiction. Subsequently, Defendant moved to dismiss Plaintiff Carlisle Construction Materials Incorporated ("Carlisle") and to either dismiss this action in its entirety or transfer it to the United States District Court for the District of Puerto Rico. The Court **RECOMMENDS** that the District Court decline to exercise its discretion to hear this case and dismiss this action without prejudice.

I. Background

***5** Plaintiff North American Roofing Services, Inc. ("North American Roofing") is a North Carolina company that provides and installs roofing systems for customers. (Pl.'s Compl. ¶¶ 1, 7.) Plaintiff North American Roofing entered into construction contracts to install roofs that incorporate a Reinforced Mechanically Attached Thermoplastic Polyolefin Laser Weld Roofing System ("TPO Membrane") on six building in Puerto Rico. (*Id.* ¶ 7–8.) Some of the TPO Membranes installed by Plaintiff North American Roofing were manufactured by Plaintiff Carlisle. (*Id.* ¶ 10.) Defendant is the current owner of the six properties at issue. (*Id.* ¶ 6.)

Defendant contends that the TPO Membrane is breaking down prematurely and, thus, the roofs on the six buildings are leaking. (*Id.* ¶¶ 9, 11, 16.) Defendant has demanded that Plaintiff North American Roofing replace the entire roofs on the six properties and compensate Defendant for all consequential damages caused by the leaks in the roof. (*Id.* ¶¶ 13, 16.) As a result, Plaintiffs filed a declaratory judgment action on March 27, 2013, in the Buncombe County Superior Court. Defendant subsequently removed the action to this Court based on diversity jurisdiction.

Plaintiffs' Complaint seeks a declaration that Defendant is prohibited from repairing and/or replacing the roofs until Plaintiff North American Roofing can inspect and investigate the cause and extent of any damage, that Plaintiff North American Roofing be permitted to repair the failing portions of the roof, and that Plaintiff North American Roofing is not obligated to reimburse Defendant for the costs of replacing the roofs or for consequential damages. Plaintiffs contend that six warranties allegedly entered into between Defendant and Plaintiff North American Roofing limit the damages Defendant may seek as a result of any leaks in the roof and constitute the sole legal remedy against it. These warranties also contain a North Carolina choice of law provision and a forum selection clause specifying that any litigation concerning the warranty be litigated in either the Superior Court of Buncombe County or the United States District Court for the Western District of North Carolina.

Meanwhile, Defendant brought an action against Plaintiffs and third party Carlisle Syntec Incorporated in the United States District Court for the District of Puerto Rico. Defendant filed the Puerto Rico action the day after Plaintiffs brought this action for declaratory judgment. Defendant asserts claims for negligence and breach of contract against Plaintiff North American Roofing relating to the installation of the TPO Membrane and a products liability claim against Plaintiffs and Carlisle Syntec Incorporated.

Subsequently, Defendant filed two Motions to Dismiss in this case. Defendant's motions are now properly before this Court for a Memorandum and Recommendation to the District Court.

II. Analysis

The North Carolina Declaratory Judgment Act provides that "[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 of validity arising under ... the contract and obtain a declaration of rights, status, or other legal relations thereunder." N.C. Gen.Stat. § 1–254. Section 1–

257, however, explicitly grants courts the discretion to decline a party's request for declaratory relief. N.C. Gen.Stat. § 1–257; *Augur v. Augur,* 573 S.E.2d 125, 129 (N.C.2002) ("Thus, while federal courts have construed the federal act to allow trial courts to grant or decline declaratory relief in their discretion, the NCUDJA has explicitly accorded this discretion to our trial courts."). A court may decline a request for declaratory relief where: "(1) the requested declaration will serve no useful purpose in clarifying or settling the legal relations at issue; or (2) the requested declaration will not terminate or afford relief from the uncertainty, insecurity, or controversy giving ride to the proceedings." *Augur,* 573 S.E.2d at 130.

***6** In considering these two principles, the Court should consider whether the declaratory judgment will settle the entire underlying controversy because declaratory relief should not be used " 'to try a controversy by piecemeal, or to try particular issued without settling the entire controversy.' " *Coca–Cola Bottling Co. Consol. v. Durham Coca–Cola Bottling Co.,* 541 S.E.2d 157,163 (N.C.Ct.App.2000) (*quoting Aetna Cas. & Sur. Co. v. Quarles,* 92 F.2d 321, 325 (4th Cir.1937)). "This is especially so where a separate suit has been filed, or is likely to be filed, that will more fully encompass the scope of the entire controversy." *Coca–Cola Bottling,* 541 S.E.2d at 163. Judicial economy and efficiency favor proceedings that will settle all of the issues in an underlying controversy. *Id.*

As the North Carolina Court of Appeals has also explained:

> These principles also call for consideration of the usefulness of a declaratory suit in light of the surrounding circumstances. A declaratory proceeding can serve a useful purpose where the plaintiff seeks to clarify its legal rights in order to prevent the accrual of damages, or seeks to litigate a controversy where the real plaintiff in the controversy has either failed to file suit, or has delayed in filing. However, a declaratory suit should not be used as a device for "procedural fencing." *See Nautilus Ins. Co. v. Winchester Homes, Inc.,* 15 F.3d 371, 377 (4th Cir.1994). A defendant in a pending lawsuit should not be permitted to bring a declaratory suit involving overlapping issues in a different jurisdiction as a strategic means of obtaining a more preferable forum. *See BASF Corp. v. Symington,* 50 F.3d 555, 559 (8th Cir.1995). Otherwise, the natural plaintiff in the underlying controversy would be deprived of its right to choose the forum and time of suit. *See id.* Furthermore, it is inappropriate for a potential tortfeasor to bring a declaratory suit against an injured party for the sole purpose of compelling the injured party "to litigate [its] claims at a time and in a forum chosen by the alleged tortfeasor." *Cunningham Bros., Inc. v. Bail,* 407 F.2d 1165, 1167 (7th Cir.), *cert. denied,* 395 U.S. 959, 89 S.Ct. 2100, 23 L . Ed.2d 745 (1969).
>
> We also note that in situations in which two suits involving overlapping issues are pending in separate jurisdictions, priority should not necessarily be given to a declaratory suit simply because it was filed earlier. Rather, if the plaintiff in the declaratory suit was on notice at the time of filing that the defendant was planning to file suit, a court should look beyond the filing dates to determine whether the declaratory suit is merely a strategic maneuver to achieve a preferable forum. *See Poston,* 88 F.3d at 258 ("[A]lthough the federal action was filed first, we decline to place undue significance on the race to the courthouse door, particularly in this instance where [the plaintiff] had constructive notice of [the defendant's] intent to sue."); *Mission Ins. Co. v. Puritan Fashions Corp.,* 706 F.2d 599, 602 (5th Cir.1983) (holding that plaintiff should not be permitted to gain precedence in time and forum by filing a declaratory action which is merely anticipatory of a parallel state action).

***7** *Id.* at 164; *see also Poole v. Bahamas Sales Accoc., LLC,* 705 S.E.2d 13, 18–19 (N.C.Ct.App.2011).

The Court finds that the District Court should decline to exercise its discretion and hear this declaratory judgment action. Plaintiffs, as potential tortfeasors, brought this declaratory judgment action against Defendant, the injured party, in an attempt to preempt a lawsuit by a traditional plaintiff and choose the time and place of the legal proceedings. *See Klingspor Abrasives, Inc. v. Woolsey,* 5:08CV–152, 2009 WL 2397088, at *4 (W.D.N.C. Jul. 29, 2009) (Voorhees, J.) ("A declaratory suit such as this cannot be sued to deprive ... the natural plaintiff in this controversy, the right to choose the time and forum to settle the matter. Such suits will not be condoned.") This is not a situation where the natural plaintiff in the dispute failed to initiate litigation or significantly delayed in doing so. In fact, Defendant brought an action against Plaintiffs the very day after Plaintiffs filed their declaratory judgment action in this Court. Plaintiffs may not use the North Carolina Declaratory Judgment Act as a means of racing Defendant to the courthouse of Plaintiffs' choosing. *See Coca–Cola Bottling,* 541 S.E.2d at 164; *Poole,* 705 S.E.2d at 18; *Woolsey,* 2009 WL 2397088, at *4.

The fact that the warranties include a choice of forum provision does not dictate a different result. The timing of the lawsuit should generally be left to the injured party, not the potential tortfeasor. *See Coca–Cola Bottling,* 541 S.E.2d at 164. Moreover, the United States District Court for the District of Puerto Rico is more than capable of determining for itself whether the warranties limit the legal remedies sought by Defendant and/or whether the warranties require that the entire case be transferred to this Court. The United States District Court for the District of Puerto Rico is also in the best situation to determine whether the breach of contract claim and tort claim asserted by Defendant against Plaintiff North American Roofing are subject to the limitations in the warranties and to determine the appropriate course of action.

Finally, resolving the declaratory judgment action would not resolve the entire underlying controversy. Defendant asserts products liability claims against the manufacturer of the TPO Membrane installed on the six buildings in the Puerto Rico action. A declaratory judgment issued by this Court addressing the rights and legal obligations of Defendant and Plaintiff North American Roofing under the terms of the warranties would not address these product liability claims. In fact, one of the defendants in the Puerto Rico action, Carlisle Syntec Incorporated, is not even a party to this action. Although the warranties, if found to be valid, may limit the legal remedies against Plaintiff North American Roofing on the claims stemming from the installation of the TPO Membrane, the same cannot be said as to Plaintiff Carlisle and third party Carlisle Syntec Incorporated. This Court will not try this case piecemeal as a declaratory judgment action addressing the rights and obligations of Plaintiff North American Roofing and Defendant under the terms of the warranties while a parallel proceeding on the underlying torts proceeds in federal court in Puerto Rico. Judicial economy and efficiency require that this Court exercise its discretion and decline to issue a declaratory judgment in this case. Accordingly, the Court **RECOMMENDS** that the District Court **DENY as moot** the Motions to Dismiss [# 5 & # 7] and **DISMISS** this case **without prejudice.**

III. Conclusion

***8** The Court **RECOMMENDS** that the District Court **DENY as moot** the Motions to Dismiss [# 5 & # 7] and dismiss this case without prejudice.

All Citations

Not Reported in F.Supp.3d, 2014 WL 1092319

Footnotes

1 The Plaintiffs also argue that the forum selection clause in the warranties "demonstrates that the parties, together and for valuable consideration, chose the appropriate forum for litigating their disputes long before the filing of any suit and thus, Defendant has no right to choose another forum now. Therefore, Defendant could not possibly be deprived of its right to choose a forum because a valid agreement already dictated where this matter would be litigated." [Doc. 35 at 10]. As stated previously, the United States District Court for the District of Puerto Rico will be able to assess the forum selection clause, rule as to whether or not it applies to all claims in this action, and transfer the case if necessary.

2 BPP notes that "[o]n December 31, BPP's counsel sent a letter to counsel for North American, stating 'Should NAR fail to respond ... within 10 business days from the date of this letter, BPP will immediately enforce all of its legal rights and remedies....' (Dec. 31 Letter, Doc. 20–1, p. 29). [Doc. 36 at 9]. Although BPP did not file suit immediately after the ten day period as it awaited an inspection, [Doc. 36 at 9], the litigation was imminent in this case. This case contrasts *Learning Network* in which a letter was sent some time after [the other party's] action, "and neither threatened litigation nor threatened to take particular action if [the other party] failed to respond to the letter by a certain date." *Id.,* 11 F. App'x at 301–02. As the Magistrate Judge noted:

> in situations in which two suits involving overlapping issues are pending in separate jurisdictions, priority should not necessarily be given to a declaratory suit simply because it was filed earlier. Rather, if the plaintiff in the declaratory suit was on notice at the time of filing that the defendant was planning to file suit,

> a court should look beyond the filing dates to determine whether the declaratory suit is merely a strategic maneuver to achieve a preferable forum.

[Doc. 34 at 6, quoting *Coca–Cola Bottling,* 141 N.C.App. at 579, 541 S.E.2d at 164 (citations omitted)].

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Only the Westlaw citation is currently available.
United States District Court, D. Arizona.

Pinal COUNTY, Plaintiff,
v.
UNITED STATES of America, Defendant.

No. CV–09–00917–PHX–NVW.
|
Sept. 3, 2010.

Attorneys and Law Firms

Charles Steven Price, James T. Braselton, Tricia Schafer, Mariscal Weeks McIntyre & Friedlander PA, Phoenix, AZ, for Plaintiff.

Sue A. Klein, U.S. Attorney's Office, Phoenix, AZ, for Defendant.

ORDER

NEIL V. WAKE, District Judge.

***1** In this quiet title action pursuant to 28 U.S.C. § 2409a, Plaintiff Pinal County seeks a determination that its property interest in San Pedro Road in Pinal County, Arizona, is superior to Defendant United States' competing conservation easement. Now before the Court are the parties' cross motions for summary judgment (Docs.34, 35). For the following reasons, Pinal County's motion is granted and the United States' motion is denied.

I. Legal Standard

Summary judgment is warranted if the evidence shows there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. Fed.R.Civ.P. 56(c). The moving party must produce sufficient evidence to persuade the Court that there is no genuine issue of material fact. *Nissan Fire & Marine Ins. Co., Ltd. v. Fritz Cos., Inc.,* 210 F.3d 1099, 1102 (9th Cir.2000). Conversely, to defeat a motion for summary judgment, the nonmoving party must show that there are genuine issues of material fact. *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 250, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986). A material fact is one that might affect the outcome of the suit under the governing law, and a factual issue is genuine "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Id.* at 248.

The moving party bears the initial burden of identifying those portions of the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, which it believes demonstrate the absence of any genuine issue of material fact. *See Celotex Corp. v. Catrett,* 477 U.S. 317, 323, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986). If the nonmoving party would bear the burden of persuasion at trial, the moving party may carry its initial burden of production under Rule 56(c) by producing "evidence negating an essential element of the nonmoving party's case," or by showing, "after suitable discovery," that the "nonmoving party does not have enough evidence of an essential element of its claim or defense to carry its ultimate burden of persuasion at trial." *Nissan Fire,* 210 F.3d at 1105–06; *High Tech Gays v. Defense Indus. Sec. Clearance Office,* 895 F.2d 563, 574 (9th Cir.1990).

When the moving party has carried its burden under Rule 56(c), the nonmoving party must produce evidence to support its claim or defense by more than simply showing "there is some metaphysical doubt as to the material facts." *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.,* 475 U.S. 574, 586, 106 S.Ct. 1348, 89 L.Ed.2d 538 (1986). Where the record, taken as a whole, could not lead a rational trier of fact to find for the nonmoving party, there is no genuine issue of material fact for trial. *Id.* The nonmoving party's evidence is presumed to be true and all inferences from the evidence are drawn in the light most favorable to the nonmoving party. *Eisenberg v. Ins. Co. of North America,* 815 F.2d 1285, 1289 (9th Cir.1987). If the nonmoving party produces direct evidence of a genuine issue of material fact, the motion for summary judgment is denied. *Id.*

II. Facts

***2** San Pedro Road, the property at issue in this case, crosses the San Pedro River in Pinal County, Arizona, near the town of Dudleyville. In 1994, the property surrounding what was to become the San Pedro Road river crossing was owned by George Gordon. After a 1993 flood washed out the Romero Bridge, an alternative river crossing, Gordon granted a Temporary Highway Easement ("Highway Easement") to Pinal County for the construction and maintenance of a public highway, including a river crossing, across Mr. Gordon's property "until the construction of a new bridge across the San Pedro River." [1] According to the terms of the Easement

Agreement, executed on December 15, 1994, the Highway Easement is automatically renewed for additional one-year periods "unless written notice is given by either party, on or before December 1 of any year, of an intent not to renew the Agreement." The Agreement is binding on George Gordon, Pinal County, and their heirs, successors, assigns, and legal representatives.

Sometime prior to March 1996, Gordon transferred title to his property to Jean and Eric Schwennesen in fee simple. On March 1, 1996, the Schwennesens conveyed a perpetual conservation easement ("Conservation Easement") over approximately 215 acres of the property to the Nature Conservancy, a District of Columbia non-profit corporation, in exchange for $140,000.

According to Clause 1 of the Deed of Conservation Easement, which makes no mention of the Highway Easement, the purpose of the Conservation Easement is to "assure that the Property will be retained forever in open space to provide for a diversity of wildlife habitat, education and agriculture and to prevent any use of the Property that will significantly impair or interfere with these values." Clause 3 therefore grants to the Nature Conservancy the right to "prevent any activity on or use of the Property that is inconsistent with the purpose of this easement ...." Clause 2, however, reserves to the Schwennesens the right to "engage in or permit or invite others to engage in all uses of the Property that are not expressly prohibited herein and are not inconsistent with the purpose of [the Conservation Easement]." Finally, Clause 11 provides that the covenants, terms, conditions, and restrictions of the Conservation Easement are binding on the parties and their heirs, successors, assigns, and personal representatives, and that interpretation of the Deed is governed by Arizona law.

In addition to the above terms, one of the Deed's recitals states that certain Baseline Documentation, completed in February 1996 and attached to the Deed as Exhibit C, provides "an accurate representation of the Property at the time of this grant and is intended to serve as an objective information baseline for monitoring compliance with the terms of this grant." The Baseline Documentation generally notes some of the ecological features of the Schwennesens' tract and describes the ecological significance of the Conservation Easement. It also notes the following "existing developments" on the property:

> ***3** The most dominant man-made features on this tract are the Dudleyville Crossing; the Magma Copper Company railway spur; the ASARCO water line; the county maintained dirt road that runs from the crossing downstream; utility lines along the county road and the cleared fields and pastures on the northwestern side of the property.

The parties agree that "Dudleyville Crossing" refers to the San Pedro Road river crossing.

On April 21, 1997, the Nature Conservancy assigned "all of the Conservancy's rights and obligations as described in the Conservation Easement" to the Bureau of Land Management ("BLM"), a bureau of the United States Department of the Interior. The assignment expressly requires the BLM "to carry out and enforce the conservation purposes of the Conservation Easement."

Years later, in mid–2007, Paul Schwennesen, the Schwennesens' son, sent a letter to the Pinal County Board of Supervisors purporting to terminate the Highway Easement. The letter, which was signed only by Paul Schwennesen, stated:

> Regardin the "Temporary Highway Easement Agreement" (Docket 2072, Page 853), signed 15 December, 1994, it is our intent as current property owner of parcel 300–27–005A to end such Easement Agreement.
>
> In consideration of the significant increase in traffic, especially off-highway vehicle traffic, and its detrimental impact on the sensitive riparian zone we feel that such a highway easement has outlived its benefit to the public health, safety, and welfare of the community.
>
> Additionally, as this easement was signed with the understanding that its temporary nature was to allow time for "construction of a new bridge across the San Pedro River" (page 1, para. 2), and no effort has been made to construct such bridge, the utility in maintaining this easement is diminished significantly.

Both Eric and Jean Schwennesen later signed the bottom of a copy of the letter, on which was written, "Letter Sent 13 June Ratified By Eric and Jean Schwennesen." However, none of the Schwennesens, including Paul, can recall when Eric and Jean signed the letter or whether a copy of the signed letter was ever sent to the County.

On August 15, 2007, Gregory Stanley, a Pinal County Public Work Director, issued a response letter explaining that San Pedro Road "has been in existence for approximately 25 years" and that closure of the road "could result in serious issues for emergency response vehicles, and seriously impair the ability to respond to fires and natural disasters in the eastern portions of Pinal County." Stanley therefore proposed a meeting "to see if there are some other measures we might be able to take in order to avoid the closure." [2] That same day, Stanley sent a letter to the BLM relaying Paul Schwennesen's attempt to close the road and seeking the BLM's assistance in keeping the road open. The letter explained that San Pedro Road "is widely used by the community of Dudleyville and other outlying citizens to cross the San Pedro River" and there is "no other public access in Pinal County's system to cross the San Pedro River."

***4** On February 13, 2008, Pinal County filed a state court condemnation action against Jean and Eric Schwennesen, Paul and Sarah Schwennesen, and the Nature Conservancy to acquire whatever interest they held in a roughly 2.025–acre parcel of land over which the San Pedro Road passes. In a June 24, 2009 stipulated judgment, Pinal County received from the Schwennesens "any and all" interest they held in the property in exchange for the sum of $90,000. Pinal County now seeks to quiet title in its right to maintain and permit public access to San Pedro Road, closure of which had not been contemplated until the Schwennesens suggested it to, or requested it of, the BLM sometime prior to entry of the stipulated judgment in the County's condemnation action. Specifically, Pinal County seeks to remove the cloud on its right caused by the United States' conflicting claim under the Conservation Easement.

III. Analysis

In support of its position, Pinal County contends that it has a superior right to control access to San Pedro Road pursuant to A.R.S. § 28–7041(C). Alternatively, it argues that the United States acquired its rights under the Conservation Easement subject to the Highway Easement, and because the Highway Easement is still in force, the County has a superior right to control access to the road. Finally, the County maintains that even if it acquired title to the property subject only to the Conservation Easement, it may continue to permit public access to the road without violating the terms of the Conservation Easement. [3]

The United States counters that A.R.S. § 28–7041(C) provides no basis for finding in the County's favor. It further maintains that Paul Schwennesen effectively terminated the Highway Easement in 2007, such that the County's condemnation judgment acquired title to the road subject to the Conservation Easement, which purportedly permits the United States to deny public access to the road. Each of the parties' contentions is addressed in turn.

A. A.R.S. § 28–7041(C)

Pinal County argues that prior to the Schwennesen's creation of the Conservation Easement, it acquired a superior right to allow public access to San Pedro Road pursuant to A.R.S. § 28–7041(C), which provides:

> All highways, roads or streets that have been constructed, laid out, opened, established or maintained for ten years or more by the state or an agency or political subdivision of the state before January 1, 1960 and that have been used continuously by the public as thoroughfares for free travel and passage for ten years or more are declared public highways, regardless of an error, defect or omission in the proceeding or failure to act to establish those highways, roads or streets or in recording the proceedings.

While no Arizona courts appear to have interpreted A.R.S. § 28–7041(C) specifically, the Supreme Court of Arizona has interpreted its predecessor, A.R.S. § 28–1861(B), a substantially similar provision. *See State ex rel. Miller v. Dawson,* 175 Ariz. 610, 858 P.2d 1213 (1993).

***5** In *Dawson,* the court was asked to decide whether A.R.S. § 28–1861 transfers title to land used for qualifying roadways from private property owners to the state. 175 Ariz. at 611, 858 P.2d at 1214. The court began its analysis with a long-standing principle of Arizona common law that the

state cannot acquire title to highways and other roads by prescription. *Id.* at 612, 858 P.2d at 1215. Rather, the state must generally follow procedures established by statute. *Id.* (citing *State ex rel. Herman v. Electrical Dist.,* 106 Ariz. 242, 243, 474 P.2d 833, 834 (1970)). Finding no indication that the Arizona legislature intended to alter that long-standing principle by enacting A.R.S. § 28–1861(B), the court found the statute to be merely curative in nature, operating only to remedy technical deficiencies in the state's attempt to acquire title through purchase, condemnation, or compliance with other statutory procedures. *Id.* at 613, 858 P.2d 1213, 858 P.2d at 1216. For example, it cures "any ultra vires problem previously existing where the state had been expending public monies on what were technically not public roads." *Id.* Therefore, the statute provides no independent basis for transferring title from private property owners to the state or, for that matter, anyone else.

Pinal County concedes that under *Dawson'* s interpretation, it did not acquire title to San Pedro Road under the statute. It maintains, however, that the statute gave the *public* a right of access to the road. The argument is unavailing. First of all, nothing in the language of the statute suggests the public somehow acquires an automatic right to access a roadway on private property simply by using it. The public has a right to access a roadway only to the extent the owner of the property on which the road passes, be it the government or a private party, grants access. Second, *Dawson* makes clear that the curative effects of the statute apply only to attempts by the state, or a political subdivision thereof, to establish public highways through statutorily permitted means. As the County has presented no evidence that it ever attempted to acquire title to the road before the Highway Easement was created, the curative effects of A.R.S. § 28–7401(C) do not add property interests any greater than those later acquired under the Highway Easement and the condemnation judgment.

B. The Highway Easement

The argument that Pinal County has a superior right to control access to San Pedro Road by virtue of the Highway Easement requires a brief examination of well-established principles of easement creation and termination. An easement "is a right that one person has to use the land of another for a specific purpose." *Ammer v. Ariz. Water Co.,* 169 Ariz. 205, 208, 818 P.2d 190, 193 (Ct.App.1991) (citing *Etz v. Mamerow,* 72 Ariz. 228, 233 P.2d 442 (1951)). The property burdened by the easement is the servient estate. *See* Restatement (Third) of Property: Servitudes § 1.1(1) (2000). The owner of the servient estate may create an easement by entering into an agreement, which may or may not include terms governing modification and termination of the easement. *Id.* § § 2.1(1), 7.1.

***6** In this case, George Gordon created the Highway Easement by entering into the Easement Agreement with Pinal County. The Agreement provides for automatic renewal for additional one-year periods "unless written notice is given by either party, on or before December 1 of any year, of an intent not to renew the Agreement." Therefore, the Highway Easement is terminable only by written notice from either party.

The only evidence of an attempt by either party to terminate the Highway Easement is the letter sent by Paul Schwennesen, the Schwennesens' son, in or around August 2007. Though the letter uses language such as "our intent" and "we feel," it was signed only by Paul Schwennesen. Because Paul Schwennesen was not one of the original parties to the Easement Agreement, he was not authorized by the Agreement to terminate the Highway Easement unless he qualified as an heir, successor, assign, or legal representative of Gordon or Gordon's heirs, successors, assigns, or legal representatives. Because the Schwennesens, Gordon's successors, were still alive at the time the letter was sent, Paul did not qualify as an heir. *See* A.R.S. § 14–1201(23) (defining "heirs" as those entitled to the property of a "decedent" under the laws of intestate succession). Furthermore, there is no evidence that the Schwennesens conveyed title to the property to Paul, assigned their interests under the Easement Agreement to him, or appointed him as their legal representative. Therefore, Paul Schwennesen did not have authority under the Agreement to terminate the Highway Easement. The United States does not contend to the contrary.

There was also no effective ratification of Paul Schwennesen's attempted termination of the Highway Easement. There is evidence that Eric and Jean Schwennesen attempted to ratify the purported termination by signing the bottom of a copy of the letter, but none of the Schwennesens can recall when it was signed and, more importantly, whether it was signed before the County's institution of condemnation proceedings. To be effective, a ratification must be sufficiently timely to avoid adverse and inequitable effects on the rights of third parties. *See* Restatement (Third) of Agency § 4.05 (2006). Any attempt to ratify the termination during the condemnation proceedings would have adversely and inequitably affected the County's prospective rights and property interests in the

road. In any event, the United States does not argue that the purported ratification was effective.

The only argument the United States appears to be making in support of the termination is that the County waived any objection to the legal sufficiency of Paul Schwennesen's purported termination letter by responding to the letter as if it were effective and by requesting the assistance of the BLM in keeping the road open. The argument is rejected on two grounds. First, the United States has provided no legal authority whatsoever to support the implied argument, and second, waiver of any legal deficiency in a termination or revocation letter requires "voluntary intentional relinquishment of a known right or conduct that would warrant an inference of such intentional relinquishment." *Havasupai Tribe v. Ariz. Bd. of Regents,* 220 Ariz. 214, 224, 204 P.3d 1063, 1073 (Ct.App.2008) (citing *Am. Cont'l Life Ins. Co. v. Ranier Constr. Co.,* 125 Ariz. 53, 55, 607 P.2d 372, 374 (1980)). There is no evidence that the County contemplated and deliberately ignored the possibility that the termination was legally ineffective at the time it responded to the letter and requested the BLM's assistance. Its actions are indicative of no more than an attempt to keep the road open without resort to legal proceedings, at which point the legal sufficiency of the letter would be at issue.

***7** The Court therefore concludes that the Highway Easement was never effectively terminated and is now permanent as a result of the County's condemnation of the underlying fee interest in general and the power to terminate the Highway Easement in particular. As the priority order of the two easements is beyond dispute, the County acquired a fee interest in the San Pedro Road river crossing subject to the Conservation Easement, which yields to the Highway Easement. The Highway Easement was not extinguished by the condemnation proceeding because the very purpose of the proceeding was to ensure the continuation of the benefits of the Highway Easement. *See* Restatement (Third) of Property: Servitudes § 7.8 (2000) ("Condemnation of the benefit of a servitude in the exercise of the power of eminent domain modifies or extinguishes the benefit only if that is the purpose of the condemnation."). Therefore, the County has all of the rights under the Highway Easement, including the right to control public access to the road.

C. The Conservation Easement

Even assuming the Highway Easement was effectively terminated, the Conservation Easement permits the County to continue vehicular access to San Pedro Road and its river crossing. It is undisputed that the County acquired all of the Schwennesens' interests in San Pedro Road as a result of the condemnation proceeding. Those rights include all of the Schwennesens' rights as grantors under the Conservation Easement. Whether the County may continue vehicular access to the crossing therefore turns on the rights of the grantor vis-à-vis the grantee under the terms of the Deed of Conservation Easement.

The Deed of Conservation Easement expressly provides that its interpretation is governed by Arizona law. In Arizona, contract interpretation is an issue of law. *Ariz. Biltmore Estates Ass'n v. Tezak,* 177 Ariz. 447, 448, 868 P.2d 1030, 1031 (Ct.App.1993). When construing an agreement under Arizona law, a court must, whenever possible, give effect to the intent of the parties at the time the agreement was made. *Taylor v. State Farm Mut. Auto. Ins. Co.,* 175 Ariz. 148, 153, 854 P.2d 1134, 1139 (1993). Therefore, the understandings of the Schwennesens and the Nature Conservancy are relevant here.

As explained, one of the Deed's recitals incorporates certain Baseline Documentation by reference. The Documentation, which was completed a month prior to and in preparation of the Deed's execution, specifically notes the following existing developments and uses on the property:

> The most dominant man-made features on this tract are the Dudleyville Crossing; the Magma Copper Company railway spur; the ASARCO water line; the county maintained dirt road that runs from the crossing downstream; utility lines along the county road and the cleared fields and pastures on the northwestern side of the property.

The parties agree that "Dudleyville Crossing" refers to the San Pedro Road river crossing. Both the Schwennesens and the Nature Conservancy were therefore aware, prior to execution of the Deed, that the San Pedro Road river crossing fell within the boundaries of the land to which the Conservation Easement would apply.

***8** The Deed recital that references the Baseline Documentation sheds light on the parties' understandings

of the role to by played by the Baseline Documentation and how the Conservation Easement would affect the road and crossing. According to the recital, the Documentation provides "an accurate representation of the Property at the time of this grant and is intended to serve as an *objective information baseline* for monitoring compliance with the terms of this grant." (emphasis added). That the information in the Documentation was intended, by both parties, to be a starting point against which future compliance would be monitored indicates the parties did not anticipate any changes to what had been described in the Documentation as *existing* developments and uses.

Such an interpretation is further supported by the rather practical observation that had the parties intended for the Deed to require an action as onerous as closing what had for many years been a publicly-accessed road, such action would have been addressed expressly. That the road was not even mentioned in the Deed strongly suggests the parties did not contemplate the road's inclusion within the scope of the restrictions of the Conservation Easement.

The Court therefore concludes that the existing developments referenced in the Baseline Documentation, including San Pedro Road and its river crossing, were carved out and excluded from the restrictions of the Conservation Easement. It naturally follows that the Schwennesens did not grant to the Nature Conservancy, and therefore the United States, any power to interfere with those existing uses. Even if the Highway Easement was effectively terminated, the County, as fee owner of the property, retains the power to reinstate the Highway Easement at any time. As such, the County has a superior interest in the river crossing and the portion of San Pedro Road that crosses the Schwennesens' land. It has the property right, notwithstanding the terms of the Conservation Easement, to allow continued public access to the road and its river crossing.

IT IS THEREFORE ORDERED that Plaintiff Pinal County's Motion for Summary Judgment (Doc. 35) is granted and Defendant United States' Motion for Summary Judgment (Doc. 34) is denied.

IT IS FURTHER ORDERED that Plaintiff Pinal County submit by September 17, 2010, a form of proposed quiet title judgment.

DATED this 2nd day of September, 2010.

All Citations

Not Reported in F.Supp.2d, 2010 WL 3523071

Footnotes

1 To date, Pinal County has not constructed a new bridge across the San Pedro River.

2 No evidence has been presented of an actual meeting between the County and any of the Schwennesens.

3 In further support of its position, the County has submitted documentary evidence that, according to the County, shows the BLM did not believe it was acquiring any right to control access to San Pedro Road at the time it received all of the Nature Conservancy's rights under the Conservation Easement. Though such evidence may have substantial persuasive force, the Court finds it unnecessary to address the evidence in light of the following analysis.