No. 124P24 TWENTY SIXTH JUDICIAL DISTRICT

NORTH CAROLINA SUPREME COURT

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ATLANTIC COAST CONFERENCE,

Plaintiff-Appellee,

v.

BOARD OF TRUSTEES OF FLORIDA STATE UNIVERSITY,

Defendant-Appellant.

From Mecklenburg County
No. 23-CV-040918-590

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RESPONSE IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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INDEX

INDEX i

TABLE OF AUTHORITIES ii

STATEMENT OF THE FACTS 7

The ACC, FSU, and the Grant of Rights 7

FSU Decides to Breach the Grant of Rights and the ACC Sues 9

The ACC and FSU File Amended Complaints and FSU Moves to Dismiss or Stay the ACC's Lawsuit 11

REASONS WHY THE PETITION SHOULD BE DENIED 12

I. FSU CANNOT SHOW ANY PROBABILITY THAT THE BUSINESS COURT'S DENIAL OF THE MOTION TO STAY WAS ARBITRARY. 14

II. THE TRIAL COURT'S DENIAL OF FSU'S MOTION TO DISMISS FOR LACK OF SUBJECT MATTER JURISDICTION IS CONSISENT WITH THIS COURT'S RECENT CASES AND THERE ARE NO EXTRAORDINARY CIRCUMSTANCES TO WARRANT REVIEW. 25

CONCLUSION 33

ATTACHMENTS 33

CERTIFICATE OF SERVICE 35

ADDENDUM

TABLE OF AUTHORITIES

Cases

Advantage Media, L.L.C. v. City of Hopkins, Minn.,
511 F.3d 833 (8th Cir. 2008) 29
City of McCall v. Buxton,
201 P.3d 629 (Idaho 2009) 31
City of Topeka v. Imming,
344 P.3d 957 (Kan. Ct. App. 2015) 31
Cmty. Collaborative of Bridgeport, Inc. v. Ganim,
698 A.2d 245 (Conn. 1997) 31
Comm. To Elect Dan Forest v. Emps. Pol. Action Comm.,
376 N.C. 558 (2021) 26
Coulson v. Kane,
773 F. App'x 893 (9th Cir. 2019) 29
Cryan v. Nat'l Council of Young Men's Christian Associations of United States,
384 N.C. 569 (2023) 13
Donovan v. Fiumara,
114 N.C. App. 524 (1994) 13
Edwards v. Town of Louisburg,
290 N.C. App. 136 (2023) 4, 26
First Telebanc Corp. v. First Union Corp.,
No. 02-80715-CIV-GOLD/TURNOFF, 2007 U.S. Dist. LEXIS 114903 (S.D. Fla. Aug. 6, 2007) 30
Gao v. Sinova Specialties, Inc.,
2018 NCBC LEXIS 70 (N.C. Super. Ct. July 16, 2018) 30
Hamilton v. Mortg. Info. Servs., Inc.,
212 N.C. App. 73, 711 S.E.2d 185 (N.C. Ct. App. 2011) 25
Harris v. Matthews,
361 N.C. 265 (2007) 13
Homestead at Mills River Prop. Owners Ass'n v. Hyder,
No. COA17-606, 2018 N.C. App. LEXIS 622 (N.C. Ct. App. June 19, 2018) 31
Howard v. IOMAXIS, LLC,
384 N.C. 576, 887 S.E.2d 853 (2023) 32
In re Council of Unit Owners of the 100 Harborview Drive Condo.,
552 B.R. 84 (Bankr. Md. 2016) 31
King Fa, LLC v. Chen,
248 N.C. App. 221 (2016) 30
La Mack v. Obeid,
2015 NCBC LEXIS 24 (N.C. Super. Ct. Mar. 5, 2015) 16
Laws. Mut. Liab. Ins. Co. of N.C. v. Nexsen Pruet Jacobs & Pollard,
112 N.C. App. 353 (1993) 14, 16

Mangum v. Raleigh Bd. of Adjustment,
362 N.C. 640 (2008) 13
Master v. Country Club of Landfall,
263 N.C. App. 181 (2018) 28
McAdoo v. Univ. of N.C. at Chapel Hill,
225 N.C. App. 50 (2013) 28
McGuire Performance Sols., Inc. v. Massengill,
904 A.2d 971 (Pa. Super. Ct. 2006) 31
Morris v. Rodeberg,
285 N.C. App. 143, 877 S.E.2d 328 25
Muter v. Muter,
203 N.C. App. 129, 689 S.E.2d 924 (2010) 3, 18
Nlend v. Nlend,
896 S.E.2d 72 (N.C. Ct. App. 2024) ..... passim
Pan-Am Tobacco Corp. v. Dep't of Corr.,
471 So. 2d 4 (Fla. 1984) 20
Park E. Sales, LLC v. Clark-Langley, Inc.,
186 N.C. App. 198, 651 S.E.2d 235 (2007) 14
Parker v. Town of Erwin,
243 N.C. App. 84 (2015) 13
Peninsula Prop. Owners Ass'n v. Crescent Res., LLC,
171 N.C. App. 89 (2005) 31
State v. Woolard,
385 N.C. 560 (2023) 12
Sw. Marine Inc.,
242 F.3d 1163 (9th Cir. 2001) 29
United Daughters of the Confederacy v. City of Winston-Salem,
383 N.C. 612 (2022) 25, 27
Wachovia Bank v. Deutsche Bank Tr. Co. Ams.,
2006 NCBC LEXIS 10 (N.C. Super. Ct. June 2, 2006) 16
Wachovia Bank v. Harbinger Cap. Partners Master Fund I, Ltd.,
2008 NCBC LEXIS 6 (2008) 16
Willowmere Community Association v. City of Charlotte,
370 N.C. 553 (2018) 5, 26, 27
Wolff v. Aetna Life Ins. Co.,
77 F.4th 164 (3d Cir. 2023) 29

Statutes

Fla. Stat. § 1001.72(1) 8, 20
N.C. Gen. Stat. § 1-75.12 ..... passim
N.C. Gen. Stat. § 59B-8(1) 5

Rules

N.C. R. App. P. 33(b) 34
N.C. R. Civ. P. 9(a) 27

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RESPONSE IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI[1]

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TO THE HONORABLE SUPREME COURT OF NORTH CAROLINA:

The Atlantic Coast Conference ("ACC" or "Conference") was formed in North Carolina in 1953. In 1991, the Board of Trustees of Florida State University ("FSU") came into North Carolina and asked to join the Conference; it was admitted as a Member. Subsequently, in 2013 and in 2016, FSU, along with every other Member of the Conference, signed a "Grant of Rights" contract with the ACC which transferred all of its media rights to the Conference. FSU further agreed that it would not

[1] While FSU's Petition claims that it seeks a Writ of Certiorari only based on the denial of its Motion to Stay, Pet. at 1-2, by the end of its Petition it also asks for a Writ relating to the denial of its Motion to Dismiss for Lack of Subject Matter Jurisdiction. Pet. at 55. For purposes of this Response, the ACC will assume it seeks a Writ for both.

challenge the validity of its Grant of Rights, warranting that it had the authority to enter into the agreements. The Conference, in turn, sold some of those rights to ESPN in exchange for various royalty and other payments. The ACC then distributed these payments to its Members; FSU's share alone has amounted to hundreds of millions of dollars.

By 2023, however, FSU had decided that it wanted more money, and sought an unequal share of Conference revenue based on its "value." In December 2023, the ACC concluded correctly that FSU intended to breach its agreements and challenge the Grant of Rights. Thus, on 21 December 2023, the ACC, a North Carolina unincorporated nonprofit association, filed a complaint seeking a declaratory judgment that the Grant of Rights, a North Carolina contract, was valid and enforceable under North Carolina law. The Conference filed its complaint in Mecklenburg County, where it is headquartered, and submitted a Notice of Designation to the North Carolina Business Court. The ACC served FSU the next day. FSU, once served, then filed a lawsuit in Tallahassee, Florida, seeking to invalidate the Grant of Rights and claiming that it never validly executed the contract.

Having breached its warranty not to challenge the validity of the Grant of Rights, and having claimed now that it never validly entered into the Grant of Rights (despite the acceptance of hundreds of millions of dollars made possible by the agreement), FSU asked the Business Court to dismiss or stay the ACC's Amended

Complaint,[2] arguing that the ACC's lawsuit was improper. After full briefing, and several hours of argument, Chief Judge Bledsoe of the North Carolina Business Court ruled that there was nothing improper with a North Carolina association suing one of its Members in North Carolina over a North Carolina agreement. Analyzing each of the factors under N.C. Gen. Stat. § 1-75.12, Chief Judge Bledsoe found that FSU had failed to meet its burden of showing that litigating this case in North Carolina worked a "substantial injustice" on FSU. To the contrary, he held that these factors "decisively weighed in favor of litigating this matter in North Carolina."

The ACC has not found a single case—and FSU has not cited one—in which a trial court was overturned for denying a motion to stay under § 1-75.12. Nor has any court that explicitly engaged in the weighing process required by § 1-75.12 been reversed for abusing its discretion. This is unsurprising given that, to prevail on appeal, the appellant must show that the trial court's ruling was a "patently arbitrary decision, manifestly unsupported by reason." *Nlend v. Nlend*, 896 S.E.2d 72, at *4 (N.C. Ct. App. 2024). FSU's Petition fails on its face because, rather than show how the Business Court's Order was "patently arbitrary" or "manifestly unsupported by reason." FSU simply argues that Chief Judge Bledsoe erred as he weighed the various factors. *Muter v. Muter*, 203 N.C. App. 129, 134, 689 S.E.2d 924, 927 (2010) (affirming denial of motion to stay when "Defendant makes no argument that the trial court acted in a patently arbitrary manner, but rather argues that the trial court should

[2] The ACC filed an Amended Complaint on 17 January 2024. FSU filed an Amended Complaint in Florida on 29 January 2024.

have resolved the factors differently."). And, while FSU is quibbling with the Business Court's weighing of the factors, it further fails to show how it would suffer a "substantial injustice" by proceeding in North Carolina. To the contrary, expecting a Member of a North Carolina unincorporated association that has received hundreds of millions of dollars from the association to litigate the validity of North Carolina contracts in a North Carolina court does not work an injustice of any kind, let alone one that is so substantial that any contrary conclusion must be "manifestly unsupported by reason." Because FSU has not showed and cannot show a prima facie case of merit, probable error, or extraordinary circumstances to warrant an extraordinary writ, the Court should deny the petition.

Perhaps in recognition that it cannot show that the Business Court's Order was "patently unreasonable" or meet its burden of proving a "substantial injustice, FSU raises a second issue later in its Petition. FSU raises it first as a basis for claiming that the Court erred in denying the stay, and then, later, as a separate issue to justify the Writ. This issue involves Chief Judge Bledsoe's denial of FSU's motion to dismiss for lack of subject matter jurisdiction based on the ACC's alleged lack of standing. This alleged lack of standing springs from FSU's claim the Conference was not authorized to sue it under the Conference's Bylaws. But this is not an issue of jurisdictional standing. The question of standing, for jurisdiction purposes, is whether there is a sufficiently concrete controversy that is being litigated by an entity with the statutory right to bring suit and a sufficient stake in the dispute. *See Edwards v. Town of Louisburg,* 290 N.C. App. 136, 140 (2023) ("Standing refers to

whether a party has a sufficient stake in an otherwise justiceable controversy such that [the party] may properly seek adjudication of the matter.").

There is no serious question that there is a sufficiently concrete dispute between FSU and the Conference, one that has existed since at least 21 December 2023. There is also no question that North Carolina law plainly authorizes the ACC, as an unincorporated association, to sue its Members for its claims, N.C. Gen. Stat. § 59B-8(1) ("A nonprofit association, in its name, may institute . . . a judicial, administrative, or other governmental proceeding . . . ."); § 59B-7(e) ("A nonprofit association may assert a claim against a member"); Comment ¶ 1 to § 59B-8 (unincorporated association "may sue and be sued"). And as this Court held in *Willowmere Community Association v. City of Charlotte,* 370 N.C. 553, 560-61 (2018), "[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." The ACC obviously has a sufficient stake in this litigation that gives it the jurisdictional standing that it needs to bring this lawsuit. As the Business Court determined, the allegations of the ACC's lawsuit "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 Agreement." Order ¶ 41. In short, "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." *Id.*

FSU seeks instead to argue over whether the ACC had sufficient "authorization" under the Conference's Bylaws to bring this lawsuit. But on 12 January 2024, the ACC met and, with an affirmative vote of all 12 Members in attendance, authorized the filing of an Amended Complaint against FSU, one that included the original claims filed on December 21.[3] This surpassed the requirement in Conference's Bylaws that a two-thirds majority—10 Members—vote to approve any "material" litigation, even assuming as FSU argues that the original Complaint was "material" litigation. Thus, to the extent that approval of 10 Members of the Conference was needed to approve the original Complaint (which the ACC denies), 12 Members plainly ratified the bringing of those claims. FSU submitted no sworn declaration of documents to rebut this fact.

It is hornbook law that "[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." ROBINSON ON NORTH CAROLINA CORPORATION LAW § 3.03. And courts across the country uniformly hold that an organization may ratify the filing of a lawsuit. *See* cases cited *infra* pp. 31-32. Thus, FSU again fails to demonstrate a prima facie case of merit, probable error, or extraordinary circumstances to warrant review of this interlocutory order.

[3] Because the Amended Complaint sought monetary damages against FSU for breaches that had occurred after December 21, the ACC believed that it constituted "material" litigation as the Conference was now suing one of its Members for damages.

The Court should therefore deny FSU's Petition for Writ of Certiorari.

STATEMENT OF THE FACTS

This Petition comes to this Court after four rounds of briefing consisting of a combined 110 pages, several hundred pages of submitted exhibits, and a four-hour hearing. This briefing and argument resulted in a 76-page decision containing 132 numbered paragraphs by the Business Court. The basic facts are not in dispute and are found in Chief Judge Bledsoe's Order.

The ACC, FSU, and the Grant of Rights

The ACC is a North Carolina unincorporated nonprofit association first formed in 1953. In 1991, FSU joined the ACC, and has actively participated in its management. Order ¶ 127. FSU's President serves on the Board of Directors for the ACC, and FSU has attended many meetings and had its employees and officers serve in leadership positions in the Conference. *Id.* In return, FSU has received hundreds of millions of dollars in distributions from the Conference, primarily from media rights agreements between the Conference and ESPN. Order ¶¶ 8-11; Amended Complaint, Summary of Claims.

A large source of the ACC's revenue stems from its media agreements with ESPN. These agreements, which began in 2010, gave ESPN the exclusive distribution rights to the athletic games played by the ACC's Members. In return, ESPN paid for those rights. Order ¶ 6. In 2012, college athletic conferences began to experience instability and realignment; the ACC was no exception. *Id.* ¶ 7. The ACC added four new Members and its Board increased the payment that a Member was required to make if it voluntarily withdrew from the Conference. *Id.*

In order to stabilize the Conference and enter into a long-term media rights agreement that would ensure the payment of predictable sums over time, the Members of the ACC "including FSU, entered into an Atlantic Coast Conference Grant of Rights Agreement with the ACC in April 2013." Order ¶ 8. The Grant of Rights transferred the media rights of each Member to the Conference. The media rights were transferred "regardless of whether the Member Institution withdraws from the Conference" and were "irrevocable and effective until the end of the Term," at that time 2027. *Id.*. The Grant of Rights signed by FSU further provided that "[e]ach of the Member Institutions covenants and agrees that . . . it will not take any action, or permit any action to be taken . . . that would affect the validity and enforcement of the Rights granted to the Conference under this Agreement." *Id.* FSU's President, in signing the Grant of Rights, further warranted that he had the authority to do so and that all necessary action had been taken to approve the contract.[4] The ACC took the rights of all of its Members and negotiated additional agreements with ESPN, agreements that increased the revenue paid to the Conference and which was distributed to its Members. *Id.* ¶ 9.[5]

[4] FSU attempts to criticize the trial court's order for its discussion of the "commercial activities of ***FSU*** (not the FSU Board)" (emphasis in original), Pet. at 21. But FSU and its Board are one and the same, as the Board is the only legal entity. Fla. Stat. § 1001.72(1) (establishing Board as "public body corporate" with the power to "contract and be contracted with, to sue and be sued, to plead and be impleaded in all courts of law"). When FSU operates in North Carolina, and receives hundreds of millions of dollars from a North Carolina association, these are the actions of the Board.

[5] The ACC Commissioner was the last signatory to the Grant of Rights signed by all of the Members, and did not execute it in Greensboro, North Carolina, until after all

In 2016, the ACC sought a new agreement with ESPN, one that would establish the ACC Network and increase the revenue that it received (and distributed to its Members). As a condition of entering into these new agreements, the Members executed an amendment to the Grant of Rights, extending the Term through 30 June 2036. Order ¶¶ 9-10. Over the next 7 years, FSU's distributions from the ACC more than doubled. Order ¶ 11.

FSU Decides to Breach the Grant of Rights and the ACC Sues

In early 2023, FSU began advocating for a larger share of the ACC's revenue, based on its assertion that its "brand" was more valuable. Order ¶ 11. Throughout 2023, FSU not only asserted its desire for an unequal share of the Conference's revenue, but openly discussed withdrawing from the Conference if its demands were not met. Order ¶¶ 11, 26. The Chairman of the FSU Board declared in a public interview in August 2023 that "the Grant of Rights 'will not be the document that keeps us from taking action.'" Order ¶ 26.

On 21 December 2023, the FSU Board posted a notice of an "emergency meeting" to be held the next day, Friday, 22 December 2023 (the last business day before the Christmas Holiday). Order ¶ 27. By that time, the Chair of the FSU Board had already conducted individual briefings with each member of the Board, and a draft complaint had been reviewed by each of the Board members. In fact, on the morning of 22 December 2023, several hours before the FSU Board meeting was held, a copy of FSU's soon-to-be filed lawsuit against the ACC was posted on the FSU News

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the Members had signed. North Carolina law therefore governs this agreement (and amendment). Order ¶ 126.

Service. Order ¶ 27. The complaint posted on the FSU New Service also disclosed terms of the ESPN agreements which were confidential and which FSU had agreed to keep confidential when it reviewed those agreements.[6] Order ¶¶ 89-92.

Based upon the notice of an "emergency meeting," the ACC concluded that it was a "practical certainty" that FSU would be initiating litigation to challenge the validity and enforceability of the Grant of Rights. Order ¶ 28. Indeed, the Business Court concluded that by December 21, litigation was "unavoidable" and that the FSU Board meeting on December 22 "was a mere formality." *Id.* The ACC was thus faced with the practical certainty that FSU would breach the Grant of Rights by challenging its validity and enforceability. It was also obligated under its agreements with ESPN to take all "commercially reasonable" efforts to protect the rights that it had granted to ESPN. Order ¶ 25. The ACC's then-President, James Ryan of the University of Virginia, in consultation with the Conference's management and some other Board members, approved suing FSU in North Carolina seeking declaratory relief as to the validity and enforceability of the Grant of Rights (and amendment).

The ACC's lawsuit was filed at the end of the day on 21 December 2023. On December 22, the FSU Board met and authorized its own lawsuit to be filed

[6] The Conference has sued FSU for breach of these confidentiality obligations. While FSU tries to claim that this is based solely on information disclosed in its lawsuit in Florida, Pet. p. 9, FSU also disclosed confidential information in the draft lawsuit that its news service posted on the internet on the morning of December 22, several hours before the Board meeting took place. FSU then proceeded to disclose further confidential information during the course of its public Board meeting on the morning of December 22. All of these were breaches.

immediately in Florida. Order ¶ 13. After that meeting, FSU was served with the ACC's lawsuit; roughly an hour later, FSU filed its lawsuit in Leon County, Florida.

The ACC and FSU File Amended Complaints and FSU Moves to Dismiss or Stay the ACC's Lawsuit

After FSU violated its contractual warranty in the Grant of Rights that it would not challenge the validity or enforceability of the agreement, and after it also publicly disclosed confidential contract terms in the agreements between the ACC and ESPN which it had agreed to keep confidential, the ACC Board met on 12 January 2024, to determine whether to file an Amended Complaint with affirmative claims for damages against FSU. The Board had not met prior to the filing of the ACC's original Complaint on December 21 because the Chair of the ACC's Board and the ACC's management believed that the Conference's lawsuit seeking to declare its agreement valid and enforceable was not material under the Conference's Constitution given that it sought no damages, but only a declaration that a contract that had existed for a decade was valid.

On January 12, however, the Conference confronted whether to sue one of its Members for damages. These affirmative claims for monetary relief were considered by the Conference to be "material," and thus required a vote of the Board. After considering the original lawsuit filed by the Conference, and proposed claims for damages against FSU, 12 Members of the ACC's Board voted to file an Amended Complaint against FSU alleging breach and seeking damages, inclusive of the original claims that had been filed. Consequently, on 17 January 2024, the ACC filed

its Amended Complaint, reincorporating its original claims for declaratory relief along with additional claims for breach and monetary damages.

FSU then filed its own Amended Complaint in Florida on January 29.

On 7 February 2024, FSU moved to dismiss the ACC's Amended Complaint or, in the alternative, for a stay under § 1-75.12. The ACC filed its Brief and supporting materials in Opposition on February 27, along with an affidavit from its Corporate Secretary. FSU then filed a Reply on 8 March 2024, raising new arguments, but providing no documentary evidence or counter-affidavits. Order ¶ 31 ("As the ACC notes in its sur-reply, the FSU Board's position for dismissal . . . 'has shifted over time.'"). As a result, the Business Court ordered the ACC to file a Sur-Reply on March 18. The ACC timely submitted its Sur-Reply with an affidavit from its Chair. The Court heard oral argument over several hours on 22 March 2024, and issued its Order on 4 April 2024. Relevant to this Petition, the Order denied FSU's Motion for a Stay and held that the ACC possessed the standing to sue FSU.

FSU now seeks review through Certiorari.

REASONS WHY THE PETITION SHOULD BE DENIED

Certiorari is an "extraordinary remedial writ" that the Court deploys "sparingly, reserving it to correct errors of law, or to cure a manifest injustice." *State v. Woolard*, 385 N.C. 560, 568 (2023) (internal quotation marks and citations omitted). Thus, the Court employs a two-factor test: first, the petitioner must show "merit or that error was probably committed," which "weighs the likelihood that there was some error of law"; and second, the petitioner must show "extraordinary circumstances" to justify the writ of certiorari, which "generally requires a showing

of substantial harm, considerable waste of judicial resources, or wide-reaching issues of justice and liberty at stake." *Cryan v. Nat'l Council of Young Men's Christian Associations of United States*, 384 N.C. 569, 572–73 (2023). FSU fails to satisfy either factor for either proposed issue.

When, as here, only a Complaint and Amended Complaint have been filed, the Business Court was required to "view the allegations [of the Complaint] 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). Because matters of jurisdiction were raised by FSU, the Court could consider matters outside the pleadings on that issue alone. *Harris v. Matthews,* 361 N.C. 265, 271 (2007); *Parker v. Town of Erwin,* 243 N.C. App. 84, 96 (2015). FSU submitted no evidence relating to these jurisdictional issues, nor did it submit any sworn declarations.

FSU has the burden under § 1-75.12 to prove that litigating this matter in North Carolina will work a "substantial injustice." Before this Court, it must also demonstrate that Chief Judge Bledsoe abused his discretion in denying the stay. With regard to jurisdictional allegations, Rule 9(a) requires only that a "party not a natural person shall make an affirmative averment showing its legal existence and capacity to sue." And these averments are to be construed "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).

I. FSU CANNOT SHOW ANY PROBABILITY THAT THE BUSINESS COURT'S DENIAL OF THE MOTION TO STAY WAS ARBITRARY.

The trial court may enter a stay "[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." N.C. Gen. Stat. § 1–75.12. The denial of a motion to stay or dismiss rests "within the sound discretion of the trial judge and will not be disturbed on appeal absent an abuse of that discretion." *Park E. Sales, LLC v. Clark-Langley, Inc.*, 186 N.C. App. 198, 202, 651 S.E.2d 235, 238 (2007).

In interpreting § 1-75,12, North Carolina courts have developed a ten-factor test to guide the Court's discretion in determining whether to issue a stay See *Laws. Mut. Liab. Ins. Co. of N.C. v. Nexsen Pruet Jacobs & Pollard*, 112 N.C. App. 353, 356 (1993). "In considering whether to grant a stay under N.C. Gen. Stat. § 1–75.12, the trial court need not consider every factor and will only be found to have abused its discretion when it abandons any consideration of these factors." *Nlend*, 896 S.E.2d 72; 6A Strong's N.C. Index (4th Ed.), § 20 ("The factors . . . for granting a stay under the statute are permissive, not mandatory, and a court will not abuse its discretion in failing to consider each enumerated factor."). But to grant a stay, the trial court "must find 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.

Though FSU wants to parse out each factor, appellate courts "do not review these issues individually; rather, [they] address [the appellant's] contentions as a

single issue: whether the trial court abused its discretion." *Id.* FSU also wants to challenge the trial court's reliance on the ACC's unrebutted affidavits, but

> the weight of the evidence supporting the trial court's findings of fact is ultimately not the question we consider on appeal when reviewing a trial court's order on a § 1-75.12 motion to stay.
>
> We do not re-weigh the evidence before the trial court or endeavor to make our own determination of whether a stay should have been granted. Instead, mindful not to substitute our judgment in place of the trial court's, we consider only whether the trial court's ruling was a patently arbitrary decision, manifestly unsupported by reason.

Nlend, 896 S.E.2d 72, at *4.

FSU does not even attempt to argue that Chief Judge Bledsoe's detailed Order analyzing all of the relevant factors is "manifestly unsupported by reason." And FSU's argument itself is based on errors of law.

First, FSU has a mistaken belief that the "first-filed" rule applies in North Carolina. That is, FSU seems to believe that whether a party "files first" dictates whether a stay should be ordered under § 1-75.12. Not so. North Carolina employs a qualitative test for staying a North Carolina case in favor of a proceeding in another state. The factors for consideration are:

> (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., 112 N.C. App. at 356. Nowhere to be found is a reference to the "first-filed" action.

To be sure, the "choice of forum by plaintiff" is one factor, but that factor turns on the plaintiff's choice of a North Carolina court, and how much weight it is to be given. When a North Carolina plaintiff sues in a North Carolina court, this factor weighs against a stay of the North Carolina proceedings: "a plaintiffs' choice of forum ordinarily is given great deference, especially when plaintiffs select their home forum to bring suit." *La Mack v. Obeid*, 2015 NCBC LEXIS 24, at *16–17 (N.C. Super. Ct. Mar. 5, 2015); *see also Wachovia Bank v. Deutsche Bank Tr. Co. Ams.*, 2006 NCBC LEXIS 10, at *18 (N.C. Super. Ct. June 2, 2006). But that weight is not determinative by itself, and rather is one of ten factors; certainly, the weight to be given that factor by the trial court can vary depending on whether the North Carolina action was the first action filed. In fact, North Carolina courts have stayed litigation here in favor of litigation elsewhere even when the North Carolina case was first-filed. *See, e.g.*, *Wachovia Bank v. Harbinger Cap. Partners Master Fund I, Ltd.,* 2008 NCBC LEXIS 6 (2008) (staying first-filed North Carolina case in favor of later-filed New York litigation). Yet FSU's entire petition (and argument below) hinges on its claim that the Business Court should not have treated the ACC's lawsuit as the first-filed action; its basis for doing so was that, somehow, a lawsuit by a North Carolina association over a North Carolina contract that is filed in North Carolina is improper "procedural fencing."

Chief Judge Bledsoe understood and summarized FSU's argument on so-called "procedural fencing," discussing every case cited by FSU. Order, ¶ 119. FSU argues here as it did below that when the ACC sued in the North Carolina courts, it did so improperly because it was not the "natural" plaintiff. In FSU's assessment, only the party that attacks a contract can be a plaintiff, and thus only FSU may choose the time and place of a lawsuit over the ACC's contracts. But after considering FSU's argument, Chief Judge Bledsoe recognized that it was "erroneous."

Here, FSU was threatening to breach its contract with the ACC, which meant that the ACC would suffer damage. Thus, the ACC was the natural plaintiff in the North Carolina action because it, as the non-breaching party, is the injured party; moreover, the ACC filed only when FSU's "alleged breach . . . was a practical certainty that threatened the ACC with imminent and unavoidable injury as a result." *Id.* ¶ 122. FSU critiques this determination as a "one-sided assessment of the parties dispute" because it claims it has been "injured" based on its allegations in its Florida lawsuit (for which it seeks only declaratory relief). Pet. at 46. But Chief Judge Bledsoe's Order accounted for FSU's argument that it was the proper plaintiff: "even assuming the FSU Board is a 'natural' plaintiff because it is the one challenging the enforceability of the Grant of Rights Agreements . . . , the fact that the ACC is also a 'natural' plaintiff is sufficient" for the ACC's choice of forum to warrant deference. *Id.* ¶ 122. Thus, Chief Judge Bledsoe did not engage in a "one-sided assessment"; he considered the issue from both sides, and even assumed that FSU was a proper plaintiff, and found that it made no difference.

Moreover, FSU's argument ignores that the agreements that lay at the heart of this dispute are North Carolina contracts that are governed by North Carolina law. Thus, the hallmarks of a case in which the plaintiff's choice of forum is not given great weight (such as in "forum shopping") do not exist here because the ACC sued where it is headquartered, sued in the forum whose law will control the dispute, and sued because its contract was about to be breached. *Id.* ¶ 125. As such, the conclusion that "the ACC's choice of forum is entitled to deference on this record" is plainly consistent with reason. *Id.* And it cannot be patently arbitrary to rule that a North Carolina association is entitled to enforce in North Carolina its contracts governed by North Carolina law, let alone conclude that doing so constitutes a "substantial injustice."

Next, FSU attacks the Business Court for failing to "properly consider and weigh the significant Florida-specific issues and matters of foreign concern that envelop this dispute." Pet. at 47. In other words, FSU wants to reweigh the trial court's discretionary determinations because it does not agree with them. But that cannot warrant an extraordinary writ because the Court does "not re-weigh the evidence before the trial court or endeavor to make our own determination of whether a stay should have been granted." *Nlend*, 896 S.E.2d 72.

In arguing that Chief Judge Bledsoe should have weighed the factors differently, FSU claims that it is "readily apparent that Florida is the more appropriate forum." *Id.* This of course is not the standard. Rather, FSU must show that litigation in North Carolina is so inappropriate that the only conclusion that can be reached is that continuing this case is a substantial injustice. *Muter*, 203 N.C. App.

at 134, 689 S.E.2d at 928 ("reiterat[ing] that defendant bore the burden of persuading the trial court that allowing the North Carolina action to proceed would 'work a substantial injustice'" and that the "trial court was not required to decide the most convenient or ideal venue for resolving this matter").

But as importantly, FSU is wrong when it claims Florida is the "more appropriate forum." The Business Court found in its weighing that North Carolina's local interests were not outweighed by Florida's, let alone created a substantial injustice because:

> The key contracts in this case – the Grant of Rights and Amended Grant of Rights – were made in North Carolina and are governed by North Carolina law. [ ] 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. [ ] 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 issues presented in in the two actions – i.e., the enforceability of the two Grant of Rights Agreements – favors resolution before a North Carolina court.

Order ¶ 126.

Moreover, while the Business Court recognized that Florida may have an interest in litigating matters involving one of its universities, the local concerns of North Carolina in this case mattered as well. These include the fact that the "ACC has been based in North Carolina for over seventy years and recently received a tax incentive from the State . . . to locate its headquarters in Charlotte. Four of its

Member Institutions are located in North Carolina . . . and only two Members of the ACC's current fifteen Members are in Florida" and that "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." Order ¶ 127. Indeed,

> [W]hile 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 consequences to the North Carolina-based ACC since it may bear directly on the Conference's ability to meet its contractual commitments to ESPN as well as the Conference's future revenues, stability, and long-term viability.

Order ¶ 128. FSU, other than disagreeing, fails to show how this reasoning was so patently arbitrary as to be manifestly without reason.

FSU also argues that Florida is the more appropriate venue "primarily because this case involves important jurisdictional issues of sovereign immunity." Pet. at 47. This argument makes no sense. There is no question that FSU has waived its sovereign immunity for contractual claims. *Pan-Am Tobacco Corp. v. Dep't of Corr.*, 471 So. 2d 4, 5 (Fla. 1984) ("[S]overeign immunity will not protect the state from action arising from the state's breach" of contract because it "is basic hornbook law that a contract which is not mutually enforceable is an illusory contract"); *see also* Fla. Stat. § 1001.72(1) (FSU "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."). The only issue of "sovereign immunity" that FSU raised was whether North Carolina courts could exercise jurisdiction over FSU. That is not a decision to be made by the Florida

courts; this is only a decision that can be made by a North Carolina court. In other words, only North Carolina courts can determine their own jurisdiction. And FSU's argument that the Business Court should have just avoided a decision on whether FSU could be sued in North Carolina by simply staying the case fails to articulate how not doing so was either patently arbitrary or constitutes a substantial injustice. It is also at its core internally inconsistent. *Compare* Pet. at 37 ("[T]he trial court therefore erred in holding that it had subject matter jurisdiction to even consider the N.C.G.S. § 1-75.12 factors.") *with id.* at 47 (arguing that the trial court "unnecessarily decided Florida had waived sovereign immunity . . . when it could have just stayed the matter and not addressed this issue."). If the Business Court had no jurisdiction over FSU because it is a sovereign (despite its waiver and consent), it had no jurisdiction to stay anything involving FSU. In other words, the Business Court did precisely what a reasoned court does – it determined its jurisdiction first and then decided whether a stay was appropriate.

In addition, FSU attacks the Court for accepting the ACC's representations about the location of purported witnesses. *Id.* But this was unrebutted in any way by FSU, even though FSU had the burden to show that a stay was warranted. Indeed, in the face of the ACC's unrebutted representation that its witnesses resided in North Carolina and its servers and books and records in North Carolina held relevant evidence, FSU made no objection and offered nothing to contradict these assertions. Order, ¶ 129 ("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 material witnesses who do not reside in Florida. . . . Without opposing argument or evidence from the FSU Board, the Court concludes these factors weigh against the FSU Board's requested stay").

FSU further suggests that review is appropriate because a Judge in Leon County Circuit Court denied the ACC's Motion to Stay FSU's lawsuit under Florida law, reaching "the exact opposite conclusion" from Chief Judge Bledsoe "on nearly every issue." Pet. at 10-11. FSU, however, fails to inform the Court that the Circuit Judge, who entered his order ***after*** Chief Judge Bledsoe's decision, explicitly refused to review the Business Court's Order on the ground that he did not want to be influenced by the Business Court's ruling on North Carolina law. Exhibit A, Excerpts from Transcript of 9 April 2024 Hearing, at 4-5. FSU further fails to note that Florida law is based on a strict "priority principle," and does not have the statutory directive of § 1-75.12. Under Florida's priority principle, the state which attaches jurisdiction first (through service) is considered the "priority" forum. Florida law gives primacy to the priority forum unless there are extraordinary issues of undue delay (such as in child custody cases).

In suggesting that the Florida court properly weighed the correct factors in denying a stay in Florida, FSU ignores that the Circuit Court departed from the priority principle of Florida law. Instead, it created a new rule in which, "if you have . . . a preemptive suit that smells of forum shopping . . . it means you lose the priority preference and then we look to other factors." Ex. A at 32. It did so not based on Florida law (because no such Florida law existed), but based on its survey of federal

patent law cases. And because no Florida court had created such a test before, the Circuit Court looked outside Florida to assemble "other factors," including such considerations as whether the ACC (a nonprofit association) had committed a Fifth Amendment "taking" against FSU by seeking to enforce the Grant of Rights (*id.* at 171), the applicability of Florida Public Records law (*id.* at 172), the fact that FSU is in Florida, whether the FSU Board had really authorized the Grant of Rights (*id.* at 179-80), and the fact that "Florida obviously is a sovereign state, and these issues directly affect Florida really more than they do the state of North Carolina because this is not North Carolina's money that is at issue" (*id.* at 180).

Respectfully, the Circuit Court's decision on the ACC's Motion to Stay under Florida law has no relevance to the issues here under North Carolina law, particularly when the Circuit Court did not review or read the Business Court's decision. And its conclusions and multifactorial analysis bear no resemblance to the weighing required to be done, and which was performed by Chief Judge Bledsoe, under § 1-75.12 and *Lawyers' Mutual* (neither of which was cited by the Circuit Court).[7] Counsel has attached the Circuit Court's decision, which was delivered orally from the bench on the same day as the hearing, transcribed, and then entered, should the Court wish to compare the balancing and analysis between the Business Court's decision and the Circuit Court's decision. Exhibit B, 6 May 2024 Order Denying ACC's Motion to Stay.

[7] Indeed, the only North Carolina case cited by the Circuit Court did not even involve the issue of a stay between a North Carolina court and a foreign court, but dealt with the priority of cases filed in two separate North Carolina counties.

Put simply, FSU cannot rely on a later order entered in another state by another court based on different law to show that Chief Judge Bledsoe abused his discretion here.. Indeed, by arguing that the Florida Circuit Court's assessment should effectively control, FSU would have North Carolina courts defer to the decision of a trial court in Florida over the decision of a Business Court Judge applying North Carolina law.

In sum, Chief Judge Bledsoe "considered each of the relevant factors and made a reasoned finding or conclusion as to each," *Nlend*, 896 S.E.2d 72, concluding that,

> (1) the nature of the case, (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

Order, ¶ 131. The Court should therefore deny FSU's petition as to the denial of its motion to stay because it has failed to show merit or error.

But FSU's Petition fails on an additional basis, for FSU does not show the existence of extraordinary circumstances to warrant the Writ. Unlike *Cryan*, the discretionary denial of a motion to stay under § 1-75.12 is not a novel issue or one that implicates wide-reaching issues of justice and liberty. Nor is there a substantial harm. Indeed, FSU has yet to articulate how proceeding in North Carolina would work a "substantial injustice," let alone how it would suffer any harm from having a North Carolina court apply North Carolina law to a North Carolina contract. And

FSU cannot show that the writ must issue to prevent "a considerable waste of judicial resources," especially when this matter has been stayed pending FSU's appeal from the denial of its Motion to Dismiss for lack of personal jurisdiction.

II. THE TRIAL COURT'S DENIAL OF FSU'S MOTION TO DISMISS FOR LACK OF SUBJECT MATTER JURISDICTION IS CONSISENT WITH THIS COURT'S RECENT CASES AND THERE ARE NO EXTRAORDINARY CIRCUMSTANCES TO WARRANT REVIEW.

Unlike § 1-75.12(c), which requires a movant to either petition for writ of certiorari or waive any error, no such statute addresses the interlocutory review of the trial court's denial of its motion to dismiss for lack of subject matter jurisdiction based on standing. The Court should therefore weigh the request against the "general policy principles counseling against entertaining interlocutory appeals." *Hamilton v. Mortg. Info. Servs., Inc.*, 212 N.C. App. 73, 86, 711 S.E.2d 185, 194 (N.C. Ct. App. 2011) (denying petition for writ of certiorari). Indeed, "[t]he mere fact that an interlocutory appeal could resolve litigation is not enough to justify a grant of certiorari." *Morris v. Rodeberg*, 285 N.C. App. 143, 148, 877 S.E.2d 328, 332, *aff'd,* 385 N.C. 405, 895 S.E.2d 328 (2023).

FSU argues that, because the ACC did not obtain the approval of two-thirds of its member institutions before filing the original Complaint, the ACC lacked jurisdictional standing. It further argues that the ACC cannot ratify the filing of the Complaint, even though 12 members voted to do just that weeks later. Pet. at 32-41. FSU, however, confuses authorization to sue with jurisdictional standing. Order ¶ 35 (quoting *United Daughters of the Confederacy v. City of Winston-Salem*, 383 N.C. 612,

626 (2022) (noting that standing is "legally and conceptually distinct" from whether lawsuit was authorized).

"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." Order ¶ 36 (quoting *Edwards v. Town of Louisburg*, 290 N.C. App. 136, 140 (2023) (citation omitted)); *Comm. To Elect Dan Forest v. Emps. Pol. Action Comm.*, 376 N.C. 558, 608 (2021) ("The North Carolina Constitution confers standing to sue in our courts on those who suffer the infringement of a legal right"). Thus, whether a suit is authorized is irrelevant to whether a party has suffered the infringement of a legal right. This is why the Court rejected the argument, advanced by FSU here, that an entity must affirmatively plead or prove its authority to sue. *Willowmere*, 370 N.C. at 560-61 ("Nothing 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.").

Chief Judge Bledsoe correctly determined that, consistent with this Court's precedent, the ACC had standing to sue when it filed its Complaint:

> [T]he 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. Because the ACC's "injury can be redressed by a favorable decision[,]"; 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[,]" 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.

Order, ¶ 41 (internal citations omitted). Thus, FSU's reliance on *Town of Midland*'s statement that "subsequent events cannot confer standing retroactively" fails because the ACC had standing at the time of suit. *Id.* ¶ 47, n.90 ("[R]atification implicates issues of authorization, not standing. Thus, *Town of Midland* is inapposite.").

The ACC was required under Rule 9(a) to only "make an affirmative averment showing its legal existence and capacity to sue." It did both, alleging that it was an unincorporated nonprofit association under North Carolina law, and that North Carolina law grants it the right to sue in its own name and "acting on its own behalf, enforce its contractual obligations with one or more of its Member Institution." Order ¶ 33 (quoting Complaint and Amended Complaint at ¶¶ 1 and 2). It was not required to plead any further authorization or compliance with corporate bylaws. *Willowmere,* 370 N.C. at 560-61. And because it had a sufficient stake in a concrete controversy with FSU over the meaning of its contract, all of the requisites of jurisdictional standing were met. As put by the Business Court, "[b]ecause the ACC was required only to 'make an 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." Order ¶ 34.

FSU deliberately conflates the issue of "standing-related arguments with . . . arguments regarding the legally and conceptually distinct issue of whether the [ACC]'s actions were authorized." *United Daughters of the Confederacy v. City of*

Winston-Salem, 383 N.C. 612, 626 (2022); Order ¶ 35. And in conflating these concepts, FSU ignores the legal realities. The ACC Constitution and Bylaws do not require that the Board authorize all lawsuits, or even all lawsuits against its Members. Rather, they require only that an absolute two-thirds authorize the initiation of "material" litigation. § 1.6.2. In determining that no authorization was necessary to file a declaratory judgment action that sought to establish the validity of the Grant of Rights between FSU and the ACC, the Conference did not seek to change the status quo, did not accuse FSU of breach, and did not seek monetary damages. Because the original Complaint only sought to declare valid a contractual relationship that had existed for 10 years, the ACC management and Board Chair believed that this would not constitute "material" litigation under the bylaws.

The ACC has the right to interpret its own bylaws and "[i]t is well established that courts will not interfere with the internal affairs of voluntary associations." *Master v. Country Club of Landfall,* 263 N.C. App. 181, 186 (2018). Consequently, "when a plaintiff challenges a voluntary organization's decision, the case will be dismissed as non-justiciable unless the plaintiff alleges facts showing (i) the decision was inconsistent with due process, or (ii) the organization engaged in arbitrariness, fraud, or collusion." *Id.* And even then, "[w]hether a voluntary organization's decision is arbitrary, fraudulent, or collusive is a question of law equated with an abuse of discretion standard." *McAdoo v. Univ. of N.C. at Chapel Hill,* 225 N.C. App. 50, 72 (2013).

FSU submitted nothing to establish that the Conference's interpretation amounted to a decision that was "manifestly unsupported by reason." *Id.* And here, in addition to the declarations submitted by the Conference, FSU's own statements in the wake of the lawsuits support the ACC's judgment that the initial Complaint was not the institution of "material litigation." In January 2024, FSU wrote to the Conference and insisted that the litigation had changed nothing: "[N]othing has changed with respect to Florida State University . . . remaining an active and vibrant member of the Atlantic Coast Conference, and Florida State intends to continue to maintain its past level of full participation in all aspects of the Conference." Exhibit C, 18 January 2023 Letter from FSU General Counsel to ACC's General Counsel. Thus, having asserted to the Conference that its relationship with the Conference was unchanged, FSU is in no position to argue that the litigation filed by the Conference was "material." Indeed, typically courts do not consider actions that seek to preserve the status quo to be material. *See, e.g.*, *Wolff v. Aetna Life Ins. Co.,* 77 F.4th 164, 172 (3d Cir. 2023) (where status quo remains unchanged, federal circuits hold that a revised class certification order does not trigger a new Rule 23(f) period); *Nat. Res. Def. Council, Inc. v. Sw. Marine Inc.,* 242 F.3d 1163, 1166 (9th Cir. 2001) (district court had jurisdiction to modify injunction while appeal was pending because changes preserved status quo); *Advantage Media, L.L.C. v. City of Hopkins, Minn.*, 511 F.3d 833, 837 (8th Cir. 2008) ("Because the preliminary injunction had merely maintained the status quo, it did not effect a material alteration in the parties' legal relationship."); *Coulson v. Kane*, 773 F. App'x 893, 895 (9th Cir. 2019) ("The district

court correctly concluded that the escrow maintained the status quo, rather than materially altering the rights of the parties.").

The Business Court, however, determined that it did not need to address these legal realities for the simple reason that, on 12 January 2024, the ACC Board ratified the filing of the original declaratory claims when it authorized the filing of an Amended Complaint inclusive of the original claims brought by the ACC. As noted by Chief Judge Bledsoe, the "ACC's evidence of ratification is unrebutted and dispositive." *Id.* ¶ 44. Indeed, corporate acts are routinely ratified and "'given effect as if originally authorized by [that corporate entity].'" *Id.* ¶ 46 (quoting *King Fa, LLC v. Chen*, 248 N.C. App. 221, 226 (2016); *see also 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[.]").

It is hornbook law in North Carolina that "[a] plaintiff corporation's failure to comply strictly with its bylaws and internal governance procedures in determination whether to commence litigation does not in itself deprive the corporation of standing to bring its claim." ROBINSON ON NORTH CAROLINA CORPORATION LAW § 3.03. And as the Business Court noted, courts throughout the country uniformly hold that an organization may later ratify the initiation of litigation that was unauthorized at the time of filing. Order ¶ 48. *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 authority to authorize the commencement of 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).

FSU seeks to rely on two cases to support its argument: *Peninsula Prop. Owners Ass'n v. Crescent Res., LLC*, 171 N.C. App. 89, 97 (2005) and *Homestead at Mills River Prop. Owners Ass'n v. Hyder*, No. COA17-606, 2018 N.C. App. LEXIS 622, at *9 (N.C. Ct. App. June 19, 2018) (unpublished). *Peninsula*, however, was silent on

whether a subsequent ratification took place (and involved a blanket ban on any lawsuits unless authorized, rather than the "materiality" distinction in these bylaws), while *Homestead* is an unpublished decision that has no precedential value. Moreover, both were decided before this Court's decisions in *Willowmere* and *United Daughters of the Confederacy* in 2022. *Willowmere* and *Daughters of the Confederacy* together make clear that an organization need not plead "authorization" to establish jurisdictional standing and that these issues are different legal concepts.

FSU next argues that ratification is not valid if the prior act was "illegal." But there was nothing "illegal" about the Conference's decision to sue FSU when FSU made clear that it did not intend to honor its contract. And FSU suggestion that ratification is ineffective because of "intervening rights" makes no sense here. FSU was not deprived of any rights between the Conference's original Complaint and the January 12 meeting. To the contrary, it exercised its right to sue the ACC in Florida, and in fact has amended its Complaint there twice. Certainly, nothing that the ACC did between December 21 and January 12 deprived FSU of its right to do and say what it pleased about its contract and this litigation.

Finally, FSU challenges the trial court's findings related to the uncontroverted affidavits of Brad Hostetter and President James Ryan submitted by the ACC with respect to its authorization to sue. Pet. at 38-42. Chief Judge Bledsoe's determinations about these uncontroverted affidavits are reviewed under the "competent evidence" standard, meaning that his determination "will be upheld if supported by any competent evidence." *Howard v. IOMAXIS, LLC*, 384 N.C. 576, 580,

887 S.E.2d 853, 857 (2023). Because FSU submitted no contrary evidence, the *only* competent evidence in the record showed that the ACC ratified the initial Complaint when it approved the filing of the Amended Complaint, inclusive of the original claims. Order, ¶¶ 49-50. That Chief Judge Bledsoe did not engage in FSU's conspiracy theories does not change the fact that his decision was supported by the *only* competent evidence.

In short, Chief Judge Bledsoe's decision was correct, FSU has not shown merit or probable error, and there are no extraordinary circumstances given that review would not promote judicial economy and this is not a novel issue given Judge Bledsoe's order being consistent with the Court's recent decisions on standing. The Court should therefore deny the petition as to the denial of FSU's motion to dismiss for lack of subject matter jurisdiction.

CONCLUSION

For these reasons, the ACC respectfully requests that the Court deny the Petition.

ATTACHMENTS

Attached to this Response are the following documents, which the undersigned verifies are true and correct copies:

- **Exhibit A** – Excerpts from Transcript of 9 April 2024 Hearing on ACC's Motion to Dismiss or, Alternatively, to Stay Proceedings in the Circuit Court of the Second Judicial Circuit in and for Leon County, Florida, Case No. 2023-CA-2860;
- **Exhibit B** – 6 May 2024 Order Denying ACC's Motion to Stay; and,
- **Exhibit C** – 18 January 2023 Letter from FSU General Counsel to ACC's General Counsel (ECF No. 41.2).

This 19th day of June, 2024.

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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.

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CERTIFICATE OF SERVICE

I hereby certify that the foregoing document was served on 19 June 2024 by e-mail to the following:

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EXHIBIT A

IN THE CIRCUIT COURT OF THE SECOND JUDICIAL CIRCUIT IN AND FOR LEON COUNTY, FLORIDA

CASE NO.: 2023-CA-2860

FLORIDA STATE UNIVERSITY BOARD OF TRUSTEES,

Plaintiff,

vs.

ATLANTIC COAST CONFERENCE,

Defendant.
_____/

TRANSCRIPT OF:

ATLANTIC COAST CONFERENCE'S MOTION TO DISMISS OR, ALTERNATIVELY, TO STAY PROCEEDINGS

VOLUME 1 (Pages 1 - 109)

DATE TAKEN: Tuesday, April 9, 2024
TIME: 9:45 a.m. to 1:45 p.m.
PLACE: Leon County Courthouse
301 South Monroe Street
Tallahassee, Florida 32301
BEFORE: JOHN COOPER, Circuit Judge

This cause came on to be heard at the time and place aforesaid, when and where the following proceedings were stenographically reported by:

JUDY LYNN MARTIN, STENOGRAPHER

Job No. : 352008

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be used by lawyers as they deem fit and if they refer me to those documents, I will then review them and consider those.

So same thing as to the other two, to the plaintiff are the motion by the defense, I call it the large motion for -- I'd say it's about like that.

Any objection to that?

MR. RUSH: No, Your Honor.

THE COURT: I've looked through it.

Again, Mr. Lawson, they appear to be primarily if not exclusively pleadings from the North Carolina case.

MR. LAWSON: That's correct, Your Honor.

THE COURT: Also the second motion is -- appears to be the opinion from the trial judge in the North Carolina case and I'm guessing it's in the 70s, page length.

MR. LAWSON: Seventy-six pages, Your Honor.

THE COURT: Seventy-six. So is there any objection to that?

MR. RUSH: No, Your Honor.

THE COURT: So while I've reviewed these -- these materials sufficiently to determine if there was any problem with taking judicial notice, I've

read some in detail, some I've not read.

The opinions from the judge in North Carolina, I've not read at this point, because I felt it would be better that I did not try to consciously or subconsciously try to move myself for or away of any reasoning he did or didn't make.

So I have read some of the affidavits attached to the plaintiff's response to motion to stay. And if you'll give me a minute, I'm going to have to change the setting of this computer from another judge to me.

(Pause)

THE COURT: Well, I'll go without the computer for the time being. It's -- it's on another judge and it says it's restarting. I'm not sure why, but it is. So let me make a note. Here we go.

Okay. All three requests for judicial notice granted with comments on the record, comments by me on the record.

All right. It might help if we just go down the line of -- starting with plaintiff and everybody announce themselves, so I'm going to try to write down -- I know many of you, but I'm going to try to write down your names so I don't get it wrong or misstate it in the heat of the argument.

went through a procedure almost exactly the same as been described as the procedure imposed by ACC here and that didn't turn -- that turned out to be a public record.

Now, you can have public records in a case and you can have protective orders, but then you have the issue the press has its own right in Florida to see public records aside from parties to an action.

So how do we get by that as being a fundamental policy driven -- look, these are multiples factors. I understand. There's no one factor that -- that balances the scale, but if you have a protective -- a preemptive suit which smells of forum shopping, it doesn't mean you lose but it means you lose the priority preference and then we look at other factors; right?

MR. LAWSON: Under North Carolina law and federal jurisdiction that would be -- that would be true, yes, Your Honor.

THE COURT: Let me read to you the Coca-Cola Company versus Durham, which is a great city by the way. My daughter went to school there for four years.

Headnote 11 -- I'm sorry. 141 N.C. App., A-P-P, 569 2000. I'm quoting, we also note that in

COURT CERTIFICATE

STATE OF FLORIDA

COUNTY OF LEON

I, JUDY LYNN MARTIN, Stenographer, certify that I was authorized to and did stenographically report the foregoing proceedings, and that the transcript, pages 1 to 108, is a true and complete record of my stenographic notes.

Dated this 14th day of April, 2024.

Judy Lynn Martin

JUDY LYNN MARTIN, Stenographer

IN THE CIRCUIT COURT OF THE SECOND JUDICIAL CIRCUIT
IN AND FOR LEON COUNTY, FLORIDA

CASE NO.: 2023-CA-2860

FLORIDA STATE UNIVERSITY BOARD
OF TRUSTEES,

Plaintiff,
vs.
ATLANTIC COAST CONFERENCE,

Defendant.
_____/

TRANSCRIPT OF:

ATLANTIC COAST CONFERENCE'S MOTION TO DISMISS OR, ALTERNATIVELY, TO STAY PROCEEDINGS

VOLUME 2 (Pages 110 - 189)

DATE TAKEN: Tuesday, April 9, 2024
TIME: 1:45 p.m. - 4:37 p.m.
PLACE: Leon County Courthouse
301 South Monroe Street
Tallahassee, Florida 32301
BEFORE: JOHN COOPER, Circuit Judge

This cause came on to be heard at the time and place aforesaid, when and where the following proceedings were stenographically reported by:

I. IRIS COOPER
Stenographic Reporter

Job No. : 352008

A P P E A R A N C E S

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ALSO PRESENT: Carolyn A. Egan, General Counsel FSU

Pearlynn Houck, General Counsel ACC

come into play, as well as the memorandum of law filed by FSU on March 12, 2024. FSU board's response to ACC's motion to dismiss for stay and FSU's response to ACC's motion to stay discovery.

The motion to stay discovery which was filed 3/27 I think is a pretty succinct statement of FSU's arguments perhaps supplemented today by other arguments that give the basic reasons why even if you look at factors other than the priority rule that the motion to stay must be denied.

The ten points of the judge in North Carolina, it may be that he cited a case to support that. But I studied the ten points as argued by counsel. I'm more persuaded by the argument of FSU on that point.

There are issues I'm going to put in quotes, the taking of the media rights whether or not it constitutes the taking or not, I would want to look at the order to see how FSU wants to draft it to see if I agree with it.

I tend to agree with FSU's arguments asserted in its memorandum on these points. I think there are issues of sovereign immunity as the relates to whether or not FSU can be sued for breach of contract in another state and whether the sovereign

immunity can be deemed waived under that state's laws.

I think there is a significance state interest in those issues for Florida. There is a significant state issue for the interest in Florida of whether or not the subject matter of this case constitutes property and whether it can be taken.

There is a significant interest in the state of Florida on the issue of what documents are of public record and what are not. And I still think looking at what I've read, the arguments are helpful and instructive.

But I still think there is an issue, particularly with regard to the ESPN contracts with ACC. As I understand it, the issue is whether or not those are public records under Florida law, not under North Carolina law.

There is a notable difference, I believe, between -- I've not seen anything argued today or in the memoranda, which was very well done by all parties, including ACC. You did a very good job.

I've not seen anything to indicate or point out any public records of Sunshine law equivalent in North Carolina to what is available in Florida. I don't think this is a -- I don't agree that the

forgive me if I'm not totally articulate. I think it's better conceived as evidence of preempted litigation and forum shopping than it is any other factor that's been mentioned.

So instead of -- one might call it ultra vires. Is it a nature of an ultra vires act? But the reality is, it's more evidence of an ultra vires -- I'm sorry -- of a premature action, an action that is not yet authorized. It's a rush to the courthouse action.

Apparently, if one accepts the affidavit, it was a rush job. Because although they were following FSU's actions since August, I take from it that they found out about the meeting and they, in essence, said, great, you got to draft this suit because I didn't get the impression that the suit had already been drafted from the affidavit.

I don't know what discovery may show or not. So I'll leave it that way, counsel, instead of I'm not as confident to be as precise as you were in your actual argument on that point. So I'm glad we have a court reporter here who will remember all of this.

The issue of whether the Grant of Rights were ratified by the board and whether they were -- and

then whether that argument had been waived by the university accepting money, I find that both sides make good arguments on that point.

But I find that the scales tip slightly in FSU's favor on that point because we're dealing with a state of Florida entity. Florida obviously is a sovereign state, and these issues directly affect Florida really more than they do the state of North Carolina because this is not North Carolina's money that's at issue.

This is ACC money that is at issue. Yes, I agree that it does affect North Carolina other state entities who are members of the ACC but not as directly as it does FSU, which is a Florida State entity and is directly funded by Florida State.

And I think I can take judicial notice of the fact that the Florida legislature gives money to State universities in Florida. So I tip that in FSU's favor, not to say that definitely you win that argument or that defense loses that argument because there's something to be said in defense's waiver argument.

I understand your argument. I think the defense's waiver argument is something worth

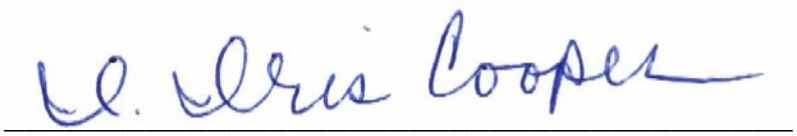
COURT CERTIFICATE

STATE OF FLORIDA

COUNTY OF LEON

I, I. IRIS COOPER, Stenographic Reporter, certify that I was authorized to and did stenographically report the foregoing proceedings, and that the transcript is a true and complete record of my stenographic notes.

Dated this 15th day of April, 2024.



I. Iris Cooper
Stenographic Reporter
Commission No. 1366674
Expires: February 7, 2028

Job No.: 352008

EXHIBIT B

IN THE CIRCUIT COURT OF THE SECOND JUDICIAL CIRCUIT
IN AND FOR LEON COUNTY, FLORIDA
CASE NO. 2023 CA 002860

FLORIDA STATE UNIVERSITY
BOARD OF TRUSTEES,

Plaintiff,

v.

ATLANTIC COAST CONFERENCE,

Defendant.
_____/

ORDER DENYING ACC'S MOTION TO STAY

This cause came before the Court on April 9, 2024, at the hearing on Defendant Atlantic Coast Conference's (the "ACC's") Motion to Dismiss or, Alternatively, to Stay. Only the alternative requested relief of a stay (the "Motion to Stay") was heard at that time, and this Order only pertains to the Motion to Stay.

The Court, having reviewed the Motion to Stay, Response, and other filings submitted by the parties, having heard argument of counsel, and otherwise being fully advised in the premises, DENIES the Motion to Stay for the reasons stated on the record on April 9, 2024, including as follows:

The ACC argues this action should be stayed in favor of its earlier-filed action in North Carolina against the FSU Board pursuant to the principle of priority. "In general, where courts within one sovereignty have concurrent jurisdiction, the court which first exercises its jurisdiction acquires exclusive jurisdiction to proceed with that case. This is called the 'principle of priority.'" *Siegel v. Siegel,* 575 So. 2d 1267, 1272 (Fla. 1991) (quoting *Bedingfield v. Bedingfield,* 417 So. 2d 1047 (Fla. 4th DCA 1982)). The Florida Supreme Court "has determined that the application of the principle of priority as between courts of sovereign jurisdictions is based upon comity and

thus a discretionary decision of the trial court[.]" *Parker v. Estate of Bealer,* 890 So. 2d 508 (Fla. 4th DCA 2005) (quoting *Siegel v. Siegel,* 575 So. 2d 1267, 1272 (Fla. 1991)). As *Siegel* explained, the principle of priority is "not applicable between sovereign jurisdictions as a matter of duty. As a matter of comity, however, a court of one state may, in its discretion, stay a proceeding" in deference to another state's proceeding. *Siegel* at 1272.

Discretion is not abused where "additional factors or circumstances which would also warrant a denial of stay by the trial court" are present. *Id.* The ACC argues that under *Roche v Roche v. Cyrulnik,* 337 So. 3d 86 (Fla. 3d DCA 2021), "extraordinary" circumstances must be found. Under *Seigel*, however, "additional," rather than "extraordinary," circumstances must be shown. Regardless of the terminology, the key is whether the circumstances warrant denial of a stay. The ACC argues that if the principle of priority is triggered and exceptional circumstances do not exist, the Court will abuse its discretion if it does not grant a priority-based stay. The ACC further argues that if exceptional circumstances do exist, it would be improper for this Court to consider the legal issues in the case, such as jurisdiction and sovereign immunity, those issues are properly reserved to the court with priority in such circumstances, and that the North Carolina court has priority. I disagree.

I find based on the record and within the Court's discretion that there are additional (and in fact extraordinary) circumstances warranting denial of the requested stay. Specifically, I find the North Carolina action to be an "anticipatory filing" done in express anticipation of the FSU Board's lawsuit in Florida, and that the anticipatory filing is in the nature of forum shopping that cannot be supported with a stay of these proceedings. In addition, the North Carolina action was brought in a foreign state against a Florida sovereign entity—another additional (and in fact extraordinary) circumstance. Finally, I find that other factors, such as locations of witnesses and

evidence and applicable law, do not tip the balance in favor of a stay.

Courts universally and for many decades, federal and state, have condemned "anticipatory suit" tactics (particularly preemptive filing of declaratory judgment actions) as a form of forum shopping, and do not reward them with stays. *See, e.g., Mission Ins. Co. v. Puritan Fashions Corp.,* 706 F.2d 599, 602 n.3 (5th Cir. 1983) ("Anticipatory suits are disfavored because they are an aspect of forum-shopping.") (quoting *American Automobile Ins. Co. v. Freundt,* 103 F.2d 613, 617 (7th Cir. 1939) ("The wholesome purposes of declaratory acts would be aborted by its use as an instrument of procedural fencing either to secure delay or to choose a forum."); *National Broom Company v. Brookstone,* 2009 Westlaw 2365677, *3 (N. D. Cal. 2009) ("An action is anticipatory when the plaintiff files upon receipt of specific concrete indications that a suit by the defendant is imminent. Such anticipatory suits are disfavored because they are examples of forum shopping. Moreover, the Declaratory Judgment Act should not be used to 'deprive the plaintiff of his traditional choice of forum and timing...provoking a disorderly race to the courthouse.' 'Application of the first-to-file rule in such situations would thwart settlement negotiations, encouraging intellectual property holders to file suit rather than communicate with an alleged infringer.'") (citations omitted); *EEOC v. University of Pennsylvania,* 850 F.2d 969, 971-72 (3d. Cir. 1988) (court did not abuse its discretion by declining to dismiss the second filed suit when the timing of the first suit indicated an attempt to preempt the imminent second suit and avoid a forum where precedent "might favor resolution of the dispute in favor of" the other party); *Sanchez Vicario v. Santacana Blanch*, 306 So. 3d 1098, 1102 (Fla. 3d DCA 2020) ("we have stated that 'Florida courts, including this one, regard forum shopping with displeasure'"); *Centennial Life Insurance Company v. Poston,* 88 F.3d 255, 258 (4th Cir. 1996) ("Although the federal action was filed first, we decline to place undue significance on the race to the courthouse door, particularly

in this instance where Centennial had constructive notice of Postons' intent to sue.").

I also find analogous the equitable considerations in cases from the patent law arena. *See, e.g., Amperex Technology Limited,* 2022 WL 135431, *2 (Fed. Cir. 2022) ("we have recognized that the first-to-file rule is not absolute that a declaratory judgment action in particular may even be dismissed though filed first, and that a 'court may consider whether a party intended to preempt another's infringement suit when ruling on the dismissal of a declaratory action.'") (quoting *Electronics for Imaging, Inc. v. Coyle,* 394 F.3d 1341, 1347-48 (Fed. Cir. 2005)); *Communications Test Design, Inc. v. Conn Tech,* 952 F.3d 1356 (Fed. Cir. 2020) (approving dismissal of the first-filed declaratory action suit in favor of the second filed suit where the first case was filed as an anticipatory suit and during negotiations, the plaintiff told the other party they were going to make a counter-proposal but instead filed the suit.); *PPS Data v. Diebold,* 2012 Westlaw 1884655, *1-*2 (Utah 2012) (refusing to apply the first-to-file rule to patent infringement action and instead dismissing that action for forum shopping.).

A good example is the North Carolina case, *Coca-Cola Bottling v. Durham Coca-Cola,* 141 N.C. App. 569 (N.C. Ct. App. 2000):

> 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.

Coca-Cola at 578 (citing *Centennial Life Ins. Co.* 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."), and *Mission Ins. Co.* at 239)); *and see Wachovia Bank v. Harbinger Capital Partners,* 2008 NCBC 6, 13 (N.C. Bus. Ct. 2008) (condemning the filing of what was "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" and concluding, "Against this backdrop, Plaintiffs' choice of forum is not entitled to substantial weight. ") (citing *Coca-Cola*).

Typically, the issue in "anticipatory suit" cases is whether the competing case was in fact filed in anticipation of the challenged case. *See, e.g., Mission Ins. Co.* at 602. In the instant case, the evidence shows that the ACC filed its declaratory judgment suit in North Carolina in anticipation of a next-morning filing in Florida by the FSU Board. Both the ACC and the FSU Board requested judicial notice of a variety of record materials from the North Carolina action in support of their positions. No requests for judicial notice were objected to, and all requests were granted at the beginning of the hearing. Among those items was the Declaration of James E. Ryan, J.D., the ACC Chair of the Board of Directors. President Ryan's Declaration describes the ACC learning on December 21, 2023 of the FSU Board's public notice of a meeting for the next day, and the ACC's becoming aware that the meeting was likely for purpose of initiating litigation against the ACC. President Ryan describes that the ACC filed its own lawsuit in North Carolina on December 21, 2023 expressly in anticipation of the FSU Board's to-be-filed Florida lawsuit—the instant suit, which the ACC seeks to stay under the principle of priority. Although the ACC argued they had an obligation to file their suit, they could have done so long before learning of the to-be-filed action and only did so after learning of the impending action in Florida.

President Ryan's Declaration describes circumstances very similar to some of the factual scenarios set forth in the cases describing other examples of anticipatory filings, above. On balance, I find the record evidence in this proceeding, including the complaints and the judicially-noticed matters, shows a virtual classic case of anticipatory filing.

The FSU Board also argues the North Carolina lawsuit was filed ("initiated") in violation

of the ACC Constitution, in the Amended Complaint (¶¶ 222-226, 248) and in response to the Motion to Stay. The ACC Constitution requires an absolute two-thirds vote in favor by the Conference Institutions before "initiating...material litigation" (the "Required Vote") under Article 1.6.2. *See* Amended Complaint ¶¶ 222-226, 248. Both parties agree as to that requirement, but the ACC argues that its lawsuit in North Carolina was only a declaratory action to maintain the "status quo," and was therefore not "material" litigation. The FSU Board disputed that the declaratory action simply sought to maintain the "status quo." "Material" is undefined in the ACC Constitution, but Black's Law Dictionary defines it as, *inter alia* (and primarily), "important."

The ACC also argues that its own interpretation of the word "material" must be deferred to under the North Carolina Uniform Unincorporated Nonprofit Association Act and the doctrine that courts should not second-guess management decisions of the board of an unincorporated association.

I do not find that the doctrine argued by the ACC supports a finding that an unincorporated nonprofit association has authority to define common words in a way that distorts their ordinary meaning to the substantial determinant of its members. The "status quo" by ACC's own concession involves important issues, and the ACC's position is inconsistent with its argument that it is in fact the "traditional plaintiff" whose choice of forum should supersede the FSU Board's choice. I do find the ACC filing in North Carolina on December 21, 2023 to be the initiation of "important" and therefore "material" litigation for which the Required Vote was likely required.

The FSU Board argues that the ACC's initiation of material litigation without the Required Vote renders the ACC's December 21, 2023 filing of its lawsuit in North Carolina an ultra vires act, and therefore a nullity under both Florida and North Carolina law. The Court makes no finding at this time as to whether that filing was an ultra vires act, but does find that the lack of the Required

Vote (along with the Declaration of President Ryan and other matters) is further evidence supporting the conclusion that the ACC filing was an anticipatory suit aimed at trying to head off the FSU Board from filing in its chosen forum (and, indeed, exclusive forum, under Florida law).

I also find that factors other than the priority rule support the denial of a stay in the case. For instance, there 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, particularly in light of *Edelman v. Jordan,* 415 U.S. 651, 673 (1974) (holding that waiver of sovereignty can only be found "where stated 'by the most express language or by such overwhelming implications from the text as [will] leave no room for any other reasonable construction.'"), and *Franchise Tax Bd. of Cal. v. Hyatt,* 139 S. Ct. 1485, 1490 (2019) (holding the Constitution does not permit "a State to be sued by a private party without its consent in the courts of a different State").

The FSU Board has raised issues about whether the ACC's claim of ownership of FSU's media rights to its home games *post-exit* from the ACC would involve a taking by the ACC of property owned by a sovereign Florida entity. Similarly, there are significant state interests as to whether that subject matter constitutes property of the State of Florida. I find that these 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. I take judicial notice that the Florida legislature provides state funds to state universities in Florida.

There is also an issue of whether the Grant of Rights was ever ratified by the FSU Board, and whether that argument has been waived by the university's receipt of money in the past. Both sides make arguments that are better made in connection with potential summary judgment

motions. There are also issues and evidence related to whether the lawsuit filed by the ACC in December 2023 was properly authorized under the ACC Constitution and bylaws, as well as whether the ACC's actions on January 12, 2024 constituted a ratification of an unauthorized action by its agent. I am not deciding at this time whether, as the FSU Board argues, the intervening rights of a third person cannot be defeated by a subsequent ratification. But I do find the ACC's actions support a finding of an anticipatory filing, as part of a rush to the courthouse. All of this should be considered with the other additional circumstances on an equitable basis to deny the ACC a first-filed priority.

There is also an issue of whether the subject matter of this case constitutes property of the State of Florida and whether certain documents (particularly ACC-ESPN contracts) are Florida public records. As discussed at the hearing, Florida law provides significant public access to documents shared with state entities.

I do not find that the issues in this case are of local concern particular to North Carolina or Mecklenburg County; they are relevant to the other states where ACC has member institutions throughout the eastern United States (another of which has sued in South Carolina, in a currently-unresolved matter), and metrics of impact on the conference other than the locations of schools (particularly financial metrics), as alleged in Plaintiff's amended complaint, suggest a particular concern in Florida. Florida hosts two member schools (FSU by far the most lucrative for the ACC as alleged in the Amended Complaint).

There's only one reason one would engage in forum shopping and that's because the party believes the forum shopped is better. That's why forum shopping is condemned in all these cases including cases from Florida.

The ACC also argues that choice of law provisions (or operations of law, such as the last-

signing party on a contract) require application of North Carolina law. But I do not find that the fact that North Carolina law may apply to some of the questions raised by the complaints in this proceeding militates in favor of staying this case. Three states (so far) are involved in similar proceedings, so that a unified result is not readily apparent by staying this matter. And this Court, as many do, regularly applies the law of other states to issues determined in Florida proceedings.

The ACC also argues that witnesses and evidence are centered in North Carolina. Witnesses are likely in multiple states, and many are likely to be in Florida. Some will likely be located in states of other Conference Institutions. And the purported location of electronic documents or emails in North Carolina, in today's world, are little reason justifying staying these proceedings. The location of servers hosting digital evidence are virtually irrelevant given the lightning speed of electronic communication.

On the other hand, the FSU Board appears the natural plaintiff, is located in Leon County, Florida, and absent a true showing of waiver of sovereign immunity for foreign venues, is susceptible to suit only in Leon County, Florida. In fact, there is a substantial risk that the terminus of the North Carolina proceedings—even after potentially protracted litigation at great expense to both parties—is reversal on appeal and dismissal for lack of subject matter jurisdiction in light of *Edelman* and *Franchise Tax Board,* and back to square one. Such risk is not presented by these proceedings in Florida, where the FSU Board has waived suit for contract claims like those made by the ACC and is susceptible to claims.

On balance, none of the cases cited by the ACC as supporting application of the principle of priority come anywhere close to the facts alleged here and the record, including the ACC's own sworn affidavit, showing a night-before filing, in express sudden knowledge of an impending lawsuit (consequent to the other party's obligation to provide public notice), for only declaratory

relief aimed at maintaining the "status quo," relying on a purported waiver of sovereign immunity of an admittedly sovereign entity in a way that would mean every ACC member has waived immunity for virtually any claim in North Carolina.

The Motion to Stay is denied.

DONE AND ORDERED this 6th day of May, 2024, Leon County, Florida.

Hon. John C. Cooper
Circuit Court Judge

Copy to: All counsel of record

EXHIBIT C

FLORIDA STATE UNIVERSITY
OFFICE OF THE GENERAL COUNSEL

January 18, 2023

VIA EMAIL: phouck@theacc.org

Pearlynn G. Houck, Esq.
General Counsel, Atlantic Coast Conference
620 South Tyron Street, Suite 1200
Charlotte, NC 28202

Dear Pearlynn:

I was surprised to receive your January 12th letter for several reasons, among them the following:

First, nothing has changed with respect to Florida State University ("Florida State") remaining an active and vibrant member of the Atlantic Coast Conference, and Florida State intends to continue to maintain its past level of full participation in all aspects of the Conference including all meetings on all subjects. Although all ACC members possess the unalienable constitutional right to withdraw from the organization (ACC Constitution 1.4.5), Florida State has never "file[d] an official notice of withdrawal", hence the Conference is precluded from treating Florida State as if it has withdrawn under its own enabling Constitutions and Bylaws. So if your question is whether the Conference has permission from Florida State to discriminate against Florida State, treat it in a disparate manner, or deprive it of information, the answer is an unequivocal no.

Second, with respect to your discussion of "conflicts of interest", "duties and obligations", "fiduciary" responsibilities and "confidential information" as those purportedly pertain to member institutions that have not withdrawn, your letter cites to no supporting provision of the ACC Constitution and Bylaws imposing any such duties because there are none. Moreover, your letter cites to no ancillary contract signed by Florida State imposing any such obligations running from member institution to either the ACC or any third parties. Your letter represents that, "the Conference, *through the Board of Directors*, believes that FSU's President has a conflict of interest . . . ." The conference must immediately provide FSU, as a member institution, with any record or communication by or with the Board of Directors or any of its members regarding such desire by the Board as well as any document discussing, considering or memorializing any such a belief.

Third, your letter manifests the fundamental misperception that has brought this enterprise to the existential crisis it now confronts. Simply stated, the member institutions were not created and do not exist for the benefit of the Conference. Rather, the Conference was created and exists solely for the benefit of its member institutions. *All* of the Constitutional "**PURPOSE[S]**" of the ACC run from the Conference to the member institutions and not vice versa. Your castigation of Florida State's president on the grounds that he has a "conflict of interest" because his overarching fiduciary duty is to the institution of higher learning of which he is President, rather than the Conference, demonstrates this fundamental misunderstanding. If that were the case, then all ACC "Directors" are plagued with the exact same "conflict" because any President who takes the position that her or his first oath is to a voluntary not-for-profit association in North Carolina as opposed to the institution of higher learning he or she serves as President is unfit for his or her

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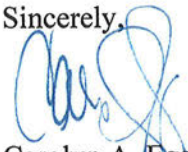
office. As the contested vote last September proves, the Directors vote first, as they should, in the interests of their institution. Such "dissent" hardly triggers any obligation for a member institution to "explain why it does not have a direct conflict of interest" and never has.

Fourth, your letter contains several mischaracterizations with respect to the litigation; I will address only the most profound. In its Complaint, the Board of Trustees of Florida State University ("Board of Trustees") seeks declarations in order to inform that Board with respect a future potential vote by the Board on the question of the possible withdrawal from the ACC by member Florida State. The vote has not happened and is not even scheduled at present. Even if the Board of Trustees prevails in all pending court proceedings, it is possible that the then-composition of the Florida State Board of Trustees votes NOT to authorize Florida State to withdraw from the ACC. Then there would be no withdrawal by Florida State.

Moreover, there are unlimited possibilities in between. For instance, the ACC members could decide to (a) eliminate the Grant of Rights or portions thereof and/or its ill-fated extension; or (b) adopt a reasonable withdrawal penalty structure. Also, given there currently is no in-force agreement for its members' Tier I media rights from 2027-2036 (since an option for that period has not been exercised by ESPN), the Conference could – for the benefit of all Conference members - immediately, vigorously and actively commence renegotiation of the Conference's long-term media and network agreements, to make them competitive with those of the Big Ten, the SEC, or the Big 12 (or even any one of them). Such things could significantly influence the outcome of any potential vote by the Board of Trustees, potentially bring all litigation to an end, and meaningfully mitigate the Conference's current existential crisis.

Finally, Florida State is seriously concerned by your representation that the "Conference has delayed action items for consideration by its Board of Directors" which actions the Conference presumably believes would benefit its members. The Conference has a responsibility to expeditiously move forward with regard to actions that benefit its members and cannot use Florida State as a pretext to continue to underserve the member institutions.

Sincerely,



Carolyn A. Egan