No. 221A24

TWENTY SIXTH JUDICIAL DISTRICT

NORTH CAROLINA SUPREME COURT

****

ATLANTIC COAST CONFERENCE, Plaintiff-Appellee, v. CLEMSON UNIVERSITY, Defendant-Appellant.	From Mecklenburg County No. 24-CV-13688

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PLAINTIFF-APPELLEE'S BRIEF

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PLAINTIFF-APPELLEE'S BRIEF

****

On April 19, 2013, the President of Clemson University ("Clemson") signed a contract governed by North Carolina law which granted Clemson's media rights ("Grant of Rights") to the Atlantic Coast Conference ("ACC" or the "Conference"), a North Carolina unincorporated association. (R pp 61-81).[1] In the Grant of Rights, and among other promises, Clemson warranted that "the grant of Rights during the entire Term is irrevocable and effective until the end of the Term regardless of whether the Member Institution withdraws from the Conference during the Term or otherwise ceases to participate as a member of the Conference." (R p 64 ¶6).

[1] The references to the Record in this appeal refer to the public record, which was redacted by Order of the Business Court and Stipulation of the Parties on this appeal. In addition, references to documents filed with the Business Court, such as Memoranda and attachments, are contained in a Rule 9(d)(2) Supplement and will be referred to by those document numbers (e.g., Doc. Ex. p ___).

Clemson's Grant of Rights to the ACC was identical to grants signed by each of the then 12 members of the Conference.

Clemson is a founding Member of the ACC, having formed the Conference in Greensboro with six other private and public universities in 1953. Since signing the Grant of Rights in 2013, Clemson has received more than $372 Million from the ACC, and its representatives have served on 17 committees that manage the ACC, including the Executive Committee. In 2016, Clemson's President served as the President of the ACC and oversaw (and approved) a 20-year extension of the Term of the Grant of Rights "regardless of whether [it] withdraws from the Conference during the Term." And when he did so, Clemson's President said:

> The ACC is a great conference, and this increases the national exposure, brings in additional revenue and offers greater opportunity for student athletes . . . . For us and the Florida States and others, it stabilizes the conference long term.

(R p 4). In 2023, Clemson voted to authorize the Conference to accept $15 Million in North Carolina taxpayer funds to keep the Conference headquarters in North Carolina. (R p 205 n.58). Clemson concedes that it is "making money" and "conducting business in North Carolina" through the ACC. Brief at 20.

But despite its leadership in entering these agreements, more than a decade of "making money" through media contracts made possible by the Grant of Rights, and consistently "conducting business" through its management of the Conference, Clemson became dissatisfied when other athletic conferences negotiated even more lucrative media contracts. Florida State University ("FSU") shared this dissatisfaction. On December 21, 2023, the Conference sued FSU in North Carolina, correctly believing that FSU intended to breach the Grant of Rights by suing the ACC in Tallahassee, Florida; the next day, FSU filed its planned lawsuit.

After litigation began with FSU, Clemson contacted the ACC and "indicated a desire to work with the Conference regarding its own membership." (R p 32 ¶118). Clemson "requested . . . protections that the ACC would not file a lawsuit against it." *Id.* The ACC agreed to work with Clemson. Then, on March 19, 2024—three days before a hearing on FSU's Motion to Dismiss in the Business Court—Clemson preemptively filed a Complaint in a South Carolina court. (R p 32 ¶119; R pp 107-34).[2] In that lawsuit, Clemson asserted for the first time that it had not transferred its media rights "regardless" of whether it remained a Member of the ACC and that it would retain its media rights even if it ceased to be a Member of the ACC.[3] And when the Conference, which has been a North Carolina unincorporated nonprofit association for more than 70 years, attempted to enforce the meaning of this North Carolina contract in the courts of North Carolina, Clemson objected, claiming that as a sovereign it could not be sued in these courts.

SUMMARY OF ARGUMENT

Clemson argues that it should not be subject to the jurisdiction of North Carolina's courts. To avoid jurisdiction Clemson urges that this Court should

[2] The timing of this lawsuit reflects an attempt by Clemson to avoid any potentially favorable ruling for the Conference in FSU's case.

[3] Unlike FSU, Clemson conceded the Grant of Rights (and its extension) was valid and enforceable, a concession which led to the dismissal of some of the Conference's declaratory claims. (R pp 221-222 ¶59). This concession is a binding judicial admission by Clemson that the Grant of Rights is a valid and enforceable agreement.

abandon its decision in *Farmer v. Troy,* 382 N.C. 366 (2022), or, failing that, restrict *Farmer*'s holding so that it does not apply here. The Court should do neither.

Clemson came to Greensboro, North Carolina more than 70 years ago to form the ACC, a North Carolina unincorporated association. For the past 70 years, Clemson actively participated in the management and governance of the Conference and collected hundreds of millions of dollars in distributions from the Conference. Since at least 2006, North Carolina law has provided that an unincorporated association "may assert a claim against a member or a person referred to as a 'member.'" Uniform Unincorporated Nonprofit Association Act ("UUNAA"). N.C. Gen. Stat. §59B-7(e). The UUNAA specifically applies to "governmental subdivisions" such as Clemson. N.C. Gen. Stat. §59B-2(3). And Clemson understood this liability under North Carolina law because, in 2012, it authorized the ACC to sue the University of Maryland, a sovereign entity, in the courts of North Carolina (and to oppose Maryland's claim that as a sovereign it could not be sued in North Carolina courts). *See Atlantic Coast Conference v. University of Maryland,* 230 N.C. App. 429 (2013). (R pp 207-09 ¶36).

Nor is there any dispute that these actions by Clemson in North Carolina were taken to manage and conduct a considerable (and lucrative) commercial business. (R pp 207-09 ¶¶35-36). Indeed, Clemson never argued otherwise before the Business Court, and admits that it is "making money" and "conducting business" in North Carolina. Brief at 20. Clemson also concedes that it may be sued on these contracts. Brief at 16. And while Clemson asserts that it is merely a "passive" participant in the ACC, it submitted no affidavits or documents in support of this argument. To the contrary, the Business Court found that "Clemson has not sought to refute any . . . allegations" made by the ACC regarding Clemson's active and extensive role in managing the activities of the Conference, and its having engaged in "continuous and systematic" governance. (R pp 204-06 ¶¶31-32).

Presented with an entity that came into North Carolina to form an unincorporated association, that actively participated as a Member in managing that association, that engaged in substantial commercial activity out of which it received more than $372 Million, that authorized suit against another sovereign member in a North Carolina court, and that could be sued on its contracts, the Business Court reached the unremarkable conclusion that Clemson consented to the jurisdiction of the North Carolina courts within the meaning of *Franchise Tax Board of California v. Hyatt,* 587 U.S. 230 (2019) and *Farmer v. Troy,* 382 N.C. 366 (2022) *cert. denied,* 143 S.Ct. 2561 (2023). In short, by entering into North Carolina, conducting commercial activity, and doing so as a Member of a North Carolina unincorporated association, Clemson necessarily chose to submit itself to the requirements of North Carolina law set forth in the UUNAA, including the obligation to answer for the claims of the ACC in the same way as a private member.

Clemson urges this Court to overrule its decision in *Farmer*, by focusing nearly exclusively on the dissent in *Farmer*, discussing the majority opinion only enough to criticize it, and ignoring entirely the concurring opinion by Justice Berger. But *Farmer* was correctly decided and is neither palpably wrong nor constitutes the type of "grievous" error that this Court has required to overturn its precedents. *Wiles v. Welparnel Constr. Co.,* 295 N.C. 81, 85 (1978).

Farmer stands for the logical principle that when an out-of-state sovereign engages in commercial activities in North Carolina under a North Carolina statutory framework that gives it rights and also imposes liability (including the right to sue and obligation to be sued), the sovereign waives (or consents) to the jurisdiction of the North Carolina courts to the extent provided by that statutory framework. In *Farmer*, this was a consent to sue and be sued in the same fashion as any other North Carolina nonprofit corporation. Here, under the UUNAA, the liability imposed (and thus the consent given) is far narrower; it is confined to the right to sue on behalf of the ACC and to be sued by the ACC for its claims, just as any other member of an unincorporated association. N.C. Gen. Stat. §59B-7(e).

At the heart of the consent in *Farmer* is the imposition of liability by statutory operation, based on *Thacker v. Tennessee Valley Authority*, 587 U.S. 218 (2019) and *Georgia v. City of Chattanooga*, 264 U.S. 472 (1924). In *Thacker*, a unanimous Court held that when an entity is "launched with [a sue and be sued] clause into the commercial world and authorize[d] to engage in business transactions with the public," the plain meaning of "sue and be sued" is that it has "the same amenab[ility] to judicial process [as] a private enterprise." 587 U.S. at 227. In *City of Chattanooga*, the Court held that when Georgia accepted the right to operate a railroad in Tennessee with the same rights and restrictions as a domestic railroad, it "divested itself of its sovereign character" and was no different than "those engaged in the railroad business in Tennessee." 264 U.S. at 482. Taken together, and as pointed out by Justice Berger in his concurrence in *Farmer*, "a state which engages in private enterprise activity and consents to the sister state's terms of doing business, should be treated like a similarly situated private corporation for its commercial activities while retaining immunity for its governmental functions." 382 N.C. at 378-79 (Berger, J., concurring).

Clemson attempts to dismiss *Thacker* while ignoring *City of Chattanooga* (which is uncited in its Brief). Instead, Clemson argues: "That Clemson is making money or conducting business in North Carolina is not relevant to the question of whether there has been a waiver of Clemson's sovereign immunity in North Carolina courts." Brief at 20. According to Clemson, only a specific act of South Carolina's legislature may provide consent and North Carolina law is "not relevant" on the question of consent. *Id.* Neither *Thacker* nor *City of Chattanooga* support such an argument, and *Hyatt* itself never suggested such a limitation.

Clemson further argues that the Eleventh Amendment should govern consent under *Hyatt*. But, again, *Hyatt* did not say this. Clemson's argument also ignores that *Hyatt* and the Eleventh Amendment create two different immunities under federal law. *Hyatt*'s immunity is a "structural immunity" which is similar to personal jurisdiction and thus subject to waiver and consent. The immunity created by the Eleventh Amendment is a limitation on the subject-matter jurisdiction of the federal courts, and has historically been applied more strictly than personal jurisdiction. But even under the Eleventh Amendment, a sovereign's conduct can still result in waiver without a legislative enactment.

At the core of *Hyatt* is the principle that each of the states is a co-equal sovereign; as a co-equal sovereign, consent is necessary before one sovereign can be sued in the courts of another. Requiring an arm of South Carolina to be answerable in North Carolina courts under North Carolina contracts when it enters into and operates a commercial enterprise in North Carolina under North Carolina law does not violate any principle of federalism. Rather, it strikes the proper balance between co-equal sovereigns. Consent is also consistent with the expectations of all of the Members of the Conference in entering into the Grant of Rights, both public and private, who surely did not believe if a dispute occurred that every public university would be bound only by a decision in its courts regardless of any conflicts that might arise from the adjudication of the same contractual issues in multiple states.

Thus, *Farmer* was correctly decided, should not be abandoned, and was properly applied to this case.

STATEMENT OF FACTS

The case comes to this Court on denial of Clemson's Motion to Dismiss under Rule 12(b)(2) on jurisdictional grounds. Because Clemson did not submit any evidence in support of its Motion, "[t]he allegations of the complaint must disclose jurisdiction although the particulars of jurisdiction need not be alleged." *Parker v. Town of Erwin*, 243 N.C. App. 84, 96 (2015). Thus, in assessing jurisdiction, "[t]he trial judge must decide whether the complaint contains allegations that, if taken as true, set forth a sufficient basis for the court's exercise of personal jurisdiction." *Id.*

The trial court "acts as a fact finder" and thus the facts that it finds, if supported by competent evidence, are binding. *Id.* at 98. *See, e.g.*, *Land v. Whitley*, 292 N.C. App. 244, 252 (N.C. Ct. App. 2024) (where "defendants do not contradict plaintiff's allegations, such allegations are accepted as true and deemed controlling").

Consequently, the facts set forth here are those facts contained within the Plaintiff's Complaint (which are considered true for purposes of the jurisdictional determination) and the Business Court's Order.[4]

The ACC, Clemson, and the Grant of Rights

The ACC is a North Carolina unincorporated nonprofit association under Chapter 59B that was formed in 1953 in Greensboro, North Carolina, by Clemson and six other public and private universities. (R pp 188-89 ¶4). Since 1953, Clemson has engaged in "'continuous and systematic membership and governance activities'" in the ACC. (R p 204 ¶31; R pp 8-10 ¶¶9-12). Between January 1, 2007 and December 31, 2023, Clemson's President attended 48 of 50 in-person ACC Board meetings, Doc. Ex. p 216 ¶3, its Presidents, Athletic Directors, and Head Coaches have "played an active role in the administration of the ACC affairs," (R p 205 ¶31), and, as of the date

[4] The ACC notes that while the Business Court's Order stated that it "does not make findings of fact on the Motions," (R p 188 ¶3), in context this refers to the various motions by Clemson directed at the validity of substantive claims and for a stay. For purposes of personal jurisdiction, the Business Court did find jurisdictional facts, as it was required to do. *See, e.g.,* R pp 204-09 ¶¶31-36. For this issue, the trial court "acts as a fact finder," and "must decide whether the complaint contains allegations that, if taken as true, set forth a sufficient basis for the court's exercise of personal jurisdiction." *Parker v. Town of Erwin*, 243 N.C. App. 84, 96 (2015). Clemson's Brief challenges no finding of fact as either unsupported by the record or clearly erroneous.

the ACC filed its Complaint, Clemson officers or employees served on 17 committees governing the ACC. (R p 8 ¶11). Clemson's President and a Clemson employee served on the Executive Committee for the ACC between 2016 and 2023, including two years as President (2016-17 and 2018-19) (R p 9 ¶11(a)-(b)), and its Athletic Director or members of its Athletic Department served on the Television or Media Committee, the Constitution and Bylaws Committee, and the Finance Committee, from 2012 through 2024. (R p 9 ¶11(c)-(e)).[5] As the President of the ACC in 2016, Clemson's President not only approved the execution of the Conference's recent media rights agreement with ESPN, but oversaw the extension of the Term of the Grant of Rights through 2036. (R p 205 ¶31; R p 24 ¶76).

Throughout its recent history, the ACC's "main source of income has consisted of payments it receives in exchange for granting exclusive media rights to broadcast athletic events and competitions involving athletes from ACC Member Institutions." (R p 206 ¶34; R pp 10 ¶¶14-16,). By "'aggregating Media Rights from each Member Institution, the Conference was able to increase the total value of those rights," distributing "the payments it receives under these media rights agreements, totaling hundreds of millions of dollars, to its Members, including Clemson." (R pp 206-07 ¶34; R p 20 ¶58).

[5] As part of its Membership in the ACC, Clemson's athletic teams regularly play in North Carolina. For example, Clemson's Football and Men's Basketball teams played 91 games in North Carolina between January 1, 2007 and December 31, 2023. In 14 of those games in North Carolina, Clemson was designated as the "home" team. (R pp 205-06 ¶32; Doc. Ex. p 217 ¶¶4-5).

In 2012, "'collegiate athletic conferences began to experience significant instability and realignment.'" (R p 190 ¶6; R pp 18-19 ¶53). The Business Court found "[t]he ACC was no exception." (R p 190 ¶6). That year, "the University of Maryland announced its withdrawal . . . . Shortly thereafter, the ACC elected to add four new Member Institutions." (R p 190 ¶6). "[A]gainst this backdrop in 2013," and to "'secure a long-term media rights agreement and thus ensure the payment of predictable sums over time,'" the ACC entered into the Grant of Rights with Clemson and its other Members. (R p 190 ¶¶6-7; R pp 18-19 ¶53).

Under the Grant of Rights:

> each of the Member Institutions is required to, and desires to, irrevocably grant to the Conference, and the Conference desires to accept from each of the Member Institutions, those rights granted herein[:]
>
> . . . .
>
> Grant of Rights. Each of the Member Institutions hereby (a) irrevocably and exclusively grants to the Conference during the Term . . . all rights (the "Rights") necessary for the Conference to perform the contractual obligations of the Conference expressly set forth in the ESPN Agreement, regardless of whether such Member Institution remains a member of the Conference during the entirety of the Term[.]
>
> . . . .
>
> Acknowledgements, Representations, Warranties, and Covenants. Each of the Member Institutions acknowledges that the grant of Rights during the entire Term is irrevocable and effective until the end of the Term regardless of whether the Member Institution withdraws from the Conference during the Term or otherwise ceases to participate as a member of the Conference in accordance with the Conference's Constitution and Bylaws. . . . Each of the Member Institutions covenants and agrees that . . . it will not take any action, or permit any action to be taken by others subject to its control, including licensees, or fail to take any action, that would affect the validity and enforcement of the Rights granted to the Conference under this Agreement.

(R pp 190-91 ¶7). After the execution of the Grant of Rights, the ACC used the "bundle" of rights received from its Members to negotiate additional agreements with ESPN, which "increas[ed] the fees paid to the Conference, which were then distributed to the Member Institutions, including Clemson." (R p 191 ¶8).

In 2016, the ACC sought to generate additional revenue for its Members through new agreements with ESPN, ones that would establish the ACC Network, broadcast more ACC athletic events, and amend the existing ESPN agreement to provide for additional payments. (R pp 192 ¶8). "ESPN, however, conditioned its participation in the [new] ESPN Agreements on each Member Institution's agreement to extend the term of the Grant of Rights." (R p 192 ¶9). Following "numerous Board and other meetings, the ACC Members, including Clemson, executed a 2016 Amendment to ACC Grant of Rights Agreement with the ACC . . . extend[ing] the term from 30 June 2027 to 30 June 2036." (R p 192 ¶9). Within days of this amendment, new agreements with ESPN were executed. (R p 192 ¶9). "Since the execution of the Grant of Rights in 2013, Clemson's distributions from the ACC 'more than doubled.'" (R pp 192-93 ¶9; R p 30 ¶108).

<u>FSU and Clemson Become Dissatisfied with the Revenue from the ACC and Litigation Begins Between FSU and the ACC</u>

Despite these new agreements and increased revenue distribution, Clemson and FSU became dissatisfied as other athletic conferences negotiated even more lucrative media agreements. In response to Clemson and FSU's dissatisfaction, in 2023 "'the Conference endorsed the concept of distributing a larger share of post-season revenues to the Members that generated those revenues.'" (R p 193 ¶10). This placated neither school.

On December 21, 2023, following repeated threats by FSU to ignore the Grant of Rights and challenge its obligations to the ACC, and when it became a "practical certainty" that FSU would initiate litigation, the ACC was left with no choice but to file a Complaint against FSU in Mecklenburg County, North Carolina. *Atlantic Coast Conference v. Board of Trustees of Florida State University*, 2024 WL 1462914, *7 ¶28 (N.C. Super. April 4, 2024). One day later, FSU proceeded to file its planned lawsuit against the ACC in Tallahassee, Florida, challenging the validity and enforceability of the Grant of Rights. (R p 193 ¶11).

During January and February 2024, both FSU and the ACC filed amended complaints against each other, and FSU moved to dismiss the ACC's Amended Complaint in North Carolina. As the litigation between FSU and the ACC unfolded, Clemson conveyed that it wished to work with the ACC regarding its own membership in the Conference, asking for assurances of confidentiality and a promise that the ACC would not sue it. (R p 194 ¶12; R p 32 ¶¶118-19). The ACC "agreed to work with Clemson, seeking a business solution rather than resorting to litigation." (R p 32 ¶118). To that end, on January 31, 2024, the ACC began negotiating the language of a "standstill and tolling" agreement with Clemson, while Clemson agreed to provide Nondisclosure language to keep the discussions confidential. (Doc. Ex. p 377).

The Business Court set argument on FSU's Motion to Dismiss for Friday, March 22, 2024. On Tuesday, March 19, 2024, Clemson sued the ACC in Pickens County, South Carolina, asking the Court of Common Pleas to interpret the language of the Grant of Rights that "the grant of Rights during the entire Term is irrevocable and effective until the end of the Term regardless of whether the Member Institution withdraws from the Conference" to mean that Clemson could withdraw from the Conference and take its media rights whenever it wanted.[6] Clemson would later amend its Complaint seeking punitive damages for "slander of title" against the Conference for its belief that when the Grant of Rights said it was effective "regardless" of whether Clemson withdrew, this meant that the Conference retained the granted rights regardless of whether Clemson withdrew.

Because the Conference had relied on Clemson's representations that it wished to seek a solution without resorting to litigation, and thus had not filed a lawsuit against Clemson before March 19, the ACC was forced to file its own lawsuit against Clemson in Mecklenburg County, North Carolina, on March 20, 2024. This was necessary so that the Business Court could adjudicate the same issues raised in the pending lawsuit against FSU with Clemson's claims, all of which are governed by North Carolina law.

<u>The Business Court's Decision</u>

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[6] Clemson also asked that it be relieved from the withdrawal payment obligation of the ACC Constitution, which it voted for and then authorized a lawsuit against Maryland to enforce, on the theory that it was now unconscionable.

Chief Judge Bledsoe issued his decision on FSU's Motion to Dismiss on April 4, 2024, holding that by conducting and managing a commercial business as a Member of the ACC, a North Carolina unincorporated association, FSU consented to the jurisdiction of the North Carolina courts for the claims of the ACC under the UUNAA. *Atlantic Coast Conference v. Board of Trustees of Florida State University*, 2024 WL 1462914 (N.C. Super. April 4, 2024). On May 7, 2024, Clemson filed its own Motion to Dismiss, claiming (like FSU) that as a sovereign entity it is not subject to the jurisdiction of the North Carolina courts for the claims of the ACC. After several rounds of briefing, the Business Court held a multi-hour argument on July 2, 2024. This briefing and argument resulted in the issuance of a 53-page decision containing 87 numbered paragraphs on July 10, 2024.

As in his decision in the FSU case, Chief Judge Bledsoe began his analysis here with "the presumption that the State of South Carolina may not 'be sued by a private party without its consent in the courts of [this] State.'" (R p 202 ¶28) (quoting *Hyatt*, 587 U.S. at 233). Because "South Carolina has extended its sovereign immunity to include its public universities," the Business Court concluded that "as a general matter, [Clemson] is entitled to sovereign immunity from suit without its consent in the state courts of every state in the country." (R p 202 ¶28) (quoting *Farmer*, 382 N.C. at 371). Thus, the "critical issue" in Clemson's Motion to Dismiss was "whether Clemson explicitly waived its sovereign immunity to suit in North Carolina." (R p 202 ¶28).

To answer this question, Chief Judge Bledsoe analyzed the text of the UUNAA, the operative statutory scheme governing the legal relations between the ACC and its Members. The UUNAA empowers the ACC, as an unincorporated nonprofit association, to sue and be sued: "A nonprofit association, in its name, may institute, defend, intervene, or participate in a judicial . . . proceeding." N.C. Gen. Stat. §59B-8(1) and cmt. 1. (R pp 202-03 ¶29 and n.49). But it also provides that a Member of the ACC, such as Clemson, is empowered to bring claims on behalf of the ACC, and to bring claims against the ACC: "A member of . . . a nonprofit association may assert a claim against or on behalf of the nonprofit association." N.C. Gen. Stat. §59B-7(e). (R p 202-03 ¶29). As a corollary to these Member rights, the UUNAA empowers the ACC to "assert a claim against a member or person referred to as a 'member' by the nonprofit association." *Id.* Thus, under section 59B-7(e), a Member can sue on behalf of the nonprofit association and can be sued for the claims of the nonprofit association in North Carolina. And the UUNAA specifically applies to a member who is a "government, governmental subdivision, agency, or instrumentality." N.C. Gen. Stat. §59B-2(3).

Because "'a sue and be sued clause can act as a waiver of sovereign immunity when a state entity's nongovernmental activity is being challenged,'" the Business Court next "analyze[d] Clemson's activities in this State" to "decide if they are of a commercial or governmental nature." (R p 203 ¶29) (quoting *Farmer,* 382 N.C. at 372). Clemson claimed in that analysis that "it simply remained a Member of the Conference when the ACC became an unincorporated nonprofit association subject to the UUNAA in 2006." (R p 204 ¶30). It thus argued that its "passive behavior is distinctly different" than the actions taken by Troy University in *Farmer*. (R p 204 ¶30).

The Business Court disagreed. (R p 204 ¶31). The Business Court reviewed the extensive, continuous, and systematic actions taken by Clemson in managing the Conference since the passage of the UUNAA, noting that "Clemson has not sought to refute any of these allegations." (R pp 204-06 ¶¶31-32). Based on these unrefuted allegations, the Business Court concluded first "that the ACC's activities . . . are commercial in nature," and second that "as a Member of the ACC, Clemson's Conference-related activities in this State are also commercial, rather than governmental, in nature." (R p 207 ¶35).

Chief Judge Bledsoe then "conclude[d] that, like FSU, Clemson has elected to engage in this substantial commercial activity in North Carolina subject to the UUNAA's sue and be sued" provisions. (R p 207 ¶36). Like FSU, "Clemson chose to remain in the Conference after the ACC . . . became subject to the UUNAA." Also, "like FSU, Clemson's then-President authorized the filing of the Conference's 2012 lawsuit against another sovereign Member . . . the University of Maryland, in North Carolina pursuant to the UUNAA's sue and be sued clause, which . . . Maryland unsuccessfully challenged on sovereign immunity grounds." (R pp 207-08 ¶36). Further, "[l]ike FSU, Clemson received hundreds of millions of dollars after entering into the Grant of Rights in 2013 and the Amended Grant of Rights in 2016, much of which was generated through Clemson's voluntary commercial activity in North Carolina." (R p 208 ¶36). The Business Court concluded:

> there is no doubt that, like FSU, [Clemson] chose to remain in the Conference after the UUNAA was passed, to enter into the Grant of Rights Agreements, and to accept the financial benefits of those agreements, and, based on its decision to approve suit against the University of Maryland, it recognized by at least 2012 that, as a Member, it was subject to the UUNAA's sue and be sued clause.

(R p 209 ¶36). *See* R pp 207-08 n.70 ("[U]nder *Farmer* . . . because Clemson and FSU conducted business in North Carolina while knowing they were subject to the UUNAA's sue and be sued clause, both of these Member Institutions explicitly waived their sovereign immunity against suit in this State."). "Accordingly . . . under *Farmer*, Clemson has waived its sovereign immunity and is subject to this suit in North Carolina." (R p 211 ¶40).

Clemson now appeals and asks this Court to abandon its decision in *Farmer*.

STANDARD OF REVIEW

When an appellate court "reviews a decision as to personal jurisdiction, it considers only 'whether the findings of fact by the trial court are supported by competent evidence in the record," *Banc of America Securities LLC v. Evergreen Intern. Aviation, Inc.,* 169 N.C. App. 690, 694 (2005). In addition, this Court "review[s] *de novo* the issue of whether the trial court's findings of fact support its conclusion of law that the court has personal jurisdiction over the defendant." *Cohen v. Continental Motors, Inc.,* 279 N.C. App. 123, 134 (2021).

Clemson asks this Court to overrule its decision in Farmer. This Court "has never overruled its decisions lightly. No court has been more faithful to *stare decisis*."

Rabon v. Rowan Memorial Hospital, 269 N.C. 1, 20 (1967). As noted by Justice Barringer in *Connette v. Charlotte-Mecklenburg Hospital Authority,* "[t]he salutary need for certainty and stability in the law requires, in the interest of sound public policy, that the decisions of a court of last resort affecting vital business interests and social values, deliberately made after ample consideration, should not be disturbed except for most cogent reasons.'" 382 N.C. 57, 76 (2022) (Barringer, J., dissenting) (quoting *Potter v. Carolina Water Co.*, 253 N.C. 112, 117-18 (1960)). Simply put, *stare decisis* "reflects the idea that 'the law must be characterized by stability,' and courts should not change the law to reach particular results." *Harper v. Hall*, 384 N.C. 292, 373 (2023). And while this Court has always reserved the right to correct for "palpable error" in cases that stand "without support in reason," *id.*, the standard is for "palpable error" is more than a disagreement. Rather, decisions are overruled only where there is a "perpetuation of error or grievous wrong." *Wiles v. Welparnel Constr. Co.*, 295 N.C. 81, 85 (1978).

ARGUMENT

In deciding whether this Court should take the extreme remedy of abandoning its precedent, it is important to understand what is *not* at issue.

Clemson never claims that the Due Process and considerations of fundamental fairness prevent it from being sued in North Carolina, nor does it argue that it lacks "meaningful contacts, ties or relations" in North Carolina. *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 472, (1985). Indeed, this Court may fairly conclude that Clemson has "purposely avail[ed] itself of the privilege of conducting activities" in North Carolina such that it could reasonably anticipate being sued here. *ALS Scan,* *Inc. v. Dig. Serv. Consultants, Inc.*, 293 F.3d 707, 712 (4th Cir. 2002).[7] Clemson also "concedes that the State of South Carolina may be held liable on a contract claim." (R p 209 ¶38). *See McCall v. Batson*, 285 S.C. 243, 244 (1985) (reaffirming that South Carolina is not "immun[e] from suit based upon its contractual obligations."); Brief at 16.

Thus, the issue before this Court is not *whether* Clemson may be sued on these claims, but *where* that lawsuit may take place. But Clemson cites a litany of North Carolina cases that discuss *whether* North Carolina can be sued on various claims, not the issue of *where* such a suit may be brought under *Hyatt*. *See, e.g.*, Brief at 11, 18-21.[8] None of these cases discuss the issue of consent under *Hyatt*. These citations make little sense here when Clemson concedes that it may be sued on these very claims. Put simply, cases that address if a sovereign can be sued at all, rather than where the suit may take place under *Hyatt*, are not relevant to this appeal.

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[7] Clemson suggests that the Conference argues the existence of minimum contacts under the Due Process Clause constitutes a consent. This is not correct. Clemson's extensive commercial contacts under a statute that imposes jurisdiction, inform the "commercial activity" inquiry under *Farmer*.

[8] For example, Clemson cites *State v. Taylor*, 322 N.C. 433, 437 (1988), for the proposition that waivers of sovereign immunity can only be mandated by the legislature. But this case involves *whether* the sovereign may be sued under North Carolina law and predates *Hyatt* and the question of *where* a sovereign may be sued by more than 30 years. Moreover, as a statement of North Carolina law, this is not correct, for "[w]henever the State of North Carolina, through its authorized officers and agencies, enters into a valid contract, the State implicitly consents to be sued for damages" and "the doctrine of sovereign immunity will not be a defense." *State v. Smith*, 289 N.C. 303, 320 (1976). And, of course, none of this is relevant here because Clemson concedes may be sued on its contracts.

I. <u>There is No Valid Reason to Abandon *Farmer*.</u>

Clemson urges this Court to abandon its decision in *Farmer*. In so arguing, Clemson incorrectly claims that *Farmer* is outside the scope of other post-*Hyatt* decisions. It then seeks to rely on cases addressing consent under the Eleventh Amendment even though *Hyatt* did not discuss (let alone adopt) such an approach. Clemson also argues *Farmer* wrongly decided and that this Court should now correct this purported error. In so arguing, Clemson largely ignores *Farmer*'s majority opinion, opting instead to extensively discuss the dissent and disregard entirely Justice Berger's concurrence. And while Clemson briefly criticizes the majority's reliance on *Thacker*, it ignores altogether *City of Chattanooga*, even though both undergird *Farmer*'s rationale and figure prominently in the majority opinion and the concurrence.

But, as noted above, *stare decisis* applies unless "it results in perpetuation of error or grievous wrong." *Wiles*, 295 N.C. at 85. Reaffirming *Farmer* does neither.

A. <u>There is Nothing Improper in Requiring a Sovereign Entity to Consent to Jurisdiction in Exchange for Conducting Commercial Business in the Forum State.</u>

In 2019, in *Hyatt*, the U.S. Supreme Court abandoned a comity analysis for reviewing claims of sovereign immunity, holding instead that the history of the republic (and particularly the understood relationship between the states at the founding), the text of the Constitution, and the constitutional architecture of federalism required that a state must provide consent before it may be sued in the courts of another state. *Hyatt*, however, prescribed neither the form nor the method for such consent. Nor did it describe the law to be applied to determine whether consent had occurred. Indeed, *Hyatt* is silent on how consent is to be determined and the analytical framework to be used.

These matters were addressed by this Court in *Farmer*. *Farmer* stands for the principle that when an out-of-state sovereign engages in commercial activities in North Carolina under a statutory framework that gives it rights and also imposes liability (including the right to sue and be sued), the sovereign waives (or consents) to the jurisdiction of the North Carolina courts to the extent provided under North Carolina law. In *Farmer*, a North Carolina resident employed by Troy University, an Alabama public university and sovereign under Alabama law, asserted tort claims against Troy. 382 N.C. at 367. Troy argued that it did not consent to foreign jurisdiction under *Hyatt*. *Id.* Indeed, the Alabama Constitution (unlike the South Carolina law here) provided that "the State of Alabama shall never be made a defendant in any court of law or equity." *Id.* (citing Ala. Const., Art. I, §14). After examining Alabama law, this Court presumed that Troy was immune from suit in North Carolina and then analyzed whether Troy had, by action or otherwise, consented to suit in North Carolina. *Id.* at 371. Troy registered to do business as a nonprofit corporation which gave it the power to sue and imposed the obligation to be sued. N.C. Gen. Stat. §55A-3-02(a)(1). Troy was also provided with a certificate of authority in which it was given "the same but no greater rights . . . and [was] subject to the same . . . liabilities . . . imposed on [ ] a domestic corporation of like character." *Id.* (citing N.C. Gen. Stat. §55A015-05(b)). Troy then conducted commercial activity in North Carolina. This Court held that these factors meant that Troy "explicitly waived its sovereign immunity." 382 N.C. at 371-73.

Importantly, none of the statutory provisions relied on by the Court specifically stated that Troy could be sued in North Carolina courts; rather they simply declared that Troy was no different from a domestic corporation. And the consent found in *Farmer* was a consent to general jurisdiction - - Troy could be sued by any person for any reason arising out of its business in North Carolina. Both the majority opinion and Justice Berger's concurrence found that these provisions Troy to the jurisdiction of the North Carolina courts and was appropriate in exchange for Troy's choice to operate a commercial enterprise in North Carolina. And both found that principle plainly expressed in two prior cases, *Thacker* and *City of Chattanooga.*

Presented with the imposition of a "sue and be sued" clause on Troy under the Nonprofit Corporation Act, the majority in *Farmer* turned to *Thacker*, which analyzed a similar provision under a similar claim of sovereign immunity. In *Thacker*, the Court held that "sue and be sued" meant what it said, and that when an entity is "launched with such a clause into the commercial world" the plain meaning of "sue and be sued" is that it has "the same amenability to judicial process as a private enterprise." 587 U.S. at 227. Moreover, imposition of consent in exchange for the right do conduct commercial activity has been part of sovereign waiver doctrine for 100 years, beginning with *Georgia v. City of Chattanooga*, 264 U.S. 472 (1924). There, Tennessee enacted a statute allowing Georgia to construct and manage a railroad in Tennessee subject to the same "rights, privileges and immunities with the same restrictions which given and granted" to a domestic railroad. However, when Tennessee sought to condemn part of the land acquired, Georgia objected on the basis of sovereign immunity. The Court held that by accepting the conditions imposed on it by the Tennessee legislature in exchange for conducting a commercial business, Georgia "divested itself of its sovereign character," effectively being no different than "those engaged in the railroad business in Tennessee." 264 U.S. at 482. As summarized by the Court, "The sovereignty of Georgia was not extended into Tennessee. Its enterprise in Tennessee is a private undertaking. It occupies the same position there as does a private corporation . . . ." *Id.* at 220.

For the *Farmer* majority, *Thacker* showed that a "sue and be sued" clause "can act as a waiver of sovereign immunity when a state entity's nongovernmental activity can be challenged." 382 N.C. at 372.[9] *City of Chattanooga* meant that acceptance of the right to do business in another State also comes with the limitations and liability imposed by that State, including a waiver of sovereign immunity. *Id.* at 374. Justice Berger's concurrence emphasized these points:

> Both *Thacker* and *City of Chattanooga* support the conclusion that when a state engages in a proprietary function in another state and consents by agreement to the sister state's terms of doing business, it consents to suit and waives its sovereign immunity for those commercial activities. It follows that a state which engages in private enterprise activity and consents to the sister state's terms of doing business, should be treated like a similarly situated private corporation for its commercial activities for retaining immunity for its governmental functions.

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[9] Clemson suggests that because *Thacker* was decided under federal law it, somehow, should not apply here. Brief at 22. But the question of where a sovereign can be sued is itself ultimately a question of federal law, for it turns on the structural immunity inherent in the Constitution explicated in *Hyatt*.

Id. at 378-79 (Berger, J., concurring).

So too here. When Clemson received hundreds of millions of dollars through its continuous participation in the management of the ACC in its commercial business of marketing the bundle of media rights provided by the Grant of Rights, Clemson was no different than any other member of an unincorporated association, with the same rights and obligations under North Carolina law. This was the essential exchange which constituted consent. And the right to do business often comes with the statutory imposition of consent, here under the UUNAA.

The UUNAA is specific about the rights it grants to members of a North Carolina nonprofit unincorporated association. For example, under the UUNAA, Clemson is protected from any torts or acts or omissions of committed by other members or the ACC "merely because" it is a member. N.C. Gen. Stat. §59B-7(b), (d). Clemson, as a Member of the ACC is also given the right to "assert a claim . . . on behalf" of the ACC. *Id.* §59B-7(e). Clemson has the right to assert its own claims against the ACC. *Id.* And, in exchange for these rights, the ACC "may assert a claim against a member." *Id.* Thus, under the UUNAA, North Carolina gave Clemson the right to sue on behalf of the ACC (and to sue the ACC), the right to assert the ACC's claims against other Members or entities, the privilege of immunity from claims brought based on its mere membership in the ACC, and the obligation that it can be sued for the ACC's claims.

This right to sue and obligation to be sued that North Carolina granted to Clemson (and all other Members of the ACC) as a condition of operating a North

Carolina nonprofit association is as explicit (if not more so) than the "sue and be sued" provision in *Farmer* but is not nearly as expansive. The Nonprofit Corporation Act in *Farmer* effectively imposed general jurisdiction over a nonprofit corporation, meaning that Troy could be sued by anyone for any reason arising out of its North Carolina operations. By contrast, the UUNAA significantly limits the scope of this right to sue and the liability to be sued for a member of an unincorporated nonprofit association. And because a member may be a governmental subdivision, the UUNAA provides for a claim against governmental subdivisions by the nonprofit association.

Here the "sue and be sued" obligation as applied to Clemson permits Clemson to sue the ACC if Clemson has a claim, to sue on behalf of the ACC for the Conference's claims, and to be sued only for the ACC's claims (here under a contract governed by North Carolina law). This limited "sue and be sued" provision in the UUNAA means that Clemson is treated no differently than any other member of a nonprofit association and has, in exchange for its membership, agreed to the limited waiver of its sovereignty. And Clemson fully exercised and understood this provision when it authorized the Conference to sue Maryland in 2012 (also on a theory that Maryland did not have immunity against the Conference's claims in North Carolina).

Finally, the legal reality is that Clemson's same arguments were presented to the U.S. Supreme Court when Troy sought *certiorari* after *Farmer*. Troy retained a former Solicitor General and was assisted by an amicus brief joined in by several states (including South Carolina), and the Petition argued that *Farmer* was an incorrect application of *Hyatt*, relying on the same Eleventh Amendment cases

Clemson cites here. If palpable error infected *Farmer*, the Petition for *Certiorari* and amicus presented the ideal procedural vehicle to address it. Yet, the Court rejected the Petition without dissent. While the denial of *certiorari* does not have precedential effect, it still leaves the underlying decision in place. If *Farmer* had been so palpably in error or grievously wrong such that this Court should abandon it, this error should have been apparent to the Supreme Court.

B. Abandoning *Farmer* Is Not Justified by Decisions in Other States or the by Eleventh Amendment.

Clemson argues that the uniform conclusion of the post-*Hyatt* cases (other than *Farmer*) is that the sovereign-defendant's law controls. Brief at 18. Not so. For example, uncited by Clemson is *Galette v. NJ Transit*, 2023 PA Super 46, 293 A.3d 649, 657-58 (2023), *pet. for appeal granted* 313 A.3d 450 (February 14, 2024) (Table), in which the court found that NJ Transit could be sued in Pennsylvania despite its claim of sovereign immunity because it operated as an independent entity and because a potential money judgment would not affect the New Jersey treasury. Similarly, in a case decided shortly after Clemson filed its Brief, *Colt v. NJ Transit Corp.,* 2024 NY LEXIS 1901, 2024 NY Slip Op 05867 (November 25, 2024), the New York Court of Appeals held that NJ Transit was not entitled to sovereign immunity from suit in New York under the test of whether doing so "would offend the dignity" or sovereignty of New Jersey in light of its operations in New York. *See Henry v. New Jersey Transit Corp.,* 39 N.Y.3d 361, 391-92 (2023) (issue of immunity from jurisdiction waived on appeal; dissent notes that waiver or consent occurred in any event in part because NJ Transit operates a multimillion-dollar business within the

State of New York). Even where decisions turned on the law of the defendant-sovereign, the courts also noted that there was no conduct that would have constituted waiver or consent by the sovereign. *See, e.g., Shoemaker v. Tazewell Cnty. Pub. Sch.,* 249 W.Va. 451, 453 (W.Va. 2023) (Plaintiff conceded that "no behavior . . . took place during the case" that would constitute waiver); *Nizomov v. Jones,* 198 N.Y.S.3d 184, 186 (N.Y. App. Div. 2023) (insufficient evidence to show that sovereign defendant waived sovereign immunity by contract); *Belfand v. Petosa,* 148 N.Y.S.3d 457, 465 (N.Y. App. Div. 2021) (litigation conduct waived sovereign immunity). Moreover, none of these cases have criticized either *Farmer*'s holding or its analytical framework. Indeed, one case cited by Clemson, *Marshall v. SEPTA*, the court extensively discusses *Farmer* in both its text and its footnotes, without criticism. 300 A.2d 537, 547-48 and n. 16, 18, 19 (Pa. Commw. Ct. 2023). If, as claimed by Clemson, *Farmer* is egregiously wrong and out of step with post-*Hyatt* case law, it is curious that no other court that has struggled with this same issue has said so, let alone criticized *Farmer*.

To claim that *Farmer* is wrong, Clemson relies heavily on cases interpreting the concept of consent under the Eleventh Amendment. But the right established in *Hyatt* did not arise from the Eleventh Amendment. And while the Court in *Hyatt* discussed the Eleventh Amendment and its enactment as part of the history of the states and Constitution, it found the constitutional principle of consent "implied as an essential component of federalism" sprang from the overall structure of the Constitution itself, rather than from a particular amendment. *Hyatt*, 587 U.S. at 247.

If the Supreme Court had meant for the Eleventh Amendment to define the consent necessary for *Hyatt,* it could have said so. It did not, and there are good reasons for this. First, because the federal courts and the federal sovereign operate in all of the states, a state sovereign-defendant, by definition, must operate within the sphere of the federal sovereign - - indeed, it has no choice and cannot avoid contact with the federal sovereign. By contrast, a claim in a state court against an out-of-state sovereign arises from the choice of the out-of-state sovereign to operate within the other sovereign state. Thus, the sovereignty of both states is implicated and must be respected. So, while the sovereign-defendant may not be subjected to jurisdiction absent consent or waiver, the forum sovereign may impose jurisdiction as a condition of conducting commercial activity within its state. This respects both sovereigns, which are co-equals, and is at the heart of *Hyatt*.

Second, there is a fundamental difference between the structural immunity established in *Hyatt* and the immunity set forth in the Eleventh Amendment, which is in part a restriction on subject-matter jurisdiction in the federal courts. Justice Gorsuch, a member of the five Justice majority in *Thacker*, recently explained these "two distinct federal law immunities from suit." *PennEast Pipeline Co. v. New Jersey*, 594 U.S. 482, 510 (2021) (Gorsuch, J., dissenting). The first is the "structural immunity" noted in *Hyatt*, which applies in federal and state court and is a "constitutional entitlement." *Id.* But "[s]tructural immunity sounds in personal jurisdiction, so the sovereign can waive that immunity by 'consent' if it wishes." *Id.* (citing *Hyatt.*) The second is the immunity under the Eleventh Amendment, which "do[es] two things at once." *Id.* at 511. While it applies only to diversity suits (and thus is more limited than the structural immunity in *Hyatt*), it also "imposes an Article III subject-matter jurisdiction barrier." *Id.* As a restriction on subject-matter jurisdiction in the federal courts, it is more restrictive than the structural right under *Hyatt*, and exceptions are more closely scrutinized. Indeed, two decades earlier, Justice Kennedy, in commenting on the "hybrid nature of the jurisdictional bar erected by the Eleventh Amendment," advocated for "modifying the Eleventh Amendment jurisprudence to make it more consistent with our practice concerning personal jurisdiction." *Wisconsin Dept. of Corrections v. Schacht*, 524 U.S. 381 (1998).

Clemson ignores the concept of co-equal sovereignty that is at the core of *Hyatt*'s structural immunity. Instead, its argument elevates South Carolina to a superior sovereign. Under Clemson's argument, it may enter into any state of its choosing, engage in commercial activity, violate its obligations or contracts, and not be held accountable in the courts of that state regardless of what the law of the forum state provides as a condition for in-state activity. If North Carolina cannot by statute impose jurisdictional consent as a consequence of entering into North Carolina to conduct commercial activity, then only South Carolina determines what laws it wishes to comply with and where disputes should be determined. For example, if Clemson formed or became part of a North Carolina entity that operated a chain of restaurants and chose not to abide by workers' compensation laws or wage laws, under its argument and regardless of what North Carolina law provided, the employees or others damaged by this disregard of North Carolina law would have to sue in Pickens County, South Carolina. Thus, under Clemson's logic, North Carolina is rendered a lesser sovereign to South Carolina even though Clemson chose to come into and establish (or join) a North Carolina entity and conduct nongovernmental activities in North Carolina. Clemson's argument turns co-equal sovereignty on its head.

The concept of waiver or consent by conduct is neither new nor radical.[10] And, contrary to Clemson's position, it does not require legislative enactment by the sovereign-defendant. For example, even under the Eleventh Amendment, since at least *Lapides v. Bd. of Regents of Univ. Sys. of Ga.,* 535 U.S. 613 (2002), the federal courts have held state action can qualify as consent without legislative enactment, as happens, for example, when a state litigant invokes federal jurisdiction "regardless of the form that invocation may take." Illustrative is *In re South Carolina,* 103 F.4th 287 (4th Cir. 2024). There, the Fourth Circuit held that when South Carolinas' attorney general sued Google in an antitrust case over its advertising practices, this waived the Eleventh Amendment immunity for *all agencies* in South Carolina, regardless of whether they were parties to the litigation and even if they objected. And as noted above, courts in New York and Pennsylvania have ruled that the sovereign defendant's activities and conduct in the forum state are relevant to the

[10] For example, a few weeks after denying *certiorari* in *Farmer*, the Supreme Court issued its decision in *Mallory v. Norfolk S. Ry.*, 600 U.S. 122 (2023). There it held that Pennsylvania could impose consent to jurisdiction on a non-resident corporation that the Pennsylvania Supreme Court found did not have sufficient minimum contacts to be sued in Pennsylvania. The absence of such contacts was, for the Court, beside the point when, as part of qualifying to do business, the non-resident corporate defendant consented to the jurisdiction of the Pennsylvania courts.

consent inquiry, while other state courts have acknowledged that conduct could result in a waiver or consent, even if it did not occur in a particular case. *See, e.g.*, *Marshall v. SEPTA,* 300 A.3D 537, 543 n.7 (Pa. Commw. Ct. 2023) (noting that sovereign could consent to be sued by some other affirmative conduct); *Nizomov v. Jones,* 198 N.Y.S.3d 184, 186 (N.Y. App. Div. 2023) (no evidence of waiver by conduct or through contract); *Belfand v. Petosa,* 148 N.Y.S.3d 457, 465 (N.Y. App. Div. 2021) (immunity claim raised only after *Hyatt* was waived by conduct in litigation). Thus, the lack of legislative enactment by the defendant sovereign has never been a complete bar to consent under the Eleventh Amendment and is plainly not so under the less restrictive structural immunity of *Hyatt.*

Properly understood, under *Hyatt*'s structural immunity there are several sources from which consent and waiver may be found, including legislative enactment, litigation conduct, and the activities of the sovereign in the forum state under legislative enactment of the forum state. Each may independently supply the necessary consent or waiver under *Hyatt.* *Hyatt* did not suggest that consent could be expressed only through legislation by the sovereign defendant's state. And *Farmer*, by recognizing that the activities of a sovereign could result in consent or waiver by North Carolina's statutory enactments, is no outlier.

II. ***Farmer*'s Principles and Analysis Apply to Clemson.**

Clemson alternatively urges this Court to not apply *Farmer*'s principles and analytical framework to this case, effectively arguing for an interpretation of *Farmer* that restricts the decision to sovereigns who register as a Nonprofit Corporation under North Carolina law. This is both wrong and unjustified.

Farmer's analytical framework requires a court to begin with the presumption that a sovereign entity cannot be sued without its consent or a waiver. It then requires the court to determine whether consent or waiver has occurred. If the sovereign has been granted legal rights and obligations under the laws of North Carolina, including most notably the right to bring claims and to be liable for claims, and is conducting commercial activity, it has consented. These are precisely the analytical steps followed by the Business Court below. And these steps establish that Clemson consented to suit in North Carolina.

To pull its conduct and the UUNAA out of Farmer's ambit, Clemson argues that the UUNAA is intended only to "mitigate the risks faced by members" of unincorporated associations. Brief at 29. In so arguing, Clemson freely concedes that the UUNAA applies to it and will claim the UUNAA's protections where it limits Clemson's liability. But Clemson cannot lay claim to the protections of the UUNAA while avoiding its obligations, and in particular the obligation that a "nonprofit association may assert a claim against a member." N.C. Gen. Stat. §59B-7(e). To justify this "heads I win, tails you lose" approach, Clemson cites several comments and provisions in the UUNAA that have *nothing* to do with the liability of a member to an unincorporated association. Instead, each of those provisions deals with the liability of a member to third parties.

For example, Clemson cites comment 6 to §59B-7, which discusses the vicarious liability of a member for the association's acts, such as a contract. While noting that a member, like Clemson, is not individually liable on a contract made by the nonprofit association, the comment says that "[l]iability for one's own conduct is left to the other law of the jurisdiction." This is not a reference to whether a member is liable to the association for the association's claim (that liability is specifically provided for in subsection (e)). Rather, this is a reference to whether a member is liable on claims brought by third parties. This is made clear by another comment cited by Clemson, comment 2. Brief at 29. It clarifies that the UUNAA "does not deal with liability of members or other persons acting for a nonprofit association for their own conduct." In other words, if a member of a nonprofit association commits a tort or enters a contract with a third person on behalf of the nonprofit association, or is sued by a third person on a tort or for breach of contract entered into by the association, other parts of North Carolina law will govern liability.

In both *Thacker* and *Farmer*, the plain meaning of a "sue and be sued" clause impelled the conclusion that the sovereign there was to be treated as any other private corporation. So too here with the provision that a "nonprofit association may assert a claim against a member." As a Member of the ACC, Clemson was to be treated no differently than any private Member of the Conference and, plainly, could have the claims of the Conference asserted against it. This was an exchange for the right to do business as a Member of the ACC, the right to sue on behalf of the ACC, and the limitations on liability created by the UUNAA for members, limitations which Clemson embraces.

Clemson complains that because its Membership in the ACC predates the passage of the UUNAA, it is excused from the UUNAA's statutory provisions. This is no more than an "ignorance of the law" excuse. As a Member of a North Carolina organization from which it received $372 Million between 2006 and 2023, Clemson had an obligation to understand the law. North Carolina adheres to the proposition that "everyone is equally capable of determining the law, is presumed to know the law and is bound to take notice of the law." *Dalton v. Dalton,* 164 N.C. App. 584, 586 (2004). Organizations are no different. *In re Forestry Foundation,* 296 N.C. 330, 342 (1979) (corporation was presumed, like all citizens, to know any changes or amendments to tax code). As importantly, moreover, is that Clemson was not ignorant of the law at all. In fact, Clemson authorized the Conference to sue another sovereign member (Maryland) in 2012 in North Carolina.

It is difficult to understand how Clemson may now suggest to this Court that it was unaware of the legal reality that it could be sued and was subject to the jurisdiction of North Carolina courts when as early as 2012 it (along with the other Members other than Maryland) exploited the UUNAA to authorize the ACC to sue another sovereign member in North Carolina.[11] Even more critically, and after authorizing suit against Maryland in the North Carolina courts, Clemson then shortly thereafter signed the Grant of Rights contract with the ACC, knowing full well that the ACC could enforce that contract in North Carolina. And, of course,

[11] Clemson seems to suggest that it actions and knowledge in 2012 is beside the point, because *Hyatt* was not decided until 2019. This ignores the fact that Clemson knew that a sovereign member could be sued by the ACC under the UUNAA as early as 2012, and before it executed the Grant of Rights.

Clemson has no difficulty claiming that the limitations of liability established under the UUNAA apply to it, despite Clemson's purported ignorance about its application.

Clemson is also wrong when it tries to read into *Farmer* a requirement that registration is the only way by which consent can occur. The issue in *Farmer* was whether a presumptively immune out-of-state sovereign had consented or waived its immunity to North Carolina jurisdiction. *Farmer* found consent in Troy's qualification as a nonprofit corporation and registration as a foreign corporation. But *Farmer* did not suggest that registration was the only mode of consent. Here, of course, Clemson manifested consent by its choice to continue as a member of a North Carolina nonprofit association, "continuously and systematically" manage that association, operate under the North Carolina law governing that association for 18 years, and benefit from North Carolina law to authorize suit against another sovereign member, all in the face of a statutory scheme that granted it the right to sue the ACC and imposed on it the obligation to be sued in the same way as any other member of a nonprofit association. The ACC submits that 18 years of participation in and management of a North Carolina unincorporated association after the UUNAA was enacted manifests consent even more clearly than the two discrete administrative acts taken by Troy.

Finally, this result is consistent with the intent of all the parties to the Grant of Rights Agreement. While Clemson executed its own Grant of Rights, its Grant of Rights was made subject to and contingent on the execution of identical contracts by each of the other Members of the ACC. In fact, Clemson's Grant of Rights with the

ACC cannot be altered without the unanimous consent of every other Member of the Conference: "This Agreement may not be modified or amended other than by an agreement in writing signed by duly authorized representative of the Conference and each of the Member Institutions that are then members of the Conference." (R p 65 ¶8). This is effectively a 12-party (now 18-party) contract between each Member of the Conference and the ACC. Clemson was one of seven sovereign institutions from five states which entered into this agreement.[12]

According to Clemson's argument, each of the eight sovereigns in this agreement intended that the agreement could only be interpreted and enforced by a court in each sovereign's jurisdiction. Consequently, the same agreement would be interpreted and enforced by the six states in which the eight sovereign Members resided, with multiple state courts potentially declaring contrary or inconsistent rights and duties and imposing conflicting judgments and remedies. Thus, according to Clemson, this Court must accept that Clemson only intended to be bound by rulings of its courts, that Georgia Tech would be only bound by rulings of the Georgia courts, FSU by the courts of Florida, the North Carolina schools by this Court, and the Virginia schools by its courts. Moreover, under Clemson's argument, the private universities in the ACC would be bound by any of the sovereign states' court rulings, even if they conflicted with each other. As an example, Clemson must argue that

[12] The others were Georgia Institute of Technology, Florida State University, the University of North Carolina, North Carolina State University, the University of Pittsburgh, the University of Virginia and Virginia Polytechnic Institute and State University.

Duke can theoretically be bound by any court in any state in the Conference, but because Clemson is bound only by South Carolina, Duke must respect that decision as to it, even if the South Carolina decision is at odd with decisions in the other states, because South Carolina is the only place where Clemson can be bound. This argument quickly leads to the result that a court in Virginia could rule that the Grant of Rights is valid as to Virginia and Virginia Tech (and thus binds the private universities as well), but a court in South Carolina could rule it is not valid, binding Clemson and the private universities. Indeed, Clemson does not address at all whether a court in South Carolina only binds it in South Carolina, leaving the other sovereign universities free to disregard the judgment because it was not rendered in their home states.

No group of sophisticated parties dealing with bundled property rights collectively worth hundreds of millions of dollars would enter into agreements under these circumstances. Clemson's argument would mean that these parties agreed that valuable rights were not only subject to competing jurisdictions, but that either no single jurisdiction could rule or that all other jurisdictions must yield to South Carolina. The only conclusion consistent with how these unanimous agreements operate is that, at least for purposes of the Grant of Rights, these sophisticated parties expected that a single uniform interpretation of rights and duties and enforcement of the obligations would occur and the sovereign entities conceded their sovereignty for the limited purposes of uniform obligations and enforcement. In fact, exactly this was occurring when the Grant of Rights was executed in 2013, for all of the sovereign universities had authorized the ACC to sue Maryland in the courts of North Carolina. This was a plain indication that the parties expected that their obligations would be enforced by the ACC in North Carolina. Put simply, without such consent, the contract that all of the ACC schools entered into in 2013 (and extended in 2016) would simply be rendered unworkable and unenforceable.

CONCLUSION

As a founding Member of the ACC, Clemson has (along with other sovereigns and private institutions) operated a commercial business in North Carolina for more than 70 years. For decades Clemson understood quite well that it could be sued in the courts of North Carolina for the ACC's claims and had authorized the ACC to sue other sovereign Members before it ever signed the Grant of Rights or its amendment. It thus signed the agreements at issue at a time when it knew that it could be sued in North Carolina by the ACC. Since signing these agreements, Clemson has received hundreds of millions of dollars from the ACC, including, most recently, its share of a taxpayer incentive provided to the ACC to maintain its headquarters in North Carolina.

Clemson has a right as a litigant to contest the meaning and scope of the contracts that it enters into, and has a right, as a Member of the ACC, to withdraw from the Conference if it so chooses. But Clemson has no right to enter into North Carolina, participate in a North Carolina enterprise that generates hundreds of millions of dollars, and then claim that North Carolina's requirement that it is liable for the claims of the ACC is invalid. *Farmer* stands for the unremarkable proposition that, in exchange for the right to do business in North Carolina, an out-of-state sovereign is subject to the jurisdiction of the North Carolina courts as may be provided under the statutes governing that business. Here, that jurisdiction under the UUNAA is limited solely to the claims of the ACC. Nothing about imposing this limited obligation for the right to participate in the lucrative commercial business of this North Carolina organization over North Carolina contracts offends the dignity of South Carolina's sovereignty or violates the precepts of *Hyatt*.

The Business Court's decision should be affirmed and Clemson, as a Member of the ACC, should be answerable in North Carolina for the claims of the ACC.

This 3rd day of January 2025.

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STATE OF NORTH CAROLINA

MECKLENBURG COUNTY

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
24CV013688-590

ATLANTIC COAST CONFERENCE,

Plaintiff,

v.

CLEMSON UNIVERSITY,

Defendant.

ORDER AND OPINION ON DEFENDANT CLEMSON UNIVERSITY'S MOTION TO DISMISS AND MOTION TO STAY UNDER N.C.G.S. § 1-75.12

1. **THIS MATTER** is before the Court upon Defendant Clemson University's ("Clemson") (i) Motion to Dismiss[1] pursuant to Rules 12(b)(1), 12(b)(2), and 12(b)(6) of the North Carolina Rules of Civil Procedure (the "Rule(s)"), and (ii) Motion to Stay Under N.C.G.S. § 1-75.12 (the "Motion to Stay"; together with the Motion to Dismiss, the "Motions"),[2] filed on 6 May 2024 in the above-captioned case.

2. Having considered the Motions, the parties' briefs in support of and in opposition to the Motions, the Complaint,[3] the appropriate evidence of record on Clemson's Motion to Dismiss pursuant to Rules 12(b)(1) and 12(b)(2) and Clemson's Motion to Stay, and the arguments of counsel at the hearing on the Motions, the Court, for the reasons set forth below, hereby **GRANTS in part** and **DENIES in part** the Motion to Dismiss and, in its discretion, **DENIES** the Motion to Stay.

[1] (Def. Clemson Univ.'s Mot. Dismiss [hereinafter "Def.'s Mot. Dismiss"], ECF No. 15.)

[2] (Def. Clemson Univ.'s Mot. Stay Under N.C.G.S. § 1-75.12 [hereinafter "Def.'s Mot. Stay"], ECF No. 17.)

[3] (Compl., ECF Nos. 3 (sealed), 4 (public redacted), 7.1 (sealed), 7.2 (public redacted).)

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Bledsoe, Chief Judge.

I.

FACTUAL AND PROCEDURAL BACKGROUND

3. The Court does not make findings of fact on the Motions. Rather, the Court recites the allegations asserted and documents referenced in the Complaint that are relevant to the Court's determination of the Motions.[4]

4. Plaintiff Atlantic Coast Conference (the "ACC" or the "Conference") is a North Carolina unincorporated nonprofit association under Chapter 59B of the North Carolina General Statutes created to "enrich and balance the athletic and educational experiences of student-athletes at its member institutions[,] to enhance athletic and academic integrity among its members, to provide leadership, and to do this in a spirit

[4] The Court notes that many of the factual allegations in the ACC's Complaint are identical or very similar to allegations in the ACC's first amended complaint against the Board of Trustees of Florida State University ("FSU") in Civil Action No. 23 CVS 40918 (Mecklenburg County, North Carolina) (the "FSU Action"), which is also pending before this Court. As a result, the Court's recitation of the relevant factual background in this Order and Opinion is very similar, and sometimes identical, to the Court's discussion in its 4 April 2024 Order and Opinion resolving FSU's Motion to Dismiss or, in the Alternative, Stay the Action ("FSU's Motion to Dismiss or Stay") in the FSU Action (the "FSU Order"). *See Atl. Coast Conf. v. Bd. of Trs. of Fla. State Univ.* (*FSU Order*), 2024 NCBC LEXIS 53, at *3–9 (N.C. Super. Ct. Apr. 4, 2024).

of fairness to all."[5] The ACC currently has fifteen members (each a "Member" or "Member Institution"; collectively, the "Members" or "Member Institutions")[6] and is governed by a Board of Directors. The "most senior executive officer of [each] Member[ ]" serves as a Director on the ACC Board,[7] and "each Director shall have the right to take any action or any vote on behalf of the Member it represents[.]"[8] Clemson has been a Member of the ACC since the ACC's founding in 1953.[9]

5. On 8 July 2010, the ACC entered into a Multi-Media Agreement (the "2010 Multi-Media Agreement") with ESPN, Inc. and ESPN Enterprises, Inc. (together, "ESPN"), granting ESPN exclusive distribution rights to certain ACC Member Institution sporting events in exchange for specified payments.[10] The ACC Board of Directors, including Clemson's then-President, unanimously approved this agreement.[11]

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[5] (Compl. ¶¶ 1, 35 (quoting Compl. Ex. 1 § 1.2.1 [hereinafter "ACC Const."], ECF Nos. 3 (sealed), 4 (public unredacted), 7.1 (sealed), 7.2 (public unredacted)).)

[6] (*See* Compl. ¶ 1.) The current ACC Members, with their year of admission to the Conference, are: Clemson University (1953), Duke University (1953), the University of North Carolina at Chapel Hill (1953), North Carolina State University (1953), the University of Virginia (1953), Wake Forest University (1953), the Georgia Institute of Technology (1978), Florida State University (1991), the University of Miami (2004), Virginia Polytechnic Institute and State University (2004), Boston College (2005), the University of Notre Dame (excluding football and ice hockey) (2013), the University of Pittsburgh (2013), Syracuse University (2013), and the University of Louisville (2014). (*See* Compl. ¶¶ 1, 29–33.)

[7] (ACC Const. § 1.5.1.2; *see* Compl. ¶¶ 1, 37.)

[8] (ACC Const. § 1.5.1.1; *see* Compl. ¶¶ 1, 37.)

[9] (*See* Compl. ¶¶ 10, 29.)

[10] (*See* Compl. ¶¶ 15 n.4, 39–40.)

[11] (*See* Compl. ¶ 39.)

6. In 2012, "collegiate athletic conferences began to experience significant instability and realignment[.]"[12] The ACC was no exception. Late that year, the University of Maryland announced its withdrawal from the ACC. Shortly thereafter, the ACC elected to add four new Member Institutions.[13] During this same period, the ACC Board, including Clemson's then-President, voted to significantly increase the amount a Member must pay if it chose to leave the Conference "to more appropriately compensate the Conference for some of the potential losses[ ]" associated with the Member's withdrawal.[14] It was against this backdrop in 2013 that the ACC and ESPN agreed to an extension of the 2010 Multi-Media Agreement through 2027.[15]

7. "[I]n order to secure a long-term media rights agreement and thus ensure the payment of predictable sums over time," the current and incoming ACC Member Institutions, including Clemson, entered into an Atlantic Coast Conference Grant of Rights Agreement (the "Grant of Rights") with the ACC in April 2013.[16] Under the Grant of Rights,

> each of the Member Institutions is required to, and desires to, irrevocably grant to the Conference, and the Conference desires to

[12] (Compl. ¶ 53.)

[13] (*See* Compl. ¶ 52.) The four new Members were the University of Notre Dame (excluding football and ice hockey), the University of Pittsburgh, Syracuse University, and the University of Louisville.

[14] (Compl. ¶ 45; *see also* Compl. ¶¶ 44, 46–59.)

[15] (*See* Compl. ¶¶ 41, 52.)

[16] (Compl. ¶¶ 54, 55; *see* Compl. ¶¶ 63–67; Compl. Ex. 2 [hereinafter "Grant of Rights"], ECF Nos. 3 (sealed), 4 (public unredacted), 7.1 (sealed), 7.2 (public unredacted).)

> accept from each of the Member Institutions, those rights granted herein[:]
>
> . . . .
>
> 1. Grant of Rights. Each of the Member Institutions hereby (a) irrevocably and exclusively grants to the Conference during the Term . . . all rights (the "Rights") necessary for the Conference to perform the contractual obligations of the Conference expressly set forth in the ESPN Agreement, regardless of whether such Member Institution remains a member of the Conference during the entirety of the Term[.]
>
> . . . .
>
> 5. Term. The "Term" of this Agreement shall begin on the Effective Date and shall continue until June 30, 2027.
>
> . . . .
>
> 6. Acknowledgements, Representations, Warranties, and Covenants. Each of the Member Institutions acknowledges that the grant of Rights during the entire Term is irrevocable and effective until the end of the Term regardless of whether the Member Institution withdraws from the Conference during the Term or otherwise ceases to participate as a member of the Conference in accordance with the Conference's Constitution and Bylaws. . . . Each of the Member Institutions covenants and agrees that . . . it will not take any action, or permit any action to be taken by others subject to its control, including licensees, or fail to take any action, that would affect the validity and enforcement of the Rights granted to the Conference under this Agreement.[17]

8. The ACC negotiated a Second Amendment to the 2010 Multi-Media Agreement in 2014, incorporating the ACC's new Members and increasing the fees paid to the Conference, which were then distributed to the Member Institutions, including Clemson.[18] In 2016, the ACC "sought to generate additional revenue for its

[17] (Grant of Rights 1, ¶¶ 1, 5, 6; *see* Compl. ¶¶ 60, 62.)

[18] (*See* Compl. ¶¶ 69–72; Compl. Ex. 3, ECF Nos. 3 (sealed), 7.1 (sealed).)

Members through a network partnership with ESPN[ ]" that would "establish the ACC Network, broadcast more ACC events, and share in the revenues of this new network."[19] To this end, the ACC and ESPN negotiated two new agreements in 2016: an Amended and Restated ACC-ESPN Multi-Media Agreement and an ACC-ESPN Network Agreement (together, the "ESPN Agreements").[20]

9. ESPN, however, conditioned its participation in the ESPN Agreements on each Member Institution's agreement to extend the term of the Grant of Rights.[21] After numerous Board and other meetings, the ACC Members, including Clemson, executed a 2016 Amendment to ACC Grant of Rights Agreement with the ACC (the "Amended Grant of Rights"; together with the Grant of Rights, the "Grant of Rights Agreements") on 18 July 2016 that, according to the ACC, extended the term from 30 June 2027 to 30 June 2036.[22] The ESPN Agreements were executed a few days later.[23] With the execution of the Amended Grant of Rights and the ESPN Agreements, the ACC hoped to provide its Member Institutions with "a predictable and substantial source of revenue[ ]"[24] that would "stabilize the [C]onference long

[19] (Compl. ¶ 74.)

[20] (Compl. ¶¶ 75–81; *see* Compl. Ex. 5 [hereinafter "2016 Multi-Media Agreement"], ECF Nos. 3 (sealed), 7.1 (sealed); Compl. Ex. 6 [hereinafter "ACC Network Agreement"], ECF Nos. 3 (sealed), 7.1 (sealed).)

[21] (*See* Compl. ¶ 83; Compl. Ex. 7 at 1 [hereinafter "Am. Grant of Rights"], ECF Nos. 3 (sealed), 4 (public unredacted), 7.1 (sealed), 7.2 (public unredacted).)

[22] (*See* Compl. ¶¶ 82, 86, 90–105; Am. Grant of Rights ¶ 2.)

[23] (Compl. ¶ 75; *see* 2016 Multi-Media Agreement 1; ACC Network Agreement 1.)

[24] (Compl. ¶ 89.)

term."[25] Since the execution of the Grant of Rights in 2013, Clemson's distributions from the ACC have, in fact, "more than doubled[.]"[26]

10. But collegiate athletics has experienced continued instability, with several schools changing their conference affiliations over the last few years.[27] In response to this volatility, "the Conference endorsed the concept of distributing a larger share of post-season revenues to the Members that generated those revenues[ ]" in mid-2023.[28] Yet this policy change proved insufficient to insulate the ACC from the instability affecting other collegiate athletics conferences.

11. On 21 December 2023, the ACC filed a complaint for declaratory judgment in Mecklenburg County Superior Court against FSU, another ACC Member Institution, seeking a declaration that the Grant of Rights Agreements are valid and enforceable contracts.[29] The next day, FSU initiated its own lawsuit against the ACC in state court in Leon County, Florida, "challenging the validity of the [Grant of Rights Agreements] along with a number of other claims[ ]" (the "Florida Action").[30] On 17 January 2024, the ACC filed its first amended complaint against FSU in North

[25] (Compl. ¶ 77 (quoting Brett McMurphy & David M. Hale, *ACC, ESPN Partner for New Conference Channel*, ESPN.com News Servs. (June 21, 2016), https://www.espn.com/college-sports/story/_/id/17102933/acc-espn-agree-20-year-rights-deal-lead-2019-launch-acc-network (quoting James Clement, then-President of Clemson University)).)

[26] (Compl. ¶ 108.)

[27] (*See* Compl. ¶¶ 110–12.)

[28] (Compl. ¶ 113.)

[29] (*See* Compl. ¶ 115.)

[30] (Compl. ¶ 116.)

Carolina, alleging "damages for breaches of the Grant of Rights [Agreements], the ACC Constitution and Bylaws, and injunctive relief for breach of FSU's fiduciary duties to the Conference[,]" in addition to the same two declaratory judgment claims asserted in its original complaint.[31]

12. While these parallel actions were pending, the ACC alleges that "Clemson indicated a desire to work with the Conference regarding its own membership in the Conference and requested assurances of confidentiality and protections that the ACC would not file suit against it."[32] The ACC avers that it "agreed to work with Clemson, seeking a business solution rather than resorting to litigation."[33] According to the ACC, "[w]hile these assurances were being documented, and without provocation by the ACC,"[34] Clemson initiated litigation against the ACC on 19 March 2024 by filing suit in Pickens County, South Carolina, seeking a declaration regarding the scope of the Grant of Rights Agreements, the enforceability of the withdrawal payment provision in the ACC's Constitution, and whether it owes the ACC fiduciary duties (the "South Carolina Action").[35] The ACC initiated this lawsuit in Mecklenburg

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[31] (Compl. ¶ 117.)

[32] (Compl. ¶ 118.)

[33] (Compl. ¶ 118.)

[34] (Compl. ¶ 119.)

[35] (*See* Compl. ¶ 119; Compl. Ex. 8 ¶¶ 92–105 [hereinafter "S.C. Compl."], ECF Nos. 3 (sealed), 4 (public redacted), 7.1 (sealed), 7.2 (public redacted).) Clemson subsequently filed an amended complaint in the South Carolina Action on 17 April 2024, adding factual allegations, three additional declaratory judgment claims, and a claim for slander of title. (*See generally* Def. Clemson Univ.'s Br. Supp. Mot. Stay Ex. B [hereinafter "S.C. Am. Compl."], ECF No. 18.3.)

County Superior Court the following day.[36] The case was designated a mandatory complex business case by the Chief Justice of the Supreme Court of North Carolina[37] and assigned to the undersigned on 21 March 2024.[38]

13. The following day, the Court held a hearing on FSU's Motion to Dismiss or Stay in the FSU Action.[39] On 4 April 2024, the Court entered the FSU Order in which it granted FSU's motion to dismiss the ACC's breach of fiduciary duty claim, but otherwise denied FSU's motion to dismiss, including FSU's argument that this Court lacked personal jurisdiction over FSU on sovereign immunity grounds, and denied FSU's motion to stay. *See FSU Order*, 2024 NCBC LEXIS 53, at *80. FSU appealed the Court's denial of FSU's motion to dismiss on sovereign immunity grounds on 9 April 2024,[40] and, on 10 May 2024, the Court stayed all proceedings in the FSU Action, including discovery, "by operation of N.C.G.S. § 1-294 pending the final resolution of the appeal of the Court's Rule 12(b)(2) ruling in the [FSU] Order or until otherwise ordered by the Court." *Atl. Coast Conf. v. Bd. of Trs. of Fla. State Univ.*, 2024 NCBC LEXIS 68, at *10–11 (N.C. Super. Ct. May 10, 2024).

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[36] (*See* Compl. 1.)

[37] (Designation Order, ECF No. 1.)

[38] (Assignment Order, ECF No. 2.)

[39] (*See Atl. Coast Conf. v. Bd. of Trs. of Fla. State Univ.*, No. 23 CVS 40918, Am. Notice Hearing & BCR 9.3 Case Mgmt. Conf., ECF No. 27.)

[40] (*See Atl. Coast Conf. v. Bd. of Trs. of Fla. State Univ.*, No. 23 CVS 40918, Notice Appeal, ECF No. 60.)

14. On 6 May 2024, Clemson timely filed the Motion to Dismiss, seeking to dismiss the ACC's Complaint under Rules 12(b)(1), 12(b)(2), and 12(b)(6)[41] and contending that Clemson and FSU are "situated differently . . . both with respect to the propriety of proceeding in this Court and the fundamental nature of the claims at issue[ ]" such that "the basis for [the] claims that the ACC brought against FSU and the related arguments on motions should have little bearing in this case."[42] At the same time, Clemson also filed a Motion to Stay this action in favor of its first-filed action against the ACC in South Carolina, arguing again that "the analysis here is different[ ]" from the analysis presented by the FSU Action.[43]

15. After full briefing, the Court held a hearing on the Motions on 2 July 2024, at which both parties were represented by counsel. The Motions are now ripe for resolution.

II.

CLEMSON'S MOTION TO DISMISS PURSUANT TO RULES 12(b)(2) AND 12(b)(6) FOR LACK OF PERSONAL JURISDICTION

[41] (*See* Def.'s Mot. Dismiss ¶¶ 1–6.) While Clemson seeks the dismissal of all claims for lack of personal jurisdiction under Rule 12(b)(2) on sovereign immunity grounds, it does not otherwise seek the dismissal of the ACC's claim for a declaratory judgment concerning the validity of the withdrawal payment provision of the ACC's Constitution under Rule 12 (the ACC's third claim for relief).

[42] (Def. Clemson Univ.'s Br. Supp. Mot. Dismiss 1 [hereinafter "Br. Supp. Def.'s Mot. Dismiss"], ECF No. 16.)

[43] (Def. Clemson Univ.'s Br. Supp. Mot. Stay 1 [hereinafter "Br. Supp. Def.'s Mot. Stay"], ECF No. 18.)

16. Clemson first argues that, under Rules 12(b)(2) and 12(b)(6), it cannot be sued in North Carolina because Clemson has not waived its sovereign immunity except within the boundaries of the State of South Carolina pursuant to article X, section 10 and article XVII, section 2 of the South Carolina Constitution and S.C. Code Ann. §§ 15-77-50, -78-30(e).[44]

A. Legal Standard

17. As this Court recently explained in the FSU Order, the appropriate Rule for consideration of a motion to dismiss on the grounds of sovereign immunity has been somewhat unsettled in North Carolina. *See FSU Order*, 2024 NCBC LEXIS 53, at *11–12 (collecting cases). Our Court of Appeals, however, recently clarified that an assertion of "[sovereign] immunity should be classified as an issue of personal jurisdiction under Rule 12(b)(2)." *Torres v. City of Raleigh*, 288 N.C. App. 617, 620 (2023). Accordingly, the Court will construe the Motion to Dismiss on sovereign immunity grounds as an issue of personal jurisdiction under Rule 12(b)(2).

18. "The standard of review to be applied by a trial court in deciding a motion under Rule 12(b)(2) depends upon the procedural context confronting the court." *Id.* (quoting *Banc of Am. Sec. LLC v. Evergreen Int'l Aviation, Inc.*, 169 N.C. App. 690, 693 (2005)). Where, as here,

> neither party submits evidence [on personal jurisdiction], the allegations of the complaint must disclose jurisdiction although the particulars of jurisdiction need not be alleged. The trial judge must decide whether the complaint contains allegations that, if taken as true, set forth a sufficient basis for the court's exercise of personal jurisdiction.

[44] (*See* Def.'s Mot. Dismiss ¶ 1; Br. Supp. Def.'s Mot. Dismiss 5–6.)

Parker v. Town of Erwin, 243 N.C. App. 84, 96 (2015) (cleaned up).[45]

B. Analysis

19. As the Court explained in the FSU Order, prior to 2019, sovereign "immunity [was] available only if the forum State 'voluntar[ily]' decide[d] 'to respect the dignity of the [defendant State] as a matter of comity.' " *Franchise Tax Bd. of Cal. v. Hyatt* (*Hyatt III*), 587 U.S. 230, 236 (2019) (second and fourth alterations in original) (quoting *Nevada v. Hall*, 440 U.S. 410, 416 (1979)). But the United States Supreme Court expressly overruled *Nevada v. Hall* in *Hyatt III*, holding that the United States Constitution does not "permit[ ] a State to be sued by a private party without its consent in the courts of a different State." *Id.* at 233. The Supreme Court, however, did not explain what form this "consent" must take in *Hyatt III*. Three years later, the Supreme Court of North Carolina took up this unanswered question in *Farmer v. Troy University*, 382 N.C. 366 (2022).

20. The ACC contends that *Farmer* controls and establishes that Clemson, just like FSU, has expressly consented to suit in the courts of the State of North Carolina.[46] Clemson argues in opposition, however, that "the waiver of sovereign

[45] To the extent Clemson seeks dismissal on sovereign immunity grounds under Rule 12(b)(6), the standard of review under Rule 12(b)(6) is the same as the analysis the Court conducts under Rule 12(b)(2) when neither party presents evidence of personal jurisdiction. *Compare Corwin v. Brit. Am. Tobacco, PLC*, 371 N.C. 605, 615 (2018) ("[T]he Court considers whether the allegations of the complaint, if treated as true, are sufficient to state a claim upon which relief can be granted under some legal theory." (quotation marks and citation omitted)), *with Parker*, 243 N.C. App. at 96 ("The trial judge must decide whether the complaint contains allegations that, if taken as true, set forth a sufficient basis for the court's exercise of personal jurisdiction." (citation omitted)).

[46] (*See* Pl.'s Br. Opp'n Def.'s Mot. Dismiss 5–13 [hereinafter "Br. Opp'n Def.'s Mot. Dismiss"], ECF No. 31.)

immunity found in *Farmer* was based on unique facts that are not present here."[47] Because *Farmer* sets out the general framework for determining what constitutes "consent" to suit in North Carolina post-*Hyatt III*, this Court must analyze the allegations of the Complaint through the lens of *Farmer* to determine whether Clemson has waived its sovereign immunity.

21. In *Farmer*, Troy University, an Alabama state institution, registered as a nonprofit corporation with the North Carolina Secretary of State, leased an office building in North Carolina, and employed Farmer to recruit military personnel in North Carolina to take its online educational courses. *See Farmer*, 382 N.C. at 367. After his employment was terminated, Farmer brought suit against Troy University for various tort claims. *Id.* Shortly after the United States Supreme Court decided *Hyatt III*, Troy University moved for dismissal based on sovereign immunity. *Id.* at 369.

22. The Alabama Constitution provides that "the State of Alabama shall never be made a defendant in any court of law or equity." Ala. Const. art. I, § 14. The Supreme Court of North Carolina observed in *Farmer* that this immunity "extend[ed] to [the State of Alabama's] institutions of higher learning." *Farmer*, 382 N.C. at 370 (second alteration in original) (quoting *Ala. State Univ. v. Danley*, 212 So. 3d 112, 122 (Ala. 2016)). Having then concluded that, "[u]nder *Hyatt III* and the United States Constitution, as a general matter, Troy University is entitled to sovereign immunity from suit without its consent in the state courts of every state in the country[,]" *id.* at

[47] (Br. Supp. Def.'s Mot. Dismiss 11.)

371, our Supreme Court then set about determining whether Troy University had consented to waive its sovereign immunity in North Carolina state court.

23. The Supreme Court began its analysis in *Farmer* by reiterating that "any waiver of sovereign immunity must be explicit." *Id.* As a registered nonprofit corporation, Troy University was subject to the North Carolina Nonprofit Corporation Act (the "NCNCA"), which contains the following sue and be sued clause:

> (a) Unless its articles of incorporation or this Chapter provides otherwise, every corporation . . . has the same powers as an individual to do all things necessary or convenient to carry out its affairs, including without limitation, power:
>
> (1) To sue and be sued, complain and defend in its corporate name[.]

N.C.G.S. § 55A-3-02(a)(1). Stressing that it was "crucial" to its "analysis that *Hyatt III* did not involve a sue and be sued clause[,]" the *Farmer* Court instead looked to *Thacker v. Tennessee Valley Authority*, 587 U.S. 218 (2019), another recent case in which the United States Supreme Court addressed the effect of a sue and be sued clause on sovereign immunity. *Farmer*, 382 N.C. at 372.

24. In *Thacker*, the United States Supreme Court explained that "[s]ue-and-be-sued clauses . . . should be liberally construed[,]" noting that "[t]hose words in their usual and ordinary sense . . . embrace all civil process incident to the commencement or continuance of legal proceedings." *Thacker*, 587 U.S. at 224 (citations and quotation marks omitted). But, according to our Supreme Court in *Farmer*, *Thacker* placed a limit on these types of clauses: "[A]lthough a sue and be sued clause allows suits to proceed against a public corporation's *commercial* activity, just as these actions would proceed against a private company, suits challenging an entity's

governmental activity may be limited." *Farmer*, 382 N.C. at 372 (emphasis added) (citing *Thacker*, 587 U.S. at 227). Our Supreme Court therefore concluded that, "while *Hyatt III* . . . requires a State to acknowledge a sister State's sovereign immunity, *Thacker* recognizes that a sue and be sued clause can act as a waiver of sovereign immunity when a state entity's *nongovernmental* activity is being challenged." *Id.* (emphasis added).

25. Applying these principles to the facts in *Farmer*, our Supreme Court determined that Troy University was engaged in commercial activity in North Carolina—specifically, the marketing and selling of online educational programs—rather than governmental activity. *Id.* at 373. Because Troy University knew that it was subject to the NCNCA and its sue and be sued clause when it chose to do business in North Carolina, "it explicitly waived its sovereign immunity." *Id.*

26. *Farmer* found independent, additional support for Troy University's waiver of sovereign immunity in article 15 of the NCNCA, which requires a foreign corporation operating in North Carolina to obtain a certificate of authority. *Id.* at 374. "A certificate of authority authorizes the foreign corporation . . . to conduct affairs in this State[,]" N.C.G.S. § 55A-15-05(a), and gives the foreign corporation "the same but no greater rights and . . . the same but no greater privileges as, and is subject to the same duties, restrictions, penalties, and liabilities . . . imposed on, a domestic corporation of like character[,]" *id.* § 55A-15-05(b). Our Supreme Court separately concluded that, "[b]y requesting and receiving a certificate of authority to do business in North Carolina, renting a building here, and hiring local staff, Troy

University, as an arm of the State of Alabama, consented to be treated like 'a domestic corporation of like character,' and to be sued in North Carolina." *Farmer*, 382 N.C. at 374–75 (quoting *id.* § 55-15-05(b)).

27. As it did in the FSU Order, the Court shall now apply the framework created by our Supreme Court in *Farmer* to determine whether, based on the allegations in the Complaint and the current record, Clemson has consented to suit in North Carolina and thereby waived its sovereign immunity for purposes of this action.

28. The Court begins with the presumption that the State of South Carolina may not "be sued by a private party without its consent in the courts of [this] State." *Hyatt III*, 587 U.S. at 233. South Carolina has extended its sovereign immunity to include its public universities, defining "State" as "the State of South Carolina and any of its . . . institutions, including state-supported . . . schools, colleges, [and] universities[.]" S.C. Code Ann. § 15-78-30(e). The Court therefore concludes that, "as a general matter, [Clemson] is entitled to sovereign immunity from suit without its consent in the state courts of every state in the country." *Farmer*, 382 N.C. at 371. The Court must now determine whether Clemson explicitly waived its sovereign immunity to suit in North Carolina. This is the critical issue posed by Clemson's Motion to Dismiss all claims.

29. As an unincorporated nonprofit association, the ACC is governed by the Uniform Unincorporated Nonprofit Association Act (the "UUNAA"),[48] N.C.G.S. §§ 59B-1 to -15, which contains the following sue and be sued clause: "A nonprofit

[48] (*See* Compl. ¶¶ 1–2, 19.)

association, in its name, may institute, defend, intervene, or participate in a judicial, administrative, or other governmental proceeding or in an arbitration, mediation, or any other form of alternative dispute resolution[,]" *id.* § 59B-8(1).[49] In addition, the UUNAA expressly permits the ACC, as a North Carolina unincorporated nonprofit association, and Clemson, as a Member of the ACC,[50] to bring suit against each other: "A member of, or a person referred to as a 'member' by, a nonprofit association may assert a claim against or on behalf of the nonprofit association. A nonprofit association may assert a claim against a member or a person referred to as a 'member' by the nonprofit association." N.C.G.S. § 59B-7(e).[51] Because "a sue and be sued clause can act as a waiver of sovereign immunity when a state entity's nongovernmental activity is being challenged[,]" *Farmer*, 382 N.C. at 372 (citing *Thacker*, 587 U.S. at 227), the Court must next analyze Clemson's activities in this State and decide if they are of a commercial or governmental nature.

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[49] Although the language of the statute itself does not include the phrase "sue and be sued," the Official Comment affirmatively states that an unincorporated nonprofit association "may sue and be sued." *Id.* § 59B-8 off. cmt. ¶ 1.

[50] (*See* Compl. ¶¶ 1–2.)

[51] As the ACC notes, an unincorporated nonprofit association member's consent to suit under the UUNAA is narrower than that of both the unincorporated nonprofit association itself under the UUNAA or a nonprofit corporation under the NCNCA. (*See* Br. Opp'n Def.'s Mot. Dismiss 9.) The UUNAA is intended to protect "a nonprofit association's members from [vicarious] tort and contract liability based solely on membership status." N.C.G.S. § 59B-7 N.C. cmt. ¶ 1. But "there are special circumstances that may result in liability[ ]" of a member, such as when "a member . . . expressly become[s] a party to a contract with the nonprofit association." *Id.* off. cmt. ¶ 6. Thus, the UUNAA permits an unincorporated nonprofit association and its members to assert claims against each other where, as here, they are the parties to a contract, *id.* § 59B-7(e), "based on the other law of the jurisdiction[,]" *id.* § 59B-7 off. cmt. ¶ 2 ("The [UUNAA] does not deal with liability of members . . . for their own conduct.").

30. Clemson first argues that the allegations in the Complaint are distinguishable from the facts in *Farmer* that led our Supreme Court to conclude that Troy University consented to suit in this State.[52] Rather than take any "affirmative steps to do business [in North Carolina,]" Clemson contends that it simply remained a Member of the Conference when the ACC became an unincorporated nonprofit association subject to the UUNAA in 2006.[53] Clemson argues that this "passive behavior is distinctly different than the affirmative actions taken by Troy University in *Farmer*."[54]

31. The Court disagrees. The ACC alleges that since the ACC's creation in 1953, Clemson has engaged in "continuous and systematic membership and governance activities" that "arise out of its membership in and management of the Conference[.]"[55] For example, the President of Clemson is a member of the ACC's Board of Directors and "regularly attend[s] meetings held in the State of North Carolina by the ACC."[56] "Three of the four most recent in-person [ACC] Board of Directors meetings were held in North Carolina[,]" and Clemson's President attended

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[52] (*See* Br. Supp. Def.'s Mot. Dismiss 8–11.)

[53] (Br. Supp. Def.'s Mot. Dismiss 9.)

[54] (Br. Supp. Def.'s Mot. Dismiss 9.)

[55] (Compl. ¶ 9; *see also* Compl. ¶ 10.)

[56] (Compl. ¶ 10; *see* Compl. ¶¶ 11–12; Br. Opp'n Def.'s Mot. Dismiss Attach. 3, Aff. Brad Hostetter, dated May 24, 2024, at ¶ 3 [hereinafter "Hostetter Aff."], ECF No. 31.4 (averring that Clemson's President attended 48 out of 50 ACC Board meetings between 1 January 2007 and 31 December 2023).)

two of these meetings in person.[57] In addition, the ACC alleges that Clemson's Presidents, Athletic Directors, and Head Coaches have "played an active role in the administration of ACC affairs[ ]" and lists in the Complaint the numerous Conference leadership and committee positions held by these individuals over the past decade.[58] Moreover, "Clemson's [then-]President was the Chair of the ACC's [Board of Directors] when [the ESPN Agreements] were unanimously approved by the Members."[59]

32. The ACC also alleges that "Clemson frequently travels to North Carolina to compete in ACC-sponsored and administered athletic events and athletic competitions[.]"[60] For example, Clemson has competed in the ACC Football Championship, held in Charlotte, North Carolina, seven times since 2005.[61] Clemson also regularly competes in the ACC's Men's and Women's Basketball Tournaments,

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[57] (Compl. ¶ 12 (stating that the "Conference generally holds two meetings of the Board of Directors per month, with three of these meetings held in person annually, often in North Carolina[ ]").)

[58] (Compl. ¶ 11; *see also* Compl. ¶¶ 13 (indicating that the ACC Board of Directors, including Clemson's President, voted to relocate the Conference's headquarters to Charlotte to secure a $15 million financial incentive derived from North Carolina taxpayer dollars), 18 (describing Clemson's participation in various ACC championship events held in North Carolina), 49 (alleging Clemson's then-President voted to increase the payment of a withdrawing Member Institution to "3 times the Conference's annual operating budget[ ]"), 55–68 (explaining the benefits of the Grant of Rights and Clemson's then-President's execution thereof), 82–100 (explaining the benefits of the Amended Grant of Rights and Clemson's then-President's execution thereof), 119 (alleging Clemson voted to approve the ACC's lawsuit against the University of Maryland to enforce the withdrawal payment).)

[59] (Compl. ¶ 76; s*ee also* Compl. ¶¶ 17, 101–04 (alleging approval of the ESPN Agreements).)

[60] (Compl. ¶ 18.)

[61] (*See* Compl. ¶ 18.)

which have been held in North Carolina 25 times over the past three decades.[62] Since 2007, Clemson's football and men's basketball teams have played a combined 91 games in North Carolina.[63] Clemson has not sought to refute any of these allegations.

33. The ACC alleges that as a "collegiate academic and athletic conference[,]"[64] its purpose is to "enrich and balance the athletic and educational experiences of student-athletes at its member institutions[,] to enhance athletic and academic integrity among its members, to provide leadership, and to do this in a spirit of fairness to all."[65] More specifically, the ACC alleges that it seeks to provide "quality competitive opportunities for student-athletes in a broad spectrum of amateur sports and championships[,]" and ensure "responsible fiscal management and further financial stability[ ]" by "[a]ddress[ing] the future needs of athletics" for the "mutual benefit of the Members[.]"[66]

34. The ACC further avers that, historically, its main source of income has consisted of the payments it receives in exchange for granting exclusive media rights to broadcast athletic events and competitions involving athletes from ACC Member Institutions.[67] "By aggregating the Media Rights from each Member Institution, the

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[62] (*See* Compl. ¶ 18.)

[63] (*See* Hostetter Aff. ¶ 4.)

[64] (Compl. ¶ 25.)

[65] (Compl. ¶ 35 (quoting ACC Const. § 1.2.1).)

[66] (ACC Const. § 1.2.1(c), (g), (i).)

[67] (*See* Compl. ¶¶ 14–16, 45–47 (estimating potential losses of "$72 Million to over $200 Million[ ]" in media rights payments alone should a Member Institution withdraw from the ACC).)

Conference was able to increase the total value of those rights[.]"[68] The Conference then distributes the payments it receives under these media rights agreements, totaling hundreds of millions of dollars, to its Members, including Clemson.[69]

35. Based on these allegations, the Court first concludes that the ACC's activities, specifically the sponsorship of athletic events and the marketing of media rights for those events, are commercial in nature. The Court further concludes that, as a Member of the ACC, Clemson's Conference-related activities in this State are also commercial, rather than governmental, in nature. *See Thacker*, 587 U.S. at 228 (describing "governmental activities" as the "the kinds of functions private parties typically do not perform[ ]").

36. The Court also concludes that, like FSU, Clemson has elected to engage in this substantial commercial activity in North Carolina subject to the UUNAA's sue and be sued clause. Like FSU, Clemson chose to remain in the Conference after the ACC, an unincorporated nonprofit association, became subject to the UUNAA and its sue and be sued clause in 2006.[70] Like FSU, Clemson's then-President authorized

[68] (Compl. ¶ 58.)

[69] (*See* Compl. Summary of Claims, ¶¶ 16, 41, 56, 69–70, 72, 75, 106–08.) According to the ACC's Form 990 tax returns, Clemson received more than $372 million in distributions between 2006 and 2021. (*See* Br. Opp'n Def.'s Mot. Dismiss Attach. 2, ECF No. 31.3; Br. Opp'n Def.'s Mot. Dismiss Corrected/Suppl. Attach. 2, ECF No. 35.2.)

[70] The Court notes that it stated in its FSU Order that "the FSU Board knew that it was subject to the UUNAA and its sue and be sued clause when it chose to be a member of a North Carolina unincorporated nonprofit association." *FSU Order*, 2024 NCBC LEXIS 53, at *42. To the extent any clarification of this statement is needed, the Court notes that it did not intend to suggest that FSU chose to become a member of an unincorporated nonprofit association subject to the UUNAA when it joined the ACC in 1991; instead, the Court meant—and believes its chosen language makes plain—that FSU, like Clemson, chose to

the filing of the Conference's 2012 lawsuit against another sovereign Member Institution, then-ACC Member the University of Maryland, in North Carolina pursuant to the UUNAA's sue and be sued clause,[71] which the University of Maryland unsuccessfully challenged on sovereign immunity grounds. *See Atl. Coast Conf. v. Univ. of Md.*, 230 N.C. App. 429, 442–43 (2013) (concluding that extending comity to the University of Maryland's claim of sovereign immunity would have violated public policy). Like FSU, Clemson received hundreds of millions of dollars after entering into the Grant of Rights in 2013 and the Amended Grant of Rights in 2016, much of which was generated through Clemson's voluntary commercial activity in North Carolina.[72] While Clemson contends that it did not vote to permit the ACC to become

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remain a Member Institution of the ACC after the UUNAA was enacted in 2006. It follows under *Farmer* that because Clemson and FSU conducted business in North Carolina while knowing they were subject to the UUNAA's sue and be sued clause, both of these Member Institutions explicitly waived their sovereign immunity against suit in this State. *See Farmer*, 382 N.C. at 375–76 ("When Troy University entered North Carolina and conducted business in North Carolina while knowing it was subject to the North Carolina Nonprofit Corporation Act and its sue and be sued clause, it explicitly waived its sovereign immunity.").

[71] In its 2012 complaint in the *Atlantic Coast Conference v. University of Maryland*, the ACC alleged:

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

(Br. Opp'n Def.'s Mot. Dismiss Corrected/Suppl. Attach. 1 ¶ 39 [hereinafter "Univ. Md. Compl."], ECF No. 35.1 (emphases added).) Both the 2012 lawsuit against the University of Maryland and the current lawsuit include a request for a declaration that the withdrawal payment in the ACC's Constitution is valid and enforceable. (*Compare* Univ. Md. Compl. ¶¶ 36–42, *with* Compl. ¶¶ 154–63.)

[72] (*See* Compl. Summary of Claims, ¶¶ 16, 41, 56, 69–70, 72, 75, 106–08.)

an unincorporated nonprofit association subject to the UUNAA,[73] there is no doubt that, like FSU, it chose to remain in the Conference after the UUNAA was passed, to enter into the Grant of Rights Agreements, and to accept the financial benefits of those agreements, and, based on its decision to approve suit against the University of Maryland, it recognized by at least 2012 that, as a Member, it was subject to the UUNAA's sue and be sued clause.

37. The "power [to sue and be sued], standing alone, does not necessarily act as a waiver of immunity[,]" *Evans v. Hous. Auth.*, 359 N.C. 50, 56 (2004), but because Clemson, like FSU, and like Troy University in *Farmer*, "chose to do business in North Carolina, while knowing it was subject to the [UUNAA] and able to take advantage of the Act's sue and be sued clause, it explicitly waived its sovereign immunity." *Farmer*, 382 N.C. at 373.

38. In its supporting and reply briefs, Clemson next argues that the statutory waiver of sovereign immunity found in S.C. Code Ann. § 59-119-60, which states that Clemson's "board of trustees is hereby declared to be a body politic and corporate[ ]" that "may sue and be sued and plead and be impleaded in its corporate name," does not extend beyond the borders of the State of South Carolina.[74] Although Clemson concedes that the State of South Carolina may be held liable on a contract claim,[75]

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[73] (*See* Br. Supp. Def.'s Mot. Dismiss 9, 11; Def. Clemson Univ.'s Reply Br. Supp. Mot. Dismiss 3–7 [hereinafter "Reply Supp. Def.'s Mot. Dismiss"], ECF No. 37.)

[74] (*See* Br. Supp. Def.'s Mot. Dismiss 7–8; Reply Supp. Def.'s Mot. Dismiss 2.)

[75] (*See* Br. Supp. Def.'s Mot. Dismiss 6 (citing *McCall v. Batson*, 285 S.C. 243, 244 (1985) (reaffirming that the State of South Carolina was not "immune[e] from suit based upon its contractual obligations")).)

Clemson contends that, because only "[t]he [South Carolina] General Assembly may direct, by law, in what manner claims against the State may be established and adjusted[,]"[76] only "[t]he circuit courts of [South Carolina] are . . . vested with jurisdiction to hear and determine all questions, actions and controversies[ ] . . . affecting boards . . . of this State[ ] . . . in the circuit where such question, action or controversy shall arise."[77] But the Court is not required to engage in statutory interpretation under *Farmer*, where our Supreme Court held that, despite the fact that "[s]overeign immunity [was] enshrined in Alabama's Constitution," Troy University had waived its sovereign immunity by engaging in commercial, rather than governmental, activities within this State under a sue and be sued clause. *Farmer*, 382 N.C. at 370, 373.

39. Recognizing the limits of this Court's authority, and for purposes of complying with the error preservation requirements of Rule 10(a)(1) of the North Carolina Rules of Appellate Procedure, Clemson alternatively argues that

> if *Farmer* is read to apply more broadly than its unique facts, such that Clemson is found to have waived sovereign immunity here, then that case was wrongly decided. With respect, Justice Barringer's dissenting opinion in *Farmer*, joined by Chief Justice Newby, is a correct statement of sovereign immunity law and should be the law in North Carolina.[78]

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[76] (Br. Supp. Def.'s Mot. Dismiss 5 (quoting S.C. Const. art. X, § 10; *id.* art. XVII, § 2).)

[77] (Br. Supp. Def.'s Mot. Dismiss 6 (quoting S.C. Code Ann. § 15-77-50).)

[78] (Br. Supp. Def.'s Mot. Dismiss 11.) Although the parties dispute its import, (*see* Br. Opp'n Def.'s Mot. Dismiss 12; Reply Supp. Def.'s Mot. Dismiss 6), the Court notes that the United States Supreme Court denied Troy University's petition for *writ of certiorari* in the *Farmer* case. *See Troy Univ. v. Farmer*, 143 S. Ct. 2561 (2023), *cert denied*. The ACC also notes that, less than a month later, the United States Supreme Court issued its decision in *Mallory v. Norfolk S. Ry.*, 600 U.S. 122 (2023), contending that the holding in *Mallory* is consistent with

Although Clemson argues that a "sovereign's lack of action in response to another state's new legislation" should not result in a waiver of sovereign immunity,[79] this Court is bound by our Supreme Court's holding in *Farmer*; namely, that conduct such as Clemson's voluntary commercial activities in this State under a sue and be sued clause results in waiver.[80] *See Farmer*, 382 N.C. at 373.

40. Accordingly, the Court concludes that, under *Farmer*, Clemson has waived its sovereign immunity and is subject to this suit in North Carolina. The Court will therefore deny Clemson's Motion to Dismiss to the extent it seeks dismissal for lack of personal jurisdiction on grounds of sovereign immunity.[81]

III.

CLEMSON'S MOTION TO DISMISS PURSUANT TO RULE 12(b)(1) FOR LACK OF SUBJECT MATTER JURISDICTION

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the Supreme Court of North Carolina's holding in *Farmer*; namely, that "a state may make submission to jurisdiction a condition of conducting commercial activity." (Br. Opp'n Def.'s Mot. Dismiss 12–13.) In *Mallory*, the Supreme Court concluded that Mallory, a Virginia resident, could nevertheless bring suit against Norfolk Southern, a corporation incorporated and headquartered in Virginia, *see Mallory*, 600 U.S. at 126, in Pennsylvania state court for a cause of action that did not accrue in Pennsylvania because Norfolk Southern had registered to do business in Pennsylvania as a foreign corporation, and Pennsylvania law explicitly permitted its "state courts to 'exercise general personal jurisdiction' over a registered foreign corporation," *id.* at 134–35.

[79] (Reply Supp. Def.'s Mot. Dismiss 6; *see* Br. Supp. Def.'s Mot. Dismiss 13.)

[80] As Clemson recognizes, any decision to overrule *Farmer* must come from our Supreme Court, not this Court.

[81] As discussed in Section II(A) above, the standard of review under Rule 12(b)(6) is the same as the analysis the Court conducts under Rule 12(b)(2) when neither party presents evidence of personal jurisdiction. Therefore, the Court will also deny Clemson's Motion to Dismiss to the extent it seeks dismissal for lack of personal jurisdiction on sovereign immunity grounds pursuant to Rule 12(b)(6).

41. Moving under Rule 12(b)(1), Clemson seeks the dismissal of the ACC's first and second claims for lack of subject matter jurisdiction, contending that the allegations in the Complaint "fail to constitute an actual or justiciable controversy as to the validity or enforceability of the [Grant of Rights Agreements] under the North Carolina Declaratory Judgment Act[ ]" and thus that the ACC does not have standing to assert these two claims.[82]

A. <u>Legal Standard</u>

42. "Standing is a necessary prerequisite to a court's proper exercise of subject matter jurisdiction[,]" *In re Z.G.J.*, 378 N.C. 500, 504 (2021) (citation omitted), and "must be addressed, and found to exist, before the merits of the case are judicially resolved[,]" *In re T.B.*, 200 N.C. App. 739, 742 (2009) (cleaned up). "Rule 12(b)(1) requires the dismissal of any action 'based upon a trial court's lack of jurisdiction over the subject matter of the claim.' " *Watson v. Joyner-Watson*, 263 N.C. App. 393, 394 (2018) (quoting *Catawba County v. Loggins*, 370 N.C. 83, 87 (2017)). The plaintiff bears the burden of establishing subject matter jurisdiction. *See Harper v. City of Asheville*, 160 N.C. App. 209, 217 (2003). In ruling on a motion to dismiss for lack of standing pursuant to Rule 12(b)(1), the Court "may consider matters outside the pleadings" in determining whether subject matter jurisdiction exists, *Harris v. Matthews*, 361 N.C. 265, 271 (2007), and must "view the allegations [of the pleading] as true and the supporting record in the light most favorable to the non-moving party[,]" *Mangum v. Raleigh Bd. of Adjustment*, 362 N.C. 640, 644 (2008). *See also,*

[82] (Def.'s Mot. Dismiss ¶ 2; *see* Br. Supp. Def.'s Mot. Dismiss 16–18.)

e.g., *United Daughters of the Confederacy v. City of Winston-Salem*, 383 N.C. 612, 624 (2022) (quoting *Harris* and *Mangum*).

43. Under the Declaratory Judgment Act (the "DJ Act"), "[a]ny person interested under a . . . written contract . . . , or whose rights, status or other legal relations are affected by a . . . contract . . . , may have determined any question of construction or validity arising under the . . . contract . . . , and obtain a declaration of rights, status, or other legal relations thereunder." N.C.G.S. § 1-254. "The purpose of the [DJ Act] is to settle and afford relief from uncertainty concerning rights, status and other legal relations[ ] . . . ." *N.C. Consumers Power, Inc. v. Duke Power Co.*, 285 N.C. 434, 446 (1974). Our Supreme Court has determined that the following principles govern the scope of the DJ Act:

> The [DJ] Act does not undertake to convert judicial tribunals into counsellors and impose upon them the duty of giving advisory opinions to any parties who may come into court and ask for either academic enlightenment or practical guidance concerning their legal affairs.
>
> . . . .
>
> The [DJ] Act recognizes the need of society for officially stabilizing legal relations by adjudicating disputes before they have ripened into violence and destruction of the status quo. It satisfies this social want by conferring on courts of record authority to enter judgments declaring and establishing the respective rights and obligations of adversary parties in cases of actual controversies without either of the litigants being first compelled to assume the hazard of acting upon his own view of the matter by violating what may afterwards be held to be the other party's rights or by repudiating what may be subsequently adjudged to be his own obligations.
>
> While the [DJ Act] thus enables courts to take cognizance of disputes at an earlier stage than that ordinarily permitted by the legal procedure which existed before its enactment, it preserves inviolate the ancient and sound juridic concept that the inherent function of judicial tribunals

> is to adjudicate genuine controversies between antagonistic litigants with respect to their rights, status, or other legal relations. This being so, an action for a declaratory judgment will lie only in a case in which there is an actual or real existing controversy between the parties having adverse interests in the matter in dispute. It necessarily follows that when a litigant seeks relief under the [DJ Act], he must set forth in his pleading all facts necessary to disclose the existence of an actual controversy between the parties[.]

Id. at 446–47 (cleaned up).

B. Analysis

44. Clemson argues that the ACC's first two claims for relief are not based on an actual and justiciable controversy between the parties.[83] Clemson contends that the "only action that Clemson is alleged to have taken to precipitate these requests for declaratory relief" is to initiate the South Carolina Action.[84] But because the South Carolina Action, unlike the Florida Action, does not challenge the validity or enforceability of the Grant of Rights Agreements, Clemson contends that there is no justiciable controversy between the parties and the ACC therefore lacks standing to bring these claims.[85]

45. The ACC argues in opposition that not only do its first two claims for relief seek a declaration that the Grant of Rights Agreements are valid and enforceable contracts, but also that "the ACC can enforce the transfer of [Clemson's media] rights through 2036 regardless of whether Clemson remains a Member[ ]" of the ACC.[86] The

[83] (*See* Br. Supp. Def.'s Mot. Dismiss 16; Reply Supp. Def.'s Mot. Dismiss 7–8.)

[84] (Br. Supp. Def.'s Mot. Dismiss 17.)

[85] (*See* Br. Supp. Def.'s Mot. Dismiss 17–18; Reply Supp. Def.'s Mot. Dismiss 8.)

[86] (Br. Opp'n Def.'s Mot. Dismiss 17.)

ACC additionally argues that the South Carolina Action "challeng[es] the enforceability of the transfer of these rights to the ACC through 2036."[87]

46. In its first claim for relief, the ACC seeks not one, but two declarations: (1) a declaration that "the [Grant of Rights Agreements] are valid and binding contracts, supported by good and adequate consideration," and (2) a declaration that "the Conference is and will remain the owner of the rights transferred by Clemson under the [Grant of Rights Agreements] through June 30, 2036, regardless of whether it remains a Member Institution."[88]

47. In its second claim for relief, the ACC seeks a declaration that Clemson is either "estopped from challenging the validity or enforceability" of the Grant of Rights Agreements or "has waived its right to contest the validity or enforceability of the terms and conditions" of the Grant of Rights Agreements.[89] The ACC's second claim for relief does not seek a declaration that Clemson is barred by estoppel or waiver from denying that it transferred its rights under the Grant of Rights Agreements through 30 June 2036, regardless of whether it remains a Member Institution.

48. The Court concludes that, to the extent the ACC seeks a declaratory judgment that the Grant of Rights Agreements are valid and enforceable contracts, no actual controversy exists. In the South Carolina Action, Clemson alleges that it "does not challenge the enforceability of the grant of media rights but merely seeks a

[87] (Br. Opp'n Def.'s Mot. Dismiss 18.)

[88] (Compl. ¶ 134.)

[89] (Compl. ¶ 153.)

declaratory judgment regarding the scope of the rights granted."[90] Based on Clemson's allegation, there is no current controversy between the parties as to the validity and enforceability of the Grant of Rights Agreements.

49. As a result, the Court will grant Clemson's Motion to Dismiss as to the first declaration sought in the ACC's first claim for relief and as to the ACC's second claim for relief in its entirety, each without prejudice. *See, e.g., State ex rel. Utils. Comm'n v. Cube Yadkin Generation, LLC*, 279 N.C. App. 217, 221 (2021) ("The existence of an actual controversy is a jurisdictional prerequisite to any judicial action based thereon."); *Holton v. Holton*, 258 N.C. App. 408, 415 (2018) (holding that a dismissal for lack of subject matter jurisdiction "must be made without prejudice, since a trial court without jurisdiction would lack authority to adjudicate the matter[ ]").[91]

50. The Court reaches the opposite conclusion, however, to the extent the ACC seeks a declaration in the first claim for relief that the "Conference is and will remain the owner of the rights transferred by Clemson under the [Grant of Rights Agreements] through June 30, 2036, regardless of whether it remains a Member

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[90] (S.C. Compl. ¶ 10; *see also* S.C. Am. Compl. ¶ 10 (alleging that Clemson "does not challenge the *validity or enforceability* of the grant of media rights but merely seeks a declaratory judgment that Clemson's position regarding the scope of those rights is correct[ ]" (emphasis added)).)

[91] Having concluded that it does not have subject matter jurisdiction over these claims, the Court need not, and does not, consider Clemson's arguments for dismissal of these claims under Rule 12(b)(6). *See, e.g., In re T.R.P.*, 360 N.C. 588, 590 (2006) ("Subject matter jurisdiction is the indispensable foundation upon which valid judicial decisions rest, and in its absence a court has no power to act[.]"); *In re Z.T.B.*, 170 N.C. App. 564, 572 (2005) ("[L]ack of subject matter jurisdiction divests the trial court of any authority to adjudicate[.]"); *see also, e.g.*, *In re K.C.*, No. COA23-612, 2024 N.C. App. LEXIS 98, at *17 (N.C. Ct. App. Feb. 6, 2024) ("Because we hold that the trial court did not have subject matter jurisdiction[,] we need not reach the other issues raised.").

Institution."[92] Although Clemson argues that "the only dispute between these parties pertains to the scope of what media rights Clemson granted," and that issue is "only plead[ed] in Clemson's first-filed South Carolina [A]ction[,]"[93] the ACC has put the same issue that is before the South Carolina court—namely, the scope of the media rights Clemson granted under the Grant of Rights Agreements—squarely before this Court.

51. In the opening paragraph of its Complaint, the ACC alleges that "Clemson . . . agreed in 2013 and 2016, along with every other Member of the ACC, to grant its media rights, 'irrevocably and exclusively,' to all of its 'home' games to the Conference through 2036, 'regardless of whether such Member Institution remains a member of the Conference during the entirety of the Term' (the 'Grant of Rights')."[94] According to the Grant of Rights, these media rights include, without limitation,

> (A) the right to produce and distribute all events of such Member Institution that are subject to the ESPN Agreement[s]; (B) . . . the right to authorize access to such Member Institution's facilities for the purposes set forth in and pursuant to the ESPN Agreement[s]; (C) the right of the Conference or its designee to create and to own a copyright of the audiovisual work of the ESPN Games . . . of or involving such Member Institution (the "<u>Works</u>") with such rights being, at least, coextensive with 17 U.S.C. 411(c); and (D) the present assignment of the

[92] (Compl. ¶ 134.)

[93] (Br. Supp. Def.'s Mot. Dismiss 18.)

[94] (Compl. Summary of Claims; *see* Compl. ¶¶ 124 ("In the [Grant of Rights Agreements], Clemson agreed to grant its athletic Media Rights 'irrevocably' and 'exclusively' to the Conference for the term."), 125 ("In the [Grant of Rights Agreements], Clemson transferred its Media Rights to the Conference 'regardless' of whether it remained a Member Institution during the term[.]"), 126 ("In the [Grant of Rights Agreements], Clemson transferred its Media Rights to the Conference through 2036 and specifically acknowledged that the transfer was valid even if it withdrew from the Conference as a Member Institution."); Grant of Rights ¶ 1; *see also* Compl. ¶¶ 56, 59, 60, 63, 85, 86.)

> entire right, title and interest in the Works that are created under the ESPN Agreement[s].[95]

The ACC further alleges that, by filing the South Carolina Action, Clemson "challeng[ed] the validity of its irrevocable grant of [media] rights, regardless of whether it remains a Member Institution."[96] The ACC then seeks a declaration from this Court that the "Conference is and will remain the owner of the rights transferred by Clemson under the [Grant of Rights Agreements] through June 30, 2036, regardless of whether it remains a Member Institution."[97] Viewing these allegations as true and in the light most favorable to the ACC, *see Mangum*, 362 N.C. at 644, the Court concludes that the ACC has alleged an actual controversy as to the second declaration in its first claim for relief and will deny Clemson's Motion to Dismiss this claim to this extent.[98]

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[95] (Grant of Rights ¶ 1; *see also* Compl. Corrected/Suppl. Ex. 4 § 2.10.1 [hereinafter "ACC Bylaws"], ECF No. 34.1 ("**Grant of Rights.** The Members have granted to the Conference the right to exploit certain media and related rights of the Members (such rights, the "Media Rights"; and the agreement pursuant to which the Members granted such rights, the "Grant of Rights").) The ACC's allegations and the Grant of Rights Agreements themselves put to rest Clemson's contention that the ACC has failed to identify the rights it claims Clemson has granted to the Conference under the Grant of Rights Agreements.

[96] (Compl. ¶ 131.)

[97] (Compl. ¶ 134.)

[98] As noted above, a court "view[s] the allegations as true and the supporting record in the light most favorable to the nonmoving party[ ]" when determining a motion to dismiss for lack of standing. *Mangum*, 362 N.C. at 644. Because this is "the applicable standard of review regardless of whether the complaint is dismissed for lack of subject matter jurisdiction pursuant to Rule 12(b)(1) or for failure to state a claim upon which relief could be granted pursuant to Rule 12(b)(6)," *United Daughters of the Confederacy*, 383 N.C. at 624, the Court will grant Clemson's Motion to Dismiss under Rule 12(b)(6) as to the first declaration sought in the ACC's first claim for relief and deny the Motion to Dismiss as to the second declaration sought in the ACC's first claim for relief to the same extent as discussed above. *See Clark v.*

IV.

CLEMSON'S MOTION TO DISMISS PURSUANT TO RULE 12(b)(6) FOR FAILURE TO STATE A CLAIM UPON WHICH RELIEF CAN BE GRANTED

A. Legal Standard

52. When deciding whether to dismiss for failure to state a claim under Rule 12(b)(6), the Court considers "whether the allegations of the complaint, if treated as true, are sufficient to state a claim upon which relief can be granted under some legal theory." *Corwin*, 371 N.C. at 615 (quoting *CommScope Credit Union v. Butler & Burke, LLP*, 369 N.C. 48, 51 (2016)). "[T]he trial court is to construe the pleading liberally and in the light most favorable to the plaintiff, taking as true and admitted all well-pleaded factual allegations contained within the complaint." *Donovan v. Fiumara*, 114 N.C. App. 524, 526 (1994) (cleaned up); *see also, e.g.*, *Sykes v. Health Network Sols., Inc.*, 372 N.C. 326, 332 (2019) (recognizing that, under Rule 12(b)(6), the allegations of the complaint should be viewed "as true and in the light most favorable to the non-moving party").

53. When considering a motion to dismiss under Rule 12(b)(6), the Court may "also consider any exhibits attached to the complaint because '[a] copy of any written instrument which is an exhibit to a pleading is a part thereof for all purposes.' " *Krawiec v. Manly*, 370 N.C. 602, 606 (2018) (quoting N.C. R. Civ. P. 10(c)). Moreover, the Court "can reject allegations that are contradicted by the documents attached [to],

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Burnette, 2020 NCBC LEXIS 10, at *17–18 (N.C. Super. Ct. Jan. 28, 2020) ("A motion to dismiss under Rule 12(b)(6) 'is seldom an appropriate pleading in actions for declaratory judgments, [. . . and] is only allowed when the record clearly shows that there is no basis for declaratory relief[,] as when the complaint does not allege an actual, genuine existing controversy.' " (quoting *N.C. Consumers Power, Inc.*, 285 N.C. at 439)).

specifically referred to, or incorporated by reference in the complaint." *Moch v. A.M. Pappas & Assocs., LLC*, 251 N.C. App. 198, 206 (2016) (quoting *Laster v. Francis*, 199 N.C. App. 572, 577 (2009)).

54. "[D]ismissal pursuant to Rule 12(b)(6) is proper when '(1) the complaint on its face reveals that no law supports the plaintiff's claim; (2) the complaint on its face reveals the absence of facts sufficient to make a good claim; or (3) the complaint discloses some fact that necessarily defeats the plaintiff's claim.' " *Corwin*, 371 N.C. at 615 (quoting *Wood v. Guilford County*, 355 N.C. 161, 166 (2002)).

B. Analysis

1. The ACC's Fourth and Sixth Claims for Relief

55. Clemson first seeks to dismiss the ACC's fourth and sixth claims under Rule 12(b)(6) because "there is no material breach of the [Grant of Rights Agreements] as a matter of law."[99] The ACC argues in response that "[b]ecause there are 'no heightened pleading requirements' for claims involving breach of contract," it has adequately alleged the existence of a valid contract and a breach of its terms, which is sufficient for its breach of contract claims to withstand dismissal at this stage in the litigation.[100]

56. Although the ACC's sixth claim for relief is for breach of the ACC's Constitution and Bylaws, not the Grant of Rights Agreements,[101] whether Clemson's

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[99] (Br. Supp. Def.'s Mot. Dismiss 20; *see* Reply Supp. Def.'s Mot. Dismiss 12.)

[100] (Br. Opp'n Def.'s Mot. Dismiss 22 (quoting *TriBike Transp., LLC v. Essick*, 2022 NCBC LEXIS 143, at *8 (N.C. Super. Ct. Nov. 30, 2022)).)

[101] (*See* Compl. ¶¶ 189–96.)

initiation of the South Carolina Action constitutes a breach of the warranty provision of the Grant of Rights Agreements impacts the Court's analysis of both claims, so the Court will begin its analysis there.

57. As the ACC correctly notes, "[t]he elements of a claim for breach of contract are (1) [the] existence of a valid contract and (2) breach of the terms of that contract." *Poor v. Hill*, 138 N.C. App. 19, 26 (2000). Throughout the Complaint, the ACC alleges that the Grant of Rights Agreements are valid and enforceable contracts and that Clemson breached these agreements by filing its complaint in South Carolina.[102]

58. The ACC would have the Court end its analysis here. But under Rule 12(b)(6), the Court may "also consider any exhibits attached to the complaint[,]" *Krawiec*, 370 N.C. at 606, and "can reject allegations that are contradicted by the documents attached [to], specifically referred to, or incorporated by reference in the complaint[,]" *Moch*, 251 N.C. App. at 206 (quotation omitted). Because the ACC attached the Grant of Rights Agreements and the South Carolina complaint as exhibits to its Complaint, the Court will determine whether these documents contradict the ACC's breach of contract allegations.

59. The warranty provision of the Grant of Rights Agreements provides that "[e]ach of the Member Institutions covenants and agrees that . . . it will not take any action, or permit any action to be taken by others subject to its control, . . . or fail to take any action, that would affect the validity and enforcement of the Rights granted

[102] (*See* Compl. Summary of Claims, ¶¶ 24, 131, 140, 150, 165, 169–71, 190.)

to the Conference under this Agreement."[103] In bringing the South Carolina Action, Clemson avers in its complaint that it "does *not* challenge the enforceability of the grant of media rights but merely seeks a declaratory judgment regarding the scope of rights granted."[104] Indeed, Clemson asserts in its opening brief that it "concedes that [the Grant of Rights Agreements] are valid and enforceable contracts[.]"[105] Despite these concessions, the ACC argues that Clemson's declaratory judgment action in South Carolina nevertheless *does* "affect the validity and enforcement of the Rights granted to the Conference" under the Grant of Rights Agreements[106] by "challenging the validity of its irrevocable grant of rights, regardless of whether it remains a Member Institution[,]" thereby breaching those agreements.[107]

60. According to the ACC, a determination of a contract's validity and enforceability necessarily involves "the construction of that agreement, or the scope of rights under it."[108] But, as Clemson notes in its reply brief, some validity and

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[103] (Grant of Rights ¶ 6; *see* Am. Grant of Rights ¶ 3 ("Except as specifically modified by this Amendment, the terms of the Original Grant [of Rights] Agreement will remain in full force and effect").)

[104] (S.C. Compl. ¶ 10 (emphasis added); *see* S.C. Am. Compl. ¶ 10 (alleging that Clemson "does not challenge the validity or enforceability of the grant of media rights but merely seeks a declaratory judgment that Clemson's position regarding the scope of those rights is correct[ ]"); Br. Supp. Def.'s Mot. Dismiss 21–22; Reply Supp. Def.'s Mot. Dismiss 12.)

[105] (Br. Supp. Def.'s Mot. Dismiss 22.)

[106] (Compl. ¶ 166 (quoting Grant of Rights ¶ 6).)

[107] (Compl. ¶ 131; *see* Compl. Summary of Claims, ¶¶ 167, 169–70.)

[108] (Br. Opp'n Def.'s Mot. Dismiss 18; *see* Br. Opp'n Def.'s Mot. Dismiss 19–20, 22–24.)

enforceability determinations do not require reference to or interpretation of a contract's terms at all.[109]

61. Moreover, the ACC's argument implies that any request for a court to interpret one or more terms of an agreement calls into question the validity and enforceability of the entire agreement.[110] Such an interpretation, however, would render the DJ Act meaningless.

62. When parties disagree over the terms of a contract, the DJ Act permits one or both parties to request a court to

> declar[e] and establish[ ] the respective rights and obligations of [the] parties . . . without either of the litigants being first compelled to assume the hazard of acting upon his own view of the matter by violating what may afterwards be held to be the other party's rights or by repudiating what may be subsequently adjudged to be his own obligations.

N.C. Consumers Power, Inc., 285 N.C. at 446. When "a court is called upon to interpret a contract its primary purpose is to ascertain the intention of the parties at the moment of its execution[ ]" by "look[ing] to the language of the contract and determin[ing] if it is clear and unambiguous." *Golden Triangle #3, LLC v. RMP-*

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[109] (*See* Reply Supp. Def.'s Mot. Dismiss 9 (citing lack of consideration or lack of authority to enter into contract as examples).) The Court notes that other challenges to enforceability or validity that may not require contract interpretation include illegality and unconscionability—challenges which have been advanced by FSU in the FSU and Florida Actions, (*see Atl. Coast Conf. v. Bd. of Trs. of Fla. State Univ.*, No. 23 CVS 40918, Fla. State Univ. Bd. of Trs.' Br. Supp. Mot. Dismiss or, in the Alt., Stay Action 16, ECF No. 20; *Atl. Coast Conf. v. Bd. of Trs. of Fla. State Univ.*, No. 23 CVS 40918, Def.'s Mot Dismiss or, in the Alt., Stay Action Ex. 1 at ¶¶ 227–46, 271–74 [hereinafter "Fla. Am. Compl."], ECF No. 19.1)—as well as mistake, lack of capacity, fraudulent inducement, duress, undue influence, impossibility, waiver, and lack of mutual assent, among others.

[110] (*See* Br. Opp'n Def.'s Mot. Dismiss 4–5, 13–14, 18–20, 22–23.)

Mallard Pointe, LLC, 2020 NCBC LEXIS 37, at *10 (N.C. Super. Ct. Mar. 23, 2020) (citation omitted). "Whether or not the language of a contract is ambiguous is a question for the court to determine." *Id.* at *11 (cleaned up). And "[w]hen a contract is in writing and free from any ambiguity which would require resort to extrinsic evidence, or the consideration of disputed fact, the intention of the parties is a question of law." *Id.* at *10–11 (quoting *Strader v. Sunstates Corp.*, 129 N.C. App. 562, 568 (1998)).

63. Under the ACC's interpretation of the Grant of Rights Agreements' warranty clause, no Member Institution could ever bring a declaratory judgment action to determine its rights under those agreements without simultaneously breaching them. But it is the province of the Court, not the party advancing or opposing a declaratory judgment claim, to determine what the disputed terms of a valid and enforceable contract mean, and the DJ Act permits a party to seek a judicial determination of the "rights, status, or other legal relations" of the parties before a breach occurs. N.C.G.S. § 1-254. Thus, Clemson's initiation of the South Carolina Action—which sought only to determine the meaning of a disputed term—did not constitute a breach of the Grant of Rights Agreements' warranty provision.[111]

[111] This conclusion does not conflict with this Court's decision in the FSU Order. In the Florida Action, FSU seeks a declaration that the entirety of the Grant of Rights Agreements are void and unenforceable on several grounds, which, as the Court concluded, *does* state a cognizable claim for breach of the warranty provision of the Grant of Rights Agreements. (*See Atl. Coast Conf. v. Bd. of Trs. of Fla. State Univ.*, No. 23 CVS 40918, Fla. Am. Compl. ¶¶ 227–46, 262–74.)

64. Having reached this conclusion, the Court will now analyze how this determination affects Clemson's Motion to Dismiss the ACC's fourth and sixth claims for relief.

a. Fourth Claim for Relief: Breach of the Grant of Rights Agreements

65. In its fourth claim for relief, the ACC alleges that Clemson's filing of the South Carolina Action breached the Grant of Rights Agreements by (1) "[taking] direct action that affects the validity and enforcement of the [Grant of Rights Agreements]";[112] (2) "tak[ing] direct action that affects the irrevocability and exclusivity of the [Grant of Rights Agreements]";[113] and (3) "breach[ing] its obligation of good faith and fair dealing[ ]" owed to the ACC under those agreements.[114] Clemson seeks dismissal, contending that the ACC mischaracterizes Clemson's claims in the South Carolina Action.[115] The Court agrees.

66. First, as the Court has already concluded, Clemson did not breach the warranty provision in the Grant of Rights Agreements by initiating the South Carolina Action. The Court therefore grants Clemson's Motion to Dismiss the first prong of the ACC's fourth claim for relief.

67. The Court reaches the same conclusion as to the second prong. Rather than challenge or otherwise seek to affect the "irrevocability" or "exclusivity" of the Grant

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[112] (Compl. ¶ 169.)

[113] (Compl. ¶ 170.)

[114] (Compl. ¶ 171.)

[115] (*See* Br. Supp. Def.'s Mot. Dismiss 22; Reply Supp. Def.'s Mot. Dismiss 12.)

of Rights Agreements as the ACC contends, Clemson's South Carolina Action concedes the validity of those agreements and seeks instead a judicial determination of the scope of its rights thereunder.[116]

68. As to the third prong, the ACC alleges that "rather than act in good faith and deal fairly with the Conference to accomplish the ends of the [Grant of Rights Agreements], Clemson has actively breached and sought to prevent the goals of those contracts[ ]" by filing the South Carolina Action and by misleading the ACC about its intention to file suit.[117] But to the extent the claim is based on Clemson's filing of the South Carolina complaint, the Court has concluded that no breach of contract claim lies for Clemson's initiation of the South Carolina Action. And because, under North Carolina law, "where a party's claim for breach of the implied covenant of good faith and fair dealing is based on the same acts as its claim for breach of contract, we treat the former as part and parcel of the latter," *Cordaro v. Harrington Bank, FSB*, 260 N.C. App. 26, 38–39 (2018), the Court shall dismiss the ACC's implied covenant claim to this same extent.

69. The ACC's allegations concerning Clemson's actions "in seeking discussions with the Conference when it had already authorized the filing of a lawsuit" fare no better.[118] While it is true that "[i]n every contract there is an implied covenant of

[116] (*See* S.C. Compl. ¶¶ 3–7, 10–16, 60–64, 91–95; S.C. Am. Compl. ¶¶ 3–7, 10–16, 67–71, 98–102.)

[117] (Compl. ¶ 171.)

[118] (Br. Supp. Def.'s Mot. Dismiss 24; *see* Compl. ¶ 120.)

good faith and fair dealing that neither party will do anything which injures the right of the other to receive the benefits of the agreement," *Bicycle Transit Auth., Inc. v. Bell*, 314 N.C. 219, 228, (1985) (citation omitted), the parties never agreed to a litigation standstill process in the Grant of Rights Agreements, nor has the ACC alleged that such a process was ever contemplated when the Grant of Rights Agreements were executed. Rather, the ACC's allegations show that the parties decided to initiate standstill discussions after the FSU and Florida Actions were filed in an attempt to reach an entirely new agreement—an agreement to delay or avoid litigation pending settlement discussions—but ultimately an agreement was never reached.[119] Viewed in the light most favorable to the ACC, the Court cannot conclude that these failed negotiations, which occurred years after the Grant of Rights Agreements were executed, "frustrat[ed] the fruits of the bargain that the [ACC] reasonably expected[ ]" under the Grant of Rights Agreements. *Value Health Sols., Inc. v. Pharm. Rsch. Assocs.*, 385 N.C. 250, 268 (2023). Accordingly, the Court will also grant Clemson's Motion to Dismiss the ACC's fourth claim for relief to the extent it seeks to assert a claim for breach of the implied covenant of good faith and fair dealing under the Grant of Rights Agreements.

b. <u>Sixth Claim for Relief: Breach of Good Faith and Fair Dealing Under the ACC's Constitution and Bylaws</u>

70. The ACC asserts a second claim for breach of the implied covenant of good faith and fair dealing, this time in connection with the ACC's Bylaws and

[119] (*See* Compl. ¶¶ 118–20.)

Constitution.[120] While implied covenant claims are nearly always paired with a breach of contract claim in North Carolina, they need not be, as is the case here. *See, e.g.*, *Richardson v. Bank of Am., N.A.*, 182 N.C. App. 531, 556 (2007) (concluding that North Carolina courts have not held "that a party alleging breach of the duty of good faith and fair dealing must allege a breach of contract"); *see also Robinson v. Deutsche Bank Nat'l Tr. Co.*, No. 5:12-CV-590-F, 2013 U.S. Dist. LEXIS 50797, at *39 (E.D.N.C. Apr. 9, 2013) (citing *Richardson* and holding that "[t]he fact that [p]laintiff does not allege a breach of a specific provision of [a contract] does not, therefore, doom her [implied covenant] claim").

71. The ACC alleges that under the ACC's Bylaws and Constitution, the ACC Commissioner is "charged with the duty to negotiate Media Rights agreements on behalf of the Conference[ ]" and that, under the Bylaws, Clemson " 'granted to the Conference the right to exploit certain media and related rights' under the Grant of Rights."[121] The ACC alleges that, by its actions, Clemson "violate[d] its duty to act in good faith and fairly deal with the Conference."[122] The Court cannot conclude, however, that a reasonable factfinder could find that Clemson interfered with the ACC's right to exploit Clemson's media rights, either by filing the South Carolina Action or by negotiating for a standstill agreement after the ACC initiated the FSU Action. Indeed, Clemson does not dispute or seek to invalidate its obligations to the

[120] (*See* Compl. ¶¶ 189–96.)

[121] (Compl. ¶ 193 (quoting ACC Bylaws §§ 2.3.1(q), 2.10.1).)

[122] (Compl. ¶ 194.)

ACC under the Constitution or Bylaws and instead simply seeks to understand the scope of the rights it has agreed under the Bylaws that the ACC may exploit pursuant to the Grant of Rights Agreements. Accordingly, the Court concludes that the ACC's sixth claim for relief should also be dismissed without prejudice.

2. Fifth Claim for Relief: Request for Declaratory Judgment that Clemson Owes Fiduciary Obligations to the Conference

72. Clemson next seeks to dismiss the ACC's claim for a declaration that Clemson, as an ACC Member Institution, owes fiduciary duties to the ACC under the ACC's Constitution and Bylaws as well as under North Carolina law.[123] The ACC concedes that this claim "is based on the same legal theory set forth in its complaints against FSU."[124]

73. This Court concluded in its FSU Order that, under the UUNAA, "an unincorporated nonprofit association does not qualify as a joint venture and, thus, the ACC cannot establish that a *de jure* fiduciary relationship existed between itself and FSU." *FSU Order*, 2024 NCBC LEXIS 53, at *61. The Court also concluded in the FSU Order that the ACC had failed to plead the existence of a *de facto* fiduciary relationship between it and FSU. *Id.* at *63. The Court then determined that there was no "contractual imposition of fiduciary duties [on FSU] under the ACC's Constitution and Bylaws." *Id.* at *64.

[123] (*See* Br. Supp. Def.'s Mot. Dismiss 24–26.)

[124] (Br. Opp'n Def.'s Mot. Dismiss 27.)

74. Because the allegations pleaded in support of the ACC's fiduciary duty claim against Clemson are substantively identical to those pleaded against FSU in the FSU Action, the Court will grant Clemson's Motion to Dismiss the ACC's fifth claim for relief for the same reasons as those set out in the FSU Order, *see id.* at *56–65, and dismiss this claim with prejudice. In so doing, the Court notes that the ACC reserves its right to appeal this ruling at the appropriate time.[125]

V.

MOTION TO STAY

75. Clemson also moves to stay any claims that remain following this Court's determination of its Motion to Dismiss pursuant to N.C.G.S. § 1-75.12 in favor of its first-filed South Carolina Action.[126] Clemson argues that the South Carolina Action should take priority "to honor Clemson University's role as first filer and the proper plaintiff in the parties' disputes."[127] Clemson further contends that "allowing this matter to proceed in North Carolina would work a substantial injustice to Clemson" while "South Carolina provides a convenient, reasonable, and fair forum for merits disposition of the parties' dispute."[128]

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[125] (*See* Br. Opp'n Def.'s Mot. Dismiss 27 ("[T]he Conference reserves the right to appeal at the appropriate time and asks that the right to appeal from a similar decision here be noted and protected by the Court.").)

[126] (*See* Def.'s Mot. Stay 1.)

[127] (Br. Supp. Def.'s Mot. Stay 1; *see* Clemson Univ.'s Reply Br. Supp. Mot. Stay Under N.C.G.S. § 1-75.12 at 3–5, ECF No. 38.)

[128] (Def.'s Mot. Stay 1.)

76. The ACC argues in opposition that proceeding in a North Carolina court, rather than a South Carolina court, "provides the best chance of a legally binding and uniform interpretation of [the Grant of Rights Agreements] that will apply to the ACC, Clemson, and FSU."[129] The ACC further contends that "North Carolina takes a qualitative approach to whether litigation should be stayed in favor of litigation in a foreign jurisdiction," and, because Clemson "achieved [its] 'first-filed' status by misdirection[,]" the Court should give less weight to that factor.[130]

77. Section 1-75.12 provides, in relevant part, as follows:

> (a) When Stay May Be Granted. – If, in any action pending in any court of this State, the judge shall find that it would work substantial injustice for the action to be tried in a court of this State, the judge on motion of any party may enter an order to stay further proceedings in the action in this State. A moving party under this subsection must stipulate his consent to suit in another jurisdiction found by the judge to provide a convenient, reasonable and fair place of trial.

N.C.G.S. § 1-75.12(a). "The essential question for the trial court is whether allowing the matter to continue in North Carolina would work a 'substantial injustice' on the moving party." *Muter v. Muter*, 203 N.C. App. 129, 131–32 (2010) (citation omitted).

78. As this Court recognized in the FSU Order, North Carolina courts consider the following ten factors in determining whether to grant a stay under N.C.G.S. § 1-75.12:

> (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

[129] (Pl.'s Br. Opp'n Def.'s Mot. Stay Under N.C.G.S. § 1-75.12 at 2 [hereinafter "Br. Opp'n Def.'s Mot. Stay"], ECF No. 32.)

[130] (Br. Opp'n Def.'s Mot. Stay 3–4.)

> 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.

FSU Order, 2024 NCBC LEXIS 53, at *67–68 (quoting *Laws. Mut. Liab. Ins. Co. of N.C. v. Nexsen Pruet Jacobs & Pollard*, 112 N.C. App. 353, 356 (1993)).

79. "[I]t is not necessary that the trial court find that *all* factors positively support a stay, as long as it is able to conclude that (1) a substantial injustice would result if the trial court denied the stay, (2) the stay is warranted by those factors present, and (3) the alternative forum is convenient, reasonable, and fair." *Laws. Mut. Liab. Ins. Co.*, 112 N.C. App. at 357. And while "the trial court need not consider every factor," *Muter*, 203 N.C. App. at 132, the court will abuse its discretion when it "abandons any consideration of these factors[,]" *Laws. Mut. Liab. Ins. Co.*, 112 N.C. App. at 357.

80. After careful consideration and review, the Court concludes, in the exercise of its discretion and based on an evaluation of each of the factors set forth in *Lawyers Mutual*, that "allowing th[is] matter to continue in North Carolina would [not] work a 'substantial injustice' on [Clemson]," *Muter*, 203 N.C. App. at 131–32, and therefore that Clemson's Motion to Stay should be denied.

81. Most importantly, the Court gives substantial weight under N.C.G.S. § 1-75.12 to the unique "practical considerations" presented by this action, when considered in combination with the FSU Action, the Florida Action, and the South Carolina Action (collectively, the "Pending Actions"). The only court that has jurisdiction over FSU, Clemson, and the ACC—and thus the only court that can

assure a consistent, uniform interpretation of the Grant of Rights Agreements and the ACC's Constitution and Bylaws, the determinations at the core of the Pending Actions—is a North Carolina court. The Florida court in the Florida Action cannot bind Clemson in South Carolina. The South Carolina court in the South Carolina Action cannot bind FSU in Florida.[131] Each of these courts and this Court could reach conflicting conclusions about the same terms of the same North Carolina contracts upon which the Pending Actions rest—and in so doing create procedural chaos and tremendous confusion at a time when the ACC, FSU, and Clemson need binding clarity concerning their rights under the ACC's most important contracts with its Members. Only a North Carolina court, most likely in a single consolidated action in North Carolina, can render consistent, uniform determinations binding the ACC, FSU, and Clemson concerning the documents that are at issue in all four Pending Actions. The Court finds that these "practical considerations" carry substantial weight under N.C.G.S. § 1-75.12(a) in deciding Clemson's Motion to Stay.

82. The parties focus most of their arguments on whether Clemson's decision to file the South Carolina Action entitles Clemson to deference under the "first-filed rule." Both parties agree that North Carolina "[c]ourts generally give great deference to a plaintiff's choice of forum," *Wachovia Bank v. Deutsche Bank Tr. Co. Ams.*, 2006 NCBC LEXIS 10, at *18 (N.C. Super. Ct. June 2, 2006), particularly when a

[131] Nor can state courts in the seven other states in which the ACC's Members are located—Georgia, Virginia, Massachusetts, Indiana, Pennsylvania, New York, and Kentucky—bind ACC Members located in a different state should Members in those states choose to sue the ACC in their home jurisdictions.

"plaintiff[ ] select[s] [its] home forum to bring suit[,]" *La Mack v. Obeid*, 2015 NCBC LEXIS 24, at *17 (N.C. Super. Ct. Mar. 5, 2015).[132] But this Court has recognized that "[i]t is well-settled law that a court has broad discretion in applying and construing the first-filed rule[,]" *id.* at *19 (quoting *Nutrition & Fitness, Inc. v. Blue Stuff, Inc.*, 264 F. Supp. 2d 357, 361 (W.D.N.C. 2003)), and that "[t]he amount of deference due . . . varies with the circumstances[,]" *Cardiorentis AG v. IQVIA Ltd.*, 2018 NCBC LEXIS 243, at *8 (N.C. Super. Ct. Dec. 31, 2018), *aff'd*, 373 N.C. 309, 314 (2020). The Court concludes here that, even if Clemson is entitled to the deference it seeks under the first-filed rule (a determination that the ACC hotly contests), the practical considerations discussed above substantially outweigh any deference Clemson is due as the first filer in the parties' dispute.

83. Other factors also weigh in favor of denying Clemson's requested stay. As it did in the FSU Order, the Court concludes that the nature of the case and the applicable law strongly favor allowing this matter to proceed in North Carolina. Like the FSU Action, the key contracts in this case—the Grant of Rights and the Amended Grant of Rights—were made in North Carolina and are governed by North Carolina law. *See, e.g.*, *Tom Togs, Inc. v. Ben Elias Indus. Corp.*, 318 N.C. 361, 365 (1986) ("Under North Carolina law, a contract is made in the place where the last act necessary to make it binding occurred."). And like in the FSU Action, the ACC's Constitution and Bylaws are also at issue, and as the ACC's governing documents, they too are governed by North Carolina law. *See, e.g.*, *Futures Grp., Inc. v. Brosnan*,

[132] (*See* Br. Supp. Def.'s Mot. Stay 5–6; Br. Opp'n Def.'s Mot. Stay 12–13.)

2023 NCBC LEXIS 7, at *5 (N.C. Super. Ct. Jan. 19, 2023) ("North Carolina courts apply the substantive law of the incorporating state when deciding matters of internal governance."). Most importantly, the core issues presented in the two actions—i.e., the scope of the rights Clemson granted to the ACC under the Grant of Rights Agreements and whether the withdrawal payment provision in the ACC's Constitution constitutes an unenforceable penalty—involve the judicial determination of the terms of a North Carolina unincorporated nonprofit association's critical North Carolina contracts and governing documents, which the Court finds favors resolution before a North Carolina court.

84. Also as it found in the FSU Order, the Court finds that the burden of litigating matters not of local concern and the desirability of litigating matters of local concern in local courts strongly favor the litigation of this matter in North Carolina. The ACC has been based in North Carolina for over seventy years and recently received a tax incentive from the State of North Carolina to locate its headquarters in Charlotte.[133] Four of its Member Institutions are located in North Carolina—more Members than from any other State—and Clemson is the only Member Institution located in South Carolina.[134] Clemson has attended numerous meetings, served in Conference leadership positions, and participated in hundreds of athletic contests in North Carolina since it joined the ACC as a founding Member in 1953.[135] Clemson

[133] (*See* Compl. ¶¶ 1, 6, 13, 29.)

[134] (*See* Compl. ¶¶ 1, 18.)

[135] (*See* Compl. ¶¶ 6, 9–12, 18, 92–97, 101; Hostetter Aff. ¶¶ 3–5.)

has also previously authorized and participated in litigation against a former ACC Member in North Carolina without complaint.[136]

85. Moreover, while Clemson is the only ACC Member Institution involved in this lawsuit, the determination of the scope of the rights the Member Institutions granted to the ACC under the Grant of Rights Agreements, regardless of whether a Member withdraws from the Conference, is critically important to all Members of the Conference, and the resolution of that issue is of tremendous consequence to the North Carolina-based ACC since it may directly bear on the Conference's ability to meet its contractual commitments to ESPN as well as on the Conference's future revenues, stability, and long-term viability. For these reasons, the Court concludes that a North Carolina court has "a local interest in resolving the controversy" that exceeds the local interest of the South Carolina courts. *See Cardiorentis AG*, 2018 NCBC LEXIS 243, at *23 (observing that North Carolina courts generally have an interest in providing a forum to hear disputes involving injuries related to citizens of the state).[137]

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[136] As noted above, like FSU, Clemson voted to approve the ACC's initiation of litigation in North Carolina against the University of Maryland in 2012. (*See* Univ. Md. Compl. ¶ 39.)

[137] The Court finds that the remaining *Lawyers Mutual* factors—(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, and (8) convenience and access to another forum—do not strongly favor either Clemson or the ACC on the evidence of record presented by the parties here. In this regard, the Court notes that Clemson, unlike FSU, offered evidence and argument in connection with factors (2) and (4), leading the Court to a different conclusion than it did in the FSU Action. *See FSU Order*, 2024 NCBC LEXIS 53, at *78 (finding that "the convenience of witnesses and the ease of access to proof favor[ed] proceeding in North Carolina[ ]" when the ACC presented evidence and argument on these factors and "the FSU Board did not specifically address these factors in its briefing or at the Hearing[ ]").

86. Considering the *Lawyers Mutual* factors as discussed above, both independently and in combination, and balancing the equities present in these circumstances, the Court concludes, in the exercise of its discretion, that the stay that Clemson requests is not warranted under *Lawyers Mutual* and that proceeding with this action in North Carolina would not work a "substantial injustice" on Clemson. The Court concludes, as discussed above, that (1) the nature of the case, (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 (10) the practical considerations presented by the issues raised in the Pending Actions, when considered in combination, decisively outweigh Clemson's choice of the South Carolina forum for the determination of the scope of the rights Clemson granted the ACC in the Grant of Rights Agreements, Clemson's related, and later-added, claim for slander of title, and Clemson's challenge to the enforceability of the withdrawal payment in the ACC's Constitution. Accordingly, the Court, in the exercise of its discretion, will deny Clemson's Motion to Stay under N.C.G.S. § 1-75.12(a).

VI.

CONCLUSION

87. **WHEREFORE**, the Court **GRANTS in part** and **DENIES in part** the Motions and hereby **ORDERS** as follows:

a. The Court **DENIES** Clemson's Motion to Dismiss to the extent it seeks dismissal of this action for lack of personal jurisdiction on grounds of sovereign immunity.

b. The Court **GRANTS** Clemson's Motion to Dismiss as to (i) the ACC's first claim for relief to the extent that claim seeks a declaration that the Grant of Rights Agreements are "valid and binding contracts, supported by good and adequate consideration," (ii) the ACC's second claim for relief based on quasi-estoppel and waiver, (iii) the ACC's fourth claim for relief for breach of contract, and (iv) the ACC's sixth claim for relief for breach of the implied covenant of good faith and fair dealing in the ACC's Constitution and Bylaws, and those claims are hereby **DISMISSED without prejudice**.

c. The Court **GRANTS** Clemson's Motion to Dismiss as to the ACC's fifth claim for relief for breach of fiduciary duty, and that claim is hereby **DISMISSED with prejudice**.

d. The Court otherwise **DENIES** Clemson's Motion to Dismiss, including Clemson's Motion to Dismiss as to the ACC's first claim for relief to the extent that claim seeks a declaration that "the Conference is and will remain the owner of the rights transferred by Clemson under the [Grant of Rights Agreements] through June 30, 2036, regardless of whether it remains a Member Institution," and this claim, together with the ACC's third claim for relief for a declaratory judgment that the withdrawal payment provision of the ACC's Constitution is a valid and enforceable contractual provision, shall proceed forward in this litigation.

e. The Court, in the exercise of its discretion, **DENIES** Clemson's Motion to Stay.

SO ORDERED, this the 10th day of July, 2024.

/s/ Louis A. Bledsoe, III
Louis A. Bledsoe, III
Chief Business Court Judge

West's North Carolina General Statutes Annotated
Chapter 59B. Uniform Unincorporated Nonprofit Association Act (Refs & Annos)

N.C.G.S.A. § 59B-1

§ 59B-1. Short title

Effective: January 1, 2007
Currentness

This Chapter may be cited as the Uniform Unincorporated Nonprofit Association Act.

Credits
Added by S.L. 2006-226, § 1, eff. Jan. 1, 2007.

Editors' Notes

NORTH CAROLINA COMMENT

This Chapter is based upon the Uniform Unincorporated Nonprofit Association Act (hereinafter "Uniform Act") and is the result of a study performed by the General Statutes Commission, partly due to S.L. 2004-161, s. 7.1. The Commission filed its report with the General Assembly on May 11, 2006.

N.C.G.S.A. § 59B-1, NC ST § 59B-1
The statutes and Constitution are current through S.L. 2024-56 of the 2024 Regular Session of the General Assembly, subject to changes made pursuant to direction of the Revisor of Statutes. Some statute sections may be more current; see credits for details.

West's North Carolina General Statutes Annotated
Chapter 59B. Uniform Unincorporated Nonprofit Association Act (Refs & Annos)

N.C.G.S.A. § 59B-2

§ 59B-2. Definitions

Effective: January 1, 2007
Currentness

In this Chapter:

(1) “Member” means a person who, under the rules or practices of a nonprofit association, may participate in the selection of persons authorized to manage the affairs of the nonprofit association or in the development of policy of the nonprofit association.

(2) “Nonprofit association” means an unincorporated organization, other than one created by a trust and other than a limited liability company, consisting of two or more members joined by mutual consent for a common, nonprofit purpose. However, joint tenancy, tenancy in common, or tenancy by the entireties does not by itself establish a nonprofit association, even if the co-owners share use of the property for a nonprofit purpose.

(3) “Person” means an individual, corporation, limited liability company, business trust, estate, trust, partnership, association, joint venture, government, governmental subdivision, agency, or instrumentality, or any other legal or commercial entity.

(4) “State” means a state of the United States, the District of Columbia, the Commonwealth of Puerto Rico, or any territory or insular possession subject to the jurisdiction of the United States.

Credits
Added by S.L. 2006-226, § 1, eff. Jan. 1, 2007.

Editors' Notes

OFFICIAL COMMENT

1. With respect to relations external to a nonprofit association, whether a person is a member of the organization determines principally a member's responsibility to third parties. Internally, whether a person is a member might determine specified rights and responsibilities, including access to facilities, voting, and obligation to pay dues. This Act is concerned only with determining whether a person is a member for purposes of external relations, such as liabilities to third parties on a contract of the nonprofit association. Therefore, “member” is defined in terms appropriate to these purposes. “Member” includes a person who has sufficient right to participate in the affairs of a nonprofit association so that under common law the person would be considered a co-principal and so liable for contract and tort obligations of the nonprofit association.

The definition may reach somewhat beyond decisions of some courts. Either participation in the selection of the leadership or in the development of policy is enough. Both are not required. This broad definition of member ensures that the insulation from liability is provided in all cases in which the common law might have imposed liability on a person, simply because the person was a member.

2. A fund-raising device commonly used by many nonprofit organizations is the membership drive. In most cases the contributors are not members for purposes of this Act. They are not authorized to "participate in the selection of persons authorized to manage the affairs of the nonprofit association or in the development of policy." Simply because an association calls a person a member does not make the person a member under this Act.

Section 6 G.S. 59B-7 nevertheless protects "a person considered to be a member by a nonprofit association" even though the person is not within the definition of member in paragraph (1) see North Carolina Comment to G.S. 59B-7.

3. The role of a member in the affairs of an association is described as "may participate in the selection" instead of "may select or elect the governing board and officers" and "may participate ... in the development of policy" instead of "may determine" policy. This accommodates the Act to a great variation in practices and organizational structures. For example, some nonprofit associations permit the president or chair to name some members of the governing board, such as by naming the chairs of principal committees who are designated ex officio members of the governing board. Similarly, the role in determination of policy is described in general terms. "Persons authorized to manage the affairs of the association" is used in the definition instead of president, executive director, officer, member of governing board, and the like. Given the wide variety of organizational structures of nonprofit associations to which this Act applies and the informality of some of them the more generic term is more appropriate.

4. "Person" instead of individual is used to make it clear that associations covered by this Act may have individuals, corporations, and other legal entities as members. Unincorporated nonprofit trade associations, for example, commonly have corporations as members. Some national and regional associations of local government officials and agencies have governmental units or agencies as members.

5. Paragraph (2) defines "nonprofit association." The model American Bar Association acts deal with both for-profit and nonprofit corporations. Unincorporated, for-profit organizations are largely covered by the uniform partnership acts. The differences between for-profit and nonprofit unincorporated organizations are so significant that it would be impractical to cover both in a single act. Therefore, this Act deals only with nonprofit organizations.

6. A charitable trust is a form of an unincorporated nonprofit legal organization. It is, however, not a nonprofit association within this Act. To the extent that trust law does not supply an answer to a legal problem concerning a charitable trust, a court could look to this Act to develop by analogy a common law answer.

7. The term "nonprofit association" is used instead of "association" for several reasons. The risk that this Act when placed in a state's code would be construed to apply to both nonprofit and for-profit associations should thus be avoided. Acts dealing with one kind of association when placed in a code have sometimes lost their identification and been inadvertently applied to the other kind where the term "association" alone was used. For example, the New York Joint-Stock Association Act of 1894 used the term "association," which it defined to include only for-profit organizations. "Association" was held in 1938 to include an unincorporated political party and the act applied to it. *Richmond County v. Democratic Organization of Richmond County*, 1 NYS 2d 349 (1938). Subsequent decisions applied the act to other unincorporated nonprofit organizations. The use of "nonprofit association" instead of merely "association" should also avoid the risk of this Act being improperly used to develop a common law rule by analogy from this Act to apply in a case involving a for-profit association. Roscoe Pound, *Common Law and Legislation*, 21 Harv. L. Rev. 383 (1908); Robert F. Williams, *Statutes as Sources of Law Beyond their Terms in Common Law Cases*, 50 Geo. Wash. L. Rev. 554 (1982).

Legal issues concerning unincorporated for-profit associations that are not partnerships and so not controlled by a partnership act would be governed by a State's other statutory or common law. Resort to one of the two partnership acts for the purposes of developing a common law rule by analogy would be appropriate. Resort for this purpose to this Act in the case of an unincorporated for-profit association would not be appropriate.

8. Two or more persons is the common statutory requirement to constitute an unincorporated nonprofit association. New Jersey, on the other hand, requires that there be seven or more members to be an association under its laws. This Act suggests the smaller number-two. Consideration was given to specifying "one" instead of "two." For example, the developer of a condominium may have created a condominium association as an unincorporated nonprofit association. Before any units are sold the developer as owner of all units has all of the memberships in the association. Should it be treated as a nonprofit association under this Act from the beginning? It should not. Can one person be "joined by mutual consent for a common purpose?" To ask the question would seem to be to answer it. If the concern is to give the developer the entity protections provided by this Act, it is very likely that it already has some protection because it is a business corporation. Nevertheless, the number is placed in brackets, in part, to raise the question whether the number should be one or two or even a larger number.

The members must be joined together for a common purpose. Several States provide that they be "joined together for a *stated* common purpose" (emphasis added). Because of the informality of many ad hoc associations, it is prudent not to impose the requirement that the common purpose be "stated." Very probably, it is the small, informal, ad hoc associations and those third parties affected by them that most need this Act.

9. "Nonprofit" is not defined. A common definition-it is an association whose net gains do not inure to the benefit of its members and which makes no distribution to its members, except on dissolution-does not work for all nonprofit associations. Consumer cooperatives, for example, make distributions to their members; but they are not for-profit organizations. Those consumer cooperatives not organized under specific state or federal laws need the benefits of this Act.

It is instructive to note that the drafting committee for the ABA Model Nonprofit Corporation Act finally determined that it could not develop a satisfactory definition of nonprofit. Instead, the act contains rules, regulations, and procedures applicable separately to each of the three kinds of nonprofit corporation-public benefit, mutual benefit, and religious. It does not define the three kinds; it described what they can do and how they may function. Considering the corporation's intended activities and the rules, regulations, and procedures applicable to each of the three different kinds of corporations, a choice is made. Having made a choice, the corporation is bound by the rules, regulations, and procedures prescribed for the kind of nonprofit corporation chosen.

10. The final sentence of paragraph (2) is adapted from Section 201(d)(1) of Uniform Partnership Act (1994). This stresses that more than common ownership and use is required. For example, that three families own a lake cottage and share its use does not make the three families a nonprofit association. Paragraph (2) precludes arrangements that are merely common ownership from being a nonprofit association under this Act.

11. The definition of "person" in paragraph (3) is a standard NCCUSL definition.

12. The definition of "State" in paragraph (4) is a standard NCCUSL definition.

NORTH CAROLINA COMMENT

In subdivision (2), the General Statutes Commission added "and other than a limited liability company' to exclude limited liability companies from the Uniform Act's definition of "nonprofit association." In subdivision (3), the Commission added "limited liability company" to expressly include limited liability companies in the Uniform Act's definition of "person."

N.C.G.S.A. § 59B-2, NC ST § 59B-2
The statutes and Constitution are current through S.L. 2024-56 of the 2024 Regular Session of the General Assembly, subject to changes made pursuant to direction of the Revisor of Statutes. Some statute sections may be more current; see credits for details.

West's North Carolina General Statutes Annotated
Chapter 59B. Uniform Unincorporated Nonprofit Association Act (Refs & Annos)

N.C.G.S.A. § 59B-3

§ 59B-3. Supplementary general principles of law and equity

Effective: January 1, 2007
Currentness

Principles of law and equity supplement this Chapter unless displaced by a particular provision of it.

Credits
Added by S.L. 2006-226, § 1, eff. Jan. 1, 2007.

Editors' Notes

OFFICIAL COMMENT

1. This section is adapted from Uniform Commercial Code Section 1-103(b). The reference in Section 1-103(b) to "the law merchant" and its examples of supplementary rules, such as those of principal and agent and estoppel, were deleted as irrelevant or incomplete and unnecessary. This change in language does not manifest any change in substance.

2. This Act contains no rules concerning governance. However, recourse to rules of governance must be had to apply some of the Act's rules. For example, whether a nonprofit association is liable under a contract made for it by an individual depends on whether the individual had the necessary authority to act as agent. Was the individual given the authority by someone empowered by the nonprofit association to give the authority? To decide a case like this a court must resort to the rules of the nonprofit association or, if there are none applicable or none at all, to the common law or other statutory law of the jurisdiction.

3. Efforts were made to develop default internal rules of governance--applicable if an association had none or none that were applicable. This effort demonstrated the complexity and difficulty of fashioning rules that would reasonably fit a wide variety of nonprofit associations--large and small, public benefit, mutual benefit, and religious, and of short and indefinite duration. It was thought best to leave this question to other law of the jurisdiction.

N.C.G.S.A. § 59B-3, NC ST § 59B-3
The statutes and Constitution are current through S.L. 2024-56 of the 2024 Regular Session of the General Assembly, subject to changes made pursuant to direction of the Revisor of Statutes. Some statute sections may be more current; see credits for details.

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West's North Carolina General Statutes Annotated
Chapter 59B. Uniform Unincorporated Nonprofit Association Act (Refs & Annos)

N.C.G.S.A. § 59B-4

§ 59B-4. Title to property; choice of law

Effective: January 1, 2007
Currentness

Real and personal property in this State may be acquired, held, encumbered, and transferred by a nonprofit association, whether or not the nonprofit association or a member has any other relationship to this State.

Credits

Added by S.L. 2006-226, § 1, eff. Jan. 1, 2007.

Editors' Notes

OFFICIAL COMMENT

This section is consistent with Restatement (Second) of Conflict of Laws Section 223 (1971). Section 3 makes a conveyance or devise of land located in a state that has adopted this Act effective even though it would not be effective under the law of the state in which the nonprofit association has its principal office or other significant relationship. No relationship of the nonprofit association other than that the property is situated in the state is required.

NORTH CAROLINA COMMENT

The General Statutes Commission replaced the Uniform Act's catchline “Territorial application” with “Title to property; choice of law” as more descriptive.

Notes of Decisions (1)

N.C.G.S.A. § 59B-4, NC ST § 59B-4
The statutes and Constitution are current through S.L. 2024-56 of the 2024 Regular Session of the General Assembly, subject to changes made pursuant to direction of the Revisor of Statutes. Some statute sections may be more current; see credits for details.

West's North Carolina General Statutes Annotated
Chapter 59B. Uniform Unincorporated Nonprofit Association Act (Refs & Annos)

N.C.G.S.A. § 59B-5

§ 59B-5. Real and personal property; nonprofit association as devisee or beneficiary

Effective: June 24, 2011
Currentness

(a) A nonprofit association is a legal entity separate from its members for the purposes of acquiring, holding, encumbering, and transferring real and personal property.

(b) A nonprofit association, in its name, may acquire, hold, encumber, or transfer an estate or interest in real or personal property.

(c) A nonprofit association may be a beneficiary of a trust or contract or a devisee.

(d) Any judgments and executions against a nonprofit association bind its real and personal property in like manner as if it were incorporated.

Credits
Added by S.L. 2006-226, § 1, eff. Jan. 1, 2007. Amended by S.L. 2011-284, § 59, eff. June 24, 2011.

Editors' Notes

OFFICIAL COMMENT

1. Subsection (a) makes a nonprofit association a legal entity separate from its members for purposes of its dealing with real and personal property. This reverses the common law view that a non-profit association was not a legal entity.

2. Subsection (b) is based on Section 3-102(8), Uniform Common Interest Act. It reverses the common law rule. Inasmuch as an unincorporated nonprofit association was not a legal entity at common law, it could not acquire, hold, or convey real or personal property. Harold J. Ford, *Unincorporated Non-Profit Associations*, 1-45 (Oxford Univ. Press (1959); 15 A.L.R. 2d 1451 (1951); Warburton, *The Holding of Property by Unincorporated Associations*, Conveyancer 318 (September-October 1985).

3. This strict common law rule has been modified in various ways in most jurisdictions by courts and statutes. For example, courts have held that a gift by will or inter vivos transfer of real property to a nonprofit association is not effective to vest title in the nonprofit association but is effective to vest title in the officers of the association to hold as trustees for the members of the association. *Matter of Anderson's Estate*, 571 P. 2d 880 (Okla. App. 1977).

A New York statute specifies that a grant by will of real or personal property to an unincorporated association is effective if within three years after probate of the will the association incorporates. McKinney's N.Y. Estates, Powers, & Trust Law, Section 3-1.3 (1981).

California gives any “unincorporated society or association and every lodge or branch of any such association, and any labor organization” full right to acquire, hold, or transfer any “real estate and other property as may be necessary for the business purposes and objects of the society,” and acquire and hold any property not so necessary for 10 years. California Corporations Code, Title 3, Unincorporated Associations, Section 20001 (West 1991).

As is the case with many of the problems created by the view that an unincorporated association is not an entity the statutory solutions are often partial-limited to special circumstances and associations. Subsection (b) solves this problem for all nonprofit associations, for all kinds of transactions, and for both real and personal property.

4. Even if a nonprofit association's governing documents provide that it “may not acquire real property,” subsection (b) makes effective a transfer of Blackacre to the association. A different result would obviously disrupt real estate titles. The remedy for this violation of internal rules lies not in preventing title from passing but, as with other organizations, in an action by members against their association and its appropriate officers to undo the transaction.

5. Subsection (c) is a necessary corollary of subsection (b) and, thus, it may be unnecessary. However, several States expressly provide that an unincorporated, nonprofit association may be a legatee, devisee, or beneficiary. See, for example, Md. Estates & Trusts Code Ann. Section 4- 301 (1991). Therefore, it is desirable to continue this as an express rule. Subsection (c) applies to both trusts and contracts. Not all state statutes apply expressly to both.

NORTH CAROLINA COMMENT

The General Statutes Commission placed “in its name” in commas in subsection (b) and added subsection (d), which was adapted from G.S. 1-69.1. Subsection (b) is consistent with the provisions of former G.S. 39-24 and former G.S. 39-25.

Notes of Decisions (1)

N.C.G.S.A. § 59B-5, NC ST § 59B-5
The statutes and Constitution are current through S.L. 2024-56 of the 2024 Regular Session of the General Assembly, subject to changes made pursuant to direction of the Revisor of Statutes. Some statute sections may be more current; see credits for details.

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West's North Carolina General Statutes Annotated
Chapter 59B. Uniform Unincorporated Nonprofit Association Act (Refs & Annos)

N.C.G.S.A. § 59B-6

§ 59B-6. Statement of authority as to real property

Effective: January 1, 2007
Currentness

(a) A nonprofit association may execute and record a statement of authority to transfer an estate or interest in real property in the name of the nonprofit association.

(b) An estate or interest in real property in the name of a nonprofit association may be transferred by a person so authorized in a statement of authority recorded in the office of the register of deeds in the county in which a transfer of the property would be recorded.

(c) A statement of authority must be set forth in a document styled "affidavit" that contains all of the following:

(1) The name of the nonprofit association.

(2) Reserved for future codification purposes.

(3) The street address, and the mailing address if different from the street address, of the nonprofit association, and the county in which it is located, or, if the nonprofit association does not have an address in this State, its address out-of-state.

(4) That the association is an unincorporated nonprofit association.

(5) The name or office of a person authorized to transfer an estate or interest in real property held in the name of the nonprofit association.

(6) That the association has duly authorized the member or agent executing the statement to do so.

(d) A statement of authority must be sworn to and subscribed in the same manner as an affidavit by a member or agent who is not the person authorized to transfer the estate or interest.

(e) The register of deeds shall collect a fee for recording a statement of authority in the amount authorized by G.S. 161-10(a)(1). The register of deeds shall index the name of the nonprofit association and the member or agent signing the statement of authority or any subsequent document relating thereto as Grantor and the name of the appointee as Grantee.

(f) An amendment, including a termination, of a statement of authority must meet the requirements for execution and recording of an original statement. Unless terminated earlier, a recorded statement of authority or its most recent amendment expires by operation of law five years after the date of the most recent recording.

(g) If the record title to real property is in the name of a nonprofit association and the statement of authority is recorded in the office of the register of deeds in the county in which a transfer of real property would be recorded, the authority of the person or officer named in a statement of authority is conclusive in favor of a person who gives value without notice that the person or officer lacks authority.

Credits

Added by S.L. 2006-226, § 1, eff. Jan. 1, 2007.

Editors' Notes

OFFICIAL COMMENT

1. This section is based on Uniform Partnership Act (1994) Section 303. California Corporations Code, Title 3, Unincorporated Associations, Section 20002 (West 1991), is similar.

2. A statement of authority need not be filed to conclude an acquisition of or to hold real property. It is concerned only with the sale, lease, encumbrance, and other transfer of an estate or interest in real property. For this, it should, but need not, be filed. The filing provides important documentation.

3. Inasmuch as the statement relates to the authority of a person to act for the association in transferring real property, subsection (b) requires that the statement be filed or recorded in the office where a transfer of the real property would be filed or recorded. This is usually the county in which the real estate is situated. This is where a title search concerning the real estate would be conducted. Uniform Partnership Act (1994) Section 303 provides for central filing, such as with the Secretary of State, but its statement of partnership authority concerns authority of partners generally, not just with respect to real estate.

4. “Filed” and “recorded” are bracketed to direct an enacting State to choose. In most jurisdictions “recorded” will be the appropriate choice.

5. Subsection (c)(2) not enacted in North Carolina deals with the problem caused by the similarity of names of small local nonprofit associations. There is no duplication of federal tax identification numbers. Therefore, any confusion of identity is avoided by this requirement.

Subsection (c)(4) informs those relying on the statement of the precise character of the organization. Knowing that the organization is an unincorporated nonprofit association may cause the person dealing with the organization to act differently.

6. Subsection (c)(5) permits the statement to identify as the person who can act for the association one who holds a particular office, such as president. This designation relieves the association from the need to make additional filings on each change of officers. Under local title standards and practices the transferee and filing or recording office are likely to require a certificate of incumbency if the statement designates the holder of an office.

7. Subsection (d) is designed to reduce the risk of fraud and to reflect law and practice applicable to other organizations. It requires someone other than the person authorized to deal with the real property to execute the statement of authority on behalf

of the nonprofit association. Whether the formalities of execution must conform to those of a deed or an affidavit is left for each State to determine.

8. Subsection (f) makes a statement inoperative five years after its most recent recording or filing. This prevents a statement whose recording or filing is unknown by the association's current leadership from being effective. Reliance on a filing or recording this old is, in effect, not in good faith.

9. Subsection (g) is based on Uniform Partnership Act (1994) Section 303(h). Its obvious purpose is to protect good faith purchasers for value without notice who rely on the statement, including those who acquire a security interest in the real property. If the required signatures on the statement, deed, or both are forgeries, the effect of them is not governed by Section 5(g). Instead, Section 2 applies and would invoke the other law of the State. In many States the deed would be a nullity. See Boyer, Hovenkamp, and Kurtz, *The Law of Property*, An Introductory Survey (West Pub. Co. 4th ed. 1991).

NORTH CAROLINA COMMENT

The General Statutes Commission inserted “of the register of deeds” in subsection (b) to identify the office in which a transfer of real property would be recorded.

The Commission made several changes in subsection (c). To assist the registers of deeds, the Commission modified the introductory language of the subsection by requiring a statement of authority to be set out in a document entitled “affidavit.” The Commission deleted subdivision (2) (the Uniform Act's requirement for a federal tax identification number) due to concerns over identity theft and the belief that the requirement was not useful in any event. In subdivision (3), the Commission conformed the requirement for an address, in part, to similar requirements in this State's statutes regulating other entities. In subdivision (5), the Commission changed “title” to “office” in light of the references to “officer” in subsection (g) and G.S. 59B-13. The Commission added subdivision (6).

The Commission modified subsection (d) by requiring a statement of authority to be sworn to and subscribed in the same manner as an affidavit and by narrowing the subsection to specify execution by a “member or agent” rather than a “person.”

In subsection (e), the Commission identified the officer authorized to collect the fee for recording a statement of authority, made the collection of the fee mandatory rather than permissive, inserted the cross-reference to the recording fee “authorized by G.S. 161-10(a)(1),” and added indexing instructions.

In subsection (f), the Commission replaced the Uniform Act's references to “cancellation,” “cancelled,” and “is cancelled” with “termination,” “terminated,” and “expires.”

In subsection (g), the Commission inserted the reference to the “register of deeds” to identify the office in which a transfer of real property would be recorded and added “or officer” for more precision.

N.C.G.S.A. § 59B-6, NC ST § 59B-6
The statutes and Constitution are current through S.L. 2024-56 of the 2024 Regular Session of the General Assembly, subject to changes made pursuant to direction of the Revisor of Statutes. Some statute sections may be more current; see credits for details.

End of Document

West's North Carolina General Statutes Annotated
Chapter 59B. Uniform Unincorporated Nonprofit Association Act (Refs & Annos)

N.C.G.S.A. § 59B-7

§ 59B-7. Liability of members or other persons

Effective: January 1, 2007
Currentness

(a) A nonprofit association is a legal entity separate from its members for the purposes of determining and enforcing rights, duties, and liabilities.

(b) A person is not liable for the contract, tort, or other obligations of a nonprofit association merely because the person is a member, is authorized to participate in the management of the affairs of the nonprofit association, or is referred to as a "member" by the nonprofit association.

(c) Reserved for future codification purposes.

(d) A tortious act or omission of a member or other person for which a nonprofit association is liable is not imputed to a person merely because the person is a member of the nonprofit association, is authorized to participate in the management of the affairs of the nonprofit association, or is referred to as a "member" by the nonprofit association.

(e) A member of, or a person referred to as a "member" by, a nonprofit association may assert a claim against or on behalf of the nonprofit association. A nonprofit association may assert a claim against a member or a person referred to as a "member" by the nonprofit association.

Credits
Added by S.L. 2006-226, § 1, eff. Jan. 1, 2007.

Editors' Notes

OFFICIAL COMMENT

1. At common law a nonprofit association was not a legal entity separate from its members. Borrowing from the law of partnership, the common law viewed a nonprofit association as an aggregate of its members. The members are co-principals. Subsection (a) changes that. It makes a nonprofit association a legal entity separate from its members for purposes of contract and tort.

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

3. Subsections (b) through (e) are applications to common cases of the basic principle in subsection (a). Because a nonprofit association is made a separate legal entity, its members are not co-principals. Consequently they are not liable on contracts or for torts for which the association is liable. Subsection (b) specifies that result with respect to contracts.

4. Subsection (b) applies the principle in subsection (a) to relieve members and others from vicarious liability for the contracts of a nonprofit association.

5. Subsections (a) and (b) eliminate a risk that existed under common law. An agent makes an implied warranty of authority to the other contracting party. If the purported principal does not exist, the agent obviously breaches the warranty. Because an unincorporated nonprofit association was not a legal entity; one purporting to act for it breached this implied warranty. *Smith & Edwards v. Golden Spike Little League*, 577 P. 2d 132, 134 (Utah 1978). Subsection (b) treats a nonprofit association as a legal entity; therefore, an agent who acts for it within her authority does not breach the warranty.

6. *"Merely"* because a person is a member does not make the person liable on an association's contract. This formulation means that there are special circumstances that may result in liability. For example, a member may expressly become a party to a contract with the nonprofit association. Subsection (b) relieves members only of their vicarious liability. Liability for one's own conduct is left to the other law of the jurisdiction.

An agent with authority from a nonprofit association who negotiates a contract without disclosing the agent's representative status is liable on the contract. Under agency law an agent acting within the agent's scope of authority for an undisclosed or partially disclosed principal is personally liable on the contract along with the principal, unless the other contracting party agrees not to hold the agent liable. *Restatement (Second) Of Agency* 320-322; Reuschlein and Gregory, *Agency & Partnership* 161-163 (West 2d ed. 1990).

Courts have pierced the corporate veil of nonprofit corporations. Comment, --P*Piercing the Nonprofit Corporate Veil*, 66 Marq.L.Rev. 134 (1984). Section 6 makes a nonprofit association a legal entity for these purposes. Therefore, as a matter of its other law a jurisdiction enacting this Act may appropriately apply this doctrine to a nonprofit association. In *Macaluso v. Jenkins*, 95 Ill.App.3d 461, 420 N.E.2d 251 (1981), the president of a nonprofit corporation was found to have so commingled its funds and assets with his own and those of a business corporation he controlled and have treated them as his own for his benefit that the corporate veil must be pierced to promote justice. He was found liable for a debt contracted in the name of the nonprofit corporation. See also Harry G. Henn & John R. Alexander, *Law of Corporations*, pp. 344-352 (West 3d ed. 1983); Alfred F. Conard, *Corporations in Perspective*, pp. 424-433 (Foundation Press, 1976).

7. An example of a partial statutory solution of members' liability for contracts of a nonprofit association is California Corporations Code, Title 3, Nonprofit Associations, Section 21100 (West 1991). It relieves members from liability for "debts or liabilities contracted or incurred by the association in the acquisition of lands or leases or the purchase, leasing, designing, planning, architectural supervision, erection, contraction, repair, or furnishing of buildings or other structures, to be used for purposes of the association." As noted earlier, partial and uncoordinated statutory solutions of common law problems are typical.

8. Subsection (c) combined in this section into subsection (b) applies the principle in subsection (a) to relieve members and others from liability for torts for which the nonprofit association is liable. Inasmuch as Section 6 this section provides that a member is not a co-principal, the member cannot be considered to be an employer of the employee who committed the tort. Again, only relief from vicarious liability is provided.

Liability of a member or other person who acts for the nonprofit association is governed by other law of the jurisdiction. That an employer is liable for a tort committed by its employee does not excuse the employee.

9. The immunity from vicarious liability provided by subsections (b) and (c) combined in this section into subsection (b) does not depend on the remedy sought. Whether it is for damages for breach of contract or tort, unjust enrichment, or the like the immunity is provided.

10. Since the mid 1980's all States have enacted laws providing officers, board members, and other volunteers some protection from liability for their own negligence. The statutes vary greatly as to who is covered, for what conduct protection is given, and the conditions imposed for the freedom from liability. Some apply only to nonprofit corporations. *State Liability Laws for Charitable Organizations and Volunteers* (Nonprofit Risk Management & Insurance Institute, 1990); *Developments, Nonprofit Corporations*, 105 Harv. L. Rev. 1578, 1685-1696 (1992). This means that members and volunteers involved with unincorporated nonprofit associations do not obtain protection under those state statutes.

The 1987 Texas act, for example, relieves directors, officers, and other volunteers from liability for simple negligence that causes death, damage, or injury if the volunteer acted in the scope of her duties for a charitable organization exempt under Internal Revenue Code Section 501(c)(3) or (4). The act also limits the amounts that may be recovered from an employee or the organization if the organization carries requisite liability insurance. The constitutionality of the provision relieving volunteers from liability has been questioned under Article I, Section 13 of the Texas Constitution--the Open Courts provision. Note, *The Constitutionality of the Charitable Immunity and Liability Act 1987*, 40 Baylor L. Rev. 657 (1988). Some statutes premise all relief upon the organization having specified liability insurance.

Section 6 this section does not affect these statutes. As noted earlier Section 6 this section deals only with vicarious liability. These statutes concern liability for one's own conduct.

11. Although not a concern of Section 6 this section, perhaps it should be noted that nonprofit organizations have been held liable for tortious acts and omissions not only of employees but also of members. In *Guyton v. Howard*, 525 So. 2d 918 (Fl. App. 1988) a nonprofit organization was held liable for the negligence of members who acted for the organization in conducting an initiation that resulted in injury.

12. Subsection (d) applies the principle in subsection (a) to reverse the common law rule that the negligence of an employee of an association is imputed to its members. A member as co-principal was vicariously responsible for an employee's conduct within the scope of the employee's duties. Section 6, however, makes the nonprofit association a legal entity. Thus, a member is not a co-principal and the employee's negligence is not imputed to a member.

Because the employee's negligence is not imputed, the member's suit against the nonprofit association for negligence by the employee is not subject to the defense of contributory negligence.

Some courts treated large nonprofit associations as entities for some purposes and so did not impute the negligence of an employee to a member. Therefore, a member could recover from the association. *Marshall v. International Longshoreman's and Warehouseman's Union*, 57 Cal.2d 781, 371 P.2d 987 (1962); Judson A. Crane, *Liability of an Unincorporated Association for Tortious Injury to a Member*, 16 Vand.L.Rev. 319, 323 (1963).

13. Subsection (e) applies the principle in subsection (a) to reverse the common law rule that a member may not sue the member's unincorporated nonprofit association. A member as co-principal is logically a defendant as well as a plaintiff in such an act. n. The logic is that one may not sue oneself.

Subsection (a) makes an unincorporated nonprofit a legal entity. Therefore, a member is separate from the nonprofit association. There is thus no logical obstacle to either suing the other. A nonprofit association may, for example, sue a member for delinquent dues. See, for example, Section 6.13 ABA Nonprofit Corporation Act (1987).

14. The Texas Supreme Court recently overruled the common law rule and held that a member may sue the unincorporated nonprofit association of which the person is a member. *Cox v. Thee Evergreen Church*, 836 S.W.2d 167 (Tex. 1992). The court also overturned the Texas common law rule that the negligence of an employee is imputed to a member. The court referred to a statute authorizing a nonprofit association to sue and be sued and other Texas statutes giving entity status for limited purposes to unincorporated nonprofit associations. It did not, however, rely on them in overturning the historic common law rule. It simply found the old rule not suitable for present times. The court also followed recent developments in other courts.

15. Section 6 this section relieves from vicarious liability not only members but also certain others. Persons who are "authorized to participate in the management of the affairs of the nonprofit association" are protected. Persons within this group--largely directors and officers, however denominated--are likely also to be members as defined in Section 1(1) G.S. 59B-2(1), and protected as such. If they are not members (i.e. not co-principals) they should not be found liable at common law. Section 6 this section extends protection to this group out of abundant caution. It 4is possible that a court might misapply the common law rationale for liability to hold a non-member manager vicariously liable. Section 6 this section prevents that somewhat remote possibility.

Section 6 this section also extends protection to a person who is not within the definition of "member" in Section 1(1) G.S. 59B-2(1) but is "considered to be a member by the nonprofit association." see North Carolina Comment. A person within this clause is one who does not have the relationship to the nonprofit association that would permit a finding under the common law that the person is a co-principal. Also the person is not a director, officer, or manager within the preceding phrase. That a person not within the two preceding phrases but within the third phrase might be found vicariously liable seems quite remote. Nevertheless, Section 6 this section accords this person protection.

As noted earlier, Section 6 this section concerns vicarious liability only. Liability for one's own conduct is covered by other law of the enacting jurisdiction.

NORTH CAROLINA COMMENT

The Uniform Act in this section provides protection for a nonprofit association's members from tort and contract liability based solely on membership status. The General Statutes Commission extended this protection to cover liability based solely on membership status for the nonprofit association's other legal obligations, such as taxes and penalties. The Commission restructured the section in the process.

Throughout this section, the Commission substituted the phrase "person referred to as a member" for the Uniform Act's phrase "person considered to be a member" to eliminate possible ambiguity created by the use of the word "consider." As the Official Comment makes clear, the phrase was intended to refer to persons who do not meet the definition of "member" but are referred to by the nonprofit association as "members" to recognize their contributions (such as a financial donation) to the association.

In subsection (e), the Commission expanded the Uniform Act's provision by changing "a claim against the nonprofit association" to "a claim against or on behalf of the nonprofit association."

N.C.G.S.A. § 59B-7, NC ST § 59B-7
The statutes and Constitution are current through S.L. 2024-56 of the 2024 Regular Session of the General Assembly, subject to changes made pursuant to direction of the Revisor of Statutes. Some statute sections may be more current; see credits for details.

West's North Carolina General Statutes Annotated
Chapter 59B. Uniform Unincorporated Nonprofit Association Act (Refs & Annos)

N.C.G.S.A. § 59B-8

§ 59B-8. Capacity to assert and defend; standing

Effective: January 1, 2007
Currentness

(a) A nonprofit association, in its name, may institute, defend, intervene, or participate in a judicial, administrative, or other governmental proceeding or in an arbitration, mediation, or any other form of alternative dispute resolution.

(b) A nonprofit association may assert a claim in its name on behalf of its members or persons referred to as "members" by the nonprofit association if one or more of them have standing to assert a claim in their own right, the interests the nonprofit association seeks to protect are germane to its purposes, and neither the claim asserted nor the relief requested requires the participation of a member or a person referred to as a "member" by the nonprofit association.

Credits
Added by S.L. 2006-226, § 1, eff. Jan. 1, 2007.

Editors' Notes

OFFICIAL COMMENT

1. Subsection (a) broadly recognizes the right of a nonprofit association to participate as an entity in judicial, administrative, and governmental proceedings, and in arbitration and mediation on behalf of it and its members. It may sue and be sued. Many States have enacted statutes granting unincorporated associations these rights. Many have rejected the argument that these acts made an unincorporated nonprofit association a separate legal entity for other purposes.

2. Ohio Rev. Code Ann. Section 1745.01 (Baldwin 1991) provides that an unincorporated association may "sue or be sued as an entity under the name by which it is commonly known and called." This formulation has an element that subsection (a) does not have--a description of the association name to be used. Maryland requires that the unincorporated association have a "group name." Md. Estates & Trust Code Ann. Section 6-406(a)--(1991). As some of the informal nonprofit associations may not have fixed on a name but need the benefit of the rule, subsection (a) does not require that it have a name.

3. Subsection (b) describes an association's standing to represent the interests of its members in a proceeding. It is the federal standing rule. *Hunt v. Washington Apple Advertising Commn*, 432 U.S. 333, 343, 97 S.Ct. 2434, 53 L.Ed.2d 383 (1977). A nonprofit association must meet the three requirements only if it seeks to represent the interests of its members. If the suit concerns only the nonprofit association's interests, subsection (b) does not apply.

4. If participation of individual members is required, the nonprofit association does not have standing. If the injury for which a claim is made or the remedy sought is different for different members, their participation through testimony and presenting other evidence is required. The typical case in which a nonprofit association has standing is where it seeks only a declaration, injunction, or some form of prospective relief for injury to its members. *Warth v. Seldin*, 422 U.S. 490, 515, 95 S.Ct. 2197, 45 L.Ed.2d 343 (1975).

5. Subsection (b) does not require the nonprofit association to show that it suffered harm or has some interest to protect to have standing to represent the interests of its members. *Warth v. Seldin*, 422 U.S. 490, 511, 95 S.Ct. 2197, 45 L.Ed.2d 343 (1975). Some states require an association to have an interest to protect which is separate from that of its members. One court found that the probable loss of members if it did not take action on their behalf was a sufficient interest to protect to give it standing to represent its members. This approach certainly diminishes greatly the burden of satisfying the requirement. States have further modified the old standing rule. Recently many states have adopted the three-pronged federal rule, which is the rule in subsection (b).

This section does not re-state rules of joinder because they will be governed by the jurisdiction's other law.

NORTH CAROLINA COMMENT

Subsection (a) replaces G.S. 1-169.1 [1] for nonprofit associations. In subsection (b), the General Statutes Commission added the references to persons referred to as "members" by the nonprofit association.

Footnotes

1 So in original Comment. Should probably read "G.S. 1-69.1".

N.C.G.S.A. § 59B-8, NC ST § 59B-8
The statutes and Constitution are current through S.L. 2024-56 of the 2024 Regular Session of the General Assembly, subject to changes made pursuant to direction of the Revisor of Statutes. Some statute sections may be more current; see credits for details.

End of Document

West's North Carolina General Statutes Annotated
Chapter 59B. Uniform Unincorporated Nonprofit Association Act (Refs & Annos)

N.C.G.S.A. § 59B-9

§ 59B-9. Effect of judgment or order

Effective: January 1, 2007
Currentness

A judgment or order against a nonprofit association is not by itself a judgment or order against a member, a person referred to as a "member" by the nonprofit association, or a person authorized to participate in the management of the affairs of the nonprofit association.

Credits
Added by S.L. 2006-226, § 1, eff. Jan. 1, 2007.

Editors' Notes

OFFICIAL COMMENT

1. This section is consistent with Restatement (Second) of Judgments, Section 61(2), which provides: "If under applicable law an unincorporated association is treated as a jural entity distinct from its members, a judgment for or against the association has the same effects with respect to the association and its members as a judgment for or against a corporation ...."

2. Section 8 this section applies not only to judgments but also to orders, such as an award rendered in arbitration or an injunction.

3. Section 8 this section reverses the common law rule. Under the common law's aggregate view of an unincorporated association, members, as co-principals, were individually liable for obligations of the association.

4. Some states changed the common law rule by statute. Ohio, for example, provides that the property of an unincorporated association is subject to judgment, execution, and other process and that a money judgment against the association may be "enforced only against the association as an entity" and not "against a member." Ohio Rev. Code Ann., Section 1745.02 (Baldwin 1991).

5. That a judgment against a nonprofit association is also not a judgment against one authorized to manage the affairs of the association recognizes fully the entity status of a nonprofit association.

6. An obvious corollary of this section is that a judgment against a nonprofit association may not be satisfied against a member unless there is also a judgment against the member.

NORTH CAROLINA COMMENT

The General Statutes Commission added the reference to a person referred to as a "member" by a nonprofit association.

N.C.G.S.A. § 59B-9, NC ST § 59B-9
The statutes and Constitution are current through S.L. 2024-56 of the 2024 Regular Session of the General Assembly, subject to changes made pursuant to direction of the Revisor of Statutes. Some statute sections may be more current; see credits for details.

End of Document

West's North Carolina General Statutes Annotated
Chapter 59B. Uniform Unincorporated Nonprofit Association Act (Refs & Annos)

N.C.G.S.A. § 59B-10

§ 59B-10. Disposition of personal property of inactive nonprofit association

Effective: January 1, 2007
Currentness

If a nonprofit association has been inactive for three years or longer, or a different period specified in a document of the nonprofit association, a person in possession or control of personal property of the nonprofit association may transfer custody of the property:

(1) If a document of the nonprofit association or document of gift specifies a person to whom transfer is to be made under these circumstances, to that person; or

(2) If no person is so specified, to a nonprofit association, nonprofit corporation, or other nonprofit entity pursuing broadly similar purposes, or to a government or governmental subdivision, agency, or instrumentality.

Credits
Added by S.L. 2006-226, § 1, eff. Jan. 1, 2007.

Editors' Notes

OFFICIAL COMMENT

1. Section 9 this section is not a dissolution rule. An inactive nonprofit association may not be one that has dissolved. It may have just stopped functioning and have taken no formal steps to dissolve. It might possibly be revived.

Section 9 this section gives a person in possession or control of personal property of a nonprofit association an opportunity to be relieved of responsibility for it. Compliance with the section provides a safe harbor.

Section 9 this section applies only to personal property--tangible and intangible. Unclaimed property acts also apply to both kinds of personal property. All States have some form of unclaimed property act. Therefore, the relationship of these acts to this Act must be examined.

2. “Inactive” is not defined. A nonprofit association that has accomplished its purpose, such as seeking approval in a school bond election, is very likely inactive. A nonprofit association that has stopped pursuing its purposes, collecting dues, holding elections of officers and board members, and conducting meetings, and has no employees would seem to be inactive.

“Inactive” does not describe a nonprofit association whose sole purpose is to act should a specific problem arise. That there has been no activity because the problem has not arisen does not make the standby organization “inactive.”

A three year period of inactivity is suggested. It is unlikely that a nonprofit association that has been inactive for that period will begin functioning again. Thus, it is prudent to transfer custody of its assets to someone likely to make appropriate use of them. While it is unlikely that a nonprofit association would deal with this issue, if its document does provide a shorter or longer period, that period governs.

3. Section 9 applies only to personal property--tangible and intangible. Unclaimed property acts also apply to both kinds of personal property. All states have some form of unclaimed property act. Therefore, the relationship of these acts to this Act must be examined.

The Uniform Unclaimed Property Act (1995) applies to certain intangible and tangible personal property. If the property has been unclaimed by the owner for five or more years it is presumed abandoned. Intangible property, such as checking and savings accounts and uncollected dividends, is the main concern of these Acts. The obligor, such as a bank or other financial institution and corporation, is directed to report and turn over the property to the state administrator.

The only tangible personal property to which the Uniform Unclaimed Property Act (1995) applies, according to Section 3, is that in “a safe deposit box or any other safekeeping repository.” Many states have additional statutes that apply to property abandoned in airport, bus, and railroad lockers and the like. Tangible personal property of an inactive nonprofit association in the control or possession of a member or other person is not likely to be in these places. Therefore, overlap of this Act with the other state acts with respect to tangible personal property is likely to be very limited.

Property of an inactive nonprofit association is likely to be in the possession or control of a former member, board member, officer, or employee. Especially with respect to intangible property, their relation to the property is unlike that of those regulated by the unclaimed property acts. They are custodians or fiduciaries and not obligors. Those upon whom duties are imposed by the unclaimed property acts are obligors on such intangible property as bank accounts, money orders, life insurance policies, and utility deposits. The person acting under Section 9 is very unlikely to be in the position of an obligor on such intangible property.

In summary, there appears to be limited overlap. Other special statutes may apply, such as laws governing unexpended campaign funds. Texas, for example, permits a person to retain political contributions for six years after the person is no longer an office-holder or candidate. It gives the person six choices of transferees, including a “recognized tax exempt charitable organization formed for educational, religious or scientific purposes.” Tex.Code Ann. Elections Section 251.012(d) and (e) (Vernon's 1986). Minnesota provides that if an unincorporated religious society “ceases to exist or to maintain its organization” title to its real and personal property vests in the “next higher governing or supervisory” body of the same denomination. Minn.Stat.Ann. Section 315.37 (West 1992).

4. It is the custody of and not the title to the property that is transferred. To whatever purpose the property was dedicated while in the hands of the transferor, it remains so dedicated in the hands of the transferee. Identification of the persons to whom the property may be transferred and cy pres principles recognize that the purpose to which the transferee may put the property need not be precisely that to which it was initially dedicated. For example, the initial purpose may no longer be viable.

5. Section 9 this section does not address what should be done with real property of an inactive nonprofit association. This seems justified. A nonprofit association owning real property of significant value is unlikely to become inactive. In the rare case that it does, the assistance of a court may be obtained in making appropriate disposition of the real property, primarily to ensure good title

6. To obtain a Section 501(c)(3) tax classification as a nonprofit organization an association must specify a distribution of assets on dissolution that satisfies the Internal Revenue Code. To avoid the interpretation that Section 9 might be construed to override an approved distribution provision in an association's governing document the primacy of that distribution provision is expressly recognized in paragraph (1).

7. If there is no bylaw or other controlling document the person may transfer custody of the personal property to another nonprofit organization or a government or governmental entity. The nonprofit organization need not have the same nonprofit purpose as the inactive one. It is enough that the transferee's purpose is "broadly similar." This requirement should not be construed narrowly. Otherwise, the risk of potential litigation over the transferor's choice will frustrate the section's purpose to provide a safe harbor.

There is no limitation with respect to the choice of a government or governmental entity.

8. Inasmuch as the transfer is made without consideration and the association almost certainly rendered insolvent, creditors of a nonprofit association would be protected by the Uniform Fraudulent Transfer Act Sections 4(a) and 5 G.S. 39-23.4(a) and G.S. 39-23.5 and similar statutes. Whether they would also be protected if the transfer is made to the administrator of an unclaimed property statute depends on the terms of a jurisdiction's act. Uniform Unclaimed Property Act (1981) Sections 20 and 24 contemplate that a creditor may proceed against property in the hands of the administrator if the creditor claims an interest in the property, such as a security interest or judgment lien. It is less clear that Section 15 of the 1995 Act recognizes this action. However, a general creditor without some claim against the property would not be protected. It is unlikely that an inactive nonprofit association would have both unpaid creditors and a significant amount of property. Therefore, the two issues discussed above are unlikely to arise.

9. The person in possession or control is not required to give notice of the proposed transfer to anyone. An examination of to whom notice might reasonably be given reveals the difficulty with such a requirement. Almost by definition an inactive nonprofit association has no current members.

NORTH CAROLINA COMMENT

In subsection (a), the General Statutes Commission added the reference to "document of gift" to cover restricted gifts. In subsection (b), the Commission added the reference to a nonprofit entity other than a nonprofit association or nonprofit corporation.

N.C.G.S.A. § 59B-10, NC ST § 59B-10
The statutes and Constitution are current through S.L. 2024-56 of the 2024 Regular Session of the General Assembly, subject to changes made pursuant to direction of the Revisor of Statutes. Some statute sections may be more current; see credits for details.

End of Document

West's North Carolina General Statutes Annotated
Chapter 59B. Uniform Unincorporated Nonprofit Association Act (Refs & Annos)

N.C.G.S.A. § 59B-11

§ 59B-11. Appointment of agent to receive service of process

Effective: January 1, 2007
Currentness

(a) A nonprofit association may file in the office of the Secretary of State a statement appointing an agent authorized to receive service of process, notice, or demand required or permitted by law to be served on a nonprofit association.

(b) A statement appointing an agent must set forth all of the following:

(1) The name of the nonprofit association.

(2) Reserved for future codification purposes.

(3) The street address, and the mailing address if different from the street address, of the nonprofit association, and the county in which it is located, or, if the nonprofit association does not have an address in this State, its address out-of-state.

(4) The name of the person in this State authorized to receive service of process and the person's address, including the street address, in this State.

(c) A statement appointing an agent must be signed and acknowledged by a person authorized to manage the affairs of a nonprofit association. The statement must also be signed and acknowledged by the person appointed agent, who thereby accepts the appointment. The appointed agent may resign by filing a resignation in the office of the Secretary of State and giving written notice to the nonprofit association at its last known address.

(d) The sole duty of the appointed agent to the nonprofit association is to forward to the nonprofit association at its last known address any notice, process, or demand that is served on the appointed agent.

(e) The Secretary of State is not an agent for service of any process, notice, or demand on any nonprofit association.

(f) The Secretary of State shall collect the following fees when the documents described in this subsection are delivered to the Secretary of State for filing:

	Document	Fee
(1)	Statement appointing an agent to receive service of process	$5.00

(2)	Amendment of statement appointing an agent	5.00
(3)	Cancellation of statement appointing an agent	5.00
(4)	Agent's statement of resignation	No fee

(g) An amendment to or cancellation of a statement appointing an agent to receive service of process must meet the requirements for execution of an original statement.

Credits

Added by S.L. 2006-226, § 1, eff. Jan. 1, 2007.

Editors' Notes

OFFICIAL COMMENT

1. This section authorizes but does not require a nonprofit association to file a statement authorizing an agent to receive service of process. It is, of course, not the equivalent of filing articles of incorporation. However, some nonprofit associations may find it prudent to file. Filing may assure that the nonprofit association's leadership gets prompt notice of any lawsuit filed against it. Also, depending upon the jurisdiction's other laws, filing gives some public notice of the nonprofit association's existence and address.

2. Central filing with a state official is provided. This is where parties will seek information of this kind and where this is commonly publicly filed.

3. The format of this section is very much like Section 5 G.S. 59B-6, which concerns a statement of authority with respect to property. Because one requires local and the other central filing they are not combined.

NORTH CAROLINA COMMENT

The General Statutes Commission modified this section in subsection (a) by adding the reference to “notice, or demand required or permitted by law to be served on a nonprofit association.” In subsection (b), the Commission deleted the Uniform Act's requirement for a federal tax identification number due to concerns over identity theft and the belief that the requirement was not useful in any event and conformed the requirement for an address, in part, to similar requirements for the statutes regulating other entities. The Commission modified subsection (c) by requiring that the agent give “written” notice of the agent's resignation to the nonprofit association “at its last known address.” The Commission also added subsections (d) and (e) and substituted a fee schedule for the Uniform Act's fee provision. The filing fees in subsection (f) are the same as those for similar documents filed by nonprofit corporations and business entities.

N.C.G.S.A. § 59B-11, NC ST § 59B-11

The statutes and Constitution are current through S.L. 2024-56 of the 2024 Regular Session of the General Assembly, subject to changes made pursuant to direction of the Revisor of Statutes. Some statute sections may be more current; see credits for details.

West's North Carolina General Statutes Annotated
Chapter 59B. Uniform Unincorporated Nonprofit Association Act (Refs & Annos)

N.C.G.S.A. § 59B-12

§ 59B-12. Claim not abated by change

Effective: January 1, 2007
Currentness

A claim for relief against a nonprofit association does not abate merely because of a change in its members or persons authorized to manage the affairs of the nonprofit association.

Credits
Added by S.L. 2006-226, § 1, eff. Jan. 1, 2007.

Editors' Notes

OFFICIAL COMMENT

This provision reverses the common law rule of partnerships, which courts often extended to unincorporated nonprofit associations. Uniform Partnership Act (1994) Sections 29 and 31(4). This Act's entity approach requires this change of the old common law rule. Similar provisions are found in many state statutes. See, for example, Ohio Rev. Code Ann., Corporations, Section 1745.04 (Baldwin 1991); Md. Ann. Code art. 6-406(a)(2); and 12 Vt. Stat. Ann. Section 815 (Equity Pub. 1973). Uniform Partnership Act (1994) adopts an entity approach and so changes the old rule. See Sections 603(a) 701, and 801 of 1994 Act.

N.C.G.S.A. § 59B-12, NC ST § 59B-12
The statutes and Constitution are current through S.L. 2024-56 of the 2024 Regular Session of the General Assembly, subject to changes made pursuant to direction of the Revisor of Statutes. Some statute sections may be more current; see credits for details.

West's North Carolina General Statutes Annotated
Chapter 59B. Uniform Unincorporated Nonprofit Association Act (Refs & Annos)

N.C.G.S.A. § 59B-13

§ 59B-13. Venue

Effective: January 1, 2007
Currentness

For purposes of venue, a nonprofit association is a resident of a county in which it has an office or maintains a place of operation or, if on due inquiry no office or place of operation can be found, in which any officer resides.

Credits
Added by S.L. 2006-226, § 1, eff. Jan. 1, 2007.

Editors' Notes

OFFICIAL COMMENTARY

1. Venue, unlike service of process, is treated by statute. See for example Mont. Code Ann. Section 25-2-118(1) (1991); 28 USCA 1391. A criterion used by all States for fixing venue is the county of residence of the defendant. Most States specify as many as eight additional grounds for venue, including the county in which the real estate that is the subject of the suit is situated and the county in which the act causing, in whole or in part, the personal injury or other tort occurred. None of these additional criteria present a special problem with respect to an unincorporated nonprofit association.

2. If an aggregate view of a nonprofit association were taken, the association is resident in any county in which a member resides. See Wright, Miller, & Cooper, 15 *Federal Procedure & Practice* 3812 (1986). Conforming to the entity view of an association, Section 12 rejects the common law view.

This section is bracketed because some states have already satisfactorily solved this problem.

States have by statute modified the common law rule. Illinois, for example, provides that "a voluntary unincorporated association sued in its own name is a resident of any county in which it has an office or if on due inquiry no office can be found, in which any officer resides." Ill.Code Civ.Prac. Section 2-102(c).

3. Section 12 this section makes a nonprofit association a resident of any county ... in which it has an office. If it has an office in five counties, for example, it may be sued in any of the five counties.

...

NORTH CAROLINA COMMENT

The General Statutes Commission modified this section by expanding a nonprofit association's residence for venue purposes to include the county in which the nonprofit association maintains a place of operation or in which any officer resides.

Section 13 of the Uniform Act (Summons and complaint; service on whom) was omitted as unnecessary.

N.C.G.S.A. § 59B-13, NC ST § 59B-13
The statutes and Constitution are current through S.L. 2024-56 of the 2024 Regular Session of the General Assembly, subject to changes made pursuant to direction of the Revisor of Statutes. Some statute sections may be more current; see credits for details.

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West's North Carolina General Statutes Annotated
Chapter 59B. Uniform Unincorporated Nonprofit Association Act (Refs & Annos)

N.C.G.S.A. § 59B-14

§ 59B-14. Uniformity of application and construction

Effective: January 1, 2007
Currentness

This Chapter shall be applied and construed to effectuate its general purpose to make uniform the law with respect to the subject of this Chapter among states enacting it.

Credits
Added by S.L. 2006-226, § 1, eff. Jan. 1, 2007.

N.C.G.S.A. § 59B-14, NC ST § 59B-14
The statutes and Constitution are current through S.L. 2024-56 of the 2024 Regular Session of the General Assembly, subject to changes made pursuant to direction of the Revisor of Statutes. Some statute sections may be more current; see credits for details.

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West's North Carolina General Statutes Annotated
Chapter 59B. Uniform Unincorporated Nonprofit Association Act (Refs & Annos)

N.C.G.S.A. § 59B-15

§ 59B-15. Effect as to conveyances by trustees; prior deeds validated

Effective: January 1, 2007
Currentness

(a) Nothing in this Chapter changes the law with reference to the holding and conveyance of land by the trustees of churches under Chapter 61 of the General Statutes where the land is conveyed to and held by the trustees.

(b) All deeds executed before January 1, 2007, in conformity with former G.S. 39-24 and former G.S. 39-25 are declared to be sufficient to pass title to real estate.

Credits

Added by S.L. 2006-226, § 2(b), eff. Jan. 1, 2007.

Editors' Notes

NORTH CAROLINA COMMENT

This section is not in the Uniform Act. It is derived from former G.S. 39-26 and former G.S. 39-27.

Notes of Decisions (1)

N.C.G.S.A. § 59B-15, NC ST § 59B-15
The statutes and Constitution are current through S.L. 2024-56 of the 2024 Regular Session of the General Assembly, subject to changes made pursuant to direction of the Revisor of Statutes. Some statute sections may be more current; see credits for details.

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