No. 124A24

TWENTY SIXTH JUDICIAL DISTRICT

NORTH CAROLINA SUPREME COURT

****

ATLANTIC COAST CONFERENCE,

Plaintiff-Appellee,

v.

BOARD OF TRUSTEES OF FLORIDA STATE UNIVERSITY,

Defendant-Appellant.

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

****

PLAINTIFF-APPELLEE'S BRIEF

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On April 19, 2013, the President of Florida State University ("FSU") signed a contract governed by North Carolina law which granted FSU's media rights ("Grant of Rights") to the Atlantic Coast Conference ("ACC" or the "Conference"), a North Carolina unincorporated association. (R pp 52-71). FSU's Grant of Rights with the ACC was identical to grants signed by each of the then 12 members of the Conference. At that time, FSU had been a Member of the ACC since 1991, and its representatives (including its Athletic Director and President) had served on the Finance Committee, the Constitution and Bylaws Committee, the Television and Media Committees, the Executive Committee, and the Council of Presidents for more than a dozen years.

In the Grant of Rights, FSU promised 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 54 ¶6). FSU also agreed that it would "not take any action . . . that would affect the validity and enforcement of the Rights granted to the Conference under this Agreement." (R p 54 ¶6). Finally, FSU warranted that it "has the right, power and capacity to execute, deliver and perform this Agreement," that the "execution, delivery and performance of this Agreement . . . have been duly and validly authorized by all necessary action," and that FSU "owns all Rights granted to the Conference." (R p 54 ¶6).

Over the next decade, FSU received more than $200 Million from the ACC through media contracts made possible by the Grant of Rights. (R p 184). FSU further agreed in 2016 to extend the Term of the Grant of Rights for another 20 years, "regardless of whether [it] withdraws from the Conference during the Term.". (R pp 294-311). During this time, FSU representatives served on more than 11 Conference committees, including as the President of the Conference, on the Executive Committee, and on the Finance Committee. (R p 187-88 ¶9; R pp 783-84 ¶64). FSU also voted to accept $15 Million in benefits provided by North Carolina taxpayers as an incentive to keep the ACC's headquarters in North Carolina. (R pp 188-89 ¶11; R pp 783-84 n. 108).

But despite a decade of FSU accepting the lucrative financial benefits made possible by the Grant of Rights while managing the Conference, in December 2023 the ACC learned that FSU intended to abandon its promises and violate its contractual commitment to "not take any action . . . that would affect the validity

and enforcement" of the Grant of Rights by suing the Conference in Tallahassee, Florida. In that lawsuit FSU claimed that it had not transferred its rights "regardless" of whether it remained a Member of the ACC, and further claimed it had never validly entered into the Grant of Rights at all, despite its then-President's signature on the contract. And when the Conference, which has been a North Carolina unincorporated association for more than 70 years, attempted to enforce this North Carolina contract in North Carolina courts, FSU objected, claiming that it could not be sued in North Carolina. It is the ACC's attempt to enforce FSU's contractual promises that brings this case to this Court.

SUMMARY OF ARGUMENT

FSU discusses three issues in five separate arguments with multiple subparts. But its appeal really presents two questions for this Court: (1) Whether the Business Court erred in applying the principles of *Farmer v. Troy,* 382 N.C. 366 (2022) to this case; and, (2) Whether this Court should abandon its decision in *Farmer*. The answer to both questions is "No."

FSU chose to come into North Carolina more than 30 years ago to become a member of the ACC. Since that time, it has participated in the active management of the Conference and reaped hundreds of millions of dollars in financial reward. For nearly 20 years, North Carolina law has provided that an unincorporated association "may assert a claim against a member or person referred to as a 'member' . . . ." Uniform Unincorporated Nonprofit Association Act ("UUNAA") N.C. Gen. Stat. §59B-7(e). The UUNAA specifically applies to a member who is a "government, governmental subdivision, agency, or instrumentality." N.C. Gen. Stat. §59B-2(3).

Indeed, in 2012, FSU 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). *Atlantic Coast Conference v. University of Maryland,* 230 N.C. App. 429 (2013). (R p 453 ¶39, R pp 818-19 ¶127 and n.203).

FSU has never disputed that it "purposefully availed 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). FSU also concedes that it is not immune from the ACC's contractual claims and may be sued on its contracts under Fla. Stat. §1001.72(1). *See Pan-Am Tobacco v. Dep't of Corr.,* 471 So.2d 4, 5 (Fla. 1984) (holding that "where the state has entered into a contract fairly authorized by the powers granted by general law, the defense of sovereign immunity will not protect the state. . . .").

Presented with an entity that came into North Carolina to join an unincorporated association, actively participated as a Member in managing that association, engaged in substantial commercial activity out of which it received more than $200 Million, authorized suit against another sovereign member (Maryland) in the North Carolina courts under the UUNAA, and could be sued on its contracts, the Business Court reached the unremarkable conclusion that FSU 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, FSU necessarily chose to submit itself to the requirements of North Carolina law as explicitly set forth in the UUNAA, including the obligation to answer for the claims asserted by the Conference in the same way as a private member.

To avoid litigating the meaning of this North Carolina contract in North Carolina courts, FSU argues that it is immune as a sovereign from suit *in North Carolina* because its legislature did not expressly consent to suit here under *Hyatt*. But *Hyatt* did not prescribe any form by which consent was to be expressed or any particular source for waiver. This Court, in *Farmer,* provided that framework. (R p 778 ¶54). *Farmer*'s framework requires that the court determine whether the defendant is a sovereign entity, and, if so, that the court apply a presumption of immunity from suit in North Carolina absent consent. *Farmer* then looks to the defendant's conduct in North Carolina and under North Carolina law to determine whether consent was given and if the defendant engaged in commercial (i.e., non-governmental) activity.

The Business Court followed this analytical framework. The Business Court started with a presumption of immunity from suit in North Carolina for FSU. It then turned to the provisions of the UUNAA. Those provisions grant FSU as a member of an unincorporated association the right to sue on behalf of the ACC while also obligating it to be sued by the ACC for its claims. In the face of this limited "sue and be sued" provision, FSU's "continuous and systematic" participation in and

management of the Conference's affairs as it engaged in the commercial activity of marketing of media rights for athletic contests constituted the necessary consent. And while FSU tries to claim now that it is merely a "passive" member of the Conference, FSU said otherwise just weeks after it sued the Conference, claiming that it had been a "vibrant and active member of the Atlantic Coast Conference" and that it "intends to continue to maintain its past level of full participation in all aspects of the Conference." (R p 712).

The consent here is stronger than in *Farmer*. FSU has no substantive sovereign immunity from the ACC's contract claims under Florida law and the consent here is far more limited than the consent in *Farmer*. In *Farmer,* based on the statute at issue and Troy University's conduct, this Court found consent to *general jurisdiction*. That is, Troy University could be sued by any person for any reason in North Carolina arising out of its business here. By contrast, the statutory consent here is *limited solely* to the claims of *the ACC* against FSU because that is all that the UUNAA permits.

The case for consent is further strengthened by the waiver of sovereign immunity for contracts under Florida law, which provides plainly that FSU is liable on its contracts "in all courts." Fla. Stat. §1001.72(1). Consent is also consistent with the expectations of all of the Members of the Conference in entering into the Grant of Rights, who surely did not believe if a dispute occurred, every public university could only be bound by a decision in its courts no matter the conflicts that would arise from litigation in several states over the same contractual provisions.

Perhaps recognizing that *Farmer*'s analysis compels a finding of jurisdiction, FSU urges this Court to overrule *Farmer*. But FSU offers no cogent justification for this Court to now abandon *Farmer* other than it wishes to litigate in Tallahassee. The principle of *stare decisis* is not so easily disregarded and here FSU fails to articulate the "grievous wrong" or "palpable error" necessary to justify abandoning *Farmer*. *Wiles v. Welparnel Constr. Co.,* 295 N.C. 81, 85 (1978).

FSU argues that North Carolina law should be irrelevant to whether North Carolina courts have jurisdiction, and that only the Florida legislature can determine whether there is jurisdiction here, regardless of FSU's conduct or actions. There is no suggestion in *Hyatt* that only a specific legislative enactment can provide consent. If only the law of the defendant-sovereign were controlling, then presumably this Court's decision in *Farmer* would have been overturned by the Supreme Court on *certiorari*.

FSU argues that the contours of consent under the Eleventh Amendment must define the consent necessary under *Hyatt*. Of course, 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 because *Hyatt* does not arise from the Eleventh Amendment; rather it is a structural form of immunity that is "implied as an essential component of federalism." *Hyatt*, 587 U.S. at 247. It is thus a form of personal jurisdiction protection and different from the subject-matter limitation imposed by the Eleventh Amendment. But even under the Eleventh Amendment, consent by conduct has long been recognized as valid jurisdictional consent without legislative enactment.

At the heart of the consent in *Farmer* is the imposition of liability in exchange for a right to conduct business, 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 otherwise sovereign 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 amenability 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 not 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).

FSU closes its Brief by conjuring up a "parade of horribles" should the ACC be permitted to sue its Members on their North Carolina contracts with the ACC. FSU ignores the principle underlying *Hyatt*, which is that the states are co-equal sovereigns. FSU's argument would make Florida a superior sovereign. FSU's argument permits any Florida agency to enter into any other state, conduct commercial activity, and be immune from enforcement in the courts of that state

regardless of the law of that state. Requiring an arm of Florida to comply with North Carolina law in North Carolina courts when it operates a commercial enterprise in North Carolina does not violate any principle of federalism. Rather, it strikes the proper balance between co-equal sovereigns.

STATEMENT OF FACTS

The ACC presents this Statement of Facts under App. R. 28(c) because it disagrees with the "Statement of Facts" submitted by FSU. The "Statement of Facts" submitted by FSU seeks to inject irrelevant "facts" into this matter, in the process mischaracterizing those "facts" and the record. Examples of such "factual" assertions are:

- FSU's claim that the ACC is an "unregistered" association under North Carolina law." FSU claims that the ACC "failed" to register as an unincorporated nonprofit association under North Carolina law. *See* Brief pp 5-6. The only statute which it cites is N.C. Gen. Stat. §59B-11. But this statute provides only that an unincorporated association "may file in the office of Secretary of State a statement appointing an agent." It does not require an unincorporated nonprofit association to appoint an agent. In fact, this provision does not mention "registration" at all, nor use the word "register." There is no provision in the UUNAA that requires an unincorporated association to "register," and the word "register" does not appear anywhere in the UUNAA (other than a single reference to the "register" of deeds for purposes of property transfer).[1]

[1] Relatedly, FSU suggests that the absence of an appointed agent for process "made the ACC difficult to serve in the Florida Action." Brief p 6. The ACC voluntarily

- FSU's claim that when it joined the ACC, the ACC had "no legal existence" under North Carolina law. FSU states as a fact that the ACC had "no legal existence" when FSU became a member in 1991. Brief p 5. This mischaracterizes North Carolina law. Indeed, the sole case cited by FSU, *Stafford v. Wood*, 234 N.C. 622 (1951), noted that since 1943 unincorporated associations doing business in North Carolina have been "legally accountable as separate entities for the acts done by them in furtherance of the objects for which they are formed." *Id.* at 626. In fact, unincorporated associations in North Carolina have long had the legal capacity to sue and be sued and to hold property before the UUNAA. *See Melton v. Hill*, 251 N.C. 134, 137-38 (1959); *Cherokee Home Demonstration Club v. Oxendine*, 100 N.C. App. 622, 625 (1990).

- FSU's claim that the ACC engaged in an "improper anticipatory filing." FSU asserts as a "fact" that the ACC engaged in "blatant" forum-shopping. Brief pp 7, 9-11. It is difficult to understand how a North Carolina organization engages in improper forum-shopping by suing in the North Carolina courts over the meaning and breach of a North Carolina contract, as the ACC did here. While FSU repeatedly cites the rulings of Florida courts, this issue was first fully briefed, argued, presented to and decided by Chief Judge Bledsoe, who held just the opposite. Chief Judge Bledsoe found that when it became clear that FSU intended to breach the Grant of Rights, the ACC was well within its rights to file its lawsuit in North Carolina. As

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accepted service by stipulation six days after FSU filed its complaint in Florida. (R p 669).

noted by Chief Judge Bledsoe, "the FSU Board's argument hinges on its erroneous view that it is the only 'natural' plaintiff in this dispute":

> The "natural" or "real" plaintiff in a civil suit is the party that has allegedly suffered damages at the hands of its opponent. [ ] Here, that is the ACC, which alleges that the FSU Board intended to breach the covenants not to sue in the Grant of Rights Agreements. The parties did not simply race to the courthouse to resolve their dispute over the agreements' terms; to the contrary, the ACC sued because the FSU Board's alleged breach of those agreements was a practical certainty that threatened the ACC with imminent and unavoidable injury as a result.

(R p 814-15 ¶122). The Business Court concluded that "the ACC did not engage in improper conduct or 'procedural fencing' in filing this action in North Carolina." (R p 817 ¶125).[2]

- FSU's claim that the ACC's lawsuit was "unauthorized." While this issue is not (and could not be) a question presented in this interlocutory appeal, FSU repeatedly claims that the ACC's lawsuit was improper. But, again, this issue was fully presented, briefed, and argued to Chief Judge Bledsoe, who ruled that whether the ACC did or did not have authorization to proceed with litigation on December 21 was beside the point because the ACC presented "unrebutted and dispositive" evidence that the litigation was ratified by the Board on January 12, 2024. (R pp 771-72 ¶44). As noted by the Business Court, "ratification is a practice frequently employed by corporate entities . . . such that the prior act 'is given effect as if

[2] The courts of Florida have refused to give this finding of a North Carolina court on North Carolina law any effect. Indeed, the trial court in Florida explicitly refused to review Chief Judge Bledsoe's Order ***at all*** on the ground that it did not want to be influenced by these findings. (Appx. pp 108-09 lines 23-25, 1-6, p 110 lines 19-21).

originally authorized.'" (R pp 772-72 ¶46). It is a well-recognized legal principle across the country that an organization may "ratify the initiation of litigation that was unauthorized at the time of filing," (R p 774 ¶48), even in Florida. *See First Telebanc Corp. v. First Union Corp.*, 2007 U.S. Dist. LEXIS 114903, at *26 (S.D. Fla. Aug. 6, 2007) ("In accordance with Florida law, . . . the board may subsequently ratify the filing of the lawsuit."). Regardless of whether the ACC's original Complaint needed to be voted on as "material litigation" by the Conference - - a contention that is hotly disputed - - "the record clearly demonstrates that by approving the filing of the FAC [First Amended Complaint], the ACC Board . . . 'intended to ratify' the filing of the Complaint on 21 December 2023." (R p 776 ¶50). Thus, "[i]n light of this uncontroverted evidence . . . the ACC was properly authorized to bring this litigation." (R p 776 ¶50).

STATEMENT OF JURISDICTIONAL FACTS RELEVANT TO THIS APPEAL

As a result of the improper inclusion of the "facts" cited by FSU, the ACC submits this alternative Statement of Jurisdictional Facts. The facts set forth here are those facts contained within the Plaintiff's First Amended Complaint (which are considered true for purposes of the jurisdictional determination) and the Business Court's Order. The ACC notes that FSU's Brief challenges no finding of fact by the Business Court as either unsupported by the record or clearly erroneous.[3]

[3] The ACC notes that while the Business Court's Order stated that it "does not make findings of fact on the Motions," in context this refers to the various motions by FSU directed at the validity of substantive claims and for a stay. For purposes of personal jurisdiction, the trial court does act as a fact-finder on facts relating to jurisdictional issues: "The trial judge must decide whether the complaint contains allegations that,

The ACC, FSU, and the Grant of Rights

The ACC is a North Carolina unincorporated nonprofit association first formed in 1953. (R pp 747-48 ¶5). In 1991, FSU joined the ACC and since that time has actively participated in its management. (R pp 783-84 ¶64, R p 818 ¶127). The Business Court found, and FSU did not dispute, that FSU's "Presidents, Athletic Directors, and Head Coaches have 'played an active role in the administration of ACC affairs'" and that FSU's employees and officers serve on at least 11 committees governing the ACC, including the Finance Committee, Executive Committee, Council of Presidents, the Television and Media Committees, and the Constitution and Bylaws Committee. (R pp 783-84 ¶64, R pp 187-88 ¶9). FSU's President approved the ACC's execution of the media rights agreements entered into on behalf of all ACC's Members. (R pp 783-84 ¶64).

Throughout its history, "the ACC's main source of income has consisted of the payments it receives in exchange for granting exclusive media rights to broadcast athletic events." (R pp 784-85 ¶66). The ACC "then distributes the payments it receives under these media rights agreements, totaling hundreds of millions of dollars, to its Members, including FSU." (R pp 784-85 ¶66). In order to secure long-term media rights agreements to generate this revenue, "the current and incoming Member Institutions, including FSU, entered into an Atlantic Coast Conference Grant of Rights Agreement . . . with the ACC in April 2013." (R pp 749-50 ¶8).

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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). The Business Court did just this in ruling on the jurisdictional issue now before this Court. *See, e.g.,* R pp 782-83 ¶63.

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 749-50 ¶8). FSU's President, in signing the Grant of Rights, further warranted that he had the authority to do so and that all necessary action had been taken to approve the contract. (R p 54 ¶6).[4] After the execution of the Grant of Rights, the ACC used the "bundle" of rights from its Members to negotiate additional agreements

[4]North Carolina governs this agreement (and amendment) because the ACC Commissioner was the last signatory to the Grant of Rights, executing it in Greensboro, North Carolina, after all other Members had signed. (R p 817 ¶126).

with ESPN, agreements that increased the revenue paid to the Conference, which was distributed to its Members. (R pp 750-51 ¶9).

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 agreements to provide for additional payments into the future. (R pp 750-51 ¶9). As a condition of entering into these new agreements, ESPN required that each Member agree "to extend the term of the Grant of Rights." (R p 751 ¶10). Following "numerous Board and other meetings, the ACC members, including FSU, executed a 2016 Amendment to ACC Grant of Rights Agreement with the ACC." (R p 751 ¶10). The amendment extended the Term of the Grant of Rights through 2036. (R p 751 ¶10). New agreements with ESPN were executed a few days later. (R p 751 ¶10). Between 2016 and 2023, FSU's distribution of revenue from the ACC "more than doubled." (R p 752 ¶11).

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

In early 2023, FSU began advocating for a larger share of the ACC's revenue, based on its assertion that its "brand" was more valuable. (R p 752-53 ¶11). Despite changes in revenue sharing made by the Conference, "FSU continued to push for 'an unequal share of all Conference revenue,' and the FSU Board discussed withdrawing from the ACC at a 2 August 2023 Board meeting." (R pp 752-53 ¶11). The Chairman of the FSU Board declared in a public interview in August 2023 that "the Grant of Rights 'will not be the document that keeps us from taking action.'" (R pp 762-63 ¶26). On December 21, 2023, "[e]vents came to a head . . . when the FSU Board notified the

public that it would hold an emergency meeting the following day," Friday, December 22 (the last business day before the Christmas Holiday). (R p 753 ¶12). The "emergency" that required this meeting was never specified.

Leading up to that meeting, each of the FSU Board Members received an individual briefing concerning litigation against the ACC and committed to vote in favor of initiating litigation. (R p 762 ¶27). Several hours before the "emergency" meeting began, a copy of FSU's lawsuit against the ACC (not yet "approved" or filed) appeared on the FSU news service. (R p 762 ¶27).

Based on these facts, the Business Court concluded that as of the notice of the "emergency" meeting on December 21, litigation was "unavoidable" and that the FSU Board meeting on December 22 "was a mere formality." (R p 763 ¶28).

Faced with the "practical certainty that litigation would arise," the ACC filed its original Complaint on December 21, 2023. In that Complaint, the ACC sought a declaration that the Grant of Rights between the ACC and FSU was a valid and enforceable agreement and that FSU, in accepting the benefits of the Grant of Rights for more than a decade (amounting to hundreds of millions of dollars), had either waived any claim that it was not valid and enforceable or was estopped from making such claims. On December 22, the FSU Board met and performatively authorized a lawsuit to be filed immediately against the ACC. (R p 753-54 ¶13). Following the end of that meeting, the ACC served FSU with the North Carolina action; roughly an hour later FSU filed its lawsuit in Leon County, Florida.

The Business Court's Decision

On February 7, 2024, FSU moved to dismiss the ACC's Amended Complaint or, in the alternative, for a stay. (R p 746 ¶2). After four rounds of briefing and several hundred pages of exhibits, the Business Court held a four-hour hearing on March 22, 2024. This briefing and argument resulted in the issuance of a 76-page decision containing 132 numbered paragraphs on April 4, 2024.[5] (R pp 746-821).

Chief Judge Bledsoe began his analysis with "the presumption that the State of Florida may not 'be sued by a private party without its consent in the courts of [this] State.'" (R p 781 ¶62) (quoting *Hyatt*, 587 U.S. at 233). Because Florida had "extended its sovereign immunity to include its public universities," Chief Judge Bledsoe further concluded "that, 'as a general matter, [the FSU Board] is entitled to sovereign immunity from suit without its consent in the state courts of every state in the country.'" (R p 782 ¶62) (quoting *Farmer,* 382 N.C. at 371). Thus, the issue for the Business Court was "whether the FSU Board explicitly waived its sovereign immunity to suit in North Carolina." (R p 782 ¶62).

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

[5] FSU implies it was inappropriate for the Business Court to issue its Order in advance of a hearing in Florida on FSU's lawsuit. This is not true. FSU and the ACC both informed the Business Court of the pending hearing in Florida and both requested a decision before that hearing. (Appx. pp 111-12). This was so because the hearing in Florida concerned whether the Florida lawsuit should be stayed in favor of the ACC's lawsuit in North Carolina. If the Business Court had granted FSU's Motion to Dismiss or, alternatively, had stayed the North Carolina lawsuit, this would have rendered the Florida hearing moot.

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 p 782 ¶63). But it also provides that a Member of the ACC, such as FSU, 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 782 ¶63). As a corollary to these Member rights, the UUNAA also empowered 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 contemplates that a Member can be 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] the FSU Board's activities in this State" to "decide if they are of a commercial or governmental nature." (R pp 782-83 ¶63 quoting *Farmer,* 382 N.C. at 372). Based on the allegations of the ACC's amended complaint, which the "FSU Board has not sought to refute," Chief Judge Bledsoe found that since 1991 FSU had engaged in continuous and systematic membership and governance activities in the Conference, including attending meetings, playing an active role in the committees of the ACC, and approving the various media agreements entered into by the ACC

made possible by the Grant of Rights. (R pp 783-84 ¶64). The Business Court further found that the ACC generated significant revenue, "totaling hundreds of millions of dollars," by aggregating the media rights of Members under the Grant of Rights and then receiving payment for the exclusive right to broadcast its athletic events. (R pp 784-85 ¶66). The ACC distributed the hundreds of millions of dollars received "to its Members, including FSU." (R p 785 ¶66).

Based on these undisputed facts, the Business Court concluded "first . . . that the ACC's activities, specifically the sponsorship of athletic events and the marketing of media rights for those events, are commercial in nature." (R p 785 ¶67). It also concluded "that, as a Member of the ACC, FSU's Conference-related activities in this State are also commercial, rather than governmental, in nature." (R p 785 ¶67). Because FSU knew that it was subject to being sued in North Carolina by the ACC under the UUNAA, and because as a Member of the ACC "FSU engaged in extensive commercial activity in North Carolina," Chief Judge Bledsoe concluded that "*Farmer* instructs that FSU 'explicitly waived its sovereign immunity' to suit in this State." (R p 785 ¶67 quoting *Farmer*, 382 N.C. at 373).

FSU now appeals to this Court.

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). Because FSU did not submit any affidavit evidence contesting personal jurisdiction, "[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, 95-96 (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 the facts that it finds, if supported by competent evidence, are binding. *Id.* at 99. *See, e.g.*, *Land v. Whitley*, 292 N.C. App. 244, 252 (2024) (where "defendants do not contradict plaintiff's allegations, such allegations are accepted as true and deemed controlling").

ARGUMENT

FSU urges four reasons to justify the dismissal, with prejudice, of the ACC's claims. These are that (1) the Business Court incorrectly applied *Farmer* to these facts, (2) Florida law is the exclusive source for determining whether there is consent or waiver under *Hyatt,* (3) the Business Court's decision conflicts with *Hyatt,* and (4) failing to reverse this case and *Farmer* "would have drastic and far-reaching implications." Brief p 21.[6] But three of these four reasons all focus on whether this Court should overrule *Farmer*, rather than present separate analytical issues. For example, *Farmer* makes clear that Florida law is not the exclusive source for consent

[6] In its Argument, FSU reverses the first and second issues, and then adds the fourth issue without numbering it as a "reason" for reversal.

or waiver, and thus FSU's argument to the contrary is no more than an argument that *Farmer* should be overruled.

Thus, these four reasons present only two questions for analysis: (1) Did the Business Court err in applying *Farmer* to the facts of this case and, if not, then (2) should this Court overrule its decision in *Farmer*? This analytical framework appropriately focuses first on whether Chief Judge Bledsoe was correct in his legal analysis, and only then whether this Court should overrule its precedent.

It is also important to understand what is *not* at issue.

First, FSU never claims that Due Process and its 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). Because FSU does not contest that it has sufficient "minimum contacts" with North Carolina, suing FSU here does not offend "traditional notions of fair play and substantial injustice." *Int'l Shoe Co. v. State of Wash., Off. of Unemployment Comp. & Placement*, 326 U.S. 310, 316 (1945). Indeed, this Court may fairly conclude that FSU has "purposefully availed 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).

Second, FSU concedes that it has no sovereign immunity from the subject matter of this lawsuit, or indeed any lawsuits over its contracts. Under Florida law, FSU has the right "to contract and be contracted with, to sue and be sued, to plead

and be impleaded in all courts of law or equity." Fla. Stat. §1001.72(1). Indeed, "where the state has entered into a contract fairly authorized by the powers granted by general law, the defense of sovereign immunity will not protect the state from action arising from the state's breach of that contract." *Pan-Am Tobacco Corp. v. Dep't of Corr.*, 471 So.2d 4, 5 (Fla. 1984). *See* R p 475 (Brief of FSU conceding that FSU does not have immunity from suit on its contracts). Moreover, as noted by the Business Court, by initiating litigation in Florida, FSU necessarily conceded that it could be sued on these agreements. (R p 818 n.198).

Thus, the issue before this Court is not *whether* FSU may be sued, but *where* that lawsuit may take place. This is not a question of substantive sovereign immunity in the sense of whether FSU is answerable for its breach (it is), but one of jurisdictional sovereign immunity under *Hyatt.* Still FSU repeatedly cites to and relies on cases dealing with sovereign immunity in its substantive sense rather than its jurisdictional sense. *See, e.g.*, Brief pp 24-5. And its repeated citations to such cases make little sense when it 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,* do not address the issues presented in this appeal.

I. FSU Explicitly Waived and Otherwise Consented to the Jurisdiction of North Carolina Courts for Claims Against It by the ACC Under the Principles of *Hyatt* and *Farmer*.

A. Sovereign Jurisdiction, *Hyatt*, and *Farmer*.

In 2012, during an earlier round of athletic conference realignment, the University of Maryland announced that it was withdrawing from the ACC and

refused to pay the Conference's withdrawal fee. The ACC sued Maryland in North Carolina (with FSU's authorization), and Maryland sued the ACC in Maryland. To defend the North Carolina case, Maryland argued that as a sovereign it was immune from suit by the Conference in North Carolina. In 2013, the Court of Appeals held that Maryland was not immune, concluding that it could be sued by the Conference under a comity analysis; the court reached the common-sense conclusion that because North Carolina could not avoid its contractual obligations, neither should Maryland. 230 N.C. App. at 442. Following this decision, FSU executed the Grant of Rights with the full knowledge that it was answerable in North Carolina courts for the Conference's claims, just as Maryland had been.[7]

Several years later, in 2019, in *Hyatt,* the 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 that is to be used.

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[7] FSU complains that the ACC only recently "discovered" that FSU authorized the ACC to sue Maryland. Brief p 42 & n.22. This mischaracterizes the Record. FSU submitted the ACC's lawsuit against Maryland as an exhibit to its Motion to Dismiss. (R pp 445-454). Thus, FSU first introduced the Maryland lawsuit into this litigation as part of its initial pleadings.

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 for 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.* Troy invoked the Alabama Constitution which (unlike the Florida Constitution here, *see infra*) provides that "the State of Alabama shall never be made a defendant in any court of law or equity." *Id.* at 370 (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. In *Farmer,* Troy registered to do business as a nonprofit corporation which gave it the power to sue and imposed the obligation to be sued. *Id.* (citing 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." 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. Nor did any of these provisions state specifically that Troy was subjecting itself to the jurisdiction of North Carolina courts. 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. This, of course, is plain from the statutory grant of the right to sue and the obligation to be sued - - North Carolina can grant such rights and impose such obligations in its courts.

B. In Actively Participating in the Management and Control of the ACC for 18 Years, FSU Consented to Jurisdiction for the Claims of the ACC Under the UUNAA.

The analytical framework courts follow in assessing whether a defendant may avoid suit in North Carolina because of sovereignty begins 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 law 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 here. And these steps establish that FSU consented to suit in North Carolina.

The Business Court plainly and unequivocally began its analysis "with the presumption that the State of Florida may not 'be sued by a private party without its consent in the courts of [this] State." (R p 781 ¶62). Because "Florida has extended it sovereign immunity to include its public universities . . . 'as a general matter, [the

FSU Board] is entitled to sovereign immunity from suit without its consent" in North Carolina. (R pp 781-82 ¶62).

There is no serious dispute, let alone one supported by any evidence in this record, that FSU is Member of the ACC and has exercised its right as a Member to manage the affairs of the ACC. FSU's "continuous and systemic membership activities" has legal significance under North Carolina law, and in particular the UUNAA. The UUNAA is specific about the rights it grants to members of a North Carolina nonprofit unincorporated association, including governmental subdivisions. For example, under the UUNAA, FSU is protected from any torts or acts or omissions committed by other members or the ACC "merely because" it is a member. N.C. Gen. Stat. §59B-7(b), (d). The UUNAA also grants FSU, as a Member of the ACC, the right to "assert a claim . . . on behalf" of the ACC. N.C. Gen. Stat. §59B-7(e). FSU also has the right to assert its own claims against the ACC. *Id.* And, in exchange for these rights, the ACC is given the symmetrical right to "assert a claim against a member." *Id.* Thus, under the UUNAA, FSU was given 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 merely because it was a Member of the ACC, and the obligation that it can be sued for the ACC's claims just like a private member of a nonprofit association.

The right to sue granted to FSU (and all other Members of the ACC) by the UUNAA, and the corresponding obligation to be answerable for the Conference's claims, 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 business in North Carolina. 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. Here the "sue and be sued" obligation as applied to FSU permits FSU to sue the ACC if FSU has a claim, to sue on behalf of the ACC for the Conference's claims, and to be sued by the Conference only for its claims. The consent and waiver in the UUNAA are thus strictly limited when compared to the Nonprofit Corporation Act. And because a member may be a governmental subdivision, the UUNAA plainly provides for a claim to be made by a nonprofit association against a governmental subdivision. N.C. Gen. Stat. §59B-2(3).

This limited "sue and be sued" provision in the UUNAA falls squarely within *Farmer* and *Thacker v. Tennessee Valley Authority*, 587 U.S. 218 (2019). In analyzing the import of the "sue and be sued" authorization provided to Troy, *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. So too here. FSU has actively participated as a Member of the Conference in managing its commercial business for 18 years under a statutory scheme that gives FSU the right to sue on behalf of the

Conference and the obligation to be answerable to the Conference for its claims. It is thus treated no differently from any other member of a nonprofit association under North Carolina law and has the "same amenability to judicial process" as the other Members of the Conference.

Moreover, FSU's actions in participating in and managing the affairs of the ACC were even more deliberate than the two administrative acts that Troy took in *Farmer*. The Business Court found that "FSU has engaged in 'continuous and systematic membership activities' that 'arise out of its membership in and management of the Conference.'" R p 783 ¶64. The Amended Complaint recited at length the number of offices held by FSU agents and employees, the meetings that FSU attended, and in particular the leadership positions held by FSU. (R pp 187-88 ¶9). Along with executing the contracts at issue - - Grant of Rights and its extension - - the President of FSU also approved the media rights agreements entered into by the ACC made possible by these contracts. (R p 784 ¶64). And the Business Court found that the "FSU Board has not sought to refute any of these allegations." (R p 784 ¶64).

FSU argues for the first time on appeal that it only "passively" serves as a Member of the ACC and is merely "one of eighteen" Members. Brief pp 20, 37, 39, 41.[8] This is not true. Notably, FSU did not submit any affidavits or other proof that it is a "passive" member; indeed, the Business Court found that FSU did not even

[8] The ACC did not have 18 members until July 1, 2024, eight months after FSU decided to breach its agreements.

seek to refute the Conference's contrary allegations. In fact, after the initiation of litigation, FSU said the opposite. In a letter to the ACC on January 18, 2024, FSU that "nothing has changed with respect to Florida State University . . . remaining an active and vibrant member of the Atlantic Coast Conference, and Florida State intends to continue to maintain its past level of full participation in all aspects of the Conference." (R p 712). Thus, in January 2024, FSU claimed to be an "active and vibrant" Member and demanded to fully participate in the Conference's management, but before this Court in its Brief, it purports to be merely a "passive" Member and should be excused from its legal obligations.

FSU appears to argue that the UUNAA provides that FSU's liability can be governed only by Florida law, citing Comment 2 to §59B-7. Brief p 43. FSU misreads that comment. Comment 2 notes that the UUNAA "does not deal with the liability of members or other persons acting for a nonprofit association for their own conduct." In other words, the UUNAA does not address whether a Member (like FSU) is liable to *third parties* if the Member commits a tort or enters into contracts while acting on behalf of the association. This does not mean, however, that the Member is not liable to the association for the association's claims (as the UUNAA plainly provides).

FSU next suggests that because the UUNAA was enacted in 2006, FSU could not have been expected to know that it could be sued by the ACC under North Carolina law. This is a thinly veiled "ignorance of the law" excuse. As a Member of a North Carolina organization from which it received hundreds of millions of dollars between 2006 and 2023, FSU 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 important, however, is that FSU authorized the Conference to sue another sovereign member (Maryland) in 2012 in North Carolina. (R pp 446-55). And FSU did more than merely vote in favor of suing Maryland in North Carolina; it submitted an affidavit to the Superior Court supporting the Conference's Motion to Disqualify Maryland's counsel based on a conflict of interest. (R pp 681-85). One of the bases for the disqualification was that Maryland's claims against the ACC could have resulted in "an award of damages against the conference [which] does have a direct impact on [Florida State] University." (R p 684). It is thus difficult to understand how FSU 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.[9]

[9] FSU claims that its actions and knowledge in 2012 are beside the point, because *Hyatt* was not decided until 2019. This ignores the fact that FSU 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.

In an attempt to distinguish *Farmer,* FSU suggests that because it did not register as a member of the ACC, *Farmer* cannot apply.[10] FSU misreads *Farmer*. 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 that consent in Troy's qualification as a nonprofit corporation and registration as a foreign corporation. 382 N.C. at 375-76. But *Farmer* did not suggest that registration was the only way consent could exist. Here, of course, FSU manifested consent by its choice to continue as a member of a North Carolina nonprofit association, manage that association, operate under the North Carolina law governing that association for 18 years, and take advantage of 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 by the ACC. The ACC submits that 18 years of participation in and management of a North Carolina unincorporated association manifests consent even more clearly than the two discrete administrative acts taken by Troy.

FSU argues that because its "performance" consists of playing its games in Florida, these contracts cannot constitute the commercial activity in North Carolina that should qualify under *Farmer*. In making this argument, FSU fundamentally distorts the contractual relationship established under the Grant of Rights. FSU transferred its "media rights" for all of its athletic contests to the ACC. This was a

[10] There is no procedure for a member of an unincorporated association to "register" as a member of the association.

transfer of a property right to broadcast its events in an agreement identical to the same transfer executed by 11 other ACC members. The purpose of the Grant of Rights was not to market the media rights of FSU's games alone; its purpose was to aggregate the media rights for all of the Conference's members and market them together as one whole. This bundle of rights is a property right which exists only under the collective Grant of Rights and in North Carolina, where the bundle of rights is held by the ACC. It is in the bundling of these rights that value was created. In fact, the Grant of Rights does not require FSU to play any games at all, it only transfers to the Conference the media rights for the games that it does play so that, together with the rights transferred by other members, they can be used to enter into media agreements with ESPN. FSU's management of this North Carolina nonprofit association, and in its management and participation in the revenue distributed by the ACC which it receives from ESPN for the bundled rights of all the Conference's Members, is plainly a commercial venture in North Carolina. In fact, FSU's argument (which it never made to the Business Court) acknowledges that this is commercial, not governmental, activity.

C. FSU's Consent is Not at Odds with Florida Law and the Intent of the Parties to the Grant of Rights.

The conclusion that FSU consented to jurisdiction is bolstered, not undermined, by Florida law. Unlike the Alabama Constitution in Farmer, Florida's Constitution contemplates that its agencies may be sued: "[p]rovision may be made by general law for bringing suit against the state as to all liabilities now existing or hereafter originating." Fla. Const. Art. X, §13. Florida's legislature waived FSU's

immunity for contract claims by providing that it has the right "to contract and be contracted with, to sue and be sued, to plead and be impleaded in all courts of law or equity." Fla. Stat. §1001.72(1). Indeed, "where the state has entered into a contract fairly authorized by the powers granted by general law, the defense of sovereign immunity will not protect the state from action arising from" that contract. *Pan-Am Tobacco Corp. v. Dep't of Corr.*, 471 So.2d 4, 5 (Fla. 1984).

FSU concedes this waiver but insists the phrase "all courts of law or equity" means only Florida courts, accusing the ACC of a "hypertechnical" reading. In short, FSU contends that "all courts" does not mean "all courts." But if the Florida legislature intended to limit the scope of this waiver in this manner, it knew how to do so. For example, as FSU notes, under a different statute, claims to recover money damages in tort "against a state university board of trustees *shall be brought in the county in which that university's main campus is located or in the county in which the cause of action accrued if the university maintains therein a substantial presence* for the transaction of its customary business." Fla. Stat. §768.28(1) (emphasis added). If the Florida Legislature had intended to limit contract litigation to the courts of Florida (or to a particular venue in Florida), presumably it would have added similar language, or more broadly the words "in this state," at the end of "in all courts of law or equity." In fact, it has done so in other statutes. *See* Fla. Stat. § 622.07 ("Every association shall have the power and authority to . . . sue and be sued ***in this state***.")

(emphasis added).[11] Put simply, "all courts of law or equity" carries with it the ordinary meaning of "all," including courts outside Florida, particularly when the legislature knew how to say otherwise. *See Storey Mountain, LLC v. George*, 357 So.3d 709, 714 (Fla. 4th Dist. Ct. App. 2023) ("The use by the Legislature of [a] comprehensive term indicates an intent to include everything embraced within that term."); *cf. N.C. Dep't of Revenue v. Graybar Elec. Co., Inc.*, 373 N.C. 382, 391 (2020) ("When a legislative body includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that the legislative body acts intentionally and purposely in the disparate inclusion or exclusion.").

This plain reading is not "hypertechnical" but is consistent with the "textualist" approach to statutory interpretation adopted by Florida's Supreme Court. Indeed, under Florida law it is improper to reinterpret the ordinary meaning of words through the prism of intent. The Florida Supreme Court recently reemphasized this principle and its textualist approach to statutory interpretation: "As expressed in our cases involving statutory interpretation, we are committed to the supremacy-of-text

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[11] Other legislatures have done so, limiting the courts where the entities could be sued. *See, e.g.*, *Milford v. People's Cmty. Hosp. Auth.*, 144 N.W.2d 687, 689 (Mich. Ct. App. 1966) (construing a statute stating: "Such hospital authority shall be a body corporate with power to sue or be sued in any court of this state"); *Arrington v. Jones*, 191 S.W. 361, 362 (Tex. Ct. Civ. App. 1917) (construing a statute stating: "It is provided that the trustees of the school district, as a body corporate, may contract and be contracted with, sue or be sued, plead or be impleaded, in any court of this state of competent jurisdiction"); *Dover v. State*, 45 Ala. 244, 255 (1871) (construing a statute stating: "The county is a body corporate, with power to sue or be sued in any court of record in this State").

principle—that is, the words of a governing text are of paramount concern to us, and what they convey, in their context, is what the text means." *Steele v. Comm'r of Soc. Sec.*, 2024 Fla. LEXIS 259, *6 (Feb. 15, 2024). Indeed, "[b]ecause even a clearly discernible Legislative intent cannot change the meaning of a plainly worded statute, it would only confuse matters to focus on what the Legislature might have intended rather than what the statute actually says." *State v. Peraza*, 259 So.3d 728, 733 (Fla. 2018). Moreover, FSU's preferred reading of the statute would require this Court to add words that the legislature did not include. Florida law forbids this practice. *See Lawnwood Med. Ctr., Inc. v. Seegar*, 990 So. 2d 503, 512 (Fla. 2008) ("It is a well-established tenet of statutory construction that courts are not at liberty to add words to the statute that were not placed there by the Legislature." (quotation marks omitted)).

If this blanket legislative waiver of immunity on contracts "in all courts" in a jurisdiction that takes a strictly textual approach to statutory interpretation is not enough to supply consent, it is difficult to imagine what type of legislative enactment would provide consent. Would the legislative enactment have to specifically include North Carolina? Would it have to be for this lawsuit? Could consent even be effective if it were enacted before litigation occurred, or must the Florida legislature "consent" on a case-by-case basis after a lawsuit has been filed? And who determines whether the consent is adequate - - FSU or the courts of the forum jurisdiction? Notably, FSU's Brief is deliberately silent on what it believes would be sufficient "consent," and this is so for a very good reason: FSU wants the freedom to engage in commercial

business anywhere in the country and to ignore the jurisdiction and law of the forum courts when it breaches its obligations. No consent would ever suffice for FSU.

FSU also argues that the Amended Complaint must be dismissed because the venue provisions of Florida law bar claims for tort outside "the county in which that university's main campus is located." Fla. Stat. §768.28(1). Because the ACC brought as one of its six claims a claim for breach of fiduciary duty arising out of FSU's role as a member of the ACC's Board of Directors under North Carolina law, FSU argues that this is a tort claim that cannot be filed outside Florida. But this is no basis to overturn the Business Court's decision because that claim was dismissed under the UUNAA. (R pp 800-07). Thus, this single claim is not part of this appeal and is irrelevant to FSU's assertion of sovereign immunity in the North Carolina courts against the ACC's contract claims. There is considerable irony that in moving to dismiss the tort claim, FSU relied on the provisions of the UUNAA to argue that no such claim existed, but now claims in this appeal that the UUNAA cannot control its rights and obligations. In other words, having sought the protection of provisions of the UUNAA to avoid a claim for breach of fiduciary duty, FSU should not be permitted to argue that the UUNAA's requirement that it be liable to the claims of the ACC does not constitute consent.

Further, a finding that FSU consented to jurisdiction is consistent with the intent of all the parties to the Grant of Rights Agreement. FSU's 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, the Grant of Rights 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. FSU was one of seven sovereign institutions from five states which entered into this agreement.[12]

Yet, according to FSU, 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 could 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 FSU, this Court must assume that FSU only intended to be bound by rulings of its courts, that Georgia Tech would be only bound by rulings of the Georgia courts, Clemson by the courts of South Carolina, the North Carolina schools by its courts, and the Virginia schools by its courts. Moreover, under FSU'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, FSU must argue that Duke can

[12] The others were Georgia Institute of Technology, Clemson 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.

theoretically be bound by any court in any state in the Conference, but because FSU is bound only by Florida, Duke must respect that decision as to it, even if the Florida decision is at odd with decisions in the other states, because Florida is purportedly the only place where FSU 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 Florida could rule it is not valid, binding FSU and the private universities. Indeed, FSU does not address at all whether a court in Florida only binds it in Florida, leaving the other sovereign universities free to disregard the judgment because it was not rendered in their home state.

No group of sophisticated parties dealing with bundled property rights collectively worth hundreds of millions of dollars would enter into agreements under these circumstances. FSU'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 Florida. 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, this was occurring when the Grant of Rights was executed in 2013, because 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 the ACC schools entered into in 2013 (and extended in 2016) would simply be rendered unworkable and unenforceable.

II. There is No Valid Reason to Abandon *Farmer*.

Because this case falls squarely within *Farmer*'s framework (and represents a far more limited consent than occurred in *Farmer*), FSU urges this Court to abandon its decision in *Farmer*. In so arguing, FSU claims that *Farmer* is outside the scope of other post-*Hyatt* decisions and must be controlled by the principles of consent under the Eleventh Amendment. FSU also argues that the majority was simply wrong in *Farmer* and that this Court should now correct that error.

FSU's argument, however, is untethered from the standards that must be met before this Court will abandon a previous decision. Indeed, FSU simply ignores these standards altogether, as if abandoning prior decisions is a regular occurrence. But throughout this Court's history, "[t]his Court has never overruled its decisions lightly." *Rabon v. Rowan Memorial Hosp., Inc.* 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)). 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 more than a disagreement. Rather, it requires either the "perpetuation of error" or "grievous wrong." *Wiles v. Welparnel Constr. Co.,* 295 N.C. 81, 85 (1978).

Affirming *Farmer* neither commits a "grievous wrong" nor "perpetuates" error.

First, it is difficult to understand how *Farmer* constitutes a palpable error or a grievous wrong considering its subsequent history. Each of the arguments that FSU makes to abandon *Farmer* was made by Troy University in its Petition for *Certiorari* and an accompanying amicus brief urging the Supreme Court to grant *certiorari.* For that Petition, Troy retained a former Solicitor General of the United States who advanced the same arguments that FSU now makes. If there was palpable error in *Farmer*, the case presented the ideal procedural vehicle to address it. The Supreme Court denied the Petition (without statement or dissent), leaving *Farmer* as valid law. While the denial of *certiorari* standing alone 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.

Second, although FSU cites post-*Farmer* cases discussing consent, none have criticized either *Farmer*'s holding or its analytical framework. Indeed, one of those cases, *Marshall v. SEPTA*, extensively discusses *Farmer* in both its text and its footnotes. 300 A.3d 537, 547-48 & n. 16, 18, 19. (Pa. Commw. Ct. 2023). There is no criticism of *Farmer.* If, as claimed by FSU, this decision was so 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*.

Indeed, while FSU argues that the uniform conclusion of the post-*Hyatt* cases (other than *Farmer*) is that the sovereign-defendant's law controls, Brief p 23, this is simply not correct. For example, in *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), 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 *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 cases that turned on the law of the defendant-sovereign noted that there was no conduct that would have constituted waiver or consent. *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).

Finally, the very premise of FSU's argument shows a fundamental misunderstanding of *Farmer*. *Farmer* did not hold that the law of the litigant state was irrelevant. In fact, *Farmer* looked to the law of the litigant state (Alabama) to determine whether the defendant was a sovereign and to review the applicable provisions of the sovereignty. 382 N.C. at 369-71. But *Farmer* also held that a sovereign defendant's conduct could provide consent to suit when none existed under the sovereign's law.

The concept that a forum state may impose jurisdictional consent as a condition for (or consequence of) engaging in commercial activity in the state is hardly new or novel. Rather, this approach 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.[13] Indeed, Justice Berger's concurrence in *Farmer* makes this point precisely: If "a state . . . engages in private enterprise activity and consents to the sister state's terms of doing business, [it] 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).

So too here. When FSU continuously participated in the management of the ACC in its commercial business of marketing the bundle of media rights provided by the Conference (and receiving hundreds of millions in exchange), FSU was no different than any other member of an unincorporated association, private or public, 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.

To claim that *Farmer* is wrong, FSU relies exclusively 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 discussed the Eleventh Amendment and its enactment as part of the history of the states and Constitution, the constitutional principle of consent is "implied as an essential component of federalism" and springs from the overall structure of the Constitution itself, rather than a particular amendment. 587 U.S. at 247.

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[13] Notably, FSU fails to cite *City of Chattanooga* in its Brief, despite this Court's reliance on it in *Farmer* in both the majority and concurring opinion.

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, there is a fundamental difference between *Hyatt* and the Eleventh Amendment. The Eleventh Amendment involves federal jurisdiction over the lawsuits of private parties against a state. 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 effectively a restriction on subject-matter jurisdiction in the federal courts. Justice Gorsuch, a member of the five Justice majority in *Hyatt*, recently clarified 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." (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 our Eleventh Amendment jurisprudence to make it more consistent with our practice regarding personal jurisdiction." *Wisconsin Dept. of Corrections v. Schacht*, 524 U.S. 381, 395 (1998).

The concept of waiver or consent by conduct is neither new nor radical.[14] And, contrary to FSU'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 without legislative enactment can be consent, as for example with a state's invocation of federal jurisdiction which waives the Eleventh Amendment, "regardless of the form that invocation might take." *In re South Carolina,* 103 F.4th

[14] 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.

287 (4th Cir. 2024), is illustrative. There, the Fourth Circuit held that when the attorney general of South Carolina sued Google in an antitrust case over its advertising practices, this waived the Eleventh Amendment immunity for *all agencies* in South Carolina in the litigation, 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 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 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, 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. Each may independently supply the necessary consent or waiver under *Hyatt.* And *Farmer*, by recognizing that the activities of a sovereign could result in consent or explicit waiver, is no outlier.

In a final effort to persuade this Court that *Farmer* should be overturned, FSU claims that the policy implications of *Farmer*'s principles here will have consequences that are both foreseen and "unforeseen." But the consequences of adopting FSU's argument - - that there must be specific legislation in Florida (which must be even more specific than the Florida waiver statute discussed above) for it to be answerable on its contracts in any other state's courts - - are more critical and foreseeable. Under FSU'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 no matter what the law of the forum state provides. Far from treating FSU as a co-equal, this approach renders Florida a supreme sovereign. If North Carolina cannot impose jurisdictional consent as a result of entering North Carolina to conduct commercial activity through a North Carolina organization, then only FSU determines what laws it wishes to comply with and where disputes should be determined. For example, if FSU 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 Tallahassee. Thus, North Carolina is rendered a lesser sovereign to Florida even though it was the Florida agency that chose to come into and establish (or join) a North Carolina entity and conduct nongovernmental activities in North Carolina. This argument turns the co-equal sovereignty principle of *Hyatt* on its head.

CONCLUSION

As a Member of the ACC, FSU has (along with other sovereigns and private institutions) operated a commercial business in North Carolina for more than 30 years. For decades FSU understood that it could be sued in the courts of North Carolina for the ACC's claims and had authorized the ACC to sue another sovereign Member before it ever signed the Grant of Rights or its amendment. It thus signed these agreements at a time when it knew that it could be sued in North Carolina by the ACC. Since signing these agreements, FSU 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, and, as recently as January 2024 asserted that it had always been an "active and vibrant member of the Atlantic Coast Conference."

FSU 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 FSU 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 to be sued in exchange for the right to participate in the lucrative

commercial business of this North Carolina organization offends the dignity of Florida's sovereignty or violates the precepts of *Hyatt*.

The Business Court's decision should be affirmed and FSU should be answerable in North Carolina courts for breaching its contractual obligations.

This 3rd day of January 2025.

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CONTENTS OF APPENDIX

STATE OF NORTH CAROLINA MECKLENBURG COUNTY ATLANTIC COAST CONFERENCE, Plaintiff, v. BOARD OF TRUSTEES OF FLORIDA STATE UNIVERSITY, Defendant.	IN THE GENERAL COURT OF JUSTICE SUPERIOR COURT DIVISION 23CV040918-590 **ORDER AND OPINION ON DEFENDANT'S MOTION TO DISMISS OR, IN THE ALTERNATIVE, STAY THE ACTION**

1. Plaintiff Atlantic Coast Conference (the "ACC" or the "Conference") initiated this litigation late on the afternoon of 21 December 2023 seeking a judicial determination that two media rights agreements between the ACC and its members are valid and enforceable. The ACC argues that it did so only when it became a practical certainty that Defendant Board of Trustees of Florida State University ("FSU" or the "FSU Board") would file a lawsuit the following day to challenge the enforceability of those agreements, which, by their terms, prohibited the FSU Board from seeking such relief. As the ACC expected, the FSU Board filed suit against the ACC in Florida the next day, allegedly breaching the agreements.

2. This matter is now before the Court upon the FSU Board's Motion to Dismiss (the "Motion to Dismiss") or, in the Alternative, Stay the Action (the "Motion to Stay"; together, the "Motions"), filed on 7 February 2024 in the above-captioned case.[1]

[1] (Def.'s Mot. Dismiss or, in the Alt., Stay Action [hereinafter "Def.'s Mots."], ECF No. 19.)

3. Having considered the Motions, the parties' briefs in support of and in opposition to the Motions, the Complaint for Declaratory Judgment (the "Complaint")[2] and the First Amended Complaint (the "FAC"),[3] the appropriate evidence of record on the FSU Board's Motion to Dismiss pursuant to Rules 12(b)(1) and 12(b)(2) of the North Carolina Rules of Civil Procedure (the "Rule(s)"), and the arguments of counsel at the hearing on the Motions, the Court, in the exercise of its discretion and for the reasons set forth below, hereby **GRANTS in part** and **DENIES in part** the Motion to Dismiss and **DENIES** the Motion to Stay.

> *Womble Bond Dickinson (US) LLP, by James P. Cooney, III, Sarah Motley Stone, and Patrick Grayson Spaugh, and Lawson Huck Gonzalez, PLLC, by Charles Alan Lawson, for Plaintiff Atlantic Coast Conference.*
>
> *Bradley Arant Boult Cummings LLP, by Christopher C. Lam, C. Bailey King, Jr., Hanna E. Eickmeier, and Brian M. Rowlson, and Greenberg Traurig, P.A., by David C. Ashburn, John K. Londot, and Peter G. Rush, for Defendant Board of Trustees of Florida State University.*

Bledsoe, Chief Judge.

I.

FACTUAL AND PROCEDURAL BACKGROUND

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

5. The ACC is a North Carolina unincorporated nonprofit association created under Chapter 59B of the North Carolina General Statutes to "enrich and balance

[2] (Compl. Declaratory J. [hereinafter "Compl."], ECF Nos. 2 (sealed), 3 (public redacted).)

[3] (First Am. Compl. [hereinafter "FAC"], ECF Nos. 11 (sealed), 12 (public redacted).)

the athletic and educational experiences of student-athletes at its member institutions[,] to enhance athletic and academic integrity among its members, to provide leadership, and to do this in a spirit of fairness to all."[4] The ACC currently has fifteen members (each a "Member" or "Member Institution"; collectively, the "Members" or "Member Institutions")[5] and is governed by a Board of Directors. The "most senior executive officer of [each] Member[ ]" serves as a Director on the ACC Board,[6] and "each Director shall have the right to take any action or any vote on behalf of the Member it represents[.]"[7] FSU has been a Member of the ACC since 1991.[8]

6. On 8 July 2010, the ACC entered into a Multi-Media Agreement (the "2010 Multi-Media Agreement") with ESPN, Inc. and ESPN Enterprises, Inc. (together, "ESPN"), granting ESPN exclusive distribution rights to certain ACC Member

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[4] (FAC ¶¶ 1, 38 (quoting FAC Ex. 1 § 1.2.1 [hereinafter "ACC Const."], ECF Nos. 11 (sealed), 12.1 (public unredacted)).) Exhibits 1–9 to the Complaint were refiled as Exhibits 1–11 to the FAC. (Exhibit 5 to the Complaint was split between Exhibits 5 and 8 to the FAC; Exhibit 6 to the Complaint was split between Exhibits 6 and 9 to the FAC.) For ease of reference, all citations in this opinion will be to the exhibits to the FAC.

[5] (*See* FAC ¶ 1.) The current ACC Members, with their year of admission to the Conference, are: Clemson University (1953), Duke University (1953), the University of North Carolina at Chapel Hill (1953), North Carolina State University (1953), the University of Virginia (1953), Wake Forest University (1953), the Georgia Institute of Technology (1978), Florida State University (1991), the University of Miami (2004), Virginia Polytechnic Institute and State University (2004), Boston College (2005), the University of Notre Dame (excluding football and ice hockey) (2013), the University of Pittsburgh (2013), Syracuse University (2013), and the University of Louisville (2014). (*See* FAC ¶¶ 32–36.)

[6] (ACC Const. § 1.5.1.2; *see* FAC ¶¶ 1, 40.)

[7] (ACC Const. § 1.5.1.1; *see* FAC ¶¶ 1, 40.)

[8] (*See* FAC ¶¶ 8, 36.)

Institution sporting events in exchange for specified payments.[9] The ACC Board of Directors unanimously approved this agreement.[10]

7. In 2012, "collegiate athletic conferences began to experience significant instability and realignment[.]"[11] The ACC was no exception. Late that year, the University of Maryland announced its withdrawal from the ACC. Shortly thereafter, the ACC elected to add four new Member Institutions.[12] During this same period, the ACC Board voted to significantly increase the amount a Member must pay if it chose to leave the Conference "to more appropriately compensate the Conference for some of the potential losses[ ]" associated with the Member's withdrawal.[13] It was against this backdrop in 2013 that the ACC and ESPN agreed to an extension of the 2010 Multi-Media Agreement through 2027.[14]

8. "[I]n order to secure a long-term media rights agreement and thus ensure the payment of predictable sums over time," the current and incoming ACC Member Institutions, including FSU, entered into an Atlantic Coast Conference Grant of

[9] (*See* FAC ¶¶ 13 n.2, 42–43.)

[10] (*See* FAC ¶ 42.)

[11] (FAC ¶ 55.)

[12] (*See* FAC ¶ 54.) The four new Members were the University of Notre Dame (excluding football and ice hockey), the University of Pittsburgh, Syracuse University, and the University of Louisville.

[13] (FAC ¶ 48; *see* FAC ¶¶ 47, 49–52.)

[14] (*See* FAC ¶¶ 44, 54.)

Rights Agreement (the "Grant of Rights") with the ACC in April 2013.[15] Under the Grant of Rights,

> each of the Member Institutions is required to, and desires to, irrevocably grant to the Conference, and the Conference desires to accept from each of the Member Institutions, those rights granted herein[:]
>
> . . . .
>
> Grant of Rights. Each of the Member Institutions hereby (a) irrevocably and exclusively grants to the Conference during the Term . . . all rights (the "Rights") necessary for the Conference to perform the contractual obligations of the Conference expressly set forth in the ESPN Agreement, regardless of whether such Member Institution remains a member of the Conference during the entirety of the Term[.]
>
> . . . .
>
> Acknowledgements, Representations, Warranties, and Covenants. Each of the Member Institutions acknowledges that the grant of Rights during the entire Term is irrevocable and effective until the end of the Term regardless of whether the Member Institution withdraws from the Conference during the Term or otherwise ceases to participate as a member of the Conference in accordance with the Conference's Constitution and Bylaws. . . . Each of the Member Institutions covenants and agrees that . . . it will not take any action, or permit any action to be taken by others subject to its control, including licensees, or fail to take any action, that would affect the validity and enforcement of the Rights granted to the Conference under this Agreement.[16]

9. The ACC negotiated a Second Amendment to the 2010 Multi-Media Agreement in 2014, incorporating the ACC's new Members and increasing the fees paid to the Conference, which were then distributed to the Member Institutions,

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[15] (FAC ¶ 56; *see* FAC ¶¶ 57, 66–67, 69; FAC Ex. 2 [hereinafter "Grant of Rights"], ECF Nos. 11 (sealed), 12.2 (public unredacted).)

[16] (Grant of Rights 1, ¶¶ 1, 6; *see* FAC ¶¶ 61–64.)

including FSU.[17] In 2016, the ACC "sought to generate additional revenue for its Members through a network partnership with ESPN[ ]" that would "establish the ACC Network, broadcast more ACC events, and share in the revenues of this new network."[18] To this end, the ACC and ESPN negotiated two new agreements in 2016: an Amended and Restated ACC-ESPN Multi-Media Agreement and an ACC-ESPN Network Agreement (together, the "ESPN Agreements").[19]

10. ESPN, however, conditioned its participation in the ESPN Agreements on each Member Institution's agreeing to extend the term of the Grant of Rights.[20] After numerous Board and other meetings, the ACC Members, including FSU, executed a 2016 Amendment to ACC Grant of Rights Agreement with the ACC (the "Amended Grant of Rights"; together with the Grant of Rights, the "Grant of Rights Agreements") on 18 July 2016 that, according to the ACC, extended the term from 30 June 2027 to 30 June 2036.[21] The ESPN Agreements were executed a few days later.[22] Both ESPN Agreements "stipulate that their terms and conditions cannot be

[17] (*See* FAC ¶¶ 70–73; FAC Ex. 3, ECF Nos. 11 (sealed), 12.3 (sealed).)

[18] (FAC ¶ 77.)

[19] (FAC ¶¶ 78–82; *see* FAC Ex. 5 [hereinafter "2016 Multi-Media Agreement"], ECF Nos. 11 (sealed), 12.5 (sealed); FAC Ex. 6 [hereinafter "ACC Network Agreement"], ECF Nos. 11 (sealed), 12.6 (sealed).)

[20] (*See* FAC ¶ 84; FAC Ex. 7 at 1 [hereinafter "Am. Grant of Rights"], ECF Nos. 11 (sealed), 12.7 (public unredacted).)

[21] (*See* FAC ¶¶ 83, 87, 91–105; Am. Grant of Rights ¶ 2.)

[22] (FAC ¶ 78; *see* 2016 Multi-Media Agreement 1; ACC Network Agreement 1.)

disclosed to the public and impose a confidentiality obligation on the Conference."[23] The ACC was permitted to disclose the ESPN Agreements to its Member Institutions, "provided that each [Member] Institution shall agree to maintain the confidentiality" of the agreements.[24] To maintain the confidentiality of the ESPN Agreements, the ACC allowed its Members to view the agreements only at the Conference's North Carolina headquarters and conditioned access on the Member's promise to maintain the confidentiality of the agreements.[25]

11. Although FSU's "distributions from the ACC more than doubled" since it entered into the Grant of Rights,[26] in early 2023, the FSU Board "began to advocate for more money for the university through unequal sharing of revenue[,]" contending that FSU's " 'brand' entitled it to more revenue."[27] In response, in May 2023, the ACC "endorsed the concept of distributing a larger share of post-season revenues to the Members that generated those revenues[.]"[28] But FSU continued to push for "an

[23] (FAC ¶ 106; *see* FAC Ex. 8 ¶ 25.11 [hereinafter "2016 Multi-Media Agreement Confidentiality Provision"], ECF Nos. 11 (sealed), 12.8 (public unredacted); FAC Ex. 9 ¶ 18.11 [hereinafter "ACC Network Agreement Confidentiality Provision"], ECF Nos. 11 (sealed), 12.9 (public unredacted).)

[24] (FAC ¶ 108 (quoting 2016 Multi-Media Agreement Confidentiality Provision ¶ 25.11; ACC Network Agreement Confidentiality Provision ¶ 18.11).)

[25] (*See* FAC ¶¶ 138–40, 161–62.)

[26] (FAC ¶ 111.)

[27] (FAC ¶ 120; *see* FAC ¶¶ 117–19, 120–21.)

[28] (FAC ¶ 122.)

unequal share of all Conference revenue,"[29] and the FSU Board discussed withdrawing from the ACC at a 2 August 2023 Board meeting.[30]

12. Events came to a head on 21 December 2023, when the FSU Board notified the public that it would hold an emergency meeting the following day.[31] The ACC alleges that, "[w]ith the knowledge of [the FSU Board]'s clear intention to breach the Grant of Rights and Amended Grant of Rights[ ]" by filing "a preemptive lawsuit against the ACC in Leon County, Florida,"[32] the ACC filed its original Complaint under seal in Mecklenburg County Superior Court later that day, seeking a declaration that the Grant of Rights Agreements are valid and enforceable contracts and a declaration that the FSU Board is estopped from challenging or has waived any right to challenge the Grant of Rights Agreements by accepting the benefits thereunder.[33]

13. According to the ACC, the FSU Board Chair indicated at the 22 December 2023 Board meeting that (i) "each of the [FSU] Board Members had been privy to 'individual briefings' over the course of several months[,]"[34] (ii) "he had spoken individually with all [FSU] Board Members for the purpose of securing the necessary

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[29] (FAC ¶ 124 (emphasis omitted).)

[30] (*See* FAC ¶¶ 129–32.)

[31] (*See* FAC ¶ 143.)

[32] (FAC ¶¶ 148–49.)

[33] (Compl. ¶¶ 116–46.)

[34] (FAC ¶ 154.)

votes to proceed to litigation[,]"[35] and (iii) "a Complaint to be filed by [the FSU Board] had been transmitted to all [FSU Board] Members several days before."[36] At the end of the meeting, the FSU Board authorized the filing of the Florida complaint, and it was filed publicly in the Circuit Court of the Second Judicial Circuit in and for Leon County, Florida later that same day (the "Florida Action").[37]

14. On 17 January 2024, the ACC filed its FAC, alleging damages and asserting claims for monetary relief against the FSU Board for breach of the Grant of Rights Agreements, breach of a contractual obligation to protect confidential information, breach of fiduciary duty, and breach of the implied duty of good faith and fair dealing under the ACC's Constitution and Bylaws, in addition to the same two declaratory judgment claims asserted in the original Complaint.[38]

15. The FSU Board subsequently filed an Amended Complaint for Declaratory Judgment in the Florida Action on 29 January 2024, asserting claims against the ACC for unreasonable restraint of trade under Fla. Stat. § 542.18; unenforceable penalties under the Grant of Rights Agreements and the ACC Constitution; breach of various contracts; breach of fiduciary duty; fundamental failure or frustration of contractual purpose; unenforceable contracts as to the Grant of Rights Agreements;

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[35] (FAC ¶ 155.)

[36] (FAC ¶ 153.)

[37] (*See* FAC ¶¶ 168, 170; FAC Ex. 16 at 1 [hereinafter "Fla. Compl."], ECF Nos. 11 (sealed), 12.16 (sealed).)

[38] (*See* FAC ¶¶ 173–273.)

and unconscionable penalty provisions in violation of Florida public policy in the Grant of Rights Agreements and the ACC Constitution.[39] For each of its claims, the FSU Board sought a judicial determination that the Grant of Rights Agreements were unenforceable against FSU or that FSU was relieved and excused from performance under those agreements.[40] The FSU Board also sought as relief for each claim a judicial decree that FSU "be deemed to have issued its formal notice of withdrawal from the ACC under section 1.4.5 of the ACC Constitution effective August 14, 2023."[41] The FSU Board has not alleged damages or sought monetary relief on any claims it has asserted against the ACC in the Florida Action.[42]

16. On 7 February 2024, the FSU Board timely filed the Motions, seeking to dismiss the FAC under Rules 12(b)(1), 12(b)(2), 12(b)(6), and 12(b)(7) or, in the alternative, seeking to stay this action in favor of the pending Florida Action.[43]

17. After full briefing, the Court held a hearing on the Motions on 22 March 2024 at which all parties were represented by counsel (the "Hearing"). The Motions are now ripe for resolution.[44]

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[39] (FSU Bd.'s Br. Supp. Def.'s Mots. Ex. 1 ¶¶ 227–74 [hereinafter "Fla. Am. Compl."], ECF Nos. 19.1 (sealed), 28 (public redacted).)

[40] (*See* Fla. Am. Compl. ¶¶ 241, 246, 250, 256, 261, 270, 274.)

[41] (Fla. Am. Compl. ¶¶ 241, 246, 250, 256, 261, 270, 274.)

[42] (*See* Fla. Am. Compl. ¶¶ 241, 246, 250, 256, 261, 270, 274.)

[43] (Def.'s Mots. ¶¶ 2–3.)

[44] The Court also heard arguments at the Hearing on the ACC's Amended Motion to Seal, (ECF No. 9), and Motion to Seal Summary Exhibit ECF No. 24.2, (ECF No. 25). The Court will resolve these sealing motions by separate order.

II.

MOTION TO DISMISS PURSUANT TO RULES 12(b)(1) AND 12(b)(2)

18. Moving under Rule 12(b)(1), the FSU Board challenges the ACC's standing to bring suit in North Carolina on two grounds: (i) the ACC filed suit before an actual or justiciable controversy arose; and (ii) the ACC failed to satisfy a necessary condition precedent prior to initiating this action.[45] The FSU Board additionally argues that, under Rules 12(b)(1) and/or 12(b)(2), it cannot be sued in North Carolina because the FSU Board has not waived its sovereign immunity except within the boundaries of the State of Florida pursuant to Fla. Stat. §§ 768.28(1) and 1001.72.[46]

A. Legal Standard

19. "Standing is a necessary prerequisite to a court's proper exercise of subject matter jurisdiction[,]" *In re Z.G.J.*, 378 N.C. 500, 504 (2021) (citation omitted), and "must be addressed, and found to exist, before the merits of the case are judicially resolved[,]" *In re T.B.*, 200 N.C. App. 739, 742 (2009) (cleaned up). "Rule 12(b)(1) requires the dismissal of any action 'based upon a trial court's lack of jurisdiction over the subject matter of the claim.' " *Watson v. Joyner-Watson*, 263 N.C. App. 393, 394 (2018) (quoting *Catawba Cnty. v. Loggins*, 370 N.C. 83, 87 (2017)). The plaintiff bears the burden of establishing subject matter jurisdiction. *See Harper v. City of Asheville*, 160 N.C. App. 209, 217 (2003). In ruling on a motion to dismiss for lack of standing pursuant to Rule 12(b)(1), the Court "may consider matters outside the pleadings" in

[45] (Def.'s Mots. ¶¶ 2(a), (b).)

[46] (Def.'s Mots. ¶ 2(c).)

determining whether subject matter jurisdiction exists, *Harris v. Matthews*, 361 N.C. 265, 271 (2007), and must "view the allegations [of the pleading] as true and the supporting record in the light most favorable to the non-moving party[,]" *Mangum v. Raleigh Bd. of Adjustment*, 362 N.C. 640, 644 (2008).

20. In North Carolina, the appropriate rule for consideration of a motion to dismiss on the grounds of sovereign immunity has been somewhat unsettled. *See, e.g.*, *Battle Ridge Cos. v. N.C. Dep't of Transp.*, 161 N.C. App. 156, 157 (2003) ("Our courts have held that the defense of sovereign immunity is a Rule 12(b)(1) defense. Our courts have also held that the defense of sovereign immunity is a matter of personal jurisdiction that would fall under Rule 12(b)(2)." (cleaned up)); *Farmer v. Troy Univ.*, 382 N.C. 366, 369–70 (2022) (reviewing a motion to dismiss on the grounds of sovereign immunity under Rules 12(b)(2) and 12(b)(6)). Our Court of Appeals, however, recently clarified that an assertion of "[sovereign] immunity should be classified as an issue of personal jurisdiction under Rule 12(b)(2)." *Torres v. City of Raleigh*, 288 N.C. App. 617, 620 (2023). Accordingly, the Court will construe the Motion to Dismiss on sovereign immunity grounds as an issue of personal jurisdiction under Rule 12(b)(2) and apply the appropriate standard of review for motions under that Rule.

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

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

Parker v. Town of Erwin, 243 N.C. App. 84, 96 (2015) (cleaned up). "[A] trial court [may] consider matters outside the pleadings[ ]" when ruling on a motion to dismiss under Rule 12(b)(2). *Id.* at 97.

B. Analysis

1. Actual and Justiciable Controversy

22. Under the Declaratory Judgment Act (the "Act"), "[a]ny person interested under a . . . written contract . . . , or whose rights, status or other legal relations are affected by a . . . contract . . . , may have determined any question of construction or validity arising under the . . . contract . . . , and obtain a declaration of rights, status, or other legal relations thereunder." N.C.G.S. § 1-254. Because the "Act recognizes the need of society 'for officially stabilizing legal relations by adjudicating disputes before they have ripened into . . . destruction of the status quo[,]' " *Gray Media Grp., Inc. v. City of Charlotte*, 290 N.C. App. 384, 391 (2023) (quoting *Lide v. Mears*, 231 N.C. 111, 117–18 (1949)), "[a] contract may be construed either before or after there has been a breach thereof[,]" N.C.G.S. § 1-254.

23. In order for a court to have subject matter jurisdiction to render a declaratory judgment, "the pleadings and evidence [must] disclose the existence of an actual controversy between the parties having adverse interests in the matter in dispute[ ] . . . at the time the pleading requesting declaratory relief was filed." *Button*

v. Level Four Orthotics & Prosthetics, Inc., 380 N.C. 459, 466 (2022) (cleaned up). Although "[a]bsolute certainty of litigation is not required," *id.*, "it is necessary that litigation appear unavoidable," *Sharpe v. Park Newspapers of Lumberton, Inc.*, 317 N.C. 579, 589 (1986) (quoting *Gaston Bd. of Realtors, Inc. v. Harrison*, 311 N.C. 230, 234 (1984)). "Mere apprehension or the mere threat of an action or a suit is not enough." *Gaston Bd. of Realtors, Inc.*, 311 N.C. at 234 (cleaned up). Instead, it is

> [t]he imminence and practical certainty of the act or event in issue, or the intent, capacity, and power to perform, [that] create[s] justiciability as clearly as the completed act or event, and is generally easily distinguishable from remote, contingent, and uncertain events that may never happen and upon which it would be improper to pass as operative facts.

Reese v. Brooklyn Vill., LLC, 209 N.C. App. 636, 652 (2011) (quoting *Sharpe*, 317 N.C. at 590 (emphasis omitted)).

24. The FSU Board argues that, at the time the ACC filed its Complaint, "litigation was still speculative and not unavoidable[.]"[47] Because the "FSU Board had not yet met, much less voted to initiate litigation," the FSU Board contends that it "could have voted not to authorize the Florida Action at that time, or not actually filed the Florida Action even if authorized."[48] As a result, the FSU Board asserts that no actual and justiciable controversy existed when the ACC filed its Complaint late in the afternoon on 21 December 2023.[49]

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[47] (FSU Bd.'s Br. Supp. Def.'s Mots. 10 [hereinafter "Br. Supp. Def.'s Mots."], ECF No. 20; *see* FSU Bd.'s Reply Supp. Def.'s Mots. 7–8 [hereinafter "Reply Supp. Def.'s Mots."], ECF No. 41.)

[48] (Br. Supp. Def.'s Mots. 10; *see* Reply Supp. Def.'s Mots. 7–8.)

[49] (*See* Br. Supp. Def.'s Mots. 10; Reply Supp. Def.'s Mots. 8.)

25. The Court finds this argument without merit. Under the Grant of Rights, the FSU Board agreed that "it will not take any action, or permit any action to be taken by others subject to its control, . . . or fail to take any action, that would affect the validity and enforcement of the Rights granted to the Conference under this Agreement."[50] As the ACC correctly notes, "[t]o protect its rights [under the Grant of Rights], the Conference was not required to wait until FSU sued, breaching that covenant[,]" but "was entitled to enforce that covenant when breach was imminent."[51] *See, e.g.*, *Lee Ray Bergman Real Est. Rentals v. N.C. Fair Hous. Ctr.*, 153 N.C. App. 176, 179 (2002) ("To satisfy standing requirements, a plaintiff must show . . . injury that is concrete and particularized and actual or imminent[.]"); *River Birch Assocs. v. City of Raleigh*, 326 N.C. 100, 129 (1990) ("To have standing the complaining association or one of its members must suffer some immediate or threatened injury."). Moreover, under the ESPN Agreements, the ACC was obligated to "take all [Commercially Reasonable Efforts] to protect the rights provided to ESPN[ ]" through the Grant of Rights and Amended Grant of Rights.[52] While the ESPN Agreements did not require the ACC to initiate litigation to protect ESPN's rights, the ACC had

[50] (Grant of Rights ¶ 6.)

[51] (Pl.'s Br. Opp'n Def.'s Mots. 3–4 [hereinafter "Br. Opp'n Def.'s Mots."], ECF No. 30; *see also* Br. Opp'n Def.'s Mots. 6 n.3 ("FSU ignores that the filing of its lawsuit challenging the Grant of Rights was itself the breach, not just an effort to invoke judicial interpretation of a contract's terms." (emphasis omitted)).)

[52] (Br. Opp'n Def.'s Mots. 8; *see also* Sur-Reply Pl. ACC 11 [hereinafter "Sur-Reply Def.'s Mots."], ECF No. 46.)

the right to initiate litigation to protect ESPN's rights in the ACC's discretion if those rights were threatened.[53]

26. The ACC alleges that, as early as 24 February 2023, the FSU Board "openly discussed withdrawing from the Conference and the cost of the withdrawal payment in order to facilitate a move to another conference in order to receive more money."[54] The ACC further alleges that FSU "began to advocate for more money for the university through unequal sharing of revenue[,]"[55] and, on 17 May 2023, the ACC "endorsed the concept of distributing a larger share of post-season revenues to the Members that generated those revenues[.]"[56] Nevertheless, the ACC alleges that FSU continued to "advocat[e] for an unequal share of all Conference revenue,"[57] once again discussing the possibility of leaving the ACC at the 2 August 2023 meeting of

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[53] "Commercially Reasonable Efforts" is a defined term in the ESPN Agreements. The portions of the ESPN Agreements initially in the record did not include the definition of this term. At the Court's request, the ACC supplied the Court and the FSU Board with the following definition from the ESPN Agreements, which it made part of the public record, prior to the Hearing:

> 1.24 "Commercially Reasonable Efforts": With respect to a given goal or objective, the efforts that a reasonable commercial person or entity in the position of the party undertaking to pursue such goal or objective would use so as to achieve such a goal or objective expeditiously; provided, however, that Commercially Reasonable Efforts shall not require any party to incur or become obligated to incur any expense not otherwise specifically provided for in this Agreement, including fees and expenses of counsel and consultants, or to incur any liability or waive or concede any right or claim that such party may have.

[54] (Compl. ¶ 94; FAC ¶ 117; *see also* Compl. ¶¶ 95–96; FAC ¶¶ 118–19.)

[55] (Compl. ¶ 97; FAC ¶ 120.)

[56] (Compl. ¶ 99; FAC ¶ 122.)

[57] (Compl. ¶ 101 (emphasis omitted); FAC ¶ 124 (emphasis omitted).)

the FSU Board.[58] The day before this meeting, the Chair of the FSU Board stated in a public interview that the Grant of Rights "will not be the document that keeps us from taking action."[59]

27. On 21 December 2023, the FSU Board notified the public that an emergency meeting would occur the following day.[60] Leading up to that meeting, the ACC alleges that "each of the [FSU] Board Members had been privy to 'individual briefings' over the course of several months[ ]" and that the Chair "had spoken individually with all [FSU] Board Members for the purpose of securing the necessary votes to proceed to litigation."[61] In addition, the ACC alleges that a draft complaint "had been transmitted to all [FSU Board] Members several days before[ ]" the meeting[62] and that a copy of the original complaint in the Florida Action appeared on FSU's news service prior to the FSU Board meeting on 22 December 2023.[63] And, of course, the FSU Board initiated litigation against the ACC within hours after the FSU Board meeting concluded.[64]

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[58] (*See* Compl. ¶¶ 102–04; FAC ¶¶ 125, 129–32; *see generally* FAC Ex. 10, ECF Nos. 11 (sealed), 12.10 (public unredacted).)

[59] (Compl. ¶ 107; FAC ¶ 135; *see* FAC Ex. 11 at 8, ECF Nos. 11 (sealed), 12.11 (public unredacted).) Citations to the page numbers in Exhibit 11 refer to the electronic PDF page numbers as the document itself contains no page numbers.

[60] (*See* Compl. ¶¶ 110, 114; FAC ¶ 143.)

[61] (FAC ¶¶ 154–55.)

[62] (FAC ¶ 153.)

[63] (FAC ¶ 169; *see also* FAC Ex. 15, ECF Nos. 11 (sealed), 12.15 (public unredacted).)

[64] (*See* FAC ¶ 170; Fla. Compl. 1.)

28. Viewing these allegations as true and in the light most favorable to the ACC as it must under Rule 12(b)(1), the Court concludes that, as of the filing of this action, the FSU Board's initiation of litigation over the Grant of Rights Agreements was unavoidable and a practical certainty. While it was theoretically possible that the FSU Board would decide not to file suit at its 22 December Board meeting, it has not offered any evidence to rebut the ACC's allegations and proof showing that the FSU Board had decided to file suit as of the filing of the ACC's Complaint and that the FSU Board's approval of that action on 22 December was a mere formality to its institution of the Florida Action. *See, e.g.*, *Ferrell v. Dep't of Transp.*, 334 N.C. 650, 656 (1993) (concluding that where "it is conceivable that litigation [might] not arise[,]" such "contingencies and possibilities[ ] . . . do not make the case nonjusticiable"); *City of New Bern v. New Bern-Craven Cnty. Bd. of Educ.*, 328 N.C. 557, 559 (1991) (concluding a justiciable controversy existed when plaintiff challenged a statute that removed "[a] right which previously belonged to the plaintiff"); *Bueltel v. Lumber Mut. Ins. Co.*, 134 N.C. App. 626, 629 (1999) (determining a justiciable controversy existed where plaintiff sought a judgment as to whether or not his past and present actions violated a contract); *Stephenson v. Parsons*, 96 N.C. App. 93, 96 (1988) (concluding that defendant's subsequent litigation against plaintiff "shows an actual controversy between [the] parties").

29. Because the ACC has demonstrated that, as of the filing of the ACC's Complaint, there existed "a practical certainty that litigation would arise" with the FSU Board, *Button*, 380 N.C. at 466 (quoting *Ferrell*, 334 N.C. at 656), there existed

an "actual controversy between the parties having adverse interests in the matter in dispute[ ] . . . at the time the pleading requesting declaratory relief was filed." *Id.*

30. The Court therefore will deny the FSU Board's Motion to Dismiss to the extent the FSU Board contends that an actual and justiciable controversy did not exist when the ACC filed this litigation.[65]

2. Condition Precedent to Initiating Suit

31. As the ACC notes in its sur-reply, the FSU Board's position for dismissal based on the ACC's failure to comply with a condition precedent "has shifted over time."[66] The first argument advanced by the FSU Board in its supporting brief appears to be focused on the sufficiency of the allegations in the pleading and, thus, is more properly considered as a motion to dismiss under Rule 12(b)(6).[67] Specifically, the FSU Board argues that because the ACC failed to either "plead generally that all conditions precedent to filing this action have occurred" or "plead specifically that [the] . . . notice, quorum meeting, and member vote" required by the ACC Constitution to initiate litigation occurred, dismissal is warranted.[68]

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[65] Because the Court concludes that an actual and justiciable controversy existed at the time the ACC filed its Complaint, the Court will also deny the FSU Board's Motion to Dismiss under Rule 12(b)(6) on this ground. *See Poole v. Bahamas Sales Assoc., LLC*, 209 N.C. App. 136, 141–42 (2011) ("Although a motion to dismiss under Rule 12(b)(6) is seldom an appropriate pleading in actions for declaratory judgments, it is allowed when the record clearly shows that there is no basis for declaratory relief as when the complaint does not allege an actual, genuine existing controversy." (cleaned up)).

[66] (Sur-Reply Def.'s Mots. 3.)

[67] (*See* Br. Supp. Def.'s Mots. 11–12.)

[68] (Br. Supp. Def.'s Mots. 11–12; *see* ACC Const. §§ 1.5.1.5, 1.6.2.) The Court notes that, although the FSU Board refers to section 1.5.4.3 of the ACC Constitution in its briefing, (*see* Br. Supp. Def.'s Mots. 11; Reply Supp. Def.'s Mots. 3), this section refers to notice and meeting

32. The Court disagrees. Although North Carolina permits notice pleading, *see* N.C. R. Civ. P. 8(a), certain matters have specific pleading requirements, *see* N.C. R. Civ. P. 9. "In pleading the performance or occurrence of conditions precedent, it is sufficient to *aver generally* that all conditions precedent have been performed or have occurred." N.C. R. Civ. P. 9(c) (emphasis added). And, when the condition precedent relates to a party's ability to bring suit, Rule 9(a) only requires that "[a]ny party not a natural person shall make an affirmative averment showing its legal existence and capacity to sue." N.C. R. Civ. P. 9(a).

33. In both its Complaint and FAC, the ACC alleges that it is "an unincorporated nonprofit association under North Carolina law."[69] The ACC further alleges that "[a]s an unincorporated nonprofit association under North Carolina law, the ACC has the ability to sue in its own name and enter into contracts[,]" and "may, acting on its own behalf, enforce its contractual obligations with one or more of its Member Institutions."[70]

34. At this stage, the Court must "construe the pleading liberally and in the light most favorable to the plaintiff, taking as true and admitted all well-pleaded factual allegations contained within the complaint." *Donovan v. Fiumara*, 114 N.C. App. 524, 526 (1994) (cleaned up). Because the ACC was required only to "make an

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requirements for committees, (*see* ACC Const. § 1.5.4.3). Section 1.5.1.5 of the ACC Constitution sets out the notice and meeting requirements for the ACC's Board of Directors. (*See* ACC Const. § 1.5.1.5.)

[69] (Compl. ¶ 1; FAC ¶ 1.)

[70] (Compl. ¶ 2; FAC ¶ 2.)

affirmative averment showing its legal existence and capacity to sue[,]" N.C. R. Civ. P. 9(a), the FSU Board's contention that the ACC failed to plead that it had taken all necessary steps prior to bringing suit, either generally or specifically, is without merit.

35. Turning to the parties' remaining arguments, the Court observes that the parties appear to "conflate[ ] . . . *standing*-related arguments with . . . arguments regarding the legally and conceptually distinct issue of whether the [ACC]'s actions were *authorized*" under the ACC Constitution. *United Daughters of the Confederacy v. City of Winston-Salem*, 383 N.C. 612, 626 (2022) (emphasis added). The Court will therefore first determine whether the Conference "has made the necessary showing of standing[ ]" prior to addressing the parties' arguments about whether the ACC was authorized to bring suit. *Id.* at 627.

36. "Standing refers to whether a party has a sufficient stake in an otherwise justiciable controversy such that [the party] may properly seek adjudication of the matter." *Edwards v. Town of Louisburg*, 290 N.C. App. 136, 140 (2023) (citation omitted). "The North Carolina Constitution confers standing to sue in our courts on those who suffer the infringement of a legal right, because 'every person for an injury done him in his lands, goods, person, or reputation shall have remedy by due course of law.' " *Comm. to Elect Dan Forest v. Emps. Pol. Action Comm.*, 376 N.C. 558, 610 (2021) (quoting N.C. Const. art. I, § 18, cl. 2). To establish standing in North Carolina, "a plaintiff must demonstrate the following: a legal injury; the traceability of the injury to a defendant's actions; and the probability that the injury can be

redressed by a favorable decision." *Soc'y for the Hist. Pres. of the Twentysixth N.C. Troops, Inc. v. City of Asheville*, 282 N.C. App. 701, 704 (2022). Thus, "[w]hen a person alleges the infringement of a legal right directly under a cause of action at common law, a statute, or the North Carolina Constitution, . . . the legal injury itself gives rise to standing." *Comm. to Elect Dan Forest*, 376 N.C. at 608.

37. Under the Declaratory Judgment Act, "an action is maintainable only in so far as it affects the civil rights, status and other relations in the present actual controversy between the parties." *Edwards*, 290 N.C. App. at 140. Nevertheless, a "plaintiff is still required to demonstrate that it has sustained a legal or factual injury arising from defendant['s] actions as a prerequisite for maintaining [a] . . . declaratory judgment action[,]" because "[t]he mere filing of a declaratory judgment is not sufficient, on its own, to grant a plaintiff standing." *United Daughters of the Confederacy*, 383 N.C. at 629 (third alteration in original) (quotation marks and citation omitted).

38. In *Willowmere Community Association v. City of Charlotte*, the Supreme Court of North Carolina previously determined that "[n]othing in our jurisprudence on *standing* requires a corporate litigant to affirmatively plead or prove its compliance with corporation bylaws and internal rules relating to its decision to bring suit." 370 N.C. 553, 560–61 (2018) (emphasis added). Even where, as here, the defendant, who is a member of the plaintiff corporate litigant, raises the plaintiff's failure to comply with its internal governance procedures as a bar to plaintiff's suit, *Willowmere* implies that defendant's relief lies in contract, through a motion to

dismiss, a motion to stay, or the initiation of a separate suit. *See id.* at 561. As long as a corporate litigant meets the three-pronged test to establish standing set out above, it "possess[es] a sufficient stake in an otherwise justiciable controversy to confer jurisdiction on the trial court to adjudicate [a] legal dispute[,]" despite the corporate litigant's "failure to strictly comply with [its] . . . bylaws and internal governance procedures in [its] decision to initiate . . . suit[.]" *Id.* at 562 (quotation marks and citation omitted); *see also* Robinson on N.C. Corp. Law § 3.03[1] ("A plaintiff corporation's failure to comply strictly with its bylaws and internal governance procedures in determining whether to commence litigation does not in itself deprive the corporation of standing to bring its claim.").

39. Here, and as discussed in connection with the FSU Board's first argument above, the Court concludes that the ACC has established that it had standing when it initiated this litigation on 21 December 2023. Under the Grant of Rights Agreements, FSU "irrevocably and exclusively" granted its media rights to the ACC for the term of those agreements.[71] FSU additionally agreed that "it [would] not take any action, or permit any action to be taken by others subject to its control, . . . or fail to take any action, that would affect the validity and enforcement of the Rights granted to the Conference under this Agreement."[72] Based on these representations,

[71] (*See* Compl. ¶¶ 52–53, 56–59, 76–80, 117; FAC ¶¶ 61–62, 65–68, 83–86; Grant of Rights ¶¶ 1, 6; Am. Grant of Rights ¶ 3 ("Except as specifically modified by this Amendment, the terms of the [Grant of Rights] will remain in full force and effect.").)

[72] (Compl. ¶ 55 (quoting Grant of Rights ¶ 6); FAC ¶ 64 (same).)

the ACC entered into the ESPN Agreements on behalf of its Members,[73] "which significantly increased the revenues paid to the Conference and distributed to its Member Institutions, including [FSU]."[74]

40. The ACC alleges that the FSU Board has "breached, ignored, or otherwise violated the terms of the Grant of Rights and Amended Grant of Rights[.]"[75] In support, the Conference alleges that FSU began seeking a greater share of Conference revenue in early 2023;[76] openly discussed leaving the Conference at meetings of the FSU Board in February and August 2023;[77] provided "individual briefings" for, and circulated a draft complaint to, each of the FSU Board Members to "secur[e] the necessary votes to proceed to litigation[ ]";[78] and held an "emergency" meeting of the FSU Board on 22 December 2023 to authorize the filing of "a preemptive lawsuit against the ACC in Leon County, Florida[.]"[79] "By challenging the validity of the Grant of Rights and Amended Grant of Rights through the Florida Action," the ACC alleges that the FSU Board "seeks to undermine or destroy the contracts and agreements that enable the Conference to create a viable collegiate

[73] (*See* Compl. ¶¶ 69–75; FAC ¶¶ 78–84.)

[74] (Compl. ¶ 120; FAC ¶ 177; *see* FAC ¶¶ 109, 111.)

[75] (FAC ¶ 181; *see* Compl. ¶ 124.)

[76] (*See* Compl. ¶¶ 97–102; FAC ¶¶ 120–25.)

[77] (*See* Compl. ¶¶ 94–96, 103–08; FAC ¶¶ 117–19, 129–32.)

[78] (FAC ¶¶ 153–55.)

[79] (FAC ¶ 148; *see* Compl. ¶ 114; FAC ¶¶ 148–57, 168.)

athletic conference that, through its activities, enhances and funds college athletics for its Members."[80]

41. As such, the ACC has demonstrated that it has "a legally protected interest" that has been "invaded" by the FSU Board's pursuit of a declaratory judgment with respect to the validity and enforceability of the Grant of Rights Agreements. *Soc'y for the Hist. Pres. of the Twentysixth N.C. Troops, Inc.*, 282 N.C. App. at 704 (citation omitted). Because the ACC's "injury can be redressed by a favorable decision[,]" *id.*; namely, through a "Declaration that the Grant of Rights and [A]mended Grant of Rights is [sic] a valid and enforceable contract [sic] between [FSU] and the ACC[,]"[81] the Court concludes that the ACC had standing to bring suit when it filed its original Complaint on 21 December 2023 under the threat of the FSU Board's imminent breach. *See id.* (requiring "a legal injury; the traceability of the injury to a defendant's actions; and the probability that the injury can be redressed by a favorable decision" for standing to obtain).

42. Although argued in the context of "standing," the parties' remaining arguments actually focus on whether the ACC was *authorized* to initiate litigation against FSU. The FSU Board argues that, because the Conference did not comply with a provision of the ACC Constitution that requires the Conference to obtain the approval of an "Absolute Two-Thirds" majority of the ACC Member Institutions prior

[80] (FAC ¶ 249.)

[81] (FAC Prayer for Relief ¶ 1.)

to "the initiation of any material litigation involving the Conference[,]"[82] dismissal is warranted.[83]

43. The ACC does not dispute that it did not obtain an "Absolute Two-Thirds" majority approval of its Members prior to filing the Complaint; rather, the Conference contends that such approval was unnecessary because the relief requested in the Complaint did not amount to "material litigation" and, moreover, had been previously authorized by the Members based on the ACC's obligation to protect ESPN's rights under the ESPN Agreements.[84] And, "[w]hile not required because the original Complaint was valid,"[85] the ACC further contends that an "Absolute Two-Thirds" majority of the Member Institutions approved the filing of the FAC, which included the original claims as they were asserted in the Complaint, at a duly called meeting of the ACC Board on 12 January 2024, thus retroactively ratifying the filing of the Complaint.[86]

44. Although the parties direct much of their focus on the ACC's first two contentions, even if the Court were to assume, as the FSU Board argues, that the relief requested in the Complaint constituted "material litigation" and that the

[82] (ACC Const. § 1.6.2.)

[83] (*See* Reply Supp. Def.'s Mots. 3–6.)

[84] (*See* Br. Opp'n Def.'s Mots. 8–9; Sur-Reply Def.'s Mots. 11.)

[85] (Br. Opp'n Def.'s Mots. 9.)

[86] (*See* Br. Opp'n Def.'s Mots. 9; Br. Opp'n Def.'s Mots. Ex. 2 at ¶¶ 3–5 [hereinafter "Hostetter Aff."], ECF No. 31.2; Sur-Reply Def.'s Mots. 5–8.)

institution of litigation was not contemplated in "the already-approved obligation [of the ACC] to take commercially reasonable action[ ]" to protect the Grant of Rights Agreements under the terms of the ESPN Agreements,[87] the Court concludes that the FSU Board's Motion to Dismiss for failure of a condition precedent must be denied because the ACC's evidence of ratification is unrebutted and dispositive.

45. Our Court of Appeals has defined "ratification" as "the affirmance by a person of a prior act which did not bind him but which was done or professedly done on his account, whereby the act, as to some or all persons, is given effect as if originally authorized by him." *King Fa, LLC v. Chen*, 248 N.C. App. 221, 226 (2016) (citation omitted). "To establish ratification, a plaintiff must show that the principal had full knowledge of all material facts and that the principal intended to ratify the act." *Hilco Transp., Inc. v. Atkins*, 2016 NCBC LEXIS 5, at *29 (N.C. Super. Ct. Jan. 15, 2016).

46. Far from "turn[ing] the law of internal governance on its head" as the FSU Board contends,[88] ratification is a practice frequently employed by corporate entities to approve defective actions which the entities failed to originally authorize. *See, e.g.*, N.C.G.S. §§ 55-1-61 to -65 (permitting ratification of defective corporate actions under the North Carolina Business Corporation Act); *Holland v. Warren*, 2020 NCBC LEXIS 146, at *20 (N.C. Super. Ct. Dec. 15, 2020) (noting that courts have interpreted N.C.G.S. § 55A-8-31(a)(1) to permit a nonprofit board to cure an improper act or

[87] (Br. Opp'n Def.'s Mots. 9.)

[88] (Reply Supp. Def.'s Br. 6 n.4.)

transaction through ratification). Just like any other corporate action, a failure to comply with procedural prerequisites prior to initiating litigation can be ratified by a corporate entity, such that the prior act "is given effect as if originally authorized by [that corporate entity]." *King Fa, LLC*, 248 N.C. App. at 226; *see Gao v. Sinova Specialties, Inc.*, 2018 NCBC LEXIS 70, at *14–15 (N.C. Super. Ct. July 16, 2018) ("[I]t is immaterial whether the board complied with the bylaws prior to asserting its original and first amended counterclaims" because "the board subsequently complied with its bylaws and ratified Sinova US's engagement of counsel and the counterclaims" and "filed its second amended counterclaims after the board approved filing the counterclaims[.]").

47. The four cases the FSU Board relies on in opposition do not compel a different result. Two of the cases are silent as to whether the corporate litigants attempted to later authorize the improperly initiated litigation by ratification. *See Peninsula Prop. Owners Ass'n v. Crescent Res., LLC*, 171 N.C. App. 89, 97 (2005); *Atkinson v. Lexington Cmty. Ass'n*, 2023 NCBC LEXIS 101, at *9 (N.C. Super. Ct. Aug. 16, 2023) (dismissing claims without prejudice because the association "could obtain member approval in the future and file a new lawsuit[ ]"). Moreover, the courts in the other two cases expressly emphasized the plaintiff associations' post-suit actions. *See Willowmere*, 370 N.C. at 561 (noting that "[t]here is no evidence in this case suggesting that any member of the [plaintiff associations] opposed plaintiffs' prosecution of this suit[ ]");[89] *Homestead at Mills River Prop. Owners Ass'n v. Hyder*,

[89] Although the issue was not before the Supreme Court, the Court of Appeals noted in its decision in *Willowmere* that "plaintiffs have not presented any evidence that the boards took

No. COA17-606, 2018 N.C. App. LEXIS 622, at *9 (N.C. Ct. App. June 19, 2018) (unpublished) (noting that, in contrast to *Willowmere*, "there was ample evidence indicating that a number of Plaintiff's members opposed this lawsuit[ ]").[90]

48. Courts in other jurisdictions have also held that a corporate entity may later ratify the initiation of litigation that was unauthorized at the time of filing. *See, e.g.*, *First Telebanc Corp. v. First Union Corp.*, No. 02-80715-CIV-GOLD/TURNOFF, 2007 U.S. Dist. LEXIS 114903, at *26 (S.D. Fla. Aug. 6, 2007) ("In accordance with Florida law, . . . the board may subsequently ratify the filing of the lawsuit."); *In re Council of Unit Owners of the 100 Harborview Drive Condo.*, 552 B.R. 84, 89 (Bankr. Md. 2016) ("[W]hen an officer has acted without authority in bringing a suit, the corporation may ratify the action, which is the equivalent of the officer's having had original authority to bring the lawsuit." (citation and quotation marks omitted)); *Cmty. Collaborative of Bridgeport, Inc. v. Ganim*, 698 A.2d 245, 254–55 (Conn. 1997) (affirming trial court's finding that board did not ratify officer's unilateral initiation of litigation); *City of McCall v. Buxton*, 201 P.3d 629, 640 (Idaho 2009) ("[T]he fact that the city manager did not have the authority to authorize the commencement of

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action in accord with their bylaws to ratify the filing of the lawsuit after the issue of standing was raised," 250 N.C. App. 292, 304 (2016), suggesting that the plaintiff boards of directors could have retroactively ratified their earlier decision to file litigation by subsequent board action.

[90] In opposing ratification, the FSU Board also relies on *Town of Midland v. Harrell*, in which the Supreme Court of North Carolina stated that "[s]ubsequent events cannot confer standing retroactively." 385 N.C. 365, 371 (2023). But as the Court has noted above, the concepts of standing and authorization to act are "legally and conceptually distinct issue[s,]" *United Daughters of the Confederacy*, 383 N.C. at 626, and ratification implicates issues of authorization, not standing. Thus, *Town of Midland* is inapposite.

this lawsuit does not require dismissal where the city council later ratified that action in a meeting that complied with the open meeting laws."); *City of Topeka v. Imming,* 344 P.3d 957, 964 (Kan. Ct. App. 2015) ("[T]he City Council could not ratify the City Manager's decision to file this lawsuit without an open, affirmative vote on the matter or by taking some action consistent with ratification."); *McGuire Performance Sols., Inc. v. Massengill*, 904 A.2d 971, 978 (Pa. Super. Ct. 2006) (determining that corporation ratified the litigation by passive acquiescence).

49. The ACC has submitted a 27 February 2024 Affidavit of ACC Secretary and Deputy Commissioner Brad Hostetter ("Hostetter")[91] and a 10 January 2024 e-mail from ACC Commissioner James J. Phillips ("Phillips")[92] in support of its argument that the Conference ratified the initiation of this litigation. In his 10 January 2024 e-mail, Phillips provided notice of a special meeting of the ACC Board of Directors for 12 January 2024.[93] Although special meetings of the Board usually require three

[91] (Hostetter Aff.)

[92] (Sur-Reply Def.'s Mots. Ex. A [hereinafter "Jan. 10 E-mail"], ECF No. 46.1.)

[93] (*See* Jan. 10 E-mail.) The FSU Board alleges that this notice was ineffective because FSU did not receive notice of this special meeting. (*See* Reply Supp. Def.'s Mots. 1.) This argument is without merit. As the Conference notes in its sur-reply, the complaint in the Florida Action requests that FSU "be deemed to have issued its formal notice of withdrawal from the ACC under Section 1.4.5 of the ACC Constitution effective August 14, 2023." (Sur-Reply Def.'s Mots. 4 n.1 (quoting Fla. Compl. 33).) Section 1.5.1.3 of the ACC Constitution provides that "[t]he CEO of any Member that . . . withdraws from the Conference pursuant to Section 1.4.5 shall automatically cease to be a Director . . . , and shall cease to have the right to vote on any matter as of the effective date of the . . . withdrawal." In addition,

> [d]uring the period between the delivery of a notice of . . . withdrawal and the effective date of the . . . withdrawal, the Board . . . may withhold any information from, and exclude from any meeting . . . and/or any vote, the Director . . . of the . . . withdrawing member, if the Board determines that . . . such attendance, access to information or voting could present a

days' notice,[94] Hostetter avers that the required three-fourths of all Directors waived this notice requirement.[95] Furthermore, Hostetter avers that a quorum of Directors attended the special meeting and "unanimously approved the filing of the [FAC] in this matter, inclusive of the original claims in the Complaint filed on December 21, 2023."[96] In his affidavit, Hostetter confirms that the 12 January 2024 vote met the "Absolute Two-Thirds" majority vote required by Section 1.6.2 of the ACC Constitution to initiate "material litigation involving the Conference[.]"[97]

50. Thus, the record clearly demonstrates that, by approving the filing of the FAC, which includes the original declaratory judgment claims as they were asserted in the original Complaint, the ACC Board of Directors "had full knowledge of all material facts" and "intended to ratify" the filing of the Complaint on 21 December 2023. *Hilco Transp., Inc.*, 2016 NCBC LEXIS 5, at *29. In light of this uncontroverted evidence, the Court concludes that the ACC was properly authorized to bring this litigation.

> conflict of interest for the . . . withdrawing member or is otherwise not in the best interests of the Conference, as determined by the Board.

(ACC Const. § 1.5.1.3.) The Court agrees with the ACC that "[a] meeting to decide whether affirmative claims should be made against FSU . . . presented just such a conflict of interest[,]" (Sur-Reply Def.'s Mots. 4 n.1), such that the ACC was not required to provide the FSU Board with notice of the 12 January 2024 special meeting.

[94] (ACC Const. § 1.5.1.5.1.)

[95] (*See* Hostetter Aff. ¶ 3 (referencing ACC Const. § 1.5.1.5.2).)

[96] (Hostetter Aff. ¶¶ 3, 5.)

[97] (*See* Hostetter Aff. ¶ 5.)

51. Because the Court concludes both that the ACC had standing to bring this lawsuit at the time it filed its original Complaint and that the ACC Board of Directors ratified the initiation of this litigation three weeks later, the Court will deny the FSU Board's Motion to Dismiss to the extent the FSU Board contends this action should be dismissed for failure to comply with any conditions precedent.

3. Sovereign Immunity

52. Prior to 2019, sovereign "immunity [was] available only if the forum State 'voluntar[ily]' decide[d] 'to respect the dignity of the [defendant State] as a matter of comity.' " *Franchise Tax Bd. of Cal. v. Hyatt* (*Hyatt III*), 587 U.S. 230, 236 (2019) (second and fourth alterations in original) (quoting *Nevada v. Hall*, 440 U.S. 410, 416 (1979)). But the United States Supreme Court expressly overruled *Nevada v. Hall* in *Hyatt III*, holding that the United States Constitution does not "permit[ ] a State to be sued by a private party without its consent in the courts of a different State." *Id.* at 233. The Supreme Court, however, did not explain what form this "consent" must take in *Hyatt III*. Three years later, the Supreme Court of North Carolina took up this unanswered question in *Farmer v. Troy University*, 382 N.C. 366 (2022). The ACC contends that *Farmer* controls and establishes that FSU has expressly consented to suit in the courts of the State of North Carolina.[98]

53. The FSU Board, however, argues that the ACC's reliance on *Farmer* is inapposite because "it pertains to a different statutory scheme—the North Carolina

[98] (*See* Br. Opp'n Def.'s Mots. 10–12; Sur-Reply Def.'s Mots. 12–14.)

Nonprofit Corporation Act [the 'NCNCA']"[99]—rather than to the Uniform Unincorporated Nonprofit Association Act (the "UUNAA"), N.C.G.S. §§ 59B-1 to -15, under which the ACC is organized. The FSU Board contends that, unlike the defendant state university in *Farmer*, it neither "registered as a nonprofit corporation[ ]" nor "has it been issued a certificate of authority to operate in this state[.]"[100] The FSU Board argues that because "[t]hese requirements simply do not apply to members of unincorporated associations," the courts of North Carolina cannot exercise jurisdiction over it under either the UUNAA or *Farmer*.[101]

54. But the FSU Board's focus on the NCNCA is misplaced. As the ACC demonstrates in its opposition brief,[102] *Farmer* sets out the general framework for determining what constitutes "consent" to suit in North Carolina post-*Hyatt III*. This Court must therefore look to *Farmer* to determine whether the FSU Board has waived its sovereign immunity based on the allegations in the FAC.

55. In *Farmer*, Troy University, an Alabama state institution, registered as a nonprofit corporation with the North Carolina Secretary of State, leased an office building in North Carolina, and employed Farmer to recruit military personnel in North Carolina to take its online educational courses. *See Farmer*, 382 N.C. at 367. After his employment was terminated, Farmer brought suit against Troy University

[99] (Br. Supp. Def.'s Mots. 14.)

[100] (Br. Supp. Def.'s Mots. 14; *see also* Reply Supp. Def.'s Mots. 8–9.)

[101] (Br. Supp. Def.'s Mots. 15; *see also* Reply Supp. Def.'s Mots. 8–9.)

[102] (*See* Br. Opp'n Def.'s Mots. 9–12.)

for various tort claims. *Id.* Shortly after the United States Supreme Court decided *Hyatt III*, Troy University moved for dismissal based on sovereign immunity. *Id.* at 369.

56. The Alabama Constitution provides that "the State of Alabama shall never be made a defendant in any court of law or equity." Ala. Const. art. I, § 14. The Supreme Court of North Carolina observed in *Farmer* that this immunity "extend[ed] to [the State of Alabama's] institutions of higher learning." *Farmer*, 382 N.C. at 370 (second alteration in original) (quoting *Ala. State Univ. v. Danley*, 212 So. 3d 112, 122 (Ala. 2016)). Having then concluded that, "[u]nder *Hyatt III* and the United States Constitution, as a general matter, Troy University is entitled to sovereign immunity from suit without its consent in the state courts of every state in the country[,]" *id.* at 271, our Supreme Court then set about determining whether Troy University had consented to waive its sovereign immunity in North Carolina state court.

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

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

N.C.G.S. § 55A-3-02(a)(1). Stressing that it was "crucial" to its "analysis that *Hyatt III* did not involve a sue and be sued clause[,]" the *Farmer* Court instead looked to

Thacker v. Tennessee Valley Authority, another recent case in which the United States Supreme Court addressed the effect of a sue and be sued clause on sovereign immunity. *Farmer*, 382 N.C. at 372.

58. In *Thacker*, the United States Supreme Court explained that "[s]ue-and-be-sued clauses . . . should be liberally construed[,]" noting that "[t]hose words in their usual and ordinary sense . . . embrace all civil process incident to the commencement or continuance of legal proceedings." *Thacker*, 139 S. Ct. 1435, 1441 (2019) (citations and quotation marks omitted). But, according to our Supreme Court in *Farmer*, *Thacker* placed a limit on these types of clauses: "[A]lthough a sue and be sued clause allows suits to proceed against a public corporation's *commercial* activity, just as these actions would proceed against a private company, suits challenging an entity's *governmental* activity may be limited." *Farmer*, 382 N.C. at 372 (emphasis added) (citing *Thacker*, 139 S. Ct. at 1443). Our Supreme Court therefore concluded that, "while *Hyatt III* . . . requires a State to acknowledge a sister State's sovereign immunity, *Thacker* recognizes that a sue and be sued clause can act as a waiver of sovereign immunity when a state entity's *nongovernmental* activity is being challenged." *Id.* (emphasis added).

59. Applying these principles to the facts in *Farmer*, our Supreme Court determined that Troy University was engaged in commercial activity in North Carolina, specifically the marketing and selling of online educational programs, rather than governmental activity. *Id.* at 373. Because Troy University knew that it

was subject to the NCNCA and its sue and be sued clause when it chose to do business in North Carolina, "it explicitly waived its sovereign immunity." *Id.*

60. *Farmer* found additional support for Troy University's waiver of sovereign immunity in article 15 of the NCNCA, which requires a foreign corporation operating in North Carolina to obtain a certificate of authority. *Id.* at 374. "A certificate of authority authorizes the foreign corporation . . . to conduct affairs in this State[,]" N.C.G.S. § 55A-15-05(a), and gives the foreign corporation "the same but no greater rights and . . . the same but no greater privileges as, and is subject to the same duties, restrictions, penalties, and liabilities . . . imposed on, a domestic corporation of like character[,]" *id.* § 55A-15-05(b). Our Supreme Court separately concluded that, "[b]y requesting and receiving a certificate of authority to do business in North Carolina, renting a building here, and hiring local staff, Troy University, as an arm of the State of Alabama, consented to be treated like 'a domestic corporation of like character,' and to be sued in North Carolina." *Farmer*, 382 N.C. at 374–75 (quoting N.C.G.S. § 55-15-05(b)).

61. The Court shall now apply the framework created by our Supreme Court in *Farmer* to determine whether, based on the allegations in the FAC and the current record, the FSU Board has consented to suit in North Carolina and thereby waived its sovereign immunity for purposes of this action.

62. The Court begins with the presumption that the State of Florida may not "be sued by a private party without its consent in the courts of [this] State." *Hyatt III*, 587 U.S. at 233. Florida has extended its sovereign immunity to include its public

universities because "[u]niversity boards of trustees are a part of the executive branch of state government." Fla. Stat. Ann. § 1001.71(3). The Court therefore concludes that, "as a general matter, [the FSU Board] is entitled to sovereign immunity from suit without its consent in the state courts of every state in the country." *Farmer*, 382 N.C. at 371. The Court must now determine whether the FSU Board explicitly waived its sovereign immunity to suit in North Carolina.

63. The UUNAA contains the following sue and be sued clause: "A nonprofit association, in its name, may institute, defend, intervene, or participate in a judicial, administrative, or other governmental proceeding or in an arbitration, mediation, or any other form of alternative dispute resolution."[103] N.C.G.S. § 59B-8(1). In addition, the UUNAA expressly permits the ACC, as a North Carolina unincorporated nonprofit association, and the FSU Board, as a Member of the ACC,[104] to bring suit against each other: "A member of, or a person referred to as a 'member' by, a nonprofit association may assert a claim against or on behalf of the nonprofit association. A nonprofit association may assert a claim against a member or a person referred to as a 'member' by the nonprofit association." N.C.G.S. § 59B-7(e). Because "a sue and be sued clause can act as a waiver of sovereign immunity when a state entity's nongovernmental activity is being challenged[,]" *Farmer*, 382 N.C. at 372 (citing *Thacker*, 139 S. Ct. at 1441), the Court must next analyze the FSU Board's activities

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

[104] (*See* FAC ¶¶ 1–2.)

in this State and decide if they are of a commercial or governmental nature. In doing so, the Court views the allegations in the FAC as true and, if appropriate, may also consider matters outside the FAC. *See Parker*, 243 N.C. App. at 96–97 (under Rule 12(b)(2), "[w]hen neither party submits evidence, . . . [t]he trial judge must decide whether the complaint contains allegations that, if taken as true, set forth a sufficient basis for the court's exercise of personal jurisdiction" (cleaned up)).

64. Since it joined the ACC in 1991, FSU has engaged in "continuous and systematic membership and governance activities" that "arise out of its membership in and management of the Conference[.]"[105] For example, the President of FSU is a member of the ACC's Board of Directors and "regularly attend[s] ACC meetings held in the State of North Carolina."[106] "Three of the four most recent in-person [ACC] Board of Directors meetings were held in North Carolina[,]" and FSU's President "attended each of these meetings either via Zoom or in person."[107] In addition, the ACC alleges that FSU's Presidents, Athletic Directors, and Head Coaches have "played an active role in the administration of ACC affairs[ ]" and in "advancing the mission of the ACC[,]" and lists in the FAC the numerous Conference leadership and committee positions held by these individuals over the past decade.[108] Moreover, the

[105] (FAC ¶ 7; *see* FAC ¶¶ 8, 36.)

[106] (FAC ¶ 8.)

[107] (FAC ¶ 10 (stating that the "Conference generally holds two meetings of the Board of Directors per month, with three of these meetings held in person annually, often in North Carolina[ ]").)

[108] (FAC ¶ 9; *see also* FAC ¶¶ 11 (indicating that the ACC Board of Directors, including the FSU President, voted to relocate the Conference's headquarters to Charlotte to secure a $15

FSU President has approved the ACC's execution of several media rights agreements entered into on behalf of all of the ACC's Member Institutions.[109] The FSU Board has not sought to refute any of these allegations.

65. As a "collegiate academic and athletic conference[,]"[110] the ACC's purpose is to "enrich and balance the athletic and educational experiences of student-athletes at its member institutions[,] to enhance athletic and academic integrity among its members, to provide leadership, and to do this in a spirit of fairness to all."[111] More specifically, the ACC seeks to provide "quality competitive opportunities for student-athletes in a broad spectrum of amateur sports and championships[,]" and ensure "responsible fiscal management and further financial stability[ ]" by "[a]ddress[ing] the future needs of athletics" for the "mutual benefit of the Members[.]"[112]

66. Historically, the ACC's main source of income has consisted of the payments it receives in exchange for granting exclusive media rights to broadcast athletic

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million financial incentive derived from North Carolina taxpayer dollars), 16 (describing FSU's participation in various ACC championship events held in North Carolina), 57–67 (explaining the benefits of the Grant of Rights and the FSU President's execution thereof), 83–104 (discussing the same with respect to the Amended Grant of Rights), 120–22 (discussing how FSU convinced the ACC to distribute "a larger share of post-season revenues to the Members that generated those revenues, rather than equally among all Members[ ]").)

[109] (*See, e.g.*, FAC ¶¶ 45 (alleging approval of the 2010 Multi-Media Agreement), 104 (alleging approval of the ESPN Agreements).)

[110] (FAC ¶ 28.)

[111] (FAC ¶ 38 (quoting ACC Const. § 1.2.1).)

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

events and competitions involving athletes from ACC Member Institutions.[113] "By aggregating the Media Rights from each Member Institution, the Conference was able to increase the total value of those rights[.]"[114] The Conference then distributes the payments it receives under these media rights agreements, totaling hundreds of millions of dollars, to its Members, including FSU.[115]

67. Based on this record, the Court first concludes that the ACC's activities, specifically the sponsorship of athletic events and the marketing of media rights for those events, are commercial in nature. The Court further concludes that, as a Member of the ACC, FSU's Conference-related activities in this State are also commercial, rather than governmental, in nature. *See Thacker*, 139 S. Ct. at 1443 (describing "governmental activities" as the "the kinds of functions private parties typically do not perform[ ]"). Because the FSU Board knew that it was subject to the UUNAA and its sue and be sued clause when it chose to be a member of a North Carolina unincorporated nonprofit association, and because FSU engaged in extensive commercial activity in North Carolina as described above, *Farmer* instructs that FSU "explicitly waived its sovereign immunity" to suit in this State. *Farmer*, 382 N.C. at 373.

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[113] (*See* FAC ¶¶ 12–14, 48–51 (estimating potential losses of "$72 Million to over $200 Million[ ]" in media rights payments alone should a Member Institution withdraw from the ACC).)

[114] (FAC ¶ 60.)

[115] (*See* FAC Summary of Claims, ¶¶ 14, 44, 58, 70–71, 73, 78, 109–11.)

68. In its supporting and reply briefs, the FSU Board argues that the statutory waiver of sovereign immunity found in Fla. Stat. Ann. § 1001.72(1), which states that "[e]ach board of trustees shall be a public body corporate . . . , with all the powers of a body corporate, including the power to . . . contract and be contracted with, to sue and be sued, [and] to plead and be impleaded in all courts of law or equity," does not extend beyond the State of Florida.[116] The FSU Board contends that, unless "expressly stated in the statute," "the phrase 'all courts' necessarily refers only to all courts in the State of Florida."[117] Although the Court questions the FSU Board's narrow reading of this statute, *see Storey Mt., LLC v. George*, 357 So. 3d 709, 715 (Fla. 4th Dist. Ct. App. 2023) ("The use by the Legislature of [a] comprehensive term indicates an intent to include everything embraced within the term." (alteration in original) (citation omitted)), the Court is not required to engage in statutory interpretation under *Farmer*, where our Supreme Court held that, despite the fact that "[s]overeign immunity [was] enshrined in Alabama's Constitution," Troy University had waived its sovereign immunity by engaging in commercial, rather than governmental, activities within this State under a sue and be sued clause, *Farmer* 382 N.C. at 370, 373.[118]

[116] (*See* Br. Supp. Def.'s Mots. 13; Reply Supp. Def.'s Mots. 9.)

[117] (Br. Supp. Def.'s Mots. 13.)

[118] The Court notes that the United States Supreme Court denied Troy University's petition for *writ of certiorari*. *See Troy Univ. v. Farmer*, 143 S. Ct. 2561 (2023), *cert denied*.

69. Accordingly, the Court concludes that, under *Farmer*, the FSU Board has waived its sovereign immunity and is subject to this suit in North Carolina. The Court will therefore deny the FSU Board's Motion to Dismiss to the extent it seeks dismissal on grounds of sovereign immunity.[119]

III.

MOTION TO DISMISS PURSUANT TO RULE 12(b)(7)

A. Legal Standard

70. Under Rule 12(b)(7), a necessary party must be joined to an action. *See Strickland v. Hughes*, 273 N.C. 481, 485 (1968). A necessary party is any person or entity with a material interest in the subject matter of the controversy, and whose interests will be directly affected by an adjudication thereof. *See Equitable Life Assurance Soc'y of the U.S. v. Basnight*, 234 N.C. 347, 352 (1951). Dismissal for failure to join a necessary party is proper only if the defect cannot be cured, and any such dismissal must be without prejudice. *See Lambert v. Town of Sylva*, 259 N.C. App. 294, 307 (2018).

[119] The ACC also argues that the FSU Board made a general appearance in this matter when it opposed the ACC's 17 January 2024 Amended Motion to Seal and therefore waived its sovereign immunity because it did not specifically reserve its right to challenge personal jurisdiction in its sealing opposition. (*See* Br. Opp'n Def.'s Mots. 14; *see generally* Def.'s Br. Opp'n Pl.'s Am. Mot. Seal, ECF No. 15.) In the parties' joint Stipulation of Service, however, the first filing the FSU Board made in this action, the FSU Board represented that "it does not waive and preserves all jurisdictional defenses it may have." (Stipulation Service, ECF No. 8.) Our Court of Appeals has held that "[w]hen a defendant promptly alleges a jurisdictional defense as his *initial step* in an action, he fulfills his obligation to inform the court and his opponent of possible jurisdictional defects." *Ryals v. Hall-Lane Moving & Storage Co.*, 122 N.C. App. 242, 247–48 (1996) (emphasis added). The Court therefore concludes that, under *Ryals*, the ACC's argument is without merit.

B. Analysis

71. The FSU Board argues in conclusory fashion that the ACC's declaratory judgment claims in the FAC should be dismissed because "the ACC did not name the actual party to the Grants of Rights—FSU."[120]

72. This argument is a non-starter. Although the signature blocks for both the Grant of Rights and Amended Grant of Rights list "FLORIDA STATE UNIVERSITY" as the "Member Institution" and bear the signature of the individual serving as President of FSU at the time of execution,[121] the FSU Board concedes that it, rather than the university, is "the contracting agent of the university[ ]" and has "all the powers of a body corporate, including the power to . . . contract and be contracted with, to sue and be sued, [and] to plead and be impleaded in all courts of law or equity[.]" Fla. Stat. Ann. §§ 1001.72(1), (3).[122] Consequently, Florida courts have held that "it is improper to sue 'Florida State University' since the Florida Legislature has designated university boards of trustees as the proper entities with the power to sue and be sued." *Broer v. Fla. State Univ.*, No. 2021 CA 000859, 2022 WL 2289143, at *2 (Fla. Circ. Ct. June 17, 2022) (dismissing defendant "Florida State University" with prejudice); *see Doe v. New Coll. of Fla.*, No. 8:21-cv-1245-CEH-CPT, 2023 U.S.

[120] (Br. Supp. Def.'s Mots. 16.)

[121] (*See* Grant of Rights 9; Am. Grant of Rights 7.) Citations to the page numbers in these exhibits refer to the electronic PDF page numbers as the signature pages do not contain page numbers.

[122] (*See* Br. Supp. Def.'s Mots. 15.)

Dist. LEXIS 173689, at *21 (M.D. Fla. Sept. 28, 2023) (dismissing defendant "New College of Florida" as an improperly named defendant).

73. Indeed, FSU has acknowledged in litigation that "Florida State University is not endowed with an independent corporate existence and so lacks the capacity to sue or be sued in its own name[.]"[123] Given that the FSU Board acknowledges that "Florida State University" has no independent corporate existence and that the Florida courts have held that the FSU Board is the proper party to answer claims against "Florida State University," the Court will deny the FSU Board's Motion to Dismiss the ACC's first and second claims for failure to join "Florida State University" as a necessary party pursuant to Rule 12(b)(7).

IV.

MOTION TO DISMISS PURSUANT TO RULE 12(b)(6)

A. Legal Standard

74. When deciding whether to dismiss for failure to state a claim under Rule 12(b)(6), the Court considers "whether the allegations of the complaint, if treated as true, are sufficient to state a claim upon which relief can be granted under some legal theory." *Corwin v. Brit. Am. Tobacco, PLC*, 371 N.C. 605, 615 (2018) (quoting *CommScope Credit Union v. Butler & Burke, LLP*, 369 N.C. 48, 51 (2016)). "[T]he trial court is to construe the pleading liberally and in the light most favorable to the plaintiff, taking as true and admitted all well-pleaded factual allegations contained

[123] (Br. Opp'n Def.'s Mots. Ex. 4 *Pompura v. Fla. State Univ.*, No. 20 CA 1080, Florida State University's Limited Appearance to Quash Attempted Service and Dismiss ¶ 4 (Fla. Cir. Ct. July 22, 2020), ECF No. 31.4.)

within the complaint." *Donovan*, 114 N.C. App. at 526 (cleaned up); *see also, e.g.*, *Sykes v. Health Network Sols., Inc.*, 372 N.C. 326, 332 (2019) (recognizing that, under Rule 12(b)(6), the allegations of the complaint should be "view[ed] as true and in the light most favorable to the non-moving party" (cleaned up)).

75. When considering a motion to dismiss under Rule 12(b)(6), the Court may "also consider any exhibits attached to the complaint because '[a] copy of any written instrument which is an exhibit to a pleading is a part thereof for all purposes.' " *Krawiec v. Manly*, 370 N.C. 602, 606 (2018) (quoting N.C. R. Civ. P. 10(c)). Moreover, the Court "can reject allegations that are contradicted by the documents attached [to], specifically referred to, or incorporated by reference in the complaint." *Moch v. A.M. Pappas & Assocs., LLC*, 251 N.C. App. 198, 206 (2016) (quoting *Laster v. Francis*, 199 N.C. App. 572, 577 (2009)).

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

B. Analysis

1. Breach of Grant of Rights and Amended Grant of Rights

77. The ACC alleges that, by initiating the Florida Action, the FSU Board has breached its obligation under the Grant of Rights Agreements not to take any actions that affect the validity, enforcement, irrevocability, and/or exclusivity of those

agreements, as well as the FSU Board's obligation of good faith and fair dealing that is attendant to all contracts.[124] In response, the FSU Board does not challenge that it breached the agreements (assuming those agreements are valid) but instead contends that, despite having received hundreds of millions of dollars under the Grant of Rights Agreements, it never entered into those agreements in the first place. The FSU Board argues that because it is the only entity that has statutory authority to enter into contracts on behalf of FSU, the ACC's failure to allege that "the FSU Board approved either Grant of Rights at any FSU Board meeting, including after appropriate notice," warrants dismissal of the ACC's contract claim.[125]

78. "The elements of a claim for breach of contract are (1) [the] existence of a valid contract and (2) breach of the terms of that contract." *Poor v. Hill*, 138 N.C. App. 19, 26 (2000). As our Court of Appeals has noted, "[o]ur system of notice pleading means the bar to plead a valid contract is low." *Lannan v. Bd. of Governors of Univ. of N.C.*, 285 N.C. App. 574, 596 (2022) (citation omitted). Consequently, the ACC need only plead "offer, acceptance, [and] consideration[ ]" to establish the existence of a valid contract. *Id.*

79. The ACC adequately alleges each element of its breach of contract claim in the FAC. The ACC alleges that, "in order to secure a long-term media rights agreement and thus ensure the payment of predictable sums over time," the Member

[124] (FAC ¶¶ 209–11.)

[125] (Br. Supp. Def.'s Mots. 15–16.)

Institutions entered into the Grant of Rights in April 2013.[126] As pleaded in the FAC, "each Member Institution granted the Conference its Media Rights and, in exchange, . . . the Conference negotiated revisions to the 2010 Multi-Media Agreement, to increase the [amounts] paid[ ]" and subsequently "distributed the funds to the Member Institutions."[127]

80. With respect to the Grant of Rights, the ACC alleges that (i) the FSU Board "agreed to and executed the Grant of Rights on April 19, 2013[ ]";[128] (ii) FSU's President "was authorized to agree to and execute the Grant of Rights on April 19, 2013 on behalf of [the FSU Board]";[129] and (iii) FSU received its pro rata share of the fees paid by ESPN to the ACC pursuant to the Second Amendment to the 2010 Multi-Media Agreement and the Grant of Rights.[130] The ACC then alleges that, by filing suit in Florida, the FSU Board breached various obligations under the Grant of Rights.[131]

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[126] (FAC ¶¶ 56–57, 69.)

[127] (FAC ¶ 58.)

[128] (FAC ¶ 66; *see also* Grant of Rights ¶ 6 ("[E]ach Member Institution represents and warrants to the Conference (a) that such Member Institution . . . has the right, power and capacity to execute, deliver and perform this Agreement and to discharge the duties set forth herein[.]").)

[129] (FAC ¶ 67; *see also* Grant of Rights ¶ 6 ("[E]ach Member Institution represents and warrants to the Conference . . . (b) that execution, delivery and performance of this Agreement and the discharge of all duties contemplated hereby, *have been duly and validly authorized by all necessary action on the part of such Member Institution*[.]" (emphasis added)); ACC Const. § 1.5.1.1 ("[E]ach Director shall have the right to take any action or any vote on behalf of the Member it represents[.]").)

[130] (FAC ¶¶ 68, 71, 73, 111.)

[131] (*See* FAC ¶¶ 205–11.)

81. With respect to the Amended Grant of Rights, the ACC alleges that the Member Institutions agreed to extend the term in the original Grant of Rights in exchange for receiving increased fees under the ESPN Agreements.[132] The ACC alleges that (i) the FSU Board "accepted and executed the Amended Grant of Rights[ ]";[133] (ii) FSU's President "was authorized to enter into and accept the Amended Grant of Rights on behalf of [the FSU Board]";[134] and (iii) FSU received a portion of the fees paid by ESPN to the ACC under the ESPN Agreements and the Amended Grant of Rights.[135] The ACC then alleges that the FSU Board breached various obligations under the Amended Grant of Rights by initiating the Florida Action.[136]

82. The ACC also contends that it has adequately pleaded waiver and equitable estoppel to preclude the FSU Board from denying that it is legally bound by the Grant of Rights Agreements.[137] The affirmative defenses of waiver and equitable estoppel "concern whether a valid and enforceable agreement may be the subject of a legal action based on conduct that occurs after the parties enter into a contract[.]" *Window*

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[132] (*See* FAC ¶¶ 84, 87–90, 109.)

[133] (FAC ¶ 99.)

[134] (FAC ¶ 100.)

[135] (FAC ¶¶ 110–11; *see also* Amended Grant of Rights ¶ 3 ("Except as specifically modified by this Amendment, the terms of the [Grant of Rights] will remain in full force and effect.").)

[136] (*See* FAC ¶¶ 205–11.)

[137] (*See* Br. Opp'n Def.'s Mots. 16.)

World of N. Atlanta, Inc. v. Window World, Inc., 2021 NCBC LEXIS 82, at *18 (N.C. Super. Ct. Sept. 22, 2021).

83. "The essential elements of waiver are (1) the existence, at the time of the alleged waiver, of a right, advantage, or benefit; (2) the knowledge, actual or constructive, of the existence thereof; and (3) an intention to relinquish such right, advantage or benefit." *Fetner v. Rocky Mount Marble & Granite Works*, 251 N.C. 296, 302 (1959). The doctrine of equitable estoppel "arises when an individual, by his acts, representations, admissions, or by his silence when he has a duty to speak, intentionally or through culpable negligence induces another to believe that certain facts exist, and such other person rightfully relies and acts upon that belief to his detriment." *Thompson v. Soles*, 299 N.C. 484, 487 (1980). Under this doctrine, "the party whose words or conduct induced another's detrimental reliance may be estopped to deny the truth of his earlier representations in the interests of fairness to the other party." *Whitacre P'ship v. Biosignia, Inc.*, 358 N.C. 1, 17 (2004).

84. The ACC alleges in the FAC that the "purpose of the Grant of Rights and Amended Grant of Rights was to permit the ACC to negotiate various agreements with ESPN and provide ESPN the Media Rights for its Member Institutions, including [FSU], in exchange for . . . [f]ees[.]"[138] The ACC further alleges that the FSU Board "knowingly and voluntarily agreed . . . to transfer ownership of its Media Rights to the ACC through June 30, 2036[ ]"[139] "for the purpose of receiving the

[138] (FAC ¶ 186.)

[139] (FAC ¶ 197.)

benefits generated by these contracts[,]"[140] "regardless of whether [FSU] remained a Member Institution of the Conference."[141] The allegations in the FAC also state that, since 2013, the FSU Board "substantially and materially benefitted from the Grant of Rights and Amended Grant of Rights[ ]"[142] by receiving its share of the "distributions from [the] revenue generated by the Grant of Rights and Amended Grant of Rights[.]"[143] Based on these allegations, the ACC argues that, even if the FSU Board "did not vote on these agreements despite accepting their benefits[,]"[144] the FSU Board is "estopped from challenging the validity or enforceability of the Grant of Rights or Amended Grant of Rights, or has waived its right to contest [their] validity or enforceability . . . as a result of its conduct[.]"[145]

85. At this stage, the Court concludes that the ACC has sufficiently pleaded that the FSU Board approved the execution of both the Grant of Rights and Amended Grant of Rights. The Court further concludes that the ACC has also sufficiently pleaded that, regardless of whether the FSU Board approved the Grant of Rights Agreements, the FSU Board should be estopped from challenging or has waived its right to challenge these agreements by its conduct in accepting the benefits of these

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[140] (FAC ¶ 200.)

[141] (FAC ¶ 197.)

[142] (FAC ¶ 191.)

[143] (FAC ¶ 187.)

[144] (Br. Opp'n Def.'s Mots. 16.)

[145] (FAC ¶ 203.)

agreements for many years without protest. Accordingly, the Court will deny the FSU Board's Motion to Dismiss the ACC's claim for breach of the Grant of Rights and Amended Grant of Rights.

2. Declaratory Judgment Claims

86. The ACC seeks a judicial declaration that (i) the Grant of Rights Agreements are valid and enforceable contracts; and (ii) the FSU Board is estopped from making or has waived by its conduct any challenge to the Grant of Rights Agreements.[146] The FSU Board seeks dismissal of these claims on the same basis that it seeks dismissal of the ACC's breach of contract claim.[147] Because the Court has concluded that the ACC's claim for breach of the Grant of Rights Agreements should survive the FSU Board's Motion to Dismiss, the Court will likewise permit the ACC's declaratory judgment claims based on those agreements to proceed.

3. Breach of Obligation to Protect Confidential Information

87. The FSU Board next seeks to dismiss the ACC's claim that the FSU Board breached its obligation to keep confidential the terms of the ESPN Agreements by disclosing some of those terms at its 22 December 2023 meeting and by publicly filing the complaint containing some of those terms in the Florida Action.[148] The FSU Board argues that "neither FSU nor the FSU Board was ever a party to [the ESPN

[146] (FAC ¶¶ 173–203.)

[147] (*See* Br. Supp. Def.'s Mots. 15–16.)

[148] (*See* Br. Supp. Def.'s Mots. 16–18.)

Agreements] or entered into any confidentiality agreement with the ACC,"[149] and, furthermore, that the FSU Board does not owe "any duties to the ACC beyond those reflected in the ACC's Constitution and [Bylaws]."[150]

88. "[A]n implied-in-fact contract 'is valid and enforceable as if it were express or written.' " *Lannan*, 285 N.C. App. at 596 (quoting *Snyder v. Freeman*, 300 N.C. 204, 217 (1980)). "A valid contract may be implied in light of the conduct of the parties and under circumstances that make it reasonable to presume the parties intended to contract with each other." *Se. Caissons, LLC v. Choate Constr. Co.*, 247 N.C. App. 104, 113 (2016) (citation omitted). Thus, the ACC need only "plead offer, acceptance, and consideration[ ]" to plead a valid implied-in-fact contract. *Lannan*, 285 N.C. App. at 597.

89. The ACC alleges that, on behalf of its Member Institutions, it entered into the ESPN Agreements with ESPN on 21 July 2016.[151] The ESPN Agreements contain the following terms:

> Each party shall maintain the confidentiality of this Agreement and its terms, and any other Confidential Information, except when disclosure is[ ] . . . to each [Member] Institution, provided that each [Member] Institution shall agree to maintain the confidentiality of this Agreement, subject to the law applicable to each such [Member] Institution[.][152]

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[149] (Br. Supp. Def.'s Mots. 16–17.)

[150] (Br. Supp. Def.'s Mots. 18; Reply Supp. Def.'s Mots. 11.)

[151] (*See* FAC ¶ 78.)

[152] (2016 Multi-Media Agreement Confidentiality Provision ¶ 21.11; ACC Network Agreement Confidentiality Provision ¶ 18.11; *see also* FAC ¶¶ 106–08, 214–18 (discussing these terms).)

The ACC alleges that "[i]n an effort to preserve the confidentiality of the ESPN Agreements, the Conference limits access to the [a]greements[ ]"[153] by only "permit[ting] its Members to inspect and review the ESPN Agreements on request at its Headquarters" and "only on agreement that the Member would not copy or reproduce the provisions of the ESPN Agreements and would treat the information as confidential."[154]

90. The ACC alleges that counsel for the FSU Board reviewed the ESPN Agreements at the ACC's headquarters on 7 October 2022, 4 January 2023, and 1 and 2 August 2023.[155] The ACC further alleges that, on each occasion, "before being provided access, and as a condition for such access, [the FSU Board] was advised that the information in the ESPN Agreements was confidential."[156] The ACC then avers that, after being advised of this confidentiality obligation, FSU's counsel reviewed the ESPN Agreements.[157] The ACC finally alleges that, despite FSU's counsel reviewing the ESPN Agreements after receiving these warnings, the FSU Board publicly disclosed confidential information from the ESPN Agreements at its 22 December 2023 meeting and in the publicly filed complaint in the Florida Action.[158]

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[153] (FAC ¶ 220.)

[154] (FAC ¶ 221.)

[155] (*See* FAC ¶¶ 138, 222.)

[156] (FAC ¶ 139; *see also* FAC ¶¶ 140, 161, 223; FAC Ex. 12, ECF Nos. 11 (sealed), 12.12 (public redacted) (reproducing an e-mail from the ACC's general counsel informing counsel for the FSU Board that the terms of the ESPN Agreements must be kept confidential).)

[157] (*See* FAC ¶¶ 139, 162, 224.)

[158] (*See* FAC ¶¶ 163–72, 225–29.)

91. Although the FSU Board focuses on the ACC's failure to allege that FSU signed a written agreement with the ACC or ESPN to maintain the confidentiality of the ESPN Agreements,[159] the ACC has alleged that it expressly advised counsel for the FSU Board that counsel could review the ESPN Agreements at the ACC's headquarters only if FSU maintained the confidentiality of those agreements. As such, the ACC has alleged that it made a legally binding, conditional offer to the FSU Board, *see, e.g.*, *Fed. Reserve Bank of Richmond v. Neuse Mfg. Co.*, 213 N.C. 489, 493 (1938) ("In negotiating a contract the parties may impose any condition precedent, a performance of which condition is essential before the parties become bound by the agreement."), which the FSU Board accepted by its counsel's reviewing the agreements, *Snyder*, 300 N.C. at 218 ("Acceptance by conduct is a valid acceptance.").

92. Thus, although the FSU Board was not a party to the ESPN Agreements, the Court concludes that the ACC has sufficiently pleaded at least an implied-in-fact contract between the ACC and the FSU Board to maintain the confidentiality of the terms of the ESPN Agreements as well as the FSU Board's breach. *Id.* ("With regard to a contract implied in fact, one looks not to some express agreement, but to the actions of the parties showing an implied offer and acceptance.").

93. The Court therefore will deny the FSU Board's Motion to Dismiss the ACC's fourth cause of action for breach of contract concerning confidentiality.

[159] (*See* Br. Supp. Def.'s Mots. 16–17.)

4. Breach of Fiduciary Duties Owed by the FSU Board to the ACC

94. The FSU Board next seeks to dismiss the ACC's claim that FSU has breached, and continues to breach, its fiduciary obligations to the Conference under the ACC's Constitution and Bylaws as well as under North Carolina law.[160] The FSU Board first argues that the ACC is a creature of statute governed by the UUNAA, N.C.G.S. §§ 59B-1 to -15, which imposes no fiduciary duties on members of unincorporated nonprofit associations.[161] The FSU Board additionally contends that neither the ACC's Constitution or Bylaws impose fiduciary duties on the Member Institutions.[162]

95. The ACC argues in opposition that, by joining the Conference as a Member Institution, FSU entered into a "common and joint venture with the other Member Institutions,"[163] and thereby has a fiduciary duty to "act in good faith, with due care, and in a manner in the best interests of the Conference"[164] under the ACC's Constitution and Bylaws "as well as [under] principles of statutory and common law in North Carolina[.]"[165] The ACC further contends that, "[b]y seeking retroactive

[160] (*See* Br. Supp. Def.'s Mots. 16–18; Reply Supp. Def.'s Mots. 10–11.)

[161] (*See* Br. Supp. Def.'s Mots. 17.)

[162] (*See* Br. Supp. Def.'s Mots. 17; Reply Supp. Def.'s Mots. 10.)

[163] (FAC ¶ 240.)

[164] (FAC ¶ 241.)

[165] (FAC ¶¶ 246–48; *see* Br. Opp'n Def.'s Mots. 19–20.)

withdrawal [from the ACC] in the Florida Action, [FSU] has a clear, direct, and material conflict of interest with the management of the Conference."[166]

96. To state a claim for breach of fiduciary duty, a plaintiff must plead that "(1) defendant[ ] owed the plaintiff a fiduciary duty; (2) the defendant breached that fiduciary duty; and (3) the breach of fiduciary duty was a proximate cause of injury to the plaintiff." *Chisum v. Campagna*, 376 N.C. 680, 706 (2021). "For a breach of fiduciary duty to exist, there must first be a fiduciary relationship between the parties." *King v. Bryant*, 369 N.C. 451, 464 (2017) (quoting *Dalton v. Camp*, 353 N.C. 647, 651 (2001)). "[A] fiduciary relationship is generally described as arising when 'there has been a special confidence reposed in one who in equity and good conscience is bound to act in good faith and with due regard to the interests of the one reposing confidence.' " *Dallaire v. Bank of Am., N.A.*, 367 N.C. 363, 367 (2014) (quoting *Green v. Freeman*, 367 N.C. 136, 141 (2013)). "North Carolina recognizes two types of fiduciary relationships: *de jure*, or those imposed by operation of law, and *de facto*, or those arising from the particular facts and circumstances constituting and surrounding the relationship." *Hager v. Smithfield E. Health Holdings, LLC*, 264 N.C. App. 350, 355 (2019).

97. Under North Carolina law, "[a] joint venture exists when there is: '(1) an agreement, express or implied, to carry out a single business venture with joint sharing of profits, and (2) an equal right of control of the means employed to carry out the venture.' " *Sykes*, 372 N.C. at 340–41 (quoting *Rifenburg Constr., Inc. v. Brier*

[166] (FAC ¶ 263; *see* Br. Opp'n Def.'s Mots. 20.)

Creek Assocs. Ltd. P'ship, 160 N.C. App. 626, 632 (2003), *aff'd per curiam*, 358 N.C. 218 (2004)). "[E]ach party to the joint venture [has] a right in some measure to direct the conduct of the other '*through a necessary fiduciary relationship*.' " *Se. Shelter Corp. v. BTU, Inc.*, 154 N.C. App. 321, 327 (2002) (quoting *Cheape v. Town of Chapel Hill*, 320 N.C. 549, 562 (1987)).

98. Prior to North Carolina's adoption of the UUNAA in 2006, the legal status of unincorporated associations at common law was uncertain. *See, e.g.*, *Venus Lodge No. 62, F. & A. M. v. Acme Benevolent Ass'n*, 231 N.C. 522, 526 (1950) ("At common law . . . an [unincorporated] association is not an entity, and has no existence independent of its members. This being true, an unincorporated association has no capacity at common law to contract; or to take, hold, or transfer property; or to sue or be sued." (cleaned up)); *Goard v. Branscom*, 15 N.C. App. 34, 38 (1972) ("The general rule deducible from the cases which have passed on the question is that the members of an unincorporated association are engaged in a joint enterprise[.]" (quoting 6 Am. Jur. 2d, Associations and Clubs, § 31)). In light of this ambiguity, the legislature adopted a modified version of the UUNAA for the "limited purpose of treating a group that acts together in nonprofit matters as a . . . legal entity" that is "separate and apart from its members for purposes of owning property and determining and enforcing third-party rights, duties and procedures." Robinson on N.C. Corp. Law § 35.03[1]; *see* N.C.G.S. § 59B-2 off. cmt. ¶¶ 1, 3; *id.* § 59B-5 off. cmt. ¶¶ 1–2.

99. Unlike North Carolina's statutes governing corporations, N.C.G.S. §§ 55-8-30, 31, nonprofit corporations, *id.* §§ 55A-8-30, 31, limited liability companies, *id.*

§§ 57D-2-21, 30, and partnerships, *id.* §§ 59-51, however, the UUNAA does not contain provisions imposing fiduciary duties on members of an unincorporated nonprofit association. Because the General Assembly has repeatedly shown that it knows how to impose fiduciary duties on various corporate actors by statute in similar contexts, the legislature should be presumed to have purposely chosen to exclude imposing fiduciary duties on members of an unincorporated nonprofit association under the UUNAA. *See, e.g.*, *N.C. Dep't of Revenue v. Hudson*, 196 N.C. App. 765, 768 (2009) ("When a legislative body includes particular language in one section of a statute but omits it in another section of the same [statute], it is generally presumed that the legislative body acts intentionally and purposely in the disparate inclusion or exclusion." (cleaned up)); *see also In re D.L.H.*, 364 N.C. 214, 221 (2010) (recognizing that "the absence of a similar provision in [a related statute] seems to indicate a legislative intent not to [reach the same result as under the related statute]"); *State v. Campbell*, 285 N.C. App. 480, 491 (2022) (applying similar reasoning when comparing two similar statutes).

100. Moreover, the Official Comment to the UUNAA explains that, "[b]ecause a nonprofit association is made a separate legal entity, *its members are not co-principals*." N.C.G.S. § 59B-7 off. cmt. ¶ 3 (emphasis added); *see also id.* § 59B-7 off. cmt. ¶ 1 ("At common law a nonprofit association was not a legal entity separate from its members. Borrowing from the law of partnership, the common law viewed a nonprofit association as an aggregate of its members. The members are co-principals. *Subsection (a) changes that*." (emphasis added)). A joint venture, however, "requires

that the parties to the agreement stand in the relation of principal, as well as agent, as to one another." *Se. Shelter Corp.*, 154 N.C. App. at 327. As the FSU Board notes, the ACC has not alleged that "the FSU Board (or any other individual [M]ember) on its own can bind the ACC or other members through its conduct."[167] Because "[o]ur Supreme Court has . . . held that a joint venture *does not exist* where each party to an agreement cannot direct the conduct of the other[,]" *Rifenburg Constr., Inc.*, 160 N.C. App. at 632 (citing *Pike v. Wachovia Bank & Tr. Co.*, 274 N.C. 1, 10 (1968)), an unincorporated nonprofit association does not qualify as a joint venture and, thus, the ACC cannot establish that a *de jure* fiduciary relationship existed between itself and FSU.[168]

101. In the absence of a *de jure* fiduciary relationship, the Court must determine whether the allegations in the FAC are sufficient to demonstrate that the relationship between the parties is one in which "there has been a special confidence reposed in one who in equity and good conscience is bound to act in good faith and with due regard to the interests of the one reposing confidence." *Dallaire*, 367 N.C. at 367 (quoting *Green*, 367 N.C. at 141). "The standard for finding a *de facto* fiduciary relationship is a demanding one: 'Only when one party figuratively holds all the cards—all the financial power or technical information, for example—have North

[167] (Reply Def.'s Mots. 11.)

[168] Although not yet adopted in North Carolina and thus not controlling, the Court notes that the revised UUNAA expressly states that "[a] member does not have any fiduciary duty to an unincorporated nonprofit association or to another member solely by reason of being a member." Rev. Unif. Unincorp. Nonprofit Ass'n Act § 17(a) (Nat'l Conf. Comm'rs on Unif. State Laws 2011).

Carolina courts found that the special circumstance of a fiduciary relationship has arisen.' " *Lockerman v. S. River Elec. Membership Corp.*, 250 N.C. App. 631, 636 (2016) (quoting *S.N.R. Mgmt. Corp. v. Danube Partners 141, LLC*, 189 N.C. App. 601, 613 (2008)). The ACC has failed to plead such a *de facto* fiduciary relationship here.

102. Under the ACC's Constitution, "all of the powers of the Conference shall be exercised by or under the authority of the Board, and all of the activities and affairs of the Conference shall be managed by or under the direction, and subject to the oversight, of the Board[.]"[169] The ACC Constitution further provides that "[t]he Board shall be composed of a representative of each Member (each a 'Director')"[170] and "[e]ach Director shall be entitled to one vote each."[171] FSU is but one of fifteen ACC Member Institutions[172] and has the power to cast just one of the votes necessary to approve any action taken by the ACC requiring Board approval. Conversely, the ACC cannot take any action requiring Board approval without the approval of its Board of Directors. As neither party can be said to "hold all the cards," a *de facto* fiduciary relationship between the ACC and the FSU Board does not exist on the pleaded facts.

103. The FSU Board makes one additional, albeit brief, argument in opposition to the ACC's breach of fiduciary duty claim, contending that "had the ACC [M]embers

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[169] (ACC Const. § 1.5.1.1; *see id.* § 1.6 (Board voting requirements); FAC ¶ 243.)

[170] (ACC Const. § 1.5.1.2; *see* FAC ¶ 244 ("As a Member Institution, [FSU] designated its President as a Member of the [ACC] Board of Directors.").)

[171] (ACC Const. § 1.6.2.)

[172] (FAC ¶ 1.)

wished to subject themselves to the fiduciary duties the ACC seeks to impose, they could have . . . included them in the . . . ACC Constitution and Bylaws[.]"[173] Although the UUNAA "contains no rules concerning governance[,]" N.C.G.S. § 59B-3 off. cmt. ¶ 2, "the [constitution] and bylaws of an association may constitute a contract between the organization and its members wherein the members are deemed to have consented to all reasonable regulations and rules of the organization,"[174] *Master v. Country Club of Landfall*, 263 N.C. App. 181, 187 (2018) (quoting *Gaston Bd. of Realtors, Inc.*, 311 N.C. at 237).

104. The ACC argues that the "provisions of the ACC Constitution that address conflicts of interest of withdrawing [M]embers[ ]" support its assertion that Member Institutions owe a fiduciary obligation "to the [Conference] not to defeat or destroy its common purpose."[175] The Court disagrees. The provision on which the ACC relies allows the ACC Board, *in its discretion*, to withhold information from or to exclude from a meeting or vote an expelled or withdrawing Member *if* the Board determines that a conflict of interest exists.[176] Whether such a conflict of interest exists is therefore discretionary; whether fiduciary duties exist, however, is not. The ACC does not point to any provision of the ACC's Constitution or Bylaws that affirmatively

[173] (Br. Supp. Def.'s Mots. 17.)

[174] The parties do not dispute that the ACC's Constitution and Bylaws are a contract between the ACC and its Member Institutions. (FAC ¶¶ 233, 267; *see* Br. Supp. Def.'s Mots. 16; Br. Opp'n Def.'s Mots. 8, 18.)

[175] (Br. Opp'n Def.'s Mots. 20; *see* FAC ¶¶ 257–64.)

[176] (*See* ACC Const. § 1.5.1.3.)

imposes fiduciary duties on current Members, nor is the Court able to find one. The ACC's breach of fiduciary duty claim therefore fails on this additional basis.

105. Because the FAC alleges that the ACC is an unincorporated nonprofit association under the UUNAA,[177] the ACC cannot establish the existence of a *de jure* fiduciary relationship with FSU under a joint venture theory. Nor has the ACC alleged sufficient facts to establish either the existence of a *de facto* fiduciary relationship or a contractual imposition of fiduciary duties under the ACC's Constitution and Bylaws. Thus, dismissal of this claim pursuant to Rule 12(b)(6) is proper both because "the complaint discloses some fact that necessarily defeats the plaintiff's claim[ ]" and "the complaint on its face reveals the absence of facts sufficient to make a good claim[.]" *Corwin*, 371 N.C. at 615 (citation omitted).

106. The Court will therefore grant the FSU Board's Motion to Dismiss the ACC's fifth claim for relief for breach of fiduciary duty and dismiss this claim with prejudice.

5. Breach of Implied Duty of Good Faith and Fair Dealing Under the ACC's Constitution and Bylaws

107. Finally, the FSU Board seeks to dismiss the ACC's claim for breach of the implied duty of good faith and fair dealing under the ACC's Constitution and Bylaws.[178] The FSU Board argues in conclusory fashion that "there is no basis in North Carolina law for the ACC's allegation that the FSU Board (or any other ACC

[177] (FAC ¶¶ 1–2, 6, 9, 17, 22–23, 233, 236.)

[178] (*See* Br. Supp. Def.'s Mots. 16–18; Reply Supp. Def.'s Mots. 10–11.)

[M]ember) owes any duties to the ACC beyond those reflected in the ACC's Constitution and [Bylaws]."[179] The Court disagrees.

108. North Carolina law has long recognized that a covenant of good faith and fair dealing is implied in every contract and requires the contracting parties not to "do anything which injures the rights of the other to receive the benefits of the agreement." *Bicycle Transit Auth. v. Bell*, 314 N.C. 219, 228 (1985) (citation omitted).[180]

109. As discussed above, to sustain a claim for breach of contract, the ACC need only plead "(1) [the] existence of a valid contract and (2) breach of the terms of that contract[,]" *Poor*, 138 N.C. App. at 26, to satisfy its burden under Rule 12(b)(6). The ACC alleges, and the FSU Board concedes, that the "ACC Constitution and Bylaws [are] . . . valid and enforceable contract[s] between the Conference and its Members[,]" including FSU.[181] The Conference further alleges that the FSU Board's "actions as detailed in this Amended Complaint violate its duty to act in good faith and fairly deal with the Conference."[182] Under our notice pleading standard, these

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[179] (Br. Supp. Def.'s Mots. 18; Reply Supp. Def.'s Mots. 11.)

[180] The revised UUNAA expressly adopts this concept, providing that "[a] member shall discharge the duties to the unincorporated nonprofit association and the other members and exercise any rights under this [act] consistent with the governing principles and contractual obligation of good faith and fair dealing." Rev. Unif. Unincorp. Nonprofit Ass'n Act § 17(b) (second alteration in original).

[181] (FAC ¶ 267; *see* FAC ¶ 233; Br. Supp. Def.'s Mots. 16; Br. Opp'n Def.'s Mots. 8, 18.)

[182] (FAC ¶ 271.)

allegations are sufficient to state a claim for breach of the duty of good faith and fair dealing under the ACC's Constitution and Bylaws.

110. The Court will therefore deny the FSU Board's Motion to Dismiss the ACC's claim against FSU for breach of its obligation of good faith and fair dealing under these governing documents.

V.

MOTION TO STAY

111. The FSU Board moves in the alternative to stay this first-filed action under N.C.G.S. § 1-75.12 in favor of its second-filed Florida Action.[183] The FSU Board argues that the Florida Action should take priority because it is "broader in scope,"[184] "more comprehensive,"[185] and in "the true proper forum for this case,"[186] and also because the ACC deserves no first-filing deference as a result of its improper forum shopping.[187]

112. The ACC argues in opposition that a North Carolina court, not a Florida court, should determine the claims of a North Carolina organization concerning the validity and breach of contracts governed by North Carolina law and further that the

[183] (*See* Def.'s Mots. ¶ 3.)

[184] (Br. Supp. Def.'s Mots. 26.)

[185] (Br. Supp. Def.'s Mots. 1.)

[186] (Br. Supp. Def.'s Mots. 18.)

[187] (*See* Br. Supp. Def.'s Mots. 21–25; Reply Supp. Def.'s Mots. 11–13.)

FSU Board has failed to offer any evidence that FSU would suffer "substantial injustice" should this litigation proceed in North Carolina.[188]

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

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

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

114. Our appellate courts have held that

> [i]n determining whether to grant a stay under [N.C.]G.S. § 1-75.12, the trial court may consider the following factors: (1) the nature of the case, (2) the convenience of the witnesses, (3) the availability of compulsory process to produce witnesses, (4) the relative ease of access to sources of proof, (5) the applicable law, (6) the burden of litigating matters not of local concern, (7) the desirability of litigating matters of local concern in local courts, (8) convenience and access to another forum, (9) choice of forum by plaintiff, and (10) all other practical considerations.

Laws. Mut. Liab. Ins. Co. of N.C. v. Nexsen Pruet Jacobs & Pollard, 112 N.C. App. 353, 356 (1993).

115. "[I]t is not necessary that the trial court find that *all* factors positively support a stay, as long as it is able to conclude that (1) a substantial injustice would result if the trial court denied the stay, (2) the stay is warranted by those factors present, and (3) the alternative forum is convenient, reasonable, and fair." *Id.* at 357.

[188] (*See* Br. Opp'n Def.'s Mots. 21–27.)

And while "the trial court need not consider every factor," *Muter*, 203 N.C. App. at 132, the court will abuse its discretion when it "abandons any consideration of these factors[,]" *Laws. Mut. Liab. Ins. Co.*, 112 N.C. App. at 357.

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

117. Much of the parties' focus in their briefing and at the Hearing is on *Lawyers Mutual*'s ninth factor—whether the ACC's choice of its North Carolina home forum is entitled to deference. North Carolina "[c]ourts generally give great deference to a plaintiff's choice of forum, and a defendant must satisfy a heavy burden to alter that choice by . . . staying the case." *Wachovia Bank v. Deutsche Bank Tr. Co. Ams.*, 2006 NCBC LEXIS 10, at *18 (N.C. Super. Ct. June 2, 2006). This is particularly true when the plaintiff chooses to file suit in its home forum. *See, e.g.*, *La Mack v. Obeid*, 2015 NCBC LEXIS 24, at *16–17 (N.C. Super. Ct. Mar. 5, 2015) ("[A] plaintiffs' choice of forum ordinarily is given great deference, especially when plaintiffs select their home forum to bring suit.").

118. This Court has recognized, however, that "[t]he amount of deference due . . . varies with the circumstances," *Cardiorentis AG v. IQVIA Ltd.*, 2018 NCBC LEXIS 243, at *8 (N.C. Super. Ct. Dec. 31, 2018), *aff'd*, 373 N.C. 309, 314 (2020), and that "when plaintiffs file a complaint merely as a strategic maneuver to choose a

favorable forum, 'first-filed' priority may be denied." *La Mack*, 2015 NCBC LEXIS 24, at *17. As our Court of Appeals has explained:

> [I]n situations in which two suits involving overlapping issues are pending in separate jurisdictions, priority should not necessarily be given to a declaratory suit simply because it was filed earlier. Rather, if the plaintiff in the declaratory suit was on notice at the time of filing that the defendant was planning to file suit, a court should look beyond the filing dates to determine whether the declaratory suit is merely a strategic maneuver to achieve a preferable forum.

Coca-Cola Bottling Co. Consol. v. Durham Coca-Cola Bottling Co., 141 N.C. App. 569, 579 (2000).

119. The FSU Board argues that the ACC's choice of forum is not entitled to deference because the ACC engaged in improper "procedural fencing"[189] by pre-emptively filing this action against the FSU Board, the "true" or "natural" plaintiff, without required ACC Board approval, "to attain what it presumes to be a more favorable forum[ ]" after learning that the FSU Board had scheduled an emergency board meeting for the following day.[190] The FSU Board cites to numerous cases that have denied first-filer advantage when a natural defendant files a declaratory judgment action in what it perceives to be a more favorable forum when it is aware that the natural plaintiff's lawsuit is imminent.[191]

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[189] *See Coca-Cola Bottling Co. Consol.*, 141 N.C. App. at 579 ("[A] declaratory suit should not be used as a device for 'procedural fencing.' ").

[190] (Br. Supp. Def.'s Mots. 23–24; *see* Reply Supp. Def.'s Mots. 12.)

[191] *See Coca-Cola Bottling Co. Consol.*, 141 N.C. App. at 579 ("A defendant in a pending lawsuit should not be permitted to bring a declaratory suit involving overlapping issues in a different jurisdiction as a strategic means of obtaining a more preferable forum. Otherwise, the natural plaintiff in the underlying controversy would be deprived of its right to choose the forum and time of suit."); *see also Poole*, 209 N.C. App. at 143; *Harleysville Mut. Ins. Co. v. Narron*, 155 N.C. App. 362 (2002); *Harris Teeter Supermarkets, Inc. v. Ace Am. Ins. Co.*,

120. The ACC contends in opposition that the FSU Board started any "race to the courthouse" and that its "grievance is . . . that it lost."[192] The ACC argues that "since before August 2023 FSU intended to breach the Grant of Rights through litigation[ ]" and that "when the [FSU] Board convened a meeting on the last business day before the Christmas Holiday for an 'emergency' matter, it did so to try to be the first to file a lawsuit, a lawsuit which it had already publicly released, and which its counsel was poised to file immediately."[193] As such, the ACC argues that "once it became apparent that FSU intended to breach its obligations by filing a lawsuit, the ACC had the right to sue to settle the validity of the Grant of Rights, and to do so in the state whose law applied and where the ACC is headquartered, North Carolina."[194]

121. After careful review, the Court concludes on the allegations and facts of record here that the ACC's choice of forum is entitled to deference as the party first to file. To begin, it is clear, as the FSU Board argues and the ACC acknowledges, that the ACC filed its action on 21 December 2023 because it correctly anticipated that the FSU Board intended to file the Florida Action the following day soon after

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2023 NCBC LEXIS 125, at *52 (N.C. Super. Ct. Oct. 10, 2023); *La Mack*, 2015 NCBC LEXIS 24, at *18–20; *Wachovia Bank, Nat'l Ass'n v. Harbinger Cap. Partners Master Fund I, Ltd.*, 2008 NCBC LEXIS 6, at *20 (N.C. Super. Ct. Mar. 13, 2008), *aff'd* 201 N.C. 507 (2009); *N. Am. Roofing Servs., Inc. v. BPP Retail Props., LLC*, No. 1:13-cv-000119-MR-DLH, 2014 U.S. Dist. LEXIS 35193, at *9–10 (W.D.N.C. 2014); *Klingspor Abrasives, Inc. v. Woolsey*, No. 5:08CV-152, 2009 U.S. Dist. LEXIS 66747, at *11 (W.D.N.C. July 31, 2009); *Nutrition & Fitness, Inc. v. Blue Stuff, Inc.*, 264 F. Supp. 2d 357, 361 (W.D.N.C. 2003).

[192] (Br. Opp'n Def.'s Mots. 21–22.)

[193] (Br. Opp'n Def.'s Mots. 21–22.)

[194] (Br. Opp'n Def.'s Mots. 24.)

the FSU Board was scheduled to vote to approve the filing of the Florida Action. The FSU Board argues that the ACC's litigation conduct is paradigmatic "procedural fencing" that should cause the Court to reject any first-filer advantage for the ACC.[195] *See, e.g.*, *Coca-Cola Bottling Co. Consol.*, 141 N.C. App. at 579 (finding "procedural fencing" when a "potential defendant [which] anticipates litigation by the natural plaintiff in a controversy" is the first to file); *Poole*, 209 N.C. App. at 141–42 (applying *Coca-Cola Bottling Co. Consol.* to dismiss claim where "natural defendant" denied "natural plaintiff" its forum of choice).

122. But the FSU Board's argument hinges on its erroneous view that it is the only "natural" plaintiff in this dispute. The "natural" or "real" plaintiff in a civil suit is the party that has allegedly suffered damages at the hands of its opponent. *Coca-Cola Bottling Co. Consol.*, 141 N.C. App. at 579–80. Here, that is the ACC, which alleges that the FSU Board intended to breach the covenants not to sue in the Grant of Rights Agreements.[196] The parties did not simply race to the courthouse to resolve their dispute over the agreements' terms; to the contrary, the ACC sued because the FSU Board's alleged breach of those agreements was a practical certainty that threatened the ACC with imminent and unavoidable injury as a result. *See, e.g.*, *River Birch Assocs.*, 326 N.C. at 129 (finding standing where an association member suffers "immediate or threatened injury"). In other words, it is the ACC, as the non-breaching party, rather than the FSU Board, as the alleged breaching party, that is

[195] (Br. Supp. Def.'s Mots. 24.)

[196] (*See* FAC ¶¶ 134, 136, 142, 149, 181, 206, 209–11.)

the injured party in this dispute, *see Coca-Cola Bottling Co. Consol.*, 141 N.C. App. at 579, and "the one who wishes to present a grievance for resolution by a court," *Cree, Inc. v. Watchfire Signs, LLC*, No. 1:20CV198, 2020 U.S. Dist. LEXIS 223801, at *15 (M.D.N.C. Dec. 1, 2020) (quoting *Piedmont Hawthorne Aviation, Inc. v. TriTech Env't Health and Safety, Inc.*, 402 F. Supp. 2d 609, 616 (2005)).

123. As such, the Court concludes that the ACC is a "natural" plaintiff in its dispute with the FSU Board. Thus, even assuming the FSU Board is a "natural" plaintiff because it is the one challenging the enforceability of the Grant of Rights Agreements as the FSU Board contends, the fact that the ACC is also a "natural" plaintiff is sufficient for the ACC to maintain its first-filer advantage. *See, e.g.*, *Wachovia Bank*, 2006 NCBC LEXIS 10, at *18 (recognizing the "heavy burden" a defendant must satisfy "to alter [a plaintiff's choice of forum] by . . . staying the case").

124. The Court's rejection of the FSU Board's attack on the ACC's choice of forum finds further support from numerous courts within and without North Carolina that have refused to stay a first-filed declaratory judgment action where, as here, both the first- and second-filed actions involve the same agreements and seek the same relief. *See, e.g.*, *IQVIA, Inc. v. Cir. Clinical Sols.*, 2022 NCBC LEXIS 105, *4–5 (N.C. Super. Ct. Sept. 14, 2022) (staying second-filed action where both the first- and second-filed actions involved the same declaratory and injunctive relief); *Baldelli v. Baldelli*, 249 N.C. App. 603, 608 (2016) (remanding with instructions to hold second-filed action in abeyance and noting that when there is a "clear interrelationship of the issues,"

allowing "both actions to proceed concurrently would be to invite conflict between the resolution of interrelated issues in the two actions[ ]"); *see also, e.g.*, *Sorena v. Gerald J. Tobin, P.A.*, 47 So. 3d 875, 878–89 (Fla. 3d Dist. Ct. App. 2010) (staying second-filed action involving "substantially similar" parties and claims "stem[ming] from the same set of facts"); *Caspian Inv., Ltd. v. Vicom Holdings, Ltd.*, 770 F. Supp. 880, 884 (S.D.N.Y. 1991) (staying second-filed action where "both actions involve[d] interpretation of the same loan agreements" and "[sought] the same relief"); *Fuller v. Abercrombie & Fitch Stores, Inc.*, 370 F. Supp. 2d 686, 690 (E.D. Tenn. 2005) (staying second-filed action, even though the second-filed case brought an additional claim, because both actions contested the same issue).

125. Based on the above, the Court cannot conclude, as the FSU Board contends, that the ACC's filing was "nothing more than an attempt to deny the FSU Board (i.e., the true plaintiff) from prosecuting its claims in its chosen venue."[197] Rather than seek to avoid unfavorable law, *see, e.g.*, *Harris Teeter Supermarkets, Inc.*, 2023 NCBC LEXIS 125, at *51 n.16, or deny a party who has suffered actual damages its choice of forum, *see, e.g.*, *Coca-Cola Bottling Co. Consol.*, 141 N.C. App. at 578—circumstances typically found to constitute improper forum shopping—the ACC chose to put its interpretation of its North Carolina contracts and their covenants not to sue before a North Carolina court once the FSU Board's breach of those contracts was imminent. *See, e.g.*, *Pilot Title Ins. Co. v. Nw. Bank*, 11 N.C. App. 444, 449 (1971) ("[J]urisdiction lies where the court is convinced that litigation, sooner or later,

[197] (Reply Supp. Def.'s Mots. 12.)

appears to be unavoidable[.]"). As such, the ACC did not engage in improper conduct or "procedural fencing" in filing this action in North Carolina. Accordingly, considering all of the facts and circumstances surrounding the filing of this action and the Florida Action, the Court concludes, in the exercise of its discretion, that the ACC's choice of forum is entitled to deference on this record.

126. The Court further concludes that the nature of the case and the applicable law strongly favor allowing this matter to proceed in North Carolina. The key contracts in this case—the Grant of Rights and the Amended Grant of Rights—were made in North Carolina and are governed by North Carolina law. *See, e.g.*, *Tom Togs, Inc. v. Ben Elias Indus. Corp.*, 318 N.C. 361, 365 (1986) ("Under North Carolina law, a contract is made in the place where the last act necessary to make it binding occurred."). The ACC's Constitution and Bylaws are also at issue, and as the ACC's governing documents, they too are governed by North Carolina law. *See, e.g.*, *Futures Grp., Inc. v. Brosnan*, 2023 NCBC LEXIS 7, at *6 (N.C. Super. Ct. Jan. 19, 2023) ("North Carolina courts apply the substantive law of the incorporating state when deciding matters of internal governance."). In addition, the FSU Board's claims in the Florida Action and its anticipated defenses and compulsory counterclaims in this action are based on the ACC's decisions and conduct in North Carolina. And while the Court recognizes that certain of the FSU Board's anticipated defenses and anticipated counterclaims may be governed by Florida law, and that the ACC's damages claims challenge, at least in part, the FSU Board's conduct in Florida, the

core issue presented in the two actions—i.e., the enforceability of the two Grant of Rights Agreements—favors resolution before a North Carolina court.[198]

127. The Court also finds that the burden of litigating matters not of local concern and the desirability of litigating matters of local concern in local courts strongly favor the litigation of this matter in North Carolina. The ACC has been based in North Carolina for over seventy years and recently received a tax incentive from the State of North Carolina to locate its headquarters in Charlotte.[199] Four of its Member Institutions are located in North Carolina—more Members than from any other State—and only two Members of the ACC's fifteen current Members are in Florida.[200] FSU has attended numerous meetings, served in Conference leadership positions, and participated in hundreds of athletic contests in North Carolina since it joined the ACC in 1991,[201] and, as noted, many of the decisions about which the FSU Board

[198] While the FSU Board has raised certain defenses that likely implicate Florida law, the FSU Board's contention that "this case involves important jurisdictional issues of sovereign immunity waiver under Fla. Stat. §§ 1001.72 and 768.28 that should be interpreted and decided by a Florida court more familiar with the intent and application of these statutes[,]" (Br. Supp. Def.'s Mots. 25), is without merit. The FSU Board initiated the Florida Action and thereby consented to suit in Florida; thus, there are no issues of sovereignty immunity waiver to be determined in Florida. Sovereign immunity waiver is only at issue in this litigation and therefore is only before this Court for determination.

[199] (*See* FAC ¶¶ 1, 11, 32.)

[200] (*See* FAC ¶¶ 1, 16.)

[201] (*See* FAC ¶¶ 8–10, 16, 94–97, 112.)

complains occurred at the ACC's headquarters in North Carolina.[202] The FSU Board has also previously participated in litigation in North Carolina without complaint.[203]

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

129. The Court also concludes that the convenience of witnesses and the ease of access to proof favor proceeding in North Carolina. While the FSU Board did not specifically address these factors in its briefing or at the Hearing, the ACC has identified by name several material witnesses who reside in North Carolina and other

[202] (*See* FAC ¶¶ 11–15, 52–53, 69, 105.)

[203] Indeed, the FSU Board voted to approve the ACC's initiation of litigation in North Carolina against the University of Maryland in 2012, (*see* Br. Supp. Def.'s Mots. Ex. 2 ¶ 39, ECF No. 19.2), and FSU's General Counsel submitted an affidavit in that litigation seeking the disqualification of the University of Maryland's counsel for a conflict of interest, (*see* Br. Opp'n Def.'s Mots. Ex. 5, ECF No. 31.5.)

material witnesses who do not reside in Florida.[204] The ACC has also represented that its servers, records, Board minutes, and agreements with ESPN are located in North Carolina.[205] Without opposing argument or evidence from the FSU Board, the Court concludes these factors weigh against the FSU Board's requested stay.

130. In addition to its arguments on the ACC's choice of forum, the FSU Board argues that this Court should defer to the Florida Action because it is broader in scope than this action. *See, e.g.*, *Coca-Cola Bottling Co. Consol.*, 141 N.C. App. at 578 (recognizing that "the interests of judicial economy and efficiency weigh in favor of suits that will settle all of the issues in the underlying controversy"). While the Florida Action may be broader in scope at this pre-answer stage of the litigation, the FSU Board ignores that its defenses and compulsory counterclaims will likely broaden the scope of this action to the same extent as the Florida Action once they are asserted. As a result, the Court does not give substantial weight to this factor in its analysis.

131. Considering the *Lawyers Mutual* factors as discussed above, both independently and in combination, and balancing the equities present in these circumstances, the Court concludes, in the exercise of its discretion, that the stay that the FSU Board requests is not warranted under *Lawyers Mutual* and that proceeding with this action in North Carolina would not work a "substantial injustice" on the FSU Board. The Court concludes, as discussed above, that (1) the nature of the case,

[204] (*See* Br. Opp'n Def.'s Mots. 26 n.16, 17.)

[205] (*See* Br. Opp'n Def.'s Mots. 27.)

(2) the convenience of the witnesses, (4) the relative ease of access to sources of proof, (5) the applicable law, (6) the burden of litigating matters not of local concern, (7) the desirability of litigating matters of local concern in local courts, and (9) the ACC's choice of the North Carolina forum, when considered in combination, decisively outweigh the FSU Board's choice of the Florida forum for the determination of the enforceability of the Grant of Rights Agreements and the resolution of the ACC's damages claims against the FSU Board for breach of those agreements. Accordingly, the Court, in the exercise of its discretion, will deny the FSU Board's alternative Motion to Stay under section 1-75.12(a).

VI.

CONCLUSION

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

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

b. The Court otherwise **DENIES** the FSU Board's Motion to Dismiss; and

c. The Court, in the exercise of its discretion, **DENIES** the FSU Board's alternative Motion to Stay.

SO ORDERED, this the 4th day of April, 2024.

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

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.

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-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.

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-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.

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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-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.

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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-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.

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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-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.

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-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.

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-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.

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-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.

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-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.

End of Document

Judge John Cooper
April 09, 2024

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

CASE NO.: 2023-CA-2860

FLORIDA STATE UNIVERSITY BOARD OF TRUSTEES,

Plaintiff,

vs.

ATLANTIC COAST CONFERENCE,

Defendant.
_____/

TRANSCRIPT OF:

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

VOLUME 1 (Pages 1 - 109)

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

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

JUDY LYNN MARTIN, STENOGRAPHER

Job No. : 352008

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

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

Any objection to that?

MR. RUSH: No, Your Honor.

THE COURT: I've looked through it.

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

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

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

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

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

MR. RUSH: No, Your Honor.

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

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

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

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

(Pause)

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

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

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

MR. RUSH: Sure.

THE COURT: Wouldn't the act -- I thought Black's Law Dictionary on material -- I think it was material. Material, it says, Black's is known for being to the point. It says important and more or less necessary, so I do think it was material.

However, it seems to me this is similar to what I pointed out is the condition precedent that I don't know that I can get into the does it relay back or not. But certainly from the point the vote was taken forward, the bylaw or the requirement had been met.

Now, I'm not saying that that dilutes your argument on the first filing that was ultra vires. I liken it more to -- I made myself a note in the corner of one of these memos that if it was an ultra vires act at that time --

MR. RUSH: Yes.

THE COURT: I'm not saying I agree or disagree with the judge because I don't know exactly what he said.

MR. RUSH: Sure.

THE COURT: But I can see a scenario where one might say the problem is cured just like compliance with Chapter 768.28 pre-suit notice is, quote,

STATE OF NORTH CAROLINA
COUNTY OF MECKLENBURG

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
2023CVS40918

Atlantic Coast Conference,

Plaintiff,

v.

Board of Trustees of Florida State University,

Defendant.

(Pages 1 to 148)

Friday,
March 22, 2024

Transcript of Proceedings

Courtroom 6370 - 9:30 a.m.

Business Court Rule 9.3 Case Management Conference

(i) Plaintiff Atlantic Coast Conference's Amended Motion to Seal, (ECF No. 9);

(ii) Defendant Board of Trustees of Florida State University's Motion to Dismiss or, in the Alternative, Stay the Action, (ECF No. 19); and

(iii) Plaintiff Atlantic Coast Conference's Motion to Seal Summary Exhibit ECF No. 24.2, (ECF No. 25).

The Honorable Lewis A. Bledsoe, III, Judge Presiding

JOYCE K. HUSEBY, CRR-RMR
Official Court Reporter
26th Judicial District

don't know if they trust me after today.

MR. KING: That's fine with us, your Honor.

THE COURT: All right. Then I won't enter an order. It's my expectation, then, that you all will honor your handshake and you won't engage in discovery.

It is my intention to issue a written order deciding the Motion to Dismiss as promptly as I can. I anticipate that that will be before April 9th, which is when I know the Florida hearing is set. I will endeavor to do that. I believe I will be able to do that. So that's my intention, is to enter a written ruling prior to April 9. I will not commit to having the Motion to Seal filed by then, although I may. I think the Motion to Dismiss or Motion to Stay is of a more immediate import.

Anything else we need to discuss? I will go with the defendants first.

MR. KING: Nothing from the defendant, your Honor. Thank you.

THE COURT: From the ACC?

MR. COONEY: Nothing from the plaintiff, your Honor.

THE COURT: What about ESPN?

MR. KORN: No, your Honor.

THE COURT: Thank you very much. I appreciate everybody's good work today. These were enlightening