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

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

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

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

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

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

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

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

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

[8] (*See* FAC ¶¶ 8, 36.)

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

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

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

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[9] (*See* FAC ¶¶ 13 n.2, 42–43.)

[10] (*See* FAC ¶ 42.)

[11] (FAC ¶ 55.)

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

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

[14] (*See* FAC ¶¶ 44, 54.)

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

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

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

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

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

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

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

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

[18] (FAC ¶ 77.)

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

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

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

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

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

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

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

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

[25] (*See* FAC ¶¶ 138–40, 161–62.)

[26] (FAC ¶ 111.)

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

[28] (FAC ¶ 122.)

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

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

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

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[29] (FAC ¶ 124 (emphasis omitted).)

[30] (*See* FAC ¶¶ 129–32.)

[31] (*See* FAC ¶ 143.)

[32] (FAC ¶¶ 148–49.)

[33] (Compl. ¶¶ 116–46.)

[34] (FAC ¶ 154.)

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

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

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

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[35] (FAC ¶ 155.)

[36] (FAC ¶ 153.)

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

[38] (*See* FAC ¶¶ 173–273.)

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

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

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

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

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

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

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

[43] (Def.'s Mots. ¶¶ 2–3.)

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

II.

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

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

A. Legal Standard

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

[45] (Def.'s Mots. ¶¶ 2(a), (b).)

[46] (Def.'s Mots. ¶ 2(c).)

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

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

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

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

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

B. Analysis

1. Actual and Justiciable Controversy

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

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

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

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

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

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

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

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

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

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

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[50] (Grant of Rights ¶ 6.)

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

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

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

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

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

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

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

[55] (Compl. ¶ 97; FAC ¶ 120.)

[56] (Compl. ¶ 99; FAC ¶ 122.)

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

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

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

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

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

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

[61] (FAC ¶¶ 154–55.)

[62] (FAC ¶ 153.)

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

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

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

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

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

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

2. Condition Precedent to Initiating Suit

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

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

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

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

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

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

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

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

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

[69] (Compl. ¶ 1; FAC ¶ 1.)

[70] (Compl. ¶ 2; FAC ¶ 2.)

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

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

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

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

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

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

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

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

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

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

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

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

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

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

[75] (FAC ¶ 181; *see* Compl. ¶ 124.)

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

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

[78] (FAC ¶¶ 153–55.)

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

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

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

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

[80] (FAC ¶ 249.)

[81] (FAC Prayer for Relief ¶ 1.)

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

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

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

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[82] (ACC Const. § 1.6.2.)

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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[91] (Hostetter Aff.)

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

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

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

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

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

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

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

[94] (ACC Const. § 1.5.1.5.1.)

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

[96] (Hostetter Aff. ¶¶ 3, 5.)

[97] (*See* Hostetter Aff. ¶ 5.)

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

3. Sovereign Immunity

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

[104] (*See* FAC ¶¶ 1–2.)

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

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

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[105] (FAC ¶ 7; *see* FAC ¶¶ 8, 36.)

[106] (FAC ¶ 8.)

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

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

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

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

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

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

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

[110] (FAC ¶ 28.)

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

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

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

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

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

[114] (FAC ¶ 60.)

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

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

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

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

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

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

III.

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

A. Legal Standard

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

[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

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[124] (FAC ¶¶ 209–11.)

[125] (Br. Supp. Def.'s Mots. 15–16.)

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

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

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[126] (FAC ¶¶ 56–57, 69.)

[127] (FAC ¶ 58.)

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

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

[130] (FAC ¶¶ 68, 71, 73, 111.)

[131] (*See* FAC ¶¶ 205–11.)

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

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

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[132] (*See* FAC ¶¶ 84, 87–90, 109.)

[133] (FAC ¶ 99.)

[134] (FAC ¶ 100.)

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

[136] (*See* FAC ¶¶ 205–11.)

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

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

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

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

[138] (FAC ¶ 186.)

[139] (FAC ¶ 197.)

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

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

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[140] (FAC ¶ 200.)

[141] (FAC ¶ 197.)

[142] (FAC ¶ 191.)

[143] (FAC ¶ 187.)

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

[145] (FAC ¶ 203.)

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

2. Declaratory Judgment Claims

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

3. Breach of Obligation to Protect Confidential Information

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

[146] (FAC ¶¶ 173–203.)

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

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

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

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

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

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

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[149] (Br. Supp. Def.'s Mots. 16–17.)

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

[151] (*See* FAC ¶ 78.)

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

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

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

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[153] (FAC ¶ 220.)

[154] (FAC ¶ 221.)

[155] (*See* FAC ¶¶ 138, 222.)

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

[157] (*See* FAC ¶¶ 139, 162, 224.)

[158] (*See* FAC ¶¶ 163–72, 225–29.)

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

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

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

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

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

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

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

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

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

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

[163] (FAC ¶ 240.)

[164] (FAC ¶ 241.)

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

[171] (ACC Const. § 1.6.2.)

[172] (FAC ¶ 1.)

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

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

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

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

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

[176] (*See* ACC Const. § 1.5.1.3.)

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

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

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

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

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

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

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

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

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

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

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

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

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

[182] (FAC ¶ 271.)

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

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

V.

MOTION TO STAY

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

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

[183] (*See* Def.'s Mots. ¶ 3.)

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

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

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

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

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

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

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

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

114. Our appellate courts have held that

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

[192] (Br. Opp'n Def.'s Mots. 21–22.)

[193] (Br. Opp'n Def.'s Mots. 21–22.)

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

[199] (*See* FAC ¶¶ 1, 11, 32.)

[200] (*See* FAC ¶¶ 1, 16.)

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

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

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

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

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

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

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

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

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

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

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

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

VI.

CONCLUSION

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

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

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

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

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

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