

STATE OF NORTH CAROLINA  
MECKLENBURG COUNTY

IN THE GENERAL COURT OF JUSTICE  
SUPERIOR COURT DIVISION  
23CV040918-590

ATLANTIC COAST CONFERENCE,

Plaintiff,

v.

BOARD OF TRUSTEES OF  
FLORIDA STATE UNIVERSITY,

Defendant.

**ORDER AND OPINION STAYING  
ACTION PENDING APPEAL**

1. **THIS MATTER** is before the Court *sua sponte* to address the Court's jurisdiction over the above-captioned case in light of Defendant Board of Trustees of Florida State University's (the "FSU Board") recent appeal of a portion of the Court's Order entered on 4 April 2024.<sup>1</sup>

2. Having considered the parties' status reports,<sup>2</sup> the arguments of counsel at the hearing on this issue, and other relevant evidence of record, the Court hereby **STAYS** all proceedings in this action, including discovery, for the reasons set forth below.

*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.*

*Greenberg Traurig, LLP, by Peter G. Rush, David C. Ashburn, and John K. Londot, and Bradley Arant Boult Cummings LLP, by Christopher C. Lam, C. Bailey King, Jr., Hanna E. Eickmeier, and Brian M. Rowlson, for Defendant Board of Trustees of Florida State University.*

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<sup>1</sup> (Notice Appeal, ECF No. 60.)

<sup>2</sup> (See Pl. Atl. Coast Conf.'s Status Rep. [hereinafter "ACC's Status Rep."], ECF No. 64; Def.'s Status Rep. After Appeal [hereinafter "FSU Bd.'s Status Rep."], ECF No. 65.)

Bledsoe, Chief Judge.

I.

PROCEDURAL HISTORY

3. On 4 April 2024, the Court entered its Order and Opinion on Defendant’s Motion to Dismiss or, in the Alternative, Stay the Action (the “April 4 Order”). *Atl. Coast Conf. v. Bd. of Trs. of Fla. State Univ.*, 2024 NCBC LEXIS 53 (N.C. Super. Ct. Apr. 4, 2024). Through the April 4 Order, the Court substantially denied the FSU Board’s motion to dismiss Plaintiff Atlantic Coast Conference’s (the “ACC”) First Amended Complaint.<sup>3</sup> *See id.* at \*80. Of particular relevance here, the Court denied the FSU Board’s motion to dismiss pursuant to Rule 12(b)(2) of the North Carolina Rules of Civil Procedure (the “Rule(s)”), determining that the FSU Board has waived its sovereign immunity to suit in North Carolina and is therefore subject to personal jurisdiction in this Court. *See id.* at \*43. The Court also denied the FSU Board’s alternative motion for a stay. *See id.* at \*79–80.

4. The FSU Board appealed the Court’s Rule 12(b)(2) ruling in the April 4 Order to the Supreme Court of North Carolina on 9 April 2024.<sup>4</sup> The FSU Board contends on appeal that this Court erred in concluding that the “FSU Board has waived sovereign immunity and is therefore subject to personal jurisdiction in the

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<sup>3</sup> The Court granted the FSU Board’s motion to the extent it sought to dismiss the ACC’s breach of fiduciary duty claim, and the Court dismissed that claim with prejudice. *See id.* at \*56–66, \*80.

<sup>4</sup> (*See Notice Appeal 1.*)

State of North Carolina.”<sup>5</sup> The FSU Board further represents that it intends to seek review of this Court’s denial of “the FSU Board’s request for stay of the trial court proceedings by means of a writ of certiorari to th[e Supreme Court] as expressly provided by [N.C.G.S.] § 1-75.12(c) and Rule 21 of the North Carolina Rules of Appellate Procedure.”<sup>6</sup>

5. On 10 April 2024, the Court entered a *Sua Sponte* Order for Status Report After Appeal (the “*Sua Sponte* Order”) directing the parties to meet, confer, and thereafter file either a joint status report or separate status reports regarding “the effect of N.C.G.S. § 1-294 on this litigation in light of the Notice of Appeal.”<sup>7</sup> The parties submitted their status reports in compliance with the *Sua Sponte* Order on 16 April 2024.<sup>8</sup>

6. The ACC and the FSU Board appear to agree that this Court’s denial of the FSU Board’s Rule 12(b)(2) motion to dismiss for lack of personal jurisdiction based on sovereign immunity in the April 4 Order is immediately appealable and that N.C.G.S. § 1-294 automatically divests this Court of jurisdiction over this matter, at least in part, pending the Supreme Court’s resolution of the FSU Board’s appeal. Their

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<sup>5</sup> (Notice Appeal 1.) The FSU Board does not contend that it is immune from suit in *any* jurisdiction; rather, the FSU Board argues that it has consented to be sued, but only in the State of Florida. (See FSU Bd.’s Br. Supp. Def.’s Mot. Dismiss or, in the Alt., Stay Action 13–15, ECF No. 20.)

<sup>6</sup> (Notice Appeal 2.)

<sup>7</sup> (*Sua Sponte* Order Status Rep. After Appeal 1, ECF No. 61.)

<sup>8</sup> (See ACC’s Status Rep.; FSU Bd.’s Status Rep.)

current dispute centers on the extent of the Court’s authority over this matter until the appeal is resolved.<sup>9</sup>

7. The Court held a hearing on this issue on 2 May 2024 at which both parties were represented by counsel (the “Hearing”). The matter is now ripe for resolution.

## II.

### LEGAL STANDARD AND ANALYSIS

8. “Under North Carolina law, the longstanding general rule [as codified by N.C.G.S. § 1-294] is that an appeal divests the trial court of jurisdiction over a case until the appellate court returns its mandate.” *Plasman v. Decca Furniture (USA), Inc.*, 253 N.C. App. 484, 490–91 (2017) (collecting cases). More specifically, N.C.G.S. § 1-294 provides that a perfected appeal “stays all further proceedings in the court below upon the judgment appealed from, or upon the matter embraced therein, unless otherwise provided by the Rules of Appellate Procedure[.]”<sup>10</sup> N.C.G.S. § 1-294. A trial court may, however, “proceed upon any other matter included in the action and not affected by the judgment appealed from.” *Id.*

9. Interlocutory orders, however, “are not immediately appealable unless the order in question affects a substantial right.” *State ex rel. Stein v. Kinston Charter*

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<sup>9</sup> (See ACC’s Status Rep. 2–4; FSU Bd.’s Status Rep. 2–4.)

<sup>10</sup> At the Hearing, counsel for both parties advised that the appeal has not yet been perfected but is expected to be perfected in due course. For purposes of this Order, the Court assumes without deciding that perfection will occur within the ordinary course, and therefore, will relate back to the filing of the Notice of Appeal. See *Woodard v. N.C. Loc. Governmental Emps.’ Ret. Sys.*, 110 N.C. App. 83, 87 (1993) (citing *Lowder v. All Star Mills, Inc.*, 301 N.C. 561, 580 (1981)).

*Acad.*, 379 N.C. 560, 571 (2021). In such cases, our Supreme Court has determined that

[w]hen a litigant takes an appeal to the Supreme Court from an appealable interlocutory order of the Superior Court and perfects such appeal in conformity to law, the appeal operates as a stay of all proceedings in the Superior Court relating to the issues included therein until the matters are determined in the Supreme Court.

*Plasman*, 253 N.C. App. at 491–92 (quoting *Veazey v. Durham*, 231 N.C. 357, 363 (1950)). As a result, “[t]he lower court only retains jurisdiction to take action which aids the appeal and to hear motions and grant orders that do not concern the subject matter of the suit and are not affected by the judgment that has been appealed.” *Ross v. Ross*, 194 N.C. App. 365, 368 (2008); see also *State ex rel. Stein v. E.I. Du Pont de Nemours & Co.*, No. 20 CVS 5612, 2021 WL 5546057, at \*1 (N.C. Super. Ct. Oct. 29, 2021) (“A trial court retains authority to handle matters that do not raise a question involved in the then-pending appeal, or to otherwise decide issues that will not be before the appellate court for review and decision on appeal.” (cleaned up)).

10. Under N.C.G.S. § 1-277(b), a litigant has a “right of immediate appeal from an adverse ruling” on a motion to dismiss for lack of personal jurisdiction when the “challenge is substantive rather than merely procedural.” *Hart v. F.N. Thompson Constr. Co.*, 132 N.C. App. 229, 231 (1999) (quoting N.C.G.S. § 1-277(b)). “If defendant’s motion raises a due process question of whether his contacts within the forum state were sufficient to justify the court’s jurisdictional power over him, then the order denying such motion is immediately appealable[.]” *Id.* (quoting *Berger v. Berger*, 67 N.C. App. 591, 595 (1984)). North Carolina courts have likewise held that

“denial of a Rule 12(b)(2) motion premised on sovereign immunity constitutes an adverse ruling on personal jurisdiction and is therefore immediately appealable under [N.C.G.S. §] 1-277(b).” *Can Am S., LLC v. State*, 234 N.C. App. 119, 124 (2014) (collecting cases); *see also Kinston Charter Acad.*, 379 N.C. at 571 (“Although an order denying a dismissal motion predicated upon the doctrine of sovereign immunity is interlocutory in nature, such an order is immediately appealable ‘because it represents a substantial right.’” (quoting *Craig v. New Hanover Cnty. Bd. of Educ.*, 363 N.C. 334, 338 (2009))).

11. The FSU Board contends that N.C.G.S. § 1-294 requires an automatic stay of all proceedings in this action because the question of “whether the FSU Board can even be sued [in North Carolina][ ] . . . necessarily ‘embrace[s]’ the entire matter[.]”<sup>11</sup> Although the ACC agrees that “this Court may not adjudicate [the FSU Board’s] substantive rights[.]” the ACC nevertheless contends that this Court retains jurisdiction to require the parties to close the pleadings and conduct written discovery while the FSU Board’s appeal is pending.<sup>12</sup>

12. The ACC primarily relies on *Inhold, LLC v. Pureshield, Inc.*, 2021 NCBC LEXIS 23 (N.C. Super. Ct. Mar. 23, 2021), to support its position.<sup>13</sup> The plaintiffs in *Inhold* initially asserted claims related to trade secrets but, when a dispute over a patent license agreement arose during the pendency of the litigation, plaintiffs sought

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<sup>11</sup> (FSU Bd.’s Status Rep. 3 (second alteration in original) (quoting N.C.G.S. § 1-294).)

<sup>12</sup> (ACC’s Status Rep. 1–2.)

<sup>13</sup> (*See* ACC’s Status Rep. 2–3.)

leave to amend their complaint to include claims related to the license dispute. *Inhold, LLC*, 2021 NCBC LEXIS 23, at \*1–2. The *Inhold* defendants argued that the license dispute claims were subject to exclusive federal jurisdiction but later conceded that “the Court could grant relief to [p]laintiffs based on state-law theories without reaching any issue of [federal] patent law.” *Id.* at \*2–3. The Court granted the motion to amend and defendants appealed. *Id.* at \*4.

13. Defendants then moved for a stay, arguing that N.C.G.S. § 1-294 “mandate[d] an automatic stay . . . [of] the entire case[ ]” pending resolution of their interlocutory appeal, and alternatively requested the Court to enter a discretionary stay. *Id.* at \*5. Plaintiffs opposed any stay. *Id.* The Court concluded that a limited stay of “the claims involving the license dispute” was appropriate because “[i]t would be imprudent for this Court to take action that could prejudice the Supreme Court’s ability to decide . . . the merits of the appeal.” *Id.* at \*6. In contrast, however, the Court concluded that discovery on the trade-secret claims could proceed, because those claims “[fell] within the category of ‘any other matter included in the action and not affected by the judgment appealed from[.]’ ” *Id.* at \*5–6, \*8 (quoting N.C.G.S. § 1-294).

14. The ACC contends that N.C.G.S. § 1-294 does not require an automatic stay of the entire case, arguing that the FSU Board “will not be prejudiced by answering because [the FSU Board] has already presented its jurisdictional defenses.”<sup>14</sup> The ACC additionally argues that the FSU Board “will not be prejudiced by participating

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<sup>14</sup> (ACC’s Status Rep. 3.)

in discovery [in this action]” because discovery is likely to move forward in the Florida action and, just like in *Inhold*, the “parties [will] conduct discovery on these claims regardless of the outcome of the appeal.”<sup>15</sup>

15. But whether or not the FSU Board will be prejudiced is not the relevant inquiry under N.C.G.S. § 1-294. Instead, the proper inquiry in this instance is whether a North Carolina trial court has the authority to compel the FSU Board to file pleadings and engage in discovery in a North Carolina lawsuit pursuant to the North Carolina Rules of Civil Procedure and the North Carolina Business Court Rules when the FSU Board has challenged the North Carolina trial court’s personal jurisdiction over it based on sovereign immunity in a pending appeal to the Supreme Court of North Carolina.

16. In *Inhold*, the trial court’s jurisdiction over a separable and readily divisible subset of claims was at issue on appeal. *See id.* at \*4–6. In contrast here, this Court’s personal jurisdiction over a party to the litigation is the issue on appeal. When an appeal concerns a trial court’s “ability to assert judicial power over [a party] and bind [the party] by its adjudication[.]” *Banc of Am. Merch. Servs., LLC v. Arby’s Rest. Grp., Inc.*, 2021 NCBC LEXIS 60, at \*11–12 (N.C. Super. Ct. June 30, 2021) (quoting *In re A.B.D.*, 173 N.C. App. 77, 83 (2005)), requiring that party’s further participation in the litigation process prior to resolution of the pending appeal clearly constitutes a “matter embraced [by the appeal],” N.C.G.S. § 1-294.

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<sup>15</sup> (ACC’s Status Rep. 3 (quoting *Inhold, LLC*, 2021 NCBC LEXIS 23, at \*7–8).) Not only does the ACC represent that “the Circuit Court in Florida has forecast that discovery may very well proceed once it rules on [the ACC’s] motions to dismiss[.]” but it also represents that the FSU Board “has sought discovery in Florida already[.]” (ACC’s Status Rep. 3.)



17. At the Hearing, the ACC conceded that it had failed to locate any North Carolina case that would permit *any* litigation-related activity in this Court—much less the closing of pleadings or engaging in discovery—during the pendency of an appeal of an adverse ruling on personal jurisdiction and/or a Rule 12(b)(2) motion premised on sovereign immunity. That is likely because our courts have routinely imposed or enforced an automatic stay of all proceedings under N.C.G.S. § 1-294 when an interlocutory appeal is lodged after the denial of a Rule 12(b)(2) motion based on personal jurisdiction, generally, and sovereign immunity, specifically. *See Atl. Coast Conf. v. Univ. of Md.*, 230 N.C. App. 429, 432–33 (2013) (issuing writ of supersedeas<sup>16</sup> to stay all proceedings pending resolution of defendants’ interlocutory appeal of a motion to dismiss based on sovereign immunity after trial court granted plaintiff’s motion to retain jurisdiction); *Kelley v. Andrews*, No. COA15-448, 2016 N.C. App. LEXIS 74, at \*3–4 (N.C. Ct. App. Jan. 19, 2016) (unpublished) (vacating trial court’s order granting a second motion to dismiss when an appeal of the first motion to dismiss, based on sovereign immunity, was pending); *Carl v. State*, 192 N.C. App. 544, 547 (2008) (granting defendant’s petition for writ of supersedeas, thereby staying all proceedings pending resolution of defendant’s interlocutory appeal of a motion to dismiss based on sovereign immunity, after trial court denied defendant’s motion to stay); *Woodard*, 110 N.C. App. at 87 (concluding defendants’ interlocutory appeal of a motion to dismiss based on sovereign immunity automatically stayed proceedings

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<sup>16</sup> A writ of supersedeas “preserve[s] the *status quo* pending the exercise of the appellate court’s jurisdiction[.]” and therefore stays the effect of a trial court’s order pending the resolution of an appeal. *City of New Bern v. Walker*, 255 N.C. 355, 356 (1961).

and vacating trial court's order on the parties' summary judgment motions issued while the appeal was pending); *see also E.I. Du Pont de Nemours & Co.*, 2021 WL 5546057, at \*3 (concluding N.C.G.S. § 1-294 automatically stayed "the action in its entirety" pending resolution of an interlocutory appeal based on personal jurisdiction filed by two of the five defendants); *Cohen v. Cont'l Motors, Inc.*, 2020 NCBC LEXIS 29, at \*12–13 (N.C. Super. Ct. Mar. 12, 2020) (staying all proceedings pursuant to N.C.G.S. § 1-294 when defendant appealed the denial of his motion to dismiss for lack of personal jurisdiction).

18. In light of this case law, and "[b]ecause jurisdiction is a non-waivable, mandatory aspect of a court's authority to adjudicate cases," *Kelley*, 2016 N.C. App. LEXIS 74, at \*2, the Court concludes that N.C.G.S. § 1-294 automatically stays this action in its entirety pending the Supreme Court's final resolution of the FSU Board's appeal.<sup>17</sup>

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<sup>17</sup> The Court finds the other cases on which the ACC relies unpersuasive because none of these cases, with one exception, concern an interlocutory appeal of a motion to dismiss based on sovereign immunity, or personal jurisdiction more broadly, which are the specific issues of relevance here. (*See* ACC's Status Rep. 2–4.) Only *Faulkenbury v. Teachers' & State Employees' Retirement System* involves the interlocutory appeal of a denial of a Rule 12(b) motion based on sovereign immunity, but the issue in that case involved plaintiffs' voluntary dismissal of two defendants in their individual capacities, rather than in their official capacities, after the notice of appeal was filed. *See Faulkenbury v. Tchrs.' & State Emps.' Ret. Sys.*, 108 N.C. App. 357, 363–65 (1993). Our Court of Appeals concluded that plaintiffs' "voluntary dismissal [of non-state actors] under Rule 41 [was] proper" during the pendency of the appeal because the dismissal did not "affect[ ] the subject matter of the action," i.e., the trial court's jurisdiction over the sovereign's actors. *Id.* at 364.

III.

CONCLUSION

19. **WHEREFORE**, the Court, for the reasons discussed above, hereby **ORDERS** that all proceedings in this matter, including all discovery, are **STAYED** by operation of N.C.G.S. § 1-294 pending the final resolution of the appeal of the Court's Rule 12(b)(2) ruling in the April 4 Order or until otherwise ordered by the Court.

**SO ORDERED**, this the 10th day of May, 2024.

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